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## Trade, Law and Development

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Christian Häberli, *Food Crisis (Cont'd): What's Wrong with Trade and Investment Rules?*  
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### FOOD CRISES (CONT'D): WHAT'S WRONG WITH TRADE AND INVESTMENT RULES?†

CHRISTIAN HÄBERLI\*

*This article looks at the food policy decisions taken in times of national or global food shortages. It finds that food security policy changes follow their own logic regardless of their impact on food prices and food availability, or their compatibility with World Trade Organization (WTO) Law or United Nations (UN) Conventions. Basically, governments that try to feed consumers without hurting their own producers are bound to manage imports, exports and food reserves acting as a price stabilisation measures. Regulators prefer scaling-up of social safety nets to public-private partnerships — regardless of WTO market access rights of foreign suppliers, let alone the Right to Food of foreign cash crop producers and food-insecure consumers. Unfortunately, no lessons were learned from the breakdown of the Doha 'Development' Round negotiations during the first global food crisis (2007–09). The new WTO rules and disciplines were largely ignored at the time. They were disregarded again at the beginning of the COVID-19 pandemic when agri-food trade broke down frequently and prices soared. Yet, trade negotiators keep calling for 'more of the same' WTO rules and lower subsidy limits — applicable mainly to other Members. Worse, on-farm greenhouse gas emissions continue increasing without any formal commitments to climate change mitigation measures — without a WTO discussion on the discriminatory nature of most climate footprint reduction measures. The impression prevails that food security always takes a back seat. The article concludes that the export bias of the multilateral trading system works against global food security: it prevents agri-food trade from playing its crucial role in the overriding challenge of feeding ten billion people sustainably by the year 2050.*

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## X. CONCLUSIONS

## I. INTRODUCTION TO THE FOOD SECURITY STORY

*A. Context and Purpose*

In 1995, the WTO, established in Marrakesh, started to bring some order into the tariff rules for agri-food trade.<sup>1</sup> Exports, including those by big developing countries, rapidly increased. This newly gained confidence facilitated compliance with the first series of WTO dispute settlement rulings. Optimists duly held that the glass, with the new rules and commitments, was half full and easy to fill completely by drawing on a large, *albeit* unevenly available tariff and subsidy ‘overhang’. Hence, the ‘Reform Process’ agreed in Article 20 of the WTO Agreement on Agriculture (AoA) and confirmed by the negotiating mandate of the Doha ‘Development’ Round would further allow Members to increase irrevocable market access commitments and abolish or reduce trade-distorting farm subsidies. All this would make trade flow to food-insecure countries, improve environmental protection, and simultaneously consider “non-trade concerns, special and differential treatment to developing country Members, and the objective to establish a fair and market-oriented agricultural trading system.”<sup>2</sup>

Food security has been defined by the body-politic as when “all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life.”<sup>3</sup> For good measure, this Public International Law (PIL) definition for national and international food security also specified that all states must “halt immediately the increase in — and to significantly reduce — the number of people suffering from hunger, malnutrition and food insecurity.”<sup>4</sup> To this end, states must “adopt a strategy consistent with [their] resources and capacities” that alleviates hunger in the short term and enables all people in the “attainment of sustainable food security” in the long term.<sup>5</sup> ‘Social’ — an adjective missing in the AoA — was added to the 1996 definition in 2009.<sup>6</sup>

Food security is a top priority even in rich countries and big food exporters. Policy changes in times of food crises and rising world market prices for staple foods pay little regard to PIL and WTO Law, bilateral treaty commitments, available

<sup>1</sup> Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410 [hereinafter Agreement on Agriculture].

<sup>2</sup> *Id.*, art. 20(c).

<sup>3</sup> World Food Summit on Food Security, *Plan of Action*, ¶ 1, FAO(063)/F688, (Nov. 13, 1996) [hereinafter WPS Plan of Action].

<sup>4</sup> World Summit on Food Security, *Declaration of the World Summit on Food Security*, ¶ 1, WFS 2009/2 (Nov. 16, 2009) [hereinafter Declaration of the World Summit on Food Security].

<sup>5</sup> WPS Plan of Action, *supra* note 3, at ¶ 1.

<sup>6</sup> Declaration of the World Summit on Food Security, *supra* note 4, at ¶ 2.

scientific evidence, or impact studies. This is so, despite the considerable policy space offered by the relevant international rules and standards for agri-food trade.

The AoA refers to 'food security' nine times. However, the proof of the pudding lies in the eating. Like even more mysterious terms such as 'non-trade concerns' or 'sustainability,' which appear in WTO provisions only for trade in agriculture,<sup>7</sup> and in the Doha Round Agenda,<sup>8</sup> 'food security' measures were never assessed by a panel as to their compatibility with WTO Law. The pudding, hence, is not in the objectives but in the implementation measures and standards. As will be shown here, in times of (undefined) food crises, self-defined national food security interests prevail while market access commitments seem to inevitably take a backseat.

This is not new. Government regulations and policies, and producer, processor, trader and consumer decisions, along with structural and cyclical factors, hoarding, and speculation, have shaped food prices and caused food shortages, at least since the Roman Empire, trading throughout the *Mare Nostrum* (now called the Mediterranean Sea). According to Bertolt Brecht, Julius Caesar was the first to use insider knowledge on the fate of grain-carrying ships when he engaged in futures trading.<sup>9</sup> Nobel Prize winner Amartya Sen's well-known work on poverty and famines of dispossessed people in his native state West Bengal was first published in 1982.<sup>10</sup> Martin Ravallion, one of his disciples, noted considerable progress in food shortage prevention and handling but also cautioned against domestic politics all-too-often preventing market adjustments and resilience towards external price shocks.<sup>11</sup> For instance, Ravallion shows that the 1974-75 famine in Bangladesh could have been avoided with better food distribution over time.<sup>12</sup>

What role do agri-food trade and investment policies play? Research by the Organisation for Economic Co-operation and Development (OECD) shows that the global food crises through the years 2007–09 and then again of 2010–11 were exacerbated by increased price volatility of agricultural commodities.<sup>13</sup> A new study

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<sup>7</sup> Agreement on Agriculture, *supra* note 1, art. 20(c).

<sup>8</sup> World Trade Organisation, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC 1, 41 ILM 746 (2002).

<sup>9</sup> BERTOLT BRECHT, *DIE GESCHÄFTE DES HERRN JULIUS CAESAR* 332 (Suhrkamp Verlag, 1998).

<sup>10</sup> AMARTYA SEN, *POVERTY AND FAMINES. AN ESSAY ON ENTITLEMENT AND DEPRIVATION* BY AMARTYA SEN (Clarendon Press, 1981).

<sup>11</sup> Martin Ravallion, *Famines and Economics*, 35(3) J. ECON. LITERATURE 1205, 1221 (1997) [hereinafter Ravallion].

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

<sup>13</sup> Marilyne Huchet-Bourdon, *Agricultural Commodity Price Volatility: An Overview* (OECD Food, Agric. & Fisheries Papers No. 52, Dec. 6 2011) [hereinafter Huchet-Bourdon].

by the OECD and the Food and Agriculture Organization (FAO) points out that, “for the first time globally, annual economic losses from disasters surpassed USD 100 billion during the three consecutive years of 2010-2012, and far exceeded humanitarian aid.”<sup>14</sup> The same report also contains country-wise studies showing how Chile, Italy, Japan, Namibia, New Zealand, Turkey and the United States of America (USA) built sustainable resilience of their agricultural industries from natural hazard-induced disasters.<sup>15</sup>

Policy decisions’ impact on food prices has been a key element in food security research for a long time. Yet, until today, scholars disagree on the reasons for price volatility. Intergovernmental organisations use economic terms like ‘price spikes’ without defining them and without citing or conducting any in-depth analytical or empirical studies. This raises the question whether, and to what extent, food policy changes are science-based and whether the right trade and investment rules, principles, and indicators have been laid down when the going was good. In the absence of agreed standards and adequate rules, analysing domestic regulation and the role of trade and trade rules in global food security becomes difficult.

After decades of relative stagnation, agricultural trade and investment started to grow significantly in the mid-nineties for a multitude of commodities in many developing countries. Different structural causes contributed to this growth of ‘commercial agriculture’. The good and the bad connected developments cannot be treated in any detail, but should nevertheless be mentioned here. First, a very recent study by Margherita Scoppola, using new OECD data, finds that globalisation along the global value chain (GVC) allowed multinational enterprises to successfully maintain value-adding components within their businesses.<sup>16</sup> Here, governments with an eye on foreign investors, who wanted to locate food processing in their country, could find an economically interesting way for efficient national food security improvements.<sup>17</sup> The second development that accompanied large agricultural investment projects, both foreign and national, is the illegal acquisition of land titles (‘land grab’).<sup>18</sup>

All this took place despite only a half-full glass of trade and investment liberalisation. As a result, global food security and domestic cash crop investment

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<sup>14</sup> ORG. ECON. COOPERATION AND DEV. & FOOD AND AGRI. ORG., BUILDING AGRICULTURAL RESILIENCE TO NATURAL HAZARD-INDUCED DISASTERS: INSIGHTS FROM COUNTRY CASE STUDIES, at 21 (June 8, 2021), <https://doi.org/10.1787/49eefdd7-en> [hereinafter OECD & FAO Report (2021)].

<sup>15</sup> *Id.*

<sup>16</sup> Margherita Scoppola, *Globalisation in agriculture and food: the role of multinational enterprises*, 48(4) EUR. REV. AGRIC. ECON. 741 (July 31, 2021).

<sup>17</sup> *Id.*

<sup>18</sup> Lorenzo Cotula & Thierry Berger, *Trends in global land use investment: implications for legal empowerment*, INT’L INST. ENV’T & DEV. (Dec. 2017), <https://pubs.iied.org/sites/default/files/pdfs/migrate/12606IIED.pdf>.

have increased and the total number of hungry people has been halved.<sup>19</sup> However, millions of small land-holders, landless and women farmers in poor countries, with no or little disposable production surpluses, remained resource-poor and without access to production credits; their relative food insecurity increased.<sup>20</sup>

Arguably, export trade security has increased, thanks to the new WTO rules and disciplines. Yet, just six years into the Doha Round negotiations, Christine Kaufmann and Simone Heri pointed out the dangers of agricultural trade liberalisation for national food security.<sup>21</sup> Matias Margulis sees this danger in the application of WTO rules to public stockholding: “the WTO’s *liberal trade bias* is often argued to be in conflict with the norms and rules of other international legal regimes” (emphasis added).<sup>22</sup>

This article cannot delve into the question of a causal link between trade liberalisation and food security. At this stage, two hypothetical points stand to reason even for a non-economist. On one side, agri-food trade can contribute to global food security on the basis of agreed, enforceable, and respected trade rules. On the other side, however, agricultural trade liberalisation cannot ignore the potential negative impact on poverty, hunger, rural, and social development at national levels. It cannot do so, without agreeing to and clarifying the tools available with policy-makers who try to prevent negative impacts, and to improve domestic food security, without encroaching on food security in poor countries. Hence, the social impact at the national level must be a part of the food-trade liberalisation benefit equation, particularly with respect to the vulnerability and food insecurity of small and often less than self-sufficient farmers in poor countries. This article will also try to show that their food security can gain from trade only with an efficient and affordable access to the ‘Food Security Toolbox’ (the toolbox), which responds to their specific needs and interests.

### *B. Food Security Toolbox — Examples more good than bad*

Let us now unpack this toolbox with a few relatively recent examples without, at this stage, analysing their impact at home or abroad. Although, at the outset, it should be pointed out that most of these measures, both consumer and producer-

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<sup>19</sup> The Millennium Development Goals: 2015 Progress Chart, United Nations (2015), [http://mdgs.un.org/unsd/mdg/Resources/Static/Products/Progress2015/Progress\\_E.pdf](http://mdgs.un.org/unsd/mdg/Resources/Static/Products/Progress2015/Progress_E.pdf) [hereinafter MDG: 2015 Progress Chart].

<sup>20</sup> OECD & FAO Report (2021), *supra* note 14.

<sup>21</sup> Christine Kaufmann & Simone Heri, *Liberalizing Trade in Agriculture and Food Security — Mission Impossible?*, 40 VAND. J. TRANSNAT'L L. 1039 (2007).

<sup>22</sup> Matias E. Margulis, *The World Trade Organization between law and politics: negotiating a solution for public stockholding for food security purposes*, 9(3-4) TRANSNAT'L L. THEORY 343, 349 (Dec. 30, 2018).



friendly ones, sometimes raise difficult questions of compatibility with the present WTO rules and disciplines.

1. **Export Restrictions:** These are the most frequent measures against food shortages. In the food crisis years of 2007–09, different types of measures were introduced, often in cascades and by many countries. (i) For rice — a relatively ‘thin’ commodity market — all three main exporters applied their policy changes almost simultaneously, thereby literally quadrupling world-market prices (WMP): Vietnam applied export quotas and state trading for exports to the Philippines. Thailand filled government-held stockpiles with overpriced paddy which eventually had to be dumped on the world feed market. India regularly increased paddy farm-gate prices and then had to export below government purchase prices. (ii) Export restrictions for wheat were applied by Russia after wildfires destroyed an important part of its domestic output. (iii) Argentina tried to limit beef price increases in Buenos Aires by restricting maize exports. Tanzania repeatedly banned maize exports, thereby negatively impacting its domestic production and the neighbouring country’s food security. (iv) Similarly, after a bad harvest, Rwanda prohibited potato exports, with the result that in the following bumper year, producers had to throw their surpluses away or sell them below cost as animal feed.
2. **Domestic food production and processing subsidies:** These often came as a reaction to such export restrictions and/or COVID-related trade measures. Malaysia, for example, decided to subsidise non-competitive paddy production at home when its Association of Southeast Asian Nations (ASEAN) free-trade neighbours Thailand and Vietnam restricted their exports. Similarly, Indonesia, and many African countries, also tried to increase production regardless of costs. Today, ‘food sovereignty’ again sounds good in many countries with production chains interrupted at national borders or in processing plants. Many biofuels and biogas schemes involve production and processing subsidies to the local industry [for e.g., USA, Switzerland, and certain European Union (EU) member states].
3. **Food Reserves:** The same goes for government-owned or government-regulated food reserves that are destined to absorb import price shocks or bumper harvests without export outlets. The massive increase of public food stockpiles after the food crisis of 2007–2009 indicated the stand of many governments of improving food security mostly with domestic reserves — never mind costs, WTO compatibility, and public-private partnership alternatives. Interestingly though, two regional/“virtual” stockpiles were added to national food reserves and domestic/international food aid schemes. The ASEAN Plus Three Emergency Rice Reserve (APTERR) was established by the ASEAN with

the support of China, Korea and Japan.<sup>23</sup> Another attempt to coordinate regional food supplies and international food aid was made by the Economic Community of West African States (ECOWAS), supported by United Nations Conference on Trade and Development (UNCTAD) and the EU.<sup>24</sup>

4. **Price Controls:** Price controls, against speculation and market cornering for rice, were introduced by Indonesia and by Vietnam, who were trying to stop domestic food shortages and panic buying in big cities with maximum farmgate prices for paddy, thereby discouraging production and processing increases in their own poor rural areas.<sup>25</sup>
5. **Import Restrictions:** Import restrictions, by way of local purchase requirements, were applied by Turkey for rice import approvals, before it lost a WTO complaint instigated by the USA.<sup>26</sup> Colombia used to issue import licenses for various food products only after the domestic produce was sold out.
6. **Import Increases:** Fuel subsidy reductions were applied in Indonesia and Madagascar to increase government-induced import for alleviating consumer price shocks and, at the same time, to compensate for the cost of life. This not only helped poor urban consumers, but it also discouraged domestic paddy production.
7. **Price Management:** Government-controlled price management occurs in many countries and for different reasons. India frequently increased producer prices before elections, and it distributed food to the poor at below purchase prices; it allegedly even offered public stockpiles for exports below local market rates.
8. **Food aid imports with maximum mill prices:** Ethiopia applies this method for wheat which is provided to local bakeries at the expense of local producers of competing foodgrains like tef (*Eragrostis Tef*).

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<sup>23</sup> Sally Trethewie, *In search of food security: addressing opacity and price volatility in ASEAN's rice sector*, 15 RSIS CENTRE FOR NON-TRADITIONAL SECURITY STUDIES (Mar. 22, 2012), [https://reliefweb.int/sites/reliefweb.int/files/resources/Policy\\_Brief\\_190312.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/Policy_Brief_190312.pdf).

<sup>24</sup> Margulis, *supra* note 22.

<sup>25</sup> Murray Fulton & Travis Reynolds, *The Political Economy of Food Price Volatility: The Case of Vietnam and Rice*, 97(4) AM. J. AGRIC. ECON. 1206 (Jul. 2015) [hereinafter Fulton & Reynolds].

<sup>26</sup> *Cf.* Panel Report, *Turkey — Measures Affecting the Importation of Rice*, WTO Doc. WT/DS334/R (adopted Oct. 22, 2007).

9. **Export state trading:** This remains a WTO negotiating topic but it is also a food security issue. Canada's supply management policy, apparently, still includes production subsidies or credit subsidies for maize and for certain quantities of dairy exports.
10. **Food aid:** This is provided to destitute domestic consumers or donor-funded tied aid programmes to increase local food security, but this displaces non-subsidised competitors from neighbouring areas or third countries. Examples are found in Malawi, Mozambique, and in the USA (displacing South African suppliers).
11. **Trade liberalisation:** This generally benefits consumers in importing countries by lower price levels. However, domestic maize producers in Mexico could not compete with US supplies benefitting from domestic support measures (e.g., NAFTA 'tortilla war'). Negotiations for a free-trade agreement between the USA and South Africa failed when such domestic support, which acted as agro-dumping, turned out to be non-negotiable despite its devastating impact on small croppers in South Africa.

As will be seen in the Part 'COVID-19 pandemic' of this article,<sup>27</sup> many COVID-19-related measures, unsurprisingly, are similar or identical to some of these measures from the toolbox.

Worse — for analysts wondering how 'climate-smart' agricultural measures differentiating between 'like' products with a different climate footprint can be implemented without violating WTO non-discrimination rules — the immobility of the WTO in respect of food security rules comes as a dire forewarning of problems to come.

## II. FOOD POLICY CHANGES DISRESPECT TRADE RULES

Similarly, food import and export prohibitions pronounced in the wake of the COVID-19 pandemic seem to pay little attention to the relevant provisions, market access commitments, support limits, and standards enunciated in the AoA, the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), and the Agreement on Technical Barriers to Trade (TBT). As for production incentives, trade and investment policies based on self-sufficiency and food sovereignty seem to be making a comeback, both as a response to border measures by other countries, and as a means to maintain food security "come what may" —

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<sup>27</sup> See discussion *infra* Part VIII.A.

despite the framework carefully elaborated between governmental and non-governmental stakeholders.<sup>28</sup>

What might have been a classical boom and bust cycle seems to have acquired new features with accelerating globalisation and ever closer market integration. First, after decades of relative stagnation, agricultural trade and investment started to grow, in the middle of the nineties, for many commodities and in many countries. Different structural causes contributed to this growth, taking place despite only a half-full glass of trade liberalisation. Perhaps significantly, the implementation of the AoA fell into this period of rapid growth, making implementation easier, while the food crisis of 2007–08 coincided with the breakdown of the Doha Round negotiations in December 2008. As a result, national governments still enjoy a large policy space, while market access became easier. When the crisis hit, the world was unprepared. Policy reactions went viral, often self-defeating, and at times, caused collateral damage to third countries that were without resilient producer structures and unable to use their defensive rights fast enough under the multilateral trade agreements and regional trade agreements (RTAs).

Two main factors explain the heavy-handed government interventions during those years, all along the food value chain: first, perceived or real food insecurity, and second, the lack of more stringent trade disciplines at a time of a rapidly globalising world economy. While the trade rules are relatively clear, enforcement is especially difficult against short-term measures, such as export restrictions or surplus disposal abroad.

Where food security is more or less permanently in crisis like, say, in Southern Africa, the tools for efficient and effective intervention, cooperation, and defence are difficult to manage. For instance, “regional or virtual” food stockpiles require mutual trust and the possibility of concerted and swift action. Absent such mechanisms, government stockpiles will remain ineffective in counteracting price spikes, which are costly and prone to corruption; moreover, such schemes can crowd out private risk management, storage, and insurance.<sup>29</sup>

This is where academia can contribute. The impact of the below-described unilateral measures on global food security, price volatility, and on investment and trade decisions by farmers and processors are interesting topics, not only for economic scholars, but also for political scientists and trade lawyers. A review by political scientists and trade lawyers of the toolbox in the light of multilateral trade

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<sup>28</sup> Food and Agriculture Organisation (FAO), *CFS Voluntary Guidelines on Food Systems and Nutrition* (Feb. 18, 2021), <http://www.fao.org/3/ne982en/ne982en.pdf>.

<sup>29</sup> Christopher Gilbert, *International Agreements for Commodity Price Stabilisation: An Assessment* (OECD Food, Agric. & Fisheries Papers Papers No. 53, Dec. 12, 2012).

rules and negotiations shows the merits, shortcomings, and failures of international food governance.

This is the ambition of this article. It starts with a review of recent measures, as applied by specific countries and for specific food commodities, together with a peremptory discussion of food security economics and a description of reactions at the international level. This is not a complete list of all the measures envisaged or actually taken, or an assessment of their food security impact domestically or in other countries. In early 2020, Gadhok et al. produced a systematic albeit pre-pandemic description, especially valuable for an assessment of the food security tools which policy-makers could use for the special benefit of their own small farmers.<sup>30</sup>

While dispute settlement rulings may show how certain measures might fare in case of new complaints, the purpose of this article is not to rule but to find a way forward for more food security and adequate food safety. Thus, the analytical part looks at these measures in the light of the relevant international rules and principles, the narrative of the WTO Doha Round breakdown, continued over six subsequent ministerial conferences, and the ineffectiveness of some of such measures and their WTO compatibility. The weak resilience of food security rules against pandemic-induced food value chain cuts, and the special difficulties of agricultural policies to contribute to climate change mitigation are further signs of a serious food policy crisis at the international level and a need for a thorough review of the rules framework. The paper concludes with a summary of eight possibilities for food security improvements at both domestic and multilateral spheres within the available policy space despite the WTO's stalemate. The hope of the author is to make a very small contribution to counter the key challenges in attaining climate-friendly food security for ten billion people.

### III. FOOD SECURITY V. PRICE VOLATILITY

One of the main symptoms of the global food crisis in the years from 2007–09 and then again in 2010–11 was increased price volatility of agricultural commodities. Calls for measures limiting 'speculation' and 'excessive' volatility were made immediately, often for different reasons with contradictory remedies, but it is only recently that the actual extent of those price increases was put in a historical context by the OECD,<sup>31</sup> and that an extensive, databased literature has become available, describing the impact of cyclical and structural food insecurity causes.

Scholars note that price volatilities are both welcomed and dreaded by regulators and operators alike. For obvious reasons, interests and influences of different

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<sup>30</sup> Ishrat Gadhok et al., *Trade and Sustainable Development Goal 2 – Policy options and their trade-offs*, Rome, FAO (2020), <https://doi.org/10.4060/cb0580en>.

<sup>31</sup> Huchet-Bourdon, *supra* note 13.

players vary. There is little agreement on whether, under what circumstances, and how much, regulatory intervention supports food security, particularly of the poor. However, general consensus holds that neither permanently stable prices nor excessive volatilities ensure food security in the medium and long term. To design and implement food security-improving investment, production, processing, and trade policies, it is therefore necessary and useful to study all the factors along the value chain which have a certain impact on price volatility. For a legal analysis of their food security impact, the effects of specific policy decisions taken by key market regulators will be of particular interest. Looking at these measures as part of the toolbox allows us to assess the present multilateral framework for its global food security resilience.

Based on the data available after the food crisis 2007–08, the FAO experts discussed the merits and dangers of rapid price movements. In a series of publications, they looked at the food security measures available in volatile global markets.<sup>32</sup> In 2009, Mulat Demeke et al. classified country responses to situations of price volatility or price spikes as (i) trade-oriented policy responses, such as reduced import tariffs and restricted exports, or (ii) consumer policies providing direct support to consumers, such as food subsidies, social safety nets, price controls, or (iii) producer-oriented policy responses supporting farmers, for e.g., input subsidies or producer price controls.<sup>33</sup> The following three types of measures would build the ‘government-driven’ part of the toolbox outlined in the introduction to this article:

1. Trade measures that aim at increasing domestic supply to stabilise markets and decoupling domestic prices from world market prices. For net-exporting countries, it would imply increasing limitations for agricultural exports, whereas a net-importing country could choose to ease import limitations.
2. Introducing or up-scaling existing domestic social safety nets would aim at protecting the population from the negative effects of price volatility, for e.g., through vouchers or direct payments to the poor.
3. Finally, countries could opt for introducing producer-oriented support, for e.g., through fixed prices at farm-gate level in order to increase domestic supply over the medium term.

Perhaps in view of the short-term sensitivity of food security, many governments tend to choose unilateral trade policy interventions instead of alternative domestic

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<sup>32</sup> Adam Prakash et al., *Safeguarding Food Security in Volatile Global Markets*, FAO (2011), <http://www.fao.org/3/i2107e/i2107e.pdf>.

<sup>33</sup> M. Demeke et al., *Country responses to the food security crisis: Nature and preliminary implications of the policies pursued*, FAO, at 5 (2009), <https://www.fao.org/3/au717e/au717e.pdf>.

policy options, such as targeted subsidies or social-safety nets, even though social policies allow the government to take a direct role in securing food supplies for the population. Notwithstanding this rapid intervention necessity, it is necessary to look at trade-offs, risk management alternatives, and the decisional space left for agri-food investors, processors, and operators.

A major challenge, in respect of food price volatility, is therefore to insulate political statements and decisions and their price impact from other price-shaping factors. With respect to the core question on the influence of policy on short and medium-term effects and long-term fundamentals, Emilio Díaz-Bonillo suggests differentiating between trends, cycles, and shorter-term events, including spikes and busts, to find out whether they are indeed short-term events, or rather they indicate a trend requiring policy adjustments.<sup>34</sup>

Looking at the behaviour of state trading firms during the Vietnamese rice market crash, Murray E. Fulton & Travis Reynolds argue that trade policy interventions provide an opportunity only for those holding political power to exploit rents from the inherent volatility of food prices on international markets, while alternate domestic policies such as targeted subsidies do not allow the elites to capture similarly high rents. By forming domestic economic institutions in a way that allow the political elite to control export or import markets, this elite is enabled to capture significant rents from trade policy changes. Hence, the Government of Vietnam favoured trade policy interventions such as rice export restrictions at the expense of paddy farmers over market mechanisms.<sup>35</sup> While this argument stands to reason, the authors fail to see how reduced import barriers in the case of a net-importing country would allow for similar levels of rent capture by the elites. Furthermore, the authors do not specify how rent capture relates to other forms of costs or benefits of different policy interventions.

Another example frequently discussed is the economics of food aid. Especially international food aid — both in kind or in grant form — can have an immediate and deleterious impact on local farm prices, even in neighbouring countries. Granted, the decision to call for food aid and then to purchase, ship, and distribute up to 6,00,000 tons of yellow maize, as was the case in Malawi, may have had to be taken long before actual local harvest volumes were known. Nonetheless, for reasons difficult to retrace in this case, this operation caused losses to the Malawian economy of an estimated 15 million USD. Moreover, it reportedly

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<sup>34</sup> Emilio Díaz-Bonilla, *Volatile Volatility: Conceptual and Measurement Issues Related to Price Trends and Volatility*, IFPR Discussion Paper 1505 (Jan. 29, 2016), <http://ebrary.ifpri.org/utills/getfile/collection/p15738coll2/id/130119/filename/130330.pdf>.

<sup>35</sup> Fulton & Reynolds, *supra* note 25.

displaced white maize supplies from South Africa, which were only available at commercial rates.<sup>36</sup>

#### IV. MULTILATERAL FOOD SECURITY PLANS: G20, MDG/SDG, UN FOOD SYSTEM, WTO

While theoretical arguments may explain political interventions in general, they still beg the question why governments would tend to choose trade policy interventions instead of alternative domestic policy options, such as targeted subsidies or social-safety nets, which would also allow the government to take a direct role in securing food supplies for the population.

Perhaps the next round of inter-governmental food policy negotiations will find a way forward, where present rules and disciplines failed, to contain autonomous and unilateral action which have a negative impact on global food security? The last Part, before the analytical part of this article will discuss developments in four different fora, all meeting in the second half of 2021: G20, Millennium Development Goals (MDG), Sustainable Development Goal (SDG), and the UN Food System. In the analytical part, the main events for climate change, the 2021 UN Climate Change Conference (COP26), and for the multilateral trading system, the (postponed)<sup>37</sup> Twelfth WTO Ministerial Conference (MC12), will be discussed in more detail.

##### *A. G20: More food aid? Less export restrictions?*

The international policy response to food crises and excessive price volatility culminates, in terms of binding multilateral trade rules, in the AoA. The impact on global food security of the new WTO rules will be examined in the analytical part of this article.

Starting soon after the price spike of nearly 150 USD for a barrel of oil, food security suddenly jumped back to the top of the international political agenda. All five G20 Summits held between 2009 and 2013 reflected a worldwide concern for these food crises and adopted action plans for countering the same. Unfortunately,

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<sup>36</sup> Hilton Zunckel, *Reforming the International Legal Regime for Food Aid* (Soc'y Int'l Econ. L., Working Paper No 2010/4, 2010).

<sup>37</sup> *Twelfth WTO Ministerial Conference*, WORLD TRADE ORGANIZATION, [https://www.wto.org/english/thewto\\_e/minist\\_e/mc12\\_e/mc12\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/mc12_e/mc12_e.htm) ("The General Council agreed on November 26, 2021 to postpone the 12th Ministerial Conference (MC12) after an outbreak of a particularly transmissible strain of the COVID-19 virus led several governments to impose travel restrictions that would have prevented many ministers from reaching Geneva.").



implementation of these action plans were relegated to the national level and, arguably, they lost their priority status to the financial crisis, which started in 2009. Held in the second year of the COVID-19 pandemic, right before the Climate Summit in Glasgow (COP26), giving its priority to the impact of the US withdrawal from Afghanistan, the G20 meeting in October 2021 seemed to again forget food security as a global issue. It even ignored a new G20 Plan of Action on Agricultural Trade and Investment recommended by a group of researchers coordinated by an Italian think tank.<sup>38</sup> This Plan of Action is now under consideration for a decision at the WTO. It could bring about more food security and adequate food safety for undisrupted flows of essential food commodities.

### B. MDG: Mission accomplished?

Somewhat surprisingly, the first of the MDG — an objective of halving the percentage of hungry people between 1990 and 2015 — was achieved on a global level.<sup>39</sup>

On May 15, 2017, the MDG Monitor wrote that the “proportion of undernourished people in the developing world has fallen by almost half since 1990”; from 23.3% in 1990–92 to 12.9% in 2014–16. Despite this (actually rather modest) target, in 2016, about 795 million people were estimated to be undernourished, including more than 90 million children under the age of five.<sup>40</sup>

Such figures raise cross-sectoral challenges way beyond food security concerns. To “reduce malnutrition in a comprehensive manner, agricultural strategies must be implemented as part of a broader set of actions that involve the health, water and sanitation, and education sector.”<sup>41</sup>

### C. SDG: NOT on Track!

Food security was given a more concrete and more ambitious target in the Sustainable Development Agenda 2030 adopted by the UN General Assembly (UNGA) on September 25, 2015; the SDG 2 (“End hunger, achieve food security and improved nutrition and promote sustainable agriculture”) and the target to “build on the Millennium Development Goals and complete what these did not achieve.” In particular, by 2030, the goal is to “ensure access by all people, in

<sup>38</sup> Priyadarshi Dash et al., Policy Brief: Agricultural Trade in a Post-Pandemic World, Institute for International Political Studies, Italy (Oct. 13, 2021), [https://www.g20-insights.org/policy\\_briefs/agricultural-trade-in-a-post-pandemic-world/](https://www.g20-insights.org/policy_briefs/agricultural-trade-in-a-post-pandemic-world/).

<sup>39</sup> MDG: 2015 Progress Chart, *supra* note 19.

<sup>40</sup> Cf. *News on Millennium Development Goals*, UN, <https://www.un.org/millenniumgoals/poverty.shtml>.

<sup>41</sup> Mark W. Rosegrant et al., *Agriculture and achieving the Millennium Development Goals*, INT'L FOOD POL'Y RES. INST. 9 (2006), <https://www.ifpri.org/cdmref/p15738coll2/id/125143/filename/125144.pdf>.

particular the poor and people in vulnerable situations, including infants, to safe, nutritious and sufficient food all year round.” A remarkable reference to the WTO Doha Round is to “[c]orrect and prevent trade restrictions and distortions in world agricultural markets, including through the parallel elimination of all forms of agricultural export subsidies and all export measures with equivalent effect.” Finally, the UNGA enjoins its member states to “[a]dopt measures to ensure the proper functioning of food commodity markets and their derivatives and facilitate timely access to market information, including on food reserves, in order to help limit extreme food price volatility.”<sup>42</sup>

The emphasis remains on access to safe, nutritious, and sufficient food for all. Compared with the language used for MDG, what is new is the importance of functioning food markets and the elimination of not only export subsidies, but also “all export measures with equivalent effect.” For trade lawyers, this raises the question whether the new objectives were really coherent with ongoing work in the run-up to the MC12. More importantly still, there is no further explanation on how to implement the commitment to ‘promote sustainable agriculture.’<sup>43</sup> Of course, ‘sustainability’ is enshrined in the whole UNGA resolution adopting the SDG. Given the wide interpretation differences and looking at the wide array of measures taken, or not taken, at the national level, one cannot but regret the absence of specific standards or (agreed) ‘good practices’, or measurements of ‘sustainable agriculture’. Unsurprisingly, the implementation question is particularly difficult at the farm level.

Looking at the commitments taken and the ongoing review process, or at the food security data midway through implementation, SDG progress looks mitigated at best.

Good news first though. On the side of the commitments, the SDG Partnership Platform established by the United Nations Department of Economic and Social Affairs (UN-DESA)<sup>44</sup> shows an encouraging review process, with voluntary reviews, stakeholder participation, and even a few critical academic contributions. A first trade vs. SDG 2 analysis has been presented in 2018 by Shenggen Fan et al.<sup>45</sup> The authors focus on various domestic policy measures and on the

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<sup>42</sup> G.A. Res. 70/1, Transforming our world: the 2030 Agenda for Sustainable Development (Oct. 21, 2015).

<sup>43</sup> *Id.*

<sup>44</sup> UNITED NATIONS DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS HOME PAGE, <https://sdgs.un.org/>.

<sup>45</sup> Shenggen Fan et al., *SDG 2.1 and SDG 2.2: Why Open, Transparent, and Equitable Trade Is Essential to Ending Hunger and Malnutrition Sustainably*, in *ACHIEVING SUSTAINABLE DEVELOPMENT GOAL 2: WHICH POLICIES FOR TRADE AND MARKETS?* (International Centre for Trade and Sustainable Development ed., 2018).

contribution of a more transparent and equitable trade for the fulfilment of SDG 2.1 and 2.2. Examples of governmental processes are recorded in a recent publication by the UN-DESA. For instance, the EU has committed to reinforce its efforts to make progress in delivering the SDGs. The European Commission (EC) used the *Modular Applied GeNeral Equilibrium Tool* (MAGNET) to examine the impact of global change on food and nutrition security, and the implications of a shift towards a more bio-based economy and environmental trade and agricultural policy reform scenarios. This MAGNET model is also used to analyse the impacts of the COVID-19 pandemic for different regions and sectors over time.<sup>46</sup>

Despite these efforts, the UN states that the world is not on track to end hunger by 2030. Moreover, this is a collective governance failure and is not solely due to the current pandemic. On the contrary, after decades of steady decline, actual food insecurity is on the increase again.<sup>47</sup>

Aware of these developments, on July 20, 2020, the UN declared that the number of people who suffer from hunger – as measured by the prevalence of undernourishment – began to slowly increase again in 2015. The UN estimated that nearly 690 million people, or 8.9 percent of the world population, were hungry – up by 10 million people in one year and by nearly 60 million in five years (emphasis added).<sup>48</sup>

The two relevant SDG Indicators 2.1.1 [Prevalence of Undernourishment (PoU)] and 2.1.2 [Prevalence of moderate or severe food insecurity in the population, based on the Food Insecurity Experience Scale (FIES)] show that “[t]he world is not on track to achieve Zero Hunger by 2030. If recent trends continue, the number of people affected by hunger would surpass 840 million by 2030”<sup>49</sup> (emphasis added).

Food insecurity is not limited to Africa. A prominent example is South Asia. In the 2020 Global Hunger Index, India features with a score of 27.2 and, consequently, ranks 94th out of the 107 countries with sufficient data to calculate 2020 GHI scores.<sup>50</sup> This seems to confirm the need for deep, comprehensive and, ‘smart’ reforms of Indian farm policies.

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<sup>46</sup> UNITED NATIONS DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, SDG GOOD PRACTICES - A COMPILATION OF SUCCESS STORIES AND LESSONS LEARNED IN SDG IMPLEMENTATION 9 (2020), <https://sdgs.un.org/publications/sdg-good-practices-2020>.

<sup>47</sup> *Goal 2: Zero Hunger*, UN SUSTAINABLE DEVELOPMENT GOALS, <https://www.un.org/sustainabledevelopment/hunger/>.

<sup>48</sup> FAO, IFAD, UNICEF, WFP & WHO, THE STATE OF FOOD SECURITY AND NUTRITION IN THE WORLD (2021), <http://www.fao.org/3/cb4474en/cb4474en.pdf> [hereinafter *State of Food Security* (2021)].

<sup>49</sup> *Food Coalition: A Covid-19 Response*, FAO (2021), <http://www.fao.org/food-coalition/en/>.

<sup>50</sup> *India*, GLOBAL HUNGER INDEX (2020), <https://www.globalhungerindex.org/india.html>.

*D. UN Food Systems Summit 2021: Which Way Forward?*

In order to provide a new and strong impetus to the global effort, UN Secretary-General António Guterres will convene the UN Systems Summit 2021 in New York on September 23, 2021, “setting the stage for global food systems transformation to achieve the Sustainable Development Goals by 2030.”<sup>51</sup>

Expectations are high. A general consensus today posits that “[i]ncreasing agricultural productivity and sustainable food production are crucial to help alleviate the perils of hunger.”<sup>52</sup> This was the conclusion at a high-level Pre-Summit: “a profound change of the global food and agriculture system is needed if we are to nourish the more than 690 million people who are hungry today – and the additional 2 billion people the world will have by 2050.”<sup>53</sup>

Again, however, no concrete implementation measures have been envisaged or adopted at the UN Systems Summit 2021.<sup>54</sup>

How does global food security look at the present state of commitments, efforts and rules? In the main Part of this article, we focus on the trade component of problem, starting with price volatility and export restrictions as a prism for our evaluation of progress and failure.

## V. ANALYSIS

Policy changes in times of (perceived, threatening, or real) food shortages raise many issues not only for economists but also under the prism of a legal analysis — way before the question of compatibility with international economic law even arises. Here, we subsequently look at the food security literature in respect of food crises and price volatility, and after that, at the relevant WTO trade rules, and the Right to Food. The Doha Round impasse then provides an opportunity for an interim assessment of trade-related food security. The fate of food security during the COVID-19 pandemic and in climate change mitigation efforts allows for a number of rules improvement proposals with the present rules framework.

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<sup>51</sup> *The Food Systems Summit*, UN (2021), <https://www.un.org/en/food-systems-summit>.

<sup>52</sup> Goal 2: Zero Hunger, Sustainable Development Goals, <https://www.un.org/sustainabledevelopment/hunger/>.

<sup>53</sup> United Nations Food Systems Summit 2021, Pre-Summit, Rome (July 26–28, 2021), <https://www.un.org/en/food-systems-summit/pre-summit>.

<sup>54</sup> *Secretary-General's Chair Summary and Statement of Action on the UN Food Systems Summit*, UNITED NATIONS (Sept. 23, 2021), <https://www.un.org/en/food-systems-summit/news/making-food-systems-work-people-planet-and-prosperity>.

*A. Food Security Policies seen by Economists*

Better distribution of storable food over time can reduce famine.<sup>55</sup> Private and public stocks and a variety of insurance schemes are among the policy tools available, at a price, for that purpose.

After decades of neglect, agriculture in developing countries obtained important domestic and foreign investments for large-scale and often export-oriented projects, along the ‘Four Fs’ of food, feed, fibre, and fuel. While this could actually increase global food security, reduce price volatility, and improve export earnings and debt-free rural infrastructure at the same time, the negative impact on resource-poor farmers is often neglected, not to mention the land tenure rights of legally or illegally dispossessed smallholders and indigenous communities.<sup>56</sup>

On the other side, in most developed countries, including the EU, agricultural policies tend to focus on farmer security rather than on food security.<sup>57</sup> In poor and often structurally weak developing countries, policymakers with less deep pockets continue to rely on quickly disbursable food aid and on price controls, especially for thinly traded commodities like rice; this, in turn, can increase their food import dependence.<sup>58</sup> Poverty and hunger, with their complex and interconnected root causes, remain central to all global development efforts.<sup>59</sup>

Post-harvest losses are perhaps the key cause for the vulnerability and for the food insecurity of small and often less than self-insufficient farmers in poor countries. This is not new, but this lack of resilience has reached a global stage. According to research conducted by the OECD, the global food crises of the years 2007–2009 and then again in 2010–2011 were exacerbated by increased price volatility of agricultural commodities.<sup>60</sup> Of course, better distribution over time can reduce famine.<sup>61</sup> Yet, while agriculture in developed countries enjoys several financial, credit, insurance, and other risk management buffer-tools, poor states cannot even provide the necessary instruments, research and development services to the weakest fragment of their society. As a result, the lack of adequate storage, including cold chain control for cash crops, can oblige smallholders to sell their

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<sup>55</sup> Ravallion, *supra* note 11.

<sup>56</sup> Christian Häberli & Fiona Smith, *Food Security and Agri-Foreign Direct Investment in Weak States: Finding the Governance Gap to Avoid “Land Grab”*, 77(2) MOD. L. REV. 189 (2014).

<sup>57</sup> CHRISTIAN HÄBERLI, *The Story of Community Preference for Food Security*, in RESEARCH HANDBOOK ON EU AGRICULTURE LAW 437–462 (Joe McMahon et al. eds., 2015).

<sup>58</sup> MANITRA A. RAKOTOARISOA ET AL., WHY HAS AFRICA BECOME A NET FOOD IMPORTER? EXPLAINING AFRICA AGRICULTURAL AND FOOD TRADE DEFICITS (FAO, 2011), <http://www.fao.org/3/i2497e/i2497e.pdf>.

<sup>59</sup> Getaw Tadesse et al., *Drivers and triggers of international food price spikes and volatility*, 47 FOOD POLY 117 (2014).

<sup>60</sup> Huchet-Bourdon, *supra* note 13.

<sup>61</sup> Ravallion, *supra* note 11.

products before, or soon after harvest, i.e., when prices are low. In addition, lack of transportation and road infrastructure makes it difficult for smallholders to reach markets for their cash crops or their temporary food crop surpluses.<sup>62</sup> Moreover, whereas rural women are frequently the sole producers and income providers in their families, their access to credits and inputs may be especially difficult, because the few instruments and capital endowment schemes available to poor men fail to consider gender specificities.

Under these circumstances, policy decisions under the banner of food security may turn out to be a socio-economic divider even among the poor. For instance, commodity exchanges, weather and price risk insurance, pre-harvest credits, and other modern risk management tools must be very carefully designed if the most food-insecure and least organised population segments are to benefit from an effective access to these tools.

National and international food aid becomes a symptom treatment, primarily directed at the poor but vocal urban population. It decreases prices for poor domestic producers with modest household level surpluses. Allegations by non-subsidising food suppliers in third countries claim that food aid donors keep 'a foot in the door' with the objective of maintaining and increasing market shares.

The continuous occurrence of food shortages has been accompanied by a large amount of theoretical and applied research. A key component of the academic literature deals with the contribution of trade policy changes to global price spikes and price volatility. A question better understood today is the interaction between, and respective contribution of, locally guided policy decisions and panic purchases, which mainly impact local market prices. Local scenarios (including natural disasters and civil unrest) were exacerbated by concurrent extreme weather events in other parts of the world, such as prolonged droughts in Australia, fires in Russia, and floods in Pakistan. Notwithstanding the academic 'understanding of what happened', irrational market behaviour shaped by ill-defined government interventions and unclear WTO rules and disciplines seems to continue.

The general argument in the surveyed literature seems to be that trade policy changes (such as export restrictions in big markets) may lead to an actual limitation

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<sup>62</sup> CFS Voluntary Guidelines on Food Systems and Nutrition, Committee on World Food Security, FAO (2021), [http://www.fao.org/fileadmin/templates/cfs/Docs2021/Documents/CFS\\_VGs\\_Food\\_Systems\\_and\\_Nutrition\\_Strategy\\_EN.pdf](http://www.fao.org/fileadmin/templates/cfs/Docs2021/Documents/CFS_VGs_Food_Systems_and_Nutrition_Strategy_EN.pdf).

of excess supply or widened demand, which explains the changes in global prices.<sup>63</sup> Rising prices could thus be the result of net-exporting countries restricting exports, and/or net-importing countries easing imports. Hans G. Jensen & Kym Anderson argue that export restrictions for certain commodities and in certain large markets contributed to the 2006–08 international price rises, and that alternative policy options that directly strive to protect the most vulnerable groups would be more efficient in dealing with food price volatility.<sup>64</sup> Gabrielle Marceau offers an unambiguous legal critique of export restrictions.<sup>65</sup> Yet, trade policy changes remain the dominant political intervention.<sup>66</sup>

A number of studies on price volatility and food crises show how policy changes can affect paddy production and rice trade. One example is India's rice export ban — itself a remarkable sign of a 'too successful' production policy — and its negative impact on South Asia.<sup>67</sup> Another example are the export restrictions in Vietnam leading to domestic and world price hikes for rice.<sup>68</sup>

Food, at any stage along the value chain, never did, and still does not, flow freely across borders. This means that agricultural trade policy changes, even in small markets, can have irrational (or 'excessive') impacts on world market prices and on global food price volatility. For example, during the 2007–09 food crisis, a particularly devastating domino effect skyrocketed the price of rice, which is one of the three largest produced but thinly traded cereals. The now well-documented rice export prohibitions played a capital role in this situation. In addition, production and market risk hedging are often constrained by the absence or over-regulation of instruments, such as risk insurance or futures trading. Accordingly, all market participants, 'from farm to fork,' tend to over-invest in food access security, including government-backed stockpile operators; for instance, this happened in Ethiopia.<sup>69</sup> Policy-makers, on their part, precede or follow expected harvest and market trends with measures taken to protect producers and, sometimes, consumers, regardless of efficiency considerations and their impact on third countries. What these policy-makers call 'food security' measures (or 'food sovereignty') may actually protect vested interests against competitive producers

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<sup>63</sup> Will J. Martin & Kym Anderson, *Trade Distortions and Food Price Surges*, in COMMODITY PRICE VOLATILITY AND INCLUSIVE GROWTH IN LOW-INCOME COUNTRIES 331 (Rabah Arezki et al. eds., 2012).

<sup>64</sup> Hans G. Jensen & Kym Anderson, *Grain Price Spikes and Beggar-thy-Neighbor Policy Responses: A Global Economywide Analysis*, 31(1) WORLD BANK ECON. REV. 158 (2017).

<sup>65</sup> Gabrielle Marceau, *WTO and Export Restrictions*, 50(4) J. WORLD TRADE 563 (2016).

<sup>66</sup> Jensen & Anderson, *supra* note 64.

<sup>67</sup> Nelson B. Villoria et al., *The Impacts of India's Food Security Policies on South Asian Wheat and Rice Markets*, 31(3) WORLD BANK ECON. REV. 730 (2017).

<sup>68</sup> Fulton & Reynolds, *supra* note 25.

<sup>69</sup> Christian Häberli, *Ethiopia's Food Reserve Policies and Practice* (NCCR Trade, Working Paper No.2, 2013).

abroad, sometimes at the expense of their own vulnerable groups. Such decisions can also send negative signals to sustainable producers and investors.<sup>70</sup>

According to an OECD-initiated long-term study, commodity price volatility over the last fifty years has not increased.<sup>71</sup> With the major exception of rice and wheat, price volatility in the aughts was higher than in the nineties, but comparable to the seventies. Looking at all commodities together, volatility was significantly higher only in 2008 than in the past. The price spikes from 2006–2008 were followed by equally sharp falls in 2009 — a pattern already observed in the nineteen sixties and seventies, *albeit* for different reasons. In the same study, Maryline Huchet-Bourdon also found that oil and fertiliser prices were more correlated with agricultural commodity prices within a period of twelve months than within shorter time periods; this correlation increased during periods of higher prices.<sup>72</sup>

Other interesting examples have caught the attention of agricultural economists. Ceballos et al. examined price transmission from major maize, rice and, wheat markets across twenty-seven countries in Africa, Latin America, and South Asia during the period 2000–2013.<sup>73</sup> They found that even where price and volatility transmission is relatively unhindered, statistically significant transmission effects could only be observed in 25% of the maize markets, but in 50% of rice markets and in 100% of all tested wheat markets. In South East Asia, it was the ‘opaqueness’ of price formation along the value chain which had exacerbated international price shocks.

In the period 2007–2011, policy responses in developing countries to price volatility were extremely varied. One common response pattern was a reinforcement of social policies with a cushioning of the price effects for both rural and urban consumers; this was not confined to countries with massive state intervention and the means to finance these policies. Chris Ackello-Ogutu criticises these responses of many African countries. He argues that the right policies would need to, instead, promote agricultural investment and food security incentives in the context of a broad-based, sustainable, and inclusive economic growth.<sup>74</sup>

Re-focusing on SDG 2 and agriculture, we find that international policy response has often exacerbated farm-gate pricing issues. Even during foreseeable price

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<sup>70</sup> Chris Ackello-Ogutu, *Managing Food Security Implications of Food Price Shocks in Africa*, 20 J. AFR. ECON. 100 (2011).

<sup>71</sup> See Gilbert, *supra* note 29.

<sup>72</sup> Huchet-Bourdon, *supra* note 13.

<sup>73</sup> Francisco Ceballos et al., *Grain Price and Volatility Transmission from International to Domestic Markets in Developing Countries*, 94 WORLD DEV. 305 (2017).

<sup>74</sup> Ackello-Ogutu, *supra* note 70.



spikes, such as those resulting from prolonged droughts in Australia, fires in Russia, and floods in Pakistan, international food aid volumes insidiously decreased. When in 2008, the world market price for rice quadrupled, the world's largest rice stockpile (in Japan) remained untouched. The WTO never endorsed the decisions of the G20 to prohibit export restrictions, even for the purpose of providing international food aid. Although export taxes and restrictions were identified by OECD, and the scholarship, as severely impairing food security — sometimes even at home — the WTO never reinforced its far too lax rules applying to food export prohibitions and quantitative restrictions laid down, back in 1947, in Article XI:2 of the General Agreement on Tariffs and Trade (GATT 1947).<sup>75</sup>

Economically viable solutions to this conundrum, by rural development projects or better trade policies, are hard to come by. Actually, even remote events, such as the announcement of policy decisions in a country with a big market and with export capacity may affect world market prices. In turn, when such policy decisions entail massive trade distortions, for instance, an export restriction, they may influence the livelihoods of vulnerable populations and their farming prospects.

This being, it would be wrong to look at national policy decisions as the sole price drivers on local and world markets. International food governance failures contribute their part to global food insecurity. For instance, hunger may actually increase when WTO rules cannot differentiate anti-poverty programmes involving exports from trade-distorting public stock disposals at dumping prices.

On the other side, price drivers such as export restrictions can kick-start unsustainable self-sufficiency programmes and 'food sovereignty' policies in countries with less efficient farm structures, unhindered by the weak domestic subsidy disciplines in the WTO. The self-defeating effect of export restrictions is a well-studied phenomenon, often enjoying scant attention by policy-makers.<sup>76</sup> A case in point is Tanzania, where food self-sufficiency measures, including export restrictions, led to domestic price increases in the following year.<sup>77</sup>

Price volatility has been interpreted as a market signal resulting from the interplay of numerous offer and demand factors, as well as from related policy decisions. The problem lies in the difficulty of differentiating the underlying cyclical changes

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<sup>75</sup> General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, art. XI:2, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT].

<sup>76</sup> Martin & Anderson, *supra* note 63.

<sup>77</sup> Kinshen Diao et al., *Economywide impact of maize export bans on agricultural growth and household welfare in Tanzania: A Dynamic Computable General Equilibrium Model Analysis*, INT'L FOOD POL'Y RES. INST. (2006), <https://www.ifpri.org/cdmref/p15738coll2/id/127796/filename/128007.pdf>.

from the structural ones, and limiting policy changes to price developments with a long-term impact and the need for structural adjustments. Admittedly, it is not easy to recognise relative and absolute price spike increases at the time of comparing and evaluating the magnitude of the price levels. However, it appears that politicians and food security advocates are quick to suspect 'speculation' and 'hoarding' in all unwanted price fluctuations and excessive household stock increases. The economic scholarship is divided on the empirical evidence and the drivers and triggers of price changes in world food markets. For example, an empirical study by Getaw Tadesse found speculation as a significant price driver in the 2007–08 maize and soybean price spikes, next to supply and demand fundamentals, with financial crises and energy markets further increasing price volatility.<sup>78</sup> Despite this, the same authors, however, humbly acknowledge that "(w)hile there is a certain consensus regarding the effects of weather, biofuel production, and export restrictions on food commodity markets, the dispute surrounding speculation is far from settled."<sup>79</sup> The (former) UN Special Rapporteur on the right to food, Olivier de Schutter,<sup>80</sup> repeatedly lambasted the role played by financial speculators.<sup>81</sup>

To avoid such vicious food insecurity cycles, there is a need for better policy responses at the national level and stricter rules and disciplines at the international level. This raises issues such as the definition of 'excessive' price volatility as a threshold for safeguard actions. Another question to be considered is which kind of food stockpile management really reduces price volatility and 'speculation?' It has also become clear that regional or 'virtual' food stockpiles can be more efficient than national schemes, but such stockpiles require mutual trust and the possibility of concerted and swift action over and beyond 'regional' food aid.<sup>82</sup> Absent pre-agreed and 'automatic' trigger mechanisms, public stockpiles will remain ineffective, extremely costly, and prone to corruption in counteracting price spikes.<sup>83</sup> Moreover, such schemes can crowd out private operator risk management, wholesale and retail storage, and non-subsidised insurance schemes.<sup>84</sup>

These problems coupled with uncertain production, trade and investment data have failed, in the eyes of critical stakeholders, to give operators the risk

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<sup>78</sup> Tadesse, *supra* note 59.

<sup>79</sup> *Id.*, at 118.

<sup>80</sup> Olivier De Schutter (Special Rapporteur on the Right to Food), *Food Commodities Speculation and Food Price Crises: Regulation to reduce the risks of price volatility* (Sept. 2010).

<sup>81</sup> Tadesse, *supra* note 59.

<sup>82</sup> Irene Musselli, *La régulation des cours et des marchés des produits de base : vers une nouvelle architecture mondiale?*, 139(3) J. DROIT INT'L 903 (2012).

<sup>83</sup> Gilbert, *supra* note 29.

<sup>84</sup> Christian Häberli, *After Bali: WTO Rules Applying to Public Food Reserves*, (FAO Commodity & Trade Pol'y Res., Working Paper No.46, 2014).

management tools entailing more food security at the respective production, processing, and trading levels. Perhaps a mix of publicly-supported private risk management tools would work better, especially in times of food shortages, than quick government interventions that are unable to produce food with a magic wand? Joseph Glauber from International Food Policy Research Institute (IFPRI), together with Katherine Baldwin et al. from OECD, argue that rapidly increasing government support to agricultural risk management can reduce farmers' risk-taking incentives and, hence, the effectiveness of market mechanisms. Instead, they posit carefully designed policies in support of private agricultural risk management tools, such as disaster aid, agricultural insurance, income stabilisation schemes, and tax and savings measures.<sup>85</sup>

### B. *Relevant International Trade Rules*

The Uruguay Round (UR) and the AoA brought about substantial changes in all three so-called pillars of food trade rules and disciplines: market access, domestic support, and export competition. But what does this mean for food security? Looking briefly at each pillar, we have to keep in mind that a number of policy tools claiming more food security do not benefit vulnerable producers, let alone reduce domestic consumer prices. People whose production and budget barely suffice to fill their bellies may wonder what agricultural trade rules are good for.

#### 1. Market Access — Tariffication and Predictability

On the face of it, virtually all rules of the old GATT 1947 applied to agriculture. But not without exceptions.

A number of so-called 'waivers' allowed large trading nations to avoid competition, both from abroad and for their main exports. Moreover, tariff bindings and reductions were few and far between. A number of other farm policies were simply practised without any explanations or legal challenges under the relevant GATT 1947 rules.

A true revolution of the UR, compared with GATT times and just about any bilateral trade agreement, was the quasi-universal 'tariffication' commitment, i.e., the conversion of all border measures into bound tariffs.<sup>86</sup> Nevertheless, acceptance of this new commitment to only apply tariffs was sometimes negotiated for each tariff line with less than clear conversion formula, opening the door to power-plays behind closed doors (dirty tariffication) and bilateral deals, introduced at the last moment in the draft schedules with the tacit agreement of negotiators paid off by bilateral concessions (side letters). Time pressure prevented full

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<sup>85</sup> Joseph Glauber et al., *Design principles for agricultural risk management policies* (Org. Econ. Coop. & Dev., Food, Agriculture & Fisheries Working Paper No. 157, May 2021).

<sup>86</sup> Agreement on Agriculture, *supra* note 1, art. 4.2.

transparency in the three months between the end of the Uruguay negotiations and the Marrakesh Conference, also marked by major unilateral concession withdrawals without multilateral consultations. All schedules nevertheless attained legal security upon their signature in Marrakesh.

Tariffication brought about a major food security improvement. Agricultural exporters now know at what conditions their supplies will be allowed on their destination markets; these exports allow to finance food imports needed at home. Tariffs, as the only remaining border protection tool for domestic produce, inform food crop importers how to fill retail shelves and to satisfy consumers with incomes above the poverty line.

Of course, incomplete (or 'fuzzy') treaty commitments maintain policy space for trade policy changes. These may be necessary as a response to food price volatility and price spikes, or to policy decisions in other countries; but unclear commitments may also curtail scheduled and reciprocal market access and, hence, the contribution of agri-food trade to food security. This, in turn, may lead to a vicious circle of measures, such as mutually increasing price volatility and consumer prices. A food trade war, or a subsidy race, inevitably lost by poorer developing countries, is only one collateral damage caused by what might be called 'fake food security policies.' Yet, given the large tariff overhang for many countries with RTA, further, limited MFN reductions would not fundamentally liberalise trade.

On the positive side, including for global food security, litigation has tied down several loose ends in the new market access rules. Importers had to clarify their country quotas under the new 'double tariff' regime, providing for lower-than-Most Favoured Nation (MFN) access for sensitive products by way of Tariff Rate Quotas (TRQ) in *EC — Bananas III*.<sup>87</sup> This milestone case also clarified the reading of GATT-Article XIII under the AoA TRQ, besides being the first GATS case.<sup>88</sup> Frequent tariff adjustments for animal feed imports must follow strict rules.<sup>89</sup> The same rule applies for the protection of food product names.<sup>90</sup> In addition, for developing country preferences (Generalised System of Preferences), how to

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<sup>87</sup> Appellate Body Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc. WT/DS27/AB/R (adopted on Sept. 25, 1997).

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

<sup>89</sup> Appellate Body Report, *Chile — Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WTO Doc. WT/DS207/AB/R (adopted on Oct. 23, 2002).

<sup>90</sup> Panel Report, *European Communities — Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WTO Doc. WT/DS290/R (Apr. 20, 2005).

further improve market access without diminishing other countries' rights became clearer.<sup>91</sup>

## 2. Domestic Subsidies

A very substantial progress achieved by the UR is the cap on all trade-distorting domestic subsidies, which limits the 'total aggregate measurement of support' (AMS) for 34 WTO Members with such measures in place during the base period (1986-88). All other Members, without these commitments in the so-called *amber box*, have to keep their product support within 5% of the value of production (i.e., the *de minimis* level) — 10% in the case of developing countries. This is an important new discipline, missing for non-agricultural products, which clarifies the conditions of competition in any given market.

The good news, especially for rich countries, is that the AoA allows twelve types of specific measures without trade distortions and, hence, without financial limits. The only 'chapeau' condition is that such support measures have "no, or at most minimal, trade-distorting effects or effects on production"<sup>92</sup> — called the 'Green Box.'

Unfortunately, under a food security perspective, this cap on all domestic subsidies does not prevent producers from penetrating other markets with poor farmers, even below world market prices. Even the disciplines of the Agreement on Subsidies and Countervailing Measures (ASCM)<sup>93</sup> applying to agri-food trade since 2003 do not prohibit 'agri-dumping.' Basically, only subsidies displacing farm imports can be challenged under the ASCM. Moreover, the ASCM may disallow environment-friendly or otherwise 'sustainable' food subsidies (except for 'green box' support measures), if the complaining Member can prove adverse effects on domestic producers, or if they depress world market prices (e.g., for cotton).

A specific exception allows developing countries to provide agricultural investment and (certain) input subsidies to "encourage agricultural and rural development [as] an integral part of the development programmes of developing countries."<sup>94</sup> No reduction obligations apply to these increasingly notified but never challenged programmes. There are no sustainability conditions. The Committee on Agriculture (CoA) only takes note of such measures — without a consensus, or

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<sup>91</sup> Appellate Body Report, *European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries*, WTO Doc. WT/DS246/AB/R (adopted on Apr. 20, 2004).

<sup>92</sup> *Id.* Annex 2. This is also called the 'green box.'

<sup>93</sup> Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14.

<sup>94</sup> Agreement on Agriculture, *supra* note 1, art. 6.2. This is also called the 'Developing Country Green Box.'

litigation, on the compatibility of these measures under this rather complicated provision.

When trying to define 'sustainable' domestic support measures under the AoA, it is perhaps good to recall that the multilateral trade rules framework is indifferent towards 'good' or 'bad' policies: as long as you do not step on my feet, your farm support remains largely a matter of your own national policy-making and financing. Nonetheless, 'resilient agricultural practices that increase productivity and production'<sup>95</sup> could still come at the expense of third country competitors. Indeed, measures taken in one country may negatively affect, say, climate resilience in another country. The question is whether taxpayers may restore the level-playing field where substandard imports — seen under a national viewpoint — threaten domestic products. At any rate, renegotiating domestic support under a food security (or a climate mitigation) perspective will require very careful crafting to "encourage agricultural and rural development" without impairing market access rights of "low-income or resource-poor producers" (Art. 6.2 AoA).

This author is of the opinion that, in a sustainable development context, discretionary and high farm support (in developed and large developing countries) has perhaps the most deleterious effect on national food security in poor countries. This is, however, a very complex matter. Where small farmers are deprived of efficient safeguards, let alone financial support, a drastic tariff reduction cannot only reduce consumer prices but also terminate their business. It is true that poor urban consumers might benefit from agro-dumping or from food aid tied to donor origin. Moreover, while slum-dwellers in Central Asia may prefer palm oil from deforested areas in South-East Asia to sustainable family-farmed plantations in West Africa, rich country farmers, on the other hand, might object to 'sustainable' but self-discriminatory regulations, and demand compensation for the loss of competitiveness.

### 3. Export Competition

The main result in the UR for export competition in developed countries was the obligation to reduce budgetary outlays for export subsidies (for commodities) by 21% and quantities (of all agricultural products) benefiting from such subsidies by 36%.<sup>96</sup> This may seem like two small, innocuous figures. Nonetheless, it was one of the very last agreements reached in the eight-and-a-half years of UR negotiations — first, between the USA and the EU, and then, reluctantly agreed to

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<sup>95</sup> Target 2.4, Indicators and Monitoring Framework, Sustainable Development Solutions Framework, <https://indicators.report/targets/2-4/>.

<sup>96</sup> Agreement on Agriculture, *supra* note 1, art. 9.2(b)(4).

by the other negotiators, eventually including the 'Cairns Group' consisting of non-subsidising agricultural product exporters.

In many cases, the agreed subsidy reductions became possible in anticipation of the AoA-agreed schedule, mainly thanks to rising world market prices. This, of course, makes it difficult to attribute market share shifts, let alone food security impacts, to the AoA.

At the same time, export subsidy reduction commitments came only as a very partial success. Both the Uruguay and the Doha Rounds failed to agree on three other forms of export competition, namely export credits, export state trading, and international food aid. Moreover, government outlays for marketing and promotion services, except as a means to reduce selling prices, are allowed in unlimited quantities, pursuant to the green box exemption in Annex 2 of the AoA, paragraph 2(f), regardless of whether they are used for domestic or export sales.

The most conspicuous lack of disciplines, from a food security viewpoint, relates to international food aid. In extreme situations, no amount of local production for sale can provide the food security required. Obviously, for starving people without money to buy food, a free lunch is always welcome and, in many instances, such as for poor school children, it can be their only means of survival. At the same time, it is recognised that, depending on the circumstances in which food aid is shipped to countries and sold on local markets, it can have negative effects by displacing domestic production or supplies from non-subsidised producers, including neighbouring developing countries. Food security, in cases where non-subsidised production and trade could make a contribution, is actually diminished because of the price-depressing effect of food aid, especially when local production as a source of revenue is being displaced. It is acknowledged that the target of WTO disciplines, as instruments of trade liberalisation, should only be the market displacement aspect of food aid: this is the non-genuine and trade-relevant aspect of food aid which could (and should) be addressed directly. This being said, the failure of the Uruguay and Doha Rounds' negotiators to even contemplate disciplines for 'non-genuine' food aid must be seen as a serious shortcoming from a food security perspective. This is conspicuously evident while looking at the development of food aid volumes during times of low and high food commodity prices. Indeed, in parallel with the unprecedented price increases in 2007, food aid was reduced to its lowest level ever. In effect, the new food aid rules in the 2007 Modalities<sup>97</sup> would have even impaired local food security. This demonstrates the truly vicious face of an instrument used first and foremost for surplus dumping, rather than for the fight against hunger and starvation.

#### 4. WTO and the Right to Food under Public International Law

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

The new disciplines on market access, domestic support, and export competition were a major achievement of the UR to the benefit of agricultural trade liberalisation. However, especially in times of high food prices, they are a blunt instrument for food security. Even the 2015 prohibition of export subsidies,<sup>98</sup> and the disciplines for export credits almost agreed in 2007,<sup>99</sup> cannot be considered as creating the level-playing field, which is especially needed by poor farmers without government support and little border protection.

This leads us to the important question on the relationship between trade liberalisation and local food security.

On the positive side, no robust research established a correlation between more liberal trade policies and local food riots in the same or in other countries. On the contrary, poor food-importing countries often showed surprisingly limited price transmission in comparison with middle-income and developed countries. Some authors try to explain this with a lack of integration in the world food economy (i.e., import market penetration at world prices) and/or state-imposed prices for staple foods. Stakeholders and activists see correlations between a world market price hike for staple food and local food riots. However, in two studies by IFPRI, the price shock transmission in West Africa was found minimal or absent, and the main reasons for hunger and civil unrest were found to be local.<sup>100</sup>

What are the PIL constraints in this race to the (price) top and to the (food security) bottom?

It has to be acknowledged that the presently relevant multilateral rules of the WTO that apply to agricultural trade can only play a limited role here. First, the prohibition of border measures, other than tariffs, is sometimes circumvented by equivalent non-tariff barriers; food security-motivated export restrictions face no substantial WTO disciplines. Second, trade-distorting domestic support is quantitatively limited, with most developing countries facing much lower limits than developed countries “benefitting” from their high farm subsidies during the agreed base period 1986-88. Third, when export subsidies, in the narrow sense, were finally prohibited in 2015, only a few (mainly developed) countries were still

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<sup>98</sup> World Trade Organization, Ministerial Declaration of 19 December 2015, WTO Doc. WT/MIN(15)/DEC.

<sup>99</sup> Committee on Agriculture, World Trade Organization, Revised Draft Modalities for Agriculture, TN/AG/W/4 and Corr.1 (Aug. 1, 2007), [https://www.wto.org/english/tratop\\_e/agric\\_e/agchairtxt\\_1aug07\\_e.pdf](https://www.wto.org/english/tratop_e/agric_e/agchairtxt_1aug07_e.pdf).

<sup>100</sup> Nicholas Minot, *Food price volatility in sub-Saharan Africa: Has it really increased?*, 45 FOOD POLY 45 (2014); Nicholas Minot, *Transmission of World Food Price Changes to Markets in Sub-Saharan Africa*, INTERNATIONAL FOOD POLICY RESEARCH INSTITUTE (2011), <https://www.ifpri.org/cdmref/p15738coll2/id/124886/filename/124887.pdf>.



using them. However, there are several other forms of exporting ‘surplus’ production, equivalent, in effect, to food dumping.<sup>101</sup>

Besides a variety of legal or non-legal non-tariff measures, domestic subsidies can still displace imports or restrict exports. In their worst forms, such actions can be seen as violating the Right to Food (R2F) enshrined in PIL.<sup>102</sup>

Without going into details here, the Right to Food, laid down in various human rights treaties, entails four commitments relevant for the multilateral trading system negotiated by Trade Ministers:

1. Poor developing countries must retain policy space for at least temporary protection of fragile agricultural producers. This challenge is not confined to WTO disciplines and commitments. Effective border protection today is increasingly becoming limited due to RTAs. Despite this, PIL must prevail where small farmers are existentially threatened by what only WTO fails to call ‘agri-dumping.’
2. The absence of new disciplines for export restrictions and, more generally, export competition, are the most blatant threats to food security. The November 2011 decision by the G20 to exempt food aid supplies from export restrictions,<sup>103</sup> has never been addressed in the WTO.
3. International finance institutions need to review their agricultural investment policies and lending priorities. A violation of this recommendation even by their own research and development programmes shows how project approvals can fail to respond to the food security objective professed by their board members.<sup>104</sup>
4. The same goes for the bilateral investment treaties (and in the recent RTAs), at least in respect of agricultural land acquisitions in vulnerable countries. Protecting ‘predatory’ investors is a PIL violation by both host and home states and by development banks participating in large rural development programmes.<sup>105</sup>

The Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least Developing Countries (LDC) and Net Food-Importing Developing Countries (NFIDC) is a ‘last minute’ sweetener for

<sup>101</sup> Cf. Panel Composed, *India — Measures Concerning Sugar and Sugarcane*, WTO Doc. WT/DS579/ (Oct. 28, 2019).

<sup>102</sup> Christian Häberli, *Sustainable Agriculture and Trade*, in *TRADE AND ENVIRONMENTAL LAW ENCYCLOPEDIA* (Panagiotis Delimatsis and Leonie Reins eds., forthcoming Dec. 2021) [hereinafter Häberli (2022)].

<sup>103</sup> Communiqué, G20 Leaders Summit, Cannes (Nov. 3–4, 2011), <https://www.oecd.org/g20/summits/cannes/Cannes%20Leaders%20Communiqu%C3%A9%204%20November%202011.pdf>.

<sup>104</sup> Häberli & Smith, *supra* note 56.

<sup>105</sup> Cotula & Berger, *supra* note 18.

countries concerned that trade liberalisation may cause specific difficulties to their producers and consumers.<sup>106</sup> This decision, with a tongue-breaking title, was adopted on April 14, 1994 by the Trade Negotiations Committee and included in the UR ministerial decisions together, a short mention of the AoA Preamble.<sup>107</sup> According to this LDC/NFIDC text, four types of action must be considered by 'liberalisation winners' in the eventuality of a negative impact of the UR agreements on the availability of food aid: (1) commitments to sufficient levels of food aid; (2) short-term financing of normal levels of commercial imports; (3) financial assistance to improve agricultural productivity and infrastructure; and (4) favourable terms for agricultural export credits. Significantly, during the 2007–09 food crisis, the LDC/NFIDC decision was never even referred to by a WTO Member, or the then WTO Director General Pascal Lamy, or by the Heads of State of the G20 claiming to be concerned by the food insecurity of the NFIDC. Requests and attempts to provide 'good offices' through the Committee of Agriculture chairperson led nowhere. An improved version for a Doha Round Final Act has not even been envisaged in the 2007 'Modalities'. Until today, the WTO has found no answer to the potentially deleterious food security impact of trade liberalisation in resource-poor countries.

#### VI. A FOOD SECURITY ASSESSMENT AFTER THE BREAK-DOWN OF THE DOHA ROUND NEGOTIATIONS

The WTO Doha Round negotiations from 2001 to 2008 represent, so far, the only major effort to complete the agricultural reform process commenced in the previous the UR (1986–1994). The results of the first seven years of the Doha Round failed to gain acceptance, purportedly after a 'high noon' moment in which USA and India disagreed over the extent of the new 'Special Safeguard Mechanism' (SSM) as a tool for tariff increases above the levels negotiated and agreed in the UR. What is clear is that many reasons for the breakdown lie outside agriculture.

The results after seven years of Doha Round negotiations for agriculture are reflected in the December 2007 'Modalities'.<sup>108</sup> Today, there are no more low-hanging fruits for more food security. Nonetheless, with a little hindsight wisdom

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<sup>106</sup> *Uruguay Round: Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries*, WORLD TRADE ORGANIZATION, [https://www.wto.org/english/docs\\_e/legal\\_e/35-dag.pdf](https://www.wto.org/english/docs_e/legal_e/35-dag.pdf).

<sup>107</sup> Agreement on Agriculture, *supra* note 1, Preamble. It mentioned "taking into account the possible negative effects of the implementation of the reform programme on least-developed and net food-importing developing countries."

<sup>108</sup> World Trade Organization, Revised Draft Modalities for Agriculture, WTO Doc. TN/AG/W/4/Rev.4 (Dec. 6, 2008) [hereinafter WTO Modalities for Agriculture].

(which some negotiators seem to lack today), some highlights are found in each pillar — together with the then unbridgeable differences.

In the first pillar, *market access*, WTO has never agreed on any MFN tariff reductions for agricultural products. Commitments made elsewhere were mostly non-reciprocal and selective, and limited to regional market access.<sup>109</sup> As a result, regional trade preferences allow for trade increases but most often exempt ‘sensitive’ or ‘special’ products envisaged in the Doha Development Agenda (DDA). The formula outlined in the ‘Modalities’ had foreseen steeper cuts on higher tariffs and ranges of cuts, all in single digits.<sup>110</sup> For developed countries, the cuts would have risen, from 50% for tariffs below 20% to 70% for tariffs above 75%, subject to a 54% minimum average, and with penalties for peak tariffs above 100% (capping).<sup>111</sup> According to David Laborde, this rather ambitious market access package would have led to more trade liberalisation than any other WTO, or non-WTO, agreement.<sup>112</sup> In other words, these results would have improved the global food security contribution of agricultural trade.

The second pillar, *domestic support*, saw as its most important result, a general commitment reducing the overall trade-distorting domestic support, cumulating Amber Box support, *de minimis* expenditures, and Blue Box support (OTDS).<sup>113</sup> Reductions by way of a tiered formula — implying higher cuts for higher levels — would have the EU reduce its base period OTDS by 80%, the US by 70%, and Japan by 75%.<sup>114</sup> All other countries would reduce OTDS by 55% (developed countries with high relative levels of OTDS to make an additional effort).<sup>115</sup> Developing countries would make two-thirds of the cut over three years to 6.7% of production, except for support mainly destined for subsistence/resource-poor farmers.<sup>116</sup> A modest but systemically important innovation would have been to separately list and limit domestic support by major products, in order to avoid easy support shifting and *product targeting*. NFIDC, without Blue Box programmes and recent new Members, would not have had any OTDS reduction obligations, but still would have faced Amber Box and *de minimis* constraints.<sup>117</sup> The subsidy reductions to which most developed countries had agreed to, looked entirely

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<sup>109</sup> *Id.*

<sup>110</sup> Christian Häberli, *Agricultural Trade: How Bad Is the WTO for Development?*, in *European Yearbook of International Economic Law* 2016, at 110 (Marc Bungenberg et al. eds., 2016).

<sup>111</sup> *Id.*

<sup>112</sup> DAVID LABORDE, *Implications of the Draft Market Access Modalities on Bound and Applied Tariffs*, in *TACKLING AGRICULTURE IN THE POST-BALI CONTEXT* (Ricardo Meléndez-Ortiz et al. eds., 2014).

<sup>113</sup> WTO Modalities for Agriculture, *supra* note 108.

<sup>114</sup> Häberli, *supra* note 110.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

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

doable after earlier reform programmes, except for the US which had merely offered to reduce their OTDS by perhaps 50% — still way above their then actual farm support (COVID-19, the US-China trade war, and the Trump administration have since then massively increased support, in all likelihood, above the UR entitlement). On their side, large developing countries like India having to live with relatively low levels of subsidy entitlements — because during the UR base period 1986–88, they didn't spend much money on farm development — are now demanding higher and discretionary levels of OTDS rather than reducing them. Hence, even reductions of the 'subsidy overhang' between MFN and preferential tariffs observed today for developed countries seem to be more far away than ever, for three reasons. First, not a single RTA disciplines trade-distorting domestic support. Second, climate mitigation measures taxing or otherwise limiting domestic production may only be politically feasible if compensation is paid to non-competition-proof producers. Third, another pandemic may lead many governments to re-increase farmer support. For real or alleged food security purposes, policy space comes first — way before market access improvements. In other words, domestic support, despite being recognised as a main issue for AoA re-negotiations, remains the most difficult area for real progress in terms of food security.

*Export competition* — the third pillar — is perhaps the most interesting part of the 2007 Modalities.<sup>118</sup> The then recommended elimination of all agricultural export subsidies and the prohibition of new ones was finally decided in November 2015 at the 10<sup>th</sup> Ministerial Conference in Nairobi. But none of the draft agreements recommended in the 'Modalities' was ever concluded in any of the three other forms of export competition. In order of importance, under a food security perspective, these are (i) new disciplines for *food aid* aiming at the prevention of 'commercial displacement' of other Members' exports (but not food dumping at the expense of local farmers in those export markets), (ii) massive improvements for subsidised *export credits, insurance and guarantees* by way of a new Article 10.2 of the AoA, based on two decades of OECD negotiations, including with important countries like Argentina, and (iii) *exporting state trading* enterprises, with only a slight revision of GATT Article XVII with specific rules for monopolies.

A large number of further provisions in the 'Modalities' explicitly addressed the concerns of NFIDC/LDC, and for cotton.

However, some of the most food security-sensitive issues had not even been included in the DDA. *Export restrictions* — very frequent during the 2007 to 2009 food crisis — and the development-sensitive issue of *differential export taxes* (a

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<sup>118</sup> WTO Modalities for Agriculture, *supra* note 108.

common practice in revenue-poor states) remain big, still unaddressed, issues, especially affecting NFIDC.

An overall assessment of the negotiations, then and now, shows the dilemma between the benefits WTO disciplines could bring to global food security and the reduction in policy space which these very same disciplines imply, not only for rich countries (e.g. US domestic support limits). The profound divergences, even between different developing countries, show that there is no single solution to this dilemma. Despite the important new RTA tariff reductions implemented since 2007, MFN market access improvements still remain a big challenge for countries with vulnerable production structures, such as India, Indonesia, Kenya, Turkey, and China. Even though such countries could still have shielded their producers from too much competition, neither the so-called G33, or other developing country groups, such as the G90, accepted the numerous ‘softeners’ proposed by the ‘Modalities,’ namely Special Products (SP) and the SSM already foreseen at the Ministerial level back in 2003.<sup>119</sup>

The present stalemate in WTO dispute settlement and the lack of domestic support disciplines in RTAs cannot prevent such measures from distorting competition and encroaching on market space agreed with other countries. Even local and domestic food security may suffer; for example, when politically more vocal urban consumers are fed with international food aid, rather than by domestic but small landholders.

Today it seems that the only way forward within the present rules framework is a comprehensive package. Looking at the rules failures in the last food crises, food security interests of all countries will have to be taken into account together with more market access and more ‘policy space,’ in combination with progressive agricultural reforms necessary in most countries, including carefully targeted support programmes for special products and for ‘climate-smart’ production methods, and safeguards temporarily protecting vulnerable farmers.

For more food security — and political acceptance by NFIDC — the leeway granted within new market access improvements should be used to better feed needy consumers, rather than to protect parochial interests. Clear, strong, and binding commitments from the ‘Doha winners’ would facilitate acceptance of a WTO agricultural reform package by the NFIDC, in two respects: *aid for trade* and *international food aid*.

1. *Aid for trade* may facilitate structural adjustments, agri-food trade, and investment reforms; for instance, projects partially shifting the food value

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<sup>119</sup> *Groups in the agriculture negotiations*, WORLD TRADE DEVELOPMENT, [https://www.wto.org/english/tratop\\_e/agric\\_e/negoti\\_groups\\_e.htm](https://www.wto.org/english/tratop_e/agric_e/negoti_groups_e.htm) (last updated Apr. 12, 2021). A list of the *seventeen* agricultural negotiation groups.

chain into a poor developing country. This, of course, is neither a self-fulfilling recipe, nor does it help 'liberalisation losers' maintain market shares or self-sufficiency rates. Hence, in order to reach a balanced negotiation outcome, the financial question would need to be built into the Doha equation (EU is showing the way, where each enlargement is accompanied by cohesion funds and structural adjustment support). In times of high food and oil prices, benefit-sharing between winners and losers could help finance the investment and technology needs of poor farmers. As for farm support, food security considerations would plead for a progressive, non-reciprocal reduction formula, in combination with a gradual reduction of taxpayer support to rich farmers, and a parallel increase in support to poor farmers in developing countries.

2. Food-importing developing countries will be well advised to observe how fast *international food aid* and *preferential export credits* dwindle when world food prices are up. Two non-binding treaty texts are referred to in AoA-Article 10.4: Article IV of the Food Aid Convention 1986,<sup>120</sup> and the FAO's Principles of Surplus Disposal and Consultative Obligations.<sup>121</sup> Both provisions could be re-examined by their respective memberships and then redrafted into a WTO commitment to maintain *food aid volumes* and *favourable credit conditions* in times of world-market price spikes and national food insufficiencies.

WTO, today, has a chance for new thinking and better solutions. Despite political claims to the contrary, WTO is not a development organisation. Even if the Doha Round, or a successor negotiation, decided at MC12, fail to seriously address the food security issue in an importers' perspective, can the WTO membership maintain its claim to promote sustainable development?<sup>2</sup>

### VIII. WTO AS DON QUIXOTE AGAINST TWO PANDEMICS

Before looking at improvement possibilities, the systemic failure of the WTO membership to stop food value chain breakages and price rises caused by export restrictions must be explored in more detail. Moreover, climate change as the next 'pandemic' raises even bigger challenges to the WTO regulatory framework, not least in terms of food security.

#### A. COVID-19 pandemic and international organisations

The COVID-19 virus enjoyed only a few weeks of free travel before governments closed borders for all kinds of trade in goods, services, and intellectual property.

<sup>120</sup> Food Aid Convention art. IV, Jul. 1, 1986, 1429 U.N.T.S. 71.

<sup>121</sup> FAO, PRINCIPLES OF SURPLUS DISPOSAL AND CONSULTATIVE OBLIGATIONS OF MEMBER NATIONS (1972).

Since then, the WTO Secretariat follows documents and updates of the policy measures of all WTO Members on a new website 'COVID-19 and world trade'.<sup>122</sup> For the first time, it started maintaining a list of food export bans and other trade disruptions along the whole food value chain, initially without waiting for notifications by concerned Members, or *counter-notifications* foreseen in Article 18.7 of AoA.<sup>123</sup>

At first sight, the extent and the length of this list comes as a shock for trade rule experts and agricultural economists alike. Indeed, as of August 2, 2021, the WTO Members had submitted a total of 405 notifications related to COVID-19. Here is an illustrative excerpt, following, in alphabetical country order, some of the 92 goods-trade measures initially applicable to agricultural products:<sup>124</sup>

- Algeria: temporary export ban on certain products (1,219 tariff lines at 10-digit level, including in HS Chapters 2; 4; 7; 8; 9; 10; 11; 15; 16; 17; 19; 20; 21; 22).
- Anguilla: temporary elimination of import tariffs (including and on certain food products (e.g. rice; brown sugar; white sugar; flour; chicken; milk; fresh or chilled vegetables; canned vegetables, fresh or chilled fruits, canned fruits); imports also exempted from interim goods taxes and administrative fees.
- Argentina: temporary implementation or elimination of export licensing requirement; imports also exempted from the statistical fee; temporary elimination of export duties (on raw hides and skins, leather and furskins); import of certain products temporary exempted from VAT.
- Belarus: temporary export restriction on certain basic food items (e.g., buckwheat, onions, garlic).
- Bolivia: temporary elimination of import tariffs on wheat and meslin.
- Cambodia: temporary export ban on rice, paddy rice and fish; temporary import ban on counterfeit ethanol, and on frozen meat of bovine animals (HS 0202) from specific origins.
- China: a total of 9 facilitation measures regarding 3 categories of agricultural administrative approval (license renewal, simplification of approval procedure, and optimisation of approval processes).
- Colombia: temporary elimination of imports tariffs on maize, grain sorghum, soya beans, oil-cake, and other solid residues, whether or not ground or in the form of pellets, resulting from the extraction of soyabean oil. The COVID-19 lockdown also led to a significant decrease in domestic demand for fuels and fuel alcohol (ethanol) required for their oxygenation (HS

<sup>122</sup> *COVID-19 and world trade*, WORLD TRADE ORGANISATION, [https://www.wto.org/english/tratop\\_e/covid19\\_e/covid19\\_e.htm](https://www.wto.org/english/tratop_e/covid19_e/covid19_e.htm) (last visited Sept. 8, 2021) [hereinafter COVID-19 & World Trade].

<sup>123</sup> Agreement on Agriculture, *supra* note 1, art. 18.7.

<sup>124</sup> COVID-19 & World Trade, *supra* note 122.

2207.20.00). Due to the resulting increase in ethanol reserves, the limited storage capacity for ethanol, and the effects of this situation on overall sugar production, limits have been placed on imports of fuel alcohol, subject to certain conditions and exemptions.

- Egypt: temporary export prohibition on beans. Exports of excess supply of beans after meeting the need of domestic market based on approval by Minister of Trade and Industry is allowed.

There were numerous appeals for ‘good behaviour.’ International organisations, governments, and scholars warned against food security-threatening trade measures such as the misuse of sanitary restrictions. Carlos Javier called for WTO “to intervene in the global agro-food system, in order to prevent the proliferation of future pandemics.”<sup>125</sup>

The World Bank and other organisations saw the main impact of the pandemic on agri-food production and trade in four different areas with examples of both food and cash crops, agricultural inputs, and transport facilities — from both developing and developed countries:<sup>126</sup>

1. *Disruption to supply chains:* Some mitigation measures drive a wedge between consumer and producer prices of commodities or between commodity exporters and importers. For example, disruptions to food supply chains may result in food security concerns, which in turn can trigger hoarding by consumers. That could push prices higher at the consumer level, while at the same time, ample harvests, such as for grains, could lead to lower producer prices.
2. *Disruptions to agricultural commodity production:* For agriculture, the upcoming growing season may be affected by shortages of available inputs resulting from mitigation measures. The labor force available for commodity production may be curtailed if vast numbers of people are subject to movement restrictions, including across borders. This is of great concern for agricultural production, especially in advanced economies, where there is a heavy reliance on migrant workers who may no longer be able to travel.
3. *Food security:* Global food markets remain amply supplied following recent bumper harvests, especially in maize and wheat. For major staple food

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<sup>125</sup> Carlos Javier, *The challenges of agricultural production in the stage of pandemics of the 21st century*, ACADEMIA LETTERS, <https://doi.org/10.20935/AL2512> (last visited sept. 8, 2021).

<sup>126</sup> *A Shock Like No Other: The Impact of COVID-19 on Commodity Markets*, COMMODITY MARKETS OUTLOOK, WORLD BANK 8-11 (Apr. 2020), <https://thedocs.worldbank.org/en/doc/558261587395154178-0050022020/original/CMOApril2020SpecialFocus1.pdf> [hereinafter Impact of COVID-19 on Commodity Markets].



commodities, stock-to-use ratios are very high by historical standards. Nevertheless, recent announcements of trade restrictions by some key exporters (e.g., Russia for wheat and Vietnam for rice), as well as “excess” buying by some importers (e.g., Philippines for rice, Egypt and Saudi Arabia for wheat), have raised concerns about food security.<sup>127</sup> If such concerns become widespread, hoarding may be the result.<sup>128</sup>

4. *Indirect supply chain disruptions*: Disruption of supply chains has already affected the export sector of Emerging Markets and Developing Economies, especially for perishable products such as flowers, fruits, and vegetables. For example, following travel disruptions from East Africa to Europe, Kenya’s exports of fresh flowers dropped nearly 80 percent. Shipments to Western European markets, including the United Kingdom, the Netherlands, and Germany, fell from 60 to 15 tons per day. Production is also being affected by disruption to key inputs. For example, low availability of pesticides are already affecting crop protection efforts and will likely reduce yields later in the year. A lack of pesticides is also hampering efforts to contain pest outbreaks, including the locust outbreak in East Africa.<sup>129</sup> Labor availability for agricultural supply chains is increasingly becoming a problem, especially for highly labor-intensive sectors, such as fruits, vegetables, meat, and dairy production.

Like the World Bank, some leading economists have also painted a positive food security picture, finding government reactions to the pandemic excessive and/or counterproductive. In the same blog post, Joe Glauber et al. argued that “trade restrictions are [the] worst possible response to safeguard food security.”<sup>130</sup> Even FAO researchers feared that widespread food purchases could augment global food insecurity by causing large-scale hoarding increases.<sup>131</sup>

The FAO published its own list of agricultural trade and policy responses during the first wave of the COVID-19 pandemic:<sup>132</sup>

1. *Trade Restrictions*: A limited number of countries imposed trade related restrictions (very few *import restrictions*). Many of the *export bans* were

<sup>127</sup> Joseph Glauber et al., *COVID-19: Trade Restrictions Are Worst Possible Response to Safeguard Food Security*, IFPRI BLOG (Mar. 27, 2020), <https://www.ifpri.org/blog/covid-19-trade-restrictions-are-worst-possible-response-safeguard-food-security>.

<sup>128</sup> JOSEF SCHMIDHUBER ET AL., *COVID-19: CHANNELS OF TRANSMISSION TO FOOD AND AGRICULTURE* (2020), <https://doi.org/10.4060/ca8430en>.

<sup>129</sup> *Id.*

<sup>130</sup> Glauber, *supra* note 127; see also David Laborde et al., *COVID-19 risks to global food security*, 369(6503) *SCIENCE* 500 (2020).

<sup>131</sup> Schmidhuber, *supra* note 128.

<sup>132</sup> FAO, *COVID-19: AGRICULTURAL TRADE AND POLICY RESPONSES DURING THE FIRST WAVE OF THE PANDEMIC IN 2020*, Table 1 (2020), <https://doi.org/10.4060/cb5406en> [hereinafter FAO (2021)].

transformed into *export quotas* and most of them were soon repealed. *Import restrictions* mainly addressed trade of live animals, fish, and some horticultural products.

2. *Measures to Lower Import Barriers*: Several countries lowered import barriers, mainly in the form of suspending import tariffs and, in limited cases, raising TRQs. Selected countries also lowered TBT measures to facilitate imports of critical food items. Most measures were temporary, put in place in March/April, 2020 and aimed to last until the end of the year.
3. *Domestic Measures*: Producer support measures were provided to ensure production. Some countries provided logistics and marketing support. Several countries increased domestic food procurement targets and/or increased imports to build national reserves and ensure availability. Some countries implemented ceiling prices, while others expanded food distribution programmes to ensure economic access.

The WTO Director General and all other concerned international organisations reacted almost immediately to the initial explosion of border closures and other trade barriers — long before the specific issue of vaccine patent protection cropped up. In April 2020, the World Bank warned in a Special Issue of ‘A Shock Like No Other.’<sup>133</sup> On August 12, 2020, the WTO published its estimate of the *trade policy costs of trade disruptions* and drew the attention of its membership to the high levels of uncertainty provoked by such disruptions — magnifying the impact of trade costs on international trade — and to the applicable WTO rules:<sup>134</sup>

[g]lobal shortages of several products led many governments to impose certain export-restrictive measures. By the end of April 2020, at least 74 economies had introduced export prohibitions, licences or controls. Most focused on the same products as the trade facilitating measures (medical supplies, pharmaceuticals and medical equipment), but some governments extended the controls to additional products, such as foodstuffs and toilet paper.

. . . Establishing trading relationships with foreign buyers or suppliers entails costs. It requires market research into tastes and preferences, acquiring language skills and conforming with foreign product or process standards. Uncertainty reduces the appetite of firms to invest, and the investment into fixed costs of exporting or importing is no exception. In this way, uncertainty magnifies existing trade barriers, adding its own share to trade costs.

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<sup>133</sup> Impact of COVID-19 on Commodity Markets, *supra* note 126.

<sup>134</sup> *Trade Costs in the Time of Global Pandemic*, WORLD TRADE DEVELOPMENT (Aug. 13, 2020), [https://www.wto-ilibrary.org/economic-research-and-trade-policy-analysis/trade-costs-in-the-time-of-global-pandemic\\_e29b9dca-en](https://www.wto-ilibrary.org/economic-research-and-trade-policy-analysis/trade-costs-in-the-time-of-global-pandemic_e29b9dca-en).

. . . According to WTO rules, export restrictions should be targeted, proportionate, transparent and temporary. Most of the export-restrictive measures implemented in response to the pandemic were described as temporary, and many have already been removed.

Soon afterwards, on August 26, 2020, a new WTO publication reported ‘stories of resilience’ for agri-food trade:<sup>135</sup>

[t]he COVID-19 crisis has had a major impact on the global economy and trade. Countries are still fighting the pandemic, and its repercussions for food supply chains are still unfolding. While agricultural trade has proven more resilient than trade in other goods owing to the essential nature of food products, additional disruptions to supply chains could start to undermine this resilience, with damaging consequences.

There is currently no supply-related reason why the ongoing health crisis should turn into a food crisis. However, disruptions to food supply chains constitute a risk for global food security. Governments’ trade policy choices will play a major role in shaping how the situation evolves.

Transparency remains crucial for food security. Incomplete or insufficient information creates uncertainty that, in turn, leads to sub-optimal policy decisions. Sharing timely information on trade-related measures, as well as making information available on production, consumption, stocks and food prices, would help markets function efficiently and contribute to ensuring global food security.

A year later, the strong recovery of world trade before the end of pandemic also appears in the WTO’s *Goods Trade Barometer*, updated on May 28, 2021 and explicitly including agricultural raw materials:<sup>136</sup>

[g]lobal trade has been recovering since the second quarter of 2020, when the spread of the COVID-19 virus prompted lockdowns in many countries and triggered a steep drop in world trade. The volume of merchandise trade was down 15.5% year-on-year in Q2, when lockdowns were in full effect, but by Q4 trade had surpassed the level from the same period in 2019. While

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<sup>135</sup> *Covid and Agriculture: A Story of Resilience*, WORLD TRADE DEVELOPMENT (Aug. 26, 2020), [https://www.wto.org/english/tratop\\_e/covid19\\_e/agric\\_report\\_e.pdf](https://www.wto.org/english/tratop_e/covid19_e/agric_report_e.pdf).

<sup>136</sup> *Goods barometer reveals strength of trade recovery, depth of COVID-19 shock*, WORLD TRADE DEVELOPMENT (May. 28, 2021), [https://www.wto.org/english/news\\_e/news21\\_e/wtoi\\_28may21\\_e.htm](https://www.wto.org/english/news_e/news21_e/wtoi_28may21_e.htm).

quarterly trade volume statistics for the first and second quarters of 2021 have not been released yet, but when they are they are expected to show very strong year-on-year growth, partly due to the recent strengthening of trade and partly as a result of the trade collapse last year.

On August 18, 2021, world media and stock exchanges reacted enthusiastically to the WTO's new edition of the goods trade barometer, affirming a "record high, confirming strength of trade recovery."<sup>137</sup> However, recovery and resilience are not universal. At the level of commodity production, FAO presented a different picture on the food security impact of COVID-19 in its Policy Brief to the MC12. The FAO's history-conscious experts compared the situation with the previous food crisis:

[d]uring the first wave of the COVID-19 pandemic, particularly in comparison with the global food price crisis of 2007-08, most trade-restricting measures were limited and short-lived. Ample supplies, comfortable stocks-to-use ratios (for cereals) and positive production prospects at the beginning of 2020 may have played a role in reducing the risks and fears of food shortages, and consequently the incidence and duration of trade-restricting measures.<sup>138</sup>

The FAO also criticised the absence of agreed international food standards. Back in 2015, Rob Vos, the Director of Agricultural Development Economics, had called for a strengthening of the Committee on World Food Security.<sup>139</sup> Looking now in particular at the number of sanitary COVID-19-related measures, especially in Africa, the FAO warned that:

COVID-19 is severely affecting trade in sub-Saharan Africa, causing demand shocks, a crash in commodity prices, widespread supply-chain disruptions, currency depreciations and a sharp drop in tourism, foreign direct investments and remittances. For the first time in 25 years, sub-Saharan Africa is set to see negative

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<sup>137</sup> *Goods Barometer hits record high, confirming strength of trade recovery*, WORLD TRADE DEVELOPMENT (Aug. 18, 2021), [https://www.wto.org/english/news\\_e/news21\\_e/wtoi\\_18aug21\\_e.htm](https://www.wto.org/english/news_e/news21_e/wtoi_18aug21_e.htm).

<sup>138</sup> COVID-19 & World Trade, *supra* note 122.

<sup>139</sup> Rob Vos, *Thought for Food: Strengthening Global Governance of Food Security*, UNITED NATIONS DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS (Nov. 12, 2015), <https://www.un.org/development/desa/dpad/publication/cdp-background-paper-no-29/>.

growth, amid declining government revenues and rising unemployment. Moreover, lockdowns to contain the spread of the virus are leading to delays at ports and critical hubs for agricultural imports and exports. This has grave implications for food security and reversed improvements in food safety and nutrition. . . . Weak capacity to comply with SPS requirements can result in a country's exclusion from key markets. At the same time, poorly applied procedures, including inadequate capacity to implement the SPS regulatory framework, can increase the cost of trade. Estimates show that domestic food prices in sub-Saharan Africa are 13 percent higher on average due to SPS measures.<sup>140</sup>

FAO's action in Sub-Saharan Africa, in part with the support of the EU, was swift. In the same publication, it reported its support to the Common Market for Eastern and Southern Africa (COMESA) trade facilitation programme, and for Boosting Intra-African Trade (BIAT) in agricultural commodities and services to advance the implementation of the African Continental Free Trade Area (AfCFTA) Agreement.<sup>141</sup>

In the FAO's above-quoted flagship publication 'The State of Food Security and Nutrition in the World 2021,' the directors and the technical experts underline the increased global food insecurity due to the *affordability gap* resulting from the pandemic:<sup>142</sup>

analysis suggests that the pandemic led to an additional 141 million people being unable to afford a healthy diet in the countries studied. Strikingly, the number of people unable to afford even half the cost of a healthy diet was also estimated to have risen from 43 percent to 50 percent. (FAO, IFAD, UNICEF, WFP and WHO 2021)

So far, however, no further discussions on poor developing countries' resilience to food shortages considering the relevant food security-related WTO rules have taken place in Geneva. On the contrary, the above self-congratulating statements by international organisations acknowledging the resilience of the food security rules system to the pandemic contrast singularly with the prolonged food price increases since the outbreak of the pandemic and before. The FAO Food Price Index tracks monthly changes in the international prices of commonly traded food commodities. It averaged 134.4 points in November 2021, up 28.8 points (27.3 percent) from November 2020. The latest increase marked the fourth consecutive

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<sup>140</sup> FAO, TRADE AND FOOD SAFETY STANDARDS 21 (2021), <http://www.fao.org/documents/card/en/c/cb3635en>.

<sup>141</sup> FAO (2021), *supra* note 132.

<sup>142</sup> State of Food Security (2021), *supra* note 48, at 29.

monthly rise in the value of the FFPI, putting the index at its highest level since June 2011.<sup>143</sup>

This author cannot establish a correlation between trade rules and food prices. However, it appears that these 'good weather rules' neither prevent border closures nor can they lessen the negative food security impact, especially on NFIDC. Hence, policy space for treating a food crisis resulting from a real or an imaginary pandemic will remain intact — never mind binding WTO Law and RTA obligations in respect of, say, export restrictions and supply chain disruptions; not to mention old and new forms of farmer support. Is this a reason to ignore the rules when governments try to mitigate climate footprint with border measures or subsidies?

### B. *Climate Change Mitigation for Agriculture*

As pointed out above, the COVID-19 pandemic had an impact with immediate effect on agricultural policies and, in poor countries, on food prices. For well-to-do producers and traders, analytical and empirical studies have shown a remarkable overall resilience for commodities consumed within a relatively short timespan, *albeit* not without exceptions.

What are the food security outcomes to be expected under the Paris Agreement obligations? Can any lessons be learned from the counterproductive government interventions and from the violation of food security trade rules during the food crisis of 2007–09 and at the initial stages of the COVID-19 pandemic?

The food security impact of climate change raises multiple complex questions. The search for 'climate-smart' agricultural production, investment, and trade is still unexplored and under-researched. Mitigation is not limited to cost considerations and their difference for poor and for rich farmers. While short-term consequences are perhaps limited to extreme weather events, it seems fair to say, at a very general level, that agriculture (and fisheries) are not only among the biggest greenhouse gas (GHG) emitters, but also very likely among the most affected sectors. This means that, in the absence of more coherence, international food security governance failure is likely to exacerbate the food price impact of global warming.

More frequent extreme weather events affect regional and local food security in new ways. In the medium and long term, new food deficit areas are likely to outnumber production winners, thereby increasing the need for agri-food trade everywhere. 'Climate refugees' could increase the number of internally displaced

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<sup>143</sup> *FAO Food Price Index*, FAO (Dec. 2, 2021), <https://www.fao.org/worldfoodsituation/foodpricesindex/en/>.

persons and migrant farmers desperately looking for jobs and food security in other cash and food crop-producing countries. On the other side, food security tools promoting new technologies and productivity increases, together with new risk insurance schemes, may allow better and longer local food production than international and national food aid schemes, end when public attention turns to other emergency scenes. A few general remarks along these lines suffice to highlight the importance of food security governance.

Policy failures, hence, are likely to exacerbate the negative food price impact of global warming.

This sub-part addresses the food security implications of climate-induced sustainable trade policies. It begins with a look into the toolbox, before discussing recent regulatory treaty efforts to make agri-food trade more sustainable.

### 1. Climate Tools v. Multilateral Market Access

Tariffs and other border measures protect local producers against foreign competition at the expense of local processors and consumers, regardless of the usage of the income generated by customs duties. Absent treaty commitments limiting tariff maxima, this is the autonomous policy space allowing, *inter alia*, for sustainable production and processing measures at home, protected by a border tax applied on food produced, processed and shipped with less climate-friendly standards. New tariff reductions will therefore limit what now is a simple and legitimate option for protecting and financing sustainable production at home. Incidentally, while border carbon adjustments may infringe WTO non-discrimination rules, adaptation to climate change requires costly structural adjustments, even in poor countries. Where income from customs duties finances environmental and rural development measures, trade liberalisation might therefore reduce the protection of less efficient but more sustainable farming. One could, thus, argue that countries with higher ('climate-smart') standards will need tariffs — at least if WTO rules disallow so-called eco- and socio-antidumping against substandard imports.<sup>144</sup>

### 2. Climate Tools in Bilateral and Regional Trade Agreements

For a very long time, environmental clauses in bilateral trade agreements remained at the general level described above for the WTO Agreements and are comparable with 'food security' texts in the AoA. Preambular language enjoined the parties to best effort actions. Treaty implementation did occasionally yield positive results, especially in the formal and informal consultations established in the Joint Committees for these bilateral and regional treaties and where financial assistance was paired with these efforts. A few unilateral measures occurred in special

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<sup>144</sup> Häberli (2022), *supra* note 102.

circumstances, such as banning Peruvian wood extracting companies for three years from entering the US lumber market. However, before the Climate Change Agreement's entry into force, global warming hardly ever played a role as a catalyser for such programmes or as a condition for trade preferences. A very recent trend in RTA negotiations is to limit preferential import tariffs to 'sustainable' imports with an explicit reference to the Paris Agreement, even though that treaty prescribes no specific standards or processing methods and merely exhorts parties to avoid protectionism in their unilateral measures.<sup>145</sup>

Both the USA<sup>146</sup> and the EU<sup>147</sup> have inserted reciprocal sustainable development commitments in their recent RTAs, sometimes paired with special dispute settlement provisions, to ensure that preferential imports do not contribute to, say, the deforestation of the Amazon, or unfairly compete with domestic produce subject to strict environmental and social standards. In 2020, Indonesia accepted sustainability conditions for its preferential palm oil exports to Switzerland under the RTA it had signed with the European Free Trade Association (EFTA) countries.<sup>148</sup>

Such provisions, import boycotts, and preference withdrawals could be challenged under the WTO non-discrimination obligation applying to *like products* and *non-product related production and processing method* obligations — the famous 'PPM'. Unfortunately — under a climate change mitigation perspective the same goes for the mandatory or voluntary border measures involving traceability processes, certification obligations, accounting and monitoring procedures, corporate governance components as well as satellite monitoring, (sometimes useful) state certificates, cooperative agricultural bank financial data, and pre-shipment inspection.

Besides, RTAs rarely address specific food security issues, with rules for the use of the toolbox. Moreover, LDC are hardly ever associated as full trading partners in such agreements. Yet, governments do need a better policy framework, agreed

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<sup>145</sup> United Nations Framework Convention on Climate Change, art. 3.5, May 9, 1992, 1771 U.N.T.S. 107.

<sup>146</sup> Agreement between the United States of America, the United Mexican States, and Canada, art. 24, OFFICE OF THE US TRADE REPRESENTATIVE (Jan. 7, 2020), <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>.

<sup>147</sup> Comprehensive Economic and Trade Agreement, art. 24.5.3, Can.-E.U, Oct. 30, 2016, 2017 O.J. (L 11).

<sup>148</sup> Wiko Saputra et al., *The Swiss Referendum and the Long Way to the Acceptance of Indonesian Palm Oil in the Global Market*, SPOS INDONESIA (Mar. 30, 2021), <https://sposindonesia.org/wp-content/uploads/2021/05/Info-Brief-Hasil-Referendum-Swiss-EN-2.pdf>



with their grading partners.<sup>149</sup> Then even poor governments could better avoid inappropriate food policies, such as price-increasing and competition-reducing tariffs, counter-productive price controls, export taxes and restrictions, and non-targeted and costly producer or consumer subsidies.

### 3. What about the Compatibility of Climate Tools with WTO Law?

Climate-friendly food security options for the multilateral rules framework of the WTO are even more difficult to find as long as the holy *non-discrimination* rule<sup>150</sup> — and many more provisions applying to ‘like’ products and the infamous ‘production and processing methods’ seem to prohibit the necessary *differentiation* prescribed under the Paris Agreement.

A detailed analysis of this potentially disastrous international governance failure has been published as a FAO background paper.<sup>151</sup> Failing an international review of, and subsequent action on, the relationship between agricultural trade rules and climate change treaty commitments, the WTO might well emerge as a stumbling bloc for climate-friendly agricultural policies notified under the Nationally Determined Contributions (NDC), which each party to the Paris Agreement is committed to submit to comments and peer-review.

The FAO’s Koronivia Joint Work on Agriculture (KJWA) initiated in 2017 in Fiji recognised the ‘unique potential of agriculture in tackling climate change’ under the Paris Agreement.<sup>152</sup> The 23<sup>rd</sup> Conference of the Parties (COP23) decided to address six interrelated topics, including the ‘socio-economic and food security dimensions of climate change across the agricultural sectors.’<sup>153</sup> Perhaps tellingly, after countless technical expert meetings and four annual ‘Koronivia Dialogues’ among agriculture negotiators, the KJWA has failed to agree on any climate mitigation measures, or standards, for agriculture.<sup>154</sup> Moreover, it appears that no country has so far included agriculture into the commitments under its NDC. On the first day of COP26, held from October 31 to November 12, 2021, in Glasgow, the Subsidiary Body for Implementation (SBI) immediately relegated KJWA to “informal informals”. Sadly, no text, and no information, emerged from these discussions. Like in previous years, on November 6 the SBI merely decided to “continue consideration of this matter at SB 56 (June 2022) with a view to

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<sup>149</sup> Zunckel, *supra* note 36.

<sup>150</sup> GATT, *supra* note 75, art. III.

<sup>151</sup> Christian Häberli, *Potential conflicts between agricultural trade rules and climate change treaty commitments*, FAO (2018).

<sup>152</sup> Koronivia Joint Work on Agriculture, FAO, <http://www.fao.org/koronivia/about/en/>.

<sup>153</sup> Conference of the Parties 23 (COP23), *Report of the Conference of the Parties on its twenty-third session*, FCCC/CP/2017/11/Add.1, Decision 4/CP.23 (Nov. 17, 2017).

<sup>154</sup> *Koronivia Joint Work on Agriculture*, FAO, <http://www.fao.org/koronivia/en/> (last visited Sept. 8, 2021).

recommending a draft decision for consideration and adoption by COP 27 (November 2022).”<sup>155</sup>

At this stage, we are compelled to admit that it is too easy to posit that a continuation of the reform process, along the negotiating mandate in Article 20 of the AoA and in the DDA, can improve multilateral food security governance under a climate change mitigation reform programme.

#### IX. FOOD SECURITY IMPROVEMENTS WITHIN THE PRESENT TRADE RULES FRAMEWORK?

To put it mildly, the readiness of the WTO membership to negotiate agricultural trade rules, let alone food security, seems to stop where more trust in the trade security offered by the multilateral system would imply additional policy space restrictions. Without a more level-playing field — and an appropriate policy space for the protection and adjustment of resource-poor and small farmers — the WTO regulatory framework contributes less than a half-empty glass to international food security governance.

With MC12 paralysed by new pandemic-related travel restrictions, the prospects for food security rules improvements look dismal, in all three pillars:

1. Considering that agricultural trade growth is increasingly taking place between developing countries, it seems reasonable to posit that the impact of trade liberalisation on smallholders in all poor countries is factored into a new *market access* improvement package.
2. Given the ‘subsidy overhang’ for the 34 Members with relatively large AMS entitlements, large reductions of such unused policy space would seem to be a low-hanging fruit. However, even a concerted effort to limit trade-distorting domestic support will not be effective unless the better-off developing countries also accept some ‘do no harm’ principles in exchange for more policy space. *Domestic support*, arguably, is now the pillar with the biggest negotiation stalemate. Despite the prohibition of export subsidies, the WTO’s export bias still disregards distortions through domestic support. Incidentally, this means that farm subsidies increasingly appear as a violation of the *Right to Food* enshrined in PIL.
3. *Export competition* remains imbalanced as well. Food security is still impaired by tied food aid, export state trading benefits, and export credits endangering the resilience of vulnerable farm groups in the importing country.

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<sup>155</sup> Glasgow Climate Change Conference: 31 October – 13 November 2021, 12(793) IISD Earth Negotiations Bulletin 30 (Nov. 16, 2021), [https://enb.iisd.org/sites/default/files/2021-11/enb12793e\\_1.pdf](https://enb.iisd.org/sites/default/files/2021-11/enb12793e_1.pdf).

Incidentally, this is where Article 10 of AoA on the “[p]revention of [c]ircumvention of [e]xport [s]ubsidy [c]ommitments”<sup>156</sup> could show a way through litigation, even for matters which the Doha Round had failed to settle through negotiation.

Unfortunately, in the absence of any negotiating texts emerging from the Geneva run-up to MC12, the image of a totally immobile membership prevails. Almost 15 years since the break-down of the Doha Round negotiations, the same old race horses appear in each delegation’s individual brief and the Chair of the Special Session of the WTO Committee on Agriculture can only list those same old ideas — without even asking why even the presently valid trade rules never guide governments in times of food crises.

Three months before MC12, Costa Rica’s WTO Ambassador Gloria Abraham Peralta merely listed what must be called a hodgepodge of *seven farm-trade topics* — without any further information or a reference to a draft MC12 decision:<sup>157</sup>

[s]ubsidies for goods such as cotton, restrictions on food exports, and the challenge of improving farmers’ access to markets. Also on the agenda are rules governing the procurement of food for public stocks, safeguards for farm goods, and rules on measures that resemble export subsidies. In all areas, improving transparency by making more information easily available is a critical concern for many countries.

. . . Ministers could take a significant step forward at the WTO conference by agreeing to an outcome on food and agriculture that helps to rebuild trust, lays out a path forward, and galvanizes political engagement. This would enable us to re-establish confidence in our collective ability to address the challenges we face.

Today, we must strive to overcome the pandemic, build more inclusive and sustainable economies, and lay the foundations for a fairer and more resilient future. An agreement at the WTO that improves food and agricultural trade rules would be an important start.

After the postponement of the Ministerial Segment of MC12, the Chairperson of the Committee on Agriculture in Special Session, H.E. Ms Gloria Abraham Peralta, in her report to the Trade Negotiations Committee, had to recognise that the Membership was unable to achieve any substantive outcome at the Conference. Instead, she submitted a

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<sup>156</sup> Agreement on Agriculture, *supra* note 1, art. 10.

<sup>157</sup> Gloria Abraham Peralta, *New Global Rules for a Fairer Food Future*, PROJECT SYNDICATE (Aug. 23, 2021), <https://www.project-syndicate.org/commentary/wto-ministerial-conference-food-and-agricultural-trade-rules-by-gloria-abraham-peralta-2021-08>.

revised draft text as a confidence-building milestone to reinvigorate the negotiation process towards MC13 and future ministerial conferences.<sup>158</sup>

## X. CONCLUSION

Governments do need better *policies*; they may need more *policy space* — and they all want *market access*. In respect of food security, adherence to better WTO rules could avoid costly errors such as tariffs that increase prices and reduce competition, counter-productive price controls, export restrictions, non-targeted and costly public stockpiles, producer and consumer subsidies. Sadly, the food crises 2007–09 as well as the COVID-19 pandemic show that many governments used the wrong toolbox measures. In addition, many policy changes, possibly based on mixed up cyclical and structural factors, probably constituted violations of WTO rules and disciplines and, in some cases, of RTA provisions.

It would be wrong, however, to consider national policy decisions as the only price drivers. *International food governance failures* contribute to global food insecurity. Hunger increases when the WTO is unable to exempt internationally coordinated food aid from export bans (as it was repeatedly mandated to do by decisions taken first by G8, then G7 and G20). Price impacting measures such as ‘surplus disposal,’ farmgate price support, and self-sufficiency efforts in the name of ‘food sovereignty’ are brought back in by the big subsidisers, unhindered by the domestic support entitlements agreed in 1994, based on the years 1986-88.

More national food security implies the development of sound and coherent agricultural and food policies. These include securing market access for competitive exports, efficient but temporary safeguards against food dumping of all kinds, and structural adjustment support for fundamentally weak farm, fish, and forestry sectors. Resource-poor vulnerable farmers require special attention and clearly focused support instruments aiming at increasing their resilience.

The analytical part of this article described the reasons for WTO’s immobility and unwillingness to review critically the available measures from a food security perspective. Even ‘low-hanging fruits,’ such as export credit disciplines, appear beyond reach today. In three ministerial conferences (2013, 2015 and 2017), the WTO has been unable to agree on a new type of safeguard clause for protecting vulnerable farm structures. It has also failed to define a new legal base for public

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<sup>158</sup> Committee on Agriculture, World Trade Organization, *Report by the Chairperson, H.E. MS Gloria Abraham Peralta to the Trade Negotiations Committee*, TN/AG/50 (Nov. 23, 2021), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/TN/AG/50.pdf&Open=True>.

stockholdings in food-insecure countries aimed at limiting price spikes and hoarding.

Nevertheless, food security improvements remain possible. A lot could be done by and for poor developing countries within the present, uneven playing field. In an increasingly globalised world, the food security of small farmers extends over the whole food value chain. Especially where on-farm production is insufficient for their own family. Agricultural economists have drawn lists of food security-related actions and measures that are also available to poor country governments. Negotiators could use such lists, sometimes in cooperation with 'willing' governments in richer countries.

The following list with *eight baskets* starts with support measures making poor farmers' production more competitive, notwithstanding WTO constraints. It continues with various risk management tools and investment contracts as crucial elements in trade agreements, and it ends with directly trade-relevant food security measures possibly requiring adjustments to WTO rules.

1. For decades, scholars and governments have proposed better access to investment and marketing credits, water, and other production inputs, especially for smallholders and female households. The benefits of e-banking, e-commerce, new risk insurance programmes, imported inputs, and rural infrastructure could thus be made available to many more of the world's poorest producers, such as women smallholders, landless farmers, and nomads.
2. Another fundamental production-support service, where poor and landless farmers are often neglected, is market data management, endowing e-connected smallholders and co-operatives with better access to food marketing and credit and enabling governments to use available border measures better and more quickly.
3. Food-insufficient countries with governments caught between vulnerable farmers and consumers could and should make better use of border measures for (i) *Governmental Assistance to Economic Development* available under GATT-Article XVIII:C,<sup>159</sup> and even more for (ii) *Emergency Action on Imports of Particular Products* under GATT-Art. XIX.<sup>160</sup> The latter is an important provision used by the USA, Japan, and Korea for sheep or garlic, but is hardly ever used by developing countries. Incidentally, such safeguards are seldom taught, or otherwise discussed, by academics other than as a 'cheap' protectionist measure.
4. A whole series of measures are now available, but still rarely used because of their complexity: better *risk management* and *risk hedging* techniques, including a public-private partnership, even for poor farmers. In many

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<sup>159</sup> GATT, *supra* note 75, art. XVIII:C.

<sup>160</sup> *Id.* art. XIV.

- countries, expensive and inefficient public stockpiles may stand in the way of such cost-efficient schemes.
5. Poor governments can make better use of international and national food aid by limiting in kind or in cash supplies to emergencies and to the poorest segments of the population. This would allow local producers, for instance, of chicken in Cameroon, or tomato concentrate in Senegal, to compete with non-subsidised food imports.
  6. Most importantly, in the context of the new trade agreements with foreign investment protection provisions, governments can learn to better formulate agricultural investment contracts with investors. In exchange for long-term land use concessions and fiscal benefits, they could incorporate local or national food security components, alongside regularly monitored social and environmental performance requirements.
  7. Food security reviews in the WTO Committee on Agriculture could benefit from lessons learned under dispute settlement procedures instigated against 'greenwashed' producer subsidies 'wrongly' notified as Green Box measures by rich countries.
  8. Litigation, as the last resort form of negotiation, may clarify the limits of trade distortions, or of domestic subsidies procuring undue advantages on export markets and causing import displacements. The success of legal complaints, followed by compliance through mandatory socio-economic impact studies and revised market access negotiations, would increase the chances of producer competition becoming fairer.

The natural tensions between policy space and market access remain the two competing sides of the same coin. Both can improve or decrease national and local food security. Nonetheless, global food security at affordable prices is achievable for all but the poorest consumers when vulnerable farmers can feed themselves and compete on globalised markets.

In the view of a former agriculture committee chair, negotiator, and dispute settlement panellist, there is a need for a lot of academic and interdisciplinary research informing negotiations. For instance, a detailed understanding of the causal effects of trade policy interventions on price volatility at the global level is still lacking. Furthermore, there is a need for work based on more direct and frequent measurements of trade policy interventions. Also lacking are studies on the need for, and the long-term effectiveness of, price spike mitigation measures, as opposed to risk hedging and organised food storage by private operators. As for public stockpiles, more comparative research on cost-efficient schemes, with the participation of the private sector, would help demystify the attraction of food reserves as an instrument for both producer and consumer price stabilisation and farm income. Regional or 'virtual' stockpiles also require further research before they can (again) be recommended to responsible governments. It is still possible to

fill the half-full glass of agri-trade liberalisation envisaged in the GATT 1994 — even though “more of the same” won’t do: today, food security for all requires new solutions.