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**FOOD CONNECTIONS:
INTENDED AND UNINTENDED
CONSEQUENCES OF TRADE
ON FOOD AND NUTRITION
SECURITY**

PAPER 1

**“A LITERATURE REVIEW ON WTO
AGREEMENTS AND FOOD SECURITY”**

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1. Introduction

There is general agreement among scholars that there is a direct and tense relationship between food security and free trade policies (Fakhri, 2020; Matthews, 2014b; Hughes & Baker, 2015; Orford, 2015; Kaufmann & Heri, 2007). Indeed, trade liberalization measures can enhance or undermine food security (Häberli, 2010; Matthews, 2014b).

Examples of measures with potential negative impacts on food security include tariff cuts (e.g. reduction of tariff barriers in developing countries may make imported food cheaper than domestic production), domestic subsidies (e.g. reduction of domestic subsidies may affect food security by limiting the tools available to developing countries to promote food production), import barriers (e.g. reduction of import barriers may not benefit all developing countries equally) and export subsidies (e.g. countries that rely on imports for domestic food supply may experience price increases and greater food insecurity) (Gonzalez, 2002).

At the same time, the international trade regime is also seen as a catalyst for achieving food security (Stewart & Manaker, 2015), as it plays an important role in ensuring access to food in the longer term by moving food from where it is available to where it is needed (Kerr, 2011), and in stabilizing prices on the internal market, regardless of whether the food consumed is domestically produced (Soares Peres & De Souza Daibert, 2017).

This debate clearly revolves around the role of the World Trade Organization (WTO) regime, whose main objective has always been the liberalization of international trade. The question, therefore, is whether the WTO agreements are in support of food security or whether they undermine it (Margulis, 2020; Häberli, 2010; Kaufmann & Heri, 2007). This is certainly not a new discussion, as disagreements over food security, including between states, are a recurring phenomenon in the multilateral trading system of the WTO (and the General Agreement on Tariffs and Trade (GATT)) (Margulis, 2017).

Olivier de Schutter, former Special Rapporteur of the UN Human Rights Council on the right to food, has been one of the main critics of the use of trade in pursuit of food security, arguing that the WTO agreements are incompatible with the measures that developing countries need to take to promote their food security (De Schutter, 2011, 2009).

In a different vein, Michael Fakhri, the current Special Rapporteur of the UN Human Rights Council on the right to food, argues that the modern international trade regime is not, and should not be, defined by “one single overarching value the idea of trade liberalization or freer trade—but by an interaction among three closely related but analytically distinct doctrines: market stabilization, freer trade, and food security” (Fakhri, 2020).

Based on these premises, the following sections focus on the main WTO agreements that have been identified in the legal literature as relevant to food security issues (section II) and on the specific norms of such agreements that have been deemed to relate to food security (section III). This study aims to provide a general overview of what scholars have focused on when addressing the tension between WTO trade liberalization rules and food security.

2. WTO Agreements that the doctrine considers relevant to food security issues

There is a clear consensus in the literature that the Agreement on Agriculture (AoA) is the main WTO agreement relevant to food security issues. However, scholars have also largely referred to the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries (Marrakesh Decision), which, although not formally an agreement, is considered “the most important outcome of the Uruguay Round negotiations for food security” (Margulis, 2017).

It was noted that the international agricultural trade rules in the AoA and the Marrakech Decision are designed to address a specific food security problem: that as food becomes more expensive as a result of the removal of price support mechanisms in Members' domestic agricultural policies under WTO rules on international agricultural trade, some countries may find it difficult to maintain food supplies (Smith, 2012).

Taken together, the food security provisions in the AoA and the Marrakech Decision marked a significant break with previous GATT rounds by codifying food security into the rules and practices of the multilateral trading system. This also had the effect of formalizing the WTO's authority in global food security governance, as its rules are legally binding under international law, whereas most other international food security agreements (e.g., under the FAO, FAC and WFP) are non-binding soft law arrangements (Margulis, 2017; Clapp, 2017).

Scholars also refer to the GATT, which contains a number of agricultural trade policies with potentially negative impacts on food security, such as restrictions on food exports (Häberli, 2010). With regard to the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement), an extensive literature on trade and food safety has emerged since the beef hormone case decided under this instrument (Weiss et al., 2008; Borghi, 2002). Although food safety is a necessary element of food security, no relevant doctrine has been found that focuses on the direct role of the SPS Agreement in enhancing or undermining food security. Finally, while the WTO Agreements on Trade in Services and on Trade-Related Aspects of Intellectual Property Rights apply to agriculture, the literature does not give much attention to the direct link between these agreements and food security.

2.1 The Agreement on Agriculture

The AoA entered into force on 1 January 1995 with the long-term objective of establishing a fair and market-oriented agricultural trading system through a “substantial progressive reduction in agricultural support and protection” (AoA preamble). In particular, the AoA called for liberalization to be based on three pillars, each with differential treatment for developing countries (see section II):

1. Market access measures based on the conversion of quantitative restrictions and other border measures into tariffs (the so-called “*tariffication*”) and the reduction of agricultural tariffs.
2. Domestic support measures, which focus on reducing trade-distorting agricultural subsidies.
3. Export competition, i.e. reducing both the volume of and expenditure on subsidized exports.

The agreed implementation period was six years (ten years for developing countries), except for Article 13, the so-called ‘peace clause’, which limited the possibility of disputes on certain agricultural subsidies being challenged under other WTO agreements for a period of nine years.

Within the norms of the three pillars, the AoA addresses a range of issues, including food security concerns, particularly in relation to least developed countries (LDCs) and net food importing developing countries (NFIDCs) (Stewart & Manaker, 2015). Indeed, this was clearly anticipated in the preamble to the AoA, which states that: “Commitments under the reform programme should be made in an equitable way among all Members, having regard to non-trade concerns, including food security...”. Food security (as well as the need to protect the environment) is thus considered by the AoA to be a ‘*non-trade concern*’. Although the AoA does not define what a non-trade concern might be, the expression reveals that “agriculture policies may have multifunctional purposes, surpassing the mere protectionist objectives” (Soares Peres & De Souza Daibert, 2017). ‘Non-trade concerns’ including food security should also be taken into account for the continuation of the reform process, according to article 20 of the AoA (Alabrese & Coli, 2022).

2.2. The Marrakesh Decision

The last paragraph of the preamble to the AoA states that “Commitments under the reform programme should be made in an equitable way among all Members ... taking into account the possible negative effects of the implementation of the reform programme on least-developed and net food importing developing countries”, thus recognizing that agricultural trade liberalization has the potential to threaten food security, at least in the short term, particularly for NFIDCs.

Therefore, in negotiating the AoA, “Members aimed to take account of the effect of agricultural trade and trade rules on food security” (Stewart & Manaker, 2015) and decided to incorporate into the AoA a separate instrument in the form of the Marrakesh Decision. Based on the idea that the agricultural reform process may

have a negative impact on the ability of countries to finance normal levels of commercial imports of staple foods and that appropriate compensatory measures should be established (paragraph 2 of the Decision), four response mechanisms were established for NFIDCs: (1) food aid; (2) short-term financing of normal levels of commercial imports; (3) favorable terms for agricultural export credits, and (4) technical and financial assistance to improve agricultural productivity and infrastructure.

2.3. The General Agreement on Tariffs and Trade

The GATT, signed in 1947, is a multilateral agreement governing trade. According to its preamble, the purpose of the GATT is “the substantial reduction of tariffs and other barriers to trade, and the elimination of preferences, on a reciprocal and mutually advantageous basis”. When the WTO was established on January 1, 1995, GATT 1994 became one of the prevailing instruments for regulating trade. However, following the entry into force of the AoA, many GATT provisions are no longer applicable to food security issues. Nevertheless, scholars still point to Article XI:2(a), Article XX and Article XX(b)(iii) as relevant to the subject, and these are discussed below.

3. Norms of WTO Agreements that have an impact on food security

3.1. The Agreement on Agriculture

In general terms, criticisms of the AoA provisions from a food security perspective range from arguments that they are one-sided and favor developed countries by allowing them to continue to heavily support their agricultural sectors; that they unduly restrict the ability of developing countries to pursue their agricultural development and food security policies; and even that they undermine the right to food of developing countries (Matthews, 2014b). For instance, it has been argued that the AoA affects food security in developing countries in two distinct ways: (1) it increases food insecurity by exacerbating rural poverty and inequality; and (2) it hampers the ability of developing countries to adopt policies that promote food security (Gonzalez, 2002).

More specifically, scholars have referred to the most relevant provisions of the AoA that relate to food security. Margulis has drafted the following table (Margulis, 2017), while others have analyzed the rules of the AoA in relation to the three pillars. Therefore, the following subsections collect scholars’ thoughts on relevant provisions regarding (1) market access, (2) domestic support, (3) export subsidies, and (4) export bans and restrictions.

Table 1. Selected Food Security Provisions in the WTO Agreement on Agriculture

| Article | Item | Relevance to food security |
|------------------------|---|--|
| Article 6 | Domestic Support Commitments | Describes permissible forms of government assistance to agricultural and rural development, including domestic food aid and investment subsidies and agricultural input subsidies targeted at low-income or resource-poor (i.e., food insecure) producers in developing countries. |
| Article 10.4 | International Food Aid | Establishes the criteria for differentiation between legitimate international food aid and disguised government export subsidies. |
| Article 12 | Disciplines on Export Prohibitions and Restrictions | Sets out consultation process for implementation of export restriction or prohibitions permitted to relieve critical shortages of foodstuffs or essential products. |
| Article 16 | Least-Developed and Net Food-Importing Developing Countries | Refers to the obligations under the <i>Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Net-Food-Importing Countries</i> . |
| Annex II, Paragraph 3. | Public Food Stockholding For Food Security | Specifies the conditions under which governments may accumulate and hold stocks of agricultural products that form an integral part of a food security programme. |
| Annex II, Paragraph 4. | Domestic Food Aid | Establishes requirements that domestic food aid programs established clearly-defined criteria nutritional objectives and conditions for eligibility for recipients to buy food either at market or below-market prices. |

3.1.1. Market access

Under the market access pillar, the ‘tariffication’ rule introduced by the Uruguay Round agricultural package provided for the replacement of agricultural non-tariff measures by a tariff offering an equivalent level of protection. Article 4.2 therefore prohibits the use of agricultural-specific non-tariff measures, including quantitative import restrictions, variable import levies and minimum import prices. Developing countries were required to make smaller reductions and had more time than developed countries, while LDCs were not required to reduce tariffs, although they were required to bind agricultural tariffs.

The relevant literature mostly focuses on the ‘exceptions’ to this general rule, which “provide temporary and very limited relief from the conversion process on food security grounds” (Smith, 2012). In particular, reference is made to the ‘Special treatment clause’ under Annex 5 and the ‘Special safeguard provisions’ under Article 5.

The ‘Special treatment clause’ allows, under Annex 5A, all Members to exclude border measures on “any primary product and its worked and/or prepared products” where the product, inter alia has been designated in the Member’s tariff schedule for special treatment that reflects “factors of non-trade concerns such as *food security...*” (Annex 5A para1(d)). Annex 5B states that developing country Members can exclude non-tariff measures from tariffication where the measure concerned relates to a primary agricultural product that is the

“predominant staple in the *traditional diet*” and if it meets the requirements of Annex 5A, paragraphs 1(a)-(d), i.e. the food security requirement. This means that, in specific cases, “some products that are strictly related to basic nutritional needs are subject to special treatment. In other words, States may be allowed to keep non-tariff measures to shield their agricultural production from competition from foreign products in order to guarantee national food and nutrition security” (Alabrese & Coli, 2022).

On this last respect, it has been noted that the reference to the ‘traditional diet’ on the one hand is able to recall the concepts of food preferences and cultural acceptability that form essential elements of the ‘modern’ notion of food security and the contents of the right to adequate food; on the other hand, it constitutes a limit to the possibility of introducing measures that favor the internal production of other (non-traditional) foods that could still be useful in ensuring physical access and, through sale, economic access to food (Alabrese, 2018).

With regard to the ‘Special safeguard provision’, Article 5 allows Members to impose additional import duties on products that they have identified in their Schedule as being particularly vulnerable (i.e. by using the symbol SSG in their Schedule for the product in question), if either the volume of imports increases above a predetermined trigger level or the import price falls below the trigger level (Article 5.1(a) and (b)). Members that have so designated their ‘tariffed’ products are thus allowed to respond to such import surges where there is a genuine threat to domestic food supplies, or where there is only a perceived threat, as Article 5 does not require the Member to show that there is actual injury or threat of injury to its food supplies (Desta, 2002).

Overall, the market access rules enshrined in the AoA has been considered as “a step in the right direction but not as more than a modest, ‘collateral’ improvement to food security” (Häberli, 2010). This is because the market access rules do not provide full access for agricultural exports from developing countries, as developed countries maintained high tariffs despite members’ commitments to reduce market access.

In addition, many developed countries have been found to circumvent tariffication through selective tariff reduction, strategic use of Article 5, weakening of minimum market access requirements and ‘dirty tariffication’, i.e. setting tariff equivalents for non-tariff barriers at excessively high levels (Gonzalez, 2002). The latter nullifies the benefits of tariff bindings and tariff reductions by creating tariff equivalents subject to subsequent reductions, which are sometimes more import-restrictive than the non-tariff barriers they replace. In addition, it has been found that most developing countries, instead of converting non-tariff barriers into tariffs, have declared bound tariffs, which are then subject to reduction commitments under the terms of their individual country schedules, thus not allowing them to invoke Article 5 (Gonzalez, 2002).

3.1.2. Domestic support

The Uruguay Round agricultural package introduced two main categories of domestic support, regulated by Articles 6, 7 and 13:

(1) support with no, or minimal, trade-distortive effect on the one hand, the so-called “Green Box” measures (Annex 2) and:

(2) trade-distorting support on the other hand, the so-called “Amber Box” measures.

In any case, Members are allowed to maintain *de minimis* levels of subsidies - five per cent of the value of agricultural production for developed countries and ten per cent for developing countries.

Article 6.5 also refers to the so-called “Blue Box”, a third category between the previous ones, which provides that direct payments under programmes to limit production are exempt from commitments if such payments are made for fixed areas and yields or for a fixed number of livestock.

Finally, there are specific exceptions for developing countries, which are included in a further box, the so-called “Development Box” under Article 6.2. These countries are generally granted greater flexibility to provide domestic support measures in relation to certain policies, such as rural development policies that are an integral part of development programmes, support for agricultural investments and incomes of farmers with low incomes or scarce productive resources, and support measures aimed at encouraging diversification and the abandonment of drug production (Alabrese, 2018; Stewart & Manaker, 2015).

Of relevance here, Annex 2, which regulates the “Green Box”, allows Members to exempt payments to their domestic farmers either because they are stockpiling *essential food for food security purposes* (paragraph 3) or because they are providing food aid to a section of their population (paragraph 4) (Borghi, 2002).

In particular, paragraph 3 of Annex 2 titled “Public stockholding for food security purposes” allows Members to claim exemption if the money is given to their farmers for the purchase and accumulation of essential food stocks which form an “integral part of a food security programme identified in national legislation”. The exemption also covers government payments to private contractors who store the goods on behalf of the government. Exemption under paragraph 3 is only available if certain prescribed criteria are met, notably that the volume and accumulation of stocks must not exceed certain ‘pre-determined targets’ solely related to food security, that the accumulation and purchase process is fully transparent, and that purchases and sales of the accumulated products are made at current market prices (Smith, 2012).

In addition, paragraph 3 is qualified by a footnote (footnote 5), which modifies the conditions of the exemption insofar as they apply to the policies of developing country Members: additional flexibility is provided for developing country Members that wish to strengthen domestic food security by investing in public stockholding. In practice, for these Members, stockholding programmes for food security that are managed

transparently and in accordance with predetermined criteria are exempt from the disciplines of the AoA (Hughes & Baker, 2015).

Measures under paragraph 3 of Annex 2 are generally considered to be very useful in ensuring food security, especially to meet short-term needs (Alabrese, 2018; Hughes & Baker, 2015). According to Matthews, “[m]ost measures that developing countries will want to take to promote small farm development and food security will fall into one of the exempt categories”(Matthews, 2014a).

Paragraph 4 of Annex 2 provides a further exemption for ‘domestic food aid’ programmes. In order for a programme to qualify for this exemption, Members must ensure that the food aid is subject to clearly defined criteria relating to *nutritional objectives*; that the food is to be provided either in kind or in the form of subsidized food to eligible individuals; and that any food purchases made by the Member for these purposes are made at commercial prices. This exemption is available to all Members, irrespective of their status, in accordance with the first paragraph of Annex 2.

As has been noted, this provision links the issue of food aid closely to the requirements of food security, with particular reference to nutritional security, including at the household level. Thus, in addition to the prevailing attention to the more purely commercial aspects, a mention is reserved for the nutritional value of food and its importance, especially for certain weaker categories of people, who are indeed identified by the rule as ‘eligible’ for this type of aid (Alabrese, 2018).

According to Hughes & Baker, taken together, these provisions (i.e. paragraphs 3 and 4) recognize the critical importance of food security and provide meaningful policy space for Members, particularly developing country Members, to take decisive action against hunger and malnutrition (Hughes & Baker, 2015). On the contrary, Häberli notes that from a food security perspective “the domestic support caps were a small step in the right direction, but they have changed little if anything in practice” (Häberli, 2010). Similarly, Smith argues that commitments to reduce domestic support do not fully curb subsidized agricultural production and that food dumping, even through food aid, remains widespread. In addition, developed country members also use food aid, sometimes perniciously, as a means to dump surplus food production (regardless of the needs of the recipient country) and avoid their commitments to reduce export subsidies (Smith, 2012). Finally, it has been said that the “Blue Box” and “Green Box” exemptions to the domestic support provisions impinge on food security in developing countries by encouraging overproduction in developed countries, which depresses world prices and creates disincentives to domestic production (Gonzalez, 2002).

3.1.3. Export subsidies

The core of the third pillar of the AoA on export subsidies is the commitment to reduce subsidized export volumes and the amount of money spent on export subsidies. The AoA limits the use of export subsidies to

specific situations listed in Article 9. In all other cases, the use of export subsidies for agricultural products is prohibited (Article 8) and an anti-circumvention provision is established (Article 10) (Kaufmann & Heri, 2007; Smith, 2012). In fact, Article 10 - with the aim of preventing trade distortions, but also of favoring initiatives truly aimed at strengthening food security in countries in difficulty - aims to prevent food aid from concealing subsidized exports, by imposing a series of constraints and controls on exporting countries to ensure that they really intend to use part of their surplus for this humanitarian purpose (Borghi, 2002). As in the other areas, developing countries have committed to smaller reductions over a longer period of time than developed countries, and LDCs have not committed to any reductions.

According to Häberli “disciplines on export competition were a major achievement of the Uruguay Round for the benefit of agricultural trade liberalization – but, especially in times of high food prices, they are a blunt instrument for improving food security (...) Moreover, with only export subsidies being reduced, and all other forms of export competition remaining basically untouched, this pillar of the AoA is not only incomplete and unbalanced; it has even had negative effects on food security, especially through its lacuna on international food aid disciplines” (Häberli, 2010). It has also been argued that by allowing past users of export subsidies to maintain them, subject to certain reduction commitments, while prohibiting the introduction of new subsidies, the AoA has perpetuated the unfair competitive advantage of developed country producers: “indeed, the AoA’s prohibition of new export subsidies may hamstrings developing countries’ use of trade-based entitlements and labor-based entitlements to promote food security while subjecting them to an influx of subsidized imports that may erode production-based entitlements by displacing domestic food production” (Gonzalez, 2002).

3.1.4. Export prohibitions and restrictions (Article 12 AoA and Article XI:2(a) GATT)

The general provision governing export restrictions or prohibitions in the WTO regime is contained in Article XI GATT. However, Article 12 of the AoA elaborates on the matter of disciplines on export prohibitions and restrictions applied on agricultural products and is expressly intended as a specification of Article XI:2(a) GATT.

The key WTO disciplines on export restrictions are contained in Article XI of the GATT, which is titled ‘General Elimination of Quantitative Restrictions’. Paragraph 1 of Article XI stipulates a general prohibition on quantitative export (and import) restrictions: “No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party”.

Paragraph 2 of Article XI provides some limited exceptions or deviations to this general prohibition on quantitative export (and import) restrictions.

In particular, paragraph 2(a), which during the Uruguay Round became part of the negotiations between contracting parties precisely in the context of the discussion on food security (Alabrese, 2018), states that: “The provisions of paragraph 1 of this Article shall not extend to the following: (a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party”.

The Appellate Body in China – Raw Materials stated that a ‘critical shortage’ “refers to those deficiencies in quantity that are crucial, that amount to a situation of decisive importance, or that reach a vitally important or decisive stage, or a turning point” (Marceau, 2016). Thus, Article XI:2(a) refers to critical shortages of foodstuffs or otherwise absolutely indispensable or necessary products. By including, in particular, the word ‘foodstuffs’, Article XI:2(a) provides a measure of what might be considered a product ‘essential to the exporting Member’ but it does not limit the scope of other essential products only to foodstuffs.

It has been noted that Article XI:2(a) is a provision whose effects may be ambiguous with regard to the issue of food insecurity, as “it introduces the possibility of applying quantitative restrictions that may have negative repercussions in certain food insecurity contexts. On the other hand, the rule is aimed precisely at allowing states to keep production within their borders in the event of food insecurity. It is therefore worth noting the circumstance - actually not uncommon when dealing with the subject of agriculture and the protectionism in which it is often shrouded - that a rule contained in an international treaty is focused on the need to guarantee the availability of food at a national level to the detriment of global food security” (Alabrese, 2018).

Article 12 establishes that before imposing an export prohibitions or restrictions, Members are required *to give due consideration to the food security needs of importing Members* (Alabrese, 2018; Borghi, 2002). In addition, Members, with the exception of developing country Members that are not net exporters of the product in question, are required to notify the Committee on Agriculture before introducing new export restrictions on food products and, if requested, to consult affected Members. There is also an obligation to consult other Members that may have a substantial interest in the export ban, such as NFIDCs that are dependent on these exports. Significantly, the combination of Article XI:2(a) GATT and Article 12 of the AoA does not reveal great consideration of the food security of the exporting country adopting the restrictive measures (Alabrese, 2018).

It has been noted that this discipline seems to be very vague (Soares Peres & De Souza Daibert, 2017) and lacks real effectiveness in protecting food security, as the obligation to take into account the food security of importing Member States is not effective, as it is not translated into an obligation to carry out an impact assessment of the restrictive measures to be taken (Alabrese, 2018; Karapinar, 2011).

More generally, it has been argued that the “WTO’s discipline on export bans and taxes is highly detrimental to food security: export restrictions lower prices in their domestic market with the intention of improving the food security status of their consumers. While consumers may benefit in the short term, in the long term the lower prices received by farmers discourage them from expanding production. This is likely to lead to a deterioration in food security in the future” (Kerr, 2011).

Conversely, Article 12 has been described as “a careful balance between, on the one hand, the acknowledged right of Members to restrict exports of foodstuffs, and, on the other hand, the unfortunate fact that national export restraints may have very negative consequences on the food security of other WTO Members. By requiring (‘shall’) that a regulating Member “give due consideration” to the food security implications of any export restraint or prohibition, the provision preserves Members' freedom under GATT Article XI:2(a) while also ensuring that the food needs of other Members occupy a central place in the minds of trade policy-makers contemplating the design and imposition of export restrictions. Far from compelling or even encouraging Members to export, then, this provision serves to remind Members that, in an increasingly globalized world, actions taken in one territory may reverberate across others. How this consideration is balanced against the right to impose export restraints to prevent or relieve critical food shortages is, however, left to the sovereign discretion of the regulating Member. Thus, Members are not compelled to export foodstuffs even in situations where the imposition of an export restraint could undermine food stability in other parts of the world” (Hughes & Baker, 2015).

3.2. The Marrakesh Decision

Article 16 of the AoA requires that developed country Members to follow the framework established in the Marrakesh Decision and that the Committee on Agriculture should “monitor, as appropriate, the follow-up to this Decision”. Thus, the substance of the new agricultural trade regime on the issue of food security for LDCs and NFIDCs is effectively limited to what is provided for in ‘the Decision’ and what may have been built upon it by the Committee on Agriculture (Geboye Desta, 2001).

Paragraph 2 of the Marrakesh Decision states that “...during the reform programme leading to greater liberalization of trade in agriculture least-developed and net food-importing developing countries may experience negative effects in terms of the availability of adequate supplies of basic foodstuffs from external sources on reasonable terms and conditions, including short-term difficulties in financing normal levels of commercial imports of basic foodstuffs” (Orford, 2015).

As has been pointed out, Members thus have considerable autonomy in determining whether or not they have food security problems and when they can respond to those problems, since paragraph 2 states that LDCs and NFIDCs *may feel the effects*, not that their populations must suffer as a result of the reform programme (Smith, 2012).

The Marrakesh Decision has been described as a “piece of political expediency which has no chance of making a contribution to improving food security” (Häberli, 2010) and as a “failure” (Geboye Desta, 2001) that has “not being satisfactorily implemented” (Kaufmann & Heri, 2007). More specifically, according to Desta, the Decision suffers from two major flaws: legal and institutional. The legal flaw relates to the nature of the obligations created, as the Decision does not create any binding obligation to provide food or other assistance to countries adversely affected by the implementation of Uruguay Round commitments on agriculture. On the contrary, the institutional deficiency lies in the fact that the Decision only refers to systems that are completely outside the WTO framework and lack any effective enforcement mechanism (Geboye Desta, 2001).

Paragraph 3 is considered to be the most important mechanisms established by the Decision to prevent food security risks by ensuring adequate levels of food aid to LDCs and NFIDCs on increasingly concessional terms (Geboye Desta, 2001). The Decision requires WTO Members “to review the level of food aid established periodically by the Committee on Food Aid under the Food Aid Convention 1986 and to initiate negotiations in the appropriate forum to establish a level of food aid commitments sufficient to meet the legitimate needs of developing countries during the reform programme” (paragraph 3(i)). It also seeks to ensure that “an increasing proportion of basic foodstuffs is provided to least-developed and net food-importing developing countries in fully grant form and/or on appropriate concessional terms in line with Article IV of the Food Aid Convention 1986” (paragraph 3(ii)). However, these provisions do not create binding obligations for WTO members; they only mandate a review and negotiations that must take place in a different forum - the International Grains Agreement (IGA). This creates an anomaly where WTO obligations can only be met by donor countries under a separate treaty (Alabrese, 2018; Geboye Desta, 2001).

Moreover, paragraph 3(iii) encourages donors to give full consideration to requests for financial and technical assistance from LDCs and NFIDCs in the context of their unilateral assistance programmes, has no multilateral follow-up or monitoring and that there is a complete lack of information on its practical implementation (Geboye Desta, 2001).

However, it has also been noted that despite its weak implementation, the Marrakesh Decision is an important instrument because it calls for a level of food aid commitments sufficient to meet the legitimate needs of developing countries during the reform programme, thereby recognizing that increased welfare from trade liberalization goes hand in hand with an increase in the legitimate needs for assistance of those countries adversely affected by the process (Kaufmann & Heri, 2007).

3.3. Article XX ‘General Exceptions’ of the GATT

Article XX ‘General Exceptions’ of the GATT provides general exceptions to the trade rules established by GATT. Its primary purpose is to allow countries to implement measures that would otherwise violate their

GATT obligations, provided these measures are necessary to achieve specific policy objectives. The ratio of Article XX is to balance the trade liberalization goals of GATT with the rights of member countries to protect essential interests such as public morals, human health, and the environment. These general exceptions are not time-bound in the same way as Article XI:2(a), and a measure within the scope of Article XX may be maintained for as long as the situation or circumstance envisaged in the relevant subparagraph persists.

Article XX(j), for instance, allows Members to maintain GATT-inconsistent measures “essential to the acquisition and distribution of products in general or local short supply”. According to Hughes & Baker, the Appellate Body in *China-Raw Materials* stated that “the kinds of shortages that fall within Article XI:2(a) are more narrowly circumscribed than those falling within the scope of Article XX(j)”. In this regard, WTO dispute settlement has yet to test whether a Member would be able to maintain a food-related export restriction under Article XX(j) even if the food situation to which the restriction responds cannot be characterized as *critical* under Article XI:2(a) (Hughes & Baker, 2015). Nor has it tested whether other provisions such as Article XX(b), covering measures “necessary to protect human ... life or health” or Article XX(g), covering measures “relating to the conservation of exhaustible natural resources” are relevant to situations of food stress (Hughes & Baker, 2015).

The key point made by the Authors, however, is that these provisions carve out significant space for Members to regulate in ways that are *prima facie* inconsistent with the GATT prohibition on export restraints, where such restraints are imposed in the service of, for example, an important social good. Thus, “any consideration of the relationship between food security and WTO law must take these provisions into account. In our view, these provisions (...) recognize and protect the right of Members to intervene in the market where export activity threatens a state's vital interests, including in relation to food security (Hughes & Baker, 2015).

Finally, it has been noted that “While GATT XI:2(a) is the standard to use for short term food crisis exceptions, it could be argued that GATT Article XX could be applied to long term food security issues” (Whang & Almeida, 2018).

3.4. Article XX(b)(iii) of the GATT

In addition to the general exceptions contained in Article XX, the GATT also provides for exceptions relating to national and international security. In particular, Article XXI(b)(iii) states that “Nothing in this Agreement shall be construed (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests (iii) taken in time of war or other emergency in international relations”.

Thus, in order to justify certain measures under the GATT Article XXI(b) (iii) there should be an emergency in international relations and such measures should be adopted at the time of such emergency. In addition, as

established in *Russia-Traffic in Transit* case, when raising a security exception, WTO Members should (1) define ‘essential security interests’ in good faith and (2) adopt measures for the protection of essential security interests in good faith, i.e. the measures should not be implausible as measures protective of those interests.

It has recently been argued that food security could be an ‘essential security interest’, for example during a pandemic (that could be viewed as an ‘emergency in international relations’), with the consequence that Article XXI(b)(iii) could be invoked on the grounds of food security (Lapa, 2020). In fact, “...ensuring food security can be related to the quintessential functions of the State. Indeed, food security is one of the elements of human security, which was defined in the Human Development Report in 1994 as covering: ‘safety from such chronic threats as hunger, disease and repression, and protection from sudden and hurtful disruptions in the patterns of daily lives, whether in homes, jobs or communities’. Similarly, food security and health security were mentioned among threats to human security. What is more, the right to food is a legally binding norm as enshrined in Article 11 of the International Covenant of Social, Economic and Cultural Rights. Therefore, one might claim that protection of human security, which includes food security, is one of the quintessential functions of the State. Consequently, food security can be considered as an essential security interest of the State.” (Lapa, 2020).

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