

## Chapter 2

### Food Security and International Agricultural Trade Regulation: Old Problems, New Perspectives

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#### I. Introduction

How can the World Trade Organisation's (WTO) rules on international agricultural trade address food security more effectively? This is a question taxing trade negotiators, policy officials outside the WTO and many eminent academic commentators. There is such a wealth of institutional literature and academic commentary advocating changes to the WTO's international agricultural trade rules beyond those in the Doha Draft Modalities for Agriculture that it is easy to get swept along with the strong impetus for fundamental change. (WTO 2008) Recent events have ensured that food security is high on the political agenda too.

The 2010 Russian wheat export ban is putting pressure on international wheat supplies. Russia is the world's fourth largest wheat exporter and its export ban means supply problems for many WTO Members. Argentina too retains long-term restrictions on the export of agricultural products. In 2008, the Argentinean government introduced further higher variable export taxes on beef, soybeans and oilseeds, together with slightly lower rates for maize and wheat, on domestic food security grounds. (Nogués 2008) The effectiveness of this policy is questionable. Argentina suffered a severe social and economic crisis in 2002. Export taxes were introduced as a very quick way to generate crucial income to alleviate the severe poverty rates. Whilst this policy alleviated the worst problems in the short term, the long-term effects were surprising. The Nogués study shows these taxes actually led to a *reduction* in agricultural production, an *increase* in rural employment and consumer prices for food. The high export taxes operated as a disincentive to produce. Farmers were unable to compete effectively on export markets as the export price was artificially inflated by the tax, so their production was either diverted straight onto the domestic consumer market, or to the domestic processing industry. The price farmers received for their products was kept artificially low by the tax, so as some of the revenue from the tax was not diverted to farmers as compensation, they received less income over time. As a consequence, the farmers switched production to other non-taxed agricultural products, or, more often, left farming completely. The result was a decline in food supply and an increase in unemployment as farms closed. Whilst consumers benefited from artificially depressed food prices in the short term as the farmers had no incentive other than to supply the domestic market; in the long term, farmers adjusted their production and consumer prices increased as domestic supplies food was sourced from outside the country (Financial Times 2010). As rural unemployment increased with the decline in farms, so consumers became less able to afford to buy the food that was produced. The policy resulted in significant civil unrest in Argentina itself as agricultural producers staged a blockade of major routes as a protest against their ability to export and so gain higher revenue for their products. The decline in

Argentinean exports also contributed to the overall decline in the volume of food available on world markets, thereby putting further upward pressure on world food prices.

The Food and Agriculture Organisation (FAO) met in September 2010 to highlight the rise in food prices caused by supply problems and discuss what measures could be put in place to prevent another major food crisis like that of 2008. Pressure will inevitably fall on trade negotiators to ensure the new international agricultural trade rules also adequately address food security. But before the trade negotiators rush to change the rules and the current Draft Modalities in line with these ideas on food security, a word of caution should be sounded. A commonly held view is that changing all the international agricultural trade rules on food security necessarily implies improving them and, as a corollary, that retaining the existing rules unchanged is a retrograde step. So, it is thought, unless great changes occur, the existing rules remain stagnant, unresponsive to contemporary political problems and so are unable to fully address contemporary problems, such as food security. Change is not inevitably improvement, rather, it is more synonymous with disturbance: for good and bad. Even when it seems obvious that the existing international agricultural rules should be changed to more fully accommodate all aspects of food security, there will be other effects that may have been overlooked. These other consequential effects may, in fact, adversely impact on different aspects of international agricultural trade regulation in a profound way.

This point is best illustrated with an example already referred to above. Argentina's export tax on agricultural products appeared to be an excellent way to address its domestic food supply problems and rural poverty. Amending the rules was thought to only ever lead to positive effects for its farmers, the rural population and consumers. However, the reality was much more complex: farmers and consumers did gain in the short term, but the long term effects were much less predictable; food production declined, farmers moved out of agricultural production and domestic food prices increased. So changes to the existing international agricultural trade rules do not only lead to positive improvements in the way the international agricultural trade rules deal with food security; they also create an entire new regulatory environment for international agricultural trade where the 'better' rules on food security are only one dimension. So, change is always more extensive than is originally anticipated. Whilst it may be true ultimately that changes to the rules do mean food security problems are more successfully resolved by the international agricultural trade rules; equally, it may mean that this innovation causes, at the same time, a significant modification in the nature of international agricultural trade regulation as a whole. The WTO's international agricultural trade rules may address food security, but the temptation to overload the WTO's international agricultural trade for those rules to address all dimensions of food security should therefore be resisted. It is important to fully understand the richness of the current international agricultural trade rules' treatment of the problem of food security and the proposals for change before trade negotiators move ahead and make changes. Since, contrary to current thinking, it may be that the existing rules are more able to accommodate some contemporary food security concerns and only small, incremental change is necessary.

The discussion is in three parts. First, Part II will look at the way the existing international agricultural trade rules' and Draft Modalities' relationship with food security is traditionally described, how problems are identified and solutions crafted. Part III will show how this is not the only way to look at this relationship; that it is possible to adopt a different perspective and so discover new truths about the interaction of the rules, the Draft Modalities and food security. I also show the ways in which this new perspective changes how the international agricultural trade rules' impact on food security is thought to happen and what the appropriate solution is. Finally, Part IV will draw some conclusions and show why it is not necessarily inevitable that the existing international agricultural trade rules' treatment of food security be fundamentally changed.

## **II. International agricultural trade regulation & food security: old problems, traditional perspectives**

How do the existing international agricultural trade rules affect food security? Where are the problems with the rules' coverage and effects and how can these problems be resolved? Do the Draft Modalities help, or merely add new problems to an already complex and difficult symbiotic relationship? A common way to analyse these questions in the context of international agricultural trade regulation is to focus on whether the existing rules address food security effectively and how the Draft Modalities improve that effectiveness. Effectiveness is explored in two overlapping ways. First, how the rules strike the balance between trade and food security and what practical effect this balance has for Members' domestic agricultural policies and international agricultural trade in general. Second, the ways the rules cause food insecurity, either by their internal deficiencies (i.e. in the way they are drafted or the values they represent and promote) or because Members have not fully implemented them.

In each instance of effectiveness, a common starting point from which the rules are analysed is a definition of food security. The most commonly used definition is the Rome Declaration on World Food Security from the 1996 World Food Summit. (WFS 1996) Under paragraph 1, food security is said to exist "when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life."<sup>1</sup> It is thought that assessing the international agricultural trade rules to the Rome Declaration in this way is the key to showing how effective the rules are, how they impact on food security and where the problems are. Once the problems with the existing rules are fully articulated in this way, the effectiveness of the Draft Modalities can be properly assessed and appropriate proposals for changes to the rules can be framed.

So, for example, Christian Häberli predicates his critique of the international agricultural trade rules and Doha proposals' inability to address food security on a particular version of the Rome Declaration. For Häberli (2010, 298), food security is "continuing access, by way of either domestic production or trade to quantitatively and qualitatively adequate food, including for the poorest segments." From this starting point, he then shows how

Members' domestic agricultural policies, like subsidies on biofuels, export bans and declines in levels of food aid all contribute to food insecurity; how these policies adversely impact on net-food importing developing countries (NFIDCs) through high commodity prices, reduce cheap imports of food and lead to growing balance of payments problems and, finally, how the international agricultural trade rules are unable to prevent such distortions and in fact exacerbate them. (Häberli 2010, 302-08)

From his perspective, the current market access rules do not give full access to developing country agricultural exports because developed countries retained high tariffs despite Members' market access reduction commitments. Domestic support reduction commitments do not fully reign in subsidised agricultural production, and food dumping remained prevalent, even through food aid. (Häberli 2010, 304) In addition, the export subsidy commitments in the Agreement on Agriculture (AoA) did not fully address the needs of net-food importing nations heavily dependent on food aid for their food security needs. The existing international agricultural trade rules do not fully anticipate that whilst food aid is an important part of famine relief, it has the power in the long term to displace domestic production. (Desta 2001, 457) Developed country Members also use food aid, sometimes perniciously, as a way to dump excess food production (irrespective of the recipient country's needs) and to avoid their export subsidy reduction commitments. (Häberli 2010, 307) The conclusion is, therefore, the existing rules do not as yet fully address this aspect of food security, but they should.

Other commentators focus on the Rome Declaration to critique the WTO's impact on the problem of food security and climate change. For example, a 2006 UK government report showed how temperatures are predicted to rise by 2-3% globally over the next fifty years and how this will have negative impacts on agricultural yields, particularly in Africa. Water will cease to be so readily available and, as a consequence, agricultural yields will drop. World cereals yields will also be hit. (Stern 2006 and Defra 2006) Climactic variations, paradoxically, also cause severe flooding with consequential adverse effects on production. (Keleman et al 2010) Pressure on food supplies as a result of growing demand for food is inevitable. When assessing the international agricultural trade rules against the Rome Declaration in the context of climate change, the commentators found the rules only exacerbate food supply problems in such cases in two linked ways: first, the flexibility in Article XI GATT and Article 12 AoA allow major wheat exporters, like Ukraine, to impose export bans as a way of managing its own population's food demands, thereby causing even greater restrictions on available food for net-food importers. (Defra 2010) The rules also encourage countries to develop trade in sectors where they have a comparative advantage. If a country's comparative advantage is not in agriculture, it becomes increasingly dependent on trade and may not remain self-sufficient in food production. As the WTO encourages liberalized trade in agricultural products, the rules are then thought to effectively restrict the availability of nutritious foods: that is, they make a Member food *insecure*. From a climate change perspective, it may be better to discourage over-dependence on trade to meet domestic food needs and, as a corollary, suggest greater political flexibility be put into the WTO rules to enable Members to encourage domestic production. (Defra 2006, 35-50)

Other commentators consider the relationship between the international agricultural trade rules, food security and sustainable farming techniques. Here, the emphasis is on the availability of land on which to grow food. ‘Land grab’ in areas of sub-Saharan Africa by countries like China, Saudi Arabia, South Korea and Kuwait for the purposes of alleviating their food supply problems, is thought to put severe stress on Sub-Saharan food supplies. (BBC 2009) It reduces the amount of land available for cultivation domestically and thereby reduces available income generated from the land. (Coula et al 2009) The Rome Declaration definition of food security makes it clear that people should have “physical and economic access” to food. Clearly land grab severely impedes that access. Neither of these issues is addressed in the existing international agricultural trade rules and commentators argue that they should.

It is clear from the discussion so far that one way of exploring the relationship between the international agricultural trade rules and food security is to use a definition like that in the Rome Declaration as a fixed determinant of what food security *should be* and then assess the international agricultural trade rules and Draft Modalities to it. Where the rules and Modalities address the same issue, or they have no adverse impact, the rules and Modalities are thought to address food security adequately. However, where the rules and Draft Modalities do not address the same dimensions of food security in the Rome Declaration or impede them, then they are thought to be deficient. Accordingly, the existing rules and the emphasis in the Draft Modalities must be adjusted in such a way that ensures the final body of rules will ensure international agricultural trade (at least under the WTO rules) meets every dimension of the food security definition in the Rome Declaration.<sup>2</sup> But a different picture emerges if the starting point for analysis is shifted away from a definition of food security that is in a different legal instrument to the WTO rules and is instead shifted to the rules themselves. In other words, once an analysis of the rules, the Draft Modalities and food security focuses on what the rules and Draft Modalities *themselves* say about food security, then it is possible to see what food security is in international agricultural trade regulation and why changing the rules to accommodate a wider, more nuanced understanding of food security based on a definition like the Rome Declaration is more problematic than it first appears. This new approach looks at all the same problems as existing commentators, but it brings new perspectives to these problems together with new ideas about how to view changes to the rules.

In one sense, this new form of analysis describes what the rules and Draft Modalities say about food security. For it proceeds by analysing the wording of the existing international agricultural trade rules and the Draft Modalities in order to show what problems of food security the current rules are designed to address and how the Draft Modalities modifies that picture. At the same time, this description reveals deeper truths about the fundamental nature of international agricultural trade regulation and the place food security occupies within it. (Smith 2010) On this new view, rules are more than just “container[s] for the transmission of messages” to direct Members to formulate their domestic agricultural policies on food security in a certain way. (White 1990, ix) Instead, the existing international agricultural trade rules and Draft Modalities are also the embodiment of a political choice to regulate some aspects of food security and not others

and to regulate those chosen aspects in certain ways. This political choice is, in turn, part of a larger vision about how international agricultural trade should be regulated in the WTO. Specifically, what problems should be regulated; how they should be regulated; who is subject to the rules; who is the target of the rules; what non-trade concerns are; which non-trade concerns are relevant to the regulation of international agricultural trade in the WTO and how the balance between trade and non-trade concerns should be struck; and, finally, what the scope of the rules' impact should be. (OECD 2010, 9)

It would be disingenuous to describe these choices about food security and agricultural trade regulation as wholly detached from Members' domestic political imperatives and trade negotiators' need to make political trade-offs in the Uruguay Round multilateral trade talks and the Doha Development Round. What can be said though is that, irrespective of the motivation for the choices, only certain problems of food security are regulated in the existing international agricultural trade rules, and they are regulated in a certain way. When the existing international agricultural trade rules and Draft Modalities are understood in this deeper way, it becomes apparent that changing them to address every dimension of food security highlighted in the current literature, is not only a question of adding in extra, 'better' language. It is also about changing the fundamental nature of the political vision for international agricultural trade in the WTO as a whole. In the next section, the discussion describes how the existing international agricultural trade rules address food security as a way of also revealing what dimensions of food security the rules focus on and the political choices that underpin that regulation. It will then show how the Draft Modalities adjust that picture and what the implications of that adjustment are. The final section of this article addresses the tricky issue of reform.

### **III. International agricultural trade regulation & food security: old problems, new perspectives**

The existing international agricultural trade rules in the AoA and the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries (the NFIDC Decision) are designed to address one particular problem of food security: that is, that as food becomes more expensive as a consequence of the removal of price support mechanisms in Members' domestic agricultural policies under the WTO rules on international agricultural trade, so some countries may find it difficult to maintain their food supply. Since, it is implicit in liberal market economics that price support mechanisms used in domestic agricultural policies in the period before the WTO rules artificially kept the costs of agricultural production low by off-setting the true costs of production through the payment of domestic subsidies to farmers. (Anderson and Martin 2006, 31) These subsidies allowed farmers to sell their products cheaply on domestic and international markets to gain market share without any substantial loss of revenue. Export subsidies to domestic farmers further supported that production model by keeping the export price of the domestically produced product artificially low, as the difference between the low export price and the true costs of production were met by the export subsidy; and, finally, various import barriers insulated domestic farmers from competition imports of agricultural products from countries, like Kenya who enjoy a comparative advantage in

agricultural production. Reducing these price support mechanisms causes price rises in the short term because the true costs of agricultural production will now feed directly into the export price of agricultural products; food aid supplies will also be vulnerable. (Clapp 2004)

The NFIDC Decision specifically acknowledges in paragraph 2 that the relevant countries, in particular, may experience food supply problems as a consequence of this liberalization programme in the WTO rules on international agricultural trade, but, the paragraph 6 of the Preamble of the AoA, also makes it clear that the rules will provide some relief from the price support reduction commitments in the Agreement for *any* Member that suffers from food supply problems as a result of the implementation of the reforms to their domestic agricultural policies.

The existing international agricultural trade rules are all orientated around ameliorating this food supply problem therefore. Relief from the reduction commitments on food security (i.e. food supply) grounds is provided in each of the three pillars of the Agreement: market access, domestic support and export competition commitments. In terms of market access, generally the rules require all non-tariff barriers to be converted into tariffs under Article 4.2 AoA. However, the rules do provide Members some temporary and very limited relief from the conversion process on food security grounds.<sup>3</sup> Annex 5A AoA potentially allows 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)); whereas under Annex 5B, 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 where it complies with Annex 5A paras 1(a)-(d). Retention of non-tariff barriers under these circumstances seems to allow more targeted protection of domestically sensitive agricultural products from the import of cheap agricultural products produced with the benefit of large domestic subsidies. However, the Annex 5 exemption was time limited and only available if the specific narrow circumstances specified in Annex 5 were complied with, including a minimum market access commitment which exceeded that required under Article 4.2. In reality, only Japan, Korea, the Philippines and Israel made such reservations in their Schedules and Japan suspended its use of the provision in 1998. (Desta, 2002).

Concerns that domestic agricultural production would be overwhelmed by the flood of cheap agricultural imports following the tariffication of non-tariff barriers and the new tariff bindings was also alleviated by the inclusion of the special safeguard provision in Article 5. Article 5 allows a Member to impose additional import duties on products it designates as particularly vulnerable in its Schedule (i.e. by using the symbol SSG in their Schedule for the product in question) when either there is an increase in the volume of imports in excess of a pre-determined trigger level, or decrease in the import price below the trigger level. (Article 5.1(a) and (b)). Article 5 allows countries, who have so designated their ‘tariffied’ products, to respond to such import surges if there is a genuine threat to the domestic food supply or where there is only a perceived threat, as the Article

5 does not require the Member to show there is actually injury or threat of injury to their food supplies. (Desta, 2002)

The rules on domestic support also provide exemption from the reduction commitments in Part IV of the AoA where Members want to maintain food supplies, but do not wish to be dependent on external sources of food. Annex 2 AoA allows Members to exclude payments to their domestic farmers either because they are stockpiling important foodstuffs (paragraph 3), or they wish to give food aid to a sector of their population (paragraph 4). The former allows Members to claim exemption if the money is given to their farmers for the purchase and accumulation of essential food stocks as part of an “integral part of a *food security* programme identified in national legislation.” This exemption also extends to government payments made to private contractors who store the goods on behalf of the government. In both cases, the exemption is only available if certain prescribed criteria are met, notably that the volume and accumulation of the stocks must not exceed certain “predetermined targets” that relate solely 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. For Members to claim exemption from their domestic support commitments for their food aid programmes under paragraph 4, the Member must show that the food aid programme has clearly defined nutritional objectives; that the food is either to be given in kind or in subsidised food to eligible individuals and that any purchase of food made by the Member for these purposes, must be made at commercial rates. This exemption is available, according to the first paragraph of Annex 2, to all Members, irrespective of their status and is subject to the general over-riding proviso that such support has “no, or at most minimal effects on production.” The NFIDC Decision does recognise that forcing Members to buy food at market prices for their domestic food aid programmes to gain the advantage of the exemption in paragraph 4 may be particularly problematic for NFIDCs as the high costs may mean access to adequate foodstuffs is difficult. Paragraph 3 of the NFIDC Decision therefore seeks to off-set that food supply problem: Members agree to “establish appropriate mechanisms to ensure that the implementation of the ... [reform programme] does not adversely affect the *availability* of food aid at a level which is sufficient to continue to provide assistance in meeting the needs of developing countries ....”

In the context of the export subsidy reduction commitments, the food supply problem is understood in a different way. Members are required to make specific reduction commitments for their use of export subsidies (Part V AoA). Only those existing export subsidies which meet the criteria in Article 9 are permitted (subject to reduction commitments); Article 10 contains anti-circumvention provisions. Articles 8-10 do impact on the exporting Member’s agricultural policies as the reduction commitments mean the amount of agricultural products subsidised reduces, with the result that the dumping of excess agricultural production on to third countries’ markets should reduce too. Article 10 specifically limits the circumstances where an exporting Member can claim exemption from its export subsidy reduction commitments on the grounds it is exporting products as food aid. The rules are therefore also protecting the importing country’s food supply in two ways: first, they attempt to prevent dumping of agricultural



produce well below the cost of production in the importing country which then drives domestic producers out of the market; second, when food is exported as food aid ‘in kind’ Article 10 seeks to protect the food supplied to the ultimate consumer is in fact nutritious and in accordance with the dietary needs of the local population. Article 10.4 therefore requires donors of international food aid to ensure that their provision of aid is “not tied...to commercial exports” of agricultural products to the donee country; that the food aid is provided in accordance with recognised requirements in the FAO’s Principles of Surplus Disposal and Consultative Obligations and that it is given in grant form wherever possible, or at least on the terms of the Food Aid Convention. The move towards genuine food aid is also recognised in paragraph 3 of the NFIDC Decision.

Members who are net-food exporters are also able to address food supply problems. In such Members’ case, problems occur when domestic food production is significantly curtailed due to production conditions, like bad weather for example. In such circumstances, such Members fear that there will be insufficient food for their domestic population if the usual levels of export trade in agricultural products concerned are maintained. Article XI:2(a) GATT allows Members to impose temporary export restrictions on key domestic agricultural products “to prevent or relieve *critical shortages of foodstuffs...*” This provision was modified by Article 12 AoA, which makes it clear that, prior to implementing an export ban, the Member is required to “give due consideration” to the food security needs of importing Members. Full details of the measure, particularly its general nature and its duration must be given to the Committee on Agriculture. There is a duty to consult other Members who may have a substantial interest in the export ban, like NFIDCs who are reliant on those exports. (Hermann and Peters 2010) Article 12 also imposes a duty to provide further detailed information to those Members if a request is made. Different arrangements apply to export bans imposed by developing countries, although these special arrangements do not apply if the developing country concerned is a net-exporter of the specific agricultural product which is subject to the export restriction.

It is evident that the current international agricultural trade rules are focused on solving one particular problem in the context of food security: that is, the adverse effect of the liberalization programme on food supplies for WTO Members, particularly the NFIDCs. What do the policy choices made in the rules reveal about the way food security is addressed in the existing international agricultural trade rules?

Food security is not an end in itself for the existing rules. Rather, as paragraph 3 of the AoA’s Preamble states, the rules’ objectives are in fact to liberalize international agricultural trade and push WTO Members towards policy choices that are more market-oriented and less focused on short-term domestic political imperatives. Food security’s relevance to the rules is then reduced to a factor that must be weighed against the market liberalization objective. As paragraph 6 of the Preamble specifically states, Members’ agricultural support reduction commitments “under the reform programme, should be made in an equitable way among Members, having regard to non-trade concerns *including food security.*” Food security is not the only non-trade concern listed in the AoA, but is one of a number of non-trade objectives listed, together with environmental

preservation, special and differential treatment and the potential adverse effects on NFIDCs of the reforms instituted by the Agreement. The balance envisaged by the Agreement is one between the market liberalization objective and each non-trade concern considered as a distinct challenge for the liberalization agenda. The relationship and balance between competing non-trade concerns in the context of agriculture, like maximising food security but on sustainable land-use principles, or not maximising production in ways that exacerbate climate change are irrelevant considerations for the existing rules. (FAO 2008) This balance is something for the Member to decide within its own domestic agricultural policy. Whilst the Member may have undertaken international commitments on climate change and development which influence how its domestic agricultural policy may be constructed, it is not for the WTO to force the Member into acceding to these international commitments through the ‘back door’ by prescribing how the balance between non-trade concerns should be addressed through the current international agricultural trade rules; the policy choice remains largely under the control of the Member therefore.

Food security is not defined at any point in the AoA or in the NFIDC Decision. Article 1 of the AoA defines the terms used in the Agreement as a whole is a substantial provision and contains over nine definitions of the terms used in the rules. Some of the definitions are used to calculate the level of a Member’s domestic support for the purposes of the reduction commitments in the AoA and each run to more than one paragraph. It is clear therefore that the trade negotiators’ attention was drawn to the need to include a definition section in the rules and that they understood its importance for the effectiveness of the rules. The omission of a definition of food security appears deliberate and implies that food security is not a matter for the rules *per se*, but is something separate which is to be determined by other international agreements and/or by the WTO Member. It is then for the Member to decide what is most appropriate for the needs of its domestic population in food security terms. Whether the policies work and the Members’ population benefit is not a relevant consideration for the current international agricultural trade rules.

As a corollary to this, an individual’s right to nutritious, safe food that meets their dietary needs, or whether the needs of different sections of the population are addressed, like those of women, within the Member’s food security policy is also outside the rules. Even when the NFIDC Decision notes the importance of recognising the negative impact of the reform programme on food security, this is described only in terms of the problems the *Member* has in terms of its food security policy. Paragraph 2 states that Members recognise that “least-developed and net-food importing developing *countries*” might feel the effect, not that their populations must suffer as a result of the reform programme before the Member can rely on the more liberal regime in the Decision. The Member has considerable autonomy to determine whether it is experiencing food security problems or not, and when it can react to those problems.

The current rules also only recognise food supply difficulties for four homogenous types of Member: the developed country, the developing country, the least developed country and the NFIDC. The NFIDC Decision highlights particular difficulties in terms of access

to food aid for NFIDCs, but beyond this rather crude division between the four categories of state in the rules, there is no recognition about the actual food security challenges for each Member and the fact that a range of policy choices may be better for those states at different times. Some Members might be particularly vulnerable either because their agricultural production is erratic or their climate unpredictable causing food supply problems in some years and not others. (WFP 2010) Or even that food aid supplies to them are unpredictable and domestic production is unable to cope with the unpredictable shortfalls in supply. (Stevens et al 2000, 14-15) Such Members are not part of a homogenous group and their Membership fluctuates over time just as their needs do. These complex and ever-changing needs are not relevant considerations for the current rules. Rather, these difficulties fall outside the WTO framework and are covered by other organisations and legal regimes; and/or the Members themselves are thought to be best placed to formulate the most appropriate solutions for their domestic situation. In either case, the WTO's rules only purport to offer a framework to increase the market orientation of existing rules and their fairness, increased trade may be an incidental effects of these rules. The final resolution of the other dimensions of food security suffered by these countries is not thought to lie with the WTO.

So the focus in the balance between food security and the market liberalization objective in the existing international agricultural rules is not a balance between the need to keep markets open and food security policies that actually *work*. Rather it is a balance between allowing a Member to pursue its own food security policy without any external regulatory constraints and one where certain limitations on Members' policy space are necessarily imposed.

Both the AoA and the NFIDC Decision do place some distinct limits on a Member's autonomy, but these limits are mainly focused only on one dimension of their food security policies. For, it is the measures Members use to achieve food security that are the subject of the rules, not their policy as such; and it is primarily those measures which restrict the inflow of agricultural products into Members' domestic markets that the existing rules concentrate on. The rules are principally import-focused therefore. Measures regarded as prohibited restrictions for the purposes of the rules are those taking the form of non-transparent quantitative restrictions as these directly impede the free-flow of imports at the border. Although Article 5 AoA, allows Members some relief from the adverse effects of the reduction of import barriers on food security grounds, this is generally only in the form of additional duties and is not a return to the use of highly distortive quotas or other non-tariff barriers. It is also only available on a temporary basis. Annex 5's exemption on food security grounds from the tariffication commitment only applies in a very limited range of circumstances; most notably where imports of the product were at historically very low levels, where effective production-limiting measures are applied to the primary product and where export subsidies have not been imposed on the product in question. Minimum access commitments must still be given in accordance with the explicit provisions of Annex 5A. Even where a Member is able to restrict imports on food security grounds because the product is also the "predominant staple in the traditional diet of a developing country" imports of the product must still be historically low, and the minimum access commitments must be given. The emphasis is

solely on keeping markets open and import restrictions are only permitted in very limited circumstances.

In addition, payments or other forms of support given to farmers, outside permitted levels, that directly stimulate specific types of domestic agricultural production are restricted by the AoA because these are thought to distort the market for agricultural products by artificially depressing the costs of agricultural production and reducing the price to consumers of domestic agricultural products compared to imported ones. As noted above, it is possible for Members to gain exemption from payments to domestic farmers on food security grounds if the Member is purchasing food as part of a public stockholding programme or they are providing food aid to their population. However, in both cases, the nature of the food aid and stockholding programmes is not a matter for the rules: it does not matter what food the Member is purchasing, or whether the food truly meets the nutritional needs of its population. Rather, the concern is about the transparency of the measure, the price the Member buys the food and also, most importantly, whether the measure has “no, or at most minimal effects on domestic production” and is not an indirect subsidy to its domestic agricultural producers. These three concerns all relate to the measure’s potential effect on the market for the product in question: that is, whether domestic farmers are gaining a financial advantage as a result of the food security policy which will enable them to sell their products cheaply on international markets. Food security is not a concern *per se*, it is the measure’s potential to create cheap exports which might flood international markets which is the real worry.

Finally, payments to farmers that off-set the costs of domestic agricultural production are severely restricted by the existing rules on the grounds that such export subsidies enable farmers to sell their products at more competitive prices on international markets to the detriment of those farmers who have not had the advantage of the export subsidy. It is the relationship between export subsidies and food aid which lies at the heart of the AoA’s provisions on export subsidies and food security. As noted, Article 10.4 is designed to address a particular problem: to prevent Members circumventing the export subsidy commitments by heavily subsidising commercial exports under the guise of food aid. What food aid is and whether Members’ policies meet the food security needs of developing and least-developed nations is not covered by the existing rules, but is instead pushed to the FAO under their Principles for Surplus Disposal and Consultative Obligations and the Food Aid Convention 1986. Whilst it is not inconceivable that the panels and Appellate Body might be called upon to interpret whether Members’ provision of food aid does in fact accord with these provisions, the over-riding objective in Article 10 is to determine whether the Member is circumventing the export subsidy commitments. Even the NFIDC Decision only requires Members to agree to put appropriate mechanisms in place to maintain food aid flows, rather than to undertake any substantive commitment to strengthen food aid *per se*.

The existing international agricultural trade rules focus on food security as a problem of food supply for four homogenous groups of WTO Member, rather than an end in itself. The relationship between food security and other non-trade concerns, like preservation of the environment, is not a matter for the rules. Instead, the rules are unconcerned whether

Members' policies solve food security problems for the Member or whether individuals become more food secure. The rules address food supply problem in specific ways without distorting international agricultural trade markets more than necessary. All the other policy choices lie with the Member. The rules should not be thought to regard food security as an unimportant consideration simply because they do not address all its dimensions. Rather, the rules see food security as a domestic problem which is best addressed at national level. Understood in this way, the rules give more power to the Member to address food security rather than less. How is this picture changed by the Draft Modalities?

Paragraph 13 of the Doha Ministerial Declaration sets out the negotiating objectives for the reform of international agricultural trade regulation. (WTO 2001) It reiterates the long-term objective of international agricultural trade regulation in the WTO remains to “establish a fair and market-oriented trading system” by reducing distortions in the market and eliminating export subsidies. The Draft Modalities still focus heavily on opening markets, reducing domestic support and eliminating export subsidies in ways designed to cut the levels of price support for international agricultural trade more effectively than the existing international agricultural trade rules. (WTO 2008) However there are subtle changes in the way food security is understood, which in turn suggests a small change in the political vision of international agricultural trade regulation for the WTO.

Food security is still one of the factors that should be balanced against the liberalization objective, together with preservation of the environment and special and differential treatment. The balance between individual non-trade concerns is still not to be addressed and food security will not be an end in itself for the reformed rules if they are based on the December 2008 Draft Modalities. This means the rules should not address the problem of ‘land grab,’ the adverse impact on the environment caused by intensive farming production techniques, and the impact on climate change on food supply. So the problem of the environment remains understood in terms of access to food, rather than as a need to rectify any underlying environmental causes of food insecurity. The role of the international agricultural trade rules is still not to rectify the tensions between non-trade concerns in the trade context; this is for the Member to determine.

The Draft Modalities continue to be heavily focused on the Member's attempts to alleviate food security difficulties, rather than on individuals' needs *per se*. However, unlike the current international agricultural trade rules, food security is now set within a more nuanced conception of special and differential treatment in the Draft Modalities that focuses on the needs of a wider range of developing countries. So, food security problems in recently acceded Members (RAMs), including a sub-category of small and vulnerable recently acceded Members, small and vulnerable economies more broadly, and developing, least developed countries and NFIDCs are targeted throughout the Draft Modalities. For example, paragraphs 7 and 17 on the calculation on the levels of domestic support, are designed to address the fact that NFIDCs are particularly vulnerable to price rises in agricultural commodities as a result of the required reductions in tariff levels in the reform programme. Both paragraphs exclude NFIDCs from the need to reduce their

domestic support, however, thereby allowing them to maintain support to bolster their domestic agricultural production. Likewise, the Draft Modalities in paragraphs 66 to 69 also identify small low-income recently acceded Members, especially those with economies in transition, as experiencing particular difficulties because the reduction in tariff revenue from imports of agricultural products significantly reduces the revenue available to them for their broader food security policies. The Draft Modalities therefore allow slower implementation of market access commitments for these countries.

Whilst it is clear in the Draft Modalities that the problem of food security remains one of food supply, there is a subtle shift to recognising that countries, in reality, experience food security problems in different ways. These ways are closely tied to the needs of their domestic population, how agricultural trade is organised domestically, and how it is best financed. However, this connection does not mean that the Draft Modalities require the Member to show their policies directly correct food insecurity for vulnerable sectors of their populations, or that the way they choose to organise and finance their domestic agricultural sectors is necessarily effective at bolstering domestic agricultural production. Rather, it is more a question of further expanding Members' policy space so that each Member is able to use more appropriate measures *it* believes guarantees food supply more effectively. For example, in the context of market access commitments, the Draft Modalities still recognise that some developing country Members, especially NFIDCs, will be particularly vulnerable and may need valuable income gained from high tariffs on the import of agricultural products to alleviate food supply problems and rural poverty which can lead to vulnerable sectors of the population becoming food insecure. However, rather than simply suggesting these problems can be alleviated through temporary exclusion of certain key foodstuffs from the tariff bindings and meeting any deficit with food aid, the Draft Modalities in paragraphs 129 to 131 go further and expand the Member's power and enable it to exclude specific food products from its reduction commitments on food security grounds. An illustrative list of these grounds is found in Annex F. It includes factors that relate a foodstuff directly to the nutritional needs of individuals; how vulnerable sectors of the population like women are dependent on certain foods; how many domestic farmers are producing a particular food and to how many people are employed in a food's production.

The Draft Modalities in Annex L acknowledge that the issue of food aid is a more complex problem than envisaged in the current international agricultural trade rules. They suggest that the amended rules should not simply concentrate on how Members might disguise export subsidies as food aid, which is essentially a supply-side problem, but should instead focus on the demand side of food aid. Food aid should therefore involve the provision of food that is nutritious for a Member's domestic population and it should not lead to greater food insecurity. In particular, the donor must be aware that market conditions of the donee state may mean provision of food aid in a particular form is inadequate and, if given in that form, may actually displace domestic production and lead to greater food insecurity. The Draft Modalities further recognize that food aid should not just take the form of dumped produce from the donor Member, but should be more attuned to the actual needs of the recipient country. There *is* a deepening recognition of the appropriate nature of food aid in the Draft Modalities therefore. However, it is *not* an

acknowledgment that food aid must be given, nor, that the WTO is the appropriate regulatory environment in which to determine whether food aid *per se* is the most appropriate way to alleviate the food security problems of the receiving Member.

The Draft Modalities do move the AoA towards a more nuanced and complex recognition of the problems developing countries face, especially in the context of food security. It is clear from the discussion that the Draft Modalities create even greater policy space for Members to adjust their policies in ways targeted towards their own particular domestic needs. Nevertheless, the Draft Modalities indicate that actually *achieving* food security remains an issue for each Member. It is not within the WTO's competence to regulate food security directly, force Members to address particular food security objectives within their domestic agricultural policies, nor adjudicate on when a Member's food security policies are working and when they are not. The needs of the individual, whilst relevant to allowing the Member greater flexibility in the choice of policy instrument, are not directly relevant to the rules. Non-trade food security objectives like the provision of micro-financing in domestic agricultural production, supporting the role of women in agriculture and labour migration to the cities away from farms are all outside the consideration of the rules. Should the existing international agricultural trade rules and the Draft Modalities be changed to accommodate more complex notions of food security?

#### **IV. Amending the rules: a step too far?**

It is tempting to believe that the existing international agricultural trade rules and Draft Modalities fail to strike the right balance between reducing protectionism in international agricultural trade and food security for the reasons highlighted in the first part of this discussion. Such a view sees the current regulatory framework as out of touch with the contemporary reality of food security problems; as blind to the suffering of people with insufficient access to food; as too wedded to free market economics as the instrument of change and as too reticent to expand the WTO's scope, when it seems obvious that its dispute settlement system makes the WTO one of the most effective international regimes with the potential to successfully regulate many controversial areas of international relations. Changing the WTO to accommodate all dimensions of food security, by adding in extra rules into the existing framework on international agricultural trade that can be upheld through the dispute settlement system, seems to be the obvious way forward. But wide ranging innovation can have unexpected consequences.

The Rome Declaration on World Food Security's definition of food security has been referred to earlier in this discussion already. The existing international agricultural trade rules could be changed in line with the definition and objectives in the Rome Declaration. The Declaration regards food security as a problem for the individual and their household, but also as a problem for national, regional and global levels. It defines food security as "when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life." The problem the Declaration is designed to address is whether an individual has access to food: not only in terms of having food to eat, but also in terms of

an individual's financial capacity to buy the right food. The right food is not merely that which provides the basic calorie intake, but is also food that the individual actually wants (either for their dietary needs, or because they enjoy it). In paragraphs 1 to 7 of the Rome Declaration, there is a role for national action, but also for regional and international co-operation to ensure poverty eradication, economic stability and ultimately to guarantee food security. Food security imperatives should also take into account the complex balance between agricultural production, "sustainable management of natural resources" food aid, variations in climate and specific problems of certain developing countries, notably those in sub-Saharan Africa. (FAO 2010)

Changing the way the existing international agricultural trade rules deal with food security and the emphasis in the Draft Modalities in the ways suggested in the Rome Declaration seems to be only a positive move therefore. Such innovation gives a clear indication that the WTO is moving towards a greater recognition of its role in the implementation of the Millennium Development Goals and also understands its impact on vulnerable individuals. However, the Rome Declaration is predicated on resolving different problems of food security to that of the WTO: it is the difficulty of eradicating hunger which is the focus for the Rome Declaration, whereas the WTO rules concentrate on ameliorating the adverse effects on food supply of price rises caused by agricultural liberalization; these issues are distinct. Whilst the individual might benefit as a result of the WTO's action, this is not an obligatory consequence of the WTO's rules. Rather, for the WTO, the Member is thought to be best placed to address food security concerns in ways which are the most appropriate for its domestic population. The WTO rules emphasis, therefore, is on keeping the Members' domestic policy space as open as possible so Members can pursue food security issues through their domestic agricultural policies, whilst only limiting Members' use of trade measures where they exacerbate trade tensions. Moving the WTO away from this pro-autonomy stance towards the recognition of the food security rights of the individual has profound ripple effects.

There is a power shift from the Members to the WTO as an organisation: it would be for the WTO (through dispute settlement) to determine whether the individual in the Member's territory actually benefitted from the Member's food security policies or not, rather than the Member itself as in the current rules. This new assessment would involve the WTO assessing various policy options against one of several possible benchmarks to decide whether the Member's policies were successful or not. This is a significant incursion into the autonomy of the Member and a constraint on the Member's ability to act in the best interests of its population. This change to the existing rules would in fact narrow the Member's policy space in regard to food security with the consequence that the Member is less able to react to the needs of its domestic population. However, the fact that many Members have made at commitments to human rights treaties, a broadly conceived 'right to food' may be thought to be a necessary constraint on Member autonomy as the WTO matures as an organisation.

How, then, should international trade negotiators proceed in the face of growing global food insecurity? The way forward to is re-evaluate the richness of the existing international agricultural trade rules in each context in which change is mooted and to re-



think what change should look like in this highly politicised environment. It is important to remember that the international agricultural trade rules do not purport to be a panacea to all the worlds' ills in every aspect of food security. Rather, they balance the need to liberalize international agricultural trade with the potential adverse effects on food supplies. The absence of fuller recognition of all the dimensions of food security within the existing rules (and the Draft Modalities) does not mean that food security is ignored by the international trade regulation. Instead, it means that the power to control food security lies elsewhere. Specifically, it is the Member who retains the right to address food security through its agricultural policies in the ways that are best suited to its domestic circumstances. It is for the Member to make important trade-offs between the various non-trade concerns. Contrary to some account of the relationship between the international agricultural trade rules and food security, my view of the function of the rules is that they are designed to keep the Member's policy space open as wide as possible, whilst trying to maximise the trade liberalization objective. As this can only ever be a balance, inevitably, there will be times when greater power is held by the WTO – for example specifying that food aid cannot be used as a disguised export subsidy – and times when greater power remains with the Member-for example in relation to export prohibitions on food security grounds. The international agricultural trade rules' function is then not to impose any particular 'correct' way of achieving food security upon its various Members in all instances. To do so would be to impose a single vision of food security on all Members that disregards the fact that Members' food security needs are widely diverse and fluctuate over time. It would disregard the fact too that Members' policy responses must change and adapt to their own domestic circumstances. Whilst it might be thought it is for the WTO rules to require Members to guarantee a brighter future where their domestic populations are adequately fed, this view assumes that the Members do not share this goal and so need some external stimulus to pressure them into addressing the needs of their populations; in reality the converse is more likely.

To see the existing international agricultural trade rules' treatment of food security as striking a balance between state power and the need to liberalize international agricultural trade is also to ascribe a different function to the rules: they act as a stable point in an otherwise highly volatile and ever-changing environment, mediating between the need for stability and the desire for change as the problems of food security change and evolve. The rules' very stability is what makes them useful, as Members know what their obligations are, and, over time, they can adapt and change their domestic agricultural policies in line with them. Radically changing a regulatory framework just because the political environment is ever changing is to misunderstand what makes rules effective in international agricultural trade.

Instead, changes to the rules should be made in small, incremental ways that slightly refine the balance between trade liberalization and the adverse impact of the liberalization programme on food supply problems. This change should *reflect* the consensus of state practice when it has had time to settle into a particular pattern. Change should not be at the expense of the existing rules' integrity. Since, it is clear that although the rules may not have achieved full liberalization of international agricultural trade yet, nor made huge inroads into alleviating food security, the rules have stabilised the legal landscape for

agricultural trade. The Draft Modalities can therefore be seen as a reflection of what current state practice is in the context of how food security will need to be regulated in international agricultural trade regulation at this point in time and what the power balance should be between the Members and the WTO. The Draft Modalities also reflect how Members believe food security fits into the larger picture of international agricultural trade regulation: for food security is only one dimension of the highly complex and intricate balance that the current rules strike between many diverse trade and non-trade issues. To advocate a fundamental change to the international agricultural trade rules' treatment of food security would be to undermine the current rules' success in stabilising the legal environment. In the words of Oakeshott, we should see innovation as "...an activity in which a valuable set of tools is renovated from time to time and kept in trim rather than as an opportunity for perpetual re-equipment." (1991, 431) Change should be small, slow, incremental and in line with state practice. Not drastic, revolutionary and bold.

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## Endnotes

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<sup>1</sup> The 2002 Declaration adds in 'social needs' into the needs which must be met for food security to exist.

<sup>2</sup> This discussion focuses on the Rome Declaration's definition on food security, but the same point is equally relevant to other definitions of food security.

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