The Right To Food and Trade Law in the External Relations of the European Union with Developing Countries

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Abstract:

The European Union has exclusive competence to negotiate trade agreements with third countries. Using this competence the European Commission developed an extensive policy to conclude free trade agreements with numerous countries around the world. These agreements include regulation of the import and export of food products and also involve developing countries prone to hunger and malnutrition. This thesis investigates the recent trade agreements between the European Union and developing countries from the perspective of the human right to adequate food. This thesis demonstrates that the clauses on import and export of food products of such agreements limit the capacity of the developing countries involved to realise the right to food of their citizens. This outcome does not take into account the normative content of the right to food as contained in international human rights law and is dismissive of the references to human rights contained in European Union funding treaties and in the previous agreements between the European Union and developing countries. This thesis also demonstrates that this outcome is mainly an autonomous policy decision of the European Union and its trade partners independent from the obligations of World Trade Organization law. The thesis concludes with several proposals of reform to conciliate the external trade objectives of the European Union with the human right to adequate food.

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European Union	EU
World Trade Organization	WTO
Economic Partnership Agreement	EPA
Trade and Development Committee	TDC
Sustainability Impact Assessment	SIA
Treaty on the European Union	TEU
Treaty on the Functioning of the European Union	TFEU
General Agreement on Tariffs and Trade	GATT
General Agreement on Trade in Services	GATS
World Trade Organization Special Safreguard	SSG

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CHAPTER 1: INTRODUCTION

One of the consequences of European integration is that the Member States conferred on the organs of the European Union (EU) the competence to conclude trade agreements with third countries. The centralisation of the trading influence of 27 countries into a single supranational entity created a powerful trading block that is emerging as an influential global economic player. Exercising this competence the EU influences the evolution of international trade law through the participation in the WTO and the conclusion of free trade agreements.

In 2005 the EU launched a new trade strategy called "Global Europe" having the objective to conclude trade agreements with numerous countries including states vulnerable to food shortages. This policy marked a change of attitude of the EU towards international trade law. In fact, before 2005 the EU aimed to influence international trade law mainly through the participation in the World Trade Organization (WTO) and the contribution to multilateral trade negotiations involving the large majority of the countries of the world. After 2005 the EU decided to build its own trade network, outside the WTO, concluding free trade agreements directly with its partner countries. The main objective of these free trade agreements between the EU and developing countries is to eliminate barriers to the trade of goods (including food) and services between the EU and its partners. For the policy-makers of the European Commission, the Global Europe Strategy should favour the integration of vulnerable countries in the global market, promote their economic development and facilitate the realisation of economic and social rights. In particular, when the EU concludes a trade agreement with a country vulnerable to food shortages it maintains that the agreement is a way to promote food security.

The central project of this thesis is to challenge this traditional understanding of the free trade agreements between the EU and countries vulnerable to food shortages by demonstrating that the present external trade policy of the EU does not contribute to the realisation of the right to food. This chapter introduces the area of research to which this thesis aims to contribute, the objective of the thesis and its general outline.

1. Area of research

This thesis is a contribution to the fast growing area of research that attempts to bridge international human rights law and international trade law. Even if the attempts of delving into the intricacies of this issue have increased since the explosion of globalisation, [1] each discipline remains largely independent and the different

[1] See F M Abbott, C Kaufmann and T Cottier (eds), *Trade and Human Rights: foundations and conceptual issues* (2006 Michigan University Press); T Cottier, J Pauwelyn and E Burgi Bonanomi (eds), *Human rights and international trade* (Oxford University Press 2005); C McCrudden and A Davies, "A Perspective on Trade and Labor Rights" (2000) 3 Journal of International Economic Law

theoretical foundations have been so far difficult to reconcile. On the one hand international trade law is grounded on neoliberal economic principles which encourage the liberalisation of international trade.[2] On the other hand, human rights law derives from the recognition of the dignity of the human person and each human right is considered to require legal protection and fulfilment for every individual.[3]

Looking at the international norms regulating food the separation of the two disciplines is evident. International human rights law recognises the right of everyone to be free from hunger in the International Covenant on Economic Social and Cultural Rights and numerous other international conventions.[4] International trade law provides the legal infrastructure to the international trade of food through a web of trade agreements, which include the founding treaties of the WTO and around 300 bilateral and plurilateral free trade agreements.[5] International human rights law sees food as an individual entitlement that countries and the international community must

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43. On the right to food and international trade law see O de Schutter, *International Trade in Agriculture and the Right to Food* (Friedrich Ebert Stiftung 2009);

O de Schutter, *International Trade in Agriculture and the Right to Food*, Occasional Paper 46; M Jansen and E Lee, *Trade and Employment* (Secretariat of the World Trade Organization and International Labour Office 2007).

[2] On the economic underpinning of international trade law see J H Jackson, "Global economics and international economic law" (1998) 1 Journal of International Economic Law 1; A O Sykes, "Comparative advantage and the normative economics of international trade policy" (1998) 1 Journal of International Economic Law 49; J Bhagwati, *International trade: selected readings* (MIT Press 1996); J Bhagwati, *In defense of globalization* (Oxford University Press 2007); J Bhagwati, "Free Trade: Old and New Challenges" (1994) 104 The Economic Journal 231; C Davidson, S Matusz and D R Nelson, "Can Compensation Save Free Trade?" (2006) 71 Journal of International Economics 167; W J Samuels, "Economics as a Science and Its Relation to Policy: The Example of Free Trade" 14 (1980) Journal of Economic Issues 163. See W M Corden, *Trade Policy and Economic Welfare* (Oxford University Press 1997); C Davidson and S J Matusz, "Trade liberalization and compensation" (2006) 47 International Economic Review 723; A D and V Norman, "Gains from trade without lump-sum compensation" (1986) 21 Journal of International Economics 111; M C Kemp and H Y Wan, "Gains from trade with and without lump-sum compensation" (1986) 21 Journal of International Economics 99.

[3] C McCrudden, "Human Dignity and Judicial Interpretation of Human Rightd" (2008) The European Journal of International Law 655; C McCrudden, "In pursuit of human dignity: an introduction to current debates", University of Michigan Public Law Research Paper No. 309; P Capps, *Human Dignity and the Foundations of International Law* (Hart Publishing 2009); D Kretzmer and E Klein (eds), *The concept of human dignity in the human rights discourse* (Kluwer Law International 2002).

[4] See Mechlem, "Food security and the right to food in the discourse of the United Nations" (2004) 10 European Law Journal; B van der Meulen, "The global arena of food law: emerging contours of a meta-framework", (2010) 4 Erasmus Law Review 217.

[5] See A Alemanno, *Trade in food: regulatory and judicial approaches in the EC and the WTO* (Cameron May 2007).

protect and actively promote, while in international trade law food is a product traded across the globe on the basis of supply and demand. The two bodies of law do not even share the same instruments of enforcement: international human rights law is enforced through the supervisory bodies of the United Nations whereas international trade law is enforced through the dispute settlement regime of the WTO. Finally, international human rights law and international trade law do not have the same research community since few scholars are trained in both disciplines. In fact, the substantive split of the two bodies of law and the separation of the international organisations dealing with human rights and international trade provoked a sharp division in the scholarship with few attempts at reconciliation.

The clinical isolation of international trade law from human rights was not perceived as a problem until the advent of globalisation and the intensification of international exchange of goods and services. In fact, the expansion of international trade made the international market a crucial element in the realisation of economic and social rights. In particular, with the intensification of transnational trade the international food market became inextricably linked with the capacity of millions of people to access adequate food. Examples of this interconnection are the recurrent global food crises when oscillations of the price of food on the international market considerably affect the capacity of countries to realise the right to food. For instance, between 2007 and 2008 the international price of several basic food products such as wheat, rice and maize spiked leaving millions of people without economic access to sufficient food.[6]

Tensions between international trade law and human rights are also present in the external relations of the EU to which this thesis is dedicated. The EU has longstanding exclusive competences on international commerce and takes part in the evolution and modification of international trade law. Yet, through the new Article 21 of the Treaty on the European Union, economic and social rights could emerge as building blocks of the external action of the EU. Article 21 innovates considerably from previous versions of EU Treaties stating that among the guiding principles of EU international relations there are the indivisibility of human rights and the principles of equality and solidarity.[7] How economic and social rights will find a place in the turbulent and often divisive outcome of EU external action is not clarified by the Treaty or by subsequent policy papers EU institutions produced. However, in recent years, the intention of giving EU external action a human face emerged unmistakably and it is well demonstrated by the attempt to include socio-economic rights in EU external trade policies. From the beginning of 2000 the EU Commission produced a wealth of inspiring documents advocating a model of global and regional governance taking stock of the historically weaker part of the international human

[6] Food and Agriculture Organization, *The state of food insecurity in the World 2011* (FAO 2011).

[7] For an analysis of the meaning of solidarity in the EU legal order see S Sciarra, "Notions of solidarity in times of economic uncertainty" (2010) 39 Industrial Law Journal 223.

rights system.[8] These documents make explicit reference to the necessity of reconciling trade and social objectives such as the promotion of food security in vulnerable countries. The inclusion of economic and social rights in EU external action is an ambitious and challenging objective because these rights are grounded on some of the weakest EU competences.[9] Internally, the EU is already falling short of the expectations of authoritative human rights observers. In fact, recent rulings of the European Court of Justice have shown how the relationship between strong EU competences, especially trade in goods and services, and social rights, can be problematic.[10]

Recent developments in EU external policies present an invaluable opportunity to bring forward the debate on the relationship between international trade law and the right to food by assessing how the EU strikes a balance between the two in its foreign relations. The post-Lisbon EU external agenda is dominated by the Global Europe Strategy, a plan aimed to the conclusion of free trade agreements with numerous countries mainly from the developing world.[11] The fact that free trade agreements are concluded with some of the poorest countries of the world lacking in

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[8] On food security see European Commission, "A EU policy framework to assist developing countries in addressing food security challenges" (Communication) COM (2010) 127 final; European Commission, "A thematic strategy for food security. Advancing the food security agenda to achieve the MDGs" (Communication) COM(2006) 21 final. On the Right to Health see European Commission, "The EU role in Global Health" (Communication) COM(2010) 128 final; European Commission, "EU Strategy for Action on the Crisis in Human Resources for Health in Developing Countries" (Communication) COM(2005) 642 final; European Commission, "A European Programme for Action to Confront HIV/AIDS, Malaria and Tubercolosis through External Action (2007-2011)" (Communication) COM(2005) 179 final.

[9] See T Novitz, "Legal Power and Normative Sources in the Field of Social Policy: Normative Power Europe at Work?, in J Orbie (ed), *Europe's Global Role: External Policies of the European Union* (Ashgate 2008); M Cremona, "Economic and Social Rights in EU External Policy" in F Bestagno (ed), *I diritti economici sociali e culturali* (Vita e Pensiero 2009) and C Barnard, "The External Dimension of Community Social Policy: The Ugly Duckling of External Relation" in Nicolas Emiliou and David O'Keeffe (eds), *The European Union and World Trade Law: After the Gatt Uruguay Round* (John Wiley & Sons 1996).

[10] In particular, see Case C-438/05 *International Transport Workers' Federation v Viking Line ABP* [2007] ECR I-10779 and Case C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareforbundet [2007] ECR I-11767. For comments on the tension between economic and social rights see P Syrpis and T Novitz, "Economic and social rights in conflict: Political and judicial approaches to their reconciliation" (2008) 33 European Law Review 411; A Davies, "One step forward, two steps back? The Viking and Laval cases in the ECJ" (2008) 37 Industrial Law Journal 126 and S Sciarra "Viking and Laval: Collective Labour Rights and Market Freedoms in the Enlarged EU", (2008) Cambridge Yearbook of European Law.

[11] See European Commission, "Report on progress achieved on the Global Europe strategy, 2006-2010" (Staff working document) SEC(2010) 1268/2 final; European Commission, "Trade as a driver of prosperity" (Staff Working Document) SEC(2010) 1268 final; European Commission, "Global Europe: Competing in the World" (Communication) SEC(2006) 567 final.

social safety nets and in the capacity to absorb trade shocks makes new free trade agreements an ideal place to study the issue because of the disparity of the relationship. In fact, the difference in economic capacity and dimension between the EU and vulnerable developing countries has the consequence that the agreements have minimal impact on EU food security. To the contrary, for small or vulnerable developing countries additional imports of food from the EU or the obligation to export certain products to Europe may have consequences on their capacity to ensure food security at domestic level. We will see for instance the case of Caribbean countries that under the free trade agreement with the EU lost the prerogative to regulate their export of food to the EU. This is so even if their contribution to the global food market is minimal and this limits their capacity of intervention during food shortages at domestic level. In the same vein countries in sub-Saharan Africa are obliged under the new treaties to import food from the EU even when this affects vulnerable domestic farmers.

This thesis looks at the details of seven treaties where the imbalance of the relationship is particularly evident, to assess to what extent the EU and its partner countries protected the right to food from the deficiencies of the international food market. From this thesis it will emerge that notwithstanding the new external competences acquired with the Lisbon Treaty, the right to food plays a very limited role when the EU concludes agreements regulating the trade of food with vulnerable countries.

2. Objective of the thesis

The relationship between international trade and the right to food in the external relations of the EU is a vast area of research involving institutional aspects of the EU as well as the study of the obligations that WTO law and international human rights law impose on the EU and its Member States. This thesis delves into the subject by constructing an analytical model to assess the extent to which the EU considers the right to food when concluding a free trade agreement with a group of countries vulnerable to food shortages. The analytical model is then applied to the case studies of the free trade agreements the EU concluded in the Caribbean and sub-Saharan Africa. These recent free trade agreements are included in the Global Europe Strategy and involve states that for their social and economic characteristics are exposed to hunger and malnutrition.

The four chapters preceding the case studies look at the relationship between international trade and the right to food from the perspectives of human rights law, the international food market, EU law and WTO law. The analytical model built in these chapters is then used to demonstrate that (1) the free trade agreements between the EU and developing countries place legal constraints on the capacity of vulnerable countries to realise the right to food and (2) that this outcome is mainly a policy choice of the parties to the free trade agreements independent from the constraints of WTO law.

As recurring global food crises demonstrated the international food market is extremely instable and changing market conditions have direct consequences on the

realisation of the right to food around the world. Negative effects on the right to food are particularly evident in countries with no safety nets and with scarce domestic production of food. The first statement of this thesis is based on the premise that since the international food market influences the realisation of the right to food especially in vulnerable countries it is a human rights duty of states to avoid that market failures negatively affect the realisation of the right. This premise is grounded on the normative content of the right to food as defined in the International Covenant on Economic Social and Cultural Rights and its interpretive documents. The Covenant in fact provides that countries have a duty to intervene to protect individuals whenever market conditions affect their fundamental economic and social rights. As clarified by the Committee this duty applies to changes of the international food market and especially to global food crisis as well as domestic crisis requiring modifications of the import or export policies of food. The research claim is proved showing that the free trade agreements increase the legal constraints on the trade instruments that countries can use to defend their citizens from the instability of the international food market or domestic food crisis. In certain cases the free trade agreement goes as far as forbidding the intervention of Caribbean and sub-Saharan countries at the occurrence of food shortages on their territory. For instance, with the free trade agreements Caribbean and sub-Saharan countries lost the capacity to limit their food export to the EU even in the case of lack of food on their territory.

The second objective of the thesis is identifying if the constraints that the free trade agreements pose on the realisation of the right to food are a consequence of WTO law or rather a free choice of the parties to the agreements. In fact, WTO law regulates the conclusion of free trade agreements limiting the policy space of the EU and its partners. In particular, WTO law imposes that by definition trade agreements have the main objective to eliminate import and export barriers between the participating countries. These rules apply also to the clauses in free trade agreements regulating the import and export of food. This means that WTO law might have obliged the EU and its partners in developing countries to limit the capacity of intervention of vulnerable states even this can affect the realisation of the right to food. To identify if this was the case for each clause on the import and export of food of the free trade agreements placing legal constraints on the realisation of the right to food the thesis clarifies if WTO law would have allowed a different outcome. When this is the case the EU and its partners in the developing world could have concluded free trade agreements more in line with the normative content of the right to food. To the contrary, when the new constraints are a consequence of WTO law the free trade agreements manifest the human rights deficiencies of this international organisation. From the thesis it will emerge that since often a different outcome of the trade negotiations was possible a reform of the EU external trade policy is required in order to make it more supportive of the realisation of the human right to food. At the same time, with regard to several trade policies relevant for the realisation of the right to food a different outcome is possible only through an amendment of WTO law.

3. Thesis outline

The thesis is composed of 7 chapters plus this introduction. Chapter 2 contains the analysis of the normative content of the human right to food on the basis of the

International Covenant on Economic, Social and Cultural Rights and its interpretive instruments. The objective of the chapter is identifying if the normative content of the right to food contains duties that are applicable to the transnational trade of food and its regulation. From the Chapter it emerges that the international dimension of the right to food is an essential complement to domestic strategies working toward the fulfilment of the right. In particular, the chapter finds that countries have the duty to ensure that the international food market does not disrupt the realisation of the right to food. This also means that the parties to the Covenant have the obligation to take the human right to food into account when providing the legal infrastructure to international trade of food through the conclusion of trade agreements.

Building on this result Chapter 3 introduces the main features of the international food market and highlights the most relevant inadequacies of the present system for the realisation of the right to food. The objective of chapter 3 is clarifying the content of the human rights duties identified in chapter 2 applying them to the present structure of the international food market. We do this by explaining the main failures of the international food market observed during recent decades and identifying the principal categories of countries and individuals that in the present configuration of the international food market remain vulnerable to food shortages. Through this analysis Chapter 3 defines the policy setting within which the EU external action takes place and identifies some priorities to reconcile the international food market and the realisation of the right to food. The chapter concludes that the EU, to contribute to the realisation of the right to food, should work towards the solution of the market failures of the present system and on the inclusion and protection of the countries and individuals which remain extremely exposed to food insecurity within the so-called global market.

Chapter 4 is dedicated to the institutional dimension of EU external trade and human rights policies. The EU is a complex institution and the exercise of its external competences requires the use of the procedures regulated by the Treaty on the European Union and the Treaty on the Functioning of the European Union. This means that the pursuit of the objectives identified in Chapter 3 is possible only if the EU has the competences and the procedures to pursue them. For this reason Chapter 4 clarifies how the EU contributes to the evolution and modification of international trade law and what are the policies and the procedures to be followed to conclude international trade agreements. The chapter also identifies the legal basis in EU treaties for an external action of the EU in the realm of international trade that also pays attention to the pursuit of the human right to food. The chapter shows that the EU is well aware of the limits of the international food market and of international trade law with regard to the pursuit of food security in vulnerable countries. In particular, the EU developed a specific policy that is dedicated to the inclusion of development objectives, including food security, in its external trade policy. The policy isolates specific aspects of international trade law that need to be modified in order to make it fully supportive of food security. If this policy is put in practice in the WTO and through the conclusion of free trade agreements the EU could be a driving force in the reconciliation between the regulation of international trade of food and the realisation of the human right to food.

If the EU aims to contribute to the realisation of the right to food through its external trade policy it must do so duly respecting existing legal obligations that the EU and its trading partners have under the law of the WTO. In fact, the WTO governs the external action of the EU in the realm of trade and places limits on what the EU can do vis-à-vis its trade partners, including countries vulnerable to food shortages. For this reason Chapter 5 assesses the multilateral rules on the import and export of food from the perspective of the right to food. The chapter defines the policy space that WTO law left to countries to include the promotion of food security within the objectives of the negotiations of international trade treaties. The chapter takes into account specific trade instruments (import tariffs and quotas, safeguards, export restrictions) contained in the General Agreement on Tariffs and Trade and the WTO Agreement on Agriculture. In addition, Chapter 5 considers the rules regulating the conclusion of free trade agreements between WTO members exposing the limits of WTO law with regard to realisation of human right to food and clarifying the legal space left to states to intervene.

Chapter 6 and Chapter 7 provide the case studies of the EU-Caribbean free trade agreement and of the six free trade agreements the EU concluded so far with sub-Saharan Africa. The two chapters contain the demonstration of the two research claims. In order to demonstrate that the free trade agreements between the EU and developing countries limit the capacity of Caribbean countries to realise the right to food, the chapters identify specific trade clauses that reduce the capacity of intervention of vulnerable countries at the occurrence of food shortages due to market instability or natural disasters. Doing so the case studies demonstrate that even if the EU has a policy dedicated to the promotion of food security through modifications of international trade law the policy does not produce results in practice. In fact, the free trade agreements considered in Chapter 6 and Chapter 7 increase the vulnerability of Caribbean and sub-Saharan countries to food shortages. In addition, the case studies make it clear if the clauses limiting the capacity of developing countries to realise the right to food are a policy decision of the parties to the trade agreement or rather a consequence of WTO law. Doing so the thesis separates the cases in which the EU could promote a regulation of international trade of food more supportive of the realisation of the right to food by modifying its external action from the cases in which an amendment of WTO law would be necessary. From Chapter 6 and chapter 7 emerge that the EU-Caribbean trade agreement and the six free trade agreements between the EU and sub-Saharan countries do not solve any of the human rights inadequacies of WTO law and often create new challenges for the realisation of the right to food.

The thesis concludes with the analysis of the reasons responsible for such an outcome. These include the lack of institutional mechanisms to include food security objectives across EU external policies and the involvement of private interest groups in all the stages of the conclusion of free trade agreements with vulnerable countries. The thesis then calls for a reform of the external trade policy of the EU and the utilisation of human rights strategies such as human rights mainstreaming to make it fully supportive of the realisation of the right to food.

CHAPTER 2: THE RIGHT TO FOOD IN INTERNATIONAL LAW

1. Introduction

The right to food received expressed recognition for the first time in Article 25 of the Universal Declaration of Human Rights which states that "everyone has the right to a standard of living adequate for the health and well being of himself and of his family including food…".[12] However, the right remained mainly aspirational until the 70's when, in the wake of one of the most disruptive world food crisis of the century, it gained the attention of the international community. Legal and economic doctrine followed suit and in the last twenty years of the twentieth century studies on how to solve the problems of hunger and malnutrition flourished across social sciences. The work of Amartya Sen on poverty and famines[13] in economics and the seminal legal analysis provided by Asbjorn Eide[14] and Philip Alston[15] laid the foundations for what is today a well-structured social right with a defined and rich normative content.

This chapter elucidates the normative content of the right to food and how this can be applied to the negotiations of free trade agreements. The main argument of this chapter is that the normative content of the right to food requires governments to take the right into account when concluding trade agreements with third countries. In particular governments have the duty to take into account the effects of trade agreements not just in respect of their own populations but also in respect of the populations of their trading partners and the international community at large. The argument carried on in this chapter is based on the International Covenant of Economic Social and Cultural Rights, the international convention including the most articulate recognition of the right to food. This chapter is divided in four sections. The first section introduces the right on the basis of the. The second part identifies the

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[12] Universal Declaration of Human Rights, Article 25, available at <www.un.org/en/documents/udhr/> accessed 2 May 2013.

[13] A Sen, *Poverty and Famines: an Essay on Entitlement and Deprivation* (Oxford University Press 1983); A Sen and Jean Drèze, *Hunger and Public Action* (Clarendon Press 1989); A Sen, *The Political Economy of Hunger* (Clarendon Press 1990); A Sen, "On the Approach to Planning Against Hunger" (1977) 58 FAO Review on Agriculture and Development; A Sen, *Hunger and Entitlement* (World Institute of Development Economics Research, 1987); A Sen, "Food and freedom" (1989) 17 World Development; A Sen, "Food Entitlement and Economic Chains" in L F Newman (ed), *Hunger in History* (Blackwell 1990); A Sen, "Entitlements and the Chinese Famine" (1990) 15 Food Policy; A Sen, "Public Action to Remedy Hunger" (1991) 16 International Science Reviews.

[14] See, A Eide, "Human rights requirements to social and economic development: The case of the right to food and nutrition rights" in Uwe Kracht and Manfred Schulz (eds), *Food security and nutrition* (St Martin Press, 1999) at 329; A Eide, "The Right to Adequate Standard of Living Including the Right to Food" in *Economic, Social and Cultural Rights – A textbook* (Martinus Nijhoff Publishers, 2001); A Eide, "The Importance of Economic and Social Rights in the Age of Globalization" in Wenche Barth Elde and Uwe Kracht (eds), *Food and Human Rights in Development* (Intersentia 2005).

[15] P Alston and K Tomasevski (eds), *The Right to Food* (Martinus Nijhoff Publishers 1984).

legal obligations stemming from the right that states have to respect in order to comply with the Covenant. The third part illustrates the external dimension of such duties namely the legal obligations stemming from the right to food that states have to respect in their international relations. This section argues that even if the Committee on Economic Social and Cultural Rights has not identified specific duties to be applied in the context of trade negotiations the right to food states cannot disregard the right when concluding trade agreements. The final section then exemplifies how human rights duties can be applied in the context of free trade agreements. The chapter concludes with a reflection on the role that such duties can play whenever countries conclude trade agreements having the explicit objective of supporting economic and social developments of third countries as it is the case of recent trade agreements concluded by the EU with developing countries.

2. The content of the right to food

(a) Introduction

This section presents the content of the right to food emerging from the International Covenant on Economic Social and Cultural Rights and its interpretive documents. The Covenant is the main international convention including the right and the point of reference of the legal doctrine on the subject. This section presents the two main concepts underpinning the right: availability of food and accessibility of food. Even if the two concepts were developed taking into account domestic food policies they constitute the theoretical underpinning for all internal and external policies that can have an impact on the realisation of the right to food.

(b) Article 11 of the International Covenant on Economic Social and Cultural Rights

The entry into force of the International Covenant on Economic Social and Cultural Rights was a watershed in the process of recognition of the right to food at international level. The Covenant in fact included, in its Article 11, a more elaborated version of the right:

> 1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.
>
> 2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need[16]

The establishment of the Committee on Economic Social and Cultural Rights allowed, from 1985, the elaboration of the right to food through General Comments and Statements and the analysis of Reports from state parties. It also gave the Committee a central role in international law for the interpretation and clarification of social rights in general and the right to food in particular. This role was strengthened by the 2008 Optional Protocol which granted individual complaints access to the Committee.[17]

Even if Article 11 points out several duties as well as key issues for the realisation of the right it does not clarify its content and was prone to reductive interpretations that could go until the point of nullifying the essence of the right. As a consequence, in 1999 the Committee on Economic Social and Cultural Rights felt the need to point out the main normative elements of the right so providing a framework of analysis for the law and policies of state parties. This was done in General Comment 12 [18] a detailed piece of legal analysis completely dedicated to the normative content of the human right to food.

The utility of having the right to food codified in international law is ensuring that the international community works towards a world where every person has a certain amount of food and water allowing her or him to live healthily, take part in society and have access to the other rights to which they are entitled. The right to food is in fact one of those enabling rights which are necessary for the individual to become an active member of society taking part in economic relationships. To fulfil this objective General Comment 12 clarifies that the individual needs to have both "physical and economic access to adequate food or means for its procurement"[19] In

[16] Article 11, International Covenant on Economic Social and Cultural Rights, General Assembly Resolution 2200A 1966, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx> accessed 5 April 2013.

[17] Optional Protocol on the International Covenant on Economic Social and Cultural Rights, General Assembly Adopted Resolution A/RES/63/117, 10 December 2008.

[18] Committee on Economic, Social and Cultural Rights, Substantive issues arising in the implementation of the International Covenant on Economic Social and Cultural Rights: General Comment 12 The right to adequate food (art.11), E/C. 12/1999/5

[19] Ibid, Paragraph 6

the view of the Committee the concept of adequacy changes on the basis of prevailing social, economic, cultural, climatic, ecological conditions but cannot be interpreted narrowly as the notion of a "minimum package of calories, proteins or other specific nutrients".[20] This means, for instance, that *de minimis* approaches to food issues, which are satisfied when a threshold of calories per head is reached, do not realise the right to food in its entirety. The individual is able to realise his right to food if food is available and accessible.

(c) Availability of food

Availability means that the market or the individual produce food in a quantity and quality "sufficient to satisfy the dietary needs…free of adverse substances, and acceptable within a given culture". General Comment 12 defines the three concepts:

> "the diet as a whole contains a mix of nutrients for physical and mental growth, development and maintenance, and physical activity that are in compliance with human physiological needs at all stages throughout the life cycle and according to gender and occupation... *Free from adverse substances* sets requirements for food safety and for a range of protective measures by both public and private means to prevent contamination of foodstuffs through adulteration and/or through bad environmental hygiene or inappropriate handling at different stages throughout the food chain; care must also be taken to identify and avoid or destroy naturally occurring toxins. *Cultural or consumer acceptability* takes into account, as far as possible, perceived non nutrient-based values attached to food and food consumption and informed consumer concerns regarding the nature of accessible food supplies."[21]

The qualification of availability through the three elements of *dietary needs*, *cultural and consumer acceptability* and *freedom from adverse substances* ensure that the interpretation of the right does not leave room for superficial realisation. Examples are countries, regions or households where the minimum calories intake per day is respected but there are considerable micronutrients deficiencies. The requirements also highlight the health dimension of the right. A diet which is based on unhealthy food or does not provide the full range of nutrients necessary to the human body to develop does not comply with the right even if it provides an adequate amount of calories. Through its cultural dimension the right to food guarantees that food is not used as an instrument of abuse and it is respectful of national and local traditions. In synthesis, human rights approaches to food policies shift the attention from quantity only towards quantity and quality of food. If food does not incorporate

[20] Ibid

[21] Ibid, Paragraphs 9, 10, 11, 12.

the characteristics above it does not fulfil human dignity and, as a consequence, the requirement of availability is not respected.

(d) Accessibility of food

As Amartya Sen notices in his seminal Development as Freedom, some of the worst famines of history occurred when at the same time the silos were full of grain and production of food in excess.[22] The 2008 global food crisis does not distinguish itself in this respect. Economic evidence shows in fact that violations of the right to food are often a problem of accessibility and not of availability. General Comment 12 addresses this issue stating that food has to be accessible to the individual both physically and economically. The two elements are both crucial for the definition of the right. Besides, the necessity of granting the individual physical and economic access to foodstuffs opens up a space for interactions of the right with numerous areas of international and domestic law. Whenever a piece of legislation or an international treaty can interfere with the access to food of vulnerable groups or its affordability the right to food is called into question. The Committee on Economic Social and Cultural Rights defined that physical accessibility requires that:

> "adequate food must be accessible to everyone, including physically vulnerable individuals, such as infants and young children, elderly people, the physically disabled, the terminally ill and persons with persistent medical problems, including the mentally ill. Victims of natural disasters, people living in disaster-prone areas and other specially disadvantaged groups may need special attention and sometimes priority consideration with respect to accessibility of food. A particular vulnerability is that of many indigenous population groups whose access to their ancestral lands may be threatened."[23]

Not every individual has the same risk to be exposed to human rights violations. Inequality, poverty and absence of safety nets make some persons more vulnerable than others. Vulnerable categories are different in different societies and depend on culture, customs, economic resources and the structure of the productive system. There are however some groups that are statistically more likely to have their basic rights violated and for them access to food is more difficult. General Comment 12 mentions women, children, elderly and ill people and indigenous populations. To them, international law affords extra protection. Article 3 and 2(2) of the Covenant contain the obligation not to discriminate on the basis of sex for access to economic social and cultural rights.

The second dimension of accessibility to food is economic accessibility. Economic accessibility is as important as physical accessibility but the protection of

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[22] See *supra* ft 13.

[23] General Comment 12, Paragraph 13.

economically vulnerable groups has been technically more difficult and politically more controversial. The Committee on Economic Social and Cultural Rights defines economic accessibility as following:

> "Economic accessibility implies that personal or household financial costs associated with the acquisition of food for an adequate diet should be at a level such that the attainment and satisfaction of other basic needs are not threatened or compromised. Economic accessibility applies to any acquisition pattern or entitlement through which people procure their food and is a measure of the extent to which it is satisfactory for the enjoyment of the right to adequate food. Socially vulnerable groups such as landless persons and other particularly impoverished segments of the population may need attention through special programmes."[24]

The concept of economic accessibility encapsulates the idea that the purchase power of every person shall be enough to provide adequate food for themselves and for their dependents. This includes the labour dimension of the right to food and in particular the issue of minimum wage. It also refers to the problems of access to land by rural populations and marginalisation of segments of society trapped in poverty spirals. Examples are the millions of people living in cities without access to any source of income nor to instruments of personal development like education or health care. Whenever poverty or lack of purchase power make food inaccessible to the individual, economic accessibility is not granted and the right to food is violated. This means that price fluctuations and more generally the realm of trade and investment are not alien to the right to food as long as they do not interfere with economic accessibility.

The concept of economic accessibility clarifies that the market economy is perfectly compatible with the right to food as long as the commodification of food and water does not prevent access to these resources. A fitting example is the process of privatisation of water resources ongoing in numerous countries. Privatisation is not incompatible *a priori* with the right to food, but when privatisation is followed by the exclusion to water supply of certain individuals the right to food is violated.

3. State duties

(a) Introduction

The normative content of the right to food defines the objective to be achieved by the Members of the Covenant. However, Article 11 is a substantive article which does not deal with the steps that countries are obliged to take in order to respect the right. In

[24] General Comment 12, Paragraph 13.

fact, the Covenant makes it explicit that most of economic and social rights should be realised progressively through sustained efforts by the Members of Covenant. This section identifies the duties that countries have to respect in order to be considered as working towards the realisation of the right to food. These duties have been elaborated as duties of governments towards their citizens and the studies on their application concentrate mostly on domestic policies. However, such duties provide the theoretical foundations on the basis of which the Committee on Economic Social and Cultural Rights developed external human rights duties applicable to relationships between states. Accordingly, this section sets the scene for the discussion of external human rights duties carried out in the next two sections.

Human rights doctrine in order to assess the realisation of economic and social rights identified several duties that states have to respect. This analytical framework distinguishes between the duty to respect, the duty to provide and the duty to fulfil economic and social rights. When Asbjorn Eide wrote his seminal report on the right to food[25] in the eighties he used these three kinds of obligations on state parties to define the content of the right. The Committee on Economic Social and Cultural Rights elaborated on this theoretical structure in its General Comment 3[26] putting Eide's duties in the context of the obligations stemming from the Covenant.

(b) Duty to respect

The duty to respect incorporates the vertical dimension of the right to food sheltering the content of the right in the relationship between the state and its citizens. In social rights theory the duty to respect includes mainly obligations of restraint even if in some cases the duty to respect has been conceptualised as incorporating positive duties as well.[27] The duty to respect is central to the argument human rights lawyers make that the realisation of economic and social rights does not concern only state intervention and expensive budget allocations. This traditional vision of social rights as bundles of positive duties was demolished by recent legal doctrine[28] and, at least in certain countries, has been disavowed by the case law. A recent study of more than 2000 cases from all around the world showed that courts apply the duty to respect

[25] A Eiden, "The right to adequate food and to be free from hunger", United Nations Economic and Social Council

[26] Committee on Economic Social and Cultural Rights, General Comment 3, The nature of States obligations (Art.2, par.1).

[27] S Fredman, *Human Rights Transformed* (Oxford University Press 2008) 205.

[28] Ibid; A Pillay, "Economic and social rights adjudication: developing principles of judicial restraint in South Africa and the United Kingdom" (2013) Public Law 599; C Harvey and E Rooney, "Integrating human rights? Socio-economic rights and budget analysis" (2010) 3 European Human Rights Law Review 266; A Nolan and M Dutschke, "Article 2(1) ICESCR and state parties' obligations: whither the budget?" (2010) 3 European Human Rights Law Review 280; S Fredman, "New horizons: incorporating socio-economic rights in a British Bill of Rights" (2010) Public Law 297.

following specific normative patterns.[29] These comprise the duty not to interfere with self-organising efforts or key resources of individuals or associations and the duty not to deny access by an individual to an existing government programme or employment opportunity. Another dimension, sometimes considered a violation of the duty to fulfil, is the removal of legislative instruments granting or facilitating the realisation of the right. The study refers to removal of legislative protection (for instance the repealing of legislation incorporating the right) or the elimination of government programmes that enable individuals to realise their social rights. [30] In order to distinguish the cases state intervention has positive effects on the realisation of the right from the cases it creates new obstacles, the concept of retrogressive measure emerged both in legal practice and doctrine.[31]

The Committee on Economic Social and Cultural Rights interpreted the right to food affirming the complex nature of this right as containing both duties of restraint and positive duties. In order to respect the right to food the state should not act in ways that make access to food more difficult or disrupt existing access to food or instruments for its procurement.[32] In particular, a state should not repeal or suspend legislation necessary for the continued enjoyment of the right nor deny access to food to particular individuals or groups. In the same vein, a state should not adopt legislation or policies which are manifestly incompatible with pre-existing legal obligations relating to the right to food. When a social policy affecting the right to food is abandoned or its budget reduced the state has the duty to ensure that this does not affect accessibility and availability of food supplies. In internal conflicts or other emergency situations a state cannot prevent access to humanitarian food aid. In extreme scenarios, such as war zones, food cannot be used as a weapon, food embargoes are prohibited and states must not destroy productive resources or impede access for reasons of self-defence. [33]

Among the three core duties the duty to respect is the least represented in the analysis of the country reports sent by state parties to the Committee. A reason for this is that the duty to respect is politically sensitive because a violation of the duty generally implies that the Government of the concerned country was directly involved in the starvation or malnutrition of a part of its population or of the population of a foreign country. Besides, the analysis of the Committee is still focused on the state

[29] M Langford (ed), *Social rights jurisprudence* (Cambridge University Press 2009).

[30]Ibid; On the theory of adjudication of economic and social rights see also J King, *Judging Social Rights* (Cambridge University Press 2012).

[31]See A Muller, "Limitations to and derogations from economic, social and cultural rights" (2009) 9 Human Rights Law Review 557.

[32] Committee on Economic Social and Cultural Rights, General Comment 12: The Right to Adequate Food, E/2004/22 E/C.12/1999/5, paragraph 18

[33] Ibid, paragraph 19

party submission and the party may be more reluctant to show in its report violations of the duty to respect rather than the duty to fulfil. With regard to the duty to fulfil it is often possible to give the impression that the state is working towards the objective whereas this is more difficult when the duty to respect was violated. It is likely that now that individuals can file complaints against state parties the duty to respect will receive more attention. Even if the practice is rare, there are examples of violations of the duty to respect in the analysis of country Reports. [34]

(c) Duty to protect

The duty to protect expresses the horizontal dimension of the right to food. It obliges states to regulate relationships between private parties so that individuals or enterprises are unable to deprive individuals of their access to adequate food. In international human rights law there is no room for claims of private parties against other private parties. As a consequence, making a state accountable for violations that in practice are committed by private actors can be controversial. The duty to protect provides that the state is responsible for regulating private relationships in a way that does not deprive individuals of their social right.

Important issues linked with the duty to protect are the human rights obligations of states during and after the processes of privatisation of natural resources and the regulation of businesses providing services necessary for the realisation of social rights. International human rights law is neutral on the economic system that state parties have to adopt and certainly there is no obligation to maintain certain resources or services public. There is however the duty to make the private ownership of natural resources or the provision of services compatible with the rights contained in the Covenant. This means, in the context of the right to food, that the operations of private actors in sensitive sectors cannot prevent access to food and water of a part of the population. Sensitive sectors are not only the ones directly involved with the production and distribution of food and water but also every other economic sector that can impact on the right to food. For instance, mining and drilling should be conducted in ways which are respectful of the local populations and do not disperse adverse substances in water and food staples. With regard to agriculture and fisheries the development of intensive means of production and the exploitation of marine resources should serve the objective of improving accessibility and availability of food. On this issue a landmark case in India well exemplifies how more efficient systems of production can have the unintended consequence of making food less accessible for some people. In the case, the Supreme Court of India found that export-

[34] See for instance the Report where the Committee, taking into account the respect of social rights in the Russian Federation, noticed that reports indicated that members of military forces received maltreatment including restriction of access to food and water. Committee on Economic Social and Cultural Rights, Report on the thirtieth and thirty-first sessions, E/2004/22 E/C.12/2003/14. An extreme case was the use of food as a weapon by Sudan through the creation of man-made famines in the southern regions of the country. See Committee on Economic Social and Cultural Rights, Report on the twenty-second, twenty-third and twenty-fourth sessions, E/2001/22 E/C.12/2000/21

oriented coastal shrimp farming resulted in loss of subsistence of local populations.[35] On this point General Comment 12 states that even if only states can be accountable for compliance with the Covenant all members of society have responsibilities in the realisation of the right of adequate food and the regulatory environment the state provides should facilitate the implementation of these responsibilities. The duty to protect has received more attention recently because it includes the duty to regulate the activities of multinational corporations so that they do not affect the enjoyment of the right to food. To regulate the issue General Comment 12 proposes a code of conduct agreed between Governments, civil society and private companies. However, under the duty to protect, states parties are obliged to take all appropriate steps to ensure that the activities of private undertakings comply with the right to food. This means that whenever soft regulation is ineffective states should try other instruments.[36]

In its Statements on globalisation[37] and the one on the 2008 global food crisis[38] the Committee offers a more comprehensive criticism of the role played by private actors in the contemporary market economy. The Committee recognises that the diminution of the role of the state, the reliance upon free market and the privatisation and deregulation of activities once considered exclusive domain of the state are of some concern for the implementation of economic, social and cultural rights. Even if these processes are not incompatible with the Covenant there is the need for instituting flanking policies safeguarding the rights it contains. In the statement issued in the occasion of the 2008 world food crisis the Committee urged state parties to introduce regulation on speculation on food staple and avoiding the use of arable land for the production of non-food products such as biofuel. [39]

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[35] Supreme Court of India, *Aquaculture* case.

[36] Committee on Economic Social and Cultural Rights, General Comment 12: The Right to Adequate Food, E/2004/22 E/C.12/1999/5, paragraph 27.

[37] Committee on Economic Social and Cultural Rights, Globalization and its impact on the enjoyment of economic, social and cultural rights, E/1999/22-E/C.12/1998/26.

[38] Committee on Economic Social and Cultural Rights, The World Food Crisis, E/C.12/2008/1.

[39] The Special Rapporteur on the Right to Food has given much attention to the issues related to the duty to protect. Jean Ziegler at first and Olivier de Schutter later on dedicated lengthy reports on the impact of investment and private economic enterprises on the right to food. Even if the documents are not binding they offer the most comprehensive account of the tensions between private action and the right to food. They also demonstrated that the actual procedures of the Committee do not allow sufficient penetration in the intricacies of these tensions.For a summary of the work of Jean Ziegler as Special Rapporteur on the Right to Food see J Ziegler, C Golay, C Mahon and S-A Way, *The Fight for the Right to Food Lessons Learned* (Palgrave MacMillan 2011). See also O de Schutter (ed), *Transnational Corporations and Human Rights* (Hart 2006).

(d) Duty to fulfil

The duty to fulfil is controversial in domestic jurisdictions because it extends considerably the prerogatives of the judiciary to review acts and policies of the executive and legislative powers.[40] For this reason the duty is often considered inacceptable and judges refuse to assess the compatibility of formal acts with social rights on the ground that the values involved in the decision can be weighed only by a political body. The duty to fulfil also receives the criticism of being so vague and empty to be impossible to apply in practice. These arguments have been successfully rebutted on several occasions but thorny problems remain. Key issues are if the duty imposes a timetable for compliance and how to deal with the fact that the realisation of the right requires budget allocations that might not be available or the state might be unwilling to use.[41]

In international law the duty to fulfil is a well-established conceptual device in place since the 80's. The Committee, in General Comment 3 clarified that state parties are subject to the duty to fulfil for every right contained in the Covenant. With regard to the right to food, General Comment 12 requires that every state takes whatever steps are necessary to ensure that everyone is free from hunger and as soon as possible can enjoy the right to adequate food. This obligation has two dimensions. First, under the Covenant, there is the positive duty to "pro-actively engage in activities intended to strengthen people's access to and utilisation of resources and means to ensure their livelihoods, including food security." Second, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right by the means at their disposal, the states have the obligation to provide the right directly.

The two main interpretative issues concerning the duty to fulfil are the same encountered in domestic law: its apparent indeterminacy and the fact that the duty to fulfil allows for progressive realisation of the right. The duty to fulfil is in fact an

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[40] A Nolan, B Porter and M Langford, "The justiciability of social and economic rights: an updated appraisal", Center for Human Rights and Global Justice Working Paper 15, 2007 available at <http://www.chrgj.org/publications/docs/wp/NolanPorterLangford.pdf>; International Commission of Jurists, "Courts and the legal enforcement of economic, social and cultural rights: comparative experiences of justiciability", Human Rights and Rule of Law Series No. 2, available at <http://www.refworld.org/docid/4a7840562.html>; M Langford, "Domestic adjudication on economic social and cultural rights: a socio-legal review" (2009) 11 International Journal on Human Rights 91.

[41] S Fredman, *Human Rights Transformed* (Oxford University Press 2008) 66; J King, "The Justiciability of Resource Allocation" (2007) 2 Modern Law Review 197; A Blyberg, "The case of mislaid allocation: economic and social rights and budget work" (2009) 11 International Journal on Human Rights 123; M Langford, "The justiciability of social rights: from practice to theory" in M Langford (ed), *Social rights jurisprudence: emerging trends in international and comparative law* (Cambridge University Press 2009); K Roach, "The challenges of crafting remedies for violations of socio-economic rights" in M Langford (ed), *Social rights jurisprudence: emerging trends in international and comparative law* (Cambridge University Press 2009).

obligation of result which means that it is necessary to define the standard to be attained to avoid that the obligation becomes void of normative content. General Comment 12 gives an ample description of the content of the right and this is the standard states should aim to attain.[42] Nutritious, culturally acceptable and healthy food should be available and accessible to everyone without discrimination. Other qualifying elements were given in the General Comment on the right to health, a right with an intricate normative content that can be generalised to the right to food. The efforts to realise the right to food have to be effective, participatory and accountable and respect the principle of equality. This means that the state has the duty to make available sufficient quantities of all the determinants of the right to food. In addition, the state has to involve the population in all decision-making processes involving the right to food and in case of violations of the right it has the duty to justify itself showing that all possible efforts have been made. Finally, the state has to grant access to the right to every individual without gender or racial biases and including the poor and the disadvantaged. The Committee went beyond these qualifications suggesting that every state should implement a detailed right to food strategy derived from the normative content of the right. General Comment 12 provides an in-depth explanation of the requirements of the strategy, suggesting the basic elements that a national law implementing the right should have. In case of severe resource constraints, measures should be undertaken to ensure that the right to adequate food is especially fulfilled for vulnerable populations, groups and individuals.

In order to make the duty applicable, it is necessary to qualify the obligations that the state has while it is in the process of realising the right. Article 2 of the Covenant provides that the state has the duty "to take steps" towards the realisation of the right. This does not mean that the right to food is aspirational.[43] The state has to move towards the objective as expeditiously as possible and retrogressive measures are allowed only if carefully considered and fully justified on the basis of all the rights contained in the Covenant. The state can justify its inaction for reasons of budget allocations only demonstrating that "every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations." Even when there are budget constraints the state has to ensure the widest possible enjoyment of the right to food[44] and has to develop instruments and strategies to monitor the level of fulfilment of the right. When a step towards the realisation of the right is taken it cannot constitute a form of discrimination against certain categories.

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[42] Committee on Economic Social and Cultural Rights, General Comment 15: The Right to Adequate Food, E/2004/22 E/C.12/1999/5, paragraph 27.S Leckie, "Violations of Economic Social and Cultural Rights" (1999) Sim Special 20; R Kunnemann, "Violations of the Right to Food" Sim Special 20.

[43] General Comment 3, Paragraph 8

[44] Sandra Fredman, *supra* footnote 27.

4. Extraterritorial dimension of the right to food

(a) Introduction

This thesis concentrates on the relationship between international trade law and the right to food in the context of the external action of the EU. The main argument of the thesis is that in recent trade agreements the EU concluded with countries vulnerable to food shortages the right to food was not taken into account. This section answers the question if the Covenant on Economic Social and Cultural rights imposes human rights duties on states to be respected not towards their citizens but in their international action and towards the citizens of third countries. This issue is central to the debate on the inclusion of the right to food in the external relations of the EU since the EU itself is an expression of the external action of EU Member States which are all Members of the Covenant. Moreover, it is generally accepted in public international law that human rights duties of states apply also to the action of international organisations to which states are parties.[45]

As it will be clarified in Chapter 4, the debate on external human rights duties stemming from the Covenant is only a part of the question if the EU has a duty to take the right to food into account when concluding international agreements with third countries. In fact, human rights obligations on the EU and its Member States might stem from European Union law or cooperation agreements concluded between the EU and countries vulnerable to food shortages.[46] However, the extraterritorial dimension of the Covenant remains crucial since it is today the only international legal source containing an extensive recognition of the right. When the European Union accepts human rights obligations in the international agreements it concludes, the Covenant is the legal instrument to which reference is made to identify the normative content of the right. This section elucidates the state of the art of the doctrine on extraterritorial obligations to realise the right to food. This section shows that even if extraterritorial duties are less developed than domestic ones the Committee on Economic Social and Cultural Rights explicitly recognised their existence.

(b) Extraterritorial duties in the Covenant

The debate on the existence of extraterritorial obligations under the International Covenant on Economic Social and Cultural Rights is a longstanding one. Even if extraterritorial human rights duties remained in the shadow for most of the Twentieth century, with the increase of the effects of globalisation on people and the thickening of supranational regulation the debate gained momentum. In particular, since the late

[45] See A Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2010) 162.

[46] See Chapter 4.

nineties the Committee has become more explicit in stating the existence of international obligations stemming from the Covenant. However, this was done through General Comments and Statements rather than via the reporting mechanisms. States in fact do not have to report on the compliance with the Covenant in their relations with other countries. As Coomans suggests,[47] the Committee introduced basic notions but never clarified the normative content of extraterritorial duties stemming from the Covenant. The international reach of the Covenant is based on Article 2 which provides that every state party has the obligation:

> "…to take steps, individually and through international assistance and cooperation, especially economic and technical...with a view to achieving progressively the full realisation of the rights…"

Articles 22 and 23 imply that the rights contained in the Covenant should be realised also through the action of the United Nations and the provision of technical assistance and regional meetings by state parties. Moreover, the Committee, in General Comment 3, recalled that under Article 55 and 56 of the Charter of the United Nations there is the obligation to cooperate for development. The duty received further attention in the UN Declaration on the Right to Development and the Committee maintains that, to be consistent with international law, the concept of development has to contain also the realisation of economic, social and cultural rights. The Committee also noticed that it is evident that the full realisation of the Covenant will remain unfulfilled and aspirational without "a program of international assistance and cooperation on the part of all states that are in the position to undertake one".[48]

With regard to the general scope of the Covenant there is a debate on if the obligation to cooperate internationally goes beyond official cooperation such as development aid and technical support to comprise also the other situations in which states relate between each other.[49] However, the lacking general legal underpinning of extraterritorial duties in certain areas has been supplemented by explicit recognition by the Committee (as in the case of international trade)[50] or in the international practice of certain countries through the inclusion of human rights clauses in international agreements dealing with other issues. This is what happens for instance in the trade agreements the EU concludes with third countries which always contain a

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[47] F Coomans, "The extraterritorial scope of the international covenant on economic social and cultural rights in the work of the UN Committee on Economic Social and Cultural Rights" (2011) Human Rights Law Review 1.

[48] General Comment 3, paragraph 14.

[49] Skogly argued that "international cooperation and assistance" includes a very wide area of subjects. See S I Skogly, "Right to adequate food: national implementation and extraterritorial obligations" (2007) 11 Max Planck United Nations Yearbook 329.

[50] See next paragraph.

general human rights clause making international human rights law applicable to the treaty in question. [51]

(c) Extraterritorial duties concerning the right to food

In the specific case of the right to food the Committee went beyond the general recognition of the duty to assist and cooperate and suggested that the right to food should be taken into account whenever the external action of the state is relevant for the right. The right to food is in fact one of the few rights in the Covenant that was codified with an intrinsic extraterritorial dimension. Article 11 provides that the right to food should be realized also through "international cooperation" and identifies in the methods of production and distribution critical aspects of the realisation of the right. In addition Article 11 Paragraph 2(b) explicitly recognises that international cooperation should also pay attention to the different needs of food-importing and food-exporting countries. For these reasons, even if the Committee has never been as exhaustive as when defining internal duties it clearly recognised that the obligation to realise the right to food through international action goes well beyond the duty to provide aid and technical assistance.[52] For this reason, the Committee included in General Comment 12 on the Right to Food a section on the duties of states to realise the right through international cooperation. There the Committee defines the duty to consider the relevant effects on the right to food when the state is involved in treaty making:

> "In implementing this commitment, States parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required. States parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due

[51] See Chapter 4.

[52] The explicit recognition of trade as an area of policy making necessary for the realisation of the right to food has a solid economic underpinning. Authoritative economic literature has in fact recognised the limited impact of food aid and development cooperation in general to solve global issues such as hunger and poverty. See P Collier, *The Bottom Billion* (Oxford University Press 2008); D Moyo, *Dead Aid* (Farar, Straus and Giroux 2009); W Easterly, *The white Man's Burden: Why the West's Efforts to Aid the Rest Have Done So Much Ill and So Little Good* (Penguin 2007). In terms of Constitutional Law of the European Union the Lisbon Treaty provided legal underpinning to the inclusion of economic and social rights in external trade policies through Article 21 Paragraph 2 of the Treaty on the European Union. As Chapter 4 will show, additional obligations have been accepted by the EU in the context of its cooperation agreements with countries vulnerable to food shortages, in particular the Lome' Convention and the Cotonou Agreement. Since the late nineties the European Union have included a human rights clause in every trade agreement it concludes. The clause explicitly recognises that trade is not *per-se* an objective of the treaties but an instrument to improve living conditions and human rights in vulnerable countries.

attention and consider the development of further international legal instruments to that end." [53]

The last sentence of the cited paragraph contains the recognition that the special nature of the right to food requires that the Members of the Covenant take the right into account whenever a treaty they are concluding can have an impact on the realisation of the right. This applies to situations where the conclusion of the agreement can impact on the right to food of the citizens of the country as well as when the consequences fall on third country nationals. This is so because the Committee recognises the international dimension of the realisation of the right to food which is detached from domestic policies and takes into account the fact that only through a common international effort the right to food can be realised globally. This conclusion is also supported by the wording of Article 11 which explicitly recognises such international dimension of the realisation of the right to food and mentions economic policies such as trade. In the General Comment the Committee also identified specific situations of international action where the right to food should be taken into account. In particular, the Committee established that states should refrain from food embargoes and more generally from using food as an instrument of political and economic pressure. When food aid is provided, this cannot develop into forms of dependency between the donor and the beneficiary. This means also that food aid should not disrupt local producers and local markets and should aim to the return to self-reliance of the beneficiaries. With regard to military occupation the Committee had occasion to establish that the duties under the Covenant extend to the territories under effective control of the state party.

In conclusion, the Covenant explicitly recognised the existence of international human rights duties which oblige countries to work towards the realisation of economic and social rights through international policies addressed not to their own citizens but to third country nationals or generally to the international community. Undeniably, to which extent this should be done was not always clarified by the Committee, which mentions only certain international policies as examples of areas of international cooperation within which economic and social rights should be respected. However, the approach was more pervasive in the specific case of the right to food where the Committee explicitly recognised that countries should take the right into account when concluding any kind of relevant international agreement. Even if the recognition of external human rights duties with regard to the right to food was extensive the Committee remained very general with regard to the content of such duties especially with regard to sector specific international policies such as trade. This attitude might be explained with the fact that the Committee is attentive not to overstep into areas of international law in which it has not competence or expertise. The absence of detailed human rights duties concerning specific areas of international treaty making should not be considered, however, as a sign that countries have no duty to realise the right to food when concluding international agreements. In fact, the Covenant and the Committee explicitly recognise the existence of external human

[53] General Comment 12, Paragraph 36.

rights duties in particular with regard to the right to food. The specific content of these duties will have to be defined case-by-case taking into account the possible effects of the treaty in question on the realisation of the right to food and the often highly technical details of the area of international law concerned.

The next section exemplifies how this general understanding of external human rights duties could be applied to the realm of trade.

5. Human rights duties in trade negotiations

(a) Introduction

This section starts from the references to trade in the International Covenant on Economic Social and Cultural Rights and its interpretive documents to define the content of some human rights duties related to the right to food in the context of the negotiations of international trade agreements. This section fills the gap left by the International Committee on Economic Social and Cultural Rights which recognised the existence of external human rights duties but did not make their content explicit. This section only defines the general content of human rights duties in the context of trade whereas the analysis of the detailed legislation on the import and export of food and its relationship with the right to food is carried out in Chapter 5 on the WTO. In addition, Chapter 4 will enter in the details of the position developed by the EU and its proposals to include non-trade objectives within international trade negotiations.

(b) The position of the Committee on Economic Social and Cultural Rights

The Committee on Economic Social and Cultural rights mentioned in several General comments the WTO among the international organisations sharing the responsibility of realising social rights suggesting that a human rights approach to trade practices should be adopted. Further clarification stems from the two Statements that the Committee on Economic Social and Cultural Rights made in 1998[54] and 2008,[55] respectively on globalisation and the world food crisis. In the first occasion the Committee asserted that states and international organisations are not exempted from their human rights obligations when acting in the realm of trade, finance and investment. When intervening on the recent global food crisis the Committee included international trade regulation within the "structural causes" which do not allow the realisation of the right to food and unequivocally maintained that addressing such causes is a duty that state parties have under the Covenant. In particular, the

[54] Committee on Economic Social and Cultural Rights, Globalization and its impact on the enjoyment of economic, social and cultural rights, E/1999/22-E/C.12/1998/26.

[55] Committee on Economic Social and Cultural Rights, The World Food Crisis, E/C.12/2008/1

Committee required the re-negotiation of WTO agreements and the preliminary assessment of bilateral and multilateral trade treaties to avoid "conflicts" with human rights obligations.

(c) Human rights duties in the context of trade negotiations

The Committee on Economic Social and Cultural Rights has not competence on international trade and a detailed General Opinion on the relationship between trade law and the right to food would be beyond its mandate. Human rights duties applicable in the context of trade negotiations can however be implied from the general obligations states have under the Covenant and general international law. This section identifies such duties in two ways. First some duties can be implied on the basis of the general obligation under the Covenant to progressively realise the right to food which obliges countries not to adopt any measure that could go against the realisation of the right. Second, this section summarises the result of the informal actions taken by the United Nations Human Rights Council. The United Nations Human Rights Council in fact issued several reports based on the research carried out by its Special Rapporteur on the Right to food which concentrate on international trade law. These documents are today the only existing guidelines on the implementation of the right to food in the context of international trade negotiations.

The obligation to progressively realise the right to food

As explained above, the Members to the Covenant on Economic Social and Cultural Rights have the duty to progressively realise the right to food. This includes the duty not to adopt retrogressive measures, namely measures that can create obstacles with regard to the realisation of the right. The Committee recognised that the regulation of international trade has an impact on the realisation of the right to food since it defines the rules on how food is exchanged internationally. In particular, international trade law regulates the flows of food stocks between areas of the world in excess of food products and areas lacking in food stocks or having serious issues of food insecurity. In doing so international trade law limits the policy space that countries have to intervene on their import and export of food and use international trade to ensure food supply to their citizens. Accordingly, trade law has the capacity to limit the spectrum of policies that a country has at its disposal at the occurrence of food shortages on its territory. For this reason the duty under the Covenant not to adopt retrogressive measures also means that there is a duty to take into account the possibility that certain trade clauses might have an impact on the exercise of domestic human rights duties that countries have under the Covenant. For instance, trade treaties should avoid trade clauses that could leave countries without instruments of last resort at the occurrence of food shortages on their territories.

It follows that when the right to food is taken into account in trade negotiations the finalised version of the treaty should include mechanisms allowing a certain degree of flexibility when the country has to intervene on international flows of food to safeguard the realisation of the right to food on its territory. For instance, as it will be explained in Chapter 5, the law of the WTO includes several clauses that have the specific aim to avoid that excessively rigid regulation could put countries at

risk of food shortages. Whenever countries conclude trade agreements without taking into account that in certain situations the realisation of the right to food might entail the intervention on trade flows they are introducing a norm that has the potential of being retrogressive and limit the realisation of the right in the future. As the Committee clarified in its General Comment 12 human rights duties not imply that countries should avoid trade liberalisation or should not organise international trade of food around the necessity of the market or of economic operators.[56] Human rights duties simply entails that countries should take care that, in the process of building an open international market for food products, the laws they agree on do not put the right to food in danger at the occurrence of food shortages on the territory of a state.

The Reports of the United Nations Human Rights Council

The United Nations Human Rights Council is the organ of the United Nations created by the UN General Assembly to address situations of human rights violations and make recommendations to address them. Since its creation in 2006 the Council developed an expertise on issues of trade and human rights requesting numerous studies on the interplay between these two areas of legislation. The Council also made extensive use of its prerogative to designate Special Rapporteurs on specific human rights issues. With regard to the Right to Food the UN Human Rights Council required the Special Rapporteur on the issue to produce a Report on the inclusion of the right to food in the context of international trade.[57] In addition, the Special Rapporteur concluded a Mission to the WTO in 2008. The Mission was one of the few examples of official dialogue between the WTO and a United Nations body in charge of the realisation of human rights.[58] Within the framework of these activities the Special Rapporteur on the Right to Food proposed several additional human rights duties that states should take into account when negotiating trade agreements.

In the two Reports the Special Rapporteur maintains that states should not accept undertakings under international trade law which would be incompatible with the international human rights framework. The document also provides a wide range of Recommendations having the objective of including the right to food in the context of multilateral trade negotiations. From these proposals several additional duties emerge which accommodate the right to food in the context of trade negotiations. These Recommendations are not binding international law but remain today the only attempt to provide countries with some guidelines on how to respect their human rights duties when they conclude a trade agreement.

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[56] See above Paragraph 3(c).

[57] United Nations Human Rights Council, Guiding principles on human rights assessment of trade and investment agreements, A/HRC/19/59/Add.5.

[58] United Nations Human Rights Council, Report of the Special Rapporteur on the right to food, Olivier De Schutter Mission to the World Trade Organization, A/HRC/10/5/Add.2.

First, the Special Rapporteur maintains that the duty to respect the human right to food prevents countries from entering into trade agreements that would require them to adopt certain measures, such as lowering a tariff or accepting not to intervene on trade flows at the occurrence of food shortages, that would result in an infringement of human rights they have agreed to uphold.[59]

Second, the duty to protect the human right to food means in the context of trade negotiations that countries will not accept treaties precluding from the possibility of controlling private actors whose conduct may lead to violating the human rights of others. For instance, because the trade agreement imposes an excessively high level of protection of foreign investors established on their territory.[60]

Third, the duty to fulfil the right to food would require in the context of trade negotiations that states refrain from concluding trade agreements that will render impossible the adoption of policies that move towards the full realisation of human rights. This requires that the fiscal and economic sustainability of trade agreements be carefully examined. States should refrain from concluding agreements that would affect their public budgets or balance of payments in a way that would impede the full realisation of the right to food making the fulfilment of the right impossible or delayed.[61]

Fourth, the Reports review public international law and maintain that there is a duty for countries having political and economic leverage not to use such leverage or other means of influence at its disposal to require that another State accepts the inclusion in a trade agreement of a provision that prohibits that State from complying with its human rights obligations. The Special Rapporteur goes as far as implying that the exercise of international influence to achieve trade clauses limiting the exercise of human rights duties engages the state exercising such influence in international responsibility. This means, for instance, that if a trade clause prohibits state intervention at the occurrence of a food crisis the country on which the crisis happens violated human rights law when it accepted the prohibition. However, also the trade partner of such country violated human rights law if during the negotiations exercised its influence to achieve the trade clause at issue.[62]

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[59] United Nations Human Rights Council, Guiding principles on human rights assessment of trade and investment agreements, A/HRC/19/59/Add.5, 7

[60] Ibid

[61] Ibid

[62] Ibid

Fifth, the Reports maintain that the conclusion of trade agreements should be preceded by a human rights impact assessment. In the opinion of the Special Rapporteur this is an additional human rights duty stemming from the fact that without such assessment countries remain unaware of the potential impact of the agreement on the realisation of the right. Beside the duty would be grounded on general public international law which imposes to take into account pre-existing international obligations when concluding an international agreements. This would oblige states to take into account any potential conflict between new trade agreements and pre-existing human rights treaties. The assessment would have the explicit task of asking the question if there are clauses of the trade agreement that could create obstacles to the realisation of the right to food. The Reports imply that whenever the human rights assessment identifies certain clauses of the trade agreement which might be problematic in human rights terms, it is a duty of the negotiating countries to take the opinion into account. This could be done for instance providing more flexible legal arrangements with regard to the areas of trade law that might have consequences on the realisation of the right to food.[63]

Finally, the Reports propose that international trade treaties should be subject to periodical revisions taking into account conflicts emerged during the period of implementation between the agreement and the right to food. This duty to monitor the implementation of the trade agreement allows states to identify after the conclusion of the agreement areas of the law which interfere on the realisation of the right. Trade practice in fact shows that the effects of a trade agreement are often unknown until they reach the implementation stage. This is so because the economic models used during the negotiations might not prove accurate when applied to the real world. Accordingly, mechanisms should be created allowing countries to flag situations where a trade agreement is limiting their capacity to intervene in support of food security. The Reports do not suggest that countries should be allowed to derogate their trade obligations whenever there is a problem with the right to food but only propose the creation of administrative mechanism allowing the problem to be taken into account.

In conclusion, the Covenant on Economic Social and Cultural Rights imposes on countries the duty to take the right to food into account during the negotiations of trade agreements. The clarification of the normative prescriptions of such duties would be beyond the mandate of the Committee. However, countries have the obligation under the Covenant to identify case by case the technical legal instruments to take the right to food into account when concluding a trade agreement. In particular countries should avoid the conclusion of trade agreements which limit the capacity of signatory parties of intervening on food shortages on the territory of a state. This duty stems directly from the general duty to progressively realise the right to food of the Covenant. In addition to this, several Reports from the UN Human Rights Council exemplified other ways to protect, respect and fulfil the right to food during the

[63] Ibid

negotiations of trade agreements. Even if these documents are not binding they can provide a blueprint to the Members of the Convention for the discharge of their external human rights duties under the Covenant.

6. Conclusions

The human right to adequate food has a rich normative content providing specific duties that states have to respect in order to progress towards the realisation of the right. With regard to international trade the Committee on Economic Social and Cultural Rights clarified that human rights obligations stemming from the right are applicable to international trade institutions such as the EU. In particular the human right to food obliges countries to avoid that other areas of international law create obstacles to the realisation of the right and this applies also to international trade law and to the treaties regulating transnational trade of food. However, the Committee remained general with regard to the specific transnational duties to be considered in the context of the negotiation and conclusion of international trade agreements. More generally, when the Committee criticises the present international trade system of food products as not contributing to the realisation of the right to food it did not clarify the deficiencies of the present system and the steps to be taken to make the international food market fully supportive of the realisation of the right.

Even if international human rights law does not provide a clear definition of human rights duties in the context of trade negotiations the existing sources clearly recognise that all international law should contribute to the realisation of the right whenever relevant. In addition, the Members of the Covenant have a duty to realise the right to food not only towards their citizens but also towards the international community at large. This recognition allowed the United Nation Human Rights Council to propose several sector specific human rights duties to be respected during trade negotiations. These duties are not binding but provide a first attempt to include human rights during trade negotiations.

The human rights duties emerging from the Covenant on Economic Social and Cultural Rights concern the European Union in three ways. First, the Member States of the European Union are all Members of the Covenant and are bound to work towards the realisation of the right to food through their international action. Since the EU is expression of the international action of EU Member States their human rights obligations reflect on the EU. Accordingly, the external action of the EU is not immune from the human rights obligations emerging from the Covenant. Second, the European Union is one of the few international actors which explicitly recognises a connection between trade and human rights and always includes a human rights clause in the trade agreements it concludes with third countries. Since this clause has the objective to generally apply all existing human rights law to the trade treaty this is an implicit reference to the Covenant on Economic Social and Cultural Rights which is the international legal authority with regard to the right to food. Finally, whenever the EU concludes a trade agreement with countries vulnerable to food shortages the external human rights duties emerging from the Covenant point at the fact that the EU should take into account the consequences of the agreement on such vulnerable states. The official documents presented before the UN Human Rights Council also specify

that a powerful trade actor as the EU should refrain from exercising its influence to achieve trade deals limiting the capacity of vulnerable countries to intervene on domestic food crisis. On this last point it must be observed that the Covenant is not the only source of obligations for the EU in this regard. In fact, as Chapter 4 will clarify, the EU spontaneously subjects itself to numerous extraterritorial duties towards countries vulnerable to food shortages. In addition, whenever the EU concludes a trade deal with a vulnerable country the treaty has the main objective of improving the living conditions and human rights in the vulnerable state. This means that even if the Covenant remains an important source of human rights duties additional obligations stem from EU external policies and the treaties the EU concluded with countries where the human right to food is far to be realised. In fact, Chapter 4 will show that the EU makes very rarely explicit reference to the Covenant and it is developing its own external human rights narrative on the basis of its Treaties and its policies of development cooperation with countries exposed to food shortages.

One of the lessons of the recent food crisis is that the present system of international trade of food periodically fails to support the realisation of the right to food exposing millions of people to hunger and malnutrition. The following chapter provides the overview of the main deficiencies of the present international food market and provides the background for the legal analysis carried out in Chapter 4 which looks at the relationship between the right to food and international trade law from the perspective of the law and policies of the EU. Chapter 5 will then take into account WTO law to identify the limits of the EU external action in the realm of food trade and the main legal issues emerging in WTO with regard to the realisation of the right to food.

CHAPTER 3: REALISING THE RIGHT TO FOOD IN THE GLOBAL FOOD MARKET

1. Introduction

In the face of the tendency of contemporary international policy-making of favouring the integration between national and international food markets, the international dimension of the realisation of the right to food is now an essential complement to domestic strategies working towards the fulfilment of the right.[64] However, even if the International Committee on Economic Social and Cultural Rights stressed the importance of international trade for the realisation of the right to food it did not clarify the mechanisms with which the trade of food between countries links with the fulfilment of the right. It only noticed that in capitalist economies, where the realisation of social rights relies on market forces, the Members of the Covenant have the duty to ensure that market behaviour is not disruptive of the realisation of social rights. In other words, whenever pure market conditions do not guarantee the progressive realisation of a right or disrupt its fulfilment, countries have the duty to identify and implement adequate policies. This can be done through domestic social policies when there are budget allocations available and the state is in the position to provide directly food aid to its citizens. When this is not possible because the country does not have public resources available to cope with the crisis the country will have to intervene trough its trade policies in order to limit the impact of international food prices on their domestic markets.[65] This is particularly so when the countries affected are vulnerable developing countries with limited financial resources to implement public policies to cope with domestic food crisis. In addition, an intervention on the terms of trade of the country might also be required by the fact that instability on the international food market has such a generalised impact on access to food at domestic level that providing food directly to the population would be too expensive.[66]

Any country taking part in international trade negotiations will have to take these shortcomings into account when including clauses which regulate the

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[64] See Chapter 2 for the definition of the right to food in international human rights law and the position of the International Committee on Economic Social and Cultural Rights on globalisation. See footnote 52 for the limits of development policies and food aid for the realisation of the right to food.

[65] See United Nations Economic and Social Commission for Asia and the Pacific, "Insulating Domestic Food Markets from International Price Volatility", available at <http://www.uncapsa.org/LIBRARYJournal_detail.asp?VJournalKey=873>.

[66] Since this thesis concentrates on the right to food and international trade law there is no space to mention the domestic policies that countries can implement to cope with domestic food shortages even when these are caused by the instability of the international food market. For an example of domestic policies that countries can implement se FAO, *Voluntary guidelines to support the realisation of the right to adequate food in the context of national food security* (FAO 2005).

international commerce of food products. This is so because at the same time as countries implement international trade law they also have to cope with the instability of international food markets and protect citizens from extreme market behaviour which could affect their capacity to access adequate amount of food. Accordingly, this chapter introduces the main features of the international food market and highlights the most relevant inadequacies of the present system for the realisation of the right to food. The chapter then concentrates on the role that the EU could play in promoting an international legislation of trade taking stock of these shortcomings. The EU is in fact in a decisive position for its influence on international trade law and its leverage during trade negotiations.

The chapter is divided in four sections. The first section introduces the main failures of the international food market observed during recent decades: price volatility, negative incentives on domestic food production and concentration of market power. The second section highlights why states cannot merely rely on food and development aid to solve the issues and why international trade law is relevant. The third section defines the principal categories of countries that in the present configuration of the global agricultural market remain vulnerable to food shortages. The existence of substantial market failures and the presence of extremely exposed categories are stumbling blocks towards the realisation of the right to food. The fourth section argues that the EU is in a privileged position to promote an international legislation of trade which takes these shortcomings into account. This is so because the EU is one of the most prominent trading blocks and its external trade policy is influential of the outcome of international trade negotiations. Accordingly, whenever the EU concludes a trade agreement with a country vulnerable to hunger and malnutrition it has the leverage and the technical know-how to include clauses attempting to comprise the realisation of the right to food among the objectives of the trade agreement.

2. Market failures

Since the 70's international trade of food gained a new dimension, the quantity of food imported and exported expanded and the variety of food staples included in international exchanges increased. As a consequence, the international food market amplified its influence on domestic policy decisions and on the planning of agricultural production. With regard to the realisation of the right to food, the international market gained a more central position on the capacity of countries and individuals of realising the right. This can be a positive factor as long as the international market contributes to the improvement of living standards of vulnerable categories. The development of a thriving international market of food does not come however, without concerns. In fact, a growing international market of food also means that availability and accessibility of commodities crucial for the realisation of the right to food escape the control of national jurisdictions and become increasingly dependent on the market. In fact, market forces, changing the quantity of food available to each country and its price can considerably influence the amount of people able to realise their basic needs. When this happens, complex economic interactions, often left in the shadow by economic literature, link the supranational dimension of the trade of food with the day-to-day struggle of vulnerable sectors of world society to access basic food staples. In countries with public resources available

the failures of global food markets can be coped with through domestic social policies. However, this is more difficult in developing countries especially when there is limited availability of public resources. In these cases the only response countries have to market deficiencies is the intervention on their import or export of food to attempt to limit the impact of global fluctuations on the domestic food market.

In a perfect world, international markets would always present to each country the ideal conditions for the realisation of the right to food of citizens and would never be disruptive of national food security. Production of food would be stable and up to the task of satisfying everyone's needs and the price of basic food staples steady and not influential on economic accessibility. Decades of empirical observation of market behaviour, however, have demonstrated a different reality where price of food commodities fluctuates continuously for reasons still not well understood, the global food supply is variable, and the global food market proved to be highly unreliable. The emblem of the untrustworthiness of the international food market is the occurrence of global food crises, generally lasting several years, during which the price or quantity of key food commodities gets out of control. In the 70's a major food crisis killed half a million people and caused malnutrition and illness for many more. In 2007 the international price of several key staples spiked causing a step back in the fight against hunger and provoking widespread social unrest. Fluctuations in the price of commodities traded internationally are a common feature of global markets and attempts to artificially set international prices proved ineffective. When unstable markets affect the capacity of the individual to access adequate amount of food the realisation of the right food is impaired. During these market-related food crisis countries are obliged to do their best to safeguard the right to food of their citizens. This can be done through social policies and incentives to domestic agriculture when possible. However, whenever these instruments are not available countries will have to intervene on their import and export of food products to limit the negative impact of the international market on domestic food security.[67]

Because international trade of food grew considerably in the past decades it is common for producers and consumers to be influenced by its behaviour. Producers plan the variety of their products on the basis of their value on the global market and consumers' economic accessibility increasingly relies on the prices set at international level. Overall, integration between transnational commerce of food and domestic markets increased and today the conditions on the global market influence greatly the

[67] On the necessity to use trade policies to cope with food crisis see J Stiglitz and A Charlton, *Fair trade for all* (OUP 2007) 67. For the analysis of the specific trade instruments relevant for domestic food security see Chapter 5. On the limits of food aid and development cooperation to cope with food crisis see footnote 52.

availability and accessibility of food at domestic level.[68] Even if the trust on global markets to satisfy domestic needs augmented, the problem of their reliability has never been properly solved. Agricultural markets remained erratic and unpredictable and in recent decades have constantly failed the task of steadily supporting the realisation of the right to food. Among the shortcomings of the present system three issues are particularly evident and hazardous for the realisation of the right to food: price volatility, negative incentives on domestic food production and concentration of market power.

(a) Price volatility

The price of food is a crucial factor in the realisation of the right to food because it affects the economic access of individuals to adequate amount of food. Accordingly, sudden oscillations of food prices disrupt local markets and make economic access to food more difficult for vulnerable individuals. These happens for both downward and upward price oscillations for different reasons.

Upward oscillations

Agriculture has always been an erratic economic activity with harvest success depending on weather conditions and exceptional events like floods or earthquakes. Though, empirical observation in recent decades has shown that extreme price oscillations on the international market have become more frequent. This market behaviour, called price volatility, has so amplified that it has become an endemic characteristic of global food markets. For instance, during the 2007 food crisis the price of food staples more than doubled in the space of a few months. Economists argue about the causes of this extreme behaviour and reach diverging conclusions. Yet, there is growing agreement that extreme volatility is likely to be the consequence of a multiplicity of factors and transformations that manifested in the second part of the 20th century. First, more integrated markets made events affecting food supply at national level more easily transmissible to the international level. For instance, a flood, an earthquake or simply a bad harvest in countries crucial to support food availability on the international market can cause a critical lack of supply. When this happens, lack of food on the global market provokes food shortages in all the countries relying on it to support their national food security. Second, global warming made the problem of adverse weather conditions and extreme climatic phenomena more generalised and common. The climatic crisis is also causing a range of issues such as desertification and loss of arable land that make agriculture more vulnerable and unpredictable than in the past.[69] Third, food prices are now linked with other

[68] On the relationship between international trade and domestic food security see FAO, *Trade reforms and food security: conceptualizing the linkages* (FAO 2003).

[69] See FAO, *Resilient livelihoods. Disaster risk reduction for food and nutrition security* (2011) available at < http://www.fao.org/docrep/015/i2540e/i2540e00.pdf> accessed 19 February 2012.

economic parameters that might be highly unstable. A major problem in this area is that food prices now react to fluctuations of the cost of oil. This is so because technological development made agriculture more productive but also extremely dependent on machines, especially in countries being major exporters of food.[70] Fourth, several countries implement export control policies limiting the food they make available on international markets. When this is done by major exporters the amount of food available on the market changes significantly and the international price of the food staple fluctuates.[71] Finally, in recent years there has been a growing tendency of marketing financial derivatives based on food commodities. This increasing financialisation of international food markets can have arbitrary consequences, especially when food is captured in speculative bubbles.[72]

Having such unstable international market of food is of great concern for the realisation of the right to food, especially in a time where international policies promote more integration between the domestic market and the international market. Whenever countries or individuals rely too heavily on the international market to feed themselves they are fully exposed to unpredictable fluctuations capable of leaving them without an adequate amount of food from one year to another. When price spikes happen, they impact the economic accessibility of adequate amounts of food. This is particularly so when the spike includes food staples used in the diet of the most vulnerable sections of the population. In the case of the 2007 crisis major consequences for the right to food came from the fact that the price of cereals and rice suffered a substantial increase.

Downward oscillations

The blatant evidence of the effects of price spikes on the right to food should not however lead to the simplistic conclusion that having cheap food available on the international market is always positive. From empirical observations conducted by international organisations in fact emerges an intricate picture where effects of price

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[70] World Bank, *Global Economic Prospects June 2011*, 8, available at < http://siteresources.worldbank.org/INTGEP/Resources/335315-1307471336123/7983902-1307479336019/Full-Report.pdf> accessed 19 February 2012. FAO, *The State of Agricultural Commodity Markets* (2009), 9, available at <ftp://ftp.fao.org/docrep/fao/012/i0854e/i0854e01.pdf> accessed 19 February 2012.

[71] FAO, *Food Export Restriction: Reviews of the 2007-2010 Experience and Consideration for Disciplining Restrictive Measures*, FAO Commodity and Trade Policy Research Working Paper No. 32, available at <http://ictsd.org/downloads/2011/05/sharma-export-restrictions.pdf> accessed 19 February 2012; B Karapinar, "Export Restrictions and the WTO Law: "Regulatory Deficiency" or "Unintended Policy Space", in *World Trade Report* (World Trade Organization 2010).

[72] See ILO, *Investing in food security as a driver to better jobs*, available at <http://www.ilo.org/global/publications/books/WCMS_170026/lang--en/index.htm> accessed 14 December 2011; Olivier De Schutter, *Food Commodities Speculation Food Price Crises*, United Nations Special Rapporteur on the Right to Food Briefing Note 02, available at < http://www.srfood.org/images/stories/pdf/otherdocuments/20102309_briefing_note_02_en_ok.pdf> accessed 19 February 2012.

fluctuations at domestic level vary greatly on the basis of national characteristics and level of development. In particular, empirical studies are consistently showing that downwards oscillations of the price of food or periods of price depression can be as detrimental to food security as price spikes. This is so because the majority of malnourished people are farmers in developing countries having their income dependent on agriculture.[73] When extremely cheap food is available on the international market this vulnerable category can be easily displaced. With their principal source of income falling or disappearing their capacity of affording food for them and their dependents is dangerously at risk.[74] This is particularly so at the occurrence of import surges, a trade phenomenon consisting in the sudden augmentation of imported goods in a certain country.[75]

(b) Negative incentives on domestic food production

For economic operators and countries planning their economic development global agricultural markets are a business opportunity. The economic opportunities offered by transnational commerce of food can be a positive factor for the realisation of the right to food, for instance, when they contribute to elevating the income of vulnerable categories. However, the global market can also incentivise a utilisation of domestic resources that is damaging for the realisation of the right to food. Negative incentives can lead to unintended consequences such as reduced availability and accessibility to basic food staples or increased price volatility. These negative incentives are obstacles to the realisation of the right to food.

International organisations documented that international markets can cause negative consequences on the realisation of the right to food in at least four ways. First, global agricultural markets can promote a use of arable land that is not conducive of the realisation of the right to food. A major example of this problem is the excessive utilisation of arable land to produce cash crops, namely varieties of crops that have high economic value but do not contribute directly to national food security. Empirical cases are the excessive employment of land to develop large-scale cultivations of cocoa, tea, cotton and coffee. This problem became worse when the growing costs of fossil fuels convinced several countries to use a part of arable land to produce biofuel. Such practice diminishes the amount of food produced and makes the price of food staples even more erratic. The development of large plantations of cash crops and the tendency of using land to produce biofuels created imbalances in

[73] FAO, *State of food insecurity in the world 2013* (FAO, 2013)

[74] FAO, *The state of food insecurity in the world*, available at < http://www.fao.org/docrep/014/i2330e/i2330e.pdf> accessed 19 February 2012; FAO, *Agricultural Import Surges in Developing Countries*, available at < http://www.fao.org/docrep/014/i1952e/i1952e.pdf> accessed 19 February 2012.

[75] FAO, *Agricultural import surges in developing countries* (FAO, 2011). For the relationship between import surges and trade instruments see chapter 5.

the distribution of natural resources and shortages of basic food staples even in countries that would be rich of arable land.[76]

Second, because international markets are not easily accessible, in order to profit of the opportunities of international commerce, countries need advanced infrastructures and the capacity to meet global standards. In principle, the desire of marketing products on a global scale is a positive incentive to economic development. The drive towards global markets however, must be handled with care. It can happen in fact that, if domestic necessities are ignored, the creation of these capacities can work against the realisation of the right to food. For instance, empirical studies showed that several developing countries invested too heavily on infrastructures to link national food production with international markets rather than connecting remote areas of the countries with cities. This conduct favoured the exclusion of a part of domestic farmers from food production chains threatening their basic income.[77]

Third, the international food market can incentivise the export of food to third countries even when its national consumption would be fundamental for national food security.[78] This process has been observed in numerous developing countries where basic food staples have been used as export commodities towards high value markets in the developed world. This mechanism can go as far as changing traditional diets when local products become over-expensive export commodities. For instance, the International Labour Organisation observed that in Bolivia quinoa, one the foundations of the local diet, became largely unaffordable when it turned into a major export commodity.[79]

Finally, global food markets can create incentives not to develop national means of production of food. This happens especially in periods when there is cheap food available on the global market. Relying on food imports, countries can underestimate the necessity of producing their own food supply and building up their own food stocks. The United Nations and especially the Food and Agriculture Organization collected a great deal of evidence on this problem.[80] In fact, because between the 1990 and 2005 food prices have been relatively stable and low, numerous countries started relying more heavily on food imports. Economic incentives towards the dismantling of national food production had evident consequences on several

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[76] J Ziegler, C Golay, C Mahon and S-A Way, *The Fight for the Right to Food* (Palgrave Macmillan 2011).

[77] S Joseph, *Blame it on the WTO? A human rights critique* (OUP 2011) 200; International Assessment of Agricultural Knowledge, Science and Technology for Development, *Agriculture at the Crossroads*, (2009) 459.

[78] See infra 3(b) Agricultural economies.

[79] See ILO, *Investing in food security as a driver to better jobs*, available at <http://www.ilo.org/global/publications/books/WCMS_170026/lang--en/index.htm> accessed 14 December 2011.

[80] For an overview of the issue see FAO, *Trade reforms and food security* (FAO, 2003) 67.

developing countries that reduced national food production and increased significantly food imports.[81] This produced negative consequences on the realisation of the right to food. To start with, numerous farmers had their income severely affected because the global market *de facto* substituted their function in the promotion of domestic food security. In addition, these countries remained extremely exposed to volatility of food prices. Even if such exposure could be counteracted through social policies this was hardly the case for numerous developing countries. When the global market turned the back on them, the distress on the realisation of the right to food was substantial. In fact, this market failure played a significant role in amplifying the effects of the 2007 price spike when numerous countries found themselves suddenly incapable of sustaining the food import bill. When the global market puts wrong incentives on food production, public policies are needed to support the realisation of the right to food.

(c) Concentration of market power[82]

In international food markets the distribution of market power is highly uneven. Accordingly, very few countries have the capacity of influencing the behaviour of the market through their trade policies. These powerful countries live side by side with a plethora of states with little or no market power. At the same time, the absence of sound competition policies at international level allowed the rise of powerful private actors that captured substantial shares of the international market of commodities that are key for the realisation of the right to food. These companies have great influence on how food is produced, traded and retailed. Having a global market that should serve every country and individual but that can be influenced by a few public and private actors certainly creates challenges for the realisation of the right to food. The EU is in a privileged position to tackle these challenges being the first trader of food in the world and a powerful actor in the WTO. Because this research concentrates mainly on public international law the following section leaves aside the problem of multinational corporations and concentrates on states.[83]

Exports

The lion's share of the international food exports goes to developed countries and transitional economies with a distinct prominence of the EU, the United States, Brazil,

[81] See infra 3(c) Net-food importing countries

[82] This section elaborates the 2011 data of the World Trade Organisation on import and export of food products. The raw data used for this section is available at World Trade Organisation, International Trade Statistics 2011, Food < http://www.wto.org/english/res_e/statis_e/its2011_e/its11_merch_trade_product_e.htm>

[83] Even from a public law perspective, there is the problem of powerful private actors being able to guide the external action of states. For this timely debate, that certainly touches the European Union, we refer the reader to the relevant literature. See, for instance, R B Hall and T J Biersteker (eds), *The Emergence of Private Authority in Global Governance* (CUP 2002).

China and Canada in commodities crucial for food security. In terms of aggregate share of world exports, these five countries produce 55% of food commodities exchanged internationally.[84] The EU and the US are the world-leading exporters providing around 17% of the food available on the international market each.[85] Brazil, Canada and Argentina together with other 16 countries account for around the 30% of world agricultural exports. This group of major exporters is known as the Cairns Group from the name of the international organisation they created to pursue their common interests. The rest of the world provide only the 14% of the food exchanged internationally. In fact, around 170 countries together generate less external trade of food than the EU or the US alone. The contribution to the residual 14% is in itself highly uneven and numerous developing countries give little or no contribution to the global food market.

Each commodity that is traded internationally has a different sensitivity in terms of realisation of the right to food depending on its content of nutrients, its affordability and its presence in domestic diets. The Food and Agriculture Organization identified a selected basket of basic staple food that is particularly important to ensure food security. Taking into account this basket of fundamental foodstuffs it appears evident that concentration of economic power remains high and generally within the same group of countries that dominate the aggregate ranking. To provide some relevant examples, only nine countries provide 82% of world exports of wheat, with the US, Canada and the EU being, by far, the leading exporters.[86] Only six countries provide 84% of rice available on the global market. In fact, Thailand alone accounts for one fourth of world supplies and Vietnam for 18%. Only four countries control 30% of exports of dairy products including milk with the EU being the world leader with its 14% share. The market of meat has similar levels of concentration with the EU, the US and the Cairns Group being the main exporters. Because certain crops such as sugar, cocoa and tropical fruit cannot grow in temperate countries, in these markets the balance of power changes and tropical and equatorial countries have established themselves as major exporters. However, market concentration remains very high across the board with a small number of southern countries maintaining a firm grip on global markets. Still, it is common that the trade of processed food utilising such raw commodities confirms the general rule, and the EU, the US, China and the Cairns Group are the major exporters.

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[84] World Trade Organization, International Trade Statistics 2011, Food, available at <http://www.wto.org/english/res_e/statis_e/its2011_e/its11_merch_trade_product_e.htm>This figure does not count intra-EU trade. When the export of EU countries is considered independently, around the 90% of food traded internationally comes from EU countries, the US, China and the Cairns Group. Intra-EU exports of food account for the 43% of all international exports.

[85] Brazil follows with around the 9%, whereas China and Canada provide around the 6%. The other countries reaching one per cent of global market share are Thailand, Indonesia, Australia, Malaysia, Mexico, India, Russia, New Zealand and Chile.

[86] Australia, Russia, Argentina, Kazakhstan and Ukraine follows.

Another significant factor is the variety of food commodities exported. Whereas leading exporters in the developed world trade a very extended range of products including both raw and processed food, minor players often concentrate on fewer export commodities. In particular, countries with no processing industries export only raw fruit and vegetables, often to more advanced countries, especially the EU, the US, China and the Cairns Group. The EU is the world leader in terms of variety of food exported being able to produce and export virtually every temperate product and processed food. Even among the Cairns Group, it is evident that the exports of less influential members are much less differentiated and certain countries tend to emerge as world leading exporters only for certain products.

Imports

The structure of international imports of food shows a concentration of market power comparable to that of exports. Fifteen countries import 80% of the food traded internationally with the EU and the US alone importing around 15% each. In fact, the EU, the US, Canada, China, Japan and Russia together capture almost 60% of the food available on the market. The rest of the countries having above 1% of share of world imports are either developed countries, emerging economies or developing countries with elevated purchase power such as the United Arab Emirates. [87] Population and need does not necessarily reflect in more food purchased on the global market. For instance, the total value of food India imported in 2009 was the same as that of Hong Kong and lower than that of Saudi Arabia.

With regard to single foodstuffs the setting is more complex and depends on national characteristics, the variety and quantity of food produced at domestic level and the principal diet of the country. As a general tendency, import of basic food staples is less concentrated than the aggregate trend. In particular, there is a wide group of developing countries that relies heavily on imports of basic foodstuffs to satisfy their domestic necessities. [88] Among developed countries, Japan has been traditionally an exception having a considerable food deficit for geographical reasons. Accordingly, Japan and the EU that are the major importers of wheat count for 1% of world imports.[89] The import of cereals is more polarised with the EU, the US and Canada being the largest importers in terms of value. Looking at the quantity, however, numerous low-income countries such as Eritrea, Palestine, Namibia, Kenya and Haiti appear among the top 20 importers. Considering more expensive products such as meat and dairy the import trends are more similar to the aggregate values. For instance, the EU and Japan import respectively around the 10% of poultry meat available on the market followed by Russia, China and Saudi Arabia. For other meat products and for milk and dairy the top 15 importers are generally the same countries

[87] Mexico 3%, Korea 3%, Saudi Arabia 2%, Hong Kong, India, United Arab Emirates, Malaysia and Switzerland 1.7%, Australia 1.5%.

[88] See *infra* 3(c) Net-food importing countries.

[89] Other major importers are Algeria, Egypt, Nigeria, Morocco, Iraq, the US, Mexico, India, Korea, Turkey and the Philippines.

as the global trend. Their position in the ranking adjusts depending on national needs and domestic production.

The scenario changes dramatically taking into account products that cannot be grown in temperate countries such as sugar, bananas, cocoa and coffee. In these cases the EU is by far the biggest importer and maintains significant distance even on the US. For instance, the International Coffee Organisation reports that the EU imports 65% of the raw coffee available on the international market and the US 20%. In fact, four countries import more than the 90% of the green coffee traded across borders. In the same vein, only four countries import almost 80% of bananas, with the EU alone importing around 40%. This trend applies virtually to every tropical and equatorial crop including raw sugar in which case the EU is by far the major importer.

Observations

If the international food market were perfect no country would have the power to influence the price of the commodities exchanged, there would not be information asymmetries and every country would have the same technologies. The structure of the global food market shows however that very few actors dominate the system. This handful of countries can change the price of commodities, own the best technologies and are in a better position to interpret the behaviour of the market.

With regard to export of food, the market is highly fragmented with very few countries having enough productive capacity to support world consumption and the vast majority of states being scarcely productive and in a position of substantial marginalisation. In particular, the EU and the US dominate the scene and are in fierce competition between each other. These two countries increasingly fear the rising antagonism of emerging economies, in particular Brazil and China. There is then a sort of second division of players that have lower capacity of influencing the market of food or emerge as leading exporters only for certain commodities. These countries are much less influential on their own, but, if they coordinate their policies, they become almost as significant as the major global players. This category includes the Cairns Group and a few other countries. The rest of the countries have very little or no trade influence at global level. This state of things has the consequence that the countries that depend on the international market to feed themselves depend, in fact, on the handful of states that provide food to the global market. Accordingly, modifications of export policies or of the quantity of food produced in major exporters can affect heavily their capacity of realising the right to food. For instance, during the 2007 food crisis the decision of several major players of limiting their exports exacerbated the scarcity of food in importing countries. In the same vein, it has been observed that amendments to the EU Common Agricultural Policy have

wide consequences on food security all around the world and especially in countries dependent on the global market.[90]

Concentration of imports also has consequences for the realisation of the right to food. In fact, major importers have great influence on the revenues of countries exporting food staples. This influence increases whenever the exporting country has a scarcely differentiated economy based mainly on the export of agricultural goods.[91] This is often the case with regard to equatorial and tropical staples produced in developing countries with scarce manufacturing capacities. In this case the income of the exporting country is highly dependent on their capacity of having access to the market of major importers. As a consequence, changes of import policies of major players can heavily affect the income of producers in export countries. The coffee and banana markets are perfect examples of this mechanism. If the EU imports 65% of coffee beans and 40% of bananas it is evident that every country relying on coffee exports as a source of income is extremely dependent on the EU import policy. In addition, the ways major importers behave on the market can influence the availability of food and its price. For instance, the EU and the US requiring more food from international markets means less availability on a global scale.

3. Limits of development aid and domestic policies

To the imperfections of the international food market countries can react through domestic policies such as incentives to domestic food production or social safety nets. In addition, vulnerable countries can rely on the development aid from third countries to support the realisation of the right to food on their territory. This section elucidates why even if these instruments remain a viable solution in case of market instability they are not sufficient to ensure the realisation of the right to food in the absence of a comprehensive approach to international policies which also includes international trade law. This is for four reasons that have been clearly identified in economic literature.

First, the impact of development aid on the solutions of the longstanding problems of certain vulnerable states such as hunger and malnutrition has been contested. Several prominent economists in fact investigated the reasons why the efforts of Western countries to aid developing countries produced so little results especially in sub-Saharan Africa. Recent studies argue that development aid to vulnerable countries is of limited use to cope with hunger and malnutrition on the long term. In particular, Paul Collier[92] and William Easterly[93] argue that development

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[90] See J Mersing, "How to Phase Out Rich Country Agricultural Subsidies Without Increasing Hunger in the Developing World" in O De Schutter and K Y Cordes (eds), *Accounting for Hunger* (Hart 2012).

[91] See *infra* 3(b) Agricultural economies.

[92] P Collier, *The Bottom Billion* (OUP, 2008) 45.

aid is very difficult to allocate and that the empirical studies on the effects of development aid on the fifty most vulnerable countries of the world in recent decades show that few results were obtained in the absence of sound policy making in the areas of trade and economic development. Other authors such as Dambisa Moyo[94] go as far as arguing that development aid makes vulnerable countries dependent from wealthier economies and traps them in a spiral of "corruption, market distortions and further poverty".[95] Even in the case of international interventions to cope with major food crisis there is no evidence in economic literature that development aid is on the long term an effective instrument to cope with hunger and malnutrition.[96]

Second, through development aid wealthy countries transfer economic resources to vulnerable states. However, the amount of wealth redistributed through development aid is limited if compared to the effects on wealth distribution of international trade.[97] In fact, international trade agreements can affect the share of wealth that each country gather from trade liberalisation. The United Nations Development Report calculated in 1997 that from the conclusion of the last round of WTO negotiations, the Uruguay Round, sub-Saharan Africa lost around $1.2 billion per year.[98] In the same vein, Joseph Stiglitz computed that the 70% of the welfare gains produced by the trade agreements concluded in the Uruguay Round went to developed countries and the large majority of the gains achieved by developing countries were collected by large states such as Brazil.[99] Other analysis estimated that 48 Least Developed Countries lost around $600 million per year as a consequence of the Uruguay Round.[100] For these reasons if a trade agreement does not take into account the weaknesses of vulnerable countries and does not include specific clauses to support their participation in the international trade system the consequences are that most of the wealth created goes to more advanced economies which are equipped to compete on the international scene. Whenever trade treaties produce the negative effects described by Stilgitz and the United Nations Report, the impact of

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[93] W Easterly, *The White Man Burden* (OUP, 2009), 2.

[94]D Moyo, *Dead aid* (Farrar, Straus and Giroux), 65.

[95] See C B Barrett and D G Maxwell, *Food Aid After Fifty Years* (2005, Routledge), 89.

[96] W Easterly and T Pfutze, "Where does the money go? Best and worst practices in foreign aid" (2008) 22 Journal of Economic Perspectives 29; R C Riddel, "Does Foreign Aid Really Work?" (OUP, 2007) 145.

[97] W S Grimes, "International trade law: wealth distribution, free trade, and competition law" (2011) Southwestern Journal of International Law 65.

[98] United Nations Development Program, *Human Development Report 1997: Human Development to Eradicate Poverty* (OUP 1997).

[99] J Stiglitz, *Making globalization work* (Penguin Books 2006) 77.

[100] J Stiglitz and Andrew Charlton, *Fair Trade for All* (OUP 2005) 47.

development aid becomes very limited. For instance, it has been calculated that the amount of wealth African developing countries lost in the aftermath of the Uruguay Round has been three times more than the total amount of development aid they received.[101] For these reasons, without a holistic approach to global governance which includes trade regulation among the policies to cope with hunger and malnutrition development aid remains of limited use.

Third, domestic policies to intervene at the occurrence of instability of the international food market require public resources that might not be available especially in vulnerable countries. In addition, the organisation of domestic policies to cope with food shortages require complex administrative organisation that might not be available in vulnerable countries where the Government has limited control of the territory. In the absence of public funding to design domestic social policies in vulnerable countries the only instrument of state intervention are trade policies.[102] In fact, intervening on the import or export of food from third countries vulnerable states can interfere on the quantity and price of food on their territory. This can be done for instance limiting the export of food to third countries so that domestic food production is directed towards the domestic market. When market instability affects domestic producers countries can raise temporary trade barriers so that vulnerable farmers do not suffer from the competition of more advanced economies.[103]

Finally, international trade treaties have an impact on public revenues. This is so because trade treaties always include limits on the amount of taxes that vulnerable states can impose on the import and export of goods. However, substituting trade revenues with alternative instruments of domestic taxation is not a straightforward process in developing countries, and recent research highlights that alternative instruments of taxation could be too expensive in low-income countries.[104] This is so because in states with a weak administrative apparatus, it is more effective levying trade taxes than enforcing a domestic tax. A study of the International Monetary Fund, for instance, examining loss of trade revenues between 1975 and 2000 provided evidence that high-income countries recovered them straightforwardly, middle-income countries recouped only 35–55% of revenues whereas low-income countries recovered 30% for each lost dollar at best.[105] Accordingly, whenever international trade law does not take into account its impact on public revenues it affects the

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[101] Ibid On the benefits and limits of international aid to fight poverty and hunger see P Collier, *The bottom billion* (Oxford University Press 2008); D Moyo, *Dead Aid* (Farrar, Strauss and Giroux 2009); William Easterly, *The white man's burden* (OUP 2007).

[102] Joseph Stiglitz makes the example of the use of temporary import barriers to cope with international market instability. See J Stiglitz, *Making globalization work*, 66.

[103] On the relationship between food crisis and trade barriers see chapter 5.

[104] H-J Chang, *Bad Samaritans* (Bloomsbury Press 2008) 69.

[105] T Baunsgaard and M Keen, *Trade Revenue and (or?) Trade Liberalization*, International Monetary Fund Working Paper WP/05/112 (International Monetary Fund 2005).

capacity of vulnerable states to implement food security policies.

In conclusion, economic literature identified a clear connection between international trade law and food security in vulnerable countries. This is so because vulnerable states have often limited public resources to organize domestic policies to directly provide emergency food relief. In this situation there are limited alternatives to the intervention on the import and export of food to insulate the domestic market and protect vulnerable producers and citizens. In addition, international treaties limit the capacity of countries to use international trade as a source of public revenues making it more difficult to gather the resources to intervene domestically to realise the right to food. Economic literature also demonstrated that development aid is not an alternative to sound economic and trade policies since its effectiveness has never been demonstrated and several prominent economists go as far as arguing that development aid is a particularly ineffective instrument to cope with poverty and malnutrition. This is so also because international trade has a major impact on the distribution of wealth among countries and the amount of development aid gathered by the international community cannot compete with the economic consequences at domestic level of the redistribution of wealth caused by international trade.

4. Vulnerable categories

As shown in Chapter 2 international human rights law identifies several categories (i.e. indigenous people, women, children) that are more exposed than others to violations of the right to food. Accordingly, human rights law provides a set of international conventions and declarations aiming specifically to their protection. Human rights conventions derive the vulnerability of these categories from their position in society, their exposure to abuses of power or the fact that they are minorities. From the analysis above emerges a different kind of vulnerability to human rights violations originating from the place certain countries and individuals have in the global market. In fact, the persistence of price volatility, the existence of wrong incentives and elevated market concentration make certain categories more exposed to food shortages than others. The following section defines the categories of countries that are more likely to be adversely affected by the failures of the international food market.

(a) Developing countries

Even if violations of the human right to food happen in every country, hunger and malnutrition are extremely polarised in certain areas of the world. The amount of hungry people in developed countries is minimal if compared with Africa, South-East Asia and South America. In 2010, of 925 million undernourished people 19 million live in developed countries, 37 million in the Near East and North Africa, 53 millions in Latin America and the Caribbean, 239 million in Sub-Saharan Africa and 578

million in Asia and the Pacific.[106] Endemic poverty, lack of advanced technology and marginalisation from global trade are all factors that contribute to the particular exposure of these areas of the world to food shortages. Developing countries tend to have less efficient social safety nets and resources to spend in the realisation of the right to food on their territory. Often, their administration is less effective at identifying cases of violations of the right to food and intervening through adequate policies. In addition, developing countries, with only the exception of a few transitional economies, have no influence on the international food market and their citizens have less purchasing power than their counterparts in the developed world. The productivity of their farmers is also lower and a part of these countries is characterized by economies based on subsistence agriculture. Lack of resources often means that the state finds it more difficult to intervene to boost production, differentiation and productivity so that subsidisation programmes are more difficult to implement. Finally, with few exceptions, developing countries have a shortage of know-how in the economics and law of international trade that make them less able to interpret global shifts and react accordingly.

These elements mean that the majority of developing countries are less fit to cope with international competition and more exposed to the deficiencies of the international food market. Accordingly, the negative effect of price volatility is more evident across the developing world than in developed countries with price spikes directly affecting the economic accessibility to an adequate amount of food. Lack of solid economic planning means that wrong incentives coming from the global market are more effective in shaping national food production. For instance, there is evidence that numerous developing countries in recent decades specialised excessively in crops needed on the international market and did not prioritise food security.[107] Moreover, because global food export is concentrated in the hands of a few exporters, mainly developed countries or transitional economies, the majority of developing countries are exposed to their market power. In addition, because the majority of developing countries are found in tropical and equatorial areas they are often dependent on the import policies of major importers of key crops such as sugar, cocoa, coffee and tropical fruit.

Developing countries are the large majority of states in the world and the group is extremely various. The World Bank divides countries between *low-income* economies, *middle-income* economies and *high-income* economies. All *low-income* and *middle-income* economies can be defined as developing and are certainly exposed to the problems described above. In fact, also numerous countries classified as *high-income economies* can be considered as developing in the sense that they still have substantial economic deficiencies. In terms of realisation of the right to food, even several Members of the Organisation for Economic Co-operation and Development

[106] See FAO, "Global hunger declining but still unacceptably high", available at < http://www.fao.org/docrep/012/al390e/al390e00.pdf> accessed 13 December 2011.

[107] FAO, *Trade reforms and food security* (2003).

have a part of the population endemically exposed to insufficient access to adequate amount of food. For instance, Mexico contains more malnourished people than all Western Europe. Among developing countries, there are some categories that are certainly more vulnerable than others. These include least-developed countries and small island developing states. Least-developed countries are a group of around 50 countries having extremely low per-capita income and particularly fragile economies. Often these countries rely on subsistence agriculture and are very exposed to hunger and malnutrition. Small island developing states are countries that because of their geographical location and small size are more easily marginalised from global markets. These countries are also more prone to economic and natural shocks beyond their control. This category includes the vast majority of Caribbean states and numerous small islands in the Pacific Ocean.

(b) Agricultural economies

A large majority of countries or regions never developed substantial manufacturing capacity. In these areas, agriculture is the main source of employment and the instrument to gain economic accessibility to adequate amount of food. Even in numerous transitional economies, a large part of the population still relies on agriculture to survive. This is especially so because in rural societies agriculture not only provides the means of subsistence but also is an embryonic form of welfare. Well functioning local agricultural markets provide rural populations with the necessary income to realise their right to food and give a crucial contribution to the realisation of other fundamental rights.[108] The economy of these countries is often fragile and unproductive. Frequently, these countries have scarcely differentiated national economies relying heavily on the cultivation of a small variety of crops or food staples. As a consequence, they are highly vulnerable to changing market conditions affecting their limited means of subsistence. In particular, agricultural economies are vulnerable to changes of import and export policies of influential countries. It is also common that in these countries, rural areas are marginalised from domestic economy and contain the majority of malnourished and hungry people. The Food and Agriculture Organization reports that of 900 million of undernourished people in the world,[109] 70% are farmers or landless labourers that are too poor to access adequate amount of food. Accordingly, in agricultural economies the realisation of the right to food requires the improvement of the living conditions of local farmers and support to improve their productivity and integration in the market and society.

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[108] On the link between food security, employment and social safety nets see ILO, *Investing in food security as a driver to better jobs*, available at <http://www.ilo.org/global/publications/books/WCMS_170026/lang--en/index.htm> accessed 14 December 2011.

[109] See O de Schutter, "Mission to the WTO", Human Rights Council, A/HRC/10/5/Add.2 and Millennium Project, *Halving Hunger: It Can be Done, Summary Version of the Report of the Task Force on Hunger* (The Earth Institute at Columbia University 2005) 6.

(c) Net-food importing countries

A net-food importer is a country whose value of imported food is higher than its value of exported food in a given period of time. Every country can be a net-food importer even if developed countries tend to avoid this condition considering it a weakness in their relationships with third countries. In the case of the EU, when the EU Commission identifies a food deficit, the Common Agricultural Policy and the external trade policy are activated in order to re-establish a surplus. Defensive mechanisms are much weaker across the developing world and food deficits lead more directly to food crises at domestic level. Accordingly, when countries already vulnerable to food shortages become also net-food importers they find themselves heavily dependent on international markets to satisfy their food security necessities. For this reason, the WTO and the Food and Agriculture Organization recognise that net-food importing developing countries are particularly susceptible to domestic food crises. It is acknowledged that between the 1990s and 2005 low prices of food on the global market favoured the excessive reliance of numerous countries in the developing world and had the consequence that some of them turned into net-food importers. For this reason, it is very common today for developing countries to be also net-food importers.[110] The WTO Committee on Agriculture produces every year an updated list of net-food importing countries on the basis of statistical evidence provided by its members. The list represents a binding recognition of net-food importers applicable to the realm of WTO law.[111] Recently, the Food and Agriculture Organization created a more efficient index of vulnerable countries that takes into account both income and import necessities. This system allowed the identification of a list of low-income-food-deficit-countries with a very high level of vulnerability to food insecurity. The list exposes countries that normally do not figure in international rankings such as India and Egypt.

5. The role of the European Union

The previous sections showed that the international food market has some deficiencies which can affect the realisation of the right to food at domestic level.

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[110]A study conducted in 1999 showed that 105 out of 148 developing countries are net food importers and two fifth are net agricultural food importers. See F Ng and M A Aksoy, "Who Are Net-food Importing Countries?" World Bank Policy Research Working Paper 4457; A A Gurkan, Ke Balcombe and A Prakash, "Food import bills: experiences, factors underpinning changes and policy implications for food security of least developed and net food-importing developing countries", FAO, available at < http://www.fao.org/docrep/006/y5117e/y5117e04.htm> accessed 13 December 2011; United Nations Ministerial Conference of the Least Developed Countries, *Globalization, Agriculture and the Least Developed Countries*, available at < http://www.unohrlls.org/UserFiles/File/LDC%20Documents/Turkey/20June07-Agriculture-Final.pdf> accessed 13 December 2011.

[111] The list is prepared under the framework of the Marrakesh Decision on Measures Concerning the Possible Negative Effects of the Reform Program on Least-Developed and Net-Food Importing Developing Countries. See below, Chapter 5 Paragraph 6.

Market failures can be dealt with through domestic social safety nets but this strategy might not be available in numerous vulnerable countries because of budget constraints. Accordingly, international trade policy plays a central role because only controlling the import and export of food the country affected can insulate its domestic market from the international food market.

This section elucidates the role that the European Union can have as international actor to promote an international legislation of trade which takes into account the realisation of the right to food. This section argues that the EU is in a privileged position to influence international trade negotiations so that the right to food is included within the objectives of international trade treaties. In fact, the central position the EU has in international trade has the consequence that it is very difficult to imagine the inclusion of the right to food in trade negotiations without a proactive role of the EU. This is so for at least two reasons. First the EU is the main importer and exporter of goods of the world which means that during trade negotiations the EU has considerable leverage on other countries. Second, the EU has advanced know-how on both food and trade policy which has developed through years of experience on trade law at domestic level. The technical knowledge the EU developed in more than fifty years of market integration at EU level puts it in a privileged position to propose solutions to include the right to food in international trade law.

4.1. Leverage during trade negotiations

In international relations studies it is uncontested that countries do not have the same bargaining power during trade negotiations. This is true with regard to any kind of trade negotiation be it a multilateral trade round or the negotiations leading to a free trade agreement.[112] This is so for several reasons, including the fact that during trade negotiations the value of the internal market of a country has a weight that can be used to achieve external objectives. In fact, countries with extremely valuable internal markets can influence the wealth and economic development of third countries depending on the degree of access to their market they allow. [113] For this reason the EU, being the biggest market of the world and the first exporter is in a privileged position during trade negotiations especially with regard to developing countries. In fact, a change in the external trade policy of the EU, for instance the decision to change the tariff on the import of a good from a third country, can have severe consequences on the third country. In addition, since the EU imports and exports virtually every product, it has an evident advantage on those countries which export only certain products and have limited import capacity. In fact, the EU has a much wider variety of benefits to offer to its trade partners in exchange of a beneficial

[112] S Meunier and K Nicolaidis, "The European Union ad conflicted trade power" (2006) Journal of European Public Policy 906, 907.

[113] S Meunier, Trading Voices: The European Union in International Commercial Negotiations (Princeton University Press 2007) 166.

commercial deal than the other way round.[114] Again, this is particularly true when the country involved in the negotiations is a vulnerable economy or an agricultural country which has little to offer to the EU in exchange of trade benefits.[115] This state of things made Meunier and Nicolaidis to affirm that 'If there is any area in which the European Union has become an uncontested power in the international system, it is clearly in the field of trade policy'.[116]

In multilateral trade negotiations the influence of the EU had already been acknowledged at the end of the Uruguay Round [117] and today the European Commission maintains that the EU "is the biggest player on the global trading scene"[118] and that "the EU has achieved a strong position by acting together with one voice on the global stage, rather than with 28 separate trade strategies".[119] More generally since the Member States of the EU created the Common Commercial Policy and gave the EU exclusive competence to negotiate international trade agreements, studies flourished in law and political science pointing at the fact that the EU is one of the most influential actors with regard to international trade policies and one of the few trading blocks able to have a clear impact on the development of international trade law.[120] The European Commission is aware of the leverage the EU has during

[114] Meunier and Nicolaidis maintain that "The EU is a formidable power in trade. […] there is little doubt that it has become, after the last enlargement, the biggest trading block in the world. As a result its potential hegemonic power, based on the capacity to grant or withhold access to its internal market, has become as strong as the US." S Meunier and K Nicolaidis, "The European Union as a Trade Power" in Christopher Hill and Michael Smith (eds), *The International Relations of the European Union* (Oxford University Press 2005).

[115] E Jones, *Negotiating Against the Odds: A Guide for Trade Negotiators from Developing Countries*, (Palgrave Macmillan 2013); A Narlikar, *International Trade and Developing Countries* (Routledge 2003); P Drahos, "Four lessons for developing countries from the trade negotiations over access to medicines" (2007) 28 Liverpool Law Review 1; J S Odell (ed), Negotiating Trade Developing Countries in the WTO and Nafta (CUP 2006); J Stiglitz and A Charlton, *Fair trade for all* (OUP 2007) 67.

[116] S Meunier, Trading Voices: The European Union in International Commercial Negotiations, Princeton, (Princeton University Press, 2005), 248.

[117] C Bretherton and J Vogler, *The European Union as a Global Actor* (Routledge, 1999) 46.

[118] European Commission, DG Trade, Official Website, <http://ec.europa.eu/trade/policy/eu-position-in-world-trade>

[119] Ibid

[120] P A Messerlin, "The influence of the EU on the World Trade System" in M Daunton, A Narlikar and R M Stern (eds), *The Oxford Handbook on the World Trade Organization* (OUP 2012); H Zimmermann, "Realist Power Europe? The EU in the Negotiations about China's and Russias's WTO Accession" (2007) 45 Journal of Common Market Studies 813; M Elsig, "The EU's Choice of Regulatory Venues for Trade Negotiations: A Tale of Agency Power?" (2007) 45 Journal of Common Market Studies 927.

international trade negotiations and developed a comprehensive strategy to use trade negotiations to achieve EU economic interests.[121]

4.2. Technical know-how in international trade law

The economic and political leverage the EU has on the evolution of international trade law is strengthened by its unmatched know-how in the field. Having intellectual resources in the area of trade that can be rivalled only by the ones of the United States provides the EU with an additional advantage whenever it is negotiating a trade agreement with a third country. This is so for two reasons. First, as Meunier and Nicolaidis maintained, "more than forty years of experience negotiating international trade agreements on behalf of its members have made the EU an essential player and a powerful bargainer in the multilateral trading system".[122] In particular, the EU Commission is one of the few administrative bodies in the world which has been taking part in the evolution of international trade law since its early stages of the negotiations linked with the General Agreements on Tariffs and Trade. Trough subsequent participation to such negotiations the EU Commission developed a profound understanding of international trade practices that few other governments can match. The advanced know-how the EU Commission achieved is demonstrated by the fact that it is able to litigate international trade disputes without the support of any private law firms. Even powerful global players such as Canada or China are unable to appear before international trade courts through their own administrative bodies and are always represented by a private law firm.[123] The practice of dispute resolution in the WTO Appellate Body provided the Commission with further insights in the application of international trade treaties which most of countries do not have since are represented in trade disputes by a third party. The difference in legal know-how is particularly evident with regard to developing countries which joined the WTO only recently and were not part of the GATT system. In addition, most of developing countries have never brought a case in front of an international trade court which means they completely lack of practice in litigation.[124]

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[121] See for instance the Communication From the Commission, "Trade, Growth and World Affairs" COM (2010) 612 final, 15 where the Commission states that "Trade and trade policy reinforce the EU's international influence and concerted action at EU level should pursue and support EU economic interests in third countries."

[122] S Meunier and K Nicolaidis, "The European Union as a Conflicted Trade Power" (co-authored with Kalypso Nicolaidis), (2006) 13 *Journal of European Public Policy* 906.

[123] See, "Where are China's WTO lawyers?", Forbes, 27/4/2009, available at < http://www.forbes.com/2009/04/27/china-wto-law-business-economy-trade.html> accessed 12 February 2014; EU Commission, The legal service of the European Commission, available at <http://ec.europa.eu/dgs/legal_service/pdf/sj_en.pdf> accessed 12 February 2014.

[124] R Abbott, "Are developing countries deterred from using the WTO dispute settlement system?" ECIPE Working Paper 01/2007.

Second, all the legal instruments negotiated at international level are already present in the legal structure of the European Union. In fact most of the issues of economic integration discussed during trade negotiations were already dealt with by European countries during their own process of regional integration. Being the most advanced customs union of the world gives the EU an edge on all the countries which lack of experience in transnational trade regulation. This means that when the EU Commission negotiates a trade agreement it can also rely on the expertise developed in its internal process of construction of a common European market. This applies to basic trade instruments such as tariffs and other restrictions as well as more specialised domains such as investment law, competition law and intellectual property.

This discrepancy in domestic experience with highly complex economic legislation is again particularly obvious with regard to vulnerable developing countries. These countries in fact are members of regional organisations which have a very basic structure including only a limited amount of market integration.[125] In addition, regional organisations in Africa, the Caribbean and the Pacific lack of the highly specialised administrative bodies of the EU and the level of regional integration achieved does not allow them to speak as a single voice during trade negotiations.[126] Finally, the difference in legal development between the EU and vulnerable countries is so wide that sometimes the legislation discussed in the trade agreement does not even exist at domestic level in the developing countries. This means that the developing country cannot rely on domestic know-how of the legal field when negotiating the agreement and has very little understanding of the consequences of the trade agreement on its domestic legislation. When new legal fields such as competition law or intellectual property are introduced in the developing country through the trade agreement domestic EU law is often used as a blueprint for the clauses of the treaty.[127] In these cases the difference in legal development mean that the developing country relies on domestic EU law to shape its own domestic legislation of the field.

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[125] United Nations Conference on Trade and Development, *Strengthening Regional Economic Integration for Africa's Development* (United Nations, 2009); J F Hornbeck, "CARICOM: Challenges and Opportunities for Caribbean Economic Integration", CRS Report for Congress, available at < http://doczine.com/bigdata/2/1367212967_0be99a5735/crscaricom_challenges_e.pdf > accessed 12 February 2014.

[126] A Jessem and E Rodriguez, "The Caribbean Community: Facing the Challenges of Regional and Global Integration", ITD Occasional Paper 2, available at < http://books.google.be/books?id=W8XcZ_51wbAC&pg=PA42&lpg=PA42&dq=caricom+external+relations&source=bl&ots=ynKEjqVFd3&sig=YmQ_h10ZAW3QIxX8VelyvcyGNaY&hl=en&sa=X&ei=Pn_7UtXoOc2qhQeN3YH4Cg&ved=0CD4Q6AEwBA#v=onepage&q=caricom%20external%20relations&f=false> accessed 12 February 2012.

[127] See for instance the impact of EU competition law on the clauses of trade agreements between the EU and developing countries S Papadopoulos, *The International Dimension of EU Competition Law and Policy* (OUP, 2010) 93.

4.3. The position of vulnerable countries in trade negotiations

European economic and political leverage and technical know-how put vulnerable countries in a particular weak position when negotiating a trade agreement with the EU. This applies to multilateral negotiations where countries are weighed in the negotiation process on the basis of their economic influence and more influential countries take part in the drafting process of the treaties from the very beginning while the other countries join at a later stage.[128] In multilateral negotiations, however, developing countries have the advantage of being the large majority of the countries taking part in the negotiations which means that they can develop strategies to influence the negotiations or at least to provoke a stalemate in case of strong disagreement with more influential international actors such as the EU. In fact, evidence is emerging in literature that the influence of developing countries in WTO negotiations increased since 2001 and that a comprehensive revision of WTO agreements is unlikely without substantial trade benefits being guaranteed to the developing world.[129]

The negotiating strategies that vulnerable countries can utilise in the WTO are not available when the EU negotiates a trade agreement directly with a country or a group of countries having very little economic influence. In this situation the EU is in a position of evident advantage because it is by far the country with the strongest bargaining power. Through this position the EU can have great influence on the results of the agreement and the content of the trade treaty.[130] In fact, even if vulnerable countries still have to sign and ratify the trade deal they might do so only to maintain a commercial relationship with the EU or to avoid that other developing countries gain access to the EU internal market at better conditions. Inequality of bargaining power means that the external trade policies of the EU are a driving force of the evolution of international trade law and that the decisions taken in Brussels by the EU Commission and the other organs of the EU are likely to affect how food is traded anywhere in the world. Accordingly, it is unlikely that the right to food is taken into account during trade negotiations without the EU developing a specific external policy on the issue. As it will showed in Chapter 4, the EU Commission is aware of these responsibilities and developed specific policies to include non-trade objectives in trade negotiations.

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[128] Sarah Joseph, *Blame it on the WTO? A human rights critique* (OUP 2011) 200.

[129] S E Rolland, "Developing countries coalitions at the WTO: in search of legal support (2007) 48 Harvard International Law Journal 483.

[130] As it will be showed in the Chapter on the EU-African trade agreements the influence of the EU can be easily demonstrated looking at the text of the trade agreements. The similiarities in the wording on the agreements in fact suggest that the European Commission develops a draft of the text which is then proposed to the countries involved in the negotiates.

4.4. Conclusions

Economic and intellectual dominance in the field of international trade put the EU in a privileged position to influence the evolution of international trade law. Since the EU has the leverage to affect the global trade agenda its external trade policy is a key factor in defining if and how the right to food is taken into account during trade negotiations. In addition, the EU Commission, being at the edge of legal know-how and research in the field of international trade is one of the few institutions in the world which is in the position of developing new ideas and legal devices to embed the realisation of the right to food in the rules regulating international trade. Even if the EU is not the only influential actor and other countries have economic and political leverage, it is unlikely that the right to food is taken into account during trade negotiations without a proactive stance by the EU. In addition, the EU, as it will be explained in Chapter 4, has an explicit mandate in its founding treaties to take into account human rights in all areas of its external action.

6. Conclusions

As showed in Chapter 2, the International Committee on Economic Social and Cultural Rights suggested that the international trade of food is becoming increasingly influential on the capacity of the Members to the Covenant of realising the right to food of their citizens. Even if the Committee did not substantiate this claim nor identified specific duties to be respected when states act on the international market of food it clarified that whenever the international food market does not support the realisation of the right, countries have the duty to address the deficiencies of the market both through domestic and international policies. Completing this interpretation the chapter showed that the international market of food is persistently failing to reinforce the realisation of the right to food and substantial empirical studies exposed market imperfections that work against the realisation of the right to adequate food. Price volatility, negative incentives on domestic food production and concentration of market power have been identified as central issues that need to be addressed in order to make the international food market more responsive to the necessities of providing food security to everyone.

The analysis proposed also refused the interpretation of the international food market as a global marketplace having the function of delivering adequate food supply to every country. International exchanges of food are extremely unstable, supply is far from steady and affordable to everyone and the excessive reliance on international trade can reduce the capacity of countries to progress in the realisation of the right to food. In addition, the international food market is not really "global" in that it is mainly a form of economic interaction between an small number of players. The failures of the international food market also make certain groups of countries and people prone to violations of the right to food because of the vulnerable position that they occupy in the market. In this respect, the chapter identified developing countries, net-food importing countries and agricultural economies as sectors of world society that require particular attention in international policies addressing the failures of the international food markets. These categories are in fact the ones that suffer

more directly from market failures and are more dependent on the external trade policies of the major economic players.

This situation bears profound consequences for the definition of the role that import and export policies play in the realisation of the right to food. In fact, from the essential features of international agricultural markets defined above it emerges that public intervention in import and export of food can play a crucial role in the realisation of the right to food at domestic level and in third countries. As far as the EU is concerned, the chapter showed that the Union is in the ideal position to address the deficiencies of the system and to promote a conformation of international trade that is more supportive of the realisation of the right to food. In fact, the EU is the pre-eminent trader of food in the world, and has extended technical knowledge in both production and trade of food. Furthermore, the EU has great market and political leverage on third countries and its export and import policies can influence availability of food everywhere in the world. In addition, the EU is a powerful actor in the WTO and it is at the centre of an intricate web of trade and development agreements with numerous vulnerable countries. In fact, the influence of the EU on global food markets is so strong that it is difficult to imagine a full realisation of the right without the support of EU external trade policy.

In particular, from the elements above three general policy priorities emerge. Firstly, the EU should attempt, when possible, at fixing the major failures of international food markets such as price volatility and the presence of negative incentives on domestic food production. Secondly, the EU should facilitate the realisation of the right to food in third countries avoiding that its external action limits the policy space these countries have for the realisation of the right. For instance, avoiding that international obligations forbid policies necessary for the realisation of the right to food at domestic level. Finally, the EU should avoid implementing import and export policies that affect categories of countries and individuals particularly vulnerable to food shortages. This means, for example, avoiding those alterations of its import or export policies that affect vulnerable farmers in developing countries.

Because import and export policies of food are crucial for the realisation of the right to food the EU is expected[131] to use extreme care when it designs its external trade policies or takes part in international law-making affecting the ways in which food is traded, especially when this action has an impact on vulnerable countries. In the development of its external trade action, however, the EU is bound to respect existing legal obligations applicable to the trade of food commodities. In particular, the EU is subjected to the General Agreements on Tariffs and Trade and to the Agreement on Agriculture, two multilateral treaties including norms on the import and export of food. Accordingly, any assessment of the EU external action cannot disregard the fact that the policy space of the EU is limited both in terms of implementation of import and export policies and capacity of negotiating new rules for international trade of food. In consideration of this, Chapter 5 evaluates existing

[131] For an overview of the human rights obligations of the EU see below Chapter 4.

multilateral obligations applicable to import and export of food from the perspective of the realisation of the right to food. The chapter will clarify the legal space that the EU and its trade partners have to regulate international trade of food.

Before entering in the details of WTO law, the next chapter looks at the relationship between trade and the right to food within the institutional dynamics of the external action of the EU.

CHAPTER 4 THE EU EXTERNAL TRADE POLICY AND THE EU EXTERNAL FOOD SECURITY POLICY

1. Introduction

This chapter looks at the relationship between the right to food and international trade law from the perspective of the policies with which the EU intervenes in international trade law. The main purpose of this chapter is clarifying how the EU contributes to the evolution and modification of international trade law and what are the policies that inspire its external action. This is done in three steps. First the chapter presents the institutional dimension of the EU external trade policy explaining the EU organs involved in the policies and the procedures to be followed to conclude international trade agreements. Second, the chapter provides a picture of the policy objectives the EU pursues internationally with regard to the international trade of food. Third, the chapter offers a perspective on the policies the EU put in place to promote food security in vulnerable countries. The chapter concludes with some observations on cross-fertilisation between the policies of the EU aiming to the modification of international trade law and the policies directed to the promotion of food security in third countries through international cooperation.

2. The influence of the EU on international trade law: institutional dimension

As showed in the previous chapter, WTO law provides the multilateral framework of international trade relationships between states. The Organisation has 157 Members out of 198 countries in the world and aspires to universal coverage. Since all major global players and the large majority of developing countries are WTO Members, the organisation is the accepted point of reference for international trade regulation. Beside the WTO, there are around 200 bilateral and plurilateral trade agreements concluded between WTO Members that make the legislation more complex and the bigger picture more difficult to obtain. These agreements remain outside the WTO institutional framework and provide regulation on import and export of food that can go considerably beyond existing multilateral trade law in terms of elimination of trade barriers. Bilateral and plurilateral trade agreements supplement multilateral trade law in the relationship between the parties but create no obligations for other countries.

The EU has a plethora of ways to intervene in this complex body of norms and use them extensively. The Directorate General for External Trade of the European Commission, one of the largest, put in place a broad policy to participate in the evolution of international trade law and promotes its modification alongside precise policy objectives defined by EU institutions. These policies are designed completely at EU level because the Treaty of Lisbon gives EU institutions exclusive competence on external trade. Accordingly, the EU Commission represents Member States during WTO negotiations and negotiates free trade agreements with partner countries. This section introduces four aspects of the EU external trade policy. First, we present the legal basis for the EU external action with regard to international trade law. Second, we explain the procedures and the institutions involved in the design and conclusion

of international trade agreements. Third, we provide a brief reflection on the role of member states during trade negotiations. Finally, the section summarises the ways with which the EU intervenes on international trade law within the WTO framework and outside of it (through free trade agreements).

(a) Competence

Since the Treaty of Rome the international commerce of goods between Members of the European Economic Community (EC) and third states has been a core competence of its institutions. To this crucial but limited prerogative the EC and the EU added additional external powers through treaty amendments and the case law of the European Court of Justice. The treaty of Lisbon represents today the point of arrival of more than 50 years of evolution of EU competences in the realm of external trade and provides the EU with an extensive and exclusive ground to act with regard to international trade regulation.[132] Notably, the Treaty of Lisbon extended the EU exclusive competence much beyond the international trade of goods fully including international trade in services and trade-related issues such as intellectual property and investment.[133] In particular, the Treaty on the Functioning of the European Union includes a general part on EU external relations that provides a list of objectives that the EU should pursue in its relationship with third countries and through its action in international organisations. Article 21 provides several objectives closely linked with the EU international commercial policy. Paragraph (e) of Article 21 provides that the EU shall "encourage the integration of all countries into the world economy including progressive abolition of restrictions on international trade" and paragraph (d) requires that the EU "foster[s] the sustainable economic, social and environmental development of developing countries with the primary aim of eradicating poverty".[134]

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[132]For a complete history of the development of EC and EU eternal powers in the realm of trade see P Eeckout, *External Relations of the European Union* (Oxford University Press 2009) 9-57; M Cremona, 'The Completion of the Internal Market and the Incomplete Commercial Policy of the European Community' (1990) European Law Review 283-297; M Cremona, 'A Policy of Bits and Pieces? The Common Commercial Policy After Nice' (2002) Cambridge Yearbook of European Legal Studies 61-91; M Cremona, "EC External Commercial Policy after Amsterdam: Authority and Interpretation within Interconnected Legal Orders" in JHH Weiler (ed), *Towards a Common Law of International Trade?: The EU, the WTO and the NAFTA* (Oxford University Press 2000); M Cremona, 'Balancing Union and Member State interests: Opinion 1/2008, choice of legal base and the common commercial policy under the Treaty of Lisbon,' (2010) 35 European Law Rev 678-694.

[133] GV Puig and B Al-Haddab, "The common commercial policy after Lisbon: an analysis of the reforms" (2011) 36 European Law Review 289-301. The legal meaning of EC and EU external exclusive competences changed over time. For an analysis of the significance of exclusivity in the common commercial policy see P Koutrakos, *EU International Relations* Law (Hart 2006) 7-134.

[134]On the relationship between the concept of sustainable development and external trade see MW Gehring and M-C Cordonnier-Segger, *Sustainable development in world trade law* (Kluwer Law International 2005); V Barral, "Sustainable development in international law: nature and operation of an evolutive legal norm" (2012) 23 European Journal of International Law 377-400; HG Ruse-Khan, "A real partnership for development? Sustainable development as treaty objective in European economic partnership agreements and beyond" (2010) 13

In addition, paragraph (h) provides that the EU should promote an international system based on multilateral cooperation and good global governance. Within this general framework, Article 3 of the Treaty on the Functioning of the European Union recognises the exclusive competence of the EU for the Common Commercial Policy. The policy is then defined in Articles 206 and 207 of the same Treaty that also outline the procedure for the conclusion of trade agreements with third countries. Article 206 identifies the areas involved in the policy as "changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be take in the event of dumping and subsidies".

As we shall see below, the EU external commercial policy is much more than that and is one of the most complex areas of EU policy making with strands reaching out other policy areas such as development cooperation and human rights promotion. The conclusion of trade agreements with third countries and the participation to the WTO fully reside within the common commercial policy. Accordingly, the planning and execution of the policies directed to the modification of international trade law happen entirely at European level through the mechanisms identified in the two EU Treaties. The following section defines the procedure to be followed for the conclusion of international trade agreements and the EU organs involved.

(b) Procedure and institutions

The European Commission performs a central role in defining European commercial strategies. In particular, the Commission plans ahead future free trade agreements and takes stock of the evolution of international trade law within the WTO framework.[135] Until the Lisbon Treaty, the policymaking on international trade and the conclusion of trade agreements took mainly the form of a dual institutional dialogue between the Commission and the Council with no substantial involvement of the European Parliament.[136] The Lisbon Treaty changed the situation providing the European Parliament with more intrusive powers in the procedure to define and carry out the EU external trade policy. Most notably, after the signature of new trade agreements of which the EU is a party the Lisbon Treaty created a procedure with which the consent of the EU Parliament is required for the conclusion of the agreement. In addition, all domestic EU legislation necessary to implement the agreement has to be adopted through the ordinary co-decision procedure. However, the role of the Parliament

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Journal of International Economic Law 139; C George and C Kirkpatrick, "Trade and development: assessing the impact of trade liberalisation on sustainable development" (2004) 38 Journal of World Trade 441.

[135] The bulk of policy making with regard to international trade happens in the Directorate General for Trade of the European Commission see.

[136] D Kleimann, "Taking stock: EU Common Commercial Policy in the Lisbon Era", Centre for European Policy Studies Working Document No. 345, April 2011.

during negotiations of trade agreements is weakened by the fact that during the negotiations it does not have procedural rights except the one of being informed.

The Treaty on the Functioning of the European Union regulates the procedure to be followed to conclude a trade agreement. The procedure can be divided in three main steps: planning, negotiation and ratification. The European Commission plans the Common Commercial Policy identifying the policy objectives to be pursued and the most suitable legal instruments. Accordingly, the Common Commercial policy is included in the general European strategies as it was the case with the Lisbon Strategy, the renewed Lisbon Strategy and the EU 2020 Strategy.[137] This is so because the Common Commercial Policy is considered a key pillar of the EU action to improve European competitiveness and create new jobs. As it happens in other policy areas, the Commission initiative is conducted in close political consultation with other EU organs, especially the European Council. When the European Commission wants to initiate the negotiations of a trade agreement, it needs to receive the authorisation of the Council, generally through qualified majority voting. The Council also provides the Commission with negotiating directives sketching the priorities to be followed during the negotiations. The European Commission informs the Council of the state of the negotiations and the Council can address directives to the negotiators and designate a special committee in consultation with which negotiations must be conducted. When the final draft of the treaty is ready the Council authorises its signature and conclusion. When the Council provides the authorisation to conclude the trade agreement it has to consult the European Parliament beforehand. In certain cases provided by Article 218 of the TFEU but covering all economic and trade agreements, the Council has to obtain the consent of the Parliament before concluding the treaty. This procedure provides the EU Parliament with a final veto power on the treaty similar to the power to ratify of national parliaments. Notwithstanding its limited role during the negotiations the EU Parliament has to be immediately informed of all the stages of the procedure.[138]

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[137]See Communication from President Barroso to the Spring European Council, "Working together for growth and jobs. A new start for the Lisbon Strategy", COM (2005) 24 final; Communication from the Commission, "Trade Growth and World Affairs. Trade Policy as a core component of the EU's 2020 strategy" COM (2010) 612 final.

[138] The fact that the Parliament acquired the power to reject trade agreements could develop in a more pervasive supervision of the negotiations. Signals of this new attitude of the European Parliament came from the rejection of the Anti-Counterfeiting Agreement and the Resolution requesting a delay of the negotiations for a free trade agreement with Japan. However, Members of the European Parliament are not allowed to take part in the negotiations. See "European Parliament rejects ACTA" available at < http://www.europarl.europa.eu/news/en/pressroom/content/20120703IPR48247/html/European-Parliament-rejects-ACTA> accessed 11 October 2012 and Reuters, "EU Parliament flexes new muscle on Japan free trade deal" available at <http://uk.reuters.com/article/2012/06/13/uk-eu-trade-parliament-idUKBRE85C18420120613> accessed 11 October 2012.

(c) Role of Member States

Since the Common Commercial Policy is an exclusive competence of the EU, Member States lost the prerogative to organise their own independent trade policies and be involved autonomously in the negotiations of trade agreements. In the same vein, the Member States of the EU participate to the WTO under the umbrella of the EU and take part in negotiations and the majority of internal meetings through delegates of the European Commission. The picture is however more complex than it would appear from the sheer observation of EU treaties. Even in areas of exclusive competence, EU Member States are highly reluctant to give away their presence on the international stage and are not keen on disappearing to leave the place to a supranational quasi-federal entity. In addition, often trade agreements include clauses on subjects that do not fall under the exclusive competence of the EU, or do not fall under the competence of the EU at all. It is also possible that trade agreements regulate issues that rely on competences that are difficult to allocate between the EU and Member States. These issues produced the relevant consequence that EU Member States maintained a presence during the negotiation of free trade agreements and, so far, always signed the resulting treaties. This phenomenon called "mixity" produces a variety of legal consequences the most important of which is that the resulting treaty requires the ratification of all Member States to enter into force. The consequences of the refusal to ratify a trade agreement by a Member State are debated, but there is agreement that mixity weakens the capacity of the EU of appearing as united federal force when acting outside the WTO. In addition, mixity makes Member States of the EU explicitly responsible under international law of the obligations that the trade agreement creates.[139]

(d) How the EU influences international trade law

Modification of international trade law is a complex legal and political process happening through lengthy negotiations between trading partners where agreeing on amendments of existing agreements is a very difficult matter. For instance, the Uruguay Round of negotiations that brought to the creation of the WTO and shaped present multilateral trade law lasted 8 years. The new round of multilateral trade negotiations started at Doha has been going on since 2001 and is encountering

[139] Mixed agreements and mixity are one of then most complex areas of the law of external relations of the European Union and a classic of the case law of the European Court of Justice. For an introduction to mixed-agreements see P Eeckout, *External Relations of the European Union* (Oxford University Press 2009) 190-225; P Koutrakos, *EU International Relations* Law (Hart 2006) 359; R Leal-Arcas, "The European Community and mixed agreements" (2001) 6 European Foreign Affairs Review 483. For a more detailed analysis see C Hillion and P Koutrakos, *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart 2010); M Cremona, ""External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law" EUI Working Paper LAW No.2006/22; E Steinberger, "The WTO Treaty as a mixed agreement: problems with the EC's and EC Member States' membership of the WTO" (2006) 17 European Journal of International Law 837.

significant obstacles in reaching any kind of agreement on a revision of existing treaties.[140] An alternative to multilateral trade negotiations is the conclusion of bilateral and plurilateral free trade agreements. These agreements are allowed by Article XXIV GATT and are easier to conclude since fewer states take part in the negotiations. Free trade agreements were an exceptional source of international trade law until 2000 but increased in number since the difficulties of concluding the Doha Round of negotiations became apparent.[141] Today, free trade agreements are a common instrument of trade regulation with which countries contribute to the evolution of international trade law. The effect on the multilateral trading system of these agreements is disputed since instead of modifying multilateral trade rules through a mutually agreed solution, free trade agreements introduce an alternative to WTO law that is fragmented in a kaleidoscope of trade agreements.[142]

The EU takes part in both the Doha Round and the negotiations of free trade agreements and is a major player in modifying international trade law. Since international commerce is one of its exclusive competences, the EU takes part in the negotiations as a united trading block and is highly influential in shaping the final result of the negotiations. In fact, the centralisation of the trading influence of 27 countries into a single supranational entity created a powerful actor that emerged as a major global economic player. Accordingly, the EU Common Commercial policy is a fundamental force in giving future directions to international trade law.[143]

The EU takes part in the creation and modification of international trade law in four ways. First, the EU is an influential member of the WTO and participates to the Doha Round of multilateral trade negotiations. The round of negotiations has the objective of modifying numerous aspects of existing regulation including the norms relevant for the international trade of food. Second, the EU negotiates accession protocols to the WTO with countries that wish to become members of the

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[140] On the stalemate of the Doha Round see E Van Der Marel, "Polly wants a Doha deal: what does the trade community think?" (2011) 10 World Trade Review 551. See also A Bouet and D Laborde, "Assessing the potential cost of a failed Doha Round" (2010) 9 World Trade Review 319.

[141] There are more than 200 preferential trade agreements in force today. Even if the trend of substituting multilateral trade law with bilateral or plurilateral trade agreements is evident, countries are contributing to the process to different extents. The European Union is heavily involved in the conclusion of PTAs and the US and China are following suit, however, other countries have been less keen on using preferential trade agreements beyond regionalism. For an updated map of Preferential Trade Agreements existing in the world see WTO, Participation in Regional Trade Agreements, available at http://www.wto.org/english/tratop_e/region_e/rta_participation_map_e.htm. For an overview of the legal issues of the conclusion of Preferential Trade Agreements see L Bartels and F Ortino (eds), *Regional trade agreements and the WTO legal system* (OUP 2006).

[142] J Bhagwati, Termites in the Trading System: How Preferential Agreements Undermine Free Trade (OUP 2008). On the limits of free trade agreements as instrument of regulation of export restrictions see Mildner and Lauster at footnote 15.

[143] On recent directions of the EU external trade policy see the Communication from the Commission, "Global Europe competing in the world".

organisation. Often, these protocols include norms on import and export policies that differ from the regulation provided in general WTO law. For instance, when China and Russia negotiated their accession protocol, they accepted additional constraints on export restrictions. Third, the EU is one of the most active users of the WTO Dispute Settlement System. Bringing cases based on existing treaties the EU prompts the WTO Panel and the WTO Appellate Body to clarify their legal content. Finally, the EU pursues a policy of conclusion of free trade agreements outside the WTO framework and is negotiating, or has already concluded, free trade agreements with more than 100 countries.[144] The EU aims to conclude free trade agreements with developed countries, emerging economies and developing countries alike. In particular, the EU fully embedded free trade agreements in its development policy and negotiates free trade agreements with all the members of the African, Caribbean and Pacific group of states,[145] a group of 77 developing countries including some of the weakest economies of the world. Since all these treaties include clauses on import and export of food the strategy will profoundly modify the existing international regulation.[146]

3. The Global Europe Strategy

(a) Overview of the policy

The Lisbon Strategy contained a chapter on external trade that underlined the importance for the EU to find new markets for its products and services. In terms of trade policy this meant taking the suitable action in the international arena to create an international trading system supportive of EU economic development. In this way the external trade strategy was directly linked with the main objective of the Lisbon Strategy of making the EU "the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion".[147] When after a difficult start[148] the Strategy was

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[144] The website of the European Commission provides regular updates on the status of the negotiations:

http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/agreements/.

[145] Case studies concerning the Caribbean and African states are included in Chapter 6 and Chapter 7.

[146] For an overview of the relationship between the EU and former European colonies see L Bartels, "The Trade and Development Policy of the European Union" in M Cremona (ed), *New Developments in the EU's External Relations Law*, (Oxford 2008); A Voiculescu, "Unorthodox human rights instruments: the ACP-EU development co-operation from the Lome Conventions to the Cotonou Agreement" (2006) 4 Journal of Commonwealth Law and Legal Education 85; S Barteit, "ACP-EU development cooperation at a crossroads? One year after the second revision of the Cotonou Agreement" (2012) 17 European Foreign Affairs Review 1.

[147] Presidency Conclusions, Lisbon European Council, 23 and 24 March 2000.

revised in 2005, the link between internal economic policies and external trade was deepened as a consequence of the necessity of supporting the achievement of the Lisbon economic and employment targets. This prompted the Directorate General for Trade of the European Commission to publish a Communication in 2006 titled "Global Europe: Competing in the World."[149] The Communication outlined the policy objectives of the EU Common Commercial Policy for the following years presenting an ambitious plan to make existing international trade law more supportive of the goals of the Lisbon Strategy. The Communication took stock of recent global economic developments and maintained that it is a priority for the EU to open third country markets to EU exports negotiating the elimination of import barriers on EU products. This meant first of all achieving better trade deals in order to lower the tariffs imposed on EU exports by third countries beyond what it was achieved in the Uruguay Round. In addition, the Communication identified the objective of tackling export restrictions of third countries that limit the access of the EU "to resources such as energy, metals and scrap, primary raw materials including certain agricultural materials, hides and skins". The Communication maintained that third countries should eliminate export restrictions on such products whenever not justified by environmental or security reasons. The Communication was the foundation for a wide strategy of opposition to trade barriers posed by third countries when conflicting with European economic development. The strategy was extended in the subsequent years and developed into several sub-policies dealing with specific aspects of international trade law. The following two paragraphs elucidate the goals of the EU Common Commercial Policy with regard to the instruments object of the research: import tariffs and export restrictions.

(b) Tariffs and the Market Access Strategy

A trade tariff is a tax on imported goods used by countries to limit the quantity of a certain good imported from a third country. As the following chapter will clarify, tariffs remain a common instrument to protect the national market from products coming from abroad. When third countries impose a tariff on a EU export they make it less marketable on their domestic markets and directly affect European businesses involved in the production, marketing and exportation of the product as well as downstream producers. Accordingly, every tariff imposed by a third country on European exports can be translated into a loss of economic revenues and jobs in the EU. In the Uruguay Round countries agreed maximum tariffs applicable on EU products but every country retained a certain level of freedom to limit imports from the EU. The maximum tariffs applicable on the EU export depends on the country and the product since different countries negotiated different obligations and bound their tariffs on EU exports at different levels in the WTO tariff schedule. One of the key objectives of the Global Europe Strategy is tackling the numerous import tariffs levied

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[148] Communication from the Commission, "Global Europe: Competing in the World" COM(2006) 567 final.

[149] Communication from the Commission, "Global Europe: Competing in the world. A contribution to the EU's Growth and Jobs Strategy" COM (567) final.

on EU exports that WTO law still allows. This action augments the presence of EU businesses in third country markets and, in the opinion of the European Commission, should provide a positive contribution to European economy and support the creation of new jobs. This dimension of the Global Europe strategy developed into a sub-policy called "Market Access Strategy".

The strategy was presented in 2007 through a set of Communications and is the last revision of one of the core branches of the EU Common Commercial Policy.[150] In the policy documents the EU Commission identifies a list of ten barriers to EU exports that should be opposed in the WTO and through bilateral and plurilateral trade agreements. Of these barriers traditional instruments such as tariffs and customs procedures are recognized as one of the main challenges to tackle.

Notably, one of the core components of the Market Access Strategy called Market Access Partnership provides a platform for exchange of information on existing trade barriers linking the Commission directly with Member State officials and European businesses. The partnership allows the Commission to have first hand knowledge from economic operators of the challenges that EU products face when trying to access third country markets. The Commission then draws on this wealth of information during trade negotiations within and outside the WTO and to plan its legal actions in the WTO Dispute Settlement System. The Partnership has a steering committee bringing together the Commission, Member States and business representatives to exchange information and develop strategies on how to remove barriers. There are then several working groups for specific products. The two working groups dealing with barriers on food products are the oldest ones, they are active since 2005 and representative of the European food industry participate regularly since June 2008.[151] The Partnership also uses a Market Access Database that classifies existing trade barriers to EU exports and helps the Commission study the regulatory instruments to tackle them.[152]

(c) Export restrictions and the Raw Materials Initiative

Export restrictions are measures with which countries put an artificial ceiling or tariff to the export of goods. The main objective of these instruments is limiting the quantity of a certain good exported to third countries. The main EU policy on international regulation of export restrictions is included in the so called "EU raw materials initiative" an economic policy stemmed from the Global Europe Strategy

[150]Communication from the Commission "Global Europe: a stronger partnership to deliver market access for European exporters" COM(2007) 183 final.

[151]European Commission, Active working groups under the Market Access Partnership – March 2011, available at <http://trade.ec.europa.eu/doclib/docs/2011/march/tradoc_147653.pdf> accessed 15 October 2012.

[152] See European Commission, Market Access Database User Guide, available at <http://madb.europa.eu/userguide/EN_def.pdf> accessed 15 October 2012.

and having the main objective of ensuring supply of raw materials to European processing industries. The policy responds to the need of ensuring that tight commodity markets due to the rise of emerging economies do not hamper European economic development. The policy proposes several actions, the first of which is the pursuit of a "raw materials diplomacy" with a view of securing access to raw materials lacking in the EU. This part of the policy is highly relevant for the objectives that the EU pursues during the negotiations of international trade agreements and influential on the EU attitude with regard to modifications of international trade law. As the 2008 EU Commission Communication "The raw materials initiative – meeting our critical needs for growth and jobs in Europe" clarifies, access to primary and secondary raw materials is a priority in EU international trade regulatory policy. In particular, the policy provides that the EU should work towards the elimination of trade distorting measures taken by third countries in all areas relevant to access to raw materials. The Communication states that:

> "The EU will take vigorous action to challenge measures which violate WTO or bilateral rules, using all mechanisms and instruments available, including enforcement through the use of dispute settlement. More generally, the EU will act against the protectionist use of export restrictions by third countries. In determining its actions, the EU will take as priority those export restrictions that pose the greatest problems for EU user industries or give their domestic downstream industries an unfair competitive advantage on international markets".[153]

The 2011 Communication on volatility of commodities prices consolidates this policy goal contextualising it within the ongoing multilateral and regional trade negotiations. The Communication considers the regulation of export restrictions a matter falling within the purview of the raw materials policy and states that the EU should:

> "further embed raw materials issues, such as export restrictions…in ongoing and future EU trade negotiations in bilateral, plurilateral and multilateral frameworks."[154]

The EU Raw Materials Initiative has been influential on the position taken by the EU in the WTO Dispute Settlement, in the Doha Round and in the negotiations of regional trade agreements. In all these three contexts the EU contributed to the modification of international trade law on export restrictions and supported an approach to export restrictions much more restrictive than the one contained in Article XI GATT and Article 12 of the WTO Agreement on Agriculture. In the WTO Dispute

[153] Communication from the Commission, "The raw materials initiative – meeting our critical needs for growth and jobs in Europe" COM(2008) 699 final.

[154] Communication from the Commission, "Tackling the challenges in commodity market and on raw materials" COM(2011) 025 final.

Settlement the EU participated to the landmark case *China-Raw Materials* that contested several export restrictions imposed by China on raw materials critical for EU industries. The case, based on Article XI GATT and China WTO Accession Protocol resulted in a clarification of the multilateral discipline and in a restrictive interpretation of the legal requirements of the exceptions to Article XI GATT. [155] In early 2012 the EU requested the institution of a WTO panel on a similar issue regarding the export of rare earths from China.[156] The panel is likely to result in an additional interpretation of multilateral rules on export restrictions by the Appellate Body. In the Doha Round, the EU supports the revision of Article XI GATT and its exceptions in order to limit the recourse to export restrictions on both food and raw materials.[157] In addition, when new states desire to become members of the WTO, the EU negotiates with them obligations on export restrictions going beyond the existing WTO framework. This happened most notably with China and Russia and a handful of other countries.[158] Finally, when negotiating free trade agreements outside the WTO framework the EU always supports restrictive clauses on export restrictions. All the free trade agreements concluded by the EU since 2005 include clauses on export restrictions that are more restrictive than multilateral trade law.

(d) The role of free trade agreements in the Global Europe Strategy

A distinctive quality of the Global Europe Strategy is the fact that the European Commission proposed to intervene on multilateral trade law not only through WTO negotiations and the WTO Dispute Settlement System but also through the conclusion of free trade agreements under Article XXIV GATT.[159] By 2005 the EU had already concluded several free trade agreements. For instance, the conclusion of a free trade agreement is a step towards accession of new Members and is a common feature of its relationship with neighbouring countries in Eastern Europe and Northern Africa. However, these agreements dealt with more limited issues than WTO law and were concluded only with countries having a special relationship with the EU.[160] A novelty of the 2006 Communication was that the EU Commission planned to conclude free trade agreements much more liberally with countries and on issues that were generally dealt with through the WTO machinery. We can only speculate on the reasons of this

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[155] J Peng and N Cunningham, "WTO case analysis, suggestions and impacts: China-Measures Related to the Exportation of Various Raw Materials" (2012) 7 Global Trade and Customs Journal 27;

[156] BBC News, "US, EU and Japan challenge China on rare earths at WTO" http://www.bbc.com.uk/news/business-17348648.

[157] See Mildner and Lauster at footnote 15.

[158]This is so because countries wishing to join the WTO have to provide additional trade advantages to existing members in order to achieve the consensus on their accession.

[159] We will deal with this issue at length in the following Chapter. See Chapter 5 Section 3(c).

[160] See PJ Cardwell "EuroMed, European neighbourhood policy and the Union for the Mediterranean: overlapping frames in the EU's governance of the Mediterranean" (2011) 49 Journal of Common Market Studies 219.

choice that are probably both internal to EU institutions and linked with the wider economic context.[161] Probably, the fact that the Doha Round of negotiations was struggling to deliver results might have convinced EU policy makers that alternative ways to liberalise trade had to be found. In fact, by late 2005 it was evident that developing countries were not available to agree on a trade package having the lines of the Uruguay Round "grand bargaining" where developing countries opened their markets on processed goods in exchange for less protection on agricultural and textile products by developed countries. In fact, in July 2008 the trade negotiations in the Doha Round collapsed because of a sharp disagreement between India and developed countries on a special mechanism to protect poor farmers from food products originating in developed countries.[162] In addition, within EU institutions, it is likely that the failure of the Lisbon Strategy was putting pressure on the Commission that needed to deliver results fast. In this context, free trade agreements appeared as the only legal instrument having a chance to advance trade liberalisation and remove barriers to EU trade within a relatively short amount of time. This is also because Article XXIV GATT obliges the parties to free trade agreements to liberalise "substantially all the trade" between them. This means that while negotiations in the WTO do not necessarily achieve substantial liberalisation, the conclusion of a free trade agreement always achieves at least the objective of eliminating the 80% of customs tariffs on goods traded between the parties.[163]

The 2006 Communication "Global Europe" was carefully drafted to announce the decision of using free trade agreements to regulate international trade reassuring about the strong commitment of the EU to the multilateral trading system. In particular, the Communication declares that "the EU's priority will be to ensure that any new FTAs, including our own, serve as a stepping stone, not a stumbling block for trade liberalisation". In addition, the Commission maintains that free trade agreements must be "approached with care" because there is a real risk to "complicate trade, erode the principle of non-discrimination and exclude the weakest economies". The Communication however, already hinted that free trade agreements were going to take a major role in EU trade action and that they were going to extend the purview of

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[161] On the political dimension of the decision of complementing the EU multilateral trade strategy with the conclusion of free trade agreements see the Communication "Global Europe" above. In addition see de declaration of Peter Mandelson, at the time EU Commissior for external trade, for instance, European Commission, "Mandelson argues for bilateral agreements that boost global free trade", London, 9 October 2006, available at <http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc_130517.pdf> accessed 15 October 2012; H Mahony, "Mandelson Defends Third-World Free Trade", Bloomberg Busineesweek, 16 October 2006, available at <http://www.businessweek.com/stories/2006-10-16/mandelson-defends-third-world-free-trade> accessed 15 October 2012; P Mandelson, "Free trade is our only way forward", The Telegraph, 6 July 2008, available at <http://www.telegraph.co.uk/comment/personal-view/3560228/Free-trade-is-our-only-way-forward.html> accessed 15 October 2012.

[162] See F Ismail, "An assessment of the WTO Doha Round July-December 2008 collapse" (2009) 8 World Trade Review 579.

[163] See below Chapter 5 Section 3(c).

international trade law on issues not already regulated by existing WTO regulation. In 2012, six years after the publication of the Global Europe Strategy the EU was negotiating, or already concluded, free trade agreements with more than 100 countries. Negotiations involve developed and developing countries alike, major global economies such as China, India and Southern American countries as well as small countries and least-developed countries. At the time of writing the EU has already concluded agreements under the Global Europe Strategy with around 30 states. If the Strategy achieves all its objectives it will produce a major shift in international trade law and the EU will be regulating the majority of its trade relationships through free trade agreements instead of WTO law.[164]

4. The right to food in the external relations of the EU

(a) Has the EU a legal mandate to realise the right to food?

The right to food does not have explicit legal bases in EU primary sources. The Treaty of Lisbon does not provide a clear-cut mandate to the EU for the realisation of Economic and Social Rights and the EU Charter of Fundamental Rights does not contain the right to food. The accession of the EU to the European Convention of Human Rights will not change this legal setting since the Convention does not contain the right to food either. In addition, the EU has no plans to accede the International Covenant of Economic Social and Cultural Rights and the Covenant has a particularly weak status in EU law and policy making. This situation however, does not provide the EU with a legal exemption from taking into account the right to food when designing its external policies. This is so for at least five reasons. First, since the adoption of the Treaty of Lisbon all the external policies of the EU, including the external trade policy are subject to the general principles of Article 21 of the Treaty on the European Union. The first paragraph of the article explicitly provides that the external action of the EU shall be guided by: "…the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law". This Article, referring to the indivisibility of human rights, gives economic and social rights the same legal status as civil and political rights in the external relations of the EU. Even if the clause is not judicially enforceable it creates a legal foundation for the inclusion of the right to food within the priorities of

[164] If free trade agreements are a complement to WTO law or rather an alternative to it is a controversial issue. See G Marceau and J Wyatt, "Dispute settlement regimes intermingled: regional trade agreements and the WTO" (2010) 1 Journal of International Dispute Settlement 67; J Bhagwati, Termites in the Trading System: How Preferential Agreements Undermine Free Trade (OUP 2008); WTO, *The WTO and preferential trade agreements: From co-existence to* coherence, World Trade Report 2011, available at < *www.wto.org/english/res_e/booksp.../world_trade_report11_e.pdf*> accessed 15 October 2012; M Matsushita and Y S Lee, "Proliferation of Free Trade Agreements and Some Systemic Issues - In Relation to the WTO Disciplines and Development Perspectives" (2008) 1 The Law and Development Review 3; L E Trakman, "The Proliferation of Free Trade Agreements: Bane or Beauty?" (2008) 42 Journal of World Trade 367.

EU external action beside other EU foreign policy goals.[165] Second, all the Members of the EU are also parties to the International Covenant of Economic Social and Cultural Rights and are often parties to the other international instruments codifying the right to food. As seen in Chapter 2 the Covenant creates not only obligations to realise the right to food on the territory of the state but also the external obligation to progressively realise the right through international cooperation, including through participation to international organisations. Since no external action of the EU can be carried out without the consent of Member States executive powers through the vote in the European Council,[166] human rights duties of EU Member States directly reflect on the EU.[167] Third, even if the EU is not a Member of the Covenant on Economic Social and Cultural Rights it can bind itself to respect the Covenant when concluding agreements with third countries. An example of this practice is the Cotonou Agreement, the international instrument providing the framework for the cooperation between the EU and 77 developing countries in Africa, the Caribbean and the Pacific.[168] In fact, the Preamble to the Treaty contains an explicit reference to the Covenant. In addition, the parties to the Cotonou Agreement asserted "their resolve to make…a significant contribution to the economic, social and cultural development of the ACP States and to the greater well-being of their population, helping them facing the challenges of globalisation…in the effort to give the process of globalisation a stronger social dimension". Most of all, Article 9 of the Cotonou Agreement is a human rights clause explicitly binding the parties to respect economic and social rights. The clause produces exactly the same binding legal effects on the EU and on its partners in the African, Caribbean and Pacific regions.[169] Fourth, the EU has a

[165] Other parts of Article 21 include references to the responsibility of the EU with regard to countries vulnerable to human rights violations and poverty. For instance Article 21.2(d) provides that the European Union shall "foster the sustainable economic, social and environmental development of developing countries with the primary aim of eradicating poverty". In the same vein Article 21.2 (g) provides that the EU should assist populations, countries and regions confronting natural or man-man disasters. Also when dealing with EU external trade policy Article 21 contextualises "progressive liberalisation of international trade" within the wider objective of "encouraging the integration of all countries into the world economy".

[166] Beside, when the EU carries out its external policies through mixed agreements the resulting agreement also requires the ratification of the notional parliaments.

[167] On indirect human rights obligations of the European Union deriving from the human rights duties of Member States see T Ahmed and I de Jesus Butler, "The European Union and Human Rights: An International Law Perspective" (2006) 17 The European Journal of International Law 771.

[168] For a general introduction to the Cotonou Agreement see A Flint, *Trade, Poverty and the Environment: The EU, Cotonou and African-Caribbean-Pacific Bloc* (Palgrave Macmillan 2008); O Babarinde and G Faber (eds), *The European Union and the Developing Countries: The Cotonou Agreement* (Martinus Nijhoff 2008); A Hadfield, "Janus advances? An analysis of EC development policy and the 2005 Cotonou Partnership Agreement" (2007) 12 European Foreign Affairs Review 39; S Kingah, "The revised Cotonou Agreement between the European Community and African, Caribbean and Pacific States: innovations on security, political dialogue, transparency and social responsibility" (2006) 50 Journal of African Law 59.

[169] Article 9 of the Cotonou Agreement provides that: "Cooperation shall be directed towards sustainable development centered on the human person, who is the main protagonist and

longstanding tradition of including a general human rights clause in free trade agreements it concludes with third countries. These clauses attracted the attention of legal doctrine for their potential of being a powerful source of human rights duties. Lorand Bartels, for instance, maintains that such clauses produce both negative and positive human rights obligations including the duty to monitor the realisation of human rights.[170] Finally, the EU is a Member of the WTO, it is bound by its Constitution and takes part in the internal meetings. Accordingly, it shares with the other Members of the organisation the commitment to improve global food security.

In conclusion, the Lisbon Treaty provided the EU with a framework, and a mandate, to exercise its external powers in order to contribute to the realisation of human rights including economic and social rights. In addition, the Member States of the EU have the duty to take the right to food into consideration when taking part in EU external policies. In certain cases, the EU also contracted binding obligations vis-à-vis third countries to respect and realise economic and social rights, as it is the case with the Agreement it concluded with the African, Caribbean and Pacific countries. However, the capacity of the EU of carrying out this mandate depends extensively on its constitutional competences and on the capacity of Member States of agreeing on the creation of specific external policies. The following two sections address the question of the existence of external EU competences relevant for the realisation of the right to food and present existing external policies aiming to the realisation of the right.

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beneficiary of development; this entails respect for and promotion of all human rights. Respect for all human rights and fundamental freedoms, including respect for fundamental social rights, democracy based on the rule of law and transparent and accountable governance are an integral part of sustainable development…The Parties refer to their international obligations and commitments concerning respect for human rights. They reiterate their deep attachment to human dignity and human rights, which are legitimate aspirations of individuals and peoples. Human rights are universal, indivisible and inter-related. The Parties undertake to promote and protect all fundamental freedoms and human rights, be they civil and political, or economic, social and cultural. In this context, the Parties reaffirm the equality of men and women....Respect for human rights, democratic principles and the rule of law, which underpin the ACP-EU Partnership, shall underpin the domestic and international policies of the Parties and constitute the essential elements of this Agreement…The Partnership shall actively support the promotion of human rights, processes of democratisation, consolidation of the rule of law, and good governance".

[170] L Bartels, "Human Rights and Sustainable Development Obligations in EU Free Trade Agreements" University of Cambridge Legal Studies Research Paper Series, Paper No. 24/2012; L Bartels, "A Legal Analysis of Human Rights Clauses in the EU's Euro-Mediterranean Association Agreement" (2004) 9 Mediterranean Politics 368. See also H Strydom, "Will the Cotonou agreement succeed where Lome' I-IV have failed?" (2007) 32 South African Yearbook of International Law 125; S Steiner, "The External Dimension of the European Fundamental Rights Agency" (2006) 11 Austrian Review of International and European Law 105; D-C Horng, "The human rights clause in the European Union's external trade and development agreements" (2003) 9 European Law Journal 677; B Brandtner and A Rosas, "Human Rights and External Relations of the European Community: An Analysis of Doctrine and Practice" (1998) 9 European Journal of International Law 468; M Cremona, "Human Rights and democracy clauses in the EC's trade agreements" (1995) Law & Justice 105.

(b) Competences

The realisation of the right to food is a complex issue requiring the intervention of states in numerous policy areas. This paragraph clarifies the legal bases for actions at EU level in two areas that the International Committee for Economic Social and Cultural Rights identified as crucial for the realisation of the right to food through international cooperation: the regulation of international trade of food and the provision of food aid to vulnerable countries in case of food shortages.

Because international trade of food falls within the Common Commercial Policy the EU has exclusive competence on the subject. This means that the policy making on international trade of food happens at EU level and the EU is competent for the conclusion of relevant international agreements. The explicit exclusive external competence means that Member States cannot contribute to the evolution of the international rules on trade of food autonomously and take part in this process through the procedures provided in EU Treaties. This applies to all areas of international policy making relevant for international commerce of food be it the Doha Round, the WTO Dispute Settlement Body or Free Trade Agreements. Therefore, the EU has exclusive competence for the negotiations on the revision of the WTO Agreement on Agriculture and the clauses of multilateral trade law relevant for the realisation of the right to food. The EU also has exclusive competence to start a legal action against other countries in the WTO Dispute Settlement when it deems that its partners are not respecting their obligation on international trade of food. In the same vein, it is the EU that negotiates the clauses regulating trade of food products in free trade agreements. This means that the EU has exclusive competence for the regulation of all the trade mechanisms creating obstacles to the realisation of the right to food identified in the previous chapter. For instance, the EU is competent for the regulation of tariff escalation, the design of mechanisms to protect vulnerable countries from import surges and all the aspects of export restrictions that are relevant to prevent food shortages.

The picture is more complex with regard to the provision of food aid during a food crisis in third countries. Member States have been reluctant to provide the EU with an external power in this regard. These disputes over competences on the direct provision of food to vulnerable individuals in third countries mirror a disagreement on the existence of a domestic EU competence to provide food to European citizens in need. Recently, these differences brought Germany to dispute the legality of the EU Food Distribution Program for the Most Deprived Persons[171] (a program dispensing

[171] See the page of the program on the website of the DG Agriculture and Rural Development of the EU Commission <http://ec.europa.eu/agriculture/most-deprived-persons/index_en.htm>. On the legal dispute around the EU competence to run the program and the attempts of the EU Commission to maintain it see European Commission, Press Release, European Commission puts new amendments on the table to overcome deadlock for the Deprived Scheme, 3 October 2011, available at <http://europa.eu/rapid/press-release_IP-11-1148_en.htm?locale=en> accessed 15 October 2012; EU Observer, EU to cut food aid for the poor, 21 October 2011, available at <http://euobserver.com/social/114013> accessed 15 October 2012.

food to around 18 million people) and the European Court of Justice to declare that the EU has no domestic competence to provide food to people in need.[172] However, whereas the Lisbon Treaty did not provide a solution to the lack of domestic competence it extended EU external powers specifically providing at Article 214 the EU with the competence to offer humanitarian aid to third countries. In addition, food aid during food crises can be provided through development cooperation, an external competence based on Articles 208, 209, 210 and 211 of the Treaty on the Functioning of the European Union. Under this competence the EU developed several external funds that can be activated during a food crisis to provide aid to vulnerable countries. Therefore, the Lisbon Treaty created a situation where the EU external competence on direct provision of food to vulnerable individuals is stronger than the one the EU has domestically. This allowed the EU to establish external instruments to intervene in case of food shortages in third countries whereas it does not have the same powers at domestic level.

The nature of the competences to provide development cooperation and humanitarian aid is different from the one the EU has in external trade. The Treaties in fact expressly clarify that the two policy areas are complementary to the action of Member States in the same fields. Doing so, the Treaties codified previous case law of the European Court of Justice where the Court had developed the doctrine of "parallel competences", namely areas of EU action where the exercise of the competence by the EU does not prohibits the action of Member States in the same field. Therefore, Member States are entitled to develop their own food aid policies beside the one carried out by the EU through the procedures defined in the Treaties. In the same vein, they can conclude treaties with third countries working as a framework to development cooperation and humanitarian aid alongside the one concluded by the EU.[173]

(c) The EU external food security policy

Since the EU and Member States have shared competence in the field of development cooperation there is the risk that the EU and its Members implement policies that are in contradiction between each other. This issue has been present since the first EU development programs and was the source of disputes before the European Court of Justice. In 2005 the EU and Member States decided to give their efforts in development cooperation a common framework in order to define the main policy objectives and coordinate their activities. The framework took the form of a Joint statement by the Council and the representatives of the governments of the Member

[172] European Court of Justice, *Federal Republic of Germany v. European Commission*, T-576/08.

[173] For a taxonomy of EU external competences and the definition of parallel external competences see P Eeckout, *EU External Relations Law* (OUP 2011); A Ward, "Community Development Aid and the Evolution of the Inter-institutional Law of the European Union" in A Dashwood and C Hillion (eds), *The General Law of EC External Relations* (Sweet & Maxwell 200) 160.

States meeting within the Council, the European Commission and the European Parliament titled « European Consensus on Development ». [174] The document identifies shared values, goals, principles and commitments that EU institutions and Member States implement in their respective development policies. The Consensus on Development highlights the intention of the EU and its Member States to collaborate with multilateral institutions towards the common objective of reducing poverty, fighting hunger and support social development. The Consensus has a wide spectrum involving numerous aspects of development cooperation including democratic governance, political, economic and social reforms, conflict prevention, social justice, human rights promotion, equitable access to public services, education, culture and health. The Consensus also refers to respect of human rights, fundamental freedoms, peace, good governance, gender equality, rule of law, solidarity, justice and commitment to multilateralism as common values to be promoted in the relationship between Europe and third countries.

It is within this framework that the EU renewed its development strategies and created a set of policies specifically directed to the fight against global hunger. The European Commission then extended and clarified the policy framework through a set of Communications and other internal policy documents.[175] In particular, the EU contributes to the fight against hunger through five policy instruments. First, the EU has several external structural funds such as the EU Development Fund and the EU Development Co-operation Instrument to which developing countries can apply to receive economic support. These funds have a structure similar to the domestic European Social Fund and have financial chapters dedicated to the promotion of food security.[176] Second, the Food Security Thematic Program provides a policy umbrella to numerous development programs organised by the EU in vulnerable countries.[177] Third, in the aftermath of the 2007-2008 food crisis the EU created an additional external fund called Food Facility endowed with one billion Euros and having an

[174] Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: "The European Consensus", OJ C46/1.

[175] See Communication from the Commission, "|the EU approach to resilience: learning from food security crises" COM (2012) 586 final; Communication from the Commission, "An EU policy framework to assist developing countries in addressing food security challenges" COM (2010) 127 final; Communication from the Commission, "A thematic strategy for Food Security – Advancing the food security agenda to achieve the MDGs" COM (2006) 21 final; Communication from the Commission, "evaluation and future orientation of Council Regulation (EC) No. 1292/96 on Food Aid Policy and Food Aid Management and Special Operations in Support of Food Security" COM(2001) 473 final.

[176] See Communication from the Commission, "Towards the full integration of co-operation with ACP countries in the EU budget", COM(2003) 590 final.

[177] The Program is based on Article 15 of the Development Co-Operation Instrument, Regulation (EC) No 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financing instrument for development cooperation, OJ L 378. The Regulation is amended regularly see Commission Regulation (EC) No 960/2009 of 14 October 2009 amending Regulation (EC) no 1905/2006 of the European Parliament and of the Council establishing a financing instrument for development cooperation, OJ L270.

expedited bureaucratic structure. The fund pursues the objectives of encouraging producers to increase food supply, it provide safety nets to local populations affected by volatile food prices and improves food management in the longer term.[178] Fourth, the EU provides food directly to populations in need at the occurrence of extreme food shortages and famines through its humanitarian aid programs.[179] Finally, the EU coordinates its efforts with multilateral institutions and concluded *ad hoc* agreements with the Food and Agriculture Organisation, the World Food Program and the United Nations. These agreements provide the framework for the development of additional policies.[180] All these policies are coordinated by the Directorate General for Development Cooperation of the European Commission, the Directorate General for Humanitarian Aid and the EU External Action Service.

5. Food security and the Common Commercial Policy

A distinctive element of the European Consensus on Development is the initiative called Policy Coherence for Development. The expression indicates a policy review program aiming to progressively embed development objectives within other external policies.[181] In particular, the Consensus on Development stresses that the policies in which the EU has exclusive competence such as trade should contribute to the

[178] Regulation (EC) No 1337/2008 of the European Parliament and of the Council of 16 December 2008 establishing a facility for rapid response to soaring food prices in developing countries, OJ L 354/62; Commission Decision of 30 March 2009 for implementing the facility for rapid response to soaring food prices in developing countries to be financed…, OJ L354/62; European Commission, EuropeAid, *The Food Facility A rapid response from the European Union*, available at < http://ec.europa.eu/europeaid/infopoint/publications/europeaid/documents/184a_foodfacility_en.pdf> accessed 15 October 2012.

[179] The legal base for this kind of intervention is the Instrument for Humanitarian Aid, Council Regulation (EC) No 1257/96 of 20 June 1996 concerning humanitarian aid. The last amendment of the Regulation is Regulation (EC) No 219/2009 of the European Parliament and of the Council of 11 March 2009, OJ L 87.

[180] Memorandum of Understanding Concerning the establishment of a Strategic Partnership between the Food and Agriculture Organization and the European Commission of the European Communities in the field of development and humanitarian affairs, available at < http://ec.europa.eu/development/icenter/repository/MoU_EC_FAO_signed_en.pdf> accessed 15 October 2012> accessed 15 October 2012; Memorandum of Understanding Concerning the establishment of a strategic partnership between the World Food Programme and the Commission of the European Communities in the field of humanitarian and recovery assistance in developing countries, available at < http://ec.europa.eu/development/icenter/repository/MoU_EC_WFPsigned_en.pdf> accessed 15 October 2012.

[181] See Communication from the Commission, "Policy Coherence for Development – Establishing the policy framework for a whole-of-the-Union approach", COM(2009) 458 final; Commission Staff Working Document, "Policy Coherence for Development Work Programme 2010-2013" SEC(2010) 421final; Communication from the Commission, "A twelve-point EU action plan in support of Millennium Development Goals" COM(2010) 159 final; Commission Staff Working Paper, "EU 2011 Report on Policy Coherence for Development" SEC(2011) 1627 final; Report from the Commission, "EU 2009 Report on Policy Coherence for Development" SEC(2009) 1137 final.

attainment of the Millennium Development Goals [182] and other development objectives set at EU level. Since in the EU, and often in Member States, policy making is fragmented, the Consensus highlights that at all levels new instruments, procedures and mechanisms need to be devised in order to promote the inclusion of development objectives within other policy areas. Within this context the Consensus defines specific objectives to be pursued within the WTO and through the negotiations of free trade agreements with developing countries. In particular, the EU supports «rapid, ambitious and pro-poor completion of the Doha Round and EU-ACP Economic Partnership Agreements » and maintains that developing countries should reform their external trade policy in line with their broader national development plans. The Consensus was followed by a Communication of the European Commission that elaborated further these general policy goals. The Communication identifies a long list of trade objectives and modifications of international trade law that the Commission considers necessary in order to align international trade regulation with the pursuit of the Millennium Development Goals.[183] Seven of them are particularly relevant for the realisation of the right to food. First, the Commission maintains that the Doha Round should provide improved market access for agricultural goods produced across the developing world. Second, the results of the Doha Round should provide the necessary differential treatment for developing countries, in particular Least Developed Countries and vulnerable economies. Third, the EU commits itself to full elimination of all remaining tariff escalation, high tariffs and tariff peaks bringing duties on products produced by vulnerable countries as close as possible to zero.[184] Fourth, the EU is committed to ensuring a development-friendly and sustainable outcome of the EU-ACP Economic Partnership Agreements. This means that promotion of South-South trade and the strengthening of local markets are the prime objectives of the process. Fifth, the EU is committed to protect developing countries from trade liberalisation of agricultural imports from the EU ensuring that market openings will be asymmetrical and progressive. Sixth, the EU will extend its Generalised System of Preferences targeting the countries most in need and making it simpler, more transparent and stable.[185] Finally, the EU is committed to avoid that its trade agreements produce an erosion of tariff preferences of most vulnerable countries. This means that at the end of the Global Europe Strategy vulnerable countries should

[182] For an introduction to Millennium Development Goals and their relationship with human rights see C Doyle, "Millennium development goals and human rights: in common cause or uneasy partners?" (2009) 13 International Journal of Human Rights 5; E Dominguez Redondo; "The Millennium Development Goals and the human rights based approach: reflecting on structural chasm with the United Nations system" (2009) 13 International Journal of Human Rights 29; G Schmidt-Traub, "The Millennium Development Goals and human rights-based approaches: moving towards a shared approach" (2009) 13 International Journal of Human Rights 72.

[183] Communication from the Commission, "Policy Coherence for Development Accelerating progress towards attaining the Millennium Development Goals" COM (2005) 134 final.

[184] For a thorough explanation of these trade instruments and their impact on the right to food see next chapter.

[185] Ibid

not find themselves in the position of having to compete with more developed states for access to the EU market. This commitment refers to the risk that African, Caribbean and Pacific countries could receive the same treatment as emerging economies such as large South American countries, rising Asian economies and South Africa.

The European Consensus on Development and the Policy Coherence for Development provide several guidelines to include in the EU Common Commercial Policy objectives that do not respond to immediate EU economic necessities. From these objectives emerge a deep commitment of the EU to differential treatment for developing countries. In addition, the EU Commission appears aware of the need of differentiating between different developing countries and protecting the most vulnerable from the competition of more developed trade partners. The EU Commission is also committed to target specific trade mechanisms such as tariff escalation that produce negative effects on vulnerable individuals in the developing world. All these pledges and commitments, if put into practice, would modify the results of the Uruguay Round and produce an international system of trade of food products more supportive of the realisation of the right to food. Even if the policy documents of the European Commission made the choice of not using a human rights language,[186] the policies listed above go in the direction of realising the right to food because are directed to correct the deficiencies of the present international trade system providing immediate support to the individuals for which the right is not realised.

6. Conclusions

The chapter took into account the institutional dimension of the external action of the EU with regard to international trade of food. The chapter highlighted that the Member States of the EU lost the prerogative of organising their commercial policy and the Union is competent for the planning of the policy, the conclusion of international trade agreements and the participation in trade related international organisations. All the organs of the EU are involved in the policy and take part in the evolution of international trade law trough the procedures contained in the Treaty on the European Union and the Treaty on the Functioning of the European Union. The EU during the last decade developed an extensive policy having the objective of influencing the development of international trade law on the basis of European economic necessities. The policy reaches numerous areas of international trade regulation including the law of import and export of food products. The bulk of policymaking happens in the Directorate General for external trade of the European Commission.

[186] On the relationship between human rights and development cooperation see P Alston and M Robinson (eds), *Human Rights and Development*, (Oxford University Press 2005); G De Beco, "The interplay between human rights and development the other way round: the emerging use of quantitative tools for measuring the progressive realisation of economic, social and cultural rights" (2010) 4 Human Rights and International Legal Discourse 265.

The EU also has an extensive policy to fight global hunger based on explicit competences given to the Union by the Lisbon Treaty. The policy uses several external instruments to provide food and economic aid to vulnerable countries and funds programs against hunger on the territory of numerous countries exposed to food shortages. The policy is run in close cooperation with Member States since in this area the EU does not have exclusive competence. The present structure of the EU action to promote food security in third countries is based on a political document titled "European Consensus on Development" with which in 2005 the Union and its Member States defined common objectives in the field of development co-operation which also include the fight against global hunger. The policy was extended and clarified through several political statements and policy documents and was reinforced after the 2007-2008 global food crisis through an additional external fund dedicated to the support of countries affected by food shortages and endowed with one billion euros. The bulk of the policy making on the EU food security policy happens in the Directorate General for Development Co-operation and in the Directorate General for Humanitarian Aid of the European Commission. The policy is linked with the multilateral food security framework and is connected with the activities of the EU, the World Food Program and the United Nations program on Millennium Development Goals. Through an administrative program called Policy Coherence for Development the EU external food security policy should go beyond the areas of development co-operation and humanitarian aid and inspire other areas of EU policy making and especially the ones where the EU has exclusive competence. Accordingly, the European Consensus for Development mandates that the external trade policy of the EU should intervene on existing international trade law to create a system more supportive of global food security and the pursuit of Millennium Development Goals. Within this framework the European Commission identified specific areas of international trade law that should be modified in order to support the progress towards universal food security. In the list the EU Commission included several major shortcomings of the multilateral system including tariff escalation and the exposure of vulnerable countries to import surges. The policy papers also recognised the need to provide vulnerable countries with special and differential treatment and sufficient policy space to organise external trade policies on the basis of their development needs.

From this chapter three preliminary conclusions can be drawn. First, the Lisbon Treaty provided the Union with a general mandate to inspire its external action in all areas to the promotion of human rights, defined as civil and political rights and economic and social rights. In addition, the Lisbon Treaty provided that the EU external trade policy should be driven by wide economic objectives in a spirit of international cooperation with third countries. Accordingly, the EU Treaties explicitly provide the legal foundations for a comprehensive vision of the Common Commercial Policy rooted in the respect and promotion of economic and social rights in third countries. Second, within the EU, the policymaking on international regulation of import and export policies of food is fragmented between different policies and administrative apparatuses. The DG Trade of the European Commission develops the economic part of the policy which responds mainly to the necessity of supporting European development and the creation of new jobs in the EU. At the same time, the part of the policy aiming to make international trade law an instrument of support to the fight against global hunger happens mainly under the DG for Development

Cooperation of the European Commission and is based on an internal administrative policy called Policy Coherence for Development having the objective to allow the use of the EU external trade policy to pursue non-trade objectives such as food security in vulnerable countries. The existence of this policy manifests the awareness of EU organs, EU bureaucracy and EU Member States of the shortcomings of the present international trading system in terms of promotion of food security. Besides, the policy demonstrates the capacity of the EU to develop plans of action to correct these shortcomings and contribute to the creation of an international trading system that is fully supportive of food security in vulnerable countries. Finally, even if the Lisbon Treaty frames the EU external action in terms of promotion of universality and indivisibility of human rights, a policy language based on human rights rarely sifted into EU external policy making. In fact, the policy documents on the EU external food security policy generally avoid the use of a normative language and do not mention the human right to food. The European Consensus on Development and the instruments of intervention in case of food crises use alternative concepts such as food security and "development goals". This attitude manifests that the EU did not fully incorporate economic and social rights in its external action and there is still reticence to define the EU action to fight global hunger in terms of progressive realisation of individual entitlements to adequate amount of food. After the adoption of the Lisbon Treaty however there is no legal limit to reframe the EU external food security policy entirely in terms of promotion of the human right to food. Notwithstanding the reticence of using the human right to food as general policy framework, the EU at least in one occasion used economic and social rights to provide legal structure to its relationship with third countries. This is article 9 of the Cotonou Agreement where the EU undertook to "promote and protect all fundamental freedoms and human rights, be they civil and political, or economic, social and cultural". Accordingly, the EU, its 27 Member States and the 77 Countries of the African, Caribbean and Pacific regions that signed the Agreement included the realisation of the right to food within the objectives of their relationship.

The chapter showed the composite picture of an evolving institutional setting with clearer external competences provided by the Lisbon Treaty and new policies being developed. It also showed a strong potential of the EU to become a driving force in the use of regional and multilateral trade regulation to pursue the realisation of the right to food. In fact, if the priorities identified in the Policy Coherence for Development initiative influence trade negotiations the EU could provide a substantial contribution to the creation of an international regulation of trade of food products that is fully supportive of the realisation of the right. This depends on the capacity of the EU Commission, Council and Parliament as well as EU Member States to put these policy objectives at the forefront of the negotiations and promote their crystallisation into international norms. In doing so the EU has to respect existing legal obligations under WTO law. For this reason before entering in the details of the trade agreements between the EU and countries vulnerable to food shortages it is necessary to assess the policy space left to the EU to modulate import and export policies and negotiate new rules on international trade of food. The following chapter provides this analysis considering the norms in WTO agreements applicable to the import and export of food between the EU and vulnerable countries.

CHAPTER 5: THE IMPORT AND EXPORT REGIME OF THE URUGUAY ROUND AND THE RIGHT TO FOOD

1. Introduction

Chapter 3 highlighted the relevance of the international food market for the realisation of the right to food and stressed the privileged position that the EU has to attempt reconciliation between market forces and the realisation of the right. The chapter also identified the centrality of import and export policies of food for the availability and accessibility of adequate food at domestic level. These policies and their regulation are particularly significant for vulnerable countries and categories that have less capacity to react to market forces and are more directly affected when the international food market does not provide food at adequate conditions. Being an influential international actor the EU can aspire to address the deficiencies of the international food market and promote an international regulation of the import and export of food that takes into account major market failures and is directed toward the realisation of the right to adequate food. As showed in chapter 4, the EU also has the competences and the institutional instruments to include in its external trade policy the priority of protecting vulnerable countries and categories from the deficiencies of international food markets. If the EU is to pursue this positive action and contribute to the realisation of the right to food everywhere in the world, however, it must do so duly respecting existing legal obligations that the EU and its trade partners have under multilateral trade law. In fact, the law of the WTO governs the EU external action in the realm of trade and places limits on what the EU can do *vis-à-vis* its trade partners, including countries vulnerable to food shortages. Multilateral trade law also regulates the extent to which vulnerable countries can intervene on import and export of food to promote the realisation of the right to food on their territory. This body of laws constitutes the legal setting within which the EU external action takes place and is extremely influential on the way the EU relates with vulnerable countries and of the way vulnerable countries relate to the EU.

This chapter assesses the multilateral framework regulating the import and export of food in the light of the realisation of the right to food. It does so defining the policy space that WTO law on import and export of food left to realise the right to food through the EU external action concentrating on the legal instruments that are the most influential for the import and export of food. This part of the thesis is a necessary premise to the case studies that will examine the detail of the EU external trade policy and recent trade arrangements the EU concluded with Caribbean and sub-Saharan countries.

2. The Uruguay Round and trade of food

Since the General Agreement on Tariff and Trade (GATT) era the Member States of the EU have been accepting international obligations on their external trade policies. Today, this body of laws puts considerable limits to what the EU can do through its external action. One of the principal functions of the GATT was the creation of international obligations limiting the space of action of Member countries on their

import and export policies. Acknowledging that import and export regulation in a country can affect welfare in its trading partners, the GATT attempted to reduce the discriminatory use of trade policies by regulating the amount of state intervention in external trade and creating a forum where countries could agree on limits on import and export taxes, quotas and other trade distortive public measures. As far as food is concerned, however, states have been highly reticent about subjecting their trade policy to mutually agreed international obligations. All through the history of the GATT, food commodities remained largely unaffected by the trend of progressive regulation and lowering of trade barriers. Trade in food remained by far the most protected area of trade and a domain where GATT rules were absent, excepted, ineffective or not respected.[187] The Uruguay Round attempted to change this situation including agricultural goods in the process of liberalisation and setting limits to government intervention in production and trade of agricultural goods. The Punta del Este Ministerial Declaration that inaugurated the trade Round in 1986 announced that:

> "There is an urgent need to bring more discipline and predictability to world agricultural trade by correcting and preventing restrictions and distortions including those related to structural surpluses so as to reduce the uncertainty, imbalances and instability in world agricultural markets."

Consequentially, the idea that international legal obligations on trade in agriculture were necessary gained political momentum and GATT Members agreed that agriculture should be included in the process of progressive trade liberalisation and reduction of market intervention. Besides, during the Round it was agreed that trade in agriculture should be subjected to the binding enforcement mechanism of the newly born EU. Because numerous GATT Members and future WTO Members had substantial economic interests in agriculture, regulation affecting it gained an extremely prominent position in the negotiation process. The success of the Uruguay Round would not have been possible without the achievement of a workable compromise on regulation on agricultural import and export, domestic support and subsidies. In fact, agriculture was an essential pillar of the so called Uruguay Round "grand bargain" in which developed countries pledged to further liberalise trade in labour intensive goods sensitive for developing countries (such as agricultural goods and textiles) in exchange for the acceptance of developing countries of new rules on tariff reduction, services, intellectual property rights and investment.[188]

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[187] See R Sharma, "Agriculture in the GATT: An Historical Account" in *Multilateral Trade Negotiations in Agriculture* (FAO 2000), available at <http://www.fao.org/docrep/003/x7352e/x7352e04.htm> accessed 16 December 2011.

[188] See J Stiglitz, *Making globalization work* (Penguin Books 2006) 77; S Ostry, "The Uruguay Round North-South Grand Bargain: Implications for Future Negotiations", in D M Kennedy and J D Southwick (eds), *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec* (CUP 2002) 285.

Because this research circumscribes its purview to the investigation of the relationship between regulation of international trade of food and the right to food, this chapter leaves aside other issues and concentrates on the parts of the Round directly affecting import and export policies of food. This regulation is contained mainly in the Agreement on Agriculture, the WTO agreement that governs the trade of all basic food staples including milk and animals and the majority of processed food.[189] The first part of this chapter will analyse regulation on import restrictions and safeguards, the second part will concentrate on export taxes and quantitative export restrictions. Every section commences with a brief introduction including the definition of each trade instrument. The analysis of each trade instrument is followed by the discussion of the present multilateral regulation in the light of the right to food.

3. Import restrictions

Public intervention in the import of food can affect the realisation of the right to food both at domestic level and in third countries. In particular, import policies can influence the realisation of the right to food in two ways. Firstly, modulating the quantity and quality of food imported, countries can define the role that the international food market plays in domestic food security. Limiting foreign imports of food, governments can in fact stimulate domestic producers and improve their position on the domestic market. Through import restrictions countries can also avoid that the international food market creates negative incentives on domestic food production. For instance, limiting cheap imports from abroad, countries can avoid that local farmers are displaced when are unable to produce food at better market conditions. Secondly, import policies can influence the income of foreign farmers intervening on the quantity of food imported from abroad. When a major importer closes its market to foreign producers of food it obliges them to look for different economic opportunities. In the absence of alternative export markets the income of the producers can be negatively affected. When the producers affected are farmers in vulnerable countries import policies can go as far as disrupting their basic income and make them unable to access adequate amount of food. Import policies of major importers such as the EU can go as far as affecting the behaviour of the international food market distressing the availability and accessibility of food staples, especially in vulnerable countries.

The two main instruments that countries use to regulate import flows are tariffs and quantitative import restrictions. Since the GATT, the regulation of tariffs and quantitative import restrictions constitutes the core content of international trade agreements that maintained the main objective to avoid that import policies of one country can produce discriminatory negative economic effects on its trade partners. For the EU and its partners tariffs and quantitative import restrictions are the main instrument of intervention of import flows of food and a central instrument of defence from the failures of the international food market. The result of the Uruguay Round

[189] The Agreement on Agriculture defines its product coverage in Annex 1. The only food product excluded from its coverage is fish.

includes a thorough discipline of tariffs and quantitative restrictions that limits the policy space of the EU in its relationship with vulnerable countries. The Uruguay Round also imposed limits on the capacity of WTO Members to negotiate different rules through preferential trade agreements among themselves. These legal obligations restrict the policy space the EU has when it negotiates preferential trade agreements with countries vulnerable to food shortages and influence the extent to which the EU can use its external trade policy to promote the right food. More generally, these norms limit the space of the EU to allocate non-trade concerns such as the pursuit of economic and social rights within its external trade policy.

(a) Definitions

Tariffs are complex trade instruments that can take different forms and produce a variety of economic effects. From a legal perspective, a tariff is a tax on imported goods. Tariffs incorporate all domestic and international legislation producing an effect on the amount of custom duty payable for a particular import such as legislation defining the tariff on the basis of the country of origin. Tariffs can be *ad valorem*, specific or mixed. An *ad valorem* tariff is a tax calculated as a percentage of the total value of the imported goods. A specific tariff is a tariff rate charged as fixed amount per quantity. For instance, a country importing a certain amount of tons of sugar charges them 140 dollars per ton no matter their value on the international market. Mixed tariffs combine elements of both ad valorem and specific tariffs. Another form of complex tariffs are tariff-rate quotas or tariff-quotas in which the duty levied on the imported goods depends on the quantity of goods imported. Generally, tariff-rate quotas apply a lower duty up to a defined quantity and higher duty when the threshold is trespassed.

Tariffs have numerous functions such as influencing the competitiveness of a product in the domestic market, collecting public revenues, supporting internal industrial policy[190] or the development of third countries or even promoting the ratification of certain international conventions.[191] Throughout history, tariffs have been used to pursue a variety of external policy objectives such as favouring trade with allied countries, pushing for certain policy options in third countries or damaging the terms of trade of enemies. The effectiveness of a tariff as an instrument of foreign policy depends on the value of the market to which it gives access. Tariff legislation of bigger markets such as the US, the EU, China, Canada and Japan can be highly influential because tariffs are the technical device with which a country grants or

[190] On the use of tariffs to promote economic development and industrialisation in the United Kingdom and elsewhere see H-J Chang, *23 Things they don't tell you about capitalism* (Penguin Books 2010) 69; H-J Chang, *Bad Samaritans* (Bloomsbury Press 2008) 15.

[191] The reference here is to the use of tariff preferences of developed countries to improve welfare gains in the developed world. See J Harrison, "Incentives for development: the EC's generalized system of preferences, India's WTO challenge and reform" (2005) 42 Common Market Law Review 1663. On the use of tariff preferences to promote human rights see B Hepple, *Labour Laws and Global Trade* (Hart 2005) 89; L Bartels, "The WTO legality of the EU's GSP+ arrangement" (2007) 10 Journal of International Economic Law 869.

denies access of foreign exporters to its domestic consumers. When the value of a domestic market is substantial, tariff legislation giving access to that market can go as far as influencing the economic development and the per-capita income of other countries. Tariffs, by changing the price of the imported good on the domestic market can also indirectly affect the quantity imported because more expensive goods sell less.[192]

Beside tariffs there are other instruments that the importer can use to affect import flows. In particular, the importer can control directly the quantity of goods imported by using import quotas that bar the import of further units when a quantitative limit is reached. Alongside tariffs and quotas, there are numerous other forms of import restrictions such as variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state trading enterprises and voluntary export restraints. The effect of these measures is similar to that of tariffs even if generally they do not generate any revenue for the importing country.[193]

(b) Import restrictions and agriculture in the Uruguay Round

In the GATT era market access to third countries was limited, tariffs and quantitative restrictions were used liberally and the international market was unstable and dominated by developed countries and large exporters. In the 70's the US and the EU engaged in several trade wars on agricultural products that resulted in claims to the GATT Panel. Because the GATT Panel could not issue enforceable decisions it became evident that GATT was incapable of enforcing market access for agricultural products. To solve this problem the Uruguay Round attempted to define more precise rules on import tariffs and restrictions and put their enforcement under the jurisdiction of the WTO Dispute Settlement Body. As a consequence, detailed regulation on agricultural tariffs and import restrictions was included in the GATT and in the Agreement on Agriculture. In agriculture, the operation was broadly inspired by the idea of liberalising trade in agricultural commodities and putting limits on the market distortions that such measures create.

The Agreement on Agriculture defined three main obligations on member countries. Firstly it required them to eliminate all non-tariff import restrictions and convert them into tariffs (the so called tariffication process).[194] Secondly, it obliged developed countries to lower their tariffs by 36% over six years with a minimum of 15% per tariff line. Granting differential treatment, developing countries were allowed to lower them on average by 24% with a minimum reduction of 10% per tariff line. Least developed countries were waived from reduction commitments even if they

[192] M Matsushita, T J Schoenbaum and P C Mavroidis, *The World Trade Organization. Law, Practice, and Policy* (OUP 2006) 259.

[193] Ibid 269.

[194] Article 4, Agreement on Agriculture.

were obliged to bind their tariffs in the WTO tariff schedule. Finally, the Agreement on Agriculture obliged member countries to bind their tariffs on a WTO tariff schedule. The function of the WTO tariff schedule is to oblige states not to levy import taxes beyond the level agreed between WTO Members. In fact, bound tariffs cannot be trespassed without providing compensation to trade partners. As a general rule, whenever a country grants a trade partner a tariff lower than the bound tariff it has to grant the same treatment to all other WTO members (the most favoured nation treatment rule). Doing so, every member of the agreement gets the same treatment and discrimination between states is avoided.

Notwithstanding the economic inspiration of the agreement, the objective to liberalise trade failed, trade in agriculture remained highly distorted and protected and the countries mostly affected by food shortages did not gain the market access they hoped when they signed up to the "grand bargain". The following section defines the interactions between the present WTO discipline on tariffs and import restrictions and explains why it fell short of the objective of contributing to the realisation of the right to food.

Developed countries

The three sets of obligations the Uruguay Round defined should have granted more transparent trade rules based on clear tariff restrictions and increased access of developing countries to developed countries for commodities crucial for their income and development. Loopholes in the implementation of the Agreement and the drafting of the tariff schedules conduced to quite opposite results. Because of the unclear procedure to be followed to convert quantitative restrictions into tariffs, numerous countries converted existing trade barriers into a level much higher than their equivalent non-tariff value. As a consequence, the process of tariff reduction started from artificially high tariffs which in fact, prevented any substantial increase in market access. This *escamotage*, named "dirty tariffication" was so intense that some economists argue that the Uruguay Round led to more protectionism in the trade of sensitive agricultural goods rather than to more free trade.[195] For instance, it is calculated that the tariff on rice of the EU was excessive by 207 per cent, and the one on sugar of the US by 66 per cent. Canada raised tariffs relative to the base period by 100 per cent in dairy products and by more than 200 per cent in poultry. Because dirty tariffication affects the income from increased market access of farmers in countries prone to food shortages it hampered the potential increase in economic

[195] See M D Ingco, "Tariffication in the Uruguay Round: How Much Liberalisation?" (1996) 19 The World Economy 425; I G and D van der Mensbrugghe, "Assessing agricultural tariffication under the Uruguay Round" in Will Martin and L Alan Winters (eds), *The Uruguay Round and the developing countries* (The World Bank 1996); M D Ingco, "Agricultural Trade Liberalization in the Uruguay Round. One Step Forward, One Step Back?", World Bank, Policy Research Working Paper 1500, August 1995; J J Nogues, "Comment to 'Trade, Growth, and Poverty—A Selective Survey' by A Berg and A Krueger, and 'Doha and the World Poverty Target' by L. Alan Winters." Commentary presented at the Annual World Bank Conference on Development Economics, May 10–11 2002, Brussels.

accessibility to food staples that the Agreement could have brought about. This is particularly so because dirty tariffication was common practice in developed countries and in agricultural goods sensitive for the livelihood of farmers in developing countries. This happened against the spirit of the grand bargain with which developed countries entered the Agreement on Agriculture pledging to increase the access of developing countries to their domestic markets. The EU and the United States, in particular, made wide use of this practice so that the level of protection from agricultural imports from the developing world resulted largely unaffected.[196]

In addition to dirty tariffication, the liberalisation process was hampered by lax interpretation of the reduction commitments. Countries achieved their average percentage of tariff reduction in such a way that protection was maintained or even became stronger for key products. A common strategy was reducing by 50% or even 100% already low tariffs and avoiding substantial reductions on strategic commodities. As a consequence, the distribution of tariffs on agricultural products of developed countries is highly uneven and tariff peaks on products strategic for the income of vulnerable groups in food deficit countries (such as cereals, sugar, horticulture or rice) were maintained. Moreover, tariffs on agriculture remained higher than tariffs of processed goods on which countries prone to food shortages generally do not have any comparative advantage. Among agricultural commodities tariffs on products from temperate areas stayed lower than tariffs on products from tropical and equatorial zones. In addition, the Members to the Organisation for Economic Co-operation and Development maintained the attitude of using non-*ad valorem* duties in lieu of *ad valorem* duties for agricultural goods. There is evidence that whenever a country uses non-*ad valorem* duties its effective level of protection is substantially underestimated.[197] Reducing the transparency of tariff protection and taxing imports without regard to their value non-*ad valorem* tariffs work as a harsher trade barrier than *ad valorem* tariffs. The US maintained non-ad valorem duties for 43 per cent of agricultural tariff lines. Europe, that does not use non-*ad valorem* duties for manufactured products maintained them on 44% of agricultural imports, and especially on imports sensitive for developing countries.[198] These imbalances created further disadvantages on market access to developed country markets of farmers in the developing world.

Attempting to avoid that tariffication resulted in more protected markets than before the Uruguay Round, in the so-called Modalities Agreement, an additional agreement clarifying how the results of the Uruguay Round should be implemented, provided for "current access commitments" and "minimum access opportunities".

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[196] See WTO, *From GATT to the WTO: the multilateral trading system at the Millennium* (Kluwer Law International 2000) 14; E Hathaway and M D Ingco, "Agricultural liberalization and the Uruguay Round" in *The Uruguay Round and the developing countries* (The World Bank 1996).

[197] The World Bank, *Global Economic Prospects 2004*, 117-119.

[198] See M A Aksoy, "Global Agricultural Trade Policies" in M A Aksoy and John C Beghin (eds), *Global Agricultural Trade and Developing Countries* (The World Bank 2005).

Both categories resulted in the implementation of tariff rate quotas with which a certain quantity of the good entered the market with a lower tariff that then augments when the threshold is trespassed. Tariff-rate quotas proved a useful mechanism to provide a high level of protection to domestic producers while providing minimum access to foreign imports. Their utility in providing market access to developing countries has however been very limited. The minimum access commitments in fact could be implemented through the quantity of imports allocated to specific developing countries as in the case of the Cotonou Agreement between the EU and African, Caribbean and Pacific states. As a consequence, minimum access commitments did not result in a generalised increase to developing country exports. Whenever minimum access commitments left space for improvement of market access other strategies were implemented to make it more difficult such as the use of importing agencies to select the exporters that were able in practice to sell on the domestic market.[199] In addition, because tariff rate quotas are complex there is some evidence that developing countries find it difficult to deal with them. Paradoxically, an instrument conceived to grant a minimum level of market access can easily become an insurmountable technical barrier whenever exporters in the developing world do not have the know-how to deal with it.

Another practice extremely negative for the human rights impact of the Uruguay Round is tariff escalation. Tariff escalation is a way of structuring tariffs of products involved in the same chain of production. Developed countries maintained lower tariffs on raw materials than on manufactured goods. The more manufacturing and technology the product incorporates, the higher the tariff. This mechanism discourages the creation of processing industries and manufactures in developing countries and is a way to support the development of complex production in developed countries.[200] The negative effect of these practices on the right to food is twofold. Tariff escalation creates a general impediment to economic development in countries already affected by high levels of hunger and malnutrition making it more difficult for them to move towards higher value products. Besides, tariff escalation encroaches upon food security strategies when it discourages the creation of food processing industries in the developing world.

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[199] After the Uruguay Round Japan made wide use of this instrument, see Dale E Hathaway and M D Ingco, "Agricultural liberalization and the Uruguay Round" in *The Uruguay Round and the developing countries* (The World Bank 1996) 49.

[200] On the negative effect of tariff escalation there is extensive literature. See J Stiglitz, *Making globalization work*, (Penguin Books 2006) 87-88; F Cheng, "Tariff Escalation in world Agricultural Trade" in *Case studies in food policy for developing countries Volume III Institutions and International Trade Policies* (Cornell University Press 2009); FAO, *The state of food insecurity in the world 2003,* 20; M A Aksoy, "Global Agricultural Trade Policies" in M A Aksoy and J C Beghin (eds), *Global Agricultural Trade and Developing Countries*, 37, 48.

Evaluation in the light of the right to food

The Uruguay Round started in the late eighties with the aspiration of revolutionising the way agricultural goods were traded in the world. If the aspiration of the Round had been duly pursued the consequences would have been conspicuous. The elimination of protectionism in agriculture would have exposed developed countries to the competition of developing countries having substantial comparative advantage in agriculture.[201] If that had happened the assessment of the relationship between the right to food and WTO law on tariff would be mainly a theoretical debate on the benefits and shortcomings of neo-liberal economic theory, on the effectiveness of free trade to promote the realisation of the right to food and on the ways to share the wealth generated by the liberalisation of trade with vulnerable countries and disadvantaged groups. However, the Uruguay Round manifestly missed out on its political and economic premises, did not create a level playing field for agriculture and did not manage to eliminate or reduce tariffs in developed countries and in the developing world. As a consequence, the appraisal of the interplay between the result of the Uruguay Round and the right to food can disregard the theoretical aspiration of the Round and concentrate on its legislative outcome that regulates, but does not liberalise, the trade of commodities crucial for the realisation of the right to food.

The first issue emerging from the Round is that it did not generate wealth in numerous countries where this would have been needed to support the realisation of the right to food. The basic positive rationale of the interplay between trade rounds and human rights is that the wealth generated through elimination of trade barriers and tariff reductions facilitates the realisation of human rights including economic and social rights.[202] It is apparent that this positive mechanism did not materialise in the Uruguay Round because the majority of economic benefits accrued to developed countries and large developing states. Countries prone to food shortages and areas of very limited economic accessibility to food staples such as Sub-Saharan Africa did not receive any share of increased wealth or were damaged by the result of the Round. The International Committee on Economic and Social Rights also noticed this overall negative outcome when in its Statement on the World Food Crisis affirmed that the norms emerged from the Uruguay Round "undermine" the right to adequate food and freedom from hunger.[203] Any further modification of multilateral trade law must prioritise the creation of wealth in countries where the right to food is far from realised also supporting the income of agricultural producers which are still

[201] The Uruguay round failed more generally, to deepen market access for labor-intensive goods in which poorer countries may have a comparative advantage. See J Stiglitz, *Making globalization work* (Penguin Books 2006) 77; H-J Chang, *Bad Samaritans* (Bloomsbury Press 2009) 13.

[202] See J Bhagwati, *In Defense of Globalization* (OUP 2004) 221; D A Irwin, *Free Trade Under Fire* (Princeton University Press 2009) 274.

[203] In the statement, the Committee identifies as a priority: "Revising the global trade regime under the WTO to ensure that global agricultural trade rules promote, rather than undermine, the right to adequate food and freedom from hunger, especially in developing and net food-importing countries."

marginalised from the world market but find in the production of agricultural commodities their only means of subsistence.

Regulation of tariffs in agriculture in developed countries is crucial for the realisation of the right to food because it influences the income of farmers in developing countries, a sector of society where there is a high concentration of malnourished people. [204] Because the variety of goods produced in countries particularly prone to violations of the right to food is generally very limited, a process of trade liberalisation supporting the realisation of the right would have expressly concentrated on such products.[205] However, on this important issue of market access the Uruguay Round did not improve the situation and, notwithstanding the promises made in the grand bargain, maintained a high level of protection of developed country markets in products that are fundamental for the realisation of the right to food in poorer countries. On this issue it cannot be overlooked that the norms resulting from the Uruguay Round could have been interpreted and implemented in a way more conducive to the realisation of the right to food. For instance, developed countries could have lowered tariff barriers of the required amount for sensitive products without recurring to dirty tariffication and without privileging tariff cuts for products that are not produced in the developing world. A range of tariff practices that work systematically against the realisation of the right to food could have been avoided without modifying the agreements resulting from the trade round. These include tariff escalation, complex tariffs, tariff peaks for key products and all the cases in which tariffs were arranged in such a way to impede access of vulnerable country producers to developed countries. As shown above, WTO agreements left considerable room to developed countries to modulate their external tariffs so that there was certainly the space to implement the Round in developed countries in a way more conducive to the realisation of the right to food.

Developing countries

The same legal loopholes that allowed developed countries to avoid tariff reduction or even raise the level of protectionism for agricultural goods were available to developing countries as well. Accordingly, there is some evidence that developing countries, especially middle income ones, implemented strategies similar to the ones utilized by developed countries. As a consequence, there has been resistance in implementing the Uruguay Round reduction commitments, including dirty tariffication, especially with regard to agricultural goods. Legal loopholes are however less momentous for developing countries because of a differential treatment clause in Paragraph 14 of the Agreement on Modalities. The clause allowed them to

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[204] See *supra* Chapter 3.

[205] Part IV GATT, remained unimplemented, acknowledges this dimension in the first commitment of Article XXXVII that provides that developed countries shall: "accord high priority to the reduction and elimination of barriers to products currently or potentially of particular interest to less-developed contracting parties, including customs duties and other restrictions…"

avoid reduction commitments on tariffs that had not been bound in previous trade negotiations using so called "ceiling bindings". Because the large majority of agricultural tariffs in developing countries were unbound before the Uruguay Round, this option allowed them to pick very high tariff bindings unrelated to the effective level of protection they had. As a consequence, developing countries maintained considerable policy space to increase tariffs as they wish and avoided the 24% reduction commitment. In addition, the Agreement on Agriculture provided additional flexibilities for developing countries and least developed countries. Exceptions are contained in Annex 5 to the Agreement on Agriculture and the most relevant for the right to food is the one allowing developing countries to maintain non-tariff barriers with regard to primary agricultural products that are the predominant staple in the traditional diet. So, WTO law left substantial policy space to developing countries to modulate their tariffs in agricultural products and to a certain extent to maintain quantitative restrictions.

Preferential treatment for developing countries did not mean that the Uruguay Round had no consequences for them. Firstly, for the first time in history developing countries bound almost the totality of agricultural commodities through the WTO schedule. As a consequence, future negotiations could impose reductions on tariff bindings on which there is no space for legal interpretations. Secondly, the majority of Agricultural goods were subject to tariffication and the practice included also goods that are fundamental for the livelihood of low-income farmers in developing countries. Thirdly, because numerous developing countries, and especially the poorest ones, did not have effective capacity of implementing tariff-rate quotas they lost the opportunity to include them in their national schedules. This made tariff-rate quotas widespread in developed countries but *de facto* forbade the practice in most of the developing world. Finally, the Agreement on Agriculture set the standard on the basis of which developing countries that did not take part in the Uruguay Round negotiate their WTO accession. These countries, in order to be granted WTO membership have to accept lower tariff bindings and often no preferential treatment without regard to the vulnerability of their agricultural sectors.[206]

Even if WTO law left considerable room for manoeuvre to developing countries to protect their domestic markets from agricultural imports, in practice, tariff and non-tariff protection plummeted across the developing world following a trend that started when the Uruguay Round was still being negotiated and continued until the present time. In fact, numerous developing countries, and especially the most financially exposed were already bound by other international commitments when they entered the Agreement on Agriculture. When the WTO Agreements were adopted the International Monetary Fund and the World Bank were already promoting elimination of trade barriers in developing countries accepting their loans. There is considerable evidence that these instruments were much more effective than

[206] See O De Schutter, "The World Trade Organization and the Post-Global Food Crisis Agenda", Activity Report, November 2011, 11, available at < http://www.wto.org/english/news_e/news11_e/deschutter_2011_e.pdf> accessed 2 January 2012; Sarah Joseph, *Blame it on the WTO?* (OUP 2011) 188.

multilateral trade law in promoting elimination of tariffs and quantitative trade barriers. The consequence was that agricultural tariffs across the developing world dropped between 1990 and 2000 from an average of 30% to an average of 18%. Besides, import restrictions, levies and other forms of import protectionism were reduced or eliminated across the board. In 2008 the average tariff on agricultural imports in developing countries had touched the 10% and there were pressures to further reducing the tariff in an attempt to ease the effect of a global price spike. [207] During the 2007 and 2008 global food crisis in fact, several developing countries lowered the tariffs on import of food staples in order to lower their price on domestic markets and improve economic accessibility. As a consequence, numerous developing countries highly exposed to food shortages, lowered their tariff to minimal levels or applied no tariffs.[208]

Evaluation in the light of the right to food

As far as developing countries are concerned, the Uruguay Round had scarce impact on the reduction of tariffs thanks to the differential treatment that allowed them to bind high tariff ceilings. As a consequence, the problems connected with low tariffs such as loss of revenue and increased exposure to the turmoil of the international market are not a consequence of WTO tariff bindings. However, effects on the realisation of the right to food came from other sides. Firstly, there is some evidence in literature that tariffication made developing countries more permeable to changes in world prices of food and increased their exposure to import surges. [209] In this respect, it is important that the Uruguay Round provided an *ad hoc* exception to implement quantitative restrictions on food commodities crucial for national food security. Secondly, it is unfortunate that the WTO agreements did not provide for a detailed classification of developing countries on the basis of their level of development and exposure to food shortages. The reference to Least Developing Countries is a step in the right direction, but modulation of trade policies should consider more closely the differences among developing countries. It is particularly undesirable that small countries with no influence on the food market are subjected to the same law as middle-income large developing countries. For the countries to the bottom of the development ladder tariff protection in richer developing countries is as

[207] M A Aksoy, "Global Agricultural Trade Policies" in M A Aksoy and J C Beghin *Global Agricultural Trade and Developing Countries*, 37, 42.

[208] On the influence of IMF structural adjustment programs on tariff reduction in developing countries see UNCTAD, *Addressing the global food crisis: key trade, investment and commodity policies in ensuring sustainable food security and alleviating poverty*, 8, 14, 15. O De Schutter criticises the practice of lowering tariffs to push down the price of food during price spikes as long as it does not allow enough protection to weak local producers see O De Schutter, "The World Trade Organization and the Post-Global Food Crisis Agenda", Activity Report, November 2011, 14, available at < http://www.wto.org/english/news_e/news11_e/deschutter_2011_e.pdf> accessed 2 January 2012.

[209] See A Valdes and W Foster, "Special safeguards for developing country agriculture: a proposal for WTO negotiations" (2003) 2 World Trade Review 5, especially footnotes 4 and 5.

detrimental as tariff protection in developed countries. So, more efforts should have been made to distinguish between developing countries providing regulation of trade accordingly to their necessity of realising the right to food. Finally, even if WTO law allowed high tariffs in the developing world the lack of flexibility and the fact that developing countries cannot update their obligations is an element of concern for the realisation of the right to food. For instance, De Schutter remarked that the loss of the prerogative of using tariff-rate quotas impedes the use of national instruments of market management such as agricultural marketing boards.[210]

(c) Special and differential treatment

What has been described so far is the general discipline of tariffs and quantitative restrictions resulting from the Uruguay Round. This discipline applies to every WTO Member on the basis of the agreed tariff schedule. EU Members do not have independent tariff schedules and the results of the Uruguay Round apply directly to the EU common external tariffs. The tariffs negotiated under the framework of the Agreement on Agriculture have to be applied in a non-discriminatory way respecting the most favoured nation principle. Whenever a WTO Member lowers a tariff towards another WTO Member it has to do so *vis-à-vis* every other member of the Organisation. Otherwise, the tariff reduction is actionable and can result in a complaint filed to the WTO Dispute Settlement Body.[211] This principle applies to agriculture as well, including goods sensitive for the realisation of the right to food in vulnerable countries. However, WTO law provides exceptions to this rule that developed countries can use to correct the results of the Uruguay Round with regard to those countries that are prone to food shortages or are trapped into poverty spirals. Because the Uruguay Round did not result in a substantial improvement of the income of vulnerable farmers in developing countries, the EU and other developed countries could use exceptions to the most favoured nation rule to grant them a minimum amount of exports, raise their income, and improve economic accessibility to an adequate amount of food. The use of special and differential treatment as an instrument to promote development and poverty reduction has been much debated and there is disagreement on its usefulness and effectiveness.[212] However, exceptions to

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[210] See O de Schutter, "The World Trade Organization and the Post-Global Food Crisis Agenda", Activity Report, November 2011, 11, available at < http://www.wto.org/english/news_e/news11_e/deschutter_2011_e.pdf> accessed 2 January 2012.

[211] M Matsushita, T J Schoenbaum and P C Mavroidis, *The World Trade Organization. Law, Practice, and Policy* (OUP 2006) 202.

[212] Tariff preferences received numerous critical accounts, especially from liberal economists. See J Bhagwati, D Greenway and A Panagariya, "Trading Preferentially: Theory and Policy" (1998) 108 Economic Journal 1128; C Ozden and Eric Reinhardt, *The Perversity of Preferences: The Generalized System of Preferences and Developing Country Trade Policies, 1976-2000,* Policy Research Working Paper 2955 (World Bank 2003); I Borchert, "Trade diversion under Selective Preferential Market Access" (2009) 42 Canadian Journal of Economics 1390; G Grossman and A Sykes, "A Preference for Development: The Law and Economics of GSP" (2005) 4 World Trade Review 41; C Michalopoulos, *The Role of Special*

the most favoured nation rule remain the only instruments available under WTO law to correct the inadequate result of the Uruguay Round without renegotiating WTO agreements from scratch. As a consequence, they gained considerable attention within the academic debate on how to use trade law to promote development. From the perspective of the right to food they could be crucial to interrupt the vicious cycle that excluded farmers in the developing world from global trade, especially in vulnerable countries, locked them into poverty and hampered their economic access to an adequate amount of food.[213] Special and differential treatment to vulnerable countries can be granted through three legal instruments: the WTO enabling clause, special waivers voted by two thirds of WTO membership and preferential trade agreements under Article XXIV GATT. The following section goes through the three exceptions to the most favoured nation rule. A fourth paragraph evaluates the present arrangement in the light of the right to food.

The enabling clause

Since the beginning of the GATT experience there has been a discussion on how to favour weaker trade partners. The debate took shape on the basis of the necessity of attracting other states to GATT negotiations and the acknowledgement that since states have different levels of development trade instruments could be put at the disposal of less developed nations.[214] In 1958 the *Haberler Report*, circulated in the context of GATT negotiations, acknowledged that existing trade rules may not work to the advantage of less developed countries. In particular, the report identified the problem of the asymmetry of trade liberalisation through which developed countries maintained high level of protection for key farm products from the developing world. The report suggested the reduction of protectionist practices on agricultural goods and explicitly noticed that not every country collected the same benefits under the GATT regime and that efforts had to be made to include disadvantaged trade partners.[215] Following the Report, GATT partners in 1965 during the Kennedy Round added to the GATT a fourth part titled "trade and development". Part IV GATT contained a list of non-binding best endeavours commitments acknowledging the necessity to sustain export earnings of less developed countries and the importance of non-reciprocity in the relationship between developed and developing countries. The principle of non-reciprocity means that "less-developed contracting parties should not be expected, in the course of trade negotiations, to make contributions which are inconsistent with

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and Differential Treatment for Developing Countries in GATT and the World Trade Organization, Policy Research Working Paper 2388 (World bank 2000).

[213] J Stiglitz goes as far as proposing to substitute the most favoured nation principle with a system where richer countries open up their markets to poorer ones whereas poorer countries maintain their trade barriers towards richer countries. Stiglitz maintains that middle-income countries should eliminate trade barriers towards poorer partners but be allowed to maintain tariff protection *vis-à-vis* developed countries. See J Stiglitz, *Making globalization work* (Penguin Books 2007) 83.

[214] M Matsushita, T J Schoenbaum and P C Mavroidis, *The World Trade Organization. Law, Practice, and Policy* (OUP 2006).

[215] GATT, *Trends in International Trade*, (1958).

their individual development, financial and trade needs…". Besides, Article XXXVII GATT contains the obligation on developed countries to eliminate trade restrictions in areas of strategic interest for the income and development of developing countries and avoiding anti-development practices such as high tariffs on processed goods. Even if Part IV GATT was not enforceable it gave political momentum to the creation of preferential treatment programs called Generalised Systems of Preferences (GSP) favouring market access of developing countries. Accordingly, numerous developed GATT members sought GATT waivers to implement GSP arrangements. After a 10 year waiver the exception to the most favoured nation principle crystallised into a permanent Decision in 1979 known as GATT "enabling clause". The enabling clause then became part of the WTO system through Article 1 (b) (iv) of GATT 1994 which included in the GATT all the Decision adopted by contracting parties before the creation of the WTO.[216]

The enabling clause allows developed countries to breach the most favoured nation principle to provide preferential access to developing countries. Developing countries, however, differ considerably among each other and WTO law generally does not take into account these differences and does not provide any agreed classification of developing countries. For this reason, the definition of developing country commonly used during trade negotiations includes a variety of states from extremely poor ones up to middle-income OECD countries such as South Korea or emerging global powers such as China. This situation led to the problem of defining the legality of differential treatment between countries classified as developing countries but having different characteristics. Accordingly, recent WTO case law had to define to what extent developed countries can discriminate between developing countries when they grant them preferential access. This problem emerged when the EU developed several programs granting additional tariff preferences to countries that had ratified pre-determined lists of international conventions. The practice became contentious with the developing countries that had not received preferential treatment and a complaint was filed to the WTO Dispute Settlement Body. This gave the opportunity to WTO courts to clarify the enabling clause in the landmark judgment *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*. At first, the Dispute Settlement Body stated that developed countries cannot discriminate between developing countries. As a consequence, GSP arrangements would have had to give the same treatment to all developing countries no matter their peculiarities. However, the Appellate Body, reversing the Panel's judgment, maintained that, because development needs are not equal among all developing countries, developed countries can discriminate between them as long as they

[216] For a general overview of the legal issues concerning the Enabling Clause see L Bartels, "The WTO Enabling Clause" in B Remiche and H Ruiz-Fabri (eds), *Le commerce international entre bi et multilatéralisme* (Larcier 2010) 249; L Bartels, "The WTO enabling clause and positive conditionality in the European Community's GSP programme" (2003) 6 Journal of International Economic Law 507.

> "ensure that identical treatment is available to all similarly-situated GSP beneficiaries, that is, to all GSP beneficiaries that have the development, financial and trade needs to which the treatment in question is intended to respond".

The case gave considerable policy space to developed countries in the way they devise their preferential arrangements. However, it also obliged them not to discriminate in an unpredictable way between developing countries. This means that preferential arrangements based on a closed list of beneficiaries are not consistent with WTO law. GSP schemes must clarify the criteria to be eligible to them and be opened to applications from all developing countries. Unfortunately, the Appellate Body did not provide any further clarification on the legality of the criteria developed countries can use to elect GSP beneficiaries.

Today, the EU, the United States, Switzerland, Norway, Australia, Canada, Japan and New Zealand all run GSP programs giving developing countries lower tariffs than the WTO most favoured nation rate. Developed countries revise their GSP arrangements on a regular basis and the extent to which developing countries benefit from them often depends on the details of GSP regulation. In particular, the effectiveness of the arrangement as an instrument to support the income of developing countries depends on the product coverage, on the duties levied, the structure of the tariffs, the rule of origins and eventual safeguards actionable by developed countries. Even if the effect of GSP arrangements on vulnerable countries must be assessed taking into account the peculiarity of each country, there is no doubt that GSP arrangements, in their actual form, have been of limited significance and did not change the outcome of the Uruguay Round. In fact, notwithstanding GSP regimes, tariffs levied by developed countries on imports from developing countries are still four times higher than tariffs on imports from other developed countries.[217] In addition, the voluntary character of tariff preferences makes them prone to abuses from developed countries that can use them as an instrument of political pressure. Moreover, the fact that tariff preferences can be cancelled at any time makes them a weak instrument of income promotion because economic operators need security and investments cannot rely on ever changing preferential tariffs.[218]

Waivers

Article IX of the Agreement Establishing the WTO contains a residual procedure enabling contracting parties to waive obligations whenever the decision is approved by three quarters of WTO members. Before the creation of the WTO, GATT Article

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[217] UNCTAD, *Trade Preferences for LCDs: an Early Assessment of Benefits and Possible Improvements*, 2004.

[218] Lorand Bartels and Christian Haberli propsed to solve this issue through a complex procedure under GATT Article II. See Lorand Bartels and Christian Haberli, "Binding Tariff Preferences for Developing Countries under Article II GATT" (2010) 13 Journal of International Economic Law 969.

XXV.5 included an equivalent procedure. The waiver must be limited in time and the decision adopting it has to state the exceptional circumstances justifying the decision. This procedure has been used for a variety of purposes including the one of allowing developed countries to provide preferential treatment to some developing countries in breach of the most favoured nation principle when this would not be allowed by WTO legislation. Because waivers are temporary, they offer limited reliability and their expiry makes trade preferences suddenly inconsistent with WTO law. A notable example of the use of waivers is the one to make compatible with WTO law the Cotonou Agreement between the EU and the African, Caribbean and Pacific (ACP) group of states. The Cotonou Agreement is an instrument of development cooperation that included a substantial trade component giving access to goods produced in ACP countries duty free of with a tariff considerably below the one offered through the EU GSP. The waiver expired in 2007 forcing the contracting parties to the Cotonou Agreement to review their relationship. The expiration of the waiver had major consequences for ACP countries that found themselves in the position of having to conclude preferential trade agreements with the EU in order to preserve their tariff preferences. As it will be seen in the case studies this came at a cost in both economic and human rights terms.[219]

Preferential trade agreements

Article XXIV GATT allows Member States to conclude preferential trade agreements.[220] To make them compatible with WTO law the most favoured nation principle does not apply to the parties to a preferential trade agreement in the relationship between each other. This exception to the GATT allowed the creation of the EU and other regional organisations as well as a plethora of free trade areas such as the North American Free Trade Area, the European Free Trade Area and the EU-South Korea Free Trade Agreement. To be consistent with multilateral trade law, preferential trade agreements have to respect numerous conditions the most important of which is that the agreement has to liberalise "substantially all the trade" between the contracting parties.[221] The WTO Dispute Settlement Body did not clarify what the requirement exactly entails. It is however agreed that a preferential trade agreement, to be compatible with WTO law, should be duty free at least for the 80% of the tariff lines. The requirement has to be met within ten years from the conclusion of the agreement. The EU uses preferential trade agreements widely to give preferential

[219] See Chapter 7.

[220] See Paragraph 5 of Article XXIV GATT: "Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area".

[221] See Paragraph 8 of Article XXIV GATT: "A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce …are eliminated on substantially all the trade between the constituent territories in products originating in such territories." This obligation does not exist on countries when they negotiate multilateral trade agreements.

access to its common market to neighbouring countries and, increasingly, to its trade partners around world.

The use of preferential trade agreements to support the income of vulnerable categories in developing countries giving them preferential access to the market of a developed country is a contentious matter. Whereas the enabling clause and waivers allow developed countries to offer non-reciprocal access to their markets to developing states Article XXIV GATT obliges the parties to a preferential trade agreement to eliminate tariffs substantially on both sides. This means that while the developing country gains access to the developed country market, also the developed country gains almost complete market access to the developing country. The WTO Appellate Body clarified the point in the case *EC-Bananas II* where it stated that the Lome' Convention, the predecessor of the Cotonou Agreement, could not be justified under Article XXIV GATT because it offered non-reciprocal preferential access to the developing countries taking part in the Convention. These countries had preferential access to the EU market but were able to maintain trade barriers on imports coming from Europe. In other words, the principle of non-reciprocity included in Part IV of the GATT, which should inspire multilateral trade law, cannot be applied in the context of preferential trade negotiations. This legal requirement limits considerably the policy space the EU and developing countries have when they negotiate a preferential trade agreement among themselves. In particular, Article XXIV makes the EU unable to agree on clauses affording substantial protection of developing countries from its agricultural exports. This condition makes preferential trade agreements unsuitable to promote the income of vulnerable groups in developing countries because they expose them to the competition of producers in the developed world.[222] Exposing vulnerable categories to the full force of European competition, preferential trade agreements have the potential to produce widespread negative effects on the realisation of the right to food.

Evaluation in the light of the right to food

Human rights literature devoted scarce attention to the interplay between the law of preferential treatment in the WTO and the realisation of the right to food. This part of legislation is however crucial for correcting the imbalances of the Uruguay Round and ensuring access of vulnerable countries to high value markets. Looking at these norms from the perspective of human rights, it is inappropriate that market access to developed countries, so fundamental for the realisation of economic and social rights, is left to the unrestricted will of richer countries. The importance of eliminating trade barriers on the exports of developing countries is also recognised in the first commitment of Article XXXVII of the fourth part of the GATT. It is unfortunate that the norm remained aspirational and was never duly implemented. The voluntary character of the instrument made tariff preferences a double-edged sword prone to abuses and political utilisations which have nothing to do with providing support to development and working towards the realisation of economic and social rights. In

[222] See Chapter 3 for the definition of vulnerable countries.

fact, conceding or revoking preferences developed countries can influence the share of wealth each developing country obtains from international trade and the income of exporters and producers in the developing world. To be an instrument of realisation of the right to food tariff preferences cannot be biased or hide economic or other foreign policy interests of developed countries. An additional problem is that the revocation of tariff preferences bears consequences for the right to food that WTO law does not oblige to consider. The end of a preferential scheme affects the economic access to adequate food of those producers in the developing world who relied on the scheme for their livelihood. In other cases WTO law prescribes the obligation to compensate partners for changes in trade policies producing adverse effects, it would have been advisable to do the same in this case.[223] WTO law could also have required to bind tariff preferences in order to provide more security and avoid their mismanagement or the abuses of donor countries.[224]

It is also undesirable that the discipline of preferential market access to developed countries, a practice crucial for the realisation of the right to food, relies on clauses that were at the margin of the Uruguay Round or were not debated at all. This includes Article XXIV GATT that was drafted in the 50's to allow the creation of the EU but is now widely used to create North-South preferential agreements. The Uruguay Round missed the opportunity to amend Article XXIV acknowledging its new function and allowing non-reciprocal liberalisation when vulnerable countries are involved in the agreement. With the rules resulting from the Round a very poor country exposed to hunger and malnutrition has to eliminate its tariffs on trade in goods almost completely whenever it enters a preferential trade agreement. This is so even when the trade partner is a developed country able to affect the livelihoods of farmers through its agricultural exports. To the contrary, the correspondent of Article XXIV GATT in the General Agreement on Trade in Services (GATS) provided that whenever a preferential agreement liberalises trade in services and developing countries are parties, "flexibility should be provided…in accordance with the level of development of the countries concerned".[225] It would have been enough for the Uruguay Round to introduce the same clause in Article XXIV GATT to make it more conducive to the realisation of the right to food. The Doha Declaration recognised this necessity at Paragraph 29 where it stipulates: "We also agree to negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements. The negotiations should take into account the developmental aspects of Regional Trade Agreements".

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[223] Such as Article 8 of the Agreement on Safeguards, see M Matsushita, T J Schoenbaum and P C Mavroidis, *The World Trade Organization. Law, Practice, and Policy* (OUP 2006) 458.

[224] See above Note 69.

[225] The reference here is to Article 5, Paragraph 3.a of the General Agreement on Trade in Services. See L Bartels, "The trade and development policy of the European Union" (2007) 18 Journal of International Economic Law 715, 754; R Adlung and M Molinuevo, "Bilateralism in services trade: is there fire behind the (BIT-) smoke?" (2008) 11 Journal of International Economic Law 365; R Lang, "Renegotiating GATT Article XXIV – a priority for African countries engaged in North-South trade agreements", United Nations Economic Commission for Africa African Trade Policy Centre, Work in Progress No.33.

The prohibition of non-reciprocal liberalisation of trade in goods in preferential trade agreements also led to the problem of possible abuses of developed countries with regard to the different forms of preferential treatment available under WTO law. Because all three forms are voluntary (GSP, waivers, preferential trade agreements) and have different consequences for the vulnerable part of the relationship more regulation would have been needed on the prerogative of developed countries to pick one form or the other. In particular, it would have been necessary to secure that developed countries offer the best form of preferential treatment WTO law has on offer. In fact, the result of the Uruguay Round leaves open the possibility that developed countries use tariff preferences to pressure developing countries in the direction of preferential trade agreements in order to obtain access to their internal market. As shown above and in Chapter 3 this practice would be dangerous for the right to food because exposes groups vulnerable to food shortages almost to the full force of the competition of the developed partner.[226]

4. Safeguards

(a) Definition

Safeguard measures are instruments of trade defence that a country can apply temporarily to avoid that its economy or domestic producers suffer serious harm from imports or trade concessions. The most common kind of safeguard is the imposition of an additional tariff on imported goods when the quantity or the price of the imported goods is injuring domestic producers. The relevance of safeguards for the realisation of the right to food is twofold. Firstly, safeguard measures are a trade barrier that can curtail access of vulnerable producers to sensitive markets such as the high value markets of developed countries. Secondly, safeguards can be used by countries prone to food shortages to interrupt import surges which, displacing local farmers, affect their income and hamper their economic accessibility to adequate amount of food. As shown above, empowering local producers in countries prone to food shortages is crucial to promote the realisation of the right to food in the long term. In fact, a too high level of imports can severely affect the capacity of developing countries to develop their own productive facilities. As a consequence, whenever import surges occurs safeguards are a useful instrument to re-establish the balance between food imports and the development of independent capacities to achieve national food security.[227] In other words, the law of safeguards contributes alongside the regulation on tariffs to the definition of the policy space that developing countries have to defend themselves from import surges. In the same vein, the law of safeguards

[226] For a very critical account of the attitude of the European Union towards tariff preferences see Oxfam, *Weighing the options*, Briefing note prepared for the Pacific Trade Ministerial, Port Vila, Vanuatu, 31 July – 1 August 2007, available at < http://www.acp-eu-trade.org/library/files/Oxfam_EN_310707_Oxfam_Weighing-the-options.pdf> accessed 7 January 2012.

[227] On the economic advisability of safeguards see J Stiglitz, *Making Globalization Work* (Penguin Books 2007) 90.

defines the policy space of developed countries to impose tariff barriers on countries prone to food shortages.

Article XIX GATT and the Safeguards Agreement, one of the agreements concluded in the Uruguay Round, contain the regime of general multilateral safeguards applicable to all products. In addition, the Agreement on Agriculture identifies a special safeguard applicable in certain cases to imports of agricultural goods. The two regimes are considerably different and define distinctive options that countries can utilise to protect their agricultural producers from foreign imports depending on the circumstances.

(b) The GATT and the Agreement on Safeguards

Article XIX GATT allows WTO Members to raise tariff barriers beyond the most favoured nation rate if:

> …as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession…[228]

The Agreement on Safeguards complements and extends this basic regime providing for detailed requirements to be followed before the WTO Member can adopt the safeguard. The level of detail and the bureaucratic character of the regulation make it significantly burdensome and the policy space WTO law leaves to use safeguard measures is very limited.[229] This is so because safeguards are a departure from the theoretical premises of WTO law and they are looked at with distrust.

Substantive requirements

Essentially, the GATT and the Agreement on Safeguards allow WTO Members to adopt safeguards when three substantive requirements are met simultaneously. Firstly, there must have been an increase of imports of the product for which safeguard measures are adopted. In *Argentina-Footwear* the WTO Appellate Body defined the

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[228] Article XIX GATT Paragraph 1.a.

[229] For an overview of the legal issues and case law related to WTO safeguards see A O Sykes, *The WTO Agreement on Safeguards: a Commentary* (OUP 2006); P M Rodriguez, "Safeguards in the World Trade Organization ten years after: a dissociated state of the law?" (2007) 41 Journal of World Trade 159.

expression "in such increased quantity" as requiring that the increase is "recent enough, sudden enough, sharp enough and significant enough, both quantitatively and qualitatively, to cause or threaten to cause 'serious injury' ". Secondly, the import surge must be the consequence of unforeseen developments and of obligations the state has to respect under WTO law. This means that the state adopting safeguards must demonstrate that new circumstances, unpredicted at the moment of the conclusion of the agreement, manifested and caused the increase of import. Finally, the increase of imports must cause or threaten to cause "serious injury" to a domestic industry producing a like or directly competitive product. In *Argentina Footwear* the Appellate Body defined this requirement as "a significant overall impairment" of the condition of the domestic industry affected by increased imports. The requirement has been further defined in sporadic but substantial case law.

The safeguard regime applies with very little discrimination between developed and developing countries. The only exception is Article 9 of the Agreement on Safeguards which requires that:

> "safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned."

The same article also allows developing countries longer time limits for the implementation of safeguard measures. All the rest of the discipline applies in the same way to both developed and developing countries. In addition, paragraph b of Article XIX GATT extends the availability of safeguards also to tariff preferences developed countries afforded to developing countries.

Procedure

Before adopting safeguards in the form of temporary tariffs, quotas, tariff-rate quotas or other protective measures, WTO members have to conduct a thorough investigation through a domestic administrative body. The procedure has to include public notice to all interested parties and the possibility for importer, exporters and stakeholders to present their views. At the end of the investigation, public authorities of the injured country must publish a report providing reasoned conclusions and the analysis of all pertinent issues in fact and law. The objective of this investigation is ensuring that safeguards are adopted only as an instrument of *extrema ratio* and only when it is evident that the injury to local producers was inflicted by imports. The public authority investigating the necessity of the safeguard has to prove the substantive requirement of Article XIX GATT and the Agreement on Safeguards. Besides, the public authority is obliged to determine the causal bond between the surge and the injury. To do so the Appellate Body defined a procedure in the cases *United States – Lamb Safeguards* and *United States – Wheat Gluten Safeguard* which obliges WTO members to distinguish the injurious effects caused by increased imports from the injurious effects caused by other factors. A safeguard is WTO

compatible only if from the analysis appears a "genuine and substantial relationship of cause and effect" between the injury and the increased imports.

When the WTO Member takes steps to implement the safeguard measure it has the duty to notify the decision to all the countries potentially affected and seek consultation. The extent of the safeguard measures cannot go beyond what is necessary to remedy or prevent serious injury and to facilitate adjustment. As a general rule, the safeguards cannot reduce the import below the average level of the three preceding years. If further reduction is necessary to prevent or remedy the serious injury an exception can be made. In this case, however, the WTO Member has to provide clear justification of the necessity of the reduction. A principle called of "non-attribution" prescribes the additional requirement of excluding from the safeguards the amount of injury attributable to factors other than increased imports. So, if a part of the injury had different causes the safeguards can remedy the injury only for the part the imports directly caused. After the adoption of the safeguards the WTO Member is obliged to compensate the damage the measure created to other members. If agreement on the compensation cannot be reached after three years from the adoption the affected WTO Members are free to retaliate. This is generally done by withdrawing an equivalent amount of trade concessions.

Evaluation in the light of the right to food

From a human rights perspective safeguards could reconcile external trade policy with the human rights duties of the state. The duty to respect the human right to food entails in fact that the state should avoid that its policies, including trade policies, negatively affect the right. Moreover, when citizens do not have access to food for reasons beyond their control the state has the duty to intervene. When the threat to the right to food comes from an import surge, the use of safeguards is an effective policy instrument to limit imports, shelter local producers and avoiding major negative effects on the right to food. When the surge is impeding the access to food of local populations displacing farmers already prone to violations of the right, a safeguard is an indirect way to provide food acting through external trade policy. The law of safeguards is relevant for the realisation of the right to food also because it influences the policy space of countries to restrict access to their markets of goods from states where producers are prone to food shortages. These dimensions of the law of safeguards, however, were not discussed comprehensively in the Uruguay Round and states did not design the resulting regulations to be used efficiently in case of temporary or permanent violations of the right to food. In fact, in the Uruguay Round there was no agreement on the objective and purposes of safeguards and this indecision permeated the regulation deeply. In international economic law literature there is a debate between commentators seeing safeguards merely as a political instrument smoothing the ratification of trade agreements in national parliaments and other authors favourable to conceptualising safeguards as a protective device from the asperity of international markets and the liberalisation of trade.[230] The GATT and the

[230] For an overview of the issue in WTO law see M Matsushita, T J Schoenbaum and P C Mavroidis, *The World Trade Organization. Law, Practice, and Policy* (OUP 2006) 459.

Agreement on Safeguards do not follow any one of these two interpretations and remain a hybrid mechanism with persistent deficiencies as an instrument of protection of the right to food. Overall, the system in force discourages the use of safeguards as a violation of the normative prescriptions of the law of comparative advantage. The underlying rationale is that safeguards are welfare reducing without consideration of the fact that they can constitute a protective device of the right to food against the unpredictability of the international food market.

Considering all the elements above, several shortcomings appear particularly evident. Firstly, the concept of import surge, the negative effects of which are well known in economic literature, does not appear in the treaties. Because the legal characterisation of import surges sets the parameters for the implementation of trade barriers it proved highly controversial in the Uruguay Round and it is always a contentious issue in multilateral and regional trade negotiations.[231] A definition of the phenomenon in international economic law emerges only through the substantive requirements allowing the recourse to trade remedies. However, the technocratic nature of the negotiation, the difficulty of striking a bargain and the struggle of developing countries to have their interests taken into account made the resulting definition detached from the human rights implications of the surges.

Secondly, the regime emerging from the GATT and the Agreement on Safeguards does not take into account the fact that import surges are more dangerous for developing countries and does not consider their administrative fragility. The asymmetry in the human rights consequences of the surges is not reflected in substantial special and differential treatment for developing countries. Notwithstanding Article 9 of the Agreement on Safeguards, countries particularly vulnerable to the realisation of the right to food did not receive any particular facilitation with regard to the burdensome substantive requirements or the administrative procedure. No alternative procedure is provided for countries that may have administrative shortcomings in implementing the regulation. Besides, the law of safeguards does not take into account the urgency of implementing the defensive measure when national food security is at stake. In fact, the present legal framework implies that the state is able to monitor the effects of its trade policy on its domestic market. This is often not the case, especially when the negative effects of the import surge fall on rural populations living outside the capital city. When the state identifies an increase in malnutrition or a process of migration from rural areas to the poorest boroughs of cities it might adopt the safeguards provisionally and then start the investigation to be able to implement it up to the relevant limit. This can be done under the Agreement on Safeguards even if the country for provisional adoption still needs clear evidence of the causal bond between the imports and the injury and the gathering of quantitative information on the serious impairment to the local industry, which in this case is often a rural settlement. In a poor country, with a weak administrative apparatus and a portion of the population endemically affected by food

[231]R Wolfe, "The special safeguard fiasco in the WTO: the perils of inadequate analysis and negotiation" (2009) 8 World Trade Review 117.

insecurity this information is difficult to collect. Even when the data is available, the establishment of the causal bond between the surge and the injury requires advanced analytical capability, not always available in developing countries. After the causal bond is established and the provisional safeguards adopted the investigation to make it definitive needs to fulfil the other substantive requirements for which the same shortcomings in data collection and analysis will prove a burden difficult to overcome.

Third, safeguards measures are not cost free. Their adoption has to be accompanied by the compensation of the export country. Even when the developing country has fulfilled all the obligations of WTO law it may still not be able to pay for compensation. This is a conceptual shortcoming that makes safeguards unfit as instrument of prevention and resolution of human rights violations. Whereas for trade law a protectionist instrument creates a reduction in global welfare that has to be compensated, it is unacceptable from a human rights perspective that there is an economic burden on the exercise of the human rights duties of a state. The reason why the Uruguay Round identified a right for compensation attached to the adoption of a safeguard may be in the negotiation procedures. In the context of trade negotiations safeguards are a trade concession as any other and the drafting of agreements does not leave space for reflection on their protective function, let alone their human rights implications. Moreover, in economic theory, the role of safeguards is easing the political opposition that trade treaties may find in national parliaments. The risk of this approach is that as long as safeguards are an effective decoy for politicians, drafters lose interest even if the system is not an efficient form of protection. Besides, in the context of trade negotiations there is the concern that countries might use injuries caused by external trade as excuse to withdraw trade concessions through safeguards. This is done having in mind influential traders but the approach is detrimental to small and vulnerable developing countries which, without having any impact on international trade, are subjected to the same rules as developed countries and big exporters such as Brazil and China. Compensation creates a further disincentive for developing countries that cannot expose themselves to compensation or retaliation. To the contrary, richer countries can "buy" the right to protect their industry if they identify it as a policy priority. There is no strategy to overcome the compensation obstacle. Whereas institution building can support developing countries through the adoption of the safeguards and the identification of the injury, compensation will always be a substantial disadvantage.

Article 9 of the Agreement on Safeguards represents a crucial limitation of the use of safeguards against developing countries. The Article's rationale is ensuring that trade policies of developed countries do not undermine the realisation of the right to food by diminishing access of vulnerable farmers to their markets. The Appellate Body highlighted its intention to enforce Article 9 exceptions in the case *United States – Line Pipe Safeguards* where it maintained that developed countries must take "all reasonable steps" to comply. Unfortunately, the exclusion works only when developing countries together account for less than 9% of total imports in the developed country so excluding from its application key products produced by vulnerable farmers in tropical countries. It is also undesirable that the 9% threshold is calculated without distinguishing between middle-income developing countries and countries particularly vulnerable to food shortages. There is no apparent justification to exclude from protection against safeguards of developed countries all developing

countries including the most exposed to malnutrition when only some of them are leading exporters of a certain product. Another objectionable element is that WTO Members, that are all obliged to notify to the WTO the safeguard measures they adopt, do not have to notify their compliance with Article 9. This leaves the enforcement of an important clause on differential treatment entirely to the WTO adjudicatory bodies. The fact that there are no examples of vulnerable countries responding to unfair safeguards through the WTO adjudicatory bodies may signal that scarcity of resources in the developing world is hampering the implementation of the clause. In addition the case law on the issue shows that developed countries had scarce attention for the implementation of Article 9.[232]

(c) The Special Safeguard in the Agreement on Agriculture

During the Uruguay Round several countries were concerned that the resulting liberalisation and the process of tariffication could harm their national producers deepening excessively the penetration of foreign imports in agricultural products. Notably, Switzerland felt particularly vulnerable because of its geographical location, surrounded by the EU and its tradition of supporting agriculture through high subsidies and domestic support.[233] To avoid the *impasse* of negotiations, the countries taking part in the Round devised a transitional mechanism, in the form of a special safeguard, enabling countries to adopt tariff increases when certain conditions indicating a threat to their local producers are fulfilled. The special safeguard mechanism was supposed to expire at the end of the Doha Round, however, when the negotiations stalled, it remained in force as a *de facto* permanent mechanism. In the Uruguay Round the system was made available to every country for the agricultural products subject to tariffication. Furthermore, to be able to use the system the country interested had to include the acronym SSG beside the tariff line in the WTO tariff schedule. Countries were obliged to use this opportunity at the moment of negotiating their tariff bindings and accession to the SSG was not left open after the conclusion of the negotiations. Switzerland and other developed countries made extensive use of this option so that they secured the right to use the special safeguard virtually in all tariff lines subject to tariffication. Because of the 39 countries reserving the right to use the SSG, 22 are developed countries the instrument remained unavailable to the majority of countries vulnerable to food shortages. Notwithstanding this disappointing result the SSG remains the only attempt to design a mechanism that, without excessive procedural rigidities, allows countries to protect their domestic market from

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[232] See paragraph 134 of the case *US – Line Pipe Safeguards*: "As the Panel emphasized, too, the available documents reveal no effort whatsoever by the United States—apart from the claimed "automatic" structure of the measure itself—to make certain that de minimis imports from developing countries were excluded from the application of the measure. Whatever the "expectations" of the United States, we are not persuaded by the facts before us that the United States took all reasonable steps that it could and, thus, should have taken to exclude developing countries exporting less than the *de minimis* levels in Article 9.1 from the scope and, therefore, the application of the supplemental duty."

[233] See T P Stewart, *The GATT Uruguay Round. A Negotiating History, Volume IV: The End Game* (Kluwer 1999) 18.

import surges. As a consequence it is on this device that research is concentrating to define a fair balance between binding tariffs at international level and the necessity of protecting vulnerable producers from foreign competition.

Substantive requirements

The SSG provides for an easier exit strategy than the general safeguards in the GATT and the Agreement on Safeguards. The SSG, in fact, has the benefit not to require the demonstration of complex substantive requirements and does not necessitate the domestic administrative procedure. When import of an agricultural good reach trigger conditions defined in Article 5 of the Agreement on Safeguards, the importer can levy additional duties immediately at the moment of importing the good. This allows the importing state to intervene immediately and automatically to interrupt the import surge. This system should afford protection to domestic producers from foreign competition and could facilitate the realisation of the right to food whenever vulnerable producers are not able to cope with it. Most notably, the utilisation of the SSG does not generate a duty to compensate trade partners.

The Uruguay Round defined the conditions to implement the SSG through two alternative triggers, one based on import volumes and one based on the price of the imported good. The price trigger allows the importing country to charge an additional duty when the price of the commodity is below a reference price calculated as the average of the price of the good between 1986 and 1988. The volume trigger allows the WTO Member to compare each year's imports with the average of imports over the previous three years. Whenever the volume of imports trespasses the reference volume of a percentage defined in the Agreement on Agriculture, the importer can add an additional duty. The reference level is calculated through a complex formula provided in paragraph 4 of Article 5. These requirements are applicable directly without judicial or administrative assessment and should produce the effect of raising the price on the domestic market protecting national producers. It should also give them a price of reference, whenever they produce below that price they are in a safe haven no matter what is the price the international market sets.

Procedure

The SSG works automatically on the basis of the two alternative triggers. No investigation is required and countries can impose the additional SSG duty whenever one of the two conditions is fulfilled. The procedure to implement the SSG is negligible but there are numerous additional technical requirements attached to the trigger conditions. Such requirements oblige the country to assess a range of economic variables to define when the trigger has been effectively trespassed or to define the additional duty allowed or the maximum period of implementation. There is a general obligation attached to the SSG to act in a transparent manner and to "afford any interested Members the opportunity to consult with it in respect of the conditions of application of such action". WTO Members have to notify the period of application of the duty but not the amounts of imports or the amounts of the additional duties.

Evaluation in the light of the right to food

In principle, the SSG could be the most effective emergency instrument concerning agricultural commodities ever included in multilateral trade law. Because of the absence of heavy procedural obligations it is on paper a good compromise between trade liberalisation and the necessity of avoiding import surges. It also represents an instrument of intervention on international trade regulation when imports are a risk for the human right to food. However, the disappointing result that the mechanism achieved in practice made it of no use as system of protection. After almost 20 years of implementation, the SSG appears to be no more than an attractive starting point on which the Doha Round can build more effective systems of protection. If the Doha Round does not make it immediately available for all developing countries the resulting regulation will still have a significant human rights handicap. The reasons for the failure are both conceptual and practical. In fact, the Agreement of Agriculture is not clear on the theoretical premises of the SSG and the same biased approach that undermined the regulation of general safeguards affects the SSG as well. It is evident from the regulatory choices made in the Uruguay Round that a part of the negotiating states saw it merely as a way to smooth the process leading to further liberalisation. However, in order to be an effective mechanism of protection of vulnerable countries more attention was needed to the necessities of the disadvantaged parties to the agreement. This was not the case and even when the SSG is accessible this is never for all imports but only for limited products. To be conceptually closer to an instrument of protection the SSG needs to be extended to every developing country and to all sensitive products. Moreover, because in this case the necessity of protection is concentrated in certain vulnerable countries and the use of SSG by developed countries damages fragile agricultural economies an asymmetrical system would be fairer. To the contrary, a clause similar to Article 9 of the Safeguards Agreement forbidding tariff increases against developing countries is absent from the SSG regime. Embedding special and differential treatment in the SSG would avoid the present situation where *de facto* the SSG is an additional trade burden on developing country exports towards developed country, especially Europe. In fact, statistics show that the developed countries that have access to the SSG used it extensively. Between 1995 and 2000 only three WTO Members did the 70% of invocations of the SSG: the US, the EU and South Korea.[234] Switzerland and the EU have resorted to the mechanism almost 1000 times each, Norway 600, Iceland 500, the US 200 whereas the rest of the world much less or never. A study of the Food and Agriculture Organization of the developing countries that have access to the SSG showed that it was used in less than 1% of the cases in which it was available. In sub-Saharan Africa where numerous malnourished people live, only South Africa, Swaziland, Botswana and Namibia adopted SSG measures. In South America only Mexico and Venezuela used the SSG and in the Caribbean only Barbados.[235] Because

[234] The content of the Safeguard Agreement was deeply influenced by Section 201 of the US Trade Act 1974. See T V Vakericks, *Antidumping, Countervailing Duties and Other Trade Actions* (1987 Practising Law Institute) 271-380.

[235] R Sharma, "Effective special safeguards mechanism" in J R Deep Ford, C dell'Aquila and P Conforti, *Agricultural trade policy and food security in the Caribbean* (FAO 2007) 160.

there is no qualitative requirement, countries can adopt the SSG without regard to the fact that restricting access for certain products bears consequences for the realisation of the right to food in the exporting country. For instance, the EU used the SSG on sugar imports coming from developing countries.[236]

An additional shortcoming is that even if procedural requirements are negligible, technical conditions make the SSG difficult to implement often to the detriment of most vulnerable members of the WTO. If the SSG is adopted on the basis of the price trigger, the allowed additional duty is proportional to how much the import price fell below the 1986-1988 reference price. The Food and Agriculture Organization noticed that this system, fixed on prices of almost 30 years ago is too rigid because often international prices today have no relationship with the situation in the '80s. This weakens considerably the SSG because the price trigger might not be the current level below which local producers are threatened. When the price set in the 80's is too low it might be reached only when the surge has already caused great distress to local producers. The SSG could have provided for regular revisions of the price trigger to ensure effective protection. Several commentators noticed that the calculation of the duties that can be imposed under the price trigger is too complicated. The Agreement on Agriculture in fact, provides for a formula resulting on a five bands mechanism. There is some evidence that highly technical requirements like this one are a source of biases against certain developing countries.[237]

Analogous issues affect the volume trigger. The SSG obliges the countries using the volume trigger to calculate consumption changes and the degree of market penetration. Both variables require advanced data collection capability that might not be present in vulnerable countries. Besides, the complex formula emerging from the Agreement on Agriculture raises the trigger whenever there is an increase in consumption in the previous years. However, as the Food and Agriculture Organization observes, consumption is likely to be flat or even decreasing in developed countries while is generally on the rise even in the poorest developing countries. This by no means signifies that developing countries are more equipped to absorb trade shocks. In fact, the consumption mechanism may work against the development tide making the right to food more difficult to realise as long as the consumption increases.[238] Finally, the SSG in its present form does not take into account the capacity of the country of adjusting to import surges. Adjusting to import surges or to a period of price depression is easier for countries providing domestic

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[236] S Singham, *A General Theory of Trade and Competition: Trade Liberalisation and Competitive Markets* (Cameron May 2007) 182; OECD, *The Uruguay Round Agreement on Agriculture. An Evaluation of its Implementation in OECD Countries* (2001) 32.

[237] FAO, *Institutional requirements for the implementation of Special Safeguard Mechanism*, FAO Brief on Import Surges No.5, available at < ftp://ftp.fao.org/docrep/fao/009/ah490e/ah490e00.pdf> accessed 8 January 2011.

[238] Ibid

support to their farmers. [239] Besides, domestic support and export subsidies, concentrated in developed or transitional economies make import surges in the developing world more dangerous. The SSG, to be an effective instrument of protection of the right to food in the developing world should take these differences into account. Accordingly, an automatic safeguard should be widely available across the countries particularly vulnerable to hunger and malnutrition and progressively restricted as long as the country is more capable of ensuring national availability of food.

Direction of the Doha Round

In the Doha Ministerial Declaration there is no reference to the Agreement on Safeguards or to the modification of Article XIX GATT. As a consequence, it is unlikely that the two sources of law will receive substantial modifications in the course of the negotiations. To the contrary, the SSG has been since the beginning of the negotiations at the very centre and had great responsibility in the 2003 collapse of the negotiations. In 2004 WTO Members reached an agreement on the continuation of the mechanism after the end of the reform programme and by 2005 there was general agreement that both price and volume triggers should be maintained. However, the detail of the regulation to be adopted proved highly contentious. When India proposed a system based on the protection of food security and smallholder livelihoods the negotiations stalled and major exporters abandoned the table. In 2008 Pascal Lamy proposed a compromise blurring the distinction between price trigger and volume trigger and making the SSG in most of the cases only when both requirements are fulfilled. Because of the fear that deepening the discussion on the SSG would lead to another stalemate, limitations to the instrument flourished. Sarah Joseph observed that the result of the negotiations is likely to be a SSG more difficult to adopt than in the present texts.[240]

5. Export restrictions

(a) Definition

Export restrictions are measures with which countries put an artificial ceiling or a tariff barrier to the export of goods. The most relevant of them are export bans, export quotas, export taxes and export licences. Export bans forbid the export of a certain good temporarily or indefinitely so that producers have to sell it exclusively on the national market. Through export quotas countries define the quantity of a certain good that can be exported abroad reserving the exceeding production for the national market. Export taxes are duties levied on exports. Export taxes have been widely used

[239] See FAO, Trade Policy Technical Notes on issues related to the WTO negotiations on Agriculture, *A special safeguard mechanism for developing* countries, Technical Note No. 9, available at < ftp://ftp.fao.org/docrep/fao/008/j5425e/j5425e00.pdf> accessed 8 January 2012.

[240] See S Joseph, *Blame it on the WTO? A human rights critique* (OUP 2011).

to increase public revenues and depending on their amount they can also affect the quantity exported. In fact, very high export taxes can produce effects comparable to export quotas and bans. Export licences are administrative certifications with which a country grants the right to export determined goods to determined countries only to certain exporters.[241] The objective of export restrictions is limiting the quantity of a certain good exported abroad or producing tax revenues from the activity of exporters and for centuries countries controlled their export regime in order to satisfy domestic necessities.

The relationship between export restrictions and the right to food is threefold and their effects on the realisation of the right changes depending on the characteristics of the country implementing them. Firstly, at the occurrence of food crises in vulnerable countries export restrictions can be used to create or refill buffer stocks and direct national food production to satisfy domestic food security. Certain developing countries widely used this strategy, for instance, when natural disasters affected the quantity of food available on their territory. More generally export restrictions can be used when national food production is directed too heavily towards third countries without regard to the necessities of local populations. Secondly, when export restrictions take the form of export taxes they generate revenues that can be directed to the realisation of economic and social rights including the right to food. There is extensive literature on the importance of export taxes for state revenues across the developing world. This means that the elimination of export taxes has the potential to affect public expenditure directed towards the realisation of the right to food whenever tariff cuts are not replaced by other sources of public income. Finally, export restrictions can produce negative effects on the realisation of the right to food because they limit the amount of food available on the international market. Reducing global food supply, export restrictions tighten market conditions on countries dependent of foreign imports to realise the right to food of their citizens.[242] This is particularly so when export restrictions are implemented by major exporters of products that are central for the realisation of the right such as wheat, rice and other basic food staples. When major exporters reduce food exports export restrictions are particularly detrimental for vulnerable countries and net-food importers.

Because the implementation of export restrictions can be both positive and negative for the realisation of the right to food it is extremely challenging to design an international regulation that works for every country. Ultimately, the compatibility of export restrictions with the realisation of the right to food depends on the characteristics of the implementing country, its vulnerability to food shortages and the

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[241] For an overview of export quotas in WTO law see M Matsushita, T J Schoenbaum and P C Mavroidis, *The World Trade Organization. Law, Practice, and Policy* (OUP 2006) 259; J Kim, *Recent Trends in Export Restricitons*, OECD Trade Policy Working Papers, available at < http://www.oecd-ilibrary.org/docserver/download/fulltext/5kmbjx63sl27.pdf?expires=1326112273&id=id&accname=guest&checksum=1950BFC3DD46E666F4CD102AF1AB6848> accessed 9 January 2012.

[242] See Chapter 3 for the definition of net-food importing countries.

importance of their exports for global food supply. For instance, export restrictions on wheat by the EU, Russia the US or Canada would have extremely severe consequences on the realisation of the right in net-food importing countries. To the contrary, export restrictions of minor exporters could be justified from a human rights perspective when they are necessary to secure the realisation of the right to food at domestic level.

(b) Export restrictions in the GATT

For the normative prescriptions of the law of comparative advantage, export restrictions and taxes are protectionist measures that should be eliminated. These instruments in fact create market distortions and shelter inefficient producers. This creates a loss of efficiency and diminishes the global amount of wealth that the system is able to create. Notwithstanding their status in liberal economic theory, international trade rounds have always been incapable of regulating the practice because countries are reluctant to give away their sovereignty on export policy. The GATT was heavily influenced by US export legislation which made extensive use of export restrictions to avoid shortages of raw materials and as instrument of proactive international action.[243] The unwillingness to pose international obligations on export policies resulted in a deep asymmetry in GATT and WTO law between regulation of imports and regulation of exports. While the former reached an advanced level of complexity the latter remains embryonic and unsubstantial.

As far as export quotas and bans are concerned, Article XI GATT contains a general prohibition of quantitative restrictions. Notwithstanding this general prohibition, GATT identifies numerous exceptions applicable to export quotas making the provision fragile and open to the interpretation of WTO Members. In fact, Article XI contains an extensive exception allowing export bans or quotas temporarily to prevent or relieve critical shortages of foodstuff or other products essential to the exporting contracting party. Making limitations on export quotas even less substantial, Article XX containing GATT general exceptions includes two paragraphs to ensure that GATT members can adopt any kind of export restrictions to serve particular national interests. Paragraph (h) allows GATT members to conclude international commodity agreements to limit the quantity delivered to the international market of a certain commodity. In this case the export limitations that the commodity agreement prescribes can be implemented by the state without conflicting with the GATT. In addition, GATT Members are free to adopt all kinds of export restrictions when implementing a governmental stabilisation plan to hold the price of domestic materials below the world price when this is necessary to ensure essential quantities of such material.

WTO law is even more lenient towards export taxes. In fact, no substantial limitation was put on the practice. The only restraint implied during the Uruguay

[243] M Matsushita, T J Schoenbaum and P C Mavroidis, *The World Trade Organization. Law, Practice, and Policy* (OUP 2006) 259.

Round was that export taxes could not be so high to be a quantitative restriction in disguise. The width of the exceptions, and the fact that no constraints were put on export taxes left GATT Members considerable freedom to design export policies. For instance, in the 70s Brazil applied export taxes on coffee beans leaving export of processed coffee tax-free in order to favour the development of Brazilian coffee processing industries.[244] After the creation of the WTO, the dispute settlement body stressed that quantitative restrictions are a particularly opaque form of trade barrier but no substantial case law stemmed from the body. Controversies were generally settled through *ad hoc* international agreements regulating exported quantities on the basis of agreed quotas.[245]

(c) Export restrictions in the Agreement on Agriculture

Because the GATT *de facto* did not manage to put export quotas and taxes under control, the Uruguay Round had to deal with the problem such practices create for vulnerable members. In fact, when large exporters limit the quantity of sensitive goods available on the international market they can affect their availability in importing countries. This mechanism is particularly dangerous with regard to agricultural products because export restraints of exporters can cause or intensify food shortages in net-food importing countries. The Uruguay round dealt with the issue in Article 12 of the Agreement of Agriculture that has the objective of tackling some of the shortcomings of the GATT regulating the conditions under which export restrictions of farm products can be adopted. The article does so providing for differential treatment between developed and developing countries and requiring that consequences on net food importing countries are considered before the adoption of export restrictions on foodstuffs.[246] Article 12 applies only to developed countries and net food exporting developing countries when they use the exception to Article XI GATT allowing import restrictions to deal with food shortages. The Article provides that before the institution of an export ban or quota the WTO Member shall give due consideration to the effects of such prohibitions or restriction on importing Members' food security. In addition the country adopting the export prohibition or restriction must inform in writing the WTO Committee on Agriculture and seek consultation with any other WTO Member that the measure might affect. The Member adopting the measure is responsible to give any necessary information to the importing member.

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[244] L S Jarvis, "The rise and decline of rent-seeking activity in the Brazilian coffee sector: Lessons from the imposition and removal of coffee export quotas" (2005) 33 World Development 1881.

[245] M Matsushita, T J Schoenbaum and P C Mavroidis, *The World Trade Organization. Law, Practice, and Policy* (OUP 2006) 259.

[246] See Chapter 3.

(d) Evaluation of the export regime of the Uruguay Round in the light of the right to food

The lax approach of the GATT with regard to export restrictions, both quantitative and tax based, resulted in widespread use of such instruments across the board and, besides developed countries, export restrictions flourished in the developing world.[247] Transitional economies desiring to use their riches of raw materials to boost industrial development can adopt escalating export restrictions discouraging export of primary commodities and facilitating export of processed goods. Developing countries also used export taxes to fund government programmes in the absence of solid systems of domestic taxation.[248] The present GATT regime of export restrictions that amounts to substantial absence of regulation of the practice it is unable to avoid dangerous market behaviour from large exporters. Under the GATT regime large exporters are free to cause or exacerbate price spikes reducing the quantity of food available on the international market and affecting food availability and economic accessibility of food in countries relying on food imports for their domestic food security. Beside, the Uruguay Round did not take substantial steps to avoid that the adoption of export restrictions distresses vulnerable WTO Members. Whenever a state adopts an export restriction it does not have to discriminate between countries able to cope with the restrictions and countries unable to do so. In particular, there is no obligation to protect net-food importing countries. As a consequence, the present regime, when export restraints are adopted, is unable to shelter food security of vulnerable countries and avoid an evident cause of instability of the food marketplace. Beside, the actual regime of export restrictions gives disproportionate market and political power to large exporters which are able to affect food security anywhere in the world and especially in net-food importing countries.

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[247] The most reliable instrument to monitor the use of export restrictions in the world is the Trade Policy Review mechanism of the WTO. For an overview of the use of export restrictions in the world trading system see J Bonarriva, M Koscielski and E Wilson, *Export controls: an overview of their use, economic effects and treatment in the global trading system*, US International Trade Commission, Office of Industries Working Paper No. ID-23, available at < http://www.usitc.gov/publications/332/working_papers/ID-23.pdf> accessed 9 January 2012.

[248] For an overview of the relationship between trade and public revenues see L Bartels, "Trade and Human Rights", *Max Planck Encyclopedia of Public International Law* (August 2011 edn) < http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e1550&recno=1&searchType=Quick&query=trade+and+human+rights> accessed 17 January 2012;

H-J Chang, *Bad Samaritans* (Bloomsbury Press 2008) 69; J Stiglitz, *Making Globalization Work* (Penguin Books 2007) 66; United Nations Economic Commission for Africa, African Trade Policy Centre, "Fiscal Implications of Trade Liberalization on African Countries", Work in Progress No. 5, available at < http://www.uneca.org/atpc/Work%20in%20progress/5.pdf> accessed 16 January 2012.

The lack of regulation on export restrictions means also that GATT leaves WTO Members, including vulnerable ones, free to adopt emergency measures to deal with food shortages. Leaving states the necessary amount of sovereignty to use their own food production to take down prices on the national market or directly provide food staples to their population GATT does not encroach upon the duty to intervene in case of food emergencies. Future modifications of the GATT need to maintain this exception to be compatible with the obligations of GATT Members under international human rights law. However, more efforts are needed during trade negotiations to strike the balance between the necessity to ensure supply on the national market and the need to prevent market volatility and price escalations.

The food security clause in the Agreement on Agriculture does not change the general picture drawn by the GATT. It is plain that the safeguards to food security included in Article 12 of the Agreement on Agriculture are insufficient to provide effective protection. The article only creates a mild form of differential treatment on notification obligations that does not limit the prerogative of developed countries and net food exporting countries to adopt export restrictions in such a way that is detrimental to countries prone to food shortages. The Article does not even oblige the exporter to exclude least developed countries from the measure. In addition, the small amount of notifications received so far suggests that the large majority of WTO Members did not inform the WTO of their export restrictions and that the information that has to be included in the notification is minimal. Finally, Article 12 does not provide for any emergency mechanism avoiding panic market behaviour at the occurrence of sudden price spikes. From the analysis of the notified export restrictions it is evident that the contribution of export restrictions to major human rights violations such as the 2008 global food crisis was completely unnoticed to the Agricultural Committee. Article 12 is an important recognition of the potential effects of export restrictions on the right to food. However, binding obligations to avoid at least the most evident cases of violations of the right to food through the adoption of export restrictions are needed.

(e) Direction of the Doha Round

Negotiations on Agriculture, which started one year before Doha, prioritised tariff reduction and decrease of export subsidies and domestic support. The Doha Declaration does not contain specific reference to export restrictions even if it includes a statement on deepening the discussion on non-trade concerns such as food security and environment. The 2004 negotiating framework states that regulation on export restraints has to be strengthened and that this is an issue of interest. The historical asymmetry between regulation on import and regulation on export is certainly present in the Doha Round and even if there is general awareness of the necessity of regulating export restrictions political support is weak. When the global food crisis deflagrated in 2007 and 2008 following a price spike, the role of lacking

regulation on export restrictions in exacerbating the crisis became evident.[249] As a consequence, several international agencies including the Food and Agriculture Organization and numerous governments maintained that export restrictions needed to be discussed urgently within the Doha framework. So far, however, progress on the issue remained unsubstantial.

6. The Marrakesh Decision on Least Developed Countries and Net-Food Importing Countries

During the Uruguay Round emerged the concern that the reform programme being devised could produce negative effects on availability and adequate supply of basic foodstuffs on the most disadvantaged members of the WTO. Such concerns crystallised into the *Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries*. The Decision recognised that the reform programme leading to greater liberalisation could have negative effects on food security in least developed countries and net-food importing developing countries. The main concern was that the Uruguay Round could lead to an increase in the price of food making countries relying on food imports and having scarce purchase power unable to meet their food needs. The Decision was made applicable to all Least Developed Countries as defined by the UN Economic Social Council and to net-importers as defined every year by the WTO Committee on Agriculture on the basis of their trade flows of basic food stuffs. Article 16 of the Agreement on Agriculture obliges WTO Members to implement the content of the Decision and the WTO Committee on Agriculture to monitor the follow-up of decision. The Decision manifested the agreement of WTO Ministers on four actions to avoid that the Uruguay Round hampers the food security of disadvantaged countries:[250]

- Reviewing the level of food aid established periodically by the Committee on Food Aid under the 1986 Food Aid Convention and initiating negotiations to establish a level of food aid commitments sufficient to meet the legitimate needs of developing countries during the reform programme

- Adopting guidelines to ensure that an increasing proportion of basic foodstuffs is provided to least developed countries and net food importing countries in grant form and/or on concessional terms in line with Article IV of the Food Aid Convention of 1986

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[249] See, FAO, *The Breakdown of the Doha Round Negotiations. What Does it Mean for Dealing with Soaring Food Prices?*, FAO Economic and Social Perspective, Policy Brief No. 3, August 2008, available at <ftp://ftp.fao.org/docrep/fao/011/aj221e/aj221e.pdf> accessed 9 January 2012.

[250] For a discussion of the limits of food aid to realise the right to food see footnote 52 and Chapter 3.

- Giving full consideration in the context of their aid programmes to requests for their provision of technical and financial assistance to least developed countries and net food-importing developing countries to improve their agricultural productivity and infrastructure

- Allowing vulnerable countries to draw on the resources of international financial institutions under existing facilities, or such facilities as may be established, in the context of adjustment programmes when such countries experience short-term difficulties in financing normal levels of commercial imports.

The Marrakesh Decision remains the cornerstone of WTO positive action towards preventing and avoiding that the legislation agreed in the Uruguay Round and in subsequent negotiations produces negative effects on the food security of vulnerable WTO Members. The Decision however, contains only best endeavour promises and is not linked to any substantial enforcement mechanism. Subsequently, the Decision has been weakened by scarce implementation and lack of efforts in clarifying crucial issues of its structure. To start with, the Committee on Agriculture and the WTO never took action to assess thoroughly the interplay between the reform programme of the Uruguay Round and the food security of least developed countries and net-food importing countries. The only concrete action of the Committee on Agriculture has been reviewing year by year the list of net-food importing countries and publishing briefs on food aid and the other actions under the Decision. This was certainly a restrictive interpretation of the obligation contained in Article 16 of the Agreement on Agriculture of "monitoring, as appropriate, the follow-up to the Decision". The Decision is also very general when it defines the substantive requirements that should trigger the proposed actions. For instance, it refers to "negative effects" on food supply without clarifying what such negative effects should be. It also mentions that least developed countries and net food-importing countries could find it difficult to buy food from the international markets at "reasonable terms and conditions". Again, there is no definition in the Decision, or elsewhere in WTO law, of when the terms and conditions of purchase of basic foodstuffs can be considered reasonable. On all these issues it is felt the lack of a sound human rights approach delineating the effect of the trade reform program in terms of progressive realisation of the right to food.

In addition to doubts on the drafting of the Decision, there is considerable evidence that its implementation has been insufficient to reconcile the results of the Uruguay Round with the necessities of food supply of poorer countries. Every one of the four instruments contained in the decision (food aid, technical and financial assistance, export credits and short-term financing), in fact, suffered conceptual or practical shortcomings. As far as food aid is concerned, there is a debate in economic and legal literature on the extent foreign aid is useful to support food security in developing countries and more generally promoting their development. The International Committee on Economic and Social Rights maintained that food aid is a manifestation of the international obligation of realising the right to food in third

countries. However, it also clarified that international aid is a double-edged sword that can create dangerous dependency spirals and hamper the economic independence of vulnerable countries.[251] As a consequence, food aid cannot be considered *per se* a solution to the shortcomings of the Uruguay Round. In other words, foreign aid cannot substitute a multilateral trading system conducive to the realisation of the right to food. Beside this conceptual reservations there is evidence that the amendment of the food aid Convention done after the conclusion of the Uruguay Round does not ensure that vulnerable countries are able to realise the right to food within their jurisdiction. [252] Moreover, under the amended food aid convention countries vulnerable to food shortages that do not qualify as least developed countries or low-income countries face more restrictive conditions to access the food aid provided under the Convention. The impact of the provisions on technical assistance included in the Decision is also minimal. In fact, the amount of funding provided to technical assistance directed to production of food in developing countries has been steadily declining since the 1980s. On this point De Schutter observes that between 1990 and 2001 bilateral aid to sub-Saharan Africa declined by 60%. Also the use of financial institutions to support food security has been so far of limited use. Credits from the IMF and the World Bank have been in fact widely considered weak instruments to support domestic food security. This is so because measures of support from financial institutions generally require extensive policy conditionality or because they are inaccessible to numerous countries vulnerable to food shortages. Besides, coordination between the WTO and financial institutions on the implementation of the Marrakesh Decision has been almost non-existent.[253] This led to a situation where the Decision requires assistance for numerous vulnerable countries but the financial institutions are unaware of the necessity of sheltering these countries from the "negative effects" on food availability of the Uruguay Round.

Overall, the Marrakesh Decision remained a non-binding document containing several pledges to countries vulnerable to food shortages that were implemented inattentively and had low priority in WTO affairs. Moreover, it is doubtful that the actions included in the Decision, even if implemented thoroughly, would have been able to reverse the shortcomings of the Uruguay Round in terms of protection and realisation of food security in vulnerable Members of the WTO.

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[251] In particular the Committee maintains that: "Food aid should, as far as possible, be provided in ways which do not adversely affect local producers and local markets, and should be organized in ways that facilitate the return to food self-reliance of the beneficiaries." See F Coomans, "The extraterritorial scope of the International Covenant on Economic, Social and Cultural Rights in the work of the United Nations Committee on Economic, Social and Cultural Rights" (2011) 11 Human Rights Law Review 1.

[252] O de Schutter, *The role of development cooperation and food aid in realizing the right to adequate food: moving from charity to obligation*, Report of the Special Rapporteur on the Right to Food to the Human Rights Council (11 February 2009) A/HRC/10/5.

[253] Ibid

7. Conclusions

The chapter assessed the multilateral norms relevant for the import and export of food from the perspective of the realisation of the human right to food. This chapter was a necessary premise to the assessment of the recent trade agreements concluded by the EU with the Caribbean and Africa carried out in chapter 6 and chapter 7. The EU, in fact, designing its policies with vulnerable countries, has to respect the prescriptions of multilateral trade law in order to avoid being sued by other WTO Members through the WTO Dispute Settlement System. Accordingly, any attempt to evaluate the EU external action towards countries vulnerable to food shortages cannot disregard the fact that pre-existing international treaties already regulate this action. At the same time a thoughtful analysis should not neglect the fact that WTO law is an evolving body of laws and that the EU is highly influential on future developments. For this reason, whenever WTO law is not consistent with the realisation of the right to food there might be the space to avoid future conflicts making the right to food a priority in existing multilateral trade negotiations.

The chapter took into account the most relevant trade instruments that states use to control import and export of food. The analysis clarified that these instruments always produce a multiplicity of effects and that generally their utilisation requires attentive weighing of the characteristics of the countries involved. Often, trade measures produce effects both within the implementing countries and in all the other countries importing or exporting the food staple involved in the measure. Whenever import or export policies have consequences for the access to food of individuals they must be handle with care and accordingly to the human rights obligations of the implementing country. Otherwise, trade instruments can produce unintended consequences and work against the realisation of the right to food in vulnerable countries. It is common that the same trade instrument can have both positive and negative consequences depending on the characteristics of the countries involved and on the ways it is implemented.

As far as tariffs and other import restrictions are concerned, the Uruguay Round did not manage to produce a positive impact on the income of vulnerable countries and missed the opportunity to ban tariff practices, such as tariff escalation, that explicitly work against the realisation of the right. More generally, flawed design, legal loopholes or misapplication did not improve the participation of vulnerable countries and producers to world economy. Notably, it is the GATT itself that recognises the importance of market access for vulnerable producers and the necessity to avoid tariff escalation in its inspirational, but unimplemented, Article XXXVII.[254] In this regard, preferential access for developing countries constitutes a crucial area of debate that however, so far, has not been able to change the main outcome of the Round. It is undesirable that throughout the regulation of tariffs WTO law was often interpreted to the detriment of market access of vulnerable producers and that the

[254] See page 34.

importance of certain key products for the realisation of the right to food was not taken into account during the negotiations.

Similar shortcomings affect the regulation of safeguards as well, with key products and vulnerable countries excluded or discouraged to apply implemented measures no matter the consequence of rising imports for the realisation of the right to food at domestic level. The Special Safeguard in the Agreement on Agriculture remains conceptually the best example of reconciliation between trade objectives and human rights duties but in its actual form is of no use for the large majority of vulnerable countries.

The regulation of export restrictions is unsubstantial and WTO law does not create particular restrictions on countries. The freedom to reduce or block exports of food towards third countries can be a threat to the right to food whenever this practice reduces access to food of individuals in net-food importing countries or other vulnerable states. It is unfortunate that the Agreement on Agriculture does not take this problem into account and provides only an extremely lax system of notifications of export restrictions that is ineffective and scarcely implemented. This lack of obligations also means that vulnerable countries are free to adopt export restrictions to protect national food security. It is important that future negotiations duly take into account this necessity when regulating export restrictions.

The way WTO law regulates preferential trade agreements is crucial for the way the EU relates with vulnerable countries because it limits the extent to which the EU can modify tariffs agreed at multilateral level. Most notably, WTO law requires substantial trade liberalisation of trade of goods whenever a preferential trade agreement is concluded. Elimination of tariffs is required no matter the characteristics of the countries involved in the process and also when vulnerable countries are parties to the agreement. The obligation is highly influential on the way the EU relates with vulnerable countries whenever it has a preferential trade agreement with them. The norm is potentially detrimental to the right to food because obliges vulnerable countries to expose themselves to the full force of competition from developed countries whenever they enter a trade agreement with them. This problem requires attention by the EU whenever it concludes a trade agreement with vulnerable countries. As we will see in the case studies, the fact that Article XXIV GATT requires to liberalise "substantially all the trade" produces major consequences for vulnerable countries involved in recent Economic Partnership Agreements with the EU.

In conclusion, WTO law produced mixed results on the policy space countries have to use trade instruments to facilitate the realisation of the right to food domestically and in third countries. In certain cases such as preferential trade agreements, WTO law is incisive and creates severe limitations, in others, like export restrictions it leaves extensive space. Accordingly, the EU should do its best to avoid that the shortcomings of the multilateral system are mirrored in its own external action and to use all the leeway the WTO leaves to facilitate the realisation of the right to food. This dimension is particularly important when the EU negotiates preferential trade agreements with vulnerable countries. In this regard, the EU should

exploit all the leeway WTO leaves to create preferential agreements that are conducive to the realisation of the right to food. This is certainly possible, for instance, with regard to export restrictions for which WTO law does not pose any substantial obligation on its Members. The same can be done with safeguards where there is considerable space to invent more efficient instruments specifically designed to protect vulnerable countries from the vagaries of the international food market. In the areas where WTO law creates a straitjacket that does not allow the EU to pursue its external action according to human rights principles, the issue should be flagged in the WTO and the relative amendments should become a priority of the EU action in the organisation. In fact, even if the evolution of multilateral trade law also depends on the other WTO Members the EU is highly influential and has unrivalled practice in achieving its external trade objectives. A robust action towards a reform of the WTO in the direction of the realisation of the right to food would certainly make a mark. For instance, this unquestionably applies to Article XXIV GATT that manifestly exposes vulnerable countries to violations of the right to food when they enter a preferential trade agreement with developed countries.

The allocation of these priorities in EU external action is not an easy task. EU external policies are highly fragmented and institutional incentives to take into account human rights in external trade might not always be present. The consequences of the EU action to embed food security within international trade law can be evaluated only by taking into account the details of the clauses of the resulting international trade treaties. The following chapters will do so with regard to seven recent free trade agreements concluded between the EU and developing countries vulnerable to food shortages. Chapter 6 concentrates on the free trade agreement between the EU and the Caribbean and Chapter 7 on the six free trade agreements the EU concluded in sub-Saharan Africa. The chapters will ascertain if the free trade agreements incorporate the priorities that the EU Commission identified trough the Policy Coherence for Development initiative, that coincide with the ones defined in this chapter, namely increased access to the EU market for vulnerable producers, elimination of tariff escalation, protection of vulnerable countries from import surges, preservation of policy space on external trade by vulnerable countries and differential treatment for countries exposed to food shortages. The chapters will assess if the free trade agreements achieve these objectives and if they can be considered a step towards the progressive realisation of the right to food.

CHAPTER 6 THE EU-CARIFORUM ECONOMIC PARTNERSHIP AGREEMENT AND THE RIGHT TO FOOD

1.Introduction

The previous chapter elucidated the aspects of the law of the WTO relevant for the import and export of food across national borders. The chapter also clarified that this body of norms limits the space of the EU when it negotiates trade deals with partner countries. In addition, the chapter made it clear the major challenges posed by the present WTO legislation on import and export policies for the realisation of the right to food. The chapter concluded that the legislation often remains lax and leaves space to WTO Members to design their own external trade policies. This is so with regard to import policies but it is especially true as far as export restrictions are concerned. There, WTO law imposes very few obligations and, when it does, exceptions provide wide policy space with regard to the export of food. The chapter suggested that the Doha Round could build upon these existing clauses in order to make the multilateral trading system more supportive of the realisation of the right to food.

This chapter examines the details of one of the trade agreements that the EU concluded with a group of small developing countries in the Caribbean region. The agreement is part of the Global Europe Strategy introduced in Chapter 4 and since its adoption it regulates the trade flows of food between the EU and the Caribbean. From the agreements that the EU concluded with developing countries this research starts from the study of this particular agreement for four reasons. First, Caribbean countries that concluded the trade agreement with the EU are countries particularly exposed to food shortages because of their level of development, their size and their exposure to natural disasters. At the same time, Caribbean countries because of their dimension and economic structure cannot influence the international price of food.[255] These characteristics make Caribbean countries significantly exposed to the conditions of the international food market that can have an impact on their food security and level of poverty.[256] Second, the EU-Caribbean Economic Partnership Agreement is expression of both the EU external trade policy and the EU external development and human rights policies. Accordingly, it is the perfect case on which to test the capacity of the EU and its "Policy Coherence for Development Initiative" to include human rights objectives in free trade agreements. Third, the agreement with the Caribbean was the first of a batch of agreements that the European Commission proposed to conclude between the EU and some of the poorest countries of the world, including sub-Saharan Africa. Accordingly, the analysis of this agreement provides the background for the analysis of the EU agenda in Sub-Saharan Africa performed in Chapter. Finally, since the Agreement was concluded under Article XXIV GATT and

[255] Together, Caribbean countries account for the 0.3% of world agricultural exports see J R Deep Ford, C dell'Aquila and P Conforti, Agricultural trade policy and food security in the Caribbean (FAO 2007).

[256] Ibid

substitutes WTO law in the relationship between the EU and the Caribbean, it shows a fraction of the wider effects of the EU external action on the development of international trade law.

The Chapter follows the structure of the previous chapter on the WTO and is divided in four sections. The first section introduces the free trade agreement between the EU and the Caribbean by highlighting its general objectives. The second section analyses the regulation of import restrictions included in the free trade agreement by describing the obligations accepted by the EU, the Caribbean and their relationship with the realisation of the right to food. The third paragraph presents the regulation of trade safeguards applicable to food imported in the Caribbean from the EU and shows to what extent they protect the right to food from import surges of food. The fourth paragraph provides the analysis of the new regulation of export restrictions included in the EU-Caribbean agreement in the light of the role that export restrictions on food play at the occurrence of major food crisis. The chapter concludes with a general assessment of the import and export regulation of the EU-Caribbean EPA in the light of the right to food.

2. The EU-CARIFORUM Economic Partnership Agreement

The Economic Partnership Agreement between the CARIFORUM States and the European Community and its Member States (hereinafter, the Caribbean EPA) is a mixed agreement concluded in 2008 between the EU, its Member States and 15 Caribbean countries.[257] Since the EPA is part of both the EU trade policy and the EU development policy, it was presented as an instrument to support the development of Caribbean countries and the improvement of human rights in the area.[258] Accordingly, the first objective of the Caribbean EPA stated in its Article 1 is "Contributing to the reduction and eventual eradication of poverty through the establishment of a trade partnership consistent with the objective of sustainable development, the Millennium Development Goals and the Cotonou Agreement". In addition, the Agreement contains a clause referring to sustainable development and the commitment of the parties to "fully take into account the human, cultural, economic, social, health and environmental best interests of their respective population and of future generations".

From a human rights perspective, the Agreement includes a general human rights clause in its preamble and refers to the human rights commitments of the

[257] The parties to the Agreement are the EU, its Member States and CARIFORUM countries, a group of countries including: Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, The Dominican Republic, Grenada, the Republic of Guyana, Haiti, Jamaica, Saint Cristopher and Nevis, Saint Lucia, Saint Vincent and the Grenadines, the Rupublic of Suriname, the Republic of Trinidad and Tobago.

[258] Article 1 of the EPA provides that the first objective of the agreement is: "contributing to the reduction and eventual eradication of poverty through the establishment of a trade partnership consistent with the objective of sustainable development, the Millennium Development Goals and the Cotonou Agreement".

Cotonou Agreement between the EU and developing countries that include main international human rights instruments such as the International Covenant on Economic Social and Cultural Rights.[259] Even if the agreement never mentions explicitly the right to food it refers to food security since the parties acknowledged the vulnerability of Caribbean countries and "recognise[d] the need to avoid major disruption of markets for agricultural, food and fish products in CARIFORUM States". The fact that the EU agreed on these clauses can be considered an expression of the EU external human rights and development policies as well as the principles of Article 21 of the Treaty on the European Union and the other EU human rights commitments identified in Chapter 4. More generally, the Caribbean EPA is part of the EU action towards ACP countries that, as seen above, has the central objective to support their economic development and to promote the realisation of human rights on their territory. This objective extends to all the parts of the Agreement including the ones regulating import and export of food.

From a trade law perspective, the Caribbean EPA is a free trade agreement concluded under Article XXIV of the GATT that has the main trade objective of liberalising "substantially all the trade" between the parties.[260] The agreement includes regulation on numerous areas such as import and export barriers, intellectual property, investment and core labour standards. The Caribbean EPA contains innovative regulation on import restrictions, safeguards and export restrictions that is considerably different from what exists in WTO law. The following paragraphs present the EPA discipline of the three trade instruments object of this research (import restrictions, safeguards and export restrictions) and consider if this new development of international trade law can be considered a positive step towards the progressive realisation of the right to food.

3. Import restrictions

The EU-CARIFORUM EPA contains a detailed regulation of import restrictions that substitutes the previous conditions to which the EU and the Caribbean were subject under WTO law. This new regulation applies to the flows of all goods including agricultural products and other food products between the EU and the Caribbean.

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[259] For a brief introduction to the Cotonou agreement and human rights clauses applicable to EU external action see Chapter 4.

[260] For a thorough introduction to Article XXIV GATT and its meaning for the realisation of the right to food see Chapter 5. In addition, on Article XXIV GATT and free trade agreements between the EU and developing countries see C Milton and O Ochieng, "The EU-ACP economic partnership agreements and the 'development question': constraints and opportunities imposed by Article XXIV and special and differential treatment provisions of the WTO" (2007) 10 Journal of International Economic Law 363. For a general analysis of article XXIV GATT and the meaning of the expression "substantially all the trade" see M Matsushita, "Regionalism and the disciplines of the WTO: analysis of some legal aspects under Article XXIV of the GATT" (2005) 13 Journal of International Economic Law 191.

(a) The EPA regime on import restrictions

The regulation of import restrictions is the part of the Caribbean EPA that was influenced the most by WTO law. This is so because the obligation to liberalise "substantially all the trade" when concluding a free trade agreement under Article XXIV GATT applies primarily to import restrictions such as import quotas and taxes. This condition is subject to interpretation but there is agreement that WTO law obliges to eliminate at least 80% of all import tariffs when WTO members enter a trade agreement between each other. As we pointed out in the previous chapters this condition limits considerably the space of the negotiators of a trade agreement to include trade conditions favourable to the most vulnerable members of the treaty. Accordingly, the principle of differential treatment as stated in Article XXXVI:8 GATT finds very limited application to free trade agreements such as the Caribbean EPA.[261] The legal obligation of liberalising "substantially all the trade" was a driving force during the negotiations of the Caribbean EPA and is responsible for the elimination of the majority of import restrictions that were still allowed under WTO law. As it happens in WTO law obligations under the EPA are not the same for developed countries, the EU, and for developing ones, the Caribbean. Accordingly, this section first takes into account the obligations that the Caribbean EPA creates on the EU and then the obligations applicable to Caribbean countries. The final part of the paragraph provides the analysis of the new legal scenario in the light of the human rights duties to realise the right to food.

Regime applied to the European Union

Under the Caribbean EPA the EU accepted to eliminate all import restrictions on the flow of goods originated in the Caribbean. However, several exceptions are contained in Annex II that allows the EU to apply import tariffs and quotas on a limited list of products that are principal exports of the Caribbean region. In particular, the Caribbean EPA allows the EU to protect its internal market from imports of sugar and sugar products originating in the Caribbean within the limits contained in the Annex. Annex II also deals with the phasing out of the preferences that certain Caribbean countries had on their sugar imports since the colonial period. These countries had preferential quotas and prices that afforded them substantial preferential treatment when entering the European market.[262] These preferences assured that vulnerable producers of sugar and bananas in the Caribbean region maintained a stable income without regard to market conditions. Under the new EPA the Caribbean lost these preferences and will have to compete with other exporters to sell their products in the EU common market.

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[261] On special and differential treatment in WTO law and the right to food see above Chapter 5.

[262] On the preferences provided to Caribbean countries before the EPA see L Bartels, 'The Trade and Development Policy of the European Union' in M Cremona (ed), *New Developments in the EU's External Relations Law, Collected Courses of the Academy of European Law* (Oxford 2008) 128.

Regime applied to the Caribbean

The regime applicable to Caribbean import tariffs on goods originating in the EU is more complex. In fact, since the negotiators recognised the vulnerability of Caribbean countries they attempted to stretch the "substantially all the trade" principle of Article XXIV GATT to provide a certain level of differential treatment to Caribbean countries allowing them to maintain import tariffs on sensitive products. This was done in order to avoid import surges of European products that could easily run Caribbean local producers out of the market. In addition, the EPA allows Caribbean countries to phase out tariffs on certain products through a step-by-step process terminating in 2033 at the latest. This decision taken during the negotiations caused the attachment to the main body of the Treaty of a schedule of around 1500 pages containing a classification of the goods traded between the EU and the Caribbean and their respective tariffs from 2009 to 2033. In the EPA the 2033 tariff is considered the point of arrival of the process of liberalisation and it is the maximum tariff that Caribbean countries should maintain in their relationship with the EU indefinitely. In any case, the imposition of tariffs higher than the ones included in the tariff schedule require the re-negotiation of the Caribbean EPA.

		Description	1/01/ 2009	1/01/ 2011	1/01/ 2013	1/01/ 2015	1/01/ 2017	1/01/ 2018	1/01/ 2019	1/01/ 2020	1/01/ 2021	1/01/ 2022	1/01/ 2023	1/01/ 2025	1/01/ 2027	1/01/ 2028	1/01/ 2029	1/01/ 2031	1/01/ 2033
0810.60		Fresh durians	40	35	29	23	18	18	12	12	6	6	0	0	0	0	0	0	0
0810.90		Fresh tamarinds, cashew apples, jackfruit, lychees, sapodillo plums, passion fruit, carambola, pitahaya and other edible fruit (excl. nuts, bananas, dates, figs, pineapples, avocados, guavas, mangoes, mangosteens, papaws papayas', citrus fruit, grapes, melons, apples, pears quinces, apricots, cherries, peaches, plums, sloes, strawberries, raspberries, mulberries, blackberries, loganberries, black, white or red currants, gooseberries, cranberries, fruits of the genus vaccinium, kiwi fruit and durians)	40	37	34	30	27	27	24	24	20	20	17	14	10	10	7	4	0
0811		Fruit and nuts, uncooked or cooked by steaming or boiling in water, frozen, whether or not containing added sugar or other sweetening matter																	
0811.10		Frozen strawberries, uncooked or cooked by steaming or boiling in water, whether or not sweetened	30	18	15	12	9	9	6	6	3	3	0	0	0	0	0	0	0

Fig. 1 Example of tariff schedule for certain kinds of fruit imported in the Caribbean from the EU

From the analysis of the schedule five trends can be identified. First, since the Caribbean EPA is subject to Article XXIV GATT negotiators could not exempt from the tariff reduction more than around the 20% of the products included in the schedule. This is so because otherwise other WTO Members could dispute that the Caribbean EPA does not reach the liberalisation that Article XXIV GATT requires. Accordingly, the large majority of EU products will enter the Caribbean market duty free from 2033 at the latest. However, the Caribbean EPA liberalised numerous tariff lines immediately or by 2020, which means that the EPA produces effects on the tariff applicable to EU imports into the Caribbean also in the short term.

Second, in order to avoid import surges, several agricultural products and other food products are exempted from the process of liberalisation. For the exempted products the Caribbean EPA does not regulate the applicable tariff which means that

the import of the product remains regulated by WTO law. For instance, most of Caribbean countries do not have any obligation to eliminate import tariffs on milk and dairy products, wheat flour, rice and maize and certain kind of meat. Tariff protection of the Caribbean market is often maintained also with certain processed products such canned food and pasta.

Third, even if numerous sensitive food products were excluded from the process of liberalisation, overall, the EPA eliminates a large part of import tariffs with around the 70% of food tariff schedules imposing duty free imports by 2033. This is so because, as any other product, food is subject to the obligation of Article XXIV GATT of liberalising "substantially all the trade" when concluding a free trade agreement.

Finally, since the maintenance of tariff protection on certain food products that are crucial for Caribbean welfare was considered a priority, the rest of tariff lines regarding non-food products had to be liberalised beyond the threshold of article XXIV GATT. This is so because GATT does not distinguish between food products and other products when obliging countries to pursue substantial liberalisation in trade agreements. This means that, on average, trade liberalisation between the EU and the Caribbean has to reach the 80% threshold imposed by WTO law. Accordingly, in order to concentrate tariff protection on food Caribbean countries had to remain more exposed on other product categories. For instance, under the EU-Caribbean EPA, Caribbean countries will lose the prerogative to impose tariffs on most European industrial products by 2033.

(b) Evaluation in the light of the right to food

Since from its conclusion the Caribbean EPA takes the place of WTO import regulation in the relationship between the countries involved, the Caribbean EPA produced considerable change to the conditions applicable to trade of food between the EU and Caribbean countries. In particular, the Caribbean EPA modified the maximum tariffs applicable to food products that the EU and Caribbean Countries are allowed to charge. In particular, the Caribbean EPA eliminated the large majority of import tariffs going much beyond what WTO law provides. The driving force of this change is Article XXIV GATT that obliges WTO Members to liberalise "substantially all the trade" when concluding a free trade agreement. The vast process of trade liberalisation triggered by the Caribbean EPA intervenes on the trade of products that are relevant for the realisation of the right to food in Caribbean countries. The effects of the Caribbean EPA on the right to food depend on three main outcomes of the agreement. First, the Caribbean EPA obliges the EU to open up its market to the large majority of products produced in the Caribbean. Second, the Caribbean EPA obliges Caribbean countries to import a large variety of goods duty free from the EU. Third, the Caribbean EPA reduces the amount of public revenues that Caribbean countries raise through import tariffs. All these three aspects of the Caribbean EPA modify considerably the scenario emerged from the WTO Uruguay Round. This section provides the evaluation of the new situation from the perspective of the realisation of the right to food.

Caribbean food imports to the EU

The effect of Caribbean imports on the EU internal market is likely to be negligible due to the scarce variety of Caribbean exports and the extremely limited role that these products play in the EU economy. To the contrary, the modification of European obligations with regard to tariffs on Caribbean goods can have consequences on the realisation of the right to food in the Caribbean because Europe is a prominent export market for Caribbean products. In this regard, the phasing out of EU preferential treatment for certain Caribbean countries on sugar and bananas is likely to harm Caribbean local producers. Accordingly, in the absence of social safety nets the EPA could produce significant pressure on two of the few export industries of the region. This is particularly so since the phasing out of the preferences happens under the Caribbean EPA in a period of less than 10 years that is unlikely to be sufficient for Caribbean local producers to adjust to the new conditions. If this happens, the EPA, reducing the income of already vulnerable individuals, could impact their economic access to sufficient food.

On the other hand, the Caribbean EPA could also support the realisation of the right to food as long as it corrects the deficiencies of the WTO system with regard to the access of the Caribbean to the EU market. Since the Caribbean EPA obliges the EU to eliminate any tariff on Caribbean products, practices such as dirty tariffication and tariff peaks that flourished under the WTO system[263] will be no longer possible under the Caribbean EPA. This modification of international trade law could be a positive step towards the realisation of the right to food in the Caribbean but with two caveats. First, the fact that the EU cannot apply any import quota or tariff on Caribbean exports should favour these countries in the access to the EU market. However, this advantage will last only if the EU does not conclude free trade agreements with other trade partners. In fact, if the EU Global Strategy is concluded the Caribbean will receive import conditions similar to all the other countries included in the strategy. For instance, since Mexico and South Korea concluded free trade agreements with the EU, under the EPA the Caribbean receive similar tax-free conditions as the one received by these countries under their free trade agreements with the EU.[264] This means that even if the Caribbean states obtained duty free access to the EU market the EPA erodes considerably the preferential treatment of Caribbean countries because more competitive countries will receive similar conditions through other trade agreements concluded under the Global Europe Strategy. In the absence of economic policies supporting the competitiveness of Caribbean producers it is possible that Caribbean countries will not be able to benefit from improved access to the EU market.

The second caveat is that Annex II of the Caribbean EPA allows the EU to impose import restrictions on several sectors where Caribbean countries have a competitive edge on the international market. Accordingly, Annex II limits the

[263] See above Chapter 5.

[264] For the introduction to the Global Europe Strategy see Chapter 4.

beneficial effects of the Caribbean EPA for Caribbean farmers. These two aspects of the EPA could reduce considerably the contribution of the EPA to Caribbean food security.

To sum up, regulation of tariffs in developed countries is crucial for the realisation of the right to food because it influences the income of farmers in the developing world, a sector of society where there is a high concentration of malnourished people. In the previous chapter we showed how the Uruguay Round did very little to solve this problem and WTO law still allows numerous trade mechanisms that limit considerably the access of vulnerable states to the markets of rich countries. From the analysis of EU obligations under the Caribbean EPA there emerges a mixed scenario where there is no guarantee that Caribbean countries will benefit from increased access to the EU market. In fact, whereas the Caribbean EPA eliminates immediately several preferences granted to Caribbean countries since the colonial period, improved access to the EU market depends on market conditions and the capacity of Caribbean countries to compete with other exporters. In other words, the negative effects on the right to food of the EPA are inevitable and immediate[265] while the positive effects are possible but not at all sure. The risk is that the increased access to the EU market granted to Caribbean countries remains on paper while more competitive emerging economies erode the market shares that before the EPA the EU granted to Caribbean countries.

EU food imports to the Caribbean

When there is a process of tariff reduction of the scale of the Caribbean EPA the main risk for the right to food comes from import surges, as explained at length in the previous chapters. Since with tariff reduction imported goods become cheaper local producers can run out of business. Accordingly, cheap imports of food can create economic distress to local farmers that in developing countries are a social group particularly affected by food insecurity. For these reasons tariff reduction has to be dealt carefully in order to avoid any negative effect on already fragile agricultural economies.[266]

The risk of increase imports of key food products from Europe to the Caribbean was manifest to negotiators when the countries decided to conclude a free

[265] On the consequences of the phasing out of the Sugar and Banana protocols see B Ahmed, "The impact of Globalization on the Caribbean Sugar and Banana Industries", (2001) 2 The Society for Caribbean Studies Annual Conference Papers <http://www.caribbeanstudies.org.uk/papers/2001/olv2p1.pdf> accessed 29 March 2011 and R Lapper, "A bitter harvest: the Caribbean faces the prospect of a life without sugar" *Financial Times* (London 15 August 2005) < http://www.ft.com/cms/s/0/97801242-0d28-11da-ba02-00000e2511c8.html#axzz1G1M0B0r4> accessed 29 March 2011.

[266] See the studies on import surges of the Food and Agriculture Organisation cited above in Chapter 5.

trade agreement including the elimination of import tariffs on food products.[267] To avoid this problem the Caribbean EPA contains some special and differential treatment allowing Caribbean countries to protect their national markets from EU exports on certain food products. This attempt of ensuring differential treatment for Caribbean countries allowing certain import tariffs on sensitive food products however, clashed with the obligation stemming from Article XXIV GATT of liberalising at least the 80% of trade in goods between the EU and the Caribbean. The result is that even if some efforts were made to protect Caribbean producers from EU exports the Caribbean EPA reduces considerably the capacity of Caribbean countries to raise import tariffs to protect their domestic markets. Since the large majority of food products will be imported from the EU duty free by 2033 it is likely that some of these new imports will displace local producers in some sensitive sectors. Since the Caribbean EPA could not provide protection to all vulnerable sectors allowing Caribbean governments to utilise import tariffs, alternative instruments are needed to avoid consequences on the realisation of the right to food. These could be the use of import safeguards or public policies such as investment in agriculture or the creation of social safety nets.[268]

To recapitulate, in the previous chapter we highlighted that the obligation to liberalise 'substantially all the trade' of article XXIV GATT could pose real problems to the right to food if developed countries conclude free trade agreements with developing states. This is so because Article XXIV GATT *de facto* forbids special and differential treatment for vulnerable countries in free trade agreements. This means that free trade agreements erode considerably the, already limited, mechanisms supporting the developing world put in place by the Uruguay Round.[269] With the Caribbean EPA this fault of Article XXIV GATT manifests its consequences in the regulation of Caribbean import tariffs. Even if some efforts were made to provide Caribbean producers with tariff protection the large majority of EU products will be imported into the Caribbean duty free. This will increase the risk of import surges in key food products, diminish the capacity of Caribbean countries to react to them and augment the dependency of Caribbean consumers from the EU food export business.

[267] See the Sustainability Impact Assessment of the EU-CARIFORUM Economic Partnership Agreement mentioned above in Chapter 4.

[268] On the necessity to allow trade measures to cope with food insecurity see Chapter 3.

[269] For a more general analysis of the consequences of EU free trade agreements on WTO special and differential treatment see C Milton and O Ochieng, "The EU-ACP economic partnership agreements and the 'development question': constraints and opportunities imposed by Article XXIV and special and differential treatment provisions of the WTO" (2007) 10 Journal of International Economic Law 363.

Reduction of trade revenues in Caribbean countries

Another challenge to the right to food the EPA creates is that it diminishes the public revenues of the countries taking part in the agreement.[270] For the EU the impact is negligible because Caribbean countries are minor trade partners but for the Caribbean the impact could be important. In fact, a recent study issued by the European Parliament shows that in several Caribbean countries trade taxes constitute more than the 20% of the national budget. Overall, the impact of the EPA is not negligible in the Caribbean since certain countries could lose up to 2.5% of their overall public revenues.[271] This is so because in the Caribbean trade revenues mainly come from import duties and taxes on the export of natural resources. Since the Caribbean EPA eliminates around the 80% of import tariffs it reduces the amount of revenues available to Caribbean countries. A sensitive reduction in public revenues could reduce the capacity of Caribbean countries to intervene in the case of sudden food shortages due to global price spikes or environmental disasters.[272] In other words, if Caribbean countries do not recoup the revenues lost with the EPA their capacity of intervening to protect and fulfil the right to food would be weakened.

However, substituting trade revenues with alternative instruments of domestic taxation is not a straightforward process in developing countries and recent research highlights that alternative instrument of taxation could be too expensive in low-income countries.[273] This is so because in states with a weak administrative apparatus it is more effective levying trade taxes than enforcing a tax on consumption. A study of the International Monetary fund, for instance, examining loss of trade revenues between 1975 and 2000 provided evidence that high-income countries recovered them straightforwardly, middle-income countries recouped only 35-55 per cent of revenues whereas low-income countries recovered 30 cent for each lost dollar at best.[274] For these reasons development literature notices that in history numerous

[270] For an overview of the relationship between trade and public revenues see L Bartels, "Trade and Human Rights", Max Planck Encyclopedia of Public International Law (August 2011 edn), http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e1550&recno=1&searchType=Quick&query=trade+and+human+rights> accessed 17 January 2012. H-J Chang, *Bad Samaritans* (Bloomsbury Press 2008) 69; J Stiglitz, *Making Globalization Work* (Penguin Books 2007) 66; United Nations Economic Commission for Africa, African Trade Policy Centre, "Fiscal Implications of Trade Liberalization on African Countries", Work in Progress No. 5, available at < http://www.uneca.org/atpc/Work%20in%20progress/5.pdf> accessed 16 January 2012.

[271] European Parliament, The CARIFORUM-EU Economic Partnership Agreement: the development component (2009) 27.

[272] In addition to this immediate effect on the economic capacity of protecting food security additional negative effects may stem from the diminished capacity of developing countries to invest in their economic development. See, for instance Stiglitz's infant economy argument, J Stiglitz, *Making Globalization Work* (Penguin Books 2007) 70.

[273] H-J Chang, Bad Samaritans (Bloomsbury Press 2008) 69; Joseph Stiglitz, *Making Globalization Work* (Penguin Books 2007) 66.

[274] T Baunsgaard and M Keen, "Trade Revenue and (or?) Trade Liberalization", International Monetary Fund Working Paper WP/05/112, June 2005.

developed countries relied on trade revenues until improved tax collection allowed transition to a different system.[275]

This new challenge was also identified in the Sustainability Impact Assessment conducted by the EU during the negotiations of the Agreement. The study highlights that "a crucial element the negotiators have to take into account during the trade negotiations is the implementation of mechanisms to mitigate the negative impact of a fall in government revenues and the development of other revenue creating activities in order to be less dependent on trade taxes".[276] For these reasons the Food and Agriculture Organization in its policy briefs on international trade law prefers regulatory options that do not limit excessively the revenues of developing countries that trade taxes generate.[277]

4. Safeguards

The previous chapter presented the limits of safeguards in WTO law with regard to the protection of the right to food from import surges. The chapter argued that the procedure and substantive requirements of WTO general safeguards are not designed to provide effective protection in case of import surges of food in vulnerable countries. In particular, the human rights implications of import surges do not emerge in the regulation, the procedure is too burdensome for developing countries and special and differential treatment for vulnerable countries is almost non-existent. The preceding chapter also discussed the WTO special safeguard concluding that even if this automatic mechanism is highly inefficient it is conceptually more promising and if amended could become an effective instrument of protection of vulnerable countries. This is so because the special safeguard works automatically and through a system of triggers that activate import tariffs as soon as the signs of import surges are present on the international market.

This section presents the EPA safeguards evaluating them in the light of the protection of the right to food. It will emerge that the safeguards of the Caribbean EPA suffer from the same shortcomings as WTO safeguards and that no efforts were made to design innovative instruments of protection of vulnerable countries. This is so even if the process of liberalisation triggered by the Caribbean EPA is much more radical than the one implemented in the Uruguay Round and the risk of import surges more significant.

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[275] H-J Chang, 23 Things They Don't Tell You Aout Capitalism (Bloomsbury Press 2008) 62.

[276] PricewhaterhouseCoopers, Sustainability Impact Assessment (SIA) of the EU-ACP Economic Partnership Agreements Regional SIA: Caribbean ACP Countries, 30 January 2004 http://trade.ec.europa.eu/doclib/docs/2005/january/tradoc_121202.pdf.

[277] See for instance how the FAO proposes to regulate export taxes, a trade instrument with a much less evident impact on public revenues than tariffs. R Sharma, *Food Export Restrictions: Review of the 2007–2010 Experience and Considerations for Disciplining Restrictive Measures*, FAO Commodity and Trade Policy Research Working Paper no. 32 (FAO, 2010).

(a) Substantive requirements

The regulation of EPA safeguards is contained in Articles 25 and 40 of the Treaty. Drafting the regulation of the Caribbean EPA safeguards, negotiators drew inspiration from Art. XIX GATT and the WTO Safeguards Agreement [278] but widened the conditions for recourse to the instrument. In fact, beside the classical case of "serious injury to a domestic industry", Article 25 refers to "disturbances in a sector of the economy", "major social problems" and "deterioration in the economic situation of the importing party". Safeguards are also available when a surge of imports cause or threaten to cause "disturbances in the markets of like or directly competitive agricultural products or in the mechanisms regulating those markets".

The rules on the duration of the safeguards grant some differential treatment to Caribbean countries. In fact, whereas the EU can adopt safeguards for two years and extend them up to four years Caribbean countries can do so for four years and confirm them up to eight. In special circumstances, the time limit can reach 10 years if the safeguard protects infant industries. In any case, the safeguard has to contain clear elements progressively leading to their elimination. In addition, no safeguard can be applied to the import of a product that has previously been subject to such a measure for a period of at least one year.

Finally, acknowledging the gap in development and competitiveness between the parties, and in view of preventing negative effects on food security, Article 40 of the EPA provides that:

> "Where compliance with the provisions of this Agreement leads to problems with the availability of, or access to foodstuffs or other products essential to ensure food security of a Signatory CARIFORUM State and where this situation gives rise or is likely to give rise to major difficulties for such a State, that Signatory CARIFORUM State may take appropriate measures in accordance with the procedures laid down..."

(b) Procedure

A major difference between the general WTO safeguards and the EPA safeguards is that in the EPA there is a structured system of supranational supervision. Accordingly, the parties to the Caribbean EPA lost the prerogative to implement safeguards autonomously even at the occurrence of substantive conditions justifying their utilisation. This is so also when safeguards would be justified by a food crisis triggered in the Caribbean by import surges. In fact, the CARIFORUM-EU Trade and Development Committee (TDC), a common intergovernmental body, supervises the entire process of adoption of the EPA safeguards. Safeguards are an instrument of last

[278] See above Chapter 5.

resort available only if the TDC does not issue a recommendation on how to remedy the circumstances or if, within 30 days of the matter being referred to the TDC, no other satisfactory solution has been reached. The TDC can be bypassed only in exceptional circumstances and for a limited amount of time of 180 for the EU and 200 days for the Caribbean.

(c) Evaluation in the light of the right to food

The EPA regulation of safeguards is based on the WTO general safeguards even if it introduces the innovation of a supranational body, the TDC, supervising the entire process of adoption. With regard to the protection of the right to food this arrangement incorporates in the EPA the shortcomings of WTO law. Furthermore, the decision of not including a special safeguard mechanism fully dedicated to the avoidance of import surges makes the EPA safeguards a particularly weak mechanism of protection of the right to food. This section enumerates four clear inadequacies of the EPA safeguards.

First, the EPA contains only general safeguards inspired to the GATT and the WTO Agreement on Safeguards that are based on substantive requirements that already proved difficult to apply at the occurrence of food security emergencies. In fact, as showed in the previous chapter, general safeguards are technically difficult to implement when import surges are caused by sudden modifications of market conditions. To the contrary, the EPA does not include any automatic mechanism based on the Special Safeguard of the WTO Agreement on Agriculture. This would have allowed automatic response to the conditions of the international market when they constitute a risk for Caribbean food security. The decision of not including a form of special safeguard in the EPA constitutes a substantial handicap in terms of protection of food security of Caribbean countries. This is particularly unfortunate since the Food and Agriculture Organisation at the time the EPA was negotiated had already developed proposals of special food security safeguards that could have been incorporated in the Agreement.[279] The EU itself included innovative special food security safeguards in other trade agreements with countries vulnerable to food shortages.[280] The absence of an automatic mechanism of protection of food security makes the Caribbean EPA a step back also with respect to WTO law.

Second, in terms of sovereignty, the EPA entails a more extensive transfer of powers to supranational institutions than what happens in WTO law. In fact, the choice of putting safeguards under the control of a supranational body is a departure from the model of the WTO Safeguard Agreement where the adoption of multilateral safeguards follows a national investigation and notification to the WTO has to be done only at the end of the procedure. With the EPA, CARIFORUM States subjected the prerogative of adopting safeguards to the assessment of the TDC. As a

[279] See above Chaper 5.

[280] See for instance the Free Trade Agreement between the EU and Central America.

consequence, the effectiveness of safeguards implemented in case of import surges of food rely on the interpretation that the TDC will give of the conditions of Article 25 and Article 40 and on the awareness of the social effects of the EPA the TDC has. The composition of the TDC, the attitude of its members with regard to food security issues and the absence of internal divisions are crucial for the success of the use of safeguard clause as instrument of protection of food security. In the absence of research facilities at the disposal of the TDC it is up to Caribbean States to identify negative effects, associate them with the liberalisation schedule of the EPA and advocate the necessity of a safeguard during a TDC meeting.[281] Moreover, the decision of centralising the control over EPA safeguards in the TDC, an intergovernmental body with no specialisation in food security issues, creates a burdensome supranational mechanism that slows down the adoption of safeguards and makes them subject to diplomatic bargaining. In addition, since all members of the EPA are represented in the TDC and the adoption of the safeguard requires majority voting the safeguard can be adopted only with the agreements of countries in which the import surge might not have manifested. Furthermore, in this system the EU has to provide its consent in the TDC to the adoption of a safeguard on the import of food in the Caribbean. This aspect of the regulation is likely to slow down even more the adoption of the safeguard and put EU export business in the position of providing an informal opinion on the decision.[282] The EPA could have at least facilitated the adoption of emergency food security safeguards keeping the procedure at national level where the effects of import surges are more evident. The fact that the TDC does not have any research facility which can draw a picture of the consequences of the EPA on food security suggests that it is unlikely that the TDC will facilitate the adoption of safeguards especially if the effects of import surges are felt only in one Caribbean country or only in a region of a Caribbean country. Even if it was already evident from the Uruguay Round experience that trade safeguards have to be implemented quickly to be an effective instrument of protection of food security, the Caribbean EPA introduces a procedure that is potentially even slower than the one provided by WTO law.

Third, Article 40 that is the only one explicitly referring to food security is a mere rhetorical expedient that does not make the safeguards of the Caribbean EPA a more efficient protective mechanism. In fact, Article 40 does not create a special safeguard but only adds an extra case to the triggers contained in Article 25. Article 40 relies entirely on the general discipline of Article 25 for the procedure of application and the nature of safeguards available to Caribbean countries. Common side effects on food security caused by trade adjustment shocks or price fluctuations seem to find a place already in the general safeguard clause under the label "major social problems". If Article 40 has any function, it is to avoid restrictive interpretations that could leave food security out of reach. However, because Article

[281] For this reason, the CARICOM intends to implement *rapid-response mechanisms* to identify and examine deleterious effects of the implementation of the EPA on consumers and domestic agricultural, food and fisheries sectors.

[282] On the participation of European food business to the EU external action see above Chapter 4.

40 does not extend the room for application of the general discipline on safeguards the reference to food security appears rhetorical. Moreover, Article 40 provides that also in case of import surges on food the only applicable safeguards are the ones of Article 25 that require the very burdensome procedure supervised by the TDC. Article 40 would have made more sense if linked with an automatic protective mechanism similar to the WTO Special Safeguard of the WTO Agreement on Agriculture.

Finally, because of the potential risks of the EPA for food security in the Caribbean and the negligible impact of the EPA on the EU, the reconciliation of trade liberalisation and the protection of the right to food would have required more asymmetry. It is particularly surprising that no distinction is made between agricultural and industrial goods and that for both categories, both the EU and the Caribbean can adopt import safeguards. As showed above, a positive aspect of the EPA is that it eliminates tariff escalation for Caribbean exports to the EU. The safeguard regime however, could reintroduce tariff escalation from the backdoor allowing the EU to temporarily restrict imports from the Caribbean whenever they gain access to the EU market. More generally, the special and differential treatment provisions of the EPA safeguards do not reflect the difference in market power of the EU and Caribbean countries. The fact that the maximum duration of the safeguards is longer for Caribbean countries is a mild form of differential treatment that is even weaker than what is provided in WTO law. In fact, Article 9 of the WTO Agreement on Agriculture obliges developed countries to exonerate developing countries from trade safeguards in the presence of certain conditions.[283] Since this, already weak, norm is not reproduced in the EPA, Caribbean countries remain exposed to EU safeguards irrespectively to their level of development and the consequences of the EU safeguards for their domestic markets. The negotiators of the EPA could have used Article 9 of the WTO Agreement on Agriculture as a model to give Caribbean countries more protection from EU safeguards.

In addition, the EPA could have been the occasion to provide Caribbean countries with protection also from EU safeguards implemented under the GATT and the WTO Agreement on Safeguards. This would have amended one of the shortcomings of WTO law that still allows developed countries to use safeguards against vulnerable states. However, the EPA clause that forbids to the EU the adoption of WTO safeguards against the Caribbean expires in 2019. This means that by 2019 the EU will be allowed to temporary raise its tariff protection against Caribbean countries even beyond the WTO tariff bindings decided in the Uruguay Round.

5. Export restrictions

The previous chapter clarified that export restrictions are a particularly weak area of WTO law and that all WTO Members preserved extensive policy space to restrict the

[283] On Article 9 of the WTO Agreement on Agriculture see above Chapter 5.

export of food towards third countries. The preceding chapter also pointed out that Article XXIV GATT (to the contrary of what happens with import restrictions) does not oblige WTO Members to eliminate export restrictions when concluding a free trade agreement. This means that in the Caribbean EPA negotiators had the liberty to preserve WTO law on export restrictions without producing any substantial modification of the pre-existing framework. In particular, the parties to the agreement where free to maintain Article XI GATT and the exception of Article XI.2(a) GATT allowing export restrictions on food to prevent or relieve food shortages. Although WTO law did not require any specific intervention on export restrictions the parties to the Caribbean EPA made the choice of including an extremely restrictive regulation of the trade practice. In fact, the Caribbean EPA forbids export restrictions on any product including food, producing a profound change in the regulation of food exports between the EU and the Caribbean. This section presents the Articles on export restrictions of the Caribbean EPA and reflects on the consequences this decision might have on the realisation of the right to food.

(a) Export restrictions in the Caribbean EPA

The Caribbean EPA contains a thorough regulation of export restrictions that will be applied instead of Article XI GATT in the relationship between the parties. The new regulation is contained in Article 14 and 26 of the Agreement and introduces a complete ban on export restrictions that is unprecedented in international trade treaties concluded by the EU. Article 26 refers to quantitative restrictions and provides that:

> "no…export prohibitions…or export restrictions on originating exports other than customs duties and taxes and fees…whether made effective through quotas, import or export licences or other measures, shall be maintained… No new such measures shall be introduced". [284]

Notably, the clause not only prohibits to the parties from adopting any form of quantitative restriction on exports, it also obliges them to dismantle any existing restriction. The regulation is made more restrictive by Article 14 that refers to the imposition of taxes on exports. In fact, the Article extends the ban to export taxes providing that:

> "customs duties on exports shall not be applicable to goods originating in the CARIFORUM State and imported into the EC and vice versa". [285]

The differences between the regulation of export restrictions contained in the EPA and WTO law are substantial. First, quantitative restrictions are forbidden without exceptions. In fact, Article 26 of the EPA provides a harsher version of

[284] EU-CARIFORUM Economic Partnership Agreement, Article 26.

[285] EU-CARIFORUM Economic Partnership Agreement, Article 14.

Article XI GATT that eliminates all the exceptions to its second paragraph including the one of Article XI.2(a) allowing the use of quantitative restrictions to prevent or relieve critical food shortages. Second, the EPA includes an innovative regulation on export taxes prohibiting the practice altogether. Article 14 is unprecedented in EU trade practice and there is nothing similar in WTO law. As shown above, WTO law is lax on export taxes and WTO Members never managed to put the practice under control. The options being discussed in the Doha Round never go as far as Article 14 and include exceptions allowing a certain margin of adoption of export taxes by WTO Member States. For instance, a paper circulated by Japan proposes to bind export taxes through a WTO schedule similar to the one used for import taxes. This would put a ceiling on export taxes leaving margins to Member States to use the policy.[286] Finally, the EPA does not reproduce several general exceptions to the GATT that in multilateral trade law augment the space of WTO members to use export restrictions. In particular the EPA does not replicate the exceptions of Article XX (g), Article XX (i) and Article XX (j). The three exceptions allow certain restrictions of international trade, including export restrictions when the action is related to the "the conservation of natural resources", the provision of materials to domestic processing industries and the "acquisition or distribution of products in general or local short supply". The choice of not including these exceptions in the EPA rules out the use of export restrictions as instrument of intervention in case of shortages of a certain good on the territory of the parties to the agreement.

To sum up, the EPA between the EU and the Caribbean includes an innovative regulation of export restrictions that prohibits the practice altogether. This regulation, that applies only to trade relationships between the EU and the Caribbean, shifts from multilateral trade law towards the complete elimination of any kind of quantitative and tax based export restriction. This extremely restrictive regulation applies without discriminating between products and includes food and agricultural products.

(b) Evaluation in the light of the right to food

The main problem of WTO regulation on export restrictions from the perspective of the right to food is that it allows too much space to influential exporters to implement export restrictions also with regard to vulnerable countries. This excessive freedom afforded to influential exporters exposes vulnerable countries and especially net-food importers to food shortages caused by export restrictions imposed by third countries. Since numerous countries vulnerable to food shortages are also net-food importers WTO law should prevent the situation in which sudden interruptions of export of food by a WTO Member trigger food shortages in other countries. Chapter 3 showed how only a very limited number of countries have enough market power to influence the realisation of the right to food in third countries implementing export restrictions. Accordingly, it is on these countries that international trade law should concentrate when regulating export restrictions.

[286] See the Negotiating proposal by Japan on WTO Agricultural Negotiations, http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/G/AG/NGW91.doc.

As noticed in the previous chapter, the positive aspect of WTO law is that the lax attitude on export restrictions allows countries exposed to food shortages but with no influence on the international food market to intervene on their export flows at the occurrence of a food crisis. Under WTO law, for instance, it was common practice of Caribbean countries to utilise export restrictions on basic food products at the occurrence of food shortages on their territories. The preceding chapter concluded that a reform of international trade law supportive of the right to food should protect vulnerable countries from export restrictions of large exporters while still allowing countries exposed to food shortages to intervene on their export flows at the occurrence of a food crisis. In other words, international trade law should afford special and differential treatment to countries vulnerable to food shortages and limit the capacity to implement export restrictions of large influential exporters of food.

This is not what happens with Articles 14 and 26 of the Caribbean EPA where negotiators opted for a general abolition of export restrictions applicable both on the EU and on Caribbean countries. This choice appears too penalising with regard to Caribbean countries that lost the prerogative to impose export restrictions on food even at the occurrence of a major food crisis caused by market instability or natural disasters. This aspect represents the main human rights deficit of the regulation of export restrictions of the Caribbean EPA and deserves a brief comment.

Export restrictions as short-term response to a food crisis

The role that export restrictions played during international price spikes brought several governments and international organisations to call for their regulation. However, the studies provided so far did not reach the point of suggesting a general ban on export restrictions. This is so because in certain limited situations export restrictions can be an instrument to deal with the negative effects of global price spikes, especially in developing countries that lack of solid social safety nets. This is so because when prices are high on the international market domestic traders tend to export the food they purchase at the expenses of poor local customers.[287] To avoid this practice several developing countries implement export restrictions during global food crises. The policy helped several vulnerable countries to drive local prices down and supply food to the weakest parts of their societies. When large exporters of food implement export restrictions their policy produces effects on third countries that can be particularly distressful if the importer is a developing country or a net-food importer. However, when the country implementing the policy is a small exporter with no influence on the international price of food there is no immediate risk for the international community. In this case, export restrictions are a legitimate instrument of intervention to fight at local level supply shortages and high prices.[288] For this reasons the proposals appeared in the Food and Agriculture Organization policy briefs

[287] FAO, Responding to the food crisis: synthesis of medium term measures proposed in inter agency assessment.

[288] On the domestic role of export restrictions during food crisis see FAO, How does international price volatility affect domestic economies and food security?, 24.

to regulate export restrictions in the context of the Doha Round do not propose to ban export restrictions altogether but go in the direction of making the practice more predictable and less distressful on global prices and net-food importers. This could be done for instance, including tax rate quotas or defining limits to export restrictions in international agreements. This would allow countries to use the policy when prices on the international market hamper their domestic food security but in a predictable way and within agreed limits that do not foster panic behaviour and food shortages in other countries.[289] The proposals appeared so far in the Doha Round also try to find a balance between different priorities and do not go in the direction of eliminating export restrictions altogether.[290]

To the contrary, the radical approach to export restrictions of the free trade agreement between the EU and the Caribbean produces the unintended consequence of depriving Caribbean countries of a policy response in case of a food emergency in the region. Since the two Articles make no distinction between different kinds of goods the regulation applies equally to industrial products, raw materials and food. Accordingly, the regulation produces a shift in international trade law towards the elimination of the practice from the spectrum of international trade policies that countries can implement. Article 14 and 26 mean, for instance, that state parties are forbidden from limiting the export of their natural resources or taxing them to produce public revenues. The new regulation also forbids any kind of emergency mechanism that uses export restrictions to augment the quantity of a certain good or material on the territory of the state. This implies that the parties to the agreement cannot limit their export to the other parties to supply certain products or materials to domestic industries. In a similar vein they cannot apply restrictions on food exports in order to supply the domestic market at the occurrence of food shortages. Because the contribution of the Caribbean to global food supply is irrelevant[291] the clause limits the space of intervention of Caribbean countries without having any positive impact on global food security. This is so because restrictions on export of food to the EU implemented by Caribbean countries would produce effects only at domestic level without affecting the international price of food.[292] During the 2007-2008 food crisis, for instance, Guyana and Suriname imposed restrictions on the export of certain rice products in order to ensure adequate supply to the domestic market.[293] If the EPA is applied to the letter, Caribbean countries will be stopped to implement such kind of

[289] See Sharma at footnote 9.

[290] See, WTO Agriculture Negotiations Backgrounder, Export restrictions and taxes, http://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd09_taxes_e.htm.

[291] In 1998 the contibution of the Caribbean to global supply of agricultural products was 2% and it declined to 0.3% in 2004. See Caribbean Agribusiness website, http://174.123.68.234/primary-dropdown/agribusiness-organisations-country.

[292] JR Deep Ford, C dell'Aquila and P Conforti, "Caribbean Countries as small and vulnerable economies", JR Deep Ford, C dell'Aquila and P Conforti, Agricultural trade policy and food security in the Caribbean (FAO 2007).

[293] FAO, The response of Latin American and the Caribbean to higher and volatile food prices and opportunities for regional cooperation, http://174.123.68.234/primary-dropdown/agribusiness-organisations-country.

actions and will have to keep exporting food to the EU even in the wake of a major food crisis.

This problem creates a new challenge to food security coming from the opposed direction of WTO law. In WTO law, export restrictions are regulated mildly and WTO members maintained extensive policy space to implement export restrictions on food in an unpredictable fashion both through quotas and export taxes. This lack of regulation produced an excessive use of export restrictions by large exporters that compromised food security in importing countries. To the contrary, in the EPA, negotiators went too far and by eliminating export taxes and quotas altogether stripped a group of countries vulnerable to food shortages of an instrument of intervention in case of food crisis.

6. Conclusions

The EU concluded the Caribbean EPA in 2008 with the objective of supporting Caribbean development and the realisation of human rights including economic and social rights. The EPA intervenes in international trade law by introducing a *lex specialis* that applies only to the trade between the EU and the Caribbean. The Caribbean EPA innovates considerably from WTO law in all the trade instruments taken into account in this research: import restrictions, safeguards and export restrictions.

The analysis of this innovative regulation under the light of the right to food elucidated that the Caribbean EPA does not solve any of the problems of WTO law and often creates new challenges for the realisation of the right to food in the Caribbean. First, with regard to import restrictions, the Caribbean EPA limits the capacity of intervention of Caribbean countries at the occurrence of import surges and increases their exposure to the vagaries of the international market. In addition, increased access for Caribbean producers might not make any difference from the existing framework since at the same time the Caribbean EPA erodes the preferential treatment provisions provided by WTO law and previous arrangements between the EU and the Caribbean.

Second, even if the clauses on import restrictions limit severely the capacity of intervention on import surges of Caribbean countries the EPA does not contain any automatic special safeguard mechanism. Without special safeguards Caribbean countries do not dispose of any efficient mechanism of protection at the occurrence of import surges of food from the EU. In fact, the general safeguards the Caribbean EPA provides are very burdensome to apply and it is unlikely that they will provide Caribbean vulnerable producers with efficient protection.

Finally, the Caribbean EPA forbids any form of export restrictions limiting the capacity of Caribbean countries to intervene at the occurrence of food shortages due to market instability or natural disasters. This means that if the Caribbean EPA is applied to the letter the Caribbean will have to keep exporting food to the EU even at the occurrence of major food shortages.

Whenever the Caribbean EPA forbids the prompt intervention of Caribbean Governments to protect their citizens from hunger and malnutrition it forbids the exercise of the human rights duties required by the International Covenant of Economic Social and Cultural Rights. In particular, the Caribbean EPA does not provide sufficient emergency mechanisms that would have allowed Caribbean countries to shelter their citizens when market instability increases food insecurity. The absence of efficient safeguards and the prohibition to use export restrictions even at the occurrence of a major food crisis constitute a particularly evident human rights deficit.

The case study also highlighted that some of the human rights deficits of the Caribbean EPA depend on pre-existing WTO law while others were the consequence of deliberate policy decisions of the negotiating parties. In particular, the regulation of import restrictions was deeply affected by the obligation to liberalise 'substantially all the trade' of Article XXIV GATT. In this part of the Caribbean EPA the EU and its partner countries made some efforts to protect vulnerable states from excessive exposure to the international food market and to EU exports. However, WTO law did not allow a free trade agreement based on the principle of non-reciprocity[294] that would have granted full protection of Caribbean producers from EU competition. Accordingly, a regulation of import restrictions that is fully respectful of human rights duties can be achieved only within the WTO through a modification of Article XXIV GATT or the adoption of a waiver for developing countries.[295]

The situation is different with regard to safeguards and export restrictions. In both cases, the EU and Caribbean countries were free under WTO law to create protective mechanisms allowing the intervention of Caribbean countries on their trade flows of food at the occurrence of import surges or food shortages. Accordingly, the human rights deficit of the Caribbean EPA in these policy areas depends on a decision of the EU and Caribbean countries. This means also that with regard to safeguards and export restrictions the Caribbean EPA could be re-negotiated to make it more supportive of the realisation of the right to food.

[294] The previous chapter discusses the WTO principle of non-reciprocity at length.

[295] See Chapter 5 on special and differential treatment.

CHAPTER 7 THE TRADE AGREEMENTS BETWEEN THE EU AND AFRICA

1. Introduction

The previous chapter examined the import and export regulation of food in the trade agreement between the EU and the Caribbean. The chapter concluded that with regard to the realisation of the right to food, the agreement does not solve the problems in WTO law and creates new challenges for the realisation of the right. The EU-Caribbean trade agreement was the first comprehensive agreement concluded under the umbrella of the Global Europe Strategy with a group of developing countries vulnerable to food shortages. As shown in Chapter 4, the Caribbean trade agreement is only a fraction of a wide project of the EU to conclude free trade agreements with the entire developing world. At the end of the process the EU will be regulating its trade relationships with vulnerable countries through free trade agreements instead of WTO law. This operation could have a serious impact on the realisation of the right to food if the deficiencies emerged in the Caribbean free trade agreement are reproduced in other treaties.

Of the areas of the world where the EU is negotiating free trade agreements, sub-Saharan Africa is among the most sensitive in terms of realisation of the right to food. In fact, sub-Saharan Africa is the home to around 230 million malnourished people and is characterised by economic fragility and exposure to natural disasters.[296] Notwithstanding this extremely disadvantaged economic setting, since 2006 the European Union has been attempting to conclude free trade agreements with every African country. So far, six agreements have been concluded involving 16 sub-Saharan countries.[297]

This chapter takes into account the clauses on import and export of food of the six free trade agreements the EU concluded with sub-Saharan countries. This chapter has the main objective of assessing if the deficiencies of the Caribbean agreement are present also in the treaties concluded so far with African countries. The chapter is divided in four sections plus this introduction. In the second section we present the free trade agreements between the EU and sub-Saharan countries summarising the state of the negotiations and the economic setting of the EU action. The section stresses the vulnerability of African countries and the special status some of them have in WTO law. In the third section we take into account the regulation of import tariffs. The treaties, intervening on the maximum tariff applicable to food products

[296] FAO, *Food security and agricultural development in sub-Saharan Africa* (FAO 2006); J Ziegler, "Peasant Farmers and the Right to Food a History of Discrimination and Exploitation", Requests Addressed to the advisory committee stemming from human rights council resolutions: right to food, A/HRC/AC/3/CRP.5.

[297] See European Commission, Overview of EPA, available at <http://trade.ec.europa.eu/doclib/docs/2009/september/tradoc_144912.pdf> Accessed 4 July 2013.

imported in the EU from African countries is relevant for the right to food because it affects the presence of vulnerable African producers in the EU common market. The treaties also regulate the maximum tariff applicable to EU food product imported in African countries from the EU. This part of the regulation is related to food security because it produces effects on the capacity of vulnerable states to protect their domestic markets from the instability of the international food market. The third section assesses the regulation of safeguards on food products imported in African countries from the EU. In this section we answer the question if the treaties provide African countries with a quick and efficient mechanism to protect their citizens from import surges of food from the EU. Section four looks at the clauses on export restrictions assessing to what extent the treaties allow African countries to use this instrument at the occurrence of food shortages on their territory. Section five concludes.

The chapter shows that also the EU-Africa free trade agreements limit the capacity of vulnerable states to realise the right to food. This is so even if the African legal and economic settings are different from the Caribbean one and would have required particular attention to the effects of the treaties on the realisation of the right to food. In fact, in sub-Saharan Africa there are numerous least-developed countries that are particularly vulnerable to food shortages. Before the free trade agreements these countries had wide space under WTO law to protect their citizens from the international food market when its failures affected the realisation of the right to food.

3. The state of negotiations between the EU and Africa

As explained at length in Chapter 4 the European Union aims to conclude free trade agreements with more than 100 countries across the world. This strategy includes also all sub-Saharan countries and these countries have been involved in close negotiations with the EU since 2006. In order to smooth the conclusion of the trade agreements the European Commission divided sub-Saharan Africa in five zones: West,[298] Central,[299] Eastern and Southern, [300] Eastern African Community [301] and South African Development Community.[302] Each group of countries constitutes a separate platform

[298] This group includes: Benin, Burkina Faso, Cape Verde, Ivory Coast, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Togo.

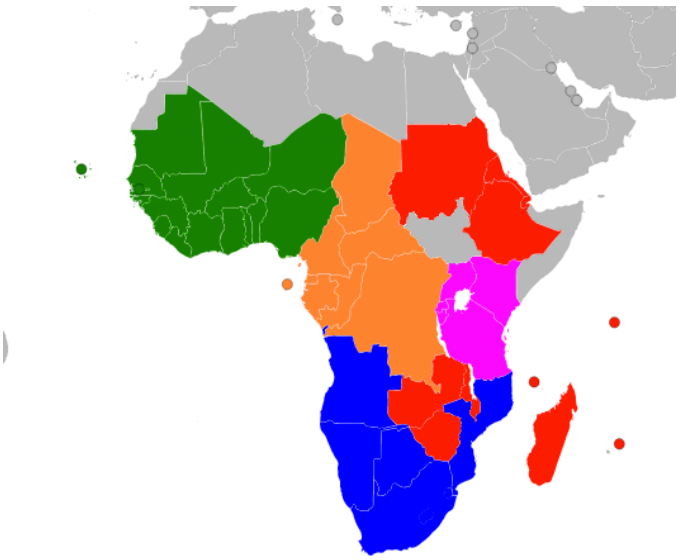
[299] This group includes: Cameroon, Central African Republic, Chad, Republic of Congo, Democratic Republic of Congo, Equatorial Guinea, Gabon and Sao Tome and Principe.

[300] This group includes: Comoros, Djibouti, Eritrea, Ethiopia, Madagascar, Mauritius, Malawi, Seychelles, Sudan, Zambia and Zimbabwe.

[301] This group includes: Burundi, Kenya, Rwanda, Tanzania, Uganda.

[302] This group includes: Angola, Botswana, Lesotho, Mozambique, Namibia and Swaziland.

to negotiate and conclude free trade agreements with the EU.[303]



The map shows the negotiating groups of the sub-Saharan leg of the Global Europe Strategy as designed by the European Commission. Green is West, Orange is Central, Red is Eastern and Southern, Pink is the Eastern African Community and Blue is the South African Development Community.

The objective of the Global Europe Strategy in sub-Saharan Africa is to achieve five comprehensive free trade agreements, one for each area. The agreements will substitute existing WTO law in the relationship between the EU and the countries involved.

The negotiations with the five groups of African countries started in 2006 at the same time as the negotiations with Caribbean countries. The history of the African negotiations has been however more troubled and so far the EU was not able to achieve the goals of its strategy.[304] This happened for different reasons depending on

[303] S Bartelt, "ACP-EU cooperation at a crossroads? One year after the second revision of the Cotonou Agreement" (2012) 17 European Foreign Affairs Review 1; P Draper, "EU-Africa Trade Relations: The Political Economy of Economic Partnership Agreements", J Tumplir Policy Essay 02/2007, European Centre for International Political Economy; A M Mansoor, V Bassant and S Samen, "Strengthening Economic Partnership Agreements and the Future of the EU-Africa Trade Relationships in the Next Decade" in *The next decade of EU trade policy: Confronting global challenges?* (Overseas Development Institute 2012).

[304] International Food & Agricultural Trade Policy Council, "Economic Partnership Agreements and African Regional Integration: *Have negotiations helped or hindered regional integration?*", Issue Brief August 2011; Andrew Bounds, "African states refuse to join EU trade deal" (Financial Times, 4 December 2007) available at: <http://www.ft.com/cms/s/0/c757bcf2-a1f2-11dc-a13b-0000779fd2ac.html#axzz2Y4HpPV1W> Accessed 14 June 2013. In sub-Saharan Africa several NGOs and civil society groups are opposing the conclusion of the trade agreements. See for instance the websites http://stopepa.twnafrica.org/ and http://www.twnafrica.org/ .

the countries. Often African countries maintained that their requests were not taken into account in the final draft of the agreements and that the treaties were not respecting the WTO principle of differential treatment for vulnerable states. [305] A role was played also by local social and intellectual movements that in some African countries and internationally are fiercely opposing the conclusion of the agreements.[306]

Facing the impossibility of concluding trade deals as comprehensive as the Caribbean one the EU Commission modified the strategy and concluded simpler agreements with the available countries. [307] These agreements called interim economic partnership agreements concentrate only on some of the trade issues the EU wanted to include at the beginning of the negotiations. Notwithstanding their name, interim trade agreements are permanent free trade treaties of the kind allowed by Article XXIV GATT. Notably, all the interim agreements concluded so far regulate the import and export of food and are substitutes for WTO law in the relationship between the EU and the Countries involved. For this reason even if the EU trade strategy in sub-Saharan Africa is not completed the agreements concluded so far provide a clear picture of the direction of the negotiations and their consequences for the right to food.

So far the EU concluded six free trade agreements with sub-Saharan countries: three with single countries and three with four or more countries. The treaties with single countries are the agreement between the EU and Côte d'Ivoire,[308] the agreement between the EU and Ghana[309] and the agreement between the EU and Cameroon.[310]

"East Africa refuses to sign EPA text" Forum Syd Africa < https://www.forumsyd.org/templates/fs_articletypeb.aspx?id=16615> (accessed 15 June 2013); Traidcraft, Economic Partnership Agreements – still pushing the wrong deal for Africa?, EPA Briefs <http://www.stopepa.de/img/EPAs_Briefing.pdf> (accessed 10 July 2013); Mohamed Gueye, "The long road to emancipation" *D+C* <http://www.dandc.eu/en/article/why-africans-do-not-worry-about-slow-epa-progress-too-much> (accessed 20 June 2013).

[306] NGOs have been particularly active on this issue and also created a "Stop EPAs day" see Oxfam International, "Protesters unite around the world against EU's unfair Free Trade Deals" <http://www.oxfam.org/en/node/203> (accessed 13 July 2013).

[307] For instance the agreements do not include regulation of trade in services, intellectual property and competition policies.

[308] Stepping Stone Economic Partnership Agreement between Côte d'Ivoire, of the one part, and the European Community and its Member States, of the other part [2009] OJ L59/3.

[309] Stepping Stone Economic Partnership Agreement between Ghana, of the one part, and the European Community and its Member States, of the other part.

[310] Interim Agreement with a view to an Economic Partnership Agreement between the European Community and its Member States, of the one part, and the Central Africa Party, of the other part [2009] OJ L 57/2.

The agreement between the EU and Eastern and Southern Africa includes Mauritius, Seychelles, Zimbabwe and Madagascar[311] and the agreement with the Eastern African Community involves Burundi, Rwanda, Tanzania, Kenya and Uganda.[312] Botswana, Lesotho, Swaziland and Mozambique also concluded a free trade agreement with the EU.[313] All these agreements are similar between each other. Since they are all relevant for the realisation of the right to food they will be analysed in the sections below.

3. Sub-Saharan Africa economic and legal setting

This section takes into account the economic and legal settings of the African states. The paradox of most of these countries is that they are at the same time extremely exposed to poverty and hunger and very rich in natural resources. In fact, despite the very low per-capita income these countries are among the main exporters of raw materials to the EU. In addition, sub-Saharan Africa has a particular legal status in WTO law since it contains numerous least-developed countries which are exempted from several key WTO obligations.

(a)Economic Setting

The economic and social situation of the countries involved in the free trade negotiations is extremely difficult. Of the 45 sub-Saharan countries taking part in the negotiations with the EU, 27 are on the list of the Food and Agriculture Organization of low-income-food-deficit countries.[314] Moreover, the large majority of the African countries that concluded the free trade agreements are net-food importers dependent on third countries to satisfy their food security needs.[315] In addition, the countries involved are often at the very bottom of international rankings on social and industrial development and capacity to compete on the international market. For instance, most of the countries involved in the free trade agreements are below the 150th position of

[311] Interim Agreement establishing a framework for an Economic Partnership Agreement between the Eastern and Southern Africa States, on the one part, and the European Community and its Member States, on the other part [2012] OJ L111/2.

[312] Agreement establishing a framework for an Economic Partnership Agreement between the European Community and its Member States, on the one part, and the East African Community partner states on the other part.

[313] Interim Agreement with a view to an Economic Partnership Agreement between the European Community and its Member States, of the one part, and the SADC EPA States, of the other part.

[314] The list contains the 62 most food insecure countries, namely countries that are unable to satisfy their food security needs through domestic supply and have a very low per-capita income. See Chapter 3 Section 3.

[315] WTO, WTO list of net food-importing developing countries, G/AG/5/Rev.10.

the UN Human Development Index.[316] All these elements make sub-Saharan Africa an area of the world extremely exposed to the vagaries of the international food market where the right to food remains largely unrealised.[317]

At the same time, sub-Saharan countries are among the richest of the world in several raw materials and natural resources crucial for the development of the EU economy. In fact, African countries are among the main exporters of gold, oil, diamonds and aluminium and are the providers of a substantial part of raw coffee and cocoa imported in the EU.[318] In addition, several countries own the reserves of critical rare materials that are scarce or absent in the territory of the European Union. Rwanda, for instance, is one of the main exporters of tantalum, a rare metal used in electronic components that the EU Commission identified as one of the key objectives of the Raw Materials Initiative.[319] From the official documents of the EU Commission it emerges that the EU approached the negotiations with Africa giving particular attention to the clauses influencing the supply of raw materials to EU processing industries.[320] Since sub-Saharan countries are also among the most exposed to hunger and malnutrition the free trade agreements between the EU and Africa are an ideal setting to evaluate the effectiveness of the EU Policy Coherence for Development initiative which should conciliate the economic objectives of the EU Commercial Policy with non-trade goals.

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[316] The exact ranking of the countries involved are the following: Cote d'Ivoire 168th, Ghana 135th, Cameroon 150th, Mauritius 80th, Seychelles 46th, Zimbabwe 172nd, Madagascar 151st, Burundi 178th, Rwanda 167th, Tanzania 152nd, Kenya 145th, Uganda 161st, Botswana 119th, Lesotho 158th, Swaziland 141st, Mozambique 185th. Most of these countries are below the 170th position of the UN index with regard to poverty and health.

[317] FAO, Regional Office for Africa, *Proramme Review 2011;* FAO, *FAO Statistical Yearbook 2012, Africa Food and agriculture* (FAO 2012).

[318] See chapter 3 section 2(c).

[319] See Chapter 4 for an introduction to the Raw Materials Initiative and its role in the EU external trade policy. European Commission, Report of the Ad-hoc Working Group on defining critical raw materials, available at >http://ec.europa.eu/enterprise/policies/raw-materials/files/docs/report-b_en.pdf> accessed 24 June 2013.

[320] See for instance the Annual Reports of the EU raw materials initiative. Even if the Reports concentrate on the necessity of ensuring supply of raw materials to the EU the 2009 Report contains an extensive part on the need to conciliate the raw materials initiative with other priorities such as the sustainable development of African countries. Even if this section of the Report maintains that "situations may arise where export restrictions are important to support, for example, development objectives, protection of the environment or the sustainable exploitation of natural resources" it does not review the clauses on export restrictions of the trade agreements between the EU and Africa. In other words, the main policy assessment of the raw materials initiative performed at EU level accepted the idea that a complete elimination of export restrictions might be detrimental to other interests but did not attempt any critical analysis of the clauses on export restrictions of the agreements with developing countries.

Finally, in certain sub-Saharan countries an emerging middle-class is increasing the value of sub-Saharan Africa as export market. For instance, a recent research prepared by Accenture showed that in 2020 the global value of the sub-Saharan market will be close to 1000 billion dollars. This is much less than the value of other emerging economies but is enough to make EU companies increasingly interested in this area of the world as a potential place to sell their products. The spending capacity of African people is however unequal between countries and social sectors. In fact, South Africa and Nigeria alone own around 50% of the entire private wealth of sub-Saharan Africa whereas in other countries the middle-class is almost nonexistent and poverty generalised. Moreover, there is a very high level of social inequality also in the richest and most developed African countries. This means that even in emerging African states a large part of the population is prone to hunger and malnutrition. Accordingly, any strategy of the EU to improve the presence of EU companies in sub-Saharan Africa should avoid affecting the most disadvantaged groups of African society. In particular, if the EU promotes the reduction or abolition of import tariffs on food should avoid increasing the exposure of vulnerable groups to the import surges of EU products in African markets. As shown in previous chapters, this market failure is particularly dangerous when it disrupts the livelihoods of local vulnerable producers. The economic setting of sub-Saharan Africa is particularly predisposed to import surges since malnourished people in this area often depend on fragile agricultural markets.[321] In addition, in Africa, local farmers do not receive any public subsidy to support their competitiveness and comprehensive public programs in support of technological development are rare and often inefficient.[322] This makes local producers in an exceptionally weak position when they face competition from developed countries such as the EU in their own domestic market.[323] Accordingly, a sudden augmentation of the import of these food products from the EU, displacing local producers, is likely to affect the realisation of the right to food in the area.

(b) Sub-Saharan Africa in WTO law

Thirty-four sub-Saharan countries are classified by the United Nations as "least-developed countries". The United Nations selects these countries on the basis of their

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[321] A recent Report funded by the European Development Fund identified the weakness of African agricultural markets as one of the main reasons of African fragility see European Report on Development 2009, *Overcoming fragility in Africa Forging a New European Approach*.

[322] A recent analysis by the FAO argued that the absence of public support to agricultural development is the main obstacle to food security in Africa see above ft 297.

[323] See Manitra A Rakotoarisoa, Ramesh P Sharma and D Hallam, *Agricultural import surges in developing countries Analytical framework and insights from case studies* (FAO 2011). For an example of import surge in one of the countries involved in the negotiations with the EU see FAO, United Republic of Tanzania: Rice Maize and Dairy Products, FAO Briefs on Import Surges (FAO 2006). The Brief reports an escalation of import surges in the period of implementation of the Uruguay Round.

low per-capita income, the instability of their agricultural production, the vulnerability of their economies and their low levels of food security, health, education and adult literacy. As noticed in chapter 6, this category is relevant for WTO law because when a country is on this list is granted additional preferential treatment. This includes the exemption of least-developed countries from several commitments and additional time to implement certain clauses contained in WTO treaties. This category is particularly relevant for the object of this research because the Agreement on Agriculture provides that least-developed countries are exempted from the WTO reduction commitments on agricultural products. This means that under WTO law least-developed countries retained considerable space to protect their markets from import surges of food when the product is regulated by the Agreement on Agriculture. [324] Therefore, when a least-developed country concludes a trade agreement with the EU, it is giving away the exemption granted by WTO law. This is so because least-developed countries are not mentioned in Article XXIV GATT and are subject to the general obligation of eliminating at least the 80% of import tariffs when concluding a free trade agreement just like any other WTO Member. This increases the legal impact of free trade agreements because with these treaties least-developed countries accept binding obligations on tariffs applicable to food products imported from the EU for the first time. In the six agreements concluded so far in sub-Saharan Africa there are 7 least-developed countries involved: Madagascar, Burundi, Rwanda, Tanzania, Uganda, Lesotho and Mozambique. Overall, there are 26 least-developed countries involved in the African leg of the Global Europe Strategy. This is a major legal difference with the Caribbean context where, with the only exception of Haiti, the countries involved are not classified as least-developed countries and were already subject to some legal constraints on the import of food under WTO law.

3. Import restrictions

All the six African trade agreements produce a profound modification of the maximum tariffs applicable to the products traded between the EU and African countries. This section will take into consideration the specificities of the regulation applicable to food products from the perspective of its effect on the realisation of the right to food in vulnerable African countries.

(a) African products imported in the EU

As far as African imports in the EU are concerned, the trade agreements eliminate the large majority of tariff barriers. This means that under the trade agreements African products enter the EU market duty free. This rule applies to all products exported by African countries with no exception.[325]

[324] Most of food products are regulated by the Agreement on Agriculture. See Chapter 5.

[325] The Annexes to the treaties do not include any exception to the elimination of tariffs. There is only transitional procedure on sugar affecting African exports until 2015.

The effects on the realisation of the right to food of this arrangement could be positive as long as the agreements facilitate the presence of African vulnerable producers in the EU common market. However, the benefits of the agreements for vulnerable individuals are not immediate because the EU is granting similar preferences to all its trade partners without regard to their level of development and capacity to compete on the international market. The risk is that the free trade regime imposed by the trade agreement will benefit the few countries and private companies that are already equipped to compete at international level.[326] In a recent paper De Schutter notices that the creation of a level playing field between countries that have different levels of development polarises the gains on the most developed countries.[327] This mechanism could produce the consequence that African countries will be unable to benefit from the tariff reduction whenever more advanced countries with similar agreements with the EU (such as Mexico or South Korea) export the same products. If this happens, the free trade agreements will not interrupt the economic marginalisation of African countries. Notwithstanding this critical aspects it is positive that all the agreements, eliminating any import tariff, forbid the use of trade instruments such as tariff escalations and tariff peaks that, as seen in Chapter 5, after the Uruguay Round contributed to the isolation of Africa from the global market.

(b) European food products imported in African countries

For the realisation of right to food, a crucial part of the treaties is the one regulating the tariffs of food products imported from the EU in sub-Saharan countries. This is so because since European countries are extremely competitive exporters able to produce virtually every product the quick opening of African markets risks benefiting the EU export business at the expenses of vulnerable African producers. In addition, the elimination of tariff barriers on food products has been linked to the increase of

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[326] J Stiglitz, *Making globalization work* (Penguin Books 2006) 54.

[327] De Schutter maintains that "[t]he negative impacts of the current distortions are real. It does not follow, however, that the solution consists simply in the removal of the existing distortions. One reason for this is that improved access to export markets for farmers from developing countries will benefit only some of these, and not the most vulnerable, unless affirmative action is taken to support the latter. But another reason is that, if trade is to work for development and to contribute to the realization of the right to adequate food, it needs to allow more flexibilities to developing countries and to ensure that the fl exibilities that are recognized are more operational, particularly in order to shield their agricultural producers from the competition from industrialized countries' farmers – thus, more protection rather than less. The reason for this is obvious, and it is at the heart of what justifies special and differential treatment for developing countries: even after the removal of existing trade-distorting measures, which currently are disproportionately benefiting developed countries, the productivity per active laborer in agriculture will remain much lower in developing countries, on the average, than in developed countries." See Olivier De Schutter, "International trade in agriculture and the right to food.", Dialogue on Globalization Occasional Paper N.46, November 2009, available at < http://library.fes.de/pdf-files/bueros/genf/06819.pdf> (accessed 19 June 2013)

import surges of food in vulnerable countries.[328]

Each of the six trade agreements between the EU and Africa attempts to limit the exposure of African countries to import surges exempting several food products from the process of liberalisation. For instance, in the Agreement between the EU and Cote d'Ivoire products are classified in four categories (A,B,C,D) and category D which includes certain live animals, cereals and vegetables is exempted from full liberalisation. In a similar vein the agreement with Cameroon arranges products in five categories and allows the imposition of import tariffs on the goods included in category 5. Every agreement has a similar mechanism to leave certain sensitive products out of the process of liberalisation.[329]

Looking at this regulatory choice from the perspective of the right to food four shortcomings can be identified. First, the food products comprised in the categories exempted from liberalisation are very limited. In fact, the treaties forbid the imposition tariffs on most of meat and dairy products imported from the EU. In the same vein, agreements never exclude more than three kinds of cereals. For instance, in the agreement with Cameroon the only exempted cereals are wheat and rice. The import of rest of agricultural products is completely liberalised with very few exception for certain kinds of fruit and vegetables. Notably, no exception is made with regard to least-developed countries.

Second, when a food product is exempted from liberalisation the treaties still define as a maximum ceiling the tariff African countries were applying at the moment of the conclusion of the treaty. This means that the treaties froze tariffs at the level that African countries were imposing on sensitive products in 2008. However, the tariffs levied on these products were extremely low at the time because the treaties were negotiated exactly in the middle of the global food crisis when food prices on the international market were very high. The tariffs were low because African countries were trying to diminish the price of food on their territory eliminating any tax imposed on these products. For instance, Ivory Coast was imposing only a tariff of 5% on rice to favour the import of the cereal on its territory.[330] This was a temporary policy, prompted by the global food crisis but the free trade agreements make these very low tariffs permanent. If in the future the international price of food goes down and African countries will need to raise the tariffs to avoid import surges of food they will be forbidden to do so. The alternative would have been to define as maximum

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[328] See above chapter 5 section 4.

[329] Article 5 of the trade agreement between the EU and Cameroon; Article 13 and Annex 2 of the trade agreement between the EU and Ghana; Annex 2 to the trade agreement between the EU and Cote d'Ivoire; Article 25 and Annex 2 of the trade agreement between the EU and Southern Africa Development Community; Article 11 and Annex 2 of the trade agreement between the EU and the Eastern African Community.

[330] FAO, Policy measures taken by governments to reduce the impact of soaring prices (as of 15 December 2008), available at <http://www.fao.org/giews/english/policy/1.asp> (accessed 13 June 2013).

applicable tariff not the tariff levied at the moment of the conclusion of the treaty, but the one required by WTO law. Failing to do so the treaties impose lower tariffs than what WTO requires. This outcome augments the exposure of vulnerable producers to import surges of food products from the EU whenever their protection would require an import tariff higher than what allowed in the treaty.

Since African countries use import tariffs to produce public revenues their elimination weakens their capacity to intervene at the occurrence of food shortages on their territories. This negative effect is present also in the Caribbean treaty but the consequences on African countries could be particularly grave because of their weak system of taxation and high dependency on trade revenues. In fact, there is evidence that African countries are among the most dependent on trade taxes and that they find it extremely difficult to replace them with alternative instruments of taxation.[331] This is particularly so when the country involved in the free trade agreement has a weak state apparatus or a history of persistent domestic instability.[332] In this situation it is possible that only a little part of lost revenues is recouped through internal taxation and that the trade agreements will have a clear impact on the resources available to African countries to intervene at the occurrence of food shortages.

Finally, since most of the countries involved in the agreements with the EU have scarce industrial capacity, the majority of vulnerable individuals living outside the capital cities have access to food that is produced through traditional instruments and without advanced mechanical support.[333] This means that the realisation of the right to food in these countries requires also the development of the independent technological know-how required to boost domestic production and diminish the dependency from the international food market.[334] This is particularly so since the countries that signed the free trade agreements with the EU are mainly net-food importers still unable to achieve domestic food security without food imports from third countries. Development economics, however, demonstrated that technological development is less likely when a developing country with almost no industrial capacity is involved in a free trade regime with an advanced economy. This is so because in the absence of progressive import tariffs on technological goods produced in the developed countries there is little economic incentive to produce such goods in

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[331] See S Bilal, M Dalleau and D Lui, *Trade Liberalisation and Fiscal Adjustments: The Case of EPAs in Africa*, European Centre for Development Policy Management Discussion Paper No. 137. See also above Chapter 6 section 3(b)

[332] This the case for instance of Zimbabwe, Uganda and Burundi which have still unstable or undemocratic governments.

[333] World Bank, *Cultivating Knowledge and Skills to Grow African Agriculture* (World Bank 2007).

[334] J Fanzo, "The Nutrition Challenge in Sub-Saharan Africa", WP January 2012, United Nations Development Programme.

the developing countries.[335] Since buying chemicals and machinery from the EU is cheaper than developing domestic technologies and the free trade agreement forbids tariffs on these products the trade agreement discourages technological development in the African states. The free trade agreements between the EU and Africa do just the opposite, enforcing a complete liberalisation of the trade of technological goods between the countries involved. Within this regime EU companies are likely to improve their presence in African domestic markets discouraging the development of an advanced food industry in the area. In other words, the free trade agreements increase the dependency of African countries not only to EU food exports but also to the technologies involved in the production of food.

The regulation of tariffs of the agreements between the EU and Africa shows the limits of an international legal system that does not allow differential treatment even when advanced economies conclude a trade deal with some of the poorest countries of the world. This is a serious human rights handicap since the treaties are likely to benefit the EU export business even when the expansion of EU trade directly affects vulnerable producers in African countries. The absence of differential treatment in these agreements is particularly regrettable since the countries involved are among the most exposed to food insecurity and the least equipped to cope with international competition and the vagaries of the international food market. In the absence of public policies to cope with this new scenario the risk is that the new trade agreements directly affect the realisation of the right to food in sub-Saharan Africa.

4. Safeguards

Since the clauses on tariffs considerably restrict the space of intervention of African countries at the occurrence of import surges, an advanced system of safeguards would be essential in order to ensure that price fluctuations on the international food market do not hurt the right to food of vulnerable individuals in African countries. However, the regulation of safeguards of the six trade agreements the EU concluded so far with African states do not take into account this necessity and provide a system of safeguards similar to the one of the Caribbean agreement. Accordingly, the African agreements always create a supranational body that supervises the adoption of safeguards, do not include an automatic mechanism like the WTO special safeguard and do not provide substantial differential treatment in favour of African countries. The only main difference between the African treaties and the Caribbean one is that the African agreements do not include a case of application of safeguards dedicated to the protection of food security in African states.

This regulatory choice leaves African countries without an efficient mechanism to react to the consequences on domestic food security of the permanent

[335] In a monograph published in 2003 Chang argues that tariffs on technological goods imported from third countries played a major role during the industrial development of all Western countries. See H-J Chang, *Kicking away the ladder* (Anthem Press 2003). In the same vein Joseph Stiglitz maintains that a free trade regime between a developed country and a developing one can discourage in the latter the creation of a technologically advanced food industry. See J Stiglitz and A Charlton, *Free trade for all* (OUP 2005).

elimination of import tariffs. In particular, the use of the same safeguards of the Caribbean agreement extends the shortcomings of that agreement also to the African context. This means that the safeguards are too slow to implement, are less effective than the ones provided in WTO law and do not take into account the difference in development between the EU and African states. Moreover, the absence of any reference to food security makes the trade agreements prone to legal interpretations that exclude the use of safeguards at the occurrence of import surges of food from the European Union. In fact, since the African countries involved in the agreements are among the least literate in issues of international trade the decision of not making explicit the link between tariff reduction and food security could have the consequence that African countries remain unaware that they are entitled to activate the safeguards at the occurrence of food crisis due to import surges of food. There is extensive evidence in WTO practice that overcomplicated regulations or omissions in the enumeration of the risk of a trade agreement have the consequence that the most disadvantaged countries do not seize the opportunity to use protective instruments even when the agreements they concluded would allow them to do so.[336]

Finally, the fact that the regulation of safeguards of all the six agreements is similar to what we found in the Caribbean case hints at the fact that the agreements were concluded with scarce attention to the specific vulnerabilities of each African country. In particular, their similarities suggest that the EU Commission was the actor that drafted all the agreements and promoted their conclusion across the developing world.[337] The absence of substantial differences between the treaties manifest that the contribution of African countries to their drafting was minimal and that their content is mainly the result of the EU external policies. This conclusion also appears the most likely since most of the African countries involved in the agreements already find it difficult to participate to the production of international trade law within the WTO and have no record in the international trade dispute settlement system because they lack of the necessary legal and economic know-how.[338] From a human rights perspective, it is regrettable that during the trade negotiations with an area of the world extremely vulnerable to hunger and malnutrition the EU resorted to a standardised blueprint and did not design a system of food safeguards tailored to the specific necessities of each African country.

In conclusion, the safeguard regulation of the trade agreements between the

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[336] See S Joseph, *Blame it on the WTO?* (OUP 2011), 53.

[337] The idea that free trade agreements with developing countries are mainly a EU initiative find support in several Communications from the Commission which present free trade agreements with Africa as a EU policy to make its relationship with the developing world WTO compliant. The Communications present the trade agreements as a development policy even if, as seen in Chapter 4 they are designed by the DG Trade. See Communication from the Commission, Regional integration for development in ACP countries COM(2008) 604final; Communication from the Commission, Economic Partnership Agreements COM(2007) 635 final.

[338] S Joseph, above ft 337.

EU and African countries presents evident shortcomings even if the economic setting of the African countries involved is more disadvantaged than the Caribbean one and the exposure to food insecurity more evident. The similarities between the regulation on safeguards of the African agreements and the Caribbean one make explicit the EU strategy to reach uniform agreements with developing countries on the basis of a text prepared by the EU Commission.[339] Arguably, a more comprehensive involvement of African states in the negotiations would have allowed a clearer definition of the risks of the agreements for the realisation of the right to food and would have made evident the necessity to endow the trade agreements with an automatic safeguard mechanism similar to the WTO special safeguard.

5. Export restrictions

All six agreements the EU concluded with African countries contain clauses applicable to exports of food that are more restrictive than WTO law. In fact, in the three separate Interim Economic Partnership Agreements that the EU concluded with Ivory Coast,[340] Ghana[341], and Cameroon[342] quantitative export restrictions are prohibited and there is no reference to the exception of Article XI.2(a) GATT on export restrictions to prevent or relieve food shortages. In these three treaties new taxes are forbidden and existing export taxes can be increased only in case of serious public finance problems, greater environmental protection or protection of infant industries even if only after consultation with the EU. Also the trade agreement between the EU and Comoros, Madagascar, Mauritius, Seychelles, Zambia and Zimbabwe prohibits the use of quantitative restrictions without reproducing the exception of Article XI.2(a) GATT on food shortages.[343] Only two free trade agreements with African countries maintain the food exception of article XI.2(a) GATT even if they impose severe limitations on the use of customs duties on exports.

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[339] For instance Article 25 of the Caribbean free trade agreement, the article creating the supranational committee and including the administrative process to be followed was copied and paste in the African agreements.

[340] Article 16 and Article 18 of the Stepping Stone Economic Partnership Agreement between Côte d'Ivoire, of the one part, and the European Community and its Member States, of the other part [2009] OJ L59/3.

[341] Article 16 and Article 18 of the Stepping Stone Economic Partnership Agreement between Ghana, of the one part, and the European Community and its Member States, of the other part.

[342] Article 15 and 22 of the Interim Agreement with a view to an Economic Partnership Agreement between the European Community and its Member States, of the one part, and the Central Africa Party, of the other part [2009] OJ L 57/2.

[343] Article 17, Interim Agreement establishing a framework for an Economic Partnership Agreement between the Eastern and Southern Africa States, on the one part, and the European Community and its Member States, on the other part [2012] OJ L111/2.

These are the Interim Economic Partnership Agreement between the EU and Burundi, Kenya, Tanzania, Uganda and Rwanda[344] and the Interim Economic Partnership Agreement between the EU and Botswana, Lesotho, Mozambique, Namibia and Swaziland.[345] Also in this last agreement new export taxes can be introduced only after consultation with the EU.

This section divides the clauses on export restrictions of the African agreements in two groups. In the first group there are the agreements with Cameroon, Ghana, Ivory Coast and Eastern and Southern African countries that do not reproduce the food security exception of Article XI.2(a) GATT. The second group includes the other two agreements that contain the food security exception allowing export restrictions to relieve food shortages on the territory of the country. The analysis of the two groups of agreements will be tackled separately since they present several specific elements with regard to the consequences on the realisation of the right to food of the countries involved. The section concludes with a comment on the influence of the EU raw materials initiative on the regulation of export restrictions of the trade agreements.

(a) Agreements not including the food security exception of Article XI.2 GATT

The four agreements with Cameroon, Ghana, Ivory Coast and Eastern and Southern African countries not allowing the application of Article XI.2(a) GATT to the exports of food and other goods have consequences similar to a complete ban on export restrictions. In particular, in case of food shortages on their territory these countries are not allowed to limit their export of food to the European Union. Even if the discipline is slightly less stringent than the one of the Caribbean agreement the consequences on food security are the same. In fact, quantitative limitations on the export of food are forbidden across the board and even if existing export taxes are allowed in certain cases the protection of food security is not one of them. For these reasons, Cameroon, Ghana, Ivory Coast, Mauritius, Seychelles, Zimbabwe and Madagascar lost the prerogative to intervene on their food exports to protect and fulfil the realisation of the right to food of their citizens.

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[344] Article 15 and Article 17 of the Agreement establishing a framework for an Economic Partnership Agreement between the European Community and its Member States, on the one part, and the East African Community partner states on the other part.

[345] Article 24 and 35 of the Interim Agreement with a view to an Economic Partnership Agreement between the European Community and its Member States, of the one part, and the SADC EPA States, of the other part.

(b) Agreements including the food security exception of Article XI.2 GATT

The two remaining agreements, including the food security exceptions of Article XI.2 GATT, provide African countries with an instrument of quick intervention in the case of food shortages on their territory. In fact, reducing food exports these countries can increase the quantity of food available on their territory and drive local prices down. However, the discipline of export restrictions is considerably different from WTO law since it restricts the legal space to levy export taxes on goods African countries export to the EU. For this reason, even if Article XI.2(a) GATT is maintained, the agreements produce a change in the attitude of international trade law towards African countries that, as seen in Chapter 5, had remained free under WTO law to tax the export of their natural resources to produce public revenues. Since the public revenues of several African countries involved in the agreements with the EU are heavily dependent on the export of natural resources the agreements weaken their capacity to collect public funds to finance social policies such as food security policies. Accordingly, at the occurrence of a food shortage on their territory the African countries involved in this group of agreements can limit the quantity of food exported but do not have any trade instrument to raise public funds to deal with the emergency. Since the trade agreements already produced a considerable loss of revenues through the elimination of the large majority of import taxes, the prohibition of taxing the export of natural resources introduces an additional weakness to the capacity of African countries to raise public revenues at the occurrence of food crises. With less public revenues available and with no instruments to raise revenues quickly in case of emergency African countries could find it more difficult to design social policies targeted to vulnerable groups.

(c) The raw materials initiative and the right to food

In different ways all the six agreements diminish the policy space of African countries to intervene in case of food shortages on their territory. Four of the agreements do so forbidding the use of all kind quantitative restrictions on food exports and two of them eliminating export taxes much beyond what provided by WTO law. To what we observed above one observation can be added. The policy paper of the EU Commission and the public debate surrounding the negotiations concentrated mainly on the effect of the treaty on the exploitation of African natural resources. This is justified by the fact that the impact of the agreements on this issue is relevant.[346] The focus on raw materials, however, produced the consequence that in all the agreements the negotiators overlooked the consequences that a more stringent regulation on export restrictions could produce on the availability of food on the territory of African countries. This caused, the conclusion of a batch of agreements that eliminates or weaken the exceptions that in WTO law allow vulnerable countries to intervene in

[346] M Curtis, *The New Resource Grab: How EU Trade Policy on Raw Materials is Undermining Development* (Oxfam, Traidcraft Exchange, WEED, AITEC 2010).

their external trade of food to protect the food security of their citizens. This result highlights the absence of coordination between the EU external trade policy and the EU external food security policy and a marked dominance of the first over the second. This issue is particularly flagrant in the African agreements since sub-Saharan Africa is at the same time one of the main exporters of oil and raw materials and one of the areas of the world characterised by extreme poverty and widespread food insecurity.

7. Conclusions

The African leg of the Global Europe Strategy is finding the opposition of numerous African countries that refused to take part in the negotiations or did not sign the text of the trade agreements. For this reason the European Commission was forced to conclude less comprehensive trade agreements only with the available countries. This produced six trade agreements regulating only the trade in goods between the EU and Africa which involved 16 African states. These agreements contain innovative regulation on the import and export of food and, despite their name, are permanent treaties fully enforceable under international law from the date of their ratification. The six free trade agreements provoked a substantial modification of the law on the trade of food between the EU and the African countries involved. Notably, the trade agreements concern countries extremely vulnerable to hunger and malnutrition which are severely affected by the instability of the international food market.

The chapter showed that even if the African economic context would have required particular attention to the effect of a free trade deal on the realisation of the right to food the human rights deficiencies of the EU-Caribbean free trade agreement are present also in the African treaties. In fact, the regulation of all the trade instruments taken into account (tariff, safeguards and export restrictions) include additional elements of concern. First, the regulation of import tariffs applicable to EU food imported into African countries leave little space to intervene on the trade flows. This is particularly so because the treaty imposes a maximum tariff even on the food products that negotiators considered sensitive for African countries. This choice exposes African countries to import surges of food produced in the EU which benefit EU export business but could significantly impoverish local producers. In addition, the treaties enforce a level playing field on advanced goods which might deepen the dependency of African food production from foreign technologies. More generally, the new treaties do not support food self-sufficiency of African countries favouring the import of food from the EU.

Second, even if the deep liberalisation of food imports from the EU would have required an efficient system of protection the regulation on safeguards does not take into account food security. In particular, the treaties do not include any automatic safeguard mechanism to ensure that the process of liberalisation does not result in additional import surges in African countries. As in the Caribbean treaty safeguards are slow to implement and, based on the WTO experience, it is doubtful that they would make any difference at the occurrence of import surges of food produced in the EU. Furthermore, the similarities in the wording of the clauses with the Caribbean agreement point at the fact that all the treaties are based on the same blueprint drafted by the European Commission. This manner of operating discourages the involvement

of African countries in the negotiation process and makes the resulting agreement dependent on policy decisions made in Brussels. The chapter suggested that more attention to the specific vulnerabilities of each African state might have conducted to a different outcome more attentive to the realisation of the right to food.

Finally, the clauses on export restrictions increase the constraints on the use of these instruments at the occurrence of food shortages on the territory of African states. Four agreements do so forbidding any form of export restriction and avoiding to reproduce Article XI.2(a) GATT. The two agreements maintaining the exception of Article XI.2(a) GATT still impose severe limits on export taxes. In the first group of treaties the effects on the realisation of the right to food are analogous to the ones identified in the Caribbean case study. Even at the occurrence of major food shortages African countries are not allowed to intervene on food exports and are obliged to keep exporting food to the EU. In the second group of agreements African countries can limit the quantity exported even if they are not allowed to use taxes on exports to raise public revenues to invest in food security policies. Overall, the six agreements constitute a change of attitude of international trade law towards the African continent. Under the WTO system in fact Africa has a wide policy space to impose both quantitative restrictions and taxes on the export of food and other products especially in situations of emergency.

This chapter confirmed the worrying picture of an external trade policy of the European Union that is not attentive to the effect of free trade agreements on the realisation of the right to food in vulnerable countries. Even in a context of extreme poverty and severe exposure to hunger and malnutrition the trade treaties are dismissive of human rights objectives and pursue the main goal of eliminating any form of trade barrier. This is done to an extent that is unprecedented in the law of the external relations of the EU. Notably, the process of trade liberalisation of the agreements between the EU and Africa go much beyond WTO requirements in all the instruments analysed. This is done also with regard to least-developed countries that in WTO law are exempted from most of the obligations on import and export of food. In terms of EU policymaking the African treaties manifest the failure of the Policy Coherence for Development initiative of the EU Commission and of the other attempts to conciliate the EU external trade policy with non-trade objectives. More generally, with the African agreements the EU betrayed the mandate of Article 21 of the Treaty on the European Union to pursue the realisation of human rights, including economic and social rights in all segments of its external action.

CHAPTER 8 REFORM PROPOSALS

1. Introduction

The thesis highlighted the shortcomings of the external trade policy of the EU which is shaping international trade law in a way that does not take into account the realisation of the right to food in vulnerable countries. Recent trade agreements between the EU and developing countries also manifest the incapacity of EU organs to implement the mandate received in Article 21 of the Lisbon Treaty of including the realisation of economic and social rights in any area of EU external policy making. This chapter proposes four directions of reform which could allow the EU to develop a deeper understanding of the interactions between trade law and the right to food and approach international trade negotiations accordingly. The first proposal is the inclusion of a human rights review of free trade agreements in the procedure to negotiate and conclude trade agreements at EU level. The second proposal is the improvement of the role of political institutions in the process. This proposal also has the objective of limiting the influence of EU private companies on the outcome of the negotiations. In fact, in the present procedure EU companies take part in any step of the negotiations alongside the EU Commission whereas the EU Parliament and the other supranational political organs have a limited impact on the drafting of the treaties. The third proposal is the creation of procedures to improve the interactions between the external trade policy of the EU and the external policies dealing with human rights and development cooperation. The final proposal is to use the EU influence in the WTO to modify the areas of multilateral international trade law that limit the capacity of vulnerable states to realise the right to food.

These proposals do not involve any dramatic modification of EU external policies and can all be implemented within existing EU competences as provided by the Lisbon Treaty. The reforms would only allow the EU, within its existing prerogatives, to pursue its external commercial policy avoiding that the finalised version of the treaty includes clauses with the potential of stopping vulnerable countries from implementing policies which are needed to realise the right to food on their territory.

2. Human rights review of free trade agreements

As highlighted in Chapter 4 the EU rarely uses a human rights language in its external policy when dealing with economic and social rights and prefers to use terms with a less clear normative content such as food security and sustainable development. An expression of this attitude is the preparation of Sustainability Impact Assessments (SIA) of free trade agreements which are reports about the consequences of the trade agreement on several social parameters including food security. The SIAs are today the only attempt to provide an analysis of the trade agreement on the basis of non-commercial interests. The SIAs of some of the treaties analysed in this thesis had in fact identified some reasons of concern in the drafts which had been duly highlighted. For instance the SIA of the trade treaty between the EU and the Caribbean noticed that: “Besides economic and social potential negative impacts, reciprocity might

strengthen vulnerability in terms of increased dependency for food security".[347] The Caribbean SIA also highlights that "[t]he impact of external sources on local and regional agricultural products is to undermine the security of the domestic food supply and nutritional standards in the region."[348] In a similar vein the SIA of the trade agreement between the EU and West Africa noticed that: "Among other issues […], there are issues of food security associated with maintaining a viable domestic industry in key commodities, such as wheat or rice. An over-reliance on cheap imports from the EU could threaten food security in the long term and ultimately displace the cultivation of domestic crops".[349]

The SIAs, however, did not provide any comprehensive analysis of the relationship between the trade agreements and food security. In fact, the SIAs only mention examples of certain key food products that are particularly crucial for certain countries and do not include a comprehensive analysis of the potential impact of the agreements on import surges of food from the EU. Moreover, the SIAs do not consider that some food products have a role in domestic food security of vulnerable countries and should not be regarded only as potential exports to the EU. In fact, only the EU-Caribbean SIA notices that it is a priority to recognise "[r]ice as a major food staple and for the issue of food security, rather than as a potential opportunity for exports to the EU."[350] More generally, the SIAs approach food security issues without providing any analysis of how concerns for food security could translate into legislation. This makes the report, which is already non-binding, even less influential on the negotiation process.

A way to improve the present system allowing negotiators to be more aware of the consequences of their activity on the realisation of the right to food would be to substitute the SIAs with a comprehensive human rights review of free trade agreements. The review could be based on the normative content of the human right to food and would flag specific trade clauses having the potential to affect the realisation of the right. In particular, the human rights review would have the objective of identifying any area of legislation making more difficult for the state concerned to adapt its regulatory framework to the requirements of human rights, or to set up the institutional mechanisms that ensure compliance with its human rights

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[347] PricewhaterhouseCoopers, Sustainability Impact Assessment (SIA) of the EU-ACP Economic Partnership Agreements Regional SIA: Caribbean ACP Countries, 30 January 2004 available at <http://trade.ec.europa.eu/doclib/docs/2005/january/tradoc_121202.pdf>, 11.

[348] Ibid, 34.

[349] PricewhaterhouseCoopers, Sustainability Impact Assessment (SIA) of the EU-ACP Economic Partnership Agreements Regional SIA: West African ACP Countries, 30 January 2004 available at < http://trade.ec.europa.eu/doclib/docs/2005/january/tradoc_121200.pdf>, 77.

[350] EU-Caribbean SIA, 77.

obligations. The United Nation Human Rights Council provided some suggestions on how such impact assessment could be performed.[351] In addition, the EU could rely on the expertise of specialised agencies such as the Food and Agriculture Organisation which developed indicators to identify when countries are progressing towards domestic food security.[352]

3. Improving the role of supranational political institutions in trade negotiations.

As showed in Chapter 4, the EU procedure for the conclusion of free trade agreements is triggered by the European Commission and supervised by the Council. The European Parliament has a sort of veto power at the end of the process and some very limited access to the material circulated during the negotiations. Even if the Treaty of Lisbon improved the position of the EU Parliament its role remains limited especially during the negotiations when the specific clauses are drafted. This situation has the shortcoming of limiting the capacity of Parliamentary committees to develop a broad understanding of the negotiation process and weakens the capacity of the Parliament of assessing critically the treaty at the end of the negotiations. Moreover, the limited access granted to the EU Parliament to the negotiation process appears in contradiction with the access provided to EU companies through the committees the EU Commission created in the framework of the EU Market Access Partnership.[353] Since negotiations generally last for numerous years the fact that the EU Parliament can intervene only when the treaty is already concluded severely limits its capacity of intervening on the drafting of specific clauses. In fact, the EU parliament can only provide a general assessment of the entire agreement so that when issues with the realisation of the right to food come from specific clauses it is unlikely that the EU Parliament would be in the position of refusing to support the entire agreement.

Another limit to the participation of political bodies concerns the organs created by the trade agreements to deal with some aspects of the implementation of the trade treaty. All the trade agreements included in this thesis in fact create a Trade and Development Committee including members of the Governments of developing countries and of the EU Commission. In addition the agreements can rely on Joint Parliamentary Assemblies including selected members of the EU Parliament and of the Parliaments of the developing countries involved. However, whenever the treaties provide for a specific prerogative the Joint Parliamentary Assembly is never involved

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[351] United Nations Human Rights Council, Guiding principles on human rights assessment of trade and investment agreements, A/HRC/19/59/Add.5.

[352] A complete and regularly updated list of the FAO food security indicators is available on the FAO official website < http://www.fao.org/economic/ess/ess-fs/ess-fadata/en/#.Uyl2Ra1dWEI>.

[353] See Chapter 4, Paragraph 3(b).

so that even in the implementation phase of the agreements the EU Commission remains central and the EU Parliament has very little influence on the process.

The debate on the democratic deficit of the European Union and other international institutions is a longstanding one and does not concern exclusively trade policy.[354] In the case of the negotiations of trade agreements the limits to the participation of the EU Parliament have often been justified with the necessity of streamlining the process and favouring the conclusion of a trade agreement. This thesis showed however that the new generation of trade agreements being concluded extends the scope of international trade law in such a way that even basic emergency policies to intervene on domestic food security are affected. In addition, the level of liberalisation being achieved is such that the space of intervention is limited across the board even with regard to food staples which are fundamental for the diets of the citizens of the countries involved. Given the reach of the trade treaties included in the thesis a more effective involvement of supranational and national parliamentary assemblies might be required in order to preserve the principles of representation and democracy. Even if the participation of national parliaments to the negotiations might be too burdensome to implement, some steps could be made in the direction of making the negotiations more transparent and open to public debate. For instance, allowing national parliaments and citizens to access the draft of the treaties before the signature or obliging the EU Commission to publish periodical press releases with a detailed state of the negotiations. The need to provide democratic access to trade negotiations is justified also in the light of the fact that this thesis took into account only a part of the clauses of the trade treaties between the EU and developing countries. Existing literature hints that this might be only the tip of the iceberg and that more interactions between trade law and human rights law might stem from other parts of the treaties such as the sections on intellectual property[355] and investment law.[356] Without pervasive democratic involvement there is the risk that key decisions

[354] C Pinelli, "The discourses on post-national governance and the democratic deficit absent an EU government" (2013) 9 European Constitutional Law Review 177; A Azmanova, "The crisis of Europe: democratic deficit and eroding sovereignty – not guilty" (2013) 24 Law and Critique 23; JE Lord, D Suozzi and AL Taylor, "Lessons from the experience of UN Convention on the Rights of Persons with Disabilities: addressing the democratic deficit in global health governance" (2010) 38 Journal of Law, Medicine and Ethics 564; R Singh, "The World Trade Organization and legitimacy: evolving a framework for bridging the democratic deficit" (2008) 42 Journal of World Trade 347; A Follesdal and S Hix, "Why there is a democratic deficit in the EU: a response to Majone and Moravcsik" (2006) 44 Journal of Common Market Studies 533.

[355] CJS Picart and M Fox, "Beyond unbridled optimism and fear: indigenous peoples, intellectual property, human rights and globalisation of traditional knowledge and expression of folklore" (2014) 16 International Community Law Review 3; M Kirby, "Intellectual property law, human rights and the HIV/AIDS pandemic – the urgent need for a Luther of jurisprudence" (2011) 42 International Review of Intellectual Property and Competition Law 251; L Forman, "An elementary consideration of humanity? Linking trade-related intellectual property rights to the human right to health in international law" (2011) 14 Journal of World Intellectual Property 155.

[356] UE Ofodile, "Foreign investment in land and the clash of regimes: mapping the role of international investment law and international human rights law" (2013) 7 Human Rights and International Legal

on how globalisation should be regulated are taken without adequate public scrutiny and without citizens being able to understand the implications of the regulations adopted.

Democratic access could also be improved in the implementation phase of the trade agreements. For instance, providing access to the documents and information of the organs created by the treaties or designing a mechanism of interaction between the Trade and Development Committees, which supervise the implementation of the agreements, and the EU-ACP Joint Parliamentary Assembly[357] which is part of the general framework of cooperation between the EU and developing countries. In the present situation there are evident signals that the influence of such Assemblies on policy making is extremely limited. For instance, at the same time as the free trade agreements were negotiated the EU-African Pacific Caribbean Joint Parliamentary Assembly adopted a resolution on the global food crisis calling domestic and supranational institutions to give food security a central position in domestic and international policy making. The Resolution went as far as recognising that "'current trade policies, particularly […] export restrictions during crises, must be reviewed to limit the effects of food price volatility."[358] However, the influence of the Resolution on the treaties was minimal, as this thesis demonstrated.

4. Improving the interaction between the EU external trade policy and human rights and development policies

Chapter 4 showed that the EU Commission has the institutional capacity to develop a comprehensive understanding of the interactions between international trade law and non-trade objectives such as food security. The Chapter also presented the Policy Coherence for Development, an internal policy of the EU Commission which has the explicit objective of making the external trade action of the EU in line with its development policy. The Communications describing the policy go as far as making a list of the reforms that the international trade system would need to support the development and improvement of living conditions in vulnerable countries. The case studies demonstrated that this policy in the end does not have any impact on the clauses regulating the trade of food products which do not take into account the

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Discourse 56; C Blake, "Moral damages in investment arbitration: a role for human rights?" (2012) 3 Journal of International Dispute Settlement 371; SW Schill, "Cross-regime harmonization through proportionality analysis: the case of international investment law, the law of state immunity and human rights" (2012) 27 ICSID Review 87; D Davitti, "On the meanings of international investment law and international human rights law: the alternative narrative of due diligence" (2012) 12 Human Rights Law Review 421.

[357] For an overview of the functioning of the EU-ACP Joint Parliamentary Assembly see the official website <http://www.europarl.europa.eu/intcoop/acp/10_01/default_en.htm>.

[358] EU-ACP Joint Parliamentary Assembly, Resolution on price volatility, the functioning of global markets for agricultural products and their impact on food security in ACP countries, ACP-EU/101.149/final.

necessities of vulnerable states even in extreme cases, like the one of export restrictions, where the new treaties directly affect the capacity of these countries to react to domestic food crisis.

The results of the case studies point at the fact that there are not within the EU Commission adequate administrative mechanisms allowing food security to be taken into account in the design of trade policy. In fact, the separation of competences between the EU Directorate General for Trade and the EU Directorate General for Development Cooperation has the consequence that the EU external commercial policy remains largely a separate policy pursuing purely economic objectives. In fact, even if the free trade agreements mention human rights and development as main objectives, the substance of the treaties take them into account to a limited extent. This is so even when, as in the case of safeguards and export restrictions, WTO law would have allowed the inclusion of trade clauses more attentive to food security and development concerns.

The human rights assessment of trade agreements proposed in the previous section would provide a solution also to this administrative issue. In fact, through the human rights assessment the concerns expressed by the Directorate General for Development Cooperation through the Policy Coherence for Development initiative could become part of the procedure to negotiate and conclude international trade agreements. The human rights assessment would also provide an institutional framework within which trade specialists, human rights specialists and development specialists could meet within the EU Commission in order to provide an external trade policy which is coherent with all the objectives included in the EU founding treaties.

In addition to this, the Directorate General for Trade and the other Directorates competent for human rights could develop internal mechanisms of cooperation with other Directorates General so that whenever a trade clause has the potential to interact with an economic and social rights the competent administrative body is involved in the negotiations. These mechanisms could be experimented at first informally simply allowing members of other Directorate Generals to provide advice on human rights issues to the administrative bodies responsible for the negotiations of the trade agreements. A blueprint for this mechanism could be provided by the Committees that the Commission uses to involve private companies in the development of the EU external commercial policy. These human rights committees would allow experts of development cooperation, human rights and food policy to provide their advice during trade negotiations and avoid that the final version of the trade treaty includes clauses that undermine the realisation of the right to food.

More generally, the EU Commission could create internal programs and administrative bodies where specialists of EU law and policy can develop expertise on both trade and human rights. The fact that the core of trade treaties was not influenced by human rights and development concerns might also be the consequence of the fact that there are very few specialists of both subjects and most of the personnel of the Commission might be unaware of the interactions between trade policy and food security. To solve this issue the Commission could favour interdisciplinary research between trade and human rights through the budget lines it has available so that to

train staff who are able to identify areas of trade policy that are problematic in human rights terms. The internal selection processes could also require the staff applying for a position of trade specialist to have at least a general understanding of international human rights law and of the existing literature on the interactions between the two areas of policy making.

5. Influencing the WTO

The thesis showed that the WTO imposes numerous obligations when the EU is negotiating a trade agreement. Some of them limit the capacity of the EU to include food security concerns when concluding a free trade agreement with a vulnerable country. This is the case for instance of the rules that article XXIV GATT imposes with regard to the elimination of tariff barriers even when the trade agreement is concluded between a major trade power and a vulnerable state. This thesis also showed that the EU has a double hat of being subject to WTO law when concluding a free trade agreement but being also one of the driving forces of the evolution of WTO law. This means that whenever the practice of negotiating a trade agreement with a vulnerable country highlights that some human rights concerns cannot be taken into account because of WTO obligations, the EU is in a privileged position to solve the issue through its action within multilateral trade negotiations. This section provides three proposals that the EU could adopt to improve the situation and allow human rights concern to sift into WTO legislation.

First, the EU could present a proposal of reform of Article XXIV GATT taking into consideration that additional flexibility should be allowed when the free trade agreement involves a country vulnerable to food insecurity. A blueprint for the reform already exists in WTO law since Article V of the General Agreement of Trade in Services provides for specific exceptions when developing countries are involved in a free trade agreement. The reform should consider that the elimination of tariffs can cause the import surges of key products and the exposure of local populations to food insecurity when local farmers are displaced. The sustainability impact assessments the EU Commission requested before the conclusion of the free trade agreements with developing countries already provided some tentative ideas on how Article XXIV GATT could be reformed to include food security concerns. For instance, the reform could allow the moderate use of tariffs whenever the food product concerned is fundamental to support local agricultural economies in vulnerable states.

Second, the EU could use multilateral negotiations such as the Doha Round to promote the objectives identified in its Policy Coherence for Development initiative. These include the inclusion of special clauses allowing a more flexible approach to regulation when WTO obligations are applied to a country vulnerable to food shortages. The EU could also propose innovative legal instruments to avoid that WTO obligations impact the capacity of vulnerable states to react to food shortages and to implement policies to realise the right to food. For instance the EU could work on a

reform of WTO special safeguards for agricultural products solving the problems existing in the present system.[359]

Finally, the EU could develop policies to bridge the distance between international trade institutions and human rights agencies. In the present system the WTO and regional trade agreements grew apart from the United Nations human rights framework and there is not any institutional mechanisms of dialogue between the two systems. As this thesis showed this separation between trade and human rights institutions can work to the detriment of human rights whenever a trade clause interferes with human rights policies of vulnerable countries. This is particularly so since international trade treaties are fully justiciable whereas international human rights law relies on soft enforcement mechanisms. The EU being influential in the WTO, the United Nations and the Food and Agriculture Organisation could propose innovative solutions to connect these institutions. This action would favour the institutional debate on the interactions between trade and the right to food and improve the awareness on these issues among international specialists. There are different strategies with which this objective could be achieved implying different degrees of involvement of the EU. The EU could start with considering international trade negotiations in the context of the interactions that trade law has with other policy areas such as human rights, food policy or development cooperation. The EU Commission already developed strategies to include non-trade issues in trade negotiations when certain Member States insisted to do so. This is for instance the case of *agricultural multifunctionality*[360] a concept developed by EU institutions to imply during trade negotiations that WTO rules on agriculture do not concern only trade policy but also other aspects such as sustainable land management and environmental protection. The EU could use similar strategies to make the point that international trade rules have an impact on food availability and accessibility and that these issues should be considered during trade negotiations.

The EU could also be more proactive and start working on structural reforms of international institutions which could permanently bridge the gap between international trade law and human rights. For instance, as the EU develops a procedure to perform a human rights assessment of international trade treaties it could also propose to include similar assessments at multilateral level. A possible approach could be to require the United Nations Human Rights Council to provide an opinion on the human rights impact of trade agreements before their conclusion. This option would be a first step towards the inclusion of international trade institutions under the

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[359] See Chapter 5.

[360] H-U Gossl, "EU trade policy and non-trade issues: the case of agricultural multifunctionality" (2008) 13 European Foreign Affairs Review 211; F Smith, "Multifunctionality and "non-trade concerns" in the agriculture negotiations" (2000) 3 Journal of International Economic Law 707.

umbrella of the international human rights system.[361] In fact, the United Nations is developing the conceptual instruments to provide such assessment and there are institutions such as the United Nations Economic and Social Council which have expertise on both trade and human rights. The EU could propose to build on this existing resources and attempt to institutionalise them within the negotiation of trade agreements. This strategy could also be used with the Food and Agriculture Organisation which has a specialised department working on trade and food security which could also provide support for the assessment of international trade agreements before their conclusion.

6. Resistance to the proposals

1. Introduction

This chapter provided several ideas that EU institutions and in particular the EU Commission could use to express an external trade policy which also takes into account the influence of international trade law on the realisation of the right to food. These proposals are likely to encounter the opposition of numerous actors within EU institutions and in the business community and any institutional or private actors interested in the solutions of the problems identified in this thesis will have to find innovative ways to cope with this resistance. This might involve new ideas to accommodate the interests involved and the education of national and international elites with regard to the interactions between global trade and human rights. In addition, strategies might have to be developed to extend the debate beyond the limited circles of EU specialists towards a larger public. The body of laws being developed above the EU through the WTO and free trade agreements is increasingly complex and involves areas such as food policy that are politically sensitive. The education of a larger public to the developments of the global regulatory framework and their significance for the realisation of individual rights might favour the inclusion of these issues in national and supranational political processes.

Even if subsequent amendments of its founding treaties extended its competences the EU maintained stronger prerogatives in economic policies,

[361] There is an historical precedent for this in the draft Convention on the International Trade Organisation, the international organisation that was proposed during the Bretton Woods meetings after the second World War and that was supposed to be the trade pillar of multilateral economic institutions. The creation of the International Trade Organisation was prompted by the United Nations Economic and Social Council and the founding treaties of the organisation provided for a mechanism to connect multilateral trade policy with the United Nations. The project failed and this is one of the reasons why the GATT became the corner stone of multilateral trade law. However the GATT and then the WTO always remained outside the United Nations framework and completely isolated from international human rights instruments.

especially transnational trade both domestically and in external policymaking. The traditional role of the European Community of purely economic organisation is still well entrenched in EU founding treaties as well as in the administrative structure of EU institutions. In fact, the inclusion of human rights within the legal structure of the EU is a relatively new development and the potential space for human rights in the EU construction that the Lisbon Treaty provided has still to be fully exploited. The proposals above are examples of policies that would allow the EU to develop a human rights approach to the issue of global food security out of the its existing competences and making use of its extensive expertise in trade issues. The inclusion of non-trade objectives in international trade policy is however a controversial issue which is likely to encounter strong resistance even within EU institutions. This section defines some of the problems that the proposals identified might find in the EU Commission and in the business lobbies that take part in EU external policy making through the committees of the Market Access Strategy.

2. EU Commission

The EU Commission is at the very centre of EU policy making in international trade. As shown in Chapter 4, the Commission has extensive powers with regard to the planning of EU strategies, the negotiations of trade agreements and their implementation. The Commission is also the institution which has available extensive intellectual and economic resources to develop trade policies and that has the pulse of any specific technical detail being discussed in trade negotiations around the world. Accordingly, it is the Commission which would be in charge of proposing alternative approaches to trade policies taking into account the realisation of the right to food. For this reason the internal distribution of prerogatives within the Commission is crucial for the EU to develop a human rights approach to international trade negotiations. We have seen, for instance, how the internal separation of competences between different Directorate Generals of the Commission is among the causes of the problems identified in the case studies. This internal fragmentation of the EU Commission with different Directorate Generals and units being specialised on very specific aspects of international policy making is likely to be the source of internal opposition to reforms leading to the inclusion of human rights within trade policy. This is so because the experts working in the units dealing with international trade and the negotiators of the EU Commission were trained since the early phases of their careers on trade law and policy and developed their expertise often in complete isolation from other areas of international policy making including human rights. Accordingly, trade experts are more naturally inclined to take decisions on the basis of their specific expertise rather than being influenced by non-trade interests.

The problem of the role of experts and expertise is clearly emerging in the literature on global governance and globalisation as one of the main issues to be dealt with in the next decades. In fact, in numerous extremely technical and specialised policy areas such as trade states increasingly outsourced decision-making to supranational agencies which make wide use of detailed technical knowledge to justify their decisions. This narrative is present in the Communications of the Commission on the Global Europe Strategy which often refer to technical studies, or statistics or multilateral legislation to justify a certain strategy or negotiating position.

Techniques of trade negotiations became a specific field of expertise in itself following rules of its own based on the experience of more than 50 years of subsequent GATT rounds and regional negotiations.[362]

The inclusion of food security concerns in trade policy would involve a reassessment of the role of the trade experts of the Commission and of the function of trade expertise in the process of production of international trade law. The decisions taken during trade negotiations would have to be open to a wider scrutiny including experts of other subjects providing diverging views on the treaties adopted. This might find the opposition of the bureaucratic personnel which was trained to consider trade policy in clinical isolation from other policy issues. If this is the case the solution might be to change the way in which trade policy experts are trained so that they develop more awareness of the implications of trade treaties for the realisation of human rights.

3. Influence of business lobbies

The EU external trade policy serves explicitly the objectives of supporting the penetration of EU companies in foreign markets and providing them with raw materials that are available only outside the EU. These two objectives are inextricably linked with the economic policies the EU Commission developed to improve growth and create jobs across the EU. For this reason the Commission allows EU business lobbies to be involved in the external trade policies so that to be able to take their interests into account when concluding international trade agreements. In addition to the committees the Commission created business lobbies have many ways to influence supranational policy making which have clearly emerged in social science literature. For instance, multinational corporations spend a large amount of resources to lobby EU institutions or national parliaments. In addition, business lobbies have extensive expertise in the domain of international trade and have the capacity to organise supranational networks where policy makers and members of the business community can meet to discuss future directions of the EU Commercial policy.

The participation of business lobbies to the EU external trade policy is legitimate in human rights terms as soon as private interests do not supersede the realisation of human rights. One of the conclusions of this thesis is that the EU Commission attempt to support EU economy through the conclusion of trade agreements with developing countries has gone too far and modified international trade law in a way that is adverse to the realisation of the right to food in vulnerable states. The proposals presented above also have the objective to offset the influence of private lobbies during trade negotiations and assure that their presence do not affect the realisation of fundamental rights in vulnerable countries. The proposals are based on the vision of EU external policy emerging from Article 21 of the Treaty on the

[362] A Hoda, *Tariff negotiations and renegotiations under the GATT and the WTO* (CUP 2001).

European Union which suggests that the pursuit of commercial interests should be balanced against other objectives including the realisation of fundamental rights.

This vision of the EU external action might find the opposition of those private lobbies which see in the limits posed by human rights law an economic burden curbing their global competitiveness. Accordingly, the success of the proposals might require innovative ways of accommodating the commercial interests of EU companies in the EU external action. The human rights assessment of trade agreements could be a first step for the development of alternative instruments of legislation that allow the EU to support its import and export necessities without affecting the capacity of vulnerable countries of realising the right to food. As showed in Chapter 5, some tentative legal instruments are already present in WTO law and the EU could build on this precedent to develop a comprehensive proposal to reconcile international trade law and the realisation of the right to food. In fact, the presence of a human rights assessment of trade agreements might also influence the way private companies approach EU policymaking. For instance, a human rights test that has to be passed could convince influential business lobbies to propose innovative instruments of regulation which would promote international market integration while at the same time contributing to the realisation of the right to food. This is an area of research endowed with little private resources in which private lobbies do not invest since there is little awareness across the EU of the interactions between international trade treaties and human rights. If a human rights assessment makes the connection explicit private lobbies might be more inclined to channel resources towards the development of proposals that allow them to pursue their interests while still meeting the human rights test included in the procedure.

4. Conclusions

This Chapter proposed four directions towards EU policymakers could move in order to include the right to food within the EU external trade policy with vulnerable states. The proposals are the creation of a human rights assessment of trade agreements, the inclusion of democratic institutions in the negotiation process, the connection of administrative bodies competent for trade, development cooperation and human rights and the use of the EU influence in the WTO to reconcile trade law and human rights. All the four proposals could be implemented within the existing EU prerogatives and without reforming existing EU Treaties.

The Chapter also argued that the proposals might prove controversial within the EU Commission and business lobbies for different reasons. In the case of the Commission the inclusion of human rights in external trade policies might find the opposition of trade specialist who were not trained in human rights issues and might to be sensitive to the issues presented in the thesis. Business lobbies might also find that the inclusion of human rights in external trade has the potential to affect their import and export interests and that the two policies should be kept separate. Any private or public actor interested in supporting the inclusion of the right to food in the external trade policy of the EU will have to cope with these resistances and propose innovative ways to accommodate the interests involved.

CHAPTER 9 CONCLUSIONS

1. Introduction

This thesis took into account the outcome of the trade negotiations of the EU with some of the poorest countries of the world in the Caribbean and Sub-Saharan Africa. The thesis showed that the trade agreements that the EU concluded with these vulnerable countries reduce their capacity to realise the right to food of their citizens. This is so because several clauses on import and export of food create legal constraints on the trade actions that would be necessary to react to food shortages. This chapter recapitulates the main results of the thesis and reflects to the consequence of the findings for the external action of the EU towards developing countries. Section two of this conclusion summarises the results of each chapter and section three recaps the findings of the case studies. Finally, section four contains a commentary on the shortcomings of the WTO and the EU with regard to the reconciliation between international trade law and the realisation of the human right to food.

2. Summary of the main findings of the first four chapters

The thesis started with an introductory Chapter on the normative content of the right to food in international law. The chapter identified the principal international treaties and conventions including the right and followed the evolution of the right to food from its early codifications until recent years. The chapter identified the International Covenant on Economic Social and Cultural Rights as the most relevant legal source and looked into the interpretations of the right provided by the International Committee on Economic Social and Cultural Rights. Doing so the chapter identified the main human rights duties stemming from the human right to food (duty to respect, duty to protect and duty to provide) and clarified their meaning. Moreover, chapter 2 investigated if the Committee provided interpretations of the right generating legal duties applicable to the negotiations of international trade treaties. The chapter concluded that the normative content of the right to food also applies to the external economic policies of states. Notably, the Committee explicitly referred to WTO law as one of the stumbling blocks preventing the realisation of the right to food in vulnerable countries. Members of the Covenant in fact are not exempted from supporting the realisation of the right when drafting international trade treaties regulating the import and export of food. In particular, all Members to the Covenant have the duty to ensure the instability on the international food market does not affect the realisation of the right at domestic level. This duty is particularly relevant in the context of the recent globalisation and liberalisation of international trade since the relevance of the international food market increased its significance for the realisation of the right. This was evident for instance between 2007 and 2008 when the upward fluctuation of the price of food on the international food market triggered a global food crisis noticeably affecting the realisation of the right to food.

Building on the conclusions of the previous chapter, chapter 3 analysed the functioning of the international food market and identified its main failures. In

addition, the chapter provided the categories of countries and individuals that are particularly vulnerable to the instability of the international food market. The market failures taken into account are volatility of food prices, negative incentives on domestic food production and concentration of market power. From the chapter emerged the picture of a highly unreliable international food market which can influence vulnerable countries towards the production of food products that do not contribute to their domestic food security. Moreover, the chapter argued that the participation of countries in the global food market is highly unequal and few countries export the large majority of the food available. This group of countries dominate the system and can influence the international price of food. Accordingly, the large majority of the international community provides very little contribution to the international food market and participates in it only as importer of food to ensure domestic food security in the absence of adequate local supply. From the analysis of the failures of the global food market the chapter identified three categories of countries that are particularly vulnerable. These are developing countries, net-food importers and agricultural economies. The chapter concluded clarifying the duty of the international community to ensure that market failures do not affect the realisation of the right to food at domestic level from the perspective of the external action of the EU. In the chapter we maintained that the EU, when negotiating trade agreements with third countries, should pay attention to the role of the international market in the realisation of the right to food. In fact, these treaties provide the legal infrastructure to the international exchange of food products between countries. Influencing the trade policies of the signatory states international trade agreements can affect the capacity of vulnerable countries to protect their citizens from the vagaries of the international food market. Accordingly, when the EU concludes trade agreements with vulnerable states it should promote their inclusion in the global food market and ensure that the clauses on import and export of food do not hamper their capacity to intervene in food shortages at domestic level.

Chapter 4 examined the details of the external action of the EU identifying the legal competences of the EU in the areas of international trade law and the right to food and describing its main policies. The chapter showed that the EU is highly influential in the evolution of international trade law since it has exclusive competence to negotiate and conclude trade agreements on behalf of its 28 Member States. At the same time, the EU has an explicit mandate in its founding treaties to contribute to the realisation of economic and social rights through its external action. This legal mandate was strengthened through the inclusion of human rights clauses in development cooperation agreements and trade treaties with vulnerable countries. Furthermore, the EU developed specific policies to prioritise development objectives when concluding trade agreements with vulnerable countries. Through these policies the EU aims to address the main deficiencies of the present system, supporting the development of vulnerable states and the realisation of non-trade objectives such as food security and public health. Notwithstanding this effort, the analysis also showed that EU policymaking on international trade law maintained a strong connection with the EU business community which takes part in the design of the policies and the identification of the priorities to be pursued when negotiating trade agreements with

third countries.[363] Accordingly, the chapter recognised two distinct visions of the participation of the EU to the creation and modification of international trade law. The first one is rooted in the necessities of EU exporters and sees international trade law mainly as a support to the economic development of the EU. The second vision sees international trade law as a support to development policies and the promotion of non-trade objectives in vulnerable countries. This second perspective promotes the drafting of trade treaties that support the inclusion of vulnerable states in the global economy and do not expose them to the instability of the international market. The chapter concluded that these two interpretations of the EU role in the evolution of international trade law coexist in EU policymaking and is not clear which one would prevail on the other in case of conflict. For this reason the relationship between recent EU trade treaties and the realisation of the right to food can be assessed only through the analysis of the specific clauses on import and export of food included in these agreements.

Chapter 5 provided the analysis of the regulation on the import and export of food in the law of the WTO. The chapter clarifies the international obligations that the EU has to respect when concluding trade agreements with countries vulnerable to food shortages. The chapter also assessed WTO legislation from the perspective of the realisation of the right to food. The chapter identified several shortcomings of the regulation emerged from the Uruguay Round that make the contribution of WTO law to the realisation of the right extremely limited. The chapter provided particular attention to the part of WTO law (Article XXIV GATT) allowing WTO Members to conclude free trade agreements outside the WTO framework. The chapter noticed that through this article the EU is enabled to conclude free trade agreements with countries vulnerable to food shortages and when concluding a trade deal of this sort WTO law obliges to eliminate the large majority of import barriers. This has to be done even when the agreement is concluded between developed countries and countries vulnerable to food shortages and even when the elimination of trade barriers increases the exposure of vulnerable countries to market instability. To the contrary, with regard to other trade instruments relevant for the realisation of the right to food such as safeguards and export restrictions WTO law leaves wide space of action and the EU is free to negotiate clauses that do not affect the realisation of the right. The chapter concludes that if the EU aims to conciliate international trade law with the realisation of the right to food it has to move it two directions. On the one hand it has to work in the Doha Round towards the modification of WTO law whenever the existing regulation is an obstacle to the realisation of the right. On the other, it has to avoid increasing the exposure of vulnerable countries to the failures of the global food market when concluding free trade agreements with them under Article XXIV GATT.

[363] See Chapter 4 for the analysis of the institutionalisation of the participation of private companies in EU external action.

3.Main findings of the case studies

The thesis included the case study of seven free trade agreements between the EU and countries vulnerable to food shortages. Chapter 6 analysed from the perspective of the human right to food the trade agreement between the EU and 15 Caribbean countries, one of the most comprehensive trade agreements the EU has concluded so far. Chapter 7 took into account a group of six interim trade agreements between the EU and countries in Sub-Saharan Africa. From the case studies emerged that all the clauses on import and export of food (tariffs, safeguards and export restrictions) reduce the capacity of the developing countries involved to react to food shortages. First, all the agreements in order to respect the prescriptions of Article XXIV GATT eliminate at least 80% of tariff protection exposing vulnerable countries to increasing competition from the EU and limiting their capacity to intervene at the occurrence of import surges of food from the EU. The Food and Agriculture Organisation considers import surges dangerous for the realisation of the right to food because they disrupt the livelihood of vulnerable farmers already exposed to hunger. To avoid this issue all the treaties exclude certain sensitive products from the obligation of eliminating import tariffs. Notwithstanding these exceptions the large majority of EU food products will be imported in the Caribbean and African countries duty free. The African agreements include additional limitations on the maximum tariff applicable to sensitive food products imported from the EU. The new regulation promotes EU food exports in vulnerable countries even when this exposes vulnerable groups to food insecurity. In other words the policy supports the EU export business even if increasing imports of food in the developing country affect the realisation of the right to food. The treaties are also likely to affect public revenues of developing countries hampering their capacity to organise policies to realise the right to food. Overall, the analysis of the clauses on tariffs manifested the necessity of revising Article XXIV GATT to allow differential treatment when vulnerable countries are involved trade agreements with the EU. Certain aspects of the regulation of tariffs however show that the negotiators also pursued the objective of imposing limits on developing countries beyond what required by WTO law. For instance, this is the case of the inclusion of a maximum tariff for sensitive products imported in African countries which is much lower than what is required by WTO law.

Second, the assessment of the clauses on import safeguards showed that during negotiations very little effort was made to provide Caribbean and African countries with an efficient mechanism of protection at the occurrence of import surges of food from the EU. In particular, the treaties do not include a special safeguard system like the one of the WTO Agreement on Agriculture which would have allowed automatic protection of domestic markets in adverse market conditions. The safeguards provided are slow to implement, are supervised by a supranational authority and contain almost no differential treatment between the EU and vulnerable countries. In addition, in the African agreements there is no reference to the possibility of using safeguards to protect food security. The safeguards contained in the Caribbean agreement contain a reference to food security which, even if important in terms of interpretation of the treaty, looks rhetorical since it does not make the safeguards easier to implement. The similarities between the regulation of safeguards of all the seven treaties taken into account manifest that little efforts were made to tailor the food safeguards on the specific necessities of each vulnerable country.

Finally, the regulation of export restrictions of all the agreements limits considerably the capacity of developing countries to use them to intervene on the quantity of food exported abroad at the occurrence of food shortages. This is particularly evident in the Caribbean case and in four of the African treaties which ban export quotas and most of export taxes. It is particularly regrettable that in these five treaties the negotiators decided not to reproduce the exception of Article XI.2(a) GATT that in the WTO system allows the use of export quotas to relieve food shortages. Two of the African agreements maintained the exception even if they include a regulation of export taxes considerably more restrictive of WTO. Moreover, the prohibition of export taxes is likely to affect public revenues especially in the African countries which are scarcely industrialised but rich in natural resources. This decision deprives vulnerable countries of an additional source of revenues even if the clauses on tariffs already have an impact on public funding. The deficiencies of the regulation of exports is particularly relevant for the examination of the EU external action because in this case WTO law explicitly provides that there is no obligation to eliminate export restrictions when concluding a free trade agreement under Article XXIV GATT. This means that at least in this area the EU had a very wide space to develop clauses fully supportive of the realisation of the right to food in vulnerable states. The case studies hint at the fact that since exports of industrial products, natural resources and food are regulated by the same Article the EU might have prioritised the objective of ensuring the supply of raw materials to its EU processing industries. This conclusion seems to be justified by the fact that the EU has a well-developed external policy on raw materials whereas there is very little policymaking on the relationship between export restrictions and food security.

In conclusion, all the seven treaties taken into account in this thesis diminish the capacity of developing countries to realise the right to food of their citizens. Doing so the treaties increase the gap between international trade law and the realisation of the right to food creating new challenges for the realisation of the right that are not present in the WTO system. This outcome was influenced by Article XXIV GATT only with regard to tariffs since WTO law would have allowed the EU and its partners to design a regulation of safeguards and export restrictions more protective of the right to food.

4.The EU, the right to food and developing countries

The seven trade agreements taken into account in this thesis pose profound questions about the relation between the EU and countries vulnerable to hunger and malnutrition. First, the circumstance that the Caribbean and African free trade agreements went through the entire process of negotiation and adoption at EU level, which involves the European Commission, the Council and the European Parliament[364] without that their deficiencies with regard to the realisation of the right

[364] Even if the European Parliament ratified the agreements it then published a resolution urging the Commission to be careful with their implementation because of the development disparity between the EU and the countries involved and the possible impact on ACP states. See European Parliament

to food were identified as a risk for food security, emphasises that the EU might lack the institutional antibodies to avoid that its external action creates food security issues in vulnerable countries. Accordingly, it might be necessary to improve the EU mechanisms of review of free trade agreements to ensure that they are examined on the basis of their effects on the right to food before their conclusion. In particular, the treaties manifest the failure of the Policy Coherence for Development Initiative of the EU Commission which should have ensured the reconciliation between the EU external trade objectives and development goals. In fact, the treaties demonstrate that in EU external policymaking commercial objectives and the support to EU export business are dominant and that the realisation of the right to food is in an marginal position. This is evident with regard to tariffs and safeguards where the clauses included in the agreements encourage the presence of EU companies in the markets of developing countries even when this is detrimental to the realisation of the right to food. A reason for this outcome might be the influence of the EU export business on the EU commercial policy through the Market Access Partnership.[365] To offset this presence the EU should introduce a procedure to assess the impact of trade agreements on the realisation of economic and social rights before their conclusion.[366] This procedure would ensure that the promotion of the EU exports does not go as far as affecting the realisation of human rights in vulnerable countries. Other strategies to ensure the reconciliation between trade objectives and human rights can be found in the numerous research projects on human rights mainstreaming in economic policies to which also the EU Parliament referred recently.[367]

Second, the EU should utilise the entire policy space left by the WTO to design trade clauses that do not diminish the capacity of vulnerable countries to react to food shortages. This space is particularly wide in the case of safeguards and export restrictions that WTO law allow to maintain when concluding a free trade agreement under Article XXIV GATT. In particular, the EU should develop an advanced system of automatic safeguards based on the one of the WTO Agreement on Agriculture but without the issues that made it ineffective. A draft of the new special safeguard to be included in trade agreements with developing countries could be developed with the Food and Agriculture Organisation which already proposed several solutions. With regard to export restrictions, the fact that the EU external action on raw materials is

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resolution of 5 February 2009 on the development impact of Economic Partnership Agreements (EPAs) (2008/2170(INI)).

[365] See the analysis of the EU Market Access Strategy in Chapter 4 Paragraph 3(b).

[366] An embryonic form of human rights assessment is the Sustainability Impact Assessment trade agreements run by the EU commission. The assessments of the treaties with Africa and the Caribbean, even if without using a human rights language, had flagged some of the issues identified in this thesis.

[367] European Parliament, Directorate General for External Policies, *Human rights mainstreaming in EU external relations*. Available at <http://www.eiuc.org/tl_files/EIUC%20MEDIA/Docs/EST28775.pdf> (accessed 11 July 2013).

overachieving with a group of small developing countries suggests that EU policy making should concentrate more on the limits that trade clauses should have when treaties are concluded with vulnerable states. In particular, the EU would need a policy on export restrictions on food that is detached from the EU raw materials initiative and that is fully dedicated to the solution of the problems that export restrictions cause during global food crises. In the same vein, the EU should negotiate clauses on export restrictions of food separately from the clauses on raw materials. In particular, the regulation of export restrictions included in the free trade agreements should not hamper the capacity of vulnerable countries to use them as emergency mechanisms or as source of revenues.

Finally, whenever WTO is not sufficiently flexible and oblige the EU to include clauses in trade agreements that are potentially harmful for the realisation of the right to food the EU should lobby in the WTO for their modification. This is particularly so with regard to Article XXIV GATT which obliges states to eliminate the large majority of trade barriers even when a developed country concludes a trade agreement with vulnerable states. This clause could be easily modified since the clause that regulates free trade agreements on services already provides for the possibility of concluding non reciprocal agreements when this is necessary to protect developing countries. A copy and paste of a few words would allow the EU and other developing countries to conclude free trade agreements while respecting the principle of differential treatment of Article XXXIV:8 GATT. It is regrettable that notwithstanding the centrality of this principle in the Doha Declaration there is no advanced proposal for the modification of the article and the EU never proposed an amendment of the Article to allow non-reciprocal trade agreements. A starting point for the revision of Article XXIV could be the introduction of an exception to the requirement of liberalising the 80% of trade for least-developed countries or for the countries included in the FAO list of low-income-food-deficit countries. This would create the legal space to solve some of the most relevant issue of the agreements between the EU and Africa. It would also allow least-developed countries to conclude free trade agreements with the EU without affecting its capacity of intervention at the occurrence of food shortages. It is in fact particularly deplorable that in the present even the sixty poorest countries of the world have to respect the same conditions as any other WTO Member when concluding a free trade agreement.

In conclusion, the EU and developing countries in their free trade agreements could have provided a regulation of the import and export of food more protective of the right to food. Today the free trade agreements between the EU and developing countries are provisionally applied, but ratification by all national Parliaments is required before the agreement enters into force. Since numerous countries have not ratified these treaties there is still space for national legislators and the organs of the EU to ensure that all the seven agreements are revised to make them fully supportive of the realisation of the right to food.

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