

The legal framework of international food aid between food security and trade concerns

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Abstract: Il quadro giuridico degli aiuti alimentari internazionali tra sicurezza alimentare e preoccupazioni commerciali - This article delves into the intricate relationship between food security, food aid, and food trade, with a specific emphasis on the developments in food aid under the purview of the World Trade Organization (WTO) law. Its primary objective is to investigate the possible role of the WTO in addressing humanitarian concerns. To accomplish this, the article begins with Section 1, which provides a comprehensive overview of the international legal framework governing food aid, tracing its evolution from the 1950s. Subsequently, Section 2 critically examines how WTO law addresses food aid and raises some questions about the role of food security within this legal regime. Section 3 explores the impact of the Nairobi Ministerial Decision, shedding light on the influence of humanitarian concerns, particularly those related to food security, on WTO regulations pertaining to food aid. The article concludes by acknowledging the disconnection between food aid and agricultural trade, which often neglects the fundamental importance of food security. It proposes that the WTO has the potential to serve as a platform for integrating the objective of food security with commercial interests, thereby facilitating the harmonization of trade considerations with humanitarian imperatives relating to food security.

Keywords: Food security; Food aid; World Trade Organization (WTO) law; Nairobi Ministerial Decision; Food Aid Convention.

1. Introduction

«We are now only eight years away from 2030, but the distance to reach many of the SDG 2 targets is growing wider each year. There are indeed efforts to make progress towards SDG 2, yet they are proving insufficient in the face of a more challenging and uncertain context.»¹ This alarming warning stems from the latest Report on the State of Food Security and Nutrition (SOFI Report), which assesses the world's food condition in light

¹ FAO, IFAD, UNICEF, WFP and WHO, 2022, The State of Food Security and Nutrition in the World 2022. Repurposing food and agricultural policies to make healthy diets more affordable. Rome, FAO. <https://doi.org/10.4060/cc0639en>, p. xxiii.

of the 2030 Agenda for Sustainable Development, and in particular of the UN Sustainable Development Goal 2, which aims for Zero Hunger.²

The frequency of food shortages caused by extreme weather events such as floods and droughts, by economic shocks, and conflicts is intensifying emergency food situations³. In these critical circumstances, ensuring the human right to food becomes paramount as such disastrous events often lead to the destruction of food sources, hinder market access and functioning, and challenge agricultural production in affected areas⁴. For instance, the ongoing war in Ukraine has disrupted supply chains,

² UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1. Sustainable Development Goal 2 is about creating a world free of hunger by 2030 and it provides the following eight specific targets: 2.1 By 2030, end hunger and ensure access by all people, in particular the poor and people in vulnerable situations, including infants, to safe, nutritious and sufficient food all year round; 2.2 By 2030, end all forms of malnutrition, including achieving, by 2025, the internationally agreed targets on stunting and wasting in children under 5 years of age, and address the nutritional needs of adolescent girls, pregnant and lactating women and older persons; 2.3 By 2030, double the agricultural productivity and incomes of small-scale food producers, in particular women, indigenous peoples, family farmers, pastoralists and fishers, including through secure and equal access to land, other productive resources and inputs, knowledge, financial services, markets and opportunities for value addition and non-farm employment; 2.4 By 2030, ensure sustainable food production systems and implement resilient agricultural practices that increase productivity and production, that help maintain ecosystems, that strengthen capacity for adaptation to climate change, extreme weather, drought, flooding and other disasters and that progressively improve land and soil quality; 2.5 By 2020, maintain the genetic diversity of seeds, cultivated plants and farmed and domesticated animals and their related wild species, including through soundly managed and diversified seed and plant banks at the national, regional and international levels, and promote access to and fair and equitable sharing of benefits arising from the utilization of genetic resources and associated traditional knowledge, as internationally agreed; 2.A Increase investment, including through enhanced international cooperation, in rural infrastructure, agricultural research and extension services, technology development and plant and livestock gene banks in order to enhance agricultural productive capacity in developing countries, in particular least developed countries; 2.B Correct and prevent trade restrictions and distortions in world agricultural markets, including through the parallel elimination of all forms of agricultural export subsidies and all export measures with equivalent effect, in accordance with the mandate of the Doha Development Round; 2.C Adopt measures to ensure the proper functioning of food commodity markets and their derivatives and facilitate timely access to market information, including on food reserves, in order to help limit extreme food price volatility.

³ According to FAO, IFAD, UNICEF, WFP and WHO, 2022, The State of Food Security and Nutrition in the World 2022. Repurposing food and agricultural policies to make healthy diets more affordable. Rome, FAO. <https://doi.org/10.4060/cc0639en>, p. xiv «After remaining relatively unchanged since 2015, the prevalence of undernourishment jumped from 8.0 to 9.3 percent from 2019 to 2020 and rose at a slower pace in 2021 to 9.8 percent. Between 702 and 828 million people were affected by hunger in 2021. The number has grown by about 150 million since the outbreak of the COVID-19 pandemic – 103 million more people between 2019 and 2020 and 46 million more in 2021.»

⁴ E. Sommaro, F. Spagnuolo, M. Alabrese, “Feeding the Hungry, Quenching the thirsty”: Shaping the Rights to Food and Water in Disaster Settings through Humanitarian Standards, in *Global Jurist*, 2019; L. Cotula, M. Vidar, *The right to adequate food in emergencies*, FAO, Rome, 2002.

impacting the prices of grain, fertilizers, and energy, thereby further increasing food prices.

In global emergencies resulting from conflicts, climate shocks, pandemics, and other disasters, the provision of food aid becomes a life-saving support for vulnerable populations⁵. However, the subject of food aid remains highly controversial⁶. Over time, international food aid has been viewed as a means to respond to the needs of donor states' domestic agricultural sectors, or to serve their commercial or foreign policy interests. It has not always been solely a means to assist the poorest countries or address emergency or disaster situations. Food aid has often been used to circumvent international trade rules on export subsidies, leading to distortions in agricultural markets⁷. Consequently, the objective of ensuring food security and the right to food for populations in need has sometimes become disconnected from the practice and regulation of food aid.

This paper aims to examine the complex interplay between food security, food aid, and food trade, with a particular focus on the developments in food aid under World Trade Organization (WTO) law. It seeks to explore whether these developments represent a reversal of the trend concerning food security. To achieve this, Section 1 provides an overview of the international legal framework governing food aid, starting from the 1950s. This overview is followed by Section 2, which examines how WTO law addresses food aid and questions the role of food security within this legal regime. Section 3 explores the Nairobi Ministerial Decision, highlighting the influence of humanitarian concerns, particularly related to food security, on WTO regulations concerning food aid. In the concluding remarks, we acknowledge the disconnection between food aid and agricultural trade, which often disregards the imperative of food security. We suggest that the WTO could serve as a forum for integrating the objective of food security with commercial purposes, thereby reconciling trade issues with humanitarian concerns related to food security.

2. The international food aid: a brief overview

After World War II, the concept of using surplus agricultural products to assist countries grappling with famine or food shortages emerged in response to agricultural overproduction⁸. This approach, known as supply-

⁵ Human Rights Council, Report of the Special Rapporteur on the right to food, Olivier De Schutter, *The role of development cooperation and food aid in realizing the right to adequate food: moving from charity to obligation*, 11 February 2009, A/HRC/10/5.

⁶ See J. Clapp, *Hunger in the Balance: The New Politics of International Food Aid*, Cornell University Press, 2012. A different perspective can be found in P. Uvin, *Regime, Surplus, and Self-Interest: The International Politics of Food Aid*, in *International Studies Quarterly*, 1992, 293.

⁷ P. Borghi, *Sicurezza alimentare e commercio internazionale*, in Rook Basile E., Massart A., Germanò A. (Eds), *Prodotti agricoli e sicurezza alimentare*, Giuffrè, 2003, 452.

⁸ FAO, Disposal of Agricultural Surpluses, FAO Commodity Policies Studies, n. 5, 1954; FAO, Uses of Agricultural Surpluses to Finance Economic Development in Under-Developed Countries, FAO Commodity Policies Studies, n. 6, 1956.

driven food aid, relied on the availability of agricultural products in exporting states rather than the actual needs of the receiving countries. Paradoxically, this resulted in food shipments to regions unaffected by food scarcity, making the aid more beneficial to the donors than the recipients. In some cases, food aid functioned as an export subsidy, timed to coincide with periods of abundant global commodity supply, thereby lowering prices and increasing accessibility for wealthier countries. Conversely, during periods of reduced global agricultural supply, prices rose, diminishing the purchasing power of the poorest nations, making it less likely for donors to provide food aid⁹. This vicious circle highlights the vital role of rules and policies in international food aid for ensuring food security rather than solely prioritizing the allocation of donor countries' agricultural produce.

The United Nations Food and Agriculture Organization (FAO) made the initial effort to incorporate food aid operations into the multilateral regulatory framework through the adoption of the FAO *Principles of Surplus Disposal and Guiding Lines* in 1954¹⁰. Subsequently, in 1961, the UN established the World Food Programme (WFP), the first program for the multilateral management of food aid. The subsequent milestone in the management and regulation of food aid was marked by the adoption of the first Food Aid Convention in 1967.

The FAO Principles aim to promote the efficient utilization of surplus agricultural production while safeguarding the commercial interests of exporters and local producers in recipient countries. These principles ensure, on one hand, that food and other agricultural commodities exported on concessional terms lead to additional consumption in the recipient country without displacing normal commercial imports. On the other hand, they aim to prevent any negative impact on domestic production. The concept of "additional consumption" refers to consumption that would not have occurred without the presence of food aid. The usual marketing requirement (UMR) serves as the mechanism to ensure such additionality. It entails a commitment from the recipient country to maintain a regular level of commercial imports of the specific commodity, in addition to the commodity supplied through concessional transactions.

While the FAO Principles on surplus disposal are voluntary in nature, they hold significance as they are specifically mentioned in Article 10 of the WTO Agreement on Agriculture. This acknowledgement establishes them as voluntary rules of conduct, but with potential legal implications if violated by WTO member states. However, in practice, there is a lack of a concrete monitoring and reporting mechanism that

⁹ C.B. Barrett, D.G. Maxwell, *Food Aid After Fifty Years. Recasting Its Role*, Routledge, London-NY, 2005.

¹⁰ Adopted with the FAO Council Resolution n. 2/20 of 1954. Today the principles are contained in FAO, *Reporting procedures and consultative obligations under the Fao principles of surplus disposal*, 2001, Annex G, <ftp://ftp.fao.org/docrep/fao/007/y1727e/y1727e00.pdf>.

would enable the WTO Committee on Agriculture to effectively identify possible violations of the FAO Principles¹¹.

The Food Aid Convention (FAC) stands as the paramount international instrument governing the provision of food aid. Initially discussed during the Kennedy round (1963-67) and adopted in 1967 as part of the International Grains Agreement, this convention has undergone several renegotiations between 1967 and 1999 to align with new international trade rules established after the establishment of the WTO. Despite these adaptations, the convention has remained steadfast in its primary objective: to establish a quantitatively defined commitment for each State party to provide food aid to beneficiary countries. Over the years, the membership of the convention has expanded, as well as the range of food types eligible for delivery as aid. Originally limited to cereals, the 1995 agreement included rice and legumes, and the 1999 agreement further encompassed additional categories of products, such as vegetable oils, powdered milk, and other foods significant to the traditional diets of vulnerable groups in recipient countries. Since 2012, the FAC has been superseded by the Food Assistance Convention, which came into effect in 2013¹².

The new Food Assistance Convention significantly broadens its scope beyond the mere distribution of agricultural products, encompassing a wider array of "food assistance" activities. Notably, the convention places considerable emphasis on addressing emergencies, as evidenced by the Preamble, which underscores the objective of enhancing the international community's capacity to respond effectively to food crisis situations. The primary aim of this assistance is expressly focused on ensuring the right to adequate food and fostering the attainment of global food security among beneficiary populations¹³.

Food security and the right to food are widely recognized as encompassing the availability and accessibility of sufficient and appropriate food that meets specific requirements. Specifically, the food available should both quantitatively and qualitatively be capable of meeting an individual's nutritional needs. Moreover, it is imperative that the food is safe, devoid of harmful substances, contaminations, and adulterations that

¹¹ J. Clapp, *Hunger in the Balance: The New Politics of International Food Aid*, Cornell University Press, 2012, 135; P. Konandreas, *Multilateral mechanisms governing food aid and the need for an enhanced role of the CSSD in the context of the new WTO disciplines on agriculture*, Background paper presented at FAO Informal Expert Consultation on Food Aid, Rome, 27-28 January 2005, 6, https://www.iatp.org/sites/default/files/451_2_60470.pdf.

¹² Food Assistance Convention 2012, 52 ILM 354. See M. Echols, *Introductory note to the Food Assistance Convention*, in *International Law Material*, 52, 2013, 354.

¹³ The beneficiaries, according to the Convention (article 4), are all the countries included in the list of Official Development Assistance Recipients of the OECD and the vulnerable populations of these countries. This means that not only governments but also some social groups are recognized as beneficiaries. On the Food Assistance Convention and the right to food, see A. La Chimia, *Food security and the right to food: finding balance in the 2012 Food Assistance Convention*, in *International and Comparative Law Quarterly*, 2016, 111.

could compromise its integrity and pose risks to consumer health¹⁴. In addition, it is crucial for food to be culturally and socially acceptable, taking into consideration values that extend beyond mere nutritional characteristics. This entails respecting diverse cultural preferences, dietary practices, and social norms related to food consumption. Recognizing and honoring cultural and social factors ensures that food assistance programs and initiatives align with the local context, promote inclusivity, and maintain the dignity and autonomy of individuals and communities in their food choices¹⁵. In this regard, the Convention aligns with and echoes international documents pertaining to the right to food and food security. These documents emphasize the fundamental importance of ensuring access to adequate and nutritious food for all individuals. The Convention acknowledges the intrinsic link between food assistance and the realization of the right to food, as well as the broader goal of achieving global food security. By incorporating principles and provisions from these international documents, the Convention reinforces the shared commitment of the international community to address hunger and promote food security on a global scale¹⁶.

In fact, the Food Aid Convention (FAC) sets clear expectations that the food supplied through food aid programs should meet specific standards of safety, nutritional adequacy, and appropriateness¹⁷. Regarding safety, the Food Assistance Convention recognizes the importance of adhering to the national legislation of the receiving country concerning food safety and quality. It also acknowledges the relevance of international standards on food safety and quality, where appropriate¹⁸. In addition to safety regulations, the Convention takes into account the policies and national legislation of the beneficiary state to determine the eligibility of food products for aid distribution¹⁹. This implies that for a product to be considered eligible as food aid, it must align with the food policies of the recipient countries, including those related to genetically modified organisms (GMOs) if applicable²⁰. This approach ensures that the food provided as aid meets the specific requirements and standards set by the countries receiving assistance, taking into consideration their regulatory frameworks and policies.

Nutritional requirements are given considerable attention within the provisions of the Convention, emphasizing the significance of meeting the

¹⁴ On food safety in connection to the right to food see Lupone, Ricci, Santini (Eds), *The right to safe food towards a global governance*, Giappichelli, 2013.

¹⁵ For a better understanding of this requirements see E. Sommario et al., *“Feeding the Hungry, Quenching the thirsty”: Shaping the Rights to Food and Water in Disaster Settings through Humanitarian Standards*, in *Global Jurist*, 2019.

¹⁶ Amongst other relevant sources, see Committee on Economic, Social and Cultural Rights, General Comment No 12: The right to adequate food (art. 11), 12 May 1999, E/C.12/1999/5; Food and Agriculture Organization of the United Nations (FAO), *Guide on legislating for the right to food*, 2009.

¹⁷ Food Assistance Convention, article 1 (a).

¹⁸ Food Assistance Convention, article 2, para. c (iii) and Rules of procedure and implementation for the Food Assistance Convention, rule 3 (a).

¹⁹ Food Assistance Convention, article 4, para. 3.

²⁰ S. Vezzani, *The International Regulatory Framework for the Use of GMOs and Products Thereof as Food Aid*, in *European Journal of Risk Regulation*, 9, 2018, 130.

dietary needs of vulnerable individuals. The Convention acknowledges the importance of catering to the specific nutritional requirements of various vulnerable groups, including the elderly, children, people with disabilities, and women in critical stages of motherhood, such as during breastfeeding. By highlighting the nutritional aspect, the Convention recognizes the unique needs of these populations and underscores the necessity of providing food aid that is tailored to meet their specific dietary requirements. This approach ensures that the food assistance provided takes into account the diverse nutritional needs of different vulnerable groups, thereby promoting their well-being and addressing their specific nutritional challenges²¹.

The Convention recognizes the significance of cultural acceptability in relation to food aid, emphasizing the importance of respecting local cultural habits and traditions. It acknowledges that food assistance should not only meet nutritional requirements but also align with the cultural preferences and traditions of the receiving populations²². This approach is consistent with the principles outlined in General Comment No. 12 on the right to adequate food, which emphasizes the need for food aid to be both culturally acceptable and nutritious, promoting the dignity and well-being of the recipient populations²³.

The FAC (and today the Food Assistance Convention) is the sole binding international agreement governing food aid. This agreement, along with the FAO Principles, is explicitly referenced in Article 10 of the WTO Agreement on Agriculture, which - *ratione temporis* - referred to the 1986 FAC but it now pertains to the new Food Assistance Convention.

The Food Assistance Convention, in turn, explicitly recalls the WTO rules: the Preamble determines to act in accordance with the WTO obligations; and article 3, devoted to the relationship of the Convention with WTO Agreements, provides for the prevalence of the current and future obligations deriving from the parties' membership to the World Trade Organization. The Food Assistance Convention cannot derogate from these obligations and, in case of any conflicts, trade rules shall prevail. This establishment of a circular system of referrals between the two legal instruments draws attention to the significance of WTO rules concerning food aid. Overall, the Food Assistance Convention and the WTO Agreements are interconnected, with the Convention acknowledging and aligning with the trade rules of the WTO. This interplay highlights the importance of considering the WTO regulations when addressing matters related to food aid.

3. The food aid in the context of the WTO

The discussion surrounding food aid within the framework of the multilateral trading system has a long history. Initially, major agricultural producing countries strongly opposed any agreement that involved the

²¹ *Food Assistance Convention*, article 2, para. a (i) and para. c (i), (ii), (iii).

²² *Food Assistance Convention*, article 2, para. c (iii) and Rules of procedure and implementation for the Food Assistance Convention, rule 3 (a) (xiii).

²³ General Comment n. 12, *Right to adequate food*, para. 39.

multilateral management of food surplus. This stance resulted in tensions between exporting and importing nations, which were first addressed during the Dillon Round (1960-1962) and the Kennedy Round (1963-1967), and later within the Uruguay Round (1986-1994).

On one side of the debate, there was a call for mechanisms to ensure the availability of food to countries in need, including through food aid. This demand stemmed from concerns among net food importing countries that increased liberalization of the agricultural sector might reduce the amount of products available for aid. Liberalization could potentially eliminate or significantly reduce overproduction and surplus issues faced by producer countries.

On the other side, exporters emphasized the need for strict regulations on food aid to prevent a decrease in imports from recipient countries and to prevent the misuse of food aid as a way to circumvent obligations related to subsidy reduction. There was a genuine concern that a country could disguise the exports of its domestic products at subsidized prices as aid. This approach would serve the dual purpose of finding an outlet for excess production and preventing surpluses from affecting domestic prices²⁴. The negotiations revolved around finding a balance between ensuring food availability for countries in need and preventing trade distortions that could arise from the misuse or misinterpretation of food aid programs. The objective was to strike a delicate equilibrium that would address the concerns of both importing and exporting countries.

In response to concerns about the potential negative effects of market liberalization on poorer countries, the Marrakech Decision was introduced, while article 10 of the WTO Agricultural Agreement specifically focused on the regulation of market-distorting food aid²⁵.

The «*Marrakech Ministerial Decision on Measures Concerning the Possible Negative Effect of the Reform Programme on Least-Developed and Net Food Importing Developing Countries*», was adopted in April 1994, at the conclusion of the Uruguay round of multilateral trade negotiations.²⁶ This decision was a significant outcome of the negotiations and aimed to address concerns about the potential adverse effects of trade liberalization on the least-developed and net food-importing developing countries.

²⁴ See M.G. Desta, *Food Security and International Trade Law. An Appraisal of the World Trade Organization Approach*, in *Journal of World Trade*, 2001, 458.

²⁵ A. Germanò, E. Rook Basile, *Il diritto dei mercati dei prodotti agricoli nell'ordinamento internazionale*, Giappichelli, 2010; F. Smith, *Agriculture and the WTO. Towards a New Theory of International Agricultural Trade Regulation*, Edward Elgar, 2009; J. McMahon, *The WTO Agreement on Agriculture. A Commentary*, Oxford University Press, 2006; G. Peroni, *Il commercio internazionale dei prodotti agricoli nell'Accordo WTO e nella giurisprudenza del Dispute Settlement Body*, Giuffrè, 2005; P. Borghi, *L'agricoltura nel Trattato di Marrakech. Prodotti agricoli e alimentari nel diritto del commercio internazionale*, Giuffrè, 2004; M. Cardwell, M.R. Grossman, C.P. Rodgers, (Eds), *Agriculture and International Trade: Law, Policy and WTO*, CABI Publishing, 2003; M.G. Desta, *The Law of International Trade in Agricultural products: from GATT 1947 to the WTO Agreement on Agriculture*, Kluwer Law International, 2002.

²⁶ This Decision was defined «last minute» and also «meaningless» by C. Häberli, *Agricultural Trade: How Bad is the WTO for Development?*, in M. Bungenberg, C. Herrmann, M. Krajewski, J.P. Terhechte (eds), *European Yearbook of International Economic Law*, Springer, 2016, 103.

In the first two paragraphs, the Decision acknowledges both the benefits of agricultural sector liberalization for international trade and the potential adverse effects for specific member countries. It then outlines four paragraphs introducing mechanisms aimed at mitigating the potential negative consequences arising from the agreements of the Uruguay Round. Regarding the potential effects on food aid, paragraph 3 aims to ensure a sufficient level of food aid that can continue to guarantee assistance to the countries to which the decision is dedicated. To this end, it is agreed: «(i) to review the level of food aid established periodically by the Committee on Food Aid under the Food Aid Convention 1986 and to initiate negotiations in the appropriate forum to establish a level of food aid commitments sufficient to meet the legitimate needs of developing countries during the reform programme; (ii) to adopt guidelines to ensure that an increasing proportion of basic foodstuffs²⁷ is provided to least-developed and net food-importing developing countries in fully grant form and/or on appropriate concessional terms in line with Article IV of the Food Aid Convention 1986; (iii) to give full consideration in the context of their aid programmes to requests for the provision of technical and financial assistance to least-developed and net food-importing developing countries to improve their agricultural productivity and infrastructure.»

These provisions on food aid require further consideration. Firstly, in relation to paragraph 3 (i), which pertains «to initiat[ing] negotiations in the appropriate forum» to review food aid levels, it is noteworthy that the provision is both non-binding and unconventional in nature. Member States would be urged to commence negotiations within the framework of a separate international agreement, namely the Food Aid Convention, in order to ensure an appropriate quantity of food aid. It is noteworthy that the call for reviewing the aid level is associated with a forum that is entirely unrelated to the WTO, which is rather unusual. Hence, the commitment to initiate negotiations applies to all WTO Members, whereas the forum for these negotiations consists solely of the limited number of donor countries that are parties to the Food Aid Convention²⁸.

The second remark pertains to the requirement of paragraph 3 (iii) to carefully consider the necessity for technical and financial assistance that could potentially enhance agricultural productivity in the recipient countries. This paragraph broadens the scope of assistance beyond the mere provision of food and aligns with the trend observed in the Food Assistance Convention of 2012. Furthermore, it reflects an approach that considers not only the availability of food but also the means to acquire it, emphasizing access to food and the aspect of dignified self-sufficiency

²⁷ It is worth noting that the Decision does not contain a definition of «basic foodstuffs». In relation to them, a later document includes «principally», therefore not exclusively, cereals, rice, basic dairy products, legumes, vegetable oils and sugar. See the *Report of the Inter-agency Panel on short-term difficulties in financing normal levels of commercial imports of basic foodstuffs*, 28 June 2002, G/AG/13, p. 3.

²⁸ See M.G. Desta, *Food Security and International Trade Law. An Appraisal of the World Trade Organization Approach*, 457.

(feeding themselves in dignity), which is inherent to the right to adequate food²⁹.

Finally, the reference to the Convention on Food Aid in paragraph 3, which is explicitly humanitarian in nature, instead of the FAO Principles that primarily address commercial concerns, is not coincidental. This reference suggests an intention to draw the WTO's attention to food aid as a mechanism for ensuring food and nutrition security, distinct from the considerations of market distortion associated with food aid.

If we consider the Marrakech Decision, which is a non-binding part of the "agricultural package" of the World Trade Organization, it focuses on the perspective of the poorest countries. On the other hand, the Agreement on Agriculture can be seen as addressing international food aid from the perspective of exporting countries³⁰. Indeed, the Agreement on Agriculture incorporates provisions that address food aid within the context of export competition rules. Article 10 of the agreement includes specific provisions to ensure that food aid is granted in accordance with WTO rules, preventing it from being used as a means to circumvent export subsidy commitments. These provisions aim to maintain fair competition and prevent distortions in international trade. In paragraph 4, it provides that Members donors of international food aid shall ensure: (a) that the provision of international food aid is not tied directly or indirectly to commercial exports of agricultural products to recipient countries; (b) that international food aid transactions shall be carried out in accordance with the FAO Principles of Surplus Disposal; and (c) that such aid shall be provided to the extent possible in fully grant form or on terms no less concessional than those provided for in Article IV of the Food Aid Convention 1986.

Thus, the Agreement on Agriculture includes provisions to ensure that food aid is untied, meaning it should not be directly or indirectly linked to the exports of agricultural products from donor states. This requirement aims to prevent any commercial pressure on recipient countries that could lead to unfair practices and distortions in the market for exporters.

Additionally, the Agreement on Agriculture expects that food aid transactions adhere to the Principles developed by the FAO. These Principles aim to ensure that food provided as aid does not displace normal commercial imports and does not have a negative impact on international trade. Moreover, Article 10.4.c of the Agreement stipulates that aid should be provided, to the greatest extent possible, free of charge or on terms that are no less favorable than those specified in Article IV of the 1986 Food Aid Convention. These terms include options such as sales with deferred payments or sales at more advantageous terms than prevailing market

²⁹ See, among many others, E. Sommariva et al., *"Feeding the Hungry, Quenching the thirsty": Shaping the Rights to Food and Water in Disaster Settings through Humanitarian Standards*, in *Global Jurist*, 2019.

³⁰ J. McMahon, *The WTO Agreement on Agriculture. A Commentary*, Oxford University Press, 2006, 178.

conditions, and may also involve transactions in the currency of the receiving country³¹.

These provisions within the WTO Agreement on Agriculture primarily address the commercial aspects of food aid and do not explicitly emphasize its humanitarian or food security dimensions. While some rules may indirectly benefit food-insecure countries by relieving trade pressure and promoting fully grant-based aid, the focus of the agreement remains largely on the concerns of donors and their business interests. Consequently, there is a paradoxical situation where a legislative text dedicated to food aid appears to exclude food security from the scope of food aid regulations.

4. The Nairobi Ministerial Decision and the penetration of food security instances in the WTO

The issue of food aid remained highly contentious during the Doha round of trade negotiations initiated in 2001³². As part of the Doha round, WTO members reached a significant agreement known as the "Nairobi Package" during the Tenth Ministerial Conference held in Nairobi in 2015. This package consists of six Ministerial Decisions, one of which specifically addresses export competition and includes crucial provisions regarding international food aid³³. The Nairobi Decision on export competition serves two primary objectives concerning food aid. Firstly, it aims to uphold a sufficient level of international food aid, ensuring that the introduced framework does not hinder the provision of aid during emergency situations. Secondly, it appears to prioritize the attainment of food security, particularly in critical and urgent circumstances. In emergency situations, protracted crises,³⁴ or non-emergency development/capacity building food assistance environments, where recipient countries or recognized international humanitarian entities, such as the United Nations, have requested food assistance, countries are encouraged to provide aid. They are permitted to deliver aid in any form, whether in cash or in-kind, in order to facilitate the provision of assistance. Although it is generally advised for Members to avoid providing in-kind international food aid due to its potential adverse effects on local or

³¹ If this provision is referred to the Food Aid Convention currently in force, the provisions of Article 5.7 should certainly be mentioned, under which at least 80% of aid must be granted in full grant form and the parties must try to increase this percentage as much as possible.

³² C.B. Barrett, D.G. Maxwell, *Food Aid After Fifty Years. Recasting Its Role*, Routledge, London-NY, 2005, 73; R. Cardwell, *Food Aid, Surplus Disposal and Multilateral Trade Agreements: What is the Historical Justification for New WTO Rules?*, in *Journal of International Agricultural Trade and Development*, 2008, 74.

³³ Ministerial Decision, *Export Competition*, WT/MIN(15)/45, 21 December 2015. Paragraphs 22-32 are devoted to *International food aid*.

³⁴ The Nairobi Decision refers to «protracted crisis» as defined by FAO which, in turn, defines protracted crises as follows: «Protracted crises refer to situations in which a significant portion of a population is facing a heightened risk of death, disease, and breakdown of their livelihoods».

regional production of the recipient country, this provision explicitly allows for an exception to this rule.

The Decision stipulates that food aid should be needs-driven, meaning it should be provided based on the actual needs of the recipients, rather than serving the market development objectives of the donor country. This implies that food shipments should not be motivated by the need to subsidize exports or increase the donor country's exports through the inclusion of specific clauses in bilateral agreements³⁵. The aid must be provided in full grant form, meaning it should be completely free of charge. This requirement ensures that the aid is not linked, directly or indirectly, to the exports of agricultural products or any other products and services from the donor country. The provision emphasizes the need for food aid to be provided without any commercial or trade-related conditions, highlighting the humanitarian nature of the assistance.

Agricultural products provided as international food aid are generally not allowed to be re-exported. However, there are exceptions in certain circumstances. For example, re-exportation may be permitted if it is necessary for logistical reasons to expedite humanitarian operations in an emergency situation or if the agricultural products are prohibited or deemed inappropriate in the country of destination. These exceptions are not further elaborated in the Decision, but when considered in relation to the Food Assistance Convention, they could be interpreted as situations where the sent products are in violation of domestic food safety regulations, culturally unacceptable, or not in compliance with the food policies of the target area³⁶.

The exceptions outlined in the Nairobi Decision serve the purpose of ensuring that countries and populations in need can receive food aid. Certain rules aimed at preventing food aid from being used as a disguised subsidy are partially relaxed. These exceptions are intended to facilitate the effective delivery of food assistance to those who require it.

5. Concluding remarks

The link between food aid and agricultural trade has often disregarded the importance of food security, with commercial interests prevailing in the field of food assistance. Despite the prevailing commercial interests of donors, the World Trade Organization (WTO) has the potential to serve as a platform for balancing the commercial claims of donors with the food security needs of several countries, particularly developing nations. The role of the WTO in balancing commercial interests with food security needs does not appear to be far-fetched, as evident from the examination of the food aid regime within the Marrakesh agricultural package and

³⁵ A. Germanò, *Gli aiuti alimentari ai Paesi in via di sviluppo*, in E. Rook Basile, A. Germanò (Eds), *Agricoltura e in-sicurezza alimentare, tra crisi della Pac e mercato globale*, Giuffrè, 2011, 279.

³⁶ See CESCR, “General Comment No. 12,” paragraph 11, according to which food must be culturally acceptable to those who consume it. This component implies a focus on “perceived non-nutrient values” at the individual and social level, which include religious precepts and traditions.

subsequent developments in the Doha round. The trajectory of the multilateral trade system regarding international food aid indicates its capacity to address issues beyond the mere avoidance of circumvention of the Agricultural Agreement. This is evident in the Nairobi Decision, where the objective of ensuring food security through aid is given equal importance to trade concerns.

In the context of the Food Assistance Convention, which is a significant international binding instrument in the field of food assistance, its relationship with WTO trade rules is worth considering. The Convention stipulates that in the event of a conflict between the two, WTO rules shall take precedence. The provision in the Food Assistance Convention, which establishes the hierarchy with WTO rules, raises questions about the acknowledgment by the international community, particularly the Convention's member states, of the increasing role that the WTO can play in governing food security. However, it is important to note that this hierarchy does not necessarily have a negative impact on food assistance activities. The relationship between the two systems can provide a framework where trade concerns and humanitarian objectives can be balanced for effective food assistance. It is true that the Food Assistance Convention is primarily composed of donor countries, and the recipient countries have limited influence over its formulation and decision-making processes. On the other hand, within the framework of the World Trade Organization, developing countries, which largely coincide with the eligible countries for receiving food assistance under the Convention, receive considerable attention. This is due to the rule of consensus that governs decision-making processes in the WTO, which allows developing countries to have a say in shaping trade rules related to food aid. Additionally, political reasons have also played a role in addressing the needs of developing countries, as demonstrated by the negotiations leading to the adoption of the Nairobi Decision, which includes provisions for emergency and food insecurity situations. The Nairobi Decision's "safe box" reflects the recognition of the importance of addressing humanitarian concerns alongside trade considerations³⁷.

Indeed, the World Trade Organization (WTO), while not primarily a humanitarian institution or development agency, has the potential to serve as a forum for reconciling trade issues with humanitarian concerns regarding food security. Through its multilateral trade system, the WTO can facilitate discussions and negotiations among member countries to find a balance between trade interests and the need to address food security challenges. The WTO provides a platform where countries can engage in dialogue and negotiate trade rules and agreements that take into account

³⁷ During the Doha Round a «safe box» was discussed to refer to the possibility of introducing special emergency measures. See, the Hong Kong Ministerial Declaration, WT/MIN(05)/DEC, 18 December 2005, paragraph 6, and also the Revised draft modalities for agriculture, TN/AG/W/4/Rev.1, 8 February 2008, Annex L, paragraphs 6-10. For a comment see R. Cardwell, *Food Aid, Surplus Disposal and Multilateral Trade Agreements: What is the Historical Justification for New WTO Rules?*, in *Journal of International Agricultural Trade and Development*, 2008, 87.

the diverse needs and priorities of its member states, including those related to food security³⁸.

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³⁸ On WTO and food security, see among the vast literature, F. Smith, *Food security and International agricultural trade regulation: old problems, new perspectives*, in J. McMahon, M.G. Desta (Eds), *Research Handbook on the WTO Agriculture Agreement. New and Emerging Issues in International Agricultural Trade Law*, Edward Elgar, 2012; P. Borghi, *Insicurezza alimentare e regole WTO*, in E. Rook Basile, A. Germanò (Eds), *Agricoltura e in-sicurezza alimentare, tra crisi della Pac e mercato globale*, Giuffrè, 2011, 79; E. Díaz-Bonilla, M. Thomas, A. Cattaneo, S. Robinson, *Food Security and Trade Negotiations in the World Trade Organization: A Cluster Analysis of Country Groups*, Trade and Macroeconomics discussion paper 59, IFPRI, 2000.