

Food Security, Right to Food, Ethics of Sustainability

Legal, Economic
and Social Policies

Edited by
Licia Califano

FrancoAngeli 

Collana

di Diritto

SAGGI E RICERCHE



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This publication was realised with the contribution of the *Carlo Bo* University of Urbino – Department of Law (DIGIUR).

The contributions published in the volume have been subject to a double blind peer review, certifying their scientific quality.

Isbn: 9788835155287

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VI. THE IMPORTANCE OF FOOD SECURITY AND RIGHT TO FOOD IN INTERNATIONAL TRADE. REFLECTIONS ON THE RENEGOTIATION OF THE WTO AGREEMENT ON AGRICULTURE

EDOARDO ALBERTO ROSSI

SUMMARY: 1. Introduction. – 2. The right to food in international law. – 3. The complicated balance between right to food and liberalisation of trade in the renegotiation of the WTO Agreement on Agriculture. – 4. Conclusions.

1. Introduction

In the international scenario, food security is continuing to take on considerable importance, especially in the area of international trade in agri-food products, severely affected by recent events, such as the pandemic, the price crisis and armed conflicts, which have jeopardised the possibility of guaranteeing access to sufficient food resources at a global level.

It is, therefore, the “quantitative” aspect of food security, understood in its close connection with the fundamental right to food, that clashes with the commercial demands associated with the liberalisation of trade¹.

This issue is coming to the fore in the complicated negotiations for the reform of the 1994 Agreement on Agriculture (AoA) of the World

1. V.A. Lupone, *Balancing Basic Human Needs and Free Trade in the WTO*, in A. Lupone, C. Ricci, A. Santini (a cura di), *The Right to Safe Food Towards a Global Governance*, Giappichelli, Torino, 2013, p. 103 et seq.

Trade Organisation, which have been going on for a long time and with little result².

The WTO member states have taken very different stances, influenced by the conditions of their national economies, dividing themselves between those that prioritise the need to ensure food security and those that tend to prioritise the needs of international trade³.

2. Back in 2009 the UN Special Rapporteur, Olivier De Schutter, in his annual report (on which see G. Adinolfi, *Alimentazione e commercio internazionale nel rapporto del 2009 del relatore speciale delle Nazioni Unite sul diritto al cibo*, in «Dir. um. dir. int.», 2010, p. 126) had highlighted some possible consequences of the application of the trade regime governed by the WTO on the food conditions of the world population (see *Report of the Special Rapporteur on the right to food*, Mr. Olivier De Schutter, «*The role of development cooperation and food aid in realizing the right to adequate food: moving from charity to obligation*», A/HRC/10/5, 11 2009, in <https://digitallibrary.un.org/record/648605#record-files-collapse-header>).

3. Within this framework, also the European Union (which has long included in its “food safety and quality” policies many institutional initiatives, such as product traceability, quality certifications, transparency, restrictions on the use of pesticides and monitoring against food fraud) has taken a leading position in the negotiations on the reform of the Agreement on Agriculture, also considering the importance of the many trade agreements it has signed, containing provisions regarding food safety cooperation (see A. Micara, *Norme TRIPs-Plus e sicurezza alimentare negli accordi commerciali dell’Unione europea*, in «SidiBlog», 2016; G.M. Ruotolo, *Gli accordi commerciali di ultima generazione dell’Unione europea e i loro rapporti col sistema multilaterale degli scambi*, in «Studi int. eur.», 2016, p. 329 et seq.; G. Gruni, *EU, World Trade Law and the Right to Food: Rethinking Free Trade Agreements with Developing Countries*, Hart, Oxford, 2018, p. 71 et seq.). After all, the European Union has extensive competence in the area of agrifood policies, which it has exercised broadly over the years. In general, on the Union’s agrifood policies see C. Ricci (a cura di), *La tutela multilivello del diritto alla sicurezza e qualità degli alimenti*, Giuffrè, Milano, 2012, p. 227 et seq.; C. Bottari (a cura di), *La sicurezza alimentare. Profili normativi e giurisprudenziali tra diritto interno, internazionale ed europeo*, Maggioli, Sant’Arcangelo di Romagna, 2015; A. Alemanno, S. Gabbi (a cura di), *Foundations of EU Food Law and Policy: Ten Years of the European Food Safety Authority*, Routledge, Londra, 2016; L. Costato, F. Albisinni, *European and Global Food Law*, Wolters Kluwer, Milano, 2016; G. Steier, K.K. Patel (eds.), *International Food Law and Policy*, Springer, Cham, 2016, p. 409 et seq.; B. Van Der Meulen, B. Wernaart (eds.), *EU Food Law Handbook*, WAP, Wageningen, 2020; M.C. Oristano, *L’Unione europea e la sicurezza alimentare: il contributo della nuova politica agricola comune e delle recenti strategie ambientali elaborate dalla Commissione*, in «Studi int. eur.», 2022, p. 383. Also worth mentioning is the approval of the recent Regulation (EU) 2019/452 of 19 March 2019, which establishes a legal framework for the control of direct foreign investments in the EU (see F. Cazzini, *L’incidenza del Covid-19 sul settore agroalimentare nel quadro dell’OMC e dei controlli sugli investimenti esteri*

It is precisely this last sector that seems to be the most central for the purposes of the topic under discussion, in that it is capable of recognising the WTO as playing a role of primary importance in reconciling respect for the logic of trade with the guarantee of the fundamental right to food.

After a brief overview of the protection of the right to food in international law, aimed at grasping its actual scope about its “quantitative” profiles (par. 2), this contribution will focus on the assessment of its impact on the renegotiation of the most important global agreement on trade in agrifood products, the aforementioned AoA (par. 3). This is to establish whether the interests at stake can be adequately balanced, trying to provide some general indications that are relevant to the course of the complicated AoA renegotiation process (par. 4).

2. The right to food in international law

The difficulty in accessing food is still a serious problem, of particular concern in certain areas of the planet and likely to extend and become even more severe in the future⁴.

Many international treaties contain provisions aimed at addressing situations of a lack of food or difficulty in accessing it⁵,

diretti, in P. Acconci, E. Baroncini (a cura di), *Gli effetti dell'emergenza Covid-19 su commercio, investimenti e occupazione. Una prospettiva italiana*, Bup, Bologna, 2020, p. 146), as well as the imminent approval of a new general regulation on the safety of products, which will replace Directive 2001/95/EC (see Council press release of 29 November 2022, *Council and European Parliament agree on new product safety rules*, in www.consilium.europa.eu/en/press/press-releases/2022/11/29/council-and-european-parliament-agree-on-new-product-safety-rules).

4. To this end, refer to the recent report by the FAO, *The State of Food Security and Nutrition in the World 2022. Repurposing food and agricultural policies to make healthy diets more affordable*, Rome, 2022, in www.fao.org/3/cc0639en/cc0639en.pdf, p. 1 et seq., which reports how those in the world affected by malnutrition rose to 828 million in 2021, as well as the *Global Report on Food Crises 2022 of the World Food Programme*, p. 6 et seq., in https://docs.wfp.org/api/documents/WFP-0000138913/download/?_ga=2.213940823.1777105945.1670256039-1287649455.1669715197.

5. Far from considering the right to safe and quality food in terms of hygiene, health

based on the recognition of the right to food as a fundamental human right⁶.

At universal level, the 1966 United Nations International Covenant on Economic, Social and Cultural Rights⁷ (hereinafter ICESCR) recognises, in Article 11 par. 1, the right “to an adequate standard of

and nutrition (food safety and quality) to be of lesser importance, here we will merely analyse the aspects related to food security, which, as stated in the Rome Declaration on Food Security and, above all, in the *World Food Summit Plan of Action* by the FAO (Rome, 13 1996: see www.fao.org/3/w3613e/w3613e00.htm), «exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life”. On this point, see A. Orford, *Food Security, Free Trade, and the Battle for the State*, in «*Jour. Int. Law Int. Rel.*», 2015, p. 2 et seq.

6. See A. Ligustro, *Diritto al cibo e sovranità alimentare nella prospettiva dell'organizzazione mondiale del Commercio*, in «*Dir. pubbl. comp. eur.*», 2019, p. 394 et seq., reminding how the universalisation of the guarantee of the right to food as a fundamental human right is countered at the level of state policies by the claim of “food sovereignty”, which can be achieved through the regulation of agrifood policies at international level, so as to ensure fair distribution and accessibility of food resources. On this subject, see also A. Azzariti, *The Right to Food Sovereignty in International Law*, in «*Ordine internazionale e diritti umani*», 2021, p. 990 et seq.

7. International Covenant on Economic, Social and Cultural Rights, adopted by the General Assembly of the United Nations with Resolution no. 2200A (XXI) of 16 December 1966, which came into force on 3 January 1976. Currently, 171 States are party to the Covenant, including Italy, which ratified it on 15 September 1978 (see https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en). On art. 11 of the Pact see G. Kent, *Freedom from Want: The Human Right to Adequate Food*, GUP, Washington, 2005, p. 45 et seq. C. Curtis, *The Right to Food as a Justiciable Right: Challenges and Strategies*, in «*Max Planck Yearbook of United Nations Law Online*», 2007, p. 321 et seq.; S.I. Skogly, *Right to Adequate Food: National Implementation and Extraterritorial obligations*, in «*Max Planck Yearbook of United Nations Law Online*», 2007, p. 354; S. Söllner, *The “Breakthrough” of the Right to Food: The meaning of General Comment No. 12 and the Voluntary Guidelines for the Interpretation of the Human Right to Food*, in «*Max Planck Yearbook of United Nations Law Online*», 2007, p. 398; F. Seatzu, *The UN Committee on Economic, Social and Cultural Rights and the Right to Adequate Food*, in «*Anuario Español de Derecho Internacional*», 2011, p. 572 et seq.; C. Ricci, *Il diritto a un cibo sicuro nel diritto internazionale. Spunti di riflessione*, Aracne, Roma, 2012, p. 21 et seq. C. Morini, *Il diritto al cibo nel diritto internazionale*, in «*Rivista di diritto alimentare*», 2017, p. 36. On the recent practice of the United Nations General Assembly and the United Nations Human Rights Council on the right to food see C. Di Turi, *Il diritto all'alimentazione nell'ordinamento giuridico internazionale*, Editoriale Scientifica, Napoli, 2021, p. 43 et seq.

living for himself and his family, *including adequate food*” (italics added).

In the second paragraph of the same article, the States committed to recognising the “*fundamental right of everyone to be free from hunger*”, adopting the necessary measures to improve methods of production, conservation and equitable distribution of food resources, taking into account the needs of importing and exporting States.

From the wording of these provisions, two elements of particular significance emerge.

First of all, par. 2 qualifies the right to be free from hunger as “fundamental”. This expression refers to the right to survival, which is the basic component of the right to food, expressly attributing it “fundamental” nature: States are obliged to take practical measures to ensure that available food resources are fairly distributed in order to guarantee the survival of all⁸.

Secondly, par. 1 does not merely recognise the right to food in general terms, but refers to it with the term “adequate food”

8. In General Comment no. 12 “The right to adequate food (art. 11)”, E/C.12/1999/5, issued by the Committee on Economic, Social and Cultural Rights (ESCR Committee) on 12 May 1999 (at <https://digitallibrary.un.org/record/1491194>), discussed in more detail below, it was clarified, in point 6, that States have a “core obligation” under article 11 par. 2 of the Covenant to take action against hunger, even in the presence of “natural or other disasters”: States are therefore obliged to ensure access to the “minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger”. On the genesis of General Comment no. 12 see. F. Seatzu, *The UN Committee on Economic, Social and Cultural Rights*, cit., p. 575 et seq., who also points out how the General Comment clearly distinguishes between “the right to adequate food” and “the right to be free from hunger”, although without explicitly clarifying the criteria for determining the content of obligations of States (p. 587). On this point see also S. Söllner, *The “Breakthrough” of the Right to Food*, cit., p. 403, according to which, while not explicitly stating the meaning of “core content”, the ESCR Committee’s General Comment no. 3 identifies “core obligations” as those obligations aimed at ensuring “at the very least, minimum essential levels” of defence of every right. On the existence of obligations to preserve the minimum essential levels of protection of the right to food, based on the principle of equality and non-discrimination, even in situations of economic-financial crisis see M. Fasciglione, *La tutela del diritto all'alimentazione in situazioni di crisi economico-finanziaria: alcune riflessioni*, in “*Dir. um. dir. int.*”, 2014, p. 448 et seq.

without, however, qualifying it as “fundamental”. The presence of the adjective “adequate” alongside the right to food, however, denotes the intention to include more articulate and additional content than the fundamental right to food for the purpose of survival, mentioned in paragraph 2⁹.

Even within the ICESCR, therefore, a distinction seems to be drawn between food security, understood as food security related to the right to food in terms of quantity, and food safety, which refers to the quality and characteristics of foodstuffs.

Although both these meanings of the right to food are mentioned in art. 11 of the ICESCR, only in relation to the right to be free from hunger is the term “fundamental” used.

Although both the right to be free from hunger (art. 11, par. 2) and the right to adequate food (art. 11, par. 1) are included in the list of economic, social and cultural rights protected by the ICESCR, it can therefore be inferred that there is a ranking of guarantees linked to the right to food¹⁰.

The attribution of the “fundamental” character to a right indicates a desire to elevate it to the status of an absolute right, which is subject neither to the logic of balancing it against other interests that do not possess the same nature, nor to the possibility of exceptions or compression¹¹.

9. In *General Comment* no. 12, cit., point 7, the ESCR Committee stressed that the notion of “adequate” food, characterised by “*prevailing social, economic, cultural, climatic, ecological and other conditions*”, is related to that of “sustainability”, which concerns the possibility of access to food also for future generations. According to the ESCR Committee, the right to adequate food also includes the fulfilment of “dietary needs” (which imply dietary regimes suitable for healthy physical and mental development: see point 9), the prevention of contamination and the care of hygienic conditions, as well as the respect of “cultural or consumer acceptability” (see point 11). On the notion of adequate food see also C. Ricci, *Contenuti normativi del diritto a un cibo «adeguato» a livello internazionale*, in C. Ricci (a cura di), *La tutela multilivello del diritto alla sicurezza e qualità degli alimenti*, cit., p. 33 et seq., and Id., *Il diritto a un cibo sicuro nel diritto internazionale*, cit., p. 21 et seq.

10. Cf. S. Söllner, *The “Breakthrough” of the Right to Food*, cit., p. 403, which refers to “two different levels of core provisions”.

11. See I. Tani, *L'evoluzione del diritto a un'alimentazione adeguata nel diritto internazionale. Riflessioni a margine della sentenza Lhaka Honhat*, in «Ordine internazionale e diritti umani», 2020, p. 965. The consideration of the right to food as

In this way, justified by its link to the fundamental right to health and life¹², and constituting an inalienable prerequisite thereof, the

a fundamental right was already contemplated in article 25 of the Universal Declaration of Human Rights of 1948 (see for all M. Gestri (a cura di), *Dalla Dichiarazione Universale alla Carta di Milano*, Mucchi, Modena, 2015, p. 7 et seq.), which envisages that “[e]ach individual has the right to a standard of living that is sufficient to guarantee their own health and well-being and those of their family, with particular regard to food [...]” (a similar formulation is also found in the Cairo Declaration on Human Rights in Islam of 1990, which in Art. 17, lett. c, protects the “right of the individual to a life of dignity which allows them to provide for all their own needs and the needs of those that depend on them, including food [...]”), having to distinguish between economic, social and cultural rights and civil and political rights only in the subsequent International Covenants of 1966. The fundamental and absolute nature of the right to food from a quantitative point of view appears is not invalidated by the observation that it has not been expressly recognised in the constitutional charters of many states (including Italy) and in the Charter of Fundamental Rights of the European Union (which merely states in Article 34 that “1. The Union recognises and respects the right of access to social security benefits and social services [...] 3. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance to ensure a decent existence for all those who lack sufficient resources, in accordance with the modalities established by EU law and national laws and practices”). Indeed, it cannot be overlooked that it is intrinsically included in the principle of equality, the right to life and social dignity (see F. Alicino, *Il diritto al cibo. Definizione normativa e giustiziabilità*, in «Rivista AIC», no. 3, 2016, p. 2 et seq and 12). For insights into the topic of economic and social rights in national constitutions see S. Söllner, *The “Breakthrough” of the Right to Food*, cit., p. 395; L. Knuth, M. Vidar, *Constitutional and Legal Protection of the Right to Food around the World*, FAO, Roma, 2011; C. Jung, R. Hirschl, E. Rosevear, *Economic and Social Rights in National Constitutions*, in «American Journal of Comparative Law», 2014, p. 1043 et seq.; A. Rinella, H. Okoronko, *Sovranità alimentare e diritto al cibo*, in «Dir. pubbl. comp. eur.», 2015, pp. 108-109, and the contribution of G. Stegher, *La sicurezza alimentare come formante del costituzionalismo ambientale*, in this volume, and the topical study of 2014 of the FAO drawn up by M. Immink, *The Current Status of the Right to Adequate Food in Food Security and Nutrition Policy Designs*, in www.fao.org/3/i3890e/i3890e.pdf. With particular regard to the Italian constitutional order see the introductory essay by L. Califano and the contribution of M. Rubechi, *Tutela dell’ambiente, revisione costituzionale e sicurezza alimentare. Considerazioni a margine della l. cost. n. 1 del 2022*, both in this volume.

12. See *General Comment* no. 6: *Article 6 (Right to Life)*, of the Human Rights Committee (HR Committee) of 30 April 1982, point 5, in <https://www.refworld.org/docid/45388400a.html>, in which it was clarified that art. 6 of the UN International Covenant on Civil and Political Rights in referring to the protection of the “inherent right to life” of every human being, also requires States to adopt measures to eliminate malnutrition. In a similar vein see the more recent *General Comment* no. 36 – *Article 6: Right to Life*, of 3 September 2019, CCPR/C/GC/36, par 26, in <https://www.ohchr.org/en/calls-for-input/general-comment-no-36-article-6-right-life>

right to be free from hunger in art. 11, par. 2, of the ICESCR is released from the traditional conception of social, economic and cultural rights according to which their effective implementation must be measured against the economic resources available to individual states¹³.

It is worth remembering that compliance with the ICESCR is overseen by the Committee on Economic, Social and Cultural Rights (hereinafter ESCR Committee)¹⁴, which also has litigation functions exercised on the basis of communications from individuals and groups complaining of violations committed by States that have ratified the Optional Protocol. However, in its first seven years of operation (considering that the first rulings on contentious cases date back to 2015), no situations specifically concerning the right to food have been brought to the attention of the ESCR Committee¹⁵.

with which the HR Committee highlighted that “[t]he duty to protect life also implies that States parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity. These general conditions may include [...] widespread hunger and malnutrition [...]. The measures called for to address adequate conditions for protecting the right to life include, where necessary, measures designed to ensure access without delay by individuals to essential goods and services such as food [...]”. See also F. Alicino, *Il diritto al cibo*, cit., pp. 4-5.

13. This approach also emerges in the Covenant itself, in art. 2, par. 1, which refers to the duty of each State to take measures, individually and through international cooperation, to progressively implement the rights recognised in the Covenant “to the maximum of its available resources”, and was confirmed by General Comment no. 3, “The Nature of States Parties’ obligations (Art. 2, Par. 1, of the Covenant)”, of 14 December 1990, E/1991/23, par. 10 of the ESCR Committee. See S. Söllner, *The “Breakthrough” of the Right to Food*, cit., pp. 401-402.

14. The ESCR Committee consists of 18 independent experts and monitors the implementation of the International Covenant on Economic, Social and Cultural Rights by the States that are party to the Covenant. It was established by the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, adopted by the United Nations General Assembly by Resolution A/RES/63/117 of 10 December 2008 and came into force on 5 May 2013. The Optional Protocol has been ratified by 26 States (see. <https://indicators.ohchr.org>).

15. See the database available at <https://juris.ohchr.org/BasicSearch>. Marginal references to food are found in very few cases, focused essentially on the right to adequate housing: *López Rodríguez v. Spain*, comm. no. 1/2013, 04 Mar 2016, E/C.12/57/D/1/2013; *Ángela Sario Rodríguez and Ionut-Cosmin Dincă v. Spain*, comm. no. 92/2019, 12 Oct 2021, E/C.12/70/D/92/2019 (decision of inadmissibility); *Asmae Taghzouti et al. v. Spain*,

The right to food has also found protection in other universal covenant instruments, such as the *Food Aid Convention* of 1999¹⁶ and

comm. no. 56/2018, 22 Feb 2021, E/C.12/69/D/56/2018 (decision of inadmissibility); *Ben Djazia et al. v. Spain*, comm. no. 5/2015, 20 Jun 2017, E/C.12/61/D/5/2015; *M. B. B. v. Spain*, comm. no. 079/2018, 15 Oct 2020, E/C.12/68/D/79/2018 (decision of inadmissibility). On the justiciability of the right to food before the ESCR Committee see, for all, C. Courtis, *The Right to Food as a Justiciable Right*, cit., p. 317 et seq. In any case, albeit in an advisory capacity, in the aforementioned General Comment no. 12 “The right to adequate food (art. 11)”, of the ESCR Committee dated 12 May 1999, the right to food was expressly considered indispensable for the enjoyment of all other rights in that it is inextricably linked to human dignity and social justice (see point 4). Recognising the existence of severe and widespread situations of hunger and malnutrition at global level, especially in less developed countries, the ESCR Committee has identified its origin not so much in the lack of food as in the difficulties of access, a problem that is still today – more than 20 years later – extremely persistent (see FAO, *The State of Food Security and Nutrition in the World 2022*, cit., and World Food Programme, *Global Report on Food Crises 2022*, cit.). The ESCR Committee has also defined the scope of the obligations incumbent on States (see also S. Söllner, *The “Breakthrough” of the Right to Food*, cit., pp. 396-397), requiring them to prove that they have made every effort to meet the minimum essential level required to ensure access to minimum food resources for the survival of the people under their jurisdiction. The obligations of States also include ensuring the “adequacy” of food resources, to be achieved “progressively”, in the sense of “as expeditiously as possible” (see par. 14), compatibly with the maximum of available resources (see S.I. Skogly, *The Requirement of Using the ‘maximum of Available Resources’ for Human Rights Realisation: A Question of Quality as Well as Quantity?*, in «Human Rights Law Review», 2012, p. 393 et seq.). States also have a duty to refrain from engaging in or tolerating discrimination in access to food based on ethnicity, gender, language, religion, social origin, opinion and other facts (see point 18), as well as an obligation to provide an environment that facilitates private contributions, also in associated form, to realise the right to adequate food (point 20). To this end, States have a margin of discretion when choosing the most suitable internal strategies and policies, within the limits set by article 11 of the Covenant (on the obligations of States to “respect, protect and fulfil” see also C. Di Turi, *Il diritto all'alimentazione*, cit., p. 62 t seq.). By contrast, in the contentious case law of the HR Committee – which has jurisdiction over violations of the International Covenant on Civil and Political Rights (adopted by UN General Assembly resolution 2200A (XXI) of 16 December 1966 and brought into force on 23 March 1976: 173 States are currently party to the Covenant) under its First Optional Protocol (currently ratified by 117 states: see <https://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-international-covenant-civil-and-political>), as well as, for the status of ratifications, <https://indicators.ohchr.org>) – a number of statements concerning the right to food are identified, linking it with the right to life, the prohibition of inhuman and degrading treatment, the right to freedom and security and the right to respect for human dignity (protected respectively in Articles 6, 7, 9 and 10 of the International Covenant on Civil and Political Rights). See the cases of *Womah mukong v. Cameroon*, com. n. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991, 10 August 1994; *ms. Yekaterina Pavlovna Lantsova v. Russian Federation*, com. no. 763/1997, U.N. Doc. CCPR/C/74/D/763/1997, 15 April 2002.

16. *Food Aid Convention*, signed in London on 13 April 1999, which came into force

the *Food Assistance Convention* del 2012¹⁷, albeit often in relation to the protection of individuals in specific vulnerable situations¹⁸. Consider article 12 of the 1979 New York Convention Against Discrimination Against Women, which requires States who are party to the Convention to ensure adequate nutrition for women during and after pregnancy, articles 24 and 27 of the 1989 New York Convention on the Rights of the Child, in which States undertook to combat malnutrition (art. 24, par. 2, lett. c) and to provide parents with nutritional assistance for their children (art. 27), as well as at. 28 of the 2006 UN Convention on the Rights of Persons with Disabilities, in which States recognised ‘the right to an adequate standard of living for persons with disabilities and their families, including adequate conditions of nutrition [...]’.

Furthermore, even in international humanitarian law there are instruments that take into consideration the protection of the right to food in the context of armed conflicts¹⁹. Consider, for example, the two 1977 Additional Protocols to the Geneva Conventions of 12 August 1949: both Protocol, on the Protection of Victims of International Armed Conflicts, in art. 54, and Protocol II on the Protection of Victims of Non-International Armed Conflicts, in art. 14, introduced, in similar terms, the ban on “starving civilians” as a method of waging war, as well as the ban on “attacking, destroying, removing or rendering inoperative [...] property essential to the survival of the civilian population, such as foodstuffs and the agricultural areas which produce them, crops, livestock [...]”²⁰.

on 1 July 1999. 25 States are currently party to the Convention. The text is available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XIX-41-c&chapter=19&clang=_en.

17. *Food Assistance Convention*, signed in London on 14 April 2012. The text is available at https://treaties.un.org/doc/source/signature/2012/ctc_xix-48.pdf.

18. See the review by G. Kent, *Freedom from Want: The Human Right to Adequate Food*, cit., p. 163 et seq.

19. S. Söllner, *The “Breakthrough” of the Right to Food*, cit., p. 394; L. Cotula, M. Vidar, *The right to adequate food in emergencies*, FAO, Roma, 2003, p. 52 et seq.; K. Mechlem, *Food, Right to, International Legal Protection*, in R. Wolfrum (ed.), *The max Planck Encyclopedia of International Law*, OUP, Oxford, 2008.

20. It should also be noted that article 8 of the Statute of the International Criminal Court also expressly qualifies acts aimed at “intentionally starving civilians as a method of warfare by depriving them of goods essential to their survival [...]” as war crimes.

At regional level, it should be emphasised that within the scope of the Organisation of American States (OAS), the 1988 Protocol additional to the American Convention on Human Rights in the Field of Economic, Social and Cultural Rights (San Salvador Protocol²¹), which, in art. 12, specifically defends the right to “adequate nourishment”²², which guarantees the possibility of enjoying the highest level of physical, emotional and intellectual development, imposing on States the obligation to promote this right and to eliminate malnutrition by improving methods of production, supply and distribution of food resources, including through international cooperation²³.

By contrast, neither the African Charter on Human and Peoples’ Rights nor the European Convention on Human Rights (and its additional protocols) contain specific provisions on the right to food.

21. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (San Salvador Protocol), adopted on 17 November 1988 and brought into force on 16 November 1999 (see www.oas.org/juridico/english/treaties/a-52.html). The Protocol is currently ratified by 18 States (for the status of ratifications see www.oas.org/juridico/English/signs/a-52.html).

22. The San Salvador Protocol also contains further references to the right to food. In particular, art. 15, par. 3, lett. *b*, envisages that “[t]he States Parties hereby undertake to accord adequate protection to the family unit and in particular: [...] To guarantee adequate nutrition for children at the nursing stage and during school attendance years [...]”; art. 17, dedicated to the defence of the elderly, states that “[...] the States Parties agree to take progressively the necessary steps to [...] provide suitable facilities, as well as food and specialized medical care, for elderly individuals who lack them and are unable to provide them for themselves [...]”.

23. Even before the adoption of the San Salvador Protocol, the Inter-American Court and the Inter-American Commission had already enshrined the right to adequate nutrition through extensive interpretations of the right to life envisaged in article 4 of the Convention (“Every person has the right to have his life respected [...]”), introducing by way of case-law the notion of “*vida digna*” (see the recent reconstructions of case-law by I. Tani, *L’evoluzione del diritto a un’alimentazione adeguata*, cit., p. 980 et seq. and C. Di Turi, *Il diritto all’alimentazione*, cit., p. 150 et seq.), of the right to ownership (art. 21) and the right to development (art. 26: “The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter [...]”: see the recent ruling by the Inter-American Court of human rights dated 6 February 2020, relating to the case on *The Indigenous Communities of The Lhaka Honhat (our Land) Association v. Argentina*, commented by I. Tani, *L’evoluzione del diritto a un’alimentazione adeguata*, cit., p. 982 et seq.).

However, the significance of the right to food has been recognised through evolutionary interpretative guidelines in both the African²⁴ and ECHR²⁵ systems.

The international community has also seen, especially in recent years, the proliferation of soft law documents concerning the right to food²⁶. While it is not possible to mention them in their entirety, it seems useful to recall at least the aforementioned FAO Rome Declaration on Food

24. In particular, the African Commission, in the case concerning the Ogoni community, *Social and Economic Rights Action Center & the Center for Economic and Social Rights v. Nigeria*, com. no. 155/96, 27 May 2002, acknowledged, in par. 64 et seq., that the right to food is implicitly included in the African Charter on Human and Peoples' Rights and is inseparably linked to the dignity of human beings, the right to life, health and development (on the case see F. Coomans, *The ogoni Case Before the African Commission on Human and Peoples' Rights*, in «International and Comparative Law Quarterly», 2003, p. 749 et seq.; D. Inman, S. Smis, *Rewriting the Social and Economic Rights Action Centre and the Centre for Economic and Rights v. Nigeria: Pushing Indigenous Peoples' Rights in Africa Forward*, in E. Brems, E. Desmet (eds.), *Integrated Human Rights in Practice: Rewriting Human Rights Decisions*, Elgar, Northampton, 2017, p. 401 et seq.). See also the subsequent case examined by the African Commission, *Centre for minority Rights Development (Kenya) and minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, com. no. 276/2003, 4 February 2010; as well as the ruling of the African Court in the Ogiek case, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, com. no. 6/2012, 26 May 2017 (the case, which received a lot of attention in doctrine, was commented on by R. Roesch, *The ogiek Case of the African Court on Human and Peoples' Rights: Not So much News After All?*, in «EJIL:Talk!», 2017; C. Focarelli, *Indigenous Peoples' Rights in International Law: The ogiek Decision by the African Court of Human and Peoples' Rights*, in A. Di Blase, V. Vadi (a cura di), *The Inherent Rights of Indigenous Peoples in International Law*, Roma Tre Press, Roma, 2020, p. 175 et seq.; C. Di Turi, *Il diritto all'alimentazione*, cit., p. 161 et seq.; see also the perplexity of S. Nasirumbi, *Revisiting the Endorois and ogiek Cases: Is the African Human Rights mechanism a Toothless Bulldog?*, in «African Yearbook of International Law», 2020, p. 497 et seq.).

25. Notably, the Strasbourg Court has linked the right to food to the right to life (art. 2 ECHR) and the ban on torture and inhuman and degrading treatment (art. 3 ECHR). See, e.g., *Kadiķis v. Latvia* (no. 2), app. no. 62393/00, 4 May 2006, par. 55 (“*La Cour estime que l’obligation des autorités nationales d’assurer la santé et le bien-être général d’un détenu implique, entre autres, l’obligation de le nourrir convenablement*”); *Stepuleac v. moldova*, app. no. 8207/06, 6 November 2007, par. 55 (“*The Court can but note the clear insufficiency of food given to the applicant, which in itself raises an issue under Article 3 of the Convention*”); *Centre For Legal Resources on behalf of Valentin Câmpeanu v. Romania*, app. no. 47848/08, 17 July 2014, par. 143, in which reference is made to a “*lack of [...] appropriate food*”; as well as the recent sentence *Tomov and others v. Russia*, appl no. 18255/10, 63058/10, 10270/11, 73227/11, 56201/13, 41234/16, 9 April 2019, par. 188.

26. See C. Di Turi, *Il diritto all'alimentazione*, cit., p. 180 et seq.

Security of 13 November 1996²⁷ and the UN Millennium Declaration of 2000²⁸, in which the States proposed to achieve the (unmet) goal of halving the percentage of people suffering from hunger. The goal of ending hunger by achieving food security also appears in the United Nations General Assembly Resolution no. 66/288, “*The future we want*”, adopted on 27 July 2012 at the end of the Rio Conference on sustainable development, and was then included among the 17 Sustainable Development Goals (SDGs) of the United Nations 2030 Agenda²⁹.

Furthermore, in 2004, the FAO Council adopted the Guidelines for the progressive realisation of the right to food within the context of national food security³⁰, in order to provide States with a tool that could be used as a starting point to establish how to implement the right to food at the domestic level, both individually and through international cooperation, proposing measures and actions to be undertaken to guide national policies, albeit without imposing specific constraints.

3. The complicated balance between right to food and liberalisation of trade in the renegotiation of the WTO Agreement on Agriculture

In recent years, the debate on balancing the need for food security and the implementation of the right to food with the demands for the

27. See above, par. 2.

28. *United Nations millennium Declaration*, adopted by the General Assembly of the United Nations in Resolution no. 55/2 of 8 September 2000, par. 19: “*We resolve further: To halve, by the year 2015, the proportion of the world’s people whose income is less than one dollar a day and the proportion of people who suffer from hunger [...]*” (see. <https://www.ohchr.org/en/instruments-mechanisms/instruments/united-nations-millennium-declaration>). On the Declaration, see G. Venturini, *Diritto allo sviluppo e obiettivi del millennio nella prospettiva dei diritti umani*, in A. Ligustro, G. Sacerdoti (a cura di), *Problemi e tendenze del diritto internazionale dell’economia*, Editoriale Scientifica, Napoli, 2011, p. 175 et seq.

29. Particularly SDG no. 2 “*End hunger, achieve food security and improved nutrition and promote sustainable agriculture*”. See also <https://sdgs.un.org/2030agenda>.

30. FAO Council, *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security*, adopted in the 127th session of the FAO Council, November 2004, www.fao.org/docrep/meeting/009/y9825e/y9825e00.HTM.

liberalisation of international trade has been exacerbated by the well-known events of the pandemic and war³¹.

One of the areas in which this contrast manifested itself in heated terms was the renegotiation of the 1994 WTO Agreement on Agriculture³².

31. In general terms, the relationship between food safety and trade in agrifood products can be approached from two different perspectives. Notably, some States support a greater liberalisation of trade, adapting national policies on food safety to the dynamics of the global market; others, on the other hand, consider domestic policies to guarantee food safety as prevalent with respect to market logic. On these two different approaches see, also in terms of historical reconstruction, T.P. Stewart, S. Manaker Bell, *Global Hunger and the World Trade Organization: How the International Trade Rules Address Food Security*, in «Penn State Journal of Law & International Affairs», 2015, p. 113 et seq.; M.E. Margulis, *The Forgotten History of Food Security in multilateral Trade Negotiations*, in «World Trade Review», 2017, p. 43 et seq.; J. Scott, *The Future of Agricultural Trade Governance in the World Trade organization*, in «International Affairs», 2017, p. 1175 et seq., as well as A. Lupone, *Balancing Basic Human Needs*, cit., p. 103 et seq. See also A. Ligustro, *Diritto al cibo e sovranità alimentare*, cit., p. 399, which identifies in this sector a “classic case of fragmentation and incoherence of international law”, due to the contrast between the UN’s strategic goals of food sovereignty and the WTO’s goals of liberalisation, which tend to favour the most industrialised states and the most competitive producers over economically weaker countries and small producers.

32. WTO Agreement on Agriculture (AoA), negotiated in the Uruguay Round, signed in April 1994 and brought into force on 1 January 1995. For the official text of the AoA see www.wto.org/english/docs_e/legal_e/14-ag.pdf. On its current renegotiation please refer to F. Cazzini, E.A. Rossi, *Recent Developments on the Relevance of Food Security and Right to Food in WTO Latest Agriculture Negotiations*, in «International Order and Human Rights», 2022, p. 566 et seq. On the need to take food security aspects into consideration during the renegotiation of the AoA see, in particular, the reflections of the UN Special Rapporteurs on the Right to Food that have succeeded one another since the establishment of this figure in 2000 (for the 2000-2008 mandate, J. Ziegler, *The right to food. Report by the Special Rapporteur on the right to food*, E/CN.4/2001/53, 7 February 2001; J. Ziegler, C. Golay, C. Mahon, S.-A. Way, *The Fight for the Right to Food. Lessons Learned*, Springer, London, 2011, p. 68 et seq.; for the 2008-2014 mandate, O. De Schutter, *A human rights approach to trade and investment policies*, in *The Global Food Challenge. Towards a human rights approach to trade and investment policies*, Institute for Agricultural and Trade Policy, 2008, p. 14 et seq.; Id., *International Trade in Agriculture and the Right to Food*, in O. De Schutter, K.Y. Cordes (eds.), *Accounting for Hunger. The Right to Food in the Era of Globalisation*, Hart, London, 2011, p. 137 et seq.; for the 2014-2020 mandate, H. Elver, *Developments of the Right to Food in the 21st Century: Reflections of the United Nations Special Rapporteur on the Right to Food*, in «UCLA Journal of International Law and Foreign Affairs», 2016, p. 1 et seq.; for the current mandate see M. Fakhri, *The right to food in the context of international trade law and policy. Interim report of the Special Rapporteur on the right to food*, A/75/219,

This Agreement, as can be seen from its Preamble, was entered into with the aim of laying the foundations for the start of a process of reforming the trade of agrifood products through progressive reductions in agricultural subsidies, correcting and preventing distortions in world agricultural markets, and making the 1947 WTO GATT discipline “*more operationally effective*”³³.

The main contents of the AoA are divided into three areas, which include the improvement of access to the market through the gradual reduction of barriers at borders and minimum access commitments for certain product categories (arts. 4-5)³⁴, the reduction the differentiated reduction of domestic support according to the type of aid granted (arts. 6-7)³⁵, as well as the reduction of export subsidies (arts. 8-11).

22 July 2020; Id., *A History of Food Security and Agriculture in International Trade Law, 1945-2017*, in J.D. Haskell, A. Rasulov (eds.), *New Voices and New Perspectives in International Economic Law*. Special Issue “European Yearbook of International Economic Law”, 2020, p. 55 et seq.; M. Fakhri, *A Trade Agenda for the Right to Food*, in “Development”, 2021, p. 212 et seq.).

33. The *GATT (General Agreement on Tariffs and Trade)* of 1947 was the main instrument for regulating international trade until its institutionalisation in the World Trade Organisation (WTO), which came into being in 1994 with the Marrakech Agreement after a long series of negotiations between the GATT member states, concluded with the Uruguay Round (1986-1994). The WTO is based on the Marrakesh Agreement and its annexes, which include the GATT 1994 (General Agreement on Tariffs and Trade and other Multilateral Agreements on Trade in Goods – ann. I A), the *GATS (General Agreement on Trade in Services - ann. I B)*, the *TRIPs (Agreement on Trade Related Aspects of Intellectual Property Rights)* other annexes related to the mechanisms the mechanism used to settle disputes (annex II), the trade policy analysis (annex. III) and other multilateral trade agreements (annex IV). For some recent references on WTO law see B. Kieffer, C. Marquet, *L'organisation mondiale du commerce et l'évolution du droit international public. Regards croisés sur le Droit et la gouvernance dans le contexte de la mondialisation*, Bruylant, Bruxelles, 2020, p. 67 et seq.; P. Van Den Bossche, D. Prévost, *Essentials of WTO Law*, CUP, Cambridge, 2021, p. 10 et seq.

34. Market access has been dominated by a process of “tariffication” of protective measures of national industries, converting non-tariff barriers into customs duties to increase the level of transparency and predictability. “Tariffication”, according to A. Ligustro, *Diritto al cibo e sovranità alimentare*, cit., p. 405, represents a prerequisite for the liberalisation of agricultural markets, pursued through the progressive and diversified reduction of duties.

35. In particular, the aids have been categorised into three different “boxes” according to their potential impact on the market structure: the amber box, concerning measures that are likely to distort the market and therefore subject to greater reduction commitments; the blue box, concerning measures that are exempt from reduction commitments under

The AoA has been the subject of a reform process for more than twenty years – starting from the Doha Round³⁶–, envisaged by its art. 20, lett. c), within the scope of which the States undertook also to consider non-trade aspects³⁷, such as the special and differentiated treatment of developing countries and, above all, the other issues and aims mentioned in the Preamble of the Agreement, among which “food security”³⁸.

In this context, delicate questions have arisen concerning certain salient provisions that can make a decisive contribution to achieving a balancing point between the need to liberalise and promote trade with the need to ensure sufficient quantities of food resources, also considering the diversification of the various negotiating positions expressed by the different coalitions of states within the WTO³⁹.

certain conditions; and, lastly, the green box. The green box includes aid in the field of public services, including the purchase of food for food security reasons and disaster relief programmes, which are generally considered to be WTO-compatible and therefore completely excluded from reduction commitments. On this aspect, see J. McMahon, *The WTO Agreement on Agriculture. A Commentary*, OUP, Oxford, 2006, p. 69 et seq.; B. O'Connor, *L'Accordo sull'agricoltura*, in G. Venturini (a cura di), *L'organizzazione mondiale del commercio*, Giuffrè, Milano, 2015, p. 139 et seq.

36. The Doha Round is the latest round of trade negotiations, including those on agriculture, between WTO members, launched in November 2001 with the fourth Ministerial Conference in Doha (Qatar). According to the Ministerial Declaration of 14 November 2001 (see www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm), the common goal is to reform the international trade system, reducing trade barriers and revising existing regulations. The negotiations are coordinated by the Trade Negotiations Committee and by the WTO's thematic committees, including the WTO Committee on Agriculture (see below).

37. J. Scott, *The Future of Agricultural Trade Governance*, cit., p. 1175.

38. On this matter, the Preamble of the AoA states that “[n]oting that commitments under the reform programme should be made in an equitable way among all Members, having regard to non-trade concerns, *including food security* [...] (italics added). See J. McMahon, *The WTO Agreement on Agriculture*, cit., p. 19 et seq. and 192 et seq.; B. O'Connor, *L'Accordo sull'agricoltura*, cit., pp. 148-149; C. Di Turi, *Il diritto all'alimentazione*, cit., p. 218 et seq.

39. Among the various groups of states that collectively took prominent positions during the negotiations are, for example, the G-10, consisting of states that attach considerable importance to non-strictly trade interests, the G-20, which groups together states with more reformist and liberalist orientations, and the G-33, within which flexible positions for developing countries and specific foodstuffs are preferred. For a complete overview of the groups active in the negotiations see the map of negotiating groups in the Doha negotiations, see the *map of negotiating groups in the Doha negotiations*,

In particular, negotiations are still aimed at adequately regulating certain aspects, such as public stockholdings for food security purposes (PSPs), domestic subsidies and export restrictions.

These issues were explicitly included as points⁴⁰ for further discussion by the WTO Committee on Negotiations on Agriculture⁴¹, which adopted a Draft Negotiation Text⁴² on 29 July 2021, with the intention of laying the foundation for the renegotiation of the AoA. This document was then updated, taking into account reactions to the July 2021 Draft, with the Revised Draft of 23 November 2021⁴³.

As regards PSPs, defined in Annex 2 of the AoA as “*Expenditures (or revenue foregone) in relation to the accumulation and holding of stocks of products which form an integral part of a food security programme identified in national legislation*” including also “*government aid to private storage of products as part of such a programme*”, it should be pointed out that they are generally allowed (included in the green box), already under the current AoA, as long as operations are conducted in a transparent manner and in compliance with objective and publicly accessible criteria: furthermore, governments are legitimised to purchase, store and distribute food

in www.wto.org/english/tratop_e/dda_e/negotiating_groups_maps_e.htm?group_selected=GRP009.

40. The topics of negotiation were divided into seven areas, including: domestic support, market access, export competition, export restrictions, the cotton sector, the special safeguard mechanism and public stockholding for food security purposes. See M. Cardwell, F. Smith, *Renegotiation of the WTO Agreement on Agriculture: Accommodating the New Big Issues*, in «The International and Comparative Law Quarterly», 2013, p. 865 et seq.; M.E. Margulis, *The Forgotten History of Food Security*, cit., p. 27; J. Scott, *The Future of Agricultural Trade Governance*, cit., p. 117.

41. The WTO Committee on Agriculture oversees the implementation of the AoA, monitors the fulfilment of the commitments undertaken by States, and promotes discussion on issues of common concern, including those within the ongoing renegotiation process. See www.wto.org/english/tratop_e/agric_e/ag_work_e.htm.

42. WTO Committee on Agriculture, Draft Chair Text on Agriculture (*Draft Negotiation Text*), JOB/AG/215, 29 July 2021.

43. WTO Committee on Agriculture, Draft Chair Text on Agriculture (*Revised Draft*), TN/AG/50, 23 November 2021. The changes introduced with the Revised Draft are the result of five meetings held between July and November 2021 (on 7, 8, 20 and 21 September, 14, 15, 28 October and 15 November: see also documents JOB/AG/217, JOB/AG/221, JOB/AG/222 and JOB/AG/223) and further meetings in small groups.

resources under PSPs as long as they act exclusively for the purposes of “*food security*”⁴⁴, also with regard to the predetermination of the volumes that can be purchased⁴⁵.

The main concern related to the use of these instruments is the conflict with WTO rules on agricultural subsidies, which could hinder the ability to implement food purchasing programmes when governments set prices (administered prices), and which could conceal forms of public subsidies in favour of the producers from whom foodstuffs are purchased, with the consequent possibility of competitive distortions (strongly opposed by the most industrialised countries)⁴⁶.

Over the past few years, the difficulties in settling this conflict have manifested themselves on several occasions, without finding a definitive point of convergence between the States.

This is confirmed by the Ministerial Decision of 7 December 2013⁴⁷, adopted in the framework of the Bali Ministerial Conference⁴⁸, in which an interim ‘peace clause’ was agreed upon, containing the commitment

44. Cf. C. Haberli, *Do WTO Rules Improve or Impair the Right to Food*, in J. McMahon-M.G. Desta (eds.), *Research Handbook in the WTO Agriculture Agreement: New and Emerging Issues in International Agricultural Trade Law*, Elgar, Cheltenham, 2012, p. 79 et seq.

45. AoA, ann. 2 (*Practice*).

46. See annex 2 to AoA, which states that purchases “*shall be made at current market prices and sales from food security stocks shall be made at no less than the current domestic market price for the product and quality in question*”. PSPs were also the subject of a controversy involving India in 2013, which, through the “Right to Food Act”, implemented a programme of assistance to the population with public distribution of food products purchased by the public authorities from small producers at administered prices and distributed at much lower prices to people in need. These measures were considered, especially by the US government, to be contrary to the provisions of the AoA on PSPs, as “implicit subsidies” in excess of the pre-established levels, in breach of the commitments undertaken by the States (on the case see, for all, S. Narayanan, *The National Food Security Act vis-à-vis the WTO Agreement on Agriculture*, in «Economic and Political Weekly», no. 5, 2014, p. 40 et seq.; G. Kripke, *Food fight: What the debate about food security means at the WTO*, in «La Revue canadienne des études sur l'alimentation», 2015, pp. 78-79; B. O'Connor, *L'Accordo sull'agricoltura*, cit., p. 149; J. Scott, *The Future of Agricultural Trade Governance*, cit., pp. 1177-1178).

47. See www.wto.org/english/thewto_e/minist_e/mc9_e/mc9_e.htm.

48. Ministerial decision of Bali of 7 December 2013, *Public stockholding for food security purposes*, WT/MV. IN(13)/38, WT/L/913, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/wt/min13/38.pdf>

of States to refrain from submitting the compatibility of existing PSPs to the WTO dispute settlement mechanism, while maintaining notification, transparency, consultation and surveillance obligations in the implementation of PSPs, with a view to reaching a final solution by the planned Ministerial Conference in Buenos Aires in 2017⁴⁹.

In 2015, before the expiry of the commitment made in the 2013 Decision, the opportunity to find a “permanent solution” on PSPs failed. Indeed, although the States celebrated the important milestone of the elimination of subsidies for the export of agrifood products with Ministerial Decision no. 980 of 19 December 2015⁵⁰, adopted in the framework of the Nairobi Ministerial Conference⁵¹, with the simultaneous Ministerial Decision no. 979⁵² they acknowledged that it was impossible to resolve the issue of PSPs, agreeing to continue negotiations with a view to finding a permanent solution.

Despite the importance of PSPs in combating food shortages, States have not yet been able to strike a balance between the demands of developing countries, which are in favour of widespread use of PSPs to ensure food security, and those of States with more developed economies that fear negative effects on trade⁵³.

In the Revised Draft of November 2021, it was noted that not much progress had been made on the issue of PSPs (point 1.9), so much so

49. See the material made available by the WTO and published at [https://www.wto.org/english/thewto_e/minist_e/mc11_e/mc11_e.htm#:~:text=The%20Eleventh%20ministerial%20Conference%20\(mC11,minister%20Susana%20malcorra%20of%20Argentina](https://www.wto.org/english/thewto_e/minist_e/mc11_e/mc11_e.htm#:~:text=The%20Eleventh%20ministerial%20Conference%20(mC11,minister%20Susana%20malcorra%20of%20Argentina)

The outcomes of the conference were considered a failure (on this point see G.M. Ruotolo, *L'attività dell'OMC nel biennio 2016-2017 e il fallimento della Conferenza ministeriale di Buenos Aires*, in «Com. int.», 2017, p. 655 et seq.; G. Sacerdoti, *Lo stallo dell'Organizzazione Mondiale del Commercio davanti alla sfida di Trump: difficoltà passeggera o crisi del multilateralismo?*, in «Dir. pubbl. comp. eur.», 2018, p. V et seq).

50. Ministerial decision of 19 December 2015, *Export Competition*, WT/MIN(15)/45 – WT/L/980, in www.wto.org/english/thewto_e/minist_e/mc10_e/l980_e.htm.

51. www.wto.org/english/thewto_e/minist_e/mc10_e/mc10_e.htm.

52. Ministerial decision of 19 December 2015, *Public Stockholding for Food Security Purposes*, WT/MIN(15)/44 – WT/L/979, in https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=225905,128899,128777,121384&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True

53. See on this point the WTO Briefing Note of 13 December 2021, at www.wto.org/english/thewto_e/minist_e/mc12_e/briefing_notes_e/bfagric_e.htm.

that it was considered the most complex aspect of the negotiations (point 8.3).

Indeed, all the proposals that emerged during the negotiations⁵⁴, including those of a provisional nature⁵⁵, were either resisted or not sufficiently agreed upon by the States, which merely recommitted themselves to intensifying negotiations on PSPs⁵⁶.

Food security can also be sought by States through domestic support to operators in the sector. Although the gradual reduction of subsidies is included among the long-term goals (see art. 20 AoA)⁵⁷, the Revised Draft of November 2021, in point 2.2, emphasises that the regulation of domestic support has to be balanced with the pursuit of general political goals, such as food security⁵⁸. On the other hand, the

54. The States of the African Group proposed simplifying the use of *PSPs* by developing countries, removing certain restrictions of the *AoA* (see *Revised Draft*, point 8.6, as well as the document JOB/AG/204 dated 12 July 2021 and Report IISD of August 2021 “*Procuring Food Stocks Under World Trade Organization Farm Subsidy Rules: Finding a Permanent Solution*”, p. 8, in <https://www.iisd.org/system/files/2021-08/food-stocks-wto-farm-subsidy-rules.pdf>). The industrialised countries of the G33, which have made a long series of proposals since 2012 (for a review see the IISD Report of August 2021, cit., p. 5), have recently proposed to confirm the Bali “peace clause” (see above), calling for information, transparency and notification obligations if certain limits are exceeded and introducing some exemptions for food aid exports (see documents JOB/AG/214 dated 28 July 2021 and JOB/AG/214/Rev.1 dated 16 September 2021).

55. The proposal of the Committee on Agriculture – referred to in the July 2021 Draft – to extend the Bali Interim Solution provisionally to the Least Developed Countries and to Developing Countries, possibly subject to specific approval of the PSP by the Committee itself, has been criticised for its tendency to make unjustified distinctions between Developing Countries (see Revised Draft point 8.5).

56. See point 45 of the *Draft ministerial Decision on Trade, Food and Agriculture*, annexed to the *Revised Draft*, cit.

57. See the cited Nairobi Decision of 2015. Developing Countries tend to be critical of restrictions to subsidies for agriculture (see S. Das, *Food Security Amendments to the WTO Green Box: A Critical Re-Examination*, in «*Journal of World Trade*», 2016, p. 1111 et seq.), in contrast to the current WTO framework, under which, with a few exceptions, they are not allowed because they are likely to affect competition, disadvantaging economic operators in non-subsidised states.

58. The negotiation of the AoA in this regard contrasts the position of exporting States – especially those of the Cairns Group, made up of a group of 19 developed and developing countries from six continents, which define themselves as “agricultural fair-trading” (see www.cairnsgroup.org) and representing 27% of the world’s agricultural exports – which favour more drastic domestic support reduction commitments than that of the states with emerging economies which propose greater flexibility in subsidy

agrifood market has frequently been protected by government support interventions, also because of certain characteristics that characterise its economic structure, such as the incidence of natural and climatic events and the low mobility of production factors⁵⁹.

In order to remedy situations of food shortages, States can also use quantitative restrictions on the export of foodstuffs to ensure that they are destined for consumption within the domestic territory⁶⁰.

Conversely, States whose food resources are predominantly dependent on imports may be adversely affected by export restrictions imposed by other States on companies operating domestically, creating risks for the availability of sufficient food resources in importing countries⁶¹. To this end, Article XI:1 of the GATT generally provides

reductions, leveraging article 6.2 of the AoA. On the debate between the two positions, see points 2.4 and 2.5 of the *Revised Draft*. For more details on the positions that emerged during the negotiations with regard to domestic support see the “*Framework for Negotiations on Domestic Support*” dated 23 January 2020, JOB/AG/177, of Argentina, Australia, Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Indonesia, Malaysia, New Zealand, Pakistan, Paraguay, Peru, Philippines, Thailand, Ukraine, Uruguay and Vietnam (<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/Jobs/AG/177.pdf&open=True>), the *Submission of the United States of 19 February 2020 “Notification of Select Domestic Support Variables in the WTO”*, JOB/AG/181 (<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/Jobs/AG/181.pdf&open=True>), as well as A. Regmi, R. Schnepf, N.M. Hart, *Reforming the WTO Agreement on Agriculture. Report of the Congressional Research Service*, 20 July 2020, pp. 14-15, available at <https://sgp.fas.org/crs/misc/R46456.pdf>.

59. See A. Ligustro, *Diritto al cibo e sovranità alimentare*, cit., p. 401.

60. See M. Cardwell, F. Smith, *Renegotiation of the WTO Agreement on Agriculture*, cit., pp. 868-869. This type of measure were frequently used, also recently, to cope with food shortages during the pandemic period: see on this point WTO Information Note, *Export Prohibitions and Restrictions*, 23 April 2020; A. Regmi, R. Schnepf, N.M. Hart, *Reforming the WTO Agreement on Agriculture*, cit., p. 13; F. Cazzini, *L’incidenza del Covid-19 sul settore agroalimentare*, cit., p. 143 et seq.; W.J. Martin, J.W. Grauber, *Trade Policy and Food Security*, in R. Baldwin, S.J. Evenett (eds.), *Covid-19 and Trade Policy: Why Turning Inward Won’t Work*, CEPR, London, 2020, p. 89; I. Espa, *Sicurezza alimentare e commercio internazionale ai tempi del Covid-19*, in P. Acconci, E. Baroncini (a cura di), *Gli effetti dell’emergenza Covid-19 su commercio, investimenti e occupazione*, cit., p. 123 et seq.; G. Adinolfi, *A tale of two crises: quali risposte dell’organizzazione mondiale del Commercio alla pandemia da Covid-19?*, in P. Acconci, E. Baroncini (a cura di), *Gli effetti dell’emergenza Covid-19*, cit., p. 68 et seq.; J. Pauwelyn, *Export Restrictions in Times of Pandemic: options and Limits Under International Trade Agreements*, in «*Journal of World Trade*», 2020, p. 727 et seq.

61. R. Cardwell, W.A. Kerr, *Can Export Restrictions be Disciplined Through the World*

for a ban on export restrictions – although Article XI:2(a) envisages that foodstuffs may be subject to temporary and direct restrictions to deal with critical and contingent situations – and article 12 of the AoA requires Member States wishing to introduce new export bans or restrictions to take due account of the consequences for the food security of importing countries (lett. a) and to notify the Committee on Agriculture in writing in advance, consulting any other Member State with a substantial interest as an importer (lett. b)⁶². In this way, food safety is expressly prioritised over the possibility of restricting or banning exports⁶³, although doubts as to how to prove that food security has been duly taken into account remain⁶⁴.

In this context, emblematic of the bitter debate concerning export restrictions is the issue of exemptions for the purchase of food resources by the World Food Programme (WFP) of the United Nations⁶⁵ for

Trade organisation?, in «The World Economy», 2014, p. 1186 et seq.; S. Murphy, *Food Security and International Trade: Risk, Trust and Rules*, in «Revue canadienne des études sur l'alimentation», 2015, pp. 88-89; M.E. Margulis, *The Forgotten History of Food Security*, cit., p. 26. Although such measures are aimed at ensuring that products subject to export restrictions are available domestically at reduced prices, in actual fact the WTO has pointed out that they can lead to an increase in the consumption of the products in question with a consequent decrease in their availability, as well as to the adoption of similar measures by other States, resulting in a general decline in international supply (see K. Anderson, S. Nelgen, *Trade Barrier Volatility and Agricultural Price Stabilization*, in «World Development», 2011, p. 36 et seq.; I. Espa, *Sicurezza alimentare e commercio internazionale*, cit., p. 127).

62. On this point, see I. Espa, *Sicurezza alimentare e commercio internazionale*, cit., p. 131, who points out that these would be inadequate notification and consultation obligations, in view of the absence of precise terms, the restriction to consultation only at the request of the importing state and the absence of review obligations in the event of unsuccessful consultations. Moreover, WTO states tend to disregard these provisions, also due to the lack of an effective monitoring system by the WTO (see I. Espa, *Sicurezza alimentare e commercio internazionale*, cit., p. 132).

63. Cf. M. Cardwell, F. Smith, *Renegotiation of the WTO Agreement on Agriculture*, cit., p. 893.

64. See point 45 of the *Draft ministerial Decision on Trade, Food and Agriculture*, annexed to the *Revised Draft*, cit.

65. As a UN humanitarian agency, the World Food Programme is committed to providing food assistance to local communities in emergency situations, also through specific development projects. It is financed entirely by voluntary donations and is headed by a 36-member Board of Directors that coordinates a staff of over 20,000 employees worldwide, cooperating in particular with the FAO (Food and Agriculture Organisation), IFAD (International Fund for Agricultural Development) and non-governmental organisations (see <https://it.wfp.org>).

humanitarian purposes. On this issue, most States have recently taken a stance in favour of the WFP initiatives, recognising their importance especially during emergency situations – such as those occurring during pandemics, armed conflicts or natural disasters – in geographical areas where there are already difficulties in accessing sufficient food supplies⁶⁶.

On this subject, also at the last WTO Ministerial Conference (MC12), held in Geneva from 12 to 17 June 2022⁶⁷, the topic of export bans and restrictions was the subject of two measures that confirm its centrality in relation to food safety⁶⁸. These are the Ministerial Declaration on the emergency response to food insecurity⁶⁹ and the Ministerial Decision on exemption from export bans or restrictions on food purchases by the WFP⁷⁰.

The Declaration emphasises the commitment of WTO Member States to adopt measures to facilitate trade, which is considered essential

66. See the Joint Statement of some 80 WTO States of 21 January 2021, see *Joint Statement on agriculture export prohibitions or restrictions relating to the World Food Programme*, WT/L/1109, available at

www.wto.org/english/news_e/news21_e/agri_21jan21_e.htm

in which they expressly recognised the importance of the humanitarian support provided by the WFP, made more urgent in the light of the Covid-19 pandemic, and pledged not to impose bans or restrictions on the export of food products purchased for humanitarian purposes by the WFP. However, despite the convergence in supporting the WFP, there remain some concerns on some aspects on the part of States where food is purchased by the WFP (see points 5.3 and 5.4 of the Revised Draft, cited above).

67. See www.wto.org/english/thewto_e/minist_e/mc12_e/mc12_e.htm.

68. The so-called *Geneva package*, includes measures on fishing subsidies, Covid-19 pandemic response actions, e-commerce and food security. Extensively see the summary *MC12 «Geneva package» - in brief* (available at

https://www.wto.org/english/thewto_e/minist_e/mc12_e/geneva_package_e.htm

17 June 2022, in

https://www.wto.org/english/thewto_e/minist_e/mc12_e/mc12_e.htm

69. WTO, Ministerial Declaration on the emergency response to food insecurity, WT/MIN(22)/28 - WT/L/1139, 17 June 2022, in

<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/28.pdf&Open=True>

70. WTO, Ministerial Decision on world food programme food purchases exemption from export prohibitions or restrictions, WT/MIN(22)/29 - WT/L/1140, 17 June 2022, in <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/28.pdf&Open=True>

to improve food security at global level⁷¹, without imposing bans or restrictions on the export of agrifood products⁷², and cooperating to ensure productivity, availability and accessibility of food, especially in humanitarian emergency situations⁷³. The option of taking emergency measures to address food insecurity problems was expressly contemplated, while limiting the risks of trade distortions as much as possible⁷⁴.

In the Decision, acknowledging the dramatic increase in the number of malnourished people in the world and the crucial humanitarian support provided by the WFP, the WTO States agreed not to impose export bans or restrictions on food purchased by the WFP for humanitarian purposes⁷⁵.

Following the adoption of these two acts, the Committee on Agriculture defined, at a meeting on 21 and 22 November 2022⁷⁶, a new work programme⁷⁷ to establish the methods for their implementation, with particular regard to food security issues⁷⁸.

In particular, the States easily reached a consensus on the urgent need to provide aid to those most severely affected by food shortages, with the aim of rapidly identifying tangible solutions, also involving the competent international organisations⁷⁹.

71. WTO, Ministerial Declaration, WT/MIN(22)/28 - WT/L/1139, cit., par. 2: “*We agree that trade, along with domestic production, plays a vital role in improving global food security in all its dimensions and enhancing nutrition*”.

72. Par. 4.

73. Par. 6.

74. In point 5 of the Declaration, the States agreed to allow these measures, specifying that they should be limited in time, circumscribed and adopted in compliance with the notification requirements of the WTO rules, taking into account the consequences for other States, especially developing and least developed food importing countries. Furthermore, in par. 7, it was reiterated that the export competition discipline of the AoA and the Nairobi Decision on Export Competition must be respected.

75. WTO, Ministerial Decision WT/MIN(22)/29 - WT/L/1140, cit., par. 1-2. The Decision also specifies that it must not be interpreted as precluding the adoption of further government measures to ensure international food security, as long as they comply with the relevant provisions of the WTO agreements.

76. See www.wto.org/english/news_e/news22_e/acc_22nov22_e.htm.

77. See the document published by the Committee at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/AG/35.pdf&open=True>.

78. The detailed catalogue of all issues addressed is available in the Committee on Agriculture document G/AG/W/226, “*Points Raised by members under the Review Process*”, see <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/AG/W226.pdf&Open=True>

79. Indeed, it appears from the proceedings of the meeting of 21-22 November

4. Conclusions

The compatibility of the current WTO rules with the international protection of the right to food, in spite of some openings at legislative and jurisprudential level⁸⁰, presents difficulties linked essentially to the task of reconciling the various positions of the States, which are often very distant from each other, also due to differences in political and social contexts and in economic and trade policy orientations⁸¹.

Furthermore, the affirmation of the right to food in the international community is still influenced by the debate on its nature: although it has been broadly accepted in international treaties and customs, it is still being defined, especially when it comes to the precise clarification of its contents and the obligations incumbent on States⁸².

(see www.wto.org/english/news_e/news22_e/acc_22nov22_e.htm) that updates on agrifood markets and the current global food security situation were provided by various international organisations, such as the World Bank, FAO, WFP, the International Grains Council (IGC), the Inter-American Institute for Cooperation in Agriculture and the International Monetary Fund. In general on the contribution of international organisations in the economic system of supply chains see P. Acconci, *The Contribution of International organizations to Food Security and Safety through a Healthy Environment*, in S. Negri (ed.), *Environmental Health in International and EU Law: Current Problems and Legal Responses*, Giappichelli-Routledge, Turin-London, 2019, p. 198 et seq.

80. See A. Ligustro, *Diritto al cibo e sovranità alimentare*, cit., pp. 399 and 416, which, notwithstanding the opposition between the primary goals of the United Nations in the protection of human rights and those of a commercial nature of the WTO, underlines how the latter has shown an openness, in terms of regulatory reforms and the jurisprudence of internal bodies, towards non-economic values and principles, highlighted by the attempt to balance commitments to reduce market protective measures (and potentially distorting competition) with food security needs, especially with regard to developing countries.

81. On the complicated connection between trade policies and social policies, related to the problems of coordination between commitments arising from WTO law and obligations to respect human rights, including the right to food, see G. Adinolfi, *Alimentazione e commercio internazionale*, cit., p. 136. As emphasised by M.E. Margulis, *The Forgotten History of Food Security*, cit., p. 28 et seq., the key issue remains to establish what level of priority WTO Member States intend to assign to food security.

82. Cf. P. De Sena, M.C. Vitucci, *The European Courts and the Security Council: Between Dédoublément Fonctionnel and Balancing of Values*, in «Eur. Journ. Int. Law», 2009, p. 193 et seq.; G. Adinolfi, *Alimentazione e commercio internazionale*, cit., p. 137, and A. Ligustro, *Diritto al cibo e sovranità alimentare*, cit., p. 394, which excludes that article 25 of the Universal Declaration of Human Rights and the norms of the 1966 International Covenants can be sufficient to prove the formation of a conventional norm with a clearly defined preceptual content.

This factor undoubtedly exacerbates the difficulties in reconciling the demands of international trade with the need to guarantee food security at a global level. Identifying the possible point of equilibrium is therefore a highly complex operation, as shown by the long and troubled renegotiation process of the *AoA*⁸³.

There is, however, a point that WTO member states must necessarily take into consideration in the context of these negotiations: even if the right to food is not considered to be intrinsically protected by conventional regulations, it is impossible to avoid placing importance on its close connection with the right to life and the right to health, which are imperative values of general international law, prevailing over the provisions of the treaties that conflict with them⁸⁴.

When situations characterised by the real risk of breaches of the right to food that put human lives at risk arise, the applicability of obligations arising from trade treaties must take into account the existence of a regulation that is imperatively recognised by the international community⁸⁵.

83. See above, par. 3.

84. Cf. C. Di Turi, *Il diritto all'alimentazione*, cit., p. 197; I. Tani, *L'evoluzione del diritto a un'alimentazione adeguata*, cit., p. 967.

85. On this subject O. De Schutter nel *Background document prepared by the UN Special Rapporteur on the Right to Food on his mission to the World Trade Organization (WTO)*, presented at the Council of Human Rights in March 2009 (*Background study to UN doc. A/HRC/10/005/Add.2*), pp. 18-19, noted that international norms on the right to food have attained an imperative nature and must be considered as prevailing over factual obligations of a commercial nature also by virtue of article 103 of the United Nations Charter, according to which, in the event of a conflict between the obligations entered into by States – including the obligation to promote, encourage, respect and universally observe human rights arising from art. 1, par. 3 and art. 55 lett. c) of said Charter – and the obligations under any other international agreement, the obligations under the Charter shall prevail (see also L. Niada, *Hunger and International Law: The Far-Reaching Scope of the Right to Food*, in «Conn. Journ. Int. Law», 2006, pp. 131 and 179). It seems, however, at least in a generalised way, that a relevant state practice can be deduced from the trend towards the incorporation of the right to food in national constitutional charters (see above, par. 2), from the dissemination of international conventions and the proliferation of soft law instruments (see above, par. 2), and from the importance assigned to the right to food in the Opinion of the International Court of Justice of 9 July 2004, *Legal Consequences of the Construction of a Wall in the occupied Palestinian Territory*, par. 130 et seq. See also C. Morini, *Il diritto al cibo nel diritto internazionale*, cit., p. 35, according to whom, even in the absence of a “constant and consistent practice of States”

Respect for the right to food and the achievement of food security must therefore also be given priority in the negotiations on the reform of the AoA, recognising food as a right and not only as a commodity⁸⁶.

Moreover, WTO law can be interpreted in such a way that commitments arising from multilateral trade provisions do not conflict with previous obligations to respect human rights, as reflected in Article XX of GATT 1994, lett. b), which allows a general exception relating to the application of the obligations to liberalise the government measures necessary to protect human life⁸⁷.

Overcoming the problem of balancing the needs pursued by the laws on human rights and the trade provisions of the WTO can therefore be based on an interpretative approach that allows the WTO rules to be interpreted in the light of the international rules on the protection of the right to food, attempting a coordination, as far as possible, between the aims of the WTO and those of protecting human rights⁸⁸.

With a view to international cooperation, this approach should also inspire negotiations for the reform of the AoA, the conclusion of which

for the purpose of identifying an ad hoc conventional norm, it is possible to detect “an important basis for the formation of an *opinion iuris* whereby everyone should be allowed to enjoy at least a basic level of access to food”.

86. In these terms see F. Cazzini, *L'incidenza del Covid-19 sul settore agroalimentare*, cit., p. 137 (cf. also the considerations of P. Mittica, in this volume). The orientation according to which a general improvement in the ease of access to food automatically follows from a mere improvement in the efficiency of the market for agrifood products and from greater liberalisation is not easy to accept (see in this regard K. Mechlem, *Harmonizing Trade in Agriculture and Human Rights: options for the Integration of the Right to Food into the Agreement on Agriculture*, in «Max Planck Yearbook of United Nations Law Online», 2006, p. 127 et seq.).

87. GATT 1994, art. XX: “*Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: [...] (b) necessary to protect human, animal or plant life or health [...]*”.

88. R. Ferguson, *The Right to Food and the World Trade Organization's Rules on Agriculture. Conflicting, Compatible, or Complementary?*, Brill, Boston, 2018, p. 197. See also F. Coomans, *Application of the International Covenant on Economic, Social and Cultural Rights in the Framework of International Organisations*, in «Max Planck Yearbook of United Nations Law Online», 2007, pp. 372-373; K. Mechlem, *Harmonizing Trade in Agriculture and Human Rights*, cit., p. 127 et seq.; A. Ligustro, *Diritto al cibo e sovranità alimentare*, cit., p. 417.

becomes even more urgent in the light of recent threats to global food security⁸⁹, constantly considering the impact of its provisions on the protection of the right to food and food security⁹⁰.

89. See the Declaration of the *WTO Director-General Ngozi Okonjo-Iweala* of 24 October 2022, *DG Okonjo-Iweala urges update to WTO rules to address global food market challenges*, in www.wto.org/english/news_e/news22_e/agri_24oct22_e.htm. It has also already been noted above, par. 3, above, that States which have reacted individually with export restrictions to cope with domestic food security problems have not achieved the desired results (I. Espa, *Sicurezza alimentare e commercio internazionale*, cit., p. 123 et seq.), confirming the urgency of a collective and agreed response that can only come through international cooperation (see G. Sacerdoti, *Quo Vadis WTO after the Covid-19 Crisis?*, in P. Acconci, E. Baroncini (a cura di), *Gli effetti dell'emergenza Covid-19*, cit., p. 47).

90. Cf. ESCR Committee, *General Comment* no. 12, cit., par. 36, and in doctrine L.E. Nierenberg, *Reconciling the Right to Food and Trade Liberalization: Developing Country opportunities*, in "Minn. Journ. Int. Law", 2011, p. 633.

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