

Queen's University Belfast

European Master's Degree in Human Rights and Democratisation
A.Y. 2017/2018

Freedom of Access to Food

Exploring the Right to Adequate Food through the capabilities approach

Author: Preetha Palasuberniam
Supervisor: Mary Dobbs

Abstract

The double burden of malnutrition is a major concern in terms of policy and practice. The right to adequate food is outlined to include access to food in terms of quality and quantity, noting personal requirements and cultural preferences. The capabilities approach detracted from a food supply perspective, promoted by Malthusian fears and enabled by GATT, to a focus on creating access to food. Promotion of trade liberalisation under the Agreement on Agriculture is supported by the capabilities approach, but in practice trade distortions and restrictions prevent the creation of a fair and equal market and hindering local food security and food sovereignty capabilities. The agreement on Trade-Related Intellectual Property Rights motivates research and development that can enhance capabilities and development. Careful implementation under its provisions must be taken to not hamper biodiversity or food sovereignty. Finally, to further enhance access to adequate food, legal measures can help to ensure trade law, policies, and programmes are aligned with the each other.

Table of Contents

<i>Chapter 1: Introduction</i>	<i>3</i>
1.1 <i>Challenges of the Right to Adequate Food</i>	
1.2 <i>Methods</i>	
1.3 <i>Capabilities Approach Theoretical framework</i>	
<i>Chapter 2: Development of Global Food Governance</i>	<i>15</i>
2.1 <i>Food Regimes</i>	
2.2 <i>Agro-Food Economy and Trade</i>	
2.3 <i>Conclusion</i>	
<i>Chapter 3: WTO's Trade and Agriculture Agreements</i>	<i>25</i>
3.1 <i>Agreement on Agriculture</i>	
3.2 <i>Agreement on Trade-Related Intellectual Property Rights</i>	
3.3 <i>Conclusion</i>	
<i>Chapter 4: Justiciability of the right to adequate food</i>	<i>41</i>
4.1 <i>Defending Socio-Economic Rights</i>	
4.2 <i>Regional Legal Development</i>	
4.3 <i>Domestic Legal Frameworks</i>	
4.4 <i>The Case of India</i>	
4.5 <i>The Case of South Africa</i>	
4.6 <i>Conclusion</i>	
<i>Conclusion</i>	<i>52</i>
<i>References</i>	<i>54</i>

Chapter 1: Introduction

The double burden of malnutrition, obesity and under-nutrition, continues to be a major concern in terms of policy and practice worldwide. It is highly important to note overweight and under-nutrition are two folds of the same problem – malnutrition. Simultaneous increase in the rate of obesity and wasting - rapid weight loss from acute malnutrition, and stunting - impaired development from chronic malnutrition, can be seen in many regions across the world. In fact, the twofold problem and its complementary non-communicable diseases are now found to coincide within the same communities and households.¹ This poses a greater public health concern as malnutrition propagates diet-related health risks - obesity triggering health problems such as cardiovascular diseases, diabetes, and high blood pressure, and under-nutrition triggering anaemia, infectious diseases and premature deaths. Despite multilateral efforts to safeguard access to food, we continuously face world hunger and malnutrition. In fact, there has been an increase in those affected. In 2015, the number of chronically undernourished people in the world was estimated at 777 million, while in 2016, the number significantly increased to 815 million.² Tackling hunger and malnutrition can be fundamental in reducing these diet-related disorders in the long term.

The prevalence of malnutrition highlights that the policy efforts may not be sufficient to meet progressive realization of the right to adequate food. Therefore, it is necessary to re-evaluate the current approaches implemented in the progressive realization of the right to adequate food, and consequently, become more successful at overcoming malnutrition. Access to adequate food is not simply a humanitarian ideal, but is also a human right with corresponding legal obligations outlined in international and regional legal frameworks. These same frameworks illustrate that the right to adequate food refers to both quantitative and qualitative aspects of that same food.

¹ FAO, IFAD, UNICEF, WFP and WHO, 'The State of Food Security and Nutrition in the World: Building

² FAO, IFAD, UNICEF, WFP and WHO, 'The State of Food Security and Nutrition in the World: Building Resilience for Peace and Food Security' (2017).

The right to adequate food is realized in Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), as part of the right to an adequate standard of living. In specific, Article 11.2 ICESCR realizes the “right of everyone to be free from hunger,” wherein states “shall take, individually and through international co-operation, the measures, including specific programmes.” Article 11.2(a) outlines the measures taken are “to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition, and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources.” Here, not only is it recognizing the importance of methods of production and distribution in procuring access to food, but also acknowledging the importance of finding methods that are sustainable, and in-line with the availability of natural resources. In addition, Article 11.2(b) obligates states to take “into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.”³ Here is an obligation to also focus on world food relations, and to take into account equitability factors of access to food. Overall, Article 11 of ICESCR obligates cooperation between states to achieve progressive realization of the right to be free from hunger; though, it must be noted, this article does not illustrate the need to address malnutrition. It simply says, “free from hunger,” implying a minimum caloric requirement will suffice, emphasizing quantitative means.

In light of the ambiguity of Article 11 ICESCR, the United Nations Economic and Social Council released General Comment No. 12 to clarify implementation required by member states under Article 11 ICESCR. General Comment No. 12 declares the right to adequate food is only realized when “every person, despite gender, age, or ethnicity has the ability, both physical and economical, to procure adequate food to fulfil individual dietary needs, free from harmful substances, culturally suitable and sustainably created”.

³ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 23 March 1976) 993 UNTS 163 (ICESCR).

It goes further, affirming dietary needs must include “nutrients for physical and mental development, and maintenance required by human physiological needs at all phases throughout the life cycle, with consideration of gender and occupational needs”. General Comment No.12 is crucial regarding the right to the adequate food. It gives states the positive obligation to ensure the progressive realization of adequate food, highlighting nutritional needs, as well as “cultural and consumer acceptability.”⁴ Thereby, General Comment No. 12 brought attention to quality of accessible food as well.

Furthermore, this right is outlined in international and regional human rights instruments emphasizing the significance, and the indivisibility and interdependence of the right to adequate food from other human rights.

The right to adequate food is incorporated in these international conventions:

- Convention on the Elimination of All Forms of Discrimination against Women (Articles 12.2) (99 signatories, 189 parties),⁵
- Convention on the Rights of Persons with Disabilities (Articles 25(f) and 28.1) (161 signatories, 177 parties),⁶
- Convention on the Rights of the Child (Articles 24.2(c) and 27.3) (140 signatories, 196 parties)⁷

The right to adequate food is also found in the following regional instruments:

- Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights,
- African Charter of the Rights and Welfare of the Child,
- Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol).

⁴ UNCESCR, ‘General Comment No. 12’ in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies’ (1999) UN Doc HRI/GEN/1/Rev.1.

⁵ Convention on the Elimination of All Forms of Discrimination against Women (adopted 1 March 1980, entered into force 3 September 1981) 1249 UNTS 189 (CEDAW) Article 12.

⁶ Convention on the Rights of Persons with Disabilities (adopted 30 March 2007, entered into force 3 May 2008) 2515 UNTS 177 (CRPD) Article 25 and 28.

⁷ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 196 (CRC) Article 24 and 27.

The right to adequate food is well established in international human rights instruments – in particular, General Comment 12. Attention was moved past caloric-based needs, and refocused on nutrition necessities, taking into account physical, geographical and cultural significance. Moreover, inclusion of the right to adequate food in the international conventions listed above showcased the necessity of food access to empower vulnerable and marginalized populations i.e. children, women and persons with disabilities. Though, these conventions are only binding to those who have ratified them – some key players, such as the United States, are signatories, but not parties to these conventions. Likewise, the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights is binding to those who have ratified it. On the other hand, the African Charter, including the Maputo Protocol, is binding in the African region – the Court cited the right to adequate food was implicit in the African Charter in response to *SERAC v Nigeria* (see Chapter 4). Furthermore, some countries have mirrored this right in their national constitutions, either as a right of its own or as a part of other rights – further explored in Chapter 4. Reflecting upon these international and regional instruments, the right to adequate food is intertwined with other so-called first generation human rights, such as the right to life. Due to this indivisibility and interdependence, the responsibility to uphold this right is even more pivotal for the realization of other rights as well.

Challenges to Food Access

The lack of access to adequate food persists despite legal and non-legal development pertaining to this right. These problems of inaccessibility, either stemming from physical unavailability, economical hindrances or other limitations, can be correlated to an imbalance in the production, distribution and consumption of food. For example, developing countries contain more than two-thirds of the world's population, and yet, only produce one-third of the world's food.⁸ This discrepancy in production, distribution and consumption creates a dependency of these countries on food and agriculture trade to

⁸ Universal Declaration on the Eradication of Hunger and Malnutrition, UNGA Res 3180 (XXVIII) (adopted on 16 November 1974).

supply its demands. In fact, they also have the largest percentage of population undergoing malnutrition and hunger.⁹ This example illustrates the imbalance within food production, and ultimately, the lack of access to a stable source of food. Furthermore, emergence of sectionalisation of food and agriculture industries for trade preferences, form a twofold dependency on trade – pressures arise from export and import requirements to sustain domestic production and economic capabilities. Therefore, an atmosphere of reliance arises from trade to ensure access to food, both physically and economically, which can be challenging as it can easily fall victim to fluctuations in world trade conditions i.e. new regulations and tariffs. To address the challenges associated with production, distribution and consumption of food and agriculture, international level policies regarding agriculture production and trade must be re-evaluated and realigned with the promotion of the right to adequate food.

As conflicting interest can emerge from agro-food trade objectives, the implications of trade and trade law can significantly impact the capability of countries to uphold the right to adequate food. The influence of state-actors can be key to instil adequate food be more accessible and attainable, thereby necessitating large key actors, i.e. multi-lateral corporations and government bodies, to actively align their intentions with those of the right. To address these challenges arising from conflicting pursuits of interests, and to harmonize agro-food trade with human rights, specifically the right to adequate food, accountability measurements should be re-examined and better enforced.

Consequently, the primary purpose of this dissertation is to analyse whether international law furthers the right to adequate food effectively. To do so, the following is assessed: the existence and status of the right to adequate food, the impact of international trade and agriculture law and agreements on the right to adequate food, and the legal strength and enforceability of the right to adequate food.

Methods

⁹ *ibid.*

This paper employs a theoretical interdisciplinary critical analysis to explore if international law effectively facilitates the right to adequate food. A capabilities approach theoretical framework has been chosen as it benefits the research by assessing social justice and development with an unprejudiced indicator – freedoms of well-being. This theory allows assessment of the quality of life, or the political and legal avenues to pursue it, by highlighting the liberty each person has to achieve any functions that are essential to life.¹⁰ The capability approach is clarified further in the next section. This paper is also based on interdisciplinarity; the primary discipline being international and human rights law, and secondary disciplines being economics and social sciences. An interdisciplinary approach has been chosen to ensure the research is not limited by any single discipline, and thereby, more reflective of reality, where multiple disciplines are intrinsically interlaced. This field of topic should not be constrained by the rigor of law, while simultaneously; it also should not be limited by the vague boundaries of social sciences.¹¹ Furthermore, the human rights field, especially pertaining to second-generation rights, is collaborative in nature. Human rights research is highly reliant on social sciences to understand the “discourse of institutions, politics, norms, trade-offs, cultures, effects and origins of human rights.”¹² Thereby, an interdisciplinary approach is most suitable for this study, as the joint disciplines widen the scope of application, and provide the foundation necessary to analyse law and socio-economic relations. In regards to the structure, this paper employs a top-down approach; first highlighting international frameworks then moving to national elements. This is because of the nature of the development of human rights and public health; while it is established and ratified at international levels, its true target is to influence national legal frameworks, and consequently, national and sub-national policies.¹³ Filtering from top-down moves legal frameworks from theory to practicality. This is highly relevant because while the discourse of the right to adequate food is outlined in international human rights instruments, assessment of malnutrition is ultimately assessed at a community or

¹⁰ Sandrine Berges, ‘Why the Capability Approach Is Justified’ (2007) 24 *Journal of Applied Philosophy* 16.

¹¹ Bård A Andreassen, Hans-Otto Sano and Siobhán McInerney-Lankford, ‘Research Methods in Human Rights: A Handbook’ 163-165.

¹² *ibid* 168.

¹³ *ibid* 413-414.

individual-based level. The legal frameworks mentioned in this paper also incorporate international trade law and agreements (Agreement on Agriculture and Trade-Related Intellectual Property Rights) because the right to adequate food is not explicitly narrated by human rights alone, but also on economic modelling. The legal structure and culture of trade in agriculture is a determining factor of a nation's capability to influence a wider set of demographics' access to adequate food, and therefore must be taken into consideration when evaluating effective modes to promote this right.¹⁴ A limitation arises as some other trade agreements may go unexplored, however, with the constraints of this thesis, it is more practical to do an in depth analysis of the agreements mentioned previously, rather than broad justifications just to regard more international trade law. The agreement on Agriculture and Trade-Related Intellectual Property Rights are of particular significance, as both stem from the World Trade Organization (WTO) – some agreements of the WTO are highly contested for the constraints put upon state's abilities to implement measures in pursue of the enjoyment of certain human rights.¹⁵ In fact, some scholars believe these two agreements in particular oppose the potential ability to achieve realization of the right to adequate food.¹⁶ Therefore, this paper deeply analyses provisions under these agreements to test the legitimacy of these statements, and further explore the relationship these trade laws have on establishing an environment that promotes the right to adequate food. As stated above, a top-down approach is used, whereby international human rights and trade law is established and the implications on nations, regarding legal and political consequences, are examined. The national examples chosen were based on the significance of case law or outcomes, contingent upon the availability of literature and documentation. This research paper is desk-based, therefore reliant on journal articles, books, legal texts, and other sources available online such as publications from governmental and non-governmental organizations. It is possible to view this heavily theoretical analysis, as another limitation of this paper, though perhaps empirical research will be better suited for future endeavours.

¹⁴ Andreassen, 'Research Methods in Human Rights: A Handbook' (n 11) 346-347.

¹⁵ Tilahun Weldie, 'The Impact of the Trade Related Aspects of Intellectual Property Rights Agreement (TRIPS Agreement) on the Realization of the Right to Food' (2010) 1 Bahir Dar University Journal of Law 97-98.

¹⁶ *ibid* 109-112; Christine Kaufmann and Simone Heri, 'Liberalizing Trade in Agriculture and Food Security - Mission Impossible' (2007) 40 Vanderbilt Journal of Transnational Law 1056.

Capabilities Approach Theoretical Framework

Capabilities approach, as founded by Amartya Sen, is a theoretical framework based on the normative claim that the primary moral concern is the freedom to achieve well-being. Here, well-being is measured in terms of the “quality of the person’s being.”¹⁷ Capabilities approach is grounded on two factors: functionings and capabilities. Sen characterizes *functionings* as the “the various things a person may value doing or being,” while *capabilities* are the freedom to achieve these functionings.¹⁸ To clarify in terms of well-being and freedom, *functionings* are the act of achieving well-being, while *capabilities* are the freedom to do so, or the “well-being freedom.”¹⁹ As mentioned previously, capabilities approach is beneficial to this research because it relies on the unbiased indicator of well-being freedom to measure the quality of life. Furthermore, this approach recognises the diversity among people when evaluating capabilities. For instance, this theory acknowledges the variable factors that can influence a person’s capabilities in life, such as it realises the co-dependency of some capabilities and allows well-being freedom to be measured in terms of collective sets of capabilities.²⁰ In addition, as opposed to other theories, such as Rawlsian resourceist approach, the capabilities approach considers conversion factors, or the ability or inability to convert a resource into a functioning, and constraints that may prevent a capability from being achieved.²¹ Sen grouped conversion factors into three categories of influence: personal (age, gender, physical characteristics), social (institutions, cultural and social norms) and environmental (climate, pollution, public facilities).²² According to the capabilities approach, the resource is not valuable in itself, rather its value arises from the functionings it enables. The approach also takes into account adaptive preferences,

¹⁷ Amartya Sen, *Inequality Reexamined*, (Harvard University Press, 1992) 39.

¹⁸ Amartya Sen, *Development As Freedom* (Knopf Press 1999) 75; Sen, 'Development as a Capability Expansion' in S Fukuda-Parr, *Readings in Development* (Oxford University Press 2003)

¹⁹ Sen, *Inequality Reexamined*, (n 17) 31-40.

²⁰ Sen, *Development As Freedom* (n 18) 38-40.

²¹ Thomas Pogge, 'Can the Capability Approach Be Justified' (2002) 30 *Philosophical Topics* 175; Sen, 'Inequality Reexamined' (n 18) 19-20.

²² Amartya Sen, *Commodities and Capabilities* (Oxford University Press 1985) 9-16.

recognizing that an individual's preferences will attenuate according to life experiences, and environmental and societal factors.²³ Measurements of well-being freedoms are not susceptible to individual diversity, reinforcing that the capabilities approach is appropriate for the purposes of this research.

The relationship between the capability approach and human rights can be seen in their shared key focus – an individual's freedom and dignity. In fact, Sen suggests that process and opportunity freedoms, that meet a threshold of significance, can be characterized as a human right, and moreover, many human rights can be characterized in regards to capabilities and functionings.²⁴ This conceptual relationship between human rights and capabilities can also be traced to Martha Nussbaum's list of basic capabilities.²⁵ In the human rights framework, actors are held accountable of their obligations to respect, protect and fulfil for the overarching goal of freedom, equality, and dignity. While the capabilities approach does not have the component of obligations, as human rights do, it does similarly highlight the importance of freedoms and opportunities.²⁶ Evaluating human rights from a capabilities-based approach provides a stronger argument to the necessity of positive obligations and duties. Nussbaum argues fundamental capabilities should be protected and promoted through legal and political means at both national and international level.²⁷ In regards to this thesis, the human right examined is the right to adequate food, subsequently, the capabilities approach is applied to this right specifically, and furthers the analysis by examining the means that enable the freedom to enjoy the right – the capability being the ultimate freedom or opportunity to “procure adequate food to fulfil individual dietary needs, free from harmful substances, culturally suitable and sustainably created.”²⁸

²³ Sen, *Development As Freedom* (n 18) 62 and 71.

²⁴ Amartya Sen, 'Elements of a Theory of Human Right' (2004) 32 *Philosophy & Public Affairs* 330-338.

²⁵ Martha Nussbaum, 'Capabilities and Human Rights' (1997) 66 *Fordham Law Review* 273-300.

²⁶ Polly Vizard, Sakiko Fukuda-Parr and Diane Elson, 'Introduction: The Capability Approach and Human Rights' (2011) 12 *Journal of Human Development and Capabilities* 1-2.

²⁷ Martha Nussbaum, 'Beyond the Social Contract: Capabilities and Global Justice' (2004) 32 *Oxford Development Studies* 13.

²⁸ UNCESCR, 'General Comment No. 12' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (1999) UN Doc HRI/GEN/1/Rev.1.

Food security and food sovereignty are both concepts founded to advance the realization of the right to adequate food. The term food security was defined at the World Food Summit (1996) – “food security, at the individual, household, national, regional and global levels is achieved 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.”²⁹ In accordance to the World Food Summit’s definition, there are four dimensions of food security – availability, access, utilisation and stability.³⁰ Food sovereignty, an alternative concept that has gained traction, is a term coined by the transnational peasant movement, La Via Campesina, It refers to “the right of peoples to healthy and culturally appropriate food produced through sustainable methods and their right to define their own food and agriculture systems,” including “the right to access productive resources such as land, water and seeds.”³¹ It requests for ecologically sustainable food production and consumption, whilst also protecting sovereign control over natural resources, local agro-knowledge, cultural identity, local markets, and local ownership of land.³² While food security is not a legal concept in itself, it has evolved to be the chief concept used in policies that promote the right to adequate food, meanwhile, food sovereignty was never formally incorporated into international level agreements, but has been implemented into the national constitutions of Ecuador, Bolivia and Venezuela, and incorporated into policies adopted by Nicaragua, Mali and Senegal.³³

Food security was greatly influenced by Amartya Sen’s theory of entitlements and the capability approach, wherein Sen acknowledged problems in food supply, availability,

²⁹ FAO, 'Report of the World Food Summit' (17 November 1996) WFS 96/REP.

³⁰ *ibid.*

³¹ La Via Campesina, 'Annual Report 2016' (May 2017)

³² Priscilla Claeys, ‘Via Campesina’s Struggle for the Right to Food Sovereignty: From Above or from Below?’, (2014) *Rethinking Food Systems* 29

³³ Priscilla Claeys, ‘Food Sovereignty and the Recognition of New Rights for Peasants at the UN: A Critical Overview of La Via Campesina’s Rights Claims over the Last 20 Years’ (2015) *12 Globalizations* 452

utilization and access, all play a role in instigating hunger and food insecurity.³⁴ Sen wrote “starvation is a matter of some people not having enough food to eat and not a matter of there being not enough food to eat,” challenging the common perception that famine and starvation were instigated by the lack of food supply, as was initially perceived by the Malthusian theory.³⁵ This new perception brought importance to the access dimension of food security, consequently, switching focus to ensure individuals have the physical and economic access to adequate food. Sen argued Malthusian optimism endorsed negligence in policy-making and created an environment of inaction – hunger was overlooked as long as the rate of food production surpassed the growth of the population.³⁶ Instead, policy-making based on capabilities approach focuses its objectives on establishing the four dimensions of food security – availability, access, utilisation and stability. While, the entitlement and capabilities approaches do have similarities, the capabilities approach better encompasses the different dimensions of food security – entitlement approach primarily regards the availability and access dimensions only.³⁷ Drèze and Sen explain the importance to focus on the utilization dimension, in addition to the access and availability dimensions: “the object, in this view, is not so much to provide a particular amount of food for each. Indeed, the relationship between food intake and nutritional achievement can vary greatly depending not only on features such as age, sex, pregnancy, metabolic rates, climatic conditions, and activities, but also access to complementary inputs,” such as medical care, clean drinking water, basic education.³⁸ Hence, since capabilities approach takes into account co-dependency of capabilities and conversion factors accounting for food consumption and ultimate nutritional achievement, it serves as a better guide for policy-making.³⁹ While food security employs a top-down approach to ensure individuals have the capabilities necessary to enjoy stable

³⁴ Matias E Margulis, ‘The Regime Complex for Food Security: Implications for the Global Hunger Challenge’ (2013) 19 *Global Governance* 53; Amartya Sen, ‘Food, Economics and Entitlements’ in J Dreze, *The Political Economy of Hunger*, vol I (Oxford University Press 1990).

³⁵ Amartya Sen, ‘Ingredients of Famine Analysis: Availability and Entitlements’ (1981) 3 *The Quarterly Journal of Economics* 434.

³⁶ Amartya Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation* (Oxford University Press 1981).

³⁷ Francesco Burchi and Pasquale De Muro, ‘From Food Availability to Nutritional Capabilities: Advancing Food Security Analysis’ (2016) 60 *Food Policy* 14-15.

³⁸ Jean Dreze and Amartya Sen, *Hunger and Public Action* (Oxford University Press 1989) 13.

³⁹ Burchi and De Muro (n 32) 15.

access to nutritious and culturally appropriate food, food sovereignty employs a bottom-up approach. It prefers freedom of individuals, and/or lower levels of governance, to set their own capabilities to define their food production, consumption and distribution, and thus, determining trade agreements and agriculture models without external pressures.⁴⁰ The food sovereignty model demands for leniency from international actors to allow local communities to self-determine their capabilities at grassroots levels.

⁴⁰ Ashley Chaifetz and Pamela Jagger, '40 Years of Dialogue on Food Sovereignty: A Review and a Look Ahead' (2014) 3 *Global Food Security* 85-90.

Chapter 2: Development of Global Food Governance

As mentioned in Chapter 1, a primary challenge to establishing stable access to appropriate foods is due to imbalances in agro-food production, distribution and consumption. This section focuses on the historical evolution of the governance of food and agriculture production and circulation, and the consequent implications on individual's freedom to be adequately nourished.

Food Regimes

The food regime theory, as developed by Harriet Friedmann and Philip McMichael, explains global development based on the interplay of agriculture and food, in relationship to the history of the world capitalist economy. It analyses the “patterns of food circulation of food in the world economy to underline the agro-food dimensions in geo-politics”.⁴¹ To be more specific, food regime theory connects a food regime to a period of institutional stability, generally, with one hegemonic actor. When there is political and economic instability, or crisis, then a shift of regimes would occur. Once stability returns, then there would be an establishment of a new food regime.⁴² This conceptualization of the historical events pertaining to food governance is used in this section, as it sufficiently encapsulates the political and economic factors associated with food governance. Furthermore, this concept is aligned with the primary challenge mentioned above – access to food is dependent on production, distribution and consumption. Friedmann summarizes effectively “if there was a crisis, then, it was not the sudden scarcity of world food supplies, but, a structural turning point, a reorganization of production and distribution of grains in the world economy.”⁴³ While

⁴¹ Philip McMichael, ‘A Food Regime Genealogy’ (2009) 36 *Journal of Peasant Studies* 139

⁴² Harriet Friedmann and Philip McMichael, ‘Agriculture and the State System: The Rise and Decline of National Agricultures, 1870 to the Present’ (1989) 29 *Sociologia Ruralis* 93

⁴³ Harriet Friedmann, ‘The Political Economy of Food : The Rise and Fall of the Postwar International Food’ (1982) 88 *American Journal of Sociology* S248.

having enough food per capita is necessary, it alone does not create a crisis; it is the restructuring of production and distribution of agro-food that is impactful.

The first theorized food regime occurred from 1870 to 1914, in where the British held hegemony over agriculture and food production and trade. Friedmann and McMichael describe this time as a key development of national economies governed by states and to the overall creation of the world economy.⁴⁴ The first food regime can be classified into two simultaneous movements. The first movement was the opening of new markets to promote a new culture of trade. Once the ‘Corn Laws’ were abolished in 1846, British had supremacy of world trade. During this time, Europe began to import tropical foods from colonies, and grains and livestock from settler colonies to help grow industrial classes domestically. In attempts of maintaining geo-political power over settler states, and other European states, the British opened up colonial markets, and heavily promoted freedom to trade and invest.⁴⁵ The second movement was the rise of nation-state system of settler states – national agricultural sectors emerged among settler states, specifically the United States, Canada and Australia, creating a new dynamic between agriculture and industrial sectors.⁴⁶ The crisis, or instability that caused the collapse of the first food regime is due to numerous factors. Some theorizing led to the belief the ultimate causes included the imperialistic conflict among European states, the collapse of the gold standard, the fall of the global wheat market, cheap overseas grains and, subsequent protectionism, and economic nationalism, and finally, the ecological and agricultural damage caused by the American dust bowl.⁴⁷ Nevertheless, the hegemony of Britain came to an end, and bringing the first food regime to a halt. These two developments during this period can be seen as the initial development of an international trade system. The opening of the market created new freedoms for states to enjoy and to expand their economies. The market in itself can be seen as a means that enables individual’s capabilities or freedoms. For one, the encouragement to trade and invest created the new capability to make transactions in the market, and permitted states the freedom to

⁴⁴ Friedmann and McMichael (n 42).

⁴⁵ Bill Pritchard, ‘The Long Hangover from the Second Food Regime : A World-Historical Interpretation of the Collapse of the WTO Doha Round’ (2009) 26 *Agriculture and Human Values* 297.

⁴⁶ Friedmann (n 43).

⁴⁷ Philip McMichael, *Food Regimes and Agrarian Questions* (Fernwood Publishing 2013)

participate. In addition, the market is a source of income generation, and thereby can enable many other capabilities that are dependent on the economic security that stable income can provide. As capabilities are also vivid in collective sets, the freedoms of income can be valuable on multiple levels. For instance, the freedoms to enjoy many human rights, predominantly economic and social rights, such as education, health, and food, are contingent upon the monetary freedoms an individual holds. While these new freedoms materialised, the focus on trade pursuits overlooked interference with some basic capabilities. For example, during this time, the British conceptualization of the ‘workshop of the world’ system emphasized the monocultures of agriculture in colonized states.⁴⁸ Monocultures, rather than the production of diverse crops, can undermine the local biodiversity and cause ecological repercussions including environmental degradation. Besides, the genetic diversity of agriculture has been shown to be vital in maintaining the food supply for local nutrition and health.⁴⁹ Inadequate diverse diets, or lack of locally accustomed crops can also inhibit culturally relevant food practices. The lack of access to food was prominent despite of geo-politics; colonized states, settler states and home all experienced hunger. Hence, the capabilities associated with the functionings of being adequately nourished or to maintain cultural traditions, were affected. According to Sen, capability deprivation is debilitating to development, while on the other hand, free market is a key player in development; these contradictory movements during the first regime had varied implications on individuals’ capabilities and freedoms.⁵⁰

The second food regime, also known as the ‘surplus regime,’ involves imbalanced production and consumption of food under state protection during the United States hegemony. It took place from 1945 to 1973, in post-war world economy, and during the boom of industrialization.⁵¹ This period, similar to the first regime, contained two main movements. In the first movement, postcolonial states began to emerge as state systems,

⁴⁸ McMichael, ‘A Food Regime Genealogy’ (n 41) 147.

⁴⁹ Robert C Bird and Daniel R Cahoy, ‘Human Rights, Technology, and Food: Coordinating Access and Innovation for 2050 and Beyond’ (2015) 52 *American Business Law Journal* 493.

⁵⁰ Sen, *Development As Freedom* (n 18).

⁵¹ Friedmann and McMichael (n 42) 103.

and began replicating the national agro-industrialization.⁵² This had a few implications. For one, this ended the monoculture practice of agriculture specialization, a problem mentioned earlier that hindered local food freedoms.⁵³ Secondly, these newly independent states, after successful lobbying by international actors, implemented food policies encouraging import of cheap food, and welcoming foreign aid.⁵⁴ These policies greatly benefited the United States in particular. The country was producing surpluses of grain, predominantly wheat, exceeding their national demands. Initially, with subsidization through the Marshall Plan, and later, with the Export Enhancement Program, it was able to redirect its surplus in newly found markets, among newly formed postcolonial states.⁵⁵ The implication of cheap imports weakened home grown grain value and agricultural production, in addition to creating a dependence on United States' food aid.⁵⁶ This reliance undermined some national economies and agriculture practices, while, simultaneously, hindered local food preferences and revoked freedoms of food cultivation. The second movement was the restructuring of agriculture production. Intensification of agricultural industry and the expansion of agribusiness transnationally created a higher demand for specific crops and livestock.⁵⁷ In addition, because agro-food was beginning to rely on global supply chains, more industries began to focus on products used in agro-food production, rather than the end product.⁵⁸ A notable example is the intensification of the meat industry with new husbandry skills, which is primarily pertinent to the United States. The industry demanded large amounts of grain, soy and corn, for feedstock. This demand, along with the subsidies mentioned above, led to specialized sectors for intensified grain production.⁵⁹ The collapse of the second food regime occurred due to multiple factors. One factor can be assigned to the emergence of new competing states. For example, during the 1960-1970s, India, who originally was a

⁵² *ibid* 103-105.

⁵³ Sen, *Development As Freedom* (n 18).

⁵⁴ Friedmann and McMichael (n 42) 105-110.

⁵⁵ Bill Pritchard, 'The Long Hangover from the Second Food Regime : A World-Historical Interpretation of the Collapse of the WTO Doha Round' (2009) 26 *Agriculture and Human Values* 297.

⁵⁶ Margulis (n 34).

⁵⁷ Friedmann and McMichael (n 42) 106-7.

⁵⁸ Pritchard (n 45) 298-299.

⁵⁹ *ibid*.

thriving exporter of grains during the British hegemony, became dependent on United States supply, absorbing 25% of its annual wheat crop. However, with green revolution agro-technology, its supply increased again, creating significant competition.⁶⁰ Competition propagated volatile prices of wheat, inflation of land prices, and ultimately the creation of a global food crisis ending the second food regime.⁶¹ Similar to the first food regime, this period had many implications on basic capabilities. The primary consequence of the second food regime was the development of surplus and intensification of production. While these outcomes developed the market and economic capabilities of some, it undermined others by destabilising local production value. Furthermore, the consequences of this had also caused ecological and environmental effects, that as Sen describes, are a deprivation of freedoms, and which ultimately hinders true societal development – development is not only based on income freedoms but also the lack of capabilities that allow an individual to achieve their functioning goals.

At this time, eradicating hunger became one of the main objectives of international systems. However, as noted in the introduction, Article 11 ICESCR, requiring the progressive realization of the right to adequate food, was initially based on equitable production and distribution of food. At this time, focus was based on a caloric need, rather than a nutritional need, therefore, justifying grain surpluses – only in 1999, when General Comment No. 12 was released, did focus change from caloric-based diets, onto nutrition-based diets. Since the common perception at the time was not yet influenced by Sen's theories of entitlement and capabilities, hunger was still viewed as a problem of a lacking of food supply, rather than a lacking of access to food. In reaction, the Food and Agriculture Organization (FAO), a United Nations agency, was created to oversee potential avenues to end hunger vis-à-vis improving food production and distribution. Initial efforts by the FAO supported the surplus regime. The FAO understood that increased international grain production and trade, aimed to distribute food surplus grown in the global North to be distributed in the South, could successfully address food

⁶⁰ NA Mujumdar and Uma Kapila, *Indian Agriculture in the New Millenium, Vol. 1* (Academic Foundation 2006).

⁶¹ Bill Pritchard, 'The Long Hangover from the Second Food Regime : A World-Historical Interpretation of the Collapse of the WTO Doha Round' (2009) 26 *Agriculture and Human Values* 297.

insecurity.⁶² Furthermore, Malthusian fears grew: i.e. fear that the population is increasing at a rate that the food production is unable to supply. In answer to the Malthusian check, international efforts were made that were in promotion of food surpluses to safeguard food security. A number of international financial institutions were established at the time that greatly impacted food policies. Of these financial institutions, the Bretton Woods Institutions, the World Bank, and the International Monetary Fund (IMF) were also established.⁶³ Particularly, the International Fund for Agricultural Development (IFAD), a specialized institution of the United Nations, was mandated to eradicate poverty and hunger, especially in rural areas, by improving agriculture through programs such as technology transfer and dissemination of knowledge. The Green Revolution grew, which included the utilization of high-yielding seeds, fertilizers and pesticides, for higher production levels.⁶⁴ Simultaneously, food aid programs were developed. Both the World Food Program (WFP) and the Food Aid Convention (FAC) were created to share the supervision of international food aid, and to further provide food assistance to developing states.⁶⁵ The rise of Malthusian fears demonstrates some of the reasons behind the focalized agricultural sectors on producing high yield. Focus of eradicating hunger was mainly pertaining to subsistence, while the repercussions of malnutrition at this point were not given adequate consideration.

McMichael, among others, contemplate a third regime beginning at the end of the last food regime. It is described as a corporate regime, wherein corporate industrial and agricultural models are thriving. However, simultaneously, alternative models such as food sovereignty are establishing as new concerns are developing.⁶⁶ Because food regime theory requires hegemony, some theorize the World Trade Organization (WTO) is in control of this third food regime – WTO will be discussed in depth later. But, this theory

⁶² FAO, 'FAO: Its Origins, Formation and Evolution 1945-1981' (1981)

⁶³ IFAD, 'IFAD's Policy Framework For Managing Partnerships With Countries In Arrears' (18 December 1997) GC 21/L.7

⁶⁴ (n 34).

⁶⁵ John Hoddinott, Marc J Cohen and Christopher B Barrett, 'Renegotiating the Food Aid Convention: Background, Context, and Issues' (2008) 14 *Global Governance* 286-289.

⁶⁶ Philip McMichael, 'Global Development and The Corporate Food Regime' in FH Buttel, *New Directions in the Sociology of Global Development*, vol 11 (Elsevier 2005)

is not fully developed, and since the WTO is comprised of many different state actors with different agendas, this conjecture of a third food regime is not fully substantial.

Agro-Food Economy and Trade

To avoid the ramification of the competition and over-subsidization that ended the second food regime, and to prevent similar food crisis, global agro-food governance was sought after. More importantly, attention turned onto securing access to food, rather than simply ensuring food supply per capita was produced. At the FAO World Food Conference, political consensus was made to address food security in agricultural governance.⁶⁷ One of the most noteworthy global agriculture and trade movements was the General Agreement on Tariffs and Trade (GATT).

The original purpose of the GATT was to control and prevent the repercussions of past downfalls. This was a chance to create a fair playing field for all actors. Moreover, it was to create an environment that promoted freedom of new actors to enter the trading arena, and promote new opportunities. GATT was created without strict agricultural regulation on tariffs or quotas, and with many agriculture-based exemptions. These exemptions and waivers, while had initial honourable intentions, turned out to be in favour of a handful of states in power. For example, under Article XI: 2(c) GATT, the United States and the European Union received waivers for the quantitative restriction on agricultural imports. These exemptions allowed import restrictions, as long as it reinforced domestic products or there were suitable substitutable domestic products. In addition, it allowed temporary surplus dumping of agricultural products. The United States also received a waiver to negate certain obligations of Article XI. This exemption enabled them to impose import quotas that were not connected to domestic production regulation programs.⁶⁸ As evidenced, the policies laid out in the GATT had contrasting significance between

⁶⁷ FAO, 'Report of the World Food Summit' (17 November 1996) WFS 96/REP

⁶⁸ General Agreement on Tariffs and Trade (adopted 30 October 1947, entered into force 1 January 1948) 55 UNTS 814 (GATT); Carmen G Gonzalez, 'Institutionalizing Inequality: The WTO Agreement on Agriculture, Food Security, and Developing Countries' (2002) 27 Columbia Journal of Environmental Law 433.

developed and developing countries. On one hand, GATT promoted agricultural production in developed states by new policies that increased taxes on agricultural exports, allowed import subsidization and farmers compensation, which ultimately, yielded products below world market prices. On the other hand, developing states lacked the means to finance agriculture production, and refocused on other industries, while, simultaneously, unable to cope, had to implement higher taxes on agricultural products to retain reasonable food prices.⁶⁹ At this period, with no other choice, many developing states had to lower import tariff under the structural adjustment programs mandated by the World Bank and IMF. This resulted in increased cheap foods, subsidized imports and, finally, wreaked chaos in local markets, which instigated increased food insecurity in some states.⁷⁰ Developing countries lost approximately \$35 billion annually due to the decline in market share for agricultural products.⁷¹ The austerity measures imposed by the IMF and World Bank created unrest and, ultimately, led to the food riots of the 1980s.⁷²

Ultimately, GATT led to an increased instability of food production, distribution and consumption. Despite, food production increasing, and Malthusian fears calming, many, now, did not have the economic capabilities to access adequate food. Accessibility to food was hampered, causing hunger to rise, and making food insecurity a more severe concern. A report released by the World Bank in 1986 acknowledges the causes of world hunger at this time. Particularly, the focus on food availability negated other more crucial factors of famine – the loss of freedoms associated with income generation. This report suggest of those who were victimized from this, include small scale farmers whose crops declined or those are unable to find alternative sources of income, landless agricultural workers who lost their employment during production decline or who are unable to cope

⁶⁹ General Agreement on Tariffs and Trade (n 68).

⁷⁰ Shona Hawkes and Jagjit Kaur Plahe, 'Worlds Apart: The WTO's Agreement on Agriculture and the Right to Food in Developing Countries' (2013) 34 *International Political Science Review* 21; Jennifer Clapp, 'WTO Agriculture Negotiations: Implications for the Global South' (2006) 27 *Third World Quarterly* 563

⁷¹ Gonzales (n 68) 435.

⁷² Thomas O'Brien, 'Food Riots as Representations of Insecurity: Examining the Relationship between Contentious Politics and Human Security' (2012) 12 *Conflict, Security & Development* ISSN: 31.

with the rapid increase in food prices with limited or stagnant wages, non-agricultural workers who experience a decline in wage, and pastoralists whose incomes and food supply are dependent upon the sale of their animals.⁷³ It confirms the lack of food security was due to the lack of purchasing capabilities of individuals and nations, not on the lack of supply alone. Thereby, the redistribution of purchasing power and resources can alleviate acute food insecurity in the short term, and help economic growth and reduction of poverty and malnutrition in the long term – outcomes of hunger in the short term also sacrifice output and income, consequently, enabling the cycle of poverty and hunger to continue for individuals and communities.⁷⁴ This report also corroborated that the “policies of developed countries limit international trading opportunities.”⁷⁵ GATT’s control on trade influenced agriculture and food production and negated the freedom of choice of food production, thereby simultaneously hindering the freedoms of distribution and consumption. “Trade restrictions caused international markets to be more unstable than they would have been otherwise, and thus, contribute to transitory food insecurity.”⁷⁶ Here, transitory food insecurity refers to a temporary lack of access to sufficient supply of food in a household resulting from food price volatility, instable household incomes and food production imbalances.⁷⁷ This lack of freedom stemming from trade restrictions, controlled the capabilities enjoyed by individuals regardless of geographic location – freedom of import, income, purchase power, etc.

Conclusion

The political economy of agriculture and food plays an immense role in realizing the right to adequate food, as it has great impacts on the production, distribution and consumption capabilities. The food regime theory is useful to analyse the implications of the restructuring of agriculture and food systems, specifically the outcomes of changes in

⁷³ World Bank, ‘Poverty and Hunger: Issues and Options for Food Security in Developing Countries’ (1986) 5.

⁷⁴ World Bank (n 73) 4.

⁷⁵ *ibid* 12.

⁷⁶ *ibid*.

⁷⁷ *ibid* 1.

production and distribution. The first food regime demonstrated the beginnings of an international trading system, especially pertaining to agriculture commodities. By opening markets, individuals were able to appreciate new freedoms. Of capabilities, the most influential was the freedoms associated with steady income generation as it is interlinked with a collective set of capabilities. However, individuals also suffered a loss of a number of pre-existing capabilities, primarily those associated with traditional food practices and inhibition of ecological diversity. The second food regime emerged during a period where hunger and famine were at high levels, and in response, food availability, through the creation of surplus, was viewed as invaluable to mitigate this problem. Since, at this point the Malthusian theory was still prominently followed, international organizations directed their efforts in creation and redistribution of food supply. This had multiple repercussions on the economic and nutritional capabilities of individuals and communities, and ultimately, hindered development capabilities of the society. In addition, the intensification of agriculture sectors and the increase of food production were done with a cost to the environment. Sustainability factors and its implications on the climate were overlooked – environmental degradation is a deprivation of freedoms and capabilities such as the freedom to enjoy clean and stable source of water. The trade and agriculture agreements under GATT affected the freedoms of food production, distribution and consumption by employing stringent contingencies. Thereby, changing local agriculture practices and thus the availability of the food people were traditionally accustomed to eat. This also limited the freedom to procure food as they saw culturally and traditionally appropriate. While, international attention on securing food had developed, the ultimate flaws of surplus distribution were verified by the capabilities and entitlement approach. New understanding of the causes of hunger developed, putting focus on the lack of access to food, not availability, and moved focus from caloric subsistence to nutritional needs.

Chapter 3: WTO's Trade and Agriculture Agreements

The previous chapters discussed issues arising from the production and distribution of agriculture and food. In particular, Chapter 2 discussed the outcomes of trade restrictions implemented under the General Agreement on Tariffs and Trade, on capabilities and freedom, particularly on the sustained access to adequate food. Trade can contribute to the security of access to food by generating economic freedoms, as well as individual income freedom and purchase capabilities – the previous chapter signified reasons to why availability is not a fundamental aspect. In addition, trade can also impact food sovereignty capabilities by influencing crops produced and local biodiversity. Trade here is used to refer to trade provisions and other trade-related aspects, such as investment provisions and intellectual property. During the year of 1986, the Uruguay Round of the GATT began, with the mandate to address agriculture and food in world trade, only in 1993, negotiations were concluded with the establishment of the World Trade Organization (WTO). This chapter focuses specifically on some trade agreements under the WTO. The WTO is the main supervisory power to international agriculture trade, making it significant to evaluate in this paper. Furthermore, all WTO member states are bound by trade and human rights law – most have ratified ICESCR.⁷⁸ Thereby, obligations outlined in ICESCR regarding Article 11, are a valid obligation among most members, and provide standards in which agricultural trade and trade-related law can be held to.⁷⁹ The purpose of this chapter is to analyse two specific trade agreements of the WTO: the Agreement on Agriculture (AoA), and the agreement on Trade-Related Intellectual Property Rights (TRIPS), in light of its impacts on the realization of the right to adequate food, and in terms of capabilities and functionings. These are chosen specifically because these are two policies that largely influence the availability, utilization, and access to food. Moreover, these agreements are highly controversial in its

⁷⁸ Kerstin Mechlem, 'Harmonizing Trade in Agriculture and Human Rights : Options for the Integration of the Right to Food into the Agreement on Agriculture' (2006) 10 Max Planck Yearbook of United Nations Law 129.

⁷⁹ *ibid.*

final impacts on the enjoyment of certain human rights.⁸⁰ In fact, some scholars argue the AoA and TRIPS agreement in particular oppose the potential capabilities or freedoms of individuals and nations to achieve realization of the right to adequate food.⁸¹ Thereby, in this chapter these agreements are evaluated in light of the capabilities it affects. By focusing on these two agreements, other important agreements and protocols, that may play a vital role in food security and realisation of the right to adequate food, will go unexamined – such as the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, and the International Treaty on Plant Genetic Resources for Food and Agriculture (relevant to TRIPS). This is a limitation of this chapter. However, this chapter hopes to focus on trade regulation under the WTO because of its more direct consequences on the production and distribution of agriculture and food.

The Agreement on Agriculture

The AoA was created in reaction to previous trade restrictions; it was “to bring more discipline and predictability to world agricultural trade by correcting and preventing restrictions and distortions including those related to structural surpluses so as to reduce the uncertainty, imbalances and instability in world agricultural markets.”⁸² The objective of the AoA as stated in its preamble, was to “establish a fair and market-oriented agricultural trading system,” specifically demanding a reform to create more “operationally effective GATT rules and disciplines.”⁸³ In particular, its “long-term objective is to provide for substantial progressive reductions in agricultural support and protection sustained...resulting in correcting and preventing restrictions and distortions in

⁸⁰ Tilahun Weldie, ‘The Impact of the Trade Related Aspects of Intellectual Property Rights Agreement (TRIPS Agreement) on the Realization of the Right to Food’ (2010) 1 Bahir Dar University Journal of Law 97-98.

⁸¹ *ibid* 109-112; Christine Kaufmann and Simone Heri, ‘Liberalizing Trade in Agriculture and Food Security - Mission Impossible’ (2007) 40 Vanderbilt Journal of Transnational Law 1056.

⁸² GATT, Ministerial Declaration on the Uruguay Round of Multilateral Trade Negotiations, adopted in Punta Del Este, Uruguay, on 20 September 1986, ILM 25 (1986), 1623 et Seq.

⁸³ Agreement on Agriculture (15 April 1994) LT/UR/A-1A/2

world agricultural markets.”⁸⁴ Ultimately, its goals include preventing the protectionism attitude of the past GATT policy by focusing on three pillars: increasing market access, and reducing trade-distorting domestic support and export subsidies.⁸⁵ Trade liberalisation is in accordance with the principles of capabilities approach, as it allows individuals more capabilities of transactions within the market. Also, the potential economic growth that may occur from trade liberalisation may help individuals to earn higher incomes, which is then capable of creating a domino effect of enabling more freedoms – wealth alone is not a focal point of capabilities approach, but instead the capabilities it enables.⁸⁶ Trade liberalisation, in theory, should increase the opportunities individuals and societies have, whether in regards to agriculture production, distribution or ultimate consumption according individual preference.

1. Market Access

This first pillar of the AoA, which is market access, is to create a more accessible market of agricultural products by three means: tariff reduction and making non-transparent import restrictions more transparent, also known as non-tariff barriers, and special safeguard mechanisms to prevent interference of import with domestic production – safeguard mechanisms can include temporary increase in tariffs to mitigate import surges and price drops to protect local producers.⁸⁷ There appear to be three hindrances to market access. First, one requirement was for developed states to reduce their tariffs by 36 percent over six years, and developing states were to reduce their tariffs by 24 percent over ten years.⁸⁸ However, since, an overall average of 36 percent reduction was required, developed states instead reduced tariffs on ‘less sensitive’ products by high rates, and increased tariffs of the items demarcated as ‘sensitive agricultural products’ by low rates – products were allocated different tariff rates according to its sensitivity on its

⁸⁴ Agreement on Agriculture (15 April 1994) LT/UR/A-1A/2

⁸⁵ Mechlem (n 78) 141.

⁸⁶ Sen, *Commodities and Capabilities* (n 22).

⁸⁷ Mechlem (n 78) 141-146; Terence P Stewart and Stephanie Manaker Bell, ‘Global Hunger and the World Trade Organization: How the International Trade Rules Address Food Security’ (2015) 3 Penn State Journal of Law and International Affairs 143.

⁸⁸ Gonzalez (n 68) 453-455.

impact on the market access.⁸⁹ While, an overall average of 36 percent reduction in tariffs was achieved, its original objectives were not fully achieved because the tariffs on sensitive agricultural products, such as food staples, that had a larger impact on opening market access more equitably, were not substantially reduced. In addition, despite the requirement to have an absolute tariff reduction commitment of 15 percent and 10 percent for developed and developing states, respectively, not all countries fully committed – the initial commitments made did not meet the required minimum.⁹⁰ For example, a study found that the overall commitment to reduction by the EU on sugar imports was 6 percent, as opposed to the required 15 percent minimum.⁹¹ Since import tariffs were still higher on certain products, the freedoms to export were strained by the cost, leaving the market not as accessible to some nations as the agreement aimed.

In relation to the second agenda, which was the tariffication of non-tariff barriers under Article 4.2 of the AoA - “members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties” including “quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties.”⁹² This was to reduce other barriers that were not directly correlated to tariffs, therefore reducing import protection and opening markets to new actors. However, this is now known as ‘dirty tariffication’ because the tariffication conversions that took place were based on the world market prices during the period 1986 to 1988.⁹³ This period was used to create a base line, though some argue it was a period where world market prices were undervalued and domestic market prices were overvalued, ultimately, creating tariffs that were higher in value than the worth of non-

⁸⁹ UNCTAD, ‘The Uruguay Round And Its Follow-Up: Building A Positive Agenda For Development 1997’ (1998) UNCTAD/ITCD/TED/2

⁹⁰ Sharmin Tania and Jackbeth K Mapulanga-Hulston, ‘Examining the Synergy between the Right to Food and Agricultural Trade Policies’ (2016) 24 African Journal of International and Comparative Law 299-300.

⁹¹ Merlinda D Ingco, ‘Agricultural Trade Liberalisation in the Uruguay Round: one step forward, one step back?’ (1995) 1500 WPS 50.

⁹² Agreement on Agriculture (15 April 1994) LT/UR/A-1A/2 Article 4

⁹³ Tania and Mapulanga-Hulston (n 90) 300.

tariff barriers.⁹⁴ In addition, the period chosen was also prejudicial, since it was a time of increased protectionism practices. With regards to the items that contained dirty tariffification, this included items such as dairy, sugar and grains, products that were heavily produced in developing states⁹⁵. For example, Switzerland's tariff for dairy products was declared at 795 percent, however the estimated actual value of the non-tariff barriers was 321 percent.⁹⁶ These two events, dirty tariffification and raised ceilings, caused tariffs that increased import cost and hindered some individual's capability to access the markets.

The third hindrance to market access is evident in the special safeguard mechanisms under Article 5 of AoA, allowing states to increase import duties, if non-tariff barriers have been converted into custom duties. Special safeguard mechanisms allowed members to raise tariffs when imports exceed the price or volume trigger level, in order to prevent disrupting domestic production.⁹⁷ However, some developing countries did not have access to the special safeguard provisions because it was only available to countries that were already engaged in tariffification during the Uruguay Round negotiations.⁹⁸ Meanwhile, others took full advantage of these mechanisms. For example, the United States used the special safeguard mechanism on 189 tariff lines, again mostly on products mentioned previously i.e.: dairy, sugar and grains.⁹⁹ This pillar of the AoA was to create a more open and fair market, allowing new states to enjoy the freedom to participate in trade. However, despite the provisions in the AoA, as evidenced above, there were still many barriers that prevented some from enjoying equitable market access. Market access has many implications on the economic growth of individuals and societies, and hence can hinder the functionings associated with capabilities that are instilled by economic freedoms – this can include the enjoyment of social services funded by the government or

⁹⁴ *ibid*; Gonzalez (n 68) 400.

⁹⁵ Tania and Mapulanga-Hulston (n 90).

⁹⁶ S. Tangermann, 'Implementation of the Uruguay Round Agreement on Agriculture by Major Developed Countries', (1995) UNCTAD/ITD/16

⁹⁷ Tania and Mapulanga-Hulston (n 90) 301.

⁹⁸ Gonzalez (n 68) 463; Tania and Mapulanga-Hulston (n 90) 301.

⁹⁹ WTO Trade Policy Review Body, 'Trade Policy Review: United States', (25 August 2010) WT/TPR/S/235/Rev.1

individual purchase power.

2. Domestic Support

The second pillar, under Article 6 of the AoA, was instilled to prevent trade-distortion from occurring due to agricultural support.¹⁰⁰ Domestic support was evaluated by Aggregate Measurement of Support (AMS) which was defined in the AoA Article 1(a) as “the annual level of support, expressed in monetary terms, provided for an agricultural product in favour of the producers of the basic agricultural product or non-product-specific support, provided in favour of agricultural producers in general”.¹⁰¹ The agreement was to reduce AMS by 20 percent in developed states and 13 percent developing states, using the base period 1986 to 1989 as noted earlier.¹⁰² A few problems became apparent within the domestic support framework. First, AMS was calculated based on individual product support given to producers, while final reduction commitments were based on total support, rather than product-by-product basis. Hence, similar to earlier, states were able to achieve their commitments by strategically steering domestic support from one sector to another.¹⁰³ Domestic support was also evaluated based on its distortions on trade and the market. To denote different domestic support based on its level of trade-distortion, a traffic light system was incorporated. The categories ‘amber box’ and ‘green box,’ represent the most and least trade-distorting. In addition, the ‘blue box’ category represents support under production-limiting programs, such as exclusion of some direct payments to farmers, and the *de minimis* rule, an exemption to domestic support reduction commitments under Article 6.2 of AoA.¹⁰⁴

The second problem was seen in this categorization of domestic support, specifically referred to as ‘box shifting,’ which occurred with misuse of the green box.¹⁰⁵ Annex 2 of

¹⁰⁰ Agreement on Agriculture (n 83) Article 6.

¹⁰¹ *ibid* Article 1.

¹⁰² Tania and Mapulanga-Hulston (n 90) 302.

¹⁰³ *ibid* 302-303.

¹⁰⁴ *ibid*.

¹⁰⁵ *ibid* 303-304.

the AoA details products worthy of the green box, which also, has to have minimal or no trade-distorting implications. The list contains general services, public stockholding for food security purposes, domestic food aid, and direct payments to producers as income support, structural adjustment assistance and environmental programmes.¹⁰⁶ Some argue domestic support of agricultural production was ingeniously labelled under the green box to mask on-going trade distortions.¹⁰⁷ Such examples include the United States' domestic food aid programmes, the EU's rural development and environmental programmes and Japan's environmental programmes – some disagree on the true objectives of these.¹⁰⁸ A third problem occurred as subsidy accumulation on the same products and producers were allowed. This is apparent in the United States of subsidization of corn production. During the fiscal years from 2003 to 2006, 43.7 percent of the total program payments were distributed to corn manufacturers, which received amber box and green box subsidies, at a total of 55 percent AMS.¹⁰⁹ Accumulation of subsidy can distort production, as it promotes producers to choose certain products or sectors that are highly subsidized, and thereby security of a higher monetary yield. This negates the true value of the capability to determine agriculture production, and also can affect the prices of food products, which can ultimately curtail purchase freedoms.

Fourth, one of the provisions of the green box was to decouple income support from production choice or volume. This can be seen as another trade-distorting impact, since farmers were receiving payments through the direct payment subsidization, their income was not solely dependent on the crop production itself.¹¹⁰ For example, the direct payment to farmers in the United States, influenced food production by various means such as requiring land to be continuously used and influenced the growth of crops, as

¹⁰⁶ Agreement on Agriculture (n 83) Annex 2.

¹⁰⁷ Gonzalez (n 68) 483.

¹⁰⁸ Tania and Mapulanga-Hulston (n 90) 303.

¹⁰⁹ WTO Committee on Agriculture Special Session, 'G-20 Comments on the Chair Reference Paper on Green Box' (16 May 2006) JOB(06)/145

¹¹⁰ Tania and Mapulanga-Hulston (n 90) 304.

vegetables and fruits had various restriction.¹¹¹ This indirectly affected the agriculture of choice, and furthermore, not all countries were able to afford the decoupled incomes.¹¹² As shown, domestic subsidization has a lot of trade distorting factors that opposes its objectives as stated in the preamble – to correct and prevent “restrictions and distortions in world agricultural markets.”¹¹³ The exemptions found, under the domestic subsidization pillar, more trade distortions were instigated, which restricted the capabilities that would have stemmed from trade liberalisation.¹¹⁴ The capabilities approach promotes free and open markets, one reason regards its affect on poverty and development – generally literature has agreed that the greater the openness or accessibility of the market, the greater the developmental growth will be.¹¹⁵ So, perhaps the collective set of capabilities dependent on trade liberalisation also impacts other economic and social factors that may in the long-term help reduce poverty levels.

3. Export Subsidies

The third pillar, under Article 3.3 of the AoA, prohibits members from subsidizing export that is not in line with other provisions and commitments under the AoA. In particular, the AoA called for a reduction in export subsidies from the base period of 1986 to 1988, and prohibited subsidy that exceeded budgetary outlay and quantity commitment levels.¹¹⁶ However, this created more prejudicial treatment between developed and developing states. Since many developing states during the base period did not provide export subsidies, and therefore did not declare initial budgetary outlay and quantity commitments levels, they were not allowed to provide any export subsidy.¹¹⁷ While, developed nations had made quantitative and budgetary commitments, and therefore, had

¹¹¹ H. de Gorter, 'The Distributional Structure of US Green Box Subsidies' in R. Melendez- Ortiz, C. Bellmann and J. Hepburn (Eds), *Agricultural Subsidies in the WTO Green Box: Ensuring Coherence with Sustainable Development Goals*, (Cambridge University Press 2009)

¹¹² Tania and Mapulanga-Hulston (n 90).

¹¹³ Agreement on Agriculture (15 April 1994) LT/UR/A-1A/2

¹¹⁴ WTO Committee on Agriculture Special Session, 'Domestic Support' (13 April 2000) G/AG/NG/S/1

¹¹⁵ Andrew Berg and Anne Krueger, 'Trade, Growth and Poverty' Paper Presented to the 2002 Annual World Bank Conference on Development Economics, (2002).

¹¹⁶ Tania and Mapulanga-Hulston (n 90) 317.

¹¹⁷ *ibid.*

responsibility to reduce export subsidization, still some export subsidization was continued.¹¹⁸ Again, through the third pillar of export subsidization, discriminatory policies are evident that are limiting the freedoms of certain countries.

Overall under these three pillars, inhibiting market access, distorting trade and unequal and unfair trading requirements can be seen. While the AoA was made in attempt to prevent the protectionism from the GATT, and promote agriculture trade liberalisation, it instead gave way to different trade distortions and had many affects on domestic economies. To evidence this, a study conducted by the FAO in 1999, analysed the impact of the AoA on food security in 16 developing countries. In this study, the FAO found the AoA resulted in an overall increase in food imports and a decline in food production.¹¹⁹ Of the products that were imported more include meat and dairy products, which the FAO found to pressure “key agricultural sectors in developing countries that were important for economic development, employment, food supply and poverty alleviation.”¹²⁰ Specifically, the FAO reported that agricultural trade liberalisation increased cheap food import and triggered a depression in food prices, while simultaneously government cuts in agricultural subsidies increased farming cost.¹²¹ Unable to cope with the high production cost and low output yield, small farmers lost their lands and livelihoods as they were unable to compete with the large-scale agricultural enterprises.¹²²

The original objectives of creating fair and equal market were not adequately achieved. In theory, trade liberalisation should create allocative efficiencies, wherein production is reflective of consumer preferences, and thereby can enable higher collective incomes.¹²³ As discussed previously, income generation is a key proponent to enabling capabilities.

¹¹⁸ Agreement on Agriculture (n 83).

¹¹⁹ FAO, ‘WTO Agreement on Agriculture: The Implementation Experience - Developing Country Case Studies’ (2003); Carmen G. Gonzalez, ‘Institutionalizing Inequality: The WTO Agreement on Agriculture, Food Security, and Developing Countries’ (2002) 27 Columbia Journal of Environmental Law 435

¹²⁰ Gonzalez (n 68) 476-477.

¹²¹ FAO (n 119).

¹²² Gonzalez (n 68).

¹²³ Kaufmann and Heri (n 16) 1041.

While some scholars agree, on the short term, the change occurring from trade liberalisation can have negative implications; evaluating trade liberalisation can bring different outcomes in the short-term and long-term. In the short-term, the growth of trade can diminish employment in certain sectors, especially for unskilled workers, due to its effects on prices and wages.¹²⁴ The long-term implications, however, can promote individual freedoms. By reducing tariffs, governments are likely to lose some revenue, which can have multiple capability-limiting consequences on services provided by the government. This lack on income can impact health care, education, infrastructure etc. and can potentially disrupt development as well.¹²⁵ The lack of public funding can hamper an individual's capabilities, especially if they are reliant on services provided by the government. While short-term results may see a negative outcome, in the long term, trade liberalisation can help development. Bannister and Thugge, agree that the potential short-term effects can be negative, particularly on low-income populations, but in the long term illustrates a positive correlation between trade liberalisation and poverty levels. Specifically, they highlight the importance of enhancing other capabilities simultaneously, by infrastructure development, market facilitation, and labour mobility.¹²⁶ Perhaps, by aligning the AoA in theory to practice, and promoting fair and equal market access, the AoA is capable of opening more freedoms to individuals and communities to develop economically and have greater developmental opportunities in the long run.

Agreement on Trade-Related Intellectual Property Rights

As explained earlier, the second agreement this chapter evaluates is the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), which was created at the Uruguay Round of the GATT in 1994. While not directly impacting trade regulations, it does have effects on agricultural production freedoms. The objectives under Article 7 of

¹²⁴ Pinelopi Koujianou Goldberg and Nina Pavcnik, 'Trade, Inequality and Poverty: What Do We Know? Evidence from Recent Trade Liberalization Episodes in Developing Countries' (2004) National Bureau of Economic Research Working Paper No. 10593.

¹²⁵ Sen, 'Inequality Reexamined' (n 18).

¹²⁶ Geoffrey Bannister and Kamau Thugge, 'International Trade and Poverty Alleviation IMF Working Paper, WP/01/54. Washington, DC: IMF.'

the agreement on TRIPS is as follows: the objective is for members to promote the “technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.”¹²⁷ The TRIPS agreement encourages knowledge dissemination and technology transfer in aims to improve social and economic welfare and development. The principles under Article 8 of TRIPS permit members to “adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development.”¹²⁸ Thereby, bringing attention of TRIPS implications on public health, nutrition, and socioeconomic development. Overall, the main purpose of the TRIPS is to create a balance between private property holders and public interest – this balance promotes continuous research and innovations, which is advantageous for public development.

TRIPS Patent Law

Under Section 5 of the agreement on TRIPS, protection of intellectual property is expounded.¹²⁹ Patent law is pertinent in the context of agriculture production, because patents here include genetically modified seeds, fertilizers and pesticides, hence having an overall influence on cost and output.¹³⁰ There are two types of patents that are relevant in this scenario, product patents and process patents. Product patents can prohibit the production, usage and sales of products, while process patents can prohibit the commercialization or usage of a particular process undertaken in production.¹³¹ A common example in agriculture is the patenting of seed varieties. This especially harms subsistence farmers, because it forbids collecting or saving seeds, replanting, selling or exchanging seeds without consent from the owner and frequently farmers may have to

¹²⁷ Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994) 1869 UNTS 299 (TRIPS) Article 7.

¹²⁸ Ibid Article 8.

¹²⁹ Agreement on Trade-Related Aspects of Intellectual Property Rights, Section 5.

¹³⁰ Weldie (n 15) 113.

¹³¹ Ibid 113-114.

pay royalties for planting patented seeds to the owner.¹³² Furthermore to control usage of patented seeds, biological confinement mechanisms have been created, whereby a plant's genome contains reproductive restrictions.¹³³ Hybridisation is an example of biological confinement, where progeny are incapable of replicating the genetically modified trait.¹³⁴ Another example is Genetic Use Restriction Technology (GURT), also known as 'terminator technologies,' where some seeds are genetically engineered to only germinate once, require the use of specific herbicides, and/or are sterile – dispute regarding GURT usage led to an international *de facto* moratorium since 2000.¹³⁵ Concerning patent law, there are also legal avenues under intellectual property law, allowing protection of research innovations, and protection under the Article 16 of the Convention on Biological Diversity and the International Union for the Protection of New Varieties of Plants (UPOV).¹³⁶ While it is completely understandable for companies to protect genetically modified seeds, and necessary for continued investment in research and development, there are advantages and disadvantages to farmers. The restrictions on traditional agriculture practices, such as saving and sharing seeds, leaves farmers with a lack of pre-existing capabilities. Such capabilities can include the freedom to choose the crops grown, or the freedoms associated with the additional monetary costs. Also, the use of biological confinement can be a trait inbred through outcrossing, unintentionally resulting in hybrids or sterility of untargeted plants, and harming biodiversity¹³⁷ As stated earlier, biodiversity can negative impact traditional practices, food preferences etc. – food sovereignty can be disadvantaged. Paradoxically, genetically modified seeds with improved functioning can be beneficial. Seeds with advanced technology can also improve production rate and production quality, and overall cultivate a more dependable product output. This fruitful production can improve a farmer's economic capabilities,

¹³² Kevin R. Gray, 'Right to Food Principles Vis-a-Vis Rules Governing International Trade' (2003) British Institute of International and Comparative Law 32

¹³³ Mary Dobbs, 'Genetically Modified Crops, Agricultural Sustainability and National Opt-Outs – Enclosure as the Loophole?' (2017) 54 Common Market Law Review 9.

¹³⁴ *ibid.*

¹³⁵ *ibid.*; Chidi Oguamanam, 'Genetic Use Restriction (or Terminator) Technologies (GURTs) in Agricultural Biotechnology: The Limits of Technological Alternatives to Intellectual Property' (2005) Canadian Journal of Law and Technology 59

¹³⁶ Dobbs (n 133) 10.

¹³⁷ Dobbs (n 133) 9.

which can then help instil freedoms of choice associated with income generation as mentioned previously, and stabilize ultimate access to food.

The patent regulation under Section 5 of the agreement on TRIPS also brings to concern biopiracy violations. Biopiracy is a term coined to refer to the appropriation of indigenous knowledge or biological resources, for patent acquisition for commercial usage.¹³⁸ This can include corporations claiming ownership for resources available in other countries, or where locals have pre-established knowledge in regards to the biological resource.¹³⁹ A highly note-worthy example is the biopiracy of the Enola bean. The Mayacoba bean, a bean yellow in color, is indigenous to the Mexican region. Farmers in the northern region of Mexico heavily rely on this bean, as it is a staple food in the Mexican diet.¹⁴⁰ In 1999, Larry Proctor, through his company PODNERS, LLC, isolated a gene variety of the Mayacoba bean that contains the genetic makeup for beans only yellow in color, in which he then termed the Enola bean. He then acquired a United States patent on this hybrid bean, based on the novelty of breeding an exclusively yellow-colored bean. After having patented this bean, Proctor sued importers of the Enola bean, and similar looking yellow colored Mayacoba beans.¹⁴¹ With fear of infringing these patent rights, export sales of yellow beans dropped over 90 percent. It is estimated the drop in sales affecting the economic stability of approximately 22,000 farmers.¹⁴² In 2008, the patent was successfully revoked, allowing farmers in Mexico to cultivate again their indigenous bean.¹⁴³ However, the yellow Mayacoba bean is a good example of biopiracy because of the appropriation of a local biological resource that had already been in use for generations, and which many local families were reliant on. Furthermore, it directly and indirectly led to the rise of food insecurity and economic instability of many Mexican farmers. Considering it that it took almost 10 years to get the patent

¹³⁸ Weldie (n 15) 121-122.

¹³⁹ *ibid.*

¹⁴⁰ 'Enola Bean Patent Challenged, Available at [Http://Www.Etcgroup.Org/Article.Asp?Newsid=96](http://www.etcgroup.org/article.asp?newsid=96)'.

¹⁴¹ *ibid.*

¹⁴² ETC Group 'Enola Bean Patent Challenged' (14 July 2004)
<http://www.etcgroup.org/article.asp?newsid=96>> accessed 1 June 2018

¹⁴³ ETC Group 'Enola Patent Ruled Invalid' (14 July 2004)
<<http://www.etcgroup.org/content/hollow-victory-enola-bean-patent-smashed-last-maybe>> accessed 1 June 2018

revoked, it may have impoverished a whole generation who's suffered the impact of this interference in the natural order. Biopiracy has occurred with numerous biological resources, while only some have been legally challenged. These include rosy periwinkle, neem, basmati rice and hoodia, among others.¹⁴⁴ In each case, patenting of local resources have many implications, including royalty payments for indigenous plants, or similar to patent regulation previously mentioned, locals were also prohibited from collecting, selling or replanting seeds.¹⁴⁵

The ultimate goal of the agreement on TRIPS is to strike a balance between intellectual property owners and public interests. Under Article 27.2 and 27.3 of TRIPS, member states are permitted from excluding from patents “commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal, or plant life or health or avoid serious prejudice to the environment,” this includes essential “biological processes for the production of plants or animals.”¹⁴⁶ However, the provisions under TRIPS do not adequately recognize the implications of private property protection on the social and economic development of society. Especially, in regards to the right of adequate food, the agreement does not set out clear provisions to guide WTO member states in their fulfilment of obligations to its progressive realization. A resolution released by the United Nations Sub-Commission on the Promotion and Protection of Human Rights illustrated the incompatibility between the agreement on TRIPS and international human rights obligations. In the Resolution 2000/7 Intellectual Property Rights and Human Rights, the committee agreed “the implementation of the TRIPS Agreement does not adequately reflect the fundamental nature and indivisibility of all human rights, including the right of everyone to enjoy the benefits of scientific progress and its applications...to the right to food.”¹⁴⁷ Moreover, “there are apparent conflicts between the intellectual property rights regime embodied in the TRIPS Agreement, and

¹⁴⁴ Weldie (n 15).

¹⁴⁵ *ibid.*

¹⁴⁶ Agreement on TRIPS (15 April 1994) 1869 UNTS 299 Article 27

¹⁴⁷ United Nations Sub-Commission on the Promotion and Protection of Human Rights, 'Intellectual Property and Human Rights' 52nd Sessionm (2000) E/CN.4/Sub.2/Res/2000/7

international human rights law."¹⁴⁸ Since TRIPS has provisions to protect *ordre public*, perhaps it could take additional measures to encourage members states to support more patent exemptions for *ordre public* reasons.

Conclusion

Trade and trade-related factors can have large advantages and disadvantages on individual's and community's economic growth and food sovereignty capabilities. This chapter focused on agreements under WTO because of its supervisory power on trade regulation. Both trade agreements discussed should theoretically enable individuals to enjoy more freedoms, and promote the development of societies. The objective of the AoA was to ultimately correct and prevent trade distortions and restrictions preventing access to equally participate in the market. Its three pillars, increased market access, and reduced trade distortions stemming from domestic support and export subsidies, has a lot of capability in encouraging a fair and equal market. However, as evidence above, some loopholes in the provisions deterred the achievement of its ultimate purpose of liberalising trade. While, the short-term shocks of trade reform can hinder economic progress, the AoA is capable of enabling more freedoms and opportunities, such as the income generation can provide individuals with capabilities to achieve better health, education, nutrition, etc. in the long run. The economic generation of the country can help with the overall development of society via public programmes, social services, health care, free education, improved infrastructure, etc. These services can especially help individuals with lower incomes to get access to services that may otherwise be inaccessible, and can help reduce poverty levels. In addition, as trade liberalisation should promote allocative efficiency, the agriculture and food production should attenuate to consumer preferences, and embody food sovereignty freedoms. The agreement on TRIPS was to create a balance of private property and public good. The objective of TRIPS was to enhance social and economic welfare for overall development, and highlights the importance of TRIPS on public health and nutrition. TRIPS is vital to motivate continued research and development in agricultural technologies to induce

¹⁴⁸ *ibid.*

productive and sustainable production, but can also restrict capabilities of food sovereignty practices, such as traditional production methods, and can negatively impact the biodiversity of local ecology. The *ordre public* exemptions under TRIPS could be encouraged to mitigate the possible negative effects it can have on health, environment, and biodiversity. Overall, trade can promote individual capabilities and well-being freedoms by helping the economic growth and promoting development, however, there can be untargeted consequences such as lowered biodiversity or food sovereignty.

Chapter 4: Right to Adequate Food

The conceptual relationship between the capability approach and human rights has been established through Nussbaum's list of basic capabilities, and Sen's characterisation of human rights as freedoms to achieve well-being.¹⁴⁹ Both concepts focus on enabling an individual's dignity by promoting individuals to have freedoms. By evaluating the human right, the right to adequate food, from a capabilities-based approach, it encompasses the necessity of obligations and duties. Furthermore, it can progress the realisation of the right by focusing on creating freedoms to "procure adequate food to fulfil individual dietary needs, free from harmful substances, culturally suitable and sustainably created."¹⁵⁰ In fact, Nussbaum argues fundamental capabilities should be protected and promoted through legal and political means at both national and international level.¹⁵¹ Thereby, exploring the capabilities that legal means can ensure or enhance is relevant. This chapter explores if national and regional legal frameworks can further promote capabilities to access the right to adequate food.

As described in the Introduction, the right to adequate food is found in multiple international and regional human rights law instruments, including ICESCR and international conventions aimed at specific groups. General Comment No. 12 further develops states obligations to respect, protect and fulfil by facilitating and providing.¹⁵² First, the obligation to respect includes respecting 'existing access to adequate food' and further 'requires State parties not to take any measures that result in preventing such access.'¹⁵³ Secondly, the obligation to protect 'requires measures by the States to ensure that enterprises or individuals do not deprive individuals of their access to adequate food.'¹⁵⁴ Both these obligations focus on ensuring pre-existing access to food remains obtainable for individuals – preventing capability deprivations. Thirdly, the obligation 'to

¹⁴⁹ Sen, 'Elements of a Theory of Human Right' (n 24); Nussbaum (n 25).

¹⁵⁰ General Comment No. 12 (n 5).

¹⁵¹ Nussbaum (n 25).

¹⁵² General Comment No. 12 (n 5).

¹⁵³ *ibid.*

¹⁵⁴ *ibid.*

fulfil (facilitate) means the State must pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security.¹⁵⁵ Nevertheless, States also have the obligation to fulfil that right directly in cases where individuals or groups are unable to enjoy this right.¹⁵⁶ This positive obligation incorporates direct food assistance when other options are not available to individuals, however, primarily focuses on creating opportunities to access food.

Defending Socio-Economic Rights

Understandably there is limitation in arguing realisation of social and economic rights, especially in regards to the obscurity surrounding them. Some scholars, such as Maurice Cranston and Joseph Raz, argue socio-economic rights are “utopian aspirations” and are not legally enforceable rights.¹⁵⁷ Cranston maintains that for a right to be enforceable, a clear relationship must be evident between the duty bearer and the duty, and moreover, the duties must be capable of being secured by the government. As illustrated above, the duties of obligations are clarified in General Comment No. 12. To him, socio-economic rights are not real rights because many governments are unable to deliver, or secure, these rights and therefore, as simply social ideals, they should not be regarded as rights.¹⁵⁸ In regards to this, as the ICESCR states, countries should promote the right to adequate food as far as their resources allow them to do so. Despite these views, there is countless literature defending socio-economic rights.¹⁵⁹ Following are several arguments in its defence. Often times, civil and political rights are viewed as negative obligations, and socio-economic rights are positive obligations. This perception of negative and positive obligations is not appropriate and should not be used to evaluate the capacity to promote

¹⁵⁵ General Comment No. 12 (n 5).

¹⁵⁶ *ibid.*

¹⁵⁷ Maurice Cranston, 'Human Rights, Real and Supposed' in DD Raphael, *Political Theory and the Rights of Man*, Ed. (Indiana University Press 1967) 43–53; Joseph Raz, 'Human Rights in the Emerging World Order' (2010) 1 *Transnational Legal Theory* 21.

¹⁵⁸ Maurice Cranston (n 157).

¹⁵⁹ Kenneth Roth, 'Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization' (2005) 26 *Human Rights Quarterly* 63; Sandra Raponi, 'A Defense of the Human Right to Adequate Food' (2017) 23 *Res Publica* 101.

these rights.¹⁶⁰ First, in regards to civil and political rights, these also require the obligation to protect and to fulfil, and thereby also include positive obligations such as the right to a fair trial. These are active measures governments must take in order to ensure the right can be implemented.¹⁶¹ On the other hand, socio-economic rights are not necessarily only positive obligations. Governments also have the responsibility to respect, and not interfere with pre-existing access to adequate food.¹⁶² For example, in cases of land grabbing where different crops are now grown for trade reasons, and local communities and subsistence farmers lose their sustainable access to food, the government in this regard, should protect these lands from interferences from external forces.¹⁶³ In addition, the governments themselves should not prevent access to food, such as the zoning laws prohibiting growing vegetables in some residential communities. This simply required the government to respect the right to adequate food, and to employ policies that will be inline with their obligations under this right. Also, other socio-economic rights can be found in some legal frameworks, such as healthcare, education, welfare and labour rights.¹⁶⁴

Regional Legal Development

The right to adequate food has been challenged in regional courts a number of times. Below, several cases are illustrated in which the right to food access has been mentioned in the regional human rights courts.

In 2012, the Inter-American Court of Human Rights (IACHR) released its judgment on the case *Sarayaku v Ecuador*, in favour of the Sarayaku indigenous community. The case concerned an Argentinian corporation's oil extraction plan in and near the community grounds. The IACHR concluded that the state had failed to respect the Sarayaku's rights

¹⁶⁰ Raponi (n 159).

¹⁶¹ Raponi (n 159) 102.

¹⁶² *ibid*; General Comment No. 12 (n 5).

¹⁶³ Raponi (n 159) 102-105.

¹⁶⁴ Sandra Raponi, 'A Defense of the Human Right to Adequate Food' (2017) 23 Res Publica 99

to communal property, consultation and life.¹⁶⁵ In particular, the Court accepted the community's claim that the corporations plan severely impact the right to food.¹⁶⁶ In addition, it agreed the extraction plans are in areas of the territory they hunt, fish and gather food, thus infringing on their food security.¹⁶⁷ The Court ordered the government of Ecuador to compensate the community to allow implementation of "educational, cultural, food security, health and ecotourism development projects or other communal works or projects of collective interest that the Community considers a priority."¹⁶⁸ The projects the compensation could develop can enable many freedoms that can help the community develop and maintain food security and sovereignty. Similar to the case above, the African Commission on Peoples' Human Rights in the case *SERAC v Nigeria*, ruled that the Nigerian government created malnutrition and starvation among the Ogoni indigenous community by the destruction of farm lands, natural resources and crops caused by negligent oil mining.¹⁶⁹ Furthermore, the Court declared the right to adequate food is implicit in the African Charter through the right to life (Article 4), right to health (Article 16), and right to development (Article 22).¹⁷⁰ The African Commission also acknowledged the implicit right to food in the case *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, wherein the indigenous group was displaced by the Kenyan government to build a wildlife reserve, and placed on semi-arid land.¹⁷¹ The Court ruled in favour of the applicant and found the government in violation for moving a pasture dependent community on lands unsuitable for pastoralism, and thereby, threatened the community's livelihoods and survivability.¹⁷² Both of these cases are similar in so far as the government in each country violated its obligations to respect and protect, and

¹⁶⁵ *Kichwa Indigenous People of Sarayaku Case (Ecuador)* (2012), Inter-American Court on Human Rights (Ser C) N 245 at para 284.

¹⁶⁶ *ibid* at paras 100, 134.

¹⁶⁷ *ibid* at paras 174.

¹⁶⁸ *ibid* at paras 317, 323.

¹⁶⁹ *Social and Economic Rights Action Center (SERAC) and Center for Economics and Social Rights (CESR) v Nigeria* Commission Decision 155/96 (2001) African Commission on Human and Peoples Rights

¹⁷⁰ *ibid*.

¹⁷¹ *ibid*.

¹⁷² *ibid*.

harmed the communities existing methods of accessing food.¹⁷³ While, these cases were not explicitly based on the grounds of the right to adequate food, it incorporated other rights that can influence the capabilities to maintain pre-existing access to food.

In 2012, the European Court of Human Rights considered the case of *Stanev v Bulgaria*. Here, Stanev was forced to live in a psychiatric institution for seven years, and without adequate food and poor living conditions.¹⁷⁴ The Court judged in favour of Stanev, affirming the living conditions in which Stanev was exposed to amounted to inhumane and degrading treatment, under Article 3 of European Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁷⁵ In addition, the court upheld the lack of financial resources cannot be a defence when faced with rights violations, particularly when the individual is held captive and therefore, unable to meet his own needs in any other way.¹⁷⁶ The Court held that providing inadequate food to individuals in social care institutions could be seen as inhumane and degrading treatment.

Domestic Legal Framework

The right to adequate food has also been incorporated into some domestic legal frameworks. While international legal frameworks are important, domestic legal frameworks can have a more direct affect on domestically ensuring access to food. Olivier De Schutter (the former Special Rapporteur to the Right to Adequate Food) in his recommendations advocates for the right to adequate food to be explicitly stated in domestic constitutions. He noted that this would create significant change because of the primacy constitutions have over ordinary laws.¹⁷⁷ In addition then, food, trade, and agriculture policies would be under more pressure to comply with domestic law requiring obligations under the right to adequate food. Some countries already have the right to

¹⁷³ Nandini Ramanujam, Nicholas Caivano and Semahagn Abebe, 'From Justiciability to Justice : Realizing the Human Right to Food' (2015) 1 McGill International Journal of Sustainable Development Law & Policy 10.

¹⁷⁴ *Stanev v Bulgaria* No 36760/06 (2012) I ECHR 3, at paras 209-210.

¹⁷⁵ *ibid* at paras 212-213.

¹⁷⁶ *ibid* at paras 210.

¹⁷⁷ Olivier de Schutter, 'Countries Tackling Hunger with a Right to Food Approach' (2010)

adequate food incorporated into their constitutions, while others are incorporating it into other legal frameworks. For example, Section 27 of the South African Constitution recognizes the right to have access to sufficient food, water, health care and social security and the Article 21 of the Belarus constitution recognizes it as part of the standard of living right. Multiple Latin American countries have also developed domestic frameworks. Some recognize the right in subsets of the population.¹⁷⁸ For example, Colombia and Guatemala specifically recognized the ‘child’s right’ to adequate food.¹⁷⁹ In addition, many countries including Malawi, Mali, Mozambique, Senegal and Uganda, are in the process of developing legal frameworks regarding agro-food and nutrition, and promoting access to food.¹⁸⁰ While not explicitly mentioned in domestic law, the Supreme Courts in both India and the Republic of Ireland have recognized the right to adequate food as parts of other rights.¹⁸¹ For example, in India, the Supreme Court has recognized the ‘right to adequate food’ is part of the ‘right to life’ under Article 21 of the Constitution in response to case *Kishen Pattnayak and Another v State of Orissa* in 1989, and then later, further developed in the *People’s Union for Civil Liberties v Union of India and Others* in 2001.¹⁸² In the Republic of Ireland, the Supreme Court has also recognized the ‘right to adequate food’ as part of the ‘right to life’ under Article 40 of the Constitution, in reaction to *G v. An Bord Uchtala and Others* in 1980.¹⁸³ Evidently, the right to adequate food has been incorporated into multiple legal frameworks. In terms of capabilities, this is a positive step towards promoting freedoms to acquire sustained access to food, as individuals have legal entitlements to this freedom. Perhaps through litigation, awareness of these legal entitlements can be created, and enabling individuals capabilities. The two cases below demonstrate the influence of litigation on creating access to food.

¹⁷⁸ Hilal Elver, ‘The Challenges and Developments of the Right to Food in the 21st Century: Reflections of the United Nations Special Rapporteur on the Right to Food’ (2016) 1 UCLA Journal of International Law and Foreign Affairs 10.

¹⁷⁹ *ibid.*

¹⁸⁰ FAO, ‘Legislation Database of FAO Legal Office: Country Policy and Legal Frameworks’ <<http://faolex.fao.org/faolex/countryprofiles.html>> accessed 1 June 2018

¹⁸¹ Raponi (n 159) 109.

¹⁸² *Kishen Pattnayak and Another v State of Orissa* (1989) Supreme Court of India; *People’s Union for Civil Liberties v Union of India and Others* (2001) 10 S.C.C. 1

¹⁸³ *G v An Bord Uchtala and Others* (1978) IR 32

The Case of India

India's constitution does not explicitly recognize the right to adequate food, though, it does imply the right, and obligates states to improve nutrition, standard of living and health under Article 47, and is deemed inseparable from the 'right to life' as stated in Article 27. *People's Union for Civil Liberties v Union of India and Others* is a noteworthy, on-going, case in the discussion of the justiciability of the right to adequate food.¹⁸⁴ The case was brought by People's Union for Civil Liberties (PUCL) against the government of India, the Food Corporation of India and state governments, for incompetent relief for drought-inflicted periods, and violating the right to life by deprivation of food.¹⁸⁵ The case has evolved to include other issues interconnected to the right of food including food-related schemes, poverty, right to work, maternity and infant entitlements, and overall accountability. To clarify, the case was brought because during a time of severe drought, many were dying from starvation, and despite state governments holding of food stocks, these were not distributed to those in need. An exploration of the reasons of this highlighted the inadequacies of the Public Distribution Scheme.¹⁸⁶ In interim orders, the Supreme Court of India conceded the 'right to food' was indeed part of the 'right to life'. The Court then ordered shops, established under the Public Distribution Scheme, to be opened and accessible to the people, Food Corporation of India to ensure appropriate usage of surplus grain, and furthermore, it enforced upon state governments the implementation of multiple food-securing schemes. These schemes included the Employment Assurance Scheme, the Midday Meal Scheme in primary school, the Integrated Child Development Scheme, the National Benefit Maternity Scheme, and the National Old Age Pension Scheme, among others.¹⁸⁷ The schemes ordered by the Supreme Court because despite the right to adequate food not being explicit, the Court in this case, obliged the government to uphold the obligation to fulfil

¹⁸⁴ Elver (n 178) 25.

¹⁸⁵ Ebenezer Durojaye and Enoch Macdonnell Chilemba, 'The Judicialisation of the Right to Adequate Food: A Comparative Study of India and South Africa' (2017) 43 Commonwealth Law Bulletin 266

¹⁸⁶ *ibid* 267-268.

¹⁸⁷ Right2Info, '*PUCL v Union of India*' (13 March 2003)

through facilitation and provide.¹⁸⁸ Following the case of *PUCL v Union of India*, other cases pertaining to the right to adequate food were also brought forward. In the cases brought to the Supreme Court, the Court upheld its position stating that the ‘right to food’ is a part of the ‘right to life’.¹⁸⁹ Similarly in *Sh. Ved Prakash Gupta v State of Punjab & others*, the claimant argued the governments inability to implement its schemes aimed at ensuring the right to food was attainable for vulnerable populations, and was harmful to children and lactating and pregnant mothers. In this case, the Court judged in ruling of the claimant requiring proactive measures to ensure its schemes were appropriately implemented.¹⁹⁰ The *PUCL v Union of India* case has made an immense difference to the justiciability of the right to adequate food in India. Despite the case being ongoing, the interim orders thus far have made a critical impact in food security. For instance, the interim orders enacted the National Food Security Act of 2013, a legal framework for food related programmes. A noteworthy key to this Act is the grievance mechanisms available for infringements of the right to adequate food.¹⁹¹ Furthermore, through this and the Right to Food Campaign, more individuals are aware of their entitlement to adequate food under the schemes mentioned above, and are proactively ensuring their entitlements. As shown, the judicialisation of the right to adequate food has made substantial improvements to hunger and malnutrition in India’s population by enabling individuals to have the capability to access adequate food.¹⁹²

The Case of South Africa

In contrast to India, South Africa explicitly mentions the right to adequate food in its constitution: Section 27 (1)(b) the right of access to sufficient food, Section 28 (1)(c) the child’s right to basic nutrition and Section 35 (2)(c) the prisoner’s right to adequate

¹⁸⁸ Durojaye and Chilemba (n 185) 268-270.

¹⁸⁹ Durojaye and Chilemba (n 185) 268.

¹⁹⁰ Human Rights Law Network, ‘*Sh Ved Prakash Gupta vs State of Punjab & others*’ < <http://www.hrln.org/hrln/right-to-food/pils-a-cases/569-sh-ved-prakash-gupta-vs-state-%20of-punjab-a-others-.html>> accessed 28 May 2018

¹⁹¹ Durojaye and Chilemba (n 185).

¹⁹² FAO, ‘Legal Developments In The Progressive Realization Of The Right To Adequate Food’ (2014)

nutrition.¹⁹³ Furthermore, to promote the realization of the right to adequate food, policies and programmes regarding food security have been developed. These include the Household Food Production program, One Home One Garden program, the Integrated Food Security Strategy, the National Policy on Food and Nutrition Security, the National School Nutrition Program and the Food for All Program.¹⁹⁴ These policy frameworks illustrate the governments attempt to fulfil its obligations to the right to adequate food. In particular, as mentioned in previous chapters, key measures in ensuring the right to adequate food relies upon making food available and accessible, creating the capabilities of individuals to access food. In many of these policy frameworks, food and agriculture production and distribution are considered. For example, the National Policy on Food and Nutrition Security was created to target the accessibility of nutritious food at the national level and in individual households.¹⁹⁵ Despite all these national level policies to ensure freedoms to enjoy the right to adequate food, many in South Africa still suffer from hunger and malnutrition.¹⁹⁶ To conceptualize this, the South African National Health and Nutrition Examination Survey (SANHANES-I) in 2013, found that nearly a quarter of the population was at risk of hunger, while another quarter were identified as in hunger. Furthermore, despite the policies aimed at children alone, 15.1percent of children in 2012 lived in hunger.¹⁹⁷ The legal and policy frameworks are put in place to ensure the right to adequate food, but the implementation falls short. In contrast to India, there has not been a large movement gaining traction to ensure the government's obligation to respect, protect and provide access to food. However, there have been only a number of cases.¹⁹⁸ For example, in the case *Kenneth George and Others v the Minister of Environmental Affairs and Tourism*, which was brought to the Cape of Hope High Court claiming the government failed to provide fair access to fishing rights to traditional fishermen. In doing so, they considered violations of the 'right to adequate food'. The Court ruled the

¹⁹³ Durojaye and Chilemba (n 185) 271.

¹⁹⁴ Durojaye and Chilemba (n 185) 271.

¹⁹⁵ H M Nkwana, 'The Implementation of the National Food and Nutrition Security Policy in South Africa' (4 December 2015) 23 *Administratio Publica* 272

¹⁹⁶ Durojaye and Chilemba (n 185).

¹⁹⁷ O Shisana, *The South African National Health and Nutrition Examination Survey (SANHANES-I)* (HSRC Press 2013)

¹⁹⁸ Durojaye and Chilemba (n 185).

government was in violation of the ‘right to food’, and subsistence fishermen were given authorization to regain their fishing rights. In addition, the Court went one step further and ordered legal and policy frameworks to be reworked to include the rights of traditional fishing communities.¹⁹⁹ The second noteworthy case in South Africa, is *Wary Holdings v Stalwo*, which regarded the right to food indirectly through the buying and selling of agricultural land as, laid in the South African Agricultural Land Act. In this case, while the Court agreed the government had a responsibility to not interfere with the ‘right to adequate food’, it did not clarify the role of land ownership to the procurement of food. The Courts concluded in favour of the applicant, but did not take the ‘right of food’ in its consideration of its judgment.²⁰⁰ The third relevant case is *Mukaddam v Pioneer Food Lids and other*, wherein the applicant was a distributor of bread produced by Pioneer Foods Ltd. It was claimed that the company had created an environment of volatile bread prices by increasing prices at the risk of consumers. In this case, the Court found Pioneer Food Lids was guilty due to prices that were non-competitive.²⁰¹ While these three cases in South Africa did not pertain to the right to adequate food directly, it shows potential of enforcing the right to food. Additionally, South Africa has multiple programmes implemented to target vulnerable populations who are at risk of lacking access to food, however, as shown in the SANHANES-I survey above, the programmes are not adequately aiding the intended population.²⁰² Perhaps if similar cases such as *Sh. Ved Prakash Gupta v State of Punjab & others* in India are brought to court in South Africa, more substantial results in creating more freedoms of access to food can be achieved.

Conclusion

Approaching human rights from a capabilities approach values the promotion of

¹⁹⁹ *Kenneth George and Others v the Minister of Environmental Affairs and Tourism* 437/05 (2005) ZASCA 57 (2007) (3) SSA 62 (SCA) (18 May 2006)

²⁰⁰ *Wary Holdings v Stalwo* SA 337 (CC) BCLR 1123 (CC) (25 July 2008)

²⁰¹ *Mukaddam and Others v Pioneer Food (Pty) Ltd and Other* SA 254 (SCA) (29 November 2012)

²⁰² ‘The South African National Health and Nutrition Examination Survey (SANHANES-1)’ (n 197).

capabilities to enjoy these rights – the consequent functionings chosen are not of importance here. Viewing human rights as a list of capabilities that will enable social development and progress emphasises the importance of enforcing these rights through obligations to respect, promote and facilitate.²⁰³ The real importance of human rights is the freedoms it allows people. In regards to the right to adequate food, the capabilities to access and procure sustainable food that meets individual and cultural preferences are the ultimate goals. One method to enforce this access is through legal means. The right to adequate food can be found in regional and national legal frameworks. Regional court cases such as case *Sarayaku v Ecuador* and *SERAC v Nigeria* showcase the capability to protect existing access to food through litigation. Furthermore, numerous domestic constitutions and legal frameworks implicitly include the right to adequate food as showcased previously. However, the cases discussed in India and South Africa show implicit and explicit incorporation of the right to adequate food may not be of primary importance. While India does not explicitly acknowledge the right, the Court has made judgements promoting proactive measures to create access to food to vulnerable populations. In South Africa, the right is explicitly mentioned and measures to aid food access do exist, but hunger and malnutrition is still a persistent issue. Perhaps legal means can foster an environment to ensure capabilities to effectively access sufficient food.

²⁰³ Nussbaum (n 25) 295.

Conclusion

Malnutrition is a burden faced by many countries posing public health concerns as diet-related health risks are propagating. A key aspect in realizing the right to adequate food is promoting sustainable access to food. Past experience, such of that during the second food regime and during the GATT, has evidenced that Malthusian fears are invalid – food availability is not an issue to solving hunger problems. Creating an excess supply to food can inhibit food and economic capabilities, and may hinder further development capabilities. Instead focus must be on establishing and maintaining existing access to food, and thereby also moving from caloric-based to nutrient-based. To do so, imbalances in production, distribution and consumption should be realigned. By establishing fair and open markets, individuals are ensured capabilities of income generation, which can then enable collective freedoms that are interdependent. However, the establishment of monoculture and intensified agriculture practices have caused other implications that hindered some freedoms. For instance, pre-existing capabilities such as eating culturally or traditionally relevant food was inhibited by the promotion of monoculture farming. In addition, other repercussions included environmental damages such as changes to the local ecosystem from changes in biodiversity – food sovereignty capabilities were hindered.

Production and distribution plays a key role on consumption practices. Therefore, trade and trade-related factors can have large advantages and disadvantages on individual's and community's economic growth and food sovereignty capabilities. Specifically, the agreements under the World Trade Organization can be greatly influential. The Agreement on Agriculture promotes trade liberalisation by creating open markets, and reducing trade distortions from domestic subsidies and export subsidies, though in practice did not meet these standards. According to the capabilities approach, trade liberalisation should create fair and equal markets, that may hinder development in the short-term, can have long-term effects that promote economic and development growth. Consequently, enabling individuals more capabilities, such as education and health. As mentioned previously, the economic generation of a country can promote overall

development through public programmes, health care, accessible education, improved infrastructure, etc., which can especially help individuals with lower incomes. This opens many capabilities that have not previously been accessible. The agreement on Trade-Related Intellectual Property Rights helps promote research and development that can ultimately enhance agriculture production and enable the capabilities associated with personal and national income generation as mentioned. However, careful usage of the provisions under this agreement must be administered to ensure it does not eliminate food sovereignty capabilities and harm local biodiversity.

While, trade liberalisation in theory can promote individual capabilities, in practice is harder to achieve. Therefore, perhaps the right to adequate food can be pursued through legal means, as well as political. Evaluation of the capabilities that legal means can help creates further access to food, or ensures existing access is not obstructed. Legal frameworks of the right to adequate food is found through numerous regional and domestic frameworks, and litigation, either directly or indirectly related to this right, has helped maintain or create stable access to food. The *PUCL v Union of India* case was exceptionally noteworthy for instigating new measures to proactively target food access for vulnerable populations. Additionally, the *Sh. Ved Prakash Gupta v State of Punjab & others* case is also relevant for bringing attention to the affectivity of implemented programmes. Ensuring programmes are meeting its target goals is essential to creating access to food – South Africa could take additional measures to ensure programmes are effective.

Overall, the capabilities approach is crucial in tackling the issues of malnutrition. By focusing on enabling individual's capability to the enjoyment of the right to adequate food, it takes into consideration aspects of individual requirements and preferences, as well as promotes food sovereignty. Focusing the assessment of the right by people's capabilities to achieve it will help align trade laws, policies and programmes in enabling sustained access to adequate food. Therefore, the double burden of malnutrition can be better combated through the realigning of issues explored through this paper.

References

- Agreement on Agriculture (15 April 1994) LT/UR/A-1A/2
- Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994)
1869 UNTS 299 (TRIPS)
- Andreassen BA, Sano H-O and McInerney-Lankford S, *Research Methods in Human Rights: A Handbook* (Edward Elgar Publishing 2017)
- Bannister G and Thugge K, 'International Trade and Poverty Alleviation' IMF Working Paper, WP/01/54. Washington, DC: IMF.
- Berg A and Krueger A, 'Trade, Growth and Poverty' Paper Presented to the 2002 Annual World Bank Conference on Development Economics.
- Berges S, 'Why the Capability Approach Is Justified' (2007) 24 *Journal of Applied Philosophy*
- Bird RC and Cahoy DR, 'Human Rights, Technology, and Food: Coordinating Access and Innovation for 2050 and Beyond' (2015) 52 *American Business Law Journal*
- Burchi F and De Muro P, 'From Food Availability to Nutritional Capabilities: Advancing Food Security Analysis' (2016) 60 *Food Policy*
- Chaifetz A and Jagger P, '40 Years of Dialogue on Food Sovereignty: A Review and a Look Ahead' (2014) 3 *Global Food Security*
- Claeys P, 'Food Sovereignty and the Recognition of New Rights for Peasants at the UN: A Critical Overview of La Via Campesina's Rights Claims over the Last 20 Years' (2015) 12 *Globalizations*
- Clapp J, 'WTO Agriculture Negotiations: Implications for the Global South' (2006) 27 *Third World Quarterly*
- Convention on the Elimination of All Forms of Discrimination against Women (adopted 1 March 1980, entered into force 3 September 1981) 1249 UNTS 189 (CEDAW)
- Convention on the Rights of Persons with Disabilities (adopted 30 March 2007, entered into force 3 May 2008) 2515 UNTS 177 (CRPD) Article
- Cranston M, 'Human Rights, Real and Supposed' in D.D. Raphael *Political Theory and the Rights of Man, Ed.* (Indiana University Press 1967)
- Dobbs M, 'Genetically Modified Crops, Agricultural Sustainability and National Opt-

- Outs – Enclosure as the Loophole?’ (2017) 54 Common Market Law Review
- Dreze J and Sen A, *Hunger and Public Action* (Oxford University Press 1989)
- , ‘The Political Economy of Hunger’, *The Political Economy of Hunger* (1990)
- Durojaye E and Chilemba EM, ‘The Judicialisation of the Right to Adequate Food : A Comparative Study of India and South Africa’ (2017) 43 Commonwealth Law Bulletin
- Elver H, ‘The Challenges and Developments of the Right to Food in the 21st Century: Reflections of the United Nations Special Rapporteur on the Right to Food’ (2016) 1 20 UCLA Journal of International Law and Foreign Affairs
- ETC Group, ‘Enola Bean Patent Challenged,’ (14 July 2004)
<http://www.etcgroup.org/article.asp?newsid=96> accessed 1 June 2018
- ETC Group ‘Enola Patent Ruled Invalid,’ (14 July 2004)
<<http://www.etcgroup.org/content/hollow-Victory-Enola-Bean-Patent-Smashed-Last-Maybe>> accessed 1 June 2018
- FAO, IFAD, UNICEF W and W, ‘The State of Food Security and Nutrition in the World: Building Resilience for Peace and Food Security’ (2017)
- FAO, ‘Report of the World Food Summit’ (17 November 1996) WFS 96/REP
- , ‘Legal Developments In The Progressive Realization Of The Right To Adequate Food’ (2014)
- , ‘FAO: Its Origin, Formation and Evolution 1945-1981’ (1981)
- , ‘WTO Agreement on Agriculture: The Implementation Experience - Developing Country Case Studies’ (2003)
- Friedmann H, ‘The Political Economy of Food : The Rise and Fall of the Postwar International Food’ (1982) 88 American Journal of Sociology
- Friedmann H and McMichael P, ‘Agriculture and the State System: The Rise and Decline of National Agricultures, 1870 to the Present’ (1989) 29 Sociologia Ruralis
- GATT, Ministerial Declaration on the Uruguay Round of Multilateral Trade Negotiations, Adopted in Punta Del Este, Uruguay, on 20 September 1986, ILM 25 (1986), 1623 et Seq.
- Goldberg PK and Pavcnik N, ‘Trade, Inequality and Poverty: What Do We Know? Evidence from Recent Trade Liberalization Episodes in Developing Countries’

- [2004] National Bureau of Economic Research Working Paper No. 10593.
- Gonzalez CG, 'Institutionalizing Inequality: The WTO Agreement on Agriculture, Food Security, and Developing Countries' (2002) 27 Columbia Journal of Environmental Law
- Gray K, 'Right to Food Principles Vis-a-Vis Rules Governing International Trade' (2003) British Institute of International and Comparative Law
- G v An Bord Uchtala and Others* (1978) IR 32de Gorter H, 'The Distributional Structure of US Green Box Subsidies', in R. Melendez- Ortiz, C. Bellmann and J. Hepburn (Eds), *Agricultural Subsidies in the WTO Green Box: Ensuring Coherence with Sustainable Development Goals*, (Cambridge University Press 2009)
- Hawkes S and Plahe JK, 'Worlds Apart: The WTO's Agreement on Agriculture and the Right to Food in Developing Countries' (2013) 34 International Political Science Review
- Hoddinott J, Cohen MJ and Barrett CB, 'Renegotiating the Food Aid Convention: Background, Context, and Issues' (2008) 14 Global Governance
- Human Rights Law Network, '*Sh Ved Prakash Gupta vs State of Punjab & others*
- IFAD, 'IFAD'S POLICY FRAMEWORK FOR MANAGING PARTNERSHIPS WITH COUNTRIES IN ARREARS'
- Ingco M, 'Agricultural Trade Liberalisation in the Uruguay Round: one step forward, one step back?' (1995) 1500 WPS 50
- International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 23 March 1976) 993 UNTS 163 (ICESCR)
- Kaufmann C and Heri S, 'Liberalizing Trade in Agriculture and Food Security - Mission Impossible' (2007) 40 Vanderbilt Journal of Transnational Law
- Kenneth George and Others v the Minister of Environmental Affairs and Tourism* 437/05 (2005) ZASCA 57 (2007) (3) SSA 62 (SCA) (18 May 2006)
- Kichwa Indigenous People of Sarayaku Case (Ecuador)* (2012), Inter-American Court on Human Rights (Ser C) N 245
- Kishen Pattnayak and Another v State of Orissa* (1989) Supreme Court of India
- La Vía Campesina, 'Annual Report 2016' (2017)

- FAO, 'Legislation Database of FAO Legal Office: Country Policy and Legal Frameworks' <<http://faolex.fao.org/faolex/countryprofiles.html>> accessed 1 June 2018
- Margulis ME, 'The Regime Complex for Food Security: Implications for the Global Hunger Challenge' (2013) 19 *Global Governance*
- McMichael P, 'Global Development and The Corporate Food Regime', *New Directions in the Sociology of Global Development*
- , 'A Food Regime Genealogy' (2009) 36 *Journal of Peasant Studies*
- , *Food Regimes and Agrarian Questions* (Fernwood Publishing 2013)
- Mechlem K, 'Harmonizing Trade in Agriculture and Human Rights : Options for the Integration of the Right to Food into the Agreement on Agriculture' (2006) 10 *Max Planck Yearbook of United Nations Law*
- Mukaddam and Others v Pioneer Food (Pty) Ltd and Other SA 254 (SCA)* (29 November 2012)
- Mujumdar N and Kapila U, *Indian Agriculture in the New Millennium, Vol. 1* (Academic Foundation 2006)
- Nkwana HM, 'The Implementation of the National Food and Nutrition Security Policy in South Africa' (4 December 2015) 23 *Administratio Publica*
- Nussbaum M, 'Capabilities and Human Rights' (1997) 66 *Fordham Law Review*
- , 'Beyond the Social Contract: Capabilities and Global Justice' (2004) 32 *Oxford Development Studies*
- O'Brien T, 'Food Riots as Representations of Insecurity: Examining the Relationship between Contentious Politics and Human Security' (2012) 12 *Conflict, Security & Development* ISSN: 31
- Oguamanam C, 'Genetic Use Restriction (or Terminator) Technologies (GURTs) in Agricultural Biotechnology: The Limits of Technological Alternatives to Intellectual Property' (2005) *Canadian Journal of Law and Technology*
- People's Union for Civil Liberties v Union of India and Others* (2001) 10 S.C.C. 1
- Pogge T, 'Can the Capability Approach Be Justified' (2002) 30 *Philosophical Topics*

- Pritchard B, 'The Long Hangover from the Second Food Regime : A World-Historical Interpretation of the Collapse of the WTO Doha Round' [2009] *Agriculture and Human Values*
- Ramanujam N, Caivano N and Abebe S, 'From Justiciability to Justice : Realizing the Human Right to Food' (2015) 1 *McGill International Journal of Sustainable Development Law & Policy*
- Raponi S, 'A Defense of the Human Right to Adequate Food' (2017) 23 *Res Publica* 99
- Raz J, 'Human Rights in the Emerging World Order' (2010) 1 *Transnational Legal Theory*
- Roth K, 'Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization' (2005) 26 *Human Rights Quarterly*
- Tangermann S, *Implementation of the Uruguay Round Agreement on Agriculture by Major Developed Countries*, UNCTAD (1995) (Distr. GENERAL, UNCTAD/ITD/16)
- Schutter O de, 'Countries Tackling Hunger with a Right to Food Approach' (2010)
- Sen A, *Inequality Reexamined*, (Harvard University Press, 1992)
- , 'Ingredients of Famine Analysis: Availability and Entitlements*' [1981] *The Quarterly Journal of Economics*
- , *Poverty and Famines: An Essay on Entitlement and Deprivation* (Oxford University Press 1981)
- , *Commodities and Capabilities* (Oxford University Press 1985)
- , *Development As Freedom* (Knopf Press 1999)
- , 'Development as a Capability Expansion' (2003)
- , 'Elements of a Theory of Human Right' (2004) 32 *Philosophy & Public Affairs*
- Social and Economic Rights Action Center (SERAC) and Center for Economics and Social Rights (CESR) v Nigeria* Commission Decision 155/96 (2001) *African Commission on Human and Peoples Rights*
- Stanev v Bulgaria* No 36760/06 (2012) I ECHR 3
- Stewart TP and Bell SM, 'Global Hunger and the World Trade Organization: How the International Trade Rules Address Food Security' (2015) 3 *Penn State Journal of*

Law and International Affairs

Tania S and Mapulanga-Hulston JK, 'Examining the Synergy between the Right to Food and Agricultural Trade Policies' (2016) 24 *African Journal of International and Comparative Law*

Shisana O, *The South African National Health and Nutrition Examination Survey (SANHANES-1)* (HSRC Press 2013)

UNCESCR, 'General Comment No. 12' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (1999) UN Doc HRI/GEN/1/Rev.1

UNCTAD, 'The Uruguay Round And Its Follow-Up: Building A Positive Agenda For Development 1997' (1998) UNCTAD/ITCD/TED/2

Universal Declaration on the Eradication of Hunger and Malnutrition, UNGA Res 3180 (XXVIII) (adopted on 16 November 1974)

United Nations Sub-Commission on the Promotion and Protection of Human Rights, 'Intellectual Property and Human Rights' 52nd Sessionm (2000) E/CN.4/Sub.2/Res/2000/7

Vizard P, Fukuda-Parr S and Elson D, 'Introduction: The Capability Approach and Human Rights' (2011) 12 *Journal of Human Development and Capabilities*
Wary Holdings v Stalwo SA 337 (CC) BCLR 1123 (CC) (25 July 2008)

Weldie T, 'The Impact of the Trade Related Aspects of Intellectual Property Rights Agreement (TRIPS Agreement) on the Realization of the Right to Food' (2010)

World Bank, 'Poverty and Hunger: Issues and Options for Food Security in Developing Countries' (1986)

WTO Committee on Agriculture Special Session, 'Domestic Support' (13 April 2000) G/AG/NG/S/1

WTO Committee on Agriculture Special Session, 'G-20 Comments on the Chair Reference Paper on Green Box' (16 May 2006) JOB(06)/145

WTO Trade Policy Review Body, 'Trade Policy Review: United States', (25 August 2010) WT/TPR/S/235/Rev.1

