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RE-THEORISING INTERNATIONAL AGRICULTURAL TRADE REGULATION TO REALISE THE HUMAN RIGHT TO FOOD IN DEVELOPING COUNTRIES

SUMMARY

The call to re-theorise international agricultural trade regulation to advance the human right to food has gained traction in various international platforms, including the United Nations (UN) and the World Trade Organization (WTO), among others. The emerging consensus is that the WTO-driven liberal rules on agricultural trade regulation have been unable to deliver effective outcomes for the realisation of the human right to food. This article explores options for re-theorising the regulation of international trade in agriculture to strengthen synergetic linkages with the obligations imposed on States to respect, promote, fulfil, and realise the human right to food enshrined under the International Covenant on Economic, Social and Cultural Rights and a number of other international human rights instruments. It contends that existing legal theories provide the basis for a plausible theoretical justification for incorporating explicit human right to food obligations into the WTO framework for agricultural trade regulation through the reform of key provisions of the WTO Agreement on Agriculture (AoA) pertaining to market access, domestic support to agriculture, and export subsidies. Theories of sustainable development and distributive justice theories spawn a comprehensive egalitarian imperative for re-conceptualising the rules of the AoA in pursuit of realising the human right to food, especially in developing countries.

1. INTRODUCTION

Proponents of neoliberalism, with their emphasis on application of liberal rules in agricultural trade governance, argue that the rules improve the availability, affordability, and accessibility of food to the world's populace.¹ Diametrically opposing are human rights scholars and other academic commentators, who argue that the current World Trade Organization's (WTO) approach to agricultural trade liberalisation exacerbates global hunger and rural underdevelopment, and contributes to

1 Meyer 2018:491.

environmental degradation, especially in developing countries.² Despite this divergence in viewpoints, the concern that the WTO model for agricultural trade regulation should be consistent with the human right to food is gaining momentum in the current multilateral trade negotiations.³ This concern has resulted in proposals to find synergy between agricultural trade liberalisation and the human right to food.⁴ It is trite that various schools of thought offer convincing theoretical foundations for amending the provisions of the Agreement on Agriculture (AoA) to meaningfully assimilate the obligations generated by the human right to food into the legal framework of international agricultural trade regulation.⁵

This article explores the aforesaid theoretical foundations for the explicit incorporation of the human right to food obligations into the WTO model for agricultural trade liberalisation.⁶ These theories are, among others, distributive justice theory; natural rights theory; Marxist theory; rational choice hypothesis and economic theory, and sustainable development.⁷ The article mainly argues that the sustainable development and distributive justice theories offer the most compelling theoretical arguments for re-conceptualising the relationship between the WTO model for agricultural trade liberalisation and the human right to food.⁸ It departs from the premise that the WTO and its members can mitigate the perceived negative effects of liberal rules in agriculture by, *inter alia*, incorporating the obligations generated by the human right to food into the organization's pro-free trade agreements.⁹

However, such revolutionary proposals towards incorporation of the obligations generated by the human right to food depend on reassuring objecting parties that such an alteration will lead to assimilation of the human right to food without undermining the competitive advantage which contracting parties may have over others.¹⁰ It would, therefore, seem that a guarantee must be given that the adoption of these proposals would not be abused for protectionist ends, which is detrimental to the comparative advantage of member states and international agricultural trade regulation.¹¹

This article is divided into four parts. Immediately following this introduction is a part dealing with the basis of the call for the re-configuration of the theoretical foundations of international agricultural trade to enable the realisation of the human right to food. This part also contends that existing legal theories provide plausible theoretical bases for incorporating explicit

2 Pechlaner & Otero 2010:179.

3 Fakhri 2021:215.

4 Gruni 2018:1.

5 Gruni 2018:2.

6 For a further lucid discussion of how legal theories offer insights on the linkage between the WTO and other social issues such as human rights, see Carmody 2016:152.

7 Chow 2014:62.

8 Lumina 2014:23.

9 Joseph 2013:268.

10 For an excellent objection to the assimilation of human rights into the legal framework of international trade regulation, see Howse & Nicolaidis 2002:56.

11 Gonzalez 2006:73.

human right to food obligations into the WTO framework for agricultural trade regulation. The third part explores the re-calibration of international agricultural trade regulation, by effecting certain significant amendments to the provisions of the AoA pertaining to market access, domestic support, and export subsidies, which constitute the three pillars of the AoA. The fourth part concludes the discussion on re-theorising international agricultural trade regulation to facilitate the realisation of the human right to food in developing countries.

2. ANALYSIS OF PROSPECTIVE THEORIES OF INTERNATIONAL AGRICULTURAL TRADE REGULATION

The call to infuse the extant legal framework of agricultural trade liberalisation with the human right to food has become more pertinent because of the current food insecurity prevalent across the globe.¹² The present state of global food insecurity results from a multiplicity of factors, chief of which are the global health crisis created by the Coronavirus COVID-19 pandemic and the Russia-Ukraine war.¹³ These twin crises have caused a global economic slowdown as well as disrupted the international food supply chains, thereby undermining the realisation of the human right to food and stalling efforts to ensure access to adequate food.¹⁴ It is against this backdrop of the need to combat the global food insecurity that the call for re-configuring international agricultural trade regulation in pursuit of realising the human right to food has become more compelling.¹⁵

The aforementioned call to inform agricultural trade liberalisation with the human right to food is not entirely without precedent.¹⁶ A number of regional Free Trade Agreements (FTAs)¹⁷ have already embedded human rights provisions, thereby creating human rights-related obligations between the contracting parties.¹⁸ Although Lewis¹⁹ cautions that the accommodation of human rights in FTAs does not automatically translate into better human

12 The United Nations Human Rights Commissioner (UNHRC) "Trade and the right to food: The path to SDG2", <https://bit.ly/3FH1DhJ> (accessed on 30 August 2022).

13 Food and Agricultural Organization (FAO) "The state of food security and nutrition in the world 2022", <https://www.fao.org/3/cc0639en/cc0639en.pdf> (accessed on 22 August 2022).

14 European Parliament "Russia's war on Ukraine: Impact on food security and EU response", <https://bit.ly/3fqilHv> (accessed on 15 July 2022).

15 United Nations Conference on Trade and Development (UNCTD) "Trade and food security: When an agreement delayed becomes a human right denied", <https://bit.ly/3DXm0WB> (accessed on 24 August 2022).

16 Petersmann 2013:621; Velluti 2016:52.

17 Art. 24 of the General Agreement on Tariffs and Trade (GATT) 1994 allows WTO member states to negotiate and conclude free trade agreements (FTAs) and customs unions, respectively. See WTO "General Agreement on Tariffs and Trade (GATT) 1994, WTO "The GATT agreement", <https://bit.ly/3UkHcLj> (accessed on 11 March 2021); Dolle "Human rights clauses in EU trade agreements: The New European", <https://bit.ly/3Ws6usZ> (accessed on 12 March 2021).

18 Bartels 2015:1071.

19 Lewis 2014:7.

rights outcomes, it has certainly transformed the relationship between trade and human rights.²⁰ Laudable as the objective of assimilating human rights obligations into FTAs may be, some academic commentators view these provisions as “legal inflation” and object that developed countries are using FTAs to globalise their social policies in a way that undermines the sovereignty of developing countries.²¹

For Aaronson,²² regional trade agreements do not provide a proper platform for addressing human rights concerns.²³ The argument is that refraining from diluting FTAs with special provisions may have positive human rights spillovers.²⁴ Indeed, in theory at least, FTAs can be instruments for achieving economic development which facilitates the realisation of human rights in states.²⁵ Nevertheless, in practice, it has been demonstrated that states often prioritise other socio-economic objectives that conflict with their human rights responsibilities under international human rights law.²⁶

Notwithstanding the above conundrum, the proliferation of human rights provisions signals the new reality in the realm of liberal trade rules.²⁷ The acquisition of human rights obligations through FTAs supports the view that rules underpinning the WTO’s free trade ideology can be influenced by human rights norms to humanise agricultural trade.²⁸ So far, evidence supporting this assimilation is increasingly becoming apparent within transnational organisations, WTO forums, and a number of international human rights bodies, especially the Committee on Economic, Social, and Cultural Rights (CESCR).²⁹ The CESCR is insisting that states engaged in agricultural trade must honour their extraterritorial responsibilities generated by the human right to food.³⁰ Presently, states are obliged to ensure that international trade agreements, including those pertaining to agriculture concluded under the auspices of the WTO, have no adverse impacts on the realisation of the human right to food.³¹ Further, states are enjoined to protect the human right to food, by regulating the activities of transnational companies.³² A reflective analysis of some legal theories or schools of thought might offer guidance on whether or not there is adequate space to effectively accommodate the

20 Lewis 2014 8.

21 Anghie 2003:249.

22 Aaronson 2010:2.

23 Aaronson 2010:3.

24 Aaronson 2010:3.

25 Aaronson 2015:57.

26 Gammage 2014:792. A good example would be the pursuit of trade liberalisation to the detriment of other commitments such as environmental sustainability and human rights responsibilities.

27 Coulibaly & Torres “Social dimensions of Free Trade Agreements”, <https://bit.ly/3sSSk6A> page 29 (accessed on 6 July 2021).

28 Lang 2011:1.

29 Anna 2017:3.

30 Committee on Economic, Social, and Cultural Rights “CESCR General Comment No. 12: The Right to Adequate Food, Art. 11”, <https://bit.ly/2ZCbQUi> (accessed on 23 July 2021).

31 Narula 2010:13; Coomans 2011:1.

32 Hadiprayitno 2017:104.

human right to food in the international agricultural trade regulation framework in honour of the human right to food.³³

2.1 Distributive justice

Distributive justice, also dubbed “social justice”, generates legal obligations to achieve a just agricultural trade system protecting farmers in developing countries from injurious subsidies employed by developed countries.³⁴ This means that informing the WTO model of agricultural trade liberalisation with the obligations generated by the human right to food may be considered imperative for the attainment of justice within the global economic order.³⁵ The approach argues that international economic law should be infused with values such as justice, against which liberal rules in agricultural trade governance may be measured.³⁶

However, in reality, academic commentators are disinclined to enunciate a universal meaning and definition of justice.³⁷ The argument is that the meaning of justice, like that of morality, elusively varies subjectively from society to society, and at different times. This explains why theories of justice may differ substantially depending on the morality and values such as communitarianism and utilitarian theories of justice, whereby they are sustained.³⁸ Nevertheless, an analysis of the justice deducible from the United Nations (UN) Charter, the Universal Declaration of Human Rights (UDHR), and other international human rights instruments, leaves one in no doubt that substantive equality is the basis of justice.³⁹

That the current neoliberal agricultural trade rules are skewed towards farmers in developed countries, as they oblige developing countries to open their domestic markets for agricultural products originating from developed countries and allowing the use of injurious subsidies to continue, is uncontroversial.⁴⁰ This lack of fairness in the economic arrangements imply that gains envisaged by the theory of comparative advantage mainly accrue to developed countries, while disadvantaging developing countries that are unable to maximise profits from agriculture.⁴¹ This situation is contributing to the unfathomable chasm between rich farmers in developed countries and poor farmers in developing countries.⁴² Certainly, the goal of distributive justice is to eradicate these social disparities through a fair allocation of regulatory benefits and responsibilities among member states.⁴³ That the WTO model for agricultural trade liberalisation inevitably has distributional effects is

33 Smith 2009:21.

34 Suttle 2017:733.

35 Khattak *et al.* 2014:1043.

36 Risse 2017:8.

37 Valentini 2011:399.

38 Carmody *et al.* 2016:152.

39 MacKinnon 2016:740; Fredman 2016:712; MacKinnon 2011:96.

40 Garcia 2013:8.

41 Whitehead 2017:736.

42 Chen 2014:4.

43 Suttle 2015:1043.

not a novel claim.⁴⁴ Distributive justice can be invoked to oppose unjust agricultural trade rules, by developing countries demanding higher degrees of special and differential treatment to address food security concerns arising from neoliberalism.⁴⁵

In explicating the meaning of justice, Campbell⁴⁶ opines that the notion embodies the principle of distributing benefits and burdens with the aim of rectifying an undesired outcome or experience emanating from certain injustices.⁴⁷ This, it is submitted, obliges all the WTO members engaged in agricultural trade to adopt a regulatory framework aimed at achieving fair trade, while simultaneously accommodating the food security interest of developing countries.⁴⁸ Given the utility of the distributive justice theory, the theory may provide theoretical justification in support of proposals for integrating the human right to food obligations into the WTO's agricultural trade regime.⁴⁹

According to Rawls,⁵⁰ distributive justice encompasses three major tenets.⁵¹ First, the achievement of freedom, subject only to limitations essential for safeguarding freedom itself.⁵² Secondly, the achievement of equality for all, mainly the enjoyment of fundamental freedoms of social life and egalitarian distribution of social goods in society, subject to the norm of difference that permits differentiation only if it produces the highest benefit for people living on the peripheries of life.⁵³ Rawls argues that distributive justice must be deployed to combat all inequalities of opportunities resulting from arbitrary outcomes such as social stratifications based on birth, wealth, and elitism.⁵⁴ According to Rawls, distributive justice envisages a far-reaching goal of transforming society through division of benefits and burdens.⁵⁵ It is plausible to suggest that Rawls' conception of distributive justice recognises that states have an inalienable right to assert their socio-economic rights in the conception and implementation of various economic arrangements.⁵⁶

Further, masking neoliberalism, inequality, and free market fundamentalism under the guise of the WTO agricultural trade liberalisation to the impairment of the realisation of the human rights to food, would be repugnant to Rawls' version of distributive justice.⁵⁷ Rawls' distributive justice theory envisages the significant goal of re-configuring economic relations in pursuit of a just international agricultural trade order.⁵⁸ However lyrical the objectives of Rawls'

44 Moellendorf 2005:146.

45 Moellendorf 2005:147.

46 Campbell 1988:19.

47 Campbell 1988:20.

48 Rawls 1988: 252.

49 Barry 1989:352.

50 Rawls 1972:354.

51 Rawls 1972:355.

52 Rawls 1972:356.

53 Rawls 1972:357.

54 Rawls 1972:357.

55 Rawls 1972:358.

56 Garcia 2013:3.

57 Gunzberger *et al.* 1977:160.

58 Shankar 2016:154.

distributive theory may be, one should not conflate them with goals perpetuated by the utilitarian theory.⁵⁹ There is a difference between utilitarianism and distributive justice theory, as advanced by Rawls.⁶⁰ Utilitarianism accepts the idea that some people in an economic arrangement may derive more benefits that exceed those of others, provided that such benefits do not amount to the 'winner-takes-it-all' outcome.⁶¹ Whatever the distinction between utilitarianism and Rawls' distributive justice theory, it is clear that both ideologies advance a model of justice that challenges neoliberal drivers of economic injustice in international agricultural trade.⁶²

Notwithstanding the above, it is plausible to posit that, in the extant state of agricultural trade liberalisation, distributive justice may be unachievable, as it is not one of the explicit objectives of the WTO rules on agricultural trade.⁶³ Liberal rules underpinning the regulation of agricultural trade have always been part of a broader agenda to reshape states in accordance with the elitists' economic visions, especially those drawn from developed countries.⁶⁴ Orford⁶⁵ argues that liberal ideology has re-shaped the global economy for its self-serving ends, beginning in the late eighteenth and early nineteenth centuries when the free trade doctrine was deployed to undermine the active role played by states in ordering the economy in favour of policies that increase the protection of landed mercantilist interests and corporate monopolies.⁶⁶ Currently, exponents of free trade rail against the activities of a twentieth-century social state in the regulation of, *inter alia*, the environment, health, agriculture, and labour, which they regard as seriously interfering with the operation of free markets.⁶⁷ This argument becomes cogent if one accepts that the priority of international agricultural trade rules has been free trade rather than fair agricultural trade.⁶⁸ This fixation on agricultural trade liberalisation as the overarching concern for trade in agriculture emanates from the mistaken belief that achieving economic growth is a *sine qua non* to reducing poverty and inequality, which assist states to quicken the pace of holistic economic transformation.⁶⁹

A further important contemporary trend among academic commentators is the use of theories of justice as justification for the incorporation of the human

59 Rawls 1997:12.

60 Bentham 1970:5; Cavalier "Utilitarian theories", <https://bit.ly/3FHaa3X> (accessed on 20 March 2021).

61 See fn. 55.

62 Jones "Equity in development: Why it is important and how to achieve it", <https://bit.ly/3DUR65V> (accessed on 22 March 2021).

63 Khattak *et al.* 2014:1043.

64 Xuetong 2018: 2.

65 Orford 2015:24.

66 See fn. 24.

67 Amadae 2003:251.

68 Sinclair 2015:445.

69 Garcia 2013:3.

right to food into the WTO system.⁷⁰ Nevertheless, the most basic question on the subject of theories of justice remains unanswered: What is justice and equality?⁷¹ The search for a universally accepted definition and understanding of concepts such as 'justice', 'fairness', and 'equality' will continue to be the focus of much debate.⁷² This is especially so in a context where organised or institutionalised forms of power such as the WTO tend to argue for the legitimacy of their institutions on the basis of own interest, good or bad, and not at all on the basis of existing values derived from egalitarianism.⁷³ The highly diverse ways in which collective forms of economic power are promoted by the WTO through liberal rules in agriculture suggest a significant tension and even incompatibility with theories of justice.⁷⁴ In such a context, it is clearly difficult to dismiss the demand to temper the application of liberal rules in agriculture with norms of justice.⁷⁵ However, the challenge of ascertaining the meaning of justice makes it difficult to re-shape liberal rules in agriculture in light of theories of justice.⁷⁶ In addition, theories of distributive justice, as conceptualised by Rawls, focus exclusively on economic inequalities, thereby ignoring issues of the recognition of difference and thus presenting challenges to the achievement of a fairer international agricultural trade regulation.⁷⁷

According to Fraser, the standard theories of distributive justice cannot adequately subsume problems of recognition, as most of the kinds of actual social injustice are a mixture of economic and cultural injustices.⁷⁸ Notwithstanding this criticism, Robeyns developed a broad-based capability theory of justice, which accounts for both cultural and economic inequalities.⁷⁹ It is noteworthy that Rawls' distributive theory can be complemented by this capability theory.⁸⁰ Such an approach offers a compelling justification for reconfiguring international agricultural trade regulation in pursuit of accommodating the human right to food.⁸¹ Therefore, distributive justice, with its egalitarian elements, presents an appropriate theoretical basis for the accommodation of the human right to food within the legal framework of international agricultural trade regulation.

70 De Schutter "The World Trade Organization and the post-global food crisis agenda: Putting food security first in the International Trade System", <https://bit.ly/3U0qm4I> (accessed on 26 March 2021).

71 Reisch 2002:347-378.

72 Garcia and Ciko "Theories of justice and international economic law", <https://bit.ly/3Ny2ByC> (accessed on 19 April 2021).

73 Moellendorf 2005:149.

74 Moellendorf 2005:152.

75 Moellendorf 2005:153.

76 Jonathan 2013:464.

77 See fn. 54.

78 Fraser 1989:212.

79 Robeyns 2005:94.

80 Robeyns 2005:95.

81 Khattak *et al.* 2014:10.

2.2 Natural law theory

One of the pertinent questions raised by contemporary legal theorists is whether international trade rules governing capital, markets, and free trade should comply with affirmed supreme values and standards of morality and natural justice required by the natural law theory.⁸² The elementary principles of natural law theory are traceable to the eminent Greek and Roman philosophers such as Socrates, Plato, Aristotle, and Cicero, who contended that laws must be legislated for the purpose of pursuing societal good.⁸³ Aristotle maintained that law should be construed as a rational instrument designed for the determinable purpose of protecting the common interest of humanity.⁸⁴ For the famous Roman orator, Cicero, state-legislated laws must comply with true law, which is discovered through human rationalisation, as such law is congruent with the dictates of the state of nature and the infallible perpetual laws of deity.⁸⁵ Aquinas, who is considered to be one of the leading lights on natural law theory, developed a more concrete doctrine which asserts the supremacy of natural law over state-legislated laws.⁸⁶ In his thesis, Aquinas argues that there exist four kinds of law namely, eternal law; human law; natural law, and divine law. Natural law is readily accessible to human beings through reason.⁸⁷ According to Aquinas, natural law is supreme and distinct from man-made law, as it provides moral standards, with which all human laws should comply.⁸⁸ Lastly, the assertions of Grotius and Suarez secularised natural law.⁸⁹

The above renowned natural law theorists argue that the validity of state positive laws, which include free trade agreements, depends on their compliance with the higher principles of natural justice and morality referred to as *lex naturalis*.⁹⁰ Natural law theory has come under intense criticism from a number of academic commentators who contend that many state positive laws do not and should not have a moral element, as there is a fundamental distinction between law and morality.⁹¹ In spite of vicious attacks, natural law theory remains a reflective philosophical yardstick used to determine the acceptable norms or conduct in a political community.⁹² The theory provides prescriptive rules on how states can legislate good positive laws whose objectives lead to a flourishing of life for humanity.⁹³ As Augustine put it, “an

82 David 2001:5; George 2007:171.

83 Bix 2003:14.

84 See fn. 72.

85 Uebersax “Study notes on Cicero and natural law”, <https://bit.ly/3sWD1K2> (accessed on 27 April 2021).

86 Coyle 2017:319.

87 Coyle 2017:320.

88 Finnis 2017:17-59.

89 Mirabella 2011:25.

90 Priel 2017:4.

91 It appears that the epitome to this view is the command theory, which became the foundational school of thought to the positive law theory approach. See Hart 1958:593.

92 Hobbes 2013:4; James 2008:436.

93 Nedevska 2015:114.

unjust law is not a law at all” – *lex injustia non es lex*.⁹⁴ The foregoing maxim by Augustine requires free trade agreements, as species of state laws, to be consistent with the prescriptions of natural law theory.⁹⁵

It is noteworthy that a pure liberal international economic order, with its concomitant agricultural trade rules resting on the utilitarian foundation, should be greeted with criticism for its failure to accommodate other important values such as human rights.⁹⁶ Most prominently, Pogge, whose scholarship gravitates towards moral philosophy, has become one of the most vocal voices expressing justifiable disdain against the extant international economic order, and relentlessly reminding exponents of free trade of the degree of economic disparities and extreme poverty emanating from the systematic failure of the current economic order.⁹⁷ Pogge suggests that the global inequalities are a testament of the truism that material prosperity generated from globalisation of commerce, including agricultural trade, largely benefits powerful countries.⁹⁸ James⁹⁹ substantiates the foregoing by arguing that there barely exists a liberal international economic order grounded on the idea of material egalitarianism.¹⁰⁰ It is, therefore, submitted that natural law theory provides a basis for re-engineering the liberal international economic order.¹⁰¹

It is plausible to maintain that principles of natural law theory offer a theoretical construct, upon which a linkage could be drawn between agricultural trade liberalisation and the human right to food.¹⁰² Undeniably, natural law theories undergirding the human right to food have ramifications that may influence the incorporation of norms pertaining to the human right to food into the WTO framework for agricultural trade liberalisation.¹⁰³ As Nedevska¹⁰⁴ aptly observed, natural law theory constitutes an important ground norm for advancing human dignity and freedom from want.¹⁰⁵ It follows that natural law obliges human beings to design, adopt, and implement international agricultural trade rules that promote fairness.¹⁰⁶ Although such a radical proposal may be greeted with much criticism because of difficulties in the application of the theory of natural law to social and economic issues, natural law theorists occupy significant roles in the ethical, legal, and political spheres.¹⁰⁷ Further, positivists dismiss the natural law theory as problematic

94 Augustine “The City of God”, <https://bit.ly/3U61poA> (accessed on 23 May 2021).

95 Burnell 2017:12.

96 Comaroff & Comaroff 2001:3.

97 Pogge 2002:6.

98 Pogge 2011:2.

99 James “De-globalisation as a global challenge”, <https://bit.ly/3DX54zi> (accessed on 23 June 2021).

100 James “De-globalisation as a global challenge”, <https://bit.ly/3U00Yu1> (accessed on 23 June 2021).

101 Sally “Natural law and international trade: What lessons for trade policy today?”, <https://bit.ly/3DTJiMV> (accessed on 24 August 2021).

102 Sally “Natural law and international trade: What lessons for trade policy today?”, <https://bit.ly/3zC0fJe> (accessed on 24 August 2021).

103 Suttle 2015:1046.

104 Nedevska 2015:97.

105 Nedevska 2015:98.

106 Stoeva 2016:44.

107 Suttle 2015:1045.

because of its inability to separate law from the precepts of morality.¹⁰⁸ Critics argue that there is necessarily no linkage between state law, which includes international agricultural trade law and moral standards as claimed by the natural law theorists.¹⁰⁹ This controversy makes the wide application of natural law theory as a basis for justifying the incorporation of the human right to food into the regime of international agricultural trade regulation problematic.¹¹⁰

2.3 Rational choice hypothesis in law

In the realm of legal theory, the rational choice hypothesis postulates that human decisions are the result of rational deliberation.¹¹¹ According to Ulen,¹¹² there is barely an agreed universal definition of rational choice hypothesis, but there are two conceptual elements underpinning the term.¹¹³ The first one maintains that choice becomes rational when it is a by-product of a deliberative and consistent human action.¹¹⁴ The person who makes a decision pondered and ruminated on his or her presupposed course of action and is able to proffer a concrete rationale for the choice.¹¹⁵ For complex decisions, which border on law and economics, the rational choice hypothesis assumes that rationality will guide decision makers to reliable and somewhat stable choices.¹¹⁶ That is, one thinks that the choices made are not irrational but rather proportionate and well suited to the decision maker's objectives.¹¹⁷

The second important element of "rational choice" posits that human beings are endowed with innate preferences which drive them to capitalise on the utility that they derive from such preferences, subject to certain prescriptions.¹¹⁸ The view that the maximisation of utility by decision makers is subject to limitations imposed by time, income, and cognitive resources, among others, is not objectionable.¹¹⁹ The vast majority of economists subscribe to this formal sense of the rational theory as being so obvious that they are baffled by those who doubt it.¹²⁰ Academic commentators use prescriptive assertions offered by the rational choice theory, in order to determine the soundness of non-market behaviour in disciplines such as biology, political sciences, history, demography, international relations, and law.¹²¹ The principal reason is that the rational choice hypothesis is regarded as the most coherent and

108 Demiray 2015:829.

109 Demiray 2015:829.

110 Demiray 2015:829.

111 Korobkin 2013:1351.

112 Ulen 1994:487.

113 Ulen 1994:488.

114 Ulen 1994:489.

115 Ulen 1994:489.

116 Ulen 1994:489.

117 Ulen 1994:490.

118 Ulen 1994:491.

119 Ulen 1994:492.

120 Ibrahim "Economic analysis of law: The concept and its application in the law and public policy", [http://www.savap.org.pk/journals/ARInt./](http://www.savap.org.pk/journals/ARInt/) (accessed on 17 June 2021).

121 Black 2003:23.

convincing theory which provides significant insights into factors that influence the practical matrix of human decision-making.¹²²

In the context of informing the WTO agricultural trade liberalisation model with norms imposed by the human right to food, the rational choice theory provides a theoretical template to assess free trade rules.¹²³ Much of the decision to alter the current free trade model in order to advance the human right to food would be premised on rational choice theory-based arguments.¹²⁴ The rational choice hypothesis will help decision makers measure the social costs of free trade in the agricultural sector and answer the question as to when states should depend on free trade to effectively maximise their resources and when they may not do so. Such an inquiry will likely steer the discussion towards how the WTO regulation of trade in agriculture should be re-configured to encourage effective use of resources in circumstances where it is not viable to depend solely on the orthodox theories of international trade regulation.¹²⁵

Despite the foregoing reasons why rational choice theory may be supportive of re-orienting trade in agriculture, some academic commentators have challenged the appropriateness of the theory in guiding and ordering some legal matters that are not economic in nature.¹²⁶ In light of this general criticism, the employment of the rational choice theory to facilitate incorporation of the human right to food norms into the WTO agricultural trade regime becomes problematic.¹²⁷

2.4 Sociological theory of law

In making a case for recalibrating agricultural trade liberalisation rules to promote the realisation of the human right to food, the theory relating to sociology of law offers important insights into the interaction of liberal rules in agriculture and the global society in general.¹²⁸ For legal theorists who subscribe to the sociological theory of law, state laws, including international economic law, are a fundamental product of contemporary society.¹²⁹ On this view, law broadly conceived ought to benefit those who adhere to it and punish those who violate its precepts.¹³⁰ Laws, either under the aegis of the WTO or otherwise, crafted to disadvantage some, while allocating inequitable benefits to others, are considered unjust and such bias supports the inference that these particular laws do not properly reflect the ethos of egalitarianism, which should be the minimum requirement for good laws.¹³¹

122 Black 2003:24.

123 Abbott 2008:5; Petersmann 2007:7.

124 Petersmann 2007:8.

125 Coase's 1960:44.

126 For further discussion on the merits and demerits of the rational choice theory of law, see Russell *et al.* 2000:1051.

127 Russell *et al.* 2000:1052.

128 Pound 1943:2.

129 Nadler 2017:60.

130 Nadler 2017:61.

131 Nadler 2017:61.

The three “fathers” of sociological theory of law, namely Marx, Weber, and Durkheim,¹³² posit that law, including international economic law, with its intended or unintended consequences as well as should be shaped by social factors such as economic necessities as well as political and cultural interest.¹³³ Indeed, the sociological theory of law views law as a product of social construction influenced by factors such as culture, religion, and institutional processes.¹³⁴ Sociological theory of law also views law as an instrument of establishing various systems of social control.¹³⁵

In his seminal work, entitled *Economy and society*, Weber developed a systematic sociology of law.¹³⁶ His profound discussion on the nexus between capitalism and the law is enlightening. Weber believes that law has its own distinct social construction, which is not necessarily determined by the tide of capitalism.¹³⁷ Although influenced by the interests of capital and other economic forces, the law dictates and controls such economic processes in a polity.¹³⁸ Weber opines that dominant economic circumstances do not inevitably result in the creation of new legal systems, but only present prospects for the spread of legal procedure if it is devised.¹³⁹ Weber drives this point home by showing that contemporary sophisticated rational capitalism could only function in a well-predictable legal system.¹⁴⁰ He argues that the current capitalist project depends entirely on the adoption of a predictable legal and administrative system. Basing his viewpoint on a case study of England, Weber concludes that there is a need for state law to determine and control economic processes in the evolution of society.¹⁴¹

According to Pound,¹⁴² the sociological theory of law maintains that transnational institutions such as the WTO, with their concomitant theoretical orientations, are specialised systems of social control, whose operation and functioning is capable of improvement through prudent effort.¹⁴³ Pound views transnational institutions as a product of human social design, a problem that falls within the realm of social sciences.¹⁴⁴ The insights of the sociological theory of law could be crucial in providing a theoretical justification for re-

132 Norman 1953:126.

133 Norman 1953:127.

134 Zumbansen “Defining the space of transnational law: Legal theory, global governance and legal pluralism”, <https://bit.ly/3Uptzuj> (accessed on 14 May 2021).

135 Trubekt 1972:7.

136 Weber 1921:4.

137 Weber 1921:5.

138 Tribe 2012:282.

139 Tribe 2012:283.

140 Tribe 2012:284.

141 Tribe 2012:285.

142 Pound “The need of a sociological jurisprudence (1907), <https://bit.ly/3U0H6sM> (accessed on 16 June 2021).

143 Pound “The need of a sociological jurisprudence (1907), <https://bit.ly/3FH3Euj> (accessed on 16 June 2021).

144 For an excellent discussion of the discordance between law and social reality, see Pound “Roscoe Pound: The causes of popular dissatisfaction with the administration of justice”, <https://law.unl.edu/RoscoePound.pdf> (accessed on 17 April 2021).

structuring the rules governing international agricultural trade to accommodate the human right to food needs of both developed and developing countries.¹⁴⁵ However, antagonists argue that the view advanced by the sociological law theory, namely that state law should determine and control economic processes in the evolution of society, does not adequately explain the limitations associated with law as an instrument of change.¹⁴⁶ The implication is that an overreliance on the sociological theory of law may not yield the desired outcomes, especially the attainment of a fair international agricultural trade regulatory regime.¹⁴⁷

2.5 Marxist theory of law

In their treatise, entitled *Free trade*, Karl Marx together with Friedrich Engels propounded a well-developed theory of sociology.¹⁴⁸ The two scholars maintained that society evolved from ancient tribal stratifications, to feudalism and, ultimately, to modern capitalist-oriented industrialisation.¹⁴⁹ Karl Marx attacked the assumptions underlying the hypothesis on free trade by arguing that it is presented as a universal, impeccable, and timeless economic law when, in reality, its successful application is limited to the existence of certain economic conditions that are capitalist in nature.¹⁵⁰ This inclination towards false universalisation of free trade results shuts the door to the possibilities of having alternative approaches and imagination.¹⁵¹

Marx also contended that the assumption advanced by the free-trade hypothesis presents a distortive view of the nature of a capitalist order.¹⁵² For Marx, the theory of comparative advantage was rendered defective by the fact that industries in Western countries, especially the United States of America (USA), developed behind a wall of tariff protectionism, warding off cheap goods manufactured by foreign firms out of its capitalist market.¹⁵³ As time progressed, the USA economy reached a certain level of economic efficiency which enabled it to compete on the same plane with capitalist rivals in Germany, Britain, and other nations. In a liberal order, this tariff shield is often not readily available for use in the struggle for the world market.¹⁵⁴

Further, Marx opined that the liberal economic order sought to lower the tariff wall and even have it removed altogether.¹⁵⁵ Nonetheless, the quest to

145 Julio 2016:374.

146 Julio 2016:375.

147 Julio 2016:376.

148 Marx & Engels "Free trade", <http://www.slp.org/pdf/marx/free-trade.pdf> (accessed on 17 May 2021).

149 Marx & Engels "Free trade", <http://www.slp.org/pdf/marx/free-trade.pdf> (accessed on 17 May 2021).

150 Marx & Engels "Free trade", <http://www.slp.org/pdf/marx/free-trade.pdf> (accessed on 17 May 2021).

151 Bhala 2010:136.

152 Bhala 2010:136.

153 Bhala 2010:137.

154 Bhala 2010:138.

155 Marx 1886:783.

remove tariffs has encountered stubborn resistance from various capitalist constituencies whose interests are negatively affected.¹⁵⁶ The result of this opposition is the prolonged struggle drawn between the capitalists themselves and their political agents.¹⁵⁷ Indeed, for the politician, the tariff “hassle” has been an immense source of political capital and electioneering.¹⁵⁸ As Engels submits in his excellent profound essay on *Free Trade*, the interest of the modern-day politicians, the “wire pullers of traditional political parties, it is not a settlement of the question but it being kept open forever”.¹⁵⁹ The foregoing insights from the theory of sociology by Marx and Engels expound the theoretical interest of free trade ideology with practical significance.¹⁶⁰ Marx’s sociological theory explores the heart of economic theory and contemporary debates about the structure of the world economy.¹⁶¹ Functionally, Marxism has become a bulwark against the excesses of capitalism and a source of re-defining the utility of liberal rules in regulating the global economy in pursuit of a utopian economic order.¹⁶²

Notwithstanding Marx’s criticism of free-trade regimes, one must not be tempted to conclude that he was an outright free-trade antagonist,¹⁶³ as he partially supported free trade based on efficiency reasons.¹⁶⁴ Marx was fascinated with the efficiency benefits and gains resulting from capitalism’s ability to achieve perpetual revolution in the development of the means of production.¹⁶⁵ He appropriated these gains and made them a pre-condition for establishing a viable socialist order. On the market theory, Marx maintained that specialisation and division of labour are desirable, as they result in the increased production of cheap and better goods and services.¹⁶⁶ This development, Marx maintains, is “[a]bsolutely necessary because without it want is merely made general, and with destitution the struggle for necessities and all the old filthy business would necessarily be reproduced”.¹⁶⁷

In addition, it seems that Marx’s limited support of free-trade efficiency was based on the need to account for the shortcomings that haunt protectionist policies.¹⁶⁸ However, owing to the aforementioned, Marx’s admiration of the free trade regime is not as clear as one might assume.¹⁶⁹ It can be submitted that Marx’s theory of law supports liberal rules in agriculture only to the extent

156 Marx 1886:784.

157 Marx 1886:785.

158 Marx & Engels 1886:782-783.

159 Marx & Engels 1886:782-784.

160 Moyn 2014:148.

161 Moyn 2014:149.

162 Bhala 2010:135.

163 Pradella 2017:147.

164 Marx 2000:2.

165 Marx 2000:3.

166 Moellendorf 2005:145.

167 Marx “The British rule in India”, <https://www.marxists.org/archive/marx/works/1853/06/25.htm> (accessed on 6 June 2021).

168 Marx “The British rule in India”, <https://www.marxists.org/archive/marx/works/1853/06/25.htm> (accessed on 6 June 2021).

169 Marx “The British rule in India”, <https://www.marxists.org/archive/marx/works/1853/06/25.htm> (accessed on 6 June 2021).

that they promote efficient and fair agricultural markets and would require the re-configuration of just international agricultural trade rules in pursuit of realising the human right to food.

2.6 Sustainable development

Theories of sustainable development offer prescriptive social and ecological norms which should influence international trade law, including rules regulating agricultural trade.¹⁷⁰ Although it is problematic to have a precise definition of sustainable development, suggestions have been made.¹⁷¹ Handl¹⁷² states that sustainable development entails “meeting human developmental goals whilst maintaining environmental preservation to achieve a balance between human enterprise and environmental stability”.¹⁷³ Similarly, Harmelen *et al.*¹⁷⁴ propose that it requires states to exploit and use their natural resources in a manner that is sustainable and less disruptive to the environmental ecosystems upon which society depends.¹⁷⁵

In the same vein, the preamble of the Marrakesh Agreement Establishing the WTO recognises sustainable development as one of the organisation’s crucial aspirational goals, by stating that parties to the agreement should conduct their trade relations to “raise standards of living, ensuring full employment and allowing for the optimal use of the world’s resources”.¹⁷⁶ Whilst the preamble grounds economic relationships on sustainable development goals, it does not go further in stating what those goals are.¹⁷⁷ The situation is worsened by the fact that preambular statements are not binding authority in the same way main textual provisions are.¹⁷⁸ This does not mean that they are without legal import; they can play a persuasive role in interpreting and ascertaining the correct meaning of a treaty’s provisions, including identifying the purpose and objectives of the treaty.¹⁷⁹ In the WTO establishment treaty’s preamble, the concept of sustainable development is presented as inseparable from the

170 WTO “Mainstreaming trade to attain the Sustainable Development Goals”, <https://bit.ly/3UhwDbY> (accessed on 29 June 2018); Jennifer Clapp “Trade and the sustainability challenge for global food governance”, <https://bit.ly/3Uijlqk> (accessed on 1 May 2021).

171 Emas “The concept of sustainable development: Definition and defining principles”, <https://bit.ly/3FGtMVX> (accessed on 1 July 2018).

172 Handl 2018:213.

173 Handl 2018:214.

174 Harmelen *et al.* “International law of sustainable development: Legal aspects of environmental security on the Indonesian Island of Kalimantan”, <https://bit.ly/3DA6WFY> (accessed on 12 June 2021).

175 Harmelen *et al.* “International law of sustainable development: Legal aspects of environmental security on the Indonesian Island of Kalimantan”, <https://bit.ly/3DxII6i> (accessed on 12 June 2021).

176 WTO “Agreement establishing the World Trade Organization”, https://www.wto.org/english/docs_e/legal_e/04-wto.pdf (accessed on 12 May 2021).

177 WTO “Agreement establishing the World Trade Organization”, https://www.wto.org/english/docs_e/legal_e/04-wto.pdf (accessed on 12 May 2021).

178 Hulme 2016:1306.

179 Hulme 2016:1307.

optimal use of the world's resources.¹⁸⁰ This might be because the Preamble was written in a way that mirrors the preamble of the General Agreement on Tariffs and Trade (GATT) (1947), which conclusively recognises the need for “developing the full use of the resources of the world”.¹⁸¹ Interestingly, despite the lofty mentioning of sustainable development in the WTO establishment treaty's preamble, the concept has not yet been meaningfully incorporated into new binding trade rules.¹⁸² Rather, the concept appears in a short note on paragraph six of the Marrakesh agreement stating that “full implementation of the WTO Agreements will make an important contribution to achieving the objectives of sustainable development”.¹⁸³

Academic commentators maintain that the concept of sustainable development requires states to consider the long-term consequences of their economic activities in light of the goals of sustainable development, rather than focusing only on the short-term gains.¹⁸⁴ It can be opined that the concept of ‘sustainable development’ aims to reorient economic policies in a manner that allows balancing environmental and developmental concerns with conservation of resources for future generations.¹⁸⁵ Such a conceptualisation goes beyond the myopism of the free trade theory's assumption that all policies based on it will inevitably have a positive bearing on development and environment.¹⁸⁶ Conversely, sustainable development obliges states to consider non-economic issues when making decisions.¹⁸⁷

It can be strongly argued that there is an intractable link between sustainable development and distributive justice.¹⁸⁸ Given its concern with, and support for the combating of economic disparities, distributive justice remains instrumental for the achievement of various Sustainable Development Goals (SDGs), including the goals of eradicating extreme poverty such as lack of food, inadequate clean drinking water, sanitation, and the prevailing global hunger.¹⁸⁹ For the WTO member states to achieve the SDGs, they must adopt fairer international agricultural trade rules that advance distributive justice

180 Hulme 2016:1308.

181 WTO “The General Agreement on Tariffs and Trade 1947”, https://www.wto.org/english/docs_e/legal_e/04-wto.pdf (accessed on 14 May 2021).

182 WTO “Agreement establishing the World Trade Organization”, https://www.wto.org/english/docs_e/legal_e/04-wto.pdf (accessed on 5 May 2021).

183 WTO “Singapore Ministerial Declaration”, <http://docsonline.wto.org> (accessed on 15 May 2021).

184 Mensah & Casadevall 2019:16; Klarin 2018:68.

185 Mensah & Casadevall 2019:17.

186 The Centre for International Sustainable Development Law “Sustainable developments in recent WTO law and jurisprudence”, http://cisdl.org/public/docs/news/Cancun_WTO_Legal_Brief.pdf (accessed on 24 May 2021).

187 Charnovitz 2007:5.

188 Ramanujam & Caivano *et al* 2019:495.

189 United Nations “The SDGs in action”, file:///D:/Free%20state%20important%20corrections/6568-Article%20Text-16191-1-10-20220718.pdf (accessed on 28 August 2022).

through the accommodation of the human right to food interests of developing, developed and least-developed countries.¹⁹⁰

Following from the foregoing argument, it is plausible to suggest that sustainable development provides a theoretical basis for integrating the human right to food obligations into the WTO's agricultural trade regime.¹⁹¹ In terms of this proposal, there is a need to supplement the free-trade goal of agricultural trade rules, in order to achieve sustainable development or more precisely sustainable agricultural trade.¹⁹² Thus, the need to reconfigure the WTO model for agricultural trade liberalisation, in order to take account of the human right to food, cannot be overemphasised.¹⁹³ On this note, Nasser¹⁹⁴ rightly observes that this is a revolutionary approach that challenges the very foundation upon which the entire WTO regime is founded, although it is only proposed in the limited context of international agricultural trade regulation.¹⁹⁵

3. RE-CALIBRATING INTERNATIONAL AGRICULTURAL TRADE RULES BASED ON NEW THEORETICAL UNDERPINNINGS

Based on the above discussion, it is submitted that the theories of sustainable development and distributive justice favour the recalibration of the AoA rules in light of the obligations to respect, promote, fulfil, and realise the human right to food.¹⁹⁶ Such substantive reform changes would reorient the international agricultural trade rules in a manner that addresses the food security and environmental protection concerns of developing countries.¹⁹⁷ More specifically, it can be strongly argued that art. 4:2 of the AoA, regulating market access measures, arts. 8 and 9 of the same agreement, governing export subsidies, and arts 3, 6 and 7 applicable to domestic support measures should be amended to incorporate the obligations generated by the human right to food.¹⁹⁸ The recalibration of the AoA rules in this manner will contribute towards the eradication of hunger and the protection of livelihoods, especially in developing countries.¹⁹⁹

3.1 Market access

Art. 4:2 of the AoA obliges WTO members to change non-tariff barriers on agricultural trade products in their tariff schedules and then reduce the overall total tariff barriers by 36 per cent, including a reduction in each tariff line of 15

190 WTO "The WTO and the Sustainable Development Goals", https://www.wto.org/english/thewto_e/coher_e/sdgs_e/sdgs_e.htm (accessed on 29 August 2022).

191 This study adopts the description 'theories of sustainable development' because they are many and varied. See Charnovitz 2007:16.

192 Castagno 2014:136.

193 Gonzalez 2014:169.

194 Nasser 2016:178.

195 Nasser 2016:179.

196 Nasser 2016:180.

197 See fn. 61.

198 Nasser 2016:181.

199 Nasser 2016:182.

per cent over the stipulated implementation period.²⁰⁰ Academic commentators have argued that this tariffication system has shortcomings because it negatively affects developing countries' capacity to adequately benefit from their comparative advantage in agricultural trade.²⁰¹ In terms of the current agricultural trade liberalisation regime, it is difficult for developing countries to derive much benefits from the current tariffication system because tariff levels remain high.²⁰² If the AoA rules are amended to achieve further reductions, it can be suggested that developing countries may benefit through increased access to those countries' markets.²⁰³ Because the possibility of small-scale farmers increasing their income depends on their ability to access the global agricultural products market, the sum total of such changes in the rules is that the revenue earned by small-scale farmers will incentivise them to grow more crops, thereby increasing agricultural productivity.²⁰⁴ In turn, increased production means that the goal of realising the human right becomes attainable, since more people in developing countries will find participation in agriculture lucrative.²⁰⁵ Furthermore, increasing market access is clearly affirmed by the theory of distributive justice, as it will allow developing countries to benefit more from agricultural trade, thereby securing increased income to support their rural populations and decrease migration to the cities.²⁰⁶

Market access provisions could also be improved in line with the obligations generated by the human right to food, by either repealing or supplementing the tariffication provisions.²⁰⁷ Under this submission, each developed country could be required to establish a generalised system of preferences for developing countries, which provides access for a certain percentage of the latter's goods.²⁰⁸ To assist the least-developed countries, the percentage could be higher.²⁰⁹ This would offer a guaranteed minimum level of not only free but fair agricultural trade.²¹⁰ Further, developing countries could incentivise the production of indigenous crops, by offering guaranteed markets for those crops. Such move will produce positive consequences for the preservation

200 WTO "Agreement on agriculture: Three pillars", file:///C:/Users/shelt/Downloads/WTO_and_Agriculture.pdf (accessed on 17 May 2021).

201 Häberli 2010:322.

202 Häberli 2010:324.

203 Guled 2009:239.

204 Arze "The WTO-AoA: Impact on farmers and rural women in Asia", <https://bit.ly/3h9Ddmw> (accessed on 16 July 2021).

205 Niemial & Jukka 2007:1061.

206 Arze "Agreement on agriculture and food sovereignty perspectives from Mesoamerica and Asia", <https://bit.ly/3sTH6P9> (accessed on 16 March 2021); Chang 2005:67.

207 Anderson 2016:98.

208 Asmah & Routman "Removing barriers to improve the competitiveness of Africa's agriculture", <https://brook.gs/3WuhWV2> (accessed on 23 May 2021).

209 Sandrey *et al.* "WTO: Agricultural issues for Africa", <https://www.namc.co.za/wp-content/uploads/2018/02/WTO-NAMC-2021pdf> (accessed on 23 May 2021).

210 Lilliston & Lake, "WTO agreement on agriculture: A decade of dumping", <http://www.un-ngls.org/orf/cso/cso7/library.pdf> (accessed on 25 May 2021).

of biodiversity.²¹¹ Although these proposals increase market access, they do not make provision for the use of restrictions predicated on the need to tackle health risks.²¹² The latter issue should be addressed through the insertion of appropriate clauses in the WTO Sanitary and Phytosanitary Measures and Technical Barriers to Trade Agreements.²¹³

3.2 Domestic support

According to art. 6 of the AoA, WTO members are obliged to reduce their domestic support to agriculture.²¹⁴ These domestic support provisions require a shift away from production-specific support programmes, which inhibit the free flow of agricultural trade to the employment of direct payments.²¹⁵ Domestic support levels are calculated using the AMS, with the exemptions of commitments contained in the Green and Blue Boxes of the AoA.²¹⁶ The current approach of merely reducing domestic support to agriculture does not promote sustainable development, as it fails to adequately consider the food-security needs of developing countries.²¹⁷ It can, therefore, be argued that the AoA must be re-designed to allow a shift from product-specific to non-product-specific support, sensitive to non-economic aspects of agriculture such as the human right to food.²¹⁸ Such an approach is clearly supported by the theory of sustainable development, which requires the legal framework of international agricultural trade regulation to accommodate other important non-trade issues.²¹⁹

Further, the current AoA approach, which is based on the assumption that product-specific support to agriculture is beneficial to contracting parties, has a number of shortcomings.²²⁰ The sheer availability of domestic production-specific support measures means that farmers will continue to

211 Wise & Murphy "Resolving the food crisis: Assessing global policy reforms since 2007", <http://iatp.org/documents/resolving-the-food-crisis-assessing-global-policyreforms-since-2007> (accessed on 25 May 2021).

212 Wise & Murphy "Resolving the food crisis: Assessing global policy reforms since 2007", <http://iatp.org/documents/resolving-the-food-crisis-assessing-global-policy-reforms-since-2007> (accessed on 25 May 2021).

213 Wiig & Kolstad "Lowering barriers to agricultural exports through technical assistance", <http://www.science-direct.com> (accessed on 23 May 2021).

214 Hathaway and Ingco "Agricultural liberalisation and the Uruguay Round, in The Uruguay Round and the developing countries", <https://bit.ly/3UkL6nr> (accessed on 3 August 2021).

215 Arze "Agreement on agriculture and food sovereignty perspectives from Mesoamerica and Asia", <https://bit.ly/3fxlt44> (accessed on 10 June 2021).

216 Fiona "Law, language and international agricultural trade in the WTO", <https://core.ac.uk/download/pdf/1873202.pdf> (accessed on 23 May 2021).

217 WTO "Agreement on agriculture: Three pillars", file:///C:/Users/shelt/Downloads/WTO_and_Agriculture.pdf (accessed on 24 July 2021).

218 Simpson & Schoenbaum 2003:399.

219 See fn. 172.

220 Simpson & Schoenbaum 2003:400.

produce at levels that cannot be sustained by demand in the market.²²¹ To maximise their income from the subsidy, farmers will adopt highly mechanised production methods of using chemical-based fertilizers and pesticides, leading to the same negative consequences for the environment as the use of export subsidies, including soil erosion, pollution, as well as the possible loss of biodiversity because of the concentration on specific crops.²²² These adverse effects militate against the realisation of the human right to food in developing countries.²²³

In light of the above, the WTO members can avoid the problems arising from product-specific support to agriculture, by ensuring that such measures are only available as an exception to the general rules.²²⁴ WTO members should then be allowed to use product-specific support in circumstances where they have a positive impact on developing countries.²²⁵ For instance, developing countries may want to incentivise the growing of other traditional crops, in order to preserve biodiversity and not necessarily for commercial purpose.²²⁶ The current AoA rules only permit such incentives when they fall in the Green Box exemption under Annex 2:12 of the Agreement, if the payments are limited to the extra costs or income involved in complying with the government programme.²²⁷ This approach has many shortfalls, because it does not offer farmers enough incentive to explore other types of farming, as the compensation is so inadequate. When these exemptions are introduced, the burden of proof would be upon members to demonstrate the importance of such programmes and the positive effects they are intended to achieve.²²⁸

3.3 Export subsidies

The third aspect of the AoA is designed to dismantle barriers to agricultural trade in the area of export competition, by reducing export volumes and the amount of money that contracting parties spend on subsidising their exports.²²⁹ Under art. 8 of the AoA, contracting parties are obliged to desist from providing export subsidies to assist their farmers to export agricultural products, except

221 Pant *et al.* "Market access II: Tariff rate quotas module 5, Agreement on agriculture, FAO Resource Manual on Multilateral Trade Negotiations on Agriculture", <http://www.fao.org/trade> (accessed on 2 June 2021).

222 Anderson & Martin 2005:29.

223 Nierenberg 2011:628.

224 Diaz-Bonilla "On food security stocks, peace clauses and permanent solutions after Bali", <https://bit.ly/3Wqvpgp> (accessed on 18 July 2021).

225 Häberli 2016:104.

226 Clapp "Trade liberalisation and food security: Examining the linkages", <https://bit.ly/3sV5Wyd> (accessed on 19 July 2021).

227 FAO "State of food and agriculture 2014: Innovation in family farming", <http://www.fao.org/3/a-i4040e.pdf> (accessed on 24 October 2020).

228 WTO "Revised draft modalities for agriculture 2008", http://www.wto.org/english/tratop_e/agric_e/chair_texts08_e.htm (accessed on 29 October 2020).

229 Anderson & Nelgen "Trade barrier volatility and domestic price stabilization evidence from agriculture", <https://bit.ly/3UItLuH> (accessed on 28 June 2021).

in compliance with arts. 9 and 10 of the Agreement.²³⁰ Although contracting parties are required to desist from incentivising the export of agricultural products using export subsidies, they still do so with impunity distorting global agricultural markets. It is, therefore, submitted that arts. 8 and 9 of the AoA governing export subsidies must be amended in favour of a comprehensive ban on export subsidies on agricultural products to minimise their deleterious effects on the prospects for realising the human right to food.²³¹ Such a ban can be foregrounded on the theory of sustainable development, which obliges WTO members to adopt agricultural trade rules that advance fair trade.²³² Juxtaposed, in this instance, is the idea that special and differential treatment should be effectively used to operationalise the obligations generated by the human right to food.²³³

In sync with the principle that special protection should be extended to vulnerable groups, the special and differential treatment provisions should be crafted in a way that ensures that they primarily benefit the poor and vulnerable in developing countries.²³⁴ Such mechanism will make the AoA more suitable for its long-term objective of creating a fair system of agricultural trade.²³⁵ Finally, agricultural trade policies and law should be complemented by conducive policies and measures falling outside of the traditional ambit of the AoA.²³⁶ This includes the creation of a strong legal framework for the human right to food, which is justiciable, as well as the strengthening of social security law, ensuring equal access to natural resources, enacting effective consumer protection laws, and adoption of food safety measures; all of these can play a significant role in realising the human right to food in developing countries. International agricultural trade is simply one aspect of a big picture.²³⁷

4. CONCLUSION

This article makes the case for the creation of a meaningful linkage between agricultural trade liberalisation under the auspices of the WTO and the human right to food.²³⁸ Notably, the arguments advanced are not entirely against the principles of agricultural trade or trade agreements that are defensible from the standpoint of economic theories and policies.²³⁹ Rather, the focus has been on demonstrating that there are, currently, some theoretical justifications for the incorporation of the human right to food in the WTO framework on

230 WTO "Agreement on agriculture", <https://bit.ly/3T0my27> (accessed on 29 June 2021).

231 Pieraccini & Novitz 2017:1175.

232 Pieraccini & Novitz 2017:1176.

233 Hart 2018:4.

234 Kleen & Page "Special and differential treatment of developing countries in the World Trade Organization", <https://bit.ly/3WvzfFh> (accessed on 19 July 2021).

235 Dragusanu *et al.* 2017:218.

236 IDLO "Realising the right to food legal strategies and approaches", <https://bit.ly/3FPBAVk> (accessed on 23 May 2021).

237 Dunford 2014:239.

238 Tania & Mapulanga-Hulston 2016:293.

239 Fletcher 2010:104.

agricultural trade regulation.²⁴⁰ While there exists a dismissive view held by free trade fundamentalists, who see liberal rules in agriculture and the human right to food as incompatible, this article argues that there is a need to establish meaningful linkages between the extant agricultural trade regime and the human right to food.²⁴¹ It follows that the proposition rejecting the adoption of a human right to food approach to international agricultural trade regulation is misplaced.²⁴² Nor is it plausible to de-link agricultural trade liberalisation from the negative impact it is having on realising the human right to food.²⁴³ It follows that a theoretical construct capable of reconciling agricultural trade with the human right to food must be sought.²⁴⁴

However, the good news is that existing legal theories already provide a plausible doctrinal foundation for re-imagining liberal rules in the governance of international agricultural trade. It has been argued, in this instance, that the re-theorisation of international agricultural trade regulation for the benefit of realising the human right to food should be largely based on the theories of sustainable development and distributive justice. These two theories encapsulate some crucial egalitarian elements and social imperatives embedded in other theoretical perspectives, including the sociological theory of law; the Marxist theory of law, and rational choice theory.²⁴⁵ The sustainable development and distributive justice theories, therefore, constitute the most credible and compelling basis for pursuing a balance between agricultural trade liberalisation and the pursuit of other social goals such as access to food. In this article, an attempt is made to find opportunities for burdening WTO members with the obligations imposed by the human right to food.²⁴⁶ The amendment of the AoA's three pillars of market access, domestic support and export provisions is proposed as a plausible means for the WTO to recalibrate its approach to agricultural trade regulation, in order to promote the realisation of the human right to food for the world's population, especially those living in developing countries.²⁴⁷

240 Hiberli 2012:84.

241 Zage 2018:78.

242 Clapp & Murphy 2013:138.

243 Clapp 2015:105.

244 De Schutter "International trade in agriculture and the right to food", <http://library.fes.de/pdf-files/bueros/genf/06819.pdf> (accessed on 2 July 2021).

245 De Schutter "International trade in agriculture and the right to food", <http://library.fes.de/pdf-files/bueros/genf/06819.pdf> (accessed on 2 July 2021).

246 Clapp & Burnett 2014:94.

247 Konstantinov 2011:235.

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