

COMBATTING A CRISIS OF GLOBAL FOOD PROTECTIONISM SPARKED BY THE WAR IN UKRAINE

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The world is currently gripped in a food crisis of historic proportions that is threatening tens of millions of people in the poorest countries of the world with famine and starvation. Sparked by the war in Ukraine, this crisis is being made worse by nations imposing export restrictions on food in a misguided attempt to curb soaring domestic food prices. Export restrictions are “beggar thy neighbor” policies that prevent increases in domestic food prices but at the expense of raising world prices, exacerbating the crisis.

Although nations have turned to the World Trade Organization (WTO) for help in removing these export restrictions, the WTO is currently an organization in disarray that lacks the legal tools and the political will to effectively address this global crisis. Unlike the WTO, many free trade agreements (FTAs) such as the United States-Mexico-Canada Trade Agreement and the Treaty on the Functioning of the European Union, contain effective legal tools to curb export restrictions on food.

At the moment, FTAs are proliferating all over the world and have now displaced the WTO as the most effective means for eliminating or curbing export restrictions on food. It is now up to the EU and the United States, the principals of the world’s most robust FTAs, to take the lead in demonstrating how FTAs can be used to effectively limit export restrictions in the face of a catastrophic food emergency.

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I. INTRODUCTION

The world is currently gripped in a global food crisis of unprecedented proportions that is the greatest in world history.¹ The crisis is driven by a number of factors: climate shocks, consequences of the Covid-19 pandemic, rising costs, but the immediate catalyst is the war in Ukraine that began in 2022.² The Russia-Ukraine war has seriously disrupted global food supply chains leading numerous countries to impose export restrictions on domestic food supplies that have only led to more increases in food prices on the world market exacerbating the crisis.³ Since

¹ UN World Food Programme, A Global Food Crisis, 2022: A Year of Unprecedented Hunger, <https://www.wfp.org/global-hunger-crisis>; Kristalina Georgieva, Sebastian Sosa, Bjorn Rother, World Food Programme, Emergency Global Food Crisis, <https://www.wfp.org/emergencies/global-food-crisis>; International Monetary Fund, Global Food Crisis Demands, Support for People, Open Trade, Bigger Local Harvests, <https://www.imf.org/en/Blogs/Articles/2022/09/30/global-food-crisis-demands-support-for-people-open-trade-bigger-local-harvests>. Agriculture (i.e. food production) is a controversial subject within the World Trade Organization. The inability of countries to agree on how to regulate trade barriers in agriculture led to the deadlock and termination of the recent WTO Doha Development Round of Negotiations in December 2015. See Daniel C.K. Chow, Thomas J. Schoenbaum, Gregory C. Dorris, International Trade Law: Problems, Cases, and Materials 280 (4th edition) (hereinafter "Chow, Schoenbaum, & Dorris, International Trade Law").

² UNCTAD, Food Export Restrictions Hurt Millions in Least Developed Countries <https://unctad.org/topic/least-developed-countries/chart-march-to-june-2022>

³ UN World Food Programme, *supra* note 1.

2019 the number of people facing acute food insecurity has soared from 135 million to 345 million.⁴ According to the United Nations, a total of 49 million people in 49 countries are on the brink of famine.⁵

Russia's invasion of Ukraine led to the suspension of agricultural exports from both countries to maintain domestic supply and to prevent domestic prices from rising. Russia banned exports of wheat, sunflower seeds, and sugar;⁶ Ukraine banned exports of wheat and oats.⁷ As Russia is the world's largest exporter of wheat and Ukraine the world's fifth largest, these export bans have seriously disrupted the supply chain for wheat.⁸ As supply bottlenecks grew and prices rose, other nations also began to impose export restraints. Since the beginning of 2022, nations have imposed 74 measures restricting agricultural exports with two thirds of them full export bans.⁹ These export restrictions have caused global food prices to spike.¹⁰ Export bans in rice, wheat and citrus fruits have led to prices increases estimated at 12.3 percent, 9 percent, and 8.9 percent respectively.¹¹ According to the World Bank:

The global food crisis . . . is a crisis made worse by the growing number of countries that are banning or restricting exports in a misguided attempt to put a lid on domestic prices. These actions are counterproductive – they must be halted and reversed.¹²

In a statement to the World Trade Organization as it prepared for its Twelfth Ministerial Conference, its highest authority, in Geneva in June 2022, Bangladesh Commerce Minister Tipu Munshi stated his concerns more bluntly:

⁴ Id.

⁵ Id.

⁶ Huileng Tan, We're Living in an Age of Food Protectionism: 5 Countries that are banning or Restricting Major Exports to Safeguard Food Supplies as Inflation Soars (May 12, 2022), <https://www.businessinsider.com/food-protectionism-countries-restrict-exports-security-inflation-wheat-palm-beef-2022-5>.

⁷ Id.

⁸ Id.

⁹ Id.

¹⁰ Alvaro Espitia, Nadia Rocha, & Michele Ruta, How Export Restrictions are Impacting Global Food Prices (July 6, 2022), <https://blogs.worldbank.org/psd/how-export-restrictions-are-impacting-global-food-prices>; see also Low De Wei, Rising Global Food Protectionism Risks Worsening Inflation, May 22, 2022, <https://www.bloomberg.com/news/articles/2022-05-24/rising-global-food-protectionism-risks-worsening-inflation-woes?leadSource=verify%20wall>.

¹¹ Espitia, Rocha, & Ruta, supra note 10.

¹² Trade Restrictions are Inflaming the Worst Food Crisis in a Decade (July 6, 2022), <https://blogs.worldbank.org/voices/trade-restrictions-are-inflaming-worst-food-crisis-decade>

We urge members not to impose export restrictions on products which are essential for our survival, particularly relevant for our food security, public health and long-term development goals in the LDCs.¹³ [Least Developed Countries]¹⁴

As further explained in Part II of this Article, export restrictions are “beggar thy neighbor” policies: they help the nation imposing them at the expense of harming other nations. Export restrictions help to stabilize prices in the country imposing them because the restrictions help to maintain or increase the food supply in the domestic market.¹⁵ At the same time, however, export restrictions decrease the food supply in the world market leading to a spike in world prices.¹⁶ Export restrictions can also result in a cascade of retaliatory export restrictions intensifying the problem.¹⁷ When nations see other nations erecting protectionist export restrictions, they often react by imposing their own export restrictions. The result is the current escalation of food protectionism leading to even higher world food prices and deepening the global food crisis.

The most pernicious effect of the current spike in world food prices is that the greatest harm is suffered by the poorest nations of the world. According to the United Nations Conference on Trade and Development (UNCTAD), export restrictions on agriculture hurt poor nations most of all:

UNCTAD estimates, based on data from UN Food and Agriculture Organization, paint a grim picture, alerting the world to impending food crises in countries that already require external assistance to ensure food security.

At least 104 million people are affected [in] least developed countries (LDCs): Afghanistan, Burkina Faso, Central African Republic, Chad, Democratic Republic of the Congo, Ethiopia, Mali, Mozambique, Myanmar, Niger, Somalia, South Sudan and Yemen.¹⁸

¹³ Statement by H.E. Mr. Tipu Munshi, MP Minister for Commerce, WT/MIN(22)/ST/80 (June 12, 2022). The Ministerial Conference is a meeting of the trade ministers of all WTO members every two years lasting about a week and is the supreme authority in the WTO. A permanent standing body, the General Council, consisting of the trade delegations of each member, is located in the WTO headquarters in Geneva, Switzerland. When the Ministerial Conference is not in session, the General Council is the highest authority of the WTO. See Chow, Schoenbaum & Dorris, *International Trade Law*, supra note 1, at 16.

¹⁴ See also Statement by Hon. Ms Betty Maina, EGH Cabinet Secretary, Ministry of Industrialization, Trade and Enterprise Development, Kenya, WT/MIN (22)/ST/72 (June 12, 2022) (“[W]e have witnessed higher food prices that have affected the net food-importing countries such as Kenya, compounded by the crisis in some parts of the world. We need to revisit export bans, especially those imposed to create buffer stock, as they hurt the net importing WTO members.”). See also Part III.E *infra*.

¹⁵ Prachi Agarwal & Yohannes Ayele, Open Data Institute, *Rising Food Protectionism: Who Pays the Price* (June 30, 2022), <https://odi.org/en/insights/rising-food-protectionism-who-pays-the-price/>. See also Part II *infra*.

¹⁶ See Part II *infra*.

¹⁷ *Id.*

¹⁸ *Food export restrictions hurt millions in least developed countries* <https://unctad.org/topic/least-developed-countries/chart-march-to-june-2022>. See also Part II *infra*.

To remove and oppose export restrictions on agriculture, nations naturally first turned to the General Agreement on Tariffs and Trade (GATT)¹⁹ and the World Trade Organization (WTO) for help because the GATT/WTO established and administers the multilateral treaties that are designed to dismantle international trade barriers.²⁰ However, a closer examination of the GATT/WTO indicates that its provisions limiting export restrictions on agricultural trade are too weak and inadequate to deal with the current food crisis. These systemic weaknesses can be traced to three factors.

First, the GATT/WTO was historically focused on dismantling import trade barriers.²¹ Due to the rampant protectionism of the chaotic 1930s, nations imposed draconian import tariffs that contributed to the eruption of the Second World War.²² After the war, the GATT focused on dismantling import trade barriers to prevent such disastrous policies from giving rise to another global conflict.²³ Scant attention was paid to export trade barriers; this is reflected in the limited number of GATT/WTO provisions that directly address export restrictions.²⁴

Second, the GATT/WTO singled out agriculture for special treatment from the very beginning and tolerated many forms of food protectionism.²⁵ The collapse of world food prices during the Great Depression of the 1930s and the need to rebuild agricultural industry and food production after the Second World War meant that many nations were allowed to ignore GATT rules often without any justification.²⁶ Even today, many nations view believe that protection of domestic agriculture is paramount as it is their main food source and as essential to national security.²⁷

¹⁹ General Agreement of Tariffs and Trade (1994). The GATT regulates trade in goods and is administered by the WTO. The GATT was originally implemented in 1947. When the WTO was established in 1995, the GATT was updated and reissued in 1994. Unless otherwise indicated, all references to the GATT are to GATT 1994.

²⁰ In addition to the GATT, the WTO also administers the General Agreement on Trade in Services (1994) (GATS) dealing with services trade and the Agreement on Trade Related Intellectual Property Rights (1994) (TRIPS) dealing with trade in technology. The WTO also administers the Dispute Settlement Understanding (DSU) (1994) dealing with the settlement of disputes. Other than the GATT, these are the other most important WTO treaties.

²¹ Daniel C.K. Chow, *Export Restrictions in the Post-Covid World: Another Step in the Demise of the WTO*, 25 *J. Int'l Econ. L.* 507-08 (2022).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Chow, Schoenbaum, & Dorris, *International Trade Law*, supra note 1, at 280.

²⁶ *Id.*

²⁷ The importance of agriculture is made evident by two events: the inability of countries to agree on a new framework for regulating agriculture that led to the failure of the Doha Development Round of Negotiations in the WTO, see Chow, Schoenbaum, & Dorris, *International Trade Law*, supra note 1, at 280; and the inability of countries to agree on rules prohibiting restrictions at the recent Geneva Ministerial Conference. See Part III.E *infra*.

Third, due to the actions of the United States, the GATT/WTO does not currently have a fully functioning dispute settlement system.²⁸ The most significant consequence of the crippling of the dispute settlement system is that WTO obligations have become in effect unenforceable, launching the GATT/WTO into a crisis of its own.²⁹ Even if a country attempted to enforce the few available GATT/WTO limitations on export restrictions on agriculture, the offending country is able to nullify any adverse decisions by the dispute settlement system and to ignore its results.³⁰

An additional indication of the weakness of the GATT/WTO system was the inability of WTO members to agree on binding rules limiting or prohibiting export restrictions on agriculture at the Twelfth Ministerial Conference held in Geneva in June 2022.³¹ Ahead of the Conference, developing and least developed countries exhorted the need for rules limiting export restrictions on agriculture.³² Despite these protests and the obvious harm caused by export restrictions, the Geneva Ministerial Conference resulted in a Declaration on Food Security that has largely symbolic significance only.³³ This impasse illustrates the deep political divisions in the WTO on agriculture and the lack of political will to agree on clear and effective solutions to a global crisis. These developments portend a gloomy future for the GATT/WTO at least in the near term as an organization that can effectively deal with trade barriers in agriculture.

The weak and inadequate export controls under the GATT/WTO stand in stark contrast to the robust set of systemic controls established under the many free trade agreements (FTAs) that are now proliferating around the world. FTAs abolish all or most tariffs on goods traded among members of the FTA.³⁴ The GATT/WTO explicitly recognizes and encourages their formation because FTAs further liberalize trade.³⁵

The most prominent example of a robust FTA is the European Union, which prohibits export bans on goods traded within the EU as well as export bans between EU countries and non-members of the EU.³⁶ The EU also prohibits export taxes on intra-EU trade and subjects export taxes between EU countries and nations with which the EU has trade agreements to strict limitations that effectively eliminate their use.³⁷ Although not as expansive or as robust, the United States' FTAs also allow the United States a similar ability to eliminate or severely limit the use of export taxes and export bans.³⁸ Other FTAs in Asia, Africa, and South America have

²⁸ See Daniel C.K. Chow, A New and Controversial Approach to Dispute Resolution under the 2020 United States China Trade Agreement, 26 Harv. Neg. L. Rev. 31, 34 (2020).

²⁹ Id. at 50-51.

³⁰ See Part III.F *infra*.

³¹ See Part III.E *infra*.

³² See *supra* notes 13-14 and accompanying text.

³³ See Part III.E *infra*.

³⁴ See Part III.G Trade between members of a FTA and non-members are subject to ordinary tariffs. If the member of the FTA and the non-member are both WTO members then trade between them is subject to their GATT/WTO tariff schedules. *Id.*

³⁵ *Id.* FTAs are authorized by GATT Article XXIV.

³⁶ See Part III.G *infra*.

³⁷ *Id.*

³⁸ *Id.*

provisions similar to the U.S. FTAs that can also be used to provide similar protections against export restrictions on agriculture.³⁹ There are now 109 members of current FTAs or two thirds of the 164-country membership of the GATT/WTO.⁴⁰ As FTAs are continuing to grow in popularity and membership, the total number of FTA countries might soon equal or surpass the membership of the WTO. FTAs also have their own fully functioning dispute resolution mechanisms that are independent of the GATT/WTO.⁴¹

This Article argues that due to the GATT/WTO's many political conflicts and internal problems, FTAs have now supplanted the role of the GATT/WTO in responding with enforcement of obligations to avoid food protectionism. This Article argues that is now up to the EU and the United States, the principals of the FTAs with the most rigorous controls on export restrictions, to lead other FTAs in combatting the rise of global food protectionism. The EU and the United States can use their legal expertise to demonstrate how the EU and U.S. FTAs can be used to block export restrictions.⁴² For example, we address in Part III of this Article how the United States and EU can effectively use FTAs to address the export restrictions imposed by Ukraine and, less likely, Russia. This can become a model for other FTAs to follow.

This Article will proceed as follows: Part II will examine the economics of trade in agriculture and explain in depth how export restrictions result in an increase in world food prices. Part II explains that nations have an incentive to use export restrictions in the face of a sudden exogenous supply shock because such restrictions can be effective in stabilizing domestic prices. Such restrictions, however, destabilize world prices by creating price spikes and disproportionately affect the poorest nations in the world. Next Part III turns to an examination of the history of agricultural trade in the GATT/WTO and the special protectionist treatment that agriculture has historically enjoyed from the GATT/WTO. Part III will also examine the GATT/WTO provisions limiting export restrictions on agriculture and explain why they are weak and inadequate to deal with the current food crisis. Further, Part III will examine the relevant provisions of the EU, U.S. and other FTAs proliferating around the world that can be used to effectively limit export restrictions and to slow down the escalating world food prices. Part III suggests that FTAs have now eclipsed the GATT/WTO as the leading entities that can effectively responded to the global food crisis. Part IV will conclude with some suggestions for the future and the leading role that the EU and the United States need to play in controlling export restrictions on agriculture.

II. THE ECONOMICS AND POLITICAL ECONOMY OF EXPORT CONTROLS

A. Rising Real Food Prices

To understand the extensive use of export policy interventions in food and agricultural markets over the past two decades, it is important to place them in the context of the long-run

³⁹ Id.

⁴⁰ Id.

⁴¹ Id.

⁴² We review some methods and arguments that the EU and United States can use to block export bans. See Part III.G.2

trend in real food prices over past 120 years. In inflation-adjusted dollars, agricultural prices fell by an average of 1 percent per year between 1900 and 2010, despite an increase in the world's population from 1.7 billion to almost 7 billion over the same time-period.⁴³ The explanation for this phenomenon is very straightforward: over time, as gross domestic product (GDP) per capita has risen, consumers have spent proportionately less of their income on food compared to other manufactured and goods, a phenomenon known as Engel's Law;⁴⁴ at the same time, agricultural productivity has increased. Between 1960 and 2010, global gross agricultural output grew on average about 2.2 per cent per year.⁴⁵ In the early part of this period, output growth came mainly from additional land, labor, irrigation, fertilizer, and energy inputs, but over time growth has mainly been due to improvements in the productivity of these inputs. As a result of improving agricultural productivity, there has been no Malthusian crisis whereby population growth outstrips agricultural production,⁴⁶ i.e., the supply of food has shifted faster than the demand for food over time, driving down its real price, the agricultural sector's terms-of-trade declining.

Over the same time-period, the downward trend in real food prices has been interrupted infrequently by both negative and positive price spikes, most notably the fall in prices during the 1930s, and the rise in prices during the mid-1970s. However, this pattern has been broken over the past two decades, world prices of key staple foods being volatile around relatively high levels, with four peaks in real prices since 2008.⁴⁷ Using the Food Price Index published by the Food and Agricultural Organization (FAO) of the United Nations (UN), with real prices indexed at 2014-16=100, at the start of the 21st Century, the index stood at 67.1, spikes subsequently occurring in 2008 at 114.3, in 2011 at 118.8, in 2012 at 111.5, and most recently in 2022 at 141.7, their highest level since 1974 when the index stood at 131.4.⁴⁸

As noted earlier, the current spike in real food prices has been driven by the Russian invasion of Ukraine, although prices were already increasing in 2021 due to poor harvests in South America, strong global demand, reduced global stocks of grains and oilseeds, an input cost squeeze mostly due to fertilizer price increases, and global supply chain pressures post-pandemic.⁴⁹ These specific and recent shocks need to be seen in the context of a broader structural shift in underlying global agricultural market conditions. In this context, agricultural economists have conducted a considerable amount of analysis of why the downward trend in real food prices appears to have been reversed over the past two decades. The most convincing explanation for this break in trend is a combination of both supply-side and demand-side factors.

⁴³ See Keith Fuglie, Sun Ling Wang, and V. Eldon Ball, Productivity Growth in Global Agriculture, 39 *Population and Development Review*, 361, 361-65 (2013).

⁴⁴ See Rodney Tyers and Kym Anderson, Disarray in World Food Markets: A Quantitative Assessment (1992), 30-35.

⁴⁵ See Fuglie *et al.*, *supra* note 43, at 361-362.

⁴⁶ See Thomas Malthus, *An Essay on the Principle of Population*, in *Cambridge Texts in the History of Political Thought* 13-20 (R. Guess & Q. Skinner Eds. 1992) 13-20.

⁴⁷ See Will Martin, *Managing High and Volatile Food Prices*, International Agricultural Trade Research Consortium, Trade Policy Issues Paper #2012-6 at 1, 1 (Nov. 2012). Downloaded from: <https://ageconsearch.umn.edu/record/142732>.

⁴⁸ See Food and Agricultural Organization of the United Nations, *FAO Food Price Index, World Food Situation* (Dec. 2022).

⁴⁹ See *Id.*

On the supply-side, there have been key developments in the markets for key food staples. Since 1970, there has been a decline in the growth rate of global yields for maize, rice, and wheat, as well as some evidence of a slowdown in the growth rate of soybean yields. In combination with a substantial increase in demand from the biofuels sector for coarse grains such as maize, oilseeds and sugar, as well as strong consumption demand for maize globally, and for soybeans in China, the world may have entered a period of rising real food prices.⁵⁰ Recent research suggests that since 2000, the gap between the growth in consumption and yield of world feed grains, oilseeds, and food grains has increased, with the gap being projected to increase over the next decade unless there are significant increases in harvested land area and/or increased yield growth.⁵¹ With harvested land increasing by a modest 0.9 percent since 2002, and the path of yield growth being stable since the early-1980s, higher real food prices are to be expected as global agricultural markets adjust.⁵²

B. Response to Food Price Spikes

While much of the initial discussion of the 2008 food price spike focused on its major causes, the subsequent and extensive economic analysis was of how policymakers, especially those in developing countries, responded to rising prices. Most commonly, developing countries chose to directly intervene to stabilize domestic food prices. A study of 81 developing countries for the FAO found that a total of 68 used border measures to suppress domestic food price inflation. Of these countries, 25 either restricted or banned exports, while the other 43 reduced tariffs and other customs fees on imports. In addition, 35 countries also released stocks at subsidized prices.⁵³

The use of direct market interventions goes against the typical recommendations put forward by economists and policy analysts since the early-1980s.⁵⁴ In the immediate post-war period, the focus of public policy was aimed at ensuring price stability for agricultural commodities through use of production, border, and stock controls. Policy instruments included, *inter alia*, input subsidies, import and export taxes, and public buffer stocks. Protection of the agricultural sector by developed countries, along with extensive use of farm subsidies, had the effect of depressing international commodity prices, with the knock-on effect of reducing the incomes of farmers in developing countries.⁵⁵ Given that three-quarters of the world's poorest people live in low-income countries, with agriculture being a major source of their income, such policies only added to global income inequality and poverty.⁵⁶ At the same

⁵⁰ See Martin, *supra* note 47, at 3-9.

⁵¹ See Carl Zulauf, The World's Increasing Need for Cropped Land, *farmdocdaily* 12: 173 (Nov. 2022). Downloaded from: <https://farmdocdaily.illinois.edu/2022/11/the-worlds-increasing-need-for-cropped-land.html>.

⁵² See *Id.*

⁵³ See Mulat Demeke, Guendalina Pangrazio, and Materne Maetz, Country Responses to the Food Security Crisis: Nature and Preliminary Implications of the Policies Pursued, Food and Agriculture Organization of the United Nations, Initiative on Soaring Food Prices 3-10 (2009).

⁵⁴ See Christophe Gouel, Food Price Volatility and Domestic Stabilization Policies in Developing Countries in *The Economics of Food Price Volatility* 261, 262 (J. Chavas, D. Hummels & B. Wright Eds. 2014).

⁵⁵ See Kym Anderson, Krueger, Schiff, and Valdés Revisited: Agricultural Price and Trade Policy Reform in Developing Countries since 1960, 32 *Applied Economic Perspectives and Policy*, 195, 196 (2010).

⁵⁶ See World Bank, *World Development Report 2008: Agriculture for Development* 1, 1-2 (2008).

time, many developing countries taxed their agricultural sector, further reducing farmers' incentives.⁵⁷

The late D. Gale Johnson famously described this situation as one of “disarray in world agriculture”, where there was over-production of agricultural products in developed countries, under-production in developing countries, and less international trade than would have occurred under free trade, with thin markets exhibiting greater price volatility.^{58,59} It has been calculated that the instability of international food prices in the early-1980s was three times greater than it would have been under free trade.⁶⁰ Key to the policy choices being made was the nominal rate of assistance (NRA) to farmers in developed compared to developing countries up to the late-1980s, where NRA is measured as the percentage by which government farm policies raise (lower) gross returns to farmers above (below) what they would be without government intervention.⁶¹

For developed countries, over the period 1955 to 1989 the NRA to farmers rose from 23 to 55 percent, while for developing countries, it fell from -24 to -16 percent over the same period, i.e., the former subsidized their farmers while the latter taxed them.⁶² Note that post-1989, agricultural NRAs have fallen in developed countries following reform of their farm policies, while they have become modestly positive in developing countries as the latter have increased agricultural import protection.⁶³

After 1980, however, the use of direct market intervention went out of favor for both economic and political reasons.⁶⁴ The economic argument put forward against attempting to stabilize agricultural commodity prices was twofold. First, prices should be allowed to play their role as a signal for production, trade, and storage decisions.⁶⁵ Second, it was argued that stabilizing prices could increase instability of agricultural producers' incomes. This follows from the fact that agricultural production and price levels are negatively correlated which provides a form of insurance to farmers. Given that instability of producer income is the variance of price multiplied by production, price and production risks partially offset each other given that prices are high (low) when production is low (high). Therefore, policies aimed at price stabilization have the potential to increase producer income instability.⁶⁶

Current policy advice recommends instead, that agricultural producer incomes should be stabilized through market-based risk-management instruments such as futures and options contracts and weather index insurance, in combination with public provision of safety nets targeted at maintaining the purchasing power of vulnerable rural and urban households. In

⁵⁷ See Anderson, *supra* note 55, at 197.

⁵⁸ See D. Gale Johnson, *World Agriculture in Disarray* 17-27 (1973).

⁵⁹ See Anderson, *supra* note 55, at 197.

⁶⁰ See Tyers and Anderson, *supra* note 44, at 225-226.

⁶¹ See Anderson, *supra* note 55, at 200.

⁶² See *Id.* at 212-16.

⁶³ See *Id.* at 216.

⁶⁴ See Franck Galtier, “Which Instruments Best Tackle Food Price Instability in Developing Countries?” 21 *Development in Practice* 526, 529 (2011).

⁶⁵ See Gouel, *supra* note 54, at 262.

⁶⁶ See David M.G. Newberry and Joseph E. Stiglitz, *The Theory of Commodity Price Stabilization* 23-29 (1981).

addition, there should be support for long-run productivity growth in agriculture through investment, and trade and private storage should be relied on to take care of market shortages.⁶⁷

However, what has been termed “best practice”, came under considerable criticism in the aftermath of the 2008 food price spike.⁶⁸ Specifically, it was argued that risk management tools are often unavailable in developing countries, safety nets have proven too complex to use, and poor food importing countries have been hurt the most during food price spikes, even as they have attempted to rely on world markets.⁶⁹ It is not surprising, therefore, that despite the recommendations of economists and institutions such as the World Bank, direct intervention to stabilize food prices is and has been widespread among developing countries over the past two decades.⁷⁰

C. The Impact of High Food Prices

The typical justification for public intervention targeted at food price instability is the assumption that markets for insuring against price risks are incomplete.⁷¹ However, according to standard economic theory, the benefits of stabilizing food prices are relatively small for consumers and are sensitive to both the degree of consumer risk aversion and the share of food expenditure in their budgets. With downward-sloping demand curves, and no income effects, the consumer surplus gains from low food prices more than compensate for surplus losses from high food prices. This implies that stabilizing food prices at the mean will be harmful to consumers in developed countries where only a small proportion of their income is devoted to food consumption, although the welfare losses would be very small.⁷² In the case of consumers in developing countries, allowing for both high food budget shares and risk aversion, the welfare gains from price stabilization still tend to be small for the range of food price volatility experienced on world food markets.⁷³

In the case of producers, it is important to recognize that in developing countries, rural households often produce food for their own consumption, and as a result their production and consumption choices are interdependent, with implications for the welfare effects of price volatility.⁷⁴ In particular, the impact of price volatility for such households depends on whether they are net producers or net consumers of food, and the size of the food surplus or deficit they face. For poor net food buyers who are risk averse and spend a large proportion of their income on food, price fluctuations are modestly welfare-reducing. In the case of net food sellers, they may benefit from less price volatility as it helps to stabilize a significant share of their income, given they make production decisions before price uncertainty is resolved. Importantly, the larger (smaller) the marketed surplus of food, the greater (lower)

⁶⁷ See Gouel, *supra* note 54, at 262.

⁶⁸ See Peter C. Timmer, Behavioral Dimensions of Food Security, 109 Proceedings of the National Academy of Sciences, 12315, 12318 (2012).

⁶⁹ See Gouel, *supra* note 54, at 262.

⁷⁰ See *Id.* at 262.

⁷¹ See Newberry and Stiglitz, *supra* note 66, at 5-8.

⁷² See Gouel, *supra* note 54, at 265.

⁷³ See Christopher L. Gilbert and Wyn Morgan, “Food Price Volatility,” *Philosophical Transactions of the Royal Society of London. Series B, Biological Sciences*, 365, no. 1554 (2010): 3023-3034, 3024-3025.

⁷⁴ See Gouel, *supra* note 54, at 267.

the benefits of price stabilization, i.e., price stabilization schemes could be regressive.⁷⁵

If reducing food price volatility is not necessarily socially optimal, it is reasonable to ask why there was so much focus on the issue during and following the 2008 price spike, as well as more recently. For example, in 2011 during France's leadership of the G20, former president Nicholas Sarkozy specifically focused on tackling instability in global commodity markets, noting that,

If we don't do anything we run the risk of food riots in the poorest countries...The day there are food riots, what country at the G20 table will say this does not concern them."⁷⁶

At the time, economists pointed out that Sarkozy, as well as other international leaders, was making the mistake of combining concerns about high food prices and food price volatility, and as a result made three errors of fact.⁷⁷ First, while real food prices have exhibited spikes in the past two decades, it is not clear that there has been a similar problem with increased food price volatility.⁷⁸ Second, the effects on consumers and producers of food price spikes and food price volatility are quite different – the former may hurt poor consumers by reducing their purchasing power, while benefiting food producers, and as noted earlier, the latter may hurt food producers; and, third, blaming political unrest on food price volatility as opposed to high food prices is not supported by the empirical evidence. In other words, for developing country consumers it is high food prices that matter not price volatility.

Casual empiricism would certainly seem to support this claim. Descriptive research using the FAO Food Price Index from January 2004 to May 2011, finds that the timing of reported food price riots over the period coincided with food price spikes.⁷⁹ For example, in 2008, 60 food price riots occurred worldwide, 10 of which resulted in multiple deaths, followed in 2011 by larger protests in North Africa and the Middle East known as the “Arab Spring”.⁸⁰ These observations are consistent with the idea that high global food prices could be correlated with social unrest. Of course, correlation does not necessarily imply causation, as such unrest can be the result of a variety of factors including poverty, unemployment, and social injustice. However, other research using monthly data and the appropriate statistical methods, has found that food price increases resulted in increased social unrest over the period January 1990 to December 2011, while food price volatility over the same period was not associated with social unrest.⁸¹

⁷⁵ See *Id.*, at 267.

⁷⁶ Nicolas Sarkozy quoted in French G20 Leadership to Focus on Commodity Prices, euobserver (2011). Downloaded from: <https://euobserver.com/news/31693>.

⁷⁷ See Christopher Barrett and Marc Bellemare, Why Food Price Volatility Doesn't Matter. Policymakers Should Focus on Bringing Costs Down, Foreign Affairs Magazine (2012). Downloaded from: <https://www.foreignaffairs.com/world/why-food-price-volatility-doesnt-matter>.

⁷⁸ See Gilbert and Morgan, *supra* note 73, at 3023-24.

⁷⁹ See Marco Lagi, Karla Z. Bertrand, and Yaneer Bar-Yam, The Food Crises and Political Instability in North Africa and the Middle East, Working Paper, New England Complex Systems Institute (2011). Downloaded from: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1910031.

⁸⁰ See *Id.*, at 4.

⁸¹ See Marc F. Bellemare, Rising Food Prices, Food Price Volatility, and Social Unrest, 97 American Journal of Agricultural Economics, 1, 1-3(2015).

Why then are policymakers in developing countries so concerned about high food prices? Given that poor households spend a large share of their incomes on food, when food prices rise, their purchasing power falls more than households on higher incomes.⁸² It is important to note though high food prices are not necessarily unambiguously bad for the poor, given that 75 percent of the world's poor live in rural areas where many are also farmers.⁸³ What matters is whether rural households are net consumers or net producers of food, and also whether higher food prices eventually stimulate increased agricultural production, resulting in higher wages being paid to unskilled agricultural labor, thereby lifting them out of poverty.⁸⁴ However, empirical research has found that even allowing for increased production in the long-run, higher food prices typically raise poverty.⁸⁵

Not surprisingly, therefore, social unrest over high food prices is a signal of significant economic hardship for poor households. In addition, there can be significant long-term effects on educational outcomes, cognitive skills, and adult economic achievement, when young children face reduced dietary diversity as households adapt to high food prices to maintain caloric intake by consuming more of an expensive staple food.⁸⁶ Also, as poor households seek to protect their food intake, they reduce their expenditures on child schooling and health services, with the potential of preventing the accumulation of human capital, i.e., the welfare losses from high food prices may compound over time.⁸⁷

Clearly such social costs cannot be compensated for during subsequent periods of low food prices. Importantly, politicians in developing countries must be seen to be reacting food price spikes, especially where there are large poor populations. For example, in his successful re-election campaign in 2009, Prime Minister Manmohan Singh emphasized how he had limited the impact of the 2008 food crisis on India, while Haitian Prime Minister Jacques-Édouard Alexis was forced to resign in 2008 for failing to keep down the price of rice, Haiti importing 82 percent of its rice requirements.⁸⁸

D. Food Prices and Trade Policy

As noted above, poor households are affected not so much by food price volatility but rather high food prices. By this argument policymakers should only intervene in markets when food prices are high. However, high food prices are only one component of price

⁸² See Martin, *supra* note 47, at 12.

⁸³ See *Id.*, at 12.

⁸⁴ See Martin Ravallion, Rural Welfare Effects of Food Price Changes under Induced Wage Responses: Theory and Evidence for Bangladesh, 42 *Oxford Economic Papers* 574, 574-75 (1990).

⁸⁵ Will Martin and Maros Ivanic, Food Price Changes, Price Insulation, and Their Impacts on Global and Domestic Poverty, in Matthias Kalkuhl, Joachim von Braun, and Maximo Torero (Eds.), *Food Price Volatility and Its Implications for Food Security* 101, 105-07 (M. Kalkuhl, J. von Braun, & M. Torero Eds. 2016).

⁸⁶ See Paul Glewwe, Hanan Jacoby, and Elizabeth M. King, Early Childhood Nutrition and Academic Achievement: A Longitudinal Analysis, 81 *Journal of Public Economics*, 345, 345-47 (2001). See also Anna D'Souza and Dean Jolliffe, "Rising Food Prices and Coping Strategies: Household-Level Evidence from Afghanistan," 48 *Journal of Development Studies*, 282, 282-84(2012).

⁸⁷ See Robert J. Myers, On the Costs of Food Price Fluctuations in Low-Income Countries, 31 *Food Policy*, 288, 288-89 (2006).

⁸⁸ See Gouel, *supra* note 54, at 261-62. See also Bellemare, *supra* note 81, at 1.

volatility, i.e., volatility is only a meaningful concept if there are also periods of low prices which may hurt producers. Consequently, one would expect to observe policy interventions during periods of both high and low food prices, where in the former the concern is for consumer welfare, while in the latter it is for producer welfare. The available empirical evidence certainly supports this hypothesis, trade policies for a sample of 75 countries being adjusted by similar magnitudes in response to both the upward price spikes of the mid-1970s and mid-2000s, as well as the downward price spike of the mid-1980s.⁸⁹

1. Political-Economic Framework

To tie observed policy choices back to the idea that policymakers care about the impact of food prices, it is necessary to have a political-economic structure that can explain why countries unilaterally act to insulate their domestic market from international price fluctuations. The most convincing framework draws on the approach to decision-making under risk originally due to Nobel Prize-winning behavioral economists Amos Tversky and Daniel Kahneman. Their key insight is that there are three characteristics of individual's behavior that do not enter orthodox utility theory: first, economic gains and losses relative to a reference point matter; second, individuals exhibit loss aversion in the sense that economic losses have a larger effect on their welfare than corresponding gains; and third, the marginal value of economic gains and losses decreases with their size.⁹⁰ Originally incorporated into a trade model accounting for protection of producers,⁹¹ it has been subsequently extended to analysis of both food consumers and producers where the world food market is affected by both positive and negative price shocks.⁹²

The structure of the model is one where for a small open economy, a manufactured good is produced using labor only, while food is produced using labor and land, where the domestic price of food affects the return to owners of that land.⁹³ The economy imports the manufactured good, and exports food at the world price P^* . A small fraction of the population are landowners, their utility being a function of the price they receive for supplying food, their consumer surplus, and government transfers, while the remaining population are workers, their utility being a function of their wage income, consumer surplus, and government transfers. Importantly, the utility functions of both landowners and workers are adjusted by a behavioral component designed to reflect reference dependence and loss aversion.⁹⁴

In the case of workers, their reservation utility corresponds to a specific reference food price \bar{P} , consistent with a subsistence level of consumption. If there is a positive spike in food prices such that $P > \bar{P}$, the expected utility of workers falls below the reference point,

⁸⁹ Kym Anderson and Signe Nelgen, Trade Barrier Volatility and Agricultural Price Stabilization, 40 *World Development* 36, 37-45 (2012).

⁹⁰ See Amos Tversky and Daniel Kahneman, Loss Aversion in Riskless Choice: A Reference-Dependent Model, 106 *Quarterly Journal of Economics*, 1039, 1046-50 (1991).

⁹¹ See Caroline Freund and Çağlar Özden, Trade Policy and Loss Aversion, 98 *American Economic Review*, 1675, 1675-91 (2008).

⁹² See Paolo E. Giordani, Nadia Rocha, and Michele Ruta, Food Prices and the Multiplier Effect of Export Policy, CESifo Working Paper No. 3783 1, 1-45(2012).

⁹³ *Id.* at 5. Note, a small open economy is unable to influence the world price of food.

⁹⁴ *Id.* at 6.

additional welfare losses being incurred. If instead food prices are low, $P < \bar{P}$, workers get no additional utility. Landowners have a reference price, \underline{P} , such that if there is a negative spike in prices, $P < \underline{P}$, they suffer a loss of welfare, while a positive spike in food prices, $P > \underline{P}$, generates no additional utility.⁹⁵

Social welfare for this economy consists of the sum of labor income, the return on land, consumer surplus, and government revenue, with loss aversion for the whole economy also being accounted for, the government setting export policy to maximize social welfare. It turns out that the optimal export policy in the presence of loss aversion depends on the world price of food P^* . If the world price of food takes an intermediate value, $\underline{P} \leq P^* \leq \bar{P}$, the optimal trade policy is free trade. If instead there is a positive food price spike, $P^* > \bar{P}$, the optimal trade policy is an export tax set to maintain the domestic price of food facing workers at the reference level \bar{P} . Finally, if there is a negative food price spike, $P^* < \underline{P}$, the optimal trade policy is an export subsidy, the objective being to maintain the domestic price of food facing landowners at the reference level \underline{P} .⁹⁶

2. Non-Cooperative Trade Policy Choices

Therefore, accounting for loss aversion on the part of workers and landowners can rationalize observed policy responses to both positive and negative food price spikes. Importantly, with countries unilaterally reacting to a world food price increase through application of an export tax (or export restriction), this simply exacerbates the initial price shock, giving rise to a multiplier effect whereby exporters implement additional export taxes (export restrictions). Suppose there is an exogenous shock to the world price of food under free trade, driving it above the worker reference price, $P_{ft}^* > \bar{P}$. The policymaker in each exporting country responds by imposing an export tax to protect their workers/consumers, by maintaining the domestic food price at \bar{P} . However, as all exporters face the same incentive, there is a multiplier effect where they all impose export taxes, thereby pushing up the world price of food, which then starts off another round of higher export taxes, further pushing up world food prices.

This “beggar-thy-neighbor” result has been highlighted by *inter alia*, trade economists Will Martin and Kym Anderson who have suggested that in using trade restrictions,⁹⁷

Insulation generates a classic collective action problem akin to when a crowd stands up in a stadium to get a better view: no one gets a better view by standing, but any that remain seated get a worse view.

The collective action problem here is one where countries would be better off cooperating not to use export policies, but in the absence of any mechanism to enforce that cooperation, countries apply such policies unilaterally, to protect themselves from high world

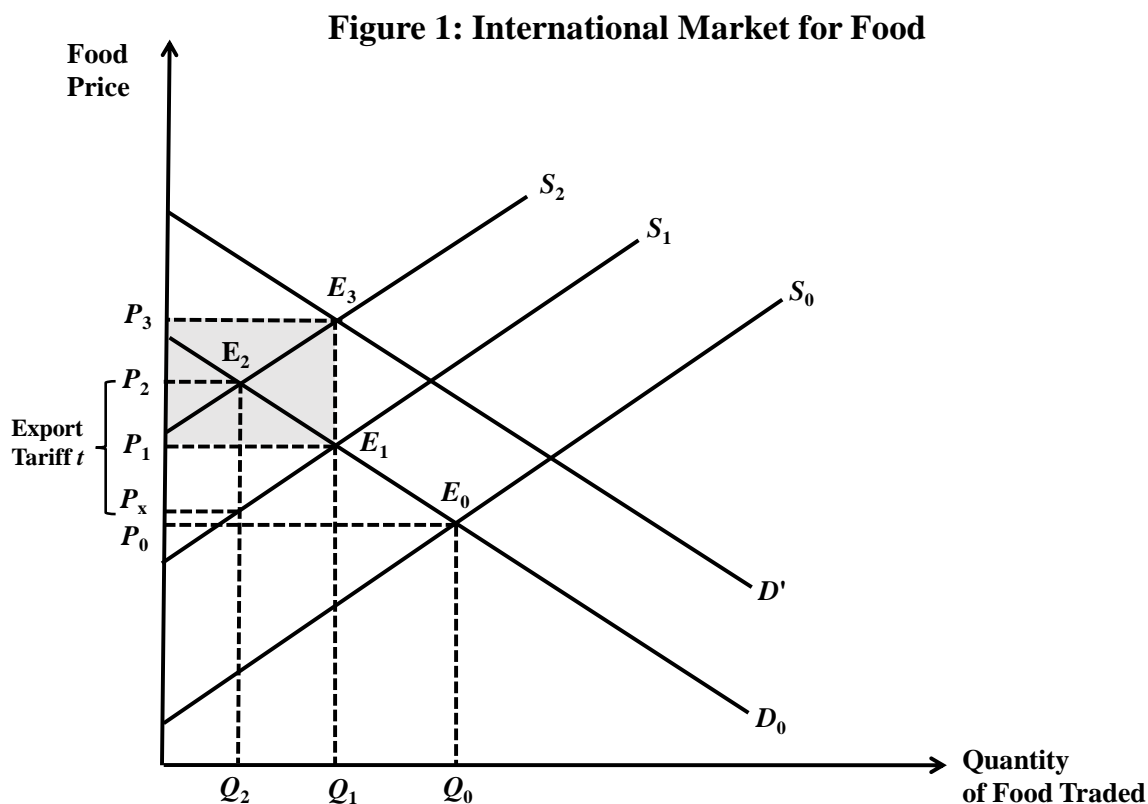
⁹⁵ Id. at 6-7.

⁹⁶ Id. at 7-9.

⁹⁷ See Will Martin and Kym Anderson, Export Restrictions and Price Insulation during Commodity Price Booms, 94 American Journal of Agricultural Economics, 422, 422 (2012).

food prices, even though the result is even higher world food prices for all countries.⁹⁸

As already noted, if multiple exporters use interventionist trade policy, it generates a global public bad through even higher world food prices. This can be illustrated as follows with reference to figure 1 which describes the international market for food. In a normal year, world market equilibrium is given by the intersection at E_0 of the world supply and demand curves, S_0 and D_0 respectively, with Q_0 being the amount traded at the world price P_0 .⁹⁹



Now suppose there is an exogenous supply shock at a time when food storage levels are also at low levels.¹⁰⁰ As a result, the supply shifts to S_1 , and without any policy intervention, the equilibrium shifts from E_0 to E_1 , Q_1 being the amount of food traded at a higher world price of P_1 . Based on the political-economic framework outlined, policymakers in food exporting countries implement an export tax t (export restriction), shifting the export supply curve to S_2 , moving the market equilibrium to E_2 , the world price increasing further to P_2 . Importantly, from

⁹⁸ See Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* 1-3 (1971).

⁹⁹ See Kym Anderson and Signe Nelgen, *Agricultural Trade Distortions During the Global Financial Crisis*, 28 *Oxford Review of Economic Policy*, 235, 238-40(2012).

¹⁰⁰ See Angus Deaton and Guy Laroque, *On the Behavior of Commodity Prices*, 59 *Review of Economic Studies* 1, 1-4(1992). Their research indicates that the prices of storable agricultural commodities are characterized by long stable periods, punctuated by short but intense price spikes.

the policymaker's perspective, this drives the domestic price of food down to P_x , which lies below the price P_1 , i.e., exporting countries provide some insulation to their workers/consumers from the initial exogenous supply shock.¹⁰¹

Even if each exporting country is individually small, their combined reactions to the supply shock reduces food exports to Q_2 . The aggregate tariff revenue generated by export taxes is given by the per unit export tax t multiplied by the level of food exports Q_2 , but importing country workers/consumers now face the higher world food price P_2 , while exporting country producers face the lower price of P_x .¹⁰² It should be noted that an export quota set at Q_2 will have the same effect on the world price, except that the wedge between P_2 and P_x is now per unit quota rent, which in the absence of any auction mechanism could be totally captured by export license holders or in some cases the political elite.¹⁰³

As noted earlier, many food importing countries responded to price spikes in 2008 by reducing their barriers to imports in response to rising world prices.¹⁰⁴ Assuming exporting countries have already intervened after the exogenous supply shock, the policy choice of importing countries shifts the import demand curve from D_0 to D' , the new market equilibrium being at E_3 , the world price rising to P_3 , the domestic price in both exporting and importing countries is now P_1 , and Q_1 is the quantity of food traded. By construction, these policy choices result in the same quantity of food being traded as compared to the initial supply shock, but at a higher world price. Importantly, due to the terms-of-trade effect, there is an economic transfer from food importing to food exporting countries equal to the shaded area $P_1E_1E_3P_3$.¹⁰⁵ Redistribution occurs due to the combined effect of export and import policies after the initial exogenous supply shock: exporting country producers and consumers receive/pay the price of P_1 , while importing country consumers pay the higher world price of P_3 , i.e., there is an income transfer from importing to exporting countries.

Given the number of developing countries that implemented trade policies during the run-up of food prices between 2006 and 2008, it is unsurprising that there is strong empirical evidence for a serious collective action problem. For example, one study found that of the 113, 83 and 70 percent increases in the prices of rice, maize, and wheat respectively between 2006 and 2008, trade restrictions accounted for 40, 10 and 19 percent of those increases respectively.¹⁰⁶

It should be noted, however, that attempts to insulate domestic markets from world food price spikes may be partially effective if not all countries intervene, and especially if those that

¹⁰¹ See Anderson and Nelgen, *supra* note 99, at 239-40.

¹⁰² *Id.* at 239-240.

¹⁰³ See Murray E. Fulton and T. Reynolds, "The Political Economy of Food Price Volatility: The Case of Vietnam and Rice," 97 *American Journal of Agricultural Economics*, 1206, 1223-24 (2015). In the case of the Vietnamese rice sector, export market access is controlled by the Vietnam Food Association (VFA) who stopped granting export contracts in late-2007 early 2008. At the same time large state-owned enterprises (SOEs) got the lion's share of the remaining export contracts, generating significant quota rents, which in turn benefited Vietnam's political elite.

¹⁰⁴ See Demeke et al., *supra* note 53, at 3-10.

¹⁰⁵ See Anderson and Nelgen, *supra* note 99, at 240.

¹⁰⁶ See *Id.*, at 254.

insulate have large poor populations. Empirical evidence suggests that for the 2006 to 2008 run up in food prices, the collective effect of trade interventions reduced the global poverty headcount by around 56 million, with the burden of higher food prices being exported to other developing as well as developed countries.¹⁰⁷ However, the same study also points out that due to exacerbation of the world food price spike, countries that chose to insulate through border policies would have experienced a lower increase in food prices if they had not directly intervened in the first place.¹⁰⁸

3. Resolution of the Collective Action Problem?

The analysis presented suggests if individual policymakers believe unilateral use of export policies to insulate their populations from high world food prices is effective, it may be difficult to place disciplines on such non-cooperative policies, despite driving up prices even further.¹⁰⁹ The key to this possibility is that in a standard model of trade policy coordination, trade policy adjustments are positively correlated with trade volumes, while for food production, trade policy adjustments are negatively correlated with price spikes.¹¹⁰

In the standard model, with no cooperation, countries have, a unilateral incentive to implement import tariffs (import quotas), thereby improving their terms-of-trade.¹¹¹ With cooperation, lower levels of import protection can be sustained in what can be thought of as “normal periods” of trade volume. However, during periods of high trade volume, there is a greater incentive for countries to deviate and seek to protect themselves from terms-of-trade losses. To prevent reversion to the non-cooperative high import tariff (import quota) equilibrium, countries cooperate over the use of “special” protection during surges in trade volume, i.e., there is “managed” trade.¹¹²

In the case of food production, the focus of policymakers is on insulating their domestic markets from global price spikes rather than maintaining their terms-of-trade in the face of changing trade volumes. How this plays out is sensitive to the asymmetric distribution of food prices, with more prices below than above the mean, but with occasional spikes.¹¹³ Without cooperation, food importing countries will utilize trade policy more frequently because of the concentration of prices below the mean – essentially what developed countries did prior to the 1990s. However, with cooperation, a food exporting country has a greater incentive to deviate because positive deviations of food prices from the mean are larger than negative ones.¹¹⁴ Therefore, asymmetry of the distribution of food prices could make it more difficult to discipline export taxes than import tariffs in trade agreements.

¹⁰⁷ See Kym Anderson, Maros Ivancic, and Will Martin, Food Price Spikes, Price Insulation and Poverty in Jean-Paul Chavas, David Hummels, and Brian D. Wright (Eds.), *The Economics of Food Price Volatility* 311k 324-30 (J. Chavas, D. Hummels & B. Wright Eds. 2014).

¹⁰⁸ See Id. at 330-34.

¹⁰⁹ See Gouel, supra note 54, at 298.

¹¹⁰ See Christophe Gouel, Trade Policy Coordination and Food Price Volatility, 98 *American Journal of Agricultural Economics* 1018, 1018-20 (2016).

¹¹¹ See Kyle Bagwell and Robert W. Staiger, A Theory of Managed Trade, 80 *American Economic Review*, 779, 781-83 (1990).

¹¹² See Id. at 780.

¹¹³ See Deaton and Laroque, supra note 100, at 2-3.

¹¹⁴ See Gouel, supra note 110, at 1019.

E. Food Prices and Safety Nets

The evidence that, use of trade restrictions by developing countries has been largely self-defeating, has resulted in many analysts recommending that effective WTO disciplines be implemented with respect to the use of export restrictions.¹¹⁵ In addition, others appeal to the post-1980s orthodoxy that recommends use of public safety nets to protect vulnerable populations in developing countries.

Safety nets are non-contributory targeted transfers designed to maintain the purchasing power of poor households and thereby prevent them falling into poverty after a price shock. Such policy instruments range from cash transfers and food stamps to food-for-work and cash-for-work programs. They are often seen as being complementary to price stabilization policies that may be insufficient in protecting the purchasing power of the poor. A reduction in the real income of households who spend a large proportion of their income on food can be placed in the context of Nobel Prize winner Amartya Sen's approach to the economics of poverty and famines, which focuses on individual's entitlements to commodity bundles including food, starvation resulting from a failure to be entitled to a bundle containing enough food.¹¹⁶ If local food prices rise, there is pressure on the purchasing power of the poor, therefore safety nets are a means of maintaining that purchasing power.¹¹⁷

There are well-known problems in developing country governments utilizing safety nets to provide insurance to poor households due to fiscal, targeting and implementation constraints.¹¹⁸ This compares to trade policies which are easily implemented, possibly less costly, and apparently politically effective.¹¹⁹ Nevertheless, empirical evidence shows that that in response to the 2006 to 2008 run up in food prices, 23 countries used cash transfers, 19 used food assistance, and 16 used policies to increase disposable income.¹²⁰

Even though many developing countries' safety nets are not considered adequate,¹²¹ they have in some cases been crucial in protecting the poor from food price increases. For example, programs such as *Progres*a in Mexico, where cash is provided to households conditional on children attending school and household members getting regular health check-ups, and Bangladesh's Public Food Distribution System (PFDS) which makes grains available to poor households who would otherwise not have access to enough food, as well as distributing food during emergency situations.¹²²

F. Trade Policy vs. Safety Nets

It is important to realize that both trade policies and safety nets are being used as substitutes for private insurance mechanisms that are not being provided by the market in

¹¹⁵ See Martin and Anderson, *supra* note 97, at 426-27.

¹¹⁶ Amartya Sen, *Poverty and Famines – An Essay on Entitlement and Deprivation* 45, 45-48 (1981).

¹¹⁷ See Harold Alderman and Trina Haque, *Countercyclical Safety Nets for the Poor and Vulnerable*, 31 *Food Policy* 372, 372-73(2006).

¹¹⁸ See *Id.* at 381.

¹¹⁹ See Gouel, *supra* note 54, at 261-62.

¹²⁰ See Demeke et al., *supra* note 53, at 10.

¹²¹ See Margaret Grosh, Colin Andrews, Rodrigo Quintana, and Claudia Rodriguez-Alas, *Assessing Safety Net Readiness in Response to Food Price Volatility*, SP Discussion Paper No. 1118 1, 9-13 (2011).

¹²² See Demeke et al., *supra* note 53, at 14-17.

developing countries. To use the jargon of economics, a world where private, market-based contracts can be written against any future contingency is efficient and is therefore the “first-best”, a result shown to hold in international trade models.¹²³ However, without functioning insurance markets, the optimal policy for a small open economy may not be free trade.¹²⁴ Therefore, if contingent contracts do not exist, any attempt by policymakers to provide insurance is likely to create market inefficiencies, i.e., trade policies and safety nets are “second-best” policy instruments and should be judged accordingly.

Even if a social protection program could achieve the same allocation of resources as a world with contingent contracts, it is still possible for such a scheme to exacerbate a food price shock. Under such a scheme, when food prices are high, income is transferred from net food producers who face a positive income shock, to net food consumers who face a negative income shock, and vice-versa when food prices are low.¹²⁵ However, such a scheme may not be consumption-neutral if income is transferred to households that have a higher propensity spend to that income on food. In this case, there will be an increase in the aggregate domestic consumption of food, with implications for world supply and prices. In other words, if an optimal social protection scheme could have “beggar-thy-neighbor” effects, then so will publicly supplied safety nets.¹²⁶ Empirical evidence suggests that the size of such effects will be a function of the type of transfer, cash vs. in-kind, how responsive the supply of food is to higher prices, and how integrated into the world market is the economy in question.¹²⁷

The key point of this discussion is that when poor consumers are unable to insure themselves against high food prices, both trade policies and public safety nets can intensify food price spikes. While it may be the case that trade policies tend to over-react to price spikes, and safety nets tend to under-react, the conclusion to be drawn here is that trade policies should not be dismissed out of hand as inefficient, but instead their effects should be evaluated relative to other policies that may also generate negative effects on the world market.¹²⁸ Importantly, in the absence of public food safety nets, export restrictions are frequently used by policymakers seeking to insulate workers/consumers from high food prices. However, notwithstanding the political efficacy of trade policies, their destabilizing effect on world food markets is well-understood, emphasizing the need for a cooperative response to their use at the multilateral level.¹²⁹

III. AGRICULTURE AND THE GATT/WTO

The previous part of this Article indicates that export restrictions are often used by countries to control domestic prices for food even though such restraints lead to higher prices on the world market for the same products. Export restraints present a collective action problem as

¹²³ See Christophe Gouel and Sébastien Jean, Optimal Food Price Stabilization in a Small Open Developing Country, 29 *The World Bank Economic Review* 72, 74-75 (2015).

¹²⁴ See *Id.* at 75.

¹²⁵ See Quy-Toan Do, Andrei A. Levchenko, and Martin Ravallion, Trade Insulation as Social Protection in *The Economics of Food Price Volatility* 345, 345-48 (J. Chavas, D. Hummels & B. Wright Eds. 2014).

¹²⁶ See *Id.* at 346-47.

¹²⁷ See Jesse M. Cunha, Giacomo De Giorgi, and Seema Jayachandran, The Price Effects of Cash Versus In-Kind Transfers, NBER Working Paper 17456 1, 1-5 (2011).

¹²⁸ See Do et al., *supra* note 125, at 346-347.

¹²⁹ See Gouel and Jean, *supra* note 123, at 98.

individual nations have an incentive to act in their own self-interest in imposing export restrictions while there is a disincentive for all nations to act collectively to refrain from their use. Despite their overall negative effect, nations have an incentive to use export restrictions to deal with exogenous supply shocks in the absence of better alternatives such as market-based risk-management techniques and safety nets. As the negative effects of export restrictions are generally acknowledged and well-understood as well as the incentives of nations to use them, the question arises on whether legal rules exist in the international legal order to limit or prohibit the use of export restrictions. The first place that nations will look for such rules is in the GATT/WTO.

A perusal of the GATT/WTO agreements indicates, however, that the bulk of its provisions deal with import controls and that export controls are considered only in a few and limited contexts. The relative paucity of rules on export controls within the GATT/WTO can be traced to two main historical themes: (1) the focus of the GATT in the post war period on reducing import trade barriers; and (2) the special and protectionist treatment that nations reserved for agriculture from the very beginnings of the GATT/WTO.

A. Import Trade Barriers and the GATT

In the years preceding the Second World War, nationalism and protectionism in international trade reached an apex.¹³⁰ During the Great Depression and global recession of the 1930s, nations erected trade barriers that prevented trade.¹³¹ In the United States, the U.S. Congress passed the Smoot Hawley Tariff Act of 1930, which imposed an effective average tariff of 53% on imports.¹³² Other nations retaliated with similarly draconian tariffs.¹³³ These protectionist trade barriers stymied international trade, which was their intended purpose.¹³⁴ During this chaotic and turbulent period, nations viewed each other with suspicion and mistrust.¹³⁵ These protectionist policies and sentiments contributed to the eruption of the Second World War and its immensely destructive impacts on the global economy.¹³⁶

After the end of the war, a group of nations gathered in Bretton Woods, New Hampshire to create a blueprint on how to prevent such disastrous trade policies from triggering another global conflict.¹³⁷ The Bretton Woods nations envisioned a post-war triumvirate of international organizations that would instill discipline in economic, fiscal, and trade policies.¹³⁸ The World Bank would lend money to developing countries to modernize their economies and to European allies for the reconstruction of Europe.¹³⁹ The International Monetary Fund would instill

¹³⁰ Chow, Export Restrictions *supra* note 21, at 507.

¹³¹ Chow, Schoenbaum, & Dorris, International Trade Law, *supra* note 1, at 10.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Chow, Export Restrictions *supra* note 21, at 507-08.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Chow, Schoenbaum, & Dorris, International Trade Law, *supra* note 1, at 10.

¹³⁹ *Id.*

discipline into the management of national currency exchange rates.¹⁴⁰ A third organization, the International Trade Organization (ITO) would help to reduce barriers to international trade, but the ITO failed to win approval due to opposition from the U.S. Congress.¹⁴¹ To jumpstart liberalization in the international trade in goods, the Bretton Woods nation implemented on a provisional basis the GATT 1947 that would be administered by the ITO.¹⁴² In 1995 the World Trade Organization was established to assume the role originally intended for the ITO.¹⁴³

The focus of the GATT 1947 was squarely on dismantling import trade barriers and little attention was paid to export restrictions. To reduce import tariffs, the GATT led succeeding “rounds” of negotiations among GATT contracting states that were a resounding success in reducing tariffs to new historical lows.¹⁴⁴ When the World Trade Organization was established in 1995, WTO members turned their attention to other trade issues, such as intellectual property, the needs of developing countries, and agriculture.¹⁴⁵ The lack of attention to export controls remained, which helps to explain there are only a few provisions in the WTO agreements that relate directly to export controls.

B. History of Agriculture in the GATT/WTO

A second reason why so few controls on exports of agricultural products exists is because agricultural trade has always been treated as a special case with the GATT/WTO.¹⁴⁶ Historically, agriculture was subject to heavy protectionism because it is the major food source for most countries.¹⁴⁷ Many countries believed that it was a matter of national concern to be able to grow their own food and not have to depend on other countries for their supply.¹⁴⁸

Although subject to GATT/WTO rules from the very beginning of the GATT in 1947, trade in agricultural goods was subject to many trade barriers such subsidies and a myriad of border measures including tariffs and many non-tariff barriers that caused many distortions in international trade.¹⁴⁹ The collapse of world agricultural prices during the 1930s during the Great Depression and the need to support domestic agricultural production in the aftermath of the widespread destruction of the Second World War meant that agriculture was singled out for special treatment.¹⁵⁰ GATT rules were violated and ignored, often without any justification.¹⁵¹

The types of trade barriers frequently found in agriculture can be divided into three categories: import trade barriers, domestic support programs, and export subsidies.

¹⁴⁰ Id.

¹⁴¹ Id.

¹⁴² Id.

¹⁴³ Id. at 10-11.

¹⁴⁴ Id. at 14-15, 151-52.

¹⁴⁵ Chow, *Export Restrictions*, supra note 21, at 508.

¹⁴⁶ Chow, Schoenbaum, Dorris, *International Trade Law*, supra note 1, at 279-80.

¹⁴⁷ Id.

¹⁴⁸ Id. at 283.

¹⁴⁹ Id. at 280.

¹⁵⁰ Id.

¹⁵¹ Id.

1. Import Trade Barriers

Historically nations imposed many different types of import trade restrictions on agricultural products that are now prohibited under the AoA: tariffs, quotas, tariff rate quotas, variable levies, import licensing requirements, and minimum import prices.¹⁵² These restrictions were all applied at the border by customs authorities. These import trade barriers reduced market access for agricultural exports. Market access is important for all countries but especially for developing countries that seek additional markets in which to sell their products.

2. Domestic Support

Many governments provide domestic support in the form of financial payments, research and training programs, pest control, and other forms of assistance.¹⁵³ Governments are aware that agricultural production is subject to many variables that can be unpredictable (such as weather) and that can cause loss and hardship to farmers.¹⁵⁴ These uncertainties can disrupt agricultural production and a nation's food supply.¹⁵⁵ To alleviate some of these concerns, many governments provide financial assistance to farmers in the form of direct payments or subsidies.¹⁵⁶

Domestic subsidies, however, can create a trade distortion. For example, agricultural producers who receive government payments are able to lower the price of their products in the domestic market.¹⁵⁷ The price advantage created by these payments can create market entry barriers for foreign agricultural products that are unable to compete on price.¹⁵⁸ The market entry barrier becomes in effect an import trade barrier.

Domestic support is very high in certain countries. For example, in 2020, government payments constituted 12% of farm income the United States, 19% in the EU, and 41% in Japan.¹⁵⁹

3. Export Subsidies

An export subsidy is a financial payment contingent upon the export of the product.¹⁶⁰ Under the WTO Subsidies and Countervailing Measures Agreement (SCM), export subsidies are illegal per se and are prohibited.¹⁶¹ However, Article 3 of the SCM exempts agricultural subsidies and provides that they are subject to the AoA, which permits their existence but

¹⁵² AoA, Art. 4.2 n.1.

¹⁵³ Id.

¹⁵⁴ Thomas J. Schoenbaum, Fashioning a New Regime for Agricultural Trade: New Issues and the Global Food Crisis, 14 J. Int'l Econ. L. 593, 597 (2011).

¹⁵⁵ Id.

¹⁵⁶ Id.

¹⁵⁷ Chow, Schoenbaum, & Dorris, International Trade Law, supra note 1, at 289.

¹⁵⁸ Id. at 280.

¹⁵⁹ Id. at 446.

¹⁶⁰ Art. 3.1(a), WTO Agreement on Subsidies and Countervailing Subsidies (1994).

¹⁶¹ Id., Art. 3.1.

provides for their gradual elimination.¹⁶² Article 3 is an example of the historical approach of the GATT/WTO in treating agriculture as a special case exempt from general prohibitions on trade restrictions on export subsidies.

An export subsidy is considered harmful in international trade because the subsidy creates a financial advantage for the exporter, which can charge a lower price for its product in the import market.¹⁶³ This price advantage can harm domestic agricultural industries that may be unable to compete with subsidized export competition. The price advantage of the exports is not the result of efficiencies in production but derive from a government payment that is an intrusion into the market.¹⁶⁴ Such subsidies are inconsistent with free market principles and harm competition.¹⁶⁵

C. AoA's Approach to Removing Trade Barriers

With the Uruguay Round of negotiations begun in 1986 that led to the establishment of the WTO, countries decided to fully integrate agriculture into the GATT/WTO regime and subject trade in agriculture to GATT/WTO discipline.¹⁶⁶ The Agreement on Agriculture (1994) (AoA) was the result of these negotiations and was designed to gradually remove these trade distortions.¹⁶⁷ We review the AoA's approach to removing trade barriers below, but note that the AoA contains no prohibitions on export bans or export taxes.

1. The AoA and "Tariffication"

In dealing with import trade barriers, the AoA pursued a two-step approach. First, the AoA pursued a policy of "tariffication," i.e., all WTO members were to convert all other forms of trade barriers into tariffs.¹⁶⁸ The reasoning behind this approach is that tariffs are universally used and are well understood. GATT/WTO tariffs can be determined with accuracy by an exporter who can then reliably plan on those costs in structuring its transactions. Some other types of import trade barriers, however, were non-transparent and difficult to understand. For example, a variable levy is one that varies in each case in accordance with criteria established by the importing country.¹⁶⁹ These criteria were often opaque, leading to uncertainty and unpredictability in determining the tariff. This type of uncertainty can itself become an impediment to trade as exporters become unable to determine their costs with confidence in dealing with certain countries and may seek to deal with countries with more predictable import barriers instead.

¹⁶² Arts. 8-10, WTO Agreement on Agriculture (1994).

¹⁶³ Chow, Schoenbaum, & Dorris, *International Trade Law*, supra note 1, at 446.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 280.

¹⁶⁷ Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products, WT/DS207/AB/R, Report of the Appellate Body adopted on Oct. 23, 2002 at ¶ 234.

¹⁶⁸ AoA, Art. 4.2.

¹⁶⁹ Chile – Price Band System, supra note 163, at ¶¶ 233-34.

Once tariffication has been completed, the tariffs for all agricultural products were incorporated in each country's tariff schedule that is on file with the GATT/WTO.¹⁷⁰ A second step is then for all countries to negotiate reduction of agricultural tariffs as part of general tariff reduction negotiations, another process that is well understood within the WTO.¹⁷¹ Together this two-step process, conversion of all trade barriers to tariffs and then negotiations to reduce tariffs, has been notably successful in reducing import trade barriers to trade in agriculture.

2. The AoA and Domestic Subsidies

The AoA approach to domestic subsidies is to divide them into two categories: domestic subsidies that have little or minimal trade distorting effects or exempt support programs and those that distort trade or non-exempt support programs.¹⁷² For example, a government funded program that provides agricultural research or training is deemed to have few trade effects and is considered an exempt support program. By contrast, a government program that purchases crops that cannot be sold commercially at a government guaranteed minimum price is deemed to be a non-exempt program. The AoA requires WTO members to reduce non-exempt programs. The AoA contains no obligations to reduce exempt support programs.

3. The AoA and Export Subsidies

Articles 8-10 of the AoA places limits on the use of export subsidies.¹⁷³ In December 2015, at the Tenth Ministerial Conference of the WTO, its highest governing body, held in Nairobi, Kenya, WTO members agreed to abolish export subsidies for agricultural products.¹⁷⁴ The elimination of export subsidies was effective immediately for developed countries and for developing countries at the end of 2018.¹⁷⁵ All export subsidies in agriculture have now been eliminated by the WTO.

4. Food Security

AoA Article 20 refers to “non-trade concerns” in agriculture.¹⁷⁶ Trade and the environment is one area of non-trade concerns.¹⁷⁷ Another non-trade concept that has gained prominence in agricultural trade in the aftermath of the 2007-2008 food crisis is that of “food security.”¹⁷⁸ According to the United Nations in its “Framework for Action” that is produced by the U.N. High Level Task Force on the Global Food Security Crisis of 2007-2008, food security consists of four principles: (1) production and availability of food; (2) access to food and nutrition; (3) people's use of food and nutrition to lead their lives to the full potential; and (4)

¹⁷⁰ Schoenbaum, *Fashioning a New Regime for Agricultural Trade*, supra note 152, at 599.

¹⁷¹ Chow, Schoenbaum, & Dorris, *International Trade Law*, supra note 1, at 281.

¹⁷² *Id.* at 280-81.

¹⁷³ AoA, Arts. 8-10.

¹⁷⁴ WTO Ministerial Conference Decision on Export Competition, WT/MIN(15)/45 — WT/L/980 (Dec. 19, 2015).

¹⁷⁵ *Id.* at ¶ 5.

¹⁷⁶ *Id.* at ¶ 6.

¹⁷⁷ Chow, Schoenbaum, & Dorris, *International Trade Law*, supra note 1, at 284.

¹⁷⁸ Schoenbaum, *Establishing a New Regime for Agricultural Trade*, supra note 152, at 605-06.

stability of supply.¹⁷⁹ Food security has become an important policy of the AoA and the GATT/WTO.

D. GATT/WTO Rules on Export Restrictions

Against this historical background, we now turn to the major GATT/WTO provisions apply to controls on agricultural exports. The GATT/WTO rules limiting the use of export restrictions must begin with the so-called “No Quotas Rule” contained in GATT Article XI entitled “General Elimination of Quantitative Restrictions.”¹⁸⁰ This is a general rule, not limited to agricultural goods:

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.¹⁸¹

In examining GATT/WTO rules on export restrictions, we must distinguish between export quotas (or bans) and export tariffs. An export quota is a quantitative restriction on the total number of exports, e.g. “No more than 200,000 tons of sugar can be exported in 2023.”¹⁸² A quota of zero is an export ban. By contrast, an export tariff is a tax imposed on each product or unit that is exported.¹⁸³ The tariff can be a flat tariff, e.g., \$1 per bushel of corn, or ad valorem, i.e., a percentage of the value of the product, e.g., “15% ad valorem”¹⁸⁴

1. Export Taxes

Article XI eliminates quotas and various other types of trade barriers but does not import or export tariffs. The first sentence states that no restrictions “*other than duties, taxes, or other charges . . . shall be instituted or maintained . . . on the exportation of any product . . .*”¹⁸⁵ This language expressly *exempts* export tariffs, taxes and other export charges (such as administrative fees) from the scope of Article XI’s prohibition. In other words, Article XI permits exports tariffs; moreover, no other provision contained in any of the WTO agreements prohibits export tariffs. In other words, while GATT Article XI eliminates export quotas or bans, export tariffs are lawful under the GATT/WTO. This GATT position means that if a restriction on export taxes is to be found, it must be found outside of the WTO.

2. Export Bans

¹⁷⁹ Trade important for food security, UN specialist tells agriculture delegations, WTO 2010 New Items, https://www.wto.org/english/news_e/news10_e/agri_18nov10_e.htm.

¹⁸⁰ GATT, Art. XI.

¹⁸¹ Id.

¹⁸² Chow, Schoenbaum, & Dorris, *International Trade Law*, supra note 1, at 257.

¹⁸³ Id. at 152.

¹⁸⁴ Id.

¹⁸⁵ GATT, Art. XI:1.

While Article XI requires the general elimination of export bans, a further reading of the GATT/WTO agreements indicates that export bans of agricultural products, like export taxes, are permitted or tolerated. Recent developments in the WTO such as the paralysis of the Appellate Body is also another reason why export bans will be permitted.

The general elimination rule for quotas contained in Article XI is followed immediately by an exception for agriculture:

2. The provisions of paragraph 1 of this Article shall not extend to the following:

(a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party.¹⁸⁶

The Analytical Index of the GATT, which summarizes the legislative history of the GATT and includes other interpretive tools, indicates that the preparatory work for the GATT stated that the words “prevent or” were intended “to enable a member to take remedial measures before a critical shortage has arisen.”¹⁸⁷ The U.S. representative took the position “critical shortage” does not mean “economic distress but referred to shortages of crops, etc.”¹⁸⁸ The GATT Analytical Index also indicates that GATT countries believed that a similar provision in a previous draft form is “adequate to allow a country to impose temporary export restrictions in order to meet a considerable rise in domestic foodstuffs due to a rise in prices in other countries.”¹⁸⁹ In considering the terms “essential to the exporting country,” the Sub-Committee at the Geneva session of the Preparatory Committee considered this language to indicate that the “importance of any product should be judged in relation to the particular country concerned.”¹⁹⁰ This legislative history suggests that although export bans are generally prohibited in the area of agriculture WTO countries are allowed to impose temporary export bans as a preventative measure in reaction to shortages in foodstuffs that are considered essential to the particular country involved.

GATT Article XI:2(a) is further attenuated by AoA Article 12, “Disciplines on Export Prohibitions and Restrictions”:

1. Where any Member institutes any new export prohibition or restriction on foodstuffs in accordance with paragraph 2(a) of Article XI of GATT 1994, the Member shall observe the following provisions:

(a) the Member instituting the export prohibition or restriction shall give *due consideration* to the effects of such prohibition or restriction on importing Members’ food security¹⁹¹

¹⁸⁶ Id.

¹⁸⁷ GATT Analytical Index at 14,

https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art11_gatt47.pdf

¹⁸⁸ Id.

¹⁸⁹ Id.

¹⁹⁰ Id.

¹⁹¹ AoA, Art. 12.1 (emphasis added).

The requirement that a country give “due consideration” to the interests of importing members is a vague requirement that can appear to be precatory in nature only and appears by design to be unenforceable. Similar terms found in the GATT have been deemed to be precatory and unenforceable due to the imprecision and vagueness of the term.¹⁹² In addition, AoA Article 12.2 also provides that Article 12.1 does not apply to any developing country member unless the member “is a net-food exporter of the specific foodstuff concerned.”¹⁹³ A net exporter means that a member exports more foodstuff than it consumes. Few countries will fall into this category for essential foods staples.

The current GATT/WTO regulations on export bans and export taxes do not provide meaningful limitations on the ability of countries to impose such restrictions. These current provisions may reflect the historical deference given to nations to protect domestic agriculture and are not adequate to discipline the use of export restrictions in the current global food crisis. In the aftermath of the last food crisis of during the global recession of 2007-2009, the United Nations has stated that these GATT/WTO provisions “are considered to have been insufficient and weak during the 2007-2009 period.”¹⁹⁴ Recognizing these limitations and the need for emergency measure to deal with the food crisis, the WTO decided to take action in its most recent ministerial conference held in Geneva in June 2022. The WTO Ministerial Conference, a meeting of all WTO trade ministers, is the highest authority in the WTO and meets every two years.¹⁹⁵

E. The 2022 Geneva Ministerial Declaration on Food Insecurity

On June 17, 2022, at the conclusion of the Twelfth Ministerial Conference held in Geneva, the WTO issued a Ministerial Declaration on the Emergency Response to Food Insecurity.¹⁹⁶ Rather than prohibiting all export bans and export taxes on agricultural products, the Ministerial Conference simplified clarified the parameters of their use. The relevant provisions of the Geneva Declaration provide as follows:

4. We underscore the need for agri-food trade to flow, and reaffirm the importance of not imposing export prohibitions or restrictions in a manner inconsistent with relevant WTO provisions.¹⁹⁷
5. We resolve to ensure that any emergency measures introduced to address food security concerns shall minimize trade distortions as far as possible; be temporary, targeted, and transparent; and be notified and implemented in accordance with WTO rules. Members

¹⁹² The original articles in the GATT for developing countries contains similar language and were long viewed as weak and ineffectual to protect the interests of developing countries. See Chow, Schoenbaum, & Dorris, *International Trade Law*, at 718 & 722.

¹⁹³ AoA, Art. 12.2.

¹⁹⁴ FAO, IFAD, IMF, OECD, UNCTAD, WFP, the World Bank, the WTO, IFPRI and the UN HLTTF *Price Volatility in Food and Agricultural Markets: Policy Responses* ¶ 97 (June 2, 2011).

¹⁹⁵ Chow, Schoenbaum, & Dorris, *International Trade Law*, supra note 1, at 16.

¹⁹⁶ Ministerial Declaration on the Emergency Response to Food Insecurity, WT/MIN(22)/28 WT/L/1139, adopted on June 17, 2022 (June 22, 2022).

¹⁹⁷ Id.

imposing such measures should take into account their possible impact on other Members, including developing countries, and particularly least-developed and net food-importing developing countries.¹⁹⁸

An additional document, the Ministerial Decision on the World Food Programme, prohibited export bans or export taxes on foodstuffs purchased by the World Food Programme for non-commercial humanitarian purposes.¹⁹⁹

The Geneva Ministerial Declaration affects the GATT/WTO limitations on export taxes and export bans differently. The Declaration's exhortation to not impose export restrictions inconsistently with relevant WTO provisions does not affect the ability of WTO countries to implement export taxes. Under the relevant WTO provision, GATT Article XI, export taxes are permitted.²⁰⁰ However, Paragraph 5 of the Declaration purports to contain a more clear statement of the parameters on export bans and export taxes: these restrictions should be "temporary, targeted, and transparent" and, in addition, export bans (but not taxes) must also be notified under existing WTO rules.²⁰¹ The applicable notification requirements for export bans is contained in the Decision on Notification Procedures for Quantitative Restrictions adopted by the Council for the Trade in Goods on June 22, 2012.²⁰²

Ultimately, the Geneva Ministerial Conference did not result in any new binding rules on export restrictions, with the exception of the decision to exempt food provided by the UN World Food Programme from all export restrictions. This latter exception served a symbolic purpose for there was never a doubt that nations would restrict food shipped by the WFP for humanitarian purposes. The true purpose of the Geneva Ministerial Declaration on Food Insecurity might have been a symbolic one: to create momentum for a fuller and more robust consideration of binding rules on export restrictions at the thirteenth ministerial conference to be held in Abu Dhabi during the first quarter of 2024.

F. The Paralysis of the WTO Appellate Body and Unenforceability of GATT/WTO Obligations

The effectiveness of the GATT/WTO's rules concerning export restrictions on agricultural goods must also be understood in the context of the recent paralysis of the WTO Appellate Body that was instigated by the United States.²⁰³ Beginning with the Obama administration in 2016, the United States has adopted a policy of blocking the reappointment of

¹⁹⁸ *Id.*

¹⁹⁹ Ministerial Decision on World Food Programme Food Purchases Exemption from Export Prohibitions or Restrictions, WT/MIN(22)/29, WT/L/1140, adopted on June 17, 2022 (June 22, 2022).

²⁰⁰ GATT, Art. XI:1.

²⁰¹ Geneva Ministerial Declaration, *supra* note 194, at ¶ 5.

²⁰² Decision on Notification Procedures for Quantitative Restrictions, adopted by the Council for Trade in Goods on June 22, 2012, G/L/59/Rev.1 (July 2, 2012). These procedures apply only to Quantitative Restrictions. An export ban is a quantitative restriction and is thus subject to these procedures, but an export tax is not and so is outside of these notification procedures.

²⁰³ Chow, Schoenbaum, & Dorris, *International Trade Law*, *supra* note 1, at 123.

existing members or the appointment of new members to the Appellate Body of the WTO.²⁰⁴ The Trump administration continued this policy of intransigence with the result that in December 2019, the members of the Appellate Body fell below that needed for a quorum so the Appellate Body cannot convene.²⁰⁵ The Biden administration has not moved to unblock the Appellate Body but has continued most of the Trump era trade policies instead.²⁰⁶

The most significant ramification of the paralysis of the Appellate Body is that all WTO obligations and WTO agreements have become in effect unenforceable. The WTO dispute settlement system is a two-tier system with panels serving as trial courts and the Appellate Body as a high court of international trade.²⁰⁷ A third body, the Dispute Settlement Body (DSB), consisting of the entire WTO membership, must then adopt panel decisions that are not appealed and Appellate Body decisions before the decisions can become legally binding.²⁰⁸ Panel decisions that are not appealed are not affected by the paralysis of the Appellate Body. However, any decisions of panels that are appealed to the Appellate Body are suspended indefinitely and cannot be adopted by the DSB. Article 16.4 of the WTO Dispute Settlement Understanding provides that “a report by the panel shall not be considered for adoption by the DSB until after completion of appeal.”²⁰⁹ Since no appeals to the Appellate Body can now be completed, any appeal of a panel decision launches it into a legal limbo, and it comes a nullity. When China won a panel decision on September 15, 2020 against the United States finding that certain U.S. tariffs were unlawful, the United States promptly appealed the decision nullifying its effect.²¹⁰

Although there are a number of proposals in the WTO to resolve this impasse as of the present none has taken effect that would fully redresses this problem. The blockage of the Appellate Body means that any WTO member that wishes to impose any export ban or taxes can do so indefinitely by appealing any adverse panel decision to the now decommissioned Appellate Body. At the Geneva Ministerial Conference held in June 2022, WTO members recognized the fundamental threat to the WTO posed by the crippling of the WTO dispute settlement system. In the M12 Outcome Document, the Ministerial Conference declared:

We acknowledge the challenges and concerns with respect to the dispute settlement system including those related to the Appellate Body, recognize the importance and urgency of addressing those challenges and concerns, and commit to conduct discussions with the view to having a fully and well-functioning dispute settlement system accessible to all Members by 2024.²¹¹

²⁰⁴ Id.

²⁰⁵ Id.

²⁰⁶ Amid Reform Talks, U.S. Maintains Block on Appellate Body Nominations, Sept. 23, 2022, <https://insidetrade.com/daily-news/amid-reform-talks-us-maintains-block-appellate-body-nominations>.

²⁰⁷ Chow, Schoenbaum, & Dorris, *International Trade Law*, supra note 1. At 108-09.

²⁰⁸ DSU, Art. 2.1.

²⁰⁹ DSU, Art. 16.4.

²¹⁰ United States - Tariff Measures on certain Goods from China - Notification of an appeal by the United States under article 16 of the Understanding on Rules and Procedures governing the Settlement of Disputes, WT/DS543/10 (Oct. 27, 2022).

²¹¹ M12 Outcome Document, WT/MIN(22)2, WT/L?1135, adopted on June 17, 2022 (June 22, 2022).

G. Limits on Export Restrictions in Regional and Bilateral Trade Agreements

The discussion of the relevant GATT/WTO provisions indicate that they create weak and inadequate restraints on the ability of WTO members to impose export restrictions on the trade in agriculture. The recently completed Geneva Ministerial Conference failed to strengthen these inadequate restraints by enacting new binding rules or new guidelines circumscribing the operation of the existing rules. These weak and inadequate restraints coupled with the paralysis of the WTO Appellate Body indicates that, at present, the WTO does not provide any effective limits on the ability of countries to impose export restrictions on foodstuffs. Nothing in the GATT/WTO texts prohibit export taxes on agricultural products and export bans are permitted subject to certain parameters. The current crippling of the WTO dispute settlement system means that members can ignore these parameters with impunity and impose any export restrictions that they wish on agricultural trade. These conditions indicate that the WTO does not create effective limits on the widespread use of export restrictions that is exacerbating the global food crisis.

In this section, we examine limitations on export restrictions that can be found in the numerous regional and bilateral free trade agreements (FTA) among WTO members countries. An FTA creates a free trade area in which all or most tariffs among the member states are reduced to zero.²¹² FTAs are permitted by the WTO by GATT Article XXIV as they further liberalize trade.²¹³ FTAs create “WTO plus” treatment as tariffs in the FTA are lower than comparable GATT tariffs. Under an exception to the Most Favored Nation principle, members of an FTA are not required to extend duty free treatment to all other members of the WTO.²¹⁴ Only members of the FTA enjoy preferential tariffs (and other trade preferences) in intra-area trade.²¹⁵ Non-members of an FTA do not enjoy trade preferences when trading with FTA members.²¹⁶

Recently, regional FTAs have proliferated around the world. In North America, there is the United States-Mexico-Canada Trade Agreement (USMCA);²¹⁷ in Europe, there is the Treaty on the Functioning of the European Union (EU);²¹⁸ in Asia, there are the Comprehensive and

²¹² Chow, Schoenbaum, & Dorris, *International Trade Law*, supra note 1, at 45.

²¹³ *Id.* at 46.

²¹⁴ GATT, Art. XXIV:5.

²¹⁵ Chow, Schoenbaum, & Dorris, *International Trade Law*, supra note 1, at 45.

²¹⁶ *Id.*

²¹⁷ United States-Mexico-Canada Trade Agreement <https://www.cbp.gov/trade/priority-issues/trade-agreements/free-trade-agreements/USMCA#:~:text=The%20U.S.%20E2%80%93%20Mexico%20E2%80%93%20Canada%20Agreement,for%20information%20concerning%20the%20USMCA>. Members are the United States, Mexico, and Canada.

²¹⁸ Treaty on the Functioning of the European Union, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>. The members of the EU are Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden.

Progressive Agreement for Transpacific Partnership (CPTPP),²¹⁹ the result of U.S.-led efforts,²²⁰ and the Regional Comprehensive Economic Partnership (RCEP)²²¹ led by China; in Africa, there is the African Continental Free Trade Area (ACFTA);²²² and in South America, there is the South Common Market (Mercosur).²²³ Together, these FTAs have 109 member countries, which is two thirds of the 164 membership of the GATT/WTO.²²⁴ These FTAs are also constantly adding new members so their membership will continue to close in on the total membership of the GATT/WTO.

The United States and the European Union also have numerous bilateral FTAs with nations around the world.²²⁵ In this discussion below, we examine the most prominent FTAs covering these regions to determine what limits they create on export restrictions on agriculture.

1. FTAs and Export Taxes

FTAs contain provisions eliminating or freezing import and export duties among their members. For example, in the EU, Article 1 of the Treaty on the Functioning of the European Union provides: “Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States.”²²⁶ Article 2.4:1 of United States-Mexico-Canada Trade Agreement (USMCA) provides that “no Party shall increase any existing customs duty, or

²¹⁹ Comprehensive and Progressive Agreement for Transpacific Partnership, <https://www.iilj.org/wp-content/uploads/2018/03/CPTPP-consolidated.pdf>. The members of the CPTPP are Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam.

²²⁰ The United States led efforts to create the Trans-Pacific Partnership and was one of its original members. After Donald J. Trump was elected to the U.S. President, he withdrew the United States from the TPP on January 23, 2017. The remaining seven members then formed the CPTPP (also known as the TPP-11). The CPTPP adopts the basic texts of the TPP.

²²¹ Regional Comprehensive Economic Partnership, <https://rcepsec.org/legal-text/>. The members are Australia, New Zealand, Brunei Darussalam, Cambodia, China, Japan, Laos, Malaysia, Republic of Korea, Singapore, Thailand and Vietnam.

²²² African Continental Free Trade Area, <https://au-afcfta.org/>. The members are Ghana, Kenya, Rwanda, Niger, Chad, Eswatini, Guinea, Côte d’Ivoire, Mali, Namibia, South Africa, Congo, Rep., Djibouti, Mauritania, Uganda, Senegal, Togo, Egypt, Ethiopia, Gambia, Sahrawi Arab Democratic Rep., Sierra Leone, Zimbabwe, Burkina Faso, São Tomé & Príncipe, Equatorial Guinea, Gabon, Mauritius, Central African Rep., Angola, Lesotho, Tunisia, Cameroon, Nigeria, Malawi, Zambia, Algeria, Burundi, Seychelles, Tanzania, Cabo Verde, Democratic Republic of the Congo, Morocco and Guinea-Bissau.

²²³ Mercosur, <https://www.mercosur.int/en/>. Members are Argentina, Brazil, Paraguay, and Uruguay. Associate members are Bolivia, Chile, Colombia, Ecuador, Guyana, Peru, and Suriname. Associate members receive preferential tariffs when trading with full members but have no voting rights.

²²⁴ Members and Observers, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (164 current members of the WTO).

²²⁵ The United States has free trade agreements with Australia, Bahrain, Canada, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Israel, Jordan, Korea, Mexico, Morocco, Nicaragua, Oman, Panama, Peru, Singapore, USMCA. See Free Trade Agreements, Office of the United States Trade Representative, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm. The EU has free trade agreements with Canada, Japan, Mexico, Singapore, Vietnam, Free Trade Agreements, <https://enterprise.gov.ie/en/what-we-do/trade-investment/free-trade-agreements/>.

²²⁶ TFEU, Art. 30

adopt any new customs duty, on an originating good.”²²⁷ Similar provisions eliminating all customs duties are found in ACFTA, CPTT, RCEP, and Mercosur.²²⁸ A new export duty imposed on agricultural trade in response to the global food crisis is in violation of these provisions.

U.S. and EU bilateral trade agreements also have provisions limiting export taxes on agriculture. For example, in the US-Chile FTA, Article 3.13 provides: Article 3.13: “Neither Party may adopt or maintain any duty, tax, or other charge on the export of any good to the territory of the other Party, unless such duty, tax, or charge is adopted or maintained on any such good when destined for domestic consumption.”²²⁹ In the EU-Chile FTA, Article 2.7 provides: No Party shall introduce or maintain any duty, tax or other charge of any kind imposed on, or in connection with, the exportation of a good to the other Party . . . that is in excess of the tax or charge that would be imposed on like goods when destined for domestic consumption.”²³⁰ Under these provisions, Chile cannot impose an export tax on an agricultural export unless the same tax is imposed on the agriculture product used for domestic consumption. As such a tax on domestic consumption will defeat the purpose of the export tax, these rules should provide an effective deterrent against the use of export taxes. With only two exceptions, all the United States’ and EU trade agreements with other partners have similar provisions.²³¹

A perusal of the remaining free trade agreements indicates that while export taxes are prohibited on intra-area trade, these other FTAs have not entered into trade agreements with other partners. This indicates that trade between these FTA members and non-members may not be subject to any restrictions on export taxes on agricultural goods.

2. FTAs and Export Bans

²²⁷ USCMA, Art. 2.4:1.

²²⁸ AFCTA, Protocol on Goods, Art. 7; CPTPP, Art. 2.4; RCEP, Art. 2.4; Mercosur, Art. 1.

²²⁹ US-Chile FTA, Art. 3.13

²³⁰ EU-Chile FTA

²³¹ For U.S. FTAs: Australia FTA, Section C, Article 2.11 (Export Taxes); Bahrain FTA, Article 2.10 (Export Taxes); CAFTA-DR (Dominican Republic-Central America (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua), Article 3.11 (Export Taxes); Chile FTA, Article 3.13 (Export Taxes); Columbia Trade Promotion Agreement, Article 2.11 (Export Taxes); Korea FTA (KORUS), Article 2.11 (Export Duties, Taxes, or Other Charges); Morocco FTA, Article 2.10 (Export Taxes); Oman FTA, Article 2.10 (Export Taxes); Panama Trade Promotion Agreement, Article 3.11 (Export Taxes); Peru Trade Promotion Agreement, Article 2.11 (Export Taxes); Singapore FTA, Article 2.4 (Export Tax); USMCA, Article 2.15 (Export Duties, Taxes, or Other Charges). The U.S. trade agreements with Israel and Jordan do not have provisions on export taxes.

For EU FTAs: Canada FTA, Article 2.9 (Fees and Other Charges); Chile FTA, Article 2.7 (Export Duties, Taxes, or Other Charges); Japan Economic Partnership, Article 2.12 (Export Duties); Singapore FTA, Article 2.7 (Elimination of Customs Duties and Taxes on Exports); United Kingdom FTA, Article 22 (Export Duties, Taxes or Other Charges); Vietnam FTA, Article 2.11 (Export Duties, Taxes or Other Charges).

Article 35 of the TFEU provides that “[q]uantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States.”²³² Further, Article 1 of EU Regulation 2015/479 provides: “The exportation of products from the Union to third countries shall be free, that is to say, they shall not be subject to any quantitative restriction, with the exception of those restrictions which are applied in conformity with this Regulation.”²³³ Under EU law, no EU member is allowed to impose export bans on agricultural products to EU countries or to non-EU countries. Thus, no EU country can impose an export ban on agricultural products whether they destined for an EU country or to a non-member of the EU.

Article 5 of EU Regulation 2015/479 provides for an exception “[i]n order to prevent a critical situation from arising on account of a shortage of essential products” but the EU Commission, its executive body, acting at the request of a member, must first authorize the export ban only if the member meets the conditions laid down in Article 5 and other provisions.²³⁴ Article 36 of the TFEU also recognizes an exception for various non-economic objectives such as health protection and security.²³⁵ However, Article 36 further provides that export bans must “constitute a means of arbitrary discrimination or a disguised restriction on trade between member states.”²³⁶ An addition limitation is that in response to Slovakia’s proposed restrictions on exports of cereals and grains, the EU Commission warned that export restriction on agriculture must be “necessary and proportionate.”²³⁷ In March 2020, a Romanian export ban of wheat and corn was rejected by the EU Commission, which held that that the measures do not appear to be proportionate as there was no evidence that Romanian was facing an imminent shortage of agricultural products intended for human consumption.²³⁸

With the exception of Mercosur, each of the other FTAs deals with export bans by incorporating GATT Article XI, the “no quotas” rule.²³⁹ Thus, the exception for export bans on agricultural goods, Article XI:2(a) is also part of these FTAs. In addition, the United States and the EU also include GATT Article XI in their trade agreements with other trading partners. This indicates that the Article XI exception for export trade bans on agriculture is in widespread use current free trade agreements.

Parties to these other FTA agreements, however, might be able to use the treaty’s dispute resolution mechanism to limit the use of export bans. For example, suppose that Chile is considering an export ban on soybeans to keep prices from rising in its domestic market. Under the U.S.-Chile FTA, the United States could argue that the ban can be justified only if it meets

²³² TFEU, Art. 35.

²³³ EU Reg. 2015/479, Art 1

²³⁴ EU Reg. 2015/479, Art. 5

²³⁵ TFEU, Art. 36

²³⁶ TFEU, Art. 36.

²³⁷ Commission Slams Slovakia’s Restrictions of Grain, Cereal Exports, <https://www.euractiv.com/section/agriculture-food/news/commission-slams-slovakias-proposed-restriction-of-grain-cereal-exports/>.

²³⁸ David Kleiman, Food Security, The Role and Limits of International Rules on Export Restrictions, <https://www.bruegel.org/blog-post/food-security-role-and-limits-international-rules-export-restrictions>

²³⁹ AFCTA, Protocol on Goods, Art. 9; CPTPP, art. 2.10; RCEP, Art. 2.17. Mercosur is silent on the issue of export bans. As each of the Mercosur countries are also members of the WTO, it is reasonable to conclude that they will apply the approach of the “no quotas” rule of GATT Article XI.

the requirement of GATT Article XI:2(a) that the ban is “temporary” and is applied to relieve “critical shortages” of foodstuffs.²⁴⁰ Currently, many countries are not using export bans because of food shortages but to keep prices from rising in the domestic market.²⁴¹ A country’s motivation to keep prices low is not a justification under this language; only a “critical shortage” satisfies the rule. Moreover, any ban must be “temporary” – it cannot be indefinite – and must be removed once a critical shortage has been alleviated. As these elements are set forth as conditions for an export ban, the United States could argue that Chile has the burden of establishing these elements in any dispute. The United States and Chile are also members of the WTO, but such an argument within the WTO is not only subject to the GATT/WTO’s traditional deference for food protectionism but also faces the problem that Chile can appeal any adverse ruling by a panel that will nullify its effects.

FTAs such as the USMCA, the EU, the U.S.-Chile FTA, and the EU-Chile FTA have their own dispute resolution mechanism that are independent of the GATT/WTO.²⁴² Under Article 22.15 of the U.S.-Chile FTA, a complaining party is allowed to impose trade sanctions on an offending party if the latter does not comply with a panel decision requiring the removal of a trade barrier such as an export ban.²⁴³ Similar provisions are found in the USMCA, the EU, and in all U.S. and EU trade agreements with other trading partners.²⁴⁴ The availability of such sanctions should provide a high degree of enforceability of the applicable trade provisions.

This review of FTAs indicates that the EU and the United States are in the strongest position to enforce prohibitions on export taxes and export bans against any country that is a part of a free trade agreement associated with either entity. For other FTAs, restrictions on export taxes on intra-area trade violate rules prohibiting all new intra-area tariffs. should be open to challenge. Other than the EU, the other five FTAs have incorporated GATT Article XI:2(a), the exception to the no quotas rule for temporary export bans on agriculture. Bans for the purpose of keep domestic prices low should be open to challenge under the dispute settlement systems of these other FTAs.

²⁴⁰ GATT, Article XI:2(a).

²⁴¹ See note 12 and accompanying text *supra*.

²⁴² See USMCA, Chapter 31 (Dispute Settlement); EU Section 5 (Court of Justice).

²⁴³ U.S.-Chile FTA, Art. 22.15.

²⁴⁴ For U.S. FTAs: Australia FTA, Chapter 21 (Institutional Arrangements and Dispute Settlement); Bahrain FTA, Chapter 19 (Dispute Settlement); CAFTA-DR (Dominican Republic-Central America (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua), Chapter 20 (Dispute Settlement); Chile FTA, Chapter 20 (Dispute Settlement); Columbia Trade Promotion Agreement, Chapter 21 (Dispute Settlement); Israel FTA, Article 19 (Dispute Settlements); Jordan FTA, Article 17 (Dispute Settlement); Korea FTA (KORUS), Chapter 22 (Institutional Provisions and Dispute Settlement); Morocco FTA, Chapter 20 (Dispute Settlement); Oman FTA, Chapter 20 (Dispute Settlement); Panama FTA, Chapter 20 (Dispute Settlement); Panama Trade Promotion Agreement, Chapter 20 (Dispute Settlement); Peru Trade Promotion Agreement, Chapter 21 (Dispute Settlement); Singapore FTA, Article 10.18 (Dispute Settlement); USMCA, Chapter 31 (Dispute Settlement).

For EU FTAs: Canada FTA, Chapter 29 (Dispute Settlement); Chile FTA, Chapter 31 (Dispute Settlement); Japan Economic Partnership, Chapter 21 (Dispute Settlement); Singapore FTA, Chapter 14 (Dispute Settlement); United Kingdom FTA, Part Six (Dispute Settlement); Vietnam FTA, Chapter 15 (Dispute Settlement).

Finally, in light of this discussion, let us review the events that have triggered a new apex in the food crisis: the export restrictions imposed by Russia and Ukraine discussed at the beginning of this Article. It should be evident that the current GATT/WTO offers no meaningful limitations on the use of export restrictions by Russia and Ukraine. Suppose, however, that Ukraine realizes its goal of becoming member of the EU. Then Ukraine's use of export bans and export taxes would run afoul of TFEU Article 1 (export bans) and Article 35 (export taxes).²⁴⁵ Exceptions to these restrictions exist but these are subject to review by the EU Commission and the caveats that exceptions must be "necessary and proportionate" and not "a disguised restriction in trade."²⁴⁶ Of course, many political obstacles, such as Russia's opposition, stand in the way of the Ukraine's entry into the EU. Suppose, instead, that the United States, the EU or both enter into an FTA with Ukraine to bolster Ukraine's war-torn economy. An FTA with the United States, the EU, or both would contain provisions that prohibit or limit the use of export restrictions as a form of domestic price control. These provisions would allow products from the Ukraine to reach important international markets and help to keep world prices from spiking. The FTAs would also contain a dispute resolution mechanism that would allow the United States and EU to enforce these restrictions. In the case of Russia, an FTA with the United States or the EU is impossible under current conditions but an FTA with Asia such as the CPTPP or more likely RCEP, the FTA led by China, might be achievable. These FTAs also contain stronger restrictions than the WTO. To be sure, it is quite possible that no set of legal rules will be effective in controlling Russia's conduct, but that prospect raises issues of the abuse of power and aggression by an autocrat that are beyond the scope of this Article.

IV. CONCLUSIONS

Although the world confronts a global food crisis of unprecedented scope and magnitude, nations are exacerbating the crisis by imposing export bans and taxes to keep domestic prices stable. These export restrictions only lead to increases in the world prices of agricultural products as the supply in the world market is kept artificially low. Nations acting in self-interest are harming the interests of all other nations, most especially the poorest countries in the world. The global food crisis is being intensified by a growing global food protectionism with nations recently enacting 74 export restrictions just since the beginning of 2022.

Due to the GATT/WTO's historical lack of emphasis on export controls and its deference to food protectionism, the GATT/WTO rules applicable to export taxes restrictions on agricultural trade are weak and inadequate. Added to these weaknesses is the current inability of the WTO dispute settlement system to fully function, making it impossible to fully enforce WTO obligations. The WTO emerges as an organization that is weak, in disarray, and incapable of responding to a catastrophic food emergency.

An optimistic scenario is that the GATT/WTO can remedy these issues in the Thirteenth Ministerial Conference to be held soon in the first quarter of 2024. GATT/WTO trade ministers have declared that they intend to restore the dispute settlement system to a fully functioning body by 2024. The issue of export restrictions on agriculture, considered in the Twelfth Ministerial

²⁴⁵ TFEU, Arts. 1 & 35.

²⁴⁶ See Part III.G.2 supra.

Conference in Geneva, should once be an urgent topic in the Abu Dhabi, the site of the next Ministerial Conference. The Ministerial Conference could resuscitate the Appellate Body and adopt binding rules prohibiting or severely limiting export restrictions. Achievement of these goals would be an optimal solution to the current global food crisis and can help avert other crises in the future. However, given the current impasse on key issues, political opposition to many of these goals, and the GATT/WTO's recent track record of deadlock, such optimistic results might be impossible to achieve.

A more promising prospect is for the EU and the United States to spearhead the use of FTAs to discipline food protectionism. These FTAs provide powerful weapons that can be used to effectively quash some of the many export restrictions that are proliferating around the world. The EU has the most powerful tools to quash export restrictions, followed by the United States. The EU and the United States should take leadership positions in enforcing restrictions, where possible, and to encourage other FTAs to follow suit on how to use FTAs to quash export restrictions. Together the 109 members of these FTAs represent two thirds of the entire 164 country WTO membership and more than half of all of the 195 recognized nations in the world.

The systemic weaknesses of the GATT/WTO coupled with the recent proliferation of FTAs around the world indicates that the future of multilateral trade, at least in the area of enforcement of treaty obligations, may lie outside of the GATT/WTO. The GATT/WTO is beset with many political disagreements that have now resulted in the crippling of its dispute settlement mechanism, one of its most prominent contributions to the multilateral system. These disagreements also may be the cause of the inability of the Geneva Ministerial Conference to agree on binding legal rules on export restrictions. Until the GATT/WTO can find the political will to overcome its many weaknesses in the area of agricultural trade, it is up to countries such as the EU and the United States to lead FTAs around the world in eliminating or curtailing export restrictions on agriculture.