

**THE RIGHT TO FOOD AND THE HURDLES IN IT'S
ENFORCEMENT UNDER THE WTO: A STUDY IN
RELATION TO IMPLICATIONS ON INDIA**

**THESIS SUBMITTED TO
THE NATIONAL UNIVERSITY OF ADVANCED LEGAL STUDIES
FOR THE AWARD OF DEGREE OF**

DOCTOR OF PHILOSOPHY

**BY
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**UNDER THE SUPERVISION OF
PROF. DR. T R SUBRAMANYA**

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MAY 2016

DECLARATION

I hereby declare that this thesis entitled “**The Right to Food and the Hurdles in It’s Enforcement Under the WTO: A Study in Relation to Implications on India**”, to the National University of Advanced Legal Studies(NUALS), for the award of Degree of Doctor of Philosophy (Ph.D.) in Law is the outcome of the research carried out by me under the Supervision and Guidance of Prof. (Dr.) T.R. Subramanya, Former Vice-Chancellor, Karnataka State Law University, Hubballi, currently Research Fellow, Centre for Regulatory Studies, Law, Policy and Governance, The WB National University of Juridical Sciences, Kolkata is an original research work done by me.

The information, views and opinions taken from the existing literature and cited in the thesis have been indicated and duly acknowledged at appropriate places. I further declare that this thesis, either wholly or in part, has not been submitted to NUALS or any other University or Institution for the award of any other Degree, Diploma or Associateship or any other title or recognition from any University/ Institution.

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CERTIFICATE

I hereby certify that this thesis entitled “**THE RIGHT TO FOOD AND THE HURDLES IN IT'S ENFORCEMENT UNDER THE WTO: A STUDY IN RELATION TO IMPLICATIONS ON INDIA**” submitted by Smt. ANITHA FLAVIA NANCY D'SOUZA for the award of the Degree of Doctor of Philosophy (Ph. D.) in Law was carried out under my guidance and supervision.

Further, I certify that this is her bonafide record of research done in conformity with the regulations governing Doctoral Degree of NUALS, Kochi. It is up to the standard expected of doctoral research and I recommend that it be sent for evaluation.



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I further certify that the suggestions and modifications suggested by the Research Committee in Pre-Submission Seminar held on 23rd April 2016 have been incorporated in the thesis.



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LIST OF ABBREVIATIONS

1. AAY Antyodaya Anna Yojana
2. AB Appellate Body
3. AIR All India Reporter
4. AoA Agreement on Agriculture
5. APL Above Poverty Line
6. BMI Body Mass Index
7. BPL Below Poverty Line
8. CACP Commission for Agricultural Costs and Prices
9. CAD Current Account Deficit
10. CAG Comptroller and Auditor General
11. CAP Common Agricultural Policy
12. CBD Convention on Bio-Diversity
13. CFC Central Food Commission
14. CIP Central Issue Price
15. CPR Civil and Political Rights
16. CRC Convention on Rights of Child
17. CUTS Consumer Unity and Trust Society
18. CWC Central ware Housing Corporation
19. DGRO District Grievance Redressal Officer
20. DSB Dispute Settlement Body

21.ESCR	Economic, Social and Cultural Rights
22.EU	European Union
23.FAO	Food and Agricultural Organization
24.FCI	Food Corporation of India
25.FPS	Fair Price shop

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26.FTA	Free Trade Agreements
27.GA	General Assembly
28. GATTS	General Agreement on Trade and Tariff
29.GDP	Gross Domestic Product
30. GHI	Global Hunger Index
31. HDI	Human Development Index
32. HRLN	Human Rights Law Networking
33. ICCPR	International Covenant on Civil and Political Rights
34. ICDS	Integrated Child Development Scheme
35. ICT	Information and Communication Technology
36. IMF	International Monetary Fund
37. ITO	International Trade Organization
38. LDC's	Least Developed Countries
39. MDG's	Millennium Development Goals
40. MDMS	Mid Day Meal Scheme

41. MDPI	Multi-Dimensional Poverty Index
42. MEA	Ministry of External Affairs
43. MFN	Most Favoured Nation
44. MMS	Mid-day Meals Scheme
45. MoCI	Ministry of Commerce and Trade
46. MOF	Ministry of Finance
47. MSP	Minimum Support Price
48. NCC	National Calamities Committee
49. NCRWC	National Commission to Review the Working of the
50. NFHS	National Family Health Survey

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51. NFSA	National Food security Act
52. NMBS	National Maternity Benefit Scheme
53. NOAPS	National Old Age Pension Scheme
54. NT	National Treatment
55. OECD	Organization for Economic Co-operation and
56. OMSS	Open Market sale Scheme
57. PC	Planning Commission
58. PIL	Public Interest Litigation
59. PUCL	People's Union for Civil Liberties

60. SDG's	Sustainable Development Goals
61. SFC	State Food Commission
62. SGYR	Sampoorna Grama Rozgar Yojana
63. SSM	Special Safeguard Mechanism
64. STE's	State Trading Enterprises
65. TFA	Trade Facilitation Agreement
66. TNC's	Transnational Corporations
67. TPDS	Targeted Public Distribution Scheme
68. TRIPS	Trade Related Aspects of Intellectual Property
69. UDHR	Universal Declaration of Human rights
70. UIDAI	Unique Identification Authority of India
71. UN	United Nations
72. UNDP	United Nations Development Programme
73. UNICEF	United Nations Children's Emergency Fund
74. UNICITRAL	United Nations Commission on Trade Law
75. W.P	Writ Petition
76. WFS	World Food Summit
77. WTO	World Trade Organization Development

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2. *Apparel Export Promotion Council v. A.K. Chopra* A.I.R. 1999 S.C. 625
3. *Chameli Singh v State of UP*, 1996 (2) SCC 549
4. *Francis Coralie Mullin v Union Territory of Delhi*, 1981 AIR SC 746
5. *KeshavanandaBharati-v-State of Kerala*, AIR 1973 SC1461
6. *I. R. Coelho V. State of Tamil Nadu*, AIR 2007, SC 861
7. *KishenPattnayak v. State of Orissa*, AIR 1989 SC 677
8. *Minerva Mills Ltd. and Ors. v. Union Of India and Ors.* AIR 1980 SC 1789
9. *Olga Tellisvs Bombay Municipal Corporation*, 1986 AIR 180, 1985 SCR Supl. (2) 5
10. *Peoples Union for Civil Liberties v Union of India and Others*. W.P No.196 of 2001. (Ongoing litigation)

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Publication of Articles on the Research topic

1. “ An overview of Constitutional Perspective of Right to Food”
*International Research Journal of Commerce, Business and
social sciences (IRJCBSS)* Vol. IV, Issue 6, October 2015

Presentation of papers on the Research topic

- i) Legal protection of the Right o Food in India: A study on the Right to Food Act, 2013, in the State Level Seminar organized by Karnataka Institute of Law and Parliamentary Reform(KILPAR) and Vidyavardhaka College of Law, Mysore, on 29th March 2014.

- ii) “Towards global commitment against hunger: An overview of international instruments protecting women’s right to food”, in the “International Seminar on Indo-UK Perspectives on Public and Transactional Laws” organised by P G Department of Studies and Research in Law, University Law College, Bangalore in Collaboration with British Council on 12th November 2014.

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CHAPTER – 1

INTRODUCTION

1.1 The Problem and its Setting

The twin challenges of Poverty and Hunger have plagued human kind since time immemorial and are intrinsic deprivations which severely diminish the quality of life of a human being. Given the most demeaning of human deprivations, there is a close interaction between hunger and poverty. Hunger is a blemish, a humiliation and defacement upon humanity, a pronounced deprivation and manifestation of poverty. Hunger is not only painful; it cuts at the very dignity of the human being. Chronic hunger is devastating as it claims more victims across the world and chronically hungry people are exceptionally vulnerable as they have fewer resources to protect themselves. The hungry are typically poor and disempowered lacking the purchasing power to procure food even during times of overall supplies.

While the world has made progress in reducing hunger in recent decades, the state of hunger is still serious or alarming. In the globalized world of the 21st century, with more than enough food produced to feed all of its 7 billion inhabitants, there are still over 800 million poor suffering from chronic under nourishment and millions of death due to hunger go unnoticed. The Food and Agriculture Organisations statistics confirm that the world produces enough

Food to feed estimated 9-10 million population in 2050. Yet it is scandalous that millions of people still strive to death due to hunger.

Eradicating hunger and poverty is not only a question of finding resources, it is also a question of challenging structural injustices and inequities of power that allow human rights abuses to take place. It is also a question of challenging economic inequalities and adopting a principled and fair approach to global economic trade Commitment to food as a right which entails obligations on Governments to ensure freedom from hunger for all people at all times.¹

Combating hunger is more than a moral duty, a legally binding human rights obligation.

1.1.1 Development of the right to food

The concept of food as a human right emerged along with the rest of contemporary international law in the aftermath of World War II. The incorporation of the right to food in international documents was a lesson learned by the world leaders during the war and was part of the leader's efforts to avoid yet another global catastrophe. World War II and the Holocaust marked a turning point in the development of human rights, preparing the way for the first incorporation into international law in the Charter of the United

¹ United Nations General Assembly, The right to food Note by the Secretary-General, A/56/210

Nations in 1945. The Four Freedoms Address of United States President Franklin D. Roosevelt² was an important precursor to the incorporation of human rights into the UN system. Economic and social rights were integral to Roosevelt's conception of human rights, under the heading of "Freedom from Want." Roosevelt's Four Freedoms, Freedom of Speech, Freedom of Worship, Freedom from want and Freedom from fear, expressed the political will to fully include economic and social rights within the emerging international human rights system from the very beginning. Later, as a result of political pressures, economic and social rights came to be thought of as "second generation rights" in the emerging international human rights system, following behind civil and political rights.³ As the first step in executing its human rights program, the United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR) in 1948, reflecting international consensus on equality of treatment and the indivisibility of human rights. The UDHR was the first international instrument that recognized the human right to food formally, as part of the right to a decent standard of living (Art. 25) and was reaffirmed in Article 11 of the ICESCR, the treaty opened for signature in

² The "State of the Union" message, delivered on 26 January 1941, Roosevelt F.D. "War—And Aid to Democracies," in Rosenman S. I., The Public Papers and Addresses of Franklin Roosevelt, New York, MacMillan Company, 1941, p.672.

³ Paul HUNT, Reclaiming Social Rights (1996).

1966 and came into force in 1976, at the height of the Cold War. The monitoring committee for the ICESCR has since written General Comment No. 12(GC 12) on the Right to Food (in 1999) -- largely in response to a request for guidance on interpretation and implementation, put forward by states involved in the 1996 UN World Food Summit.⁴

Article 25(1) of the UDHR states:

*“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food.....”*⁵

The most important binding guaranty of the right to food became and remained the Art. 11 ICESCR which reads as follows:

*“The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food”*⁶

The most authoritative definition of the right to food as set out in Article 11 of the ICESCR is to be found in GC12, the most important international body that is entrusted with monitoring the implementation of the ICESCR. :

“the right to every man and woman and child alone and in community with others to have physical and economic access at all times to

⁴ CESCR 1999, para. 2

⁵ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 25, U.N. Doc.A/Res/217(III) (Dec. 10, 1948).

⁶ International Covenant on Economic, Social and Cultural Rights art. 11, para. 1, Dec. 16, 1966, S. TREATY DOC. NO. 95-19, 993 U.N.T.S. 3.

adequate food or means for its procurement in ways consistent with human dignity.”⁷

Thus, the right to food encompasses two separate norms contained in Article 11 of the ICESCR: the right to adequate food and the fundamental right of everyone to be free from hunger. The ICESCR has entrusted States with the primary responsibility of ensuring the right to food. As with all human rights, States have an obligation to respect, protect and fulfil the right to food.⁸

In this context, it is important to emphasize certain elements of the right to food. Food must be *available*, *accessible* and *adequate*. *Availability* requires on the one hand that food should be available from natural resources either through the production of food, by cultivating land or animal husbandry, or through other ways of obtaining food, such as fishing, hunting or gathering. On the other hand, it means that food should be available for sale in markets and shops. Access to food is essential to human survival. *Accessibility* requires *economic* and *physical access* to food to be guaranteed. Economic accessibility means that food must be affordable. Individuals should be able to afford food for an adequate diet without compromising on any other basic needs, such as school fees, medicines or rent. *Adequacy* means that the food must satisfy

⁷ <http://www.fao.org.right.to.food>.

⁸ Committee on Economic, Social and Cultural Rights, 'General Comment 12: The right to adequate food (Art. 11)', UN doc. E/C.12/1999/5 (12 May 1999) para 17.

dietary needs, taking into account the individual's age, living conditions, health, occupation, sex, etc. For example, if children's food does not contain the nutrients necessary for their physical and mental development, it is not adequate. Food that is energy-dense and low-nutrient, which can contribute to obesity and other illnesses, could be another example of inadequate food. Food should also be *safe* for human consumption and free from adverse substances, such as contaminants from industrial or agricultural processes, including residues from pesticides, hormones or veterinary drugs. Food should also be *culturally acceptable*. For example, aid containing food that is religious or cultural taboo for the recipients or inconsistent with their eating habits would not be culturally acceptable.

1.1.2 Trade liberalization with the advent of WTO

Recent decades have seen rapid growth of the world economy. This growth has been driven in part by the even faster rise in international trade. Integration into the world economy has proven a powerful means for countries to promote economic growth, development, and poverty reduction. Trade has been an engine of growth for much longer. Since the creation of General Agreement on Trade and Tariffs (GATT) in 1947, the world trading system has benefited from eight rounds of multilateral trade liberalization, as well as from unilateral

and regional liberalization. Indeed, the last of these eight rounds, the so-called "Uruguay Round" led to the establishment of the World Trade Organization (WTO) in 1995, to help administer the growing body of multilateral trade agreements. The coming into force of WTO brought about significant changes in international economic relations between countries as the WTO deals with the rules of trade at a global level between nations. The WTO was established to deal with regulation of trade between participating countries by providing a framework for negotiating and formalising trade agreements and a dispute resolution process aimed at enforcing participant's adherence to WTO agreements.

The resulting integration of the world economy under the WTO regime, has raised living standards around the world. Most developing countries have shared in this prosperity; in some, incomes have risen dramatically. As a group, developing countries have become much more important in world trade—they now account for one-third of world trade, up from about a quarter in the early 1970s. Moreover, trade between developing countries has grown rapidly, with 40 percent of their exports now going to other developing countries.

However, the overall progress has been less rapid. The poorest countries have seen their share of world trade decline substantially, and without lowering their

own barriers to trade, they risk further marginalization. The developing and transition economies, including virtually all of the Least Developed Countries (LDCs), fit this description. In contrast to the successful integrators, they depend disproportionately on production and exports of traditional commodities. No country in recent decades has achieved economic success, in terms of substantial increases in living standards for its people, without being open to the rest of the world. Opening up their economies to the global economy has been essential in enabling many developing countries to develop competitive advantages in the manufacture of certain products.

1.1.3 International Trade Rules on agriculture and the Right to Food.

Agriculture has been treated as an exception to the multilateral trade rules negotiated since world war, as a “special case”. In the subsequent GATT rounds of multilateral negotiations, significant progress was made in liberalizing the border protection and Non-Tariff measures within borders on industrial products traded among developed economies, but little impact was made on the rising trend of support and protection afforded to their farmers. Nor was much done to liberalize trade in agricultural and industrial products of export interest to developing economies. Agricultural policies in developed countries are based on price-support measures and subsidies of various kinds

sustained by heavily restricting imports from lower-cost producers in other developed and developing countries. Over the decades, these policies have resulted in massive distortions of production, consumption, and trade in the agricultural sector. The detrimental effects have been significant. Subsidies to farm production and exports in industrial countries have depressed commodity prices in “world” markets, closing off trade opportunities and imposing other costs on countries at the periphery of the world economy, many of them very poor.

It was not until the Uruguay Round negotiations of 1986–1994 that governments started to address these distortions by bringing the agricultural sector of the world economy into the multilateral trade-liberalizing process.⁹ The WTO’s Uruguay Round Agreement on Agriculture (AoA) presented as a significant first step towards structural change in global food markets, strengthened food security through free trade. The AoA foresaw a substantial liberalisation of agricultural markets through the adoption of stricter rules in the use of subsidies, import restrictions and other agriculture policy measures within exceptions made for LDC’s under Special preferential treatment. While liberalization of agricultural trade is considered to bring important benefits, it

⁹ David Orden, Rashid S. Kaukab, and Eugenio Diaz-Bonilla, *Liberalizing Agricultural Trade and Developing Countries*, Global Policy Program November 2002. p.1

is stated that the AoA imposes one sided free trade model on poor countries, while rich countries continue to heavily subsidize their agricultural sector. These policies undermine the right to food with agriculture comprising 65 percent of employment and 29 percent of GDP in agri-based economies.¹⁰ WTO in spite of being the sole body regulating trade at the global level and having in itself principles such as non-discrimination, transparency and equal national treatment has miserably failed to see beyond the commercial interests and thus be equal to all the countries of the world. The richer countries have always been the ones playing the dominant role in the global markets and in turn adversely effecting and regulating the trade policies of the relatively poor countries. Implementation of agricultural trade liberalization measures so far, as well the negotiations under AoA have produced a situation that is unbalanced and essentially unfair to developing countries. Many developing countries, especially LDC's have liberalized well beyond WTO commitments while industrialized countries still heavily protect their agriculture through subsidies and tariff structures. Small farmers are particularly vulnerable when they are in competition with cheaper subsidized agricultural production from developed countries. When 60 to 80 percent of the population is dependent on

¹⁰ World Bank, Global World Development Report 2008-Agriculture for Development 3(2007).

agriculture, which is still the case in many developing countries, there can be a dramatic impact of AoA on the right to food of the majority of the population in these countries.

Given the present inadequacy in WTO rules regarding agriculture, further and fairer agricultural liberalization is unsurprisingly one of the main demands of developing countries.¹¹ However, many developing countries do not have a comparative advantage in agriculture. Agricultural liberalization could be counterproductive or even disastrous for some of the poor in developing countries, and could have detrimental effects on enjoyment of the right to food.¹²

The Preamble of the Marrakech Agreement establishing the WTO recognizes that, far from being an end in itself, the encouragement of trade by the establishment of a rules-based system of international trade and by the gradual lowering of barriers to trade should serve the ends of human development. If trade is to contribute to the realization of the right to adequate food, the regime of international trade needs to recognize the specificity of agricultural products,

¹¹ Report of the Special Rapporteur on the Right to Food, para 5; WTO, *Trade liberalization and the right to food*, Ha-Joon Chang, *Bad Samaritans: the Myth of Free Trade and the Secret History of Capitalism* (Bloomsbury Press, New York, 2008) 79.

¹² Special Rapporteur on the Right to Food, citing the FAO; IAAKSTD, 455.

rather than to treat them as any other commodities; it should also allow more flexibilities to developing countries, particularly in order to shield their agricultural producers from the competition from industrialized countries' farmers. For countries that have a competitive agricultural sector, the expansion of international trade in agricultural commodities can have a growth-enhancing effect and improve their trade balance. These benefits should be balanced against other potential impacts on the right to food.

1.1.4 Right to Food in India

India is a food surplus nation that prides itself in having been self-sufficient in food production for decades and having leaped forward economically. Despite the buoyant economic growth in recent years, India is saddled with the highest levels of hunger and malnutrition and ranks 55th in Global Hunger Index(2015). Starvation is a brutal but little-discussed reality in India. Though the position of India is marginally improving, it is still categorized under 'alarming levels' list of nations across globe and fighting hunger remains a great challenge. This makes for an even more shocking reading when one realizes that food grains often pile up and rot in the Food Corporation of India's (FCI) warehouses. Food production has risen continuously and intensive production has led to increased

harvests. However, different parts of the population are particularly exposed to right to food violations.

Even though, India's right to food has legal precedent in international human rights law and international legal frameworks, most of the work to enforce and fulfil the right to food has not been presented in international human rights language. Rather, the right to food has been framed primarily as a national fundamental right, founded on unique principles of Indian constitutional law.¹³

Indian Constitution does not expressly recognize the fundamental right to food. However, comparable human right provisions are found in the articles of the fundamental rights as well as the Directive Principles of State Policy. Art. 21 of the Indian Constitution provides the fundamental right to the protection of life and personal liberty. This article mandates the state to ensure the right to life of citizens. This includes the right to live with dignity with at least two decent meals a day. Article 47 of Directive Principle of State Policy specifies that 'the duty of the state to raise the level of nutrition and the standard of

¹³ Francis Coralie Mullin v. Adm'r, (1981) 2 S.C.R. 516, 518 (India); *People's Union for Civil Liberties v. Union of India*, Writ Petition (Civil) No. 196 of 2001 (India).

living and to improve public health'. The orders of the Apex Court of India interpret the right to food as part of the right to life, which is a fundamental right as per the Indian Constitution. India has a wide variety of feeding programs, food subsidies and other "schemes" to alleviate hunger. The major paradigm shift observed in recent years is the substitution of political patronage with legal rights, the brightest jewel in the crown of Indian democracy, the conferment of the right to food through the National Food Security Act, 2013, a steep taken to convert Gandhiji's dream of a hunger-free India into reality. It is important to realise the significance of the Act in the light of the conditions that prevailed in India during the first 20 years after Independence. During the 1960s, India was the largest importer of food aid, mainly from the United States and in fact, during 1966, over 10 million tonnes of wheat was imported, leading to India being labelled as a nation surviving on a ship-to-mouth basis. Today, India is set to commit over 60 million tonnes of home-grown wheat, rice and nutri-milletts to fulfil the legal entitlements under the Food Security Act. Through this largest social protection law, steps are taken to eradicate hunger in human history.

However, a major hindrance in fighting starvation in India is the lack of proper implementation of government schemes which are directed towards providing food for all. Inefficient planning leaves grain rotting in government warehouses

rather than getting to the hungry. Botched government surveys leave poor families without the ration cards to which they are supposed to be entitled.

Corrupt ration shop dealers pilfer food and sell it on the black market rather than to intended beneficiaries. Either there is corruption on the local levels or there is a disinterest among the government officials to ensure that the schemes are properly being carried out. Clear mechanisms with respect to the identification of beneficiaries have not been defined. The indicators of the poor are not specific and are vague in description. All the committees which have been designed to look into the measures of poverty have set different numbers for the below the poverty line population. As far as the Public Distribution system is concerned, it is a well-known reality that most of the food delivered is lost to leakages and is sold in the open market for a higher price.

Despite the progress achieved, enormous challenges still remain to building sustainable and equitable food systems and to ensuring the right to food for millions of hungry in India. The need of the hour is to implement existing as well as future schemes of the Government with a mission to eradicate the hunger of the people and to make the phenomenon of starvation deaths a thing of the past.

The right to food was the first of the ESC rights to be studied by the UN human rights system. The UDHR and ICESCR both enshrine the right to food, thereby committing signatories to ensure that this right is realized for all within their borders. Given the crucial importance of access to food in a world of plenty where massive hunger persists, it may not come as a surprise that the right to food has been playing a pioneering role in the resurgence of economic and social rights over the years.

The right to food is an emerging human rights issue to be addressed at the WTO. The likely impacts of implementing WTO Agreements on food distribution, quality, accessibility and nutritional value will become more pronounced as liberalisation on trade advances. Liberalisation will have some positive outcomes as prices will drop and market access widens however there are other offsetting concerns that arise, particularly without the ability of developing countries to use AoA protective or compensatory mechanisms.¹⁴

Despite the discipline imposed by AoA, agriculture remains one of the most distorted areas of international trade. For India, agriculture is the major area of concern, as it supports the livelihood of around 70 percent of the population.

¹⁴ Kevin R. Gray, Right to food principles Vis a Vis rules governing international trade, Senior Fellow in Public International Law and Human Rights British Institute of International and Comparative Law, December 2003.

Any multilateral negotiation on agricultural market access and farm subsidies is bound to have its implications for Indian agriculture and on the right to food of the vast population dependent upon it. India is a state party to ICESCR, hence there is an obligation to respect, protect and fulfil the right to food for every citizen. The Uruguay Round Agreements are a milestone in the development of the international trade in agricultural commodities¹⁵ that have played a prominent role in shaping the contours of the multilateral trading system and the right to food in India. Although India has adopted right to food law, it is unseen whether it can fulfil the obligations by enacting the necessary domestic policies given the existing dictum of the international trade regime.

It is in this context this research is undertaken to analyse the instrumental relationship and the impact of free trade rules of WTO on the right to food in India.

1.2 Scope of the study

The scope of the study is to present the conceptual framework of right to food and to examine the impact of WTO on protection and enforcement of the

¹⁵ Sheshagiri, B., Honkan, G. G. and Dr. L. D. Vaikunthe, Impact of W.T.O on Indian Agriculture: Performance and Prospects, *International Journal of Current Research*, Available at <http://www.journalcra.com>.

right to food in India. Effort is made to analyse how the establishment of a free and liberalized trade regime under WTO has and would affect human right to food. While there is a coalesced point of view within the human rights community that the reality of free trade and the right to food are fundamentally in conflict,¹⁶ it is argued that the underlying causes of food insecurity are the trade liberalization policies of the WTO that support an industrial and export model of agriculture. The present study focuses on whether developing states are able to ensure the realisation of the right to food for their citizens given their existing trade obligations.

1.3 Objectives of study

- To examine the causes that led to the decline of the observance and enforcement of the right to food.
- To ascertain and find out how the establishment of a free and liberalized trade regime under WTO has and would affect human right to food.
- To examine the length and breadth of trade liberalizations that have taken place and to find out how they have effected developing countries, in particular, India.

¹⁶ See Human Rights Council Holds Panel Discussion on Realization of Right to Food, STATES NEWS SERVICE (Mar. 9, 2009)

- To find out and provide reasons and to recommend remedial measures to rectify and overcome prevailing international and national deficiencies of the topic under study.
- To draw conclusion on the basis of the study and to suggest measures to address core concerns on the protection of right to food from a free and liberalised trade regime under WTO.

1.4 Research Questions

- i. Can the prevailing legal regime of WTO ensure better protection of the right to food?
- ii. Is the Dispute Settlement Mechanism under the WTO adequate to address the disputes arising between state parties?
- iii. Whether the current trend and practice related to liberalization of trade under WTO has led to the decline of the protection of the right to food?
- iv. Is the free trade policy under WTO, producing an environment in which states particularly developing states can discharge their obligation with regard to right to food?
- v. How does the Food Security Legislation ensure enforcement of food as a right?
- vi. What changes in approach at national and international level can ensure a meaningful availability of food as a matter of right?

1.5 Relevance and Utility of the Study

The deprivation of the right to food is one of today's most serious human rights violations. The right to be free from life afflicting hunger is the most fundamental and the most obviously universal of all human rights, for if this human right is not guaranteed, all others are *ipso facto* made irrelevant. For this reason, it has always been high on the list of those cited in solemn declarations of political intent; yet it is still the most violated in practice. This human right is not realized in the case of the millions of clinically hungry people. Feeding the needy is still viewed as charity the world mostly hands out to the poor, the disadvantaged and the hungry. Despite the treaties, the good intentions, the proclaimed norms, hunger has become a chronic condition for vast and growing number of human beings all over the world. Adequate food is denied in every continent. People are not hungry because we produce too little, they are hungry because they cannot afford the food that is available in the markets or because they lack the necessary resources to produce food for themselves. They are thus hungry because they lack economic access to food. The Right to Food is a basic and fundamental human right for every human being whose fulfilment impinges on the realization of most other human rights. Yet the

pervasiveness of human hunger worldwide starkly illustrates the on going failure to fulfil the "right to food."

There is no doubt but that the global community has articulated a strong commitment to ensuring the right to food as demonstrated by the evolution of international laws promoting the right, the repeated International Declarations signed by the majority of nations, and the Action Plans adopted to promote the right to food. Enormous challenges still remain to building sustainable and equitable food systems and to ensuring the right to food for millions across the globe. In most states the basis for the creation of a normative legal basis for the right to food already exists, as states have already incorporated human rights in their national laws. However, their national laws and policies need to be brought into agreement with what the states have agreed to internationally. Studying the scope and nature of right to food violations especially in liberalised trade regime, offers an opportunity to analyse the situation and to take the steps that are necessary to overcome the violation of the basic human right to food.

1.6 Legal Frame Work

In this research, an attempt is made to examine the WTO agreements affecting the right to food and the measures that are required to be adopted

to overcome the lacunas that exists in these agreements. A thorough analysis of WTO agreements and the Food Security legislation enacted by the Government of India is undertaken along with the relevant portions of the constitution of India.

1.7 Research Methodology

The study is primarily textual, descriptive and has largely been written in an investigative and analytical style using the doctrinal sources relating to right to food. In the course of analysis, lot of original sources such as UN documents, agreements adopted by the WTO, regional and national documents relevant to this study are examined. Authoritative texts are used extensively in order to gain sight into the jurisprudence of WTO. In addition, all the secondary sources made available in books and leading journals are also consulted. Various scholarly articles have been referred and the same are listed in the Bibliography.

1.8 Review of literature

The realisation of the right to food in the era of trade liberalisation, sovereign countries need a rules-based trading system sustained with transparency and clarity through the multilateral institutions such as the WTO. Since much of the world is impoverished, rules of global trade must work as effectively for the

poor as the rich, if the system is to be credible. The WTO and its predecessor GATT have been criticized for imposing an asymmetrical global trade regime that predominantly has had a negative impact on developing countries. While this may reflect an asymmetrical world, concerns remain that the effects of the WTO need to be moderated to prevent the consolidation, and in some cases perpetuation, of inequities in opportunities between countries.

Right to food has been a debatable issue since the coming into force of AoA. Though the issue has been discussed in various ministerial conferences of WTO, a feasible solution is yet to be arrived. Plenty of literature is written touching upon the issue. A review of few of the books relevant to the issue under study is stated as follows:

Rorden Wilkinson's book, *What's Wrong with the WTO and How to Fix It*,¹⁷ has emerged. In this book, Wilkinson advances an argument that is seldom heard in debate about the WTO and international trade: that the system should be completely dismantled and rebuilt. Notwithstanding the practicalities of this suggestion, posing the question as to how the WTO should be designed from scratch prompts an interesting debate to the purpose and function of the

¹⁷ John Wiley & Sons Publications, (2014)

WTO, both as a stand-alone institution, and contextualized within the global economy. Key to Wilkinson's argument is the premise that inequity in the international trade system between countries at different stages of development has existed since the conception of the current trade system. He also demonstrates how throughout the WTO's history, tactics have been used to directly or indirectly prevent developing countries from competing in the global marketplace or fully participating in the negotiating process. For Wilkinson, key to the re-imagining of the WTO is a new declaration of the WTO's aims and objectives that places the realization of trade-led-development-for-all in an environmentally sustainable fashion at the forefront of the purposes of the multilateral trading system – with particular emphasis on helping the least able.

Sarah Joseph's book *Blame it on the WTO?: A Human Rights Critique*,¹⁸ weighs the criticisms and examines the validity of the statement that the WTO is often accused of, at best, not paying enough attention to human rights or, at worst, facilitating and perpetuating human right while examining the effect of WTO rules on the enjoyment of the right to food. The book examines problems regarding free trade and agriculture, such as the detrimental effects of

¹⁸ Oxford University Press, UK (2013)

volatile markets, cartels, and specialization, and explores the alternative path of empowering small farmers.. Much of the analysis focuses on whether WTO rules and free trade policies generally are producing or are likely to produce an environment in which States, particularly developing States, can discharge their obligations with regard to the right to food.

Freedom from want, The Human Right to Adequate Food by George Kent,¹⁹ makes it clear that feeding people will not solve the problem of hunger, for feeding programs can only be a short-term treatment of a symptom, not a cure. The real solution lies in empowering the poor. Governments, in particular, must ensure that their people face enabling conditions that allow citizens to provide for themselves.

In a wider sense, Kent brings an understanding of human rights as a universal system, applicable to all nations on a global scale. If, as Kent argues, everyone has a human right to adequate food, it follows that those who can empower the poor have a duty to see that right implemented, and the obligation to be held morally and legally accountable, for seeing that that right is realized for everyone, everywhere. As a legal claim, the 'human right to adequate food' may

¹⁹ Georgetown University Press, Washington DC, 2005

seem thin gruel, but George Kent enriches the concept with data-based policy analysis, compelling ethical arguments, and a full review of concerned international, national, and nongovernmental organizations. He persuasively makes the case for accountability where the face of famine, malnutrition, and starvation confront the hands of those who hold political power at every level in our new global economy."

Anwarul Hoda and Ashok Gulati, WTO Negotiations on Agriculture and Developing Countries²⁰ state that the World Trade Organization's Doha Round of trade talks has been plagued by a lack of concrete progress toward establishing a fair and harmonious agricultural trading system. As the results of the Doha Round could have far-reaching implications for the trade and economic prospects of developing countries in the twenty-first century, it is critical for these countries to fully understand the issues involved in the negotiations on agriculture. The book examines the implementation experience of key members of the WTO, and then traces the developments in the negotiations up to the recent impasse. In light of these considerations, and on the basis of a case study of India, the authors propose various elements of a negotiating position and strategy for developing countries. The authors offer

²⁰ The Johns Hopkins University Press, Baltimore, MD, 2007

though but realistic recommendations regarding tariffs, market access, treatment of sensitive or special products, and other aspects of international trade.

Joseph A Mc Mahon, The WTO Agreement on Agriculture,²¹ seeks to provide legal commentary on AoA through an in-depth examination of the provisions and dispute that have arisen in each of these three pillars. The WTO AoA subjected agriculture to a set of international rules for the first time in the history of international trade. Ever since its negotiation, the Agreement has been at the forefront of the controversy surrounding the purpose and impact of the WTO itself. The commentary is structured around the three areas of reform initiated by the Agreement - market access, domestic support and export competition.

In addition, the book situates these provisions against their background in pre-WTO regulation. It analyzes the operation of the 'Peace clause' and assesses the impact of the clause's expiration. The commentary concludes by assessing the Agreement's accommodation of and impact on developing economies, and

²¹ Oxford University Press, 2007

examining the process of reforming domestic farm subsidies, one of the dominant issues currently confronting the WTO.

George Kent, Ending Hunger Worldwide²² Why does hunger persist in a world of plenty? Ending Hunger Worldwide challenges the naive notion that everyone wants hunger to end, arguing that the powerful care - but not enough to make a difference. George Kent argues that the central focus in overcoming hunger should be on building stronger communities. It is these communities which can provide mutual support to ensure that people don't go hungry. Kent demonstrates that there is not a shortage of food but of what Amartya Sen terms 'opportunities', and that developing tight-knit communities will lead to more opportunities for the hungry and undernourished. Ending Hunger Worldwide challenges dominant market-led solutions, and will be essential reading for activists, NGO workers and development students looking for a fresh perspective.

George Kent, Global Obligations for the Right to Food (ed.)²³ A child may be born into a poor country, but not a poor world. If global human rights are to be

²² Tylor and Francis Ltd., UK, 2015

²³ Lanham, Maryland: Rowman & Littlefield, 2008

meaningful, they must be universal. Global Obligations for the Right to Food assesses the nature and depth of the global responsibility to provide adequate food to the world's population. While governments have a primary responsibility for assuring the right to food for people under national jurisdictions, we as a global community are all responsible. Global Obligations for the Right to Food explores the various actions that should be taken by governments, non-governmental organizations, and individuals to ensure that citizens of the world have access to adequate food.

Freedom from Want: The Human Right to Adequate Food, George Kent,²⁴ makes it clear that feeding people will not solve the problem of hunger, for feeding programs can only be a short-term treatment of a symptom, not a cure. The real solution lies in empowering the poor. Governments, in particular, must ensure that their people face enabling conditions that allow citizens to provide for themselves. In a wider sense, Kent brings an understanding of human rights as a universal system, applicable to all nations on a global scale. If, as Kent argues, everyone has a human right to adequate food, it follows that those who can empower the poor have a duty to see that

²⁴ Washington, D.C. Georgetown University Press, 2005.

right implemented, and the obligation to be held morally and legally accountable, for seeing that the right is realized for everyone, everywhere.

1.9 Scheme of Study

The research study has been presented in the seven chapters and is structured as follows:

The **Introductory** Chapter is devoted to the study of scope, objectives and utility of the topic. The analyses largely concerns the instrumental relation between the right to food and WTO rules along with legal basis for the right to food. In addition to the legal framework, the methodology that is adopted in this research is mentioned along with relevant literature review.

The **Second** Chapter titled **Background to the Establishment of WTO and the Relevant International Trade Agreements Dealing with the Right to Food: An Overview**, provides a comprehensive overview of the WTO from a historical perspective along with basic principles of trading system. The WTO is the only international organization dealing with the global rules of trade between nations and functions on the three basic principles of Trade without Discrimination having two components, the Most Favoured Nation and National Treatment, Reciprocity of trade concessions and Transparency. WTO

dispute settlement system is considered as the backbone of multilateral trading system, a unique contribution to the stability of global economy. The second part of the chapter makes an analysis of relevant provisions of WTO agreement on Agriculture, Trade Related Aspects of Intellectual Property Rights(TRIPS) and Agreement on Application of Sanitary and Phyosanitary Measures(SPS) in the context of right to food.

Chapter **Three** of the thesis **Enforcing the Right to Food in the WTO Era: A Critical Analysis of the Agreement on Agriculture**, briefly summarize the history of agricultural trade liberalization highlighting the significance of trade in agriculture as a vital part of international development and the impact of trade liberalisation in agriculture under the WTO regime on the right to food. The chapter highlights the contentious issues and the on goingdebate over agricultural subsidies at the 10th Ministerial conference of WTO in Nairobi and the impact of AoA on the right to food.

The **Fourth** Chapter titled **The Right to Food under the Indian Constitution and its Contemporary Relevance in India: An Assessment**, reviews the role of constitutions in general before examining the provisions of the Indian Constitution protecting the right to food. While the apex court has reiterated in several of its decisions that the Right to Life guaranteed under

Article 21 of the constitution in its true meaning includes the basic right to food, it is indeed surprising that the justiciability of the specific right to food as an integral right under Article 21 had never been articulated or enforced until the filing of a writ petition before the apex court in 2001, in the *People's Union for Democratic Rights Litigation(PUCL)*.²⁵ The chapter presents in detail the PUCL litigation, tracing its development from the original petition to where the PIL and the enumerated entitlements it protects and promotes stand today.

The **fifth** Chapter is titled **Legal Protection of the Right to Food and its Enforcement in India: A Study of the National Food Security Act, 2013**.

Although international treaties recognise the right to food, a domestic legally enforceable and justiciable right to food can provide a basis for legal redress. In 2013, the government of India passed the National Food Security Act(NFSA), designed to ensure access to adequate food at affordable prices. This chapter evaluates the performance of India's Public Distribution System, existing food-grain procurement and distribution system as a means for legal redress and

²⁵ (Civil) No. 196/2001

enforcement of the right to food. The Food Security law imposes a legal duty on the state that had previously existed only as a moral duty, creating accountability on the government. Effort is made through this chapter to analyse the strengths and deficiencies of NFSA with a focus on the strategies that are required to be adopted for the better implementation the Act.

The **Sixth** Chapter titled **The Right to Food and its Enforcement an Utopian Dream or Reality?** focuses on the world's poorest countries namely LDC's from a trade centric point of view and assesses effects of WTO policies on the right to food in these countries. All most all the developing are affected by food insecurity and are obliged to protect the right to food as guaranteed under Art.11 of ICESCR and other binding international instruments. Agricultural support measures of advanced countries act as causes for food insecurity in LDCs. While the import of subsidised foods by developing countries are frequently necessary options to address food crises in the short run, they can adversely affect the economic development in the long run. The chapter concludes by suggesting the strategies that are required to be adopted for the realisation of the right to food.

The last part of the thesis, **Conclusion and Suggestions**, summarizes the preceding chapters of the research work with suggestions to overcome the loopholes in the implementation of the NFSA in enforcing right to food in India without getting eroded by the WTO regime and that the human right to food may be reconciled with international trade law through relevant WTO reforms, developing country actions, including protectionist measures and international collaboration defended on the basis of the domestic right to food.

CHAPTER – 2

**BACKGROUND TO THE ESTABLISHMENT OF WTO AND THE
RELEVANT INTERNATIONAL TRADE AGREEMENTS DEALING
WITH THE RIGHT TO FOOD: AN OVERVIEW**

2.1 Roots of WTO: GATT to Uruguay

2.2 Marrakesh Agreement: Establishing the World Trade Organization

2.3 Key objectives of WTO

2.4 Basic principles of the trading system under WTO

2.4.1 Trade without Discrimination

2.4.1.1 The Most Favoured Nation (MFN)

2.4.1.2 National Treatment

2.4.2 Reciprocity of trade concessions

2.4.3 Transparency and predictability in import and export rules
and regulations

2.5 Organizational Structure of WTO

2.5.1 Ministerial Conference

2.5.2 General Council

2.5.3 The Trade Policy Review Body

2.5.4 The Dispute Settlement

2.5.5 The Councils on Trade in Goods and Trade in Services

2.6 Drawbacks of WTO

2.7 WTO Dispute Settlement System

2.8 Outline of the Dispute Settlement Understanding

- 2.8.1 Consultations
- 2.8.2 Establishment of Dispute Settlement Panel
- 2.8.3 Good Offices, Conciliation and Mediation
- 2.8.4 Panel Proceedings
- 2.8.5 Appellate Body Review
- 2.8.6 Adoption of Panel Reports/Appellate Review
- 2.8.7 Implementation of Panel and Appellate Body Reports
- 2.8.8. Compliance Panels
- 2.8.9 Remedies
- 2.9 India and WTO Dispute Settlement
- 2.10 An Emerging India in WTO Dispute Settlement
- 2.11 India and WTO Disputes: Challenges
- 2.12 Legal Effect of WTO Decisions
- 2.13 Analysis of selected WTO Agreements in the context of right to food.
 - 2.13.1 Agreement on Agriculture(AoA)
 - 2.13.2 Agreement on Trade Related Aspects of Intellectual Property Rights(TRIPS)
 - 2.13.3 Agreement on Application of Sanitary and Phytosanitary Measures(SPS)
- 2.14 Conclusion

CHAPTER – II

**BACKGROUND TO THE ESTABLISHMENT OF WTO AND THE
RELEVANT INTERNATIONAL TRADE AGREEMENTS DEALING
WITH THE RIGHT TO FOOD: AN OVERVIEW**

2.1 Roots of WTO: GATT to Uruguay

Towards the end of World War II, representatives of the US and its Allied Forces endeavored to work out the arrangements for a new world order in the post war era. As a result of these negotiations, the US and its Allies planned to establish three important international institutions to liberalize trade and payment. In 1944, an International Monetary Conference was held at Breton Woods, New Hampshire. With the end of World War II in sight, the purpose of the Conference was to develop a plan for rebuilding the world economy by establishing three important international organizations viz, The International Monetary Fund (IMF), World Bank(WB) and The International Trade Organization(ITO). The IMF and World Bank were formally created at this meeting. The third international organization in the golden triangle that was supposed to come into existence, the ITO, failed to get the necessary support from participating countries legislative bodies over the next several years. The ITO was intended to supervise international trading rules and promote free trade among nations, in order to guard against a return to the protectionist policies that had contributed to the Great Depression. Furthermore, the fostering of international trade linkages along with predictable, enforceable international trading rules would help to promote peaceful international relations. Though the Havana Charter establishing the ITO was concluded in 1948, it never came into being, largely

due to the refusal by the United States to ratify the Havana Charter¹. Therefore, a provisionally approved section known as General Agreement on Trade and Tariffs(GATT) was elevated to lead position in bringing order to world trade, to reduce tariffs, remove trade barriers and facilitate trade in goods. It was the product of unprecedented international cooperation by an international community that was deeply scarred by the damage and destruction that endless warfare had brought about; an international community searching for an entirely new beginning and a new international order. With the demise of the ITO, the membership of the GATT became the forum for continued negotiation of free trade rules. Thus, GATT came into existence in the year 1948, after long negotiations to form an organization called ITO failed to materialize. From 1948 to 1994, the GATT provided the rules for much of the world trade and presided over periods that saw some of the highest growth rates in international commerce.

To begin with 23 countries became founding GATT members including India. The primary objective of GATT was to see that impediments to international trade mainly in the form of tariffs were reduced or even removed in order to facilitate the movement of goods across borders. In the course of seven rounds of negotiations, it succeeded in getting countries to lower their tariff rates, enabling greater movement of goods. The first GATT trade round concentrated on

¹Amrita Narlikar, *The World Trade Organization: A Very Short Introduction*(Oxford University Press, New York, 2005) 11; David Kinley, *Civilising Globalisation*(Cambridge University Press, Cambridge, 2009) 39–40

reducing tariffs. The Kennedy Round in the mid-sixties brought about Anti-dumping Agreement. The Tokyo Round during the seventies was the first major attempt to tackle trade barriers that do not take the form of tariffs and to improve the system, adopting a series of agreements on non-tariffs barriers, which in some cases interpreted existing GATT rules and in others broke entirely new ground.

However, the nature and character of global trade became very complex over a period of time. Countries began to realize that GATT did not have all the answers to the questions posed by the increasingly complicated nature of global trade. Well before the GATT's 40th anniversary its members concluded that the GATT system was straining itself to adapt to a new globalised economy. In response to the problems identified in the 1986 Ministerial Declaration, the eighth GATT round known as the Uruguay Round was launched in September 1986, in Punta del Uruguay². It was the biggest negotiating mandate on trade ever agreed. The talks extended the trading system into several new areas, notably trade in services and Intellectual Property, and to reform trade in the sensitive sectors of agriculture and textiles.

2.2 Marrakesh Agreement: Establishing the WTO

The Final Act concluding Uruguay Round and officially establishing the World Trade Organization (WTO) was signed on April 15, 1994, during the Ministerial meeting at Marrakesh, Morocco and hence is known as the Marrakesh

²P.Gallagher, *The first ten years of WTO*, Cambridge University Press, 2006, p.7

Agreement³. The WTO's creation on 1st January 1995 marked the biggest reform of international trade since after the Second World War. It also brought to reality in an updated form the failed attempt in 1948 to create an International Trade Organization. Located in Geneva, Switzerland, it has 162 state parties as members who represent over 95% of world trade and includes observer governments who typically have applied for membership and international organization observers. India is a founder member of WTO.

The WTO is the only international organization dealing with the global rules of trade between nations. Its main function is to ensure that trade flows as smoothly, predictably and freely as possible. At the heart of the system – known as the multilateral trading system – are the WTO's agreements, negotiated and signed by a large majority of the world's trading nations and approved in their parliaments. These agreements are the legal ground-rules for international commerce. Essentially, they are contracts, guaranteeing member countries important trade rights. They also bind governments to keep their trade policies within agreed limits to everybody's benefit. The agreements are negotiated and signed by governments, but their purpose is to help producers of goods and services, exporters and importers conduct their business.

³*Understanding WTO Overview: a navigational guide, www.wto.org*

2.3 Key objectives of WTO:

- to set and enforce rules in international trade
- to provide a forum for negotiating and monitoring further trade liberalization
- to resolve trade disputes
- to increase the level of transparency in decision-making processes
- to cooperate with other major international economic institutions involved in global economic management
- to help developing countries benefit fully from the global trading system

Although shared by the GATT, in practice these goals have been pursued more comprehensively by the WTO. GATT focused almost exclusively on goods—though much of agriculture and textiles were excluded—the WTO encompasses all goods, services, and intellectual property, as well as some investment policies.

In addition, the permanent WTO Secretariat, which replaced the interim GATT Secretariat, has strengthened and formalized mechanisms for reviewing trade policies and settling disputes. Because many more products are covered under the WTO than under the GATT and because the number of member countries and the extent of their participation has grown steadily—the combined share of international trade of WTO members now exceeds 90 percent of the global total—open access to markets has increased substantially.

The rules embodied in both the GATT and the WTO serves at least three purposes.

- First, they attempt to protect the interests of small and weak countries against discriminatory trade practices of large and powerful countries.
- Second, the rules require members to limit trade only through tariffs and to provide market access not less favourable than that specified in their schedules (i.e., the commitments that they agreed to when they were granted WTO membership or subsequently).
- Third, the rules are designed to help governments resist lobbying efforts by domestic interest groups seeking special favours. Although some exceptions to the rules have been made, their presence and replication in the core WTO agreements were intended to ensure that the worst excesses would be avoided.

By thus bringing greater certainty and predictability to international markets, it was thought, the WTO would enhance economic welfare and reduce political tensions.

2.4 Basic principles of the trading system under WTO

The WTO agreements are lengthy and complex because they are legal texts covering a wide range of activities. But a small number of relatively simple, fundamental principles inherited from the core principles of GATT, run through all of these documents which are the foundation of the multilateral trading system. These principles include:

2.4.1 Trade without Discrimination: The first key principle of the WTO rule book is “trading without discrimination or Non-discrimination”, having two components.

i) The Most Favoured Nation(MFN)

The MFN clause has been the pillar of the system since the inception of the GATT in 1947. According to this principle, “Any advantage given by a contracting party to a product of another country must be extended unconditionally to a like product of all other contracting parties”. Each member treats all other members equally as most favoured trading partners. If a country extends any benefit to one trading partner, it has to extend the same benefit to all the other WTO members so that they all remain “Most-Favoured”. However, this principle is relaxed in certain exceptional cases, such as if country X has entered into a regional trade agreement with another country Y, then the concessions extended to Y country need not be extended to other non-members of the agreement⁴.

ii) National Treatment

According to this principle, imported products must be treated the same way as domestic goods. This principle condemns discrimination between foreign and national goods and states that once duties are paid on the imported goods, they must be given the same treatment like domestic goods in relation to any charges, taxes or administrative or other regulations⁵

2.4.2 Reciprocity of trade concessions: The engine of the WTO regime is reciprocity. It is a fundamental element of the negotiating process. This principle reflects that any concession extended by one country to another need to be

⁴*Ibid*

⁵Dr. G Bharathi, *World Trade Organization-Understanding its implications for India*, Oct. 2004

reciprocated with an equal concession such that there is not a big difference in the payments situation. This principle along with the first principle would actually result in more and more liberalization of the world trade as any country relaxing its trade barriers need to extend it to all other members and this would be reciprocated⁶.

2.4.3 Transparency and predictability in import and export rules and regulations:

The third principle states that the members to the WTO are required to publish their trade regulations, to maintain institutions allowing for the review of administrative decisions affecting trade, to respond to request for information by other members and to notify changes in trade policies to the WTO. These internal transparency requirements are supplemented and facilitated by periodic country, specific reports through the Trade Policy Review Mechanism (TPRM) The WTO system tries also to improve predictability and stability, discouraging the use of quotas and other measures used to set limits on quantities of imports⁷.

2.5 Organizational Structure of WTO.

The basic structure of the WTO includes the following bodies:

2.5.1 Ministerial Conference is composed of international trade ministers from all member countries. This is the governing body of the WTO, responsible for setting the strategic direction of the organization and making all final decisions on agreements under its wings. The Ministerial Conference meets at least once

⁶Basic Principles of WTO, *China Trade in Services*, 2007, 1.

⁷B. Holkman, *The WTO: Functions and basic principles*, 2001, 4

every two years. It is composed of political representatives from each member country known as trade ministers. The Ministerial Conference has supreme authority over all matters. It can take decisions on all matters under any of the multilateral trade agreements.

2.5.2 General Council is composed of representatives of all the member countries, normally country delegates based in Geneva. In essence this is said to be the real engine of the WTO and has all the powers of the Ministerial Council when that body is not in operation. It is responsible for overseeing the day-to-day business and management of the WTO, and is based at the WTO headquarters in Geneva. In practice, this is the key decision-making arm of the WTO for most issues.

2.5.3 The Trade Policy Review Body, is composed of all the WTO members, and oversees the Trade Policy Review Mechanism, a product of the Uruguay Round. It periodically reviews the trade policies and practices of all member states. These reviews are intended to provide a general indication of how states are implementing their obligations and to contribute to improved adherence by the WTO parties to their obligations.

2.5.4 The Dispute Settlement composed of all the WTO members, oversees the implementation and effectiveness of the dispute resolution process for all WTO agreements, and the implementation of the decisions on WTO disputes. Disputes are heard and ruled on by dispute resolution panels chosen individually for each

case, and the permanent Appellate Body that was established in 1994. Dispute resolution is mandatory and binding on all members.

2.5.5 The Councils on Trade in Goods and Trade in Services provide a mechanism to oversee the details of the general and specific agreements on trade in goods (such as those on textiles and agriculture) and trade in services. There is also a Council for the Agreement on Trade-Related Aspects of Intellectual Property Rights, dealing with just that agreement and subject area.

2.6 Drawbacks of WTO

The policies of the WTO impact all aspects of society and the planet. It is well known, creating a world of "free trade" though will promote global understanding and peace, the domination of international trade by rich countries for the benefit of their individual interests fuels anger and resentment among the poor countries. WTO rules put the "rights" of corporations to profit over human rights. Farmers produce enough food in the world to feed everyone - yet because of corporate control of food distribution, millions of people worldwide suffer from chronic malnutrition. According to the UDHR, food is a human right. In developing countries, as many as four out of every five people make their living from the land. WTO policies have allowed dumping of heavily subsidized industrially produced food into poor countries, undermining local production and increasing hunger.

The WTO supposedly operates on a consensus basis, with equal decision-making power for all. In reality, many important decisions it appears, are taken in a process whereby poor countries' negotiators are not even invited to closed door meetings -- and then 'agreements' are announced that poor countries didn't even know were being discussed. Many countries do not even have enough trade personnel to participate in all the negotiations or to even have a permanent representative at the WTO. This is an hindrance to poor countries from representing their interests. Likewise, many countries are too poor to defend themselves from WTO challenges from the rich countries, and change their laws rather than pay for their own defense.

The WTO's "Most Favored Nation" provision requires all WTO member countries to treat each other equally and to treat all corporations from these countries equally regardless of their track record. Developing countries are prohibited from creating local laws that developed countries once pursued, such as protecting new, domestic industries until they can be internationally competitive⁸.

2.7 WTO Dispute Settlement System

From its inception, the GATT provided for dispute resolution, allowing a GATT Party to invoke GATT dispute settlement articles if it believes that another Party's measure, whether violative of the GATT or not, caused it trade

⁸<http://www.globalexchange.org/campaigns/wto/opposeWTO.html>

injury. GATT did not set out a dispute procedure with great specificity, GATT Parties developed a more detailed process including ad hoc panels and other practices. The procedure was perceived to have certain deficiencies, however, among them a lack of deadlines, a consensus decision-making process that allowed a GATT Party against whom a dispute was filed to block the establishment of a dispute panel and the adoption of a panel report by the GATT Parties as a whole, and laxity in surveillance and implementation of panel reports even when reports were adopted and had the status of an official GATT decision.

A reform of the GATT dispute settlement process was made in the Uruguay Round of Multilateral Trade Negotiations, begun in 1986 and concluded in 1994 with the signing of the Marrakesh Agreement establishing the WTO. The WTO Agreement requires any country that wishes to be a WTO Member to accept all of the multilateral trade agreements negotiated during the Round, including the GATT, as well as the Understanding on Rules and Procedures Governing the Settlement of Disputes, applicable to disputes arising under virtually all WTO agreements⁹.

Dispute Settlement Mechanism (DSM), the central pillar of the multilateral trading system, is WTO's unique contribution to the stability of the global

⁹ Jeanne J. Grimmett (Legislative Attorney) Dispute Settlement in the World Trade Organization (WTO): An Overview, *Congressional Research Service*, Dated April 8, 2010, p.1, Available at: http://digitalcommons.ilr.cornell.edu/key_workplace

economy. It makes the trading system more secure and predictable. The system is based on clearly-defined rules, with timetables for completing a case. Without a means of settling disputes, the rules-based system would be less effective. Disputes in the WTO are essentially about broken promises. WTO members have agreed that if they believe fellow-members are violating trade rules, they will use the multilateral system of settling disputes instead of taking action unilaterally. That means abiding by the agreed procedures, and respecting judgments. The current dispute settlement system was created as part of the WTO Agreement and is embodied in the Understanding on Rules and Procedures Governing the Settlement of Disputes, commonly referred to as the Dispute Settlement Understanding DSU. A dispute arises when a member government believes that another member government is violating an agreement which has been made in the WTO. However, these agreements are consequential to dialogues between the member States and hence they are the writers of such agreement. In case any dispute arises, the ultimate duty to settle it lies in the hands of member government through Dispute Settlement Body (DSB). This system has already achieved a great deal and provides some of the necessary attributes of security and predictability which trader and other market participants need and which is called for in the DSU under Article 3. Under the GATT, procedures for settling disputes were ineffective and time consuming since a single nation, including the nation whose actions was the

subject of complaint could effectively block or delay every stage of the dispute resolution process.

The DSU was designed to deal with the difficulty of reducing and eliminating non-tariff barriers to trade. A non-tariff trade barrier can be almost any government policy or regulation that has the effect of making it more difficult or costly for foreign competitors to do business in a country. In the early years of the GATT, most of the progress in reducing trade barriers focused on trade in goods and in reducing or eliminating the tariff levels on those goods. More recently, tariffs have been all but eliminated in a wide variety of sectors.

2.8 Outline of the Dispute Settlement Understanding

The DSU advanced out of the ineffective means used under the GATT for settling disagreements among members. The Dispute Settlement Understanding officially known as rules and procedure Governing the Settlement of Disputes, establishes rules and procedures that manage various disputes arising under the Covered Agreements of the Final Act of the Uruguay Round. All WTO member nation-states are subject to it and are the only legal entities that may bring and file cases to the WTO. The DSU created the Dispute Settlement Body (DSB), consisting of all WTO members, which administers dispute settlement procedures.

It provides strict time frames for the dispute settlement process and establishes an appeals system to standardize the interpretation of specific clauses of the agreements. It also provides for the automatic establishment of a panel and automatic adoption of a panel report to prevent nations from stopping action by simply ignoring complaints. Strengthened rules and procedures with strict time limits for the dispute settlement process aim at providing “security and predictability to the multilateral trading system” and achieving “[a] solution mutually acceptable to the parties to a dispute and consistent with the covered agreements.” The basic stages of dispute resolution covered in the understanding include consultation, good offices, conciliation and mediation, a panel phase, Appellate Body review, and remedies.

Settling disputes is the responsibility of the Dispute Settlement Body (the General Council in another guise), which consists of all WTO members. The DSB has the sole authority to establish “panels” of experts to consider the case, and to accept or reject the panels’ findings or the results of an appeal. It monitors the implementation of the rulings and recommendations, and has the power to authorize retaliation when a country does not comply with a ruling.

There are two main ways to settle a dispute once a complaint has been filed in the WTO. The parties find a mutually agreed solution, particularly during the phase of bilateral consultations; and through adjudication, including the subsequent implementation of the panel and Appellate Body reports, which are

binding upon the parties once adopted by the Dispute Settlement Body. The main stages to the WTO dispute settlement process are:

2.8.1 Consultations

The DSU permits a WTO Member to consult with another Member regarding “measures affecting the operation of any covered agreement taken within the territory” of the latter. If a WTO Member requests consultations with another Member under a WTO agreement, the latter Member must enter into consultations with the former within 30 days. If the dispute is not resolved within 60 days, the complaining party may request a panel. The complainant may request a panel before this period ends if the other Member has failed to enter into consultations or if the disputants agree that consultations have been unsuccessful¹⁰.

2.8.2 Establishment of Dispute Settlement Panel

If a panel is requested, the DSB must establish it at the second DSB meeting at which the request appears as an agenda item, unless it decides by consensus not to do so. Thus, while a defending Member may block the establishment of

¹⁰Once the WTO is notified that a request for consultations has been made, the dispute will be assigned a number. Disputes are numbered in chronological order. The prefix WT/DS, followed by the assigned number, is then used to designate WTO documents issued in connection with the dispute. For example, the pending dispute between the United States and China, China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audio Entertainment Products is DS363, with the U.S. request for consultations sent to China on August 10, 2007, numbered WT/DS363/1, and the WTO Appellate Body report issued on December 21, 2009, numbered WT/DS363/AB/R.

a panel the first time the complaining Member makes its request at a DSB meeting, the panel will be established, virtually automatically, the second time such a request is placed on the DSB's agenda. While DSB ordinarily meets once a month, the complaining Member may request that the DSB convene for the sole purpose of considering the panel request. Any such meeting must be held within 15 days after the complaining Member requests that the meeting be held.

The panel is ordinarily composed of three persons. The WTO Secretariat proposes the names of panelists to the disputing parties, who may not oppose them except for "compelling reasons". If there is no agreement on panelists within 20 days from the date that the panel is established, either disputing party may request the WTO Director-General to appoint the panel members.

2.8.3 Good Offices, Conciliation and Mediation

Unlike consultation in which "a complainant has the power to force a respondent to reply and consult or face a panel," good offices, conciliation and mediation "are undertaken voluntarily if the parties to the dispute so agree."

No requirements on form, time, or procedure for them exist. Any party may initiate or terminate them at any time. The complaining party may request the formation of panel," if the parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute." Thus the DSU recognized that what was important was that the nations involved in a

dispute come to a workable understanding on how to proceed, and that sometimes the formal WTO dispute resolution process would not be the best way to find such an accord. Still, no nation could simply ignore its obligations under international trade agreements without taking the risk that a WTO panel would take note of its behaviour.

2.8.4 Panel Proceedings

After considering written and oral arguments, the panel issues the descriptive part of its report (facts and argument) to the disputing parties. After considering any comments, the panel submits this portion along with its findings and conclusions to the disputants as an interim report. Following a review period, a final report is issued to the disputing parties and later circulated to all WTO Members. A panel must generally provide its final report to disputants within six months after the panel is composed, but may take longer if needed; extensions are usual in complex cases. The period from panel establishment to circulation of a panel report to WTO Members should not exceed nine months. In practice, panels have been found to take more than 13 months on average to publicly circulate reports.

2.8.5 Appellate Body Review

The DSB establishes a standing Appellate Body that will hear the appeals from panel cases. The Appellate Body “shall be composed of seven persons, three of whom shall serve on any one case.” Those persons serving on the Appellate

Body are to be “persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the Covered Agreements generally.” The Body shall consider only “issues of law covered in the panel report and legal interpretations developed by the panel.” Its proceedings shall be confidential, and its reports anonymous.

Decisions made by the Appellate Body “may uphold, modify, or reverse the legal findings and conclusions of the panel.” The DSB and the parties shall accept the report by the Appellate Body without amendments “unless the DSB decides by consensus not to adopt the Appellate Body report within thirty days following its circulation to the members.”

2.8.6 Adoption of Panel Reports/Appellate Review

Within 60 days after a panel report is circulated to WTO Members, the report is to be adopted at a DSB meeting unless a disputing party appeals it or the DSB decides by consensus not to adopt it. Within 60 days of being notified of an appeal (extendable to 90 days), the Appellate Body (AB) must issue a report that upholds, reverses, or modifies the panel report. The AB report is to be adopted by the DSB, and unconditionally accepted by the disputing parties, unless the DSB decides by consensus not to adopt it within 30 days after circulation to Members. The period of time from the date the panel is established to the date the DSB considers the panel report for adoption is not to

exceed nine months (12 months where the report is appealed) unless otherwise agreed by the disputing parties.

2.8.7 Implementation of Panel and Appellate Body Reports (Article 21)

In the event that the WTO decision finds the defending Member has violated an obligation under a WTO agreement, the Member must inform the DSB of its implementation plans within 30 days after the panel report and any AB report are adopted. If it is “impracticable” for the Member to comply immediately, the Member will have a “reasonable period of time” to do so. The Member is expected to implement the WTO decision fully by the end of this period and to act consistently with the decision after the period expires. Compliance may be achieved by withdrawing the WTO-inconsistent measure or, alternatively, by issuing a revised measure that modifies or replaces it.

Under the DSU, the “reasonable period of time” is: (1) that proposed by the Member and approved by the DSB; (2) absent approval, the period mutually agreed by the disputants within 45 days after the report or reports are adopted by the DSB; or (3) failing agreement, the period determined by binding arbitration. Arbitration is to be completed within 90 days after adoption of the reports. To aid the arbitrator in determining the length of the compliance period, the DSU provides a non-binding guideline of 15 months from the date of adoption. Arbitrated compliance periods have ranged from six months to 15

months and one week. The DSU envisions that a maximum 18 months will elapse from the date a panel is established until the reasonable period of time is determined¹¹.

2.8.8 Compliance Panels (Article 21.5)

Where there is disagreement as to whether a Member has complied—i.e., whether a compliance measure exists, or whether a measure that has been taken is consistent with the WTO decision in the case—either disputing party may request that a compliance panel be convened. A compliance panel is expected to issue its report within 90 days after the dispute is referred to it, but it may extend this time period if needed. Compliance panel reports may be appealed to the WTO Appellate Body and both reports are subject to adoption by the DSB.

If the defending Member fails to comply with the WTO decision within the established compliance period, the prevailing Member may request that the defending Member negotiate a compensation agreement. If such a request is made and agreement is not reached within 20 days¹², trade sanctions can be imposed.

¹¹. *Ibid.* 9 p.5

¹²As of now, there have been 29 compliance panel proceedings, 13 of which involved the United States. Nineteen of the 29 panel reports were appealed, including 11 appeals by the United States.

2.8.9 Remedies

There are consequences for the member whose measure or trade practice is found to violate the Covered Agreements by a panel or Appellate Body. The dispute panel issues recommendations with suggestions of how a nation is to come into compliance with the trade agreements. If the member fails to do so within the determined “reasonable period of time,” the complainant may request negotiations for compensation. Within twenty days after the expiration of the reasonable period of time, if satisfactory compensation is not agreed, the complaining party “may request authorization from the DSB to suspend the application to the member concerned of concessions or other obligations under the Covered Agreements.”

Retaliation shall be first limited to the same sector(s). If the complaining party considers the retaliation insufficient, it may seek retaliation across sectors. The DSB shall grant authorization to suspend concessions or other obligations within thirty days of the expiry of the reasonable time unless the DSB decides by consensus to reject the request. The defendant may object to the level of suspension proposed. The original panel, if members are available, or an arbitrator appointed by the director-general” may conduct arbitration.

Members may seek arbitration within the WTO as an alternative means of dispute settlement “to facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.” Those parties must reach

mutual agreement to arbitration and the procedures to be followed. Agreed arbitration must be notified to all members prior to the beginning of the arbitration process. Third parties may become party to the arbitration “only upon the agreement of the parties that have agreed to have recourse to arbitration.” The parties to the proceeding must agree to abide by the arbitration award. “Arbitration awards shall be notified to the DSB and the Council or Committee of any relevant agreement where any member may raise any point relating thereto.”

2.9 India and WTO Dispute Settlement

The Dispute Settlement Understanding (DSU) of the WTO is widely regarded as the “backbone of the multilateral trading system”¹³. The changes introduced by the new DSU, which included the concept of “automaticity”¹⁴, “cross retaliation”¹⁵, strict timelines and the opportunity to file appeals before an appellate forum¹⁶, ensured that the developing countries could secure a more meaningful role in the dispute settlement system. The first few years of the WTO dispute settlement were a revelation. The effectiveness of the DSU was

¹³William Davey, *The WTO Dispute Settlement System: The First Decade*, J. INT'L. ECON. L. 79 (2001)

¹⁴ . Understanding on Rules and Procedures Governing the Settlement of Disputes, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, art 6.1, Annex 2, 1869 U.N.T.S 401 [hereinafter DSU]. Once a panel is formed, it is almost impossible to block the adoption of the panel or the Appellate Body report. See, David Palmeter, *The WTO as a Legal System*, 24 FORDHAM INT'L L. J. 444, 468 (2000).

¹⁵ art. 22.6

¹⁶ art. 17.12

seriously tested during this time. This period witnessed a variety of complaints from developed countries *inter se* and between developing countries and developed countries. A number of developing countries such as India, Brazil, Mexico, Venezuela, Pakistan and Thailand were involved in some of the most high profile cases filed before the WTO during this time¹⁷. A few such examples include US- Shrimp¹⁸, EC- Bed Linen¹⁹, US- Gasoline²⁰, and US Cotton²¹.

India's experience with the WTO negotiation process and the WTO dispute settlement system presents quite a contrasting picture. In the negotiation arena, India emerged as an influential player and a representative voice of the developing countries during this period²². India participated proactively in the various negotiating forums of the WTO and took leadership positions in the WTO Ministerial Conferences in Singapore (1996), Geneva (1998), Seattle

¹⁷ Report of ACWL (2010), available at: http://www.acwl.ch/e/documents/reports/Oper_2010.pdf

¹⁸ Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS 58/AB/R (Oct 12, 1998) (adopted Nov. 6, 1998) [hereinafter US – Shrimp or Shrimp/Turtle].

¹⁹ Appellate Body Report, European Communities – Anti-dumping Duties on the Imports of Cotton-Type Bed Linen from India, WT/DS 141/AB/R (March 1, 2001) (adopted March 12, 2001) [hereinafter EC- Bed Linen].

²⁰ Appellate Body Report, United States – Standards for Reformulated and Conventional Gasoline, WT/DS/AB/R (Apr. 29, 1996) (adopted May 20, 1996).and US Cotton.

²¹ Appellate Body Report, United States – Subsidies on Upland Cotton, WT/DS 267/AB/R (March 3, 2005) (adopted March 21, 2005).

²² Sheila Page, Developing Countries in GATT/WTO Negotiations (*Overseas Development Institute Working Paper 2002*), available at: <http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4738.pdf> (discussing the role of developing countries including India in trade negotiations under GATT/WTO).

(1999), Doha (2001) and Cancun (2003). These changes happened at a time when India's trade share was still very insignificant; India's merchandise trade was less than one percent and services trade was less than two percent²³. Dispute settlement was one area where India's presence was prominently noticed. India was acutely aware of the implications of signing a comprehensive treaty such as the WTO. Parliamentary debates²⁴ and intense internal discussions on the impact of the Dunkel Draft took place long before India signed the Marrakesh text²⁵. However, there is a very strong indication that a serious debate on the implications of the treaty obligations took place in India only in the aftermath of the losses in India – Patents²⁶, India – QR²⁷ and India – auto²⁸ disputes. Some of these cases acted as catalysts in shaping India's participation in WTO negotiations and dispute settlement.

Immediately after joining the WTO, India had to face challenges to its patent mail-box system from the U.S. and the EC²⁹. Article 70 of the TRIPS

²³ Report of the Secretariat, Trade Policy Review-India, WT/TPR/S/182 (Apr. 18, 2007).

²⁴ PARLIAMENT OF INDIA REPORT OF THE DEPARTMENT-RELATED STANDING COMMITTEE ON COMMERCE (Dec. 13, 1993).

²⁵ V M Tarkunde, Final GATT Agreement: An Assessment, 29(36) *ECON. & POL. WEEKLY* 2378 (1994).

²⁶ India – Patents, Appellate Body Report, India – Patent Protection for Pharmaceuticals and Agricultural Chemical Products, WT/DS 50/R and WT/DS 50/AB/R, (Dec. 19, 1997) (adopted Jan. 16, 1998) India – QR

²⁷ India – QR, Appellate Body Report, India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, WT/DS/AB/R (Aug. 23, 1999) (adopted Sep. 22, 1999)

²⁸ Appellate Body Report, India – Measures Relating to Trade and Investment in the Motor Vehicle Sector, WT/DS 175/AB/R (March 19, 2002) (adopted April 5, 2002)

²⁹ Appellate Body Report, India – Patent Protection for Pharmaceuticals and Agricultural Chemical Products, WT/DS 50/R and WT/DS 50/AB/R (adopted Jan. 16, 1998)

Agreement provides that where a Member does not make available patent protection for pharmaceutical and agricultural chemical products as of the date of entry into force of the TRIPS Agreement, that Member must establish a system for filing patent applications with regard to those products (the so-called “mail-box” filing). The objective of the mail box filing was to provide a legal basis for establishing filing and priority dates to be used when these applications were examined later. The Appellate Body upheld the panel’s decision when it held that India’s use of “administrative instructions” in the absence of a domestic legislation did not provide a sound legal basis for ensuring compliance with the TRIPS Agreement. In a way, the WTO panel and the Appellate Body decisions were a direct indictment of how the Indian government would view its own powers. India’s loss in these disputes triggered a series of debates in India and generated an unprecedented level of interest in IPR matters.

In yet another instance, in India – QR³⁰ the United States challenged India’s invocation of quantitative restrictions on some 2714 tariff lines citing balance of payment grounds. Until the QRs were challenged by the U.S., it was considered that developing countries had the autonomy to maintain import

³⁰ Appellate Body Report, India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, WT/DS/AB/R (Aug. 23, 1999) (adopted Sep. 22, 1999)

restrictions on balance-of-payment grounds and for that reason, India had maintained restrictions from the mid-1950s³¹. This case also raised a systemic issue of whether a WTO panel can review the justification of balance-of-payment restrictions under Article XVIII: B of GATT 1994. This was important in light of the practice under the GATT, which was to respect the divisions between political organs, such as the Balance-of-Payments Committee, and judicial organs, such as the dispute settlement panels³². The panel as well as the Appellate Body maintained that the quantitative restrictions amounted to a violation of Article XI: I of the GATT and that they cannot be justified under Article XVIII: B of GATT, 1994. The Appellate Body stated that clear WTO rules could not be disregarded in order to safeguard institutional balance between political and quasi-judicial organs of the WTO³³. This case also brought a marked change in the substantive approach to balance-of payments issues, which some commentators have interpreted as a movement away from the pragmatism of the GATT towards a more adjudicatory, “legalistic” approach³⁴. Almost as a concurrent development, the

³¹ Deborah E. Siegel, Legal Aspects of the IMF/WTO Relationship: The Fund's Articles of Agreement and the WTO Agreements, 96 *AM. J. INT'L L.* 561, 588 (2002); see also Kenneth W. Abbott, The Many Faces of International Legalization, 92 *AM. SOC'Y INT'L PROC.* 57 (1998).

³² *Ibid.*

³³ Frieder Roessler, *The Institutional Balance Between the Judicial and the Political Organs of the WTO*, in *NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW* 325, 325-46 (2000).

³⁴ Chantal Thomas, Balance-of-Payment Crises in the Developing World: Balancing Trade, Finance and Development in the New Economic Order, 15 *AM. U. INT'L REV* 1249, 1274.

United States requested the DSB to establish a panel in India – Measures Relating to Trade and Investment in the Motor Vehicle Sector (India – Auto), concerning India's use of local content, foreign exchange and trade balancing requirements in the automobile sector. The India – Auto dispute was by and large a “mopping up” operation to eliminate some of the remaining vestiges of the import licensing regime which India was required to modify in the India – QR decision.³⁵ India lost the case, but the outcome in this decision was almost expected after the panel and Appellate Body findings in the India – QR dispute.

The losses in the India – Patents and the India – QR decisions served as a wakeup call for the government, the industry and other stakeholders. India looked for adequate defensive measures to protect the domestic sector from any import surge.³⁶ India's use of anti-dumping provisions substantially increased during this time and the government also used other types of trade contingency protection including safeguards.³⁷ The highlight of this period is that India was a successful complainant in some of the disputes which have attained a legendary status in WTO law and practice and continue to be

³⁵ Kyle Bagwell and Alan Sykes, India- Measures Affecting Automotive Sector, in THE AMERICAN LAW INSTITUTE REPORTERS' GUIDE ON WTO CASE LAW 158 (Henrik Horn & Petros C. Mavrioidis eds., 2004).

³⁶ Romain Wacziarg, India in the World Trading System (Centre for Research on Economic Development and Policy Reform, *Working Paper No. 146*, 2002)

³⁷ S. Narayanan, Trade Policy Making in India, (Institute of South Asian Studies Insights, No.3, National University of Singapore, May 15, 2005) (noting that “trade policy making in India was perceived as confused, contradictory and ill conceived”).

important milestones in the evolution of the international trade law jurisprudence.

India along with Indonesia, Malaysia and Thailand were the complainants in the landmark US – Shrimp (Shrimp/Turtle) dispute.³⁸ India also challenged the EC practice of “zeroing” in anti-dumping proceedings in the famous EC – Bed

Linen dispute.³⁹ In Turkey – Textiles (QR),⁴⁰ India successfully challenged Turkey’s imposition of quantitative restrictions on 19 categories of textiles and clothing items ostensibly for the formation of the Turkey-EC Customs Union. The panel in this dispute had the unenviable task of finding out whether the claimed customs union in fact met the requirements of Article XXIV of the GATT, an issue which was quite a difficult one for a dispute settlement panel to resolve.

India’s challenge of the EC’s generalized system of preferences (GSP) in as much as it provided preferential duty access to certain products originating from 12 countries under the garb of combating drug production and trafficking is yet another landmark decision. The WTO dispute settlement panel’s finding

³⁸ Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS 58/AB/R (Oct 12, 1998) (adopted Nov. 6, 1998)

³⁹ EC – Bed Linen, supra note 46; Zeroing takes place when the dumping amount is set to zero rather than its calculated negative value in cases where the export price is higher or where those transactions are non-dumped. See Edwin Vermulst & Daniel Ikenson, Zeroing Under the WTO Anti-Dumping Agreement: Where Do We Stand? 2 *GLOBAL TRADE & CUSTOMS J.* 231 (2007).

⁴⁰ Appellate Body Report, Turkey – Restrictions on Import of Textile and Clothing Products, WT/DS 34/AB/R Products, WT/DS 34/AB/R (Oct. 22, 1999) (adopted Nov. 19, 1999)

in December 2003 that the term “non-discriminatory” in the 1979 Enabling Clause required “that identical tariff preferences under GSP schemes be provided to all developing countries without differentiation except for the implementation of *priori* limitations”⁴¹ and preferential treatment for certain LDCs was hailed as a major success for India. The finding of the panel was modified in appeal; nonetheless, the panel as well as the Appellate Body decision led to significant improvement in clarity on the operation of the GSP schemes. India’s capacity to effectively participate in trade negotiations drastically improved during this period. In fact, India’s experience of dealing with some of these disputes provided significant guidance to other developing countries in participating in dispute settlement matters.

It should be noted that, in EC - Bananas III, one of the early cases decided under the WTO dispute settlement process, the Appellate Body explicitly ruled that private lawyers could represent and make pleadings at oral hearings on behalf of a Member.⁴² After this ruling, a number of developed and developing country Members of the WTO, including India, started using specialized private lawyers and law firms for WTO dispute settlement⁴³.

⁴¹ . Panel Report, European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, ¶ 7.161, WT/DS246/R (Dec. 1, 2003)

⁴² Appellate Body Report, European Communities – Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R (Sep. 9, 1997) (adopted Sep. 25, 1997) [hereinafter EC – Bananas] (“[W]e rule that it is for the WTO Members to decide who should represent it as members of its delegation in in an oral hearing of the Appellate Body.”)

⁴³ Arthur E. Appleton of Lalive and Partners appeared for India in the US – Shrimp/Turtle dispute, Frieder Roessler appeared for India in the India – Patents, India – QR See Gregory

During the Uruguay Round negotiations, India had only a limited offensive agenda; to seek the elimination of quotas and other restrictions on textiles and apparel items in leading developed country markets.

2.10 An Emerging India in WTO Dispute Settlement

By the time of the Cancun Ministerial, India had already emerged as a powerful influence in WTO negotiations and dispute settlement⁴⁴. Therefore, the developments post-2003 should be looked at in a different context. Although the selection of this particular year has been arbitrary, there is every reason to think that India's stature in the WTO system underwent a major change around this time. India was no longer considered as a "force that could

Shaffer, *The Challenges of WTO Law: Strategies for Developing Country Adaptation*, 5 *WORLD TRADE REV.* 177 (2006). Brussels based law firm Vermulst Waer & Verhaeghe (VWV) appeared in the EC – Bed Linen dispute and India – Auto disputes; VERMULST, WAER & VERHAEGHE, available at: <http://www.vvgb-law.com/publications/Edwin%20Vermulst/Zeroing%20in%20on%20zeroing.pdf>.

US law firm Squire Sanders assisted India in US – Steel plate Mihaela Papa, *Emerging Powers in International Dispute Settlement: From Legal Capacity Building to a Level Playing Field*, 3(3) *J. INT'L DISPUTE SETTLEMENT* 1, 12 (2012). Krishnan Venugopal, Profile of Krishnan Venugopal, available at: <http://www.itechlawindia.com/2009/KrishnanVenugopal.html> a New Delhi based lawyer has been involved in disputes such as India – Patents, India – QR, India – Auto, EC – GSP and US – Customs Bond Directive, Appellate Body Report, United States – Customs Bond Directive For Merchandise Subject to Anti-dumping/ Countervailing Duties, WT/DS/AB/345/R (July 16, 2008) (adopted July 28, 2008) [hereinafter US – Customs Bond Directive]. either alone or jointly with other lawyers. During 2002-03, India engaged the Advisory Centre on WTO Law (ACWL) in two disputes, namely, the EC – GSP and the US – Rules of Origin disputes. During this period, India predominantly depended on foreign lawyers including ACWL, and the concept of domestic legal capacity building was not high on the agenda of the Indian government at that time. Papa, *Emerging Powers in International Dispute Settlement*, , at 14 (noting that emerging countries such as Brazil and India have been not consistent in supporting the private legal sector in WTO dispute settlement.)

⁴⁴ Amrita Narlikar, *India and the World Trade Organization*, in *THE WORLD TRADE ORGANIZATION: A VERY SHORT INTRODUCTION* 270, 272 (Steve Smith et al eds., 2005).

throw the negotiation process into disarray”, but was considered as a contributor to the coalition building process. As David Deese notes in his work while referring to Brazilian and Indian leadership on the Doha negotiations, “[f]or the first time there was also a shared structural leadership beyond the United States and the EU at the heart of the international trade negotiations.⁴⁵” Various developing country coalitions that emerged in the run up to the Cancun Ministerial are testimony to India’s leadership in trade negotiations along with other developing countries.⁴⁶

2.11 India and WTO Disputes: Challenges

India’s role in the WTO negotiating process is well known. In the words of Marc Galanter, there are two types of litigants: one-shotters, who take occasional recourse to courts, and repeat players, who are engaged in similar disputes over an extended period of time.⁴⁷ Repeat players have long-term interests and play for the rules.

⁴⁵ David Deese, *WORLD TRADE POLITICS: POWER, PRINCIPLES AND LEADERSHIP* 153-55; see also Gregory Shaffer et. al., *The Trials of Winning at the WTO: What Lies Behind Brazil’s Success*, 41 *CORNELL INT’L L.J.* 383, 389 (2008).

⁴⁶Ujal Singh Bhatia, *G-20- Combining Substance with Solidarity and Leadership*, in *REFLECTIONS FROM THE FRONTLINE: DEVELOPING COUNTRY NEGOTIATORS IN THE WTO* (Pradeep S. Mehta ed., 2012)

⁴⁷Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits Legal Change*, 9 *LAW & SOC’Y REV.* 95, 97 et seq. (1974) (provides a socio-legal analysis of dispute settlement in the U.S. legal system); see also Alvaro Santos, *Carving out Policy Autonomy for Developing Countries in the World Trade Organization: The Experience of Brazil and Mexico*, 52 *VIRGINIA J. INT’L L.* 551, 573 (2012).

In terms of the number of disputes (both as complainants and respondents), India tops the list of developing country users of the WTO dispute settlement system. In the last 20 years, India has filed cases mainly against various high income and upper middle income countries. The only exception to this list is Turkey, which is a low middle-income country. India has used the dispute settlement process to seek remedies against countries which it would not have been able to do in a power oriented system.

Trade policy in India is primarily the responsibility of the Ministry of Commerce and Industry (MoCI) and it plays a key role in defining and formulating the trade and external commercial policy.⁴⁸ The MoCI occupies a unique and special space in trade policy governance; it used to formulate policy largely in isolation without necessarily seeking the concurrence of other branches of the government. Even the Ministry of External Affairs (MEA) has a limited role in this area. The MoCI also negotiates bilateral and regional agreements. However, the consistency and harmony of domestic and external policies is addressed at the Union Cabinet level headed by the Prime Minister with the assistance of advisory committees. Before an important policy measure is formulated and adopted, inter-ministerial consultations with key Ministries such as the Ministry of Finance (MoF) and Ministry of External

⁴⁸Official Website of the Department of Commerce, Ministry of Commerce and Industry, Government of India, available at: http://commerce.nic.in/trade/international_trade.asp?id=1&trade=i.

Affairs (MEA) is invariably undertaken. Ministry of Textiles (MoT), Ministry of Agriculture (MoA) and other nodal Ministries are involved on a case by case basis. Moreover, there is a Standing Committee of the Cabinet formed to advise the Prime Minister on WTO matters.⁴⁹ The Standing Committee of the Cabinet is invariably consulted on negotiating positions and strategies, and the Prime Minister and his office is constantly kept informed of the progress and status of the negotiations.⁵⁰ The Commerce Minister is also bound to brief the Parliament with respect to the developments in the negotiations.

In addition, a separate institutional mechanism known as Trade and Economic Relations Committee (TERC) has been constituted in 2005 to draw up the extent, scope and operational parameters of India's economic relations with other countries in a co-ordinated and synchronised manner. TERC is chaired by the Prime Minister and serviced by the Prime Minister's Office.⁵¹

Although the current structure of trade policy formulation is working in India, inter-ministerial coordination can be delaying at times. Again, the state governments whose policies may have an impact on India's WTO commitments need to be consulted on a regular basis. This is particularly

⁴⁹See Composition and Functions of the Cabinet Committees (as on Aug. 30, 2011), at 9, available at: http://cabsec.nic.in/files/archive/cabinet_committees_30.08.2011.pdf.)

⁵⁰ Prior to the finalization of a note for the Union Cabinet or the Cabinet Committee, the concerned issues are discussed at a Committee of Secretaries (CoS) or a Group of Ministers (GoM) to arrive at a consensus on the contentious matters. Interview with an official in the Govt, of India, [Name Withheld], in New Delhi (April 28, 2013) (on file with author).

⁵¹ TERC has met eighteen times until 2012 and has been instrumental in determining the mandate for negotiating groups in a number of free trade agreements involving India. Sujay Mehdudia, The PM-headed panel for early ASEAN Agreement, THE HINDU, Nov. 3, 2012

important when the subject matter of the governmental policy falls within the concurrent list of the Indian Constitution. The concurrent list is a list of subjects on which both the union and the state governments have a right to legislate.¹²⁸ In the *India – Additional Duties*⁵² dispute, India faced challenges from the United States and European Union regarding its duty regime on imported wine and spirits. The additional duty was originally introduced by the federal (Union of India) government in lieu of the incidence of state level excise duties on domestically manufactured wine and spirits at the point of importation⁵³. Since different states apply different rates of excise duty, the uniform rate of the border adjusted duty in certain cases exceeded the equivalent rate of state duty leading to a WTO complaint. One of the options to deal with this problem was to eliminate additional duties, but such a step could have created a bias against domestically manufactured goods. In such situations, coordination between various state governments in India is necessary to formulate a coherent and uniform system of internal taxation which is consistent with India's WTO obligations.

⁵² Appellate Body Report, *India – Additional and Extra-Additional Duties on Imports from the United States*, WT/DS360/AB/R (Oct 30, 2008).

⁵³ WTO Members may use customs services to collect internal charges in respect of imported products and may make the importation of products conditional upon the payment of charges equivalent to internal on like domestic products. See Frieder Roessler, Comment, *India – Additional and Extra-Additional Duties on Imports from the United States*, American Law Institute Reporters Studies on WTO Law (2009), available at: [http://www.ali.org/doc/wto/wto2008/7%20Additional%20Import%20Duties%20\(India\)%20Comment.pdf](http://www.ali.org/doc/wto/wto2008/7%20Additional%20Import%20Duties%20(India)%20Comment.pdf)

India is one of the leading initiators of anti-dumping actions in the world. India has initiated more anti-dumping action than any other country in the world ever since the establishment of the WTO⁵⁴ and has been largely fortunate not to be involved in any long drawn dispute with any other WTO country. As Mark Wu notes, India's major trading partners such as the US and the EU have not viewed India's anti-dumping regime as problematic.⁵⁵ Although the EC challenged⁵⁶ a number of anti-dumping actions (27 investigations) by India against EC member countries, the dispute was not actively pursued. A number of Indian lawyers have gained significant experience in antidumping investigation and litigation.⁵⁷

The official body in India administering anti-dumping measures, namely the Directorate General of Anti-dumping and Allied Duties (DGAD), has come of age in handling complex investigations on a wide variety of products.

India is widely considered as one of the most successful developing country

⁵⁴ World Trade Organization, Anti-dumping Investigations by Reporting Member from 01/01/1995 to 30/06/2012, available at: http://www.wto.org/english/tratop_e/adp_e/AD_Initiations By Rep Mem.pdf.

⁵⁵ Mark Wu, Anti-dumping in Asia's Emerging Giants, 53 HARV. J. INT'L. L. 1, 23 (2012) (noting that on an overall rule-of-law perspective, both India and China are in compliance with international treaty obligations on Anti-dumping).

⁵⁶ Request for Consultation by the European Communities, India – Anti-Dumping Measures on Imports of Certain Products from the European Communities, WT/DS304/1 (Dec 8, 2003) (after consultation between India and the EC, mid-term reviews were initiated in certain cases, which seemed to result in a solution). See Satoru Taira, Tara Hamda and Naofumi Makino, India, in ANTI-DUMPING LAWS AND PRACTICES OF NEW USERS 165, 198 (Junji Nakagawa ed., 2007) [hereinafter ANTI-DUMPING LAWS AND PRACTICES OF NEW USERS].

⁵⁷ Chambers and Partners, Asia Pacific Guide for Lawyers (2011), available at: http://www.chambersandpartners.com/Asia/Editorial/41754#org_112542.

users of the WTO dispute settlement system. India has achieved significant capacity in WTO dispute settlement on account of a number of factors, which include, the emergence of India as a strong and powerful influence in international trade negotiations, the rise of India as one of the leading users of trade remedy instruments, the exposure of legal practitioners and consultants to complex international trade disputes and methods of adjudication, India's participation in some of the most high profile disputes, the ability of the burgeoning private sector firms to explore market access potential in third country markets, etc. A confluence of these factors has helped India in gaining experience and expertise in WTO litigation and, more importantly, in building capacity across sectors and stakeholders.

2.12 Legal Effect of WTO Decisions

After the DSB adopts a report of a panel (and the Appellate Body), the conclusions and recommendations contained in that report become binding upon the parties to the dispute. The DSU states that, when the parties cannot find a mutually agreeable solution, the first objective is normally to secure the withdrawal of the measure found to be inconsistent with the WTO Agreement. The panel and the Appellate Body then concludes by recommending that the Member concerned bring its measure into conformity with WTO law, the DSU adds that prompt compliance with the recommendations or rulings of the

DSB is essential in order to ensure the effective resolution of disputes. An adopted panel and Appellate Body report is also binding on the complainant.

2.13 Analysis of selected WTO Agreements in the context of right to food.

2.13.1 Agreement on Agriculture(AoA):

Agriculture happens to be one of the most protected sectors in all the countries without any exceptions, and therefore an agreement on the agricultural issues have always been evading and debated strongly by all the countries involved in trade in agriculture.

The 1986 Ministerial Declaration, which launched the Uruguay Round, put agriculture at the heart of the negotiations and declared that “there is an urgent need to bring more discipline and predictability to world agricultural trade by correcting and preventing restrictions and distortions including those related to structural surpluses so as to reduce the uncertainty, imbalances and instability in world agricultural markets”⁵⁸. The entry into force of the AoA in 1995 was the first step towards agricultural trade to a rules-based system and to initiating a process of trade liberalization⁵⁹. The preamble to the Agreement recognizes that the agreed long-term objective of the reform process initiated by the Uruguay Round reform programme is to establish a fair and market-oriented agricultural

⁵⁸GATT Ministerial Declaration on the Uruguay Round of Multilateral Trade Negotiations, adopted in Punta del Este, Uruguay, on 20 September 1986, *ILM* 25(1986) et seq.

⁵⁹The AOA is an integral part of the WTO Agreements. It is annexed to the Final Act embodying the results of the Uruguay Round of Multilateral Trade Negotiations, *UNTS* Vol. 1867 No.31874, page 410

trading system. The reform programme comprises specific commitments to reduce support and protection in the areas of domestic support, export subsidies and market access, and through the establishment of strengthened and more operationally effective GATT rules and disciplines. The Agreement also takes into account non-trade concerns, including food security and the need to protect the environment, and provides special and differential treatment for developing countries, including an improvement in the opportunities and terms of access for agricultural products of particular export interest to these Members.

The Agreement defines agricultural products and establishes a number of generally applicable rules with regard to trade-related agricultural measures, primarily in the areas of market access, domestic support and export competition. These rules relate to country-specific commitments to improve market access and reduce trade-distorting subsidies which are contained in the individual country schedules of the WTO Members and constitute an integral part of the GATT. The Agreement establishes a Committee on Agriculture to oversee the implementation of the AOA and affords Members the opportunity of consulting on any matter relating to the implementation of commitments, including rule-based commitments.

2.13.2 Agreement on Trade Related Aspects of Intellectual Property Rights(TRIPS)

Intellectual property protection has been extended to a wide range of products relevant to food and agriculture. A large part of the population in developing

countries depends on the production and sale of agricultural products. The TRIPS Agreement, which came into effect on 1st January 1995, is to date the most important and comprehensive multilateral agreement on intellectual property. In relation to right to food, one predominant concern with TRIPS is its potential impact on the public's access to genetic resources. There are also issues relating to the presence of TRIPS protection that facilitates the development of mono-agricultural practices as opposed to diversifying agro-biodiversity and the use of locally adapted plant varieties.⁶⁰

2.13.3 Agreement on Application of Sanitary and Phytosanitary Measures(SPS)

The SPS Agreement addresses a category of health and safety regulations known as “Sanitary and Phytosanitary Measures”- measures that members adopt to protect life or health of humans, animals or plants within their territories from risks posed by pests, diseases, food additives, or contaminants.

A strong component of the right to food is the guarantee of access to safe and nutritious food to meet dietary needs and food preferences. The SPS Agreement offers a sanctioned method to ensure this through import control although it can also impede market access by rendering it more difficult to meet importing country standards. The use of SPS Measures as a mode of disguised protectionism is worrisome for developing country exporters who see stricter

⁶⁰Council of Canadians(2003), Crossroads at Cancun: CCIC Brief for the Fifth WTO Ministerial, available at <http://www.ccic.ca/devpol/cancun/ccic-cancun-brief.pdf> at 28.

measures introduced when there are agricultural surpluses in developed country markets.⁶¹ They also represent a high cost for developing countries in introducing the proper SPS measures consistent with importing country requirements, despite the ability to receive technical and financial assistance under SPS agreement.⁶² Some developing countries have expressed concern about potential abuse of the SPS agreement to compensate for other tariff barriers to their exports that have fallen⁶³. One strong motivation for the introduction of the SPS agreement is to develop a degree of harmonized standards to combat agricultural protectionism.⁶⁴ The SPS agreement establishes the rules governing the domestic application of human, animal and plant health standards for imports. It permits WTO members to apply measures, to protect human, animal or plant life or health.⁶⁵ Food safety measures, which can immediately impact the right to food based on quality and nutritional value could fall under the SPS agreement disciplines. SPS measures must be based on scientific principles and be consistent with international standards.⁶⁶ Measures can be taken to protect against risks associated with diseases, pests, additives, contaminants, toxins and

⁶¹Diaz-Bonilla (2002) at 37.

⁶²Articles 29 and 30.

⁶³Murphy (2001) at 24.

⁶⁴G. Marceau & J. Tractman (2002) "A Map of the WTO Law of Domestic Regulation of Goods" (2002)

⁶⁵JWT 811-881;D. Roberts (1998) "Preliminary Assessment of the Effects of the WTO Agreements on Sanitary and Phytosanitary Trade Regulations", (1988) 1 *JIEL* 377

⁶⁶Art. 2.1. A corollary provision in the Technical Barriers to Trade Agreement (TBT) allows states to apply technical regulations with the "protection of human health or safety, animal or plant life or health be a legitimate objective of such regulation". Ultimately, the TBT Agreement would not be applicable to member's sanitary and phytosanitary measures defined under the SPS

disease-causing organisms in foods, beverages and feedstuffs. They must be non-discriminatory and not represent a disguised restriction on international trade although the appropriate level of protection is still the prerogative of the WTO member. The SPS measure, indicating how to attain the chosen level of protection, is subject to the scrutiny of the SPS Agreement. The means to be chosen to reach the sought objective are assessed under Article 5.6, which looks at whether: another SPS measure is reasonably available taking into account technical and economic feasibility: the chosen measure achieves the Member's desired level of sanitary or phytosanitary protection: and whether another measure is significantly less restrictive to trade than the chosen measure.⁶⁷

2.14 Conclusion

The WTO provides the institutional and legal foundation for the new multilateral trading system that came into being during 1995. The Agreement establishing the WTO is a comparatively short agreement that sets out its role, structure and powers. It is also the first text of permanent importance in the package of agreements signed in Marrakesh at the end of the UR negotiations. The WTO

Agreement although states may prefer to rely on the TBT Agreement since there is a lower scientific threshold to upload a measure)

⁶⁷Appellate Body Report, Australia-Measures Effecting Importation of salmon, WT/DS18/AB/R, para194

⁶⁸. Preamble, para.4.

Agreement creates an entirely new international organization to administer “an integrated, more viable and durable multilateral trading system encompassing the GATT, the results of past liberalization efforts, and all of the results of the UR of Multilateral Trade Negotiations”.

CHAPTER - 3

**ENFORCING THE RIGHT TO FOOD IN THE WTO ERA: A
CRITICAL ANALYSIS OF THE AGREEMENT ON AGRICULTURE**

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3.2 Agriculture in the Uruguay Round

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3.15.4 Contention of Developed Countries

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CHAPTER-3

ENFORCING THE RIGHT TO FOOD IN THE WTO ERA: A CRITICAL ANALYSIS OF THE AGREEMENT ON AGRICULTURE

3.1 Introduction

Of the world's poor and food insecure, two-thirds live in rural areas of developing countries¹ depend on agriculture for their immediate livelihoods and future prospects.² Agriculture remains the economic driving force and agricultural growth often the corner stone for poverty reduction. While in the industrialised countries only five per cent of their labour force is employed in the agricultural sector, as much as 70 percent are engaged in agricultural activities in low-income economies.³ It is also worth noting that while farmers in poor countries derive most of their income from agricultural activity, a major part of the farmer's income in rich countries comes from agricultural subsidies⁴. Appropriate agricultural policies, including agricultural trade

1. IFAD, Rural Poverty Report, 2001 – The Challenge of Ending Rural Poverty, 2001,1;
FAO, The State of Food and Agriculture, 2005, Agriculture Trade and Poverty: Can Trade Work for the Poor? 2005, 61

2. In Least Developed Countries(LDCs) the poverty rate for rural households reaches almost 82 per cent; World Bank, Global Economic Prospectus, 2004,106.

3. FAO (2003)

4. Carlos A Primo Braga, Kjersti Brokhaug, Agriculture and Doha Development Agenda(DDA), Back ground Note, Debate on agricultural trade organized by the Working Group on Trade of the Parliamentary Network on the World Bank(PNoWB). This note relies extensively on Aksoy and Beghin (2005).

policies, are an essential component of a much wider bundle of measures necessary to realise their right to food.

The WTO Agreement on Agriculture (AOA), concluded at the end of the Uruguay Round (UR) of Multilateral Negotiations, brought in new rules on agricultural trade, one of the most distorted and fiercely protected sectors. The AoA, the first international accord of its kind in the agricultural sector, was presented as a significant step towards structural change in global food markets which would strengthen right to food through fair trade.⁵ Up to 1995, the rules of the GATT were largely ineffective in disciplining key aspects of agricultural trade. In particular, export and domestic subsidies came to dominate many areas of world agricultural trade, while the stricter disciplines on import restrictions were often flouted. The UR negotiations went a long way toward changing all that.⁶

3.2 Agriculture in the Uruguay Round(1986-1994)

In 1986, the Punta del Este Ministerial Declaration, which launched the Uruguay Round, put agriculture at the heart of the negotiations and declared that “there is a urgent need to bring more discipline and predictability to world

⁵ Shona Hawkes and Jagjit Kaur Plahe, *The WTO's Agreement on Agriculture and the Right to Food in Developing Countries*, *Monash University Business and Economic Working Papers*, 4/10, May 2010

⁶Pranav Kumar. *Implementation of the WTO Agreement on Agriculture in India, The reality of Trade: The WTO and Developing Countries*, *North South Institute*, 2000

agricultural trade by correcting and preventing restrictions and distortions including those related to structural surpluses so as to reduce the uncertainty, imbalances and instability in world agricultural markets”⁷. The entry into force of the AoA in 1995 was the first step towards subjecting agricultural trade to a rules based system and to initiating a process of trade liberalisation. After eight years of tough talks and the signing of the Marrakesh Agreement, a new multilateral framework to encourage the gradual liberalisation of agriculture was set up within the World Trade Organization.

On the basis of the AoA, Member States undertook to implement a programme to reform agricultural policies in force.⁸ The core objective of AoA is to establish a fair and market-oriented agricultural trading system. Its implementation period was six years for developed countries and nine for developing countries, starting with the date the agreement came into effect - January 1, 1995. These dates are now extended under a built-in provision of AoA of own review and renewal.⁹ The reform programme established binding commitments in three major areas called the three pillars.

⁷GATT, Ministerial Declaration on the UR, on 20 September 1986, *ILM* 25(1986) 1623 et seq

⁸ Over the period 1995-2000 for developed countries and 1995-2004 for developing countries

⁹Kaliappa Kalirjan, Kanhaiya Singh, India and the WTO's Agreement on Agriculture (A-o-A), Invited paper prepared for presentation at the International Association of Agricultural Economists Conference, Gold Coast, Australia, August 12-18, 2006

3.2.1 Market Access

Market Access refers to the conditions for importing goods into a country. It aims to reduce border obstacles to imports of agricultural products, such as taxes and duties – commonly known as tariffs. Furthermore, countries had to abolish restrictions on the quantity of agricultural goods entering their markets. All other barriers that were not tariffs, known as ‘non-tariff barriers’ and including health standards or packaging requirements, had to be converted into tariffs, a process known as “tariffication.” The Special Safeguard (SSG) is a tariff mechanism that provides temporary protection against sudden import surges or falls in world prices. However, only countries that underwent tariffication can apply the SSG. Many countries, particularly developing countries, did not undergo tariffication because they did not have a significant amount of non-tariff barriers.¹⁰

On the market access side, the Uruguay Round resulted in a key systemic change: the switch from a situation where a myriad of non-tariff measures impeded agricultural trade flows to a regime of bound tariff-only protection plus reduction commitments. The key aspects of this fundamental change have been to stimulate investment, production and trade in agriculture by (i) making agricultural market access conditions more transparent, predictable and

¹⁰The Agreement on Agriculture, 3D/ FORUM- ASIA

competitive, (ii) establishing or strengthening the link between national and international agricultural markets, and thus (iii) relying more prominently on the market for guiding scarce resources into their most productive uses both within the agricultural sector and economy-wide.

In many cases, tariffs were the only form of protection for agricultural products before the Uruguay Round, that led to the “binding” in the WTO of a maximum level for these tariffs. For many other products, however, market access restrictions involved non-tariff barriers. This was frequently, though not only, the case for major temperate zone agricultural products. The Uruguay Round negotiations aimed to remove such barriers. For this purpose, a “tariffication” package was agreed which, amongst other things, provided for the replacement of agriculture-specific non-tariff measures with a tariff which afforded an equivalent level of protection. The tariffs resulting from the tariffication process account, on average of the developed country Members, for around one fifth of the total number of agricultural tariff lines. For the developing country Members, this share is considerably smaller. Following the entry into force of the AoA, there is now a prohibition on agriculture-specific non-tariff measures, and the tariffs on virtually all agricultural products traded internationally are bound in the WTO.

Each WTO Member has a “schedule” of tariff concessions covering all agricultural products. These concessions, an integral part of the results of the

Uruguay Round, are formally annexed to the Marrakesh Protocol and have become an integral part of the GATT 1994. The schedule sets out for each individual agricultural product, or, in some cases agricultural products defined more generally, the maximum tariff that can be applied on imports into the territory of the Member concerned. The tariffs in the schedules include those that resulted from the tariffication process, which, in many cases, are considerably higher than industrial tariffs, reflecting the incidence of agriculture-specific non-tariff measures prior to the WTO. Many developing countries have bound their previously unbound tariffs at “ceiling” levels, i.e. at levels higher than the applied rates prior to the WTO.

Developed country Members agreed to reduce, over a six-year period beginning in 1995, their tariffs by 36 per cent on average of all agricultural products, with a minimum cut of 15 per cent for any product. For developing countries, the cuts are 24 and 10 per cent, respectively, to be implemented over ten years. Those developing country Members which bound tariffs at ceiling levels did not, in many cases, undertake reduction commitments. Least-developed country Members were required to bind all agricultural tariffs, but not to undertake tariff reductions.

As part of the tariffication package, WTO Members were required to maintain, for tariffied products, current import access opportunities at levels corresponding to those existing during the 1986-88 base period. Where such

“current” access had been less than 5 per cent of domestic consumption of the product in question in the base period, an (additional) minimum access opportunity had to be opened on a most-favoured-nation basis. This was to ensure that in 1995, current and minimum access opportunities combined represented at least 3 per cent of base-period consumption and are progressively expanded to reach 5 per cent of that consumption in the year 2000 (developed country Members) or 2004 (developing country Members), respectively.

The current and minimum access opportunities are generally implemented in the form of tariff quotas. In case of minimum access, the applicable duty was required to be low or minimal, low that is either in absolute terms or, at least, in relation to the “normal” ordinary customs duty that applies to any imports outside the tariff quota. These tariff quotas, including the applicable tariff rates and any other conditions related to the tariff quotas, are specified in the schedules of the WTO Members concerned.

While the vast majority of tariff quotas in agriculture have their origin in the Uruguay Round negotiations, a number of such commitments were the result of accessions to the WTO. These tariff quotas constitute binding commitments as opposed to autonomous tariff quotas which Members may establish at any time, for example, in order to stabilize the domestic price after a poor harvest.

3.2.2 Domestic Support

The second pillar of the AoA is the commitment to reduce trade distorting domestic support measures (Article 6 AoA).¹¹ Amongst the three pillars of the AoA, the provisions of this pillar have the most far reaching effects on countries' flexibility to design agricultural and food security policies. Domestic support ranges from direct budgetary transfers to other forms of market price support such as minimum artificial market prices. While direct support measures aim at guaranteeing certain levels of income, other forms of domestic support were originally implemented to stimulate domestic growth. Domestic support often leads to excess production at artificially high prices which, because of its elevated prices can only be exported with the help of export subsidies, or as food aid.¹² At the same time, the artificially high prices make imports, and even re-imports of subsidised exports attractive so that import restrictions are often needed to accompany domestic support measures. The EC, for example, had become the world's second largest sugar exporter despite the fact that its production costs were more than double those in many

¹¹The term "domestic support" in the AoA refers to subsidies provided to agricultural producers regardless of whether their products are exported ,i.e., to domestic subsidies. For details on domestic support, While in the WTO in general domestic subsidies are disciplined by the Agreement on Subsidies and Countervailing Measures (*UNTS* Vol.1869No.31874, page 14), the regulation of agricultural domestic support is left mainly to the AoA.

¹²FAO, *The State of the Food Insecurity in the World 2003*.

developing countries. At the same time, world market prices of sugar were below the cost of even the most efficient producers.¹³

The AoA establishes various categories of domestic support measures and foresees different commitments for each. Its basic approach is that all market price support, non-exempt direct payments and other non-exempt measures are to be reduced. They fall in the residual category of “Amber Box” measures. 35 countries(counting EC as one) provided such support during the 1986 – 1988 base period. They had to calculate their Base Total Aggregate Measurement of Support(Base Total AMS)¹⁴and to reduce it by 20 percent during the six – year implementation period in the six-year implementation period in the case of developed countries; and 13.3 percent over ten years in the case of developing ones. Least Developed countries(LDC's)¹⁵ had to bind their support levels, but

¹³World Bank, Global Economic Prospects.

¹⁴The Aggregate Measurement of Support(AMS) is defined as “the annual level of support, expressed in monetary terms, provided for an agricultural product in favour of the producers of the basic agricultural product or non-product specific support provided in favour of agricultural producers in general, other than support provided under programmes that qualify as exempt from reduction under Annex 2” (article 1(a) AoA). The Total Aggregate Measurement of Support means the sum of all domestic support provided in favour of agricultural producers, calculated as the sum of all aggregate measurements of support for basic agricultural products, all nonspecific aggregate measurements of support and all equivalent measurements of support (article 1(h) AoA). Annex 3 sets out how the AMS is to be calculated. The countries are Argentina, Australia, Brazil, Bulgaria, Canada Chinese Taipei, Colombia, Costa Rica, Croatia, Cyprus, Czech Republic, EC, Hungary ,Iceland, Israel, Japan ,Jordan, Korea, Lithuania, Macedonia, Mexico, Moldova, Morocco, Newzealand, Norway, Papua New Guinea ,Poland, Slovak Republic, Slovenia, South Africa, Switzerland, Liechtenstein, Thailand, Tunisia, United States, Venezuela; Committee on Agriculture, Special Session, Total Aggregate Measurement of Support, Note by the Secretariat ,Doc. TN/AG/S/13 of 27 January 2005.

¹⁵LDCs are those recognised by the Economic and Social Council of the United Nations.

have no reduction obligations. The reduction commitment applies sector-wide and is not product specific. Countries can therefore legally increase product-specific Amber Box support to any level provided the aggregate limit is respected. The AoA prohibits the introduction of new Amber Box measures. This restriction *de facto* favours those countries that have already used them and which can continue to do so within the limits of their reduction commitments.

The AoA exempts a number of domestic support measures from the reduction commitments these are *de minimis* exemptions, developing country exemptions, the Blue and the Green Box.

De minimis exception: all members may provide product specific support(E.g., price support for rice or cotton) up to a *de minimis* threshold, which is for developed countries 5 percent and for developing countries 10 percent of the total value of production of the agricultural product per year. An additional 5, respectively 10, percent of the value of total agricultural production may be granted for non-product specific support(e.g., for fertilizers, seeds etc.)This exemption has proved to be of little use to developing countries as most of them have been able to use only a small part of the 10 percent limit due to lack of financial resources.¹⁶

¹⁶Article 6 (4) AoA

Developing country exceptions: recognising that encouraging agricultural and rural development is an integral part of the development programmes of developing countries, article 6 (2) AoA exempts for these countries certain measures from the calculation of the total AMS. The two most important exceptions are investment subsidies which are generally available to agriculture in developing countries as well as agricultural import subsidies generally available to low-income or resource poor producers.¹⁷ This flexibility provided under article 6(2) AoA has, however, been little used.

Blue Box; the next category of support measures are the so-called Blue Box measures which were included at the instigation of the EC. Those are direct payments provided under production-limiting programmes such as compensation payments or US deficiency payments, both of which pay farmers the difference between a government target price for agricultural commodities and the corresponding market price.¹⁸ They constitute a half-way house between highly trade and production distorting Amber Box measures and those categorized as Green Box measures which are the least trade and production distorting, Blue Box measures are excluded from the reduction commitments.¹⁹

¹⁷ IGWG: India is the only developing country that comes anywhere close to its limits on domestic support

¹⁸ Another exception applies to domestic support to producers in developing countries to encourage diversification from growing illicit narcotic crops, article 6(1) AoA

¹⁹ (article 6(5) AoA), C Gonzales, "Institutionalizing Inequality: the WTO Agreement on Agriculture, Food Security and Developing Countries", *Columbia Journal of Environmental Law* 27 (2002), 438

Although the Blue Box allows clearly market distorting support, its acceptance was necessary to secure an overall distorting support, its acceptance was necessary to secure an overall agreement on the AoA-as the lesser evil to no regulation of trade in agriculture. As the overwhelming majority of WTO Members cannot use Blue Box measures, there is strong pressure to reduce or abolish them.

Green Box: finally, the Green Box exempts a number of policies from the reduction commitment.²⁰ These measures must meet the fundamental requirement of not having any trade distorting or production effects, or at least keep them to the 'most minimal' standard used by the AoA.²¹ They must also be provided through publicly-funded government programmes, not involve transfers from consumers and not have the effect of providing price support to producers. Twelve specific types of policies are listed under which support can be provided without limits. Amongst them are measures which are highly relevant to the development of the rural sector and developing countries, namely, investments in research, pest and disease control, training, extension,

²⁰To be exempted, payments under such production-limiting programmes must be based on fixed area and yields, or made on 85 percent or less of the base level of production or in the case of livestock payments, be made on a fixed number of head, article 6 (5) AoA

²¹Annex 2 AoA. For comprehensive information about green box measures reported by WTO members, see Committee on Agriculture Special Session, Green Box Measures: Note by the secretariat, Doc. TN/AG/S/10 of 8 November 2004

advisory, inspection, marketing and promotion, and infrastructural services such as electricity, roads, markets and port facilities etc.²²

In addition, some typical elements of food security policies are covered, such as domestic food aid, income safety-net programmes, public stockholding for food security purposes, and direct payments for relief from natural disasters.²³ These exceptions allow countries to meet their obligation to take measures to support domestically vulnerable groups, including those harmed by trade liberalisation measures, and those that cannot provide for their own needs. They need to be available in parallel to long-term investments in the agricultural sector.²⁴ Food safety nets, in the terminology of the AoA called “domestic food aid” are an indispensable component of any program to realise the right to food. They are permitted under the AoA²⁵ in relation to the provision of domestic food aid to sections of the population in need, if eligibility to receive support is subject to clearly-defined criteria related to nutritional objectives.²⁶ Aid may be provided in-kind (food) or cash (cash support or coupons) to allow eligible recipients to buy food whether at market or at subsidized prices. Food purchases by the government shall be made at

²²Annex 2(1) AoA

²³Cf Voluntary Guideline 8.4 and 8.14

²⁴Cf Voluntary Guideline 16.7 and 14

²⁵Cf.FAO’s “twin-track approach”:FAO, Anti Hunger Programme, Rome: FAO,2003, available at <ftp://Ftp.fao.org/docrep/fao/006/j0563e/j0563e00.pdf>

²⁶Annex 2 para 4 AoA defines domestic food aid outlays as “expenditures (or revenues foregone).

current market prices and the financing and administration of the ad shall be transparent. The provisions of food stuffs at subsidized prices with the objective of meeting food-stuffs at subsidized prices with the objective of meeting food requirements of urban and rural poor in developing countries on a regular basis at reasonable prices is explicitly considered to be in conformity with the AOA²⁷ Green Box measures are also necessary in order to support small-scale farmers in particular marginalized areas. The underlying principle of international trade to move production to where it is most efficient and to use economies of scale tends to lead to a consolidation of farms as competitive pressures begin to build up following trade liberalization. While productivity and competitiveness increase, farm labourers tend to become displaced and marginalized, crating hardship that involves typically small farmers and food-insecure population groups.

3.2.3 Export Subsidies

The third pillar of the AoA is the commitment to reduce export subsidies, i.e., subsidies contingent upon export performance. Article 1 (e) of AoA defines “subsidy” as a financial contribution made by a government or any public body conferring a benefit on the recipient. Export subsidies, are often regarded as

²⁷This requirement is in line with right to food principles as it ensures allocation according to need and based on clear criteria, and allows recipients who were unjustly denied access to such programmes to challenge decisions.

the most contentious and most harmful trade policy instrument. Potentially more competitive developing country exporters cannot compete with subsidized low- priced OECD commodities, leading in the long-term to the neglect of much needed investment in agriculture.²⁸ Developed countries account for the vast majority of export subsidies with the EC alone providing 90 percent.²⁹

Under AoA, each member undertakes not to provide export subsidies otherwise than in conformity with the AoA and with the commitment specified in its schedule.³⁰ Six types of export subsidies are subject to reduction commitments which relate both to expenditure on subsidies and quantity exported. For developed countries obligations are higher and implementation periods shorter than for developing countries, while least developed members are not required to undertake any reductions.³¹ Countries that had not provided export subsidies, namely the vast majority of developing countries, are prohibited from

²⁸ Annex 2 (4) note 6 AoA

²⁹ World Bank, Global Economic Prospectus) Export subsidies depress world market prices and coupled with the opening of markets, can cause import surges which displace domestic production

³⁰FAO, Trade Policy Briefs Related to the WTO Negotiations on Agriculture, No. 4 Export Competition-Appropriate disciplines for Eliminating Subsidies, 1, available at <http://ftp.fao.org/decrep/fao/007/j5013e/j5013e01.pdf>

³¹Article 8 AoA

introducing export subsidies,³² which creates structural imbalances similar to those highlighted under domestic support.³³

The proliferation of export subsidies in the years leading to the Uruguay Round was one of the key issues that were addressed in the agricultural negotiations. While under the GATT export subsidies for industrial products have been prohibited all along, in the case of agricultural primary products such subsidies were only subject to limited disciplines which moreover did not prove to be operational.

The right to use export subsidies is now limited to four situations:

- (i) export subsidies subject to product-specific reduction commitments within the limits specified in the schedule of the WTO Member concerned;
- (ii) any excess of budgetary outlays for export subsidies or subsidized export volume over the limits specified in the schedule which is covered by the “downstream flexibility” provision of Article 9.2(b) of the AoA;
- (iii) export subsidies consistent with the special and differential treatment provision for developing country Members (Article 9.4 of the Agreement); and

³²Under the Modalities Agreement, developed countries are required to reduce their expenditure on export subsidies to a level 36 percent below the levels existing in the 1986-1990 base period and to reduce the quantities benefiting from export subsidies by 21 percent, both over a six year implementation period; Modalities Agreement, Annex 8. For developing countries the equivalent figures are 24 percent and 14 per cent and the period is ten years

³³Article 3(3) AoA

- (iv) export subsidies other than those subject to reduction commitments provided that they are in conformity with the anti-circumvention disciplines of Article 10 of the AoA.

In all other cases, the use of export subsidies for agricultural products is prohibited (Articles 3.3, 8 and 10 of the Agreement).

3.3 Peace clause

The AoA contains a “due restraint” or “peace clause” which regulates the application of other WTO agreements to subsidies in respect of agricultural products. The provisions provide that Green Box domestic support measures cannot be the subject of countervailing duty action or other subsidy action under the WTO Agreement on Subsidies and Countervailing Measures, nor can they be subject to actions based on non-violation nullification or impairment of tariff concessions under the GATT. Other domestic support measures which are in conformity with the provisions of the AoA may be the subject of countervailing duty actions, but due restraint is to be exercised by Members in initiating such investigations. Further, in so far as the support provided to individual products does not exceed that decided in the 1992 marketing year, these measures are exempt from other subsidy action or nullification or impairment action. Export subsidies conforming to the Agreement on Agriculture are, to the extent relevant, covered by corresponding provisions. The commitments taken under the AoA and within the Members’ schedules are

part of an ongoing process. Already at the conclusion of the Uruguay Round, Members agreed to hold further negotiations on agriculture commencing one year before the end of the six-year implementation period. These negotiations will examine what further commitments are necessary to achieve the long-term objective of substantial progressive reductions in support and protection resulting in fundamental reform. The negotiations are also to take into account factors such as the experience gained during the implementation period, the effects of Uruguay Round reduction commitments on world trade in agriculture, non-trade concerns, special and differential treatment to developing country Members and the objective to establish a fair and market-oriented agricultural trading system.

3.4 The Ministerial decision

The Ministerial Decision on Measures concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries was adopted as part of the outcome of the Uruguay Round negotiations on agriculture. The Decision recognises that while the progressive implementation of the results of the Uruguay Round as a whole will generate increasing opportunities for trade expansion and economic growth to the benefit of all Members, during the reform programme least-developed and net food-importing developing countries may experience

negative effects in terms of the availability of adequate supplies of basic foodstuffs from external sources on reasonable terms and conditions, including short-term difficulties in financing normal levels of commercial imports of basic foodstuffs.

Ministers agreed to a number of mechanisms to ensure that the implementation of the results of the Uruguay Round does not adversely affect the availability of food aid at a level which is sufficient to continue to provide assistance in meeting the food needs of developing countries. These mechanisms include a review of the level of food aid established periodically by the Committee on Food Aid under the Food Aid Convention and the initiation of negotiations to establish a level of food aid commitments sufficient to meet the legitimate needs of developing countries during the reform programme; the adoption of guidelines to ensure that an increasing proportion of basic foodstuffs is provided in fully grant form; and agreement by the developed country Members to give full consideration in the context of their aid programmes to requests for the provision of technical and financial assistance to least-developed and net food-importing developing countries to improve their agricultural productivity and infrastructure.

Ministers also agreed to ensure that any agreement relating to agricultural export credits makes appropriate provision for differential treatment in favour of least-developed and net food-importing developing countries. The Decision recognizes that in case of short-term difficulties in financing normal levels of commercial imports, net food-importing developing countries may be eligible to draw on the resources of international financial institutions under existing facilities, or such facilities as may be established, in the context of adjustment programmes, in order to address such financing difficulties.

The Decision's follow-up is monitored by the Committee on Agriculture and it is subject to regular review by the Ministerial Conference. As part of a series of steps to make the Decision operational, the Committee established a WTO list of least-developed and net food-importing countries since the Decision describes but does not list the countries that are to be covered by the Decision. The list of net food-importing developing countries can be found here.³⁴

The AoA foresaw a substantial liberalization of agricultural markets through the adoption of stricter rules on the use of subsidies, tariffs, import restrictions and other agricultural policy measures, with exceptions made for LDCs under special preferential treatment. The success of the AoA in liberalizing

³⁴Kerstin Mechlem, *Harmonising Trade in Agriculture and Human rights: Options for the Integration of the Right to Food into the Agreement on Agriculture*, Max Planck Yearbook of United Nations Law, Vol.10, 2006

agriculture was less than expected but it has opened the door to future liberalization and concrete results are expected in near future.

3.5 The main actors in the agricultural negotiations

The main actors in the agricultural negotiating group set up for the Uruguay Round were the USA, the EC and, to a lesser extent, the Cairns Group. The USA was enthusiastic about promoting greater liberalisation in agricultural trade, and was keen to reduce the protection and support enjoyed by producers in the EC under the Common Agricultural Policy (CAP). The EC was much less amenable to far reaching liberalisation, but was keen to reach a workable compromise, that could be enshrined in the GATT, in order to minimise future trade friction between itself and the USA. The Cairns Group consisted of 14 countries, from both the developing and developed world, whose membership comprised Canada, Australia, New Zealand, Thailand, Indonesia, Malaysia, the Philippines, Argentina, Brazil, Colombia, Chile, Uruguay, Fiji and Hungary. As net exporters of agricultural commodities they generally shared a common interest in desiring greater liberalisation in farm trade; the Cairns contingent argued strongly for a reduction in the protectionism and domestic support measures enjoyed by farmers in developed countries. Developing countries outside of the Cairns group also had a strong interest in the negotiations,

although their influence over the proceedings was relatively minor. For the large group of developing countries which were net importers of food, the main concern was over the impact of the Round on the cost of food imports. Two other countries with a major interest in the outcome of the round were Japan and the Republic of Korea. These countries had highly protected domestic rice markets, and a strong domestic opposition to reform of the sector. However, despite the importance of these other interest groups, discussions in the Uruguay Round were dominated by the differences between USA and the EC, the resolution of which determined the rate of progress towards an agreement.

When the negotiations on agriculture began, the positions of the EC and the USA were still very far apart. To emphasise its commitment to liberalisation the USA opened the negotiations with an unrealistic demand for the "zero-zero" option. Introduced in July 1987, it indicated that:

'All agricultural subsidies and all quantitative restrictions on agricultural imports be phased out over a period of ten years, and that world health and safety measures be harmonised.'

This position found support amongst members of the Cairns Group, which was itself proposing an immediate freeze on price support followed by the phased reduction of such support. The EC was, however, totally opposed to across-the-board reforms, and wanted instead to negotiate concessions on a commodity by

commodity basis. The EC's demands focused primarily on the concept of "rebalancing", whereby access to the EC cereals market would only be negotiated in exchange for a concession that would allow it to reintroduce tariffs on non-cereal animal feeds. Tariffs for the latter had been bound at zero in an earlier round, and had since caused imported animal feeds to displace EC-grown cereals in the feeds used by EC livestock producers. Japan, like the EC was keen to protect its farmers from international competition, particularly in the rice sector, for which it sought special treatment. This demand was made on the grounds that rice played a unique role in the diet, culture and environment of the country, and should therefore be treated differently from other agricultural commodities. Japan was, however, strongly in favour of measures to reduce export subsidies; as a net importer of agricultural commodities Japan would not find commitments in this area particularly demanding.

Meanwhile, the demands of developing countries were focused on their need for special and differential treatment within the negotiations. They emphasised the fact that agriculture plays a major role in the development of their respective countries, and that new GATT rules and disciplines should not inhibit agricultural growth by placing excessive constraints on government support policies.

The concern over the Uruguay Round's impact on those developing countries that were net importers of food, lay in the prospect that reduced surpluses in the North, resulting from a cut in permitted levels of agricultural support and export subsidies, would raise the international price of food, and, hence, the cost of importing it. Consequently, developing countries argued that the magnitude of cuts in support and protectionism affecting them, should be smaller than for developed countries, and that they be given a longer period of time in which to fully implement any policy changes.

3.6 Midterm Review at Montreal

At the mid-term review in Montreal at the end of 1988, the negotiating parties in the agricultural group were as far apart as ever, and they had failed to produce an interim text for discussion by the group at the Montreal meeting. Meanwhile the Cairns Group refused to approve the draft texts of any of the other 14 negotiating groups until there was a text on agriculture. Following this failure, the main participants continued to search for a compromise. A breakthrough eventually came with the resumption of the mid-term review in April 1989. This culminated in the Geneva Accord, that saw the United States negotiators drop their demand for the zero-zero option, and led to the adoption of a series of short-term measures that involved a freeze in the current levels of domestic support, export subsidies and border protection.

The negotiating parties committed themselves once again to the long term objective of reducing government intervention in the above three areas of agricultural policy, and it was proposed that negotiations should proceed by seeking separate commitments in each of these three policy areas.

The EC and some other countries were reluctant, however, to adopt such an approach. The EC was particularly opposed to making substantial cuts in its export subsidies. Talks continued in the hope that an agreement could be achieved by December 1990, the original deadline for the conclusion of the Uruguay Round; but, the text presented there was rejected by the EC, and the deadline came and went without any agreement being reached. It was not until 1991 that the negotiators finally arrived at a consensus, whereby countries would agree to make concessions in areas import access, domestic support and export subsidies. These areas eventually became the three main pillars of the final agricultural agreement. But, before that could happen the negotiators would have to establish the level of concessions that would be made, and that took two more years of tough negotiating.

3.7 The Dunkel Draft and CAP reform.

At the end of 1991, the Director-General of the GATT presented a comprehensive Draft Final Act, known as the Dunkel Draft, in the hope of

bringing the Round closer to a conclusion. The Draft covered agriculture, as well as all of the other areas under negotiation in the Round. It included the first complete text on agriculture, in which quantitative proposals were presented with respect to concessions in each of the three major disciplines.

It was internal pressure within the EC to reform the Common Agricultural Policy, that gave the GATT negotiations the momentum that they needed. The MacSharry plan for CAP reform, that was eventually adopted in May 1992, included proposals that would bring the EC's agricultural policy much closer to meeting the targets outlined in the Dunkel proposals.

The most important element of the MacSharry plan under the GATT was the proposal to substitute a certain amount of domestic price support with direct payments to agricultural producers, as compensation for lower farm prices. These direct payments were to be contingent upon the adoption by EC producers of production limiting measures that would reduce the area of land under agricultural production.

However, although the EC formally agreed to implement the MacSharry plan in May 1992, some obstacles to a GATT agreement still remained. The EC was still reluctant to make substantial cuts in export subsidies, and a question hung

over whether the compensation payments of the CAP reform should be subject to domestic support reduction commitments.

3.8 The Blair House Accord

It was against this background that the American and EC negotiators undertook a series of bilateral discussions, that eventually led to an agreement, known as the Blair House Accord. The meeting that achieved this took place at Blair House in Washington in November 1992, and focused on making suitable amendments to the Dunkel Text. These amendments included the following:

- the 24 per cent cut in the volume of exports that was originally proposed, was reduced to 21 per cent
- the base period used for establishing the baseline from which export subsidies would be cut, was made more flexible, and had the effect of initially raising the level of permitted export subsidies;
- direct payments made under production limiting programmes, such as those made under the EC's CAP reform, and the USA's policy of deficiency payments and land set-aside, were made exempt from domestic support reduction commitments;
- commitments to reduce domestic support on a product by product basis were replaced by a commitment to reduce overall support to the agricultural sector.

The Blair House Accord broke the impasse in the agricultural negotiating group, and as the Uruguay Round drew to a close in December 1993, a consensus, on how to include agriculture within the framework of the GATT, and on the commitments that this would entail, was finally reached.

The Agreement on Agriculture was included in the "Final Act Embodying the Results of the Uruguay Round Multilateral Trade Negotiations". Thus, agriculture became subject to GATT disciplines.

3.9 The Marrakesh Decision

For some countries, the high amount of OECD domestic support and export subsidies has worked to their advantage. LDCs and net food importing developing countries have traditionally benefited from cheap, subsidised food stuffs from the major industrialised nations. For this short term benefit, however, they often paid the long term price of preventing their own agricultural growth and rendering their agriculture non-competitive. During negotiations of the AoA³⁵, it became clear that these countries could suffer, at least during a transitory period, from the expected rise in world food prices coupled what a decline in food aid motivated by support reductions in OECD countries. It was accepted that they need temporary assistance to make the

³⁵www.wto.org.

necessary adjustments to deal with higher priced imports and eventually to export.³⁶ In response the Marrakesh Decision was adopted, which constitutes a specific application of the principle of special and differential treatment. According to article 16 AoA, developed country members shall take such actions as is provided for within the Marrakesh Decision.

WTO Members agreed upon four mechanisms.

1. The first mechanism concerns food aid. Members decided to review the level of food aid established by the Committee on Food Aid under the Food Aid Convention and to initiate negotiations to establish a level of food aid commitments necessary to meet the legitimate interests of developing countries. In addition, they committed to adopting guidelines on increasing the proportion of food aid that is provided in fully grant form and/or in appropriate concessional terms.
2. Second, Ministers undertook to give full consideration in their aid programmes to requests for technical and financial assistance to improve agricultural productivity and infrastructure.
3. Third, they ensured that any future agreement relating to agricultural export credit markets(as mandated under article 10 AoA) will make provision for differential treatment;

³⁶UNCTAD, Impact of the Reform Process in Agriculture on LDCs and Net Food-Importing Developing Countries and Ways to Address Their Concerns on Multilateral Trade Negotiations, Doc. TD/B/COM.1/EM.11/2 and Corr.1 of 23 June 2000.

4. Finally, they agreed to enable countries experiencing short term difficulties in financing their normal level of commercial importers to draw on the resources of international financial institutions under existing or new facilities.

Between 1995 and 1999, LDCs and the Net Food Importing Countries indeed experienced increases in food bills and reductions in food aid, which they had difficulties dealing with, in part due to the poor implementation of the Marrakesh Decision. There are three reasons for the unsatisfactory implementation of the Marrakesh Decision.

- The Decision had no operational mechanisms for carrying out the support measures specified in it.
- There was no attempt within the WTO framework to estimate systematically the impact of the implementation of the AoA on LDCs and net-food importing developing countries
- There have been few country- specific impact studies of the AoA during the WTOs monitoring of the Decision.

With respect to the first commitment, a new Food Aid Convention was concluded. It neither increased the level of commitments³⁷ nor was aid distributed according to want. The World Food Programme (WFP) pointed out that only half of global food aid during the 1990s was actually targeted at those

³⁷Food Aid Convention, 1999, available at:<http://untreaty.un.org/English/notpubl/19-41c-eng.htm>

who needed it.³⁸ Due to the fact that food aid is measured in monetary terms rather than in tonnage, food aid availability is inversely proportional to need:

when prices are low, more food aid is obtainable.³⁹ The Marrakesh Decision avoids addressing the double edged sword of food aid.

In relation to the second commitment, it is unclear whether requests for technical and financial assistance to improve agricultural productivity and infrastructure have been received.⁴⁰ In any case, the volume and share of aid directed to agriculture has fallen to less than half the levels of the 1980s resulting in a large and growing investment gap between countries where the prevalence of hunger is high and those that have managed to reduce hunger.⁴¹ Assistance to agriculture is also not related to need.

With respect to export credits, the third commitment, little overall progress has been made until present, so that the question of special and differential treatment has not yet been fully addressed.

Regarding the fourth commitment concerning finance facilities, in 2002, the Inter-Agency Panel in Short –Term Difficulties in Financing Normal Levels if

³⁸Globalisation and its Impact of the Full Realisation of Human Rights, Report of the High Commissioner for Human Rights submitted in accordance with Commission on Human Rights Resolutions 2001/32, Doc.E/CN.4/200254 of 15 January 2002 para.29

³⁹IGWD, Food Aid and the Right to Food, Information Paper, FAO Doc. 1GWG RTFG/INF.6

40. Ibid. para.29

⁴¹FAO, The State of Food Insecurity in the World, 2003

Commercial Imports of Basic Food stuffs recommended, *inter alia*, exploring the feasibility of an inter –agency ex-ante financing mechanism.⁴² Little progress has been made since then. When world food prices are high concessionary financing could ensure that LDCs and new food importing countries could purchase food at reasonable prices in the international market. An ex-ante mechanism as recommended by the panel would be preferable to an ex-post revolving fund as ex-post financing cannot support food imports in times of need. Given the lack of progress on the Marrakesh Decision, the Doha WTO Ministerial Conference included it amongst the implementation issues in 2001.

3.10 Agricultural Reform: The lead up to Doha

Agriculture was at the heart of realising the development promise of the Doha Development round. Running from March 2000 to 2001, Phase One of negotiations saw 126 of the WTOs then 142 Members submit forty-five proposals and three technical documents.⁴³ The trade talks held during November 2001, were the first of nine negotiating rounds held since World War II to place the “needs and interests” of developing countries “at the heart”

⁴²Inter Agency Panel on Short-Term difficulties in Financing Normal Levels of Commercial Imports of Basic Foodstuffs, Reports of the Inter-Agency Panel, Doc.WT/GC/62 G/AG/13 of 28 June 2002, 44

⁴³Dilip K Da, The Doha Round of Multilateral Trade Negotiations and Trade in Agriculture, *J. WORLD TRADE*, 40(2), 259,274(2006)

of a round. The declaration stated “The majority of the WTO members are developing countries. We seek to place their needs and interests at the heart of the programme”.

The Doha Round was launched just after governments had approved the UN Millennium Development Goals(MDGs) to halve world poverty by 2015. MDG 8, on a ‘global partnership for development’ called for an ‘open, rules-based predictable, non-discriminatory trading and financial system’.⁴⁴ Proposals highlight a range of shared and specific concerns about the AoA’s impacts of a State to guarantee the right to food. Developing countries emphasized food production as a social safety net in their Phase One and Phase Two(March 2002 to March 2003) proposals. They also raised links between trade and social protection mechanisms such as state trading enterprise, state marketing boards and the general system of preferences. The need for sufficient policy space to respond to local food needs was also clear, and linkages were drawn between national security, political and economic stability and food policy.⁴⁵ Food aid disciplines were also debated. An end to the blue box and

⁴⁴Signed or sealed? Time to raise the debate on international trade talks, PANOS MEDIA TOOLKIT ON PRSPs-No.2 available at www.pano.org.uk/globalisation

⁴⁵WTO, Agreement on Agriculture: Special and Differential Treatment and a Development Box- Proposal to the June 2000 Special Session of the Committee on Agriculture by Cuba, Dominican Republic, Honduras, Pakistan, Haiti, Nicaragua, Kenya, Uganda, Zimbabwe, Srilanka and El Salvador, WTO Doc.G/AG/NG/W/74,1(28 Nov.2000)

reform or removal of green box in order to protect local production and livelihoods was a common theme.

3.11 Mini Ministerial Meeting-Geneva, 2008

On 21 July 2008, negotiations started again at the WTO's HQ in Geneva on the Doha round but stalled after nine days of negotiations over the refusal to compromise over the special safeguard mechanism. "Developing country members receive special and differential treatment with respect to other members' safeguard measures, in the form of a *de minimis* import volume exemption. As users of safeguards, developing country members receive special and differential treatment with respect to applying their own such measures, with regard to permitted duration of extensions, and with respect to re-application of measures.

Negotiations had continued since the last conference in June 2007. Around 40 ministers attended the negotiations, which were only expected to last five days but instead lasted nine days. During this conference, the U.S. Trade Representative Susan Schwab announced that the U.S. would cap its farm subsidies at \$15 billion a year, from \$18.2 billion in 2006. The proposal was on the condition that countries such as Brazil and India drop their objections to various aspects of the round. After one week of negotiations, many considered agreement to be 'within reach'. However, there were disagreements on issues

including special protection for Chinese and Indian farmers and African and Caribbean banana imports to the EU. The negotiations collapsed on 29 July over issues of agricultural trade between the United States, India, and China. In particular, there was insoluble disagreement between India and the United States over the special safeguard mechanism (SSM), a measure designed to protect poor farmers by allowing countries to impose a special tariff on certain agricultural goods in the event of an import surge or price fall.

3.12 Delhi Mini-Ministerial Meeting: Pledge to conclude Doha Round by 2010

In 2009, several countries called for negotiations to start again. The Director-General and Chair of the Trade Negotiations Committee Pascal Lamy visited India to discuss possible solutions to the impasse. A mini-ministerial meeting held in India on 3 and 4 September 2009 pledged to complete the round by the end of 2010.

3.13 Snapshot of Bali Trade Package

At the WTO's Ninth Ministerial Conference in Bali, Indonesia, December, 2003, the Bali Package was adopted which marked the historic progress for 12 year long Doha Round trade talk covering the four progress in the Doha Round Agenda including trade facilitation, agriculture, cotton production, as well as development and issues of LDCs. This Package represents the first

multilateral trade deal in nearly two decades; however, it covers only a small fraction of the Doha Round mandate and left the more difficult trade topics for future negotiations.⁴⁶ Prior to arriving at the Bali Ministerial Conference, WTO agricultural negotiators had selected five agricultural issues out of a much larger package of proposals that had been tabled in 2008 as part of the Doha Round agricultural negotiations.⁴⁷ The Bali Package included five agricultural issues:

1. Export subsidies and other policies known collectively as export competition;
2. Tariff Rate Quota (TRQ) administration focused on managing persistently under-filled quotas;
3. A temporary peace clause for a developing country's above-market purchases of commodities for food-security stockholding programs;
4. A proposed list of green-box-eligible general services of particular interest to developing countries; and
5. Cotton, in response to a proposal from four African members.

The first major implementation step under the Bali Agreement included a July 31, 2014, deadline for the WTO's General Council to approve a protocol to

⁴⁶Ibid. 44

⁴⁷CRS Report RS22927, WTO Doha Round: Implications for U.S. Agriculture

incorporate the Trade Facilitation Agreement (TFA) into the text of the WTO's legal agreements. Then, WTO members would begin to address a so-called post-Bali agenda which would include drafting a work program by the end of 2014 to conclude the Doha Round.

However, efforts to put the TFA in place were dealt a setback in July, when a small group of countries, led by India, raised concerns about the status of the WTO's work on food security issues and blocked consensus on implementing the TFA. India wanted a permanent solution to exempt such programs - in which governments buy commodities from farmers at above-market prices to distribute to the poor - from counting toward WTO subsidy limits.

WTO members failed to resolve the impasse ahead of the July 31 deadline, and the entire post Bali work came to a temporary standstill. The impasse was resolved in November 2014, when the United States and India reached an agreement to move forward with full implementation. As decision-making in the WTO is based on consensus among all members, the elements of the U.S.-India bilateral agreement were discussed with the full WTO membership in the interest at arriving at final and simultaneously agreed-upon decision.⁴⁸

⁴⁸Randy Schnepf, Agriculture in the WTO Bali Ministerial Agreement, Congressional Research Service Report, November 13, 2014

The Bali Agreement adopted by the WTO on December 7, 2013, was struck after the United States gave in to India's demand on food security and agreed to a temporary peace clause to shield the food subsidy programs of developing countries - including India's food subsidy program - from challenge under WTO rules⁴⁹. A key condition of this "interim solution" was that developing countries must take steps to make sure that the stocks procured under these stockholding schemes do not distort trade, nor affect the food security of others. The deal also set a 2017 deadline to negotiate a permanent solution to the food security issue, with an interim report due in 2015.

3.14 U.S.-India Agreement Resolves Impasse

On November 13, 2014, the United States and India reached an agreement on a set of measures intended to break the impasse in the work of the WTO to implement the agreements reached last December at the WTO Ministerial in Bali.⁵⁰

The bilateral agreement consists of two key elements:

- **Move the Trade Facilitation Agreement (TFA) Forward** - The TFA should be implemented without conditions, on the basis of a standard legal instrument for implementing new WTO agreements.

⁴⁹CRS Report RS20088, Dispute Settlement in the World Trade Organization (WTO): An Overview, by Daniel T. Shedd, Brandon J. Murrill, and Jane M. Smith

⁵⁰Doug Palmer, "India's Stance Throws WTO into Crisis," *Politico*, July 24, 2014

- **Understanding on Specific Food Security Programs** - A peace clause (i.e., a mechanism under which WTO members will not challenge food security stockholding programs under WTO dispute settlement procedures) will remain in place until a permanent solution regarding this issue has been agreed to and adopted.

The bilateral agreement also sets out elements for an intensified program of work and negotiations to arrive at such a permanent solution. As decision-making in the WTO is based on consensus among all members, the elements agreed between the United States and India will be presented for consideration by the full WTO membership.⁵¹

After years of uncompromising stances that continuously culminated in collapsed negotiations and less than optimum outcomes, the Bali Ministerial marked the first substantive breakthrough for the WTO since the launch of the Doha Round in 2001. Not only did the agreement serve to restore faith in a system that many had begun to be viewed as defunct, the package also paved the way for the implementation of multilateral trade rules that are expected to have large benefits for the global economy. With estimates of export gains from the trade facilitation agreement ranging at around one trillion dollars, this

⁵¹“WTO to Kick Off Meetings on Path Forward for TFA, Doha Next Week,” Inside U.S. Trade, September 11, 2014

ministerial conference has been lauded as the first concrete step towards the conclusion of the Doha Round.⁵²

To the extent that the Bali Agreement represented the low-hanging fruit of the agricultural negotiations, the contentious, last-minute nature of the final result, coupled with the almost minimalist nature of the “concessions” - modest movement on fill-in-rates on TRQs, agreeing to agree on export competition and general services, and possible back-sliding on distorting above market producer price supports as part of the food-security stockholding peace clause deal - left many trade analysts wondering if the truly ground-breaking Uruguay Round (UR) agreement of 1994 was a one-time event. The UR agreement achieved substantial concessions and commitments across all three pillars of agricultural negotiations - export competition, domestic support, and market access. India’s insistence on new concessions on food stockpiling - the green box already allows for unlimited food stockpiling for food security purposes, provided the food is purchased at market prices (not above-market prices as India proposes) - would appear to represent serious erosion on domestic support commitments that have already been achieved during previous negotiating rounds. Many take the view that, to achieve *bona fide* progress for agriculture in the next phase of multilateral trade negotiations, concessions will

⁵²“Trade Facilitation Deal Hangs in Balance as WTO Members Wait on India,” Inside U.S. Trade, July 24, 2014

have to be made across all three negotiating pillars simultaneously to avoid (or at least minimize) the potential for zero-sum results for any individual country. Furthermore, market observers suggested that WTO members in the developing country category (minus the truly less-developed countries) will have to accede to substantive market access, not just for the benefit of competitive export nations like the United States, but for the benefits that will accrue to their own domestic industries when access to lower priced goods from international markets results in lower product costs and greater choice for domestic consumers.⁵³

3.15 Tenth Ministerial Conference, Nairobi, December 2015

Ministers from the WTO's 162 member countries met at the Kenyan capital during December, 2015 for negotiations aimed at a deal to liberalize global trade. The meeting sparked much debate between the developed and developing countries over the issues of abolishing agricultural export subsidies and progress on the Doha Development Agenda. The meeting comes two years after ministers from WTO member countries reached a landmark deal in Bali on overhauling global customs procedures in the form of Trade Facilitation Agreement.

⁵³USTR, "FACT SHEET: U.S.-India Agreement on Trade Facilitation," Press Release, November 13, 2014, at <http://www.ustr.gov/about-us/press-office/fact-sheets/2014/November/US-India-Agreement-on-Trade-Facilitation>

3.15.1 Highlights of the Declaration

The five-page declaration at the Nairobi meeting reaffirmed the principles and objectives set out in the Marrakesh Agreement establishing the WTO. The elimination of agricultural export subsidies, new rules for export credits, and decisions on international food aid and exporting State Trading

Enterprises (STE's) make up an important part of the "Nairobi Package." The decision to fully eliminate any form of agricultural export subsidies is an historic decision and constitutes a significant step in the reform of agricultural trade. It ensures that countries will not resort to trade-distorting export subsidies and thereby levels the playing field for agriculture exporters. It is particularly meaningful for farmers in poor countries who cannot afford to compete with rich countries which artificially boost their exports through subsidization. Due to the high commodity prices in recent years, many countries have significantly reduced their export subsidies and only a handful of WTO members still use export subsidies, according to a WTO survey in 2015. The developed countries will immediately remove export subsidies, except for a handful of agriculture products and developing countries will do so by 2018, with a longer time-frame in some limited cases. In addition, developing countries will keep the flexibility of covering marketing and transport costs for agriculture exports until the end of 2023, while the poorest

and food-importing developing countries will enjoy additional time to cut export subsidies.

Export competition has been a long standing issue in the WTO's agricultural negotiations and the elimination of all forms of agricultural export subsidies constituted one of the United Nations Sustainable Development Goals(SDGs) launched in 2015. The proliferation of export subsidies in the years leading up to the Uruguay Round was one of the key issues that were addressed in these negotiations and they have remained a heated topic in recent years in the WTO. While export subsidies for industrial products have been prohibited for over 50 years, such subsidies in agricultural products were only subject to limited disciplines. It is finally agreed that members would "exercise utmost restraint" in using any form of export subsidy, and "ensure to the maximum extent possible" that progress will be maintained in eliminating all forms of export subsidies. The Nairobi decision represents a major step forward in agricultural trade by fully eliminating any form of agricultural export subsidies.

An important issue relates to the operations of state trading enterprises and their potential effects to circumvent the UR market access concessions and commitments to reduce exports subsidies. Since little was done during the Uruguay Round to bring more discipline to the activities of state trading enterprises, their effects on the effectiveness of the new UR rules in practice

becomes a critical issue. In addition, the ongoing accessions to the WTO of major developing countries with State Trading Enterprises(STEs), highlight the need to examine STEs and how to reduce their distortionary effects on trade.

3.15.2 India's resolve on agriculture at the meeting

The meeting, considered an important test for the Indian government because it was to be considered as to whether India would stand up for its poor farmers or succumb to pressure from the United States, which continues to oppose credible and developmental outcomes. India stressed the need for the WTO member countries to take up for discussion on a priority basis the issue of huge trade distorting farm subsidies of the rich countries and its consequent adverse impact on millions of resource poor and subsistence farmers in developing countries. Farm lobbies in the rich world have been, for decades, shaping the discourse and determining the destiny of these poor farmers in India. Reduction in the huge subsidies given to the farm sector in the rich countries, which was a clear mandate of the ongoing Doha Round negotiations with a 'development' agenda, is now not even a matter of discussion, leave aside serious negotiations.

The outcome of the conference has sent a mixed message. On a positive note, all members agreed for the first time to a legally binding deal to promote

agricultural trade by removing subsidies for farm exports. However, the final text showed that some members have given up on the Doha Round Agenda, a sign that recent regional trade deals have begun to weaken WTO. For India, contrary to what former Commerce Minister Anand Sharma has argued, the Nairobi conference outcome will not hurt Indian farmers. In reality, as a net exporter of agricultural products, the deal on agriculture holds potential for India. The Nairobi ministerial conference provided evidence of the way trade negotiations are likely to evolve. Three major stakeholders among developed countries, the US, EU and Japan, have begun to stitch together far reaching regional trade deals. Consequently, their need for WTO and the extent of concessions they are willing to offer there is declining. This does not bode well for many developing countries such as India as WTO provides a better platform to secure a fair trade deal. Even if multilateral trade deals in WTO have been limited, the dispute settlement mechanism of the organisation has worked to the advantage of developing countries. WTO does indeed remain relevant.

India's stake in subsequent WTO meetings remains high. For the moment, the prevailing system which supports India's PDS is insulated from legal challenges by other countries. But tough negotiations lie ahead before India secures a permanent solution. Also, a special safeguard mechanism to protect

Indian farmers from import surges or price falls needs to be flushed out in subsequent meetings. If there is a larger message for India's politicians, which came through in Nairobi, it is that domestic economic reforms need to be addressed immediately. A robust domestic economic structure is the only bulwark against an increasingly hostile trade environment.

3.15.3 Contention of the Developing Countries

The Conference saw a clash of Interests between developed and developing Countries. India, China and Indonesia on behalf of 47 developing countries, demanded comprehensive and balanced outcomes, particularly deliverables that would help resource-poor farmers in all the three core negotiating areas, viz., agriculture, non-agricultural market access and services.

In this regard, an LDCs package, has been agreed upon by all the members during the Nairobi meet, which would include duty-free, quota-free market access for LDCs, the LDC services waiver (to ensure preferences to LDCs in services trade) and preferential rules of origin.

India has expressed disappointment over non-reaffirmation of the long-stalled Doha Round, agreement on removal of cotton subsidy altogether by 01 January 2017, and a few other provisions related to phasing out of export subsidies.

3. 15.4 Contention of Developed Countries

The US and its supporters want a finite number of deliverables in which they themselves do not have to undertake any fresh commitments, including “export competition (in agriculture)”, some limited concessions for the poorest countries and transparency-related commitments.

The US and EU wants to launch new negotiations while pursuing unresolved issues in agriculture and other areas outside the Doha architecture. But a majority of WTO members want to continue with the Doha negotiations.

The biggest demand of the developed countries is to abolish agricultural export subsidies, so as to allow developing countries to better integrate themselves into the global market.⁵⁴

3.15.5 Contentious issues and on-going Debate

The main complaint about policies supporting domestic prices, subsidized production and subsidised exports is that they encourage over-production. This works as deterrent to imports and promotes low-priced dumping on world markets. However, there are also arguments in favour of subsidies, particularly in the case of net importers of agriculture products. Such countries do benefit from imports at suppressed prices⁵⁵. Nevertheless, depending on prolonged

⁵⁴“WTO to Kick Off Meetings on Path Forward for TFA, Doha Next Week,” Inside U.S. Trade, September 11, 2014.

⁵⁵*Ibid.*48

food aid program could render a country net importer of food due to the dependency created by circumstances and could discourage domestic production. Once such a vicious circle is created it becomes difficult to come out of it.

About 84 percent of farmer households in India survive with less than 2.0 hectare of land with average size of their holding being 0.63 hectare, while average size of all holdings in India is just about 1.4 hectare. Survival of such farmers is at stake if they do not get alternative means of livelihood. Where will these farmers get employment if Indian markets are flooded with foreign agricultural products under the market access program?

In India the product-specific support is negative, while the non-product specific support i.e., subsidies on agricultural inputs, such as, power, irrigation, fertilisers etc., is well below the permissible level of 10 per cent of the value of agricultural output. Therefore, India is under no obligation to reduce domestic support currently extended to the agricultural sector. Yet, subsidies are widely considered burden in India and they are being rationalized.⁵⁶ Subsidy constitutes almost 54 percent of the agriculture value added in OECD as compared to seven per cent in India. This figure will further go down when

⁵⁶ArchanaJatkar and ChenaiMukumba, Unpacking the Bali Package A Snapshot of the Bali Ministerial Decisions of the WTO Members, CUTS Centre for International Trade, Economics & Environment (CUTS CITEE),available at, www.cuts-international.org

taken as percentage of value of agriculture output. Opposition to subsidy is also from within than outside. It is not that, the farmers in OECD countries will become jobless if subsidies are removed. The population dependency on farm is extremely thin in these countries. It is not like India, where more than 60 per cent of the population depends on farm. In OECD countries the farmers can easily switch to better options quickly as demonstrated in New Zealand, which was heavily subsidizing its sheep farmers until 1984. The sheep farm subsidy was completely removed within a span of one year after 1984 and today New Zealand is one of the least subsidized countries among OECD countries, with a subsidy incidence of just about 0.3⁵⁷

3.16 Next Steps for Agriculture

Though India has demonstrated that there exists broad political support to its economic reform programme, as has been proved by the transition of several Governments in the last decade through the political space, agricultural trade policy reforms need to be accelerated much more than what has been done so far. The challenge is to mitigate the inefficiency that exists in the Indian agriculture to close the gap between its potential and actual performances through a proper policy framework. India being a net exporter in agriculture products, it has more to gain from the trade reforms. It has sufficiently high

⁵⁷See Panagariya, 2005

bound rates on most of the products and therefore, flexibility can be ensured against unfair competition. India does not have to worry about its subsidy, as it is already below the required line and it also does not have any domestic support to reckon with. All these place India in an advantageous position. Moreover, the on-going negotiations are likely to yield enough flexibility in product choice and tariff selection. A multilateral trading system is in the interest of India, given the fact that it is placed in such a situation where no clear group fits well. Therefore, India should work towards the success of the Doha round and in the meantime make use of the opportunity to reform its domestic market to bring in more efficiency. The interests of India are certainly at variance from the common interest of least developed countries, which became amply clear during the Tokyo and Doha Ministerials, when the least developed countries left India alone. Many of these countries are net importers of food and the subsidy in the exporting countries makes them better off.⁵⁸, a facility that was never available to India. The services sector for India is critical to its growth and increasing the pace of industrial growth is its necessity. With favourable bound rates for agriculture on board, the negotiating framework of India must be different from that of other developing countries. The situation is highly tenacious for India, particularly in view of the fact that the developed

⁵⁸Cooper 2004 and also see information uploaded at www.ewg.org/farm/

countries have managed to link agriculture subsidy with the market access in services and industry. If the European Union needs to do more on agricultural tariffs, and the US needs to do more on reducing agricultural subsidies, then the G-20 group of countries, where India is a key member, are also needed to do more on industrial tariffs. This is a hard ball game. Moreover, all these issues are dynamically linked to the future agenda of the WTO *inter-alia* in terms of substantial opening up trade in services; rules governing transparency in bilateral trade agreements, anti-dumping and subsidies; trade facilitation; trade & environment; WTO agreement on Intellectual Property Rights (TRIPS) and its relation with Convention on Bio Diversity (CBD), and extensions to geographical indication protection (GIs); Dispute Settlement and Aid for Trade. Traditionally, India has fallen prey to the group dynamics because its interests do not fully confirm to the least developed countries, whose cause it used to champion nor does it radically differ from those of developed countries, who it confronts. Therefore, the time has come for India to come out of ambiguity and take a rational step in the negotiation process to harness best of its own interests. Some sacrifices are worth taking in order to gain a wider market.⁵⁹

⁵⁹Agriculture policies in OECD Countries: Monitoring and Evaluation 2005, OECD, Paris, 2005

3.17 The AoA and the right to food

The WTO makes some mention of food security, although the AoA contains no reference to the right to food. The implications of the AoA for food security, particularly in the transition period of global structural reform of food markets, were recognised as a Non-Trade Concern(NTC) to be reviewed in the next negotiating Doha round. “Special and Differential treatment(S&D)-where developing countries and LDCs were allowed longer implementation periods and some exemptions on reform commitments-was also a mechanism to indirectly safeguard food security. Despite various references to food security, the WTO gives no clear definition of this term.⁶⁰

The main WTO concession to the right to food was the Marrakesh Decision, that allayed fears that the AoA would threaten food rights. It recognised that by winding back protectionist policies that artificially deflate food prices, agricultural trade liberalisation would raise global food prices. The Marrakesh Decision outlined non-legally binding commitments and mechanisms to address these impacts for Net Food Importing Developing Countries(NFIDCs) and LDCs. Responses included helping to fulfil-provide by providing food aid and fulfil-facilitate through short term financing of commercial imports;

⁶⁰Currently, there are three exceptions: bananas, rice and sugar where quotas exist. But the quotas are slated to end between 2006 and 2008

agricultural export credits; and financial assistance to improve agricultural infrastructure and production.

It did not address other scenario's where the AoA would impact food availability and access and did not take measures to respect and protect the right to food in low-food producing countries. Its creation fits a particular interpretation of free trade where net gains for those who 'win' under this system are considered large enough to compensate those who "lose". The imperative for "winners" to compensate "losers" is that even after providing compensation their net gains are greater than operating outside of perfect free trade. In this theory vulnerable States do not directly respect, protect and fulfil the right to food, but hope to secure transfer-based entitlements from other States or entities, such as Corporate Social Responsibility Programmes., UN agencies and NGOs. Despite world food price spikes in 1996 and the 2007-2008 food price crisis, the Marrakesh Decision has never been enacted because developed countries argue that there is insufficient proof of causality between the AOA and food insecurity.⁶¹

⁶¹Kaliappa Kalirjan, Kanhaiya Singh, India and the WTO's Agreement on Agriculture (A-o-A), Invited paper prepared for presentation at the International Association of Agricultural Economists Conference, Gold Coast, Australia, August 12-18, 2006

3.18 Implications of AoA on the Right to food

The AoA's stated long-term objective is "to provide for substantial progressive reductions on agricultural support and protection sustained over an agreed period of time, resulting in correcting and preventing restrictions and distortions in world agricultural markets"⁶² It was presented as a significant first step towards structural change in global food markets which would strengthen food security through free trade. Liberalisation of agricultural trade, though can bring important benefits, the AoA is believed to impose a one sided free trade model on poor countries, while rich countries continue to heavily subsidise their agricultural sector. These policies undermine the right to food, in the agriculture based economies. The AoA embraces the free trade approach, with the stated long term objective "to provide for substantial progressive reductions on agricultural support and protection sustained over an agreed period of time, resulting in correcting and preventing restrictions and distortions in world agricultural markets".

The impact of the AoA on the right to food is most immediately felt by marginalised and poor peasants and rural workers because these groups have no other source of income but the land. The WTO makes some mention of food security, although the AoA contains no reference to the right to food. The AoA

⁶². *Ibid.* 5

is one of the WTO's agreements, binding on all the members. The main features of the AoA are its 'three pillars' Domestic Support, Export Competition and Market Access, which attest to the lopsided nature of the agreement. The AoA has been criticised for categorising subsidies into trade distorting domestic subsidies(the amber box) which have to be reduced, and non-trade distorting subsidies(blue and green boxes) which escape disciplines and thus can be increased. The agreement prohibits subsidies to agricultural crops while exempting much of the subsidies of the developed countries through the amber box and the blue box. As efficient agricultural exporters press WTO members to reduce their trade-distorting 'amber box' and 'blue box' support, developed countries 'green box' spending has increased- a trend widely expected to continue. The green box subsidies do in fact distort trade, affect developing country farmers and can also harm the environment. This has allowed the rich countries to maintain or raise their very high subsidies by switching from one kind of subsidy to another.

Export Subsidies are considered to have more adverse effects on food security. Export subsidies are seen by developing countries to be the "most destructive trade policy instruments".⁶³ These allow for the export of agriculture surpluses at prices below production costs, which bring down and cause import surges

⁶³ Ibid. 5

and agricultural dumping in developing countries. Countries that use such subsidies can be seen to violate right to food obligations since the impacts of such measures can limit the availability and access to food in other countries where domestic production decreases.

Under Market Access, the agreement provides for tariff cuts on all agricultural products together with a minimum access volume for all agricultural products even if the country does not actually need to import them.⁶⁴ A particular concern regarding Market Access is if countries reduce tariffs local products might be displaced by imports. If the displacement concerns products that are mainly grown by small subsistence farmers, the incomes of the rural poor might plummet with devastating consequences for their food security.⁶⁵ Such transitions need appropriate companion policies which as historical experience show, take decades or longer to bear fruit. Countries therefore need to avoid opening their agricultural sectors to international competition too extensively and too quickly, as this is likely to hinder rather than enhance their growth prospects and in turn their ability to reduce poverty and food security.

⁶⁴Jagjit Phale, Sacrificing the right to food on the altar of free trade, 2007-01-04, Issue 284 available at <http://www.pambazuka.org/en/category/features/39046>

⁶⁵Food Sovereignty Framework: Concept and Historical Context, *Food Sovereignty Framework*, December 2005

The AoA has been sharply criticised for its failure to address 'dumping' and rich country subsidies are widely held responsible. The AoA box system categorising domestic agricultural support has allowed the US and EU to retain and increase their subsidies whilst claiming compliance with WTO rules supposedly controlling their distortion of production and trade. The EU and US have been shifting support from the amber to the blue and green boxes and claim they are no longer distorting trade, despite evidence that they fuel overproduction and dumping.⁶⁶

It is argued that International trade rules are disastrous for food security and the right to food. Liberalisation of agriculture, which has occurred mainly in developing countries, has produced increased hunger and malnutrition rather than safer food security. As Kevin Watkins of OXFAM wrote in the British newspaper "The Guardian" in November 1996 at the time of the World Food Summit: "Free Trade will never feed the world, on the contrary." It is stated in the report "Trade and Hunger"⁶⁷ that food security based on international trade is mirage for the poorest in developing countries. Further, it is that much of the agricultural trade liberalisation in developing countries over the past 20 years has been based on the hope that agricultural production in developing

⁶⁶Food Sovereignty Framework: Concept and Historical Context, Food Sovereignty Framework, December 2005

⁶⁷S Polaski, "Agricultural Negotiations at the WTO: First, Do No Harm, Carnegie Endowment for International Peace", *Policy Outlook*, June 2005

countries would switch to high value export crops, which would enable them to import food. However, this has not happened in many countries, which have struggled to find viable export crops, as commodity prices have fallen and they have laboured to find the funds to meet their food import needs. International Trade does not automatically help countries to meet food shortages if they do not have foreign exchange to buy food imports. Of course the problems are different for net food importing countries that cannot grow sufficient food. For this reason, the Decision on Measures concerning the Possible Negative effects of the Reform Programme on Least Developed and Net Food Importing Countries (Marrakesh decision) was taken, but it has had little concrete effect so far,⁶⁸ nor does it help when their farmers have to compete with cheap subsidised imports. Both producers and consumers suffer when liberalisation allows unscrupulous traders and private monopolies to pay low prices to farmers and charge high prices to consumers. Often government monopolies are simply replaced by monopolistic private companies or traders, who offer poorer prices to farmers and charge higher prices to consumers.⁶⁹

68. *Ibid* 48

69 John Madeley, Trade and Hunger: an overview of case studies on the impact of trade liberalisation on food security”, Global Studier No. 4)Stockholm, church of Sweden, Diakonia, Forum Syd, the Swedish Society for Nature Conservation and the Programme if Global Studies, 2000

Both the US and EU overproduce and needed to find markets and reduce expensive subsidies. Disagreements between them over agriculture nearly stalled negotiations in the GATT until they reached a compromise agreement on agriculture at Blair House in the USA in 1992. These two major trading blocks largely thrashed out the AoA and selected the base year and detailed targets so as to benefit them most. Many, if not most developing countries reportedly signed up to the UR without understanding the implications of the agreements for their farmers. The policies of US and EU over the past few decades have allowed both blocks to dump or dispose of their surpluses in developing countries using various mechanisms and have affected agricultural development in these countries.⁷⁰

Increased reliance on international trade in order to ensure food security results in a dependency on international trade, which is a source of various vulnerabilities: loss of export revenues when the prices of export commodities go down, threats to local producers when low priced imports arrive on the domestic markets, balance of payments problems for the net food-importing countries when the prices of food commodities go up. It also reinforces the power of highly concentrated transnational corporate actors. Increased cross border trade implies an increased role for transnational's rather than domestic

⁷⁰See TD/B/COM.1?EM.11/2 and Corr.1

agro-food systems. Global sourcing increase the number of suppliers and thus, the competition between them, leading to dominant actors to force outrageously low prices on agricultural producers. The current trade regime also encourages the segmentation of the farming sector, increasingly divided between one segment which has access to high value markets, and as result to the best technologies, inputs, credit and political influence and another segment which is left to serve only the low-value, domestic markets and is comparatively neglected and marginalised. It also promotes long supply chains which imply long distance transport and unsustainable modes of production, with serious implications for climate change and human health and nutrition.⁷¹

The AoA undermines the right to food because it does not recognise the obligation of the State to protect and fulfil this right as enshrined in international law. The AoA it appears has established a set of rules which are biased against developing countries, constraining the State from acting to respect, protect and fulfil the right to food. The AoA is not just a trade agreement, it is a set of rules which undergird a deeply unfair system that imposes a free trade model on the poor and carves out protection for the richest players in the global market, blatantly violating the right to food. The AoA

⁷¹S Way and J Chileshe, "*Trade liberalisation and the impact on poverty: Zambia case study*". In Oxfam/Institute of Development Studies, University of Sussex, *Liberalisation and Poverty*(Oxford, Oxfam, 1999)

sanctions a global system which denies agricultural market access and promotes increased agribusiness dumping, depressing world market prices thereby violating the right to food and curtails the right to developing countries to mitigate the effects of dumping in local markets through the use of tariffs. In the post UR negotiations on agriculture, developing countries have clearly articulated their need for an AoA congruent with their right to food responsibilities, supported by a worldwide food rights campaign. Instead of responding to their legitimate needs of all Member States to meet their right to food obligations, the developed countries invited a small group of middle-income powers into its folds, pursuing “divide and rule” tactics.⁷²

3.19 Conclusion

The WTO has become the symbol of economic globalisation. Its policies often lead to inequalities between states, hampering the development of poor countries, and the lack of transparency in decision-making and other procedures. The reform achieved in the Uruguay Round, however, was only a partial liberalisation. In it the Member countries agreed to open up national

⁷²Mission to the world trade organisation, Report by the UN Special Rapporteur on the right to food, Oliver Schutter, Human Rights Council, March 2009

markets, to cut export and⁷³ national subsidies to the agricultural sector. While many developing countries in the beginning were in favour of this agreement, because they were expecting better access to the markets in industrialised countries, more and more developing countries are becoming seriously critical of the agreement.⁷⁴

73. Ibid 5

⁷⁴Impact of the WTO Agreement on Agriculture on the Right to Adequate Food by MichealWindfuhr, Food First Information and Action Network(FIAN) International, 2001

CHAPTER - 4

**THE RIGHT TO FOOD UNDER THE INDIAN CONSTITUTION AND
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CHAPTER – 4

**THE RIGHT TO FOOD UNDER THE INDIAN CONSTITUTION AND
ITS CONTEMPORARY RELEVANCE IN INDIA: AN ASSESMENT**

4.1 Introduction

India has a large history of famines and droughts which always resulted in the unavailability of food. Prevalence of hunger and starvation deaths are not an anomaly in India. After independence, due to the land reforms and onset of green revolution in 1960's, food grain production increased dramatically, as a result of which India was able to enhance the wide spread distribution of food grains through the vast network of Ration shops under the Public Distribution System (PDS). These efforts reduced the danger and threats of hunger and food denials to a large extent of the poor population.

Much before signing any of the international covenants, India gave itself a legal framework with a welfarist notion. The constitution aims at securing all its citizens Social, Economic and Political justice, equality and dignity, prohibits discrimination and recognizes all human rights. Civil and political rights are recognized as justiciable fundamental rights. Economic, social and cultural rights are defined as Directive Principles of State Policy.

Before examining India's specific jurisprudential progression towards finding and founding a constitutional right to food, it is important to note that adequate legal guarantees to the right to food existed prior to the establishment of a right to food in India. Indeed, the right to food has been enshrined in international

legal documents for over half a century and is a part of the modern international human rights framework that has both influenced and been influenced by India¹. Interestingly, while India's right to food has legal precedent in international human rights law and international legal frameworks, most of the work to enforce and fulfill a right to food has not been presented in international human rights language. Rather, the right to food has been framed primarily as a national fundamental right, founded on unique principles of Indian constitutional law.²

India's reliance on domestic law to identify, adjudicate and implement a constitutional right to food reflects a more general confidence in its own sovereignty and position vis-à-vis international human rights bodies when it comes to espousing and upholding of human rights. While the Indian Constitution requires the State to "foster respect for international law and treaty obligations³," greater institutional emphasis is placed on internalizing those norms and strengthening the capacity of national instruments to deliver on third periodic report submitted under Article 40 of the International Convention

¹. For more information regarding India's involvement with the United Nations and international human rights instruments, see United Nations, Permanent Mission of India to the United Nations, India and United Nations: Human Rights, http://www.un.int/india/india_and_the_un_hr.html.

² *Francis Coralie Mullin v. Adm'r*, (1981) 2 S.C.R. 516, 518 (India); *People's Union for Civil Liberties v. Union of India*, Writ Petition (Civil) No. 196 of 2001)

³ INDIA CONST. art. 51

on Civil and Political Rights (ICCPR)⁴ to the Human Rights Committee, which states:

*“India firmly believes that in the matter of implementation of the provisions of the Covenant, what is of paramount importance is the country’s overall performance and its resolve to translate into reality the enjoyment of right by its people, to be viewed from the Constitution and the laws as well as the effectiveness of the machinery it provides for enforcement of the rights”.*⁵

India’s dedication to its Constitution and laws is illustrated in an analysis of Supreme Court decisions which suggests that the apex court rarely relies on or follows international human rights norms in reaching a decision.⁶ While the justices mention international human rights norms in their opinions, those norms do not regularly play a significant role in reaching a final decision. Rather, emphasis is on the Court’s own precedents. Further analysis of Supreme Court cases suggests that the Court is likely to explicitly follow international human rights norms in reaching a decision only in the absence of any domestic law that provides for effective enforcement of the human rights in

⁴ India firmly believes that in the matter of implementation of the provisions of the Covenant, what is of paramount importance is the country’s overall performance and its resolve to translate into reality the enjoyment of right by its people, to be viewed from the Constitution and the laws as well as the effectiveness of the machinery it provides for enforcement of the rights.

⁵ U.N. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Third Periodic Reports of States Parties Due in 1992, 3, U.N. Doc. C/76/Add.6 (June 17, 1996)

⁶ Rajat Rana, Could Domestic Courts Enforce International Human Rights Norms? An Empirical Study of the Enforcement of Human Rights Norms by the Indian Supreme Court Since 1997 26 (Univ. of Va. Sch. of Law, Working Paper Series, 2009), available at <http://ssrn.com/abstract=1424044>

question. In *Apparel Export Promotion Council v. A.K. Chopra*⁷, is perhaps further evidence of its preferred reliance on domestic mechanisms to protect, promote, and fulfil the right to food and its reluctance to share the authority to do so with external or international adjudicative bodies.

Thus, though subject to the ICESCR and other international legal documents promoting economic and social rights, India relies mostly on domestic law and has devoted the majority of its attention to incorporating human rights, such as the right to food, into the Indian Constitution.

4.2 The role of Constitutions in the realisation of right to food

A country's Constitution plays a fundamental role in the realization of the right to food because it is the supreme law of the land⁸ and the source of all political power within a nation. It is a body of rules that establishes and regulates a government by stipulating checks, balances and limitations of governmental authority,⁹ the constitutionality of every law and act of government is one of the most important political principles of democracies and universally accepted rule of law norms.

⁷ . A.I.R. 1999 S.C. 625.

⁸ For explicit claims, see *inter alia*, the Constitution of Australia, Preamble; the Canadian Constitution Act, 1982, Art.552; the Constitution of Italy, Art.1; the Constitution of Ireland, Art.6; the Constitution of Japan, Art. 98; and the Constitution of the United States, Art. 6. For implicit claims, see *inter alia*, the Constitution of India, Arts. 251 and 254; the Basic Law of Federal Republic of Germany, Arts. 20 (3), 23,28 (1) and (3), 37, 56, 64(2), 70, 87 a(2), 98(2), and 142.

⁹ . The second kind of constitution, an unwritten constitution, exists for example in Canada, England, Israel and New Zealand. These countries have no written constitution in one single document, but rather a number of Basic Laws, that are primary laws guiding society. In the absence of a formal codified set of laws, tradition and existing legal and political systems may provide enduring constitutional principles.

The logical consequence of the superiority of the constitution is that it supersedes all acts of the legislature contrary to it. Consequently, such acts will not bind either the courts or the citizens. Constitutional provisions are also binding for the executive so all administrative authorities are equally limited by its provisions. Any executive or administrative act that contravenes the provisions of the constitution must be considered void and the courts must invalidate it.

On the basis of a right to food provision in the constitution, the constitutional court or the highest court of a country has the power of judicial review. This means that it declares certain laws unconstitutional if they violate the right to food provision, and the person whose rights have been breached may have a right to remedy. This has an enormous impact on the realization of the right to food because a successful claim may lead to the reform of legislation or policies found to violate that right.

4.3 Types of constitutional recognition of the right to food

Many national constitutions take into account the right to food or some of its aspects. The Constitutional recognition of the right to food can be divided into four broad categories:

4.3.1 Explicit and direct recognition, as a human right in itself or as part of another, broader human right;

Some of the countries recognize the right to food explicitly as an individual human right. It is necessary to distinguish between the different ways in which this recognition takes place. The countries that recognize right to food as a human right, stipulate the right to food for a specific category of the population only, such as children or prisoners or few countries have constitutional provisions that stipulate the right to food explicitly as being part of another human right. This is often worded in ways similar to Article 11.1 ICESCR as part of a human right to an adequate standard of living, to a quality of life or to development.¹⁰

4.3.2 Right to food implicit in a broader human right

There are many countries whose constitutions do not make explicit reference to 'food' or 'nutrition' but guarantee other human rights in which the right to food is implicit, according to their normal meaning in international law. These rights include the right to an adequate or decent standard of living, to well-being, to a means necessary to live a dignified life, to development, and to a standard of living not below the subsistence level. Rights such as the right to a minimum wage ensuring existence compatible with human dignity,¹¹ to social security, assistance for the destitute, special assistance and protection of

¹⁰ See UN Declaration on the Right to Development, proclaimed in 1986 by UN General Assembly resolution 41/128.

¹¹ Andorra (art. 29), Argentina (art. 14bis 1)), Belarus (art. 42), Bolivia (art. 7.e), Costa Rica (art. 57), Croatia (art. 55), Cuba (art. 9), Ecuador (art. 35), El Salvador (art. 70.2), Honduras (art. 128.5), Italy (art. 36), Lesotho (art. 30), Madagascar (art. 29), Mexico (art. 123), Nigeria (art. 16d), Paraguay (art. 92), Peru (art. 24), Portugal, (art. 59), Romania (art. 43), Slovakia (art. 35), Spain (art. 35), Venezuela (Bolivarian Republic of) (art. 91).

(orphaned) children, aid for (working) mothers before and after child birth and for the disabled and the elderly, all necessarily provide implicit protection of aspects of the right to food. Some constitutions even stipulate special protection in the case of loss of the family breadwinner.¹²

4.3.3 Explicit recognition of the right to food as a goal or Directive Principle within the constitutional order

Many of the countries that do not recognize the right to food explicitly in their substantive provisions or bills of rights refer nonetheless to the right to food or to raising the level of nutrition and standard of living in the provisions that set out the objectives or Directive Principles of State Policy. Directive Principles are statements of principle. They often represent the values to which a society aspires although at the time of drafting they may not reflect a broad societal reality. Very often these constitutional provisions guide governmental action, particularly in the socio-economic field, but are not considered to provide for individual or justiciable rights. The use of Directive Principles varies from country to country. In India, although the Directive Principles began as unenforceable guidelines, an active Supreme Court has transformed them into strong constitutional rights. In a number of cases, the Supreme Court of India interpreted the constitutional right to life to include the right to food, based on the constitutional provisions in the Directive Principles of State Policy. Of

¹² E.g. Moldova (art. 50(2)), Spain (art. 39(2)).

course, such Directive Principles include implicit reference to the right to food in many, if not most, constitutions by referring to general wellbeing or social justice objectives.

4.3.4 Indirect recognition, through interpretation of other human rights by the judiciary

There are many countries whose Constitutions guarantee other human rights in which the right to food is not necessarily implicit. This is the case in particular with regard to the right to life and the right to be free from torture and degrading treatment. Thus, the absence of direct recognition of the right to food in a State Constitution does not mean that the right to food is totally unprotected in the country. Depending on a country's legal tradition, other human rights can be interpreted as including the right to food. A combination of other constitutional provisions together with general state policy commitments or directive principles may be used to advance the implementation of this right. For instance, there may be state policies on the promotion of well-being, the right to work and the right to social security (in cases of unemployment or inability to work) which can be relied upon in combination with constitutional rights. As mentioned earlier, in India the fundamental right to life has been expanded by the courts with reference to Directive Principles. This creates a dynamic relationship between the Fundamental Rights and the Directive Principles of the Constitution, and an avenue to enforce the latter as individual rights. In other cases, courts can give

a broad interpretation of civil (and not just economic and social) rights, some of which are widely guaranteed under domestic law, such as the right to life, the right not to be subjected to cruel or degrading treatment and the right to human dignity, even without referring to Directive Principles of State Policy.¹³

4.4 India's Constitutional Provisions for the Right to Food: An overview

India's history of colonization resulted in a progressive constitution that provides a foundation for a justiciable right to food.¹⁴ In 1950, three years after independence, India adopted a progressive Constitution aimed at securing all its citizens social, economic and political justice, equality and dignity. The Constitution prohibits discrimination and recognizes all human rights. Civil and political rights are recognized as directly justiciable fundamental rights and economic, social and cultural rights are defined as Directive Principles of State Policy.¹⁵ The realization of a right to food in India has been largely dependent on revolutionary aspects of the Indian Constitution that provide for comparatively easy incorporation of human rights principles into Indian constitutional law, especially in regards to ESCR.

¹³ Lidija Knuth and Margret Vidar, *Right to Food Studies, Constitutional and Legal Protection of the Right to Food around the World*, Food and Agriculture Organization of the United Nations Rome, 2011.

¹⁴ See Special Rapporteur on the Right to Food, *The Right to Food*, Report by the Special Rapporteur on the Right to Food, Mission to India, 19, 20, E/CN.4/2006/44/Add.2 (Mar. 20, 2006.)

¹⁵ See Special Rapporteur on the Right to Food, *The Right to Food*, Report by the Special Rapporteur on the Right to Food, Mission to India, 19, 20, E/CN.4/2006/44/Add.2 (Mar. 20, 2006.)

On reading of India's Constitution is that its framers were caught between crafting a Constitution appropriate to the Indian context and replicating existing common law Constitutions.¹⁶ Yet, the context in which the Indian Constitution was being drafted was one that prompted a closer look at social and economic rights. "At the time of independence in 1947, India was in the grip of a serious food crisis" ¹⁷ The drafting history of Articles 21 provides records that the drafters discussed the postcolonial nature of the Constitution and their unique post-colonial obligations to protect the rights of the most vulnerable populations. Statements were made admonishing against a repetition of British domination: "This autocracy is in our blood and it is showing signs everywhere We are ruling our people in a manner much less generous than the aliens did; . . . if you want to safeguard the freedom of the people and their liberty, there should be a more radical provision in the Constitution than what has been proposed [in the current draft of Article 21]."¹⁸

¹⁶ In addition to referencing British rights, India's constitutional drafters turned to the Constitution of the Irish Free State of 1921, the Constitution of the United States, and the Constitution of Canada. Shashi P. Misra, *Fundamental Rights and the Supreme Court: Reasonableness of Restrictions* 27 (1985).

¹⁷ S.S. Acharya, *National Food Policies Impacting on Food Security: The Experience of a Large Populated Country—India*, in *Food Insecurity, Vulnerability and Human Rights Failure* 3 (Basudeb Guha-Khasnobis et al. eds., United Nations Univ. 2007).

¹⁸ B.L. Hansaria, *Right to Life and Liberty Under the Constitution : A Critical Analysis of Article 21*, at 13 (1993). Drafters also made reference to the need for wider judicial review as providing the flexibility future generations of rights holders would require. "[J.H. Larry] was of the view that if the clause [Article 21] stood as it was, 'the whole Constitution becomes lifeless.' So, unless the amendment was accepted, Larry said, 'You will not earn the gratitude of future generations.' This indicates that Article 21's drafters contemplated the idea of a "living" constitution sufficiently adaptable to changing conditions so as to continuously provide and protect human rights. Id. The resulting original document is thus a blend between the two forces of existing common law constitutions and the unique Indian context)

Historical accounts indicate that the earliest constitutional movement focused on CPR rather than ESCR. This emphasis can be explained by the limited models of constitutions available as references at the time. In addition to looking to British rights, India's constitutional drafters turned to the Constitution of the United States, the Constitution of the Irish Free State of 1921, and the Constitution of Canada.¹⁹ Thus, India's initial constitutional references were limited to former Commonwealth countries whose constitutions predominantly emphasized CPR. ESCR do, nevertheless, occupy an important place in the Indian Constitution: India was ultimately established as a social welfare state²⁰ and its Constitution has defined and recognized justice as social, economic, and political.²¹ However, after constitution drafting was resumed upon India's independence in 1947, the economic and social rights articulated in the Constitution were distinguished from justiciable civil and political "fundamental rights." The ESCR enumerated in Articles 36 through 51 were labelled "Directive Principles," deemed non-justiciable and

¹⁹ . HANSARIA, at 7. The drafters also referenced Articles 31 to 34 of the Japanese Constitution. These articles of the Japanese Constitution were drafted by the United States and enumerated defense rights such as right to counsel.

²⁰ The preamble designates India as a "socialist . . . republic." Indian Const.pmb.; Mehta, supra note 73, at 46 ("The directive principles [enunciated in India's constitution] aim at the betterment of the individual as an integrated component of the society. Elimination of inequality of income opportunities and status and securing a just social order, is the philosophical foundation of Part IV, embodying the concept of the welfare state.")

²¹ Mehta explains the interplay between the social, economic, and political principles enunciated in the Indian constitution: The Preamble of the Constitution together with the Fundamental Rights and Directive Principles constitute the Bhagwad Gita of Indian Sociological Jurisprudence. Its core principles make the people of India the ultimate sovereign, the country socialist, democratic and republican in character in order to secure to all its citizens justice—social, economic and political.

accompanied by the instruction that “the provisions contained in this Part shall not be enforceable by any court.”

Though the Indian Constitution is arguably somewhat paradoxical in its incorporation of ESCR but refusal to attach any enforceability to them, this inherent contradiction can be explained by India’s holistic understanding of its Constitution and the interdependent relationship between its “Fundamental Rights” and its “Directive Principles.” Indeed, while the Constitution distinguishes between CPR and ESCR, it also embodies a synthesis of the two. The structure and drafting history of the Indian Constitution eschews a strict dichotomy between CPR and ESCR, implying instead an inseparable relationship between the two that is often obscured and misinterpreted due to the difference in the modes of realization that the drafters had envisioned for them. Structurally, the Indian Supreme Court’s constitutional construction frequently refers to the equal importance of and relationship between the Preamble, Fundamental Rights, and Directive Principles.²²

Additionally, the drafting history of the Constitution strongly suggests that the division into judicially and non-judicially enforceable sections was meant to be a temporary deference to India’s status as a newly independent state still suffering under the weight of colonialism. The Non-enforceability clause only provides that the infant State shall not be immediately called upon to account

²² Commentators, such as Subhash C. Kashyap, have noted this essential relationship and stated that “the democratic socialisms spelt out in the Preamble and Directive Principles of our Constitution is meant to provide the rich content in which the fulfillment of the Fundamental Rights has to be achieved.” MEHTA, at 48.

for not fulfilling the new obligations laid down upon it. A State just awakened to freedom with its many pre-occupations might be crushed under the burden unless it was free to decide the order, the time, the place and the mode of fulfilling them.²³

4.5 The Mandates of the Constitution

Human rights in the Indian Constitution are divided into two separate parts. Part III of the constitution houses the “Fundamental Rights” which include the right to life, equality, religion, freedom of movement, free speech and expression which in conventional human rights language may be termed as civil and political rights. Part IV of the constitution contains Directive Principles of State Policy which include all the social, economic and cultural rights, such as the right to education, livelihood, health and housing.

The Constitution of India both explicitly and implicitly provides for a right to food, thereby offering robust national protection that is likely more accessible to Indian citizens than similar safeguards provided by international bodies.²⁴

Explicitly, Article 47, located in the Directive Principles section of the Constitution, creates a “duty of the State to raise the level of nutrition and the

²³ MEHTA, referencing *Bandhua Mukti Morcha v. Union of India*, A.I.R. 1984 S.C. 802 (India).

²⁴ In general, domestic institutions are literally more accessible—they are geographically closer and their proceedings are conducted in a similar language to the one of the rights holder. The principle of exhaustion—that rights holders must exhaust domestic remedies before seeking redress and remedy at the international level—also makes domestic institutions a more likely starting point for those pursuing human rights claims.

standard of living and to improve public health”.²⁵ Given the aspirational and non-justiciable nature of the Directive Principles, however, most of the development of the right to food has occurred within the context of Article 21, which includes a right to life and is located within the enforceable and justiciable Fundamental Rights section of the Constitution.²⁶

The Constitution provides for human rights protection through Directive Principles by creating a non-enforceable “duty of the State to raise the level of nutrition and the standard of living and to improve public health.” Given the aspirational and non-justiciable nature of the Directive Principles, however, most of the work to locate, explicate, and realize a right to food was done at a more implicit and interpretative level under Article 21, the right to life, which is located within the enforceable “Fundamental Rights” section of the Constitution. Drawing on constitutional precedent defining the Article 21 right to life as “the right to live with human dignity and all that goes with it, namely, the bare necessities of life such as adequate nutrition,” and a history of activist, human rights-oriented judicial interpretation of this Article, the Supreme Court in *PUCL* interpreted the right to life with dignity to include the right to food, thereby affirmatively incorporating the right to food — originally an

²⁵ Comment to Article 47 explains: The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavor to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

²⁶ INDIA CONST. art. 21.

aspirational Directive Principle — into Article 21 and transforming it into a justiciable and enforceable fundamental right.

In addition to favorable constitutional human rights provisions, the availability of the Public Interest Litigation (PIL) mechanism utilized by Colin Gonsalves, Jawahar Raja, and Aparna Bhat to litigate *PUCL*, is a crucial element to the success of India's right-to-food case. The PIL system addresses situations in which there is compelling evidence of legal injury caused to the public interest, but no individual with proper standing to bring a claim, by removing the standing requirement present in private interest litigation. This makes it possible for any person to bring a case on behalf of others too impoverished or otherwise prevented by hardship from accessing a court. In addition to allowing lawyers to bring public interest petitions on behalf of an injured population, the PIL system also grants courts the ability to review administrative implementation of social and economic entitlements, such as the right to food, and to hold government officials accountable in the event of non compliance.

In *Ami Prasad v Union of India and Others*²⁷ the Madhya Pradesh High Court held that if there is an obligation upon State for allotment of food grains, state should follow that order to secure food to citizens. As per the order of Supreme Court in *PUCL* litigation, families holding BPL & APL cards are entitled to receive food grains of 35 kg per month. However, BPL & APL card holders of the state were getting only 20 kg per month as number of card holders under

²⁷ 2013 (1) *JLJ*97

Union of India was different from that of Madhya Pradesh which implied that real BPL families were not getting benefit as ordered by Supreme Court. Therefore, shortage of food was not to be blamed for the hunger-stricken strata but the lax attitude of the administration adopted for the identification of BPL & APL families. Moreover, food grains could also be saved from wastage due to inadequate storage capacity. Given that right to food is a basic human right and is also a sub set of right to life, the court issued direction to the respondents for removal of anomaly of number of BPL & APL card holders in state while disposing the petition. This case forms one of the major instances which led the government to enact a legislation to cater to the right to food.

4.5.1 Right to Food and Preamble of the Constitution

Socialism is one of the signature tunes of the Constitution. The concept of democratic socialism aims to put an end to poverty in India . According to John Rawls “a society is said to be socialist when the egalitarian principles are followed, rights are valued and the dignity of each individual is upheld’. Socialism operates as an important tool in the campaign towards realizing the right to food of the people living below the poverty line. The concept of socialism empowers the Government to adopt measures to diminish the difference between the rich and the poor. Such measures will end poverty in India to a large extent. The reduction of poverty shall lead to a reduction in

hunger and malnourishment and help realization of the right to food of the people.

4.5.2 Right to Food as part of Basic Structure of the Constitution

The Constitution consists of certain basic features or framework which cannot be altered through the process of amendment. The essential elements of individual freedom like immunity from starvation constitute the basic structure of the Constitution.²⁸ Freedom from hunger is one of the most elementary needs for human existence, therefore the right to food is an integral part of the basic feature of the Constitution and is protected from all legislative interference that aims to dilute or abrogates the right.

The mandate of the Constitution to build a welfare state and an egalitarian society is another basic feature of the Constitution. An egalitarian society ensures equality in distribution of the food produced in the country as well as the equal distribution of the wealth of the country therefore, its mandate protects the right to food of the people.

The rights guaranteed under the golden triangle consisting of the right to equality²⁹, right to freedom³⁰, and right to life³¹, is the basic feature of the

²⁸ *Keshavananda Bharati-v-State of Kerala*, AIR 1973 SC1461.

²⁹ Article 14

³⁰ Article 19

³¹ Article 21

Constitution as the provisions stands for equality and rule of law.³²The rights flowing from the fundamental right to life constitute the core value and if such rights are allowed to be abrogated it shall alter the very nature of the Constitution.³³The right to food is one of the rights flowing from the bundle of rights guaranteed under the right to life.

4.5.3 Right to Food as a Fundamental Right

It is universally accepted and commonly viewed that society must ensure adequate food supply. India – a Sovereign Socialist Secular Democratic Republic –has a written Constitution which provides for the Fundamental Rights of its citizens. Evidence of constitutional synthesis between CPR and ESCR in the Indian context is perhaps nowhere more apparent than in the Supreme Court's interpretation of and judicial activism with respect to Article 21 a fundamental principle that protects the right to life. Article 21 of the Constitution guarantees "Protection of life and personal liberty". It has been interpreted by the Indian Supreme Court to mean the right to life with dignity. Most importantly, the Court has further interpreted the right to life with dignity to include the right to food, affirmatively incorporating the right to food—

³² *Minerva Mills-v-Union of India*, AIR 1980 SC 1789) & *I.R. Coelho-v-State of Tamil Nadu*, AIR 2007, SC 861.

³³ *I.R. Coelho*, AIR 2007, SC 861

originally a Directive Principle—into Article 21 and thereby transforming it into a justiciable and enforceable fundamental right.³⁴

The Constitution does not expressly recognize the fundamental right to food. This act of judicial interpretation is particularly interesting, given that nothing in the plain text of Article 21 indicates that it should be read to include this or any other ESCR. However, Article 21 guarantees a fundamental right to life and personal liberty. The Article 21 entitled 'Protection of life and personal liberty' and included in the chapter on Fundamental Rights, says: 'No person shall be deprived of his life or personal liberty except according to procedure established by law'. The expression "life" in this Article has been judicially interpreted to mean a life with human dignity and not mere survival or animal existence. In a number of judgments the judiciary has recognized the right to food as a right flowing from the right to life guaranteed under the Constitution of India.³⁵

Over the years, the Supreme Court has explicitly stated several times that the right to life should be interpreted as a right to "live with human dignity", which includes the right to food and other basic necessities. The legal basis of the right to food has been also spelt out by the National Human Rights

³⁴ "[T]he right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition."

³⁵ *Peoples Union of Civil Liberties-v- Union of India, Shantistar Builders-v-Narayan Khamalal Totame*, (1990) 1 SCC 520, *Kapila Hingorani-v-State of Bihar*, (2003) 6 SCC 1

Commission (NHRC) in the proceedings of a hearing held on 17 January 2003.³⁶

“Article 21 of the Constitution of India guarantees a fundamental right to life and personal liberty. The expression ‘Life’ in this Article has been judicially interpreted to mean a life with human dignity and not mere survival or animal existence. In the light of this, the State is obliged to provide for all those minimum requirements which must be satisfied in order to enable a person to live with human dignity, such as education, health care, just and humane conditions of work, protection against exploitation, etc. In the view of the Commission, the Right to Food is inherent to a life with dignity, and Article 21 should be read with Articles 39(a) and 47 to understand the nature of the obligation of the State in order to ensure the effective realization of this right. Article 39(a) of the Constitution enunciated as one of the Directive Principles, fundamental in the governance of the country, requires the State to direct its policy towards securing that the citizens, men and women equally, have the right to an adequate means of livelihood. Article 47 spells out the duty of the State to raise the level of nutrition and the standard of living of its people as a primary responsibility. The citizen’s right to be free from hunger enshrined in Article 21 is to be ensured by the fulfillment of the obligation of the State set out in Articles 39(a) and 47. The reading of Article 21 together with Articles 39(a) and 47 places the issue of food security in the correct perspective, thus making the Right to Food a guaranteed Fundamental Right which is enforceable by virtue of the constitutional remedy provided under Article 32 of the Constitution.”

³⁶ ‘Supreme Court Orders on the Right to Food - A tool for action’ Right to Food.

Therefore, the interpretation is that the right to life implies life with dignity, and the complementary rights that are mandatory for the realization of this right are also by implication fundamental rights. Since life is biologically impossible without regular nutrition, the right to food has been widely recognized by implication as a fundamental right.³⁷

However, an important issue which is raised before the High Court of Bombay in a clutch of public interest litigations challenging Maharashtra Animal Preservation (Amendment) Act,(Beef Ban Law)as to whether Article 21 which guarantees right to life and personal liberty, includes the right to choice of food? The court vide its judgement dated 6thMay 2016 has held that "right to food" which is part and parcel of Article 21 also includes right to "choice of food", especially when their choice of food is not injurious to health.

4.5.4 Right to food under Directive Principles of State Policy

Beyond the classical freedoms and assurances the constitution expressly provides for socio-economic rights although formulated as non-enforceable directives or goals for State action in rights in Part IV of the constitution as Directive Principles of State Policy. The right to food or in general the economic, social and cultural rights are defined in this part Directive Principles of State Policy, which are guidelines to the Central and State

³⁷ Commissioners of the Supreme Court (2007): 'Seventh Report of the Commissioners', New Delhi, available at www.sccommissioers.org.

governments for framing laws and policies. The provisions are not enforceable by any court of law but the principles laid down therein are considered as fundamental in the governance of the country making it the duty of the state to apply these principles in making laws to establish a just society in the country. In this regard, Art.39(a) and Art. 47 of the Indian constitution are most prominent.

Article 39(a):

Art. 39(a) directs the State to ensure that all citizens have the right to an adequate means of livelihood. Undoubtedly, food is not only a means of livelihood but is a necessity for survival.

Article 47:

Art. 47 of the constitution makes a clear reference to Right to Food by stating that the state shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties.

These Articles in the Constitution leave no doubt that it is among the primary duties of the State to take proper steps to, and base its economic policies on ensuring that there is enough food for all citizens to satisfy their hunger, to raise the level of nutrition and the standard of living. The Directive Principles are non-justiciable policies which the Nation State is required to provide to its

people with the development of the economic resource of the country. These principles are inserted in the Constitution for the guidance of the State and are considered fundamental in the governance of the country. They impose an obligation on the State to apply these policies in law making³⁸. The fundamental rights like the equality clause and the right to life can be used as a means to implement the Directive Principles.³⁹ This part of the Constitution is as important as any other fundamental right in the governance of the country. The Directive Principles and fundamental rights supplements each other and both together form the conscience of the Constitution.⁴⁰

The Directive Principle calls upon the State for establishment of a Welfare State⁴¹. A Welfare State promotes a just socio-economic order and thereby aids the realization of the right to food of the people. It also directs the Nation State to ensure to its people in course of time a social order based on justice social, economic and political. In order to provide economic justice the Directive Principle calls upon the Nation State to minimize the inequalities of income, status, facilities opportunities amongst individuals and groups⁴². It can be utilised harmoniously with the right to equality, right to freedom and the right to life to redress the sufferings of the poor and enforce their economic rights.

³⁸ . Shiva Rao, 2010

³⁹ *Keshavananda Bharati*, (1973) 4 SCC 225) & *Unni Krishnan-v-State of Andhra Pradesh*, 1993 SCC (1) 645.

⁴⁰ *Olga Tellis-v-Bombay Municipal Corporation*, 1986 AIR 180, 1985 SCR Supl. (2) 51& *Minerva Mills*, AIR 1980 SC 1789.

⁴¹ Article 38(1)

⁴² Article 38(2)

Thus, the directive principles promote the realization of the right to food of the people.

The Directive Principles require the State to formulate its policies to secure the adequate means of livelihood to the people⁴³. Absence of an adequate means of livelihood leads to poverty. As hunger in India is the result of poverty rather than lack of production, means of livelihood shall eliminate hunger and malnutrition from the country.

The scope of the provision of the Constitution is very wide. It not only includes the right to food of the people which is nutritiously adequate to lead a healthy life free from all hidden hunger but also to ensures that the food available is free from all harmful substances and is fit for human consumption.⁴⁴ Although the right to food is not directly justiciable, its inclusion in the Directive Principles of State Policy serves to guide interpretation of fundamental rights, including the right to life protected by Article 21.

Article 47 of the Constitution imposes on the state to regard as among its primary duties, the raising the levels of nutrition and the standard of living of its people. The health of the majority of human beings depends more on their food security and nutrition. The problem of insecurity of food, malnutrition is widely prevalent across the various socio-economic groups, particularly among

⁴³ Article 39(a)

⁴⁴ Gargi Dutta, Right to Food as a Constitutional Mandate in India, *IJSR – International Journal of Scientific Research*, Volume : 2, Issue : 12, December 2013.

those who are living below poverty line, landless agricultural labour, people in slum and remote tribal areas, those who are affected by constant calamities like drought are more vulnerable to this. National Commission to Review the Working of Constitution (NCRWC) pointed out that, “Over 260 million people living below poverty line in India are chronically hungry. Hunger and poverty forces families to make trade offs, trade offs between hunger and meeting other basic needs. Trade offs for who goes to school and who doesn't. In such trade offs women and children are often the suffers. Poorly-fed and malnourished pregnant women give birth to stunted and unhealthy babies who are prone to diseases. ...the Scheduled Castes, Scheduled Tribes and Backward Class are an easy prey of poverty, hunger and women of these categories are its worst victims”.⁴⁵ It is thus clear that there is a strong legal foundation for the right to food within India.

Thus, the joint reading of Article 21 together with Article 39(a) and Article 47 places the issue of Right to food on a high constitutional level thus making the Right to Food a guaranteed Fundamental right which is enforceable by virtue of the constitutional remedy provided under Article 32 of the constitution But, the limitation has been that Article 47 and 39 (a) are a part of the Directive Principles of State Policy and unlike the Fundamental Rights, which are

⁴⁵ Dr. D. Anand, Right to food and role of stat in the constitution of India, *International Research Journal* , August 2010 ISSN- 0975-3486 RNI: RAJBIL 2009/30097 VOL I *ISSUE 11.

unambiguously justiciable, the Directive Principles don't put legal binding on the State and are not enforceable.

4.6 Judicial Activism: Providing an Enforceable, Constitutional Right to Food through PUCL litigation

India is experiencing a human rights paradox. While its GDP has been climbing steadily over the past decade, rates of malnutrition and starvation-related morbidity remain extremely high.⁴⁶ With half of its women and children malnourished, India is home to the largest population of malnourished people in the world. In a notable refusal to accept the negative effects of globalization upon access to basic nutrition for its poorest populations, however, the Supreme Court of India has established itself as a champion of food security and committed itself to the realization of the right to food in India. Through its landmark decision in *PUCL*⁴⁷ litigation, the Supreme Court explicitly established a constitutional human right to food and determined basic nutritional floor for India's impoverished millions.

The PIL exposed the excessive amounts of food grains rotting in government granaries, while people continue to die of hunger and starvation. Representing the People's Union for Civil Liberties (Rajasthan), Human Rights Law Network(HRLN) filed a public interest litigation in the Supreme Court in April

⁴⁶ . India's Global Hunger Index (GHI) 2008 score is 23.7, which gives it a rank of 66th out of 88 countries. This score indicates a continued poor performance in reducing hunger in India. The GHI aims to capture three interrelated aspects of hunger — inadequate consumption, underweight children, and child mortality. Int'l Food Policy Research Institute, Global Hunger Index Report (2008), available at <http://www.ifpri.org/pubs/cp/ishi08.pdf>.

⁴⁷ (Civil) No. 196/2001

2001 - seeking legal enforcement of the 'Right to Food.' The Court stepped in to stop the rot and corruption in the public distribution system and issued several orders strengthening various social security schemes. India is the first and only nation in the world to protect the right to food in its Constitution. An on-going petition, the Supreme Court has not only reconfigured specific government food schemes into legal entitlements, setting out in detail minimum allocations of food grains and supplemental nutrients for India's poor, but has also clearly articulated how those government schemes are to be implemented and identified which public officials to hold accountable in the event of non-compliance.⁴⁸ Though much work needs to be done in order to enhance service, delivery and access to the above stated rights, the outcome of this historic case is a major victory for economic, social and cultural rights globally.

While the Supreme Court has reiterated in several of its decisions that the Right to Life guaranteed in Article 21 of the constitution in its true meaning includes the basic right to food, clothing and shelter, it is indeed surprising that the justiciability of the specific Right to Food as an integral right under Article 21 had never been articulated or enforced until 2001. Prior to the big Right to

⁴⁸ Most of the interim orders are comprised of directions to the state and central governments. In the case of the state governments, the Chief Secretary is answerable to the Supreme Court on behalf of the government. In regards to the Indian government, the person whom the Supreme Court will hold responsible depends on to what department or ministry it addressed its directions.

Food petition filed by *PUCL* in 2001, the only other case concerning specifically the right to food, that went up to the Supreme Court in 1986 was the case of *Kishen Pattnayak v State of Orissa*.⁴⁹ In this petition, the petitioner wrote a letter to the Supreme Court bringing to the court's notice the extreme poverty of the people of Kalahandi in Orissa where hundreds were dying due to starvation and where several people were forced to sell their children. The letter prayed that the State Government should be directed to take immediate steps in order to ameliorate this miserable condition of the people of Kalahandi. This was the first case specifically taking up the issue of starvation and lack of food. In the judgment passed in this case, the Supreme Court took a very pro-government approach and gave directions to take macro level measures to address the starvation problem such as implementing irrigation projects in the State so as to reduce the drought in the region, measures to ensure fair selling price of paddy and appointing of a Natural Calamities Committee(NCC). None of these measures actually directly affected the immediate needs of the petitioner – i.e. to prevent people from dying of hunger. More importantly, the Supreme Court did not recognize the specific Right to Food within this context of starvation.

Following the *Kishen Pattnayak* case in 1986, there were no other cases going up to the Supreme Court or the High Courts concerning the right to food, until

⁴⁹ 1989 AIR 677, 1989 SCR (1) 57.

2001. It is not surprising that the next judgment concerning right to food and the right against starvation deaths again emerged from the State of Orissa, one of the poorest States in India. In 2001, there was a massive drought in several States in India especially Orissa, Rajasthan and Madhya Pradesh. Due to the drought, which had been going on for months and the extreme poverty and complete lack of access to food grains, people were starving in large numbers. While the poor were starving in the drought hit villages, the central government had excess food grains in its storehouses, which were not being disbursed and were rotting! The agitation in the country over lack of access to food grains in the drought hit States took rapid momentum after shocking incidents of people in some of the poorest districts of Orissa dying due to starvation. Despite these facts, the central government maintained that there were no incidents of starvation deaths.

Slowly, the agitation over access to food became a full-fledged Right to Food campaign in the country. As part of this campaign, a public interest litigation was filed by the *PUCL* in April 2001 in the Supreme Court for enforcement of the Right to Food of the thousands of families that were starving in the drought struck States of Orissa, Rajasthan, Chhattisgarh, Gujarat and Maharashtra and where several had died due to starvation. Through this petition, a demand was

made to recognize right to food as a legal right of every person in the country.⁵⁰

4.6.1 Issues raised in the petition

The PIL raised the following three issues:

1. The first concern raised is about the food grains rotting in the Government godowns when thousands still die in our country from starvation.
2. Secondly, whether Article 21, which bestows the right to life and liberty, encompasses the right to food.
3. The final question as to whether the right to food meant that the government has a duty to provide food to the people affected by drought.

This petition was filed at a time when the Food Corporation of India stores/godowns were overflowing with food grains on one hand and there were reports of the intensified hunger and starvation in drought affected areas on the other. The basic argument was that the right to food was an implication of the fundamental “right to life” enshrined in Art.21 of the Constitution. The petition argued that Central and State Governments had violated the right to food by failing to respond to the drought situation, and in particular by accumulating gigantic food stocks while people went hungry.

⁵⁰ Initially the case was filed against Union of India and six major states but later on all the States/UTs were brought under the case. www.sccommissioners.org and www.righttofoodindia.org.

India's on-going effort to realize a constitutional right to food thus began with a petition brought in July 2001 on behalf of the poor in the state of Rajasthan who had not been receiving the required employment and food relief mandated by the Rajasthan Famine Code of 1962. Filed in response to the failure of the government to address acute hunger and starvation deaths at a time when India was producing a grain surplus, the *PUCL* petition sought enforcement of a constitutional right to food under Article 21 of the Constitution of India. Fifteen years into the litigation, *PUCL* has been expanded to apply to all state governments and to address larger, more complex issues of hunger, unemployment, and food security. To date, the litigation remains open, standing as one of the longest running *mandamus* cases of its kind. The scope of the petition was not restricted to drought situations alone. It also focused on the general need to uphold the "right to food". The respondents to the lawsuit were the Union of India, all the state/UT governments and the Food Corporation of India.

4.6.2 Prayer in the petition

The Petition sought for the intervention of the Supreme Court to directing the government to

- (a) provide immediate open-ended employment in drought-affected villages,
- (b) provide unconditional support to persons unable to work,
- (c) raise the PDS entitlement per family, and
- (d) provide subsidised food grain to all families.

The petition also sought for an order to the central government to supply free food grain for these programs.

The Supreme Court held its first hearing on 9 May 2001 and has held regular hearings in the case since then. The case is still ongoing, but a number of interim orders have been issued. In its Interim Order of 2 May 2003, the Court stated:

“Article 21 of the Constitution of India protects for every citizen a right to live with human dignity. Would the very existence of life of those families which are below poverty line not come under danger for want of appropriate schemes and implementation thereof, to provide requisite aid to such families?”

Reference can also be made to:

Article 47 which inter alia provides that the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties.”

The Supreme Court has thus formally recognized the right to food, and has ordered the central and State governments to take a number of measures to improve the situation. The justiciability of this right is therefore confirmed, and the Court has issued a number of orders to government, entailing expenditure of resources. Among the decisions of the court case to date are:

- Benefits of eight nutrition-related schemes⁵¹ have become legal entitlements;
- All state governments have been directed to begin cooked mid-day meals for all children in government and government-assisted schools;
- State and central governments have been ordered to adopt specific measures to ensure public awareness and transparency of assistance programmes;
- Government of India must develop a system to ensure that all poor families are identified as Below Poverty Line;
- Licences of ration shop dealers to be cancelled if they (i) do not open on time, (ii) overcharge, (iii) retain ration cards, (iv) make false entries in BPL cards, or (v) engage in black marketing;
- Especially vulnerable groups have been identified amongst the poor, including widows, the elderly, infirm, disabled, pregnant and lactating women without assured means of subsistence, as well as “primitive tribes”;
- All State Governments have been ordered to implement food for work schemes in scarcity areas.

⁵¹ .(1) the Targeted Public Distribution Scheme (TPDS); (2) *Antyodaya Anna Yojana*(AAY); (3) the Mid-Day Meal Scheme (MDMS); (4) the National Old Age Pension Scheme (NOAPS); (5) the *Annapurna* Scheme; (6) the Integrated Child Development Scheme (ICDS); (7) the National Maternity Benefit Scheme (NMBS); and (8) the National Family Benefit Scheme

In its Interim Orders, the Supreme Court appointed two Commissioners of the Court “for the purpose of monitoring the implementation of all orders relating to the right to food”. The Commissioners are empowered to enquire about any violations of these orders and to demand redress, with the full authority of the Supreme Court. They may enlist the assistance of NGOs and individuals. Resident Commissioners have also been appointed in each state, to assist the Commissioners of the Court.⁵²

While early interim orders in the litigation addressed mainly the public distribution of food grains to families and persons falling below the government-designated poverty line, the Supreme Court order of November 28, 2001 critically and expansively transformed *PUCL* by identifying which food schemes were to be considered legal entitlements under the constitutional right to food and determining in detail how those government schemes were to be implemented. Since this watershed order, *PUCL*'s interim orders have sought to define gradually, but in increasing detail, India's constitutional right to food. This remarkable case, while supported and advanced by the highly effective Right to Food Campaign and a Supreme Court-ordered Commission responsible for the implementation and monitoring of protected food schemes, was made legally possible through progressive, activist judicial interpretation

⁵² JURISPRUDENCE ON THE RIGHT TO FOOD, Justiciability: Cases on Switzerland, India and South Africa, Source Document: FAO The Right to Food Guidelines: Information Papers and Case Studies.

of the Constitution and through the development of a public-interest litigation mechanism that relaxes standing requirements in cases where public injury has been caused by the government.

4.6.3 From Court Orders to Measurable Results

The *PUCL* case is notable both legally and politically, but most importantly it is remarkable for the tangible and ever growing positive effects that it has had on the lives of the poor and the hungry. The Supreme Court's ruling that the right to food is a justiciable, reviewable, expandable, legally enforceable and constitutional— and thus inviolable — right opened up new avenues both for political discourse and for concrete action.

Justiciability provides a vehicle for ordinary people to access and utilize the courts. Moreover, enshrining the right to food as a legal entitlement provides an extremely important tool for holding the state accountable and demanding change. This change may take the form of opening a specific ration shop, increasing government inputs for agricultural production, or raising the quality of the cooked food provided at school mid-day meals. As the last decade under *PUCL* has shown, when the right to food is protected as a legal, constitutional entitlement, the option for the government to rollback programs designated to fulfill the right to food disappears. The legal entitlement also provides a foothold for preserving and expanding existing right-to-food programs and for

developing new programs to fight hunger, malnutrition, discrimination, and poverty.

Concrete examples of the *PUCL* case's marked, positive impact on the lives of India's poorest citizens abound. In perhaps an unprecedented move, the Supreme Court forced the government of India to increase its budget and spend millions of dollars on programs related to ensuring adequate food and nutrition. According to one of the principal lawyers on the case, "No court in the world would force its government to increase its budget," and yet this is exactly what has happened in India. For example, the October 7, 2004 interim order increased ICDS funding, which controls the allocations of food for children ages zero to six at feeding centres throughout India, from one to two rupees per child. The November 28, 2001 interim order commanded state governments and union territories "to implement the Mid-Day Meal Scheme by providing every child in every Government and Government assisted Primary Schools with a prepared mid-day meal with a minimum content of 300 calories and 8-12 grams of protein each day of school for a minimum of 200 days" and mandated that "those Governments providing dry rations instead of cooked meals must within three months start providing cooked meals in all Government and Government aided Primary Schools." A subsequent interim order, handed down on April 20, 2004, required that the Indian government allocate funds to cover the conversion cost for food-grains into cooked meals

and absolutely prohibited the recovery of any portion of these costs from children or their parents.

The success of the Mid-Day Meal Scheme is an excellent example of the power and utility of the *PUCL* case. The Supreme Court's 2001 interim orders galvanized the mandatory provision of cooked lunches at government-run schools throughout the country. While the MDMS was officially launched in 1995, prior to *PUCL*, it was poorly implemented, reaching only a handful of states throughout the country. Additionally, the original program only provided for uncooked grains as opposed to a nutritionally balanced cooked meal, which allowed for more "leakages" of food grains (i.e., the siphoning off grains for personal use or sale on the black market). The activists drafting the original pleas asked the Supreme Court to mandate proper implementation of the MDMS. Right-to-food advocates knew that the states of Tamil Nadu and Gujarat were implementing the MDMS extremely well, and thus provided a successful model for how combining central-government and state-level resources could result in significant and measurable improvements in student enrolment and nutritional intake.

The Supreme Court's interim orders, issued in response to this petition, set off a spark that completely reversed the non-implementation of the MDMS in other states. One of the ways the Supreme Court orders galvanized the MDMS was by handing down specific instructions regarding operationalization of the program and designating the state governments of India as the entities

responsible for the implementation of this scheme. Placing responsibility on state governments allowed the Court to ensure proper implementation by targeting more organized, powerful, and better-funded government entities. Moreover, requiring specific minimum calorie and protein contents and that the meals be cooked transformed the program into a scheme that is inherently more difficult to corrupt and, on its face, much more supportive of school attendance and child nutrition goals. The reshaping of the MDMS gave the Right to Food Campaign, as well as concerned parents and community members, a foothold for further advocacy. The Campaign launched a “country-wide ‘day of action on mid-day meals’ in April 2002” and spent several years monitoring, reporting, organizing, lobbying, and campaigning on the issue. The Campaign’s work involved raising awareness about the fact that every child in India has a legal right to a cooked mid-day meal and explaining what it means to possess this legal right. Through both grassroots and national advocacy and community participation, including the reporting and advocacy efforts of the Supreme Court-ordered Commission, the program has begun to be implemented more uniformly throughout India, and the nutritional content of the meals has greatly improved. The Campaign also used the interim orders to link the right to food to the right to education. Because it is provided free of charge, the mid-day meal acts as an incentive for impoverished families to enrol their children in school and for the children to attend at least the morning session prior to the meal, if not the full day.

Perhaps the most salient example of how the *PUCL* litigation has launched the right to food into both mainstream political discourse and public consciousness is the debate surrounding national legislation that codified and expanded food security entitlements set forth in *PUCL*. This movement towards codification of the *PUCL* entitlements demonstrated a national commitment to promoting the realization of the right to food.

4.6.4 PUCL: More Relevant Than Ever

It is neither natural nor humane for people to starve when the means to produce food are at hand. When the government of India began undertaking economic policies that brought great wealth to the country, but allowed the poorest Indians to slip backwards into malnutrition, hunger, and death from starvation, the Supreme Court of India courageously stepped in and halted the inhumanity through a series of detailed interim orders commanding swift government action. Consistent monitoring by Supreme Court-appointed commissioners and civil society has kept high pressure on the government and successfully expanded the case to its current, wide reaching, and tangibly effective level. While core programs, such as the Mid-day Meal Scheme, appear to be working remarkably well, hunger, malnutrition, permanent stunting, and death caused by a lack of adequate food continue to haunt India in equal and perhaps larger numbers than before the court case began. The Supreme Court Commissioners who are monitoring implementation of the *PUCL* case state that they have seen more starvation deaths in the past year than in any year since their work began

in 2001. Both the success of the case to date and the current state of hunger illustrate the continued relevance of the human right to food as a tool for positive change in India. Now more than ever is the time for the Indian government to take ownership of the entitlements developed through *PUCL*, expand upon them, and create policies that strike at the core of hunger, poverty, and malnutrition, routing them out once and for all.⁵³

Legal action is one of the means that can be used, in a democratic political system, to hold the State accountable to its responsibilities. It is in that spirit that *PUCL* went to the Supreme Court in April 2001 to seek legal enforcement of the right to food. The Public Interest Litigation initiated by the *PUCL* is a complex plot with many actors. Though the right to food has been interpreted and judicially acknowledged as a fundamental right, it actually did not have practical implications. If a person dies in custody because of torture the State authorities are criminally liable for the death. But if a person dies because of hunger and starvation, the State authorities are not held responsible. The case is just seen as a failure of the State and no punishment is meted out to the State agencies who are responsible for ensuring that every person has access to sufficient food for their survival.

⁵³ The Right to Life Is the Right to Food: People's Union for Civil Liberties v. Union of India & Others by Lauren Birchfield and Jessica Corsi, <https://www.wcl.american.edu/hrbrief/17/3corsi.pdf>.

4.6.5 Impact of Right to Food case

The right to food case is being heard from 2001 and the Supreme Court has passed a series of significant and historic interim orders that have touched the lives of millions of people living with poverty and hunger.

In the order dated 27th April 2004, the Supreme Court directed that no scheme covered by the orders made by this Court should be discontinued or restricted in any way without the prior approval of the same Court. In other words, it means that till further orders, the schemes would continue to operate and benefit all those who are covered by the schemes.

This was a landmark judgment and the significance of this interim order lies in the fact that it converted the benefits of these programmes into legal entitlements. By this, the State no longer has the option to discontinue or reduce any of these schemes. This order has proved very useful and effective a number of times in preventing governments to remove or reduce the entitlements under these schemes.

The schemes covered under the right to food case envelop the entire life cycle of a human being, from the time when the child is in mother's womb to the time when a person becomes incapable of doing any hard labour for his survival. The assistance provided under the NMBS scheme to women during pregnancy is based on the premise that it would be used for the nutritional

support of women during pregnancy which would be good for the yet-to-be-born child's health. The ICDS programme addresses the needs of children under six years, pregnant and lactating mothers and adolescent girls. The Mid-Day Meal programme covers all the school going children. The Sampoorna Grameen Rozgar Yojana (now replaced by NREGA) provides work to all the adults in rural areas of India. Similarly the pensions provided under National Old Age Pension Scheme, all the old people above 65 who are BPL are being assisted.

The Supreme Court orders like the universalization of ICDS services to all hamlets and among all children under six years, pregnant and lactating mothers and adolescent girls and the one asking for the universalization of hot cooked meals to all the school going children have had large impacts on the allocations, coverage and utilization of schemes. In general, the Supreme Court orders have improved significantly the food security of millions of people living with hunger.

4.6.6 Opportunity in the Right to Food Case

The Supreme Court has passed tens of orders which have had a substantial impact but still there is a long way to go. A number of orders have not been implemented in letter and spirit and hundreds of thousands of potential beneficiaries are not aware of their rights under these food schemes. However,

the schemes are performing wonderfully, it has been observed, in the pockets where the civil society, activists and community volunteers do monitor the performance of the schemes in their own areas, make people aware and help them to get enlisted as beneficiaries under different schemes.

During the progress of the case, a number of Interim Applications (I. A's) have been filed under the same case bringing the different issues of concerns regarding the functioning of these schemes to the notice of the Supreme Court. A couple of times, the High Courts in different States, too, have given directions to the respective states for the effective implementations of the schemes. Therefore, the Supreme Court has given the opportunity to rally around and demand the benefits under the schemes as a legal right.

4.6.7 Intervention by the Supreme Court

As a result of aggressive campaigns and Public Interest Litigation, over the last few years the Supreme Court of India has monitored the battle for the right to food. The problem is so acute that the Supreme Court was forced to intervene heavily on State and Central governments on several occasions. Today, the directions issued by the Supreme Court are one of the major components for implementing the right to food. In brief, the interventions of the court had three major impacts:

- It converted the benefits of the eight nutrition-related schemes into legal entitlements;
- It directed all state governments to begin providing a cooked midday meal for all children in government-assisted schools; and
- It directed the state and central governments to adopt specific measures to ensure public awareness and transparency of these schemes/programmes.

The Commissioners appointed by the Supreme Court have submitted their fifth report on the states' compliance of these orders. But the court cannot continue to intervene and monitor progress for very long. Hence the government needs to draw lessons from these intercessions and take specific measures to address the concerns raised by the Supreme Court in response to various Public Interest Litigations⁵⁴

4.6.8 Food Distribution Schemes Made into Entitlements

The Court, in an unprecedented interim order on 28 November 2001, directed all the State governments and the Union of India to effectively enforce eight different centrally sponsored food schemes to the poor. These food security Schemes were declared as entitlements (rights) of the poor, and the Court also laid down very specific time limits for the implementation of these schemes with the responsibility on the States to submit compliance affidavits to the court. These included the Antyodaya Anna Yojna(AAY), the National Old-Age

⁵⁴ George Cheriyan, Enforcing the Right to Food in India Bottlenecks in Delivering the Expected Outcome, *Research Paper No. 2006/132*, November 2006.

Pension Scheme, the Integrated Child Development Services (ICDS) programme, the National Mid-day Meals Programme (NMMP), the Annapurna scheme and several employment schemes providing food for work. Of the eight schemes, the most significant was the Mid-day Meal Scheme and the direction of the Court to all state governments to provide cooked mid-day meals in all government schools by January 2002.

In addition to the above the Supreme Court also held that under the Targeted Public Distribution Scheme, the States should commence distribution of 25 kilograms. Grain per family per month⁵⁵, latest by 1 January 2002. All state governments were directed to take their 'entire allotment of food grains from the Central Government under the various Schemes and disburse the same in accordance with the Schemes'. Further, the court required that 'the Food for Work Program in the scarcity areas should also be implemented by the various States to the extent possible'.

Therefore, it is interesting to note that this time the Supreme Court did not merely direct the States to formulate appropriate schemes for as had been done earlier by the Court in several housing rights cases, but it went several steps further in directing strict implementation of already formulated (and modified where considered necessary) Schemes within fixed time frames to make them

⁵⁵ As opposed to the earlier limit of 20 kgs grain per family per month

entitlements and to ensure accountability. With a view to ensuring adequate food to the poorest of the poor, the Supreme Court in March 2002 asked all States and Union Territories to respond to an application seeking the framing of wage employment schemes such as the Sampoorna Gramin Rojgar Yojna (SGRY) ensuring the right to work to adults in rural areas. On 8 May 2002, the Supreme Court agreed on a system of monitoring and also added that the States are to provide a funds utilization certificate before the money is released for their use.

The remedies used to enforce this newly recognized right to food were thus at the micro-level of implementing schemes such as the Mid-day Meal Scheme and its monitoring and also at the macro-level.

4.6.9 Enforcement of the Right to Food

This time the Supreme Court was much more receptive than it was in *Kishen Pattnayak* case to take immediate action for preventing hunger. The Supreme Court expressed serious concern about the increasing number of starvation deaths and food insecurity despite overflowing food in FCI storehouses across the country. The Bench comprising of Justices Kirpal and Balakrishnan, then even broadened the scope of the petition from the initially mentioned six drought affected States, to include all the Indian States and Union Territories.

In its several hearings, the Court directed all state governments to ensure that all Public Distribution Shops are kept open with regular supplies and stated that it is the prime responsibility of the government to prevent hunger and starvation. On 23 July, 2001, recognising the right to food, the court said:

“In our opinion, what is of utmost importance is to see that food is provided to the aged, infirm, disabled, destitute women, destitute men who are in danger of starvation, pregnant and lactating women and destitute children, especially in cases where they or members of their family do not have sufficient funds to provide food for them. In case of famine, there may be shortage of food, but here the situation is that amongst plenty there is scarcity. Plenty of food is available, but distribution of the same amongst the very poor and the destitute is scarce and non-existent leading to mal-nourishment, starvation and other related problems.”

The Supreme Court, thus recognized a distinct Right to Food under the constitution under Article 21 and also sought to broaden the scope of the right to not only encompass the right to be free from starvation, but to also include distribution and access to food and the right to be free from mal-nutrition, especially of women, children and the aged

Enforcement of the orders of the Supreme Court in the Right to Food petition has been very varied on the ground level. Not all States have not been implementing the orders due to various reasons. However, since the beginning of the 2002 academic year, primary schools in Rajasthan have been serving

mid-day meals in compliance of the Supreme Court orders, and among States that did not already have a mid-day meal scheme; Rajasthan was the first to comply. Interestingly, the mid-day meal scheme is not merely providing nutrition to the school children.

These orders of the Supreme Court bear great relevance for social rights jurisprudence – it shows once again that courts do have the authority to order positive action by the state which has financial / budgetary implications, such as the Supreme Court's interim order requiring the state governments to provide cooked mid-day meals to children within three months instead of uncooked meals etc. and that social rights can in fact be enforced concretely. Financial implications did not seem to affect the Court in making this order for enforcement of the right to food of the thousands of people starving in the drought struck states.

While the Court has been guided entirely by national law, it could also have drawn on recent advances made in understanding the right to food at the global level. There is increasing recognition worldwide that food and nutrition is a human right and thus there is a legal obligation to assure that all people are adequately nourished.

Ground level reports and surveys done for the implementation of the Supreme Court orders are not uniform. By no means is the implementation of all the

schemes perfect in any way, and there remains a lot of scope for further improvement, but in states such as Rajasthan where the Right to Food campaign is very strongly asserted, these schemes have been internalized quite quickly by all concerned – school teachers, village administrations, state governments and the communities.

While the Petitioners in the Right to Food petition focused on the 'starvation deaths', the Supreme Court enlarged the scope of the right to Food to include malnutrition, distribution and access to food and designed enforcement mechanisms and remedies to implement the right. However, the larger issues of food security were not addressed by the Court. Widespread hunger is a much larger issue in India and it is now getting impossible to de-link endemic hunger from these 'starvation deaths'⁵⁶, and the scope of the right to food needs to bring the issue of hunger within its fold. While this needs to be addressed, the *PUCL* petition and campaign is important as it shows how with the active intervention of the Supreme Court and supported by litigants such as the *PUCL* who presented empirical data and material to the Court, there is no reason why certain social rights such as the right to food cannot be subject to judicial determination.⁵⁷

⁵⁶ Sainath, 2001

⁵⁷ Kothari, J, 'Social Rights and the Indian Constitution', 2004 (2) *Law, Social Justice & Global Development Journal (LGD)*. http://www.go.warwick.ac.uk/elj/lgd/2004_2/kothari.

4.7 Conclusion

India is an active member of the United Nations and is a state party to ICESCR. Hence there is an obligation to respect, protect and fulfil the right to food for every citizen of India. The Indian Constitution does not expressly recognize the fundamental right to food. However, comparable human right provisions are found in the articles of the fundamental rights as well as the Directive Principles of State Policy. India provides one of the best examples in the world in terms of the justiciability of economic, social and cultural rights, with the right to life interpreted extensively by the Supreme Court to include the right to food. The orders issued by the Supreme Court clearly establish that the court understands the right to life, affirmed in Article 21 of the constitution, as implying the right to food.⁵⁸ Today, the nation inured to scarcity of food and starvation, the nature of this problem is ironic, in spite of the increasing number of starvation deaths amidst overflowing food grain godowns of the government. The obvious affirmation to the query necessitates that a single starvation death in the midst of several millions of food grains in warehouses is a blemish on the state and food policy and public distribution system. There is a great need for state intervention for the realisation of the right to food by ensuring equality of opportunity for all in their access to basic resources.

⁵⁸ George Kent, The Human Right to Food in India, University of Hawai'i March 12, 2002.

CHAPTER – 5

**LEGAL PROTECTION AND ENFORCEMENT OF RIGHT TO
FOOD IN INDIA: A STUDY IN RELATION TO NATIONAL
FOOD SECURITY ACT, 2013**

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CHAPTER – 5

**LEGAL PROTECTION AND ENFORCEMENT OF THE RIGHT TO FOOD
IN INDIA: A STUDY ON THE NATIONAL FOOD SECURITY ACT, 2013.**

5.1 Introduction

The foreword of “The Global Hunger Index¹” begins with the quote- “The dogs of hunger are not dead; some are sleeping, others are biting”. Unsurprisingly, the issue of hunger and food insecurity arising out of poverty or otherwise, continues to concern the policy makers, administrators, social researchers and the academia, especially in the third world countries.

According to Food and Agriculture Organization (FAO), food security exists when all people, at all times, have physical and economic access to sufficient, safe, and nutritious food to meet their dietary needs and food preferences for an active and healthy life.² Ensuring food security is an issue of great importance for a country like India where more than one-third of the population is estimated to be absolutely poor and one-half of all children malnourished in one way or another. There have been many emerging issues in the context of food security in India in the last few decades. These are:

(i) economic liberalization in the 1990s and its impact on agriculture and food security;

¹ 2011, published by International Food Policy Research Institute, Washington DC

² S Mahendra Dev & Alakh N Sharma, Food Security in India, Performance, Issues and Challenges, *Oxfam India Working Paper Series*, September 2010

- (ii) establishment of WTO: particularly the AoA under it;
- (iii) challenges of climate change; crisis of the three Fs, viz., food prices, fuel prices, and financial crisis;
- (iv) the phenomenon of hunger amidst plenty, i.e., accumulation of stocks in the early years of this decade and in 2008-09 along with high levels of poverty;
- (v) introduction of Targeting in the Public Distribution System for the first time in the 1990s;
- (vi) 'Right to Food' campaign for improving food security in the country and the Supreme Court Orders on mid-day meal schemes;
- (vii) proposal for National Food Security Law (Right to Food Act)³

5.2 Public Distribution System(PDS)

The Right to Food means that every man, woman and child alone and in community with others must have physical and economic access at all times to adequate food or by using a resource base appropriate for its procurement in ways consistent with human dignity. In order to improve access to food, the government of India introduced the Public Distribution System(PDS), the largest food distribution network of its kind in the world. The PDS system has its origin in the "rationing system" introduced by the British during World

³ The National Food Security Act (NFSA) 2013- Challenges, Buffer Stocking and the Way Forward ShwetaSaini and Ashok Gulati, INDIAN COUNCIL FOR RESEARCH ON INTERNATIONAL ECONOMIC RELATIONS *Working Paper* 297, March 2015.

War II as a war-time rationing measure. It is a system whereby accessibility of vital supplies is assured within easy reach of the consumers in every corner and bend of the country. This is a transaction system where food grains, sugar and other necessary items like kerosene and edible oil etc. are made available to the people of the state at reasonable price to meet their basic needs. PDS also serves as an effective tool of social welfare and directly contributes to the development of rural population at large and the poorest of the poor in particular who cannot afford to buy necessary and essential items from open market.

Before the 1960s, distribution through PDS was generally dependant on imports of food grains. It was expanded in the 1960s as a response to the food shortages of the time; subsequently, the government set up the Agriculture Prices Commission and the Food Corporation of India to improve domestic procurement and storage of food grains for PDS. By the 1970s, PDS had evolved into a universal scheme for the distribution of subsidised food. In the 1990s, the scheme was revamped to improve access of food grains to people in hilly and inaccessible areas, and to target the poor. Subsequently, in 1997, the government launched the Targeted Public Distribution System (TPDS), with a focus on the poor. TPDS aims to provide subsidised food and fuel to the poor through a network of ration shops. Food grains such as rice and wheat that are

provided under TPDS are procured from farmers, allocated to states and delivered to the ration shop where the beneficiary buys his entitlement.⁴

For the sake of clarity, the history of PDS in India can be divided into four phases. The first phase was from its origins to 1960, a period when the system was extended to other cities. During this phase, distribution through PDS was usually dependent on imports of food grain. The second phase, from 1960 to 1978, was one which brought about major organizational changes. Specifically, in response to the food crisis of the mid- 1960s, the government of India took a holistic approach to food security, procurement and storage. The third phase, from 1978 to 1991, was marked by large-scale growth of the PDS, supported by domestic procurement and stocks. The fourth phase, from 1991 to the present, is one in which the policy of universal PDS has been replaced by a targeted policy in line with the objectives of economic liberalization. Thus, over the entire period, the PDS grew from a rationing scheme in selected cities to a national universal programme of food distribution and then to a policy targeted at the income-poor.⁵

5.3 Targeted Public Distribution System (TPDS)

A well-targeted and properly functioning Public Distribution System is an important constituent of our food security. In June, 1997, the Government of

⁴ Sakshi Balani, Functioning of the Public Distribution System An Analytical Report, PRS Legislative Research, December 2013.

⁵ Analysis Brij Pal1, Organization and Working of Public Distribution System in India: A Critical Analysis, Department of Public Administration, ISSN (Paper)2224-5766 ISSN (Online)2225-0484.

India launched the TPDS with focus on the poor. Under the TPDS, States were required to formulate and implement fool proof arrangements for the identification of the poor for delivery of food grains and for its distribution in a transparent and accountable manner at the Fair Price Shop(FPS) level. The scheme, when introduced, was intended to benefit about 6 crore poor families for whom a quantity of about 72 lakh tonnes of food grains was earmarked annually. The allocation of food grains to the States/UTs was made on the basis of average consumption in the past i.e. average annual off-take of food grains under the PDS during the past ten years at the time of introduction of TPDS. The existing TPDS operates through a multi-level process in which the centre and states share responsibilities. The centre is responsible for procuring or buying food grains, such as wheat and rice, from farmers at a minimum support price. It also allocates the grains to each state on the basis of a formula. Within the total number of poor in each state, state governments are responsible for identifying eligible households. The centre transports the grains to the central depots in each state. After that, each state government is responsible for delivering the allocated food grains from these depots to each ration shop. The ration shop is the end point at which beneficiaries buy their food grains entitlement.⁶ In September 2013, Parliament enacted the National Food Security Act(NFSA), 2013. The Act relies largely on the existing TPDS to

6.*Ibid* 4.

deliver food grains as legal entitlements to poor households. This marks a shift by making the right to food a justiciable right, thus giving a statutory backing to the TPDS.

5.3.1 Identification of eligible households under existing TPDS

The government launched TPDS in order to target food grains entitlements to poor households. Therefore, identification and classification of beneficiaries is crucial to fulfil the goals of the scheme.

5.3.2 Categorisation of beneficiaries

Under TPDS, beneficiaries are divided into two categories:

- Households below the poverty line or BPL
- Households above the poverty line or APL

BPL beneficiaries that are currently covered under TPDS were identified through a detailed process when TPDS was initially launched. The Planning Commission calculated state-wise estimates of the total number of BPL beneficiaries that would be covered under TPDS. Each state government was responsible for identifying eligible BPL households on the basis of inclusion and exclusion criteria evolved by the Ministry of Rural Development. Such households were entitled to receive a BPL ration card. APL households were not identified and any household above the poverty line could typically apply for an APL ration card.

5.3.3 Antyodaya Anna Yojana (AAY)

The AAY scheme was launched in December 2000 for the poorest among the BPL families.⁷ Individuals in the following priority groups are entitled to an AAY card, including:

- (i) landless agricultural labourers,
- (ii) marginal farmers,
- (iii) rural artisans/craftsmen such as potters and tanners,
- (iv) slum dwellers,
- (v) persons earning their livelihood on a daily basis in the informal sector such as porters, rickshaw pullers, cobblers,
- (vi) destitute,
- (vii) households headed by widows or terminally ill
- (viii) persons, disabled persons, persons aged 60 years or more with no assured means of subsistence, and all primitive tribal households.

5.3.4 Entitlements under TPDS

Eligible beneficiaries are entitled to subsidised food grains such as wheat and rice. States have the discretion to provide other commodities such as sugar, kerosene and fortified atta under TPDS. The AAY and BPL families are entitled to 35 kg of food grains and the APL are entitled to 15-35 kg of food grains.

⁷ Frequently Asked Questions, Department of Food and Public Distribution.

5.3.5 Process for identification of eligible households		
The centre and states identify eligible BPL households through a detailed process as seen in the table below ⁸		
National Sample Survey Organisation	Conducts sample survey of consumer expenditure every five years	Consumer expenditure is the expenditure of a household on some basic goods and services. The expenditure on this basket of goods is the basis for the poverty line
Planning Commission	Estimates state-wise poverty, i.e., the number of people below the poverty line	Uses NSSO household expenditure data
Central government	Allocates food grains to each state based on state-wise poverty estimates of Planning Commission and population projections of the Registrar General of India as of March 2000	The number of BPL families has been calculated using 1993-94 poverty estimates by Planning Commission. This number has not been revised despite the release of new poverty estimates by the Planning Commission in 2004-05 and 2011-12
Ministry of Rural Development	Comes out with criteria for inclusion and exclusion from BPL list as part of its BPL Census	Criteria for classification of BPL families, as per BPL Census 2002, include parameters like size of land holding, clothing owned, food security, means of livelihood etc
State Governments	Identify eligible households	Based on above criteria
<hr/> <p>⁸ Sources: Department of Food and Public Distribution; Planning Commission; Ministry of Rural Development; PRS.</p>		

The government does not identify APL households; therefore, any household above the poverty line is eligible to apply for a ration card. The centre allocates food grains to states for APL families in addition to BPL families; however, this allocation is based on availability of food grains in the central stocks and the average quantity of food grains bought by states from the centre over the last three years. Hence, the allocation to a state increases if its offtake increases over the previous years.⁹

5.3.6 Management of food grains for TPDS

The central and state governments share responsibilities in order to provide food grains to the identified beneficiaries. The centre procures food grains from farmers at a Minimum Support Price (MSP) and sells it to states at central issue prices. It is responsible for transporting the grains to godowns in each state. States bear the responsibility of transporting food grains from these godowns to each fair price shop (ration shop), where the beneficiary buys the food grains at the lower central issue price. Many states further subsidise the price of food grains before selling it to beneficiaries. The Food Corporation of India (FCI) is the nodal agency at the centre that is responsible for transporting food grains to the state godowns. Specifically, FCI is responsible for:

- (i) procuring grains at the MSP from farmers,

9. *Ibid.* 4

- (ii) maintaining operational and buffer stocks of grains to ensure food security,
- (iii) allocating grains to states,
- (iv) distributing and transporting grains to the state depots,
- (v) selling the grains to states at the central issue price to be eventually passed on to the beneficiaries.

Each stage of this process is discussed below.

5.3.6.1 Procurement of food grains from farmers

The food grains provided to beneficiaries under TPDS are procured from farmers at Minimum Selling Price. The MSP is the price at which the FCI purchases the grains directly from farmers; typically the MSP is higher than the market price. This is intended to provide price support to farmers and incentivise production. Currently procurement is carried out in two ways:

- (i) Centralised Procurement: Centralised procurement is carried out by the FCI, where FCI buys crops directly from farmers.
- (ii) Decentralised Procurement: Decentralised procurement is a central scheme under which States/Union Territories (UTs) procure food grains for the central pool at MSP on behalf of FCI. The scheme was launched to encourage local procurement of food grains and minimise expenditure incurred when transporting grains from surplus to deficit states over long distances. These states directly store and distribute the grains to beneficiaries in the state. Any

surplus stock over the state's requirement must be handed over to FCI. In case of a shortfall in procurement against an allocation made by the centre, FCI meets the deficit out of the central pool.

The centre procures and stores food grains to:

- (i) meet the prescribed minimum buffer stock norms for food security,
- (ii) release food grains under TPDS on a monthly basis,
- (iii) meet emergency situations arising out of unexpected crop failures, natural disasters, etc., and
- (iv) sell through the Open Market Sale Scheme (OMSS)¹⁰ in 1993, to sell food grains in the open market; this was intended to augment the supply of grains to moderate or stabilise open market prices.¹¹

5.3.6.2 Storage of food grains

Apart from the food grains requirement for immediate distribution under TPDS, the central government maintains minimum buffer reserves of food stocks for emergencies. The food grains procured for TPDS and other contingencies are maintained and stored as the central pool stock. FCI is the main government agency entrusted with the storage of food grains in the central pool. According to the storage guidelines of the FCI, food grains are

¹⁰ "Performance Audit Report on Storage Management and Movement of Food grains in FCI", Comptroller and Auditor General of India, May 7, 2013, http://saiindia.gov.in/english/home/Our_Products/Audit_Report/Government_Wise/union_audit/recent_reports/union_performance/2013/Civil/Report_7/Report_7.html.

¹¹ *Ibid* 4

normally stored in covered godowns, silos, and in the open, referred to as Covered and Plinth (CAP).¹² However, FCI's own storage capacity has been insufficient to accommodate the central pool stock of food grains. As a result, FCI hires space from various agencies such as the central and state warehousing corporations, state government agencies and private parties. In an evaluation of the storage management of food grains by FCI, the Comptroller and Auditor General (CAG) noted that there is sub-optimum utilisation of the existing storage capacity available with FCI and states¹³ CAP storage involves storage on elevated plinths with polythene covers specially made for this purpose. Normally, CAP storage capacity should only be resorted to for storing food grains during peak procurement seasons. Subsequent storage should be in the covered godowns, as storage in CAP for long duration exposes food grains to the risk of deterioration in quality.

5.3.6.3 Allocation of food grains to States

The central government allocates food grains from the central pool to the state governments for distribution to BPL, AAY and APL families. Allocation for BPL and AAY families is done on the basis of the number of identified

¹² "Storage Management", Food Corporation of India website, <http://fciweb.nic.in/storages/view/4>.

¹³ "Storage Management", Food Corporation of India website, <http://fciweb.nic.in/storages/view/4>.

households. On the other hand, allocation for APL families is made on the basis of:

- (i) the availability of food grains stocks in the central pool, and
- (ii) the past offtake (lifting) of food grains by a state from the central pool.

Given the food grains stocks in FCI, the centre has the discretion to allocate more grains to states on an ad-hoc basis. In the past, ad-hoc allocations have been provided in the event of floods, droughts and festivals¹⁴ etc.

5.3.6.4 Distribution of food grains to beneficiaries

The responsibility of distributing food grains is shared between the centre and states. The centre, specifically FCI, is responsible for the inter-state transport of food grains from procuring to consuming states, as well as delivering grains to the state godowns. Once FCI transports grains to the state depots, distribution of food grains to end consumers is the responsibility of state governments. On receipt of food grains, states allocate the grains to each district and further to each Fair Price Shop (FPS) within the first week of the month. State governments are responsible for transporting food grains from the state godowns to the doorstep of each FPS in the state. Across the country, food grains are distributed to a network of around 5.13 lakh FPSs.¹⁵ Beneficiaries buy their monthly food grains entitlements at subsidised prices from these ration shops.

¹⁴. *Ibid* 4.

¹⁵ Monthly food grain bulletin. Department of Food and Public Distribution, February 2013, http://dfpd.nic.in/fcamin/bulletion/FEB_2013.pdf.

Fair price shops or ration shops form the last mile delivery of the TPDS network. Ration shops can be owned privately, by co-operative societies or the government. The owners of ration shops are licensed under the PDS (Control) Order, 2001 to sell essential commodities at central issue prices. Ration shop owners are issued licenses by state governments and have certain responsibilities under the scheme. These responsibilities include:

- (i) sale of commodities as per the entitlement of ration card holders at the retail issue prices fixed by state governments,
- (ii) maintenance of records and the display of information such as the list of BPL and AAY beneficiaries, entitlements of essential commodities, timings of shops, and opening and closing stocks, and
- (iii) Maintenance of accounts of actual distribution of essential commodities and the balance stock at the end of the month to government officials and the gram panchayat.¹⁶

5.3.6.5 Pricing of food grains: MSP, CIP and food subsidy

While the centre procures food grains at the MSP, the price at which food grains are sold under TPDS is much lower. The centre sells food grains to states at subsidised prices, known as Central Issue Prices(CIP). The food subsidy is the difference between the costs incurred by the centre on MSP and CIP.

¹⁶. *Ibid* 4

- **Minimum Support Price**

As mentioned earlier, the MSP is the price at which the centre buys food grains from farmers. Typically, the MSP is higher than the market price and is intended to incentivise production. The MSPs for various agricultural commodities are fixed by the central government based on rates recommended by the Commission for Agricultural Costs and Prices (CACP). The CACP considers certain factors such as the cost of cultivation and remunerative prices for farmers on their produce while determining the MSP. The MSPs recommended by the CACP are finally approved by the Cabinet Committee on Economic Affairs.

- **Central Issue Price**

Wheat and rice are sold by the central government at uniform central issues prices (CIP) to states and union territories for distribution under TPDS. The issue prices for food grains for AAY and BPL categories have remained

constant since 2000 and the CIP of APL categories since 2002.5 Table 5 depicts the issue prices for different categories under TPDS.

- **Food Subsidy**

The food subsidy is the difference between the cost (MSP and handling and transportation costs) and the issue price at which the beneficiary buys food

grains. The centre reimburses FCI and State agencies with the food subsidy, since they are responsible for procurement and selling the procured food grains to States at CIP. The food subsidy also includes the buffer subsidy, which is the cost borne by FCI and States for maintaining buffer stocks beyond the prescribed time frame.¹⁷

5.4 Issues Involved in Implementation of TPDS

There are several issues to consider while analysing the implementation of TPDS, which relate to the following

5.4.1 Identification of beneficiaries

Studies have shown that targeting mechanisms such as TPDS are prone to large inclusion and exclusion errors.¹⁸ This implies that entitled beneficiaries are not getting food grains while those that are ineligible are getting undue benefits. An expert group was set up in 2009 to advise the Ministry of Rural Development on the methodology for conducting the BPL census. It estimated that about 61% of the eligible population was excluded from the BPL list while 25% of non-poor households were included in the BPL list. Another indicator of inaccurate classification of beneficiaries is the existence of ghost cards in several states. “Ghost cards” are cards made in the name of non-

¹⁷. *Ibid* 4

¹⁸ “Report of the Expert Group to advise the Ministry of Rural Development on the methodology for conducting the Below Poverty Line (BPL) Census for 11th Five Year Plan”, (Chairperson: Dr. N.C. Saxena), August 2009, <http://rural.nic.in/sites/downloads/circular/ReportofExpertGroupChaired-Dr.N.C.Saxena.pdf>.

existent people. The existence of ghost cards indicates that grains are diverted from deserving households into the open market.¹⁹

5.4.2 Trends in procurement vis-à-vis production of food grains.

Nearly 75 percent of the population is entitled to food grains. This has ramifications for the procurement of food grains by the centre and states. According to current trends, the government procures nearly one-third of the cereals production, which amounts to almost half of the marketed surplus (total production minus captive consumption by farmer) of wheat and rice. Over the last few years, the procurement of food grains has been increasing steadily with a quantity of 70 million tonnes in, comprising nearly 36% of production. In several states such as Punjab, Haryana and Madhya Pradesh, the state government is dominant in procuring rice and/or wheat, and controls a large proportion of the market. Under the National Food Security Act, the centre would be required to procure nearly 61 million tonnes of food grains consistently every year to deliver rights under the law. Procurement of this quantity of food grains might be easier in years when production is high. However, in years of drought and domestic shortfall, India will have to resort to large scale imports of rice and wheat, exerting significant upward pressure on prices. This raises questions regarding the government's ability to procure

¹⁹. *Ibid* 4

grains without affecting open market prices and adversely impacting the food subsidy bill.

5.4.3 Allocation and offtake of food grain

The centre allocates food grains to states on the basis of the identified BPL population, the availability of food grains stocks, and the quantity of food grains lifted by states for distribution under TPDS. The allocation to a state changes every year on the basis of the state's average consumption over the last three years.

5.4.4 Rising food subsidy

The food subsidy, the difference between the cost of procuring food grains and the price at which they are issued to beneficiaries under TPDS, is borne by the central government. The food subsidy has increased over the years, having more than quadrupled over the years. The factors that contribute to the rising food subsidy are: (i) record procurements in recent years, (ii) increasing costs of buying (at MSP) and handling food grains, and (iii) a stagnant CIP. The cost of handling food grains (MSP and other costs) has increased due to rising costs of production and increasing costs for handling and distributing food grains. The cost of producing rice and wheat has gone up primarily due to sharply rising input costs such as labour and energy costs, including fertilisers. Costs of handling food grains or procurement incidentals, which include cost of gunny bags, and charges to state governments for

storage and interest, etc., have also been increasing. In addition, since procurement is concentrated in a few states, the cost of distributing these food grains to other states has also increased. These combined factors contribute to the rising costs of procurement and ultimately add to the food subsidy bill. In contrast, the CIP of cereals (the price at which food grains are sold to beneficiaries under TPDS) such as rice and wheat have remained constant since 2002. The widening difference between the rising cost of procuring and handling food grains and the constant issue price has been a major factor for the rising food subsidy.

5.4.5 Shortfall in storage capacity with FCI against the central pool stock

After obligations under TPDS have been met, the food grains that have been procured need to be stored as a buffer stock. The government also aims to create storage capacity for procured food grains in procuring states and transfers food grains from surplus regions to deficit regions. While there has been a sharp hike in procurement from 19.6 million tonnes in 2008 to 82.0 million tonnes in 2012, FCI's storage capacity (both owned and hired) has not increased commensurate to the growth in procurement. In its report, the CAG found that from 2008-09 onwards, due to the increase in procurement of food grains, there was a severe strain on storage capacity available in the country

for the central pool stock.²⁰

5.4.6 Leakage of food grains

TPDS suffers from large leakages of food grains during transportation to and from ration shops into the open market. In an evaluation of TPDS, the Planning Commission found 36% leakage of PDS rice and wheat at the all-India level.

5.5 Mechanisms to strengthen TPDS

Reforms have been proposed to make the TPDS more effective. Major reforms include leveraging Aadhaar to improve identification of beneficiaries and using information technology.²¹

5.5.1 Role of Aadhaar

One of the key problems in the implementation of TPDS is the inclusion and exclusion errors in the identification of beneficiaries. Proposals have been made to integrate the Unique Identification or Aadhaar number with several government schemes, including TPDS to address this problem. The Aadhaar number would be used to accurately identify and authenticate beneficiaries entitled to receive subsidies under TPDS and other government schemes. According to a study by the Unique Identification Authority of India,(UIDAI)

²⁰ “Performance Audit Report on Storage Management and Movement of Food grains in FCI”, Comptroller and Auditor General of India, May 7, 2013, http://saiindia.gov.in/english/home/Our_Products/Audit_Report/Government_Wise/union_audit/recent_reports/union_performance/2013/Civil/Report_7/Report_7.html

²¹ “Eleventh Five Year Plan of the Planning Commission (2007- 12)”, Volume II. 2008, http://planningcommission.nic.in/plans/planrel/fiveyr/11th/11_v2/11th_vol2.pdf.

using Aadhaar with TPDS would help eliminate duplicate and ghost (fake) beneficiaries, and make identification of beneficiaries more accurate.²²

5.5.2 Technology-based reforms of TPDS implemented by states

The Supreme Court appointed a committee under the chairmanship of Justice Wadhwa to look into reforms to the TPDS that have been implemented by various states. In its 2009 report, the Wadhwa Committee found that certain states had implemented computerisation and other technology-based reforms to TPDS. Technology-based reforms helped plug leakages of food grains during TPDS. The Committee found that the current manual recording of eligibility of beneficiaries and transactions was prone to human errors and tampering. Furthermore, there was pilferage through the distribution network and no central monitoring system to ensure end-to-end delivery. The Committee observed that end-to-end computerisation could curb large-scale diversion and help track the delivery of food grains from state depots to beneficiaries. Some IT-based reforms implemented by states and the challenges they address:

5.5.2.1 Digitisation of ration cards: Allows for online entry and verification of beneficiary data, Online storing of monthly entitlement of beneficiaries, number of dependants, offtake of food grains by beneficiaries from FPS, etc

²² “Envisioning a role for Aadhaar in the Public Distribution System”, Unique Identification Authority of India, Planning Commission, June 2010, http://uidai.gov.in/UID_PDF/Working_Papers/Circulated_Aadhaar_PDS_Note.pdf.

5.5.2.2 Computerised allocation to FPS: Computerises FPS allocation, declaration of stock balance, web-based truck challans, etc. Allows for quick and efficient tracking of transactions

5.5.2.3 Issue of smart cards in place of ration cards: Secure electronic devices used to store beneficiary data. Stores data such as name, address, biometrics, BPL/APL category and monthly entitlement of beneficiaries and family members. Prevents counterfeiting.

5.5.2.4 Use of GPS technology: Use of Global Positioning System (GPS) technology to track movement of trucks carrying food grains from state depots to FPS.

5.5.2.5 SMS based monitoring: Allows monitoring by citizens so they can register their mobile numbers and send/receive SMS alerts during dispatch and arrival of TPDS commodities.

5.5.2.6 Use of web-based citizens portal: Publicises grievance redressal machinery, such as toll free number for call centres to register complaints or suggestions.²³

5.6 Alternatives to TPDS

There are some alternatives to TPDS, which address some problems during implementation. Tamil Nadu implements a Universal rather than a Targeted

²³ Sources: Justice Wadhwa Committee Report on Computerisation of PDS Operations, 2009; PRS.)

PDS. Experts have noted that PDS could be replaced with cash transfers or food coupons. Each of these alternatives is discussed below in detail.

5.6.1 Universal PDS

When PDS was first introduced, it was a universal entitlement scheme. In 1997, it was changed into the Targeted PDS. Universal PDS helps the state avoid errors in targeting beneficiaries. Subsidised PDS commodities are distributed to all residents without classifying them into different categories. According to the Justice Wadhwa Committee Report, non-classification helps the state avoid errors of exclusion of eligible and vulnerable families.

5.6.2 Cash Transfers

Under this scheme, beneficiaries would be given either cash or coupons by the state government, which they can exchange for food grains. Such programmes provide cash directly to a target group – usually poor households. Some potential advantages of these programmes include:

- (i) reduced administrative costs,
- (ii) expanded choices for beneficiaries, and
- (iii) competitive pricing among grocery stores.

Additionally, since cash transfers include the transfer of money directly to the beneficiary, access must be provided to banks or post offices, as poor access

to these institutions in some areas may reduce their effectiveness.²⁴ In January 2013, the Ministry of Consumer Affairs, Food and Public Distribution introduced a pilot scheme in six Union Territories for the direct transfer of cash subsidy under TPDS.²⁵ According to a UIDAI paper by the Planning Commission, using Aadhaar with cash transfers would help eliminate duplicate and fake beneficiaries, and make identification for entitlements more effective.

5.6.3 Food coupons

Food coupons are another alternative to PDS.²⁶ Beneficiaries are given coupons in lieu of money, which can be used to buy food grains from any grocery store. Under this system, grains will not be given at a subsidised rate to the PDS stores. Instead, beneficiaries will use the food coupons to purchase food grains from retailers (which could be PDS stores). Retailers take these coupons to the local bank and are reimbursed with money. According to the Economic Survey 2009-10 reports, such a system will reduce administrative costs.²⁷ Food coupons also decrease the scope for corruption since the store

²⁴ “Revival of the Public Distribution System: Evidence and Explanations”, Reetika Khera, Economic and Political Weekly, November 5, 2011.

²⁵ “Cash Transfer System under PDS”, Press Information Bureau, Ministry of Food, Consumer Affairs and Public Distribution, December 10, 2012.

²⁶ “Economic Survey 2009-10”, Chapter 2, 2010, <http://indiabudget.nic.in/es2009-10/chapt2010/chapter02.pdf>.

²⁷ “Economic Survey 2009-10”, Chapter 2, 2010, <http://indiabudget.nic.in/es2009-10/chapt2010/chapter02.pdf>.

owner gets the same price from all buyers and has no incentive to turn the poor buyers away. Moreover, BPL customers have more choice; they can avoid stores that try to sell them poor-quality grain.²⁸ Regular delivery of food coupons to the intended beneficiaries though could pose logistical challenges; there is a need to ensure the timely reimbursement of subsidy to the participating retailers. Further, the beneficiaries will have the choice of food under this scheme.

5.7 The need and relevance of Food Security Law in India

The UDHR and ICESR, to which India is a signatory, cast responsibilities on all State parties to recognize the right of everyone to food. Eradicating extreme poverty and hunger was one of the goals under the Millennium Development Goals of the United Nations.²⁹ Indian Constitution provides the right to life to all its citizens including the Right to Food under Article 21 and directs the state to take measures to raise the level of nutrition and the standard of living of its people and improve the public health under Article 47. In pursuance of the obligations under Indian constitution and International conventions, providing food security to all citizens has been the focus of the Government's planning and policy. The Food Security Act is the latest initiative of Indian Government

²⁸ “Tenth Five Year Plan of the Planning Commission (2002-07)”, http://planningcommission.nic.in/plans/planrel/fiveyr/10th/volume2/v2_ch3_4.pdf.

²⁹ Anon., 2013

to achieve the food security through rights based legislation. The ambitious programme of the Government, besides offering several opportunities, throws many challenges in its implementation. In this background, it is important to review the features of the NFSA with special emphasis on its strengths and weaknesses and its implications on Indian Agriculture.

5.8 Definition of Food Security

Food security, as a concept, originated in the mid nineteen seventies. Section.6 of the NFSA defines Food security as “the supply of the entitled quantity of food grains and meal” as specified in the Act. World Food Summit, 1974 defines food security as “availability at all times of adequate world-food supplies of basic food stuff to sustain a steady expansion of food consumption and to offset fluctuations in production and prices.”³⁰ In 1983, FAO expanded its concept to include securing access by vulnerable people to available supplies, implying that attention should be balanced between the demand and supply side of the security equation. It defined food security as “ensuring that all people at all times have both physical and economic access to the basic food that they need.”³¹In 1986, the World Bank Report “Poverty and Hunger” focused on the temporal dynamics of food insecurity. The concept of food

³⁰ FAO. (1983). World Food Security: A Reappraisal of the Concepts and Approaches. Director General's Report. Rome).

³¹ World Bank. (1986). Poverty and Hunger: Issues and Options for Food Security in Developing Countries. Washington DC. ”

security was elaborated in terms of “Access of all people at all times to enough food for an active, healthy life.”³² The 1996 World Food Summit defined food security as “food security, at the individual, household, national, regional and global levels(is achieved) when all people, at all times have physical and economic access to sufficient, safe and nutritious food to meet the dietary needs and food preferences for an active and healthy life.”³³ The definition of food security was again refined in The State of Food Insecurity, 2001: “Food security (is) a situation that exists when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life³⁴ to individuals. It is the nutritional status of the individual household member that is the ultimate focus, and the risk of that adequate status not being achieved or becoming undermined. The latter risk describes the vulnerability of individuals in this context. Food insecurity exists when people do not have adequate physical, social or economic access to food as defined above.³⁵ Thus, Food security is built on three pillars:

- Food availability: sufficient quantities of food available on a consistent basis.

³² Food Security: Concepts and Measurement. (n.d.).Retrieved from www.fao.org/docrep/005/y4671e/y4671e06.htm.”

³³ FAO. (2002). The State of Food Insecurity in the World 2001. Rome.

³⁴ Food Security: Concepts and Measurement. (n.d.).Retrieved from www.fao.org/docrep/005/y4671e/y4671e06.htm.

³⁵ FAO, 1983:33.

- Food accessibility: having sufficient resources to obtain appropriate foods for a nutritious diet.
- Food use: appropriate use based on knowledge of basic nutrition and care, as well as adequate water and sanitation.
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5.9 Notable features of Food Security Legislation

NFSA has a laudable objective of eradicating hunger and malnutrition from India in the shortest possible time. The proposed legislation marks a paradigm shift in addressing the problem of food security-from the current welfare approach to a rights based approach. It is therefore to get it right, not just in terms of making it a legal entitlement under the 'rights approach' but making it a success on the ground. The significance of the Act lies in its various features and provisions among which many were missing in the hither to existing schemes and Government programmes. Based on the quantum of grain-distribution commitment, the coverage and the expected impact, the TPDS forms the largest component of NFSA. The TPDS entitles the persons belonging to eligible households to receive food grains (mainly rice, wheat and coarse cereals) at highly subsidised prices. This system is likely to benefit 81.35 crore people or about 16.57 crore households, which are entitled to receive 5 kilograms of grains per person per month. State-wise coverage of population and households is substantially more than the coverage under the BPL category under the earlier TPDS in all states/Union Territories. In a

country with 22 per cent of the population living below the poverty line (as per Tendulkar Committee), coverage of 67 per cent under the Act clearly shows the intentions of the government to extend the benefit also to the population above the poverty line. Given the widespread objectives and implications, and the mammoth financial commitment involved, it becomes important to understand the various provisions of the major schemes under the NFSA.

5.9.1 Right based approach³⁶ : The Act aims to give legal entitlement to every poor person belonging to priority households, to receive 5 kg of food grains per person per month and the households covered under AAY shall be entitled to 35 kg of food grains per household per month per person at subsidised prices under the TDPS. The legal entitlement to receive food grains by persons will give them the constitutional right to minimum food security. Due to the enactment of this landmark legislation, the State is under a legal obligation to ensure the availability of entitled grains to eligible persons.

5.9.2 Coverage of population:³⁷ Under the NFSA, the coverage under TPDS has been delinked from poverty estimates and extended at the all-India level to cover up to 75 per cent of the rural population and up to 50 per cent of urban population. Based on the Census 2011 population figures, the number of persons eligible for subsidised food grain under the Act is estimated at 81.35

³⁶ Sec.3(1)

³⁷ Sec.3(2)

crore, which is 67 per cent of the total population or about 16.57 crore total households in the country. Until the next Census figures are available, the Act fixes the Census 2011 population figures as the base for the beneficiary identification process and for calculating the grain allocation commitments.

5.9.3 Types of Beneficiaries:³⁸ Unlike the earlier TDPS system, where beneficiaries are identified under three broad categories – poorest of poor (Antyodaya or AAY), BPL and APL – there are only two categories under the Act's TPDS, namely, Priority and AAY. The AAY beneficiaries, under the existing TPDS system, are retained under the NFSA

5.9.4 Entitlements:³⁹ Persons belonging to eligible households are entitled to receive 5 kilograms of food grains (rice, wheat, and coarse grains) per person per month at subsidised prices, provided that existing AAY households, which constitute the poorest of the poor, will continue to receive 35 kilograms of food grains per household per month. This compares to the earlier entitlement of 35 kg/card/month for all beneficiaries under TPDS.

5.9.5 Identification of beneficiaries:⁴⁰ While the poverty estimates from the Planning Commission will form the base of the state-wise number of beneficiaries under the Act, the Socio-Economic and Caste Census (SECC) survey will help identify these beneficiaries in each state. Planning

³⁸ Sec.3(1)

³⁹ Sec.3(1)

⁴⁰ Sec.10

Commission determines this state-wise coverage by using the NSS Household Consumption Survey data and census population data for 2011-12 and estimates the number of people falling below a state-wise threshold level. Using these estimates, the Commission provides the state-wise inclusion ratios.⁴¹ The SECC survey collects and estimates household level data to identify beneficiaries,⁴²The survey lays emphasises on capturing residential, social and occupational vulnerabilities. Processing the data against pre-determined indicators, the survey will be used to identify beneficiaries. However, the use of SECC by states is not binding. States could devise their own methodology to identify beneficiaries. If they decide to use the survey, they get the freedom to choose the relevant indicators and customise the survey. However, the total number of beneficiaries cannot be different from that fixed by the Centre.

5.9.6 Life Cycle Approach: Unlike the previous schemes of the Government, the NFSA adopts the life cycle approach, in the sense; it is an integrated effort to address the food requirement of every phase of human life cycle from infancy to the adult and the parenthood.

⁴¹ After conducting the SECC survey for districts in each state, a draft list is created and publicly displayed for disputes, if any, to be raised. Once the draft lists are ready and displayed, the final lists are created.

⁴² [Economic Survey 2013](#).

5.9.7 Food Security Allowance:⁴³ In case of states failure to supply the entitled quantities of food grains or meals to entitled persons, such persons shall be entitled to receive food security allowance as a substitute. The central government will provide for the allowance. In case of non-provision, the central or state government will be liable to meet the claim by the entitled person under the Act. However, in situations of force majeure (like war, fire, drought, flood, cyclone, and earthquake), where regular supply of food grains/meals is adversely affected, the liability does not apply.

5.9.8 Nutritional support to Women⁴⁴ and Children:⁴⁵ In order to address malnutrition among children, the children in the age group of 6 months to 14 years, may approach any feeding facility such as anganwadi centre or school Mid-Day Meals Centres for midday meal. There is a special focus on the nutritional support to women and children. Pregnant women and lactating mothers are entitled to nutritious meals free of charge during pregnancy and six months after the child birth, through the local anganwadi, so as to meet the nutritional standards. They will also receive maternity benefit of not less than Rs 6000, in such instalments as may be prescribed by the Central Government. Children in the age group of 6 months to 14 years will be entitled to take home ration or hot cooked food as per prescribed nutritional norms.

⁴³ Sec.8

⁴⁴ Sec.4

⁴⁵ Sec. 5

5.9.9 Women Empowerment:⁴⁶In a major shift from the past, the eldest woman in every eligible household who is not less than eighteen years of age, shall be head of the household for the purpose of issue of ration card

. This is done with a rationale of helping the feeding hands to have first right to food grains.

5.9.10 Grievance Redressal Mechanism:⁴⁷Every state government shall put in place an internal grievance redressal mechanism which may include call centres, help lines, designation of nodal officers or such other mechanism as may be prescribed. The State Food Commission and Central Food Commission will be established under the Act to oversee the effective implementation of the Act. The District Grievance Redressal Officer will look after and address the grievances of the public at every district.

5.9.11 Reforms in TPDS:⁴⁸ The Act contains measures for reforms in the TPDS, to be undertaken progressively by the central and state governments. These reforms include, inter alia. doorstep delivery of food grains to TPDS outlets, application of information and communication technology (ICT) tools, diversification of commodities distributed under the PDS over a period of time, etc. The Act also includes provisions for transparency and accountability in TPDS that include disclosure of records of TPDS, conduct of social audit and

⁴⁶ Sec. 13

⁴⁷ Sec.14

⁴⁸ Sec.12

setting up of vigilance committees at the state, district, block and fair price shop levels.

5.9.12 Social Audit and Penalty Provisions:⁴⁹ All TPDS related records shall be placed in the public domain and kept open for inspection to the public, in such manner as may be prescribed by the State Government. Every local authority, or any other authority or body, as may be authorised by the State Government, shall conduct or cause to be conducted, periodical social audits on the functioning of fair price shops, TDPS and other welfare schemes and cause to publicise its findings and take necessary action, in such manner as may be prescribed by the state government. To ensure transparency and proper functioning of the TDPS and accountability of the functionaries in such system, every State Government shall set up Vigilance Committees who can regularly supervise the implementation of all schemes under this Act.

5.10 Limitations in the implementation of the Act

Despite the strengths mentioned above, the Act has been the subject of criticism for its shortcomings related to its narrow approach to food security, the fiscal challenges it poses, inflationary pressure on the food items due to the implementation of the Act, centralised food procurement, inadequate coverage of the population, rationale of spending so hugely on the welfare schemes, developing the dependence syndrome among the people, etc.

⁴⁹ Sec.27

The following are the actual limitations on the NFS Act.

- a. High fiscal burden-subsidy cost above 1.25 lakh crore rupees per year.
- b. Government will have to keep large stock of foodgrains but FCI storage capacity insufficient.
- c. Keeping such a large quantity of food grains out of open markets in FCI godowns may lead to food inflation.
- d. Government may have to import foodgrain during drought years which may result in additional Current Account Deficit.(CAD)
- e. An average adult needs 14kg foodgrain, while the NFSA gives only 5 kg per person to Priority households.
- f. The Act focuses only on the supply of cereal. What about pulses (to give protein), edible oil (to give fat), fruits, vegetables (for vitamin) and milk- to combat malnutrition?
- g. Parliamentary standing Committee has recommended GPS tracking of trucks, CCTVs in go-downs to prevent diversion. But, yet to be implemented.
- h. Identifying households eligible for this scheme has been a big challenge.

- i. During natural calamity and wars- Union and state govt. will not be responsible for non-supply of foods⁵⁰
- j. Stopping “institutional” corruption in state PDS machinery mission impossible.⁵¹

5.11 Challenges in the implementation of the NFS Act

Food Security is one of the challenges confronting the world today. Ensuring food security and eliminating mass malnutrition is perhaps India’s biggest and most serious development problem and challenge for policy makers. Food is the first among many basic human needs, and it is for this reason that “the human right to food is recognised in several instruments under international law.⁵² The Food Security Act is the first step in ensuring right to food.⁵³ The success of this legislation completely rests on its implementation by the State Governments which in the process may face the following Issues and challenges.

5.11.1 Production: To achieve sustainable food security and to meet the need for adequate nutrition, there must be enough current and future food production. Despite large percentage of population being engaged in

⁵⁰ Sec. 44 of the Act

⁵¹ UN 1999.

⁵² *Yojana*, Issue Dec 2013.

⁵³ Dipa Sinha, Economic

agriculture, India is chronically deficient in food grain production. The slowdown and stagnancy in agriculture has become a serious concern for the economy in general and food security of the country in particular. Volatility in food system due to exogenous shocks from weather related events, instability in international markets, population growth, it is difficult to meet the demand. This could also result in *fiscal* imbalance where MSP of rice and wheat is increased to reduce the food subsidy burden for the government.

5.11.2 Procurement: Another challenge in implementing the scheme comes from the amount of food grains need to be procured. Given the coverage of FCI to selected States in procuring food grains, the wide gap between issue prices as envisaged under the Act and considered to be fixed and minimum support price which is likely to go up in future, may lead to the substitution effect where the farmers will like to purchase food grains from PDS system and switch to some other non-cereal crops that leads to import of basic food grains. These in turn have potential to destabilize the world food price. Regular siphoning off supply from the market through public procurement means that open market prices of food grains remain high, which adversely affect all those who are rightly or wrongly left out from the State run PDS.

5.11.3 Identification of beneficiaries: With the scheme aiming to provide subsidised food to 67 percent of the population, new households will be brought under the TPDS. One of the main drawbacks of TPDS is the large

margin of error in selection of targeted beneficiaries. Concerns are raised about provision for identification of households under the Act. The Act does not specify criteria for the identification of households eligible for TPDS entitlements. The experience from existing practice of TPDS shows a large proportion of eligible households are not included in 'BPL list' and do not have a ration card.

5.11.4 Storage: Lack of proper scientific storage facilities and the resultant rotting of food grains, as seen under the PDS and efforts to revamp the situation by including provisions for creation of such facilities, it fails when it comes to implementation. No specific timeframe for creation of such facilities to avoid wastage of foodgrains has been laid down. There is absolutely no mention of any sort of enforcement mechanism such as imposing fines on states that fail to comply with the deadlines of creation of such facilities. The issue of effective usage of excess stock that cannot be stored has also not been elaborated upon.

5.11.5 Distribution: The strongest criticism of the Act arises from the lack of faith in the ability of the beleaguered PDS of the country to deliver an expanded nationwide programme of distribution of food grains. PDS with a very large network is perhaps the largest retail system of its type in the world. However, the PDS has virtually collapsed in several states except in Tamil Nadu and Kerala, due to weak governance and lack of accountability. Though the Act speaks reforming PDS by involving community-based organisations,

NGO's and self-help groups, it is not convincing that such reforms will greatly improve the efficiency of the system. The main shortcoming from which the PDS has been found to suffer is substantial extent of leakage of grain from the distribution chain. The delivery mechanism of the programme is thus an area of major concern.

5.11.6 Corruption: The biggest evil faced by the country today is corruption. Starting from an office clerk, to the head of a project, almost everyone in the governmental department is corrupt. Bribery and black money run a parallel economy in the country. Pertaining to high levels of corruption, it is just to think that most of the funds allocated by the government it appears is distributed amongst the employees themselves and the remaining scanty is then utilized for project implementation. As a result of which, the quality and quantity of the project work and most of the goals or objectives set by the government for the project are left unfulfilled.

5.11.7 Fluctuation in the market prices of food grains

What happens to the market price of grain under cash and in-kind transfers, respectively? The question is important because, in practice, it is difficult to devise a perfect safety net. Some of the poor could be left out even if the coverage was meant to be universal. Moreover, if a policy intervention causes a rise in the market price of grain, the non-poor who are not entitled to a food subsidy would be adversely affected, and this would make the scheme

politically difficult to implement. Finally, even the poor beneficiaries would source part of their food grains from the market. Grain markets have a well-defined seasonal pattern. Price levels are at their lowest at harvest time and then rise through the year to cover the costs of carrying stocks. Grain prices can be higher either because of a higher harvest price or because of greater margins of storage and distribution.

When governments procure, the initial harvest price is determined not by the forces of supply and demand but by the support price set by the government. In India, most of the grain (especially wheat) is procured from a few states. As a result, the support price, and hence the harvest price, is typically determined through bilateral bargaining between the central government and the state governments. Given the nature of parliamentary democracy in India, the ruling party cannot ignore the votes in these surplus states, and consequently the outcome of the bargaining game is a price that is higher than it would otherwise be cash transfers. The power of the farm lobby to dictate prices does vary with circumstances. Shortage in the world market reduces the threat of imports and increases their power, but their power diminishes if government stocks are far in excess of need.

An additional complication is that the Central government is extremely sensitive to the possibility of under-supply to the PDS. Politicians and bureaucrats perceive the costs of insufficient supplies but nobody is held

accountable for excessive stocks and high prices. Predictably, the errors are in one direction. Since the early 1990s, procurement has consistently exceeded PDS sales. This is why there have been recurrent crises of excess stocks and consequently, of storage capacity. High procurement prices and large government stocks displace private trade and therefore, bumper procurement and stocks continue until the momentum is broken by an exceptional event such as a drought or by ad-hoc dumping of grain in the domestic (open market sales) or international market (exports).

The implication is that in our structure of procurement, there is always a tendency to accumulate excess stocks which in turn high prices. If the expanded obligations under the Food Security Act are met by a mix of transfers in-kind and in cash, it will restrain the pressures on procurement and public stocks. Of course, the problem vanishes in a world where cash transfers completely replace the transfers in-kind.⁵⁴

5.12 Fiscal Implications of the NFSA

The Food Security Bill became an Act with little parliamentary opposition. Yet the question remains unanswered as to can we afford the cost of subsidising food for such a large chunk of the population?

⁵⁴ Ashok Kotwal, Milind Murugkar, Bharat Ramaswami, Some reflections on the National Food Security Act, YOJANA, December 2013, p.27

The Act is an important effort to ensure the majority of population in India has access to adequate quantity of food at affordable prices. There is a widespread concern that the enhanced food subsidy will aggravate the already delicate fiscal situation of the country. Though there are contesting calculations of the impact of the Act on fiscal deficit⁵⁵ there is no denying that there is going to be some adverse impact on the fiscal situation. High fiscal deficit worsens public debt position, which can prompt international agencies to downgrade India's credit rating, which in turn can affect India's attractiveness as a destination of investment. It is however, to be noted that fiscal deficit situation is not dependent on the size of the overall governmental revenue expenditure process and managing of the deficit calls for wider subsidy, expenditure and tax reforms. Although the Act is likely to simplify the identification of beneficiaries, the financial implications are still going to be huge. The food subsidy cost of implementing the NFSA is estimated at Rs. 1.2 lakh crores for 2013-14. The selling price of any average quality Rice is around Rs.20 per kg. Government is selling it at Rs.3per kg, the difference of Rs.17/- will be the subsidy the government is offering. So, for 5 kg of rice, the subsidy is Rs.85/- per person and this is on a monthly basis and the government will have to incur

⁵⁵ .Long term economic effects of food security bill in India: An Analysis. By Dr.Pramod Bubna, International Journal of Advanced Research in Management and Social sciences, Vol.2/No.12/December 2013.

this subsidy bill every month and forever for around 85 crore people. Thus, the overall impact the Act will have on its tax payers is estimated at around 1.2 lakh crores. But Economists and industry experts feel that this estimate is highly optimistic and may go up to 2.4 lakh crores. Another important point is that, the food security scheme is an open ended scheme. This means that, there is no end date or expiry date for this scheme. It will be a never ending phenomenon that covers 67% of our population irrespective of whether they need that subsidy or not. This means as the population grows, the expenditure too would keep going up⁵⁶ Establishing legal rights of almost 70 percent of the population to entitlement of a fixed minimum quota of food grains at subsidised rates can significantly enhance the welfare of the economically marginal population. To that extent, the legislation, despite not being a conceptual novelty and despite being an expanded edition of the food security currently extended through the TPDS, can be game changer for India. The fiscal implications of the scheme, however, make it a double edged sword⁵⁷

5.13 The NFSA: A mere discharge of the constitutional mandate?

To discharge the obligation created under the Constitution, the country has adopted the NFSA. The right to food has established itself as a constitutional mandate. It occupies a position of prominence in the Constitution being a part

⁵⁶ Amitendu Palit, ISAS Insights, No.226-4 Sep 2013.

⁵⁷ PAHAL was launched earlier in June 2013 by the Ministry of Petroleum and Natural Gas and recently re-launched in November 2014.

of Article 21. The Government of India has adopted a very restricted perception of the right to food while framing the Act. The Act, for realization of the right to food mostly seeks to provide food assistance to the malnourished people ignoring other similar obligations of the state. Thus, right to food which is a Constitutional mandate is not adequately protected under the Indian Legal Framework. Framing legislation on right to food which is wider in ambit than NFSA and a constitutional amendment to expressly include the right to food in the Constitution of India as has been done in the case of the similarly placed right to education, is an utmost necessity to ensure that its entitlements are not diluted as this legislative framework is not in conformity with the international protection.

Under international law the Government has three obligations, namely the obligation to respect, protect and provide. The Act provides nutritional assistance to intervene hunger to the food vulnerable sections. The Act in reality has nothing more to provide than the re-drafting the present entitlements of the nutritional assistance under the on-going schemes with increased coverage. The protections under this legislation are limited to the obligation of the state to provide food assistance to the people in hunger. It does not intervene the cause of hunger through protection which is sustainable in nature like the protections of agricultural land, livelihood to name a few. Therefore the Act fails to discharge the obligation to respect the right to food of the people which requires the Nation State to refrain from any act which deprives an

individual or a group of individuals from enjoying their right to food through their own efforts. Such obligation prohibits policies that destroy the access to food of individuals or group of individuals. The Act also fails to discharge the obligation to respect the present access to food enjoyed by the people.

5.14 Measures to be adopted for effective implementation of the Act

Upon evaluating the preparedness of the implementing states, there appears lesser probability that the Act will be implemented in its true spirit by all the 36 states/UTs. However, if the centre does 'force' states to implement the Act and its provisions, without satisfying the various pre-conditions, it will be doing a great disservice to the country. By pouring more grain, this time with a legal entitlement, into an already leaky (estimates of leakage range between 40 to 50 per cent) and an inefficient TDPS basket is only likely to drain the system of already scarce financial resources. After evaluating the enormous inefficiencies in existing FCI operations, a report by a high-level committee (HLC) on FCI (2015) suggested shelving of some of the provisions under the NFSA. The report seems to suggest that if such provisions are implemented without, first, fixing the system, the laxity in the system will only multiple further.

5.15 Conclusion

Successful implementation of this ambitious food security program will leave a meaningful safety net for a vast majority of Indians who eke out their living in the unorganised sector comprising of agriculture, the rural non-farm sector and the urban informal sector which is characterised by easy entry, cut throat completion, low wages, low productivity, financial exclusion and absence of social security provisions, virtually devoid of any social security system to fall back upon. The Act is a major step to honour the spirit of the constitution and the judgement of the apex court, an important beginning of the journey to end hunger throughout the nation. While food security-a situation where all people at all times have access to sufficient safe and nutritious food for an active and healthy life-can be achieved in theory without the adoption of legal measures, the addition of legally enforceable rights makes the future of food security more secure. It is not enough to enact law on the food security; such law needs to be owned by those who are most in need of its enforcement.

CHAPTER-6

**THE RIGHT TO FOOD AND ITS ENFORCEMENT AN UTOPIAN
DREAM OR REALITY?**

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CHAPTER-6

THE RIGHT TO FOOD AND ITS ENFORCEMENT AN UTOPIAN DREAM OR REALITY?

6.1 Introduction

Food is the most basic requirement for survival, it still seems to be a luxury which millions barely have access to.¹ Given the crucial importance of access to food in a world of plenty where massive hunger persists, it may not come as a surprise that the right to food has been playing a pioneering role in the resurgence of economic and social rights during the past few years. Though many countries have pledged their allegiance to the task of eradicating hunger, so far it has proved to be a utopian dream.

6.2 Recognition of food as a basic human right

The right to food, as a justiciable, legally enforceable right, is relatively a recent invention. The movement towards the full recognition of its potential went through successive phases. For almost fifty years, following the adoption of the UDHR in 1948, the right to food was part of the corpus of international human rights law, but it was seen as of rather symbolic value. To the extent there were any obligations attached to its proclamation, they were understood as subject to progressive realization and dependent on whichever international

¹Parvathi Menon & Divya Dixit, STARVING INDIA: FOOD SECURITY VIS-À-VIS RIGHT TO FOOD IN INDIAN CONTEXT, ISSN 1923-6662 (online). Available at <http://www.ssrn.com/link/OIDA-Intl-Journal-Sustainable-Dev.html>

assistance and cooperation the State could obtain: such obligations were neither concrete nor immediate, and victims of hunger could hardly invoke the right to food against the governments who were not acting swiftly enough to improve their situation.

Under the ICESCR, the “right to food” is defined as the right to be free from hunger and to have sustainable access to food in a quantity and quality sufficient to satisfy one’s dietary and cultural needs. States that have ratified this Covenant are obligated to take steps to progressively achieve the full realization of the right to food for those within their territory or under their jurisdiction. Implicit in this state-centric approach is the rationale that human rights are the byproduct of relationships between governments and the individuals they govern, rather than relationships between global actors and individuals worldwide whose rights are affected by their actions. In the age of economic globalization, a variety of state and non-state actors may be contributing to the state of world hunger, but not all actors are given equal consideration under international law.

The existing human rights legal framework is ill-equipped to deal with these actors and the effects of their policies abroad: it does not adequately address the obligations of transnational corporations (TNCs) and international financial institutions (IFIs); States Parties’ obligations are limited to individuals in their

territory or under their jurisdiction; and states that do not ratify the ICESCR may escape right to food obligations altogether.

6.3 Substantive Issues arising in the implementation of the ICESCR

The nature of the legal obligations of States parties are set out in Article 2 of the Covenant and has been dealt with in the Committee's GC No.3 (1990). The principal obligation is to take steps to achieve progressively the full realization of the right to adequate food. This imposes an obligation to move as expeditiously as possible towards that goal. Every State is obliged to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger.

Some measures at these different levels of obligations of States parties are of a more immediate nature, while some other measures are more of a long-term character, to achieve progressively the full realization of the right to food.

Violations of the Covenant occur when a State fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger. In determining which actions or omissions amount to a violation of the right to food, it is important to distinguish the inability from the unwillingness of a State party to comply. Should a State party argue that resource constraints make it impossible to provide access to food for those who are unable by themselves to secure such access, the State has to demonstrate that every effort

has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations. This follows from Article 2.1 of the Covenant, which obliges a State party to take the necessary steps to the maximum of its available resources, as pointed out by the Committee in its GC No. 3, paragraph 10. A State claiming that it is unable to carry out its obligation for reasons beyond its control therefore has the burden of proving that this is the case and that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food. Furthermore, any discrimination in access to food, as well as to means and entitlements for its procurement, on the grounds of race, colour, sex, language, age, religion, political or other opinion, national or social origin, property, birth or other status with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of economic, social and cultural rights constitutes a violation of the Covenant.

Violations of the right to food can occur through the direct action of States or other entities insufficiently regulated by States. These include: the formal repeal or suspension of legislation necessary for the continued enjoyment of the right to food; denial of access to food to particular individuals or groups, whether the discrimination is based on legislation or is pro-active; the prevention of access to humanitarian food aid in internal conflicts or other emergency situations; adoption of legislation or policies which are manifestly

incompatible with pre-existing legal obligations relating to the right to food; and failure to regulate activities of individuals or groups so as to prevent them from violating the right to food of others, or the failure of a State to take into account its international legal obligations regarding the right to food when entering into agreements with other States or with international organizations.

6.4 Violations of the right to food through trade policies

International Trade underwent dramatic changes in the 20th century as a result of the two world wars. The war-associated food shortages, economic crises, and disease spread set the stage for global trade agreements and organizations designed to address global public good issues. The GATT was created to reduce tariff-based trade barriers and to prevent the downward spiral of world trade seen in the Great Depression from 1929 to 1933.² Many countries had supply-driven economies, where policies favored increased agricultural production to ensure adequate domestic supplies of basic feedstuffs. Increasing the supply and reducing the costs of food were politically popular national priorities. Food self-sufficiency was a powerful motivation, especially for countries that had experienced food shortages in the past. Countries that exceeded domestic demand used export markets and food aid programs to deal with the excess. Subsequently, with the creation of WTO in 1995 and further trade liberalization under it, had significant impacts on the structure of the

²Personal communication, Christiane Wolff, World Trade Organization, March 2012.

world food economy, the scale and direction of trade flows and thus on food prices.

International trade liberalization under the WTO regime affected the right to food. The WTO's AoA, for instance, imposes several restrictions on WTO members in favor of trade liberalization in agriculture.³

First, under the premise of increasing market access for agricultural products, members must replace quantitative restrictions with tariffs, which they are subsequently bound to reduce. But a lack of enforcement of this subsequent tariff reduction has led to noncompliance and has harmed developing countries seeking viable markets, increasing their dependence on food imports. Second, members must refrain from introducing new forms of domestic support for agricultural production and must reduce current levels of support by certain base percentages. Such an arrangement favors developed countries that already had stable support systems that can be reduced to still-functional levels or that consist of support mechanisms beyond the scope of the AoA. And third, members must reduce existing export subsidies and refrain from introducing new export subsidies. This again favors developed countries that already had export subsidies in place.⁴Subsidized food and agriculture products arrive on

³Special Rapporteur on the right to food, *Report of the Special Rapporteur on the Right to Food, Olivier De Schutter, Addendum: Mission to the World Trade Organization*, ¶ 14, presented to the 10th Session of the Human Rights Council, U.N. Doc. A/HRC/10/5/Add.2 (Feb. 4, 2009), available at <http://www.srfood.org/images/stories/pdf/officialreports/or3-hrc-10-5-add2-advancededitedversion-en.pdf>.

⁴ECOSOC, Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *The New International Economic Order and the Promotion of Human Rights: Report on the Right to*

the markets of developing states as cheap imports with which local products cannot compete. As a consequence of dumping practices, smallholders have less income and fewer resources to buy seeds and fertilizers, which in turn affects their agricultural production, and thus their livelihood. The disparate levels of protection and liberalization within developing and developed countries makes illusory the notion of a “level playing field,” and makes it difficult, if not impossible, for developing countries to minimize the negative effects of agricultural trade while maximizing its benefits.

Trade liberalization can have significant impacts on the structure of the world food economy, the scale and direction of trade flows, and thus on food prices. The magnitude of these impacts is likely to vary significantly between and within countries due to various factors ranging from border policies, the number of sellers and buyers in the market and households' effective demand.

6.5 Implications of Trade liberalization on Developing and Least Developed Countries (LDC's):

About two thirds of the WTO's members are developing and Least Developed countries. They play an increasingly important and active role in the WTO because of their numbers and they increasingly look to trade as a vital tool in

Adequate Food as a Human Right, U.N. Doc. E/CN.4/Sub.2/1987/23 (July 7, 1987)
(submitted by *Asbjørn Eide*)

their development efforts.⁵ Developing countries are a highly diverse group often with very different views and concerns. The impact of international trade on the food situation of these countries is both complex and contradictory. It is generally considered that while self-sufficiency in food is not necessary for developed countries - since they have sufficient means to buy what they need on world markets - but it is nevertheless desirable for poor countries.⁶

The WTO agreements include numerous provisions giving developing and least-developed countries special rights or extra leniency – “special and differential treatment”. Among these are provisions that allow developed countries to treat developing countries more favorably than other WTO members.

Trade liberalization has already exposed developing country farmers to ruinous competition driving down prices, undermining rural wages and exacerbating unemployment. Farmers in the developing world have become the children of the lesser god, the neo-poor. Through a variety of instruments, the rich countries have ensured complete protectionism. Trade policies therefore have remained highly discriminatory against the developing country farmers. The

⁵Ravindra Rena, Impact of WTO Policies on Developing Countries: Issues and Perspectives. *TRANSNATIONAL CORPORATIONS REVIEW (CANADA)*, 4(3):77-88, (2012)

⁶Commission on Human Rights, Fifty Seventh Session, E/CN.4/2001/53, Feb 2001.

export subsidies and credits are cornered by the food exporting companies. The shocking levels of food dumping and its little understood but horrendous impact on the farming sector in the developing countries is the result of clever manipulation at the WTO. The US and the EU were successful in ensuring that some subsidies and that included direct payments, have little or no impact in production levels and have little or no trade. Using sophisticated models and taking advantage of the un-preparedness of the developing country negotiations, they devised a complicated set of rules that termed only 'amber box' subsidies as 'trade distorting' that need to be cut. So it turned out, these were the type of subsidies that the poor countries were also using.⁷

Agricultural trade is far from being free and even further from being fair, many developed countries continue to protect and subsidize the production of basic, staple foods. Many developing countries are becoming dependent on food imports and are subjected to unfair competition from developed-country products sold at prices below the cost of production. This displaces local production of basic foodstuffs and farming livelihoods in those countries. While agriculture and food production in developing countries remains at a fixed at a low level, agriculture in the developed countries attained high levels

⁷. Devinder Sharma, *India Together: WTO and the great trade robbery*, Sept 2003

of production due to massive government support and tight protection for the sector.⁸ This has important implications for the realization of right to food.

Despite preaching the benefits of free trade in agriculture, the EU and US and other industrialized countries still heavily protect their agriculture in order to ensure the production of basic staple foods. Developing countries have been persuaded into liberalizing their agricultural sectors, often under the programmes of IMF/WB rather than AoA, only to find that the promised benefits of 'free trade' in agriculture have not materialized. Instead, their farmers have often been devastated by artificially low prices created by the 'dumping' of subsidized agricultural products. While some developed countries continue to subsidize and protect agriculture as a question of national security, food security or multifunctionality, many of the poorest developing countries are left at a severe disadvantage, as they cannot afford to subsidize products of the developed countries. A pattern of trade is beginning to emerge where the developed countries dominate the production of staple foods, the developing countries have shifted from being net food exporters to being net food importers over the years and the costs of their food imports have risen making it increasingly difficult for many of these countries to pay their food imports. This leaves these countries unable to produce their own food, but also unable to

⁸. Food Sovereignty Framework, Dec 2005

guarantee an income to buy their own food, leaving them increasingly vulnerable to food insecurity and severally affecting their ability to guarantee the realization of the right to food⁹

A report entitled “Trade and Hunger”¹⁰ claims that food security based on international trade is “more mirage than fact” for the poorest in developing countries, on the basis of 27 case studies in different countries. The report argues that much of the agricultural trade liberalization in developing countries over the past 20 years has been based on the hope that agricultural production in developing countries would switch to high-value export crops, which would enable them to import food. However, this has not happened in many countries, which have struggled to find viable export crops, as commodity prices have fallen and they have laboured to find the funds to meet their food import needs. International trade does not automatically help countries to meet food shortages if they do not have foreign exchange to buy food imports.¹¹ Both producers and consumers suffer when liberalization allows unscrupulous traders and private

⁹Commission on Human Rights, Economic, Social and Cultural Rights, The right to food, Report submitted by the Special Rapporteur on the right to food, Jean Ziegler, in accordance with Commission on Human Rights resolution 2-3/25., Feb 2004.

¹⁰John Madeley, “*Trade and hunger: an overview of case studies on the impact of trade liberalization on food security*”, Globala Studier No. 4 (Stockholm, Church of Sweden, Diakonia, Forum Syd, the Swedish Society for Nature Conservation and the Programme of Global Studies, 2000.

¹¹Of course the problems are different for net food importing countries that cannot grow sufficient food. For this reason, the Decision on Measures concerning the Possible Negative

monopolies to pay low prices to farmers and charge high prices to consumers.¹²The switch to export crops has also shifted government attention away from small-scale farm agriculture focused on food security.

For several developing countries that have liberalized their agricultural sectors, the experience has not been a positive one. Whilst farming livelihoods have been devastated when opened up to competition for imports sold at below-cost-of production, consumers have not always benefitted from lower prices. All this has left many countries understandably distrustful of the promises of free trade for ensuring food security. The increasingly familiar story of trade talks collapsing is a symptom of the current inequities of the global trading system, which are being perpetuated rather than resolved under the WTO, given the unequal balance of power between member countries.¹³

The WTO is not just about trade: it is about power and control of resources. The most critical issues facing LDC's today are poverty and hunger and these issues are related to each other. LDC's are primarily agricultural economies with nearly 70% of the population engaged in agriculture. The vast majority of

Effects of the Reform Programme on Least Developed and Net Food Importing Countries (Marrakesh Decision)

¹²IMF, "External evaluation of the ESAF: report by a group of independent experts, June 1998" (Washington, D.C., 1998).

¹³Economic, Social and Cultural Rights, The right to Food, Report submitted by the Special Rapporteur on the right to food, Jean Ziegler, in accordance with Commission on Human Rights resolution 2003/25,E/CN.4/2004/10 9 February 2004.

the poor and food insecure are in rural areas. Therefore poverty alleviation and food security must start in these areas. The outcome of the World Food Summit states that, “food security exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life.” It requires that food is available locally and that people have the means to acquire it, either by growing it or purchasing it, throughout the entire year. Agricultural Productivity of LDC's is relatively low. Land degradation is a major problem, due to increasing population pressure, erosion, water scarcity and the breakdown of traditional systems for soil fertility. Farmers have little support from their Governments. Most of the LDC's dismantled marketing boards, extension services and credit support and opened up agricultural markets to subsidized exports from developed countries. This decimated agricultural sectors and most turned from net food exporters to net food importers within a decade. International finance organizations and bilateral donors advised several LDC's to set up production and export capacity for cash crops. While some countries, have been successful in this regard, this focus often distracted political attention and crowded out investment from staple food production and its supportive infrastructure and institutions. In addition, post harvest losses in LDC's are large, with at least one third of food produced being lost before reaching consumers due to spoilage, poor storage and transport facilities.

The LDC's receive extra attention in the WTO. All the WTO agreements recognize that they must benefit from the greatest possible flexibility and members must take extra efforts to lower import barriers on LDC's exports. Since the UR agreements were signed in 1994, several decisions in favour of LDC's have been taken. Meeting in Singapore in 1996, WTO ministers agreed on a "Plan of Action for LDC's," This included technical assistance to enable them to participate between in the multilateral system and a pledge from developed countries to improved market access for least developed countries products. A year later, in October 1997, six international organizations- the International Monetary Fund, the International Trade Centre, the United Nations Conference for Trade and Development, the United Nations Development Programme, the World Bank and the WTO- launched the "Integrated Framework", a joint technical assistance programme exclusively for least-developed countries. It contains several broad elements: improved market access, more technical assistance, support for agencies working on the diversification of LDC's economies; help in following the work of the WTO; and a speedier membership process for LDC's negotiating to join the WTO. At the same time, more and more member governments have unilaterally scrapped import duties and import quotas on all exports from LDC's.

In spite of the conventional understanding about the creation of an 'open' global free trade system, there is very limited 'free trade'. The relevance of the

WTO in the world system is that it is seen as the central institution in a centralized global economy. This has major relevance for developing countries as they grapple with huge development challenges.¹⁴

Thus, the developing countries and LDC's face a number of risks associated with trade. Perhaps the best known is declining terms of trade, as the world prices of the primary commodities they export tend to fall overtime relative to the price of the manufacturers they import. A related problem is the volatility of the world prices for the primary (especially agricultural) commodities they export. Furthermore, these prices are determined in markets beyond the influence of individual poor countries and typically affected by factors beyond their control. Related to this are supply side risks, especially the sensitivity of output to climate variability. Droughts and excess rain creating flooding can cause serious damage to agricultural output.

6.6 Upholding the right to food

The right to food is among the basic economic and social rights and is fundamental right of all citizens. While all the rights under the Covenant are meant to be achieved through progressive realization, States have some minimum core obligations which are of immediate effect. They have the

¹⁴Jennifer Chiraga, *Trade, gender and the search for alternatives*, Trade Justice Reader 1.

obligation to refrain from any discrimination in access to food as well as to means and entitlements for its procurement, on the grounds of race, colour, sex, language, age, religion, political or other opinion, national or social origin, property, birth or other status. States are further prohibited to take retrogressive measures, i.e. deliberate measures which result in the deterioration of current level of fulfillment of the right to food.

The Covenant requires that States take whatever steps are necessary to ensure that everyone is free from hunger and as soon as possible can enjoy the right to adequate food but they have a margin of discretion in choosing the ways and means of implementing the right to adequate food. Finally, States have to ensure the satisfaction of the minimum essential level required to be free from hunger.

Despite the growing global acceptance of an individual's right to food and the obligation of the state to ensure that all its citizens are free from hunger, millions of people around the world today are still chronically malnourished. There has been progress. In 1996, countries set out a clear target to eradicate hunger at the World Food Summit and in 2004, the 162 member states of the United Nations Food and Agricultural Organisation adopted voluntary guidelines "to support the progressive realisation of the right to adequate food".

Among those nations, Brazil led the way. President Lula's ambitious Zero Hunger programme helped to establish the right to food as a constitutional right in 2010. Nicaragua, Bolivia and Ecuador were also at the forefront of legislating the right to food with similar laws and constitutional amendments. Across Latin America, change came out of successful campaigns led mostly by peasant farmers. In India, however, it was the Supreme Court that pronounced the right to food as an integral part of the right to life. The right to food case and the efforts of the right to food campaign vocalised a consensus held among Indians that the second-fastest growing economy in the world could not continue to have the largest number of hungry people and malnourished in the world. The battle in the courts and the struggle on the streets led to the passage of the NFSA in 2013, which has expanded the public distribution system of food grains to cover more than 820 million people.

Globally, as in India, the challenge to the right to food is considerable. The most significant barrier to change is the inability of governments to fix the global food system as a whole and address the issue of growing corporate control over food systems. Despite the commitments made under the covenants and national laws, hunger still persists. Steps are being taken for the progressive realization of the right to food. For realizing right to food, three things may be necessary. One is the process of formulation of policies. Second is the progressive realization of right and concern for disadvantaged. Third is monitoring and accountability. The process of formulation of policies should

be participatory. Then only the policy makers come to know of the problems of the poor. Also one has to take care of the disadvantaged persons in providing food and nutrition. Monitoring and public accountability are important instruments for realization of right to food.¹⁵

International trade can play a major role in improving food security at the national level. States should promote international trade as one of the effective instruments for development, as expanded international trade could open opportunities to reduce hunger in many of the developing countries. It is recalled that the long-term objective referred to in the AoA is to establish a fair and market-oriented trading system through a programme of fundamental reform encompassing strengthened rules and specific commitments on support and protection in order to correct and prevent restrictions and distortions in world agricultural markets. States are urged to implement commitments expressed at various relevant international conferences. Agriculture is a central element in the current negotiations. Efforts should be intensified to achieve the internationally agreed aims embodied in the three pillars of the Doha mandate, namely substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade distorting domestic support.

¹⁵E/C.12/1999/5.) And in 2002, the third World Food Summit (called "WFS+5")

6.7 Strategies for the realization of the right to food.

6.7.1 Recognition of Right to food as a Constitutional Right

The recognition of right to food as a justiciable right at the national and the international level is gaining ground year after year.¹⁶ Many countries are including or already have included the right to food in their constitutions. The Constitutional right to food is the strongest possible basis the right to food can have, since all laws must conform to the constitutional provisions.

Explicit recognition of the right to food in constitutions is seldom noticed. Direct recognition has the advantage of avoiding the uncertainty of judicial interpretation since the right is clearly spelled out. The insertion of the right to food in the constitutions of the countries improves accountability since the constitutional provisions limit actions and policies of all branches of the government. Each policy or act by the government needs to be in line with the constitution and acts deemed unconstitutional will need to be annulled immediately. Further constitutional recognition allows for a trickle down or cascading effect to take place from the constitutional right to the national laws, to the policies and strategies and to the program level. This continuum will need to be constructed in order to give effect to the constitutional provision. In

¹⁶S. Mahendra Dev, *Right to Food in India, Working Paper No. 50* CENTRE FOR ECONOMIC AND SOCIAL STUDIES, 2003.

practice this is not followed necessarily in this order, as programmes sometimes get developed before laws.(e.g. India) or laws get developed before actual constitutional recognition. The important element however is that these different elements along this continuum are in place in order to realize progressively the right to food. The insertion of the right to food into the constitution is thus not mere symbolic significance. It imposes on all branches of the State to take measures to respect, protect and fulfill the right to food by adopting adequate laws and by implementing policies and programmes aimed at the progressive realization of the right to food. At the same time, constitutional recognition is an important step in empowering people to realize their right to food as they can use the right to food recognized in the constitution to demand those adequate polices and laws which establish an enabling international environment for them to realize their right to food.

6.7.2 Developing Right to food frame work Law.

GC 12 urges States to develop a legal framework as a cornerstone in their path towards a rights-based approach to their food security. Several countries have adopted framework laws and others are currently in the process of drafting framework laws in their efforts towards adopting a right to food strategy as a contribution to improved food security. This consolidation of the right to food in national law can differ since countries can opt to include right to food in an

overreaching right to food framework law first or include it in sectoral legislation.

There is a general recognition that establishing a framework law may significantly contribute to the realization of the right to food, in a number of ways:

- (a) By ensuring that governmental bodies will be held accountable if they do not comply with the obligations the said framework imposes on them.
- (b) By ensuring that the right to food will be at the center of national development strategies, which developing countries may then refer to in their dialogue with donor countries seeking to provide international aid.
- (c) By strengthening the position of countries in negotiations related to trade or investment, by referring their partners to the obligations they are imposed vis-à-vis their constituencies at domestic level.

Ideally, a national framework law on the right to food is a translation of the provisions included in the ICESCR into the national sphere, as it 'can give a precise definition of the scope and content of this human right, set out obligations for state authorities and private actors, establish necessary institutional mechanisms and give the legal basis for subsidy legislation and other necessary measures to be taken by the competent state authorities.'^{17A}

¹⁷FAO Methodological Toolbox on the Right to Food-Guideline on Legislating for the Right to Food, page 4

framework law thus facilitates-and is imperative-in the implementation of the right to food at the national level.

6.7.3 Adoption of National strategies

Laws alone are not sufficient to realize the right to food in a country. Through the adoption of a national strategy for the realization of the right to food and the implementation of the programmes placed under such a national strategy, the right to food is operationalized and put into action at the local level.

Guideline 3 of the Right to Food Guidelines provides useful indicators about how States could adopt a national human rights-based strategy for the realization of the right to food. Such a national strategy should comprise the establishment of appropriate institutional mechanisms, particularly in order to:

- i) Identify, at the earliest stage possible, emerging threats to the right to adequate food, by adequate monitoring systems;
- ii) Improve coordination between the different relevant ministries and between the national and sub-national levels of government;
- iii) Improve accountability, with a clear allocation of responsibilities and the setting of precise timeframes for the realization of the dimensions of the right to food which require progressive implementation;
- iv) Ensure the adequate participation, particularly, of the most food-insecure segments of the population;

v) Ensure that specific attention is given to the need to improve the situation of the most vulnerable segments of society, including girls and women whose specific situation must be taken into account.(Guideline 3.9), to the principle of non-discrimination, as well as to the explicit inclusion of access to adequate food as part of larger poverty reduction strategies.(Guideline 3.4 and 3.5)

6.7.4 The role of Courts

It has been remarked that a right is only fully justiciable 'if it is only recognized as such if there are procedural mechanisms which allow victims of violations access to judicial review'.¹⁸

As more and more countries adopt laws on the right to food or include it in their constitutions, courts will play an increasingly important role. We have witnessed already right to food violations lodged before the courts in countries such as India, Argentina, Columbia, Switzerland and Paraguay. *PUCL* is one of the most successful court cases filed before the Supreme Court of India.¹⁹The case ignited a series of on-going interim judicial orders imposing the implementation of several food schemes set up previously by the government and providing clear and concrete benchmarks for the government

¹⁸FIAN 'How to Promote the justiciability of the Right to Food-A multidimensional Strategic Proposal(FIAN, Heidelberg, 2008) p.7.

¹⁹Writ Petition (Civil) No. 196/2001.

to follow. The case led to the development of a strong civil society group campaigning for the right to food throughout the country. In India the awareness-rising function of such campaigns is very important as (caste-based) discrimination is still widespread, and the poorest among the poor have little notion of what their rights are since they are not accustomed to have any.

6.7.5 Securing process by the design of an Institutional Framework

It is imperative that national institutions are created to monitor and assess the right to food situation in a country. Right to Food Guidelines 5 declares that States 'should assess, where appropriate, the mandate and performance of relevant public institutions, and where necessary establish, improve, or reform their organization and structure to contribute to the realization of the right to food.'²⁰ Several countries have followed this Guideline, in setting up novel structures on their way to realize the right to food in their country.

India, through the PUCL case and subsequently through the NFSA has established Commissioners on the right to food. These Commissioners fulfill a vital role in monitoring of the implementation of the right to food and

²⁰See also General Comment 10 on "The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights" by the Committee on Economic, Social and Cultural Rights.

Or warding recommendations on legal and policy action. The Commissions have proven to be extremely helpful.²¹

6.8 Conclusion

The right to food is an emerging human rights issue to be addressed at the WTO. The likely impacts of implementing WTO Agreements on food distribution, quality, accessibility and nutritional value will become more pronounced as liberalization on trade advances. Liberalization will have some positive outcomes as prices will drop and market access widens however there are other offsetting concerns that arise, particularly without the ability of developing countries to use AoA protective or compensatory mechanisms. The incorporation of right to food language into WTO requirements can supplement some of the protective mechanisms, facilitating better integration of human rights concerns into WTO decision making. It can also establish a goal to be fulfilled for countries when negotiating and implementing international trade rules. "The right to food is not a utopia, it can be realized for every woman, man and child, even in times of crisis. We have the legal framework in the

²¹A K Sen, Poverty and Famines. An Essay on Entitlement and Deprivation. Oxford University Press, 1981.

form of international, regional and national human rights standards. To make the right to adequate food a reality for all, action at country level is essential. It is there that the difference will be made for those who are suffering from hunger."²²

²² Barbara Ekwall, Coordinator of the Right o Food, FAO

CHAPTER – 7

CONCLUSION AND SUGGESTIONS

7.1 Summary of Discussions

7.2 Conclusion

7.3 Suggestion

CHAPTER – 7

CONCLUSION AND SUGGESTIONS

Chapter 1 of the thesis provides conceptual analysis of hunger and the grim scenario prevailing all over the world by capturing the dimension of human suffering, the unbearable nagging dread that tortures starving persons from the moment they wake up. It then describes the conceptual evolution of the food into its current denomination as human right to food. Outline of the international recognition of the right to food along with commitment of states parties to respect, protect and fulfil the right to food is also provided. The analyses largely concerns the instrumental relation between the right to food and WTO rules along with legal basis for the right to food.

Chapter 2 begins by tracing the roots of WTO as the successor of GATT. The current WTO agreements are the legacy of commitments that countries have voluntarily negotiated with each other, on a repeat basis, in the decades since 1947. The GATT established the forum for negotiations on cutting tariffs that subsequently would take place over the following decades through multilateral trade rounds. WTO superseded the GATT in 1995, as the umbrella organisation and its formation was a watershed development in the sphere of international trade. It was a major advancement in the multilateral trade regime, established to deal with regulation of trade between participating countries by providing a frame work for negotiating and formalizing trade agreements. The WTO provides the

institutional and legal foundation for the multilateral trading system based on the principles of non-discrimination embodied in the most favoured Nation and National Treatment rules, Reciprocity of trade concessions and Transparency.

One of the major advancements in the multilateral trading regime that the WTO brought in was the setting up of a substantive dispute settlement mechanism. An effective mechanism to settle disputes thus increases the practical value of the commitments the signatories undertake in an international agreement. The fact that the Members of the WTO established the current dispute settlement system during the Uruguay Round of Multilateral Trade Negotiations underscores the high importance they attach to compliance by all Members with their obligations under the WTO Agreement. Settling disputes in a timely and structured manner is important. It helps to prevent the detrimental effects of unresolved international trade conflicts and to mitigate the imbalances between stronger and weaker players by having their disputes settled on the basis of rules rather than having power determine the outcome. WTO members use the multilateral system of settling disputes instead of taking action unilaterally if they believe fellow-members are violating trade rule. India is one among the most active developing country users of the WTO dispute settlement system and has been able to make effective use of the system and is strictly adhering to WTO rules while conducting international trade. When most of the developing countries were diffident to approach Dispute Settlement Body to ascertain their rights due to the huge expenses involved and

lack of technical and related competence, India from the beginning is an active user of the DSU.

However, the functioning of the DSB within the WTO, over the years, has also revealed certain limitations in the system. One major problem is the increasing degree of non-compliance with the rulings of the DSB by industrially advanced countries and formations like the United States and European Union. The DSB does provide for a retaliatory mechanism whereby the winning country can retaliate against the country that does not comply with its ruling. It is this provision that gives some teeth to the DSB. However, a number of cases have demonstrated that the mechanism has not served its purpose in situations where smaller, economically vulnerable countries are involved in disputes with larger or economically stronger countries. Notwithstanding the remarkable performance of the DSB, therefore, the fact that it has certain lacunae has become very evident.

The Uruguay Round Agreements, concluded in 1994, are the most important source of multilateral trade rules governing domestic agricultural and trade policies. To the extent that trade contributes to increased economic activities that generate employment and incomes for food-insecure population groups, almost all WTO Agreements have an impact on food security to a varying degree. However, keeping in view the nature of the topic, and in view of the overwhelming importance of the agricultural sector for food security, a brief analyses of the

relevant provisions of TRIPS and SPS agreement dealing with the right to food are examined in the second part of the chapter.

Chapter 3 explores the relationship between AoA and the obligation of the members of the WTO to respect the human right to food to which they have committed themselves by ratifying the ICESCR. Agricultural trade liberalization has been a contentious issue ever since the WTO embarked on the task of establishing binding set of rules on the member countries of the organization. Trade in agriculture is vital part of international development. The AoA, concluded at the end of Uruguay Round of Multilateral Negotiations brought in new rules on agricultural trade, one of the most distorted and fiercely protected sectors. The entry into force of the AoA was the first step towards subjecting agricultural trade to a rules based system and to initiating a process of trade liberalization in agriculture. The long term objective of the AoA is to establish a fair and market – oriented trading system in order to correct and prevent restrictions and distortions in world agricultural markets. The AoA establishes important parameters for such policies and economic growth by initiating a process of liberalization which consists of market access, reduction of domestic support and export subsidies. Appropriate agricultural policies including agricultural trade policies, are an essential component of much wider bundle of measures necessary to realize the right to food, agriculture still stands alone as the sector where export subsidies are expressly and generously permitted under WTO law.

However, the AoA is frequently criticized for not taking sufficient account of the needs of developing countries to pursue policies necessary to promote their food security. To a certain extent, the AoA reflects economic and political power distribution, strikingly asymmetrical and works systematically against developing countries and the world's poor.¹ By making much needed economic growth in agriculture in developing countries more difficult, the *de facto* imbalances in rights and obligations between developing and developed countries have negative implications for the right to food and deprive trade of the positive role it could play in the realization of human rights.²

The dogma behind the AoA is, open markets in food will benefit the poor, and increase world agricultural productivity. But the majority of WTO members are developing countries and, for them, the easing of tariff restrictions in the current economic climate would be suicidal. In fact, the consequences of opening their economies to unregulated food imports are wholly predictable. Agricultural subsidies in OECD countries, especially the U.S., EU, Canada and Japan, are very high. In the face of this, farmers in the developing countries stand little chance of competing.

¹ World Bank, *Global Economic Prospects*, 2004, 118

² Cf. IGWG, *Right to Food Principles and International Trade Agreements*, Information Paper, FAO.Doc, IGWG RTFG/INF 5, para 18.

The WTO tenth Ministerial Conference held at Nairobi during December 2015, sparked much debate between the developed and developing countries over the issue of abolishing agricultural export subsidies and progress on the Doha Development Agenda. The meeting, considered a litmus test for the Indian Government-whether it stands up for its poor farmers or succumbs to pressure from the United States, which continues to oppose credible and developmental outcomes. India stressed the need for the WTO member countries to take up for discussion on a priority basis the issue of huge trade distorting farm subsidies of the rich countries and its consequent adverse impact on millions of resource poor and subsistence farmers in developing countries. The outcome of the conference has sent a mixed message. On a positive note, all members agreed for the first time to a legally binding deal to promote agricultural trade by removing subsidies for farm exports. Of the six items of the so-called historic Nairobi package, two were of particular interest to India – a permanent solution to the issue of public stockholding for food security and Special Safeguard Measure (SSM) to protect farmers from import surges.

Chapter 4 reviews the role of constitutions in general before examining the constitutional provisions protecting the right to food. The underlying principles of the constitution of India is to provide a social framework for the right to food though the right is not explicitly stated. This does not mean that the right to food is

totally unprotected in the country. The fundamental right to life has been expanded by the Supreme Court with reference to directive principles which creates a dynamic relationship and an avenue to enforce the latter as individual rights. The right to food is implicitly enshrined in Art. 21 of the Constitution as the fundamental right to life. The Right to Food is inherent to a life with dignity, and Article 21 should be read with Articles 39(a) and 47 to understand the nature of the obligations of the State in order to ensure the effective realization of this right. Article 47 spells out the duty of the State to raise the level of nutrition and the standard of living of its people as a primary responsibility. Article 39(a) of the Constitution, enunciated as one of the Directive Principles, fundamental in the governance of the country, requires the State to direct its policy towards securing that the citizens, have the right to an adequate means to livelihood. The citizen's right to be free from hunger enshrined in Article 21 is to be ensured by the fulfilment of the obligations of the State set out in Articles 39(a) and 47. The reading of Article 21 together with Articles 39(a) and 47, places the issue of food security in the correct perspective, thus making the Right to Food a guaranteed Fundamental Right which is enforceable by virtue of the constitutional remedy provided under the Constitution.³

³ Ziegler (2008), p.67

While the apex court has reiterated in several of its decisions that the Right to Life guaranteed under Article 21 of the constitution in its true meaning includes the basic right to food, it is indeed surprising that the justiciability of the specific right to food as an integral right under Article 21 had never been articulated or enforced until 2001, in the *PUCL* litigation. This litigation has since become a rallying point to make the right to food a justiciable right. The *PUCL* litigation highlights two aspects of the state's negligence in ensuring food security: the breakdown of the PDS and the inadequacy of relief programs in drought-affected areas. Following on this, it asked the Supreme Court to intervene, by directing the government to provide subsidised food grain to all families among other directions on employment etc. The petition, largest among the most complex litigations, shows that there is more to the right to food than the law, since the realisation of the right through the interim order depended on action across detailed policy programmes, pushed by advocacy and wider socio-political mobilisation. This case illustrates how courts have been used to advance the right to food and rights-based approach to transform existing welfare schemes into legal entitlements, enabling consistent monitoring and evaluation of the schemes and mobilising people to claim their entitlements to food.

Chapter 5 evaluates the development of a right to food within the national system as a means for legal redress and enforcement of the right. It begins with an insight

into India's Public Distribution System as the largest distribution network of its kind in the world which aims to provide subsidised food grains to the poor. Although international treaties recognise the right to food, a domestic legally enforceable and justiciable right to food can provide a basis for legal redress. Without national legal enforcement mechanisms an international right to food fails to serve as an effective tool for combating hunger.

The NFSA 2013 inserted the right to food into the national law thereby imposing a legal duty on the state that had previously existed only as a moral duty, creating accountability on the government. Designed to ensure access to adequate food at affordable prices, the NFSA was passed with the objective to make the right to food a legal entitlement by providing subsidised food grain to nearly two thirds of the population.

The Act largely relies on the existing TPDS to deliver food grains as legal entitlements to poor households. This makes a shift by making the right to food a justiciable right. While constitutional provisions are described in rather broader terms, a frame work law on the right to food can elaborate further on this right and thus make it operational in practice. India through NFSA has adopted the legislative technique to address the food security issue and for the realisation of right to food. The Act spells out obligations of State authorities and institutional

arrangements for a better distribution network, meaningful monitoring and access to courts, by providing for government accountability. NFSA is a unique step taken by Indian government to fight against hunger and protect right of the people for food. With its peculiarities like the life cycle approach, women empowerment, consideration of vulnerable sections in society and proposed reforms in public distribution system, NFSA is a promising effort for food security in India.

However, limited resources and exponentially increasing population, lack of infrastructure, operational inefficiencies and poor performance of the PDS are the major hurdles in successful implementation of the Act. For the effective implementation of the Act steps are necessary to be taken to restructure the PDS, introducing innovative ideas such as smart cards, food credit/debit cards, food stamps and decentralized procurement, to eliminate hunger and make food available to the poor, in a cost-effective manner. Beside, leakages in PDS system should be minimized, administrative reforms are needed at grassroots level and improvement in distribution process should be monitored efficiently, keeping in view, other challenges prevailing in the current system.

Chapter 6 provides an insight into the impact of agricultural trade policies under the WTO on the developing and the LDC's. All most all of developing countries are most affected by food insecurity due to the biased impact of current

international trade rules on agricultural trade between developed and developing States. Agricultural support measures of advanced countries act as causes for food insecurity in LDCs. Globally, as in India, the challenge to the right to food is considerable. The most significant barrier to change is the inability of governments to fix the global food system as a whole and address the issue of growing corporate control over food systems. In stark contrast to the industrialised countries, many LDC's have been implementing far-reaching trade liberalization programmes, opening their economies to external competition. As a consequence, the LDC's have been locked into a highly unequal liberalisation process. Trade restrictions in the industrialised world continue to limit the opportunities for export from the LDC's, while imports have imposed considerable adjustment costs on local produces. This is especially true in agriculture, where the industrialised countries which dominate global markets continue to provide heavy subsidies to their own producers⁴

Despite these drawbacks steps are being taken for the realisation of right to food. The recognition of the right to food as a justiciable right at the national and the international level is gaining ground year after year. Many countries are including or already have included the right to food in their constitutions. Several countries have adopted framework laws and many others are currently in the process of

⁴ Rigged Trade and Not Much Aid: How Rich Countries Help to Keep the Least Developed Countries Poor, Oxfam International, 2001, p.13

drafting framework laws in their efforts towards adopting a right to food strategy as a contribution to improved food security.

Conclusion

The problem of hunger was a fundamental driving force behind the concept of universal human rights, influenced by Roosevelt's "Four Freedoms" speech which stated that freedom from want was one of four essential freedoms. Hunger is the deprivation of the fundamental right to food that human beings have sought to achieve ever since the origin of mankind. The persistence of scourge like hunger even today among large sections of the world population in spite of astronomical distances covered by science and technology, especially over the last century, perhaps remains the greatest contradiction and challenge within the contemporary world system. This immediately tempts to conclude the necessity of more free trade across national boundaries entailing further lowering of tariffs on agricultural products. The advocates of free trade will argue that this is helpful in reducing the high food prices that are currently dominating the world markets and ensure a cheap supply of food to the poor countries reeling under hunger.

Deriving from the right to life, the Right to Food guarantees every human being to be free from hunger. In essence, the right to food entitles people to a very basic right, namely to dispose of the means to feed themselves in dignity. Human rights are not only moral guidelines; they represent legal obligations that have to be

respected throughout national and international policy formulations. The right to food is one of them and the same is accepted in binding treaties ratified by a large number of states. Following this, it is evident that States need to respect their obligations under one regime when entering into agreements with another, this means respecting human rights obligations they have committed to by ratifying the respective Covenants when entering trade agreements at the international level.

The current international trade system, governed through the WTO agreements, sustains the advantage for the developed countries and hinders the expansion of benefits for developing countries. In the case of agricultural trade, the main problem identified is the nature of trade flows-developing countries mostly export commodities and import processed goods. This kind of trade benefits the economically powerful elite, but does not yield the same results for large parts of the rural populations of developing countries. Trade regime furthers dependency of states on international markets in the pursuit of food security.

The Preamble of the Marrakesh Agreement establishing the WTO recognises that, far from being an end in itself, the encouragement of trade by the establishment of rules-based system of international trade and by the gradual lowering of barriers to trade should serve the ends of human development. If this objective is to be fulfilled and if trade is to contribute to the realisation of the right to food, the

regime of international trade needs to recognise the specificity of agricultural products, rather than to treat them as any other commodities; it should also allow more flexibilities to developing countries, particularly in order to shield their agricultural producers from the competition from industrialised countries farmers. States are required to assess the impacts of trade agreements on the right to food and ensure they do not accept undertaking under the WTO frame work which would be incompatible with their obligations to respect, protect and fulfil the right to food.

There are a couple of historical truths that often remains ignored in contemporary trade policy recommendations. Advocacy of freer trade regimes to enable cheaper food supply to poor countries is essentially a snapshot view which remains oblivious of the transformation that occurred in agricultural production in the majority of the poor countries as they moved from 'Food-First' to 'Export-First' regimes and adopted export-oriented agriculture under the guidance of the Bretton Woods Institutions. The goal of internal food security and augmenting food production was pushed to the backyard of policy making in the developing economies to satisfy the growing demand for primary products. The fact that so many hunger-afflicted countries are also net importers of cereals is precisely due to the export-oriented non-food cultivation that was encouraged by these countries a few decades ago.

The other reality that existed in the developing countries and was largely ignored was that the majority of the cultivators and primary producers were not food buyers. A move away from 'Food-First' regime to an export-orientated one meant undertaking the risky affair of trying to attain food security for the population in these countries through trade in the world markets. With primary product prices falling and fluctuating erratically in the world market and food prices trends relative to that of the primary products generally remaining adverse, cheaper food imports to feed one's population was a dream that never got cherished in most cases. With world prices affecting domestic prices within a trade-liberalised regime, the returns to agricultural production starts falling even within the domestic economies further compounding the problem for the large rural populace in the developing countries.

States, by acceding to trade agreements, are obligated to act according to the dictates of the international trade regime. With respect to food, this includes, *inter alia*, agreements between member states of the WTO. Obligations under the WTO generally require states to lower tariff and non-tariff barriers to trade, eliminate state support and subsidies for certain industries, and not discriminate against foreign ownership. The AoA targets government policies that are trade distorting, but it allows governments to offer support where it would not directly stimulate production. In addition to converting all barriers to trade into tariffs, countries

commit to reducing their tariffs over time. Under the AoA developed countries can continue their subsidy policy and practice cut-throat competition dumping on the world market to the detriment of the agricultural sector and food security in many developing countries. Liberalisation caused an import surge in the food sectors of many developing countries, without providing these countries with the opportunity to expand their agricultural exports. In many developing countries food processing and marketing structures vital for national economy and food supply have been destroyed, because they could not compete with cheap imports. Emerging of large-scale farms has intensified the marginalisation of small farmers, unemployment and poverty due to a lack of social security systems.

In view of these experiences, agricultural policies under the AoA, require reformed significant reforms. New safeguards for developing countries and small farmers, export subsidy reductions and changes geared towards securing the human right to food are crucial. Global paradigm shift in agricultural policies is necessary to ensure the human right to food for all human beings and to provide agricultural production with a social, ecological and consequently, sustainable profile. Small-scale agriculture with its unique cultural diversity must be protected as it contributes to food security. If trade is to work for development and to contribute to the realization of the right to food, it needs to recognise the specificity of agricultural products, rather than to treat them as any other commodities and to

allow more flexibilities to developing countries, particularly in order to shield their agricultural producers from the competition from industrialised countries' farmers. The reason for this is obvious, and it is at the heart of what justifies special and differential treatment for developing countries; even after the removal of existing trade-distorting measures, which currently are disproportionately benefitting developed countries, the productivity per active labourer in agriculture will remain much lower in developing countries, on average, than in developed countries.

The deepening of the reform programme under the AOA will not result in agricultural producers in developing countries being able to compete on equal terms with producers in industrialised countries, unless wages in developing countries are repressed at very low levels to compensate for a much lower productivity per active labourer. Certain developing countries have a highly mechanised agricultural, but in other developing countries, particularly LDC's agriculture remains a fragile sector. Encouraging these countries to open up their agricultural sector to competition by binding themselves to low rates of import tariffs may therefore constitute a serious threat to the right to food, particularly if we take into account that food insecurity is mostly concentrated in the rural areas

and that a large portion of the population in the countries which are most vulnerable depends on agriculture for their livelihoods.⁵

The NFSA is enacted with the object to provide food and nutritional support in human life cycle approach, by ensuring access to adequate quantity of quality food at affordable prices to people to live a life with dignity. Many social, economic and political reasons have instigated its enactment. The objective of this Act also includes setting new standards of delivery, transparency and accountability for social programs. It also aims to provide a guarantee of adequate nutrition which is derived from the right to food as a part of the right to life under Article 21 which is a fundamental right of all citizens. The Act should ideally be an opportunity for the government to show its seriousness of purpose and commitment. For that, it should go beyond piecemeal measures to comprehensively ensure that food is a basic human right, addressing both immediate hunger and in the longer run, all the three aspects of availability, access and nutritional outcomes, This calls for a life cycle approach, starting with addressing the rights of the child, continuing through to old age, adopting an inclusive approach, greater coordination between departments and ministries, making the necessary investments and budgetary allocations to ensure both

⁵ UN General Assembly-Report of the Special Rapporteur on the right to food, Olivier De Schutter, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Food*. A/HRC/10/5/Add.2, 2009

adequate production and mechanisms to cope with climate change and greater vigilance in ensuring effective distribution and utilization of allocations made.

The PDS mechanism under the Act insulates the beneficiaries from inflation and price volatility and ensures access to food grains even in remote areas. But at the same time it leads to large leakages and diversions of subsidised food grains. There have been complaints of sub- standard quality of food grains distributed under this mechanism and at times there is adulteration of food grains. In some cases, where the government is unable to deliver food to the PDS system, the Act provides for cash transfers. In cash transfer system, there is cash in the hands of the poor which expands their choices and relieves financial constraints to some extent. Also cash transfer programmes involve low administrative costs because it does not need procurement, storage and distribution facilities. But this scheme requires extensive banking network and may expose recipients to price volatility and inflation. This may defeat the very purpose of the Act as the cash can be used to buy non-food items by the people.

The NFSA could be a game changer for the realisation of the right to food if the government is able to overcome corruption and plug leakages. The success of such initiative should be measured in terms of how many poor are able to pull themselves from poverty and become self-reliant, in overcoming hunger and the

realisation of right to food in the coming years. The right to food does not mean handing out free food to everyone, rather, the right to food means that governments must respect, protect and fulfil the right to food, as guaranteed under ICESCR. The majority of the WTO states parties are parties to the ICESCR and hence need to ensure that human rights are given adequate weight to their trade dealings. The agreement establishing the WTO which foresees that members' relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living. This objective is, in language and spirit, close to the "adequate standard of living" envisaged under ICESCR.⁶

A new social contract whereby food is considered a commons and a public good, a necessary narrative to develop Universal Food Coverage schemes at national level is the utmost need. The supply/demand rules will never get rid of hunger in the world as aspired by the post-2015 Sustainable Development Goals(SDGs)⁷, since the market does not have any incentive to provide food access to those who do not have money to pay for an essential resource. Unlike the market, the food commons are about equity, collectiveness, embeddedness and direct democracy from local to global. This invokes a radical paradigm shift from individual competitiveness as the engine of progress via endless growth towards collective cooperation as the

⁶ On the extent to which the multilateral trading system and human rights law pursue similar objectives, see H.Lim, "Trade and Human Rights- What's at Issue?". JWT 35 (2001) 275.

⁷ <https://sustainabledevelopment.un.org/focussdgs.html>- also termed as post-MDG or post 2015

driver of happiness and the common good. There is a need to develop a food system that first, provides for sustainable nutrition for all and second, provides meaning and not just utility, to food production, trading and consumption. Recent years have witnessed a making-up of global hunger statistics to justify the developmental progresses achieved by the dominant economic ideology .The world is not doing so nicely under the market-driven industrial food system. There is absolutely a need for a paradigm shift that considers food as a commons and develop political and legal frameworks according to that vision and to make “commons food” common and nutrition a public good. Sustainable Development Goal 2 states “End hunger, achieve food security and improved nutrition and promote sustainable agriculture” as a sort of moral aspirational imperative. As the post 2015 framework aims at being aspirational and transformative, a more ambitious stunting goal is needed to really eliminate hunger before 2030. This is attributed to strong political commitments, adequate food policies, and legal frameworks based on the right to food both at the international and domestic level.

Suggestions

To overcome the prevailing deficiencies and to make the Government’s initiative to yield better results and to ensure the progressive realisation of food as a right the following suggestions are proposed through this research.

International Level:

1. International trade can play a major role in the promotion of economic development, and the alleviation of poverty and improving food security at the national level. In this direction, States should promote international trade as one of the effective instruments for development, as expanded international trade could open opportunities to reduce hunger and poverty in many of the developing countries.
2. Agriculture is a central element in the current negotiations. Efforts should be intensified to achieve the internationally agreed aims embodied in the three pillars of the Doha mandate, namely substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade distorting domestic support. The negotiations on agriculture taking place in the WTO Ministerial Conferences should deliver an outcome that is consistent with the ambition set out in the Doha mandate. Special and differential treatment for developing countries shall be an integral part of all elements of the negotiations and shall take fully into account development needs in a manner consistent with the Doha mandate. Negotiations should take fully into account the special needs and interests of developing countries and LDCs, reciprocity in reduction commitments.

3. Through the adoption and implementation of a national strategy for the realization of the right to food, the right to food can be operationalised and put into action at the local level. Participation of the affected people is key to the success of such a strategy. This implies that people need to be included in the decision-making processes surrounding the right to food as this ensures that real needs are identified and effectively responded to. Participation further increases the awareness around the right to food and thus empowers people to realize and claim their right to food, as they are aware of their rights and what this implies. The participation of all layers of society, including women, indigenous groups and other vulnerable groups ensures greater attention for gender and non-discrimination of the government in their food policies and acts. Non-discrimination, participation, accountability are all fundamental human rights principles as the attention paid to them fosters the creation of an enabling environment for people to realize their right to food.
4. States should create an enabling environment and strategies to facilitate and support the development of private and public sector initiatives to promote appropriate tools, technologies and mechanization in the provision of relevant services, including research, extension, marketing, rural finance and microcredit, to enable more efficient food production by all farmers, in particular poor farmers.

5. Legal protection and recognition of the right to food, empowering people to claim that right can lead to a paradigm shift in the way policies are formulated and adjusted to the needs of people. Such protection and recognition can take different forms as long as individuals can claim access to food as a right rather than as an act of benevolence. It can in particular lead to more effective policies and people centred programmes to combat hunger and poverty.
6. States should also promote good governance as an essential factor for sustained economic growth, sustainable development, poverty and hunger eradication and for the realization of all human rights including the progressive realization of the right to food. States should ensure, in accordance with their international human rights obligations, that all individuals, including human rights defenders of the progressive realization of the right to food, are accorded equal protection under the law and that due process is guaranteed in all legal proceedings. Where appropriate and consistent with domestic law, States may assist individuals and groups of individuals to have access to legal assistance to better assert the progressive realization of the right to food.
7. States should promote and safeguard a free, democratic and just society in order to provide a peaceful, stable and enabling economic, social, political and cultural environment in which individuals can feed themselves and their

families in freedom and dignity. Food should not be used as a tool for political and economic pressure.

8. Where poverty and hunger are predominantly rural, focus should be made on sustainable agricultural and rural development through measures to improve access to land, water, appropriate and affordable technologies, productive and financial resources, enhance the productivity of poor rural communities, promote the participation of the poor in economic policy decisions, share the benefits of productivity gains, conserve and protect natural resources, and invest in rural infrastructure, education and research. In response to the growing problem of urban hunger and poverty, States should promote investments aimed at enhancing the livelihoods of the urban poor.
9. Where necessary, States should consider adopting and, as appropriate, reviewing a national poverty reduction strategy that specifically addresses access to adequate food. States, individually or in cooperation with relevant international organizations, should consider integrating into their poverty reduction strategy a human rights perspective based on the principle of non-discrimination. In raising the standard of living of those below the poverty line, due regard should be given to the need to ensure equality in practice to those who are traditionally disadvantaged and between women and men. In their poverty reduction strategies, States also should give priority to

providing basic services for the poorest, and investing in human resources by ensuring access to primary education for all, basic health care, capacity building in good practices, clean drinking water, adequate sanitation and justice and by supporting programmes in basic literacy, numeracy and good hygiene practices.

10. States should, in accordance with their national law and priorities, as well as their international commitments, improve the functioning of their markets, in particular their agricultural and food markets, in order to promote both economic growth and sustainable development, *inter alia*, by mobilizing domestic savings, both public and private, by developing appropriate credit policies, by generating sustainable adequate levels of national productive investment through credits in concessional terms and by increasing human capacity. States should put legislation, policies, procedures and regulatory and other institutions in place to ensure non-discriminatory access to markets and to prevent uncompetitive practices in markets. States should encourage the development of corporate social responsibility and the commitment of all market players and civil society towards the progressive realization of the right of individuals to adequate food in the context of national food security. States should provide adequate protection to consumers against fraudulent market practices, misinformation and unsafe food. The measures toward this objective should not constitute unjustified

barriers to international trade and should be in conformity with the WTO agreements.

Domestic Level:

1. On the operational front, there is an immediate need to fix the delivery system under the PDS. For this, the centre has to warrant 100 per cent implementation of the nine-point action plan⁸ and has to ensure a transparent and an integrated end-to-end computerization system in all the states/UTs. There is a need to revisit the targeted number of beneficiaries under the Act. In a country where 22 to 30 per cent of people live below poverty, coverage of 67 per cent sounds extravagant and this extended coverage results in reducing the family entitlement of the real poor. The High Level Committee on restructuring of Food Corporation of India, 2015, recommends reducing the coverage under NFSA to 40 per cent and increase the allocation of priority house hold from five to seven kgs/person/month. The policy makers can use these reviewed lists to revise the final list of beneficiaries under the Act.
2. On the procurement front, first the government has to encourage states with natural resource endowments favourable to agriculture to produce and feed themselves rather than import grains from other state. Concerted efforts are

⁸ One of the points under the nine-point action plan requires the states to regularly “review the AAY/BPL lists”.

needed by the government to abolish additional levies imposed by states and the government may look at the MSP to be the final price, inclusive of the levies/taxes etc., so that there are no systemic market distortions at the state level.

3. There is a need to revisit the targeted number of beneficiaries under the Act. As mentioned earlier, in a country where 22 to 30 per cent of people live below poverty, coverage of 67 per cent sounds extravagant and this extended coverage if results in reducing the family entitlement of the real poor, then there surely are problems that need immediate correction.
4. Reforms are required to be made to make the TPDS more effective. One of the key problems in the implementation of TPDS is the inclusion and exclusion errors in the identification of beneficiaries. Integrating the Aadhaar number with several government schemes, including TPDS can address this problem. The Aadhaar number would be used to accurately identify and authenticate beneficiaries entitled to receive subsidies under TPDS and other government schemes. Using Aadhaar with TPDS would help eliminate duplicate and ghost (fake) beneficiaries, and make identification of beneficiaries more accurate.
5. Technology-based reforms such as end-to-end computerisation could curb large-scale diversion and help track the delivery of food grains from state depots to beneficiaries.

6. To achieve economic access to food more efficiently, the present system of physically distributing grains can be substituted with conditional cash transfers, based on the platform created by the Aadhaar unique identity scheme. As this system would require fingerprints of all those drawing benefits from the government and the direct deposit of cash to a beneficiary's bank account, leakages can be reduced dramatically. Cash transfers reduces physical handling of grain and gives greater autonomy to the beneficiaries to choose their consumption basket.
7. Awareness raising is key to operationalizing the right to food. Citizens must be made aware of their rights while public servants must be instilled with a clear consciousness of obligation. This is possible only through appropriate information and education policies that also encourage people to utilize their rights.
8. Existing policies and legislative and institutional frameworks should be reviewed periodically, in order to ascertain their compliance with right to food obligations and principles and to identify problem areas. The causes rather than the symptoms of hunger should be addressed.
9. It is necessary to outline food security policies and programmes directed at the four components of food security: availability of sufficient food in terms of quantity, quality and safety; regular access of all to this food; stability of supplies and of access; and adequacy of utilization of the available food at

household and individual level through adequate hygiene conditions and good care for those who cannot help themselves.

10. Being extremely vulnerable, people living below the poverty line are unjustly exploited by the forces of an open market. In this depressing scenario, legal guarantee through a universal regime of food security is the only way out. Such a regime will challenge the lethargy of non-accountability and bring about an equity-based social framework wherein agriculture and natural resources receive due attention.
11. There is need to revisit the age-old policy drive of attaining complete self-sufficiency in production of all agricultural commodities. This policy has, explicitly and implicitly, made the policy makers attempt policies ignoring global dynamics. However, shrinking resources, evolving and expanding consumer demands in the present times highlight the growing inter-dependence amongst the countries of the world. As India today has attained food security at the national level, in terms of ample food supplies annually, there is a growing need to question and move away from the undisputed adage of the need to attain complete self-sufficiency. Instead, the country should adopt the need to maximize self-sufficiency/reliance, which is consistent with economic efficiency. Expanding agricultural production is a necessity for India and now with legally enforceable distribution commitment under the NFSA, the need is further reinforced. But to

efficiently meet challenges from changing consumption patterns, fluctuating supplies, expanding populations, a modicum of openness has to be maintained for accessing global agri-markets.

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