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Title:

Can the World Trade Organization Ensure that International Food Aid is Genuine?

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Abstract:

The Doha Round negotiation mandate of the World Trade Organization (WTO) proposes to minimise trade distortions and commercial displacement under the cover of international food aid, without preventing genuine food aid from reaching people in need. This paper presents problematic aspects of international food aid for trade and competition and an overview of the international governance of food aid. The latest available Draft Modalities for Agriculture (December 2008) are seen as being only halfway successful in implementing the Doha mandate. A new text with better-targeted disciplines and a political food aid commitment are proposed as part of the Doha Round Final Act.

Key Words:

Food Aid, Doha Round, World Trade Organization, Food Aid Convention

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Introduction

When delegates assembled in Hong Kong for the Sixth WTO Ministerial Conference and opened the *Financial Times* in the morning, they were greeted by an advertisement sponsored by the World Food Programme (WFP) and the then Special Rapporteur on the right to food. An African boy with a food bowl was begging the delegates not to decrease food aid.¹ Indeed, stricter disciplines on food aid to prevent the circumvention of commitments to reduce export subsidies were on the agenda. The fears of the advertisers were addressed in the Hong Kong Ministerial Declaration, which stated that “[t]here is consensus among Members that the WTO shall not stand in the way of the provision of genuine food aid”.² To this end, a “safe box” for bona fide food aid was to be established preventing unintended impediments in emergency situations.³

It was mainly the G20 and the Cairns Group⁴ together with the European Communities (EC)⁵ that put the issue of food aid on the negotiation agenda because they considered the complexity of food aid in kind, the implied export subsidies, the involvement of the food industry, distributors and shipping as trade-distorting. In the July 2004 framework, the WTO Members agreed that the objective of WTO disciplines on food aid, as instruments of trade liberalisation, should focus on the prevention of commercial displacement.⁶

The aim of this article is to test the objectives set out in the Hong Kong Ministerial Decision against the state of the negotiations as captured in Annex L of the latest available Revised Draft Modalities (6 December 2008).⁷ The first two sections describe food aid from a trade and competition viewpoint and analyse food aid governance other than in the WTO. Section three discusses the present WTO rules pertaining to food aid. Negotiations on food aid disciplines during the Doha Round are outlined in section four

¹ *Financial Times Asia Edition*, 16 December 2005, Advertisement Identification Number 600351.

² World Trade Organization, Doha Work Programme: Ministerial Declaration adopted on 18 December 2005, WTO Doc. WT/MIN(05)/DEC (22 December 2005), annex A, para. 14.

³ *Ibid.*, para. 6.

⁴ See, e.g. World Trade Organization, Committee on Agriculture Special Session, Schedule for the Elimination of all Forms of Export Subsidies: Joint G-20 - Cairns Group Contribution, para. 3, WTO Doc. JOB(06)148 (18 May 2006). Available at: http://www.cairnsgroup.org/proposals/060518_g20.html (accessed 16.05.2010).

⁵ The EC suggested that Article 10.4 should be strengthened to prevent the abuse of food aid as a mechanism for disposal of surpluses. Committee on Agriculture, Special Session, European Communities Proposal Export Competition, WTO Doc. G/AG/NG/W/3 (18 September 2000).

⁶ World Trade Organization, Doha Work Programme: Decision Adopted by the General Council on 1 August 2004, WTO Doc. WT/L/579 (2 August 2004), para. 18.

⁷ World Trade Organization, Committee on Agriculture Special Session, Revised Draft Modalities for Agriculture, WTO Doc. TN/AG/W/4/Rev.4 (6 December 2008).

while section five contains an assessment of the December 2008 Modalities. Section six offers some conclusions and suggestions for solutions.

It should be emphasised that *national food aid* – which are of capital importance in countries like India – can also have a major impact on production, trade and competition. However, despite certain WTO disciplines applying, national food aid including public stockholding schemes is not addressed in this article focussing on international competition aspects of international food aid.

1. Food Aid from a Trade and Competition Viewpoint

Food aid has helped to achieve many humanitarian and development goals but it has also been criticised for damaging local markets, fostering dependency, and for being susceptible to corruption.⁸ This section gives a brief overview of the most important issues and controversies surrounding international food aid, especially the trade distortion and competition aspects.

1.1 Food Aid Developments

Food aid is one of the oldest forms of foreign aid and was once a central part of overseas development assistance (ODA). Accounting for about 13.5 per cent of total ODA flows in 1971,⁹ it had decreased to only 3.4 per cent of ODA in 2005.¹⁰ However, despite this overall trend, for the least developed countries, food aid ranged between 15 and 20 per cent of total food imports during 1994–2003.¹¹ The impact of food aid can be very significant for recipient countries, the proportion of food aid including concessional sales may account for up to 70 per cent of the total food imports of a country.¹²

⁸ United Nations Economic and Social Commission for Asia and the Pacific, *Sustainable Agriculture and Food Security in Asia and the Pacific* (2009), 190.

⁹ Christopher B. Barrett and Daniel G. Maxwell, *Food Aid after Fifty Years: Recasting Its Role* (London: Routledge, 2005), 6.

¹⁰ Edward Clay, "Resolving the Outstanding Issues on Food Aid: Response to the 'Communication from the Chairman of the Committee on Agriculture Special Session, 30 April 2007'," (2007), 2.

¹¹ Panos Konandreas, "WTO Negotiations on Agriculture: A Compromise on Food Aid Is Possible," in *WTO Rules for Agriculture Compatible with Development*, ed. Jamie Morrison and Alexander Sarris (Rome: Food and Agriculture Organization of the United Nations, 2007), 317.

¹² Ruosi Zhang, "Food Trade and Food Aid: What Is the Impact of International Law on Food Security?," in *La Sécurité Alimentaire / Food Security and Safety*, ed. Ahmed Mahiou and Francis Snyder (Leiden: Nijhoff, 2006), 711.

Five donors (United States, European Union, Canada, Japan and Australia) provide more than 90 per cent of all food aid. The United States of America has traditionally been by far the largest donor providing over 60 per cent of total food aid.¹³

Food aid is generally categorised in three ways: emergency, project and programme food aid. The first, emergency food aid, is distributed in times of natural disasters or extreme food insecurity during armed conflicts or economic shocks.¹⁴ The second, project aid, is provided to support development projects to a recipient government, a multi-lateral development agency or a non-governmental organisation operating in the recipient country. It is either directly distributed, for example in school feeding or food for work programmes, or sold (“monetised”) to fund other development projects. The third category, programme food aid, is bilateral development support to governments of developing countries; it is generally monetised at below market prices on the local market in order to generate government income. Donors often impose conditions on the provision of programme food aid such as to negotiate on military matters or to adopt particular macroeconomic, trade or agricultural policies.¹⁵

Because recipients would not otherwise be able to purchase food and are most likely to consume the food aid they receive rather than sell it on the market, emergency food aid is considered to have the least market-distorting impact.¹⁶ In contrast, project food aid is often monetised and can therefore have trade and competition distorting effects. Since most programme food aid is monetised on the open market, thereby simply augmenting the supply in recipient countries, this type of aid is considered as having the most market distorting effect.¹⁷

In a trend towards less market-distorting forms of food aid deliveries, emergency food aid in recent years has constituted nearly two-thirds of food aid, while programme food aid has fallen to 15–20 per cent of total food aid flows from a high of 60–70 per cent at the beginning of the 1990s.¹⁸ In addition, local and triangular purchases of food are increasing (as opposed to procurement in the donor country). While this seems to indicate

¹³ Konandreas, "WTO Negotiations on Agriculture: A Compromise on Food Aid Is Possible," 314.

¹⁴ Barrett and Maxwell, *Food Aid after Fifty Years: Recasting Its Role*, 14.

¹⁵ *Ibid.*, 13.

¹⁶ Konandreas, "WTO Negotiations on Agriculture: A Compromise on Food Aid Is Possible," 319.

¹⁷ *Ibid.*

¹⁸ *Ibid.*, 317.

a considerable improvement, food aid has still to be fully decoupled from being an instrument to dispose of surpluses and to circumvent domestic support and export subsidy commitments. As will be discussed in section four the negotiations on food aid in the Doha Round are trying to disentangle genuine food aid from commercial displacement. This could mean a major step towards complete delinking and ensuring genuineness of food aid.

1.2 The Problem with Food Aid

Whether food aid is an instrument of politics or philanthropy has been the subject of many studies. Food aid has been shown, for example, to be a function of donor country strategic motives, driven by closeness of economic and military ties between donor and recipient.¹⁹ However, this article focuses on at least six critical aspects in food aid as a trade competition issue.

First, food aid is sometimes used for *surplus disposals*.²⁰ This may result in the situation that food aid is least available when the need is greatest: in-kind food aid peaked in 1999–2000 when there were large surpluses and low prices for cereals.²¹ When food prices started to rise sharply in 2007, food aid deliveries fell to their lowest levels since 1961.²² The World Food Programme's Food Aid Flows Report 2007 contains the following table clearly establishing this inverse relationship between the wheat price and direct transfers of wheat as food aid.²³

¹⁹ Nikolaos Zahariadis, Rick Travis, and James B. Ward, "U.S. Food Aid to Sub-Saharan Africa : Politics or Philanthropy?," *Social Science Quarterly* 81, no. 2 (2000).

²⁰ Barrett and Maxwell, *Food Aid after Fifty Years: Recasting Its Role*, 27-28. Polly J. Diven, "The Domestic Determinants of US Food Aid Policy," *Food Policy* 26, no. 5 (2001): 471.

²¹ Oxfam International, "Food Aid or Hidden Dumping?: Separating Wheat from Chaff," Oxfam Briefing Paper No. 71, (2005), 2.

²² United Nations World Food Programme and International Food Aid Information System, *2007 Food Aid Flows*, International Food Aid Information System - The Food Aid Monitor, June 2008 (Rome: WFP, 2008), 1.

²³ *Ibid.*, 2.

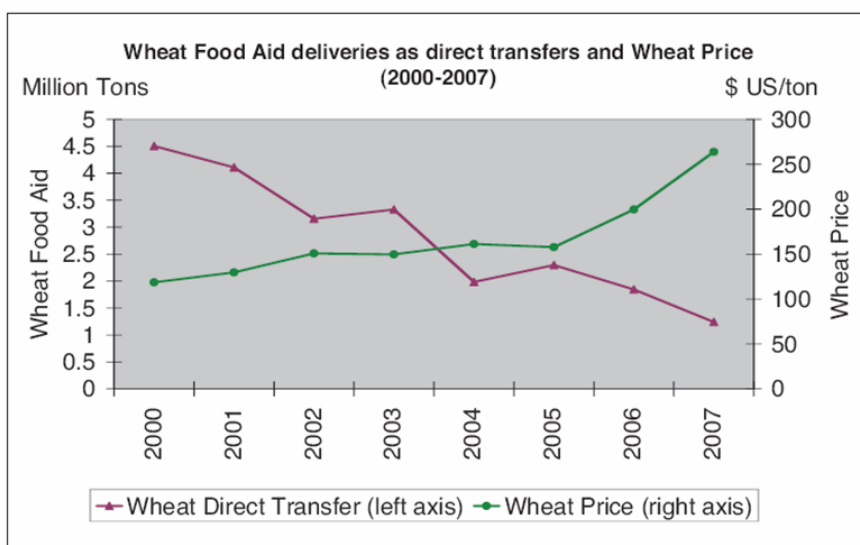


Figure 1: Wheat food aid deliveries as direct transfers and wheat price (Source: WFP 2008)

Second, more than any other kind of aid, 88 per cent of *in-kind food aid* is still tied to procurement in the donor country (instead of cash transfers),²⁴ even though the actual costs of local purchases are 46 per cent and those of triangular transactions²⁵ are 33 per cent lower than those of tied direct aid.²⁶ This transfer inefficiency benefits interest groups in donor countries.²⁷

Third, the practice of *monetisation* of food aid has become a subject of controversy. Its impact on local market prices is determined by several factors, including supply and demand elasticity, the relative quantity of monetised aid, local storage capacity, trade policies, import parity prices and the economies of neighbouring countries.²⁸

Fourth, food aid may serve to *capture new markets*. Until the 2008 Food, Conservation, and Energy Act in the United States, the desire to develop new markets and the requirement that commercial development potential be considered in choosing recipient

²⁴ Ryan Cardwell, Brooke Fridfinnson, and James Rude, "Food Aid as Surplus Disposal? The WTO, Export Competition Disciplines and the Disposition of Food Aid," Canadian Agricultural Trade Policy Research Network, Commissioned Paper 2007-3 (2007), 6.

²⁵ Triangular operations are transactions by which a donor provides commodities that have been purchased or exchanged in a third country as food aid to a recipient country. See United Nations World Food Programme, *2007 Food Aid Flows* (Rome: 2008), VII.

²⁶ Organisation for Economic Co-operation and Development, *The Development Effectiveness of Food Aid - Does Tying Matter?* (Paris: OECD Publishing, 2006), 17.

²⁷ A glance at the list of participants of the 2008 International Food Aid conference hosted by the United States Department of Agriculture and the United States Agency for International Development shows the diverse interests in in-kind food aid: besides governmental representatives and NGOs, there were commodity vendors, representatives from packaging companies, domestic transporters, freight forwarders, port facility services and steamship line industries. See http://www.fsa.usda.gov/Internet/FSA_File/2008_ifac_registration_list.xls (accessed 15.05.2010).

²⁸ United Nations World Food Programme, *World Hunger Series 2009: Hunger and Markets* (London: Earthscan, 2009), 130.

countries were explicit policy objectives.²⁹ However, there is scant empirical evidence that food aid is a suitable instrument to build long-term commercial markets for donor country exports.³⁰

Fifth, there is the risk of *displacement of unsubsidised commercial exports from third countries*. In 2000, Guyanese rice exports to Jamaica were said to be displaced by US food aid which suddenly doubled following a bumper crop in the USA.³¹ In the absence of more empirical research, it is difficult to prove that food-exporting developing countries face unfair competition from 'non-genuine' food aid. However, the example of Guyana underlines the need for WTO rules and disciplines to address export competition aspects also from a development perspective.

Finally, food aid may *damage local production in recipient countries*. For example, in 2002/2003 food aid donors over-reacted to a projected food deficit of 600,000 metric tonnes in Malawi, causing a severe decline in cereal prices and hurting local producers.³² As early as 1960, later Nobel Laureate Theodor Schultz published an influential analysis demonstrating that food aid may be detrimental to the recipient country by depressing local food prices and creating production disincentive effects.³³ In contrast, recent empirical studies have found that food aid does not appear to undermine local agricultural production, at least in the long term.³⁴ Without going into the details of this controversy, it can be concluded that the risk of negative effects is greater when local markets are not well integrated with regional and international markets³⁵ and that food aid's negative effects on prices and production incentives can be minimised through proper timing and targeting.³⁶

²⁹ See United States Department for Agriculture, Economic Research Service, *2008 Farm Bill Side-by-Side*, 42, available at <http://www.ers.usda.gov/FarmBill/2008/2008FarmBillSideBySide041509.pdf> (accessed 15.05.2010).

³⁰ Barrett and Maxwell, *Food Aid after Fifty Years: Recasting Its Role*, 78.

³¹ Oxfam International, "Food Aid or Hidden Dumping?: Separating Wheat from Chaff," 18.

³² *Ibid.*, 2.

³³ Theodore W. Schultz, "Value of U.S Farm Surpluses to Underdeveloped Countries," *Journal of Farm Economics* 42 (1960).

³⁴ See, e.g. Awudu Abdulai, Christopher B. Barrett, and John Hoddinott, "Does Food Aid Really Have Disincentive Effects? New Evidence from Sub-Saharan Africa," *World Development* 33, no. 10 (2005).

³⁵ Food and Agriculture Organization of the United Nations, *The State of Food and Agriculture: Food Aid for Food Security*, FAO Agriculture Series No. 37 (Rome: Food and Agriculture Organization of the United Nations, 2006), 41.

³⁶ United Nations World Food Programme, *World Hunger Series 2009: Hunger and Markets*, 93.

2. Food Aid Governance outside the WTO

International food aid is closely linked with trade, but also with policies on agriculture, development and humanitarian assistance. Besides international economic law containing food aid norms, both within the framework of the WTO (Agreement on Agriculture) and within international commodity agreements (Food Aid Convention), international human rights, humanitarian, refugee, criminal and environmental law all contain norms that are relevant for the provision of food aid.³⁷ While there may be overlap or collision of norms, it is not necessarily a bad thing that different treaty regimes exist. Law making and law enforcement by specialised organisations can generally be assumed to lead to even better legislation.³⁸ However, to avoid a potentially disruptive fragmentation effect, the specialized institutions should take account of general international law *and* of rules made in other institutions.³⁹ With regard to the international governance of food aid, the pertinent issue therefore is less a fragmentation of norms than a fragmentation of international authority leading to the question of whom, among the plethora of organisations and treaty regimes, should have the authority to make a determination on a particular question arising under international law.⁴⁰

Attempts to regulate for example the untying of food aid and monetisation within the WTO could be characterised as a form of legislative “forum shopping” where states, if their goals are not reached by the norms produced in one forum, just shift regime to fulfil them in other international fora.⁴¹ In that sense, fragmentation of international food aid law provides powerful states with the opportunity to abandon, or threaten to abandon, any given venue for a more sympathetic one.⁴² It is difficult to disentangle the interests of states in setting food aid on the agenda in the WTO. While the initial driving force was to prevent the circumvention of commitments to reduce export subsidies, the

³⁷ For an overview, see, e.g., Food and Agriculture Organization of the United Nations, “The Right to Adequate Food in Emergencies,” *FAO Legislative Studies* 77, (2002).

³⁸ Joost Pauwelyn, “Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands,” *Michigan Journal of International Law* 25 (2004): 904.

³⁹ *Ibid.*

⁴⁰ Cf. Tomer Broude, “Fragmentation(s) of International Law: On Normative Integration as Authority Allocation,” in *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity*, ed. Tomer Broude and Yuval Shany (Oxford: Hart, 2008), 100.

⁴¹ *Ibid.*, 109.

⁴² Adarsh Ramanujan, “Conflicts over ‘Conflict’: Preventing Fragmentation of International Law,” *Trade, Law and Development* 1, no. 1 (2009): 190.

proposal on the table, as we will see in section five, is regulating many aspects of food aid going beyond this initial concern.

The following sections discuss the main provisions regulating competition aspects of the governance of food aid outside the WTO.

2.1 Principles of Surplus Disposal (FAO)

The Council of the United Nations Food and Agricultural Organization (FAO) endorsed the Principles of Surplus Disposal and Consultative Obligations in 1954, soon after the United States established the Food for Peace Program in summer 1954.⁴³ The Principles of Surplus Disposal seek to ensure that food aid results in additional consumption, defined as consumption that would not have taken place in the absence of the transaction on concessional terms, and which does not displace normal commercial imports. This is to be ensured by the maintenance of the Usual Marketing Requirements (UMRs) that are defined as being satisfied when current-year commercial food aid imports do not fall below a five-year historical average. The FAO Consultative Sub-Committee on Surplus Disposal (CSSD), based in Washington, monitors adherence to the principles by reviewing food aid transactions. However, in recent years the reporting of food aid shipments to the CSSD has largely collapsed, both causing and reflecting tensions over the effect of food aid on commercial agricultural trade.⁴⁴ The latest update of the Principles of Surplus Disposal was published in 2001 and takes into account the existing food aid provisions in the WTO Agreement on Agriculture.⁴⁵

2.2 Multilateral Food Aid (WFP)

In 1962, the World Food Programme (WFP) was established by parallel resolutions of the FAO and the UN General Assembly, marking the beginning of multilateral food aid.

⁴³ United States, Agricultural Trade and Development Assistance act of 1954 which established the Food for Peace programme, the primary food aid programme of the United States. The Food for Peace programme had become “the single most extensive foreign aid programme in American history, with exception of the Marshall Plan” See D. John Shaw, *The UN World Food Programme and the Development of Food Aid* (Basingstoke: Palgrave, 2001), 15.

⁴⁴ Barrett and Maxwell, *Food Aid after Fifty Years: Recasting Its Role*, 73.

⁴⁵ Food and Agriculture Organization of the United Nations, *Reporting Procedures and Consultative Obligations under the FAO Principles of Surplus Disposal* (Rome: 2001). Available at: <ftp://ftp.fao.org/docrep/fao/007/y1727e/y1727e00.pdf> (accessed 15.05.2010).

The world food crisis of 1973–1974 and the World Food Conference were significant events marking the rise of multilateral food aid efforts and the WFP became a central part of that agenda.⁴⁶ In 2000, WFP was responsible for more than 95 per cent of multi-lateral food aid allocated and 30–40 per cent of all food aid worldwide. Central features of most bilateral food aid programmes such as supplier interests in expanding export markets and surplus disposal are absent from the WFP's stated mission.⁴⁷

In recent years, WFP has developed sophisticated tools and guidance that make the work of assessment officers easier. For example, there are standard questionnaires for household, trader and focus group surveys that pay specific attention to markets allowing the impact of shocks on food prices to be estimated, while simultaneously evaluating the effect of these price changes on consumers, producers and traders. This model also allows estimates of the quantity of food aid that can be received by a country without disturbing its local markets.⁴⁸

2.3 Food Aid Convention (IGA)

The institutional basis of food aid was further strengthened with the signing of the Food Aid Convention (FAC) as part of the International Wheat Agreement in 1967, now called the International Grains Agreement 1995 (IGA).⁴⁹ The FAC was negotiated at the same time as the Kennedy Round of negotiations on the General Agreement on Tariffs and Trade, establishing the close link between international trade and food aid as far back as 1967.⁵⁰ Weak as its enforcement may be, the FAC is the only treaty under which signatories have accepted a binding legal obligation to provide international development assistance.⁵¹

⁴⁶ Barrett and Maxwell, *Food Aid after Fifty Years: Recasting Its Role*, 61.

⁴⁷ *Ibid.*, 62.

⁴⁸ United Nations World Food Programme, *World Hunger Series 2009: Hunger and Markets*, 115.

⁴⁹ See <http://www.iga.int/en/downloads/brochure/iga1995.pdf> (accessed 15.05.2010).

⁵⁰ The United States insisted on greater burden sharing on international food aid as the price for agreeing to a new international wheat agreement while the European Economic Community wanted to secure their role as a grain exporter. The American objective was that the FAC would allow a reduced food supply on global markets by the increased use of non-American resources for food aid. See Barrett and Maxwell, *Food Aid after Fifty Years: Recasting Its Role*, 55-6.

⁵¹ John Hoddinott, Marc J. Cohen, and Christopher B. Barrett, "Renegotiating the Food Aid Convention: Background, Context, and Issues," *Global Governance* 14, no. 3 (2008): 283. See also, Edwini Kessie, "The Legal Status of Special and Differential Treatment Provisions under the WTO Agreements," in *WTO Law and Developing Countries*, ed. George A. Bermann and Petros C. Mavroidis (2007).

The membership in the FAC is limited to donor countries⁵² which pledge to provide a specified minimum level of food aid disbursements to guarantee a predictable flow of food aid every year. However, certain features such as the possible declaration of commitments not in tonnage but in value terms and the possibility of carrying over unfulfilled commitments to the following years can create incentives not to provide food aid when prices are high.⁵³ Moreover, quite often the minimum commitments have been set at such a low level, far below actual deliveries, that they are not very meaningful.⁵⁴

The FAC encourages members to provide food aid in grant form rather than concessional sales, and to decouple food aid from export promotion. It also stipulates that food aid transactions, including bilateral food aid that is monetised, are to be carried out in a manner consistent with the FAO's Principles of Surplus Disposal and Consultative Obligations.⁵⁵ However, there is no systematic evaluation of individual donors and the Food Aid Committee does not make public failures to meet commitments under the FAC.⁵⁶ Overall, the monitoring of compliance with FAC commitments remains weak.

2.4 Human Rights

From a competition viewpoint, human rights law adds the perspective of food aid beneficiaries and addresses the concern that poorly targeted food aid may disrupt local markets and harm rural livelihoods. The Committee on Economic, Social and Cultural Rights in its General Comment 12 on the right to adequate food stated that food aid should be provided, as far as possible, in ways that do not adversely affect local producers and local markets, and should be organised in ways that facilitate the return to food self-reliance of the beneficiaries.⁵⁷ In the same vein, Guideline 15 of the FAO Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security recommends, *inter alia*, that donor states should

⁵² Membership as of July 2007: Argentina, Australia, Canada, European Community and its Member States, Japan, Norway, Switzerland and the United States. See <http://www.igc.org.uk/en/aboutus> (accessed 15.05.2010).

⁵³ See Hoddinott, Cohen, and Barrett, "Renegotiating the Food Aid Convention," 287-88.

⁵⁴ Food and Agriculture Organization of the United Nations, *Food Aid for Food Security*, 19.

⁵⁵ Food Aid Convention 1999, Article IX(e)(ii), available at <http://www.igc.org.uk> (accessed 15.05.2010).

⁵⁶ Hoddinott, Cohen, and Barrett, "Renegotiating the Food Aid Convention," 289.

⁵⁷ UN 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. 39. The Committee on Economic, Social and Cultural Rights is the supervisory body of the International Covenant on Economic, Social and Cultural Rights that enshrines in Art. 11 the right to adequate food.

provide assistance in a manner that takes into account the importance of not disrupting local food production, has a clear exit strategy and promotes increased use of local and regional commercial markets.⁵⁸

3. Present WTO Rules on Food Aid

For the regulation of food aid, the WTO Agreement on Agriculture (AoA) has established two different elements: first, Article 10 aims to prevent the circumvention of disciplines to reduce export subsidies. Second, Article 16 incorporates a commitment to “establish appropriate mechanisms to ensure that the implementation of the results of the Uruguay Round on trade in agriculture does not adversely affect the availability of food aid”. While the latter commitment cannot be seen as more than a best endeavour, Article 10.4, addressing international food aid, will now be discussed in more detail.

3.1 Substantive Provisions of Article 10.4 AoA

Article 10 belongs to part V of the AoA, which is the export competition pillar and regulates the prevention of circumvention of export subsidy commitments. Article 10.4 attempts to discipline food aid as a tool for surplus disposal used to circumvent export subsidy restrictions. Transactions that are claimed to fall under food aid but do not meet the three requirements discussed in the following sub-sections are considered export subsidies and prohibited or limited by the AoA and the country schedules. It is noteworthy that Article 10.4(a) and (b) are identical to Article VII(2) of the 1995 Food Aid Convention. This indicates that the food aid needs of food-deficient countries were left exclusively to the provisions of the FAC, whereas FAC provisions addressing donors’ specific trade-related concerns were imported into the AoA.⁵⁹

⁵⁸ Food and Agriculture Organization of the United Nations, *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security* (Rome: 2005), guideline 15.1.

⁵⁹ Melaku Geboye Desta, “Food Security and International Trade Law: An Appraisal of the World Trade Organization Approach,” *Journal of World Trade* 35 (2001): 462.

3.1.1 Not tied to commercial exports

Article 10.4(a) stipulates that Members donors of international food aid shall ensure “that the provision of international food aid is not tied directly or indirectly to commercial exports of agricultural products to recipient countries.”

This rule bans the practice of tying the provision of food aid to other commercial sales. There are no explanations on which elements of concessionality would fall under “direct or indirect” tying. The Food Aid Convention specifies that the provision of food aid should not be “tied directly or indirectly, formally or informally, explicitly or implicitly, to commercial exports of agricultural products or other goods and services to the recipients”.⁶⁰ Article 10.4(a) speaks only of commercial exports of agricultural goods. It would be interesting to assess a case of food aid indirectly linked to the supply of other goods and services. However, Article 10.4(a), like the rest of Article 10.4, has never been tested in dispute settlement.

3.1.2 Monetisation

Article 10.4(b) prescribes that “Members donors of international food aid shall ensure [...] that international food aid transactions, including bilateral food aid which is monetized, shall be carried out in accordance with the FAO ‘Principles of Surplus Disposal and Consultative Obligations’, including, where appropriate, the system of Usual Marketing Requirements (UMRs)”.

The Consultative Subcommittee on Surplus Disposal (CSSD) monitors adherence to the Principles of Surplus Disposal.⁶¹ The requirements to ensure that commercial exports are not displaced include a prohibition on the export of the product (or similar products) received by the recipient country, the calculation of a UMR indicating the quantity of commercial purchases the recipient country must make, and the possibility for review and challenge of notifications by other exporting countries. However, under the existing rules it is hardly possible to determine whether a transaction entails commercial dis-

⁶⁰ Food Aid Convention, 1999, Article IX(e). Article IX(d) states more generally that all food aid transactions are to be conducted “in such a way as to avoid harmful interference with normal patterns of production and international commercial trade”.

⁶¹ See section 2.1 above.

placement.⁶² Furthermore, reporting requirements were effectively being ignored leaving the CSSD almost non-functioning.⁶³ Given the stricter disciplines on export subsidies in the AoA, the sharp decline in notification to the CSSD over the past decade has fuelled renewed concerns that food aid is used to circumvent export subsidy commitments.⁶⁴

3.1.3 Fully grant form

Article 10.4(c) provides that Members donors of international food aid shall ensure “that such aid shall be provided to the extent possible in fully grant form or on terms no less concessional than those provided for in Article IV of the Food Aid Convention 1986.”

This article contains aspirational language in the formulation of “to the extent possible” and calls for food aid to be provided in grant form as opposed to being sold under credit or subsidy agreements. Most donors comply with this guideline. The United States continues to provide food aid as concessional sales, although the importance of credit programmes has declined in recent years.⁶⁵ Article IV of the Food Aid Convention 1986 includes sales on credit.⁶⁶ While still included in the 1999 Food Aid Convention, the EU and other FAC members are of the opinion that such programmes are a competition issue and that sales on credit should no longer be included in the list of food aid operations.

3.2 Analysis of the normative value of Article 10.4

⁶² Edward Clay, "Getting It Right? The Doha Round Proposals on International Food Aid," (2007), 4.

⁶³ See, e.g., Edward Clay, "Food Aid and the Doha Development Round: Building on the Positive," Overseas Development Institute Background Paper, February 2006, (2006), 6.

⁶⁴ Barrett and Maxwell, *Food Aid after Fifty Years: Recasting Its Role*, 70.

⁶⁵ Linda M. Young, "Options for World Trade Organization Involvement in Food Aid," *The Estey Centre Journal of International Law and Trade Policy* 3, no. 1 (2002): 20.

⁶⁶ Article IV of the 1986 Food Aid Convention reads: Food aid under this Convention may be supplied on any of the following terms: (a) gifts of grain or gifts of cash to be used to purchase grain for the recipient country; (b) sales for the currency of the recipient country which is not transferable and is not convertible into currency or goods and services for use by the donor members; (c) sales on credit, with payment to be made in reasonable annual amounts over periods of 20 years or more and with interest at rates which are below commercial rates prevailing in world markets; on the understanding that such aid shall be supplied to the maximum extent possible by way of gifts, especially in the case of least developed countries, low per capita income countries and other developing countries in serious economic difficulties. (asterisks omitted)

Article 10.4 AoA allows unlimited amounts of food aid as long as they are (i) not tied directly or indirectly to commercial exports of agricultural products to recipient countries, (ii) in conformity with the FAO Principles of Surplus Disposal and Consultative Obligations, and (iii) provided to the extent possible in fully grant form or on terms no less concessional than those provided for in the 1986 Food Aid Convention.

According to one commentator, Article 10.4 AoA effectively shields all official food aid satisfying OECD-DAC definitions for ODA from WTO export competition disciplines, arguing that these definitions exclude any link to the export of other goods at least to LDCs.⁶⁷ Another opinion holds that Article 10.4 AoA stands apart from other parts of the Agreement because the disciplines on food aid are merely provided in the hope that WTO Members will abide by them in good faith; according to this somewhat surprising line of argument these disciplines are not enforceable under WTO dispute settlement.⁶⁸

While there is no provision preventing Article 10.4 claims under the WTO dispute settlement mechanism, it is true that so far, not a single case has included a claim under Article 10.4 AoA. One reason could be the not very clearly defined obligations, in the case of Article 10.4(c) AoA even framed in aspirational language. This obviously increases the burden of proof for a complainant under the export competition aspect of AoA food aid disciplines.

The case of *US – Upland Cotton* does however offer a small clarification since the parties, the Panel and the Appellate Body have reasoned about Article 10.4 AoA in connection with the United States' claim that Article 10.2 AoA⁶⁹ excludes the application of Article 10.1 AoA.⁷⁰ The Appellate Body in *US – Upland Cotton* held that Article 10.2 must be interpreted in a manner that is consistent with Article 10.1, that is "in a manner which results in, or which threatens to lead to, circumvention of export subsidy commitments; nor shall non-commercial transactions be used to circumvent such commit-

⁶⁷ Clay, "Food Aid and the Doha Development Round," 4.

⁶⁸ Ryan Cardwell, "Food Aid and the WTO: Can New Rules Be Effective?," *The Estey Centre Journal of International Law and Trade Policy* 9, no. 1 (2008): 77-78.

⁶⁹ Article 10.2 AoA reads: Members undertake to work toward the development of internationally agreed disciplines to govern the provision of export credits, export credit guarantees or insurance programmes and, after agreement on such disciplines, to provide export credits, export credit guarantees or insurance programmes only in conformity therewith.

⁷⁰ Article 10.1 AoA reads: Export subsidies not listed in paragraph 1 of Article 9 shall not be applied in a manner which results in, or which threatens to lead to, circumvention of export subsidy commitments; nor shall non-commercial transactions be used to circumvent such commitments.

ments”.⁷¹ Likewise, Article 10.4 does not exclude international food aid from the scope of Article 10.1, since food aid is covered by the second clause of Article 10.1 to the extent that it is a “non-commercial transaction”.⁷² Article 10.4 provides specific disciplines that may be relied on to determine whether international food aid is being “used to circumvent” (Article 10.1) export subsidy commitments. The Appellate Body concluded its analysis by stating that WTO Members were free to grant as much food aid as they wish, provided they did so in conformity with Articles 10.1 *and* 10.4.⁷³

In *EC – Sugar* both the Panel and the Appellate Body stopped with conclusions on Article 9 AoA and saw no reason to examine claims made under Article 10.1.⁷⁴ Regrettably, this case does not offer additional clarifications.

The present formulation of Article 10.4, by leaving open a number of criteria and disciplines, makes it more difficult for a complainant invoking this provision in a particular case of litigation. However, the intent and purpose of Article 10 as a whole clearly focuses on the impact of agricultural policy instruments on competition: export subsidy commitments must not be circumvented through non-commercial transactions including food aid. As will be discussed in section five, the question arises whether the current Doha Round proposal on food aid disciplines is a step forward in this direction.

3.3 NFIDC-Decision

While Article 10.4 AoA reflects a concern that food aid donors could circumvent export subsidies obligations, Article 16 incorporates into the AoA the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries (NFIDC-Decision).⁷⁵ In this decision, Ministers also agreed to establish mechanisms ensuring that the reform pro-

⁷¹ Appellate Body Report, *United States – Subsidies on Upland Cotton*, WTO Doc. WT/DS267/AB/R (3 March 2005), para. 616. Cf. separate opinion, paras 631–35.

⁷² *Ibid.*, para. 619. Cf. Joseph A. McMahon, *The WTO Agreement on Agriculture: A Commentary* (Oxford: Oxford University Press, 2006), footnote 147.

⁷³ *Ibid.* (emphasis added).

⁷⁴ Appellate Body Report, *European Communities – Export Subsidies on Sugar*, WTO Doc. WT/DS265,266,285/AB/R (28 April 2005), para. 346.

⁷⁵ Article 16 reads:

1. Developed country Members shall take such action as is provided for within the framework of the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries.

2. The Committee on Agriculture shall monitor, as appropriate, the follow-up to this Decision.

gramme would not adversely affect the availability of food aid. To this end, they agreed to review the level of food aid under the Food Aid Convention, initiate negotiations in the appropriate forum to establish a sufficient level of food aid and to adopt guidelines on how to deliver an increasing proportion of food aid in fully grant form.⁷⁶

However, the implementation of the NFIDC-Decision has been limited to a fruitless exchange of views during the November meetings of the Committee on Agriculture – and without reference to other international rules and commitments.⁷⁷ This did not change with the inclusion of the NFIDC-Decision at the Doha WTO Ministerial Conference as one of its implementation-related issues and concerns.⁷⁸ An even more blatant testimony to the uselessness of this decision is the fact that it was never even referred to during the food crisis of 2007–08.⁷⁹

4. Food Aid in the Doha Round

4.1 From Doha to Hong Kong

According to Article 20 AoA, trade liberalisation for agriculture is an ongoing ‘reform process’. Interestingly, the Doha Development Agenda (DDA) with respect to agriculture is limited to just two paragraphs (paras 13 and 14). As for export disciplines, there is only half a sentence regarding export subsidies, without any mention of the larger notion of “export competition” (Art.8 AoA), and even less on the specific matter of food aid.⁸⁰

⁷⁶ World Trade Organization, *Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries, Marrakesh Agreement Establishing the World Trade Organization, Decisions Adopted by the Trade Negotiations Committee (Adopted on 15 April 1994)*, 1867 UNTS 60 (1994), paras. 3(i), 3(ii).

⁷⁷ See Kerstin Mechlem, "Harmonizing Trade in Agriculture and Human Rights: Options for the Integration of the Right to Food into the Agreement on Agriculture," in *Max Planck Yearbook of United Nations Law*, ed. Armin von Bogdandy and Rüdiger Wolfrum (2006), 158-60.

⁷⁸ World Trade Organization, *Ministerial Declaration, Adopted on 14 November 2001*, WTO Doc. WT/MIN(01)/DEC/1 (20 November 2001), para. 12. World Trade Organization, *Implementation-Related Issues and Concerns, Decision of 14 November 2001*, WTO Doc. WT/MIN(01)/17 (20 November 2001), para. 2.2.

⁷⁹ On the normative value of the NFIDC-Decision also see Christian Häberli, "Food Security and WTO Rules," in *Food Crises and the WTO*, ed. Baris Karapinar and Christian Häberli (Cambridge: Cambridge University Press, 2010), 307-08., particularly 07–08.

⁸⁰ Regarding the NFIDC-Decision, Ministers simply re-approved in Doha the four measures contemplated as possible remedies for the negative effects of the Uruguay Round.

In preparations for the DDA, the EC had noted that forms of export competition other than export subsidies were subject to less stringent rules and fewer transparency requirements.⁸¹ But export competition as a whole remained a minefield. When the Ministers reassembled two years later in Cancun, in September 2003, negotiations got as far as a second revision of the preparatory document. As for agriculture, a new sentence explained what was meant by “export competition”: “[D]isciplines shall be established on export subsidies, export credits, export state trading enterprises, and food aid programs.”⁸² Before the collapse of that conference, Ministers also had been about to approve the parameters of the negotiation on food aid: “Additional disciplines shall be agreed in order to prevent commercial displacement through food aid operations.”⁸³ However, this conference finished without a final document being adopted. From then on the Doha negotiations continued with less clarity than would have been necessary for a successful conclusion.

The informal ministerial gathering held in July 2004 in Geneva allowed for considerable progress, especially on agriculture (the “July framework”). The provisions regarding food aid took another step forward as part of the decision to work towards “detailed modalities ensuring the parallel elimination of all forms of export subsidies and disciplines on all export measures with equivalent effect by a credible end date”.⁸⁴ Ministers decided to eliminate by the end date (“to be agreed”):

Provision of food aid that is not in conformity with operationally effective disciplines to be agreed. The objective of such disciplines will be to prevent commercial displacement. The role of international organizations as regards the provision of food aid by Members, including related humanitarian and developmental issues, will be addressed in the negotiations. The question of providing food aid exclusively in fully grant form will also be addressed in the negotiation.⁸⁵

At the same time, the link with other export competition disciplines was established with more precision:

In exceptional circumstances, which cannot be adequately covered by food aid, commercial export credits or preferential international financing facilities, ad hoc temporary

⁸¹ McMahon, *The WTO Agreement on Agriculture*, 207.

⁸² World Trade Organization, *Preparations for the Fifth Session of the Ministerial Conference, Draft Cancún Ministerial Text*, WTO Doc. JOB(03)/150/Rev.2 (13 September 2003), para. 3.

⁸³ *Ibid.*, para. 3.5.

⁸⁴ World Trade Organization, *Doha Work Programme, Decision Adopted by the General Council on 1 August 2004*, WTO Doc. WT/L/579 (2 August 2004), para. 17.

⁸⁵ *Ibid.*, para. 18.

financing arrangements relating to exports to developing countries may be agreed by Members. Such agreements must not have the effect of undermining commitments undertaken by Members in paragraph 18 above, and will be based on criteria and consultation procedures to be established.⁸⁶

An intensive negotiation process followed this rather successful, albeit informal, result. When the next occasion presented itself at the Sixth Ministerial Conference in December 2005 held in Hong Kong, one of the few meaningful results of that conference was an agreement on the date on which export subsidies would be eliminated (i.e. the end of 2013). The text adopted on food aid reads as follows:

On food aid, we reconfirm our commitment to maintain an adequate level and to take into account the interests of food aid recipient countries. To this end, a "safe box" for bona fide food aid will be provided to ensure that there is no unintended impediment to dealing with emergency situations. Beyond that, we will ensure elimination of commercial displacement. To this end, we will agree effective disciplines on in-kind food aid, monetization and re-exports so that there can be no loop-hole for continuing export subsidization.⁸⁷

4.2 The December 2008 'Draft Modalities'

The latest document on the results of the negotiations following the Hong Kong Ministerial Conference was submitted on 6 December 2008 by Ambassador Crawford Falconer from New Zealand as the then chairperson of the "Agriculture Committee in Special Session". These so-called "modalities" are in fact a highly complex text reflecting Falconer's personal views on the state of the negotiations and on the areas where a consensus might be reached. The text extends over 130 pages and is the basis for the following analysis of the disciplines envisaged for international food aid. It consists of general disciplines both in the main text and in a new Annex, a new definition of the 'Safe Box', and further disciplines for non-emergency food aid.⁸⁸

The chapeau text regarding export competition insists that these modalities will not diminish in any way existing export subsidy obligations or their "circumvention through

⁸⁶ Ibid., para. 26.

⁸⁷ World Trade Organization, *Doha Work Programme, Ministerial Declaration Adopted on 18 December 2005*, WTO Doc. WT/MIN(05)/DEC (22 December 2005), para. 6.

⁸⁸ World Trade Organization, *Revised Draft Modalities for Agriculture*, WTO Doc. TN/AG/W/4/Rev.4 (6 December 2008), Annex L, 72-74. Available at: http://www.wto.org/english/tratop_e/agric_e/agchairtxt_dec08_a_e.pdf (accessed 18.05.2010).

non-commercial transactions.”⁸⁹ Food aid is mentioned in four places: first, paragraph 160 again underlines that there can be no alteration to existing WTO commitments or to the institutional food aid arrangements and commitments in place (para. 161).⁹⁰ Second, the December 2008 Modalities further specify that food aid disciplines are to be implemented in parallel with those on all other forms of export subsidies.⁹¹ Third, all other proposed international food aid disciplines are contained in Annex L of the December 2008 Modalities. Finally, special provisions apply to cotton, even though a practical case of application for this non-food commodity is difficult to imagine.⁹²

4.2.1 General disciplines applicable to all food aid transactions

The main thrust of the proposed disciplines is to prevent commercial displacement, as specified in the above-quoted ministerial texts. To this end, international food aid volumes shall be maintained and take into account the interests of food aid recipients (para. 1). In addition, food aid shall be needs-driven, provided “in fully grant form” and “not tied directly or indirectly to commercial exports of agricultural products or of other goods and services”, nor shall they be “linked to the market development objectives of donor Members” (para. 2). The WTO Members shall also ensure that such food aid is not re-exported except in specified circumstances (para. 2 lit.e). Most importantly, there is an obligation to avoid “an adverse effect on local or regional production of the same or substitute products” (para. 3).

⁸⁹ Ibid., para. 160 of the main text: “Nothing in these modalities on export competition can be construed to give any Member the right to provide, directly or indirectly, export subsidies in excess of the commitments specified in Members’ Schedules, or to otherwise detract from the obligations of Article 8 of that Agreement. Furthermore, nothing can be construed to imply any change to the obligations and rights under Article 10.1 or to diminish in any way existing obligations under other provisions of the Uruguay Round Agreement on Agriculture or other WTO Agreements.

⁹⁰ Ibid., para. 161: Nor can anything in these modalities be construed to diminish in any way the existing commitments contained in the Marrakesh Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-developed and Net Food-importing Developing Countries of April 1994 and the Decision on the Implementation-related Issues and Concerns of 14 November 2001 on, inter alia, commitment levels of food aid, provision of food aid by donors, technical and financial assistance in the context of aid programmes to improve agricultural productivity and infrastructure, and financing normal levels of commercial imports of basic foodstuffs. Nor could it be understood to alter the regular review of these decisions by the Ministerial Conference and monitoring by the Committee on Agriculture.

⁹¹ Cf. Annex K, para. 3.

⁹² “To the extent that new disciplines and commitments for export credits, export credit guarantees or insurance programmes, agricultural exporting state trading enterprises and international food aid create new and additional obligations for Members as regards cotton, any such obligations shall be implemented on the first day of the implementation period for developed country Members, and by the end of the first year of the implementation period for developing country Members” (para. 169).

The term “food aid” covers both in-kind and cash-based food aid donations.⁹³ According to paragraph 3, Members commit to making their best efforts to move increasingly towards untied cash-based food aid.

4.2.2 Further disciplines for emergency situations (Safe Box)

In order to avoid an “unintended impediment to the provision of food aid during an emergency situation” Annex L establishes the conditions under which food aid (whether cash or in-kind) shall be presumed to be in conformity with the objective of avoiding commercial displacement. Among the conditions, there is the declaration of emergency and a needs assessment during which there can be no initiation of dispute settlement (paras 6–7). Emergency food aid, including in-kind, may not be sold (“monetised”) except within LDCs for the sole purpose of transport and delivery (para. 8). It may be continued “as long as the emergency lasts subject to an assessment of continued genuine need” by the relevant multilateral agency, and subject to repeated notifications (paras 9–10).

4.2.3 Further disciplines for non-emergency situations

Non-emergency in-kind food aid is subject to a targeted assessment, which “would incorporate and reflect objective and verifiable poverty and hunger data” and with the objective of preventing, or at the very least minimizing, commercial displacement (para. 11). Monetisation is subject to similar conditions as for Safe Box food aid, but in addition to fund the internal transportation and delivery of food aid, it was broadened in the December 2008 Modalities to allow for funding the procurement of agricultural inputs to low-income or resource-poor producers (para. 12).

⁹³ Cf. Footnote 1 of Annex L.

5. Assessment of the December 2008 Modalities

The aim of this article is to test whether the December 2008 Modalities can prevent food aid from being used as a loophole for continuing export subsidisation while complying with the other objectives set out in the Hong Kong Ministerial Decision. These were to maintain an adequate level of food aid, to ensure that there is no unintended impediment to dealing with an emergency situation and to ensure elimination of commercial displacement.⁹⁴

It may be difficult to reach a fully satisfactory solution for such a sensitive topic. Nevertheless, the new disciplines at the very least should not make it more difficult for an exporter without food aid to prove commercial displacement by a competitor whose government is a food aid donor, than is possible particularly under the present version of Article 10.4 AoA.⁹⁵

This assessment of the December 2008 Modalities starts with some remaining “loose language” (5.1) before looking at potential dispute settlement cases (5.2). Finally, the present proposals are compared with the existing disciplines in Articles 10 and 16 of the AoA (5.3).

5.1 December 2008 Draft Modalities: The loopholes

After so many years of little progress on the food aid component in the DDA agriculture negotiations, especially with regard to export competition, the December 2008 version is a step forward. However, a closer look reveals a number of loopholes allowing considerable policy space for both donors and recipients of food aid.

5.1.1 Grant form and untied aid – a reality check

The proposed disciplines insist on the need to avoid food aid, which is in any way tied to commercial interests or market development objectives:

Members shall ensure that all food aid transactions are provided in conformity with the following provisions: [...] that [...] they are in fully grant form [...] they are not tied di-

⁹⁴ World Trade Organization, *Doha Work Programme, Ministerial Declaration Adopted on 18 December 2005*, para. 6.

⁹⁵ See chapter 3.

rectly or indirectly to commercial exports of agricultural products or of other goods and services [...] they are not linked to the market development objectives of donor Members.⁹⁶

On the face of it, this looks good for two reasons. Firstly, this text finally rules out food aid on concessional terms.⁹⁷ Secondly, even though the insistence on untied aid is only a reaffirmation of the wording in the present Article 10.4, it is indeed the link to commercial trade interests which causes the main trade-distorting effects of food aid.

A second look at these provisions reveals a more mixed picture. First, in the July 2004 framework agreement, the issue of “less than free” food aid was still disputed. It had been argued, not entirely without reason, that in certain circumstances food aid in fully grant form would be too costly to cover even a small production shortfall such as for rice in Indonesia.

Export competition can be impaired in several ways by food aid.

For instance, concessional food aid is also a case for export credit disciplines - but this article cannot look in detail at the technically very demanding Annex J of the December 2008 Modalities. However, for basic foodstuffs to LDCs and NFIDCs, a potentially important export credit loophole has been left open in that annex, because its paragraph 5 might also be invoked for food aid.⁹⁸

Second, for tied aid the problem is that it is often extremely difficult to prove such links. For example, the Economic Research Service of the US Department of Agriculture clearly associates food aid to agricultural trade in general.⁹⁹ US food aid to Egypt is almost exclusively provided in fully grant form, cash-based, and never formally linked to the purchase of US cereals or other goods. It so happens, however, that all of Egypt’s food aid imports are from the United States of America. Incidentally, Egypt also hap-

⁹⁶ World Trade Organization, *Revised Draft Modalities for Agriculture*, para. 2.

⁹⁷ Cf. section 3.1.3.

⁹⁸ “Least-developed and net food-importing developing countries as listed in G/AG/5/Rev.8 shall be accorded differential and more favourable treatment comprising allowance for a repayment term in respect of them of between 360 and 540 days for the acquisition of basic foodstuffs. Should one of these Members face exceptional circumstances which still preclude financing normal levels of commercial imports of basic foodstuffs and/or in accessing loans granted by multilateral and/or regional financial institutions within these timeframes, a further extension of such a time frame shall be provided.”

⁹⁹ Cf. USDA Agricultural Outlook, August 1999/AGO-263, p. 4, available at <http://www.ers.usda.gov/publications/agoutlook/aug1999/ao263.pdf> (accessed 14 May 2009).

pened to be among the first countries in Africa to approve a genetically modified version of corn for planting.¹⁰⁰

In addition, proof positive of commercial displacement is only likely to be obtainable until well after the objective is reached, for instance when market shares have increased or a new commercial market has been successfully developed by way of food aid as a ‘gate-opener’.

5.1.2 Emergencies – who can pull the trigger?

Emergency food aid, as pointed out in section 4.2.2, may be provided without following the rules and disciplines of AoA Article 10, subject only to (a) an *emergency declaration* or (b) an *emergency appeal*, followed by a *needs assessment*.

Both the recipient government and the Secretary General of the United Nations can declare an emergency.¹⁰¹ And a very long list of bodies can launch an emergency appeal:

“a country; a relevant United Nations agency, including the World Food Programme and the United Nations Consolidated Appeals Process; the International Committee of the Red Cross or the International Federation of Red Cross and Red Crescent Societies; a relevant regional or international intergovernmental agency; a non-governmental humanitarian organization of recognized standing traditionally working in conjunction with the former bodies.”¹⁰²

In both cases Article 6 prescribes a needs assessment either by a “*relevant*” UN Agency (normally the WFP) or by the International Committee of the Red Cross or the International Federation of Red Cross and Red Crescent Societies. When these conditions are fulfilled, all food aid provided in such cases will fall in the Safe Box and thus be deemed not to constitute a case of commercial displacement.

In so-called non-emergency cases, the criteria are only slightly stricter. The overall objective of avoiding commercial displacement still applies, but with a “softener”:

“...even in-kind aid is allowed, based on a “targeted assessment” [...] with the objective of preventing, or at the very least minimizing, commercial displacement.”¹⁰³

¹⁰⁰ <http://www.fas.usda.gov/gainfiles/200804/146294295.pdf> (accessed 18.05.2010).

¹⁰¹ Para. 6, lit.a.

¹⁰² Para. 6, lit.b.

¹⁰³ Paras 11 lit.(a) and (c) (excerpts).

A positive result of the negotiations so far is that paragraph 11 (lit.c) defines commercial displacement in rather clear terms, and it implicitly also applies to situations of competition with domestic production:

“Commercial displacement in this context shall arise where the provision of in-kind food aid by a Member materially displaces commercial transactions that would otherwise have occurred in or into a normally functioning market in the recipient country for the same product or directly competitive products.”

Nevertheless, it is quite clear that not all possibilities of abuse are thus being eliminated. In addition, the distinction between emergency and non-emergency situations is also blurred by the fact that there is no definition of ‘emergency’, and how long it can last.

The then Chairman of the Committee on Agriculture was quite clear that a definition of emergency situations in WTO law could not be a possible solution:

[I]t seems to me at least clear that WTO has no business trying to set itself up as the authority to pass judgement on these things. It simply has no credibility as it does not have the expertise to do so; nor is its function to set itself up as some kind of judge and jury on such matters within the international system. The definition that has been under consideration is that of the World Food Programme. [...] Therefore, in the absence of a compelling reason to override the definitions used by those that are responsible for administering and delivering food aid the furthest it would seem to me to be reasonable to go as regards a definition is to include the WFP definition as a reference.¹⁰⁴

Furthermore, any definition of an emergency can evolve over time, and the relevant international organisations use slightly different definitions.¹⁰⁵ The World Food Programme, as the dominant player in emergency food aid, defines three types of emergencies: sudden-onset emergencies, slow-onset emergencies and complex and protracted crises.¹⁰⁶ It is however questionable whether the third type should fall under the Safe Box, given that it can extend over years, *or even decades*.¹⁰⁷ Paragraph 10 of Annex L merely states that food aid may be provided as long as the emergency lasts, subject only to an assessment of continued genuine need as a result of the initial onset of the emergency. WTO Members decided, perhaps wisely so, not to include a definition of emer-

¹⁰⁴ See, e.g., World Trade Organization, Communication from the Chairman of the Committee on Agriculture (30 April 2007), para. 58, available at http://www.wto.org/english/tratop_e/agric_e/agchairtxt_30apr07_e.pdf (accessed 01.06.2010)

¹⁰⁵ On the normative value of the NFIDC-Decision also see Christian Häberli, Food Security and WTO Rules, in Baris Karapinar and Christian Häberli (eds), *Food Crises and the WTO*, Cambridge, New York, 2010 (in particular pp. 307-08).

¹⁰⁶ Food and Agriculture Organization of the United Nations, *Food Aid for Food Security*, 47-62.

¹⁰⁷ *Ibid.*, 56. (emphasis added). See also, World Food Programme, Definition of Emergencies, WFP Doc. WFP/EB.1/2005/4-A/Rev.1 (4 February 2005).

agency situations in WTO law. However, given the growing prevalence of complex and protracted crises,¹⁰⁸ some tightening of the Safe Box may be necessary in order not to open a Pandora's Box for food aid shipments that are not challengeable.

5.1.3 Safe Box = Genuine food aid?

The present formulation in paragraph 6 of the modalities in respect of the Safe Box has a clear, political objective. It is based on the Hong Kong mandate and is therefore an unlikely candidate for further changes. The assumption is that all food aid – cash and in-kind – supplied in cases of “certified” emergencies does not constitute commercial displacement or market creation, and therefore falls outside WTO disciplines on export competition. Obviously, this sentence intends to reassure food aid donors that their emergency interventions will escape scrutiny under the new WTO export competition disciplines.

Bearing in mind the uncertainties surrounding the emergency triggers the question remains whether the Safe Box will really serve as a haven for genuine food aid only. This article cannot address particular cases of supposed abuse in the past. For instance, corrupt import agencies or food stockpile managers can declare an emergency, or a needs assessment may conclude that emergencies can last for decades. The question in this context is therefore whether Safe Box food aid should under any circumstances be shielded from scrutiny. The next section addresses this question.

As for non-emergencies, it is hardly possible, without detailed case studies, to assess and quantify the commercial impact of, for instance, project aid such as free school meals with official ‘sponsors’ on which the WFP spent US\$ 340 million in 2007.¹⁰⁹ This leads to the conclusion that it will in many instances be difficult, to say the least, to assess the genuine character of food aid from an export competition perspective.

Furthermore, from a human security perspective, there is the concern that the Safe Box may impede the delivery of food aid to prevent or forestall an emergency, requiring that

¹⁰⁸ Ibid. The number and scale of complex and protracted crises associated with violent conflict have risen sharply over the past decade, especially in sub-Saharan Africa.

¹⁰⁹ <http://documents.wfp.org/stellent/groups/public/documents/newsroom/wfp199570.pdf> (accessed 15 May 2009).

human disasters must have already taken place in order for food aid to be permissible.¹¹⁰ A procedural distinction between emergency and non-emergency cases of hunger is probably useful to prevent bureaucrats from discussing calories while people are dying of hunger. However, as pointed out in the previous sub-section, the duration of an emergency remains an open issue. It is an unfortunate fact that emergencies as envisaged by the Safe Box cannot easily be distinguished from situations in a number of developing countries where the human security of people is threatened on a daily basis by lack of access to adequate food. Since in most cases, poverty or lack of income generation is the underlying cause of chronic hunger, providing food aid without also providing support for improving livelihoods is not likely to help those affected over the long term.¹¹¹

5.1.4 Monetisation

The last square brackets in the July 2008 Draft Modalities were on the issue of monetisation in non-emergency situations. The December 2008 Draft Modalities have broadened the scope for monetisation for non-emergency situations. It is now allowed if it is necessary to fund the internal transportation and delivery of food aid or the procurement of agricultural inputs to low-income or resource-poor producers (para. 12). Whether the removal of these square brackets reflects the Members' compromise over monetisation or rather the push by the then Chairman of the Committee on Agriculture to reduce square brackets remains to be seen in future versions of the modalities.

5.2 Fit for Dispute Settlement?

It can be concluded so far that the avoidance of commercial displacement through food aid is recognised as an overarching principle in negotiations on export competition. At the same time, all emergency operations will fall into the Safe Box of Annex L. They will therefore be "presumed" not to constitute cases of commercial displacement or market creation. Whether or not the conformity presumption mentioned in paras 4 and 6

¹¹⁰ Robert Howse and Ruti G. Teitel, "Beyond the Divide: The Covenant on Economic, Social and Cultural Rights and the World Trade Organization," Friedrich-Ebert-Stiftung, Occasional Papers Geneva No. 30 (2007), 26-7.

¹¹¹ Oxfam International, "Food Aid or Hidden Dumping?: Separating Wheat from Chaff," 10.

means that emergency food aid will no longer be challengeable under the new Article 10.4 is not quite clear. In theory, all food aid operations remain challengeable, but it is quite clear that in emergency situations the burden of proof establishing circumvention of export competition is on the complainant – probably without supporting evidence from an international organisation.

In any case, it would be necessary to look at all the facts together. In such an analysis, the proposed procedural requirements and new disciplines in respect of non-emergency food aid and monetisation can show the way forward in different situations where the question of circumvention of WTO disciplines on export competition arises.

First, and regardless of the less-than-clear distinction between emergency and non-emergency cases, the principle of different procedures for different situations seems appropriate. True emergencies lend themselves less well to commercial operations than longer-term needs of hungry but resource-poor people. From a trade law angle, an apportioning of the burden of proof commensurate with the potential for circumvention would appear a good procedural solution. This means that the presumption of conformity with WTO export competition disciplines is highest when food aid is provided in extreme emergencies, on a cash basis and locally or regionally procured (cf. paragraph 3). At the other end of the scale, food aid for non-emergency situations, in-kind, monetised and/or on a multi-year basis would seem automatically to call for a test of genuineness.

If such a principle is accepted, challenges under the DSU could be handled accordingly. A principle of *circumvention risk proportionality* could be a yardstick for the question of when the burden of proof shifts from the complainant to the respondent.

As pointed out above, the normal timelines of WTO dispute settlement may not allow for an adequate prevention of commercial displacement. It may therefore be necessary to establish a fast-track procedure, at least for non-emergency cases, where a presumption of displacement would be easier to establish by, say, the lack of a correct needs assessment. This could also involve the Committee on Agriculture. In such cases, it would be relatively quick to indicate non-compliance with export competition disciplines. The expertise in the WFP and other food aid organisations may be helpful – but other views such as those of commercial operators and local traders and producers may be useful too.

The next step, before reaching some conclusions on the proposed new disciplines, is a closer look at the present rules.

5.3 Comparison with food aid provisions in Articles 10 and 16 AoA

Section 3.1 examined the present rules on food aid, namely (i) the export subsidy circumvention disciplines in Article 10, (ii) Article 16.1 that commits developed country Members to the actions provided for in the so-called NFIDC-Decision, and (iii) paragraph 2 of that decision mandating the Committee on Agriculture to monitor the follow-up.¹¹²

Before comparing these provisions with the December 2008 Modalities three aspects are noteworthy. First, as pointed out in the Appellate Body Report on *US – Foreign Sales Corporation (FSC)*, the term “export subsidy commitments” in Article 10.1 has a “wider reach [than reduction commitments] that covers commitments and obligations relating to *both* scheduled and unscheduled agricultural products.”¹¹³ Second, Article 10.4 specifically deals with international food aid; it obliges donors to ensure that “the provision of food aid is not tied directly or indirectly to commercial exports” (lit.a). Third, although the NFIDC-Decision has remained without any concrete effect, it does mention food aid as one instrument to mitigate possible negative effects of trade liberalisation.

When considering food aid from a competition and commercial displacement perspective, it is true that the *US – FSC* case addressed export subsidies and not Article 10.4 AoA on international food aid. Nevertheless, building on the examination of *US – Cotton* in section 3.1, recourse to Article 10.1 in a future food aid case remains possible: the ruling in *US – FSC* clarifies the application of Article 10.1 also to unscheduled commodities.

The Doha Round results should take this line a step further: Article 10.4 would increase in normative value if the proposed provisions on compliance with the Usual Marketing Requirements and the prohibition on tying food aid to commercial exports were made

¹¹² World Trade Organization, *Decision on Effects of the Reform Programme*.

¹¹³ Appellate Body Report on *US – FSC*, para. 144.

more stringent. For instance, the December 2008 Modalities define commercial displacement more explicitly.¹¹⁴ Furthermore, even without a quantifiable definition of commercial displacement in Article 10.4 AoA, the obligation to adhere to the Principles of Surplus Disposal including the system of Usual Marketing Requirements (Article 10.4 lit.b) could already serve as a test for circumvention. A complainant could argue that a successful demonstration of commercial displacement as defined through the Usual Marketing Requirements, would *eo ipso* constitute a violation of Article 10.4(b).

Today there is no ‘Safe Box’ *de facto* shielding all emergency aid from a challenge. The present formulation of Article 10.4 might therefore offer, by way of its implicit reference to the Principles of Surplus Disposal, a more comprehensive and satisfactory approach to challenge market displacement through food aid than the December 2008 Modalities. On the other hand, the system of UMRs has never effectively prevented commercial displacement.¹¹⁵ This leads to the conclusion that, either in the Doha negotiation or in other fora such as the FAO Consultative Sub-Committee on Surplus Disposal, the indicators for the occurrence of market displacement should be refined and their enforcement strengthened.

Finally, although the NFIDC-Decision contains no binding commitments on food aid levels, there is a clear obligation of the WTO Membership “to establish appropriate mechanisms to ensure that the implementation of the results of the Uruguay Round on trade in agriculture does not adversely affect the availability of food aid.” The fact that these mechanisms have never been established raises the question how a new commitment, similar to the NFIDC-Decision, could be made more useful. If Annex L is enshrined in WTO law, it may at least improve the general commitment of WTO Members to “to maintain an adequate level of international food aid” (para. 1, Annex L). However, the question of what constitutes an *adequate* level will be a contentious issue. If the WTO membership is serious about this commitment, it should be phrased in such a way as to entail clear, measurable and enforceable commitments.

¹¹⁴ Cf. section 5.1.2. Para. 11 lit.c of Annex L reads: “[...] Commercial displacement in this context shall arise where the provision of in-kind food aid by a Member materially displaces commercial transactions that would otherwise have occurred in or into a normally functioning market the recipient country for the same product or directly competitive products.”

¹¹⁵ Christopher B. Barrett and Daniel G. Maxwell, *Food Aid after Fifty Years: Recasting Its Role* (London: Routledge, 2005), 69-71. This also applies to the so-called Bellmon Analysis which recipient agencies of US food aid have to undertake before monetisation, see *ibid.*, 190-1.

Summing up, it appears that despite some clear progress in terms of food aid disciplines it would be wrong to shield all sorts of emergency actions from legal scrutiny by way of a dispute settlement case, simply because they happen to fall into the Safe Box. The burden of proof of abuse would in any case rest on the complainant – but the respondent would need good arguments to rebut such clear facts as market share changes following food aid operations, even if undertaken in official emergency cases and on the basis of a needs assessment. On the other hand, even non-emergency operations such as school meals may fully qualify as genuine food aid – provided they are undertaken in good faith and according to internationally agreed guidelines.

6. Conclusions

International food aid comes in many shapes and sizes. Beneficiaries and needs are numerous and varied. Clearly, there are many situations where hungry people have neither money nor resources for food production, such as in a newly established refugee camp. At the same time there are other situations with partial food self-sufficiency, or where people earn enough to cover some of their calorific intake needs. A clear rule for all circumstances allowing an assessment of the commercial impact of all forms of food aid will hardly be possible. In any case the WTO is not the place to assess the quality of food aid operations, nor can it decide on quantitative targets or commitments for its Members.

The main driver for establishing the Safe Box and for allowing monetisation even for in-kind food aid and in non-emergency situations was the concern not to see food aid dwindle as a result of too stringent WTO disciplines on export competition. This concern was addressed at the 2005 WTO Ministerial in Hong Kong where the WFP and a number of NGOs made a strong plea not to have the WTO deal with such a sensitive item. While this concern is shared, the Doha Round can nevertheless be seen as an opportunity to better de-link food aid from serving as an instrument of surplus disposal. Given the right formulations food aid will not decrease in volume and commercial displacement can be avoided.

The conclusions are, firstly, that Annex L goes partly beyond the WTO's main role of fighting protectionism (6.1) and, secondly, that the food aid negotiation should focus very narrowly on the real WTO issues in this field, i.e. commercial displacement and market creation through directly or indirectly tied food aid (6.2). Finally, with a pledge on food aid governance attached to the Doha Round Final Act the donor community could commit to reversing the trend towards reducing food aid when world market prices are high (6.3).

6.1 Annex L is reaching beyond the trade-related aspects of food aid

Put simply, WTO is about protectionism and not about the quality nor the quantity of food aid. 'Doha' is a so-called Development Round that may justify expansion of regulation of food aid-issues going beyond food aid as circumvention of export subsidy reductions. Nevertheless, it appears that some issues dealt with in the December 2008 Modalities such as the problems arising from monetisation and in-kind food aid as well as displacement of local production by food aid should be addressed in a more appropriate forum. If the competent international organisations have been unable to come to grips with these problems, it is doubtful whether the WTO can solve them. The mandate of the WTO extends to trade distortion and surplus disposal. With regard to food aid, there is a need for better institutional cooperation and coordination to ensure that different international regimes are making coherent effects on international food aid and global food security.

In this context, the recent proposals for a Global Food Aid Compact (GFAC) to replace the Food Aid Convention are worth mentioning.¹¹⁶ While this is still a scholarly discussion, the proposals envisage a GFAC Secretariat within the WFP, co-chaired by the WFP, the WTO and by OECD-DAC.¹¹⁷ This configuration would explicitly recognise the interlinkages between food aid, global agricultural trade and overseas development assistance. The GFAC would absorb the CSSS, rendering that body unnecessary by subjecting food aid to WTO disciplines. A new GFAC outside the International Grains Council would signal clearly that food aid is no longer viewed as a trade promotion

¹¹⁶ See, e.g., Christopher B. Barrett and Daniel G. Maxwell, "Towards a Global Food Aid Compact," *Food Policy* 31, no. 2 (2006).

¹¹⁷ Barrett and Maxwell, *Food Aid after Fifty Years: Recasting Its Role*, 229.

tool.¹¹⁸ Finally, the GFAC would not entrust the WTO to exercise global oversight on each and every aspect of food aid operations, but merely demand that its proven trade-related disciplines and dispute resolution mechanisms be made available within the realm of food aid.¹¹⁹

6.2 WTO to focus exclusively on commercial displacement

If it is to ensure a level-playing field for traders without the backing of their Finance Ministers, the WTO must address all cases of export competition. Today this happens only for export subsidies. For the new disciplines including those on food aid it will often be rather difficult to prove hidden subsidies. Worse, in most cases the infringement of the new disciplines will take place long before a final ruling in a dispute settlement case, which means that the non-subsidised food exporters will have lost market shares or market creation opportunities long before a WTO Dispute Settlement Body decision is implemented.

These shortcomings were pointed out by recent literature.¹²⁰ However, this does not mean that the attempt to discipline export competition through food aid is futile. This paper argues for a re-focussing on WTO's mandate to combat protectionism and anti-competitive trade-distortions. There is no accepted definition of 'genuine' food aid, and the WTO is not the place to develop such a definition. Nevertheless, when developing additional disciplines in this field, perhaps a negative formulation might be more appropriate, i.e. the absence, through international food aid, of trade distortion and/or commercial displacement effects.

What is needed are clear rules, and enforcement through the established channels in the WTO including the Committee on Agriculture, bilateral consultations, trade policy reviews, good offices and dispute settlement. For food aid disciplines, there is the possibility of shifting the burden of proof according to the likelihood of abuse. Obviously, the *prima facie* burden of proof remains on the complainant. But the task of the complainant will be easier if the presently available international criteria for genuine food

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ See, e.g., Cardwell, "Food Aid and the WTO: Can New Rules Be Effective?."

aid are made mandatory under WTO litigation (e.g. recourse to the Usual Marketing Requirements, or other relevant WFP or FAC provisions). These criteria should remain the competence of the appropriate fora. In the WTO a kind of fast track procedure could be entrusted to the WTO Committee on Agriculture. Such a procedure could follow a list of indicators for commercial displacement, making it easier to detect non-genuine food aid and to raise the issue in the appropriate forum, including under the DSU.

Box 1 presents a proposal for a new Annex L in the December 2008 modalities, replacing Art.10.4 of the AoA.

Box 1: International Food Aid (Replacing Article 10.4 of the Agreement on Agriculture)

1. Members shall ensure that food aid* is provided in full conformity with the disciplines below, thereby contributing to the objective of preventing commercial displacement or market creation. Commercial displacement shall arise where the provision of food aid by a Member materially displaces commercial transactions that would otherwise have occurred in or into a normally functioning market in the recipient country for the same product or directly competitive products.

* Unless otherwise specified, the term food aid is used to refer to both in-kind and cash-based food aid donations.

General disciplines applicable to all food aid transactions

2. Members shall ensure that all food aid transactions are provided in conformity with the following provisions:

- (a) they are needs-driven
- (b) they are in fully grant form
- (c) they are not tied directly or indirectly to commercial exports of agricultural products or of other goods and services
- (d) they are not linked to the market development objectives of donor Members.

3. The provision of food aid shall take fully into account local market conditions of the same or substitute products. Unless authorised by the organisations mentioned under paragraph 6 below, Members shall refrain from providing food aid in situations where this would cause, or would be reasonably foreseen to cause, an adverse effect on local or regional production of the same or substitute products.

4. Members are encouraged to procure food aid from local or regional sources to the extent possible, provided that the availability and prices of basic foodstuffs in these markets are not unduly compromised.

5. The recipient government has a primary role and responsibility for the organization, coordination and implementation of food aid activities within its territory.

6. The competent international bodies, i.e. a relevant United Nations agency, the International Committee of the Red Cross or the International Federation of Red Cross and Red Crescent Societies, and the Food Aid Convention, shall establish rules and guidelines for monetisa-

tion and re-exports of food aid, in-kind and non-emergency operations, and for monitoring and surveillance.

Further disciplines for food aid transactions in emergency situations (Safe Box)

7. To ensure that there is no unintended impediment to the provision of food aid during an emergency situation, food aid provided under such circumstances (whether cash or in-kind) shall be within the ambit of the Safe Box and, therefore, deemed to be in conformity with this Article, provided that the emergency is confirmed, within a period of three months, by an assessment of need coordinated under the auspices of one of the international bodies referred to in paragraph 6 above.¹²¹

8. All emergency food aid provided in conformity with the conditions of paragraphs 2 to 7 and all the other relevant provisions of this Article shall remain in the Safe Box, i.e. unless proven otherwise it shall be presumed to be in conformity with this Article.

9. A notification will be required on an *ex-post* basis by donor Members at six-month intervals in order to ensure transparency.

10. Subject to its continued conformity with the other provisions of this Article, emergency food aid may be provided as long as the emergency lasts subject to an assessment of continued genuine need as a result of the initial onset of the emergency. The relevant multilateral agency shall be responsible for making or conveying such a determination, and notification thereof shall be provided to WTO.

Further disciplines for food aid transactions in non-emergency situations

11. Food aid in non-emergency situations outside the Safe Box shall be:

(a) based on a targeted assessment of need as under paragraph 7 above or, where such a targeted assessment is not reasonably obtainable, by an international humanitarian non-governmental organisation of recognized standing, working in partnership with a recipient country government. That assessment would incorporate and reflect objective and verifiable data on poverty and hunger published by an international or regional intergovernmental organisation or by a recipient country that objectively identifies the food security needs of the target populations described in sub-paragraph (b) below;

(b) provided to redress food deficit situations which give rise to chronic hunger and malnutrition and, accordingly, such food aid shall be targeted to meet the nutritional requirements of identified food insecure groups; and

(c) be provided consistently with the objective of preventing commercial displacement.

Monitoring and surveillance

12. Food aid donor and recipient Members shall be required to notify to the Committee on Agriculture, on an annual basis, all relevant data.

6.3 Pledge on the maintenance of total food aid flows after Doha

¹²¹ Needs assessment should be done with the involvement of the recipient government and may involve a relevant regional inter-governmental organization or an NGO, but while the latter bodies may be involved, this is in a context where they are in coordination with the relevant United Nations agency or ICRC/IFRCRC as the case may be. A needs assessment shall not have standing for the purposes of access to the safe box under these provisions unless it has been conducted in such a coordinated manner, and has obtained the demonstrable consent or approval of the relevant multilateral agencies.

The WTO should not determine levels of spending on food aid. Even though the effectiveness of the Food Aid Convention is constrained by its nature as a voluntary agreement, the FAC is the appropriate forum for pledges by donor countries. However, the WTO cannot ignore the fact that food aid levels in the past often went down when world market prices rose – whether or not as a consequence of multilateral trade liberalisation. When they adopted the NFIDC-Decision at Marrakesh, back in 1994, Trade Ministers acknowledged the link between trade liberalisation and the possibility of disruptions, including in levels of food aid. The Doha Round Final Act will provide an opportunity to improve on that decision which has never been put to use. Even though the WTO can neither guarantee food aid levels nor supervise the operations, it must ensure that its decisions do not diminish food security among the poorer segments of its membership. In addition, Members may be more willing to make concessions on their food aid positions within the reciprocal deal-making environment of the WTO. A political but enforceable commitment in the Final Act not to reduce food aid when prices are rising would go a long way towards the acceptance of the Doha package – and improve the functioning of the Food Aid Convention. Therefore, it is proposed to add the following pledge on food aid governance as an annex to the Doha Round Final Act.

Box 2: Proposal for a Food Aid Commitment in the Doha Round Final Act

Ministers,

Recognizing the need to make every effort to ensure that adequate food aid levels be maintained throughout the agriculture reform process, which will continue as a result of the Doha Round negotiations;

- *commit* not to reduce their actual food aid spending levels for commodities whose world market prices rise above the preceding three-year average.

6.4 Summing up

As matters stand today, the potential for Doha Round improvements, from an export competition viewpoint, of food aid and food security is rather limited.

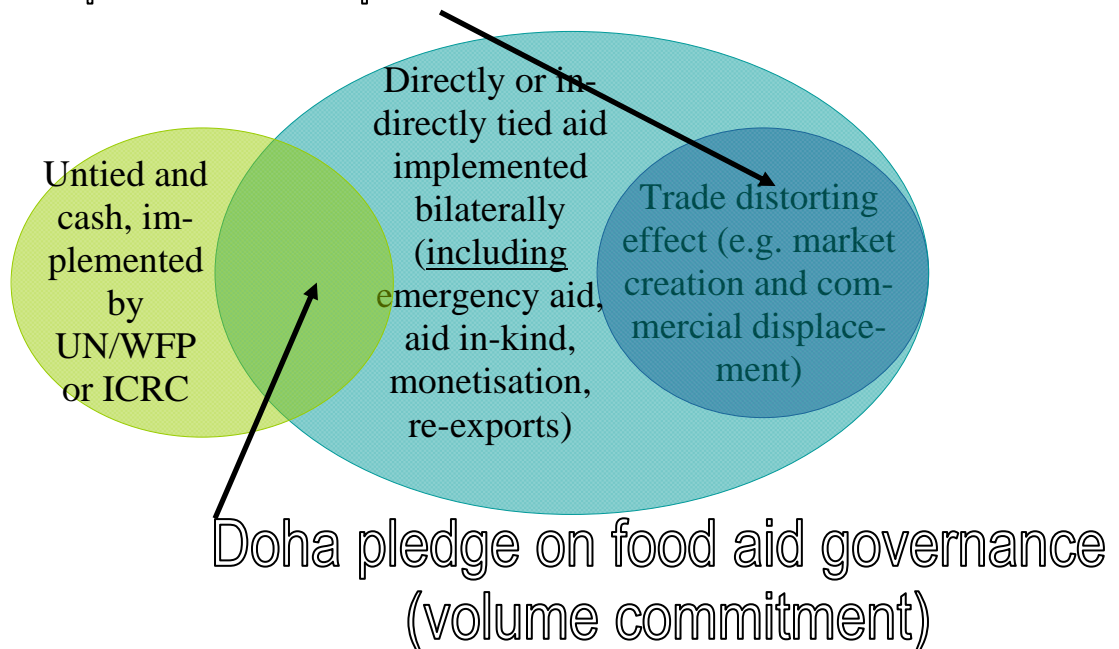
Food aid, basically, comes in two forms: either untied and cash (implemented by UN/WFP or ICRC), or directly and indirectly tied. Only part of the latter has a potential for trade distortion through market creation and commercial displacement, including emergency aid, aid in-kind, monetisation, and re-exports. This is where new WTO dis-

ciplines could improve the situation from an export competition viewpoint. However, 'emergency aid' and some other forms of tied aid will escape the new disciplines even if they are trade distorting.

Finally, and as a flanking measure, a WTO-based commitment to improve food aid governance could avoid a reduction of total food aid when prices increase.

Graph 1: Forms and Impacts of Food Aid after Doha

Doha improvement potential



Bibliography

- Abdulai, Awudu, Christopher B. Barrett, and John Hoddinott. "Does Food Aid Really Have Disincentive Effects? New Evidence from Sub-Saharan Africa." *World Development* 33, no. 10 (2005): 1689-704.
- Barrett, Christopher B., and Daniel G. Maxwell. *Food Aid after Fifty Years: Recasting Its Role*. London: Routledge, 2005.
- . *Food Aid after Fifty Years: Recasting Its Role*. London: Routledge, 2005.
- . "Towards a Global Food Aid Compact." *Food Policy* 31, no. 2 (2006): 105-18.
- Broude, Tomer. "Fragmentation(s) of International Law: On Normative Integration as Authority Allocation." In *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity*, edited by Tomer Broude and Yuval Shany, 99-120. Oxford: Hart, 2008.
- Cardwell, Ryan. "Food Aid and the WTO: Can New Rules Be Effective?" *The Estey Centre Journal of International Law and Trade Policy* 9, no. 1 (2008): 74-93.
- Cardwell, Ryan, Brooke Fridfinnson, and James Rude. "Food Aid as Surplus Disposal? The WTO, Export Competition Disciplines and the Disposition of Food Aid." Canadian Agricultural Trade Policy Research Network, Commissioned Paper 2007-3 (2007).
- Clay, Edward. "Food Aid and the Doha Development Round: Building on the Positive." Overseas Development Institute Background Paper, February 2006, (2006).
- . "Getting It Right? The Doha Round Proposals on International Food Aid." (2007).
- . "Resolving the Outstanding Issues on Food Aid: Response to the 'Communication from the Chairman of the Committee on Agriculture Special Session, 30 April 2007'." (2007).
- Desta, Melaku Geboye. "Food Security and International Trade Law: An Appraisal of the World Trade Organization Approach." *Journal of World Trade* 35 (2001): 449-68.
- Diven, Polly J. "The Domestic Determinants of US Food Aid Policy." *Food Policy* 26, no. 5 (2001): 455-74.
- Food and Agriculture Organization of the United Nations. "Reporting Procedures and Consultative Obligations under the FAO Principles of Surplus Disposal." Rome, 2001.
- . "The Right to Adequate Food in Emergencies." FAO Legislative Studies 77, (2002).
- . "The State of Food and Agriculture: Food Aid for Food Security." In *FAO Agriculture Series No. 37*. Rome: Food and Agriculture Organization of the United Nations, 2006.
- . "Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security." Rome, 2005.
- Häberli, Christian. "Food Security and WTO Rules." In *Food Crises and the WTO*, edited by Baris Karapinar and Christian Häberli. Cambridge: Cambridge University Press, 2010.
- Hoddinott, John, Marc J. Cohen, and Christopher B. Barrett. "Renegotiating the Food Aid Convention: Background, Context, and Issues." *Global Governance* 14, no. 3 (2008): 283-304.
- Howse, Robert, and Ruti G. Teitel. "Beyond the Divide: The Covenant on Economic, Social and Cultural Rights and the World Trade Organization." Friedrich-Ebert-Stiftung, Occasional Papers Geneva No. 30 (2007).

- Kessie, Edwini. "The Legal Status of Special and Differential Treatment Provisions under the WTO Agreements." In *WTO Law and Developing Countries*, edited by George A. Bermann and Petros C. Mavroidis, 12-35, 2007.
- Konandreas, Panos. "WTO Negotiations on Agriculture: A Compromise on Food Aid Is Possible." In *WTO Rules for Agriculture Compatible with Development*, edited by Jamie Morrison and Alexander Sarris, 313-31. Rome: Food and Agriculture Organization of the United Nations, 2007.
- McMahon, Joseph A. *The WTO Agreement on Agriculture: A Commentary*. Oxford: Oxford University Press, 2006.
- Mechlem, Kerstin. "Harmonizing Trade in Agriculture and Human Rights: Options for the Integration of the Right to Food into the Agreement on Agriculture." In *Max Planck Yearbook of United Nations Law*, edited by Armin von Bogdandy and Rüdiger Wolfrum, 127-90, 2006.
- Organisation for Economic Co-operation and Development. "The Development Effectiveness of Food Aid - Does Tying Matter?". Paris: OECD Publishing, 2006.
- Oxfam International. "Food Aid or Hidden Dumping?: Separating Wheat from Chaff." Oxfam Briefing Paper No. 71, (2005).
- Pauwelyn, Joost. "Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands." *Michigan Journal of International Law* 25 (2004): 903-27.
- Ramanujan, Adarsh. "Conflicts over 'Conflict': Preventing Fragmentation of International Law." *Trade, Law and Development* 1, no. 1 (2009): 171.
- Schultz, Theodore W. "Value of U.S Farm Surpluses to Underdeveloped Countries." *Journal of Farm Economics* 42 (1960): 1019-30.
- Shaw, D. John. *The UN World Food Programme and the Development of Food Aid*. Basingstoke: Palgrave, 2001.
- UN 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).
- United Nations Economic and Social Commission for Asia and the Pacific. "Sustainable Agriculture and Food Security in Asia and the Pacific." 2009.
- United Nations World Food Programme. "2007 Food Aid Flows." Rome, 2008.
- — —. *World Hunger Series 2009: Hunger and Markets*. London: Earthscan, 2009.
- United Nations World Food Programme, and International Food Aid Information System. "2007 Food Aid Flows." In *International Food Aid Information System - The Food Aid Monitor, June 2008*. Rome: WFP, 2008.
- World Trade Organization. *Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries, Marrakesh Agreement Establishing the World Trade Organization, Decisions Adopted by the Trade Negotiations Committee (Adopted on 15 April 1994)*. 1867 UNTS 60 (1994).
- — —. *Doha Work Programme, Decision Adopted by the General Council on 1 August 2004*. WTO Doc. WT/L/579 (2 August 2004).
- — —. *Doha Work Programme, Ministerial Declaration Adopted on 18 December 2005*. WTO Doc. WT/MIN(05)/DEC (22 December 2005).

- — —. *Implementation-Related Issues and Concerns, Decision of 14 November 2001*. WTO Doc. WT/MIN(01)/17 (20 November 2001).
- — —. *Ministerial Declaration, Adopted on 14 November 2001*. WTO Doc. WT/MIN(01)/DEC/1 (20 November 2001).
- — —. *Preparations for the Fifth Session of the Ministerial Conference, Draft Cancún Ministerial Text*. WTO Doc. JOB(03)/150/Rev.2 (13 September 2003).
- — —. *Revised Draft Modalities for Agriculture*. WTO Doc. TN/AG/W/4/Rev.4 (6 December 2008).
- Young, Linda M. "Options for World Trade Organization Involvement in Food Aid." *The Estey Centre Journal of International Law and Trade Policy* 3, no. 1 (2002): 10-28.
- Zahariadis, Nikolaos, Rick Travis, and James B. Ward. "U.S. Food Aid to Sub-Saharan Africa : Politics or Philanthropy?" *Social Science Quarterly* 81, no. 2 (2000): 663-76.
- Zhang, Ruosi. "Food Trade and Food Aid: What Is the Impact of International Law on Food Security?" In *La Sécurité Alimentaire / Food Security and Safety*, edited by Ahmed Mahiou and Francis Snyder, 703-24. Leiden: Nijhoff, 2006.