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

Simone Heri and Christian Häberli

ABSTRACT
The Doha Round negotiation mandate 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 food aid for trade and competition, an overview of the international governance of food aid, and the present rules on food aid embodied in Article 10.4 of the WTO Agreement on Agriculture. The latest available Draft Modalities for Agriculture (December 2008) are seen as an only halfway successful implementation of the Doha mandate. By way of conclusions we propose a new text with better-targeted disciplines, and a political food aid commitment as part of the Doha Round Final Act.

KEY WORDS
Food Aid, Doha Round, World Trade Organization, Food Aid Convention, Principles of Surplus Disposal

Simone Heri is a research fellow for the NCCR Trade Regulation Individual Project 4 on Trade and Human Rights. Christian Häberli, PhD, is a senior consultant for the NCCR Trade Regulation Individual Project 5 on Agriculture. Contact at: simone.heri@wti.org and christian.haeberli@wti.org

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INTRODUCTION......................................................................................................... 2

1. FOOD AID FROM A TRADE AND COMPETITION VIEWPOINT ...... 3
   1.1 Food Aid Developments.................................................................................. 3
   1.2 The Problem with Food Aid ........................................................................ 5

2. FOOD AID GOVERNANCE OUTSIDE THE WTO......................... 8
   2.1 FAO: Principles of Surplus Disposal............................................................. 8
   2.2 WFP: Multilateral Food Aid ......................................................................... 9
   2.3 Food Aid Convention..................................................................................... 10
   2.4 Human Rights and Other Areas of International Law............................. 12

3. PRESENT WTO RULES ON FOOD AID ........................................ 14
   3.1 Substantive Provisions of Article 10.4 AOA ............................................. 14
       3.1.1 Not tied to commercial exports ............................................................. 15
       3.1.2 Monetisation ....................................................................................... 15
       3.1.3 Fully grant form.................................................................................. 16
   3.2 Analysis of the normative value of Article 10.4.................................... 17
   3.3 NFIDC-Decision ....................................................................................... 18

4. FOOD AID IN THE DOHA ROUND ............................................ 19
   4.1 From Doha to Hong Kong ......................................................................... 19
   4.2 The December 2008 Draft Modalities...................................................... 22
       4.2.1 General disciplines applicable to all food aid transactions ............... 23
       4.2.2 Further disciplines for emergency situations (Safe Box)............... 24
       4.2.3 Further disciplines for non-emergency situations ......................... 24

5. ASSESSMENT OF THE DECEMBER 2008 DRAFT MODALITIES ...... 25
   5.1 Current Draft Modalities: The loopholes................................................. 25
       5.1.1 Grant form and untied aid – a reality check ................................... 25
       5.1.2 Emergencies – who can pull the trigger?........................................ 27
       5.1.3 Safe Box = Genuine food aid?............................................................ 28
   5.2 Fit for Dispute Settlement? ..................................................................... 29
   5.3 Comparison with food aid provisions in Articles 10 and 16................ 31

6. CONCLUSIONS............................................................................................... 33
   6.1 Annex L is reaching beyond WTO’s objective and the DDA
       Negotiation mandate ................................................................................. 34
   6.2 WTO should focus exclusively on commercial displacement and
       Market creation through non-genuine food aid ...................................... 34
   6.3 Food aid beneficiaries should insist on the maintenance of total
       food aid flows after Doha ........................................................................ 38

BIBLIOGRAPHY......................................................................................................... 39
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 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. Indeed, stricter disciplines on food aid to prevent the circumvention of export subsidies reduction commitments were on the negotiators agenda. The World Food Programme’s fears were addressed in the Hong Kong Ministerial Declaration when Ministers stated that “[t]here is consensus among Members that the WTO shall not stand in the way of the provision of genuine food aid.” To this end, a “safe box” for bona fide food aid was to be created so as to ensure that there is no unintended impediment in emergency situations.

The aim of this paper is to test the objectives set out in the Hong Kong Ministerial Decision to “maintain an adequate level and to take into account the interests of food aid recipient countries” and to “ensure elimination of commercial displacement” against the state of the negotiations as captured in Annex L of the latest available Revised Draft Modalities (6 December 2008). The still unanswerable question is whether effective disciplines against “non-genuine” food aid will reduce food supplies where they are most needed.

The first two chapters describe food aid from a trade and competition viewpoint and analyse the governance of food aid other than in the WTO. The present WTO rules pertaining to food aid are discussed in chapter three. Negotiations on food aid disciplines during the Doha Round are outlined in chapter four while chapter five contains an assessment of the December 2008 Draft Modalities. Finally, conclusions and a proposal for revised language in the food aid disciplines are offered in chapter six.

*FIRST DRAFT, Comments welcome by 31 August 2009.


3 Ibid, para. 6.

4 Ibid.

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. This first chapter gives a brief overview about the most important issues and controversies surrounding food aid, focussing especially on trade distortion and competition aspects.

1.1 Food Aid Developments

Food Aid is one of the oldest forms of foreign aid and it once was a central part of overseas development assistance (ODA). Accounting for about 13.5 percent of total ODA flows in 1971, it has decreased to only 3.4% of ODA in 2005. However, despite this overall trend, for the least developed countries, food aid ranged between 15 and 20 percent of total food imports during 1994-2003. 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% of the total food imports of a country.

More than 90 percent of all food aid is provided by five donors (The United States, European Union, Canada, Japan and Australia). The United States has traditionally been by far the largest donor providing for over 60 percent of total food aid.

Food Aid is generally categorised in three types: 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. It is also called humanitarian or relief food aid and the general intent is to provide short-term relief to persons who are not able to meet

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their food requirements due to an emergency. The second, project aid, is provided to support development projects to a recipient government, a multilateral development agency or a non-governmental organisation operating in the recipient country. Project food aid is either directly distributed, for example in school feeding or food for work programmes, or sold (“monetised”) to fund other development projects. The third, programme food aid, is bilateral development support to governments of developing countries, which is typically monetised at below market prices on the local market in order to generate income for the government. Donors often impose conditionalities on the provision of programme food aid such as to negotiate on military matters or to change particular macroeconomic, trade or agricultural policies.

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. In contrast, project food aid often is not wholly additional to what beneficiaries would consume without food aid deliveries. In addition, it is often monetised and can therefore have trade and competition distorting effects. Since most of programme food aid is monetised on the open market thereby simply augmenting the supply in recipient countries, programme food aid is considered to be the most market distorting.

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 percent of total food aid flows from a high of 60-70 percent at the beginning of the 1990s. Also, local and triangular purchases of food are increasing (as opposed to procurement in the donor country). While this seems to indicate 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. The negotiations on food aid in the Doha Round which, as will be discussed in chapter four, try to disentangle genuine food aid from commercial displacement, could mean a major step towards complete delinking and ensuring genuineness of food aid.

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12 Barrett and Maxwell, *Food Aid after Fifty Years: Recasting Its Role*, 14.
13 Ibid., 13.
15 Ibid.
16 Ibid., 317.
1.2 The Problem with Food Aid

It becomes clearer why food aid can be a trade issue when looking at a number of problematic issues associated with food aid.

First, food aid has often been used to dispose of (subsidised) surpluses and is positively correlated with donors’ stocks. The use of food aid to dispose of surpluses implies a countercyclical disbursement, meaning it is least available when the need is highest. In-kind food aid peaked in 1999-2000 when there were large surpluses and low prices for cereals. When food prices started to raise sharply in 2007, food aid deliveries reached their lowest levels since 1961. The World Food Programme’s Food Aid Flows Report 2007 contains the following table clearly establishing this link between the wheat price and direct transfers of wheat as food aid.

Figure 1: Wheat food aid deliveries as direct transfers and wheat price

Second, in-kind food aid tied to procurement in the donor country, while declining, is still too often used instead of cash transfers. Approximately 67 percent of non-food aid is untied using the Organisation for Economic Co-

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20 Ibid., 2.
operation and Development (OECD) definition of “tied aid”. In contrast, 88% of food aid in 2006 was tied to procurement in donor countries, even though the actual costs of local purchases are 46% and those of triangular transactions are 33% lower than those of tied direct aid. This transfer inefficiency benefits but interest groups in donor countries. A glance at the participant list 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 commodity vendors, there were representatives from packaging companies, domestic transporters, freight forwarders, port facility services and steamship line industries.

Third, the practice of monetisation of food aid has become a subject of controversy in the Doha Round negotiations. While monetisation is feared to be a rather disruptive practice, its impact on local market prices is determined by several factors, including elasticities of supply and demand, the relative quantity of monetised aid, local storage capacity, trade policies, import parity prices and the economies of neighbouring countries.

Fourth, there is the risk of displacement of un-subsidised 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.

Fifth, food aid has sometimes been used to capture new markets. Although the 2008 Food, Conservation, and Energy Act in the United States has changed this, the desire to develop new markets was until then explicitly written into legislation. Title I food aid programs in the 2002 Farm Security and Rural Investment Act stated that priority is to be given to export of US

22 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.
24 Participants included: Academic (15), commodity support (4), consulting group (29), government (165), media (16), other (30), surveyor (9), transportation support (6), trade association (25), commodity vendors (78), packaging (23), domestic transportation (11), freight forwarder (22), port facility services (26), steamship line (47), private voluntary organizations/non-governmental organizations (239), see http://www.fsa.usda.gov/Internet/FSA_File/2008_ifac_registration_list.xls
agricultural commodities to those developing countries which have demonstrated a potential to become commercial markets. While there are some isolated cases in which food aid may have cultivated a new taste for foreign commodities, there is little evidence that food aid is a suitable instrument to build long-term commercial markets for donor country exports.27

Finally, there is a risk of damage to local production in recipient countries through the distortion of local markets. For example, in 2002/2003 food aid donors over-reacted to a projected 600,000 metric tonne food deficit in Malawi, causing a severe decline in cereal prices and hurting local producers.28 Already in 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.29 In contrast, more recent empirical studies have found that food aid does not appear to undermine local agricultural production, at least in the long run.30 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 markets31 and that food aid’s negative effects on prices and production incentives can be minimised through proper timing and targeting.32

WTO is hardly the right forum to address all of these problems; issues of coordination and coherence arise with the other international mechanisms regulating food aid to which we now turn.

27 Barrett and Maxwell, Food Aid after Fifty Years: Recasting Its Role, 81.
2. Food Aid Governance outside the WTO

International food aid is closely linked with trade, but also with policies for 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), human rights law, humanitarian law, refugee law, criminal law and environmental law all contain norms that are relevant for the provision of food aid.

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.\(^{33}\) 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.\(^{34}\) 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 who, among the plethora of organisations and treaty regimes, should have the authority to make a determination on a particular question arising under international law.\(^{35}\)

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 seek them in other international fora.\(^{36}\) Whether the WTO is the appropriate forum to regulate food aid comprehensively depends also on the governance of food aid outside the WTO, which will be described in the next chapters.

2.1 FAO: Principles of Surplus Disposal

The United Nations Food and Agricultural Organization’s (FAO) Council endorsed the Principles of Surplus Disposal and Consultative Obligations in 1954, soon after the United States established the Food for Peace program in

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34 Ibid.
36 Ibid., 109.
summer 1954. The Principles of Surplus Disposal seek to ensure that food aid results in additional consumption, which is defined as consumption that would not have taken place in the absence of the transaction on concessional terms, and does not displace normal commercial imports. This is ensured by the maintenance of the Usual Marketing Requirements 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.

The latest update of the Principles of Surplus Disposal was published in 2001 and takes into account the existing food aid provisions in the Uruguay Round Agreement on Agriculture.

2.2 WFP: Multilateral Food Aid

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. 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. In 2000, WFP was responsible for more than 95 percent of multilateral food aid allocated and 30-40 of all food aid worldwide. Central features of most bilateral food aid programs such as supplier interests in expanding export markets and surplus disposal are absent from the WFP’s stated mission.

In recent years WFP has developed sophisticated tools and guidance that make the work of assessment officers easier. For example, standard questionnaires have been developed for household, trader and focus group sur-

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37 United States, Agricultural Trade and Development Assistance act of 1954 which established the Food for Peace program, 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.

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


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

41 Ibid., 62.
veys that pay specific attention to markets allowing to estimate the impact of shocks on food prices and simultaneously to evaluate the effect of these price changes on consumers, producers and traders. This model also allows to estimate the quantity of food aid that can be imported without disturbing local markets.42

2.3 Food Aid Convention

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. 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 already back in 1967.43 Weak as its enforcement may be, the FAC is unique in that it is the only treaty under which signatories have accepted a binding legal obligation to provide international development assistance.44

The membership in the FAC is limited to donor countries45 who 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 to carry over unfulfilled commitments to the following years can create incentives not to provide food aid when prices are high.46 Moreover, quite often the minimum commitments have been set at such a low level, far below actual deliveries, that they are not very meaningful.47

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 which is

43 The United States insisted on greater burden sharing on international food aid as a price for agreeing to a new international wheat agreement the European Economic Community wanted to secure their role as a grain exporter. The American objective behind this was that the FAC would allow to reduce 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.
45 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
47 Food and Agriculture Organization of the United Nations, Food Aid for Food Security, 19.
monetised, are to be carried out in a manner consistent with the FAO’s Principles of Surplus Disposal and Consultative Obligations.\textsuperscript{48} However, there is no systematic evaluation of individual donors and the Food Aid Committee does not make failure to meet commitments under the FAC public.\textsuperscript{49} Overall, the monitoring of compliance with FAC commitments remains weak.\textsuperscript{50}

The last International Grains Agreement dates from 1995 and consists of the Grains Trade Convention 1995 and of the Food Aid Convention 1995.\textsuperscript{51} Following the recommendations adopted in December 1996 at the WTO Singapore Ministerial Meeting in respect of least-developed and net food-importing developing countries, FAC members decided to open the Food Aid Convention 1995 for renegotiation.\textsuperscript{52} The FAC was subsequently renewed in 1999 and extended annually since 2002.

A certain extent of coordination to ensure coherence in the international governance of food aid is already taking place between the Food Aid Committee and the WTO. For example, both the decision to open the Food Aid Convention 1995 for re-negotiation and the completion of negotiations were followed by an exchange of letters between Mr. Germain Denis, then Executive Director of the International Grains Council and Mr. Renato Ruggiero, then Director-General of the WTO. In the letters, which are attached to the International Grains Agreement,\textsuperscript{53} Mr. Denis expressed his satisfaction about the close co-operation with the WTO that was maintained throughout the negotiation of the Food Aid Convention 1999 and the regular progress reports being made to the Committee on Agriculture. Mr. Ruggiero, in turn, welcomed the various improvements such as the extension of the list of potential recipients so as to cover all WTO Members which were on the list of net food-importing developing countries at that time. He welcomed the conclusion of the negotiations as a key contribution to the follow-up of the recommendations adopted by Ministers at the Singapore Ministerial Conference.

\textsuperscript{49} Hoddinott, Cohen, and Barrett, “Renegotiating the Food Aid Convention,” 289.
\textsuperscript{50} Human Rights Council, Report of the Special Rapporteur on the Right to Food Mr. Olivier de Schutter, \textit{The Role of Development Cooperation and Food Aid in Realizing the Right to Adequate Food: Moving from Charity to Obligation}, UN Doc. A/HRC/10/5 (11 February 2009), para. 13.
\textsuperscript{51} International Grains Agreement 1995, 1882 UNTS 195.
\textsuperscript{52} Cf. Preamble of the 1999 Food Aid Convention: The Parties to this Convention, recalling that in their 1994 Marrakesh decision on measures concerning least-developed countries and net food-importing developing countries, Ministers of WTO member countries agreed to review the level of food aid established under the Food Aid Convention as further elaborated at the 1996 Singapore Ministerial Conference.
ence with respect to the Marrakesh Ministerial Decision on Measures Concerning Possible Negative Effects of the Refrom Programme on Least-Developed and Net Food-Importing Developing Countries.

At the 99th session of the Food Aid Committee in London on 9 December 2008 Members considered the focus of a possible new Convention. Pending a successful conclusion of the Doha Round, it was agreed that the Food Aid Convention 1999 should be extended for another year with effect from 1 July 2009. It seems that FAC members have since suspended a renegotiation of the food aid disciplines until the WTO’s Doha Round results are adopted.

Considering the 2007-2008 food crisis and its persisting structural causes coupled with the slow progress in the Doha Round, FAC members should at least start negotiating a new FAC in parallel to the Doha Round. The coordination with the WTO during the negotiation of the 1999 Food Aid Convention cited above could be continued to ensure coherence, and conflicts with an eventually to be adopted Doha Final Act could still be amended when extending a future FAC. With the decision to wait for a Doha outcome the FACs importance in international food aid governance is further wakened and the allocation of authority to decide over international food aid matters is shifted to the WTO without a compelling reason.

2.4 Human Rights and Other Areas of International Law

As noted above in the introduction to this chapter, not only international economic law contains norms on food aid, but also many other areas of international law such as human rights, humanitarian, criminal, refugee and environmental law. In addition, there are several non-binding instruments such as the Guiding Principles on Internal Displacement, resolutions of international conferences or codes of conduct adopted by NGOs, and humanitarian agencies.

Since human rights law entails, under certain circumstances, an obligation to provide food aid, it is the right to food that will be focussed upon in the following section.

Several human rights treaties and instruments recognize the right to adequate food, with the most important codification being article 11(1) of the

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56 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).
International Covenant on Economic, Social and Cultural Rights (ICESCR).\(^{57}\) Moreover, article 11(2) guarantees the right to freedom from hunger, i.e. the right to the minimum nutritional intake ensuring survival. The Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment 12 on the right to adequate food stated that the right to food imposes three levels of obligations on states parties: the obligation to respect, protect and fulfil (facilitate and provide) this right. Only when an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, states have the obligation to fulfil (provide) that right directly. This obligation also applies for persons who are victims of natural or other disasters.\(^{58}\) With regard to international food aid, it is noteworthy, that states claiming resource constraints would make it impossible for them to fulfil the right to food are obliged to actively seek international assistance.\(^{59}\) According to the CESCR “states parties [to the Covenant] should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required”.\(^{60}\) Human rights instruments do not define precise levels at which states should provide aid. The obligation for each state party to act “individually and through international assistance and co-operation” (article 2.1 ICESCR) and other such provisions are still in need of being further clarified. This is not, however, equivalent to saying that there is no such obligation.\(^{61}\)

Furthermore, the CESCR stated that food aid should, as far as possible, be provided in ways which do not adversely affect local producers and local markets. In the same vein, Guideline 15 of the the FAO Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security recommends that donor states should 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.\(^{62}\)

\(^{57}\) 160 states parties as of 31 March 2009.
\(^{58}\) 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.
\(^{59}\) Ibid., para. 17.
\(^{60}\) Ibid., para. 36 (emphasis added).
\(^{61}\) Human Rights Council, The Role of Development Cooperation and Food Aid in Realizing the Right to Adequate Food, para 9.
3. Present WTO Rules on Food Aid

Although the rules and disciplines established by the General Agreement in Tariffs and Trade (GATT)\textsuperscript{63} in 1947 also applied to agricultural goods, there were no specific rules on food aid and the general approach towards agriculture was one of waivers from, exceptions to and disregard of the applicable rules.\textsuperscript{64}

The Agreement on Agriculture (AoA) was negotiated and concluded as part of the Uruguay Round Agreements leading to the establishment of the WTO. Its aim is to establish “a fair and market-oriented agricultural trading system” through “substantial progressive reduction in agricultural support and protection”.\textsuperscript{65} The AoA consists of three main pillars: market access, domestic support, and export competition.

For the regulation of food aid, the Agreement on Agriculture has established two different elements: First, article 10 AoA aims to prevent the circumvention of disciplines to reduce export subsidies. Second, Article 16 AoA 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 can not be seen as more than a best endeavour effort, Art. 10.4 AoA, 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, that is the export competition pillar, and regulates the prevention of circumvention of export subsidy commitments. While the Uruguay Round negotiations did produce substantial disciplines for export subsidies, disciplines on hidden export subsidies in the form of international food aid (article 10.4) and exports credits (article 10.2) were considerably weaker and no disciplines were imposed on state trading enterprises.\textsuperscript{66}

\textsuperscript{63} General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 UNTS 194.
\textsuperscript{64} Joseph A. McMahon, \textit{The WTO Agreement on Agriculture: A Commentary} (Oxford: Oxford University Press, 2006), preface.
\textsuperscript{65} Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, pmbl., 1867 UNTS 410.
\textsuperscript{66} Cf. McMahon, \textit{The WTO Agreement on Agriculture}, 143.
Article 10.4 attempts at disciplining food aid as a tool of surplus disposal used to circumvent export subsidy restrictions. The three rules discussed in more detail below establish criteria designed to distinguish genuine food aid from subsidisation of agricultural exports. Transactions that are claimed to fall under food aid but do not meet the requirements discussed in the following are considered export subsidies and prohibited or limited by the AoA and the country schedules.

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. While there are no explanations which elements of concessionality would fall under “direct or indirect” tying in article 10.4 AoA, 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.” Article 10.4(a) speaks only of commercial exports of agricultural goods. An interesting case would be how a panel would evaluate a case of food aid 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)”.

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67 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”. 
The process for monitoring adherence to the Principles of Surplus Disposal is monitored by the Consultative Subcommittee on Surplus Disposal (CSSD). 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, the existing rules are generally recognised as being ineffective in determining whether a transaction entails commercial displacement. In addition, as described in chapter 2, reporting requirements have effectively been ignored leaving the CSSD almost non-functioning. 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.

### 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”. Article IV of the Food Aid Convention 1986 includes sales on credit. While still included in the 1999 Food Aid Convention, the EU and other FAC members are of the opinion that sales on credit should no longer be included in the list of food aid operations.

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68 See section 2.1 above.


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

72 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)
3.2 Analysis of the normative value of Article 10.4

Unlike the FAC’s Food Aid Committee and the Principles of Surplus Disposal’s Consultative Sub-Committee on Surplus Disposal, the AoA disciplines are enforceable through the WTO’s dispute settlement system.

Article 10.4 AoA allows unlimited amounts of food aid as long as they are not tied directly or indirectly to commercial exports of agricultural products to recipient countries, accord with the FAO Principles of Surplus Disposal and Consultative Obligations, and are 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 excludes from WTO export competition disciplines all official food aid satisfying OECD-DAC definitions for ODA, given that there is no link to the export of other goods. It was also argued that article 10.4 AoA stands apart from other parts of the AoA because the disciplines on food aid are not enforceable and are merely provided in the hope that WTO Members will abide by them in good faith; Members who do not comply were not subject to retaliation under the WTO’s Dispute Settlement Understanding.

The fact that no single dispute settlement case included claims brought under article 10.4 AoA makes it difficult to refute those claims. One reason for the lack of jurisprudence could exactly be the not very clearly defined obligations, in the case of 10.4(c) AoA even framed in aspirational language.

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 AoA excludes the application of article 10.1 AoA. The Appellate Body in US-Upland Cotton held that 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

75 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.
76 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.
shall non-commercial transactions be used to circumvent such commitments? Likewise, article 10.4 does not exclude international food aid from the scope of article 10.1, it is covered by the second clause of article 10.1 to the extent that it is a “non-commercial transaction”. 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, provided they did so in conformity with articles 10.1 and 10.4, 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.

Since 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, 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 is clear: export subsidy commitments must not be circumvented through non-commercial transactions including food aid. The question arises whether the Doha Round results, as presently envisaged, are 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 AoA incorporates the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries (NFIDC-Decision). In this decision Ministers agreed to establish mechanisms ensuring that the availability of food aid would not be ad-

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79 Ibid. (emphasis added)
81 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.
versely affected by the reform programme. 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 to deliver an increasing proportion of food aid in fully grant form.\textsuperscript{82} Apart from food aid, the NFIDC-Decision also included three other response mechanisms: (1) short-term financing of normal levels of commercial imports, (2) favorable terms for agricultural export credits, and (3) technical and financial assistance to improve agricultural productivity and infrastructure.\textsuperscript{83}

However, the implementation of the NFIDC-Decision has been slow and for most if not all points incomplete.\textsuperscript{84} This did not change significantly with the inclusion of the NFIDC-Decision at the Doha WTO Ministerial Conference as one of its implementation-related issues and concerns.\textsuperscript{85}

4. Food Aid in the Doha Round

4.1 From Doha to Hong Kong

In the WTO, trade liberalisation for agriculture is recognised as being an ongoing process. Based on Article 20 of the Agreement on Agriculture, the continuation of this process was to start one year before the full implementation of the Uruguay Round decisions, i.e. on 1\textsuperscript{st} of January 2000. After the Seattle Ministerial in December 1999 had failed to produce a full negotiating mandate for a new round of multilateral negotiations, it took another two years of talks under the “built-in agenda” of Article 20, and on 20 November 2001 the Doha Ministerial Conference finally adopted such a mandate. By that time, not less than 45 negotiation proposals from 121 countries had been submitted just for agriculture. Despite this large volume of material, the

\textsuperscript{82} 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).
\textsuperscript{83} Ibid., paras. 3-5.
negotiating mandate adopted in Doha with respect to agriculture is limited to just two paragraphs. As for export disciplines, there is only half a sentence regarding export subsidies, without any mentioning of the larger notion of “export competition”, and even less the specific matter of food aid. Equally interesting is the fact that this half-sentence is also the only one where the Ministers made an addition to the draft text submitted by the then Chairman Stuart Harbinson. The addition consists of only six words:

“reductions of, with a view to phasing out, all forms of export subsidies;”

In fact, these six words are an implicit acknowledgement of what had been the centrepiece of agricultural exporters’ demands for the last several decades, and the very foundation of the so-called Cairns Group, i.e. the elimination of all agricultural export subsidies. It was the European Commission, under tight instructions from its Council of Ministers meeting in permanence throughout the Doha conference, which had successfully avoided the spectre of an elimination of the main surplus disposal instrument in the Common Agricultural Policy (CAP).

In another document the Ministers simply re-approved the four measures contemplated as possible remedies for the “losers” of the Uruguay Round which their predecessors had already adopted back in Marrakesh on 14 April 1994:

(The Conference) “[T]akes note of the report of the Committee on Agriculture (G/AG/11) regarding the implementation of the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries, and approves the recommendations contained therein regarding (i) food aid; (ii) technical and financial assistance in the context of aid programmes to improve agricultural productivity and infrastructure; (iii) financing normal levels of commercial imports of basic foodstuffs; and (iv) review of follow-up.”

When they reassembled two years later in Cancún, 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”:

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86 World Trade Organization, Ministerial Declaration 2001, para. 13. (emphasis added)
87 World Trade Organization, Implementation-Related Issues, para. 2.2. (emphasis added)
“[D]isciplines shall be established on export subsidies, export credits, export state trading enterprises, and food aid programs.”

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.”

But this conference again finished without a final document being adopted. Henceforth the Doha negotiations continued with less clarity than would be necessary for a successful conclusion.

The informal ministerial gathering taking place in July 2004 in Geneva allowed for considerable progress, especially in agriculture (the “July framework”). The provisions regarding food aid took further shape 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.” 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 negotiations.”

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 financing arrangements relating to exports to developing countries may be agreed by Members. Such agreements must not have the effect of undermining commit-

88 World Trade Organization, Preparations for the Fifth Session of the Ministerial Conference, Draft Cancun Ministerial Text, WTO Doc. JOB(03)/150/Rev.2 (13 September 2003), para. 3.
89 Ibid., para. 3.5.
90 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.
91 Ibid., para. 18. (emphasis added)
ments undertaken by Members in paragraph 18 above, and will be based on criteria and consultation procedures to be established.”

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 taking place in Hong Kong, one of the very few meaningful results of that conference was an agreement on the date at 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.”

4.2 The December 2008 Draft Modalities

Since 2005 there has been no formal WTO Ministerial Conference. However, food aid has been repeatedly discussed. The latest document on the results of these negotiations, based on these discussions and on further informal ministerial gatherings, was submitted on 6 December 2008 by Ambassador Crawford Falconer from New Zealand as the then chairman 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.

The chapeau text regarding export competition insists on the fact that these modalities will not diminish in any way existing export subsidy obligations.

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92 Ibid., para. 26.
93 World Trade Organization, Doha Work Programme, Ministerial Declaration Adopted on 18 December 2005, WTO Doc. WT/MIN(05)/DEC (22 December 2005), para. 6. (emphasis added)
94 World Trade Organization, Revised Draft Modalities for Agriculture, WTO Doc. TN/AG/W/4/Rev.4 (6 December 2008), annex L. (See annex 1 of this paper)
or their “circumvention through non-commercial transactions.” Food aid is mentioned in four places:

1. 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).

2. The modalities paper further specifies that food aid disciplines are to be implemented in parallel with those on all other forms of export subsidies.

3. All other proposed international food aid disciplines are contained in Annex L of the December 2008 modalities.

4. Special provisions apply to cotton, even though a practical case of application for this non-food item is difficult to imagine.

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

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95 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.

96 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.

97 Cf. Annex K, para. 3.

98 “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)
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).

The term “food aid” covers both in-kind and cash-based food aid donations. According to paragraph 3, Members commit to making their best efforts to move increasingly towards more 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 (para. 12).

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99 Cf. Footnote 1 of Annex L.
5. Assessment of the December 2008 Draft Modalities

The most important question for this analysis is whether the December 2008 Draft Modalities can prevent food aid from still being used as an export competition tool (by way of commercial displacement and/or market creation)? It may be difficult to reach a water-tight solution for such a sensitive topic. Nevertheless, the new disciplines to 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 big food aid donor, than is possible particularly under the present version of AoA-Article 10.4.100

Our assessment of these modalities starts with some remaining “loose language” (5.1). We then examine the situation in respect of potential dispute settlement cases (5.2), and we finally compare the present proposals with the existing disciplines in Articles 10 and 16 of the AoA (5.3).

5.1 Current Draft Modalities: The loopholes

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

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 directly 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.”101

100 See chapter 3.
101 Modalities, Annex L, para. 2. (emphasis added)
On the face of it, this looks good for two reasons. Firstly, this text finally rules out food aid on concessional terms.\(^{102}\) 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 closer scrutiny of 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 distorted in several ways. Actually, concessional food aid is also a case of export credit disciplines. This paper can not look in detail at the technically very demanding Annex J of the December 2008 modalities. However, it appears that for basic foodstuffs to LDCs and NFIDCs a potentially important export credit loophole has been left open in that annex. This provision in paragraph 5 might also be invoked for food aid.\(^{103}\)

Second, for tied aid the problem is that in many cases it is 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.\(^{104}\) 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 literally all of Egypt’s food aid imports are from the United States of America. Moreover, Egypt happened to be among the first countries in Africa to approve a genetically modified version of corn for planting.\(^{105}\)

In addition, proof positive of such ties is only likely to succeed empirically, in other words 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.” Incidentally, this is

\(^{102}\) Cf. section 3.1.3.

\(^{103}\) “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.”


likely to be the case irrespective of whether other foreign or domestic pro-
ducers are being displaced by such a process.

5.1.2 Emergencies – who can pull the trigger?

Emergency food aid, as pointed out above 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.

- An emergency can be declared both by the recipient government and
the Secretary General of the United Nations.\(^{106}\)

- A very long list of bodies can launch an emergency appeal: “a coun-
try; 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 re-
gional or international intergovernmental agency; a non-
governmental humanitarian organization of recognized standing
traditionally working in conjunction with the former bodies.”\(^{107}\)

In both cases article 6 prescribes a needs assessment by either 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 assess-
ment” […] with the objective of preventing, or at the very least minimizing,
commercial displacement.”\(^{108}\)

A clearly positive result of the negotiations so far is that paragraph 11 (lit.c)
defines commercial displacement in rather clear terms, and that it implicitly

\(^{106}\) Para. 6, lit.a

\(^{107}\) Para. 6, lit.b

\(^{108}\) Paras. 11 lit.(a) and (c) (excerpts)
also applies to situations of competition with domestic production. 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 the duration of an emergency is nowhere limited in absolute terms.

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 crisis. It is however questionable whether the complex and protactred crises category of emergencies should fall under the Safe Box, given that it can extend over years, or even decades.

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 emergency situations in WTO law. However given the growing prevalence of complex and protracted crises, some tightening of the safe box may be necessary for not opening a Pandora Box for food aid shipments that are not challengeable.

5.1.3 Safe Box = Genuine food aid?

The present formulation in the modalities in respect of the Safe Box has a clear, political objective which is based on the Hong Kong mandate. 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 in paragraph 6 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 paper can not address particular cases of supposed abuse in the past, for instance when emergencies are declared by corrupt import agencies or stockpile managers, or when a needs assessment concludes 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. We address this question in the next section.

As for non-emergencies, it is hardly possible, without detailed case studies, to assess the commercial impact of for instance project aid such as free school meals for which alone the WFP spent $340m in 2007.115 This leads us to conclude 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.

5.2 Fit for Dispute Settlement?

We have so far concluded that the avoidance of commercial displacement through food aid is recognised as an overarching principle in the negotiation 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 means that emergency food aid will no longer be challengeable under the new Article 10.4 is not quite clear. We would argue that all food aid operations should remain challengeable, but we accept that the complainant would face a much more difficult task establishing export competition circumvention in emergency situations.

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 for-

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ward in different situations where the question of circumvention of WTO disciplines on export competition arises.

Therefore, the question now is whether and how this text can help to clarify issues in the context of a dispute settlement case and whether the new disciplines are enforceable.

First of all, 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 emergency situations lend themselves less well for 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 of circumvention would appear as 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). On the other side of the scale, food aid for non-emergency situations, in-kind, monetised and/or on a multi-year basis would seem to automatically 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 used as 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. For this reason it may 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 may be possible to relatively quickly reach a stage with a finding of non-compliance with export competition disciplines. The expertise in the WFP and other food aid organisations may be of help – but other views such as those of commercial operators and local traders and producers may need to be heard as well.

As a next step, and before reaching our conclusions on the proposed new disciplines we compare them with the present rules on the matter.
5.3 Comparison with food aid provisions in Articles 10 and 16

In section 3.1 we had examined the present rules on food aid, namely the export subsidy circumvention disciplines in Article 10, and article 16.1 that commits developed country Members to the actions provided for in the so-called NFIDC-Decision, and in paragraph 2 mandates the Committee on Agriculture to monitor the follow-up to this decision.116 Before comparing these provisions with the December 2008 modalities we recall that three aspects are noteworthy in respect of food aid. 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.”117 Second, article 10.4 specifically deals with international food aid. It obliges donor members to ensure that “the provision of food aid is not tied directly or indirectly to commercial exports” (lit.a). So far, this provision has not been invoked in any litigation. Third, the NFIDC-Decision has so far remained without any concrete effect, even at the height of the 2007-08 food crisis. Even so, it does mention food aid as one instrument to mitigate possible negative effects of trade liberalisation.

We now compare the actual and the proposed rules in respect of commercial displacement:

The US – FSC case addressed export subsidies and not article 10.4 AoA on international food aid. Nevertheless, building on our examination of US – Cotton in section 3.1., we consider that a recourse to article 10.1 in a future food aid case remains possible. The ruling in US – FSC the application of article 10.1 also to unscheduled commodities which serve as food aid.

In a similar vein, a revised article 10.4 could obtain a stronger meaning if the provisions on the compliance with the Usual Marketing Requirements and the prohibition of tying food aid to commercial exports were made more stringent. In contrast to the present article 10.4 AoA, the December Draft Modalities (paragraph 11 lit.c of Annex L) define commercial displacement more explicitly.118 However, even without a quantifiable definition of com-

116 World Trade Organization, Decision on Effects of the Reform Programme.
118 Cf. section 5.1.2. Para. 11 lit.c 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.”
mmercial 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 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 lit.b. Today there is no concept of the safe box. The present formulation of article 10.4 therefore might 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 Modalities. On the other hand, the system of UMRs is widely acknowledged for not effectively preventing market displacement.\(^{119}\) This leads us to conclude 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 leads to the question how such a commitment like the NFIDC-Decision could be made more useful in the future. If Annex L is enshrined in WTO law, it may improve at least the general commitment of WTO Members to “to maintain an adequate level of international food aid” (para. 1, annex L). However, already the question on 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.

Summing up, it appears to us that despite some clear progress in terms of food aid disciplines it would be wrong to completely 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 fol-

\(^{119}\) Christopher B. Barrett and Daniel G. Maxwell, *Food Aid after Fifty Years: Recasting Its Role* (London: Routledge, 2005), 69-71. This applies as well to the so-called Bellmon Analysis recipient agencies of US food aid have to undertake before monetisation, see ibid, 190-1.
allowing food aid operations, be they undertaken in official emergency cases and on the basis of a needs assessment. On the other side, 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 forms and sizes. Beneficiaries and needs are as numerous and varied. Very clearly, there are many situations where hungry people have neither money nor any resources for food production, such as 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 to assess the commercial impact of all forms of food aid will hardly be possible. At any rate, WTO is not the place to assess the quality of food aid operations, nor can it decide on quantitative targets or commitments by 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 to see food aid dwindle if too stringent disciplines on export competition are introduced in WTO. This concern dates back to the Hong Kong Ministerial where the WFP and a number of NGOs made a strong plea not to have WTO deal with such a sensitive item. While we share this concern, we nevertheless see the Doha Round as an opportunity to better delink food aid from serving as an instrument of surplus disposal. We are of the view that given the right formulations food aid will not decrease in volume and commercial displacement can be avoided. Unfortunately, the political meddling with this admittedly very difficult subject has produced an impasse underlying the present proposals.

Our conclusions are, firstly, that these proposals go partly beyond WTO’s main role to fight protectionism (6.1) and, secondly, that the food aid negotiation should very narrowly focus 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 to reduce food aid when world market prices are high (6.3).
6.1 Annex L is reaching beyond WTO’s objective and the DDA negotiation mandate

Put simply, WTO is about protectionism, not about the quality or the quantity of food aid. Annex L as of now is far too detailed and partly repetitive. It contains loose language and loopholes. Moreover, there are several matters and issues dealt with in the present modalities which should rather be addressed in another forum, such as more stringent definitions of commercial displacement or the problems arising with monetisation, in-kind food aid, and re-exportation. If the competent international organisations have been unable to come to grips with what we consider as symptoms or indicators rather than causes of trade distortion and surplus disposal, it is doubtful whether WTO can solve these problems and at the same time ensure enforcement.

A procedural distinction between urgent and non-urgent cases of hunger is probably useful in order to prevent bureaucrats from discussing calories while people are dying of hunger. However, as pointed out in section 5.1.2., the duration of an emergency remains an open issue.

Focussing on the international trade-distortion potential of food aid also means that it will be difficult to address displacement of local production by food aid in a WTO context.

6.2 WTO should focus exclusively on commercial displacement and market creation through non-genuine food aid

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

These shortcomings have been pointed out by recent literature. But this does not mean, in our view, that the attempt to discipline export competition

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120 See, e.g., Cardwell, "Food Aid and the WTO: Can New Rules Be Effective?.”
through food aid is futile. We rather argue for a re-focussing on WTO’s mandate to combat protectionism and trade-distorting support. There is no accepted definition of ‘genuine’ food aid, and we do not think WTO can or should try to develop such a definition. However, for purposes of developing new WTO disciplines in this field, perhaps a negative formulation might be more adequate, 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 WTO including the Committee on Agriculture, bilateral consultations, trade policy reviews, good offices and dispute settlement. For food aid disciplines we see the possibility for a shifting of the burden of proof according to the likelihood of abuse. Obviously, the burden of proof *prima facie* remains on the complainant. But the latter’s task will be easier if the presently available international criteria for genuine food aid are enforceable through WTO litigation (e.g. mandatory recourse to the Usual Marketing Requirements, or other relevant WFP or FAC provisions). These criteria should be improved by the appropriate fora. In addition they could be complemented by a kind of fast track procedure in 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.

Below, we present a proposal for a new Annex L, replacing Art.10.4 of the AoA.

**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.

2. General disciplines applicable to all food aid transactions

   Members shall ensure that all food aid transactions are provided in conformity with the following provisions:
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<td>(a)</td>
<td>they are needs-driven;</td>
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<tr>
<td>(b)</td>
<td>they are in fully grant form;</td>
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<tr>
<td>(c)</td>
<td>they are not tied directly or indirectly to commercial exports of agricultural products or of other goods and services;</td>
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<tr>
<td>(d)</td>
<td>they are not linked to the market development objectives of donor Members.</td>
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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 monetisation 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 in 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 3 months, by an assessment of need coordinated under the auspices of an international body referred to in paragraph 6 above.\(^{121}\)

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\(^{121}\) Needs assessment should be done with the involvement of the recipient government and may involve a relevant regional intergovernmental organization or an NGO, but while the latter bodies may be so involved, this is in a context where they are in coordination with the relevant United Nations agency or ICRC/IFRCRCS 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 latter multilateral agencies.
8. All emergency food aid provided in conformity with the conditions of paragraph 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 to make or convey such 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 poverty and hunger data published by an international or regional intergovernmental organisation or by a recipient country that objectively identifies the food insecurity 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 Food aid beneficiaries should insist on the maintenance of total food aid flows after Doha

WTO should not determine food aid spending levels. The Food Aid Convention is the appropriate forum for pledges by donor countries. However, being itself a player influencing trade levels by way of rule-making, WTO cannot ignore the fact that food aid levels in the past were often 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 implementation of operations, it must ensure that its decisions do not deteriorate food security among the poorer segments of its membership. 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. The dismal experience made with the NFIDC-Decision should be enough of an incentive to do it better the next time round.

We therefore propose the following pledge on food aid governance as an annex to the Doha Round Final Act.

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

December 2008 Modalities, ANNEX L

POSSIBLE NEW ARTICLE 10.4 TO REPLACE THE CURRENT ARTICLE 10.4 OF THE AGREEMENT ON AGRICULTURE
INTERNATIONAL FOOD AID

1. Members reaffirm their commitment to maintain an adequate level of international food aid (hereinafter referred to as "food aid"\textsuperscript{123}), to take account of the interests of food aid recipients and to ensure that the disciplines contained hereafter do not unintentionally impede the delivery of food aid provided to deal with emergency situations. Members shall ensure that food aid is provided in full conformity with the disciplines below, thereby contributing to the objective of preventing commercial displacement.

\textit{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; and

(e) agricultural products provided as food aid shall not be re-exported in any form, except where, for logistical reasons and in order to expedite the provision of food aid for another country in an emergency situation, such re-exportation occurs as an integral part of an emergency food aid transaction that is itself otherwise in conformity with the provisions of this Article.

3. The provision of food aid shall take fully into account local market conditions of the same or substitute products. Members shall refrain from providing in-kind 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


\textsuperscript{123} Unless otherwise specified, the term food aid is used to refer to both in-kind and cash-based food aid donations.
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. Members commit to making their best efforts to move increasingly towards more untied cash-based food aid.

4. Untied cash-based food aid that is in conformity with the provisions of paragraph 2 above shall be presumed to be in conformity with this Article.

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

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

6. 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 in the ambit of the Safe Box and, therefore, deemed to be in conformity with this Article, provided that:

   (a) there has been a declaration of an emergency by the recipient country or by the Secretary-General of the United Nations; or

   (b) there has been an emergency appeal from 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; and

in either case, there is an assessment of need coordinated under the auspices of a relevant United Nations agency, including the World Food Programme; the Interna-

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124 It is conceivable that there could be circumstances where strict application of this obligation would have the effect of acting as an unintended impediment to the capacity of Members to respond fully and effectively to genuine need with in-kind food aid in an emergency situation envisaged under paragraphs 6 to 10 below. Therefore it is recognized that, in such an emergency situation, Members may be permitted to depart from the strict application of this obligation, but only and strictly to the extent that this is a necessary and unavoidable consequence of the nature of the emergency itself such that to act in strict conformity would manifestly compromise the capacity of a Member to respond effectively to meet food aid needs. Furthermore, a Member shall in any case be obliged to avoid or, if this is not possible in the circumstances, to minimize, any adverse effects on local or regional production through the provision of in-kind food aid otherwise in conformity with the provisions of paragraphs 6 to 10 below.
7. Following the emergency declaration or appeal as provided for in paragraph 6 above, there may well be a period where the needs assessment outcome is pending. For the purposes of this Agreement, this period shall be deemed to be 3 months in duration. Should any Member consider that the food aid concerned would fail to satisfy the conditions provided for under paragraph 6 above, no initiation of dispute settlement on these grounds may occur until that period has elapsed (provided that the relevant multilateral agency referred to in paragraph 6 above has not, within this period, given a negative assessment or has otherwise demonstrably not consented to a needs assessment). Where, within or by the end of this period, the relevant multilateral agency has either itself carried out a positive needs assessment or has demonstrably provided its consent or approval pursuant to footnote 3, and the other conditions of paragraph 6 have been satisfied, the food aid concerned shall remain in the Safe Box hereafter provided it is also in conformity with all the other relevant provisions of this Article.

8. There shall be no monetization for food aid inside the Safe Box, except for least-developed countries where there is a demonstrable need to do so for the sole purpose of transport and delivery. Such monetization shall be carried out solely within the territory of the recipient least-developed country such that commercial displacement is avoided or, if not feasible, at least minimized.

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 other provisions of this Article, food aid that is in conformity with paragraph 6 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 to make or convey such determination.

**Further disciplines for food aid transactions in non-emergency situations**

11. Further to the disciplines set out in paragraphs 1 to 5 above, in-kind food aid in non-emergency situations outside the Safe Box shall be:

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125 Needs assessment should be done with the involvement of the recipient government and may involve a relevant regional intergovernmental organization or an NGO, but while the latter bodies may be so involved, this is in a context where they are in coordination with the relevant United Nations agency or ICRC/IFRCRCS 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 latter multilateral agencies.

126 In the case of a landlocked Member, additionally for the transport/delivery from the extra-territorial continentally contiguous port of final unloading to the destination territorial border.
(a) based on a targeted assessment of need whether carried out by an international or regional intergovernmental organization\textsuperscript{127}, including the UN, or, where such a targeted assessment is not reasonably obtainable, by a donor government or a humanitarian non-governmental organization of recognized standing, working in partnership with a recipient country government. That assessment would incorporate and reflect objective and verifiable poverty and hunger data published by an international or regional intergovernmental organization or by a recipient country that objectively identifies the food insecurity 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, or at the very least minimizing, commercial displacement. 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.

12. Monetization of in-kind food aid in non-emergency situations shall be prohibited except where it is in conformity with the provisions of paragraph 11 above and, as a means to meet direct nutritional requirements of least-developed and net food-importing developing country members, it is necessary to fund the internal transportation and delivery of the food aid to, or the procurement of agricultural inputs to low-income or resource-poor producers in, those Members. Monetization shall be carried out within the territory of the recipient least-developed or net food-importing developing country.\textsuperscript{128} Additionally, commercial displacement shall be avoided.

\textit{Monitoring and surveillance}

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

\textsuperscript{127} This should involve the recipient country government and may involve humanitarian non-governmental organisations working in partnership with the recipient country government.

\textsuperscript{128} In the case of a landlocked Member, additionally for the transit transport/delivery from the extra-territorial continentally contiguous port of final unloading to the destination territorial border.