

Chair's Reference Paper¹

FOOD AID²

As a result of the joint proposal from the African Group and the Least-Developed Countries (TN/AG/GEN/13 refers) and the ensuing discussion during the last "agriculture week", we now have available to us what could be used eventually as a textual working document on the food aid issue. As I noted in my concluding remarks at the last informal special session, I believed then, as I do now, that the best means for me to help this issue move forward now is to prepare a commentary bearing in mind the state of our discussion. As such, I have prepared this reference paper in that light.

As you will see from the outline below, I leave open at this point the question of whether we will end up with "general" provisions on such matters as re-export, tied aid, grant form etc. that would cover both the emergency (Safe-Box) and non-emergency food aid situations. I think it is more useful at this point to take a step-by-step approach. I suggest that certain disciplines could have a certain logic in each respective place. If it proves to be the case in due course that the answer is the same for relevant provisions in both situations, logic would dictate that a general approach would make sense. But the most important issue to begin with would seem to be trying to narrow down first whether or not we have genuine divergences in each particular situation. If, as I hope, those divergences are closing and can be closed, we can deal with the question of overall placement subsequently.

Background

Paragraph 6 of the Hong Kong Ministerial Declaration (WT/MIN(05)/DEC) states, *inter alia*, that:

"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."

Paragraph 17 of Annex A of the Agreed Framework (WT/L/579) states that:

"The Doha Ministerial Declaration calls for "reduction of, with a view to phasing out, all forms of export subsidies". As an outcome of the negotiations, Members agree to establish 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."

Paragraph 18 states, *inter alia*, that:

The following will be eliminated 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

¹ The headings used in this reference paper are indicative only.

² Article 10.4 of the Agreement on Agriculture refers to international food aid.

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.

Paragraph 19 states:

"Effective transparency provisions for paragraph 18 will be established. Such provisions, in accordance with standard WTO practice, will be consistent with commercial confidentiality considerations."

Paragraph 20 states:

"Commitments and disciplines in paragraph 18 will be implemented according to a schedule and modalities to be agreed. Commitments will be implemented by annual instalments. Their phasing will take into account the need for some coherence with internal reform steps of Members."

Paragraph 21 states:

"The negotiation of the elements in paragraph 18 and their implementation will ensure equivalent and parallel commitments by Members."

Structure for Discussion

General Provisions

1. Some Members have proposed that there should be general provisions applying to all food aid transactions. The African and LDC Groups proposal did not contain general provisions that would apply to all food aid transactions. However, this issue was raised and there was an openness to at least consider this as a possibility. That said, it was clear that there was a certain level of concern that any general disciplines which also applied to emergency situations should not have the effect of impeding emergency food aid transactions in the Safe Box.
2. As noted above, it is my sense that we would, in procedural terms, be better advised at this point to revert to this issue once we have addressed more specifically the applicability of the relevant discipline elements in each situation: emergency and non-emergency respectively.

Safe Box for Emergency Food Aid

3. It is clear from the Hong Kong Ministerial Declaration that Members are to develop a Safe Box of bona fide food aid for emergency situations. It is accepted that at least in the emergency situation Safe Box, in-kind food aid is permissible. As regards this element, from the discussions that have taken place, a key issue is how or when an emergency situation is declared, or who is able to declare an emergency.
4. Essentially - and as you will hopefully see in more detail from the comments below - my sense of direction is that we use a multilaterally-oriented trigger as the core test for getting into the Safe Box. This seems to me to make the most sense. It is suggested that provision could in fact be reasonably made for how we could deal with any exceptional situations that are not covered by this core approach. My hope is that when we look in detail through this, we will reach a view that there is less of an operational problem than we might have started to convince ourselves there once was. If there is a residual issue we have to deal with that is indeed bigger than I am suggesting, we have at least defined that area of the unknown down to more specific parameters. And that would be progress of a sort.
5. As regards the tangible additional "disciplines" that would be applicable within that Safe Box (whether they end up as "general" disciplines or specific Safe Box disciplines can be moot for now), I feel we need to test just how much real basis there is for any resistance in substance for operational disciplines. It is true that one can take the view that a Safe Box is a Safe Box and that no disciplines should be applied. Certainly, it is important that there be no practical impediment to dealing with emergency situations. But I have not detected any real resistance to at least the applicability or appropriateness of some disciplines here. Put another way, I have yet to hear a substantive problem with there being at least some operational conditions applicable here. The purpose of the relevant section below is to now test this in a focussed way.
6. It has also been more specifically proposed that untied cash food aid should be in the Safe Box. Given that this is not in fact in-kind food aid to begin with and on the assumption that it satisfies all the other criteria (if any) that are to be applicable for Safe Box status, I have not detected any objection to this approach.

Approaches to establishing a "trigger" for Safe Box status

7. This comes down to a question of which appeals from which bodies can be considered to be sufficient for an "emergency situation" to be deemed to exist. There seems to be no disagreement that the UN Consolidated Appeal process would be a bedrock standard. The real question is, therefore, what else, or what other bodies would also be a basis for satisfying the trigger standard.

8. There seems to be no disagreement that an appeal from the ICRC or the International Federation of Red Cross and Red Crescent Societies would also constitute a an appropriate "appeal trigger".

9. Therefore, it might be possible, as a first step, to provide for the following:

Food aid transactions shall be exempt from the provisions of [...], where such aid is provided in response to an emergency appeal from:

(i) *a relevant United Nations agency, the United Nations Consolidated Appeals Process, the International Committee of the Red Cross or the International Federation of Red Cross and Red Crescent Societies.*

10. In principle, it would seem to be sensible also to accept the judgement of reputable and responsible international intergovernmental bodies. The issue would then resolve itself down to a more narrowly technical one of ensuring a reliable technical description, but without over-negotiating this.

11. But would it be necessary to confine this "trigger" standard only to purely intergovernmental bodies? This, at the moment, seems to be the view of some delegations. It cannot be denied, of course, that there are non-governmental and private institutions that have real repute in the field, albeit that there may be a view that it is unlikely that the relevant intergovernmental bodies are going to have, or at least very often, a differing view from these private or non-governmental bodies. But, bearing that in mind, is it warranted to have a blanket opposition to an appeal from them as representing an appropriate trigger in its own right?

12. This, it seems to me, comes down to an empirical and practical question as to whether, as a matter of performance in the field, these organisations "get it wrong". If the answer is that they do, or that some of them do, there might be understandable reticence to include their appeals as a standard.³ But if the answer is that they don't, why would inclusion of an appeal from them be a problem? I have in mind such bodies as MSF, OXFAM, etc. It seems hardly credible to deny their expertise and role.

13. Thus the idea was advanced by the African and LDC Groups of "collaboration" between non-governmental organisations, private charitable bodies and relevant international humanitarian organisations as being a standard to apply so as to be responsibly inclusive of such organisations. Therefore, it is now for Members to consider what, if any, other agencies or relevant international humanitarian organisations could or should be added to this list. For example, could we not try:

(ii) *a relevant intergovernmental or regional humanitarian agency, non-governmental organisation, or private charitable body, working in collaboration with a relevant*

³ Alternatively, if it was to be considered that the fully Safe Box trigger should only be available for intergovernmental appeal *per se*, there could be additional conditionality applied in the case of private or non-governmental bodies' appeals along the lines outlined below for a direct governmental appeal situation, thereby creating what might be called "conditional access to the Safe Box". But it is not so clear to me at least that this is the optimal way to go.

United Nations agency, the International Red Cross and Red Crescent Movement or relevant international humanitarian organisation.

Are there other bodies that should be included?

14. The approach suggested by the Africa and LDC proposal does include the issue of a direct appeal from one government to another or others. The point has been made that a situation could arise so quickly that an intergovernmental appeals trigger standard would not be able to be met because it would take time for the processes to work through to that point. There seemed not to be anyone who disagreed with the proposition that such a situation could in principle arise, or, indeed, that it had in fact arisen. On that basis, it is conceivable to imagine that some kind of relevant provision could be arrived at along, e.g. the following lines:

Recognising that, in exceptional circumstances, where the urgency of the food aid need is such that to wait for an appeal as set out in (i) or (ii) above would result in an undue delay in the provision of food aid, food aid provided in response to an urgent official government request by a recipient country shall also be exempt from the provisions of [...]. Under such circumstances, both the donor country and recipient government shall notify [...].

15. There seems to be a residual concern that this should not become some kind of loophole to by-pass a more transparent and multilaterally-based process. Essentially, this would seem to involve some kind of judgement on how likely this would be in practice. To begin with, if it was a case of "exceptional circumstances", the effective constraint is reasonably clear - it is not and could not be the norm. Furthermore there would be notification and scrutiny of that particular situation. What also seems hard to avoid concluding is that where that appeal was made directly and where there was in fact a genuine emergency, it would, at least likely more often than not, be only a matter of time before an appeal that satisfied the more substantive "triggers" was in fact registered.

16. If, however, this subsequent multilaterally based standard did not in fact occur, we would be in a different situation. It is not clear, however, that there is in fact any other very distinct situation that any Member is in fact seeking to cover under a genuine emergency situation. After all, it would imply that there could be a genuine emergency completely independent of and without the eventual concurrence of the relevant and reputable specialized international agencies or bodies that work in collaboration with them. As I say, it is not at all clear to me that anyone is in fact arguing for this. If they were to do so, this is obviously a residual situation where there is at this point no emerging basis for consensus that this would be a clear-cut Safe Box situation.

17. With respect to not impeding the delivery of emergency food aid, there is also the issue of duration. While some Members would like to see a specified duration period (e.g. x months), others believe that emergency food aid should be provided for as long as it is necessary. It is clear that this is an issue where the interests of recipient countries must be respected. Moreover, given that emergency situations differ in nature and impact, are we, as a trade organization, in a position to pre-determine the period for which food aid can be provided? It seems inherently implausible that the WTO, as a purely trade-oriented organization, could be considered to have some superior comprehension of when an emergency has ended than the relevant international bodies specializing themselves in these matters.

18. If we accept the appropriateness of relevant international organisations (or others in collaboration with relevant international organisations) to make the assessment of what constitutes an emergency situation, it would seem more appropriate to allow such organisations to determine also the duration of the emergency.

19. The validity of that judgement, of course, rests on whether there is an inherent lacuna in the relevant international procedures on such a point. Should there be such (but this is a matter to be established rather than presumed, and discussions to this point have not established that this is so) the

first-best solution is obviously not to be found in the WTO but in those organizations themselves. That said, if, for all practical intents and purposes, there is indeed a gap in this area within the relevant international bodies, such that the disciplines could be rendered ineffective, something would need to be provided for. Some practical or at least interim understanding would need to be reached pending changes to the procedures of the relevant international organisation.

20. If so, (and I see no reason at this point to presume that this is a real problem), at the very least, it would seem inherently more sensible to be looking in the direction of having a provision which states that the WTO would be seeking advice from such a body (perhaps after the lapse of a certain period of time) rather than taking some kind of a priori and prescriptive decision which endeavours to predefined *urbi et orbi* what an "emergency period" must always be.⁴ Quite apart from anything else (not least its negotiability), this would seem to lack real credibility.

21. Thus, in order to ensure that the duration is not purely arbitrary, taking a leaf from the African and LDC Groups proposal, something along the following lines might be considered:

Food aid provided during an emergency situation may be provided for as long as necessary, based on an assessment of genuine food needs conducted by [...].

Approaches to other substantive disciplines

22. The premise, as noted above, is that this is the situation where it would be clear that in-kind food aid would in fact be permissible (without prejudice to where we end up on in-kind food aid in non-emergency situations). As noted above, it is not at this point clear that there is consensus that there should be applicable other provisions. There are certainly Members who are arguing this, albeit along the lines of generally applicable provisions. There are other Members that are more reserved on this point, at least at this time. But I have not had the sense that there is any deep a-priori opposition to this. Rather the issue seems to be more that of how far such disciplines should go.

23. More specifically, I have not detected any Member arguing that food aid in an emergency situation should be tied in any way. Indeed it seems most sharply contradictory to the concept of dealing with an emergency to be imposing other conditions on a recipient in an emergency situation.

24. Therefore, without prejudice to where we end-up for food aid outside of an emergency situation, there seems to be no disagreement with the proposition that: *emergency food aid should be fully untied from commercial transactions.*

25. I have heard no disagreement with the view that emergency food aid *should not be re-exported (except where it is managed under the control of and/or at the direction of the relevant international agency, along the lines described in the Africa and LDC proposal).*

26. There seems to me, at the very least, to be implicit agreement that emergency food aid should be needs-driven and, indeed, based on needs assessment. That, after all, is what an "emergency" inherently means. That said, the character of what might be commonly called "needs assessment" may differ (reflecting the inherent differences in situation) as between an emergency and a non-emergency situation.

27. Nobody seems to disagree with the view that *there should be effective transparency* in all cases.

⁴ This does not preclude a mirror variant: a notional period by which time advice is to be sought from a relevant expert body regarding prolongation of an emergency situation. If that body says an emergency situation still exists, prolongation is accepted. If that body gives negative advice, the emergency is deemed to be over and henceforth the non-emergency disciplines are to be applicable.

28. It seems clear also that victims of an emergency are not part of a normal commercial market as they do not have the physical or financial means to meet their immediate food requirements. This seems to entail that, at least for emergency situations (and without prejudice to the case of non-emergency situations which remain to be addressed), *in-kind donations should be in fully grant form*. It is not clear to me that anyone has a problem with this, but it would be useful to have it clarified as to whether there is dissent on this point.

29. While it is not, perhaps, such a central issue, it has also been suggested that *there be no linkage by a donor to market development objectives*. Irrespective of where we come out on this issue more generally, it would be interesting to test whether there is considered to be a defensible rationale for such a linkage when dealing with a purely emergency situation at least.

30. There seems not to be such a degree of emerging consensus on the situation vis-à-vis monetization even under the emergency food aid situation and this needs further intensive reflection.

31. As noted above, it has also been more specifically proposed that untied cash food aid should be in the Safe Box. Given that this is not in fact in-kind food aid to begin with and on the assumption that it satisfies all the other criteria (if any) that are to be applicable for Safe Box status, I have not detected any objection to this approach. Notification and transparency would be important here too.

Disciplines for Food Aid in Non-Emergency Situations

32. As set out in the Hong Kong Ministerial Declaration, the objective for food aid outside of the Safe Box is to ensure the elimination of commercial displacement through effective disciplines on in-kind food aid, monetization and re-exports. The African and LDC Groups proposal lists a series of eight disciplines covering non-emergency food aid.

33. The discussions to-date have clearly signalled a need for disciplines on non-emergency food aid, although there are clear areas of divergence, particularly around the continued provision of in-kind food aid and monetization. We have still firm divergences here, particularly over the phase out of in-kind food aid to cash only food aid.

34. But it is also worth trying to discern and record where we might also be closer to convergence.

35. In this regard, I have not detected any fundamental disagreement with the view that non-emergency in-kind food aid should be needs based, should not be tied, should be targeted and provided for specific objectives. If so, Members could consider the following kinds of conditions for non-emergency in-kind food aid:

In-kind food aid provided in situations other than that defined as an emergency, shall be:

- (i) *demand/needs driven;*
- (ii) *based on an assessment of need;*
- (iii) *not tied directly or indirectly to commercial exports of goods and services to recipient countries;*
- (iv) *aimed at addressing developmental objectives including through targeted delivery to well-identified vulnerable population groups to address specific nutritional needs; and*
- (v) *shall take fully into account local market conditions of the same or substitute commodities and, as much as possible, be sourced locally, sub-regionally or regionally.*

36. I have the sense also that the issue of re-exports is also getting clearer (i.e. that it should be prohibited with one exception i.e. effectively no different from that applicable as regards Safe Box transactions), and that the disciplines here could or should apply to all food aid.

37. Beyond that we are in less convergent territory, which suggests that it is here we need to test concrete ideas to see if they can help find a way forward on remaining divergence.

38. Here we need to settle on how far we can or should go on the whether food aid should be provided in fully grant form.

39. On monetization, some Members would like to see monetization phased out, while other Members, including at least some recipients, wish to retain the right to monetize *per se* or to allow monetization for specific purposes such as those set out in the African and LDC Groups paper (e.g. to fund activities that are directly related to the delivery of food aid or the procurement of agricultural inputs).

40. Obviously we need to resolve the issue of in-kind and cash only food aid outside the Safe Box.

Implementation, Notification, Consultation, Monitoring and Transparency

41. There is no general reluctance to work hard on these areas and it seems to me to be accepted that they will play an important part in enhancing disciplines. Of course, considerable work is required in terms of how disciplines will be implemented, what would be required to be notified, who would be required to notify, and what consultation and/or monitoring are necessary to ensure full transparency. This is as much as anything a function of the substantive disciplines to be arrived at.
