

## Multilateral mechanisms governing food aid and the need for an enhanced role of the CSSD in the context of the new WTO disciplines on agriculture

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### SUMMARY

The paper provides a brief historical account of the main instruments and institutions governing the provision of international food aid from 1954 to the present time. It looks specifically at the WTO disciplines on food aid incorporated in the Uruguay Round Agreement on Agriculture and examines the implications of possible new disciplines envisaged under the Doha Round of negotiations. The main focus of the paper is on the implications of these new commitments for the FAO Principles on Surplus Disposal and the Consultative Subcommittee on Surplus Disposal (CSSD), which administers the Principles.

It is argued that the CSSD is well placed to continue an effective monitoring role of food aid transactions under the new WTO disciplines, given that it has a very similar membership to that of the WTO, it has in place a long-established *ex ante* notification and monitoring mechanism, and, perhaps more importantly, its mandate on food aid is broader than that of WTO, as it includes considerations of both commercial interests of exporters (avoiding displacement of commercial imports) and interests of recipient countries (avoiding disincentive effects to the domestic market).

However, it is also pointed out that several changes, both substantive and operational, are necessary for the Principles and the CSSD to become a more effective mechanism in monitoring donor adherence to the new disciplines on food aid to be agreed at the WTO. They have to become: credible - based more on multilateral mechanisms and yardsticks; dependable - carry out regular and comprehensive monitoring and reporting; and enforceable - subject to remedial action for non-compliance. The changes that may be necessary include:

firstly, streamlining the Register of Transactions with the eventual definition of legitimate food aid to be agreed at the WTO;

secondly, establishing a process whereby the CSSD makes full use of the information that exists at FAO/GIEWS and WFP on country and commodity-specific supply/demand balance, capacity to import and food aid needs;

thirdly, redefining the old concept of Usual Marketing Requirements (UMR) to one of Commercial Import Requirements (CIR), the latter reflecting a capacity to import commercially, assessed through an objective multilateral process, as opposed to the bilaterally determined UMRs;

fourthly, establishing a legal obligation under the WTO disciplines (together with appropriate repercussions for non-compliance) for donors to notify regularly and comprehensively their food aid transactions to the CSSD, which in turn would report formally to the WTO CoA;

fifthly, an important semantic issue concerns the notion of “surplus disposal”, still reflected in the title of the CSSD, which is out of date and also offensive to a part of the WTO membership, considering the overall objectives of the reform process in agriculture;

finally, the location of the CSSD may need to be addressed and there may be now a stronger rationale for the CSSD to be relocated than has been the case in the past.

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## I. A HISTORICAL BACKGROUND ON FOOD AID AND KEY MILESTONES

### 1.1 *The origins: surplus disposal and the FAO Principles*

A milestone in the international discussion of food aid can be traced back to the Seventh Session of FAO Conference in November 1953. The Conference paid special attention to the growing difficulties encountered for the first time since the end of the Second World War in absorbing surpluses of certain commodities (notably cereals), rapidly accumulating in North America. These difficulties had led the US to adopt measures and legislation of surplus disposal but there was concern that if these measures were to be applied exclusively in the light of national objectives and interests, they could threaten orderly development of international trade.

Following its review of the situation, the Conference concluded that, in accordance with FAO's basic aims, the absorption of excess supplies was to be sought by adopting policies for increasing consumption in the developing countries. It was recognized at the same time that the movement of surpluses into consumption required consideration of the possible international repercussions of such measures, including their effects not only on the commercial exports of similar products of competitors, but also on production and economic development within receiving countries.

Accordingly, the Conference instructed the Committee on Commodity Problems (CCP) to consider: (i) The most suitable means of disposing of surpluses including proposals for setting up consultative machinery through which the disposal of agricultural surpluses can be facilitated; and (ii) The principles which should be observed by Member Nations in order that the disposal of surpluses be made without harmful interference with normal patterns of production and international trade<sup>2</sup>.

How were these three concerns expressed by the FAO Conference followed up?

In 1954, FAO carried out a major study on surplus disposal<sup>3</sup>, which pioneered some very creative ways in making appropriate uses of food aid to address humanitarian needs in developing countries and was the first major step in the conceptual evolution of food aid towards its eventual food security role. That study had profound implications both at the conceptual and institutional level. It launched new ideas for utilizing food surpluses in food-for-work projects, for food stabilization purposes, in special feeding programmes for the most vulnerable target groups, and in support of government programmes to subsidize consumption.

Closely related, in timing and significance, was another FAO study that followed in 1955<sup>4</sup>, concerning the possible contribution of food aid to economic development. A clear distinction was made for the first time between food assistance for welfare and support for general development programmes. That study stressed the role of food aid as an additional capital to finance economic development, including its balance of payments and budgetary support roles.

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<sup>2</sup> Seventh session of FAO Conference (1953), Conference Resolution No. 14/53: *Disposal of Agricultural Surpluses*

<sup>3</sup> "Disposal of Agricultural Surpluses", FAO Commodity Policy Studies No. 5, 1954.

<sup>4</sup> "Uses of Agricultural Surpluses to Finance Economic Development in Under-Developed Countries", FAO Commodity Policy Studies No. 6, 1955.

In parallel with the identification of appropriate ways to make use of surpluses, a CCP Working Party, meeting in Washington, D.C. (February-March 1954), drafted the FAO “Principles of Surplus Disposal and Guiding Lines for Dealing with Agricultural Surpluses”<sup>5</sup>. In June 1954 the CCP commended to Member Governments the proposed Principles and established the Consultative Subcommittee on Surplus Disposal (originally abbreviated as CSD and subsequently changed to CSSD<sup>6</sup>) as a subsidiary body of the FAO Committee on Commodity Problems<sup>7</sup>. On 27 July 1954 the CSSD held its first meeting with a membership of 21 governments. In December of the same year the first edition of “Disposal of Agricultural Surpluses: Principles Recommended by FAO” was published and in November 1955, 37 Member Nations indicated readiness to adhere to the FAO Principles<sup>8</sup> (this number increased to over 50 by the early 1970s). In 1959 the CSSD submitted to CCP its report on “Consultative machinery and procedures and Operations and adequacy of the FAO Principles of Surplus Disposal”, which set down the procedures for bilateral consultations in accordance with the Principles<sup>9</sup>.

As several countries moved from a net importing position to an exporting position of basic foodstuffs in the 1960s, certain concerns about food aid transactions emerged and a CSSD *ad hoc* Group was formed in 1963 on “Changing Attitudes toward Agricultural Surpluses”. Its report, in April 1963, pointed out to CCP new developments in the scope and nature of “near-commercial” and “extra-commercial” transactions<sup>10</sup> and in April 1965 the CSSD submitted to CCP the “‘Grey Area’ Panel Report” on developments and problems arising from concessional transactions with commercial features and commercial transactions with concessional elements<sup>11</sup>.

In July 1969 a CCP Working Party developed the *Catalogue of Transactions* as an internationally accepted basis for classifying concessional transactions and in December of the same year the CCP agreed on new Consultative and Reporting Procedures (procedures for notification and consultation on transactions identified as likely to cause harmful interference with normal patterns of production and trade)<sup>12</sup>. Finally, in October 1970, the CCP agreed on procedures for the establishment of Usual Marketing Requirements (UMRs), which were endorsed by the FAO Council in the same year<sup>13</sup>.

## 1.2 *From surplus disposal to food assistance: creation of multilateral mechanisms*

The establishment of the **World Food Programme** (WFP) in 1962 marked the beginning of

<sup>5</sup> Report of the Working Party on Surplus Disposal to CCP (CCP 54/2)

<sup>6</sup> The acronym of the sub-Committee was changed to CSSD in October 1995 in order to avoid confusion with another UN body, the Commission on Sustainable Development created at that time.

<sup>7</sup> CCP Resolution No. 1 (23)

<sup>8</sup> Eighth session of FAO Conference (1955), Conference Resolutions No. 7/55: *Principles and Guiding Lines of Surplus Disposal*; and No. 8/55: *Use of Surpluses In Aid of Development*.

<sup>9</sup> CCP/CSD/59/23 and Tenth session of FAO Conference (1959), Conference Resolution No. 11/59: *Operation and Adequacy of FAO Principles of Surplus Disposal and Guiding Lines*

<sup>10</sup> CCP/CSD/63/27.

<sup>11</sup> CCP/CSD/65/19.

<sup>12</sup> CCP/CSD/70/70.

<sup>13</sup> Council Resolution No. 2/55.

multilateral food aid. The first move in this direction was the UN General Assembly resolution in 1960 on the Provision of Food Surpluses to Food Deficient Peoples through the United Nations System. Following this resolution and further intensive studies in the United Nations and FAO<sup>14</sup>, the formation of the WFP was approved in late 1961, under the joint auspices of FAO and the United Nations, with resources pledged voluntarily by the member governments of the UN and FAO.

The next milestone was the first **Food Aid Convention** (FAC) in 1967 as one of the two instruments - the other being the Wheat Trade Convention - which constituted the 1967 International Grains Agreement. The adoption of the FAC coincided with a major reversal in the world supply/demand situation, from surpluses to relatively tight supplies, and with the related efforts of the traditional food aid donors to involve more countries as donors, especially in Western Europe and Japan, which until then had given little or no food aid.

The FAC is a treaty that was intended to enhance the capacity of the international community to respond to food aid needs by guaranteeing a predictable flow of food aid per year, irrespective of price or supply fluctuations. Under the FAC 1967, an aggregate annual minimum guaranteed volume of 4.2 million tons of food aid in cereals (in wheat equivalent) was committed<sup>15</sup>. The Convention was renegotiated in 1971 maintaining the same minimum commitment, and again in 1980, when the minimum guaranteed level was raised to 7.6 million tons of cereals. The number of donors also rose to 22 and the cereal coverage was extended to rice.

The FAC was renewed and renegotiated a number of times through the 1980s and early 1990s, with the aggregate minimum commitment essentially being maintained at about 7.6 million tons until the 1995 Convention, when donors lowered their minimum commitment by more than a quarter to about 5.5 million tons. The Convention presently in effect is the 1999 FAC.

Together with the minimum guaranteed volume of food aid, a set of guidelines form part of the FAC, related to the provision of food aid to ensure that it is targeted effectively and directed towards the neediest countries. The Convention also cross-references donors' obligations to the CSSD by stating that food aid should be provided in a manner consistent with the FAO "Principles of Surplus Disposal and Consultative Obligations". While the FAC, as a treaty, is a legal instrument and as such goes beyond the CSSD, it, like the CSSD, lacks a binding enforcement mechanism whereby donors not meeting their commitments and/or not observing agreed guidelines and principles could face discomfiture and possible penalties under a WTO-like dispute settlement/resolution mechanism.

Another major step in the evolution of food aid was the decisions and recommendations of the **World Food Conference** in 1974. In particular, the Conference established the WFP Committee on Food Aid Policies and Programmes (CFA), and the FAO Committee on World Food Security (CFS). Both of these Committees promoted innovative approaches in the use of food aid to support food security and economic development in vulnerable countries.

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<sup>14</sup> UN General Assembly Resolution 1496 (XV); ECOSOC Resolution 832 (XXXII) requesting the UN and FAO to formulate more detailed proposals regarding procedures and arrangements for a multilateral programme; FAO/UN Joint Report on Proposals Regarding Procedures and Arrangements for the Multilateral Utilization of Surplus Food (FAO document C 61/18, Rome 1961); FAO Resolution No. 1/61 on Utilization of Food Surpluses - World Food Programme and UN General Assembly Resolution 1714 (XVI) on a World Food Programme.

<sup>15</sup> Individual donor shares were negotiated in the GATT Kennedy Round of trade negotiations. The nineteen participants in the 1967 Convention included grain-importing countries as food aid donors.

In addition, the World Food Conference recommended the acceptance by all donor countries of the concept of forward planning of food aid and of a global food aid target of 10 million tons of cereals. It also suggested the need for raising the share of food aid channeled through WFP, the grant component of the bilateral food aid programmes, and the cash resources available for commodity purchases from developing countries. The Conference recommended measures for meeting international food emergency requirements in order particularly to enhance WFP's capacity to render speedy assistance in emergencies.

The latter recommendation led to the establishment of the **International Emergency Food Reserve (IEFR)** by the UN General Assembly in September 1975, with a minimum target of 500 000 tons of cereals, placed at the disposal of WFP, additional to regular WFP pledges, and subject to the existing WFP procedures for approval of emergency requests. The CFA approved modalities for the operation of the IEFR at its First Session in 1976, which were revised by the Committee at its Sixth Session in 1978.

At its Seventh Session in May 1979, the CFA recommended Guidelines and Criteria for Food Aid to guide food aid programmes and policies of bilateral as well as multilateral donors.

## II. FOOD AID IN THE WTO CONTEXT

### 2.1 *WTO Agreement on Agriculture*

Food aid is part of the disciplines on Export Competition agreed under the WTO Agreement on Agriculture (AoA). The AoA contains disciplines on food aid under Article 10.4 which spells out some specific requirements on how food aid should be provided to be in conformity with the WTO (i.e. to prevent the circumvention of Export Subsidy Commitments) and in this context it also makes specific reference to existing provisions on food aid, specifically under the CSSD and FAC. Article 10.4 states that:

“Members donors of international food aid shall ensure:

- (a) that the provision of international food aid is not tied directly or indirectly to commercial exports of agricultural products to recipient countries;
- (b) 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); and
- (c) 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.”

Another relevant text of the AoA is paragraph 16 which makes reference to specific provisions for Least-developed and Net Food-Importing Developing Countries agreed under the *Marrakesh Decision* (which is an integral part of the Uruguay Round Agreement). Paragraph 16.1 states that:

“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.”

In turn, the relevant parts of the Marrakesh Decision that pertain to food aid are paragraphs 3 (i) and (ii), which read as follows:

“3. Ministers accordingly agree 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 at a level which is sufficient to continue to provide assistance in meeting the food needs of developing countries, especially least-developed and net food-importing developing countries. To this end Ministers agree:

- (i) to review the level of food aid established periodically by the Committee on Food Aid under the Food Aid Convention 1986 and to initiate negotiations in the appropriate forum to establish a level of food aid commitments sufficient to meet the legitimate needs of developing countries during the reform program;
- (ii) to adopt guidelines to ensure that an increasing proportion of basic foodstuffs is provided to least-developed and net food-importing developing countries in fully grant form and/or on appropriate concessional terms in line with Article IV of the Food Aid Convention 1986;”

Basically, paragraph 16 and the Marrakesh Decision do not add anything new (to what is already contained in Article 10.4) as regards the disciplines that would govern the provision of food aid. What they do is to raise some concerns about the level of food aid and add an obligation on the part of donors (specifically developed country Members of the WTO) to review the situation “*to review the level of food aid...and...to establish a level of food aid commitments sufficient to meet the legitimate needs of developing countries during the reform program*”. Additionally, the Decision goes further as regards the terms of food aid to LDCs and NFIDCs, namely “*an increasing proportion*” (as opposed to “*the extent possible*” of Article 10.4) be provided “*in fully grant form and/or on appropriate concessional terms in line with Article IV of the Food Aid Convention 1986*”.

The explicit reference to the FAO Principles and the FAC provisions in the AoA is significant. It is significant in the sense that the Principles and the FAC became part of the rights and obligations of WTO members under the legal framework of the WTO. In that sense to the extent that these provisions are not adhered to, members of the WTO that view this as creating an imbalance between agreed rights and obligations under the AoA could potentially have recourse to the dispute settlement mechanism (as they do for other provisions in the WTO agreements).

Where is then the problem? The problem is that an operational mechanism has not been put in place for determining whether these outside-the-WTO provisions are faithfully adhered to and, in the case they are not, to establish the extent of injury and remedial action. It is not the WTO that monitors these provisions but the respective organizations that administer them, i.e. the CSSD and the FAC Secretariats. The fundamental omission of the AoA was not to stipulate a formal link between the CoA (responsible for monitoring the AoA in its totality) and the CSSD and FAC (responsible for monitoring those provisions explicitly included in the AoA). For example, while Article 10.4(b) and 10.4(c) use the right words “*shall be carried out in accordance with the FAO...*” and “*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*”, there is no explicit provision stipulating formal monitoring and reporting to the CoA the extent to which these are being adhered to.

## 2.2 *New disciplines on food aid under the Doha Round*

Food aid in the Doha Round negotiations remained under the “export competition” pillar of the AoA as was the case under the UR negotiations. But for a variety of reasons, food aid became, much more than before, intertwined with other components of export competition having to do with export subsidies, export credits and STEs. The main reason that certain members of the WTO insisted on such links is that there is a danger that some forms of food aid transactions could act like other forms of export subsidization such as export subsidies

and export credits. In view of this, the text on food aid in the July Framework established full “parallelism” between food aid and other forms of export subsidization, including export subsidies, export credits, and trade distorting practices of exporting STEs.

The relevant text on food aid that constitutes a basis for further negotiations is contained in paragraph 18 of the July Framework<sup>16</sup>. As for other parts of the Framework, while the language is very general as regards the provisions that would govern food aid, it is fairly clear on the objective, namely that, in parallel with other forms of export subsidization, those types of food aid that do not conform with disciplines to be agreed will be eliminated by some future date.

The Framework is also clear, explicitly or implicitly, on the key issues on food aid that would have to be addressed in the negotiations. These issues are not new but have been debated ever since the launching of the Doha round and the most concrete attempt so far to reconcile the various positions was Attachment 6 of the draft modalities text of March 2003 (Harbinson text). While this text no longer has any legal status, by all accounts it is likely to constitute the starting point in any attempt to add flesh to the skeleton of the Framework text.

Negotiations on food aid have centered on three interrelated issues<sup>17</sup>:

- definition of “legitimate” food aid
- operationally effective disciplines to prevent commercial displacement
- effective monitoring and reporting mechanisms to ensure adherence to the agreed disciplines

#### *Definition of “legitimate” food aid*

Legitimacy of food aid in the context of the WTO negotiations is understood to be related to the following considerations:

- use of food aid,
- financial terms under which is provided, and
- link to commercial transactions

First, as regards intended use of food aid, the Harbinson text made a clear distinction between emergency food aid and food aid for other purposes. Legitimacy of the former (in cash or in kind) was stipulated when:

“granted in response to appeals from specialized United Nations food aid agencies, from non-governmental humanitarian organisations or private charitable bodies, or in response to bilateral government-to-government requests for emergency food aid relief.”

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<sup>16</sup> Paragraph 18 covers all forms of export subsidization, stipulating that those elements that do not conform to disciplines to be agreed will be eliminated. For food aid it states:

“18. 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 organisations 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.”

<sup>17</sup> In all of these issues there are roles for the relevant international organizations, as explicitly mentioned in both the Harbinson text and the July Framework. This will be discussed under the relevant issues.

Legitimacy of the latter was stipulated when:

“provided exclusively in the form of untied financial grants to be used to purchase food for or by the recipient country: except that such food aid may be provided in-kind within the framework of projects and programmes operated by specialized United Nations food aid agencies or on behalf of such specialized agencies through non-governmental humanitarian organisations or private charitable bodies”.

The provision on emergency food aid does not change much as regards present practices. Also, the second provision, on other uses of food aid, does not change much from present practices to the extent that food aid is provided in the form of untied financial grants. However, the changes could be substantial for in-kind food aid, especially government-to-government “programme” food aid provided for budgetary support, which would no longer be legitimate, if these provisions were to be adopted.

The other issue that would probably have to be settled as regards non-emergency food aid is some clarity on what constitutes legitimate “non-governmental humanitarian organisations or private charitable bodies”. Clearly, if government-to-government “programme” food aid is to be curtailed, there could be an attempt to channel in-kind food aid through NGOs and PVOs. In order to ensure that such channeling of in-kind food aid does not circumvent the agreed disciplines, the nature of such entities is likely to be much more scrutinized than in the past. Specific provisions are likely to be incorporated in the WTO disciplines on the profile of such entities in order to be considered as legitimate.

Second, as regards the financial terms under which food aid is provided, and irrespective of the uses of food aid, the Harbinson text stipulated that:

“food aid is provided exclusively in fully grant form”

This provision, if it were to materialize, is also significant. While some 85 to 90 % of food aid is now given as full grant, the remaining involves varying degrees of concessionality. Unless the respective donors (essentially the US) are in a position to change their internal procedures that govern these concessional transactions, the overall volume of food aid is likely to be affected.

It may be noted that concessional (non-fully grant) food aid was allowed under the AoA (see Article 10.4 (c) above) as long as it was in conformity with Article IV of the Food Aid Convention 1986 (which has become Article IX (a) in the FAC 1999). Specifically under Article IX (a) (iii), one of the terms under which food aid may be supplied is:

“sales of food on credit, with payment to be made in reasonable annual amounts over periods of 20 years or more and with interest rates which are below commercial rates prevailing in world markets”.

Third, as regards possible links to commercial transactions the Harbinson text stipulated that:

“the provision of food aid is not tied directly or indirectly, formally or informally, explicitly or implicitly, to commercial exports of agricultural products or of other goods and services to recipient countries.”

This provision goes beyond what is already included in Article 10.4 of the AoA referred to above<sup>18</sup> by stipulating additionally words such as “formally or informally”, “explicitly or implicitly” and “other goods and services”. Its origin, word-by-word, is Article IX (e) (ii) of the FAC 1999. Although some of these additional requirements for untied food aid are difficult to monitor in practice, they can be significant. In particular, this could be the case for US food aid, nearly all of which is purchased from US producers on the domestic market and then shipped abroad by US shipping companies (75% of US food aid is by law required to use US registered vessels). Again, to the extent that this provision is adopted, it could have important implications for the food aid provided by the US, unless that donor is prepared to amend its related legislation accordingly.

#### *Operationally effective disciplines to prevent commercial displacement*

While the Framework mentions simply “commercial displacement” this should be understood to include both displacement of international trade as well as disincentives to domestic production in the recipient countries (i.e. displacement of domestic trade). As regards operationally effective disciplines to prevent such effects, the March 2003 Harbinson text gave central role to the FAO Principles, stating that:

“Members shall ensure that their food aid transactions are carried out in accordance with the procedures under the FAO “Principles of Surplus Disposal and Consultative Obligations”, including, where appropriate, the system of “Usual Marketing Requirements”. Any Member may raise any matter relating to a donor Member's compliance with these principles and requirements under Article 18.6 of this Agreement.”

Since March 2003, there has been considerable discussion at the CSSD about its future role in the context of the WTO negotiations. At the same time questions have been raised by the negotiators in Geneva about the ability of the CSSD, at its present form, to play the monitoring role envisaged in the Harbinson text. The implication of this is that there is likely to be resistance in Geneva to incorporating the above text in the new provisions to be agreed, unless the modus operandi of the CSSD are strengthened to make it a more effective monitoring mechanism (more on this below).

Another provision in the Harbinson text on market displacement applies to recipient countries and stipulates that:

“Members which are recipients of food aid undertake not to re-export such food aid otherwise than as part of a triangular food aid transaction initiated by a specialised United Nations food aid agency.”

This is straightforward and there is not likely to be any controversy about it.

#### *Monitoring and reporting mechanisms*

As regards monitoring and reporting mechanisms, the Harbinson text<sup>19</sup> stipulates the following:

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<sup>18</sup> Which simply stated that “the provision of international food aid is not tied directly or indirectly to commercial exports of agricultural products to recipient countries”

<sup>19</sup> The Framework text includes a general provision on “monitoring and surveillance” in paragraph 50, applicable to all three pillars, which reads as follows:

“50. Article 18 of the Agreement on Agriculture will be amended with a view to enhancing monitoring so as to effectively ensure full transparency, including through timely and complete notifications with respect to the commitments in market access, domestic

“Members shall report on the form in which food aid is provided, as well as on the products, amounts, destinations, channeling and other relevant terms and conditions of their food aid operations, on the basis of a format and at intervals to be established by the Committee on Agriculture.”

and that:

“Food aid transactions which are not in conformity with the provisions of subparagraph (a) above<sup>20</sup> and which cannot be accommodated within limits of a Member's export subsidy reduction commitments shall be deemed for the purposes of Article 10.1 of this Agreement to constitute non-commercial transactions which circumvent that Member's export subsidy commitments.”

As is the case with all other provisions of the AoA, it is clear that the CoA will retain central role in the ex post monitoring of food aid transactions as regards adherence to the relevant disciplines to be agreed. The important additional element that has been explicitly included in the Harbinson text is the implications for members that do not adhere to these disciplines. What is also clear, both from the Framework and the Harbinson text, is that in this monitoring function there will much more explicit involvement than in the past of the relevant organizations having competence on food aid issues.

There are good reasons for the key role envisaged for such organizations.

First, there is now a greater recognition by the WTO membership that food aid issues go well beyond legitimate commercial displacement concerns of exporting countries but involve also legitimate food security concerns of recipient countries, also members of the WTO. In fact, the balance in the WTO has changed considerably vis a vis the past and instrumental in this is the growing membership of developing countries in the WTO, many of which are recipients of food assistance. Second, an important factor that necessitates greater involvement of the food agencies is the need to bring into the process specialized knowledge and established operational mechanisms that do not exist in the WTO but are crucial for effective implementation of the agreed provisions. The role of FAO and WFP are key in this context. Of particular importance is the role of the CSSD and this will be discussed below.

### III. HOW TO MAKE THE CSSD A MORE EFFECTIVE INSTRUMENT

The FAO “Principles of Surplus Disposal” (administered by the CSSD) date back to 1954 and constitute “a code of international conduct which encourages the constructive use of surplus agricultural commodities and at the same time safeguards the interest of commercial exporters and local producers.”<sup>21</sup> As a code of international conduct, the Principles are essentially a non-binding commitment, although they have been in existence for some 50 years.

Since 1995 the Principles have indirectly become part of the binding legal obligations of WTO members under the AoA. However, as discussed above, this link of the AoA to the

support and export competition. The particular concerns of developing countries in this regard will be addressed.”

<sup>20</sup> These are the provisions discussed above defining legitimate food aid.

<sup>21</sup> *Reporting procedures and consultative obligations under the FAO principles of surplus disposal: A guide to members of the FAO Consultative Subcommittee on Surplus Disposal*, Rome 2001 (this is the latest booklet of the Principles, published after they were revised in 1998, following the Uruguay Round Agreement).

Principles has been rather weak in the sense that there is no mechanism for the WTO CoA to be formally notified by the CSSD as to whether donors adhere to the Principles and if not what remedial action should be taken. At the same time, these apparent inadequacies of the agreed provisions in the AoA as regards food aid have not been formally raised at the CoA, which is monitoring all aspects of the AoA, nor has there been any formal complaint in other relevant WTO bodies outside the CoA.

However, issues pertaining to the Principles and the CSSD in administering them, have come up in the negotiations and, for the Principles to be incorporated under the new WTO disciplines on agriculture, several important changes would have to be considered, both at the substantive level as well as in the operational procedures at the CSSD in administering them. In essence, the Principles will need to be strengthened so as to provide an assurance to the WTO membership that they are a dependable, effective and enforceable instrument in monitoring adherence of food aid transactions to the new disciplines to be agreed.

It is therefore important to think through at this stage on how to revamp the Principles and the operational procedures of the CSSD so that this body is in a position to respond effectively to the role that is likely to be asked to play.

### *3.1 Revising the Register of Transactions*

An obvious amendment to the Principles concerns the necessity of bringing the Register of Transactions into line with the definition of “legitimate” food aid to be agreed at the WTO. That is a relatively straightforward exercise whereby the Principles would take on board the substantive changes in the definition of food aid, so that there is a consistency between the Principles and the WTO on what constitutes legitimate food aid. The last time such an exercise was undertaken was in 1997 when the Register of Transactions was brought into line with the Uruguay Round Agreement on Agriculture.

However, questions about the Principles and the role of the CSSD go beyond the issue of harmonization of the definitions of food aid and involve more fundamental questions, centered around two interrelated issues: first, the extent to which a food aid transaction responds to objectively recognized needs of the recipient country, and second the extent to which the food aid provided adversely affects commercial trade flows.

### *3.2 Making full use of GIEWS and WFP assessments*

While it may be argued that the first issue does not fall strictly under the purview of the Principles, it is nonetheless indirectly related to the core of the objectives of these Principles. This is because to the extent that a food aid shipment does not respond to recognized needs of the recipient country, there are grounds to suspect that the objective of safeguarding the interests of commercial exporters and local producers would not be met. Hence, in many ways legitimacy of needs assessments and avoiding adverse affects on commercial trade are intrinsically related and essentially the two sides of the same coin.

The major deficiency of the CSSD in this area is that there is no formal arrangement in place (aside from possible bilateral consultations between diplomats taking place in Washington D.C.) to guarantee that a particular food aid shipment directed to country ‘x’ responds to objectively identified food aid needs of that country<sup>22</sup>. Essentially the CSSD consultative process depends on *ad hoc* confirmations on the part of the donors/recipients about the

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<sup>22</sup> A related issue which is also of concern as regards disincentive effects from the allocation of food aid supplies globally, is the relative needs between countries, i.e. whether the needs of country ‘x’ are relatively greater than those of another country ‘y’ and whether food aid allocations respond to such relative needs.

rationale of the food aid transactions being notified. It may be noted that sometimes the donors themselves undertake assessments prior to making their food aid allocations to potential beneficiary countries but such analyses may not enjoy the confidence of other countries especially when strong commercial interests are involved. How can this situation be improved?

Clearly the CSSD Secretariat in Washington itself does not have the commodity and country-specific expertise and capacity that are required to carry out such an analysis. However, within FAO there is a credible alternative, and this can be found in the systematic country-specific assessments of the supply/demand situation of basic foodstuffs undertaken by the FAO Global Information and Early Warning System (GIEWS) in collaboration with WFP. Such assessments have been carried out continuously for a long time, both as regards emergency food aid needs and structural deficits of food insecure countries, taking into account their capacity to import commercially. The GIEWS in collaboration with the WFP monitors the situation in the vulnerable countries and report regularly their findings to donors through special reports as well as through country-specific special alerts in cases of emergency situations necessitating immediate response. Therefore, a well-established and dependable system is in place which enjoys the confidence of the donor community.

A mechanism has not been established for the CSSD consultative process to draw systematically on this capacity that exists in the GIEWS. However, this could change by establishing a process whereby the CSSD makes full use of the information that exists at the GIEWS as regards assessments of food aid needs of individual countries and globally so that the CSSD membership can have a better basis for reviewing individual transactions notified to it, as well as a better understanding of how such transactions fit within the broader context of food aid flows in relation to overall needs. As the commodities covered by GIEWS/WFP are by far the most important for food aid purposes, the other commodities provided as food aid could continue to be covered by existing procedures until better assessment is extended to them as well.

### 3.3 *Compliance with Commercial Import Requirements (CIRs) instead of UMRs*

Now coming to the second and related issue on possible commercial displacement effects of food aid transactions, the operational mechanism at the CSSD is compliance with the Usual Marketing Requirement (UMR). The UMR is a commitment by the recipient country to maintain a normal level of commercial imports of the same commodity specified in the concessional transaction, in addition to the food aid received. The UMR is calculated on the basis of a rolling average of the last five years of commercial imports, based on internationally accepted statistics and adjusted for special circumstances (see below).

Adherence to the UMR is meant to ensure two interrelated objectives: first, that food aid results in additional consumption (consumption that would not have taken place in the absence of the transaction); and second that to the extent that this happens there is no adverse impact on commercial trade both internationally and domestically in the recipient country (i.e. no disincentives to domestic production).

Additionality of consumption is difficult to achieve in the majority of food aid interventions. The extent to which this materializes would depend on careful identification of a distinctly undernourished population group and an equally careful targeting of food aid supplies to these individuals, together with other basic necessities that they are likely to lack.

Because of the inherent difficulties in ensuring additionality of consumption, adherence to the UMR would at best avoid displacement of international trade. As regards the domestic market, to the extent that the additional consumption generated is less than the amount of food aid received (which, as argued above, is likely to be the case), there would be

disincentive effects. Thus, the UMR is a lopsided mechanism in the sense that strict adherence to it would safeguard the commercial interests of other exporting countries but not necessarily the interests of domestic producers in the recipient country. In fact, the latter are likely to be adversely affected from a strict adherence to the UMR and this issue has been raised on several occasions at the CSSD<sup>23</sup>.

In view of the above considerations, specific provisions were introduced in the Principles in 1983 which allowed the possibility of adjusting the statistically determined UMR level taking into account an array of factors, including, *inter alia*: a substantial change in production in relation to consumption of the commodity concerned in the recipient country; a substantial change in its balance-of-payments position or its general economic situation; evidence of a significant trend in commercial imports and the representativeness of the reference period; any other considerations that may be raised by the recipient country.

While, in principle, the basis exists for making appropriate adjustments to UMRs, the necessary analytical approach to address this problem correctly and comprehensively is not a trivial one under the best of circumstances. Partly in view of such difficulties, adjustments to UMRs are normally made through a process of bilateral negotiation between the donor and the recipient government. This however is a contestable approach from the perspective of either third parties or the recipient country itself. To the extent that the bilateral negotiations did not yield an appropriate reduction to the UMR although the underlying factors may have called for such, the domestic market of the recipient country would be adversely affected. On the other hand, to the extent that the agreed adjustment is large or the UMR is waived altogether, third parties adversely affected may find it unacceptable.

A way out of this situation would be to multilateralize the process of establishing UMRs. Again, the solution can be found in the systematic assessments made by GIEWS in collaboration with WFP of the supply/demand situation in individual countries. That exercise includes an assessment of the amount that the country could import commercially and the remaining amount which represents food assistance needs. This objectively assessed capacity of a country to import commercially is essentially what is aimed for in trying to arrive at an adjusted UMR level. But by making a systematic assessment of the capacity of a country to import commercially, the resulting adjustment to the statistically calculated UMR may not necessarily be always downwards. To the extent that the total import needs of a country for a particular commodity have an upward trend and the country has the capacity to increase its commercial imports, that should be reflected in its commitment to import commercially an amount greater than before, i.e. greater than the statistical average of the last five years (the basis for the UMR).

Because this concept of the capacity to import commercially is substantively different from the UMR notion, consideration should be given to replacing the UMR by a more appropriate measure, which may simply be labeled as Commercial Import Requirements (CIR). However, the essence of the UMR concept should be retained in the new measure, i.e. the CIR is a commitment by the recipient country to maintain a level of commercial imports of the same commodity specified in the concessional transaction at least equal to the CIR, in addition to the food aid received.

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<sup>23</sup> It may be noted that of the 46 members of the CSSD in 1992, some 28 of them did not subscribe to Council Resolution 2/55 which established the UMR mechanism ("Principles of Surplus Disposal and Consultative Obligations of Member Nations", Rome 1992, pages 58 and 59) and this issue has been raised on several occasions during CSSD meetings. It has also been argued at the CSSD that UMRs exert undue economic pressure on the recipient countries which distorts the humanitarian aspect of food aid, as recognized by all members of the CSSD, and also interfere negatively with development plans of recipient countries.

The suggested CIR would respond to concerns of both third parties and recipient countries. Third parties would get the needed assurance that the recipient country would continue to import commercially (and to the extent that the recipient country has the capacity, such imports may even increase<sup>24</sup>). The food aid recipient country would get the assurance that the level of commercial imports that it is obliged to import would not represent an undue burden and more importantly the total supplies imported (commercial and food aid), being at a level that the domestic market is able to absorb, would not risk creating disincentive effects to domestic production.

### 3.4 *Establishing legal obligations for notification of food aid transactions*

As already discussed above, while the existing Principles were brought into the AoA and therefore became part of the legal WTO framework, in practice no use was made of this link. One of the main reasons was the omission to stipulate an operational relationship between the WTO CoA (responsible for monitoring the AoA in its totality) and the CSSD.

Clearly this omission has to be rectified under the new disciplines and related arrangements being developed at the WTO, for the CSSD to become an effective instrument in the WTO system. In particular, in addition to including a provision stipulating that food aid transactions are carried out in accordance with the FAO Principles (presumably a revised version of them as discussed above), it is also necessary to stipulate the reporting obligations of the CSSD to the CoA as regards the transactions notified to it. Moreover, for this arrangement to work, the new AoA disciplines need also stipulate that donors have a legal obligation to report to the CSSD the totality of their food aid shipments so that, in turn, the CSSD is in a position to report to the CoA comprehensively on the totality of food aid transactions.

Of equally crucial importance is to make clear in the new AoA the repercussions for donors not complying with their reporting obligations. An effective way to deal with this could be to stipulate that food aid transactions which are not reported to the CSSD and which are found not to be in conformity with the provisions defining legitimate food aid, and which cannot be accommodated within the limits of a Member's export subsidy reduction commitments shall be deemed to constitute non-commercial transactions which circumvent that Member's export subsidy commitments (i.e. a language adapted from what is stated in the Harbinson text).

Should the above-suggested formal links between the CSSD and the WTO CoA be established under the new agreement on agriculture, there will be a need for the CSSD to review the procedures on notifications and reporting schedule to meet the requirements of the WTO monitoring arrangements under the CoA. Assuming that the CoA would maintain the same regularity of four monitoring meetings annually, the CSSD would have to match this schedule.

### 3.5 *Dropping the notion of "surplus disposal"*

An important semantic issue concerns the notion of "surplus disposal", still reflected in the title of the CSSD. The background to the CSSD was discussed above and while in the early days the role of the Subcommittee was distinctly to monitor surplus disposal operations, this is no longer the case. Besides being out of date, these words are also offensive to a part of the WTO membership, considering that the overall objective of the reform process in agriculture is to get away from such trade distorting notions and practices. In view of these considerations, the time has come for making the appropriate language modifications. The Principles could be simply be renamed as

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<sup>24</sup> As already explained above, under certain conditions, the resulting commitment of a food aid recipient country to import commercially, under the proposed CIR measure, could be greater than that resulting from the UMR measure (average of the last five years).

Principles of Food Aid Transactions and correspondingly, the Subcommittee could be renamed as Subcommittee on Food Aid Transactions (SFAT).

### 3.6 *Location of the CSSD*

A final issue that may need to be addressed concerns the location of the CSSD. The decision to locate the CSSD in Washington was the result of a recommendation made by the CCP Working Party on Surplus Disposal in 1954.

The location of the Subcommittee was not an issue during the early years. This was understandable given the dominance of the US as the major provider of food aid, which was drawn from its considerable surplus stocks at that time. The first instance this issue was raised was in July 1968 when, in discussions in the CCP on the future role of the CSSD, it was noted that while the CSSD had been located in Washington from the beginning there was no reason it should necessarily stay there. A CCP working group was established to examine the functions of the CSSD; however it made no recommendation as regards changing its location.

Six years later (1974), the Subcommittee undertook another review of its work and its future role, where the question of location was also considered and Washington was re-affirmed on the basis of various factors, including well staffed embassies in the field of agricultural trade, availability of relevant information, expeditious international communications, effective consultations with interested governments, flexibility and adaptability to changing circumstances, etc. The issue was again raised at the 56th session of CCP in 1987 and consensus in favour of Washington was reported to the 57th Session of the CCP in 1988.

The last time that this issue was raised was at the 61st session of the CCP in February 1997, when a request was made to the Secretariat: “to prepare a report reviewing the question of the CSSD location, its operational procedures, ways to improve participation by developing countries and to report to its 62nd session.” Rome had been suggested as an appropriate venue in view of the concentration of food aid agencies there (WFP and IFAD, besides FAO) and the presence of technical staff in the representations of developing countries, often better versed on food issues than their Washington counterparts.

Consideration of the CCP of this issue on the basis of the report prepared by the FAO Secretariat came again to the conclusion that there were no reasons at that time to have the CSSD move to Rome. The case may be different now, considering the pressure on the CSSD to become a more effective instrument in monitoring of food aid transactions. Also of consideration is whether this role of the CSSD can be best served by making a greater use of the established knowledge and information resources available at the GIEWS and the WFP, as suggested above.