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The WTO and Food Aid: Food Security and Surplus Disposal in the 2015 Ministerial Decision on Export Competition

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In December 2015 at the WTO Ministerial in Nairobi, a Ministerial Decision was reached on export competition. This decision marked the first major breakthrough for the long post–Uruguay Round negotiations on agriculture. It was agreed in Nairobi that export subsidies for agricultural products would no longer be permitted as a policy option for members of the WTO. To fully discipline export subsidies, however, the opportunity to use food aid shipments as a means to circumvent the prohibition on export subsidies also needed to be dealt with. Any constraints on the use of food aid, however, should not inhibit the use of food aid to assist in providing food security for those requiring food during an emergency. Hence, there are two objectives of trade policy in the case of food aid – allowing food aid to contribute to food security and removing the ability to use food aid as a mechanism for surplus disposal. The Nairobi Ministerial Declaration allows food aid to contribute to food security but fails to remove its use for purposes of surplus disposal.

Keywords: Doha Development Round, food aid, Ministerial Decision, Nairobi, surplus disposal, WTO

Introduction

> … it will provide a better framework for international food aid – maintaining this essential lifeline, while ensuring that it doesn't displace domestic producers.
>
> R. Azevêdo
> Director General
> World Trade Organization
> December 19, 2015

IN December 2015 the World Trade Organization held its tenth Ministerial Meeting in Nairobi, Kenya. WTO Ministerials represent the highest level of decision making in the organization. They are held every two years. When Roberto Azevêdo took over as director general of the WTO, he decided to eschew the *single undertaking* model of negotiations, whereby no agreement could be announced until all outstanding issues in a round of negotiations were resolved, and instead opted for a piecemeal approach to negotiations, whereby progress in a round is agreed and announced at Ministerial Meetings (Kerr, 2014). Once the piecemeal approach was adopted, there has been considerable pressure, at least from the WTO staff and particularly the director general, to have the Ministerials produce an agreement on something substantial. At the previous Ministerial in Bali in 2013 an agreement on trade facilitation was reached. The meeting in Nairobi was the next opportunity to prove that it was possible to move forward on the Doha Development Agenda, which had seen little progress since it was launched in 2001.

Agricultural trade has been one of the most contentious issues on the Doha negotiating agenda. The issues in agricultural trade are actually left over from the Uruguay Round, where they could not be resolved. The Uruguay Round Agreement on Agriculture (AoA) represented a partial step in the process of integrating agriculture into the general WTO trade rules (Hobbs and Kerr, 2000). The goal of full integration was accepted but, in the end, it could not be agreed that the goal would be accomplished in one step. To save the Uruguay Round, it was instead agreed that a partial step toward integration was an acceptable compromise but that negotiations toward full integration would recommence after a five year hiatus in 1999, whether or not a new full round of negotiations was agreed (Gervais et al., 1999). These renewed negotiations, which were mandated in the AoA, commenced but were quickly rolled into the negotiating agenda of the Doha Development Round. As had been predicted (Kerr, 2000), further progress on agriculture proved difficult. At the Ministerial in Nairobi the first major agreement on a portion of the agricultural issues on the Doha agenda was announced. One component of what was agreed in Nairobi was how the WTO would treat the contentious topic of food aid.

Agriculture in the Doha Development Agenda

The focus of trade negotiations on agriculture in the Uruguay Round, and continued in the Doha Development Round, has been on what are known as the *three pillars* of contentious issues. The three pillars are (1) market access; (2) export competition; and (3) domestic support (Gaisford and Kerr, 2001). Market access pertains to import barriers to agricultural products (Anderson, 2005). Export competition deals primarily with the subsidizing of exports. Domestic support covers subsidies that do not fall into the category of export subsidies (Brink, 2011). Agricultural trade was largely exempt from the long General Agreement on Tariffs and Trade (GATT) process of tariffication and tariff reduction that took place between 1947 and the commencement of the Uruguay Round negotiations in 1986 – a process that saw the removal or reduction of high post–World War II trade barriers on industrial goods to an average of less than 5 percent. It was agreed in the AoA that tariffication would be applied to agricultural products, meaning that quantitative restrictions and variable levies could no longer be used, and that tariffs would be reduced by 36 percent by developed countries and 20 percent by developing countries. These reductions, however, left agricultural tariffs typically much higher than industrial tariffs (Nassar, Arashiro and Jank, 2007). Further progress on the reduction of agricultural tariffs was left to the future negotiations mandated in the AoA.

Domestic support was at very high levels in many developed countries, and was far in excess of the de minimis levels allowed for industrial goods, i.e., 5 percent of the value of production for developed countries and 10 percent for developing countries (Brink, 2011). The high levels of agricultural subsidies could not be reduced to the norms for industrial goods during the Uruguay Round negotiations, and the compromise reached was that each country's subsidy levels would be determined – according to a measure known as the Aggregate Measure of Support (AMS) – and then, with some exceptions, developed countries agreed they would reduce their subsidies by an average 20 percent of their agreed AMS value (Gaisford and Kerr, 2001). Domestic subsidies were also classified into different categories – often referred to as coloured boxes, e.g., amber box, green box, etc. Subsidies classified as non-actionable – green box subsidies – are allowed without limit. Actionable subsidies – amber box – are subject to AMS caps and the 20 percent reduction. Again, movement to the GATT norms for industrial goods was left to the new negotiations mandated in the AoA (Orden, Blandford and Josling, 2011).

Export subsidies are in the prohibited category – red box – in the case of industrial goods. If a country is found to be using a prohibited subsidy it must be immediately withdrawn (Rude, 2007). In the case of agricultural products, a waiver applied, and export subsidies could be used without any effective limit until the AoA (Gaisford and Kerr, 2001). When high domestic prices guaranteed to farmers led to surpluses, export subsidies were used to dispose of the excess. The European Union was a particularly heavy user of export subsidies, as its Common Agricultural Policy (CAP) pricing policies led to surpluses over a range of agricultural products (Gaisford and Kerr, 2001; Warley, 2005). Export subsidies reduced the market share of traditional agricultural exporters, drove down international prices and inhibited the development of export markets for some developing countries. The disruptions to trading patterns led to retaliation and a deterioration in relations between major agricultural producing countries that spilled over to international relations more broadly. The frictions caused by export subsidies in agriculture provided the major spur for the extension of GATT disciplines to agricultural products being on the Uruguay Round negotiating agenda.

After very acrimonious negotiations, it was agreed as part of the AoA that the use of export subsidies would be curtailed – a 36 percent reduction in expenditures and a 21 percent reduction in volume of products receiving such subsidies from developed countries and a 20 percent reduction in expenditures and a 14 percent reduction in volume for developing countries. Developing countries were not, however, heavy users of export subsidies. Of course, this compromise was a long way from the prohibited use of such subsidies in the general GATT rules. Further progress toward prohibition was left to the future negotiations mandated in the AoA.

Hence, the focus of agricultural negotiations in the Doha Development Round has been on completing the Uruguay Round agenda pertaining to the three pillars. Progress on any of the pillars during the Doha Round has proved elusive. Unlike the Uruguay Round, where developed countries were the major contenders, during the Doha Round the major split has been between developing-country and developed-country members. Developing countries have pushed for concessions from developed countries while not wishing to offer to liberalize their own trade practices. Empirical studies suggest that the major benefits of liberalization for developing countries will arise from reductions in barriers to market access and tighter limits on domestic support (Anderson and Valenzuela, 2008). Reforms to export subsidies would benefit developing countries the least when comparing the three pillars. Developing countries, however, make extensive use of both barriers to market access and domestic subsidies and, hence, are reluctant to liberalize these facets of their trade regimes. On the other hand, as suggested above, developing country governments do not make extensive use of export subsidies. Thus, it has been easier for them to push for further reductions in the use of export subsidies because developed countries would have to make major concessions, while developing countries would not.

Export Subsidy Issues in the Doha Round

At the WTO Ministerial in Hong Kong in 2005, what was thought to be a major breakthrough on export subsidies was announced. The European Union agreed to cease using export subsidies for agricultural products. Given that the EU had been the major global user of export subsidies, this was a major concession in the negotiations. The EU was able offer this concession because, over the period since the end of the Uruguay Round, it had undertaken a combination of *box shifting* (e.g., altering subsidy programs into forms that fit in the green box of non-actionable subsidies) and other reforms to the CAP. Thus, while the EU had been winding down its export subsidies, making it easier to make the concession, the important aspect of the commitment was that the EU would eschew any return to using export subsidies in the future. Of course, the prohibition would apply to all members of the WTO if agreement could be reached and would move export subsidy rules for trade in agricultural products to match the general WTO rules on export subsidies.

The EU concession, however, was not unconditional. It was contingent on there being a successful completion of the Doha Development Round as a single undertaking. Of course, that never came to pass. The move away from the single undertaking approach to the piecemeal approach seems to have been accepted by the EU, thus allowing the agreement on export subsidies at the Nairobi Ministerial.

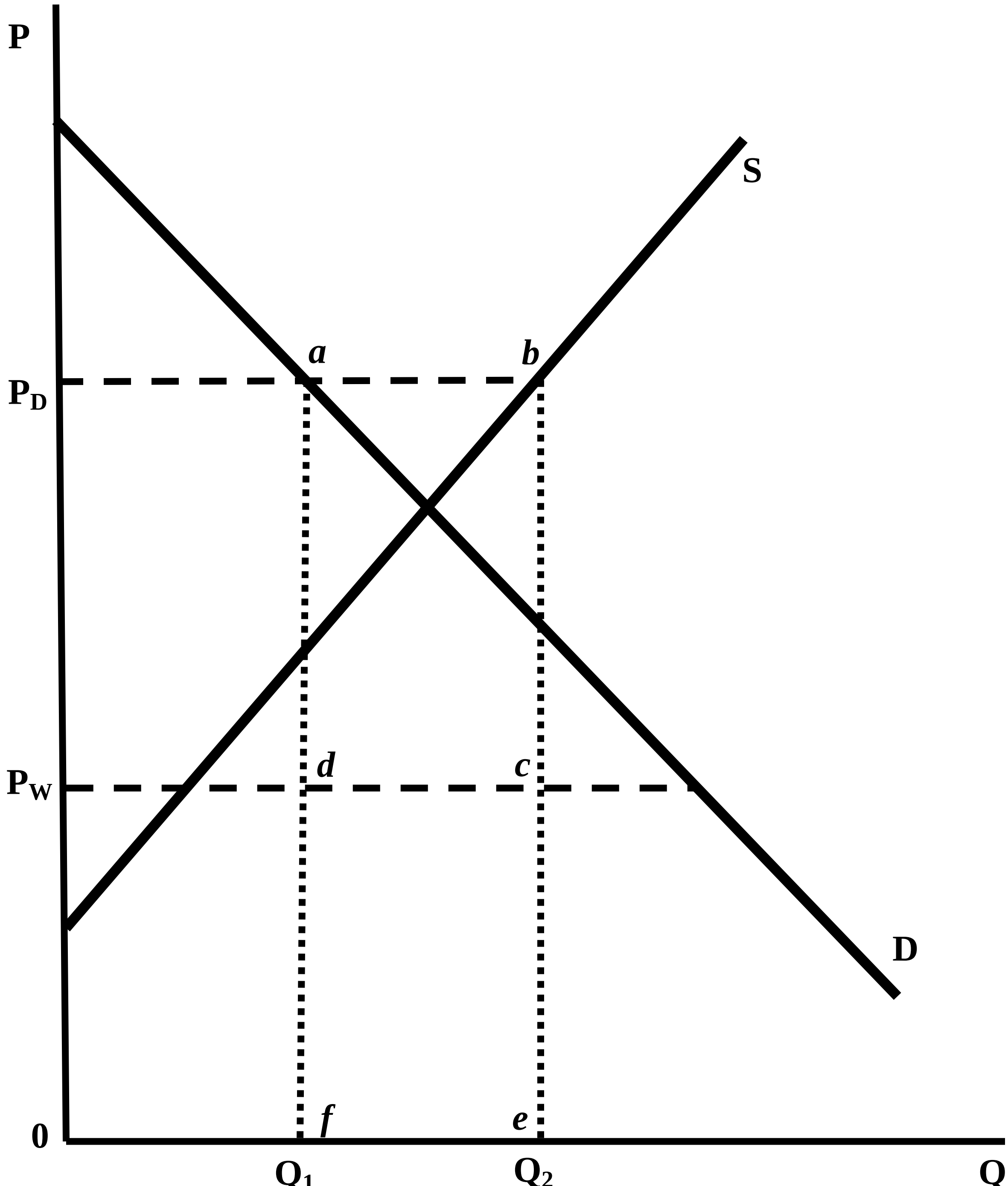
The EU, however, imposed further conditions if it was to abandon its export subsidy program. These related to alternative mechanisms for providing export subsidies. The three alternatives were (1) export credit programs; (2) state trading enterprises; and (3) food aid. The EU’s position was that if it was to give up its use of export subsidies to deal with policy-induced surpluses, other countries should not still be able to use the alternatives either by subsidizing credit for import buyers (Rude, 2007), funneling resources through exporting state trading enterprises (Annand, Buckingham and Kerr, 2001) or using food aid for surplus disposal (Young, 2002). These issues remained unresolved from the 2005 Hong Kong Ministerial until the 2015 Nairobi Ministerial.

The problem of failing to deal with the food aid issue at the same time as removing export subsidies as a policy option for dealing with surpluses is illustrated in figure 1. A policy-induced surplus which requires additional policy measures to dispose of the surplus normally arises when the price received from the market is too low for at least a subset of farmers to remain profitable (Gaisford and Kerr, 2001). In the case of a supplementary policy of export subsidies,[1] the government guarantees farmers a price sufficiently high to return some farmers to profitability – P_D in figure 1. At P_D farmers are willing to produce Q_2, but domestic consumers are only willing to consume Q_1. This leads to a surplus equal to Q_2 minus Q_1.

With an export subsidy policy, the surplus is purchased from farmers at P_D and then sold on the international market at P_W. The cost to the government is area **abcd**. If the use of this mechanism of disposing of surpluses is closed off through a WTO agreement, one alternative available to governments is to dispose of the surplus by declaring it food aid – in other words, moving the surplus out of the domestic market at zero price. Relative to an export subsidy policy, food aid represents an increased budgetary cost – **abef** (>**abcd** in figure 1). From the trade point of view, the additional product moving out of the domestic market is the same although the actual consumers are likely to differ. Only under a specific set of circumstances, however, will the extra product moving into international channels not displace products exported on a commercial basis (i.e., without subsidy) by other exporting countries (Rude, 2007). From this perspective, food aid is subsidized trade. The displacement of unsubsidized exports by subsidized exports is the trade issue pertaining to food aid.

Of course, food aid need not arise from policy-induced surpluses. Food aid can also be sourced on a commercial basis. In recent years, the thinking on food aid has moved from the acquisition and shipment of food from a donor country to the donation of money to international organizations that distribute food aid, with the funds received being used to purchase food locally or regionally in the vicinity of the area where it will be distributed. While much food aid is now provided in a monetary form, it is a mixed system with some countries still acquiring food destined for aid domestically and then shipping it to recipient markets. If all food aid were restricted to monetary donations then there would be little need for WTO rules pertaining to food aid. Decisions at the WTO require unanimity, however, and some countries would not agree to restricting food aid to monetary donations.

Figure 1
Surplus Disposal – Export Subsidy versus Food Aid



Further, if WTO disciplines on food aid proved to be too restrictive, then individuals legitimately requiring food aid might suffer needlessly. During the Doha Round negotiations considerable effort was put into coming up with a workable definition of emergency food aid – in other words food aid that would be exempt from WTO disciplines that attempted to limit food acquired for purposes of surplus disposal being distributed as food aid. Cardwell (2008) provides a detailed discussion of the Doha Development Round issues pertaining to food aid and the proposals for dealing with food aid during the negotiations. The major contentious issues were how to determine whether or not food being proffered as aid was simply disguised surplus disposal; whether the transfer of food would disrupt agricultural production in the recipient country (Cardwell and Kerr, 2009); which institution would be the appropriate determinant of the legitimacy of a particular food aid program (Young, 2002); and what would be the appropriate disciplinary measure if particular food aid shipments were found to be non-compliant with WTO rules on food aid. While the negotiations on food aid were well advanced prior to the Ministerial Meeting in Nairobi (Cardwell, 2008), no agreement had been reached. At the Ministerial in Nairobi most of this prior work appears to have been put aside when the agreement on export subsidies was reached. Thus, the question is raised as to what the Nairobi agreement will mean for closing off food aid as a channel for surplus disposal and the contribution of food aid to food security.

Food Aid in the Nairobi Ministerial Decision on Export Competition

The Nairobi Ministerial Decision addresses two issues relating to food aid: (1) ensuring that the WTO rules do not interfere with the contribution food aid makes to food security and (2) ensuring that food aid is not used as a disguised export subsidy.

Food Security

The introductory paragraph of the Ministerial Decision on Export Competition pertaining to food aid provides a commitment to the food security goal of food aid:

> 22. Members reaffirm their commitment to maintain an adequate level of international food aid, 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. … (WTO, 2015)

This provides a strong and unambiguous commitment to ensuring that trade rules will not constrain food aid in the case of a food security emergency. It should be noted that this strong commitment is solely to food aid provided in the case of an emergency and not to food aid justified on other grounds, for example, those outlined in paragraph 25 of the Ministerial Decision:

> non-emergency development/capacity building food assistance environments where recipient countries or recognized international humanitarian/food entities, such as the United Nations, have requested food assistance, (WTO, 2015)

or those mentioned in paragraph 27:

> short and/or long term food deficit requirements or insufficient agricultural production situations which give rise to chronic hunger and malnutrition in least-developed and net food-importing developing countries. (WTO, 2015)

While one could make arguments that the situations listed in paragraphs 25 and 27 represent those where food security is an issue, it is fairly clear that the intent of the Ministerial Declaration is to restrict aid responses justified on food security grounds to those considered a food emergency.

Sometimes with trade documents it is topics that are not specifically addressed which can have considerable importance. In the Nairobi Ministerial Declaration there is a strong commitment to provide food aid in food emergencies, but there is no indication as to which institution(s) are recognized as competent to determine if an emergency actually exists and, thus, trigger the provision of food aid. In the absence of this being addressed in the Ministerial Declaration, the determinant of when an emergency exists lies with either the potential recipient country or the potential donor country, or with institutions recognized as having this expertise by recipient or donor countries.

The remainder of the Ministerial Declaration's section on food aid, paragraphs 23-32, deals directly or indirectly with constraining surplus disposal. It deals both with methods of procuring food aid and the consequences of surplus disposal.

Surplus Disposal

The second half of the introductory paragraph – 22 – on food aid of the Ministerial Decision deals with constraining non-emergency food aid and, implicitly but not exclusively, with food acquired for purposes of surplus disposal:

> To meet the objective of preventing or minimizing commercial displacement, Members shall ensure that international food aid is provided in full conformity with the disciplines specified in paragraphs 23 to 32, thereby contributing to the objective of preventing commercial displacement. (WTO, 2015)

Paragraph 23 states the members agree that food aid should be *needs driven* and fully in *grant form*. The former means that food aid should not be driven by surplus disposal. The latter means that food aid should not be proffered with strings attached. The remainder of the paragraph re-enforces the *no strings attached* commitment. Paragraph 23 is relatively straight forward – at least in the language of trade agreements – in its goal of removing the potential of using food aid for surplus disposal. From that point on, however, the language becomes ambiguous and sometimes contradictory.

Paragraph 24 reads as follows:

> The provision of food aid shall take into account local market conditions of the same or substitute products. Members shall refrain from providing in-kind international food aid in situations where this would be *reasonably foreseen* to cause an adverse effect on local or regional production of the same or substitute products. In addition, Members shall ensure that international food aid does not *unduly* impact established, functioning commercial markets of agricultural commodities (emphasis added). (WTO, 2015)

In-kind food aid, rather than monetary donations, is the major channel by which surplus disposal disguised as food aid is donated – surplus food will be in this form. Hence, paragraph 24 still leaves open the potential for surplus disposal. If funds are simply donated without strings to institutions that distribute food aid then they can be used to procure food from whichever source of food the food aid institution finds the least costly, thus breaking the link between surplus disposal and food aid procurement.

With the door now open for in-kind aid, the wording in paragraph 24 does not adequately constrain its use. The constraint is defined as situations that could be *reasonably foreseen*. It is not possible to define *reasonably* in the context of a government's subsequent action. Presumably if the activity was actually undertaken, a government would have thought that its perceptions were reasonable. It is possible that a third party could rule on whether what a government had foreseen was reasonable, but no third party is specified. One could envision that another member could request to have a dispute settlement panel decide on reasonableness *ex post* to the giving of in-kind food aid, but by then the surplus could have been dissipated and the recipient's market disrupted and/or commercial imports negatively impacted. No penalty or sanction is included in the Ministerial Declaration for not having reasonable foresight.

In a similar vein, *unduly* is undefinable, particularly when applied speculatively prior to the impact of the in-kind food aid on *established, functioning commercial markets of agricultural commodities* (WTO, 2015) being known. Thus, paragraph 24 does not provide any constraint on the use of food aid arising from surplus disposal beyond that which can be expected from *moral suasion.*

Paragraph 25 exhorts members to provide cash-based aid, but in-kind aid is explicitly allowed. Further, in-kind aid is allowed over a wide range of market conditions including *protracted crises (as defined by the FAO), or non-emergency development/capacity building food assistance environments where recipient countries or recognized international humanitarian/food entities, such as the United Nations, have requested food assistance* (WTO, 2015). Protracted crises, non-emergency development and capacity building have been, historically, major justifications for food aid originating in surplus disposal. Further, United Nations authorization is not specified, the UN is only illustrative. Thus another (donor friendly) institution could provide the cover for food aid arising from surplus disposal.

Paragraph 26 only encourages members to *seek to increasingly procure international food aid from local or regional sources to the extent possible* (WTO, 2015). As a result, the door is left open to procuring product surplus to the donor country's needs.

Monetization – the process whereby food aid is given to governments or non-government development organizations (NGOs) to be sold in the recipient country's market to finance, typically, development projects or the NGO's operations – has been a major channel for food aid derived from surplus disposal. Paragraph 27 deals with monetization. It states,

> Members shall monetize international food aid only where there is a demonstrable need for monetization for the purpose of transport and delivery of the food assistance, or the monetization of international food aid is used to *redress short and/or long term food deficit requirements or insufficient agricultural production situations which give rise to chronic*

> *hunger and malnutrition* in least-developed and net food-importing developing countries (emphasis added). (WTO, 2015)

Food deficit requirements and *insufficient agricultural production* are sufficiently elastic terms that surplus food could be moved through monetization channels. Restricting monetarization solely to least-developed countries and net food-importing countries leaves considerable scope for destinations to relieve surplus pressure. Further, as recipient countries or NGOs directly benefit from the monetized food aid system, they have an incentive to be receptive to such donations.

Paragraphs 28 and 29 specify independent third-party oversight of food distributed through monetized channels, but not for the procurement of food destined for monetization. Paragraph 28 requires a market assessment of a potential recipient of such aid but not of the source from which the food is derived. In other words, there is no *market test* for the source of the food aid.

The language in Paragraph 30 is ambiguous and somewhat contradictory:

> Members commit to allowing maximum flexibility to provide for all types of international food aid in order to maintain needed levels while making efforts to move toward more untied cash-based international food aid in accordance with the Food Assistance Convention. (WTO, 2015)

The first part of the paragraph can be seen as a re-affirmation of the commitment to food security, but it can also be interpreted as keeping the door open to food aid sourced as part of a surplus disposal program. The members have only committed to *making efforts* to move to cash-based aid.

In short, nowhere is surplus disposal as a source of food aid explicitly forbidden. Further, there are no penalties specified if countries do not succumb to the moral suasion embedded in the Ministerial Declaration.

Conclusions

The Nairobi Ministerial Declaration regarding export competition has been touted as a major breakthrough and accomplishment for the WTO in the long, drawn-out, Doha Development Round and, in particular, for the new piecemeal approach to negotiations. The member states have agreed to eschew the future use of export subsidies for agricultural products. This brings the rules for agricultural trade into broad alignment with the general WTO rules pertaining to export subsidies. They are now in the prohibited category of subsidies. Hence, the long process of bringing trade rules for agricultural products into alignment with the general GATT rules agreed during the Uruguay Round has finally been accomplished for one pillar of the AoA's set of special arrangements for agriculture.

To fully eliminate the use of export subsidies, however, food aid must also be disciplined. This is because from one perspective, in-kind food aid can in certain circumstances be considered simply a form of export subsidy. For normal export subsidies the surplus output is sold on the international market for what it will fetch. Transferring the same surplus food to another party as food aid is simply *selling* the surplus at zero price. From an international trade perspective the effect is the same (Gaisford and Kerr, 2001). Thus, if there are no disciplines on food aid the potential for countries to use export subsidies remains.

Of course, the disciplining of food aid is complicated by the concern that the constraints imposed on food aid will inhibit the ability of those whose food security is compromised due to an emergency event to receive the food they require. Hence, there is a need for rules that can achieve both objectives – allow food aid to contribute to food security while at the same time removing the ability to use food aid for surplus disposal. As outlined above, the Nairobi Ministerial Declaration on Export Competition does a good job of attempting to ensure that food aid can flow during an emergency. On the other hand, the disciplines on the use of food aid for purposes of surplus disposal appear to be relatively weak.

The public pronouncements surrounding the Nairobi Ministerial Declaration suggest that new constraints on the use of food aid for surplus disposal were part of the agreement. Close examination of the text, however, suggests the heralded constraints consist of nuanced language along with a considerable degree of trust in the influence of *moral suasion.* Experience, however, suggests that vagueness in language may be employed to escape the intent of rules, and moral suasion is ineffective when difficult domestic circumstances are manifest. It should be remembered that the entire reason why export subsidies for agricultural products became a major issue in the first place arose from the *waiver* on the use of export subsidies in agriculture added to the GATT text in 1955. It states that:

> … such subsidy shall not be applied in a manner which results in that contracting party having *a more than equitable share* of world export trade in that product … (emphasis added). (GATT Article XVI:3)

More than equitable share proved to be legally undefinable and allowed the European Union (and other member states) to use export subsidies without limit (Gaisford and

Kerr, 2001). The language in paragraphs 24 to 30 of the Nairobi Ministerial Declaration is reminiscent of the language that in the past attempted to control the use of export subsidies. It may be that WTO dispute settlement panels will be willing to interpret the wording in the Nairobi Ministerial Declaration, but there is no assurance that a dispute will lead to the use of food aid as a means of surplus disposal being inhibited.

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Endnotes

Endnotes

[1] Alternative supplemental policies could be providing subsidised food to low-income domestic consumers, storing the surplus or destroying the surplus.