The International Regulatory Framework for the Use of GMOs and Products Thereof as Food Aid

Simone VEZZANI*

1. INTRODUCTION

Trade in genetically modified organisms (GMOs) and products thereof has given rise to a number of commercial disputes and still is an area of tension at the international level. While a large amount of literature exists on the application of the precautionary principle to biotechnology in international trade law, less attention has been paid to the international regulatory framework concerning the use of GMOs in food aid donations.

Opinions diverge widely. Part of the international community and some food aid experts have criticised the use of GMOs as food aid, considering it as a strategy aimed at inducing beneficiary countries to remove restrictions on the importation of GM food and crops.¹ Conversely, other commentators have condemned the refusal by some States to accept food aid shipments containing GMOs in situations of severe famine, deeming such conduct to be a serious violation of the right to food, if not a crime against humanity.²

In this context, this paper considers the international legal regime applicable to the use of GMOs in food aid. Food assistance operations must abide by an ample body of applicable principles, standards and rules. As further detailed below, this body includes the Cartagena Protocol on Biosafety, the Food Aid Convention, WTO and human rights law. As far as soft law instruments are concerned, there are many that are relevant to food aid, adopted by the United Nations (UN) and other international organisations, to which the food safety standards of the Codex Alimentarius Commission should be added. Further principles and rules apply to humanitarian assistance for giving relief from hunger to affected populations during (or in the aftermath of) armed conflicts, natural

* Associate Professor of EU Law and Advanced International Law, University of Perugia; e-mail: simone.vezzani@unipg.it. This paper was made possible by funds provided by the Law Department of the University of Perugia (“Ricerca di base 2015”) for the project “Subjective legal positions between (domestic) uncertainties and search for (supranational) effective protection”, coordinated by Professor Luisa Cassetti. I would like to thank the anonymous referees for their valuable comments. The usual disclaimer applies. All the websites quoted in the paper were last visited on 20 September 2017.

¹ N Zerbe, “Feeding the Famine? American Food Aid and the GMO Debate in Southern Africa” (2004) 29 Food Policy 593. It should be noted in this context that, apart from providing GM food aid, the United States Agency for International Development has been sharply criticised for supporting non-governmental organisations which promote the cultivation of GMOs in the African continent (R Carayol, “Bataille autour des semences transgéniques en Afrique”, Le Monde Diplomatique, September 2017, 11).

² See section VI, below, especially notes 46–49.
disasters and similar emergency situations. While donated food should be safe for human consumption, it is widely accepted that certain safety and quality standards may be relaxed. However, from a legal standpoint, this gives rise to many problems relating to coordination among rules, standards and principles to be complied with in the interplay of international food, trade and environmental law.

Other challenging regulatory problems concern enhancing the empowerment of beneficiary populations through a participatory approach, in line with the ownership principle in development cooperation policies, and holding the donors accountable for the damage resulting from the assumption of donated products or their spread into the environment. This paper also inquires whether international assistance programs should abide by food safety and biosecurity laws, regulations and policies of the recipient State, and whether non-scientific factors (such as economic impact or cultural preferences) should also be taken into account.

2. CONCERNS RELATING TO THE PRESENCE OF GMOs IN FOOD AID

Concerns relating to the presence of GMOs in aid shipments are threefold. As is further detailed in the following paragraph, beneficiary countries have occasionally expressed concerns about possible risks to human health associated with the consumption of GM food. More frequently, they have justified refusal of GM food aid based either on environmental risks, or on the socio-economic impact of GM crops. These last two concerns are explicable in light of the fact that food aid shipments are often given in whole grain form and, therefore, contain biologically active genetic materials. Indeed, empirical evidence shows that not rarely portions of donated GM corn or soy grains are set aside by small farmers and peasants in recipient countries to be used as seeds.

As concerns the environmental impact, critics of GM crops argue that they are more greenhouse gas intensive and may jeopardise biodiversity in the long term. Although scientific certainties are (still) lacking, it has been also argued that insect-resistant GMOs may cause harm to non-target species and/or accelerate resistance in insect populations. Another risk which is feared is “gene-pollution”, consisting of cross-pollination and transfer of genetic materials to autochthonous plant varieties (“outcrossing”), especially in centres of origin and diversification.

As concerns the socio-economic impact, GM crops are currently mostly suitable to high-input agriculture, since they require farmers to purchase costly external outputs such as pesticides and herbicides. Furthermore, GM crops are generally patented, which means that farmers are not allowed to save and exchange seeds from their harvest and

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have to pay royalties to patent-holders. The introduction of GM crops may also have a negative long-term impact on the overall farming and agricultural system, displacing local varieties and landraces more resilient and better suited to local conditions. Finally, opponents of agricultural biotechnology complain that coexistence of GM and non-GM crops requires the adoption of expensive measures aimed at segregating the production and distribution chains, in order to allow the production of organic or GM-free products, for which there is an increasingly high demand in the market.

Concerns relating to releasing GMOs into the environment are theoretically distinct from those about food safety. In fact, it is quite possible that a certain GMO may prove to be safe for human consumption, while its cultivation may have an adverse environmental and socio-economic impact. The reverse is true as well. However, in practice it is not easy to disentangle the three profiles, so long as food aid consists of whole grains and other non-treated plant components which are capable of reproducing themselves if released into the environment.

3. THE GMOs FOOD AID CRISIS

The presence of GMOs in food aid should not come as a surprise, if one just considers that the largest donor of food aid (mostly in the form of in-kind aid) is the United States, where a high percentage of cultivated corn and soy are GM and no segregated system for GM and non-GM crops exists. It is plausible to assume that since GMOs started to be commercialised in the mid 1990s, food aid shipments provided to the Global South, in the framework of both bilateral and multilateral cooperation, have often contained (percentages of) GMOs. Aid shipments may contain both GM living plants and products thereof, such as flours, vegetable oils derived from soy, corn or canola, milk produced from transgenic soybeans, etc. In the near future, food aid might also contain GM animals (such as transgenic fishes) or products thereof authorised for human consumption.

International practice shows several cases in which food aid shipments were rejected by recipient countries because they contained GMOs. The first reported case dates back to 1999: Ecuador refused to accept several tonnes of GM soy donated by the United States and the cargo was finally destroyed. In any case, the most serious GMO food aid crisis was in 2002, when the United States delivered as food aid some 500,000 tonnes of corn kernels through the World Food Programme (WFP) and a number of NGOs. Recipient countries were southern African States threatened with severe famine. Of
them, Zambia, initially followed by Zimbabwe, rejected the aid on ground that it contained around 75% GMOs. Mozambique, Swaziland and Lesotho accepted the aid, but only on condition that the grains were treated, so that local farmers could not plant them. A similar position was taken by other States, which decided to monitor the distribution of cargos, in order to ensure that the donated grains were not used as seeds.12 In March 2016, the Minister of Agriculture of Zimbabwe confirmed the refusal of genetically modified corn as food aid, even if not excluding that the Government may later consider accepting it “provided it is trucked directly to millers under security escort”.13

In the above-mentioned cases, the States which rejected food aid were mainly concerned by the risks associated with the spread of GM crops in their territory, as a result of spillage or planting of whole grains. Concerns regarding possible environmental damage have been generally accompanied by the fear that the spread of GM crops may threaten the receiving State’s food sovereignty and exports to the EU and other countries where such GMOs are not authorised for human consumption.

More rarely food safety considerations came into play. Notably, in the case of Zambia, a scientific delegation studied the food and recommended that it not be accepted, on the ground of health concerns. Furthermore, the Zambian President declared: “[i]f [GM food] is safe, then we will give it to our people. But if it is not, then we would rather starve than get something toxic”.14 Similar food safety concerns have been reported as justifying India’s refusal of a shipment of food aid from the United States containing corn and soy.15 In a few cases, food aid shipments were found to contain traces of “StarLink”, a GMO that has been authorised exclusively for animal feed or industrial use, as it contains an insecticidal protein having proven allergenic properties.16

Biosafety concerns have even led some African international organisations to adopt guidelines on receiving GM food aid, in order to promote the harmonisation at a regional level with regard to both risk assessment and management and the labelling of shipments that contain or may contain GMOs17. These include the “Guidelines on Handling GM Food Aid” adopted in 2003 by Southern African Development Community (SADC)18 – requiring exporters to mill grain before it is transported to the final destination – and the 2014 Common Market for Eastern and Southern Africa (COMESA) “Policy on Biotechnology and Biosafety”.19

16 ibid.
17 For a general overview see DP Keetch et al (eds), Biosafety in Africa: Experiences and Best Practices (East Lansing, Michigan State University Press, 2014).
A number of other food aid disputes are known, where food aid donations were refused by recipient countries because of the presence of GMOs/derived products. Among them, the case of Sudan is particularly significant. Although it had passed a law banning the import of GM products, in 2003 Sudan agreed to waive the ban in order to receive GM food aid, according to some authors after the US government had threatened to cut all its food aid. The waiver was lifted in 2007, when Sudan also acquired instruments for ascertaining the presence of GMOs in food aid.

The refusal of GM food aid in the 2000s opened a wide debate in the international donors’ community and is considered, by a number of observers, as one of the reasons for the exacerbation of the EU-United States commercial dispute which led to the filing of the Biotech Products complaint before the WTO. On one side, the EU claimed that the United States used food aid to push more acceptance of GMOs in Africa and promote the interests of US agribusiness corporations. On the other side, the United States charged that the EU was influencing the choices of African countries and promoting its anti-GMOS agenda.

4. FOOD SAFETY CONSIDERATIONS

Similarly to conventional varieties obtained through mutagenesis or traditional breeding techniques, GM plants may contain toxins or, in any case, have nutritionally deleterious effects for humans. Notably, it is proven that the introduction of a transgene may cause allergies in people allergic to the protein coded by the introduced DNA. For instance, Pioneer created a GM variety of soy (which in the end was not authorised for commercialisation) containing DNA derived from a Brazil nut and it was found that this variety caused allergies in people not allergic to conventional soy.

What remains disputed is whether GM food may produce not-yet detected new risks in the long term, either due to the presence of unknown allergens or toxins, or due to gene transfer to human cells as a consequence of eating GM food, possibly through intestinal bacteria. According to present scientific knowledge, there is no proof of the latter risk to

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20 Said countries also include Nicaragua and Bolivia (Clapp, supra note 11).
22 In the same year, a shipment of cereals from the WFP was temporarily held up by the Sudanese authorities, on suspicion that the donated grains were genetically modified, before being finally released (S Moola and V Munnik, GMOs in Africa: Food and Agriculture. Status Report 2007 (The African Centre for Biosafety, 2007) 14).
human health;\textsuperscript{25} however, part of the scientific community claims that insufficient scientific evidence still exists and the precautionary principle continues to be invoked.\textsuperscript{26} As is well known, States use very different approaches in conducting risk assessment of GMOs.\textsuperscript{27} According to US law, GM products are considered to be equivalent to the non-GM ones and restrictions are justified only if risks for human health have been scientifically proven.\textsuperscript{28} To the contrary, European legislation emphasises the precautionary principle, according to which “[w]here there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent”.\textsuperscript{29}

Firmly established as a “general principle of food law”,\textsuperscript{30} the precautionary principle has inspired EU legislation harmonising risk assessment and management procedures for the approval of GM food and feed and establishing labelling obligations.\textsuperscript{31} In particular, risk assessment is undertaken by EFSA, which has to evaluate whether the applicant for authorisation for a GM product has adequately and sufficiently demonstrated that the product has no adverse effect on human or animal health or the environment.\textsuperscript{32} While risk assessment has an exclusively and strictly scientific basis, the risk management decision of the Commission can also take into account “other legitimate factors”\textsuperscript{33} not relating to the protection of health or the environment, such as social or ethical

\textsuperscript{25} For instance, as concerns GMOs authorised for food use in the EU, no risk for human health has been detected by EFSA.


\textsuperscript{27} L. Bodiguel and M. Cardwell (eds), The Regulation of Genetically Modified Organisms: Comparative Approaches (Oxford, Oxford University Press, 2010).


\textsuperscript{29} ECJ, Case C-157/96, R v Ministry of Agriculture, Fisheries and Food [1998] ECR I-2265, at para 63. On the precautionary principle in EU food law see A Alemanno, Trade in Food: Regulatory and Judicial Approaches in the EC and the WTO (London, Cameron May, 2007) 105–160 (for a comparison between the EU and the US approach see ibid 216–223).


\textsuperscript{32} EFSA has also developed some guidelines concerning the toxicological assessment and assessment of potential allergenicity of GMOs: “Guidance for Risk Assessment of Food and Feed from GM Plants” (2011); “Guidance on Allergenicity Assessment of Genetically Modified Plants” (2017); see also EFSA, “Guidance on the Environmental Risk Assessment of Genetically Modified Plants” (2010). All these documents can be read at <www.efsa.europa.eu/en/applications/gmo/regulationsandguidance>.

\textsuperscript{33} Regulation No 1829/2003, supra note 31, Art 7.
concerns.\textsuperscript{34} It should also be noted that – as far as release into the environment is concerned – the EU regulatory framework dramatically changed with the adoption of Directive (EU) No 2015/412, which allows individual Member States to prohibit cultivating GM seeds or propagating materials within their own territory – even if the placing of said seed or materials on the market has been authorised at the EU level – based on non-scientific considerations such as socio-economic impacts, land use or agricultural policy objectives.\textsuperscript{35}

A compromise solution between the US and the European model has been found by the Codex Alimentarius Commission, which in 2003 adopted a set of guidelines for the conduct of food safety assessment of foods derived from modern biotechnologies, which has been taken as a source of inspiration by several national regulators.\textsuperscript{36}

As underlined above, food safety concerns have played a minor role in the refusal of GM commodities. This is quite comprehensible, especially in cases where the imported product has undergone scientific risk assessment and has been duly authorised in the donor country for many years, in the absence of any scientific evidence that it is harmful to human health. However, it should not pass unnoticed that people who benefit from food assistance, especially in emergency situations, generally have a very poor diet, mostly based on one single cereal (for instance corn or rice). This consideration should be taken into account when evaluating the significance of the toxicological data relating to the consumption of GM products by individuals in the Global North, who have a much more varied diet.

5. BIOSAFETY ASPECTS RELATING TO TRANSBOUNDARY MOVEMENTS OF GMOS

As concerns environmental risks, the Convention on Biological Diversity (Rio, 1992) recognises the necessity of regulating, managing or controlling “the risks associated with the use and release of living modified organisms resulting from biotechnology which are likely to have adverse environmental impacts that could affect the conservation and sustainable use of biological diversity, taking into account the risks to human health”.\textsuperscript{37}

Furthermore, the Convention deals with transboundary movements of living modified organisms (LMOs) and provides that the Party where the modified organisms are to be introduced should be notified and provided with “any available information about the


\textsuperscript{36} Doc CAC/GL 45-2003, with Annexes adopted in 2008 and amended in 2011. The Guidelines only deal with the safety and nutritional aspects of biotechnologies. Although they do not expressly embody the precautionary principle, they recognise that unintended and unexpected effects may occur due to the introduction of transgenes and are based on the principle of pre-market approval and pre-market safety assessment.

\textsuperscript{37} Convention on Biological Diversity, opened for signature at the Earth Summit in Rio de Janeiro on 5 June 1992 and entered into force on 29 December 1993, 31 International Legal Materials 818 (1992), Art 8(g).
use and safety regulations required by that Contracting Party in handling such organisms, as well as any available information on the potential adverse impact of the specific organisms concerned to the Contracting Party into which those organisms are to be introduced” (Article 19(4)). These provisions are binding for all 196 Parties to the Convention. It should be noted, incidentally, that the deliberate release of GMOs into the environment is also governed by the Aarhus Convention, adopted a few years after Rio, which binds States Parties to ensure information and the participation of the public in decision-making.38

Since it was not possible during the Earth Summit to agree more detailed biosafety obligations, the Biodiversity Convention, at Article 19(3), recognises the opportunity of concluding a Protocol specifically regulating the transfer and use of LMOs which might have adverse effects on the conservation and sustainable use of biological diversity. The Protocol was finally adopted on 29 January 2000 in Cartagena, mostly at the request of developing countries, especially in Africa, which feared becoming a testing ground for potentially harmful technologies.39 LMOs are defined in the Protocol (Article 3(f)) as “any living organism that possesses a novel combination of genetic material obtained through the use of modern biotechnology”. For the present purposes, LMO will be used as a synonym for GMO. Although food aid is not mentioned in the Biosafety Protocol, it is undisputed that this last one also applies to grain food aid. Instead, derived products such as flours, vegetable oils etc are not included within the Protocol’s scope of application, as they are not capable of transferring or replicating genetic material.40

1. The Cartagena Protocol

The Biosafety Protocol is based on the assumption that GMOs are inherently different from non-GM organisms and carry special risks. Its primary objective is to ensure that contracting Parties are given the necessary information before agreeing to the import of LMOs into their territory. Modelled in several respects upon the international treaties on transboundary movements of hazardous wastes, the Protocol is based on the principle of “Advance Informed Agreement” (AIA), according to which intended movements of LMOs have to be notified in advance to the Party of import and may proceed only after said Party has given its written consent. Decisions by the receiving State must be taken as a result of a risk assessment procedure, according to what is established under Article 15

38 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998), 38 International Legal Materials 517 (1999), Art 6(11): “Each Party shall, within the framework of its national law, apply, to the extent feasible and appropriate, provisions of this article to decisions on whether to permit the deliberate release of genetically modified organisms into the environment”. In 2005, Parties to the Aarhus Convention adopted an amendment to the Convention detailing obligations on public participation in GMO decisions, which however has not yet reached the number of ratifications necessary to enter into force (Decision II/1, adopted at the second meeting of the Parties held on 25–27 May 2005).


and Annex III of the Protocol, and should be based on the precautionary principle (Article 10(6)). Furthermore, pursuant to Article 26, the socio-economic impact of LMOs can also be taken into account in national biosafety regulations.

The Protocol distinguishes between two categories of LMOs: (a) those intended for dissemination into the environment (such as seeds for planting and animal breeding stocks); and (b) those intended for direct use as food, feed or processing (LMO-FFPs). According to Article 7(1), the AIA procedure applies to the first transboundary movement of the first category of LMOs. LMO-FFPs, on the other hand, are subject to a less onerous regime under Article 11. The latter mechanism requires each Party in which domestic use of a LMO-FFPS is allowed to inform the other Parties through the Biosafety Clearing House and communicate all the relevant information on the basis of which other Parties may make decisions on imports. In any case, States maintain the right to ban imports (or to subject them to special conditions, such as the milling of grains) on a precautionary basis in case of lack of scientifi c certainty (Article 11(8)).

The Protocol also lays the framework for safe handling, transport, packaging and identification. Pursuant to Article 18(2)(a), each Party shall take measures to require that documentation accompanying LMO-FFPS “clearly identifies that they ‘may contain’ living modified organisms and are not intended for intentional introduction into the environment, as well as a contact point for further information”. The Conference of the Parties, serving as the meeting of the Parties to the Protocol, has adopted several decisions containing more detailed requirements for this purpose.41

From an institutional point of view, the Biosafety Clearing House (BCH) established by the Protocol facilitates the exchange of information and technical cooperation. Under Article 11, the contracting Parties which have approved a particular GMO to be put on the market for human consumption have to transmit all relevant information to the BCH, including a risk assessment report evidencing potential risks for human health. Furthermore, each contracting Party has to create a national authority to implement the AIA procedure.

In the light of the preceding considerations, the Cartagena Protocol binds State Parties which are providers of GM food aid to respect strict obligations concerning notification and labelling, while at the same time allowing recipient States not to give their consent based on health or environmental concerns, or simply for fear of negative socio-economic impact. Of course, the importance of the Protocol is reduced by the fact that the most important producers and exporters of GMOs, including the United States, Canada, Australia and South Korea, are not contracting Parties. In any case, receiving countries not having the necessary technical capabilities to carry out adequate risk assessment activities may benefit from the scientific analysis carried out by other States and international organisations which has been shared through the BCH.

2. The Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress

As an extension of the Cartagena Protocol, on 15 October 2010, the Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress (henceforward: “Supplementary Protocol”) was adopted. Currently (September 2017) the Supplementary Protocol has

41 See, COP-MOP Decision BS-I/6 and other subsequent decisions on the same topic.
been ratified by 38 States and needs two more instruments of ratification, acceptance, approval or accession to enter into force. It aims at ensuring accountability in case of significant adverse impact on the environment and human health, as a consequence of the transboundary trade and transport of LMOs. More precisely it binds contracting Parties to provide for effective liability and redress mechanisms in their domestic legislation, either through existing civil liability law or by enacting ad hoc legislation.

One of the damage scenarios envisaged by the negotiating Parties regards exactly an intentional transboundary movement of LMOs for the purpose of food aid. It should be also noted that, as we can evince from the travaux préparatoires, the Supplementary Protocol may apply, not only to LMOs, but also “to damage caused by [processed materials that are of living modified organism-origin], provided that a causal link is established between the damage and the living modified organism in question”.

As underlined by the former Special Rapporteur on the Right to Food, Olivier De Schutter, in the context of food aid assistance the improvement of accountability mechanisms and accessible remedies, which are currently very rudimentary, remains particularly challenging. The enactment by beneficiary countries of legislation concerning GM food and crops liability would certainly contribute to make donors more accountable for damages resulting from the assumption of donated products and their diffusion into the environment.

6. RELEVANT PRINCIPLES OF FOOD ASSISTANCE: THE PRINCIPLE OF RECEIVING STATE’S CONSENT

The biosafety perspective is not sufficient to establish when refusal of food aid may be lawful or amount to an internationally wrongful act. Due account must be also given to applicable international rules and principles concerning food assistance. As acknowledged by the 2003 Bruges resolution of the Institute of International Law about humanitarian assistance, the provision of external assistance requires the consent of the affected State. Nevertheless, a State facing a situation of emergency is under an obligation to seek humanitarian assistance and to accept it when offered in good faith by donor States or international organisations. More recently, the same principle has been confirmed by the International Law Commission’s 2016 Draft articles on the protection of persons in the event of disasters, whose Article 11 provides as follows: “[t]o the

43 UNEP/CBD/BS/COP-MOP/5/17, at para 133.
extent that a disaster manifestly exceeds its national response capacity, the affected State has the duty to seek assistance from, as appropriate, other States, the United Nations, and other potential assisting actors”. It is commonly agreed that not accepting food aid might amount to a violation of the *erga omnes* obligation to respect the right to food. Even more seriously, capricious or arbitrary refusal of food aid might, in extreme circumstances, amount to an international crime, implying the individual criminal responsibility of the perpetrators. However, opinions diverge on what constitutes an arbitrary refusal.

Both the Bruges resolution and the ILC’s Draft Articles recognise that assistance can be lawfully subjected to certain conditions and, accordingly, also refused for valid reasons. In particular, under Article 14 of the ILC’s Draft, “[t]he affected State may place conditions on the provision of external assistance … in accordance with … applicable rules of international law, and the national law of the affected State. Conditions shall take into account the identified needs of the persons affected by disasters and the quality of the assistance”. The Commentary expressly clarifies that “inclusion of the word ‘quality’ is meant to ensure that affected States have the right to reject assistance that is not necessary or that may be harmful. Conditions may include restrictions based on, inter alia, safety, security, nutrition and cultural appropriateness.”

The reference to cultural appropriateness and to national law considered in its entirety (which may well include biosafety laws and regulations) reveals that, according to the ILC, it would not be unreasonable for a State to require as a condition for acceptance of food aid the absence of GMOs and derived products, also based on concerns unrelated to food safety. This approach is in line with most recent trends in international law. In fact, a human rights approach to food assistance requires that beneficiaries are provided with an amount of food which is adequate, respects local dietary preferences and is adapted to the different social and anthropological contexts. Furthermore, also according to the emerging “food sovereignty” paradigm, States should be accorded the right to define their own agriculture and food policies, respecting cultural preferences and development priorities. After all, as revealed by the EU experience concerning pre-market authorisation of GMOs, in several donor countries social and

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48 According to many observers, an example of unreasonable refusal of food assistance is provided by the conduct of the Government of Myanmar during the food crisis caused by the Nargis cyclone in 2008, where foreign humanitarian operators were not allowed to enter the country for a long time. A very debated issue is also whether the so-called “responsibility to protect”, which has emerged in UN Security Council practice, implies a duty for donor States to provide food aid when certain specific conditions are met: S Ford, “Is the Failure to Respond Appropriately to a Natural Disaster a Crime Against Humanity? The Responsibility to Protect and Individual Criminal Responsibility in the Aftermath of Cyclone Nargis” (2010) 38 Denver Journal of International Law and Policy 227.


50 Commentary to Art 14 of the ILC’s Draft Articles, supra note 47, para 9.

51 Committee on Economic, Social and Cultural Rights, General Comment No 12 on the right to adequate food (Art 11), 12 May 1999, UN Doc E/C.12/1999/5. For an analysis of recent trends concerning the protection of the right to food in international law see L Chiussi, “Food for Thought on the Right to Food” (2015) 70 La Comunità internazionale 355.

ethical concerns are among those legitimate factors that can be taken into account in risk management decision making.53

1. The Food Assistance Convention

An elaborated set of principles on how to design, implement and evaluate food assistance programmes has been agreed in the 2012 Food Assistance Convention, concluded by the most important food donors, including the EU and the United States, and replacing the 1967 Food Aid Convention, as further revised.54 As summarised by La Chimia, the 2012 “Convention is the manifesto of food assistance; it set benchmarks for all donors to follow when providing food assistance and is relevant when assessing donors’ performance”.55 The Convention has marked a shift from the quantitative, and largely donor-centred and top-down approach of its predecessors.56 It “breaks with the legal laissez-faire that characterizes the aid sector in general and the assumption that aid is a charitable activity and donors can freely chose what, if and when donate”.57

In line with the OECD Paris Declaration on Aid Effectiveness of 2005,58 the 2012 Convention recognises donor States’ obligation to respect the principles of ownership and beneficiaries’ participation in development cooperation policies.59 This new approach should guarantee that food assistance is designed and implemented in ways more consistent with agreed international obligations in the field of human rights and sustainable development, through participatory decision making in all phases of the assistance programmes (ex-ante assessment, scheduling and implementation, monitoring and ex-post evaluation). Particularly relevant, for the present purposes, is Article 4(3), which defines eligible products as “products for human consumption that comply with relevant national policies and legislation of the country of operation, including, as appropriate, applicable international food safety and quality standards…”. This provision is particularly clear in affirming that donors have to comply with the recipient State’s policies and legislations, and innovates with respect to the previous Food Aid Conventions, which just referred to international food safety standards. As convincingly argued by La Chimia, “Article 4.3 is important in the context of current debate on Genetically Modified Food (GM Food). For example, donors who in the past

53 See supra note 34.
57 La Chimia, supra note 55, 134.
59 Donor States’ obligation to respect the principle of ownership in development cooperation policies has been particularly emphasised by the former Special Rapporteur on the Right to Food, Olivier De Schutter, supra note 44; id, “The Transformative Potential of the Right to Food”, UN Doc A/HRC/25/57, 24 January 2014, 28.
have tried to overcome recipients’ ban to GM food aid would now be in breach of the Convention if such ban is part of beneficiaries’ national policies and legislation”.60

7. FOOD AID UNDER THE LENS OF WTO LAW

Not surprisingly, one of the most controversial topics during the negotiation of the Cartagena Protocol was its relationship with trade agreements, which was finally left unclear by some contradictory provisions.61 The extent to which WTO law allows member States to adopt restrictive trade measures based on a precautionary approach is hotly debated. It is worth noting that whether a WTO member may legitimately prohibit the importation of GM products on precautionary grounds, in the absence of scientific certainties concerning the risks to human health and the environment, was left unresolved by the EC-Biotech Products report:62 the WTO panel limited itself to finding that the EC moratorium constituted a violation of procedural obligations under the SPS Agreement, and avoided tackling the most controversial topics.63 This is not the place to examine this complex and much-explored issue.

The question that needs to be tackled here is whether food aid falls within the scope of application of WTO law. Of course, provision of food aid, either in fully grant form or on concessional terms, is distinct from a commercial trade transactions. However, this does not mean that food aid is not subject to WTO law. This conclusion is supported by the Food Assistance Convention itself, whose Article 3 affirms the prevalence of WTO obligations over the Convention.64 The main reason why Article 3 has been introduced is that in-kind tied aid may circumvent obligations under the WTO Agreement on Agriculture, concerning reduction of export credits and subsidies.65 This problem has been lastly addressed in the 2015 WTO “Nairobi Package”.66

Having established that food aid is subject to WTO obligation, the question arises of whether the ban of food aid containing GMOs may be prohibited under WTO law. One might argue that it is not very likely that a donor State might invoke WTO law against another Party that has refused to accept food assistance. However, this is not an entirely hypothetical scenario. In WTO proceedings, a State complaining about a WTO breach might find it a good strategy to insist on the fact that the respondent State is starving its

60 La Chimia, supra note 55, 118.
64 Art 3 reads as follows: “nothing in this Convention shall derogate from any existing or future WTO obligations applicable between Parties. In case of conflict between such obligations and this Convention, the former shall prevail. Nothing in this Convention will prejudice the positions that a Party may adopt in any negotiations in the WTO”. For a comment on this point see La Chimia, supra note 55, 129–133.
66 WTO Ministerial Decision of 19 December 2015 on Export Competition (WT/MIN(15)/45) paras 22–32.
population for fear of purely hypothetical health risks, by refusing food aid shipments in the event of natural disasters or humanitarian crisis.

The present author believes that a donor State should not invoke WTO law (alleging for instance that the refusal of GM food aid constitutes a violation of the SPS Agreement) if it has voluntarily offered to provide food assistance to the advantage of another State and on a non-commercial basis. As also emphasised by Article 3(3) of the Dispute Settlement Understanding, the main objective of the WTO is the “maintenance of a proper balance” between the benefits accruing to each Contracting Party under the covered agreements. Clearly enough, according to the system’s logic, the donor State cannot demonstrate that it has been deprived of any current or expected benefit because of another State’s refusal to accept some donated food.

Another question that arises is the following: if a State accepts certain agricultural products and foodstuffs as food aid, is it precluded from subsequently invoking sanitary or phytosanitary reasons to ban the importation of the same food items on a commercial basis? It is submitted that the answer is no. No consequences under WTO law should be derived from food safety standards used by recipient countries when accepting food aid containing GMOs. It should be noted in this regard that much domestic legislation concerning food donations to poor people within State boundaries allows the lowering of certain high-level safety and quality standards. The same derogation from safety or environmental standards applicable in commercial transactions should be allowed a fortiori as concerns acceptance of international food aid, especially in food emergency situations (humanitarian assistance and disaster relief).

8. DONORS’ POLICIES FOR GM FOOD AID

An analysis of the international practice concerning food aid assistance supports the view that donor States and international organisations should comply with receiving States’ biosafety and food safety legislation when providing food assistance. Since the 2002 food aid crisis, the UN acknowledged that “[i]t is UN policy that the decision with regard to the acceptance of GM commodities as part of food aid transactions rests with the recipient countries […]. It is WFP policy that all donated food meet the food safety standards of both the donor and recipient countries and all applicable international standards, guidelines and recommendations”. The practice of the WFP is particularly relevant, considering that almost all multilateral food aid is currently delivered through this UN Agency. In 2004, the WFP issued some “Operational Guidelines on the Donation of Food derived from Modern Biotechnology”, confirming the Organization’s engagement to honor any restriction posed by donor and recipient countries on donations, purchase or receipt of GMOs/biotech food. As we can evince from this document, WFP respects bans to GM imports, as well as sovereign decisions.
made by recipient countries, requiring GM commodities to be subjected to special treatments such as milling.\textsuperscript{70}

A soft law instrument on international humanitarian assistance, the “Sphere Standards”, affirms that “Genetically modified (GMO) seeds should not be distributed unless they have been approved by the local Authorities”.\textsuperscript{71} Even if it is referring to operations in support of local agriculture, this recommendation supports the view that consent of the receiving State is needed for the distribution of whole grain food aid, as an expression of the same principle that release of GMOs into the environment should need the informed consent of the receiving State.

As concerns EU food aid, it is subject to Regulation (EC) No 1946/2003, which implements the Cartagena Protocol.\textsuperscript{72} Furthermore, the European Commission’s policy document on humanitarian food assistance (adopted in 2010 and revised in 2013) recognises that, “in support of the ‘do not harm’ principle, humanitarian food assistance partners are expected to safeguard the interests of their beneficiaries in the selection of food commodities and agricultural inputs (concerning safety, appropriateness and effectiveness), whilst also conforming with the relevant national policies and legislation in the country of operation”.\textsuperscript{73}

Finally, it is quite significant to note that even the United States Department of Agriculture, which is the main provider of in-kind food aid containing GMOs, has acknowledged that US aid providers should comply with biosafety regulations of the recipient countries and that shipments of LMOs should be accompanied by a declaration that the shipments may contain LMOs.\textsuperscript{74}

Coming to non-State actors, policies on GM food aid have been adopted by some NGOs involved in food assistance operations and are in line with the most recent trend toward receiving States’ ownership. Some NGOs have voluntarily adopted a moratorium on the use of whole kernel GM crops. A similar approach has been adopted by other NGOs, such as ACT Alliance. Whilst this last one has committed itself not to buy any GM food and not to distribute whole GM grains as food aid, it has also established that “[i]f the distribution of donated GM food aid is unavoidable, in order to alleviate a serious hunger situation, and there is no other alternative and timely solution, the members of ACT Alliance in their field programs will first ensure that: - all beneficiaries have a right to know the origin of the food available and if they are genetically modified; - all beneficiaries have a right to choose and decide if they want GM food or not”.\textsuperscript{75}

\textsuperscript{70} ibid.

\textsuperscript{71} Humanitarian Charter and Minimum Standards in Humanitarian Response (The Sphere Project, 2011) 207.


\textsuperscript{74} USDA, “Notice to U.S. Food Aid Program Partners. Guidance for Meeting Documentation Requirements for Shipments of LMO’s for Food, Feed, or for Processing Under the Cartagena Protocol on Biosafety”, at \texttt{<www.google.it/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjwsPS37TaHUGmBoKHqtsLMAMM&url=http\%3A\%2F\%2Fcdn.biodiversidadla.org\%2Fcontent\%2Fdownload\%2F3732\%2F11121\%2Fversion\%2F1\%2Ffile\%2FUSDA.pdf&usg=AFQjCNhA3jh0vD4r0D5s9MEvbtEaj0J9Pg&sig2=Hd-ke4BLP1AFyykGec3Lw>.

9. CONCLUDING REMARKS

The provision of traditional in-kind food aid has been frequently criticised for adversely affecting the livelihoods of small local farmers and manufacturers, increasing dependency of recipient States on food imports and producing adverse impacts on the environment. In order to mitigate these side effects, the current approach of UN institutions and of the EU is to give preference to cash-based donations and to shift towards the purchase of local food, or at least of food products from neighbouring poor countries. Nevertheless, the timely provision of in-kind food aid remains necessary to meet the basic needs of the most vulnerable populations in situations of extreme poverty and in the event of sudden-impact natural disasters and humanitarian crisis, where the population is also faced with a sanitary emergency due to lack of access to determinants of health. It is worth noting that, as denounced by the UN Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, Stephen O’Brien, the world is currently confronted with the worst humanitarian crisis since 1945, with 20 million people facing starvation in Syria, Yemen, South Sudan, Somalia and Nigeria.

In this context, more than a decade after the outbreak of the food aid crisis, food aid containing GMOs or products thereof still is a controversial topic, due to wide differences among national legislations on risk assessment, risk management and the labelling of GM products. International practice clearly reveals that receiving States are mainly concerned by the environmental risks and socio-economic impacts of GM crops. It is not possible to doubt that movements of food aid involving whole grain or any other propagative plant materials, though intended for use as food (LMO-FFPS), are within the scope of application of the Cartagena Protocol. According to it, recipients of food aid must be notified if a shipment contains GMOs and are free to decide whether to accept or reject it, including on a precautionary basis in case of lack of scientific certainties. Beneficiary countries are allowed to impose specific restrictions, such as accepting only milled or processed grains which cannot germinate (or requiring such treatments during the growing season). In addition to this, whole grains which are LMOs should be accompanied by appropriate shipping documentation, if destined for or to be transshipped through Cartagena Protocol Parties.

It is argued that all donors of food aid should comply with applicable national and international biosafety standards. As also recognised by the WFP, receiving States have the right to choose their level of protection and eventually to impose bans, even in case of insufficient evidence of detrimental effects for human health and the environment. They should not be faulted for adopting restrictive measures on the basis of WTO law. Conversely, different sets of food safety standards should be allowed concerning, on one side, the commercialisation of GMOs and products thereof and, on the other side, their importation as food aid.


All donors should put in place appropriate strategies to handle situations where recipient countries do not accept GMOs and products thereof as food aid. For their part, a bona fide approach would require beneficiary States to declare in advance restrictions on the acceptance of food aid containing GMOs, so that food aid agencies are prepared to provide timely alternative commodities. A database containing such information might be administered by WFO, possibly in conjunction with FAO and the Biosafety Clearing House. In any case processed foods, which are not capable of reproducing themselves if introduced into the environment, should be preferred to whole kernel GM crops. This would isolate food safety concerns, by eliminating all the environmental and socio-economic risks feared by receiving States. Abandoning the use of whole kernel grains also has its advantages from a policy point of view. Though providing food aid in a form other than grain may involve extra costs and cause shipment delays, as emphasised by a note submitted to the WFP Executive Board in 2002, providing milled grains is “desirable as part of cereal fortification, a strategy aimed at enhancing the nutritional impact of ratios both to contend with the possibility of incomplete rations and to address the special nutritional needs of those with HIV/AIDS”. 78

While international donors are increasingly taking into account receiving States’ biosecurity and biosafety standards in the ex ante assessment and scheduling phases, independent mechanisms are still particularly lacking for monitoring the implementation of food assistance programmes. Pending the entry into force of the Nagoya-Kuala Lumpur Supplementary Protocol, equally lacking are accessible and effective remedies to hold donors accountable for damages resulting from the assumption of donated products or from their dissemination into the environment.