

Consumers International's Decision-Making in the Global Market

Codex Briefing Paper

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Prologue

The constitutional foundation of Consumers International (CI) is consumers rights, such as the right to be informed, the right to safety and the right to choose. Such a rights based foundation, for example, to consumer safety, is not recognized as a legitimate factor in how the Codex Alimentarius Commission (Codex) elaborates food standards to carry out its constitutional mandate to protect consumer health and foster fair practices in the international trade of food. Codex, however, does recognize the economic impact of food standards on Codex members and their companies as a legitimate factor to take into account in standard setting, particularly at Steps 3 and 5 of the eight Step Codex procedure for elaboration of standards.¹ Since the World Trade Organization Agreement on Trade Related Application of Sanitary Phytosanitary Measures (SPS Agreement) recognized Codex standards as presumptively conforming to the objectives of the SPS Agreement, the pressure to elaborate standards to minimize trade barriers, rather than to maximize consumer protection, has been overwhelming.

Although a rights-based approach to consumer protection is illegitimate in Codex, CI, as a non-governmental organization accredited to participate in Codex negotiations, has tried to reduce the dominance of the least trade restrictive approach to food standard setting in Codex. CI has sought to enhance consumer organization participation in the expert consultations that are to provide the scientific basis for standard setting. CI has also worked to orient the constitutional parameters of Codex towards its consumer protection mandate, rather than to focus most debate on the trade facilitation Purpose that is part of the Codex constitutional framework.² Nonetheless, CI is swimming against the tide of a multilateral trading system (and its international standard setting bodies) that resolutely has ignored its historic foundation in the United Nations system and

¹ "Part 1: Uniform Procedure for the Elaboration of Codex Standards and Related Texts", *Procedural Manual*, Codex Alimentarius Commission, 13th edition (Rome, 2004), 20-21.

² "Purpose of the Codex Alimentarius", *Procedural Manual*, 29.

in the human rights constitution of that system.³ Reports by the UN Human Rights Commission (HRC) on how the multilateral trade system has affected the fulfillment of human rights obligations have resulted in extraordinary measures to curtail or cancel HRC reporting meetings and to transfer HRC monies to provide security for the UN Headquarters in New York against the threat of terrorism.⁴

Emblematic of the illegitimacy of consumer rights, indeed of the United Nations Economic, Social and Cultural rights, in standard setting was the polarized debate about the revision of a Draft Code of Ethics for International Trade in Food at the 27th Session of the Codex Alimentarius Commission (28 June – 3 July 2004). Revision of the Draft Code of Ethics has been long stymied by those members and observers for whom ethics has no status in standard setting, except as 'disguised forms of barriers to international trade', according to the delegate from Brazil, which is among the members that wish to stop all work on the Code.⁵ CI, some EU member countries and several developing countries spoke in favor of continuing the revision of the Code. For CI, advocacy for ethically grounded trading practices is consequent to its recognition that 'Consumers also have responsibilities to use their power in the market to drive out abuses, to encourage ethical practices and to support sustainable consumption and production'.⁶ Without such advocacy, neither consumer rights nor responsibilities can be realized.

Yet given the alienation of Codex constitutional frameworks from a rights based approach to consumer protection, opposition to the revision of the Code is likely only to grow stronger. At the 27th Session of Codex, the 'Representative of the WTO indicated that all Codex texts could be equally relevant under the SPS Agreement and how a particular text would be interpreted by a WTO panel could be determined in the framework of a specific trade dispute'.⁷ For major agricultural exporting members, the possibility that a Codex Code of Ethics could be cited in a trade dispute would be most unwelcome, whether or not this Code could be elaborated and adopted by Codex members to protect consumer health. While an opinion of a member of the WTO Secretariat is by no means a binding interpretation of the SPS Agreement, most major exporting countries are united in their opposition to having ethics play a role in standard setting or in the dispute settlement process.

The debate over the Code of Ethics displays in miniature the larger debate over proposed changes to the constitutional frameworks and modus operandi of Codex that were initiated with a quasi-external evaluation of Codex. Codex is currently modifying and implementing the recommendation resulting from this evaluation. The paper that follows this prologue analyzes some of the results of the evaluation process and makes recommendations on how best to protect consumer health and to foster fair practices in international trade, e.g. prevention of deceptive food marketing practices.

³ E.g. "Mainstreaming the right to development into international trade law and policy at the World Trade Organization", United Nations Economic and Social Council: Commission on Human Rights (E/CN.4/Sub.2/2004/17 (9 June 2004).

⁴ Chakravarthi Raghavan, "Special Rapporteurs protest time constraints at HRC", South-North Development Monitor (SUNS), No. 5097, 11 April 2002.

⁵ "Report of the Twenty-seventh Session of the Codex Alimentarius Commission" (Advance Copy) ALINORM 04/27/41, paragraph 153.

⁶ "About Consumers International" at <http://www.consumersinternational.org/about>

⁷ "Report of the Twenty-seventh Session of the Codex Alimentarius Commission", paragraph 158

Overview

The mandate for this briefing paper is to analyze the process for and institutional framework of Codex decision-making and to make recommendations on how to optimize consumer organization participation in Codex, the expert consultations that provide scientific evidence for standard setting and the technical capacity building to implement standards. Codex food safety and food quality standards, guidelines, codes of practices, pesticide, contaminant, additive and veterinary drug residues limits in food (henceforth standards) may be adopted by any of the 168 Codex member governments.⁸ The content of specific Codex standards, however important, is relegated to the status of examples, in keeping with the terms of reference for the commission of this paper. The paper's focus is recent proposals to change the Codex decision-making structure. The proposals resulted from the 'Report of the Evaluation of the Codex Alimentarius and Other FAO [Food and Agriculture Organization] and WHO [World Health Organization] Food Standards Work'⁹ (henceforth Evaluation) published in December 2002 and the ongoing negotiations to implement Codex revised Evaluation recommendations.

CI has submitted comments on the Evaluation's 42 major recommendations and their implementation. This briefing paper refers to some of those comments, but does not presume to represent either the range of those comments or anticipate adjustments in CI proposals at future Codex meetings to implement the recommendations. Instead this paper contextualizes Codex's global governance role in the international political economy and synthesizes the state of the debate over the Evaluation's recommendations in four issue areas: 1) enhancing consumer and public interest organization participation in Codex decision making to improve standards; 2) FAO/WHO provision of expert scientific advice to Codex committees; 3) national adoption, implementation and enforcement of Codex standards; 4) FAO/WHO capacity building for more effective national food safety and quality control systems.

Following the synthesis of each issue are a few recommendations that build upon Codex responses to CI recommendations thus far in the ongoing Evaluation process. On a couple Codex reform issues that fall outside of these topics, a couple of recommendations have been made. But how might CI address the issues of Codex reform not considered in the Evaluation?

In an appendix to the briefing paper, Jerri Husch, one of the five members of the Evaluation Team, analyzes what evaluation methodology was excluded in the attempt to analyze Codex as an institution. Dr. Husch outlines some of the methodological issues underlying a more fundamental reform of Codex than is envisioned in the Evaluation.. As Dr. Husch notes, the role of 'other legitimate factors' (besides risk assessment recommendations from expert consultations) as a basis for standard setting, were ignored in the methodology of the Evaluation. Decision making criteria on 'other legitimate factors' to set standards that will not have adverse impacts on multilateral agreements or recommendations, such as those on environmental health and

⁸ "Guidelines for the Acceptance Procedure for Codex Standards", *Procedural Manual*, CODEX ALIMENTARIUS COMMISSION, 13th ed. (Rome, 2003).

⁹ "Report of the Evaluation of the Codex Alimentarius and Other FAO and WHO Food Standards Work", CODEX ALIMENTARIUS COMMISSION, ALINORM 03/25/3 (December 2002).

sustainable development, were rejected in 2001, by the majority of Commission members.¹⁰ Hence the decision by the Evaluation Team to not solicit information on Codex issues concerning factors other than quantified risk assessment in Codex decision-making reflected majority opinion.

Much current Codex debate concerns the 'scope' of Codex standards as evidence for trade disputes. If Codex standards are to have greater relevance to public health, Codex will have to widen its purview to consider more kinds of scientific evidence and other legitimate factors in standard setting. This paper, however, uses as its database existing Codex texts and Evaluation recommendations, rather than undertaking the more difficult task of describing a standard setting process designed, financed and equipped to realize public health objectives through food safety measures.

Data for the Evaluation were compiled from bibliography compiled or commissioned by the Evaluation Team, from questionnaires received from 103 Codex member governments and 40 of the 155 international non-governmental organizations (INGOs) accredited to Codex as observers and from interviews during visits to a 24 Codex member countries. (Annex 7: Methodology of the Evaluation).¹¹ CI responded to the Evaluation questionnaire and CI member organization representatives responded to an April 2002 public call for comments and met subsequently to discuss their concerns about Codex with members of the Evaluation team and/or of an expert panel that included CI consultant Diane McCrea. CI submitted comments on the Evaluation and participated in Codex meetings in January, May, July and November 2003 that have discussed implementation of the Evaluation's recommendations. The next meeting to discuss implementation is an extraordinary session of the Codex Committee on General Principles (CCGP) in November 2004.

Further implementation of the Evaluation depends in part on decisions taken by the FAO and the WHO as Codex's parent bodies on 24 of the 42 recommendations. Financially, implementation depends on decisions by member countries to increase extra-budgetary support (i.e. beyond the contributions to the regular FAO and WHO budgets) for the provision of expert scientific advice to Codex, for the Codex Secretariat and for capacity building activities. As a result of the falling value of the U.S. dollar and a decision by the 32nd FAO Conference 'to adopt a level below the Zero Real Growth scenario, the Codex programme was requested to reduce its spending by 5% for 2004-2005'. The WHO contribution to Codex is expected to remain the same, but the net effect of the budget reduction for the Codex Secretariat will be to delay the implementation of at least some of the Codex revised Recommendations.¹²

¹⁰ See "Proposed Amendment to the Statements of Principle on the Role of Science in the Codex Decision-Making Process and the Extent to which Other Factors Are Taken Into Account", CODEX ALIMENTARIUS COMMISSION (Geneva 2-7 July 2001) ALINORM 01/10, Appendix V, and "Report of the Twenty-fourth Session of the Codex Alimentarius Commission", (Geneva 2-7 July 2001), ALINORM 01/41/, paragraphs 94-96.

¹¹ "Joint FAO/Who Evaluation of the Codex Alimentarius and Other FAO and WHO Work on Food Standards: General Aspects", CODEX ALIMENTARIUS COMMISSION, ALINORM 03/26/11 (May 2003), paragraph 6.

¹² "Report of the Third-Third Session of the Executive Committee of the Codex Alimentarius Commission", ALINORM 04/27/3 9February 2004), paragraphs, 24-26.

Enhancing consumer and public interest organization participation in Codex decision making: CI's participation in Codex

CI has intervened in the work of Codex for about thirty years. CI has participated in Codex standards-setting negotiations at the Commission, at six regional committees, at eight substantive committees and two ad hoc task forces.¹³ The broad justification for this intervention is simple as the Codex mandate itself – to protect consumer health and prevent unfair trade practices, e.g. deceptive food labeling.

The protection of consumer health is paramount. According to the WHO, '[f]ood and waterborne diarrheal diseases, for example, are leading causes of illness and death in less developed countries, killing an estimated 2.2 million people annually, most of whom are children'.¹⁴ In industrialized countries 'microbiological foodborne illnesses affect up to 30 percent of the population'.¹⁵ Furthermore, immune systems weakened by foodborne illness are more susceptible to disease and death. For example, a recent Danish study with about 49,000 participants, showed that 'relative mortality within one year [following a gastrointestinal infection] was 3.1 times higher in patients than in controls [who experienced no infection]'.¹⁶

In response to the rising incidence of food and water borne illness, the 53rd World Health Assembly adopted a resolution that called on WHO to 'work towards integrating food safety as one of WHO's essential public health functions' and to work with other international organizations 'and with the Codex Alimentarius Commission' to do so (WHA 53.15: May 2000). WHO's food safety strategy includes outreach to international public health organizations to become more involved in Codex work,¹⁷ but to judge by the near absence of public health organization participation in Codex (only the World Medical Association is accredited to Codex), food safety appears to be thus far a relatively low priority for international public health organizations.

Recommendation 1: Given the Codex priority on protection of consumer health, Codex should extend formal invitations to international public health organizations to become involved in Codex work. The Commission should instruct the Codex Secretariat to hold an orientation sessions for interested international public health officials prior to their first participation in Codex meetings.¹⁸ These international public health organizations should

¹³ The Codex Committees on Food Labeling, General Principles, Pesticide Residues, Food Hygiene, Food Additives and Contaminants, Residues of Veterinary Drugs in Foods, Food Import and Export Inspection and Certification Systems, Nutrition and Foods for Special Dietary Uses, Meat Hygiene, plus the ad hoc task forces for Foods Derived from Biotechnology and Animal Feeding.

¹⁴ "WHO Global Strategy for Food Safety: Safer food for better health", WORLD HEALTH ORGANIZATION (Geneva, 2002), 5 at http://www.who.int/foodsafety/publications/general/global_strategy/en/,

¹⁵ David Heymann, "Introductory Remarks", FAO/WHO *Global Forum of Food Safety Regulators: Proceedings, Appendix IV* (Marrakesh, Morocco, 28-30 January 2002), 66. For working documents from the Forum, go to <http://www.foodsafetyforum.org/global>

¹⁶ Morten Helms et al., "Short and long term mortality associated with food-borne bacterial gastrointestinal infections: registry based study", BRITISH MEDICAL JOURNAL 326: 357 (15 February 2003)

¹⁷ "WHO Global Strategy for Food Safety: Safer food for better health", 3.

¹⁸ This recommendation should be part of a broader strategy concerning INGO participation the WHO Global Strategy on Food Safety, for which participation in Codex is merely one of seven methodological

meet with World Health Organization food safety officials and other interested parties to assess how best to promote Codex standards towards the implementation of the WHO Global Strategy on Food Safety. CI should consider how food safety officers in its member organizations and regional offices can best contribute to the realization of Global Strategy objectives.

According to FAO, only about ten percent of global agricultural production is traded internationally¹⁹ and it is this ten percent that in theory is subject to Codex standards. However, if these standards were adopted, implemented and enforced by Codex member governments for national food consumption, as well as for food imports, the public health impacts of preventing food borne disease in food not traded internationally presumably would be great indeed. Therefore, the public health impact of Codex standards could be far greater than currently unmeasured but the presumed public health benefits of food traded internationally according to Codex standards, where they are adopted and enforced. .

Our analysis of present discussions about the proposed future decision-making structure of Codex builds on the work of the CI project in Codex capacity building that resulted in several capacity building workshops for CI member organizations and such publications as *Codex Alimentarius for Consumers* (2000) and 'Capacity Building and Participation: Consumer Organisations in Codex Alimentarius' (2002). According to this latter briefing paper, '[t]he specific aim is to strengthen the capacity of consumer organizations in developing countries and in Central and Eastern Europe to participate in and have an impact on the Codex decision-making process'.

Furthermore, the capacity building project succeeded in getting the Commission to agree in 1999 to develop 'benchmarks to measure the state of consumer participation in Codex and track progress from year to year'. These benchmarks included tracking which National Codex Committee meetings included consumer representative participation. Collecting and reporting of this benchmark data was to have been discussed at the 2001 Commission meeting, but member and industry concern to increase the 'speed' of standard setting, which led to the Evaluation, have sidelined this consumer participation initiative.

Recommendation 2: Codex should renew its work on benchmarking consumer organization participation in national Codex meetings for at least two purposes: 1) to implement the 'Core Functions of Codex Contact Points' in the Codex Procedural Manual and

approaches taken by WHO to enhance food safety. However, since this briefing paper's primary focus is Codex, this recommendation is limited to the Codex approach.

¹⁹ Cited in Jacques Berthelot, "Some theoretical and factual clarifications in order to get a fair Agreement on Agriculture at the WTO", paper prepared for the Symposium on issues affecting the world trading system, WORLD TRADE ORGANIZATION (Geneva, 6-7 July 2001), 3. . It is worth noting that current negotiating proposals for the WTO Agreement on Agriculture would require WTO Members to increase the imported percentage of national domestic consumption of a given food from the current five percent to ten percent, regardless of balance of payment problems created by that increase and regardless of whether a Member is already self-sufficient or capable of self-sufficiency in producing that food. ("Negotiations on Agriculture: First Draft on Modalities (TN/W/AG/1/REV1 (18 March 2003), paragraph 16. This proposed provision is not mentioned in the 13 September 2003 Framework Agreement on Modalities debated at the WTO ministerial in Cancun, Mexico.

2) to increase the likelihood of consumer organization participation in FAO/WHO Food Standards Programme capacity building activities concerning Codex.

According to CI surveys, the ability of its member organizations to intervene in national food safety management programs and National Codex Committee meetings varies widely ('Capacity Building and Participation: Consumer Organisations in Codex Alimentarius'). Nonetheless, CI advice to member organizations on how to participate effectively in National Codex Committees remains valid²⁰ and should be pursued as part of an overall member organization plan for protection of consumer health from food borne illness and prevention of deceptive food marketing practices.

Since the completion of the CI Codex capacity building project in 2002, CI's Food and Nutrition Programme Activities have been reorganized so that management of the Food Safety Module of the Programme is coordinated by CI's African office, which will also begin in 2005 to coordinate CI's Codex work. The re-orientation of the CI's food safety work has been towards thematic issues with a regional, national or local focus, rather than the previous focus on international institutions, especially Codex.

Nonetheless, the Food Safety Module still includes participation in the Codex Commission meeting, and some Codex committee meetings, including regional Codex meetings, as part of the Food Safety Module of Activities (e.g. Activities B-2.3-2.5, B-4.1-B-4.3 and B-4.5). The CI Biotechnology and Food Security Modules also contain Codex relevant work. As a result of the reorganization, CI will focus its Codex activities on meetings of the Commission, on the Committees on General Principles, on Food Hygiene, on Food Labeling and on the biotechnology Task Force. (CI's Codex work covers only about a sixth of all Codex committees. According to the Codex Secretariat, there were 37 Codex Committee meetings in the 2001-2003 budget biennium, not counting the Commission and Executive Committee meetings.²¹) All of this future work will be affected by the changes in decision-making and institutional structure proposed in the Evaluation.

The Problem: Can standards to facilitate international trade protect consumer health and prevent unfair trade practices?

Codex was founded in 1962 as part of the joint FAO/WHO Food Standards Programme and began operating in 1963. According to the Evaluation's terms of reference, the 'Programme's importance has gradually shifted from providing a basis for national standards to providing the point of reference in standards, guidelines and codes of practice for international trade'.²² This summary of the emphasis of the Programme's work history is accurate as a one-sentence encapsulation can be, except that we would substitute the word 'emphasis' for 'importance'. The emphasis in normative standard setting work of the Programme, carried out in Codex, has definitely shifted.

²⁰ See, in particular, "Participation in Codex Alimentarius – A step by step approach" in *Codex Alimentarius for Consumers* (Consumers International, October 2000), 64-89.

²¹ "Joint FAO/Who Evaluation of the Codex Alimentarius and Other FAO and WHO Work on Food Standards: Review of the Codex Committee Structure and Mandates of Codex Committees and Task Forces, including Regional Committees", CODEX ALIMENTARIUS COMMISSION, ALINORM 03/26/11, Add. 1 (May 2003), paragraph 4.

²² Annex I, "Working Terms of Reference – Joint FA/WHO Evaluation of the Codex Alimentarius Commission and Other FAO/WHO Work on Food Standards", FOOD AND AGRICULTURE ORGANIZATION (April 2002), PC 87/INF/3, paragraph 13.

Less clear is whether this shift will enable Codex better to implement its mandate of 'protecting the health of consumers and ensuring fair practices in the food trade', e.g. preventing deceptive food labeling practices.²³ Furthermore, it is unclear whether the demand expressed in the Evaluation for 'greater speed in Codex work and the generation of expert scientific advice' (paragraph 29) to create trade facilitating standards will be accompanied with sufficient resources and political will to support other components of the Programme, chiefly provision of expert scientific advice in response to prevalence and severity of foodborne illness, and capacity building to strengthen food control systems that protect consumer health. Only when accompanied by provisions to implement them can Codex standards and standard setting can be effective.

As of 2002 (the latest on-line update available as of April 2004, due to Codex Secretariat resource constraints), the Codex Alimentarius included over 230 commodities standards (e.g. for cheese), over 200 general standards (e.g. for food contaminants and toxins), 47 Codes of Practice (e.g. for meat hygiene), more than 40 guidelines (e.g. for determination of judgments of 'equivalence' between different food safety measures), over 2500 maximum residue limits for pesticides in foods and over 500 maximum residue limits for veterinary drugs in foods.²⁴ If these standards are adopted in national law, implemented and enforced, they can help to protect consumer health and to provide consumers with safe and wholesome food. As was noted in the Evaluation, 'standards do not protect consumers unless they are enforced through a properly functioning food control system' for which responsibility rests squarely with individual countries' (paragraph 14).

However, the Evaluation goes on to note that the majority of Codex member countries do not have the resources to either intervene effectively in Codex standard setting activities or to implement and enforce Codex standards that members have adopted (paragraph 15). The Evaluation stated that '[t]he development of [food safety] legislation is not perceived by developing countries to be a very high priority for assistance as compared to other areas. This may be because food laws are ineffective in the absence of surveillance and enforcement capability' (paragraph 211). The challenge for CI to protect consumer health through recourse to Codex standards is then not only one of helping to set better Codex standards, but also campaigning for the adoption, implementation and enforcement of standards at a national level. Securing adequate levels of appropriate technical assistance to build food control systems targeted at specific food borne illness is crucial to standards adoption, implementation and enforcement. As CI stated to the May 2003 meeting of the World Health Assembly, 'if capacity building activities to provide technical assistance to implement and enforce standards remain greatly under-funded while the standards setting process is accelerated, the standards will serve primarily to facilitate trade and not to protect consumer health'.²⁵

Codex and SPS standards in the international political economy

²³“Statutes of the Codex Alimentarius Commission”, *Procedural Manual*, CODEX ALIMENTARIUS COMMISSION (Rome, 2003), 13th ed., Article 1a)

²⁴ At http://www.codexalimentarius.net/standard_list.asp and Ray A. Goldberg and Harold H. Hogan, Jr., “Codex Alimentarius and Food Labeling”, Case study N9-903-417 (28 October 2002), HARVARD BUSINESS SCHOOL, 171.

²⁵ “Statement of Consumers International to the Members of the WHA [World Health Assembly] on Codex”, 26 May 2003.

Increasingly, standards to protect consumer health and/or to prevent unfair trade practices have come under attack as 'disguised' non-tariff barriers to trade.²⁶ To take one of many possible examples, a Thai trade official noted of the recent outbreaks of avian influenza and resulting devastation to Thai poultry exporters, 'The rich food importers are getting better and better at manufacturing safety hazards – real and imagined'.²⁷ The bitterness of this response can be explained by Thailand's loss of exports sales due to import bans resulting from avian influenza, worth U.S.\$1 billion in 2003. (In early March 2004, the FAO announced that if current import bans on meat and live animals from the United States and eleven other countries, due to animal health diseases, continued through the end of 2004, the estimated \$33 global meat trade would lose about \$10 billion in sales.²⁸)

A recent study by a CI member organization on World Trade Organization (WTO) dispute resolution case law concerning the SPS and the Technical Barriers to Trade (TBT) Agreements concluded, '[b]y their very nature, TBT and SPS measures are obstacles to international trade. They should not become unnecessary obstacles. The question is: what is unnecessary? The protection of human, plant or animal life, health or safety in one territory, could be detrimental to the same in another territory. Finding the right balance will have to be decided on a case-to case basis'.²⁹ In the view of this study, WTO dispute panels, and not the deliberations of Codex, will determine a balance between consumer protection and trade facilitation. Whether or not this view is shared widely among CI member organizations, there is little doubt that according to Evaluation data, the trade facilitation function of standards ranks high on the Evaluation's 'Priorities to be given to the future work of Codex', particularly for low income Codex members (Table 13).

Part of the Purpose of Codex is that '[t]he publication of the Codex Alimentarius is intended to guide and promote the establishment of definitions and requirements for foods to assist in their harmonization and in doing so to facilitate international trade'.³⁰ The use of Codex standards to facilitate international trade received a new legal status with the referencing of Codex standards as presumptively consistent with the provisions of the WTO SPS Agreement. The Agreement

²⁶ CI is criticized indirectly in the Evaluation by expert panel member, Dr. Anwarul Hoda, whose background paper, commissioned for the Evaluation, is summarized in paragraphs 80-83. (CI sought to have all background papers for the Evaluation posted on the Codex Web site, but this recommendation was disregarded by the Commission.) Dr. Hoda dismisses the concerns of "developed country consumer organizations" that protection of consumer health may conflict with trade facilitation in Codex's work. Evaluation Recommendation no. 6, based on Dr. Hoda's paper, urged Codex to develop guidelines on Appropriate Levels of Protection (ALOPs) for consumers "to reduce the scopes of disputes in the WTO". However, there was no Codex support for this recommendation, since the setting of ALOPs is a prerogative of governments according to Article 5 of the WTO SPS Agreement. (CODEX ALIMENTARIUS COMMISSION, ALINORM 03/26/11 (May 2003), paragraphs 31-33.).

²⁷ William Barnes, "Food safety fears 'used as excuse to ban imports'" FINANCIAL TIMES, 6 April 2004.

²⁸ "Avian influenza: A threat of rural livelihoods, agricultural production and human health", (6 February 2004) FOOD AND AGRICULTURAL ORGANIZATION at <http://www.fao.org/newsroom/en/focus/2004/36467/index.html> and "Animal disease outbreaks hit global meat exports" (2 March 2004) FOOD AND AGRICULTURE ORGANIZATION at http://www.fao.org/newsroom/en/news/2004/37967/print_friendly_version.html

²⁹ Ralf J. van de Beek and Prabhash Ranjan, "Dealing with Protectionist Standard Setting: Effectiveness of WTO Agreement (*sic*) on SPS and TBT" CONSUMERS UNION TRUST CENTER FOR TRADE, ECONOMICS AND ENVIRONMENT (Jaipur, India: 2003), 28.

³⁰ "Purpose of the Codex Alimentarius", *Procedural Manual*, CODEX ALIMENTARIUS COMMISSION (Rome, 2003), 13th ed.

instructs its Members 'to base their sanitary or phytosanitary measures on international standards' (Article 3.1.) and presumes those international standards to 'be consistent with the relevant portions of this Agreement and of GATT [General Agreement on Tariffs and Trade] 1994' (Article 3.2). Codex is named as one of the international standard setting bodies in whose work WTO Members should participate 'within the limits of their resources' (Article 3.4). The lack of resources for over half of Codex's member countries to participate in standard setting lead to the launching of a FAO/WHO Trust Fund for Participation in Codex in February 2003. The Fund is discussed in the 'capacity building' section of this briefing paper.

Certain international standards, guidelines and recommendations are referenced in Annex A, 3a) of the SPS Agreement on definitions, including 'for food safety, the standard guidelines and recommendation established by the Codex Alimentarius Commission relating to food additives, veterinary drug and pesticide residues, contaminants, method of analysis and sampling, and codes and guidelines of hygienic practice'. Presumably, these are the kind of standards, guidelines and recommendations that will be cited by WTO members in the event of an SPS trade related dispute. What these particular standards appear to have in common is that they tend to be about quantification or be quantifiable, e.g. 0.5 milligrams of lead allowed as a contaminant in cocoa butter.

Perhaps the most notorious use of a quantified risk assessment in a WTO dispute settlement was that by the United States of a FAO/WHO Joint Expert Committee on Food Additives (JECFA) report on the Maximum Residue Level of three beef livestock growth promoters that could be tolerated without harm to human health. The U.S. contended that this report offered irrefutable proof of the safety of six U.S. government approved hormone growth promoters used in beef traded internationally. The JECFA report was used as evidence in a 13 February 1998 WTO Dispute Settlement Body (DSB) ruling in favor of the United States and against an EU import ban against beef treated with those growth promoters. Controversies over both the scientific integrity of the JECFA report and procedural requirements for risk assessments created by the DSB, as well as the inconclusive results of EU risk assessments of the growth hormones, lead the European Union to maintain the import ban while paying the trade sanctions resulting from the DSB ruling.³¹

The preference in the SPS Agreement for quantifiable Codex standards is to give clearer justification for declaring whether an SPS measure results in 'discrimination or a disguised restriction on international trade', according to Guidelines developed by the WTO SPS Committee to clarify what is meant in Article 5.5 by an Appropriate Level of Protection (ALOP) for consumers.³² (The United States sought to make the guidelines enforceable under dispute settlement rules, however, the guidelines finally were adopted as non-binding.³³) The SPS

³¹ "Beef Hormones: Dispute Splits U.S., EU Scientists; Research Continues on Risk to Humans", WORLD FOOD REGULATION REVIEW, October 1999; "Communication of the Commission to the Council and Parliament: WTO decisions regarding the EC hormones ban", EUROPEAN COMMISSION, 10 February 1999; "Comments to the Appellate Body of the World Trade Organization Concerning European Communities Measures Concerning Meat and Meat Products (Hormones), submitted on behalf of Public Citizen, Institute for Agriculture and Trade Policy, Cancer Prevention Coalition and Community Nutrition Institute, 31 October 1997.

³² "Guidelines to further the practical implementation of Article 5.5", Committee on Sanitary and Phytosanitary Measures, WORLD TRADE ORGANIZATION, G/SPS/15 (18 July 2000).

³³ "WTO Works Out New SPS Guidelines Without Legal Status", INSIDE U.S. TRADE, 14 April 2000.

Agreement and the Guidelines clarifying it assign to each WTO Member the responsibility of indicating ALOPs for its citizens, however incomparable those ALOPs and their justifications might be.

The preference for quantification in Annex A, 3a) means that while Codex standards are generally referenced in the SPS Agreement, quantifiable standards are more likely to be used in dispute resolution and hence have a higher status in the global governance structure of the international political economy. Such Codex codes of practice as the ongoing revision of the Code of Ethics for International Trade in Food are troublesome for some Codex members because of the possibility that they might be cited in a trade dispute as a standard presumed to be consistent with the SPS Agreement. Therefore, Codex committees have begun to discuss the 'scope' and 'status' of Codex standards vis-a-vis the SPS Agreement.

For example, the United States has proposed that the Codex Committee on General Principles (CCGP), at its 3-7 May 2004 session, discuss the status of the 'Code of Ethics' 'under the WTO SPS and TBT trade agreements' before devoting any further work to elaborating the Code.³⁴ In sum, it appears that all Codex standards are equal to the task of protecting consumer health and preventing unfair trading practices, but some standards are more equal than others if they can serve as evidence in trade dispute resolution. Since the SPS Agreement only recognizes certain kinds of Codex standards as being consistent with the SPS – the standards relating to food additives, veterinary drug and pesticide residues, contaminants, hygienic practice and methods of analysis and sampling - , the question arises whether work on other Codex standards that protect consumer health and prevent unfair trade practices will fall de facto to a second or third priority in Codex work.

Recommendation 3: Codex should request an opinion from FAO and WHO legal counsel to advise it about whether the legal status and criteria for prioritizing work on Codex standards requires any further clarification in the *Procedural Manual* in light of the limitations on the kinds of Codex standards recognized as international standards in Annex 3a) of the WTO SPS Agreement.

Enhancing consumer and public interest organization participation in Codex decision making: reforming Codex constitutional frameworks

The governing documents of Codex as an institution are the 'Statutes' and the 'Rules of Procedure', published together in the *Procedural Manual*. Evaluation recommendations that do not require FAO or WHO implementation decisions will be carried out through changes in these and other constitutional documents in the *Procedural Manual*.

Article 2 of the 'Statutes' states that 'Membership of the Commission is open to all Member Nations and Associate Members of FAO and WHO which are interested in international food standards'. Government delegates are usually government officials, but governments may choose to be represented by industry officials, academics or occasionally consumer organization

³⁴ "Draft U.S. Positions: Codex Committee on General Principles", U.S. Codex Office, 13 April 2004.

representatives. There are no proposals to revise the Statutes on neither government membership nor that of intergovernmental organizations that are observers to Codex.

However, some governments and international industry groups have indicated that consumer organizations are not representative of consumers and therefore, despite a 1999 revision of criteria for recognizing international non-governmental 'observer' organizations (INGOs), the Evaluation recommends another revision of Rule VII.5 on observers (Recommendation 27). There are nine consumer and public interest non-governmental organizations among the current roster of 155 Codex recognized INGOs.³⁵ The vast majority of Codex recognized INGOs are industry based groups, some of whose members participate in national Codex delegations, occasionally as the sole representative of the Codex member country. INGO accreditation criteria to participate in Codex meetings and accreditation are being revised in the Codex Committee on General Principles (CCGP), according to guidance that CCGP received from the Commission.³⁶

On the basis of the criterion that INGOs should be 'genuinely international', it appears that a number of regional INGOs may lose their accreditation. Another criterion under discussion concerns how the INGO demonstrates its expertise in matters of interest to Codex. According to current implementation discussions, the Codex Executive Committee (CCEXEC) will review all accreditation applications and make recommendations to the Directors General of FAO and WHO, who will make accreditation decisions.³⁷ The Secretariat has advised the CCGP to consider in its 3-7 May 2004 session 'whether it should be required that an INGO applying for observer status should have been established a certain number of years proceeding its application preceding its application and demonstrate in its application that it has been carrying out substantive activities rather than being merely a means to enable certain individuals or groups to gain access to Codex meetings and documents'.³⁸ The issue will be considered again at the CCGP session in November 2004.

Recommendation 4: CI opposed the Recommendation to review INGO accreditation criteria as an Evaluation priority.³⁹ However, since Codex has decided to review INGO accreditation criteria, CI recommends that the primary criterion to be evaluated by CCEXEC should be demonstrated achievement in contributing substantively to Codex work. For transparency reasons, all INGOs applying for accreditation should supply information on the purpose/interests, members and finances of their organizations in their applications for

³⁵ At http://www.codexalimentarius.net/organizations_list.stm

³⁶ "Proposed Amendment to Rule VIII.5 (Observers) of the Rules of Procedure", CODEX ALIMENTARIUS COMMISSION (CX/GP/04/20/3) and (CX/GP/04/20/3 Add. 1); "Review of the Principles Concerning the Participation of International Non-Governmental Organizations in the Work of the Codex Alimentarius Commission", CODEX ALIMENTARIUS COMMISSION (CX/GP/04/20/8). Both of these documents will be discussed at the 3-7 May 2004 session of the Codex Committee on General Principles

³⁷ "Report of the Nineteenth (Extraordinary) Session of the Codex Committee on General Principles (17-21 November 2003, Paris), CODEX ALIMENTARIUS COMMISSION, ALINORM 04/27/33, paragraphs 39, 45 and 77-82 at ftp://ftp.fao.org/codex/alnorm04/al04_33e.pdf

³⁸ "Review of the Principles Concerning the Participation of International Non-Governmental Organizations in the Work of the Codex Alimentarius Commission", CODEX ALIMENTARIUS COMMISSION, Codex Committee on General Principles, CX/GP/04/20/8 (May 2004), paragraph 13.

³⁹ CAC/26/INF/3, pp. 46-47.

observer status. The number of years that an INGO had existed prior to application for accreditation should not be a criterion.

Accreditation allows INGOs to receive and comment on all Codex documents and to participate in all Codex meetings ('Statutes', Article 5), except for the Executive Committee (CCEXEC), within the limits of the INGO's resources. As a result of Evaluation implementation discussions, it appears that the CCEXEC will have the central role in prioritizing work on standards and managing the standards development process, hence the ability to participate in CCEXEC meetings will become crucial.

At the November 2003 session of CCGP, CI once again sought to allow for consumer organization representation on the CCEXEC. To respond to member concerns that observers would enjoy greater rights at CCEXEC than non-CCEXEC members if representative INGOs participated in the CCEXEC, CI proposed that CCEXEC meetings be opened for a three-year trial period to all members and observers. The Codex Chairperson would allow non-EXEC members and observers speak at his or her discretion, most likely on extraordinary occasions. However, this proposal too was rejected and CCGP instructed the Secretariat to investigate the legal and financial implications of 'passive participation', such as Web casting CCEXEC meetings or broadcasting the CCEXEC meetings to a 'listening room' near to the CCEXEC meeting site.⁴⁰

Recommendation 5: Web-casting of CCEXEC meetings is preferable over a listening room of 'passive participation', since Web-casting allows for wider participation and greater transparency. The Secretariat's analysis of Web-casting financial and legal implications should be done in the context of an overall communications plan to enhance the Codex Web site, and enhance technical support for developing country and economies in transition countries Codex offices to receive and comment on Codex and other Food Standards Programme documents.

Codex meetings, with the exception of CCEXEC, are open to the public, unless a Committee decides otherwise.⁴¹ But in practice, the public for Codex meetings are either members of the food trade press or academics investigating standards issues. However, only Codex accredited members and observers may comment electronically on documents and speak in sessions. As a rule, Codex chairpersons call on member delegates to speak first, then intergovernmental organization representatives and finally INGOs. But if member discussion is deadlocked, Chairs will occasionally break with custom and call on an INGO to speak if the INGO's written comments offer a new proposal to break the impasse in discussions.

The Evaluation makes no recommendations concerning Codex's transparency to the public beyond the urgency of upgrading the Codex Web site (Recommendation 29) and perhaps hiring a consultant to make the *Procedural Manual* more 'user friendly'. (While CI agreed with this Recommendation, it expressed disappointment with the Evaluation's discussion of how Codex should communicate with consumers, particularly regarding health risks in food.⁴² CI's subsequent recommendations regarding communication are given below in the section on 'Provision of

⁴⁰ *ibid.*, paragraphs 38-44.

⁴¹ "Guidelines for Codex Committees and *Ad Hoc* Task Forces", *Procedural Manual*, paragraph 20.

⁴² CAC/26/INF/3, p. 49.

Scientific Advice' where communication is analyzed as a function of making the operations of Codex and expert scientific bodies more transparent to the public.)

The accountability of Codex decision-making is the subject of Evaluation Recommendations regarding the conduct of Chairpersons and the conduct of meetings. Except in the case of electing the Codex Chairperson and Vice-Chairpersons of Codex, and in rare instances, e.g. whether to adopt a Maximum Residue Level for recombinant Bovine Growth Hormone, Codex decisions are not taken by vote but by discussion until consensus is reached.

The definition of consensus is currently under debate at Codex (Recommendation 24) but that definition is not an accountability issue per se. Rather, the issue of accountability arises when the Chairperson interprets the existence of a consensus in its clear absence, in order to force progress on a standard despite the lack of consensus. Occasionally, the Secretariat's report of meetings will indicate a clear lack of consensus despite the Chairperson's decision to forward a standard to the Commission for adoption, for example in the case of the guidelines on the judgment of equivalence of SPS measure in the 2001 session of the Codex Committee on Food Export Import Inspection and Certification Systems.⁴³ More typically, however, the Secretariat's report records the comments of members concerning controversy about consensus. Given the Evaluation's overall priority on 'speeding up' Codex's standard-setting, and Codex's lack of willingness to discipline Chairs who abuse their power, the temptation for chairs to declare consensus by fiat may grow. It seems likely that Codex will seek to improve the quality of chairing through developing criteria for members to select chairs and through Secretariat orientation sessions for new chairs.

Given the resource constraints on many members and some observers, including CI, to participate physically in meetings, it becomes all the more important that Chairpersons present for discussion comments by members and observers who are not physically participating in Codex meetings. CI was instrumental in proposing a revision to the 'Draft Guidelines to Chairpersons of Codex Committees and *Ad Hoc* Intergovernmental Task Forces: 'Chairpersons should also ensure that the written comments, received in a timely manner, of members and observers not present at the session are considered by the Committee; that all issues are put clearly to the Committee'.⁴⁴ Both Codex members and observers should strive that the guideline, adopted by the Commission at its 27th session, is implemented by Codex Chairpersons. Particularly for developing countries and resource constrained INGOs, this Guideline offer the opportunity to enhance effective participation even in the absence of resources to participate physically in a Codex meeting.

CI supported Evaluation Recommendation 15, which advised FAO and WHO to increase resources to the Codex Secretariat, for among other reasons to increase the timeliness and accuracy of the translation of documents into official FAO and WHO languages, and thereby enhance stakeholder participation and consultation.⁴⁵ Because most Codex negotiations are conducted in English, the issue of timely and accurate translation and interpretation is a vital to the transparency and accountability of Codex decision-making. Following Recommendation 32, the Secretariat is drawing up a budget to estimate the costs for implementing Codex revised Evaluation Recommendations, including a new budget for the Secretariat.

⁴³ CCFICS cite

⁴⁴ ALINORM 04/27/33, Appendix VII.

⁴⁵ CAC/26/INF/3, p. 27.

Models of decision-making in Codex: the Eight Step Procedure

Codex decision-making about standard setting is set out clearly in the *Procedural Manual* as an eight step process ('Procedures for the Elaboration of Codex Standards and Related Texts'). The first step is for the Commission to decide to authorize new work, usually at the request of a Committee, and to decide which Committee should do the work. Members, but not INGOs can propose new work. As a result of the Evaluation, a detailed project document will be required to propose new work. The CCEXEC will review the project document to ensure that new work proposed fits within the new criteria for establishing Codex work priorities. The criteria are still being negotiated.

The second Step is for the Secretariat either to draft a standard or to arrange for a consultant to do so, taking into account or requesting FAO/WHO expert advice, as well as the Commission's guidance. Step 3 is a request for comments on the draft standard, while Step 4 results in amendments to the draft standard. At Step 5, the amended draft standard is presented to the Commission for its approval as a draft standard. If there is broad Commission support for the standard at Step 5, the Commission may choose to vote to use the 'accelerated procedure' to skip Steps 6 and 7 of further consultation and amendment and adopt the standard for publication at Step 8. The accelerated procedure required a two-thirds majority of voting members to implement.

This straight forward model of decision-making notwithstanding, most members and observers of Codex expressed a wish for 'greater speed in Codex and expert scientific advice' in setting standards to facilitate trade. As previously mentioned, fulfilling this objective depends in part upon the willingness of member governments to adequately finance the Secretariat and joint FAO/WHO expert meetings. However, beyond the issue of resources, the Evaluation recommended a series of measures to 'speed up' the standard setting process, so that if Codex cannot adopt a standard five years after its inception (Recommendation 18), the Commission must make a decision about whether to reauthorize the work, discontinue it or move the work to a different committee (Recommendation 23).

Furthermore, to 'speed up' the standard-setting process, the Evaluation recommends that 'the emphasis in Codex should switch from writing standards in meetings to developing standards through a consultative process between meetings' (Recommendation 20). (The full set of Evaluation recommendations to change Codex standard setting procedures, indicating many interim measures between steps, is contained in Evaluation, Figure 4.) Implementation of Recommendation 20 would entail greater use of intersessional electronic, rather than physical, working groups to revise standards, consultants to facilitate consensus about controversial matters and using 'knowledgeable NGOs in preliminary standard development'.

CI commented extensively on these Recommendations, finding that some of them, such as the use of a project document to justify undertaking new work, would enhance the quality of standard setting. CI also submitted comments on guidelines for intersessional electronic working groups to maximum resource constrained member and observer participation in the standard setting process. However, CI did not support the idea of intersessional facilitators of consensus, 'particularly if the consultant drafting the preliminary standard and the consultant/facilitator hired to manage

consensus on a standard are from the same country or observer group'. As a result of the high potential for conflict of interests arising from the use of consultants to draft standards, CI made the following comment, put forth here, slightly revised, as a recommendation here:

Recommendation 6: Before the Commission considers whether to authorize a policy of using NGOs to draft preliminary standards, it should request the Committee on General Principles to propose criteria for the selection of consultants/facilitators and guidelines for their activities to minimize conflicts of interest. CCGP should consider whether the selection criteria proposed for scientists nominated to serve on FAO/WHO Joint Expert Committees or *ad hoc* consultations could serve as a basis for proposing consultant/facilitator selection criteria.

Provision of expert scientific advice to Codex

Some Codex committees and task forces request scientific advice and risk assessments from joint FAO/WHO committees and ad hoc consultations. These include the WHO/FAO Joint Meeting on Pesticide Residues (JMPR), the WHO/FAO Joint Expert Committee on Food Additives and Contaminants (JECFA), the WHO/FAO Joint Expert Meetings on Microbiological Risk Assessment (JEMRA) and the WHO/FAO Expert Consultation on Foods Derived from Biotechnology – Genetically Modified Organisms.

Despite the high priority put by Codex on basing its standards on 'sound science', the Evaluation notes that Codex Committees have often not been able to obtain the advice they request because of an inadequate budget. Hence, the Evaluation states that '[f]or sound, science-based decision making to be central to the Codex process, the increased funding of risk assessment is a top priority. . . There is general acceptance in the future experts will have to be paid in order to obtain independent good quality assessments in a timely manner' (paragraph 181). As of this date, there is no agreement about how provision of expert scientific advice should be financed or how Codex requests for such advice should be prioritized. However, there is agreement that delays in requesting and receiving scientific advice slows down the standard setting process (paragraph 184). According to documentation prepared by FAO and WHO for the 27th Session of Codex, 'the FAO and WHO Secretariats will also link further fundraising efforts to the improvement of the process for the provision of scientific advice'.⁴⁶

Even if and when resources are provided to enable science-based standard setting with the 'greater speed' desired by members and observers, there are several issues in the provision of scientific advice that concern CI. Prominent among these issues is transparency in the selection of scientific experts, in the operations of the international scientific committees and in the reporting of risk to consumers. One CI position paper noted that '[t]he work of expert groups is the least open and least transparent part of the international policymaking process, reflecting certain old-fashioned attitudes about how science should be applied to policy. Most expert body meetings are closed to the public. Reports by the expert bodies that support Codex committees often are not available for months or years while recommendations might be issued promptly, the basis for those

⁴⁶ "Other Matters Arising From FAO and WHO", CODEX ALIMENTARIUS COMMISSION, ALINORM 04/27/10G, paragraph 8.

positions might not be public for a long time. This lack of transparency has led to public distrust of certain conclusions by expert bodies on controversial topics'.⁴⁷ The pressure from CI and other Codex members and observers to make the scientific advisory process more transparent is beginning to have some welcome results for consumers.

In January 2004, FAO and WHO held a 'Workshop on the Provision of Scientific Advice to Codex and Members Countries'. The Report of the workshop includes some recommendations, which, if financed and implemented, could greatly improve the quality, as well as the transparency of scientific advice, and involve consumer organization representatives in communication of risk to the consumers.⁴⁸ These Report recommendations included making 'reports available as soon as possible' (26); consider 'the publication of some reports in draft form in order to allow for public comment or peer review before finalization' (27); and enhancing 'transparency of their reports through the inclusion of a plain language summary of the findings of expert panels. This may be facilitated by including risk communication experts in expert panels' (29). This latter recommendation reflects a CI recommendation made in a paper presented to the workshop.⁴⁹ The Codex Secretariat intends to request formal comments from member countries and observers on the Workshop's recommendations.⁵⁰

However, two important CI recommendations to the workshop are not reflected in the Report. One concerns the importance of including a consumer representative to act as a kind of ombudsman/woman who makes sure that questions, particularly of a controversial nature, are asked of the experts, and that the results of expert scientific advice are communicated in a way that the public will understand. The CI recommendation reads: 'appoint an independent consumer representative to ensure that public questions are addressed, and to assist in communicating outcome of the [expert] meetings to the public' (paragraph 6.2e).

Another CI recommendation on transparency is to make private deliberations among experts the exception, rather than the rule in expert meetings (paragraph 6.4a). The opposition to opening expert meetings to the public has to do with concerns about the business confidentiality of data and the efficient production of scientific advice that could be impeded if the scientific advisory process were opened up. It is true that the workshop recommends 'improved procedures for the interaction of expert panels with data providers and other stakeholders' (recommendation 22) and would allow public comment prior to finalizing the report of the expert consultation (recommendation 27). However, these recommendations still fall short of allowing the public to have the opportunity to be represented in a meeting whose result may affect their health. Therefore, based on the CI recommendations proposed to but not adopted at the workshop, we make the following recommendation:

⁴⁷ "Improving The Quality, Openness, and Transparency of International Scientific Advice", CONSUMERS INTERNATIONAL (October 2002), 2.

⁴⁸ "Report of the Joint FAO/WHO Workshop on the Provision of Scientific Advice to Codex and Member Countries" (27-29 January 2004), FAO and WHO (March 2004).

⁴⁹ "Ensuring Transparency of the Process of Providing Scientific Advice To Codex and Member Countries", CONSUMERS INTERNATIONAL (January 2004), paragraph 6.2f).

⁵⁰ "Report of the Joint FAO/WHO Workshop on the Provision of Scientific Advice to Codex and Member Countries", 36.

Recommendation 7: FAO and WHO should open expert consultations and committee meetings to the public. They should allow public input in the meetings via a consumer representative who would convey the public's written and verbal questions and concerns about the consultation, and who would be permitted to ask questions about the draft report of consultations to aid in risk communication.

There is a great deal more that can be said and that CI and others have proposed to improve the quality, as well as transparency, of scientific advice to Codex. However, proposals to enhance consumer participation in expert consultations and to improve transparency and risk communication with consumers can help improve the protection of consumer health.

A Crisis in the Codex Acceptance Procedure for Standards and the Protection of Consumer Health

As a result of the referencing of Codex texts in the SPS Agreement, it has been proposed that notification of SPS measures to the WTO has made 'superfluous' the Acceptance Procedure for national government adoption of Codex standards.⁵¹ The disuse into which the Acceptance Procedure has fallen for encouraging adoption of Codex standards into national law lead the United States, in draft comments prepared for the 20th session of CCGP, to argue that notification of acceptance of Codex standards 'has largely been superceded by the World Trade Organization's notification procedures' and recommends deletion of references to Codex notification in the *Procedural Manual*, following a review by the Secretariat to ensure that there no 'unintended consequences'.⁵² Deletion of the Acceptance Procedure would be a radical step for Codex to take, since following deletion, Codex standards would have no other function than as evidence in trade disputes. Therefore, the proposal to delete the Acceptance Procedure merits some comment.

The Procedure is the formal mechanism that enables Codex members to adopt Codex standards in their national legislation or regulations or to use Codex standards as a basis for national legislation or regulations. If Codex were to replace use of the Acceptance Procedure with the notification by WTO members of national SPS measures, one might assume that the measures to be notified to the WTO SPS Committee would be the same as the Codex standards that if adopted, implemented and enforced, would protect consumer health and prevent unfair trade practices. The assumption would be false. Instead the Acceptance Procedure for Codex standards would be replaced by a notification procedure designed to prevent SPS related trade disputes.

WTO members are required to notify the SPS Committee, when 'the content of a proposed sanitary or phytosanitary regulation is not substantially the same as the content of an international standard, guideline or recommendation, and if the regulation may have a significant effect on trade of other members' (Annex B, 'Transparency of Sanitary and Phytosanitary Regulations', paragraph 5). Although the mandatory character of WTO notification ensures that such notification will be used

⁵¹ Alexia Herwig, "Legal and institutional aspects in the negotiation of a Codex Alimentarius Convention", *Zeitschrift fuer das gesamte Lebensmittelrecht*, vol. 2 (2001), 268.

⁵² "Draft U.S. Positions: Codex Committee on General Principles" (Twentieth Session; 3-7 May 2004, Paris), 20.

more frequently than the voluntary notification of acceptance of Codex standards, WTO notification should not be allowed to supplant the Codex Acceptance Procedure.

The SPS Agreement references a narrower range of international standards than that of Codex and hence would offer less protection of consumer health, even if the objective of WTO notification were protection of consumer health and not trade facilitation. The notification procedure for the SPS Agreement in Annex B does not refer to all Codex standards, but to those kinds of standards in Annex 3a), i.e. standards that are either quantified in risk assessments or are about quantification. Even if WTO Members were in agreement as to what was 'not substantially the same' in a SPS regulation and about whether a regulation that deviates from an international standard will result in a 'significant effect on trade', the narrow ranges of standards in Annex 3a) does not cover the broader array of Codex standards intended to protect consumer health and prevent unfair trade practices.

If the relatively narrow range of international standards in Annex 3a) were to become the norm for judging which national SPS measures were inconsistent with international standards, all the Codex standards which are not quantifiable would no longer be WTO authoritative for judging consistency of national SPS measures with Codex standards. While WTO notification of SPS measures is oriented towards avoiding trade disputes that might result from proposed national SPS measures, the protection of consumer health is far less served by WTO notification than by adoption of the broader range of Codex standards. Furthermore, as noted by a Codex Committee chairperson, 'WTO SPS 'notifications can give only a very limited impression of whether Codex norms are meeting national needs and therefore provide a suitable basis for harmonization' among differing food safety and quality measures'.⁵³

It is true that the Acceptance Procedure has fallen into disuse as food safety officials have shifted their focus from promoting the adoption of Codex standards to assisting in the notification of their possibly non-conforming national SPS measures to the WTO. Nonetheless, according to the Evaluation, 'the majority of countries at all stages of development claim to have adopted into their national legislations more than 60% of all types of Codex standards with the exception of those relating to methods of analysis' (paragraph 57). There is no documentation published by Codex to support this claim and no obligation for Codex members to report which standards they have adopted and how. In light of these facts, we advise as follows:

Recommendation 8: Codex should reject the proposal to substitute the WTO notification of SPS measures for the Codex Acceptance Procedure. Rather than discontinue the Acceptance Procedure, Codex should work with the FAO/WHO Food Standards Program to increase the member's use of the Procedure, to revise the Procedure to enhance ease of use, and to provide the Codex Secretariat with the resources needed to post on the Codex Web site timely documentation of member adoption of standards. To ensure that adoption of Codex standards is carrying out the mandate to protect consumer health, Codex should commission a study of the public health impacts of the adoption of selected Codex standards in selected member countries.

⁵³ Digby Gascoine, "Harmonization, Mutual Recognition and Equivalence – How and What Is Attainable?" Conference on International Food Trade Beyond 2000 (11-15 November 1999: Melbourne, Australia) FAO/WHO, ALICOM 99/21, paragraph 8.

Because of the trade facilitation Purpose of Codex, the Evaluation recommends that 'FAO and Codex review the possibilities for establishment of a database of national standards of importance in trade including their application and methods of analysis' (Recommendation 30). CI supported this recommendation but amended it to include the 'establishment of a data base of national food standards, indicating which of those standards are Codex standards. The database should also contain regulatory information and contact points concerning the implementation, enforcement and review process for the standards'.⁵⁴ Since this comment was made, it has become clear that some member countries wish to eliminate the Acceptance Procedure for using Codex standards as the basis for national food laws and to substitute for it notification of SPS measures according to Annex B of the SPS Agreement. Furthermore, the interagency International Portal For Food Safety, Animal and Plant Health (www.fao.org/biosecurity), launched formally on 25 May 2004 will contain some of the kinds of information proposed in the earlier CI recommendation.⁵⁵ Therefore, in its preparations for the November 2004 meeting of CCGP on implementation of the Evaluation Report, CI may will need to modify its comments on Evaluation Recommendation 30.

FAO/WHO capacity building for more effective national food safety and quality control systems

The Evaluation has just two Recommendations concerning capacity building, one of them concerning Codex activities (Recommendation 42). The FAO/WHO Trust Fund for Participation in Codex (Trust Fund) was launched on 14 February 2003 at an extraordinary session of the Commission that reviewed the Evaluation. The notional budget for the Trust Fund, to cover capacity building activities for twelve years, was U.S.\$40 million.⁵⁶ One hundred and thirty-three developing countries and countries in transition country members would be eligible to apply for funds to enable their officials to 'enhance their effective level of participation in the development of global food safety and quality standards'.⁵⁷ According to the Consultative Group for the Trust Fund, U.S.\$500,000 had been received as of February 2004, a minimum that the Committee judged sufficient to commence Fund activities.⁵⁸ At the 27th Session of the Commission, the Consultative Group reported that the Fund had received US\$922,379 as of 30 April 2004. Trust Fund beneficiaries have participated thus far in Codex committee meetings on food hygiene, pesticide residues, general principles and food labeling.⁵⁹

⁵⁴ "Comments received in response to Circular Letter 2003/8-CAC: comments received from international organizations", CODEX ALIMENTARIUS COMMISSION, CAC/26/INF/3 (May 2003), 50.

⁵⁵ "Other Matters Arising From FAO and WHO", CODEX ALIMENTARIUS COMMISSION, ALINORM 04/27/10G, paragraphs 59-62.

⁵⁶ "FAO, WHO Launch \$40 Million Trust Fund To Help Poor Countries Participate in Codex Alimentarius", Press Release FAO/WHO/12 (14 February 2003).

⁵⁷ "FAO/WHO Project and Fund for Enhance Participation in Codex: Progress report", CODEX ALIMENTARIUS COMMISSION, ALINORM 03/25/4 (January 2003), paragraph 3.

⁵⁸ "Report of the Third-Third Session of the Executive Committee of the Codex Alimentarius Commission", ALINORM 04/27/3 9February 2004), paragraph 44.

⁵⁹ "FAO/WHO Project and Fund for Enhanced Participation in Codex: Fourth Progress Report", CODEX ALIMENTARIUS COMMISSION, ALINORM 04/27/10F, paragraphs 1-3.

At the CCEXEC meeting in February 2004, the United States, supported by the Codex Coordinator for Latin America and the Caribbean, proposed new country classification criteria that would reduce the number of Codex members eligible to apply to the Trust Fund.⁶⁰ One proposed criterion is participation in the World Trade Organization, indicated by 'who ever has filed a SPS notification has thereby given notice of participation'.⁶¹ Since only 145 of 168 Codex members are also WTO members, this proposed criterion effectively would reduce the eligibility rating of at least 23 least developed Codex member countries. Codex had earlier agreed to 'give priority to least developed countries and in general to those countries that needed more assistance to participate in the Codex process'.⁶² To accept this U.S. proposal would be to renege on that agreement.

Recommendation 9: Codex should not make SPS notification to the WTO a criterion for eligibility to apply to the Trust Fund and to benefit from the Fund. To do so would not only all but ensure that at least 23 Codex members would continue not to participate in Codex. Furthermore, requiring SPS notification to the WTO for Trust Fund eligibility also would set a precedent that would allow Codex participation to become a subordinate function of participation in the WTO.

Despite discussions of the Evaluation to increase 'inclusiveness of developing member countries in the Codex standard development process, including risk assessment'⁶³ it has proven difficult to get government funding to implement this objective. The Fund is currently on a pace to raise less than a sixth of its funding target. It is likely that the Trust Fund will soon be turning, if it has not already turned, to industry to finance the Fund's activities. Both in its comments to the Commission and in a press release in February 2003, CI expressed its opposition to Trust Fund reliance on industry funding. CI pointed out that past industry funding of developing country delegations to Codex meetings may have 'resulted in conflicts of interest or in violation of WHO and/or FAO guidelines for relations with commercial enterprises'.⁶⁴ Given the likelihood of industry funding of the Trust Fund and notwithstanding efforts by the Consulting Group to ensure that industry funding does not unduly influence the substance of Fund activities, CI repeats the recommendation made in its January 2003 comments on the Fund:

Recommendation 10: Codex should request of FAO and WHO that all Codex recognized observers be invited to participate in the planning of and at the meetings of all Food Standards Programme capacity building activities, including those of the Trust Fund.

Given the reorientation of CI's Food and Nutrition Programme towards thematic issues, one way for CI to tie international standard setting to regional and national food safety issues is through the capacity building of food control systems that enable implementation of standards to protect consumer health, particularly in developing countries and countries in transition. Consumer organizations can and should become advocates for integrating food safety capacity building into the public health plans of their countries, though getting the right kind of assistance for capacity building is a great challenge. The Evaluation noted 'a stark contrast between developing countries'

⁶⁰ ALINORM 04/27/3, paragraphs 47-49.

⁶¹ CX/EXEC 04/53/3, Conference Room Document 3 (January 2004, United States), 2.

⁶² Ibid., paragraph 46.

⁶³ ALINORM 03/26/11, paragraph 3.

⁶⁴ "Consumers International's Comments on the WHO Project and Fund for Enhanced Participation in Codex" (January 2003), 1.

stated priorities for development assistance in food safety and the volume of voluntary contributions by developed countries which share those priorities' (paragraph 214).

Conclusion

Codex has taken many steps to facilitate the participation of the few Codex accredited consumer and public interest organizations in the standard setting process. However, given the pressures on Codex to expedite its work for the elaboration of standards for the purpose of trade facilitation, a great effort will have to be made so that the implementation of reforms resulting from the Evaluation focus on the protection of consumer health and the integration of food safety in public health planning. Particularly given the resource constraints of CI member organizations and consumer organizations in general, a great deal of strategic focus will be needed to convert participation in the national and international levels of Codex standard setting into concrete achievements for the protection of consumer health.

Appendix I

In the appendix below, WHO consultant and Evaluation Team member Jerri Husch gives her evaluation of the Evaluation. The briefing paper above takes the Evaluation as a given. Dr. Husch provides an unofficial description of the Evaluation's methodology and the short comings of that methodology, particularly regarding the Codex recognized 'other legitimate factors' (i.e. besides risk assessment) that are to be taken into account in Codex decision-making. Dr. Husch's wide experience in the sociological analysis of organizations brings a different way of thinking about Codex and its constituent groups post-Evaluation. Because Codex has not made available to the public commissioned papers and other data that were crucial in determining the Recommendations in the Evaluation report, Dr. Husch's critique of the Evaluation methodology offers a unique basis for beginning to think about how Codex might be reformed beyond the framework provided by the Recommendations as they are implemented by the Commission.

Decisions and Choice: The 2003 Joint Evaluation of the FAO/WHO Food Standards Programme and Codex Alimentarius

As Codex, WHO and FAO, debate the final recommendations of the Codex Evaluation, questions have been raised as to whether they accurately reflect the input and needs of country, IGO and INGO members of Codex. How did the final decisions and choices about research methods, data collection and analytic tools ultimately affect the final content of the Evaluation recommendations? With a goal of moving from debate to implementation, this paper outlines how the Evaluation team made decisions, what decisions were made and the impact of those decisions on the writing of the final recommendations.

Specifically, the evaluation sought to find answers to questions related to the relevancy, legitimacy, efficiency, equity, accountability and transparency in the global food standards setting process. Requests for the evaluation emerged for three reasons. First, the 1995 WTO decision to use Codex Alimentarius standards in trade disputes fundamentally altered the economic and political importance of the Codex Alimentarius standards. Secondly, the impact of an increasingly complex global standards setting process needed to be examined, and finally, the lack of a clear mandate for Codex as an institution required a full organizational management review.

Methods

A fundamental difference in analytic perspective affected all the work of the Evaluation team. This difference influenced the choice of evaluation methods and how those methods were operationalized. The difference in perspective also affected how and what evidence was collected and finally how the data was analyzed and what were viewed as priority issues in the final recommendations.

The two perspectives differed on the fundamental definition of how 'institutions' as a 'social system' or 'organization' function. One perspective saw institutions as a collection of static parts or 'functions' that when taken together make the organization 'work'. This perspective assumes that the 'functions' are fixed and that the links, or 'relationships' between the functions, are not important, and that functions basically don't change. Thus if one area of an organization changes, other areas will not be affected, as they have discreet and separate functions.

The other perspective also works from a 'social system' model, but emphasizes that organizations are a dynamic set of interconnected parts or 'elements'. Those elements have certain 'functions', but those functions may change over time and in different contexts. What is important in this perspective is the LINKS between the parts. In this view, organizations are constantly adapting, always change and are dynamic.

In the context of Codex, using this perspective an evaluation would,

- 1) Describe the 'elements' of the Codex 'system', i.e. the committees, the CAC, the Secretariat, the national agencies, the stakeholders,
- 2) Illustrate how they fit together, and,
- 3) Offer insights on how change in one element could affect all other elements in the organization.

The difference of perspective affected all decisions about the scope of the evaluation, including: 1) defining the parameters and elements of global food standards setting process, 2) the role of Codex as an institution in that process, and 3) the management and administrative structures of Codex that are the formal 'links' of that organizational process.

Ultimately it was decided, based on the rationale of a tight time schedule, to use a static model and to focus on the discrete 'parts' of the system, with an emphasis on risk assessment. With this perspective in mind, the questionnaire, the interviews and the final analysis were all constructed to gather descriptive details about the parts of the Codex system. Questions and data collection related to the linkages and relationships between the elements of the Codex standards setting process were viewed as too time consuming and were negatively sanctioned. Due to this

narrowing of scope, important issues, some highly complex, and related to policy decisions, i.e. Codex recognized 'other legitimate factors' in standard setting other than risk assessment, were not fully analyzed.

Methodological Rigour

By rejecting an integrated and dynamic analytic model, a full disclosure of the links between method, research activities and analysis was also rejected. Scientifically transparent and rigorous evaluations explicitly link goals, objectives and activities to clear outcomes. However, the Codex evaluation process as a whole, for the sake of time, was fraught with inconsistencies. Some examples include:

- **No clear and agreed upon goals, methods and outcomes for the evaluation.**
- **No clear and explicit assumptions related to choice of data collection method,**
- **No consistent use of data collection methods.**
- **Lack of transparent and consistent approaches in consolidating large amounts of data and information.**
- **No explicit and documented analytic framework with theoretical rationale for writing the final report.**

Data Collection and Analysis

Although the emphasis of the evaluation was descriptive, a draft framework which focused on analyzing categories of responses in the data ('pile sorts'), revealed some interesting patterns emerging. From a review of all the interviews, and responses to the questionnaires, the following patterns of Codex organizational processes emerged. This includes:

- lack of clarity of policy through-out the standards setting process,
- no consistency across administrative functions,
- no organizational coherence of work procedures across any (or all) of the elements that comprise Codex.

The following examples are global in scope:

- Codex representatives are housed in different Ministries in different countries,
- Codex focal points not aware of other interested parties,
- Countries have different ways of collecting data for risk assessment,
- Committees are managed differently.
- National agencies lack communication between national agencies.
- Departments within international organizations rarely collaborate.
- International agencies duplicate, contradict or ignore other agency activity around food standards.
- One international agency uses scarce resources to establish agricultural cooperatives, while another international agency, across the street, sets food processing standards and packaging criteria, that prevent those very products from ever entering the markets.

Consumer groups voiced concerns are viewed as 'consumer problems' and not seen as linked to the core organizational problems of clarity, consistency, or coherence of work procedures which affect transparency, relevancy, accountability etc. .

Final Recommendations

Given the complexity of the information exchange and decision making challenges WHO/FAO and Codex confront, simple solutions that address only a part of the problem are not viable. Simple analyses that focus on separate functions and stop without linking functions to organizational capacity are not relevant to the current world.

The greatest shortcoming of the current Evaluation recommendations is that they do not deal with the complexity of contemporary food standards setting reality. They are discrete, primarily descriptive and do not offer insight into the links between decisions and the actions needed to develop practical solutions to address the complex problems of Codex. If Codex is to be comprehensively well coordinated, fully participatory and openly accountable for its actions, then the recommendations only offer insight into one small part of that process.

Much can be learned, for example, from environmental analyses that recognize the linkages between organizational elements. Models and techniques that offer insight into complex processes and systematic organizational analyses exist. Such tools, if used, would accommodate the multiple perspectives and multiple sources of information that are at the heart of Codex

Viable, practical and solutions oriented recommendations would:

- Explicitly link resource appropriations and other relevant organizational strategy outcomes.
- Deliberately search for the *unintended* effects (both positive and negative) of introducing change to the organizational system .
- Compare and contrast alternative ways of achieving results of similar or greater value.
- Assess which dimensions would merit changes to the system, relative to other viable alternatives.