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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

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TOWARDS A REVISION IN THE CODEX **ALIMENTARIUS COMMISSION**

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ABSTRACT

The Codex Alimentarius Commission plays an important role in international trade so far as setting of standards in international trade is concerned. However, very less has been studied about the Commission, its role and the challenges confronted by the Commission in the contemporary times. The Commission has been overshadowed by the non-binding nature of its decisions and the new agreements in the WTO regime. It also faces serious political conflicts set by different regional players who take different sides on issues such as genetically modified food.

Keywords: Codex Alimentarius Commission, World Trade Organisation, SPS Agreement, Food and Agricultural Organisation

INTRODUCTION:

The Codex Alimentarius Commission is an organization which developed from the coordination of the interests of consumers of the food industry and the corresponding authorities dealing with these interests. The work in the International Codex Alimentarius is now carried out by the two United Nations (UN) organizations, the Food and Agricultural Organization (FAO) and the World Health Organization (WHO) within the Codex Alimentarius Commission which has its seat in Rome.²

The first meeting of the Codex Committee on Pesticide Residues took place in The Hague, Netherlands January 17-21, 1966. Sixteen countries were represented. The second meeting in 1967

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² Richard Wildner, Codex Alimentarius Commission, Food, Drug, Cosmetic Law Journal, MAY 1973, Vol. 28, No. 5, Papers Presented at the Budapest Food and Drug Law Institute Conference (MAY 1973), 326-330

had twenty-three countries in attendance.³ For the last several years there have been forty-one to forty-six country delegations in attendance. Codex, however, really started prior to 1966. At a meeting of the Joint Food and Agriculture Organization (FAO)/World Health Organization (WHO) Program on Food Standards in November 1961, the concept of the Codex Alimentarius Commission was discussed and adopted.⁴

UNDERSTANDING THE NATURE OF THE CODEX ALIMENTARIUS COMMISSION:

The organizational structure and the functioning of the Codex Alimentarius Commission is provided in the Statutes of the Codex Alimentarius Commission. Article 1 of the Statute states that the Codex Alimentarius Commission shall be responsible for making proposals to the Food and Agriculture Organization (FAO) and the World Health Organization (WHO) on all matters pertaining to the implementation of the Joint FAO/WHO Food Standards Programme. It shall make proposals on matters related to:

- a) protecting the health of the consumers and ensuring fair practices in the food trade;
- b) promoting coordination of all food standards work undertaken by international governmental and non-governmental organizations;
- c) determining priorities and initiating and guiding the preparation of draft standards through and with the aid of appropriate organizations;
- d) finalizing standards and publishing them in a Codex Alimentarius either as regional or worldwide standards;
- e) amending published standards, as appropriate, in the light of developments.

The Codex Alimentarius Commission (CAC) shall also be consulted by the Directors General of the Food and Agriculture Organization (FAO) and the World Health Organization (WHO) on all matters pertaining to the implementation of the Joint FAO/WHO Food Standards Programme.⁵

³ Feb. 19-Mar. 1, 1967, The Hague, Netherlands

⁴ Depew, The Joint FAO-WHO Conference on Food Standards, 18 Food Drug Cosm. L. J. 34, 34 (1963)

⁵ Article 1 of the Statute of the CAC

Article 2 states that the membership of the Commission is open to all Member Nations and Associate Members of FAO and WHO which are interested in international food standards. It is not only open to Member Nations of the FAO or WHO because as under Article 3 any Member Nation or Associate Member of FAO or WHO which is not a Member of the Commission but has a special interest in the work of the Commission, may, upon request to the Director-General of FAO or WHO, attend sessions of the Commission and of its subsidiary bodies and ad hoc meetings as observers.⁶

In short the Codex Alimentarius Commission is an intergovernmental body, created by FAO and WHO in 1963, in order to implement the Joint Food Standards Programme. It is organised as a private public regulatory regime and involves in its decision-making procedure, national governments, various industry representatives, NGOs, and international organisations. The main purpose of the organisation is protecting the health of the consumers and ensuring fair practices in the food trade.⁷

The Codex Alimentarius is not a set of rules in which the food law with its numerous regulations and prohibitions is codified, the Codex is, rather, a collection of diverse expertise, guiding principles, containing characteristics for the evaluation of foodstuffs, a description of various nutrients with regard to their quality and attributes, but in no case is it a legal norm, a law, a regulation or a decree. Owing to the fact that national legislative bodies no longer decree detailed regulations for individual foodstuffs but pass general food directions which apply to all foodstuffs, a new system has been introduced into the alimentary code, namely the skeleton laws. These skeleton laws are reified by, for example, the fact that it is generally prohibited to market victuals detrimental to health or adulterated goods. The definition as to what is unhealthy or adulterated or labelled incorrectly is put down by the expert and thus, he fills the skeleton, puts the flesh onto it, so to speak.⁸

The standard-setting activity⁹ is run mainly by the CC, and is triggered by proposals coming from national governments or subsidiary committees. The Commission has a pivotal role and decides the

⁶ Statute of Codex Alimentarius Commission

⁷ FAO/WHO, Statutes of the Codex Alimentarius Commission, Rome – Geneva, 1961/62, Art. 1, www.fao.org, www.who.in

⁸ Richard Wildner, Codex Alimentarius Commission, Food, Drug, Cosmetic Law Journal, MAY 1973, Vol. 28, No. 5, Papers Presented at the Budapest Food and Drug Law Institute Conference (MAY 1973), 326-330

⁹ The full procedures for the adoption of standards are encompassed in the Procedures for the Elaboration of Codex Standards and Related Texts adopted by the Commission, available at < <http://www.fao.org/DOCREP/005/Y2200E/y2200e04.htm#TopOfPage>>..

priority according to which proposals for standards are to be implemented, and which subsidiary committees must draft the standards. The draft standards are then circulated among members for comment, and submitted to the CC for approval, before being published and included in the Codex Alimentarius.¹⁰

FUNCTIONS OF THE CODEX ALIMENTARIUS COMMISSION:

The functions of the Commission are mainly agenda-setting, negotiation and adoption, implementation, monitoring and enforcing. The functions have been elaborated as under:

a) Agenda-Setting: The Rules of Procedure are clear in endowing any member of the Commission along with the Directors-General of the FAO and WHO with the power to propose the inclusion of an item in the agenda for a session of the Commission.¹¹ The proposed agenda is then voted by the Commission.¹²

b) Negotiation and Adoption: The process of drafting and adoption is almost entirely internal to the Commission and the members. The FAO and WHO can provide guidelines on certain particular matters¹³ and, in the limited case of dairy products, the International Dairy Federation can issue recommendations to the drafters. An intense session of comments from members and interested international organizations precedes the final adoption by the Commission.

International non-governmental organizations are allowed to take part in every stage of the drafting procedure, except for the adoption one.¹⁴

¹⁰ S Henson and J Humphrey, The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes (Paper for FAO/WHO May 2009)

¹¹ Rule V of the Rules of Procedure

¹² Ibid, Rule VI.

¹³ Namely, when the standards incorporate a maximum limit for residues of pesticide or veterinary drugs, Procedures for the Elaboration.

¹⁴ The Principles Concerning the Participation of International Non-Governmental Organizations in the Work of the Codex Alimentarius Commission, available at <<http://www.fao.org/DOCREP/005/Y2200E/y2200e09.htm#TopOfPage>>. Such principles establish an accreditation procedure, through which organizations having a particular connection with the matters covered by the standards (in terms of expertise, competence, aims or subject-field) can apply for the status of observers. See also the report International Non-governmental Organizations in Observer Status with the Codex Alimentarius Commission, Report by the Secretariat (CAC/30 INF/2), available at <ftp://ftp.fao.org/Codex/CAC/CAC30/if30_02e.pdf>. It must be noted that, according to official reports, industry-related NGOs hugely outnumber consumers' associations.; On participatory issues in the Codex, T Huller and ML Maier, 'Fixing the Codex?: Global Food-Safety Governance under Review'

- c) **Implementation:** Several aims are listed among those belonging to the Commission, and each of them would correspond to a different implementation stage, and a different responsible actor. For instance, if the very purpose of the standards were the harmonization of international food standards, implementation would occur through the adoption of national norms incorporating them, the implementing subjects being the domestic rule-makers. Instead, if the prevailing interest were the fairness of international trade in foods, the implementation task would perhaps be carried out by trade authorities granting equal market access to food abiding by the same standards. Implementation is typically reflected in compliance with the standards, and is therefore carried out by the subjects producing, processing, distributing and selling the food, i.e., the companies.¹⁵
- d) **Monitoring:** Several actors can be expected to play a monitoring role in connection with Codex standards, reacting to cases of non-compliance. Consumers are the most obvious candidates, as they are the direct beneficiaries of standards compliance and, conversely, the most affected in case of non-compliance. Retailers and distributors may adopt policies requiring compliance by Codex standards, hence bearing an interest to monitor the actual respect thereof along the supply chain. The Codex Commission does not perform directly certification activities, but encourages Member States to set up a system of certification run by official bodies or officially recognized bodies.¹⁶
- e) **Enforcing:** Non-compliance issues raised through monitoring can be considered and enforced in different venues. Courts may adjudicate disputes arising from consumers' claims alleging the violation of standards, either under tort or contract law.¹⁷ Retailers and distributors can terminate their business relationship with producers and suppliers for non-compliance with the standards. Third-party certifiers may threaten the withdrawal of, or deny the award of, certification. State authorities are empowered to regulate and deny market access to food that

¹⁵ Henson and Humphrey, On the 'mixity' of the Codex's original purpose: 'If several potentially conflicting goals are built into the mandate of an individual organization, as in the case of Codex, conceptualizing problem-solving capacity is [a] daunting task.'

¹⁶ The Principles for Food Import and Export Inspection and Certification Cac/GI 20-1995, adopted by the Codex Alimentarius Commission at its 21st Session, 1995, available at <<http://www.fao.org/docrep/009/y6396e/Y6396E01.htm#ch1>>

¹⁷ A G Chan, 'Qs-9000 and Its Legal Implications' (1999) 64 J of Air L and Commerce 1123, 1147, describing plaintiffs' use of court claims founded on violations of voluntary standards.

is produced or processed in violation of standards. Independent authorities active in the field of food safety can assess non-complying companies where the standards have been incorporated into applicable domestic regulations.¹⁸

CHALLENGES FACED BY CODEX ALIMENTARIUS

COMMISSION:

• LEGAL NATURE OF STANDARDS MADE BY THE COMMISSION

Codex standards are not binding on Member States,¹⁹ who are nevertheless encouraged, as a general practice, to accept them voluntarily and to enact domestic rules incorporating them. The General Principles of the Codex²⁰ provide for three kinds of acceptance—full acceptance, acceptance with specific deviations, and free distribution—graduated according to the degree of force accorded to the standards in the domestic market.²¹

• PROBLEM OF UNCERTAINTY:

Despite its expert mechanisms, the Codex increasingly faces a critical problem: scientific uncertainty. This basic problem is not new; mankind has been making policy decisions under uncertainty in one form or another for as long as we have existed. Since nothing can be definitely proven by science –

¹⁸ *Ibid*

¹⁹ FAQ page of the Codex website <http://www.codexalimentarius.net/web/faq_gen.jsp#G11>: ‘General Question 11: Are Codex Standards mandatory? Answer: Codex texts are voluntary and non-binding’

²⁰ Available at <<http://www.fao.org/DOCREP/005/Y2200E/y2200e05.htm#TopOfPage>>

²¹ For instance, full acceptance of a standard implies that food not conforming therewith shall not be distributed under the name or description laid down in the standard (see Principle 4A.i). According to the taxonomy of GK Hadfield, ‘The Public and the Private in the Provision of Law for Global Transactions’ in V Gessner (ed), *Contractual Certainty in International Trade: Empirical Studies and Theoretical Debates on Institutional Support for Global Economic Exchanges* (Hart Publishing 2009) 238, Codex standards would rank as public under some criteria, but they would still have a ‘private ordering’ aspect, since ‘legal obligations based in private ordering derive exclusively from the intent and consent of the obligated party to be bound.’ (240); Vogel, ‘Private Global Business Regulation’ (2008) 11 *Annual Rev of Political Science* 261, 265 (regarding ISO regulations). Similarly, F Cafaggi, *Product Safety, Private Standard Setting and Information Networks* (Working Paper 2008/17 EUI 2008) 10, refers to technical standards as ‘privately produced’ when compliance is voluntary. For a distinction between private regulation, co-regulation and ex-post recognized self-regulation see F Cafaggi, *Rethinking Private Regulation in the European Regulatory Space* (Working Paper 2006/13 EUI 2006); B Kingsbury, N Krisch and RB Stewart, ‘The Emergence of Global Administrative Law’ (2005) 68 *L and Contemporary Problems* 15 (CC is a hybrid body); A Herwig, ‘Transnational Governance Regimes for Foods Derived from Bio-Technology and their Legitimacy’ in C Joerges, I-J Sand and Gunther Teubner (eds), *Transnational Governance and Constitutionalism* (Hart Publishing 2004) 199, 204; J Pauwelyn, ‘Non-Traditional Patterns of Global Regulation: Is the WTO ‘Missing the Boat’?’ in Joerges and Petersmann, 199, 208–215 (CC is essentially a public body).

we merely operate on the hypothesis that best fits the facts at any given time —any standard setting or regulatory body makes such decisions on a regular basis.²²

The last decade has seen enormous growth in new technologies and products of interest to standard setters, particularly in the biotechnology and chemicals sectors. The speed of that growth has been such that we have not been able to assess the human health and environmental implications of a number of the new innovations on which we now rely. Of the 70,000 chemicals in commercial use in the United States in 1995, only 2% had been fully tested for human health effects, with 70% not tested for health effects of any kind.²³

• **THE WTO'S SANITARY AND PHYTOSANITARY AGREEMENT:**

The World Trade Organization was created in 1995, taking under its umbrella the various agreements existing around the General Agreement on Tariffs and Trade, and various new agreements resulting from the Uruguay Round of multilateral negotiations. One of these new agreements was the Agreement on Sanitary and Phytosanitary Measures (SPS). In this agreement, Codex was named as one of five recognized bodies for setting international standards. With the stroke of a pen, in an agreement not of its own making, the Codex was thus fundamentally changed.²⁴

RELEVANCE OF THE CODEX STANDARDS:

The Codex looks into several key issues such as follows:

(A) Labelling of Genetically-Modified Foods: Codex is grappling with the issue of whether mandatory labelling of genetically modified foods is necessary.²⁵ Such an approach is recommended by many countries, particularly those of the European Union, and by consumer interest organizations. Other countries, such as the United States, believe that labelling of genetically-modified foods is necessary only when they present a specific safety issue. For instance, allergens, when their composition is significantly different than the comparator food, or when the food requires substantial changes in usage or processing. An interesting aspect of the Codex discussion on this issue involves

²² A Forced Evolution? The Codex Alimentarius Commission, Scientific Uncertainty and the Precautionary Principle Aaron Cosbey, <https://www.iisd.org/system/files/publications/forced_evolution_codex.pdf>

²³ Rachel's Environment and Health Weekly. Environmental Trends, Issue #613, August 27, 1998.

²⁴ Supra 21

²⁵ Report of the Twenty-Fifth Session of the Codex Committee on Food Labeling app. VI, Codex Doc. ALINORM 97/22A.

the interpretation of that portion of the Codex sound science principle relating to the promotion of fair practices in food trade and the consumer's right-to-know. Many Codex member countries believe that mandatory labelling of genetically-engineered foods is appropriate under the fair trade provisions of that principle. The Codex Executive Committee, at the request of the Codex Committee on Food Labelling, reviewed this issue.²⁶ The Executive Committee stated that product safety was paramount and that the four Codex sound science principles should be adhered to closely. The Executive Committee noted, however, that while the consumer's right-to know was ill-defined and variable, it was an element that needed to be considered on a case-by-case basis. While a final Codex decision on this subject is still a long way off, it will contribute both to clarifying the meaning of the second sound science principle and to facilitating international trade in this growing food sector.

(B) Milk Pasteurization: The food hygiene portions of several dairy products standards, including that for cheese, are being considered for final approval by the Codex Commission.²⁷ These present an interesting risk assessment situation that relates to the fundamental importance of the Codex sound science principles. At issue is whether the raw milk ingredient must be pasteurized or have received an alternative treatment that provides an equivalent level of health protection. Several Codex member countries, particularly those of the European Union, believe that application of the Codex general principles of food hygiene i.e., good manufacturing practices combined with Hazard Analysis Critical Control Points (HACCP) systems and end-product testing are adequate. Other countries, especially the United States, believe these provisions are inadequate and that mandatory pasteurization, or its equivalent, should be required. The central debate focuses on what is an acceptable level of risk, with undercurrents of societal and economic issues. The final decision by Codex on this subject should impact the interpretation of the sound science principles.

(C) Equivalency of Inspection Systems: While the equivalency of inspection systems in a generic sense is not a new issue to Codex, the detailed consideration of equivalency is new. This could be a very difficult issue on which to reach consensus and it will influence the interpretation of both Codex sound science and risk analysis principles. Clearly, it is an important aspect of the trading of foodstuffs. To date, the equivalency of inspection systems has been addressed only in a general sense,

²⁶ Report of the Forty-Third Session of the Executive Committee of the Codex Alimentarius Commission TU 27-30, Codex Doc. ALINORM 97/3

²⁷ Report of the Codex Committee on Milk and Milk Products, 21 -24, Codex Doc. ALINORM 97/11

as an element of the Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems,²⁸ which was developed by the Codex Committee on Food Import and Export Inspection and Certification Systems. This guideline document strongly endorses equivalency of inspection systems but does not offer a detailed definition of that phrase or an illustration of its practical application. The Codex Commission will be asked to approve a new work item for the Inspection and Certification Systems Committee to develop Guidelines on the Determination of Equivalence.²⁹

(D) Broader Ramifications of HACCP: HACCP is a well-accepted as a Codex food safety policy. The Codex Commission has adopted the seven principles of HACCP³⁰ and approved the twelve-step HACCP implementation plan³¹ at its 1997 meeting. Various Codex Committees also have endorsed HACCP as the preferred means of ensuring the safety of foods. Critical details of HACCP implementation policy and operation remain to be determined by Codex. Important issues currently under discussion by the Codex Committee on Food Hygiene include the extent of HACCP implementation, the applicability to product type, the extent of coverage, third-party certification, and the approach to enforcement.³²

(E) Food Allergens: Another noteworthy technical issue in this area is that of food allergens. The issue is fundamentally one of differing approaches to allergen labelling to ensure consumer identification of allergens and safe consumption of allergen-containing foods. While mandatory ingredient declaration, as required in the United States, permits direct consumer knowledge of allergens, the labelling approach used by other countries, in which a composite ingredient comprising less than twenty-five percent of the product does not require individual ingredient declarations, creates difficulty for the allergic consumer. The Codex Committee on Food Labelling is considering a five per cent composite ingredient approach, along with the development of a list of known food

²⁸ Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems app. II, Codex Doc. ALINOR

²⁹ Guidelines on the Determination of Equivalence pt. II, app. I, Codex Doc. ALINORM 97/21

³⁰ Report of the Twenty-First Session of the Codex Alimentarius Commission, Codex Doc. ALINORM 95/37.

³¹ Report of the Twenty-Ninth Session of the Codex Committee on Food Hygiene app. II, Codex Doc. ALINORM 97/13 A.

³² Report of the Twenty-Ninth Session of the Codex Committee on Food Hygiene 61-63, Codex Doc. ALINORM 97/13A.

allergens.³³ The Food Labelling Committee also requested that the Codex Commission consider the establishment of a scientific advisory group to assist with allergen identification.

CONCLUSION:

The Commission will quickly lose credibility if it allows itself to be torn apart repeatedly by political fighting that produces no results. That said, institutional change of such a fundamental nature is difficult to effect. If it does choose to evolve, Codex would be well advised to do so quickly, without waiting to be moved by a crisis. In the words of one analyst:

“—Nothing could be worse than to undertake the necessary debate at the international level in the context of a specific decision. That creates a situation in which one party wins while another loses—distributive bargaining—whereas there is urgent need for a framework that all concerned can recognize as contributing to some important policy goal.”³⁴



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³³ Report on the Twenty-Fifth Session of the Codex Committee on Food Labeling 41 -45, Codex Doc. ALINORM 97/22A.

³⁴ Konrad von Moltke, “The Precautionary Principle, Risk Assessment and the World Trade Organization”, Winnipeg: International Institute for Sustainable Development, forthcoming.