
POLITICIZATION, DEADLOCK, AND DISPUTE:

THE IMPACTS AND IMPLICATIONS OF POST-1995 LINKAGES BETWEEN THE CODEX ALIMENTARIUS COMMISSION AND THE WORLD TRADE ORGANIZATION

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Introduction

The Codex Alimentarius Commission¹ (CAC) is an institution created from a vision shared by the administrations of the Food and Agriculture Organization (FAO) of the United Nations (UN) and the World Health Organization (WHO) to develop science-based food safety standards and guidelines designed to protect consumer health and ensure fair trade practices. The Commission was established to develop “international scientific evaluation mechanisms that could provide the best possible science-based advice to member countries with periodic update[s] to assure that new scientific information was always taken into account in FAO/WHO recommendations” (Lupien 2000, 193). Therefore, the Codex Commission’s Statutes and Procedures are designed to ensure that it pursues risk assessment, management, and communication in order to minimize food-related health risks.

The Codex Commission promotes international harmonization of food safety standards by coordinating the food safety work undertaken by national governments and non-governmental organizations (NGOs). Because of its status as a single international “reference point for consumers, food producers and processors, national food control agencies, and the international food trade,” the Codex Commission has encouraged scientific and technical research and debate on topics of food safety and has increased international awareness of those issues (FAO and WHO 2005, 1). The

¹ Codex Alimentarius translates from Latin as “food law” or “food code.” The Codex Alimentarius is comprised of the standards, guidelines, codes of practice, and related texts produced by the Commission.

Commission's formal purposes are to: protect consumer health by mitigating the risks associated with food production and consumption, ensure fair practices in food trade, promote coordination of all food standards work undertaken by international governmental and non-governmental organizations, facilitate international trade, and publish and amend food safety standards in a *Codex Alimentarius*.

Despite its dedication to ensuring fair trade practices, the Codex Commission's first responsibility is to protect consumer health. This responsibility is tantamount to minimizing the risks associated with the production, trade, and consumption of foods and food products. Therefore, Codex procedures and recommendations are grounded in risk assessment, management, and communication. Diahanna Post defines risk assessment as "the technical evaluation of the risk of a certain substance" for individuals or populations (2005, 3). The *Statements of Principle Relating to the Role of Food Safety Risk Assessment*, implemented by the 22nd Session of the Codex Commission, declares that:

- Health and safety aspects of Codex decisions and recommendations should be based on a risk assessment, as appropriate to the circumstances.
- Food safety risk assessment should be soundly based on science, should incorporate the four steps of the risk assessment process,² and should be documented in a transparent manner.
- There should be a functional separation of risk assessment and risk management, while recognizing that some interactions are essential for a pragmatic approach.
- Risk assessments should use available quantitative information to the greatest extent possible and risk characterizations should be presented in a readily understandable and useful form.³

² 1. Hazard identification; 2. Hazard characterization; 3. Exposure assessment; 4. Risk characterization. For an explanation of each step, see Appendix D.

In completing the risk assessment, the Codex gathers all available scientific data, both qualitative⁴ and quantitative, from multiple sources and geographic regions.⁵ Should the available scientific data be incomplete, the Commission publishes a “code of practice” rather than a “standard” and continues to compile information. Risk assessments must reflect realistic exposure scenarios and should specifically address any relevant needs or situations of developing countries. In addition, they are required to detail the constraints, uncertainties, limitations, and assumptions of the data and record minority opinions. The 13th *Procedural Manual* mandates that experts responsible for risk assessment “should be selected in a transparent manner on the basis of their expertise, experience, and their independence with regard to the interests involved.” The selection process must identify any potential conflicts of interest and should ensure effective participation of experts from different geographic regions.

Risk assessment provides the benchmark for risk management, the process of “weighing alternatives in light of the results of risk assessment and, if required, selecting and implementing appropriate control options” (Hathaway 1999, 248). Risk management decisions are incorporated into Codex standards, guidelines, recommendations, and codes of practice. A vital part of risk management is risk communication. The 13th *Procedural Manual of the Codex Commission* states that risk communication should promote the understanding of the scientific data considered during risk assessment processes, encourage consistency and transparency in risk management, strengthen the participation of Codex Commission members in risk analysis and management, and foster trust and confidence in the safety of the global food supply. Risk communication thus ensures, or at least strives to ensure, that all

³ Published in the 13th *Procedural Manual*. Available online at <http://www.foodlaw.rdg.ac.uk/codex-4.htm>.

⁴ Qualitative data must be expressed quantitatively.

⁵ The Commission is particularly charged with incorporating data from developing countries.

While the United States, like the Codex Commission, operates on the basis of risk assessment and management, European Union (EU) member states as well as the European Union itself often ascribe to the precautionary principle. These Codex members debated these approaches to consumer safety throughout the late 1990's. This dispute culminated in the 2001 linkage between risk management and the precautionary principle by the Codex Secretariat. The Codex Commission determined that it would not publish a standard to the *Codex Alimentarius* absent scientific certainty. In addition, the Commission agreed to explicitly consider the uncertainty and variability of scientific data in the risk assessment procedure. While this agreement did introduce precaution into the Codex framework, it fell short of the language endorsed by the EU at the 2000 meeting of the Committee of General Principles: "when relevant scientific evidence is insufficient to objectively and fully assess risk from a hazard in food, and

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- To protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins, or disease-carrying organisms in food, beverages, or feedstuffs;
- To protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plant or products thereof, or from the entry, establishment, or spread of pests; or
- To prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests (SPS Agreement, Annex A).

The SPS provides that “to harmonize sanitary and phytosanitary measures on as wide a basis as possible, [states] shall base [or benchmark] their sanitary and phytosanitary measures on international standards, guidelines or recommendations,” specifically those provided within the *Codex Alimentarius* (Dawson 1995, 263). In addition, members may “introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines, or recommendations, if there is a *scientific justification*” (SPS Agreement, Article 3, emphasis mine). This provision enables member state governments to set higher than recommended standards in accordance with the precautionary principle in cases where there is insufficient or contradictory scientific evidence, although it does require that those governments defend their policies against accusations that they constitute non-tariff barriers to trade. Moreover, should the available scientific evidence be insufficient, WTO members may “provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information” and “seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary and phytosanitary measure accordingly within a reasonable period of time” (SPS Agreement, Article 5). This provision allows member state governments to implement temporary precautionary measures while conducting risk assessments provided that those measures eventually be aligned with the conclusions of the risk analysis. Finally,

The WTO lacks a cohesive, consistent, and continuous approach to risk in that it has addressed economic risk in different ways relative to different issues across its institutional history.⁸ Traditionally, WTO Dispute Settlement Panels and Appellate

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Panels have ruled against NTB barriers grounded in precautionary principles. The best-known example of this adherence to risk management is the WTO's ruling against the European Commission's ban on US and Canadian beef from hormone-treated cattle. In this case the Dispute Resolution Panel ruled that "the precautionary principle is not an established rule or principle of law and that it is not an acceptable basis for actions that are supposed to be based on scientific risk assessment" (Goldstein and Carruth 2004, 493). This ruling, however, was not as fatal a blow to the concept of a precautionary approach as it has been made to appear. In fact, the panel's ruling was that "the carcinogenic risk from banned hormone-treated beef was no greater than carcinogenic risk from the EC's homegrown antibiotic-treated pork, which was not banned" (Goldstein and Carruth 2004, 493). It was this inconsistency, and not the concept of precaution itself, that invalidated the EC's claim to precautionary protection under provisions of the SPS Agreement, because it indicated that the EC's ban was not an attempt to protect consumer health but rather to protect domestic agricultural interests. Because the EC banned imported meat products that contained animal growth hormones even though allowed for the production and distribution of similarly domestic meats, it violated the WTO's nondiscrimination principle. Therefore, the precautionary principle could be invoked in food safety disputes as a justification for consumer protection standards but not as a disguise for protectionist policies.

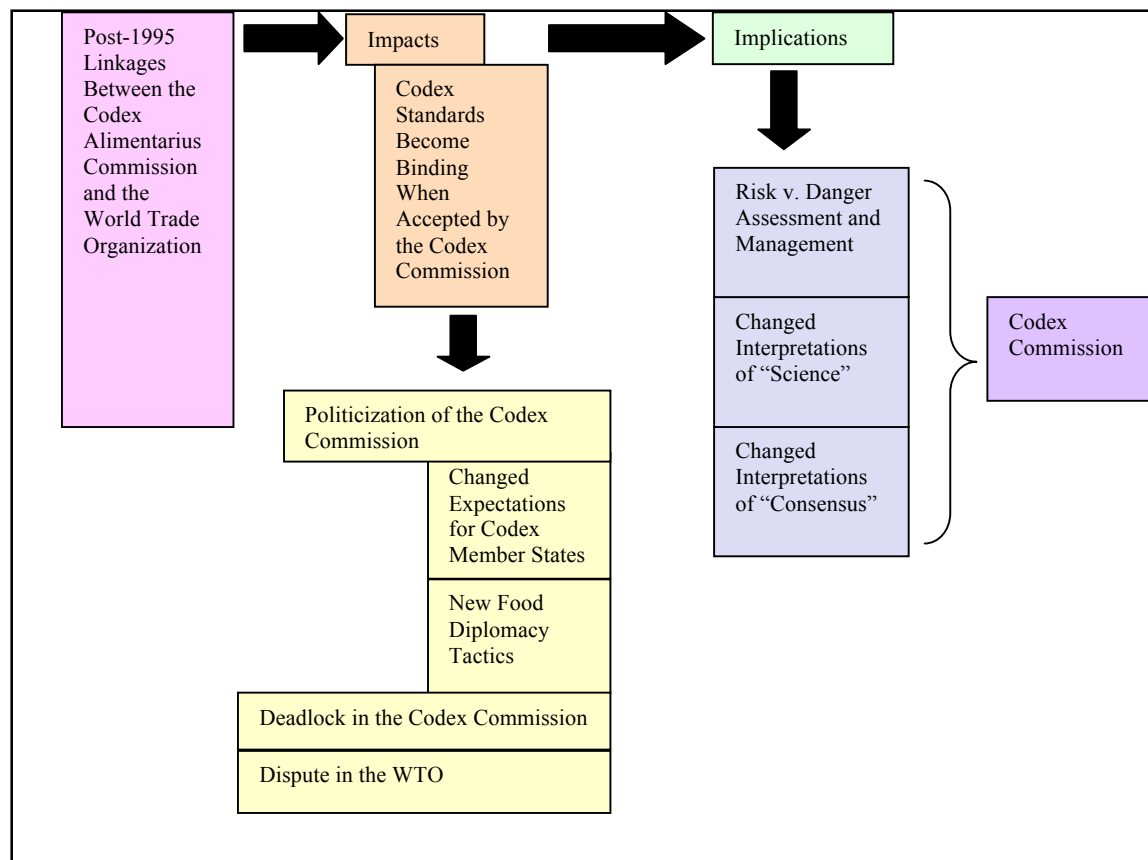
Although the WTO has not ruled in favor of a precautionary approach in a case related to food safety, it has done so with respect to other issues. For example, in 2001 a WTO Appellate Panel considering an EC ban on Canadian-made asbestos ruled that health risks could be considered when determining if products were "like" under the Article III:4 of the GATT. The panel went further, ruling that risk must be examined, not only in terms of a product's physical properties, but also in terms of consumer perception and behavior. This decision by the Appellate Panel, which went beyond the scope of the decision in question, signals that the WTO is willing to consider the

precautionary principle as part of an appropriate approach to risk assessment to justify non-tariff barriers to trade on the basis of consumer health. Moreover, it suggests that consumer perceptions may serve as justification for trade barriers even when those perceptions are not grounded in scientific research. If applied to disputes regarding food safety issues, this decision would bring the WTO's approach to risk into a direct confrontation against the Codex Commission's dedication to risk management techniques.

Post-1995 associations between the WTO and the Codex Commission altered the dynamics of the Codex Commission. There are three impacts of the post-1995 linkages between the Codex Commission and the WTO: first, linkages with the WTO have politicized⁹ the Codex Commission; second, the post-1995 Codex Commission has become characterized by deadlock; third, the WTO has faced high intensity food safety conflicts in its dispute settlement panels. These impacts have broad reaching implications, both for the institutions and for issues of food safety, affecting changing approaches to risk, science, and consensus in the Codex Commission.

⁹ David Easton defines politics as a distributional process to determine, in laymen's terms, who gets what, when, where, why, and how. In that sense, politics is interest-based disagreement over the allocation of resources or influence. When I argue that its post-1995 linkage with the WTO *politicized* the Codex Commission, I am, in effect, indicating that Codex decision-making processes have become subject to distributional dynamics. Prior to 1995 Codex standards were non-binding in nature, allowing national governments to accept or reject Codex recommendations in national policy-making processes. At that time, standard elaboration processes were not political because of the "Gentlemen's Club" dynamics detailed earlier. Because of 1995 linkage between the Codex Commission and the WTO, however, Codex member-states employ politicized food diplomacy tactics in Commission and Committee meetings to elaborate binding standards that represent the interests and commitments of their national governments in a process that is political.

Figure 1: The Impacts and Implications of Post 1995 Linkages Between the Codex Commission and the WTO



Establishing the 1995 Linkage Between the Codex Commission and the WTO

The linkage between the Codex Commission and the WTO was more incidental than deliberate, and Codex documents from the early 1990's suggest that the Commission did not take into account the likely impacts and implications of the relationship. The TBT and SPS Agreements were originally part of the GATT. Under that framework, the TBT Agreement states that GATT member states should take into account relevant standards developed by international institutions when developing national food safety policies. The SPS Agreement is more explicit, citing the *Codex Alimentarius* as the reference point that GATT member states should reference when

¹⁰ Codex procedures were designed initially to make standards non-binding in order to give national governments maximum control over adoption and implementation and to minimize conflict between member states. Therefore, standards were first approved by the Commission and then accepted by national governments on a voluntary basis. The General Principles of the Codex Alimentarius Commission dictated that standards would be included in the *Codex Alimentarius* after they had been accepted by “a sufficient number of states” (Codex Alimentarius Commission Session, 3rd Session). What number or proportion of Commission member states was necessary to constitute “a sufficient number” was not defined, and reports of subsequent session of the Commission document that different numbers were considered sufficient for different issues. In addition, national governments were permitted to accept Codex standards with [often unspecified] “deviations,” which became, as noted by several Codex Members at the 4th Session of the Codex Committee on General Principles (1974), tantamount to non-acceptance. The WTO changed this process by conflating these two steps. *Codex Alimentarius* standards and guidelines now

The WTO was established in 1995. Until then, the Codex Commission acknowledged that it could have an institutional relationship with the GATT without altering its institutional practices, procedures, or structures. However, the establishment of the WTO and its binding regulatory frameworks altered the Codex Commission's approach to the TBT and SPS agreements. At its 21st session that year, the Codex Commission "noted that the new role for Codex standards and related texts...[may require that the Commission] accord more importance on the objective in the Statutes of ensuring fair practices in the food trade so that words, including quality and trade descriptions, if used in international trade, would have internationally consistent and clearly understood meanings" (Codex Alimentarius Commission 1995). Here the Commission recognized, for the first time on record, that it would have to alter its operations, specifically its use of language, to preserve its institutional integrity in light of its association with the WTO. David G. Victor best addresses both impacts of that institutional linkage by stating

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sanctions against member states that failed to implement Codex decisions. Because member states adhered to Codex standards on a voluntary basis, the dynamics of food diplomacy within the Commission were relatively restrained. For example, prior to 1995, “a Codex member might disagree with the profile and content of a standard and have no intention of adhering to it, but nevertheless would abstain from halting the process” of standard formation and incorporation into the *Codex Alimentarius* (Veggeland and Ole Borgen 2005, 683). This norm worked in favor of states that wanted to implement less stringent national food safety standards, including the United States, as well as those that desired more rigorous policies, particularly the European Union, but did not mean that Codex activities had no influence on national food safety policies. On the contrary, the Codex Commission served as a forum for technical and scientific discourse, worked closely with national and international expert bodies, and published standards that frequently served as national food safety policies. Similarly, this institutional culture did not preclude debates among self-interested member states, particularly regarding the scientific data considered in the development of the *Codex Alimentarius*. It did, however, prevent the political and diplomatic deadlock now associated with the post-1995 Codex Commission.

Linkages with the WTO made Codex standards binding, not when accepted by national governments, but when incorporated into the *Codex Alimentarius* by the Codex Commission. This was institutionalized into the General Principles of the Codex Alimentarius in 2005 when language regarding the acceptance of Codex Commodity Standards by national governments was eliminated by the Commission (Codex Alimentarius Commission 2005). The Codex Committee on General Principles reported in 2005 that this elimination was designed to prevent duplicate work by the Codex Commission and the World Trade Organization. Because transparency in the WTO requires that its member states publish their trade policies and justifications and because member states that defy the conditions of the SPS Agreement can face action

under the dispute settlement procedures, the Codex Commission, beginning with its 21st session in 1995, saw its acceptance procedures as repetitive and unnecessary. This de facto acceptance of the WTO as the enforcement mechanism for national acceptance of Codex standards indicated that the Codex Commission has internalized the dynamics of the post-1995 world and demonstrates an additional impact of that linkage: the Codex Commission's relationship with the WTO has constrained the breadth and substance of its activity and its ability to address politically charged issues.

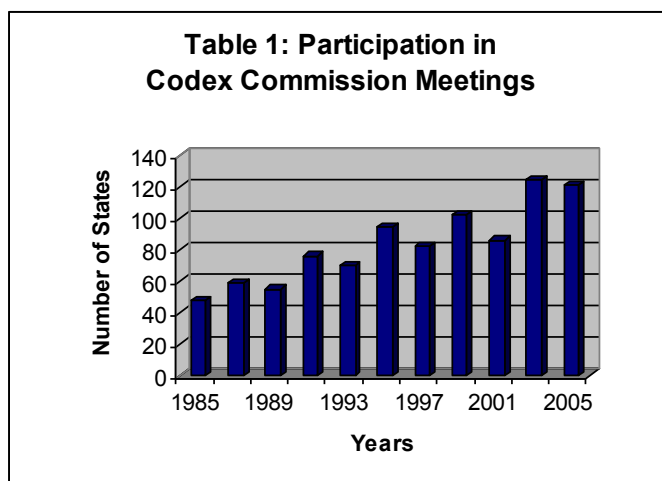
Prior to 1995, Codex member states expected that the *Codex Alimentarius* would guide national policy making processes on a voluntary basis. Linkages with the WTO altered the practices of enforcement for Codex standards and, in turn, the expectations of Codex members. Member states approach the post-1995 Codex Commission with the expectation that Codex standards, guidelines, and codes of practice will become national policies either through WTO agreements or dispute settlements.

The most obvious and widespread reaction to the heightened importance of Codex standards has been expanded participation in the Codex deliberations in spite of the fact that member states must pay to attend Commission and Committee meetings. Table 1 shows growing attendance at Codex Commission meetings from 1985 to 2005.¹¹¹² In addition, participation in the Codex Committee on General Principles, which defines the purpose and scope of the *Codex Alimentarius*, the nature of Codex standards, and the procedures of Codex standard acceptance by member governments, has increased dramatically since 1995. Table 2 shows that this trend both among Codex member states and among a subset of member states known as the Cairns

¹¹ Data are from official reports from the meetings of the Codex Commission from 1985-2003. These data were collected by Frode Veggeland and Sven Ole Borgen (2005) and by the author.

¹² Although the Codex Commission and the WTO became institutionally linked in 1995, negotiations between the Codex Commission and the General Agreement on Tariffs and Trade (GATT) began in the mid-1980s catalyzing increased participation in the Codex Commission. That participation increased more rapidly, however, after linkages with the WTO made Codex standard binding on WTO member states.

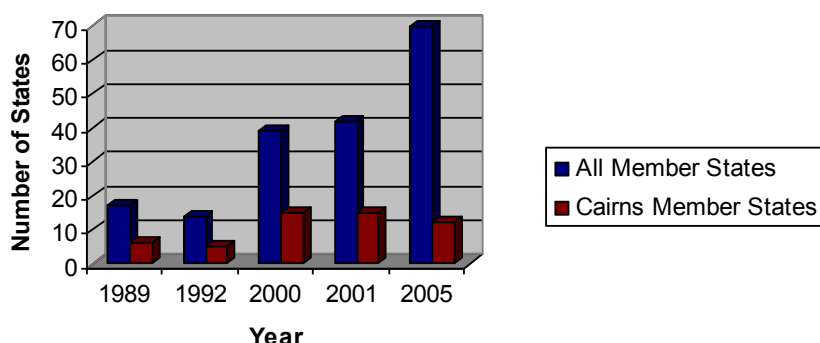
Group.^{13,14} The Cairns Group represents a coalition of primarily developing agricultural exporters. Its establishment during the Uruguay Round of the GATT for purposes of agricultural trade liberalization indicated an increased role for developing agricultural countries within the multilateral framework of the WTO. Its increased participation in the Codex Commission indicates that considerations stemming from the WTO are increasingly important in Codex deliberations, not only for developed countries, like the United States and the members of the European Union, but also for their counterparts in the developing world (Veggeland and Ole Borgen 2005, 687).



¹³ There are fewer data represented in Table 2 due to limited documentation by the Codex Commission, particularly before 1999.

¹⁴ Argentina, Australia, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Indonesia, Malaysia, New Zealand, Pakistan, Paraguay, Philippines, South Africa, Thailand, and Uruguay.

**Table 2: Participation in the
Codex Committee on General Principles**



While increased participation in the Codex Commission and Committees represents one kind of member state reaction to the post-1995 linkages with the WTO, others fall more under the classification of food diplomacy. These tactics are used primarily to prevent Codex action on politically charged issues of food safety and international trade, which include, in order of increasing levels of political dispute, the establishment of acceptable levels of pesticide and veterinary drug residue in food products, nutritional guidelines, food labeling requirements, codes of practices for animal feeding, and the development, trade, and consumption of Genetically Modified Foods. These tactics contribute to deadlock in the Codex Commission and are often used by the United States to block proposals made by members of the European Union.¹⁵

National delegations frequently stall Codex proposals at key steps in the standard formation process to prevent their inclusion in the *Codex Alimentarius*. Codex proposals traverse a series of eight steps in order to become part of the *Codex*

¹⁵ Members of the European Union have been proactive members of the Codex Commission throughout its history and have historically fought for higher food safety and consumer protection standards. Prior to 1995 the United States did little to block these proposals since it could not be compelled to adopt them as national policy. With the establishment of the WTO and its system of binding dispute settlement, the United States began using various food diplomacy tactics to block the adoption of more rigorous food safety standards, especially those that are the subject of either political or scientific dispute. This paper later analyzes these tactics and their implications for both the Codex standard formation process and the WTO dispute settlement process in four issues of food safety and international trade of differing levels of political and scientific dispute.

Alimentarius. Steps 3, 6, and 8 require comments from member governments and are the most common holding points for politically charged and disputed standards. For example, the 26th and 27th sessions of the Codex Commission held a draft proposal for Minimum Residue Levels of Bovine Somatotropin at Step 8 because “no requests had been received [from member governments] to change the status of the standard.” Similarly, the same session, “recognizing that there was no consensus on substantial issues, agreed to return the Draft Guidelines for Use of Nutritional and Health Claims to step 6 for further comments and consideration.” These examples represent a trend in the Codex Commission: disputed proposals are simply stalemated in the formation process to prevent their inclusion in the *Codex Alimentarius* and their use by WTO dispute settlement panels.

Codex delegations also impede work on contentious issues by preventing the establishment of Codex Committees to deal with charged issues of food safety. Moreover, Codex member states can work at the committee level to prevent action on food safety issues. For example, the United States delegation has employed this tactic to inhibit work on food labeling requirements, which US production, processing, and packaging industries oppose. These food diplomacy tactics constrain the activities of the Codex Commission to issues grounded in scientific and political consensus and have a very clear goal: to ensure that Codex standards represent the least necessary levels of consumer protection and food safety and thereby to shift the burden of proof in WTO dispute settlements to states choosing to invoke higher standards. Although this strategy maximizes the regulatory discretion of Codex member states, it has consequences for the World Trade Organization in terms of dispute resolution.

Since its establishment in 1995, the WTO has faced questions about the extent to which national consumer safety standards constitute non-tariff barriers to international trade and violate WTO open trade commitments. While forced to address this issue in multilateral negotiations, the WTO also has adjudicated numerous dispute settlements

among member states in which one state accuses the other of illegally hindering international trade by means of consumer protection standards. This trend is important because it constitutes the final impact of post-1995 linkages between the WTO and the Codex Commission: increased conflict in WTO dispute settlement panels regarding the role of consumer protection standards for international trade.

The Implications of Post-1995 Linkages Between the Codex Commission and the WTO

Thus, there have been three primary impacts of post-1995 linkages between the Codex Commission and the WTO: politicization, deadlock, and dispute. These have implications both for institutions and for issues of international food trade over the interpretation of three concepts by the Codex Commission: risk, science, and consensus.

The SPS Agreement requires that food safety regulations be based upon relevant international standards, guidelines, and codes of practice, particularly those in the *Codex Alimentarius*, grounded in scientific risk assessment. This requirement had an immediate impact on the Codex Commission, because “before the conclusion of the SPS agreement the Codex Alimentarius Commission had adopted no principles or definitions related to the application of risk management and risk assessment”—scientific or otherwise (Victor 2000, 930). The Commission first recognized the need to develop universal procedures of risk assessment at its 19th session in 1991. At its 20th session, the Commission heard from Hathaway, Consultant to the Secretariat, on the role of risk assessment, management, and communication in the standard formation process. Hathaway noted that JECFA and JMPR, the expert committees responsible for coordinating scientific research and providing scientific data to the Codex Commission, “were ideally suited to perform risk assessment” but communicated that Codex Committees needed universal risk assessment procedures (Codex Commission 1993). Hathaway recommended that “the Expert Committees...develop risk

Codex delegations spent years debating appropriate methods of risk assessment. In 1999, the Commission decided that “relevant Codex Committees should continue to develop and to apply risk analysis principles and methodologies appropriate to their specific mandates within the framework of the Action Plan and report their progress to the Commission on a regular basis” and that national “governments [should] incorporate principles of risk analysis when establishing or updating national legislation on food safety matters” (Codex Commission 1999). Although this decision represented incremental progress toward a uniform approach to risk, it did not institutionalize standardized procedures of risk assessment and, to a large degree, transferred the responsibility for risk assessment to JECFA and JMPR and to national governments. The institutional deadlock that surrounded the issue of risk assessment is an implication of the 1995 politicization of the Codex Commission and demonstrates, as Hathaway communicated in an article that year, that “there is a

considerable conflict between science-based and ‘regulatory-political’ risk management” (Hathaway 1999, 250).

This conflict can alternatively be considered in terms of the difference between “risk” and “danger” in international food safety and food diplomacy. Contrary to vernacular usage, risk and danger are not equivalent concepts. Risk indicates a level of uncertainty; the risks of an action, including the trade and consumption of foods, are not necessarily known in advance. Hathaway alluded to this in his presentation to the 20th session of the Codex Commission when he recommended that “countries develop a coherent risk communication strategy to inform and to educate consumers that food will always have some minimal level of risk.” Danger, on the other hand, communicates a level of conviction that an action, such as the consumption of food contaminated by pesticide residues, will have specific detrimental consequences. Prior to 1995 and the transition of Codex standards from voluntary to binding, the Codex Commission could address the risks of international food production and the international food trade. The Commission could respond to scientific concerns absent consensus or certainty in its standard formation process because final legislative authority remained in the hands of national governments. The dynamics of the Commission as a “gentlemen’s club” allowed proactive member states, such as those in the European Union, to incorporate food safety standards into the *Codex Alimentarius* that acknowledged the inherent uncertainty in risk assessment. The relevant literature has identified that approach as the “precautionary principle”: what is not known to be safe is assumed to be dangerous. As already demonstrated, the 1995 linkage between the Codex Commission and the World Trade Organization politicized the Codex Commission and altered both the expectations and the food diplomacy tactics of its member states. The Codex Commission has struggled to develop uniform practices of “risk assessment, management, and communication” because it is no longer institutionally capable of

addressing risk at all. Instead, this politicized body is limited to addressing the *dangers* of food production, consumption, and trade.

An assessment of the Codex Commission's ability to mitigate the dangers of food consumption and trade requires an analysis of the Codex Commission's approach to a second concept: "scientific" research processes and data outputs. Science "amounts to a *process*---institutionalized at leading universities, research facilities, and scientific [peer reviewed] journals worldwide---for systematically pursuing knowledge...[through] the testing and retesting of hypotheses to ensure that they withstand most withering scrutiny" (Mooney 2005, 14). Scientific methods of analysis and research yield data that may masquerade as objective truth but are, in fact, rarely undisputed. Very few findings, even those grounded in scientific research, enjoy international consensus.

Some findings enjoy more scientific consensus than others. That the consumption of pesticide and veterinary drug residues is dangerous to human health is relatively undisputed. Nevertheless, scientists continue to disagree about maximum safe exposure levels. Scientists tend to agree that bovine spongiform encephalopathy is a danger associated with animal feeding practices but disagree about the risks associated with the use of bovine growth hormones. Scientists, recognizing the risks of food allergies and intolerances, support food labeling requirements, though they disagree about the degree of specificity necessary to protect consumers with particular dietary and nutritional requirements. No issue of food safety invokes more scientific dispute than that of Genetically Modified Foods. Some scientists proclaim that GMFs will eliminate world hunger and malnutrition, while others characterize them as a risk to human health and environmental sustainability. Although opinions on these issues vary widely, they can be substantiated by applying carefully conducted and selected scientific data and research. Therefore, the SPS Agreement's provision that food safety standards be grounded in "science" compounds the politicization effects of the 1995 linkage between the Codex Commission and the WTO. Member state delegations,

therefore, use “scientific data” in addition to food diplomacy tactics to achieve nationally self-interested goals through the Codex Commission’s structures and procedures.

The Codex Commission does not conduct its own scientific research. Instead, the Commission and its subsidiary bodies synthesize available data into standards, guidelines, and codes of practice. The sources of those data have changed throughout the history of the institution, due in part to the changing nature of the Codex Commission following its linkages with the WTO.

The 3rd Session of the Codex Commission published the “Procedures for the Elaboration of World-Wide Codex Standards,” which instructed subsidiary bodies to “take into account the work accomplished by the appropriate international Organizations when preparing proposed draft provisional standards” (Codex Alimentarius Commission 1965). This indicates that the Codex Commission would consider scientific data solely from international organizations, as the Commission did not mention the work accomplished by research universities, nationally sponsored research laboratories, or peer reviewed journals. Therefore, in its early years the Codex Commission used data from JECFA, JMPR, and JEMRA when elaborating Codex standards, guidelines, and codes of practice. At that time, the nature of those data was relatively unimportant; states that considered them excessive could implement less severe national policies whereas states that considered them insufficient could implement more stringent national policies. As the Commission changed, so did its range of “acceptable” scientific data for purposes of standard elaboration.

In 1995, the same year as the establishment of the WTO, the Codex Commission considered proposals to base Codex standards and other recommendations on scientific principles and the extent to which other factors need to be taken into account. At that time, the Commission confirmed that Codex standards should be grounded in sound scientific principles and expanded the range of acceptable sources beyond JECFA, JMPR, and other international expert panels (Codex Alimentarius Commission

This addition to the General Principles of the Codex Commission corresponded with the transformation of Codex standards from voluntary to binding and the politicization of Codex activities. Member state delegations since have used scientific dispute to limit the scope and substance of Codex standards, recommendations, and codes of practice. The point, however, is clear: the SPS Agreement's foundation in scientific data and research was intended to make Codex standards more legitimate and, therefore, more useful for purposes of national elaboration and multilateral dispute settlement. Instead, this reliance on scientific data widened the field of acceptable sources and incorporated scientific disputes into the Commission's work as a counterpart to and justification for political discord. As a result, Codex standards since have corresponded to the least common denominator in the available scientific data. Standards, recommendations, and codes of practice represent what scientists agree to be *dangerous* and what scientists agree to be dangerous is inevitably less restrictive

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than what they argue to be *risky*. The implications of this trend include increased deadlock within the commission, lower overall Codex standards for health and consumer protection, and increased reliance on WTO dispute settlement processes in light of the increasing number of national food safety standards that exceeded Codex recommendations.

Third, the impacts of post-1995 linkages between the Codex Commission and the WTO have changed the Codex Commission's definitions of "consensus," particularly in terms of voting practices and standard acceptance. The requirements for consensus in the Codex Commission have become more rigorous since its affiliation with the WTO. The Commission's 2nd Session required that measures, including changes to the General Principles and progress through elaboration steps, be passed by a majority vote. In 1991, new voting rules were implemented that required a two-thirds majority vote for the elaboration of Codex Standards (Codex Alimentarius Commission 1991). This procedural distinction reflects the more structural changes affecting the Codex Commission at this time. Higher standards of voting consensus reflected the higher stakes of Codex activity after its affiliation with the GATT and the WTO. It also, however, corresponded with an overall decrease in political and scientific consensus within the Codex Commission. More stringent voting requirements, therefore, contributed to the Commission's focus on *danger* rather than *risk* and its tendency to pass standards that were grounded in scientific and political consensus but that represented more constrained activity and a narrower range of issues. Therefore, while increasing consensus requirements did correspond to greater acceptance of Codex standards by member governments (though they had few options under the binding nature of the WTO) they also corresponded to greater political and scientific deadlock in the Commission and increased dispute in the WTO.

Conclusion

Critics of the Codex Commission brand it as an agent of multinational corporations and “a serious threat to health freedom” (HealthFreedom 2006). However, this argument is profoundly misguided. For while it is true that multinational corporations are affected by binding Codex standards as the standards are necessarily, either voluntarily or by means of WTO dispute settlement, incorporated into national regulatory policies, the Codex Commission does not represent multinational corporations. Instead, it represents the interests of its member states. And although national delegations may be influenced by particularistic interests, including corporate interests, within their borders or constituencies, multilateral institutions that represent the interests of member states often become beholden to specific national interests. It is erroneous to critique the Codex Commission for the responsiveness of national delegations to sub-national entities and corporate interests.

Moreover, it is misguided to accuse the Codex Commission or Codex standards of endangering health freedom. Codex standards are grounded in the best available scientific data and are designed to protect consumers from health dangers and to inform them of likely health risks. Rather than threaten, this evidently enhances health freedom, giving consumers the information necessary to make personally appropriate food choices. While Codex standards provide minimal levels of health protection, the framework of the WTO allows member states to exceed those standards on the basis of legitimate risk analyses. Moreover, the Codex Commission’s trust fund provides developing countries with resources to develop and implement food safety standards and to contribute to the body of scientific research upon which Codex standards are based. To say that the Commission’s standards, guidelines, and codes of practice endanger health freedom is to demonstrate a fundamental misunderstanding of the Commission’s structures, functions, and procedures.

Yet the Codex Alimentarius Commission was undeniably transformed by its post-1995 linkage to the WTO. The impacts and implications of that linkage have profound

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