

## **THE LABELING OF GM FOODS - THE LINK BETWEEN CODEX AND THE WTO**

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This paper briefly describes the history and operation of Codex; its involvement in matters affecting trade in products of biotechnology; the fit of its standards in the WTO framework; and concludes with the challenges that lie ahead, particularly in regard to the ongoing discussions at Codex concerning the labeling of GM foods, and how these might play out in the WTO.

*Key words:* Codex Alimentarius Commission; General Agreement on Tariffs and Trade (GATT); SPS Agreement; technical barriers to trade; labeling.

Over the past decade or so, the Codex Alimentarius Commission (Codex) has risen from a rather obscure international organization responsible for setting food standards, to one which has direct impact on decisions taken at the World Trade Organization (WTO). Whether the Codex is prepared for such a change is open to question, but the fact is undeniable that Codex decisions and standards are of increasing interest to major trading nations. This paper briefly describes the history and operation of Codex; its involvement in matters affecting trade in products of biotechnology; the fit of its standards in the WTO framework; and concludes with the challenges that lie ahead, particularly in regard to the ongoing discussions at Codex concerning the labeling of GM foods, and how these might play out in the WTO.

### **History And Operation Of Codex**

In 1962, the United Nations Food and Agriculture Organization (FAO) and the World Health Organization (WHO) acknowledged the need for a set of international standards to provide guidance to the food industry and protection to consumer health and, consequently, developed the Codex Alimentarius Commission (Codex). Codex administers the Joint FAO/WHO Food Standards Program. The program has several purposes. Among other things, the program strives to protect consumer health and ensure fair trade practices involving food. Consequently, the program is designed to facilitate the co-ordination of food standards work performed by both governmental and non-governmental international organizations. The program also involves the determination of priorities, the guidance for preparation of draft standards, and the finalization of standards. After governments accept the standards, they are published as regional or worldwide standards pursuant to the program.

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A Codex food standard includes a description of the product and the essential composition and quality factors which identify the product from close substitutes; identification and analysis of any additives and potential contaminants in the food product; Codex product hygiene requirements and Codex labeling requirements; and a complete description of the scientific procedures used to sample and analyze the product. Determination of the safety of the food product is based on scientific risk analysis and toxicological studies. Once a Codex standard is adopted, member countries are encouraged to incorporate it into any relevant domestic rules and legislation. However, under the principles of Codex, member states retain the right to unilaterally impose more stringent food safety regulations deemed necessary to ensure domestic consumer protection, provided the different standards are scientifically justifiable.

### **Developing Labeling Standards For Products Of Biotechnology**

There are currently no Codex standards in place for products of biotechnology. However, there has been significant activity lately in Codex on the issue of biotechnology. Codex activities are currently more concentrated on the labeling of food products derived from biotechnology. Such activities are carried out by the Codex Committee on Food Labeling (CCFL) and, most recently, by a new Codex Ad Hoc Intergovernmental Task Force on foods derived from biotechnology. The CCFL has met several times, most recently in Ottawa, Canada in May 2000, while the task force met for the first time in Chiba, Japan in March 2000. MacKenzie (in this issue) provides a detailed account of the CCFL and its recent deliberations.

At the current time, agreement on the mandatory labeling of biotechnology food products remains elusive. Some countries, such as Australia, Brazil, Canada, New Zealand, Peru, and the United States support labeling of foods based on safety, composition, intended use, and nutrition. This approach is consistent with their respective labeling laws. Several European countries and India, on the other hand, favor the mandatory labeling of all foods derived from biotechnology. In the most recent meeting of the CCFL, only an agreement to redraft the section on mandatory labeling for further comments emerged.

### **Codex Standards And Their Fit With The WTO**

Codex plays an important role in agri-food trade because its standards, guidelines, and recommendations are now acknowledged in the Sanitary and Phytosanitary (SPS) and Technical Barriers to Trade (TBT) Agreements of the WTO Agreement. A brief review of WTO Agreement provisions is necessary to situate Codex's impact on the WTO process.

Under the WTO Agreement, non-conforming measures that restrict trade must be removed. The WTO Agreement, however, provides a number of exceptions for measures and regulations which, for example, are necessary to protect human, animal, or plant life and health. This protection was originally contained exclusively under Article XX of the General Agreement on Tariffs and Trade (GATT) (GATT, 1947) but has now been incorporated into the WTO Agreement as Article XX of the GATT (GATT, 1994a). In effect, it is Article XX(b) of GATT (1994a) which enables member states to define legislation creating barriers to trade to ensure food safety. The WTO Agreement, however, also contains two new agreements, the SPS and the TBT Agreements, which set out specific rules for determining the legitimacy of measures affecting the health and safety of food, and technical barriers for all products including food.

The SPS Agreement makes reference to the importance of "relevant international organizations" in setting "international standards, guidelines or recommendations" (GATT 1994b, p. 69, preamble to SPS Agreement) while the TBT Agreement makes reference to "international standards" and

“standardizing bodies” (GATT 1994c, pp. 138, 142, preamble & Article 4 of TBT Agreement). In the SPS Agreement, Codex is specifically mentioned as one of these bodies and, while not specifically mentioned in the TBT Agreement, its reference can be inferred; particularly, since the TBT Agreement deals with issues of labeling as technical barriers. Both the SPS and TBT Agreements implore all parties to harmonize their domestic standards with international standards, guidelines, and recommendations, where such standards exist. In the case of trade disputes, standards, guidelines, and recommendations—like those created under Codex, the International Office of Epizootics, and the International Plant Protection Convention—enjoy a preferred and protected status under the WTO dispute resolution process. While the provisions determining the existence of non-conforming measures are different under the two agreements, an important similarity exists between them in that any internationally accepted and recognized standard is protected from challenge as being an obstacle to international trade (GATT 1994b, p. 71, Article 3.2; GATT, 1994c, p. 141, Article 2.5).

Thus, once international standards emerge, their employ is very difficult to challenge under the WTO dispute resolution mechanism. With a Codex standard on labeling, clearly WTO panels would be obliged to accept the standard once enacted into any national legislation. Such legislation would be a legitimate exception to WTO rules set up to facilitate free trade.

## **Conclusions**

There are at least three immediate challenges before Codex relating to the regulation of the products of biotechnology. The first challenge is to what degree Codex is prepared to make, or is capable of achieving consensus in order to make, new international standards for genetically modified (GM) foods. The debate concerning the labeling of genetically modified foods has been long and protracted without any international standard in sight, despite several member states having already enacted national legislation on the issue of labeling. Will Codex wish to venture further into the GM debate by attempting to develop rules for food safety that go beyond labeling when the labeling issue has already shown itself to be so intractable?

The second challenge will be to see if Codex standards are totally solid as bars against attack to otherwise non-conforming measures under the WTO dispute resolution. The SPS Agreement is clear that standards relating to international SPS measures are “deemed” to be necessary to protect life and health, but the TBT Agreement states that such standards are only “rebuttably presumed” not to be an unnecessary obstacle to international trade. Clever lawyers will make arguments that may put into question whether such standards will always be a defense.

Finally, a third challenge is whether the issue of biotechnology might itself cause a change in Codex practice, producing an undesirable product that the WTO would then have to deal with. With current Codex discussion solidifying around the fact that risks should be assessed based on scientific evidence of risk to human health, some countries are unwilling to accept any risks of biotechnology and wish to place a moratorium on biotechnology-based agri-food products. Other countries wish to examine other risks (e.g., to society, the environment, and the economy). One suggested solution is to allow countries to abstain from specific Codex food standards decisions. This would have a disastrous result. Opting out of the standards piecemeal would fragment the global market and reverse efforts to harmonize international food standards. How would the WTO deal with an “international standard” that had been endorsed by only some of the members of Codex?

Codex and the WTO are partners for now, with Codex standards forming a clear and recognizable part of what the WTO accepts as limitations to free trade. The question to ponder is whether this harmonious relationship can continue if the Codex were to develop standards that lack the consensus of all Codex members. At what point will the honeymoon be over?

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