

CODEX ALIMENTARIUS COMMISSION AND THE WORLD TRADE ORGANIZATION LEGAL ORDER

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Abstract: *This article examines the way in which Codex Alimentarius Commission played an important role in adopting international food standards, and also the way in which the Codex affected the World Trade Organization applicable law. The Codex standards are considered the benchmark for international food standards; still this situation gave rise to remarkable political and legal consequences for the members of World Trade Organization whether they were or not also members of the Codex Commission. According to SPS and TBT Agreements, all WTO members are obliged to comply with the Codex food regulations. Certain clarifications regarding the role of Codex have been made through the WTO dispute settlement mechanism.*

Key words: *Codex Alimentarius Commission, food standards, World Trade Organization.*

1. Introduction

Codex Alimentarius Commission was created in 1962 by Food and Agriculture Organization (FAO) and World Health Organization (WHO), in order to develop food standards, guidelines and codes of practice under the Joint FAO/WHO Food Standards Programme. The Codex Commission main goals were to protect the health of the consumers, to promote fair trade practices in the food trade and to promote coordination of all food standards. Codex Alimentarius is the main instrument for the harmonization of food standards, and constitutes a collection of internationally adopted food standards, codes of practice and maximum residue limits of pesticides

and veterinary drugs in food. The objectives of Codex are to protect the health of consumers, to ensure fair practices in food trade and to promote the coordination of all food standards work undertaken by national governments. Given its main responsibilities and purposes, the Codex Alimentarius Commission was referred to by the World Trade Organization (WTO), during the Uruguay Round of GATT, as the central reference point for the elaboration of international food standards. This historical fact is of great importance since the Codex was legally and institutionally linked to the most comprehensive international regime for regulating global food trade [1].

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The main focus of this article is on the Alimentarius Commission, an emphasis being placed on the food safety aspects relating to the SPS Agreement, TBT Agreement and GATT.

2. Codex Alimentarius' Impact on the World Trade Organization Applicable Law

The Codex Commission has played an increasingly important role [2] in the international food trade since 1995, the year in which the World Trade Organization was created. The Uruguay Round of Multilateral Trade Negotiations in 1986-1994 and the earlier negotiations under the General Agreement on Tariffs and Trade (GATT) led to the establishment of the WTO in January 1995. Agriculture became an important topic within the trade discourse and as a consequence it was agreed to reduce tariff barriers for many agricultural products in order to encourage free trade. Two agreements relevant to food, the Sanitary and Phytosanitary Agreement (SPS Agreement) and the Agreement on Technical Barriers to Trade (TBT Agreement), were concluded within the framework of the WTO. These agreements set important parameters governing the adoption and implementation of food quality and food safety measures.

Strictly speaking, Codex standards were not binding as such, and acquired binding force only as a consequence of explicit adoption by individual members. However, the legal status of these standards has increased significantly by virtue of being referenced in the SPS Agreement.

The TBT Agreement, which had been in existence as a voluntary agreement (the "Standards Code") since the Tokyo Round (1973–1979), was converted into a binding multilateral agreement through the Uruguay Round. It covers all technical

relationship between the Codex requirements and standards (applied to all commodities), such as labelling.

The SPS Agreement was drawn up to ensure that countries apply measures to protect human and animal health (sanitary measures) and plant health (phytosanitary measures) based on an assessment of risk, or in other words, based on science. The aim is the establishment of a multilateral framework of guidelines and rules that will orient the development, adoption and enforcement of harmonized sanitary and phytosanitary measures and minimize their negative effects on trade. The use of international standards is intended to allow countries to prioritize the use of their often limited resources and to concentrate on risk analysis.

Under the SPS Agreement, Codex standards, guidelines and recommendations have been granted the status of a reference point for international harmonization. They also serve as the basic texts to guide the resolution of trade disputes. WTO members are called upon to base their national food safety measures on international standards, guidelines and other recommendations adopted by Codex where they exist, and so long as a country employs these standards, its measures are presumed to be consistent with the provisions of the SPS Agreement. (Countries may also apply stricter standards than the Codex standards, so long as those are based on science.) Thus, while Codex standards in and on themselves are not binding, they have become binding on WTO members through the SPS Agreement.

The advantages of having universally agreed food standards for the protection of consumers, with a view to facilitating trade, are acknowledged by two important WTO Agreements: the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and the

Agreement on Technical Barriers to Trade (TBT Agreement). These Agreements recognize that international standards and technical regulations bring benefits to both producers and consumers; their objective is to facilitate secure and predictable access to markets ensuring that health regulations do not create unnecessary obstacles to trade [3]. In particular, the SPS Agreement provides a multilateral framework of rules applying to all measures which may affect negatively the freedom of international trade, in particular to any trade-related measure taken to protect human life or health from risks arising from additives, contaminants, toxins, veterinary drug and pesticide residues, or other disease-causing organisms in foods or beverages.

Building on the provision of Article XX(b) of the GATT and the terms of its *chapeau* – which predated the first reference to the precautionary principle by almost 40 years – the SPS Agreement incorporates elements of precaution, setting out the right of Governments to restrict trade to pursue health objectives, provided that the measures adopted be based on scientific evidence or on an appropriate risk assessment and according to the principles of non-discrimination and proportionality [4]. Scientific justification (as provided in Article 2.2 and as backed up by the risk assessment discipline under Article 5) is, in point of fact, the pivot of the Agreement's management of the health-trade interface [5]. Hence, while in Article XX of GATT restrictive measures are an exception, in the SPS Agreement “there is a right [under article 5.7], albeit a conditional right, to take provisional measures subject to the requirements for risk assessment laid out in Article 5.1, 5.5 and 5.6” [6]. Therefore, the Agreement tries to balance two conflicting interests: the sovereign right of Members to determine the level of health protection they deem appropriate, on the one hand,

and the need to ensure that a sanitary or phytosanitary requirement does not represent an unnecessary, arbitrary, discriminatory, scientifically unjustifiable or disguised restriction on international trade, on the other. In order to achieve this goal, the SPS Agreement encourages Members to use existing international standards, guidelines and recommendations; it acknowledges the authority of Codex standards by making express reference to them as a privileged basis for internationally harmonised regulation.

Still, we should observe the fact that the standards established by the Codex Commission do not have the force of international law, since they are not directly legally binding on member countries and therefore there is no obligation to impose them by domestic regulations. The situation is different in the case of the WTO Agreements, since they are binding for all WTO members. Therefore, the members are obliged to follow the provisions related to Codex Standards that are contained explicitly in SPS and TBT Agreement. This situation may induce uncertainty and confusion for Codex members, even if some important clarifications regarding the role of Codex have been made through the WTO dispute settlement mechanism.

3. The Codex Standards and WTO Dispute Settlement Mechanism

The relevance of Codex standards is further confirmed by the case law of the WTO Appellate Body, which considers them as the international benchmarks against which national food measures and regulations are evaluated within the legal parameters of the WTO Agreements. Most important of all, in the disputes concerning the *EC-Sardines* [7] and the *EC-Hormones* [8] cases, the Appellate Body

Reports pointed to the recognition of Codex standards as “relevant international standards” to be used by States as a basis for their technical regulations, and hinted to the possibility that such standards might be adopted without consensus. In admitting such possibility the Appellate Body is said to have sensibly contributed to a greater politicisation of Codex decision processes and standard setting procedures, since adoption of standards without consensus approval implies the possibility that Member States be required to conform to standards they have not supported with their vote. Moreover, the Codex Alimentarius is backed up by the trade sanctions of the WTO, since any non Codex-compliant nation would automatically lose in any food-trade dispute with a Codex compliant country, unless it were in a position to justify a possible ban on food products on the basis of a risk assessment rigorously supported by adequate scientific evidence. This approach was laid out in both the *EC–Asbestos* [9] and *EC–Hormones* cases, where the Appellate Body established some basic principles in matter of trade restrictions on products that are likely to pose a health hazard: first and foremost it recognized that public health interests must always take precedence, unless unilateral precautionary measures, not supported by the protection afforded by international standards or risk assessment, disguise protectionist interests; second, it established that the right to fix a higher level of national protection be justified through available, pertinent scientific information, which implies that there exists a rational relationship between the measure and the risk assessment; third, it stressed that States putting in place a measure based on the precautionary principle must continue their scientific research and perform serious reviews of the

precautionary measure to show evidence of their good faith [10].

Through this approach, the Appellate Body showed that “the WTO cannot and does not stand for free trade at any cost”; it rather emphasised the importance of international standards for “uphold[ing] a rule-based multilateral trading system that ensures secure and predictable market access, while respecting health and [safety] concerns.” [11]. Be that as it may, it is necessary to highlight the fact that many global food safety issues still lie beyond the reach of international trade agreements [12]. Actually, it has been observed that, depending on their focus and characteristics, health regulations may fall under the SPS Agreement, the TBT Agreement or the GATT alone, and that this fragmentary approach is really disadvantageous, especially in view of the need to manage the challenges posed by “the latest frontier[s] of the contested trade-health relationship.”

This is one of the main reasons why the most important international organizations involved (mainly WHO, WTO and FAO) are steadily improving coordination of their activities and complementing each other’s work in the field of health and trade issues. Together with national governments they are also furthering efforts to protect consumers across the globe from threats to food safety due to the most diverse causes.

Regarding the dispute settlement mechanism, we can conclude that the WTO Appellate Body has tried to give certain justification regarding the role of the Codex and the juridical status of its standards. First, the WTO has clearly stated that Codex standards are relevant as foundations for assessing whether or not member states fulfil their WTO obligations. Second, the concluded disputes show that the judicial bodies of

WTO are willing to go far in assessing whether or not national regulations are based on Codex standards. Third, the dispute show that, provided they cannot justify the legitimacy of a national regulation in other ways, member states could lose a case on the grounds that they did not follow a Codex standard. Member states could thus be forced by the dispute settlement mechanism to adjust their regulation [13].

4. Conclusions

This article explored the relationship established between Codex Alimentarius commission and the World Trade Organization and the relevancy of the Codex food standards for the international food trade, in general, and for the WTO applicable law and for the dispute settlement mechanism, in particular. Given the fact that the Codex Alimentarius Commission was described by the WTO as the central reference point for the elaboration of international food standards, we can conclude that the institutional and legal framework of WTO influenced state behaviour with regard to Codex.

As we have previously mentioned, the standards established by the Codex Commission do not have the juridical force of international law, since they are not directly legally binding on member countries. Thus, the states have no obligation to impose these standards by domestic regulations. But since WTO Agreements are binding for all WTO members, the members are obliged to follow the provisions related to Codex Standards that are contained explicitly in SPS and TBT Agreement. In this point, we should also mention the fact that certain clarifications regarding the role of Codex

have been made through the WTO dispute settlement mechanism.

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