

codex alimentarius commission

FOOD AND AGRICULTURE
ORGANIZATION
OF THE UNITED NATIONS

WORLD HEALTH
ORGANIZATION

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Agenda Item 6

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JOINT FAO/WHO FOOD STANDARDS PROGRAMME

CODEX COMMITTEE ON GENERAL PRINCIPLES

Fourteenth Session, Paris, France, 19–23 April 1999

REVIEW OF THE STATUS OF CODEX TEXTS

1) STATUS OF CODEX TEXTS IN THE FRAMEWORK OF THE TBT AGREEMENT BACKGROUND

1. The 45th Session of the CCEXEC noted that the status of standards and related texts in relation to the SPS Agreement had been clarified by the reply of the SPS Committee, as follows:

- the SPS Committee cannot formally interpret the provisions of the SPS Agreement;
- the Agreement does not differentiate between the terms “standards”, “guidelines” or “recommendations”;
- there is no legal obligation on WTO Members to apply any of these Codex texts;
- how a text would be applied depended on its substantive content rather than on the category of the text;
- Regional standards are not included in the definition of “international standards” used in the Agreement, but may be applied within a given Region.

2. The Executive Committee agreed that:

- the reply of the SPS Committee should be brought to the attention of all Codex Committees;
- the reply by the SPS Committee seemed to conclude the correspondence on this matter;
- the work of Codex should move forward without concern arising from misunderstandings or misinterpretations as to how Codex standards and related texts might be used;
- the guidance given by the 22nd Session of the Commission in relation to the status of Codex advisory texts should continue to be adhered to; and
- the Committee on General Principles should examine the possibility of developing a set of appropriate preambular statements explaining the intent of different types of Codex texts.

3. The last session of the CCGP considered the Review of the Status and Objectives of Codex Texts (CX/GP 98/9) and agreed that there was no need for action to be taken in relation to Codex Standards and related texts that:

- meet either or both of the objectives of the Joint FAO/WHO Food Standards Programme and are intended for application by governments; or
- meet either or both of the objectives and are recommendations to Member governments, but where it is for governments to decide how to apply the recommendations within their national legislative framework; or

- provide additional information for the uniform application and interpretation of other standards and texts.

4. Nevertheless, the Committee recommended that relevant Codex Committees should also attempt to clarify the status of several texts identified in the Secretariat report, in particular those listed in paragraphs 32-36 of the working paper.

5. In view of the reply of the SPS Committee, the Committee was of the opinion that the development of a set of preambular statements explaining the intent of the different types of Codex texts was unnecessary.

6. There was considerable debate on whether the intergovernmental Codex Alimentarius Commission was an appropriate forum for the establishment of standards for voluntary application by commercial partners and whether the so-called “advisory” material should be removed from the Annexes to existing standards. As the discussions on this issue are related to the status of texts in the context of the TBT Agreement, the Committee agreed that the Secretariat should prepare, together with the Secretariat of the Committee on Technical Barriers to Trade, an analysis of the status of Codex standards with respect to that agreement, for consideration at its next Session. It also accepted the offer of the Delegation of Australia to prepare a paper on its experiences in applying such advisory material through voluntary industry/government/consumer codes of practice (see document CX/GP 99/8).

STATUS OF CODEX TEXTS UNDER TBT

GENERAL ASPECTS

7. As regards the status of Codex texts, some elements in the reply from the SPS Committee are of a general nature in the framework of WTO and can be applied in the case of the TBT, as follows:

- the TBT Committee cannot formally interpret the provisions of the TBT Agreement; and
- there is no legal obligations on WTO Members to apply any Codex texts

8. The question of the differences between Codex texts should be considered in the light of the definitions included in the TBT Agreement (Annex 1), which recognizes two categories of documents, technical regulations and standards, which are repeated here for ease of reference:

TECHNICAL REGULATION

Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method

STANDARD

Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. it may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method

9. The definitions are related to the measures taken by Member governments, which may be mandatory or voluntary. When reference is made to the recommendations of international bodies, the Agreement mentions international standards. These texts are not mandatory and as in the case of the SPS Agreement, there is no legal obligation for governments to use them. The TBT Agreement recommends that governments harmonize their regulations on the basis of international standards and in the framework of Codex, this applies to all the provisions which do not address protection of consumers’ health. The relevant texts include essentially the commodity standards but also guidelines and related texts concerning nutrition, labelling, processing technology, such as the sections of the codes of practice which are not related to hygiene.

10. The problems related to the difference between standards and other texts in relation to the SPS Agreement have been clarified by the reply from the SPS Committee. There does not seem to be difficulties to extend this principle in the framework of the TBT Agreement. As in the case of the SPS Agreement there is no difference between the various categories of Codex texts involved; for the purpose of the TBT Agreement all Codex standards and related texts correspond to the TBT definition of “standard”.

11. In addition, Article 2.4 of the TBT Agreement specifies that “*Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued...*”. It is therefore possible for governments to use parts of the international standards as a basis for harmonization, and this is applicable in the case of Codex standards, where any specific section, including the annex, could be used for this purpose.

CODEX STANDARDS (INCLUDING THE ANNEX) UNDER TBT

12. However, the major problem raised within Codex in relation to “quality” provisions (relevant to TBT) concerns the status and use of the annexes which have been introduced in recent years, following the recommendations of the 1991 Conference for the simplification and rationalization of standards.

13. The 22nd Session of the Commission recommended that when quality criteria additional to essential quality factors were included in Codex standards and other texts, this should be indicated as follows “*This text is intended for voluntary application by commercial partners and not for application by governments*”. The inclusion of “non-essential” provisions in Codex standards is still under consideration, especially as different approaches have been taken by individual Committees, due to the nature of the commodities concerned. An important aspect of the general discussion of this issue relates to the status of such provisions under the TBT Agreement.

14. In the framework of the TBT Agreement, the provisions included in the annexes are covered by the definition of a standard as they provide “*for common and repeated use, rules, guidelines or characteristics for products with which compliance is not mandatory*” as defined in Annex 1. The TBT Agreement does not specify that standards are established by governments or regulated by governments, as it appears from the definitions in Annex 1. The standardizing bodies covered by the Agreement and listed under points 4 to 8 of Annex 1 may be non-governmental. This definition is wider than the Codex definition of a standard and it includes all Codex texts as already indicated above.

15. Consequently, the definitions or criteria concerning the annexes of Codex standards are limited to their relevance in the framework of Codex, but the distinctions made in this context do not change the status of Codex texts under WTO and especially the TBT Agreement. The inclusion of a statement to the effect that some provisions in a Codex standard are not intended to be applied by governments does not affect their relevance under TBT. They still constitute a “*document approved by a recognized body*” and an international standard according to the definition in Annex 1 of the Agreement.

16. For the purpose of the TBT Agreement, if a Member government uses the Annex as a basis for its national regulations, there is no difference with the use of a Codex standard or any other Codex text. It may be assumed that the use of any Codex text, covered by the TBT Definition of an international standard, would be in conformity with the provisions of the Agreement as regards harmonization with international standards.

17. As the distinction between the standard and the annex does not appear relevant, Codex Committees may need to reconsider the need for such a presentation; if they wish to retain it for practical purposes, that should be done without referring to their applicability at the national or international level.

18. Taking into account that the harmonization of standards and technical regulations is one of the objectives of the TBT Agreement and of Codex, a recommendation limiting the ability of governments to use part of an international standard in their national regulations seems inconsistent with the overall purpose of Codex and WTO.

CONTENT AND FORMAT OF CODEX STANDARDS

19. Once the status of the standards, their annexes, and other Codex texts are clarified under TBT, it remains to determine, for the purposes of Codex, what type of provisions should be included in the standards. Generally speaking, and excluding matters related to health protection which are addressed in the SPS context, Codex standards and related texts should include all the elements which are relevant in order to ensure fair practices and consumer protection in international trade.

20. Most Codex texts have been established because there was a need for harmonization between existing national regulations in Member countries. Codex as an intergovernmental organization is responsible for the establishment of standards which reflect consensus between governments and are therefore generally

acceptable as a reference in trade. The provisions which governments are expected to regulate on cannot be defined in theory, that depends on the need of countries for food legislation ensuring the quality and safety of their production, exports and imports.

21. There has been considerable debate about the aspects of standards on which governments should regulate, especially the distinction between “essential” and “commercial” or “non-essential” factors. The notion of “non-essential” or “other” provisions did not arise directly from the recommendations of the 1991 Conference, but from the practical problems faced by some Committees to reach consensus on a number of provisions when revising the standards. These were simply transferred to an annex to allow the finalization of the revised standards. However, this concept is not included in the current Format of Codex Standards and the definition of “Essential Composition and Quality Factors” in the Format, which refers to “compulsory and optional ingredients”, may include the elements which have been transferred to the Annex.

22. However, if Committees wish to retain the annex, the approach followed throughout Codex should be consistent, and the Format would need to refer to the Annex, with a clear definition of what it is intended to include. In view of the difficulties encountered by the Committees to define the nature of this Annex, it is proposed to discontinue its use and retain the current Format, and to recognize that those provisions which are not relevant to governments or for the purposes of international trade should not be included in Codex standards.

23. The contents of a standard may differ according to the product under consideration, since “quality” or “commercial” aspects may be more important in some standards than in others. This is the case in national regulations, which depend on the type of product considered, and there is no set rule to determine which type of requirements should be generally incorporated or excluded.

24. The example of the standards for fruits and vegetables illustrates the fact that the regulation of “commercial” quality aspects by governments corresponds to current practice in many countries, with the objective of ensuring fair trade practices. In many cases, they were initially developed at the national level to ensure the quality of exports, and according to the country they may have been retained only for export purposes or applied also in the home market and for import control. The development of international standards in this area reflects the need to harmonize regulations, as the provisions included in such standards are subject to legislation at the national and regional level.

25. It is recalled that the “Criteria for Work Priorities” adopted by CCGP at its last session require evidence of a “diversification of national legislation” as one of the criteria to be considered. The Committee may therefore recommend that Codex Committees determine whether regulations actually exist in member countries on any aspect of a proposed standard, as one of the criteria to initiate new work and determine the need for standardization. This might be more practical than trying to differentiate between essential quality and commercial quality, none of which has been defined satisfactorily or consistently so far.

CONCLUSIONS

26. As regards the status of Codex texts under TBT, the Committee should note that :

- all Codex texts, including standards and their annexes, are covered by the TBT definition of “standard”;
- distinctions based on acceptance are not relevant in the framework of WTO.

27. In regard to Standards that contain “voluntary Annexes”, the Committee may recommend the following:

- The distinction between the Standard and the Annex does not affect their status in the framework of TBT and should be discontinued;
- Annexes should be used for presentation purposes only, and then only when absolutely necessary for clarity;
- Provisions that are not relevant for governments or for the purpose of international trade should not be included in Codex standards;
- Committees are invited to determine whether regulations exist in member countries concerning the current annexes as one of the criteria for their inclusion in the standard.