

codex alimentarius commission



FOOD AND AGRICULTURE
ORGANIZATION
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JOINT OFFICE: Viale delle Terme di Caracalla 00153 ROME Tel: 39 06 57051 www.codexalimentarius.net Email: codex@fao.org Facsimile: 39 06 5705 4593

Agenda Item 4

CX/GP 09/25/4

**JOINT FAO/WHO FOOD STANDARDS PROGRAMME
CODEX COMMITTEE ON GENERAL PRINCIPLES
Twenty-fifth Session
Paris, France, 30 March to 3 April 2009**

CONCEPT OF “CONSENSUS” AND ITS APPLICATION IN CODEX

Replies to CL 2008/34-GP

(Australia, Colombia, Cuba, European Community, Iran, Japan, Norway, New Zealand and United States)

Australia

Australia is pleased to offer the following comments in respect of the document prepared by the Codex Secretariat on the *Concept of Consensus and Its Application in Codex*.

With respect to the statements in Section D 3.1, 3.2 and 3.3 Australia broadly supports these statements. In our view they support the premise that existing Codex Guidelines for Chairs, including the Measures to Facilitate Consensus, provide practical and, in our view, workable guidance for reaching consensus decision-making. The Manual for use by Chairpersons of Codex Committees details some suggestions on dealing with contentious issues where consensus might not be reached and encourages the Codex members (meaning all involved – Chairs, Secretariat and Delegations) to work together in an a structured and more collaborative manner.

In respect of the statement in 3.4 “Consensus is frequently applied within the UN system and other international intergovernmental organizations (e.g. WTO) and while there seems to be a good common understanding of the meaning of consensus no legal definition of consensus has been adopted by any of these organizations. Should Codex, see the need to adopt such a definition it would be advisable that it is in line with the general understanding and common practice in the UN system.”

Australia broadly supports the first sentence of this statement, the fact that no other UN organisation has sought to define consensus suggests the term is well understood. With respect to the final sentence, Australia considers that the current practice and common understanding of consensus displayed throughout the UN system together with the current Rules of Procedure, including the measures to facilitate consensus already provide adequate guidance on consensus decision-making. Further we consider that trying to define consensus may actually be counterproductive to what we are trying to achieve in Codex. The issues being raised seem to be more about encouraging a better understanding of the process of achieving consensus among Codex participants and meeting chairs, it seems questionable whether this is achievable through seeking to define consensus.

In respect of the statement 3.5 “There are cases in Codex meetings in which there is clearly no consensus but it is not clear how to proceed in order to get achieve consensus.” Australia can agree with this statement; however we do consider that guidance on how to proceed when there is no consensus is provided through the

Chairs Manual and the Procedural Manual. There is also always the possibility of seeking advice from the Commission and/or the Executive committee as to how a committee might proceed.

In respect of the statements 3.6 and 3.7 Australia agrees that there may be some situations where delegations feel that the concept of consensus has not been applied harmoniously or where delegations do not agree with the Chairs conclusions. In these situations delegations could seek to meet with the Chair during a break and ask them to explain how and why the particular conclusion was reached. While this will not change the decision it may help to allay delegations fears that they have been treated unfairly or that their views have not been taken into consideration and will help to broaden members understanding of the concept of consensus.

4. Measures to describe and improve the Codex Consensus Building Process

Australia considers that the measures proposed in 4.1, 4.2, 4.3 and 4.4 will assist in improving members understanding of the process of achieving consensus. It might also be useful for this to be included as a topic at the seminars conducted for first time delegates and at future Codex training workshops.

Colombia

Colombia is pleased to offer the following comments to the document “Concept of ‘Consensus’ and its Application in Codex” sent by the Secretary of the Codex Alimentarius Commission.

The references below are to the Spanish version of the document CL 2008/34-GP.

(1) Answers to the statements in Section D.3

3.1 “Consensus and non-consensus are in most cases interpreted satisfactorily by Codex Chairs.” However, in some cases a distortion of what actually happened in the plenary halls may occur; said distortion could be interpreted as the result of pressure on the Chairs or a conflict of interest.

3.2 Although the consensus can be reached in meetings outside of plenary halls, the work to reach the consensus must be thorough, and not as said in the document, “take place in a manner that is as open and transparent to all parties as possible without obstructing the possibility to find consensus”.

3.3 The willingness of the parties to negotiate and move positions is not the only basic precondition to being able to reach a consensus. The following issues must also be taken into account:

- The information on the different issues that will be addressed at Codex meetings must be thorough and available in a timely manner, so that no dissymmetry is created between members.
- The Chairs must act in an open and transparent manner, free of pressure and conflicts of interest.
- Just for the purpose of expediting documents review and approval, the Chairs must not neglect the observations sent by Codex members.
- The treatment of the members in the plenary hall must be impartial.

3.4 Should Codex see the need to adopt a definition of consensus, it could use as guidance the common practice of consensus within the United Nations system but also within other broad-based systems or organisations, such as the WTO.

3.5 We agree with this statement.

3.6 We agree with this statement.

3.7 We agree with this statement with the proviso that the second sentence of the paragraph has the following meaning, “They may feel that the correct process has not been followed, but **they** decide not to block the decision.” (Our emphasis)

(2) and (3) Answers to the proposals of Section D.4; other issues addressing the implementation of the concept of consensus are also raised.

As was mentioned in the subsections of 3.3. of this document, there are other preconditions to reaching a consensus. We submit the following proposals for the other stated preconditions;

- Deploy every available means to meet the conditions established in the Procedural manual concerning the circulation of Codex information and documents
- In the case where the Chair has a manifest conflict of interest, be it political, economic or other, with the analysis of a topic and subsequent decision-making during a meeting, the Chair will have to be temporarily assumed by the Second Chair at the Head Table of that meeting. This measure could be decided by the said Chair or recommended by the Secretariat, FAO, or WHO representatives; the said recommendation would be based on an earlier statement or a statement in the hall by one or several members, where it is clearly manifest that the Chair may have a conflict of interest when addressing a particular topic.
- Plenary sessions should be held only when simultaneous translations in the official Codex languages at the meetings are guaranteed.
- Last, we suggest opting for a consensus mechanism based on a quantitative basis, in the following manner:
- The Chair will consider that a consensus exists when, after a topic has been submitted to the consideration of the plenary session, no more than 10% of attending members express formal objections to the submitted position that is accepted by the majority. In this case, the members who are not part of the consensus, although they have to abide by the consensus, may explicitly set forth their position in the meeting report.

Cuba

1. Cuba ratifies paragraphs 5.3 and 5.4 of the Report of the 16th session of the Coordinating Committee for Latin America and the Caribbean that was held in December 2008, in Acapulco, Mexico, where a **definition of consensus** submitted by the Paraguay delegation was put forward.
2. Cuba also agrees with the statements in paragraph D.3 and the measures proposed in paragraph D.4 of document CL 2008/34-GP of November 2008.
3. Cuba also considers that the proposal for a yearly meeting of the Chairs of the different committees can substantially help solve Codex **consensus** problems.
4. Cuba considers that when it is necessary to vote, the CONSENSUS should be done country per country and not per block, as has been done on some occasions.
5. It is important to realise that the term CONSENSUS does not mean the same thing as unanimity, and the definition does not imply that consensus is a quantifiable absolute or relative (percentage) number.
6. We do not consider it advisable to support the concept of “near-consensus”; we consider that after a discussion on a situation or a document, a consensus will or will not be reached; however, the term “near-consensus” is ambiguous and its quantitative boundary is blurry. That is why it is also important to have a definition, as is stated in paragraph 4.

European Community

The Member States of the European Community (MSEC) would like to thank the Codex Secretariat for preparing a very comprehensive and useful document concerning the application of the concept of consensus. It provides a very useful basis to further discuss and to draw conclusions on this important issue.

The correct application of the concept of consensus is a very demanding task not only for the chairpersons of the Codex committees and task forces but also for the delegates.

The MSEC can in general agree with the statements in Section D.3 of the document attached to CL 2008/34-GP and welcome the proposals in Section D.4 to improve the Codex Consensus Building Process. The MSEC are pleased to provide more detailed comments on these statements and proposals as follows:

Question (1): Section D.3 lists a number of statements. Do you agree with these statements?

3.1 Consensus and non-consensus are in most cases interpreted satisfactorily by Codex Chairs.

The MSEC believe that although in most cases consensus and absence of consensus was correctly interpreted, the concept of consensus should be kept under review and additional tools and guidance are needed to ensure its correct application.

3.2 Many of the proposals made by chairs to increase chances of reaching consensus point to the need for the Codex family (meaning all involved – Chairs, Secretariat and Delegations) to learn to work together in an even more structured and more collaborative manner. Much of this work will have to take place outside of plenary halls in various forms of informal meetings (which were seen as an essential way of fostering consensus by all who replied), but it must also take place in a manner that is as open and transparent to all parties as possible without obstructing the possibility to find consensus.

The MSEC fully agree with this statement. Physical informal meetings or working groups have demonstrated at many occasions their abilities to reach consensus on very polarised issues (e.g. traceability/product tracing principles, sardines, cheese labelling).

3.3 The basic precondition to being able to reaching consensus is that the parties are willing to negotiate and move positions.

The MSEC support this statement.

3.4 Consensus is frequently applied within the UN system and other international intergovernmental organizations (e.g. WTO) and while there seems to be a good common understanding of the meaning of consensus no legal definition of consensus has been adopted by any of these organizations. Should Codex, see the need to adopt such a definition it would be advisable that it is in line with the general understanding and common practice in the UN system.

Creating a rigid definition for consensus may prove to be a very difficult task and might not be the most productive way to improve its application within Codex. This is supported by the fact that none of the international organisations using the concept of consensus in their decision making have chosen to create such a definition. The MSEC remain however open to any suggestion which would certainly need to encompass a certain level of flexibility in order not to jeopardise the Codex productivity. A more effective approach could be to develop further operational guidance on how to reach consensus, supplementing the existing guidelines on consensus in the Procedural Manual. The MSEC note that Section B.2 of the document attached to CL 2008/34-GP contains very useful elements which could be used in creating such guidance.

3.5 There are cases in Codex meetings in which there is clearly no consensus but it is not clear how to proceed in order to get achieve consensus.

In such cases it is necessary to consider how and why such impasses arose. One way to avoid such situations would be at the earliest stage of development of a Codex Standard. It should therefore be made a criterion for the CCEXEC and CAC to consider the prospects of achieving consensus before controversial work items are given the go-ahead. When deciding whether or not to pursue further efforts to reach consensus, another important factor would be the level (quantity) of international trade in particular products/commodities.

3.6 There are cases where delegations feel that the concept of consensus has not been applied harmoniously between different Committees or even within the same session.

The appreciation of consensus depends on a variety of factors including soft factors such as the atmosphere in the meeting. It is important to foster a consistent approach to achieving consensus in the various Committees, and the proposed guidance for Chairs will go some way in achieving this. The concept of consensus does not lend itself to a numerical definition; rather it relies on a spirit of goodwill and flexibility to reach agreement.

3.7 There are cases where the Chair declares consensus and some delegations do not agree and are not content with the decision. They may feel that the correct process has not been followed but decide not to block the decision.

A delegation may have concerns about a decision but in a spirit of compromise decides not to block it. The MSEC believe that such an approach should be seen positively, and encouraged more widely.

Question (2): Section D.4 lists a number of proposals. Would they address the problems mentioned in Section D.3? If not please indicate how the problems in Section D3 could be solved?

4.1 The Secretariat will complete the first version of the Chairs-booklet with any guidance given by the chairs in this document and by members and observers in comments and during the discussion in the Committee on General Principles including a description of the Codex Consensus Building Process as to be followed by Chairs. The booklet primarily meant for the use by Codex Chairs as their personal guide will be publicly available on the Codex website as a work in progress building on the actual experience with the process in Codex sessions.

The MSEC believe that the Chairs booklet can become a very valuable tool to improve the understanding of the consensus mechanism, not only for the Chairs but also to all delegates. The Secretariat could discuss the matter with other secretariats within the UN system to explore whether any useful guidance could be drawn from their experience into the booklet. The MSEC fully support the publication of the booklet on the Codex webpage. The objective of reaching consensus should be recognised by all Codex members.

4.2 Cases as in 3.4¹, 3.5, and 3.6 could be taken up in the informal meeting of chairs and CCEXEC as appropriate so that the process can be reviewed and, if necessary, adapted and corrective action taken.

The MSEC fully support the idea of having problematic cases discussed in informal meetings of chairs and CCEXEC in order to propose new approaches aiming at solving the issues at stake.

4.3 The Codex Secretariat could provide the means for the Chairs to meet once a year in a facilitated forum to further discuss problem cases and to develop the Codex Consensus Building Process. Any new results are to be included in the Chairs booklet.

The MSEC fully support this proposal. Presumably such a meeting would take place at the time of the CAC, although other arrangements would have to be made if the CAC returns to biennial meetings.

4.4 The following could be added at the end of the “Guidelines to Chairpersons of Codex Committees and Ad Hoc Intergovernmental Task Forces”:

¹ 3.4 is an inappropriate reference.

Where there is a deadlock in the standards development, the Chairperson should consider acting as a facilitator, or appointing a facilitator, working during a session or between sessions to assist members to reach consensus. The facilitator should orally report on the activity undertaken and the outcome of the facilitation to the plenary.

The MSEC support this addition. It should be emphasised that a facilitator should be experienced in Codex work. Therefore, the MSEC suggest adding the following phrase in the first sentence of the proposed text: "..., or appointing a facilitator **with sufficient experience in Codex work and procedures**, working during a session...

Question (3): In your opinion, are there further problems concerning the application of the concept of consensus in Codex? If yes please describe them and how you think they could be solved.

MSEC believe the Executive Committee has an important role in fulfilling its critical review function: in assessing proposals for new work, and the prospects for their agreement; and in deciding whether to cease debate on a proposal where there appears to be little prospect of either compromise or consensus.

MSEC underline the importance of reaching consensus as it is necessary to avoid frequent votes where a large minority would be aggrieved by their outcome.

Iran

General comment:

“Measures to Facilitate Consensus” (Codex recommendations – appendix)

- These general measures proposed in 2003 are sound in principle and contribute to a more proficient consensus building process.

Specific comments:

Taken into account the background of the discussion in Codex, the replies from Codex Chairs on the concept of consensus and the applicability and usefulness of the measures to facilitate consensus and the application of the concept of consensus in the UN system and WTO, Iran Comments focus on the following reply in each case:

1. Section D.3 lists a number of statements. Do you agree with these statements?

- Altogether this committee regards the conclusions as valid and pertinent.

2. Section D.4 lists a number of proposals. Would they address the problems mentioned in Section D.3? If not please indicate how the problems in Section D.3 could be solved?

- The measures can be effective and do to some extent address the problems outlined in Section D.3; we can further strengthen the principle of consensus with the following:
- To mitigate those instances where some delegations may not agree to or are not wholly content with a declared consensus, this committee suggests that the Chairperson (as much as it is feasible) to declare a consensus only if it has been reached on the basis of sound scientific evidence.
- Where country delegations &/or their representatives make any remarks and forward an opinion at Codex Committee sessions (or even at the various steps in the drafting of standards) due care should be taken that such inputs are supported by valid tangible observations. Likewise, if they oppose any proposal under discussion, that this disagreement has a scientific justification also. In the acceptance of new proposals, invitation to comments and discussions through to the final decision whether to

accept the adoption of any proposals or not, the Chairperson is also responsible in applying the same tools of acceptable scientific principles.

- Adherence to the above criteria would enhance the Codex decision making process, making for a more satisfactory outcome for all parties. In addition, the proper documentation and propagation of comments and proposals from all delegations - whether their motion is in the end carried or not – would also serve to encourage the increased involvement and participation of developing countries.

3. In your opinion, are there further problems concerning the application of the concept of consensus in Codex? If yes please describe them and how you think they could be solved?

- Where a country delegation has expended valuable time and resources in contributing towards the adoption or amendment of a standard, the mechanism through which Codex reaches consensus becomes of paramount importance. Proper due process and attention to the comments of the participating country and their acceptance or rejection on the basis of acceptable scientific criteria would endorse both the comments and the Codex consensus process.
- In cases of ‘near-consensus’, this committee regards further study on the topic and redefining, where possible, the scope of the subject matter being considered, as offering the best opportunity for further clarification and the possibility of reaching eventual consensus.

Japan

Japan is pleased to submit the following comments in response to CL 2008/34-GP.

(1) Section D.3

This section well summarizes the views expressed by the Codex Committee chairs as well as the current application of “consensus” in the UN and other international governmental organizations.

(2) Section D.4

4.1: This proposal is a sensible one. However, an additional proposal could be made in this relation.

For these years, the Codex has tackled not a few difficult issues. Examples are “Standard for Sardines and Sardine-Type Products”, “labelling provisions (“Country of Origin”) in specific cheese standards (such as Mozzarella and Cheddar)” and “Standards for Gluten-Free Foods” in the commodity area, and “traceability” and “precaution” in the general area. The Codex, nevertheless, has found a solution in each instance. The Codex can learn much from such past experiences.

The process that led the Codex to the solution is published in meeting reports. However, the information is scattered in the reports ranging several years involving more than one committee. If the record on a specific issue is compiled in one volume, it will be of great value for the Codex in future decision. It will give a hint when the Codex encounters difficult issues.

The chairperson(s) of the concerned committee(s) or consultants can produce such a document with assistance of the Secretariat.

4.2: Cases 3.4, 3.5, and 3.6 are different in nature.

For case 3.4, we find the proposal is reasonable. We wonder if the FAO Basic texts, Rule XII, 21 can be used technically with appropriate interpretation

For case 3.5, it is important to identify the cause of non-consensus. The CCEXEC may ask the chairperson’s view. Sometimes, *redefining the scope of the subject matter (1.4)* and transferring the matter to a different Committee/Task Force may work. In the new environment, delegations are different and they can discuss the matter from different angle(s). Only the CCEXEC can mediate such a transaction.

For case 3.6, different application of “consensus” between different Committees may not always be of concern, because two different Committees are dealing with different subjects and are not always comparable. Inconsistency in the same session appears of more concern, but it may happen if the topics

are different. The problem should be handled on a case-by-case basis. If there is no clear example of case 3.6, 3.6 could be deleted.

4.3: We agree.

4.4: A “facilitator” was once proposed in the Codex Review. Due to lack of experience, we may encounter some problems such as:

-whether members and observers accept or trust the facilitator.

-if a chairperson takes the role of the facilitator, he/she may risk his/her neutrality in the plenary, because there is more or less an element of persuasion in the process of facilitation. In addition, if his/her facilitation fails, how can he/she conduct the plenary meeting afterwards?

Therefore, the power and duty of a facilitator needs to be determined beforehand.

(3) This document (CL 2008/34-GP) gives sufficient information on how “consensus” is understood in the Codex. We do not have any further suggestion.

Norway

Norway would like to thank you for this opportunity to submit comments and information on the Concept of Consensus and its application within Codex. We would also like to thank the secretariat for preparing the very informative circular letter.

General remarks

We agree that within Codex “*consensus is not unanimity, nor is consensus a quantifiable absolute or relative number*”. A common understanding of the concept of consensus is an important basis for decisions made in Codex and will facilitate a more uniform management of committee meetings.

We would also like to mention the importance of reaching consensus in the Codex decision making process, this due to the linkage to the WTO/SPS Agreement. Since the CODEX, OIE and IPPC standards were linked to the SPS Agreement in 1993, see article 3. 2 *Sanitary or phytosanitary measures which conform to relevant provisions of this Agreement shall be presumed to be in accordance with the obligations of the members under the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular to the provisions of Article XX(b)*, the importance of using the standards in international trade has increased. A narrow definition of consensus could be detrimental to the progress of work and the status of Codex texts.

Comments on the CL

(1) Section D.3 lists a number of statements. Do you agree with these statements?

In general, we agree with the statements listed in section D.3.

It is our experience that *Consensus and non-consensus are in most cases interpreted satisfactorily by Codex Chairs* as put forward in 3.1, and we do recognise the experiences as described in para 3.5 (clearly no consensus but not clear how to proceed) and 3.7 (consensus declared by the Chair and the delegation do not agree and are not content, but decide not to block the decision).

In order to achieve an agreement that most parties can accept, is it in our opinion, both necessary and useful for Codex members to use the tools described in 3.2 (the Codex family learning to work together in a more structured and collaborative manner and also working together outside plenary halls and in informal meetings) and absolutely the conclusion in 3.3 (parties must be willing to negotiate and move positions).

In this regard we would like to emphasise that the concept of openness and transparency must not be neglected, because without the trust in transparency, delegations will not be willing to negotiate or move positions.

(2) Section D.4 lists a number of proposals. Would they address the problems mentioned in Section D.3? If not please indicate how the problems in Section D.3 could be solved?

We support the proposed actions; however we feel that the responsibility for achieving consensus to a large degree also lies within the delegations responsibility. For this reason guidance described in 4.1 should also be directed to the delegations, especially when talking about “facilitating the achievement of consensus” (example: informal meetings outside the plenary hall, negotiation and moving of positions, knowledge on previous discussions regarding the agenda item at stake, the scope of work, knowledge about Codex procedures and so on). This will be a supplement and support to the chairs responsibilities and make it even clearer that the chair cannot achieve consensus in the committee without the delegations help.

We are also of the opinion that it is useful for delegations to discuss the concept of consensus (in addition to the chairs meetings as suggested), and would suggest that it might be useful to arrange short seminars or meetings on this item before committee meetings (also as a reminder to the delegations that they are about to enter into a global setting); *How to contribute to consensus and adoption of standards within the Codex system?* To educate new delegates and members it might also be useful to include information on consensus in the “Understanding Codex” publication.

Regarding the chair or an appointed person as facilitator

Codex bodies frequently take advantage of facilitators or moderators as a tool to make progress. We strongly support this measure for progressing work. Such functions, either in between sessions or in sessions, are considered valuable. We support the idea of formalizing these functions while underlining the importance of appointing a facilitator accepted by all parties and that the process is open for all interested parties.

(3) In your opinion, are there further problems concerning the application of the concept of consensus in Codex? If yes please describe them and how you think they could be solved.

We would like to add that when entering into the work of Codex committees and standard development, to achieve progress, delegations often need to be reminded that the aim of this work is to find common global solutions to protect consumers’ health and ensuring fair practices in the global food trade and that this is not achieved by every delegation getting accept for their own national or regional regulations. Delegations are gathered to give their contribution from their point of view and their background and must often be reminded to rise above their own level and find and create solutions which are best for all parties, not just for some. Most references to national or regional regulations must be positively met with a request for bringing the most important elements further, not necessarily as text in a standard but as a good contribution to a common solution.

We would also like to emphasise the importance of following the procedure of developing standards as described in the procedural manual; including an active attitude to project documents and proposed new work, scope and rationale for the standards, keeping work within the committees Terms of References and noting the time frame set for the work. In this regard we would like to mention that the critical review of proposed new work conducted by the Executive Committee is of great importance in helping Codex managing the work of importance for Codex members.

Another issue for consideration is that the wish for achieving consensus cannot go on the expenses of achieving safe food. This might also lead trading partners into using private standards, and so on.

To conclude: We agree that within Codex “*consensus is not unanimity, nor is consensus a quantifiable absolute or relative number*”. It is our opinion that *Consensus and non-consensus are in most cases interpreted satisfactorily by Codex Chairs*, however the process leading up to the point of decision making whether it is at step 5 or step 8, is of the utmost importance of the final outcome (consensus or not). It is of our experience that members are willing to use the measures to facilitate consensus building² and by taking use of these tools we can achieve consensus. Therefore further work regarding consensus should not be related to developing a definition, but elaborating on the consensus building process.

² Page 58 – 59 in the 17th edition: Consensus.

New Zealand

New Zealand welcomes the opportunity to comment on the concept of consensus and its application in Codex.

In New Zealand's experience, the absence of a formal definition of consensus has not been a hindrance. New Zealand has found the 'Measures to facilitate consensus' very helpful and pragmatic way of promoting consensus based decision making. Again from our experience consensus may be deemed to have been achieved when the committee has, *as a whole* agreed on a position with only a few objections. This ultimately is a matter of intuitive judgement.

Where consensus has not been possible it is not because of any deficiencies in the 'Measures' or their application but because of inflexibilities and entrenched national positions. By way of illustration New Zealand would refer to the difficulties in achieving consensus on some of the CCMMP work on individual cheese standards. The work relating to Parmesan and Processed Cheese are cases in point.

As for the specific questions in CL 2008/34-GP New Zealand would like to submit the following comments:

Comments on Section D.3

New Zealand is in general agreement with the statements made in section D.3 of the Secretariat paper. It is also our view that in most cases the judgement of consensus by chairs of Committees has been satisfactory. We agree with the statements that consensus requires concerted effort on the part of all parties both within and outside the meeting environment. Consensus also requires a clear willingness to be flexible. This is an essential precondition.

With regard to the statement in 3.4, New Zealand continues to hold the view that it is neither practical nor necessary for Codex to define consensus. As has been observed in previous discussions on the subject, judgement of consensus is a qualitative determination and it would be impractical and counterproductive to try and quantify the concept in a formal way. So New Zealand believes that Codex should follow the practice of other international organizations in the UN system to take practical steps to forge common understanding of consensus.

The statement in 3.6 is interesting and would suggest that there may be differences among committees or even within a session of a committee on how consensus is determined. Uniform application of the concept of consensus across Codex committees and within Committee sessions should be the goal and its achievement in the long run will depend on a clear commitment from all committee chairs and members to apply/adhere to the *Measures to facilitate consensus*. However, we do acknowledge that there is always a human element that influences the judgement of consensus in any particular plenary discussion. We believe that the recent practice of convening informal meetings of chairs to share experiences should, over time, be conducive to more consistent determination of consensus across committees.

With regard to the statement in 3.7 it is true that sometimes members may disagree with the chair's assessment of consensus. New Zealand believes that as members we have all faced such situations. In such circumstances it is up to individual members to decide on how they would wish to express their position. Possible responses could include a decision to let the matter proceed or request to have the national position recorded in the report of the meeting. If Codex is to continue to make progress with the practical application of Consensus it will require the active cooperation of all members.

Comments on proposals in D.4

New Zealand supports the proposal to develop a guidance booklet for chairs of committees to help them promote consensus based decision making.

New Zealand also supports the proposal for the secretariat to continue to arrange for chairs of all committees to meet informally and share their problems and experiences in the application of consensus based decision making.

New Zealand likes the idea of using facilitators as a way of making progress on difficult issues. Whether this should be done by chairs themselves or some other party will require further consideration. We would also note that use of facilitators should be seen as part of a set of actions that may be needed to progress work and achieve consensus.

United States

GENERAL COMMENTS

The United States notes that the subject of consensus as the approach to decision-making in the standards-related work of Codex has been considered extensively within Codex, both within the Codex Committee on General Principles and in the deliberations of the Commission. The outcome of these discussions has been, we believe, productive, establishing guidance that has been quite helpful in facilitating the work of Codex. We particularly note the guidance on consensus that has been developed over the past few years and which now appears in the Codex *Procedural Manual*, specifically the provisions under Rule XII, *Elaboration and Adoption of Standards*³ and the instructions for chairpersons relating to consensus that are given in the *Guidelines to Chairpersons of Codex Committees and Ad-Hoc Intergovernmental Task Forces*. We believe this guidance is extremely useful.

We note that most issues are resolved through committee discussions, including the judicious use of working groups, often employing the elements of guidance on consensus that have been developed by Codex. This ability to resolve difficulties has, in our experience, applied to all but the most contentious issues, recognizing that it is not uncommon to require both time and effort to achieve consensus.

The United States further notes that there are rare situations in which consensus cannot be achieved, resulting in delays or a halt in the standard-setting work of Codex. These situations are almost always attributable to one of the following: significant differences in national legislation; emerging issues for which there is a lack of significant scientific agreement on the potential risks to consumer health or consequences to international trade; or, differences in cultural and/or societal values. Thus, in spite of extensive, good-faith negotiations, reaching consensus is highly unlikely in these situations. We believe that existing Codex guidance on consensus and Codex standards management practices provide mechanisms to handle such situations. In particular, guidance on when to refrain from initiating work or when to redefine or suspend work needs to be applied judiciously, but as appropriate.⁴

At present, the United States does not support developing a definition for consensus within Codex that is associated with a specific numerical value for identifying when consensus has been reached. Such an approach is consistent with voting, which is already an option. Codex does not need to create a new definition of “consensus” that does not conform with the general practice of international organizations, including that of the United Nations.⁵

Notwithstanding these general comments, the United States is supportive of considering further guidance relating to facilitating consensus and provides the following specific comments on the conclusions and recommendations presented in Section D of CL 2008/34-GP.

³ Paragraph 2 of Rule XII states that “The Commission shall make every effort to reach agreement on the adoption or amendment of standards by consensus. Decisions to adopt or amend standards may be taken by voting only if such efforts to reach consensus have failed.”

⁴ Per Measures to Facilitate Consensus (Appendix: General Decision, Procedural Manual, p. 197 Seventeenth Edition), the 26th Session of the Commission has recommended seven measures to facilitate Member Countries in achieving consensus. These include refraining from submitting proposals in which the scientific basis is not well established and redefining the scope of the subject matter being considered to eliminate those issues for which consensus could not be reached.

⁵ Per an opinion letter issued by the United Nations Under-Secretary-General for Legal Affairs on June 17, 2002, “[i]n United Nations practice, the concept of “consensus” is understood to mean the practice of adoption of resolutions or decisions by general agreement without resort to voting in the absence of any formal objection that would stand in the way of a decision being declared adopted in that manner.”

SPECIFIC COMMENTS

Comments relating to Section D.3 (Conclusions) of the Circular Letter

Item 3.1. Consensus and non-consensus are in most cases interpreted satisfactorily by Codex Chairs.

The United States agrees with this conclusion.

Item 3.2. Many of the proposals made by chairs to increase chances of reaching consensus point to the need for the Codex family to learn to work together in an even more structured and more collaborative manner.

The United States generally agrees with this conclusion. We are fully supportive of the need to work in a collaborative manner to reach consensus, recognizing that the need for compromise is an essential component in reaching consensus. We also recognize the need to work in a structured manner and support this approach, but caution that flexibility is needed and that becoming too rigid in either structure or in implementing operating rules could likely hinder, rather than aid in achieving consensus. An example in this regard is the need for cross-committee communication and cross-committee working groups that may be needed upon occasion to help resolve an issue. Such activities, particularly cross-committee working groups, need some structuring but flexibility is needed to ensure that such mechanisms are employed and work effectively.

Item 3.3. The basic precondition to being able to reach consensus is that the parties are willing to negotiate and move positions.

The United States appreciates the benefits associated with consensus decision-making. However, not all decisions can be reached by consensus. As we indicated in our general comments, there have been instances wherein countries are *unable* to change their positions, e.g., because of legitimate concerns about the lack of available scientific evidence to support such a change. In such cases consensus decision-making would be inappropriate. The Procedural Manual recommends that the Commission either refrain from approving proposals for new work that raise such concerns or redefine the scope of the work to eliminate the issue(s) on which consensus is not likely to be reached.

Item 3.4. Should Codex see the need to adopt a definition it would be advisable that it is in line with the general understanding and common practice in the UN system.

The United States agrees with this conclusion and notes our general comments above regarding a definition of consensus. While we do not support a new definition of consensus, if such a definition is reached over our objection it should clearly state that it applies only in the context of Codex.

Item 3.5. There are cases in Codex meetings in which there is clearly no consensus but it is not clear how to proceed in order to achieve consensus.

We agree with this conclusion, but would note that these cases are actually very few in number, most likely do not warrant further guidance on consensus, but do require both the Codex Executive Committee and the Commission to be more pro-active in implementing previously agreed upon standards management procedures.

We would again mention that the problem of how to proceed could be eliminated if proposals for new work were carefully considered and, in cases where it is apparent that there will be problems achieving consensus, a decision be made not to undertake the new work. We would note that a lack of consensus with respect to a proposal for new work is a likely indication that the work should not go forward. If committees declined to proceed with new work in such cases, it would considerably reduce the incidences of stalemates in the standard development process.

Item 3.6. There are cases where delegations feel that the concept of consensus has not been applied harmoniously between different committees or even within the same session.

The United States would agree with this conclusion but, as with conclusion 3.5, we would note that these situations have been relatively few in number and could likely be resolved with the application of existing guidance on consensus and with the enhanced training of Chairpersons.

Item 3.7. There are cases where the Chair declares consensus and some delegations do not agree and are not content with the decision. They may feel that the correct process has not been followed but decide not to block the decision.

The United States agrees with this conclusion, but suspect these cases are relatively few.

Comments relating to Section D.4 (Measures to describe and improve the Codex Consensus Building Process)

Item 4.1. The Secretariat will complete the first version of the Chairs-booklet with any guidance given by the Chairs in this document and by members and observers in comments and during the discussion in the Committee on General Principles including a description of the Codex Consensus Process as to be followed by Chairs.

The United States agrees with this proposal and believes it will be very helpful.

Item 4.2. Cases as in 3.4, 3.5, and 3.6 could be taken up in the informal meeting of the chairs and CCEXEC as appropriate so that the process can be reviewed and, if necessary, adopted and corrective action taken.

The United States agrees with this proposal but would comment that it would be helpful for members and observers to have an opportunity to review and comment on the conclusions reached and corrective action being proposed.

Item 4.3. The Codex Secretariat could provide the means for the Codex Chairs to meet once a year in a facilitated forum to further discuss problem cases and to develop the Codex consensus building process. Any new results are to be included in the Chairs booklet.

The United States agrees with this proposal and believes it would be helpful. In fact, the United States suggests that it would be helpful to more formally establish the meeting of the Chairs and develop an appropriate terms of reference that includes activities relating to consensus as well as the broader area of general committee operations.

Item 4.4. The following could be added at the end of the “Guidelines to Chairpersons of Codex Committees and Ad-Hoc Intergovernmental Task Forces.

Where there is a deadlock in the standards development, the Chairpersons should consider acting as a facilitator, or appointing a facilitator, working during the session or between sessions to assist members to reach consensus. The facilitator should orally report on the activity undertaken and the outcome of the facilitation to the plenary.

The United States would not object to the inclusion of this provision but believes it has only limited value. We believe that use of facilitators should not suffice for either the Chair and the Committee (or the Commission) to make all efforts to achieve consensus. The use of facilitators should also not suffice for the Codex Executive Committee and the Commission to properly manage the Codex standards process. If a facilitator is to be used, it should be used only in those circumstances where all efforts to reach consensus have not succeeded. We believe that these situations are very few in number and exist where Members have strongly held views that relate to national requirements and interests, and where the potential for success in reaching a facilitated consensus agreement is quite limited. In these cases careful consideration of the true need for the Codex standard and the cost of facilitation and its likelihood of success is needed versus discontinuing the work.