

# AUTHORITY AND LEGITIMACY IN GLOBAL GOVERNANCE: DELIBERATION, INSTITUTIONAL DIFFERENTIATION, AND THE CODEX ALIMENTARIUS

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*In this Note, Livermore examines an important and controversial facet of globalization—the increased prominence and power of international institutions—through a study of the Codex Alimentarius. The Codex is an international food standard-setting body created in 1964 which experienced a significant increase in its authority in 1994 when its standards were incorporated into the World Trade Organization (WTO) regime through the Agreement on the Application of Sanitary and Phytosanitary Measures and Agreement on Technical Barriers to Trade. Standards that had once been entirely voluntary now have the bite of law in the global trade system. This change has challenged the Codex by subjecting its decision-making processes to a higher standard of accountability while at the same time undermining the deliberations which were at the heart of its successful functioning and claim of legitimacy. This Note argues that deliberation within the Codex alone is unlikely to solve this legitimacy dilemma but that the structure of the WTO regime, which divides power between multiple independent bodies, creates the possibility of an external check on the Codex in the form of judicial review exercised by the WTO Appellate Body. Livermore proposes that the Appellate Body review the decisionmaking of the Codex for procedural fairness and appropriate consideration of the views of minority states. Livermore also considers lessons that the successes and difficulties of the Codex have for the design of international regimes in the future.*

## INTRODUCTION

The role of international organizations in promoting global welfare has undergone an important shift in recent decades. With the rise of globalization, international bodies have taken on greater governance tasks and have been delegated significant new powers. Institutions that for many years were considered merely forums for states to coordinate their efforts now have an independent role in global governance. As the power relations between states, private actors, and

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international institutions have changed, a new structure for the exercise of governance authority is emerging.

Many scholars have taken note of this shift,<sup>1</sup> which poses significant challenges to central ideas such as the supremacy of the sovereign state<sup>2</sup> and the nature of democratic governance.<sup>3</sup> A great deal of work has been done sketching out the theoretical problems posed by globalized governance and proposing possible remedies.<sup>4</sup> This Note contributes to these efforts by examining the Codex Alimentarius, an international food safety standard-setting body.<sup>5</sup> The Codex is a leading example of an international organization that has been granted greater governance authority and has struggled through a difficult period of adjustment to that authority. In this Note, I argue that, on balance, greater authority has challenged the legitimacy and efficacy of the Codex by subjecting the Codex to higher standards for public participation and democratic accountability<sup>6</sup> and undermining

<sup>1</sup> See, e.g., Benedict Kingsbury, Nico Krisch, & Richard B. Stewart, *The Emergence of Global Administrative Law* 4 (Inst. for Int'l Law & Justice, Global Administrative Law Series, Working Paper No. 2004/1, 2004), available at <http://www.iilj.org/papers/2004/documents/2004.1KingsburyKrischStewart.pdf> (describing “global administrative law” project).

<sup>2</sup> See, e.g., Kanishka Jayasuriya, *Globalization, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance*, 6 *IND. J. GLOBAL LEGAL STUD.* 425, 425–27 (1999) (discussing consequences of international level regulatory governance on conceptions of state sovereignty).

<sup>3</sup> This debate has been especially heated in the context of the European Union. See generally Dieter Grimm, *Does Europe Need a Constitution?*, 1 *EUR. L.J.* 282 (1995) (analyzing calls for European Union constitution); Mette Jolly, *A Demos for the European Union?*, 25 *POLITICS* 12 (2005) (discussing nature and importance of concept of “demos” in context of European integration); J.H.H. Weiler, *Does Europe Need a Constitution? Demos, Telos and the Maastricht Decision*, 1 *EUR. L.J.* 219 (1995) (arguing that lack of “demos” for European Union does not preclude Union-wide democratic institutions).

<sup>4</sup> For a non-comprehensive bibliography of work in this field, see Michael Livermore, *Bibliography of Articles on Global Administrative Law Topics*, [http://www.iilj.org/global\\_adlaw/gal\\_bibliography.htm](http://www.iilj.org/global_adlaw/gal_bibliography.htm) (last visited Oct. 27, 2005).

<sup>5</sup> The Codex Alimentarius was created in 1963 as a joint project of the United Nations Food and Agriculture Organization (FAO) and the World Health Organization (WHO). FOOD & AGRIC. ORG. & WORLD HEALTH ORG., *Origins of the Codex Alimentarius*, in UNDERSTANDING THE CODEX ALIMENTARIUS 7 (2005), available at <http://ftp.fao.org/docrep/fao/008/y7867e/y7867e00.pdf> [hereinafter *Origins of the Codex*]. The name “Codex Alimentarius” can refer both to the standard-setting body, and the set of standards themselves. For the sake of clarity, throughout this Note, when using either “the Codex Alimentarius” or “the Codex,” I will be referring to the body. When referring to the set of standards, I will use “Codex standards.”

<sup>6</sup> The transfer of control of regulatory policy from nation-states to an international organization places pressure on the legitimacy of the international institution as its decisionmaking processes are subjected to greater scrutiny and judged by a stronger set of legitimacy criteria—such as democratic accountability. The application of democratic norms to international institutions is a recent innovation that Professors Keohane and Nye see as fundamentally challenging the model of international organizations as clubs of powerful states. See Robert O. Keohane & Joseph S. Nye, Jr., *Between Centralization and Fragmentation: The Club Model of Multilateral Cooperation and Problems of Democratic*

the deliberative process that was at the heart of its successful functioning. I propose a partial solution to these difficulties through the exercise of a process-based judicial review of the Codex by the World Trade Organization (WTO) Appellate Body. While judicial review will not be the final step in grounding the legitimacy of the Codex, it can provide an important external check on the Codex that facilitates equal participation in Codex deliberations and ensures that Codex standards are broadly accepted before they are adopted.

Part I provides background on the Codex and its new role in the WTO. Established over forty years ago, the Codex is an international organization comprised of states and charged with the promulgation of minimum quality standards for food products.<sup>7</sup> The standards of the Codex are in some ways similar to the rules promulgated by domestic food agencies such as the United States Food and Drug Administration, and are intended to serve as model regulations for domestic decisionmakers. Prior to the creation of the WTO,<sup>8</sup> the standards promulgated by the Codex were entirely voluntary; however, the Agreement on the Application of Sanitary and Phytosanitary Measures and the Agreement on Technical Barriers to Trade (the SPS/TBT Agreements) altered the nature of Codex standards by creating a legal framework that gives incentives in the WTO trading system for states to base their food regulations on Codex standards—giving the Codex coercive authority for the first time.<sup>9</sup> By giving legal

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*Legitimacy* 9 (Harvard Univ. John F. Kennedy Sch. of Gov't, Faculty Research Working Paper No. 01-004, 2001), available at [http://ksgnotes1.harvard.edu/Research/wpaper.nsf/rwp/RWP01-004/\\$File/rwp01\\_004\\_nye\\_rev1.pdf](http://ksgnotes1.harvard.edu/Research/wpaper.nsf/rwp/RWP01-004/$File/rwp01_004_nye_rev1.pdf).

<sup>7</sup> FOOD & AGRIC. ORG. & WORLD HEALTH ORG., *The Codex System: The Codex Alimentarius Commission and How It Works*, in UNDERSTANDING THE CODEX ALIMENTARIUS, *supra* note 5, at 15 [hereinafter *The Codex System*].

<sup>8</sup> The SPS/TBT Agreements were passed as part of the Uruguay Round of trade talks, which established the World Trade Organization. See Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 1867 U.N.T.S. 493 (1994) [hereinafter SPS Agreement]; Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 1868 U.N.T.S. 120 (1994) [hereinafter TBT Agreement]; *infra* Part I.

<sup>9</sup> See *infra* Part I; Terence P. Stewart & David S. Johanson, *The SPS Agreement of the World Trade Organization and International Organizations: The Roles of the Codex Alimentarius Commission, the International Plant Protection Convention, and the International Office of Epizootics*, 26 SYRACUSE J. INT'L L. & COM. 27, 29–34 (1998) (giving detailed summary of Agreements). Codex standards are not binding per se. See Sabino Cassese, *Shrimps, Turtles and Procedure: Global Standards for National Administrations* 15 (Inst. for Int'l Law & Justice, Global Administrative Law Series, Working Paper No. 2004/4, 2004), available at <http://www.iilj.org/papers/2004/2004.4%20Cassese.pdf> (“[T]he rules created by international organs in furtherance of the treaties . . . do not create direct, legally binding obligations upon the States.”). However, Codex standards do have “direct legal

effect to Codex standards, the Agreements changed the character of the Codex as an institution from one exercising entirely “soft” persuasive authority to a body with the ability to generate standards with “hard” consequences.<sup>10</sup>

Part II discusses the impact of the SPS/TBT Agreements on the legitimacy of the Codex. The increasing authority of the Codex is part of a more general trend of transferring power from national governments to international organizations. This transfer of power has subjected international bodies to greater scrutiny. As with other international bodies, although to a lesser extent, the legitimacy of the Codex to make rules that have binding characteristics has been questioned. Because it is unlikely that the Codex, as an international institution, will be able to rely on direct electoral accountability as a means of legitimacy, some commentators have proposed deliberation as one possible solution to this legitimacy dilemma.

Part III is an analysis of deliberations in the Codex. Examining records of Codex deliberations<sup>11</sup> and an independent evaluation of the Codex commissioned by the Food and Agriculture Organization (FAO),<sup>12</sup> I find that there are several characteristics of the Codex which make robust deliberation difficult, including large inequalities among the participants, few procedural protections for minority positions, and overrepresentation for industry and state interests. In addition, the incentive created by the SPS/TBT Agreements for states to pursue domestic agendas in the Codex aggravates these problems.

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consequences” in the WTO regime, giving them a binding characteristic. *Id.* at 16. For example, the SPS regime effectively creates two tracks for states: In Track One, states adopt Codex standards; in Track Two, states justify their regulatory decisions according to the SPS Agreement procedure. *See infra* Part I. Within Track One, the Codex standards are, for all practical purposes, binding. Some have noted that the burden on the regulators under the SPS regime is actually lessened in the presence of international standards. *See, e.g.,* Donald H. Regan, *The Limited (and Sometimes Perverse) Contribution of the WTO to Global Administrative Law* 4–5 (Apr. 22–23, 2005) (draft paper given at NYU Law School Global Administrative Law Conference), *available at* [http://iilj.org/global\\_adlaw/documents/ReganPaper.pdf](http://iilj.org/global_adlaw/documents/ReganPaper.pdf). Nevertheless, it would be difficult to argue that the selection by the Codex of a specific standard from the range of possible standards does not have important consequences for states.

<sup>10</sup> *See generally* JOSEPH S. NYE, JR., *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS* (2004) (defining and describing “soft power” in world politics).

<sup>11</sup> There is a significant record of deliberations of the Codex in the published Reports of the Sessions of the Codex Commission, in addition to submissions to the Codex by state and nongovernmental parties. *See infra* notes 100–01.

<sup>12</sup> The Codex underwent an evaluation in 2002, initiated by the FAO, which provides valuable insights into its functioning. *See* W. BRUCE TRAILL ET AL., *REPORT OF THE EVALUATION OF THE CODEX ALIMENTARIUS AND OTHER FAO AND WHO FOOD STANDARDS WORK* (2002) [hereinafter *EVALUATION*].

Because of these difficulties, deliberation alone will insufficient to legitimate Codex decisionmaking.

Part IV discusses the relationship of the WTO Appellate Body and the Codex and proposes that Appellate Body review of Codex standards has the ability to add legitimacy to the Codex. By giving the Codex the ability to generate norms and the WTO Appellate Body the authority to interpret and apply those norms in interstate litigation, the WTO regime creates the possibility for judicial review of Codex decisions and decisionmaking. Part V argues that the Appellate Body can add to the legitimacy of the Codex by increasing procedural protection for interests that are underrepresented in the Codex process, thereby correcting some of the structural flaws in Codex decisionmaking. However, the Appellate Body will have to tread carefully and ensure that its decisions are grounded in the WTO Agreements and generally accepted principles of international law in order to avoid judicial overstepping that might threaten its own legitimacy.

In conclusion, I discuss how the experience of the Codex should inform international organizations and regimes in the future. The conflict between the prior role of the Codex as facilitator of informal policy convergence and its new role as generator of quasi-binding, legal standards raises questions of the wisdom of granting functioning, useful institutions new powers that may weaken their traditionally effective tools. The ability of deliberation in international organizations to withstand the pressure created by new coercive authority is doubtful in light of the experience of the Codex. Institutional differentiation, however, holds great promise to provide greater legitimacy for international regimes granted coercive authority in the future.

## I

### BACKGROUND ON THE CODEX

The stated purposes of the Codex are to protect consumers and facilitate fair practices in the trade of food.<sup>13</sup> The Codex has created standards for over 300 topics,<sup>14</sup> which include detailed product specifi-

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<sup>13</sup> See JOINT FAO/WHO FOOD STANDARDS PROGRAMME, *General Principles of the Codex Alimentarius*, in CODEX ALIMENTARIUS COMMISSION PROCEDURAL MANUAL 29 (14th ed. 2004) [hereinafter *General Principles*]; see also *Statutes of the Codex Alimentarius Commission* art. 1(a), in CODEX ALIMENTARIUS COMMISSION PROCEDURAL MANUAL 3 (14th ed. 2004), available at <ftp://ftp.fao.org/codex/ProcManuals/Manual14e.pdf> (stating that purpose of Joint FAO/WHO Joint Food Standards Programme is, *inter alia*, "protecting the health of consumers and ensuring fair practices in the food trade").

<sup>14</sup> Complete List of Standards Adopted by the Codex Alimentarius Commission up to 2001, [http://www.codexalimentarius.net/web/standard\\_list.do?lang=en](http://www.codexalimentarius.net/web/standard_list.do?lang=en) (last visited Jan. 18, 2006).

cations and minimum requirements on thousands of issues.<sup>15</sup> Examples of issues addressed by the Codex include acceptable moisture retention agents for frozen fish sticks,<sup>16</sup> maximum solid sugar added to preserved blackcurrant juice,<sup>17</sup> and appropriate lighting in meat and poultry processing facilities.<sup>18</sup> Codex standards are directed at ensuring minimum food quality, in addition to providing recommendations for regulatory best practices.<sup>19</sup>

One of the Codex's goals in creating a uniform set of standards is to assist in the harmonization<sup>20</sup> of domestic regulation in order to facilitate international trade.<sup>21</sup> Various types of harmonization exist, including unification,<sup>22</sup> mutual recognition,<sup>23</sup> informal policy conver-

<sup>15</sup> For example, the Codex has adopted over 3000 maximum residue levels for pesticides. Stewart & Johanson, *supra* note 9, at 41.

<sup>16</sup> Codex Alimentarius Comm'n, *Codex Standard for Quick Frozen Fish Sticks (Fish Fingers), Fish Portions and Fish Fillets—Breaded or in Batter*, Codex Stan. 166, § 4 (1989, revised 1995), available at [http://www.codexalimentarius.net/download/standards/112/CXS\\_166e.pdf](http://www.codexalimentarius.net/download/standards/112/CXS_166e.pdf).

<sup>17</sup> Codex Alimentarius Comm'n, *Codex Standard for Blackcurrant Juice Preserved Exclusively by Physical Means*, Codex Stan. 120, § 2, ¶ 1 (1981), available at [http://www.agribusinessonline.com/regulations/grades/standards\\_codex/juiceblkcurrant.pdf](http://www.agribusinessonline.com/regulations/grades/standards_codex/juiceblkcurrant.pdf).

<sup>18</sup> Codex Alimentarius Comm'n, *Code of Hygienic Practice for Meat*, CAC/RCP 58, § 8.3, ¶ 68 (2005), available at [http://www.codexalimentarius.net/download/standards/10196/CXP\\_058e.pdf](http://www.codexalimentarius.net/download/standards/10196/CXP_058e.pdf).

<sup>19</sup> See, e.g., Codex Alimentarius Comm'n, *Guidelines on Good Laboratory Practice in Residue Analysis*, CAC/GL 40 (1993, revised 2003), available at [http://www.codexalimentarius.net/download/standards/378/cxg\\_040e.pdf](http://www.codexalimentarius.net/download/standards/378/cxg_040e.pdf).

<sup>20</sup> Legal or regulatory "harmonization" is a concept that applies when two rule-making bodies have legislative jurisdiction over similar matters in distinct territories. Martin Boodman, *The Myth of Harmonization of Laws*, 39 AM. J. COMP. L. 699, 702–03 (1991). Traditionally, harmonization has been understood as an effort by policymakers to adapt domestic rules to the rules of other jurisdictions in light of the existence of private transactions across borders. *Id.* at 703 & n.7. Harmonization efforts can be directed at traditional legal rules, policy objectives, decisionmaking rules, or institutional structures and processes. David W. Leebron, *Claims for Harmonization: A Theoretical Framework*, 27 CAN. BUS. L.J. 63, 68–70 (1996).

<sup>21</sup> See *General Principles*, *supra* note 13, at 29. The facilitation of trade is only one of the arguments put forth in support of harmonization. See Leebron, *supra* note 20, at 75–91 (listing additional justifications for harmonization including reducing externalities, increasing efficacy of unilateral rules, creating fair competition, securing economies of scale and "political" economies of scale, and promoting transparency).

<sup>22</sup> Unification eliminates "as much as reasonably possible the diversity of laws in international and inter-jurisdictional transactions." Boodman, *supra* note 20, at 705 & n.11. Under unification, a single set of standards applies across all participating jurisdictions. See Leebron, *supra* note 20, at 72 ("The degree to which a harmonization requirement continues to tolerate difference is the harmonization 'margin.' The 'unification' of law, or the adoption of uniform laws, is harmonization with zero margin.").

<sup>23</sup> In a mutual recognition, or equivalence, regime, goods that are compliant with the standards of one jurisdiction are treated as compliant for all jurisdictions in the regime. See Gregory Shaffer, *Reconciling Trade and Regulatory Goals: The Prospects and Limits of New Approaches to Transatlantic Governance Through Mutual Recognition and Safe Harbor Agreements*, 9 COLUM. J. EUR. L. 29, 32–33 (2002). Mutual recognition has been

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gence,<sup>24</sup> and choice of law rules,<sup>25</sup> all of which assist trade by lessening the impact of borders on cross-jurisdictional transactions. The international standards produced by the Codex aid harmonization efforts by providing a point of reference for the unification of domestic food regulation; in addition, the deliberations of the Codex support informal policy convergence by providing a forum for the dissemination of scientific knowledge and regulatory best practices.<sup>26</sup>

The governing body of the Codex Alimentarius is the Codex Commission,<sup>27</sup> which meets every two years and makes the major policy decisions for the institution. An Executive Committee, composed of a chairperson, three vice chairs and six representatives from geographical groups, meets more frequently and makes other impor-

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an important component of harmonization efforts within the European Union. *Id.* at 33–35. For background on mutual recognition regimes and their place in global ordering, see Kalypso Nicolaidis & Gregory Shaffer, *Managed Mutual Recognition Regimes: Governance Without Global Government* (Inst. for Int'l Law & Justice, Global Administrative Law Series, Working Paper No. 2005/06, 2005), available at <http://www.ilj.org/publications/documents/2005.6NicolaidisShaffer.pdf>.

<sup>24</sup> Informal policy convergence can be the result of the spread of “best” practices and ideas between countries and geographic areas, regulatory cooperation between agencies in different jurisdictions to achieve shared goals, or similar demands from local or international business or civil society actors leading to similar public policies. See, e.g., Daniel W. Drezner, *Globalization and Policy Convergence*, 3 INT'L STUD. REV. 53, 56–65 (2001) (reviewing theories of convergence); see also Alessandra Casella, *Product Standards and International Trade: Harmonization Through Private Coalitions?*, 54 KYKLOS 243, 244 (2001) (discussing role of private actors in driving policy convergence); Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1 (1992) (discussing role of transnational networks of professionals in influencing state decisionmaking).

<sup>25</sup> Choice of law rules could be considered a basic form of harmonization—jurisdictions do not make substantive changes to facilitate harmony between regulatory regimes, but they do create a system for coherent application of rules of various jurisdictions under a variety of circumstances. Note that choice of law requires no cooperation between states and can be adopted unilaterally. Andrew T. Guzman, *Exploring the Need for International Harmonization: Introduction—International Regulatory Harmonization*, 3 CHI. J. INT'L L. 271, 272 (2002).

<sup>26</sup> While it is generally understood that broader adoption of “scientific” regulatory methods will lead to policy convergence, this idea has been contested. See Jeffery Atik, *Science and International Regulatory Convergence*, 17 NW. J. INT'L L. & BUS. 736, 739 (1996) (“competing sciences may produce varied regulatory solutions” rather than true convergence). Even those who allow for the possibility of science as “variegated” and culturally situated expect “[c]enters of scientific authority [to] exercise influence on the patterns of regulatory design.” *Id.* As an international body with wide participation, the Codex can serve as a center of this sort.

<sup>27</sup> Codex Alimentarius, *Membership of the Commission*, <http://www.codexalimentarius.net/web/members.jsp?lang=en> (last visited Oct. 27, 2005). I will generally refer to the Codex Alimentarius Commission as either “the Commission” or “the Codex Commission.”

tant decisions.<sup>28</sup> In addition to the Executive Committee there are seven Commodity Committees,<sup>29</sup> and nine General Subject Committees.<sup>30</sup> There are also Regional Coordinating Committees to coordinate food standard activities across regions, including the development of regional standards.<sup>31</sup> The Committees are hosted by Member countries, which take on significant responsibility for facilitating Committee activities.<sup>32</sup> Standards are adopted through an elaborate eight-step process, culminating in adoption by the Commission.<sup>33</sup>

The number of states participating in the Codex has grown significantly over the decades. During the early years of the Codex, only a small percentage of states, most of which were relatively wealthy, took part in Codex proceedings.<sup>34</sup> Currently, there are 172 Member states of the Codex Commission.<sup>35</sup> The relative im-

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<sup>28</sup> See World Health Org., Structure of the Codex Alimentarius Commission (CAC), [http://www.who.int/foodsafety/codex/general\\_info/en/index3.html](http://www.who.int/foodsafety/codex/general_info/en/index3.html) (last visited Oct. 27, 2005).

<sup>29</sup> The Commodity Committees deal with classes of food and include, for example, a Committee on Fats and Oils and a Committee on Meat Hygiene. *Id.*

<sup>30</sup> The General Subject Committees deal with subject areas that cut across food categories, such as Food Labeling or Residues of Veterinary Drugs in Food. *Id.*

<sup>31</sup> *Id.* There are also a number of mechanisms that are not officially part of the Codex structure through which the Codex can receive expert advice. These include expert consultations with WHO and FAO staff and reviews of the work of three expert committees: the Joint FAO/WHO Committee on Food Additives, the Joint FAO/WHO Meetings on Pesticide Residues, and the Joint FAO/WHO Meetings on Microbiological Risk Assessment.

<sup>32</sup> See EVALUATION, *supra* note 12, § 4.4.3.10.

<sup>33</sup> Step One: The Commission decides to create a standard and allocates responsibility to a Committee. Step Two: The relevant Committee (or the Codex Secretariat), in consultation with the relevant expert General Subject Committees, creates a draft standard. Step Three: Draft standard is circulated to Members and observers. Step Four: Committee considers responses and has opportunity to amend draft. Step Five: Draft standard is submitted to Commission or Executive Committee for review. Step Six: Draft is again circulated. Step Seven: Comments are considered by Committee with opportunity to amend. Step Eight: Adoption by the Commission. See *id.* § 4.1.2. There is also a truncated process which allows for the adoption of a standard after Step Five. *Id.*

<sup>34</sup> At the first session of the Codex Commission in 1963, twenty-seven states participated as Members, of which only five could currently be considered developing countries (India, Pakistan, South Africa, Thailand, and Turkey). In addition four states participated as observers, including Argentina and the Dominican Republic. JOINT FAO/WHO FOOD STANDARDS PROGRAMME, REPORT OF THE FIRST SESSION OF THE JOINT FAO/WHO CODEX ALIMENTARIUS COMMISSION app. A (1963) (no recorded votes), available at <http://www.fao.org/docrep/meeting/005/66479e/66479E12.htm#appA> [hereinafter FIRST CODEX REPORT].

<sup>35</sup> One hundred seventy-two states participate as Members of the Codex Alimentarius Commission. Ninety countries participated as Members in the most recent Codex Commission session, counting the European Community (EC) as a separate entity. JOINT FAO/WHO STANDARDS PROGRAMME, REPORT OF THE TWENTY-SEVENTH SESSION OF THE JOINT FAO/WHO CODEX ALIMENTARIUS COMMISSION app. A (2004) (no recorded

portance of developing countries in the Codex has grown dramatically.<sup>36</sup>

For much of its history, the adoption of the Codex standards was entirely voluntary, and most states did not adopt Codex standards directly.<sup>37</sup> However, even then, the Codex served an important role in the international community by providing a forum for the discussion of food policy by regulators and affected interests, and the dissemination of scientific information and best practices. Thus, the effectiveness of the Codex prior to the SPS/TBT Agreements should not be gauged solely, or even primarily, by the number of countries that accepted, whole-cloth, Codex standards. Though it may prove difficult to measure, the ability of the Codex to serve as a “network” of regulators for the coordination of state activities and the diffusion of ideas seems a more valid criterion for judging its effectiveness.<sup>38</sup>

The SPS/TBT Agreements transformed the Codex by embedding Codex standards in the system of rules and incentives of the WTO. According to the structure of the Agreements, states that accept Codex standards are presumed to be compliant with the Agreements and with the General Agreement on Tariffs and Trade (GATT), thus largely freeing those states from the cost of defending their food regulations in expensive litigation before WTO Panels and the Appellate Body. The following section explains in more detail the place of the Codex in the SPS/TBT Agreements.

#### A. *The SPS/TBT Agreements*

In 1995, the SPS/TBT Agreements were adopted during the Uruguay Round of trade negotiations as part of a massive expansion of the international trade regime and the creation of the WTO. While the GATT—with its national treatment and most favored nations

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votes), available at [http://www.codexalimentarius.net/download/report/621/al04\\_41e.pdf](http://www.codexalimentarius.net/download/report/621/al04_41e.pdf) [hereinafter TWENTY-SEVENTH CODEX REPORT].

<sup>36</sup> See *The Codex System*, supra note 7, at 20 (showing growth in participation of developing countries in recent decades).

<sup>37</sup> In explaining this phenomenon, the FAO/WHO reasoned that “[d]iffering legal formats and administrative systems, varying political systems and sometimes the influence of national attitudes and concepts of sovereign rights . . . deter the acceptance of Codex standards.” *Id.*

<sup>38</sup> Anne-Marie Slaughter, Dean of the Woodrow Wilson School of Public and International Affairs at Princeton University, has written extensively on the role of intergovernmental networks in global governance. See, e.g., ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004) (explaining theory of transnational governance networks); Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 MICH. J. INT’L L. 1041 (2003) (same); Anne-Marie Slaughter, *The Accountability of Government Networks*, 8 IND. J. GLOBAL LEGAL STUD. 347 (2001) (raising issue of accountability in network forms of governance).

regimes—remains the centerpiece of the global trading system, the new agreements, which included the SPS and TBT Agreements, as well as others on intellectual property,<sup>39</sup> investment,<sup>40</sup> and dispute resolution,<sup>41</sup> are important components of the system of rules under which international trade is conducted.

The primary functions of the original GATT of 1944 were the elimination of import quotas and the reduction in tariff barriers. However, it was recognized that non-tariff trade barriers could be as effective as tariffs in excluding foreign products. The GATT addressed this problem by creating an obligation for Member countries not to discriminate against foreign producers in internal taxation and regulation.<sup>42</sup>

The SPS/TBT Agreements add to the GATT system by encouraging the harmonization of certain types of regulations and subjecting state regulators in those areas to a regime of scientific rationality and justification. The SPS Agreement covers domestic food, plant, and livestock regulation;<sup>43</sup> the TBT Agreement covers “technical regulations” such as labeling and product specification.<sup>44</sup> Under SPS Agreement Article 3, domestic food regulations that conform to international standards are presumed to be in compliance with the SPS Agreement and GATT.<sup>45</sup> Members that depart from international standards must be prepared to provide scientific justification.<sup>46</sup>

<sup>39</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 1869 U.N.T.S. 299 (1994).

<sup>40</sup> Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 1868 U.N.T.S. 186 (1994), available at [http://www.wto.org/english/docs\\_e/legal\\_e/18-trims.pdf](http://www.wto.org/english/docs_e/legal_e/18-trims.pdf).

<sup>41</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 1869 U.N.T.S. 401 (1994) [hereinafter Understanding on Dispute Settlement].

<sup>42</sup> Regulations which give “less favourable” treatment to imported products “than that accorded to like products of national origin” are prohibited. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194, at art. III, ¶ 2. The 1947 GATT was later incorporated into the WTO Agreements.

<sup>43</sup> See SPS Agreement, *supra* note 8, Annex A, ¶ 1 (definition of sanitary or phytosanitary measure). **R**

<sup>44</sup> See TBT Agreement, *supra* note 8, Annex 1, ¶ 1 (definition of technical regulation). **R**

<sup>45</sup> “Sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994.” SPS Agreement, *supra* note 8, art. 3.2; see Stewart & Johanson, *supra* note 9, at 30 (describing function of Articles 3.3 and 5). **R**

<sup>46</sup> SPS Agreement, *supra* note 8, art. 3.3; see also Stewart & Johanson, *supra* note 9, at 30 (describing two ways to deviate from Codex standards). **R**

SPS Agreement Article 5 sets out the requirements of risk assessment that can serve as the basis for scientific justification.<sup>47</sup> The TBT Agreement includes an obligation for Members to use international standards “as a basis” for technical regulations unless the international standards would be an “ineffective or inappropriate means” to achieve legitimate domestic ends.<sup>48</sup>

The SPS/TBT Agreements impact the Codex because the Codex was named as a body which has the authority to issue international standards.<sup>49</sup> With adoption of the SPS/TBT Agreements, the non-binding model regulations for food safety that the Codex had been creating for decades began carrying legal consequences for WTO Members. Members now have very real incentives to adopt Codex standards.<sup>50</sup> The cost of litigating before the Appellate Body can be quite high.<sup>51</sup> Even when a case is won, the victor has lost the litigation costs. States also frequently lose cases involving alleged violations of the SPS/TBT Agreements.<sup>52</sup> Once a case is lost, the penalties of non-compliance can be severe. Adopting international standards is a way for countries to avoid these costs.

<sup>47</sup> SPS Agreement, *supra* note 8, art. 5.

<sup>48</sup> TBT Agreement, *supra* note 8, art. 2.4. “Legitimate objectives” is a term of art. The treaty does not provide a definition, but rather a non-exhaustive list: “national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment.” *Id.* art. 2.2.

<sup>49</sup> SPS Agreement, *supra* note 8, Annex A, ¶ 3(a) (defining international standards for food safety as those created by Codex Alimentarius). Two other bodies named in the SPS Agreement were the Secretariat of the International Plant Protection Convention, which issues standards for plant health, and the International Office of Epizootics, which issues standards for animal health. *Id.* ¶ 3(b)–(c). The Codex has also been recognized as a body with the authority to issue standards on technical regulations for the purposes of the TBT Agreement. *See, e.g.*, Appellate Body Report, *European Communities—Trade Description of Sardines*, WT/DS231/AB/R, ¶ 315(e) (Sept. 26, 2002) [hereinafter *EC-Sardines*].

<sup>50</sup> In the words of the authors of the Evaluation:

Whereas in the past member governments of Codex were under no obligation to use Codex standards for domestic consumer protection or health, since the WTO SPS agreement of 1994, Codex has had legal status. While this does not require that all countries adopt all Codex standards, they must be able to justify non-adoption according to strictly-defined criteria.

EVALUATION, *supra* note 12, § 3.1, ¶ 21.

<sup>51</sup> Legal fees for a litigation of medium complexity can run from U.S. \$200,000 to over \$400,000, with fees in some higher complexity cases running well into the millions. *See* Hakan Nordström, *The Cost of WTO Litigation, Legal Aid and Small Claim Procedures 1–2 tbl.1* (June 1, 2005) (draft paper presented at University of Wisconsin-Madison Conference: WTO Dispute Settlement and Developing Countries), available at [http://wage.wisc.edu/uploads/WTO%20Conference/nordstroem\\_update.pdf](http://wage.wisc.edu/uploads/WTO%20Conference/nordstroem_update.pdf).

<sup>52</sup> *Cf.* Jeremy C. Marwell, Note, *The WTO Public Morals Exception: Balancing Trade and Morality After Gambling*, 81 N.Y.U. L. REV. 809, 816 n.29 (2006) (citing cases of measures found to have violated SPS/TBT Agreements).

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While the SPS/TBT Agreements undoubtedly raised the profile and power of Codex standards, they have also created a new set of difficulties for the Codex as an institution. In the next Part, I discuss how the SPS/TBT Agreements have threatened the legitimacy of the Codex, and briefly describe how this problem is part of a more general legitimacy dilemma facing international institutions. I also discuss deliberation as one of the proposed mechanisms to add legitimacy to international institutions.

## II

### THE LEGITIMACY OF THE CODEX

With the SPS/TBT Agreements, the function of the Codex in the international order changed dramatically. In the past, although the goal of the Codex ostensibly had been to encourage the unification of state food policies, the harmonization mechanism most effectively used by the Codex was informal policy convergence, utilizing the “soft” tools of persuasion and the spread of scientific information. Now, Codex standards are backed by a system of significant legal and economic incentives promoting the unification of regulatory food policy.

As the authority of the Codex has increased, its internal operations have become the subject of more strict scrutiny by the public, and questions of the legitimacy of the Codex have arisen.<sup>53</sup> It is not hard to understand this change. Prior to the SPS/TBT Agreements, the Codex standards were entirely voluntary, and parties were free to ignore Codex standards. When Codex standards were adopted by states, or when states used Codex standards as their model, they were giving their full free consent, absent any external incentive or coercion. Because states were entirely free to reject Codex standards, criticism of the Codex had very little urgency.

Codex standards are now backed by legal and economic authority; a demand for the Codex to be accountable to the interests that are impacted by Codex standards seems reasonable. Now that

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<sup>53</sup> See, e.g., Diane McCreia, *Codex Alimentarius—In the Consumer Interest?*, 7 *CONSUMER POL’Y REV.* 132 (1997) (criticizing Codex Alimentarius as inadequately responsive to consumer interests); Lori M. Wallach, *Accountable Governance in the Era of Globalization: The WTO, NAFTA, and International Harmonization of Standards*, 50 *U. KAN. L. REV.* 823, 826, 836–37 (2002) (referring to harmonization as “slow motion coup d’etat against accountable, democratic governance” and criticizing Codex for lack of public participation); Public Citizen, Codex Alimentarius Commission, <http://www.citizen.org/trade/harmonization/comments> (last visited Nov. 1, 2005) (highlighting role of industry representatives in Codex Commission); Trans Atlantic Consumer Dialogue, Consumer Participation, <http://www.tacd.org/cgi-bin/db.cgi?page=view&config=admin/docs.cfg&id=17> (last updated Dec. 16, 2002).

the standards of the Codex carry binding authority in the WTO system, they act to restrict and structure the policy choices of states. Just as domestic regulators are expected to promote common values such as equality,<sup>54</sup> the Codex—which constrains the full regulatory autonomy of states—will be held to similar standards. It is important that these values be reflected not only in substantive policy choices, but also in the procedures and internal decisionmaking processes of the Codex.

There is a more general trend of questions arising about the accountability and legitimacy of international institutions as these bodies take on larger and more important governance roles.<sup>55</sup> The officials of international institutions are largely bureaucratic representatives from the Member states, who are only indirectly accountable to the voting electorate.<sup>56</sup> While there are forms of accountability other than electoral accountability,<sup>57</sup> Western societies have grown accustomed to democratic elections as the primary source of accountability for government institutions.<sup>58</sup> The distance of international institutions from electoral politics thus threatens the legiti-

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<sup>54</sup> The FAO has identified five values that underlie the regulation of food: (1) the right to adequate food, (2) equality, (3) trust, (4) informed consent, and (5) optimization. FOOD & AGRIC. ORG., FAO EXPERT CONSULTATION ON FOOD SAFETY: SCIENCE AND ETHICS 8–12 (2003), available at <http://ftp.fao.org/docrep/fao/006/j0776e/j0776e00.pdf>.

<sup>55</sup> See Paul B. Stephan, *The New International Law—Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 U. COLO. L. REV. 1555, 1578–80 (1999) (arguing that new subjects of international law require greater accountability of international institutions). See generally Kingsbury, Krisch, & Stewart, *supra* note 1.

<sup>56</sup> Because there can often be a long chain of delegation between any given bureaucrat and an elected official, the ability of the electorate to hold bureaucrats to account for their decisions is questionable. Compounding the matter, the officials involved in international institutions are often subject to fewer of the procedural rules that have evolved to check administrative decisionmaking, such as public participation requirements and judicial scrutiny of decisions. See Patti Goldman, *The Democratization of the Development of United States Trade Policy*, 27 CORNELL INT'L L.J. 631, 643–51 (1994) (detailing ways in which procedures surrounding international trade policy fall short of comparable domestic procedures).

<sup>57</sup> See, e.g., Robert O. Keohane & Joseph S. Nye, Jr., *Democracy, Accountability, and Global Governance* 4–5 (Harvard Univ. John F. Kennedy Sch. of Gov't, Politics Research Group Working Paper on International Relations No. 01-4, 2001) (describing four forms of accountability in addition to electoral: hierarchical, legal, reputational, and market).

<sup>58</sup> See, e.g., Francesca E. Bignami, *The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology*, 40 HARV. INT'L L.J. 451, 451 (1999) (“In contemporary parliamentary systems, legitimacy rests in, and government authority flows from, the directly elected chamber.”). As more decisions are taken out of the hands of elected officials, the voting power of citizens is weakened. Given the role that international institutions play in formulating national policy, it can be argued that in order for the democratic rights of citizens in nation states to be vindicated, citizens must have some rights in international bodies. See, e.g., Steve Charnovitz, *The Emergence of Democratic Participation in Global Governance (Paris, 1919)*, 10 IND. J. GLOBAL LEGAL STUD. 45, 46 (2003) (citing Susan Marks, *Democracy and International Governance*, in THE

macy of decisions taken by these institutions.<sup>59</sup> When international institutions or agreements place restrictions on or interfere with the core regulatory functioning of states, these difficulties are heightened. The fear of usurpation is greatest in cases where states are subject to decisions to which they did not consent *ex ante*,<sup>60</sup> or where significant decisionmaking authority is vested in agencies, so that power is delegated from the collected states to civil servants, as is the case for the World Bank and the International Monetary Fund.<sup>61</sup> These anxieties not only have produced criticism by academics, but also have contributed to domestic political fallout for international institutions<sup>62</sup> and

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LEGITIMACY OF INTERNATIONAL ORGANIZATIONS 47, 66 (Jean-Marc Coicaud & Veijo Heiskamen eds., 2001)).

<sup>59</sup> Legitimacy can be defined in both a normative and a positive sense. As a positive term, the legitimacy of an institution describes a social fact—the actual acceptance of the authority by its subjects. *See* Keohane & Nye, *supra* note 57, at 1 (“Legitimacy implies that those subject to a governance process accept it as properly authoritative.”). Legitimacy is contrasted with “fear” and “interest” in explaining rule compliance. *See* Jens Steffek, *The Power of Rational Discourse and the Legitimacy of International Governance* 6–7 (Eur. Univ. Inst., RSC Working Paper No. 200/46, 2000), available at [http://www.iue.it/RSCAS/WP-Texts/00\\_46.pdf](http://www.iue.it/RSCAS/WP-Texts/00_46.pdf) (discussing theories of Max Weber on legitimacy as empirical phenomenon). Normatively, legitimacy is often associated with democratic institutions. *See id.* at 5 (describing traditional philosophers’ conception of normative legitimacy).

The crisis of legitimacy of international institutions in some sense exists along both normative and positive lines. Normatively, most current conceptions of legitimacy look for some form of democratic accountability, which is generally not present for international institutions. *See, e.g.,* Robert A. Dahl, *The Shifting Boundaries of Democratic Governments*, 66 *SOC. RES.* 915 (1999) (situating author among “[s]keptics [who] argue that the conditions required for the function of democratic institutions simply do not exist at the international level”). Positively, the level of acceptance of the authority of international bodies is contested. *See infra* notes 62–63 and accompanying text. *But see* Steffek *supra*, at 3 (taking as given that “states support international governance”). Throughout this Note, I understand legitimacy in the positive sense, as a social fact, which arises from our diverse normative conceptions. I do not here evaluate or provide an account of our normative understanding of legitimacy.

<sup>60</sup> That states must consent to any rules binding them is one of the bedrock principles of our system of international law. However, that principle has been challenged in recent decades as the sovereignty of states is limited by certain constraints, such as the human rights of their citizens and environmental damage caused outside of their borders. *See generally* Jayasuriya, *supra* note 2.

<sup>61</sup> *See, e.g.,* Ngaire Woods & Amrita Narlikar, *Governance and the Limits of Accountability: The WTO, the IMF, and the World Bank*, 53 *INT’L SOC. SCI. J.* 569 (2001) (arguing that international financial institutions are insufficiently accountable to affected interests); Ngaire Woods, *Holding Intergovernmental Institutions to Account*, *ETHICS & INT’L AFF.*, Spring 2003, at 69 (same); Ngaire Woods, *Making the IMF and the World Bank More Accountable*, 77 *INT’L AFF.* 83 (2001) (discussing ways to increase accountability of international financial institutions).

<sup>62</sup> *See, e.g.,* Elaine Sciolino, *French Voters Soundly Reject European Pact*, *N.Y. TIMES*, May 30, 2005, at A1 (connecting rejection of European Constitution by French voters to “fear of a more powerful European Union”); *The Presidential Candidates’ 2nd Debate: “These Are the Differences,”* *N.Y. TIMES*, Oct. 9, 2004, at A12 (transcript of second 2004 U.S. presidential debate in which President George W. Bush defended his decision not to

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outbreaks of street protest designed to halt the effective functioning of existing international bodies.<sup>63</sup>

### A. *Legitimacy and Deliberation*

For a variety of reasons, it is unlikely that international institutions will be able to rely on traditional means such as direct electoral accountability to provide legitimacy for their decisions.<sup>64</sup> In the absence of these mechanisms, alternative processes for building legitimacy have been proposed,<sup>65</sup> many of which rely heavily on the legitimating value of deliberation.<sup>66</sup>

A number of rationales have been given for why deliberation creates legitimacy. Deliberation can help improve the substantive content of decisions by facilitating the generation of relevant information and the consideration of diverse viewpoints,<sup>67</sup> thus creating better policies that are more likely to engender acceptance by the relevant parties.<sup>68</sup> Deliberation subjects decisions to public scrutiny, which allows them to be openly debated and defended by reasons,<sup>69</sup> creating policy that has been more thoroughly discussed and explained.

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join International Criminal Court, stating that Court “is where our troops can be brought in front of a judge, an unaccounted [sic] judge”).

<sup>63</sup> See, e.g., David E. Sanger & Joseph Kahn, *A Chaotic Intersection of Tear Gas and Trade Talks*, N.Y. TIMES, Dec. 1, 1999, at A14 (describing “battle of Seattle” protests during Millennium Round of trade talks).

<sup>64</sup> See, e.g., Kingsbury, Krisch, & Stewart, *supra* note 1, at 15 (describing objective of building global democracy as “at present illusory”).

<sup>65</sup> See, e.g., Jost Delbrück, *Exercising Public Authority Beyond the State: Transnational Democracy and/or Alternative Legitimation Strategies?*, 10 IND. J. GLOBAL LEGAL STUD. 29, 40–43 (2003) (discussing concept of legitimacy as applied to international institutions and describing democratic and alternative means of increasing legitimacy).

<sup>66</sup> See, e.g., DEMOCRACY IN THE EUROPEAN UNION: INTEGRATION THROUGH DELIBERATION? (Erik Oddvar Eriksen & John Erik Fossum eds., 2000) (providing number of interesting perspectives defending deliberation as legitimating force in European Union political structure); Archon Fung, *Deliberative Democracy and International Labor Standards*, 16 GOVERNANCE 51 (2003) (advocating use of deliberation in development of international labor standards); Loren A. King, *Deliberation, Legitimacy, and Multilateral Democracy*, 16 GOVERNANCE 23, 38–45 (2003) (endorsing reason-giving rationale for increasing legitimacy through deliberation); Marco Verweij & Timothy E. Josling, *Special Issue: Deliberately Democratizing Multilateral Organizations*, 16 GOVERNANCE 1, 11 (2003) (arguing that deliberation in multilateral bodies will increase input-based legitimacy, defined as “the extent to which public policy decisions are in accord with the will of those whose lives will be impacted”); Steffek, *supra* note 59, at 18–20.

<sup>67</sup> See Fung, *supra* note 66, at 52 (calling input of multiple parties into binding rule formation “distinctive idea of deliberative democracy”); King, *supra* note 66, at 33–34 (arguing that public deliberation which includes wide variety of opinions enhances private decisionmaking).

<sup>68</sup> Keohane & Nye, *supra* note 6, at 15 (discussing output-based legitimacy).

<sup>69</sup> Steffek, *supra* note 59, at 12–14.

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Deliberation in international bodies can also help preserve the regulatory autonomy of states. When the parties that are the primary participants in the rule making are the same entities that are subject to the discipline, some of the regulatory autonomy of states that may be lost in the international regime is preserved through the ability to affect the development of relevant standards.<sup>70</sup>

Early on, the Codex embraced the idea of deliberation, and its participation practices are considered among the most open of any important international body. However, as discussed above, these deliberative practices are now being called on to provide legitimacy to a much more powerful and controversial institution than the voluntary organization that was created thirty years ago. The ability of Codex deliberations both to remain robust in the face of greater power and to provide legitimacy to a newly coercive institution will provide an important test case for the claim that deliberation has an important role to play as international organizations take on greater governance authority.

### III

#### ANALYSIS OF CODEX DELIBERATION

In this Part, I discuss the deliberative practices of the Codex, focusing on the deficiencies that hamper the ability of deliberation to provide sufficient legitimacy to the Codex.

The Codex has always been a deliberative body. The decision-making structure set up by the Codex for the review of standards involves multiple stages of review by various committees, each with input into the formulation of the standard. The Committees consider significant amounts of scientific data<sup>71</sup> and create an impressive record in favor of a standard. Also, the Codex heavily encourages consensus-based decisions, with most standards being adopted unanimously after lengthy review in the Committee process.

Furthermore, the participation of non-state actors in the proceedings of the Codex was envisioned at the very beginning of the organization and has increased. In the first *Rules of Procedure for the Commission* adopted in 1963, the Directors-General of the FAO and WHO were given the power to invite intergovernmental or international nongovernmental organizations (NGOs) to “attend as

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<sup>70</sup> This arrangement is exactly how the SPS/TBT Agreements maintain their status as governance by agreement, which is a fundamental legitimizing characteristic of international governance. *Id.* at 21.

<sup>71</sup> See generally FOOD & AGRIC. ORG. & WORLD HEALTH ORG., *Codex and Science*, in UNDERSTANDING THE CODEX ALIMENTARIUS 21, *supra* note 5.

observers sessions of the Commission and its subsidiary bodies.”<sup>72</sup> The first session of the Commission included six international governmental organizations as observers and nine international NGOs, which were mostly industry representatives.<sup>73</sup> The participation of NGOs has grown since that time, with twenty-eight groups participating in a recent session of the Commission.<sup>74</sup>

Deliberation in the Codex has also proven essential to its successful functioning. Deliberation can be an important tool in soliciting the voluntary cooperation of states.<sup>75</sup> Decisions made through fair and open procedures, which invite the participation of potentially affected parties, may elicit greater compliance than arbitrary commands imposed by force. For institutions that do not carry a great deal of effective coercive economic, military, or legal power, voluntary compliance is an extremely important mechanism for the effectiveness of norms.<sup>76</sup> Indeed, although few states have adopted Codex standards directly, the open deliberations surrounding them have been significant in establishing norms for domestic food regulators.<sup>77</sup>

However, there are deficiencies in the structure of Codex deliberation<sup>78</sup> which have become more problematic in light of the increased

<sup>72</sup> FIRST CODEX REPORT, *supra* note 34, app. B Rule VII.3, available at <http://www.fao.org/docrep/meeting/005/66479e/66479E13.htm>.

<sup>73</sup> *Id.* app. A. The NGOs were the Food Law Institute, the Inter-American Bar Association (which shared an address with the Food Law Institute), the International Association for Cereal Chemistry, the International Dairy Federation, the International Federation of Margarine Associations, the International Liaison for the Food Industries, the International Organization for Standardization, the Permanent International Committee on Canned Foods, and the Union of Industries of the European Community. *Id.*

<sup>74</sup> TWENTY-SEVENTH CODEX REPORT, *supra* note 35, app. I.

<sup>75</sup> See Fung, *supra* note 66, at 52 (noting that deliberative democracy improves governance by developing participants’ argumentation skills, diversifying perspectives, and broadening contributions to development of standards).

<sup>76</sup> See generally NYE, *supra* note 10 (discussing importance of “soft” power for entities that do not have access to “hard” power).

<sup>77</sup> For example, Codex deliberations were cited by the Evaluation as providing “valuable insights into how to establish and enforce appropriate food standards” for developing countries. EVALUATION, *supra* note 12, § 3.2, ¶ 25.

<sup>78</sup> There is no consensus identifying the most important characteristics of deliberative processes; some characteristics which are broadly agreed to be important are reasoning, broad participation by interested stakeholders, possibility of influencing outcomes, and equality among the participants. See King, *supra* note 66, at 41. See generally JOSEPH M. BESSETTE, *THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN GOVERNMENT* 49 (1994) (“[E]very deliberative process involves three essential elements: information, arguments, and persuasion.”); DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS (James Bohman & William Rehg eds., 1997) [hereinafter *ESSAYS ON REASON AND POLITICS*] (collection of essays discussing fundamentals of deliberative democracy theory); DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL (Seyla Benhabib ed., 1996) (collection of essays discussing democracy and deliberation in heterogeneous polities); Jon Elster, *Deliberation and Constitution Making*, in DELIBERATIVE DEMOCRACY 97, 100–04 (Jon Elster ed., 1998) (arguing

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authority given to the institution. Inequities between the various participants are perhaps the most important failing. In order for there to be true deliberation, equality between participants is essential.<sup>79</sup> There are a number of important disparities between the parties in the Codex process. First, developing countries are less able to participate in Codex deliberations due to a lack of resources. In addition, states have more power than non-state actors, limiting the ability of interests that are not effectively represented by states to be heard. Finally, within the non-state groups present at the Codex, there is a bias towards industry groups, with many fewer active consumer group participants.

Perhaps the most striking inequality within the Codex involves the differences in the level of participation between developing and developed countries. An independent evaluation of the Codex found that ninety-six percent of low-income countries and eighty-seven percent of middle-income countries participate less than they would like,<sup>80</sup> the cost of participation being the main obstacle.<sup>81</sup> A disparity between the levels of expertise of developing versus developed country delegations places developing countries at a disadvantage. Furthermore, due to the costs associated with hosting Codex Committees, developed countries host most Committees, and consequently have greater control over the process.<sup>82</sup> The Codex has recognized the barriers faced by developing countries and has undertaken some efforts to help mitigate these difficulties, including holding more meetings in developing countries,<sup>83</sup> and establishing a trust fund to

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that “deliberative setting can shape outcomes independently of the motives of the participants” through, for example, social norms in favor of impartial reasons for policy choice); Michael E. Morell, *Citizens’ Evaluations of Participatory Democratic Procedures: Normative Theory Meets Empirical Science*, 52 POL. RES. Q. 293 (1999) (outlining empirical study noting effect of participation in perceptions of democratic procedures).

<sup>79</sup> See, e.g., King, *supra* note 66, at 41 (“[N]o participant should have grounds for thinking that . . . democratic procedures have systematically privileged some interests prior to or during public deliberation.”). See generally James Bohman, *International Regimes and Democratic Governance: Political Equality and Influence in Global Institutions*, 75 INT’L AFF. 499 (1999) (discussing equality from “cosmopolitan democracy” framework); Jack Knight & James Johnson, *What Sort of Equality Does Deliberative Democracy Require?*, in *ESSAYS ON REASON AND POLITICS* 279, *supra* note 78 (theorizing on forms of equality that should be adopted in order to satisfy conditions of deliberative democracy).

<sup>80</sup> EVALUATION, *supra* note 12, § 3.2, ¶ 24.

<sup>81</sup> *Id.* “[T]he overwhelming reason given [was] lack of financial resources.” *Id.*

<sup>82</sup> Host countries spent approximately U.S. \$7 million in the two year period 2000–2001 (including in-kind contributions). See EVALUATION, *supra* note 12, Annex 3. Furthermore, the control of host countries over the committees has been recognized. *Id.* § 4.4.3.10.

<sup>83</sup> See *id.* § 4.4.3.8 (noting that holding meetings in developing country facilitates participation by that country and others in region although it decreases attendance by developing countries generally).

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help facilitate the participation of developing nations.<sup>84</sup> However, there are still significant barriers to the equal participation of developing countries.

While the Codex does allow significant participation from non-governmental interests, there are some procedural and power-allocating practices of the Codex which skew the decisionmaking in favor of state interests. Compared to some international bodies, the Codex allows for broad participation from non-state interested parties.<sup>85</sup> The primary vehicle for NGO participation in the Codex is attainment of observer status.<sup>86</sup> There are significant participatory privileges that

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<sup>84</sup> See JOINT FAO/WHO STANDARDS PROGRAMME, REPORT OF THE TWENTY-FIFTH (EXTRAORDINARY) SESSION OF THE JOINT FAO/WHO CODEX ALIMENTARIUS COMMISSION ¶¶ 39–51 (Feb. 13–15, 2003). However, fundraising for the trust fund has been slow. The goal of the fund is to raise U.S. \$40 million over a twelve-year period. See World Health Organization, Codex Trust Fund, <http://www.who.int/foodsafety/codex/trustfund/en/> (last visited Nov. 1, 2005). However, the fund has only been able to raise less than U.S. \$1 million as of April 2004. PATIENCE MENSAH, REPORT ON FOURTH MEETING OF THE FAO/WHO CONSULTATIVE GROUP (CGTF) FOR THE FAO/WHO PROJECT AND FUND FOR ENHANCED PARTICIPATION IN CODEX 2 (2004).

<sup>85</sup> Codex has acknowledged the value of nongovernmental organizations. JOINT FAO/WHO FOOD STANDARDS PROGRAMME, *Principles Concerning the Participation of International Non-Governmental Organizations in the Work of the Codex Alimentarius Commission*, in CODEX ALIMENTARIUS COMMISSION PROCEDURAL MANUAL, *supra* note 13, § 1, available at [http://www.codexalimentarius.net/web/ngo\\_participation.jsp](http://www.codexalimentarius.net/web/ngo_participation.jsp) [hereinafter *INGO Principles*] (citing NGO role in “[providing] expert information, advice and assistance,” “represent[ing] important sections of public opinion,” and acting as “authorities in their fields of professional and technical competence”). The Codex rules seem very open when compared to non-state participation in the WTO, which is strictly limited.

There has been significant debate over the exclusion of nongovernmental actors from the WTO. See, e.g., Steve Charonovitz, *Opening the WTO to Nongovernmental Interests*, 24 *FORDHAM INT’L L.J.* 173 (2000) (discussing history of NGO involvement in trade talks and recommending greater NGO participation); Maura Blue Jeffords, *Turning the Protesters into a Partner for Development: The Need for Effective Consultation Between the WTO & NGOs*, 28 *BROOK. J. INT’L L.* 937 (2003) (arguing for greater role for NGO participants). However, there are a number of other international bodies in which NGO participation is high. For example, environmental groups have played an important role in shaping environmental treaties. The UN system has taken a number of measures to solicit the participation of NGOs. See United Nations and Civil Society, <http://www.un.org/issues/civilsociety> (last updated July 27, 2005). The World Bank has responded to criticism about the efficacy and justness of its development projects by giving a new role to NGOs, including the right to initiate proceedings to review Bank decisions before a quasi-judicial panel. For background, see Jonathan A. Fox, *The World Bank Inspection Panel: Lessons from the First Five Years*, 9 *GLOBAL GOVERNANCE* 279, 288 (2000), discussing the successes and the failures of the Inspection Panel.

<sup>86</sup> NGOs are granted observer status on the finding of the Directors-General of the FAO and WHO that they will make a “significant contribution in advancing the purposes of the Codex Alimentarius Commission.” *INGO Principles*, *supra* note 85, § 4.2. The organization must submit an application and meet certain criteria including: being “international in structure and scope of activity” and “representative of the specialized field of interest in which they operate”; and having “aims and purposes in conformity with the Statutes of the Codex Alimentarius Commission.” *Id.* § 3. The NGO must also have cer-

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accompany attainment of observer status, including the right to speak at meetings and receive documents.<sup>87</sup> However, states have a great deal of additional authority in the Codex, most importantly the rights to participate in Executive Committee sessions, propose expert committee members, and vote.<sup>88</sup> Because states have these additional procedural rights, interests that are not adequately represented by states<sup>89</sup> will not have an equal voice in the Codex.

There is also disparity between groups representing different non-state interests. The proportion of nongovernmental groups representing industry or professional interests vastly outweighs that representing consumers.<sup>90</sup> It is likely that this increased representation is augmented by greater access to resources, including expert consultation.<sup>91</sup> The ability of consumer groups to be effectively heard in consultations with national delegations to the Codex may be impaired by a lack of domestic political influence.<sup>92</sup> While there is significant par-

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tain internal structures in place, including a “permanent directing body,” “authorized representatives,” “systematic procedures and machinery for communicating with its membership,” and a mechanism for Members to vote on policies. *Id.*

<sup>87</sup> Accredited NGOs may participate in all sessions of the Commission, receive “all working documents and discussion papers,” circulate their views in writing “without abridgement” and, at the discretion of the Chairperson, participate in discussions. These privileges extend to the meetings of Subsidiary Bodies of the Commission. *Id.* § 5.1.

<sup>88</sup> JOINT FAO/WHO FOOD STANDARDS PROGRAMME, *Rules and Procedures of the Codex Alimentarius Commission*, in CODEX ALIMENTARIUS COMMISSION PROCEDURAL MANUAL, *supra* note 13 at 6, rules IV, VII & XII.

<sup>89</sup> There is a large number of possible interests that may not be represented adequately by states. Any interest which faces a significant collective action problem—when preferences are widely held but weak and diffuse—may not be able to mobilize government to act on its behalf. *See generally* MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1971) (classic work describing problem of collective action in political organizing). In addition, an interest that is a minority in many states but a majority in none may find no representation at all, despite being a significant interest in the aggregate. Also, in nondemocratic states or states with very shallow democratic practices, the ability of groups to find adequate representation through state officials will be even more limited.

<sup>90</sup> There were 151 nongovernmental organizations with observer status in February 2002. EVALUATION, *supra* note 12, § 4.1.4. Of those, approximately seventy-one percent were industry bodies, twenty-two percent professional, and eight percent consumer/public interest. *Id.* The overrepresentation of industry has been a longstanding practice in the Codex. *See supra* note 73 and accompanying text.

<sup>91</sup> A lack of expertise may be a very significant barrier to participation. *See* Consumers International, *Participation Is Not Enough* 4 (Sept. 2004), available at [http://consint.live.poptech.coop/Shared\\_ASP\\_Files/UploadedFiles/936D5474-64C0-4582-95F9-7BA857491ABA\\_Doc1189.pdf](http://consint.live.poptech.coop/Shared_ASP_Files/UploadedFiles/936D5474-64C0-4582-95F9-7BA857491ABA_Doc1189.pdf) (quoting Indonesian consumer NGO as saying: “Even though the government always invites us [to national consultations], we are not expert in all Codex subjects and can thus only participate in a few.”).

<sup>92</sup> *See id.* (discussing results of survey where “consumer organisations . . . report that governments too often are more open to influence from the regulated industries than consumer groups”).

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participation by consumer groups in Codex processes,<sup>93</sup> there is good reason to believe that among nongovernmental participants, the voice of industry concerns is louder than that of consumers.<sup>94</sup>

In addition to drawing attention to existing deficiencies in Codex deliberations, the SPS/TBT Agreement may have actually made deliberation in the Codex less effective. Prior to the Agreements, the Codex served as a forum for the discussion of food policy and the dissemination of scientific knowledge. Now that the Codex serves as the site of negotiation for quasi-binding standards in a unification regime, domestic regulators have an incentive to bring Codex standards more closely in line with domestic policy goals<sup>95</sup> since the negative domestic consequences of adopting an international standard are least when the divergence between the international standard and the optimal domestic regulation are smallest.<sup>96</sup> While it is likely that participants in the Codex were somewhat biased towards their domestic regulatory standards prior to the adoption of the SPS/TBT Agreements, the strength of those preferences is likely much stronger now.

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<sup>93</sup> The most prominent consumer organization participating in the Codex is Consumers International (CI), which has been a continuous participant in the Codex for over twenty years and reports that it has impacted Codex decisions. *See id.* at 3 (“CI has managed to exert substantial influence at Codex meetings.”). CI has also found that slightly over half of domestic consumer NGOs feel that they have impacted the decisions of their national delegations. *Id.* Of course, this finding implies that nearly half of responding groups do not feel that national delegations were impacted by the arguments of consumers.

<sup>94</sup> It is worth noting that governments participating in the Codex believe that the balance of consumer and industry interests in the Codex is “about right.” EVALUATION, *supra* note 12, § 4.4.3.9.

<sup>95</sup> Stewart & Johanson, *supra* note 9, at 34; *see* EVALUATION, *supra* note 12, § 3.1, ¶ 21 (“Legal recognition of Codex has given it greater relevance and importance, but has inevitably made compromise more difficult.”). Even if the regulator has private information that the policy preferences of the public will lead to less desirable outcomes, when deliberations are held in public and officials are sufficiently concerned about their standing with the (relevant) public, they will vote with public opinion. *See* David Stasavage, *Public Versus Private Deliberation in a Representative Democracy* 4 (2004) (unpublished paper, on file with the New York University Law Review), available at <http://personal.lse.ac.uk/stasavag/private10.pdf> (discussing costs of transparency for deliberative bodies).

<sup>96</sup> One of the costs of a unification regime is that regulations that are efficient from the perspective of domestic preferences and endowments are abandoned in favor of a single international standard. General welfare may be lessened if there is an inefficiently low level of regulatory heterogeneity. *See generally* Alan O. Sykes, *The (Limited) Role of Regulatory Harmonization in International Goods and Services Markets*, 2 J. INT’L ECON. L. 49 (1999) (arguing that harmonization is inefficient in many circumstances). Therefore, in order for the decision to join a unification regime to be efficient, the costs of the regime in terms of this inefficiency must be outweighed by the benefits achieved by unification, such as an increase in trade. Attempts to subject this cost benefit calculation to rigorous theoretical inquiry are at the formative stage. *See* Erin N. Sawyer, *Economic Impacts of Harmonization Organic Standards Internationally* 40–52 (2004) (unpublished M.S. thesis, University of Saskatchewan) (on file with the New York University Law Review) (literature review of economic analysis of harmonization).

The problem with more strongly held preferences among the participants in the Codex is that strong and inflexible preferences are inimical to deliberative processes.<sup>97</sup> During a functioning deliberation, the preferences of the participants may change due to the reasoning presented by the other participants.<sup>98</sup> If state representatives bring negotiating positions which are not subject to change based on discussion and debate, it will be very difficult, if not impossible, for the Codex to function as a deliberative body.

The increase in profile of the Codex has also made it a forum for the negotiation of differences between states on matters of “high politics”—such as genetically modified food—rather than the relatively more mundane and technical issues that it was designed to address. The introduction of high politics into the Codex means that the deliberations that take place *inside* the Codex are subverted to larger public debate taking place *outside* the Codex. While a public forum may be the more appropriate place to resolve these kinds of matters, their inclusion on the Codex agenda strains the deliberative capacity of the Codex. In fact, the issues that have most challenged the ability of the Codex to arrive at consensus decisions could all be characterized as high politics.<sup>99</sup>

In addition, the use of voting to adopt standards has increased since the adoption of the SPS/TBT Agreements, despite a preference in the Codex for consensus decisions. Prior to 1995, no standards had been adopted through a vote.<sup>100</sup> Since 1995, three standards have

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<sup>97</sup> Deliberation can be defined as a process where agents “suppose that their political opinions may be revised by discussion with other citizens; and therefore these opinions are not simply a fixed outcome of their existing private or nonpolitical interests.” Jeffrey T. Checkel, *Taking Deliberation Seriously* (Advanced Research on the Europeanisation of the Nation-State, Working Paper No. 01/14, 2001) ((quoting John Rawls, *The Idea of Public Reason Revisited*, in *COLLECTED PAPERS* 573, 580 (Samuel Freeman ed., 1999)), available at [http://www.arena.uio.no/publications/working-papers2001/papers/wp01\\_14.htm](http://www.arena.uio.no/publications/working-papers2001/papers/wp01_14.htm).

<sup>98</sup> See Cass R. Sunstein, *Republicanism and the Preference Problem*, 66 *CHI.-KENT L. REV.* 181, 191 (1990) (claiming that deliberation in democratic republic can be expected to change “preference, values, and perceptions of both individual and collective interests”). See generally Gerry Mackie, *Does Democratic Deliberation Change Minds?* *POL., PHIL. & ECON.* (forthcoming 2006) (unpublished manuscript, on file with the New York University Law Review).

<sup>99</sup> See *infra* note 101.

<sup>100</sup> See *FIRST CODEX REPORT*, *supra* note 34 (no recorded votes); *SECOND CODEX REPORT* (1964) (no recorded votes); *THIRD CODEX REPORT* (1965) (no recorded votes); *FOURTH CODEX REPORT* (1966) (no recorded votes); *FIFTH CODEX REPORT* (1968) (no recorded votes); *SIXTH CODEX REPORT* (1969) (four recorded votes; no standards adopted by vote); *SEVENTH CODEX REPORT* (1970) (one recorded vote; no standards adopted by vote); *EIGHTH CODEX REPORT* (1971) (no recorded votes); *NINTH CODEX REPORT* (1972) (no recorded votes); *TENTH CODEX REPORT* (1974) (no recorded votes); *ELEVENTH CODEX REPORT* (1976) (no recorded votes); *TWELFTH CODEX REPORT* (1978) (no

been adopted through voting of Codex Members rather than by consensus.<sup>101</sup> In the cases where the Codex has resorted to majority voting, the standards passed by narrow margins and addressed more controversial areas.<sup>102</sup> Voting is not a popular practice in the Codex, and a large majority of states would not support an increase in the use of voting to resolve differences between Member countries.<sup>103</sup> Of course, it is too early to tell if increased voting will be a long-term trend or a brief practice. It is also impossible to know for certain that changes in the voting practices were caused by the Agreements, although the Agreements provide a compelling account for the increase.

It is worth noting, however, that even though a relatively small number of decisions are made by a vote, the possibility of a vote may

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recorded votes); THIRTEENTH CODEX REPORT (1979) (no recorded votes); FOURTEENTH CODEX REPORT (1981) (no recorded votes); FIFTEENTH CODEX REPORT (1983) (no recorded votes); SIXTEENTH CODEX REPORT (1985) (one vote on host country for veterinary drugs committee); SEVENTEENTH CODEX REPORT (1987) (no recorded votes); EIGHTEENTH CODEX REPORT (1989) (no recorded votes); NINETEENTH CODEX REPORT (1991) (one recorded vote, deciding *not* to adopt standard on Maximum Residue Limits for Estradiol-17 $\beta$ , Progesterone, Testosterone and Zeranol); TWENTIETH CODEX REPORT (1993) (one recorded vote on host country for milk standards committee). For the full citation of the Second through Twentieth Codex Reports, see *infra* Appendix, pp. 806–07.

<sup>101</sup> See TWENTY-FIRST CODEX REPORT (1995) (two recorded votes; first standard adopted by vote: “Maximum Residue limits for 5 Growth Hormones”); TWENTY-SECOND CODEX REPORT (1997) (three recorded votes; two standards adopted by vote: “Maximum Residue Limits for Bovine Somatotropin” and “Revised Standard for Natural Mineral Waters”); TWENTY-THIRD CODEX REPORT (1999) (no recorded votes); TWENTY-FOURTH CODEX REPORT (2001) (no recorded votes); TWENTY-FIFTH CODEX REPORT (2003) (no recorded votes); TWENTY-SIXTH CODEX REPORT (2003) (two recorded votes; no standards adopted by vote); TWENTY-SEVENTH CODEX REPORT, *supra* note 35 (no recorded votes). For the full citation of the Twenty-First through Twenty-Sixth Codex Reports, see *infra* Appendix, pp. 807–08.

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<sup>102</sup> EVALUATION, *supra* note 12, § 4.4.3.7. For example, the standard for acceptable hormone levels in beef was not adopted by consensus. Rather, the beef hormone standard was adopted by secret ballot at the request of the United States and was adopted over the objections of many European countries. Stewart & Johanson, *supra* note 9, at 42. The issue of hormone levels in beef has proved extremely controversial. Due to the use of hormones, the European Union (EU) has banned the import of American and Canadian beef. The Americans and Canadians successfully challenged this ban before the WTO tribunals, but the European Community (EC) has refused to accede to the decision of the Appellate Body; rather than accept U.S. and Canadian beef, the EC has paid the price, suffering U.S. and Canadian sanctions against it, which cost it hundreds of millions of dollars.

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<sup>103</sup> Sixty-two percent of governments that responded to the FAO survey oppose an increase in the use of voting in the Codex. EVALUATION, *supra* note 12, § 4.4.3.7. The Observer of the European Communities has condemned the use of secret ballots as a violation of transparency. Stewart & Johanson, *supra* note 9, at 42. Interestingly, a large majority of nongovernmental participants support an increase in the use of voting. EVALUATION, *supra* note 12, § 4.4.3.7. However, consumer representatives do not. *Id.* From this information, we might conclude that voting favors industry at the expense of consumers.

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also affect decisions that are made by consensus. Once a majority exists in support of a standard, the minority states know that continued resistance may be futile, and become willing to “trade” their agreement for small concessions. In some cases, however, the threat of a vote is insufficient to coerce parties to give their agreement, likely because of domestic consequences for national officials taking a position on a highly public issue that is contrary to the views of its citizens.<sup>104</sup>

It would be grossly unfair and inaccurate to state that the efforts of the Codex to facilitate broad participation and deliberation over standards have been a failure. However, it is important to note that the SPS/TBT Agreements have placed very serious pressure on Codex processes and exacerbated existing deficiencies in Codex decision-making. Problems with deliberations limit their value for legitimating the Codex, and may compromise the ability of the Codex to function as a driver of informal policy convergence.

#### IV APPELLATE BODY INTERPRETATION OF CODEX STANDARDS

If deliberation in the Codex—as it is currently practiced and is likely to be practiced in the future—cannot carry the entire burden of legitimizing Codex standards, then we must look elsewhere in the structure of the Codex and the WTO regime to take up part of the weight. One very promising feature of the WTO agreements is the fracturing of power between multiple interrelated bodies. Power is divided among states (who are responsible for implementing the agreements, bringing complaints before WTO tribunals, and undertaking enforcement), the tribunals, the WTO Secretariat, and multiple other international bodies such as the Codex. There are a number of important benefits that this institutional differentiation can provide. Coordinating bodies make up for some of each other’s internal deficiencies; institutional differentiation creates the possibility of delibera-

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<sup>104</sup> For example, we would not expect a regulator from the EU to vote for high thresholds for hormones in beef products because of political consequences even if (1) the threshold was going to be adopted by vote without their support and (2) by lending their support they could negotiate the level down, achieving a result closer to the preferences of most EU voters (assuming EU voters prefer lower thresholds). *See supra* note 102.

tion between bodies;<sup>105</sup> and the delegation of different powers to different entities facilitates the optimal exercise of public authority.<sup>106</sup>

This section focuses on the interaction between the Codex and the WTO tribunals and draws the conclusion that judicial review of Codex decisionmaking by WTO tribunals can be an important mechanism to enhance the legitimacy of the Codex. By exercising judicial review, the WTO tribunals can create important procedural protections for interests that may be underrepresented in the Codex process. In addition, by actively engaging the Codex in an ongoing dialogue over the most appropriate decisionmaking structure, the WTO tribunals can spur the Codex to reexamine continually and improve its internal processes. In this section, I describe how the SPS/TBT Agreements divide power between the Codex and WTO tribunals and discuss how the Appellate Body, building on its past decisions and general principles of administrative and international law, can exercise process-based judicial review of the Codex.

#### A. *Separation of Powers and Judicial Review Under the SPS/TBT Agreements*

Under the SPS/TBT Agreements, the power to create international standards is granted to the relevant international bodies, most importantly the Codex, while the power to interpret those standards is given to the WTO tribunals, with appellate jurisdiction given to the Appellate Body.<sup>107</sup> This institutional differentiation fragments power under the SPS/TBT Agreements so that each body must rely (at least partially) on the other for its effective operation. This arrangement is similar, in some respects, to the “separation of powers” familiar from domestic constitutional systems.<sup>108</sup>

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<sup>105</sup> See, e.g., GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982) (describing relationship of judiciary to legislature); Jeffrey K. Tulis, *Deliberation Between Institutions* (Feb. 2000) (unpublished manuscript, on file with the New York University Law Review), available at <http://www.la.utexas.edu/conf2000/papers/DeliberationBetInstit.pdf> (discussing possibility of inter-body deliberation).

<sup>106</sup> See generally Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) (discussing types of social problems best addressed by courts, administrators, and markets—including legislative markets).

<sup>107</sup> There is a check on the Appellate Body, but it is quite weak. The Dispute Settlement Body, comprised of all WTO Member states, may decide not to adopt a decision of the Appellate Body, but only through full consensus, which means that the winning litigant would have to vote to nullify its victory. For most purposes, this weak check can be ignored. See generally Understanding on Dispute Settlement, *supra* note 41.

<sup>108</sup> While there are many good reasons to be wary of comparisons between the international and domestic systems (such as a lack of a global “demos” or “polity,” greater distance between international institutions and citizens, and the intervening authority of states between individuals and international institutions), there are many important lessons that international institutions can draw from domestic experience. See generally Richard

One of the most popular arguments in favor of judicial review in the domestic context is that it acts to make up for deficiencies in the political branches, which systematically underrepresent certain groups and interests;<sup>109</sup> this reasoning can also support the exercise of judicial review by the Appellate Body. By exercising a heightened level of judicial review, the Appellate Body can compensate for deficiencies of representation and equality in the Codex decisionmaking process. Further, by providing an independent check on the exercise of the Codex's power, Appellate Body review will encourage the Codex to evaluate its own internal processes and engage in deliberation with the Appellate Body over the best procedures to protect all affected interests.<sup>110</sup> The tribunal also creates an alternative forum where, some would argue, issues of accountability and appropriate procedural protections for minority interests can be decided according to principle rather than political bargaining.<sup>111</sup>

While there are accountability and legitimacy issues associated with independent tribunals, especially those exercising judicial review,<sup>112</sup> the Appellate Body can aid its legitimacy by ensuring that its exercise of procedural review is grounded in both the language and the object and purpose of the WTO agreements, as well as established principles of international law.

### *B. Current Judicial Review by the Appellate Body*

WTO tribunals have exercised interpretive power over Codex standards on a number of occasions. As a threshold issue, the Appellate Body has recognized the Codex as a relevant international body

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B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?* 68 *LAW & CONTEMP. PROBS.* 63 (2005). One of the difficulties of applying domestic administrative law principles in the global context is the dissimilarity in institutional structures, most importantly the lack of strong independent judicial organs. This problem is not as great in the WTO context, where there is a division of authority between bodies and a strong standing tribunal.

<sup>109</sup> See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (advocating theory of judicial review in order to correct for problems in political branches); Bruce A. Ackerman, *Beyond Carolene Products*, 98 *HARV. L. REV.* 713 (1985) (proposing revision to Ely's theory so as to protect anonymous and diffuse interests as well as discrete and insular minorities).

<sup>110</sup> Cf. Tulis, *supra* note 105, at 4–14 (showing how early deliberation between Executive and Congress encouraged Congress to evaluate internal policies).

<sup>111</sup> See generally Ronald Dworkin, *The Forum of Principle*, 56 *N.Y.U. L. REV.* 469 (1981) (concluding that courts provide means of deciding certain important social questions based on principle rather than political expediency).

<sup>112</sup> For two discussions of this issue in the U.S. domestic context, see generally LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) and MARK V. TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* (1988).

with the authority to create international food standards.<sup>113</sup> Panels have interpreted the Codex for purposes of determining whether domestic regulations have been “based on” the international standards and are, therefore, accorded a presumption of validity.<sup>114</sup> In these analyses, tribunals are called on to interpret not only treaty terms but also the meaning of Codex standards.<sup>115</sup> Tribunals have also made decisions expanding the relevance of international standards in interpreting state obligations under the least restrictive measure requirement of SPS Agreement Article 5.<sup>116</sup> Tribunals have thus determined both the meaning and the power of Codex standards.

A significant consequence of the division of authority in the SPS/TBT Agreements is the possibility of review of Codex standards by WTO tribunals. This review could take two forms. WTO tribunals could review the substantive content of a Codex standard and/or the processes by which a standard was adopted.

Substantive review of Codex standards is unlikely; there is no obvious textual hook for such review and the technical nature of Codex standards puts them beyond the expertise of WTO tribunals.<sup>117</sup> Procedural review, on the other hand, is far less technical and fits well within the competency of the Appellate Body. In fact, some procedural review of the internal practices of the Codex has already been performed by the Appellate Body.

In *EC-Sardines*, Peru brought a complaint against the European Community alleging a violation of the TBT Agreement.<sup>118</sup> Under the TBT Agreement, states must use “relevant international standards” as

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<sup>113</sup> See, e.g., *EC-Sardines*, *supra* note 49, ¶ 221 (basing analysis on fact that Codex is recognized body). R

<sup>114</sup> *Id.* ¶¶ 234–35.

<sup>115</sup> For example, in *EC-Sardines*, the EC argued that the Codex standard on the labeling of sardines was “intended as a self-standing option for ‘naming,’” while Peru claimed that “the species other than *Sardina pilchardus* to which Codex Stan 94 refers may be marketed as ‘X sardines’ where ‘X’ is one of the four following alternatives: (1) a country; (2) a geographic area; (3) the species; or (4) the common name of the species.” *Id.* ¶¶ 236–37. The Appellate Body agreed with Peru. *Id.* ¶ 239. While this may not seem like a momentous decision, what is important is that the Appellate Body is interpreting the text of Codex standards, creating a new kind of dynamic between the Codex and the Appellate Body.

<sup>116</sup> In *Australia–Salmon*, a panel compared domestic regulations to the standards promulgated by the International Office of Epizootics. In determining that the domestic regulations were not less restrictive measures, the fact that they diverged from the international standards was given “appropriate weight” in the panel’s consideration. Panel Report, *Australia—Measures Affecting the Importation of Salmon*, ¶ 8.180, WT/DS18/R (June 12, 1998).

<sup>117</sup> It is possible that if a Codex standard violated a *jus cogens* principle a tribunal would refuse to apply it. This scenario, however, is very unlikely to occur as it is difficult to imagine a Codex standard (such as a labeling requirement) violating *jus cogens*.

<sup>118</sup> *EC-Sardines*, *supra* note 49. R

the basis for state regulations, unless those standards would be an “ineffective or inappropriate” means of achieving state ends.<sup>119</sup> Peru argued that the refusal by European Community authorities to label a species of fish exported by Peru (*sardinops sagax*) as “sardines,” despite a Codex standard which specified *sardinops* as a “sardine,” violated this requirement.<sup>120</sup> One of the counterarguments made by the European Community was that in order for a standard adopted by an international body to be considered the “relevant” international standard, it must be adopted by consensus, and no determination had been made by the Panel on that subject.<sup>121</sup> The Appellate Body disagreed, making a text-based argument that consensus is not a requirement for “relevant” international standards.<sup>122</sup>

The Appellate Body’s holding that non-consensus standards are valid for the purposes of the SPS/TBT Agreement is not its most significant move. That the Appellate Body inquired into the validity of Codex standards at all, exercising a form of judicial review over the decisionmaking processes of the Codex, is more significant. While the *EC-Sardines* decision upheld the Codex standard, the fact of Appellate Body inquiry creates the possibility that a later standard will not be upheld. By undertaking any review of the internal processes of the Codex, the Appellate Body has announced the possibility that the arguments concerning the decisionmaking procedures of the Codex may be fair game.

There are at least two textual hooks that can be used to argue for additional procedural review of Codex standards. First, though the *EC-Sardines* decision seems to close the door on a consensus rule for the Codex, there is still room for the Appellate Body to adopt less burdensome, but still meaningful procedural requirements, before allowing a standard to be considered a “relevant” international standard for the purposes of the TBT Agreement. Second, in Article 3 of the SPS Agreement, the presumption that a national regulation is valid if it conforms to an international standard is a rebuttable pre-

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<sup>119</sup> TBT Agreement, *supra* note 8, art. 2.4.

<sup>120</sup> *EC-Sardines*, *supra* note 49, ¶¶ 67–84.

<sup>121</sup> *Id.* ¶ 36 (summarizing textualist justification for EC position).

<sup>122</sup> In its decision, the Appellate Body relied on the definition of “standard” in the TBT Agreement, the explanatory note for which states: “This Agreement covers also documents that are not based on consensus.” *Id.* ¶ 220 (citing TBT Agreement, *supra* note 8 Annex 1 ¶ 2). The Appellate Body largely passes over the argument by the EC that the use of the term “relevant” in the text of the TBT Agreement creates a subset of standards, and that an appropriate understanding of that subset would be those standards that have been adopted by consensus. For an argument that the Appellate Body should have held that non-consensus decisions were not “international standards,” see Regan, *supra* note 9, at 10–12.

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sumption.<sup>123</sup> The Appellate Body has yet to articulate how that presumption can be rebutted and could announce a procedural requirement in that context.

*C. Sources of Law and Substantive Standards Helpful to Appellate Body Review of the Codex*

The exercise of judicial review over the Codex offers a number of potential benefits for the WTO system, but also comes with some potential dangers. The exercise of judicial review could help enhance the fairness and legitimacy of the WTO system through the creation of procedural requirements to make up for deficiencies in Codex decisionmaking processes. However, even in well-settled constitutional systems, the appropriate scope of judicial review is a subject of significant controversy; the appropriateness of judicial review in the international context is likely even more controversial.<sup>124</sup> The difficult challenge for the Appellate Body is to take advantage of the opportunities presented by its power of judicial review while ensuring that its decisions remain grounded in established principles of international law.

The Appellate Body has already developed some administrative law principles from which it can draw.<sup>125</sup> In *Turtle Shrimp*,<sup>126</sup> the Appellate Body articulated a standard of state conduct that Professor Cassese has characterized as a due process requirement.<sup>127</sup> Among the failures on the part of the United States that led to its loss in that case were the lack of a “transparent, predictable certification process,” the inability of a state subject to the U.S. regulation to have a “formal opportunity . . . to be heard, or to respond to any arguments that may be made against it,” the absence of a “formal written, reasoned decision,” and no “notice of denial” or “procedure for review

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<sup>123</sup> See SPS Agreement, *supra* note 8, art. 3.2 (“Sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be . . . presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994.”) (emphasis added). R

<sup>124</sup> For example, the second Bush administration expressed hesitation at the possibility of allowing U.S. soldiers to stand before an international court; a hesitancy that it presumably would not have with trials conducted in U.S. courts. See *supra* note 62. R

<sup>125</sup> Giacinto della Cananea, *Beyond the State: The Europeanization and Globalization of Procedural Administrative Law*, 9 EUR. PUB. L. 563, 573–76 (2003) (describing administrative law principles being applied by WTO tribunals).

<sup>126</sup> Appellate Body Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Turtle Shrimp*].

<sup>127</sup> See Cassese, *supra* note 9, at 3 (discussing *Turtle Shrimp* decision of Appellate Body: “[F]or States to respect the prohibition on arbitrary discrimination between countries where the same conditions prevail, as required by the GATT norm, they must respect the principle of due process.”). R

of, or appeal from, a denial of an application” for certification.<sup>128</sup> While these due process principles apply to the actions of states, who are the subject of WTO treaty obligations, rather than to other bodies in the WTO system, they show a willingness on the part of the Appellate Body to articulate administrative law standards. Thus, they may be able to provide some of the theoretical grounding for procedural requirements of the Codex.

There are other principles that can help inform Appellate Body review of Codex decisionmaking. It has been argued that there are administrative law principles embedded in the WTO treaties, including transparency and consultation.<sup>129</sup> In addition, international courts have developed a set of principles for determining when a rule of customary international law exists that can be deployed in the context of Codex standards.<sup>130</sup> This jurisprudence may be helpful in determining the kind of support necessary for the development of an international standard.<sup>131</sup> Procedural protections for states with minority practices or interests which are greatly impacted by standards can be justified by analogy to this doctrine.

The Appellate Body can also look to the administrative practices of other international organizations. The Codex is not the only body engaged in the task of establishing international standards. The practices of the International Organization for Standardization (ISO), among others, might be relevant for the evaluation of Codex processes. In addition, it may be useful to compare the procedures of the Codex more broadly to accountability mechanisms in other global regulatory regimes.<sup>132</sup>

#### *D. Expanded Procedural Review—One Possible Rule*

One possible procedural rule that the Appellate Body could adopt<sup>133</sup> is that the Codex must adopt a standard through a

<sup>128</sup> *Id.* at 2, quoting *Turtle Shrimp* ¶ 180.

<sup>129</sup> See Cassese, *supra* note 9, at 7–8.

<sup>130</sup> See International Court of Justice, A Guide to the History, Composition, Jurisdiction, Procedure, and Decisions of the Court, <http://www.icj-cij.org/icjwww/igeneralinformation.htm> (on file with the New York University Law Review) (last visited Nov. 1, 2005).

<sup>131</sup> This would not be the first time that WTO tribunals utilized sources of law external to the WTO treaties. See generally David Palmeter & Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 AM. J. INT'L L. 398 (1998) (considering different sources of law utilized by WTO, including external sources).

<sup>132</sup> See Kingsbury, Krisch, & Stewart, *supra* note 1, at 2 (considering “the emergence and the potential further development of administrative law mechanisms to promote greater accountability in decision-making in the rapidly proliferating variety of global regulatory mechanisms”).

<sup>133</sup> In proposing a possible rule that the Appellate Body could adopt, I by no means want to imply that this is the only, or even the best, rule. Rather, I hope only to “break the

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supermajority, and not over the objection of any specially affected section of states,<sup>134</sup> for it to qualify as a valid international standard. Supermajority voting provisions are the norm of similar international bodies<sup>135</sup> and would help to alleviate some of the concerns of a bare majority of states imposing their views on the minority. Furthermore, a requirement that specially affected states give their consent to a rule provides an incentive for consensus, helps ensure that no rule is overly burdensome for any particular state, and grounds the legitimacy of the standard in the consent of states. Finally, if the Appellate Body wishes to give a greater role to nongovernmental actors, it could look to the expressed views of NGOs in “borderline” cases where a standard has been adopted by less than consensus, but more than a bare majority. While a requirement of this sort might further slow down Codex decisionmaking,<sup>136</sup> it is more important, for the purposes of harmonization and the legitimacy of the international trade system, that the standards are widely accepted than quickly adopted.

Because of the tenuous position and legitimacy of the Appellate Body, it is important that it neither exercise its discretion too broadly nor create overly burdensome procedural rules. It is also important that the requirements it does adopt are rooted in international law principles, the normative values of the WTO system, and the practice of states and international organizations. While judicial review in this area will be a significant step, it is important for the Appellate Body to remember that the WTO treaties are an innovation in international governance, requiring creativity and courage in their interpretation and implementation to achieve their long-term success.

## CONCLUSION

Perhaps the most important lesson that can be learned from the experience of the Codex is that an institution can expect to undergo a number of significant changes and challenges as it adapts to the exer-

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ice” by showing what a rule could look like, and what kind of legal and policy rationales could be used to justify it.

<sup>134</sup> Under the well-established doctrine of “specially affected states,” the views—positive, negative, or undetermined—of states that have a relatively more compelling interest in a rule are given greater consideration. See PETER MALANCZUK, *AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW* 42 (7th ed., 1997) (noting that “general” practice required to form customary international law should include “the conduct of all states, which can participate in the formulation of the rule or the interests of which are specially affected”).

<sup>135</sup> See EVALUATION, *supra* note 12, § 4.2 fig. 2.

<sup>136</sup> The slowness of the Codex has been a subject of complaint by some countries. See *id.* § 3.2, ¶ 26. However, there may be other ways to speed up the Codex process that do not compromise the fairness of decisions, such as holding meetings more frequently.

cise of additional governance authority. In order for the organization to maintain its effectiveness, it will have to remain flexible and continually respond to unforeseen problems and opportunities. Institutional arrangements that are not rigid, but allow for ongoing revisions over time, may be some of the most important characteristics of successful international organizations during this time of change in the nature of global governance.

The conflict between the informal role of the Codex in promoting policy convergence and the formal role of Codex standards in the WTO harmonization regime is also an important lesson from the experience of the Codex. Much of international governance takes place through intergovernmental networks and informal cooperation arrangements; if a formalization of governance authority tends to degrade the ability of these informal arrangements to perform their function, a powerful argument will have to be made to justify an increase in the level of formality in international relations.

It is also useful to note that an international organization exercising more coercive governance authority may have a more difficult time maintaining robust deliberations as the interest of the parties in pursuing domestic agendas through the body grows. The point of the critique in Part III is not to state that deliberation in the Codex is worthless or efforts to promote broad participation are wasted. It is important to remember that the Codex had sufficient legitimacy at the time of the adoption of the SPS/TBT Agreements such that states were willing to delegate to the institution a significant role in the WTO regime. However, it may be naïve to expect bodies that currently have strong and useful deliberations to continue to do so after the grant of additional governance authority. In addition, heightened legitimacy demands will subject the deliberation of these institutions to greater scrutiny, highlighting flaws that may have been more harmless when the institution was purely voluntary.

Differentiation of roles like that provided for in the WTO system is a promising mechanism to promote the legitimacy and effectiveness of international regimes in the future. While the institutional differentiation found in the Codex between a deliberative administrative/regulatory body and an independent tribunal is not commonplace in international governance arrangements, governance powers affecting issue areas are often spread between multiple bodies and multiple regimes.<sup>137</sup> While to some extent this may have been a haphazard,

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<sup>137</sup> A common ad hoc mechanism for the division of authority occurs when multiple regimes exert control over the same issue. Professors Kal Raustiala and David G. Victor have coined the term “regime complex” to describe this phenomenon. Kal Raustiala &

rather than planned, arrangement, there are many benefits to dividing authority. The give and take between different institutions, which have varied competencies and accountability mechanisms, may provide the adaptive capacity needed to ensure the long-term success of global governance regimes.

## APPENDIX

*A. Full Citations of the Second through Twentieth Codex Reports*

JOINT FAO/WHO STANDARDS PROGRAMME, REPORT OF THE SECOND SESSION OF THE JOINT FAO/WHO CODEX ALIMENTARIUS COMMISSION (1964) (no recorded votes)

JOINT FAO/WHO STANDARDS PROGRAMME, REPORT OF THE THIRD SESSION OF THE JOINT FAO/WHO CODEX ALIMENTARIUS COMMISSION (1965) (no recorded votes)

JOINT FAO/WHO STANDARDS PROGRAMME, REPORT OF THE FOURTH SESSION OF THE JOINT FAO/WHO CODEX ALIMENTARIUS COMMISSION (1966) (no recorded votes)

JOINT FAO/WHO STANDARDS PROGRAMME, REPORT OF THE FIFTH SESSION OF THE JOINT FAO/WHO CODEX ALIMENTARIUS COMMISSION (1968) (no recorded votes)

JOINT FAO/WHO STANDARDS PROGRAMME, REPORT OF THE SIXTH SESSION OF THE JOINT FAO/WHO CODEX ALIMENTARIUS COMMISSION (1969) (four recorded votes; no standards adopted by vote)

JOINT FAO/WHO STANDARDS PROGRAMME, REPORT OF THE SEVENTH SESSION OF THE JOINT FAO/WHO CODEX ALIMENTARIUS COMMISSION (1970) (one recorded vote; no standards adopted by vote)

JOINT FAO/WHO STANDARDS PROGRAMME, REPORT OF THE EIGHTH SESSION OF THE JOINT FAO/WHO CODEX ALIMENTARIUS COMMISSION (1971)

JOINT FAO/WHO STANDARDS PROGRAMME, REPORT OF THE NINTH SESSION OF THE JOINT FAO/WHO CODEX ALIMENTARIUS COMMISSION (1973) (no recorded votes)

JOINT FAO/WHO STANDARDS PROGRAMME, REPORT OF THE TENTH SESSION OF THE JOINT FAO/WHO CODEX ALIMENTARIUS COMMISSION (1974) (no recorded votes)

JOINT FAO/WHO STANDARDS PROGRAMME, REPORT OF THE ELEVENTH SESSION OF THE JOINT FAO/WHO CODEX ALIMENTARIUS COMMISSION (1976) (no recorded votes)

JOINT FAO/WHO STANDARDS PROGRAMME, REPORT OF THE TWELFTH SESSION OF THE JOINT FAO/WHO CODEX ALIMENTARIUS COMMISSION (1978) (no recorded votes)

JOINT FAO/WHO STANDARDS PROGRAMME, REPORT OF THE THIRTEENTH SESSION OF THE JOINT FAO/WHO CODEX ALIMENTARIUS COMMISSION (1980) (no recorded votes)

JOINT FAO/WHO STANDARDS PROGRAMME, REPORT OF THE FOURTEENTH SESSION OF THE JOINT FAO/WHO CODEX ALIMENTARIUS COMMISSION (1981) (no recorded votes)

JOINT FAO/WHO STANDARDS PROGRAMME, REPORT OF THE FIFTEENTH SESSION OF THE JOINT FAO/WHO CODEX ALIMENTARIUS COMMISSION (1983) (no recorded votes)

JOINT FAO/WHO STANDARDS PROGRAMME, REPORT OF THE SIXTEENTH SESSION OF THE JOINT FAO/WHO CODEX ALIMENTARIUS COMMISSION (1985) (one vote on host country for veterinary drugs committee)

JOINT FAO/WHO STANDARDS PROGRAMME, REPORT OF THE SEVENTEENTH SESSION OF THE JOINT FAO/WHO CODEX ALIMENTARIUS COMMISSION (1987) (no recorded votes)

JOINT FAO/WHO STANDARDS PROGRAMME, REPORT OF THE EIGHTEENTH SESSION OF THE JOINT FAO/WHO CODEX ALIMENTARIUS COMMISSION (1989) (no recorded votes)

JOINT FAO/WHO STANDARDS PROGRAMME, REPORT OF THE NINETEENTH SESSION OF THE JOINT FAO/WHO CODEX ALIMENTARIUS COMMISSION (1991) (one recorded vote, deciding *not* to adopt standard on Maximum Residue Limits for Estradiol-17 $\beta$ , Progesterone, Testosterone and Zeranol)

JOINT FAO/WHO STANDARDS PROGRAMME, REPORT OF THE TWENTIETH SESSION OF THE JOINT FAO/WHO CODEX ALIMENTARIUS COMMISSION (1993) (one recorded vote on host country for milk standards committee).

*B. Full Citations of the Twenty-First through  
Twenty-Sixth Codex Reports*

JOINT FAO/WHO STANDARDS PROGRAMME, REPORT OF THE TWENTY-FIRST SESSION OF THE JOINT FAO/WHO CODEX ALI-

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MENTARIUS COMMISSION (1995) (two recorded votes; first standard adopted by vote: “Maximum Residue limits for 5 Growth Hormones”)

JOINT FAO/WHO STANDARDS PROGRAMME, REPORT OF THE TWENTY-SECOND SESSION OF THE JOINT FAO/WHO CODEX ALIMENTARIUS COMMISSION (1997) (three recorded votes; two standards adopted by vote: “Maximum Residue Limits for Bovine Somatotropin” and “Revised Standard for Natural Mineral Waters”)

JOINT FAO/WHO STANDARDS PROGRAMME, REPORT OF THE TWENTY-THIRD SESSION OF THE JOINT FAO/WHO CODEX ALIMENTARIUS COMMISSION (1999) (no recorded votes)

JOINT FAO/WHO STANDARDS PROGRAMME, REPORT OF THE TWENTY-FOURTH SESSION OF THE JOINT FAO/WHO CODEX ALIMENTARIUS COMMISSION (2001) (no recorded votes)

JOINT FAO/WHO STANDARDS PROGRAMME, REPORT OF THE TWENTY-FIFTH (EXTRAORDINARY) SESSION OF THE JOINT FAO/WHO CODEX ALIMENTARIUS COMMISSION (2003) (no recorded votes)

JOINT FAO/WHO STANDARDS PROGRAMME, REPORT OF THE TWENTY-SIXTH SESSION OF THE JOINT FAO/WHO CODEX ALIMENTARIUS COMMISSION (2003) (two recorded votes; no standards adopted by vote)