
TABLE OF CONTENTS

Foreword	V
Preface and Acknowledgements	VII
Abbreviations	XV
Introduction	
1. The rise of the Codex Alimentarius Commission and its standards	1
2. International governance and fragmentation of international law; questions as to the legal nature of Codex standards	3
3. Legitimacy and the Codex Alimentarius Commission, its standard-setting procedure and its standards	6
4. The structure of research	12
Chapter I	
The Codex Alimentarius Commission: the Institutional Framework	13
1. Introduction	13
2. The origin of the Joint FAO/WHO Food Standards Programme	13
3. A Joint FAO/WHO Institutional Framework	16
3.1 The Joint FAO/WHO Codex Alimentarius Commission	18
3.1.1 Powers and internal rules	18
3.1.1.1 The subsidiary character of the Codex Alimentarius Commission	19
3.1.1.2 Delegation of powers as basis for Codex Alimentarius Commission's authority	21
3.1.1.3 The Procedural Manual	24
3.1.2 Composition	25
3.1.2.1 Members of the Codex Alimentarius Commission	25
3.1.2.2 Observers of the Codex Alimentarius Commission	27
3.1.3 Meetings of the Codex Alimentarius Commission	28
3.1.4 Budgetary issues	30
3.2 The Executive Committee	31
3.2.1 Legal basis, powers and internal rules	31
3.2.2 Composition	32
3.2.3 Meetings and budgetary issues	33
3.3 The Codex Secretariat	33
3.4 The Codex Committees and Task Forces	34
3.4.1 Different types of Committees	35
3.4.1.1 General Codex Committees and Commodity Codex Committees	36

3.4.1.2	<i>Ad Hoc</i> Intergovernmental Task Forces	38
3.4.1.3	Regional Co-ordinating Committees	38
3.4.2	Powers and internal rules	39
3.4.3	Composition	39
3.4.4	Budgetary issues	40
3.5	Scientific expert bodies	42
3.5.1	Mandate and internal rules	42
3.5.2	Composition and meetings	44
3.5.3	Administration and finance	47
3.6	The Joint FAO/WHO Consultative Group for the Trust Fund	48
4.	Conclusions	49
Chapter II		
The Codex Alimentarius: harmonisation through standard-setting		51
1.	Introduction	51
2.	The structure of the Codex Alimentarius	52
2.1	From a vertical to a horizontal approach	53
2.2	World-wide and regional Codex standards	56
2.3	Other types of Codex measures	58
2.4	The relationship between the various measures	59
3.	The scope and specificity of the measures contained in the Codex Alimentarius	62
3.1	Ensuring the protection of health	63
3.2	Ensuring fair trade practices in foods	66
3.3	Addressing the diversity of national circumstances	67
3.3.1	Scientific ‘uncertainty’ due to variability	67
3.3.2	Diversity of national circumstances and ‘non-scientific’ factors	71
4.	The Codex standard-setting procedure and the acceptance procedure	73
4.1	A uniform 8-step standard-setting procedure	75
4.2	The emphasis on consensus-building during the standard-setting procedure	80
4.3	The publication and acceptance procedure	83
5.	The Codex Alimentarius: levels of harmonisation	86
5.1	Codex standards and other Codex measures	87
5.2	The acceptance procedure	89
6.	Legal status of the Codex Alimentarius under the acceptance procedure	91
7.	Conclusions	93
Chapter III		
The Codex and the EC		95
1.	Introduction	95
2.	Overview of the harmonisation process of the European Community and the Codex Alimentarius Commission compared	96

2.1	Prior to 1987	96
2.2	1987-1997	98
2.3	1997-2002	99
2.4	Post-2002	101
3.	The promotion of the acceptance of Codex standards and MRLs	102
4.	The use of Codex Alimentarius in secondary EC food legislation prior to 2002	103
4.1	The use of Codex Alimentarius in the preparation of EC food law	103
4.2	Reference to the Codex Alimentarius in secondary EC food legislation	106
5.	The Codex Alimentarius and the European Court of Justice	108
5.1	The European Court of Justice and its reference to the Codex Alimentarius in the context of Article 28 and 30 EC	108
5.1.1	The explicit role of the work of the Joint FAO/WHO Food Standard Programme in the jurisprudence on Article 30 EC	110
5.1.2	Developments reducing the role of the Codex Alimentarius under Article 30	115
5.2	The European Court of Justice and its use of the Codex Alimentarius in the context of secondary food legislation	116
5.3	The Codex Alimentarius, the European Court of Justice and the legality of EC measures adopted by the Community institutions	117
6.	2002 and beyond: Increasing resort to Codex standards?	120
6.1	General principles of food law and the reference to the Codex Alimentarius	121
6.2	EC food law and the consideration of Codex standards and other related texts	123
6.3	The European Food Safety Authority and the Joint FAO/WHO Food Standards Programme	126
7.	The changing inter-institutional relationship between the European Commission and the Codex Alimentarius Commission	129
8.	Conclusions	132

Chapter IV

The WTO Agreements and the Codex Alimentarius	135
1. Introduction	135
2. Harmonisation in the context of the SPS Agreement and the TBT Agreement	136
2.1 The objective and the function of harmonisation in the framework of the SPS Agreement and the TBT Agreement	137
2.2 The provisions on harmonisation under the SPS Agreement and the TBT Agreement	140
2.2.1 The scope of the obligation to harmonise	140
2.2.1.1 The terms 'based on' or 'use as a basis'	142
2.2.1.2 The right to deviate from international standards	144
2.2.2 Harmonisation as encouragement	152

3.	The status of Codex Measures under the SPS Agreement and the TBT Agreement	154
3.1	The Codex Alimentarius Commission as a recognised standard-setting body under the SPS Agreement and the TBT Agreement	155
3.2	The status of Codex standards as necessary measures to protect legitimate objectives	158
3.3	The status of international standards as binding norms	159
3.3.1	Explicit rejection of binding status of Codex standards by the Appellate Body	160
3.3.2	The application of the terms ‘used as a basis’ by panels	162
3.4	The status of international standards as appropriate and effective standards under the TBT Agreement	164
3.5	The status of international standards under Article 5 of the SPS Agreement	165
3.5.1	Article 5.1: Risk assessment techniques developed by the relevant international organisations	166
3.5.2	The role of the scientific basis of the international standards to interpret the scientific justification for a higher national level of protection	169
3.5.3	The role of international standards and the choice of a least trade restrictive measure achieving this level	173
4.	The changed status of Codex measures and the abolition of the Codex acceptance procedure	175
4.1	The obligations under the SPS Agreement and the TBT Agreement cover all documents adopted by the Codex Alimentarius Commission	176
4.2	The different objective and content of the obligations resulting from Codex measures in the context of the WTO agreements	177
4.3	Consequences related to the different membership of both institutions	178
4.4	The role of the ‘explicit consent’ under the acceptance procedure and under the SPS Agreement and the TBT Agreement	178
4.5	Consequences of the abolition of the Codex acceptance procedure	182
5.	The inter-institutional relationship of the WTO – Codex Alimentarius Commission	182
5.1	The dispute settlement mechanism	184
5.1.1	Lack of judicial review to ensure legitimacy of the Codex procedures	185
5.1.2	WTO panels and the interpretation of Codex measures	188
5.1.2.1	The scope of the obligation to use customary rules of interpretation	190
5.1.2.2	The competence to seek information from ‘outside’ sources	192
5.2	The SPS Committee: Monitoring the process of international harmonisation	195
6.	Conclusions	197

Chapter V

The legitimacy of the Codex Alimentarius, the standard-setting procedure and the institutional framework	201
1. Introduction	201
2. Questions of legitimacy related to the institutional structure	203
2.1 The normative competence of the Codex Alimentarius Commission	204
2.2 Delegation of tasks to Codex Committees: a question of decentralisation	206
2.2.1 Concerns related to the position of the Codex Committees	207
2.2.1.1 Codex Committees and the initiation of new work	207
2.2.1.2 The definition of inter-Committee relationship	209
2.2.2 Instruments to supervise and co-ordinate the activities of Codex Committees	211
2.2.2.1 The ‘Criteria for Establishing Work Priorities’, the ‘Medium-Term Plan’ and their application by the Codex Alimentarius Commission and the Executive Committee	211
2.2.2.2 The definition of inter-relationship between Codex Committees	214
2.2.3 Amendments of the ‘Procedures for the Elaboration of Codex Standards and Related Texts’ and the new function of the Executive Committee	215
2.3 The mandate of expert bodies	217
2.3.1 Relation risk assessor – risk manager	218
2.3.2 Working procedures to ensure independence of the expert bodies	221
2.4 The role of other international institutions in the elaboration procedure	224
3. Procedural legitimacy	228
3.1 Consensus	230
3.1.1 Final decision-making and the rules regulating consensus	231
3.1.2 Consensus-building: the role of Codex Committees	236
3.1.3 Managing the procedure	237
3.2 Participation	241
3.2.1 Participation possibilities of developing countries	242
3.2.1.1 Obstacles to a <i>de facto</i> effective participation of developing countries	243
3.2.1.2 Ways to stimulate the participation of developing countries	245
3.2.1.2.1 Co-chairing and hosting of Codex Committee meetings in developing countries	246
3.2.1.2.2 The Trust Fund for the participation of developing countries and countries in transition in the work of the Codex Alimentarius Commission	247
3.2.2 Analysing the intergovernmental character of participation rights	248
3.2.3 The participation of industry INGOs <i>vis-à-vis</i> public interest INGOs	250
3.3 Transparency	254

3.3.1	Transparency and the standard-setting procedure	255
3.3.2	Transparency and the Procedural Manual	256
3.3.3	Openness of the meetings of the involved bodies	257
3.3.4	Access to documents	259
3.3.5	Problems related to translations	259
4.	Substantive legitimacy	260
5.	Conclusions	263
Conclusions		269
1.	General conclusions	269
2.	Main concerns, recommendations and suggestions	277
2.1	Consequences resulting from the fragmentation of law	277
2.2	Towards a more structural approach to ensure the legitimacy of the Codex Alimentarius Commission, its standard-setting procedure and its standards	279
<i>Annexes</i>		
Annex I:	Codex International Individual Standard for Gouda, Codex Stan C-5-1966	285
Annex II:	Codex Standard for Chocolate and Chocolate Products, Codex Stan 87-1981 (Rev. 1-2003)	289
Annex III:	General Standard for the Labelling of Prepackaged Foods, Codex Stan 1-1985 (Rev. 1-1991)	301
Annex IV:	Code of Hygienic Practice for the Transport of Food in Bulk and Semi-Packed Food, CAC/RCP 47-2001	309
Annex V:	Guidelines for Food Import Control Systems, CAC/ GL 47-2003	315
Bibliography		325
Table of Cases		339
Index		341