Decision Making in the Global Market: Trade, Standards and the Consumer
Decision Making in the Global Market: Trade, Standards and the Consumer
Acknowledgements

Consumers International (CI) would like to warmly thank the experts who produced reports for The Decision Making in the Global Market programme.

Programme reports

Introduction: The Decision Making in the Global Market Project
Kamala Dawar, CI

Governance in the World Trade Organisation (WTO)
Researched & written by Brendan McGivern Counsel, White & Case International Trade (Geneva)

Governance and Economic Development in the World Trade Organisation (WTO)
Researched & written by Prof. Simon J. Evenett University of St. Gallen, The Brookings Institution, and CEPR

Governance in the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC)
Researched and written by Bruce Farquhar Standards consultant, Canada

Governance in the Codex Alimentarius Commission
Researched and written by Dr. Steve Suppan Institute for Agriculture and Trade Policy, USA

The WTO Agreement on Technical Barriers to Trade (TBT)
Researched and written by Dr. James H. Mathis University of Amsterdam, Department of International Law, The Netherlands

The WTO Agreement on Sanitary and Phytosanitary Measures
Researched & written by Dr. Steve Suppan Institute for Agriculture and Trade Policy, USA

The Decision Making in the Global Market programme is supported by the Ford Foundation. The views expressed in this document are those of individual experts and do not represent Consumers International policy or the views of the Ford Foundation.

Editing by Sue Jones. Jcomm Communications & Consultancy
Programme Manager – Julian Edwards, CI
Programme Officer – Kamala Dawar, CI
Programme Assistants – Boris Wolf & Marco Presutto, CI

Designed and produced by Steve Paveley
Copyright © Consumers International June 2005
Contents

Decision Making in the Global Market 7

Governance in the World Trade Organization (WTO) 15

Governance and Economic Development in the World Trade Organization (WTO) 31

Governance in the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC) 45

Governance in the Codex Alimentarius Commission 75

The WTO Agreement on Technical Barriers to Trade (TBT) 105

The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) 133

List of Abbreviations 151
Decision Making in the Global Market

Introducing the Project

The Issue

Food and products standards are set at national and international levels to protect consumers, but there is evidence that this positive aim is being compromised by the ‘capture’ of standards by trade interests.

World Trade Organization (WTO) agreements are intended to remove barriers to trade between countries. It has raised the status of international standards from being voluntary, to the level of obligations on national governments. WTO Members are required to use them as a basis for their own technical regulations and product standards. Failure to do so leaves governments vulnerable to accusations of maintaining trade barriers, and to trade disputes.

The effect is that standards are being set with the objective of increasing trade, or avoiding trade disputes, instead of protecting the interests of consumers. National governments are also obliged to review their regulations and standards to ensure that they comply with new international standards.

The problem of standards ‘capture’ is further compounded by the decision making processes of the WTO, and international standard-setting bodies such as Codex, where the consumer voice has little opportunity to make itself heard.

Increasingly, business interests dominate international standard setting. This has implications for consumer protection and the influence consumer advocates have on standard-setting at national and international level.

The Project

Consumers International’s Decision Making in the Global Market project addresses these issues by:

• analysing the effects of WTO agreements on consumer interests
• assessing the governance and decision making processes of the WTO and international standard-setting bodies
• looking at the consumer experience – particularly those in poorer countries – of under-representation in international trade and standard-setting institutions
• considering what can be done to re-assert the interests of consumers in the standards process and increase their voice in international decision making.

This project is based on the belief that international guidelines, standards and frameworks are essential to make the global market work to the benefit of all.

The Democratic Deficit

The lack of consumer representation within international economic regimes may, in part, be due to the presumption that national government
delegations will adequately represent and articulate the interests of their domestic stakeholders. This assumption is flawed. Freedom House statistics show that in 2003 only 117 countries, of the world total of 192, were electoral democracies. The WTO membership of 148, therefore includes about 30 countries without the institutional mechanisms to ensure that all relevant stakeholders can make their interests known at the national level.

International non–governmental organisations (INGOs) representing consumers, the environment or human rights, question whether national governments can or do adequately represent all relevant interests in any given trade issue within the bargaining process. Organisations such as Consumers International were created because their founding members had learned that they could not hope to be wholly effective if their work was confined to the domestic level.

Any democratic deficit at national level will only be magnified at the international level. Negotiations between government delegations at international level may involve trade-offs that would be politically unacceptable within a national democracy. Indirect representation has also led to international economic institutions, such as the World Trade Organization (WTO), lacking many of the rules, processes and methods of democratic oversight found in domestic government. This democratic deficit is detrimental to stakeholders whose daily lives are directly affected by decision making in these institutions.

Consumers International's Mandate

Consumers International (CI) was founded by a group of national consumer testing organisations who recognised that they could build upon their individual strengths by working across national borders to support, link and represent consumer groups and agencies more effectively at the international level.

CI’s voting members are independent consumer organisations that have a national presence and a substantial record of programmes and services for consumers across a range of issues. They must also be independent of party politics and not funded by commercial or trading corporations. CI now has a membership of over 250 organisations in 115 countries and a long history of recognition from public and private bodies at national, regional and international levels. Half of CI member organisations are based in developing countries and the global dimension is vital to the work of CI. CI is supported by both membership dues and grants.

As a federation of consumer organisations and an active part of civil society, Consumers International’s presence in world forums gives it the opportunity to highlight the problems of consumers and of citizens who are the least heard at all levels.

CI advocates for the effective implementation of the UN Guidelines for Consumer Protection in all countries and for consumer representation and involvement in bodies, at all levels, which make decisions affecting the lives of consumers. CI fundraises and implements projects to achieve this.

CI is a regular actor at global institutions. Its membership structure and mandate conform to the UN criteria for the admission of NGOs into official relations. CI has category A Observer status at the United Nations Economic and Social Council (ECOSOC) and is a recognised body and active within a broad range of international institutions including the World Health Organization (WHO), the Food and Agriculture Organization (FAO), the Commission on Social Development, the United Nations Conference on Trade and Development (UNCTAD), and the United Nations Environment Programme (UNEP), in addition to the standard-setting bodies of the Codex Alimentarius Commission (Codex), the International Organisation for Standardization (ISO) and the International Electrotechnical Commission (IEC).

CI also undertakes research and advocacy on World Trade Organization (WTO) issues and agreements, participates as an observer at WTO Ministerial Meetings and attends the Director General’s NGO consultation panels and symposia. However, little has changed since 1969, when it was noted that: ‘in accord with traditional international law thinking ... a citizen can usually only make policy recommendations to GATT through his government and can only in that way seek relief if he is injured by foreign activities inconsistent with GATT’.

In 2005, NGOs remain excluded from WTO legislative activities such as the meetings of the General Council, the trade negotiations themselves, as well as executive activities such as the various Councils, Bodies and Committees. This is despite the
fact that Article V(2) of the WTO Agreement provides the authority for setting up mechanisms for consultation and co-operation. The judicial branch of the WTO - the WTO dispute settlement process - is similarly closed to public scrutiny and stakeholder representation, despite taking decisions on issues of direct concern to consumers.

CI’s strategy is to influence global decision making bodies by supporting and co-ordinating its member and partner activities at the national and regional levels and co-ordinating campaigns and policy making at the regional and international levels. This approach, particularly in relation to Codex, the ISO and the IEC, involves developing the capacity of organisations to engage and have influence in these institutions.

The Decision Making in the Global Market project capitalises on CI’s position as a recognised INGO within these international bodies and on its members’ experience working at a national level. It uses this unique position to produce new evidence and policy recommendations to advocate for more effective, representative and transparent decision making, while simultaneously increasing its members’ capacity to be able to do this successfully. The project is a two-year initiative funded by the Ford Foundation and is managed from CI’s Head Office, using electronic discussion groups to ensure the results are both relevant and representative of Consumers International’s membership. To guide this process a voluntary steering group was created of experts in consumer issues, international trade law and standard-setting; group members come from both developing and developed country perspectives. The steering group defined the outline of the research and identified suitable researchers to undertake the work. The members of the steering group have also acted as representatives and presenters at the various outreach events organised throughout the project. All the research has been expert peer-reviewed and all CI policy recommendations are formed through the process of membership consultation as defined in the CI policy-making procedures.

The Debate

The analysis of this project focuses on identifying the extent and consequence of any democratic deficit within the major institutions involved in setting international standards for the trade in goods. It addresses the body of criticism concerned about the impact of world trade on development, communities, the environment and public health. It looks at how world trade rules are made and who makes them. The result is to provide the basis for developing practical policy recommendations to rectify democratic imbalances in the global market place, and increase relevant and effective stakeholder participation in trade and standardisation processes to promote public welfare.

While examining the main rule-making organisations, the project also considers the co-ordination, consistency and coherence of decisions taken within and between these international organisations. The use of Codex Alimentarius Commission (Codex) standards has become practically obligatory in international trade in food. Codex is the international standards-making body which is used as a reference point for the purpose of human health within the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS). But the SPS Agreement is not designed to function as a public health agreement, it is designed to facilitate trade by ensuring that a policy to protect public health is not more trade-restrictive than required to reach that objective.

Product standards set by the International Organisation for Standardisation (ISO) and the International Electrotechnical Commission (IEC) are also used as points of reference within the WTO Technical Barriers to Trade agreement (TBT). But the status of ISO and IEC in this agreement is not as clear as that of Codex in the SPS Agreement; there is no definition in the TBT Agreement as to what constitutes an international standard. The TBT Agreement does require that standard bodies are open to all WTO Members, but this does not address the democratic deficit that occurs at national or international level when standards are set.

Under these two WTO trade agreements there is a strong legal presumption in favour of Members using existing international standards when regulating the domestic marketplace. The opportunities to deviate from the standards are complex and carefully prescribed. The SPS Agreement requires any state wanting to set higher standards for protecting human, plant and animal health to justify this with scientific evidence. The TBT Agreement states that because international standards should form the basis for national standards, each international
standard will prescribe how much flexibility Members have to deviate from it.

Several TBT and SPS cases referring to standards set in Codex and ISO have now gone to dispute settlement within the WTO. The Dispute Settlement Understanding (DSU) has itself come under greater scrutiny because of: its role as an extra-ordinary mode of WTO decision making; the composition of its panels; questions about conflicts of interest around expert evidence; dispute panels’ role in interpreting the standards themselves; and the implications for Members’ state sovereignty arising from dispute decisions.

The CI Project recommends ways to improve the levels of participation, transparency and accountability in the process of deepening international integration through standardisation. In doing so, we do not analyse consumer welfare in relation to specific cases in global decision making; due to limited NGO access to the WTO Consumers International plays a more crucial role in publicising and opening up the process surrounding international trade, than in directly influencing international economic decision making. This is despite the constituency CI represents and the expertise it can bring to these discussions.

The Research Methodology

To capture the nature of the decision making processes in trade and standard setting, the research has focused on both national and international levels.

The international research aims to increase understanding of the decision making processes within:

1. The World Trade Organization (WTO), including an analysis of
   - The GATT Agreement on Technical Barriers to Trade The TBT Agreement
   - The WTO Agreement on the Application of Sanitary and Phytosanitary Measures The SPS Agreement

2. The International Organisation of Standardization (ISO) and the International Electrotechnical Commission (IEC)

3. The Codex Alimentarius Commission (Codex).

1. The World Trade Organization
The criticisms now commonly levelled at the WTO include:

- lack of equity, participation and transparency in the WTO leading to the bigger trading powers dominating the agenda at the expense of smaller poorer countries which have most need of increased trade
- short-term commercial interests over-riding broader public interests and the promotion of equitable development – even though these aims are set out in the Preamble to the WTO Agreement. And while the preamble is non-binding, it has been cited as a guiding force in several dispute panel and Appellate Body reports. The decision to qualify the original objectives of the preamble to GATT 1947, to ensure the WTO was more appropriate to the world trading system of the 1990s, indicates the importance attached to this text
- while INGO’s, such as CI, welcome Article V:2 of the WTO Agreement which authorises the General Council to make appropriate arrangements for consultation and cooperation with non-governmental organisations concerned with matters related to those of the WTO, many civil society organisations feel excluded from their right to voice their concerns within decision making processes.

One paradox is that although development NGOs lobby to secure development objectives within trade agreements, their participation in policy making continues to be impeded by WTO developing country Members who, at the same time argue that they themselves do not have the resources to represent their interests adequately and cannot afford to face further negotiating pressures or international challenges to their domestic authority. There is also a general concern that opening up the WTO to NGO participation will not necessarily serve the public interest, since not all NGOs operate in the public interest. This concern could be addressed, of course, by strict accreditation criteria, such as that used by the UN Economic and Social Council (ECOSOC).

The research on the WTO assesses its governance principles and includes a description of the organisation, the nature of its Membership and its rules for participation, transparency and accountability. The dispute settlement mechanism, panel and Appellate Body (AB) reports and procedures covering amicus curiae briefs and representation before panels, are examined, using trade disputes cases to illustrate these processes. The WTO Dispute Settlement Understanding (DSU)
provides for customary rules of interpretation of public international law to be applied to clarify the provisions of the WTO agreements. To some extent, this has served as a vehicle to consider other public international sources for their bearing on the meaning of WTO terms and provisions. These ‘other’ international legal rules have reflected and prioritised values and interests outside those of trade liberalisation. The dispute settlement organs also have responsibility for adjudicating any competing or conflicting values because they determine the rights and obligations of WTO Members.

The research incorporates an assessment of the impact of the Preamble to the WTO Agreement, which contains a commitment to sustainable development in guiding WTO dispute settlement, along with recommendations for further accommodating other international rules that support sustainable development within the WTO. It puts forward policies to enhance and institutionalise the development of greater inclusiveness, such as the consideration of amicus curiae briefs by NGOs within WTO dispute settlement, by amending dispute settlement rules to open the proceedings to both written submissions and oral argument.

The resulting recommendations to widen the sources of input into the processes of dispute resolution complement those calling for new judicial measures to achieve inclusiveness, participation and transparency within WTO rules and rule making.

The remit of the research covers the legal frameworks regulating international standards within the WTO. These were first concluded in the form of the 1979 GATT Standards Code, and revised during the Uruguay Round as the Agreement on Technical Barriers to Trade (TBT) and the Agreement on the Application of Sanitary and Phytosanitary measures (SPS). The SPS specifically addresses the variety of measures used by governments to ensure food safety and to protect human health from pests or diseases carried by plants and animals. The WTO research component of this project, therefore, incorporates a critical analysis of the rules, processes and procedures set out by the TBT and SPS agreements, the levels of involvement with stakeholders and the impact they have had on these constituencies. The analyses also form the basis for proposals for enhancing effectiveness and good governance in the day-to-day application of WTO agreements.

2. The Codex Alimentarius Commission

The Codex Alimentarius Commission sets international food standards. It was established jointly in 1962 by the Food and Agricultural Organization (FAO) and the World Health Organization (WHO), and is committed by its statutes to seek to protect the health of consumers and ensure fair practices in food trade. The decisions made by Codex therefore have a significant impact on the well-being of consumers, the environment and trade in food.

Since 1962, Codex has set more than 200 commodity food standards, mostly agreed by consensus but in a few cases by majority voting. A standard adopted by Codex is deemed to be an ‘international standard’ even if only a limited number of countries or stakeholders have participated in the technical work of developing it, and even if it was adopted by a slender majority in a vote.

This is of particular concern to many developing countries, who have argued that their participation is very limited within the standardisation process due to lack of capacity or access. Although in theory all Member countries can participate in Codex activities, in practice most government delegates come from the developed countries because they have the resources to attend and contribute. NGO observers from the food and chemical industry greatly outweigh representatives from public interest groups at Codex meetings for the same reasons. It is of little surprise, therefore, that the legitimacy and appropriateness of international standards has been questioned by both governments and NGOs such as Consumers International.

The research focuses on these concerns by identifying the guiding principles, policy making procedures and processes that are in place within Codex. We then make recommendations for ensuring inclusive and representative decision making at Codex and in the policymaking of the Members themselves. The Codex paper analyses the role initially envisaged for Codex, charts CI’s past participation in Codex and evaluates Codex’s present role in promoting consumer interests within the framework of other international bodies such as the WTO.

3. The International Organisation for Standardization (ISO) and the International Electrotechnical Commission (IEC)

In this research paper, the principles, structures and operations of the ISO and the IEC are examined following a similar research framework to those used
for Codex and the WTO. This includes an assessment of inclusiveness, transparency and other measures of good governance.

These two organisations are, however, distinct from the WTO and Codex; ISO and IEC are industry-sponsored bodies. Nevertheless, the decision making process in both is also state-centric; only national standards bodies can be full Members and delegate national representatives to the international technical committees. Liaison status can be granted by the ISO to those who represent other interested parties, including the consumer interest. Consumers International can attend meetings and comment on drafts but it has no vote.

The research paper incorporates an assessment of CI’s participation in ISO and IEC, and analyses the roles originally envisaged for them and what actually happens within the context of other international bodies such as the WTO.

The SPS Agreement states that Codex standards are considered scientifically justified and accepted as the benchmarks against which national measures and regulations are evaluated. This specific recognition is not applied to ISO and IEC standards. The TBT Agreement only requires the use of relevant international standards as the basis for national technical regulations. This means that many international product standard-setting bodies could exist and their standards compete for recognition. The implications of this are discussed along with an assessment of the possible impact of expanding the remit of ISO to include ‘softer’ issues of the environment, organisational social responsibility, e-commerce and complaints handling.

**National Research**

The national handbook for consumer organisations is based on eight country case studies undertaken by CI members in Argentina, the Czech Republic, India, Indonesia, Mali, the United States, Uruguay and Zambia.

The research looks at the mechanisms and processes for making national decisions and critically examines the involvement of national authorities and parliaments or other bodies in standard setting. The results map the factors that influence how decisions are taken at the national level related to these international institutions.

The case studies use the experience developed from participating in trade and standards-setting processes and involves CI’s network of consumer groups. This has allowed us to compare and contrast practices and standards around the world, while producing a handbook for enhancing consumer and NGO participation in trade and standard-setting processes, and putting forward best practice guidelines.

**Summing Up**

CI’s use of a project methodology, which involves research from both CI members and external experts, has enabled us to arrive at a unique contribution to understanding of the issues. The project has gathered and disseminated its research by making use of the CI membership network. Its findings are relevant to national consumer organisations’ practical experience in trade and standard setting issues domestically and at the international level. This bottom-up approach has simultaneously developed CI members’ understanding of the implications of deepening integration through the international standard-setting process, while enhancing their capacity to undertake both research and advocacy work in these areas in the future.

The advocacy element to this project is crucial because it is through exchanging information, opening debates and identifying new solutions to the challenges posed by international trade, that CI can work for a just and fair marketplace. It does this through effective consumer input in national regional and global trade and economics policy-making. The international standardisation process should facilitate trade and promote the health and safety of the public. New ideas need to be generated about how to enhance understanding of the impact of standards on consumers within WTO SPS and TBT committees, and how to interpret and achieve the goals set out in the Preamble of the WTO Agreement such as ‘sustainable development’ and eliminating ‘discriminatory treatment in international trade relations’.

This project is an initiative to generate and advocate new thinking on global governance. We believe that national and international governmental organisations actually benefit from the input that an international membership based NGO such as Consumers International can offer.
Footnotes

1 This 2 year project was supported by the Ford Foundation and implemented from Consumers International London Office. For further information please contact Kamala Dawar (kdawar@consint.org).


3 Article V.2 states: ‘The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO’

4 Consumers International Regional Offices have also developed good relationships with regional decision making bodies and networks, these range from the European Union and the OECD to bodies in each of the regions including ECLAC, COMESA, ECOWAS, APEC, ASEAN.

5 The members of the steering group are Milos Barutciski, Senior Partner Davies Ward Phillips and Vineberg, Canada; Bruce Farquhar ISO Consultant; Nessie Golakai CI Regional Office For Africa, Zimbabwe; John Kanutie Consumers Information Network, Kenya; Rhoda Karpatkin, President Emeritus CI and Consumers Union (US), Dr James Mathis, University Of Amsterdam, The Netherlands; Mark Ritchie Director Institute For Trade And Agricultural Policy, USA; Dr Taimoon Stewart, Research Fellow University Of The West Indies, Trinidad.

6 The WTO negotiators qualified the words ‘full use of the resources of the world’ set forth in the preamble of the GATT 1947 with the following: ‘… while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development,...’


8 The GATT Agreement on Technical Barriers to Trade. Article §2.4.
Governance in the World Trade Organization (WTO)

Prepared for Consumers International
by Brendan McGivern
White & Case International Trade (Geneva)
In recent years, WTO governance issues have become increasingly prominent. The WTO has come under pressure to reform its internal decision making structure to make it more inclusive and transparent, particularly for developing country Members, and to enhance the role that NGOs and other civil society representatives may play in the process.

The impetus for reform has arisen principally as a result of WTO Ministerial Conferences, where many developing countries have felt marginalized. This problem was particularly acute in Seattle (1999), where groups of developing countries voiced strong concerns about being excluded from invitation-only ‘green room’ meetings among key Ministers. The Ministerial Meetings in Doha (2001) and Cancun (2003) avoided the more egregious mistakes of Seattle, and tried to enhance the transparency and inclusiveness of the ‘green room’ process, but with only limited success.

Small groups of Ministers continue to play a pivotal role at WTO Ministerial meetings. While the composition of the ‘green room’ changes on an issue-by-issue basis, many Members remain unhappy that they are often excluded from discussions that directly affect their vital interests. At the same time, it is widely recognised that the efficiency of Ministerial discussion and decision making bears an inverse relationship to the size of the group.

The consensus principle of decision making has also come under question. The WTO Agreement permits
voting in certain circumstances. However, there is widespread resistance among most WTO Members to voting on any issues, even non-legal ones (e.g. the selection of the Director General). The consensus principle is seen as protecting the interests of each Member by ensuring that no major decisions are taken against its wishes. This is critical for smaller WTO Members, but even larger countries benefit from consensus. The United States, in particular, would not welcome the prospect of being outvoted in the WTO. At the same time, the consensus principle considerably hampers the ability of the WTO to take decisions; on any given issue, the interests of the most reluctant or even recalcitrant Member must be accommodated. This prevents the WTO from moving forward on issues even where there is widespread, although not universal, support. It also means that even relatively straightforward decisions can take months or years of negotiations. On more controversial issues, including the negotiation of new WTO disciplines, any type of forward progress can be blocked completely.

The WTO has also come under criticism from NGOs for being insufficiently transparent, and insufficiently attentive to the views of civil society. The WTO has attempted to address the concerns of NGOs, including allowing NGO representatives to attend portions of Ministerial meetings, sponsoring symposia on trade issues, providing ongoing briefings, and adopting a more liberal document de-restriction policy. However, much of the ongoing work of the WTO remains closed to the public. Councils and Committees meet in closed session, as do dispute settlement panels and the Appellate Body.

Nevertheless, the WTO can only be as open – or as closed – as its Member governments permit. Many countries, particularly developing countries, emphasise that the WTO is an inter-governmental organization, and they are extremely reluctant to adopt any measures that would erode this fundamental character.

That said, there are many WTO insiders who are strong advocates of reform. At the time of the 1999 Seattle Ministerial, EC Trade Commissioner Pascal Lamy remarked famously that the WTO was a ‘medieval institution’. Several years later, he stood by this view: 

\[I:\text{am often asked if I regret my rather strong words about the WTO as a medieval institution in Seattle. To this, I can only note that I was rapidly trumped by [WTO Director General] Mike Moore,\]

who - reacting to my remark - said that the WTO was not medieval, but Jurassic.\[1\]

Terms such as ‘medieval’ and ‘Jurassic’ are certainly too harsh, but there is no doubt that the WTO has governance issues that need to be addressed. But reform has lost whatever momentum it once had, and there are currently few serious debates within the WTO on restructuring the system. There are a number of reasons for this:

- there is little convergence among WTO Members about what, if any, changes are required;
- the consensus principle can significantly inhibit the prospects for agreement even for relatively modest changes;
- there is a view among many Members that substantial reform efforts cannot be pursued during a negotiating round, and that Members now need to focus principally on securing the success of the Doha Development Agenda.\[2\]

Nevertheless, there are changes that the WTO can and should make to help ensure its ongoing legitimacy. High on the reform list should be enhanced transparency, particularly in dispute settlement. The legitimacy of the panel and Appellate Body process would be significantly enhanced if all hearings were conducted in open session. Nonetheless, open hearings are opposed by the vast majority of WTO Members.

It may be possible to achieve some progress on dispute settlement transparency through practice, rather than through any formal amendment of treaty text. For example, an open panel hearing could be authorized by a simple decision of a panel rather than by changing the DSU.\[1\] Indeed, the United States routinely asks other WTO Members to accept open panel hearings for specific WTO disputes, although to date no other WTO Member has accepted. It may be that ad hoc arrangements may help to facilitate broader acceptance of open panel hearings among WTO Members in the long term.

In the short or medium term, many WTO Members will strongly oppose any changes – whether to the panel process or otherwise – that may undermine what they consider to be the fundamental basis of the WTO as an inter-governmental organisation. Any changes to the WTO will be incremental, at best, for the foreseeable future.
Proposals for Reform

There have been a large number of proposals and academic writings on WTO reform. To take but a small sampling of recent works:

The European Communities has been an active proponent of WTO reform. The October, 2000 EC Paper (‘Improving the Functioning of the WTO System’) proposed measures to improve decision making, enhance the flow of information, and improve the functioning of Ministerial Conferences. In October 2003, the EC prepared a new proposal, ‘Reflection Paper on WTO Organizational Improvements’. This paper advocated, among other things, strengthening the role of the WTO Secretariat and the Director General, improving the participation of Members, streamlining the committee structure, and establishing an advisory group.

The South Centre has advocated a number of reforms to the WTO including terminating veto rights, ending what it calls ‘passive’ consensus decision making, allowing an ‘opt out’ for developing countries, and restructurin of the WTO’s role to emphasise poverty reduction, development and stability. The South Centre has also urged greater flexibility, instead of what it calls a ‘one size fits all approach’.

In the 2003 paper, ‘WTO Decision Making: A Broken Process’, the Institute for Agriculture and Trade Policy called for the abolition of the ‘green rooms’ and the adoption of the principle that no Member could be excluded from any meeting. It also proposed that all negotiating texts must be produced by WTO Members, not by the Chair, and called for the approval of agendas and draft texts by the entire Membership.

ActionAid’s paper, ‘WTO Democracy and Reform’ urges WTO Members to embark on a thoroughgoing process of reform of the WTO as an institution, its various bodies and its agreements so as to address the threats which it poses to people’s rights. It calls for an end to what it sees as ‘blackmail and bullying tactics’ by developed countries. It seeks greater transparency. It also argues that governments should be required to ‘disclose all written advice they receive relating to trade negotiations’ in order to ‘curb bad practice involving industry’.

Solidar, an international alliance of NGOs, has pointed to three preconditions for solving WTO reform issues:

- a culture of openness, including better access to documentation and information about decision making;
- granting accreditation in a systemic and structured manner to civil society groups as consultative partners; and
- opening up the policy-making process to recognized stakeholders.

Marco Bronckers argues that if WTO Member governments want to take the need for global governance seriously, the WTO needs to operate as an open, and not a self-contained regime under public international law. His views are set out in ‘More Power to the WTO?’ Journal of International Economic Law, Volume 4, Issue 1, pages 41-65 (2001).


The Caribbean Policy Development Centre/Caribbean Reference Group has sought ‘a democratisation of the WTO, in terms of its operational and administrative processes and its approaches to trade negotiations’. It has urged that ‘the practice of informal agenda setting be eliminated. Institutionally, the original desire for the trade body to dialogue with all interested parties, including civil society representatives, should be resurrected’.

In August 2003, ‘Trade Matters’ published a memorandum on ‘The Need to Improve Internal Transparency and Participation in the WTO’. The paper expressed concern about the ‘lack of proper rules of procedures and the lack of transparency and as well as the lack of participation or exclusion of a majority of Member in decision making processes’. The paper identified a range of procedural and institutional defects in WTO decision making, including at Ministerial Conferences.

In January, 2004, the Bretton Woods Committee held a conference on ‘The WTO: End Its Reign or Rein It In?’. During the conference, a number of speakers addressed issues of reform. Clayton Yeutter, a former
United States Trade Representative, discussed several areas for reform, including the consensus-based decision making process and the role of the WTO Director-General. Guenter Burghardt, Head of the European Commission Delegation, emphasised the WTO’s limited budget and technical capacity.

In a July 2004 draft paper, ‘Still Foggy After All These Years: Reform Proposals for the WTO’, Robert Wolfe of Queen’s University suggested a number of reforms to improve the WTO as a negotiating forum. His reform proposals include holding an annual Ministerial Conference, clarifying the roles of the officers at Ministerial Conferences, and maintaining the consensus decision making principle. He concludes that ‘… Procedural improvements by themselves will not solve intractable policy disagreements, but they will make a difference’.

The Constitutional Framework

Membership

WTO delegates – mostly rotational diplomats: The WTO currently comprises 147 Member governments, and the delegates to the WTO are government officials from those Members. The majority of the delegates are rotational diplomats from the foreign ministries of the sending governments, although a substantial minority of countries sends officials from their trade ministries.

Many, such as those from the United States, the EC, Japan, Canada, Brazil, Korea, Egypt, Hong Kong, India, Mexico, and many others include officials with substantial expertise on WTO issues. Some delegates, principally from smaller developing countries, are concurrently accredited to the United Nations specialized agencies in Geneva. This can severely restrict the amount of time they are able to spend on WTO issues.

Non-resident Members: Most Members have permanent missions to the WTO in Geneva, but about two dozen, mainly least-developed countries, do not. They cover the WTO from Brussels, London, or even from their own capitals. These Members do, of course, come to WTO meetings whenever they are able to do so, and the WTO organises the annual ‘Geneva Week’ to bring officials from non-resident Members to briefings on WTO issues and activities.

WTO Membership not universal: Membership in the WTO is extensive but not universal. As noted above, there are currently 147 Members in the WTO, compared with 191 in the United Nations. Countries (or separate customs territories) seeking to join the WTO must negotiate the terms of accession, and must be able to assume all of the binding obligations under the covered agreements. Accession negotiations can be a difficult and extended process, in many cases lasting years.

Democratic principles underpinning representation/participation: As indicated above, delegates to the WTO are government officials, and their nominations are simply administrative acts of the sending governments. The WTO itself operates on ‘democratic principles’ in that the Agreement provides for voting, although virtually all decisions are taken by consensus.

Few references to consumers in WTO texts: The WTO agreements seek to eliminate barriers to trade
in goods, services and intellectual property. As such, virtually all of the disciplines set out in the covered agreements are of interest to consumers. Nevertheless, there are few explicit references to consumers in any of the agreements. The most direct references to consumers are those set out in the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Anti-Dumping Agreement) and the Agreement on Subsidies and Countervailing Measures (the SCM Agreement).

Article 6 of the Anti-Dumping Agreement deals with evidence in anti-dumping investigations. Article 6.12 states that:

The authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organizations in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding dumping, injury and causality. [emphasis added]

Article 12 of the SCM Agreement is the parallel provision on evidence in countervailing duty investigations. Article 12.10 of the SCM Agreement (mirroring Article 6.12 of the Anti-Dumping Agreement) similarly provides that:

The authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organizations in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding subsidization, injury and causality. [emphasis added]

Under both the Anti-Dumping Agreement and the SCM Agreement, national investigating authorities must grant opportunities for ‘representative consumer organizations’ to provide information on dumping or subsidisation, injury to the domestic industry, and the so-called ‘causal link’ between the dumped or subsidised goods and the injury to the industry. [emphasis added]

These provisions merely provide the opportunity to consumer organisations to present relevant information; the investigating authorities decide, on a case by case basis, how much weight to give such information.

In addition, Article 19.2 of the SCM Agreement, relating to the imposition of countervailing duties, states in part that:

… It is desirable that the imposition [of the countervailing duty] should be permissive in the territory of all Members, that the duty should be less than the total amount of the subsidy if such lesser duty would be adequate to remove the injury to the domestic industry, and that procedures should be established which would allow the authorities concerned to take due account of representations made by domestic interested parties whose interests might be adversely affected by the imposition of a countervailing duty. [emphasis added]

This is the so-called ‘lesser duty rule’, which urges, but does not obligate, investigating authorities to impose a countervailing duty that is less than the full amount of the subsidy, if such a ‘lesser duty’ would remove the injury to the domestic industry. It also requires WTO Members to set up procedures to take into account the views of domestic interested parties whose interests might be adversely affected by the countervailing duties. A footnote to this provision states that the term ‘domestic interested parties’ includes ‘consumers and industrial users of the imported product subject to investigation’.

These provisions have not, as yet, been interpreted in WTO dispute settlement.

In addition to the Anti-Dumping Agreement and the SCM Agreement, the General Agreement on Trade in Services (the ‘GATS Agreement’) includes a number of references to consumers. Article 1.2 of the GATS defines ‘trade in services’ in part as the supply of a service ‘in the territory of one Member to the service consumer of any other Member’. This ‘consumption abroad’ by a consumer is ‘Mode Two’ of the four modes of supply of a service under the GATS. The GATS Annex on Financial Services covers a wide range of financial services, such as ‘lending of all types, including consumer credit’.

A final direct reference to consumers is set out in Article 6.2 of the Agreement on Textiles and Clothing, which enumerates rules on when a safeguard action may be taken on textiles. Article 6.2 states in part that such safeguard action may be taken only when it is demonstrated that a particular product is being
imported in such increased quantities as to cause serious damage, or threat of damage, to the domestic industry. It adds that serious damage must be caused by increased quantities of imports, ‘and not by such other factors as technological changes or changes in consumer preference’.

Under GATT and WTO case law, one of the tests for determining ‘like products’ for the purposes of the national treatment disciplines of GATT Article III are ‘consumers’ tastes and habits’. However, this derives from the jurisprudence, and not from the treaty text.

Published Statements about Goals/Procedures: The WTO does not publish statements about its goals, other than what is in the text of the agreements, and in Ministerial Declarations. The legal texts are discussed above. We did not find any explicit references to consumers in any of the Ministerial Declarations since the entry into force of the WTO in 1995. Similarly, WTO procedural rules do not refer to consumers.

Stakeholder Participation and Consultation
The work of the WTO Councils and Committees are not open to the public. There is no consultative process between consumer groups (or other stakeholders) and the WTO itself. There are no board-level WTO policies or procedures dealing with consumer consultation or representation (indeed, there is no WTO board). There are no provisions for representations by consumers or other stakeholders to any of the WTO Councils or Committees.

The WTO does not provide financial support for participation by civil society representatives at Ministerial meetings, public symposia, or other WTO events. However, certain national governments do provide financial support to facilitate participation by their NGOs at WTO events.

Consultations with consumers and other stakeholders tend to be done by national governments, not by the WTO. The extent and the effectiveness of such consultations obviously differ widely among WTO Member governments.

Accreditation Process
No procedure exists to accredit NGOs to the WTO for its ongoing work. However, the WTO grants accreditation for NGOs to attend the bi-annual Ministerial conferences, where they may attend plenary sessions. For example, a large number of NGOs attended the most recent Ministerial meeting in Cancun last year. During Ministerial conferences, the WTO Secretariat provides facilities and regular briefings for NGOs.

The WTO has established an ‘NGO Room’ on its website, where it publishes position papers received from NGOs on a wide variety of issues. The WTO Secretariat also organizes an annual public symposium, which attracts a large number of representatives from civil society.

The processes established by the WTO do not differentiate between public interest NGOs (PINGOs) and business-interest NGOs (BINGOs).

As indicated above, accredited organisations do not have a right to attend WTO meetings, to speak, or to circulate papers. Although the WTO permits accredited NGOs to attend the plenary sessions of Ministerial meetings, any rights under the WTO Agreements accrue only to the Member states, not to NGOs. The WTO has tried in recent years to be more open to civil society, as discussed above. Nevertheless, NGOs do not have any rights of access or participation in the WTO.

Transparency
The WTO transparency issue may usefully be divided into three broad headings:

- access to WTO meetings;
- access to WTO documents; and
- access to dispute settlement proceedings and information.

Access to WTO meetings: As indicated above, WTO meetings generally remain closed to the public. Only delegates have access to WTO Councils and Committee meetings. Accredited NGOs may attend the plenary sessions of Ministerial meetings, but the really meaningful work is invariably done outside of the plenary sessions. Indeed, most of the hard negotiations during Ministerial meetings are conducted in the ‘green room’, the invitation-only small group gatherings.

Access to WTO documents: On May 14, 2003, the WTO General Council adopted a new policy on document de-restriction, after many months of gridlocked negotiations. This compromise text falls
short of the objectives of a number of Members, mainly developed countries, that had sought a more liberal document de-restriction policy. Paragraph 1 of the May 2002 General Council decision states that general principle that: ‘All official WTO documents shall be unrestricted’. This general statement, however, is subject to considerable qualification throughout the rest of document. In general terms, the document de-restriction policy may be summarized briefly as follows:

As noted above, this policy applies to ‘official WTO documents’. Yet a great deal of substantive work is accomplished through unofficial documents or other communications between WTO Members, including through so-called ‘non-papers’. Often, the tabling of an official WTO document may follow, rather than precede, a great deal of negotiation among Members.

(i) **Restricted documents submitted by Members:** Any Member may submit a document to a WTO Council or Committee as restricted. Such a document ‘shall be automatically derestricted’ after its first consideration by the relevant Council or Committee or 60 days after the date of circulation, whichever is earlier. However, the submitting Member has the option of renewing the restricted status of the document for further 30 day periods, without limitation. If the Member renews its request every 30 days, then the document will remain restricted indefinitely.

(ii) **Restricted background documents requested from the WTO Secretariat:** WTO background documents can be designated as restricted by the Council or Committee that requested them. They will automatically be derestricted 60 days after the date of circulation. However, a Member may request that the document remain restricted for one additional period of 30 days after the originally-scheduled derestriction date, after which it becomes derestricted.

(iii) **Minutes of WTO meetings:** Minutes of meetings are first delivered to WTO Members as restricted. However, they are automatically derestricted 45 days after the date of circulation to Members.

(iv) **Documents related to the renegotiation of GATT or GATS schedules:** Documents relating to modification or re-negotiation of concessions under Article XXVIII of the GATT 1994, or specific commitments Article XXI of the GATS, remain restricted until such negotiations have been completed and the changes are certified in the schedules.

(v) **Accession documents:** Documents relating to working parties on accession similarly remain restricted until the working party report has been adopted.
Access to Dispute Settlement Proceedings and Information

As indicated earlier, WTO dispute settlement panel and Appellate Body proceedings remain closed to the public. They are closed to other WTO Members as well, i.e. to all Members except those participating as disputing parties or third parties. Consequently, there is no arrangement for participation by NGOs, other than possibly through the practice of submitting briefs as amicus curiae (‘friends of the court’). The amicus issue is discussed further below.

Legal arguments filed during proceedings at the panel and the Appellate Body stage are similarly confidential, but individual Member governments may, if they choose, make their submissions public. The United States, for example, routinely posts its submissions on the USTR web site on the day of filing. Other WTO Members that regularly make their submissions public include Canada, Australia, New Zealand, and the EC. Some other Members have released their submissions on an ad hoc basis in individual disputes. Most Members, however, keep their submissions confidential.

In a small minority of cases, Members making their submissions public might first need to remove confidential business information prior to release.

Several weeks prior to the public release of a dispute panel report, the Panel provides a confidential interim report, which includes the Panel’s rulings, to the disputing parties only. Other WTO Members that regularly make their submissions public include Canada, Australia, New Zealand, and the EC. Some other Members have released their submissions on an ad hoc basis in individual disputes. Most Members, however, keep their submissions confidential.

Following translation of the final Panel report, it is made public and posted on the WTO web site. The descriptive portion of the panel report includes a full summary of the arguments of the disputing parties and the third parties. In some cases (usually with the prior permission of the litigants), the Panel appends the actual submissions.

Accountability

The non-observance of the substantive rules of the WTO are subject to challenge through the WTO dispute settlement system (see ‘Additional Issues’ below). The procedural rules applicable to transparency contain no provisions relating to non-observance.

Models for the Policy Process

Policy-making in the WTO is based on consensus among 147 Member governments, which means that political considerations naturally impact upon the negotiations. A consensus-based system also means, by definition, that progress is slow and incremental.

While political considerations affect policy-making, the WTO is relatively less politicised than many other international organizations, such as the United Nations. The WTO works in a reasonably business-like manner, seeking to reduce political considerations where possible.

Critical Analysis of how the Process Works

No criteria recommended to others: The WTO does not recommend criteria to others; it has no independent policies of its own. The only policies or rules that apply in the WTO are those that have been agreed to by the Member governments, i.e., in the legal texts, in Ministerial Declarations, or in Council or Committee decisions. Unlike some other international institutions, the WTO Secretariat does not have any mandate to make any independent recommendations to WTO Member governments.

The WTO compared to other international organisations: As stated above, the WTO is relatively more business-like than many other international organisations. It has a comparatively lean staff of about 550, which includes about 200 professionals. The WTO also has a significantly smaller budget than many international organisations. Although WTO negotiations have stagnated in recent years, the WTO remains far more relevant and results-oriented than many of the other, far more politicised, international organisations.

The WTO compared to national institutions: Despite the many strengths of the WTO, it has some significant weaknesses when compared with national institutions, or even customs areas such as the EU. On policy matters, the consensus principle can obstruct or seriously delay decisions on a wide range of issues. The WTO can rapidly adjudicate disputes, and panel or Appellate Body decisions are adopted virtually automatically (unlike in the GATT, a losing party cannot block adoption of the report). However, unlike national systems, the WTO has no means to enforce its own decisions. Ultimately, in cases of non-compliance, the only recourse that may be available to the prevailing Member would be to impose retaliatory trade sanctions against the non-compliant defending
party. However, retaliation may fail to induce compliance, and it give rise to a host of other problems, including the imposition of costs on the economy of the retaliating Member. In terms of effectiveness, the WTO might be placed on a spectrum, somewhere ahead of most other treaties, but well short of effective national legal systems.

**Additional Issues**

The WTO Dispute Settlement System: The strength of the WTO system is founded on four core features:

(i) the compulsory jurisdiction of panels;  
(ii) appellate review;  
(iii) the automatic adoption of Panel and Appellate Body reports; and  
(iv) binding results.

WTO Panels and the Appellate Body adjudicate disputes affecting trade in goods, services, and intellectual property. In this sense, virtually all such decisions affect the interests of consumers. However, there a number of cases that are of particular interest for consumers, and for consumer organizations:

*EC – Hormones*, a 1998 decision in which the EC’s ban on hormone-treated beef was found to be inconsistent with the EC’s obligations under the *Agreement on the Application of Sanitary and Phytosanitary Measures* (SPS Agreement)\(^{14}\);  
*Australia – Salmon*, a 1998 decision in which Australia’s quarantine restrictions on imported salmon were found to violate Australia’s obligations under the SPS Agreement\(^ {15}\);  
*EC – Sardines*, a 2002 decision in which Peru successfully challenged an EC labelling regulation for the marketing of sardines. This was found to be a violation of the EC’s obligations under the *Agreement on Technical Barriers to Trade* (TBT Agreement)\(^ {16}\);  
*EC – Asbestos*, a 2001 decision that rejected Canada’s challenge under the TBT Agreement and the GATT to an EC ban on asbestos and asbestos-containing products\(^ {17}\); and  
*Japan – Apples*, a 2003 decision that upheld a U.S. complaint that Japan’s quarantine restrictions on certain U.S. apples was in breach of Japan’s obligations under the SPS Agreement\(^ {18}\).

Although these and many other disputes impact directly on consumers, there is little opportunity for direct input into the process by consumer groups. As noted above, all WTO disputes are conducted at the government-to-government level. Private individuals or NGOs have no standing before WTO Panels.

Some NGOs have sought to put their views directly to WTO Panels and/or the Appellate Body through the use of *amicus* briefs, but this remains highly controversial in WTO dispute settlement. In the 1998 *US – Shrimp* case, the Appellate Body ruled that Panels had the right to accept unsolicited *amicus* briefs. In the 2000 *US – Lead and Bismuth II* dispute, the Appellate Body stated that it too had the right to receive *amicus* briefs.\(^ {19}\) In the 2001 *EC – Asbestos* dispute, the Appellate Body adopted a special procedure to receive *amicus* briefs, and this procedure was posted on the WTO web site (although the tribunal ultimately rejected all applications for leave to file such briefs). The actions of the Appellate Body in *EC – Asbestos* drew strong criticism from many WTO Members, particularly developing countries, at a special General Council meeting held in November 2000 to consider the *amicus* issue.

Within the last couple of years, the Appellate Body has treated the *amicus* issue cautiously. It has affirmed its right to receive such briefs but then has stated, invariably without reasons, that the individual briefs received were not of assistance in the disposition of the appeal.

In the March 2004 decision in *US – Softwood Lumber VI*, the panel rejected the *amicus* submission sent to it in light of ‘the absence of consensus among WTO Members on the question of how to treat *amicus* submissions’.\(^ {20}\)

In summary, while *amicus briefs* provide a theoretical avenue for consumer groups and other NGOs to participate in disputes, in actual practice their impact has been extremely limited.\(^ {21}\)

A consumer organisation or other NGO is far more likely to have an impact on the panel process if its submission is put forward by one of the disputing governments. This was the case in *EC – Sardines* where Peru appended a letter from the United Kingdom Consumers’ Association (as such, it was technically not an *amicus* submission). In *EC – Sardines*, the EC argued that the relevant international standard for the labelling of sardines would be ineffective or inappropriate to allow the
EC to fulfill its stated objectives of consumer protection, market transparency, and fair competition.

More specifically, the EC argued that consumers in most EU member States associated the words ‘sardines’ exclusively with the type of sardines found mainly in European waters, *Sardina pilchardus*. Peru argued that European consumers did not associate ‘sardines’ exclusively with *Sardina pilchardus*, and attached the Consumers’ Association letter in support of its position. The Panel quoted an extract from the letter in its report: ‘According to the Consumers’ Association, ‘a wide array of sardines were made available to European consumers for many decades prior to the imposition of this restrictive regulation.’’. The Appellate Body found that ‘the Panel did not exceed the bounds of [its] discretion by giving some weight to…an extract of a letter from a United Kingdom Consumers’ Association’. What is interesting about EC – Sardines is that the EC purported to speak for the interests of its consumers, and yet was effectively rebutted by Peru with the assistance of a letter by a consumer organisation in the EU.

As for observing the proceedings, as noted above, Panels and Appellate Body hearings remain closed to the public.

A similar situation exists for the WTO Councils and Committees, both in terms of their ongoing work, as well as for the current Doha Round of negotiations. NGOs and other stakeholders have no standing before such bodies, and must provide their input through national governments.

**Councils:** WTO Councils and Committees work on a wide variety of issues of direct relevance for regulatory and governance issues, including the technical work associated with services regulation. In the wake of the Cancun Ministerial, there is no momentum for any serious negotiations on investment and competition policy. The issue of health and the Trade-Related Aspects of Intellectual Property Rights (TRIPS) is of major interest to consumers. There are efforts to amend the TRIPS Agreement to incorporate the 2003 agreement on compulsory licensing, although WTO Members remain divided as to the nature of amendment required.

**Impact of Preamble on Sustainable Development:** The first preamble to the WTO Agreement states that the WTO Parties recognise that:

> ‘…their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development…’

[emphasis added]

A preamble is not part of the substantive obligations set out in a treaty, but it can be used as a guide to interpretation. The *Vienna Convention on the Law of Treaties* provides that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context, and in the light of its object and purpose. The Convention adds that the context for the purpose of treaty interpretation includes the preamble.

Indeed, the preambular reference to ‘sustainable development’ had a considerable impact on the Appellate Body’s interpretation of GATT Article XX(g) in the 1998 United States – Shrimp case. GATT Article XX(g) allows WTO Members to take measures to protect ‘exhaustible natural resources’. In determining whether this term included living as well as non-living natural resources, the Appellate Body relied on the preamble as interpretive guidance:

The words of Article XX(g), ‘exhaustible natural resources’, were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment. While Article XX was not modified in the Uruguay Round, the preamble attached to the WTO Agreement shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy. The preamble of the *WTO Agreement* – which informs not only the GATT 1994,
but also the other covered agreements – explicitly acknowledges ‘the objective of sustainable development’.

From the perspective embodied in the preamble of the WTO Agreement, we note that the generic term ‘natural resources’ in Article XX(g) is not ‘static’ in its content or reference but is rather ‘by definition, evolutionary’.

Given the recent acknowledgement by the international community of the importance of concerted bilateral or multilateral action to protect living natural resources, and recalling the explicit recognition by WTO Members of the objective of sustainable development in the preamble of the WTO Agreement, we believe it is too late in the day to suppose that Article XX(g) of the GATT 1994 may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources.

The Appellate Body went on to note that:

At the end of the Uruguay Round, negotiators fashioned an appropriate preamble for the new WTO Agreement, which strengthened the multilateral trading system by establishing an international organization, inter alia, to facilitate the implementation, administration and operation, and to further the objectives, of that Agreement and the other agreements resulting from that Round. In recognition of the importance of continuity with the previous GATT system, negotiators used the preamble of the GATT 1947 as the template for the preamble of the new WTO Agreement. Those negotiators evidently believed, however, that the objective of ‘full use of the resources of the world’ set forth in the preamble of the GATT 1947 was no longer appropriate to the world trading system of the 1990’s. As a result, they decided to qualify the original objectives of the GATT 1947 with the following words:

… while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development…

We note once more that this language demonstrates a recognition by WTO negotiators that optimal use of the world’s resources should be made in accordance with the objective of sustainable development. As this preambular language reflects the intentions of negotiators of the WTO Agreement, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement, in this case, the GATT 1994. We have already observed that Article XX(g) of the GATT 1994 is appropriately read with the perspective embodied in the above preamble.

Many developing countries were extremely dissatisfied with the Appellate Body’s use of the preamble in US – Shrimp, and strongly criticised what they characterised as the tribunal’s ‘evolutionary’ approach to interpretation. Nevertheless, Panels asked to consider the ‘sustainable development’ portion of the preamble in future would likely follow the guidance of the Appellate Body. This has not arisen in any subsequent cases to date.

Moreover, the 2001 Doha Ministerial Declaration noted that Ministers ‘strongly reaffirm our commitment to the objective of sustainable development, as stated in the Preamble to the Marrakesh Agreement’.

WTO Accommodation of Other International Rules on Sustainable Development: The issue of the extent to which the WTO can accommodate other international rules that support sustainable development raises the broader issue of the role of the WTO in the public international law system. This remains a matter of some controversy in the WTO. Some view the WTO as part of the wider corpus of public international law, while others view the WTO as a self-contained system to which substantive principles of customary international law do not apply.

The United States, in particular, does not accept the notion that substantive principles of customary international law apply to the WTO. The December, 2002 paper submitted by the United States and Chile in the WTO dispute settlement negotiations criticised ‘situations in which legal concepts outside the WTO texts have been applied in…WTO dispute settlement proceeding[s], including asserted principles of international law other than customary international law rules of interpretation (e.g. state responsibility, proportionality)’.

It is also likely that there would be considerable resistance from some WTO Members to any
argument that sustainable development has attained the status of customary international law, and that this rule of customary international law applies to the WTO agreements.

In the 1998 case of EC – *Hormones*, the Appellate Body reacted very cautiously to the EC argument that the precautionary principle is ‘a general customary rule of international law’ or at least ‘a general principle of law’:

The status of the precautionary principle in international law continues to be the subject of debate among academics, law practitioners, regulators and judges. The precautionary principle is regarded by some as having crystallized into a general principle of customary international 
*environmental* law. Whether it has been widely accepted by Members as a principle of *general or customary international law* appears less than clear. We consider, however, that it is unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question. We note that the Panel itself did not make any definitive finding with regard to the status of the precautionary principle in international law and that the precautionary principle, at least outside the field of international environmental law, still awaits authoritative formulation…..\textsuperscript{26} [original emphasis]

Although the Appellate Body agreed that the precautionary principle ‘finds reflection’ in certain provisions of the SPS Agreement, this principle did not ‘override’ the substantive provisions of the Agreement at issue in that dispute.\textsuperscript{27}

At the November 2001 Doha Ministerial meeting, Ministers mandated negotiations on certain trade and environment issues, including on the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs). These discussions have made little progress to date.

Other means by which substantive principles of sustainable development could be applied in the WTO would include an authoritative interpretation under Article IX.2 of the WTO Agreement, or even an amendment under Article X. Yet the use of these
Footnotes

1 Pascal Lamy, ‘Leadership, the EU and the WTO’. Speech to the Evian Group, Montreux, 13 April 2002.

2 Even the EC, one of the principal proponents of reform, has essentially conceded that no major changes will be agreed at any time in the near future. As stated by Pascal Lamy in a January, 2004 speech: ‘…on the need for improving the workings of the WTO as an organisation, we have concluded first to pursue modest, but feasible, reforms on the preparation and management of Ministerial conferences and other means to improve the efficiency and inclusiveness of WTO negotiations. More systemic questions, which are crucial in my view, will have to wait for the moment, given the limited appetite of other WTO Members for changes in this field’.


3 The confidentiality provision for WTO Panels is set out in paragraph 1 of the Appendix 3 Working Procedures. Article 12.1 of the DSU enables Panels to modify the Appendix 3 Procedures, ‘after consulting the parties to the dispute’. The same flexibility does not apply to appeals, as DSU Article 17.10 provides that the ‘proceedings of the Appellate Body shall be confidential’.


7 ‘Reforming the World Trade Organization, a Perspective of Caribbean Non Governmental Organizations and Civil Society on Governance and Trade and Economic Relations in International Trade Negotiations’, June 2001

8 The draft is available at: http://qsilver.queensu.ca/~wolfer/Papers/reform.pdf.

9 The International Bovine Meat Agreement, a plurilateral agreement that was terminated in 1997, did refer directly to the interests of consumers. Article 1 of this Agreement, setting out its objectives, stated that:

The objectives of this Agreement shall be:

1. to promote the expansion, ever greater liberalization and stability of the international meat and livestock market by facilitating the progressive dismantling of obstacles and restrictions to world trade in bovine meat and live animals, including those which compartmentalize this trade, and by improving the international framework of world trade to the benefit of both consumer and producer, importer and exporter....’

10 No guidance is provided in the Agreements as to what would constitute a ‘representative’ consumer organization. This would need to be decided in each case by the investigating authorities.

11 SCM Agreement, footnote 50. The ‘lesser duty rule’ also appears in the Anti-Dumping Agreement (Article 9.1), but there is no comparable provision requiring investigating authorities to establish procedures to take account of the views of consumer organizations or other domestic interested parties.

It is useful to consider briefly the practice in the two largest Members of the WTO, the United States and the EC, with respect to comments from consumer groups in dumping or countervailing duty investigations.

The regulations of the U.S. Department of Commerce allow consumer organizations to comment on factual information submitted by interested parties in dumping investigations. However, consumer organizations are not considered to be ‘interested parties’ in the investigation, and therefore may not obtain access to the parties’ confidential submissions. It may therefore be difficult for consumer organizations to comment effectively on such submissions. Moreover, as they are not interested parties, consumer organizations cannot request review proceedings.

Consumer groups also have the right to submit comments to the U.S. International Trade Commission on injury determinations. However, the views of such groups do not have a direct substantive effect on the Commission’s determinations, as these determinations must be based on the effect of dumped imports on the domestic industry, not on other groups.

The EU anti-dumping regulations provide that antidumping measures may be imposed only if they are shown to be in the broader Community interest. Thus, unlike U.S. law, EU antidumping law allows, and indeed requires, the Commission to take into account the interests of ‘domestic’ (Community) parties other than producers of the like product. The EU regulations also permit users and consumers to present their views to the Commission. Since Community interest is a condition precedent to imposition of measures, the input of consumers could, at least in theory, have a substantive effect on the Commission’s decision. As noted above, this is not the case in the United States. However, in practice, the Community interest factor is decisive in few, if any, original anti-dumping investigations.

12 Article XXVIII defines ‘service consumer’ as ‘any person that receives or uses a service.’ In the context of Mode 2, this would include, for example, a person who travels to another WTO Member as a tourist, thereby becoming a consumer of tourism services. See also footnote 6(iv) of the GATS Agreement.

13 GATS Annex on Financial Services, Article 5(a)(vi).


21 One of the relatively few cases in which an amicus submission was given substantive consideration was in the compliance panel proceeding in Australia – Salmon. In that case, the Panel received a letter from ‘Concerned Fishermen and Processors’ in South Australia. The Panel stated that it ‘considered the information submitted in the letter as relevant to its procedures and has accepted this information as part of the record.’ It found that ‘the information submitted in the letter has a direct bearing on a claim that was already raised by Canada, namely inconsistency in the
sense of Article 5.5 of the SPS Agreement in the treatment by Australia of pilchard versus salmon imports.' The Panel quoted the Appellate Body report in US - Shrimp as support for its authority to receive and consider unsolicited briefs. See *Australia – Measures Affecting Importation of Salmon – Recourse by Canada to Article 21.5 of the DSU*, WT/DS18/RW, adopted on March 20, 2000, paragraphs 7.8-7.9.


24 Id., paragraphs 152-153.


26 This debate relates to the role of substantive rules of customary international law. It is accepted by all that customary rules of interpretation of public international law, particularly those embodied in the Vienna Convention, apply to the WTO. This is embodied in Article 3.2 of the Dispute Settlement Understanding.

27 Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding: Contribution by Chile And the United States on Improving Flexibility and Member Control in WTO Dispute Settlement. TN/DS/W/28, December 23, 2002.


29 Ibid., paragraph 125. The defence of ‘precaution’ under Article 5.7 of the SPS Agreement was also rejected by the Appellate Body in the November, 2003 case of *Japan – Measures Affecting the Importation of Apples*, WT/DS245/AB/R, December 10, 2003. In Japan – Apples, the Appellate Body said that it was ‘unable to endorse Japan’s approach of interpreting Article 5.7 through the prism of ‘scientific uncertainty’. ’ The tribunal said that the application of Article 5.7 was triggered ‘not by the existence of scientific uncertainty, but rather by the insufficiency of scientific evidence.’
Governance and Economic Development in the World Trade Organization (WTO)

Executive Summary

The Doha Development Agenda and associated negotiations are supposed to prioritise improvements in the wellbeing of people in the developing world. Paper improvements in market access and other negotiated promises are no longer enough, it is the impact on the poor that really counts. The question is, can the governance arrangements of the World Trade Organization (WTO), largely inherited from its predecessor the General Agreement on Tariffs and Trade (GATT), can rise to this new challenge?

There are compelling reasons for thinking not. The slow pace of the Doha Round negotiations contrasts starkly with the momentum behind the WTO’s dispute settlement mechanism; an outcome which makes the WTO appear excessively legalistic and increasingly detached from both its economic and commercial rationale and newly-acquired pro-development objectives. New thinking about WTO governance must recognise the realities of greater developing country participation in WTO negotiations, the vacuum in development thinking left by the abandonment of the Washington Consensus, the paucity of serious analyses to assess negotiating positions, and other important international economic dynamics, such as the resurgence of regionalism. In this paper, I discuss these factors, highlight the challenges they pose for the WTO, and assess whether certain proposed reforms to WTO governance processes meet those challenges. Most, in fact, fall short.
Mission Creep at the WTO

Although the ambitions for, and the scope of, the multilateral trading system have grown markedly over the past two decades, some processes for making international trade rules have endured. The WTO, just like its predecessor, is a Member-driven organisation where consensus is the guiding principle for making collective decisions. Moreover, in contrast to the World Bank and the International Monetary Fund (IMF), the WTO and GATT secretariats have far less power, fewer resources with which to operate independently (including undertaking policy-relevant research and technical assistance and capacity building), and no rights to make suggestions or proposals. In addition, the non-discrimination principles have endured as important guidelines for the negotiation and implementation of multilateral obligations on trade and related policies.

These enduring aspects of the WTO governance system have been augmented by a number of important institutional and diplomatic developments. The Uruguay Round saw developing countries brought within the ambit of significant binding rules on trade policy. Moreover, the Dispute Settlement Understanding (DSU) – which substantially constrains the ability of WTO members to evade their multilateral obligations – forces all WTO Members, and developing countries in particular, to take a hard look at any proposals for further multilateral rules.

The WTO system of governance includes a juridical mechanism and a negotiating (what some call a legislative) mechanism and the differences and relationships between them are becoming clearer over time. One difference is that many disputes between WTO Members are typically resolved in less time than it takes to negotiate new multilateral disciplines. This has reinforced the impression that the WTO has become dominated by disputes, pedantic legalism, and concerns far removed from its newly acquired development objectives. Worse still, there is growing criticism of the economic content of the rulings of the dispute panels and the Appellate Body (AB) which has led some leading international economists to seriously advocate a return to the GATT system of dispute resolution. WTO Members are concerned with any propensity for panels and the AB to ‘make law’ rather than ‘interpret law’, a distinction that is arguably easier to make in theory than in practice.

Another critical development is that the scope of multilateral trade rules has expanded into new market access-related and regulatory matters. The significance of the Uruguay Round, in extending the reach of the WTO into services and into certain important regulatory policies (such as intellectual property laws), cannot be overstated. Pressure to expand the WTO’s reach even further in the Doha Round was apparent from the Singapore meeting of WTO Ministers in 1996, which arguably began the preparatory work for the current multilateral trade round. Although three of the so-called Singapore Issues have been taken off the negotiating table in the Doha Round, proposals for new multilateral obligations in other areas remain.

Last but not least, the goals of the WTO have evolved substantially since 1995, the year the WTO came into existence. Negotiating legal obligations on market access and impediments to selected aspects of international commerce are no longer the central goals of the multilateral trading system. Ever since the Ministerial Declaration of the Doha meeting in 2001, considerable importance has been attached to the effects of new multilateral trade obligations on the plight of citizens in developing and transition economies. These effects, rather than rule-writing, will be the acid test of the Doha Round, it is said. That is what can be discerned from the rhetoric of the Doha Round; whether it happens is another matter. At a minimum, this change in focus of the WTO has brought forward many civil society and other groups who have firm views about the impact of international trade rules on sustainable development.
Three Factors that Condition Perceptions of the WTO Governance Process

It might be tempting to assess the governance challenges facing the WTO solely in terms of its procedures and stumbling blocks encountered since the Doha round was launched in 2001. This would be a mistake as it ignores three important conditioning factors that shape how many governments, scholars, NGOs, and others view the purpose and decision making processes of the WTO.

Discontent with neo-liberal reforms and the Washington Consensus

One important conditioning factor in recent years has been the growing scepticism, by many in the development community, towards the liberalising principles of what is known as the Washington Consensus. This ideology, which shaped the policy advice given to developing countries for the last 15 years of the 20th century, has been widely rejected in East Asia following the 1997 financial crisis and in Latin America, where poverty has continued despite solid economic growth. South Asian and Sub-Saharan African nations, many of whose governments never really wholeheartedly subscribed to the Washington Consensus, have become vocal critics too. Given the barrier-reducing nature of many of the Uruguay Round’s agreements, it is not surprising that this shift in development thinking has coloured debates on the implementation of already-agreed trade rules as well as the merits of further multilateral disciplines.

Rejecting one development paradigm might not have been such a problem if a well-thought through, tested, and widely-accepted alternative had replaced it. This has not happened, although the World Bank did initiate a ‘Global Learning Process’ that led to the adoption of the so-called Shanghai Consensus early in 2004. In principle, this ‘bottom up’ process of distilling lessons from various policy experiments in developing countries, could have provided the foundation for a new way of thinking about sustainable development. Unfortunately, there is little to suggest that this Consensus has attained the profile that its backers undoubtedly wanted. By the end of 2004, references to the Shanghai Consensus were rarely found in newspaper articles, editorials, academic studies, or NGO pamphlets and press releases on development matters. Of particular relevance to our discussion here, I have yet to hear of a single trade negotiator from a developing country refer to the Shanghai Consensus in a discussion of their government’s negotiating priorities. Another nail in the coffin for this World Bank-led initiative was the adoption of a different set of tenets for development at the UNCTAD XI conference in June 2004. It remains to be seen if the so-called Sao Paolo Consensus will share the same fate as its East Asian predecessor. The vacuum created by the demise of the Washington Consensus has yet to be filled.

In a negotiating round that is supposed to be devoted to promoting development, this state of affairs has placed the proponents of market-opening reforms and the like in a very difficult position. No longer can they argue that further multilateral trade agreements help nations to implement policies that ‘everyone knows are good for you’. Worse still, debates about the merits of further market opening are no longer couched solely in terms of legal obligations and alike. Empirical, technical and economic, evidence has become more important. This is not ground on which every trade negotiator feels comfortable. Even when evidence is offered another problem arises: few developing countries have the expertise in Geneva or in national capitals to effectively analyse such evidence. Under these circumstances the temptation to say ‘no’ to further reforms is overwhelming.

Given this limited internal capacity, to whom could developing countries turn for assessment of the impact of proposed multilateral obligations? Surely not the Bretton Woods institutions, whose very policy recommendations they so recently rejected. The United Nations Conference on Trade and Development (UNCTAD) is a possibility but, as evidenced by the research produced by this organisation, only a few of its staff have retained the analytical skills necessary to conduct such research. In any case, some of its officials have used the backlash against the Washington Consensus to undermine the WTO, rather than play a constructive role in helping developing countries devise proposals that are likely to garner consensus among the WTO’s membership. All of this is especially unfortunate as many developing countries see UNCTAD as ‘their’ think tank.

One might have thought that developing countries would turn to development NGOs for impartial advice. By and large, and with a few notable exceptions, this has not happened. Many NGOs, especially those based in Western countries, push controversial and unacceptable initiatives, such as proposals to link trade and labour standards and the
inclusion of environmental clauses, into trade agreements. In the judgement of most mainstream economists both proposals would have the effect of reducing the competitiveness of many developing countries’ exporters, retarding economic growth, and increasing unemployment and poverty. Alliances of convenience definitely occur from time-to-time – such as over-subsidies to cotton exporters by Western nations – but these alliances typically form after developing countries have determined their priorities. Even so, there is little evidence that Western NGOs have filled the analytical vacuum on WTO-related matters in a manner that has decisively shifted the negotiating priorities of developing countries.

Given the paucity of analytical skill and experience on trade and development in developing countries, the vacuum created by the demise of the Washington Consensus, and the dearth of alternative sources of impartial advice, how can we seriously expect most developing countries to play an informed, constructive, and pro-active role in the WTO? As these countries make up over two-thirds of the WTO’s membership, the current situation is a recipe for fear and scepticism to generate stalemate.

The growing clout of developing countries in international affairs

If you had to give a two minute account of ‘who ran what’ in the fifty years after the Second World War, most explanations would probably emphasise the following points. The Americans and British set up the World Bank and IMF at the Bretton Woods conference in 1944, and after the war successive American governments plus the leading European governments dominated those institutions. Three of the five permanent Members of the UN Security Council still have a lot of clout in geopolitical affairs. Twenty-three original Members of the GATT helped shape the rules of the world trading system and, since developing countries were not asked to sign binding obligations on a wide scale until the Uruguay Round, the industrialised countries (in particular the United States and Members of European Union as represented by the European Commission) dominated multilateral trade negotiations.

Developing countries did play a prominent role in the debates on the New International Economic Order in the 1970s, but this did not disrupt the arrangements described above. In fact, UNCTAD became a vehicle for advancing the ideas of some leading developing countries, most notably India, but the non-binding nature of much of the resulting international accords did not cause anyone to lose sleep in Western economics and finance ministries. Perhaps the only potential for disruption of this status quo was the rise of Japan, and that was managed smoothly with its government taking seats on the World Bank and IMF’s Executive Board. Nuance could be applied to these arguments but the essential elements are there.

What is different now is that certain larger developing countries – in particular Brazil, China, India, and South Africa – are beginning to assert themselves more and more in international forums. The sources of these countries’ clout differ although all are substantial players in their own regions. For some, clout is derived from their sizeable populations; for others it is that their exports are having important effects on global industries or that their economies are expected to become ever larger in the coming decade or two. Whatever the reasons, these countries are beginning to flex their muscles and insist on a greater say in forums that are supposed have global mandates and reach. In the diplomatic arena this has manifested itself in the recent scramble for seats on the UN Security Council. In international trade negotiations it has taken the form of the G20, which rose to prominence before the Cancun Ministerial and which is led by the four developing countries listed above.

An interesting question is whether the leaders of the G20 view developments in the multilateral trade arena solely in commercial terms, or whether they are interpreted through a broader geopolitical lens. If so, it may well account for the apparent propensity of these larger countries to occasionally oppose proposals, or to deliberately ‘go slow’, just to make the point that the traditional leaders of the multilateral trading system (the U.S. and European Union) can no longer dictate terms to the rest of the WTO membership. We must hope that this is a transitory phenomenon but the option to be difficult will always be there. The point here is not to accuse certain leading developing countries of bloody-mindedness, but rather to question whether broader geopolitical developments have not shaped how those countries have approached the Doha Round, how they will view the eventual outcome of the round, and how they might view any reforms to the WTO’s governance.

The aftermath of the Uruguay Round

The third important conditioning factor, which reinforces the other two, has been the pervasive view
that some of the Uruguay Round agreements have harmed developing countries. There is also a perception that many governments did not know what they were signing up to when they agreed to the Uruguay Round and this feeds the impression that the last multilateral trade round was illegitimate. The governance challenge posed by this is compounded because many of the WTO’s procedures look forwards not backwards. The current negotiating machinery is geared to negotiating new liberalising disciplines, much like a video player that has no rewind button! But ‘rewind’, or re-negotiate, is what many developing countries would dearly love to do.

Faced with refusals by industrial countries to revisit the principal tenets of certain Uruguay Round agreements, such as TRIPS, many developing countries have taken steps which undermine the value of a rules-based system. The first response is not to implement a controversial obligation in full or on time and the second is to block, or at least stall, negotiations on matters that the industrial countries want. For many with a purely legal mindset, re-negotiation of certain Uruguay Round agreements is an anathema. Yet this hard-line position is unlikely to deliver what its’ proponents want, namely, preserving the status quo at the lowest possible cost. Forcing developing countries to comply with the TRIPS agreement through invoking the DSU is more likely to discredit the DSU than it is to ensure compliance. As the Doha Round drags on, and is held hostage to the legacy effects of its predecessor, the cost to industrialised countries in terms of forgone export opportunities grows and grows.

The arguments in the last paragraph point, perhaps, to a more fundamental point: there really are limits to what legal agreements can effectively accomplish in a multilateral trading system where:

- a subset of the membership can de facto determine not to comply with a given agreement

- the objectives of the system change markedly so that the legitimacy of prior agreements is evaluated through a new lens

- there is insufficient capacity to assess the implications of legal provisions, which leaves the door open for a subset of the membership to cast doubt on the legitimacy of prior agreements and argue that they did not fully understand their implications.

Many trade lawyers and negotiators will feel frustrated by this, but don’t these realistic considerations cast doubt on how far a narrow legal emphasis on a rules-based system can go? Indeed, to what extent is it appropriate to uniquely identify the WTO with a rules-based system? And, in doing so, are we incorrectly downplaying the roles that diplomacy, trade-related capacity, and legitimacy will play in the future evolution of the multilateral trading system?

Are there any options, short of re-negotiation, that can get us out of the current impasse? One potentially promising option might be to allow developing countries to offer a ‘development defence’ in DSU proceedings on WTO agreements that are particularly burdensome. This defence could be included in a new agreement on the interpretation of existing multilateral accords but many important details would have to be worked out, such as what evidence would satisfactorily meet the development defence and which parties would have to bear the costs in providing such evidence?
Are We Facing Up to the Challenges to WTO Governance?

The governance challenges posed by the three factors described have been reinforced by the mission creep of the WTO. This section looks at the pros and cons of various options for reforming the governance of the multilateral trading system. The magnitude of the gap between the challenges described in the last section and the tinkering described in this one will become apparent. That is not to say that some of the ideas described below cannot play a useful role.

Expertise and variable geometry

The widespread use of the DSU and the need to cover many detailed negotiating briefs has placed human resources in developing countries’ trade ministries under considerable strain. There is a real dilemma here. International commerce, and the government policies that affect it, has become more complex and wide-ranging in nature and, unsurprisingly, the demands for cross-border collective action in those policy spheres has grown over time. Without substantial training in trade-related expertise in developing countries, expanding the scope of the WTO means spreading negotiating talent more thinly. This is hardly a recipe for effective buy-in or well thought through agreements.

Legitimacy and effectiveness are compromised by the current paucity of trade policy expertise in many developing countries, particularly for those WTO members that do not have a mission in Geneva and for those nations whose Geneva-based trade staff is merely an add-on to their UN-focused missions.

Given the lack of necessary expertise in developing country delegations, one related question is whether there is a case for variable geometry – that is, for some countries to forge ahead and sign plurilateral agreements while others take on more obligations as and when it suits their developmental needs. This suggestion is not without its problems however, especially if developing countries fear that plurilateral agreements signed by others inevitably set precedents for themselves.

Special and differential treatment

Calls for special and differential treatment (SDT) for developing and least developed countries represent another form of variable geometry that could be given greater prominence in the world trading system. Existing WTO agreements already contain specific clauses that differentiate between classes of WTO Members but in recent years demands for SDT have reached fever pitch.

Currently, diplomats in Geneva are still trying to flesh out precisely what SDT could mean in different contexts. Traditionally, SDT referred to longer transition periods to meet specific WTO disciplines for developing countries, a self-declared category. Now some have taken SDT to include:

- asymmetric obligations on a given matter across WTO Members (including, in the limit, no obligations on developing countries)
- binding commitments to finance capacity in developing countries to meet new obligations
- escape clauses for developing countries from the DSU if they cannot afford to meet new obligations, etc.

What do such proposals mean for WTO governance?

Differentiation and WTO governance

The first point, but probably not the most important one, is to recognise the rhetorical manner in which SDT has been used. Calls for SDT were doubly attractive in recent years because of the evident ease with which SDT can be linked to development considerations and because it avoided the need to define precisely what was wanted. Ambiguity and rhetoric can make for strong weapons. Indeed, the widespread use of the vacuous term ‘policy space’ is testament to the enduring power of seeking differentiation within the world trading system.

To the extent that calls for SDT are really a smoke screen for some WTO Members not wanting to take on new obligations, then this may be a less significant challenge to the world trading system. Most multilateral trade rounds have had their recalcitrants, from industrialised and developing countries, and there are many instruments available to WTO Members to cope with them.

To the extent that calls for SDT result in different obligations being agreed for different classes of WTO Members, the question is what criteria are used to differentiate? At the moment, with the exception of least-developed country status (which is determined by the United Nations), countries self-select into developing country status and that selection cannot be challenged by other WTO Members. This arrangement has led to some anomalous outcomes...
and a lack of differentiation among developing countries. Yet circumstances do differ markedly among developing countries and arguably multilateral trade obligations should reflect this. Moreover, the circumstances relevant to the subject matter of each agreement may differ too, calling for agreement-specific rules for differentiating among WTO Members.

A tension immediately arises between the enduring goal of trade diplomats to seek maximum commercial advantage for their nation, and development outcomes that requires the design of objective criteria for differentiating among WTO Members on a specific matter. One litmus test as to whether trade diplomats have really grasped the significance of the new development focus of the WTO, is whether they will accept that objective criteria, rather than an unreconstructed mercantilist calculus, should drive discussions on SDT.

Little attention has been given to the knowledge base necessary to objectively establish parameters for SDT. Perhaps a reformed UNCTAD could provide such advice or, where appropriate, another UN agency with specialists in a given area under negotiation at the WTO?

Even more problematic is the paucity of data needed to begin making objective assessments of the case for differentiation. Collecting up-to-date data will take resources and time, neither of which developing countries have a surfeit of. In many respects the discussions on special and differential treatment highlight the mismatch between the laudable goals of the Doha Round and the underlying institutional and analytical pre-requisites to meet those goals.

A constituency system?
Another alternative that might be worth exploring is whether a formal constituency system at the WTO would give developing countries, especially the poorest, greater say over the WTO’s affairs. A formal body could be created that included elected representatives from different groups of developing countries. Constituency membership could be endogenously defined (through voting) or fixed by geographic region or income class. Difficulties would arise in defining the voting structures for electing representatives of a constituency. One Member one vote is unlikely to appeal to the largest trading powers and using shares of world trade, to define national voting weight, would reinforce the marginalisation of the poorest nations. Such matters are, however, not impossible.

What matters is that this initiative could be structured in such a way as to give each type of developing country a seat at the table in a body that would meet more often than the WTO’s General Council. This new body could provide frequent, if

The CAIRNS group of agriculture exporters is a long-standing example of the latter.

In principle the creation and dissolution of coalitions of WTO Members is a flexible and pragmatic way to identify key positions and to better represent the interests of developing countries without indulging in nearly 150 sets of bilateral negotiations on each issue. There are no guarantees, however, that inter-coalition dynamics unfold in such a way as to benefit all developing countries. For example, the G90 group of developing countries played a much less prominent role in the negotiation of the so-called July 2004 package than at the failed Cancun Ministerial meeting in 2003. Indeed, much talk now centres on how to ‘buy off’ any G90 opposition to a deal that the G20 group of larger developing countries might come to with the industrialised economies.

Coalitions may provide many developing countries with a ‘home’ and additional clout in WTO negotiations, but that clout need not convert into substantial and beneficial improvements in market access and the like. Indeed, the Doha Round increasingly looks like it has merely expanded the set of WTO insiders from the major industrialised economies to include the leading Members of the G20 (India, China, South Africa and Brazil.) If so, then many remain effectively ‘outsiders’.
not necessarily day-to-day, strategic counsel to ambassadors, committee chairmen, and the Director-General of the WTO.

**A more pro-active pro-development Director-General**

Some have argued for a stronger role for the WTO’s Director-General to ‘knock heads together’, facilitate agreement among WTO Members and to ensure that the perspectives of under-represented groups are not overlooked. These options should be treated with care, however, so as not to undermine the neutrality of the Director-General. Good incumbents of that post have played a role in facilitating the conclusion of agreements in the past and in spotting windows of opportunity to advance negotiations. But this invariably depends on the skills of the individual concerned, rather than on an institutional mechanism.

As for representing the marginalised nations, a Director-General may be able to accomplish this indirectly by giving poorer developing countries a regular forum to raise matters of importance. Out and out advocacy by a Director-General would probably be ignored – after all, what negotiating coin does a Director-General have?

Although much of the discussion here has focused on internal WTO governance matters, the relationship between WTO processes and two other institutions merits a mention too. These institutions are first, preferential trading arrangements and second, the Bretton Woods institutions, the World Bank and the IMF. Each is discussed in turn.

**Throwing sand into the wheels of WTO governance: preferential trading agreements**

The relationship between preferential trading agreements (PTAs) and the multilateral trading system is multi-faceted and, without a specific focus, cannot be adequately summarised here. Our immediate interest is in drawing out the implications for WTO governance of the renewed interest in signing unilateral and reciprocal agreements to liberalise international commerce on a preferential basis. There are several strands to this which are described below.

First, in certain matters PTAs can establish competing modalities that will be very difficult to reconcile in any subsequent multilateral trade agreements. Service sector negotiations in PTAs are a case in point. Many PTAs adopt a positive list approach for service sector obligations, others a negative list; this results in two competing models of service sector reform each with strong supporters. It would be difficult now to reconcile these two approaches in a new General Agreement on the Trade in Services (GATS) and this will undoubtedly get harder as the current wave of regionalism progresses. In this respect it is worth noting that concluding a new or expanded GATS agreement is a key negotiating priority of certain developing countries such as India.

Preferential liberalisation has another deleterious impact on concluding multilateral accords in the market access area. Concerns about ‘preference erosion’ (which occurs when multilateral reductions in bound tariff rates result in the gap between applied tariff rates and preferential tariff rates being narrowed) have been a major concern of many small and poor developing countries in the Doha Round. Here there is a case for complementing any multilateral accords on trade in goods, with measures to finance and implement improvements in the export sectors of the recipients of preferences. Where diversification of exports is not possible, and experience here has to date proved to be sobering, perhaps direct compensation should be paid.

The third point to be made in this regard is that the growing complexity and controversy associated with multilateral trade negotiations at the WTO, as well as the seemingly interminable length of these negotiations, has made the negotiation of PTAs all the more desirable. While the latter may appeal to certain export interests, it is likely to come at the expense of supporting the successful conclusion of the Doha Round.

Regionalism often saps support for multilateral liberalisation, and there are critical developing country interests (such as eliminating export subsidies for agricultural products and imposing disciplines on the use of anti-dumping measures) that can only be effectively tackled at the WTO. Worse still, delays in concluding multilateral trade rounds tend to foster spurts of regionalism, which in turn make it even harder to conclude negotiations in Geneva. While this downward spiral has been broken before, there is no guarantee that it can be in the future. Developing countries may want to indicate to industrialised countries seeking preferential trading agreements that they should focus their attention on negotiating multilaterally in Geneva instead.
Can the coherence agenda ever work?

Discussions about the relationship between the WTO and the Bretton Woods institutions invariably focus on the ‘coherence’ between the three agencies’ missions and actions. An immediate question arises as to how the WTO’s new goal of promoting development sits with the long-standing objectives of the IMF and the World Bank.

First and foremost, trade and WTO-related reforms are not seen by the World Bank Board and its staff as of paramount importance in strategies to alleviate poverty and to promote sustainable development. This may come as a shock to some in trade circles but a perusal of copies of the Bank’s leading annual publication, the *World Development Report*, reveals the low priority accorded to WTO-related reform measures. This has a number of implications, not the least of which is that there are surely limits to the extent to which the World Bank will finance the implementation of any new WTO accords on the scale that many trade diplomats may want to see.

Moreover, the limited resources devoted to the support of directly WTO-related trade policy research strongly indicates that seriously and comprehensively informing discussions during the Doha Round, is not a priority for the World Bank’s in-house research department. The World Bank does have a ‘Trade Department’ active in giving advice on trade policy-related matters, which developing countries may find useful, but the supply of analytical work to inform decision making on WTO matters is inadequate. If its output is anything to go by, the IMF’s recent steps to establish a small group of trade researchers suggest that it will not fulfil this role either. Perhaps this reluctance could be put down to a desire not to venture into the WTO’s patch, an outcome that amounts to one aspect of coherence being accomplished at the cost of providing the analytical work needed to allow developing countries to make informed choices in the Doha Round.

It should be acknowledged that the World Bank and IMF participate in the broadly supported Integrated Framework initiative. This initiative enables developing countries to identify their trade policy priorities, encourages them to align those priorities with their overall development goals and, using diagnostic tools, identify bottlenecks to the implementation of trade agreements to better target technical assistance and capacity-building measures. Conceivably this initiative could be implemented on a wider scale than hitherto during and after the conclusion of the Doha Round.

The most perplexing aspect of the discussions on coherence is that the same industrialised countries, which agreed that the WTO’s emphasis should now be on promoting development, also sit on the boards of the IMF and World Bank and have yet to align the programmes of the latter to the goals of the former. The impetus must come from these countries as the officials of the WTO, IMF, and World Bank only have so much discretion within which to operate. Resource allocation and priorities are ultimately set by the Executive Directors of the World Bank and the IMF, many of whom are appointed by their nation’s finance/treasury departments and not their trade or aid ministries.

Developing countries should demand greater coherence on the part of the industrialised countries in this respect, and insist that a funding channel be created at the World Bank after the completion of the Doha Round to identify, and then finance, technical assistance needs arising from the new round’s obligations. This approach is not without its risks, not least that it may have the inadvertent effect of revealing that the finance/treasury and other ministries in developing countries do not want to shift World Bank resources towards trade-related capacity building either!

The real coherence agenda then, is to align the priorities of the relevant ministries within developing and industrialised countries to give greater prominence to multilateral trade initiatives and to ensure that the wealthy countries channel enough resources through bilateral aid and the Bretton Woods institutions, to facilitate the balanced conclusion and implementation of the Doha Round.
Conclusion: the Governance Challenge Facing the WTO

It is now apparent that few realised the significance of entrenching the goal of promoting sustainable development into the world trading system in general, and the current multilateral trading round in particular. At a time when international governance arrangements are greatly contested, with a multiplicity of state and non-state actors seeking to shape initiatives and outcomes, and when widespread differences of view have emerged as to the contribution, if any, international economic integration can play in promoting development, reorienting the purpose of the WTO was always going to be risky and difficult. The response of national policymakers to date has been at best incremental and, at worst, denial and cosmetic tinkering.

The purpose of this short essay has been to identify a number of the critical governance challenges posed by the Doha Development Agenda. While institutional changes are certainly part of the solution, the legitimacy and credibility of the WTO will depend on other factors including:

• the depth and breadth of expertise available to developing countries

• flexibility in the design and enforcement of trade obligations that better take account of national circumstances and development goals

• a more coherent approach to targeting and financing assistance to developing countries through the international and regional development agencies.

There must be serious doubts as to whether the current cohort of trade negotiators, steeped in the mercantilist logic of prior trade rounds, comprehend, let alone know how to tackle the governance challenges posed by the Doha Development Agenda. If WTO Members are to avoid any more Cancun-like failures, which would further undermine the credibility of the world trading system to the detriment of all, then a wide-ranging and inclusive discussion on WTO governance must commence immediately.
Footnotes

1 This should not be read to imply that there are no special provisions for developing countries, or classes of developing countries such as the least developed countries, in the Uruguay Round multilateral agreements.

2 In the Tokyo Round agreements, and before, several provisions and conventions in multilateral trade agreements effectively allowed developing countries to avoid the obligations that industrialised countries signed up to. These ‘carve outs’ meant, among other things, that developing countries did not have to think too defensively about the obligations taken on by GATT Members. In the mercantilist logic of many trade negotiators and officials these ‘something for nothing’ arrangements were seen as particularly desirable. Whether developing countries used the associated freedom to advance their development interests is another matter.

3 Of course, some disputes between WTO Members appear to go on and on and on.

4 I should add that this is not my position. Having said that, given all of the faults of the current dispute settlement understanding, I am puzzled at the extraordinary lengths that some international trade lawyers and public international lawyers go to defend the status quo. Is the DSU really that strong and effective that it deserves this almost unqualified support? Or am I missing something?

5 My discussion of these three factors is because I think they are important for understanding the positions and, I hesitate to say it, even the motives of various parties that are fully engaged in deliberations on the Doha Round. Readers should not assume that I agree with the arguments made by these parties, many of which are summarised in the three sections that follow.

6 The election in recent years of more populist leaders in Argentina, Brazil, and Uruguay are one indication of the degree of ‘reform fatigue’ in that region.

7 It is appropriate to acknowledge, though, UNCTAD’s analytical work on market access matters, in particular as they relate to preferences. This work has been widely cited and recognised as first rate.

8 Some economists will be disappointed to see that I do not stress the traditional implications of discrimination in preferential trading agreements. It is not that I think that the loss of tariff revenues and the so-called trade diversion are unimportant, rather that these points are well known (and I would add, comprehensively ignored by policymakers.)

9 Arguably, Egypt, Nigeria, and eventually Indonesia could join this list of pre-eminent developing countries.

10 As the membership of this group has changed over time, it has acquired a number of different labels. G20 is used because there are approximately 20 WTO Members that formed an ad-hoc coalition on matters relating to the Doha round.

11 The reduction in borrowing from the World Bank by middle income developing countries can also be seen as an attempt by these countries to avoid the strings that are attached to loans from an organisation that they perceive as being run by US and European nations. As Hirschman pointed out years ago, agents often have three choices when faced with a situation they dislike: exit, voice, or loyalty. As far as the middle-income developing countries are concerned, more and more of them are choosing the exit option when it comes to many of their dealings with the World Bank. This is often ‘dressed up’ as those countries ‘graduating’ from World Bank tutelage and assistance. In the WTO context, and as will soon be argued in the main text, the loyalty option has been destroyed in the aftermath of the Uruguay Round and the voice option is now being exercised. The formal exit option has, fortunately, not occurred yet. Although if one views disengagement – such as requests for the Doha Round for free, etc – as a form of exit, then arguably some of the developing countries have involved this option too.

12 Moreover, many developing countries have no doubt learned a trick-or-two about serial non-compliance with Appellate Body rulings from the leading industrialised countries.

13 Using the DSU to remedy such ‘collective’ non-compliance is fraught with danger. If action is taken against one country for non-compliance then it will look like those bringing the case are ‘picking on’ the defendant. Moreover, as certain industrialised countries are so fond to point out, Panel and Appellate Body rulings do not create precedents for other WTO Members, implying that the other non-complying nations can carry on as before. Alternatively, if action is taken against a group of countries for non-compliance then the systemic implications for the legitimacy of the DSU must surely be a factor, especially if the defendants believe that the measure they are non-complying with would harm their development. Any victory by the plaintiffs in this situation could well be pyrrhic as it may well come at the cost of the DSU itself.

14 Bernard M. Hoekman has advocated this option.

15 Put straightforwardly, this calculus sees exports as good, imports as bad, and exemptions, exclusions, and exceptions from binding rules are good, and commitments as bad. Of course, if this calculus triumphed certain paradoxes emerge: all nations cannot export without someone importing, and multilateral commitments would be almost worthless if everyone was granted complete exemptions, exclusions, and exceptions to those rules!

16 The former are the ongoing Economic Partnership Agreements (EPA) negotiations between the European Union and the ACP nations. The latter includes, for example, the negotiations between the ASEAN nations and China over the potential establishment of a free trade area between their economies.

17 Some economists will be disappointed to see that I do not stress the traditional implications of discrimination in preferential trading agreements. It is not that the loss of tariff revenues and the so-called trade diversion are unimportant, rather that these points are well known and ignored by policymakers.
Governance in the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC)

Prepared for Consumers International by Bruce J Farquhar
# Governance in the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC)

## Executive Summary

This paper is intended to inform discussions concerning consumer representation in the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC).

The ISO and IEC are two of the best-known international standards organisations. IEC’s objective is to promote understanding and international cooperation on all matters of standardisation and related matters such as the verification of conformity to standards in the fields of electricity, electronics and related technologies. ISO’s aim is to promote the development of standardisation to facilitate international exchange of goods and services and cooperation in the spheres of intellectual, scientific, technological and economic activity.

The relative importance of the work of both has increased in recent years due to reliance on standards as a means of avoiding technical barriers to trade and achieving the goals of regulatory reform. The World Trade Organization’s Technical Barriers to Trade (TBT) Agreement directs governments to use international standards as ‘a basis for’ domestic regulations except when such standards would not fulfil legitimate objectives. The TBT committee has adopted a set of criteria to which international standards should conform. These include transparency, openness, impartiality and consensus, effectiveness and relevance, coherence, and a development dimension.

## Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Executive Summary</td>
<td>47</td>
</tr>
<tr>
<td>Recommendations</td>
<td>50</td>
</tr>
<tr>
<td>The Role of International Standards in the Global Economy</td>
<td>52</td>
</tr>
<tr>
<td>Analysis of Existing Structures and Procedures in ISO and IEC</td>
<td>55</td>
</tr>
<tr>
<td>The Standards Development Process</td>
<td>58</td>
</tr>
<tr>
<td>Inventory of Proposals for Reform</td>
<td>65</td>
</tr>
<tr>
<td>New ISO Strategy 2005-2010</td>
<td>68</td>
</tr>
</tbody>
</table>
The bodies’ importance has also increased because of new initiatives launched by ISO in particular in respect of new areas of standardisation activity. ISO has pioneered work on management systems standards and has considered initiatives in the fields of electronic commerce, services, tourism, alternative dispute resolutions and complaints handling, second hand goods and, most recently, corporate social responsibility.

The use of international standards has also been promoted through the adoption of extensive standards policies at national and regional levels. The European Union (EU) has placed considerable emphasis on the use of standards in the establishment of the internal market in Europe. The adoption of the so-called ‘New Approach’ to technical harmonisation was one of the major implementing actions of the single market programme. As a result, European standards now account for some 90% of the output of national standards development organisations (SDOs) in Europe with only 10% being exclusively national standards. This is the reverse of the same proportions at the beginning of the 1980s. So as not to create new barriers to trade the European standards bodies’ concluded co-operation agreements with their international counterparts. As a result approximately 40% of the 10,000 standards under the control of the European Committee for Standardisation / Comité Européen de Normalisation (CEN) are based on international standards and approximately 90% of those standards under the control of the European Committee for Electro-Technical Standardisation / Comité Européen de Normalisation Electrotechnique (CENELEC).

The membership of ISO consists of national standards bodies most broadly representative of standardisation in their respective countries. National bodies in countries without a Member body can be registered as either a correspondent or subscriber Member with no voting rights. Only one body in each country may be admitted to membership.

ISO and IEC issued a joint statement on consumer participation in standardisation work in 1979. This statement recognised the basic principle that all interests should be taken into account in the international standardisation process including that of consumers. Specific recommendations were made to ISO and IEC national Members. The latest version of this statement is examined later.

The ISO has also adopted a Code of Ethics which commits Members to take appropriate measures to facilitate the participation of consumers and other affected parties from civil society, SMEs and public authorities. The Code also commits ISO parties to contribute to help Members from developing countries improve their capacity and their participation in international standardisation.

Other initiatives on stakeholder involvement include the ISO Council standing committee on strategies (CSC/STRAT) examining ethics in the ISO system, including stakeholder engagement. The ISO/TMB (Technical Management Board) strategic advisory group on social responsibility is also examining ISO processes with respect to involvement of stake-holders. Possible future scenarios identified were:

- a code of ethics for national standards bodies;
- direct participation of stakeholders - previously debated in a joint technical committee (JTC1);
- a tri-partite balance of interested parties (following the UN agency and International Labour Organization (ILO) models); and
- a future role of value for national standards bodies in ‘new paradigms’ (in other words, the national standards bodies will still have a valuable role to play under any new working methods).

The issues

Despite the many commitments to consumer participation in the standards work of both bodies, there is still a great deal to be done to make this a reality. The issue becomes more pressing because of the increasing use of international standards as a basis for domestic regulation, particularly with regard to WTO Multilateral Agreements on Trade in Goods which provide a means of redress where such standards are deemed to form an unnecessary obstacle to international trade.
The arrangements for stakeholder participation and consultation are based around technical work and the national delegation principle; stakeholders are directed to the national Members of ISO and IEC. International or broadly based regional organisations can apply for liaison status to participate in the technical work.

ISO has formed its own Committee on Consumer Policy (COPOLCO). The Membership of COPOLCO is, however, still nominally the national Members of ISO. The presence of consumer representatives on national delegations to the annual COPOLCO meeting is dependant on the national Members who determine the composition of the delegation. National delegations are appointed by the national standards bodies and under ISO rules consumer representatives do not have a right to be included on the delegation. Other organisations attend the COPOLCO meetings as observers. These include Consumers International and ANEC, the European consumer voice in standardisation. IEC does not maintain its own Consumer Policy Committee; rather it has participated as an observer on an ad hoc basis at ISO COPOLCO meetings. Occasionally some IEC issues have been raised and addressed in COPOLCO meetings but the main thrust of COPOLCO is clearly ISO.

Scrutiny of the attendance lists at past ISO meetings reveals that not all delegations include consumer representatives. Some are simply made up of officials from the national standards bodies or only include government officials. At the meeting in May 2004, for example, there were 27 national delegations present. Thirteen of these appeared to contain representatives from independent consumer associations and 14 delegations were comprised solely of representatives from a national standards body.

The influence of COPOLCO has increased through the 1990s and it often takes the lead in proposing new avenues of work that are eventually taken up within ISO. Improvements in the workings of COPOLCO, and the attitude to consumer issues in ISO, have occurred gradually over time and some issues that have been raised have not been resolved. The work of the Technical Management Board (TMB), policy setting and governance bodies of ISO are not open to the public. The General Assembly holds a one-day open session as part of its annual meeting, usually around a specific theme of current interest to its membership. International and regional inter-governmental organisations and some NGOs participate at these events. The ISO Council is completely closed to outside participation.

The TMB, to which the council delegates a lot of authority in respect of the technical work, is similarly closed. The TMB is comprised of only 12 Members so many ISO Members are also formally excluded. Influencing the TMB seems to rely on cultivating personal relationships with serving Members. This process is made difficult for NGOs, and other organisations outside the ISO membership, because the list of Members of the TMB is not published outside the ISO membership.

The situation in IEC is essentially the same. The Council, Council Board and Standards Management Board are not open to the public. Their documents are also password-protected on the website. Another important committee in IEC, the Advisory Committee on Safety (ACOS), draws its membership primarily from technical committees and subcommittees dealing with safety matters. It also has four experts knowledgeable in safety matters, but has no officer affiliation with any IEC technical committee or subcommittee dealing with safety matters. These experts are appointed in their own personal capacity. There is no specific provision for consumer participation. Documents are not publicly available.

There is no formal accreditation process for NGOs in ISO comparable with the accreditation schemes that exist for the United Nations, WHO, Codex Alimentarius, or regional standards bodies such as CEN in Europe. Rather, there is a system of approving, on a case-by-case basis, individual liaisons between NGOs and specific technical bodies. An application for a liaison status has to be made to the central secretariat which refers it to the technical committee. The P-Members (Participating Members) of the technical committee then make a proposal to the ISO Secretary-General or IEC General Secretary. Once a liaison has been established, organisations are sent copies of all relevant documentation and are invited to participate in meetings.

Developing countries, which are under-represented and have only two Members on the TMB, are also disadvantaged. SDOs from developing countries are often unable to attend meetings in person and thereby could have difficulty cultivating the necessary personal relationships. The only information publicly available from ISO about the work of the TMB is the TMB Communiqué – a newsletter outlining some of the decisions taken by the TMB.
Measures have been introduced recently to provide financial support for participation by representatives from developing and least developed countries (LDCs) in the work of ISO. This aid has been extended to consumer representatives. DEVCO, the developing countries policy development committee of ISO, has established a technical assistance fund. Other initiatives include sponsorship by national Members of participants from developing countries and training events held in developing countries. Two of these training workshops have been targeted at consumer representatives.

Management body documents from ISO and IEC are not publicly available. Documents from specific technical bodies are available to organisations that have a liaison with them. They should also be available to NGOs who participate in national mirror committees (committees that are established within national SDOs to follow work at international level, and who decide on the positions national delegations will take to international meetings and how national votes will be cast during the international standards development process).

There is an appeals process but this is only open to ISO and IEC Members and not to liaison organisations.

The fundamental issue is whether there should be direct stakeholder participation at international level. It should be relatively easy to make a case in the specific instance of disadvantaged groups such as consumer groups, development NGOs, trade unions or environmental groups. They are invariably a minority interest at the national level so it is too easy for their voice to be lost in the drive for national consensus and a national line to present at international standards meetings. Direct participation gives voice to their concerns. This principle has been accepted in many other arenas such as the Codex Alimentarius Commission and in the United Nations Economic Commission for Europe (UNECE) where global technical regulations for vehicle safety are being developed. The World Trade Organization (WTO) itself also engages directly with international NGOs.

Recommendations

Consumers International's recommendations for reform of ISO and IEC are presented below in the manner of the list contained in the ISO analysis.

Communications and promotion

1. Increase communication efforts to raise awareness and promote the concept of balanced stakeholder representation

2. Develop guides for national standards bodies, addressing the issue of how to associate civil society and small and medium enterprises and ensure their implementation in practice

3. Improve communication concerning ISO and IEC's deliverables other than standards, raising awareness of the alternatives to full standards development.

Process improvement

4. Develop statistics on stakeholder diversity (representation within national mirror committees, delegations and experts) to enable national standards bodies to document what they have done to ensure balanced representation of interests.

5. Disseminate information more broadly at earlier stages in the process, offering electronic consultation (or even ‘e-membership’) to larger groups of stakeholders and encouraging national public enquiries at earlier stages.

6. Give the right (as opposed to Chair’s discretion) to certain groups of stakeholders to participate in committee work as observers.

7. Target at an early stage for better participation of representatives from regulating authorities.

8. Assess the International Telecommunications Union – Telecommunications Standardisation Sector (ITU-T) model for direct participation and pilot test balanced direct participation in selected fields (most likely high tech emerging technologies such as mobile telephony or biometrics).

9. Consider involvement in technical management and policy committees for international organisations through access to information and/or direct participation. (General Assembly,
TMB, Council, technical committees, Chairman’s Advisory Group in ISO, Council, Council Board, standards management board and advisory committees in IEC).

10. Give right of appeal to NGOs and/or develop some other conflict resolution mechanism.

11. Identify positions of stakeholder groups within national delegations.

12. ISO and IEC Central Secretariat need to establish procedures to monitor the quality of consensus and spread best practice with respect to stakeholder involvement.

**New mechanisms to foster participation of certain groups of stakeholders**

13. Facilitate the development of international networks of stakeholders from civil society.

14. Use of the Internet and electronic means for exchanging information, supporting their direct participation in ISO committees as liaison organisations.

15. Consider the possibility of creating a fund to support participation of consumers (in a way similar to what is currently done for developing countries).

16. ISO could further strengthen its commitment to ensure balanced representation in national delegations and enhance the effectiveness of direct representation at the international level.

**ISO and IEC governance**

17. Integrate liaison organisations, such as CI, into both the standardisation process as well as the governance structures of ISO & IEC Central Secretariat and technical committees.

18. Give the right, rather than Chair’s discretion, for certain groups of stakeholders to observe committee work.

19. Implement measures to establish a balance of social interests, including balanced composition of project teams or Chairman’s advisory groups.

20. Establish a funding mechanism for consumer participation.

21. Require technical committees to address governance and representation issues in their business plans and set clear targets for stakeholder participation.

22. Create a conflict resolution mechanism.

**ISO and IEC membership**

23. Include clear guidance in each new work item proposal for national standards boards to follow in determining the composition of their national delegations and mirror committees.

24. Make available accurate statistics on stakeholder diversity (within national mirror committees, delegations and experts) to document the representation of interests in national standards bodies.

25. Survey Member bodies requirements and practices for stakeholder engagement, to promote best practice.

26. Encourage Member bodies to conduct public review and comment at all major stages of ISO standards development.

27. Ensure better and earlier participation of representatives from regulating authorities.

**Civil society participation**

28. Allow public access to draft standards in order to ensure input from all stakeholders.

29. Facilitate the development of international networks of stakeholders from civil society.
The Role of International Standards in the Global Economy

The International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC) are two of the best-known international standards organisations. Both are private non-governmental organisations that serve as networks for national standards bodies.

IEC was established in 1904. The object of the organisation is: ‘to promote international co-operation on all questions of standardization and related matters, such as the verification of conformity to standards in the fields of electricity, electronics and related technologies, and thus to promote international understanding. This object, inter alia, is achieved by issuing publications, including International Standards.’ The IEC has 5,204 publications including some 4,737 international standards.

ISO was established in 1947 to: ‘promote the development of standardisation and related activities in the world with a view to facilitating international exchange of goods and services and developing cooperation in the spheres of intellectual, scientific, technological and economic activity’. In order to achieve these objectives the organisation develops and issues international standards. ISO has issued 14,251 international standards and standards-type documents. ISO is active in the following sectors: generalities, infrastructures and sciences, health safety and environment engineering technologies, electronics, information technology and telecommunications, transport and distribution of goods, agriculture and food technology, materials technologies, construction and specific technologies.

The relative importance of the work of both has increased in recent years due to reliance on standards, as a means of avoiding technical barriers to trade and achieving the goals of regulatory reform, and the considerable broadening of the scope of international standardisation activity.

WTO technical barriers to trade agreement

As a result of the Uruguay round of the GATT the Agreement on Technical Barriers to Trade (TBT) now applies to all signatories to the GATT. It is no longer a voluntary code as was the case under the Tokyo round. The TBT agreement also introduces specific requirements with respect to the use of international standards. Article 2.4 of the TBT Agreement (art. 2.4) directs governments to use international standards as ‘a basis for’ a technical regulation except when such standards: ‘would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.’

Broadening of scope of international standards work

Another factor in the increasing importance of international standards has been the new initiatives launched by ISO in particular in respect of new areas of standardisation activity. ISO has pioneered work on management systems standards; the ISO 9000 series has been followed by the ISO 14000 environmental management series that has caught the attention of environmental NGOs. ISO has also considered initiatives in the fields of electronic commerce, services, tourism, alternative dispute resolutions and complaints handling, second hand goods and, most recently, corporate social responsibility. All of these initiatives have extended the range of ISO’s activities and raised its importance for consumer groups as well as other social stakeholders.

International standards in the European Union

The use of international standards has also been promoted through the adoption of extensive standards policies at national and regional levels. The European Union (EU) has placed a considerable emphasis on the use of standards in the establishment of the internal market in Europe. The adoption of the so-called ‘New Approach’ to technical harmonisation was one of the major implementing actions of the single market programme. As a result, European standards now account for some 90% of the output of national SDOs in Europe with only 10% being exclusively national standards. This is the reverse of the same proportions at the beginning of the 1980s. So as not to create new barriers to trade the European standards bodies concluded co-operation agreements with their international counterparts. As a result of these agreements approximately 40% of the 10,000 standards under the control of the European Committee for Standardisation / Comité Européen de Normalisation (CEN) are based on international standards and approximately 90% of those standards under the control of the European Committee for Electro-Technical Standardisation / Comité Européen de Normalisation Electrotechnique (CENELEC).
The US and other countries use of standards regulation reform work

Countries outside the European Union also have policies with respect to the use of standards in support of their regulatory frameworks. In the US for example, federal agencies are obliged to defer to voluntary consensus standards where use of these standards meets legitimate regulatory objectives.

Brazil has promoted the idea of singularity. Under this concept only one organisation would be recognised in each area of standardisation. This principle does not consider the value that may result from competition between standards development organisations (SDOs). One representative from a sustainable development NGO has described the application of this principle in the case of sustainable management standards as unwise.

US-based SDOs have actively pursued the concept of multiple international standards organisations. The standards policy of the American Society of Mechanical Engineers (ASME), an accredited SDO in the US, emphasises alternatives to ISO standards if they meet TBT intent with regard to non-discrimination and transparency, both technically and procedurally. It promotes recognition that ‘international standards’ are not synonymous with ISO standards.

ISO and IEC have had to respond to this debate and the developments in WTO. ISO has in particular launched a number of initiatives aimed at addressing some of the issues raised, for example, in the second triennial review of the WTO TBT agreement. An overview of these was presented to the ISO TC/SC Chairs Conference in June 2003.

There are three elements to the initiatives:

- working co-operatively and effectively with existing standards and their developers;
- enhancing the effective participation of developing countries;
- engaging a broad range of stakeholders in standards development.

ISO is co-operating with a number of SDOs including the International Telecommunications Union (ITU) and CEN. It has also responded to criticism it about its close co-operation with CEN by launching some pilot projects where US SDOs take a leading role on some international standards projects. The SDOs include the American Society for Testing and Materials (ASTM International), the American Petroleum Institute (API) and the Institute of Electrical and Electronics Engineers (IEEE).

Three-quarters of ISO’s membership is from developing countries. Of this 52% did not participated in any ISO TC or SC meetings during 2000-01 and

Current issues in the standards world

The current debate in the standards world very much surrounds what constitutes an international standard. The WTO’s Sanitary and Phytosanitary (SPS) Agreement dealing with food issues, clearly identifies the three organisations that are considered to write international standards for the purposes of the agreement. These are the Codex Alimentarius Commission, the International Office of Epizooties and the International Plant Protection Convention (Annex A).

The TBT agreement has not defined the organisations that write international standards for the purposes of the TBT agreement. Rather there is a reference to international standards in the original agreement:

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

In the second triennial review the TBT committee of WTO adopted a set of criteria to which international standards should conform. These include transparency, openness, impartiality and consensus, effectiveness and relevance, coherence, and a development dimension.

Essentially there are two camps within the debate as to what constitutes an international standards development organisation. The EU has a more hierarchical view that puts ISO and IEC at top of a pyramid with regional and national standards bodies below. The US view allows for more competition in standards development. The result has been difficulty in tying down the definition of international standards bodies in the WTO TBT triennial reviews.
42% are not registered as Members of any ISO TC or SC.\(^{19}\) ISO is promoting partnership and twinning arrangements as a means of building capacity.

Other initiatives on stakeholder involvement include the ISO Council standing committee on strategies (CSC/STRAT) examining ethics in the ISO system, including stakeholder engagement. The ISO/TMB Strategic advisory group on social responsibility is also examining ISO processes with respect to involvement of stakeholders. Possible future scenarios identified were:

- a code of ethics for national standards bodies;
- direct participation of stakeholders (previously debated in JTC1);
- a tri-partite balance of interested parties (following the UN agency and International Labour Organization (ILO) models); and
- a future role of value for national standards bodies in ‘new paradigms’ (in other words, the national standards bodies will still have a valuable role to play under any new working methods).

Opportunities for reform do exist. ISO is increasingly sensitive to the status of international standards under WTO and recognises the need to meet the criteria established. Attention has been directed to the question of stakeholder participation. In 2000 ISO went through a strategic review process which identified the need for improvements in stakeholder involvement. ISO now has its Horizon 2010 process underway. This is a consultation exercise aimed at developing a strategy for 2005-2010.

ISO has also adopted a Code of Ethics.\(^{19}\) The Code of Ethics commits ISO Members to take appropriate measures to facilitate the participation of consumers and other affected parties from civil society, SMEs and public authorities. The Code also commits ISO parties\(^{20}\) to contribute to help Members from developing countries improve their capacity and their participation in international standardisation.

At the time of first drafting of this report (August 2004) it was possible to access the submissions from the American National Standards Institute (ANSI) in the US and from the Standards Council of Canada (SCC). Both submissions comment on the application of the current rules and the ISO/IEC statement on consumer participation.

The ANSI submission proposes that other models of participation should be considered, in particular direct stakeholder involvement. A number of NGOs including CI have commented as part of this exercise. We will look at the recommendations coming out of this consultation process in greater detail later in this report. The Strategy was formally adopted by the General Assembly at its meeting in Geneva in September 2004. The Strategy is also discussed in greater detail.

**A brief overview of consumer representation in standardisation to date**

We shall look at consumer representation in ISO and IEC in greater detail when we go on to examine the structures of the two organisations. To put the activities in ISO and IEC in context we can state that there is a long tradition of consumer representation in standards work at the national level. The right of French consumers to be consulted in standards work was guaranteed by law in 1941.\(^{21}\) The forerunner of the Consumer Policy Committee of the British Standards Institution, the Woman’s Advisory Committee, was established in 1951 and the Consumer Council of DIN, the German standards organisation was established in 1964.

In Europe the need for co-ordinated consumer representation at the European level became increasingly important with the adoption of the new approach and the ambitious single market programme. A project was started in 1983 and eventually led to the development of ANEC, the European consumer voice in standardisation, in 1995.

Internationally the ISO Council took a resolution in 1964 where they stated their desire to promote consumer participation in standards work in recognition of: ‘the wish for consumers at national and international level for greater involvement in the framing of decisions affecting their interests’.\(^{22}\) COPOLCO, the ISO Committee on Consumer Policy was established in 1978. Under the present arrangements COPOLCO reports to the ISO Council.

ISO and IEC issued a joint statement on consumer participation in standardisation work in 1979. This statement recognised the basic principle that all interests should be taken into account in the international standardisation process including that of consumers. Specific recommendations were made to ISO and IEC national Members. The latest version of this statement is examined later.
Analysis of Existing Structures and Procedures in ISO and IEC

Summary of constitutional frameworks

Membership

- **International Standards Organization (ISO)**

The membership of ISO consists of national standards bodies most broadly representative of standardisation in their respective countries. National bodies in countries without a Member body can be registered as either a correspondent or subscriber Member with no voting rights. Only one body in each country may be admitted to membership. There are currently 148 national standards bodies, comprising 97 Member bodies, 36 correspondent Members and 15 subscriber Members.

The general assembly of Members meets once a year. A council consisting of the ISO officers and 18 Member bodies governs the operation of the organisation in accordance with the policy laid down by the Members. Five of the council Members are drawn from the five ISO Member bodies that are considered to be the largest contributors to the operations of the organisation. The other 13 are elected for two-year terms. The technical management board consists of 12 Members and a chairman. Four of the Members are appointed from the four organisations that reflect the most significant responsibility and productivity within the technical committee structure. The other eight are elected from among the Membership and serve three-year terms. The TMB has the responsibility for the general management of the technical committee structure.  

Within the technical committee structure ISO Members can elect to be participating ‘P’ Members or observing ‘O’ Members of specific technical bodies. This principle also extends to membership of ISO policy development committees including COPOLCO the consumer policy advisory committee. The organisation may co-operate with other international organisations interested partially or wholly in standardisation or related activities. The council lays down the conditions of co-operation.  

- **International Electrotechnical Commission (IEC)**

The membership and structure of IEC are similar to those of ISO. Any country wishing to participate in the work of the IEC must form a national electro-technical committee. There can only be one national committee for each country. National committees are admitted as full Members or as associate Members depending on their level of economic activity. Associate Members can participate in the work of the commission but have no voting rights. There are currently 62 national committees of whom 11 are associate Members.

The general assembly of the IEC is called the Council. The Council delegates the management of the commissions’ work to the council board. Specific management responsibilities in the field of standards are in turn delegated to the standards management board, and in the field of conformity assessment to the conformity assessment board. Membership on the council board is automatically granted to national committees whose individual membership fees are equal to the maximum fixed percentage of the total dues. Ten other Members are elected from the membership. An Executive Committee (ExCo) comprised of the office-bearers implements the decisions of the Council and Council Board and prepares the agendas and documents for the Council Board and supervises the operation of the Central Office and communication with National Committees.

The standards management board consists of a chairman and 15 Members. Six Members are appointed upon nomination by those six national committees who pay the highest percentages of the membership dues, combined with the highest percentages of technical committee and subcommittee secretariats. Nine other Members are elected from the membership. Account is supposed to be taken of the personnel; qualifications; a balanced geographical distribution; and the number of TC/SC secretariats held by their respective national committees.

Stakeholder participation and consultation

- **General participation and consultation**

ISO and IEC have recognised the need for consumer participation in standards work. They have agreed a common policy statement and a set of recommendations for their national membership. The recommendations are annexed to this paper. A second document from ISO: ‘The Consumer and Standards: guidance and principles for consumer participation in standards development’, published in March 2003, elaborates on the policy statement.
The arrangements that exist for stakeholder participation and consultation are based around the technical work and in the case of ISO the policy advisory committees. The arrangements are also based around the national delegation principle. Stakeholders are directed to the national Members of ISO and IEC. International or broadly based regional organisations can apply for liaison status to participate in the technical work of ISO or IEC. This process is examined in greater detail later.

ISO has formed its own consumer policy advisory committee in the form of COPOLCO. The membership of COPOLCO is, however, still nominally the national Members of ISO. The presence of consumer representatives on national delegations to the annual COPOLCO meeting is dependant on the national Members who determine the composition of the delegation. National delegations are appointed by the national standards bodies and under ISO rules consumer representatives do not have a right to be included on the delegation.

Scrutiny of the attendance lists at past ISO meetings reveals that not all delegations include consumer representatives. Some are simply made up of officials from the national standards bodies or only include government officials. At the meeting in May 2004, for example, there were 27 national delegations present. Only 13 of these appear to contain representatives from independent consumer associations with 14 delegations being comprised solely of representatives from the national standards body. Other organisations attend the COPOLCO meetings as observers. These include Consumers International and ANEC, the European consumer voice in standardisation.

IEC does not maintain its own Consumer Policy Committee; rather it has participated as an observer on an ad hoc basis at ISO COPOLCO meetings. Occasionally some IEC issues have been raised and addressed in COPOLCO meetings but the main thrust of COPOLCO is clearly ISO.

The influence of COPOLCO has increased through the 1990s with COPOLCO often taking the lead in proposing new avenues of work that are eventually taken up within ISO. Improvements in the workings of COPOLCO, and the attitude to consumer issues in ISO, have occurred gradually over time and some issues that have been raised have not been resolved. COPOLCO, for example, cannot choose its own chairman. This decision rests with the ISO Council which acts on the advice of a nomination committee composed of the ISO President, Vice-President Policy, Vice-President Technical Management and the Secretary-General. The committee acts in consultation with the outgoing COPOLCO chairman.

The work of the Technical Management Board (TMB), policy setting and governance bodies of ISO are not open to the public. The General Assembly holds a one-day open session as part of its annual meeting, usually around a specific theme of current interest to its membership. International and regional inter-governmental organisations and some NGOs participate at these events. The ISO Council is completely closed to outside participation.

The TMB to which the council delegates a lot of authority in respect of the technical work, is similarly closed. The TMB is comprised of only 12 Members so many ISO Members are also formally excluded. Influencing the TMB seems to rely on cultivating personal relationships with serving Members. This process is made difficult for NGOs, and other organisations outside the ISO membership, because the list of Members of the TMB is not published outside the ISO membership.

Developing countries, which are under-represented and have only two Members on the TMB, are also disadvantaged. SDOs from developing countries are often unable to attend other meetings in person and thereby could have difficulty cultivating the necessary personal relationships. The only information publicly available from ISO about the work of the TMB is the TMB Communiqué - a newsletter outlining some of the decisions taken by the TMB.

The situation in IEC is essentially the same. The Council, Council Board and Standards Management Board are not open to the public. Their documents are also password-protected on the website. Another important committee in IEC, the Advisory Committee on Safety (ACOS), draws its membership primarily from Technical committees and subcommittees dealing with safety matters. It also has four experts knowledgeable in safety matters but has no officer affiliation with any IEC technical committee or subcommittee dealing with safety matters. These experts are appointed in their own personal capacity. There is no specific provision for consumer participation. Documents are not publicly available.
Measures have been introduced recently to provide financial support for participation by representatives from developing and least developed countries (LDCs) in the work of ISO. This aid has been extended to consumer representatives. DEVCO, the developing countries policy development committee of ISO, has established a technical assistance fund. Other initiatives include sponsorship by national Members of participants from developing countries and training events held in developing countries. Two of these training workshops have been targeted at consumer representatives.

- **Accreditation process**

There is no formal accreditation process for NGOs in ISO comparable with the accreditation schemes that exist for the United Nations, WHO, Codex Alimentarius, or regional standards bodies such as CEN in Europe. Rather, there is a system of approving, on a case-by-case basis, individual liaisons between NGOs and specific technical bodies. This provision is contained in the ISO/IEC Directives. There are four classes of liaison status:

- **Category A** – organisations active at the technical committee or subcommittee level;

- **Category B** – for organisations that simply wish to be kept informed of the work of a technical committee or subcommittee;

- **Category C** – reserved for the use of JTC1 that is a joint technical committee of ISO and IEC that deals with information technology;

- **Category D** – for organisations who wish to be active at the level of a working group or project team.

This last category was introduced in 2001 to accommodate organisations with a very narrow interest in the work of a technical committee. An application for a liaison status has to be made to the central secretariat which refers it to the technical committee. The P-Members (Participating Members) of the technical committee then make a proposal to the ISO Secretary-General or IEC General Secretary. Once a liaison has been established, organisations are sent copies of all relevant documentation and are invited to participate in meetings.

There do not appear to be any cases of a international or broadly based regional organisation denied liaison status after consultation with the P-Members.

Both CI and ANEC have active liaisons. However the fact remains that NGOs do not have a right to participate and must apply each time. In theory at least, a negative vote from a P-Member would disqualify an NGO from immediate registration as a liaison. The process for dealing with a negative vote is also unclear from the ISO directives.

ISO and IEC do not provide any specific additional secretariat or resource support for organisations in liaison. As discussed above there are some resources available for the policy development committees dealing with consumer issues and developing countries issues. These resources have been increased in recent years.

The process does not differentiate between business and civil society NGOs. However, the need for civil society NGOs to participate independently is greater, as there is a perception that industry dominates most of the national standards development organisations. For example a recent study of the ISO 14000 process found that the participants in the TC207 committee are heavily concentrated in large global industry, and that small business, consumer and environmental groups remain under-represented.

**Transparency**

As previously noted management body documents from ISO and IEC are not publicly available. Documents from specific technical bodies are available to organisations that have a liaison with them. They should also be available to NGOs who participate in national mirror committees (committees that are established within national SDOs to follow work at international level and who decide on the positions national delegations will take to international meetings and how national votes will be cast during the international standards development process).

In early 2005 the Pacific Institute reached a formal agreement with ISO for a one-year pilot project to publish draft international standards on its web site. The Pacific Institute participates in environmental international standards work and co-ordinates an initiative called the International NGO Network on ISO (INNI).

ISO technical body business plans and IEC technical body strategic policy statements are all publicly available on the respective websites. These are
Decision Making in the Global Market

relatively recent initiatives by ISO and IEC taken to increase the transparency of the technical work, especially with respect to the concern that the work of the technical bodies should be relevant to the marketplace.

Accountability
There is an appeals process but this is only open to ISO and IEC Members and not to liaison organisations.

National bodies have the right of appeal:
- to the parent technical committee on a decision of a subcommittee
- to the technical management board on a decision of a technical committee
- to the ISO council or IEC council board as appropriate on a decision of the technical management board.

The appeal has to be lodged within three months of the decision in question. The decision of the council or council board on any case of appeal is then final.

There are certainly instances where national consensus-building procedures have been compromised or evaded all together and this has gone un-rectified by ISO. One well-documented example is the case of the Swedish proposal for a new work item for an

The Standards Development Process

Standards writing process in ISO and IEC

<table>
<thead>
<tr>
<th>Stage</th>
<th>Main features</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preliminary stage</td>
<td>Work items that are not sufficiently mature for processing to further stages</td>
</tr>
<tr>
<td>Proposal stage</td>
<td>New work item proposal for A new standard A new part in an existing standard In ISO revision or amendment of an existing standard or part A technical specification or a publicly available specification Proposal may be made by A national body The secretariat of the relevant technical body Another technical body An organisation in liaison The TNB or one of its advisory groups CEO To be accepted requires a commitment in IEC by 25% of P-Members in technical body (minimum of four) In ISO 5 P-Members And approval by a simple majority of the P-Members of the technical body</td>
</tr>
<tr>
<td>Preparatory stage</td>
<td>Work may be carried out in a working group in ISO or project team in IEC. P-Members making commitment to proposal must nominate experts. Other P-Members and A- or D- organisations in liaison may also nominate experts Preparatory stage ends once a working draft is ready for circulation to the Members of the technical body as a first committee draft (CD)</td>
</tr>
<tr>
<td>Committee stage</td>
<td>Principal stage at which comments from national bodies are taken into consideration Three month consultation process to all P and O Members Compilation of comments circulated to P and O Members within four weeks of closure of period for comment</td>
</tr>
<tr>
<td>Enquiry stage</td>
<td>Five month vote draft distributed to all national Members</td>
</tr>
<tr>
<td>Approval stage</td>
<td></td>
</tr>
</tbody>
</table>
environmental communications standard where the US national committee disregarded its own procedural rules to issue a counter-proposal to the Swedish proposal. Another instance is voting on an ISO standard on cigarette lighters, where national subsidiaries of international and European companies and trade associations suddenly applied for membership of national mirror committees in order to oppose a requirement in the standard for child resistance.

Cross-comparative analyses between national, regional and international standards bodies

The foundation of the ISO process is the national delegation principle. Measurement of the ability of stakeholders to participate in national delegations and in the work of ISO Members is, therefore, very important.

There are a number of research reports that have addressed specifically the issue of consumer representation in standardisation internationally. A report from 1997 examining the situation nationally in countries whose national Members of ISO were also Members of ISO COPOLCO, found that of the 41 Members responding to the survey, 16 had a consumer committee, 18 had consumer participation in the governing body and 37 had consumer participation in technical committees.

A survey conducted for Consumers International (CI) in 2000 garnered a 34% response rate from the 264 Members that comprised the CI membership at that time. Of those that responded:

- 86% had contact with their national Member of ISO and 80% attended meetings with them;
- 48% had membership of the board of the national Member of ISO; and
- 50% of the national Members of ISO have a consumer policy officer for consumer organisations to liaise with.

The survey also identified overwhelming interest to participate in international standards work (86%) and national standards work (83%).

Another survey of its Members in 2004 permitted CI to identify its priorities for technical standards work. The survey also made some findings in respect of the level of participation in standards work. Most of the organisations that replied to the CI survey had some contact with their national standards bodies. While two thirds of the organisations were active on national technical committees or working groups only one third were active at the international level.

The difficulty of participating at the international level is also borne out by the findings of a survey into consumer representation in standardisation undertaken by the European Commission in 2004. The summary report of the findings of the survey concluded that one particular problem concerned the participation of consumer organizations in international standardisation, which seemed to be out of their reach.

Other civil society groups also have difficulty participating in international standards work. A recent report by the Pacific Institute examined participation in the work of ISO TC207 the technical committee overseeing the drafting of environmental management standards. It found that developing countries, governments and civil society were under-represented. The report also found that publicly available information on stakeholder involvement in ISO standards development is very limited and that there is no consistent and systematic protocol for tracking stakeholder participation.

At the time of revising this report (March 2005) research on barriers to consumer representation in standardisation was taking place in the UK and in Canada. CI has also launched a project aimed at improving levels of consumer representation in Latin America. ISO-COPOLCO launched a virtual working group at its meeting in May 2004 to examine consumer participation. In particular the group was asked to examine current practice and limitations of consumer participation, benchmarking of consumer representation in ISO, existing standards or guidance on public participation and to analyse the information it gathered in the light of the final ISO Strategy.

Benchmarking

When seeking to establish a benchmark of its Members’ practices against which to compare ISO and IEC it is probably better to take the most influential national Members of ISO. De Vries ranked national Members of ISO for their influence in ISO according to the following formula:

\[
\text{Number of WG secretariats} + 2 \times \text{number of SC secretariats} + 4 \times \text{number of TC secretariats}.
\]
So, for example, if the national SDO of Country A has four WG secretariats, 3 SC secretariats and 5 TC secretariats – its index would be 4+(2X3)+(4X5)=30.

The presence of consumer representation in the board of the national Member of ISO and the existence of a national consumer standards committee is identified from the COPOLCO directory.

<table>
<thead>
<tr>
<th>Country</th>
<th>Ranking</th>
<th>Consumer representation in board</th>
<th>Consumer committee</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States</td>
<td>715</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Germany</td>
<td>711</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>UK</td>
<td>602</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>France</td>
<td>392</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Sweden</td>
<td>181</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Japan</td>
<td>143</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Canada</td>
<td>114</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Netherlands</td>
<td>113</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Russia</td>
<td>80</td>
<td>Unknown</td>
<td>Unknown</td>
</tr>
<tr>
<td>Norway</td>
<td>76</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>

It is interesting to note that with the exception of Russia, in respect of which data was not available, all the national Members of ISO have consumer committees and have, or have had, consumer representation at the governing board level. ISO has its consumer committee COPOLCO but does not have consumer representation in its governing body.

ANEC, the European consumer voice in standardisation, has also reported on the national arrangements specifically in Europe, most recently in May 2001. ANEC found that in the 18 EU and EFTA Member states 10 had consumer representatives on the boards of the national Members of the European standardisation organisations and 11 had consumer committees devoted to the consideration of standards issues (seven of these inside the national Members of the European standardisation bodies and four outside).

In the remaining countries consumer groups were consulted on an ad hoc basis. Finally only nine countries provided financial support for consumer participation in standardisation. The vast majority of this support comes from government. The European Commission has more recently carried out its own survey. The Commission findings have borne out the findings of the earlier ANEC studies.

Europe is an important case study as the European regional standards writing model in CEN and CENELEC is essentially the same as the international model found in ISO and IEC and both organisations have a large standards output. Other regional groups such as COPANT write many fewer standards than CEN or ISO and do not generally operate in areas of consumer priority, thereby lessening considerably NGO interest to participate in their work. Accordingly, these regional groups can be discounted for benchmarking purposes. Codex is also an interesting model as there has been a considerable demand from NGOs to participate in their activities.

CEN created a form of associate membership for European NGOs and industry associations. Associate Members have the right to participate in the General Assembly (without voting rights), the Administrative Board when policy matters are being discussed, the Technical Board and any other technical body. They also receive all relevant documentation and information, including draft standards.

Since associate membership was introduced in 1993, there have only been eight organisations admitted to CEN as associate Members. Few industry groups have chosen to follow this route. This probably reflects the fact that ultimately the majority of industry federations and associations are concerned with the standards work in their own specific sector and a liaison with the technical committee involved is sufficient for their means. Rather the introduction of associate membership has been intended to provide a means for social partners to become more closely involved in the work of CEN. Consumers, trade unions, environmental groups and a European group representing the interests of small and medium enterprises (SMEs) are all associate Members of CEN.

Associate membership has not opened the floodgates and unnecessarily diluted the principle of national delegations that is as much the basis for CEN’s work as it is for ISO. In an ISO context one could also imagine that associate membership might also provide a means for entry for NGOs involved in development issues.

ISO and IEC compared to their recommendations to their own members

The fundamental issue is whether there should be direct stakeholder participation at the international level. It should be relatively easy to make a case in the specific instance of disadvantaged groups such as consumer groups, development NGOs, trade
unions or environmental groups. They are invariably a minority interest at the national level so it is too easy for their voice to be lost in the drive for national consensus and a national line to present at international standards meetings. Direct participation gives voice to their concerns. This principle has been accepted in many other arenas such as the Codex Alimentarius Commission and in the United Nations Economic Commission for Europe (UNECE) where global technical regulations for vehicle safety are being developed. The World Trade Organization (WTO) itself also engages directly with international NGOs.

The following table compares the relevant provisions of the recommendations to their memberships of the ISO/IEC statement on consumer participation. The complete list of recommendations is reproduced in an appendix to this report.
<table>
<thead>
<tr>
<th><strong>Relevant provisions of the ISO/IEC Statement</strong></th>
<th><strong>ISO</strong></th>
<th><strong>IEC</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>1. National bodies shall support ISO and IEC initiatives aimed at encouraging consumer representation in standardisation.</td>
<td>ISO has its own consumer policy committee COPOLCO</td>
<td>IEC’s participation in COPOLCO has been very patchy in the past. IEC does not have a consumer committee of its own.</td>
</tr>
<tr>
<td>2. There should be provision at the national level for consumer participation in the initiation and planning of the standards work programmes, both national and international, as well as in policy matters relevant to the consumer.</td>
<td>Apart from COPOLCO there is no direct participation in the policy-making bodies of ISO e.g. Technical Management Board, Council or General Assembly. IEC does not recognise consumer representation above national level in policy matters.</td>
<td>No participation above technical level – actively discourages consumer representation above technical level</td>
</tr>
<tr>
<td>3. At the national level, consumer interests should be invited to participate in all technical committees executing standards projects affecting the interests of the consumer. The degree of participation should reflect the relative importance to consumer interests of the particular project.</td>
<td>ISO does not have any established policy or procedure requiring it to actively seek the direct participation of NGOs in its work technical or otherwise</td>
<td>Nothing</td>
</tr>
<tr>
<td>4. If consumers are not able to finance their participation in the standardisation process themselves, the national body should enable consumers to participate in priority areas of consumer interest. It should be recalled that consumers form an integral part of the consensus-building process.</td>
<td>ISO does not provide any financial support outside secretariat services to COPOLCO</td>
<td>No financial support</td>
</tr>
<tr>
<td>7. Standards work can be technical and complex by nature. Where possible and necessary, national bodies should provide consumer representatives with guidance and training on standards procedures and with briefings on technical issues, in order to make their contribution both effective and based on a knowledge of real possibilities. Consumer representatives should receive early notice concerning upcoming meetings and should receive documents in sufficient time to review them thoroughly.</td>
<td>COPOLCO has arranged some training courses for consumer representatives financed by third parties</td>
<td>IEC does not provide any training for consumer representatives</td>
</tr>
<tr>
<td>Relevant provisions of the ISO/IEC Statement</td>
<td>ISO</td>
<td>IEC</td>
</tr>
<tr>
<td>---------------------------------------------</td>
<td>-----</td>
<td>-----</td>
</tr>
<tr>
<td>There should also be access for persons with disabilities, for anyone who requires it.</td>
<td>ISO publishes a newsletter, Focus, but it is only available upon payment. Other information is available on the ISO website. It is in somewhat of a decentralised format and a lot of information regarding the technical work, technical management and policy development is password protected.</td>
<td>IEC publishes its own Bulletin. Other information is available on the website but there is nothing targeted at consumers, unlike in the case of ISO. Again a lot of information is password protected in the document management system.</td>
</tr>
<tr>
<td>8. National bodies should ensure effective communication to consumer groups, other relevant organisations and the general public, on the results of their standards work of interest to consumers. Whenever possible, they should use publicity expertise and new possibilities offered by technological development (such as the Internet), to encourage feedback and the application of standards.</td>
<td>ISO only formally consults with its Members. A more recent development has been the creation of ad hoc multi-stakeholder groups to examine the feasibility of ISO in specific sectors such as Corporate Social Responsibility. The direct involvement of consumer groups in this work is to be welcomed but this process has not been formalised.</td>
<td>IEC only consults with its national Members.</td>
</tr>
<tr>
<td>9. National bodies should be encouraged to ‘sound out’ consumer opinion through existing consumer organisations or, if no such organisations exist, on their own initiative.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>10. During the standards-writing process, consumer input should be sought (see chart of standards process below and annex of text of recommendations). To target consumer input, the setting of priority areas of work is very important. There should be a process for identifying priority areas of work where consumer participation is deemed essential, as well as areas where consumer involvement is considered less critical, i.e. when keeping consumers informed may be sufficient. Technical committees and standards bodies should work with consumers to try to identify priority issues for</td>
<td>COPOLCO has its own priorities group and COPOLCO in general has been able to influence the priorities adopted by ISO. There is however a need for better publication of these activities to interested groups and through CI. This is under discussion.</td>
<td>The only consumer input is through national committees or through Consumers International who have been able to get liaison status on some technical committees.</td>
</tr>
</tbody>
</table>
Relevant provisions of the ISO/IEC Statement

<table>
<thead>
<tr>
<th>ISO</th>
<th>IEC</th>
</tr>
</thead>
</table>

| consumer participation, for example on the basis of the priority areas identified by COPOLCO. Standards bodies should also seek to identify, for the priority areas, consumer representatives. They should organise an effective system of communication between these representatives and the officer in charge of that work at the national standards body. |

| COPOLCO is a committee composed of national delegations from ISO Members. National consumer committees, where they exist, usually consist of representatives of consumer organisations. We have also seen that national SDOs and European SDOs allow direct consumer participation at higher technical management, policy and governance levels – something ISO and IEC do not. |

| IEC has no consumer committee. It has participated in COPOLCO but the participation has been inconsistent. |

| 11. National bodies are invited to study the composition and terms of reference of the various consumer committees of other national bodies, and to consider whether any changes in their own national structures would be appropriate in order to follow these recommendations. |

| Organisations in liaison can propose new work items to technical bodies otherwise the only avenue open to consumer groups is through COPOLCO |

| Organisations in liaison can propose new work items to technical bodies. |
Inventory of Proposals for Reform

The following chapter is not a statement of CI policy. Rather it is an inventory of proposals for reform that have been made to date by organisations including CI and other NGOs. This inventory and the rest of the findings of this report, together with the findings of other components of the Global Governance project, will help inform the development of future CI policy.

The ISO Horizons exercise has clearly identified stakeholder involvement as being an area for concern and one where ISO needs to do better. The consultation process that ISO has undertaken has necessarily solicited a number of proposals for reform addressing this important issue. A summary of the findings of the consultation has been made available to ISO Members. The main general findings of the analysis with respect to stakeholders are contained in the following box.

ISO’s current practices are considered to be consistent with ISO’s stated principles, and it has been noted that the national delegation principle works well, ensuring substantial stakeholder participation.

However the vast majority of responses indicate that is difficult to guarantee access to all stakeholders and that there are significant margins for improvement, in particular as far as participation of certain stakeholders’ groups are concerned, notably:

- **consumers and small and medium enterprises** (SMEs) (indeed, most of the comments concern these two groups of stakeholders)

- **regulatory authorities** (their participation is sometime considered insufficient, in particular when standards with a potential for reference in technical regulations are concerned);

- **direct participation from industry** (notably concerning fast-changing fields and emerging technologies).

Many recommendations were made with respect to action that could be undertaken by ISO to strengthen and extend stakeholder participation.

These lines of action can be grouped into three main categories:

- communications and promotion
- modification/improvement of processes (concerning participation and dissemination of information)
- development of new mechanisms to foster the participation of disadvantaged categories of stakeholders.

Proposals concerning lines of action to be considered for each of the above categories are outlined below.

**Communications and promotion**

- Increase communication efforts to raise awareness and promote the concept of balanced stakeholder representation

- develop guides for national standards bodies, addressing the issue of how to associate civil society and small and medium enterprises

- improve communication concerning ISO’s deliverables other than standards, raising awareness of the alternatives to full standards development.
Some proposals that were made by stakeholders are not reflected in this summary of the consultation exercise prepared by ISO. For whatever reason, ISO has chosen not to reflect all the comments that have been made. A number of other comments that were made were pertinent to the issue of consumer representation in standardisation. Given the fact that ISO acknowledges that stakeholder involvement is an issue of concern this is perhaps somewhat surprising.

Consumers International in particular stressed the need to ensure better implementation of its joint ISO/IEC policy on consumer participation. CI also proposed ISO to consider strengthen CI’s role along the lines of the European model where ANEC is represented in the European standards bodies, not only at the technical level but also at the strategic level.

ANEC proposed complementing national representation of consumer interests and other NGO interests by regional and international organisations, and establishing a status equivalent to the one of Associate Members in CEN. ANEC also additionally called for:

- measures to be implemented seeking to establish a balance of social interests, including balanced composition of project teams or Chairman’s advisory groups
- establishment of a conflict resolution mechanism within ISO
- identifying stakeholder interests in addition to the national positions
- identifying TC Members/participants according to interest groups
- establishment of a funding mechanism for consumer participation
- public access to draft standards in order to ensure

Some proposals that were made by stakeholders are not reflected in this summary of the consultation exercise prepared by ISO. For whatever reason, ISO has chosen not to reflect all the comments that have been made. A number of other comments that were made were pertinent to the issue of consumer representation in standardisation. Given the fact that ISO acknowledges that stakeholder involvement is an issue of concern this is perhaps somewhat surprising.

Consumers International in particular stressed the need to ensure better implementation of its joint ISO/IEC policy on consumer participation. CI also proposed ISO to consider strengthen CI’s role along the lines of the European model where ANEC is represented in the European standards bodies, not only at the technical level but also at the strategic level.

ANEC proposed complementing national representation of consumer interests and other NGO interests by regional and international organisations, and establishing a status equivalent to the one of Associate Members in CEN. ANEC also additionally called for:

- measures to be implemented seeking to establish a balance of social interests, including balanced composition of project teams or Chairman’s advisory groups
- establishment of a conflict resolution mechanism within ISO
- identifying stakeholder interests in addition to the national positions
- identifying TC Members/participants according to interest groups
- establishment of a funding mechanism for consumer participation
- public access to draft standards in order to ensure
input from all stakeholders; in other words commitment to consult stakeholders who are not represented, for instance in writing

• establishment of an internal mechanism to monitor the above mentioned measures.

ANEC stated its conviction that International Standards Bodies have to comply with the same principles European standardisation is based on.

The International Institute for Sustainable Development (IISD) stated that not enough is being done to encourage the establishment of representative mirror committees at the national level. The IISD also proposed that the ISO CS should have a process in place to verify that national standards boards’ are taking necessary and reasonable steps to truly represent a national consensus position of all interested parties. IISD also proposed that it would be appropriate for each new work item proposal to include guidance for national standards boards in determining the composition of their national delegations and mirror committees. Depending on the extent to which the new work item is related to a field of NGO interest no specific guidance will be needed; in others, the credibility of ISO’s engagement in a field of standardisation may be undermined unless ISO takes proactive steps to ensure consumer participation.

Echoing ANEC and CI, IISD also expressed its belief that liaison organisations must be integrated into the standardisation process and the governance structures of ISO Central Secretariat and technical committees. IISD proposed that technical committees should be required to address governance and representation issues in their business plans, setting, for example, clear targets for stakeholder participation in the Chairman’s Advisory Groups.

IISD goes on to discuss the nature of consensus within the work of ISO. They identify that paragraph 8 of Annex 4 of the Report of the Second Triennial Review of the TBT Agreement states that: ‘Consensus procedures should be established that seek to take into account the views of all parties concerned and to reconcile any conflicting arguments.’ Article 1.17.5 of the ISO Directives, Part 1 states: ‘Technical committees and subcommittees shall seek the full and, if possible, formal backing of the organisations having A-liaison status for each International Standard in which the latter are interested.’ IISD state that their experience to date suggests that there is a distinct absence of any mechanism that would enable technical committees to seek the full and formal backing of liaison organisations.

The IISD also directed ISO’s attention to the report prepared by the NGO Members of ISO Technical Committee 207. The 14 recommendations contained in this report address the need to ensure balanced representation in national delegations and enhancing the effectiveness of direct representation at the international level.

ANSI stressed the need to give greater consideration to direct multi-stakeholder participation in the work of ISO, as well as ensuring effective implementation of stakeholder participation in the work of national delegations. ANSI also proposed surveying Member bodies on their internal requirements and practices for stakeholder engagement, and sharing and encouraging the use of best practice. ANSI proposed to amend the ISO processes to encourage Member bodies to conduct public review and comment at all major stages of ISO standards development.
New ISO Strategy 2005-2010

Final ISO strategy
ISO Strategy for 2005-2010 was unanimously approved at the ISO General Assembly meeting in Geneva 15-16 September 2004. The plan articulates a global vision of ISO in 2010 and identifies seven key objectives:

1. Developing a consistent and multi-sector collection of globally relevant international standards;
2. Ensuring the involvement of stakeholders;
3. Raising the awareness and capacity of developing countries;
4. Being open to partnerships for the efficient development of international standards;
5. Promoting the use of voluntary standards as an alternative or as a support to technical regulations;
6. Being the recognised provider of International Standards and guides relating to conformity assessment;
7. Providing efficient procedures and tools for the development of a coherent and complete range of deliverables.

The most important of these for consumer groups is ensuring the involvement of stakeholders (see following box).

Ensuring the involvement of stakeholders

Result: ISO, through its national Members, its network of liaisons and partnerships, its coherent set of deliverables, its electronic accessibility and its initiatives, promotes the value of voluntary standardisation, allows adequate involvement of interested and affected stakeholders in its work and processes, and thus builds the appropriate level of consensus to ensure that its deliverables are effectively used and recognised in world markets.

Actions

- Survey and facilitate the involvement by its Members of interested and affected stakeholders at the national level, especially private sector, public sector and authorities, as well as consumer organisations.
- Optimise liaisons and involvement with representative international organisations of stakeholders.
- Develop mechanisms to better capture the expectations and feedback of industry stakeholders.
- Investigate funding to support the participation of under-represented groups (e.g. consumers).
- Assess whether International Workshop Agreements (WAs) are an effective means to enable alternative modes of stakeholder participation in ISO and clarify the corresponding business model.
- Develop and disseminate training and educational material on the nature and practice of voluntary standardisation for teachers and students, participants in standardisation, staff of ISO Members and other standards developing organisations.
- Enhance communication tools, develop initiatives and encourage studies to demonstrate and promote the economic and social benefits of voluntary standardisation to political and economic leaders, higher education, standards users and the general public.

Source: ISO Strategy 2005-2010
Annual strategy implementation plans are to be drawn up that will identify:

- general measures to be undertaken;
- specific initiatives aimed at fulfilling the strategic objectives;
- performance indicators to measure the progress of the implementation of the strategic plan.

ISO action plan for developing countries
The ISO code of ethics adopted in June 2004, contained a commitment by ISO to contribute to actions to help ISO Members from developing countries improve their capacity and their participation in international standardisation. The first concrete realisation of this commitment has been the agreement of an ISO action plan for developing countries 2005-2010.

Deliverables under the action plan include training in and awareness of ISO's initiatives in the area of social responsibility and the role of consumers in the standards-making process.

**ISO work on social responsibility**
Perhaps the first test of a more open approach from ISO towards stakeholders is going to be the development of a guidance document for social responsibility ISO26000. In discussing whether to go ahead with work on social responsibility, ISO received many comments on the difficulties various stakeholder groups faced in participating in international standards work. This led to a novel approach being adopted for the development of the social responsibility document.

National delegations in the working group can be composed of up to six delegates, one delegate coming from each of the following six interest groups: Industry, labour, government, consumer, NGO and others. ISO has also identified international organisations falling into these categories to be invited to participate in the work as organisations in D liaison status. Each organisation may send a delegation of two to the working group meetings. Organisations not identified initially by ISO and who wish to participate can apply to the Technical Management Board of ISO for D liaison status.

Another interesting feature of the approach being taken is twinned leadership of the working group.

Under this arrangement, a ISO Member from a more developed nation shares leadership with an ISO Member from a less well-developed country. In this case it will be Sweden and Brazil.
Annex: Reproduced from the ISO/IEC Statement on Consumer Participation in Standards Work

Recommendations

ISO and IEC make the following recommendations jointly to the national bodies (Member bodies and National Committees) of both organisations:

1. National bodies shall support ISO and IEC initiatives aimed at encouraging consumer representation in standardisation.

2. There should be provision at the national level for consumer participation in the initiation and planning of the standards work programmes, both national and international, as well as in policy matters relevant to the consumer.

3. At the national level, consumer interests should be invited to participate in all technical committees executing standards projects affecting the interests of the consumer. The degree of participation should reflect the relative importance to consumer interests of the particular project.

4. If consumers are not able to finance their participation in the standardisation process themselves, the national body should enable consumers to participate in priority areas of consumer interest. It should be recalled that consumers form an integral part of the consensus-building process.

5. Where a technical committee is developing an International Standard primarily of interest to consumers, national bodies should seek the active participation of consumers in national delegations. It is essential that the consumer representatives are involved when the delegation is briefed and that the consumer view is taken into account when decisions on the national position are taken.

6. To assist national bodies in this effort, technical committees should include a statement in their new work item requests to highlight the fact that a specific international standardisation matter is of particular interest to consumers (as required by the ISO/IEC Directives, Part 1, Annex C).

7. Standards work can be technical and complex by nature. Where possible and necessary, national bodies should provide consumer representatives with guidance and training on standards procedures and with briefings on technical issues, in order to make their contribution both effective and based on a knowledge of real possibilities. Consumer representatives should receive early notice concerning upcoming meetings and should receive documents in sufficient time to review them thoroughly. There should also be access for persons with disabilities.

8. National bodies should ensure effective communication to consumer groups, other relevant organisations and the general public, on the results of their standards work of interest to consumers. Whenever possible, they should use publicity expertise and new possibilities offered by technological development (such as the internet), to encourage feedback and the application of standards.

9. National bodies should be encouraged to ‘sound out’ consumer opinion through existing consumer organisations or, if no such organisations exist, on their own initiative.

10. During the standards-writing process, consumer input should be sought in particular at the following stages:

- during the establishment of standardisation work programmes
- as soon as a subject is proposed to the standards body for study, at the time the feasibility of the project is being established and prior to the establishment of the draft proposal
- when establishing the scope of the standard (e.g. health and safety, fitness for use and environment), listing the characteristics, assigning the tasks to the Members of the committee and determining whether research among consumers is necessary
- during the technical committee’s work, whenever a decision is to be made that affects the established scope and/or the required performance level(s)
- whenever national delegations are briefed for their participation in international standards work, encouraging representation of consumer interests on national delegations
- following the circulation of the draft, when the committee considers all the comments received
• at the voting stage.

(A list of key moments for consumer input in standards development is given at Annex.)

To target consumer input, the setting of priority areas of work is very important.

There should be a process for identifying priority areas of work where consumer participation is deemed essential, as well as areas where consumer involvement is considered less critical, i.e. when keeping consumers informed may be sufficient. Technical committees and standards bodies should work with consumers to try to identify priority issues for consumer participation, for example on the basis of the priority areas identified by COPOLCO.

Standards bodies should also seek to identify, for the priority areas, consumer representatives. They should organise an effective system of communication between these representatives and the officer in charge of that work at the national standards body.

11. National bodies are invited to study the composition and terms of reference of the various consumer committees of other national bodies, and to consider whether any changes in their own national structures would be appropriate in order to follow these recommendations.

12. National bodies should provide a mechanism to allow consumer representatives to request that standards projects be initiated and to ensure that these initiatives have normal opportunities to progress.

13. Particular attention should be paid to providing a close co-ordination of all activities arising from these recommendations within the same country. This would also facilitate a common approach to matters of consumer interest in international standardization.

Key moments for consumer input in standards development

Stage in process consumer input
New work item
Consumer representatives should be involved in identifying new work items for the standards bodies, and should be informed of the commencement of work on new work items to allow them to identify priorities for direct consumer participation.

Consensus-building within working group
Consumer representatives may wish to participate directly on priority issues.

Consensus-building within SC/TC
Consumer representatives should be consulted as part of the national consensus-building process on matters of consumer interest.

Enquiry draft voting (DIS in ISO, CDV in IEC) (as above)
Approval vote (FDIS in ISO/IEC) (as above).

Publication of new standard
Where possible, consumer representatives should help to ensure that standards are actually used.

Periodic review/revision
Consumer representatives should provide feedback from the practical application of the standard.
Footnotes

1 Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with relation to Articles 2, 5 and Annex 3 of the Agreement, G/TBT/9, Annex 4 (13 November 2000).

2 This approach saw national regulations being harmonised at the European level through the adoption of Directives that establish a general requirement for goods to be safe but do not go into any great product-specific technical details other than to specify essential safety requirements applicable to all products. European standards are one way of demonstrating compliance with the essential safety requirements. Use of a Harmonised European standard resulting in a presumption of conformity with the legislation and often requiring a less onerous conformity assessment procedure to be applied than would be the case if another standard or technical specification were applied.

3 Code of Ethics, ISO, June 2004

4 All ISO Members and ISO organizational entities

5 ISO/COPOLCO/DEVCO seminars, Making an impact: Consumer representation in standards-setting Regional seminar programme, Bangkok, Thailand – 8 September 2003 and Making an impact: consumer representation in standardization, was held on 6 April 2004 in Cairo Egypt

6 IEC Statutes and Rules of Procedure 2001 Article 2

7 The IEC in Figures as at 22 January 2004 accessed on the IEC website

8 ISO Statutes and Rules of Procedure; Article 2.1 ISO Statutes

9 Article 2.2.2 ISO Statutes

10 ISO in Figures January 2004

11 This approach saw national regulations being harmonised at the European level through the adoption of Directives that establish a general requirement for goods to be safe but do not go into any great product-specific technical details other than to specify essential safety requirements applicable to all products. European standards are one way of demonstrating compliance with the essential safety requirements. Use of a Harmonised European standard resulting in a presumption of conformity with the legislation and often requiring a less onerous conformity assessment procedure to be applied than would be the case if another standard or technical specification were applied.

12 Agreement on Technical Barriers to Trade, Annex 1, para. 2


14 Communication from Brazil, G/TBT/W/140 (28 July 2000).


16 ASME standards policy ASME Board on Government Relations CY 2003-2004 Objectives


18 ISO/DEVCO/TMB Survey 2002

19 Code of Ethics, ISO, June 2004

20 All ISO Members and ISO organizational entities

21 Article 5 of the decree of 24 May 1941

22 ISO Council Resolution 48/1964

23 ISO in figures for the year 2003

24 ISO Statutes Article 7

25 ISO Statutes Article 8

26 ISO Statutes Article 15

27 IEC in figures as at 22 January 2004 accessed on the IEC website

28 ISO Statutes Article 8

29 ISO Statutes Article 9

30 IEC Statutes Article 10


32 ISO/COPOLCO/DEVCO seminars, Making an impact: Consumer representation in standards-setting Regional seminar programme, Bangkok, Thailand – 8 September 2003 and Making an impact: consumer representation in standardization, was held on 6 April 2004 in Cairo Egypt


34 The draft international standards can be accessed on: http://www.pacinst.org/inni/dis/ . The website requires registration.


36 ISO14000 Update June 2001 Vol VII No.6 (Business and the Environment’s ISO 14000 Update Service)


38 Consumers’ International work area priorities for Involvement in international standards (non-food topics) - to inform the development of CI’s Standards Strategy Part 1: Summary February 2005

39 Questionnaire on Consumer Representation in Standardisation activities at National, European and International level Evaluation Report, European Commission 2005


41 Standardization A business approach to the role of National Standardisation Organisations Henk J. de Vries, Kluwer, 1999

42 COPOLCO Directory 7th edition August 2003

43 ANEC, Consumer representation in standardisation national arrangements in the EU and EFTA May 2001
44 ISO Strategic planning process: results of the consultation and analysis of the responses GA 2004-STRAT UPDATE 2004-02-10

45 ANEC comment on ISO Horizon Consultation referred to in the ANEC comment on the Commission working document on the role of European standardisation in the framework of European legislation and policies ANEC 2003/GA/054 11 December 2003

46 ISO/TC 207/N590: ‘Increasing the Effectiveness of NGO Participation in TC207’

Decision Making in the Global Market
Governance in the Codex Alimentarius Commission

Prepared for Consumers International
By Steve Suppan
Institute for Agriculture and Trade Policy
## Governance in the Codex Alimentarius Commission

### Executive Summary

The Codex Alimentarius Commission and committees, known as ‘Codex’, is an intergovernmental body administered by the World Health Organization (WHO) and the Food and Agriculture Organization (FAO) of the United Nations, to set international food standards. Founded in 1962, Codex’s mission has been to protect the health of consumers and prevent unfair practices, such as deceptive labelling, in the international food trade. Codex standards are offered to government Members for voluntary adoption in domestic laws, and for application to their food exports and imports and domestically produced and consumed food.

Codex standards are among international standards referenced as *presumptively authoritative*, in the World Trade Organization (WTO) Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), for the purpose of facilitating trade and for resolving trade disputes over barriers created by national food safety standards.

Motivated in part by the change in the legal status of Codex standards under the SPS Agreement, FAO and WHO initiated an Evaluation of Codex and the FAO/WHO Food Standards Programme in 2002. The Evaluation’s recommendations include speeding up the notoriously slow Codex standard-setting process and making its work more ‘efficient.’ This paper analyses some of the Evaluation’s recommendations, and their possible implementation by Codex, in terms of whether they will enhance consumer governance in the Codex Alimentarius Commission.

### Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Executive Summary</td>
<td>77</td>
</tr>
<tr>
<td>Recommendations</td>
<td>80</td>
</tr>
<tr>
<td>Introduction</td>
<td>81</td>
</tr>
<tr>
<td>Codex and Consumer Rights</td>
<td>83</td>
</tr>
<tr>
<td>The Codex Evaluation of 2002</td>
<td>84</td>
</tr>
<tr>
<td>Enhancing Participation in Codex Decision Making</td>
<td>85</td>
</tr>
<tr>
<td>Can Standards to Facilitate International Trade</td>
<td>87</td>
</tr>
<tr>
<td>Prevent Unfair Trade Practices?</td>
<td></td>
</tr>
<tr>
<td>Codex and SPS Standards in the International</td>
<td>88</td>
</tr>
<tr>
<td>Political Economy</td>
<td></td>
</tr>
<tr>
<td>Models of Decision Making in Codex: the Eight-step Procedure</td>
<td>93</td>
</tr>
<tr>
<td>Provision of Expert Scientific Advice to Codex</td>
<td>95</td>
</tr>
<tr>
<td>A Crisis in the Codex Acceptance Procedure</td>
<td>96</td>
</tr>
<tr>
<td>FAO/WHO Capacity Building</td>
<td>99</td>
</tr>
<tr>
<td>Conclusion</td>
<td>100</td>
</tr>
</tbody>
</table>
protection and particularly the protection of consumer health. A critique of the methodology of the Evaluation and issues not yet dealt with by the Evaluation is at Annex 1.

This paper explains Codex’s global governance role in the international political economy and summarises the debate over the Evaluation’s recommendations in four areas:

- enhancing consumer and public interest organisation participation in Codex decision making to improve standards
- FAO/WHO provision of expert scientific advice to Codex committees
- national adoption, implementation and enforcement of Codex standards
- FAO/WHO capacity building for more effective national food safety and quality control systems


Codex
Codex states that its main purposes are: protecting the health of consumers, ensuring fair trade practices in the food trade and promoting co-ordination of all food standards work undertaken by international governmental and non-governmental organisations.

Membership of Codex is open to all WTO Member States and Associate Members of FAO and WHO. National delegations to Codex are led by senior officials appointed by their governments. Delegations may, and often do, include representatives of industry, consumer organisations and academic institutes.

Countries that are not yet Codex Members sometimes attend in an observer capacity. Some international governmental organisations and international NGOs also attend in an observer capacity. They may present submissions to the meeting at every stage except in the final decision, which is the exclusive prerogative of Member States. Over the past 35 years, CI has participated in Codex standards setting at the Commission at six regional committees, eight substantive committees and two ad hoc task forces. Nevertheless it still covers only about a half of all Codex bodies.

CI’s proposals for Codex standards have incorporated the best available scientific evidence and other factors, such as ethical principles, as the basis for safety decisions. It has advocated open and transparent decision making with greater consumer participation in the expert consultations that provide the scientific basis for standard setting. CI has worked to focus Codex on its consumer protection mandate, rather than trade facilitation, but it is swimming against the tide of a multi-lateral trading system and international standard-setting bodies.

The issues
Rights – such as consumers’ right to safe food – are not recognised as a legitimate factor in how Codex elaborates food standards. Codex does, however, take into account the economic impact of food standards on Codex Member governments and their national food producers. Since the WTO’s SPS Agreement recognised Codex standards as presumptively conforming to the objectives of the SPS Agreement, the pressure to elaborate standards to minimise trade barriers, rather than to maximise consumer protection, has been overwhelming.

Standards to protect consumer health and prevent unfair trade practices have increasingly come under attack as ‘disguised’ non-tariff barriers to trade. Many government Members and some international non-governmental organisation observers, view Codex work largely in terms of trade facilitation, going so far as to call for a ‘stand still’ in Codex work until the economic consequences of a standard can be determined. The trade facilitation function of standards ranks high on the Evaluation’s priorities to be given to the future work of Codex, particularly for low-income Codex Members. We believe that WTO dispute panels, not Codex, will determine the balance between consumer protection and trade facilitation in the future.

The polarised debate about revision of a Draft Code of Ethics for International Trade in Food is indicative of the treatment of consumer rights in standard setting. Revision has long been opposed by Members and observers for whom ethics has no status in standard setting except as disguised forms of barriers to international trade. Most major exporting countries are united in their opposition to having ethics play a role in standard setting or in the dispute settlement process at which provisions of the SPS Agreement are interpreted in the framework of trade disputes.
Nevertheless, protecting consumer health is a fundamental purpose of Codex; in CI’s view it is the paramount objective. According to the WHO: ‘food and waterborne diarrheal diseases are leading causes of illness and death in less developed countries, killing an estimated 2.2 million people annually, most of whom are children.’

In industrialised countries ‘microbiological foodborne illnesses affect up to 30 percent of the population.’ According to the FAO, only about 10 per cent of global agricultural production is traded internationally. This 10 per cent in theory is subject to Codex standards. If these standards were adopted, implemented and enforced by Codex Member governments for domestic food production and consumption the public health impact would probably be significant.

The 53rd World Health Assembly adopted a resolution that called on WHO to ‘work towards integrating food safety as one of WHO’s essential public health functions’ and to work with other international organisations ‘and with the Codex Alimentarius Commission’ to do so (WHA 53.15: May 2000).

WHO’s food safety strategy includes outreach to international public health organisations to encourage them to become more involved in Codex work, but to judge by the near absence of their participation in Codex (only the World Medical Association is accredited) food safety appears to be a relatively low priority for international public health organisations.

In addition and as a result of the referencing of Codex texts in the SPS Agreement, it has been proposed that notification of SPS measures to the WTO has made ‘superfluous’ the Acceptance Procedure for national government adoption of Codex standards. This would eliminate the possibility that Codex standards might have wider benefits than those resulting from the application of SPS measures to internationally trade foods. Codex standards would have no other function than as reference points to facilitate trade and as evidence in trade disputes. In effect, Codex would formally abandon a key mechanism for assisting governments to adapt standards whose implementation in domestic regulations would protect consumers.

Proposed changes to the constitutional frameworks and modus operandi of Codex were initiated with a quasi-external Evaluation of Codex. FAO and WHO drafted its terms of reference and responded to the draft report prior to its publication. Codex is currently modifying and implementing the recommendations resulting from this Evaluation. This report analyses some of the results of the Evaluation process and makes recommendations on how best to protect consumer health and to foster fair practices in international trade, e.g. prevention of deceptive food marketing practices.

One of the results of the Evaluation implementing discussions is that the Codex Executive Committee (CCEXEC) will have the central role in prioritizing work on standards and managing the standards development process, hence observer participation in its meetings will become more crucial.

Despite the high priority Codex puts on basing its standards on ‘sound science’ the Evaluation notes that Codex Committees have often not been able to obtain it in time because of an inadequate budget. There is no agreement yet about this but there is agreement that it has slowed down the standard-setting process. There are several issues in the provision of scientific advice that concern CI including the transparency in the selection of experts, the operation of international scientific committees and the reporting of risk to consumers. Reports by expert bodies used as the basis for standard setting are often not available for months or years after the standard has been set.

The FAO/WHO Trust Fund for Participation in Codex (Trust Fund) was launched in 2003 for developing countries and countries in transition to enhance their participation in the development of global food safety and quality standards. At the CCEXEC meeting in February 2004, the USA, supported by the Codex Co-ordinator for Latin America and the Caribbean, proposed new criteria that would reduce the number of eligible Codex Members. One proposed criterion was participation in the WTO, indicated by ‘who ever has filed a SPS notification has thereby given notice of participation.’ Since only 145 of 168 Codex Members are also WTO Members, this would reduce the eligibility rating of 23 least developed country Codex Member countries. Codex had earlier agreed to ‘give priority to least developed countries and in general to those countries that needed more assistance to participate in the Codex process.’ To accept this US proposal would be to renego on that agreement.
Recommendations

Health protection

1. Given Codex's continuing mission to protect consumer health, Codex should extend formal invitations to international public health organisations to become involved in Codex work.

Consumers International should consider how food safety officers in its Member organisations and regional offices can contribute to the realisation of the WTO's Global Strategy on Food Safety objectives.

Consumers International should campaign for the adoption, implementation and enforcement of standards at national level

One way for CI to tie international standard setting to regional and national food safety issues is through the capacity building of food control systems. National food safety systems that enable implementation of standards to protect consumer health must be developed, both for domestic health protection and to support food exports, particularly in developing countries and countries in transition.

Consumer organisations can and should become advocates for integrating food safety capacity building into the public health plans of their countries.

2. Codex should ask FAO and WHO legal counsel whether the legal status and criteria for prioritising work on Codex standards requires any further clarification in the Procedural Manual, in the light of the selective list of Codex texts recognised as international reference points in Annex 3a) of the WTO SPS Agreement.

3. If Codex standards are to have greater relevance to public health, Codex will have to widen its remit to consider more kinds of scientific evidence such as data from developing countries.

Participation

4. Codex should revitalise its work on benchmarking consumer organisation participation in national Codex meetings.

Consumers International's advice to members organisations on how to participate effectively in

National Codex Committees remains valid and should be pursued.

5. Codex should request of FAO and WHO that all Codex-recognised observers be invited to participate in the planning of and at the meetings of all Food Standards Programme capacity-building activities, including those of the Trust Fund, at the national, regional and global levels.

6. The Codex Committee on General Principles (CCGP) should recommend for the Commission's approval a provision that requires CCEXEC to invite written comments from non-CCEXEC Member governments and observer organisations on standards management agenda items. The report of CCEXEC meetings would indicate how the written comments were incorporated into CCEXEC discussions and any comments submitted could be included as an appendix to the report.

7. Web-casting of Codex meetings should be explored as a means of enhancing participation and transparency. The Secretariat's analysis of the financial and legal implications of web-casting should be done in the context of an overall communications plan that would include enhancing the Codex website.

Consultants

8. Before Codex considers whether to authorise a policy using NGOs to draft preliminary standards, it should request the Committee on General Principles to propose criteria for the selection of consultants/facilitators and guidelines for their activities to minimise conflicts of interest.

9. FAO and WHO should open expert consultations and committee meetings to the public. They should allow public input in the meetings via a consumer representative who would convey the public's written and verbal questions and concerns about the consultation, and who would be permitted to ask questions about the draft report of consultations to aid in risk communication.

Procedure

10. Codex should delay taking any decision to abolish the Acceptance Procedure at least until the WTO SPS Committee has agreed on revised notification guidelines that Codex can review to determine
whether they would assist in carrying out Codex’s mission and whether the WTO Secretariat has resources sufficient to ensure the implementation of the revised notification guidelines.

11. Codex should not make SPS notification to the WTO a criterion for eligibility to apply to the Codex Trust Fund and to benefit from the Fund.

Introduction

This report has been commissioned as part of the Decision Making in the Global Market project. The mandate of this background research paper is to analyse the process and institutional framework of Codex decision making and to make recommendations on how to optimise consumer organisation participation in Codex, the expert consultations that provide scientific evidence for standard setting and the technical capacity building to implement standards.

The Codex Alimentarius Commission, normally referred to as Codex, was established by the Food and Agriculture Organisation (FAO) and the World Health Organization (WHO) in 1962 in order to harmonise food standards among countries. Commission meetings have been held every two years alternatively at FAO headquarters in Rome and WHO headquarters in Geneva, and individual committee meetings are hosted by various countries, usually on an annual basis. The recommendation to hold annual Commission meetings, while desired by Members, will depend on adequate financing, particularly of the Secretariat, by FAO and WHO Member governments. An Executive Committee that includes elected officers, regional representatives and a Secretariat co-ordinate and manage Codex business. To date there have been 27 Commission meetings.

Codex states that its main purposes are: protecting the health of consumers and ensuring fair trade practices in the food trade, and promoting co-ordination of all food standards work undertaken by international governmental and non-governmental organisations.

In the 1940s, rapid progress was made in food science and technology, including the development of more sensitive analytical tools, knowledge about the nature of food, its quality and associated health hazards. Coupled with increasing public awareness and concern about actual and potential food hazards, this led to increased co-operation and joint meetings between specialist committees of WHO and FAO, both founded in the 1940s. FAO and WHO convened the first joint FAO/WHO Conference on Food Additives in 1955, which evolved into the Joint FAO/WHO Expert Committee on Food Additives (JECFA) which still meets regularly. Joint Expert committees on other topics (such as pesticides and microbial hazards) followed.
Since the Codex Commission was established, it has created more than two dozen committees to carry out its work. Today there are nine general subject committees and 16 commodity committees. The general subject committees have broad mandates, such as setting standards for food additives, pesticides, or veterinary drug residues in foods. Commodity committees set both safety and quality standards for food categories such as milk and dairy products, meat and poultry, or fresh fruits and vegetables. The Joint Expert bodies of WHO/FAO provide, on request, scientific advice (such as risk assessments) as needed by Codex committees and Member governments.

As of 2002 (the latest on-line update available as of April 2004), the Codex Alimentarius included:

- over 230 commodities standards (e.g. for cheese)
- over 200 general standards (e.g. for food contaminants and toxins)
- 47 Codes of Practice (e.g. for meat hygiene)
- more than 40 guidelines (e.g. for determination of judgments of ‘equivalence’ between different food safety measures)
- over 2,500 maximum residue limits for pesticides in foods
- over 500 maximum residue limits for veterinary drugs in foods.

Membership of Codex is open to all Member States and Associate Members of FAO and WHO. Today Codex has a membership of 168 countries accounting for 98 percent of the world population. Commission officers, including the chairperson, three vice-chairpersons, regional co-ordinators and a secretary, are drawn from Members States. Members meet every two years alternatively in Rome and Geneva, to elect officers and make decisions.

At all Codex meetings, representation is on a country basis. National delegations are led by senior officials appointed by their governments. Delegations may, and often do, include representatives of industry, consumer organisations and academic institutes. Countries that are not yet Codex Members sometimes attend in an observer capacity. Some international governmental organisations and international NGOs also attend in an observer capacity. They may present submissions to the meeting at every stage except in the final decision, which is the exclusive prerogative of Member States.

To facilitate continuous contact with Member countries, in collaboration with national governments, Codex has established country Codex Contact Points and many Member countries have National Codex Committees to co-ordinate activities nationally.

Consumers International represents the global consumer voice at Codex and many Members contribute to and attend Codex committee meetings.
Codex and Consumer Rights

The constitutional foundation of Consumers International is consumers’ rights, such as the right to be informed, the right to safety and the right to choose. Rights such as a consumers’ right to safe food – are not, however, recognised as a legitimate factor in how Codex elaborates food standards. But Codex does recognise the economic impact of food standards on Codex Member governments and their national food producers as a legitimate factor to take into account in standard setting.

Since the WTO Agreement on Trade Related Application of Sanitary and Phytosanitary Measures (SPS Agreement) recognised Codex standards as presumptively conforming to the objectives of the SPS Agreement, the pressure to elaborate standards to minimise trade barriers, rather than to maximise consumer protection, has been overwhelming.

Although a rights-based approach to consumer protection is illegitimate in Codex, CI, as an accredited INGO participant in Codex deliberations, has tried to reduce the dominance of the ‘least trade restrictive’ approach to food standard setting in Codex. CI has sought to enhance consumer organisation participation in the expert consultations that provide the scientific basis for standard setting. CI has also worked to focus Codex on its consumer protection mandate, rather than on trade facilitation. Nonetheless, CI is swimming against the tide of a multilateral trading system and its international standard-setting bodies.

The polarised debate about the revision of a Draft Code of Ethics for International Trade in Food is indicative of the treatment of consumer rights in standard setting. Revision of the Draft Code of Ethics has been long opposed by those Members and observers for whom ethics has no status in standard setting, except as ‘disguised forms of barriers to international trade’, according to the delegate from Brazil, which is among the Members that wish to stop all work on the Code.

CI, some EU Member countries and several developing countries spoke in favour of continuing the revision of the Code. For CI, advocacy for ethically grounded trading practices follows on from its recognition that: ‘Consumers also have responsibilities to use their power in the market to drive out abuses, to encourage ethical practices and to support sustainable consumption and production.’ Without such advocacy, neither consumer rights nor responsibilities can be realised.

Opposition to the revision of the Code is likely only to grow stronger. At the 27th Session of Codex, the: ‘Representative of the WTO indicated that all Codex texts could be equally relevant under the SPS Agreement and how a particular text would be interpreted by a WTO panel could be determined in the framework of a specific trade dispute.’ Most major exporting countries are united in their opposition to having ethics play a role in standard setting or in the dispute settlement process.

The debate over the Code of Ethics displays in miniature a larger debate over proposed changes to the constitutional frameworks and modus operandi of Codex that were initiated with a quasi-external Evaluation of Codex. While a team of external experts interviewed government officials and key informants, such as Codex secretariat staff and elected officers, FAO and WHO initiated the review, drafted its terms of reference and responded to the draft report prior to its publication. Codex is currently modifying and implementing the recommendations resulting from this Evaluation. The remainder of this report analyses some of the results of the Evaluation process and makes recommendations on how best to protect consumer health and to foster fair practices in international trade, e.g. prevention of deceptive food marketing practices.
The Codex Evaluation of 2002

Codex food safety and food quality standards, guidelines, codes of practices, pesticide, contaminant, additive and veterinary drug residues limits in food (henceforth standards) may be adopted by any of the 168 Codex Member governments. In this paper, the content of specific Codex standards, however important, is relegated to the status of examples. The paper’s focus is recent proposals to change the Codex decision making structure.

The proposals resulted from the ‘Report of the Evaluation of the Codex Alimentarius and Other FAO Food Standards Work’ (henceforth referred to as the Evaluation) published in December 2002 and from ongoing discussions within the Codex Commission and its parent agencies regarding how to implement the Evaluation recommendations.

CI has submitted comments to Codex on the Evaluation’s 42 major recommendations and their implementation. This briefing paper refers to some of those comments but does not represent either their full range or anticipated changes CI may make in its positions at future Codex meetings to implement the recommendations. Instead this paper explains Codex’s global governance role in the international political economy and summarises the debate over the Evaluation’s recommendations in four areas:

1. enhancing consumer and public interest organisation participation in Codex decision making to improve standards

2. FAO/WHO provision of expert scientific advice to Codex committees

3. national adoption, implementation and enforcement of Codex standards

4. FAO/WHO capacity building for more effective national food safety and quality control systems.

Following the discussion of each issue are some further recommendations that build upon Codex responses to CI recommendations in the ongoing Evaluation process. Several recommendations fall outside the four listed topics, because CI might wish to address issues of Codex reform not considered in the Evaluation.

Much current Codex debate concerns the ‘scope’ of Codex standards as evidence for trade disputes. If Codex standards are to have greater relevance to public health, Codex will have to widen its remit to consider more kinds of scientific evidence, such as data from developing countries, and other legitimate factors in standard setting. This paper, however, uses as its database existing Codex texts and Evaluation recommendations, rather than undertaking the more difficult task of describing an ideal standard-setting process, designed, financed and equipped to realise public health objectives through food safety measures.

Data for the Evaluation were compiled from bibliographies compiled or commissioned by the Evaluation Team, from questionnaires received from 103 Codex States governments and 40 of the 155 international non-governmental organisations (INGOs) accredited to Codex as observers, and from interviews during visits to a 24 Codex Member countries (Annex 7: Methodology of the Evaluation).

CI responded to the Evaluation questionnaire and CI members responded to an April 2002 public call for comments and met subsequently to discuss their concerns about Codex with Members of the Evaluation team. In addition, an expert panel established by WHO/FAO to assist in the evaluation included a Member with strong CI connections. CI submitted comments on the Evaluation report when it was issued and participated in Codex meetings in January, May, July and November 2003 and May, July and November 2004 at which implementation of some of the Evaluation’s recommendations was discussed. Amendments to the Codex Procedural Manual resulting from these discussions will be presented for adoption at the Commission meeting in July 2005 in Rome.

Twenty-four of the Evaluation’s 42 recommendations are addressed to WHO and FAO, rather than to Codex, and further implementation will depend on decisions taken by those agencies. Financially, implementation depends on decisions by Member States to increase extra-budgetary support (i.e. beyond the contributions to the regular FAO and WHO budgets) for the provision of expert scientific advice to Codex, for the Codex Secretariat and for capacity-building activities. As a result of the falling value of the US dollar and a decision by the 32nd FAO Conference ‘to adopt a level below the Zero Real Growth scenario, the Codex programme was requested to reduce its spending by 5% for 2004-2005.’
The WHO contribution to Codex is expected to remain the same, but the net effect of the budget reduction for the Codex Secretariat will be to delay implementation of at least some of the recommendations.

Enhancing Participation in Codex Decision Making: CI’s Participation in Codex

Over the past 35 years, CI has participated in Codex standards setting at the Commission, at six regional committees, at eight substantive committees and two ad hoc task forces. CI’s Codex work covers only about a half of all Codex bodies.

Protecting consumer health is a fundamental purpose of Codex and – in CI’s view – its paramount objective. According to the WHO: ‘food and waterborne diarrheal diseases are leading causes of illness and death in less developed countries, killing an estimated 2.2 million people annually, most of whom are children.’ In industrialised countries ‘microbiological foodborne illnesses affect up to 30 percent of the population.’ Furthermore, immune systems weakened by foodborne illness are more susceptible to disease and death. A recent Danish study showed that: ‘relative mortality within one year [following a gastrointestinal infection] was 3.1 times higher in patients than in controls [who experienced no infection].’

In response to the rising incidence of food and waterborne illness, the 53rd World Health Assembly adopted a resolution that called on WHO to ‘work towards integrating food safety as one of WHO’s essential public health functions’ and to work with other international organisations ‘and with the Codex Alimentarius Commission’ to do so (WHA 53.15: May 2000).

WHO’s food safety strategy includes outreach to international public health organisations to become more involved in Codex work, but to judge by the near absence of public health organisation participation in Codex (only the World Medical Association is accredited to Codex), food safety appears to be a relatively low priority for international public health organisations.

Recommendation 1: Given the Codex priority on protecting consumer health, Codex should extend formal invitations to international public health organisations to become involved in Codex work.

The Commission should instruct the Codex Secretariat to hold orientation sessions for interested international public health officials prior to their first participation in Codex meetings. These international public health organisations should
Decision Making in the Global Market

meet with WHO food safety officials and other interested parties to assess how best to promote Codex standards towards the implementation of the WHO Global Strategy on Food Safety. CI should consider how food safety officers in its Member organisations and regional offices can best contribute to the realisation of Global Strategy objectives.

According to FAO, only about 10 percent of global agricultural production is traded internationally. This 10 percent in theory is subject to Codex standards. However, if these standards were adopted, implemented and enforced by Codex Member governments for domestic food production and consumption, as well as for food imports, the public health impact of enhanced safety of food not traded internationally presumably would be very great. Therefore, the public health impact of Codex standards, where they are adopted and enforced, could be far greater than currently assumed.

Our analysis of present discussions about the proposed future decision making structure of Codex builds on the work of the CI project on Codex capacity building that resulted in several workshops for CI member organisations and such publications as Codex Alimentarius for Consumers (2000) and ‘Capacity Building and Participation: Consumer Organisations in Codex Alimentarius’ (2002).

According to this latter briefing paper: ‘The specific aim is to strengthen the capacity of consumer organisations in developing countries and in central and eastern Europe to participate in and have an impact on the Codex decision making process.’

In 1999, CI member Consumers Union collaborated with the Codex Secretariat to prepare a background paper on enhancing consumer participation in the work of Codex. At its meeting that year, the Commission agreed, in response to recommendations from the Secretariat in the paper, to develop certain ‘benchmarks to measure the state of consumer participation in Codex and track progress from year to year.’ These benchmarks included tracking which National Codex Committee meetings included consumer representative participation.

The status of implementation of this initiative was to have been discussed at the 2001 Commission meeting, but the Commission did not get to the item because of the volume of other business on its agenda. Since then, consumer participation has not been placed on the Commission’s agenda for further discussion. It appears to be a low priority, relative to other topics, such as increasing the speed of Codex decisions that were a central focus of the Evaluation.

Recommendation 2: Codex should revitalise its work on benchmarking consumer organisation participation in national Codex meetings.

Renewed attention by the Commission to this topic would serve at least two purposes. It would be a significant step in bringing into operation the ‘Core Functions of Codex Contact points,’ as called for in the Codex Procedural Manual. And it would foster development of contact networks connecting consumer organisations and food safety officials at the national level. Such networks would be useful, among other things, for involving the consumer sector more effectively in food safety capacity-building activities, which are the subject of a later section of this paper.

According to CI surveys, the ability of its member organisations to intervene in national food safety management programmes and National Codex Committee meetings varies widely. In a September 2004 survey, 32 of CI’s 230 member organisations report that they participate in developing CI Codex comments, serve on their national Codex delegations and/or serve on CI delegations to Codex meetings at some point during the year. Seventy-two percent of survey respondents reported that their organisation had taken part in a Codex consultation held by their government. Though 56 percent of responding organisations believed that their participation had influenced at least one government position on Codex, 44 percent said that their governments did not circulate written reports on the outcomes of Codex meetings, so it was difficult to assess consumer participation impacts and how to improve preparation for government consultations.

However, the survey notes quantitative and qualitative improvements in consumer participation in Codex matters. Therefore, CI advice to member organisations on how to participate effectively in National Codex Committees remains valid and should be pursued as part of an overall member organisation plan for protection of consumer health from foodborne hazards and prevention of deceptive food marketing practices.

Alongside CI’s participation in the Codex Commission and some Codex committee meetings, including regional Codex Committees, CI will focus its future Codex activities on meetings of the
Governance in the Codex Alimentarius Commission

Commission, on the Committees on General Principles, on Food Hygiene, on Food Labelling and on the Biotechnology Task Force. All of this work will be affected by the changes in decision making and institutional structure proposed in the Evaluation.

Can Standards to Facilitate International Trade Protect Consumer Health and Prevent Unfair Trade Practices?

According to the Evaluation’s terms of reference, the Codex ‘Programme’s importance has gradually shifted from providing a basis for national standards to providing the point of reference in standards, guidelines and codes of practice for international trade.’ This summary of the emphasis of the Programme’s work history is as accurate as a one-sentence encapsulation can be, except that we would substitute the word ‘emphasis’ for ‘importance’. The emphasis in Codex standard-setting work has definitely shifted.

Less clear is whether this shift will enable Codex better to implement its mandate of: ‘protecting the health of consumers and ensuring fair practices in the food trade.’ Furthermore, it is unclear whether the demand expressed in the Evaluation for ‘greater speed in Codex work and the generation of expert scientific advice’ (para. 29), which is driven by a desire to create trade-facilitating standards, will be accompanied by sufficient resources and political will to support other components of the Programme.

If the full range of Codex standards are adopted in national law, implemented and enforced, they can help to protect consumer health and to provide consumers with safe and wholesome food. As was noted in the Evaluation, ‘Standards do not protect consumers unless they are enforced through a properly functioning food control system for which responsibility rests squarely with individual countries’. (para. 14).

However, the Evaluation goes on to note that the majority of Codex Member countries do not have the resources either to participate effectively in Codex standard-setting activities or to implement and enforce Codex standards (para 15). The Evaluation stated that: ‘The development of [food safety] legislation is not perceived by developing countries to be a very high priority for assistance as compared to other areas. This may be because food laws are ineffective in the absence of surveillance and enforcement capability’ (para. 211).

The challenge for CI to protect consumer health through Codex standards is then not only to help set better Codex standards, but also to campaign for the adoption, implementation and enforcement of
standards at a national level. Securing adequate levels of appropriate technical assistance to build effective food safety control systems is crucial to standards adoption, implementation and enforcement. As CI stated at the May 2003 meeting of the World Health Assembly:

‘If capacity building activities to provide technical assistance to implement and enforce standards remain greatly under-funded while the standards-setting process is accelerated, the standards will serve primarily to facilitate trade and not to protect consumer health.‘

Codex and SPS Standards in the International Political Economy

Standards to protect consumer health and/or to prevent unfair trade practices have increasingly come under attack as ‘disguised’ non-tariff barriers to trade. For example, a Thai trade official noted of the 2003-4 outbreaks of avian influenza and resulting devastation to Thai poultry exporters: “The rich food importers are getting better and better at manufacturing safety hazards – real and imagined.” Thailand experienced a loss of export sales due to import bans worth US $1 billion in 2003.

In early March 2004, the FAO announced that if current import bans on meat and live animals from the US and 11 other countries, due to animal health diseases, continued through till the end of 2004, the estimated US$ 33 billion global meat trade would lose about $10 billion in sales. An unpublished study estimates that the United States has lost 5,000 jobs and US $1.9 billion in beef sales because of Mad Cow related import bans. Agribusiness advocates for a US WTO challenge to EU regulations on genetically modified organisms claims US $400 million in lost annual sales for soy exports alone, due to the regulations.

A recent study by a CI member organisation on WTO dispute resolution case law concerning the SPS and the Technical Barriers to Trade (TBT) Agreements concluded: ‘By their very nature, TBT and SPS measures are obstacles to international trade. They should not become unnecessary obstacles. The question is: what is unnecessary? The protection of human, plant or animal life, health or safety in one territory, could be detrimental to the same in another territory. Finding the right balance will have to be decided on a case-to case basis.’

In the view of the authors of this study, WTO dispute panels, not Codex deliberations, will determine a balance between consumer protection and trade facilitation. There is little doubt that according to Evaluation data, the trade facilitation function of standards ranks high on the Evaluation’s ‘Priorities to be given to the future work of Codex,’ particularly for low-income Codex Members (Table 13).

Part of the Purpose of Codex is that: ‘The publication of the Codex Alimentarius is intended to guide and promote the establishment of definitions and requirements for foods to assist in their harmonisation and in doing so to facilitate
international trade.’ The use of Codex standards to facilitate international trade received a new legal status with the referencing of Codex standards as presumptively consistent with the provisions of the WTO SPS Agreement. The Agreement instructs its Members ‘…to base their sanitary or phytosanitary measures on international standards’ (Article 3.1) and presumes those international standards to be consistent with the relevant portions of this Agreement and of GATT [General Agreement on Tariffs and Trade] 1994’ (Article 3.2).

Codex is named as one of the international standard-setting bodies in whose work WTO Members should participate ‘within the limits of their resources’ (Article 3.4). The lack of resources for over half of Codex’s Member countries to participate in standard setting led to the launching of a FAO/WHO Trust Fund for Participation in Codex in February 2003. The Fund is discussed in the ‘capacity building’ section of this briefing paper.

Certain international standards, guidelines and recommendations are referenced in Annex A, 3a) of the SPS Agreement on definitions, including: ‘for food safety, the standard guidelines and recommendation established by the Codex Alimentarius Commission relating to food additives, veterinary drug and pesticide residues, contaminants, method of analysis and sampling, and codes and guidelines of hygienic practice.’ It is reasonable to assume that these are the kind of standards, guidelines and recommendations that will be cited by WTO Members in the event of an SPS trade-related dispute. What these particular standards appear to have in common is that they tend to be quantitative, for example, 0.5 milligrams of lead per kilogram allowed as a contaminant in cocoa butter.

Perhaps the most notorious reliance on quantitative risk assessment in a WTO dispute settlement was the use by the USA of an FAO/WHO Joint Expert Committee on Food Additives (JECFA) report on the safe Maximum Residue Level of three beef hormones used as livestock growth. The US contended that JECFA’s assessment offered irrefutable proof of the safety of six US government approved hormone growth promoters used in beef traded internationally.

The JECFA report was used as evidence in a 13 February 1998 WTO Dispute Settlement Body (DSB) ruling in favor of the US and against an EU import ban against beef treated with those growth promoters. Controversies over both the scientific integrity of the JECFA report and procedural requirements for risk assessments created by the DSB, as well as the inconclusive results of EU risk assessments of the growth hormones, led the EU to maintain the import ban while paying the trade sanctions resulting from the DSB ruling.

The preference in the SPS Agreement for quantitative Codex standards is to give clearer justification for declaring whether an SPS measure results in ‘discrimination or a disguised restriction on international trade,’ according to Guidelines developed by the WTO SPS Committee. This explanation is part of a broader effort to clarify what is meant in Article 5.5 by an Appropriate Level of Protection (ALOP) for consumers.” The US sought to make the guidelines enforceable under dispute settlement rules; however, the guidelines finally were adopted as non-binding. The SPS Agreement and the Guidelines clarifying it assign each WTO Member the responsibility of indicating ALOPs for its citizens, however incomparable those ALOPs and their justifications might be. Article 5.5 provides for the possibility of challenging in WTO disputes domestic SPS measures that are applied indiscriminately to domestic and imported products alike. Because of the very great difficulty that government will have in documenting consistency in SPS measure application for each and every product, at least one legal scholar has called for the repeal of Article 5.5.45

Nonetheless, there is no call by WTO Members to repeal Article 5.5, so the Guidelines for the Article’s implementation can give some idea of how quantitative standards may be used in challenging indiscriminately applied SPS measures. While the Guidelines allow for the use of qualitative documents, such as guidelines or recommendations to justify an ALOP, ‘the use of quantitative terms, where feasible, to describe the appropriate level of protection can facilitate the identification of arbitrary or unjustified distinctions in levels deemed appropriate in different situations’.

The preference for quantification in Annex A 3a) means that while Codex standards are generally referenced in the SPS Agreement, quantitative standards are more likely to be used in dispute resolution than are Codex guidelines or codes of practice. Because most WTO Members lack the resources to do their own quantified risk assessments to defend a domestic measure from a WTO challenge, they are more likely to rely upon their adoption of a quantified standard. Hence it would reasonable to presume that quantified standards will be invoked in threats to file
WTO challenges and adduced in the relatively few cases in which WTO Members request the formation of WTO dispute panels.

Qualitative documents to justify the ALOP of a WTO Members, such as the Code of Ethics for International Trade in Food are troublesome for some Codex Members because of the possibility that they might be cited in a trade dispute as a standard presumed to be consistent with the SPS Agreement. Therefore, Codex committees have begun to discuss the ‘scope’ and ‘status’ of Codex standards vis-à-vis the SPS Agreement.

For example, the USA proposed that the Codex Committee on General Principles (CCGP), at its 3-7 May 2004 session, discuss the status of the ‘Code of Ethics’ ‘under the WTO SPS and TBT trade agreements’ before devoting any further work to elaborating the Code. Following vigorous debate, the 27th session of the Commission requested CCGP to discuss at its April 2005 session ‘whether there is a clear need for a Codex of Ethics for International Trade in Food’ and whether, given the existence of other Codex, FAO, WTO and WHO texts, ‘any aspects of the problem remain unaddressed and whether these aspects were within the mandate of the Commission’. Seldom, if ever, in the history of Codex, has the Commission ever asked a Committee to satisfy so many criteria in order to justify continuance of work on a text. It would not be surprising if CCGP recommends discontinuing work on the Code of Ethics.

AT the 27th Session of the Commission, during the discussion on the Code of Ethics, ‘the Representative of the WTO indicated that all Codex tests could be equally relevant under the SPS Agreement and how a particular text would be interpreted by a WTO panel could be determined in the context of a specific trade dispute’. This is not a binding legal interpretation, but an opinion offered in the context of deciding whether the Code conformed, not to the mission of Codex, but to the use of Codex standards in SPS related trade disputes. In sum, it appears that all Codex standards are equal to the task of protecting consumer health and preventing unfair trading practices, but some standards are more equal than others if they can provide clearer evidence in trade dispute resolution. Since the SPS Agreement clearly recognises certain kinds of Codex standards as being consistent with it – the question arises whether work on other Codex standards that protect consumer health and prevent unfair trade practices will fall de facto to a second or third priority in Codex work.

Recommendation 3: Codex should ask FAO and WHO legal counsel whether the legal status and criteria for prioritising work on Codex standards requires any further clarification in the Procedural Manual in light of the selective list of Codex standards recognised as international reference points in Annex 3a) of the WTO SPS Agreement.

Enhancing participation in Codex decision making: reforming Codex constitutional frameworks

Codex’s governing documents are the ‘Statutes’ and the ‘Rules of Procedure’, published together in the Procedural Manual. Evaluation recommendations that do not require FAO or WHO implementation decisions will be carried out through changes in these and other constitutional documents in the Procedural Manual.

Article 2 of the Statutes states that: ‘Membership of the Commission is open to all Member Nations and Associate Members of FAO and WHO which are interested in international food standards’. Government delegates are usually government officials, but governments may choose to be represented by industry officials, academics or occasionally consumer organisation representatives. There are no proposals to revise the Statutes either on government membership or on the observer status of intergovernmental organisations at Codex.

However, despite a 1999 revision of criteria for recognising international non-governmental ‘observer’ organisations (INGOs), the Evaluation recommends another revision of Rule VII.5 on observers (Recommendation 27). The reasoning behind this recommendation is far from transparent. On one hand, some governments and industry INGOs have claimed that consumer INGOs participating in Codex are not truly representative of consumers. On the other hand, some industry Codex observers do not appear to be truly international in nature. There also have been (unsuccessful) attempts by free-market advocates that call themselves ‘consumer’ organisations but that accept funding from industry, to become accredited as Codex observers, with the explicit goal of trying to counter the influence of Consumers International and other current Codex consumer INGO observers.
The current roster of 155 Codex recognised INGOs includes nine consumer and public interest non-governmental organisations. The vast majority are industry-based groups, some of whose Members participate in national Codex delegations, occasionally as the sole representative of the Codex Member country. INGO accreditation criteria are being revised in the Codex Committee on General Principles (CCGP), according to guidance that CCGP received from the Commission. CCGP will recommend to the Commission changes to the Codex Procedural Manual ‘Principles Concerning the Participation of International Non-Governmental Organizations in the Work of the Codex Alimentarius Commission’. The Commission will likely adopt these recommended changes at its July 2005 meeting.

By the criterion that INGOs should be ‘genuinely international’, it appears that a number of regional INGOs from both consumer and industry sectors may lose their accreditation. Another criterion under discussion concerns how the INGO demonstrates its expertise in matters of interest to Codex. According to current implementation discussions, the Codex Executive Committee (CCEXEC) will review all accreditation applications and make recommendations to the Directors General of FAO and WHO, who will make accreditation decisions. CI’s concern that the accreditation procedure lacked an appeals process has been allayed by a CCGP agreed provision that allows reapplication for INGO accreditation two years after loss of accreditation.

Accreditation allows INGOs to receive and comment on all Codex documents and to participate in all Codex meetings (Statutes, Article 5), except for CCEXEC, within the limits of the INGO’s resources. As a result of Evaluation implementation discussions, it appears that the CCEXEC will have the central role in prioritising work on standards and managing the standards development process, hence observer participation in CCEXEC meetings will become even more crucial.

At the November 2003 session of CCGP, CI once again sought to allow for consumer organisation representation on the CCEXEC. To respond to Member concerns that observers would enjoy greater rights at CCEXEC than non-CCEXEC Members if representative INGOs participated in the CCEXEC, CI proposed that CCEXEC meetings be opened for a three-year trial period to all Members and observers. The Codex Chairperson would allow non-EXEC Members and observers speak at their discretion, most likely on extraordinary occasions. However, this proposal was also rejected. CCGP instructed the Secretariat to investigate the legal and financial implications of ‘passive participation’, such as web-casting CCEXEC meetings or broadcasting the CCEXEC meetings to a ‘listening room’ near to the CCEXEC meeting site.

At its November 2004 session, CCGP discussed the Secretariat options paper. FAO and WHO Legal Counsel also presented a paper that found ‘no impediments of an institutional or legal nature to the proposed web-casting or publicising of the [CCEXEC] proceedings’. However, several delegations stated that they did not regard web-casting CCEXEC proceedings as a priority in view of Codex’s financial constraints. These delegations emphasised that ensuring timely distribution of relevant documents in relevant languages of the Commission was a far more efficient tool to achieve transparency of all the proceedings of the Codex Alimentarius Commission and its subsidiary bodies.

Even if FAO/WHO Member contributions funded the proposed Codex reforms fully, some provision still should be made for observer organisation and non-CCEXEC Member participation in CCEXEC meetings in light of the standards management function that CCEXEC will likely assume as a result of implementation of Evaluation Recommendations. This function will include review of proposals for new work and the review of draft standards to be presented to the Commission.

Some CCEXEC standards management decisions may result in controversies that could impede the completion of non-controversial CCEXEC agenda items, if CCEXEC meetings were open to all governments and observers. Since the Codex Chairperson has expressed concerns that verbal interventions from Member governments and observer organisations could make it impossible to chair CCEXEC meetings properly, Codex could allay these legitimate concerns while allowing for comment on CCEXEC standards management decisions, by requiring CCEXEC to invite written comments from non-CCEXEC Member governments and observer organisations on at least standards management agenda items. Such written comments could inform CCEXEC standards management reviews in ways that could improve CCEXEC work and minimise the number of controversies resulting from standards management decisions.
Recommendation 4: CCGP should recommend for the Commission’s approval a provision that requires CCEXEC to invite written comments from non-CCEXEC Member governments and observer organisations on standards management agenda items. The report of CCEXEC meetings would indicate how the written comments were incorporated into CCEXEC discussions and any comments submitted could be included as an appendix to the report. Furthermore, while recognising that there are other important means to enhance Codex transparency, web-casting of CCEXEC proceedings would enhance Codex transparency and acceptance of CCEXEC decisions. Given the austerity budget imposed on Codex by FAO/WHO Member governments, Codex should give consideration to the much cheaper web-casting option of using only the audio channel, as suggested by the 49th Parallel Biotechnology Forum.

Recommendation 5: Web-casting of Codex meetings should be explored as a means for enhancing participation and transparency. The Secretariat’s analysis of the financial and legal implications of web-casting should be done in the context of an overall communications plan that would include enhancing the Codex website. Codex meetings, with the exception of CCEXEC, are in theory open to the public, unless a Committee decides otherwise.

But in practice, the only members of the public who have attended Codex meetings are occasional members of the food trade press or academics investigating standards issues. However, only Codex accredited Members and observers may comment on documents and speak in sessions. As a rule, Codex chairpersons call on Member delegates to speak first, then intergovernmental organisation representatives and finally INGOs. But if Member discussion is deadlocked, Chairs can break with custom and call on an INGO for their written comments to offer a new proposal to break the impasse in discussions. CI has played this role on numerous occasions.

The Evaluation makes no recommendations concerning Codex’s transparency to the public beyond the urgency of upgrading the Codex website (Recommendation 29) and perhaps hiring a consultant to make the Procedural Manual more ‘user-friendly’. (While CI agreed with this Recommendation, it expressed disappointment with the Evaluation’s lack of attention to how Codex should communicate with consumers, particularly regarding health risks in food.)

The accountability of Codex decision making is the subject of Evaluation Recommendations regarding the conduct of Chairpersons and the conduct of meetings. Codex decisions are not taken by vote but by discussion until consensus is reached, except when electing the Codex Chairperson and Vice-Chairpersons, and, but rarely, when adopting controversial standards. The definition of consensus is currently under debate at Codex (Recommendation 24) but that definition is not an accountability issue per se. Rather, the issue of accountability arises when a committee Chairperson interprets the existence of a consensus in its clear absence, in order to force progress on a standard despite the lack of agreement. Occasionally, the Secretariat’s report of meetings will indicate a clear lack of consensus despite the Chairperson’s decision to forward a standard to the Commission for adoption, for example in the case of the guidelines on the judgment of equivalence of SPS measure in the 2001 session of the Codex Committee on Food Export Import Inspection and Certification Systems. More typically, however, the Secretariat’s report records the comments of Members in enough detail to illuminate controversies and indicate the breadth (or lack) of consensus. Given the Evaluation’s overall priority on ‘speeding up’ Codex’s standard-setting, and Codex’s lack of willingness to date to discipline Chairs who may have abused their power, the temptation for Chairs to declare consensus by fiat may grow. It seems likely that Codex will seek to improve the quality of chairing through developing criteria for Members to select Chairs and through Secretariat orientation sessions for new Chairs.

Given the resource constraints that preclude many Members and some observers, including CI, from participating physically in most Codex meetings, new mechanisms for involving absent Members in deliberations are essential. CI was instrumental in proposing a revision to the Draft Guidelines to Chairpersons of Codex Committees and Ad Hoc Intergovernmental Task Forces: ‘Chairpersons should also ensure that the written comments, received in a timely manner, of Members and observers not present at the session are considered by the Committee; that all issues are put clearly to the Committee’. Both Codex Members and observers should strive to ensure that the guideline, adopted by the Commission at its 27th session, is
implemented by Codex Chairpersons. This guideline offers the opportunity to enhance effective participation even without the capacity to travel to a Codex meeting.

Evaluation Recommendation 21 urged that Codex Commission and committee report less on who said what and more on the actions taken. From the very first meeting, in January 2003, to discuss the Evaluation, CI has stressed the importance of a full and accurate reporting of the meeting. CI noted then: ‘Observers and governments without the resources to participate in the current schedule of meetings or any increase in meetings that may result from an accelerated standards-setting process, will find themselves at great disadvantage if the Secretariat reports to all Members and observers only decisions taken and not the context in which decisions were made’.62

CCGP has made no proposal to amend the Procedural Manual to provide guidance on how Codex work is to be reported. In practice, it appears, on the basis of this writer’s experience of recent Codex meetings that host committees and the Secretariat have tried to compromise between recording every delegate’s intervention and a decisions taken only format. Delegates will have to press to have their individual interventions included, particularly if they did not submit written proposals to the Secretariat. One explanation for reducing the length of Codex reports is the cost of printing and translations, which returns us again to the matter of the Codex budget.

CI supported Evaluation Recommendation 15, which advised FAO and WHO to increase resources for the Codex Secretariat to increase the timeliness and accuracy of the translation of documents into official FAO and WHO languages, and thereby to enhance stakeholder participation and consultation.63 Because most Codex meetings are conducted in English, timely and accurate translation and interpretation are vital to the transparency and accountability of Codex decision making. Following Recommendation 32, the Secretariat is drawing up a budget to estimate the costs for implementing Codex revised Evaluation Recommendations, including a new budget for the Secretariat.

**Models of Decision Making in Codex: the Eight-step Procedure**

Codex standard setting uses an eight-step process set out clearly in the Procedural Manual (‘Procedures for the Elaboration of Codex Standards and Related Texts’). The first step is for the Commission to decide to authorise new work, usually at the request of a Committee, and to decide which Committee should do the work. Members, but not INGOs can propose new work. As a result of the Evaluation, a detailed project document will be required to propose new work. CCEXEC will review the project document to ensure that new work proposed fits within the new criteria for establishing Codex work priorities. The criteria are still being developed.

Step 2 is for the Secretariat either to draft a standard or to arrange for a consultant to do so, taking into account or requesting FAO/WHO expert advice, as well as the Commission’s guidance. At Step 3 the draft standard is circulated to Member governments and observers for comments, while at Step 4 the originating committee considers comments received, and discusses and amends the draft. At Step 5 the amended draft standard is presented to the Commission for its approval as a draft standard. If there is broad Commission support for the standard at this point, the Commission may choose to vote to use the ‘accelerated procedure’ to skip Steps 6 and 7 (another round of circulation for comments, committee discussion and revisions), and adopt the standard immediately for publication (Step 8). The accelerated procedure required a two-thirds majority of voting Members to implement.

While this process seems straightforward and relatively simple, in practice it usually takes from three to seven years, often longer, for a draft Codex standard to work its way through the process. Committees typically meet only once per year (and some less often than that). Drafts are published, and comments solicited and compiled, on a schedule compatible with once-a-year discussions. Often discussion in plenary session at a Committee meeting does not resolve all issues, but identifies more work that is needed on a draft.

This work is often assigned to a drafting group (made up of volunteers from the full committee) that meets between sessions of the committee. If a document is not, by consensus, completed and ready to advance to Step 5, it can be held at Steps 3-4 while the committee continues to work on it. Most draft
Codex standards require two or three years, sometimes longer, to move from Step 3 to Step 5.

Further delays can arise when a Codex committee needs scientific input—such as a risk assessment—from one of the WHO/FAO Joint Expert bodies. The work load on those bodies is enormous, and they also meet typically once a year. JECFA, which supports Codex committees on food additives and contaminants, and on residues of veterinary drugs, holds alternating meetings and considers drug residue issues only every other year. The CCRVDF meets only at 18-month intervals. Three years may go by between CCRVDF asking JECFA for an evaluation of a drug, and the committee meeting to discuss JECFA's response.

Given Codex's prolonged deliberations, particularly when Codex requests a risk assessment, it is not surprising that most Members and observers of Codex expressed a wish for 'greater speed in Codex and expert scientific advice.' As previously mentioned, fulfilling this objective depends in part upon the willingness of Member governments to adequately finance the Secretariat and joint FAO/WHO expert meetings. However, beyond the issue of resources, the Evaluation recommended a series of measures to 'speed up' the standard-setting process. One such proposal would institute a 'sunset' provision, so that if Codex cannot adopt a standard five years after its inception (Recommendation 18), the Commission must make a decision about whether to re-authorise the work, discontinue it or move the work to a different committee (Recommendation 23).

Furthermore, to 'speed up' the standard-setting process, the Evaluation recommends that: 'the emphasis in Codex should switch from writing standards in meetings to developing standards through a consultative process between meetings' (Recommendation 20). Implementation of this recommendation might include greater use of inter-sessional electronic, rather than physical, working groups to revise standards; hiring consultants to facilitate consensus about controversial matters; and using 'knowledgeable NGOs in preliminary standard development.'

CI commented extensively on these Recommendations, finding that some, such as the use of a project document to justify undertaking new work, would enhance the quality of standard setting. CI also commented on proposed guidelines for inter-sessional electronic working groups, designed to maximise participation by resource constrained Members and observers in the standard-setting process. However, CI did not support the idea of inter-sessional facilitators of consensus: 'particularly if the consultant drafting the preliminary standard and the consultant/facilitator hired to manage consensus on a standard are from the same country or observer group.' As a result of the high potential for conflicts of interests arising from the use of consultants to draft standards, CI made the following comment, slightly revised:

**Recommendation 6:** Before the Commission considers whether to authorise a policy of using NGOs to draft preliminary standards, it should request the Committee on General Principles to propose criteria for the selection of consultants/facilitators and guidelines for their activities to minimise conflicts of interest.

CCGP might consider whether the selection criteria proposed for scientists nominated to serve on FAO/WHO Joint Expert Committees or ad hoc consultations could serve as a basis for proposing consultant/facilitator selection criteria.
Provision of Expert Scientific Advice to Codex

Some Codex committees and task forces obtain scientific advice and risk assessments from joint FAO/WHO committees and ad hoc consultations. Despite the high priority put by Codex on basing its standards on ‘sound science’, the Evaluation notes that Codex Committees have often not been able to obtain the advice they request in timely fashion because of an inadequate budget for the joint scientific advisory system. Hence, the Evaluation states that: ‘for sound, science-based decision making to be central to the Codex process, the increased funding of risk assessment is a top priority ...There is general acceptance in the future experts will have to be paid in order to obtain independent good quality assessments in a timely manner’ (para. 181).

There is no agreement yet about how provision of expert scientific advice should be financed or how Codex requests for such advice should be prioritised. However, there is agreement that delays in requesting and receiving scientific advice have slowed down the standard-setting process (para. 184). According to documentation prepared by FAO and WHO for the 27th Session of Codex: ‘the FAO and WHO Secretariats will also link further fundraising efforts to the improvement of the process for the provision of scientific advice.’

Even if and when resources are provided to enable science-based standard setting with the ‘greater speed’ desired by Members and observers, there are several issues in the provision of scientific advice that concern CI. Of particular note is transparency in the selection of scientific experts, in the operations of the international scientific committees and in the reporting of risk to consumers.

One CI position paper has noted that: ‘the work of expert groups is the least open and least transparent part of the international policymaking process, reflecting certain old-fashioned attitudes about how science should be applied to policy. Most expert body meetings are closed to the public. Reports by the expert bodies that support Codex committees often are not available for months or years while recommendations might be issued promptly, the basis for those positions might not be public for a long time. This lack of transparency has led to public distrust of certain conclusions by expert bodies on controversial topics.’ The pressure to make the scientific advisory process more transparent is beginning to have some welcome results for consumers.

In January 2004, FAO and WHO held a ‘Workshop on the Provision of Scientific Advice to Codex and Members Countries’. FAO subsequently commissioned Lisa Lefferts, an independent consultant who participated in the workshop, to write a background paper on transparency issues. The Report of the workshop includes some recommendations from that paper, which, if financed and implemented, could greatly improve the quality, as well as the transparency of scientific advice, and involve consumer organisation representatives in communication of risk to the consumers.

These Report recommendations included making ‘reports available as soon as possible’ (26); consider ‘the publication of some reports in draft form in order to allow for public comment or peer review before finalisation’ (27); and enhancing ‘transparency of their reports through the inclusion of a plain language summary of the findings of expert panels. This may be facilitated by including risk communication experts in expert panels’ (29). The report from the Workshop was circulated by for comments and CI formally endorsed the recommendations on transparency and proposing additional steps. FAO and WHO stated that the final stage of the evaluation process on provision of scientific advice will be to convene a meeting to consider the report and craft final recommendations to WHO/FAO. However, WHO/FAO have been unable to raise the required funds to convene the meeting. The effort to improve the scientific advisory system at WHO and FAO has lost what little momentum it had, and seems in danger of failing to produce any substantive change in the system.

If the process can be re-started, CI has some specific objectives for improving the eventual outcome. Two important recommendations from Lisa Lefferts’ background paper are not reflected in the Workshop Report. One concerns the importance of including a consumer representative as a participant at expert scientific meetings. This person would act as a kind of ombudsman (or woman) who makes sure that questions, particularly of a controversial nature, are asked of the experts, and that the results of expert scientific advice are communicated in a way that the public will understand (para. 6.2e).

Another recommendation on transparency is to make private deliberations among experts the
exception, rather than the rule in expert meetings (para. 6.4a). Such meetings should be open to observers, rather than closed sessions as they have traditionally been. Opposition to opening expert meetings is based on concerns about the business confidentiality of data, and fear that the efficient production of scientific advice could be impeded if the scientific advisory process were opened up to a broader range of scientific perspectives.

The Workshop Report recommends ‘improved procedures for the interaction of expert panels with data providers and other stakeholders’ (recommendation 22) and proposes to allow public comment prior to finalising the report of the expert consultation (recommendation 27). However, these recommendations still fall short of allowing the public to have the opportunity to be represented in a meeting. Therefore, we make the following recommendation:

Recommendation 7: FAO and WHO should open expert consultations and committee meetings to the public. They should allow public input in the meetings via a consumer representative who would convey the public’s written and verbal questions and concerns about the consultation, and who would be permitted to ask questions about the draft report of consultations to aid in risk communication.

CI and others have made additional proposals to improve the quality, as well as transparency, of scientific advice to Codex. Enhanced consumer participation in expert consultations and improved transparency and risk communication with consumers can help improve the protection of consumer health.

A Crisis in the Codex Acceptance Procedure for Standards and the Protection of Consumer Health

As a result of the referencing of Codex texts in the SPS Agreement, it has been proposed that notification of SPS measures to the WTO has made ‘superfluous’ the Acceptance Procedure for national government adoption of Codex standards. Codex Members have been reluctant to adapt into national legislation the standards, recommendations and guidelines to which they have agreed, because many Members do not have the resources to implement the standards to protect their consumers. One study calculated that only about 12 percent of Codex standards had been accepted as of 1993. Therefore, the only consumers to be protected by the implemented standards are those who consume imported foods. The abolition of the Acceptance Procedure would eliminate the possibility that Codex standards might have wider benefits than those resulting from the application of SPS measures to internationally trade foods.

The disuse into which the Acceptance Procedure has fallen led the USA to argue that notification of acceptance of Codex standards ‘has largely been superseded by the World Trade Organization’s notification procedures’ and to recommends deletion of references to Codex notification and the Acceptance Procedure in the Procedural Manual, following a review by the Secretariat to ensure that there no ‘unintended consequences’. Following deletion, the 24 Codex Members that are not Members of the WTO will benefit neither from notification to the WTO SPS Committee nor from using the Acceptance Procedure.

Deletion of the Acceptance Procedure would be a radical step for Codex to take, since following deletion Codex standards would have no other function than as reference points to facilitate trade and as evidence in trade disputes. In effect, Codex would formally abandon a key mechanism for assisting governments to adapt standards whose implementation in domestic regulations would protect consumers. Nonetheless, the November 2004 session of CCGP agreed to request that the Secretariat draft a proposal for abolition of the Acceptance Procedure that is to be presented for adoption by the Commission in July 2005. Therefore, the proposal to abolish the Acceptance Procedure, which is likely to be approved by the Commission, merits some comment.
The Procedure is the formal mechanism that enables Codex Members to adopt Codex standards in their national legislation or regulations or to use Codex standards as a basis for national legislation or regulations. If Codex were to replace use of the Acceptance Procedure with the notification by WTO Members of national SPS measures, it might be assumed that the measures to be notified to the WTO SPS Committee would be the same as the Codex standards that if adopted, implemented and enforced, would protect consumer health and prevent unfair trade practices. That assumption would be false. Instead the Acceptance Procedure for Codex standards would be replaced by a notification procedure designed much more narrowly to prevent SPS-related trade disputes.

WTO Members are required to notify the SPS Committee, when: ‘the content of a proposed sanitary or phytosanitary regulation is not substantially the same as the content of an international standard, guideline or recommendation, and if the regulation may have a significant effect on trade of other Members’ (Annex B, ‘Transparency of Sanitary and Phytosanitary Regulations’, para. 5). Although the mandatory character of WTO notification ensures that such notification will be used more frequently than the voluntary notification of acceptance of Codex standards, WTO notification should not be allowed to supplant the Codex Acceptance Procedure.

The SPS Agreement references a narrower range of international standards than Codex has adopted and hence would offer less protection of consumer health, even if the objective of WTO notification were protection of consumer health rather than trade facilitation. The notification procedure for the SPS Agreement in Annex B does not refer to all Codex standards, but only to those kinds of standards in Annex 3a), i.e. quantitative standards. Even if WTO Members were in agreement as to what was ‘not substantially the same’ in a SPS regulation and about whether a regulation that deviates from an international standard will result in a ‘significant effect on trade’, the narrow ranges of standards in Annex 3a) does not cover the broader range of Codex standards intended to protect consumer health and prevent unfair trade practices.

If the relatively narrow range of international standards in Annex 3a) were to become the norm for judging which national SPS measures were inconsistent with international standards, all the non-quantitative Codex standards (i.e. those not referenced in Annex 3a) would no longer be WTO authoritative for judging consistency of national SPS measures with Codex standards. While WTO notification of SPS measures is oriented towards avoiding trade disputes that might result from proposed national SPS measures, the protection of consumer health is far less served by WTO notification than by adoption of the broader range of Codex standards. Furthermore, as noted by a Codex Committee Chairperson: ‘WTO SPS notifications can give only a very limited impression of whether Codex norms are meeting national needs and therefore provide a suitable basis for harmonization among differing food safety and quality measures’.

The Acceptance Procedure has fallen into disuse as food safety officials have shifted their focus from promoting the adoption of Codex standards to assisting in the notification of their possibly non-conforming national SPS measures to the WTO. Nevertheless, according to the Evaluation: ‘the majority of countries at all stages of development claim to have adopted into their national legislations more than 60 percent of all types of Codex standards with the exception of those relating to methods of analysis’ (para. 57). Codex has published no documentation to support this claim and Codex Members are not required to report which standards they have adopted and how.

At the November 2004 session of CCGP, in response to CI’s criticism that notification to the WTO SPS Committee served a very narrow function: ‘The Secretariat informed the Committee that in the framework of the review of the operation of the SPS Agreement currently underway, notification of sanitary and phytosanitary measures was under review and that there were ‘proposals to extend the scope’ of notifications to also cover those proposed measures based on international standards’. Whether the WTO SPS Agreement notification rules will be modified to make the information contained in the Member notifications usable for determining how they protect consumer health remains to be seen. Nor is there any certainty that the WTO Secretariat’s resources would increase so that SPS notification information could be publicised. Given the reluctance, thus far, of most WTO Members to notify their domestic SPS measures to the SPS Committee, there is no reason to anticipate greater compliance with the SPS agreement notification requirements than has occurred to date. While the May 2004 launching of the International Portal for
Food Safety and Animal and Plant Health (www.ipfsaph.org) is to be welcomed as an electronic miscellany of laws, regulations, reports and even minutes of SPS Committee discussions, it is far from yet being usable to consult as a means to protect consumers.

Given this situation, we make the following recommendation:

**Recommendation 8:** Codex should delay taking any decision to abolish the Acceptance Procedure at least until the WTO SPS Committee has agreed on revised notification guidelines that Codex can review to determine whether those guidelines would assist in carrying out Codex’s mission and whether the WTO Secretariat has resources sufficient to ensure the implementation of the revised notification guidelines.

In the meantime, rather than discontinue the Acceptance Procedure, Codex should work with the FAO/WHO Food Standards Programme to verify the extent of the use of the Procedure as claimed in the Evaluation, to revise the Procedure to enhance ease of use, and to provide the Codex Secretariat with the resources needed to post on the Codex website timely documentation of Member adoption of standards. To ensure that adoption of Codex standards is carrying out the mandate to protect consumer health, Codex should commission a study of the public health impacts of the adoption of selected Codex standards in selected Member countries.

Because of the trade facilitation Purpose of Codex, the Evaluation recommends that: ‘FAO and Codex review the possibilities for establishment of a database of national standards of importance in trade including their application and methods of analysis’ (Recommendation 30). CI supported this recommendation but amended it to include the: ‘establishment of a database of national food standards, indicating which of those standards are Codex standards. The database should also contain regulatory information and contact points concerning the implementation, enforcement and review process for the standards.’ The International Portal for Food Safety and Animal and Plant Health does not indicate whether the documents posted there voluntarily by governments are based on Codex texts. Nor is there any information about implementation and enforcement measures. At present, the data is clearly weighted on the side of trade impacts (5,367 documents related to WTO agreements and 3,567 related to trade in general) over health impacts (260 documents). The balance and kind of contributions will have to shift before the database becomes more usable for protecting consumer health.
**FAO/WHO Capacity Building**

The Evaluation has just two Recommendations concerning capacity building, one of them concerning Codex activities (Recommendation 42). The FAO/WHO Trust Fund for Participation in Codex (Trust Fund) was launched on 14 February 2003 at an Extraordinary Session of the Commission that reviewed the Evaluation.

The notional budget for the Trust Fund, to cover capacity-building activities for 12 years, was US$ 40 million. A total of 133 Codex Member States that are developing countries and countries in transition would be eligible to apply for funds to enable their officials to ‘enhance their effective level of participation in the development of global food safety and quality standards’.

According to the Consultative Group for the Trust Fund, US$ 500,000 had been received as of February 2004, a minimum that the Committee judged sufficient to commence Fund activities. At the 27th Session of the Commission, the Consultative Group reported in its Fourth Progress Report that the Fund had received US$922,379 as of 30 April 2004. Trust Fund beneficiaries have participated thus far in Codex committee meetings on food hygiene, pesticide residues, general principles and food labelling. A Fifth Progress Report is scheduled to come out in early 2005.

At the CCEXEC meeting in February 2004, the USA, supported by the Codex Co-ordinator for Latin America and the Caribbean, proposed new country classification criteria that would reduce the number of Codex Members eligible to apply to the Trust Fund. One proposed criterion is participation in the WTO, indicated by ‘who ever has filed a SPS notification has thereby given notice of participation’.

Since only 145 of 168 Codex Members are also WTO Members, this proposed criterion effectively would reduce the eligibility rating of 23 least developed country Codex Member countries. Codex had earlier agreed to ‘give priority to least developed countries and in general to those countries that needed more assistance to participate in the Codex process’. To accept this US proposal would be to renego on that agreement.

**Recommendation 9:** Codex should not make SPS notification to the WTO a criterion for eligibility to apply to the Codex Trust Fund and to benefit from the Fund.

To do so would not only all but ensure that at least 23 Codex Members would continue not to participate in Codex; it would also make Codex participation a subordinate function of participation in the WTO.

Despite discussions of the Evaluation to increase ‘inclusiveness of developing Member countries in the Codex standard development process, including risk assessment’ it has proven difficult to get government funding to implement this objective. On current projections the Fund will raise less than a sixth of its funding target. It is likely that the Trust Fund will soon be turning to industry to finance the Fund’s activities.

Both in its comments to the Commission and in a press release in February 2003, CI expressed its opposition to Trust Fund reliance on industry funding. CI pointed out that past industry funding of developing country delegations to Codex meetings may have: ‘resulted in conflicts of interest or in violation of WHO and/or FAO guidelines for relations with commercial enterprises’. Given the likelihood of industry funding of the Trust Fund and notwithstanding efforts by the Consulting Group to ensure that industry funding does not unduly influence the substance of Fund activities, CI repeats the recommendation made in its January 2003 comments on the Fund.

**Recommendation 10:** Codex should request of FAO and WHO that all Codex recognised observers be invited to participate in the planning of and at the meetings of all Food Standards Programme capacity-building activities, including those of the Trust Fund, at the national, regional and global levels.

One way for CI to tie international standard setting to regional and national food safety issues is through the capacity building of food control systems. National food safety systems that enable implementation of standards to protect consumer health must be developed, both for domestic health protection and to support food exports, particularly in developing countries and countries in transition.

Consumer organisations can and should become advocates for integrating food safety capacity
building into the public health plans of their countries, although getting the right kind of assistance for capacity building is a great challenge. The Evaluation noted: ‘a stark contrast between developing countries’ stated priorities for development assistance in food safety and the volume of voluntary contributions by developed countries which share those priorities’ (para. 214).

**Conclusion**

Codex has taken many steps to facilitate the participation of the few Codex accredited consumer and public interest organisations in the standard setting process. However, given the pressures on Codex to accelerate its work to facilitate trade, a great effort is required to ensure that the reforms resulting from the Evaluation focus on protecting consumer health and integrating food safety in public health planning. Given resource constraints, strategic focus is needed to convert participation in the national and international levels of Codex standard setting into concrete achievements to safeguard the health of consumers.
Footnotes


5 ‘WHO Global Strategy for Food Safety: Safer food for better health’, 3.


7 CX/EXEC 04/53/3, Conference Room Document 3 (January 2004, United States), 2.

8 Ibid., para. 46.


14 ‘About Consumers International’ at http://www.consumersinternational.org/about


18 A member of the Evaluation Team analysed the methodological issues underlying reform of Codex. She noted that the role of ‘other legitimate factors’ (such as environmental health and sustainable development) has been ignored in the Evaluation methodology: This flowed from a decision by the Codex Commission in 2001. This report is available on the CI website: www.consumersinternational.org, on the Global Governance page.


21 The Codex Committees on Food Labelling, General Principles, Pesticide Residues, Food Hygiene, Food Additives and Contaminants, Residues of Veterinary Drugs in Foods, Food Import and Export Inspection and Certification Systems, Nutrition and Foods for Special Dietary Uses, Meat Hygiene, plus the ad hoc task force for Foods Derived from Biotechnology and ad hoc task force on Animal Feeding.


24 The study involved about 49,000 participants. Morten Helms et al., ‘Short and long term mortality associated with food-borne bacterial gastrointestinal infections: registry based study’, British medical Journal 326: 357 (15 February 2003)


26 This recommendation is part of a broader strategy concerning INGO participation the WHO Global Strategy on Food Safety, for which participation in Codex is merely one of seven methodological approaches taken by WHO to enhance food safety. However, since this briefing paper’s primary focus is Codex, this recommendation is limited to the Codex approach.

27 Cited in Jacques Berthelot, ‘Some theoretical and factual clarifications in order to get a fair Agreement on Agriculture at the WTO’, paper prepared for the Symposium on issues affecting the world trading system, World Trade Organization (Geneva, 6-7 July 2001), 3. It is worth noting that current negotiating proposals for the WTO Agreement on Agriculture would require WTO Members to increase the imported percentage of national domestic consumption of a given food from the current five percent to ten percent, regardless of balance of payment problems created by that increase and regardless of whether a Member is already self-sufficient or capable of self-sufficiency in producing that food. (Negotiations on Agriculture: First Draft on Modalities (TN/W/AG/1/REV1 (18 March 2003), para. 16. This proposed provision is not mentioned in the 13 September 2003 Framework Agreement on Modalities debated at the WTO ministerial in Cancun, Mexico.


29 ‘Participation is not enough’, Consumers International (September 2004), 4-6.

30 See, in particular, ‘Participation in Codex Alimentarius – A step by step approach’ in Codex Alimentarius for Consumers (Consumers International, October 2000), 64-89.

31 These include Activities B-2.3-2.5, B-4.1-B-4.3 and B-4.5.


35 Evaluation Recommendation no. 6 urged Codex to develop guidelines on Appropriate Levels of Protection (ALOs) for consumers ‘to reduce the scope of disputes in the WTO.’ However, there was no Codex support for this recommendation, since the setting of ALOPs is a prerogative of governments according to Article 5 of the WTO SPS Agreement. (Codex Alimentarius Commission, ALINORM 03/26/11 (May 2003), para. s 31-33.)

36 William Barnes, ‘Food safety fears ‘used as excuse to ban imports’ Financial Times, 6 April 2004.


43 ‘Guidelines to further the practical implementation of Article 5.5’, Committee on Sanitary and Phytosanitary Measures, World Trade Organization, G/SPS/15 (18 July 2000).


50 The standards relating to food additives, veterinary drug and pesticide residues, contaminants, hygienic practice and methods of analysis and sampling

51 At http://www.codexalimentarius.net/organizations_list.stm

52 ‘Proposed Amendment to Rule VIII.5 (Observers) of the Rules of Procedure’, Codex Alimentarius Commission (CX/GP/04/20/3) and (CX/GP/04/20/3 Add. 1); ‘Review of the Principles Concerning the Participation of International Non-Governmental Organizations in the Work of the Codex Alimentarius Commission’, Codex Alimentarius Commission (CX/GP/04/20/8), Both of these documents will be discussed at the 3-7 May 2004 session of the Codex Committee on General Principles


54 ‘Draft Revised Principles Concerning the Participation of International Non-Governmental Organizations in the Work of the Codex Alimentarius Commission’, Codex Alimentarius Commission, ALINORM 05/28/33, Appendix VII, Section 4.2

55 ibid., para. s 38-44.

56 ‘Report of the Twenty-First (Extraordinary) Session of the Codex Committee on General Principles’ (ALINORM 05/28/33), para. 65.

57 Ibid., para. 67.


59 CAC/26/INF/3, p. 49.

60 The Secretariat noted that 10 of 43 participating Members and observers in the Ninth Session of the Codex Committee on Food Import/Export Inspection and Certification Systems had various objections to draft guidelines on judgment of equivalence of SPS measures. (ALINORM 01/30A, para. 90). Nonetheless, the draft guidelines were forwarded by the Chair to the Commission for adoption under the Accelerated Procedure used for non-controversial standards. Also see Bruce Silverglade, ‘Report on the Codex Committee on Food Import/Export Inspection and Certification Systems’ (Perth, Australia; 11-15 December 2000), International Association of Consumer Food Organizations, 5.

61 ALINORM 04/27/33, Appendix VII.


63 CAC/26/INF/3, p. 27.

64 The Codex Committee on Pesticide Residues is supported by the WHO/FAO Joint Meeting on Pesticide Residues (JMPR). Both the Codex Committee on Food Additives and Contaminants and the Codex Committee on Residues of Veterinary Drugs in Foods rely on the WHO/FAO Joint Expert Committee on Food Additives and Contaminants (JECFA). The WHO/FAO Joint Expert Meetings on Microbiological Risk Assessment (JEMRA) works with the Codex Committee on Food Hygiene and the Codex Committee on Meat and Poultry Hygiene, while the (Codex) Ad Hoc Intergovernmental Task Force on Foods Derived From Biotechnology has been supported by the WHO/FAO Expert Consultation on Foods Derived from Biotechnology – Genetically Modified Organisms. The Codex Committee on Nutrition and Foods for Special Dietary Uses has on occasion called upon both JECFA and JMPR for advice, particularly related to the safety of infant foods.

66 'Improving the Quality, Openness, and Transparency of International Scientific Advice', Consumers International (October 2002), 2.

67 'Ensuring Transparency of the Process of Providing Scientific Advice To Codex and Member Countries.' Background paper by Lisa Lefferts, prepared for the Joint FAO/WHO Workshop on the Provision of Scientific Advice to Codex and Member Countries (January 2004), para. 6.2f).


72 ‘Draft U.S. Positions: Codex Committee on General Principles’ (Twentieth Session; 3-7 May 2004, Paris), 20.

73 ‘Report of the Twenty-First (Extraordinary) Session of the Codex Committee on General Principles’, para. s 118-122.


75 Report of the Twenty-First (Extraordinary) Session of the Codex Committee on General Principles’, para. 121.

76 ‘Other Matters Arising From FAO and WHO’, Codex Alimentarius Commission, ALINORM 04/27/10G, para. s 59-62

77 ‘Comments received in response to Circular Letter 2003/8-CAC: comments received from international organizations’, Codex Alimentarius Commission, CAC/26/INF/3 (Mary 2003), 50.


83 ALINORM 04/27/3, para. s 47-49.

84 CX/EXEC 04/53/3, Conference Room Document 3 (January 2004, United States), 2.

85 Ibid., para. ‘Consumers International’s Comments on the WHO Project and Fund for Enhanced Participation in Codex’ (January 2003), 1.
The WTO Agreement on Technical Barriers to Trade (TBT)

Interaction with International Standards and Implications for Consumers

Produced for Consumers International
By Dr James H Mathis
Department of International Law,
University of Amsterdam,
The Netherlands
Decision Making in the Global Market
The WTO Agreement on Technical Barriers to Trade (TBT)

Interaction with international standards and implications for consumers

### Contents

- **Executive Summary**
- **Recommendations**
- **Introduction**
- **The TBT Agreement**
- **The TBT Agreement Regime for International Standards**
- **The TBT Committee and International Standards**
- **Dispute Settlement Participation**
- **Conclusions**

### Executive Summary

This paper examines the World Trade Organization’s Technical Barriers to Trade (TBT) Agreement and its interaction with:

- international standards
- bodies that set standards
- states that are engaged in the process
- the organised non-governmental community of consumers who have interest in its process and outcomes.

The TBT Agreement raises international standards to the level of WTO Member obligations. We look at what mechanisms could be used by states and standard-setting bodies to ensure that health and safety objectives are properly included in a regime which has brought trade interest into international standards setting.

Recommendations are made for Consumers International to monitor and participate in TBT decision making and dispute processes and secure more representational participation before standard bodies.

### The Agreement

Efforts by GATT Parties to harmonise product regulations and standards and address more subtle forms of ‘non-tariff’ barriers, led to the conclusion of
the GATT Tokyo Round Standards Code (1980). This plurilateral agreement was updated and concluded in the Uruguay Round as the WTO Agreement on Technical Barriers to Trade (TBT Agreement).

As one of the Multilateral Agreements on Trade in Goods, the TBT was subscribed to by all WTO Members and subject to the provisions of the WTO Dispute Settlement Understanding (DSU). The DSU allows for panel and Appellate Body (AB) review in respect to the interpretation of the terms and provisions of the TBT Agreement for any dispute between Members.

The Agreement applies to all products including industrial and agriculture products, but excludes government purchasing requirements and sanitary and phytosanitary measures designed to protect food, plant and animal health (covered by the WTO SPS Agreement). Its provisions apply to product technical regulations (mandatory) and product standards (non-mandatory). The prevailing view is that the agreement does not cover standards describing mandatory product processes that are not directly incorporated into the end product.

The earlier Standards Code and the TBT Agreement have significantly extended the reach of GATT law in two ways:

- It establishes a new legal theory for complaints based on ‘unnecessary obstacles to trade’ which focuses on the inherent trade restrictiveness of a regulation, rather than whether the restriction is discriminatory in terms of treatment accorded to domestic production
- It obliges signatories to use applicable international standards as a basis for their domestic regulations.

In a more procedural sense, the agreement encourages WTO Members to:

- participate in international standard setting
- ensure that their conformity systems are open to the products of all Members on an equal basis
- ensure that their technical regulations are transparent.

It also requires Members to notify their technical regulations to the TBT Committee: if they have a significant effect on trade; if no international standard exists; and when a domestic regulation is not ‘in accordance’ with an existing international standard. WTO Members have an obligation to review and amend their pre-existing and non-conforming product requirements when new international standards are generated.

There is no obligation to establish national requirements but this is encouraged, in effect, by the ‘safe harbour’ provision in Article 2.5. This is a rebuttable presumption for Members when they enact their domestic regulations in accordance with an existing international standard. It is only available for requirements fulfilling the national objectives of: ensuring the quality of exports; the protection of human, animal or plant life or health; protection of the environment; or for the prevention of deceptive practices.

**Its effects**

The implications for consumers are multiple and probably contradictory. Where international standards facilitate trade, consumers are offered some consistency in information and the benefits of lower prices generated by competitive imports. At the same time, where consumers of the importing country support a variation from an international standard as their national choice, benefit may be lost. Given the obligation to review and amend national requirements, the entire field of existing technical regulations is open for consideration. This presents a myriad of challenges and opportunities for consumers seeking to affect the outcome of national regulations.

States have their own systems for passing laws and regulation and vary in the degree of democratic participation and procedural due process they adopt. These domestic procedures are probably eroded, even where participation guarantees are given, when a binding rule is established by a body beyond a state’s domestic rule making system.

To the extent that the TBT Agreement has upgraded international standards to obligations, it is also likely that it has raised the profile of trade issues in standard-setting processes. If standards are designed to reflect only trade interests then the objectives of health and safety are challenged. There is a need, therefore, for international consumers to be engaged at the institutional level of standard bodies to ensure diversity of representation and ensure that objectives remain balanced.
Consumers, diverse as they are, may wish to increase their influence in order to ensure that standards are not poorly designed. If standard setting took account of the interests of consumers the legal boost to the criteria from the TBT Agreement could be viewed as a good thing. On the other hand, if international standards are adopted without participation, or shift the focus from national processes where consumers have influence, or over-emphasise trade aspects rather than protection objectives, then the negative effects of an undesirable standard-setting process would be magnified by the operation of the TBT provisions.

Legitimacy requires that concepts of due process and participation exist where a rule is being made. Since states have the power to designate representation to international standard bodies, legitimacy relies upon the assumption that states are somehow collating the collective interests of their own democracies and processes when they establish voting delegations for international standard setting. From the WTO legal perspective, the emphasis is upon guaranteeing that all WTO Members have the right and the capacity to be represented as states before these bodies. This expresses a sort of ‘first level’ of legitimacy.

A national consumer organisation might concur with this objective since it is probably in their interest to ensure that a state is securing its procedural process rights before those of a standard body and as a state among equals. It would be more problematic if consumer avenues for representation, already secured at the national level, were not somehow translated into a form of international representation that could reflect the essentials of the domestic due process: rights of notification and comment and judicial review on both substance and procedure. Selecting a single delegation for representation at international level is a daunting task.

This suggests a second level of legitimacy would be to seek to assess or influence the quality of that representation. As of now, this is a consideration to be made state by state; the WTO rules do not address the quality of delegation representation. But since the WTO’s TBT Committee has set out its concepts of behaviour for a body constituting international standards the power to go further might be available. Failing that, a standard body could take up the role of ensuring that delegations reflect societal interests between producers and consumers. This would inform state behaviour and clear the path for more balanced representation. Where this directive was not forthcoming from the standard body, influencing each state’s own policies would be the focus for national consumer organisations.

A third layer of legitimacy can be suggested if one considers an ‘international consumer interest’ operating independently of domestic considerations either before international bodies or the WTO. If a second level of legitimacy were achieved, one should expect a diversity of consumer interests to be expressed about a particular proposed standard via the opinions of the delegations. At the same time, there are common and systemic interests that can be pressed on behalf of all consumers before the bodies. One is to ensure that a body’s activities remain centred upon its own stated goals of promoting harmonisation for the legitimate objectives such as health and safety. While the TBT Agreement adopts a harmonisation approach in order to facilitate trade among Members, standard bodies pursue harmonisation for a mix of objectives, trade and non-trade.

Influencing standards leads to influence over the behaviour of all WTO Members. Producers are well placed to understand and respond to the new decision making environment and to organise their representation accordingly. States are quite aware that WTO claims can be filed against non-conforming regulations and many will seek to avoid even minor non-conformities if there is a chance that they will be accused of barriers to trade. Their tendency will be to ensure that their own trade interests are reflected in standard body delegations. While the legitimate objectives incorporated in standard body preambles remain in place, the constitutional realities in play suggest a more trade-oriented disposition in the process and probably more trade-sensitive substantive outcomes as well.

A real check on the character of standard bodies would seem to be not states themselves, but some greater assembly of interest to represent the international consumer and other legitimate interests more directly in the process. States will retain the power to vote but mechanisms to enhance the profile of the independent international voice should be assessed, determined and then advocated. The role of non-state actors collectively organised within other international organisations and bodies, should be further examined for relevant models.

The WTO has taken a rather passive role with regard to the TBT Agreement and its effects. To date no
dispute case has ruled explicitly on the ‘unecesary obstacles’ provisions in the TBT but interpretation can also be forthcoming from adopted ‘understandings’ as a result of delegate negotiations and WTO Ministerial Conference adoptions. Neither the TBT or the SPS Agreement are under consideration for the Doha Round of negotiations and in the case of the TBT, the 3rd Triennial Review of the functioning of the agreement does not indicate any call for clarification or modification of the provisions. Pursuing revision will have to be undertaken via state representation.

**Recommendations**

1. **Consumers International should come forward with an opinion as to whether the TBT and SPS regimes require amendment or additional understanding** and, if so, develop strategies accordingly. It should also pursue a more systemic interest, especially in the positions taken by WTO Members, in the triennial reviews of the functioning of the TBT Agreement and for any other committee work regarding the qualifications for international standards, or the behaviour of standard bodies. A part of this strategy should also focus on ensuring that consumer protection objectives of the standard body are being properly respected in view of the increased pressure upon Members to recognise trade-oriented objectives.

2. **CI should monitor the WTO TBT Committee focusing on two areas:**

   - international standards and the relationship between the TBT Agreement and standard bodies
   
   - notifications by states of non-conforming regulations and any resulting consultations between Members to ensure early notice on possible dispute cases dealing with international standards.

   For CI’s Members priorities include notifications of non-conforming standards and discussions and submissions engaged in by their own governments.

3. **CI should campaign for greater consumer participation at international standard bodies** on two distinct tiers (international and national consumer) and at two levels (standard bodies and states).

   - It should challenge the legitimacy of standards and standard bodies that do not seek to include broader representation in their processes.

   - CI should press to be included in delegations, or demand that it be referred into the activities of those delegations, for standard bodies that have TBT observer status. This is in conjunction with its role as observer or participant in other standard body functions. CI should be informed of consultations between the body and the TBT Committee and of any positions the standard body is taking before the TBT Committee.
• CI should demand the right to receive submissions and comment pre-submission. It should publicise its evaluation of the conduct of standard bodies at the WTO.

• Standard bodies should be pressed to encourage their Members to develop diverse delegations.

• The TBT Committee has already enunciated its principles for the qualification of international standards. CI should be directly interested in how these criteria function and in any review undertaken of the criteria either specially or periodic.

• If CI wants to see a broader concept of ‘interested parties’ when standard bodies notify and states collect information, then CI should clarify a position on this point, communicate it to the Member states via its members, and commence making this case before the committee.

• If CI thinks that the definition of an international standard should incorporate a different notion of flexibility to that outlined by the dispute panels, then that also has to be put before the TBT Committee.

• CI should help any of its members who are seeking representation on relevant delegate bodies or to have input into the positions taken by delegations. This is particularly emphasised in those cases where there is a significant gap between due process rights already secured at national level and the degree of participation accorded for international standard setting.

4. **CI should develop a strategy to seek observer status at the TBT Committee and permission to make submissions.** WTO does not allow observers in the form of non-governmental organisations but it does accord observer status for intergovernmental organisations including standard bodies. This raises the possibility of whether CI could be represented as a part of a standard body delegation already observing at the TBT Committee. Where the TBT and SPS Agreements are concerned, there is a strong case to be made that at any point in time when non-governmental observers may be permitted in the WTO, CI should be an early entrant to these selected bodies. Selected body observer status for intergovernmental organisations is expressly contemplated in the WTO and seeking selected body rather than general observer status has a certain strategic and focused value. CI meets the criteria for intergovernmental organisation representation as the purpose of observer status is to allow organisations which ‘have competence and a direct interest in trade policy matters … or have responsibilities related to those of the WTO’ to follow discussions ‘on matters of direct interest to them’.

In addition, these factors are met on ‘the nature of work of the organisation concerned, the nature of its membership, the number of WTO Members in the organisation, reciprocity with respect to access to proceedings, documents and other aspects of observship, and whether the organization has been associated in the past with the work of the Contracting Parties to GATT 1947.’ An international consumer NGO with national qualified membership can meet these criteria. If CI chooses to pursue observer status this would be a longer-term strategy, and it would be necessary to draw distinctions between itself and a larger community of non-governmental organisations that cannot ever realistically meet the criteria. There is, however, one point of precedent where international consumers were represented during the 1947 Havana Conference for the International Trade Organisation Charter, together with the International Chamber of Commerce and international labour. The focus should be upon observing only in respect of relevant bodies such as TBT or SPS, and the strategy should be public and publicised.

• The strategy should screen for other INGO’s that would also meet the criteria for a direct interest in international standards:

  - by having a membership composed of qualified national organisations in both developed and developing countries

  - by having a track record of observer status at other international organisations dealing with standards.

5. Another WTO area to consider is that of dispute settlement. **CI should monitor WTO cases**
Concerning TBT that have significant consumer implications.

- CI should attempt to take a position on these cases and publicise that position.

- CI should file direct friend-of-the-court *amicus curiae* submissions. These should be published for the record whether or not accepted by a panel.

- CI should consider whether it can also function as a warning mechanism for its members where they may have access to their state submission procedures (by attachment) in dispute cases. As noted in McGivern’s contribution to the project, almost every WTO case touches consumers in one way or another. For consumers, there is a strategic interest in any case where a state invokes its understanding of the consumer interest as a legitimate objective in support of its product regulation.

In the TBT context, the best example of an NGO opinion finding its way into a dispute panel’s consideration was a consumer organisation insertion in the EC-Sardines case. This was not an *amicus curiae* but attachment of a consumer organisation letter to the submission of a litigant party. This is an inexpensive and cost effective strategy in those cases where a consumer organisation is able to cite a long-term interest in the standard and assess a litigant’s own view of the consumer interest objectives of a regulation. It is likely that national litigants will seek to use this technique again and consumer organisations can be made aware of the opportunities when their own countries are disputants or responding to a dispute. All cases with a TBT claim are notified to the TBT Committee and monitoring disputes, to determine whether a submission attachment would be relevant, could be done centrally by CI.

7. **CI should assist its members to challenge states to give the broadest and most meaningful interpretation of the TBT’s Committee Decision on international standards and standard bodies.** Consumer organisations at national level should demand full disclosure of all drafts and other materials provided to body Members by the relevant standard body. CI should publicise cases of good practice where national organisations are being given participatory rights in comment and/or participation in delegations. CI should seek to have the consumer interest identified as an ‘interested party’ in international standard setting at every opportunity in the process, state by state.

8. **CI should assist its members to raise awareness about the obligation to review and amend existing national regulations in light of new international standards as part of their own domestic strategies for enhancing domestic consumer protection.**

6. **CI should monitor standard body documentation and procedures in respect of the TBT Committee’s Decision regarding international standards.** In particular, CI should evaluate the transparency provisions of notification to ‘interested parties’ and make the case that national consumer organisations are always interested parties for the purpose of notice. Although the Decision does not require it, CI should argue that the best practice for circulating draft standards is to notify consumer organisations as interested parties. CI should publicise procedures which do not satisfy the TBT Committee’s criteria and continue to argue for an expansion of the criteria in practice. It should also characterise the TBT Decision as a ‘minimum’ of what WTO rules require but not intended to reflect broader governance considerations.
Introduction

Governments pursue the legitimate objectives of health and safety by setting and enforcing requirements for products and their characteristics. These compel producers to either comply or to forego the opportunity of marketing their products. These standards intersect international trade and economic law when they arguably favour domestic producers at the expense of imported products, or otherwise act as ‘unnecessary obstacles’ to international trade.

Since standards functioning as trade barriers are never explicitly protectionist, their potential character as disguised restrictions is often at issue. While most barriers are the result of differences in countries’ culture, choices and means of identifying characteristics or labelling requirements, a more pernicious strand of protectionism emerges where domestic regulation has been captured by those interested in isolating the domestic market from foreign competitive forces.

The efforts of a number of GATT Parties to promote harmonisation for product regulations and standards and enhance the system’s ability to address more subtle forms of ‘non-tariff’ barriers, led to the conclusion of the GATT Tokyo Round Standards Code (1980). This plurilateral agreement was updated and concluded in the Uruguay Round as the WTO Agreement on Technical Barriers to Trade (TBT Agreement). As one of the Multilateral Agreements on Trade in Goods, the TBT became subscribed to by all WTO Members and then also subject to the provisions of the WTO Dispute Settlement Understanding (DSU). The DSU provisions allow for panel and Appellate Body (AB) review in respect to the interpretation of the terms and provisions of the TBT Agreement for any dispute between Members.

The institutional changes brought by the WTO are noted in particular, since the obligations relating to international standards changed little from the original Standards Code text. For the pre-WTO era, there is not much evidence of controversy concerning the Code’s treatment of international standards, or about the Code overall for that matter. Since there were negotiation issues on the revisions undertaken in the Uruguay Round, the provisions on international standards were not high among them according to some accounts. The dispute procedures under the Standards Code were never invoked in any reported final outcome and no GATT dispute case ever resulted in a ruling on a Code issue, although a number of cases appeared to include issues dealing with product standards.

In the WTO, some cases could have also have been brought under the TBT provisions, but only recently have the provisions been the subject of dispute settlement when the dispute panel and AB reported on EC-Asbestos and EC-Sardines. The clarity added by these rulings will probably promote the use of the TBT provisions in dispute settlement claims.

The EC Sardines case concerned a claim by Peru that the EC failed to apply a Codex standard for its regulation. It provided the first ruling on the requirement for Members to use such standards as a basis for their own domestic regulations. Although commentary on the TBT Agreement tends to emphasise other TBT provisions that ‘encourage’ the use of international standards, this ruling was somewhat more direct in applying the rather unambiguous and obligatory text of Article 2.4 of the TBT Agreement in order to resolve the dispute.

Since standards generated by international bodies are understood to have an otherwise non-binding legal character, this TBT provision raises implications for global governance issues. While participation legitimacy in rule making should be of interest to states and standard bodies, it is clearly important to the ultimate consumers of products and to the organisations that seek to secure their interests before domestic and international rule-making bodies.
The TBT Agreement

The dual priorities of eliminating unnecessary barriers to trade and promoting harmonisation based on international standards was fully identified in the Tokyo Standards Code. According to the introduction of that code, a noted aim of the negotiations was to:

...reduce or eliminate non-tariff measures or, where this is not appropriate to reduce or eliminate their trade restricting or distorting effects, and to bring such measures under more effective international discipline.

And,

...when governments or other bodies adopt technical regulations or standards, for reasons of safety, healthy, consumer or environmental protection, or other purposes, these should not create unnecessary obstacles to trade.¹⁵

These two elements were fully preserved in the WTO TBT Agreement and are still reflected in its preamble in words essentially identical to the original code:

Recongnizing the important contribution that international standards and conformity assessment systems can make in this regard by improving efficiency of production and facilitating the conduct of international trade;

Desiring therefore to encourage the development of such international standards and conformity assessment systems;

Desiring however to ensure that technical regulations and standards, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade;[¹]¹⁶

While the original code may not have generated much controversy it is clear that this earlier agreement, and the TBT Agreement, significantly extended the reach of GATT law in two ways. First, it established a new legal theory for complaints based on an ‘unnecessary obstacle to trade’ standard. This would focus on the inherent trade restrictiveness of the regulation itself, rather than on whether the restriction was discriminatory in comparing treatment accorded to domestic production, as in the national treatment context.¹⁷

A second innovation was that the Standards Code provided an obligation for the signatories to apply international standards for their domestic regulations:

2.2 Where technical regulations or standards are required and relevant international standards exist or their completion is imminent, Parties shall use them, or the relevant parts of them, as a basis for the technical regulations or standards except where, as duly explained upon request, such international standards or relevant parts are inappropriate for the Parties concerned...

It is at least a point of historical interest that this obligation to use international standards has been a fully effective GATT obligation since 1980, and as between the major industrial Members of the GATT.

Scope and application of the Agreement

The TBT Agreement applies to all products, including industrial and agriculture products, but excludes government purchasing requirements or any government measures that fall under the definitions for sanitary and phytosanitary measures as defined in Annex A of the Agreement on Sanitary and Phytosanitary Measures (the WTO SPS Agreement).¹⁸

When interpreting its provisions, the general terms for standardisation and procedures for assessment of conformity are stated to be those applied within the United Nations system and by international standardising bodies. However, where a term is specifically defined in the agreement, as in its attached Annex 1, then these TBT-specific definitions control.

The TBT Agreement’s scope of application applies both to product technical regulations (mandatory) and product standards (non-mandatory). A technical regulation is:

A document which lays down product characteristics or their related processes
and production methods, including the applicable administrative provisions with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method. Although there are contrary arguments, the prevailing view is that the TBT Agreement does not cover standards describing mandatory production processes that are not directly incorporated into the resulting product. So-called ‘non-incorporated’ process standards, although also the subject of international standard setting, do not appear to fall within the agreement.

The key to this definition is this notion of a document setting forth the intrinsic and related characteristics of an identifiable product. The following case paragraph from the Appellate Body is noted as the primary case reference on the definition.

‘67. …the TBT Agreement itself gives certain examples of ‘product characteristics’ – ‘terminology, symbols, packaging, marking or labelling requirements’. These examples indicate that ‘product characteristics’ include, not only features and qualities intrinsic to the product itself, but also related ‘characteristics’, such as the means of identification, the presentation and the appearance of a product. In addition, according to the definition in Annex 1.1 of the TBT Agreement, a ‘technical regulation’ may set forth the ‘applicable administrative provisions’ for products which have certain ‘characteristics’. Further, we note that the definition of a ‘technical regulation’ provides that such a regulation may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements. The use here of the word ‘exclusively’ and the disjunctive word ‘or’ indicates that a ‘technical regulation’ may be confined to laying down only one or a few ‘product characteristics’.

There is also some strong inclination in the definition to limit the application of the agreement to actual physical characteristics. Although there are contrary arguments, the prevailing view is that the TBT Agreement does not cover standards describing mandatory production processes that are not directly incorporated into the resulting product. So-called ‘non-incorporated’ process standards, although also the subject of international standard setting, do not appear to fall within the agreement.

Structure
The TBT Agreement’s 15 articles are divided into sections dealing with:

- Technical Regulations and Standards (Articles 2 through 4)
- Conformity with Technical Regulations and Standards (Articles 5 to 9)
- Information and Assistance (Articles 10 through 12)
- Institutions, Consultation and Dispute Settlement (Articles 13 and 14)
- Final Provisions (Article 15).

In addition, three annexes cover:

- Terms and Definitions (Annex 1)
- Technical Expert Groups (Annex 2)
- Code of Good Practice for the Preparation, Adoption and Application of Standards (Annex 3).

In summary, the TBT Agreement is seen to address its primary attention to the behaviour of Members’ technical regulations and standards, their systems of conformity assessment and the promulgation of a code of good practice for non-governmental standard-setting bodies. One view of the agreement is that it treats these aspects from both a substantive and procedural perspective. In substance, it directs that technical regulations and standards should have certain minimum qualities, for example that a technical regulation shall not serve as unnecessary obstacles to international trade, or that Members shall use applicable international standards for their own regulations, or that a technical regulation shall not discriminate in favour of domestic producers.

In a more procedural sense, Members are encouraged to participate in international standard setting, to ensure that their conformity systems are open to the products of all Members on an equal basis, to ensure that their technical regulations are transparent or that amending or non-conforming regulations be notified to other Members to ensure right of comment.

The general regime for technical regulations
The TBT Agreement Preamble affirms the independence of states to determine their own levels of protection in their use of product standards, and lists certain categories of legitimate objectives:

Recognizing that no country should be prevented from taking measures necessary
to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, ...

As indicated above for the GATT Standards Code, the TBT Agreement preserves that regime of treating regulations in two primary areas. First, while it appears to recognise that a Member remains free to determine its own product requirements as suitable for protection of life or health etc, the TBT provides a standard of redress where such requirements may be so burdensome as to form an ‘unnecessary obstacle to international trade’. Article 2.2 provides this requirement, recited here in part:

Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade.

For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.

Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment.

In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products.

This sub-paragraph establishes a basis for a dispute complaint whereby one WTO Member would argue that another’s regulation posed an unnecessary obstacle to international trade.

Thus far, there has not been a WTO case to prompt interpretation and application of this sub-paragraph. Whether or not there are subtle differences in this compared with necessity tests employed in other GATT/WTO contexts, it is at least clear that there is a necessity test being advanced here. This is evident from ‘not more trade restrictive than necessary’ in the context of the obligatory ‘shall’ not create ‘unnecessary’ obstacles.

Given that Members are free to identify their own legitimate objectives for product standards, and that the test must also take account of the ‘risks non-fulfilment would create’ it is fairly arguable that the TBT necessity test has elements of assessing the importance of the objective itself when balanced with the restrictiveness the product requirement imposes upon trade. This balancing approach is common in domestic jurisdictions and US lawyers familiar with the Supreme Court approach to interstate (dormant) commerce clause cases would recognise the balancing approach. Similarly, those familiar with the EC free movement rules may identify some aspects of the proportionality test applied by the European Court of Justice, which asks in part whether the means employed to achieve the objective are proportionate to the objectives being sought.

However the dispute bodies eventually characterise the TBT necessity test, there will certainly remain a strong potential to challenge product regulations that are trade restrictive to some significant degree; and since a Member that conforms its regulations to an international standard is offered a defence against the charge of unnecessary obstacle to trade, the incentive to avoid the examination of necessity testing should be clear.
The TBT Agreement Regime for International Standards

There are two Article paragraphs dealing with a Member’s use of international standards. First discussed is Article 2.5 which provides a ‘safe harbour’ for WTO Members when they conform their domestic regulations to relevant international standards.

Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade.

This promotes the use of international standards as a domestic point of reference, at least when the state is seeking to realise one of the listed legitimate objectives. The effect is that conformity avoids a risk of a WTO claim, since the burden of establishing that an international standard acts as an unnecessary obstacle to trade would fall on the complaining party. It is nearly impossible to imagine how a complainant could prevail on such a theory.

This establishes a solid incentive for Members to use international standards for their domestic laws. While not mandating that Members have regulations at all, the approach remains more that of a ‘carrot’ than a ‘stick’.

The Article 2.4 regime – ‘as a basis’

A second provision found in Article 2.4 was the subject of WTO case law in EC Sardines and presents a more obligatory expression.

...where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations

...except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

Failure to use an international standard as a basis for domestic product regulation results in a violation of the agreement.

This obligation to use international standards must be qualified. First, a Member is not obliged to translate all international product standards into domestic regulations. The Member can choose not to regulate at all. The expression, ‘when technical regulations are required’ refers to the Member’s own determination to regulate.

At that point, an existing (or imminent) relevant international standard becomes applicable and must then be used ‘as a basis’ for the domestic law. The term ‘basis’ appears as a major parameter establishing flexibility in the obligation and also acts to distinguish this Article 2.4 from the safe harbour granted by Article 2.5.

The term has now been interpreted in both the SPS (EC-Hormones) and the TBT (EC-Sardines) context to not require a rigid or absolute conformity with the international standard. It is not synonymous with the terms ‘in accordance with’ (SPS provision), or ‘in conformity with’ (TBT 2.5 provision).

Instead, the requirement of ‘basis’ is understood to reflecting the concepts of ‘stands’, ‘founded’, ‘built upon’, or ‘supported by’. As the EC – Sardines panel recited the earlier AB report in EC – Hormones,

...we cannot lightly assume the sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome, obligation by mandating conformity or compliance with such standards..., since ‘based on’ is not the same as to conform or comply.

Reading TBT Article 2.5 together with 2.4, the safe harbour provision appears to be available for Members who undertake actual conformity with the international standard. Where a Member chooses to deviate in some manner from the precise terms of an international standard, that Member has an obligation to ‘base’ its regulation upon the international standard.

While we can see that this is not an obligation of strict conformity, one can also recognise that the criteria for the degree of flexibility allowed are also not being enunciated by the TBT provisions. To compare, the SPS Agreement has a clearly stated
right for Members to impose higher levels of food safety protection (than international standards) but then these deviations are subject to risk assessment and science obligations (SPS, Article 5). While these present their own complexities, the SPS Agreement is clearer on a Member’s right to assume a higher level of protection, and more explicit in balancing this right by setting science and risk assessment criteria for cases where Members choose to deviate.

The TBT Agreement’s scope is broader and can cover any product characteristic that is not related to food safety, many of which are not related to health factors at all. The agreement does not attempt to fully enunciate all possible objectives. Given this, there is not such a clear avenue to refer to science or risk assessment as a means to set the balance point between harmonisation and a Member’s right to set an individual level of protection.

The TBT more generally confirms that a country should not be prevented from taking measures necessary to realise its legitimate objectives, but it does not declare the power of a Member to regulate more restrictively (higher level of protection) than the relevant international standard, other than as can be discerned from the flexibility granted by the term ‘basis’.

This raises the question of how much deviation is permitted to a Member who does not choose stricter conformity. This will be treated case by case of course, but one can surmise that any panel called upon will commence an interpretation of the underlying international standard itself to determine whether, by its design, object and purpose, how much actual flexibility can extracted from it for a Member to set some higher or different level of protection, but still remain within the notion of ‘based upon’.

Whether the different level set remains ‘based upon’ the international standard, would seem to depend in large part upon the design of the standard itself.

The resulting inference is that the process undertaken in passing a new international standard is quite a significant factor in determining the residual flexibility left to Members to adjust the requirements to their own particular levels.

It is noted, finally, that the structure of a case submission regarding the order of claims treated has some bearing on this outcome as well. As in the EC – Sardines case where a complaining party chose, as first avenue, to charge that another Member has failed to base its domestic law on an international standard (Art. 2.4), a positive finding for the complainant on that point can resolve the case so that no further consideration of whether or not the standard was actually an unreasonable obstacle to trade (Art. 2.2.) need be undertaken.

It is conceivable that a panel could undertake this other test but this would seem to require the respondent in the case to argue that, although the domestic regulation was not based upon the international standard, its deviation was nevertheless not an unnecessary barrier. A panel could rule that there was a linkage between the two provisions, but for now judicial economy can be and has been applied to terminate the further inquiry since a clean violation and a resolution can be made solely on the basis that an international standard was not applied.

This is the manner in which the EC – Sardines case was handled by the panel. Peru’s request centred upon TBT Article 2.4 as directed to the prohibition within the EC Regulation that would not permit the marketing of S. sagax in the Communities under the possible names of ‘Peruvian Sardines’ or ‘Pacific Sardines’ or ‘Sardines – Sardinops sagax’ or the customary name as applied within a Community Member state of ‘Peruvian Sardines’ (or its German equivalent).

In the structure of the case as raised by Peru, alternative claims were made first based on Article 2.4 then, if no violation were found there, upon a consideration of Article 2.2. Since the panel found a violation of Article 2.4 and considered this paragraph first, no further analysis was requested or undertaken. Judicial economy allows the panel to make the finding necessary to resolve the dispute. The respondent did not seek to link the Article 2.4 obligation to either Article 2.2 criteria or to the non-discrimination requirements of either the TBT Agreement or GATT Article III.

**Additional TBT considerations for international standards**

- **Member obligation to review and amend**

An additional aspect of the EC – Sardines case dealt with whether the Community was obliged to conform its prior inconsistent (regulations) to a later enacted international standard. Both the panel and the AB affirmed that there was an affirmative obligation on the part of Members to review existing
legislation in light of newly formed international standards. From the panel report:

If we were to find that Members do not have an ongoing obligation to reassess their technical regulations, it would be possible to pre-empt obligations under Article 2.4 of the TBT Agreement by adopting technical regulations before relevant international standards are adopted.  

This obligation should be seen to apply whether or not the country participated in the standard formulation at international levels, and whether or not it voted for or against the standard in those cases where consensus is not required. Although this obligation could be viewed as independent from one to conform an inconsistent regulation to an international standard, as a result of a panel report recommendation, in fact the effect is similar since a panel would have to be initiated in any case against a country maintaining an inconsistent standard. In some cases where it is in the consumer interest to have an international standard realised in domestic law, the obligation to review could be used as an argument to support domestic review and amendment.

• **What is an international standard?**
The TBT Agreement simply refers to a ‘standard’ as a document approved by a recognised body that provides, for common and repeated use, the guidelines or characteristics for products or related processes with which compliance is not mandatory. By explanatory note, standards prepared by the international standardization community are based on consensus. The TBT Agreement Annex, however, also refers to documents that are not based on consensus. The EC’s argument in the sardines case, regarding the non-consensual voting procedure on the Codex committee, failed to convince the panel in the light of explicit Annex criteria. Thus, by consensus or otherwise, where a standard is developed by an international body or system one then accepts that such a standard is an ‘international standard’.

• **What is an International body?**
According to the TBT Annex too, an international body is a ‘body or system that is open to the relevant bodies of at least all Members’. This establishes the level of participation for states or customs territories that is required to invoke the obligations to use international standards according to Article 2.4 and Article 2.5. As long as the bodies of at least all WTO Members are permitted to join the international body or system, then the standards that are determined by that body or system are ‘international’. ‘Openness’ to WTO Members is the only relevant criterion, assuming that the result is, in fact, a document laying down product characteristics. In addition, such domestic bodies that join the international body or system need not be governmental in nature, since the Annex also considers the term ‘non-governmental body’ as one other than a central or local government body. Since the criterion of ‘open to the bodies of at least all Members’ is not limited to governmental bodies, then clearly private standard-setting bodies can be qualified as international bodies for the purpose of the TBT Agreement’s obligations to use their standards as a basis for domestic regulations.

WTO is an international organisation comprised of Members constituting customs territories most, but not all, of them states. To the extent that all of its Members are permitted to participate in international standard setting bodies or system, the operative presumption expressed in the TBT provisions is that the resulting standards are legitimated, since they are promulgated by systems which recognise WTO Members as participants. Clearly to the extent that any particular WTO Member chooses to balance its domestic participation in favour of its consumers is not a concern of the TBT Agreement as the Members have drafted it. That aspect is rather within the province of the Member states themselves, just as the choice to have or not have a domestic product requirement remains an independent choice. This is reflected by TBT Article 2.6 where, ‘…with a view to harmonizing technical regulations on as wide a basis as possible,’ Members shall play a full part in international standardizing bodies for those standards that they have either adopted or expect to adopt as domestic technical regulations.’ This simply reinforces the WTO’s international organisational character as one composed of state actors.

Bodies are not certified or ‘listed’ with the TBT Committee, and the TBT Agreement does not designate a list of ‘recognised’ bodies or provide any indicative listing of bodies. TBT does not use the same approach as the WTO SPS agreement where Codex, the International Office of Epizootics, and the International Plant Protection Convention are specifically referenced in SPS Annex A. The concept of ‘open to all’ also does not necessarily foreclose the
recognition of a body in a case where ‘all’ choose not to join. The concept has to be considered as organic and with potential for evolution in respect of the TBT Agreement text and the capacity of a panel to rule on a case by case basis in respect to any claim that a Member has failed to apply an international standard.

The TBT Committee has organised information sessions with international bodies, and a list of invited bodies provided in the 3rd annual report provides an indication of the range of recognised possibilities. As stated:

Ten organizations were invited (FAO, FAO/WHO Codex, IEC, ISO, OIE, OIML, ITU, OECD, UN/ECE, and WHO).

- **Developing country aspects**

While no provision is made for non-state actors, differences are recognised among states in relation to their respective development levels. There are provisions in the TBT Agreement to accommodate the position of developing country Members, again with the emphasis placed upon WTO Members rather than other entities. TBT Article 12.4 recognises that developing countries adopt certain technical regulations, standards or conformity assessment procedures that are aimed at preserving indigenous technology, production methods and processes compatible with their development needs. Thus:

Members therefore recognize that developing country Members should not be expected to use international standards as a basis for their technical regulations or standards, including test methods, which are not appropriate to their development, financial and trade needs.

The following two paragraphs reinforce this theme. Article 12.5 requires that WTO Members take reasonable measures to ensure that international standardising bodies are organised and operate to facilitate the active participation of relevant bodies in all Members, taking into account the special problems of developing country Members. Article 12.6 obliges developed Members to assist developing Members in their requests to have standardising bodies prepare international standards for products of special interest to the developing Members.

- **Member obligation to notify non-conforming product requirements**

TBT Article 2.9 requires Members to notify their technical regulations if they are likely to have a significant effect upon trade, when no international standard exists or the domestic regulation is not ‘in accordance’ with an existing international standard. Since the language used is that of conformity, one should read the provision as requiring that deviating regulations still ‘based upon’ international standards must be notified. Notification to the WTO Secretariat is to be made in time to: provide opportunity for suggested amendments to be made before they come into force; provide details to other Members upon their request and allow suggestions and discussions to be taken into account.

There is more incentive to apply international standards on a more strict conformity basis where transparency and consultation allows other Members to have an early opportunity to assess domestic regulations prior to initiating dispute resolution procedures.

This discussion has focused on the TBT provisions dealing with the adoption of product requirements related to international standards. We have not covered the agreement’s comparable points of reference for either conformity assessment (TBT Article 5.5 and 5.6) or for ‘non-international’ standard-setting bodies according to the annexed Code of Good Conduct. However, the provisions outlined demonstrate a quite comprehensive regime aimed at adoption of international standards, including an obligation to notify non-conforming regulations, and to review existing regulations in light of new international standards.

Given the implications for the domestic policies of the Members, it is not surprising that the TBT Committee has outlined some criteria for what actually constitutes an international standard. This is directed at the behaviour of standard bodies in relation to WTO Members. The committee documentation on this constitutes the primary expression of the WTO Members’ opinion of what constitutes adequate participation and legitimacy at this international level of decision making.
The TBT Committee and International Standards

Committee principles for the development of international standards

As a part of its triennial review, the TBT Committee reported a Decision regarding the appropriate behaviour of standard bodies in order to qualify their resulting standards as ‘international’ for the purposes of the Agreement. The Report provides the Committee’s rationale for the Decision.

In order to improve the quality of international standards and to ensure the effective application of the Agreement, the Committee agreed that there was a need to develop principles concerning transparency, openness, impartiality and consensus, relevance and effectiveness, coherence and developing country interests that would clarify and strengthen the concept of international standards under the Agreement and contribute to the advancement of its objectives.

The clear emphasis throughout is to ensure that all WTO Members have rights of participation in those bodies, and to raise the participation of developing Members in particular. As such, one would not expect to see any particular accommodation in the Decision for non-state actors and there is nothing in the Decision that can be read to suggest that an international body should elevate the participation of a consumer organisation (or any other non-governmental actor).

Since this document controls the definitional gateway of what may or may not qualify as an international standard, what is omitted from the recommendations raises as many questions as what has been included. Similar, the Committee process of consultation and from whom it did or did not receive comment, also raises questions of process. Finally, the value of the document as a possible source of WTO law in the case of dispute action can also be noted. These are all governance issues.

The committee’s approach has to been to cover the chronological sequence of standard setting from transparency through coherence, but the transparency step may provide the best entry point to argue that a definition for international standards could (or should) include a right of non-state actor participation in the positions developed by national delegations. Reciting the section on transparency:

In providing the essential information, the transparency procedures should, at a minimum, include:

- the publication of a notice at an early appropriate stage, in such a manner as to enable interested parties to become acquainted with it, that the international standardizing body proposes to develop a particular standard
- the notification or other communication through established mechanisms to Members of the international standardizing body, providing a brief description of the scope of the draft standard, including its objective and rationale. Such communications shall take place at an early appropriate stage, when amendments can still be introduced and comments taken into account
- upon request, the prompt provision to Members of the international standardizing body of the text of the draft standard
- the provision of an adequate period of time for interested parties in the territory of at least all Members of the international standardizing body to make comments in writing and take these written comments into account in the further consideration of the standard
- the prompt publication of a standard upon adoption
- to publish periodically a work programme containing information on the standards currently being prepared and adopted.

When the process opens, information flows from the standard body to interested parties within the territories of the Members. Following this, notification of draft standards flows to Members but not to interested parties.

Members are to be given enough time, however, to ensure that interested parties have time to comment and that Members have time to take those comments into account. This last step does not seem realisable unless the Members have also decided to forward the draft standard to interested parties, but there is no explicit obligation for the Member to do this and the
text is explicit that Members are to receive the drafts. 
What is of obvious interest here is the question of 
who or what is an ‘interested party’, and whether a 
national consumer organisation is interested for the 
purpose of this definition. Since the annex uses the 
term ‘relevant bodies of Members’ at other points, 
the notion of interested parties can also be assumed 
to be something different than other standard bodies.

The term ‘interested parties’ is not defined in the 
TBT Agreement, though it is also used in the TBT 
Annex 3 Code of Good Practice. It is also not defined 
by the Committee in this Annex 4 document nor in 
the governing Report.

If the international body met the obligation by 
broadcasting to the widest possible audience (by 
internet or open publication) the initial obligation 
relating to interested parties would be met and 
consumers would receive the same information as all 
others. If dissemination were narrower the standard 
body would be looking at the term to decide who 
was interested. In this case, one course of action 
would be to seek inclusion of national consumer 
organisations.

Going further, if consumer interests were not 
routinely included as interested parties then the TBT 
Committee might recognise this as something 
needing clarification when it reviews the operation 
of the Decision and the functioning of standard 
bodies. If a clarification included an explicit reference 
to consumers as interested parties, this would first 
establish a clear basis for inclusion in the 
transparency procedures. Perhaps more significantly, 
such a reference would also establish the beginnings 
of a legal basis to argue that a qualified international 
standard is one that has taken account of consumer 
interests, at least in this transparency phase.

An argument supporting this would be for 
consistency of procedures to allow Members to meet 
the obligations of the TBT Agreement. As the 
Triennial report stated:

The Committee noted that a diversity of 
odies were involved in the preparation of 
ternational standards (i.e. intergovern-
mental or non-governmental bodies; 
specialized in standards development or 
involved also in other related activities), 
and that different approaches and 
procedures were adopted by them in their 
standardization activities.

However, the obligation under the 
Agreement for Members to use 
nternational standards was the same.

The emphasis here is on a developing common 
practice that fulfils the committee’s notion of 
legitimacy in light of the obligations in the 
agreement. Some standard bodies may publish 
widely, others may not, and the term ‘interested 
parties’ may not be given any consistent meaning 
from body to body. This is probably not acceptable 
given that the obligation to apply international 
standards is the same irrespective of the differing 
characters of standard bodies.

The value of the Committee Decision as a source of 

law for interpretation in a dispute settlement case 
should be recognised even though the language of 
the Decision uses the term ‘should’ rather than 
’shall’. The question of whether a standard qualifies 
as an international standard can be raised in a case 
and this Committee Decision can be used to assess 
whether a standard meets the enunciated criteria. 
The EC referred to the Decision as a part of its 
argument that a consensus was required in the 
setting of the Codex Sardine standard, although in 
that case the panel ruled that the TBT Agreement’s 
permission for non-consensus took precedence.

Unfortunately, the Decision does not require that the 
Members actually solicit and receive comments from 
interested parties, just that they be given time to do 
so. This is a significant deference to sovereignty, 
especially as it is combined with an obligation on 
draft standards to give notice to Members only. 
Receiving input from interested parties is the choice 
of a Member, this discretion does not fall within the 
Decision’s remit to the standard bodies. One single 
point of reference in the Triennial Report does 
however refer to the larger community of interest, 
here in the context of developing countries.

Increasing awareness and co-ordination at 
the national level among stakeholders with 
respect to the importance of international 
standards related to trade interests could 
help to strengthen the financial and 
human resources of national standardiza-
tion bodies, thus enhancing their 
effectiveness in the international standard-
ization process.

As a result, while the TBT Agreement has the power 
to translate the legal value of an international
The WTO Agreement on Technical Barriers to Trade (TBT) standard into obligations on WTO Members, the TBT Committee has prescribed the behaviour of standard-setting bodies whose promulgated standards could be at issue in any WTO panel case. For this purpose, the committee has outlined these behavioural conditions, with emphasis on the rights of all WTO Members to participate in that process. This designated role for states defines the scope of legitimacy and governance, for this context, as one dealing with the relationship of states and their relevant bodies and the international bodies.

This is the situation ‘as is’ but note also that while the committee has demonstrated its inherent power to outline some conditions for what constitutes an international standard, it has also opened the door to assess this criteria in the light of participation and governance issues. One such issue that will not likely fade over time is the comparison between a state’s own accorded rights of participation in regulatory matters contrasted with the process by which states receive input and form delegations to international bodies. Given the TBT obligation to apply international standards as a basis for domestic regulation it is evident that the legislative field of action has passed from the state to the international body.

Even though this democracy issue has not fallen within the field of interest of the TBT Committee, the manner by which states and international bodies respond to the gap will have an impact on the longer term credibility of the TBT Agreement’s obligation to use international standards in spite of the Decision. This suggests that further enhancements in the criteria can not be excluded and that advocacy can be focused.

**TBT Committee and inter-governmental observer status**


Where the TBT Committee has conferred this status the following benefits are specified:

8. Representatives of organizations accorded observer status may be invited to speak at meetings of the bodies to which they are observers normally after Members of that body have spoken. The right to speak does not include the right to circulate papers or to make proposals, unless an organization is specifically invited to do so, nor to participate in decision making.

9. Observer organizations shall receive copies of the main WTO documents series and of other documents series relating to the work of the subsidiary bodies which they attend as observers. They may receive such additional documents as may be specified by the terms of any formal arrangements for cooperation between them and the WTO.

This status can be established in reference to individual WTO bodies, rather than to the WTO at large. For the TBT Committee, the process of approval is set out by incorporating the WTO’s guidelines for observer states.

The limitation noted at the outset is that the guidelines refer to ‘International Intergovernmental Organisations’ which limits the participation to organisations whereby governments constitute membership. The criteria are, however, of interest to non-governmental organisations to assess whether they meet them. The criteria are recited as follows:

**Guidelines for Observer Status for International Intergovernmental Organizations in the WTO**

1. The purpose of observer status for international intergovernmental organizations (hereinafter referred to as ‘organizations’) in the WTO is to enable these organizations to follow discussions therein on matters of direct interest to them.
2. Requests for observer status shall accordingly be considered from organizations which have competence and a direct interest in trade policy matters, or which, pursuant to paragraph V:1 of the WTO Agreement, have responsibilities related to those of the WTO.

3. Requests for observer status shall be made in writing to the WTO body in which such status is sought, and shall indicate the nature of the work of the organization and the reasons for its interest in being accorded such status.

4. Requests for observer status shall be considered on a case-by-case basis by each WTO body to which such a request is addressed, taking into account such factors as the nature of work of the organization concerned, the nature of its membership, the number of WTO Members in the organization, reciprocity with respect to access to proceedings, documents and other aspects of observership, and whether the organization has been associated in the past with the work of the CONTRACTING PARTIES to GATT 1947.

In the case of Consumers International the only bar to entry, at least to some particular WTO bodies, is the form of the organization as non-governmental. CI can successfully document a direct interest in TBT matters given its history in having observer status and other relations with international standard bodies. It also has a unique position in regard to its membership, since members are national consumer organisations that broadly reflect the WTO membership and are certified as representing the consumer interest in their states.

The organisation can also credibly show that, through its members, it has a direct interest in the processes undertaken by those governments as they relate to the TBT Agreement obligations and its procedures and to the international standard-setting bodies that are responsible for enacting the committee’s Decision.

At any point in time where the WTO opens for non-governmental organisations to act as observers, an international consumer organisation representing qualified national consumer organisations would be able to make an early and credible case for inclusion.

Dispute Settlement Participation

Although the TBT Committee processes are limited to participation by WTO Members, and non-state actors do not have the capacity to observe or participate, the dispute resolution procedures of the DSU, as interpreted by the AB, have provided potential for access in particular cases. At the panel’s discretion, non-governmental actors may request to file *amicus curiae* briefs. Where a case had significance for the consumer interest such a request may be granted and the submission considered by the Panel.

EC – Sardines, incorporated submission

A more ‘back door’ *amicus curiae* approach to raise the consumer perspective was effective in the EC – Sardines case where Peru annexed a letter from a consumer organisation to its submission to the Panel. Facts from this case illustrate the value of opinion evidence submitted in this manner.

The Community identified three legitimate objectives for its regulation: consumer protection, market transparency, and fair competition. The first two objectives were claimed for the contention that EC consumers should expect products of the same nature and characterisation to share the same trade description, and that consumers in most of the Member states associated sardines exclusively with *S. pilchardus*. None of the objectives were contested by Peru. The Panel noted that TBT Article 2.2 allows Members to decide ‘what policy objectives they wish to pursue and the levels at which they wish to pursue them’. However, while only a Member is in a position to elaborate the objective it is trying to accomplish, ‘…panels are, however required to determine the legitimacy of those objectives.’

The panel went on to investigate and invalidate the EC’s factual assertion that historical practice had created any consistent set of consumer expectations by which the Codex Stan 94 definitions would be rendered inappropriate or ineffective to validate the legitimate objectives. The panel considered legislation in force in a number of the EC Member states prior to the passage of the EC regulation, and found that this material was probative in principle with regard to the question of consumer expectations. After considering a number of evidentiary points (too numerous to detail here), the panel finally ruled that the EC had not established that consumers in most of the Member states had always associated the term sardines with that of *S.*
The WTO Agreement on Technical Barriers to Trade (TBT)

pilchardus alone. The Codex standard was therefore not inappropriate or ineffective to meet the legitimate objectives of the EC.\footnote{45}

The detailed use of consumer organisation opinion is detailed in the second submission of Peru:

57. The largest private consumer organisation in Europe, the Consumers’ Association, noted the first submissions of Peru and the EC to the Panel on the websites of the Advisory Centre on WTO Law (ACWL) and the European Commission. It decided to express its views on this submission in an open letter addressed to the Executive Director of the ACWL. This letter is attached as Exhibit PERU-16. The facts and arguments that the Consumers’ Association presented on the legal issues before the Panel should be regarded as part of Peru’s submission to the Panel.

Quoting the content of the letter itself:

58. The Consumers’ Association reaches the conclusion that the EC Regulation ‘does nothing to promote the interests of European consumers’. It correctly notes that: ‘If the objectives stated by the Commission had indeed been the main driving force behind the Regulation we would have had a very different Regulation than the one we are faced with today. Europe’s consumers have, for many decades enjoyed a range of sardines from different countries. It is noticeable that when the Commission invokes the spectre of consumer confusion and distress absolutely no evidence is presented to support their case. This is because the more liberal and internationally consistent regime prior to the adoption of the Regulation did not cause problems for consumers. The Regulation was designed to protect European producers and processors and clearly acts against the economic and information interests of Europe’s consumers.’\footnote{46}

It is clear from this where a consumer perspective can be of value in a case. The technique used here of incorporating a single letter into a country’s submission is a low-cost intervention for the organisation and the complainant party. Here the issues were: consumer expectations, marketplace confusion and whether the international standard was promoting clarity. One could suggest that where any party to a dispute is arguing the consumer interest in relation to a country’s objectives and the means taken to achieve them, this would raise the possibility that a national consumer organisation with background on the issue could make a contribution.

A question is whether the opportunities for increasing such interventions can be facilitated by an ‘early warning’ mechanism operated at the international level. It is interesting that the monitoring function of case issues is made somewhat easier by the fact that the relevant committees receive notification of cases where a provision under their authority has been raised. Thus the TBT Committee receives notice of all cases where a TBT provision is being raised in claim or defence.

Other cases with a TBT dimension

Although it is not possible to draw TBT considerations into cases where the TBT provisions have not been raised on a claim or a defence, there have been a number of cases since the entry into force of the WTO where a TBT provision has been cited as a part of the request for consultation. In most cases the TBT is raised as an alternative claim.

This is especially so in food protection cases where the SPS Agreement is primarily plead, but TBT is plead too in case the application for labelling or otherwise might fall within TBT. In a few cases it does appear as though TBT has been raised as a primary claim, mainly on a charge of unnecessary obstacles (TBT Art. 2.2).

While traditionally cases have tended to rely upon GATT Articles the trend may be to raise TBT as primary, certainly for the cases turning on ‘description’ of a product or its characteristics. This follows from the increased level of legal security as to the application of the TBT Agreement (EC-Asbestos definitions) as well as the stated tendency for panels to resolve claims flowing from the more specific (TBT provisions) to the more general (GATT Articles).

For point of reference, 23 cases have been notified as including a TBT claim, as digested from the WTO web site.\footnote{47}
Conclusions

Impact on consumers
The TBT Agreement translates non-binding international standards into an effective obligation to use such standards as a basis for domestic regulations when a Member chooses to regulate. The interplay generating this legal effect is subtle. The requirement to positively establish national requirements is still not imposed by the provisions but the TBT Agreement ‘encourages’ the use of international standards especially by reference to the safe harbour provision of TBT Article 2.5.

But this softer approach turns on the difference between the notion of ‘conformity’ and what is meant by ‘basis’. It is only in the distinct meaning of these terms that flexibility has been granted regarding the obligation to apply international standards as a basis for domestic regulations, when appropriate and effective, to meet a Member’s chosen objectives.

Are consumers in favour or opposed to the principle of international standards receiving broader domestic application? This question can be put in the context of the substance of the standards and the way they are adopted. On substance, there are strongly held opinions on both sides. The spread of a common standard must be positive to the extent that it eliminates confusion in the marketplace and promotes access to goods and the benefits gained from choice. The EC-Sardines case is directly on point; the non-conforming EC regulation clearly restricted a source of foreign supply. In that case a consumer group supported the international standard and challenged the EC’s claim that its own regulation was serving consumer interests.

At the same time, and irrespective of the process of setting a standard, its is also true that a common standard could reduce product diversity and source diversity.

From a national consumer perspective, it seems that the substance question turns upon whether a standard is posing as a ‘floor’ or as a ‘ceiling’. Depending upon one’s point of view, any single standard could be criticised for being both. This is to say that one country’s ceiling may be another country’s floor. A developed-country consumer seeking the highest level of protection will argue that a ceiling has been formed that frustrates domestic objectives whereas a developing-country consumer may argue that the ‘floor’ is too high – developing country exceptions aside.

Whether a standard sets a floor or a ceiling the TBT Agreement’s use of the term ‘basis’ may allow some degree of flexibility. ‘Based upon’ may mean adopting common methodology but having the flexibility to set the level. The likelihood of this type of flexible standard would seem higher where the process takes into account the diversity of national consumer opinions. This suggests that an international standard would be more consumer friendly where the setting process allows diverse national interests to express themselves.

To the extent that the TBT Agreement has upgraded international standards to obligations, it is also likely that it has raised the profile of trade issues in standard-setting processes. Consumers, diverse as they are, may wish to increase their influence too in order to ensure that these standards are not poorly designed. If standard setting took account of the interests of consumers the legal boost to the criteria from the TBT Agreement could be viewed as a good thing. On the other hand, if international standards are adopted without participation, or shift the focus from national processes where consumers are better organised and able to affect the process or over-emphasise trade aspects rather than protection objectives, then the negative effects of an undesirable standard-setting process would be magnified by the operation of the TBT provisions.

For the international (non-country specific) consumer, wider adoption of international standards can be considered commensurate with enhancing the clarity of information in the marketplace and welfare gains usually associated with lower prices and greater choice from international trade. However, if standards are designed to reflect only trade interests then the objectives of health and safety are challenged. There is a need, therefore, for international consumers to be engaged at the institutional level of standard bodies not only to ensure diversity of representation but to also to ensure that objectives remain balanced.

The TBT Agreement is not setting standards, it references existing standards for the purposes of WTO rights and obligations. The criteria developed by the TBT Committee emphasises aspects concerning participation by WTO Members before standard bodies but it is possible to make the case, and some Members may be willing to do so on behalf of
consumers, that global decision making requires more. Seeking friendly Members to make the argument for more inclusive standard setting may be all that can be realistically achieved for now given the WTO predisposition against non-governmental observers. This situation is not going to change without arguments showing how particular non-governmental organisations representing consumers can meet the underlying WTO criteria of direct interest and meaningfully contribute to informal rule making in WTO Committees.

Relationships among actors
The increased profile of the TBT Agreement in respect of global governance issues with a consumer dimension, can also be viewed from the perspective of the relationships established between the three actors: the WTO, the Member States, and the standard bodies.

WTO and Member States
Impact of case rulings: The WTO and its TBT Committee are the recipients of disputes concerning individual national legal acts. Rulings impact on the sustainability of inconsistent national regulations. This in turn impacts upon the domestic legislative process itself, including the obligation to review and amend non-conforming domestic regulations. This should inform national consumer strategies regarding existing and proposed domestic product laws, at national and sub-national levels.

States as actors in dispute cases: States are actors in the WTO dispute settlement procedures and they may complain or defend a regulation on the basis of consumer protection. Consumer organisations may be called upon and relied upon to validate or invalidate a regulation’s stated objectives. The possibility of direct consumer participation via amicus curiae submissions or by incorporated state submissions has been discussed.

States’ access to WTO processes: Consumer organisations do not have access to the TBT Committee. States do have access and the capacity to form submissions in the process of ongoing committee work. It is possible for states to incorporate consumer viewpoints in these.

States and standard-setting bodies
There is a second relationship between states and standard-setting bodies. An international standard-setting body is defined in WTO law as one open to the ‘relevant bodies of at least all Members’.

The manner of representation for the purpose of participation by any state Member is a consideration for all non-state actors with an interest in a standard or the process by which it was adopted.

In recognition of the importance of international standards the WTO TBT Committee has forwarded its own Decision on the principles by which standard-setting bodies should operate in respect of their process and in respect of ‘all Members’. Thus far there has been far less focus on what constitutes the term ‘relevant’ in relation to appropriate national actors or combinations of actors that should have access to the standard setting process.

This is closely aligned to the global governance question of what it means to be ‘open’ when the result of the process creates international trade law consequences. The core consideration in the relationship between relevant bodies of states and international standard-setting bodies is that the process of standard setting will need to be demonstrably legitimate (sufficient) to support the legal effects that the standard may have in application and as a result of the WTO norms introduced by the TBT provisions.

This concept is also not static as a legitimacy issue and it is capable of reflecting broader considerations over time as the notion of international governance in the context of international organisations takes firmer legal root.

Standard bodies and the TBT Agreement
The final relationship is between the standard body and the TBT Agreement. Here there is a question of what other bodies, besides the dedicated standard bodies, may qualify to establish international standards, i.e. whether there is any legal basis to argue that there is or is not a ‘closed list’.

The TBT Committee has formulated its own criteria for qualifying international standards in reference to the process by which they are announced for consideration and adopted, and to the participation of developing countries.

Although these criteria do not place burdens upon bodies to incorporate the concerns of non-governmental organisations, they are required to provide for sufficient opportunity for states to collect information. The failure to collect relevant information from stakeholders, while not actionable in a legal sense, indicates that the process was not
well undertaken in terms of fulfilling the criteria. There is a moral argument here; standard bodies are required to give the states this opportunity so states ought to fulfil that requirement in good faith.

Another line of analysis should survey and compare the objectives of the TBT Agreement and international standard-setting bodies, and reflect upon how the TBT may be affecting bodies’ objectives. Harmonisation and public policy objectives of standard setting, as entrusted to international bodies, are not the same as the harmonisation objectives for trade purposes that are operable in the TBT. While there is overlap to the extent that international standard setting is also intended to facilitate trade, much of the standard setting is done for the objective of eliminating market confusion and protecting social values such as health or the environment. Where the TBT Agreement raises the legal effects of these standards, the possible influence of the TBT objectives on the balance of priorities of standard setting itself should be interest to those who wish to see standard setting retain or enhance its focus on core objectives.
Attachments

WTO Cases involving a TBT claim, as notified to the TBT Committee

WT/DS291, European Communities – Measures Affecting the Approval and Marketing of Biotech Products, multiple countries requesting

WT/DS290, European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs – Request for Consultations by Australia

WT/279, India – Import Restrictions Maintained under the Export and Import Policy 2002-2007 – Request for Consultations by the European Communities

WT/DS263, European Communities – Measures Affecting Imports of Wine - Request for Consultations by Argentina

WT/DS233, Argentina – Measures Affecting the Import of Pharmaceutical Products - Request for Consultations by India

WT/DS232, Mexico – Measures Affecting the Import of Matches – Request for Consultations by Chile

WT/DS210, Belgium – Administration of Measures Establishing Customs Duties for Rice – Request for Consultations by the United States

WT/DS203, Mexico – Measures Affecting Trade in Live Swine – Request for Consultations by the United States

WT/DS151, United States – Measures Affecting Textiles and Apparel Products (II) – Request for Consultations by the European Communities

WT/DS144, United States – Certain Measures Affecting the Import of Cattle, Swine and Grain from Canada - Request for Consultations from Canada

WT/DS137, European Communities – Measures Affecting Imports of Wood of Conifers from Canada – Request for Consultations by Canada

WT/DS134, European Communities – Restrictions on Certain Import Duties on Rice – Request for Consultations by India

WT/DS135, European Communities – Measures Affecting Asbestos and Products Containing Asbestos - Request for Consultations by Canada

WT/DS100, United States – Measures Affecting Imports of Poultry Products – Request for Consultations by the European Communities

WT/DS85, United States – Measures Affecting Textiles Apparel Products – Request for Consultations by the European Communities

WT/DS72, European Communities – Measures Affecting Butter Products – Request for Consultations by New Zealand

WT/DS61, United States – Import Prohibition of Certain Shrimp and Shrimp Products – Request for Consultations by the Philippines

WT/DS56, Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and other Items - Request for Consultations by the United States

WT/DS48, European Communities – Measures Affecting Livestock and Meat (Hormones) - Request for Consultations by Canada

WT/DS41, Korea – Measures concerning Inspection of Agricultural Products – Request for Consultations by the United States

WT/DS20, Korea – Measures Concerning Bottled Water – Request for consultations by Canada

WT/DS14, European Communities – Trade Description of Scallops – Request for Consultations by Chile
Footnotes

1 The TBT Agreement definition for technical regulation considers ‘product characteristics or their directly related processes and production methods … with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to product, process or production method.’ TBT Agreement, Annex 1. To contrast, a product standard is ‘non mandatory’. The term ‘product standards’ may be used inclusively.

2 The TBT Agreement is within Annex IA, Multilateral Agreements on Trade in Goods. The Dispute Settlement Understanding is found in Annex 2 of the WTO Agreement.

3 TBT Article 14.1, ‘settlement of disputes with respect to any matter affecting the operation of the Agreement shall take place under the auspices of the Dispute Settlement Body…’ DSU Article 3.2 states a purpose of dispute settlement, ‘to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.’

4 The SPS Agreement does not pre-date the WTO. Packaging and labelling requirements related to food safety are covered by SPS. Within a single enactment, it is quite possible that portions it could be determined to fall part under the SPS Agreement and portions within the TBT Agreement.

5 For an example of this, Bruce Farquhar’s contribution to this project as to the ISO procedures.

6 The TBT Agreement definition for technical regulation considers ‘product characteristics or their directly related processes and production methods … with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to product, process or production method.’ TBT Agreement, Annex 1. To contrast, a product standard is ‘non mandatory’. The term ‘product standards’ may be used inclusively.

7 The TBT Agreement is within Annex IA, Multilateral Agreements on Trade in Goods. The Dispute Settlement Understanding is found in Annex 2 of the WTO Agreement.

8 TBT Article 14.1, ‘settlement of disputes with respect to any matter affecting the operation of the Agreement shall take place under the auspices of the Dispute Settlement Body…’ DSU Article 3.2 states a purpose of dispute settlement, ‘to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.’

9 There were 46 signatories to the Tokyo Round TBT code at the time of the Uruguay Round. ‘Most of these Members were the industrialized nations of the European Union, with the United States and select Asian and Latin American countries also represented.’ Wilson, J., (2001), Advancing the WTO Agenda on Trade and Standards - A Developing Country Voice in the Debate, draft version, Geneva, 2001, http://www.aercafrica.org/documents/standardsgenva.doc.

10 Stewart, The GATT Uruguay Round: a Negotiation History, Kluwer, Deventer, 1993, pp. 1013-1024, 1067-1105, at 1069. Cited in Volker, E., Results of the Uruguay Round, College of Europe. Some other provisions were contentious, but neither Volker nor Stewart highlight international standards.

11 Including the first appealed case in the WTO, U.S. Reformulated Gasoline. The WTO SPS Agreement has received more attention in the literature. Reasons include the early high profile case of EC-Hormone Treated Beef, the Agreement’s requirements for risk assess- ment and science-based standards, and perhaps some overall greater awareness and sensitivity to trade and food safety issues.


13 The subparagraph reads as follows. ‘2.4 Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.’

14 The term ‘global governance’ treated here in the sense of procedural due process - institutional issues including rights to be notified, comment, terms of access and representation, overall transparency, together according legitimacy as to the resulting substantive standard.

15 Further, to provide for measures of assistance to developing countries in the application of technical regulations or standards. GATT Standards Code, Introduction.

16 TBT Agreement Preamble, The only difference in text being the replacement of ‘certification systems’ in the original agreement by the term ‘conformity assessment systems’.

17 That the Standards Code provisions opened the notion for a distinct right of GATT legal action based upon the trade burden of the regulation itself has been noted as a significant international economic law inroad into the realm of state regulatory autonomy. See, Heiskanen, V., (2004), ‘The Regulatory Philosophy of International Trade’, Journal of World Trade, V. 38(1), pp. 1-36, at 6.

18 The SPS Agreement does not pre-date the WTO. Packaging and labelling requirements related to food safety are covered by SPS. Within a single enactment, it is quite possible that portions it could be determined to fall part under the SPS Agreement and portions within the TBT Agreement.

19 For the definition of standard, a ‘[D]ocument approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.’

20 EC – Asbestos, AB Report, para. 67. The AB also ruled that a domestic regulation or requirement needed to be examined ‘as a whole’.

21 For prevailing view, Appleton, A., (2004), ‘The Agreement On Technical Barriers To Trade: Balancing Domestic Policy Autonomy With Trade Liberalization’, chapter on file with author. Two implications are noted here. To the extent that international process standard setting is not covered, it will also not fall within the requirement to use international standards as a basis for domestic requirements. Related, process standards are also not subjected to any of disciplines of the TBT in regard to notification of non-conforming standards, etc.

22 TBT Agreement Articles 5.4 and 5.5 treat conformity assessment according to guides or recommendations by international standardising bodies, not treated here.

23 This final annex is new in the WTO Agreement and provides for the voluntary adoption of the agreement’s substantive disciplines
as applied for mandatory technical regulations when either governmental or non-governmental bodies are adopting or applying non-mandatory standards

24 US Supreme Court, Pike v. Church.

25 For a discussion of the evolution of necessity tests applied in WTO, G. Marceau & J. Trachtman, The Technical Barriers to Trade Agreement..., Journal of World Trade, 36(5), 2002, pp. 811-881, at 824 et. Unlike GATT Article XX, the test in TBT (and SPS) is applied as part of the rule rather than the exception. Not only will the burden remain upon complainant, but the flexibility granted to a Member to not apply the alternatively less restrictive measure may be greater. See, SPS Agreement, footnote to Article 5.6 for possible guidance. A most severe version of the test considering only the availability of lesser restrictive alternatives (no balancing as to objectives) would appear too narrow for the TBT context.

26 One might suggest that the reverse inference is a stick, i.e., that a non-conforming domestic regulation should be presumed to be an unnecessary obstacle to trade. However, the burden of proof remains on complainant whether or not the regulation is conformed to an international standard.

27 TBT Agreement, Article 2.4. The obligation was also stated as ‘shall use them’ in the Tokyo Standards Code.

28 Certainly whether or not the domestic regulation challenged was discriminatory in favouring domestic production (national treatment), and apparently, whether or not the non-conforming regulation was actually an unnecessary obstacle to trade. However, the burden of establishing that the relevant international standard is appropriate and effective as to the claimed domestic objective does remain on the complainant. See also, Heiskanen, supra., at p. 8

29 EC- Sardines, Panel Report, paras 7.77 - 7.79, quoting EC- Hormones, AB Report, WT/DS26/AB/R, paras. 70 and 71. The final qualification of whether the international standard is inappropriate or ineffective is not taken up here.

30 EC- Sardines, panel report, para. 7.79.

31 TBT Agreement, Annex 1, para. 2.

32 WTO, G/TBT/9, Second Triennial Review, 13/11/00, Annex One. ‘The Committee was informed of the different approaches and procedures adopted by these various bodies in their standardization activities (i.e. their membership and meetings, openness in drawing up programmes, transparency procedures, procedures for comments and decision making, application of adopted standards, as well as coordination and cooperation with other bodies at the international level.’


34 G/TBT/9, para. 20.

35 G/TBT/9, Annex 4, para. 4, italics added.

36 Code of Good Practice, TBT Agreement Annex 3, paras. L, M, and P.

37 G/TBT/9, para. 19.

38 G/TBT/9, para. 25.

39 G/TBT/14, Committee on Technical Barriers to Trade, Ninth Annual Review, 5.02.2004.
The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS)

Prepared for Consumers International
Steve Suppan
Institute for Agriculture and Trade Policy
The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS)

Executive Summary

This paper looks at the World Trade Organization’s Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement) and related decision making processes.

The objective of the Agreement is to assist international trade in food, agricultural commodities and live animals that will be used as food and help overcome barriers to trade. Some of the ways it does this are:

- by harmonisation of national or domestic food safety, plant health and animal health measures through reference to presumptively authoritative international standards (Article 3) in the SPS Agreement.

- a requirement that WTO Member notify the WTO SPS Committee of those domestic SPS measures that are not based on international standards or for which no international standards exist (annex B, paragraph 5).

- a framework (Article 4) for negotiating equivalence agreements, or bilateral recognition by an importing member that the SPS measures of an exporting member have equivalent effect in protecting, human, plant or animal health.
The SPS Committee meets at least three times a year and its tasks include negotiating guidelines to implement or to ‘clarify’ the SPS Agreement. WTO Member also discuss specific notifications to determine whether they are non-tariff barriers to trade. Potential barriers may be challenged under the terms of the WTO Understanding on the Rules and Procedures Governing the Settlement of Disputes, otherwise known as the Dispute Settlement Understanding (DSU).

Consumer organisations, like civil society organisations (CSOs) in general, have usually focused on (extra-ordinary) SPS-related decision making such as DSU dispute panels that decide whether a domestic SPS measure violates the SPS Agreement. One reason for this interest is that dispute panel and DSU Appellate Body (AB) decisions can require repeal or modification of domestic laws and regulations that are intended to protect consumers.

The interest of consumer organisations may also be prompted where a decision may determine how future SPS-related trade disputes are interpreted. Canada, in its current WTO case against EC – Biotech Products for example, will refer to rulings in Japan-Varietals relating to SPS measures used on horticultural products. The dispute panel may decide to justify a ruling in the EC- Biotech Products case by reference to Japan-Varietals but, unlike a precedent-based legal system, the panel is not required to do so. A report by the Organization for Economic Cooperation and Development (OECD) notes: ‘Although the WTO is not based on precedent, the accumulation of a body of jurisprudence relating to the settlement of disputes will determine how they should be interpreted’.

Part of the reason for interest in extra-ordinary decision making is that CSOs have access to the documents of dispute panels and the AB where they do not have direct access to documentation the (ordinary) decision making of the SPS Committee. Nevertheless, most disputes are settled before a decision is rendered by a DSU panel and the AB and international non-government bodies (INGs) and CSOs do not have access to these settlement negotiations which are usually only available to government officials and their food and agribusiness industry advisors.

This paper examines the DSU panel and AB case concerning the dispute between the United States and Canada vs the European Communities (EC – Measures Concerning Meat and Meat Products also known as EC Hormones). The case related to the use of growth hormones in the production of beef. Our purpose is not to review the facts of the case, consumer advocacy for the EC ban or the rulings. The intention is to examine how the DSU can be improved so that the use of expert opinion in the future is more transparent and unbiased than it was in the EC – Hormones case.

The paper argues that, in addition to CSO’s focus on extra-ordinary decision making, they should lobby their governments on positions taken in the SPS Committee. This committee’s decisions and guidelines can affect the ability of governments to protect consumers at least as much as decisions made by a dispute panel or AB which could result in changes to consumer protection laws.

Monitoring of, and lobbying about, SPS Committee decisions and discussions would, of course, require human and financial resources. It is acknowledged that consumer organisations may wish to devote these resources elsewhere, to national food safety rule making or to national positions for Codex meetings, for example, to name just two SPS-related activities. The following recommendations are put forward for consideration with the understanding that Consumers International’s member organisations and other CSOs may have commitments that would preclude undertaking the work entailed in the recommendations.

**Recommendation 1**
CI member organisations should lobby their governments for changes in the DSU to allow dispute panels and the Appellate Body to review unsolicited CSO ‘friend of the court’ (amicus curiae) briefs. Alternatively or additionally, CI member organisations should lobby their governments for a formal mechanism by which CSO briefs concerning a WTO dispute, and to which a government is either a disputant or a third party, are annexed to the government’s brief.

**Recommendation 2**
CI member organisations should lobby their governments to propose DSU provisions to verify the impartiality, independence and the scientific basis of expert testimony.

**Recommendation 3**
CI member organisations should lobby their
The WTO Agreement on the Application of Sanitary and Phytosanitary Measures

Overview of the SPS Agreement

Negotiations towards the SPS Agreement began in the late 1980s when the General Agreement on Trade and Tariffs (GATT) Standards Code was judged to be inadequate to prevent the use of domestic SPS measures as unjustified barriers to trade. The GATT principle of ‘national treatment’ had been applied to ensure that SPS requirements for imported foods were not more stringent than those for domestic foods but the lack of science-based and risk assessment criteria for resolution of SPS disputes, particularly in EC – Hormones, motivated the negotiation of the SPS Agreement.

The Agreement goes beyond the GATT requirements in several ways. First, it requires that an SPS measure ‘is based on scientific principles and is not maintained without sufficient scientific evidence’ (Article 2.2). The question of what is ‘sufficient’ is answered to some extent by the requirement that a WTO member’s SPS measures ‘shall be’ based on international SPS standards (Article 3.1) such as those of the Codex Alimentarius Commission (Article 3.4) that have a scientific basis.

If WTO Members wish to achieve a higher level of SPS protection than that afforded by the international standards and guidelines, such measures ‘shall not be inconsistent with any other provision of this Agreement’ (Article 3.3). To achieve this consistency, and to protect domestic SPS measures from a challenge under the DSU, the WTO member must fulfill a number of requirements.

Perhaps the most difficult of these are contained in Article 5. This article requires that SPS measures be justified by an assessment of risks to human, plant and/or animal health in traded foods and live animals, ‘taking into account risk assessment techniques developed by the relevant international organizations’ (Article 5.1). If a risk assessment were the only requirement of the article, then WTO Member could satisfy this by showing the risk assessment on which an SPS measure was based or by referring to an international standard. In practice, and in order to show that a domestic SPS measure conforms with the Agreement, negotiators set the evidentiary bar far higher.

Article 5 asserts that the risk assessment and the determination of an ALOP is a function of the ‘objective of minimizing negative trade effects’ (Article 3.4). Far from asserting the textbook
governments to repeal Article 5.5 of the SPS Agreement. The Article requires WTO Member to demonstrate not only that a disputed SPS measure is needed to achieve an Appropriate Level of Protection (ALOP) but that other SPS measures are applied consistently in an indefinite number of ‘comparable situations’. This makes it exceedingly difficult to defend an ALOP for consumers, animals or plants. If WTO Member do not repeal Article 5.5, CI member organisations should monitor their governments’ SPS regulations to ensure that those governments do not modify, repeal or prevent the application of SPS measures because of the threat of a trade dispute.

Recommendation 4

A change in SPS notification rules proposed by Brazil has the potential to delay implementation of SPS measures to protect consumer health. CI and its member organisations should lobby their governments to delete or amend the Brazilian proposal which is currently under negotiation in the SPS Committee.

Recommendation 5

Given the pressure to implement Article 4 of the SPS Agreement through bilateral equivalency agreements between WTO Member, and given the complexity of negotiating, implementing and enforcing such agreements, CI member organisations should campaign for public disclosure of equivalence agreement documents to help determine whether the agreements will protect consumers from food-borne hazards in imported foods.
independence of risk assessment from risk management, the SPS agreement states that ‘[I]n assessing the risk to animal, plant life or health and determining the appropriate level of sanitary or phytosanitary protection from such risk, Members shall take into account as relevant economic factors’ a series of cost-effectiveness criteria when managing the risks. The negotiators, in effect, take on the role of risk managers instructing risk assessors not to determine risks just on the basis of a review of scientific literature but also to take into account the economic costs of applying SPS measures.

Quite discreetly, the negotiators say nothing about applying cost-effectiveness analysis to the risks to human health mentioned in Article 5.1. The only other mention of human health is: ‘the exceptional character of human health risks to which people voluntarily expose themselves’ (Article 5.5). It is not clear whether the negotiators believe that a consumer’s choice of one food over another, e.g. soy burgers instead of beef burgers, is an ‘exceptional’ risk and beyond the cost-effectiveness framework applied to plant and animal health. This mention of human health is in the context of instructing the SPS Committee to negotiate guidelines to implement Article 5.5. The article requires that risk management demonstrate consistency in the application of SPS measures to achieve appropriate levels of protection ‘in different situations’ and to avoid ‘arbitrary or unjustified distinctions’ in ALOPS. Later in the paper we will review Article 5.5 and the Guidelines to implement it.

This overview cannot summarise all of the disciplines the SPS Agreement brings to bear on the application of SPS measures. We cannot conclude it, however, without mentioning Article 5.7 because this acknowledges what the rest of the SPS agreement does not; namely that an adequate science-based justification for an SPS measure cannot always be given. Sometimes, to protect animal and human health, risk managers have to apply SPS measures, up to and including import bans, on the basis of very little scientific information e.g. with regard to avian influenza. Article 5.7 concerns the use of provisional SPS measures ‘in cases where relevant scientific evidence [needed for a risk assessment] is insufficient’. The article requires that WTO Member seek ‘the additional assessment for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time’.

In our view Article 5.7 does not deserve the notoriety it received as a result of its invocation in the Japan – Varietals case and by its association with the precautionary principle in the EC – Hormones case. Here the negotiators frankly acknowledged the limit to all the other articles whose objective is to facilitate trade whenever possible and to ‘minimise negative effects to trade’ whenever the application of an SPS measure can be justified by the high evidentiary bar set by the SPS Agreement.
The WTO Agreement on the Application of Sanitary and Phytosanitary Measures

The SPS Agreement: Possible Kinds of Consumer Advocacy Activities

The following analysis results in fewer recommendations than those in a previous Decision making paper on the Codex Alimentarius Commission (Codex), and far fewer recommendations than CI makes in the course of its oral and written interventions in Codex. Part of the reason for this modest and pragmatic purport is that currently non-governmental and consumer organisations lack access to intervention in formal WTO decision making.

Despite this lack of direct access there are at least four kinds of advocacy that could help to protect consumers:

1. lobbying governments for procedural modifications to the WTO agreement on dispute resolution to allow non-governmental organisations to submit *amicus curiae briefs* in dispute cases, and to develop guidelines to make expert testimony in disputes more impartial and transparent

2. lobbying governments and campaigning publicly when governments are disputants or third parties to a dispute concerning the substantive content of complaints or defenses, in matters governed by the SPS Agreement

3. lobbying governments about their positions on Decisions before the WTO SPS Committee intended to ‘clarify’ or implement the SPS Agreement

4. lobbying governments and campaigning about abusive invocations of the SPS Agreement aimed at changing or pre-empting national legislation and regulation that protects consumers.

The state of play on the implementation of the SPS Agreement by the SPS Committee is provided here to give a context and basis for our recommendations. This analysis, though far from comprehensive, is focused on aspects of two implementation issues:

- non-binding guidelines concerning how governments should determine an ALOP when applying SPS measures so as not to discriminate against imported foods
- Decisions on equivalency of SPS measures, including special and differential treatment for developing countries in SPS matters.

As implementation of the SPS Agreement occurs through the SPS Committee and dispute panel rulings, we outline controversies in DSU provisions and dispute panel procedures. Our analysis focuses on the use of expert testimony and *amicus curiae briefs* and how these procedures affected the outcome of the EU/US/Canada dispute on hormone treated beef.

Since the SPS Agreement is designed to facilitate trade it might be assumed that it offers no opportunities to protect consumers, notwithstanding the intent to protect human health stated in its non-binding preamble. According to one survey of WTO dispute rulings, ‘the complainants win in 88 percent of the cases that reach a final conclusion in a [dispute settlement] panel or before the Appellate Body’ based on 1995-2002 data.’ This general tendency for complainants to win changes in the defendant’s laws or gain some form of compensation, as in the application of a certain amount of tariffs, should not lead us to assume that 88 percent of WTO challenges to domestic SPS measures will result in the repeal or modification of those measures as ‘disguised barriers to trade’.

As is noted below, relatively few WTO complaints are filed with reference to the SPS Agreement and very few result in dispute panel and AB rulings that can be analysed to determine whether they undermine consumer protections. There is ample opportunity, however, for governments unilaterally to weaken or not apply SPS measures to protect consumers because of a credible threat that domestic measures will be challenged under the SPS Agreement as trade barriers. In addition to dispute panel rulings consumer organisations should give more attention to whether negotiated and unpublished settlements about SPS disputes result in weakening measures intended to protect human, plant and animal health. Similarly, more attention needs to be paid to government positions taken in the ordinary decision making of the SPS Committee that ‘clarifies’ how to use and interpret the SPS Agreement.

Recommendations are proposed for the four kinds of advocacy activities outlined above on the basis of current state of play on dispute resolution, SPS Committee guidelines for determining how governments establish ‘appropriate levels of protection’ and bilateral equivalence of SPS measures to facilitate trade.
Decision-making in the SPS Committee and the Dispute Settlement Framework for Trade-Related SPS disputes

In 1997, Franz Fischler, European Union Commissioner of Agriculture, called for the renegotiation of the SPS Agreement. Its binding obligations were, he said, paralysing the adoption of international food safety, food quality and animal health standards set by international organisations referenced in the Agreement. Following a 1998 WTO AB ruling, that overturned some elements of a dispute panel ruling concerning the using of growth hormones in the production of beef, the United States also considered re-opening SPS Agreement negotiations. Since then a not very cordial entente has thwarted renegotiation of the SPS Agreement and there is no ‘built-in’ agenda for further negotiation.

Formal legal interpretation of the SPS Agreement is based on relatively few trade-related SPS disputes currently before panels of the Dispute Settlement Body (DSB) empanelled under the DSU, which is an Annex of the Agreement that founded the WTO.

Interpretation of the SPS Agreement is not limited to dispute panel and AB rulings, however, it also takes place in Decisions, Recommendations and Guidelines negotiated by the SPS Committee to ‘clarify and improve’ the implementation of specific articles, e.g. Article 4 concerning the bilateral determination of equivalence in Member’ SPS measures. All WTO Member may send representatives to the Committee which meets three times a year and informally as necessary.

The high cost of litigating disputes, the slow pace at which post-ruling sanctions are applied, and the very great difficulty in getting WTO rule violators to change offending legislation or regulations, are some of the factors that discline most WTO Member from pursuing recourse through the DSU. Most trade-related SPS disputes are resolved through bilateral negotiations, albeit invoking the SPS Agreement, and in rare cases even involve Heads of State pleading the case of particular industries.

A recent quantitative study of DSB proceedings suggests that the number of disputes filed about domestic regulations, such as the application of SPS measures, peaked in 1998 and is on the decline. Complaints or ‘counter-notifications’ to the SPS Committee of measures that a member believes may violate the SPS Agreement are fairly frequent. According to one study of SPS Committee minutes, between 1995 and 2002, 241 such complaints were filed. Relatively few of these complaints result in dispute filings, however, and even fewer result in DSU rulings that can be examined as case studies. From 1996 to 2003, only three disputes citing the SPS Agreement were reviewed by the AB. Cross-referencing in the WTO ‘Index of disputes issues’ makes calculation of dispute themes somewhat imprecise but we estimate that, as of 5 October 2004, of about 90 agriculture and fish product-related dispute issues, 14 concerned SPS matters at least in part.

The usefulness of analysing case studies of trade disputes resolved by panels in order to determine the overall impact of the SPS Agreement on the protection of consumer health, is therefore somewhat limited. Pre-dispute bilateral resolution of the application of SPS measures, without public disclosure of relevant documentation, seems to be the rule. The exceptions are rulings that can be studied by the public to learn how trade dispute panels judge whether the application of national SPS measures conforms to the SPS Agreement.
Prospects for Consumer
Organisation Intervention in
Influencing the Interpretation
of the SPS Agreement

International standard setting organisations, such as Codex, are constitutionally arranged to enable intervention by accredited INGOs, such as CI. The opportunities for INGO intervention in formal WTO activities are virtually non-existent, however, except and insofar as dispute panels allow amicus curiae briefs from NGOs and individuals in specific trade disputes (NGOs and individuals are invited to participate in informal, non-decision making activities such as WTO sponsored seminars or briefings). The AB ruled, in October 1998, in Canada Asbestos that dispute panels had the discretion to consider unsolicited amicus curiae briefs from NGOs and individuals. The ruling set off a fire storm of Member protest, which led to accusations that the AB was usurping Member rights.

After more than two years of Member comments the AB recently revised its working procedures. They do not address the issue of amicus curiae briefs, although the AB expects ‘to have an opportunity to consider some of the matters raised by Member in the context of future revision exercises’. Any recommendation concerning amicus curiae briefs will have to take account of this controversy in the light of the current DSU negotiations, which are not part of the Single Undertaking framework of the Doha Round of negotiations.

As, ‘the provisions of the DSU hardly amount to a comprehensive code of civil procedure or evidence, there is no explicit provision granted or denied that dispute panels must consider any other briefs than those of the disputants and third party Member. Article 13 of the DSU provides that: ‘Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate’. At question is whether the word ‘seek’ encompasses non-obligatory consideration of an unsolicited amicus brief by a panel or the AB.

Professor Robert Howse argues that because the purpose of the DSU is not just to settle disputes to the satisfaction of the disputants and third parties, but also to clarify the law (Article 3.2), the discretion to accept amicus briefs is related to the AB’s broader institutional role in clarifying the law[SP1]. While the AB may decide not to refer an amicus in a specific ruling, particularly given the 60-90 day time line [SP2]for an AB to review an appeal, both it and the dispute panels should retain the discretion to accept briefs that may help to decide a case or to clarify the law on which a decision is based.

Despite the protests of what Howse calls the trade ‘club’ of developed countries against the filing of NGO amicus briefs, ‘the powerful interests of developed countries, such as corporate interests, have means of getting their point of view know in dispute settlement circles that don’t depend on amicus submissions. . . All of the howls of the trade ‘club’ about amicus practice when NGOs are involved should be interpreted in light of their utter silence about the due process issues raised by the long-standing practice of lawyers, lobbyists, etc. talking to delegates or even legal officials of the Secretariat. . . This is no time for NGOs to back off from amicus submissions. In the short term, the AB may not ‘consider’ any of these submissions. But it will be forced in each instance to reaffirm its discretion to accept or reject the submissions. With each reaffirmation, the Members of the WTO are reminded that, despite all the pressure, the AB has not backed off from its basic legal position, and that NGOs are not prepared to back off as well.’

In light of the current dispute over amicus briefs, CI should consider how best to communicate the views of its member organisations to governments regarding procedural and substantive issues in SPS and other disputes heard by WTO panels. At least three not mutually exclusive options should be considered, in the following order of temporal priority:

**Recommendation 1**

- A first option is that CI seek funding to prepare amicus curiae briefs consonant with CI World Congress Resolutions and campaign objectives, e.g. regarding genetically modified organisms in EC – Biotech Products, and request CI member organisations to use such amicus curiae briefs to influence the positions taken by their governments in disputes.

- A second option is that CI member organisations lobby their governments for changes in the DSU to allow dispute panels and the AB to review unsolicited NGO amicus curiae briefs. Such briefs could be reviewed following DSB panel and/or AB review of disputant and third party briefs, if the panel or AB declares that amicus curiae briefs are warranted to provide relevant evidence or
A third option is that CI member organisations lobby their governments for the creation of a formal mechanism by which NGO briefs concerning a dispute to which a government is either a disputant or a third party could be annexed to the government’s brief.

The SPS Agreement and the Dispute Settlement Agreement: Facilitating Trade

The SPS Agreement is designed to facilitate trade not to act as a public health agreement, such as The World Health Organization Framework Convention on Tobacco Control. It has among its non-binding objectives the desire to, ‘improve the human health, animal health and phytosanitary situation in all Members’ (Preamble). The binding provisions of the agreement require Member to justify the ‘necessity’ of the application of SPS measures to achieve public health objectives.

The justification for such measures is assumed to conform with the SPS Agreement if a WTO member references, in its notification, an agreed standard established by one of three standards-setting bodies referenced in the agreement. These are: the Codex Alimentarius Commission, the International Animal Health Organizations (Office Internationale des Epizooties or OIE) and the International Plant Protection Convention (Articles 2.2, 3.2). Members may seek to apply measures that offer a higher level of human, animal or plant health protection, than that offered by international standards ‘if there is a scientific justification’ (Article 3.3) and, in line with the conditions of Article 5, the higher level of protection does not result in discrimination against imported foods.

However, the public health objectives should not be ‘more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility’ (Article 5.6). As indicated in our discussion below of Article 5.5, the SPS Committee had difficulty in developing voluntary guidelines to advise governments on how to implement their sovereign discretion to select the appropriate level of protection. The guidelines advise that governments may define a quantitative amount of risk to impose on consumers or give a qualitative description of how much consumers are to be protected.

There is no obligation, however, to document the ALOP even when notifying an SPS measure to the SPS Committee (Annex B). The documentation of an ALOP may have to be produced if and when another WTO Member counter-notifies the SPS Committee that an SPS measure is trade restrictive. The consumer protection value of notification is further reduced because Member are not required to include
in their notifications ‘confidential information . . . which would prejudice the legitimate commercial interests of particular enterprises’ (Annex B). ‘Taking into account’ that an SPS measure is economically and technically feasible and the least trade restrictive measure for a member to achieve whatever ALOP it may set, dilutes the consumer protection value of the SPS measure.

Complicating the already attenuated relation of the SPS Agreement to the protection of human, animal and plant health is the fact that nothing in the DSU requires trade disputants to adduce peer reviewed scientific literature as evidence to resolve trade disputes. As noted above, Article 13 of the DSU states: ‘Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate’. The Article continues: ‘Confidential information which is provided shall not be revealed without formal authorisation from the individual, body or authorities of the Member providing the information’, even if the information in question concerns a product or a substance that might harm public, animal or plant health. Annex 4 on ‘Expert Review Groups’ has no provisions to prevent conflicts of interest resulting from an expert having financial or corporate interests in the matter under dispute. However, parties to a dispute may object to experts chosen by the panel.

The DSU is currently being renegotiated under the mandate of paragraph 30 of the Doha Ministerial Declaration. Article 13 is not being targeted for renegotiation, however, and clarification of the treatment of amicus curiae brief to the panels, a matter of great interest to non-governmental organisations, is too controversial to allow the Chairman of the Trade Negotiations Committee to propose a revision. Weak rules of self-disclosure for panelists’ qualifications, negotiated in 1996, allowed a board member of the Nestlé Corporation to be selected to rule on US sanctions on Cuba where Nestlé had a factory.

The use of expert advice in Dispute Settlement: the Beef Hormone Dispute

Among the many controversies in the EU/US/Canada dispute over the use of growth hormones in beef production (EC – Hormones) was the dispute panel’s use of expert advisers. As an amicus curiae brief submitted to the Appellate Body’s review of the panel ruling noted in 1997, The United States and the EC agreed that the manner in which the Panel used scientific experts would affect the integrity of the dispute settlement process and public confidence in the outcome of the dispute. The brief noted that the public could not be confident of the integrity of the process, since, among other issues:

- the panel did not make public the written submissions of experts to the panel
- the panel’s report on expert responses to panel-drafted questions referenced no scientific literature as grounds for the expert’s views
- the panel did not ensure that the experts were impartial and independent by publishing conflict of interest information about each expert
- one of the experts selected from lists provided by Codex: ‘Dr. Jock McLean was actually a member of the Codex group that produced the 1988 report relied on by the United States. In addition to choosing its experts from a list provided by Codex, the Panel submitted questions to the Codex Commission Secretariat and involved a sixth expert, who represented the Codex secretariat, in its expert deliberations’.

In effect, Codex affiliated experts were allowed to review the scientific validity of their own work and present that as independent and impartial evidence. The panel did not seek independent corroboration of their views in peer-reviewed literature. Furthermore, the NGOs submitting the brief discovered – since the panel report did not include the resumés of the experts – that two of the six experts were employed by the disputant governments at the time of the dispute.

These flaws have impaired the credibility of WTO rulings based on putatively impartial and independent expert evidence. While many proposals have been made to address the weaknesses of the DSU, as far as we can determine the proposals do not address the provision of expert advice. At a non-governmental forum at the WTO in May 2004, the ambassadors of Brazil and India recognised that the DSU needed to be reformed but suggested that such reforms could only take place after the conclusion of Doha Round negotiations, i.e. in 2008 at the earliest. Government officials may believe that disputes are so seldom that DSU reform should be secondary to the renegotiation of other agreements. Our view is that since dispute panel and AB rulings are used to justify changing national SPS measures, or to
threaten the measures of other countries in the name of upholding the SPS Agreement, the public needs to have documented assurance that the evidence upon which such rulings are based is impartial, independent and reflects the best peer-reviewed science, and not just the opinion of an expert.

The DSU Rules of Conduct, negotiated in December 1996, include ‘Self-Disclosure Requirements for Covered Persons’ intended to address the apparent lack of impartiality and independence of experts that undermined the credibility of the dispute over growth hormones in beef. These self-disclosure requirements need to be strengthened by guidelines to independently verify the impartiality, independence and the scientific basis of expert testimony. WTO Members apparently do not wish to strengthen the implementation of Article 13 and Appendix 4 of the DSU regarding expert advice, at least not before the conclusion of Doha Round negotiations. Nevertheless, dispute panels and the AB will have to rule on important cases prior to 2008, not the least of which is the current US case and possible future cases against EU rules on genetically modified organisms.

Recommendation 2
CI member organisations should lobby their governments to propose non-binding guidelines to implement Article 13 and Appendix 4 of the DSU. These guidelines could include measures to ensure that panelists only put questions to experts that the experts are qualified to answer, and that speculative responses to panelists’ questions or conflicting statements by experts are part of the public record of the panel decision.

Non-binding guidelines cannot oblige panels to be more rigorous in reducing possible conflicts of interest among experts or more rigorous and transparent in the use of expert opinion. It is, however, probably more feasible to get Members to negotiate such guidelines than to negotiate binding changes to the DSU.

The WTO Committee on Sanitary and Phytosanitary Measures: Guidelines on the Implementation of Article 5.5

As noted above, with the exception of relatively few dispute rulings about SPS measures, the implementation of the SPS Agreement is the competence of the WTO SPS Committee. In this section and the following one, we illustrate some of the Committee’s work on two issues of interest to consumers and about which consumer organisations may wish to advise their governments and/or educate consumers. The issues are:

- a government’s right to set ‘appropriate levels of protection’ for its citizens
- bilateral agreements to determine whether exporting countries’ SPS measures are equivalent in effect to the SPS measures of the importing country.

Article 5.5 calls for Member to co-operate in the committee to negotiate what became the non-binding ‘Guidelines to Further the Practical Implementation of Article 5.5’. The guidelines help Member to avoid ‘arbitrary or unjustifiable distinctions’ in the ALOP when applying SPS measures. The statement of the ALOP may be qualitative or quantitative (e.g. a permitted level of food contamination) and should serve to guide consistent implementation over time[SP3] (paragraph A.1). Governments may not set a more stringent ALOP for imported food than for domestic food without being accused of creating a disguised restriction on international trade. The guidelines are to undergo periodic revision during the life of the Agreement (paragraph 2).

When negotiating the guidelines, the US sought to reflect the 1997 dispute panel ruling in its favor with regard to the EU ban on imported meat and meat domestically produced with growth hormones. The EU sought to have reflected, the 1998 AB ruling that overturned much of the dispute panel’s ruling, including the charge that the EU ban was applied discriminatorily. The compromise guidelines have a degree of complexity that favours only those Members with massive SPS bureaucracies capable of setting norms for protecting human, plant and animal health without being accused of disguised trade protectionism.

Consider the following advice: ‘To avoid arbitrary or unjustifiable difference in the level of protection a
Member considers to be appropriate in different situations, a Member should compare any proposed decision on the level of protection in a particular situation with the level it has previously considered or is considering to be appropriate in situations which contain sufficient common elements so as to render them comparable with regard to human life or health, to animal life or health, or to plant life or health’ (paragraph A.4). This guideline offers ample scope for litigation over what are ‘situations’ in which there are ‘sufficient common elements’ so as to enable procedural comparisons between differing SPS measures. To judge by this advice, any SPS measure proposed by any member to protect human, animal or plant health should be compared with every existing SPS measure, or measure under consideration, to determine whether the level of protection provided by it can be justified in the event of a trade dispute challenge.

According to this guideline, a member must justify the level of protection it decides to provide by ensuring consistency with the ALOP of every other of the member’s SPS measures that a trade dispute complainant might consider to be a comparable measure. This means that SPS measures informed by science-based risk assessment, and applied indiscriminately and consistently to domestic and imported foods alike, can be challenged as trade restrictive if a member cannot show that the risk management decision is consistent with the decision process of measures regarded as comparable by a complainant. To heed this guideline would be to interfere in the right, affirmed in the guidelines, ‘of a Member to determine its appropriate level of sanitary and phytosanitary protection against risks to human life or health, or to animal or plant life and health’.

The US sought to make these guidelines binding but was prevented from doing so by the EC and other Members. 35 Nevertheless even the voluntary guidelines might be invoked by one member to threaten an SPS-related trade dispute. The result could be that application of a proposed SPS measure is rejected, not because it lacks a scientific basis and a risk assessment, but because a member cannot meet the procedural requirement of comparing the ALOP with measures to achieve other ALOPs in so-called comparable situations.

The difficulty of implementing Article 5.5 through this guideline leads us back to examining the viability of Article 5.5 itself. Steve Charnovitz has written that ‘the SPS Agreement – which was largely initiated by the US government – favors those countries that have a surfeit of administrative procedures’. 36 He argues partly on the basis of an examination of a dispute between Canada and Australia concerning salmon, and partly on the basis of the difficulty of demonstrating procedural comparisons, that ‘Article 5.5 is too extreme and should be repealed’. 37 We agree.

**Recommendation 3**
CI member organisations should lobby their governments to repeal Article 5.5 of the SPS Agreement. The article makes it exceedingly difficult to defend an ALOP for consumers, animals or plants, by requiring a member to demonstrate not only that the disputed SPS measure is needed to achieve an ALOP but that other SPS measures are applied consistently in an indefinite number of ‘comparable situations’. If WTO Member do not repeal Article 5.5, CI member organisations should monitor their governments’ SPS regulations to ensure that their governments do not modify, repeal or prevent the application of SPS measures because of the threat of a trade dispute.
Decision Making in the Global Market

Special and Differential Treatment and Determination of Equivalence in SPS Measures

At the WTO Ministerial Conference in Doha, Qatar, the WTO, the World Bank, the World Health Organization (WHO), the United Nations Food and Agriculture Organization (FAO) and the International Animal Health Organization (OIE in its French acronym) stated their intention to support developing country participation in international standard-setting organisations, and to provide technical assistance ‘in the establishment and implementation of appropriate food safety and animal and plant health measures’. 38

Towards fulfilling that intention and implementing Articles 9 and 10 of the SPS Agreement, the organisations established a Standards and Trade Development Facility, coordinated by the WTO and financed by the World Bank with an initial contribution of $300,000 and with a project 2003 fiscal year budget of about US $2 million contingent on partner contributions. 39 In 2004, an FAO/WHO Trust Fund to support developing country participation in Codex began operations with less than a million dollars of a 12-year notional budget of US $35-40 million. 40 The post-Doha SPS Committee ‘discussions went beyond the need for participation in standard-setting to the capacity to implement these standards. The need to involve the private sector had been identified, as well as enforcement of the capacity of developing countries to ensure the safety of the products which they imported’. 41

Special and Differential Treatment (S&D) provisions in the SPS Agreement appear in the preamble, Article 5.6, Article 9, Article 10 and Annex B concerning transparency of SPS measures. The following review concerns only notification measures to increase transparency.

The SPS Committee has sought to implement S&D by considering revisions to notification procedures ‘to re-notify [SPS] measures when the scope of a measure was changed in such a way that trade from developing countries could be adversely affected’. 42 The committee is still discussing a 2001 proposal from Brazil which states that if ‘the introduction of SPS measures may have significant effect on trade opportunities for products of interest to developing countries, Members shall notify the WTO and inform concerned Members prior to the application of such measures’. 43 This proposal would change the notification requirement in Annex B that states: ‘The Secretariat shall promptly circulate copies of the notification to all Members and interested international organizations and draw the attention of developing country Members to any notifications relating to products of particular interest to them’ (paragraph 8). Under the Brazilian proposal, SPS measures would no longer be notified promptly after their application in domestic food regulation. Instead SPS measures would have to be notified before their application to determine whether such measures would adversely affect trade opportunities for developing countries.

The proposal is controversial because of the difficulty of determining, prior to application, which Members’ trade opportunities might be adversely affected by an SPS measure, the extent to which they might be affected and whether a delay would interfere with the importing member’s rights to set appropriate levels of protection for its consumers under Article 5.5. A further difficulty arises in the possibility that human, plant or animal health might be adversely affected during the time that a proposed measure is not applied and while the impact of the measure on trade opportunities of concerned Member is assessed. It is not clear whether pre-application notification of an SPS measure would provide an importing country with legal justification not to apply the measure pending its trade impact review.

There are currently no sanctions for failing to promptly notify the WTO. The US, for example, took about three years to notify its 2001 Aggregate Measures of Support to the Committee on Agriculture. On the other hand, pre-application notifications could encourage exporting countries to counter-notify that a proposed measure would constitute a ‘disguised barrier to trade’ and lead to withdrawal of the measure or to a trade dispute if the measure was not withdrawn.

Consumers International has been a strong proponent of technical assistance to developing countries to assist them to participate in Codex standard-setting activities and to support the adoption, implementation and enforcement of standards to protect consumer health. 44 CI recognises that to date S&D technical assistance to developing countries has been very modest and that far more could and should be done to implement S&D in food safety matters, particularly in providing needed SPS infrastructure to protect consumer health and facilitate trade. However, the change in SPS
notification rules proposed by Brazil, though ostensibly an S&D provision, has the potential to delay implementation of SPS measures that might protect consumer health.

**Recommendation 4**
Consumers International and its member organisations should lobby their governments to delete or amend the Brazilian proposal in the context of other proposed changes to SPS notification currently under negotiation in the SPS Committee.

**Implementation of Article 4 on the Recognition of the Equivalence of SPS Measures**

Article 4 of the SPS Agreement concerning the bilateral recognition by an importing member that the SPS measures of an exporting member have equivalent effect in protecting human, plant or animal health, applies to all WTO Members. Developing countries have been particularly interested in furthering the SPS Committee’s implementation of Article 4, as they recognise that equivalence is very helpful in facilitating trade. The SPS Committee developed a format for Members to notify the bilateral Determination of the Recognition of Equivalence of SPS Measures, but as of November 2002: ‘no Member has submitted a notification regarding agreements recognizing equivalence’. 45

In 2003, Codex and OIE adopted guidelines for equivalence agreements on SPS measures. In the same year, the Interim Commission on Phytosanitary Measures, began to develop guidelines for phytosanitary measures. 46 Nonetheless, as of the July 2004 meeting of the SPS Committee, no bilateral equivalence agreements had been notified. This is due to a number of factors, not the least of which are the aforementioned difficulties in implementing Article 5.5 on ‘arbitrary and unjustifiable’ differences in SPS measures without usurping the Members’ right to apply measures to achieve a documented appropriate level of protection.

According to a July 2004 Decision of the SPS Committee, ‘the importing Member should indicate the appropriate level of protection which its sanitary or phytosanitary measure is designed to achieve. The explanation should be accompanied by a copy of the risk assessment on which the sanitary or phytosanitary measure is based or a technical justification based on a relevant international standard, guideline or recommendation’. 47 This means that when an exporting member requests recognition of equivalence for ‘a specific measure, or measures related to a certain product or category of products or on a system-wide basis’ 48 the importing member will have to justify each of its measures for which equivalence is requested, ‘normally within a six-month period’. 49 The exporting member will have to do the same and ‘provide reasonable access, upon request, to the exporting Member for inspection, testing and other relevant procedures for the recognition of equivalence’ 50 although no time frame is provided for such visits.
As noted above, Codex adopted guidelines in 2003 to aid its Members in the determination of equivalence. Recognising that the guidelines were of a general nature, Codex authorised the start of a work programme of appendices to the guidelines that would provide specificity concerning documentation requirements, technical inspection visit requirements and technical assistance requirements, among other issues, for determination of equivalence. The authorisation of such appendices indicates that the implementation of equivalence agreements is a good deal more complicated than is detailed in general guidelines or in an SPS Committee Decision.

The pressure for importing countries to conclude equivalence agreements has, however, led to criticisms that the procedure and substance of the agreements violated some domestic regulations even where there were extensive SPS bureaucracies and infrastructure as in the US. Despite these criticisms the US Food Safety Inspection Service is proposing to eliminate the requirement that SPS officials of Members exporting meat or poultry to the US, review the practices of the in-plant inspectors of export establishments on a monthly basis. Elimination of the requirement would, arguably, not only violate US law but could also weaken meat and poultry inspection for consumers in the exporting member’s country.

**Recommendation 5**

Given the pressure from the SPS Committee to implement Article 4 of the SPS Agreement through bilateral equivalency agreements and given the complexity of negotiating, implementing and enforcing such agreements, CI member organisations should campaign for public disclosure of equivalence agreement documents to determine whether the agreements will protect consumer health from food-borne diseases resulting from the consumption of imported foods. CI should also continue to participate in the Codex work programme on equivalence agreements to elaborate appendices to the recently adopted guidelines that will help to ensure the protection of consumer health.

**Conclusion**

From the viewpoint of agricultural economists, trade disruptions due to SPS factors ‘are relatively small, considering the magnitude of global food and agricultural trade ($436 billion in 2001), the thousands of food categories and products traded, the roughly 200 counties participating in food trade and the range of food safety challenges’. Even the FAO announcement in March 2004, that in 2004 the $33 billion meat and poultry trade would lose $10 billion in sales due to import bans resulting from animal health and meat contamination issues, would not disturb the macro-economic view that SPS measures are working well to facilitate trade. Even the cost to public health and work hours lost to food-borne diseases, albeit more difficult to calculate, might not disturb this happy view of macro-economic welfare.

Consumer organisations, on the other hand, have sufficient grounds to be concerned that decision making processes, the substance of decisions in dispute settlement and the implementation of the SPS Agreement are among factors making it more difficult for governments to justify to other WTO Members the SPS measures that protect consumers. Although consumer organisations, like other NGOs, have no legal standing in WTO activities, we believe that the foregoing analysis shows the need for consumer organisations to intervene with their governments to prevent the weakening of SPS measures that protect consumers. It will then be up to governments, closely monitored by consumer organisations, to take positions in the WTO that will defend their right and ability to protect consumer health.

It is hoped that the recommendations outlined here will be considered as starting points from which consumer organisations may lobby and publicly campaign to change the implementation of the SPS Agreement in ways that will allow governments to protect consumer health.
Footnotes


18 Reference my Codex paper for Decision making


Chakravarthi Raghavan, ‘DSU talks miss another deadline’, South-North Development Monitor (SUNS), No. 5583 (1 June 2004).


ibid.

ibid.


ibid., p 7-8.

ibid., p 8.

Chakravarthi Raghavan, ‘DSU talks miss another deadline’, South-North Development Monitor (SUNS), No. 5583 (1 June 2004), p4.


29 ibid., p 291.

30 Agencies to boost developing countries’ participation in setting food safety and related norms, World Trade Organization, press release 254 (11 November 2001).

31 Report to the Committee on Trade and Development on Special and Differential Treatment, World Trade Organization, Committee on Sanitary and Phytosanitary Measures, G/SPS/23 (15 November 2002), paragraph 2 and Standards and Trade Development Facility, The World Bank Group, January 2003.


33 Report to the Committee on Trade and Development on Special and Differential Treatment, World Trade Organization, Committee on Sanitary and Phytosanitary Measures, G/SPS/23 (15 November 2002), paragraph 2.
Ibid., paragraph 3.

Implementation – Related Issues and Concerns, World Trade Organization, Committee on Sanitary and Phytosanitary Measures, G/SPS/24 (15 November 2002), paragraph 3.


Ibid., paragraph 11.


Ibid., paragraph 2.

Ibid., paragraph 1.

Ibid., paragraph 3.

Ibid., paragraph 7.

Ibid., paragraph 4.

‘Guidelines on the Judgment of Equivalence of Sanitary Measures Associated with Food Import and Export Inspection and Certification Systems’, ALINORM 03/30A, paragraphs 6-8 and Appendix II.

ALINORM 03/30A, paragraph 55.


69 Federal Register Notice 51194 (18 August 2004).

# List of Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>AB</td>
<td>Appellate Body</td>
</tr>
<tr>
<td>ACWL</td>
<td>Advisory Centre on WTO Law</td>
</tr>
<tr>
<td>ACOS</td>
<td>Advisory Committee on safety - IEC</td>
</tr>
<tr>
<td>AFNOR</td>
<td>French National Standards Institute</td>
</tr>
<tr>
<td>ALOP</td>
<td>Appropriate Level of Protection</td>
</tr>
<tr>
<td>ANEC</td>
<td>the European Consumer Voice in Standardisation</td>
</tr>
<tr>
<td>ANSI</td>
<td>American National Standards Institute</td>
</tr>
<tr>
<td>API</td>
<td>American Petroleum Institute</td>
</tr>
<tr>
<td>ASME</td>
<td>American Society of Mechanical Engineers</td>
</tr>
<tr>
<td>ASTM</td>
<td>American Society for the Testing of Materials</td>
</tr>
<tr>
<td>BINGO</td>
<td>Business-interest Non-governmental Organisation</td>
</tr>
<tr>
<td>BSI</td>
<td>British Standards Institution</td>
</tr>
<tr>
<td>CCEXEC</td>
<td>Codex Executive Committee</td>
</tr>
<tr>
<td>CCGP</td>
<td>Codex Committee on General Principles</td>
</tr>
<tr>
<td>CCRVDF</td>
<td>Codex Committee on Residues of Veterinary Drugs in Foods</td>
</tr>
<tr>
<td>CEN</td>
<td>European Committee for Standardization</td>
</tr>
<tr>
<td>CENELEC</td>
<td>European Committee for Electro-Technical Standardisation</td>
</tr>
<tr>
<td>CI</td>
<td>Consumers International</td>
</tr>
<tr>
<td>Codex</td>
<td>Codex Alimentarius Commission</td>
</tr>
<tr>
<td>COPANT</td>
<td>Pan American Standards Commission</td>
</tr>
<tr>
<td>COPOLCO</td>
<td>Consumer Policy Committee of ISO</td>
</tr>
<tr>
<td>CS</td>
<td>Central Secretariat</td>
</tr>
<tr>
<td>CSC/STRAT</td>
<td>ISO Council standing committee on strategies</td>
</tr>
<tr>
<td>CSOs</td>
<td>Civil Society Organisations</td>
</tr>
<tr>
<td>DEVCO</td>
<td>Developing Countries Policy Committee of ISO</td>
</tr>
<tr>
<td>DIN</td>
<td>German National Standards Institute</td>
</tr>
<tr>
<td>DSU</td>
<td>Dispute Settlement Understanding</td>
</tr>
<tr>
<td>EC</td>
<td>European Community</td>
</tr>
<tr>
<td>ECOSOC</td>
<td>Economic and Social Council</td>
</tr>
<tr>
<td>EPA</td>
<td>Economic Partnership Agreement</td>
</tr>
<tr>
<td>ExCo</td>
<td>Executive Committee of the IEC</td>
</tr>
<tr>
<td>FAO</td>
<td>Food and Agriculture Organization</td>
</tr>
<tr>
<td>GATS</td>
<td>General Agreement on Trade in Services</td>
</tr>
<tr>
<td>GATT</td>
<td>General Agreement on Trade and Tariffs</td>
</tr>
<tr>
<td>IBRD</td>
<td>International Bank of Reconstruction and Development</td>
</tr>
<tr>
<td>IEC</td>
<td>International Electrotechnical Commission</td>
</tr>
<tr>
<td>IEEE</td>
<td>Institute of Electrical and Electronics Engineers</td>
</tr>
<tr>
<td>IISD</td>
<td>International Institute for Sustainable Development</td>
</tr>
<tr>
<td>ILO</td>
<td>International Labour Organization</td>
</tr>
<tr>
<td>IMF</td>
<td>International Monetary Fund</td>
</tr>
<tr>
<td>INGO</td>
<td>International non-Government organisation</td>
</tr>
<tr>
<td>INNI</td>
<td>International NGO Network on ISO Standardization</td>
</tr>
<tr>
<td>ISO</td>
<td>International Organisation for Standardization</td>
</tr>
<tr>
<td>ITU</td>
<td>International Telecommunications Union</td>
</tr>
<tr>
<td>JECFA</td>
<td>WHO/FAO Joint Expert Committee on Food Additives and Contaminants</td>
</tr>
<tr>
<td>JEMRA</td>
<td>WHO/FAO Joint Expert Meetings on Microbiological Risk Assessment</td>
</tr>
<tr>
<td>JMPR</td>
<td>WHO/FAO Joint Meeting on Pesticide Residues</td>
</tr>
<tr>
<td>LDC</td>
<td>Least Developed Countries</td>
</tr>
<tr>
<td>NGO</td>
<td>Non-government Organisation</td>
</tr>
<tr>
<td>NWIP</td>
<td>New Work Item Proposal</td>
</tr>
<tr>
<td>OECD</td>
<td>Organisation for Economic Cooperation and Development</td>
</tr>
<tr>
<td>OIE</td>
<td>World Organisation for Animal Health</td>
</tr>
<tr>
<td>O-Member</td>
<td>Observer Member</td>
</tr>
<tr>
<td>P-Member</td>
<td>Participating Member</td>
</tr>
<tr>
<td>PINGO</td>
<td>Public-interest Non Governmental Organisation</td>
</tr>
<tr>
<td>PTAs</td>
<td>Preferential Trading Agreements</td>
</tr>
<tr>
<td>SC</td>
<td>Sub-committee</td>
</tr>
<tr>
<td>SCC</td>
<td>Standards Council of Canada</td>
</tr>
<tr>
<td>SDO</td>
<td>standards development organisation</td>
</tr>
<tr>
<td>SME</td>
<td>small and medium enterprises</td>
</tr>
<tr>
<td>SPS Agreement</td>
<td>Trade Related Application of Sanitary and Phytosanitary Measures</td>
</tr>
<tr>
<td>TC</td>
<td>Technical Committee</td>
</tr>
<tr>
<td>TBT</td>
<td>Agreement on Technical Barriers to Trade</td>
</tr>
<tr>
<td>TMB</td>
<td>ISO Technical Management Board</td>
</tr>
<tr>
<td>TRIPS</td>
<td>Trade Related Intellectual Property Rights Agreement</td>
</tr>
<tr>
<td>UNCTAD</td>
<td>United Nations Conference on Trade and Development</td>
</tr>
<tr>
<td>UNECE</td>
<td>UN Economic Commission for Europe</td>
</tr>
<tr>
<td>USTR</td>
<td>(Office of) United States Trade Representatives</td>
</tr>
<tr>
<td>WB</td>
<td>World Bank</td>
</tr>
<tr>
<td>WG</td>
<td>Working Group</td>
</tr>
<tr>
<td>WHO</td>
<td>World Health Organization</td>
</tr>
<tr>
<td>WTO</td>
<td>World Trade Organization</td>
</tr>
</tbody>
</table>