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**The Politics of Food Safety in the Age of
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Commission in the SPS-Agreement of
the WTO**

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The Politics of Food Safety in the Age of Global Trade: The *Codex Alimentarius* Commission in the SPS-Agreement of the WTO

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Abstract

International trade in food increases the real and imagined risks to food safety, often due to substantive differences in food standards across countries. The member states of the WTO sought to address these cross-national differences, which often also create non-tariff barriers to trade, through the Agreement on Sanitary and Phytosanitary (SPS) Measures. The SPS-Agreement imposes constraints on WTO member states' use of SPS measures—constraints that are legally binding and enforceable—and it commits them to using, for their domestic food safety regulations, the international standards developed by the Codex Alimentarius Commission whenever appropriate Codex standards exist. This paper seeks to understand the origins and consequences of this extraordinary case of international delegation of regulatory authority, given that the delegation of standard-setting was by no means the only way to deal with the functional need for international cooperation on food safety and given that Codex was neither the only nor clearly the best international body to which this task could be delegated. I develop a theoretical explanation of institutional choice and employ it in an empirical analysis of the choice in favor of Codex, based on extensive archival research and interviews with most of the core negotiators. In the conclusion, I examine current policy implications.

The Politics of Food Safety in the Age of Global Trade: The *Codex Alimentarius* Commission in the SPS-Agreement of the WTO

International trade in food increases real and imagined risks to food safety. These risks primarily arise either from non-compliance with existing food safety standards or from substantive differences in sanitary and related standards for agriculture or food processing industries, which may differ across countries in stringency or due to differences in the fundamental principles embodied in the standards (see, e.g., Ansell and Vogel 2006; Ansell and Balsiger 2009; Echols 2001; Levi, Segal, and Vinter 2009:esp.14f; Pollack and Shaffer 2009).

One way to deal with the governance issues that arise from cross-national differences in food safety standards is for governments to cooperate in developing *international* standards for common use (see Coglianesi, Finkel, and Zaring 2009:10,17). Where using common international standards is feasible, it has many benefits, which have been discussed at least since the Tokyo Round negotiations of the GATT in the 1970s (Bhagwati and Hudec 1996; Trebilcock and Howse 2005:206f).¹ Common standards, for instance, make the detection of compliance problems easier. In addition, policy proposals such as the one by Bamberger and Guzman (2009), under which importers assume legal responsibility for imported products being "safe," may require for their practical implementation common/international standards. Moreover, many food safety standards are embedded or referenced in government regulations. Common international standards reduce the likelihood that these regulatory measures create unnecessary non-tariff barriers to trade—an important consideration for food-exporting countries such as the U.S. (Büthe 2008; Epps 2008:12ff; Josling, Roberts, and Orden 2004).

During the Uruguay Round of the GATT (1986-1993), which led to the creation of the World Trade Organization (WTO), the member states of the GATT decided to address the issue of cross-national differences in food safety standards by negotiating the Agreement on the Application of Sanitary and Phytosanitary Measures. This "SPS-Agreement" is an integral part of the treaty establishing the WTO, binding on all member states, and enforceable via the Dispute Settlement Mechanism (for details, see Alemanno 2007:239ff; Epps and Trebilcock 2009). Through the SPS-Agreement, member states have committed themselves, *inter alia*, to using "international standards" whenever international standards exist that can achieve the desired (explicitly specified) level of consumer protection. If a country's regulations mandate compliance with standards that differ from international standards, they may be challenged as non-tariff barriers to trade. The regulating country then must provide scientific evidence, using "risk assessment techniques developed by the relevant international organizations" (Art.5(1)), to show that the risks against which the regulatory measure is supposed to protect indeed exists, and that international standards could not achieve the desired level of consumer protection against these health or food safety risks. By contrast, domestic regulations that effectively "convert" an "international standard" into a domestic one are categorically presumed to be compliant with WTO law.²

¹ GATT stands for General Agreement on Tariffs and Trade, under which a series of negotiating "rounds" took place (see, e.g., Spero and Hart 2010:74ff).

² See the Appellate Body's interpretation of "conform to international standards" in EC-Hormones, para. 170ff. Several WTO disputes have been brought against, and lost by, powerful member states based on the provisions of the SPS-Agreement (see, e.g., Pauwelyn (1999) and WTO Dispute Settlement Gateway (http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm, 5/4/2009).

Where do these international standards come from? As I have shown in previous work (Büthe 2008), the Uruguay Round negotiators recognized quickly that setting technical or scientific standards for food safety during the Uruguay Round trade negotiations would be impractical. Setting or selecting such standards required specialized expertise that the GATT negotiators generally did not have, and having diplomats or trade experts set standards through international negotiations was likely to be excruciatingly slow and therefore not suitable as a method for developing international food safety standards, given the heterogeneity and changing nature of food products traded in global markets (see Coglianese, Finkel, and Zaring 2009:15). GATT negotiators therefore agreed early on to delegate the task of setting standards to outside bodies of technical experts (Büthe 2008). Specifically, Annex A(3) of the SPS-Agreement defines international standards "for food safety" as the standards "established by the Codex Alimentarius Commission ..."³ But how did Codex get written into the treaty? What explains its selection as *the* international food safety standard-setter under the SPS-Agreement?

The selection of the Codex Alimentarius Commission ("Codex") might seem like a foregone conclusion: There are hundreds of Codex standards for agricultural trade and food safety, including for pesticide residues, as well as quality, labeling, safe handling, transport, and storage of fruits, vegetables, milk products, and many processed foods.⁴ An international organization (IO) with 180 countries as members, Codex now is the clear focal point for international food standard-setting. Codex's centrality today, however, is unsuitable as an explanation for why Codex was selected as the international standard-setter, since causation runs the other way: Codex today is in numerous ways a function of the prominence that it acquired by being selected as the designated food safety standard-setter in the SPS-Agreement (e.g., Tarullo 2000; Veggeland and Borgen 2005). At the launch of the Uruguay Round negotiations in 1986, Codex had a 23-year history of rather modest achievements and faced an uncertain future; some characterized it as "moribund."

Taking Charles Tilly's warning against teleology serious (1975; see also Spruyt 1994), I therefore study this case of institutional choice prospectively: I start by analyzing food standard-setting at the beginning of the Uruguay Round and explore the options at that time, rather than starting from the end-result, assuming that it was the only possible outcome. Doing so, I find that there were, by the mid-1980s, at least four organizations that developed widely used international standards for food and food safety. Each was viable and credible as an international food standard-setter, and all were discussed repeatedly during the negotiations of the SPS-Agreement. At the same time, the four organizations differed in their decisionmaking rules, with the level of support required for standards-adoption ranging from simple majority to unanimity. Moreover, many individuals and diverse groups have a stake in food safety standards—and the four organizations differed in which stakeholders were represented. The choice was therefore likely to be consequential. What explains the choice in favor of Codex?

Because the material and political stakes are high, any government negotiator should want to delegate standard-setting to a body that is likely to set standards that will be favorable to the politically powerful interests from his country. But informational constraints may impede a negotiator's ability to accurately anticipate the distributional consequences of delegating to one organization rather than another. In the absence of good information, I argue, negotiators will form their preferences over multiple available standard-setting bodies based on the perceived

³ The SPS-Agreement deals not only with the safety of human food but also with animal and plant health and safety.

⁴ See http://www.codexalimentarius.net/web/standard_list.do (4/9/2009) for details.

legitimacy of those bodies. Extracting a key element of a more comprehensive theoretical discussion of IO legitimacy that I have developed elsewhere (Büthe 2009), I hypothesize that countries oppose delegation of standard-setting authority to organizations that exclude them, provided that more inclusive alternatives exist. Finally, I conceptualize international standard-setting organizations not just as passive institutional structures but as actors, with interests of their own and the potential for genuine agency. The more central the setting of food safety standards is to an organization's mission and independent existence, the greater should be the organization's incentive to pro-actively foster its perceived legitimacy, increasing the chance that it will be selected as the standard-setter.

I develop these hypotheses more fully in the next section, then examine them empirically. For the empirical analysis (only summarized here due to space constraints), I was able to draw upon a large number of original documents from the Uruguay Round negotiations, released well ahead of the normal schedule for diplomatic documents, through the GATT Digital Archive (<http://gatt.stanford.edu>). I supplement information from those documents with insights gained through extensive interviews with almost all of the surviving core SPS-Agreement negotiators and background information provided by other participants. In the conclusion, I discuss some of the policy implications for food safety in a world of global trade.

Explaining International Delegation of Regulatory Authority

The regulation of domestic economic activities has long been one of the hallmarks of sovereignty. Preserving this prerogative of the modern state (at least for advanced capitalist democracies) was part of the compromise of embedded liberalism that characterized the post-WWII international economic order (e.g., Goldstein 1993; Ruggie 1983). The economic integration that was enabled by this post-war order, however, meant that, by the 1970s, cross-national differences in standards and regulations had become important non-tariff barriers to trade (Ray 1987). At the same time, poor sanitary standards for food handling and processing in one country could affect consumers in another. Continued national regulatory prerogatives in an age of international interdependence thus not only carried increasing economic costs but became increasingly politically risky for governments as, in the event of trade-related food scares or health crises, they would be blamed for "failing" to protect their citizens from differing standards (or poor regulatory enforcement) abroad.

The international harmonization of standards through the delegation of standard-setting to inter- or transnational expert bodies became the means through which governments sought to achieve both high quality standards and the benefits of reduced cross-national variation in regulatory environments. Yet, while economic globalization increased the demand for international food safety standards, multiple suppliers of such standards already existed. Negotiating a formal agreement that recognized the standards from a particular source as "international standards"—not just retroactively but also prospectively for yet-to-be-developed standards—therefore entailed a choice from among several existing bodies, none of which was technically superior to the others, nor clearly socially or economically "optimal" for the task at hand (Büthe 2009). What explains the selection of the Codex Alimentarius Commission?⁵

⁵ Delegation to Codex is non-exclusive insofar as Annex A, Article 3(d) allows for the possibility that, "for matters not covered by [Codex for food safety], standards promulgated by other relevant international organizations open for

I start from the observation that the GATT Uruguay Round negotiating framework combined formal rule-based, egalitarian consensus decision-making with informal, power-based bargaining procedures (Steinberg 2002). Specifically, the SPS-Agreement was negotiated in the Working Group on Sanitary and Phytosanitary Regulations and Barriers (WGSP), a sub-committee of Negotiating Group 5 (Agriculture). WGSP held formal meetings every few months, which were open to every member state. These official negotiating sessions, however, were interspersed by meetings in various informal settings among the SPS negotiators from an "inner core" group of countries, consisting of Australia (informally representing the Cairns Group of agricultural exporters), Canada, Finland (representing the Nordic countries), the European Union, and the United States. Representatives of Argentina, Japan, and New Zealand were part of a larger core group of eight but less involved in the negotiations.

This kind of arrangement leads me to expect that advanced industrialized countries set the agenda for the formal negotiations. At the same time, they needed to foster the perception that the SPS-Agreement would benefit developing countries (LDCs) through agricultural trade liberalization, since LDC support or at least acquiescence was crucial for a successful conclusion of a negotiating round in which LDCs were asked to reduce their protectionist barriers for manufactured goods, agree to bring intellectual property rights protection into the GATT/WTO, etc. This leads me to expect that developing countries were able to veto the selection of standard-setters that they found clearly objectionable. At the same time, the informal institutions should make it unlikely that developing countries would have succeeded in setting the agenda, i.e., to successfully propose a standard-setter that was not also desired by developed countries.

Among developed countries, the U.S. and the EU are usually the most prominent actors (Mattli and Büthe 2003; Drezner 2007). Although I explicitly recognize that others may play an important role (see also Helfer 2004), U.S. and EU consensus (where or when it can be reached) usually is the blueprint for the final agreement.⁶ The key analytical task is therefore to explain government negotiators' preferences, especially the preferences of the U.S., the EU and developing countries as a group.

A Theory of Preference Formation in International Regulatory Delegation

Institutional choices have distributional consequences (Knight 1992:esp. 21ff; Krasner 1991), and the material stakes are high when selecting an international organization to set standards that affect market access. Moreover, writing the delegation of standard-setting authority into a treaty creates a new status quo, which may be hard to change subsequently. Government negotiators thus have strong incentives to "get it right." I therefore assume that each government is strategic when forming its preferences in that it will seek to shift governance to an institutional setting in which it expects to do well or to a body whom it expects to set standards that will be favorable to the interests of the country's domestically powerful groups.

I am interested not just in the outcome but also the decisionmaking process that leads to the delegation of regulatory governance. I therefore assume that governments have incentives to

membership to all Members" might be recognized explicitly as "international standards" for the purposes of the SPS Agreement, though no such additions have ever even been proposed.

⁶ This analytical position does not require the assumption that "great power politics" is all that matters. The international coalition required to achieve agreement may be much broader, but I focus analytically on the U.S. and the EU because, on many issues, they exhibit the greatest divergence in initial preferences, so any compromise agreeable to them is likely to be agreeable to many others.

behave strategically, but I do not assume that negotiators can fully anticipate the consequences of their choices. Instead, I recognize that it is materially and/or politically costly for a negotiator to acquire the kind of information that would allow him to make the optimal choice among the potential regulatory bodies through backwards induction based on an accurate anticipation of the distributional consequences. Prospective analysis, which takes the informational constraints of the negotiators seriously and examines them empirically instead of assuming them away, is warranted because there are strong theoretical reasons to expect that negotiators *could* not fully anticipate the consequences of their choice between the possible standard-setters, as well as strong empirical evidence that they *did* not.

Theoretically, there are at least three reasons to be cautious when making strong assumptions about negotiators' ability to anticipate the consequences of institutional choices. First, the specific actors involved in the standard-setting organizations often differ from those involved in the international or transgovernmental negotiations that lead to the delegation of the standard-setting task (see also Büthe 2006). Negotiators may therefore be expected to have incomplete information. Second, changing the legal status of the technical standards developed by a particular international organization, for instance by making compliance with previously optional standards a prerequisite for market access, changes the stakes. Actors who previously did not bother to participate in international institutionalized rule-making now have incentives to seek a voice in the standard-setting process. Such changes in the cast of characters who want to influence the regulatory outcomes are likely to undermine informal norms against political-strategic behavior because new actors have not been socialized to act in norm-compliant ways. Even without a change in the set of actors, the delegation of authority will change the incentives to use the organization's decisionmaking rules and procedures strategically to influence specific outcomes, for instance by building minimum winning coalitions rather than comply with consensus norms. The precise nature of these changes and the shape of the likely coalition, however, is often very difficult to predict, especially in the long run. Third, delegation itself may lead to changes in the standards-developing organization's formal or informal institutions.⁷

Empirically, many of the countries whose governmental representatives negotiated the SPS-Agreements have expressed their regrets, and they often explicitly blame not having correctly anticipated the consequences of delegating standard-setting to Codex. The EU's efforts to have Codex standards reflect the principles underlying its approach to food safety, for instance, have had "mixed success" (Poli 2004), prompting attempts to shift standard-setting for genetically modified organisms out of the Codex to other institutional settings that are more congenial to EU concerns (e.g., Pollack and Shaffer 2009). Developing countries have been increasingly frustrated by their relative marginalization in Codex and the costliness of the obligations that they undertook by committing to Codex standardization (e.g., Dubey 1996; Singh 2006; Wilson and Abiola 2003). Even in the U.S., where agricultural exporters and food industry multinationals have generally been quite happy with the delegation to Codex, consumer groups and others have expressed concerns about industry domination of the nominally intergovernmental Codex (e.g., Post 2005; Rosman 1993; Victor 2004).⁸

⁷ Jupille and Snidal (2006) offer an alternative theoretical rationale for not assuming complete information, based on Herbert Simon's notion of bounded rationality. Their reasoning is complementary rather than competing with mine.

⁸ In the late 1980s/early 1990s, the multinational Nestlé alone had 38 representatives on various national delegations; Coca Cola, Unilever, and Monsanto were not far behind (Avery, Drake, and Lang 1993).

While governments may seek to anticipate the consequences of delegation, the difficulties in actually forming such expectations suggest that governments' preferences are in fact largely based on their past experience with the organizations that they are considering as international standard-setters. Here, countries may differ not only in how well their stakeholders have objectively done in the alternative institutional settings in the past, but also in how much past experience a country's stakeholders have. Expectations based on only a small number of past experiences, for instance, are more likely to be erroneous than expectations based on extensive experience. This is likely to be a serious issue for developing countries, many of which had little prior experience with the actual standard-setting in each standards-developing organization.

When governments or other representatives of a country's stakeholders lack information about an international organization, they can generally obtain it, but may differ in how costly it is to do so. Domestic institutional structures in particular can raise or lower the economic or political costs of information. For example, when a country has no domestic regulatory agency for a given issue, it is unlikely to have public officials with the requisite expertise to assess the consequences of delegating standard-setting in that issue area to one particular international body or another. This disadvantage is likely to be common among developing countries. At the same time, advanced capitalist countries may also differ significantly from each other in this regard, since the existence of well-informed individuals or groups within a country does not make that information automatically available to those who represent the country's interests at the international level (Mattli and Büthe 2003).

In sum, the better the information that a country's representative in international negotiations has at his disposal, the more closely will the preferences that he pursues resemble those that can be predicted by assuming complete information. To the extent that some or all countries have informational limitations, explaining their preferences—and ultimately institutional selection—also requires taking other factors into account.

For reasons examined more fully elsewhere (Büthe 2009), institutional selection should also be a function of the perceived legitimacy of the institutions to which standard-setting authority may be delegated. A full analysis of the legitimacy of international organizations is beyond the scope of this paper; I focus on what Buchanan and Keohane call "sociological legitimacy," i.e., the extent to which it is "widely *believed*" that the organization "has the right to rule" (2006:405). Existing analyses of the perceived legitimacy of IOs suggest that it is to a large extent a function of an organization's inclusiveness (e.g., Coicaud and Heiskanen 2001). I therefore argue that organizations with limited geographical scope—especially IOs that formally restrict membership or participation—have little global legitimacy. This is not to say that such bodies do not sometimes play a prominent role in global governance, but I argue that when there is an alternative international body with at least the appearance of universal scope, then the universal alternative will have greater legitimacy than the organization with limited geographical scope.

Finally, an organization's perceived legitimacy and technical capacity are not fixed but can be influenced by the organization itself. I view international organizations not just as forums within which governments and economic interests interact, but also as actors with potential to actively pursue organizational interests of their own. This allows me to specify conditions under which I would expect IO attempts to influence their own selection. In situations where multiple bodies have previously been involved in setting international standards for a product or service,

not being selected is likely to reduce a body's importance. The political and economic costs of not being officially recognized as the international standard-setter may, however, have to be weighed against the costs of increased scrutiny and politicization that result from the delegation of regulatory authority. Concretely, if an inter- or transnational body is first and foremost an issue-specific standards-developing organization, not being designated an international standard-setter may call into question the viability of the organization, giving it strong incentives to pursue selection as *the* standard-setter. By contrast, an organization for which developing a particular kind of international standards is only one activity among many is more likely to view a fight to gain recognition as *the* international standard-setter for the issue area in question as an unwelcome distraction and therefore should not seek selection particularly forcefully. In sum, I would expect pure issue-specific standard-setters to be more likely to actively seek delegation and even fight against the selection of other, competing standards-developing organizations.

Food Safety Standards and the Selection of Codex

The Institutional Status Quo Ante

I begin the analysis by describing the institutional status quo ante. Four international organizations had been engaged in setting a broad range of food (safety) standards during the decades prior to the Uruguay Round negotiations in 1986: the United Nations Economic Commission for Europe (UN/ECE), the International Organization for Standardization (ISO), the Organization for Economic Cooperation and Development (OECD), and the *Codex Alimentarius* Commission.

UN/ECE: The UN Economic Commission for Europe— technically one of five regional sub-organization of the UN Economic and Social Council (ECOSOC)—was founded in 1947 to facilitate the reconstruction of Europe after World War II. Its mission is to advance economic integration and cooperation among its member states and promote sustainable development and economic prosperity in Europe and beyond through policy dialogue and other means. As part of this mission, it started early on to set standards for perishable foods—most importantly quality standards for fresh and dried fruits and vegetables. These UN/ECE standards were by the 1980s used by agricultural producers as well as import/food safety regulators in many parts of the world, including the U.S. and many developing countries. However, there were few developing countries amongst its members, and none from outside Europe. And although UN/ECE explicitly allows the participation of all UN member states in its standardization activities, it was clearly perceived as a European regional organization.⁹

ISO: The International Organization for Standardization, an international non-governmental body headquartered in Geneva, was founded in 1947 to develop international standards for a broad range of economic activities; it adopted its first standards in 1951 (see Latimer 1997; Murphy and Yates 2008:esp. 11-20). While most of ISO's early work was focused on standards for manufactured goods, one of its 67 original Technical Committees, TC34 for "Agriculture and Food Products," sets standards, for instance, for the safe storage and

⁹ More information can be found at the UN/ECE website, including about current use (<http://www.unece.org/trade/agr/info/accept.htm>, 5/15/2009). The actual standard-setting takes place in "specialized sections" of the Working Party on Agricultural Quality Standards, part of the Committee on Trade. Regarding participation, see *Terms of Reference and Rules of Procedure of the Economic Commission for Europe*. 4th rev. ed. (E/ECE/778/Rev.4). Geneva: United Nations, 2006.

transport of fruits and vegetables. Several other ISO TCs also develop standards relevant for food safety: TC54 (essential oils), TC93 (starch), TC134 (fertilizers and soil conditioners), TC147 (water quality), and TC234 (fisheries and aquaculture). Membership in ISO is open to the body "most representative of standardization" in each country; most of these member bodies are also non-governmental or hybrid public-private entities. By the beginning of the Uruguay Round negotiations, ISO membership had grown to 74 "full" and 16 "correspondent" member bodies from around the world (see Latimer 1997; ISO 2005).¹⁰

Actual standard-setting in ISO is the task of highly specialized technical committees, subcommittees, and working groups of technical experts appointed by the member bodies, coordinated by a small central secretariat in Geneva. Each committee has a secretariat from a national member body that pays for the TC's administrative costs,¹¹ as well as a chairman from a different member body. ISO standard-setting takes place in six stages (for details, see Büthe and Mattli 2010a). ISO decisionmaking rules require consensus (defined as the absence of opposition for which technical reasons are provided) for the committee work to move forward, and standards adoption requires large super-majorities in formal votes on the two final drafts. At the same time, effective interest representation in the ISO requires involvement during the standards-development process because the draft standard becomes successively more specific as it moves through the stages, which in turn requires good information dissemination and effective preference aggregation at the domestic level. Büthe and Mattli's work shows that domestic institutions differ in how well they are suited to these tasks—even among advanced industrialized countries, with domestic institutional fragmentation in the U.S. often impeding effective participation.

OECD: The Organization for Economic Cooperation and Development, an international organization independent of the UN, compiles statistics, provides economic analyses, and develops policy recommendations on behalf of its now 30 industrialized member states. Developing countries sometimes welcome the OECD's analyses and its role in coordinating development aid, but often describe the OECD as an "exclusive club" of rich countries (e.g., Büthe 2009; Woodward 2009:85f). Founded in 1961, it soon afterwards got involved in setting standards for agricultural and forest tree seeds and seedlings, as well as for fruits and vegetables. These standards have long been used in the certification of agricultural commodities for domestic and international commerce in OECD countries and beyond. Standard-setting takes place in separate, specialized working groups, which are officially subcommittees of the OECD's Committee on Agriculture.¹² Participation is also open to non-OECD countries, though it is limited in practice, except for the working group on agricultural seeds, which has long had participants from several countries from every continent.¹³ However, OECD member states are assured a gatekeeping function in that the standards, once agreed by the standards-developing working group, must be approved unanimously by the OECD Council in order to become OECD standards.

¹⁰ "Correspondent" membership was created in 1968 to bring developing countries into ISO even if their shortage of technical experts or lack of a national standards-developing organization did not (yet) allow for full membership (Frontard 1997:46). Correspondent members pay greatly reduced membership fees but have no voting rights.

¹¹ Consequently, most secretariats are held by member bodies from developed countries.

¹² The OECD has some 200 committees, subcommittees and working groups, see <http://webnet3.oecd.org/OECDgroups/> (5/15/2009).

¹³ See http://www.oecd.org/document/33/0,3343,en_2649_33905_39575585_1_1_1_1,00.html and http://www.oecd.org/document/35/0,3343,en_2649_33909_2734819_1_1_1_1,00.html (3/30/2009).

Codex: The Codex Alimentarius Commission is the central institution of the Food and Agriculture Organization (FAO) and World Health Organization (WHO) Joint Food Standards Program, set up in 1963. The members of Codex (about 130 in 1986) are states, represented usually by national governments' ministries or departments of agriculture and/or food regulatory agencies, though many representatives from food industry multinationals and business associations, as well as an occasional representative of consumer groups, serve as appointees on national delegations (e.g., Braithwaite and Drahos 2000:401; Rosman 1993). Codex develops standards for food commodities, for labeling and hygienic handling of food, as well as for the assessment of food-related safety risks. Actual developing country participation in standard-setting and even their attendance at the plenary sessions of Codex was very low at the time of the Uruguay Round negotiations, but many of them had nominally been members of Codex for years, and there were virtually no restrictions on their membership: Membership is open to all countries that are members or associate members of both FAO and WHO.

Actual standard-setting is the task of specialized Codex Committees, such as the Committee on Food Additives, the Committee on Pesticides Residues, or the Committee on Milk and Milk Products. These committees follow an 8-step procedure to develop the standard through various draft stages.¹⁴ The committees' standards become proposals to the plenary session of the Codex Alimentarius Commission, which may formally adopt or reject it. Codex's consensus norms call for reaching consensus in the committees that develop the standard and for passing the standard by consensus in the plenary meeting, but Codex rules allow for adoption of a standard by simple majority, where each country has one vote.

From Institutional Plurality to Sole Designation of Codex

For decades, the international food standards of UN/ECE, ISO, OECD and Codex coexisted as voluntary standards. None of the four organizations became the clear focal point for food safety standard-setting. In fact, until the 1990s, domestic regulatory measures that controlled agricultural production or imports (i.e., market access) drew only occasionally upon international standards, and the international standards as such were not binding on anyone. The stakes in international standardization were consequently low. There was little cost to letting any subset of countries proceed with developing any "international standard" they desired. Abstentions from a large number of countries were common in the international SPS standard-setting bodies; and anyone who felt that a proposed standard was too lax or too stringent focused his/her energies on getting a different standard adopted domestically.¹⁵ Moreover, the Codex Alimentarius Commission was no more prominent than the other organizations. Quite to the contrary: Having initially gained prominence as an international food standard-setter in the early 1970s (Kay 1976:33f), it was by the mid-1980s characterized by "apathy and inaction" (Victor 1997:188) and was described to me in an interview with a long-term observer as "largely moribund" by the time the Uruguay Round was launched in 1986.¹⁶

Economic globalization, however, raised the costs of continued divergence of standards and increased the potential benefit of having a common set of international standards. Specifically, the reduction of tariff levels had rendered existing cross-national differences in

¹⁴ See *Codex Procedural Manual*, 16th ed., 19ff (http://www.codexalimentarius.net/web/procedural_manual.jsp, 6/14/2007) and Victor (1997) for details.

¹⁵ E.g., not-for attribution interviews, 7/18/2007; 11/9/2008.

¹⁶ Not-for-attribution interview 6/19/2007.

standards a significant non-tariff barrier to trade (NTB); and in many cases, countries had raised standards with the intent of creating NTBs (e.g., Baldwin 2000; Bhagwati and Hudec 1996; Mansfield and Busch 1995). For trade in agriculture, SPS measures were by the 1980s the most important NTB, and agricultural exporters were concerned that any liberalization of agriculture negotiated during the Uruguay Round would be undone by protectionist importing countries raising SPS standards to compensate for lower tariffs and quantitative restrictions.

Governments that approached the Uruguay Round primarily as agricultural exporters (especially the U.S., Canada, and the CAIRNS group, led by Australia) therefore sought a binding agreement on SPS measures. Given that an agreement on agriculture was from the start a prerequisite for successfully concluding the Uruguay Round, agricultural importing countries also realized the need to address this issue. But they emphasized that SPS standards are at the heart of often politically sensitive health and food safety regulations, and that an international agreement must not fundamentally impede their ability to protect their populations against diseases and pests.

The resulting SPS-Agreement is an ambitious compromise between the objectives of liberalizing agricultural trade and safeguarding regulatory flexibility. With the exceptions noted in the introduction, the Agreement commits all member states of the WTO to use international standards in their SPS measures. The negotiators, however, rejected as impractical the suggestion that they write a specific list of international standards into the treaty. Maintaining the flexibility to develop new standards as new health and food safety issues might warrant, required delegating the ongoing task of setting SPS standards to more specialized bodies (Büthe 2008). But which international standard-setting bodies (from the set depicted in Figure 1) should be recognized under the SPS-Agreement? This question was the source of discussion and contention for a long time, since the consequences of the other provisions hinged to a large extent on whose standards would be recognized as "international standards" (e.g. /WGSP/2, /WGSP/3, and /WGSP/W/22).¹⁷

The EU in particular sought to get the UN/ECE and the OECD written into the Agreement (/W/56, /W/103:4, /W/146). The other members of the inner core group were largely indifferent vis-à-vis UN/ECE and OECD, but the official recognition of these two standard-setters in the SPS-Agreement was strongly opposed by developing countries. While few developing countries regularly sent a representative to attend the SPS negotiations (and almost never SPS specialists), their views carried some weight because the conclusion of the Uruguay Round required their support, especially for the agriculture negotiations. And they clearly saw UN/ECE and OECD as geographically limited bodies that lacked legitimacy for global governance, and they insisted that the recognized standard-setters would have to be open to participation from all GATT/WTO member states *and* have actual participation from countries from all regions of the world (e.g., /W/130).¹⁸ Lacking legitimacy, the bodies with limited scope thus had no chance to be written into the SPS-Agreement, as suggested by the theoretical argument above.

¹⁷ Unless otherwise noted, all cited Uruguay Round Negotiations documents start with MTN.GNG/NG5/...

¹⁸ Also: not-for-attribution interviews 6/19/2007; 7/30/2007; 8/2/2007.

		<u>Geographic Scope/Reach</u>	
		limited	universal/global
<u>Centrality of Food Standard-Setting for the Organization</u>	high		Codex Alimentarius Commission
	low	UN/ECE; OECD	International Organization for Standardization (ISO)

Figure 1
Competing Int'l Food Safety Standard-Setters

The decision in favor of Codex and against ISO was more complex. ISO had support from the EU and the Nordic countries but also from some CAIRNS group countries and many developing countries as it enjoyed special legitimacy from having already been noted as an international standard-setter in the Tokyo Round TBT-Agreement. Codex meanwhile also had broad support and had been noted in numerous discussions prior to the launch of the Uruguay Round. Both organizations had (access to) substantial technical expertise, though neither was intimately familiar even to the core negotiators. Particularly importantly, the small EU SPS-negotiating team had no member with any expertise in Codex. The EU lead negotiator noted in interviews that he had simply assumed—with regret in retrospect—that Codex worked like the World Animal Health Organization (OIE) with its strong consensus norms, where he had represented the EU for years. Only the U.S. negotiators had a very good understanding of how Codex worked, thanks to the presence of multiple experts with experience in Codex on the U.S. domestic "inter-agency" committee charged with developing the U.S. negotiating position. On that basis, the U.S. supported Codex strategically.

Given most negotiators' incomplete information, it was important that Codex actively sought delegation as an actor in its own right, whereas ISO did not. Codex and FAO (as Codex's primary "parent" organization) made frequent submissions to the Working Group, praising the unique scientific expertise of Codex committees and emphasizing Codex's norm of setting standards by consensus—usually with no mention of the fact that at any stage of the Codex standard-setting process, a simple majority is sufficient to advance and adopt a standards proposal. In addition, FAO built a constituency for Codex among developing countries by linking Codex to FAO development and technical assistance (e.g., /WGSP/W/15:4-6; /WGSP/W/20). Representatives of Codex even sought to de-legitimize ISO as an alternative source of international SPS standards by arguing that, as a non-governmental organization, ISO

was dominated by private, particularistic interests (e.g., TBT/M/31)—hardly a credible claim for those with complete information given the dominant role of private industry in Codex, but effective in that it diminished the legitimacy of ISO in the eyes of some developing country governments, for which relinquishing regulatory authority to non-governmental bodies was anathema.¹⁹

By contrast, and consistent with the argument presented above, ISO, for which setting food safety standards was only one concern among many, far less actively sought recognition through a mention in the SPS-Agreement. When invited to give a presentation about the organization and its standard-setting procedures to the SPS Working Group at its June 1990 meeting, ISO obliged and certainly emphasized its technical expertise and history of consensual, scientific standard-setting (/WGSP/W/24:2f), but its representatives never lobbied the negotiators to delegate to ISO.

Conclusions & Policy Implications

Concerns about food safety make international trade in food products a public policy issue that goes well beyond trade policy. Conversely, food safety is an issue that can no longer be studied as a purely domestic policy issue. Many of the key food safety standards are today developed by the Codex Alimentarius Commission, an international organization which seeks to adopt standards by consensus but, if conflicts of interest cannot be resolved, adopts standards by a simple majority of its now 180 member countries (as of April 2009). Codex attained its current prominence by being designated the international standard-setter in the SPS-Agreement.

This chapter has analyzed why the authority to set international food safety standards was delegated to Codex in the SPS-Agreement. This prominent delegation of regulatory authority is puzzling not only because food safety issues are politically sensitive but also because there were at least four international bodies that had for decades set food and food safety standards when the Uruguay Round negotiations were launched, but only one of them was written into the treaty.

I have argued that, to explain the selection of Codex as the designated source of "international standards" for food safety under the SPS-Agreement, we must examine and take seriously the informational constraints of GATT negotiators' strategic calculations, as well as their perceptions of the available standard-setting bodies' legitimacy—perceptions that could be influenced by those international bodies, understood as actors rather than mere institutional structures. I have found that the SPS standard-setting organizations with geographically limited scope (UN/ECE and OECD) lacked legitimacy in the face of universal/global alternatives and were therefore opposed by developing countries. They stood little chance of being designated international standard-setters for purposes of the SPS-Agreement, although their inclusion was repeatedly suggested. Among the two global bodies, Codex had a much stronger organizational imperative to seek designation as the official international standard-setting organization, and it sought this designation forcefully, shaping perceptions of its technical capacity and legitimacy while building on strategic support from the U.S. As a consequence, Appendix A of the SPS-Agreement defines "international standards ... for food safety" as "the standards, guidelines and recommendations established by the Codex Alimentarius Commission relating to food additives, veterinary drug and pesticide residues, contaminants, methods of analysis and sampling, and

¹⁹ Not-for-attribution interviews, 6/19/2007; 7/17/2007.

codes and guidelines of hygienic practice." It is one of the most robust and near-exclusive cases of international delegation of regulatory authority.

Two sets of questions remain to be addressed, which are particularly important from a policy perspective. (1) Did it matter that Codex rather than ISO was selected? Would the actual standards, developed by Codex since the SPS-Agreement came into force, have differed if they had been developed by ISO instead? (2) In light of the now-common criticisms of Codex as a standard-setter, how might international food safety standard-setting be improved?

How standards might have differed had they been developed in one institutional setting rather than another is very difficult to predict, because the formal-legal delegation of standard-setting authority (and the publicity that goes with it) often changes the politics of standard-setting (e.g., Büthe and Mattli 2009). That said, there are several reasons to think that the choice mattered: First, the decisionmaking procedures differ. Both organizations have consensus norms, but when consensus cannot be achieved, Codex allows for adopting an international standards by simple majority, whereas ISO standards adoption requires large supermajorities. This suggests that the most politically contentious standards, adopted by Codex with a bare majority, would not have become international standards in ISO—leaving food-important countries with greater leeway to address food safety concerns through divergent national measures. Second, in other research on global governance, I have found that the traditional power resources of states are far less usable in international non-governmental organizations than in inter-governmental organizations (Büthe and Mattli 2010a, 2010b). This suggests that delegation to the inter-governmental Codex rather than non-governmental ISO was detrimental to the interests of the small highly developed countries, who often play a prominent role in ISO, but quite beneficial to large developed countries, such as the United States, whose government has a wealth of power resources at its disposal.

Whose interests, however, are represented by the U.S. government? One of the key concerns about Codex in recent years has been the over-representation of industry and the under-representation of consumer interests. In fact, my research suggests that this skewed representation of stakeholders contributed to the attractiveness of Codex to U.S. government negotiators since it largely replicated the domestic political power structure within the United States (see also Vogel 1995:211ff). In part, the imbalance in favor of commercial interests (especially food industry multinationals) is simply a function of the uneven distribution of technical expertise—a general constraint on any policies or procedures to make standard-setting more inclusive (Mattli and Büthe 2005). The under-representation of non-commercial stakeholders in U.S. delegations to Codex technical committees, however, is also a function of the long-standing U.S. policy to treat willingness to pay as the "true" measure of the seriousness of any stakeholder's interest. Non-governmental appointees to Codex committees therefore pay their own way. Since Codex standard-setting stretches over multiple years and involves attending meetings in various countries around the globe, the lack of any public support for non-commercial participants is bound to reinforce the under-representation of consumer safety advocates and other non-commercial stakeholders. Subsidies for non-commercial participants thus hold greater promise for a better balance of interest representation than shifting standard-setting to another organization or boosting the transparency of the Codex process through increased use of administrative law procedures.

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