

codex alimentarius commission



FOOD AND AGRICULTURE
ORGANIZATION
OF THE UNITED NATIONS

WORLD
HEALTH
ORGANIZATION



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**CL 2008/34-GP
November 2008**

TO: Codex Contact Points
Interested International Organizations

FROM: Secretary, Codex Alimentarius Commission

SUBJECT: **Request for comments and information on: Concept of Consensus and its application within Codex**

DEADLINE: **30 January 2009**

COMMENTS: **To:**
Secretary
Codex Alimentarius Commission
FAO/WHO Food Standards Programme
Viale delle Terme di Caracalla
00153Rome, Italy
Fax: +39 06 5705 4593
E-mail: codex@fao.org (*preferably*)

In preparation of the 25th Session of the Codex Committee for General Principles (CCGP), Governments and international organizations wishing to submit comments on the attached document on the *Concept of Consensus and its Application in Codex* are invited to do so in writing, preferably by E-mail to the Secretary, Codex Alimentarius Commission, Joint FAO/WHO Food Standards Programme, FAO, Viale delle Terme di Caracalla, 00153 Rome, Italy (Email: codex@fao.org, fax : +39 06 57054593) **before 30 January 2009**.

Taken into account the background of the discussion in Codex, the replies from Codex Chairs on the concept of consensus and the applicability and usefulness of the measures to facilitate consensus and the application of the concept of consensus in the UN system and WTO, the comments should focus on the following (please justify your reply in each case):

- (1) Section D.3 lists a number of statements. Do you agree with these statements?
- (2) Section D.4 lists a number of proposals. Would they address the problems mentioned in Section D.3? If not please indicate how the problems in Section D.3 could be solved?
- (3) In your opinion, are there further problems concerning the application of the concept of consensus in Codex? If yes please describe them and how you think they could be solved.

CONCEPT OF “CONSENSUS” AND ITS APPLICATION WITHIN CODEX

Prepared by the Secretariat

A. Background

The discussion on the concept of “consensus” has a long history within Codex but intensified after some decisions were taken by the Commission by vote with only a narrow majority:

At its 21st Session in 1995, the Commission first rejected in a roll-call vote a motion to adjourn debate on MRLs for growth-promoting hormones (28 for adjourning, 31 against adjourning, 5 abstentions) then by secret ballot adopted the MRLs (33 for, 29 against, 7 abstentions) and at the same session decided by roll-call vote to adjourn the debate on maximum residue limits for bovine somatotropins (33 for adjourning, 31 against adjourning, 6 abstentions)¹.

At its 22nd Session in 1997, the Commission again decided by roll-call vote to suspend consideration of the adoption of the MRLs for BST (38 for suspension, 21 against suspension, 13 abstentions)². At the same session, the Commission adopted the Revised Standard for Natural Mineral Waters by roll-call vote (33 for, 31 against, 10 abstentions)³.

The discussions at these sessions showed much dissatisfaction about the fact that Codex had taken decisions by vote in conditions deemed to be unsatisfactory. The votes were almost balanced, with either a substantial number of abstentions or of members not participating in the votes. As a result, Codex standards were adopted or rejected by a relatively small majority with a large number of members not voting in favor..

The following table sums up the discussions that followed until the present.

Body-Session/Year	Discussion/ outcome (references to rules are in the numbering of the 17 th Edition of the Procedural manual)
CCGP-13/ 1998 ⁴ ,	Discussed two options: retaining a simple majority for the adoption of standards with systematic recourse to practical arrangements to reach consensus; or the adoption of standards by a majority of two thirds, which would have the effect of strengthening the need for consensus before standards were submitted to the Commission.
CCGP-14/ 1999 ⁵ ,	Agreed on the proposal to amend Rule XII. Discussed changing majority for adopting standards to two-thirds but no agreement.
CAC-23/ 1999⁶:	Adopted the amendment to Rule XII of the Rules of Procedure (addition of paragraph 2 stating that voting should only take place when efforts to reach consensus have failed).
CCGP-15/ 2000 ⁷ ,	Agreed on a proposal to amend Rule VIII, 5 by including a cross-reference to new paragraph 2 of Rule XII. No consensus on changing the Rule VIII, 2 on majority.
CCEXEC-49/ 2001 ⁸ .	Endorsed measures to facilitate consensus.
Joint Evaluation 2002 ⁹	<i>Wherever possible, decisions should be made by consensus. Codex should define consensus for decision-making purposes in committees and the Commission. We propose ‘no formal objection by more than one member present at the meeting’; and:</i> <i>a) committees should, as the norm, achieve consensus before passing on standards to the Commission for adoption;</i> <i>b) facilitators working between meetings should help to reach consensus and should be systematically used to assist in overcoming deadlock at any stage of the standard setting process);</i> <i>c) in cases of ‘near-consensus’, proposed standards should be passed on by committees to the Commission for consideration. A consultative postal-balloting system should be considered as a way</i>

¹ ALINORM 95/37, paras 43-48

² ALINORM 97/37, paras 64-70

³ ALINORM 97/37, paras 85-95

⁴ CX/GP 98/6 and ALINORM 99/33 paras 24-30

⁵ CX/GP 99/5 and ALINORM 99/33A paras 38-51

⁶ ALINORM 99/37 paras 61-62

⁷ CX/GP 00/5 and ALINORM 01/33 paras 67-77

⁸ ALINORM 03/3 para. 35

⁹ Report of the Evaluation of the Codex Alimentarius and other FAO and WHO Food Standards Work (2002), paras 132-137, 4.4.3.7 Consensus Building and Decision Making

	<i>of ensuring inclusiveness and legitimacy;</i> d) if no better than 'near-consensus' could be reached in the Commission, voting should take place but should require at least a two-thirds majority of those present and voting for a standard to be adopted (Recommendation 24).
FAOPC-89/ 2003 ¹⁰	Questioned the need for and practicality of the definition of consensus suggested by the evaluation.
FAOCouncil- 124/ 2003 ¹¹	Concurred with the main findings and recommendations of the Programme Committee
CAC-26/ 2003 ¹²	Adopted the <i>Measures to Facilitate Consensus</i>
CAC-26/ 2003 ¹³	Considered Proposal No.34 contained in document ALINORM 03/26/11 Add.4 (para.41) as follows: <i>In view of the divergence of opinions on this matter the Commission may wish to maintain the status quo in this matter. It may wish to advise the body responsible for implementing the procedural review that resolution of the question of consensus in regard to decision-making is a matter of importance and that efforts should be made to develop appropriate guidance for Codex Committees and Task Forces. In view of the diversity of opinions currently held on this matter, the Commission may wish to request a progress report on the issue at its Regular Session in 2005 (Proposal No.34: - Determination of consensus). The Commission agreed in principle to this proposal.</i>
CAC-27/ 2004 ¹⁴	Adopted the amendments to the Procedures for the Elaboration of Codex Standards and Related Texts; referred the comments made by India to the CCGP and asked the CCGP to consider the possibility of developing a definition of "consensus".
CCGP-21/ 2004 ¹⁵	Agreed that no new work should be undertaken on a definition of "consensus" until more experience had been gained in the application of the <i>Measures to Facilitate Consensus</i> .
CCGP-22/ 2005 ¹⁶	India presented their comments. Several delegations referred to the decision of CCGP-21 – several others felt that the notion of consensus was essential and should be defined in Codex.
CCGP-23/ 2006 ¹⁷	Many delegations supported the approach suggested by India and stated that the definition of consensus was important others felt that the decision of CCGP-21 was still valid.
CCGP-24/ 2007 ¹⁸	Many delegations supported work on a definition of consensus, some supported the concept and others also the wording suggested by India. These delegations stated that the definition of consensus was important to facilitate reaching consensus in Codex meetings, as the practical application of this concept had raised many doubts. Many other delegations, while being open to a discussion on this question, were of the opinion that arriving at a definition that would help the work of Codex would be difficult and that care should be taken to avoid describing the qualitative concept in quantitative terms. They also felt that the terms used in the definition proposed by India might create new problems because they also needed to be defined in order to make the definition applicable. Some delegations felt that the decision of CCGP-21 was still valid. Other delegations were of the opinion that the concept of a "spirit of compromise" in order to find consensus was already well established in Codex and an explicit definition of consensus might be detrimental to the present situation. The Committee agreed to forward the content of the discussion to the Commission for further advice.
CAC-30/ 2007 ¹⁹	Noted that the definition of consensus and how the concept was handled in practice in Codex was considered an important issue by many members, to be further discussed as a matter of priority within the CCGP. The Commission agreed that: - The issue be discussed by the 60 th Session of the Executive Committee, including how to request chairpersons of Codex subsidiary bodies to provide their input on the matter and especially their experiences with the application of the <i>Measures to Facilitate Consensus</i> ; - The Secretariat compile the replies from the chairpersons into a discussion paper and circulate it to members and observers at the earliest possible time in the second half of 2008, in order to allow for

¹⁰ CL 124/14 paras 50-57

¹¹ CL 124/REP paras 83-84

¹² ALINORM 03/41 para. 28-31

¹³ ALINORM 03/41 para. 178

¹⁴ CX/GP 04/21/2 and ALINORM 05/28/33 paras 6-10

¹⁵ CX/GP 04/21/2 and ALINORM 05/28/33 paras 6-10

¹⁶ CX/GP 05/22/2, CX/GP 05/22/2-Add.1 and ALINORM 05/28/33A paras 8-16

¹⁷ CX/GP 06/23/6 Part-I and ALINORM 06/29/33 paras 106-114

¹⁸ CX/GP 06/23/6 Part-I and ALINORM 07/30/33 paras 116-130

¹⁹ ALINORM 07/30/REP paras 198-200

	ample time for reflection and the preparation of comments and proposals by Codex members for discussion of the issue at the 25 th Session of the CCGP in April 2009.
CCEXEC-60/2007 ²⁰	Agreed on questionnaire to be distributed to Chairpersons of Codex Committees and Task Forces.

The Joint Evaluation of the Codex Alimentarius and other FAO and WHO Food Standards Work (2002) looked at the issue of consensus in recognition that “the occasional use of simple majority voting of delegates present to adopt standards has led to some of the most controversial Codex decisions, given the narrow margins by which standards were passed” (4.4.3.7 Consensus Building and Decision Making, paras 132-137, Report of the Joint Evaluation of the Codex Alimentarius and other FAO and WHO Food Standards Work). The Report proposed a definition of consensus as “no formal objection by more than one member at a meeting”, proposed the introduction of the concept of “near-consensus”, recommended systematic use of facilitators working between meetings to help to reach consensus and to overcome deadlock, and also recommended the introduction of a two-thirds majority, instead of a simple majority, in the voting to adopt a standard.

Subsequently, seen that the written comments from member countries did not support the concept of “near-consensus”, the proposed definition of consensus received mixed support (some countries in favour, others against) and qualified majority (two-thirds) voting for the adoption of standards had some support, the 26th Session of the Commission agreed to maintain *status quo* on the issues related to determination of consensus, while adopting the Measures to Facilitate Consensus for inclusion in the Procedural Manual as a general decision of the Commission²¹.

The use of facilitators, while it was supported by the Commission in principle, has not been practiced extensively within Codex since 2003 until today. In certain situations, the Chairperson of a Codex subsidiary body has undertaken to personally talk to the parties holding opposed views on specific matters, either during the session or between sessions. In other cases, Codex subsidiary bodies chose to convene an informal meeting of the parties concerned (in line with point (c), Consensus, Guidelines to Chairpersons of Codex Committees and Task Forces) or establish a physical working group (rather than an electronic working group) which served as a forum for discussion among members which held divergent views, when informal consultations between interested parties had not been sufficient to achieve consensus.

B. SUMMARY OF REPLIES

In December 2007 the questionnaire as reproduced in the Annex to this document was sent to Chairpersons of the Commission and its subsidiary bodies as well as Vice-Chairpersons of the Commission who were in these positions in 2006-2007. The deadline for replies was 15 April 2008.

Until June 2008, seven replies were received. The Secretariat collected the answers and combined similar concepts. The first draft this was first discussed at the informal meeting of Chairs on 4 July 2008 and then distributed again to all Chairpersons with the deadline 22 August 2008 to solicit additional replies and to give the opportunity to check if the contributions from Chairs had been appropriately captured and if necessary make adjustments.

The revised document was sent again to those who had provided comments on the draft and also reviewed at an informal meeting of the Chairperson and Vice-Chairs of the Commission, held in Rome from 22-24 September 2008.

Examples given by the Chairs to illustrate measures have been included in footnotes to the text.

²⁰ ALIRNORM 08/30/3 paras. 35-37

²¹ ALINORM 03/26/11: Add. 4, paras 40-41; ALINORM 03/41 paras 178-179

1. Use and effectiveness of the existing *Measures to Facilitate Consensus*

The replies show that most measures are applied “often” to “always” by the Chairs. The only measure applied somewhat less was 1.4 (Redefining the scope). Measures were mostly seen to be effective to very effective or even essential.

1.1 *Refraining from submitting proposals in the step process where the scientific basis is not well established on current data and, where necessary, carry out further studies in order to clarify controversial issues.*²²

Limitations	Less relevant in commodity committees. Trade and market needs cannot always wait for science – it is increasingly difficult to try to deny Codex members the possibility to start working on something they deem needed, but where the scientific evidence is not yet mature. Scientific advice is more effective in preventing non-consensus than to facilitate consensus.
Advantages	Thoughtful consideration and discussion of new work proposals has sharpened recognition that the Committee can't do everything and that work on new standards should be started only when sufficient data are available to support the work. Discuss any matters to the extent where scientific evidence or support is available and avoid or limit to the minimum as possible the debate that cannot be based on science. This is especially useful when framing the work at the beginning.
Implementation	If consensus cannot be reached that the Committee should propose new work. The Chair usually asked the member country that proposed the new work to develop a CL for discussion at the next session.

1.2 *Providing for thorough discussions and documentation of the issues at meetings of the committees concerned*^{23 24}

Limitations	WTO recognition sometimes leads to unmovable contradictory positions. This can paralyze the work of Codex even if ample time for discussion is provided.
Advantages	A good understanding of the subject matter is the key for a constructive discussion. Full and thorough discussion and documentation is a necessity at all decision-making points and avoids challenges to final adoption at CAC. Clear decisions and thorough documentation of the debate and the decisions that will influence the debate in the later sessions can avoid confusion or duplication of the same debate
Implementation	Setting timelines for discussion on each item, in particular documents that are in the Step process the committee can ensure that all topics are discussed thoroughly in order to reach consensus. A feeling of joint enterprise among delegates through thorough debate can facilitate reaching a

²² Since adoption of CCFH's work management and priority-setting procedures new work on fresh produce, Vibrio, Viruses was started only after JEMRA or an expert panel provided the needed scientific evidence/analysis.

²³ The draft code of hygienic practice for milk and milk products had been in development for more than 12 years. Progress ceased because of the concerns of a number of developing countries that the requirements of the code ignored the practical constraints and limitations faced by small-holder dairy farmers. Assurances that the code's provisions were not mandatory, and that flexibility was built into the fabric of the code failed to calm these worries. The solution was found through careful listening to the concerns in informal meetings facilitated by trusted third parties (such as FAO representatives). These discussions showed that a separate text that would specifically address the special challenges faced by small-holders would resolve the anxieties allowing the code to be adopted.

²⁴ 30th session of the CAC: *Revision of WHO Guidelines for Drinking Water Quality*: To facilitate consensus on this issue, an in-session working group chaired by Switzerland, as host country for the adjourned Committee on Natural Mineral Waters had reviewed written comments received and provided its recommendations to the Commission whether the amendment to the Codex Standard on Natural Mineral Waters was necessary and, if yes, how to proceed. The Commission endorsed the conclusions of the working group.

	<p>consensus.</p> <p>Stimulate/facilitate mutual understanding of viewpoints by having members explain the underlying rationale.</p> <p>Thorough preparation of discussion papers or other documents (by working groups or rapporteurs) facilitates discussions.</p> <p>In-session working groups preparing documentation for the plenary to create a common sense of urgency.</p>
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1.3 Organizing informal meetings of the parties concerned where disagreements arise, provided that the objectives of any such meetings are clearly defined by the Committee concerned and that participation is open to all interested delegations and observers in order to preserve transparency^{25 26 27 28}

Limitations	<p>When it comes to the core controversial issues, none of the Members is willing to compromise in a mere informal meeting. (*)</p> <p>Contribution of working groups to consensus cannot be considered as decisive because the decision to establish a working group, its mandate and the follow-up to its recommendations depends largely on the feeling of the Committee which is independent.</p> <p>Physical working groups can become like pseudo Committee meetings and thus as complex to handle. As a chair it may be necessary to sit down with a few people understanding the issue and work on possible solutions. This may at that moment not be fully transparent but the only way forward. Any solutions found can then be properly presented to the committee with enough time for reflection. So transparency is very important but if taken to the extreme it can stand in the way to reach consensus.</p>
Advantages	<p>This allows spending less time on the plenary to progress most of the work.</p> <p>Working groups (physical or electronic) are an indispensable tool to resolve issues where discussions would be difficult to manage in plenary given the number of participants and the time that can be spent on each agenda item (finalizing a text or part of a text, examine in detail written comments when they are numerous).</p> <p>Informal meetings provide a forum for members to exchange information and discuss their concerns.</p> <p>In the plenary, members hardly change their position. One of the reasons could be that the delegations cannot communicate their real (or hidden) concern through the formal debate. In smaller groups, the delegations can explain their view more frankly, and try to find a common ground for the both sides' interest. (*)</p> <p>Informal meetings allow more detailed technical exchange of views and are helpful to look for</p>

²⁵ Because of lack of progress during the development of the *Guidelines on the Judgement of Equivalence of Sanitary Measures Associated with Food Inspection and Certification Systems* the Committee agreed to form a working group to revise the document for further consideration at the next meeting. The working group also failed to advance the text and a number of members especially from one region voiced strong concerns. The Chair organized a workshop in this region to discuss the issues (funding for attendance was provided). This workshop was crucial to the success of a working group meeting that continued work on drafting the guidelines by getting the dissenting countries engaged in the discussion rather than have them block the work going forward.

²⁶ During the discussions on drafts for principles for the application of traceability/product tracing members of Codex were polarised on the scope of the principles for the application of traceability/product tracing (food safety vs. facilitation of trade). To increase understanding of the concerns, various seminars were held in each Codex region during 2004/05. These seminars provided a forum for members to exchange information and discuss their concerns. The Committee was then able to develop a set of principles that addressed all members concerns.

²⁷ *Powdered-formulae Code*: Consensus was facilitated considering the scientific advice and in a series of informal evening WG sessions at annual CCFH plenary sessions during which interested parties worked with each other, face to face, to find reasonably common ground on the questions of (1) which hazards were associated with (2) which risks and in (3) which age groups of powdered-formula consumers. Solutions were found in these settings possibly because all parties with major interests and concerns were able to be present at the annual CCFH sessions to a greater degree than was possible at specific inter-session WG meetings on the subject and because there were frequent and effective interactions between scientific advisors and the Committee.

²⁸ A code of practice was stalled in the step process because two members could not agree on the definition of "antimicrobial". The Chair requested that the two delegations meet outside of the plenary session in an effort to resolve their differences. This was successful and the document was advanced to step 5/8.

	options. Having an opportunity to establish an electronic working group or a physical one is really an improvement. It allows continuing on work between meetings in order to make progress.
Implementation	Chair organizing regional workshops in preparation of working groups. During workshop inform delegations about the issue in detail and let them voice their concerns and ask countries that in order for consensus to be achievable, delegates should preferably have a mandate from their national authorities to deal flexibly and positively with the issues arising. Offering chance of informal meetings at right moment is a key to the success of negotiation. In a difficult situation it can be useful to interrupt a stuck discussion in plenary come back to it when the whole text has been examined. This gives the chance to delegates to digest the issues, talk among themselves and think in wider perspectives. The Chair of the Committee can seek out parties during breaks at the meeting to resolve issues that may block consensus.

(*) A similar point was mentioned both as limitation and as advantage – a point for future discussion: in which cases will delegates easier compromise in a formal or informal meeting.

1.4 Redefining, where possible, the scope of the subject matter being considered for the elaboration of standards in order to cut out issues on which consensus could not be reached^{29 30 31 32 33 34}

Limitations	Useful to reach consensus on the main issue at hand but the unattended part may come back for discussion eventually, generating additional work. When cutting out difficult parts should not alter the objective of the standard or make it useless or trivial.
Advantages	In the final phase of discussion this measure it allows to use the willingness of the Committee to conclude an issue by sorting between those aspects that could form part of an agreement and those where the absence of a solution could lead to a failure of the work. Especially useful when developing large comprehensive codes of practice.
Implementation	Do not try to reach consensus on matters where consensus can never be reached. Such matters should be re-framed so that common understanding can be reached. Avoid work that can be handled more wisely in other committees.

1.5 Providing that matters are not progressed from step to step until all relevant concerns are taken into account and adequate compromises worked out^{35 36 37}

²⁹ For the Appendix to the *Guidelines on the Judgement of Equivalence of Sanitary Measures Associated with Food Inspection and Certification Systems*, work was initially approved on 6 separate annexes. After several discussions both in physical working group meetings and during in plenary the Committee agreed to redefine the scope of the work and combine all 6 annex into one single appendix. The work still took several years to complete but amending the scope facilitated achieving consensus.

³⁰ The approach was used recently for: milk code, infant formula code, risk metrics, egg code, and listeria in RTE foods. It has allowed the codes to be adopted while allowing their annexes to proceed at a slower pace in the step process.

³¹ The Task Force on Foods Derived from Biotechnology transferred “detection methods” to CCMAS, “traceability” to CCGP/CCFICS, “nutrition” to CCNFSU, GMO “database” to FAO (and OECD), “animal health” to OIE.

³² Brazil nuts were removed from the scope of the Sampling plan for aflatoxins to allow the text to move forward.

³³ Risk assessment (by WHO and FAO) is independent of risk management (of Codex). Re-definition of substantial equivalence in the expert consultation was a strong tool for GMO debate not only in the Codex Task Force but also in other international fora.

³⁴ The “Proposed Draft Guidelines for the Design and Implementation of National Regulatory Food Safety Assurance Programmes Associated with the Use of Veterinary Drugs in Food Producing Animals” contained a section on milk which was very complex and poorly developed. After discussions spanning several sessions, it was agreed to remove this section and discontinue further work on it.

³⁵ There were unresolved issues in the *Proposed Draft Recommended Code of Practice for the Handling and Processing of Quick Frozen Foods*. The Commission agreed to establish an Ad Hoc Intergovernmental Task Force on the Processing and Handling

Limitations	<p>This is rather a definition of consensus than a measure to reach it.</p> <p>It has proven useful not to apply this measure e.g. when most of a standard is finalized, except for a section or some text in “square brackets”. This way the next session can focus only on the not agreed text and possibly some consequential amendments. This does not apply to work proposed at step 8 because discussions that should have taken place in the Committee could be moved or repeated in the Commission.</p> <p>Consensus of going forward with a noted reservation is also a way to progress and may allow resolving the issue at a later stage.</p> <p>This may be exploited by members who simply do not want the matter to advance in the step process for national interests.</p>
Advantages	<p>This is essential, basic, and fundamental to effective work management.</p> <p>Valuable when there are substantive differences of opinion that require time and further discussion to resolve in an amicable manner.</p>
Implementation	<p>Members and observers should ensure through appropriate preparation and consultation that issues which have been dealt with successfully by the Committee are not raised again in the Commission.</p> <p>Intersession work i.e. working groups are instrumental in ensuring that documents do not progress through the step process until there is substantial consensus on the content. Many documents can progress through the step 5/8 process because of the significant amount of work done through physical working groups.</p> <p>Wait advancing the step process until delegates feel it natural.</p> <p>To avoid any exploitation delegates objecting to advancement are asked to state specifically their reasons for objecting to the advancement of the matter and what additional information would be needed to resolve their concerns. The Chair then seeks to obtain a commitment from the delegation that if the requested information is provided, the delegation will not object to advancing the matter at the next session of the committee. This discussion is meticulously captured in the report of the committee and referred to in the subsequent session thus holding the member country accountable for commitments made in the previous session.</p>

1.6 *Emphasizing to Committees and their Chairpersons that matters should not be passed on to the Commission until such time as consensus has been achieved at the technical level*

Limitations	<p>This is also hardly a measure to facilitate consensus from an auxiliary body point of view.</p>
Advantages	<p>Essential, basic, and fundamental to effective work management.</p> <p>By making it clear at the beginning of the discussion on any standard proceeding through the step process that the standard will not advance unless there is consensus by the Committee, there is an incentive to reach consensus.</p>
Implementation	<p>The Chair should remind the Committee of this when opening/ closing items</p> <p>If delegations do not agree, advancing steps is a dangerous attempt for the Chair.</p> <p>If no progress is made on the basis of technical consensus, proposals should return e.g. to step 2 for further elaboration It depends on definition of consensus. Broad consensus is not the same as full consensus. Broad consensus should be required on the content and full consensus on the process e.g. to go to step 8 with still a reservation.</p>

of Quick Frozen Foods to finalise the Code with one session of the Task Force or to discontinue discussion. The task force was successful and the Code adopted.

³⁶ This measure was specifically employed for several draft codes on which consensus seemed elusive over the course of several years, including: risk metrics, infant formula, Listeria in RTE foods, and validation.

³⁷ An MRL for a veterinary drug at Step 7 pending JECFA re-evaluation of new scientific data submitted by a Member Organization. The JECFA Secretariat rescheduled the veterinary drug as a priority substance to address the toxicological concerns raised by a member. JECFA addressed in detail to all the specific toxicological concerns raised by the member and concluded there was no basis for revising the MRL. At the next session of the CCRVDF, the member once again opposed advancing the MRL based on the same toxicological concerns. The Committee, however, advanced the MRL to Step 8 despite the reservation expressed by the member.

1.7 *Facilitating the increased involvement and participation of developing countries*^{38 39 40}

Limitations	The participation of developing countries has been facilitated by the Codex Trust Fund. Nevertheless the rotation between countries from one session to the next has been a handicap because it limited the possibility of these countries to familiarise themselves with the items on the agenda.
Advantages	One of the most important issues for Codex, as it provides both valuable input and legitimacy to its works.
Implementation	<p>When countries send comments but cannot attend the session either the host country secretariat or the Codex secretariat could read the written comments submitted and bringing them up at the relevant moment in the meeting.</p> <p>Hold a seminar for first time delegates prior to the plenary. This seminar can include a brief outline by the Chair of how the Committee is run and presentation from lead countries of specific topics on the Agenda, issues to be discussed and expected progress. This ensures that first time delegates understand the background to the proposed discussions and that they have the opportunity to ask questions in an informal setting.</p> <p>Fund participation of developing countries to workshops, seminars or working groups.</p> <p>Co-hosting with substantive participation of the co-hosting country (such as substantive involvement of the co-chair in management of the session).</p> <p>Working with developing countries on the hosting of WGs and Taskforces.</p> <p>It is very important to give all delegates (members and observers) the opportunity to express their concern or view. The Chair should make them feel welcome and encourage their active participation.</p> <p>Chair to make contact with specific delegations to ensure an adequate balance of views in electronic working group outcomes.</p> <p>Real progress on this point could be made by further capacity building activities. The lack of data from developing countries is often a bottleneck</p> <p>When it becomes apparent that one or more developing countries is not participating on an issue that is of vital importance to that country, the Chair may encourage the member country to advocate on its own behalf. This interaction generally takes place during breaks or at social functions rather than during the plenary session. More often, developed member countries attempt to solicit support from developing member countries in order to advance the developed countries agenda.</p>

³⁸ Half of all CCFH sessions held since 2001 have been co-hosted in developing countries: 2001 Thailand; 2005 Argentina; 2007 India; 2008 Guatemala. CCFH is also attempting to balance the effectiveness of physical working groups (WGs) at advancing work quickly with the burden that physical WGs place on delegations (especially on developing country delegations) through increasing use of eWGs (electronic WGs). CCFH is also increasing use of translation of working documents for physical WGs, even though the working language of the WG meeting may be in English. We have also encouraged developing countries to take the lead in developing CCFH texts. For example, India is leading a WG to develop text on CCFH risk analysis procedures. Essential, and increasingly so, as developing country delegations become fully participatory partners in Codex work. and increasing the participation of developing countries through working with them on the hosting of WGs and Taskforces (such as India and Thailand).

³⁹ Developing Countries participate with help of Trust Fund and are always invited to participate in session of electronic working parties and take sometimes the lead (Discussion paper on cocoa by Ghana, proposals for priorities JECFA by Sudan and Nigeria)

⁴⁰ During discussions on an MRL for a veterinary drug important to shrimp-producing countries, there was little participation from Southeast Asian member countries which had a strong interest in seeing the MRL advance. The Chair called a break to encourage these delegations to engage in the discussion and the MRL was advanced during the subsequent discussion.

2. Other measures to facilitate consensus

2.1 *Informal meetings*

2.1.1 Proactive use of informal, in-session meetings

A chair should be sensitive to perceive when a Coffee break even if it is not scheduled, can be most useful when a discussion is not able to progress any more in the plenary. The break allows the interested parties to come together and make a decision or draft text, either having the discussion at their own initiative or by the express invitation by the Chair.

Some members may be holding a previously agreed common position that they have to respect in the plenary. The break gives them the chance to evaluate the convenience of keeping an inflexible position or start compromising. Members who came with strict instructions that they cannot modify can consult whether it would be possible to consider arguments expressed and show flexibility and compromise.

2.1.2 Chair participation in informal meetings

The Chair can proactively encourage and participate in the discussion between the members with most interest in a given issue, usually as a facilitator. If the issue is very controversial, participation of the chair may help maintaining a constructive atmosphere. A clarification on whether the Chair perceives that the opinion of a member not willing to compromise has consensus among the auxiliary body or not, can help members re-evaluate their positions and start compromising.

The Codex Secretariat may alert the Chair of their analysis of written comments which showed controversy about a draft standard. In an informal meeting at the side of the session the Chair could meet those who had sent the comments and those that had participated most in drafting of the standard drafted. In a first meeting hear everyone's concerns, and propose a solution. In a second meeting agreement after each one has consulted with other members or their capital.

*2.1.3 Contact between the sessions*⁴¹

Contact with the main parties involved in a discussion between sessions, to try to arrange that they contact each other and find solutions, via e-mail, telephone or other ways if a solution can be found it can be presented in writing to the subsidiary body.

Facilitation of consensus has in some cases been achieved through facilitating discussion of the topic at workshops/seminars held in different regions that provided a forum for all parties to put forward their views/express their concerns or just to learn in more detail about the topic being discussed.

Whilst this mechanism was costly (with the host country and others meeting the costs of the seminars) it facilitated discussion with the outcome being greater understanding and appreciation of the issues at hand by all concerned.

2.2 *Efficient work during the sessions*

2.2.1 Keep everyone discussing the same issue

It is common that members have a pre-defined position, and when they take the floor, they are keen to present it all, then the next speaker presents their own position, and a third may agree with part of the first, but not with all, and disagree with most of the second and then the discussion becomes impossible to handle, as there are too many things on the floor. Addressing one issue at a time and asking for views on that particular issue and leave it resolved before moving to the next can facilitate arriving at a consensus.

⁴¹ This method worked with the subject of traceability/product tracing and has been trialled with regards to GM labelling (although in this case it may not have worked, it still provided an opportunity for education and exchange of views).

2.2.2 *Consider the written comments submitted*

Having either the host country secretariat or the Codex secretariat read written comments in the absence of the authors can increase transparency and participation of developing (and some times developed) countries and can prevent a possible opposition of the member in the Commission.

2.2.3 *Use Existing FAO guidance*

The FAO's "Guide on the Conduct of Plenary Meetings"⁴² contains useful guidance for proper conduct of meeting, which is essential for obtaining consensus.

Powers and duties of Chairman and Vice-Chairmen of the Conference. "The Chairperson has complete control over the proceedings and makes decisions on points of order. The Chairperson may propose a time limit for speakers, to limit the number of times a delegate may intervene on any questions, the closure of list of speakers, the adjournment or closure of debate (Page 1, left column, 2nd and 3rd paragraphs)".

It is important to give delegates equal chance of intervention, which is essential for giving satisfaction to all the delegates. From the beginning, our Task Force limited each intervention within 2 minutes, and used a traffic signal-like device, which is now used in other Codex meetings as well.

Decorum in debate. "All remarks should be addressed to the Chairman and not to individual delegates (Page 2, left column, 1st paragraph)." Right of reply. "Under this procedure, where a delegate wishes to reply to criticism of government's policy, he should preferably do so on the evening of the day on which such criticism has been voiced, after all those wishing to participate in the discussion have had an opportunity to do so. At the end of the afternoon meetings the Chairman would accordingly announce: "This concludes our business for the day, but before adjourning the meeting I shall give the floor to the delegate of ... who has asked to exercise the right of reply (Page 2, left column, 4th and 5th paragraphs)."

Courtesy and decency should be observed during debate if the delegates want to reach a consensus.

The Chairperson should always state very clearly what the issue is and make sure it is fully understood (Page 3, left column, 2nd paragraph).

This is very important. Very often, the cause of disagreement is misunderstanding of the context. It may be useful to show on the screen the item or paragraph under debate to avoid out-of-place interventions.

2.2.4 *Active listening by the Chair*

The Chair should speak sparingly so as to give more chance of intervention to delegates. The Chair should listen. The Chair should not feel guilty when consensus cannot be reached but only state that in his/her opinion there is no consensus and ask delegates how they want to manage the situation. Continued pleading and talking by the Chair may lead to delegates blaming him/her for mismanagement and not arriving at consensus.

2.2.5 *Interrupting a stuck discussion*

The Chair may interrupt a stuck discussion and come back to the point only after the whole document has been discussed. This may give the chance for delegations to organise themselves and meet informally and discuss the issue.

2.2.6 *Chair/Secretariat serving as institutional memory*⁴³

For avoiding useless or sometimes detrimental debate, it is sometimes useful that the Chair or the Secretariat remind the delegates of agreements already obtained in the same committee or in other codex places, particularly of definitions and other terms. The members of the committee are changing, and some may not be aware of how the notion was developed before.

⁴² ftp://ftp.fao.org/unfao/bodies/conf/c2005/GuideConduct_en.pdf

⁴³ The term "food safety assessment" in TFFBT, which is not any safety assessment but is the particular assessment approach using a comparator.

2.2.7 Develop text within the Committee ensuring input from all

The practice of projecting the text onto screens while the committee works can help significantly to ensure that all members' views are reflected in the text of the particular documents. Delegates can see as they work the completed text and any objections can be raised at the completion of each section of text and if necessary the committee will return to problematic text. At the completion of the document (regardless of where it is in the step process) delegations are provided with a clean copy of the text to consider either overnight or during a break, delegations are then asked if there are any significant objections to the completed text.

2.2.8 Create a constructive atmosphere in the room.

When the meeting is running smoothly, everything is well prepared, there are no technical hiccups, consistent decisions are taken throughout the meeting, people are much more willing to accept compromise proposals than when they are irritated and tired. A chair should not only properly summarize the discussion and the decision taken but also where appropriate give a rationale for his decision and share the course of his thinking with the meeting. A chair should thus not only actively listen to the meeting but on occasion also actively educate the meeting, and of course entertain the participants.

The head table needs to deal with an issue, leaving delegations with feelings that they have been heard even if their position has not been adopted. They should not leave the meeting feeling that they have been defeated.

2.3 Work management measures

2.3.1 Suspend the discussion for some years

Suspend the discussion for some years and restart it when the context has changed or the feeling in the Committee has evolved. The abolishing of the acceptance procedure was one example. Of course this measure goes against effort on planning and accelerating the work which were put forward in the reform process.

2.3.2 Clarify possible consequences of non agreement

If consensus is blocked by apparent unwillingness of parties in the plenary to negotiate, the Chair may propose that, if a way forward cannot be found, the document be sent back to the working group, or to recommend to the Executive Committee that the work be put on hold for a few years which might not be in the best interests of delegates' stakeholders especially if already years of work have been spent on the issue in question. The unwelcome possibility of losing all investment of time and money can incite the disputing parties to work together to find a mutually acceptable solution.⁴⁴

The Chair may also emphasise that there is an agreed deadline for the final adoption of a standard. The Chair may remind the delegates of related agreements already obtained in the Commission or in other committees to streamline the debate.

2.3.3 Clarify the need to be prepared for negotiation

Success is not only determined by the way a meeting is run; without delegations being prepared to move their original position in reply to developments during the session one cannot hope to progress towards a solution. Delegations attention should be drawn to this important point. In particular they should be invited to obtain instructions before the meeting, which allow a margin for negotiation.

2.3.4 Get from positions to interests

A lot of time is spent in Codex meetings on seemingly not reconcilable positions. After a number of years of stuck negotiation it is possible that the underlying interests emerge and offer the opportunity to generate options that would satisfy some or all of the interests of all parties.

⁴⁴ During a protracted discussion it became apparent that consensus would not be possible due to strong differences of opinions. The Chair declared that if a decision could not be reached he would refer the issue to the Codex Executive Committee for a decision. Faced with the prospect that the Executive Committee might render a decision that was far worse than either of the two options under consideration, several delegations met during a break and forged a compromise position which was introduced in plenary and agreed to by the Committee.

2.4 *Seek feedback from participants*

It is a pity that in international intergovernmental meetings we are so afraid to give each other feedback. In symposia and conferences it becomes more and more common practice that participants are asked to complete a form and to express their views on the speakers and their presentations. Maybe this would be more difficult in Codex but courageous host governments may wish to start a pilot.

3. Summary of the Chairs Understanding of Consensus

Preconditions	<p>Everyone has had a chance to express their views, the written comments have been considered, no more flags are raised. There has been exhaustive debate.</p> <p>Consensus cannot be presented as a standalone concept. The full engagement of all members is necessary. Consensus is a mechanism/tool to achieve our goal of setting standards.</p>
Clear consensus	<p>There is a generalized sense of “nodding” in the room, no or few concerns or objections are raised.</p> <p>No delegation expresses an opposition to transmit the document to the Commission.</p> <p>No sustained objections from delegations on substantive matters.</p> <p>The Chair summarizes the discussion and proposes a decision based on his/her perception of the consensus in the Committee.</p> <p>The collective will after extensive discussion when nobody wishes to speak any more.</p>
Some objections/ Chair may declare consensus	<p>The fourth principle of the General Decisions of the Commission states that “When the situation arises that members of Codex agree on the necessary level of protection of public health but hold differing views about other considerations, members may abstain from acceptance of the relevant standard without necessarily preventing the decision by Codex”.</p> <p>If objections from one or more delegations are voiced, but it seems clear that the general sense of the room is that agreement has been reached.</p> <p>If delegations still express reservations of editorial or substantive manner but they agree to have them included in the report of the session in order not to delay the process.</p> <p>If one or several members do not agree, but either they do not oppose openly, or they do, but have a clear understanding that the issue has already reached agreement from all other members, and the Head(s) of delegation is (are) willing to take it back home to consult whether there is a chance to compromise.</p>
Further objections	<p>If delegations disagree with the assessment of the Chair, these delegations should state that and the Chair should reconsider the assessment and undertake further discussion.</p> <p>If there is sufficient disagreement within the Committee, further attempts will be made to reach consensus, but if those attempts fail, the discussion will be captured in the report indicating that consensus could not be reached and the reasons given.</p>
Problems	<p>Since there is no definition of consensus in Codex, consensus may sometimes be perceived as what the chair rules before moving to the next agenda item. This can have fortunate or unfortunate consequences. This burden increases when it comes to final adoption decisions, and when the issue at hand has strong consequences and there are opposed positions.</p> <p>Elaboration of A definition of consensus would most likely take several years agreement and any definition arrived at could not be of much help in elaborating standards in Codex because the work in committees is far too complicated and success depends on too many factors to be captured in a definition e.g. "soft factors" like creating a constructive spirit in the room.</p> <p>A chairperson usually knows when there is consensus and when there is not but there are situations in the middle where there is uncertainty how to proceed.</p>

4. Cases where it was impossible to reach consensus ^{45 46 47 48 49}

If the basic conditions to start a process to reach consensus are not met, if the stakes are high, and the status quo is less costly for one or more of the relevant interested parties (BATNA – best alternative to negotiated agreement), than an agreement that differs from what they want, there will not be any will to compromise. If there is no will to compromise, no process will lead to a solution.

When members are convinced that they cannot comply with a proposed standard they will not wish to adopt it.

A general issue preventing consensus can be an uneven understanding of Codex standards by governments: e.g. when an importing country considers that the products outside the scope of the standard are not suitable for trade and consumption, while the intent of the Committee was merely to make clear that the standard did not apply to those products. A preventive communication mechanism with both Authorities and the WTO could help the Codex consensus building process.

The difficulty to reach consensus may be a matter of trust. Consensus can be reached better when a common goal, a collective wish has been built through good communication.

National interest and blocks of countries with harmonized positions can be an obstacle to reach consensus on the international level.

5. Critical Review: Contribution of the examination of new work proposals based on project documents to facilitating consensus

Limitations	If the members agreed on forwarding the project proposal to the CAC, the outcome of the critical review (yes/no advice to start) will not influence consensus on the work.
Advantages	<p>The development of project documents ensures that there is sufficient rationale for the work. It defines the scope so that the Committee can determine if it is a priority area of work and ensures that agreement has been reached before the Executive Committee or the Commission approve the work and by doing so contributes to facilitating consensus.</p> <p>Thorough Critical Review will ensure that new work is not taken up by subsidiary bodies unless the proposed work concerns issues that are ready for - and amenable to - standardization, for example, that data are available and sufficient to support technological considerations inherent in the development of the standards.</p> <p>The process acts as a brake on unlimited increase of new work.</p> <p>The process may have some benefit in reaching consensus by surfacing contentious issues earlier</p>

⁴⁵ The work on the *Proposed draft guidelines for the utilization and promotion of quality assurance systems to meet requirements in relation to food and discussions on the development of guidelines on judgement of equivalence of technical regulations associated with food inspection and certification systems* was discontinued because the Committee felt that it was not able to progress the matters at that time due to lack of information or that there was not a specific problem in international trade to be addressed.

⁴⁶ The Task Force on Foods Derived from Biotechnology reached consensus in all the works that it undertook. However, it experienced time when reaching consensus appeared almost impossible, such as, on uncertainty, substantial equivalence, precaution, traceability, monitoring, other legitimate factors, and probably more. The Task Force started just after the Seattle WTO was crushed by rampage of NGOs including anti-GMO activists. GMO was already a target of polemic with respect to, such as, trade, environment, mistrust on science, fear of new technology, etc. Politicized topics are sometimes very difficult to handle.

⁴⁷ Certain member s opposed advancement of the veterinary drug ractopamine to Step 8t but offered no scientific reasons for their opposition despite requests from the Chair. In this case, ractopamine was outlawed in those member countries that opposed advancing the MRL. This is only one of many examples in which national interests prevent consensus.

⁴⁸ The revision of the Code of Ethics for international Trade in Food remains on the agenda. The Committee is profoundly divided on the principle of such a code and the necessity to undertake such a revision work.

⁴⁹ In spite of expert consultations, circulation of these scientific findings to all delegations, and intra-session WGs to discuss the scientific issues it has been impossible to find consensus on the lactoperoxidase matter. In the Chairs view, failure to find consensus on this matter is based, at least in part, on three factors: (1) fundamental confusion regarding the practical likelihood that LPS-treated products are or will be introduced into international trade; (2) confusion regarding the CAC's position as somehow restrictive of countries' use of the LPS system within their own borders; and (3) non-scientific objections to LPS-treated products.

	in the discussion. Because the new procedures for submitting proposals for new work require substantial documentation, differences of opinion will become evident and dealt with before the new work is approved by the Codex Executive Committee.
Implementation	The Critical review should also ensure that there are no characteristics of the commodity (such as significant international variability in the “standard of identity”) or concept (such as fundamental disagreement among countries regarding the activities that properly constitute “risk management”) that are likely to present significant obstacles to achievement of consensus. Extensive debate in the plenary on project documents can be useful for framing or focusing the activity of the new work.

6. Contribution of the Critical Review: Monitoring progress of standards development to facilitating consensus

Limitations	In some cases the examination by the Executive Committee did not change the parameters of the discussion.
Advantages	<p>When everyone realizes that compromise is important or the issue may even be taken out of the subsidiary body, it would provide additional importance to reaching agreements.</p> <p>The review will be strong pressure to the committees.</p> <p>Recognition that CCEXEC will act would be likely to stimulate subsidiary bodies to more effectively manage their work for themselves and avoid having CCEXEC manage it for them.</p> <p>By requiring that progress on the elaboration of standards be monitored against specific time lines and taking corrective actions when standards development is not progressing in a timely manner, it is likely that the Committee will feel a greater sense of urgency to reach consensus under the Critical Review procedures.</p>
Implementation	<p>This will only contribute to facilitating consensus if the Executive Committee not only monitors but fully exercises its standards management function by:</p> <ul style="list-style-type: none"> - providing advice to committees that cannot reach consensus on what actions they should take to reach consensus - suggesting strongly to the Commission to discontinue work that is going nowhere, - suggesting changes of priority on the work of a given subsidiary body to allow advancement of the more urgent issues at hand, - employing it in a consistent, balanced, and predictable manner so that Codex subsidiary bodies understand that CCEXEC can be expected to ask that they suspend work on which they have consistently made no progress. Thus far, such actions by CCEXEC remain theoretical (or, to put it another way, remain a promise more than a reality), and therefore, committees with standards too long in the step process according to the terms of the critical review guidelines, have felt no consequences for their failure to progress those documents.

7. When there is no consensus at the committee level, some committees or task forces have chosen to refer specific matters to the Commission and/or the Executive Committee and/or FAO/WHO for advice.

7 (a) Effectiveness of advice given^{50 51 52 53}

Limitations	When the recommendations of the Commission only reflected the differences that were at the origin of the deadlock of the discussion at the Committee level.
Advantages	Useful to clarify responsibilities between subsidiary bodies or to clarify what should be done if there is no clear “home” for an item.

7 (b) Should Committees/Task Forces ask the advice of the Commission and/or the Executive Committee and/or FAO/WHO more often or less often? And why?

Limitations	<p>Particularly on controversial-high-stakes issues, there is enough communication within most Codex members so that representatives in the subsidiary body will contact their representatives to the Commission and the Coordinator that participates in CXEXEC, to make their case. If all parties do so, it is unlikely that there will be a different result from what happened in the auxiliary body itself, and the consultation would only be a waste of time and resources.</p> <p>Committees/Task Forces should ask the advice of the Commission and/or the Executive Committee only where necessary as I believe that many issues which are technical in nature needs to be addressed by the Committees/Task Forces itself.</p> <p>In principle, Committees/Task Forces should take full responsibility.</p> <p>When they ask advice, they should consider if the Executive Committee is in a position capable of giving appropriate solution.</p> <p>The structure of Codex does not lend itself well to interaction between the Committees and the Commission/Executive Committee. Generally, the Committees need advice in real time when their Committees are in session, but the Commission/Executive Committee meet only once every year and never during the time when the Committees are in session. The Committees, therefore, rely heavily on the advice of the Codex secretariat present during their meeting. Rather than relying on the Commission/Executive Committee for advice, it is most beneficial to have an experienced, well informed Codex Secretariat available to advise the Committees during their meetings.</p>
Advantages	Matters requiring coordination among committees/task forces or Codex and other bodies, for example, could be an appropriate matter for asking advice.
Implementation	<p>Committees/Task Forces should seek advice from FAO/WHO more often as experts from these organisations would facilitate decision-making especially in providing scientific advice.</p> <p>The implementation of the critical review should be the frame for recommendation from the</p>

⁵⁰ **Antimicrobial Resistance:** This issue had no obvious home in any existing subsidiary body and was referred to CAC for consideration by CCFH and CCRVDF. CAC decided to establish a taskforce to deal with the issue, which was a logical and constructive decision.

⁵¹ **Active Chlorine:** This issue is one for which more than one committee had jurisdiction, but no one committee covered all aspects of the issue. CCFH and CCFAC (it was CCFAC at that time) referred the issue to CAC (and to FAO and WHO for further scientific evaluation) with the recommendation that both risks (associated with by-products of chlorination) and benefits (reduction of microbial load) of the use of active chlorine be evaluated. The issue is to return the matter to the appropriate subsidiary body (keeping in mind that this process began before the division of CCFA into CCFA and CCCF) after conclusion of the expert evaluations. This decision by CAC was logical and constructive.

⁵² **Lactoperoxidase:** This issue has its roots in a determination made by the CAC in 1991 that the LPS system should not be used for products intended for international trade. Subsequent expert advice and repeated referrals of the matter between CAC and CCFH have failed to produce a consensus resolution. The matter has been sent back this past year to CAC by CCFH, with the recommendation that final action on this matter should be taken by CAC, and that further referrals to CCFH will accomplish nothing. This experience has thus far been less than productive of a constructive resolution. Failure to achieve resolution may be due to what seems to be a mixture of scientific and non-scientific issues.

⁵³ The CCRVDF has asked FAO/WHO for advice on many occasions, most often to clarify the policies or decisions of the JECFA. Occasionally the CCRVDF has asked FAO/WHO to hold an expert consultation to assist the Committee in its standard setting deliberations. As an example, expert consultations were held to address the problems for risk managers when JECFA is unable to establish an ADI or MRL for a veterinary drug.

	<p>Commission and the Executive Committee.</p> <p>If committees and taskforces were to begin having the experience of receiving regular constructive guidance from CCEXEC and CAC with greater predictability, then requests for guidance from CCEXEC/CAC might become more frequent. It is, however, perhaps too frequently the case at the present time that requests for guidance result in a referral from the CAC back to the committee to take another try a resolving the issue. Perhaps some thought should be given to helping committees phrase questions for CCEXEC/CAC in a manner that assists these bodies in providing constructive feedback.</p> <p>There should be guidance on more objective criteria that could be applied by the subsidiary body. Only when there is doubt correct interpretation and application of the criteria by the subsidiary body it should be raised in the Executive Committee, or the CXEXEC should act at its own initiative to apply the criteria as part of the standards management process above described.</p>
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C. “CONSENSUS” IN THE UNITED NATIONS SYSTEM AND IN THE WORLD TRADE ORGANIZATION

The Codex Alimentarius Commission is a subsidiary body of FAO and WHO, which in turn are specialized agencies of the United Nations. The issue of consensus within Codex should therefore be seen in the broader context of the United Nations and its specialized agencies in general. While the organizations have in general not adopted formal definitions of consensus, the concept of consensus and related practice in decision making as well as evolution of that practice within the UN system has been extensively studied in legal literature. Consensus has indeed been used as a means of decision making in a number of organs of the United Nations and in many organizations as the standard decision making procedure. In some cases, specific reference is made to consensus in the rules of procedure of the organ concerned; in other cases, consensus is frequently used in practice but is not mentioned in the rules of procedure of the organ concerned.

As regards the General Assembly of the United Nations, its Rules of Procedure *per se* do not make any reference to consensus although consensus is used in the Assembly as a method of decision making less cumbersome than a formal voting for questions already discussed. Nonetheless, the General Assembly has appended to its Rules of Procedure, as Annex IV, the “Conclusions of the Special Committee on the Rationalization of the Procedures and Organization of the General Assembly”, which state as follows⁵⁴:

The Special Committee considers that the adoption of decisions and resolutions by consensus is desirable when it contributes to the effective and lasting settlement of differences, thus strengthening the authority of the United Nations. It wishes, however, to emphasize that the right of every Member State to set forth its view in full must not be prejudiced by this procedure.

Consensus has come to be referred to in the rules of procedure of several conferences, treaties, conventions and other bodies operating within the United Nations system⁵⁵. In these rules of procedure, it is recommended to seek achieving consensus before resorting to voting (as is the case with Rule XII.2 of the Rules of Procedure of the Codex Alimentarius Commission), although the precise language used and the way emphasis is laid on consensus are different from one text to another. However, in general none of these texts

⁵⁴ Rules of Procedure of the General Assembly, A/520/Rev.17 (<http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/520/Rev.17&Lang=E>)

⁵⁵ Rule 36 of the Rules of Procedure of the Third United Nations Conference on the

Least Developed Countries, 2001 (<http://www.unctad.org/conference/>); Rule 50 of the Rules of Procedure of the Conference of the Parties to the WHO Framework Convention on Tobacco Control, 2006 (<http://www.who.int/fctc/cop/rop/en/index.html>); Rule 35 of the Rules of Procedure of the Meeting of the Parties to the Protocol on Pollutant Release and Transfer Registers to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, UNECE, 2007 (<http://www.unece.org/env/pp/prtr.docs.htm>). Recourse to consensus is provided for in several instruments concluded within or under the aegis of FAO for the adoption of some decisions or for a range of decisions such as the Agreement establishing the General Fisheries Commission for the Mediterranean, the Agreement establishing the Indian Ocean Tuna Commission and the International Treaty on Plant Genetic Resources. Recourse to consensus is also provided for in an increasingly large number of treaties, namely environmental conventions.

provides a definition of consensus. It is also the case with the International Plant Protection Convention (IPPC) as well as the Rules of Procedure of the Commission on Phytosanitary Measures (CPM), which read as follows⁵⁶:

The contracting parties shall make every effort to reach agreement on all matters by consensus. If all efforts to reach consensus have been exhausted and no agreement is reached, the decision shall, as a last resort, be taken by a two-thirds majority of the contracting parties present and voting (Article XI.5, IPPC).

The Commission shall make every effort to reach agreement on all matters by consensus. If all efforts to reach consensus have been exhausted and no agreement has been reached, the decision shall, as the last resort be taken by a two-thirds majority of the members of the Commission present and voting (Rule VI.2, Rules of Procedure, CPM).

Notwithstanding the provisions of Rule VI.2, where consensus is not reached on a proposal for the adoption of a standard which has been introduced before the Commission for the first time, the proposed standard shall be referred back to the appropriate body of the Commission, together with its comments thereon, for further consideration (Rule X.2, Rules of Procedure, CPM).

Given the linkage between Codex and the World Trade Organization (WTO) through Multilateral Trade Agreements, the practice followed in the GATT and the WTO may be briefly mentioned here although the GATT/WTO is neither equivalent to nor comparable to Codex in that the GATT/WTO was/is not a standards setting body operating within the United Nations system in its strict sense. Moreover, one could consider that the significant emphasis placed on the use of consensus for decision-making in the WTO is a reflection of the legally binding nature of the WTO Agreements including its dispute settlement mechanisms. On the other hand, a glance at the evolution of discussion over the decision making process and the challenges identified so far within the WTO, one of the international organizations in which the value of transparency and inclusiveness, especially the active participation of developing countries, is recently gaining importance, provides certain elements of interest to the ongoing debate on consensus in Codex.

Although Article XXV of the GATT treaty formally provided for decision-making by a majority of votes cast and did not refer to consensus anywhere, the GATT decision-making practice was, until the creation of the WTO, that of consensus whereby the chairperson of a meeting would take sense of a meeting rather than ask for a vote. Now, Article IX of the WTO Charter states “the WTO shall continue the practice of decision-making by consensus followed under GATT 1947”, and a footnote thereto states that “[t]he body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decisions”. Where not otherwise specified, and where a consensus cannot be established, simple majority voting is sufficient. In addition, there are three different methods of voting: (i) amendments to general principles, e.g. MFN and national treatment, require unanimity; (ii) amendments to issues other than the general principles require a two-thirds majority; and, (iii) interpretations of the provisions of the WTO agreements, including decisions on waivers, require a three-fourths majority vote⁵⁷.

In the day-to-day operation as well as dealing with a more comprehensive trade negotiation agenda, the WTO and its members have been striving to achieve the right balance between efficiency and transparency. One step forward in this effort was the endorsement of the Principles and Practices section of the Statement by the Chairman of the General Council at the First Meeting of the Trade Negotiations Committee in 2002⁵⁸. One tool often used by the WTO to facilitate consensus is informal consultations (e.g. switching between “formal” and “informal” modes during a sitting, convening of informal meetings back-to-back to the plenary)

⁵⁶ Procedural Manual, International Plant Protection Convention, FAO, 2007.

⁵⁷ World Trade Report 2007, pp. 322-323, WTO

⁵⁸ TN/C/1, 4February 2002, WTO

while ensuring that the plenary is advised, in advance, of the schedule of informal consultations to take place and that the outcome of informal consultations is reported back to the plenary by the Chairperson.

D. Summary and Conclusions

1. General remarks

Standard dictionary definitions of consensus usually refer to “general agreement or accord” or “collective opinion.” Other languages have different concepts such as: “confluence of different opinions to the same conclusion”, “all agreed to a proposal”, “different in color depending upon from which side you are looking at”, “common understanding” or “finding a common ground” and there are probably many others depending on culture and language. According to most definitions consensus is not unanimity, nor do those definitions imply that consensus is a quantifiable absolute or relative (percentage) number.

2. Consensus as seen by Codex Chairs

Consensus in Codex is seen quite harmoniously by Codex Chairs (see section B.3) as the culmination of a cooperative process. It is the general sense among members of the group that an agreement has been reached that most parties can accept. Such a consensus agreement is one about which all parties to the process of achieving the agreement agree that the process has been fair and conducted in a spirit of goodwill and cooperation.

Such consensus agreements have characteristics of negotiated agreements. Negotiated agreements are formed through the hard work of parties with interests in an issue as they work together to find a solution that as much as possible satisfies the core needs of each of the parties. Codex consensus is thus not “what the Chair rules” but what has been found collaboratively by the group. It is the Chairs difficult task to sense when consensus has been reached.

A definition of consensus was only mentioned by two chairs as summarized below:

- Since there is no definition of consensus in Codex, consensus may sometimes be perceived as what the chair rules before moving to the next agenda item. This can have fortunate or unfortunate consequences. This burden increases when it comes to final adoption decisions, and when the issue at hand has strong consequences and there are opposed positions.
- Elaboration of a definition of consensus would most likely take several years agreement and any definition arrived at could not be of much help in elaborating standards in Codex because the work in committees is far too complicated and success depends on too many factors to be captured in a definition e.g. "soft factors" like creating a constructive spirit in the room.
- A definition of consensus will not prevent that in the end, after every effort to reach consensus has failed an issue can be settled through voting (Rule XII.2 of the Rules of Procedure)

3. Conclusions

The following conclusions have been drawn from the replies of chairs and the experience of the Codex Secretariat. They are being put forward for discussion and comments.

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

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

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

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

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

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

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

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

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

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

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

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

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

QUESTIONNAIRE

Name and title of Respondent:

Name of Committee or Task Force:

Questions:

Q1. Regarding the Measures to Facilitate Consensus (General Decision of the Commission, see Appendix), please answer the following question for each of the seven measures:

	How often have you applied or proposed this measure as the Codex Chairperson?	Reasons/Examples
A		
B		
C		
D		
E		
F		
G		

Q2. Regarding the Measures to Facilitate Consensus (General Decision of the Commission, see Appendix), please answer the following question for each of the seven measures:

	How effective/useful has this measure been in your experience?	Reasons/Examples
A		
B		
C		
D		
E		
F		
G		

Q3. You may have applied, to facilitate consensus, measures other than those mentioned above [A-G]. Will you provide a brief description of examples of the cases where measures/approaches you applied/took worked quite well?

Q4. Describe, in practical terms, when you understand a consensus has been reached in your committee (the intent of this question is not to invite you to define the concept of consensus, but to provide practical information on how you have been interpreting and applying the concept).

Q5. Will you provide a brief description of examples of the cases where it was impossible to reach consensus despite application of these [A-G] and other measures? What were the reasons for that in your view?

Q6. Do you think that the Critical Review – examination of new work proposals based on project documents – by the Executive Committee, introduced in the Elaboration Procedure in 2004, will contribute to facilitating consensus?

Q7. Do you think that the Critical Review – monitoring progress of standards development – by the Executive Committee, introduced in the Elaboration Procedure in 2004 will contribute to facilitating consensus?

Q8. When there is no consensus at the committee level, some committees or task forces have chosen to refer specific matters to the Commission and/or the Executive Committee and/or FAO/WHO for advice.

(a) If the Committee you have chaired has done so, was the advice received from the Commission and/or the Executive Committee and/or FAO/WHO useful or helpful? Provide specific examples.

(b) Do you think Committees/Task Forces should ask the advice of the Commission and/or the Executive Committee and/or FAO/WHO more often or less often? And why?

Q9. Please provide your suggestions to improve facilitation of consensus.

Q10. Please feel free to provide, on a separate sheet of paper, any case studies on reaching consensus.

Thank you.

Your answer will be compiled into a discussion paper by the Codex Secretariat. Please note that respondents' identity may eventually be revealed through the description of specific cases to be included in the discussion paper. The paper will then be circulated to Codex members and observers at the earliest possible time in the second half of 2008. The comments and proposals received from Codex members will be discussed at the 25th Session of the CCGP in April 2009.

APPENDIX

MEASURES TO FACILITATE CONSENSUS⁵⁹

The Codex Alimentarius Commission, desiring that every effort should be made to reach agreement on the adoption or amendment of standards by consensus, recommends the following measures to facilitate consensus:

- A. Refraining from submitting proposals in the step process where the scientific basis is not well established on current data and, where necessary, carry out further studies in order to clarify controversial issues;
 - B. Providing for thorough discussions and documentation of the issues at meetings of the committees concerned;
 - C. Organizing informal meetings of the parties concerned where disagreements arise, provided that the objectives of any such meetings are clearly defined by the Committee concerned and that participation is open to all interested delegations and observers in order to preserve transparency;
 - D. Redefining, where possible, the scope of the subject matter being considered for the elaboration of standards in order to cut out issues on which consensus could not be reached;
 - E. Providing that matters are not progressed from step to step until all relevant concerns are taken into account and adequate compromises worked out;
 - F. Emphasizing to Committees and their Chairpersons that matters should not be passed on to the Commission until such time as consensus has been achieved at the technical level;
 - G. Facilitating the increased involvement and participation of developing countries.
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⁵⁹ Decision of the 26th Session of the Commission, 2003.