

Food safety and GMOs in “new NAFTA”

A retreat in science-based policy

SETTING THE TABLE

The proposed new NAFTA, dubbed the U.S.-Mexico-Canada Agreement (USMCA), would expedite exports and imports of food and agricultural products, purportedly based on “scientific principles” and “science-based decision making,” (Article 9.3.1h). However, the Trump administration’s attacks on the science, economic analysis and budgets of government agencies, the so-called “administrative state” which former presidential adviser Steve Bannon vowed to “deconstruct”, weaken trade policy implementation and enforcement capacity.¹ Inconsistent implementation and weak enforcement could both disrupt trade and pose risks to consumers of imported foods. The agreement, if approved by Congress, would institutionalize the Trump administration’s anti-consumer, anti-environmental protection and anti-food safety enforcement agenda for a generation in the new NAFTA text.

THE SPS TEXT AND ITS IMPLEMENTATION AND ENFORCEMENT CONTEXT

Although the New NAFTA chapter on Sanitary and Phytosanitary Measures (SPS) has the objective to “reinforce and build upon the [WTO] SPS Agreement,” (Article 9.3.1 b), there are several features that could weaken the application of the WTO SPS Agreement. One of the most peculiar derogations from the SPS Agreement could be called the “do nothing to harm trade” clause: “Each Party shall consider not taking any measure as a risk management option where not taking any measure would achieve the Party’s appropriate level of protection,” (Chapter 9.6.10 (Science and Risk Analysis)).

If there is a trade-related SPS problem between or among the United States, Mexico and Canada, how would a “do nothing” policy achieve the “appropriate level of protection,” unless that latter term has no substantive, actionable meaning? Consider a recent historical example: The U.S. Department of Agriculture radically reduced its audits of Canadian meat inspection rules and practices by 60 percent without providing a rationale and without inviting public comment on its auditing decision prior to implementation.² As a result, USDA allowed imports of Canadian meat products without the number of audits required to verify that the Canadian meat inspection system was equivalent to that of the United States. The USDA, in effect, trusted Canada to protect U.S. consumers from unsafe products without informing the public that it had reduced its verification audits. Would the USDA’s decision to take no action to publicize its decision to reduce audits require a demonstration that the no action policy did not endanger U.S. consumer health? How would such a demonstration be verified, documented and reported?

Whether or not an importing country’s regulatory authority has adequate information to determine that an exported product complies with its SPS rules, the importing country must import: “For greater certainty, a Party is not stopping imports because it is undertaking a review if the Party stops imports on the basis that the review identifies that the information necessary to permit the importation of a good is lacking,” (Footnote 1 to Article 9.6.15 (Science and Risk Analysis)). This footnote shows the role of science-based decision making in the New NAFTA: To validate the trade imperative even when scientific information is inadequate to enable risk analysis. Article 5.7 of the WTO SPS Agreement, which establishes the



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right of importing countries to provisionally adopt a SPS measure “where relevant scientific evidence is insufficient,” is tossed into the dustbin of trade policy history—if this footnote prevails in a trade dispute. More broadly, the importing imperative acts against a precautionary approach in food and agricultural product regulation to protect consumer health.

“STREAMLINING” DETERMINATIONS THAT SPS SYSTEMS PROVIDE EQUIVALENT LEVELS OF PROTECTION

The “trade no-matter-the-lack-of information” imperative of the New NAFTA is given further support in the provisions to expedite trade through determinations that an exporting country’s SPS systems or individual SPS measures are equivalent to those of the importing country. These equivalence determinations are not only the result of a comparative review of rules, but include verifying audits of government SPS facilities, (e.g. port of entry sampling and testing facilities). The new NAFTA would hurry up equivalence determinations by “streamlining” them. “Streamline” is one of the favorite euphemisms of the Trump administration’s deconstruction of the administrative state:³ “On request from the exporting Party, the importing Party’s competent authority shall consider whether a streamlined process may be used to determine equivalence.” (Article 9.9.6) “Shall consider” is an oxymoronic blend of trade policy requirements and the “best endeavor” language that is acted upon only under the threat of retaliation.

However, it is difficult to “streamline” an equivalence determination, unless that determination is based only on a comparative document review, without corroborating evidence in physical plant audits, both announced and unannounced. The Article 9.10 (Audits), however, applies only to audits of government documentation and SPS facilities, not to audits of facilities in the export supply chain, which would determine to what extent governments effectively enforced and exporters complied with SPS rules.

TRANSPARENCY OF SPS INFORMATION, EXCEPT FOR CONFIDENTIAL BUSINESS INFORMATION

Transparency requirements to inform the public of the results of audits and other SPS information are qualified by exemptions for Confidential Business Information protected by domestic law. For example, “The auditing Party and audited Party shall each ensure that procedures are in place to prevent the disclosure of confidential information that is acquired during the audit process,” (Article 9.11). Even the article that is explicitly about transparency allows government to exempt from publication comments on SPS measures, even if the communication between governments and private parties concerns whether an SPS measure protects human, animal or plant health relevant to a traded food or agricultural product: “A Party shall also make available to another Party, on request, and to the extent permitted by the confidentiality and privacy requirements of the Party’s law, significant written comments and relevant documentation considered to support the measure that were received during the comment period,” (Article 9.13.10 (Transparency)). Transparency is required only of government authorities to explain their SPS measures and why they are not trade restrictive. Communication between government authorities and private entities commenting on a putatively trade restrictive measure may remain confidential.

CONCLUSION

IATP does not believe that the text of the New NAFTA SPS chapter represents a status quo document, notwithstanding the extent to which it refers to or even copies the WTO SPS Agreement.⁴ There are enough significant departures from the SPS Agreement that put greater burdens on government agencies to import food and agricultural products even in the absence of information about the conformity of those products with importing country SPS measures. These agencies, at least under the Trump administration, will have reduced budgets, infrastructure and personnel to generate the information to demonstrate compliance with importing country requirements.

ENTRENCHING THE NON-REGULATION OF FOOD AND AGRICULTURAL PRODUCTS OF “MODERN BIOTECHNOLOGY”

“Section A: Agricultural Biotechnology” is part of Chapter 3: Agriculture. The chapter’s Article 3.1 on definition for “agricultural goods” is based on Annex I to the WTO Agreement on Agriculture which lists products corresponding to numbers in the Harmonized Item Description and Coding System (HS) maintained by the World Customs Union. The United States Harmonized Tariff Schedule recognizes numerous modifications of products (e.g. “modified whey”) with specific HS numbers and item descriptions.⁵ Article 3.1 definitions for “product of agricultural biotechnology” and “product of modern biotechnology” likewise comprise all products in the HS.

However, no genetic modification is recognized with a separate HS product number, reflecting the U.S. regulatory doctrine that no matter how much a genome (e.g. of corn) is altered in engineering, it “is not materially different in composition, safety and other relevant parameters from corn-derived food and feed currently on the market,” to cite a U.S. Food and Drug Administration (FDA) letter of March 11, 2016 to Monsanto.⁶ The letter repeats a 25 year-old doctrine of “substantial equivalence” between products of conventional plant breeding and those derived from genetic engineering to explain why, for example, the FDA will neither formally risk assess nor regulate MON 87419, modified to resist the herbicide Dicamba. (More than a million acres of U.S. crops not resistant to Dicamba have been damaged by the inherently volatile herbicide, which can drift miles from where it is sprayed.)⁷ The substantial equivalence doctrine has long been criticized as unscientific, particularly regarding its failure to recognize the molecular differences between GE plants and their conventional counterparts.⁸ Nevertheless, this old doctrine underlies Section A provision in the “modernized” New NAFTA.

LEGALIZING THE TRADE OF UNAUTHORIZED AND UNREGULATED PRODUCTS

On March 28, U.S. Department of Agriculture Secretary Sonny Perdue vowed, well in advance of the beginning of a decade-long delayed “modern biotechnology” rulemaking process, that USDA will never regulate agricultural products derived from genome editing: “Under its biotechnology regulations, USDA does not regulate or have any plans to regulate plants that could otherwise have been developed through traditional breeding techniques, as long as they are not plant pests or developed using plant pests.”⁹ Because plant breeders no longer use plant pests in genetic modification, the “as long” caveat is meaningless.

Article 3.A.3.2. reads, “This Section does not require a Party to mandate an authorization for a product of agricultural biotechnology to be on the market.” While this provision could be interpreted to mean that countries are under no obligation to allow such crops on the market, it could also mean that no authorization, based on a pre-market safety assessment, is required for those transgenic or genome-edited crops to be traded among the Parties. The latter interpretation is more consistent with the celebratory tone of the USTR summary sheet on the New NAFTA and agriculture. This provision could remove the kind of legal jeopardy that Syngenta incurred when it had to pay U.S. farmers \$1.5 billion for selling farmers a variety of GE corn seed that China rejected as unauthorized by its regulators after the corn had already been harvested and exported.¹⁰ However, the protection provided to Syngenta and other agricultural biotechnology companies only applies to trade among the three USMCA Parties—not to trade with China. The risks associated with the unauthorized, but traded, GE product pass from the companies in the GE supply chain to the consumer.

LOW LEVEL PRESENCE OF UNAUTHORIZED PRODUCTS RELIEVES EXPORTERS OF LIABILITY FOR SPS VIOLATIONS

Article 3.A.1 defines a Low-Level Presence Occurrence (LLPO) as one, “which may on occasion be inadvertently present in food or feed in importing countries in which the food safety of the relevant recombinant-DNA plant has not been determined.” This definition legalizes import of products derived from modern

biotechnology that have not been authorized for commerce in the importing country. Section A requires import of unregulated agricultural biotechnology products by means of a technically unspecified article on LLPO of those products that are unauthorized for commerce in the importing country. There is no way to determine, under the terms of Section A, what has been inadvertently included in a food or feed shipment and what has been included intentionally.

There is no provision in Section A to require negotiation to agree on sampling procedures and detection methodologies for genetically engineered products, nor to determine a quantitative threshold for LLPOs. The absence of LLPO agreements, negotiated for unapproved transgenic crops,¹¹ ensures that the import of genome edited products will occur without any quantified limits nor regulatory apparatus to determine what kind or quantity of unauthorized products is being imported. The Global Alliance for Ag Biotech Trade (GAABT) has long demanded inclusion of LLPOs provisions in trade agreements and lobbied successfully to get the terms it wanted for LLPs in Codex Alimentarius Commission guidance.¹² Codex guidance documents, however, are not binding on Codex member governments.

The legal, administrative and financial burden of managing the exporting country's failure to prevent the inclusion of unauthorized GE products falls not on the regulatory agencies of the exporting country (e.g. the USDA and FDA biotechnology regulatory services and the Grain Inspection Service), but on the importing country's customs and regulatory agencies. In this peculiar reversal of the rule of law, the importing country shall "ensure that the LLP occurrence is managed without unnecessary delay and that any measure³ applied to manage the LLP Occurrence is appropriate to achieve compliance with its laws and regulations and takes into account any risk posed by the LLP Occurrence," (Article 3A.3.3c).

Perhaps the most extraordinary feature of this clause is footnote 3, which explains that "For purposes of this paragraph, "measure" does not include penalties." "SPS measures" in the annex of definitions in the WTO SPS Agreement "include all relevant laws, decrees, regulations, requirements and procedures, including inter alia, end product criteria, processes and production methods," and a long etc. (U.S. policy forbids regulation and risk assessment of GE food and agriculture products according to the process—i.e. risk

of the techniques—from which the food or agriculture product is derived.¹³) How can the New NAFTA SPS chapter claim to "build on the SPS Agreement" when Section A: Agricultural Biotechnology forbids penalties for violations of laws, decrees and other SPS relevant measures? The "management" of the LLPO presumes the eventual importation of the unauthorized product, no matter how often the exporting entity violates the importing country's laws and regulations, and no matter how great the quantity of the unauthorized GE product is included in an export consignment.

CONCLUSION

The lack of any terms or provisions for future negotiation of terms for a quantitative threshold of LLPOs; the lack of requirements to ensure that LLPOs are rare and substantively "adventitious;" the lack of an agreed inventory, even if not exhaustive, of product sampling and detection methods, all of these absent provisions invite country-to-country litigation. The United States, with its powers of retaliation, authorized by the New NAFTA or outside of it, would have the upper hand in such disputes, even if they were resolved prior to the formal dispute settlement process. For example, a question under this skeletal Section would be, how infrequent does an unauthorized shipment from an exporting entity have to occur to be consider "on occasion?" How would the new NAFTA decide a LLPO violation dispute if the exporting entity and importing one belonged to the same parent, such as Cargill North American exporting to Cargill Latin America?

The lack of legal burden placed on the exporting country's grain inspection agency to prevent the export of unauthorized products creates two generic scenarios: 1.) Potential importing country port of entry product rejections on the huge array of agricultural products denominated in the Harmonized System of tariffs; 2.) forced import of these products, enabled by the definitional vagaries of Section A. None of the negotiating Parties should rejoice in either outcome. Compared to LLPO agreements for transgenic crops, the New NAFTA agricultural biotechnology rules pose more risks because of the potential application of LLPO terms to all the agricultural products in the Harmonized System. The USDA's claim that the New NAFTA could become a template for other trade agreements¹⁴ is unlikely to be realized among governments that have the economic capacity and political will to withstand U.S. retaliation.

Read further analysis on the “New NAFTA”

- *“New NAFTA” puts the brakes on farm policy reforms*
- *Imposing hurdles to delay and weaken public protections*
- *“New NAFTA” continues damaging climate legacy*

ENDNOTES

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