



CENTER FOR FOOD SAFETY

USMCA Secretariat
U.S. Section Room 2061
1401 Constitution Avenue N.W.
Washington, D.C. 20230

SSMTLC
Secretariado de la Sección Mexicana de
los Tratados de Libre Comercio

07/11/2023 13:08 hrs.

RECIBIDO

November 7, 2023

Delivered via email: usa@can-mex-usa-sec.org and to ssmtlc@economia.gob.mx

Dear Members of the Panel:

Request by a Non-governmental Organization (NGO) to submit Written Views

The Center for Food Safety (CFS) requests permission to provide information to the U.S. Mexico Canada Agreement (USMCA) panel formed to consider the trade dispute formally initiated on August 17, 2023, by the Office of the U.S. Trade Representative (USTR) against the government of Mexico, pursuant to Article 20 of the Rules of Procedure for Chapter 31 (Dispute Settlement) of the Canada-United States-Mexico Agreement (“CUSMA. We seek leave to file written views that may assist the panel in evaluating the submissions and arguments of the disputing Parties in the Corn Export dispute (MEX-USA-2023-31-01) .

The dispute is characterized in the USTR complaint as Mexican government measures comprising the “Tortilla Corn Ban” and the “Substitution Instruction.”¹ USTR has yet to release the substance of its complaint, so here we can refer only to its three-page outline of the dispute.

CFS is a not-for-profit NGO founded in 1998 and headquartered in Washington, DC. We have one million members in the US and Canada. We take no funds from any party in this dispute. We have worked with Codex Alimentarius Commission (Codex), the international food standards body whose documents are referenced as authoritative in the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)² and alluded to in the USTR dispute against Mexico. Codex standards are mandated to both protect consumer health and to facilitate trade, however notification of their adoption as national standards has not been required by Codex since 2005.³ CFS also regularly advises US regulatory agencies on how to better regulate new GMOs and seeks the advice of US courts on the interpretation of the laws.

In the remainder of this request, we outline categories of information for the dispute panel to consider. Mexico has not yet presented its evidence in response to the yet to be published full U.S. complaint, so the following outline does not prejudge U.S. or Mexico’s evidence and arguments.

Risk analysis: The WTO SPS Agreement, the USMCA chapter and indeed, the agricultural biotechnology provisions of the USMCA Market Access chapter,⁴ put a difficult burden of proof on the importing country to defend its SPS measures. For example, the U.S. charges that “Mexico does not ensure that its measure is applied only to the extent necessary” to, in this case, protect

¹ <https://ustr.gov/sites/default/files/2023-08/US%20Panel%20Request%20-%20Mexico%20Biotech.pdf>

² https://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm, Annex A.

³ <https://www.iatp.org/documents/codex-standards-and-consumer-rights>

⁴ <https://www.iatp.org/documents/understanding-agricultural-biotechnology-provisions-us-mexico-canada-agreement>

WASHINGTON D.C. OFFICE: 518 C Street, NE, Suite 200, Washington, D.C. 20002, T (202) 547-9359, F (202) 547-9429

CALIFORNIA OFFICE: 303 Sacramento St, 2nd floor, San Francisco, CA 94111, T (415) 826-2770, F (415) 826-0507

PACIFIC NORTHWEST OFFICE: 2009 NE Alberta St, Suite 207, Portland, OR 97211, T (971) 271-7372

the health of the Mexican white corn consumer. Since feeding trials (save occasionally short-term rat studies) are not conducted in agricultural biotechnology risk assessments, the panel will have to consider whether the so-called “Tortilla Corn Ban” is a risk management measure applied “to the extent necessary” to protect consumer health. In terms of the Codex “Principles of Risk Analysis,” the panel should consider whether the import ban, applied non-discriminately, is a “other legitimate concern” in risk management. May a sovereign government apply product bans as risk management measures in response to what EU Director General of Trade Pascal Lamy characterized as “collective preferences,”⁵ e.g., of Mexican consumers who rejected genetically engineered corn for animal feed when it was mixed with white corn in tortilla flour?⁶ The panel should consider how The Codex Principles of Risk Analysis for Foods Derived from Modern Biotechnology⁷ apply in this dispute.

When there is insufficiency of scientific evidence for a risk assessment: The USTR does not cite Article 5.7 of the WTO SPS Agreement in its complaint, but the article is relevant to this dispute. That article begins “In cases where relevant scientific evidence is insufficient” WTO members are allowed to apply provisional SPS measures, pending a risk assessment with sufficient evidence to review the applicable SPS measure “within a reasonable period of time.”

The panel should consider critically arguments that there is a scientific consensus that genetically engineered plant varieties are “safe,” since such arguments are rife with misinformation⁸ and ignore conflicts of interest among scientists involved in consensus reports.⁹ Rather than make the non-scientific assumption that GE crops are “substantially equivalent” to conventionally bred crops, despite their very different respective molecular characterizations and frequently transgenic construction, we urge the panel to review the literature on the risks of new genetic engineering techniques, e.g., non-target effects and unintended on-target effects like chromothripsis, on a case by case basis.¹⁰ How are such techniques applied and with what unintended alterations, to overcome resistance in the white corn genome developed over hundreds of years of farmer and public plant breeding? Do those identified risks point to an insufficiency of evidence to conduct a risk assessment? How does the routine granting of agricultural biotechnology product developer Confidential Business Information claims by government regulators¹¹ affect the sufficiency and quality of evidence available for risk assessment and the transparency of the risk assessment process required by Article 5.7 and the USMCA SPS chapter?

Is the “Substitution Instruction” a SPS measure subject to risk assessment or a non-discriminatory sovereign economic development import substitution policy? The panel should consider not dismissing this question just because economic development is not a binding trade concern, e.g., the deletion of “development” from the Doha Development Agenda. Climate change and COVID-19 are among the non-trade concerns that the vast array of trade related rules did not engage until forced to by overwhelming circumstances.

The U.S. charges Mexico with identical violations of the USMCA SPS chapter in the U.S. characterized “Tortilla Corn Ban” and the “Substitution Instruction,” which Mexico defends in part with a biosafety policy to protect Mexican maize landraces from contamination by GM germplasm.¹² The panel should decide whether intergovernmental agreement biodiversity and biosafety obligations are dispositive in the “Substitution Instruction” complaint. Biodiversity loss and erosion are top corporate risk management concerns.¹³ These should become trade concerns, not remain ignored non-trade issues.

Sincerely,

Jaydee Hanson, Policy Director

⁵ https://agritrop.cirad.fr/547673/1/document_547673.pdf

⁶ <https://www.alainet.org/en/node/119035?language=es>

⁷ <https://www.fao.org/3/y5819e/y5819e03.htm>

⁸ <https://enveurope.springeropen.com/articles/10.1186/s12302-023-00787-4>

⁹ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5330472/>

¹⁰ E.g., <https://www.frontiersin.org/articles/10.3389/fbioe.2023.1276226/full>

¹¹ E.g., <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3589341/>

¹² E.g., <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5696427/>

