

Community of Vicente Guerrero, Españita, Tlaxcala on March 15, 2024

**Written view of Grupo Vicente Guerrero on the Panel Measures  
related to genetically modified corn**

1. As we stated in the request for a technical view and after analyzing the U.S. complaint and the Mexican response, we consider some aspects have been omitted which we believe are fundamental to achieving the protection of native corn. We list them below: risks and impacts of the import of Corn from Agricultural Biotechnology (MBA) for consumption and release into the environment in farming and indigenous agriculture for agro-cultural practices, as well as on people's food.

2. The measures implemented by the Presidential Decree of February 2023 are in accordance with the obligations contained in the United States-Mexico-Canada Agreement (USMCA) for the following reasons:

**A. The Parties failed to review in advance whether the Corn from Agricultural Biotechnology (MBA) has the risk analysis to issue measures.**

3. The preamble to the United States-Mexico-Canada Agreement (USMCA) recognizes that, in order to strengthen, protect and enhance trade relations, the Parties have the inherent right to establish legitimate public health objectives, protection of the environment and conservation of natural resources such as native corn and its wild relatives. To achieve this, the Parties should promote high levels of health and environmental protection through the promotion of the rule of law and the enforcement of health and environmental legislation.

4. The rule of law, the development of sustainable agriculture, the protection of health and environmental protection recognized in the preamble of the USMCA constitute the legal framework of reference in its chapters three, nine and twenty-four.

5. This view addresses issues that both Parties raised before this Panel: the protection of human health in Mexico and the protection of the environment; the sowing of plants from agricultural biotechnology such as corn, cotton, and soybeans; the resistance to pesticides

and insects (due to the expression of proteins such as those of the Cry family); and the use of pesticides such as glyphosate, derivatives and others.

6. These approaches lead to a fundamental issue: Who has the obligation to prove the safety of the MBA, the exporting Party or the importing Party?

7. Since the North American Free Trade Agreement (Article 714) it is recognized that the importing Party has the right to determine that the exporting Party's risk assessment (measure) does not meet the level of protection that the importing Party deems appropriate.

8. The Agreement on the Application of Sanitary and Phytosanitary Measures (Art. 4.1), recognized by the USMCA and the World Trade Organization (WTO), goes further when levels of protection are not equivalent. It obliges the exporting Party to demonstrate that its risk assessments (sanitary or phytosanitary measures) implemented on its products achieve the importing Party's level of protection. In this case, the U.S. must prove Mexico's level of protection in the risk assessments applied to the MBA it seeks to export to Mexico, as the two Parties' levels of protection are diametrically different.

9. In sum, according to the rules of the USMCA (Art. 3.12), the benefit to the importing party is recognized, which guarantees that the presence of MBA must be undetected. This means that the detection of its presence in the food, product or crop should go undetected because it does not cause damage to health, the environment or plant and aquaculture health, which translates into a guarantee of safety. Both Parties omit to comment on this issue, which is a fundamental prerequisite for this Panel to be able to rule on the protection of trade in MBAs.

10. Previously, the U.S. has shown inconsistencies in its ability to ensure the safety of MBAs. In 2013, when China rejected its exports, the U.S. was internationally exposed about its inability to segregate the MBAs it trades and thus to manage the risks of each type or event of MBA.

11. On the other hand, the U.S. misrepresented to the Panel a 2016 court order in Mexico stating that since 2013 a court order has prevented the planting of MBA, however, in 2016 this changed. An appeals court authorized the planting of MBAs as long as the relevant judge is regularly informed so that data on their positive and negative effects can be obtained. The industry has since shied away from providing this information. The U.S. failed to report it to the Panel.

12. Subsequently, in 2020, the adequate level of health and environmental protection was strengthened with the Federal Law for the Promotion and Protection of Native Corn (LFFPMN) in its articles 1 and 4 by ordering the protection of native corn and in constant diversification, not only in planting, but also in commercialization and consumption in order to guarantee the human right to nutritious, sufficient and quality food. As Mexico points out in its written counter-submission, the presence of MBA in food that is consumed directly would be a flagrant violation of the level of protection mandated by the law.

13. In order to comply with the level of protection of the health of the Mexican population and the environment, risk assessments carried out on any type of MBA must consider three issues, namely: (i) the various ways in which the Mexican population consumes corn; (ii) the level of consumption with an average per person of 328 grams per day (in tortillas alone) which is equivalent to 39% of protein, 45% of calories and 49% of daily calcium requirements;<sup>1</sup> (iii) agro-cultural practices such as the milpa that generate genic flow through seed saving and exchange which in turn have an impact on consumption.

14. The U.S. representation therefore leaves a previous and fundamental issue unanswered. Does it have a risk analysis on the consumption of MBA, directly for the Mexican diet and prior to cultivation in its center of origin? Considering the daily consumption of corn in masa and tortilla products during all stages of life of the Mexican population and Mexican agro-cultural practices.

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<sup>1</sup> Conabio 2012.

**B. The U.S. fails to establish its right to claim compliance with the USMCA on Corn from Agricultural Biotechnology because it does not demonstrate that it complies with the agreement's own rule of law.**

**1. Alleged safety of Corn from Agricultural Biotechnology**

15. For decades the US claimed that its MBA exports to Mexico passed the relevant food safety assessments. It substantiates its claims with the risk assessments it conducts in accordance with Food and Drug Administration (FDA) guidelines.

16. Since its initial written submission, the U.S. describes how it obtained release or planting permits for MBAs by claiming that they are safe. However, it fails to point out that since 2016 the planting of MBAs has only been permitted for scientific purposes in Mexico by court order to conserve the continued diversification of native corn and its wild relatives, as the Judicial Branch found that safety was not proven and ordered investigations.

17. Furthermore, by declaring that MBAs are safe, it managed to introduce and maintain its exports to Mexico, despite the fact that this was an safe standard for the U.S. population who, of the total production of MBAs in that country, consume 40% for biofuel production and 40% for the livestock industry.<sup>2</sup> Currently, the U.S. intends to continue exporting MBA to Mexico without a relevant risk analysis because the standard of protection of both countries is not equivalent, due to the way corn is consumed in Mexico, thus, MBA's do not meet the safety standard determined by international regulations, the LFFPMN and scientific evidence.

18. In this reasoning, the U.S. representation leaves a basic and bona fide issue unanswered. Have any of its risk analyses included MBA consumption in the daily consumption of corn in

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<sup>2</sup>Economic Research Service, U.S. Department of Agriculture 2023.  
<https://www.ers.usda.gov/topics/crops/corn-and-other-feed-grains/feed-grains-sector-at-a-glance/>

masa and tortilla products during all life stages of the Mexican population and Mexican agro-cultural practices?

## **2. Failure of the U.S. to segregate the different types of MBAs it commercializes**

19. In 2013 the U.S. was internationally exposed for its failure to segregate each type of MBA it trades, thereby demonstrating its inability to implement risk management controls. This was proven when China rejected an entire shipment of 60,000 tons of MBA because it detected the presence of MBA MIR 162 that was not authorized for human consumption in its territory.<sup>3</sup> The U.S. agricultural and trade practices demonstrated its inability to segregate and trace every MBA event it exports. This resulted in one agro-industrial company having to pay large and unaffordable compensation to U.S. farmers.

20. In order to implement appropriate risk management controls derived from each type of MBA, it is necessary that the exporting State has the capacity to effectively separate each type of MBA. The risk is increased year after year by the desired and unexpected modifications, functions and stacking that are added to Mexico's corn.

21. Thus, the U.S. representation leaves an issue that is indispensable for risk management unanswered: has it demonstrated in its risk analysis that it can segregate each MBA it trades? Segregation must be considered to be done from and during planting, production and trading. In addition, it implies the implementation of detection and bioremediation techniques in case segregation fails.

**3. The U.S. conceals from the Panel that, since 2016, the industry has shied away from requesting MBA release permits in Mexico and thus providing information on their effects.**

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<sup>3</sup> <https://www.reuters.com/article/idUSL2N0J31QG/>

22. In 2016, a federal appeals court ordered the granting of MBA release permits that are requested to allow scientific research considering the potential risks posed by the release or planting of MBAs to biodiversity and human health. In addition, the court ordered that, if release permits are granted, those carrying out the releases must submit periodic reports and implement containment measures, which will be reviewed to show their efficacy, and if glyphosate is used, COFEPRIS must conduct health safety studies on the people who produce and consume MBAs.<sup>4</sup> All of this under judicial and public scrutiny. To date, no one has requested permits to release MBA for research purposes.

23. Even though amparo trials were filed against the appellate court's order, the Supreme Court of Justice of the Nation, in its ruling on an amparo under review, unanimously upheld the validity of the measure to grant experimental and pilot release permits with containment measures and periodic reporting under judicial and collective scrutiny.<sup>5</sup>

24. Regarding the Presidential Decrees of December 31, 2020, and February 13, 2023, both order that, in compliance with the applicable regulations, including the application of the rules of the Law on Biosafety of Genetically Modified Organisms, the biosafety authorities refrain from releasing MBAs into the environment. This includes and is consistent with the decision of Mexico's highest court to allow only experimental and pilot releases of MBAs.

25. Despite being authorized for experimental and pilot release permits for scientific research purposes, the industry has shied away from managing and obtaining release permits for MBAs under judicial and public scrutiny since 2016 to date, in order to generate scientific evidence on MBA and its effects in Mexico. This shows that the industry knows

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<sup>4</sup> Civil Appellate Dossier 860/2015 of the now extinct Second Unitary Court in civil and administrative matters of the First Circuit.

<sup>5</sup> This measure was ratified by the Supreme Court of Justice of the Nation in October 2021:  
<https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=265782>

about the effects of MBA and hides them, as it has refused to place those effects under judicial scrutiny.

26. With documents containing false information,<sup>6</sup> the U.S. conceals from the Panel that the industry has been reluctant to request MBA release permits and to provide information on their effects. In its statements to the Panel, the U.S. has in bad faith manipulated the effects of the injunction by asserting that the release of MBA is suspended by court order, yet this assertion is false, since as evidenced above, experimental and pilot releases for scientific purposes are permitted and subject only to judicial scrutiny.

27. The U.S. representation leaves what the industry is hiding unanswered. **Why have they shied away from releasing or seeding MBAs under judicial scrutiny and observation?**

28. The purpose of the precautionary measure is the release for scientific purposes, however, the U.S. manipulates the effects of the measure in order to avoid providing an answer as to why it has not released MBAs under judicial scrutiny over the years in order to ascertain their effects. It is worth noting that in requests for other products from agricultural biotechnology, such as cotton,<sup>7</sup> data and full scientific evidence on the impacts of release were also not provided.

#### **4. The U.S. fails to provide evidence of food safety studies that analyze whether MBAs may be inadvertently present in the Mexican diet.**

29. With the entry into force of the USMCA in 2020, chapters 3, 9 and, 24 of the USMCA established the rule of law, the protection of health, and the environment as the legal frame of reference, which are recognized in the preamble of the agreement. Chapter 3 specifically creates a new benefit for the parties, which is the Inadvertence of the MBA in the Mexican diet and the countryside, expressly recognized in articles 3.12 and 3.15.

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<sup>6</sup> U.S. Exhibits 19 and 89.

<sup>7</sup> The U.S. brought to the panel proceedings matters related to cotton from agro-industrial biotechnology, for instance, in Exhibits 19 and 89.

30. Furthermore, in Mexico, a court order recognized the serious risk and illegality of the presence of MBA in the Mexican countryside for the conservation and continued diversification of native corn, and allowed safety analyses to be carried out for MBA food and planting. Studies that to this day the industry has refused to carry out. Likewise, the LFFPMN established in 2020 a minimum standard of protection for native corn to guarantee sufficient, adequate and quality food for the Mexican population. Both measures are recognized by the USMCA.

31. In this regard, the rules of the USMCA and the WTO Agreement on the Application of Sanitary and Phytosanitary Measures state that the exporting Party must provide the analyses that prove the feasibility to manage the risks of MBAs in Mexico considering the Mexican practices of direct consumption and pre-planting, because the level of protection of both parties is not equivalent and that of the importing Party is more protective. The U.S. representation leaves what the industry is hiding unanswered. May MBAs be inadvertently present in the Mexican diet?

**5. The U.S. rejected Mexico's public proposal for the two countries' authorities to jointly assess the effects of the MBAs.**

32. After the U.S. requested consultations under the USMCA Chapter 31 procedure on the measures it now challenges, the Mexican President proposed that both the exporting and importing Parties form a panel to find out for sure whether or not the MBA causes harm to health and the environment.

33. Despite the fact that the U.S. position does not prove that its exports have the safety assessments in accordance with Mexico's level of protection that the USMCA itself recognizes and requires to protect the exporting country's MBA. And Mexico's position asserts that it has the assessments to issue the protective measures in the presidential decree and failed to question whether U.S. exports have the risk assessment required to request its protection. Both representations leave a previous issue for the



relevance of this procedure unanswered: do MBA exports have the relevant assessments?

34. We believe that this Panel should not make a decision on the legality of the measures implemented in the February 2023's Presidential Decree under Chapter 9 of the USMCA until risk assessments are presented showing how the MBA will affect the Mexican population, the environment, and the continued conservation and diversification of native corn and its wild relatives.

35. Finally, food, health and the environment are so important to the parties to the USMCA that they are enshrined in whole chapters of the agreement, so any dispute must be based on whether MBA exports are effectively safe for those who eat or might eat the MBA. In consequence, the exporting country must prove with certainty that the MBA is safe for the food, health, and environment of the importing country.

**Sincerely**

Pánfilo Hernández Ortiz

Representative of Proyecto de Desarrollo Rural Integral Vicente Guerrero, A.C.

Contact: Pánfilo Hernández Ortiz | Tel: 2461118888 | Email:

guerrerogv@prodigy.net.mx