

Article 32.5 Indigenous Legal Rights General Exception: Lip-service or the real deal?

Sharon Anglin Treat

Senior Advisor,

Institute for Agriculture & Trade Policy

May 2, 2024



Institute for
Agriculture &
Trade Policy

Sharon Anglin Treat

NORUMBEGA
STRATEGIES

This is a first opportunity to interpret an Indigenous Rights General Exception in any trade agreement involving the United States.

Will it prove to be window dressing, or the real deal?

Where did it come from?

Canada responded to pressure from Indigenous advocates:

“One of Canada’s objectives for the Canada-United States-Mexico-Agreement (CUSMA) was to better reflect the interests of Indigenous peoples in international trade.”

“This exception is a demonstration of the commitment by all three governments to ensure that FTA obligations do not interfere with a country’s legal obligations toward Indigenous peoples.” [Source: Canada’s international trade website]

*“This clause is pivotal.
It assures the parties freedom to meet their legal
obligations to Indigenous Peoples
and to act in the interests of Indigenous peoples
without the concern that such actions
may run afoul of trade or investment rules,
meaning that one state cannot bully the other
at the cost of Indigenous peoples’ rights.”*

-- Perry Bellegarde, then-National Chief of the Assembly of First Nations (Canada)
and member of the NAFTA Council advising negotiators

- No Indigenous general exception in NAFTA, which USMCA updates
- Indigenous exception in the Transpacific Partnership (CPTPP) and other trade agreements secured by New Zealand
- The CPTPP exception protects measures “to accord more favorable treatment” to Indigenous Peoples
- CPTPP provision problematic; interpreted narrowly to protect measures such as preferential duty-free treatment for Indigenous handicrafts

Article 32.5: Indigenous Peoples Rights

“Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods, services, and investment, this Agreement does not preclude a Party from adopting or maintaining a measure it deems necessary to fulfill its legal obligations to indigenous peoples.”

Article 32.5 – Indigenous Peoples Rights

- **Broad scope:** Applies to all provisions in the agreement – even if panel finds violation of SPS obligations, challenged measures can be upheld
- USMCA negotiators changed ambiguous phrase “accord more favorable treatment” to “deems necessary to fulfill its legal obligations”
- **Self-judging:** Each Party may determine the scope of its country’s protections for Indigenous Peoples -- not another Party or dispute panel (similar to national security exception)
- **Canada agrees with this interpretation.** Its third-party submission states: “the necessity of adopting or maintaining a measure to fulfill a Party’s legal obligations to Indigenous Peoples is self-judging.”

Also relevant: Article 24.15, Trade and Biodiversity

Not a general exception, but important context for interpreting the Indigenous legal rights general exception [excerpt]

1. The Parties recognize the importance of conservation and sustainable use of biological diversity, as well as the ecosystem services it provides, and their key role in achieving sustainable development.
2. Accordingly, each Party shall promote and encourage the conservation and sustainable use of biological diversity, in accordance with its law or policy.
3. The Parties recognize the importance of respecting, preserving, and maintaining knowledge and practices of indigenous peoples and local communities embodying traditional lifestyles that contribute to the conservation and sustainable use of biological diversity.

Mexico's Laws Guarantee Indigenous Rights

- Mexico's Constitution has several provisions recognizing Indigenous Peoples and rights – including land system and human rights
- Constitution guarantees all individuals the right to a healthy environment and health, including “nutritional, sufficient and quality nourishment”
- Federal law protects cultural heritage and resources of Indigenous and Afro-Mexican populations
- Mexico has ratified multiple international human rights treaties that protect Indigenous Peoples' rights (ILO Convention, UN Declaration on the Rights of Indigenous Peoples, UN Convention on Biodiversity, etc)
- International obligations are incorporated into Mexico's laws upon ratification and are relied on by judges in rendering decisions

Mexico's Restrictions on GM Corn in Tortillas “Deemed Necessary” To Protect Indigenous Rights

- Native corn is central to identity, culture, economy; has spiritual importance to Indigenous Peoples in Mexico going back millennia
- Indigenous and small-scale farmers are responsible for most of the genetic diversity of corn in North America
- Traditional diets heavily rely on corn – Mexicans have highest corn consumption in the world, 432 pounds/year, 60% of caloric intake. Important consideration for health impacts of GM corn produced with heavy use of herbicides and with Bt and Vip toxins
- Native corn species and biodiversity under threat from GM imports, with NAFTA-era Commission on Environmental Cooperation report (2013) concluding biosecurity measures needed

Mexico's Measures Not Disguised Trade Restriction nor Unjustified Discrimination

- Tortilla ban addresses uses only, doesn't restrict trade
- Not discriminatory – applies equally to all countries including Mexico
- Substitution requirement for animal feed not in effect yet and US growers have time to shift production methods to grow non-GM corn
- Non-GM corn sells for a premium and yields are similar

Canada's response – having it both ways?

- Canada agrees Mexico has authority to decide for itself whether a regulation is necessary to fulfill its legal obligations to Indigenous Peoples
- BUT ... Canada questions whether Mexico has acted in good faith and substantiated that these obligations are rooted in law, noting some of Mexico's measures protect the rights of non-Indigenous people along with the rights of Indigenous Peoples. Canada calls this an “unreasonable” broadening of the scope of Article 32.5.
- *Canada's interpretation would dramatically narrow the exception.*
- *Canada's interpretation is inconsistent with USMCA negotiators' decision to replace ambiguous, narrower CPTPP language that shielded only measures discriminating in favor of Indigenous Peoples*

United States' rebuttal – Mexico can't use Article 32.5 Indigenous Exception as an Affirmative Defense

- Says “Mexico has not shown that its measures are not used as a disguised restriction on trade in goods or a means of arbitrary or unjustified discrimination within the meaning of the first clause of this provision.” [Para. 244, page 77]
- Alternatively, the U.S. argues, it had a “reasonable expectation at the time the USMCA was concluded” that a benefit under Chapters 2 and 9 – Mexico’s acceptance of imported GM corn - would continue. Therefore, it argues, even if the panel finds that Mexico’s measures are not inconsistent with the USMCA because of the Indigenous Peoples exception, the measures “are causing nullification or impairment” of U.S. expectations and based on Article 31.2 the panel should rule for the U.S. [Para.251-263]
- *This interpretation could prevent a Party from changing its policies after the date the USMCA was concluded. Note that the Article 32.5 Indigenous Exception text specifically protects Mexico’s authority to adopt new measures; it isn’t limited to “maintaining” existing policies.*

Thank you!

Sharon Anglin Treat
www.norumbegastrategies.com
sharon.treat@outlook.com



Institute for
Agriculture &
Trade Policy

Sharon Anglin Treat

NORUMBEGA
STRATEGIES