What Does the New NAFTA Have to Say About Agricultural Biotechnology?

Sharon Anglin Treat
Senior Attorney, IATP
March 30, 2022
Takeaways:

- **It could be worse!** The Ag Biotech provisions don’t do what the industry says they do.

- **BUT they are still bad,** because they give industry a platform to cast doubt on the legitimacy of Mexico’s agricultural and public health policies and could have a chilling effect if regulators and politicians are influenced by the industry interpretation.

- These provisions are all about promoting agribusiness, use and sale of genetically engineered seed and products, and associated inputs – pesticides etc.

- They also **promote the U.S. agenda to deregulate** oversight of agricultural biotechnology and chemicals.
T-MEC/USMCA and Agricultural Biotechnology

- T-MEC/USMCA is the first U.S. FTA with dedicated agricultural biotechnology provisions
- This was a key demand of ag biotech industry including Monsanto/Bayer, lobby group BIO
- Ag biotech provisions located in Section B of Chapter 3: Agriculture (Articles 3.12-3.16)
- Other provisions relevant to GMO and glyphosate policies include Chapter 9, Sanitary & Phytosanitary Measures; Chapter 24: Environment; Chapter 31: Dispute Settlement
“Mexico must resume the approval process for all agricultural biotechnology products” and “immediately rescind its anti-USMCA decree banning the import of biotech corn and begin creating a gene editing framework that conforms with international norms and trade agreement commitments.”

- Michelle McMurray-Heath, BIO President & CEO testifying before U.S. Senate

The U.S. needs to take enforcement action under the U.S.-Mexico-Canada Agreement to address Mexico’s continued refusal to approve genetically modified crop traits and counter Mexico’s threat to ban GMO corn from the human food supply, Biotechnology Innovation Organization President and CEO Michelle McMurry-Heath told lawmakers Tuesday.

McMurry-Heath’s message to members of the Senate Finance Committee at a hearing was well-received by lawmakers, several of whom expressed consternation with Mexico’s anti-GMO stance under President Andrés Manuel López Obrador.

"Mexico’s failure to perform scientific regulatory assessments in over three years, its disregard for due process and transparency, and its decree to arbitrarily ban key technologies is a direct violation of both the letter and spirit of USMCA and commitments to the WTO,” McMurry-Heath said in written testimony. "These actions require a strong response from the U.S. government.”

She expressed appreciation that U.S. Trade Representative Katherine Tai raised the issue in recent meetings with Mexican Economy Secretary Tatiana Clouthier and other officials, but stressed that won’t be enough.

McMurry-Heath said that with “little indication from Mexico that it will adhere to its USMCA commitments, BIO strongly urges USTR to begin taking enforcement action on Mexico’s treatment of
Mexico’s sovereignty recognized

Mexico retains authority to adopt and implement policies to protect the environment and public health, preserve and enhance biodiversity, and respect Indigenous communities and lifestyles.

✔ **Article 24.3.1 of the Environment Chapter** recognizes “the sovereign right of each Party to establish its own levels of domestic environmental protection and its own environmental priorities, and to establish, adopt, or modify its environmental laws and policies accordingly.”

✔ **Article 24.15 on Trade and Biodiversity** mandates that each Party “shall promote and encourage the conservation and sustainable use of biological diversity, in accordance with its law or policy” recognizes “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.”
The Ag Biotech section has unambiguous language preserving Mexico’s right to say “NO” to GMOs:

“This Section does not require a Party to mandate an authorization for a product of agricultural biotechnology to be on the market.”

[Article 3.14.2 ]
So what *is* required? Mostly, procedures.

- **INFORMATION ABOUT HOW TO APPLY FOR GMO AUTHORIZATION.** Must be publicly available and to the extent possible, online. [Art. 3.14.3(a)-(c)]

- **YEAR-ROUND APPLICATION PROCESS.** The Parties are required to “accept and review applications for the authorization, if required, of products of agricultural biotechnology on an ongoing basis year-round.” [Art. 3.14.4(b)(i)]

- **TIMETABLE FOR ACTING.**
  - Nothing requires a decision or a particular timeframe for a decision on a *new* application for authorization.
  - For previously authorized products, a Party shall “take steps to help ensure that the review of the product is completed and a decision is made in a timely manner, and if possible, prior to expiration.” The text encourages action but doesn’t impose a hard-and-fast deadline. [Art.3.14.4(b)(iii)]

- **NOVEL PRODUCTS.** The Parties may not link an authorization decision or limit acceptance of applications for authorization to only those products that have already been authorized in another country. [Art.3.14(b)(ii)]

- **INFORMATION EXCHANGES.** The Parties are required to exchange information about “new and existing authorizations of products of agricultural biotechnology.” [Art.3.14.4(b)(iv)]
Mexico is required to manage cross-contamination

One of the few mandatory provisions requires each party to “adopt or maintain policies or approaches designed to facilitate the management of any LLP Occurrence” [Art. 3.15.1].

An importing country must ensure the contamination “is managed without unnecessary delay” and that any measure taken to address the contamination is “appropriate” taking into account the risk. [Art. 3.15.3(c)-(d)]
What might be subject to dispute settlement?

Article 31.2 lists three scenarios for invoking dispute settlement:

- Questions of interpretation
- Where an actual or proposed measure “would be inconsistent with an obligation” or a party “has otherwise failed to carry out an obligation” or
- Where a party has a reasonable expectation that a benefit would accrue to it under the Agriculture chapter but that benefit “is being nullified or impaired” by a measure of another party

GMO seed authorization isn’t a benefit that anyone could expect since authorization not mandated by T-MEC/USMCA.

Alternatively, it may be reasonable to expect that Mexico’s regulatory agencies will comply with deadlines set out in Mexico’s own laws, even if there are no hard deadlines for authorization decisions in T-MEC/USMCA.
Glyphosate policy subject to SPS chapter

Focus on adopting policies that “advance science-based decision making” and are “based on scientific principles”

Mexico is not prevented from establishing the level of protection it determines appropriate; requiring a risk assessment before a product is granted access to its market; or adopting or maintaining a SPS measure on a provisional basis if relevant scientific evidence is insufficient

WTO rules apply; should follow relevant international standards, guidelines, and recommendations “deemed to be necessary to protect human, animal, or plant life or health”

Lots of detail on how risk assessment conducted

What is meant by “science-based”?
Who decides if scientific evidence is “sufficient”?
How do you establish what is “necessary” to protect life or health?
Are policies based on the precautionary principle allowed?
When is a ban justified?
Many U.S. States Restrict or Ban Certain Pesticides, Including Glyphosate
Where is glyphosate banned in the U.S.?

Every year, the United States uses more than 1.8 million tons of glyphosate. The weed-killer doesn't just kill weeds. Roundup is found in about 90% of food products tested by the U.S. government—including honey. There are at least 150 cities in the nation that have organics first pesticide policies. While national agencies have been slow to adopt a position that Roundup and its active ingredient are carcinogenic, municipalities are leading the charge by banning or restricting the use of the chemical.

Contact Info

Sharon Anglin Treat
Senior Attorney
Institute for Agriculture & Trade Policy
Email: streat@iatp.org
Website: www.iatp.org
Twitter:
@sharontreat
@IATP