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U.S.-Mexico GMO Corn Dispute Could Endanger the USMCA

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On February 13, 2023, the Government of Mexico promulgated a decree forbidding the import of genetically modified (“GMO”) corn into Mexico for nixtamalization (cooking and steeping in an alkaline solution, usually water and calcium hydroxide, for use in tortillas) and flour production². The immediate ban targets white corn, which currently comprises a small portion of US exports to Mexico. Most US corn exports to Mexico are yellow corn used for animal feed. The decree, however, also sets forth the objective of gradually phasing out the use of GMO corn in animal feed and for human consumption other than in nixtamalization or flour.

On August 17, 2023, after engaging in unproductive consultations with Mexico, the United States announced that it is establishing a dispute panel under Article 31 of the United States-Mexico-Canada Agreement (“USMCA”) to consider US objections to both parts of the Mexican decree.³ This controversy highlights the difficult issues of the tradeoff between increasing food production and maintaining biodiversity, as well as how to honor international trade obligations while protecting native cultures and interests from the economic forces unleashed by free trade.

The Mexican government had on December 31, 2020, announced that it would ban GMO corn in the diets of Mexicans and end the use of the herbicide glyphosate by January 31, 2024.⁴ The reaction from US corn producers and their congressional representatives was immediate and robust. Mexico is the second-largest export market for US corn (after China), with exports to Mexico totaling \$4.792 billion in 2022⁵. This equates to about 17 million metric tons of yellow corn crossing the border annually.⁶ The loss of that market would have a serious impact on several US corn-growing states.

In response to US pressure, on February 23, 2023, Mexico scrapped the 2024 deadline banning GMO corn for animal feed and industrial use (primarily yellow corn, much of which is imported from the United States), though it did retain the ban on its use for human consumption (primarily white corn, much less of which is imported from the United States and a significant portion of which is still grown in Mexico). Further heightening tensions, on June 23, 2023, Mexico imposed a 50% tariff on the import of white corn⁷ to be in force until the end of 2023. These measures, Mexico announced, were in accordance with the December 31, 2020, decree.

Following the 2020 decree, the Mexican government through the Secretariat of the Environment, Secretariat of Health, and the Secretariat of Agriculture, as well as the Federal Sanitary Commission (“COFEPRIS”) and the

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² https://www.dof.gob.mx/nota_detalle.php?codigo=5679405&fecha=13/02/2023#gsc.tab=0

³ <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/august/united-states-establishes-usmca-dispute-panel-mexico-agricultural-biotechnology-measures>

⁴ “take measures within their authority to gradually eliminate the use, acquisition, distribution, promotion, and import of the chemical compound glyphosate and of all agrochemicals that contain glyphosate as an active ingredient.”

https://www.dof.gob.mx/nota_detalle.php?codigo=5609365&fecha=31/12/2020#gsc.tab=0

⁵ USDA/FAS, 2021.

⁶ USDA/ERS, December 13, 2022.

⁷ https://www.dof.gob.mx/nota_detalle.php?codigo=5693309&fecha=23/06/2023#gsc.tab=0

HAYNES BOONE

National Science and Technology Council had published a joint report detailing the measures undertaken to advance compliance with the 2020 decree.⁸

These developments arise in a critical moment of the US-Mexico trade relations, especially at a time when repositioning of supply chains away from China to Mexico under the USMCA has been a boon to the Mexican economy. As noted, the United States is Mexico's largest supplier of corn, with exports valued at nearly \$5 billion USD⁹. According to data by the Secretariat of Finance and Public Credit, Mexico imported around 39% of its corn consumption from 2016 to 2022¹⁰, with 90.5% of its imports coming from the US.¹¹ An argument can be made that Mexico's actions stem from long-held views on the cultural importance of corn, the need for Mexico to become a self-sufficient corn producer, and the wish for Mexico to develop its agricultural industry. Mexico's Secretary of Agriculture has also been quoted saying that the three principles of his administration are "diminishing rural poverty, increasing productivity, and securing food supply."¹² This is supported by the enactment and promotion of "Sembrando Vida", one of Mexico's flagship social programs. The program, which was initiated in 2020, is managed by the Secretariat of Agriculture and seeks to eliminate social ills such as rural poverty and environmental destruction¹³. The explanatory statement of the February 13, 2023, decree notes specifically that "The program Sembrando Vida has demonstrated substantial progress in accomplishing an agroecological transition and on the development of biologically safe alternatives to agrochemicals such as glyphosate." Sembrando Vida has sponsored an agroforestry technique called "MIAF" whose purpose is fostering organic corn production as a strategic goal.¹⁴

It appears that the enacted decrees may pose significant risks for the Mexican government with respect to its trade relationship with the United States. The US legal challenge to Mexico's actions is predicted on USMCA Article 9.6 which requires that a party's measures be based on "relevant international standards, guidelines or recommendations or on appropriate risk assessment" as well as on "relevant scientific principles" and only to "the extent necessary to protect human, animal, or plant life or health" and in such a manner that is "no more trade restrictive than required to achieve the level of protection that the Party has determined to be appropriate."

It seems that Mexico's strategy for minimizing the chances of being found to have violated Article 9 of the USMCA is by focusing on the health risks possibly associated with glyphosate. The February 2023 decree mentioned health risks associated with glyphosate as one of the reasons for forbidding GMO corn imports, and while the press has questioned the scientific validity of such arguments, the matter is still contested.

Although several scientific studies concluded by EU and US-based organizations have dismissed concerns regarding the safety of glyphosate,¹⁵ the matter is not beyond question.¹⁶ On March 20, 2015, the International Agency for Research on Cancer, part of the World Health Organization, published a report classifying glyphosate as "probably carcinogenic for humans"¹⁷. This report forms the basis for Mexico's arguments that its measures don't violate the USMCA and could be the cornerstone for justifying an import ban¹⁸. The USMCA

⁸ https://www.gob.mx/cms/uploads/attachment/file/776137/INFORME_GLIFOSATO_101122.pdf

⁹ <https://expansion.mx/economia/2023/06/19/maiz-la-disputa-que-viene-entre-mexico-y-estados-unidos>

¹⁰ <https://www.eleconomista.com.mx/empresas/Mexico-aumenta-dependencia-de-maiz-importado-20230206-0108.html>

¹¹ <https://www.eleconomista.com.mx/empresas/Mexico-aumenta-dependencia-de-maiz-importado-20230206-0108.html>

¹² <https://www.milenio.com/negocios/decreto-mexico-desactivo-eventual-panel-maiz-t-mec>

¹³ <https://www.gob.mx/bienestar/acciones-y-programas/programa-sembrando-vida>

¹⁴ <https://www.gob.mx/bienestar/acciones-y-programas/programa-sembrando-vida>

¹⁵ <https://www.env-health.org/scientific-evidence-of-glyphosate-link-to-cancer-dismissed-in-ongoing-eu-assessment-new-report-reveals/>

¹⁶

<https://www.nature.com/articles/nature.2015.17181#:~:text=But%20other%20evidence%2C%20including%20from,cells%20from%20exposure%20to%20glyphosate.>

¹⁷ <https://www.iarc.who.int/wp-content/uploads/2018/07/MonographVolume112-1.pdf>

¹⁸ <https://contralinea.com.mx/interno/semana/decreto-que-prohibe-maiz-transgenico-no-violo-el-t-mec-amlo/>

HAYNES BOONE

allows for import restrictions to “protect human, animal or plant health, provided that such measures do not constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.” The Secretary of Economy even proposed creating a joint COFEPRIS-FDA taskforce to evaluate possible health risks of glyphosate.¹⁹ The US has asserted that scientific data utilized to support Mexico’s stance is debatable.

Beyond the scientific and health controversy there is also the issue of cultural preservation. For its part, Mexico has benefited from lower corn prices since the increase of imports from the United States under NAFTA, but it has also seen the failure of many small farms, with close to a million former farmers moving to cities or seeking work north of the border after NAFTA was ratified in 1994.

Temple University has reported that domesticated corn has its origins in Mexico more than 8,700 years ago.²⁰ Many strains of corn remain in Mexico, though large numbers have already disappeared and uncontrollable cross pollination with GMO varieties is seen as threatening this biodiversity, as well as the attendant historical and cultural links.²¹ According to Food & Power website, “Mexico has maintained a vast array of diverse corn species, with 64 recognized strains, called landraces, and over 21,000 regionally adapted varieties. Over two-thirds of Mexican corn farmers still save their own seeds and plant native strains.”²² The US position on the trade dispute would suggest that — despite the 8,700-year history of corn in Mexico and its centrality to Mexican culture — any panic about GMO corn is the result of recent unscientific fearmongering. But beyond valid environmental and economic concerns, the factor of cultural significance raises an important question that is not reflected in the USMCA text. In the decades since the inception of NAFTA, Mexico’s corn imports from the United States have more than quadrupled. Limiting US corn imports might be the only way to ensure the continued viability of the farming sector that cultivates native maize. Mexico will no doubt assert that preservation of Mexico’s culture is a higher value than adherence to the strictly scientific concerns of the USMCA. The US (supported by US agribusiness) will counter that Mexico has benefited from many aspects of the USMCA, and it cannot selectively decide which elements to honor and which to ignore. Tradeoffs were made by the parties in the course of negotiations, and Mexico cannot have the benefits without the costs.

The USMCA has a defined legal process by which trade disputes involving its member countries are to be settled. The dispute panel requested by the United States is in accordance with Chapter 31 of the USMCA. The panel, once constituted, would be expected to present its initial report within 150 days.²³ After a further period of 60 days, allowing for country comments and finalization of the report, the report would be made public.²⁴

Assuming the panel rules against Mexico, resolution of the dispute should then occur within 45 days, with Mexico then either removing its GMO corn measures, providing compensation to the United States, or accepting some other remedy.²⁵ If Mexico fails to implement the panel ruling, the United States would be allowed to suspend trade benefits with Mexico equivalent to the damage caused by the latter’s GMO corn measures,²⁶ most likely in the form of tariffs against specific Mexican products, though this is unlikely to be acceptable to US corn growers and exporters.

¹⁹ <https://www.eleconomista.com.mx/empresas/Mexico-propone-a-EU-analisis-conjunto-sobre-maiz-20221213-0128.html>

²⁰ <https://news.temple.edu/news/researchers-find-earliest-evidence-domesticated-maize>

²¹ <https://www.foodandpower.net/latest/2018/10/10/mexicos-native-corn-varieties-threatened-by-new-nafta>

²² Id.

²³ Article 31.17.1.

²⁴ Article 31.17.

²⁵ Article 31.18.2.

²⁶ Article 31.19.1.

HAYNES BOONE

Because anything short of complete capitulation by Mexico is not going to satisfy US agricultural interests, the entire USMCA framework may find itself under significant strain. As Tom Haag, President of the National Corn Growers Association, warned on February 23, 2023, shortly after the Mexican import ban was announced, "Singling out corn – our number one ag export to Mexico – and hastening an import ban on numerous food-grade uses makes USMCA a dead letter unless it's enforced."²⁷ This may not be an exaggeration. A conflict between US agriculture, one of the leading forces behind US international trade engagement, and the Mexican government, could jeopardize the continued viability of the USMCA in both countries. That said, it cannot escape the attention of leaders on both sides of the border that Mexico has recently surpassed China and Canada as the leading trade partner of the United States.²⁸ Despite the political environment in both countries, the incentives are strong to keep this issue from disrupting the overall trade relationship. In fact, the Mexican president himself emphasized the role of the COFEPRIS-FDA joint task force in remarks on August 18, thus suggesting that Mexico is looking for a way to resolve the GMO corn controversy. The USMCA panel arbitrators' decision and the reaction to it of the disparate interests in both countries will be illuminating.

²⁷ <https://www.farmprogress.com/farm-business/vilsack-foreshadows-formal-action-against-mexico>

²⁸ <https://www.businessinsider.com/us-mexico-china-trade-world-economy-changing-2023#:~:text=Mexico%20replaced%20China%20as%20America's%20top%20trade%20buddy%20%E2%80%94%20and%20it,global%20economy%20is%20rapidly%20transforming&text=Trade%20between%20the%20US%20and,the%20start%20of%20the%20pandemic.>