AGREEMENT BETWEEN THE UNITED STATES OF AMERICA, THE UNITED MEXICAN STATES, AND CANADA

PANEL ESTABLISHED PURSUANT TO CHAPTER 31

MEXICO — MEASURES CONCERNING GENETICALLY ENGINEERED CORN

MEX-USA-2023-31-01

FINAL REPORT

20 December 2024

Panel Members

Christian Häberli (Chair)
Hugo Perezcano Díaz
Jean Engelmayer Kalicki

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TABLE OF DEFINITIONS AND ABBREVIATIONS

Definition/Abbreviation	Description
2004 CEC Report	Report of the Commission for Environmental Cooperation Secretariat, *Corn & Biodiversity: The Effects of Transgenic Corn in Mexico*, Conclusions and Recommendations, 2004 (MEX-95)
2005 Biosafety Law	Law on Biosafety of Genetically Modified Organisms (*Ley de Bioseguridad de Organismos Genéticamente Modificados*), published on 18 March 2005 (USA-85 and MEX-250)
2008 Biosafety Regulations	Regulations to the Law on Biosafety of Genetically Modified Organisms (*Reglamento de la Ley de Bioseguridad de Organismos Genéticamente Modificados*), published on 19 March 2008 (USA-86 and MEX-251)
2020 Decree	Decree establishing the actions that must be carried out by the agencies and entities that make up the Federal Public Administration, within the scope of its powers, to gradually replace the use, acquisition, distribution, promotion and importation of the chemical substance called glyphosate and of the agrochemicals used in our country that contain it as an active ingredient, for sustainable and culturally appropriate alternatives that allow maintaining production and are safe for human health, the biocultural diversity of the country and the environment (*Decreto por el que se establecen las acciones que deberán realizar las dependencias y entidades que integran la Administración Pública Federal, en el ámbito de sus competencias, para sustituir gradualmente el uso, adquisición, distribución, promoción e importación de la sustancia química denominada glifosato y de los agroquímicos utilizados en nuestro país que lo contienen como ingrediente activo, por alternativas sostenibles y culturalmente adecuadas, que permitan mantener la producción y resulten seguras para la salud humana, la diversidad biocultural del país y el ambiente*), published on 31 December 2020 (USA-92)
2020 Dossier	CONAHCYT, *Scientific Record on Glyphosate and GM Crops*, 2020 (MEX-85)
2023 Decree	Decree Establishing Various Actions Regarding Glyphosate and Genetically Modified Corn (*Decreto por el que se establecen diversas acciones en materia de glifosato y maíz genéticamente modificado*), published on 13 February 2023 (USA-3 and MEX-167)
ALOP	Appropriate level of protection
Article 6.II Measure	Measure introduced by Article 6.II of the 2023 Decree
Articles 7/8 Measure	Measure introduced by Articles 7 and 8 of the 2023 Decree

Definition/Abbreviation	Description
CIBIOGEM	Interministerial Commission on Biosafety of Genetically Modified Organisms (*La Comisión Intersecretarial de Bioseguridad de los Organismos Genéticamente Modificados*)
Codex Guideline	Codex, *Guideline for the Conduct of Food Safety Assessment of Foods Derived from Recombinant-DNA Plants*, CAC/GL 45-2003 (USA-114)
Codex Principles	Codex, *Principles for the Risk Analysis of Foods Derived from Modern Biotechnology*, CAC/GL 44-2003 (USA-113)
Codex Working Principles on Risk Analysis	Working Principles for Risk Analysis for Food Safety for Application by Governments (USA-211)
COFEPRIS	Mexican Federal Commission for the Protection Against Sanitary Risks (*La Comisión Federal para la Protección contra Riesgos Sanitarios*)
CONABIO	National Commission for the Knowledge and Use of Biodiversity (*La Comisión Nacional para el Conocimiento y Uso de la Biodiversidad*)
CONAHCYT	National Council of Humanities, Sciences and Technologies (*El Consejo Nacional de Humanidades, Ciencias y Tecnologías*)
Constitution	Political Constitution of the United Mexican States (*Constitución Política de los Estados Unidos Mexicanos*), 1917 (MEX-237)
EPA	U.S. Environmental Protection Agency
FAO	Food and Agriculture Organization of the United Nations
GATT 1994	General Agreement on Tariffs and Trade 1994
GE	Genetically engineered
GM	Genetically modified
GMO	Genetically modified organism
Hearing	Hearing in MEX-USA-2023-31-01 Mexico - Measures Related to Genetically Engineered Corn (Mexico City, 26-27 June 2024)
IPPC	International Plant Protection Convention (USA-102)
ISPM	International Standard for Phytosanitary Measures
ISPM 1	IPPC, *Phytosanitary principles for the protection of plants and the application of phytosanitary measures in international trade* (CAN-19)
ISPM 2	IPPC, *Framework for pest risk analysis* (USA-117)
ISPM 11	IPPC, *Pest risk analysis for quarantine pests* (USA-103)
JMPR	Joint FAO/WHO Meeting on Pesticide Residues
LMO	Living modified organism
Measures	Article 6.II and Articles 7/8 Measures
MEX Comments	Mexico Comments on the USA's Responses to the Panel's Questions, 5 August 2024
Mexico	United Mexican States

Definition/Abbreviation	Description
MEX IWS	Initial Written Submission of the United Mexican States, 15 January 2024
MEX Opening Statement	Opening Statement of the United Mexican States, 26 June 2024
MEX Rebuttal	Rebuttal Submission of the United Mexican States, 28 May 2024
MEX Responses to Panel Questions	Written Responses from the United Mexican States to questions from the Panel, 15 July 2024
Moratorium	Moratorium on commercial planting of GM corn in Mexico pursuant to a 2013 preliminary injunction
MRL	Maximum residue limits
Native Corn Law	Federal Law for the Promotion and Protection of Native Corn (*Ley Federal para el Fomento y Protección del Maíz Nativo*), 13 April 2020 (MEX-12)
NGE	Non-governmental entity
Party/Parties[1]	USA and Mexico (as disputing parties)
PRA	Pest risk analysis
RoP	Rules of Procedure for Chapter 31 (Dispute Settlement) of the USMCA
SNIB Database	Database maintained by National Biosafety Information System (*Sistema Nacional de Información sobre Biodiversidad*), available at: https://conahcyt.mx/cibiogem/index.php/sistema-nacional-de-informacion
SPS	Sanitary or phytosanitary
SPS Agreement	WTO Agreement on the Application of Sanitary and Phytosanitary Measures, adopted 15 April 1994, entered into force 1 January 1995), 1867 U.N.T.S. 493 9 (USA-34)
SPS Chapter	Chapter 9 of the USMCA
Third Party	Canada
USA	United States of America
USA Comments	Comments of the United States on other Parties' Responses to Written Questions From The Panel, 5 August 2024
USA IWS	Initial Written Submission of the United States of America, 25 October 2023
USA Opening Statement	Opening Statement of the United States of America, 26 June 2024
USA Rebuttal	Rebuttal Submission of the United States of America, 2 April 2024
USA Responses to Panel Questions	Responses of the United States to Written Questions from the Panel, 15 July 2024
USMCA or Agreement	Agreement between the United States of America, the United Mexican States, and Canada (*Tratado*

[1] Canada participated as a third Party in this dispute; however, for ease of reading, the Panel refers to the USA and Mexico as the "Parties." When the Panel intends to refer to all participating parties, including Canada, it expressly so indicates.

Definition/Abbreviation	Description
	entre México, Estados Unidos y Canadá), entered into force on 1 July 2020
VCLT	Vienna Convention on the Law of Treaties (1969)
WHO	World Health Organization
WTO	World Trade Organization

I. INTRODUCTION

1. This dispute concerns two measures Mexico introduced on 13 February 2023 as part of the *Presidential Decree Establishing Various Actions Regarding Glyphosate and Genetically Modified Corn* (the "**2023 Decree**"), namely: (1) the order in Article 6.II of the 2023 Decree to "revoke and refrain from issuing authorizations for the use of genetically modified corn grain for human consumption"; and (2) the instruction in Article 7 of the 2023 Decree that the relevant authorities should "carry out the actions leading to in effect achieving the gradual substitution ["*realizarán las acciones conducentes a efecto de llevar a cabo la sustitución gradual*"] of genetically modified corn for animal feed and industrial use for human consumption."[2] The United States of America (the "**USA**") claims that these measures are inconsistent with the United Mexican States' ("**Mexico**") obligations under the Agreement between the United States of America, the United Mexican States, and Canada that entered into force on 1 July 2020 (the "**USMCA**" or "**Agreement**"). Mexico disagrees.

2. The dispute is limited to the USA's challenge to the measures quoted above. For avoidance of doubt, the dispute does *not* involve any challenge to other provisions of the 2023 Decree, including (*inter alia*) certain measures introduced in Articles 3, 4 and 5 regarding the compound known as glyphosate, and in Article 6.I regarding a continued moratorium on the planting of genetically modified ("**GM**") corn in Mexico. Those provisions are relevant to this dispute only insofar as they provide context to the challenged measures, which are Articles 6.II and 7 of the 2023 Decree.

II. PROCEDURAL BACKGROUND

3. The disputing parties are the USA and Mexico (together, the "**Parties**"). Canada participated as a third party (the "**Third Party**").

[2] USA-3/MEX-167, Decree Establishing Various Actions Regarding Glyphosate and Genetically Modified Corn, 13 February 2023, Articles 6-7 (referring to USA-3, PDF p. 10). The English translation of the first paragraph of Article 7 at USA-3 provides that: "The agencies and entities of the Federal Public Administration will carry out the appropriate actions in order to conduct the gradual substitution of genetically modified corn for animal feed and industrial use for human consumption." The supplied translation inaccurately translates "las acciones conducentes" into "appropriate actions". "Conducente" means to guide or lead someone or something. (Cf. "conducente: Que conduce (‖ guía a alguien o algo)". Real Academia Española: Diccionario de la lengua española, 23.ª ed., [versión 23.7 en línea]. <https://dle.rae.es> (consulted on 13 September 2024). Thus, a more accurate translation of the first paragraph of Article 7 of the 2023 Decree is: "The agencies and entities of the Federal Public Administration will carry out the actions leading to in effect achieving the gradual substitution of genetically modified corn for animal feed and industrial use for human consumption." The Panel finds it more appropriate to rely on this latter translation in its analysis, while not changing any quotes from the Parties' submissions containing the former translation at USA-3.

4. The USA's claims arise under Chapter 9 ("Sanitary and Phytosanitary Measures") and Chapter 2 ("National Treatment and Market Access for Goods") of the USMCA.

5. The key stages in this USMCA proceeding are summarized below. Further factual background about the underlying issues and events is set forth in the subsequent Section III.

A. Consultation Requests Following the 2023 Decree

6. On 6 March 2023 – three weeks after issuance of the 2023 Decree on 13 February 2023 – the USA requested technical consultations with Mexico regarding the 2023 Decree's agricultural biotechnology measures, pursuant to Article 9.19.2 of Chapter 9 (the "**SPS Chapter**") of the USMCA. The USA and Mexico held technical consultations in Mexico City on 30 March 2023; Canada observed the consultations. According to the USA, the technical consultations did not resolve the matters of concern.[3]

7. On 2 June 2023, the USA requested consultations with Mexico pursuant to Articles 31.2 and 31.4 of the USMCA, with regard to certain Mexican measures that concern products of agricultural biotechnology. These consultations took place in Mexico City on 29 June 2023. Canada participated in the consultations pursuant to Article 31.4.4 of the USMCA. The USA says that these consultations likewise failed to resolve the matters of concern.[4]

B. Establishment of the Panel

8. On 17 August 2023, the USA requested the establishment of a panel, pursuant to Article 31.6.1(a) of the USMCA, with the terms of reference as set out in Article 31.7 of the USMCA.[5]

9. On 23 August 2023, pursuant to Article 31.9.1(a) of the USMCA, the Parties agreed to a panel comprised of three members.[6]

10. On 25 August 2023, Canada notified the Parties of its intention to participate as a Third Party in the proceedings.[7]

11. On 22 September 2023, the USA was selected by lot to choose the chair of the panel, pursuant to Article 31.9.1(b) of the USMCA. On 27 September 2023, Christian Häberli, a citizen of

[3] USA IWS, ¶ 62.
[4] USA IWS, ¶ 63.
[5] USA IWS, ¶ 64.
[6] USA IWS, ¶ 65.
[7] MEX IWS, ¶ 33.

Switzerland, was selected as the Panel Chair. On 12 October 2023, pursuant to Article 31.9.1(d), the USA selected Hugo Perezcano Díaz, a citizen of Mexico, to serve as a member of the Panel. On 18 October 2023, Mexico selected Jean Engelmayer Kalicki, a U.S. citizen, to serve as a member of the Panel.[8] The following were subsequently appointed as Assistants to the Panelists: Víctor Saco (Christian Häberli); Manuel Sánchez Miranda (Hugo Perezcano Díaz); and Zsófia Young (Jean Engelmayer Kalicki).

C. Written Submissions

12. The USA filed its initial written submission on 25 October 2023 ("**USA IWS**").

13. Mexico filed its initial written submission on 15 January 2024 ("**MEX IWS**").

14. Canada filed its third Party written submission on 15 March 2024.

15. The USA filed its rebuttal submission on 2 April 2024 ("**USA Rebuttal**").

16. Mexico filed its rebuttal submission on 28 May 2024 ("**MEX Rebuttal**"), accompanied by four expert reports.

17. The procedural deadlines in this case were calculated in light of the Rules of Procedure for Chapter 31 (Dispute Settlement) (the "**RoP**"), which regulate the suspension of certain time periods as necessary to complete required translations.[9] The length of each submission and the extensive number of annexes filed in this case inevitably impacted the procedural timetable. Adjustments to procedural deadlines were discussed and agreed with the Parties, resulting in an agreed timetable issued on 11 April 2024, which contained "estimates" for the subsequent stages of the proceedings.

18. Both Parties presented confidential information in their submissions. The Panel endeavored to avoid referring to confidential information and requested the Parties to indicate if any parts of this Report should be marked as confidential.

[8] USA IWS, ¶ 65.

[9] RoP, ¶¶ 24.1-24.4 (requiring translation of written submissions into the language in which each participating Party indicates it wishes to receive such submissions; restricting delivery of written submissions to the Panel and other participating Parties "until all translated versions … have been prepared"; and providing that "[a]ny time period applicable to a panel proceeding shall be suspended for the period necessary to complete the translation of any written submissions").

D. Non-Governmental Entities

19. Between 24 October and 7 November 2023, 14 non-governmental entities ("**NGEs**") requested leave to submit written views in respect of the dispute.[10]

20. On 14 November 2023, Alianza por la Salud Alimentaria filed an untimely request for leave to submit a written view, or, in the alternative, to co-sign El Poder del Consumidor's written view (which had been received on 24 October 2023). On 17 November 2023, the Panel decided not to allow the untimely request for leave but allowed Alianza por la Salud Alimentaria to support the request by El Poder del Consumidor. On 21 November 2023, El Poder del Consumidor and Alianza por la Salud Alimentaria submitted their joint request for leave to file a written view.

21. On 17 November 2023, the Panel received the Parties' and the Third Party's comments on the NGE requests.

22. The Panel considered the merits of those requests pursuant to Article 31.11 of the USMCA and Article 20 of the RoP.

23. On 15 December 2023, the Panel granted six requests in their entirety, limited the scope of five requests, and denied three requests pursuant to Article 20.2 of the RoP. Following the Parties' and the Third Party's requests for reconsideration, the Panel issued a revised decision on 8 January 2023, granting nine,[11] and denying five requests.[12]

[10] The 14 NGEs were: (1) El Poder del Consumidor, A.C. (received 24 October 2023); (2) Proyecto sobre Organización, Desarrollo, Educación e Investigación "PODER" (received 30 October 2023); (3) Biotechnology Innovation Organization "BIO" (received 6 November 2023); (4) Friends of the Earth "FOE" (received 6 November 2023); (5) Farm Action (received 7 November 2023); (6) Fundación Semillas de Vida (received 7 November 2023); (7) Asociación Nacional de Empresas Comercializadoras de Productores del Campo, A.C. "ANEC" (received 7 November 2023); (8) National Farmers Union "NFU" (received 7 November 2023); (9) Institute for Agriculture & Trade Policy, the Rural Coalition, Alianza Nacional de Campesinas "IATP" (received 7 November 2023); (10) Global Development and Environment Institute "GDAE"(received 7 November 2023); (11) Canadian Biotechnology Action Network "CBAN" (received 7 November 2023); (12) Center for Food Safety "CFS" (received 7 November 2023); (13) Grupo Vicente Guerrero "GVG" (received 7 November 2023); and (14) The Council of Canadians (received 7 November 2023).

[11] The nine NGEs granted leave were: (1) El Poder del Consumidor (EPC) and Alianza por la Salud Alimentaria (ASA); (2) Proyecto sobre Organización, Desarrollo, Educación e Investigación "PODER"; (3) Biotechnology Innovation Organization "BIO"; (4) Friends of the Earth "FOE"; (5) Fundación Semillas de Vida; (6) Asociación Nacional de Empresas Comercializadoras de Productores del Campo, A.C. "ANEC"; (7) Institute for Agriculture & Trade Policy, the Rural Coalition, Alianza Nacional de Campesinas "IATP"; (8) Center for Food Safety "CFS"; (9) Grupo Vicente Guerrero "GVG".

[12] The five NGEs denied leave were: (1) Farm Action; (2) National Farmers Union "NFU"; (3) Global Development and Environment Institute "GDAE"; (4) Canadian Biotechnology Action Network "CBAN"; (5) The Council of Canadians.

24. On 15 March 2024, the nine authorized NGEs filed their respective written views. Mexico presented comments on the NGE written views on 3 May 2024. The USA did not present written comments.

25. The Panel has considered the NGE views, and Mexico's comments on the same, in its analysis of the claims before it.

E. Hearing

26. On 31 May 2024, the Panel held a pre-hearing conference with the Parties and the Third Party to discuss the logistics of the hearing scheduled to take place between 26-28 June 2024 (the "**Hearing**"). On 5 June 2024, the Parties shared their joint proposed Hearing agenda, indicating that only two hearing days would be necessary. The Parties agreed on Zoom transmission of the Hearing with audio only, including simultaneous interpretation, accessible by advance registration.

27. On 17 June 2024, Mexico requested to confirm whether the Panel or the USA had made a decision on the possibility of questioning Mexico's experts, noting the unavailability of one of the experts during the Hearing dates. On 18 June 2024, the Panel informed Mexico that it did not, in principle, envisage questions for the experts, however, if the USA were to cross-examine or engage with Mexico's expert evidence during the Hearing, the Panel may add its own questions. The USA confirmed on the first day of the Hearing that it did not plan on questioning Mexico's experts.[13]

28. Also on 17 June 2024, Mexico confirmed that it would use confidential information during the case and requested that necessary arrangements be made.

29. The Hearing took place in Mexico City on 26-27 June 2024, attended by representatives of the Parties and the Third Party in person and remotely. Registered observers could follow the proceedings online. Annex I lists the participants in the Hearing.

30. Following the Hearing, the Parties provided written copies of their oral opening ("**USA Opening Statement**" and "**MEX Opening Statement**" respectively), rebuttal, and closing submissions to the Panel. Mexico also provided a copy of the PowerPoint slides it relied on for its oral opening statement. Canada provided a copy of its oral opening statement.

[13] Tr. Day 1, p. 1 [ENG].

F. Post-Hearing

31. On 28 June 2024, the Panel issued written questions to the Parties.

32. On 15 July 2024, the Parties provided written responses to the Panel's questions ("**USA Responses to Panel Questions**" and "**MEX Responses to Panel Questions**" respectively). The Parties provided comments on each other's responses to the Panel's questions on 5 August 2024 ("**USA Comments**" and "**MEX Comments**" respectively).

G. Initial Report

33. Pursuant to Article 31.17.1 of the USMCA, the Panel issued its Initial Report on 30 September 2024. Pursuant to Article 31.17.3 of the USMCA, the Parties provided their comments on the Initial Report on 6 November 2024, which the Panel has considered carefully and incorporated as appropriate in this Final Report.

III. FACTUAL BACKGROUND

34. The Panel notes the extensive factual background provided by the Parties in their respective submissions. The following is a summary of the facts as pleaded by the Parties or established by the evidence, without prejudice to any legal conclusions by the Panel, which will be addressed in later sections. The summary is not intended to be exhaustive, and the absence of reference to particular facts or assertions, or to the evidence supporting any particular fact or assertion, should not be taken as an indication that the Panel did not consider those matters. The Panel has carefully considered all evidence submitted to it in the course of these proceedings.[14]

A. Regulatory Background

35. In Mexico, the Biosafety Law of Genetically Modified Organisms introduced in 2005 (the "**2005 Biosafety Law**") and the Regulations to the Genetically Modified Organisms Biosafety Law introduced in 2008 (the "**2008 Biosafety Regulations**"), regulate the importation and trade of GM products.[15]

[14] The Panel notes that when they exist, the Panel relies on the English translations of exhibits provided by the Parties or the Mexican Section of the Secretariat. In instances where the Parties have introduced the same factual exhibit twice and the translations provided are different, the Panel indicates on which translation it relies. When referring to the Parties' submissions, the Panel indicates the version of the exhibit on which each Party relied.

[15] USA-85/MEX-250, Law on Biosafety of Genetically Modified Organisms, published on 18 March 2005; USA-86/MEX-251, Regulations to the Law on Biosafety of Genetically Modified Organisms, published on 19 March 2008. The Panel notes the Parties' submissions on and differing use of the terms "genetically modified" versus "genetically engineered". The Panel understands that irrespective of differing usage, both Parties are referring to the manipulation of an organism's genes using modern molecular biology, including recombinant DNA

36. Pursuant to this framework, there are different requirements for the importation and trade of GM products intended for (1) "release into the environment" (*i.e.*, planting); and (2) for other uses, including human consumption and animal feed.[16] The importation and trade of GM products for the latter category, including of GM corn, requires an "authorization" from the competent Mexican authorities.[17] Every application for authorization of a new GM product – an "event" – must be accompanied by "[t]he study of the possible risks that the use or consumption by humans of the determined GMO might have on human health, including scientific and technical information related to its innocuousness."[18] The 2008 Biosafety Regulations set out in detail the requirements for the information to be included in such a study.[19]

37. For the purposes of importing GM products, the application for authorization additionally must include "the information and documentation demonstrating that the GMO is authorized in conformity with the legislation of the country of origin."[20] Once authorized, the GM product "may be freely commercialized and imported for their trading, as well as products containing such organisms and products derived from them."[21]

38. With respect to planting, in 1998, Mexico introduced a *de facto* moratorium on the commercial cultivation of GM corn, which remained in force until 2005.[22] As a result of a subsequent class action proceeding, in 2013, the Mexican courts issued a preliminary injunction which ordered the temporary suspension of "the issuance of commercial permits to release GM corn into the environment, and only to grant permits to release GM corn in experimental stages, but under judicial supervision" (the "**Moratorium**").[23] In 2021, the Supreme Court affirmed the continued preliminary injunction on commercial planting of GM corn pending the outcome of the class action proceedings.[24] Although a first-instance court thereafter issued a judgment in

technology, as opposed to other forms of genetic modification, such as grafting or induced mutation (USA IWS, ¶¶ 10-11; MEX IWS, ¶ 69). For ease of reference, and given the terminology used in the 2023 Decree itself, the Panel refers to "GM" unless quoting directly from the Parties' submissions or evidence.

[16] USA-85/MEX-250, 2005 Biosafety Law, Articles 32, 91 (referring to USA-85, PDF pp. 20, 33).

[17] USA-85/MEX-250, 2005 Biosafety Law, Articles 91-98 (referring to USA-85, PDF pp. 33-35).

[18] USA-85/MEX-250, 2005 Biosafety Law, Article 92 (referring to USA-85, PDF p. 34).

[19] USA-86/ MEX-251, 2008 Biosafety Regulations, Article 31 (referring to USA-86, PDF pp. 24-31).

[20] USA-85/MEX-250, 2005 Biosafety Law, Article 93 (referring to USA-85, PDF p. 34).

[21] USA-85/MEX-250, 2005 Biosafety Law, Article 97 (referring to USA-85, PDF pp. 34-35).

[22] MEX IWS, ¶ 102, citing MEX-86, Serratos Hernández, J. A., "Biosafety and the spread of transgenic corn in Mexico", 2009, Revista Ciencias.

[23] MEX IWS, ¶ 227, citing MEX-257, Ruling of the First Chamber of the Supreme Court of Justice of the Nation, 13 October 2021; MEX Rebuttal, ¶ 111, n. 165.

[24] MEX IWS, ¶ 229.

those proceedings in September 2023, this was subject to further challenges, and the proceedings remained ongoing as of the time of the writing of this Report.[25]

39. Meanwhile, on 13 April 2020, Mexico introduced the Federal Law for the Promotion and Protection of Native Corn (the "**Native Corn Law**"), the stated objective of which was:

> I. To declare the activities of production, commercialization and consumption of Native Corn and Constant Diversification, as a cultural manifestation in accordance with article 3 of the General Law of Culture and Cultural Rights;
>
> II. To declare the protection of Native Corn and Constant Diversification in everything related to its production, commercialization and consumption, as an obligation of the State to guarantee the human right to nutritious, sufficient and quality food, established in the third paragraph of article 40 of the Political Constitution of the United Mexican States, and
>
> III. To establish institutional mechanisms for the protection and promotion of Native Corn and Constant Diversification.[26]

40. The Law defines "Native Corn" as:

> Breeds of the Zea mays taxonomic category mays subspecies that indigenous peoples, growers and farmers have grown and grow, from seeds selected by themselves or obtained through exchange, in constant evolution and diversification, which are identified by the National Commission for the Knowledge and Use of Biodiversity.[27]

B. The 2020 Decree

41. On 31 December 2020, Mexico issued an executive decree with the stated purpose of gradually replacing the use of the herbicide chemical substance glyphosate until its total substitution by 31 January 2024 (the "**2020 Decree**").[28] In particular, the 2020 Decree stated as follows:

> The purpose of this Decree is to establish the actions to be carried out by the agencies and entities that comprise the Federal Public Administration, to gradually replace the use, acquisition, distribution, promotion and importation of the chemical substance called glyphosate and the agrochemicals used in our country that contain it as an active ingredient, with sustainable and culturally appropriate alternatives, which allow production to be maintained and are safe for

[25] MEX Rebuttal, ¶¶ 110-113, citing MEX-380, Judgment of the Twelfth District Judge in Civil Matters in Mexico City, 28 September 2023 (redacted).
[26] MEX-12, Native Corn Law, Article 1 (referring to the Panel's translation).
[27] MEX-12, Native Corn Law, Article 2.VII (referring to MEX-12-ENG).
[28] USA-92, 2020 Decree.

> human health, the biocultural diversity of the country and the environment. In this sense, from the entry into force of this Decree and until January 31, 2024, a transition period is established to achieve the total substitution of glyphosate.[29]

42. Article 2 of the 2020 Decree instructed the relevant authorities "to refrain from acquiring, using, distributing, promoting and importing glyphosate or agrochemicals containing it as an active ingredient, within the framework of public programs or any other government activity."[30] Article 3 directed the promotion of "sustainable and culturally appropriate alternatives to the use of glyphosate," and the support of "scientific research, technological developments and innovations" to identify such alternatives.[31]

43. While the stated concern of the 2020 Decree was about glyphosate and agrochemicals that contained it, the 2020 Decree also contained provisions with respect to GM corn, whether or not such corn had been treated with glyphosate. Article 5 provided that:

> The Secretariat of Environment, Secretariat of Natural Resources, Secretariat of Health, and Secretariat of Agriculture and Rural Development, as well as the National Council of Science and Technology, at the latest in the first semester of 2023, **shall promote the reforms of the applicable laws to avoid the use of glyphosate as an active substance in agrochemicals and genetically modified corn in Mexico**.[32]

44. The first part of Article 6 of the 2020 Decree codified the Moratorium on the commercial cultivation of GM corn:

> For the purpose of contributing to food security and sovereignty and as a special measure to protect native corn, corn fields, biocultural wealth, peasant communities, gastronomic heritage and the health of Mexicans, the authorities in matters of biosafety, within the scope of their competence, in accordance with the applicable regulations, **shall revoke and refrain from granting permits for the release of genetically modified corn seeds into the environment**.[33]

45. The second part of Article 6 instructed the competent authorities to revoke existing authorizations for GM corn events intended for human consumption, and not issue new authorizations for such events, with the stated purpose of achieving "total substitution" of GM

[29] USA-92, 2020 Decree, Article 1.
[30] USA-92, 2020 Decree, Article 2.
[31] USA-92, 2020 Decree, Article 3.
[32] USA-92, 2020 Decree, Article 5 (emphasis added).
[33] USA-92, 2020 Decree, Article 6 (emphasis added).

corn in the Mexican diet by the end of January 2024, while taking into account "the country's food self-sufficiency policies":

> Likewise, the biosafety authorities, within the scope of their competence, **in accordance with the applicable regulations and based on criteria of sufficiency in the supply of glyphosate-free corn grain, will revoke and refrain from granting authorizations for the use of genetically modified corn grain in the diets of Mexicans**, until its total substitution on a date no later than January 31, 2024, in congruence with the country's food self-sufficiency policies and with the transition period established in the first article of this Decree.[34]

46. The Sixth Transitional Article of the 2020 Decree specified that "[f]ailure to comply with this Decree will give rise to the corresponding administrative responsibilities in terms of the General Law of Administrative Responsibilities."[35]

C. Pre-2023 Decree Consultations

47. On 30 January 2023, the USA sent a formal, written request to Mexico under Article 9.6.14 of the SPS Chapter of the USMCA, requesting "an explanation of the reasons for" and "pertinent relevant information regarding" certain Mexican measures concerning agricultural biotechnology, in particular the 2020 Decree.[36]

48. According to the USA, Mexico provided a response on 14 February 2023, which directed the USA to the 2023 Decree issued the previous day (13 February 2023) and which repealed the 2020 Decree.[37]

49. As discussed further below, Mexico's position is that the 2023 Decree was prepared to take into account the USA's comments on the 2020 Decree, and therefore that the 2023 Decree was itself a response to prior consultations.[38] The USA rejects Mexico's position and says that it was not provided with an opportunity to comment on the 2023 Decree before its adoption.[39] The Parties' disagreement in this regard is set out in further detail in Section V.B below.

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[34] USA-92, 2020 Decree, Article 6 (emphasis added).
[35] USA-92, 2020 Decree, Sixth Transitional Article.
[36] USA IWS, ¶ 60.
[37] USA IWS, ¶ 61; USA-3/MEX-167, 2023 Decree, Second Transitional Article (referring to USA-3, PDF p. 11).
[38] MEX Rebuttal, ¶ 396, citing MEX-410, Press release "U.S. and Mexican authorities hold constructive dialogue on corn in Washington D.C., 16 December 2022; MEX-411, Press release, "Joint Statement from Ambassador Tai and Secretary Vilsack after Meeting with Mexican Government Officials," 16 December 2022; MEX-412, Inside US Trade, "Tai, Vilsack: Biotech talks with Mexico have been difficult, but U.S. is 'hopeful'," 18 August 2022; MEX Comments, ¶ 28.
[39] USA Comments, ¶ 49.

D. The 2023 Decree

50. The preamble of the 2023 Decree described certain actions that had been taken since the 2020 Decree, including a gradual reduction in imports of glyphosate and the promotion of potential alternatives to it.[40] With regard to GM corn, the preamble noted the 2020 Decree's provisions regarding both permits for the release of GM corn into the environment through planting, and authorizations for the use of GM corn in food intended for human consumption (dough and tortillas).[41] It stated that "it is deemed appropriate to update the current provisions in order to specify their content and scope."[42]

51. Article 1 of the 2023 Decree described its stated purpose as the following:

> to establish the actions to be taken by the agencies and entities that compose the Federal Public Administration, in relation to the use, sale, distribution, promotion and import of the chemical substance called glyphosate and agrochemicals that contain it as an active ingredient and genetically modified corn, in order to safeguard health, a healthy environment and food security and self-sufficiency.[43]

52. The 2023 Decree defines GM corn as "corn that has acquired a novel genetic combination, generated through the specific use of biotechnology techniques as defined in the applicable national and international regulations."[44] The 2023 Decree identifies three categories of corn:

> **Corn for human consumption**, which is intended for human consumption through nixtamalization or flour processing, which is the one carried out in the sector known as the dough and tortilla;
>
> **Genetically modified corn for industrial use for human consumption**, which is intended for human consumption, before industrialization other than that indicated in the preceding section, and
>
> **Genetically modified corn for animal feed**, which is intended for the livestock and aquaculture sector, for animal feed.[45]

53. Article 3 of the 2023 Decree instructs Mexican authorities, within the scope of their competencies, to abstain from using GM corn and glyphosate, "within the framework of public programs or any other government activity," and to establish corresponding security measures

[40] USA-3/MEX-167, 2023 Decree, preamble (referring to USA-3, PDF pp. 7-8).
[41] USA-3/MEX-167, 2023 Decree, preamble (referring to USA-3, PDF p. 8).
[42] USA-3/MEX-167, 2023 Decree, preamble (referring to USA-3, PDF p. 8).
[43] USA-3/MEX-167, 2023 Decree, Article 1 (referring to USA-3, PDF p. 9).
[44] USA-3/MEX-167, 2023 Decree, Article 2.II (referring to USA-3, PDF p. 9).
[45] USA-3/MEX-167, 2023 Decree, Article 2.III-V (referring to USA-3, PDF p. 9) (emphasis added).

and sanctions.[46] Article 4 of the 2023 Decree includes measures for the regulation of "the import, production, distribution and use of glyphosate" and to carry out "actions conducive to the establishment and generation of alternatives and sustainable and culturally adequate practices," with a transition period until 31 March 2024.[47] Article 5 instructs the Ministries of Agriculture and Rural Development and of Environment and Natural Resources to "guarantee, promote and implement sustainable and culturally appropriate alternatives to the use of glyphosate" during the transition period, and the National Council of Science and Technology to promote scientific research to that end.[48] As previously noted, the USA does not formally challenge Articles 3, 4 and 5 of the 2023 Decree in these proceedings.

54. The USA does challenge certain measures introduced by Articles 6 and 7 of the 2023 Decree.

55. Article 6 provides that:

> The biosafety authorities, within the scope of their competence, with the purpose of contributing to food security and sovereignty and as a special measure to protect native corn, the milpa, biocultural wealth, peasant communities, gastronomic heritage and human health, in accordance with the applicable regulations:
>
> I. Shall revoke and refrain from issuing permits for the release of genetically modified corn seeds into the environment in Mexico;
>
> **II. Shall revoke and refrain from issuing authorizations for the use of genetically modified corn grain for human consumption**; and
>
> III. Shall promote, in coordination with the National Council of Science and Technology, the reforms of the applicable legal ordinances, related to the object of this decree.[49]

56. The USA does not challenge Article 6.I, which constitutes the continued codification of the Moratorium on planting GM corn in Mexico. However, the USA challenges the measure in Article 6.II, which it describes as the "Tortilla Corn Ban."[50] Mexico refers to Article 6.II instead as the "End Use Limitation."[51] The Panel elects not to endorse either characterization, and instead refers neutrally to the measure introduced by Article 6.II of the 2023 Decree as the "**Article 6.II Measure**."

[46] USA-3/MEX-167, 2023 Decree, Article 3 (referring to USA-3, PDF p. 9).
[47] USA-3/MEX-167, 2023 Decree, Article 4 (referring to USA-3, PDF p. 9).
[48] USA-3/MEX-167, 2023 Decree, Article 5 (referring to USA-3, PDF pp. 9-10).
[49] USA-3/MEX-167, 2023 Decree, Article 6 (referring to USA-3, PDF p. 10) (emphasis added).
[50] USA IWS, ¶ 57.
[51] MEX IWS, ¶ 261.

57. Article 7 provides that:

> The agencies and entities of the Federal Public Administration will carry out the actions leading to in effect achieving the gradual substitution ["*realizarán las acciones conducentes a efecto de llevar a cabo la sustitución gradual*"] of genetically modified corn for animal feed and industrial use for human consumption.[52]
>
> Until the substitution referred to in the preceding paragraph is achieved, the Federal Commission for the Protection Against Sanitary Risks may issue authorizations of genetically modified corn for animal feed and industrial use for human consumption, being the responsibility of whoever uses it in Mexico that it does not have the destination foreseen in section III of the second article of this ordinance.[53]

58. Article 8 describes the process for implementing Article 7. It provides that:

> The implementation of alternatives for the gradual substitution in the country of genetically modified corn for animal feed and industrial use for human consumption shall be carried out based on supply sufficiency criteria, consistent with the country's food self-sufficiency policies, in accordance with scientific principles and relevant international standards, guidelines or recommendations. The relevant scientific studies will be carried out, for which the Federal Commission for the Protection Against Sanitary Risks will integrate a joint research protocol so that, under its coordination, a study on the consumption of genetically modified corn and the possible damages to health will be carried out by said entity and the equivalent instances of other countries.[54]

59. The USA refers to the measure introduced by Article 7 of the 2023 Decree as the "Substitution Instruction,"[55] while Mexico refers to it as the "Gradual Substitution,"[56] noting in particular the related text of Article 8. Neither Article 7 nor 8 clarify the steps and the sequence implied by the term "gradual substitution." However, at the Hearing, Mexico stated that "substitution" could not and would not commence before the completion of a corresponding risk assessment pursuant to Article 8 of the 2023 Decree.[57] The USA counters that this alleged sequencing is not clear from the text itself, and that Article 7 in any event prejudges the outcome of any future risk assessment by mandating gradual substitution.[58] These positions are discussed further in

[52] See n. 2 above with respect to the translation of the first paragraph of Article 7 at USA-3.
[53] USA-3/MEX-167, 2023 Decree, Article 7 (referring to USA-3, PDF p. 10).
[54] USA-3/MEX-167, 2023 Decree, Article 8 (referring to USA-3, PDF p. 10).
[55] USA IWS, ¶ 58.
[56] MEX IWS, ¶ 261.
[57] Tr. Day 2, p. 14 [ENG] (Mexico stating that "Only if all the conditions and qualifications set forth in articles seven and eight are met, the specific conducive actions for gradual substitution may be carried out.").
[58] USA Comments, ¶¶ 6, 11.

Section V.A.2). In the meantime, to avoid any confusion regarding terminology, and accepting that Article 8 is relevant to understanding Article 7, which the USA challenges, the Panel refers to this measure as the "**Articles 7/8 Measure**."

60. Finally, Article 10 of the 2023 Decree contains similar language to that which previously was reflected, for the 2020 Decree, in a Transitional Article. Specifically, Article 10 provides that:

> Non-compliance with the provisions of this Decree by the agencies and entities of the Federal Public Administration shall give rise to the corresponding administrative liabilities in terms of the General Law of Administrative Responsibilities.[59]

E. Post-2023 Decree Consultations

61. As discussed in Section II.A above, following the introduction of the 2023 Decree, the USA requested consultations regarding certain aspects of the 2023 Decree, and the USA and Mexico held such consultations on 29 June 2023, with Canada's participation.

F. Clarifications Regarding Corn Usage and Terminology

62. Finally, through their submissions in these proceedings, the Parties have clarified certain terminology regarding corn varieties and made certain contentions regarding usage in the period prior to the 2023 Decree. Specifically, Mexico says that the corn for human consumption through nixtamalization or flour processing (minimally processed foods) that is referenced in Article 6.II of the 2023 Decree is primarily a category of corn known as "**white corn**," while corn for industrial use for human consumption and animal feed, referenced in Articles 7 and 8, is primarily what is known as "**yellow corn**".[60] The Parties agree that the USA exports significantly more yellow corn to Mexico than white corn.[61] In addition, Mexico asserts that it is practically self-sufficient in white corn production.[62]

63. The Parties also agree that the vast majority of corn cultivated in the USA is GM corn and that the USA does not have any mandatory mechanism in place to separate out or label GM corn and non-GM corn for export purposes.[63] Nor has Mexico historically imposed any labeling requirements to distinguish between GM and non-GM corn.[64] The absence of labeling for GM

[59] USA-3/MEX-167, 2023 Decree, Article 10 (referring to USA-3, PDF p. 11).
[60] MEX IWS, ¶ 236.
[61] MEX IWS, ¶¶ 237-248; USA Rebuttal, ¶¶ 206, 260, citing USA-229, U.S. Census Bureau Data, "U.S. Corn Exports to Mexico 2022-Jan. 2024".
[62] MEX IWS, ¶ 237.
[63] MEX IWS, ¶¶ 96, 111; USA Rebuttal, ¶ 255; Tr. Day 2, p. 11 [ENG].
[64] Tr. Day 2, p. 12 [ENG].

corn grain as such may be distinguished from how *processed* goods are now treated in both countries. Although the record is not entirely clear, the Panel understands that since 1 January 2022, the USA requires most manufacturers, retailers and importers of food products that are intended for human consumption and contain certain bioengineered substance (including corn) to so indicate on the packaging, either in the form of text, a symbol, electronic/digital link or text message disclosure.[65] In any event, as the USA observes, the disclosure requirement does not apply to foods exported from the USA, nor does it apply to commodity grain shipments. As for Mexico, it stated during the Hearing that new legislation that came into force in April 2024 requires certain warnings when processed foods contain ingredients that directly derive from GMOs.[66] In its written responses to the Panel's questions, Mexico elaborates that Article 21 of the new law establishes that "producers and distributors of processed foods must warn [...] when their products contain ingredients that directly derive from the use of genetically modified organisms."[67] No such labeling or warning requirements currently exist for GM corn grain as such.

64. In response to the Panel's question regarding whether there was data on the volume of Mexico's imports of GM and non-GM corn, the USA confirms that it "does not maintain data on the volume of U.S. corn exports to Mexico that are [GE] versus non-GE, nor is the United States aware of any data in Mexico that would reflect this information."[68] Mexico states that "there is currently no distinction that allows identifying whether or not corn imports correspond to GM corn," and, consequently, "there are no import volumes differentiated between GM corn and non-GM corn."[69]

65. In response to the Panel's question regarding the availability of data identifying the percentage of GM corn treated with glyphosate, the USA states that:

> Based on the data available, from 2017 through 2021, an estimated 90 percent of U.S. corn acreage was planted with herbicide-tolerant corn varieties, and the remaining 10 percent was planted with non-herbicide tolerant corn varieties. Available usage data covering this time period indicate that, on average, approximately 80 percent of herbicide-tolerant corn acreage was treated with glyphosate annually, and 15 percent of non-herbicide tolerant corn acreage was treated with glyphosate annually.

[65] MEX Comments, ¶ 4, citing MEX-474, 7 USC. § 1639; MEX-473, 7 CFR, § 66.
[66] Tr. Day 2, p. 12 [ENG].
[67] MEX Responses to Panel Questions, ¶ 5, referring to the General Law of Adequate and Sustainable Food, issued on 17 April 2024.
[68] USA Responses to Panel Questions, ¶ 39.
[69] MEX Responses to Panel Questions, ¶ 125.

> In other words, during this time period, approximately 73.5 percent of all U.S. corn acreage was treated with glyphosate annually. Moreover, approximately 18 percent of all U.S. corn acreage was herbicide-tolerant corn varieties that were not treated with glyphosate.[70]

66. In this regard, Mexico says that it is not arguing that "all GM corn offered for export to Mexico has necessarily been treated with glyphosate," however, Mexico submits that "it is a fact that the vast majority of GM corn has been treated with glyphosate-based herbicide formulations and/or one or more other pesticides."[71] Mexico also adds that "stacked" GM varieties (a GM plant variety that has undergone more than one genetic modification) are treated with several different pesticides in combination during the growing cycle.[72]

67. At the Hearing, Mexico rejected the USA's assumption that before the Measures, "genetically modified white corn from the United States has been [u]sed in the production of masa and tortillas."[73] Instead, Mexico said "that this is not the case; masa and tortillas are only made with native corn, before the measure and at present."[74] In response to the Panel's questions, Mexico clarified that:

> Until before the 2020 Decree came into force, there was no rule preventing the use of genetically modified corn in these products, however, historically, nixtamalized products are produced with non-GMO white corn.
>
> For example, non-GM white corn is used for tortillas and this includes native corn and non-GM hybrid corn […].[75]

68. In its written responses to the Panel's questions, Mexico further states that:

> GM corn grain is not generally consumed directly by humans in Mexico for the following reasons: (i) GM corn cultivation is currently not permitted in Mexico; (ii) Mexico is generally self-sufficient with respect to white corn used for direct human consumption; and (iii) while Mexico imports large volumes of corn, including GM corn,

[70] USA Responses to Panel Questions, ¶¶ 40-41 (emphasis omitted). The USA clarified that the term "herbicide-tolerant corn," as used in the passage above, "is largely synonymous with transgenic corn, with a small number of exceptions," and that "the estimated percent of glyphosate-tolerant and non-glyphosate tolerant corn treated with glyphosate is approximately equal to the values presented above for herbicide-tolerant and non-herbicide-tolerant corn." Id. at n. 44.
[71] MEX Responses to Panel Questions, ¶ 24.
[72] MEX Responses to Panel Questions, ¶ 24, citing Antoniou Expert Report, ¶ 25.
[73] Tr. Day 1, p. 87 [ENG].
[74] Tr. Day 1, p. 87 [ENG].
[75] Tr. Day 2, p. 8 [ENG].

> it is generally corn for other end uses, including yellow corn (or "field corn") that is not suitable for direct human consumption.[76]

69. In its comments on the USA's responses to the Panel's questions, Mexico reiterated that, in Mexico, people consume more whole grain corn, in the form of unprocessed or minimally processed foods, than in any other country.[77]

70. In any event, Mexico's position is that "domestic production of white corn (non-GM hybrid and native) generally covers the demand for corn intended for direct human consumption" and that "Mexico has presented evidence of the presence of transgenes in products of the masa and tortilla industry."[78] Mexico's point is that the GM white corn that is imported may be unintentionally diverted for planting, for example through traditional seed exchange practices. This could result in transgenic introgression (the transfer of modified genes between GM and non-GM corn), which may lead to the presence of transgenic proteins in food products.[79]

71. In response to the Panel's question about how much of the white corn produced in Mexico is classified as *native* corn, Mexico refers to "information for the period 2017-2023 generated by the Undersecretariat of Food Self-Sufficiency of the Secretariat of Agriculture and Rural Development based on data obtained from the 2007 and 2022 Agricultural Census of INEGI, as well as the Agrifood and Fisheries Information Service."[80] The tables provided include two categories of corn: (1) native seed, and (2) improved seed.[81]

72. Mexico defines "native seed" as:

> Native seed or "semilla criolla" is understood as "the seed generally native to the region, traditionally used in subsistence agriculture. It is characterized by being used in the planting of small plots, with little use of fertilizers and pesticides, and where the final destination of the production is usually selfconsumption," that is, those varieties of native corn that are recognized by CONABIO [the National Commission for the Knowledge and Use of Biodiversity] as indicated in Article 2.VII of the Federal Law for the Promotion and Protection of Native Corn.[82]

73. Mexico defines "improved seed", which the Panel understands is a category of non-GM corn

[76] MEX Responses to Panel Questions, ¶ 2.
[77] MEX Comments, ¶ 22.
[78] MEX Responses to Panel Questions, ¶ 4, citing MEX Rebuttal, ¶¶ 283, 285, 300, 406, 531.
[79] MEX Responses to Panel Questions, ¶¶ 74-77.
[80] MEX Responses to Panel Questions, ¶ 126.
[81] MEX Responses to Panel Questions, pp. 42-44, Tables 1-7.
[82] MEX Responses to Panel Questions, n. 92.

seeds that includes "hybrid seeds," as previously referenced by Mexico, as:

> Improved and certified seed is defined as that "resulting from a process of improvement or selection of crop varieties in order to increase the productive capacity, resistance to diseases, pests, drought, or any other desirable characteristic. It includes hybrid seeds and all those treated, selected and packaged by commercial companies", distinguishing them from GM seeds.[83]

74. Mexico asserts, based on the information provided, that, in 2022, native seed represented 55.7% of production, while improved seed represented 39.4% (with no data on 4.9%).[84] In 2023, 53% of the production was from native seed and 42.4% was from improved seed (with no data on 4.7%).[85] The available data shows that production from native seed has remained around 55-58% since 2017 (indicating a slight decrease over time), while production from improved seed remained between 37-40% of total production (indicating a slight increase over time).[86]

75. Mexico says that "according to the information contained in the Agricultural Census (CA) 2022 and 2007 of INEGI and the Agrifood and Fisheries Information Service (SIAP 2022), 67% of white corn producers use native seed, of which 46% are indigenous peoples and communities."[87] The USA, in its comments on Mexico's responses, notes that: (1) it was unable to locate any public data to corroborate Mexico's statement that 67% of white corn producers use native seed; and (2) the data shows that "it is 46 percent of *all* Mexican farmers—not 46 percent of Mexican *corn* farmers—that identify as indigenous."[88]

76. In its submissions, Mexico refers to the traditional, informal exchange of seeds, which Mexico says is part of the traditional agricultural practices of indigenous peoples.[89] In response to the Panel's question about whether Mexico regulates seed exchange as it pertains to corn, Mexico draws a distinction between: (1) "the formal or commercial exchange of seeds (i.e., seed trade)" and (2) "the traditional, informal exchange of seeds" referenced above.[90] Mexico states that the Federal Law on Seed Production, Certification and Trade regulates the exchange of seeds,

[83] MEX Responses to Panel Questions, n. 93.
[84] MEX Responses to Panel Questions, p. 44, Table 6.
[85] MEX Responses to Panel Questions, p. 44, Table 7.
[86] MEX Responses to Panel Questions, pp. 42-44, Tables 1-7.
[87] MEX Responses to Panel Questions, ¶ 127.
[88] USA Comments, ¶¶ 67-68 (emphasis in original), citing USA-310, National Institute of Statistics and Geography ("INEGI"), Agricultural Census 2022, "Number of active agricultural production units and percentage of producers according to self-identification and indigenous speaking status by federal entity, municipality and sex of the producer".
[89] MEX IWS, ¶ 124; MEX Rebuttal, ¶ 472.
[90] MEX Responses to Panel Questions, ¶ 128.

however, while "the Law recognizes the uses and customs of rural and indigenous communities, including the informal exchange of these seeds, [it] does not seek to regulate them."[91]

IV. MEASURES AT ISSUE, TERMS OF REFERENCE, RULES OF INTERPRETATION, AND BURDEN OF PROOF

A. Measures at Issue

77. This dispute concerns the Article 6.II Measure and the Articles 7/8 Measure as quoted in full above. The USA does not challenge any of the other measures introduced by the 2023 Decree.[92]

B. Terms of Reference

78. The Panel's terms of reference are provided in Article 31.7 of the USMCA. They are to:

> (a) examine, in the light of the relevant provisions of this Agreement, the matter referred to in the request for the establishment of a panel under Article 31.6 (Establishment of a Panel); and
>
> (b) make findings and determinations, and any jointly requested recommendations, together with its reasons therefor, as provided for in Article 31.17 (Panel Report).

C. Applicable Rules of Interpretation

79. Pursuant to Article 31.13.4 of the USMCA, the Panel shall interpret the USMCA "in accordance with customary rules of interpretation of public international law, as reflected in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*" (the "**VCLT**"). Both Parties base their arguments on the text of the USMCA and refer to the customary rules of interpretation of public international law as embodied in Article 31 of the VCLT.[93] Article 31 of the VCLT provides, in part, that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[94]

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[91] MEX Responses to Panel Questions, ¶ 129, citing MEX-470, Federal Law of the Production, Certification and Trade of Seeds, Art. 3.
[92] USA IWS, ¶ 70; MEX IWS, ¶¶ 260-261.
[93] USA IWS, ¶ 68; MEX IWS, ¶ 41.
[94] Article 32 of the VCLT (Supplementary means of interpretation) reads: "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."

D. Burden of Proof

80. The Panel is further guided by Article 14 of the RoP, which contains a special rule on the allocation of the burden of proof as follows:

> 1. A complaining Party asserting that a measure of another Party is inconsistent with this Agreement, that another Party has failed to carry out its obligations under this Agreement, that a benefit the complaining Party could reasonably have expected to accrue to it is being nullified or impaired in the sense of Article 31.2(b) (Scope), or that there has been a denial of rights under Article 31-A.2 (Denial of Rights) or Article 31-B.2 (Denial of Rights), has the burden of establishing that inconsistency, failure, nullification or impairment, or denial of rights. […]
>
> 2. A responding Party asserting that a measure is subject to an exception or affirmative defence under the Agreement has the burden of establishing that the exception or defence applies.

V. THE PARTIES' CLAIMS AND DEFENSES

81. The USA claims that the Article 6.II Measure and the Articles 7/8 Measure (together, the "**Measures**" or informally "the measures at issue") are inconsistent with several provisions of the SPS Chapter and the National Treatment and Market Access for Goods Chapter of the USMCA.[95] Mexico rejects the USA's claims and argues that the Measures are consistent with the USMCA.[96]

82. In the alternative, Mexico contends that even if the Measures are found to be inconsistent with the USMCA, they: (1) are justified under Article 24.15.2 of the USMCA;[97] (2) fall within the exceptions provided for under Article XX (a) and (g) of the General Agreement on Tariffs and Trade 1994 (the "**GATT 1994**");[98] or (3) fall within the exception under Article 32.5 of the USMCA.[99] The USA rejects Mexico's defenses, arguing that (1) Article 24.15.2 of the USMCA does not operate as an exception that provides an affirmative defense;[100] (2) Mexico has not demonstrated that it satisfies Article XX of the GATT 1994;[101] and (3) Mexico has not met the requirements under Article 32.5 of the USMCA.[102]

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[95] USA IWS, § V; USA Rebuttal, §§ IV-V.
[96] MEX IWS, § VII; MEX Rebuttal, § V.
[97] MEX IWS, § VII.I.
[98] MEX IWS, § VII.J-K; MEX Rebuttal, § V.I-J.
[99] MEX IWS, § VII.L; MEX Rebuttal, § V.K.
[100] USA Rebuttal, § VI.
[101] USA Rebuttal, § VII.
[102] USA Rebuttal, § VIII.

83. Should the Panel find that the exception pursuant to Article 32.5 of the USMCA does apply to the Measures, the USA requests a determination under Article 31.13.1(b)(iii) that a benefit it could have reasonably expected to accrue to it under Chapters 2 or 9 of the USMCA is being nullified or impaired pursuant to Article 31.2.(c) (so-called non-violation).[103] Mexico, in turn, contends that the Measures do not fall within the scope of Article 31.2.(c).[104]

84. The Panel addresses each of the Parties' claims and defenses in the sections that follow, in a sequence that appears to be most logical for avoiding duplication of arguments and analysis.

A. Article 9.2: SPS Measures

1) The Relevant Provisions

85. Article 9.2 of the USMCA sets out the scope of the SPS Chapter as follows:

> This Chapter applies to all sanitary and phytosanitary measures of a Party that may, directly or indirectly, affect trade between the Parties.

86. Article 9.1 of the SPS Chapter incorporates the definitions from Annex A of the World Trade Organization's (the "**WTO**") *Agreement on the Application of Sanitary and Phytosanitary Measures* (the "**SPS Agreement**"), except as otherwise provided in Article 9.1.2 of the USMCA. Annex A, paragraph 1 of the SPS Agreement defines an SPS measure as:

> Any measure applied:
>
> (a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;
>
> (b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;
>
> (c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or
>
> (d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.
>
> Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, *inter alia*, end

[103] USA Rebuttal, § IX.
[104] MEX Rebuttal, § V.L.

> product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety.

2) The Parties' Arguments

87. The USA contends that the SPS Chapter of the USMCA applies because both of the Measures are (i) SPS measures; and (ii) may affect trade between the Parties.[105]

88. The USA submits that both Measures are SPS measures because the 2023 Decree's "main purpose" includes "the rights to health and a healthy environment, native corn, . . . as well as to ensure nutritious, sufficient and quality diet."[106] The USA refers to the Mexican government's public statements to assert that the Measures are "clearly applied for one or more of the purposes set forth in Annex A, paragraph 1 of the SPS Agreement."[107] In the USA's view, this is the case irrespective of whether Mexico introduced the Measures to address concerns related to human health or to native corn.[108] The USA adds that "[t]he fact that a measure may serve more than one purpose does not alter its classification as an SPS measure."[109]

89. Mexico accepts in principle that the Measures fall within the definition of an SPS measure to the extent that they are applied to protect human health or the life or health of native corn.[110] Mexico contends however that the measures introduced by the 2023 Decree also seek to fulfill additional, non-SPS objectives related to native corn, such as to protect the "milpa", gastronomical heritage, and the fulfillment of obligations towards indigenous peoples.[111] Mexico submits that "[t]hese elements are linked to the history of the first settlers of the current Mexican territory, which is why they are central to the cultural identity of Mexicans," and "is why their protection was considered when issuing the 2023 Decree."[112] With respect to the

[105] USA IWS, ¶¶ 82-107.
[106] USA IWS, ¶ 86 (Article 6.II Measure); ¶ 99 (Articles 7/8 Measure), citing USA-3, 2023 Decree, Preamble.
[107] USA IWS, ¶¶ 87-90 (Article 6.II Measure); 100-101 (Articles 7/8 Measure), citing USA-98, "Stenographic Version of the Morning Press Conference of President Andrés Manuel López Obrador," 15 February 2023; USA-99, Mexican Secretariat of Economy, "Secretariat of Economy and USTR Discuss the Corn Decree," 27 February 2023; USA-100, "Transcript of the Morning Press Conference of President Andrés Manuel López Obrador," 7 March 2023.
[108] USA IWS, ¶¶ 90-91.
[109] USA IWS, ¶ 92 (Article 6.II Measure); ¶ 100 (Articles 7/8 Measure).
[110] MEX IWS, ¶ 334.
[111] MEX IWS, ¶¶ 334-335; MEX Rebuttal, § III.A.
[112] MEX Rebuttal, ¶ 138, citing Espinosa Expert Report, ¶ 56.

other non-SPS objectives, such as food security and self-sufficiency, Mexico adds that "these objectives could be consequences of the different measures established by the decree, and are relevant to analyze the context of the decree, but not necessarily the purposes listed in Annex A-1."[113]

90. However, with respect to the Articles 7/8 Measure, Mexico argues that it falls outside of the definition of an SPS measure for another reason: because it is not an "applied" measure within the meaning of Annex A, paragraph 1 of the SPS Agreement, and consequently the USA's claim is premature.[114] In response to the Panel's questions at the Hearing, Mexico stated that with respect to the scientific studies envisioned in Article 8 of the 2023 Decree, Mexico had not yet set a schedule for scientists to undertake the research.[115] With respect to the timing, Mexico explains that because the USA and Canada requested consultations under the USMCA less than a month after the issuance of the 2023 Decree, and because those consultations were held in June 2023 as a preliminary phase of the current dispute settlement procedure, "[i]t is reasonable for the Mexican authorities to await the outcome of this dispute before planning next steps in relation to Articles 7 and 8."[116]

91. In its written responses to the Panel's Questions, Mexico elaborates that its statement at the Hearing that "no regulatory or administrative mechanism capable of beginning to carry out a 'gradual substitution' … is possible in the foreseeable future," reflects the reality that "(i) there are many steps that must be completed to develop and implement such a mechanism, (ii) the process will require significant time and resources, and (iii) no steps have been taken yet."[117]

92. Mexico adds that this "does not mean that there is no intention 'for acting on' the provisions in Articles 7 and 8."[118] In particular, Mexico points to the "appropriate actions" referenced in Article 7 of the 2023 Decree, which, in Mexico's view, "are disciplined by the conditions and requirements set out in Article 8," and consequently must be read together.[119] This means, according to Mexico, "[i]t is only once all of the conditions and requirements set forth in

[113] Tr. Day 2, p. 22 [ENG].
[114] MEX IWS, ¶¶ 307-312; MEX Rebuttal, ¶¶ 215-241; MEX Comments, ¶ 12 (stating that: "Mexico notes that the obligations under Chapter 9 of the USMCA and the dispute settlement process provided for in Chapter 31 may not be used by a Party to obtain a declaratory determination or to otherwise prevent another Party from taking regulatory measures in the public interest before such measures […] have been designed, and much less applied. This would prejudge a Party's ability to design and implement the measure in accordance with its international obligations.")
[115] Tr. Day 2, p. 16 [ENG].
[116] MEX Responses to Panel Questions, ¶ 17.
[117] MEX Responses to Panel Questions, ¶ 6.
[118] MEX Responses to Panel Questions, ¶ 6.
[119] MEX Responses to Panel Questions, ¶ 7. See n. 2 above with respect to the translation of the first paragraph of Article 7 at USA-3.

Articles 7 and 8 are met that the 'appropriate actions' may be carried out to implement and conduct a gradual substitution."[120] These conditions include that the actions are "appropriate"; "in accordance with scientific principles and relevant international standards, guidelines or recommendations"; and "based on supply sufficiency criteria, consistent with the country's food self-sufficiency policies."[121]

93. With respect to the penalties contemplated in Article 10 of the 2023 Decree in the case of non-compliance, Mexico states that because "Articles 7 and 8 do not impose any time requirements, non-compliance within the meaning of Article 10 does not arise merely because the competent authorities have not yet started to take the steps set forth in these provisions," instead, "the risk of non-compliance arises from the possibility of taking actions that are not 'appropriate'."[122]

94. In response to the Panel's question regarding whether the current wording of Article 7 prejudges the outcome of the relevant scientific studies required in Article 8, Mexico submits that:

> Articles 7 and 8 in no way establish a predetermined result. They do not dictate that implementation of a "gradual substitution" measure is inevitable. Similarly, they do not require that such a measure must be "total" or unconditional in scope. To the contrary, these provisions explicitly condition the actions to be taken and the implementation of a "gradual substitution" measure on the specific requirements outlined above. The competent authorities have broad discretion to determine how to comply with these requirements, including in relation to the outcomes of the relevant scientific studies, scientific principles and the relevant international standards, and in developing the scope, design, and structure of a future measure, and the mechanisms, conditions, and exceptions that would be applied. Again, all of this remains in the future.[123]

95. Mexico says that "[w]hile the wording in Article 7 is forcefully drafted, it does not and cannot predetermine the outcomes of the relevant scientific studies required under Article 8 [and that] interpreted in its proper context, the instructions in Article 7 cannot render the conditions and requirements in Article 8 superfluous or inutile."[124] Mexico adds that if "the relevant scientific studies, including the coordinated assessment of possible damages to health, were to establish that substitution of GM corn with non-GM alternatives is not warranted for animal feed and/or

[120] MEX Responses to Panel Questions, ¶ 10.
[121] MEX Responses to Panel Questions, ¶ 7; MEX Comments, ¶ 9.
[122] MEX Responses to Panel Questions, ¶ 11.
[123] MEX Responses to Panel Questions, ¶ 14 (internal citations omitted).
[124] MEX Responses to Panel Questions, ¶ 20.

industrial food processing, a 'gradual substitution' measure could not be implemented in compliance with Articles 7 and 8," and, consequently, could not be implemented at all.[125]

96. In the alternative, Mexico says that if the Panel finds that the Articles 7/8 Measure is an SPS measure, it is a "provisional" measure within the meaning of Articles 9.6.4(c) and 9.6.5 of the USMCA and Article 5.7 of the SPS Agreement.[126] In particular, Mexico highlights that "all timing requirements were withdrawn in the 2023 Decree to allow the competent authorities in Mexico to address" the various conditions and requirements set out in Articles 7 and 8. Mexico submits that "this is broadly in line with the requirements contained in Article 9.6.5 of the [USMCA], including the requirement to 'seek to obtain the additional information necessary for a more objective assessment of risk', and to 'complete the risk assessment after obtaining the requisite information'."[127]

97. Mexico adds that the conditions for provisional measures set out in Article 9.6.5 of the USMCA "are consistent with those in the second sentence of Article 5.7 of the SPS Agreement," regarding which the WTO Appellate Body has noted that they "must be interpreted keeping in mind that that the precautionary principle finds reflection in this provision."[128] In response to the Panel's questions, "Mexico confirms that the precautionary principle has played an important role in the origins and evolution of the measures at issue in the 2023 Decree, although not to the exclusion or detriment of Mexico's USMCA and WTO obligations."[129] As such, and with reference to WTO panel reports, Mexico rejects the USA's view that the precautionary principle is not relevant to the legal analysis in this case.[130] Mexico's further arguments on the

[125] MEX Responses to Panel Questions, ¶ 21.
[126] MEX IWS, ¶¶ 350-360; MEX Rebuttal, ¶¶ 242-262. Article 9.6.4(c) of the USMCA provides: "Recognizing the Parties' rights and obligations under the relevant provisions of the SPS Agreement, this Chapter does not prevent a Party from: […] adopting or maintaining a sanitary or phytosanitary measure on a provisional basis if relevant scientific evidence is insufficient." Article 9.6.5 of the USMCA provides: "If a Party adopts or maintains a provisional sanitary or phytosanitary measure if relevant scientific evidence is insufficient, the Party shall within a reasonable period of time: (a) seek to obtain the additional information necessary for a more objective assessment of risk; (b) complete the risk assessment after obtaining the requisite information; and (c) review and, if appropriate, revise the provisional measure in light of the risk assessment."
[127] MEX Responses to Panel Questions, ¶ 47.
[128] MEX Rebuttal, ¶ 252; MEX IWS, ¶ 355, citing MEX-294, Appellate Body Report, *United States - Continued Suspension of Obligations in the EC - Hormones Dispute*, WT/DS320/AB/R, adopted on 14 November 2008 ("**Appellate Body Report, *US-Continued Suspension***"), ¶ 860. In instances where the Parties have introduced the same legal authority multiple times, the Panel cites to both legal authority numbers, except when referring to the Parties' submissions citing a legal authority, in which case the Panel indicates only the legal authority number cited by the Parties themselves.
[129] MEX Responses to Panel Questions, ¶ 44.
[130] MEX Comments, ¶¶ 15-16, citing MEX-286, Appellate Body Report, *European Communities - Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted on 13 February 1998 ("**Appellate Body Report, *EC-Hormones***"), ¶ 124, cited in MEX-294, Appellate Body Report, *US-Continued Suspension*, ¶ 680; MEX-277, Panel Reports, *European Communities - Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, Add.1 a Add.9 and Corr.1 / WT/DS292/R, Add.1 a

precautionary principle are addressed in Section V.C below, in the context of the Parties' arguments about Article 9.6.6(a) of the USMCA.

98. The USA rejects Mexico's position that the Articles 7/8 Measure is not an applied measure, and argues that it does qualify as such, because it mandates substitution as the ultimate result and is contained in a Presidential Decree, which imposes administrative penalties on agencies that do not comply.[131] In response to the fact that Mexico had not yet commissioned the scientific studies contemplated in Article 8 of the 2023 Decree, the USA stated that "the main thrust of the SPS chapter is that science must come first."[132] In the USA's view, the Articles 7/8 Measure "is not a neutral instruction to study something further. It instructs substitution even where it indicates authorizations are available in the interim."[133] The USA's view is that "the measure sends a powerful signal to the market and quite obviously pre-judges this [scientific] inquiry."[134] For this reason, the USA says that the instruction is "not harmless," because potential investors "now have to consider that the market may be severely limited," even if they "have uncertainty about whether, when, and to what extent the opportunity to export may be taken away."[135] The USA adds that "[t]he fact that the measure may not be carried out despite its clear dictate, or may be carried out but on an indeterminate timeline provides no assurance."[136] In fact, the USA contends that:

> While the exact timing of when to take the "appropriate actions" under the Substitution Instruction [the Articles 7/8 Measure] is left to the discretion of the implementing agencies, whether to take the actions to achieve substitution is not. Should any relevant government agency in Mexico fail to comply with the provisions of the 2023 Corn Decree, including the Substitution Instruction, the Decree establishes that these agencies will be subject to administrative penalties.[137]

Add.9 and Corr.1 / WT/DS293/R, Add.1 a Add.9 and Corr.1, adopted on 21 November 2006 ("**Panel Reports, *EC-Biotech***"), ¶ 7.3065.

[131] USA Rebuttal, ¶ 58, citing USA-3, 2023 Decree, Articles 7, 10.

[132] Tr. Day 2, p. 21 [ENG].

[133] Tr. Day 2, p. 21 [ENG]; see also USA Responses to Panel Questions, ¶¶ 5-7; USA Comments, ¶ 11 (stating that: "there is no reasonable way to understand [the instruction] as a neutral call for scientific inquiry […] The Substitution Instruction is plain on its face; the measure preordains that GE corn must be replaced with non-GE corn, leaving no place for genuine scientific inquiry.")

[134] USA Comments, ¶ 6.

[135] Tr. Day 2, p. 21 [ENG].

[136] Tr. Day 2, p. 21 [ENG].

[137] USA Responses to Panel Questions, ¶ 8; see also USA Comments, ¶ 7 (rejecting Mexico's suggestion that "the omission of a specific date or general timeline for execution of a measure thereby removes that measure from the scope of the SPS Chapter"); and ¶ 10 (reiterating that: "The Substitution Instruction is not neutral; it mandates substitution and preordains the outcome. Mexico's eleventh-hour attempts to claim that the substitution may not even be undertaken at all—despite the clear recourse of administrative penalties for failure to do so—do not cure this measure of its deficiencies under USMCA"). See n. 2 above with respect to the translation of the first paragraph of Article 7 at USA-3.

99. The USA also rejects Mexico's alternative argument that the Articles 7/8 Measure is a provisional measure within the meaning of Article 9.6.5 of the USMCA, on the basis that the text of the measure is not time limited and it is, consequently, a final, adopted measure that is currently in effect.[138] With respect to Mexico's reliance on the precautionary principle, the USA submits that it "has no role in the legal analysis here."[139] This is because, the USA says, "[i]t is the consistency of Mexico's measures with the USMCA that is before this Panel, and the precautionary principle is incapable of rendering an inconsistent measure otherwise."[140] The USA's position is that Article 9.6.5 of the USMCA requires both that it be established that there is insufficient evidence and that there be a specific plan of follow-on activity "quickly to resolve the insufficiency of evidence to actually do the risk assessment,"[141] all "within a reasonable amount of time."[142] The USA contends that Mexico has failed to evidence that it has done any such follow-on activity "in the year-plus since the [Articles 7/8 Measure] was adopted, contravening Article 9.6.5."[143] In the USA's view, "[a] Party cannot invoke Article 9.6.5 simply on the basis that the existing scientific evidence does not support that Party's views, or by ignoring the ample scientific evidence already available to conduct an appropriate risk assessment."[144]

100. Finally, with respect to the second element of Article 9.2, the USA contends that the Article 6.II Measure may affect international trade because it "prohibits GE corn imports into Mexico for certain purposes."[145] With respect to the Articles 7/8 Measure, the USA submits that it may affect international trade because "according to the plain text and as applied, [it] is intended to restrict the importation of GE corn for animal feed and for industrial use for human consumption in Mexico."[146]

101. Mexico's view is that the 2023 Decree does not include any restrictions on importing GM corn to Mexico. Rather, the 2023 Decree regulates the *use* of GM corn in Mexico, by barring the use of GM corn grain for direct human consumption.[147] Mexico emphasizes that any denial of

[138] USA Rebuttal, ¶¶ 61-64.
[139] Tr. Day 2, p. 31 [ENG].
[140] USA Comments, ¶ 25.
[141] Tr. Day 2, p. 32 [ENG].
[142] USA Comments, ¶ 8.
[143] USA Comments, ¶ 8 and ¶¶ 26-27.
[144] USA Comments, ¶ 27, citing USA-230, Panel Report, *Japan - Measures Affecting the Importation of Apples*, WT/DS245/R, adopted on 10 December 2003 ("**Panel Report, *Japan-Apples***"), ¶¶ 8.219-8.220.
[145] USA IWS, ¶ 95.
[146] USA IWS, ¶ 106.
[147] MEX IWS, ¶¶ 253, 263-271; MEX Rebuttal, ¶ 167.

authorizations for new events must be in compliance with the 2005 Biosafety Law[148] and that no existing authorizations have yet been revoked.[149]

3) The Panel's Analysis

102. As a threshold matter, the Panel notes Mexico's position that the 2023 Decree refers to a number of different objectives underlying the various measures it adopts, and that some of these objectives involve SPS concerns (*i.e.*, protecting human and plant life and health), while others do not (*e.g.*, biocultural wealth and peasant communities). However, as Mexico also accepts,[150] simply because a measure may have *additional* purposes beyond an invocation of SPS protection does not render it a non-SPS measure. Rather, if a measure is motivated at least in part by SPS goals, and if it "may, directly or indirectly, affect trade between the Parties," it is an SPS measure to which the requirements of USMCA Chapter 9 apply. At the same time, the USMCA provides for the possibility that an SPS measure that is inconsistent with the USMCA may still be justified by its non-SPS purposes if they fall within certain exceptions, as discussed in Sections V.G and V.H below.

103. In this section, the Panel first addresses whether the Article 6.II Measure and the Articles 7/8 Measure are SPS measures, and then whether such measures "may, directly or indirectly, affect trade between the Parties," within the meaning of Article 9.2 of the USMCA.

a. The Article 6.II Measure

104. By its terms, Article 9.2 of the USMCA has two prongs: it applies to (a) "all sanitary and phytosanitary measures of a Party," that (b) "may, directly or indirectly, affect trade between the Parties."

105. With respect to the first prong of the analysis, the Parties agree that the Article 6.II Measure is an SPS measure because it is a measure applied to protect human and plant life.

106. However, with respect to the second prong – whether the SPS measure "may, directly or indirectly, affect trade between the Parties" – the Parties disagree. Given that the standard is "*may* […] affect trade," in the Panel's view, it is self-evident that Article 6.II of the 2023 Decree meets this standard. It is not dispositive whether the measure, in fact, has *already* affected trade to a cognizable degree.

[148] MEX Rebuttal, ¶ 169.
[149] MEX IWS, ¶ 318.
[150] MEX IWS, ¶¶ 334-335.

107. In the Panel's understanding, Article 6.II of the 2023 Decree applies to all use of GM corn for direct human consumption. The Moratorium on commercial cultivation of GM corn means there is no legal domestic GM corn production in Mexico (beyond the limited amount given approval through the judicial process). The Moratorium itself was not the result of an executive order, and by its nature as a preliminary injunction (albeit a longstanding one), it is capable of being lifted in time. By contrast, Article 6.I of the 2023 Decree effectively precludes on a permanent basis the commercial cultivation of GM corn. Consequently, as a result of measures that are not challenged in this case, GM corn cannot be planted legally in Mexico, whether from domestic seed sources or foreign seed sources entering pursuant to authorization.

108. As a result, the vast majority of GM corn impacted by the Article 6.II Measure (GM corn used for direct human consumption) will not be corn grown domestically in Mexico: it would be GM corn imported from elsewhere, including from the USA. Thus, the only new aspect Article 6.II adds to the existing regulatory landscape in Mexico is a limit on importation. Whether or not this limit on importation is *de iure* (which the Parties debate), it is certainly *de facto*. Without Article 6.II, GM corn from outside of Mexico might continue to enter the country for use for direct human consumption, pursuant either to previously granted authorizations or potential new ones. Under Article 6.II, that possibility is expressly foreclosed. In other words: whether the Article 6.II Measure is phrased as specifically regulating the importation of GM corn or not, it is definitively a measure that *may* affect imports.

109. For these reasons, the Panel finds that the Article 6.II Measure is an SPS measure within the meaning of Article 9.2, to which the SPS Chapter of the USMCA therefore applies.

b. The Articles 7/8 Measure

110. With respect to the Articles 7/8 Measure, the Parties disagree on several grounds as to whether it falls within the scope of Article 9.2 of the USMCA.

111. First, Mexico contends that the Articles 7/8 Measure falls outside of the definition of an SPS measure because it is not yet an "applied" measure, pending the taking of any concrete steps for its implementation. The Panel disagrees. While the definition of an SPS measure in Annex A, paragraph 1 of the SPS Agreement does use the term "applied" – as in "[a]ny measure applied: […] to protect animal or plant life or health [or] to protect human life or health…." – the Panel interprets the word "applied," in the phrase "applied ... to protect," the same way that the Appellate Body did in the *Australia-Apples* case, namely functioning as a link between a

measure and *its SPS objectives*.[151] The term does not appear to be used in this context to distinguish between degrees of implementation of a measure at a given point in time.

112. The text of Article 7 of the 2023 Decree states that the relevant authorities "will carry out the actions leading to in effect achieving the gradual substitution" ("*realizarán las acciones conducentes a efecto de llevar a cabo la sustitución gradual*")[152] of GM corn for animal feed and industrial use for human consumption. The stated purpose of doing this includes, *inter alia*, protecting human and plant life and health. On its face, this is a measure with a clear SPS purpose. Moreover, the words "*will carry out the actions leading to in effect achieving the gradual substitution*" are an instruction to the relevant authorities; the words cannot be interpreted as if they said "may carry out" or "should consider whether to carry out." Even Mexico acknowledges that Article 7 is "forcefully drafted."[153] Furthermore, Article 7 is contained in a decree issued by the President, the Federal Executive. It is an executive order to effectively achieve the gradual substitution, and Article 10 of the 2023 Decree imposes administrative penalties on authorities that do not comply with that order.

113. The fact that Article 7 contemplates a "*gradual* substitution" does not change the mandatory nature of the instruction, only how it is to be achieved. The meaning of "*gradual*," as defined in the *Diccionario de la Real Academia Española*, is something "that proceeds by degree."[154] In this case, the end point of the process is provided by Article 7, namely achieving an outcome in which non-GM corn has been "substitut[ed]" for any GM corn. The fact that this end point may be reached gradually rather than precipitously does not render the instruction any less forceful, as a measure "applied" for SPS purposes.

114. Finally, the fact that Mexico has not yet conducted the further scientific studies contemplated by Article 8 does not change the fact that Article 7 forcefully orders the gradual substitution of GM corn for the expressed purpose (at least in part) of protecting human and plant life and health. The pace of compliance by the competent authorities, including whether such authorities have even initiated that process, is a different matter. Moreover, nothing in the measure itself

[151] MEX-279, Appellate Body Report, *Australia - Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R, adopted on 17 December 2010, ¶ 172 ("The word 'to' in adverbial relation with the infinitive verb 'protect' indicates a purpose or intention. Thus, it establishes a required link between the measure and the protected interest.... [T]he relationship of the measure and one of the objectives ... must be manifest in the measure itself or otherwise evident from the circumstances related to the application of the measure.").
[152] See n. 2 above with respect to the translation of the first paragraph of Article 7 at USA-3.
[153] MEX Responses to Panel Questions, ¶ 20.
[154] Cf. "gradual: Que está por grados o va de grado en grado." Real Academia Española: Diccionario de la lengua española, 23.ª ed., [versión 23.7 en línea]. <https://dle.rae.es> [consulted on 13 September 2024]. The meaning in Spanish is equivalent to that in English of the Oxford English Dictionary: "Of a process: Taking place by degrees; advancing step by step; slowly progressive." Oxford English Dictionary, definition of "gradual", available at: https://www.oed.com/search/dictionary/?scope=Entries&q=gradual.

provides or even suggests that the competent authorities will not begin implementing the measure unless and until future studies demonstrate a real health risk from using GM corn for animal feed and industrial use for human consumption, instead of carrying out the actions to effectively achieve the gradual substitution. While Mexico suggested that the substitution mandated in Article 7 might not be implemented at all if the future studies concluded it was not necessary, this was unsupported by any evidence, such as an official interpretation or clarification of the legal provision by the competent authority or court.

115. Accordingly, the Panel finds that the Articles 7/8 Measure is an SPS measure within the meaning of Annex A, paragraph 1 of the SPS Agreement, and meets the first prong of the definition of an SPS measure of Article 9.2 of the USMCA.

116. With respect to the second element of the Article 9.2 analysis – whether the SPS measure "may, directly or indirectly, affect trade between the Parties" – the Panel agrees with the USA's view that the Articles 7/8 Measure "sends a powerful signal to the market"[155] regarding both direction and end result of Mexico's policy regarding GM corn for animal feed and industrial use for human consumption, namely the "substitution" of such products with non-GM corn. The Panel also agrees with the USA that the measure may have a "chilling effect" on imports from the USA.[156] The fact that there is no specific timeline yet for the implementation of the Articles 7/8 Measure, or that the implementation may await the conclusion of yet-unscheduled scientific studies, does not change the fact that the Articles 7/8 Measure *may* affect trade between the Parties.

117. Second, the Panel is equally unable to accept Mexico's alternative argument that, even if the Articles 7/8 Measure is an SPS measure, it is a "provisional measure" within the meaning of Articles 9.6.4(c) and 9.6.5 of the USMCA. Article 9.6.4(c) allows Parties to adopt an SPS measure "on a provisional basis if relevant scientific evidence is insufficient," while Article 9.6.5 requires a Party adopting such a measure (i) to obtain the additional information it needs; (ii) to complete a risk assessment; and (iii) review and revise the provisional measure in light of the risk assessment, all "within a reasonable period of time".

118. The Panel understands Mexico's argument to be that the Articles 7/8 Measure is a provisional measure because any future substitution would be contingent on the outcome of these Panel proceedings as well as on future scientific studies. However, this is insufficient for the purposes of Article 9.6.5, which also imposes a temporal element ("a reasonable period of time") for the gathering of additional information, the completion of the risk assessment, and the review and

[155] USA Comments, ¶ 6.
[156] Tr. Day 1, p. 22 [ENG].

revision afterwards of the provisional measures. In that sense, a "provisional measure" by definition is temporary, *i.e.,* merely "provisional." But there is nothing in the 2023 Decree suggesting that the "gradual substitution" of GM corn with non-GM, directed by Article 7 is intended as temporary or provisional. Nor has Mexico offered any evidence to that effect by the competent authorities, apart from the arguments rendered in this proceeding.

119. Finally, the Panel notes Mexico's references to the precautionary principle in the context of its provisional measure argument. However, even if Mexico was relying on the precautionary principle when introducing the Articles 7/8 Measure, this would not render it any less an SPS measure under Article 9.2 or circumvent the temporal requirement in Article 9.6.5 of the USMCA. The Panel addresses Mexico's further arguments based on the precautionary principle in Section V.C below.

120. For these reasons, the Panel finds that the Articles 7/8 Measure is an "applied" measure and falls within the scope of Article 9.2, and that, as presently framed, does not meet the requirements of a provisional measure under Articles 9.6.4(c) and 9.6.5 of the USMCA.

* * *

121. Given the Panel's finding that both the Article 6.II Measure and the Articles 7/8 Measure are SPS measures, the Panel now moves to considering the compliance of these measures with the specific requirements of USMCA Chapter 9 that the USA alleges were violated.

B. Articles 9.6.3, 9.6.7, 9.6.8 and 9.6.6(b) with Regard to Risk Assessments and Scientific Principles

1) The Relevant Provisions

122. There is no dispute between the Parties that Mexico did not base the SPS measures in question on international standards, guidelines or recommendations. Mexico argues that there are none that meet its appropriate level of protection ("**ALOP**") and, for that reason, Mexico contends that it conducted a risk assessment that is appropriate to the circumstances of the risk to human, animal, or plant life or health. Articles 9.6.3, 9.6.7 and 9.6.8 as they relate to the conduct of risk assessments should be analyzed together.

123. Article 9.6.3 of the USMCA provides:

> Each Party shall base its sanitary and phytosanitary measures on relevant international standards, guidelines, or recommendations provided that doing so meets the Party's appropriate level of sanitary or phytosanitary protection (appropriate level of protection). If a sanitary or phytosanitary measure is not based on relevant

> international standards, guidelines, or recommendations, or if relevant international standards, guidelines, or recommendations do not exist, the Party shall ensure that its sanitary or phytosanitary measure is based on an assessment, as appropriate to the circumstances, of the risk to human, animal, or plant life or health.

124. Article 9.1.2 defines "relevant international standards, guidelines, or recommendations" as:

> those defined in paragraph 3(a) through (c) of Annex A of the SPS Agreement and standards, guidelines, or recommendations of other international organizations as decided by the SPS Committee;

125. In turn, paragraph 3(a) through (c) of Annex A of the SPS Agreement provide:

> International standards, guidelines and recommendations
>
> (a) for food safety, the standards, guidelines and recommendations established by the Codex Alimentarius Commission relating to food additives, veterinary drug and pesticide residues, contaminants, methods of analysis and sampling, and codes and guidelines of hygienic practice;
>
> (b) for animal health and zoonoses, the standards, guidelines and recommendations developed under the auspices of the International Office of Epizootics;
>
> (c) for plant health, the international standards, guidelines and recommendations developed under the auspices of the Secretariat of the International Plant Protection Convention in cooperation with regional organizations operating within the framework of the International Plant Protection Convention ….

126. Article 9.6.8 of the USMCA provides that:

> In conducting its risk assessment and risk management, each Party shall:
>
> (a) ensure that each risk assessment it conducts is appropriate to the circumstances of the risk to human, animal, or plant life or health, and takes into account the available relevant scientific evidence, including qualitative and quantitative data and information; and
>
> (b) take into account relevant guidance of the WTO SPS Committee and the relevant international standards, guidelines, and recommendations of the relevant international organization.

127. Article 9.6.7 of the USMCA provides that:

> Each Party shall conduct its risk assessment and risk management with respect to a sanitary or phytosanitary regulation within the scope of Annex B of the SPS Agreement in a manner that is documented and provides the other Parties and persons of the Parties an opportunity to comment, in a manner to be determined by that Party.

128. Footnote 5 of Annex B of the SPS Agreement identifies what "sanitary and phytosanitary" regulations are within the scope of Annex B:

> 1. Members shall ensure that all sanitary and phytosanitary regulations[5] which have been adopted are published promptly in such a manner as to enable interested Members to become acquainted with them.
>
> [FN]5 Sanitary and phytosanitary measures such as laws, decrees or ordinances which are applicable generally.

129. Several provisions of Annex B of the SPS Agreement make clear that both adopted and proposed measures are within the scope of Annex B (see, for instance, paragraphs 1, 2, 3(a) and 5(a) of Annex B).

130. Article 9.6.6(b) of the USMCA provides that:

> Each Party shall ensure that its sanitary and phytosanitary measures:
>
> […]
>
> (b) are based on relevant scientific principles, taking into account relevant factors, including, if appropriate, different geographic conditions;

2) The Parties' Arguments

a. Article 9.6.3: Based on Relevant International Standards, Guidelines, or Recommendations or on an Assessment of the risk to human, animal, or plant life or health

131. The USA submits that "[a] bedrock principle of the SPS Chapter of the USMCA is that any SPS measure must have a basis in science" and a risk assessment is particularly critical in furthering this requirement.[157] For that purpose, a Party must first determine, "through either a scientific risk assessment or adherence to an international standard, guideline, or

[157] USA IWS, ¶ 108.

recommendation, that a risk to human, animal, or plant life or health exists."[158] This requirement is reflected in Article 9.6.3 of the USMCA.

132. The USA claims that the Measures are inconsistent with Article 9.6.3 because they are based neither on (1) relevant international standards, guidelines, or recommendations, nor on (2) an "appropriate" risk assessment.[159] With reference to the definitions contained in Article 9.1 of the USMCA and paragraphs 3(a) through (c) of Annex A of the SPS Agreement, the USA argues that the applicable international standards are those established by the Codex Alimentarius Commission for food safety and pursuant to the International Plant Protection Convention (the "**IPPC**") for plant health, which Mexico has failed to follow in implementing the Measures.[160]

133. With respect to food safety, the USA refers to the *Codex Principles of the Risk Analysis of Foods Derived from Modern Biotechnology* (the "**Codex Principles**");[161] and the *Codex Guideline for the Conduct of Food Safety Assessment of Foods Derived from Recombinant-DNA Plants* (the "**Codex Guideline**").[162] The USA submits that both of these documents "underscore the importance of conducting a risk assessment before undertaking any risk management measures related to GE products."[163] The USA says that Mexico has not conducted any such risk assessment.[164]

134. With respect to plant health, the USA refers to the Preamble of the IPPC providing that "phytosanitary measures should be technically justified";[165] the IPPC's *Framework for pest risk analysis* (the "**ISPM 2**"), which requires a pest risk assessment;[166] and the IPPC's *Pest risk analysis for quarantine pests* (the "**ISPM 11**"), which includes standards related to pest risk analysis ("**PRA**") for living modified organisms ("**LMOs**"), such as GM crops, requiring that the pest risk assessment be conducted on a case-by-case basis.[167]

[158] USA IWS, ¶ 108.
[159] USA IWS, ¶ 111 (Article 6.II Measure); ¶ 132 (Articles 7/8 Measure).
[160] USA IWS, ¶¶ 113, 115-117 (Article 6.II Measure), 133, 139 (the Articles 7/8 Measure).
[161] USA IWS, ¶¶ 119, 134 citing USA-113, Codex, *Principles for the Risk Analysis of Foods Derived from Modern Biotechnology*, CAC/GL 44-2003.
[162] USA IWS, ¶¶ 120, 134 citing USA-114, Codex, *Guideline for the Conduct of Food Safety Assessment of Foods Derived from Recombinant-DNA Plants*, CAC/GL 45-2003.
[163] USA IWS, ¶ 118.
[164] USA IWS, ¶ 122.
[165] USA IWS, ¶¶ 125, 140, citing USA-102, International Plant Protection Convention, 1997.
[166] USA IWS, ¶¶ 126, 141, citing USA-117, IPPC, International Standards for Phytosanitary Measures, *Framework for pest risk analysis*, 2007 (ISPM 2).
[167] USA IWS, ¶ 127, citing USA-103, IPPC, International Standards for Phytosanitary Measures, *Pest risk analysis for quarantine pests*, 2013 (ISPM 11), § 2.

135. Mexico contends that the Article 6.II Measure is consistent with Article 9.6.3 because there are no relevant international standards that meet the ALOP set by Mexico.[168] It was for this reason, Mexico says, that it conducted a risk assessment that is "appropriate to the circumstances of the risk to human health or life and plant life in Mexico and is based on scientific evidence," referring to the *Scientific Record on Glyphosate and GM Crops* dated 2020 (the "**2020 Dossier**") prepared by the National Council of Humanities, Sciences and Technologies ("**CONAHCYT**" for its acronym in Spanish),[169] and the National Biosafety Information System database (the "**SNIB Database**" for its acronym in Spanish) maintained by Interministerial Commission on Biosafety of Genetically Modified Organisms ("**CIBIOGEM**" for its acronym in Spanish).[170] Mexico says that the criteria for risk assessments are set out in Annex A(4) of the SPS Agreement, with which Mexico says its risk assessment complies.[171]

136. In Mexico's view an SPS measure is considered to be based on a risk assessment when the results of the risk assessment sufficiently justify – or reasonably support – the SPS measure in question. Mexico submits that this is a substantive requirement requiring a rational relationship between the measure and the risk assessment.[172] Mexico adds that "ensuring that a risk assessment is 'appropriate to the circumstances' involves assessing risk on a case-by-case basis, including country-specific situations."[173]

137. Mexico suggests that the Panel consider the following factual issues in the circumstances of this dispute:

> (a) Whether there exists relevant scientific evidence of the risks, including, *inter alia*: divergent opinions coming from qualified and respected sources, such as qualified scientists who have investigated the particular issues at hand; and evidence of actual potential for adverse effects on human health in the real world — for example, in Mexican society as it actually exists.
>
> (b) Whether the evidence on the record in this dispute establishes that the Risk Assessment, including Conahcyt's "Scientific Record on Glyphosate and GM Crops" [the 2020 Dossier] and Cibiogem's

[168] MEX IWS, ¶¶ 361-363.
[169] MEX-85, CONAHCYT, Scientific Record on Glyphosate and GM Crops, 2020. The Panel notes that at the time of the preparation of the 2020 Dossier, CONAHCYT was called CONACYT (*Consejo Nacional de Ciencia y Tecnología* - the National Council of Science and Technology).
[170] MEX IWS, ¶ 371; MEX Rebuttal, ¶¶ 344, 346. The SNIB Database is available at: https://conahcyt.mx/cibiogem/index.php/sistema-nacional-de-informacion.
[171] MEX IWS, ¶¶ 366, 371.
[172] MEX Rebuttal, ¶¶ 338-342, citing MEX-290, Appellate Body Report, *India - Measures Concerning the Importation of Certain Agricultural Products*, WT/DS430/R and Add.1, adopted on 19 June 2015 ("**Appellate Body Report, *India-Agricultural Products***"), ¶ 5.16; MEX-286/USA-250, Appellate Body Report, *EC-Hormones*, ¶¶ 186, 193.
[173] MEX Rebuttal, ¶ 343, citing MEX-295, Panel Report, *Australia - Measures Affecting Importation of Salmon*, WT/DS18/R, adopted on 6 November 1998, ¶ 8.71.

> collection of relevant studies in the SNIB [the SNIB Database], is based on relevant available scientific evidence of the risks to human health and native corn in Mexico.
>
> (c) Whether the Risk Assessment, including the relevant available scientific evidence in Cibiogem's collection of relevant studies [the SNIB Database], is appropriate to the circumstances existing at the time this Panel was established, and could "sufficiently warrant" or "reasonably support" the maintenance of the measures at issue at that point in time.
>
> (d) Taking into account that Mexico has decided to follow a precautionary approach, does the Risk Assessment, on the basis of the relevant available scientific evidence outlined above, "sufficiently warrant" or "reasonably support" the measures at issue, notwithstanding the uncertainties and constraints involved in the assessment of the risks, and even though the United States and Canada might not decide to apply similar measures to address the same risks (to the extent that the same risks could arise in the specific circumstances prevailing in the United States and/or Canada).[174]

138. On this basis, Mexico submits that its risk assessment "is based on relatively recent, relevant, independent scientific evidence from qualified and reputable sources that is sufficient to establish (i) risks to human health arising from the direct consumption of GM corn grain in Mexico, and (ii) risks to native corn of transgenic contamination arising from the unintentional, unauthorized, and uncontrolled spread of GM corn in Mexico."[175] At the Hearing, Mexico added that the authorization process regularly in use in Mexico, which has authorized the use of quite a number of GM corn events, is insufficient to address Mexico's concerns. This is because, according to Mexico, that authorization process does not take into consideration either the toxicity of transgene proteins or the accumulation of herbicides in minimally processed foods.[176] Mexico says that, contrary to the USA's contentions, the Biosafety Regulations do not require an applicant to provide a risk assessment in the case of stacked events, instead requiring only information on parental events (the events with pre-existing modifications from which the stacked event is created), and not the stacked event *per se*.[177] Mexico submits that this means that it is "impossible to fully assess the interactive effects of combined genes."[178]

139. With reference to WTO Appellate Body Reports, Mexico submits that it has the right to establish its own ALOP, "which level may be higher (i.e., more cautious) than that implied in

[174] MEX Responses to Panel Questions, ¶ 55.
[175] MEX Responses to Panel Questions, ¶ 56.
[176] Tr. Day 1, p. 84 [ENG].
[177] MEX Comments, ¶¶ 25-26, quoting 2008 Biosafety Regulations, Article 31(n) (on the record as USA-86/MEX-251).
[178] MEX Comments, ¶ 27.

existing international standards, guidelines and recommendations."[179] Mexico also refers to a WTO Panel clarifying that the fact that a State decides to follow a "precautionary approach" could impact the assessment of whether an SPS measure is "based on" a risk assessment.[180] In Mexico's view, "[t]he determination of an ALOP is an entirely subjective exercise," meaning that a "USMCA Party may determine any level of protection that it considers to be appropriate or 'adequate' under the circumstances. There is no additional requirement for 'objective reasonableness'."[181] Nevertheless, Mexico submits that "a Party's ALOP is effectively disciplined by compliance with the requirements in Article 9.6 of the USMCA and the provisions of the SPS Agreement."[182] On this basis, Mexico submits that the ALOPs it determined with respect to the SPS purposes of the Article 6.II Measure "meet the standard of 'sufficient precision' to allow the application of the relevant provisions of Article 9.6 of the [USMCA]."[183]

140. With respect to the protection of human health resulting from direct consumption of GM corn, Mexico says that it has adopted a "zero risk" ALOP.[184] Mexico submits that this is most appropriate in the circumstances because "the presence of contaminants and toxins in GM corn grain, such as transgenic proteins and glyphosate, has been well documented. In addition, the adverse health effects of these contaminants and toxins have been scientifically demonstrated."[185] Mexico adds that "[t]he population in Mexico is highly exposed and vulnerable to these risks due to the amount of corn grain consumed directly on a daily basis in the form of tortillas and other foods made with nixtamalized flour and dough."[186]

141. On this basis, Mexico rejects the USA's reliance on the Codex Principles and Guideline, highlighting, for example, that the Codex maximum residue limits ("**MRLs**") with respect to glyphosate residues for corn "are not appropriate or relevant for the unique circumstances in Mexico,"[187] and that they do not address the toxicity of transgenic proteins or the impact of "the cumulative risks arising from dietary exposure to glyphosate and transgenic protein residues in

[179] MEX Rebuttal, ¶ 276, citing MEX-286, Appellate Body Report, *EC-Hormones*, ¶ 124; MEX-297, Appellate Body Report, *Brazil - Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted on 17 December 2007 ("**Appellate Body Report, *Brazil-Retreaded Tyres***"), ¶ 210.
[180] MEX IWS, ¶ 368, citing MEX-277, Panel Reports, *EC-Biotech*, ¶ 7.3065.
[181] MEX Responses to Panel Questions, ¶¶ 31-34, citing MEX-292, Appellate Body Report, *Australia - Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted on 6 November 1998 ("**Appellate Body Report, *Australia-Salmon***"), ¶ 199; MEX-290, Appellate Body Report, *India-Agricultural Products*, ¶ 5.205.
[182] MEX Responses to Panel Questions, ¶ 35, citing MEX-286, Appellate Body Report, *EC-Hormones*, ¶ 177.
[183] MEX Responses to Panel Questions, ¶ 37.
[184] MEX IWS, ¶¶ 340-342, citing MEX-292, Appellate Body Report, *Australia-Salmon*, ¶ 125; MEX Rebuttal, ¶ 350.
[185] MEX IWS, ¶ 340, citing MEX-85, 2020 Dossier.
[186] MEX IWS, ¶ 341; see also MEX Responses to Panel Questions, ¶¶ 70-71.
[187] MEX Rebuttal, ¶ 351.

minimally processed foods made from whole grain GM corn."[188] In particular, Mexico points out that there are no Codex MRLs "to address the risk of glyphosate residue in commodities made from maize/corn."[189] This is because the Codex prescribes MRLs for a number of corn-based products (e.g., maize meal, maize flour, corn flour, and corn meal), however, "the standards either provide no MRL for the presence of glyphosate residue (maize meal and maize flour), or provide no MRL of any kind at all (corn flour and corn meal)." For these reasons, Mexico says it "has never endorsed an MRL that addresses the concerns addressed by the [2023] Decree."[190]

142. Mexico's arguments about the appropriateness of a "zero risk" ALOP for direct consumption may be seen in the context of its contention at the Hearing that minimally processed foods, including dough and tortillas, "are only made with native corn, before the measure and at present."[191] Nevertheless, Mexico maintains that the Article 6.II Measure is separately justified because of the risk of transgenic introgression.[192] In its written responses to the Panel's questions, Mexico emphasizes that the Article 6.II Measure "addresses the full range of risks that arise in connection with the direct consumption of GM corn grain, including ingestion of transgenic insecticidal toxins, pesticide-resistant GM enzymes, other GM materials, and residues from the concentrated pesticides used in the cultivation of GM corn (including, but not limited to, systemic glyphosate)," and notes that "types of contaminants and toxins are present in all GM corn kernels."[193] Mexico contends that assessing and managing the individual risks posed by each individual GM corn event "would not address the risks to human health in Mexico in a meaningful or effective manner," because these risks "do not exist in isolation," instead, "they aggregate and accumulate in the corn grain market and in people's diets."[194] Mexico provides the following example of GM corn grain that would not be consumed on an event-by-event basis:

[188] Tr. Day 2, p. 35 [ENG]. see also MEX Responses to Panel Questions, ¶¶ 63-66.
[189] MEX Responses to Panel Questions, ¶ 67.
[190] MEX Responses to Panel Questions, ¶ 68, citing MEX-462, FAO, Codex Alimentarius, Pesticide Database, Commodities; MEX-463, FAO, Codex Alimentarius, Pesticide Database, Commodities Detail, CF 0645 - Maize meal; MEX-464, FAO, Codex Alimentarius, Pesticide Database, Commodities Detail, CF 1255 - Maize flour; MEX-465, FAO, Codex Alimentarius, Pesticide Database, Commodities Detail, CF 5273 - Corn flour; MEX-466, FAO, Codex Alimentarius, Pesticide Database, Commodities Detail, CF 5275 - Corn meal.
[191] Tr. Day 1, p. 87 [ENG].
[192] Tr. Day 2, pp. 59-60 [ENG] (referring to "the risks due to involuntary, unwanted or uncontrolled transgenic contamination, and these same risks in light of the specific circumstances of traditional agricultural practices that can precisely cause this transgenic contamination to pass from genetically modified corn, which is destined for any other use, to the final use that is established in the limitation of final use for masa and tortillas, in an involuntary manner, for example, through the regional exchange of seeds between an indigenous community and another indigenous community. and this goes unnoticed.")
[193] MEX Responses to Panel Questions, ¶ 25.
[194] MEX Responses to Panel Questions, ¶ 26.

> A tortilla made from nixtamalized masa produced with GM corn grain would contain an unknown combination of different varieties of GM corn. As such, it would contain unknown total amounts and combinations of transgenic proteins and pesticide residues. The risk to human health arising under these conditions would be multiplied by the large amount of tortillas and similar foods consumed each day over the long term.[195]

143. With respect to the protection of native corn, Mexico says it has adopted a lower ALOP, but since the Article 6.II Measure serves multiple purposes, including the protection of human health and native corn, the higher "zero risk" ALOP for the protection of human health overlaps with the lower ALOP for the protection of native corn.[196] It is for this reason, Mexico submits that "the priority objectives cannot be examined in isolation from one another," which "should not prevent the measure from contributing to the purpose of protecting native corn nor diminish its ability to fulfil the purpose of protecting human health at the appropriate level of protection determined by Mexico."[197]

144. Mexico submits that "[s]cientific evidence establishes that GM corn grain is 'a potential route of transgene dispersal to native corn' because 'imported grains are functional seeds, which retain their ability to develop and express recombinant proteins'."[198] Mexico argues that the cultivation of GM corn seed is the greatest source of risk to native corn, and refers to the fact that despite the Moratorium on commercial cultivation of GM corn, transgenic introgression has continued.[199] In this context, Mexico refers to a report prepared by the Commission for Environmental Cooperation in 2004 (the "**2004 CEC Report**"), the findings of which, including with respect to transgenic introgression, Mexico says, "were evaluated in the Risk Assessment and were the basis for the development of, *inter alia*, the measures that are the subject of this dispute."[200]

145. Mexico adds that because of traditional farming practices, "unintended transgenic contamination of native corn becomes embedded in seed stocks, spreading with each crop cycle. Through seed exchange with other farmers and communities, this contamination can proliferate through traditional seed systems and grain markets throughout Mexico."[201] Where

[195] MEX Responses to Panel Questions, ¶ 27, see also ¶ 28, citing Antoniou Expert Report, ¶ 158.
[196] MEX IWS, ¶¶ 346-349; MEX Rebuttal, ¶ 353; MEX Responses to Panel Questions, ¶ 81.
[197] MEX Responses to Panel Questions, ¶ 81.
[198] MEX IWS, ¶ 347, citing MEX-87, Trejo-Pastor, V., Espinosa-Calderón, A., del Carmen Mendoza-Castillo, M., Kato-Yamakake, T. Á., Morales-Floriano, M. L., Tadeo-Robledo, M., & Wegier, A., "Commercialized corn grain in Mexico as a potential disperser of genetically modified events," 2021, pp. 251-259
[199] MEX IWS, ¶ 348.
[200] MEX Rebuttal, ¶ 365, citing MEX-95, Commission for Environmental Cooperation Secretariat, *Corn & Biodiversity: The Effects of Transgenic Corn in Mexico*, 2004.
[201] MEX Responses to Panel Questions, ¶ 75.

this happens, Mexico says that "GM contamination in Mexico is not a matter of cross-pollination," instead, "it is a matter of GM corn and Mexico's native non-GM corn varieties growing together in the same milpas and small fields."[202] It is for this reason, Mexico contends that:

> International standards, recommendations and guidelines geared toward industrial agriculture in the United States and Canada (among other jurisdictions such as the EU) simply do not address the risks that transgenic contamination from the unintentional and uncontrolled spread of GM corn poses to Mexico's native corn.[203]

146. Consequently, Mexico argues that the international standards set out in the IPPC and the ISPM 11, relied on by the USA, are not appropriate in the circumstances.[204] In any event, Mexico submits that the ISPM 11 requires parties "to achieve the necessary degree of safety that can be justified and is feasible within the limits of available options and resources," with which, Mexico says its "risk assessment and risk management strategies" comply.[205]

147. With respect to the protection of human health from more indirect consumption – *i.e.*, risks arising from the consumption of products made from animals fed with GM corn and industrially processed GM corn – Mexico reiterates that the Articles 7/8 Measure has not been implemented. However, once implemented, Mexico says the plan for "gradual substitution" of GM corn in that arena reflects a more "risk tolerant" ALOP, referring to the fact that the Articles 7/8 Measure itself recognizes the need for further relevant studies.[206]

148. The USA recognizes a Party's prerogative to determine its ALOP, however, relying on the WTO Panel Report in *EC-Hormones*, the USA emphasizes that "[t]he right of a Member to define its appropriate level of protection is not [] an absolute or unqualified right."[207] The USA submits that "a Party must still comply with its other SPS obligations,"[208] and that "the risk must be ascertainable; a Party cannot simply rely on theoretical uncertainty."[209] On this basis,

[202] MEX Responses to Panel Questions, ¶ 76.
[203] MEX Responses to Panel Questions, ¶ 77.
[204] MEX Rebuttal, ¶ 353; MEX Responses to Panel Questions, ¶ 64.
[205] MEX Responses to Panel Questions, ¶ 80.
[206] MEX IWS, ¶¶ 343-345.
[207] USA Responses to Panel Questions, ¶ 12, citing USA-250, Appellate Body Report, *EC-Hormones*, ¶ 173.
[208] USA Comments, ¶ 23.
[209] USA Responses to Panel Questions, ¶¶ 11-12, citing USA-250, Appellate Body Report, *EC-Hormones*, ¶ 173; see also USA Comments, ¶ 23, citing USA-114, Codex Guideline, ¶ 3 (explaining that the Codex principles of risk analysis are intended to apply to identifiable hazards and risks); USA-250, Appellate Body Report, *EC-Hormones*, ¶ 186 (noting that science can never provide absolute certainty that a given substance will never have adverse health effects); USA-109, Appellate Body Report, *Australia-Salmon*, ¶ 125 (explaining that "the 'risk' evaluated in a risk assessment must be an ascertainable risk; theoretical uncertainty is 'not the kind of risk which, under Article 5.1, is to be assessed,'" quoting Appellate Body Report, *EC – Hormones*). See also Tr. Day 2, p. 26 [ENG].

the USA contends that:

> if a Party asserts "zero risk" as its ALOP, as Mexico has done, that does not mean a Party can presumptively ban a substance. A Party must nevertheless conduct a risk assessment, as it would with any other ALOP, to demonstrate why the measure is necessary and, moreover, not more-trade restrictive than necessary to achieve that ALOP.[210]

149. The USA's view is that Mexico has not adequately defined its ALOPs,[211] and that the Codex Alimentarius and IPPC standards for these alleged risks are capable of addressing any ALOP.[212]

150. In relation to the risk to human health, the USA refers to paragraph 3(a) of Annex A of the SPS Agreement, incorporated into the USMCA, which "affirms that the Codex standards relating to 'food additives, . . . pesticide residues, [and] contaminants,' are the relevant international standards for assessing the safety of food."[213] The USA highlights that the Mexican Federal Commission for the Protection Against Sanitary Risks ("**COFEPRIS**" for its acronym in Spanish), the authority "responsible for assessing the safety of GE events […] has confirmed that Codex provides the relevant standards applicable to safety assessments of GE foods."[214] The USA submits that "[h]ad Mexico actually followed the Codex standards, and its own Biosafety Law and Regulations, Mexico would have evaluated the very risks that it purports to be of concern."[215]

151. The USA dismisses Mexico's and its expert's reliance on "whole-food animal feeding studies" and says that these "are not typically relied upon in assessing the risks of GE crops and other foods due to confounding variables and difficulties of interpreting such data."[216] The USA adds that even if the studies cited by Mexico were accurate, "Mexico has not taken the results and conducted the actual risk assessment required, evaluating hazard, exposure, and risk, to fulfill

[210] USA Responses to Panel Questions, ¶ 12 (emphasis omitted).
[211] USA Rebuttal, ¶ 78.
[212] USA Rebuttal, ¶¶ 84-93; USA Responses to Panel Questions, ¶ 14 (highlighting that USMCA Article 9.1.2 incorporates by reference the SPS Agreement's definition of "relevant international standards, guidelines, or recommendations," which identifies Codex and IPPC as the relevant standard-setting bodies for food safety and plant health respectively).
[213] USA Responses to Panel Questions, ¶ 15 (referring to Mexico's claims that "both transgenes and pesticide residues would be a 'contaminant'.")
[214] USA Responses to Panel Questions, ¶ 16, citing USA-217, FAO GM Foods Platform, Mexico – Country Profile (affirming that Mexico "follows the relevant Codex Guidelines or national/regional guidelines that are in line with the Codex Guidelines in conducting safety assessment of GM food"); USA Comments, ¶ 28.
[215] USA Responses to Panel Questions, ¶ 17, citing USA-85, 2005 Biosafety Law, Art. 9(VIII) ("The possible risks that GMOs activities may entail to human health and biological diversity will be evaluated case by case. Such assessment must be supported by the best scientific and technical evidence available."); USA-86, 2008 Biosafety Regulations, Arts. 31-32 (providing that a "[s]tudy of potential risks that the human use or consumption of the GMO in question may represent to human health, which shall include scientific and technological information about its safety, [] shall include the following").
[216] USA Responses to Panel Questions, ¶ 18.

its commitments under the USMCA."[217] Mexico responds that such studies constitute relevant and reliable evidence and points out that the European Union requires 90-day feeding studies on rodents for new event applications.[218] As such, Mexico contends that "[s]uch studies can and do make a valid contribution to a risk assessment."[219]

152. The USA rejects Mexico's contention that its unique circumstances render the Codex and IPPC standards insufficient, arguing that "[t]hese standards are not an inflexible directive ill-suited to specific country conditions or any of the supposed human health hazards that Mexico has identified related to GE corn."[220] In fact, the USA points out that "Codex already accounts for differing consumption patterns around the world when establishing its MRLs."[221]

153. In particular, with respect to the MRLs for a pesticide like glyphosate, the USA says that "the MRL is not determined on an event-specific basis."[222] Instead, "[a]n MRL is determined pursuant to a risk assessment that estimates risks from all dietary exposures" […] as well as other exposures.[223] The USA emphasizes that "[a] country may adopt the Codex MRLs for the particular pesticide and commodity, or countries may choose to deviate from these levels based on a risk assessment."[224] In addition, the USA states that Mexico is incorrect when it says that the MRL framework is inadequate to address its concerns, because the "Codex frameworks apply not only to substances that may be applied topically during the planting season but also to plant-incorporated protectants […] (*i.e.*, the 'insecticidal toxins and pesticide-resistant enzymes' that Mexico refers to in its responses)."[225] In response to Mexico's argument that there are no Codex MRLs for certain pesticide and commodity combinations (for example, glyphosate residues in corn meal), the USA contends that simply because it does not exist, "does not prevent a country from establishing an MRL *pursuant to a risk assessment*."[226]

154. With respect to the existing science on glyphosate residues, the USA refers to studies dating back to the 1990s that determined that "glyphosate residues do not concentrate in processed corn commodities," which, it says, is reflected in both the USA's and the European Food Safety

[217] USA Responses to Panel Questions, n. 18.
[218] MEX Comments, ¶¶ 20-21.
[219] MEX Comments, ¶ 21.
[220] Tr. Day 2, pp. 37-38 [ENG].
[221] USA Comments, ¶ 40.
[222] USA Comments, ¶ 17.
[223] USA Comments, ¶ 17 and ¶ 29 (highlighting that in conducting such a risk assessment to establish MRLs "a regulatory agency must first make a safety finding with respect to that pesticide using a risk assessment, which typically takes into account nationally representative consumption data.")
[224] USA Comments, ¶ 29.
[225] USA Comments, ¶¶ 30-31.
[226] USA Comments, ¶ 32 (emphasis added).

Authority's approach.[227] Thus, the USA rejects Mexico's suggestions that "this is some uncharted space," and submits that "[s]ufficient scientific evidence is already available."[228] In relation to the actual risk of glyphosate exposure, the USA refers to the 2019 Joint FAO/WHO Meeting on Pesticide Residues (the "**JMPR**") calculations, which showed that "[t]he glyphosate exposure for Mexico's group was just 2% of the acceptable amount of glyphosate that a person could consume each day for the rest of their life without seeing negative health effects."[229]

155. In any event, the USA asserts that even in the absence of relevant international standards, Mexico still would have needed to base its measures on a meaningful risk assessment. With reference to the definition of a risk assessment in the SPS Agreement, the USA says that "a risk assessment is a systematic process that weighs all of the available scientific evidence and then estimates the probability of occurrence and severity of the known or potential adverse health effects with a specific GE event under consideration."[230] In practice, the USA says, that "a risk assessment for food derived from GE plants, as provided under the Codex Guidelines and reflected in Mexico's Biosafety Regulations, contains five main parts:"[231]

> (i) A description of the particular GE event;[232]
>
> (ii) An assessment of possible toxicity;[233]
>
> (iii) An assessment of possible allergenicity;[234]
>
> (iv) A compositional analysis of key components;[235] and
>
> (v) Other considerations such as the potential accumulation of pesticide residues and the use of antibiotic resistance marker genes.[236]

[227] USA Comments, ¶¶ 36-37.
[228] USA Comments, ¶ 37.
[229] USA Comments, ¶ 40 (emphasis omitted), citing USA-155, Extra JMPR, "2019 Report – Pesticide Residues in Food," p. 81 (2019) (excerpt).
[230] Tr. Day 1, p. 53 [ENG]; USA Comments, ¶ 19.
[231] USA Responses to Panel Questions, ¶ 20.
[232] USA Responses to Panel Questions, ¶ 20(i), citing, USA 114, Codex Guideline, § 4.
[233] USA Responses to Panel Questions, ¶ 20(ii), citing, USA 114, Codex Guideline, ¶¶ 34-40.
[234] USA Responses to Panel Questions, ¶ 20(iii), citing, USA 114, Codex Guideline, ¶¶ 41-42; USA-153, Annex 1 ("Assessment of Possible Allergenicity").
[235] USA Responses to Panel Questions, ¶ 20(iv), citing, USA 114, Codex Guideline, ¶¶ 44-45; cf. id. ¶ 48 and USA-153, Codex Guideline Annexes (2003), Annex 2 ("concerning GE crops that have undergone modifications to intentionally alter nutritional quality or functionality, which are subject to an additional nutritional assessment").
[236] USA Responses to Panel Questions, ¶ 20(v), citing, USA 114, Codex Guideline, ¶¶ 18, 54-58.

156. With reference to Annex A of the SPS Agreement, the USA states that:

> Dietary risk is a function of two elements: (i) **hazard** (i.e., "the potential for adverse effects on human or animal health") and (ii) **exposure** (i.e., "arising from the presence of additives, contaminants, toxins or disease-causing organisms in food").[237]

157. On this basis, and relying on WTO Panel Report, the USA submits that "the risk assessment itself must weigh the available scientific evidence (for example, the relevant toxicity and exposure data) and convey its reasoning for the ***specific risk*** it is determining and whether it is deeming a ***particular GE event*** under consideration to be safe."[238]

158. With respect to Mexico's argument that the available international standards do not take into account "stacked" traits, the USA notes that the Codex Guideline applies to stacked events and points out that "Mexico's existing authorization process requires that an applicant apply anew whenever it seeks to market a stacked GE product."[239] The USA adds that Mexico's own safety assessments, conducted as part of the authorization process, "conservatively assume that the new GE corn event makes up 100 percent of the corn product consumed by an individual and that no degradation of the newly expressed protein occurs. Typically corn is subjected to certain processing steps, such as cooking, before being consumed by humans; these steps often degrade or denature the protein, thereby decreasing potential exposure."[240]

159. In response to Mexico's argument that event-specific risk assessments, as required by Mexico's own regulations and the Codex Guideline, are inadequate to protect human health because of aggregate and cumulative risks, the USA says that Mexico conflates pesticide residues with transgenic proteins and that, in any event, Mexico has not "not shown that these in fact present any food safety risk (independently or collectively) nor explained on what basis Mexico understands these issues to have any interactive effects on human health."[241] In particular, the

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[237] USA Comments, ¶ 19 (emphasis in original), citing USA-34, WTO Agreement on the Application of Sanitary and Phytosanitary Measures, adopted 15 April 1994, entered into force 1 January 1995), 1867 U.N.T.S. 493 9, Annex A, ¶ 4.
[238] USA Comments, ¶ 19 (emphasis in original), citing USA-230, Panel Report, *Japan-Apples*, ¶ 8.267; USA-250, Appellate Body Report, *EC-Hormones*, ¶ 200.
[239] USA Responses to Panel Questions, ¶ 26, citing USA-86, 2008 Biosafety Regulations, art 31(I)(n). The USA adds that "these 'stacked' trait products are typically developed through conventional cross-breeding of GE parental plants," and that the USA "is not aware of any safety assessments concluding that stacked GE traits through conventional breeding pose any greater risk to food or feed safety than stacking multiple non-GE traits by conventional breeding." The USA also states that, "contrary to statements by Mexico … the U.S. regulatory process examines the potential for interactive effects (synergy, antagonism, or additive effects) when two or more plant-incorporated protectants ("PIPs") are in the same plant; this evaluation is conducted through a mandatory premarket process, as this combination would represent a new pesticide mixture." USA Responses to Panel Questions, n. 38.
[240] USA Comments, n. 22.
[241] USA Comments, ¶¶ 13-14, ns. 19 and 20.

USA highlights that none of the studies on which Mexico relies in fact assesses "a 'mixture of different pesticides' or a 'combination of different varieties of GM corn,' much less identifies any risk from consuming residues of such mixtures or combinations in a typical Mexican diet."[242]

160. The USA's point is that established methodologies and assessment techniques exist to conduct cumulative risk assessments, and accordingly that "Mexico should have conducted a risk assessment to evaluate its assertion of a cumulative dietary risk from consumption of GE corn grain."[243] Instead, the USA suggests that "Mexico's argument appears to be based on a presumption of hazard, rather than the requisite identification of risk," without presenting "any plausible hypothesis to call into question the assessments it has already performed or why such assessments would not be applicable to typical consumption conditions where consumers eat a combination of foods."[244]

161. In relation to plant health risk, the USA says that Mexico has not identified why the IPPC standards are inadequate in the context of its agricultural practices.[245] The USA points in particular to the ISPM 11, which outlines "the process for assessing the entry, establishment, and spread of a potential plant pest by identifying the potential pathways of the pest, specific to the genes or traits of concern."[246] The USA says that the IPPC standards "provide a framework to methodologically assess whether a plant pest risk exists and the potential or actual harm such as disease or injury to other plants, which includes an assessment of economic and environmental impacts," and submits that "Mexico has not presented any document or documents that would remotely conform to the IPPC standards."[247]

162. The USA contends that the risk assessment put forward by Mexico, referring to the 2020 Dossier and the SNIB Database, is inadequate and does not constitute a risk assessment as defined under the USMCA.[248] In particular, the USA highlights that the 2020 Dossier refers to only one article alleging the presence of transgenes or glyphosate residues in food and that

[242] USA Comments, ¶ 14.
[243] USA Comments, ¶ 15.
[244] USA Comments, ¶ 16.
[245] USA Comments, ¶ 42.
[246] USA Responses to Panel Questions, ¶ 28, citing USA-103, ISPM 11, § 2.1.1.1 ("In the case of [living modified organisms ("LMOs")], identification [of the pest] requires information regarding characteristics of the recipient or parent organism, the donor organism, the genetic construct, the gene or transgene vector and the nature of the genetic modification.")
[247] USA Responses to Panel Questions, ¶ 29, citing USA-103, ISPM 11, §§ 2.1-2.5; USA-117, Secretariat of the IPPC, Framework for Pest Risk Analysis, § 2.2 (2007).
[248] USA Rebuttal, ¶¶ 81-83, 97.

the same article makes no assessment of dietary exposure or associated risk.[249] With respect to the other articles on which Mexico relies, the USA submits that they "represent a haphazard literature search" and do not constitute "a risk assessment consistent with the relevant international standards or the definition of a risk assessment under the USMCA."[250] In this context, the USA recalls that "a risk assessment is a systematic process that weighs *all* of the available scientific evidence."[251]

163. Further, the USA argues that these articles do "not present any organized assessment of a particular event so as to assess (i) the potential hazard of a substance in or on GE corn and (ii) the exposure to that substance, as relevant to Mexico's population, in order to characterize the specific risk."[252] Instead, the USA submits, all Mexico has done "is merely present hypotheses that it posits could be food safety issues," without performing "the analysis necessary to demonstrate that these are, in fact, food safety concerns that would make certain GE corn unsafe, let alone unsafe to the point that all existing and future GE corn events would be considered unfit for human consumption in Mexico."[253]

164. At the Hearing, the USA emphasized that the high consumption of corn in Mexico is not relevant, not because it is factually incorrect, but because it would be considered as part of any risk assessment:

> We don't doubt the veracity of the claim about Mexico's consumption levels, but because the consumption levels are part of the risk assessment, they are part of what is considered under the processes that are required by USMCA. It is not a reason to not do a risk assessment, it is not a reason to ignore international standards. *International standards in place don't only permit consideration of consumption levels, they require it*. An essential feature of evaluating risk is evaluating exposure, and exposure, of course, is a function of consumption levels.

[249] USA Rebuttal, ¶ 98, citing MEX-85, 2020 Dossier, p. 7, which in turn cites to MEX-125, González-Ortega, E., Piñeyro-Nelson, A., Gómez-Hernández, E., Monterrubio-Vázquez, E., Arleo, M., Dávila-Velderrain, J., Martínez-Debat, C. and Álvarez-Buylla, E. "*Pervasive presence of transgenes and glyphosate in maize-derived food*", Agroecology and Sustainable Food Systems, 2017; USA Comments, n. 64 (explaining that "this article (MEX-125) is a snapshot in time at a specific location of a limited number of processed maize-based food samples (as opposed to raw agricultural commodity samples) pulled from a marketplace and tested for the presence of transgenes and glyphosate residues. The article makes no claims as to the safety of the food, and 72.3 percent of GE corn sampled had no glyphosate residues at all. Moreover, the highest level of residue reported in the text was 0.045 mg/kg, far below Mexico's existing glyphosate MRL of 1.0 mg/kg in corn, and Codex's 5.0 mg/kg MRL. The article also acknowledges that transgenes present in industrially processed products could be from other transgene-containing materials, such as soy flour.")
[250] USA Comments, ¶ 18 and p. 9, Table 1 (containing the USA's analysis of the studies cited by Mexico).
[251] USA Comments, ¶ 19 (emphasis added).
[252] USA Comments, ¶ 20.
[253] USA Comments, ¶ 21.

> So, there is every occasion for Mexico when it does its risk assessment that it's required to do, to consider its consumption levels, to consider the fact that Mexican citizens consume far more corn than many other societies. That is absolutely available to Mexico to consider.[254]

165. In its comments on Mexico's responses to the Panel's questions, the USA adds that, given Mexico's assertion that it is self-sufficient in white corn production, which is non-GM and is the corn used for dough and tortilla, "following Mexico's logic to its natural conclusion, Mexico implies that its population in fact has very limited exposure to imported GE corn in the form of dough and tortillas, and in its diet more broadly."[255] The USA's view is that "Mexico's repeated invocation of its allegedly high corn consumption levels, left uncontextualized, is a red herring," because "[d]ietary risk is a function of exposure and hazard," which is a "critical component in assessing risk."[256] The USA submits that this confirms that "Mexico has not conducted a credible risk assessment," and that the Article 6.II Measure "is not a science-based measure but instead is an SPS measure that wrongfully restricts imports without the requisite scientific justification."[257]

166. With respect to the risk to native corn, the USA submits that Mexico has not explained the harm Mexico's native corn varieties are facing as a result of imported GM corn for food or feed.[258] At the Hearing, the USA questioned the scope of what corn Mexico really is seeking to protect, given that it has not taken any steps to protect native corn varieties from the numerous non-native varieties also present in Mexico, other than by singling out GM corn:

> As the United States has pointed out that Mexico's conspicuous failure to discipline non-GE, non-native corn, which unlike GE corn is not a null set in Mexico. Mexico has started to describe diversification of corn year after year and experimenting with new crops and variants as part of native corn and indigenous traditions. While the United States does not doubt that there is evolution of all corn species through cross breeding, this leaves Mexico's invocation of protection of native corn varieties in shambles.
>
> What exactly is it preserving or conserving? What exactly is the exhaustible natural resource? If it is narrowly the current genetic makeup of its 59 varieties, then Mexico is now acknowledging it is not even trying to conserve that, as its changing genetics are now an inherent feature in Mexico's telling. And if evolving genetics is fine,

[254] Tr. Day 1, pp. 82-83 [ENG] (emphasis added).
[255] USA Comments, ¶ 2.
[256] USA Comments, ¶ 3.
[257] USA Comments, ¶ 3.
[258] USA Rebuttal, ¶ 104.

> it is unclear what Mexico is trying to conserve and preserve and what the specific threat is to that conservation or preservation.[259]

167. The USA rejects Mexico's reliance on the 2004 CEC Report, stating that it is outdated and "lacks scientific veracity," and contends that "Mexico has still not offered a plant pest risk assessment to substantiate any alleged risks to native corn from transgenic introgression."[260]

168. The USA concludes that even if Mexico had conducted a risk assessment, the science would not support the presence of risk because: (1) GM corn does not contain unsafe levels of glyphosate residues;[261] (2) transgenic proteins and other features of GM corn do not present a human health risk;[262] and (3) GM corn imported for food or feed use has not harmed native corn varieties.[263]

169. With respect to the Articles 7/8 Measure, the USA rejects Mexico's "assurances that any future actions taken pursuant to the measure will necessarily conform to scientific principles and relevant international standards, on the basis that the Substitution Instruction says that they must."[264] In the USA's view, "Mexico has already disavowed the relevance of the Codex and IPPC international standards that are expressly recognized under the USMCA as the applicable standards, and Mexico has made clear that its conception of a risk assessment flouts scientific principles."[265] The USA submits that "[a] Party cannot evade the disciplines of the SPS Chapter

[259] Tr. Day 1, p. 81 [ENG].
[260] USA Comments, ¶42, citing USA Opening Statement, ¶¶ 39, 48.
[261] USA Rebuttal, ¶¶ 108-110.
[262] USA Rebuttal, ¶¶ 111-114. The USA identifies the following exhibits that in its view assess the safety of GM corn as isolated from any glyphosate risk: USA Comments, ¶ 22, citing USA-198, EPA, "Biopesticides Registration Action Document - Bacillus thuringiensis Cry3Bb1 Protein and the Genetic Material Necessary for Its Production (Vector PV-ZMIR13L) in MON863 Corn (OECD Unique Identifier: MON-ØØ863-5)" (Sept 2010); USA-199, EPA, "Biopesticides Registration Action Document - Cry1Ab and Cry1F Bacillus thuringiensis (Bt) Corn Plant-Incorporated Protectants" (Sept 2010) (excerpt); USA-200, M. Mendelsohn et al., "Are Bt Crops Safe?," 21 NATURE BIOTECHNOLOGY 1003 (Sept. 2003) USA-203, EPA, "Biopesticide Registration Action Document - Bacillus thuringiensis Cry1A.105 and Cry2Ab2 Insecticidal Proteins and the Genetic Material Necessary for Their Production in Corn" (2008); USA-204, EPA, "Biopesticides Registration Action Document - Bacillus thuringiensis Vip3Aa20 Insecticidal Protein and the Genetic Material Necessary for Its Production (via Elements of Vector pNOV1300) in Event MIR162 Maize (OECD Unique Identifier: SYN-IR162-4)" (2009); USA-205, EPA, "Biopesticides Registration Action Document - Modified Cry3A Protein and the Genetic Material Necessary for its Production (Via Elements of pZM26) in Event MIR604 Corn SYN-IR604-8" (2010)' USA-305, EPA, "Review of the Application for a FIFRA Section 3 Seed Increase Registration of MON 95379 Corn Expressing Transgenic Insecticidal Plant-Incorporated Protectants Bacillus thuringiensis Cry1B.868 and Cry1Da_7 Proteins and associated FFDCA Petition to Establish a Permanent Exemption from the Requirement of a Tolerance for Residues of Cry1B.868 and Cry1Da_7 Proteins when used as Plant-Incorporated Protectants in Food and Feed Commodities of Corn" (May 2024).
[263] USA Rebuttal, ¶¶ 115-129.
[264] USA Comments, ¶ 9.
[265] USA Comments, ¶ 9.

just by including hollow provisions in a measure that state, at some point in the future, a Party will justify its scientifically unsupported measures."[266]

b. Article 9.6.8: Conduct of a Risk Assessment

170. For the same reasons as set out above, the USA contends that Mexico failed to conduct a risk assessment within the meaning of Article 9.6.8, and that, consequently, the Measures are inconsistent with Article 9.6.8 of the USMCA.[267] In particular, the USA highlights that a risk assessment should be based on "scientific data,"[268] use "sound scientific methods,"[269] be performed on a "case by case basis,"[270] and that the resulting SPS measure should be "technically justified."[271] The USA submits that Mexico's purported risk assessment did not follow any of these principles.[272]

171. In contrast, Mexico's position is that it conducted a risk assessment that is consistent with Annex A(4) of the SPS Agreement.[273] In particular, based on same arguments as set out above, Mexico contends that the risk assessment – in relation to human health and the genetic diversity of native corn – "is appropriate to the circumstances and accounts for available scientific evidence."[274]

c. Article 9.6.7: Conduct a Risk Assessment in a Manner Allowing Comment

172. The USA's position is that Mexico did not conduct a risk assessment. However, even if Mexico had conducted a risk assessment on which the Measures were based, the USA contends that the Measures are inconsistent with Article 9.6.7 of the USMCA because Mexico did not provide the USA with an opportunity to comment on the risk assessment or the resulting risk management.[275] In the USA's opinion, a party must document both its risk assessment and its risk management, as distinct processes, and that documentation is what needs to be provided to affected parties for comment under Article 9.6.7.[276] The USA points to the many years during which the USA and Mexico discussed measures related to GM corn and asserts that during these discussions, Mexico never identified either the 2020 Dossier or the SNIB Database as its

[266] USA Comments, ¶ 9.
[267] USA IWS, ¶¶ 177-184; USA Rebuttal, ¶¶ 156-163.
[268] USA Rebuttal, ¶ 157, citing USA 113, Codex Principles, § 3, ¶¶ 12-15, 29-30.
[269] USA Rebuttal, ¶ 157, citing USA-114, Codex Guideline, § 3, ¶ 20.
[270] USA Rebuttal, ¶ 157, citing USA-113, Codex Principles, § 3, ¶¶ 10, 12.
[271] USA Rebuttal, ¶ 157, citing USA-102, IPPC, Arts. II.1, VII.2.
[272] USA Rebuttal, ¶ 157.
[273] MEX IWS, ¶ 403.
[274] MEX Rebuttal, ¶ 354.
[275] USA IWS, ¶ 169; USA Rebuttal, ¶ 152.
[276] Tr. Day 2, p. 43 [ENG]; USA Comments, ¶ 51.

risk assessment.[277] The USA also says that Mexico has not identified any documented risk management process. Instead, when the USA formally requested more information about Mexico's agricultural biotechnology measures on 30 January 2023 – including purportedly a specific request for the risk assessment on which the 2020 Decree was based – Mexico announced the issuance of the 2023 Decree without a substantive response.[278]

173. Mexico submits that the Measures are not inconsistent with Article 9.6.7 because the 2020 Dossier was published on the CONAHCYT website in August 2020, was posted on Twitter and was referenced in media coverage.[279] Mexico says that the 2020 Dossier informed the 2020 Decree, aspects of which the USA objected to, which were then the subject of consultations. As a result of those consultations, Mexico says it narrowed the scope of Article 6.II of the 2023 Decree by only restricting the use of GM corn for nixtamalization and processing of flour (rather than a wholesale restriction on GM corn for human consumption, as previously set out in Article 6 of the 2020 Decree).[280] At the Hearing, Mexico emphasized that the 2020 Dossier was published under its own title and that the SNIB Database was, and continues to be, public.[281] In response to the Panel's questions, Mexico added that the USA was informed of the 2020 Dossier, and its contents, in the context of the discussions regarding the 2020 Decree, which, in Mexico's view, is sufficient to meet the requirements of Article 9.6.7.[282]

174. With respect to risk management, Mexico contends that there is nothing in Article 9.6.7 that requires Mexico to institute a separate risk management process.[283] In this regard, Mexico reiterates that the USA "had an opportunity to comment on the risk management measures under consideration when it provided comments and consulted with Mexico on the scope of the 2020 Decree," including "on policy considerations that [the USA] believed Mexico should

[277] USA Rebuttal, ¶ 153.
[278] USA IWS, ¶¶ 60-61; USA Rebuttal, ¶ 154; USA Comments, ¶ 50. The 30 January 2023 information request to which the USA refers does not appear to be in the record of these proceedings. The USA's contention that it asked Mexico specifically for the risk assessment, as part of its more general information request of 30 January 2023, was made for the first time in the USA's comments on Mexico's response to the Panel's questions.
[279] MEX IWS, ¶ 397; MEX Rebuttal, ¶ 394.
[280] MEX Rebuttal ¶ 396, citing MEX-410, Press release "En Washington, autoridades de Mexico y Estado Unidos sostienen diálogo constructivo en torno al maíz", 16 December 2022; MEX-411, Press release, "Joint Statement from Ambassador Tai and Secretary Vilsack after Meeting with Mexican Government Officials", 16 December 2022; MEX-412, Inside US Trade, "Tai, Vilsack: Biotech talks with Mexico have been difficult, but U.S. is 'hopeful'," 18 August 2022.
[281] Tr. Day 2, p. 42 [ENG].
[282] Tr. Day 2, p. 42 [ENG].
[283] MEX Rebuttal, ¶ 395.

consider."[284] Mexico submits that it "assessed these concerns and modified its measure to address in particular the U.S. concerns regarding total substitution."[285]

d. Article 9.6.6(b): Based on Relevant Scientific Principles

175. The USA contends that because Mexico's Measures are not based either on international standards, guidelines, or recommendations or on an appropriate risk assessment in accordance with Article 9.6.3 of the USMCA, accordingly they are not based either on "relevant scientific principles" as required by Article 9.6.6(b).[286]

176. The USA submits that the Article 6.II Measure "is inconsistent with Article 9.6.6(b) of the USMCA" because it "is not based on scientific principles."[287] The USA argues that the generally accepted principles "on which the development of SPS measures is based are the Codex standards, guidelines, and recommendations in the context of food safety, and the Secretariat of the IPPC's standards, guidelines, and recommendations in the context of plant health."[288] The USA emphasizes that these relevant standards "all prescribe that a scientifically sound risk assessment should be performed and undergird any SPS measure that is enacted."[289] However, the USA argues, as set out above, that the Article 6.II Measure is not based on international standards, guidelines, or recommendations or on a risk assessment, and that "there is nothing in the [2023 Decree] that would indicate that the [Article 6.II Measure] is based on any scientific evidence at all."[290]

177. In this context, the USA refers to WTO panels finding that "that where a Party has failed to conduct a risk assessment, it may be presumed that the Party's measure is not based on scientific principles."[291] For the same reasons set out above, the USA does not accept Mexico's claim to have conducted a qualifying risk assessment, highlighting that Mexico did not conduct a case-by-case assessment of GM events as required and that the purported risk assessment itself does

[284] MEX Comments, ¶ 30-31, citing MEX-412, Inside US Trade, "Tai, Vilsack: Biotech talks with Mexico have been difficult, but U.S. is 'hopeful'," 18 August 2022.
[285] MEX Comments, ¶ 31.
[286] USA IWS, ¶¶ 163-168.
[287] USA IWS, ¶ 165.
[288] USA IWS, ¶ 163.
[289] USA IWS, ¶ 163.
[290] USA IWS, ¶ 163.
[291] USA IWS, ¶ 164, citing USA-121, Panel Report, *Australia - Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/R, adopted 17 December 2010, ¶¶ 7.472, 7.510, 7.779, 7887, 7.905, 7.1308; USA-122, Panel Report, *United States - Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R, adopted 25 October 2010, ¶ 7.201; USA Rebuttal, ¶ 147.

not address how GM corn imported for direct human consumption "presents an actual risk to [Mexico's] native corn varieties."[292]

178. For the same reasons, the USA contends that the Articles 7/8 Measure is not based on relevant scientific principles and is inconsistent with Article 9.6.6(b) of the USMCA.[293]

179. As set out above, Mexico's position is that there are no relevant international standards that meet its ALOP for the protection of human health and native corn, which is why it conducted a risk assessment that took into account the relevant scientific evidence available and is appropriate to the unique circumstances in Mexico. Mexico adds that the 2020 Dossier was created to support the 2020 Decree, and, in turn, the 2023 Decree as a whole, including in relation to measures not challenged by the USA.[294]

3) The Panel's Analysis

a. The Article 6.II Measure

180. There is no dispute between the Parties that the Article 6.II Measure is not based on "relevant international standards, guidelines or recommendations." Mexico admits as much, while claiming that the international standards, guidelines or recommendations cited by the USA are not suitable to addressing the risk posed to the Mexican population or to native corn varieties in accordance with the "zero risk" level of protection it has adopted. Mexico therefore claims to have based the Article 6.II Measure on an appropriate risk assessment. The USA disagrees with Mexico's contention that the Codex Principles and Guideline and the IPPC are not suitable. It also disagrees that the Article 6.II Measure was based on an appropriate risk assessment, as an alternative to "relevant international standards, guidelines, or recommendations."

181. The Panel agrees with the USA that SPS measures must have a basis in science and, to that effect, pursuant to Article 9.6.3 of the USMCA, a Party must first determine, through either adherence to an international standard, guideline, or recommendation, or an appropriate scientific risk assessment, that a risk to human, animal, or plant life or health exists.[295] The Panel accepts that a Party has the discretion to set its ALOP – including as zero risk – and to determine whether international standards, guidelines, or recommendations meet that ALOP. However, if the Party in question does not base its SPS measures on relevant international standards, guidelines, or recommendations – because it has determined that they are not suitable

[292] USA Rebuttal, ¶ 147.
[293] USA IWS, ¶¶ 166-168; USA Rebuttal, ¶ 151.
[294] MEX IWS, ¶¶ 429-343; MEX Rebuttal, ¶¶ 341-348.
[295] USA IWS, ¶ 108.

to meet is ALOP or for any other reason – the SPS measures in question nevertheless must be based "on an assessment, as appropriate to the circumstances of the risk to human, animal, or plant life or health." This requirement of an "*appropriate*" risk assessment as an alternative to adherence to international standards is meaningful and must be interpreted with some rigor.

182. Moreover, Article 9.6.8(b) expressly requires a Party to "take into account relevant guidance of the WTO SPS Committee and the relevant international standards, guidelines, and recommendations of the relevant international organization" *in conducting its risk assessment*. This means that even where a Party determines not to "adhere" to an international standard of *substantive* protection from risk, it still must demonstrably take relevant guidance "into account" in developing and applying its own risk assessment methodology.

183. As noted, the USA refers to the Codex Principles, the Codex Guideline, the IPPC, the ISPM 2 and the ISPM 11 as relevant international standards, guidelines or recommendations. Mexico counters that these are not relevant to address its ALOP.[296] The Panel considers that rather than establishing specific standards, guidelines or recommendations of substantive protection from risks, these principles provide a framework for undertaking risk analysis, including risk assessment.[297] In other words, rather than being relevant international standards, guidelines or recommendations on which a Party could base its SPS measures pursuant to USMCA Article 9.6.3, these are relevant to the *process* of conducting risk assessment and risk management pursuant to Article 9.6.8.

184. The purpose of the Codex Principles is "to provide a framework for undertaking risk analysis on the safety and nutritional aspects of foods derived from modern biotechnology."[298] The Codex Guideline supports the Codex Principles by addressing "safety and nutritional aspects of foods consisting of, or derived from, plants that have a history of safe use as sources of food, and that have been modified by modern biotechnology to exhibit new or altered expression of traits."[299] The Codex *Working Principles for Risk Analysis for Food Safety for Application by Governments* (the "**Codex Working Principles on Risk Analysis**") "provide guidance to national governments for risk assessment, risk management and risk communication with regard to food related risks to human health."[300]

[296] See ¶¶ 131-134 above.
[297] USA-211, Codex, "Working Principles for Risk Analysis for Food Safety for Application by Governments" (2007) ¶ 7 (providing that "The risk analysis should follow a structured approach comprising the three distinct but closely linked components of risk analysis (risk assessment, risk management and risk communication) as defined by the Codex Alimentarius Commission, each component being integral to the overall risk analysis.")
[298] USA-113, Codex Principles, ¶ 7.
[299] USA-114, Codex Guideline, ¶ 1.
[300] USA-211, Codex Working Principles for Risk Analysis, ¶ 1.

185. These documents underscore that risk analysis should be applied consistently, in an open, transparent and documented manner, and evaluated and reviewed as appropriate in the light of newly generated scientific data.[301] For risk assessment more specifically, these international standards, guidelines or recommendations provide:

> 20. Each risk assessment should be fit for its intended purpose.
>
> 21. The scope and purpose of the risk assessment being carried out should be clearly stated and in accordance with risk assessment policy. The output form and possible alternative outputs of the risk assessment should be defined.
>
> 22. Experts involved in risk assessment including government officials and experts from outside government should be objective in their scientific work and not be subject to any conflict of interest that may compromise the integrity of the assessment. Information on the identities of these experts, their individual expertise and their professional experience should be publicly available, subject to national considerations. These experts should be selected in a transparent manner on the basis of their expertise and their independence with regard to the interests involved, including disclosure of conflicts of interest in connection with risk assessment.
>
> 23. Risk assessment should incorporate the four steps of risk assessment, i.e. hazard identification, hazard characterization, exposure assessment and risk characterization.
>
> 24. Risk assessment should be based on scientific data most relevant to the national context. It should use available quantitative information to the greatest extent possible. Risk assessment may also take into account qualitative information.
>
> 25. Risk assessment should take into account relevant production, storage and handling practices used throughout the food chain including traditional practices, methods of analysis, sampling and inspection and the prevalence of specific adverse health effects.
>
> 26. Constraints, uncertainties and assumptions having an impact on the risk assessment should be explicitly considered at each step in the risk assessment and documented in a transparent manner. Expression of uncertainty or variability in risk estimates may be qualitative or quantitative, but should be quantified to the extent that is scientifically achievable.
>
> 27. Risk assessments should be based on realistic exposure scenarios, with consideration of different situations being defined by risk assessment policy. They should include consideration of susceptible and high-risk population groups. Acute, chronic (including long-term),

[301] USA-211, Codex Working Principles on Risk Analysis, ¶ 6.

> cumulative and/or combined adverse health effects should be taken into account in carrying out risk assessment, where relevant.
>
> 28. The report of the risk assessment should indicate any constraints, uncertainties, assumptions and their impact on the risk assessment. Minority opinions should also be recorded. The responsibility for resolving the impact of uncertainty on the risk management decision lies with the risk manager, not the risk assessors.
>
> 29. The conclusion of the risk assessment including a risk estimate, if available, should be presented in a readily understandable and useful form to risk managers and made available to other risk assessors and interested parties so that they can review the assessment.[302]

186. In a similar vein, with respect to plant life and health, the IPPC's *Phytosanitary principles for the protection of plants and the application of phytosanitary measures in international trade* (the "**ISPM 1**") requires that the competent national authority base its PRA (pest risk analysis) "on biological or other scientific and economic evidence."[303] The ISPM 2 and the ISPM 11 describe and provide details for the conduct of PRA within the scope of the IPPC.[304] The ISPM 2 is "a technical tool used for identifying appropriate phytosanitary measures" that "provides the rationale for phytosanitary measures".[305] It can also be used for organisms not previously recognized as pests, including LMOs (living modified organisms).[306] The ISPM 2 provides that the PRA process consists of three stages: (1) initiation; (2) pest risk assessment; and (3) pest risk management.[307]

187. Initiation of the PRA begins with the identification of organisms and pathways that may be considered for pest risk assessment in relation to an identified PRA area.[308] It involves, *inter alia*, the determination of whether an organism is a pest, defining the PRA area, evaluating any

[302] USA-211, Codex Working Principles on Risk Analysis, ¶¶ 20-29.
[303] CAN-19, IPPC, International Standards for Phytosanitary Measures, *Phytosanitary principles for the protection of plants and the application of phytosanitary measures in international trade* (ISPM 1), Art. 2.1.
[304] USA-117, ISPM 2, p. 5; USA-103, ISPM 11, p. 6.
[305] USA-117, ISPM 2, pp. 4-5.
[306] USA-117, ISPM 2, pp. 2 and 3. ISPM 2 defines living modified organisms as "organisms that possess a novel combination of genetic material, obtained through the use of modern biotechnology and are designed to express one or more new or altered traits." USA-117, p. 10. See also USA-103, p. 8.
[307] USA-117, ISPM 2, p. 5 (The PRA structure).
[308] USA-117, ISPM 2, § 1.1. The PRA area needs to be clearly defined at the initiation stage for purposes of analyzing the establishment, spread and economic impact of the organism in question and to "clarify the identity of the pest(s), its/their present distribution and association with host plants, commodities etc." although "[o]ther information will be gathered as required to reach necessary decisions as the PRA continues." USA-103, ISPM 11, § 1.3.

previous PRA and making a determination of whether the organism in question is a pest, in which case a risk assessment will need to be carried out.[309]

188. The ISPM 11 provides that information gathering, including from a variety of sources, "is an essential element of all stages of PRA."[310] The ISPM 2 emphasizes the need for information at the initiation phase to identify the organism in question, its potential economic impact, which includes environmental impact, its geographical distribution, host plants, habitats and association with commodities, modes of transport and its intended end uses.[311] Specifically for LMOs, the ISPM 11 provides the following list of the information that a full PRA may include:

- name, identity and taxonomic status of the LMO (including any relevant identifying codes) and the risk management measures applied to the LMO in the country of export
- taxonomic status, common name, point of collection or acquisition, and
- characteristics of the donor organism
- description of the nucleic acid or the modification introduced (including genetic construct) and the resulting genotypic and phenotypic characteristics of the LMO
- details of the transformation process
- appropriate detection and identification methods and their specificity, sensitivity and reliability
- intended use including intended containment
- quantity or volume of the LMO to be imported.[312]

189. Once information has been collected, pests and pathways of concern identified and the PRA area defined, the appropriate risk assessment can be conducted.[313] The ISPM 11 notes that, specifically "[f]or LMOs, from this point forward in PRA, it is assumed that the LMO is being assessed as a pest, and therefore 'LMO' refers to an LMO that is a potential quarantine pest due

[309] USA-117, ISPM 2, §§ 1.1.2, 1.4, 1.5.
[310] USA-103, ISPM 11, § 1.3.
[311] USA-117, ISPM 2, § 1.
[312] USA-103, ISPM 11, § 1.3.
[313] USA-117, ISPM 2, § 1.5.

to new or altered characteristics or properties resulting from genetic modification" and requires that the risk assessment be carried out on a case-by-case basis.[314]

190. As part of the second stage of the PRA - the pest risk assessment - the pest needs to be categorized on the basis of sufficient information.[315] In order for an LMO to be categorized as a pest, it "has to be injurious or potentially injurious to plants or plant products under conditions in the PRA area."[316] The ISPM 11 provides detailed guidance on the process of determining whether an LMO has the potential to be a pest through a categorization process, which includes the following elements:[317]

a. Identification: The identity of the pest should be clearly defined to ensure, among other things, that the assessment is based on the relevant biological and other information.[318] Specifically for LMOs, "identification requires information regarding characteristics of the recipient or parent organism, the donor organism, the genetic construct, the gene or transgene vector and the nature of the genetic modification."[319]

b. Presence or absence in the PRA area: "The pest should be absent from all or a defined part of the PRA area. […] In the case of LMOs, this should relate to the LMO of phytosanitary concern."[320]

c. Regulatory status: "If the pest is present but not widely distributed in the PRA area, it should be under official control or expected to be under official control in the near future. […] In the case of LMOs, official control should relate to the phytosanitary measures applied because of the pest nature of the LMO. It may be appropriate to consider any official control measures in place for the parent organism, donor organism, transgene vector or gene vector."[321]

d. Potential for establishment and spread in the PRA area: "Evidence should be available to support the conclusion that the pest could become established or spread in the PRA area."[322] Specifically for LMOs, "the following should be considered:

[314] USA-103, ISPM 11, § 2.
[315] USA-103, ISPM 11, § 2.
[316] USA-103, ISPM 11, § 1.1.
[317] USA-103, ISPM 11, § 2.1.
[318] USA-103, ISPM 11, § 2.1.1.1.
[319] USA-103, ISPM 11, § 2.1.1.1.
[320] USA-103, ISPM 11, § 2.1.1.2, Annex 4 (PDF p. 36).
[321] USA-103, ISPM 11, § 2.1.1.3.
[322] USA-103, ISPM 11, § 2.1.1.4.

- changes in adaptive characteristics resulting from the genetic modification that may increase the potential for establishment and spread

- gene transfer or gene flow that may result in the establishment and spread of pests, or the emergence of new pests

- genotypic and phenotypic instability that could result in the establishment and spread of organisms with new pest characteristics, e.g. loss of sterility genes designed to prevent outcrossing."[323]

e. Potential for economic consequences in the PRA area: "There should be clear indications that the pest is likely to have an unacceptable economic impact (including environmental impact) in the PRA area. […] In the case of LMOs, the economic impact (including environmental impact) should relate to the pest nature (injurious to plants and plant products) of the LMO."[324]

191. At the conclusion of the pest categorization, the ISPM 11 instructs that "[i]f it has been determined that the pest has the potential to be a quarantine pest, the PRA process should continue."[325] The next step is the assessment of the probability of introduction and spread of the pest, including an analysis of both intentional or unintentional pathways of introduction and intended use in the case of LMOs.[326] For example, the ISPM 11 enumerates various factors to be considered in a pest risk assessment, including cultural practices and control measures, providing that: "For plants that are LMOs, it may also be appropriate to consider specific cultural, control or management practices."[327]

192. Finally, the ISPM 11 also requires the evaluation of potential economic consequences in a pest risk assessment.[328] Quantitative data to provide monetary values needs to be obtained, while qualitative data may also be used.[329] Economic factors may need to be examined in detail. In the case of LMOs, the economic impact (including environmental impact) should relate to the pest nature (injurious to plants and plant products) of the LMO, and evidence of the "potential economic consequences that could result from adverse effects on non-target organisms that are

[323] USA-103, ISPM 11, § 2.1.1.4.
[324] USA-103, ISPM 11, § 2.1.1.5 (noting that: "Unacceptable economic impact is described in ISPM 5 Supplement 2 (Guidelines on the understanding of potential economic importance and related terms including reference to environmental considerations).")
[325] USA-103, ISPM 11, § 2.1.2.
[326] USA-103, ISPM 11, § 2.2.
[327] USA-103, ISPM 11, § 2.2.2.3.
[328] USA-103, ISPM 11, § 2.3.
[329] USA-103, ISPM 11, § 2.3.

injurious to plants or plant products," as well as of the economic consequences that could result from pest properties should be considered.[330] The ISPM 11 provides specific guidance on assessing the potential economic consequences of plants as pests and more detailed guidance for the corresponding assessment in the case of LMOs.[331]

193. The ISPM 11 also requires that areas of uncertainty and the degree of uncertainty in the assessment be documented, including where expert judgment has been used, for purposes of transparency and to identify and prioritize research needs.[332]

194. With respect to the documentation of PRAs, the ISPM 11 provides that:

> The whole process from initiation to pest risk management needs to be sufficiently documented so that when a review or a dispute arises, the sources of information and rationale used in reaching the management decision can be clearly demonstrated. The main elements of documentation are:
>
> The main elements of documentation are:
>
> - purpose for the PRA
> - pest, pest list, pathways, PRA area, endangered area
> - sources of information
> - categorized pest list
> - conclusions of risk assessment
>
> . probability
> . consequences
>
> - risk management
>
> . options identified
> . options selected.[333]

195. The availability of this detailed international guidance on the conduct of food safety and pest risk assessments informs the analysis in this case. Mexico claims that the Article 6.II Measure

[330] USA-103, ISPM 11, § 2.3.
[331] USA-103, ISPM 11, § 2.3.
[332] USA-103, ISPM 11, § 2.4.
[333] USA-103, ISPM 11, § 4.

was "based" on a risk assessment it conducted prior to issuance of the 2023 Decree, and cites the 2020 Dossier and the SNIB Database as embodying the contents of that risk assessment.[334] However, the Panel finds that on the face of these materials, the 2020 Dossier and the SNIB Database do not meet any of the requirements of a risk assessment. The 2020 Dossier is, as the USA notes, essentially a high-level summary of a select subset of materials covering a range of topics. The SNIB Database is a collection of materials without any analysis of their contents.

196. The Panel need not go through each and every requirement with which any risk assessment needs to comply. It finds that Mexico breached Article 9.6.8, and in consequence concludes that the Article 6.II Measure is not based on a risk assessment as required by USMCA Article 9.6.3. In essence, the 2020 Dossier does not indicate the scope or purpose of any risk analysis, or even that it is a risk analysis or risk assessment at all. There is no indication of which experts participated in the elaboration of the 2020 Dossier or how they were selected; in fact, the authors are not even identified. Other than the list of references cited (which take up 1/3 of the 2020 Dossier), there is no indication of what sources were used and whether these sources included developers of the product in question (if indeed the subject of analysis was GM corn), scientific literature, general technical information, independent scientists, regulatory agencies, international bodies and other interested parties, including the other USMCA Parties. There is no indication either of what methods for collection of data and information were used, and what science-based risk assessment methods and statistical techniques were employed to assess the data and information. There is no hazard/pest identification, hazard/pest characterization, exposure assessment, risk characterization, definition of a PRA area, etc. There is no indication that GM corn was even considered a pest or potential pest. Importantly, there is no analysis whatsoever of the scientific data and information, or the particular risk studies, on which the Mexican competent authorities previously granted authorizations for GM corn under the 2005 Biosafety Law and the 2008 Biosafety Regulations, much less a disciplined analysis and explanation of why such studies no longer would be adequate.[335] While new data in principle may justify revisiting old conclusions, one would expect an appropriate risk assessment at minimum to grapple expressly with the prior analyses.

b. The Articles 7/8 Measure

[334] MEX IWS, ¶ 371; MEX Rebuttal, ¶¶ 344, 346; MEX-85, 2020 Dossier. Because Mexico contends that its risk assessment predated the 2023 Decree, there is no need to examine how the USMCA might address an alternative scenario where a Party carries out a risk assessment only after its adoption of an SPS measure, but before a Panel is established to examine that measure. While Mexico correctly notes that that question was addressed by the Panel in MEX-277, Panel Reports, *EC-Biotech*, ¶¶ 7.3030 and 7.3034 (see MEX Responses to Panel Questions, ¶ 54), that temporal issue does not arise in this case.

[335] USA-85/MEX-250, 2005 Biosafety Law; USA-86/MEX-251, 2008 Biosafety Regulations (referring in particular to Article 31 of the 2008 Biosafety Regulations).

197. Mexico admits that it did not base the Articles 7/8 Measure either on relevant international standards, guidelines or recommendations, or on a risk assessment. Accordingly, the Panel finds that the Articles 7/8 Measure is in breach of Articles 9.6.3 and 9.6.8 as well.

c. Article 9.6.7 Requirements

198. As noted above,[336] Article 9.6.7 requires that risk assessment and risk management with respect to a sanitary or phytosanitary regulation, such as the 2023 Decree (not only the Articles 6.II and 7/8 Measures), be conducted "in a manner that is documented and provides the other Parties and persons of the Parties an opportunity to comment." This obligation is *in addition to* the documentation and risk communication requirements contained in the relevant international standards, guidelines and recommendations that must be taken into account in the circumstances of this case pursuant to Article 9.6.8, referred to in paragraphs 183 and 184 above, in respect of risk analysis generally.

199. The Codex Principles establish that "[e]ffective risk communication is essential at all phases of risk assessment and risk management."[337] Effective risk communication "is an interactive process involving all interested parties, including government, industry, academia, media and consumers" that "should be fully documented at all stages and open to public scrutiny," and "[i]n particular, reports prepared on the safety assessments and other aspects of the decision-making process should be made available to all interested parties."[338] The Panel notes that according to the Codex Principles, effective risk communication is not only an interactive process but should specifically include an interactive and responsive *consultation* process where the views of all interested parties should be sought and relevant food safety and other issues that are raised during consultation are addressed during the risk analysis process.[339] The Codex Principles specify:

> A transparent and well-defined regulatory framework should be provided in characterising and managing the risks associated with foods derived from modern biotechnology. This should include consistency of data requirements, assessment frameworks, the acceptable level of risk, communication and consultation mechanisms and timely decision processes.[340]

200. The Panel finds that Mexico did not comply with the transparency, communication and documentation requirements of USMCA Chapter 9 or the relevant international standards,

[336] See ¶¶ 127-129 above.
[337] USA-113, Codex Principles, ¶ 22.
[338] USA-113, Codex Principles, ¶¶ 22-23.
[339] USA-113, Codex Principles, ¶ 24.
[340] USA-113, Codex Principles, ¶ 26.

guidelines and recommendations. Mexico's position that the 2020 Dossier and the SNIB Database were available online or were mentioned in a tweet or a press article is insufficient to meet this standard. Even from a purely common-sense approach, how was anybody to know that Mexico considered the 2020 Dossier and the SNIB Database to constitute its risk assessment and that it expected comments? At the very least, to be meaningful, Article 9.6.7 of the USMCA requires a Party to issue a formal notification (1) of the proposed sanitary or phytosanitary regulation, *i.e.*, the decree that will either constitute or incorporate specific SPS measures; (2) that it will undertake a risk assessment and the methodology and criteria it will follow; (3) that it is inviting comments from the USMCA Parties and all interested parties, including those who had previously obtained or applied for authorizations for GM corn pursuant the 2005 Biosafety Law and the 2008 Biosafety Regulations, and other relevant producers, such as growers of native varieties, academia, media and consumers; (4) and that there is a specified period to submit comments. It is axiomatic that the period for comments then should be followed by a period of assessment of the comments received.

201. Mexico also failed to provide an opportunity to the USA and Canada to comment on Mexico's claimed risk assessment within the meaning of Article 9.6.7 of the USMCA.

d. Article 9.6.6(b): Based on Relevant Scientific Principles

202. Mexico neither based the Article 6.II Measure on international standards, guidelines or recommendations, nor conducted a risk assessment in conformity with Article 9.6.3. Thus, there is no evidence that the Article 6.II Measure is based on relevant scientific principles. As regards the Article 7/8 Measure, Article 8 recognizes that the scientific studies necessary to support the substitution of GM corn based on scientific principles have not yet been carried out.

203. Accordingly, the Panel finds that Mexico's Measures are inconsistent with Article 9.6.6(b) of the USMCA.

C. Article 9.6.6(a): Applied Beyond the Extent Necessary

1) The Relevant Provision

204. Article 9.6.6(a) of the USMCA provides that:

> Each Party shall ensure that its sanitary and phytosanitary measures:
>
> (a) are applied only to the extent necessary to protect human, animal, or plant life or health;

2) The Parties' Arguments

205. The USA claims that the Measures "go well beyond that which is necessary to protect human, animal, or plant life or health," and are consequently inconsistent with Article 9.6.6(a).[341] The USA defines "necessary" as "indispensable, vital, essential; requisite," on which basis the USA submits that the Measures are not indispensable, "because there is no scientific evidence of a risk to human health from previously authorized GE corn events."[342] Further, with respect to protecting plant life or health, the USA says that it is unclear how a ban on the use of GM corn - whether for food or for feed - has any relation to the protection of plant life.[343]

206. With respect to the Article 6.II Measure, the USA submits that Mexico has not evidenced that GM corn "presents unsafe levels of glyphosate residue or any other credible risk to human health."[344] At the Hearing, the USA referred to data from the WHO and the JMPR, which has shown higher levels of glyphosate in non-GM corn.[345] Even if Mexico had a legitimate concern, the USA says, "it should have relied on current or modified MRLs, employed by Codex and countries around the world to ensure the safety of the global food supply," which would apply to both GM and non-GM corn.[346] The USA adds that this framework "not only can be - but typically is - tailored to country-specific conditions, based on residue and exposure data."[347]

207. With respect to the protection of native corn, the USA questions whether genetic "purity" can even be claimed as an SPS issue in the absence of evidence of actual harm to the plant.[348] In any event, the USA argues that GM corn that is imported cannot cross-pollinate unless it is planted (which is already banned in Mexico), and, even then, it takes time for it to reach maturity. Further, the USA refers to studies showing that "the vast majority of corn pollen falls within five meters of a field's edge, and 98 percent of pollen travels no further than ten meters."[349] With respect to the risk of cross-pollination with native corn, the USA points to

[341] USA IWS, ¶ 147.
[342] USA IWS, ¶¶ 149-150 (Article 6.II Measure); 155-157 (Articles 7/8 Measure).
[343] USA IWS, ¶¶ 151-152 (Article 6.II Measure); 158-160 (Articles 7/8 Measure).
[344] USA Rebuttal, ¶ 134.
[345] Tr. Day 2, p. 39 [ENG].
[346] USA Rebuttal, ¶ 134.
[347] Tr. Day 2, p. 39 [ENG].
[348] USA Comments, ¶ 75.
[349] USA Rebuttal, ¶ 136, citing USA-256, J. M. Pleasants et al., "Corn Pollen Deposition on Milkweeds In and Near Cornfields," 98 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES 11919 (2001); USA-257, F. Bénétrix & D. Bloc, "GMO and Non-GMO Maize Possible Coexistence," 294 PERSPECTIVES AGRICOLES 14 (Oct. 2003).

studies finding that "cross-pollination levels are a mere one percent or less where GE crops and non-GE crops are grown at a distance of 30 meters."[350]

208. The USA says that "Mexico's arguments indicate that local agricultural practices are responsible for any transgene flow, not the imports themselves, which are granted entry under the express condition that they are not diverted for seed," and that there is "no evidence that U.S. exporters have contributed to illegal diversion."[351] On this basis, the USA submits that "there are numerous less trade-restrictive measures available to mitigate gene flow between corn plants, irrespective of whether the plant is GE or non-GE," including "adapting co-existence measures that are employed around the world to mitigate cross-pollination between native and non-native crops, such as spatial isolation and natural barriers; clean equipment and storage measures; and community outreach and education."[352] The USA adds that "the Mexican Government should promote the distribution of whatever it considers to be native seed from its community seed banks," which, together with the co-existence measures and already existing programs to educate farmers, are all better suited to address Mexico's concerns than the sweeping Article 6.II Measure in the 2023 Decree.[353]

209. For the same reasons, the USA submits that the Articles 7/8 Measure is applied beyond the extent necessary and suggests that less trade restrictive alternatives were available to Mexico, including "enforcing or strengthening remediation procedures under the Biosafety Law to regulate and sanction unauthorized behavior such as illegal GE corn cultivation."[354]

210. Mexico rejects the USA's position and considers that the legal question under Article 9.6.6(a) is whether Mexico has applied the measure in question "only to the extent necessary" to protect human health and native corn in Mexico.[355] In this regard, Mexico says that this obligation reflects the first requirement in Article 2.2 of the SPS Agreement, and that there is a close relationship between Articles 2.2 and 5.6 of the SPS Agreement, which implies that there is a similar relationship between Articles 9.6.6(a) and 9.6.10 of the USMCA.[356] Further, Mexico

[350] USA Rebuttal, ¶ 137, citing USA-170, G. Brookes et al., "Genetically Modified Maize: Pollen Movement and Crop Co-existence," PG ECONOMICS (Nov. 26, 2004); USA-261, B. L. Ma et al., "Extent of Cross-Fertilization in Maize by Pollen from Neighboring Transgenic Hybrids," 44 CROP SCIENCE 1273 (2004); USA-262, M. Palaudelmàs et al., "Sowing and Flowering Delays Can Be an Efficient Strategy to Improve Coexistence of Genetically Modified and Conventional Maize," 44 CROP SCIENCE 2404 (Nov. 2008); USA-263, J. Messeguer et al., "Pollen-mediated Gene Flow in Maize in Real Situations of Coexistence," 4 PLANT BIOTECHNOLOGY JOURNAL 633 (2006).
[351] USA Comments, ¶ 70.
[352] USA Rebuttal, ¶ 139.
[353] USA Comments, ¶¶ 72-74.
[354] USA Rebuttal, ¶¶ 141-143.
[355] MEX Rebuttal, ¶ 268.
[356] MEX IWS, ¶ 375; MEX Rebuttal, ¶ 268.

considers the relevance of Article XX(b) of the 1994 GATT, which provides an exception for "measures […] necessary to protect human, animal or plant life or health."[357] Mexico adds that Article 2.4 of the SPS Agreement expressly states that: "Sanitary or phytosanitary measures which conform to the relevant provisions of this Agreement shall be presumed to be in accordance with the obligations of the Members under the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b)."[358]

211. Mexico submits that the "necessity" of a measure has to be determined (i) by weighing and balancing "the contribution of the measure to the achievement of the ends it pursues" and "the restrictive impact of the measure on international trade," and (ii) by a comparison between "the challenged measure and possible alternatives, taking into account the importance of the interests at stake."[359] With regard to the weighing and balancing exercise, Mexico refers to the WTO Appellate Body stating that "responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, e.g. life-terminating, damage to human health are concerned."[360]

212. With respect to Mexico's precautionary approach, at the Hearing, Mexico argued that the 2023 Decree "implicitly incorporated the precautionary principle," in particular with respect to Article 8, because "Mexico considers that more evidence is needed to determine to what extent such risks, including accumulation of toxins or stacking of GM proteins, are transmitted to GM maize products further down the chain."[361] Mexico contrasted this with Article 6.II of the 2023 Decree, which it said is not based on the precautionary principle "because the harmful risks of direct consumption of genetically modified corn in processed products, as well as glyphosate residues, are well documented and demonstrated."[362] However, in its Rebuttal and in its written responses to the Panel's questions, Mexico submits that it:

> should not be prevented from adopting a precautionary approach to the protection of human health, specifically with respect to the direct consumption of GM corn grain in Mexico, based on the available

[357] MEX IWS, ¶ 376; MEX Rebuttal, ¶ 269.
[358] MEX Rebuttal, ¶ 269.
[359] MEX IWS, ¶ 376; MEX Rebuttal, ¶ 271, citing MEX-296, Panel Report, *India - Measures Concerning the Importation of Certain Agricultural Products*, WT/DS430/R and Add.1, adopted on 19 June 2015, ¶ 7.609; MEX-297, Appellate Body Report, *Brazil-Retreaded Tyres*, ¶ 178; MEX-298, Appellate Body Report, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted on 20 April 2005 ("**Appellate Body Report, *US-Gambling***"), ¶¶ 306-307; MEX-299, Appellate Body Report, *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted on 19 January 2010, ¶ 242.
[360] MEX Rebuttal, ¶ 276, citing MEX-286, Appellate Body Report, *EC-Hormones*, ¶ 124.
[361] Tr. Day 2, p. 30 [ENG].
[362] Tr. Day 2, p. 29 [ENG].

> independent scientific evidence on the risks of ingesting transgenic proteins and pesticide residues in GM corn grain.[363]

213. Mexico adds that it "should not be forced to allow GM corn grain to be used for direct human consumption in Mexico and 'wait' for scientific evidence to eventually confirm, *after the fact*, the adverse effects on the human population in Mexico over the long term."[364] In this regard, Mexico says that it "cannot be coerced into ignoring the independent scientific evidence that indicates the harmful effects of transgenic proteins and pesticide residues in GM corn, nor into placing the economic interests of U.S. biotech corporations ahead of people's health in Mexico."[365]

214. Mexico contends that:

> given Mexico's precautionary approach, the 2023 Decree is based on a Risk Assessment that is "appropriate to the circumstances of the risk to human health" in Mexico, has taken into account sufficient relevant scientific evidence of "the actual potential for adverse effects on human health in the real world" from qualified, reputable, independent sources. Notwithstanding the relevant uncertainties, constraints, and challenges in the assessment of the risks to human health, the Risk Assessment "sufficiently warrants" or "reasonably supports" the measures at issue.[366]

215. With respect to the Article 6.II Measure, Mexico argues that it is implemented to protect human health in Mexico from risks arising from contaminants and toxins in GM corn.[367] Mexico submits that the measure does not impose a ban on importation, rather it is designed and implemented as a domestic restriction on the end use of GM corn in Mexico (regardless of where it is produced).[368] Mexico's position is that when only non-GM corn grain is used for direct consumption, any possibility of human health risks from direct consumption of GM corn grain are eliminated, thus achieving the zero-risk ALOP determined by Mexico.[369]

216. In any event, Mexico says that almost all the corn imported from the USA is yellow corn which historically has been used for animal feed or industrial processing of food, and the Article 6.II Measure has not affected those imports.[370] Mexico adds that the trade data regarding current corn imports is relevant to the degree of trade restrictiveness involved, and submits that the

[363] MEX Rebuttal, ¶ 277; MEX Responses to Panel Questions, ¶ 58; MEX Comments, ¶ 16.
[364] MEX Rebuttal, ¶ 277; MEX Responses to Panel Questions, ¶ 59 (emphasis in original).
[365] MEX Responses to Panel Questions, ¶ 59.
[366] MEX Responses to Panel Questions, ¶ 61.
[367] MEX IWS, ¶¶ 381-382.
[368] MEX IWS, ¶ 385.
[369] MEX IWS, ¶ 385.
[370] MEX IWS, ¶ 387; MEX Rebuttal, ¶¶ 279-281.

Article 6.II Measure has no – or only minimal – impact on white corn exports, which should be balanced against other factors (*i.e.*, health risk and high consumption of corn-based food products in Mexico).[371]

217. With respect to alternative measures, Mexico rejects the USA's suggestions to prevent cross-pollination between GM and non-GM corn varieties.[372] Mexico says that the USA "fails to acknowledge or consider the very different circumstances in Mexico, including with respect to traditional, small-scale agriculture based on the milpa, subsistence farming (with any small surplus sold locally), and the practices of peasant farming communities," including informal seed exchange.[373] In this context, Mexico refers to a study highlighting the resulting risk of GM corn seed or grain spreading: "[i]n addition to seed systems, farmers occasionally use grain purchased as food or feed in lieu of seed. In contrast to pollen, which deposits largely within meters, seed and grain can move thousands of kilometers…."[374] On this basis Mexico argues that the issue in Mexico is not a matter of cross-pollination between neighboring fields, rendering the USA's suggestions of using buffer crops or barriers inapplicable. Rather, Mexico says that "it is a matter of GM corn and Mexico's non-GM native varieties of corn *growing together in the same milpas and fields*."[375]

218. With respect to the Articles 7/8 Measure, Mexico reiterates that it is not yet being applied and that the USA's claim is premature, even if it is an SPS measure, Mexico submits that the Articles 7/8 Measure is a provisional SPS measure that has not yet been implemented.[376] As such, Mexico contends that it "is not achieving any level of protection, let alone exceeding the level of protection that Mexico may determine to be appropriate [and] has no trade restrictive impact."[377] Mexico refers to the fact that since the implementation of the 2023 Decree, the volume of yellow corn imported from the USA has increased.[378]

3) The Panel's Analysis

219. Article 9.6.6(a) of the USMCA requires each Party to "ensure" that its SPS measures are "applied only to the extent necessary to protect human, animal, or plant life or health." The

[371] MEX Rebuttal, ¶¶ 283-286.
[372] MEX Rebuttal, ¶ 312.
[373] MEX Rebuttal, ¶ 312.
[374] MEX Rebuttal, ¶ 314, citing MEX IWS, ¶ 106, n. 97, referring to MEX-89, Dyer, G., Serratos-Hernández, J., Perales, H., Gepts, P., Piñeyro-Nelson, A., Chávez, A. Salinas-Arreortua, Yúñez-Naude, A., Taylor, J. and Álvarez-Buylla, E. "*Dispersal of transgenes through corn seed systems in Mexico*", 2009, PLoS One, p. 2.
[375] MEX Rebuttal, ¶ 317.
[376] MEX IWS, ¶¶ 390-393; MEX Rebuttal, ¶¶ 333-337.
[377] MEX IWS, ¶ 393.
[378] MEX IWS, ¶ 393.

word "ensure" carries some force, requiring both effort and result in limiting the scope of a measure only to that which is truly "necessary."

220. For a Party to determine whether a particular measure is "applied only to the extent necessary to protect human, animal, or plant life or health," it must have some objective standard against which to assess both the precise nature and source of the risk, and what is in fact necessary to protect against that risk. In this case, Mexico says it determined that there were no relevant international standards, guidelines or recommendations that were adequate to address its ALOP, and, consequently, it asserts that it decided to prepare its own risk assessment. However, as set out above, the Panel finds that Mexico did not carry out a risk assessment in compliance with Articles 9.6.3 and 9.6.8 of the USMCA. A Party cannot appropriately tailor a measure to ensure that it is "applied only to the extent necessary," if the measures are neither based on "international standards, guidelines or recommendations" nor based on a risk assessment "as appropriate to the circumstances," that would show what kind of tailoring would be necessary.

221. Because (contrary to Article 9.6.3) Mexico did not base its Measures either on relevant international standards, guidelines or recommendations, or an appropriate risk assessment, it has failed to ensure that they are based on relevant scientific principles (contrary to Article 9.6.8). In these circumstances, the Panel finds that the Measures are also being applied beyond the extent shown to be necessary, contrary to Article 9.6.6(a).

222. The next question is whether Mexico's arguments in respect of the precautionary principle carry enough weight to change the Panel's analysis. Mexico has repeatedly argued that it "should not be prevented from taking a precautionary approach to the protection of human health, *specifically with respect to the direct consumption of GM corn grain* in Mexico,"[379] and that it "should not be forced to allow GM corn grain to be used *for direct human consumption* and 'wait for' the scientific evidence of adverse effects on people in Mexico over the long term."[380] These repeated assertions can only relate to the Article 6.II Measure, which addresses GM corn intended for direct human consumption. At the same time, Mexico insists that it already conducted an appropriate risk assessment corresponding to the Article 6.II Measure, which in Mexico's view already documents and proves the risk of direct consumption of GM corn on human health. In fact, at the Hearing, Mexico argued that the precautionary principle was

[379] MEX Rebuttal, ¶ 277 (emphasis in original); see also MEX Responses to Panel Questions, ¶ 58; MEX Comments, ¶ 16.
[380] MEX Rebuttal, ¶ 277 (emphasis added); see also MEX Responses to Panel Questions, ¶ 59; MEX Comments, ¶ 16.

particularly relevant to the Articles 7/8 Measure, contrasting it with the Article 6.II Measure, where Mexico argued the risk was already "well documented and demonstrated."[381]

223. The Panel's view is that the precautionary principle does not obviate the requirements of Article 9.6.6(a) or Mexico's other USMCA commitments relevant to the Measures at issue. As a threshold matter, the 2023 Decree makes no mention of Mexico's purported precautionary approach, in contrast with the 2020 Decree which specifically referred to the precautionary principle in its preamble.[382] Mexico's submission that the 2023 Decree "implicitly incorporated the precautionary principle,"[383] even though not mentioned in the text, is not supported by any contemporaneous documents issued by the relevant authorities.

224. Specifically, the language of the Article 6.II Measure could not be clearer: it instructs the relevant authorities to "revoke and refrain from issuing authorizations for the use of genetically modified corn grain for human consumption," for the specific "purpose of contributing to food security and sovereignty and as a special measure to protect native corn, the milpa, biocultural wealth, peasant communities, gastronomic heritage and human health." There is nothing in this text that would indicate the measure is one on which an authority can act only on a provisional basis under certain circumstances, as a matter of precaution until further scientific study is completed. Instead, the Article 6.II Measure is a clear instruction that entirely forbids the use of GM corn for direct human consumption – including to revoke all authorizations previously granted by Mexico's competent authorities.

225. The express application of the Article 6.II Measure to all GM corn events, regardless of their particular characteristics, is the type of sweeping prohibition that directly implicates Mexico's obligation under Article 9.6.6(a) of the USMCA to "ensure" a measure is "applied only to the extent necessary." The precautionary principle does not authorize a Party to sidestep the specific duty imposed by Article 9.6.6.(a), to narrow an SPS measure as much as possible, in order to tailor it only to that which is "necessary" to protect against identified risks.

226. With respect to the Articles 7/8 Measure, Mexico says that the precautionary principle is of particular relevance because, in its view, the science with respect to potential risks posed by GM corn used for animal feed and industrial use is insufficiently developed. However, this does not change the fact that Article 7 clearly instructs an end-goal in which non-GM corn is substituted for all GM corn used for such purposes, again without distinction among the characteristics of different GM corn events (including those previously authorized by Mexico).

[381] Tr. Day 2, p. 29 [ENG].
[382] USA-92, 2020 Decree, PDF p. 5.
[383] Tr. Day 2, p. 30 [ENG].

While Mexico states that the timing and the pace of the implementation of Article 7 is dependent on the outcome of the further scientific studies envisioned by Article 8 of the 2023 Decree, it does not indicate any particular sequence or timing. Nor, importantly, does Article 7 allow for the possibility that the studies might demonstrate *no* need for substitution, or only a need for substitution for certain specified GM corn events or product uses. Nothing in the text of Article 7, even considered holistically with Article 8, alludes to the type of narrowing exercise that USMCA Article 9.6.6(a) commands. Rather, Article 7 remains an order to substitute *all* GM corn for animal feed and industrial use (albeit to be achieved gradually, starting from the adoption of the 2023 Decree), irrespective of the outcome of the yet-unscheduled scientific studies. As with the Article 6.II Measure, the sheer scope of the Articles 7/8 Measure thus cannot be squared with Article 9.6.6(a) of the USMCA.

227. For these reasons, the Panel finds that the Measures are applied beyond the extent necessary to protect human, animal, or plant life or health and are inconsistent with Article 9.6.6(a) of the USMCA.

D. Article 9.6.10: No More Trade Restrictive than Required to Achieve Appropriate Level of Protection

1) The Relevant Provisions

228. Article 9.6.10 of the USMCA provides that:

> Without prejudice to Article 9.4 (General Provisions), each Party shall select a sanitary or phytosanitary measure that is not more trade restrictive than required to achieve the level of protection that the Party has determined to be appropriate. For greater certainty, a sanitary or phytosanitary measure is not more trade restrictive than required unless there is another option that is reasonably available, taking into account technical and economic feasibility, that achieves the Party's appropriate level of protection and is significantly less restrictive to trade.

229. Annex A, paragraph 5 of the SPS Agreement, incorporated as relevant here into the USMCA, defines "appropriate level of sanitary or phytosanitary protection" as "[t]he level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal, or plant life or health within its territory."

2) The Parties' Arguments

230. The USA submits that the Measures are inconsistent with Article 9.6.10 because Mexico has not defined an ALOP for either Measure and there is no credible evidence establishing the

alleged risks to human or plant health.[384] With respect to how risk is assessed, the USA submits that none of the studies on which Mexico's purported risk assessment relies address "both exposure to and toxicity of glyphosate residue on or in GM corn."[385] As a result, the USA says that they "cannot be relied on to identify a human health concern at any level of exposure."[386] The USA adds that it is unclear how the Article 6.II Measure achieves a zero risk ALOP when it does not ban any *non*-GM corn that has been treated with glyphosate.[387]

231. Mexico's view is that Article 9.6.10 of the USMCA reflects the text of Article 5.6 and footnote 3 of the SPS Agreement.[388] As such, Mexico says that the question is whether the importing country *could have* adopted a less trade restrictive measure, which requires a panel to assess objectively whether an alternative measure would achieve the ALOP.[389] To show that a measure is inconsistent with Article 5.6 of the SPS Agreement, the complaining party must show that the alternative measure (i) is reasonably available (technical and economic viability); (ii) meets the ALOP; (iii) is significantly less trade restrictive (same language in Article 9.6.10).[390] Mexico also recalls the relationship between Articles 9.6.6(a) and 9.6.10 and incorporates by reference its arguments with respect to Article 9.6.6(a).[391]

232. Mexico submits that because it has determined a zero risk ALOP, the Article 6.II Measure is appropriate. However, Mexico also notes that the importation of GM corn continues to be permitted for uses other than direct human consumption, and, in any event, that most of the corn imported from the USA is for animal feed and industrial use, which is not affected by the Article 6.II Measure.[392] With respect to the protection of native corn, Mexico says "it is not possible to eliminate the risks of transgenic contamination in Mexico from spread of unauthorized, illegal, unintended, or uncontrolled GM corn plants."[393] In response to the USA's statement at the Hearing that Mexico "has run programs to educate farmers on advantageous agricultural techniques, including to promote the sustainability of traditional farming, and has distributed what it considers to be desirable seed,"[394] Mexico submits that:

[384] USA IWS, ¶ 188.
[385] USA Rebuttal, ¶ 166.
[386] USA Rebuttal, ¶ 166.
[387] USA Rebuttal, ¶ 169.
[388] MEX IWS, ¶ 436; MEX Rebuttal, ¶ 398.
[389] MEX IWS, ¶ 438; MEX Rebuttal, ¶ 398.
[390] MEX IWS, ¶ 439; MEX Rebuttal, ¶ 399.
[391] MEX IWS, ¶ 441; MEX Rebuttal, ¶ 401.
[392] MEX IWS, ¶¶ 442-451; MEX Rebuttal, ¶¶ 402-418.
[393] MEX Rebuttal, ¶ 421.
[394] Tr. Day 1, p. 18; see also USA Opening Statement, ¶ 75, citing USA-299, Government of Mexico, National Institute of Forestry, Agricultural, and Livestock Research "Conservation and Identification of Native Corn Diversity" (Mar. 26, 2024); USA-300, Government of Mexico, Secretariat of Agriculture and Rural Development,

> Given that GM corn grain is not separated from non-GM corn grain in the marketplace or labeled to be identified and distinguished by consumers, Mexico does not believe that the educational programs could be effective, much less capable of meeting the adequate level of protection established by Mexico. To the extent that the United States suggests that Mexico should educate its indigenous peoples and farmers to abandon their traditional agricultural practices, Mexico rejects this proposal. Such a measure cannot be considered "reasonably available".[395]

233. In response to the Panel's question regarding whether Mexico considered a more targeted measure, assuming one principal motivation for the 2023 Decree was a concern about potential glyphosate residues, Mexico reiterates that the Article 6.II Measure addresses all the risks arising in relation to the direct consumption of GM corn grain, not just the ingestion of glyphosate residues.[396] Mexico submits that this is reflected in its risk assessment and in the documents in the SNIB Database.[397] Because the other risks, including pesticide residues and/or transgenic proteins are present in all GM corn grain, the risks remain even with respect to GM corn not exposed to glyphosate.[398] Further, and as argued elsewhere, Mexico says that these risks do not exist in isolation: "they aggregate and cumulate in the corn grain market and in people's diets."[399] For these reasons, a more targeted measure, in Mexico's view, "would fail to address the risks to human health in Mexico in a meaningful or effective manner."[400] Mexico emphasizes that Article 6.II in fact "constitutes a narrower targeting of the measure originally proposed in the 2020 Decree," and shows that "a *broader* measure was considered, but Mexico selected a much narrower measure after consultations with the United States."[401]

234. The USA rejects Mexico's claim that the 2023 Decree is a narrower measure as a result of consultations, and reiterates that Mexico did not consult with it prior to adopting the 2023 Decree.[402] In any event, the USA submits that "any alleged tailoring of Mexico's measures is irrelevant where those measures are not based on any risk assessment," because:

> A measure not based on a risk assessment is necessarily more trade-restrictive than required to achieve an appropriate level of protection,

"Agriculture Secretariat Promotes the Cultivation of Native Corn to Ensure Quality, Conservation, and Financial Benefits for Farmers" (May 25, 2023); USA-301, F. Guzzon et al., "Conservation and Use of Latin American Maize Diversity: Pillar of Nutrition Security and Cultural Heritage of Humanity, 11 AGRONOMY 172 (Jan. 2021).

[395] MEX Responses to Panel Questions, ¶ 133.
[396] MEX Responses to Panel Questions, ¶ 83.
[397] MEX Responses to Panel Questions, ¶ 83.
[398] MEX Responses to Panel Questions, ¶ 84.
[399] MEX Responses to Panel Questions, ¶ 85.
[400] MEX Responses to Panel Questions, ¶ 85.
[401] MEX Responses to Panel Questions, ¶ 86 (emphasis in original).
[402] USA Comments, ¶ 44.

> as the Party has failed to demonstrate that a risk to human, animal, or plant life or health even exists.[403]

235. With respect to the Articles 7/8 Measure, Mexico's position is that it cannot be inconsistent with Article 9.6.10 of the USMCA because it has not been "applied," and therefore the claim is premature. Even if the Panel were to find that the measure is "applied", Mexico says that it does not yet have any trade restrictive effect. Mexico refers to the prospect of further scientific studies, which is one of the reasons the Articles 7/8 Measure has not yet been implemented.[404]

3) The Panel's Analysis

236. Article 9.6.10 of the USMCA raises similar issues about the tailoring of SPS measures as does Article 9.6.6(a). It expressly requires a Party to select an SPS measure that "is not more trade restrictive than required" to achieve its ALOP. This process necessarily requires consideration both of the nature and source of the risk and the potential alternative options that may be available.

237. The Panel finds that the Measures fail this test for reasons similar to those discussed in the context of Article 9.6.6(a), and in light of the Panel's findings of breach of the USMCA regarding Articles 9.6.3, 9.6.6(b), 9.6.7 and 9.6.8.

238. For these reasons, the Panel finds that the Measures are more trade restrictive than required to achieve Mexico's ALOP and are inconsistent with Article 9.6.10 of the USMCA.

E. Article 2.11: Market Access

1) The Relevant Provisions

239. Article 2.11 of the USMCA provides in relevant part:

> Except as otherwise provided in this Agreement, no Party shall adopt or maintain any prohibition or restriction on the importation of any good of another Party or on the exportation or sale for export of any good destined for the territory of another Party, except in accordance with Article XI of the GATT 1994, including its interpretative notes, and to this end Article XI of the GATT 1994 and its interpretative notes are incorporated into and made a part of this Agreement, *mutatis mutandis*.

240. Article XI:1 of the GATT 1994 states:

[403] USA Comments, ¶ 46.
[404] MEX IWS, ¶¶ 452-456; MEX Rebuttal, ¶¶ 431-434.

> No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

241. Article XI:2 of the GATT 1994 sets out the categories of measures that are exempted from the scope of Article XI:1, including with respect to import prohibitions and restrictions:

> […]
>
> (b) Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade;
>
> (c) Import restrictions on any agricultural or fisheries product, imported in any form, necessary to the enforcement of [certain] governmental measures…

242. Pursuant to Article 2.11.7 of the USMCA, certain measures are exempt from the requirements of Article 2.11,[405] but neither Party has contended that the Measures at issue in this case qualify for such exemption.

2) The Parties' Arguments

243. The USA submits that the Measures are inconsistent with Article 2.11 of the USMCA because they (i) constitute a restriction on importation; (ii) were not adopted or maintained "in accordance with Article XI of the GATT 1994"; and (iii) are not "otherwise provided" for in the USMCA.[406]

244. The USA contends that it is "evident" that the Measures are related to the importation of GM corn because the Article 6.II Measure explicitly states that Mexico's biosafety authorities "shall revoke and refrain from issuing authorizations for the use of genetically modified corn grain for human consumption."[407] With respect to the Articles 7/8 Measure, the USA points to the "explicit directive" in Article 7 to "conduct the gradual substitution of genetically modified corn for animal feed and industrial use for human consumption," which in the USA's view

[405] Specifically, Article 2.11.7 states that the prior paragraphs of Article 2.11 (paragraphs 1 through 6) do not apply to the measures set out in Annex 2-A. Annex 2-A in turn states that paragraphs 1 through 4 of Article 2.11 (Import and Export Restrictions) do not apply to certain export measures pursuant to Mexico's Hydrocarbons Law or certain import prohibitions or restrictions of used tyres, used apparel, non-originating used vehicles and used chassis equipped with vehicle motors.
[406] USA IWS, ¶ 199.
[407] USA Rebuttal, ¶ 178, citing USA-3, 2023 Decree, Art. 6.II.

restricts the importation of all GM corn into Mexico.[408] The USA also notes the 2023 Decree's reference to self-sufficiency in directing its authorities to "abstain from […] promoting and importing genetically modified corn," and requiring the eventual complete replacement of imported GM corn for any purpose.[409]

245. For the same reasons, the USA contends that the Measures constitute a "restriction[] . . . on the importation of any product of" the USA under Article XI:1 of the GATT 1994, satisfying the second part of Article 2.11.[410] Finally, with respect to the third element, the USA submits that the Measures are not "otherwise provided" for in the USMCA because they do not fall into any of the exceptions listed in Annex 2-A.[411]

246. The USA contends that the Measures already have had trade effects, referring *inter alia* to the decline of white corn exports to Mexico during 2023.[412] The USA's position is that "U.S. farmers and biotechnology companies view Mexican approval of new products as a precondition for U.S. farmers to plant the products."[413] As a result, the USA says that "[s]eed companies, farmers, and traders are unable to plan efficiently for forthcoming growing seasons."[414] The USA submits that the 2023 Decree's instruction to "[e]stablish the security measures and impose the corresponding sanctions," and its caution that "whoever uses" the GM corn is responsible to guarantee that it is not used for purposes of human consumption, has "an obvious chilling effect" on imports from the USA.[415] In the USA's view, "the measures on their face deprive U.S. exporters of competitive opportunities."[416]

247. With respect to Mexico's argument that the Article 6.II Measure has not resulted in any restriction on imports because white corn exports to Mexico have increased between January-April 2024, the USA submits that: (1) Mexico acknowledged that the USA need not show trade effects; (2) the four month period is very short and only covers white corn; and (3) "there is no analysis that would indicate the counterfactual export levels for that period this year in the absence of these measures."[417]

[408] USA Rebuttal, ¶ 178, citing USA-3, 2023 Decree, Art. 7; see also USA IWS, ¶¶ 216-219.
[409] USA Rebuttal, ¶ 180, citing USA-3, 2023 Decree, Art. 3.I.
[410] USA IWS, ¶¶ 210 (Article 6.II Measure), 222 (Articles 7/8 Measure).
[411] USA IWS, ¶¶ 211-214 (Article 6.II Measure); 223-225 (Articles 7/8 Measure).
[412] USA Rebuttal, ¶ 190, citing USA-229, U.S. Census Bureau Data, "U.S. Corn Exports to Mexico 2022-Jan. 2024".
[413] USA Rebuttal, ¶ 48.
[414] USA Rebuttal, ¶ 48.
[415] Tr. Day 1, p. 22 [ENG].
[416] USA Comments, ¶ 63.
[417] Tr. Day 1, p. 22 [ENG]; see also USA Comments, ¶¶ 62-64.

248. Mexico rejects the USA's position and argues that the Measures are oriented to domestic issues, not international trade, and therefore relate to obligations under Article III of the GATT 1994 (National Treatment on Internal Taxation and Regulation) and the equivalent provisions under the USMCA, and are not governed by Article 2.11.[418] In particular, Mexico emphasizes that the requirement of an authorization for GM events under the 2005 Biosafety Law is not an import restriction of GMOs because the same authorization is required for all similar domestic GMOs. Mexico contends that, consequently, "an authorization is an internal restriction on the trading of GMOs in Mexico."[419]

249. Even if Article 2.11 applies to the Measures, Mexico's position is that Article 2.11 of the USCMA applies to measures prohibiting or restricting trade, which Mexico submits the Measures do not because they are domestic measures that apply equally to all GM corn, regardless of its origin.[420] As such, Mexico submits that the Measures have not blocked or restricted the import process, pointing to the fact that imports have increased, and Mexico continues to issue authorizations for new GM corn events, now, however, with a provision expressly limiting the end use to feed and industrial use.[421]

250. With respect to the Articles 7/8 Measure, Mexico submits that the "same may one day be true," namely that imported GM corn for animal feed and industrial use will be affected the same way as any other GM corn in Mexico.[422] However, Mexico reiterates its position that no implementing actions have yet been taken and there is nothing in Articles 7 and 8 of the 2023 Decree that is capable, by itself, of affecting the importation of GM corn.[423] Finally, Mexico adds that there is no mention of "importing" in any context in Articles 6, 7 or 8 of the 2023 Decree.[424]

3) The Panel's Analysis

251. As set out above in Section V.A, the fact that a measure is drafted in language that facially may apply to both imported and domestic products does not mean that it cannot function as a restriction on imports. Mexico already bars the domestic commercial planting of GM corn. As

[418] MEX IWS, ¶ 460; MEX Rebuttal, ¶¶ 444-445.
[419] MEX Rebuttal, ¶ 447.
[420] MEX IWS, ¶ 474; MEX Rebuttal, ¶ 451.
[421] MEX IWS, ¶ 475; MEX Rebuttal, ¶¶ 438, 448, citing MEX-399; Grains Council, "Market Perspectives – April 18, 2024"; MEX-405, SALUD, Cofepris, "Authorization for GM corn from the United States", 12 August 2023 (providing: "Use: For animal feed and industrial use for human food; except crop, corn flour and nixtamalized dough.").
[422] MEX Rebuttal, ¶ 437.
[423] MEX Rebuttal, ¶¶ 437, 452-453.
[424] MEX Rebuttal, ¶ 438.

such, the Measures' obvious intended effect is on imported GM corn. For the same reason, the Panel cannot accept Mexico's argument that because the Measures are oriented to domestic issues, not international trade, they are not governed by Article 2.11.[425]

252. The fact that imports of GM corn from the USA apparently have increased to date has no bearing on the Article 2.11 analysis, because there is no requirement under Article 2.11 to show actual trade effects, as both Parties accept.[426] The direct consequence of the Article 6.II Measure is that no GM corn *can* be imported from the USA for the purposes of direct human consumption, which is an obvious restriction from the prior state of affairs, in which such corn *could be* imported for that purpose (regardless of how much actually was). Indeed, the language that Mexico says it includes in its new "Authorization[s] for Commercialization and Import for Commercialization of Genetically Modified Organisms" appears designed precisely to ensure this restriction.[427]

253. Moreover, the direct consequence of the Article 6.II Measure is that all GM corn now imported from the USA must be intended for a different purpose, namely for animal feed or industrial use. Yet the consequence of the Articles 7/8 Measure, in turn, is that at some point in the future, Mexico will carry out gradual implementation of a pre-ordained goal of substituting all GM corn for these purposes with non-GM corn. The fact that the relevant authorities have not yet decided how to implement the Articles 7/8 Measure, and apparently have not yet commissioned the scientific studies that Mexico says will give rise to a further risk assessment influencing that implementation, does not change the fact that the Articles 7/8 Measure is already an "applied" measure, in effect by executive decree, even if not yet implemented. That measure by its terms casts doubt on the continued availability and viability of a market for imports that was not previously restricted, other than through the normal functioning of Mexico's authorization process for specific GM corn events. The creation of market uncertainty about Mexico's announced "substitution" plan logically may well have a chilling effect on plans for continued export of these products.

254. Consequently, the Panel finds that the Measures constitute a "prohibition or restriction on the importation" of GM corn to Mexico within the meaning of Article 2.11 of the USMCA.

[425] MEX IWS, ¶ 460; MEX Rebuttal, ¶¶ 444-445.
[426] USA Rebuttal, ¶ 46 (stating that: "No U.S. claim requires establishing the existence of trade effects...") MEX Rebuttal, ¶ 438 (stating that: "While a complainant is not necessarily required to demonstrate the existence of trade effects, this does not preclude a panel from considering clear and uncontested evidence that the trade in question has been substantially increasing, plainly demonstrating the exact opposite of the alleged prohibitions or restrictions on importation.")
[427] MEX-405, SALUD, Cofepris, "Authorization for GM corn from the United States", 12 August 2023.

F. Article 24.15: Conservation and Sustainable Use of Biological Diversity

1) The Relevant Provision

255. Article 24.15 of the USMCA on Trade and Biodiversity provides in relevant part:

> 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.

2) The Parties' Arguments

256. Mexico argues that the Measures are aimed at the conservation and sustainable use of native corn varieties within the terms of Article 24.15.2.[428] In response to the USA's position that "Article 24.15 does not operate as an exception that provides an affirmative defense to breaches of other provisions of the USMCA,"[429] and the Panel's related question at the Hearing, Mexico explained that it was not relying on Article 24.15 as an exception. Instead, Mexico considered the provision to be important and relevant because "it is an obligation that the parties have and that comes to demonstrate the compatibility of the two measures with this environmental obligation that the State of Mexico has."[430]

257. In this context, Mexico submits that the Measures "contribute to an SPS goal which is to protect native corn from risks arising from the spread of 'pests' from GM corn plants in Mexico, including genetic introgression and contamination that threatens the biodiversity of native corn in Mexico."[431] Mexico says that the Measures and objectives they seek to achieve are consistent with Article 24.15.3 of the USMCA because the Measures "contribute to the protection of culture, heritage, traditions, communities, and the identity of people of indigenous origin, in relation to the natural biodiversity of native Mexican corn and its various varieties of corn."[432]

[428] MEX IWS, § VII.I.
[429] USA Rebuttal, ¶ 194.
[430] Tr. Day 2, pp. 47-48 [ENG]; see also MEX Comments, ¶ 35.
[431] MEX IWS, ¶ 477.
[432] MEX IWS, ¶¶ 481-482.

3) The Panel's Analysis

258. The Panel accepts that Article 24.15 of the USMCA imposes obligations on all Parties, including to "promote and encourage" the conservation and sustainable use of biological diversity. The USA is not claiming that Mexico has breached any such obligation, and Mexico is not raising any defense or claiming any exception to its other USMCA obligations by virtue of Article 24.15, as it acknowledges it could not. The Panel notes Mexico's argument that Article 24.15 provides important context for its obligations in general with respect to conservation and biological diversity, and to the other exceptions that Mexico says apply in the present case. As such, the Panel addresses Mexico's obligations arising under Article 24.15 in the subsequent sections.

G. Articles XX(a) and (g) of the GATT 1994 (Public Morals and Exhaustible Natural Resources Exceptions)

1) The Relevant Provisions

259. Article 32.1.1 sets out general exceptions to the applicability of certain chapters of the USMCA:[433]

> For the purposes of Chapter 2 (National Treatment and Market Access for Goods), Chapter 3 (Agriculture), Chapter 4 (Rules of Origin), Chapter 5 (Origin Procedures), Chapter 6 (Textile and Apparel Goods), Chapter 7 (Customs Administration and Trade Facilitation), Chapter 9 (Sanitary and Phytosanitary Measures), Chapter 11 (Technical Barriers to Trade), Chapter 12 (Sectoral Annexes), and Chapter 22 (State-Owned Enterprises and Designated Monopolies), Article XX of the GATT 1994 and its interpretative notes are incorporated into and made part of this Agreement, *mutatis mutandis*.

260. The chapeau and paragraphs (a) and (g) of Article XX of the GATT 1994 read as follows:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> (a) necessary to protect public morals; [...]

[433] Unlike the SPS Agreement, which does not provide for the exceptions contained in Article XX of the GATT 1994, they are expressly referenced in Article 32.1.1 of the USMCA as applicable to Chapter 9 (SPS Measures) and invoked in this case by Mexico.

> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption

2) The Parties' Arguments

261. Mexico argues that even if the Measures are found to be inconsistent with the USMCA, they are justified under Article 32.1.1 because they fall within the exceptions contained in Articles XX(a) and (g) of the GATT 1994.[434]

262. The Parties agree that Article XX of the GATT 1994 requires a two-tiered analysis: (1) to determine whether a measure is justified under a particular subparagraph of Article XX; and (2) to determine whether the measure satisfies the requirements of the chapeau of Article XX.[435] Accordingly, both tests must be satisfied in order for Article 32.1.1 to exonerate a measure from the consequences of inconsistency with other requirements of the USMCA.

263. The Panel first summarizes below the Parties' arguments regarding the applicability of the "public morals" exception in Article XX(a) and the "conservation of exhaustible natural resources" exception in Article XX(g) of the GATT 1994. It then summarizes their respective arguments regarding whether the Measures satisfy the requirements of the chapeau of Article XX.

a. The Public Morals Exception

264. With respect to the public morals exception, Mexico submits that the Measures are necessary to protect native corn, the milpa, the biocultural wealth and the gastronomic heritage of Mexico under the terms of Article XX (a) of the GATT 1994.[436] Mexico says that the 2023 Decree includes measures that address risk not only to human health, but also to native corn, which is "considered cultural heritage in Mexico" and is "vitally important to the identity and cultural of Mexico's indigenous and peasant communities, who are considered custodians and stewards of this tradition and biodiversity."[437]

265. Mexico relies on WTO panels defining public morals as "a set of habits of life relating to right and wrong conduct (i.e. social values) that belong to, affect or concern a community or a nation," and as denoting norms of "right and wrong conduct maintained by or on behalf of a

[434] MEX IWS, ¶ 486; MEX Rebuttal, ¶¶ 454-455.
[435] MEX IWS, ¶ 490; USA Rebuttal, ¶ 197.
[436] MEX IWS, ¶¶ 491-500; MEX Rebuttal, ¶¶ 456-460.
[437] MEX Rebuttal, ¶ 457.

community or nation,"[438] as part of evaluating whether the measure is designed to safeguard the public morals objective.[439] Mexico refers to WTO panels finding certain types of policies as pertaining to public morals, including: (i) preventing gambling by children; (ii) restricting prohibited content in cultural goods (violence, pornography); and (iii) protecting animal welfare.[440] In particular, Mexico says that "the protection of native corn varieties is similar to the protection of animal welfare in the context of agricultural products."[441]

266. Mexico points to the Preamble and Article 6 of the 2023 Decree identifying "food sufficiency, gastronomic heritage and support for farming communities as objectives of the measure."[442] In particular, Mexico links the protection of native corn varieties to its stated "moral duty to preserve […] the livelihoods of communities that derive their income and livelihood from the cultivation and processing of native varieties of grains,"[443] and contends that the 2023 Decree contributes to this public moral objective.[444] Mexico refers to its longstanding commitment to these principles as reflected, *inter alia*, in Articles 4 and 27 of the Political Constitution of the United Mexican States (the "**Constitution**") and a number of domestic laws and international conventions to which Mexico is a signatory, all of which, Mexico says, evidence the existence of the stated concerns.[445]

267. Mexico further submits that "the design, architecture and revealing structure of the [2023] Decree relates to the protection of public morals as intended by the measure,"[446] and that "the applicable legal standard only requires evaluating that the measure is not incapable of protecting public morality."[447] In Mexico's view, the Article 6.II Measure "prevents transgenic

[438] MEX IWS, ¶ 493, citing MEX-335, Panel Report, *United States - Tariff Measures on Certain Goods from China*, WT/DS543/R and Add.1, distributed to the members of the WTO on 15 September 2020, appealed on 26 October 2020 ("**Panel Report, *US-Tariff Measures (China)***"), ¶¶ 7.115-7.116.
[439] MEX Rebuttal, ¶ 461, citing MEX-335, Panel Report, *US - Tariff Measures (China)*, ¶ 7.110; MEX-342, Panel Reports, *Brazil - Certain Measures Concerning Taxation and Charges*, WT/DS472/R, Add.1 and Corr.1 / WT/DS497/R, Add.1 and Corr.1, adopted on 13 January 2019. ("**Panel Reports, *Brazil-Taxation***"), ¶ 7.519.
[440] MEX IWS, ¶ 496, citing MEX-340, Panel Report, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted on 20 April 2005; MEX-339, Panel Report, *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R, adopted on 19 January 2010; MEX-338, Panel Reports, *European Communities - Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R and Add.1 / WT/DS401/R and Add.1, adopted on 18 June 2014; MEX-341, Panel Report, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*, WT/DS461/R, adopted 22 June 2016; MEX-342, Panel Reports, *Brazil-Taxation*.
[441] MEX IWS, ¶ 496.
[442] MEX IWS, ¶ 494.
[443] MEX IWS, ¶ 494; see also MEX Rebuttal, ¶¶ 477-480.
[444] MEX IWS, ¶ 494.
[445] MEX IWS, ¶ 495; MEX Rebuttal, ¶ 474.
[446] MEX IWS, ¶ 497.
[447] Tr. Day 1, p. 64; see also MEX Opening Statement, ¶ 137, citing MEX-335, Panel Report, *US-Tariff Measures (China)*, ¶ 7.145.

contamination from the spread of GM corn in the unique circumstances in Mexico, where corn grain for consumption can be readily exchanged and used for cultivation purposes."[448] Consequently, Mexico says, the Article 6.II Measure "protects public morals by preventing harmful displacement of native corn and the corresponding negative impact on indigenous communities and associated gastronomic traditions."[449]

268. At the Hearing, Mexico argued that "given the important public values embedded in Mexico's native maize and the traditional practices that have been [u]sed for generations to develop its unique breeds and varieties, protecting them is a public policy interest that rises to the level of a public morality; thus, the natural biodiversity and natural genetic integrity of native maize reflect what is morally right."[450] Mexico contrasted this with "the impact of transgenic contamination and its adverse effects on the culture, heritage, traditions, identity, livelihoods, food self-sufficiency and well-being of indigenous and peasant communities, as well as the people of Mexico in general," which, in Mexico's view, "reflect grave moral wrongs."[451]

269. With respect to the "necessity" requirement in Article XX(a) of the GATT 1994, Mexico says that "the Panel must weigh and balance factors such as the relative importance of society's values, the level of restrictiveness of the measure on trade, the contribution of the measure to the realization of its objective, and an assessment of whether less restrictive alternatives suggested by the United States are reasonably available."[452] Mexico submits that: (i) the preservation of native corn and gastronomic traditions are important public morals in Mexico;[453] (ii) the Measures are less trade restrictive than an import ban, are narrow, and restrict a particular end use, not trade;[454] (iii) the Article 6.II Measure " significantly reduces pathways for the spread of GM corn through exchange and distribution systems" and therefore "furthers the public moral objective of protecting native corn, the livelihoods of indigenous communities, and associated gastronomic traditions";[455] and (iv) the alternatives proposed by the USA are not reasonably available to Mexico because they do not take into consideration the seed exchange practices of indigenous and peasant communities.[456]

[448] MEX Rebuttal, ¶ 463.
[449] MEX Rebuttal, ¶ 463; see also ¶¶ 481-483.
[450] Tr. Day 1, p. 65 [ENG].
[451] Tr. Day 1, p. 65 [ENG].
[452] MEX IWS, ¶ 498, citing MEX-335, Panel Report, *US-Tariff Measures (China)*, ¶ 7.159; MEX Rebuttal, ¶¶ 484-485.
[453] MEX Rebuttal, ¶ 486.
[454] MEX Rebuttal, ¶ 488.
[455] MEX Rebuttal, ¶ 487.
[456] MEX Rebuttal, ¶ 489.

270. The USA rejects Mexico's defense on the basis of the public morals exception.[457] In the USA's view, "'[p]ublic morals' are, in the ordinary sense of these terms, standards relating to right and wrong conduct of the people as a whole."[458] The USA accepts that Mexico has discretion to define what "public morals" are for itself. However, within the context of the exception under Article XX(a), the USA submits that Mexico must identify with precision both the public morals in question and how the measure relates to them.[459] The USA says that Mexico has not explained sufficiently "what it means when it refers to preservation of native corn and seeking to maintain unique gastronomic traditions."[460] The USA does not accept that the "preservation of livelihoods" constitutes a public moral objective, because it "is not in itself a standard of good or bad behavior, but a desired economic outcome."[461]

271. With respect to the protection of native corn, the USA points to the fact that "Mexico's present-day native corn varieties are a product of ongoing cross-breeding and evolution over millennia, including cross-breeding with non-native hybrids."[462] Gene flow between corn species (whether they are GM or non-GM varieties) is a natural phenomenon, the USA contends, and Mexico has not prohibited "the importation, domestic cultivation, or sale of any non-GE corn that is not a native variety."[463] Similarly, the USA dismisses Mexico's arguments based on gastronomic traditions, and refers to Mexico's own evidence that the corn most commonly used for direct consumption is white corn, which is imported from the USA only in small volumes.[464]

272. With respect to the "necessity" requirement in Article XX(a), the USA refers to WTO panels finding that the ordinary meaning of the term "necessary" requires the consideration of four factors: (i) the relative importance of the objective pursued by the measure; (ii) the contribution of the measure to that objective; (iii) the trade-restrictiveness of the measure; and in most cases (iv) the existence of "reasonably available" alternative measures.[465] In the USA's view, the Measures do not meet the requirements of the last three factors because: (ii) Mexico has not evidenced the perceived threat and has not explained how the Measures would address that

[457] USA Rebuttal, ¶¶ 202-208.
[458] USA Rebuttal, ¶ 203, citing USA-296, Oxford English Dictionary Definitions of "Public" and "Morals".
[459] USA Rebuttal, ¶ 203, citing USA-275, Panel Reports, *Brazil-Taxation*, ¶ 7.558.
[460] USA Rebuttal, ¶ 203.
[461] USA Rebuttal, ¶ 204.
[462] USA Rebuttal, ¶ 205, citing USA-166, I. Rojas-Barrera et al., "Contemporary Evolution of Maize Landraces and Their Wild Relatives Influenced by Gene Flow with Modern Maize Varieties," 116 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES 21302 (Oct. 2019).
[463] USA Rebuttal, ¶ 205.
[464] USA Rebuttal, ¶ 206, citing MEX IWS, ¶¶ 236-243.
[465] USA Rebuttal, ¶¶ 210-211, citing USA-120, Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted on 10 January 2001, ¶¶ 164-166; USA-277, Appellate Body Report, *US-Gambling*, ¶¶ 306-307.

threat;[466] (iii) the Article 6.II Measure constitutes an outright ban on GM corn for direct human consumption, and the Articles 7/8 Measure would prevent all other uses of GM corn once the period of gradual substitution ends, creating uncertainty in the US market regarding the extent of trade that will be allowed during the transition period;[467] and (iv) alternative measures exist, including "co-existence" measures to address the risk of cross-pollination and "education, publicity, financial support, gastronomic tourism, and other supply- and demand-enhancing efforts" to address any risk to the gastronomic traditions.[468]

b. The Exhaustible Natural Resources Exception

273. Mexico submits that the Measures relate to the conservation of the biodiversity and genetic integrity of native corn varieties as "exhaustible natural resources" within the meaning of Article XX(g).[469] Referring to WTO panel reports, Mexico says that the analysis under Article XX(g) "calls for a holistic assessment" that "must be applied on a case-by-case basis, through careful scrutiny of the factual and legal context in a given dispute", while not limiting the analysis to the text of the measure.[470]

274. The Parties agree that Article XX(g) requires two elements: (1) whether the Measures "relate to the conservation of exhaustible natural resources"; and (2) whether the Measures "are made effective in conjunction with restrictions on domestic production or consumption."[471]

275. With respect to the first element ("relate to"), Mexico submits that the Measures relate to the conservation of a natural resource: the "native varietals and landraces of corn and maize, including their biodiversity and genetic integrity."[472] Mexico says that "[t]his natural resource is exhaustible because Mexico's native corn, including its natural biodiversity and genetic integrity, is under threat of loss and possibly extinction as evidenced through the transgenic contamination of native corn in Mexico."[473] This conservation objective, Mexico contends, is one of the main purposes of the 2023 Decree, as evidenced by the text of the 2023 Decree,

[466] USA Rebuttal, ¶ 212.
[467] USA Rebuttal, ¶ 213.
[468] USA Rebuttal, ¶¶ 214-215.
[469] MEX IWS, ¶¶ 501-507.
[470] MEX IWS, ¶ 502, citing MEX-335, Appellate Body Report, *US–Tariff Measures (China)*, ¶ 7.159; MEX-344, Appellate Body Reports, *China-Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, adopted on 29 August 2014, ¶ 5.95.
[471] MEX IWS, ¶ 503, citing MEX-342, Panel Reports, *Brazil-Taxation (EU)*, ¶ 7.974; USA Rebuttal, ¶ 218.
[472] MEX IWS, ¶ 506.
[473] MEX IWS, ¶ 507, citing MEX-90, Quist, D., Chapela, I., "Transgenic DNA introgressed into traditional corn landraces in Oaxaca", 2001, Mexico, Nature.

including the *chapeau* of Article 6 and the last preambular recital, and the class action lawsuit that resulted in the Moratorium on the cultivation of GM corn in Mexico (see ¶ 38 above).[474]

276. Mexico highlights that there is "a close and genuine relationship" between the Measures and the conservation objective "because GM corn grain can be used as viable seed," and consequently can be diverted for cultivation, which has been happening in Mexico, and which is "why transgenic introgression remains a problem in Mexico despite the moratorium on the commercial cultivation of GM corn."[475] Mexico says that traditional hybridization is different from transgenic introgression because the latter involves disruptive transgenes from GM corn being imparted into native corn varieties, which "results in various impairments to the genetic code of native corn and ultimately diminishes the integrity of the effected plants."[476] Mexico's view is that "[c]orn that is both non-native and non-GM does not represent this critical risk."[477]

277. The USA rejects Mexico's argument on the basis that: (1) Mexico relies on a single study to conclude that native corn is at a risk of transgenic introgression and is consequently an exhaustible natural resource;[478] and (2) Mexico's own authorities testified in court, in the class action lawsuit, that there was no evidence of unauthorized release of GM corn seed, let alone of GM corn grain which had been imported for food and feed uses, and the court rejected the claim that GM corn negatively impacted native corn.[479] Moreover, irrespective of whether a threat exists, the USA submits that Mexico does not address how gene flow from GM corn is qualitatively different from gene flow from non-native, non-GM corn varieties, or cross-breeding between native varieties.[480] For these reasons, the USA says that the Measures do not truly "relate to" the conservation of exhaustible natural resources.[481]

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[474] MEX IWS, ¶ 507, citing MEX-257, Ruling of the First Chamber of the Supreme Court of Mexico of October 13, 2021; ¶¶ 510-511; MEX Rebuttal, ¶ 497, 511-518.
[475] MEX IWS, ¶ 509, citing MEX-87, Trejo-Pastor, V., Espinosa-Calderón, A., del Carmen Mendoza-Castillo, M., KatoYamakake, T. Á., Morales-Floriano, M. L., Tadeo-Robledo, M., & Wegier, A., "Corn grain commercialized in Mexico as a potential disperser of transgenic events", 2021, Fitotecnia Mexicana Magazine; MEX-188, Santana R., "Mayans denounce the planting of GM soy and corn in Hopelchén, Campeche", 2020; MEX-189, Greenpeace Mexico, "Illegal GM planting did occur in Campeche", 2021; MEX Rebuttal, ¶ 493; see also ¶¶ 501-507.
[476] MEX Rebuttal, ¶¶ 493, 500, 508-510, citing FOE Written Views, p. 8.
[477] MEX Rebuttal, ¶ 510.
[478] USA Rebuttal, ¶ 219, citing MEX IWS, ¶ 507, which in turn cites to MEX-90, Quist, D., Chapela, I., "*Transgenic DNA introgressed into traditional corn landraces in Oaxaca*", 2001, Mexico, Nature.
[479] USA Rebuttal, ¶¶ 220-222, citing MEX-380, Judgment of the Twelfth District Judge in Civil Matters in Mexico City, 28 September 2023 (redacted). The Panel notes the USA submitted a document marked as confidential to support this statement (USA-165). Mexico resubmitted the same document with the confidential information redacted (MEX-380). To avoid referring to confidential information unnecessarily in this Report, the Panel includes the reference to Mexico's exhibit instead.
[480] USA Rebuttal, ¶ 224.
[481] USA Rebuttal, ¶ 225.

278. With respect to the second element of the Article XX(g) analysis ("made effective"), Mexico refers to the Moratorium and to Articles 3, 4, 5 and 6.I of the 2023 Decree, all of which it says constitute "restrictions on the domestic production of GM corn crops [which] reinforce and complement the restrictions on international trade."[482] Mexico adds that the Article 6.II Measure is applied equally to domestic and imported GM corn, while the Articles 7/8 Measure, once applied, will contribute to the same purpose.[483]

279. The USA recalls that it is not challenging Articles 3, 4 or 5 of the 2023 Decree,[484] and argues that the Moratorium does not support Mexico's position because, even assuming there is a risk to native corn, it "would be from non-native corn, not just GE corn."[485] Thus, the USA submits that "[b]y imposing trade restrictions only on GE corn, but not imposing restrictions on 'non-native' non-GE corn in Mexico, the burden of Mexico's challenged measures falls solely on imports."[486] In the USA's view this is in violation of the requirement in Article XX(g) that, if restrictions are imposed on imports to preserve exhaustible natural resources, they must be "made effective in conjunction with restriction on domestic production or consumption." In the USA's view, because "no real restrictions on domestic production and consumption are imposed at all, and all limitations are placed upon imported products alone, the challenged measures do not appear designed to conserve a natural resource."[487]

c. The Chapeau of Article XX of the GATT 1994

280. Mexico submits that the Measures also satisfy the requirements of the *chapeau* of Article XX because the Measures: (1) are not applied in a manner than would constitute a means of arbitrary or unjustifiable discrimination;[488] and (2) do not constitute a restriction on international trade.[489] The USA disagrees and argues that "Mexico has not shown that its measures are not used as a disguised restriction on trade or a means of arbitrary or unjustified discrimination."[490]

281. First, with respect to arbitrary discrimination, Mexico accepts that the Measures discriminate against GM corn, but submits that this is neither arbitrary nor unjustifiable because "the discrimination against GM corn in each of the measures is rationally connected to the public

[482] MEX IWS, ¶ 513; MEX Rebuttal, ¶¶ 494, 519-523.
[483] MEX IWS, ¶ 514.
[484] USA Rebuttal, ¶ 229.
[485] USA Rebuttal, ¶ 230.
[486] USA Rebuttal, ¶ 230.
[487] USA Rebuttal, ¶ 231.
[488] MEX Rebuttal, ¶¶ 525-542.
[489] MEX Rebuttal, ¶¶ 543-553; see also MEX IWS, ¶¶ 515-519.
[490] USA Rebuttal, ¶ 233.

policy objectives justifying the measures."[491] Mexico argues that the Measures do not discriminate against *imported* GM corn specifically because they "only have a discriminatory effect on imported *GM corn* to the extent that it is *GM corn*."[492] In this regard, Mexico refers to Articles 6, 7 and 8 of the 2023 Decree not containing the words "import" or "export," and contends that they are focused simply on regulating the end use of GM corn in Mexico, regardless of origin.[493] Mexico reiterates that Article 6.II "applies horizontally and equally to all GM corn grain, whether domestic or imported," and Articles 7 and 8 will be the same once applied.[494] Mexico says that the fact that there is no GM corn commercially produced in Mexico does not evidence that the Measures have a protectionist intent; rather, it is "rationally connected to the same objectives that justify the measures at issue," which is reflected in the Moratorium and in Article 6.I of the 2023 Decree.[495] Mexico also refers to the fact that corn exports from the USA to Mexico have increased since the issuance of the 2023 Decree.[496]

282. Mexico adds that the different conditions prevailing in Mexico and in the USA are also relevant to the analysis;[497] it refers to the significance of the natural biodiversity, 59 native varieties of corn, and to the association with indigenous peoples and farming communities.[498] In contrast, Mexico says that the circumstances in the USA are very different, and refers to "industrial farming of commercial monocultures of GM corn in large fields, maximizing surplus production and economic interests."[499] The conditions in Mexico mean that the native corn varieties are "vulnerable to transgenic contamination and genetic erosion from the spread of GM corn."[500] Further, Mexico says that the conditions related to the consumption and cultural importance of corn are also different in Mexico and the USA, referring in particular to the fact that in 2021, "consumption of corn and corn products in Mexico was 10 times higher than in the United States,"[501] and that "traditional Mexican cuisine has been acknowledged as intangible cultural heritage of humanity by UNESCO."[502]

[491] MEX Rebuttal, ¶¶ 525-526; see also MEX IWS, ¶ 523.
[492] MEX Rebuttal, ¶ 528 (emphasis in original).
[493] MEX Rebuttal, ¶ 528.
[494] MEX IWS, ¶ 520.
[495] MEX Rebuttal, ¶ 529.
[496] MEX Rebuttal, ¶ 531, citing MEX-399, U.S. Grains Council, "*Market Perspectives*" 18 April 2024 p. 4.
[497] MEX Rebuttal, ¶ 533, citing MEX-336, Appellate Body Report, *Indonesia-Importation of Horticultural Products, Animals and Animal Products*, WT/DS477/AB/R, WT/DS478/AB/R, and Add.1, adopted on 22 November 2017, ¶ 5.94; MEX-337, Appellate Body Reports, *European Communities - Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R / WT/DS401/AB/R, adopted on 18 June 2014, ¶¶ 5.300.
[498] MEX Rebuttal, ¶¶ 534-535.
[499] MEX Rebuttal, ¶ 536; see also MEX IWS, ¶ 521.
[500] MEX Rebuttal, ¶ 537; see also MEX IWS, ¶¶ 524-525.
[501] MEX Rebuttal, ¶ 540, citing MEX-40, FAO, "Food Balances (2010-) [2022]"; see also MEX IWS, ¶ 522.
[502] MEX Rebuttal, ¶ 540.

283. In the USA's view, the Measures do result in discrimination that is arbitrary and unjustifiable, primarily because of the way the Measures "unduly target imports" by imposing restrictions only on GM corn, while not imposing any restrictions on "non-native" non-GM corn in Mexico, especially in the context of the Moratorium.[503] The USA submits that "[t]here is no basis in Mexico's stated policy objectives for this different and detrimental treatment of imported corn as compared to domestic corn."[504]

284. Second, with respect to a "disguised restriction on international trade," Mexico refers to the WTO Appellate Body equating this with "restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX."[505] On this basis, Mexico incorporates by reference its arguments above,[506] and refers, in particular, to (1) the increase in exports since the issuance of the 2023 Decree;[507] (2) the horizontal application of the Article 6.II Measure to all GM corn, regardless of origin;[508] and (3) the fact that the Articles 7/8 Measure is incapable, on its own, of restricting trade.[509] Mexico says that the references to "self-sufficiency" in the 2023 Decree are not indicative of an intent to restrict imported corn, and emphasizes the other policy objectives of the 2023 Decree, including "food security" and a "healthy environment".[510] Similarly, Mexico says that its policy objective to preserve the livelihoods of indigenous and peasant communities is not protectionist because "[t]he vast majority of 'Mexican producers' are subsistence farmers, campesinos, peasant communities, and Indigenous people using traditional agricultural methods," who do not compete with industrial producers of yellow corn in the USA.[511]

285. The USA rejects Mexico's position and submits that "the design and context of the measures, along with other public statements, reveal the otherwise disguised intent to restrict international trade."[512] In particular, the USA says that: (1) the Measures do not fit their stated purpose because there is no evidence of risk to plant health and of how the Measures address such purported risk;[513] (2) Mexico has made statements in the 2023 Decree itself and in its

[503] USA Rebuttal, ¶ 242.
[504] USA Rebuttal, ¶ 242.
[505] MEX Rebuttal, ¶ 543, citing MEX-269, Appellate Body Report, United States - *Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted on 20 May 1996, p. 29.
[506] MEX Rebuttal, ¶ 544.
[507] MEX Rebuttal, ¶¶ 545-546.
[508] MEX Rebuttal, ¶ 547.
[509] MEX Rebuttal, ¶ 548.
[510] MEX Rebuttal, ¶ 550.
[511] MEX Rebuttal, ¶ 551.
[512] USA Rebuttal, ¶ 235.
[513] USA Rebuttal, ¶ 236.

submissions revealing that the intent of the 2023 Decree is to restrict trade, including references to "self-sufficiency," "safeguarding local production" and "duty to preserve […] livelihoods";[514] and (3) the effect is clearly to target imports given that there is no GM corn cultivated in Mexico; "by imposing measures that target GE corn, and not any 'non-native' corn, Mexico only impacts imports of corn, to the benefit of domestic producers that plant non-GE corn."[515]

286. With respect to Mexico's argument that corn imports from the USA have increased since the introduction of the 2023 Decree, the USA says "[t]his is hardly an attempt to compare U.S. exports to the counterfactual levels had Mexico not adopted its measures."[516] The USA also notes that Mexico "makes no attempt to account for other market forces during a more recent period, such as the current drought plaguing Mexico's corn growing regions."[517]

3) The Panel's Analysis

287. The Panel recognizes the importance to Mexico of protecting the traditions and livelihoods of indigenous and peasant communities, particularly as these are intertwined with the cultivation of native corn. These objectives are central to a number of laws in Mexico and to provisions of its Constitution. The Panel respects these objectives and Mexico's prerogative to pursue them. Its findings above about the Measures' inconsistency with various requirements of the USMCA should not be taken as disregard for the importance of Mexico's other, non-health related objectives.

288. Mexico's non-SPS objectives when introducing the Measures are of particular relevance in the context of its defenses, including that, even if the Measures are found to be inconsistent with the USMCA, they are justified under Article 32.1.1 because they fall within the exceptions contained in Articles XX(a) and (g) of the GATT 1994.

289. The Panel has found that the Measures are inconsistent with Articles 2.11, 9.6.3, 9.6.6(a), 9.6.6(b), 9.6.7, 9.6.8, 9.6.10 of the USMCA, as detailed in the above sections. It will now address whether they are nonetheless justified under Article 32.1.1. of the USMCA.

a. The Public Morals Exception

[514] USA Rebuttal, ¶¶ 237-238, citing USA-3, 2023 Decree, Preamble and Article 8; MEX IWS, ¶¶ 216, 284, 494, 499.
[515] USA Rebuttal, ¶ 239.
[516] Tr. Day 1, p. 34 [ENG].
[517] Tr. Day 1, p. 34 [ENG].

290. With respect to the public morals exception under Article XX(a) of the GATT 1994, the Panel accepts that governments have wide discretion to define what constitutes a public moral. At the same time, both Parties appear to agree that the notion of public morals is linked to concepts of "right and wrong conduct."[518] The Panel agrees that the word "morals" in particular connotes an element of ethical values and standards. It is not simply about economic performance.

291. In this case, Mexico argues that the public morals the Measures seek to protect are the preservation of native corn, the gastronomic heritage, and the livelihoods of communities that rely on the cultivation of native corn.[519] The USA objects that these do not qualify as public morals, particularly noting that "preservation of livelihoods" is not in itself a standard of good or bad behavior.[520]

292. Ultimately, the Panel does not have to determine whether the particular *objectives* Mexico identifies are capable of qualifying as matters of "public morals," within the meaning of Article XX(a) of the GATT 1994. That is because Article XX(a) contains an equally important second prong, namely that the *measures* at issue be "*necessary* to protect public morals." It is only where this necessity requirement is also established that a measure may be exempted from complying with the other chapters of the USMCA.

293. In this case, Mexico says that the Measures are necessary for the protection of the asserted public morals objectives set out above, because GM corn poses a risk of transgenic introgression which could interfere with native corn varieties. It contends that the Article 6.II Measure in particular reduces the risk of such transgenic introgression.[521] This in turn is said to be necessary to protect the traditions and livelihoods of indigenous and farming communities which grow native corn.[522]

294. However, the Panel also notes Mexico's insistence that the amount of its imports of white corn, which is used for direct consumption, has been negligible. Further, Mexico has now repeatedly stated that minimally processed foods, such as dough and tortilla – which form the basis of the gastronomic traditions that Mexico seeks to protect – have historically been produced with non-GM white corn.[523] In these circumstances, Mexico has not shown how the presence in the country of such small amounts of imported GM white corn – which by Mexico's own assertion

[518] MEX Rebuttal, ¶ 461, citing MEX-335, Panel Report, *US-Tariff Measures (China)*, ¶ 7.115; USA Rebuttal, ¶ 203, citing USA-296, Oxford English Dictionary Definitions of "Public" and "Morals".
[519] MEX IWS, ¶ 494.
[520] USA Rebuttal, ¶¶ 203-204.
[521] MEX IWS, ¶ 497; MEX Rebuttal, ¶ 463.
[522] MEX Rebuttal, ¶ 463.
[523] See ¶¶ 67-68 above.

has not been used in any event for minimally processed foods – threatens the traditions or livelihoods of the indigenous and farming communities that Mexico seeks to protect.

295. Moreover, to the extent that the primary concern is said to be about transgenic introgression, Mexico has not demonstrated how the threat to the traditions and livelihoods of indigenous and farming communities from GM corn is greater than the threat posed *by non-native, non-GM corn*. The challenged Measures single out GM corn from other varieties of non-native, non-GM corn that seem equally capable of giving rise to cross-pollination or hybridization. Mexico has not shown why GM corn poses a "public morals" issue on account of the risk of transgenic introgression that the Measures are necessary to address, while cross-pollination or hybridization between native and non-native, non-GM corn does not.

296. Fundamentally, this issue ties back to the inadequacy of Mexico's risk assessment, which provides insufficient basis to conclude that GM corn, or transgenic introgression itself, poses such a risk of negative effects on human or plant health, or on the supposed genetic integrity of native corn varieties, that it is a threat to the traditions and livelihoods of indigenous and farming communities. Mexico's arguments presume that GM corn is inherently "wrong," but have failed to prove its harmfulness whether through an adequate risk assessment or otherwise.[524]

297. In other words: the Panel understands Mexico's stated desire to maintain the genetic integrity of its native corn varieties. But irrespective of whether that desire (in itself) could be considered a "public morals" objective, Mexico has not demonstrated that the Measures are "necessary" to achieve that goal. In fact, they appear to do little or nothing to further that goal, because:(1) the Measures exclusively target GM corn and do not impose any restrictions on non-native, non-GM corn which could equally threaten the genetic integrity of native corn, without providing sufficient scientific basis for drawing this distinction; (2) the Article 6.II Measure bans the use of GM corn for direct consumption, but does not address unintentional diversion for planting; and (3) the Articles 7/8 Measure continues for now to allow authorizations of GM corn for animal feed and industrial use, but also without any corresponding measures to address unintentional planting. Yet it appears that unintentional planting would be the only way by which transgenic introgression could occur, given the Moratorium and Article 6.I of the 2023 Decree.

[524] Mexico's core proposition is that there is a qualitative difference, from a risk perspective, between hybridization of native corn with non-GM (and non-native) maize, and what it considers to be "contamination" through the replacement of natural maize genes with genes that are not part of the natural maize genome. However, Mexico has presented insufficient scientific evidence to demonstrate that the distinction makes a difference from the standpoint of risk.

298. For these reasons, the Panel finds that even if (*arguendo*) the stated objectives constitute "public morals" within the meaning of Article XX(a), Mexico has not demonstrated that the Measures are "necessary" to protect those objectives.

b. The Exhaustible Natural Resources Exception

299. With respect to the exhaustible natural resources exception under Article XX(g) of the GATT 1994, Mexico argues that (1) the Measures relate to the conservation of the genetic integrity native corn varieties, which are threatened by transgenic introgression; and (2) the Measures are made effective in conjunction with restrictions on domestic production, including the Moratorium and other unchallenged provisions of the 2023 Decree.[525]

300. The Panel affirms that the conservation of exhaustible natural resources is a legitimate objective to be taken into account by States. The Panel also takes note of Mexico's explanation that one of the objectives of the Measures was to protect its designated 59 native varieties of corn. In these circumstances, and assuming *arguendo* that native varieties of corn may qualify as an "exhaustible" resource, then the first prong of the Article XX(g) test may be met – that the Measures "relat[e] to the conservation of exhaustible natural resources." The requirement of "relating" to an objective simply requires a logical connection.

301. Unlike the public morals exception in Article XX(a), the "exhaustible natural resources" exception in Article XX(g) does not impose a necessity requirement. However, Article XX(g) contains a different second requirement, namely that a measure targeted to such an objective must be "made effective in conjunction with restrictions on domestic production or consumption." The notion is that a Party may not single out threats from abroad to its exhaustible natural resources while not taking corresponding steps to address similar threats from within.

302. In this case, however, Mexico has not pointed to any domestic measures that address the purported threat to the genetic integrity of native corn. While the Moratorium and Article 6.I of the 2023 Decree prohibit the commercial planting of GM corn in Mexico, they do not place limitations on the planting of non-native, non-GM corn that may also pose a threat to the genetic integrity of native corn. Similarly, Articles 3, 4 and 5 of the 2023 Decree, on which Mexico relies in this context, relate to the regulation of glyphosate use in Mexico and are not designed for the preservation of the genetic integrity of native corn.

[525] See ¶¶ 275 and 278 above.

303. The Panel understands Mexico's position to be that there are different types of threats to genetic integrity, and that traditional hybridization is different from transgenic introgression.[526] But Mexico has not demonstrated that this is a distinction of any significance for its stated objective of preserving native varieties of corn. In particular, it has not shown that transgenic introgression from GM corn is somehow "worse" or more disruptive to the genetic integrity of native corn than traditional hybridization between different non-GM varieties of corn, such as to justify its enacting Measures which take aim only at the former and not the latter.

304. For these reasons, the Panel finds that Mexico has failed to show that the Measures are made effective in conjunction with corresponding domestic restrictions as required under Article XX(g) of the GATT 1994.

c. The Chapeau of Article XX of the GATT 1994

305. The Panel considers that both public morals considerations and the conservation of exhaustible natural resources are important objectives that may give rise to different measures. However, such measures also have to meet the requirements of the *chapeau* of Article XX. The *chapeau* requires that the measures are not applied in a manner which would constitute: (1) "a means of arbitrary or unjustifiable discrimination" or (2) "a disguised restriction on international trade."

306. The Panel addresses the second element of the *chapeau* first, whether the Measures at issue in this case are a disguised restriction on international trade. The Panel's view is that the 2023 Decree as a whole contains language that makes it clear that it intends to stop the importation into Mexico of GM corn. For example, Article 1 sets out the purpose of the 2023 Decree as establishing the actions to be taken by the relevant authorities "in relation to the use, sale, distribution, promotion and *import*" of both glyphosate *and* GM corn, in order to achieve various objectives, including *self-sufficiency*.[527] The 2023 Decree also refers to Mexico's "food self-sufficiency policies" on multiple occasions.[528] Self-sufficiency by definition means the ability to provide for one's own needs independently, without imports.

307. The particular context of the 2023 Decree is also instructive. As discussed elsewhere, in light of the Moratorium and Article 6.I of the 2023 Decree, there is no commercial, legal cultivation of GM corn within Mexico. As a result, the Measures' impact in relation to GM corn can *only* be on imported GM corn. The fact that Articles 6, 7 and 8 do not themselves refer to "imports" or "exports" does not change the Measures' clear intention to restrict the importation of GM

[526] See ¶ 276 above.
[527] USA-3/MEX-167, 2023 Decree, Article 1.
[528] USA-3/MEX-167, 2023 Decree, Preamble, Articles 4, 8.

corn to Mexico. As such, it is the Panel's view that the Measures constitute a disguised restriction on international trade.

308. Since the Panel has found that the Measures constitute a disguised restriction on international trade, there is no need for it to address whether the Measures also constitute a means of arbitrary or unjustifiable discrimination. Consequently, the Panel finds that the Measures currently in dispute are not justified under Article 32.1.1 of the USMCA.

H. Article 32.5: The Indigenous Peoples' Rights Exception

1) The Relevant Provision

309. Article 32.5 provides:

> 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.

2) The Parties' Arguments

310. Mexico argues that even if the Measures are found by the Panel to be in violation of Articles 2 and 9 of the USMCA, without being justified under Article 32.1.1, they are still justified under Article 32.5 of the USMCA.[529] Mexico considers that the entirety of the 2023 Decree, including the specific Measures at issue in this case, is necessary to comply with Mexico's legal obligations to indigenous people. Such obligations are "found in four types of legal orders: i) the international treaties or agreements that Mexico has signed; ii) the political constitution; iii) federal laws; and iv) state laws."[530]

311. With respect to international treaties, Mexico refers specifically to:

a. "Article 21 of the Pact of San José, as interpreted by the Inter-American Court of Human Rights, [which] imposes an obligation on the Mexican State to respect the cultural property and identity of indigenous peoples, which takes into account their

[529] MEX IWS, ¶ 527; MEX Rebuttal, ¶ 569.
[530] MEX IWS, ¶ 530. See also Tr. Day 2, p. 51 [ENG] (emphasizing that all of these laws seek "to foster and protect native corn as State heritage, just like the Federal Law establishing that same thing. Native corn is related to indigenous peoples, so those laws are also related to the obligations of Mexico with its indigenous peoples."); MEX Responses to Panel Questions, ¶ 103.

traditions, oral expressions, customs, languages, arts and rituals, their knowledge and uses, among other elements";[531] and

b. "Article 2 of ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries [which] obliges the Parties to take action to protect 'full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions.'"[532]

312. With respect to the Constitution, Mexico refers to Article 2, which establishes that "'[t]he right of indigenous peoples and communities [...] to preserve and enrich their languages, knowledge and all the elements that constitute their culture and identity' is recognized and guaranteed."[533] In Mexico's view, "native corn is part of the identity of indigenous peoples and therefore, through the 2023 Decree, Mexico complies with this obligation at the constitutional level."[534]

313. With respect to federal laws, Mexico refers to:

a. "[T]he Federal Law for the Protection of the Cultural Heritage of Indigenous and Afro-Mexican Peoples and Communities [which] provide[s] for Mexico's obligation to 'guarantee the protection [...] of the cultural heritage […] of indigenous peoples and communities' and to 'prohibit any act that threatens or affects' it," and which defines "cultural heritage" as "the group of tangible and intangible assets that include […] all the elements that constitute the cultures and territories of the indigenous […] peoples and communities, which give them a sense of community with their own identity and that are perceived by others as characteristic."[535]

b. Article 2 of the Native Corn Law, which defines "native corn" as that "which indigenous peoples, peasants and farmers have cultivated and cultivate from self-selected seeds."[536] In Mexico's view, "the relationship between native corn and

[531] MEX Responses to Panel Questions, ¶ 104, citing MEX-358, Inter-American Court of Human Rights, *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgement 17 June 2005 (Merits, Reparations and Costs), ¶¶ 135, 154.
[532] MEX Responses to Panel Questions, ¶ 104, citing MEX-359, ILO Convention 169 on Indigenous and Tribal Peoples, Art. 2.
[533] MEX Responses to Panel Questions, ¶ 105 (emphasis omitted).
[534] MEX Responses to Panel Questions, ¶ 105.
[535] MEX Responses to Panel Questions, ¶ 106 (emphasis omitted), citing MEX-255, Federal Law for the Protection of the Cultural Heritage of Indigenous and Afro Mexican People and Communities, Arts. 1 and 2.
[536] MEX Responses to Panel Questions, ¶ 107.

indigenous peoples is indivisible," which "implies that any measure to protect native corn is a measure that seeks to protect indigenous groups."[537]

c. Article 3 of the General Law on Culture and Cultural Rights, which is referenced in Article 1 of the Native Corn Law, "states that a cultural manifestation is the material and immaterial elements inherent to the history, art, traditions, practices and knowledge that identify groups, peoples and communities."[538] In turn, Article 3 of the Native Corn Law recognizes "the production, marketing and consumption activities of Native Corn and Constant Diversification, as a cultural manifestation."[539]

314. With respect to state laws, Mexico refers to "laws for the promotion and protection of native corn as food heritage for the states of Colima, Guerrero, Michoacán, Sinaloa, among others, [which] seek to promote and protect native corn as heritage of the State, just like the Federal Laws."[540]

315. Specifically in relation to Mexico's obligations to respect and protect the traditional practice of the exchange of native corn seeds, Mexico refers to:

a. Article 31 of the United Nations Declaration on the Rights of Indigenous Peoples, which grants indigenous peoples the right to "maintain, control, protect and develop their cultural heritage, traditional knowledge, traditional cultural expressions, traditional knowledge and traditional cultural practices," including genetic resources and seeds. Mexico says that "[t]his Article stresses that the State must adopt effective measures to 'recognize and protect the exercise of these rights'";[541] and

b. The United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas, in Article 19, which according to Mexico reaffirms that peasants have the right to "save, use, exchange and sell seeds" that they have conserved; Mexico says

[537] MEX Responses to Panel Questions, ¶ 107.
[538] MEX Responses to Panel Questions, ¶ 108.
[539] MEX Responses to Panel Questions, ¶ 108, citing Espinosa Expert Report, ¶ 177 (referring to MEX-12, Native Corn Law, Art. 3. The Panel notes that Mexico refers to ¶ 17 of the Espinosa Expert Report, however, this appears to be a mistake and the correct reference is ¶ 177.)
[540] MEX Responses to Panel Questions, ¶ 109, citing MEX Rebuttal, ¶ 362, citing MEX IWS, ¶ 495 (referring to the following laws: Law for the promotion and protection of native corn as food heritage of the state of Colima; Law for the sustainable rural development of the State of Guerrero; Law for the promotion and protection of native corn as food heritage of the state of Michoacán; Law for the promotion and protection of native corn in the state of San Luis Potosí; Law for the Promotion and Protection of Native Corn in the State of Sinaloa; Law for the Promotion and Protection of Native Corn as Biocultural and Food Heritage of the State of Mexico; Law for the Promotion and Protection of Corn as Native Heritage, in Constant Diversification and Food for the State of Tlaxcala).
[541] MEX Responses to Panel Questions, ¶ 132, citing MEX-356, United Nations Declaration on the Rights of Indigenous Peoples, Art. 31.

> that "this right encompasses the maintenance and development of seeds, such as corn, in their cultural and economic context."[542]

316. To illustrate the connection between these various legal obligations and the 2023 Decree, Mexico points to the final recital of the 2023 Decree, which identifies that:

> …the main purpose of these measures is to protect the rights to health and a healthy environment, native corn, the milpa, biocultural wealth, peasant communities and gastronomic heritage; as well as to ensure nutritious, sufficient and quality diet.[543]

317. Mexico submits that of these, "the following objectives are directly relevant and rationally connected to the fulfilment of Mexico's legal obligations to indigenous people: protection of native corn; protection of the milpa; protection of biocultural wealth, referring to the value of the unique biodiversity of Mexico's native varietals and landraces of native corn and maize, including to indigenous people; and protection of peasant communities."[544]

318. With respect to the necessity requirement in Article 32.5, Mexico contends that since the phrase used is "a measure [the Party] deems necessary," it is sufficient that Mexico considers the measure is necessary.[545] With respect to the requirement that the measure is necessary "to fulfill its legal obligations to indigenous peoples," Mexico accepts that "the contribution of a measure to the achievement of its objective must be significant."[546] In this regard, Mexico says that the obligations reflected in the 2023 Decree "stem from the provisions of Article 2 of the Constitution,"[547] and from the Federal Law of Protection of the Cultural Heritage of Indigenous and Afro-Mexican Peoples and Communities, as set out above.[548]

319. On this basis, Mexico argues that "the protection of native corn is a cultural manifestation that falls within the definition of 'cultural heritage' of indigenous peoples,"[549] and notes that this was mentioned in the 2004 CEC Report.[550] Further, Mexico refers to international conventions,

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[542] MEX Responses to Panel Questions, ¶ 132, citing MEX-472, United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas, Art. 19.
[543] MEX IWS, ¶ 536, citing MEX-167, 2023 Decree (the translation of the quoted recital is available at USA-3, 2023 Decree, PDF p. 8).
[544] MEX IWS, ¶ 537.
[545] MEX IWS, ¶ 539.
[546] MEX IWS, ¶ 539.
[547] MEX IWS, ¶ 541, citing MEX-237, Political Constitution of the United Mexican States, 1917, Art. 2 (providing that: "Indigenous communities are those that form a social, economic and cultural unit, are settled in a territory and recognize their own authorities in accordance with their customs and traditions.")
[548] MEX IWS, ¶ 541, citing MEX-255, Federal Law of Protection of the Cultural Heritage of Indigenous and Afro-Mexican Peoples and Communities.
[549] MEX IWS, ¶ 542.
[550] MEX IWS, ¶ 543, citing MEX-95, 2004 CEC Report.

and the interpretations of the Inter-American Court of Human Rights, recognizing an obligation by States to respect the cultural identity of indigenous peoples, which, in Mexico's view, "implies the protection of native corn."[551]

320. With reference to Article 32.5's proviso that measures adopted to fulfil legal obligations to indigenous people may still not be "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," Mexico refers back to its earlier arguments with respect to the similar language in the chapeau of Article XX of the GATT 1994."[552] However, Mexico also emphasizes what it says is a key difference between Article 32.5 of the USMCA and Article XX of the GATT 1994, namely, that the USMCA refers to "discrimination against persons of the other Parties," while the GATT 1994 refers to "discrimination between countries where the same conditions prevail."[553] On this basis, Mexico argues that "the discrimination established by Article 32.5 refers to unequal treatment of the people of the other Parties […] Article 32.5 does not cover unequal treatment towards goods or services."[554] Consequently, Mexico's view is that "Article 32.5 does not require an examination of discrimination between goods and the United States has simply not identified unequal treatment against a U.S. person."[555]

321. In any event, Mexico says, the Measures do not entail any discrimination against persons (not even U.S. exporters), because the Measures apply to both domestic and foreign products and the 2023 Decree does not impact non-GM corn from the USA.[556] With reference to IATP's Written Views in these proceedings, Mexico notes that U.S. corn producers "have either made that shift [to grow non-GM corn] or have expressed a willingness to do so to meet Mexico's needs."[557] Mexico adds that the Measures focus on important public interests and values in Mexico; do not include the words "import" or "export"; and, instead, are concerned with the use of GM corn.[558]

[551] MEX IWS, ¶¶ 545-549, citing MEX-357, Pact of San José, Ratified by Mexico on 7 May 1981. Promulgatory Decree; MEX-358, Inter-American Court of Human Rights, *Case Indigenous Community Yakye Axa Vs. Paraguay*, Judgement, 17 June 2005 (Merits, Reparations and Costs); MEX-359, ILO Convention 169 on Indigenous and Tribal Peoples, Ratified by Mexico on 11 July 1990. Promulgatory Decree.
[552] MEX IWS, ¶¶ 531-535; MEX Rebuttal, ¶ 568.
[553] MEX Rebuttal, ¶¶ 557-559.
[554] MEX Rebuttal, ¶ 559.
[555] MEX Rebuttal, ¶ 560.
[556] MEX Rebuttal, ¶¶ 562-563.
[557] MEX Rebuttal, ¶ 563, citing IATP Written Views, ¶ 49.
[558] MEX Rebuttal, ¶ 566.

322. The USA rejects Mexico's arguments and submits that Mexico "has failed to discharge its burden of establishing that Article 32.5 of the USMCA justifies its measures."[559]

323. First, the USA rejects Mexico's argument that the 2023 Decree fulfils specific legal obligations to indigenous peoples, on the basis that Mexico refers "to vague, highly generalized concepts such as protecting the cultural heritage of Indigenous peoples and communities," which, in the USA's view does not constitute a concrete legal obligation.[560] In particular, the USA questions whether the legal obligation really is "to preserve the exact genetics of what [Mexico] views as native corn," and, if so, how Mexico would explain the constant evolution in genetics that takes place irrespective of the presence of GM corn.[561] The USA submits that "Mexico seeks to grant itself nearly limitless license to restrict U.S. exports of GE corn by continued reference to these vague concepts" and without identifying a specific legal obligation or explaining how the Measures fulfill such obligations.[562]

324. As for Article 32.5's proviso restricting how measures may be used, the USA observes that *both* elements of Article 32.5 (regarding discrimination and disguised restrictions on trade) are phrased slightly differently than Article XX of the GATT 1994. However, the USA states that these differences have no bearing on the issues before the Panel.[563] For example, with respect to Mexico's argument that Article 32.5 refers to discrimination against "persons," the USA submits that the definition of "persons" also includes enterprises, which includes US exporters. The USA's position is that Mexico has not shown that the Measures are not used to discriminate against US exporters.[564]

325. Consequently, the USA incorporates by reference its arguments under Article XX, emphasizing that the Measures are designed to restrict imports of GM corn while not taking any aim at domestic non-native, non-GM corn, notwithstanding that the latter equally might impact the native corn said to be centrally important to indigenous communities.[565]

3) The Panel's Analysis

326. The Panel hears, respects and credits Mexico's dedication to fulfilling its legal obligations towards indigenous peoples, including its international obligations, as well as those arising under the Constitution and federal and state laws. It also accepts Mexico's explanation that its

[559] USA Rebuttal, ¶ 244.
[560] USA Comments, ¶ 56.
[561] USA Comments, ¶ 58.
[562] USA Comments, ¶¶ 58-59.
[563] USA Rebuttal, ¶ 245.
[564] USA Rebuttal, ¶ 249.
[565] USA Rebuttal, ¶ 246.

domestic legal instruments establish a linkage between indigenous peoples and native corn. The Panel further recognizes Mexico's right to take measures to protect native corn to the extent it considers this linked to its obligations to the rights of indigenous peoples. Such measures may need to evolve over time. The Panel's legal assessment, however, is limited to the Measures that the USA has placed at issue in these proceedings. An assessment of evolving measures would be beyond the remit of this Panel.[566]

327. Under the text of the USMCA, Mexico is obligated to ensure that any measures adopted to fulfill these objectives comply with specific limitations to which it agreed, including in trade agreements that Mexico has ratified. These limitations include the proviso in Article 32.5 that measures which a Party "deems necessary to fulfill its legal obligations to indigenous peoples" may not be used as a "disguised restriction on trade in goods, services, and investment."

328. Mexico says that the Measures are necessary to protect the genetic integrity of native corn, which it argues is inextricably linked to the traditions and cultural heritage of indigenous peoples. The Panel does not doubt the significance of native corn to the indigenous peoples of Mexico. However, as explained above, the Measures single out GM corn and do not address other forms of gene flow to native corn by non-native, non-GM corn. Otherwise put, the Measures take aim only at a type of non-native corn that is imported from abroad, and not at any types of non-native corn that are grown domestically or imported.

329. Further, neither the Measures at issue, nor other domestic measures to which the Panel has been directed, seek to address underlying issues (including perhaps the informal seed exchange practices of indigenous and farming communities) that could result in the unauthorized planting of GM corn, rather than its use exclusively for the non-planting purposes for which authorization was granted. The Measures seek to address concerns about transgenic introgression or other forms of gene flow only by revoking the authorizations which enable GM corn to be imported in the first place; they do not seek to address the problem of misuse that allegedly occurs domestically after imports arrive.

330. For these reasons, the Panel finds that the Measures are a disguised restriction on trade. They are not justified under the exception in Article 32.5 for measures that otherwise are inconsistent with the requirements of the USMCA.

[566] One of the panelists does not join the majority's opinion on whether measures may evolve, which in the panelist's view is uncalled for and unrelated to the case before the Panel, the Parties' pleadings or the measures in dispute. While the panelist respects and does not question the Parties' rights under Article 32.5 of the USMCA, the Panel's functions are limited by Article 31.13 of the Agreement. The panelist otherwise shares the content of this paragraph and the Report.

I. Article 31.2(c): Nullification or Impairment

1) The Relevant Provisions

331. Under Article 31.2 of the USMCA, the scope of dispute settlement provisions under Chapter 31 applies not only when a Party considers another Party's measure to be "inconsistent with an obligation of this Agreement," but also even in the absence of inconsistency (a non-violation claim),

> c) when a Party considers that a benefit it could reasonably have expected to accrue to it under Chapter 2 (National Treatment and Market Access for Goods), Chapter 3 (Agriculture), Chapter 4 (Rules of Origin), Chapter 5 (Origin Procedures), Chapter 6 (Textile and Apparel Goods), Chapter 7 (Customs Administration and Trade Facilitation), Chapter 9 (Sanitary and Phytosanitary Measures), Chapter 11 (Technical Barriers to Trade), Chapter 13 (Government Procurement), Chapter 15 (Cross-Border Trade in Services), or Chapter 20 (Intellectual Property Rights), is being nullified or impaired as a result of the application of a measure of another Party that is not inconsistent with this Agreement.

332. Article 31.13.1(b)(iii) of the USMCA in turn provides that in the event of a dispute, a panel should make determinations as to whether "the measure at issue" in fact "is causing nullification or impairment within the meaning of Article 31.2 …."

2) The Parties' Arguments

333. The USA's primary argument is that the Measures are inconsistent with Mexico's obligations under the USMCA. However, as a secondary argument, the USA asserts that *if* the Panel were to find that the Measures are not inconsistent with the USMCA because they fall under the Article 32.5 exception, *then* the Panel should find that the Measures nonetheless still raise a problem under Article 31.2(c). According to the USA, a benefit it could reasonably have expected to accrue to it under Chapter 2 or Chapter 9 of the USMCA is being nullified or impaired as a result of the application of the Measures.[567] The Panel understands that the USA does not ask the Panel to make a finding under this issue unless it has applied the Article 32.5 exception to reject the USA's principal arguments about inconsistency with Mexico's obligations under Chapters 2 and 9.[568]

334. With reference to the history of trade between Mexico and the USA, including under NAFTA and the USMCA, and particularly with respect to GM corn, the USA argues that the "benefit"

[567] USA Rebuttal, ¶ 251.
[568] USA Comments, n. 74.

it could reasonably have expected to accrue was that "the volume and value of U.S. exports to Mexico of corn, including GE corn, would continue under Chapter 2 and Chapter 9 after USMCA entered into force."[569] In response to the Panel's question with respect to whether the "benefits" could be "direct or "indirect", the USA adds that the "benefit" in Article 31.2(c) of the USMCA "is characterized neither as a 'direct' or 'indirect' benefit, but rather one 'it could reasonably have expected to accrue.' The directness of a benefit may therefore have some relevance as to whether a Party could reasonably have expected it to accrue,"[570] however, the USA rejects Mexico's position that for the purposes of non-violation complaints, benefits must be direct.[571]

335. The USA contends that the Measures are causing nullification or impairment because: (1) exports from the USA have moved freely to Mexico; (2) the USA exported USD 4.9 billion in corn to Mexico in 2022; (3) also in 2022, GM corn accounted for 93% of corn planted in the USA; (4) the USA is the largest producer of GM crops in the world; and (5) Mexico is the USA's second largest export market for corn.[572]

336. The USA adds that the Measures already have impacted trade, as argued elsewhere, and that the Articles 7/8 Measure "has also created significant uncertainty for U.S. farmers and companies as well as Mexican importers and food producers."[573] The USA argues that Mexico's reliance on trade data in this context is "fallacious" because "[t]o understand the extent that restraints are reducing exports, one would need to compare exports to the counterfactual volume or value of exports that would have taken place in the absence of the measures."[574] As an example, the USA notes that Mexico "makes no attempt to account for other market forces during a more recent period, such as the current drought plaguing Mexico's corn-growing regions."[575]

337. Mexico rejects the USA's contention and argues that the USA has not sufficiently identified the "benefit" that it considers it could have reasonably expected to accrue to it.[576] In response to the Panel's questions, and contrary to the USA's position, Mexico submits that for the

[569] USA Rebuttal, ¶¶ 254-258; USA Comments, ¶ 54.
[570] USA Responses to Panel Questions, ¶ 32.
[571] USA Comments, ¶ 52.
[572] USA Rebuttal, ¶ 259.
[573] USA Rebuttal, ¶¶ 260-261.
[574] USA Comments, ¶ 63.
[575] Tr. Day 1, p. 34 [ENG].
[576] MEX Rebuttal, ¶¶ 572-573.

purposes of "a non-violation complaint, the 'benefit' at issue must be sufficiently 'direct' to be reasonably or legitimately expected by the claimant."[577]

338. In Mexico's view, the USA "has not specified whether the reasonable expectation at issue is market access and competitive opportunities with respect to U.S. corn grain exports in general or for U.S. corn grain exports genetically modified in particular,"[578] and rejects the USA's references to having a reasonable expectation that Mexico would not adopt the Measures and that the trade of GM corn would continue under the USMCA as before.[579] Mexico emphasizes, as elsewhere, that exports of US corn to Mexico have increased in volume since the issuance of the 2023 Decree, and, as such, it "cannot be said that any expectations the United States might have had regarding market access for exports of US corn to Mexico at the time the USMCA was concluded are being 'nullified or impaired'."[580] Mexico submits that, even if the USA does not need to establish the existence of trade effects for its claims, it does not mean that the Panel must ignore evidence of actual trade increasing, which, in Mexico's view, "plainly demonstrates the exact opposite of the restrictions on trade and 'import bans' that the United States has alleged in this dispute."[581]

339. Even if the Panel were to find that there is nullification and impairment, Mexico contends that Article 31.2(c) of the USMCA, similarly to Article XXIII:1(b) of the GATT 1994, requires that a benefit accruing to a party under an international trade agreement be nullified and impaired "as a result of the 'application' of a measure."[582] Mexico points to three elements identified by WTO Panels interpreting Article XXIII:1(b) of the GATT 1994:

i. the application of a measure by a WTO Member;

ii. the existence of a benefit accruing under the relevant agreement; and

iii. the nullification or impairment of the benefit as a result of the application of the measure.[583]

[577] MEX Responses to Panel Questions, ¶ 98.
[578] MEX Comments, ¶ 37.
[579] MEX Rebuttal, ¶¶ 572-573.
[580] MEX Rebuttal, ¶¶ 574-578; see also MEX Comments, ¶ 38.
[581] MEX Rebuttal, ¶ 578.
[582] MEX Rebuttal, ¶ 582.
[583] MEX Rebuttal, ¶ 588, citing MEX-420, Panel Report, *United States-Certain Country of Origin Labelling Requirements*, WT/DS384/R, WT/DS386/R, adopted on 23 July 2012, ¶ 7.890; MEX-421, Panel Report, *United States-Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/R WT/DS234/R, adopted on 27 January 2003, ¶ 7.120; MEX-417, Panel and Appellate Body Reports, *European Communities-Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/R y WT/DS135/AB/R adopted on 5 April 2001 ("***EC-***

340. Mexico argues that the correct reading of Article 31.2(c), in the context of the whole treaty, involves distinguishing between (a) violation claims, which hold Parties accountable for the substantive obligations of the treaty even though departures may be justified based on public policy exceptions such as Article 32.5, and (b) non-violation complaints, which "should be approached with caution and treated as exceptional."[584] On this basis, Mexico submits that allowing a non-violation complaint against a measure that has been found to be inconsistent with USMCA obligations but nonetheless justified under Article 32, "would undermine the capacity of the USMCA parties to protect the public policy interests covered by the Article 32 exceptions."[585] The USA rejects Mexico's view, and objects to Mexico's general references to "Article 32 exceptions," because "the language in Article 32.5 differs markedly from the language in Article 32.1." Indeed, the USA says that "the Indigenous peoples exception was not included as one of the general exceptions, which undermines Mexico's assumption that these provisions should be treated identically."[586] The USA maintains that a claim under Article 31.2(c) would be available even if the Measures were found to be justified under Article 32.5.[587]

341. Mexico adds that the wording of Article 31.2(c) implies an additional element, in that Article 31.2(c) specifically covers only "the application of a measure … that is not inconsistent" with the USMCA.[588] In Mexico's view, this means that a measure that has been found to be inconsistent with the USMCA, even if it is subsequently justified under one of the exceptions, does not fall within the scope of a non-violation complaint under Article 31.2(c).[589] Mexico contrasts the wording in Article 31.2(c) of the USMCA of that in Article XXIII:1(b) of the GATT 1994, which covers nullification or impairment that results from the application of "*any* measure, *whether or not* it conflicts with the provisions of" the GATT 1994."[590] Mexico submits that "this difference in wording must be given meaning."[591] It contends that these considerations are relevant because the USA's non-violation claim arises only in the alternative scenario where the Panel has found that the Measures are inconsistent with the USMCA but are justified under

Asbestos"), ¶ 8.283; MEX-419, Panel Report, *Japan-Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted on 22 April 1998 ("**Panel Report, *Japan-Film***"), ¶ 10.41.
[584] MEX Responses to Panel Questions, ¶ 117, citing MEX Rebuttal, ¶ 587, citing MEX-419, Panel Report, *Japan-Film*, ¶¶ 10.36-10.37.
[585] MEX Responses to Panel Questions, ¶ 118, citing MEX Rebuttal, ¶ 599.
[586] USA Comments, ¶ 61.
[587] USA Comments, ¶ 61.
[588] MEX Rebuttal, ¶ 590 (emphasis in original).
[589] MEX Rebuttal, ¶ 590.
[590] MEX Responses to Panel Questions, ¶ 120 (emphasis in original).
[591] MEX Responses to Panel Questions, ¶ 120.

Article 32.5.[592] On this basis, Mexico submits that the Measures do not fall within the scope of Article 31.2(c).[593]

342. In any event, even if the Measures do fall within the scope of Article 31.2(c), Mexico considers that a "stricter burden of proof" applies to the USA's non-violation claim because of "the nature and importance of certain measures," as identified by the WTO Panel in *EC-Asbestos* in the context of interpreting Article XXIII:1(b) of the GATT 1994.[594] Mexico says that this led the Panel in that case "to find that the complainant had failed to establish the existence of nullification or impairment because it had not presented a 'detailed justification in support of its claim'."[595]

343. With respect to the Articles 7/8 Measure, Mexico submits, as set out elsewhere, that in the absence of action to implement any future substitution, there is nothing in Articles 7 and 8 of the 2023 Decree that could nullify or impair the market access of US corn exports to Mexico.[596] Mexico recalls that "only a measure that is 'being applied', 'and not the market structure which may or may not result from the application of such measure, may be the basis' for a non-violation nullification or impairment claim."[597] Consequently, Mexico contends that the USA's non-violation claim against the Articles 7/8 Measure is premature.[598]

344. Mexico contends that the USA "could not have reasonably expected that Mexico would not regulate GM corn grain in Mexico," and, in fact, "could have reasonably anticipated, as foreseeable, that Mexico would introduce measures to regulate GM corn grain in Mexico in the public interest."[599] Mexico says this is because "(i) prior to the conclusion of the USMCA, there was an undisputed concern in Mexico regarding GM corn, which led to the progressive adoption of regulatory measures that rendered future regulations foreseeable to the United States"; and "(ii) the arguments and evidence submitted by the United States do not meet the high burden of proof required under Article 31.2(c)."[600]

345. With respect to the first point, Mexico refers to (i) the *de facto* moratorium on the commercial cultivation of GM corn between 1998 and 2005; (ii) the 2004 CEC Report, which raised concerns and issued recommendations regarding GM corn; and (iii) the class action

[592] MEX Rebuttal, ¶ 592.
[593] MEX Rebuttal, ¶¶ 596-599.
[594] MEX Rebuttal, ¶ 591, citing MEX-417, Panel Report, *EC–Asbestos*, ¶¶ 8.281-8.282.
[595] MEX Rebuttal, ¶ 600, citing MEX-417, Panel Report, *EC–Asbestos*, ¶¶ 8.301-8.304.
[596] MEX Rebuttal, ¶ 601.
[597] MEX Rebuttal, ¶ 602 (emphasis omitted), citing MEX-419, Panel Report, *Japan–Film*, ¶ 10.59.
[598] MEX Rebuttal, ¶ 602.
[599] MEX Rebuttal, ¶ 604.
[600] MEX Rebuttal, ¶ 605.

proceedings, resulting in the judicial injunction ordering the Moratorium.[601] It was in this context, Mexico says, that the USMCA negotiations took place.[602] Mexico adds that since 2019, Mexico "shared scientific information with the United States, discussing concerns about glyphosate, GMOs, and GM corn consumption safety," and introduced the Native Corn Law, reflecting those concerns.[603] Mexico's view is that the 2020 Decree and the 2023 Decree "reflect over two decades of ongoing regulatory efforts by Mexican authorities, evolving in response to scientific uncertainties regarding the risks associated with GM corn in Mexico."[604]

346. With respect to the second point, referring to the stricter burden of proof Mexico says is applicable under Article 31.2(c), Mexico submits that the USA's reliance on past trade values and past authorizations "do not establish a reasonable expectation against future regulation of GM corn, particularly as scientific evidence of risks develops and is taken into consideration by responsible government authorities."[605]

347. Finally, Mexico submits that the Measures do not cause nullification and impairment because the required "causal link" is not present.[606] In Mexico's view, to establish causality, a complainant must evidence that "the measure directly disrupts the anticipated competitive landscape."[607] Mexico says that the USA has failed to provide such evidence because there are alternative explanations for the decline in white corn exports in 2023, and, in any event, even white corn exports have increased in 2024.[608]

348. In response to the Panel's question with respect to whether the 2023 Decree could be modified to avoid nullification and impairment, "Mexico observes that it is extremely difficult to respond to this question in the absence of specific findings and reasoning from the Panel."[609] Mexico adds, with reference to the increase in US corn imports, that "the evidence clearly establishes that no such nullification or impairment is occurring and none is likely to occur in the foreseeable future."[610] For these reasons, Mexico says that "it is unclear how [it] could modify the 2023 Decree to avoid the alleged nullification or impairment."[611] In any event, Mexico recalls that if it were forced to withdraw Articles 6.II, 7 and 8 of the 2023 Decree in order to

[601] MEX Rebuttal, ¶¶ 606-611.
[602] MEX Rebuttal, ¶ 612.
[603] MEX Rebuttal, ¶ 613, citing MEX-12, Native Corn Law.
[604] MEX Rebuttal, ¶ 614.
[605] MEX Rebuttal, ¶¶ 616-617.
[606] MEX Rebuttal, ¶ 621.
[607] MEX Rebuttal, ¶ 621.
[608] MEX Rebuttal, ¶¶ 622-624.
[609] MEX Responses to Panel Questions, ¶ 121.
[610] MEX Responses to Panel Questions, ¶ 122.
[611] MEX Responses to Panel Questions, ¶ 123.

avoid nullification and impairment, "it would be withdrawing measures that had been found to be justified under Article 32.5," thus withdrawing "measures deemed necessary to fulfil Mexico's legal obligations to indigenous peoples."[612] As such, Mexico submits that "[t]he determination of nullification and impairment would completely undo the justification of the measure under Article 32.5, undermining this critical protection for indigenous people."[613]

3) The Panel's Analysis

349. The USA raises its non-violation claim only in a contingent scenario where the Panel finds that the Measures (a) are inconsistent with the USMCA, but (b) are nonetheless justified under Article 32.5. The Panel has found that the Measures are inconsistent with several Articles in Chapters 9 and 2 of the USMCA, but are *not* justified under Article 32.5.

350. The Panel considers that both Parties have raised serious arguments in connection with this claim, including with respect to assertions about "reasonable expectations." However, because the Panel understands that the USA does not press the claim in the current circumstances, it accordingly makes no determination on this matter.

VI. CONCLUSIONS AND RECOMMENDATION

351. For the reasons stated above, the Panel finds that the Measures are SPS measures within the meaning of Article 9.2 of the USMCA and that the Measures are inconsistent with the following provisions of the USMCA:

a. Article 9.6.3, because the Measures are not based on relevant international standards, guidelines or recommendations, or on an assessment, as appropriate to the circumstances, of the risk to human, animal, or plant life or health;

b. Article 9.6.8, because Mexico did not conduct a risk assessment taking into account relevant international standards, guidelines, and recommendations of the relevant international organizations;

c. Article 9.6.7, because Mexico did not conduct a risk assessment or risk management with respect to the Measures in a manner that was documented and provided the other USMCA Parties an opportunity to comment;

d. Article 9.6.6(b), because the Measures are not based on relevant scientific principles;

[612] MEX Responses to Panel Questions, ¶ 124.
[613] MEX Responses to Panel Questions, ¶ 124.

e. Article 9.6.6(a), because the Measures are not applied only to the extent necessary to protect human, animal, or plant life or health;

f. Article 9.6.10, because Mexico did not select SPS measures not more trade restrictive than required to achieve the level of protection that it determined to be appropriate; and

g. Article 2.11, because Mexico adopted or maintains a prohibition or restriction on the importation of a good of another Party.

352. With respect to Mexico's defenses, the Panel finds that:

a. the Measures do not fall within the exceptions under Articles XX(a) and (g) of the GATT 1994 and are consequently not justified pursuant to Article 32.1.1 of the USMCA; and

b. the Measures are not justified under Article 32.5 of the USMCA.

353. Accordingly, the Panel recommends that Mexico bring its Measures into conformity with its USMCA obligations under Chapters 2 and 9 of the USMCA. The Panel accepts that Mexico is seeking to address genuine concerns in good faith, and suggests that such concerns be channeled into an appropriate risk assessment process, measures based on scientific principles, and in dialogue among all USMCA Parties to facilitate a constructive path forward.

ANNEX I.

LIST OF HEARING PARTICIPANTS

USA	Mexico	Canada
Erin Biel Brittany Hendricks Brian Janovitz Leslie Yang Braeden Young Nancy Kao Chris Peterson Julie Van Alstine Eric Flamm Bianca Nunes Laurel Celeste	Alan Bonfiglio Ríos Pamela Hernández Mendoza Luis Fernando Muñoz Rodríguez Alejandro Rebollo Ornelas Oscar Manuel Rosado Pulido María Daniela Parra Hernández Mariah Karla Arreola Alcántara Aldo González Aranda Sergio Alonso Patiño Reyes José Vicente Peredo Vázquez Roberto Orbe Colón Sergio Iván Balderas Rodríguez Patricia Cos Purón Andrea Torres Morales Adelita San Vicente Tello Aidé Jiménez Martínez Heriberto Vázquez Cardona Juan Reynaga Mejía Octavio Hernández Rosas Erica Lissette Hagman Aguilar Brisa Yunuen Orozco López Nemer Alexander Naimes Henkel Gabriela Moreno García	Marie-Claude Boisvert Christopher Koziol Thomas Walker Christopher Anderson Ken Ellens

The Panel	Mexican Section of the Secretariat
Christian Häberli (Chair) Jean Engelmayer Kalicki Hugo Perezcano Díaz **Assistants to the Panelists** Víctor Saco Zsófia Young Manuel Sánchez Miranda	Karla Rosas Antonio Parra Diana Muñiz Brenda Hernández Javier Gutiérrez Francisco Torres Gustavo Sepúlveda