

Mexico City, March 15, 2024.

Mexican Section of the Secretariat.  
By hand.

Written submission of the Project on Organization, Development, Education and Research regarding the import and use of genetically modified corn.

A. Approach.

As announced, the purpose of this submission is to provide a basis for considering the Decree Establishing Various Actions Regarding Glyphosate and Genetically Modified Corn, published on February 13, 2023 (the Decree), as a necessary measure for Mexico to comply with its obligations to its Indigenous Peoples, pursuant to Article 32.5 of the USMCA.

This measure does not involve arbitrary or unjustifiable discrimination against persons from the other Parties to the USMCA, nor it is used as a disguised restriction on trade in goods, and which, on the contrary, should be maintained as a measure to remedy the discrimination against Indigenous persons and communities in Mexico caused by the import and use of genetically modified corn.

In this scenario, such a measure in favor of indigenous persons and communities in Mexico must even be considered in conformity with a norm of compelling nature that prohibits discrimination against them with respect to the rights and obligations existing between the Parties to the USMCA; therefore, the Decree under review by the Panel cannot be incompatible with Mexico's obligations under the USMCA, but rather it may be complied with in conformity with other treaties in force among the Parties.

## B. Mexico's obligations to its indigenous peoples

Article 2 of the Political Constitution of the United Mexican States that the indigenous peoples of Mexico are those who are descended from the populations that inhabited the present territory of the country at the beginning of colonization and who preserve their social, economic, cultural and political institutions, or at least some of them. It mentions that the communities that constitute an indigenous people 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. With regard to indigenous peoples, it states that awareness of their indigenous identity should be the fundamental criterion for the application of indigenous standards to them.

In addition, Article 1 of the Constitution prohibits any discrimination based on ethnic or national origin that has the purpose of nullifying or impairing the rights and freedoms of individuals. In the case of indigenous peoples and communities, among these rights, there is emphasis on the right to decide on their internal forms of coexistence and social, economic, political and cultural organization; the right to preserve and enrich their knowledge and all the elements that constitute their culture and identity; the right to preserve and improve their habitat and to maintain the integrity of their lands; the right to access the preferential use and enjoyment of the natural resources of the places they inhabit and occupy, all of these rights are acknowledged in Article 2.

It is particularly important to note that in the Article 2 of the Mexican Constitution, cited above, it states that, in order to eliminate any discriminatory practices against indigenous peoples, the Federation shall establish the necessary policies to guarantee the enforcement of indigenous rights and the integral development of indigenous peoples and communities, said policies shall be designed and implemented jointly with them. The above makes it clear that respect for the right of indigenous individuals, communities and peoples to be consulted, as well as the other rights highlighted, are Mexico's obligations towards its indigenous peoples.

Obligations that are reinforced by the international agreements that Mexico has executed, which have the judicial backing of the country's Supreme Court. With regard to the former, in terms of Article 1.2 of the USMCA, it should be said that the Parties have confirmed their existing rights and obligations to each other, in accordance with other international agreements or treaties to which they are also Parties.

Two of these agreements should be considered: the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination. Article 1.2 of the former states that all peoples shall be free to dispose of their natural wealth and resources, without prejudice to obligations under international law and international economic cooperation based on the principle of mutual benefit, and that in no case shall it be permitted to deprive any people of its own means of subsistence. In like manner, Article 2.1 establishes the obligation to respect and to guarantee to all persons within the territory of the States Parties to that agreement and subject to their jurisdiction, without distinction of any kind, the rights therein recognized; while Article 2.2, states that each State Party undertook to take appropriate measures to establish the necessary provisions to enforce those same rights.

Among these rights, the right to participate directly in the conduct of public affairs (Article 25a), the right to equal protection of the law without discrimination or prohibition of discrimination (Article 26), and the right of ethnic minorities to have their own cultural life (Article 27) are relevant to this case.

On the other hand, Article 1.1 of the aforementioned Convention states that racial discrimination shall mean any distinction, exclusion, restriction or preference based on race, color, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Also important is the obligation contained in Article 5 to prohibit and eliminate racial discrimination in the enjoyment of certain rights, such as the right to participate in the conduct of public affairs at any level (section c), and economic, social and cultural rights (section e), including the right to public health and to equal participation in cultural activities.

Finally, Mexico's obligations to its indigenous peoples are completed by the guarantee that the Supreme Court of Justice of the Nation has given to certain indigenous rights in relation to the issue of genetically modified organisms. Specifically, the criteria derived from the rulings of its Second Chamber in the Amparos under review 198/2015, 241/2015, 270/2015, 410/2015, 498/2015, 499/2015 and 500/2015 should be invoked, since in all of them the need for prior consultation with indigenous communities located in places where genetically modified organisms (soy) would be planted was recognized. More importantly, it was noted that the release of these organisms into the environment could also pose risks to biodiversity, due to their spread through various meteorological mechanisms, as well as through insect pollination.

In this sense, a relevant aspect of these legal precedents that should be noticed in this case is that the Courts have approved, as a correlative obligation to respect indigenous rights, the practice of consultation prior to the release of genetically modified organisms with indigenous communities that may be affected. Moreover, in the issue of the release of seeds from genetically modified corn, the First Chamber of the Supreme Court considered relevant to take into account these precedents of the Second Chamber when validating a precautionary measure ordered as a result of a collective action, consisting of the suspension of the issuance of commercial permits for the release of genetically modified organisms into the environment (Corn case) and the limitation of experimental and pilot permits (Amparo under review 1023/2019).

In this context, there is no doubt that Mexico is entitled, and even obliged, to adopt a measure such as the Decree in question in order to comply with some of its legal obligations towards its indigenous peoples.

To begin with, the lack of prior consultation with the country's indigenous communities prior to the import of genetically modified corn, given that its release into the environment could pose risks to biodiversity, as already mentioned, must be remedied. This could affect, at least, the indigenous peoples' right to preserve and enrich their knowledge, culture and identity around their native corn; the right to preserve and improve the habitat and maintain the integrity of their lands for its cultivation; the right to have access to the preferential use and enjoyment of the natural resources of the places they inhabit and occupy for the cultivation of their corn; the right to freely dispose of their natural wealth and resources for the same purpose; the right to not be deprived of their own means of subsistence through the contamination of their corn by genetically modified corn; the right to have their health protected; and the right to have their own cultural life around their corn and the *milpa* (T.N. polyculture-crop-rotation sowing field).

### C. Compatibility of the Decree with the USMCA

In line with some of these rights, the Decree refers to the protection of health, a healthy environment, food security and food self-sufficiency. In addition, Article 6 orders the revocation of permits for the release of seeds from genetically modified corn into the environment and of authorizations for the use of grain from that corn for human consumption, as well as the suspension of the granting of such permits and authorizations. While Article 7 requires measures for the progressive replacement of genetically modified corn for animal feed and industrial use for human consumption only.

Therefore, it is necessary to provide reasons why this Decree does not constitute arbitrary or unjustifiable discrimination against persons of the other Parties to the USMCA, nor is it used as a disguised restriction on trade in goods.

In order to resolve this question, it is essential to evaluate the content of the Decree. Its Article 1 clarifies to whom it is addressed and for which purpose. Subject to this instruction are only the agencies and entities that conform the Federal Public Administration. Its purpose is to guide their actions with regard to the use, disposal, distribution, promotion and import of genetically modified corn and its goal is to safeguard a group of rights.

The instruction to the regulated entities is further specified in Article 3: within the scope of their competencies, they must refrain from acquiring, using, distributing, promoting and importing genetically modified corn for any use, within the framework of public programs or any other government activity. The same regulated entities, according to Article 7 of the Decree, must undertake a gradual substitution of genetically modified corn for animal feed and industrial use for human food. Thus, in reality, these provisions of the Decree only contain an elementary decision in the exercise of the most basic freedom: to stop consuming a product and find an alternative.

In Article, the regulated entities are limited, being addressed only to the biosafety authorities, so that they, within their sphere of competence, revoke permits for the release of seeds from genetically modified corn into the environment and authorizations for the use of grain from this corn for human consumption, and cease to grant such permits and authorizations.

Properly read, none of this discriminates against persons from the other Parties to the USMCA, nor is it used as a disguised restriction on trade in goods. The import of this corn has not been stopped, but it has only been decided not to consume it, not to allow its release, and not to authorize it in the masa and tortilla sector.

Decisions that fulfill Mexico's commitments to its indigenous population, being presented as a special measure to protect native corn, the milpa, biocultural wealth, farming communities, gastronomic heritage and human health. Decisions that may barely be described as a first measure of remediation for the lack of prior consultation with the country's indigenous communities before opening the import of genetically modified corn.

#### D. Discrimination against Indigenous Peoples and Communities in Mexico

Having ignored the indigenous peoples of Mexico in the import of genetically modified corn is open discrimination against them. The special relationship and ties that these people have with their corn should have always been taken into account. Even if we were to assert that their consultation should take place only in the case of significant impacts on their environment, and not whenever actions which could affect them directly are planned, it is clear that, in accordance with the obligations to respect and guarantee their rights, if said import were to go ahead without further ado, it would result in the violation of their human rights and, therefore, in discrimination.

In addition to the sources that document the special relationship that indigenous communities have with their corn, an additional effort was made to confirm this at first hand.<sup>1</sup> The testimonies collected show that almost all the people feel affected by the import of genetically modified corn, as it affects their health, water, soil, air, flora, fauna, food, economy, seed exchange and corn culture. Virtually none of them has been consulted in a prior, free and informed manner, and the result is that they feel discriminated.

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<sup>1</sup> Site to view the results: <https://share.mayfirst.org/s/PepfcGdoXLHDqLw>

It is precisely this discrimination that leads to a final fundamental question. The Decree at issue here, even if it were inconsistent with the USMCA, is consistent with a higher peremptory norm of general international law.

#### E. Relevance of the compelling-nature norm prohibiting racial discrimination

It has been noted that under Article 1.2 of the USMCA, the Parties confirm their rights and obligations under the WTO Agreement and other agreements to which they are also Parties. It is therefore reiterated that the determination to be made by the Panel must take into account the obligations that the Parties have undertaken under these other agreements. These treaties should include the 1969 Vienna Convention on the Law of Treaties of (VCLT), which has been accepted as a rule of interpretation in Article 31.13.4 of the USMCA.

It is important to mention that Article 31.13.4 admits the possibility of applying customary rules of international law.<sup>2</sup> This, in turn, allows at least Article 53 of the VCLT to be understood as such. Consequently, it is possible to conclude that the Panel must resolve this case in light of *peremptory laws* rules that may be relevant, even overriding those of other agreements that the Parties have among them.

As a result, if the Decree at issue is in any way in conformity with or consistent with a peremptory norm of general international law under the terms of Article 53 of the VCLT, the Panel cannot conclude that it is inconsistent with the obligations under the USMCA or that Mexico has failed to comply with them, since the Decree is covered by Article 32.5 of the USMCA.

In other words, it is clear that the Panel must ensure that the existing rights and obligations among the Parties to the USMCA do not violate *peremptory* norms. Similarly, if there is a *peremptory* norm prohibiting discrimination, the Panel must

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<sup>2</sup> For the identification of these rules, the Draft conclusions on identification of customary international law, may be followed as adopted in 2018 by the International Law Commission (ILC).

decide whether the Decree follows it and take it into account in resolving this dispute in order to avoid discrimination against indigenous peoples.

In order to depart from a common language on the peremptory norms, the Panel may find illustrative the document entitled *Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens)*, adopted just this year by the International Law Commission.

In this understanding, the existence of the *peremptory* norm prohibiting discrimination is clear. The judgments of the Inter-American Court of Human Rights make this clear. See, for example, *Hendrix v. Guatemala*, Judgment of 7 March 2023, para. 62; *Olivera Fuentes v. Peru*, Judgment of February 4, 2023, para. 85; *Guevara Díaz v. Costa Rica*, Judgment of June 22, 2022, para. 46; *Buzos Miskitos (Lemoth Morris et al.) v. Honduras*, Judgment of August 31, 2021, para. 98; *Ramírez Escobar et al v Guatemala*, Judgment of March 9, 2018, para. 270; *Duque v Colombia*, Judgment of February 26, 2016, para. 91; *Flor Freire v. Ecuador*, Judgment of August 31, 2016, para. 109; and its Advisory Opinion OC-27/21, *Freedom of association, collective bargaining and the right to strike, and their relationship with other rights, from a gender perspective*, of May 5, 2021, para. 152; and its Advisory Opinion OC-24/17, *Gender identity and equality and non-discrimination for same-sex couples*, of November 24, 2017, para. 61.

Thus, the remaining question is whether the Decree is consistent with the prohibition of discrimination. The position submitted before this Panel is in the affirmative. The reasoning underlying this position is based on the following premises. First, the Decree is explicit in the sense that it seeks to protect native corn, the milpa, biocultural wealth, farming communities, gastronomic heritage, and human health, as well as to safeguard health, the environment, food security and self-sufficiency.

Second, all of these purposes are in fulfillment of Mexico's obligations to its indigenous peoples, communities and individuals. In particular, as already stated, those related to respect for the rights of indigenous peoples to preserve and enrich their knowledge, culture and identity around their corn; to preserve and improve the habitat and maintain the integrity of their lands for cultivation; to have access to the preferential use and enjoyment of the natural resources of the places they inhabit and occupy for the cultivation of their corn; to freely dispose of their natural wealth and resources for the same purpose; and not to be deprived of their own means of subsistence by the contamination of their corn by genetically modified corn; to have their health protected; and to have their own cultural life around their corn and the milpa.<sup>3</sup>

Thirdly, without the protection that the Decree confers upon Mexico's indigenous population, even if it is not included as an explicit purpose, it would result in open discrimination against them. This is because by ignoring the indigenous population in the issue of the import of genetically modified corn, the special relationship and ties they have with their corn was not acknowledged. This is an issue that has a significant impact on their territories and is capable of directly harming them.

In conclusion, not only is the Decree not incompatible with the rights and obligations derived from the USMCA, but it is allowed as a necessary measure to comply with the legal obligations of Mexico's indigenous peoples, in accordance with the *peremptory* norm prohibiting discrimination against them, which takes precedence over the treaty.

[Illegible Signature]

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<sup>3</sup> Consultation of the case *Comunidades indígenas miembros de la asociación Lhaka Honhat (NuestraTierra)*, judgement of the Inter-American Court of Human Rights dated February 6, 2020, on specific cultural rights, paragraphs 231 and on, may result very explanatory.