Technical View for the Dispute Settlement Panel in the MEX-USA-2023-31-01 review of genetically modified corn submitted by El Poder del Consumidor (EPC) and Alianza por la Salud Alimentaria (ASA).

I. Introduction

The Decree Establishing Various Actions Regarding Glyphosate and Genetically Modified Corn (February 13, 2023) ("Decree 2023" or "Decree") which (i) prohibits the use of genetically modified corn (GMC) in masa and tortillas, and (ii) instructs Mexican government agencies to gradually replace -i.e., restrict and eventually completely ban- the use of GMC in all products for human consumption and animal feed1, serves as a protective measure aimed at safeguarding human health, environmental integrity and bio-cultural heritage.

This technical view will demonstrate that Mexico's ban on GMC contained in the Decree is in line with its obligations under the United States-Mexico-Canada Agreement (USMCA) and the Agreement on Sanitary and Phytosanitary Measures (SPS) of the General Agreement on Tariffs and Trade (GATT), and that it responds to a long series of actions to apply the precautionary principle, taking into account the massive pattern of consumption of this grain by Mexican consumers. By examining technical evidence on corn consumption in Mexico, relevant trade law cases and legal reasoning in international law, this view will provide arguments in favor of Mexico's policy.

II. Mexico's constant concern about GMC consumption.

Contrary to U.S. claims, for almost 30 years, Mexico has taken action to protect the health of its population and the diversity of native corn that has traditionally been consumed.

In that context, in 1998, the National Agricultural Biosafety Committee issued a moratorium on the cultivation of GMC for experimental purposes. On the other hand, in 2004, the North American Commission for Environmental Cooperation (CEC) issued its final report on corn and genetic diversity in Mexico. In this document, carried out by scientists free of conflicts of interest, the CEC concluded that:

"The volume and form of corn consumption differs greatly between Mexico and most other countries. The grain is fundamental to the Mexican diet, which is why both the transgenes already approved and those proposed for future introduction in Mexico require special consideration".2

The Commission also recommended that Mexico, because of its consumption characteristics, minimize GMC imports of or take measures to prevent gene flow, such as milling the grains at entry into the territory.3

On 18 March 2005, the Law on Biosafety of Genetically Modified Organisms was enacted, which was heavily influenced by agroindustry.4 Nevertheless, thanks to civil society, section XI of article 2 was included, which establishes the existence of a special protection regime for this seed.

In September 2013, a group of stakeholders, including consumers, filed a class action against the inadequacy of the regulatory framework to protect human health and the environment from the effects of GMC. This collective group succeeded in getting a court to issue an injunction, suspending the issuance of permits for the release of GMC in the pilot and commercial mode. In October 2021, Mexico's highest court decided to uphold the order.

Another example occurred in April 2020, when the Federal Law for the Promotion and Protection of Native Corn was published, which establishes that the consumption of native corn is a cultural manifestation and orders the state to protect these seeds, as part of the guarantee of the Mexican population's right to food.

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1 Decree establishing different actions regarding glyphosate and modified corn
3 Íbidem, p. 27
In sum, the market entry, use and consumption of GMOs has been a permanent concern of the Mexican population and government. In this sense, the measures reviewed by this Panel did not emerge improvised, but follow decades of efforts to guarantee the safety and nutritional quality of the most consumed grain by the Mexican population.

III. The importance of corn for Mexican consumers.

To strengthen the legal arguments that will be offered later, it is stressed that Mexico is the center of origin of corn from the teocintle, its closest wild ancestor. Its domestication and diversification process has continued for thousands of years. In the Mexican territory, CONABIO\(^5\) has identified up to 64 different breeds, 59 of which are native\(^6\). This biological circumstance has been combined with the cultural one, which is why corn is at the center of the diet of Mexican consumers.

This crop is a fundamental pillar of the Mexican diet. It is estimated that the population has an annual per capita consumption of up to 196.4 kg of corn, ingested daily, mainly through tortillas\(^7\). Therefore, ensuring the quality and safety of these tortillas is of great importance for the public interest, specifically for the protection of the health of Mexican consumers due to the quantity and frequency with which they consume corn.

The risks of GMO consumption also reach the cultural dimension, as they threaten the agricultural knowledge and practices of indigenous and farming communities. It is important to recognize that the defense of the forms of corn consumption in Mexico is framed within the concept of food sovereignty, which refers to the right of countries and communities to define their own agricultural and food policies autonomously, without being overly dependent on imports and without being subjected to pressures from foreign companies or nations. Furthermore, one of the principles of food sovereignty and a right of Mexicans is that they have access to nutritious, culturally appropriate and sustainably produced food.

IV. Consistency of Mexico’s measures with Chapter 9 and Chapter 2 of the USMCA

First, it is the opinion of EPC and ASA that, in legal terms, the Decree 2023 does not constitute a ban on the import of corn into Mexico or its commercialization. The Decree is intended to regulate the end use of corn, i.e. its use and consumption in masa and tortillas, for human consumption, and its text does not mention the “import ban”.

However, should the Panel find that the measures issued by Mexico are subject to the USMCA (Chapters 9 and 2) and the GATT SPS Agreement, EPC and the ASA are of the view that Decree 2023 does not violate the obligations contained in the USMCA or the SPS Agreement.

a) Consistency with Chapter 2 of the USMCA “National Treatment and Market Access for Goods.”

Decree 2023 aligns with the principles outlined in Chapter 2 of the USMCA, which emphasizes National Treatment and Market Access for Goods. The United States argues that the measures adopted by Mexico constitute a violation of Article 2.11 of the USMCA. The principle of “National Treatment” has been recognized in WTO jurisprudence.\(^8\) According to Article 2.11 of the USMCA, discrimination against goods based on their origin is strictly prohibited,\(^9\) except in accordance with GATT’s Article XI\(^10\).

Article XI permits the imposition of quantitative restrictions under certain conditions. While, as the United States points out, the measures adopted by Mexico in Decree 2023 do not constitute an exception under GATT Article XI for environmental protection in the trade law context, the exceptions contained in Article XX of the USMCA are of particular interest.\(^11\)

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\(^5\) Comisión Nacional para el Conocimiento y Uso de la Biodiversidad (T.N. National Commission for the Knowledge and Use of Biodiversity)

\(^6\) CONAGARPA. Razas de Maíz de México. Disponible en: https://www.biodiversidad.gob.mx/diversidad/alimentos/maices/razas-de-maiz


\(^9\) USMCA, art. 2.11. “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.

\(^10\) Article XI of the GATT generally prohibits quantitative restrictions on imports or exports of any product since asserts: “No prohibitions or restrictions other than duties, taxes or other charges, (...) shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party (...).” However, GATT provides for exceptions to this fundamental principle. These exceptions allow imposing quantitative measures under limited conditions, and only if taken by justified political reasons pursuant to the GATT.

1. Decree 2023 is consistent with GATT Article XX.

GATT Article XX contains exceptions that allow members to impose measures that are intended to protect human life and the environment. The analysis of a measure under GATT Article XX is divided in two levels. First, a panel must examine whether the measure complies with at least one of the ten exceptions listed in Article XX. Second, consideration must be given to the issue of whether the measure in question satisfies the requirements of the heading of Article XX.

For the analysis of this case, it is relevant that the measures adopted by Mexico in Decree 2023 are: (i) necessary to protect human, animal or plant life or health, in terms of subparagraph (b), and (ii) relating to the conservation of exhaustible natural resources, in terms of subparagraph (g).

(i.ii) “To protect human life or health”

In order to analyze whether the measure is necessary in terms of subparagraph (b), it must first be assessed whether the measure is intended to protect human life and health. In the EC-Asbestos case, Canada claimed before the European Communities over the Decree issued by France to “halt” the spread of asbestos-related health risks. In that case the Appellate panel recognized the legitimacy of the Decree issued by France “to protect human health and life” even if they represent a restriction on trade.

Currently, there is no solid evidence, free of conflict of interest, that GMC consumption is safe in the long term for a population that consumes it in the quantity and frequency that the Mexican population does. Researchers and consumer organizations have warned about impacts such as allergic potential in those who consume transgenic crops that are obtained, for example, through the importation.

In this regard, the research of Dr. David Schubert of the Salk Institute for Biological Studies, is relevant, since he alerted the previous Mexican government (2012-2018) about the health risks of consuming transgenic corn and the dangers of applying the studies done with the U.S. population to the Mexican population. He said that the conclusion that the consumption of transgenic corn, specifically that which includes the Bt protein, is safe for Mexican consumers because no diseases have been found in Americans, is invalid. Considering also that consumption in the U.S.A. is related to some products that are not part of the daily diet, while in Mexico, it is consumed in large quantities as a basic food. Finally, Schubert pointed to various conditions resulting from the ingestion of transgenic corn that have been observed in human and animal models, such as allergies, stomach inflammation, histopathological changes in the liver, kidney and uterus.

On the other hand, it is relevant to mention the effect that glyphosate, a pesticide intimately associated with agriculture of genetically modified crops, has on human health due to GMC consumption. Scientific evidence free of conflict of interest established a significant association between exposure to glyphosate and different health problems, such as different types of cancer, endocrine diseases and dysregulation, and reproductive complications, including an increased risk of malformations in products (teratogenesis).

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12 Report of the Appellate panel, USA – Gasoline, p. 22, DSR 1996:1, 3, d 20; Report of the Appellate panel, Dominican Republic – Import and Sale of Cigarettes, Sec 64
13 Report of the Appellate panel, USA – Shrimp, Sec 149
14 Report of the Appellate panel, U.S.A – Shrimp, Sec 149
15 Brazil — Retreaded Tyres WT/DS332/AB/R (2007) Sec 139
16 EC – Asbestos
17 EC – Asbestos & 175
20 Idem
There are also studies that have found alterations in the neurobehavioral development of children, greater difficulties in their use of short-term memory, and alterations in mental development or general developmental problems. \(^{24,25,26}\)

It is also undeniable that the demand for the goods consumed determines the behavior of the food system. This system, in turn, has an impact on the environment in which the population develops. Thus, several studies have warned that if public policies and trade agreements continue to promote intensive technologies for releasing transgenic corn breeds into the environment, they could contribute to the extinction of the genetic resources of corn. \(^{27}\) The risk of losing the diversity of native corn breeds is very high, especially considering that this is an open-pollinated crop, which facilitates its contamination with transgenic corn breeds. Thus, the consumer demand for transgenic crops has a high probability of endangering the environment by causing loss of biodiversity, both wildlife and agro-biodiversity, through genetic contamination of the corn seeds. \(^{28}\)

Another problem is the contamination of water bodies, as glyphosate may affect water quality. This not only poses greater risks to aquatic life, but also implies potential negative impacts on human health when the population drinks contaminated water. \(^{29}\) This type of contamination may occur even if the sprayed crop area is not located near large bodies of water. This is because once spraying has been carried out, pesticide residues are deposited on the soil and, through infiltration processes, the substances enter the soil through rainfall until they reach bodies of water, and even phreatic levels, from where they may be extracted through wells for human use. \(^{30}\)

Glyphosate has also been studied for its negative impacts on biodiversity, affecting not only the weeds it is intended to kill, but also wildlife species and ecosystems near application areas, which serve as habitats and food sources for hundreds of species. This degradation of natural habitats is the main risk factor for the reduction of biodiversity. \(^{31}\) Research has also shown that its use often leads to increased weed resistance to glyphosate. \(^{32}\) This leads to an increase in the application of toxic herbicides, aggravating these environmental and public health problems.

Finally, another consequence of the consumption of herbicide-resistant GM seeds, such as glyphosate, is the impact on other actors in the food system. Thus, in Mexico, unfortunately, the use of these pesticides is part of everyday activities in various farming communities and has had severe consequences. Research in Jalisco, one of the three Mexican states with the highest rate of intoxication due to pesticide application, revealed that 100% of the children between 5 and 15 years of age studied in two communities showed exposure to pesticides through urine samples. Of the 100% of the study subjects identified as exposed to pesticides, more than 70% were exposed to kalathion, methoxuron, glyphosate, dimethoate, enilconazole and acetochlor.\(^{25}\), in other words, Mexico has evidence of exposure of developing children to these pesticides with negative effects on neurodevelopment, among other comorbidities. \(^{34}\)

In this case, the United States argues that Mexico did not present sufficient scientific evidence, with special emphasis on the publication of the Biotechnology Committee of the Mexican Academy of Sciences, “Transgénicos. Principales Beneficios, a Ausencia De Daños y Mitos” (2017), to demonstrate that “there is not a single confirmed evidence of harm caused by the use of transgenic organisms”. It is worth noting that, although this publication mentions that there are citations to more than a thousand peer-reviewed studies, there is no certainty that this has been subjected to this type of review or that the citations are not misrepresented. In addition, other scientists free of conflict of interest have

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31 Monsanto.

questioned this compilation. It is also emphasized that Mexico provided evidence from at least 16 peer-reviewed scientific journals, e.g. *Science* and *Nature*. In addition, reference is made in this view to peer-reviewed articles that are also free of conflict of interest.

There is a relevant history of biased evidence in the specific case of agroindustries, and producers of inputs such as genetically modified seeds and their associated pesticides. It was documented how Monsanto initiated a series of campaigns to defame, discredit and intimidate researchers whose scientific positions differed from its own research. At the same time, it massively publicized its own research. This was proven in 2017, when it was ordered to publish confidential documents amid a class action lawsuit brought by thousands of people affected by the use of its product Roundup (glyphosate).³⁶

This behavior should call for greater caution and meticulous analysis of the evidence presented by corporate entities through their allies and stakeholders and governments. In this regard, this Panel must undertake to carefully analyze the evidence provided by the Parties and ensure that it has not been financed or influenced in any way by the transgenic industry to deny or disguise the risks and harms of its consumption.

In sum, Decree 2023 aims to protect human health and environmental integrity from potential risks associated with genetically modified organisms (GMOs), based on conflict-free, peer-reviewed evidence. Therefore, Mexico’s regulatory measures are consistent with Article XX(b) of the GATT, as they are intended to "protect human health and life". i.i.ii) "Necessary"

Now then, in determining whether the measure is "necessary" to protect human life and health, in terms of GATT Article XX(b), the WTO Appellate Body has taken into account factors such as (i) the extent to which the measure contributes to the fulfilment of the public policy objective, (ii) the importance of the values protected by the measure, and iii) the impact of the measure on international trade.³⁹

For example, in the Brazil - Retreaded Tyres case, the Appellate Panel found that the import ban on retreaded tyres was "apt to contribute substantially to the achievement of its objective".⁴⁰ The Panel examined the replacement of retreaded tyres with new tyres in the Brazilian market and found that all types of retreaded tyres have a shorter life expectancy than new tyres, therefore a ban on the import of retreaded tyres decreases the total tyre waste in Brazil.⁴¹

It is within the competence of a WTO Member to establish the public health or environmental objectives it seeks to achieve, as well as the level of protection it wishes to obtain, through the measure or policy it decides to adopt.⁴²

In the *in situ* case, Mexico has determined that the level of protection it wishes to achieve with respect to human health risks from direct consumption of GMO grain in Mexico is "zero risk":

*Mexico has adopted a "zero risk" level of protection to address risks from direct consumption of GM corn grain in masa nixtamalizada, tortillas and related foods. The "zero risk" ALOP with respect to the protection of human health overlaps with the ALOP with respect to the protection of native corn.*⁴⁴

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38 Report of the Appellate Panel, USA – Apuestas, d 306
39 Report of the Appellate Body, USA – Gambling, sec 306
42 Idem, sec 212
45 Mexico’s Initial Submission, Mexico – Measures related to Genetically Modified Corn (MEX-USA-2023-31-01) sec 363.
The WTO Appellate Body has recognized that while there is no requirement in Article XX(b) to quantify the risk to human life and health, the risk must be assessed either in quantitative or qualitative terms. The same analysis applies to the quantification of the degree of contribution of the measure to the fulfilment of public policy.

In order to conduct such an analysis the Panel must examine the Risk Assessment provided by Mexico. The United States alleges that Mexico failed to conduct a Risk Assessment pursuant to Article 9.6.7 of the USMCA. Such allegations are erroneous and constitute factual arguments in which the United States seeks to decontextualize the information submitted by Mexico and impose its own regulation of the risk of MGC consumption in the United States. In this regard, it is not acceptable for one WTO Member to require another WTO Member to adopt essentially the same regulatory program without taking into consideration that the conditions of that Member may be different and the policy solutions may not be tailored to the particular conditions, for example, corn consumption.

Now, in *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, the Panel made the following observations with respect to the applicable standard for judging whether a measure is "necessary" under Article XX(b):

> [...] the import restrictions imposed by Thailand could only be considered "necessary" within the meaning of Article XX(b) if no other measure consistent with the General Agreement, or less inconsistent with it, was reasonably available to Thailand to achieve its sanitary policy objectives.

The measure adopted by Mexico on the end-use ban of GMC for human consumption meets the "zero risk" level of protection, as the ban applies to all GMC in Mexico, regardless of whether it is imported or produced in the country. There is no alternative measure "reasonably available to Mexico" that would mitigate the risks to human health from direct consumption of GMC.

i.ii) "conservation of exhaustible natural resources"

Article XX(g) of GATT provides an exception to Article XI for measures aimed at the conservation of exhaustible natural resources, provided that the State applies such measures in conjunction with restrictions on domestic production or consumption.

In the *US - Shrimp* case, the Appellate Body considered that the general structure and design of the measure imposed by the United States to prohibit the importation of certain types of shrimp and shrimp product was not a general prohibition on the importation of shrimp, but a measure in terms of GATT Article XX(g). The Panel determined that since the measure is "relating to" the conservation of an exhaustible natural resource, i.e. sea turtles, and restricting the mode of shrimp catch that may result in sea turtle bycatch, the average falls within the scope of Article XX(g).

The WTO recognizes that the generic term "natural resources" in Article XX(g) is not "static" in content or reference, but rather is "by definition, evolving". It is therefore relevant to note that modern international conventions and declarations make frequent references to natural resources covering both living and non-living resources.

In this case, the measure also aims to protect native corn. The restrictions imposed on the importation and use of GMC for human consumption have the effect of preserving the native Mexican corn species that form part of the diet of several peoples and communities. This is not a protectionist measure, as it is not intended to favor national producers, but rather to preserve part of Mexico's biological and cultural heritage. In this sense, it should be pointed out that GMC is not a good that could replace native corn in terms of consumption and that, on the contrary, it puts their existence at risk.

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45 Korea – Beef, secs. 163 and 164; EC – Asbestos, Sec 172; Report of the Appellate Panel, USA – Gambling, Sec 306; Report of the Appellate Panel, Dominican Republic – Importation and Sales of Cigarettes, Sec 70;
46 Brazil – Retreaded Tyres Sec 146; EC – Asbestos &176
47 Brazil – Retreaded Tyres Sec 146
48 USA – Shrimp Sec 177.
49 Idem
50 USA – Shrimp Sec 141.
51 USA – Shrimp Sec 142.
52 USA – Shrimp Sec 130
53 Idem
GMC cannot be considered a substitute for native corn because, first of all, several of these species are endemic to the country, once contaminated with transgenes or exterminated with pesticides, they are irretrievable. Secondly, native species of corn respond to the food uses of certain communities, so that GMM, usually yellow and forage, would not be culturally appropriate in terms of the right to food. Finally, it should be noted that GMC contain fewer nutrients than the native corn used for the wide variety of Mexican foods, so they are not substitutable in the Mexican diet, which is mainly based on this grain.

In this sense, there is no alternative measure that could be equally useful to protect these native corn species. Thus, it is necessary that the spread of GMC for human or animal consumption, whether from national or international sources, be interrupted in order to avoid transgene contamination of native species, as well as to prevent them from being affected by the use of pesticides such as glyphosate. This is because it has been documented that one of the ways in which transgenic corn has spread and contaminated native corn is precisely through imported grains.

The measure under review not only protects the health of animals, plants and the Mexican population, but also Mexico’s environment, specifically in terms of biological diversity. In this sense, the measure is protected within the margin that the USMCA itself allows for taking actions to promote and encourage the conservation and sustainable use of biological diversity.

Moreover, to be a measure within the meaning of Article XX(g), the issuing state must jointly provide for restrictions on domestic trade or consumption. For example, in United States - Shrimp, the Appellate Panel noted that the measure at issue had been "equitable" because it was issued in conjunction with restrictions on domestic shrimp harvesting.

Mexico’s prohibition of GMC applies equally to domestic and imported products. This approach also aligns with Article 9.4 of the USMCA, which encourages the use of international standards and guidelines to ensure non-discriminatory SPS measures. Mexico’s GMC ban exemplifies this principle by applying uniformly to both domestically produced and imported corn, without favoring one over the other based on origin. The Decree therefore remains faithful to the non-discrimination provisions enshrined in Chapter 2 of the USMCA.

b) **Decree 2023 is consistent with Chapter 9 of the USMCA.**

Chapter 9 of the USMCA asserts the rights and obligations of the parties under sanitary and phytosanitary (SPS) measures and the SPS Agreement that may directly or indirectly affect trade between the parties.

Article 9.6 establishes the importance of implementing SPS measures necessary for the protection of human, animal or plant life or health, based on relevant international recommendations, provided that doing so meets the appropriate level of sanitary and phytosanitary protection (appropriate level of protection) of the Party that established it.

i) *The Decree does not restrict trade “more than is necessary” to achieve the level of protection determined by Mexico to be adequate.*

Article 9.6.10 of the USMCA and Article 5.6 of the SPS Agreement provide the applicable standard for determining whether the measures adopted by Mexico are not more trade-restrictive than necessary to achieve the level of protection determined by Mexico.

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57 USA – Shrimp Secs 143 – 145

58 Article 9.6 (1), (2) and (3) of the USMCA.
Mexico determined that the appropriate level of protection is "zero risk". However, a measure will only be more trade-restrictive than required if another measure is reasonably available and significantly less trade-restrictive.59

For example, in the EC - Asbestos case, Canada argued that the "controlled use" of chrysotile asbestos fibers was a "reasonably available" alternative measure that meets the objective of the Decree issued by France, i.e. to protect human life and health by "stopping" the spread of the risk of asbestos-related diseases. The Panel determined that no alternative measure was reasonably available to France, as any alternative measure to the prohibition of the use of chrysotile asbestos fibers would not meet the adequate level of protection determined by France, i.e., "stopping" the risk of spreading diseases60, and therefore, the Decree issued by France is "necessary to protect the health and life of people".61

As another example, in the case of Brazil - Retreaded Tyres, the Panel found that the alternatives proposed by the European Communities, which were mostly remedial in nature (i.e., waste management and disposal)62, were not real alternatives to prevent the accumulation of tires which was the object of the import ban issued by Brazil.63

In this case, Mexico cannot establish an alternative measure that would allow the use of GMC for human consumption and final use in masa and tortillas in the national territory without affecting possible trade from the United States. Even assuming that Mexico would alternatively prohibit only GMC produced in Mexico, in order not to affect the possible trade of GMC imported from the United States, Mexico would leave open the possibility that GMC produced in the United States could be improperly used for direct human consumption.

Therefore, such alternative does not comply with the adequate level of protection determined by Mexico, i.e., "zero risk" of affecting the health and life of people by the direct consumption of GMC. Therefore, the application of such measure is impossible and it is not a "reasonably available" measure.64 Consequently, the Decree is necessary to protect the health and life of people.

As already mentioned, in the case of GMC consumption in Mexico, there are particular conditions in terms of volume and frequency that make a study unfeasible, since it would put the population at risk, in addition to the possibility of damage to human, animal and plant health that must be avoided. In addition, as already mentioned, the effects of GMC consumption would take years to manifest, by which time it would be too late to take sanitary and phytosanitary actions. The United States has the burden of proof on the existence of a "less restrictive" measure to achieve the level of protection determined by Mexico.

Mexico established in its initial written submission a prima facie justification that the measure adopted meets the "zero risk" standard established and is therefore "necessary" for the protection of human health and life. There is no alternative measure that is "less restrictive" and "reasonably available" to meet the level of protection established by Mexico.

Given that Mexico presented a prima facie analysis, the onus probandi is on the United States to demonstrate that there is a "less restrictive" alternative measure.65

V. Decree 2023 is consistent with Customary International Law and the Principles of International Environmental Law

The prohibition of transgenic corn for "end use" in Mexico is justified under the precautionary principle, which allows States to adopt precautionary measures in the face of scientific uncertainty.66 The prohibition reflects Mexico's proactive approach to address potential risks associated with genetically modified crops, pending further scientific research.

59 Article 9.6.10 of the USMCA; Article 5.6 of the SPS Agreement
60 EC – Asbestos Sec 174.
61 EC – Asbestos Sec 175.
62 Brazil – Retreaded Tyres Sec 157
63 Idem, Secs 153, 157, 171-175.
64 EC – Asbestos Sec 169.
65 Report of the Appellate Panel, USA – Gambling Secs 309, 320, 326; Korea – Beef Secs 323'325
The prohibition of GMC in Mexico is based on conflict-free scientific research indicating potential risks associated with transgenic crops, including environmental damage and health concerns. However, the measures adopted by Mexico are also consistent with the precautionary principle.

The precautionary principle is widely recognized in International Environmental Law, and is even considered mandatory or as international custom by some courts. It has also been adopted in several domestic legal systems, as is the case in Canada and Mexico. According to its formulation in the Rio Declaration, this principle consists of the following:

“[…] Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”

In the context of trade law, this principle is also recognized, to some extent, in Article 5.7 of the SPS Agreement, indicating that when relevant scientific evidence is insufficient, States may provisionally adopt sanitary or phytosanitary measures on the basis of the relevant information available to them. Specifically, in matters of public health, the precautionary principle is not supplementary, but vital and an unavoidable tool to prevent possible harm to human life.

In the Japan - Variety Testing case, the WTO Panel recognized the legitimacy of precautionary measures to protect human health and the environment, even in the absence of definitive scientific evidence. However, in the Japan - Apples case, the Appellate Body clarifies that Article 5.7 of the SPS Agreement does not apply in situations where the “scientific evidence is uncertain”, but in situations where “the scientific evidence is insufficient.” “Insufficiency” is interpreted as the case where “the evidence does not refer to the fact that it may be small in quantity, but rather that it does not lead to reliable conclusive results”.

The SPS Agreement has been referenced in 53 requests for consultations, 5 of which are related to genetically modified organisms, however, only in the EC - Biotech case has the Panel issued a declaration. The Panel’s decision in this case is relevant, as the European Union (EU) was questioned for its moratorium on the approval of new genetically modified organisms (GMOs) for commercialization. EC-Biotech has been the subject of multiple debates, as the Panel did not take into account the precautionary principle and decided that the measures adopted by the European Union were inconsistent with Article 5 of the SPS Agreement. Almost two decades later, it is relevant to differentiate the EC - Biotech case from this dispute.

In EC - Biotech, the EU justified its moratorium on the basis of the precautionary principle due to scientific uncertainty about the potential health and environmental risks of GMOs, arguing that the absence of conclusive scientific evidence required the adoption of precautionary measures to protect health and the environment. On the other hand, the EU moratorium in the EC-Biotech case was a broad measure that affected all new GMOs. Therefore, the Appellate Panel considered it an "unjustifiably broad" measure.

In this case, the scientific and regulatory circumstances must be differentiated, since Mexico has carried out specific scientific and regulatory evaluations of GMC in the Mexican context, considering the potential risks to human health and the environment. On the other hand, the prohibition of GMC in Mexico is not based on a generalized moratorium on all GMOs, but focuses on GMC for human consumption.

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67 TIDM, Responsibilities and Obligations of the States regarding the Zone’s activities. Consultive View dated February 1, 2011, par. 135.
68 Corte IDH, Opinión Consultiva Corte IDH OC-23/17 párrafo 180
70 Cfr. Supreme Court of Canada, 114957 Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town)
73 Appellate Body Report, Japan - Measures Affecting the Importation of Apples, Doc. WT/DS245/AB/R, secs 181, 182
74 Ibid.
75 DS205; DS291; DS292; and DS293
77 EC – Biotech, par 4.523 and 4.524
78 EC – Biotech, par 4.1161 – 4.1171
79 EC – Biotech, par 5.62 and 5.63
80 EC – Biotech, par 7.1431 – 7.1434
Now then, the precautionary principle not only reduces the standard of proof required for the adoption of measures necessary to avoid a risk to the environment, but also shifts the burden of proof to the party wishing to carry out the risky activity.\footnote{Appellate Body Report, US-Wool Shirts and Blouses case, Doc. WT/DS33/AB/R, d 335.} This has been considered in the doctrine\footnote{Corti Varela, Justo, El principio de precaución en la jurisprudencia internacional, Revista Española de Derecho Internacional, Sección ESTUDIOS, Vol. 69/1, enero-junio 2017, Madrid, pp. 219-243, \url{http://dx.doi.org/10.17103/redi.69.1.2017.1.08}} and in some particular votes of international courts. In this sense, in order to avoid that the party that intends to apply a protective measure of the environment and health has to demonstrate it with compelling evidence, it would not be viable for Mexico to generate the proof that the fact that it intends to avoid will cause damage, since this would necessarily imply to make happen what is desired to be prevented: a damage to the health of the population and to the native corn that it consumes.

Thus, if the Panel considers that the scientific evidence presented by Mexico and the United States does not generate reliable conclusive results, the burden of proof is on the United States to demonstrate that there is no long-term risk to human health from the direct consumption of GMC.

\section*{VI. Conclusion}

In short, in Mexico, corn consumption is an integral part of the culture and diet. Thus, this grain is a staple food in the Mexican diet, which results in a massive and frequent consumption pattern not similar to that of the United States of America. Therefore, ensuring the quality and safety of the grains that are ingested is a matter of great importance for Mexico and, in order to protect the health of its population from the risks identified in the existing scientific evidence and based on the precautionary principle, it took the measures that are reviewed by this panel. Likewise, Mexico implemented measures to protect the native corn that is part of its biodiversity and environment.

In this context, as analyzed throughout this document with scientific evidence and international arbitral precedents, the measures adopted by Mexico, in addition to being legitimate, are necessary for the protection of human and animal health and life, for the preservation of plants, as well as for the conservation of exhaustible natural resources. Consequently, they are consistent with the principles of international trade and its obligations established in the USMCA, the SPS Agreement and the GATT.

Finally, as presented in this technical view, it is necessary that, in consideration of the precautionary principle, the burden of proof, so far generated for Mexico, be reversed. It should be the United States that proves that there is no long-term risk to human health from the direct consumption of GMC, in the particular case of the Mexican consumption pattern. Therefore, we respectfully request this Panel to take into consideration the information free of conflict of interest and legal arguments set forth in this document to conduct the analysis of the case and resolve the conformity of the Mexican measures with the obligations of the USMCA.

Sincerely,

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Alejandro Calvillo Unna Paulina Magaña Carbajal
El Poder del Consumidor, A.C. Alianza por la Salud Alimentaria