TRADE PANEL RULES AGAINST FOOD SOVEREIGNTY, INDIGENOUS RIGHTS AND BIODIVERSITY: Analysis of Dec. 20, 2024 Final Report in USMCA case, Mexico — Measures Concerning Genetically Engineered Corn

Summary

The Mexican government announced its plans to transition away from imports of genetically modified (GM) corn and the use of glyphosate shortly after President Andrés Manuel López Obrador took office in 2019. These plans were part of a bigger package of reforms intended to strengthen the country's self-reliance on its food supplies and to move toward agroecological production. Those measures responded to years of successful advocacy efforts and litigation led by the Sin Maíz No Hay País (Without Corn, There Is No Country) campaign to prevent planting of GM corn and protect the country's cultural heritage and biodiversity.

The initial decree called for phasing out the use of glyphosate and of imports of GM corn by 2024. The revised decree issued in February 2023 continued the eventual phaseout of glyphosate, eliminated the use of GM corn in flour and tortillas for direct human consumption, and called for the eventual substitution of GM corn for industrial use and animal feed as non-GM corn becomes available.

The U.S. filed a formal dispute under the U.S.-Mexico-Canada Agreement (USMCA, known as T-MEC in Mexico) on Aug. 17, 2023. The U.S. asserted that the Mexican government's actions violate Sanitary and Phytosanitary Standards (SPS, food and plant safety provisions) in the agreement. Even though it does not export corn to Mexico, Canada joined the complaint as a third party.

Civil society groups in the three countries submitted detailed comments on the case, focusing especially on the science behind Mexico's restrictions on GMOs and glyphosate and the role of the decree in Mexico's overall transition to more sustainable production that also advances rural livelihoods and food security. The Institute for Agriculture and Trade Policy's (IATP) comment (written with the Rural Coalition and the Alianza Nacional de Mujeres Campesinas) focused on the Mexican government's rights to take

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these actions in order to comply with its commitments to Indigenous rights and biodiversity as described in the USMCA text.[1]

After a public hearing and several rounds of written comments by the Parties, the Panel released its final report on Dec. 20, 2025. Taken as a whole, the decision is overwhelmingly negative. It found against Mexico on every claim it took up, relied on the U.S. version of most disputed facts, invoked questionable science, and enunciated an overly broad definition of trade effects.

The Panel found that each of the challenged policies in Mexico's 2023 decree met the definition of a Sanitary and Phytosanitary Measure under USMCA Chapter 9, requiring a risk assessment based on international scientific principles and an opportunity for review and comment prior to adoption, which it concluded Mexico had failed to carry out. The Panel further found that these measures may directly or indirectly affect trade between the Parties, that the measures weren't narrowly tailored or applied only to the extent necessary to achieve the level of protection required, and that Mexico through these policies has prohibited or restricted importation of a good from another Party in violation of USMCA Chapter 2 on National Treatment and Market Access.[2]

The Panel rejected Mexico's arguments that any of the exceptions — for public morals, exhaustible natural resources and/or Indigenous legal rights — could nevertheless justify its measures.

On Feb. 6, Mexico announced it would withdraw the restrictions on GM corn for human consumption and the directive to gradually eliminate imports of GM corn for animal feed and other uses. This decision comes in the context of enormous pressures on trade issues.

The Panel's ruling and Mexico's ultimate decision are disappointing, but there are elements to the decision that are relevant for future trade policies, potentially including the scheduled joint review of the USMCA.[3] While it is difficult to see any silver lining here, the Panel decision offered Mexico a narrow path forward to try to justify its policies under the USMCA. The Panel limited the remedy for Mexico's violations of the USMCA to a recommendation that Mexico conduct a risk assessment to support its measures. The Panel accepted that Mexico has the right to set the "Appropriate Level of Protection" (ALOP) under Chapter 9 at zero risk, which seems significant. According to the Panel, Mexico's measures violated the USMCA because it did not carry out a formal risk assessment, and the measures chosen by Mexico to implement the ALOP were either ineffective or overbroad — not that the level of protection was unjustified.

The Panel accepted Mexico's factual case that the domestic legal instruments it referenced establish a linkage between Indigenous peoples and native corn and that Mexico has a right to take measures to protect native corn in order to fulfill its legal obligations to Indigenous Peoples. By accepting Mexico's definition of Indigenous legal rights it "deems necessary," the Panel appears to endorse the view, expressed in IATP's written submission, that the definition of the rights protected by this exception is self-judging by the party invoking it. Unfortunately, since the Panel nonetheless rejected Mexico's argument that the

1. These comments are available at https://www.iatp.org/usmca-corn-case-submissions.

2. Specifically, the Panel found that Mexico's 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; 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.

3. Article 34.7 of the USMCA calls for a joint review of the agreement six years after its entry into force. That review is scheduled to conclude on July 1, 2026. At that time, the Parties could agree to make certain changes to the agreement or start a process to eventually withdraw from it.

Indigenous Peoples Legal Rights Exception applied under the facts of this case, it is unclear whether the exception truly is self-judging. Jane Kelsey's analysis of the Panel decision suggests that this provision could be clarified if the USMCA is updated to explicitly address what the dispute panel can and cannot consider under the exception.[4]

While the Panel did not rule on the U.S. claim made under USMCA Article 32.2(c) that Mexico's policies constituted nullification or impairment of US expectations, it devoted substantial discussion to the issue. If the U.S. argument were to be accepted, it would appear to negate the Article 32 exceptions in their entirety, raising the question as to whether they are anything but window-dressing. The nullification argument is a dangerous theory that could be used to challenge policy changes in the U.S. and Canada as well as Mexico, based on vague claims that "expectations" were upset. Such arguments are similar to — but even more vague than — now-discredited claims of investor expectations common to investor-state dispute settlement (ISDS), which was largely removed from USMCA at the behest of U.S. negotiators. Article 32.2(c) should be clarified in any update to the USMCA to ensure that such vague claims cannot be used to undermine USMCA exceptions.

Some overarching issues

Before discussing the specifics of the decision, it is important to draw attention to some of the Panel's factual and interpretive conclusions which significantly weighted the decision in favor of the U.S. and against Mexico.

- Non-native, non-GM corn. Central to the Panel's decision are factual conclusions about the science of hybridization and Mexico's regulation (or lack of regulation) of hybrid non-GM corn. The Panel parrots the U.S. argument that the integrity of Mexico's native corn species is just as threatened by "traditional hybridization" by non-GM varieties of corn as from "transgenic introgression" from GM corn and repeatedly relies on this conclusion to shoot down Mexico's arguments.

  For example, rejecting the applicability of the Public Morals Exception, the Panel states: "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." [¶295, italics in original]

  In rejecting the applicability of the Exhaustible Natural Resources Exception, the Panel states: "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. 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." [¶303, footnotes deleted]

  And addressing the Indigenous Legal Rights Exception, the Panel states: "...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

4. Jane Kelsey, "Implications of the Failure of the Indigenous Peoples Exception in USMCA for the Treaty of Waitangi Exception," January 6, 2025. A summary version is available at https://ngatoki.nz/wp-content/uploads/2023/12/6.-Memo-on-USMCA-GM-Case.pdf

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." [¶328] The Panel used this argument to conclude that Mexico had not demonstrated that its policies effectively advanced Indigenous Peoples legal rights even though the Panel recognized 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." [¶326]

There was no clear response to the U.S. and Panel's assertion that native corn is threatened by non-GM hybridization. If Mexico decides to comply with the Panel decision while upholding its GM corn policies under the USMCA, it will need to tailor its policies to address the Panel's conclusion.

- Food self-sufficiency. In the Panel's view, food self-sufficiency is not a valid policy goal, and indeed it is evidence of 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. The 2023 Decree also refers to Mexico's "food self-sufficiency policies" on multiple occasions. Self-sufficiency by definition means the ability to provide for one's own needs independently, without imports." [¶306, footnotes deleted]

- Trade effects. The Panel completely dismissed the need to show actual trade impacts as a prerequisite for a violation of either Chapter 2 or Chapter 9. Contradicting itself, the Panel nevertheless discussed the relevance of vague and insubstantial trade impacts, as described by the U.S.

  On its face, the language in SPS Article 9.2 is quite expansive — "may, directly or indirectly, affect trade between the Parties" — and the Panel agreed with the U.S. that vague "chilling effects" and "market signals" are sufficient to meet this standard. For example, the Panel states: "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' 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. 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." [¶116, italics in original, footnotes deleted]

  The Panel also found that actual trade effects, including an *increase* in trade, are irrelevant under Chapter 2. The decision states: "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." [¶252] At the same time, the Panel seems to assert that speculative impacts on trade *are* relevant: "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." [¶253]

Detailed analysis of SPS and market access claims

- What is an SPS measure? At the outset of its analysis, the Panel notes that if a measure has mixed objectives — both SPS and other purposes, such as protecting biocultural wealth and peasant communities — those additional objectives "… do 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." [¶102].

- Applicability of exceptions: The Panel recognizes that the USMCA provides for the possibility that an SPS measure that is inconsistent with USMCA Chapter 9 may still be justified by its non-SPS purposes if they fall within certain exceptions, such as the Indigenous Peoples Legal Rights Exception. [¶102]

- Is Article 6.II of Mexico's Decree an SPS Measure? In this case, the Parties agree that Article 6.II of the 2023 Decree, which states that Mexico's biosafety authorities "[s]hall revoke and refrain from issuing authorizations for the use of genetically modified corn grain for human consumption" is an SPS measure "because it is a measure applied to protect human and plant life." [¶105]

- Does Article 6.II affect trade between the Parties? Mexico argued that its measure did not meet this requirement. In the Panel's view, it is "self-evident" that Article 6.II of the Decree "may, directly or indirectly, affect trade between the Parties." The Panel asserts that the use of the word "may" means "it is not dispositive whether the measure, in fact, has *already* affected trade to a cognizable degree." [¶106] The Panel also rejects Mexico's argument that the measure is an even-handed policy that doesn't target trade or imported corn, reasoning that Article 6.1 of the Decree prohibits domestic cultivation of GM corn, so that the practical effect of the latter provision is to target imported corn. The Panel states: "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." [¶108]

- Is Article 7/8 of Mexico's Decree an SPS measure? Mexico argued that this measure, calling for the "gradual substitution" of GM corn for animal feed and industrial use for human consumption, did not constitute an SPS measure because it has not been "applied", and a risk assessment will be forthcoming before it is implemented. In a secondary argument, Mexico asserted the SPS obligations are not applicable because Article 7/8 is a "provisional" measure within the meaning of USMCA Article 9.6.4(c), which provides that SPS measures may be provisionally adopted "if relevant scientific evidence is insufficient." USMCA Article 9.6.5 provides that in the case of a provisionally adopted measure, "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."

  The Panel rejected these arguments and found Article 7/8 to be an SPS measure. First, it differed with Mexico as to the meaning of the word "applied" in this context, finding that the word isn't used to distinguish between different degrees of implementation, as Mexico argued, but rather that a measure is linked to an SPS objective.[5] [¶111] Second, the Panel rejected Mexico's reliance on the gradual nature of the substitution as having any relevance, stating: "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." [¶113]

  Finally, the Panel rejected Mexico's alternative argument that even if Article 7/8 is an SPS measure,

5. See also footnote 151 referencing as precedent an Appellate Body report on the question of the meaning of the word "application."

it is "provisional" because future substitution would be contingent on the outcome of this trade challenge and future scientific studies. The Panel instead found that there is nothing in the 2023 decree indicating that the measure is temporary or provisional, and that Mexico had failed to provide any other evidence of this intent. [¶118] The Panel also dismissed Mexico's reliance on the precautionary principle as irrelevant to the analysis as to whether the measure qualified as "provisional." [¶119]

- <u>Does Article 7/8 affect trade between the Parties</u>? The Panel found that Article 7 of the 2023 Decree met the second prong of USMCA Article 9.2 and *may* affect trade because it "'sends a powerful signal to the market' 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 agreed with the U.S. that the measure *may* have a "chilling effect" on imports from the U.S. regardless of whether there is a specific timeline for implementation. [¶116]

- <u>Level of protection and the precautionary principle.</u> It should be noted here that, even though the Panel did not find Mexico's precautionary arguments persuasive it accepted "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." [¶181] This is significant in establishing a protective baseline for any subsequent risk assessment Mexico carries out to support future SPS regulations. The Panel also agreed with Mexico that a Party may conclude that there are no suitable international standards, guidelines or recommendations to meet its ALOP. However, if a Party finds that international standards are not suitable, it must still conduct a specific and rigorous *risk assessment* based on international guidance. [¶181] In other words, "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." [¶182] The Panel concluded that in the absence of 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." [¶183, italics in original]

- <u>Limiting the scope of SPS measures to the extent necessary</u>. In this case, the Panel determined that Mexico failed to carry out a risk assessment in compliance with USMCA Articles 9.6.3 and 9.6.8, and therefore, the Panel could not find that the measures were "applied only to the extent necessary to protect human, animal, or plant life or health." [¶219] The Panel stated: "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." [¶220]

  The Panel found that Mexico's arguments concerning the precautionary principle did not change its conclusions. As the Panel stated, Mexico "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,' 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.'" [¶222, italics in original]

  The Panel held that these arguments were relevant only to the Article 6.II measure, which addressed GM corn intended for human consumption, and that nothing in Mexico's 2020 Decree or supporting materials mentioned the precautionary principle or identified the measure as a provisional or temporary measure pending the outcome of further study: "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." [¶224] The Panel stated: "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." [¶225]

The Panel similarly found that Mexico's Article 7/8 substitution instruction was not saved by Mexico's reliance on the precautionary principle. As discussed above, the Panel rejected Mexico's attempt to use the precautionary principle to define the Article 7/8 substitution measure "provisional." [¶¶118-119] Mexico also argued that the precautionary principle was of particular relevance to the scope of the Article 7/8 Measure and whether it was sufficiently tailored to the risk, 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. This argument was likewise rejected by the Panel, which stated: "… 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)." [¶226]

The Panel relied on the same reasoning to find that neither measure complied with USMCA Article 9.6.10, which requires a Party to select an SPS measure that "is not more trade restrictive than required" to achieve its ALOP. Here, the Panel concluded, Mexico failed to consider "both the nature and source of the risk and the potential alternative options that may be available" by adopting flat-out prohibitions prior to assessing risk in accordance with the procedures laid out in the USMCA. [¶236]

- The requirements of a USMCA-compliant risk assessment. As discussed above, according to the Panel, the design of a risk assessment must be based on international standards. The Panel outlined in detail the specifics of a compliant risk assessment in ¶¶185-195 as well as the transparency and notice-and-comment requirements of USMCA Article 9.6.7 in ¶¶198-200. The Panel concluded that the 2020 Dossier in support of Article 6.II of the 2020 Decree, which Mexico relied on as its risk assessment, is not a risk assessment at all but rather "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." [¶195] The Panel characterized the Dossier as lacking the site-specific detail USMCA requires in a risk assessment: "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." [¶196]

  The Mexican government's evolving view of GM corn safety proved problematic in this context. The Panel focused on Mexico's recent changes to its policies, finding that Mexico failed to distinguish its actions authorizing GM corn under prior laws and regulations: "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." [¶196] The Panel also concluded that Mexico failed to provide the U.S. and Canada with an opportunity to comment on Mexico's "claimed risk assessment" as required by the USMCA. [¶201]

- Market access. As detailed above, actual trade impacts, or the lack of trade impacts, was deemed by the Panel immaterial to the analysis of USMCA Article 2.11. Instead, vague assertions by the U.S. of "market uncertainty" and a possible "chilling effect" were found sufficient to affect exports of these products from the U.S. to Mexico and to constitute a "prohibition or restriction of the importation of GM corn" in violation of Article 2.11. [¶253-254] The fact that Mexico's policies were facially neutral and applied to both domestic and imported corn did not mean that Mexico's measures were not trade restrictions, according to the Panel. In fact, the Panel used the existence

of Mexico's domestic restrictions on growing GM corn to argue that only imported corn could be restricted by the measures challenged here, so in its view the policies were obviously aimed at trade.

The Panel's circular reasoning seems to create a Catch-22 situation without an obvious solution. It is difficult to envision how any product ban, even if supported by a detailed risk assessment, would not run afoul of this market access argument.

Applicability of the exceptions

- Conservation and sustainable use of biological diversity. Mexico attempted to use USMCA Article 24.15 on Trade and Biodiversity to support its Measures on GMO corn. The biodiversity article is not an exception, and Mexico did not claim it as such; instead, Mexico argued 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 sought to apply in this case. Mexico argued, as did IATP in its brief, that its 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." [¶257]

  Unfortunately, while mentioning conservation and biological diversity, the Panel did not, as it said it would, specifically address USMCA Article 24.15 in its analysis of Mexico's claimed exceptions (the Public Morals and Exhaustible Natural Resources Exceptions under GATT 1994 Article XX and the USMCA Article 32.5 Indigenous Legal Rights Exception).[¶258] Thus we are no wiser as to the import of this article, and are left with the impression that any context provided by the article was of little account to the Panel.

- Public Morals Exception. Mexico's public morals argument linked the measures protecting native corn varieties to Mexico's 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," principles that are reflected in Mexico's Constitution, and domestic and international laws. [¶266] As stated by the Panel, 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." [¶268] In contrast, Mexico argued, "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 [...] reflect grave moral wrongs." [¶268]

  While "accepting that Mexico has discretion to define what 'public morals' are for itself," the U.S. argued that "'[p]ublic morals' are, in the ordinary sense of these terms, standards relating to right and wrong conduct of the people as a whole" and that Mexico failed to explain how its objectives were valid public morals objectives and not "a desired economic outcome." [¶270]

  The Panel punted on the question of whether Mexico's objectives qualified as matters of "public morals" within the meaning of Article XX(a) of the GATT 1994, so Mexico's argument that native corn issues can fit within the "public morals" frame remains available for a future attempt. Stating that "governments have wide discretion to define what constitutes a public moral," the Panel nonetheless noted that the notion of public morals is linked to concepts of right and wrong conduct, and revealed its sympathy with the U.S. argument that Mexico's objectives were economic in nature, stating that the public morals exception "is not simply about economic performance." [¶290] Nonetheless, rather than address whether Mexico's objectives met the definition of a "public moral," the Panel jumped to an analysis of the secondary requirement of Article XX(a)

of GATT 1994 that measures adopted be "necessary" to protect the public morals as defined.

The Panel then found that Mexico failed to demonstrate that its chosen measures were "necessary" to protect public morals. [¶292] In finding that Mexico's measures were not "necessary" to protect public morals, the Panel relied on its view (echoing the U.S. argument), that the threat to the traditions and livelihoods of Indigenous and farming communities from GM transgenic introgression is equivalent to the threat posed by non-native, non-GM corn. Thus, in its view, Mexico failed to effectively address the real threat to public morals through its measures. [¶295] Indeed, the Panel concluded that Mexico's measures "do little or nothing" to achieve its goals.[6] [¶297]

The Panel also challenged Mexico's assertion that the small amount of imported GM white corn currently used in minimally processed foods threaten the traditions or livelihoods of Indigenous and farming communities. [¶294] Once again, the Panel's decision places Mexico in a no-win situation; apparently in order to establish the existence of a risk, the threat level must already be sufficiently high that it may be irreversible.

The Panel also connected its objections "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." [¶296] In a footnote, the Panel notes, "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." [Footnote 524]

- Exhaustible Natural Resource Exception. Mexico also argued that its measures relating to conservation and protection of the genetic integrity of native corn species threatened by transgenic introgression, and its restrictions on domestic production of GM corn, were justified by the exhaustible natural resource exception under Article XX(g) of the GATT 1994. Again, the Panel disposed of this argument by asserting that Mexico failed to address the real threat, e.g. non-native, non-GM corn, limiting its restrictions to GM corn even though the former "may also pose a threat to the genetic integrity of native corn." [¶302, 303] Even though Article XX(g) does not impose the necessity requirement found in Article XX(a), the Panel relied on the same argument it employed in Article XX(a) to conclude that Mexico failed to meet a different requirement, 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." [¶301]

  In fact, Mexico did take steps to limit GM corn domestically; its measure was facially neutral. Recall that in its analysis of market access requirements of Article 2.11, the Panel used the existence of Mexico's domestic restrictions on growing GM corn to argue that *de facto* only imported corn would be restricted by Mexico's measures under challenge, so the policies were obviously aimed at other countries.

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6. Specifically: "(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." [¶297]

This is a circular argument from which there is no off ramp. Mexico could have tried to establish through a detailed, rigorous risk assessment that GM corn poses a greater risk to the integrity of native corn than other non-native corn; this is consistent with the Panel's decision and its proposed remedy. However, even this may not have met the Panel's objections. In its analysis of both the public morals and exhaustible natural resources Article XX exceptions, the Panel also addressed the Chapeau which 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." [¶305] The Panel concluded that Mexico's 2023 Decree evinces a "clear intention to restrict the importation of GM corn to Mexico" and thus constitutes a disguised restriction on international trade. [¶307] It based this conclusion on the fact that the 2023 Decree uses the word "import" as well as "use, sale, distribution, promotion" of both glyphosate and GM corn, and also "refers to Mexico's 'food self-sufficiency policies' on multiple occasions." As noted above, in the Panel's view, "Self-sufficiency by definition means the ability to provide for one's own needs independently, without imports" and thus is evidence of a prohibited intent to discriminate against imports. [¶306]

- Indigenous Peoples' Legal Rights. Despite recognizing that 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 [¶102], and giving Mexico credit for its "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" [¶326], the bottom line is the Panel concluded that USMCA Article 32.5 did not justify Mexico's measures.

  By accepting Mexico's definition of "indigenous legal rights" the Panel appears to endorse the view, expressed in IATP's written submission, that the scope of this exception is self-judging by the Party invoking it. The Panel accepted Mexico's factual case that the domestic legal instruments it referenced "establish a linkage between indigenous peoples and native corn," and importantly, the Panel also "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." [¶326] The Panel apparently accepted that Mexico may judge the scope of indigenous legal rights it "deems necessary," but when it came to deciding whether the policy choices Mexico made fulfilled those legal rights, the Panel ruled otherwise.

  Jane Kelsey has pointed out that the Treaty of Waitangi between New Zealand and the Māori, although less specific than USMCA's Article 35.2 in other ways, may be a helpful model for changes to this provision. She says: "The USMCA also uses the self-judging language of what the party 'deems necessary' to meet its obligations. However, it is unclear whether that only applies to the necessity for the particular measure to implement the legal obligation, or whether the nature of the legal obligation itself is also self-judging. Unlike the Treaty Exception, the USMCA does not refer explicitly to what any dispute panel can and cannot consider."[7]

  Mexico argued that the entirety of the 2023 Decree is necessary to comply with Mexico's legal obligations to Indigenous Peoples, and that "native corn is part of the identity of indigenous peoples" and therefore the Decree was necessary to comply with legal rights set out in international treaties, the Constitution, federal laws including the Native Corn Law and the Federal Law or the Protection of the Cultural Heritage of Indigenous and Afro-Mexican Peoples and Communities, and laws in Colima, Guerrero, Michoacan, Sinaloa and other states. [¶¶310-314] Mexico asserted that "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." [¶317]

7. Jane Kelsey, "Implications of the Failure of the Indigenous Peoples Exception in USMCA for Treaty of Waitangi Exception," January 6, 2025 at 4.

Whatever the intent of the USMCA negotiators, it is apparent that the Panel in this first case interpreting Article 32.5 did not find the nature of the legal obligation itself to also be self-judging, since it disputed the relevance and effectiveness of the measures Mexico invoked. The Panel rejected the applicability of the exception on the basis that Mexico's measures do not address the supposed threat to native corn from non-native, non-GM corn, including from informal seed exchange practices on Indigenous and farming communities, and thus constitute a disguised restriction on trade. The Panel stated: "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." [¶328]

Additionally, according to the Panel, Mexico's policies are not targeted to address the "underlying issues." Rather, "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." [¶329]

What path forward for future policies?

While finding against Mexico repeatedly, the Panel's decision still preserved a narrow path for Mexico to justify its measures. The Panel agreed that Mexico can define for itself what constitutes Indigenous legal rights under USMCA. While it could have foreclosed the option of using the public morals exception by objecting to Mexico's claim that native corn practices fit within the "public morals" frame, it did not do so. The Panel also found that Mexico can set its "Appropriate Level of Protection" at zero risk, which is a win for the precautionary principle — even though the Panel rejected Mexico's arguments that reliance on the precautionary principle justified its classification of the substitution measure as temporary rather than permanent. The remedy recommended by the Panel is for Mexico to carry out a rigorous risk assessment. While it has chosen at this time to withdraw the disputed measures — perhaps in response to the extreme trade pressures announced by President Donald Trump — the option of conducting a risk assessment as recommended by the Panel, and then adopting new GM corn measures if supported by that assessment, remains a possibility.

The Panel used circular reasoning to defeat Mexico's claims that its policies were neutrally applied. It repeatedly found impacts on trade based on nothing but U.S.-claimed "market signals," and discriminatory intent where Mexico had adopted neutral policies applicable both domestically and internationally. The Panel also repeatedly rejected the premise that Mexico's measures were tailored to the policy problem it was trying to address — or even that Mexico's measures were effective. As we discuss above, a core problem for Mexico was the Panel's adoption of the U.S. argument that focused on non-native hybrid corn as a threat to the integrity of Mexico's native corn species. Unless Mexico can address this issue head-on in its risk assessment and distinguish the threat from that posed by GM corn, it is hard to see how there could be a different result in the future.

The USMCA Indigenous legal rights exception was easily defeated by the requirement that the challenged measures not be "a disguised restriction on trade," and the GATT public morals exemption was neutered by the necessity requirement. While the self-judging nature of the Article 32.5 exception was upheld in part, it did not extend to Mexico's designation of the measures it deemed necessary to implement Indigenous legal rights. In the end, the Panel did not agree that Mexico's measures had any relationship to the Indigenous legal rights it stated it was seeking to protect, and the Panel's view prevailed.

The Panel also failed to consider the interconnectedness of the USMCA's biodiversity obligations and Indigenous legal rights. As IATP pointed out in its brief, the Environment Chapter imposes obligations on the Parties to protect biodiversity, and in Article 25.15.3 specifically recognizes the importance of Indigenous

lifestyles and culture in conserving that biodiversity. Yet the Panel ignored Mexico's arguments that its USMCA obligations to protect biodiversity should inform the scope of the Indigenous legal rights it was obligated to protect, despite agreeing that Mexico can define for itself the measures "necessary to fulfill its legal obligations to indigenous peoples," Article 32.5.

The anticipated USMCA review provides an opportunity to further clarify or change the applicability of the Indigenous legal rights exception and biological diversity provisions. For example, the Indigenous exception could be clarified to explicitly address what the dispute panel can and cannot consider under the exception, and biodiversity provisions could be specifically referenced under the Indigenous legal rights exception. It is unclear whether such changes would make any difference to the result. These provisions were already far more specific and central than in prior trade agreements such as the CPTPP, yet in the final analysis that specificity counted for little. As long as these are exceptions and not carve-outs from the agreement, the burden of proof is on Mexico to defend its policies under trade rules that don't recognize cultural issues that are so central to Mexico's identity and policies. Trade agreements are designed to promote trade and corporate objectives, and USMCA is no exception. The biotechnology and industrial agriculture lobbies heavily influenced the initial USMCA negotiations, and the likelihood that these interests will be any less involved in any re-write is extremely remote.

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