

*Panel established pursuant to Chapter 31 of the Canada-United States-Mexico Agreement*

**SSMTLC**  
Secretariado de la Sección Mexicana de  
los Tratados de Libre Comercio

20/03/2024 16:19 hrs.

**RECIBIDO**

***MEXICO – MEASURES CONCERNING GENETICALLY ENGINEERED CORN  
(MEX-USA-2023-31-01)***

**THIRD PARTY WRITTEN SUBMISSION OF CANADA**

**March 15, 2024**

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**TABLE OF CASES REFERRED TO IN THIS SUBMISSION**

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<i>Argentina – Financial Services</i>	Appellate Body Report, <i>Argentina – Measures Relating to Trade in Goods and Services</i> , <a href="#">WT/DS453/AB/R</a> and Add.1, adopted 9 May 2016, DSR 2016:II, p. 431
<i>Australia – Apples</i>	Appellate Body Report, <i>Australia – Measures Affecting the Importation of Apples from New Zealand</i> , <a href="#">WT/DS367/AB/R</a> , adopted 17 December 2010, DSR 2010:V, p. 2175
<i>Australia – Apples</i>	Panel Report, <i>Australia – Measures Affecting the Importation of Apples from New Zealand</i> , <a href="#">WT/DS367/R</a> , adopted 17 December 2010, as modified by Appellate Body Report <a href="#">WT/DS367/AB/R</a> , DSR 2010:VI, p. 2371
<i>Australia – Salmon</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , <a href="#">WT/DS18/AB/R</a> , adopted 6 November 1998, DSR 1998:VIII, p. 3327
<i>Brazil – Retreaded Tyres</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , <a href="#">WT/DS332/AB/R</a> , adopted 17 December 2007, DSR 2007:IV, p. 1527
<i>Canada – Continued Suspension</i>	Appellate Body Report, <i>Canada – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , <a href="#">WT/DS321/AB/R</a> , adopted 14 November 2008, DSR 2008:XIV, p. 5373
<i>Canada-Dairy TRQ Allocation Measures</i>	Panel Report, <i>Canada-Dairy TRQ Allocation Measures (CDA-USA-2021-31-010) (December 20, 2021)</i>
<i>Canada – Herring and Salmon</i>	GATT Panel Report, <i>Canada – Measures Affecting Exports of Unprocessed Herring and Salmon</i> , L/6268, adopted 22 March 1988, BISD 35S/98
<i>China – Publications and Audiovisual Products</i>	Appellate Body Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , <a href="#">WT/DS363/AB/R</a> , adopted 19 January 2010, DSR 2010:I, p. 3
<i>Costa Rica – Avocados (Mexico)</i>	Panel Report, <i>Costa Rica – Measures Concerning the Importation of Fresh Avocados from Mexico</i> , <a href="#">WT/DS524/R</a> and Add.1, adopted 31 May 2022
<i>China – Intellectual Property Rights</i>	Panel Report, <i>China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights</i> , <a href="#">WT/DS362/R</a> , adopted 20 March 2009, DSR 2009:V, p. 2097
<i>China – Rare Earths</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum</i> , <a href="#">WT/DS431/AB/R</a> / <a href="#">WT/DS432/AB/R</a> / <a href="#">WT/DS433/AB/R</a> , adopted 29 August 2014, DSR 2014:III, p. 805
<i>China – Rare Earths</i>	Panel Reports, <i>China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum</i> , <a href="#">WT/DS431/R</a> and Add.1 / <a href="#">WT/DS432/R</a> and Add.1 / <a href="#">WT/DS433/R</a> and Add.1, adopted 29 August 2014, upheld by Appellate Body Reports <a href="#">WT/DS431/AB/R</a> / <a href="#">WT/DS432/AB/R</a> / <a href="#">WT/DS433/AB/R</a> , DSR 2014:IV, p. 1127
<i>China – Raw Materials</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , <a href="#">WT/DS394/AB/R</a> / <a href="#">WT/DS395/AB/R</a> / <a href="#">WT/DS398/AB/R</a> , adopted 22 February 2012, DSR 2012:VII, p. 3295
<i>China – Raw Materials</i>	Panel Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , <a href="#">WT/DS394/R</a> , Add.1 and Corr.1 / <a href="#">WT/DS395/R</a> , Add.1 and Corr.1 / <a href="#">WT/DS398/R</a> , Add.1 and Corr.1, adopted 22 February 2012, as modified by Appellate Body Reports <a href="#">WT/DS394/AB/R</a> / <a href="#">WT/DS395/AB/R</a> / <a href="#">WT/DS398/AB/R</a> , DSR 2012:VII, p. 3501
<i>Colombia – Textiles</i>	Appellate Body Report, <i>Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear</i> , <a href="#">WT/DS461/AB/R</a> and Add.1, adopted 22 June 2016, DSR 2016:III, p. 1131

SHORT FORM	FULL CASE TITLE AND CITATION
<i>EC – Approval and Marketing of Biotech Products</i>	Panel Reports, <i>European Communities – Measures Affecting the Approval and Marketing of Biotech Products</i> , <a href="#">WT/DS291/R</a> , Add.1 to Add.9 and Corr.1 / <a href="#">WT/DS292/R</a> , Add.1 to Add.9 and Corr.1 / <a href="#">WT/DS293/R</a> , Add.1 to Add.9 and Corr.1, adopted 21 November 2006, DSR 2006:III, p. 847
<i>EC – Chicken Cuts</i>	Appellate Body Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> , <a href="#">WT/DS269/AB/R</a> , <a href="#">WT/DS286/AB/R</a> , adopted 27 September 2005, and Corr.1, DSR 2005:XIX, p. 9157
<i>EC – Hormones</i>	Appellate Body Report, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones)</i> , <a href="#">WT/DS26/AB/R</a> , <a href="#">WT/DS48/AB/R</a> , adopted 13 February 1998, DSR 1998:I, p. 135
<i>EC – Hormones</i>	Panel Reports, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones)</i> , <a href="#">WT/DS48/R/CAN</a> (Canada) / <a href="#">WT/DS26/R/USA</a> (US), adopted 13 February 1998, as modified by Appellate Body Report <a href="#">WT/DS26/AB/R</a> , <a href="#">WT/DS48/AB/R</a> , DSR 1998:II, p. 235 / DSR 1998:II, p. 699
<i>EC – Sardines</i>	Appellate Body Report, <i>European Communities – Trade Description of Sardines</i> , <a href="#">WT/DS231/AB/R</a> , adopted 23 October 2002, DSR 2002:VIII, p. 3359
<i>EC – Seal Products</i>	Appellate Body Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , <a href="#">WT/DS400/AB/R</a> / <a href="#">WT/DS401/AB/R</a> , adopted 18 June 2014, DSR 2014:I, p. 7
<i>India – Agricultural Products</i>	Panel Report, <i>India – Measures Concerning the Importation of Certain Agricultural Products</i> , <a href="#">WT/DS430/R</a> and Add.1, adopted 19 June 2015, as modified by Appellate Body Report <a href="#">WT/DS430/AB/R</a> , DSR 2015:V, p. 2663
<i>Japan – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , <a href="#">WT/DS8/AB/R</a> , <a href="#">WT/DS10/AB/R</a> , <a href="#">WT/DS11/AB/R</a> , adopted 1 November 1996, DSR 1996:I, p. 97
<i>Japan – Agricultural Products II</i>	Appellate Body Report, <i>Japan – Measures Affecting Agricultural Products</i> , <a href="#">WT/DS76/AB/R</a> , adopted 19 March 1999, DSR 1999:I, p. 277
<i>Japan – Apples</i>	Appellate Body Report, <i>Japan – Measures Affecting the Importation of Apples</i> , <a href="#">WT/DS245/AB/R</a> , adopted 10 December 2003, DSR 2003:IX, p. 4391
<i>Japan – Apples</i>	Panel Report, <i>Japan – Measures Affecting the Importation of Apples</i> , <a href="#">WT/DS245/R</a> , adopted 10 December 2003, upheld by Appellate Body Report <a href="#">WT/DS245/AB/R</a> , DSR 2003:IX, p. 4481
<i>Korea – Radionuclides</i>	Appellate Body Report, <i>Korea – Import Bans, and Testing and Certification Requirements for Radionuclides</i> , <a href="#">WT/DS495/AB/R</a> and Add.1, adopted 26 April 2019, DSR 2019:VII, p. 3653
<i>Korea – Radionuclides</i>	Panel Report, <i>Korea – Import Bans, and Testing and Certification Requirements for Radionuclides</i> , <a href="#">WT/DS495/R</a> and Add.1, adopted 26 April 2019, as modified by Appellate Body Report <a href="#">WT/DS495/AB/R</a> , DSR 2019:VII, p. 3823
<i>Korea – Various Measures on Beef</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , <a href="#">WT/DS161/AB/R</a> , <a href="#">WT/DS169/AB/R</a> , adopted 10 January 2001, DSR 2001:I, p. 5
<i>India – Agricultural Products</i>	Appellate Body Report, <i>India – Measures Concerning the Importation of Certain Agricultural Products</i> , <a href="#">WT/DS430/AB/R</a> , adopted 19 June 2015, DSR 2015:V, p. 2459
<i>India – Agricultural Products</i>	Panel Report, <i>India – Measures Concerning the Importation of Certain Agricultural Products</i> , <a href="#">WT/DS430/R</a> and Add.1, adopted 19 June 2015, as modified by Appellate Body Report <a href="#">WT/DS430/AB/R</a> , DSR 2015:V, p. 2663
<i>Indonesia – Import Licensing Regimes</i>	Appellate Body Report, <i>Indonesia – Importation of Horticultural Products, Animals and Animal Products</i> , <a href="#">WT/DS477/AB/R</a> , <a href="#">WT/DS478/AB/R</a> , and Add.1, adopted 22 November 2017, DSR 2017:VII, p. 3037
<i>Russia – Pigs (EU)</i>	Appellate Body Report, <i>Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union</i> , <a href="#">WT/DS475/AB/R</a> and Add.1, adopted 21 March 2017, DSR 2017:I, p. 207

SHORT FORM	FULL CASE TITLE AND CITATION
<i>Russia – Pigs (EU)</i>	Panel Report, <i>Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union</i> , <a href="#">WT/DS475/R</a> and Add.1, adopted 21 March 2017, as modified by Appellate Body Report WT/DS475/AB/R, DSR 2017:II, p. 361
<i>Russia – Traffic in Transit</i>	Panel Report, <i>Russia – Measures Concerning Traffic in Transit</i> , <a href="#">WT/DS512/R</a> and Add.1, adopted 26 April 2019, DSR 2019:VIII, p. 4301
<i>US – Animals</i>	Panel Report, <i>United States – Measures Affecting the Importation of Animals, Meat and Other Animal Products from Argentina</i> , <a href="#">WT/DS447/R</a> and Add.1, adopted 31 August 2015, DSR 2015:VIII, p. 4085
<i>US – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , <a href="#">WT/DS285/AB/R</a> , adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475)
<i>US – Gambling</i>	Panel Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , <a href="#">WT/DS285/R</a> , adopted 20 April 2005, as modified by Appellate Body Report WT/DS285/AB/R, DSR 2005:XII, p. 5797
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , <a href="#">WT/DS2/AB/R</a> , adopted 20 May 1996, DSR 1996:I, p. 3
<i>US – Gasoline</i>	Panel Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , <a href="#">WT/DS2/R</a> , adopted 20 May 1996, as modified by Appellate Body Report WT/DS2/AB/R, DSR 1996:I, p. 29
<i>US – Poultry (China)</i>	Panel Report, <i>United States – Certain Measures Affecting Imports of Poultry from China</i> , <a href="#">WT/DS392/R</a> , adopted 25 October 2010, DSR 2010:V, p. 1909
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , <a href="#">WT/DS58/AB/R</a> , adopted 6 November 1998, DSR 1998:VII, p. 2755
<i>US – Softwood Lumber V</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , <a href="#">WT/DS264/AB/R</a> , adopted 31 August 2004, DSR 2004:V, p. 1875
<i>US – Steel and Aluminium Products (Turkey)</i>	Panel Report, <i>United States – Certain Measures on Steel and Aluminium Products</i> , <a href="#">WT/DS564/R</a> , Add.1 and Suppl.1, circulated to WTO Members 9 December 2022, appealed 26 January 2023
<i>US – Tariff Measures (China)</i>	Panel Report, <i>United States – Tariff Measures on Certain Goods from China</i> , <a href="#">WT/DS543/R</a> and Add.1, circulated to WTO Members 15 September 2020, appealed 26 October 2020
<i>US – Tuna II (Mexico) (Article 21.5 – Mexico)</i>	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico</i> , <a href="#">WT/DS381/AB/RW</a> and Add.1, adopted 3 December 2015, DSR 2015:X, p. 5133
<i>US – Tuna II (Mexico)</i>	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , <a href="#">WT/DS381/AB/R</a> , adopted 13 June 2012, DSR 2012:IV, p. 1837
<i>US – Tuna (Mexico)</i>	GATT Panel Report, <i>United States – Restrictions on Imports of Tuna</i> , DS21/R, DS21/R, 3 September 1991, unadopted, BISD 39S/155

### TABLE OF ABBREVIATIONS USED IN THIS SUBMISSION

ALOP	Appropriate Level of Sanitary or Phytosanitary Protection
Appellate Body	WTO Appellate Body
BCH	Biosafety Clearing-House
CCPR	Codex Committee on Pesticide Residues
Codex	Codex Alimentarius Commission
CUSMA	Canada-United States-Mexico Agreement
CUSMA SPS Committee	CUSMA Committee on Sanitary and Phytosanitary Measures
Decree	<i>Decree Establishing Various Actions Regarding Glyphosate and Genetically Modified Corn (Feb. 13, 2023)</i>
GATT 1994	<i>The General Agreement on Tariffs and Trade 1994</i>
GE	Genetically engineered
GM	Genetically modified
IEDI	International Estimated Daily Intake
IPPC	<i>International Plant Protection Convention</i>
ISPMs	International Standards for Phytosanitary Measures
ISPM 1	<i>ISPM 1: Phytosanitary principles for the protection of plants and the application of phytosanitary measures in international trade</i>
ISPM 2	<i>ISPM 2: Framework for pest risk analysis</i>
ISPM 5	<i>ISPM 5: Glossary of phytosanitary terms</i>
ISPM 11	<i>ISPM 11: Pest risk analysis for quarantine pests</i>
ISPM 20	<i>ISPM 20: Guidelines for a phytosanitary import regulatory system</i>
JMPR	Joint FAO/WHO Meeting on Pesticide Residues
LMOs	Living modified organisms
Modern Biotechnology Principles	<i>Principles for the Risk Analysis of Foods Derived from Modern Biotechnology</i>
MRLs	Maximum residue limits
OECD	Organization for Economic Cooperation and Development
PRA	Pest risk analysis
Recombinant-DNA Plants Guideline	<i>Guideline for the Conduct of Food Safety Assessment of Foods Derived from Recombinant-DNA Plants</i>



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SPS Chapter	Sanitary and Phytosanitary Measures Chapter
SPS Agreement	<i>Agreement on the Application of Sanitary and Phytosanitary Measures</i>
UNDRIP	<i>United Nations Declaration on the Rights of Indigenous Peoples</i>
VCLT	<i>Vienna Convention on the Law of Treaties</i>
Working principles for risk analysis	<i>Working Principles for Risk Analysis for Application in the Framework of the Codex Alimentarius</i>
WTO	World Trade Organization

**LIST OF EXHIBITS**

Exhibit #	Exhibit Name
CAN-1	Government of Canada, <i>DD2008-69: Determination of the Safety of Pioneer Hi-Bred Production Ltd.'s Sulfonylurea - Tolerant ExpressSun™ Sunflower (Helianthus annuus) L. SU7</i> , available online: <a href="https://inspection.canada.ca/plant-varieties/plants-with-novel-traits/approved-under-review/decision-documents/dd2008-69/eng/1310745430566/1310745507692">https://inspection.canada.ca/plant-varieties/plants-with-novel-traits/approved-under-review/decision-documents/dd2008-69/eng/1310745430566/1310745507692</a> (accessed 14 March 2024)
CAN-2	Codex Alimentarius, <i>Principles for Risk Analysis and Guidelines for Safety Assessment of Foods derived from Modern Biotechnology</i> (CAC/GL 44-2003) available online, <a href="https://www.fao.org/3/a1554e/a1554e.pdf">https://www.fao.org/3/a1554e/a1554e.pdf</a> (accessed 23 February 2024)
CAN-3	[Intentionally omitted]
CAN-4	<i>A decade of EU-funded GMO research (2001-2010)</i> , available online: <a href="https://op.europa.eu/en/publication-detail/-/publication/d1be9ff9-f3fa-4f3c-86a5-beb0882e0e65">https://op.europa.eu/en/publication-detail/-/publication/d1be9ff9-f3fa-4f3c-86a5-beb0882e0e65</a> (accessed 23 February 2024)
CAN-5	World Trade Organization, <i>20 Questions on Genetically Modified (GM) Foods</i> , available online: <a href="https://www.iatp.org/sites/default/files/20_Questions_on_Genetically_Modified_GM_Foods.htm#:~:text=The%20GM%20products%20that%20are,environmental%20and%20human%20health%20risk">https://www.iatp.org/sites/default/files/20_Questions_on_Genetically_Modified_GM_Foods.htm#:~:text=The%20GM%20products%20that%20are,environmental%20and%20human%20health%20risk</a> . (accessed 15 March 2024)
CAN-6	FAO and WHO. 2023. Codex Alimentarius Commission Procedural Manual. Twenty-eighth edition, revised. Rome. <a href="https://www.fao.org/3/cc5042en/cc5042en.pdf">https://www.fao.org/3/cc5042en/cc5042en.pdf</a>
CAN-7	Biosafety Clearing-House, available at: <a href="https://www.biosafetyclearinghouse.org/">Search   Biosafety Clearing-House (cbd.int)</a> (Data retrieved 27 February 2024)
CAN-8	"May", Oxford English Dictionary, <a href="https://www.oed.com/dictionary/may_v1?tab=meaning_and_use#37901930">https://www.oed.com/dictionary/may_v1?tab=meaning_and_use#37901930</a> (accessed 23 February 2024)
CAN-9	World Health Organization, "Food Cluster Diets", The Global Health Observatory, <a href="https://www.who.int/data/gho/samples/food-cluster-diets">https://www.who.int/data/gho/samples/food-cluster-diets</a> (accessed 13 March 2024)
CAN-10	FAO and WHO. 2019. <i>Pesticide residues in food 2019 – Report 2019 - Extra Joint FAO/WHO Meeting on Pesticide Residues</i> . Rome.
CAN-11	<i>Codex Working Principles for Risk Analysis for Application in the Framework of the Codex Alimentarius</i> (adopted by the 26th Session of the Codex Alimentarius Commission, 2003; Codex Alimentarius Commission Procedural Manual, 13th edition)
CAN-12	Kleter GA, van der Voet H, Engel J, van der Berg JP. <i>Comparative safety assessment of genetically modified crops: focus on equivalence with reference varieties could contribute to more efficient and effective field trials</i> . <i>Transgenic Res.</i> 2023 Aug;32(4):235-250
CAN-13	Richard E. Goodman (2024) <i>Twenty-eight years of GM Food and feed without harm: why not accept them?</i> , <i>GM Crops &amp; Food</i> , 15:1, 40-50

CAN-14	<i>Guideline for the Conduct of Food Safety Assessment of Foods Derived from Recombinant-DNA Plants</i> (CAC/GL 45-2003)
CAN-15	<i>ISPM 5: Glossary of phytosanitary terms</i>
CAN-16	<i>ISPM 2: Framework for pest risk analysis</i>
CAN-17	<i>ISPM 11: Pest risk analysis for quarantine pests</i>
CAN-18	<i>ISPM 20: Guidelines for a phytosanitary import regulatory system</i>
CAN-19	<i>ISPM 1: Phytosanitary principles for the protection of plants and the application of phytosanitary measures in international trade</i>
CAN-20	Government of Canada, Health Canada and Canadian Food Inspection Agency statement on the Séralini et al. (2012) publication on a 2-year rodent feeding study with glyphosate formulations and GM maize NK603 available at <a href="https://www.canada.ca/en/health-canada/services/food-nutrition/genetically-modified-foods-other-novel-foods/canadian-food-inspection-agency-statement-seralini-2012-publication-2-year-rodent-feeding-study-glyphosate-formulations-maize-nk603.html">https://www.canada.ca/en/health-canada/services/food-nutrition/genetically-modified-foods-other-novel-foods/canadian-food-inspection-agency-statement-seralini-2012-publication-2-year-rodent-feeding-study-glyphosate-formulations-maize-nk603.html</a> (accessed 12 March 2024)
CAN-21	Relevant," <i>Oxford English Dictionary</i> , <a href="https://www.oed.com/dictionary/relevant_adj?tab=meaning_and_use#25975641">https://www.oed.com/dictionary/relevant_adj?tab=meaning_and_use#25975641</a> (accessed 23 February 2024)
CAN-22	"Scientific", <i>Oxford English Dictionary</i> , <a href="https://www.oed.com/dictionary/scientific_adj?tab=meaning_and_use#23962329">https://www.oed.com/dictionary/scientific_adj?tab=meaning_and_use#23962329</a> (accessed 23 February 2024)
CAN-23	"Principle" <i>Oxford English Dictionary</i> , <a href="https://www.oed.com/dictionary/principle_n?tab=meaning_and_use#28387145">https://www.oed.com/dictionary/principle_n?tab=meaning_and_use#28387145</a> (accessed 23 February 2024)
CAN-24	<i>Statements of Principle Concerning the Role of Science in the Codex Decision-Making Process</i> , available online: <a href="https://www.fao.org/fao-who-codexalimentarius/codex-texts/procedural-manual/sections/appendix/appendix1/en/">https://www.fao.org/fao-who-codexalimentarius/codex-texts/procedural-manual/sections/appendix/appendix1/en/</a> (accessed 13 March 2024)
CAN-25	<i>Harmonisation of Regulatory Oversight in Biotechnology: Safety Assessment of Transgenic Organisms in the Environment</i> , Volume 6, (OECD Publishing: Paris, 2016, available online: <a href="https://www.oecd-ilibrary.org/docserver/9789264253421-en.pdf?expires=1706106769&amp;id=id&amp;accname=ocid54006162&amp;checksum=F2B21949712DD52C5B0506AC4600956F">https://www.oecd-ilibrary.org/docserver/9789264253421-en.pdf?expires=1706106769&amp;id=id&amp;accname=ocid54006162&amp;checksum=F2B21949712DD52C5B0506AC4600956F</a> (accessed 23 February 2024)
CAN-26	<i>Recombinant DNA Safety Considerations: Safety considerations for industrial, agricultural and environmental applications of organisms derived by recombinant DNA techniques</i> , (OECD Publishing: Paris, 1986), available online: <a href="https://www.oecd.org/env/ehs/biotrack/Recombinant-DNA-Safety-Considerations.pdf">https://www.oecd.org/env/ehs/biotrack/Recombinant-DNA-Safety-Considerations.pdf</a> (accessed 23 February 2024)
CAN-27	<i>Harmonisation of Regulatory Oversight in Biotechnology: Safety Assessment of Transgenic Organisms in the Environment</i> , Volume 10: OECD Consensus Document on Environmental Considerations for the Release of Transgenic Plants, Harmonisation of Regulatory Oversight in Biotechnology (OECD Publishing: Paris, 2023), available online: <a href="https://www.oecd-ilibrary.org/docserver/62ed0e04-en.pdf?expires=1706106388&amp;id=id&amp;accname=ocid54006162&amp;checksum=810BC86100A3AB04B590E214A32E33F6">https://www.oecd-ilibrary.org/docserver/62ed0e04-en.pdf?expires=1706106388&amp;id=id&amp;accname=ocid54006162&amp;checksum=810BC86100A3AB04B590E214A32E33F6</a> (accessed 23 February 2024)

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CAN-28	Search   Biosafety Clearing-House, Mexico BCH-RA-MX-112639, Risk assessment generated by a regulatory process (accessed 1 March 2024)
CAN-29	"Exhaustible", <i>Oxford English Dictionary</i> , <a href="https://www.oed.com/dictionary/exhaustible_adj">https://www.oed.com/dictionary/exhaustible_adj</a> (accessed 23 February 2024)
CAN-30	"Exhausted", <i>Oxford English Dictionary</i> , <a href="https://www.oed.com/dictionary/exhausted_adj">https://www.oed.com/dictionary/exhausted_adj</a> (accessed 23 February 2024)
CAN-31	Mallory-Smith, C. and Zapiola, M. (2008), <i>Gene flow from glyphosate-resistant crops</i> . <i>Pest. Manag. Sci.</i> , 64: 428-440
CAN-32	"Deem", <i>Oxford English Dictionary</i> , <a href="https://www.oed.com/dictionary/deem_v?tab=meaning_and_use#7373797">https://www.oed.com/dictionary/deem_v?tab=meaning_and_use#7373797</a> (accessed 23 February 2024)
CAN-33	"Fulfill", <i>Oxford English Dictionary</i> , <a href="https://www.oed.com/dictionary/fulfil_v?tab=meaning_and_use#3525954">https://www.oed.com/dictionary/fulfil_v?tab=meaning_and_use#3525954</a> (accessed 23 February 2024)
CAN-34	"Obligations", <i>Black's Law Dictionary</i> , Eleventh Edition
CAN-35	<i>United Nations Declaration on the Rights of Indigenous Peoples</i>

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## I. INTRODUCTION

1. The Panel in this dispute is asked to determine if Mexico's measures concerning genetically modified ("GM") corn are consistent with several of Mexico's obligations under the Sanitary and Phytosanitary Measures Chapter ("SPS Chapter") of the Canada-United States-Mexico Agreement ("CUSMA"). On February 13, 2023, Mexico issued a Presidential Decree that requires its biosafety authorities to:<sup>1</sup> (i) revoke, and refrain from granting authorizations for the use of GM corn for human consumption (Tortilla Corn Ban), and, (ii) take the necessary steps to gradually substitute the use of GM corn for animal feed and for industrial use for human food (Substitution Instruction).<sup>2</sup>

2. Canada emphasizes at the outset that it shares many of the policy objectives Mexico claims to be advancing through these measures. For example, Canada agrees that protecting human, animal, and plant life and health, as well as the environment and biodiversity, are vitally important.<sup>3</sup> So too are preserving and promoting cultural heritage, and respecting the rights of Indigenous Peoples.

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<sup>1</sup> See, Mexico's Presidential Decree Establishing Various Actions Regarding Glyphosate and Genetically Modified Corn (Feb. 13, 2023) ("Decree"), Exhibit USA-3. Article 2.III of the Decree defines "corn for human consumption" as "which is intended for human consumption through 'nixtamalization' or flour production, which is what is made in the sector known as dough and tortillas. Article 2.IV of the Decree defines "genetically modified corn for industrial use for human consumption as "which is intended for human consumption, before its industrialization other than that indicated in the previous section [...]" and the term "genetically modified corn for animal feed as "which is intended for livestock and aquaculture sectors, for animal feed'.

<sup>2</sup> See, Panel Request of the United States of America, paras. 1-2, and the initial written submission of the United States of America, paras. 4, 70. For clarity, Canada uses the same terminology in this submission to describe the two Mexican measures.

<sup>3</sup> Canada acknowledges the importance of protecting biodiversity as a legitimate objective and that the use of GM products in centers of origin may require special consideration. Canada is a center of origin for sunflower, and therefore considered the impact of novel herbicide-tolerant sunflower varieties on biodiversity when they were assessed in 2005, 2008 and 2010. When conducting those risk assessments, Canada considered whether gene flow from the novel sunflower variant could result in introgression of the herbicide-tolerance trait into Canada's wild sunflowers (*Helianthus annuus*, a native of North America), and the impact that the herbicide-tolerance trait could have on wild sunflowers' biodiversity. Ultimately, these novel varieties were approved for cultivation in Canada, because the herbicide-tolerance trait was not found to pose any heightened risk to sunflower biodiversity in Canada. Based on the information provided in Mexico's initial written submission, it does not appear that Mexico has based its measures on a similar assessment, nor have they identified any specific risks to biodiversity. Government of Canada, DD2008-69: Determination of the Safety of Pioneer Hi-Bred Production Ltd.'s Sulfonylurea - Tolerant ExpressSun™ Sunflower (*Helianthus annuus*) L. SU7, available online: <https://inspection.canada.ca/plant-varieties/plants-with-novel-traits/approved-under-review/decision-documents/dd2008-69/eng/1310745430566/1310745507692> (accessed 14 March 2024), Exhibit CAN-1.

3. Canada is concerned about Mexico's measures because they are not supported by science and have the potential to unnecessarily disrupt North American trade in a manner inconsistent with Mexico's CUSMA obligations.

4. On March 8, 2018, Canada, the United States, and Mexico completed the negotiation of a new SPS Chapter and agreed to advance science-based decision making while facilitating trade between them.<sup>4</sup> After recommitting to science-based trade under CUSMA, it appears that Mexico has now reversed its approach for GM corn without any basis in science for doing so.

5. As both a Party to CUSMA and a significant producer and exporter of GM products,<sup>5</sup> Canada has a strong interest in ensuring clear, predictable, and science-based rules for trade, and preserving the balance of rights and obligations set out in the SPS Chapter. While CUSMA maintains the right of each Party to adopt or maintain SPS measures that are necessary for the protection of human, animal, or plant life or health, those measures must be consistent with the SPS Chapter. Importantly, SPS measures must be science-based and must not create unnecessary barriers to trade.

6. Internationally, scientists have concluded that GM crops pose no more risk to human health than non-GM crops.<sup>6</sup> GM crop varieties have been grown around the world for use in food and livestock feed since the mid-1990s. GM products that are

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<sup>4</sup> CUSMA entered into force on July 1, 2020. In the Preamble to the Agreement, the Parties resolve to "protect human, animal, or plant life or health in the territories of the Parties and advance science-based decision making while facilitating trade between them". Article 9.6.1 also provides that the "Parties recognize the importance of ensuring that their respective sanitary and phytosanitary measures are based on scientific principles". A foundational principle that was maintained when renegotiating NAFTA is that SPS measures must have a basis in science.

<sup>5</sup> Canada recognizes the difference in terminology used by Mexico in their Decree and by the United States in their initial written submission, referring to these products as either "genetically modified" or "genetically engineered". Canada will use the term "genetically modified" within its third Party written submission with the recognition that in the context of these panel proceedings the intent and meaning behind the differing terminology is essentially equivalent. Canada considers that both terms have the same intent in referring to products derived from modern biotechnology as defined by *Mexico's Law on Biosafety of Genetically Modified Organisms* and in the *Principles for Risk Analysis and Guidelines for Safety Assessment of Foods derived from Modern Biotechnology* (CAC/GL 44-2003) ("Modern Biotechnology Principles"), Exhibit CAN-2, as well as those products that have primarily been developed through recombinant deoxyribonucleic acid (recombinant DNA) technology as referred to by the United States in para. 11 of its initial written submission.

<sup>6</sup> For example, a compilation of 50 different studies, entitled: "A decade of EU-funded GMO research (2001-2010)", concluded that there is no scientific evidence associating GM plants with higher risks for the environment or for food and feed safety than with conventional plant breeding technologies. A decade of EU-funded GMO research (2001-2010), available online: <https://op.europa.eu/en/publication-detail/-/publication/d1be9ff9-f3fa-4f3c-86a5-beb0882e0e65> (accessed 23 February 2024), Exhibit CAN-4.

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currently on the international market have all passed pre-market safety assessments conducted by national authorities.<sup>7</sup> At the conclusion of such assessments, if the GM product is determined to be as safe as its conventional counterpart, the product is authorized.<sup>8</sup>

7. Canada is of the view that it is not the process through which a plant with novel traits is developed that determines potential risks, but rather the characteristics of the final plant variety, the environment in which the plant is released, and how the plant is used. As the nature of the risks associated with GM plants depends upon these factors, which vary from variety to variety, general assertions about the risks of GM plants, as a class, are scientifically unsound. Each GM plant needs to be evaluated on a case-by-case basis, taking into consideration the factors outlined above. Once these factors have been thoroughly assessed to inform a science-based decision on authorization, Canada is of the view that the authorized GM plant is as safe as its conventionally-bred counterpart.

8. Canada also stands by the rigour associated with internationally established methods to evaluate the risks that GM products might pose to human, animal or plant life or health. In this regard, prior to 2018, Mexico had assessed and approved 90 GM corn varieties. More broadly, GM corn varieties have been assessed and approved in 37 jurisdictions,<sup>9</sup> highlighting the international familiarity with, and consensus surrounding, the safety of GM corn. To date, Canada is not aware of any credible evidence of adverse health effects directly attributable to GM technology, or from GM derived foods, including corn.

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<sup>7</sup> Pre-market assessments around the world are normally based on Codex standards and recommendations. World Trade Organization, *20 Questions on Genetically Modified (GM) Foods*, available online: [https://www.iatp.org/sites/default/files/20\\_Questions\\_on\\_Genetically\\_Modified\\_GM\\_Foods.htm#:~:text=The%20GM%20products%20that%20are,environmental%20and%20human%20health%20risk](https://www.iatp.org/sites/default/files/20_Questions_on_Genetically_Modified_GM_Foods.htm#:~:text=The%20GM%20products%20that%20are,environmental%20and%20human%20health%20risk) (accessed 15 March 2024), Exhibit CAN-5, Q.12.

<sup>8</sup> The principles for risk analysis are also outlined in the Codex document *Modern Biotechnology Principles*, Exhibit CAN-2 and the FAO and WHO. 2023. *Codex Alimentarius Commission Procedural Manual*. Twenty-eighth edition, revised. Rome, available online: <https://www.fao.org/3/cc5042en/cc5042en.pdf> ("Working Principles for Risk Analysis") (accessed 23 February 2024), Exhibit CAN-6.

<sup>9</sup> According to the Biosafety Clearing-House, available online: [Search | Biosafety Clearing-House \(cbd.int\)](https://www.biosafetyclearinghouse.org/) (Data retrieved 27 February 2024), Exhibit CAN-7, a public database established under the Cartagena Protocol on Biosafety to facilitate the exchange of information on Living Modified Organisms ("LMOs").

9. Canada concurs with the United States that the safety of GM products is well established and widely confirmed,<sup>10</sup> and is of the view that the scientific studies demonstrating the safety of GM food and feed referenced in the United States' submission are legitimate, reliable, and internationally recognized.<sup>11</sup>

10. With this context in mind, Canada's submission focuses on the proper interpretation of the rights and obligations of a Party under the SPS Chapter, and Mexico's arguments with respect to the application of the general and Indigenous Peoples exceptions in Chapter 32 of CUSMA to SPS measures.

11. In **Section II.A** of this submission, Canada provides its views on the proper interpretation of "SPS measures" and the legal standard for determining whether a measure is subject to the obligations of the SPS Chapter.

12. In **Sections II.B, C, and D**, Canada provides its views on the obligations of each Party to base its SPS measures on either relevant international standards or a risk assessment, and on relevant scientific principles. Canada also comments on the existence of those standards, and scientific principles, as well as the obligation of a Party to ensure that its risk assessment is appropriate to the circumstances of the risk to human, animal, or plant life or health.

13. In **Section II.E**, Canada provides its views on the close relationship between the obligation to apply SPS measures only to the extent necessary to protect human life or health, and the obligation to ensure that SPS measures are not more trade restrictive than required. Canada also provides its views on the proper approach to determining a Party's Appropriate Level of Protection ("ALOP").

14. In **Section II.F**, Canada provides its views on the scope of application of Article 9.6.5. Canada also responds to Mexico's arguments on the provisional character of the Substitution Instruction, and comments on the sufficiency of relevant scientific evidence to complete a risk assessment.

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<sup>10</sup> Canadian regulators have accumulated over 25 years of experience with the assessment of GM plants for the end uses of environmental release, novel animal feeds and novel foods for human consumption. Canadian regulators have assessed over 100 GM plant events, and of those, over 40 have been GM corn events. An event represents a particular crop variety with one or more particular transgenes in specific locations on a chromosome.

<sup>11</sup> Initial written submission of the United States of America, paras. 10-17, 30-37.



15. Finally, in **Section II.G**, Canada provides its views on the interpretation of the general exceptions for the protection of public morals, the conservation of exhaustible natural resources, and the fulfillment of a Party's legal obligations to Indigenous Peoples.

## **II. LEGAL ARGUMENTS**

### **A. Meaning of "SPS" measures**

16. In its submission, the United States asserts that both the Tortilla Corn Ban and the Substitution Instruction are SPS measures within the definition set out in Annex A of the *Agreement on the Application of Sanitary and Phytosanitary Measures* ("SPS Agreement") because the measures are applied to accomplish one of the purposes in Annex A, paragraphs 1 (a) and (b).<sup>12</sup>

17. For its part, Mexico agrees that each of the measures in dispute falls within the SPS definition to the extent that they are applied to protect human health from risks arising from "contaminants" or "toxins" in foods made from GM corn or to protect native corn from pests.<sup>13</sup> Furthermore, Mexico argues that the Substitution Instruction falls outside the definition of SPS measure because it is not a measure that is "applied" within the meaning of SPS measure.<sup>14</sup> Mexico does not appear to be challenging the application of the SPS Chapter to the Tortilla Corn Ban.

18. Canada agrees with the United States that Mexico's measures are SPS measures that are applied for one or more of the purposes set forth in Annex A of the SPS Agreement, as incorporated into CUSMA.<sup>15</sup> In this section, Canada provides its views on the legal standard to be used to determine whether the obligations in the SPS Chapter apply to the measures at issue.

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<sup>12</sup> Initial written submission of the United States of America, paras. 84, 86, citing the Decree, Preamble, 14th Recital, Exhibit USA-3, paras. 90-91, 100. The United States also cites Article 6 of the Decree that declares it is a "special measure" to "protect" "human health" and "native corn".

<sup>13</sup> Initial written submission of the United Mexican States, paras. 313, 334, 335. Mexico alleges that its measures are designed to contribute to both SPS and non-SPS purposes. *See also*, Initial written submission of the United Mexican States, para. 24. Mexico provides that it did determine an appropriate level of sanitary or phytosanitary protection, *i.e.*, i) to protect human health from risks arising from "contaminants" or "toxins" in the GM corn grain that is consumed directly in everyday food such as tortillas; and ii) to protect native corn from the risks arising from transgenic introgression of GM corn plant "pests" into the environment.

<sup>14</sup> Initial written submission of the United Mexican States, paras. 300, 308, 310, 312.

<sup>15</sup> Initial written submission of the United States of America, paras. 90-92, 98, 100.

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## 1. The legal standard for determining whether the obligations of the SPS Chapter are applicable

19. The SPS Chapter of CUSMA applies to all sanitary and phytosanitary measures of a Party that may, directly or indirectly, affect trade between the Parties.<sup>16</sup>

Therefore, the SPS Chapter applies to a measure that is (a) an SPS measure, that (b) may, directly or indirectly, affect trade between the Parties.

### a) “SPS measure”

20. Article 9.1 of the SPS Chapter incorporates by reference the definition of “SPS measure” set out in Annex A of the SPS Agreement. Two elements are necessary to meet the definition of an SPS measure. The first relates to form: it must be a “measure”. The second relates to purpose: it must be applied to protect against one or more of the risks identified in Annex A.<sup>17</sup>

21. With respect to the form, the first part of the second paragraph of Annex A(1) provides an illustrative list of legal instruments through which SPS measures may be adopted. This list includes decrees, regulations, and requirements. Hence, there can be no question that Mexico’s Decree constitutes a “measure”. The central question is whether Mexico’s measures are applied to protect against one or more of the risks identified in Annex A.

22. To determine if a measure is applied to protect against one of the risks listed in Annex A(1), or to prevent or limit the damage specified therein, a panel is required to make an assessment of whether there is a clear and objective relationship between the measure at issue, and one of the purposes listed in Annex A(1).<sup>18</sup> A panel’s determination must not only be based on the assertions made by the responding Party with respect to the objectives of its measures. It must ascertain the objectives of the measures based on all relevant circumstances, including the

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<sup>16</sup> Article 9.2 of CUSMA.

<sup>17</sup> Annex A(1) of the SPS Agreement includes measures applied “(a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms; (b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs; (c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or (d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.”

<sup>18</sup> Appellate Body Report, *Australia – Apples*, paras. 172-173. Panel Report, *Korea – Radionuclides*, para. 7.25.

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text and structure of the measure, its regulatory context, and the way in which it is designed and applied.<sup>19</sup>

23. In this case, Mexico recognizes that its measures seek to protect: (i) human health from risks arising from “contaminants” or “toxins” in GM corn grain that is consumed directly in everyday food such as tortillas; and (ii) native corn from the risks arising from the spread of GM corn plant “pests” into the environment.<sup>20</sup> Mexico does not appear to deny that its Decree seeks to protect against one of the risks listed in Annex A(1). However, Mexico alleges that its measures are also designed to contribute to non-SPS objectives, such as biocultural wealth, peasant communities and gastronomic heritage.<sup>21</sup> Furthermore, Mexico argues that Articles 7 and 8 of the Decree are not “applied” measures within the meaning of Article 9.2 because they have not been “implemented”.<sup>22</sup>

24. In Canada’s view, a measure that pursues dual objectives can qualify as an SPS measure if at least one objective falls within one of the purposes enumerated in Annex A(1).<sup>23</sup> Therefore, a measure that is designed to protect, for example, gastronomic heritage while at the same time having the objective of protecting human health from risks arising from “contaminants” or “toxins” in food, or plant health from risks arising from “pests”, can fall within the meaning of Annex A(1) and qualify as an SPS measure. This position is consistent with the panel’s findings in *EC – Approval and Marketing of Biotech Products*. In that case, the EC argued that its measures were “not necessarily sanitary or phytosanitary in character” since the objective was to protect the environment and conserve biodiversity.<sup>24</sup> The panel dismissed that claim and held that measures enacted for both SPS and non-SPS

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<sup>19</sup> Appellate Body Report, *Australia – Apples*, para. 173. Panel Report, *Korea – Radionuclides*, para. 7.25.

<sup>20</sup> Initial written submission of the United Mexican States, paras. 24, 323, 326.

<sup>21</sup> Initial written submission of the United Mexican States, para. 286: Mexico indicates that biocultural wealth, peasant communities and gastronomic heritage encompasses: i) the conservation of biodiversity and genetic integrity of native varieties and landraces of corn [...]; and ii) the protection of agricultural diversity, *i.e.*, the milpa, as well as the gastronomic of native varieties and landraces of corn of Mexico, including as a key ingredient of traditional Mexican foods. *See also*, Initial written submission of the United Mexican States, para. 294, referring to social values, cultural heritage, and cultural identity in relation to corn, dough, tortilla, and related traditional foods; initial written submission of the United Mexican States, paras. 295, 313.

<sup>22</sup> Initial written submission of the United Mexican States, para. 4.

<sup>23</sup> Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.165.

<sup>24</sup> *Ibid*, para. 4.334.

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purposes are not outside of the scope of the SPS Agreement.<sup>25</sup> In other words, measures that are enacted for one of the purposes in Annex A(1) do not fall outside of the scope of the SPS Chapter simply because they also seek to achieve non-SPS objectives.<sup>26</sup>

25. Mexico's argument that the Substitution Instruction falls outside the scope of the SPS Chapter because it has not been "applied" reflects a failure to interpret that term in its context and in the light of the object and purpose of Annex A(1).

26. The object and purpose of the definition of an SPS measure is to determine the scope of application of the SPS disciplines. The term "applied" must also be interpreted in its context.<sup>27</sup> The WTO Appellate Body ("Appellate Body") has explained that the word "to" indicates a purpose or intention, and therefore, it establishes a required link between the measure and the protected interest.<sup>28</sup> The phrase "applied to", taken in its context, reflects the main element of an SPS measure – a required nexus between the measure at issue, and one of the purposes listed in Annex A(1).

27. An argument that a measure must be "implemented" to fall within the scope of Annex A(1) would lead to an absurd result. This is because some of the key provisions of the SPS Chapter that explicitly discipline the steps that apply prior to the implementation of an SPS measure would become inutile.<sup>29</sup> For example, Article 9.6.3 sets forth rules for the identification of SPS measures when it provides that SPS measures shall be "based on" relevant international standards or a risk assessment.<sup>30</sup> Article 9.6.10 also provides that each Party shall "select" SPS

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<sup>25</sup> Panel Reports, *EC – Approval and Marketing of Biotech Products*, paras. 7.158, 4.887.

<sup>26</sup> *Ibid*, para. 7.158.

<sup>27</sup> Initial written submission of the United Mexican States, para. 305. Mexico asserts that the ordinary meaning of the word "applied" is "to employ, administer or put into practice a knowledge, measure or principle in order to obtain a certain effect or performance on someone or something". Canada however considers that the term "applied" should be read in its context. The term "applied" is immediately followed by the word "to". The term "applied" is not used in Annex A as a past participle, but it used to serve as a connector between the measure and the purposes listed in Annex A(1).

<sup>28</sup> Appellate Body Report, *Australia – Apples*, para. 172.

<sup>29</sup> Interpreting the term "applied to" as requiring a measure to be "implemented" would also preclude measures from being challenged under the SPS Chapter on an "as such" basis even if it is clear from their design, text, structure and regulatory context that they are aimed at protecting against one of the risks listed in Annex A(1). Canada also notes that the dispute settlement provisions of Chapter 31 of CUSMA apply to actual or proposed measures of another Party. See, Article 31.2 of CUSMA.

<sup>30</sup> Similarly, Article 1 of the SPS Agreement provides: "This Agreement applies to all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade. Such measures shall

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measures that are not more trade restrictive than necessary. For those reasons, and to ensure the effective application of the treaty, the argument that only measures that are “implemented” fall within the scope of the SPS Chapter should be rejected. The focus of the Panel’s analysis as to whether a measure constitutes an SPS measure should not be on the “manner in which” Mexico’s Decree will be implemented, but on its design, text, structure, and regulatory context, to determine whether it has a clear and objective relationship with the purpose of protecting against the risk under consideration.<sup>31</sup>

**b) “May, directly or indirectly, affect international trade”**

28. The United States submits that both the Tortilla Corn Ban and Substitution Instruction may affect international trade since Mexico’s measures prohibit or restrict imports of GM corn.<sup>32</sup>

29. For its part, Mexico argues that its measure to gradually substitute GM corn for animal feed and industrial use for human consumption is not an “applied” measure and therefore, the Decree has had no effect on U.S. imports of GM corn into Mexico.<sup>33</sup>

30. Canada agrees with the United States that Mexico’s measures “may, directly or indirectly, affect international trade”.<sup>34</sup> Mexico alleges that the Decree has had no effect on trade, but the use of the term “may” in Article 9.2 indicates that a measure only needs to be “capable of affecting” trade to be subject to SPS disciplines.<sup>35</sup> For example, a measure that makes importation unpredictable, or influences corn

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be developed and applied in accordance with the provisions of this Agreement” (emphasis added). Clearly, the SPS Agreement applies to SPS measures in development and makes a distinction between SPS measures in development, and those being applied.

<sup>31</sup> Appellate Body Report, *Australia – Apples*, para. 173. The Appellate Body suggested that an approach that is similar to the interpretation of Article III:1 of the GATT 1994 should be adopted. In the context of Article III:1, the Appellate Body assessed the measure’s design, architecture, and structure of a measure to discern whether a measure is applied so as to afford protection. *See, e.g.*, Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 29. *See, e.g.*, Panel Report, *Costa Rica – Avocados (Mexico)*, para. 7.149. The panel noted that the activities or requirements analysed in *Australia – Apples* were SPS measures as they “can be implemented in order to obtain certain effects”.

<sup>32</sup> Initial written submission of the United States of America, paras. 94-96, 103-106.

<sup>33</sup> Initial written submission of the United Mexican States, paras. 308, 310.

<sup>34</sup> Article 1.1 of the SPS Agreement. *See also*, Article 9.2 of CUSMA.

<sup>35</sup> Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.434.

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exporters due to uncertainty, is a measure that is capable of affecting trade between the Parties.

31. The dictionary definition of the term “may” is “[e]xpressing objective possibility, opportunity, or absence of prohibitive conditions; have the potentiality to [...]”.<sup>36</sup> In *EC – Approval and Marketing of Biotech Products*, the panel held that “it is not necessary [for the complaining Party] to demonstrate that an SPS measure has an actual effect on trade”.<sup>37</sup> Rather, the term “may” qualifies the word “affect” and the use of that term indicates that it is sufficient if the measure at issue “has the potential to affect international trade, directly or indirectly”.<sup>38</sup>

32. Accordingly, to assess whether Mexico’s measures “may” affect international trade, the Panel’s task is to determine whether those measures “have the potential” to affect trade, directly or indirectly.<sup>39</sup>

**B. Article 9.6.3: SPS measures must be based on relevant international standards, guidelines, or recommendations or on a risk assessment**

33. In its initial written submission, the United States alleges that Mexico’s measures are inconsistent with Article 9.6.3 of CUSMA because they are not based on international standards, guidelines, or recommendations, or on an appropriate risk assessment.<sup>40</sup>

34. For its part, Mexico argues that the international standards cited by the United States are not relevant because they do not address the risks arising from glyphosate and GM protein residues in food, or from unintended gene transfers from

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<sup>36</sup> “May”, *Oxford English Dictionary*, [https://www.oed.com/dictionary/may\\_v1?tab=meaning\\_and\\_use#37901930](https://www.oed.com/dictionary/may_v1?tab=meaning_and_use#37901930) (accessed 23 February 2024), Exhibit CAN-8.

<sup>37</sup> Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.435.

<sup>38</sup> Panel Report, *Korea – Radionuclides*, para. 7.22.

<sup>39</sup> While it is not necessary for a measure to have an “actual” effect on trade, Canada considers that, “by its very nature”, an import ban affects international trade. See, e.g., Panel Reports, *India – Agricultural Products*, para. 7.157; *Russia – Pigs (EU)*, para. 7.234; *Costa Rica – Avocados (Mexico)*, para. 7.97; *Korea – Radionuclides*, para. 7.30; and *EC – Hormones*, para. 8.23.

<sup>40</sup> Initial written submission of the United States of America, paras. 110-111, 132.

GM corn.<sup>41</sup> Mexico also alleges that those standards do not achieve the ALOP it considers appropriate to address those risks.<sup>42</sup>

35. Article 9.6.3 requires each Party to base its SPS measures on relevant international standards, guidelines, or recommendations, provided that doing so meets the Party's ALOP. If a Party does not base its SPS measures on relevant international standards, for example because that Party determines that the relevant international standards are not sufficient to achieve its ALOP, or such international standards do not exist, the second sentence of Article 9.6.3 applies. The second sentence of Article 9.6.3 requires a Party to ensure that its SPS measures are based on an assessment, as appropriate to the circumstances, of the risk to human, animal, or plant life or health.

36. Consequently, there are two situations covered by Article 9.6.3. A Party shall either base its SPS measures on:

- a) relevant international standards, guidelines, or recommendations if they exist and if they meet the Party's ALOP, or;
- b) on an assessment, as appropriate to the circumstances, of the risk to human, animal, or plant life or health.

37. Article 9.6.3 reflects the Parties' preference for basing SPS measures on relevant international standards to harmonize SPS measures and to minimize the negative effects of those measures on trade. At the same time, including the phrase "provided that doing so meets the Party's appropriate level of sanitary or phytosanitary protection" reflects the Parties' recognition of the right of each Party to establish the level of protection it determines to be appropriate.

38. The second sentence of Article 9.6.3 permits a Party to depart from an international standard if the international standard is not sufficient (or ineffective) to achieve the level of protection pursued. For example, a Party may decide to establish a level of protection that is higher than the level of protection implied in the

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<sup>41</sup> Initial written submission of the United Mexican States, para. 362. Mexico refers to risk posed to the Mexican population by glyphosate and GM protein residues in food, or to native corn varieties arising from unintended gene transfers from GM corn.

<sup>42</sup> Initial written submission of the United Mexican States, para. 363.

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international standard and implement that level of protection through a measure that is not based on the international standard. However, this right is not absolute.<sup>43</sup> It is abundantly clear from the second sentence of Article 9.6.3 that an SPS measure must be based on an assessment of risk if it departs from existing relevant international standards, guidelines or recommendations.

39. In this case, Mexico alleges that it has conducted a risk assessment<sup>44</sup> and that the Tortilla Corn Ban is “based on” that risk assessment.<sup>45</sup> However, Mexico merely refers to a general summary document it compiled on GM crops and herbicide application that does not appear to fall within the meaning of risk assessment as defined in Annex A of the SPS Agreement,<sup>46</sup> or provide evidence of the risks its measures are allegedly seeking to address.<sup>47</sup>

40. Mexico also alleges that the international standards cited by the United States are not relevant to address the risks arising from glyphosate and GM protein

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<sup>43</sup> Appellate Body Report, *EC – Hormones*, paras. 172-173.

<sup>44</sup> Initial written submission of the United Mexican States, para. 397.

<sup>45</sup> *Ibid*, para. 372. Mexico does not expressly claim that the Substitution Instruction is based on a risk assessment.

<sup>46</sup> Article 9.1 of CUSMA incorporates the definitions in Annex A of the SPS Agreement which defines the term “risk assessment” as follows: “The evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs.” A risk assessment should identify hazards (including, if known, the mechanisms of harm), quantify the exposure (including if there is any accepted threshold of exposure), and finally reach conclusions on the risk that the combination of hazard and exposure represents.

<sup>47</sup> Initial written submission of the United Mexican States, paras. 397-398, and CONAHCYT, “Scientific Record on Glyphosate and GM Crops”, 2020, Exhibit MEX-085. Mexico alleges that the risk assessment evaluated the potential adverse effects on health of Mexican from the presence of contaminants, specifically, residues of glyphosate and certain proteins in foods made from GM corn that Mexicans commonly consume. However, Mexico refers to a summary document entitled “Scientific Record on Glyphosate and GM Crops” that does not identify hazards or risks arising from the consumption of GM corn (including, what the mechanisms of harm are), quantify exposure (including if there’s any accepted threshold of exposure), and reach conclusions on the risk that the combination of hazard and exposure represents (including any mitigations that could be used to manage the risk). Mexico’s summary also does not assess whether GM corn is a “pest” and the likelihood of entry, establishment or spread if it is a pest, to determine the potential biological and economic consequences on native corn species and biodiversity in Mexico arising from the importation of GM corn. At best, it might be considered as a summary of limited information about the safety of glyphosate and how GM corn may be a route of dietary exposure. Canada does not consider that such summary constitutes an assessment of the risks arising from GM corn. While many of the statements made about considerations of GM corn are aspects that would be considered in a food safety assessment conducted by a competent authority, this document lacks robust sources, analysis, and conclusions. Mexico also identifies human health risks associated with exposure to glyphosate, which is frequently applied to GM corn. However, these risks are not articulated in any detail in Mexico’s submission or the cited documents, as only general concerns are raised (such as the potential impacts on human health and negative effects on other organisms). When it comes to the issue of “genetic erosion” as a consequence of introgression of DNA from transgenic corn to native corn, hybridization with conventional modern corn poses the same concerns. In other words, the issue is not specific to GM corn.



residues in food, or the risks to native corn varieties arising from unintended gene transfers from GM corn.<sup>48</sup>

41. Canada is of the view that there are international standards, guidelines and recommendations that are relevant to the measures at issue. Those international standards are not ineffective to achieve the level of protection pursued by a Party. This is because those international standards do not imply a particular level of protection or recommend a sanitary or phytosanitary measure, but provide guidelines and recommendations to assist a Party in identifying risks and risk management measures that are proportionate to the identified risk.

42. In the following sections, Canada provides an overview of the international standards, guidelines, and recommendations that are relevant to Mexico's measures to provide guidance to the Panel when assessing the consistency of Mexico's measures with the first sentence of Article 9.6.3.

43. The first section points to the relevant international standard applicable if Mexico seeks to protect human health from risks arising from "contaminants" or "toxins" in in foods. The second section identifies the relevant international standards applicable if Mexico seeks to protect plant life or health (native corn) from risks arising from the spread of "pests". In the third section, Canada comments on the legal standard that should guide the panel's determination of whether an SPS measure is "based on" relevant international standards, guidelines, or recommendations within the meaning of Article 9.6.3.

**1. The relevant international standards are the Codex standards that pertain to GM food products**

44. Article 9.1.2 of CUSMA defines the phrase "relevant international standards, guidelines, or recommendations" as those defined in paragraphs 3(a) through (c) of Annex A of the SPS Agreement, and standards, guidelines, or recommendations of other international organizations as decided by the CUSMA Committee on Sanitary and Phytosanitary Measures ("CUSMA SPS Committee").

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<sup>48</sup> Initial written submission of the United Mexican States, para. 362. Initial written submission of the United States of America, paras. 108-145.

45. To determine if Mexico's measures are based on relevant international standards, guidelines or recommendations, the Panel first needs to determine whether one or more of the international standard-setting bodies identified in Annex A(3) of the SPS Agreement, or other international organizations as decided by the CUSMA SPS Committee, have established standards, guidelines or recommendations relevant to the measures at issue. If relevant international standards, guidelines or recommendations exist, the Panel must then compare the challenged measure(s) to the international standards, guidelines or recommendations and determine whether the measure(s) may be said to be "based"<sup>49</sup> on the relevant international standard(s), guideline(s) or recommendation(s).<sup>50</sup>

46. The CUSMA SPS Committee has not made any decision on other relevant international standards, guidelines, or recommendations. Accordingly, paragraphs 3(a) through (c) of Annex A of the SPS Agreement provide the list of relevant international standards for food safety, animal health, and plant health, respectively.

47. Mexico's measures prohibiting the use of GM corn for use in human food (in the sector known as dough and tortilla) and the gradual substitution of GM corn whose industrialization generates products intended for human consumption relate to food safety.<sup>51</sup>

48. For food safety, paragraph 3(a) of Annex A refers to the standards, guidelines and recommendations established by the Codex Alimentarius Commission ("Codex"). Those standards, guidelines and recommendations address food additives, veterinary drug and pesticide residues, contaminants, methods of analysis and sampling, and codes and guidelines of hygienic practice. More specifically, Codex has established international standards that are relevant for the risk analysis of foods derived from modern biotechnology.

49. Mexico states that the Codex Committee on Pesticide Residues ("CCPR") is the authority responsible for establishing the Maximum Residue Limits ("MRLs") for pesticide residues in specific food items or in groups of food or feed moving through

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<sup>49</sup> See below, Section II.B.3, where Canada comments on the legal standard that should guide a panel's determination of whether an SPS measure is "based on" relevant international standards.

<sup>50</sup> Panel Report, *US – Animals*, para. 7.222.

<sup>51</sup> Initial written submission of the United Mexican States, paras. 320-321, 323, 330, 331.

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international trade.<sup>52</sup> Canada agrees that the Codex MRLs reflect the level of pesticide residues that food and feed may safely contain. If Mexico's measures seek to address risks arising from pesticide residues in food, the Codex recommendations would be relevant. However, these recommendations for MRLs do not appear relevant because the design, text, structure, and regulatory context of Mexico's measures reveal that they do not concern risks arising from glyphosate residues in food crops.

50. Further, Canada is of the view that Mexico misconstrues these Codex recommendations, for two reasons. First, Mexico submits that the Codex MRLs do not take into account the different, notably higher, level of corn consumption in Mexico, and are based on global averages or estimates of daily consumption.<sup>53</sup> This statement is inaccurate. To the contrary, the Codex MRLs do take into account varying patterns of food consumption from different groups of countries in the world and categorize those groups based on their varying patterns of food consumption.<sup>54</sup>

51. Second, not only do the Codex MRLs take into account Mexico's different patterns of consumption, but they are based on the principle of sound scientific analysis and evidence to ensure the quality of the food supply. Consequently, Mexico cannot assume that there is an increase in risk simply because corn consumption is higher in Mexico.<sup>55</sup>

52. As Canada explains above, a Party may depart from relevant international recommendations if those recommendations are not sufficient to achieve a Party's ALOP. However, an SPS measure that departs from existing recommendations must be based on a risk assessment. Therefore, even if Mexico's measures concern

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<sup>52</sup> Initial written submission of the United Mexican States, para. 420.

<sup>53</sup> *Ibid*, para. 423.

<sup>54</sup> See, the World Health Organization, "Food Cluster Diets", The Global Health Observatory, <https://www.who.int/data/gho/samples/food-cluster-diets> (last accessed 13 March 2024), Exhibit CAN-9. Mexico is in the geographic region 5 (G05), and Canada and the United States are in the geographic region 10 (G10).

<sup>55</sup> See, Annex 3 to the 2019 Joint FAO/WHO Meeting on Pesticide Residues JMPR FAO and WHO. 2019. *Pesticide residues in food 2019 – Report 2019 – Extra Joint FAO/WHO Meeting on Pesticide Residues*. Rome., Exhibit CAN-10, pp. 243 and 245. As noted in Annex 3 of the 2019 JMPR Report, the latest International Estimated Daily Intake ("IEDI") for glyphosate included maize and all its processed commodities. The IEDI also demonstrated that the dietary intake of maize and its processed commodities for G05 (which includes Mexico) were notably higher than that for G10 (which includes Canada and the United States). For all cluster diets assessed, the long-term intake of residues of glyphosate from all uses that have been considered by the JMPR are unlikely to present a public health concern.

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glyphosate residues and Mexico chooses not to adopt the recommendations of Codex, it is then required to base its measures on a risk assessment.

53. In this section, Canada highlights the foundational principles that are relevant to Mexico's measures and should be followed prior to selecting a sanitary measure.

**a) Principles for the Risk Analysis of Foods Derived from Modern Biotechnology ("Modern Biotechnology Principles")**

54. From the Codex perspective, if a measure is based on a food safety concern, the question is whether an assessment of risk has been performed.<sup>56</sup> Any hazards associated with foods should be subjected to the risk analysis process of the Codex. More specifically, if a country wants to assess potential risks associated with foods derived from modern biotechnology,<sup>57</sup> such as GM corn, it should follow the Codex Working Principles for Risk Analysis<sup>58</sup> and the Modern Biotechnology Principles.<sup>59</sup>

55. The Modern Biotechnology Principles supplement the Working Principles for Risk Analysis by elaborating specific guidelines for conducting risk analysis on the safety of foods derived from modern biotechnology.<sup>60</sup> The purpose of the risk analysis process is to assess potential risks, and only if necessary, develop approaches to manage the risks that have been identified through that assessment.<sup>61</sup>

56. The Working Principles for Risk Analysis provide that the risk analysis should follow a structured approach comprising three distinct but closely linked components

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<sup>56</sup> *Working Principles for Risk Analysis for Application in the Framework of the Codex Alimentarius* (adopted by the 26th Session of the Codex Alimentarius Commission, 2003; Codex Alimentarius Commission Procedural Manual, 13th edition) ("Working Principles for Risk Analysis"), Exhibit CAN-11, para. 2; Modern Biotechnology Principles, Exhibit CAN-2, s. 2 (Scope and Definitions), para. 7, s. 3 (Principles), para. 10.

<sup>57</sup> The term "modern biotechnology" is defined as "the application of: in vitro nucleic acid techniques [...], that overcome natural physiological reproductive or recombinant barriers and that are not techniques used in traditional breeding and selection". GM products, such as GM corn, fall within the scope of "modern biotechnology". Modern Biotechnology Principles, Exhibit CAN-2, s. 2 (Scope and Definitions), para. 8.

<sup>58</sup> Working Principles for Risk Analysis, Exhibit CAN-11.

<sup>59</sup> Modern Biotechnology Principles, Exhibit CAN-2.

<sup>60</sup> Working Principles for Risk Analysis, Exhibit CAN-11. Modern Biotechnology Principles, Exhibit CAN-2, s. 3.9. Any risk analysis for foods derived from modern biotechnology should be consistent with the Working Principles for Risk Analysis.

<sup>61</sup> Modern Biotechnology Principles, Exhibit CAN-2, s. 1.2.

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of risk analysis.<sup>62</sup> The Modern Biotechnology Principles explains the three stages of the risk analysis as follows:<sup>63</sup>

- **Stage 1 (risk assessment)** includes a safety assessment, which is designed to identify whether a hazard, nutritional or other safety concern is present, and if present, to gather information on its nature and severity. The safety assessment should include a comparison between the food derived from modern biotechnology and its conventional counterpart, focusing on determination of similarities and differences. If a new or altered hazard, nutritional, or other safety concern is identified through the safety assessment, the risk associated with it should then be characterized to determine its relevance to human health;<sup>64</sup>
- **Stage 2 (risk management)** involves a consultation process with all interested parties, considering the risk assessment and other relevant factors for human health. Any adopted risk management measures for foods derived from modern biotechnology should be proportional to the risk, be based on the outcome of the risk assessment and, where relevant, take into account other legitimate factors in accordance with the general decisions of the Codex and the Working Principles for Risk Analysis;<sup>65</sup> and
- **Stage 3 (risk communication)** includes an interactive exchange of information and opinions throughout the risk analysis process concerning hazards and risks, risk-related factors and risk perceptions, among all interested parties. This includes transparency, clearly explaining the risk assessment findings, and the basis of risk management decisions.<sup>66</sup>

57. According to the Principles, any risk management measures for foods derived from modern biotechnology, including sanitary measures, should be proportional to the risk that has been assessed.<sup>67</sup> This is because it is the risk assessment that

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<sup>62</sup> Working Principles for Risk Analysis, Exhibit CAN-11, s. 5. See also, Exhibit CAN-11, s. 6: "The three components should be documented fully and systematically in a transparent manner".

<sup>63</sup> Modern Biotechnology Principles, Exhibit CAN-X, ss. 3.10-3.12, 3.16, 3.22-3.24.

<sup>64</sup> Working Principles for Risk Analysis, Exhibit CAN-11, Annex 1, defines "risk assessment" as the follows: "A scientifically based process consisting of the following steps: (i) hazard identification, (ii) hazard characterization, (iii) exposure assessment, and (iv) risk characterization".

<sup>65</sup> Working Principles for Risk Analysis, Exhibit CAN-11, Annex 1, defines "risk management" as the follows: "The process, distinct from risk assessment, of weighing policy alternatives, in consultation with all interested parties, considering risk assessment and other factors relevant for the health protection of consumers and for the promotion of fair trade practices, and, if needed, selecting appropriate prevention and control options".

<sup>66</sup> Working Principles for Risk Analysis, Exhibit CAN-11, Annex 1, defines "risk communication" as the follows: "The interactive exchange of information and opinions throughout the risk analysis process concerning hazards and risks, risk-related factors and risk perceptions, among risk assessors, risk managers, consumers, industry, the academic community and other interested parties, including the explanation of risk assessment findings and the basis of risk management decisions".

<sup>67</sup> Modern Biotechnology Principles, Exhibit CAN-2, s. 3, para. 16.

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identifies whether a hazard, or nutritional safety concern is present, and if present, the nature and severity of that concern.<sup>68</sup> In Canada's view, in the absence of an assessment of risk identifying a hazard, nutritional, or other safety concern, Mexico's risk management measures cannot be found to be proportionate to a risk nor based on the outcome of a risk assessment.<sup>69</sup>

58. Despite Mexico's assertion, Mexico has not produced a risk assessment document that comports with the requirements set out in the definition of risk assessment in Annex A. Canada considers that it is therefore reasonable to conclude that Mexico's measures are not based on a risk assessment. Not only has Mexico failed to produce a risk assessment to support its measures, Canada notes that GM products cannot be marketed in Mexico unless they have been approved and assessed as safe.<sup>70</sup> To date, Mexico has reviewed and approved 181 applications for authorization to use GM events for both food and feed in Mexico.<sup>71</sup> Mexico's pre-market approval process for products for consumption does not distinguish between food and livestock feed. By prohibiting the import of GM corn products for consumption that have previously been authorized as safe, Mexico appears to have ignored the outcome of its own pre-market approval assessment that previously authorized market access for GM corn imports in Mexico.

59. In addition to a risk assessment, Codex recognizes that a long history of safe use is also relevant when determining the level of safety of a product:

For many foods, the level of food safety generally accepted by the society reflects the history of their safe consumption by humans. It is recognised that in many cases the knowledge required to manage the risks associated with foods has been acquired in the course of their long history of use.<sup>72</sup>

60. Canada agrees with the United States that the safety of GM products has been widely confirmed by international organizations and empirical evidence.<sup>73</sup> For

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<sup>68</sup> Modern Biotechnology Principles, Exhibit CAN-2, s. 3.10. See also, Working Principles for Risk Analysis, Exhibit CAN-11, s. 19, which indicates that risk assessment should incorporate the following four steps: hazard identification, hazard characterization, exposure assessment, and risk characterization.

<sup>69</sup> Modern Biotechnology Principles, Exhibit CAN-2, s. 3, para. 16.

<sup>70</sup> Mexico has a rigorous system in place to assess GM products for hazard and nutritional safety concerns. Initial written submission of the United States of America, paras. 42-52.

<sup>71</sup> Initial written submission of the United States of America, para. 50.

<sup>72</sup> Modern Biotechnology Principles, Exhibit CAN-2, s. 1.1 (emphasis added).

<sup>73</sup> Initial written submission of the United States of America, paras. 30-31.

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decades, GM crops have been consumed around the world.<sup>74</sup> In fact, more than 353 risk assessments have been performed on GM corn events globally.<sup>75</sup> The scientific community has also repeatedly confirmed the safety of consuming GM crops, including GM corn.<sup>76</sup> Canada considers that Mexico has not considered the long history of safe use of GM corn when adopting its measures.

61. Even if Mexico had identified a risk, the Modern Biotechnology Principles emphasize that different risk management measures may be capable of achieving the same level of protection to manage an identified risk.<sup>77</sup> For example, Codex provides that post-market monitoring may be an appropriate risk management measure to either verify conclusions about the absence or possible impact and significance of potential consumer health effects.<sup>78</sup>

62. Finally, Codex provides that national governments should adopt a consistent approach to characterize and manage safety risks associated with foods derived from modern biotechnology. Codex further states that unjustified differences in the level of risks presented to consumers between these foods and similar conventional foods should be avoided.<sup>79</sup>

63. Canada is concerned that Mexico has adopted a ban on the import and sale of GM corn for use in in dough and tortillas, even though Mexico has issued over 181 event authorizations across 11 different GM crops, including GM corn, over several decades.<sup>80</sup> By adopting a radically different approach for GM corn related to the end-use in dough and tortillas, it appears that Mexico is being arbitrarily inconsistent in

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<sup>74</sup> Kleter GA, van der Voet H, Engel J, van der Berg JP. *Comparative safety assessment of genetically modified crops: focus on equivalence with reference varieties could contribute to more efficient and effective field trials*. Transgenic Res. 2023 Aug;32(4):235-250, Exhibit CAN-12.

<sup>75</sup> According to the Biosafety Clearing-House, available online: [Search | Biosafety Clearing-House \(cbd.int\)](#) (Data retrieved 27 February 2024), Exhibit CAN-7, of the 960 LMO records present in the BCH, 353 or 37% of the records include corn that meets the definition of an LMO. Of those 353, 316 include at least one herbicide resistance trait, and 231 records represent corn where glyphosate (commercially known as Roundup). Therefore, as a single trait, glyphosate resistant corn represents 24% of all the listed LMO records in the BCH. See also, Initial written submission of the United States of America, para. 50.

<sup>76</sup> Richard E. Goodman (2024) Twenty-eight years of GM Food and feed without harm: why not accept them?, *GM Crops & Food*, 15:1, 40-50, Exhibit CAN-13; Canada is also of the view that the scientific studies referenced in the United States' submission are legitimate, reliable, and internationally recognized. See, Initial written submission of the United States of America, paras. 30-37.

<sup>77</sup> Modern Biotechnology Principles, Exhibit CAN-2, s. 3, paras. 19-20.

<sup>78</sup> Modern Biotechnology Principles, Exhibit CAN-2, s. 3, para. 20.

<sup>79</sup> Modern Biotechnology Principles, Exhibit CAN-2, s. 3, para. 25.

<sup>80</sup> USDA & GAIN, "Agricultural Biotechnology Annual, Mexico," (Mar. 12, 2020), Exhibit USA-2, p.

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its approach to characterizing and managing the purported safety risks associated with GM corn.

**b) Guideline for the Conduct of Food Safety Assessment of Foods Derived from Recombinant-DNA Plants (“Recombinant-DNA Plants Guideline”)**

64. The Recombinant-DNA Plants Guideline makes recommendations on how to assess the safety of foods consisting of, or derived from, plants that have a history of safe use as sources of food, and that have been genetically modified using recombinant-DNA.<sup>81</sup>

65. To identify any potential safety and nutritional concerns regarding foods derived from new plant varieties, the starting point of a safety assessment consists of comparing a new food with its conventional counterparts for the purposes of similarities and differences.<sup>82</sup>

66. The purpose of each safety assessment is to provide assurance, based on the best available scientific knowledge, that the new food is as safe as its conventional counterpart.<sup>83</sup> It is the outcome of the safety assessment process that should be used to determine if a risk management measure is needed or not. The safety assessment also ensures well-informed<sup>84</sup> and appropriate risk management decisions.<sup>85</sup>

67. Finally, a case-by-case approach should be used in assessing potential allergenicity or protein toxins.<sup>86</sup> In adopting a ban on the importation of all varieties

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<sup>81</sup> *Guideline for the Conduct of Food Safety Assessment of Foods Derived from Recombinant-DNA Plants* (CAC/GL 45-2003) (“Recombinant-DNA Plants Guideline”), Exhibit CAN-14, s. 2 (Definitions), paragraph 8: Recombinant-DNA plants are plants that have altered genetic material through in vitro nucleic acid techniques, as defined in paragraph 8 of the Recombinant-DNA Plants Guideline.

<sup>82</sup> Modern Biotechnology Principles, Exhibit CAN-2, s. 3, paras. 10-11: A safety assessment is characterized by an assessment of a whole food or a component thereof relative to the appropriate conventional counterpart: A) taking into account both intended and unintended effects; B) identifying new or altered hazards; and C) identifying changes, relevant to human health, in key nutrients. See also, Recombinant-DNA Plants Guideline, Exhibit CAN-14, s. 3.13.

<sup>83</sup> Recombinant-DNA Plants Guideline, Exhibit CAN-14, s. 3.52.

<sup>84</sup> See, e.g., Modern Biotechnology Principles, Exhibit CAN-2, ss. 3.12, 3.14, 3.15. A safety assessment should take into account all available scientific data and information derived from scientifically sound procedures. The data and information, based on sound science, should also be obtained using appropriate methods and be capable of withstanding scientific peer review. Risk assessment should apply to all relevant aspects of foods derived from modern biotechnology.

<sup>85</sup> Recombinant-DNA Plants Guideline, Exhibit CAN-14, s. 3.21.

<sup>86</sup> Modern Biotechnology Principles, Exhibit CAN-2, s. 3.12. See also, Recombinant-DNA Plants Guideline, Exhibit CAN-14, ss. 1.4, 3.38-3.41.



of corn derived from modern biotechnology,<sup>87</sup> it appears that Mexico is no longer applying a case-by-case approach.

68. Canada respectfully recommends that the Panel consider the Modern Biotechnology Principles, the Working Principles for Risk Analysis, as well as the Recombinant-DNA Plants Guideline as relevant to determine whether Mexico has based its measures on relevant international standards.

**2. If Mexico's measures are intended to protect plant life or health, the International Standards for Phytosanitary Measures ("ISPMs") are the relevant international standards**

69. If Mexico's measures are intended to protect native corn from risks arising from gene flow from transgenic corn,<sup>88</sup> the "international standards, guidelines and recommendations" for plant health are those referred to in paragraph 3(c) of Annex A of the SPS Agreement, as incorporated into CUSMA Chapter 9:

[...] the international standards, guidelines and recommendations developed under the auspices of the Secretariat of the International Plant Protection Convention in cooperation with regional organizations operating within the framework of the International Plant Protection Convention.

70. Paragraph 3 of Annex A specifically recognizes the Secretariat of the International Plant Protection Convention ("IPPC") as the relevant international standard-setting organization for matters of plant health. The International Standards for Phytosanitary Measures ("ISPMs") developed under the auspices of the IPPC are the relevant international standards for Mexico's measures if they seek to protect native corn from risks arising from transgenic introgression of GM corn plants.

71. In particular, *ISPM 11: Pest risk analysis for quarantine pests* ("ISPM 11") is relevant, as it provides guidance on how to evaluate potential phytosanitary risks to

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<sup>87</sup> Initial written submission of the United States of America, para. 4.

<sup>88</sup> *Ibid*, paras. 124, 139. Initial written submission of the United Mexican States, para. 24: "to protect native corn from the risks arising from transgenic introgression of GM corn plant "pests" into the environment.

plants posed by living modified organisms (“LMOs”)<sup>89</sup> and identify appropriate risk management options.<sup>90</sup> *ISPM 20: Guidelines for a phytosanitary import regulatory system* (“ISPM 20”) is also a relevant international standard as it provides guidelines regarding the application of phytosanitary measures to the entry of regulated articles, such as the prohibition of imports.<sup>91</sup>

72. To provide guidance to the Panel on the interpretation of the recommendations found in ISPM 11 and 20, Canada briefly recounts the key principles for the application of phytosanitary measures in international trade.

**a) ISPM 1: Phytosanitary principles for the protection of plants and the application of phytosanitary measures in international trade**

73. ISPM 1 sets out a series of basic phytosanitary principles that aim to provide guidance on the understanding of the IPPC and the fundamental elements in phytosanitary systems.<sup>92</sup> The basic principles outlined in ISPM 1 include necessity, managed risk, minimal impact, technical justification and modification. The basic principles are briefly summarized in relevant part below:<sup>93</sup>

Basic principles	
ISPM 1, Article 1.2 – <b>Necessity</b>	“Contracting parties may apply phytosanitary measures <u>only</u> where such measures are necessary”.

<sup>89</sup> *ISPM 5: Glossary of phytosanitary terms* (“ISPM 5”), Exhibit CAN-15, defines living modified organism as: “[a]ny living organism that possesses a novel combination of genetic material obtained through the use of modern biotechnology”. Canada considers that LMOs would thus also capture GM corn covered by Mexico’s measures.

<sup>90</sup> *ISPM 2: Framework for Pest Risk Analysis* (“ISPM 2”), s. 1.2.4 (Living modified organisms), Exhibit CAN-16, pp. 2-11: A pest risk analysis may be carried out to determine whether the LMO is a pest, and subsequently assess the pest risk. *See also, ISPM 11: Pest risk analysis for quarantine pests* (Adoption) (“ISPM 11”), Exhibit CAN-17, pp. 11-6: “In April 2004, the Sixth Session of the Interim Commission on Phytosanitary Measures adopted a supplement on pest risk analysis for living modified organisms (“LMOs”) and agreed that it should be integrated into ISPM 11 Rev. 1 (Pest risk analysis for quarantine pests including analysis of environmental risks and living modified organisms). The supplementary text on environmental risks is marked with “S1” and the supplementary text on LMOs is marked with “S2”.

<sup>91</sup> *See, e.g., ISPM 20: Guidelines for a phytosanitary import regulatory system* (“ISPM 20”), Exhibit CAN-18, Articles 4.2, 4.2.3.

<sup>92</sup> Background to *ISPM 1: Phytosanitary principles for the protection of plants and the application of phytosanitary measures in international trade* (“ISPM 1”), Exhibit CAN-19.

<sup>93</sup> Emphasis added.

ISPM 1, Article 1.3 – <b>Managed risk</b>	“Contracting parties should apply phytosanitary measures based on a policy of managed risk. [...] Contracting parties shall institute only phytosanitary measures that are consistent with the pest risk involved”. (IPPC, Article VII.2(g))
ISPM 1, Article 1.4 – <b>Minimal Impact</b>	“Contracting parties should apply phytosanitary measures with minimal impact. [...] that they “shall institute only phytosanitary measures that [...] represent the least restrictive measures available, and result in the minimum impediment to the international movement of people, commodities and conveyances”. (Article VII.2(g))
ISPM 1, Article 1.8 – <b>Technical Justification</b>	“Contracting parties shall technically justify phytosanitary measures “on the basis of conclusions reached by using an appropriate pest risk analysis or, where applicable, another comparable examination and evaluation of available scientific information”. (Article II.1)
ISPM 1, Article 1.11 – <b>Modification</b>	“Modifications of phytosanitary measures should be determined on the basis of a new or updated pest risk analysis or relevant scientific information. Contracting parties should not arbitrarily modify phytosanitary measures”. (Article VII.2(h))

74. These basic principles provide the foundation for, and inform, all ISPM standards. Accordingly, they should be understood as a guide to understanding which elements of each standard are “fundamental” for the purposes of assessing whether Mexico’s measures are based on the relevant ISPM standards.

**a) ISPM 11: Pest risk analysis for quarantine pests**

75. ISPM 11 provides the details and guidance for evaluating whether phytosanitary risks to plants posed by LMOs exist and identifying appropriate risk management options if risks have been identified.<sup>94</sup>

76. Mexico alleges that its measures seek to address phytosanitary risks arising from gene flow of GM corn and transgenic introgression, where the LMO is acting as

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<sup>94</sup> ISPM 11, Exhibit CAN-17, pp. 11-6. “In April 2004, the Sixth Session of the Interim Commission on Phytosanitary Measures adopted a supplement on pest risk analysis for LMOs and agreed that it should be integrated into ISPM 11 Rev. 1: Pest risk analysis for quarantine pests including analysis of environmental risks and living modified organisms. The supplementary text on environmental risks is marked with “S1” and the supplementary text on LMOs is marked with “S2”. See also, ISPM 2, Exhibit CAN-16, pp. 2-4 (Outline of Requirements), which provides that the pest risk assessment process may be used for organisms not previously recognized as pests (such as living modified organisms). The first step of a PRA process is to determine or confirm whether or not the organism considered is a pest.

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a potential vector or pathway for the introduction of a genetic construct of phytosanitary concern.<sup>95</sup>

77. If a country decides to review its phytosanitary measures, a new or revised pest risk analysis ("PRA") is required.<sup>96</sup>

78. ISPM 11 identifies three stages of pest risk analysis:

- **Stage 1 (initiating the process)** involves identifying the pest(s) and pathways that are of quarantine concern and should be considered for risk analysis in relation to the identified PRA area;
- **Stage 2 (risk assessment)** begins with the categorization of individual pests to determine whether the criteria for a quarantine pest are satisfied. Risk assessment continues with an evaluation of the probability of pest entry, establishment, and spread, and of their potential economic consequences (including environmental consequences); and
- **Stage 3 (risk management)** involves identifying management options for reducing the risks identified at stage 2 to an acceptable level. These are evaluated for efficiency, feasibility and impact in order to select those that are appropriate.

79. The first step of any risk analysis is to gather information to clarify the identity of a pest, its present distribution and association with host plants.<sup>97</sup> In the context of LMOs, the first step of the initiation stage is to determine if an LMO has the potential to be a pest.<sup>98</sup> Annex 3 of ISPM 11 provides guidance on how to determine if an LMO has such potential.<sup>99</sup>

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<sup>95</sup> Initial written submission of the United Mexican States, paras. 121-122, 127, 399.

<sup>96</sup> ISPM 11, Exhibit CAN-17, s. 1.1.3. ISPM 2, Exhibit CAN-16, s. 1.1.3 further provides that: "For existing trade, no new measures should be applied until the revision or new PRA has been completed, unless this is warranted by new or unexpected phytosanitary situations that may necessitate emergency measures".

<sup>97</sup> ISPM 11, Exhibit CAN-17, s. 1.3.

<sup>98</sup> *Ibid*, s. 1 (Stage 1: Initiation): A plant pest risk from LMOs may be presented by the organisms with the inserted genes (*i.e.*, the LMO); the combination of genetic material (e.g. gene from plant pests such as viruses); or the consequences of the genetic material moving to another organism *See also*, Annex 3, pp. 11-30: "In cases of phytosanitary risks related to gene flow, the LMO is acting more as a potential vector or pathway for introduction of a genetic construct of phytosanitary concern rather than as a pest in and of itself. Therefore, the term 'pest' should be understood to include the potential of an LMO to act as a vector or pathway for the introduction of a gene presenting a phytosanitary risk".

<sup>99</sup> In particular, the fact that a genetic modification in similar or related organisms has previously been assessed as having no phytosanitary risk is a factor to conclude that an LMO is not a potential pest. If there is indication that new traits resulting from genetic modifications may present phytosanitary risk, a new or revised pest risk assessment should be initiated.

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80. When conducting a pest risk assessment,<sup>100</sup> a country has to collect relevant information or assess the relevant probability of introduction, establishment and spread to be in a position to decide whether a measure is required and if so, the strength of measures to be applied.<sup>101</sup> Importantly, the probabilities of risks need to be investigated and estimates of associated uncertainties need to be fully documented.

81. ISPM 11 provides that it is the conclusions of the pest risk assessment that are used to decide if a risk management measure is required, and the strength of measures to be used.<sup>102</sup> Any decisions on how to manage risk should be based on the information collected during the pest risk assessment, to ensure that it is technically justified and designed in proportion to the risk.<sup>103</sup> This is consistent with the basic principle that any modification to a phytosanitary measure should be determined based on a new or updated pest risk analysis or relevant scientific information.<sup>104</sup>

82. ISPM 11 provides that “zero-risk is not a reasonable option”,<sup>105</sup> and therefore a party to the IPPC should “manage risk to achieve the required degree of safety that can be justified and is feasible within the limits of available options and resources”.<sup>106</sup> A prohibition of imports should be viewed as measures of last resort when no satisfactory measure to reduce risk to an acceptable level can be found.<sup>107</sup>

83. In this case, Mexico is prohibiting the imports of GM corn, which is a departure from the recommendations that zero-risk is not a reasonable option, and prohibiting imports should be a measure of last resort. If Mexico has not based its

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<sup>100</sup> ISPM 11, Exhibit CAN-17, s. 2 (Stage 2: Pest Risk Assessment).

<sup>101</sup> *Ibid*, s. 2.2. Assessing the probability of introduction requires an analysis of each of the pathways with which a pest may be associated from its origin to its establishment.

<sup>102</sup> *Ibid*, s. 3, pp. 11-22.

<sup>103</sup> *Ibid*. See also, ISPM 1, Exhibit CAN-19, s. 1.2. IPPC, Article VII.2(a): “Contracting parties shall not, under their phytosanitary legislation, take any measures specified in [...] unless such measures are made necessary by phytosanitary considerations. “Both the IPPC and ISPM 1, Exhibit CA-19, provide that the Contracting parties may apply phytosanitary measures only where such measures are made necessary by phytosanitary consideration.

<sup>104</sup> ISPM 1, Exhibit CAN-19, s. 1.11.

<sup>105</sup> ISPM 11, Exhibit CAN-17, s. 3.

<sup>106</sup> *Ibid*. See also, Article 3.6: “The result of the pest risk management procedure will be either that no measures are identified which are considered appropriate or the selection of one or more management options that have been found to lower the risk associated with the pest(s) to an acceptable level”.

<sup>107</sup> *Ibid*, ss. 3.4, 3.4.6.

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measures on a risk assessment or identified a risk, it would appear that Mexico's measures were not designed in proportion to identified phytosanitary risks, and therefore cannot be technically justified.

**b) ISPM 20: Guidelines for a phytosanitary import regulatory system**

84. ISPM 20 pertains to the structure and operation of a phytosanitary import regulatory system. This standard provides general guidelines for the regulatory framework of a phytosanitary import regulatory system, including phytosanitary regulations and procedures.<sup>108</sup>

85. Article 4.2 of ISPM 20 indicates that phytosanitary measures, such as prohibitions, restrictions or other phytosanitary import requirements, should be applied to regulated articles only if necessary by phytosanitary considerations and technically justified.<sup>109</sup>

86. Article 4.2.3 provides specific recommendations applicable to prohibitions of imports.<sup>110</sup> In particular, it provides that prohibitions on imports of specified commodities or other regulated articles for phytosanitary reasons "should be used when no alternatives for pest risk management exist". If prohibitions are used, they should be technically justified and can only be applied to the risk associated with quarantine pests. Therefore, no prohibition should be applied to GM corn if it has not

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<sup>108</sup> ISPM 20, Exhibit CAN-18, s. 4, sets out recommendations for the regulatory framework and the issuing of regulations. It provides that imported commodities that may be regulated include articles that may be infected or contaminated with regulated pests. Plants and plant products used for planting, consumption, processing, or any other purpose are examples of regulated articles.

<sup>109</sup> ISPM 5, Exhibit CAN-15, defines the term "regulated articles" as follows: "Any plant, plant product, storage place, packaging, conveyance, container, soil and any other organism, object or material capable of harbouring or spreading pests, deemed to require phytosanitary measures, particularly where international transportation is involved [FAO, 1990; revised FAO, 1995; IPPC, 1997]".

<sup>110</sup> See also, ISPM 20, Exhibit CAN-18, s. 4.4, which provides examples of phytosanitary actions that are less trade restrictive than prohibitions. Direction to a particular end use such as processing is listed as an example of phytosanitary action. If a country is concerned about gene flow arising from GM corn which is intended for human consumption, but is diverted from that use and planted outdoors, a requirement for nixtamalization prior to import is a potentially less trade restrictive measures than a prohibition on GM corn for human consumption in dough and tortilla. In the nixtamalization process, there are several stages. First, dried maize is soaked in a solution of water with lime, often with ashes mixed in. The grain is then cooked, steeped, drained, and rinsed multiple times. The grain is then ground to make a wet dough from which tortillas are formed or allowed to dry into flour. Gene flow from a corn grain diverted for use as a corn seed could only take place if the corn grain were diverted before nixtamalization. After nixtamalization, corn grain is sufficiently processed that there are no intact grains that could be diverted for use as seeds, and therefore no risk of corn-to-corn gene flow.

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been determined to be a “quarantine pest”<sup>111</sup> or as a high-risk commodity for processing and animal feed, and it has not been subjected to specific phytosanitary measures.

87. To be based on ISPM 20, a phytosanitary measure should be necessary and technically justified. In the absence of “conclusions reached by using an appropriate pest risk analysis or, where applicable, another comparable examination and evaluation of available scientific information” a measure cannot be technically justified,<sup>112</sup> and therefore, based on ISPM 20.

### **3. SPS measures must be “based on” relevant international standards, guidelines or recommendations**

88. In the context of the SPS Agreement, the Appellate Body has found that a measure is “based on” a particular international standard when the standard is used as the “principal constituent” or “fundamental principle” for the purpose of enacting the measure.<sup>113</sup> In *US – Animals*, the panel clarified that the test is whether the challenged measures are “founded”, “built upon” or “supported by” the relevant standards, such that they serve as a principal constituent or fundamental principle of the measures.<sup>114</sup> A measure may be “based” on an international standard and adopt only some elements of the standard, especially when some elements are not present in a measure.<sup>115</sup>

89. The Appellate Body has found that “something cannot be considered a ‘basis’ for something else if the two are contradictory”.<sup>116</sup> In *India – Agricultural Products*, the panel concluded that a fundamental departure from a relevant international

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<sup>111</sup> ISPM 5, Exhibit CAN-15, defines the term “quarantine pest” as: “A pest of potential economic importance to an area endangered thereby and not yet present there, or present but not widely distributed and being officially controlled.”

<sup>112</sup> IPPC, Article II.1.

<sup>113</sup> Appellate Body Report, *EC – Sardines*, paras. 243-244. The Appellate Body made this finding in relation to Article 2.4 of the TBT Agreement, which states that, where relevant international standards exist, WTO Members shall use them as “a basis for” their technical regulations. Given the Appellate Body’s statement in *EC – Sardines*, para. 274, that there are “strong conceptual similarities” between Article 2.4 of the TBT Agreement and Article 3.1 of the SPS Agreement, the Appellate Body’s reasoning under Article 2.4 of the TBT Agreement is pertinent in this context.

<sup>114</sup> Panel Report, *US – Animals*, para. 7.233. The Appellate Body has also found that “[a] thing is commonly said to be ‘based’ on another thing when the former ‘stands’ or is ‘founded’ or ‘built’ upon or ‘is supported by’ the latter”. See, Appellate Body Report, *EC – Hormones*, para. 163.

<sup>115</sup> Panel Report, *US – Animals*, para. 7.218. Appellate Body Report, *EC – Hormones*, para. 163: The Appellate Body also concluded that a measure might be based on a standard yet not conform to it if only some, but not all of the elements of the standard are incorporated into the measure.

<sup>116</sup> Appellate Body Report, *EC – Sardines*, para. 248.

standard amounts to a contradiction of that standard, and that where an SPS measure contradicts an international standard, it cannot properly be concluded that the SPS measure is “based on” the international standard.<sup>117</sup>

90. Canada considers that the same legal standard should apply in the CUSMA SPS context to determine if a measure is “based on” relevant international standards. This is because the substance of the relevant obligations, and the language of the obligations, is the same.

91. Therefore, the focus of this Panel’s analysis should be whether Mexico’s measures are “founded”, “built” upon or “supported by” the relevant Codex and ISPM standards, guidelines or recommendations identified in Sections II.B.1 and B.2 such that they serve as a principal constituent or fundamental principal of Mexico's measures.<sup>118</sup>

92. Based on the foregoing, it would appear that Mexico has not used the Codex and ISPMs standards as the “principal constituent” or the “fundamental principle” for its measures.

93. In fact, Mexico has failed to substantiate its assertion that its measures are based on a risk assessment, nor does it appear to have used the conclusions of any risk assessment to determine whether its prohibition on GM corn imports is needed. Consequently, the basis for Mexico’s measures does not appear to be based on the relevant Codex standards. This is because Mexico cannot have identified, let alone implemented, the appropriate risk management measures to address a safety concern relating to GM corn without identifying any risks using sound scientific methodology or evidence. Mexico’s measures would also appear to be a departure from the ISPM principles because Mexico’s measures contradict the phytosanitary principles of necessity, minimal impact, and technical justification that are central to ISPM standards.<sup>119</sup> Mexico has not provided any of the underlying risk assessment data that might potentially justify the necessity of its measures.

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<sup>117</sup> Panel Report, *India – Agricultural Products*, paras. 7.269-7.273. See also, Appellate Body Report, *EC – Sardines*, para. 248; Panel Reports, *US – Animals*, para. 7.233, *Russia – Pigs (EU)*, para. 7.254.

<sup>118</sup> Panel Report, *Russia – Pigs (EU)*, para. 7.489.

<sup>119</sup> See, ISPM 1, Exhibit CAN-19 and ISPM 20, Exhibit CAN-18.



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**C. Parties shall conduct a risk assessment and risk management in a manner consistent with Article 9.6.8**

94. Paragraph (a) of Article 9.6.8 requires CUSMA Parties to “ensure” that their risk assessments and associated risk management<sup>120</sup> are conducted in a manner “appropriate to the circumstances of the risk,” and that they “take into account” available relevant scientific evidence.

95. Paragraph (b) of Article 9.6.8 requires Parties to also take into account the relevant guidance of the WTO SPS Committee, and the relevant international standards, guidelines, and recommendations of relevant international organizations. The obligations in paragraphs (a) and (b) are cumulative.

96. In this case, Mexico appears not to have conducted a risk assessment as defined in Annex A.4 of the SPS Agreement, nor – despite its assertions to the contrary – has it produced one as part of its initial written submission.<sup>121</sup> The summary document Mexico characterizes as its “risk assessment” includes irrelevant information about alternative practices to weed management and statements about food sovereignty that have no bearing on the potential risks of GM corn.<sup>122</sup> While there is some information regarding the potential health impacts of glyphosate, there is no overall linkage drawn between identified potential hazards and actual risks or risk management.<sup>123</sup>

97. In short, it comes nowhere close to the methodological rigour that a risk assessment compliant with Article 9.6.8 would evince.

98. In light of those deficiencies, Canada agrees with the United States that Mexico cannot have “ensured” that its risk assessment is appropriate to the circumstances of the risk to human, animal, or plant life or health, or “ensured” that its risk assessment takes into account relevant scientific evidence, as Article 9.6.8

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<sup>120</sup> Article 9.1.2 of CUSMA defines “risk management” as: “the weighing of policy alternatives in light of the results of risk assessment and, if required, selecting and implementing appropriate controls, which may include sanitary or phytosanitary measures”.

<sup>121</sup> A “risk assessment” for the purposes of Annex A.4 sets out, *inter alia*, an evaluation of the likelihood of entry or spread of a pest or disease within the territory of the importing Member according to the SPS measures which might be applied, and of the associated potential biological and economic consequences.

<sup>122</sup> CONAHCYT, “Scientific Record on Glyphosate and GM Crops”, 2020, Exhibit MEX-085, which Mexico claims constitutes its “risk assessment”.

<sup>123</sup> *Ibid*, pp. 12-14.

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requires.<sup>124</sup> Similarly, Mexico has not conducted a risk assessment that “take[s] into account” relevant international standards, guidelines, and recommendations of the relevant organizations.

**D. Article 9.6.6(b): Parties shall ensure that their SPS measures are based on relevant scientific principles**

99. In its initial written submission, the United States argues that Mexico has not “based” its SPS measures on “relevant scientific principles,” as required under Article 9.6.6(b).<sup>125</sup>

100. For its part, Mexico alleges that the Tortilla Corn Ban is based on a “thorough and robust review of scientific studies, data, and analyses” that takes into account “relevant factors to Mexico”.<sup>126</sup> Mexico’s submission does not address the consistency of the Substitution Instruction with Article 9.6.6(b).

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<sup>124</sup> Initial written submission of the United States of America, paras. 178-180.

<sup>125</sup> *Ibid*, paras. 161-165. The full text of Article 9.6.6(b) reads: “Each Party shall ensure that its sanitary and phytosanitary measures [...] are based on relevant scientific principles, taking into account relevant factors, including, if appropriate, different geographic conditions.”

<sup>126</sup> Initial written submission of the United Mexican States, paras. 430-431. While Mexico does not cite to any particular studies to support this assertion, Mexico relies on numerous exhibits throughout its submission to ground its claim that the measures at issue are based in science. Yet many of the examples Mexico cites are methodologically flawed, or oversimplify or exaggerate nuanced scientific conclusions. For example, at para. 135, Mexico refers to a study to support its conclusion that GM corn has negative impacts on health. Mexico claims that this “recent systematic review of studies conducted in animals and humans on the consumption of GM foods reported minor illnesses in one human crossover trial and, within the 204 animal studies, 59.46% reported 22 adverse effects (out of 37), of which 16 were reported as serious adverse effects (mortality, tumors or cancer, significant low fertility, decreased learning and reaction capacity, and some organ abnormalities).” However, Canada notes that this information was retrieved from the abstract of the referenced study, and does not include important context provided throughout the remainder of that document. For example, at page 27 of the same study, the authors expressly acknowledge that:

There are several limitations in this review. The methodological quality of the included studies is generally poor, which indicates a high or unclear risk of bias resulting from insufficient reporting of methodological components in the studies [...] [wh]en we did the manual search, we found that related publications were retracted sometimes, under the name of inadequate experimental designs or statistical analysis.

At para. 179, Mexico refers to evidence suggesting that the presence of glyphosate in urine was associated with chronic kidney disease, even in individuals who were not in direct contact with the herbicide. However, when the referenced study is read in its totality, glyphosate is never mentioned. Further, the study acknowledges that there are several factors that have an impact on chronic kidney disease, and not solely agrochemicals.

At para. 185, Mexico cites to the “famous Seralini study” as evidence for the assertion that rats that ingested grains grown with Roundup exhibited chronic renal deficiencies. However, an independent review of this study – including by Canadian, German, Australian and French regulatory agencies – found several scientific issues, including shortcomings in the study’s design, implementation, and reporting.

101. Canada considers that an SPS measure will be inconsistent with Article 9.6.6(b) if: (1) there are “scientific principles” that are “relevant” to the measure at issue, and (2) the measure is not “based on” those relevant scientific principles.

102. In this section, Canada addresses the meaning of the term “relevant scientific principles”. Canada also explains why it agrees with the United States that when an SPS measure is not based on a risk assessment, then there is a presumption that the measure is not based on “relevant scientific principles”.<sup>127</sup>

### **1. The meaning of “relevant scientific principles”**

103. As the United States notes, both the SPS Chapter and the SPS Agreement require SPS measures to be “based on” “scientific principles”.<sup>128</sup> The obligation in the SPS Chapter further specifies that the scientific principles must be “relevant” to the measure at issue.

104. CUSMA does not define the phrase “relevant scientific principles”. In the absence of a definition, and pursuant to Article 31.13(4), panels shall interpret CUSMA in accordance with the customary rules of interpretation of public international law, as reflected in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* (“VCLT”). Article 31 of the VCLT provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.<sup>129</sup>

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For an overview of these findings, see, Government of Canada, *Health Canada and Canadian Food Inspection Agency statement on the Seralini et al. (2012) publication on a 2-year rodent feeding study with glyphosate formulations and GM maize NK603* available online: <https://www.canada.ca/en/health-canada/services/food-nutrition/genetically-modified-foods-other-novel-foods/canadian-food-inspection-agency-statement-seralini-2012-publication-2-year-rodent-feeding-study-glyphosate-formulations-maize-nk603.html>, (accessed 12 March 2024), Exhibit CAN-20.

<sup>127</sup> Initial written submission of the United States of America, paras. 164-165, citing Panel Reports, *Australia – Apples*, paras. 7.472, 7.510, 7.779, 7.887, 7.905, 7.1308, and *US – Poultry (China)*, para. 7.201.

<sup>128</sup> Initial written submission of the United States of America, para. 162.

<sup>129</sup> *Vienna Convention on the Law of Treaties*, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679, 31(1)(a).

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105. Panels routinely refer to the dictionary definitions of a term as a guide to determine its ordinary meaning.<sup>130</sup>

106. The Oxford English Dictionary defines the term “relevant” as “bearing on or connected with the matter in hand; closely relating to the subject or point at issue; pertinent to a specified thing”.<sup>131</sup> This definition accords with the meaning given to the term by the Appellate Body in the context of the SPS Agreement.<sup>132</sup> Based on the context of Article 9.6.6, to be considered “relevant”, the scientific principles must “concern” or “be connected” to the SPS measures at issue.

107. With respect to the term “scientific”, the dictionary definition is “of a process, method, [or] practice based on or regulated by science [...] valid according to the principles of science”.<sup>133</sup> In *EC – Hormones*, the Appellate Body interpreted the term “scientific” to mean:

“of, relating to, or used in science,” “broadly, having or appearing to have an exact, objective, factual, systematic or methodological basis”, “of, relating to, or exhibiting the methods or principles of science” and “of, pertaining to, using, or based on the methodology of science”.<sup>134</sup>

108. In *Japan – Apples*, the panel also referred to the methodology of science when interpreted the phrase “scientific evidence” as “evidence gathered through scientific methods”.<sup>135</sup>

109. Finally, the term “principle” has a variety of meanings, the most relevant definitions being “a general or inclusive theorem or law, having numerous special

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<sup>130</sup> See e.g., Final Panel Report, *Canada-Dairy TRQ Allocation Measures* (CDA-USA-2021-31-010) (December 20, 2021), para. 104. See also, Appellate Body Report, *US – Gambling*, para. 164, where the Appellate Body noted that “[i]n order to identify the ordinary meaning, a Panel may start with the dictionary definitions of the terms to be interpreted”, and Appellate Body Report, *US – Softwood Lumber V*, para. 658, where the Appellate Body stated that dictionary definitions “offer a useful starting point for discerning the ordinary meaning” of words.

<sup>131</sup> “Relevant,” *Oxford English Dictionary*, [https://www.oed.com/dictionary/relevant\\_adj?tab=meaning\\_and\\_use#25975641](https://www.oed.com/dictionary/relevant_adj?tab=meaning_and_use#25975641) (accessed on 23 February 2024), Exhibit CAN-21.

<sup>132</sup> Appellate Body Report, *EC – Sardines*, paras. 229-230 (bearing upon or relating to the matter at hand; pertinent).

<sup>133</sup> “Scientific,” *Oxford English Dictionary*, [https://www.oed.com/dictionary/scientific\\_adj?tab=meaning\\_and\\_use#23962329](https://www.oed.com/dictionary/scientific_adj?tab=meaning_and_use#23962329) (accessed on 23 February 2024), Exhibit CAN-22.

<sup>134</sup> Appellate Body Report, *EC – Hormones*, fn. 172.

<sup>135</sup> Panel Report, *Japan – Apples*, para. 8.92.

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applications across a wide field” or “a general law or rule adopted or professed as a guide to action; a settled ground or basis of conduct or practice”.<sup>136</sup>

110. In light of these definitions, Canada considers the term “scientific” in the context of “scientific principles” to mean that those principles shall be based on, relate to, or be used in science, gathered through scientific methods, or relate to the use of scientific methods of analysis, such as empiricism, objectivity, peer review and falsifiability. Taken together, Canada considers that the phrase “relevant scientific principles” in Article 9.6.6(b) captures the general rules that have been developed to guide and promote the uniformity and harmonization of SPS measures across a wide field, taking into account sound scientific evidence and analysis, and that are closely connected or appropriate for the sanitary or phytosanitary matter at issue. This reflects the ordinary meaning of these terms, in their context,<sup>137</sup> and is consistent with the relevant findings of WTO panels and the Appellate Body that have considered the meaning of these terms in the SPS Agreement.

111. As discussed above in Section II.B.3, for a measure to be “based on” relevant scientific principles, the measure must be “founded” or “built upon” or “supported by” those principles. Where an SPS measure contradicts a relevant scientific principle, it cannot be said to be “based on” that principle. Therefore, Canada understands Article 9.6.6(b) as requiring SPS measures to be “built upon” or “supported by” relevant scientific principles, and not to contradict those principles.

## **2. Relevant scientific principles in the context of GM corn**

112. If Mexico’s measures are rooted in food safety or plant health concerns regarding GM corn, then Canada views the scientific principles set out in the international standards section above,<sup>138</sup> as “relevant.” This is because they have a

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<sup>136</sup> “Principle” *Oxford English Dictionary*, [https://www.oed.com/dictionary/principle\\_n?tab=meaning\\_and\\_use#28387145](https://www.oed.com/dictionary/principle_n?tab=meaning_and_use#28387145) (accessed on 23 February 2024), Exhibit CAN-23. See also, Panel Report, *China – Intellectual Property Rights*, para. 7.264.

<sup>137</sup> Article 9.3 sets out the objectives of the SPS Chapter. These include:

(e) enhance transparency in and understanding of the application of each Party’s sanitary and phytosanitary measures;

(f) encourage the development and adoption of science-based international standards, guidelines and recommendations, and promote their implementation by the Parties;

[...]

(h) advance science-based decision making.

<sup>138</sup> See above, Section II.B.

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direct bearing on, or relationship to, Mexico's stated policy concerns. Relevant international standards include the Modern Biotechnology Principles and the Recombinant-DNA Plants Guideline.<sup>139</sup>

113. The scientific principles that underlie risk management approaches in dealing with recombinant-DNA techniques articulated by the Organization for Economic Cooperation and Development ("OECD") are also "relevant."<sup>140</sup> Those principles reflect international best practices to harmonize regulatory and risk management approaches in the context of environmental, health, or safety risks related to GM crops.<sup>141</sup>

114. The Modern Biotechnology Principles, the Recombinant-DNA Plants Guideline, and the OECD principles each emphasize the importance of using a case-by-case approach and evaluating risks by comparing GM crops with their conventional counterparts. In particular, the OECD principles emphasize the need to:

- use the considerable data on the environmental and human health effects of living organisms to "guide risk assessments";<sup>142</sup>

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<sup>139</sup> Recombinant-DNA Plants Guideline, Exhibit CAN-14. See also, the Statements of Principle Concerning the Role of Science in the Codex Decision-Making Process, which provides that the Codex food standards and guidelines are "science-based":

The food standards, guidelines, and other recommendations of Codex shall be based on the principle of sound scientific analysis and evidence, involving a thorough review of all relevant information, in order that the standards assure the quality and safety of the food supply. See, the *Statements of Principle Concerning the Role of Science in the Codex Decision-Making Process*, available online:

<https://www.fao.org/fao-who-codexalimentarius/codex-texts/procedural-manual/sections/appendix/appendix1/en/> (accessed 13 March 2024), Exhibit CAN-24.

<sup>140</sup> Canada, the United States, and Mexico are all OECD Members.

<sup>141</sup> The OECD has published guidance documents for GM organisms for nearly 40 years, which are developed by consensus among the OECD's 38 Member countries. See, e.g., OECD, *Harmonisation of Regulatory Oversight in Biotechnology: Safety Assessment of Transgenic Organisms in the Environment*, Volume 6, (OECD Publishing: Paris, 2016, available online: <https://www.oecd-ilibrary.org/docserver/9789264253421-en.pdf?expires=1706106769&id=id&accname=ocid54006162&checksum=F2B21949712DD52C5B0506AC4600956F>) (accessed 23 February 2024) ("OECD Safety Assessment of Transgenic Organisms"), Exhibit CAN-25, pp. 14-21. See also, OECD, *Recombinant DNA Safety Considerations: Safety considerations for industrial, agricultural and environmental applications of organisms derived by recombinant DNA techniques*, (OECD Publishing: Paris, 1986), pp. 24-31, available online:

<https://www.oecd.org/env/ehs/biotrack/Recombinant-DNA-Safety-Considerations.pdf> (accessed 23 February 2024) ("Recombinant DNA Safety Considerations"), Exhibit CAN-26, which sets out principles and concepts for handling genetically modified organisms safely outside of contained laboratory conditions. This document is a major resource for the formation of harmonized national regulatory frameworks related to GM products.

<sup>142</sup> Recombinant DNA Safety Considerations, Exhibit CAN-26, p. 8.

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- ensure that recombinant-DNA organisms are evaluated for potential risks by means of “an independent review of potential risks on a case-by-case basis”;<sup>143</sup> and
  - use the familiarity principle, under which the well understood biology of existing crop plants and prevailing risk management practices for those crop plants should form a baseline when conducting risk management for GM organisms developed from those existing crop plants.<sup>144</sup> Familiarity arises from existing knowledge and experience with the biology of the unmodified plant, the introduced trait(s), and the receiving environment. This baseline should play “a key role in setting the context for the environmental risk/safety assessment”.<sup>145</sup>

115. When determining whether Mexico’s measures are “based on” relevant scientific principles, the Panel should consider whether Mexico’s approach to risk management constitutes a departure from or contradicts these relevant principles for risk analysis. As Canada discusses below, where a Party has failed to base its measure on a risk assessment, it may be presumed that the Party’s measures are not based on relevant scientific principles.<sup>146</sup>

### **3. A failure to base SPS measures on a risk assessment creates a presumption that Article 9.6.6(b) has been breached**

116. Canada agrees with the United States that a measure that is not “based on” a risk assessment should be presumed to not be based on “relevant scientific principles”.<sup>147</sup> This presumption is similar to the presumption that arises out of the relationship between Articles 5.1 and 2.2 of the SPS Agreement.

117. In the WTO context, panels and the Appellate Body have affirmed that Article 5.1 (equivalent to the last phrase of the second sentence of Article 9.6.3) may be viewed as a specific application of the basic obligations contained in Article 2.2

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<sup>143</sup> Modern Biotechnology Principles, Exhibit CAN-2, s. 3.12. Recombinant-DNA Plants Guideline, Exhibit CAN-14, s. 3.38-3.41. See also, Recombinant-DNA Plants Guideline, Exhibit CAN-14, s. 1.4.

<sup>144</sup> OECD Safety Assessment of Transgenic Organisms, Exhibit CAN-25, pp. 23-24.

<sup>145</sup> Harmonisation of Regulatory Oversight in Biotechnology: Safety Assessment of Transgenic Organisms in the Environment, Volume 10: OECD Consensus Document on Environmental Considerations for the Release of Transgenic Plants, Harmonisation of Regulatory Oversight in Biotechnology (OECD Publishing: Paris, 2023) available online: <https://www.oecd-ilibrary.org/docserver/62ed0e04-en.pdf?expires=1706106388&id=id&accname=ocid54006162&checksum=810BC86100A3AB04B590E214A32E33F6> (accessed 23 February 2024), Exhibit CAN-27, pp. 13-14.

<sup>146</sup> Initial written submission of the United States of America, para. 164. See also, Panel Report, *Australia – Apples*, para. 7.905, citing Appellate Body Report, *Australia – Salmon*, paras. 137-138.

<sup>147</sup> Initial written submission of the United States of America, paras. 164-167.

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(equivalent to Article 9.6.6(b)).<sup>148</sup> Therefore, if an SPS measure is not based on a risk assessment as required under Article 5.1, it can be presumed that the measure is not based on scientific principles, in violation of Article 2.2.

118. Canada considers that the same presumption should apply in the CUSMA SPS context. This is because the substance of the relevant obligations, and their relationship to one another, is the same. As with the SPS Agreement, CUSMA requires that SPS measures be based on a risk assessment.<sup>149</sup> That risk assessment must in turn be based on scientific evidence and be conducted in accordance with scientific principles and methodology. In the absence of a risk assessment, as required under Article 9.6.3, an SPS measure is presumed to not be based on relevant scientific principles, as required under Article 9.6.6(b).

119. Mexico has failed to substantiate its assertion that its measures are based on a risk assessment, as defined under Annex A.<sup>150</sup> Therefore, absent evidence to the contrary, it should be presumed that Mexico's measures are not based on relevant scientific principles.

**E. SPS measures must only be applied to the extent necessary to protect human, or plant life or health and not be more trade restrictive than required to achieve a Party's ALOP**

120. In its initial written submission, the United States argues that both the Tortilla Corn Ban and the Substitution Instruction are inconsistent with Article 9.6.6(a) because they are applied beyond the extent necessary to protect human life or health, or to protect plant life or health.<sup>151</sup> The United States argues that both measures are inconsistent with Article 9.6.10 because there are significantly less trade restrictive alternative measures available that would achieve Mexico's ALOP.<sup>152</sup>

121. For its part, Mexico argues that neither measure is inconsistent with Article 9.6.6(a) because these measures are necessary to achieve Mexico's chosen

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<sup>148</sup> Appellate Body Reports, *Japan – Agricultural Products II*, para. 82; and *EC – Hormones*, para. 180. See also, Appellate Body Report, *Australia – Salmon*, paras. 137-138.

<sup>149</sup> If those measures are not based on relevant international standards (see, Article 9.6.3), or if they are not provisional SPS measures within the meaning of Article 9.6.5. See below, Section II.F, where Canada provides its views on provisional measures under Article 9.6.5.

<sup>150</sup> See above, Section II.C, where Canada discusses the document Mexico characterizes as a "risk assessment".

<sup>151</sup> Initial written submission of the United States of America, paras. 146-160.

<sup>152</sup> *Ibid*, paras. 185-194.



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ALOPs.<sup>153</sup> Mexico also argues that neither measure is inconsistent with Article 9.6.10 because there are no significantly less trade restrictive alternative measures available that would achieve Mexico's ALOPs.<sup>154</sup>

122. In this section, Canada will first comment on the legal relationship between Articles 9.6.6(a) and 9.6.10. Canada will then provide its views on the proper interpretation of Article 9.6.10.

### **1. Relationship between Articles 9.6.6(a) and 9.6.10**

123. Article 9.6.6(a) requires each Party to ensure that its SPS measures are applied only to the extent "necessary" to protect human, animal or plant life or health. Article 9.6.10 provides that each Party shall select an SPS measure that is not more trade restrictive than required to achieve that Party's ALOP. In this section, Canada comments on the relationship between these two Articles.

124. Canada considers that Articles 9.6.6(a) and 9.6.10 should be read together, such that a violation of Article 9.6.10 should provide a sufficient basis for a panel to find a violation of Article 9.6.6(a). This reflects the close relationship between the two obligations. By requiring that the selected SPS measure be "not more trade restrictive than required", Article 9.6.10 elaborates upon the more general obligation in Article 9.6.6(a) to apply SPS measures "only to the extent necessary". This relationship is also consistent with prior reports of WTO panels and the Appellate Body discussing the relationship between the analogous obligations in the Articles 5.6 and 2.2 of the SPS Agreement.<sup>155</sup>

125. Article 9.6.6(a) provides a general obligation that SPS measures shall be "applied only to the extent necessary to protect human, animal or plant life or health". An analysis of "necessity"<sup>156</sup> requires a panel to consider "relevant factors",

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<sup>153</sup> Initial written submission of the United Mexican States, paras. 374-394.

<sup>154</sup> *Ibid*, paras. 435-456.

<sup>155</sup> Panel Report, *India - Agricultural Products*, para. 7.614; Appellate Body Report, *Australia - Apples*, para. 339; Panel Report, *Russia - Pigs (EU)*, paras. 7.843-7.846, para. 7.840: "The obligation that a Member shall ensure that an SPS measure is applied only to the extent necessary to protect human, animal or plant life or health is closely linked to the obligation set out in Article 5.6".

<sup>156</sup> Canada agrees with the United States that "necessary" means "indispensable, vital, essential; requisite" and that necessity should be interpreted to require that the measures at issue are closer to being "indispensable" to achieving their objective rather than simply "making a contribution to" that objective. Initial written submission of the United States of America, para. 148.

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including “the trade restrictiveness of a measure, its contribution to the purported objective, and whether that contribution may be made by a less trade-restrictive alternative.”<sup>157</sup> A panel may, on this basis, reach a preliminary conclusion that the measure is necessary. A preliminary finding of necessity must then be confirmed by considering whether there is a reasonably available alternative SPS measure that could achieve a Party’s ALOP while also being significantly less trade restrictive.<sup>158</sup>

126. Article 9.6.10 incorporates this last step of the necessity analysis set out above and makes it a discrete element of the analysis of whether an SPS measure is more trade restrictive than required. It also stipulates that the alternative measure must be “significantly” less trade restrictive.

127. If a panel were to find that a measure violates Article 9.6.10 because there is a reasonably available alternative measure that is significantly less trade-restrictive, and that alternative measure would achieve the Party’s ALOP, then the same reasoning would apply under Article 9.6.6(a). Similarly, there could be a violation of the necessity requirement of Article 9.6.6(a) if a panel were to find that the measures at issue imply or reflect a higher level of protection than the ALOP determined by the responding party.<sup>159</sup> Thus, a violation of the more specific obligation in Article 9.6.10 would also entail a violation of the more general “necessity” obligation in Article 9.6.6(a).

128. Accordingly, Canada considers that the Panel should first assess whether Mexico’s measures violate Article 9.6.10. If the Tortilla Corn Ban or the Substitution Instruction are found to violate Article 9.6.10, that measure should be presumed to violate Article 9.6.6(a) as well.

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<sup>157</sup> Panel Reports, *Russia – Pigs (EU)*, paras. 7.842 and *India – Agricultural Products*, paras. 7.607-7.613.

<sup>158</sup> Panel Report, *India – Agricultural Products*, para. 7.613 and Appellate Body Report, *Australia – Salmon*, para. 194.

<sup>159</sup> Panel Report, *India – Agricultural Products*, paras. 7.607-7.613, 7.614. The panel concluded that India’s measures were also applied beyond the extent necessary to protect human and animal life or health within the meaning of Article 2.2 since they were more trade-restrictive than required to achieve India’s ALOP. See also, Appellate Body Report, *Australia – Salmon*, para. 213, fn. 166: after pointing to the phrase “only to the extent necessary” in Article 2.2 of the SPS Agreement, the Appellate Body observed, that:

[t]he establishment or maintenance of an SPS measure which implies or reflects a higher level of protection than the appropriate level of protection determined by an importing Member, could constitute a violation of the necessity requirement of Article 2.2.

## **2. Requirements of Article 9.6.10**

129. Article 9.6.10 requires that a Party's SPS measure is not more trade restrictive than required to achieve that Party's ALOP.

130. The second sentence of Article 9.6.10 explains that an SPS measure is more trade restrictive than required if there is an alternative SPS measure that:<sup>160</sup>

1. is reasonably available taking into account technical and economic feasibility;
2. achieves the Party's appropriate level of sanitary or phytosanitary protection; and
3. is significantly less restrictive to trade than the contested SPS measure.

131. These three elements are cumulative. In this section, Canada will provide its views on each element.

### **a) Whether an alternative SPS measure is reasonably available**

132. The first element of the test under Article 9.6.10 requires the Panel to examine whether an alternative SPS measure is reasonably available to Mexico.

133. An obvious alternative measure would be to review and approve authorization for GM events for food and feed use in Mexico. This is the authorization process that had been in place for 13 years, following the promulgation of the Biosafety Law and the Biosafety Regulations, prior to May 2018 in Mexico.<sup>161</sup> If Mexico considers that this measure was available to manage any alleged risks associated with GM corn as both food and feed, it would appear that it is also available to manage the alleged risk associated with human consumption of GM corn through nixtamalization or flour production.

### **b) Whether an alternative measure achieves Mexico's ALOP**

134. The second element of the test under Article 9.6.10 requires the Panel to examine whether the alternative measure achieves Mexico's ALOP. To assess this,

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<sup>160</sup> Appellate Body Report, *Australia – Salmon*, para. 194. Canada considers that the same test should apply because, while the CUSMA text is structured to provide additional clarity in interpreting this provision, the underlying obligations and policy rationales are the same.

<sup>161</sup> Initial written submission of the United States of America, paras. 50-51.

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the Panel must first ascertain Mexico's ALOP and then determine whether that ALOP is "the one actually being applied via [the] measure".<sup>162</sup>

135. A Party not only has the "prerogative"<sup>163</sup> to determine its ALOP, but an "implicit obligation"<sup>164</sup> to do so. A Party cannot select its SPS measure without knowing its ALOP because it is the Party's ALOP that "determines the SPS measure to be introduced or maintained".<sup>165</sup> This is because an ALOP is an "objective", whereas an SPS measure is "an instrument chosen to attain or implement that objective".<sup>166</sup>

136. A Party must also identify its ALOP in sufficiently precise terms to enable the other Parties or a panel to determine whether the selected measure is consistent with the obligations of the SPS Chapter.<sup>167</sup> For example, it would be impossible to determine whether Mexico's SPS measures are more trade restrictive than required to achieve Mexico's ALOP under Article 9.6.10, or whether an alternative measure would achieve Mexico's ALOP, if Mexico's ALOP is unknown or vague.

137. If a Party fails to identify its ALOP, or does so with insufficient precision, a panel may establish the ALOP "on the basis of the level of protection reflected in the SPS measure actually applied".<sup>168</sup> The Appellate Body in *India - Agricultural Products* indicated that "a panel is required to ascertain the respondent's appropriate level of protection on the basis of the totality of the arguments and evidence on the

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<sup>162</sup> Panel Report, *US – Poultry (China)*, para. 7.244.

<sup>163</sup> Appellate Body Report, *Australia – Salmon*, para. 199.

<sup>164</sup> *Ibid*, para. 206.

<sup>165</sup> Appellate Body Report, *Canada – Continued Suspension*, para. 523. Based on the wording of Article 5.6 of the SPS Agreement, the Appellate Body has explained that the "determination of the level of protection is an element in the decision-making process which logically precedes and is separate from the establishment or maintenance of the SPS measure".

<sup>166</sup> Appellate Body Report, *Australia – Salmon*, para. 200. This is further evidenced by the wording of Article 9.6.10, which uses the past tense "determined" to describe the Party's ALOP but uses the present tense "select" to describe the SPS measure.

<sup>167</sup> Appellate Body Report, *Australia – Salmon*, paras. 206-207.

<sup>168</sup> Appellate Body Reports, *Australia – Salmon*, para. 207 and *Korea – Radionuclides*, para. 5.24. For example, a complete import prohibition would typically reflect a very low risk tolerance, something close to a "zero-risk" level of protection. See, e.g., Appellate Body Report, *Australia – Salmon*, para. 197. On the other hand, Canada considers that a ban that is only restricting the import of a product when it is destined for certain end-uses, or when domestic supply is not sufficient, would reflect a higher risk tolerance.

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record”.<sup>169</sup> Canada considers that this reasoning also applies to the determination of a Party's ALOP in the context of CUSMA.

138. In this case, Mexico asserts that its measures combine three distinct ALOPs:

- to address risks to human health from the human consumption of GM corn in tortillas or dough, Mexico's ALOP is “to eliminate risks to the greatest extent possible”, *i.e.*, “zero risk”;
- to address risks to human health arising from GM corn used as animal feed or in industrial food processing, Mexico's ALOP is “risk tolerant” and “based on feasibility and adequacy of supply”; and
- to address risks to native corn, Mexico's ALOP is to “mitigate the damage caused to native corn by slowing or stopping the rate of transgenic introgression” and “to try to limit the extent of future damage and to support efforts to reverse or eliminate existing damage, if possible”.<sup>170</sup>

139. In Canada's view, the Panel should consider whether these ALOPs are sufficiently precise to enable the application of the relevant provisions of the SPS Chapter, and to determine if an alternative measure achieves Mexico's ALOP.

**c) Whether an alternative measure is significantly less trade restrictive**

140. Canada considers that a ban is the most trade restrictive measure possible. In the context of the SPS Agreement, WTO panels and the Appellate Body have found that any measure imposing conditions upon importation, even if stringent, would still be significantly less restrictive to trade than an outright prohibition.<sup>171</sup>

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<sup>169</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.221. The Appellate Body has provided additional guidance on how to identify a Member's ALOP in: Appellate Body Reports, *India – Agricultural Products*, para. 5.226; and *Australia – Salmon*, paras. 203-204, 207. See also, Panel Reports, *US – Animals*, paras.7.377-7.381; and *India – Agricultural Products*, paras. 7.583-7.586.

<sup>170</sup> Initial written submission of the United Mexican States, para. 346. In paragraph 349 of its submission, Mexico asserts that “different ALOPs for different SPS purposes cannot be examined in isolation from each other”. Mexico appears to argue that its zero-risk ALOP for the protection of human health from food safety risks can also contribute to the protection of native corn. However, each of Mexico's measure should be proportionate to the level of risk the measure allegedly protects against, and achieve Mexico's relevant ALOP for that particular risk. Thus, for example, the Panel should conclude whether the Tortilla Corn Ban is more trade restrictive than required to achieve Mexico's ALOP in relation to risks to human health, and separately conclude whether the Tortilla Corn Ban is more trade restrictive than required to achieve Mexico's ALOP in relation to risks to its native corn.

<sup>171</sup> Panel Reports, *Russia – Pigs (EU)*, para. 7.1236; *Australia – Salmon*, para. 8.182; and *India – Agricultural Products*, para. 7.590.

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141. In the present case, Canada agrees with the United States that “there is no credible scientific evidence establishing any health risks posed by consumption of GM corn in dough and tortillas”.<sup>172</sup> As such, because there is no scientifically verified risk to protect against,<sup>173</sup> it also appears that Mexico's measures are not proportionate to the risk and would be more trade restrictive than required to achieve any level of protection Mexico has determined to be appropriate. Mexico has also not identified any objective scientific evidence establishing any health risks posed by the consumption of GM corn in food or feed, generally.

**d) Application of Article 9.6.10 to SPS Measures without an identified risk**

142. The Appellate Body has stated that if a risk assessment concludes that there is “no ascertainable risk” then “no SPS measure can be taken”.<sup>174</sup> Similarly, the Appellate Body has also stated that “there may be situations where there is no pertinent scientific information available indicating a risk such that an SPS measure would be unwarranted even on a provisional basis”.<sup>175</sup>

143. The underlying reasoning behind these statements is that, where a Party has not identified a risk, it is not entitled to take measures to act against what can only be described as “theoretical uncertainty”.<sup>176</sup> Put differently, SPS measures can only be taken to protect against ascertainable risks.

144. Canada considers that the same reasoning should apply in a scenario where a Party has not identified whether a hazard, nutritional or other safety concern is present, or evaluated evidence to determine if an organism is a pest and has the potential to be injurious to the environment. In the absence of an ascertainable risk, no SPS measure should be taken as there is no risk against which to react. To allow otherwise would enable the Parties to introduce SPS measures protecting against mere theoretical uncertainty, undermining the essential thrust of the disciplines of the SPS Chapter.

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<sup>172</sup> Initial written submission of the United States of America, para. 188.

<sup>173</sup> Mexico has not identified a science-based risk associated with GM corn, especially considering that authorized GM corn is as safe as its conventional counterpart.

<sup>174</sup> Appellate Body Report, *Canada – Continued Suspension*, para. 531.

<sup>175</sup> *Ibid*, para. 681 (emphasis added).

<sup>176</sup> *Ibid*, para. 569.

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145. In the terms of Article 9.6.10, this is relevant when a panel considers whether an alternative measure would meet the respondent's ALOP. Irrespective of what level of protection the regulating Party establishes, if that Party introduces an SPS measure to protect against mere theoretical uncertainty without any scientific basis, that SPS measure will be significantly more trade restrictive than necessary. In this case, the clear alternative measure, as described above, would be to return to a pre-market review and authorization regime.

**F. Mexico misconstrues the nature of Article 9.6.5**

146. Article 9.6.4(c) of CUSMA recognizes the right of each Party to adopt provisional SPS measures where relevant scientific evidence is insufficient. Article 9.6.5 sets out the related obligations that discipline the adoption or maintenance of those provisional measures. In this way, Article 9.6.5 is similar to Article 5.7 of the SPS Agreement.<sup>177</sup>

147. Mexico alleges that its Substitution Instruction has “not yet been implemented” and that, consequently, it should be viewed by the Panel as a provisional measure within the scope of Article 9.6.5.<sup>178</sup>

148. Canada disagrees with this interpretation. As an overarching matter, Article 9.6.5 is concerned with measures that have been adopted or are being maintained when there is insufficient scientific evidence. Either the Substitution Instruction is a proposed measure that has not been adopted, and is not subject to Article 9.6.5, or it is a measure that must satisfy the requirements of Article 9.6.5. There is no middle ground that permits a Party to disregard the “latter requirements” under the provision, as Mexico claims.<sup>179</sup> Given Mexico's erroneous characterization of this provision, Canada provides its views on the scope of application of Article 9.6.5,

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<sup>177</sup> Article 5.7: In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.

<sup>178</sup> Initial written submission of the United Mexican States, para. 393.

<sup>179</sup> *Ibid*, para. 359.

including the cumulative requirements that a Party must meet for its SPS measures to comply.

**1. Threshold requirement under Article 9.6.5: insufficiency of relevant scientific evidence**

149. The threshold requirement under Article 9.6.5 is whether a provisional measure is being adopted only in a situation when the “relevant scientific evidence is insufficient”. This language prescribes the specific circumstances under which a provisional SPS measure may be adopted.

150. In *Japan – Apples*, the Appellate Body provided guidance on the meaning of “insufficient” that Canada considers relevant in the context of Article 9.6.5. In that dispute, the Appellate Body found that “insufficient scientific evidence” refers to a situation where the available scientific evidence does not allow, in quantitative or qualitative terms, the performance of a risk assessment.<sup>180</sup> In *EC – Approval and Marketing of Biotech Products*, the panel clarified that the (in)sufficiency of the relevant scientific evidence must be assessed at the time the impugned measure was adopted.<sup>181</sup>

151. Therefore, in order to meet this threshold requirement, the available scientific evidence must be “insufficient” to perform a risk assessment, and that it is for this reason that Mexico has adopted the measures without such an assessment. In Canada’s view, this threshold requirement has not been met.

152. As Canada explains above,<sup>182</sup> there is “sufficient scientific evidence” to complete a risk assessment for GM corn, and this scientific evidence was available to Mexico at the time it adopted the Tortilla Corn Ban and Substitution Instruction. As of February 2024, more than 1,300 risk assessments relating to GM corn have been conducted in nearly 40 different jurisdictions around the world. Of those, over 750 risk assessments have been performed in 27 different jurisdictions which focused on the safety of GM corn for direct use as food and feed. The large number of risk

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<sup>180</sup> Appellate Body Report, *Japan – Apples*, para. 179.

<sup>181</sup> Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.3253, cited in Panel Report, *Russia – Pigs (EU)*, para. 7.647.

<sup>182</sup> See above, Section I. See also, Initial written submission of the United States of America, paras. 30-37.



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assessments performed in many locations highlights the significant international familiarity with GM corn for food and feed use, as well as the thoroughly assessed safety of such products.<sup>183</sup> As the United States notes, Mexico's own Academy of Sciences has acknowledged that there is sufficient empirical evidence demonstrating GM food does not damage human health, or negatively impact the environment or biodiversity.<sup>184</sup> There is consequently a large volume of scientific evidence to allow for the performance of a risk assessment.

## 2. Additional requirements under Article 9.6.5

153. In addition to the threshold requirement that there be "insufficient scientific evidence", a Party adopting or maintaining a provisional SPS measure must: (1) seek to obtain the additional information necessary for a more objective assessment of risk, (2) complete a risk assessment after obtaining the requisite information, and (3) review and, if appropriate, revise the provisional measure in light of the risk assessment. The Party must satisfy these three additional requirements within a "reasonable period of time." As the Appellate Body noted in *Canada – Continued Suspension*, the obligation to seek additional information helps to ensure that the "insufficiency" of the scientific evidence is not a perennial state, but rather a transitory one.<sup>185</sup> The provisional measure must last only until the imposing Party procures the additional scientific information necessary to assess the risk objectively.

154. Consequently, even if this Panel were to consider that the relevant scientific evidence is insufficient to conduct a risk assessment, Mexico is still required to: (1) seek to obtain the additional information necessary for a more objective assessment of risk, (2) complete a risk assessment after obtaining the requisite information, and (3) review and, if appropriate, revise the provisional measure in light of the risk assessment. These requirements are cumulative, which means that Mexico must

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<sup>183</sup> These assessments are available online at the Biosafety Clearing-House using the following search parameters: Search criteria: Risk assessments generated by a regulatory process; Parental organism (common name) = Maize, Corn, MAIZE; Scope of the risk assessment = LMOs for direct use as food and LMOs for direct use as feed. [Search | Biosafety Clearing-House \(cbd.int\)](#) (Data retrieved 27 February 2024), Exhibit CAN-7. This search generated 75 results for risk assessments conducted by Mexico for GM corn, for direct use as food and feed. The most recent risk assessment conducted by Mexico is from May 2017; See, Search | Biosafety Clearing-House, Mexico BCH-RA-MX-112639, Risk assessment generated by a regulatory process (accessed 1 March 2024), Exhibit CAN-28. See also, Initial written submission of the United States of America, paras. 30-37, which discusses the proven safety record of biotechnology products.

<sup>184</sup> Initial written submission of the United States of America, para. 122.

<sup>185</sup> Appellate Body Report, *Canada – Continued Suspension*, para. 679.

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satisfy each requirement to comply with the provision. There is nothing in the text or context of Article 9.6.5 that would support the conclusion that a Party can simply disregard certain requirements as “not applicable”.<sup>186</sup> Furthermore, Mexico must satisfy each of these requirements within a “reasonable period of time”.

**a) “Reasonable period of time”**

155. In the context of Article 5.7 of the SPS Agreement, WTO panels and the Appellate Body have observed that what constitutes a reasonable period of time must be established on a case-by-case basis. Whether the period of time is reasonable will depend on: (1) the difficulty of obtaining the additional necessary information, and (2) the particular characteristics of the provisional SPS measure.<sup>187</sup> Canada would also draw the Panel’s attention to the ordinary meaning of the phrase “reasonable period of time”, which is as “quickly as legally possible”,<sup>188</sup> or without unwarranted, excessive, disproportionate, or unjustifiable delay.<sup>189</sup> Given that Mexico has not provided any evidence that it has conducted a risk assessment for its Substitution Instruction,<sup>190</sup> or reviewed its measures more than a year after adopting them, it would appear that it has not satisfied any of the three cumulative requirements under Article 9.6.5, or the obligation to do so within a reasonable period of time.

**G. Mexico’s measures do not appear to fall within the scope of the CUSMA general exceptions**

156. Mexico seeks to justify its measures under Article XX(a) and (g) of the GATT 1994, which are incorporated into CUSMA under Article 32.1.<sup>191</sup> Article XX(a) allows a Party to justify measures that would otherwise be inconsistent with the SPS Chapter on the basis that they are “necessary” for the protection of public morals.

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<sup>186</sup> Initial written submission of the United Mexican States, para. 359.

<sup>187</sup> Appellate Body Report, *Japan – Agricultural Products II*, para. 93. The panel in *EC – Approval and Marketing of Biotech Products* interpreted the term “reasonable period of time” in Article 5.7 in a manner similar to the term “undue delay” in Annex C(1)(a); Panel Reports, *EC – Approval and Marketing of Biotech Products*, paras. 7.1495-7.1497 (concerning Annex C(1)(a)), para. 7.3245 (concerning Article 5.7).

<sup>188</sup> Panel Report, *US – Animals*, para. 7.301.

<sup>189</sup> Appellate Body Report, *Australia – Apples*, para. 437.

<sup>190</sup> See above, Section II.C, where Canada’s discussion of the document Mexico characterizes as a “risk assessment”.

<sup>191</sup> CUSMA Article 32.1.1 provides that: “[f]or the purposes of [...] Chapter 9 (Sanitary and Phytosanitary Measures) [...] Article XX of the GATT 1994 and its interpretative notes are incorporated into and made part of this Agreement, *mutatis mutandis*.”

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Article XX(g) allows a Party to justify measures relating to the conservation of exhaustible natural resources.

157. In this section, Canada provides its views on the interpretation of the general exceptions under Article XX(a) and (g) and explains the conditions that must be met to justify an inconsistent measure under those general exceptions. Canada also sets out considerations that it sees as relevant for the Panel's analysis.

### **1. Article XX(a): Necessary to protect public morals**

158. Article XX(a) allows a Party to justify otherwise inconsistent measures on the basis that they are "necessary" for the protection of public morals.

159. It is well established that whether a measure is provisionally justified under one of the Article XX paragraphs involves an examination of the degree of connection or relationship between the measure at issue and the legitimate interest or policy to be promoted or realized.<sup>192</sup> A Party invoking Article XX(a) must demonstrate the following elements to justify its measure:

1. the measure concerns a "public morals" objective within the meaning of GATT Article XX(a);
2. the measure is designed to protect that objective; and
3. the measure is "necessary" to protect public morals.<sup>193</sup>

160. First, as Mexico notes, the term "public morals" refers to standards of right or wrong conduct.<sup>194</sup> A "public moral" may vary in content from Party to Party, and a Party should be given some scope to define and apply it for themselves – including how to characterize the public moral in an Article XX(a) defence.<sup>195</sup> However, Canada stresses that a panel is not bound by a Party's articulation but should make an "objective and independent assessment" of all the evidence before it.<sup>196</sup>

161. The second step in the analysis is whether the measure is "designed" to protect public morals. A measure is "designed" to protect public morals if it is "not incapable" of protecting the public moral, such that there is a relationship between

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<sup>192</sup> See, Appellate Body Report, *US – Gasoline*, p. 18.

<sup>193</sup> Panel Report, *US – Tariff Measures (China)*, paras. 7.110, 7.112. See also, Appellate Body Report, *Colombia – Textiles*, para. 5.67.

<sup>194</sup> Initial written submission of the United Mexican States, paras. 493-500.

<sup>195</sup> Panel Report, *US – Gambling*, paras. 6.461, 6.465.

<sup>196</sup> Panel Report, *US – Tariff Measures (China)*, para. 7.177.

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the two.<sup>197</sup> The examination of whether a measure is “designed” to protect public morals may involve scrutinizing a range of evidence and considerations related to the measure at issue, including its text, the measure’s legislative history, the measure’s objective, and other evidence regarding its content, structure, and expected operation.<sup>198</sup>

162. The third step in the analysis is whether the measure is “necessary” to protect the identified public moral(s). In the WTO context, the Appellate Body has considered three factors to determine whether a measure is “necessary” in this context:

1. the relative importance of the interests or values furthered by the challenged measure;
2. the degree to which the measure contributes to that objective; and,
3. the relative trade-restrictiveness of the measure.<sup>199</sup>

163. These factors are “weighed and balanced”.<sup>200</sup> In most cases, a panel must also compare the challenged measure with possible alternatives identified by the complainant.<sup>201</sup> In order for the measure to be found “not necessary”, the alternative must be less trade-restrictive, make at least an equivalent contribution to the objective, and must be reasonably available to the country defending the measure.<sup>202</sup>

164. With respect to the first factor, Canada invites the Panel to examine critically Mexico’s claim that the objectives of its measures are fundamental questions of right and wrong in Mexican society that are the subject of public moral debate.<sup>203</sup> As the Party invoking the exception, it is Mexico who bears the burden of demonstrating that its measures fall within the scope of that exception. Yet Mexico adduces no evidence to support its characterization of the measures beyond citing a variety of

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<sup>197</sup> Appellate Body Report, *Colombia – Textiles*, para. 5.68.

<sup>198</sup> *Ibid*, para. 5.80. While it is helpful if the measure expressly refers to a public moral, this is not required. See, Appellate Body Report, *Colombia – Textiles*, para. 5.69.

<sup>199</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.169; *Korea – Various Measures on Beef*, para. 164; *US – Gambling*; and *Brazil – Retreaded Tyres*, para. 182.

<sup>200</sup> *Ibid*.

<sup>201</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.169; *US – Tuna II (Mexico)*, para. 321; and *US – Gambling*, para. 307.

<sup>202</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156.

<sup>203</sup> Initial written submission of the United Mexican States, para. 499. Mexico refers to the preservation of food sufficiency, protecting the gastronomic heritage associated with corn, and supporting rural and indigenous communities. See generally, Panel Reports, *EC – Seals*, paras. 7.383-7.398.

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domestic and international legal instruments that it claims reflect “principles of public morality”.<sup>204</sup> Additionally, it is notable that until 2018, Mexico had regularly assessed and approved GM corn varieties for import and sale on the Mexican market.

165. With respect to the second factor, “a panel's duty is to assess, in a qualitative or quantitative manner, the extent of the measure’s contribution to the end pursued, rather than merely ascertaining whether or not the measure makes any contribution”.<sup>205</sup> Canada notes that Mexico’s measures only apply to GM corn used in dough and tortillas, or industrial use for human consumption, despite acknowledging that corn is used in “an enormous number of traditional and culinary preparations”.<sup>206</sup> If, for example, protecting the gastronomic heritage associated with corn is a moral value in Mexico, Canada questions the extent of the contribution to the Decree’s claimed objectives if GM corn can still be used in any other traditional culinary preparation. To satisfy the second factor, there must be a genuine relationship of ends and means between the objective pursued and the measure at issue.<sup>207</sup> Canada invites the Panel to consider whether such a genuine relationship exists in this case.

166. With respect to the third factor, the Appellate Body in *Colombia – Textiles* explained that “a panel must seek to assess the degree of a measure's trade-restrictiveness, rather than merely ascertaining whether or not the measure involves some restriction on trade”.<sup>208</sup> The examination of a measure's trade-restrictiveness may be done in a qualitative or quantitative manner.<sup>209</sup>

167. Taken as a whole, Mexico appears to have adopted a highly trade restrictive measure that only makes a limited contribution, if any, to the protection of the public morals it claims are at issue, while adducing little evidence to confirm that this is a moral value widely shared across Mexican society.

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<sup>204</sup> Initial written submission of the United Mexican States, para. 495.

<sup>205</sup> See, Appellate Body Report, *Argentina – Financial Services*, para. 6.234 referred to by the Appellate Body in *Colombia – Textiles*, para. 5.72.

<sup>206</sup> Initial written submission of the United Mexican States, para. 68.

<sup>207</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

<sup>208</sup> Appellate Body Report, *Colombia – Textiles*, paras. 5.73, 5.104.

<sup>209</sup> *Ibid*, para. 5.73.

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## 2. Article XX(g): relating to the conservation of exhaustible natural resources

168. Mexico also seeks to provisionally justify its measures under Article XX(g) on the basis that they relate to the conservation of “Mexico’s native varieties and landraces of corn and maize, including their biodiversity and genetic integrity”.<sup>210</sup> Mexico also alleges that these measures are made effective in conjunction with domestic restrictions.<sup>211</sup>

169. To be provisionally justified under Article XX(g), a measure must satisfy three main requirements:

1. The measure must relate to the conservation of “an exhaustible nature resource”;
2. There must be a close relationship of ends and means between the measure and the conservation objective (relating to); and,
3. The measure must be made effective in conjunction with restrictions on domestic production or consumption.<sup>212</sup>

170. In assessing Mexico’s defence under Article XX(g), the Panel should consider whether: (1) Mexico’s native corn is an “exhaustible natural resource,” (2) the measures at issue “relate” to the conservation of that resource, and (3) the measures are “made effective in conjunction with restrictions on domestic production or consumption”.

### a) Native corn must be an “exhaustible natural resource”

171. The Appellate Body has previously interpreted the term “natural resource” to be capable of including both “living” and “renewable” natural resources.<sup>213</sup> When negotiating CUSMA, the Parties explicitly recognized and incorporated that interpretation into the scope of application of Article XX(g) under CUSMA.<sup>214</sup>

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<sup>210</sup> Initial written submission of the United Mexican States, para. 506.

<sup>211</sup> Mexico appears to argue that both the measures at issue (the Tortilla Corn Ban and the Substitution Instruction) are provisionally justified under Article XX(g).

<sup>212</sup> Panel Reports, *China – Raw Materials*, para. 7.361. See also, Appellate Body Reports, *China – Rare Earths*, para. 5.88.

<sup>213</sup> Appellate Body Report, *US – Shrimp*, para. 128.

<sup>214</sup> Article 32.1.3 provides that: “[t]he Parties understand [...] that Article XX(g) of the GATT 1994 applies to measures relating to the conservation of living and non-living exhaustible natural resources”.

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172. The term “exhaustible” is not defined in CUSMA. As Mexico notes, there is also no internationally agreed upon definition of “exhaustible natural resources”.<sup>215</sup> The use of the adjective “exhaustible” sets a limit on the scope of “natural resources” that may fall under Article XX(g). The qualifier “exhaustible” indicates the intention of the drafters to limit the scope of the provision, such that it would not apply to all natural resources, but only those capable of being exhausted.<sup>216</sup> Therefore, in the absence of a definition, and pursuant to Article 31.13(4), the Panel shall interpret “exhaustible” in accordance with the customary rules of interpretation of public international law, as reflected in Articles 31 and 32 of the VCLT.<sup>217</sup>

173. The dictionary definition of the term “exhaustible” is “that admits of being exhausted”.<sup>218</sup> “Exhausted”, in turn, is defined as “consumed, used up, expended” or “[d]eprived of essential properties [...] completely impoverished”.<sup>219</sup> These definitions accord with the meaning of “exhaustible” as interpreted by WTO panels and the Appellate Body.<sup>220</sup>

174. If the Panel finds that Mexico’s native corn is an exhaustible natural resource, it must then consider whether the Substitution Instruction is a measure “relating” to the conservation of that resource and separately, whether the Tortilla Corn Ban is a measure “relating” to the conservation of that resource.

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<sup>215</sup> Initial written submission of the United Mexican States, para. 505; see also Panel Report, *China – Rare Earths*, para. 7.248.

<sup>216</sup> Panel Reports, *China – Rare Earths*, para. 7.249: “An unduly broad interpretation of the term “natural resource” would not, in the Panel’s opinion, respect this intention to limit the scope of the provision, but would instead deprive the qualifier ‘exhaustible natural’ of meaning, contrary to the principle of effective treaty interpretation.”

<sup>217</sup> See above, Section II.C(1).

<sup>218</sup> “Exhaustible”, *Oxford English Dictionary*, [https://www.oed.com/dictionary/exhaustible\\_adj](https://www.oed.com/dictionary/exhaustible_adj) (accessed 23 February 2024), Exhibit CAN-29.

<sup>219</sup> “Exhausted”, *Oxford English Dictionary*, [https://www.oed.com/dictionary/exhausted\\_adj](https://www.oed.com/dictionary/exhausted_adj) (accessed 23 February 2024), Exhibit CAN-30.

<sup>220</sup> See, e.g., Panel Report, *US – Gasoline*, para. 6.37, where the panel considered whether a resource (clean air) could be “depleted”. See also, Appellate Body Report, *US – Shrimp*, para. 132, where the Appellate Body found that the exhaustibility of sea turtles would be very difficult to controvert due to the international recognition that they were a species threatened with “extinction”. See Appellate Body Report, *US – Shrimp*, para. 128, where the Appellate Body also stated that living resources are just as “finite” as non-living resources. Thus far, policies aimed at the conservation of tuna (GATT Panel Report, *US – Tuna (Mexico)*), salmon and herring (GATT Panel Report, *Canada – Herring and Salmon*), dolphins (Panel Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*), turtles (Appellate Body Report, *US – Shrimp*), and clean air (Panel Report, *US – Gasoline*) have been found provisionally justified under Article XX(g).

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**b) There must be a close relationship between the measure and the conservation of Mexico's native corn**

175. For a measure to “relate to” the conservation of exhaustible natural resources, that measure must have a “substantial relationship”<sup>221</sup> to the conservation of the exhaustible natural resource at issue. This means that the measure should have a “close and genuine relationship of ends and means to the conservation of exhaustible natural resources”<sup>222</sup> rather than a merely “incidental” or “inadvertent” relationship.<sup>223</sup> The measure must also be sufficiently tailored to its policy objective, and not “disproportionality wide in its scope and reach”.<sup>224</sup> A panel could ascertain whether that substantial relationship exists, for example, by considering the “predictable effects” of that measure.<sup>225</sup>

176. Mexico argues that its measures are aimed at conserving its native corn, including its “biodiversity and genetic integrity”.<sup>226</sup> Mexico asserts that its native corn is exhaustible and “under threat of loss and possibly extinction” due to “transgenic contamination”.<sup>227</sup>

177. To determine whether Mexico's measures “relate” to the conservation of native corn, the Panel should first consider whether the introduction of a particular trait to native corn, without any regard for the impact of that trait, poses a risk of

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<sup>221</sup> Appellate Body Report, *US – Shrimp*, para. 136.  
<sup>222</sup> *Ibid.*, and *China – Raw Materials*, para. 355 as referenced by Appellate Body Reports, *China – Rare Earths*, para. 5.94.

<sup>223</sup> Appellate Body Report, *US – Gasoline*, p. 19.

<sup>224</sup> Appellate Body Report, *US – Shrimp*, para. 141.

<sup>225</sup> Appellate Body Report, *US – Gasoline*, p. 21.

<sup>226</sup> Initial written submission of the United Mexican States, paras. 477-478. Mexico asserts that this biodiversity encompasses the natural genetics and phenotypic diversity of various unique and cultivated varieties of native corn in Mexico.

<sup>227</sup> Initial written submission of the United Mexican States, para. 507.



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“exhausting” native corn.<sup>228</sup> It is not sufficient to merely identify a risk of gene flow from GM corn to Mexico’s native corn.<sup>229</sup>

178. Second, the objective<sup>230</sup> of the Substitution Instruction would appear to be the elimination of the use of GM corn for food and feed without regard to how different practices or uses of GM corn may impact the conservation of Mexico’s native corn.<sup>231</sup> In this regard, the Appellate Body cautioned against “simple, blanket prohibitions” that are employed without regard for how different circumstances and practices may affect the conservation of an exhaustible natural resource.<sup>232</sup> Such measures would appear to lack the required close and rational relationship to the conservation of the exhaustible natural resource at issue.

179. Third, the Panel should also consider whether the Substitution Instruction is only “merely incidentally or inadvertently aimed” at conserving Mexico’s native corn.<sup>233</sup> If Mexico establishes that GM corn imported for food and feed purposes poses a potential risk of exhausting Mexico’s native corn, the Panel should still

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<sup>228</sup> Harmonisation of Regulatory Oversight in Biotechnology: Safety Assessment of Transgenic Organisms in the Environment, Volume 10: OECD Consensus Document on Environmental Considerations for the Release of Transgenic Plants, Harmonisation of Regulatory Oversight in Biotechnology (OECD Publishing: Paris, 2023), Exhibit CAN-27 Annex B: Vertical Gene Flow”. This Annex explains that vertical gene flow (the transfer of genetic material between genetically distinct populations) is not necessarily an “adverse effect”. Canada notes that the identification of potential adverse effects resulting from vertical gene flow should be informed by the characteristics and the traits of the GM plant, and of the potential receiving environment(s) including the characteristics of the recipient plant, in this case native corn. Canada also notes the European Commission’s similar conclusion in *A decade of EU-funded GMO research* (2001-2010), Exhibit CAN-4, p. 16: “[t]he main conclusion to be drawn from the efforts of more than 130 research projects, covering a period of more than 25 years of research, and involving more than 500 independent research groups, is that biotechnology, and in particular GMOs, are not *per se* more risky than e.g. conventional plant breeding technologies.”

<sup>229</sup> In this regard, Canada notes Exhibit MEX-016 which states that “it is possible for landraces to keep their distinguishing morphological characteristics despite extensive gene flow”, and Exhibit MEX-007 EN, which states that “[l]ikely there is no such thing as ‘pure’ corn, in the sense that all individuals composing such a breed are genetically homogenous”. See also, Harmonisation of Regulatory Oversight in Biotechnology: Safety Assessment of Transgenic Organisms in the Environment, Volume 10: OECD Consensus Document on Environmental Considerations for the Release of Transgenic Plants, Harmonisation of Regulatory Oversight in Biotechnology (OECD Publishing: Paris, 2023), Exhibit CAN-27, “vertical gene flow in and of itself is not an adverse effect”.

<sup>230</sup> The implication of Article Seven of the Presidential Decree is that “authorizations of genetically modified corn for animal feed and industrial use for human consumption” may only be issued until the “gradual substitution” is “achieved”. After the substitution is achieved, no further authorizations may be issued.

<sup>231</sup> For example, the risk asserted by Mexico in using GM corn as animal feed may vary depending on how the animals are fed, which may also be different than the risk presented by the use of GM corn in an industrial setting for human consumption. The preamble of the Presidential Decree also notes that GM corn may continue to be used in the manufacture of other products, however it is not clear how that use may present a different risk to Mexico’s native corn than in the context of industrial use for human consumption.

<sup>232</sup> Appellate Body Report, *US – Shrimp*, para. 141.

<sup>233</sup> Appellate Body Report, *China – Rare Earths*, para. 5.90.

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consider whether the measures are sufficiently tailored to that risk. If the Substitution Instruction is “disproportionately wide in its scope and reach”<sup>234</sup> in relation to the conservation of Mexico’s native corn, that would suggest that the Substitution Instruction lacks this connection.

180. Finally, if the Panel concludes that Mexico has not established that the importation of GM corn for food and feed purposes poses a potential risk of exhausting Mexico’s native corn, it would appear that the Substitution Instruction does not have the required substantial relationship to the conservation of Mexico’s native corn.<sup>235</sup> This is because if there is no established risk, then the Substitution Instruction could not possibly have a “positive effect”<sup>236</sup> on the conservation of Mexico’s native corn – as it is not protecting against a risk. The Appellate Body has noted that such a situation would indicate that the measure was “very probably [...] not designed as a conservation regulation to begin with.”<sup>237</sup>

181. In relation to the Tortilla Corn Ban, Mexico claims that this measure protects against the exhaustion of its native corn because GM corn used to create dough or tortillas could potentially be diverted for “clandestine and illegal cultivation”.<sup>238</sup> The Panel should consider carefully whether this relationship is a “close and genuine” one, as required by Article XX(g), and in light of the considerations identified above.

**c) The measures must be “made effective in conjunction with restrictions on domestic production or consumption”**

182. Article XX (g) requires that measures operate together with restrictions on domestic production or consumption of exhaustible natural resources.<sup>239</sup> In other words, Mexico’s measure must not only impose restrictions on the imported or exported products, but restrictions must also exist on the domestic products.<sup>240</sup> This

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<sup>234</sup> Appellate Body Report, *US – Shrimp*, para. 141.

<sup>235</sup> Appellate Body Report, *US – Gasoline*, p. 19.

<sup>236</sup> *Ibid.*, p. 22.

<sup>237</sup> *Ibid.*

<sup>238</sup> Initial written submission of the United Mexican States, para. 509.

<sup>239</sup> Appellate Body Reports, *China – Raw Materials*, para. 356. The Appellate Body has explained that to fulfill this requirement, the disputed measure must “work together with restrictions on domestic production or consumption”.

<sup>240</sup> Appellate Body Report, *US – Gasoline*, p. 20. Appellate Body Reports, *China – Rare Earths*, para. 5.92.

third element is essentially a “requirement of even-handedness in the imposition of restrictions”.<sup>241</sup>

183. Under this element, the Panel should consider whether Mexico’s restrictions on international trade work together with similar restrictions on domestic production or consumption. If Mexico imposes restrictions on international trade in the pursuit of conservation, those must be reinforced and complemented by restrictions on domestic production or consumption of native corn to make them effective.<sup>242</sup>

### **3. Mexico’s measures must meet the requirements of the chapeau**

184. If the Panel finds that Mexico’s measures are provisionally justified under Article XX(a) or XX(g), it must then consider whether those measures are applied in a manner that satisfies the requirements of the chapeau to Article XX. The purpose of the chapeau is to protect against abusive or illegitimate uses of the general exceptions.<sup>243</sup>

185. The chapeau has two main requirements, a measure cannot be applied in a manner that constitutes: (a) arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or (b) a disguised restriction on international trade.

#### **a) Arbitrary or unjustifiable discrimination**

186. To assess whether a measure is consistent with the first element of the chapeau, a panel’s task is to determine whether the measure is applied in a manner that constitutes discrimination, whether that discrimination is arbitrary or unjustifiable, and whether the same relevant conditions prevail in the territory of the countries compared.<sup>244</sup>

187. A determination of whether discrimination is “arbitrary or unjustifiable” involves consideration of the “cause” or “rationale” put forward to explain the discrimination in question, and whether there is a “rational connection” between the

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<sup>241</sup> Appellate Body Report, *US – Gasoline*, p. 21.

<sup>242</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.132.

<sup>243</sup> Appellate Body Report, *US – Gasoline*, p. 25.

<sup>244</sup> Appellate Body Report, *US – Shrimp*, para. 150.

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reasons given for the discriminatory treatment and the objective of the measure. The Appellate Body has explained that:<sup>245</sup>

“[o]ne of the most important factors in the assessment of arbitrary or unjustifiable discrimination is the question of whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX”.

188. A discriminatory measure that has no connection to, or goes against, the provisionally justifying objective should be found to be arbitrary or unjustifiable.

189. To determine whether Mexico’s measures are applied in a manner that constitutes arbitrary or unjustifiable discrimination, the Panel should consider the objectives of the measures at issue. The Panel should also consider whether there is a rational connection between the discrimination and the objective of the measure, whether the measures are calibrated to the alleged risk posed by GM corn, and whether Mexico treats products that present the same risk differently.

190. Mexico raises concerns about GM corn that has been modified to be resistant to herbicides. However, traits conferring herbicide tolerance are not exclusive to GM plants nor is it true that all GM varieties contain herbicide tolerant traits. Herbicide tolerant traits can also be present in modern non-GM varieties. Therefore, Canada would reiterate the view that it is not the process of product development that determines risk, but rather the characteristics present in the final product. Traits conferring herbicide tolerance are also unlikely to pose a selective advantage to landraces or become more frequent in the landrace population over time, due to the absence of selection pressure (*i.e.*, if it is not favoured by environmental demands because these herbicides are not used).<sup>246</sup>

191. Gene flow between any corn varieties is a naturally occurring phenomenon.<sup>247</sup> In this regard, the Panel should consider whether Mexico grows

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<sup>245</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.306 (referring to Appellate Body Reports, *US – Shrimp*, para. 165 and *Brazil – Retreaded Tyres*, paras. 227-228, 232).

<sup>246</sup> Mallory-Smith, C. and Zapiola, M. (2008), *Gene flow from glyphosate-resistant crops*. Pest. Manag. Sci., 64: 428-440, Exhibit CAN-31.

<sup>247</sup> Harmonisation of Regulatory Oversight in Biotechnology: Safety Assessment of Transgenic Organisms in the Environment, Volume 10: OECD Consensus Document on Environmental Considerations

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modern non-GM corn hybrids that are different than its own native corn. For example, with respect to Mexico's defence under Article XX(g), Canada notes Mexico's statement that there are 64 breeds of corn in Mexico, of which 59 are native.<sup>248</sup> If modern corn hybrids are bred in Mexico, a comparative safety assessment should be used to determine whether GM corn poses a hazard to the genetic integrity of Mexico's native corn that is greater than that posed by modern non-GM corn hybrids.

192. Finally, the Appellate Body made it clear that the respondent bears the burden of proof if it considers that the same relevant conditions do not prevail between the territory of the countries compared.<sup>249</sup>

193. The Appellate Body in *EC – Seal Products* found that the "conditions" to be examined are those that are "relevant" in light of the "specific character of the measure at issue and the circumstances of a particular case", including which subparagraph the measure was provisionally justified under, the policy objective of that measure, and the substantive obligation that was violated.<sup>250</sup>

194. In this regard, Mexico has alleged that, even if there were some form of discrimination, the same conditions do not prevail between Mexico and the United States "with respect to the production and consumption of corn".<sup>251</sup> The Panel must therefore consider whether the conditions of production and consumption of corn in each country are "relevant" conditions in light of the measures at issue and the circumstances of this case.

### **b) Disguised restriction on international trade**

195. The second element of the chapeau requires that measures are not applied in a manner that constitutes a disguised restriction on international trade. A measure

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for the Release of Transgenic Plants, Harmonisation of Regulatory Oversight in Biotechnology (OECD Publishing: Paris, 2023), Exhibit CAN-27.

<sup>248</sup> Initial written submission of the United Mexican States, para. 15. Canada notes that Mexico does not provide information on the proportion of production those groups represent within Mexico.

<sup>249</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.301.

<sup>250</sup> *Ibid*, paras. 5.299-5.301.

<sup>251</sup> Initial written submission of the United Mexican States, paras. 521-522.

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may constitute a disguised restriction when, for example, it is implemented as a means to disguise or conceal trade restrictive objectives.<sup>252</sup>

196. The Appellate Body has explained that protectionist measures can often be discerned from the design, architecture, and revealing structure of the measure.<sup>253</sup> The Appellate Body in *US – Gasoline* also found that the disguised restriction element may be read together with the arbitrary and unjustified discrimination element, and includes “disguised discrimination in international trade”.<sup>254</sup>

197. In determining whether a measure constitutes a disguised restriction on trade, WTO panels and the Appellate Body have engaged in a case-by-case analysis, considering “warning signals” when interpreting the meaning of “disguised restriction on trade” in the SPS Agreement.<sup>255</sup> In the context of SPS measures, the absence of a risk assessment or an insufficient risk assessment also indicate that a measure “is not really concerned with the protection of human, animal or plant life or health but is instead a trade restrictive measure taken in the guise of an SPS measure”.<sup>256</sup> Likewise, differing treatment between domestic and foreign products in relation to a certain risk also suggests that the measure is not aimed at one of the purposes under the SPS Agreement but rather is a disguised restriction on international trade.<sup>257</sup> These warning signals are relevant for the purpose of determining if a measure constitute a “disguised restriction on trade” in the CUSMA SPS context. This is because the wording and substance of the relevant obligations are the same.<sup>258</sup>

198. As described above, Mexico alleges that gene flow from transgenic corn, imported for food or feed use, poses a risk to Mexico’s native corn. However, Mexico has not identified any potential adverse effects on native corn resulting from vertical gene flow from GM corn imported for feed or food use. In the absence of a risk assessment, the Panel should look at the purpose of Mexico’s measures.

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<sup>252</sup> Appellate Body Report, *US – Gasoline*, p. 25.

<sup>253</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 29.

<sup>254</sup> Appellate Body Report, *US – Gasoline*, p. 25.

<sup>255</sup> Appellate Body Reports, *EC – Hormones (Canada)*, paras. 215, 240 and *Australia – Salmon*, paras. 159-162.

<sup>256</sup> Appellate Body Report, *Australia – Salmon*, para 166. See also, Panel Report, *Russia – Pigs (EU)*, paras. 7.1390, 7.1391.

<sup>257</sup> *Ibid.*

<sup>258</sup> Article 9.6.6(e) of CUSMA, “are not applied in a manner that constitutes a disguised restriction on trade between the Parties”.

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199. In this regard, Canada notes that one of the purposes of the Substitution Instruction is to increase reliance on domestic corn.<sup>259</sup> The fact that the Substitution Instruction appears to provide an advantage to domestic producers of corn, and seeks to increase Mexico's consumption of domestic corn, should inform the Panel's findings as to whether the purpose of Mexico's measures are to conserve Mexico's native corn from exhaustion or to protect the public morals it claims are at issue.

200. Further, Mexico explicitly affirms that the Tortilla Corn Ban "will play an important role in safeguarding both local production and gastronomic heritage from being overtaken by the preferred U.S. production methodology".<sup>260</sup> Mexico also affirms that it "serves to discourage the expanded use of GM corn for direct consumption in a manner that would displace the multiple varieties of native corn grown by Mexican farmers".<sup>261</sup> These statements should also inform the Panel's findings as to whether Mexico's measures constitute a disguised restriction on trade.

201. Canada invites the Panel to consider carefully whether Mexico has met the requirements of the chapeau, especially in light of the factors identified above.

#### **4. Mexico misconstrues the scope of Article 32.5**

202. Article 32.5 of CUSMA provides that the Agreement does not prevent a Party from adopting or maintaining a measure it deems necessary to fulfill its legal obligations to Indigenous Peoples. This exception is subject to the requirement that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods, services, and investment.

203. Mexico argues that its measures are justified as they are necessary to fulfill its legal obligations to Indigenous Peoples under both domestic and international legal instruments.<sup>262</sup> Mexico claims that the production, commercialization and

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<sup>259</sup> 2023 Corn Decree, Exhibit USA-3, Art. 8.

<sup>260</sup> Initial written submission of the United Mexican States, para. 499 (emphasis added).

<sup>261</sup> *Ibid*, para. 497.

<sup>262</sup> *Ibid*, para. 537. These obligations include the following: "protection of native corn; protection of the milpa; protection of biocultural wealth, referring to the value of the unique biodiversity of Mexico's native varieties and landraces of native corn and maize, including to indigenous people; and protection of peasant communities (which, under Mexico's Constitution, are communities that are part of indigenous peoples)". See *also*, Initial Written Submission of the United Mexican States, para. 541: Mexico further

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consumption of its native corn is a “cultural manifestation” under the *General Law of Culture and Cultural Rights* that is “inevitably linked to the indigenous peoples, peasants and farmers of Mexico”, and any act that threatens or affects indigenous peoples and Afro-Mexican peoples’ cultural heritage is “prohibited”.<sup>263</sup>

204. In this section, Canada addresses the legal standard that must be satisfied to demonstrate that a measure is justified under Article 32.5.

**a) Two-tier test**

205. Given that Article 32.5 and Article XX of the GATT 1994, as incorporated in Article 32.1, have a number of elements in common and share a similar structure, Canada is of the view that it would be logical to apply Article 32.5 utilising the same two-tier test developed by the Appellate Body for Article XX.<sup>264</sup> This would involve first examining the measure against the substantive elements of the provision to determine whether it is provisionally justified. Second, if it is found to be provisionally justified, a further examination of the measure, as applied, would follow to determine whether the measure is used as a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

**i) First tier: provisional justification**

206. The text indicates that there are two elements in the first tier of the test under Article 32.5. Specifically, to be provisionally justified a measure must: 1) be deemed “necessary” by the Party invoking the exception “to fulfill” its obligations, and 2) those obligations must be “legal obligations to Indigenous Peoples”.

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claims its obligations include to “guarantee the protection, safeguarding and development of the cultural heritage and collective intellectual property of indigenous peoples and communities” and initial Written Submission of the United Mexican States, para. 220. Mexico refers to its constitutional obligation to respect and guarantee the right of indigenous peoples to self-determination, which includes respect for the culture and identity. Mexico indicates that it must establish regulatory provisions for indigenous peoples to “define, preserve, protect, control and develop the elements of their cultural heritage, their knowledge and traditional cultural expressions”.

<sup>263</sup> Initial written submission of the United Mexican States, para. 221.

<sup>264</sup> See, Appellate Body Report, *Indonesia – Import Licensing Regimes*, paras. 5.94-5.99, where the Appellate Body explains the logic under Article XX of the GATT 1994 to follow a two-tier test to determine whether a measure is justified under that provision, starting with the provisional application of the paragraphs, and finishing with the requirements of the chapeau.



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**(a) First element: “it deems” necessary to fulfill**

207. The adjectival clause “it deems” qualifies only the word “necessary”, *i.e.*, the necessity of the measures to fulfill a Party’s legal obligations to Indigenous Peoples. That is, the adjectival clause “it deems” does not extend to the determination of whether the invoking Party has any legal obligation to Indigenous Peoples and what those obligations are. This interpretation is supported by the ordinary meaning of the phrase “it deems necessary to fulfill its legal obligations”, taken in its context and in the light of the object and purpose of Article 32.5.

208. It is clear from the text that the word “it” refers to the Party adopting or maintaining the measure(s) in question. This word precedes the verb “deems”, which means “to judge or think (in a specified way)”.<sup>265</sup> The adjectival clause “it deems” therefore refers to the invoking Party’s own judgment, which cannot be replaced by that of a panel. The phrase “it deems” is immediately followed by the adjective “necessary”. This means that the necessity of the measure to fulfill a Party’s legal obligations to Indigenous Peoples is subject to the invoking Party’s own judgement.

209. The dictionary definition of the term “fulfill” is “satisfy or meet a requirement or condition”.<sup>266</sup> The use of the phrase “to fulfill” in Article 32.5 instead of “that fulfills” indicates that the purpose of the measure must be to fulfill a Party’s legal obligations to Indigenous Peoples. This is consistent with the Appellate Body’s interpretation of the word “to” in adverbial relation with the infinitive verb “protect”.<sup>267</sup> The Appellate Body explained that the word “to” indicates a purpose or intention, and therefore, it establishes a required link between the measure and the protected interest.<sup>268</sup> Consequently, the phrase “to fulfill” in Article 32.5 establishes the required connection between the measures and the purpose or intention. Accordingly, under Article 32.5, a Party must consider that its measures are

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<sup>265</sup> “Deem”, *Oxford English Dictionary*, [https://www.oed.com/dictionary/deem\\_v?tab=meaning\\_and\\_use#7373797](https://www.oed.com/dictionary/deem_v?tab=meaning_and_use#7373797) (accessed 23 February 2024), Exhibit CAN-32.

<sup>266</sup> “Fulfill”, *Oxford English Dictionary*, [https://www.oed.com/dictionary/fulfil\\_v?tab=meaning\\_and\\_use#3525954](https://www.oed.com/dictionary/fulfil_v?tab=meaning_and_use#3525954) (accessed 23 February 2024), Exhibit CAN-33.

<sup>267</sup> Appellate Body Report, *Australia – Apples*, para. 172.

<sup>268</sup> *Ibid.*

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“necessary for” a defined purpose, namely “to fulfill” its legal obligations to Indigenous Peoples.

210. In Canada’s view, this means that the necessity of adopting or maintaining a measure to fulfill a Party’s legal obligations to Indigenous Peoples is self-judging. In other words, this element of the test is subjective and at the discretion of the Party invoking the exception.

211. Importantly, a panel is tasked under Chapter 31 of CUSMA to make an objective assessment of the matter before it.<sup>269</sup> As such, the Panel is required to make an objective assessment of the invoking Party’s subjective determination of the “necessity” of the measure at issue. The subjective standard means that an invoking Party must be accorded a high level of deference by a panel with respect to its consideration of the necessity of the measure. However, to guard against abuse of the provision, the invoking Party must have a good faith belief that its measure is necessary to fulfill the stated purpose and must be able to substantiate that belief.<sup>270</sup> While the threshold required to substantiate a good faith belief should not be unduly high, it must be appropriate to the factual situation and more than a simple assertion that Article 32.5 has been invoked. A complete lack of substantiation would be grounds for finding that this element has not been satisfied and the measure is not provisionally justified under the exception.

**(b) Second element: “its legal obligations to Indigenous Peoples”**

212. In Canada’s view, the second element in the first tier of the test requires that the invoking Party demonstrate that it has legal obligations to Indigenous Peoples. To satisfy this requirement, a Party must demonstrate that those obligations to Indigenous Peoples exist and, as discussed below, are rooted in the law.

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<sup>269</sup> Article 31.13 of CUSMA.

<sup>270</sup> See, Panel Report, *Russia – Traffic in Transit*, para. 7.138. When examining whether a Member has taken its action in good faith in the context of GATT Article XXI, previous WTO panels have looked at whether, for example, the invoking Member has articulated its essential security interests “sufficiently enough to demonstrate their veracity” and demonstrated that the action for which justification was sought met a “minimum requirement of plausibility”. Similarly, Canada considers that, under Article 32.5, the measure invoked by a Party must meet a “minimum requirement of plausibility” in relation to the fulfilment of the legal obligations of a Party.

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213. The possessive pronoun “its” indicates that the legal obligations are those of the Party adopting or maintaining the measure. The term “obligations” is defined as “obliged to do something”.<sup>271</sup> Canada notes that it is a term susceptible of many and varied meanings. It could, depending on the particular context, refer to anything that a “person is bound to do or refrain from doing, whether that duty is imposed by law, contract, promise, social relations, courtesy, kindness, or morality”.<sup>272</sup> However, the term “legal” explicitly qualifies the type of obligations. That term indicates that the obligation must be more than a moral duty to do or refrain from doing something. It must be a legal duty – an obligation imposed under the law.<sup>273</sup> Although, the term “obligation” can reflect a subjective element when it refers to a Party’s perception of being bound to do or forbear from doing an action based on kindness or morality, the use of the qualifier “legal” makes it clear that Article 32.5 is not referring to the perception of a Party, but that it involves the objective existence of an obligation that is required by law.

214. Thus, the ordinary meaning of the term “legal obligations” and textual construction of this provision indicate that the existence of such an obligation is a factual question and is to be determined on an objective basis. Therefore, the determination of whether those obligations are legal obligations to Indigenous Peoples is not self-judging (*i.e.*, subjective, like the first element). The Panel should therefore make an objective assessment of whether the obligations at issue fall within the meaning of the phrase “legal obligations to Indigenous Peoples”.

215. Finally, considering the diversity of Indigenous Peoples, a general definition of “Indigenous Peoples” was not included in CUSMA. In fact, Canada notes that this term is not readily capable of a single and widely accepted definition, as reflected by

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<sup>271</sup> “Obligations”, Black’s Law Dictionary, Eleventh Edition, Exhibit CAN-34, p. 1292.

<sup>272</sup> *Ibid.*

<sup>273</sup> This contrasts with the use of the word “interest”, for example in Article XXI(b) of the GATT, which means “the relation of being involved or concerned as regards potential detriment or (esp.) advantage” or as “[a] thing that is of some importance to a person, company, state”. See, Panel Report, *US – Steel and Aluminium Products (Turkey)*, para. 7.125, fn. 466 referring to the Shorter Oxford English Dictionary, 5th Edition (Oxford University Press, 2003), p. 1400. The Panel in *Russia – Traffic in Transit* explained that an interest in something would depend on the particular perceptions of a Party in question, which can expect to vary with changing circumstances. See, Panel Report, *Russia – Traffic in Transit*, para. 7.131: “The specific interests that are considered directly relevant to the protection of a state from such external or internal threats will depend on the particular situation and perceptions of the state in question, and can be expected to vary with changing circumstances. For these reasons, it is left, in general, to every Member to define what it considers to be its essential security interests”.

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discussions at the international level.<sup>274</sup> While a panel may start with a dictionary definition as a guide to discern the ordinary meaning of the terms of a treaty, previous WTO panels and the Appellate Body have recognized that dictionaries alone are not necessarily capable of resolving complex questions of interpretation.<sup>275</sup> The ordinary meaning of a treaty term may be ascertained only in its context and in light of the object and purpose of the treaty.<sup>276</sup> A dictionary definition in this context is not dispositive of the meaning of “Indigenous Peoples”, in particular because it cannot be used to “identify” Indigenous Peoples in a Party’s territory. Rather, it can only provide a general understanding of the term “Indigenous”. This is because the identification of Indigenous Peoples will vary regionally, and each Indigenous Peoples have unique histories, languages, cultural practices, and spiritual beliefs. Canada considers that identification of Indigenous Peoples should be based on their own self-identification.<sup>277</sup> Canada notes that the use of the plural “Indigenous Peoples” in Article 32.5, instead of the singular “Indigenous People”, indicates that the legal obligations of a Party are those that are owed to Indigenous Peoples collectively, because of their status as such.

216. In this case, Mexico has the burden to articulate its legal obligations to Indigenous Peoples in a manner that is sufficient for the Panel to conclude that those obligations exist and that they are rooted in the law.

217. Mexico refers to various domestic and international legal instruments in support of its claim that its measures are necessary to fulfill its legal obligations to

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<sup>274</sup> See, e.g., *United Nations Declaration on the Rights of Indigenous Peoples* (“UNDRIP”), Exhibit CAN-35, preambular statement, p. 7: “Recognizing that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration”.

<sup>275</sup> Appellate Body Report, *China – Publications and Audiovisual Products*, para. 348; Appellate Body Report, *US – Gambling*, para. 164; see also Appellate Body Report, *EC – Chicken Cuts*, para. 175, where the Appellate Body indicated that the “ordinary meaning of a treaty term must be ascertained according to the particular circumstances of each case. Importantly, the ordinary meaning of a treaty term must be seen in the light of the intention of the parties “as expressed in the words used by them against the light of the surrounding circumstances”.

<sup>276</sup> Appellate Body Report, *China – Publications and Audiovisual Products*, para. 348.

<sup>277</sup> Self-determination is a widely accepted and fundamental principle reflected in, *inter alia*, UNDRIP. UNDRIP refers to the right of indigenous peoples to determine their own identity or membership in accordance with their customs and traditions. See UNDRIP, Article 33 1, which provides: “Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions.” UNDRIP, Exhibit CAN-35, p. 7, Articles 2 and 33.1.

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Indigenous Peoples.<sup>278</sup> Canada notes that some of those instruments appear to relate to the rights of peoples and communities in Mexico more broadly, such as Afro-Mexicans and farmers.<sup>279</sup> Applying the phrase “legal obligations to Indigenous Peoples” as covering obligations of general application owed to all or some Mexican citizens - beyond Indigenous Peoples - would significantly broaden the scope of application of Article 32.5, and lead to a result that is unreasonable. Canada invites the Panel to examine whether those instruments set forth Mexico’s legal obligations to Indigenous Peoples.

218. Accordingly, to be provisionally justified under Article 32.5, the measure at issue must be deemed “necessary” by the Party invoking the exception “to fulfill” its legal obligations to Indigenous Peoples. Those obligations must be owed to Indigenous Peoples collectively, under the law of the invoking Party. The existence of such obligations is a matter to be objectively assessed by the Panel based on the evidence and arguments before it.

**ii) Second tier: “not be used as a means of arbitrary or unjustified discrimination or disguised restriction on trade”**

219. The requirement in Article 32.5 that the measure shall not be used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods, services, and investment is substantively similar to the requirement of the chapeau of GATT Article XX. Both the

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<sup>278</sup> Initial written submission of the United Mexican States, paras. 530, 541-542, 547, 549, fn. 566. Mexico references Articles 1, 2, 4, 73, of the Political Constitution of the United Mexican States, Exhibit MEX-237, Articles 1 & 3 of the Federal Law for the Protection of the Cultural Heritage of Indigenous and Afro-Mexican Peoples and Communities, Exhibit MEX-255, Article 21 of the Pact of San José, Exhibit MEX-357 and Article 2 of the ILO Convention, Exhibit MEX-359. Mexico also references the Inter-American Court of Human Rights judgement in the case of *Case Indigenous Community Yakye Axa Vs. Paraguay*, Exhibit MEX-358. See, Initial written submission of the United Mexican States, paras. 547-548, fn. 568.

<sup>279</sup> Canada notes that some of those instruments appear to relate to the rights of peoples and communities in Mexico, such as Afro-Mexicans and farmers. See, e.g., Federal Law of Protection of the Cultural Heritage of Indigenous and Afro-Mexican Peoples and Communities, Exhibit MEX-255. Article 1 provides that “Peoples or communities comparable to indigenous peoples and communities shall have, where appropriate the same rights established in this Law”. Mexico also cites the Pact of San José, an international human rights instrument that is applicable to all “persons subject to [the] jurisdiction” of the signatory State.

chapeau of Article XX<sup>280</sup> and Article 32.5 aim to prevent the abuse of the exceptions set out in these provisions.

220. A measure must satisfy the following requirements to be consistent with Article 32.5:

1. It must not be used as a means of arbitrary or unjustified discrimination “against persons of the other Parties”;<sup>281</sup> and
2. It must not be used as a disguised restriction on international trade.

221. In Canada’s view, the only difference between the test under Article 32.5 and the chapeau requirements under Article XX is in the determination of whether there is discrimination. Unlike under the chapeau to Article XX, the analysis under Article 32.5 does not include examining whether “the same conditions prevail”.

### **III. CONCLUSION**

222. This dispute raises important questions on the proper interpretation and application of the SPS Chapter and general and Indigenous Peoples exceptions in Chapter 32 of CUSMA. Canada invites the Panel to carefully review the claims and arguments of the Parties in light of the observations made in this submission.

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<sup>280</sup> Appellate Body Reports, *US – Shrimp*, para. 159; *US – Gasoline*, p. 23; and *Brazil – Retreaded Tyres*, paras. 215, 224.

<sup>281</sup> Appellate Body Reports, *US – Shrimp*, para. 150.