

INTERNATIONAL DECISIONS

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United States-Mexico-Canada Agreement (USMCA)—Sanitary and Phytosanitary Measures (SPS)—GMO corn

MEXICO — MEASURES CONCERNING GENETICALLY ENGINEERED CORN, MEX-USA-2023-31-01. At <https://ustr.gov/sites/default/files/Final%20Report%20ENG.pdf>. Panel Established Pursuant to Chapter 31, USMCA December 20, 2024.

On December 20, 2024, a Panel in *Mexico — Measures Concerning Genetically Engineered Corn* ruled against Mexico, regarding its ban on genetically engineered corn (GMO corn).¹ The United States invoked the panel under the United States-Mexico-Canada Agreement (USMCA).² In its Final Report, the Panel found Mexico's ban on GMO corn for human consumption was inconsistent with USMCA provisions on Sanitary and Phytosanitary Measures (SPS). SPS measures seek to protect human, animal, and plant life or health. Mexico claimed to have enacted the ban to protect biodiversity, "biocultural wealth, peasant communities, gastronomic heritage and human health" (para. 55). In finding it unlawful, the Report breaks new ground on SPS rules, illuminating how trade obligations impact the ability to pursue domestic food regulations.

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The dispute arose from a presidential decree, issued on February 13, 2023 by the government of Mexico, to regulate the use of GMO corn, defined as corn with "a novel genetic combination, generated through the specific use of biotechnology techniques"³ (para. 52). The Decree identified three categories of the grain: corn for human consumption in tortillas and *masa* (dough);⁴ GMO corn in industrial use destined for human food;⁵ and GMO corn in animal feed.⁶ In Article 6, the Decree expressly banned GMOs in corn for human consumption, e.g., tortillas or *masa*, out of concern for human health and biodiversity. It did not ban GMO corn in animal feed or for industrial use. Instead the Decree described what must be done before Mexico enacts these prohibitions. Specifically,

¹ Final Report: Mexico — Measures Concerning Genetically Engineered Corn, Panel Established Pursuant to Chapter 31, USMCA, MEX-USA-2023-31-01 (Dec. 20, 2024) [hereinafter Final Report].

² See Agreement Between the United States of America, the United Mexican States, and Canada 7/1/20 Text, at <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> [hereinafter USMCA].

³ See DECRETO por el que se establecen diversas acciones en materia de glifosato y maíz genéticamente modificado, DIARIO OFICIAL DE LA FEDERACIÓN, Art. 2.II (Feb. 13, 2023), at https://www.dof.gob.mx/nota_detalle.php?codigo=5679405&fecha=13/02/2023#gsc.tab=0 [hereinafter Decree].

⁴ This is corn made into a flour or after nixtamalization. See *id.* Art. 2.III. Nixtamalization is a process of soaking corn kernels in an alkaline solution before grinding.

⁵ See *id.* Art. 2.IV (excluding corn in *masa* or tortillas).

⁶ See *id.* Art. 2.V.

Article 8 required Mexico's food safety agency to examine national food security needs and research the risks to human health from GMO corn in animal feed and industrial use.

The United States requested a panel on August 17, 2023, after technical consultations with Mexico in March and dispute consultations in June. It argued that the Decree was inconsistent with multiple obligations from Article 9.6 Science and Risk Analysis and Article 2.11 Import and Export Restrictions. Canada joined as a third party to the dispute. In addition, the panel granted requests from nine non-governmental entities to submit their written views.

The Panel Report found the Decree was inconsistent with multiple commitments in Articles 9.6 and 2.11 and found the Decree did not fall within the exceptions Mexico raised.⁷ First, the Panel Report described new ground for the scope of SPS commitments, emphasizing that signals to the market trigger requirements under Chapter 9. Chapter 9 commitments apply to SPS measures "that may, directly or indirectly, affect trade."⁸ The panel found that Mexico's plans to eventually to prohibit GMO corn in animal feed and for industry qualified as an SPS measure.⁹ The Report specifically looked at Decree Articles 7 and 8. Article 7 called for these eventual bans but explained that Mexico's food safety authorities would still issue authorizations for these types of GMO corn.¹⁰ Article 8 described the conditions, including examinations of scientific risks and food security, needed to institute these eventual prohibitions.¹¹

The Panel Report emphasized that Decree Article 7 "sends a powerful signal to the market" and this may impact GMO corn exports for industrial use and for livestock (para. 116). The Report added that the absence of any timeline for implementing the bans and the studies required by Article 8 did not change that the Decree "may effect trade" (*id.*, emphasis removed).

This reasoning deviates from established World Trade Organization (WTO) doctrine that a measure "must be applied" to trigger SPS commitments.¹² The WTO Agreement on the Application of Sanitary and Phytosanitary Measures defines an SPS measure as "[a]ny measure applied . . ."¹³ The USMCA incorporates this definition and expressly affirms rights and obligations from that agreement.¹⁴

The Panel Report explained that it interprets the word "applied" as a "link" between the measure and "*its SPS objectives*" (para. 111). The Panel disagreed with Mexico's interpretation that "applied" requires taking concrete steps (*id.*). The Report explained that the term "applied" does not "distinguish between degrees of implementation" (*id.*).

⁷ See *id.*, paras. 351, 252.

⁸ See USMCA, *supra* note 2, Art. 9.2.

⁹ See Final Report, *supra* note 1, para. 121.

¹⁰ See Decree, *supra* note 3, Art. 7.

¹¹ See *id.* Art. 8.

¹² See Appellate Body Report, Australia — Measures Affecting the Importation of Apples from New Zealand, para. 172, WTO Doc. WT/DS367/AB/R (adopted Dec. 17, 2010); see also Panel Report, Costa Rica — Measures Concerning the Importation of Fresh Avocados from Mexico, paras. 7.76, 7.77, WTO Doc. WT/DS524/9 (adopted May 31, 2022); Panel Report, Korea — Import Bans, and Testing and Certification Requirements for Radionuclides, para. 7.25; WTO Doc. WT/DS495/R (adopted on Apr. 26, 2019); WTO Analytical Index: SPS Agreement — Annex A (DS reports), § 1.2.1(1–3) (current as of Dec. 2024), at https://www.wto.org/english/res_e/publications_e/ai17_e/sps_anna_jur.pdf.

¹³ WTO Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex A:1, at https://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm [hereinafter SPS Agreement].

¹⁴ See USMCA, *supra* note 2, Arts. 9.1.1, 9.3.1(b), 9.4.1.

Second, the Panel Report made significant legal findings regarding the Appropriate Level of Protection (ALOP). This is “[t]he level of protection deemed appropriate by” a party “establishing a[n SPS] measure . . . within its territory.”¹⁵ Mexico argued that it chose an ALOP of “zero risk” given the scientifically demonstrated risks of contaminants and toxins in GMO corn, such as transgenic proteins and glyphosate.¹⁶ Likewise, Mexicans are highly exposed and vulnerable to these risks given their high consumption of corn on a daily basis.¹⁷ The panel found that when devising an SPS measure a party can determine its own ALOP which could be “zero risk,” but this must be accompanied by an “appropriate” risk assessment (para. 181). This effectively analyzes ALOP and risk assessment together.

The panel accepted Mexico’s ALOP but explained that the Decree must be based “on an assessment, as appropriate to the circumstances” (*id.*). The Panel emphasized that the requirement for an “appropriate” risk assessment “must be interpreted with some rigor” (*id.*). Its basis for this was that the Decree did not adhere to any international standards, as mentioned in Article 9.6.3.¹⁸

Article 9.6.3 does not require adherence to the international standards. It states parties “shall base” measures on international standards.¹⁹ This is different from adherence. This distinction is consistent with WTO Appellate Body findings that SPS measures do not need to conform with international standards.²⁰

Third, the Panel determined that Mexico did not conduct a risk assessment, as required by Article 9.6.8.²¹ It described what Mexico offered as a risk assessment as a database of materials “without any analysis of their contents” (para. 195). It found this to be insufficient for many reasons.²² Mexico’s database did not identify the experts who participated in creating it. It did not identify potential hazards, characterize the hazards, or assess exposure to them. Further, it failed to examine prior assessments used to authorize for GMO corn, done pursuant to Mexico’s Biosafety Law from 2005 and 2008 Biosafety Regulations. It is not immediately apparent that the USMCA requires these. Chapter 9 does not define what is needed for risk assessments, instead it refers to definitions from the SPS Agreement,²³ which include a definition for risk assessment.²⁴

The Report clarified some of what is needed for a risk assessment, explaining that international organizations “provide a framework” and a “process for conducting risk assessment” (para. 183, emphasis removed).²⁵ Unconvincingly, Mexico used the SPS

¹⁵ SPS Agreement, *supra* note 13, Annex A:5.

¹⁶ See Final Report, *supra* note 1, para. 140. Glyphosate is an herbicide found to be a likely cause of cancer by the World Health Organization’s International Agency for Research on Cancer (IARC).

¹⁷ See *id.*, para. 140.

¹⁸ See *id.*, paras. 180–81.

¹⁹ See USMCA, *supra* note 2, Art. 9.6.3 (stating parties “shall base” measures on international standards).

²⁰ See Appellate Body Report, European Communities–Trade Description of Sardines, para. 242, WTO Doc. WT/DS231/AB/R (adopted Oct. 23, 2002); Appellate Body Report, European Communities–Measures Concerning Meat and Meat Products (Hormones), para. 166, WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R (adopted Feb. 13, 1998); see also PETROS C. MAVROIDIS, THE REGULATION OF INTERNATIONAL TRADE, VOLUME 2: THE WTO AGREEMENTS ON TRADE IN GOODS 478 (2016); PETER VAN DEN BOSSCHE & WERNER ZDOUC, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES, AND MATERIALS 1036–40 (5th ed. 2022).

²¹ USMCA Article 9.6.3 also requires a risk assessment when there are no applicable international standards. Mexico argued that there were not applicable international standards. See Final Report, *supra* note 1, para. 135.

²² See *id.*, para. 196.

²³ See USMCA, *supra* note 2, Art. 9.1.1.

²⁴ See SPS Agreement, *supra* note 13, Annex A:4.

²⁵ See Final Report, *supra* note 1, para. 185 (citing the Codex Alimentarius Commission’s Working Principles on Risk Analysis, paras. 20–29).

Agreement's definition of risk assessment as guidance for what is needed in Article 9.6.8.²⁶ In sum, the Report determined Mexico did not meet the procedural criteria of a risk assessment.

Fourth, the Panel determined that a lack of risk assessment makes the Decree inconsistent with several more obligations in Chapter 9. These obligations are that a measure: be based on scientific principles,²⁷ be applied only to the extent necessary,²⁸ and not be more trade restrictive than required.²⁹

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Four takeaway points can be highlighted from this case, regarding SPS doctrine and the application of SPS measures. First, the panel's reasoning was not limited to established understandings of SPS rules. In some instances, the Report deviated from settled interpretations of the SPS Agreement, despite requirements in the USMCA to incorporate definitions from the SPS Agreement and to recognize rights and obligations in the SPS Agreement.³⁰ These departures include what constitutes an SPS measure. The Report found that a measure falls within the definition of an SPS measure even if it has not been implemented.³¹

The Report merged ALOP and risk assessment.³² This requirement is new and effectively limits a party's authority to establish its own ALOP. With a long history of addressing this matter, WTO SPS doctrine protects this ALOP deference whenever parties pursue SPS measures.³³ This discretion is "wide" and "unambiguous."³⁴

USMCA provisions appear to continue this. In various places, Article 9.6 expressly repeats that a party instituting an SPS measure determines its own ALOP.³⁵ Nonetheless, the panel's reasoning is novel by correlating ALOP with risk assessment.

Second the panel's reasoning is not limited to the text of USMCA provisions. This is most obvious in how the Report elevates the substantive significance of a risk assessment. It adds risk assessment, an independent commitment from Article 9.6.8, to its analysis of USMCA provisions covering scientific principles, necessity, and trade restrictiveness. Risk assessment is not mentioned in the text of these relevant articles.³⁶

The Report mixed the obligation to conduct a risk assessment with separate commitments regarding scientific principles, necessity, and trade restrictions.³⁷ There is no reference, expressed or implicit, to risk assessment in the texts of Articles 9.6.6(b), 9.6.6(a), and 9.6.10.

²⁶ See *id.*, para. 171 (citing SPS Agreement, Annex A:4). Chapter 9 incorporates this definition. See USMCA, *supra* note 2, Art. 9.1.1.

²⁷ See *id.* Art. 9.6.6(b).

²⁸ See *id.* Art. 9.6.6(a).

²⁹ See *id.* Art. 9.6.10.

³⁰ See *id.* Arts. 9.1.1, 9.3.1(b), 9.4.1.

³¹ See Final Report, *supra* note 1, para. 111.

³² See *id.*, para. 181.

³³ See Appellate Body Report, Australia — Measures Affecting Importation of Salmon, para. 199, WTO Doc. WT/DS18/AB/R (adopted Nov. 6, 1998); Appellate Body Report, United States — Continued Suspension of Obligations in the EC — Hormones Dispute, para. 523, WTO Doc. WT/DS320/AB/R (adopted Nov. 14, 2008); see also MAVROIDIS, *supra* note 20, at 478.

³⁴ See MAVROIDIS, *supra* note 20, at 478.

³⁵ USMCA, *supra* note 2, Art. 9.6.4(a) (affirming rights from Chapter 9 and the SPS Agreement). The right to determine an ALOP limits other obligations. See, e.g., *id.* Arts. 9.6.3 (regarding international standards); 9.6.9 (addressing risk management); and 9.6.10 (examining less trade restrictive options).

³⁶ See *id.* Arts. 9.6.6(b), 9.6.6(a), 9.6.10.

³⁷ See notes 27–29 *supra* and accompanying text.

Article 9.6.6(b) requires that an SPS measure be based on scientific principles. The Panel found that without a risk assessment there was “no evidence” the Decree was based on relevant scientific principles (para. 202). Here, the report merged the process of examining risks with scientific principles. Scientific principles and risk assessment are quite distinct from each other. They require different things and seek different objectives. Scientific principles are laws and rules used in science. While risk assessment is an identification and evaluation of risks that an SPS measure addresses. The United States also comingled these two obligations in its written submission.³⁸

Next, the panel added risk assessment to its examination of a measure’s necessity and its commercial impact. Specifically, it referred to risk assessment obligations in its analysis of commitments under Article 9.6.6(a) and Article 9.6.10. It reasoned that since Mexico did not conduct a risk assessment, the Decree could not have been tailored to meet the requirements of either article (paras. 220, 236).

These USMCA provisions do not mention risk assessment. Article 9.6.6(a) requires that measures be applied “only to the extent necessary” to protect human or plant life. It does not refer to risk assessment. This article commits parties to choose SPS measures that are not excessive in their protections.

Article 9.6.10 requires that a Party select a measure “that is not more trade restrictive than required” (para. 228). It does not mention risk assessment. This provision seeks to limit the commercial impact of an SPS measure.

The Panel reasoned that since Mexico did not conduct a risk assessment, the Decree could not have been tailored to meet the requirements of either Article 9.6.6(a) or Article 9.6.10 (paras. 220, 236). This is novel, since risk assessment is not mentioned in the text of either article. This effectively mixes an evaluation of risks with other commitments in Chapter 9.

In sum, with the Panel’s findings on scientific principles, necessity and trade restriction, risk assessments acquire substantive weight far beyond the procedural obligations in the text of Article 9.6.8. Trade lawyers and trade negotiators should make note of these changed approaches to interpreting SPS rules.

Third, the case points to an evolving economic context for trade disputes, when commercial harms are not immediately obvious. As the dispute was litigated, Mexico imported record levels of corn from the United States, including GMO corn, in 2023 and 2024.³⁹ During this time, the United States claimed Mexican regulations on GMO corn hurt American access to Mexico. There is a mismatch between trade figures and some of the most public pronouncements during this dispute.⁴⁰ The Decree only constrained trade in GMO corn in tortillas and *masa*.

³⁸ See United States of America, MX-USA-2023-31-01, Mexico – Measures Concerning Genetically Engineered Corn, Initial Written Submission of the United States of America (2023), 56–57 (Oct. 25, 2023, public version released Nov. 17, 2024), at <https://www.iatp.org/documents/initial-written-submission-us-mexicos-measures-concerning-gm-corn>.

³⁹ See FOREIGN AGRIC. SERV, GRAIN AND FEED UPDATE: MEXICO, MX2024-0044 (Sept. 24, 2024), at https://apps.fas.usda.gov/newgainapi/api/Report/DownloadReportByFileName?fileName=Grain%20and%20Feed%20Update_Mexico%20City_Mexico_MX2024-0044.pdf.

⁴⁰ See, e.g., Cassidy Walter, *Is America’s No. 1 Corn Export Market at Risk?*, SUCCESSFUL FARMING (Aug. 23, 2024), at <https://www.agriculture.com/is-americas-top-corn-export-market-at-risk-8695292>.

For the neighbors, trade and consumption are integrated, creating a dependency on exports and vulnerability from imports. The United States is the largest producer and exporter of corn.⁴¹ This can lead to lower prices for corn sales, when domestic and overseas demand do not meet American supply. For producers, this strain is compounded by recent export gains from Brazil and the loss of corn exports to China.⁴² On the import side, Mexico is the leading buyer of American corn. It has been the number one or two buyer for decades. The grain is the main source of proteins for Mexicans. Corn carries significant cultural and historical value in Mexican society.

The dispute offers valuable illumination regarding SPS rules and their role in trade in food and agricultural goods. As the panel explained, SPS measures are a legal concern when they provide “signal[s] to the market” (para. 116). A three-fold fear likely drives these trade actions: changes in overseas regulations, price depreciation, and mounting global competition. Accordingly, trade enforcement functions as a tool to fortify trade relationships secured with the North American Free Trade Agreement and WTO three decades ago. This develops even as important elements of that global trade regime have changed, especially when it comes to dispute settlement.

With corn, similar dynamics exist beyond North America. It is the most widely produced crop in the world and the preferred staple for over 1.2 billion people in Sub-Saharan Africa and Latin America.⁴³ Like with Mexico, national governments may increasingly value protecting food security and the health of consumers.

For this trade and others involving food safety, there is a latent tension between SPS rules and trade obligations.⁴⁴ American trade policy objectives keenly identify national SPS regulations as threats. A report last year from the U.S. trade representative made this point repeatedly.⁴⁵ It identified potential trade barriers in at least twenty economies, alarmed by national controls of GMOs and other biotechnologies. Expected examples, like China, the European Union, and Russia, made the list.⁴⁶ But so did less obvious cases, with smaller economies like Angola, wartime economies like Ukraine, and potential trade partners Kenya and Taiwan.⁴⁷ Aside from the report, common trade and food safety fears continue over food born illnesses and pests.⁴⁸ Negotiations over recent American tariffs will likely address SPS rules and trade in agricultural, including concerns over beef treated with hormones and pork treated with ractopamine.⁴⁹

⁴¹ USDA, ECON. RSCH. SERV., CORN AND OTHER FEED GRAINS – FEED GRAINS SECTOR AT A GLANCE, (updated Apr. 7, 2025), at <https://www.ers.usda.gov/topics/crops/corn-and-other-feed-grains/feed-grains-sector-at-a-glance>.

⁴² See Jena Lynde-Smith, *Corn Is King in the U.S., But Will Trade Dynamics Change That?*, SEEDWORLD (Nov. 26, 2024), at <https://www.seedworld.com/us/2024/11/26/corn-is-king>; Karen Braun, *China Forgoes US Corn Despite Slowdown in Brazilian Shipments*, REUTERS (Sept. 19, 2024), at <https://www.reuters.com/markets/commodities/china-forgoes-us-corn-despite-slowdown-brazilian-shipments-2024-09-19>.

⁴³ See Crop Trust, *Crop: Maize* (2025), at <https://www.croptrust.org/what-we-do/projects/outreach-projects/crops-in-color/maize>.

⁴⁴ See Ching-Fu Lin, *Interactions Between Food Safety Protection and Trade Liberalization in the WTO and FTAs*, in RESEARCH HANDBOOK ON INTERNATIONAL FOOD LAW 243, 245 (Michael T. Roberts ed., 2023); Andrew T. Guzman, *Food Fears: Health and Safety at the WTO*, 45 VA. J. INT’L L. 2 (2004).

⁴⁵ See U.S. TRADE REP., 2024 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS (Mar. 2024), at <https://ustr.gov/sites/default/files/2024%20NTE%20Report.pdf>.

⁴⁶ See *id.* at 57, 138–39, 305–06.

⁴⁷ See *id.* at 9–10, 355–56, 234, 329.

⁴⁸ See, e.g., Abebe Tibebu, Habtamu Tamrat & Adane Bahiru, *Review: Impact of Food Safety on Global Trade*, 10 VETERINARY MED. & SCI. e1585 (Aug. 19, 2024), at <https://doi.org/10.1002/vms3.1585>.

⁴⁹ See Warren Maruyama, Meghan Anand & William Alan Reinsch, *Can Trump’s Reciprocal Trade Negotiations Make America Great Again?*, CSIS (Apr. 30, 2025), at <https://www.csis.org/analysis/can-trumps-reciprocal-trade-negotiations-make-america-great-again>.

The lesson from the GMO corn dispute is export losses are not needed for legal tensions between national measures and international commitments. The Panel Report found signals to the market, from a measure not yet implemented, can trigger SPS obligations.

Fourth, the decision offers new indications on how SPS rules impact food safety. These are informative even when states are not parties to the USMCA. The United States promotes its approach to food safety when negotiating trade agreements.⁵⁰ In addition, the SPS Agreement and other trade agreements contain similar SPS provisions as the USMCA.

National food policymakers should take note of how the ruling defines an SPS measure, employs risk assessment obligations, and treats glyphosate. The Panel Report suggests that SPS obligations can be triggered by measures that have not been implemented. It emphasized “signals” to the market to determine when SPS commitments apply (*id.*). Next, the obligation to conduct a risk assessment can impact how additional rights and obligations are examined. This has consequences for setting an ALOP. It impacts additional commitments that measures are based on scientific principles, necessary, and not more trade restrictive than required. Said plainly, how a government evaluates food safety risks implicate many other SPS obligations, even if they appear distinct. Lastly, glyphosate does not enter an examination of SPS commitments. Despite both the parties indicating glyphosate is an essential part of trade in GMO corn or not, the report’s analysis does not mention the herbicide.⁵¹

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Court of Justice of the European Union—Treaty on the Functioning of the European Union—Treaty on European Union—infraction procedure—financial penalties (lump sum and periodic penalty payment)—area of freedom, security, and justice—right to asylum—prohibition of refoulement and collective expulsion—principle of sincere cooperation

EUROPEAN COMMISSION V. HUNGARY (RECEPTION OF APPLICANTS FOR INTERNATIONAL PROTECTION II) No. C-123/22. At <https://curia.europa.eu/juris/documents.jsf?num=C-123/22>.

Court of Justice of the European Union, June 13, 2024.*

In a ruling of June 13, 2024 (Judgment), the Court of Justice of the European Union (CJEU) heavily fined Hungary for failing to comply with a previous judgment of December 17, 2020.¹ Substantively, the CJEU found that Hungary disregarded the principle of sincere

⁵⁰ Filippo Fontanelli, *Unspoken SPS-Plus and SPS-Minus Aspirations: Biotechnologies in EU and US Trade Agreements*, 12 EUR. J. RISK REG. 564, 571–72 (2021).

⁵¹ See, e.g., Final Report, *supra* note 1, paras. 137, 140–42, 153–54, 180–203 (for Art. 9.6.3); paras. 230, 231, 233, 236–38 (for Art. 9.6.10).

* The views expressed in this case note are solely those of the author and its content does not necessarily represent the views or position of the European Union Agency for Fundamental Rights.

¹ European Commission v. Hungary, C-808/18, ECLI:EU:C:2020:1029, Judgment (2020).