

**\*\*\* AS DELIVERED \*\*\***

***MEXICO – MEASURES CONCERNING GENETICALLY ENGINEERED CORN***

**(MX-USA-2023-31-01)**

**OPENING STATEMENT  
OF THE UNITED STATES OF AMERICA**

**June 26, 2024**

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**TABLE OF ABBREVIATIONS**

<b>Abbreviation</b>	<b>Definition</b>
2023 Corn Decree or Decree	<i>Decree Establishing Various Actions Regarding Glyphosate and Genetically Modified Corn</i> <sup>1</sup>
ALOP	Appropriate level of protection
Biosafety Law	<i>Biosafety Law of Genetically Modified Organisms</i> (Feb. 2005)
Biosafety Regulations	<i>Regulations to the Genetically Modified Organisms Biosafety Law</i> (2008)
CIMMYT	International Maize and Wheat Improvement Center
Codex	Codex Alimentarius Commission
Codex Guidelines	<i>Guideline for the Conduct of Food Safety Assessment of Foods Derived from Recombinant-DNA Plants</i>
Codex Principles	<i>Principles for the Risk Analysis of Foods Derived from Modern Biotechnology</i>
COFEPRIS	Mexican Federal Commission for the Protection Against Sanitary Risks
CONAHCYT	National Council of Science and Technology
CONAHCYT Dossier	“Scientific Dossier on Glyphosate and GM Crop”
GE	Genetically engineered
IPPC	<i>International Plant Protection Convention</i>
MRL	Maximum residue level
Party	USMCA Party

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<sup>1</sup> The original Spanish text is titled: “Decreto por el que se Establecen Diversas Acciones en Materia de Glifosato y Maíz Genéticamente Modificado.”

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SPS	Sanitary and phytosanitary
SPS Agreement	<i>Agreement on the Application of Sanitary and Phytosanitary Measures</i>
USMCA or Agreement	<i>United States-Mexico-Canada Agreement</i>

**TABLE OF EXHIBITS<sup>2</sup>**

Exhibit No.	Description
USA-299	Government of Mexico, National Institute of Forestry, Agricultural, and Livestock Research “Conservation and Identification of Native Corn Diversity” (Mar. 26, 2024) <a href="https://www.gob.mx/inifap/prensa/conservacion-y-conocimiento-de-la-diversidad-de-maices-nativos">https://www.gob.mx/inifap/prensa/conservacion-y-conocimiento-de-la-diversidad-de-maices-nativos</a> .
USA-300	Government of Mexico, Secretariat of Agriculture and Rural Development, “Agriculture Secretariat Promotes the Cultivation of Native Corn to Ensure Quality, Conservation, and Financial Benefits for Farmers” (May 25, 2023), <a href="https://www.gob.mx/agricultura/prensa/incentiva-agricultura-cultivo-de-maices-nativos-para-garantizar-calidad-preservacion-y-beneficios-economicos-al-productor?idiom=es">https://www.gob.mx/agricultura/prensa/incentiva-agricultura-cultivo-de-maices-nativos-para-garantizar-calidad-preservacion-y-beneficios-economicos-al-productor?idiom=es</a> .
USA-301	F. Guzzon et al., “Conservation and Use of Latin American Maize Diversity: Pillar of Nutrition Security and Cultural Heritage of Humanity, 11 AGRONOMY 172 (Jan. 2021), <a href="https://www.mdpi.com/2073-4395/11/1/172">https://www.mdpi.com/2073-4395/11/1/172</a> .
USA-302	U.S. Department of State, “Highlighting U.S. Efforts to Combat the Biodiversity Crisis” (Dec. 15, 2022), <a href="https://www.state.gov/highlighting-u-s-efforts-to-combat-the-biodiversity-crisis/">https://www.state.gov/highlighting-u-s-efforts-to-combat-the-biodiversity-crisis/</a> .
USA-303	“Inconsistent,” <i>Oxford English Dictionary</i> , <a href="https://www.oed.com/dictionary/inconsistent_adj?tab=meaning_and_use#620151">https://www.oed.com/dictionary/inconsistent_adj?tab=meaning_and_use#620151</a> (definition II).
USA-304	“Preclude,” <i>Oxford English Dictionary</i> , <a href="https://www.oed.com/dictionary/preclude_v?tab=meaning_and_use#28827800">https://www.oed.com/dictionary/preclude_v?tab=meaning_and_use#28827800</a> (definitions 3 and 4).

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<sup>2</sup> Only exhibits newly introduced in the U.S. Opening Statement are listed in the Table of Exhibits.

## I. INTRODUCTION

1. Good morning, Chair and members of the Panel. On behalf of the United States, I would like to begin by thanking the Panel and the staff assisting you for your work on this dispute.
2. Despite the length of the Parties’ submissions, this dispute is rather straightforward.
3. Through the USMCA, Mexico committed to adopt or maintain sanitary and phytosanitary (“SPS”) measures that are predicated on science- and risk-based principles. Mexico, very plainly, did not do that for corn.
4. *For over thirty years*, the international scientific community has regarded genetically engineered (“GE”) crops as safe for human consumption and safe for animal and plant life and health.
5. Mexico had long permitted the importation and sale of GE corn in Mexico. This was done pursuant to a science-based authorization process, conducted by Mexico’s own scientific authorities, that openly acknowledged and followed the relevant international standards for food safety, which included a risk assessment process.
6. When the United States, Canada, and Mexico negotiated and signed the USMCA, Mexico had among the most authorizations in the world to import and sell GE corn for use in human food and animal feed, and had issued approximately *200 authorizations* across 11 different GE crops—foremost among them, corn.
7. After permitting the importation and sale of GE corn in Mexico for decades without experiencing any adverse effects on human, animal, or plant life or health, and after recommitting to fair and science-based trade under the USMCA, Mexico completely reversed its policy.
8. Mexico adopted the *Decree Establishing Various Actions Regarding Glyphosate and Genetically Modified Corn* (the “2023 Corn Decree”), and included within it the two measures that are before the Panel in this dispute. The first is a ban on GE corn for use in dough and tortillas (referred to here as the Tortilla Corn Ban). The second is an instruction to gradually displace imports of GE corn for use in animal feed and industrial use for human consumption (referred to here as the Substitution Instruction). There was no scientific basis for this abrupt change in policy, no new risk assessment, and no other justification valid under the USMCA.
9. Because we are now in dispute settlement proceedings, Mexico has attempted to articulate a justification for its scientifically unsupportable measures. In its submissions and likely again here today, Mexico may posit miscellaneous hypotheses about human, animal, or plant health risks allegedly related to GE corn. The United States, as it did in its Rebuttal, will endeavor to provide the Panel with the important scientific context to rebut these statements,

though the United States notes that, contrary to Mexico’s representation,<sup>3</sup> should it be the case that a particular article here or there is not addressed in great detail, this is not a tacit acceptance by the United States of the article’s conclusions, nor does it obviate Mexico’s multiple breaches of the SPS Chapter.<sup>4</sup>

10. Mexico’s failure to fulfill its USMCA commitments—and inability to justify them under any USMCA exception—is clear. Mexico, as it admits, has rejected relevant international standards for food safety and plant health, and has belatedly put forward what it calls a “risk assessment” that, on its face, does not assess risks from the importation and sale of GE corn in Mexico for food or feed use.

11. From these very evident shortcomings, Mexico’s other defenses in this dispute necessarily fail, as the United States will explain.

## **II. THE TORTILLA CORN BAN AND THE SUBSTITUTION INSTRUCTION ARE SUBJECT TO THE SPS CHAPTER’S DISCIPLINES.**

12. Both the Tortilla Corn Ban and the Substitution Instruction are SPS measures. What does that mean? That means that these are measures applied, at least in part, to allegedly protect human, animal or plant life or health and, as stated in Article 9.2 of the SPS Chapter, may directly or indirectly affect trade.

13. Mexico does not contest that the disciplines of the SPS Chapter apply to the Tortilla Corn Ban. Thus, there is no dispute here that the Tortilla Corn Ban is subject to the SPS obligations of the USMCA.

14. For the Substitution Instruction, Mexico has tried to circumvent the disciplines of the SPS Chapter by claiming that this measure has not yet been “applied” or, in the alternative, is just a provisional measure. Neither of these defenses is logical or accurate based on the plain text of the measure.

15. First, the Substitution Instruction has clearly been applied to meet an SPS objective, as it has entered into force and contains a clear dictate to eliminate GE corn in certain food and feed end uses. This is a presidential decree with legal effect that provides an unambiguous instruction to substitute GE with non-GE corn. The fact that the exact timing of when this substitution will be carried out is left unspecified does not attenuate its legal effect; in fact, the decree outlines

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<sup>3</sup> Mexico’s Rebuttal Submission, para. 49.

<sup>4</sup> See U.S. Rebuttal Submission, para. 32 n.30; *id.*, Annex I, n.1; *id.*, Annex II, n.16; *id.*, Annex III, n.26 (similarly explaining that “[t]o the extent the United States has not commented on a particular exhibit cited by Mexico in its Initial Submission, such an omission does not imply an endorsement of the exhibit’s credibility or accuracy”).



administrative penalties if the Substitution Instruction is not carried out.<sup>5</sup> Contrary to what Mexico contends, an SPS measure cannot escape the disciplines of this chapter just because it does not delineate every detail that will be taken to execute the measure. The Substitution Instruction is being applied and is subject to the SPS Chapter.

16. Likewise, the Substitution Instruction is not a “provisional” measure. The Substitution Instruction provides no indication that it is a temporary measure that may be replaced or modified. Instead, it directs government agencies to execute a substitution of non-GE corn for GE corn.

17. Moreover, a provisional measure, as elaborated in the USMCA, is only permissible where there is insufficient scientific evidence to conduct a risk assessment. That is not the case here. Risk assessments of GE plants and animal-derived food commodities are routinely overseen by national regulators, including in Mexico historically. Mexico’s own regulatory authority—the Federal Commission for the Protection Against Sanitary Risk (“COFEPRIS”)—has authorized some 100 GE corn varieties for use in food and feed, and, in doing so, assessed the potential for allergenicity, toxicity and nutritional issues. These are the very same varieties for which Mexico now claims, years later, that it must enact a provisional measure, due to insufficient scientific evidence. Mexico, at once, argues that newly published studies have rendered its past assessments obsolete, yet also claims that the available evidence is insufficient.<sup>6</sup> Mexico has not articulated why the available scientific evidence is inadequate to review these products that it has already evaluated, and the reality is that such evidentiary deficiencies simply do not exist.<sup>7</sup>

18. *Even if* one were to assume that the scientific evidence is insufficient—which it is not—Mexico still would have had to gather additional information and complete a risk assessment for this measure within a reasonable period of time under Article 9.6.5. Mexico, as it has admitted in its Rebuttal, has done nothing in the past year-plus to fulfill these requirements.<sup>8</sup>

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<sup>5</sup> *Decree Establishing Various Actions Regarding Glyphosate and Genetically Modified Corn* (“2023 Corn Decree”), art. 10 (“Non-compliance with the provisions of this Decree by the agencies and entities of the Federal Public Administration shall give rise to the corresponding administrative liabilities in terms of the General Law of Administrative Responsibilities.”) (Exhibit USA-3).

<sup>6</sup> *See, e.g.*, Mexico’s Rebuttal Submission, paras. 60-61, 260-262; Mexico’s Initial Submission, paras. 149-150, 330 (claiming the “human health risks arising from GM corn ‘for animal feed and industrial use for human consumption’ are similar in nature to those arising from GM corn grain for human consumption through nixtamalization or processing into flour for dough, tortilla and related foods”); *see also* U.S. Rebuttal Submission, para. 36.

<sup>7</sup> *See* U.S. Rebuttal Submission, paras. 63-67.

<sup>8</sup> *See* Mexico’s Rebuttal Submission, paras. 256-258.

19. The Substitution Instruction is not a temporary measure or the product of inadequate scientific evidence, but rather is being applied and is subject to the SPS disciplines of the USMCA.

20. There is also no question that the Substitution Instruction may directly or indirectly affect trade as it effectively targets every remaining food or feed use for which GE corn is exported to Mexico.

21. Therefore, both measures at issue here—the Tortilla Corn Ban and the Substitution Instruction—are properly subject to the SPS Chapter’s commitments. With this established, the United States will proceed with addressing the SPS claims before the Panel.

### **III. MEXICO’S LEGAL ARGUMENTS REINFORCE THAT THE MEASURES AT ISSUE ARE NOT SCIENCE- OR RISK-BASED, CONTRARY TO THE SPS CHAPTER OF THE USMCA.**

22. As the United States explained in its submissions and again here today, a bedrock principle of the SPS Chapter is that any SPS measure must have a basis in science. This requirement was intended to allow Parties to protect human, animal, or plant life or health while reducing potential abusive uses of SPS measures for non-legitimate purposes.

#### **A. Mexico Has Not Based its Tortilla Corn Ban or Substitution Instruction on Relevant International Standards or on a Risk Assessment as Required under Article 9.6.3 of the USMCA.**

23. Critical to ensuring that SPS measures remain based on science is Article 9.6.3 of the SPS Chapter. Article 9.6.3 requires that a Party base its SPS measures on the relevant international standards, guidelines, or recommendations, unless doing so would not meet the level of protection that the Party has deemed appropriate (also known as a Party’s “ALOP”). What this means in practice is that a Party must evaluate whether there are relevant international standards that apply to these risks and can meet the designated ALOP. If there are no relevant international standards or these relevant standards exist but are not suitable to meet a Party’s ALOP, then a Party nevertheless still must base its measures on an appropriate risk assessment.

24. Here, Mexico has failed to fulfill Article 9.6.3 in multiple respects.

25. *First*, the measures are not based on the international standards relevant to human and plant life or health, which are capable of fulfilling Mexico’s ALOPs; and

26. *Second*, even assuming no relevant international standards apply to meet Mexico’s alleged ALOPs, Mexico did not conduct a risk assessment on which these measures are based.

27. In this dispute, Mexico has assigned a “zero risk” ALOP for GE corn when consumed in dough and tortillas, and then a “more risk tolerant” ALOP for GE corn when present in other

food or feed.<sup>9</sup> For both measures at issue, Mexico also asserts some “lower ALOP” “to mitigate the damage caused to native corn by slowing or stopping the rate of transgenic introgression.”<sup>10</sup>

28. Although these ALOPs concern food safety and plant health, Mexico has failed to base its measures on the relevant international standards—the Codex standards for food safety and the International Plant Protection Convention (“IPPC”) standards for plant health—that are recognized under the USMCA.<sup>11</sup> Mexico, without explanation, claims that these standards are not relevant and do not fulfill its ALOPs.

29. Both the Codex standards and the IPPC standards are well-suited to address any ALOP that the Panel may find Mexico has adequately articulated, as each standard provides a risk assessment framework for the miscellaneous issues that Mexico has raised in its briefings, whether that be unintended expressions of transgenic proteins, pesticide residues on food or feed, or alleged pests to native corn varieties. Mexico is a member of both Codex and the IPPC, and both put forward a risk assessment framework that, on their face, are meant to be tailored to a country’s specific conditions.<sup>12</sup>

30. Mexico has publicly recognized that the Codex Guidelines for assessing the safety of GE foods (which include an assessment of toxicity, allergenicity, and compositional changes) as well as Codex’s maximum residue level (“MRL”) framework for pesticide residues are relevant and applicable to its own food safety regulatory process.<sup>13</sup> Mexico is aware that both the Codex

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<sup>9</sup> Mexico’s Initial Submission, paras. 363, 349.

<sup>10</sup> Mexico’s Initial Submission, paras. 346, 349.

<sup>11</sup> World Trade Organization (“WTO”), *Agreement on the Application of Sanitary and Phytosanitary Measures* (“SPS Agreement”), Annex A, para. 3 (“International standards, guidelines and recommendations (a) for food safety, the standards, guidelines and recommendations established by the Codex Alimentarius Commission relating to food additives, veterinary drug and pesticide residues, contaminants, . . . (c) for plant health, 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.”) (USA-34); *United States-Mexico-Canada Agreement* (“USMCA”), art. 9.1.2 (incorporating these definitions).

<sup>12</sup> See, e.g., Codex Alimentarius, *Guideline for the Conduct of Food Safety Assessment of Foods Derived from Recombinant-DNA Plants* (“Codex Guidelines”), sec. 3, para. 16 (Exhibit USA-114); Secretariat of the International Plant Protection Convention (“IPPC”), *Pest Risk Analysis for Quarantine Pests*, sec. 2 (2017) (Exhibit-103).

<sup>13</sup> FAO GM Foods Platform, Mexico – Country Profile (affirming that Mexico “follows the relevant Codex Guidelines or national/regional guidelines that are in line with the Codex Guidelines in conducting safety assessment of GM food”) (last modified Oct. 19, 2023) (Exhibit USA-217); Official Standard of Mexico, NOM-082-SAG-FITO/SSA1-2017, arts. 7.2.1, 8.1 (Oct. 4, 2017), <https://faolex.fao.org/docs/pdf/mex170706.pdf> (Exhibit USA-244); see also EPA, “NAFTA Guidance on Data Requirements for Pesticide Import Tolerances: Questions & Answers,” <https://www.epa.gov/pesticide-tolerances/nafta-guidance-data-requirements-pesticide-import-tolerances-questions-answers> (last updated Feb. 20, 2024) (“Mexico accepts Codex MRLs on commodities for domestic consumption.”) (Exhibit USA-246).

Guidelines and the MRL framework can be and typically are tailored to country-specific conditions, as Mexico has traditionally done this in the past.<sup>14</sup>

31. Mexico’s newly invoked argument that it has a unique consumption pattern rings hollow and would not give it a reason to abandon these Codex instruments. National differences in consumption do not preclude the ability to estimate dietary exposure and risk for the relevant population. Rather, estimating dietary exposures in food using representative consumption data is a crucial part of a food safety evaluation and is already provided for in the Codex process. Mexico failed to base its measures on the relevant Codex and IPPC standards, and therefore has breached Article 9.6.3 of the USMCA. On this ground alone, Mexico’s defense of Article 9.6.3 should fail.

32. Should the Panel, however, find that the Codex and IPPC standards are not relevant, or they are relevant but would not meet Mexico’s ALOPs, then Mexico should still be found to have contravened Article 9.6.3, as it has not based its measures on a risk assessment, as required. For the Tortilla Corn Ban, Mexico has put forward an alleged risk assessment from CONAHCYT (Mexico’s Exhibit 85); Mexico also refers to miscellaneous other studies in its legal arguments and claims that these, too, were part of its risk assessment. In its Rebuttal, Mexico appears to suggest that these materials formed the basis of its Substitution Instruction as well.<sup>15</sup> However, these documents do not individually or collectively constitute a risk assessment for either measure.

33. As Mexico acknowledges, a “risk assessment,” in the context of food safety, must evaluate “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.”<sup>16</sup> Consistent with this definition, dietary risk, at a basic level, is a function of two elements: hazard (meaning, how toxic a substance is) and exposure (for example, lifetime dietary consumption of a particular substance). Mexico’s submissions do not provide any evaluation of hazard, or estimates of exposure or risk, from consuming GE corn whether that be due to glyphosate residues or any of the various other alleged adverse health effects that Mexico raises. Mexico, in its Rebuttal, conspicuously did not address these glaring omissions in any respect.

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<sup>14</sup> See, e.g., COFEPRIS, “Search of Sanitary Registrations of Pesticides, Plant Nutrients and MRLs,” <http://siipris03.cofepris.gob.mx/Resoluciones/Consultas/ConWebRegPlaguicida.asp> (searchable database of Mexico’s pesticide MRLs for commodities, including corn) (Exhibit USA-245).

<sup>15</sup> See, e.g., Mexico’s Rebuttal Submission, para. 253 (“The basis for the 2023 Decree, including the instructions in Articles 7 and 8, was the assessment of risks in the ‘*Scientific Record on glyphosate and GM crops*’ (2020) prepared by CONAHCYT and the collection of relevant studies in the National Biosafety Information System (SNIB) maintained by CIBIOGEM.”).

<sup>16</sup> SPS Agreement, Annex A, para. 4 (incorporated into the USMCA under Article 9.1) (USA-34); Mexico’s Initial Submission, para. 366.

34. For the Panel’s benefit, and as the United States explained in its Rebuttal, international food safety standards and regulators typically break down the two elements of a risk assessment—hazard and exposure—into a four-step process: (1) Hazard Identification; (2) Hazard Characterization; (3) Exposure Assessment; and (4) Risk Characterization.<sup>17</sup> Mexico, at most, has performed the first step of a risk assessment: Hazard Identification—meaning Mexico has posited that something in or on GE corn is potentially capable of causing adverse health effects.

35. Mexico has not performed, or even argued that it has performed, Step 2 (Hazard Characterization), which requires a dose-response assessment that analyzes how the likelihood and severity of adverse health effects are related to the amount and condition of exposure to a particular substance. Mexico has not performed, or even argued that it has performed, Step 3, an Exposure Assessment (meaning, how much of the substance people are actually exposed to during a specific time period). Mexico also has not completed Step 4, Risk Characterization, meaning the qualitative or quantitative estimation of the probability of occurrence and severity of known or potential adverse health effects from consuming the substance. Citing to a curated selection of miscellaneous articles does not cure Mexico of these deficiencies.

36. Similarly, with respect to plant health, Mexico acknowledges that Annex A, paragraph 4, of the SPS Agreement, incorporated into the USMCA, provides that a plant health risk assessment should evaluate “the likelihood of entry, establishment or spread of a pest or disease according to the SPS measures which might be applied, and of the associated potential biological and economic consequences.” Mexico has fallen woefully short of meeting this definition.

37. Mexico has not even articulated the traits or genes of concern, let alone evaluated the likelihood of entry, establishment, or spread of the alleged “pest,” as required under the USMCA. Still today, Mexico has not demonstrated in any form what actual or potential *harm* Mexico’s native corn varieties are facing as a result of imported GE corn for use in dough and tortillas, or for industrial food use and feed. Mexico cites to studies—many from some 20 years ago—that allege the presence of transgenes in Mexican corn varieties. None of these studies present any evidence of harm to plant life or health.<sup>18</sup> That is unsurprising, because Mexico’s

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<sup>17</sup> See, e.g., Codex, “Working Principles for Risk Analysis for Food Safety for Application by Governments,” at 5, 9 (2007) (Exhibit USA-211); see also, e.g., EPA, “Conducting a Human Health Risk Assessment” (last updated June 22, 2022) (Exhibit USA-212); EFSA, “The Four Steps of Risk Assessment,” <https://multimedia.efsa.europa.eu/riskassessment/index.htm> (USA-213).

<sup>18</sup> See, e.g., MEX-086 (a perspectives piece largely outlining the history of GE corn field trials in the 1990s); MEX-090 (a 20 year-old article confirming the presence of transgenes in local varieties, implicating DICONSA (a Mexican government agency) as a strong source of the transgenes, and finding that mixing has resulted in high variability); MEX-098 (no data on effects on plant health or food safety are presented other than posing the question that more data are needed); MEX-099 (provides several hypotheses of “damage” from transgenes, all of which are presented as hypotheses that might or might not be confirmed experimentally); MEX-101 (confirming the presence of transgenes in three of 23 sampled localities in 2001); MEX-103 (fails to identify that the native corn varieties in

own government authorities (six different agencies) represented to a Mexican court that they are not aware of any harm caused to native corn varieties from the importation of GE corn, as the United States explained in its Rebuttal.<sup>19</sup>

38. Mexico, in response, has now endeavored to distance itself from the testimony of its own government agencies, claiming that this court testimony was made in 2015, before publication of the CONAHCYT risk assessment that allegedly supports Mexico’s measures.<sup>20</sup> To be clear, the CONAHCYT risk assessment, which is predominantly about the herbicide glyphosate rather than plant health, cites a mere three articles that purport to show the presence of transgenes in native corn. Two of these studies were published well before 2015 and present data that are over 20 years old; the third study does not distinguish whether samples with transgenes were of native corn or commercial hybrids.<sup>21</sup> Thus, there is no relevant new information in the CONAHCYT document that post-dates this government testimony. And again, none of these studies, nor any of the other studies that Mexico has cited in its submissions, present any evidence of a plant life or health risk to native corn resulting from transgenic introgression, nor do these studies individually or collectively constitute a plant pest risk assessment as required under Article 9.6.3.

39. Also in a post hoc attempt to justify its measures, Mexico cites a 2004 report in its Rebuttal (Exhibit 95) and now claims that this report is or was part of the plant pest risk assessment that the challenged measures, adopted some 20 years later, are based on.<sup>22</sup> The United States already addressed this report in its Rebuttal and explained that this report hypothesizes—without basing any conclusions on scientific analysis—that the importation and unapproved planting of transgenic corn from the United States is the source of transgenes in Mexico’s native corn landraces. At the time of publication in 2004, the United States submitted

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fact contained transgenes, let alone caused any damage); MEX-102 (found transgene presence in landrace seed stocks in the year of sampling in one of the two communities; did not identify individual events and presented no data on damage); MEX-104 (unrelated study from Spain); MEX-105 (asserts, without providing any evidence, a situation where during transformation, DNA may insert into other genes and disrupt or alter their expression; there is nothing special about transgenes that would cause them to insert randomly throughout the genome upon cell division/reproduction, versus any other type of gene); MEX-109 (did not focus on GE corn or even on transgenes; the warnings about potential genetic assimilation are equally applicable to conventional corn hybrids vis-à-vis native corn); MEX-376 (did not indicate whether differences in the amount of methylation had any biologically meaningful effect and did not identify any unexpected and undesirable biological effects in terms of change in insect resistance).

<sup>19</sup> Judicial Branch of the Federation of the United Mexican States, Final Judgment 321/2013-I (Sept. 28, 2023) (Exhibit USA-165); U.S. Rebuttal Submission, Section IV.A.3.

<sup>20</sup> Mexico’s Rebuttal Submission, paras. 116, 513.

<sup>21</sup> MEX-085 (footnotes 40, 41, 44, which correspond to MEX-90, MEX-101, MEX-103, respectively).

<sup>22</sup> Mexico’s Rebuttal Submission, para. 365.

a four-page critique of this report, noting that the findings and recommendations lacked scientific rigor; this critique can be found at the end of the report, in Annex 3 of Mexico’s Exhibit 95.<sup>23</sup>

40. This report, which Mexico cites extensively, also concedes that, even if transgene flow were to occur, “[t]here is no reason to expect that a transgene would have any greater or lesser effect on the genetic diversity of landraces or teosinte than other genes from similarly used modern cultivars.”<sup>24</sup> The report did not identify any plant health risk that would suggest actual or potential harm to native corn resulting from any alleged introgression and in fact noted that “[s]cientific investigations and analyses over the past 25 years have shown that the process of transferring a gene from one organism to another does not pose any intrinsic threat over the short or long term, either to health, biodiversity or the environment.” Once again, Mexico has not identified an appropriate risk assessment on which its SPS measures are based with respect to plant life or health.

41. Taken together, there are multiple independent bases on which Mexico’s defense under Article 9.6.3 simply fails. *First*, Mexico has failed to follow the relevant international standards for food safety and plant health, by Mexico’s own admission, and failed to demonstrate that these standards do not fulfill Mexico’s ALOPs. *Second*, Mexico did not conduct a risk assessment for the Tortilla Corn Ban or the Substitution Instruction. The failure to base the challenged measures on a valid risk assessment is not surprising because, fundamentally, the science does not support a finding of human or plant health risk. In other words, a valid risk assessment never would have provided a basis to adopt the challenged measures. For each of these reasons, Mexico’s measures are inconsistent with Article 9.6.3.

**B. Neither the Tortilla Corn Ban nor the Substitution Instruction Serves a Legitimate SPS Purpose; Thus, Each is Applied Beyond the Extent Necessary to Achieve Mexico’s Alleged SPS Objectives.**

42. As these measures lack any legitimate human, animal, or plant health justification, they also are applied beyond the extent necessary to achieve Mexico’s alleged SPS objectives, as required under Article 9.6.6(a).

43. Mexico has provided no evidence that GE corn imported into Mexico contains unsafe levels of glyphosate residue or any other credible risk to human health. That is unsurprising, because, according to the latest U.S. government data, the vast majority of U.S. corn grain has *no*

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<sup>23</sup> MEX-095, Annex 3.

<sup>24</sup> MEX-095, at 17. Mexico cites at length from this report. See Mexico’s Rebuttal Submission, paras. 365-368, 370, 388-389, 473, 606, 608-610, 615.

*detectable glyphosate residue at all* and, where there are any residues, the levels are *far below* Mexico’s existing MRL for glyphosate.<sup>25</sup>

44. Nevertheless, if Mexico had a legitimate, scientifically supportable concern about the risk of glyphosate residues, for example, it should have relied on current or modified MRLs, as the United States explained in its submissions. These MRLs are employed by Codex and countries around the world to ensure the safety of the global food supply and facilitate, rather than inhibit, trade. Notably, MRLs would apply to both GE and non-GE corn, as pesticides may be used on either type of corn, and would apply to *all corn* intended for human consumption, not just specific end uses. Instead, Mexico has implemented measures that are not rooted in science and are not “necessary” to protect human health.

45. In addition, Mexico has alleged various other human health issues from consuming GE corn, such as the presence of certain transgenic proteins, unintended gene expression, and nutritional deficiencies of GE crops versus conventional counterparts. As the United States explained at length in its Rebuttal and remains true upon a thorough review of Mexico’s latest submission and reports, Mexico has presented no evidence that, individually or collectively, would constitute a risk assessment identifying a risk of concern. If Mexico did indeed have a legitimate concern about the safety of a particular GE corn variety, it could have conducted an event-specific risk assessment, consistent with its authorization process historically and as provided under Codex.<sup>26</sup> Mexico did not do that, and instead categorically banned GE corn, without so much as a risk assessment on a commodity or an event-specific basis.

46. Similarly, the Tortilla Corn Ban and the Substitution Instruction, which ban the use of GE corn for food and feed uses, do not address any legitimate risk to Mexico’s native corn varieties, as the United States has explained. The GE corn relevant here, authorized for food and feed uses, is expressly prohibited from being cultivated in Mexico.

47. Even if now, contrary to court statements, Mexico contends that GE corn imports intended for food or feed have somehow affected the genetic composition of Mexico’s native corn varieties, the United States is not aware of any scientific evidence demonstrating that such activity would present a risk to plant life or health. Nor is the United States aware of any scientific evidence that shows that imports for food and feed are the sole or even primary source

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<sup>25</sup> USDA AMS, PESTICIDE DATA PROGRAM, ANNUAL SUMMARY, CALENDAR YEAR 2022 (Jan. 2024), <https://www.ams.usda.gov/sites/default/files/media/2022PDPAnnualSummary.pdf> (Exhibit USA-254).

<sup>26</sup> See, e.g., Codex Alimentarius, *Principles for the Risk Analysis of Foods Derived from Modern Biotechnology* (“Codex Principles”), sec. 3, paras. 10, 12, 30 (providing that “safety assessments of foods derived from modern biotechnology should be reviewed when necessary to ensure that emerging scientific information is incorporated into the risk analysis”) (Exhibit USA-113); COFEPRIS, “Case-by-Case Safety Assessment List of Genetically Modified Organisms (GMOs)” (2018), [https://conahcyt.mx/cibiogem/images/cibiogem/sistema\\_nacional/registro/lista-evaluacion-inocuidad-181-portal.pdf](https://conahcyt.mx/cibiogem/images/cibiogem/sistema_nacional/registro/lista-evaluacion-inocuidad-181-portal.pdf) (Exhibit USA-90).



of any alleged transgenic introgression into native varieties (as opposed to, for example, continued perpetuation of existing native corn varieties that already contain transgenes).

48. Again, the relevant question in an SPS context is whether there is a risk to plant life or health. Mexico unequivocally has not shown that, and the United States is not aware of any such actual or potential harm. On this point too, Mexico’s government agencies have agreed in court, as have the authors of the 2004 report that Mexico now purports to rely on as its plant health risk assessment.<sup>27</sup>

49. The lack of scientific justification underpinning Mexico’s measures is plain: Mexico’s position here is that the mere presence of a gene harms native plant life or health. Moreover, that harm apparently can only occur where that gene is a transgene, as opposed to any other gene from a non-native corn variety, and irrespective of what that transgene or trait may be. It must be underscored that conventional corn varieties, transgenic corn, and native corn all belong to the same species and sub-species. Mexico has created a false construct that transgenic introgression is bad, and any other gene flow (so long as it is not from a GE plant) is good. This position has no basis in science.

50. To summarize, Mexico has not shown that the Tortilla Corn Ban (targeted at the importation of GE corn for use in dough and tortillas) and the Substitution Instruction (targeted at the importation of GE corn for animal feed and industrial food use) are “necessary” to protect native corn varieties grown in Mexico.

51. As neither measure in fact contributes to—let alone is necessary to—protecting any SPS purpose, these measures are inconsistent with Article 9.6.6(a) of the USMCA.

**C. Mexico’s Measures are Not Based on Relevant Scientific Principles, Contravening Article 9.6.6(b) of the USMCA.**

52. The United States will next discuss the U.S. claim under Article 9.6.6(b) of the USMCA, concerning Mexico’s commitment to ensure that its SPS measures are based on scientific principles. Tellingly, Mexico did not refute this claim at all with respect to the Substitution Instruction. As for the Tortilla Corn Ban, the same infirmities we have seen with the other claims also plague Mexico’s defense of this measure.

53. It stands to reason that, if a Party failed to conduct a risk assessment, as was established with respect to Article 9.6.3, the Party’s measures are not based on scientific principles. As the United States has already explained, there is no coherent methodology to what Mexico purports to be its risk assessment in the form of the CONAHCYT document or the miscellaneous other

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<sup>27</sup> Judicial Branch of the Federation of the United Mexican States, Final Judgment 321/2013-I (Sept. 28, 2023) (Exhibit USA-165); MEX-095.

studies it has decided to cite in its submissions. Therefore, the Tortilla Corn Ban is not based on scientific principles.

54. Mexico’s defenses to this claim are inapposite. First, Mexico, in its Initial Submission, makes the hollow assertion that it took into account the centrality of corn in its national consumption patterns. Mexico cites no scientific support, let alone a risk assessment, that captures an evaluation of hazard, exposure, and risk of GE corn with respect to Mexican consumption patterns.

55. Mexico also tries to defend the Tortilla Corn Ban by pointing to its alleged limited trade-restrictiveness in that it is only directed at certain end uses; again, that argument does nothing to explain the scientific underpinnings of the measure. Nor does that argument help to explain, as a scientific or logical matter, how banning GE corn for dough and tortillas or for other food and feed uses protects the plant life and health of native corn.

56. Mexico has not met its commitment to ensure that its measures are based on scientific principles and, as a result, contravenes Article 9.6.6(b) of the USMCA.

**D. Mexico Has No Documented Risk Assessment or Risk Management and Did Not Afford Other Parties an Opportunity to Comment under Article 9.6.7 of the USMCA.**

57. *Even assuming for the sake of argument* that Mexico prepared an appropriate risk assessment for each measure in this dispute, that would not be enough for Mexico to have fulfilled its USMCA commitments. Under Article 9.6.7, Mexico was required to document both its risk assessment and risk management processes and afford other Parties the opportunity to comment on them, which Mexico did not do.

58. Over the many years in which the United States engaged with Mexico on its agricultural biotechnology measures, Mexico did not provide any document purporting to be a risk assessment, even when explicitly asked. Faced with no other option, the United States ultimately issued a formal written request to Mexico under Article 9.6.14 of the USMCA seeking “an explanation of the reasons for” and “pertinent relevant information regarding” Mexico’s agricultural biotechnology measures. In response, Mexico simply announced the 2023 Corn Decree and provided no substantive response.<sup>28</sup> Plainly, the United States never had an opportunity to comment on any risk assessment prior to the institution of either measure. This contravenes Article 9.6.7.

59. As for a documented risk management process, Mexico appears to claim that whatever it has defined as its risk assessment also captures its risk management process—but does not explain what exactly it is referring to or how risk management is reflected in such

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<sup>28</sup> U.S. Initial Submission, paras. 60-61; U.S. Rebuttal Submission, para. 154.

documentation.<sup>29</sup> As the United States explained in its submissions, risk management is a process that is distinct from, and conducted in light of, a risk assessment. As defined in the USMCA, risk management is “the weighing of policy alternatives in light of the results of [a] risk assessment,” and may or may not include SPS measures.<sup>30</sup> Mexico remains unable to identify any documented risk management process for these measures, and the United States was not made aware of such a document or documents so as to comment on them prior to adoption of these measures.

60. Each of these errors—lack of documented risk management and the absence of an opportunity to comment—is a basis for finding that Mexico breached Article 9.6.7.

**E. Neither Measure Took Into Account Relevant International Standards or Available Relevant Scientific Evidence, Contrary to Article 9.6.8 of the USMCA.**

61. Similarly, *even assuming for the sake of argument* Mexico conducted the requisite risk assessment for each of its measures, Article 9.6.8 of the USMCA required that these risk assessments “take[] into account the available relevant scientific evidence” and “the relevant international standards, guidelines, and recommendations.” Mexico did not fulfill this commitment either.

62. Mexico, in its submissions, has openly repudiated the relevant international standards of Codex and the IPPC, without justification. For example, Mexico acknowledges that Codex MRLs are relevant international standards that address maximum residues of glyphosate on certain commodities, including corn. Nevertheless, Mexico criticizes the Codex MRLs as insufficient to address Mexico’s desired level of protection, on the basis that Mexicans consume a lot of corn.<sup>31</sup>

63. However, Mexico itself has traditionally recognized a 1.0 ppm (parts per million) MRL for glyphosate residues on corn, which departs from the Codex MRL of 5.0 ppm, so Mexico recognizes that the Codex MRLs need not be adopted directly.<sup>32</sup> Mexico has not shown through a risk assessment why its MRL was insufficient. It also has not shown why its MRL was only insufficient with respect to GE corn *but not* non-GE corn, which may also have glyphosate

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<sup>29</sup> Mexico’s Rebuttal Submission, paras. 395-396.

<sup>30</sup> USMCA, art. 9.1.2; *see also Principles for the Risk Analysis of Foods Derived from Modern Biotechnology* (“Codex Principles”), sec. 3, para. 16 (Exhibit USA-113); Secretariat of the IPPC, *Framework for Pest Risk Analysis*, sec. 2.3 (2007), [https://www.ippc.int/static/media/files/publication/en/2016/01/ISPM\\_02\\_2007\\_En\\_2015-12-22\\_PostCPM10\\_InkAmReformatted.pdf](https://www.ippc.int/static/media/files/publication/en/2016/01/ISPM_02_2007_En_2015-12-22_PostCPM10_InkAmReformatted.pdf) (Exhibit USA-117).

<sup>31</sup> *See, e.g.*, Mexico’s Initial Submission, paras. 420-423.

<sup>32</sup> *See, e.g.*, COFEPRIS, “Search of Sanitary Registrations of Pesticides, Plant Nutrients and MRLs,” <http://siipris03.cofepris.gob.mx/Resoluciones/Consultas/ConWebRegPlaguicida.asp> (searchable database of Mexico’s pesticide MRLs for commodities, including corn) (Exhibit USA-245).

residues. As the United States explained in its Rebuttal, past data have shown that non-GE corn can have higher levels of glyphosate residue than GE corn, yet Mexico’s measures do not restrict non-GE corn in food and feed.<sup>33</sup> Even assuming for the sake of argument that Mexico had conducted some assessment of risks for its measures, Mexico, by its own admission and as demonstrated, did not take into account relevant international standards or the available relevant scientific evidence.

64. In addition, Mexico claims that its risk assessment took into account all of the relevant scientific evidence, citing a curated set of studies. Most of these studies are entirely irrelevant or unresponsive of the claims that Mexico makes, as the United States explained in its Rebuttal.<sup>34</sup> Mexico remains unable to articulate any coherent scientific methodology for how it developed its Tortilla Corn Ban and Substitution Instruction. Nor has it been able to explain how, if at all, it took into account the multitude of risk assessments from regulators around the world, including assessments by its own regulators, confirming the safety of commercialized GE corn.

65. Mexico appears now to dismiss out of hand its own past risk assessments as well as those of other international regulators because some or all of the data were generated by the applicant companies themselves; Mexico takes the same approach with respect to any study that includes an author who is or was affiliated with a biotechnology company.<sup>35</sup> Categorically rejecting data in that manner has no scientific justification. If companies are expected to refrain from scientific investigations prior to seeking regulatory approval, or were prevented from publishing their results, this would reduce, not improve, transparency. And, to state the obvious, during pre-market approvals, companies developing the products in a laboratory are typically best-situated to perform the necessary tests on the products they are developing. That is why the United States, for example, has a consultative process to work with biotechnology developers on refining their studies for new plant varieties. Providing false data to regulators—in Mexico, the United States, and elsewhere—is illegal.<sup>36</sup>

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<sup>33</sup> See U.S. Rebuttal Submission, Annex II, at 2-3 (citing Food & Agriculture Organization of the United Nations (“FAO”)/World Health Organization (“WHO”) Joint Meeting on Pesticide Residues (“JMPR”), “Pesticide Residues in Food 2005,” at 129-130, 144 (2005) (Exhibit USA-159); JMPR, “Pesticide Residues in Food 2011,” at 155, 159 (2011) (Exhibit USA-160)).

<sup>34</sup> See Annex III to U.S. Rebuttal Submission (reviewing articles cited in Section VII.E.4.b of Mexico’s Initial Submission).

<sup>35</sup> See, e.g., Mexico’s Rebuttal Submission, paras. 52, 259, 262, 305.

<sup>36</sup> And if Mexico has concerns that any data are allegedly outdated, as it asserts, then it should perform an updated event-specific risk assessment in a manner consistent with how it traditionally has authorized GE events and as provided under Codex. See, e.g., Mexico’s Rebuttal Submission, para. 22; Codex Principles, sec. 3, paras. 10, 12, 30 (Exhibit USA-113); COFEPRIS, “Case-by-Case Safety Assessment List of Genetically Modified Organisms (GMOs)” (2018), [https://conahcyt.mx/cibiogem/images/cibiogem/sistema\\_nacional/registro/lista-evaluacion-inocuidad-181-portal.pdf](https://conahcyt.mx/cibiogem/images/cibiogem/sistema_nacional/registro/lista-evaluacion-inocuidad-181-portal.pdf) (Exhibit USA-90).

66. As Mexico’s own Biotechnology Committee of the Mexican Academy of Sciences has echoed, there is no scientific evidence of a risk to humans, animals, or plants from commercialized GE corn varieties used in dough and tortillas, in animal feed, or in industrial food uses.<sup>37</sup> Because any risk assessment that Mexico may have performed did not take into account all the available scientific evidence and, by Mexico’s own admission, did not take into account relevant international standards, Mexico’s measures are inconsistent with Article 9.6.8 of the USMCA.

**F. Mexico Has Not Refuted That Both Measures Are More Trade-Restrictive Than Required Under Article 9.6.10 of the USMCA.**

67. For the United States’ final SPS claim, the United States has demonstrated that Mexico’s measures are more trade-restrictive than required to achieve the ALOPs that Mexico has asserted in this dispute.

68. Article 9.6.10 of the USMCA explains that a measure is in breach if there is an alternative measure that (i) is reasonably available, (ii) achieves the Party’s ALOP, and (iii) is significantly less trade-restrictive than the measure at issue.

69. Both of Mexico’s measures are at odds with Article 9.6.10, because they do not achieve Mexico’s ALOPs, and there are numerous less-restrictive alternatives readily available to address Mexico’s alleged concerns.

70. Starting with the Tortilla Corn Ban, it is not clear how this measure even achieves Mexico’s proclaimed “zero risk” ALOP for human health, because this measure does not ban non-GE corn, which may also have glyphosate residues. The Tortilla Corn Ban also does not ban the importation or sale of other crops—whether GE or non-GE—that may be grown domestically in Mexico or internationally with the aid of glyphosate. The fact that Mexico has “tailored” the Tortilla Corn Ban to focus just on GE corn does not reflect restraint in terms of trade-restrictiveness, as Mexico claims, but instead underscores that Mexico has targeted GE corn without scientific justification. Mexico has not presented any risk assessment to justify this position. Even if Mexico were able to identify a health concern related to some level of dietary intake of glyphosate residues on GE corn, a significantly less trade-restrictive measure that is reasonably available would be for Mexico to continue implementing its MRLs for glyphosate.

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<sup>37</sup> Biotechnology Committee of the Mexican Academy of Sciences, TRANSGENICS. MAJOR BENEFITS, ABSENCE OF HARMS AND MYTHS, at 14, 28 (2017), <http://conjunctus.amc.edu.mx/libros/TransgenicosCoordinadorFBolivar.pdf> (“The Biotechnology Committee of the AMC points out and emphasizes that the approved GMOs, as well as their products, currently used as food or medications, have been subjected to numerous analyses and evaluations that have demonstrated that they do not cause harm to human or animal health, nor to biodiversity or the environment. . . . [T]here is no[t] a single confirmed evidence of damage caused by the use of transgenic organisms; all cases of alleged damage to health, environment and biodiversity are unfounded and entirely lacking in scientific rigor.”) (Exhibit USA-37).

71. To the extent Mexico has concerns about transgenic proteins, it should continue to conduct risk assessments on an event-specific basis—meaning specific to the particular transgenes—as it historically has done through its authorization process and as provided in the Codex Guidelines. As the United States explained in its Rebuttal, when applicants submit authorization requests to COFEPRIS, these applicants must provide a Mexico-specific dietary exposure risk assessment for the particular GE event, including where multiple transgenes are present, and these studies are already extremely conservative and based on Mexicans’ consumption patterns.<sup>38</sup> Mexico did not even engage with this point in its Rebuttal. However, if Mexico did indeed consider that these dietary exposure assessments—which are already required pursuant to its Biosafety Regulations—need refinements, then it can and should address these issues through its authorization process rather than through a categorical ban on all current and future GE corn events.

72. Similarly, to the extent the measures are intended to protect plant life or health, neither measure achieves Mexico’s ALOP for native corn protection because Mexico has not submitted any scientific evidence, let alone a risk assessment, showing that GE corn imported for use in dough and tortillas, or for any other food or feed use, adversely affects the plant life or health of native corn varieties. Mexico can point to no scientific evidence in its purported risk assessment that stopping authorized imports of GE corn for food and feed would actually eliminate or meaningfully limit transgene flow into native corn varieties, as Mexico has not even assessed that risk.

73. Indeed, if, as Mexico alleges, transgene flow has already occurred as a result of the importation of GE corn into Mexico, halting the importation of GE corn, whether for certain end uses or altogether, would not address the presence of transgenes in native corn varieties.

74. As Mexico admits, local agricultural practices are the reason for transgene flow, not the imports themselves, which are granted entry under the express condition that they are not diverted for seed—and Mexico has provided no evidence that U.S. exporters have contributed to illegal diversion in any respect. Mexico purports that it has undertaken many efforts to protect its native varieties. If these efforts were expanded or bolstered, then the importation of GE corn should not be an issue.

75. For example, Mexico represents that it has a law for the promotion and protection of native corn that has resulted in the development of community seed banks to “promot[e] the sustainability of traditional systems in the areas where they are practiced.”<sup>39</sup> In order to preserve the local practices that Mexico claims to honor, the Mexican Government should promote the distribution of whatever it considers to be native seed from its community seed banks thereby

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<sup>38</sup> U.S. Rebuttal Submission, para. 160; *Regulations to the Genetically Modified Organisms Biosafety Law* (“Biosafety Regulations”) (2008), art. 31.I.j.5; *see also* Non-governmental Entity Written Views of Biotechnology Innovation Organization, at 2-3, 8-9.

<sup>39</sup> Mexico’s Initial Submission, para. 203.

ensuring farmers’ native corn fields are “pure,” in its view, so they can save seed and exchange seed with other farmers with native corn reserves. The Mexican Government currently, and in the past, has run programs to educate farmers on advantageous agricultural techniques, including to promote the sustainability of traditional farming, and has distributed what it considers to be desirable seed.<sup>40</sup> It is hard to understand how Mexico can credibly rebuke these very programs as ineffective.

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<sup>40</sup> See, e.g., Government of Mexico, National Institute of Forestry, Agricultural, and Livestock Research “Conservation and Identification of Native Corn Diversity” (Mar. 26, 2024) <https://www.gob.mx/inifap/prensa/conservacion-y-conocimiento-de-la-diversidad-de-maices-nativos> (“Specialists from all over the state came to INIFAP’s Oaxaca Central Valley Experimental Field for a course on the identification of corn varieties. During the event, the importance of correct collection, characterization and identification of the main local breeds was highlighted. . . . The primary objective was to train specialists on how to collect corn more efficiently and preserve this diversity in INIFAP germplasm banks. The course also sought to support farmers by providing information on the best techniques and highest-yield varieties, thereby promoting the conservation and sustainable use of this crucial agricultural resource. Cooperation among specialists, farmers, and initiatives like community seed banks helps to ensure that corn diversity in Oaxaca continues to be a vital resource for future generations.”) (USA-299); Government of Mexico, Secretariat of Agriculture and Rural Development, “Agriculture Secretariat Promotes the Cultivation of Native Corn to Ensure Quality, Conservation, and Financial Benefits for Farmers” (May 25, 2023), <https://www.gob.mx/agricultura/prensa/incentiva-agricultura-cultivo-de-maices-nativos-para-garantizar-calidad-preservacion-y-beneficios-economicos-al-productor?idiom=es> (“The expert from the National Institute of Forestry, Agricultural and Livestock Research (INIFAP) . . . added that gene banks are an efficient form of conservation, but the seeds and genetic material must also be in the hands of farmers.”) (USA-300); see also “MasAgro Maize,” *International Maize and Wheat Improvement Center* (“CIMMYT”), <https://masagro.mx/descripcion-general/> (a project of Mexico’s Secretariat of Agriculture and Rural Development and CIMMYT, from 2010-2020, which promoted sustainable development by breeding maize hybrids and improving native seed with participant farmers) (Exhibit USA-167); F. Guzzon et al., “Conservation and Use of Latin American Maize Diversity: Pillar of Nutrition Security and Cultural Heritage of Humanity, 11 *AGRONOMY* 172 (Jan. 2021), <https://www.mdpi.com/2073-4395/11/1/172> (“Conservation of maize landraces in germplasm banks is crucial to ensuring the preservation and availability of their diversity for future generations. In situ conservation of landraces, however, is also highly desirable because it enables the continued co-evolution of maize with changing climate and farmer preferences. . . . According to many authors, the main threat to the cultivation and on-farm conservation of maize landraces in Latin America is the substitution by or introgression with hybrid cultivars. . . . Options that enhance the sustainability of landrace cultivation, and therefore their on-farm conservation, include: (1) strengthening market opportunities for landraces (including increase knowledge of nutritional and end use quality of landraces), to make the cultivation of maize landraces and [open pollinated varieties (“OPVs”)] not only important for subsistence farming, but also profitable for local farmers, (2) strengthening breeding programs that develop improved OPVs starting from local landraces, and make their seed available to resource poor farmers, and (3) increasing the access by local farmers to quality germplasm of maize landraces and OPVs through e.g., community seed banks, agrobiodiversity fairs, and registration of landraces and improved OPVs to national germplasm catalogues. Integration of these strategies, encouraged by public interventions, such as payments for ecological service (PES), and collaboration between different actors and stakeholders (e.g., farmers, consumers, breeding and research centers, policy makers, food manufacturing sector) could enhance the livelihoods of resource-poor farmers who are currently the guardians of in situ maize diversity, and avoid losses of these priceless genetic resources, as well as the agronomic, biological, and cultural diversity that is connected with them.”) (USA-301).

76. In conjunction with the use of seed banks, coexistence measures and establishment of *in situ* reserve areas would also address the issue of native variety identity more directly and effectively than the measures at issue. As the United States explained in its Rebuttal, farmers can employ spatial isolation, natural barriers, and clean equipment and storage measures, to protect their native corn fields and significantly mitigate cross-pollination between native and non-native corn crops. The Mexican Government can enforce or strengthen measures under the Biosafety Law to regulate and sanction unauthorized behavior; continue or strengthen existing conservation measures (such as germplasm banks) and adopt new ones; or engage in community outreach and education efforts of the sort that Mexico already pursues. All would be equally if not more effective at eradicating allegedly harmful transgene flow that has already occurred and mitigating it going forward, rather than prohibiting the importation of GE corn for certain end uses.

77. And, to recall, Mexico has not demonstrated why banning the importation of GE corn, but not the importation, domestic cultivation, and sale of non-GE corn adequately protects Mexico’s native corn varieties. As explained already, Mexico’s distinction between GE corn versus other non-native varieties is an artificial one, and Mexico’s claims that transgenes cause “damage” to the native corn genome or displaces other genes are simply not accurate or demonstrated by the studies that Mexico cites.<sup>41</sup>

78. To summarize, because Mexico’s measures do not achieve any ALOP against a human or plant health risk, a reasonably available, less trade-restrictive alternative would be to withdraw them altogether. However, even if they contributed to Mexico’s ALOPs, there are less trade-restrictive alternatives that are readily available for Mexico to utilize. Both measures are inconsistent with Article 9.6.10 of the USCMA.

#### **IV. THE UNITED STATES PROPERLY CHALLENGED THE RELEVANT MEASURES UNDER ARTICLE 2.11 OF THE USMCA.**

79. The United States established in its written submissions that Mexico’s measures are inconsistent with its obligations under Article 2.11.1 of the USMCA, which precludes a Party from prohibiting or restricting the importation of any good of another Party, except in accordance with Article XI of the GATT 1994.

80. In its Rebuttal Submission, Mexico continues to argue that the challenged measures fall under Article III of GATT 1994, not USMCA Article 2.11, including because, according to Mexico, the measures do not constitute prohibitions or restrictions on the importation of any good.

81. Mexico is wrong about what is necessary for a measure to prohibit or restrict importation

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<sup>41</sup> See, e.g., Mexico’s Rebuttal Submission, para. 81 (citing studies that do not support the propositions made); *id.*, paras. 92-93, 95 (same).



of a good within the meaning of Article 2.11. But before elaborating on this point, the United States would like to highlight the areas of agreement, which narrow the questions before the Panel.

82. First, Mexico seemingly agrees that the United States is not required to demonstrate the existence of trade effects.<sup>42</sup> Second, Mexico acknowledges that it does not contend in this dispute either that the challenged measures are in accordance with Article XI of the GATT 1994 or that the measures are “otherwise provided” for in the USMCA.<sup>43</sup> Thus, the Parties agree that the only issue before the Panel to resolve the U.S. claims under Article 2.11 is whether each challenged measure is “a prohibition or restriction on importation.”<sup>44</sup> Finally, Mexico agrees that WTO dispute settlement reports related to Article XI:1 of the GATT 1994 can potentially provide relevant guidance.

83. Mexico’s main argument, which it makes in several forms, is that the challenged measures are not prohibitions or restrictions on importation, and “fall under Article III of the GATT 1994,” because they apply equally to domestic goods and imports alike.<sup>45</sup> This is an improper understanding of what Article 2.11 disciplines and ignores the salient facts regarding the 2023 Corn Decree and the background against which it was adopted.

84. As an initial matter, whether a measure is a prohibition or restriction on the importation of any good of another Party under Article 2.11 is determined by the ordinary meaning of those words. The ordinary meaning of “prohibition,” as used in Article 2.11, is “[t]he outlawing of the trading or importation of a specific commodity; a legal ban of this sort.”<sup>46</sup> The ordinary meaning of “restriction,” as relevant to acts of importation or exportation, is “a limitation on action; a limiting condition or regulation.”<sup>47</sup> Thus, the ordinary meaning encompasses anything that imposes a “limitation” or a “limiting condition” on importation.

85. Consistent with this ordinary meaning, WTO panel reports have interpreted “prohibition” on importation to mean that “Members shall not forbid the importation of any product of any other Member into their markets.”<sup>48</sup> As for the word “restriction” in Article XI:1 of the GATT

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<sup>42</sup> See Mexico’s Rebuttal Submission, para. 438.

<sup>43</sup> Mexico’s Rebuttal Submission, para. 442.

<sup>44</sup> See Mexico’s Rebuttal Submission, para. 442.

<sup>45</sup> See Mexico’s Rebuttal Submission, paras. 436, 447.

<sup>46</sup> “Prohibition,” *Oxford English Dictionary*, <https://www.oed.com/view/Entry/152258?redirectedFrom=prohibition#eid> (Exhibit USA-125).

<sup>47</sup> “Restriction,” *Oxford English Dictionary*, <https://www.oed.com/view/Entry/164022?redirectedFrom=restriction#eid> (Exhibit USA-127).

<sup>48</sup> See Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, para. 7.11 (adopted Dec. 17, 2007) (Exhibit USA-126); Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R, para. 7.454 (adopted Oct. 25, 2010) (quoting same) (Exhibit USA-122).

1994, WTO panel reports have noted that “[t]he scope of the term ‘restriction’ is also broad, as seen in its ordinary meaning, which is ‘a limitation on action, a limiting condition or regulation.’”<sup>49</sup>

86. Mexico eschews this straightforward analysis, and instead argues on the premise that, where domestic goods are disciplined similar to the import prohibitions or restrictions, the measure is properly challenged under GATT Article III instead of USMCA Article 2.11. There is no basis for this. Mexico is effectively applying a national treatment test to the measures, and then concluding that if the treatment of domestic and imported goods is equivalent, it should be scrutinized under GATT Article III, which provides for national treatment!

87. In putting forward this argument, Mexico relies on the panel report in *Indonesia – Chicken Meat*.<sup>50</sup> But the passage in that report quoted by Mexico was merely explaining its understanding of the interpretive note Ad Article III (to GATT Article III).<sup>51</sup> The panel reasoned that a measure that affects the internal sale, offering for sale, etc. of only imports, but not the like domestic goods, is not subject to the provisions of Article III by virtue of this interpretive note. It does not however conclude that a measure that prohibits or restricts imports somehow escapes scrutiny under Article XI if domestic goods also face constraints.

88. Underpinning all of this is a factual backdrop Mexico ignores. Mexico has adopted a separate moratorium on cultivation of GE corn in Mexico.<sup>52</sup> Therefore, the challenged measures only impact imported GE corn.

89. Furthermore, the 2023 Corn Decree itself evidences an intent to restrict imported corn. It explicitly cites self-sufficiency in directing its government authorities to “abstain from [...] promoting and importing genetically modified corn,”<sup>53</sup> and requiring the eventual complete replacement of imported GE corn for any purpose. Indeed, in its Initial Submission, Mexico notes that the Tortilla Corn Ban and the Substitution Instruction are necessary to prevent the “dominance of GM corn in the marketplace” and the displacement of corn grown by Mexican

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<sup>49</sup> Panel Report, *India – Quantitative Restrictions*, para. 5.128 (footnotes omitted) (Exhibit USA-128).

<sup>50</sup> Mexico’s Rebuttal Submission, para. 445.

<sup>51</sup> Ad Article III states:

Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.

<sup>52</sup> Mexico’s Initial Submission, para. 507.

<sup>53</sup> 2023 Corn Decree, art. 3(I) (Exhibit USA-3).

farmers.<sup>54</sup>

90. This context makes clear that the challenged measures operate as prohibitions or restrictions on the importation of GE corn from the United States, and therefore breach USMCA Article 2.11.

91. Mexico’s additional arguments in its Rebuttal Submission are to no avail.

92. Mexico argues that no existing authorizations for GE corn have been revoked, amended, or modified in accordance with the 2023 Corn Decree and COFEPRIS has continued to issue authorizations for GE corn products.<sup>55</sup> It is not entirely clear what Mexico believes to be the relevance of these statements. It is certainly not the case that these statements, if true, would preclude these measures from acting as a prohibition or restriction on importation of GE corn. In fact, Mexico agrees that any GE corn event that has been authorized or may be authorized in the future cannot be imported for certain end uses.<sup>56</sup>

93. To this point, as Mexico admits, the authorizations that have been granted since adoption of the 2023 Corn Decree have been expressly limited to “animal feed and industrial use for human food: except cultivation, corn flour, and nixtamalized dough,” whereas they used to be granted for “food and feed” without exception.<sup>57</sup> So, on their face, they preclude certain imports.

94. In addition, given that the 2023 Corn Decree instructs the Mexican government to “[e]stablish the security measures and impose the corresponding sanctions within the framework of this decree” and that it is the responsibility of “whoever uses” the GE corn to guarantee that it is not used for purposes of human consumption, there is an obvious chilling effect to the importation of GE corn from the United States.<sup>58</sup> Finally, there is a chilling effect to the mere submission of new authorization requests based on the text of the measures challenged in this dispute. Accordingly, there can be no question that these measures do prohibit or restrict the importation of GE corn, including competitive opportunities.<sup>59</sup>

95. Mexico also asserts that the Tortilla Corn Ban “has not resulted in any restriction on the process of importing any GM corn into Mexico.”<sup>60</sup> Mexico suggests as evidence a rise in U.S.

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<sup>54</sup> Mexico’s Initial Submission, para. 497.

<sup>55</sup> Mexico’s Rebuttal Submission, para. 448.

<sup>56</sup> Mexico’s Initial Submission, paras. 21, 318.

<sup>57</sup> See Mexico’s Initial Submission, para. 318.

<sup>58</sup> See 2023 Corn Decree, arts. 3(II), 7 (Exhibit USA-3).

<sup>59</sup> See Panel Report, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/R, WT/DS444/R, WT/DS445/R, paras. 6.453-6.455 (adopted Jan. 26, 2015) (Exhibit USA-281).

<sup>60</sup> Mexico’s Rebuttal Submission, para. 449.

exports of white corn to Mexico in the January-April 2024 period relative to the same period a year earlier.<sup>61</sup>

96. Mexico has already acknowledged that the United States need not show trade effects.<sup>62</sup> In addition, this is a very short time period—just four months—and only covers white corn, a subset of all corn. Furthermore, there is no analysis that would indicate the counterfactual export levels for that period this year in the absence of these measures. In short, Mexico has certainly not shown that there are no trade effects, and it is not an element of the U.S. claims anyway.

97. Finally, Mexico again argues that the Substitution Instruction does not yet exist.<sup>63</sup> The United States will not belabor this point again here, but just recalls its prior arguments explaining why this adopted measure is certainly subject to challenge.<sup>64</sup>

98. Thus, Mexico fails to successfully rebut the United States’ demonstration that the Tortilla Corn Ban and the Substitution Instruction breach USMCA Article 2.11.

#### **V. MEXICO’S MEASURES DO NOT SATISFY THE REQUIREMENTS OF ARTICLE XX(a) OR ARTICLE XX(g) OF GATT 1994.**

99. Mexico contends that, were the Panel to find the Tortilla Corn Ban or the Substitution Instruction inconsistent with its USMCA obligations, its measures would be justified under Article 32.1.1 of the USMCA, incorporating Article XX of the GATT 1994.

100. Article XX provides for certain limited and conditional exceptions to the substantive obligations set forth in the GATT 1994.<sup>65</sup> Because it is an exception to otherwise applicable commitments, Mexico as the responding party bears the burden of proof.<sup>66</sup>

101. Mexico and the United States agree that Article XX calls for a two-tier analysis: first, whether the challenged measures falls within the scope of one of the exceptions listed in Article XX; and second, as to whether the measures satisfies the requirements of the chapeau of Article

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<sup>61</sup> Mexico’s Rebuttal Submission, para. 449.

<sup>62</sup> See Mexico’s Rebuttal Submission, para. 438.

<sup>63</sup> Mexico’s Rebuttal Submission, para. 452.

<sup>64</sup> See U.S. Rebuttal Submission, paras. 58-59.

<sup>65</sup> GATT 1994, art. XX; see Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, para. 157 (adopted Nov. 6, 1998) (Exhibit USA-278).

<sup>66</sup> USMCA Rules of Procedure for Chapter 31 (Dispute Settlement), art. 14.2 (“A responding Party asserting that a measure is subject to an exception or affirmative defence under the Agreement has the burden of establishing that the exception or defence applies.”). Similar logic has been applied in past WTO reports. See, e.g., Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, at 22-23 (adopted May 20, 1996) (hereinafter “Appellate Body Report, *US – Gasoline*”) (Exhibit USA-273).

XX.<sup>67</sup> Mexico must prove both requirements in order to establish an exception under Article XX; the failure to satisfy either requirement is fatal to Mexico’s defense.

102. In this dispute, Mexico claims that its measures are justified under Article XX(a) as necessary to protect public morals, and Article XX(g), relating to the conservation of natural resources.

103. As highlighted in the United States’ Rebuttal Submission, and reiterated here again today, Mexico’s arguments fail to satisfy the requirements of both Article XX(a), Article XX(g), and the chapeau of Article XX.

**A. Mexico’s Measures Are Not Provisionally Justified Under Article XX(a).**

104. In order for an inconsistent measure to be justified under Article XX(a), a party must demonstrate that the measure (i) seeks to protect public morals, and (ii) is “necessary” to achieve that objective.<sup>68</sup> Mexico fails in both respects.

105. Mexico asserts two potential public morals: (i) the protection of native varieties of corn, and (ii) the livelihoods of indigenous communities and associated gastronomic traditions.

1. Protection of native varieties of corn.

106. The United States previously demonstrated that Mexico had failed to establish the existence of public morals with sufficient clarity to allow the United States, and the Panel, to assess its validity for purposes of Article XX(a).

107. In its Rebuttal Submission, Mexico narrows what exactly it is identifying as public morals, but fails to establish with evidence a valid public moral for Article XX(a) purposes.

108. Mexico asserts that one public moral the challenged measures are necessary to protect is the preservation of native corn. Mexico clarifies that “native” distinguishes certain corn from hybrid varieties.<sup>69</sup> Mexico also asserts that there are 59 breeds of native corn, and they are defined as “those breeds...that indigenous peoples, peasants and farmers cultivate, from seeds selected by themselves or obtained through exchange, in constant evolution and

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<sup>67</sup> See Mexico’s Initial Submission, para. 490; see also Appellate Body Report, *US – Gasoline*, at 22 (Exhibit USA-273).

<sup>68</sup> See, e.g., Panel Report, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*, WT/DS461/R, para. 7.293 (adopted June 22, 2016) (“In the context of Article XX(a), ... a Member wishing to justify its measure must demonstrate: (i) that it has adopted or enforced the measure ‘to protect public morals,’ and (ii) that the measure is ‘necessary’ to protect such public morals.”) (Exhibit USA-274).

<sup>69</sup> Mexico’s Rebuttal Submission, para. 466.

diversification.”<sup>70</sup>

109. Perplexingly, Mexico’s definition of native corn—which explicitly includes breeds from seeds obtained through exchange and in constant evolution and diversification—contradicts the supposed public moral of preserving native corn. This reinforces the U.S. point in its Rebuttal Submission that corn is in constant evolution and, indeed, Mexico’s current native varieties are the product of ongoing cross-breeding and evolution over millennia, including breeding with non-native varieties.<sup>71</sup> This makes it simply unclear what Mexico means when it states that a public moral is the preservation of native corn while simultaneously recognizing that corn is in “constant evolution.” Vague references to the importance of native corn is insufficient to establish a public moral for Article XX(a) purposes without more.

110. Moreover, the evidence Mexico cites in support of this purported public moral makes the problem worse, not better. Ordinarily, the evidence itself would help to clarify exactly what a Party means if it is not clear from the description of the public moral itself. But Mexico cites to sweeping laws that address countless issues at differing levels of very high generality. In its Rebuttal Submission, Mexico argues that laws have been used as evidence of public morals in WTO disputes,<sup>72</sup> but this misses the point. The United States of course agrees that laws may very well serve as evidence of a country’s public morals. The problem is that *the particular laws cited by Mexico* are very difficult to connect to a public moral that is sufficiently precise for Article XX(a) purposes. The United States previously noted Mexico’s cursory treatment of these laws, which were either not explained at all or described in the most cursory fashion in a footnote.<sup>73</sup> Notably, Mexico’s Rebuttal Submission continues with only the most cursory characterization of the laws, with no citations to specific provisions or discussions of the evidence.<sup>74</sup> This is plainly inadequate.

111. Mexico also quotes from a report it submitted listing a parade of horrors that would befall traditional milpa, traditional species, biodiversity, and the food supply of indigenous peasant farmers from the use of GE varieties and associated technology.<sup>75</sup> Mexico then continues: “As previously reported, since the early 2000s numerous studies have confirmed the presence of transgenes in native corn varieties in Mexico.”<sup>76</sup>

112. This underscores the obvious strong rebuttal to the supposed parade of horrors—the

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<sup>70</sup> Mexico’s Rebuttal Submission, para. 466.

<sup>71</sup> See the U.S. Rebuttal Submission, paras. 205-206.

<sup>72</sup> Mexico’s Rebuttal Submission, para. 475.

<sup>73</sup> See the U.S. Rebuttal Submission, para. 207.

<sup>74</sup> See Mexico’s Rebuttal Submission, para. 474.

<sup>75</sup> See Mexico’s Rebuttal Submission, para. 472.

<sup>76</sup> Mexico’s Rebuttal Submission, para. 473.

challenged measures are recent. Prior to these measures, GE corn was permitted and used extensively for food and feed in Mexico. And yet those horrors never materialized. Moreover, if transgenes have been present in native corn varieties for two decades, why would anything need to change to protect the native varieties that exist today and thus necessarily were adequately protected over the last two decades despite the presence of transgenes?

113. For all these reasons, Mexico has failed to establish preservation of native corn as a valid public moral for purposes of Article XX(a).

114. But even if it had, its invocation of the exception in Article XX(a) would still fail because the severely trade-restrictive measures it adopted are *not necessary* to protect the stated public moral.

115. As an initial matter, the United States observes that Mexico’s necessity arguments are only with respect to the Tortilla Corn Ban (what it calls the End Use Limitation).<sup>77</sup> Mexico advances no equivalent argument in defense of the Substitution Instruction.

116. In assessing the term “necessary” as used in Article XX of the GATT 1994, WTO panels have relied on the ordinary meaning to pursue an analysis involving four factors: (i) the relative importance of the objective pursued by the measure; (ii) the contribution of the measure to that objective; (iii) the trade-restrictiveness of the measure; and in most cases (iv) the existence of “reasonably available” alternative measures.<sup>78</sup> Mexico explicitly agrees that the first three factors should be considered, and though it omits the fourth, it does advance argumentation on it.<sup>79</sup>

117. Regarding the first factor, Mexico argues that the numerous laws and legal protections accorded to the protection of native corn varieties and indigenous peoples demonstrate that the stated public moral is “extremely important.”<sup>80</sup> But as the United States has already discussed, the summary citation of these laws does nothing to establish a valid public moral for purposes of Article XX(a), much less an extremely important one.

118. Regarding the second factor—contribution of the measure to the objective—Mexico argues in its Rebuttal Submission that the risk to native corn is through the entry and spread of “GM corn grain by virtue of it being easily exchanged as part of the agricultural practices of

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<sup>77</sup> See Mexico’s Rebuttal Submission, Sections I.1.b and I.1.c.

<sup>78</sup> See e.g. Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, paras. 164-166 (adopted Jan. 10, 2001) (Exhibit USA-120); Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, paras. 306-307 (adopted Apr. 20, 2005) (Exhibit USA-277).

<sup>79</sup> See Mexico’s Rebuttal Submission, para. 459.

<sup>80</sup> Mexico’s Rebuttal Submission, para. 486.

indigenous and peasant communities,”<sup>81</sup> and the Tortilla Corn Ban “significantly reduces pathways for the spread of GM corn through exchange and distribution systems.”<sup>82</sup>

119. There are several problems with this argument. First, as a factual matter, it is unsupported because Mexico has been importing GE corn for decades and these distribution systems did not eliminate the current native corn species Mexico now purports to protect. Second, Mexico’s suggestion that indigenous peoples will use the GE corn is at odds with Mexico’s asserted risk that this will deprive them of their way of life and economic livelihoods. Third, this rationale is undermined by Mexico’s continued (if temporary) importation of GE corn for uses other than in dough and tortillas, and Mexico’s failure to discipline in any way non-GE, non-native corn. In short, Mexico fails to establish that the Tortilla Corn Ban meaningfully contributes to achieving the stated objective. (And the Substitution Instruction presumably would contribute even less in light of the transition period, though the United States recalls that Mexico fails to advance any argumentation regarding this measure.)

120. Regarding the third factor—the trade-restrictiveness of the measure—the United States previously explained that an immediate ban is trade restrictive in the extreme, and the delay during the transition period for the Substitution Instruction only softens this a bit, leaving it on the far end of the spectrum as well.<sup>83</sup>

121. In its Rebuttal Submission, Mexico relies on the fact that the Tortilla Corn Ban “restricts a particular end use, rather than trade.”<sup>84</sup> This argument is unavailing. As both sides acknowledge, the restriction here prevents GE corn from being imported from the United States in Mexico. The only role of the end uses is to differentiate the timeline and corresponding harshness of the restrictions. That is, in the case of GE corn for use in dough or tortillas, there is an immediate prohibition. For other end uses, the full prohibition will take some time, though the severity of the restriction increases until full prohibition is reached. These measures directly take aim at billions of dollars in trade.

122. It bears observing that, even as some trade is temporarily permitted under the Substitution Instruction, it alongside the Tortilla Corn Ban introduces a massive amount of uncertainty into the market for U.S. farmers, Mexican livestock farmers, commodity markets, biotechnology developers, and Mexican consumers. As the United States explained in its written submissions, U.S. farmers and biotechnology companies view Mexican approval of new products as a precondition for U.S. farmers to plant the products. U.S. biotechnology companies will not commercialize a new GE product, and U.S. farmers will not begin growing it, until it is evaluated

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<sup>81</sup> Mexico’s Rebuttal Submission, para. 487.

<sup>82</sup> Mexico’s Rebuttal Submission, para. 487.

<sup>83</sup> See U.S. Rebuttal Submission, para. 213.

<sup>84</sup> Mexico’s Rebuttal Submission, para. 488.



and can be lawfully marketed in the United States and in key export markets.<sup>85</sup> Seed companies, farmers, and traders are unable to plan efficiently for forthcoming growing seasons. Both the quantity and variety of crops grown impact trade. Thus, there is no question that the challenged measures are extremely trade-restrictive.

123. And that leads to the final consideration—the availability of alternatives. The United States does not bear a legal burden to prove the existence of less trade-restrictive alternatives, but their ready availability further underscores that Mexico’s measures are not necessary to meet the stated objective of protecting native corn. Mexico argues that spatial isolation, clean equipment and storage methods, continuing germplasm banks, conservation, and community outreach “do not account for the fact that indigenous and peasant communities exchange seeds as part of their cultural stewardship and agricultural practices.”<sup>86</sup>

124. As an initial matter, community outreach and education about the supposedly dire risks to their livelihoods and way of life would seem to be an extremely effective measure for preventing the intentional (and illegal) use of GE corn for cultivation by the very people Mexico claims to be protecting. Moreover, if Mexico is so concerned about maintaining some alleged yet undefined “purity” of its seeds, notwithstanding there would be no scientific basis, Mexico should use the very *in situ* and *ex situ* conservation measures, like seed banks, and co-existence measures that the United States has already described here and in its submissions. Eliminating imports for certain end uses or altogether would not address the transgenes that Mexico alleges have already tainted its native varieties. The less trade-restrictive alternatives that the United States has put forward would be equally if not more effective at eliminating allegedly harmful transgene flow and mitigating it going forward, rather than targeting imports that should not be planted in the first place under Mexican law.

125. Finally, Mexico’s gastronomic traditions are highly regarded and can be served through education, publicity, financial support, gastronomic tourism, and other supply- and demand-enhancing efforts that ensure the use of native varieties of corn in its gastronomic traditions, and the protection of native varieties to the extent necessary to continue those traditions.

126. Thus, not only is Mexico’s invocation of “protecting native varieties of corn” insufficient to establish a public moral that is valid for Article XX(a) purposes, but even if that were assumed not to be the case, it is clear that the heavily trade-restrictive measures Mexico adopted are not *necessary* to achieve this state objective. Accordingly, on each basis independently, Mexico’s Article XX(a) defense based on protecting native varieties of corn fails.

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<sup>85</sup> See also National Academies of Sciences, Engineering, Medicine, GENETICALLY ENGINEERED CROPS: EXPERIENCES AND PROSPECTS, at 306-308 (2016), <https://nap.nationalacademies.org/read/23395> (Exhibit USA-57).

<sup>86</sup> Mexico’s Rebuttal Submission, para. 489.

2. Preservation of Indigenous Livelihoods.

127. Mexico also argues that its inconsistent measures can be justified under Article XX(a) to serve the public moral of preserving the livelihoods of indigenous peoples. The United States has already explained why this is not a valid public moral for purposes of Article XX(a), as it would effectively turn a limited and specific exception into a broad safeguard, clearly contrary to what the Parties to the USMCA agreed.<sup>87</sup>

128. Mexico now argues that this ignores that Mexico “guarantees indigenous people and peasant communities the right to self-determination, which includes, among other things, respect and identity.”<sup>88</sup> This is a distraction not relevant to the legal argument. No one is protesting treating indigenous people or peasant communities with respect. And the United States presumes that Mexico has a strong interest in the prosperity of its people. Indeed, this interest was no doubt a driving rationale for all three parties joining the USMCA.

129. But that interest simply is not the type of public moral contemplated by Article XX(a). Nothing Mexico argues alters the fact that this reading would take what is clearly intended as a limited exception to the disciplines of the agreement, and turn it into a blank check. The Parties surely never intended to permit measures that breach the USMCA whenever a Party claims that such measures will serve the livelihoods of its citizens.

130. Mexico attempts to draw support from *US – Tariff Measures*. But as Mexico itself writes, *China* as the complaining party in that dispute argued that the challenged measures were not based on public morals, as the complaining party asserted, but *rather* sought a purely economic objective of reducing China’s exports to the United States.<sup>89</sup> Here, it is Mexico as the responding party asserting the public morals defense that is claiming a purely economic objective. The equivalent would have been if in *US – Tariff Measures*, the United States as the responding party argued that reducing China’s exports to the United States was the public moral, which obviously was not what the United States argued. Rather, the United States adopted the measures to “obtain the elimination” of conduct that violates U.S. standards of right and wrong, not reducing China’s exports to the United States. Likewise, in *Brazil – Taxation*, the stated public moral was specifically around bridging the digital divide, which is still more specific and precise than Mexico’s stated objective of preservation of livelihoods, with no further explanation, analysis, or evidence.<sup>90</sup>

131. The United States does not doubt the sincerity of Mexico’s interest in the prosperity of all

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<sup>87</sup> See U.S. Rebuttal Submission, para. 204.

<sup>88</sup> Mexico’s Rebuttal Submission, para. 478.

<sup>89</sup> Mexico’s Rebuttal Submission, para. 480.

<sup>90</sup> Panel Reports, *Brazil – Certain Measures Concerning Taxation and Charges*, WT/DS472/R, WT/DS497/R, paras. 7.562-7.564 (adopted Jan. 11, 2019) (Exhibit USA-275).

of its people, including its indigenous communities. But this interest is not a valid public moral for purposes of Article XX(a).

**B. Mexico’s Measures Are Not Provisionally Justified Under Article XX(g).**

132. Mexico also argues that its measures, if inconsistent with the USCMA, nevertheless meet the exception in Article XX(g).

133. The Parties agree that, for Mexico to succeed, it must establish that each challenged measure: (i) relates to the conservation of exhaustible natural resources, and (ii) is made effective in conjunction with restrictions on domestic production or consumption.

134. The parties also agree that meeting the first element requires the complaining party to establish a “close and genuine relationship of ends and means” between the measure and the relevant preservation of natural resources.<sup>91</sup>

1. Relate to conservation of a natural resource.

135. Here, Mexico simply cannot show the required level of relationship between the challenged measures and the preservation of the exhaustible natural resource it alleges—native corn.

136. According to Mexico’s defense the “exhaustible natural resource” at issue is Mexico’s native corn varieties, which Mexico argues are “under threat of loss and possibly extinction as evidenced through the transgenic contamination of native corn in Mexico.”<sup>92</sup> The United States has already demonstrated that there is no evidence to substantiate this purported threat.

137. In addition to referencing the overwhelming weight of the scientific evidence,<sup>93</sup> the United States recalled that, in a collective action that presented this issue to a Mexican court, Mexico’s own government agencies have testified that there is no evidence of unauthorized release of GE corn seeds licensed for cultivation (let alone GE corn grain imported for food and feed uses), and have no evidence of any adverse effects to native corn varieties.<sup>94</sup> The United States further noted that the court firmly rejected the collective’s claims that GE corn grain could negatively impact Mexico’s native corn varieties and reaffirmed their ability to coexist.<sup>95</sup>

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<sup>91</sup> See Mexico’s Rebuttal Submission, para. 493. See also U.S. Rebuttal Submission, para. 223.

<sup>92</sup> Mexico’s Initial Submission, para. 507.

<sup>93</sup> See U.S. Rebuttal Submission, para. 219, n.294. See also U.S. Rebuttal Submission, paras. 115-129.

<sup>94</sup> See U.S. Rebuttal Submission, para. 220. See also U.S. Rebuttal Submission, paras. 115-129.

<sup>95</sup> U.S. Rebuttal Submission, para. 222.

138. In addition, as the United States explained previously,<sup>96</sup> if preservation of native corn varieties is the exhaustible natural resource Mexico raises, and the mode of potential exhaustion is alteration of its genetic makeup through breeding, then the target of any measures obviously would be non-native corn.

139. But Mexico’s measures do not do that. They focus solely on GE corn, the sole province of imports, while omitting any discipline on other non-native corn. Accordingly, Mexico’s measures clearly do not exhibit the required “close and genuine relationship of ends and means” with the stated objective of preserving native corn varieties.

140. In its Rebuttal, Mexico advances two lines of argument. First, it attempts to undermine the persuasiveness of the court case discussed by the United States. Second, it argues that GE corn *is* more likely than non-GE, non-native corn to severely harm or eliminate native corn varieties. Neither line of argumentation can withstand scrutiny.

141. Regarding the court case, Mexico argues that an appeal has rendered the court’s ruling non-final.<sup>97</sup> Mexico provides no evidence to support this assertion, but even if true, it would not alter the testimony provided in that proceeding, nor has there been any contrary ruling that would undermine the most recent ruling from a Mexican court.

142. Mexico also argues that the evidence relied on by the court is out of date because it considered submissions between 2013 and 2016, and did not consider the 2020 report by CONAHCYT that Mexico now claims is part of its risk assessment. But as the United States already noted earlier in this statement, there is no relevant new information in the CONAHCYT document that post-dates this government testimony. Indeed, two of the three articles that even purport to show the presence of transgenes in native corn are over 20 years old.<sup>98</sup>

143. Regarding the criticism that the challenged measures arbitrarily focus on GE corn and omit any disciplines on other non-native corn, Mexico attempts to argue that GE corn and other non-native corn are not equivalent risks to the objective of preserving native varieties.

144. According to Mexico, the United States conflates what Mexico calls “natural hybridization” (through which non-GE, non-native corn cross-breeds with native corn) and “transgenic introgression” (through which GE corn cross-breeds with native corn).<sup>99</sup> According to Mexico, it is well documented that transgenic introgression, in particular, poses a threat to

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<sup>96</sup> U.S. Rebuttal Submission, para. 224.

<sup>97</sup> Mexico’s Rebuttal Submission, para. 512.

<sup>98</sup> MEX-085 (footnotes 40, 41, 44, which correspond to MEX-90, MEX-101, MEX-103, respectively).

<sup>99</sup> See Mexico’s Rebuttal Submission, paras. 508-510.

native corn varieties.<sup>100</sup>

145. The notion that transgenic DNA is “damaged” relative to what Mexico calls “natural” DNA is simply wrong. When two different conventional corn varieties are crossbred, genetic changes (sometimes millions of them) occur in the offspring plant’s DNA that can differ significantly from the parent varieties’. There are going to be background differences between the parents and progeny of any breeding technique. This is a natural feature of breeding and contributes to evolution and biodiversity. There is nothing special about transgenes that would cause them to insert randomly throughout the genome upon cell division and reproduction, versus any other type of gene. If there were unintentional transgene flow into another corn variety, the transgene, its position, and its expression would be as stable as any other gene after cross breeding.

146. Mexico simply ignores the chief flaw in its own justification. Non-GE, non-native corn can transfer genes to Mexico’s native corn varieties, but Mexico’s measures do nothing to protect against this supposed “risk.” For all these reasons, Mexico fails to establish that either of the challenged measures shares a “close and genuine relationship of ends and means” with conservation of native corn varieties as an exhaustible natural resource for purposes of Article XX(g).

2. Made effective in conjunction with restrictions on domestic production or consumption.

147. Moreover, to successfully invoke the exception in Article XX(g), Mexico would also have to demonstrate that its measures are “made effective in conjunction with restrictions on domestic production or consumption.”<sup>101</sup> Further, this prong of Article XX(g) has been interpreted to be a “requirement of even-handedness in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources.”<sup>102</sup> Mexico agrees with this understanding of the need for even-handedness.<sup>103</sup>

148. In an attempt to demonstrate that its measures are “made effective in conjunction with restrictions on domestic production or consumption” Mexico points to the moratorium on cultivation of GE corn domestically. However, this continues to misalign with Mexico’s stated conservationist goal – to conserve its native varieties of corn and its biodiversity.

149. That goal suggests the need for even-handedness with respect to non-native varieties of corn. Given the moratorium on the cultivation of GE corn in Mexico that had already been in

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<sup>100</sup> See Mexico’s Rebuttal Submission, paras. 501-507.

<sup>101</sup> Appellate Body Report, *US – Gasoline*, at 20 (Exhibit USA-273).

<sup>102</sup> Appellate Body Report, *US – Gasoline*, at 21 (Exhibit USA-273).

<sup>103</sup> See Mexico’s Rebuttal Submission, para. 519.

place, measures focused on GE corn, but excluding other non-native corn, *de facto* target imports without impacting domestic production. This is not the even-handedness Article XX(g) requires.

150. This failure provides an additional, independent basis to reject Mexico’s Article XX(g) defense.

**C. Any Provisionally Justified Measures Under Article XX(a) or Article XX(g) Are Applied Inconsistently with the Article XX Chapeau.**

151. Mexico—as the party invoking an Article XX exception—has the burden to demonstrate that it has met the requirements of the chapeau of Article XX. That is, Mexico must demonstrate that each measure at issue is not (i) applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or (ii) a disguised restriction on international trade. Mexico’s arguments fail in both respects.

**1. Arbitrary or unjustifiable discrimination.**

152. Mexico acknowledges that its “measures clearly discriminate against GM corn,”<sup>104</sup> and that “GM corn is not produced in Mexico.”<sup>105</sup> This makes clear that the discrimination from the measures falls exclusively on imports.

153. Mexico asserts that the discrimination is justifiable because of the public policy objectives the measures serve, but the United States has already established that the measures are not based on science and do not serve Mexico’s stated objectives around human health and protection of native varieties of corn.

154. In its Rebuttal Mexico attempts to focus its analysis on demonstrating that the “same conditions” do not in fact prevail when comparing Mexico and the United States. The United States and Mexico agree that the “‘conditions’ relating to the particular public policy objective under the applicable subparagraph are relevant for the analysis under this chapeau.”<sup>106</sup>

155. Mexico alleges that, with respect to human health, the high quantities of consumption in Mexico constitute a difference in prevailing conditions.<sup>107</sup> This is not the case. The science-based approach required by USMCA enables parties to take full account of exposure levels in adopting measures. This is not a case where the United States is complaining about discrimination based on setting an MRL too low, for example. Rather, here, Mexico bluntly banned all imports of GE corn—immediately for GE corn for dough and tortillas, and on a gradual basis for other GE corn for animal feed or industrial use for human consumption—with

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<sup>104</sup> Mexico’s Rebuttal Submission, para. 525.

<sup>105</sup> Mexico’s Rebuttal Submission, para. 529.

<sup>106</sup> Mexico’s Rebuttal Submission, para. 533, (citing *EC-Seals (AB)*, para. 5.300).

<sup>107</sup> See Mexico’s Rebuttal Submission, para. 540.

no legitimate scientific basis, and without the required process. The impact falls squarely on imports. This is the very definition of arbitrary or unjustifiable discrimination, and consumption patterns play no role in explaining this.

156. With respect to protection of native corn varieties, Mexico alleges that unique varieties of corn in Mexico and other values regarding biodiversity constitute material differences in prevailing conditions for purposes of the Article XX chapeau.<sup>108</sup> The veiled criticism of U.S. values is a distraction with no legal relevance. However, it suffices to say that the United States is leading efforts to halting and reversing the loss of biodiversity within in the United States and internationally. The United States has engaged globally and domestically to support efforts to conserve, protect, and restore nature. Furthermore, the United States and its federal agencies have committed significant financial investment in projects that enable biodiversity to thrive.<sup>109</sup>

157. As for Mexico’s tradition regarding its native species, that merely restates the exhaustible natural resource Mexico alleges is at risk. That cannot also serve as a difference in prevailing conditions, lest the analysis become circular. Rather, given that preservation of native corn varieties is Mexico’s stated objective under Article XX(g), the prevailing conditions should be understood to refer to the presence of non-native corn. In this respect there should be no discrimination, yet Mexico’s measures do the opposite. The focus exclusively on GE corn imports while sparing domestically-produced non-native corn from discipline.

## 2. Disguised restriction.

158. In its Initial Submission Mexico did not even attempt to demonstrate that its measures were not disguised restrictions on international trade, and instead only addressed whether the challenged measures constitute arbitrary or unjustifiable discrimination.<sup>110</sup>

159. In its Rebuttal Submission, Mexico again raises certain trade data regarding particular U.S. corn exports. This is hardly an attempt to compare U.S. exports to the counterfactual levels had Mexico not adopted its measures. As just one example, it makes no attempt to account for other market forces during the more recent period, such as the current drought plaguing Mexico’s corn growing regions. The simplistic analysis is wholly incapable of demonstrating that Mexico’s measures do not restrict trade. Indeed, if they had no impact at all, why maintain them?

160. And try as it might, Mexico cannot dispute the facts that the design and context of the measures, along with other public statements, reveal the otherwise disguised intent to restrict

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<sup>108</sup> See Mexico’s Rebuttal Submission, paras. 534-539.

<sup>109</sup> U.S. Department of State, “Highlighting U.S. Efforts to Combat the Biodiversity Crisis” (Dec. 15, 2022), <https://www.state.gov/highlighting-u-s-efforts-to-combat-the-biodiversity-crisis/> (Exhibit USA-302).

<sup>110</sup> See Mexico’s Initial Submission, paras. 518-526.

international trade.

161. First, there is the poor fit between the measures and their ostensible purpose. Indeed, procedurally, Mexico did not pursue the types of actions one would expect (and the USMCA requires) if there were a legitimate scientific inquiry, such as a risk assessment. This is especially glaring given that GE corn has been imported into Mexico for decades with no documented harms that reflect the allegedly severe outcomes Mexico now contemplates.

162. Second, Mexico has made isolated statements that reveal the intent to restrict trade. There are references in the 2023 Corn Decree as well as in Mexico’s Initial Submission to “self-sufficiency,” which implies a preference for buying domestic production at the expense of supply that is currently imported.<sup>111</sup> In addition, Mexico asserts in its Initial Submission 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>112</sup>

163. Furthermore, Mexico states that it has a “duty to preserve . . . the livelihoods of communities that derive their income and livelihood from the cultivation and processing of native varieties of grains.”<sup>113</sup> That is another way of saying to protect Mexican producers in competition with imported corn. Mexico now argues that its producers do not compete with imports, but that is impossible to square with the Substitution Instruction, which instructs that very substitution. Mexico did not adopt a measure that requires, supports, or encourages a certain amount of planting of these native varieties. Nor did Mexico discipline non-native corn varieties (whether GE or not). Instead, Mexico’s measures target GE corn, which is only from foreign sources.

164. Third, the effect of these measures suggests a clear targeting of imports. Because Mexico banned the cultivation of GE corn in Mexico in 2013, imposing measures that target GE corn, and not any “non-native” corn, only impacts imports.

165. Lastly, as the United States has previously discussed, Mexico has not based its Tortilla Corn Ban or Substitution Instruction on an appropriate risk assessment. The absence of a risk assessment is strongly suggestive that an alleged SPS measure is instead taken to restrict imports—a disguised restriction on trade.<sup>114</sup>

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<sup>111</sup> See, e.g., 2023 Corn Decree, preamble (Exhibit USA-3); *id.*, art. 8 (Exhibit USA-3); Mexico’s Initial Submission, paras. 216, 284.

<sup>112</sup> Mexico’s Initial Submission, para. 499.

<sup>113</sup> Mexico’s Initial Submission, para. 494.

<sup>114</sup> Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, para. 166 (adopted Nov. 6, 1998) (Exhibit USA-109) (“[A] finding that an SPS measure is not based on an assessment of the risks to human, animal or plant life or health - either because there was no risk assessment at all or because there is



166. Accordingly, Mexico fails to establish that, as required by the chapeau of Article XX, its measures are not a disguised restriction on international trade, which provides an independent basis to reject Mexico’s defenses under Article XX(a) and Article XX(g).

**VI. MEXICO FAILED TO DISCHARGE ITS BURDEN OF ESTABLISHING THAT USMCA ARTICLE 32.5 APPLIES TO ITS MEASURES.**

167. Mexico also invokes Article 32.5 of the USMCA as an affirmative defense to justify its inconsistent measures. However, Mexico has failed to establish that Article 32.5 of the USMCA justifies its measures.<sup>115</sup> Mexico’s arguments fail, as the United States has demonstrated, because its measures constitute a disguised restriction on trade and arbitrary or unjustified discrimination as they are designed and applied to restrict imports of GE corn while not affecting domestic production or consumption of non-native, non-GE corn.

168. Mexico argues that the “United States has not even affirmatively alleged that the measures at issue are being used as a means of discrimination against U.S. exporters.”<sup>116</sup> This is not the case. The United States incorporated by reference extensive argumentation on how the challenged measures discriminate against U.S. exporters.<sup>117</sup> This was based on the U.S. view that the phrase “arbitrary or unjustified discrimination against persons of the other Parties” in Article 32.5 is very similar to the phrase “arbitrary or unjustifiable discrimination between countries where the same conditions prevail” in the chapeau of GATT 1994 Article XX, and the differences in language do not have significance to the issues currently before the Panel.<sup>118</sup>

169. Mexico’s main argument is that the arbitrary or unjustified discrimination refers only to the people of the other Parties.<sup>119</sup> However, the United States already explained that USMCA explicitly defines persons to include enterprises.

170. Mexico also argues that no discrimination exists because the United States produces non-GE corn as well and anecdotally some U.S. producers have shifted production or expressed a willingness to do so. To state the obvious, the fact one or more U.S. producers may be willing to produce non-GE corn does not cure the discrimination against the many producers that

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an insufficient risk assessment - is a strong indication that this 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, i.e., a ‘disguised restriction on international trade.’”).

<sup>115</sup> USMCA Rules of Procedure for Chapter 31 (Dispute Settlement), art. 14.2 (“A responding Party asserting that a measure is subject to an exception or affirmative defence under the Agreement has the burden of establishing that the exception or defence applies”).

<sup>116</sup> Mexico’s Rebuttal Submission, para. 567.

<sup>117</sup> See U.S. Rebuttal Submission, paras. 245-246.

<sup>118</sup> U.S. Rebuttal Submission, para. 245.

<sup>119</sup> See Mexico’s Rebuttal Submission, para. 559.

unquestionably do produce GE corn and are discriminated against by Mexico’s measures, while Mexican producers of other non-native corn varieties face no similar discipline.

171. Therefore, because Mexico’s measures constitute arbitrary or unjustified discrimination against persons of the United States, Mexico’s defense under Article 32.5 fails.

172. Separately, Mexico agrees that the analysis regarding a “disguised restriction” mirrors the analysis of the phrase “disguised restrictions on international trade” for purposes of the GATT Article XX chapeau.<sup>120</sup> For the reasons the United States already explained in the context of the chapeau analysis, Mexico’s measures also constitute a disguised restriction on trade for Article 32.5 purposes, providing another, independent reason why Mexico’s Article 32.5 defense fails.

**VII. ALTERNATIVELY, A BENEFIT THE UNITED STATES REASONABLY COULD HAVE EXPECTED TO ACCRUE TO IT UNDER THE USMCA IS BEING NULLIFIED OR IMPAIRED AS A RESULT OF THE APPLICATION OF MEXICO’S MEASURES.**

173. As a final matter, the United States has requested pursuant to Article 31.13.1(b)(iii) that the Panel find that Mexico’s measures are causing nullification or impairment within the meaning of Article 31.2 of the USMCA.

174. As explained in our Rebuttal Submission, the United States requests that—should the Panel find that the Tortilla Corn Ban or the Substitution Instruction are not inconsistent with Mexico’s USMCA obligations due to the applicability of Article 32.5—the United States considers that a benefit it reasonably could have expected to accrue to it under Chapter 2 or Chapter 9 of the USMCA is being nullified or impaired and requests that the Panel determine pursuant to Article 31.13.1(b)(iii) that these measures are causing nullification or impairment within the meaning of Article 31.2(c).

175. In an effort to avoid the applicability of Article 31.2 in this dispute, Mexico asserts that text of this provision does not legally provide for a Party to pursue a nullification or impairment claim. Specifically, Mexico misreads the language in Article 31.2(c)—“not inconsistent”—to mean that Article 31.2 can only apply when measures are *consistent* with the USMCA, excluding measures justified under Article 32.5.

176. Mexico’s argument is not supported by the USMCA text. Article 31.2 refers to measures that are “not inconsistent” with USMCA, a phrase that may be understood to mean measures that are not “at variance, discordant, incompatible, [or] incongruous” with the USMCA.<sup>121</sup> Article 32.5, in turn, provides that the USMCA “does not preclude” certain measures on indigenous

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<sup>120</sup> Mexico’s Rebuttal Submission, para. 568.

<sup>121</sup> “Inconsistent,” *Oxford English Dictionary*, [https://www.oed.com/dictionary/inconsistent\\_adj?tab=meaning\\_and\\_use#620151](https://www.oed.com/dictionary/inconsistent_adj?tab=meaning_and_use#620151) (definition II) (Exhibit USA-303).

peoples’ rights. A measure that the USMCA “does not preclude” – in other words, a measure that the USMCA does not “bar” or “prevent”<sup>122</sup> – is a measure that is not at variance, discordant, incompatible, or incongruous with USMCA. Accordingly, a measure that falls within Article 32.5 is “not inconsistent” with the USMCA for purposes of Article 32.1(c).

177. Accordingly, the Panel should find that the U.S. non-violation nullification or impairment claim is properly considered under Article 31.2(c) and—should the Panel find that the that the Tortilla Corn Ban or the Substitution Instruction are not inconsistent with Mexico’s USMCA obligations due to the applicability of the indigenous peoples’ exception—continue its evaluation of the United States’ claim that a benefit it reasonably could have expected to accrue to it is being nullified or impaired as a result of the application of Mexico’s measures.

178. The United States has provided the Panel with a detailed explanation of how it reasonably could have expected to accrue benefits under Chapter 2 and Chapter 9, specifically citing the U.S.-Mexico agricultural relationship, the formalized market access achieved under NAFTA, the renegotiated USMCA including stronger SPS provisions based on science and risk, and Mexico’s long history of a science-backed regulatory process for evaluating biotechnology products.

179. Mexico attempts to minimize this evidence and argues that the United States could not have reasonably expected a benefit to accrue to it for three reasons. This includes (i) the existence of Mexico’s moratorium on GE corn cultivation, (ii) the CEC report and its recommendations, and (iii) litigation in Mexican courts concerning GE corn, all occurring before the renegotiating of the USMCA.<sup>123</sup> However, Mexico’s argument is unavailing.

180. Most importantly, the United States has already addressed the shortcomings of the CEC report in its Rebuttal Submission and earlier in this opening statement. Specifically, that this report hypothesizes—without basing any conclusions on scientific analysis—that the importation and unapproved planting of transgenic corn from the United States is the source of transgenes in Mexico’s native corn landraces. Despite Mexico’s view, there is no reason that the United States would base its international trade policy or give significant weight to an outdated 2004 CEC report that is lacking scientific veracity.

181. The existence of Mexico’s moratorium on GE corn cultivation cuts against Mexico’s argument. That is, that Mexico for years prevented GE corn cultivation but *permitted* GE corn importation establishes the reasonableness of the U.S. expectation that its USMCA benefits would not be nullified. And litigation in Mexican courts that the Mexican Government opposed, defending its own science-based regulation, further confirms the reasonableness of the U.S.

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<sup>122</sup> “Preclude,” *Oxford English Dictionary*, [https://www.oed.com/dictionary/preclude\\_v?tab=meaning\\_and\\_use#28827800](https://www.oed.com/dictionary/preclude_v?tab=meaning_and_use#28827800) (definitions 3 and 4) (Exhibit USA-304).

<sup>123</sup> Mexico’s Rebuttal Submission, para. 606.

expectation.

182. The United States has also detailed the nullification or impairment it views as a result of the Tortilla Corn Ban and the Substitution Instruction.

## **VIII. CONCLUSION**

183. Chair, members of the Panel, this concludes the opening statement of the United States. We thank you for your attention and look forward to responding to your questions.