

MEX-USA-2023-31-01 MEXICO — MEASURES CONCERNING GENETICALLY ENGINEERED
CORN

Medidas relacionadas con el maíz genéticamente modificado

Written submission of the Institute for Agriculture and Trade Policy (IATP), the Rural Coalition

and the Alianza Nacional de Campesinas

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RECIBIDO

I. INTRODUCTION

1. The Institute for Agriculture and Trade Policy (IATP), the Rural Coalition and the Alianza Nacional de Campesinas are submitting these written views to assist the dispute settlement panel in MEX-USA-2023-r31-01 under the United States-Mexico-Canada Agreement (“USMCA,” “CUSMA” or “TMEC”). The United States is challenging measures set out in Mexico’s February 13, 2023 Decree, *DECRETO por el que se establecen diversas acciones en materia de glifosato y maíz genéticamente modificado*,¹ specifically the ban on use of GE corn (maize) in tortillas or dough (nixtamalization), and the instruction to Mexican government agencies to gradually substitute non-GE corn for GE corn in all products for human consumption and for animal feed.²

2. We believe Mexico’s measures are consistent with its obligations under USMCA, including to the extent applicable, Chapter 9, Sanitary and Phytosanitary (SPS) Measures, the risk assessment provisions therein and relevant international standards. The deficiencies of the U.S. complaint have been thoroughly addressed by Mexico and in third party submissions. We instead address issues of first impression concerning the derivation, text and application of USMCA General Exception Article 32.5 for measures necessary to fulfill Indigenous legal rights.

3. Mexico’s laws guarantee the right to food security, healthy food and a clean environment for all, and protection of human rights including Indigenous religions, culture, traditions, agrarian land practices, traditional knowledge and access to biologically diverse natural resources. The measures enacted by Mexico in the February 13, 2023 Decree, which are necessary to fulfill the legal rights of Indigenous peoples, meet the requirements of the Article 32.5 General Exception and are not a means of “arbitrary or unjustified discrimination” against other Parties nor a “disguised restriction on trade.” In fact, the current decree meets the USMCA criterion of using the least trade-distorting measure available to achieve a policy objective.

II. USMCA ARTICLE 32.5 BROADLY DEFINES AND PROTECTS INDIGENOUS LEGAL RIGHTS, EXPANDING PROTECTIONS WELL BEYOND PRIOR TRADE AGREEMENTS

4. This is a first opportunity to interpret an Indigenous Rights General Exception in any trade agreement involving the United States. USMCA Article 32.5 reads: “*Indigenous Peoples Rights. Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods, services, and investment, this Agreement does not preclude a Party from adopting or maintaining a measure it deems necessary to fulfill its legal obligations to indigenous peoples.*”

5. USMCA’s Article 32.5 Indigenous Rights General Exception is much more sweeping than any contained in agreements previously concluded by the U.S. or Canada. Article 32.5 may be seen as a reaction to, and a correction of, the inadequacies of prior attempts to recognize Indigenous rights in trade agreements.

¹ https://www.dof.gob.mx/nota_detalle.php?codigo=5679405&fecha=13/02/2023#gsc.tab=0

² <https://ustr.gov/sites/default/files/2023-08/US%20Panel%20Request%20-%20Mexico%20Biotech.pdf>

USMCA updates and replaces the North American Free Trade Agreement (NAFTA), which did not include any agreement-wide provisions directly addressing Indigenous concerns or rights.³

6. The USMCA Indigenous exception is derived from Article 29.6.1 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), to which Mexico and Canada are Parties.⁴ The CPTPP exception, required by the New Zealand government, reads “nothing in this Agreement shall preclude the adoption by New Zealand of measures it deems necessary to accord more favourable treatment to Māori in respect of matters covered by this Agreement.” According to New Zealand, this article “protects the government’s ability to adopt policies that fulfil its obligations to Māori, including under the Treaty of Waitangi.”⁵

7. The CPTPP’s “*to accord more favourable treatment*” language has been criticized consistently because of concerns that it may not broadly apply to all measures protecting or implementing Indigenous rights, but only those discriminating in favor of Indigenous peoples.⁶ USMCA negotiators eliminated this ambiguity by deleting the contentious phrase from the otherwise similar USMCA Article 32.5 General Exception.

8. With the removal of this phrase, USMCA’s Article 32.5 clearly applies to any measure a Party enacts or implements to fulfill its legal obligations to Indigenous peoples, provided that the measure is not arbitrary or unjustifiable discrimination.⁷

9. The scope of the exception is self-judging.⁸ Article 32.5 protects non-conforming measures that a Party “deems necessary;” it is up to each Party to determine what those legal obligations are — not to an arbitration panel or another Party.

10. The broad scope of USMCA Article 32.5 was well understood by Indigenous leaders involved in negotiations. Perry Bellegarde, then-National Chief of the Assembly of First Nations (Canada) and member of the NAFTA Council (a Canadian government-appointed entity advising negotiators) said: “*This clause is pivotal. It assures the parties freedom to meet their legal obligations to Indigenous Peoples and to act in the interests of Indigenous peoples without the concern that such actions may run afoul of trade or investment rules, meaning that one state cannot bully the other at the cost of Indigenous peoples’ rights*”.⁹ A 2018 report of the Assembly of First Nations favorably compared the USMCA provision to NAFTA: “The exception included within NAFTA only covered certain sections of the investment chapter, and not the ones most likely to lead to a dispute. This new exception clause covers the entire agreement and applies

³ Brenda L. Gunn. Impacts of the North American Free Trade Agreement on Indigenous Peoples and Their Interests.

<https://ssrn.com/abstract=1586163>. NAFTA text online: <http://www.sice.oas.org/trade/nafta/naftatce.asp>

⁴ CPTPP text online: <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/29.aspx?lang=eng>

⁵ <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/cptpp/understandingcptpp/protections/#:~:text=The%20Treaty%20of%20Waitangi%20exception,are%20party%20to%20the%20Agreement>

⁶ Waitangi Tribunal Report on the Trans-Pacific Partnership Agreement (Wai 2522, 2016). Online:

https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_104833137/Report%20on%20the%20Trans-Pacific%20Partnership%20Agreement%20W.pdf; Tina Ngata, Lessons from Aotearoa: The Indigenous “exception” clause in Free Trade

Agreements. Yellowhead Institute. February 20, 2019, <https://yellowheadinstitute.org/2019/02/20/lessons-from-aotearoa/>; Scott Harrison, Robin Asgari. International Trade Inclusivity: The CPTPP and Indigenous International Trade and Investment. December 17, 2020.

<https://www.asiapacific.ca/publication/international-trade-inclusivity-cptpp-and-indigenous#:~:text=Some%20critics%20have%20stated%20that,address%20Indigenous%20rights%20or%20economic>.

⁷ Risa Schwartz. Protecting Indigenous Rights in the United States-Mexico-Canada Agreement. International Economic Law and Policy Blog. 2018. <https://ielp.worldtradelaw.net/2018/10/guest-post-protecting-indigenous-rights-in-the-united-states-mexico-canada-agreement.html>

⁸ Ibid.; <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/cptpp/understanding-cptpp/protections/#:~:text=The%20Treaty%20of%20Waitangi%20exception,are%20party%20to%20the%20Agreement>

⁹ Bellegarde, Perry (2018). Macleans’, October 4, 2018, <https://www.macleans.ca/opinion/by-including-indigenous-peoples-the-usmca-breaks-new-ground/>

to Indigenous peoples across North America. It will allow all three states to take action to fulfill their legal obligations to Indigenous peoples with no concerns of reprisal.”¹⁰

11. Canada prioritized including Indigenous protections in the USMCA,¹¹ characterizing Article 32.5 as a “first for Canada’s FTAs, this dedicated Indigenous general exception (IGE) provides greater certainty that the Government of Canada can adopt or maintain measures necessary to fulfil its legal obligations to Indigenous peoples, including Aboriginal rights as recognized and affirmed by Section 35 of the Constitution Act, 1982, and those rights set out in self-government agreements.”¹² Mexico’s government likewise hailed the General Exception as “groundbreaking,” asserting: “Article 32.5 states that legal obligations to Indigenous people cannot be defeated or interfered with by commitments under trade rules. This general exception covers the entire USMCA.”¹³

12. USMCA includes provisions throughout that address the rights and concerns of Indigenous peoples. Indigenous peoples are specifically included in measures on corporate social responsibility, preferential duty-free treatment for handicrafts, the environment and support for small and medium size enterprises.¹⁴ These references are interpretive context reinforcing the constitutional obligations of the Parties to Indigenous peoples and the expansive definition of Indigenous rights protected by the Article 32.5 General Exception.

13. In particular, USMCA Environment Chapter 24 provides important context and detail for interpreting the Indigenous Rights General Exception. The chapter explicitly recognizes the centrality of the natural world and biological diversity to the lives, beliefs and practices of Indigenous peoples. Characterized as “innovative” and a “notable improvement” over NAFTA, USMCA’s “consideration of the relevance of the environment for indigenous populations, acknowledging their constitutional rights, and pointing out the importance of consulting with them on efforts to enhance environmental protection issues” has been specifically noted.¹⁵

14. Article 15 of the Environment Chapter is devoted to Trade and Biodiversity. Article 25.15.2 includes the requirement that “*each Party shall promote and encourage the conservation and sustainable use of biological diversity, in accordance with its law or policy.*” The importance of Indigenous peoples’ knowledge and practices to achieving conservation and sustainability is explicitly recognized in Article 25.15.3: “*The Parties recognize the importance of respecting, preserving, and maintaining knowledge and practices of indigenous peoples and local communities embodying traditional lifestyles that contribute to the conservation and sustainable use of biological diversity.*”

15. Also relevant to the instant case, Article 25.15.4 recognizes that the Parties retain authority to regulate and restrict access to their country’s genetic resources through national measures. As we detail below, preserving biological diversity — and specifically the health and genetic integrity of heritage corn varieties — is key to the continuing viability and health of Indigenous communities.

III. MEXICO HAS COMPREHENSIVE AND ROBUST LEGAL PROTECTIONS FOR INDIGENOUS PEOPLES

¹⁰ [https://www.afn.ca/uploads/sca-2018/Documents/Dialogue%20Sessions/Day%202%20-%20December%205,%202018/03%20Economics/02\)%20Draft%20AFN%20First%20Nations%20Trade%20Relations%20Overview.pdf](https://www.afn.ca/uploads/sca-2018/Documents/Dialogue%20Sessions/Day%202%20-%20December%205,%202018/03%20Economics/02)%20Draft%20AFN%20First%20Nations%20Trade%20Relations%20Overview.pdf).

¹¹ Patricia M. Goff. Bringing Indigenous Goals and Concerns into the Progressive Trade Agenda, *Interventions économiques*, <http://journals.openedition.org/interventionseconomiques/12777>.

¹² https://www.international.gc.ca/trade-commerce/indigenous_peoples-peuples_autochtones/approach-proche.aspx?lang=eng

¹³ https://embamex.sre.gob.mx/eua/images/stories/economicos/2021/factsheets/Indigenous_People__USMCA.pdf

¹⁴ <https://www.bakerinstitute.org/research/important-new-features-usmca>. The Preamble also recognizes “the importance of increased engagement by indigenous peoples in trade and investment.”

¹⁵ Mariana Sánchez Ramírez and Daniela Steven. Making the Environment a Priority in North America, <https://www.wilsoncenter.org/publication/making-environment-priority-north-america>

16. Mexico's Constitution includes multiple provisions recognizing Indigenous peoples and rights specific to them. Article 2 paragraph 2 recognizes the pre-colonization history of Indigenous peoples in Mexico: *"The nation is multicultural, based originally on its indigenous peoples, described as descendants of those inhabiting the country before colonization and that preserve their own social, economic, cultural and political institutions, or some of them."* Since its 1917 adoption, Mexico's Constitution has recognized some form of Indigenous land rights. Although modified in 1992, Article 27 continues to recognize traditional communal land rights.¹⁶

17. More recently, Mexico has also viewed Indigenous rights from a human rights perspective. "Recent constitutional reforms have focused on human rights thereby broadening its application to indigenous communities. Article 1 states that 'all individuals shall be entitled to the human rights granted by this Constitution and the international treaties signed by the Mexican State, as well as to the guarantees for the protection of these rights.' Additionally, Article 2 recognizes the right of indigenous peoples to self-determination and establishes preferential access for indigenous peoples to the natural resources in the areas they inhabit."¹⁷ The second paragraph of Article 2 explicitly states that its human rights provisions must be interpreted expansively in accord with international treaties on the subject, "working in favor of the broader protection of people at all times."¹⁸

18. The Constitution also addresses the right to food, health and the environment. Article 4 Paragraphs 3, 4 and 5 of Mexico's Constitution guarantees to all individuals "the right to nutritional, sufficient and quality nourishment;" "the right to health protection;" and "the right to a healthy environment for his/her own development and well-being."¹⁹

19. Indigenous rights are also protected through national legislation and executive decree. Agrarian Tribunals established by the 1992 Organic Law are tasked with resolving conflicts.²⁰ The General Law for the Protection of the Cultural Heritage of Indigenous and Afro-Mexican Populations and Communities was enacted by decree in 2022. This legislation protects resources and establishes a consultation process for development projects, providing a mechanism to implement-related concepts in the Constitution.²¹ The López Obrador administration has established the Instituto Nacional de los Pueblos Indígenas (INPI). Mandated by the Constitution, INPI replaces prior institutions with a similar mission. Recent INPI activities include organizing events promoting the rights of Indigenous women and children,²² supporting education by creating programs around preserving Indigenous languages²³ and participating in a presidential commission to protect sacred lands.²⁴

20. Under Mexico's legal system, once an international treaty is ratified, it becomes part of Mexican law and takes full effect.²⁵ Implementing legislation is not required for the legal rights articulated in international agreements to be effective: "With or without primary legislation, the executive branch can implement

¹⁶ For a history of land reform in Mexico, see: <https://archivos.juridicas.unam.mx/www/bjv/libros/9/4452/16.pdf>

¹⁷ Hector Calleros, "Mexico's Constitution, Indigenous Rights and the Future: Symposium on 200 years since Latin American States' Independence and Indigenous Peoples," <https://blog-iacl-aicd.org/independence-and-indigenous-peoples/2021/10/7/mexicos-constitution-indigenous-rights-and-the-future>

¹⁸ Translation by M. Fernanda Gomez Aban, https://www.constituteproject.org/constitution/Mexico_2015

¹⁹ Ibid.

²⁰ <http://www.ordenjuridico.gob.mx/Documentos/Federal/html/wo15393.html>

²¹ <https://ecija.com/en/sala-de-prensa/mexico-regulations-on-the-cultural-heritage-of-indigenous-and-afro-mexican-populations-and-communities/>

²² <https://www.gob.mx/sre/prensa/revisan-sre-inpi-y-mujeres-indigenas-avances-y-retos-de-la-implementacion-de-la-recomendacion-general-39-de-la-cedaw?idiom=es>

²³ <https://www.infobae.com/mexico/2023/10/06/nace-la-ulim-para-revitalizar-y-proteger-las-lenguas-indigenas-de-mexico/>

²⁴ <https://www.inah.gob.mx/boletines/se-instala-comision-presidencial-para-preservar-y-proteger-lugares-sagrados-y-rutas-de-peregrinacion-indigenas-no-seran-objeto-de-nuevas-concesiones-mineras>

²⁵ Article 133, https://www.constituteproject.org/constitution/Mexico_2015

international agreements by means of secondary or subordinate legislation, particularly by executive decrees.”²⁶

21. Mexico has ratified numerous international treaties and legal instruments that identify and protect Indigenous legal rights relevant to the instant case. These include, inter alia, the United Nations Declaration on the Rights of Indigenous Peoples;²⁷ the International Labour Organization Indigenous and Tribal Peoples Convention, 1989 (No. 169);²⁸ the International Convention on the Elimination of All Forms of Racial Discrimination;²⁹ the American Convention on Human Rights;³⁰ and the United Nations Convention on Biological Diversity, Kunming-Montreal Global biodiversity framework (December 27, 2022).³¹

22. The centrality of international law in Mexican law and jurisprudence is illustrated by the frequency with which political and judicial institutions turn to these agreements to interpret and amend Mexico’s laws. For example, Mexico’s Supreme Court of Justice noted in Amparo Directo 33/202 (June 30, 2021) that Mexico’s Constitution was reformed in 2001 based on International Labour Organization (ILO) Convention 169, reflected in the current Article 2 recognizing “the multicultural composition of the Nation, originally based on its indigenous peoples and communities, who will be recognized in local constitutions and laws.”³² In that case, the Indigenous community of Choréachi appealed to the InterAmerican Commission of Human Rights pursuant to the American Convention on Human Rights.³³ The Commission’s decision in support of the Indigenous community helped pressure the Mexico Agrarian Court to recognize the precedence of the community’s constitutionally-guaranteed land rights over conflicting legislation permitting privatization.³⁴

23. Similarly, a recent decision of the Mexican Supreme Court canceling mining concessions on Indigenous land relied on rights set out in the Indigenous and Tribal Peoples Convention (ILO Convention No. 169) and its implementing legislation. The Court determined that the prior consultation process required under both international and domestic law — in which Indigenous communities are informed of a project before giving consent — was never carried out.³⁵

24. The U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP) is part of Mexican law, and the binding legal principles it enumerates are therefore included among the measures that Mexico deems “*necessary to fulfill its legal obligations to indigenous peoples*” under USMCA’s Article 32.5 General Exception.³⁶

25. UNDRIP Article 11.1 provides that “Indigenous peoples have the right to practice and revitalize their cultural traditions and customs.” Article 20.1 asserts the rights of Indigenous peoples “...to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional

²⁶ César Nava Escudero. “Indigenous Environmental Rights in Mexico: Was the 2001 Constitutional Reform Facilitated by International Law?” Mexican Law Review (June 2021), <https://www.scielo.org.mx/pdf/mlr/v4n2/v4n2a2.pdf>

²⁷ https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

²⁸ https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169

²⁹ <https://legal.un.org/avl/ha/cerd/cerd.html>

³⁰ <https://treaties.un.org/doc/publication/unts/volume%201144/volume-1144-i-17955-english.pdf>

³¹ https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf; [Spanish:

<https://www.cbd.int/doc/c/2c37/244c/133052cdb1ff4d5556ffac94/cop-15-1-25-es.pdf>]

³² Human Rights Office of Mexico’s Supreme Court of Justice, *Extract of Amparo Directo 33/2020*, Mexico.

<https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/summary/2022-06/Summary%20AD33-2020%20HRO.pdf>. Full text: <https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/sentencia/2022-06/AD33-2020.pdf>

³³ <https://www.oas.org/en/iachr/>

³⁴ For background on the case, see <https://pbiusa.org/Choreachi>

³⁵ <https://news.mongabay.com/2022/02/mexicos-top-court-cancels-mining-concessions-near-indigenous-communities/>

³⁶ David A. Gantz. Important New Features in the USMCA, <https://www.bakerinstitute.org/research/important-new-features-usmca> (citing Kevin O’Callaghan, Emilie Bundock and Madison Grist, “USMCA Aims to Protect the Interests of Indigenous Peoples in International Trade,” Fasken Indigenous Bulletin, October 23, 2018)

and other economic activities.”³⁷ Article 31.1 provides that Indigenous peoples “have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora...”³⁸

26. Mexico is a signatory of the U.N. Convention on Biological Diversity, the principles and goals of which have likewise been incorporated into Mexico’s laws. The Kunming-Montreal Global Biodiversity Framework adopted by the Convention in 2022 recognizes both “monetary and non-monetary benefits from the utilization of genetic resources” and articulated the goal of “ensuring traditional knowledge associated with genetic resources is appropriately protected, thereby contributing to the conservation and sustainable use of biodiversity, in accordance with internationally agreed access and benefit-sharing instruments.”³⁹

27. The Convention on Biological Diversity provides important context for USMCA’s Article 32.5 Indigenous Rights General Exception and the Environment Chapter. The latter recognizes the role of the environment in the well-being of Indigenous peoples (Article 24.2.4) and requires each Party to “promote and encourage the conservation and sustainable use of biological diversity, in accordance with its law or policy.” (Article 24.15.2)

28. The global importance of protecting Mexico’s native corn species has been recognized by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).⁴⁰ USMCA Article 1.3 includes a general exception for measures that carry out the obligations of the multilateral environmental agreements listed in USMCA Article 24.8, including CITES (a Party must “adopt, maintain, and implement laws, regulations, and all other measures necessary to fulfill its respective obligations”).

IV. THE INTEGRITY AND BIOLOGICAL DIVERSITY OF NATIVE CORN IS INEXTRICABLY INTERTWINED WITH THE HEALTH, FOOD SECURITY AND CULTURE OF MEXICO’S INDIGENOUS PEOPLES

29. To understand the centrality of native corn to Indigenous peoples, listen to Indigenous voices: “*The health and survival of our corn mother/father in all its natural varieties, colors and original strength and resilience cannot be separated from the health and survival of our Peoples. Our struggles to protect corn as a source of our lives cannot be separated from our struggles to defend our rights to land, water, traditional knowledge and self-determination.*” Declaration of Santa Domingo, 2013 Indigenous Peoples International Conference on Corn, Oaxaca Mexico.⁴¹

30. As the trilateral Commission on Environmental Cooperation (CEC) established under NAFTA recognized, “Maize has significant cultural, symbolic, and spiritual values for most Mexicans. ...The risk assessment of transgenic maize in Mexico is inextricably linked to these values.”⁴²

31. The relationship between Mexico’s Indigenous peoples and native corn landraces goes back millennia. “Corn is central to the traditional diets, means of subsistence, millennial Nation-to-Nation trade relations, creation stories, songs, traditional cultural and agricultural practices and ceremonies....”⁴³ For Indigenous

³⁷ <https://social.desa.un.org/issues/indigenous-peoples/united-nations-declaration-on-the-rights-of-indigenous-peoples>

³⁸ https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

³⁹ <https://www.cbd.int/article/cop15-final-text-kunming-montreal-gbf-221222>

⁴⁰ CITES lists for protections two corn (maiz) species found in Mexico (*Coryphantha maiz-tablasensis* and *Zamia loddigesii*). CITES text: <https://cites.org/eng/disc/text.php>. CITES species checklist <http://api.speciesplus.net>

⁴¹ U.N. Permanent Forum on Indigenous Issues, <https://www.un.org/esa/socdev/unpfii/documents/2013/CRP-4.pdf>

⁴² The Effects of Transgenic Maize in Mexico, Commission for Environmental Cooperation Secretariat Report (“CEC Maize Study”) at 23, <http://www.cec.org/files/documents/publications/2152-maize-and-biodiversity-effects-transgenic-maize-in-mexico-key-findings-and-en.pdf>

⁴³ Referencing Cristina Santini. “The People of the Corn.” *Cultural Survival Quarterly*. 30.4 (2006): n. page. Web. 1 May. 2013. <http://www.culturalsurvival.org/publications/cultural-survival-quarterly/mexico/people-corn>.

communities in Mexico, such as the Zapotec, the right to “practice and revitalize their cultural traditions and customs” is inseparable from the preservation of their cultural identity.⁴⁴

32. Corn consumption in Mexico — including in Indigenous and peasant communities where most of the country’s corn is cultivated by subsistence farmers — is exponentially greater than in the U.S. “White corn makes up almost 87% of Mexico’s corn production, some 22 million tons a year, most of which is for human consumption. Mexicans eat on average around 432 pounds of white corn per year, largely in the form of tortillas. On the other hand, while the U.S. is the world’s largest producer and consumer of corn, less than 2% is for human consumption, according to the World Resources Institute.”⁴⁵

33. As the CEC concluded, this dramatic difference in consumption rates is a legitimate factor in evaluating the health impacts of shifting from native corn varieties to corn genetically engineered to repel pests and withstand herbicides.⁴⁶ The use of GE corn seeds is clearly associated with increased herbicide use,⁴⁷ potentially also exposing Mexicans to higher levels of herbicide residues.⁴⁸

34. Mexico’s traditional cuisine, including corn cooking processes such as nixtamalization, has been listed by UNESCO as an Intangible Cultural Heritage of Humanity worthy of safeguarding: “*Traditional Mexican cuisine is a comprehensive cultural model comprising farming, ritual practices, age-old skills, culinary techniques and ancestral community customs and manners. It is made possible by collective participation in the entire traditional food chain: from planting and harvesting to cooking and eating. The basis of the system is founded on corn, beans and chili; unique farming methods such as milpas (rotating swidden fields of corn and other crops) and chinampas (man-made farming islets in lake areas); cooking processes such as nixtamalization (lime-hulling maize, which increases its nutritional value); and singular utensils including grinding stones and stone mortars.*”⁴⁹

35. Small scale farmers (campesinos) and Indigenous farming communities are responsible for most of the genetic diversity of corn in North America. “Scientists say this type of farming, fueled by traditional practices such as saving or sharing seeds from one season to the next, has resulted in Mexico’s 59 native maize varieties: a cornucopia of husks and cobs of all sizes and colors, from deep purple to creamy-white to pink to glowing orange.”⁵⁰ Traditional landraces of maize are cultivated throughout more than one-half of Mexico's cropland. The prevalence of Indigenous peoples in rural areas is highly related to the conservation and distribution of native maize varieties throughout the territory.⁵¹ The CEC likewise found “The diversity of maize in Mexico is maintained primarily by local and indigenous farming communities. This system allows the conservation of the maize genetic resources that constitute the basis of food and agricultural production.”⁵²

⁴⁴ Javier Castellanos. The Preservation of Indigenous Knowledge in Contemporary Mexico in *El cultivo del maize en Yojoivi*, <https://doi.org/10.18113/P8ik159698>, Ida Day, <https://journals.psu.edu/ik/article/view/59698> included in *Other Ways of Knowing*. Interinstitutional Center for Indigenous Knowledge, Pennsylvania State University (2015).

⁴⁵ Lorena Rios. Ambrook Research, <https://ambrook.com/research/supply-chain/mexico-trade-dispute-gmo-corn>

⁴⁶ CEC Maize Study at 20

⁴⁷ Benbrook, C.M. Impacts of genetically engineered crops on pesticide use in the U.S., the first sixteen years. *Environ Sci Eur* 24, 24 (2012). <https://doi.org/10.1186/2190-4715-24-24>

⁴⁸ E. González-Ortega, et al. (2017) Pervasive presence of transgenes and glyphosate in maize-derived food in Mexico, *Agroecology and Sustainable Food Systems*, 41:9-10, 1146-1161, DOI <https://doi.org/10.1080/21683565.2017.1372841>

⁴⁹ UNESCO, Decision of the Intergovernmental Committee: 5.COM 6.30, <https://ich.unesco.org/en/decisions/5.COM/6.30>

⁵⁰ Study by Mauricio Bellon, National Commission for the Knowledge and Use of Biodiversity, cited by Emiliano Rodríguez Mega. *Scientific American*. November 19, 2018, <https://www.scientificamerican.com/article/small-farmers-in-mexico-keep-corns-genetic-diversity-alive/>

⁵¹ Perales H., Golicher D. Mapping the Diversity of Maize Races in Mexico. *PLoS ONE*. 2014;9:e114657. doi: 10.1371/journal.pone.0114657.

⁵² CEC Maize Study at 18. We note that for millennia, Indigenous peoples in the U.S. likewise have had deep cultural, religious and culinary connections to native seed species, including corn. Indigenous farming communities in the U.S. today face even greater struggles to protect traditional practices and seeds because of the greater degree of removal from traditional lands. See, e.g., <https://www.morningagclips.com/project-works-to-grow-pawnee-corn>

V. MEXICO'S MEASURES REGARDING GLYPHOSATE AND GENETICALLY MODIFIED CORN ARE NECESSARY TO FULFILL ITS LEGAL OBLIGATIONS TO INDIGENOUS PEOPLES

36. In 2019, Mexico enacted a Federal Law for the Promotion and Protection of Native Maize. The law designates over 60 varieties of corn developed with traditional and indigenous agricultural methods as part of Mexico's national heritage, making its conservation a human right on par with nutrition, health and culture. The objectives of the law include encouraging sustainable development, promoting biodiversity of native corn and supporting the activities of native producers of native corn.⁵³

37. According to a sponsor, Senator Ana Lilia Rivera Rivera, a primary motivation for the legislation was "... the debt that [Mexico] still has with indigenous communities since the implementation of the North American Free Trade Agreement [NAFTA] in 1994." Of particular concern was the possibility that foreign companies can patent seed varieties that were already developed under traditional Mexican agriculture. Victor Manuel Chima of the Fray Francisco de Vitoria Human Rights Center called such a possibility a "... a kind of intellectual plundering of [indigenous] communities." Senator Rivera asserted that because of this new law "... never, ever, will anyone be able to patent or create economic or commercial rights [that would take precedence] over the human right to corn."⁵⁴

38. The purpose of Mexico's February 13, 2023 Decree banning use of GE corn in tortillas or nixtamalization (masa) and instructing Mexican government agencies to gradually substitute non-GE corn for GE corn in all products for human consumption and for animal feed, "is to protect the rights to health and a healthy environment, native corn, the milpa, biocultural wealth, peasant communities and gastronomic heritage; as well as to ensure nutritious, sufficient quality diet."⁵⁵ This purpose is a valid exercise of Mexico's domestic legislative authority articulated in its Constitution, laws and international agreements incorporated into Mexican law and jurisprudence. The measures enacted in the Decree are necessary to fulfill the legal rights of Indigenous peoples in Mexico, including their Constitutionally protected health, food security, history, culture, religious beliefs, community land tenure, stewardship of genetic resources and knowledge, healthy environment including protection of biological diversity, and traditional agrarian practices.

39. Maintaining the genetic diversity of Mexican corn is essential to protecting Indigenous peoples' rights. Yet the rich diversity of corn species in Mexico is being eroded.⁵⁶ The Mexican government's concerns that transgenic contamination by GE corn will damage this ecologically vital diversity are evidence-based. One study found "the presence of introgressed transgenic DNA constructs in native maize landraces grown in remote mountains in Oaxaca, Mexico, part of the Mesoamerican centre of origin and diversification of this crop."⁵⁷ Another traced the presence of transgenes and glyphosate in maize-based foods in Mexico. "Transgenic sequences were present in overall 82% of assayed food categories; while the most widely form of maize consumption in Mexico, tortillas, had recombinant sequences in 90.4% of the samples. ... Additionally, glyphosate was detected in approximately 27.7% of the samples rendered positive for transgenic events tolerant to this herbicide."⁵⁸ The CEC Maize Study confirmed the threats to native corn varieties from GM corn imports, which have been planted in kernel form, contaminating native varieties,

⁵³ Senate Gazette, April 25, 2019 / LXIV/ISPO-128-2432/94786, https://www.senado.gob.mx/65/gaceta_del_senado/documento/94786

⁵⁴ "Native corn gets legal protection, prevents 'intellectual plundering,'" April 4, 2020, <https://mexiconewsdaily.com/news/native-corn-gets-legal-protection/>

⁵⁵ https://www.dof.gob.mx/nota_detalle.php?codigo=5679405&fecha=13/02/2023#gsc.tab=0

⁵⁶ <https://www.ucdavis.edu/news/study-reveals-troubling-loss-mexico-s-maize-genetic-diversity>; Perales H, Golicher D (2014) Mapping the Diversity of Maize Races in Mexico. PLoS ONE 9(12): e114657. <https://doi.org/10.1371/journal.pone.0114657>

⁵⁷ Quist, D., Chapela, I. Transgenic DNA introgressed into traditional maize landraces in Oaxaca, Mexico. *Nature* 414, 541–543 (2001). <https://doi.org/10.1038/35107068>; see also CEC Maize Study.

⁵⁸ E. González-Ortega, et al., (2017) Pervasive presence of transgenes and glyphosate in maize-derived food in Mexico, *Agroecology and Sustainable Food Systems*, [10.1080/21683565.2017.1372841](https://doi.org/10.1080/21683565.2017.1372841)

and recommended strict controls on GE corn imports based on the assessed difficulty of controlling gene flow to protect native varieties.⁵⁹

40. Measures in the February 2023 Decree are necessary to ensure that Indigenous people in Mexico have access to safe and healthy food, guaranteed in Mexico's Constitution. The potential health impacts of dietary exposure to GE Bt corn Cry and Vip toxins, and to glyphosate residues, have not been adequately studied, separately or cumulatively. The Mexican people have the highest corn consumption in the world, largely through minimally processed white and native corn flour for traditional foods.⁶⁰ This unique consumption pattern, especially marked in traditional Indigenous diets, entails human ingestion exposure to high and increasing levels of pesticide residues as multiple pesticide applications are required to control pests resistant to the pesticide traits of GE varieties.

41. The February 2023 Decree is necessary to prevent the contamination of Mexican maize landraces and protect the integrity of Mexico's corn species. A recent study correlated the prevalence of transgenic corn in Mexico to regions where "porous border dynamics could favor the smuggling of transgenic maize seed from Guatemala or other Central American countries into various borderline regions in Chiapas, a phenomenon that has been already reported for other states in Mexico, such as Chihuahua in the north and recently, Tabasco in the south." The authors of that study recommended "biosecurity measures geared towards diminishing the introduction of genetically modified maize into local native varieties."⁶¹

42. In 2009, Mexican civil society groups sought an investigation of transgenic maize being imported, distributed and grown in the state of Chihuahua in contravention of multiple Mexican laws. Under NAFTA's weak enforcement mechanism, the CEC declined to investigate the allegations.⁶² As previously detailed, NAFTA lacked protections specific to Indigenous peoples. USMCA's Article 32.5 Indigenous rights general exception and Article 24 protections for biological diversity and the knowledge and practices of Indigenous peoples corrected this significant defect.

43. Mexico's February 2023 Decree is necessary to implement and enforce the rights of Indigenous and subsistence farmers to save, select and breed their own seeds. These rights are protected by Mexico's 2019 Law for the Promotion and Protection of Native Maize and the U.N. Declaration on the Rights of Indigenous Peoples, incorporated into Mexico's laws. These objectives are also recognized by all Parties to the Convention on Biological Diversity. As detailed above, the Convention is part of Mexico's laws as well as providing interpretive context for the biological diversity and Indigenous rights protections in USMCA.

VI. MEXICO'S MEASURES ARE NEITHER UNJUSTIFIED DISCRIMINATION NOR A DISGUISED RESTRICTION ON TRADE

44. Mexico's corn measures meet the requirements of the Article 32.5 General Exception because they are not "*used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods, services, and investment.*" Mexico's objective isn't to derive commercial advantage for domestic producers. Mexico's measures apply indiscriminately to domestic and foreign producers and products. The U.S. has provided no evidence of economic harm or unfair discrimination resulting from Mexico's rules.

⁵⁹ Kathleen McAfee. Beyond techno-science: Transgenic maize in the fight over Mexico's future. *Geoforum* 39 (2008) 148–160. <https://sciences.ucf.edu/biology/d4lab/wp-content/uploads/sites/23/2021/11/Mexican-corn.pdf>

⁶⁰ Sánchez-Vega LP, et al. (2021) Perception of traditional foods in societies in transition: The maize tortilla in Mexico. *J Sens Stud.* 2021; 36:e12635. <https://doi.org/10.1111/joss.12635>

⁶¹ Ayala-Angulo M, González EJ, et al. Local and Regional Dynamics of Native Maize Seed Lot Use by Small-Scale Producers and Their Impact on Transgene Presence in Three Mexican States. June 30, 2023. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10346707/#B14-plants-12-02514>

⁶² Transgenic Maize in Chihuahua, Submission ID: SEM-09-001, <http://www.ccc.org/submissions/registry-of-submissions/transgenic-maize-in-chihuahua/>

45. Mexico's February 2023 Decree does not restrict trade in GE corn, including white corn. The first part of the Decree restricts the *uses* of GE corn in tortilla and maize flour (masa) for direct human consumption. This directive affects very few U.S. producers. Only an estimated 3% of U.S. corn exports to Mexico are white corn, and of that, only a portion is GE.⁶³ An unknown portion of this GE corn was destined for tortilla or masa production. The only U.S. producers affected are those growing GE white corn who had contracts with Mexican buyers in the tortilla or masa industries. The U.S. did not provide evidence of harm in its submission.

46. The second part of Mexico's February 2023 Decree, the instruction to Mexican government agencies to gradually substitute non-GE corn for GE corn in all products for human consumption and for animal feed, has no material impact on imports of U.S. GE corn. The instruction includes no deadlines and lists no trade measures to achieve such a transition.

47. U.S. claims of potential trade and economic impacts derive from a flawed set of economic studies commissioned by BIO, the trade association of biotechnology companies. These studies were based on worst-case scenarios under a previous Mexican decree,⁶⁴ which is not relevant to this case since it is no longer in effect and is not the subject of this U.S. complaint. It is nevertheless worth noting that even the flawed BIO study found, in a brief overview of an alternative scenario in which restrictions do not apply to GE corn for animal feed and industrial uses, that: "the market adjusts relatively quickly and the large shifts in farm trends and the grain handling industry are not predicted."⁶⁵

48. In fact, trade data shows that overall, Mexico's imports of corn from the U.S. have *increased* since the Decree was announced. U.S. corn exports to Mexico increased 16.9% in January-November 2023 over the previous year to a record high of 18.2 million tons and are expected to reach 19.5 million tons, with further increases expected next year, according to the Mexican agriculture consultancy GCMA.⁶⁶

49. Since 2020, when Mexico indicated a preference for non-GE white corn for its tortillas, U.S. farmers wishing to export to that market have had three years to shift to non-GE varieties. All U.S. white-corn farmers still have that option, and some farmers have either made that shift or have expressed a willingness to do so to meet Mexico's needs.⁶⁷ Non-GE corn yields are comparable to GE corn yields, according to seed industry sources.⁶⁸ And non-GE white corn earns a premium price estimated to be 10%-20% higher than GE varieties.⁶⁹ As a result, rather than face economic harm, U.S. corn producers as a whole may reap higher returns by shifting some of their production to non-GE varieties in response to Mexico's February 2023 Decree.

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⁶³ <https://www.ers.usda.gov/webdocs/outlooks/105467/fds-221.pdf?v=2721.7> Pages 13-14.

⁶⁴ Timothy Wise. Distorting Markets in the Name of Free Trade, <https://www.iatp.org/distorting-markets-name-free-trade>

⁶⁵ World Perspectives Institute study, page 38, https://www.bio.org/sites/default/files/2022-10/Implications%20and%20Consumer%20Price%20Impacts%20of%20a%20Mexican%20GM%20Corn%20Ban_Final_221003%20%28002%29.pdf

⁶⁶ <https://mexiconewsdaily.com/news/mexico-imported-a-record-amount-of-grains-this-year/>

⁶⁷ <https://non-gmoreport.com/articles/mexico-plans-to-buy-non-gmo-corn-from-the-u-s-other-countries-as-it-moves-ahead-with-gmo-ban/>

⁶⁸ <https://non-gmoreport.com/articles/non-gmo-corn-seed-outperforming-gm-seed-in-field-trials/>

⁶⁹ <https://non-gmoreport.com/articles/mexico-plans-to-buy-non-gmo-corn-from-the-u-s-other-countries-as-it-moves-ahead-with-gmo-ban/>