

**Mexico – Tax Measures on Soft Drinks and Other Beverages
WT/DS308**

**Opening Statement of the United States
Second Meeting of the Panel**

February 23, 2005

1. Mr. Chairman, and members of the Panel, we appreciate this opportunity to appear before you today to review and further clarify the issues in this dispute, and we thank you again for the time and effort you have put into resolving this dispute. This statement will briefly review the status of this dispute, and will principally focus on responding to the arguments presented by Mexico concerning Article XX(d) in its second submission.

Status of this Dispute

2. This dispute, as you are well aware, and despite Mexico's repeated attempts to argue otherwise, concerns Mexico's obligations under the WTO Agreement and certain tax measures that Mexico imposes on non-cane sugar sweeteners and soft drinks and syrups. Mexico readily admits that it imposed these tax measures to stop the displacement of Mexican cane sugar by imports of high-fructose corn syrup ("HFCS") from the United States.

3. The U.S. first and second submissions and responses to Panel questions have presented all of the facts and argument necessary to establish a *prima facie* case that Mexico's tax measures on soft drinks and syrups – contained in the Law on the Special Tax on Production and Services (or the IEPS by its Spanish acronym) – are in breach of its obligations under Articles III:2 and III:4 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"). Mexico has not

contested any of those facts or arguments. Accordingly, the United States will focus here on Mexico's alleged defense under Article XX(d) of the GATT 1994.

Article XX(d) – "Laws or Regulations"

4. Under this defense, Mexico contends that its tax measures are necessary to secure U.S. compliance with the NAFTA and, therefore, justified as an exception to WTO rules under Article XX(d). As the party asserting it, Mexico bears the burden of proof on this defense. Mexico has not met that burden and, therefore, cannot justify its tax measures under Article XX(d).

5. The fundamental flaw in Mexico's defense is that Article XX(d) pertains to "laws or regulations," not obligations owed Mexico under the NAFTA or any other international agreement. Thus, the energy Mexico has expended attempting to convince the Panel that its tax measures are "necessary" or "justifiable," because Mexico has "exhausted" efforts to find a solution to the NAFTA sugar dispute, are simply efforts to distract attention from the fact that Mexico is unable to sustain its assertion that "laws or regulations" means or includes obligations under an international agreement.

6. As the United States explained in its second submission and in response to the Panel's questions, the phrase "laws or regulations" means rules promulgated by a government such as statutes or administrative rules – in other words, the domestic laws or regulations of the Member applying the measure at issue. This is the interpretation of the phrase "laws or regulations" derived from application of the Vienna Convention rules of treaty interpretation. These rules direct the treaty interpreter to the ordinary meaning of the terms of the treaty in their context and

in light of the treaty’s object and purpose.¹ As demonstrated in the U.S. responses to questions and second submission, the ordinary meaning of “laws or regulations” is the domestic laws or regulations of the Member claiming the Article XX(d) exception. This meaning is supported by (1) the dictionary definition of the words “laws” and “regulations”; (2) the use of the words “laws” and “regulations” as opposed to the words “obligations” or “agreements” used in Article XX and elsewhere in the GATT 1994 and the WTO Agreement;² and (3) the effect on the WTO Agreement of reading the phrase “laws or regulations” to include obligations under international agreements.³ The United States has already detailed each of these points in previous submissions. We emphasize here that acceptance of Mexico’s interpretation of “laws or regulations” to include obligations owed Mexico under the NAFTA would open the door for any Member to claim that a breach of the WTO Agreement, or some other treaty, by another Member meant that the Member was free to breach any of its WTO obligations. Such a reading of Article XX(d) would nullify Article 23 of the DSU, render Article 22 of the DSU meaningless, and significantly undermine the effective functioning of the WTO dispute settlement system.

7. Such a reading would also mean that WTO panels and the Appellate Body would be called upon to examine any treaty that was the subject of such a claim of breach to determine if the trade measures adopted were “necessary to secure compliance” with that treaty. To do so would require WTO panels or the Appellate Body to determine if there was, in fact, a breach of the underlying agreement. In other words, WTO dispute settlement would become a forum of

¹ VCLT, Art. 31(1).

² U.S. Responses to Questions of the Panel, paras. 72-74; U.S. Second Written Submission, paras. 44-46.

³ U.S. Second Submission, paras. 47-48.

general dispute resolution for all international agreements, and all such agreements would be in effect incorporated into, and enforced by, the WTO Agreement by virtue of Article XX(d). This cannot possibly be what Mexico, let alone other WTO Members, intends. Ironically, it would also mean that with each additional international agreement a Member enters into, the more it diminishes the benefits secured under the WTO Agreement: the Member's WTO rights would be subject to being infringement by any party with whom it had entered into an international agreement so long as the party claimed the WTO breach was to secure compliance with the non-WTO Agreement.

8. Despite the serious, even astounding, implications of what Mexico argues, it is surprising how little Mexico has provided in support of its contention that U.S. obligations under the NAFTA constitute "laws or regulations" within the meaning of Article XX(d). Other than the mere assertion that "laws" as used in Article XX(d) includes international agreements,⁴ the only support Mexico offers is that Article 38 of the International Court of Justice (ICJ) Statute includes "international conventions" as a source of "international law,"⁵ that "treaties" like "laws" create legal obligations,⁶ and that paragraphs (b) and (g) of Article XX are not limited to measures relating to "policies in respect of things located or actions occurring within the territorial jurisdiction of the Member taking the measure."⁷ The latter of these arguments is essentially irrelevant. The question is not whether the measure at issue relates to actions

⁴ Mexico First Written Submission, para. 118; Mexico Second Written Submission, para. 71.

⁵ Mexico Responses to Questions of the Panel, p. 13 (WTO translation); *see also* Mexico Second Written Submission, para. 71 (citing Article 38 of the ICJ Statute).

⁶ Mexico Second Written Submission, paras. 69-72, 77-78; Mexico Responses to Questions of the Panel, p. 13 (WTO translation).

⁷ Mexico Second Written Submission, paras. 74-76; Mexico Responses to Questions of the Panel, p. 13-14 (WTO translation).

occurring outside the territorial jurisdiction of the Member taking the measure. In the disputes cited by Mexico,⁸ the measure at issue was a domestic law applied within the jurisdiction of the Member taking the measure, and none of these disputes, of course, was interpreting “laws or regulations” under Article XX(d). Rather, the question is whether Article XX(d) applies to obligations owed by another Member under an international agreement. It does not. The reference to the ICJ Statute likewise misses the point and for the same reason. Mexico has yet to demonstrate that the phrase “laws or regulations” means or includes “international law” or that the creation of “legal obligations” is synonymous with the word “laws.”

9. In particular, whatever is included in the scope of “international law,” there is a textual difference between the words “international law” and the word “laws” which, of course, is the actual word used in Article XX(d). In Article XX(d) and throughout the WTO Agreement, the word “laws” is used to refer to domestic laws.⁹ By contrast, in the two instances where the WTO Agreement references the words “international law” – in Article 3.2 of the DSU and Article 17.6 of the Antidumping Agreement – the word “law” appears in the singular and is preceded by the word “international.” As noted in the U.S. second submission, the Spanish and French texts of the Agreement use entirely different words to refer to “international law” as contained in Articles 3.2 and 17.6, than they do to refer to “laws” as contained in Article

⁸ Mexico Second Written Submission, paras. 74-76 (citing *US – Shrimp* and *Tuna Dolphin*); Mexico Responses to Questions of the Panel, p. 13-14 (WTO translation) (citing *US – Shrimp* and *Tuna Dolphin*).

⁹ See, e.g., Marrakesh Agreement Establishing the WTO, Art. XVI:4; GATT Arts. VII:1, VIII:3 and X:1; General Agreement on Trade in Services (GATS) Arts. V:3, VI:3, XXVIII(k) and Annex on Telecommunications, para. 3(d); Agreement on Import Licensing Procedures, Art. 8.2; Agreement on the Implementation of Article VII of the General Agreement on Tariffs and Trade 1994, Art. 3.2; AD Agreement, Art. 18.5; Agreement on Rules of Origin, *passim*; Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), preamble, Arts. 3.2, 8.1, 40.2, 63.1, 63.2, and 65.3; Agreement on Preshipment Inspection, *passim*.

XX(d).¹⁰ To borrow a quote from Mexico’s second submission and oral statement today: “[A] treaty interpreter is not entitled to assume that the use of different words in a treaty was merely inadvertent or ‘accidental.’”¹¹

10. Moreover, “laws” as it appears in Article XX(d) is used in conjunction with the word “regulations.” As the United States has explained, “regulations” are defined as instruments “issued by various governmental departments to carry out the intent of the law.”¹² Thus, a reading of the phrase “laws or regulations” to mean the domestic laws or regulations of the Member applying the measure at issue attributes the same scope to the word “laws” as it does to the word “regulations.” Mexico’s reading, on the other hand, creates an asymmetry between the scope of the word “laws” and the word “regulations” as used in Article XX(d). Under Mexico’s reading, only the former captures instruments that are not solely domestic in scope.

11. Mexico’s argument that international agreements create “legal obligations” is likewise without merit.¹³ The mere fact that international agreements create “obligations” between States, that are referred to as “legal,” does not address the question of whether obligations under an international agreement – whether legal or otherwise – fall within the scope of the phrase “laws or regulations” in Article XX(d). Mexico has not demonstrated that “legal obligations” assumed by the United States under the NAFTA constitute “laws” within the meaning of Article XX(d). In this regard, the United States points out that in the United States, international trade agreements, such as the NAFTA and the WTO Agreement, are not laws and are not enforceable

¹⁰ U.S. Second Written Submission, note 72.

¹¹ Mexico Second Written Submission, para. 50 (citing the Appellate Body in *EC – Hormones*).

¹² U.S. Responses to Question of the Panel, para. 71.

¹³ Mexico Second Written Submission, paras. 69-72, 77-78.

in U.S. courts.¹⁴ That interested parties in the United States may ask the U.S. Trade Representative to seek our trading partners' compliance with those agreements, contrary to Mexico's suggestion,¹⁵ does not make those agreements "laws."

12. Rather than demonstrate that the phrase "laws or regulations" means or includes "international law" or international agreements, Mexico, instead, argues that the United States "must explain why the term 'laws' as used in Article XX(d) cannot include international law."¹⁶ Mexico forgets its burden of proof. It is Mexico's burden, as the party asserting the defense, to establish that its tax measures qualify as measures "necessary to secure compliance with laws or regulations" within the meaning of Article XX(d). Throughout these proceedings, however, Mexico has been unable to demonstrate that obligations owed Mexico under an international agreement constitute "laws or regulations." Without such a demonstration, Mexico cannot justify its tax measures by way of Article XX(d).

Article XX(d) – "Necessary to Secure Compliance"

13. Despite being unable to demonstrate that "laws or regulations" actually means or includes international agreements, Mexico makes much of its allegedly exhaustive efforts to resolve the dispute it has with the United States over market access for cane sugar under the NAFTA. On the basis of these efforts, Mexico insists that its tax measures are "necessary to secure compliance" and in keeping with the chapeau to Article XX. As the United States explained in its second submission and responses to questions, these efforts do not render Mexico's tax

¹⁴ *Corus Staal BV v. United States*, CAFC Slip Op. No.04-1107 (Jan. 21, 2005) at 9.

¹⁵ Mexico Second Written Submission, para. 78.

¹⁶ Mexico Second Written Submission, paras. 71, 73.

measures “necessary” or designed to “secure compliance” within the meaning of paragraph (d); they also do not mean that Mexico’s tax measures are applied in a manner that is consistent with the chapeau to Article XX. Rather than repeat what was said in our earlier submissions, today I will focus on two points regarding Mexico’s second submission.

14. The first relates to Mexico’s insistence that its tax measures “relate[] virtually exclusively to the United States” and are “directed against the United States.”¹⁷ To support this assertion, Mexico explains that most imports of HFCS and soft drinks come from the United States and “arose under the NAFTA.”¹⁸ Mexico then concludes that its tax measures are, therefore, a response to the U.S. “refusal” to resolve the NAFTA sugar dispute. The United States presumes Mexico included this point in response to the U.S. point that breaching obligations owed WTO Members other than the United States cannot be necessary to secure U.S. compliance with the NAFTA.¹⁹ Mexico’s response, however, incorrectly assumes that a measure may avoid a breach of Article III simply because it affects only a small amount of trade. To quote the Appellate Body:

Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products. ... [I]t is irrelevant that “the trade effects” of the tax differential between imported and domestic products, as reflected in the volumes of imports, are insignificant or even non-existent; Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products.²⁰

¹⁷ Mexico Second Written Submission, paras. 3, 81.

¹⁸ Mexico Second Written Submission, para. 81.

¹⁹ See U.S. Second Written Submission, paras. 59, 65.

²⁰ *Japan – Alcoholic Beverages II*, AB Report, p. 16.

Regardless of the share of Mexican HFCS imports formerly accounted for by products of Members other than the United States, Mexico's tax measures would still treat the products of those other Members less favorably than the products of Mexico, in violation of Article III of the GATT. Therefore, Mexico still has not answered the question why such less favorable treatment of *other Members' products* is necessary to secure U.S. compliance with the NAFTA.

15. In pointing out that its tax measures are targeted “virtually exclusively” at the United States, Mexico appears to state that its tax measures also discriminate *de facto* against imports from the United States vis-a-vis imports from other countries. Apparently Mexico is conceding a breach of Article I of the GATT 1994, as well as Article III in this dispute, although Article I is not within this Panel's terms of reference.²¹

16. The second point is that Mexico continues to be unable to explain why the discrimination imposed on imported HFCS as a result of Mexico's tax measures is necessary to secure U.S. compliance with the NAFTA. This owes to the fact that Mexico cannot explain why stopping the displacement of Mexican cane sugar by imported HFCS is anything more than a means to protect its cane sugar industry. In other words, while Mexico attributes much harm to its cane sugar industry because of the displacement of cane sugar by imported HFCS, Mexico has yet to explain how stopping this displacement through its discriminatory tax measures would result in U.S. compliance with alleged NAFTA obligations. Even greater opportunities to export “displaced” Mexican cane sugar are merely another means to aid Mexico's cane sugar industry; they are not means to secure U.S. compliance with alleged NAFTA obligations. In short, Mexico

²¹ GATT Art. I:1.

has explained why it believes helping its cane sugar industry is necessary. It has also explained how measures which stop or counteract the displacement of cane sugar may contribute to this. Yet, neither explanation addresses why Mexico's tax measures constitute measures to secure compliance with the NAFTA, much less necessary ones.

17. The closest Mexico comes to stating why it believes its tax measures are “necessary to secure compliance” with the NAFTA, is its contention that, by hurting U.S. exports of HFCS through its discriminatory tax measures, Mexico will “induce” sweetener producers to come to the “negotiating table.”²² Even if Mexico's contention were correct, *inducing* sweetener *producers* to engage in negotiations is not the same thing as securing U.S. compliance with the NAFTA.

18. Moreover, the United States points out that Mexico's tax measures could not have even been “necessary” to stop the displacement of Mexican cane sugar by imported HFCS as a result of “preferential access” for HFCS under the NAFTA.²³ This is because Mexico did not provide such preferential access at the time it imposed its tax measures. Rather, from 1997 through May of 2002, Mexico imposed WTO- and NAFTA-inconsistent antidumping duties on HFCS from the United States.²⁴ In other words, Mexico has already adversely altered the balance of rights and obligations under the NAFTA, which was negotiated as a set of mutual concessions. Now Mexico is withdrawing concessions under the WTO, concessions which were never negotiated on the basis of other concessions granted under the NAFTA.

²² Mexico Second Written Submission, para. 83.

²³ Mexico First Written Submission, paras. 5-6, 124.

²⁴ See U.S. First Written Submission para. 14-18.

Issues Relating to Mexico’s “Preliminary Ruling” Request

19. Aside from its Article XX(d) defense, Mexico raises a number of other issues in the course of these proceedings that are simply not relevant to resolution of this dispute. In its second submission, for example, Mexico continues to argue points only relevant – if at all – to its already-rejected request for a preliminary ruling. These points include Mexico’s assertions that “this is a NAFTA dispute,”²⁵ that a finding of WTO-inconsistency will prejudice on-going or future NAFTA proceedings,²⁶ that the Panel need not issue findings on the consistency of Mexico’s tax measures with Mexico’s WTO obligations,²⁷ and that the United States does not have the right, or does not deserve, to bring this dispute before the WTO.²⁸ The Panel has already considered these issues in rejecting Mexico’s request for a preliminary ruling and in concluding that the Panel “does not have the discretion, as argued by Mexico, to decide not to exercise its jurisdiction in a case that has been properly brought before it.”²⁹ These issues also do not bear on whether Mexico’s tax measures are consistent with Article III or justified under Article XX(d). They are, therefore, not issues that this Panel needs to consider further.

“General Principles of International Law”

20. Mexico has also attempted to justify its tax measures under “general principles of international law.” The matter in dispute, however, concerns the consistency of Mexico’s tax measures with Mexico’s obligations under the WTO Agreement – namely, whether Mexico’s tax measures are consistent with Article III and, if not, whether they are justified under Article

²⁵ See, e.g., Mexico Second Written Submission, paras. 4, 7.

²⁶ See, e.g., Mexico Second Written Submission, paras. 6, 8.

²⁷ Mexico Second Written Submission, paras. 48-57.

²⁸ See, e.g., Mexico Second Written Submission, paras. 8.

²⁹ Letter from the Chairman of the Panel to Representatives of the Parties (Jan. 18, 2005) at 2.

XX(d). Issues Mexico raises concerning justifications for its tax measures under “general principles of international law” are, therefore, not issues this Panel need, or should, resolve.

21. That said, Mexico’s suggestion that its tax measures are somehow justified as a matter of “general principles of international law” – although still irrelevant to the consistency of Mexico’s tax measures with Mexico’s WTO obligations – does raise some concerns which merit a couple of brief remarks.

22. First, the WTO dispute settlement system exists to resolve WTO disputes, that is, disputes over Members’ rights and obligations under the covered agreements.³⁰ Accordingly, when a WTO panel is established, it is established to examine the relevant provisions of the covered agreements and “to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in *those agreements*.”³¹ A WTO panel’s mandate simply does not extend to determining the rights and obligations of countries under general principles of international law. Thus, in this dispute, the Panel’s mandate is limited to determining the consistency of Mexico’s tax measures with Mexico’s obligations under the covered agreements. Just as the Panel’s mandate does not extend to examining U.S. obligations under the NAFTA,³² it does not extend to examining Mexico’s rights under general principles of international law.

23. Second, exceptions to WTO rules are expressly stated in the text of the WTO Agreement. Yet, nothing in the text of the WTO Agreement provides that a measure that is otherwise WTO-

³⁰ DSU Arts. 1.1, 3.2 and 3.4.

³¹ DSU Art. 7.1(emphasis added); *see also* DSU Art. 11.

³² U.S. Responses to the Questions of the Panel, para. 12.

inconsistent might be justified under the WTO Agreement so long as it comports with some (unspecified) general principles of international law. Moreover, there is no basis for a panel to graft general principles of international law onto the rights and obligations agreed upon by WTO Members and expressed in the text of the WTO Agreement. In fact, the Appellate Body has already rejected the notion that a principle of international law – whether recognized or not – might be used as grounds for justifying measures that are otherwise inconsistent with a Member’s obligations under the WTO Agreement.³³

24. Mexico’s reliance on the Appellate Body reports in *EC – Bananas*, *US – Wool Shirts*, *India – Patents* and *Canada – Aircraft* in this regard are inapposite. Although the Appellate Body did refer in those reports to non-WTO tribunals’ practice regarding certain procedural issues, it did not rely on that practice as the basis for its findings. Instead, in each of the reports cited by Mexico,³⁴ the Appellate Body concluded that the text of the DSU and other provisions of the WTO Agreement supported the panel’s findings with respect to the relevant procedural issue, noting, in addition, that non-WTO tribunals had similarly viewed the issue.³⁵ These reports do not support Mexico’s contention that its tax measures – which are inconsistent with Article III and not excepted under Article XX – are nevertheless justified under the WTO Agreement due to a “recognized general principle of international law.”

³³ *EC – Hormones*, AB Report, paras. 120-125.

³⁴ Mexico Second Written Submission, para. 17.

³⁵ *EC – Bananas*, AB Report, paras. 10, 132-138 (considering representation by private counsel and standing and referring to DSU Article 3.7 and GATT Article XXIII); *US – Wool Shirts*, AB Report, pp. 14-17 (considering the burden of proof and referring to DSU Article 3.8 and GATT Article XXIII); *India – Patents*, AB Report, paras. 64-71 (considering the ability to review municipal law and referring to the panel’s “task in determining whether India’s [measures] were in conformity with India’s obligations under Article 70.8(a) of the TRIPS Agreement”); *Canada – Aircraft*, AB Report, paras. 197-206 (considering adverse inferences and referring to the panel’s mandate, DSU Article 11 and SCM Agreement Article 4).

25. Mexico’s contention likewise does not find support in its out-of-context citations to statements made by the United States in connection with the Air Services Agreement of 1946,³⁶ the GATT 1947,³⁷ the NAFTA,³⁸ or another WTO dispute settlement proceeding.³⁹ Whatever statements the United States may or may not have made in these contexts – over half of which pre-date U.S. obligations under the WTO Agreement – such statements cannot be used as grounds to create new exceptions to WTO rules.

26. In addition to its defense under Article XX(d) and assertion of a “right to take unilateral action” under general principles of international law, Mexico contends – in what appears to be an argument recycled from its failed request for a preliminary ruling – that the Panel need not limit its recommendations in this dispute to a request that Mexico bring its WTO-inconsistent tax measures into compliance.⁴⁰ Mexico is incorrect.⁴¹ Panel recommendations are limited to recommendations that WTO-inconsistent measures be brought into conformity with the covered agreements.⁴² This limitation is explicitly provided for in Article 19.1 of the DSU which provides: “Where a panel ... concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement.”

³⁶ Mexico Second Written Submission, para. 32 (regarding a 1978 dispute over the right to operate a West Coast to Paris flight via London).

³⁷ Mexico Second Written Submission, para. 23, 37-38 (regarding a 1989 statement in connection with a dispute over hormone-treated beef).

³⁸ Mexico Second Written Submission, para. 33-35 (regarding a 1994 memorandum of understanding); *id.* paras. 28-30 (regarding a 1996 dispute over agricultural products).

³⁹ Mexico Second Written Submission, paras. 40-45 (regarding *US – Section 301*).

⁴⁰ Mexico Second Written Submission, paras. 62-64.

⁴¹ *See also* U.S. Opening Statement at the First Meeting of the Panel, para. 12.

⁴² DSU Art. 19.1.

Conclusion

27. Therefore, in this dispute, for the reasons already stated and in our prior submissions, the United States respectfully requests the Panel to find that Mexico's tax measures are inconsistent with Articles III:2 and III:4 of the GATT 1994 and not justified under Article XX(d), and recommend that Mexico bring its WTO-inconsistent tax measures into conformity with its obligations under the GATT 1994.

28. Mr. Chairman, members of the Panel, this concludes the oral statement of the United States. Thank you for your attention. We would be pleased to respond to any questions you may have.