

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

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

**February 24, 2005**

1. Mr. Chairman, members of the Panel, thank you for meeting with us again today. We appreciate the opportunity you allowed us to reflect a bit more on Mexico's opening statement and the question you posed to us yesterday.
2. Having done that, it strikes us that perhaps the best way to start, is by again being very clear about what this dispute is about. This dispute is about Mexico's obligations under Article III of the GATT 1994 and the consistency of Mexico's tax measures with those obligations. Throughout these proceedings, and again in its statement yesterday, however, Mexico has done its utmost to avoid any discussion of this issue. Instead, Mexico has chosen to focus its response in these proceedings on an unprecedented reading of Article XX(d) and a recasting of this dispute as one about U.S. obligations under the NAFTA. As the United States has maintained throughout these proceedings, and continues to maintain today, both Mexico's Article XX(d) defense and its efforts to recast this dispute as one under NAFTA are unsustainable. To avoid repeating myself on these points, I will refer the Panel to our prior submissions for the many reasons why Mexico's XX(d) defense must fail and why its discussions of NAFTA in these proceedings are simply not relevant to task before this Panel. Instead, I will use today's closing to respond to some specific points raised in the various sections of Mexico's opening statement.

### **Introduction and the relevance and the status of the NAFTA dispute**

3. Turning to the first two sections of Mexico’s statement (its introduction and discussion of the relevance of the NAFTA dispute), Mexico makes three assertions there and one omission that merit some remarks.

4. First, Mexico continues to fault the United States in these proceedings for not discussing Mexico’s grievances under the NAFTA. Yet, even Mexico admits that Mexico’s grievances under the NAFTA are outside the Panel’s terms of reference and, therefore, not issues which this Panel may issue findings on in this dispute. Accordingly, rather than engage on issues that are clearly outside this Panel’s terms of reference, the United States has chosen to remain focused on the issues that actually are within the Panel’s terms of reference – namely the consistency of Mexico’s tax measures with Mexico’s WTO obligations.

5. Second, Mexico asserts that the United States does not see any “link” between HFCS and cane sugar. This, of course, is not the U.S. view. The United States agrees with Mexico, for example, that HFCS and cane sugar are directly competitive and substitutable products. What the United States claims are not linked, however, are Mexico’s obligations under the WTO Agreement and U.S. obligations under the NAFTA. That is, nothing in the WTO Agreement makes the obligations Mexico owes the United States under Article III of the GATT 1994 contingent on Mexico’s view of whether the United States has complied with obligations under the NAFTA.

6. Third, Mexico asserts that Article 31(3) of the Vienna Convention requires panels to consider any relevant standards or norms applicable to the relations of the parties to a treaty. And, therefore, Mexico asserts that the Panel must consider the NAFTA in this dispute. Article

31(3) of the Vienna Convention, however, pertains to the interpretation of the terms of a treaty, and provides that “relevant rules of international law applicable in the relations between the parties” shall be taken into account along with the context of the treaty’s terms. Mexico has not identified any terms of the WTO Agreement for which it might be using the NAFTA or “general principles of international law” as relevant context for interpretation of the meaning of the WTO Agreement’s terms. Mexico reference to Article 31(3) does not change the fact that interpretation and application of the NAFTA are outside the Panel’s terms of reference.

7. Fourth, as to Mexico’s omission, Mexico fails to explain how the Panel could consider whether Mexico’s tax measures are necessary to secure U.S. compliance with the NAFTA, if the Panel does not first examine what the terms of the NAFTA are and whether U.S. actions are consistent with those terms. Yet, these issues as to the interpretation and application of the NAFTA are the precise issues Mexico has already conceded are outside this Panel’s terms of reference. Thus, the very determination that Mexico’s Article XX(d) defense calls upon the Panel to make – namely, U.S. compliance with the NAFTA – is the very determination Mexico asserts is not within the Panel’s authority to make.

8. Mexico’s suggestion that the Panel might consider the “facts” of the NAFTA, and take as “background” that a dispute under the NAFTA prompted Mexico’s tax measures and gave rise to the present WTO dispute, does not save its Article XX(d) defense. The fact that the NAFTA exists or that a dispute exists thereunder, does not answer the question of whether Mexico’s tax measures constitute measures to secure compliance with alleged U.S. obligations to provide market access for Mexican sugar under the NAFTA (that is, assuming for the moment the NAFTA obligations fall within the scope of “laws or regulations”). With respect to supposed

factual issues such as those in paragraph 36 of Mexico’s opening statements, we’d like to come back to those later in writing if we may.

### **Recommendations**

9. Turning to the next section of Mexico’s statement as to the recommendations a WTO panel is permitted to make, Mexico contends that per Article XXIII of the GATT, the recommendations a WTO panel might make in a given dispute are more flexible than suggested by the United States. This is simply not true. DSU Article 19.1 definitively answers the question of what types of recommendations WTO panels are permitted to make – that is, if a panel finds a Member in breach of its WTO obligations, it “shall recommend that the Member concerned bring the measure into conformity” with the relevant covered agreement.

### **Article III**

10. With respect to Mexico’s points on Article III:2 and III:4, the United States has already addressed the issues Mexico raises in the U.S. second submission and responses to questions. I will not repeat those responses now, other than to make three brief points. One, as we said before, a measure may constitute both a breach of Article III:2 and III:4. Two, Mexico has not rebutted the evidence and arguments presented by the United States that Mexico’s tax measures constitute a form of dissimilar taxation within the meaning of Article III:2 or a law affecting the internal sale and use of imported products within the meaning of Article III:4. Three, it is Mexico that has chosen to alter the conditions of competition by applying tax measures that discriminate against soft drinks and syrups as well as against sweeteners. Specifically, Mexico’s tax measures constitute an excise tax on soft drinks and syrups containing HFCS. We have demonstrated how that tax translates linearly into a conditional tax on HFCS and, in fact, as a

prohibitive excise tax on HFCS. It, therefore, falls under Article III:2. Mexico's tax measures are also measures "affecting" the use of imported HFCS. The measures punish bottlers for using imported HFCS. Mexico's tax measures, therefore, fall under Article III:4. If there is overlap with respect to Articles III:2 and III:4 in this dispute, it is because the particular tax measures Mexico has chosen to apply are discriminatory excise taxes on one product that also punishes the bottler for using imported inputs to make that product.

**Article XX(d)**

11. Turning to Article XX(d) and the specific points Mexico raises there. The first point is that, despite Mexico's assertions otherwise, Mexico most clearly has not met its burden of proof with respect to its Article XX(d) defense. Under that burden, Mexico must put forth facts and arguments sufficient to establish that its tax measures are, first, justified under paragraph (d) as measures "necessary to secure compliance with laws or regulations" and, second, applied in manner that is in keeping with the chapeau to Article XX. As late as this second meeting of the Panel, however, Mexico has yet to marshal any legal argument under the relevant rules of treaty interpretation to support its assertion that the phrase "laws or regulations" encompasses U.S. obligations under the NAFTA or to provide any factual support for its contention that its tax measures secure, or even contribute, to U.S. compliance with alleged NAFTA obligations, much less that its tax measures are necessary to such compliance.

12. Mexico's comments in paragraphs 9 and following of its closing statement on the status of the NAFTA under U.S. law, to the extent we have been able to understand them this morning, do not appear accurate or complete. However, we are unfortunately not in a position to comment in more detail on those paragraphs on such short notice today.

13. More generally, we fail to see how Mexico’s more general point assists its position.

Mexico seems to say that different countries treat the relationship between their international obligations and their internal laws in different ways. We fails to see why that would be an argument in favor of interpreting the words “laws or regulations” in Article XX(d) of the GATT as applying to international agreements. If anything, Mexico’s point highlights the difference between international obligations, and internal laws and regulations.

14. Further to this point, the phrase “laws or regulations” within Article XX(d) means the “laws or regulations” of the Member claiming the Article XX(d) exception; not the laws or regulations of the Member against whom it has invoked its Article XX(d) exception. Therefore, by way of example, Mexico might invoke Article XX(d) as justification for a measure to secure compliance with its own laws or regulations, but not the laws or regulations of other Members. Said another way, Mexico cannot assert an Article XX(d) defense for measures to enforce U.S. domestic law.

15. My second point is that in its statement yesterday – and perhaps this is a reflection of Mexico’s recognition of where acceptance of its Article XX(d) defense may lead – Mexico suggests that its reading of Article XX(d) is not as broad as it might first appear. That is, Mexico suggests that its reading of Article XX(d) only applies in situations where (i) a genuine dispute exists under an international agreement; (ii) dispute settlement under that international agreement has not resolved the dispute; (iii) diplomatic efforts have also not resolved that dispute; (iv) the domestic industry of the Member invoking Article XX(d) has suffered some type of harm as a result of the dispute under the international agreement; and (v) the relevant international agreement is not a WTO agreement. This new reading of Article XX(d), however, does not get

us past the fact that Article XX(d) does not apply to obligations under an international agreement.

Nor does it get us past the fact that, under Mexico’s reading of Article XX(d), any Member, who believes that another Member has breached obligations owed under an international agreement, would be free to breach its WTO obligations, provided the Member claimed to have exhausted other avenues to resolve the dispute and to have a domestic industry in need of assistance.

Despite Mexico’s claims, this would be an extremely broad exception to WTO rules.

16. Finally, no less than two pages from the end of its statement, Mexico tries to refute some of the points the United States offers, based on application of the rules of treaty interpretation, as to why the phrase “laws or regulations” means the domestic laws or regulations of the Member claiming the Article XX(d) exception. Mexico’s arguments here, however, do not save its Article XX(d) defense. For example, the fact that Article XVI:4 of the Marrakesh Agreement includes the word “its” before “laws, regulations and administrative procedures” only re-emphasizes the U.S. point that “laws or regulations” as used in the WTO Agreement is understood to mean the domestic laws or regulations of WTO Members, not obligations under international agreements or under general principles of international law. In the numerous instances where the WTO Agreement references “laws” or “regulations” some are preceded by the word “its” or the word “their” (referring to a Member’s, or Members’ in the plural, laws and regulations); others are simply preceded by “the” or no article at all, as in Article XX(d). What is clear, however, is that when the WTO drafters meant to refer to international law, they did so expressly, as in Articles 3.2 of the DSU and 17.6 of the Antidumping Agreement.

17. Moreover, contrary to Mexico’s assertion, the United States is not reading “national” or “domestic” into the text of Article XX(d). Rather, the ordinary meaning of the phrase “laws or

regulations” interpreted in its context and in light of the WTO Agreement’s object and purpose leads to the conclusion that phrase “laws or regulations” with no qualifying adjective proceeding it, means the domestic laws or regulations of the Member claiming the Article XX(d) exception.

**Conclusion**

18. With these remarks, Mr. Chairman and members of the Panel, this concludes our closing statement. We look forward to receiving your written questions in due course. And, of course, we want to thank you again for all the time and energy you put forth to serve in this dispute, and likewise to thank the members of the Secretariat for all their efforts and assistance in this matter. These efforts are much appreciated, and particularly your efforts, Mr. Chairman, in graciously agreeing to participate in today’s and yesterday’s meeting from afar.