

***MEXICO – TAX MEASURES ON SOFT DRINKS AND OTHER  
BEVERAGES***

***(WT/DS308)***

**SECOND SUBMISSION OF  
THE UNITED STATES OF AMERICA**

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## TABLE OF CONTENTS

Table of Reports Cited .....	ii
I. INTRODUCTION .....	1
II. MEXICO’S TAX MEASURES ARE INCONSISTENT WITH ARTICLE III OF THE GATT 1994 .....	2
A. Burden of Proof .....	2
B. Mexico’s Tax Measures Are Inconsistent with Article III of the GATT 1994 ...	3
1. Mexico’s Tax Measures on Non-Cane Sugar Sweeteners Are Inconsistent with Article III:2 of the GATT 1994 .....	5
(a) The United States Has Established a <i>Prima Facie</i> Case That the HFCS Soft Drink and Distribution Taxes Are Inconsistent with Article III:2, Second Sentence .....	5
(b) The HFCS Soft Drink and Distribution Taxes Are Inconsistent with Article III:2, First Sentence With Respect to Beet Sugar ...	6
2. Mexico’s Tax Measures on Soft Drinks and Syrups Are Inconsistent with Article III:2 of the GATT 1994 .....	8
(a) The United States Has Established a <i>Prima Facie</i> Case That the HFCS Soft Drink and Distribution Taxes With Respect to Soft Drinks and Syrups Are Inconsistent with Article III:2, First Sentence .....	8
(b) The HFCS Soft Drink and Distribution Taxes Are Inconsistent with Article III:2, First Sentence With Respect to Soft Drinks and Syrups Sweetened with Beet Sugar .....	9
3. The United States Has Established a <i>Prima Facie</i> Case That Mexico’s Tax Measures Affecting the Use of HFCS Are Inconsistent with Article III:4 of the GATT 1994 .....	12
III. MEXICO’S TAX MEASURES ARE NOT JUSTIFIED UNDER ARTICLE XX(D) OF THE GATT 1994 .....	13
A. U.S. Obligations Under the NAFTA Are Not “Laws or Regulations” .....	14
B. Mexico’s Tax Measures Are Not Designed to “Secure Compliance” .....	19
C. Mexico’s Tax Measures Are Not “Necessary” .....	20
D. Mexico’s Tax Measures Are Incompatible with the Chapeau to Article XX ...	23
IV. CONCLUSION .....	25

**TABLE OF REPORTS CITED**

<b>SHORT TITLE</b>	<b>FULL TITLE AND CITATION</b>
<i>Argentina – Hides and Leather</i>	Panel Report, <i>Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather</i> , WT/DS155/R and Corr.1, adopted 16 February 2001
<i>Canada - FIRA (GATT)</i>	GATT Panel Report, <i>Canada - Administration of the Foreign Investment Review Act</i> , L/5504, adopted 7 February 1984, BISD 30S/140
<i>Canada - Periodicals</i>	Panel Report, <i>Canada - Certain Measures Concerning Periodicals</i> , WT/DS31/R and Corr.1, adopted 30 July 1997
<i>Canada - Wheat Exports and Grain Imports</i>	Panel Report, <i>Canada - Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/R, adopted 27 September 2004
<i>Dominican Republic - Import and Sale of Cigarettes</i>	Panel Report, <i>Dominican Republic - Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/R, 26 November 2004
<i>EC - Asbestos</i>	Appellate Body Report, <i>European Communities - Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001
<i>EC - Asbestos</i>	Panel Report, <i>European Communities - Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/R and Add.1, adopted 5 April 2001
<i>EC - Bananas III</i>	Appellate Body Report, <i>European Communities - Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997
<i>EC - Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
<i>EEC - Parts and Components (GATT)</i>	GATT Panel Report, <i>EEC - Regulation on Imports of Parts and Components</i> , L/6657, adopted 16 May 1990, BISD 37S/132
<i>India – Quantitative Restrictions</i>	Appellate Body Report, <i>India – Quantitative Restrictions on Imports of Agricultural, Industrial and Textile Products</i> , WT/DS90/AB/R, adopted 22 September 1999

<i>India – Quantitative Restrictions</i>	Panel Report, <i>India – Quantitative Restrictions on Imports of Agricultural, Industrial and Textile Products</i> , WT/DS90/R, adopted 22 September 1999
<i>Indonesia - Autos</i>	Panel Report, <i>Indonesia - Certain Measures Affecting the Automobile Industry</i> , WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1, 2, 3, and 4, adopted 23 July 1998
<i>Japan - Agricultural Products (GATT)</i>	GATT Panel Report, <i>Japan - Restrictions on Imports of Certain Agricultural Products</i> , L/6253, adopted 2 February 1988, BISD 35S/163
<i>Japan - Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan - Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996
<i>Japan - Alcoholic Beverages II</i>	Panel Report, <i>Japan - Taxes on Alcoholic Beverages</i> , WT/DS8/R, WT/DS10/R, WT/DS11/R, adopted 1 November 1996
<i>Korea - Various Measures on Beef</i>	Appellate Body Report, <i>Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001
<i>Korea - Various Measures on Beef</i>	Panel Report, <i>Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/R, WT/DS169/R, adopted 10 January 2001
<i>Turkey - Textiles</i>	Panel Report, <i>Turkey - Restrictions on Imports of Textile and Clothing Products</i> , WT/DS34/R, adopted 19 November 1999
<i>US - Auto Taxes (GATT)</i>	GATT Panel Report, <i>United States - Taxes on Automobiles</i> , DS31/R, 11 October 1994
<i>US - Gasoline</i>	Appellate Body Report, <i>United States - Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996
<i>US - Gasoline</i>	Panel Report, <i>United States - Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/R, adopted 20 May 1996
<i>US – Malt Beverages (GATT)</i>	GATT Panel Report, <i>United States – Measures Affecting Alcoholic and Malt Beverages</i> , DS23/R, adopted 19 June 1992, BISD 39S/206

<i>US - Offset Act (Byrd Amendment)</i>	Appellate Body Report, <i>United States - Continued Dumping and Subsidy Offset Act of 2000</i> , WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003
<i>US - Section 337 (GATT)</i>	GATT Panel Report, <i>United States - Section 337 of the Tariff Act of 1930</i> , L/6439, adopted 7 November 1989, BISD 36S/345
<i>US – Shrimp (21.5)</i>	Appellate Body Report, <i>United States - Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia</i> , WT/DS58/RW/AB/R, adopted 21 November 2001
<i>US – Shrimp (21.5)</i>	Panel Report, <i>United States - Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia</i> , WT/DS58/RW/R, adopted 21 November 2001
<i>US - Shrimp</i>	Appellate Body Report, <i>United States - Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998
<i>US - Shrimp</i>	Panel Report, <i>United States - Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/R and Corr.1, adopted 6 November 1998
<i>US - Spring Assemblies (GATT)</i>	GATT Panel Report, <i>United States - Imports of Certain Automotive Spring Assemblies</i> , L/5333, adopted 26 May 1983, BISD 30S/107
<i>US - Tuna/Dolphin I (GATT)</i>	GATT Panel Report, <i>United States - Restrictions on Imports of Tuna</i> , DS21/R, 3 September 1991, BISD 39S/155
<i>US - Tuna/Dolphin II (GATT)</i>	GATT Panel Report, <i>United States - Restrictions on Imports of Tuna</i> , DS29/R, 16 June 1994

## I. INTRODUCTION

1. In its first submission, the United States established a *prima facie* case that Mexico's tax measures on high-fructose corn syrup (HFCS) and soft drinks and syrups sweetened with HFCS are inconsistent with Articles III:2 and III:4 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"). Mexico has not rebutted that case and, in fact, has repeatedly stated that it will not respond to the U.S. claims that its tax measures are inconsistent with Article III.<sup>1</sup> Instead, Mexico has attempted to change the subject by asserting that the United States is in breach of its obligations under the North American Free Trade Agreement (NAFTA) and that this alleged breach justifies a request for the Panel to refuse to address the Article III claims or, in the alternative, that this alleged breach justifies Mexico's tax measure under Article XX(d) of the GATT 1994. The Panel has already rejected Mexico's request for it to decline to address the U.S. Article III claims and the United States respectfully requests it to reject likewise Mexico's Article XX(d) defense.

2. Mexico cannot, and does not, rely on the text of the GATT to support its Article XX(d) defense – as Mexico appears to concede, since Mexico has yet to cite any basis in the WTO Agreement for its contention that “laws or regulations” may include obligations under an international agreement. Instead, all Mexico is able to offer in support of its contentions that Article XX(d) covers another Member's obligations under an international agreement is that neither a panel nor the Appellate Body has ever rejected these specific contentions and that unspecified “principles of international law” exist which override the ordinary meaning of the text of the WTO Agreement. There is no basis for this argument, which is wholly contrary to the customary principles of treaty interpretation applicable under Article 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”).

3. Notwithstanding Mexico's arguments as to their relevance, U.S. obligations under the NAFTA are simply not an issue this Panel need ever reach to resolve the matter before it. This is because there is no basis for the Panel to conclude that “laws or regulations” encompass another Member's obligations under an international agreement. This conclusion can, and should, be reached without ever considering the meaning of various NAFTA provisions or the obligations allegedly owed Mexico by the United States under the NAFTA.

4. Mexico's approach to this dispute has had the effect of narrowing the issues before the Panel to (1) confirming that the United States has established a *prima facie* case that Mexico's tax measures are inconsistent with Articles III:2 and III:4 of the GATT 1994 and (2) examining the merits of Mexico's contention that its tax measures are justified under Article XX(d) of the GATT 1994. In view of the limited contested issues before the Panel, this submission will focus on clarifying some of the key issues regarding U.S. claims under Article III, including issues raised by the Panel's questions, and on rebutting Mexico's alleged defense under Article XX(d). The United States continues to maintain the views expressed in all of its previous submissions

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<sup>1</sup> See, e.g., Mexico First Written Submission, para. 114; Mexico Responses to the Questions of the Panel, pp. 7, 8, 21 (courtesy translation).

and statements to the Panel. We look forward to addressing and resolving any further issues at the second meeting of the parties with the Panel.

## II. MEXICO’S TAX MEASURES ARE INCONSISTENT WITH ARTICLE III OF THE GATT 1994

### A. Burden of Proof

5. Mexico has indicated that the Panel should construe its non-response to the U.S. claims to mean that, once the Panel has satisfied itself that the United States has met its burden to establish a *prima facie* case under Article III, Mexico does not object to the Panel proceeding on the presumption that its tax measures are incompatible with Article III.<sup>2</sup> The United States does not disagree with this approach.

6. Confirmation that the United States has established a *prima facie* case of inconsistency in this dispute should not be an arduous task. The United States has put forward more than ample evidence and legal argument in its first submission to establish that Mexico’s tax measures are inconsistent with Article III. If there were any doubt, the United States elaborated on this evidence and argument in its oral statements and responses to the Panel’s questions and further does so in the course of this submission. To date, Mexico has contested none of the facts or legal arguments put forth by the United States in support of the U.S. Article III claims. To the contrary, Mexico has even confirmed that cane sugar and HFCS are competitive and substitutable as sweeteners for soft drinks and syrups and that it imposed its tax measures to stop the displacement of Mexican cane sugar by imported HFCS.<sup>3</sup> The U.S. evidence is therefore uncontested, and indeed in some instances is confirmed, by Mexico.<sup>4</sup>

7. As suggested in the U.S. response to questions, the Panel may find it useful to draw upon the panels’ approach in *US – Shrimp*<sup>5</sup> and *Turkey – Textiles*.<sup>6</sup> In those disputes, the responding party chose not to contest that the measures at issue were inconsistent with Article XI of the GATT and, instead, chose to defend those measures under Articles XX and XXIV of the GATT respectively.<sup>7</sup> In those disputes, the panels undertook a brief analysis confirming that the

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<sup>2</sup> Mexico Responses to the Questions of the Panel, p. 6 (courtesy translation).

<sup>3</sup> Mexico First Written Submission, paras. 5, 34, 112; Mexico Opening Statement at the First Meeting of the Panel, paras. 2, 19; Mexico Responses to the Questions of the Panel, p. 10 (courtesy translation).

<sup>4</sup> The United States notes that data provided by Mexico in response to Question 42 confirm the data submitted by the United States that (1) Mexico produces an extraordinary amount of cane sugar as compared to HFCS; (2) prior to imposition of its tax measures, Mexico imported only very small amounts of sugar relative to HFCS imports; and (3) after imposition of Mexico’s tax measures, imports of HFCS plummeted.

<sup>5</sup> *US – Shrimp*, Panel Report, paras. 7.15-7.19.

<sup>6</sup> *Turkey – Textiles*, Panel Report, para. 9.66.

<sup>7</sup> See also *Indonesia – Autos*, Panel Report, para. 14.106-14.114. In *Indonesia – Autos*, Indonesia did not specifically argue that the complaining parties had not demonstrated the elements necessary to establish a violation of Article III:2 (*i.e.*, like products and differential taxation), but rather argued, unsuccessfully, that Article III:2 was

complaining party had made its *prima facie* case. Having found in the affirmative, the panels, then, proceeded to examine the defending party's affirmative defense.

8. Proceeding on the same basis in this dispute, the Panel should find the United States has met its burden of proof and that Mexico's tax measures are in breach of its obligations under Articles III:2 and III:4 of the GATT 1994.

#### **B. Mexico's Tax Measures Are Inconsistent with Article III of the GATT 1994**

9. As reviewed in the U.S. first submission, Mexico applies a 20 percent tax on the internal transfer and importation of soft drinks and syrups ("HFCS soft drink tax") and a 20 percent tax on the representation, brokerage, agency, consignment and distribution of soft drinks and syrups ("distribution tax"). Mexico further subjects the internal transfer of soft drinks and syrups to certain bookkeeping and reporting requirements ("reporting requirements"). Mexico exempts from these taxes and reporting requirements transfers of soft drinks and syrups sweetened exclusively with cane sugar. Thus, Mexico applies a 20 percent tax on the importation of soft drinks and syrups (regardless of sweetener) and a 20 percent tax on the internal transfer, as well as on the representation, brokerage, agency, consignment and distribution, of soft drinks and syrups sweetened with any sweetener other than cane sugar. Internal transfers of soft drinks and syrups sweetened with any sweetener other than cane sugar are further subject to the reporting requirements.<sup>8</sup>

10. For the reasons outlined at greater length in previous submissions, Mexico's tax measures are inconsistent with Article III of the GATT 1994. First, Mexico's HFCS soft drink and distribution taxes are inconsistent with Article III:2 as a discriminatory tax on imported, non-cane sugar sweeteners for use in soft drinks and syrups. These non-cane sugar sweeteners include HFCS, as highlighted in the U.S. first submission, as well as beet sugar as addressed in more detail below. The HFCS soft drink and distribution taxes are inconsistent with both the first and second sentences of Article III:2. That said, the United States has focused its arguments under Article III:2 with respect to HFCS on the second sentence. As detailed below, the United States has focused its arguments regarding beet sugar on the first sentence of Article III:2.

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inapplicable because its measure was permitted under the SCM Agreement. In assessing whether the complaining parties had established a *prima facie* case, the panel briefly reviewed the evidence before it and concluded that "this evidence is sufficient to establish a presumption of likeness between the Timor and Corolla for purposes of Article III:2. Since Indonesia has submitted no evidence or argument to rebut the presumption of likeness for the purposes of Article III:2, we find that imported products like the National Car exist for purposes of Article III:2." *Indonesia – Autos*, Panel Report, paras. 14.110.

<sup>8</sup> In response to questions from the Panel, Mexico provided various details about the operation of its tax measures. Mexico Responses to the Questions of the Panel, pp. 22-24. None of these details, however, change the discriminatory nature of Mexico's tax measures which apply to imported HFCS and other non-cane sugar sweeteners and imported soft drinks and syrups made with such sweeteners, but do not apply to Mexican cane sugar or to most Mexican produced soft drinks and syrups.



11. Second, Mexico's HFCS soft drink and distribution taxes are inconsistent with Article III:2 of the GATT 1994 as discriminatory taxes on imported soft drinks and syrups. When collected “at the time or point of importation,”<sup>9</sup> of soft drinks and syrups, Mexico's HFCS soft drink tax discriminates on its face against imports, as only domestic transfers of soft drinks and syrups are subject to the cane sugar-only exemption. When collected on subsequent internal transfers of imported soft drinks and syrups, Mexico’s HFCS soft drink and distribution taxes discriminate *de facto* against imported soft drinks and syrups made with non-cane sugar sweeteners including HFCS and beet sugar.

12. Third, Mexico's HFCS soft drink and distribution taxes are inconsistent with Article III:4 of the GATT 1994 as a law affecting the internal sale and use of non-cane sugar sweeteners including HFCS and beet sugar. As discussed in the U.S. responses to questions, to the extent a measure that discriminates against imported product takes the form of dissimilar taxation affecting the internal sale, offering for sale, purchase, transportation, distribution or use of the imported product, that measure may breach both Articles III:2 and III:4 of the GATT 1994. This is the case with the HFCS soft drink and distribution taxes as applied to non-cane sugar sweeteners.<sup>10</sup> In this regard, the Appellate Body has noted with respect to the overlap of Articles III:2 and III:4:

[W]e recognize that the relationship between these two provisions is important, because there is no sharp distinction between fiscal regulation, covered by Article III:2, and non-fiscal regulation, covered by Article III:4. Both forms of regulation can often be used to achieve the same ends. It would be incongruous if, due to a significant difference in the product scope of these two provisions, Members were prevented from using one form of regulation – for instance, fiscal – to protect domestic production of certain products, but were able to use another form of regulation – for instance, non-fiscal – to achieve those ends. This would frustrate a consistent application of the “general principle” in Article III:1.<sup>11</sup>

13. Fourth, Mexico’s reporting requirements are inconsistent with Article III:4 of the GATT 1994 as requirements affecting the internal sale and use of non-cane sugar sweeteners including HFCS and beet sugar.

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<sup>9</sup> Note Ad Article III of the GATT.

<sup>10</sup> U.S. Responses to the Questions of the Panel, paras. 42-46.

<sup>11</sup> *EC – Asbestos*, AB Report, para. 99; *see also Argentina – Hides and Leather*, Panel Report, para. 11.144 (finding that “tax administration” measures are not “categorically excluded from the ambit of Article III:2” as this would “create a potential for abuse and circumvention of obligations contained in Article III:2”).

**1. Mexico’s Tax Measures on Non-Cane Sugar Sweeteners Are Inconsistent with Article III:2 of the GATT 1994**

**(a) The United States Has Established a *Prima Facie* Case That the HFCS Soft Drink and Distribution Taxes Are Inconsistent with Article III:2, Second Sentence**

14. The United States has met its *prima facie* burden of establishing that Mexico’s HFCS soft drink tax is inconsistent with the second sentence of Article III:2. As reviewed in the U.S. first submission, the elements necessary to establish a claim under the second sentence of Article III:2 of the GATT 1994 are as follows: (1) the imported and domestic products must be “directly competitive or substitutable”; (2) the imported and domestic products must not be similarly taxed; and (3) the tax must be applied “so as to afford protection to domestic production.” The United States established each of these elements in its first submission with respect to HFCS for use in soft drinks and syrups.

15. Mexico’s distribution tax is also inconsistent with the second sentence of Article III:2 of the GATT 1994. The distribution tax discriminates against HFCS for use in soft drinks and syrups in the same manner as the HFCS soft drink tax.<sup>12</sup> In particular, in applying a 20 percent tax on the representation, brokerage, agency, consignment and distribution of soft drinks and syrups sweetened with HFCS, Mexico imposes a 400 percent tax on HFCS as a sweetener for soft drinks and syrups that it does not also apply on the use of Mexican cane sugar. The distribution tax is applied for the same protectionist purposes as the HFCS soft drink tax and is, therefore, likewise inconsistent with the second sentence of Article III:2.<sup>13</sup>

16. Mexico has confirmed that HFCS and cane sugar compete and are substitutes as sweeteners for soft drinks and syrups.<sup>14</sup> Mexico has also confirmed that it imposed the taxes to stop the displacement of Mexican cane sugar by imported HFCS as a sweetener for soft drinks and syrups.<sup>15</sup> With respect to this latter admission and despite Mexico’s claim to the contrary, it is not possible to reach any other conclusion than a measure designed to stop the displacement of domestic production by imported products is a measure to protect domestic production.<sup>16</sup>

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<sup>12</sup> U.S. First Written Submission, para. 131.

<sup>13</sup> U.S. First Written Submission, paras. 132-140.

<sup>14</sup> Mexico First Written Submission, paras. 5, 34, 112; Mexico Opening Statement at the First Meeting of the Panel, para. 19.

<sup>15</sup> Mexico First Written Submission, para. 111; Mexico Opening Statement at the First Meeting of the Panel, paras. 25; Mexico Responses to the Questions of the Panel, p. 9 (courtesy translation).

<sup>16</sup> Mexico asserts in its first submission that the type of protectionism it affords its domestic cane sugar industry is not the “traditional protectionism of the type that the GATT and the WTO panels have repeatedly addressed over the years.” Mexico First Written Submission, para. 11; *see also* Mexico Opening Statement at the First Meeting of the Panel, para. 25. The text of Article III does not distinguish between types of protectionism nor, despite Mexico’s unsupported assertions to the contrary, do prior GATT and WTO panel reports. The U.S. first submission has set out in detail the manner in which Mexico’s tax measures afford protection to domestic

Because Mexico has not rebutted the U.S. *prima facie* case, the United States respectfully requests that the Panel find that the HFCS soft drink and distribution taxes as applied to HFCS for use in soft drinks and syrups are inconsistent with Mexico's obligations under the second sentence of Article III:2 of the GATT 1994.

**(b) The HFCS Soft Drink and Distribution Taxes Are Inconsistent with Article III:2, First Sentence With Respect to Beet Sugar**

17. The focus of U.S. argumentation in this dispute has been the discrimination Mexico's tax measures impose on HFCS, and this remains the principal concern of the United States. Having said that, Mexico's soft drink and distribution taxes discriminate against all non-cane sugar sweeteners as sweeteners for soft drinks and syrups. These non-cane sugar sweeteners include not only HFCS but also beet sugar.

18. Mexico's HFCS soft drink and distribution taxes are inconsistent with the first sentence of Article III:2 of the GATT 1994 with respect to beet sugar and soft drinks and syrups sweetened with beet sugar. As discussed below, beet and cane sugar are "like" products and soft drinks sweetened with beet and cane sugar are "like" products. The breach with respect to beet sugar-sweetened soft drinks and syrups is elaborated in Section II.B.2(b). The breach with respect to beet sugar is described below.

19. In its first submission, the United States explained that in their refined form (the form required to produce soft drinks and syrups) beet sugar is "chemically and functionally identical" to cane sugar.<sup>17</sup> Beet and cane sugar are both "a form of sucrose" with the same molecular structure.<sup>18</sup> In fact, cane and beet sugar are equally 99.95 percent sucrose with the remaining 0.05 percent consisting of trace minerals and proteins.<sup>19</sup> Cane and beet sugar may be used for identical purposes, including as a sweetener for soft drinks and syrups.<sup>20</sup> Because they are virtually identical with respect to physical properties and end-uses, they are distributed in the same manner<sup>21</sup> and consumers (in this case, soft drink and syrup producers) use them

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production, as confirmed by the Mexican government and Mexico's Supreme Court. *See* U.S. First Written Submission, paras. 48-55, 132-140, 149-151.

<sup>17</sup> U.S. First Written Submission, para. 22.

<sup>18</sup> U.S. First Written Submission, para. 22.

<sup>19</sup> The Sugar Bureau, *All About Sugar: General Information*, available at <[http://www.sugar-bureau.co.uk/general\\_information/all\\_about\\_sugar/details.html?act=detail&id\\_item=469](http://www.sugar-bureau.co.uk/general_information/all_about_sugar/details.html?act=detail&id_item=469)> ("The juice is extracted from either sugar beet or cane and impurities are removed. It is then crystallised into white sugar, which is 99.95% sucrose. Sugar is identical whether it comes from beet or cane.")

<sup>20</sup> U.S. First Written Submission, para. 22.

<sup>21</sup> The Sugar Bureau, *The Story of Sugar*, available at <[http://www.sugar-bureau.co.uk/story\\_of\\_sugar/sos.pdf](http://www.sugar-bureau.co.uk/story_of_sugar/sos.pdf)>, ("Both cane and beet sugar, once refined, is taken from the factories by lorry to wholesalers, supermarkets and food and drink manufacturers all over the country.")

interchangeably.<sup>22</sup> For example, as the EC mentioned in its third party statement to the Panel, European soft drink producers sweeten their products with beet sugar.<sup>23</sup> Beet and cane sugar are equally classified under HS heading 1701.<sup>24</sup> Although “like” products need not be identical products,<sup>25</sup> cane and beet sugar are nearly that. Beet sugar is, thus, “like” cane sugar within the meaning of the first sentence of Article III:2.

20. As was demonstrated for HFCS in paragraph 45 of the U.S. first submission, the incidence of the tax on beet sugar used as a sweetener for soft drinks and syrups is much greater than the nominal 20 percent tax on non-cane sugar sweetened soft drinks and syrups. The Panel will recall that this is because the taxes are imposed on the value of the finished soft drink or syrup, such that the tax on the sweetener contained in that soft drink or syrup is many times greater than the value of the sweetener itself.<sup>26</sup> With respect to beet sugar, the HFCS soft drink and distributions taxes amount to nearly a 400 percent tax on the use of beet sugar as demonstrated below:

- The wholesale price of a 12 ounce can of Coca Cola in Mexico is about 5 pesos, or 43.8 U.S. cents.<sup>27</sup>
- At a 20 percent tax rate, the tax on this can of soda is 1 peso, or 8.8 U.S. cents.<sup>28</sup>
- The cost of beet sugar for one 12 ounce can of soda is approximately 0.26 pesos, or 2 U.S. cents.<sup>29</sup>
- Therefore, the beverage tax equals almost 3.9 times the cost of the beet sugar in the can or a nearly 400% tax on beet sugar as a sweetener for soft drinks and syrups.

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<sup>22</sup> See U.S. First Written Submission, para. 77 (quoting Coca-Cola’s website which states: “Because there is no noticeable taste difference, bottlers have the option of using either high fructose corn syrup (HFCS), beet sugar or cane sugar, depending on availability and cost.”).

<sup>23</sup> EC Third Party Submission, para. 25; EC Third Party Oral Statement, para. 14. See also The Sugar Bureau, *The Story of Sugar*, available at < [http://www.sugar-bureau.co.uk/story\\_of\\_sugar/sos.pdf](http://www.sugar-bureau.co.uk/story_of_sugar/sos.pdf), (explaining that the beet sugar replaced cane sugar as the main source of sugar in Europe by 1880).

<sup>24</sup> Exhibit US-43 (Mexican Tariff Schedule).

<sup>25</sup> See *Japan – Alcoholic Beverages II*, Panel Report, para. 6.21.

<sup>26</sup> See U.S. First Written Submission, paras. 45, 131 (regarding HFCS).

<sup>27</sup> U.S. First Written Submission, paras. 45.

<sup>28</sup> U.S. First Written Submissions, paras. 45.

<sup>29</sup> Based on the price of refined cane sugar in Mexico as of March 2004. See Exhibit US-11E at 9. Mexico does not produce beet sugar; accordingly, the price of refined cane sugar is used here as a proxy for the price of beet sugar. See U.S. First Written Submission, para. 19.

A nearly 400 percent tax that is not applied to the like domestic product is clearly a tax in “excess of” within the meaning of GATT Article III:2, first sentence.<sup>30</sup>

21. Although not required to establish a breach of the first sentence of Article III:2,<sup>31</sup> the application of the HFCS soft drink and distribution taxes to beet sugar – a nearly identical product – highlights the truly protectionist purpose of Mexico’s tax measures. As stated in the U.S. first submission, cane sugar is essentially a domestic product, with very small volumes of imports entering the Mexican market.<sup>32</sup> Mexico does not produce beet sugar and so beet sugar is by definition an imported product in Mexico.<sup>33</sup> In providing a tax exemption for soft drinks and syrups sweetened only with cane sugar, which is almost exclusively a domestic product in Mexico, but not for soft drinks and syrups sweetened with the nearly identical sweetener, beet sugar, which is exclusively an imported product, Mexico designed its tax measures to protect domestic production.

22. Because beet and cane sugar are “like” products but only beet sugar when used as a sweetener for soft drinks and syrups is subject to taxation, the HFCS soft drink and distribution taxes are inconsistent with the first sentence of Article III:2 of the GATT 1994 as taxes applied on imports in excess of those applied to like domestic products. Accordingly, the United States respectfully requests that the Panel find the HFCS soft drink and distribution taxes inconsistent with Article III:2.

**2. Mexico’s Tax Measures on Soft Drinks and Syrups Are Inconsistent with Article III:2 of the GATT 1994**

**(a) The United States Has Established a *Prima Facie* Case That the HFCS Soft Drink and Distribution Taxes With Respect to Soft Drinks and Syrups Are Inconsistent with Article III:2, First Sentence**

23. The United States has also established a *prima facie* case that Mexico’s HFCS soft drink and distribution taxes are inconsistent with the first sentence, or in the alternative, the second sentence of Article III:2 of the GATT 1994 with respect to soft drinks and syrups sweetened with HFCS. The United States has demonstrated that soft drinks and syrups sweetened with HFCS are “like” (or, with respect to the second sentence claim, “directly competitive or substitutable”

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<sup>30</sup> See U.S. First Written Submission, paras. 84-87 (discussing and citing prior reports on Article III:2, first sentence with respect to taxes applied on imports “in excess of” that applied to like domestic products).

<sup>31</sup> *Japan – Alcoholic Beverages II*, AB Report, p. 18.

<sup>32</sup> See, e.g., U.S. First Written Submission, paras. 3, 19-20, 25.

<sup>33</sup> U.S. First Written Submission, para. 19; Exhibits US-11A at 7, US-11B at 7, US-11C at 6, US-11D at 7 and US-11E at 7 (showing no Mexican production of beet sugar).

with) soft drinks and syrups sweetened with Mexican cane sugar.<sup>34</sup> The United States has also demonstrated that by providing an exemption from the HFCS soft drink and distribution taxes only for the internal transfer of soft drinks and syrups sweetened exclusively with cane sugar, Mexico applies a tax to imported soft drinks and syrups – which are nearly all sweetened with non-cane sugar sweeteners – in “excess of” that applied to the like domestic product.<sup>35</sup> Based on these demonstrations, the United States has established a *prima facie* case that Mexico’s HFCS soft drink and distribution taxes are inconsistent with the first sentence of Article III:2.

24. The United States has further demonstrated that Mexico’s taxation of soft drinks and syrups made with non-cane sugar sweeteners is applied so as to afford protection to Mexican production of soft drinks and syrups, which even before imposition of Mexico’s tax measures were largely sweetened with cane sugar.<sup>36</sup> Therefore, the United States has also established a *prima facie* case of inconsistency with the second sentence of Article III:2 with respect to imported soft drinks and syrups. Mexico has not rebutted this case nor the case with respect to soft drinks and syrups under the first sentence of Article III:2. Accordingly, on the basis of the U.S. *prima facie* case, the United States respectfully requests that the Panel find the HFCS soft drink and distribution taxes with respect to soft drinks and syrups are inconsistent with the first sentence, or in the alternative, the second sentence, of Article III:2 of the GATT 1994.

**(b) The HFCS Soft Drink and Distribution Taxes Are Inconsistent with Article III:2, First Sentence With Respect to Soft Drinks and Syrups Sweetened with Beet Sugar**

25. Mexico’s soft drink and distribution taxes discriminate against all non-cane sugar-sweetened soft drinks and syrups. These non-cane sugar-sweetened soft drinks and syrups include not only soft drinks and syrups sweetened with HFCS, but also those sweetened with beet sugar.<sup>37</sup>

26. The discrimination against soft drinks and syrups sweetened with beet sugar, coupled with the fact that these soft drinks and syrups are “like” those sweetened with cane sugar (as explained below), renders the HFCS soft drink and distribution taxes inconsistent with the first sentence of Article III:2 of the GATT 1994 with respect to beet sugar-sweetened soft drinks and syrups, just as it does for soft drinks and syrups sweetened with HFCS.

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<sup>34</sup> U.S. First Written Submission, paras. 64-83 (like products); *id.*, paras. 141-145 (directly competitive or substitutable products).

<sup>35</sup> *Id.*, paras. 84-90 (in excess of), 146-148 (not similarly taxed).

<sup>36</sup> *Id.*, paras. 149-152.

<sup>37</sup> As noted in the U.S. first submission, soft drinks and syrups sweetened with high-intensity sweeteners are generally referred to as “diet” or “light” and comprise only two to three percent of the Mexican soft drink market. *See* U.S. First Written Submission, para. 29-30.

27. As noted above, the United States explained in its first submission that beet and cane sugar are “chemically and functionally identical” and may be used interchangeably as a sweetener for soft drinks and syrups.<sup>38</sup> As beet and cane sugar are virtually identical, it follows that soft drinks and syrups sweetened with them are as well and, therefore, that soft drinks and syrups sweetened with beet sugar are “like” those sweetened with cane sugar.

28. In addition, soft drinks and syrups sweetened with beet sugar are “like” soft drinks and syrups sweetened with cane sugar because they share the same physical properties, end-uses, consumer preferences and tariff classification. Specifically, each of the physical characteristics described in paragraphs 78 and 79 of the U.S. first submission with respect to HFCS- and cane sugar-sweetened soft drinks and syrups equally apply with respect to soft drinks and syrups sweetened with beet sugar. With respect to chemical composition, as stated above, cane and beet sugar are 99.95 percent the same chemical compound. The identity of the chemical make-up of soft drinks and syrups sweetened with cane versus beet sugar is, therefore, even greater. To be exact, that would make beet sugar- and cane sugar-sweetened soft drinks 99.99 percent identical. Moreover, as noted in the U.S. first submission, the ingredient label on a can of soda reads the same (both in Mexico and the United States, as well as in Europe) regardless of whether it is sweetened with HFCS, beet sugar or cane sugar.<sup>39</sup>

29. Furthermore, although in the United States most regular soft drinks and syrups are sweetened with HFCS and in Mexico with cane sugar, in the EC (as the EC mentioned in its third party submission and statement to the Panel) soft drinks and syrups are sweetened with beet sugar.<sup>40</sup> There is no indication that consumers in Europe use soft drinks and syrups sweetened with beet sugar for end-uses that in any way differ from the end-uses for soft drinks and syrups in the United States or Mexico. As discussed in the U.S. first submission, Coca-Cola, the world largest soft drink producer attests that “[b]ecause there is no noticeable taste difference, bottlers have the option of using either high fructose corn syrup (HFCS), beet sugar or cane sugar, depending on availability and cost.”<sup>41</sup> Also as discussed in the U.S. first submission, U.S. soft drink and syrup producers generically refer to the sweetener component as “sugar”, not cane or beet sugar or HFCS.<sup>42</sup> With respect to tariff classification, there is no separate classification for soft drinks and syrups based on the type of sweetener used, as Mexico confirmed in its responses to the Panel’s questions.<sup>43</sup>

30. Although soft drinks and syrups sweetened with beet sugar are “like” soft drinks and syrups sweetened with cane sugar, only the former is subject to a 20 percent tax on its importation and internal transfer (the HFCS soft drink tax) as well as on its distribution,

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<sup>38</sup> U.S. First Written Submission, para. 22.

<sup>39</sup> U.S. First Written Submission, para. 71.

<sup>40</sup> EC Third Party Submission, para. 25; EC Third Party Oral Statement, para. 14.

<sup>41</sup> U.S. First Written Submission, para. 77 and Exh. US-38.

<sup>42</sup> U.S. First Written Submission, para. 80.

<sup>43</sup> Mexico Responses to the Questions of the Panel, p. 22 (courtesy translation).

representation, brokerage, agency, and consignment (the distribution tax). As explained in the U.S. first submission, as well as above, in Mexico soft drinks and syrups are largely sweetened with cane sugar. This was true even before imposition of Mexico's discriminatory taxes. Soft drinks and syrups produced in the United States and elsewhere, however, are sweetened largely with non-cane sugar sweeteners. A 20 percent tax applied to beet sugar-sweetened soft drinks and syrups that is not applied to "like" cane sugar-sweetened soft drinks is, therefore, a tax applied on imports from the United States and elsewhere "in excess of" that applied to the like domestic product.<sup>44</sup>

31. Because beet- and cane sugar-sweetened soft drinks and syrups are "like" products, but only beet sugar-sweetened soft drinks and syrups are subject to taxation, the HFCS soft drink and distribution taxes are also inconsistent with the first sentence of Article III:2 of the GATT 1994 as taxes applied on imported beet sugar-sweetened soft drinks and syrups in excess of those applied to like domestic soft drinks and syrups sweetened with cane sugar.

32. The United States notes that, in its responses to the Panel's questions, Mexico raised for the first time that, due to an amendment made to the IEPS during the Panel proceedings effective January 1, 2005, the HFCS soft drink tax allows the same tax exemption for importations of cane sugar-only soft drinks and syrups as it does for their internal transfer.<sup>45</sup> This fact, however, should not change the Panel's analysis in this dispute. The January 1, 2005 amendment to the HFCS soft drink tax is outside the Panel's terms of reference. As provided in the U.S. panel request, the measures before the Panel are Mexico's tax measures as embodied in the *Ley del Impuesto Especial sobre Producción y Servicios* ("IEPS", or Law on the Special Tax on Production and Services) published on January 1, 2002 and its subsequent amendments published on December 30, 2002 and December 31, 2003 as amended December 31, 2003.<sup>46</sup> Accordingly, the tax measures before the Panel are those that existed at the time of the Panel's establishment. The Panel should, therefore, not take into account the January 1, 2005 amendment to the IEPS in evaluating the U.S. claims that Mexico's tax measures as described in its request for a panel are inconsistent with Mexico's obligations under Article III of the GATT 1994.<sup>47</sup>

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<sup>44</sup> Although most regular soft drinks and syrups produced in the United States are sweetened with HFCS, as stated in the U.S. First Written Submission, some niche products produced in the United States such as kosher Coke and organic soft drinks are sweetened with sugar, whether cane or beet. See U.S. First Written Submission, para. 32.

<sup>45</sup> Mexico Responses to the Questions of the Panel, p. 22-24 (courtesy translation). Mexico's January 1, 2005 amendment was published in the *Diario Oficial* on December 1, 2004.

<sup>46</sup> WT/DS308/4.

<sup>47</sup> In *Indonesia – Autos*, for example, the panel noted Indonesia's point that it had terminated one of the contested measures, but nevertheless assessed and issued findings with respect to that measure. The panel noted that panels in the past had made findings on measures within their terms of reference that had been terminated and that the parties to the dispute contested the effectiveness of the measure's termination. *Indonesia – Autos*, para. 14.9 & n.642 (citing additional panels to have taken this approach).



33. In any event, the amendment does not change the *de facto* discrimination that exists with respect to the internal transfer and distribution of imported soft drinks and syrups sweetened with non-cane sugar sweeteners. Mexico's excess or dissimilar taxation of imported soft drinks and syrups constitutes discrimination on both a *de facto* and *de jure* level.<sup>48</sup> Mexico's HFCS soft drink and distribution taxes discriminate *de facto* against imported soft drinks and syrups (*i.e.*, apply a tax on imported soft drinks and syrups in excess of that applied to domestic soft drinks and syrups) by taxing the *internal transfer and distribution* of soft drinks and syrups sweetened with HFCS and beet sugar but not the internal transfer and distribution of soft drinks and syrups sweetened with cane sugar. The January 1, 2005 amendment only affects importations of soft drinks and syrups and, therefore, does not change the *de facto* discrimination that exists with respect to the internal transfer and distribution of imported soft drinks and syrups sweetened with non-cane sugar sweeteners.

**3. The United States Has Established a *Prima Facie* Case That Mexico's Tax Measures Affecting the Use of HFCS Are Inconsistent with Article III:4 of the GATT 1994**

34. In addition to being inconsistent with Article III:2, first and second sentences, of the GATT 1994, Mexico's tax measures are also inconsistent with Article III:4 of the GATT 1994 as taxes affecting the internal use of HFCS as a sweetener for soft drinks and syrups. As set out in the U.S. first submission, to establish a breach of Article III:4 the complaining party must demonstrate: (1) the imported and domestic products are "like products"; (2) the measure is a law, regulation, or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution, or use of the imported and domestic like products; and (3) the imported product is accorded less favorable treatment than the domestic like product.<sup>49</sup> The United States demonstrated each of these elements with respect to Mexico's HFCS soft drink and distribution taxes and Mexico's reporting requirements in its first submission<sup>50</sup> and further elaborated on them in its responses to the Panel's questions.<sup>51</sup>

35. Accordingly, the United States has established a *prima facie* case that Mexico's tax measures (HFCS soft drink tax, distribution tax and reporting requirements) are inconsistent with Article III:4 as measures affecting the use of HFCS as a sweetener for soft drinks and syrups. Mexico has not rebutted this case. Therefore, on the basis of the U.S. *prima facie* case, the United States respectfully requests the Panel to find the HFCS soft drink and distribution taxes and reporting requirements on HFCS for soft drink and syrup use to be inconsistent with Article III:4 of the GATT 1994.

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<sup>48</sup> See U.S. Response to the Questions of the Panel, paras. 59-62.

<sup>49</sup> U.S. First Written Submission, para. 154.

<sup>50</sup> U.S. First Written Submission, paras. 153-162.

<sup>51</sup> U.S. Responses to Questions of the Panel, paras. 42-52.

36. Mexico's HFCS soft drink and distribution taxes and reporting requirements are also inconsistent with Article III:4 of the GATT 1994 as applied to beet sugar. As stated above, cane and beet sugar are "like" products within the meaning of the first sentence of Article III:2. Indeed, beet and cane sugar are nearly identical products. Further, the discrimination imposed on beet sugar by Mexico's tax measures discriminate against beet sugar just as they do HFCS by offering an advantage on the use of cane sugar (which is almost exclusively a domestic product) that it does not equally offer on beet sugar (which is exclusively an imported product). Specifically, Mexico's tax measures provide a complete tax exemption for use of the domestic product, cane sugar, while denying that same exception to like imported products, whether HFCS or beet sugar. Mexico's HFCS soft drink and distribution taxes and reporting requirements are, therefore, also inconsistent with Article III:4 as applied to beet sugar.

### **III. MEXICO'S TAX MEASURES ARE NOT JUSTIFIED UNDER ARTICLE XX(D) OF THE GATT 1994**

37. Having avoided any direct response to the U.S. Article III claims, Mexico asserts that, even if its tax measures are inconsistent with Article III, they are nevertheless justified as "necessary to secure compliance" with U.S. obligations under the NAFTA. Mexico contends that Article XX(d) of the GATT 1994 provides an exception for such measures. Mexico is incorrect. Article XX(d) provides an exception for measures necessary to secure compliance with "laws or regulations." It does not provide an exception for measures to secure compliance with obligations under an international agreement. In arguing to the contrary, Mexico attempts to construct an entirely new Article XX exception. This new exception would offer WTO Members a free pass from their WTO obligations any time a Member believes obligations owed it under the WTO Agreement or any other international agreement have not been fulfilled. Such an exception would fundamentally undermine the dispute settlement system established in the WTO Agreement and should be rejected.

38. Article XX(d) and the chapeau of Article XX provide:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the

protection of patents, trade marks and copyrights, and the prevention of deceptive practices[.]

39. The party who invokes Article XX(d) as an affirmative defense bears the burden of proof with respect to each element of that defense.<sup>52</sup> Thus, in this dispute Mexico must establish and prove that it has met each of the elements required for invocation of an Article XX(d) defense.

40. The elements required to invoke Article XX(d) are that the measure at issue must: (1) concern compliance with “laws or regulations” which are not inconsistent with the GATT; (2) be designed to “secure compliance” with such laws or regulations; and (3) be “necessary” to secure such compliance.<sup>53</sup> If these elements are met, the measure will be provisionally justified under paragraph (d). However, for an Article XX defense to be successful, the application of the measure in question must also comply with the chapeau to Article XX. That is, the application of the measure must not be a “disguised restriction on international trade” nor “a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.” Whether the measure is provisionally justified under paragraph (d) should be examined prior to considering whether the application of the measure is consistent with the chapeau.<sup>54</sup>

41. Mexico’s tax measures do not qualify for an Article XX(d) defense. They are not provisionally justified under paragraph (d) nor are they consistent with the requirements of the chapeau. The failure of Mexico’s Article XX(d) defense begins with the first step of the analysis as its tax measures do not concern compliance with “laws or regulations.” The Panel may reject Mexico’s Article XX(d) defense on this basis alone and, for this reason, it need not examine further whether Mexico’s tax measures are “necessary to secure compliance” or in keeping with the chapeau. That said, for the sake of completeness, the United States has provided an analysis of each of the elements required to justify a measure under Article XX(d), including the elements of the chapeau.

#### **A. U.S. Obligations Under the NAFTA Are Not “Laws or Regulations”**

42. Mexico’s argument that Article XX(d) provides a legal justification for the HFCS tax depends on reading the phrase “laws or regulations” in Article XX(d) to include obligations

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<sup>52</sup> *Korea – Various Measures on Beef*, AB Report, para 157.

<sup>53</sup> *Korea – Various Measures on Beef*, AB Report, para. 157. The Appellate Body in *Korea – Beef* stated: “For a measure . . . to be justified provisionally under paragraph (d) of Article XX, two elements must be shown. First, the measure must be one designed to ‘secure compliance’ with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994. Second, the measure must be ‘necessary’ to secure such compliance.” For ease of analysis, we have broken the requirements of Article (d) into three elements because, unlike in *Korea – Beef*, Mexico has invoked an Article XX(d) defense for a measure that is not in fact a law or regulation.

<sup>54</sup> *US – Shrimp*, AB Report, paras. 118-120.

under international agreements. Such a reading would be contrary to the text of Article XX(d), read in its context and in light of the object and purpose of the GATT 1994.<sup>55</sup>

43. As explained in the U.S. responses to the Panel’s questions, the ordinary meaning of “laws or regulations” is the domestic laws or regulations of a government.<sup>56</sup> The phrase “laws or regulations” is not defined as including obligations under an international agreement, which have a different meaning.<sup>57</sup>

44. This interpretation of the ordinary meaning of “laws or regulations” is supported by the context in which the phrase “laws or regulations” appears – namely, Article XX of the GATT and more broadly the GATT and the WTO Agreement as a whole.<sup>58</sup> In particular, Article XX itself distinguishes between “laws” and “regulations” on the one hand and “obligations” under an international agreement on the other. Thus, while Article XX(d) provides a defense for measures necessary to secure compliance with “laws or regulations,” Article XX(h) provides a defense for measures “undertaken in pursuance of obligations under any intergovernmental commodity agreement.” There would be no reason for the different phrasing had the drafters intended “law or regulations” to mean the same thing as “obligations under” an international agreement. Indeed, reading “laws or regulations” to include obligations under “international agreements” would render Article XX(h) redundant.<sup>59</sup>

45. Other provisions of the GATT further support the distinction between “laws” and “regulations” on the one hand and “agreements” and “obligations” on the other hand. The United States cited several examples in its responses to the Panel’s questions.<sup>60</sup> The United States emphasizes that none of those examples supports Mexico’s contention that the phrase “laws or regulations” in Article XX(d) includes obligations under an international agreement. To the contrary, the cited examples reinforce that “laws or regulations” in the context of Article XX(d) mean the domestic laws and regulations of a government.<sup>61</sup>

46. Further, variations on the phrase “laws or [and] regulations” appear many times in a number of the WTO agreements, each time referring to *domestic* laws and regulations, not treaties. For instance, Article XVI:4 of the Marrakesh Agreement Establishing the WTO provides

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<sup>55</sup> See *Vienna Convention on the Law of Treaties* (“Vienna Convention” or “VCLT”) Art. 31(1) (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”).

<sup>56</sup> U.S. Responses to the Questions of the Panel, para. 71 (quoting from Black’s Law Dictionary a work referred to as a “standard law dictionary” in *Korea-Various Measures on Beef*, Appellate Body Report, para. 160 ).

<sup>57</sup> U.S. Responses to the Questions of the Panel, para. 71 (quoting from Black’s Law Dictionary).

<sup>58</sup> *Id.*, para. 72.

<sup>59</sup> See *U.S. – Gasoline*, AB Report, p. 23 (finding that “an interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutile.”).

<sup>60</sup> U.S. Responses to the Questions of the Panel, paras. 73-74 & n.56 (citing GATT Articles X:1, III:3, XXI:(c), XII:4(d), XV:6, XVIII:12, XVIII:16, XVIII:18, XVIII:21, XVIII:22, XIX:1 and XXIII.)

<sup>61</sup> *Id.*, para. 71.

that “[e]ach Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.” It is logical that each Member would be responsible for its own domestic laws, regulations and administrative procedures.

47. Moreover, Article 23 of the DSU provides “[w]hen Members seek the redress of a violation of obligations... under the covered agreements ... they shall have recourse to, and abide by, the rules and procedures of this Understanding.”<sup>62</sup> Since the WTO Agreement is an international agreement, Mexico’s reading of Article XX(d) would authorize unilateral action by any Member to secure compliance with another Member’s obligations under the WTO Agreement. Such a result, however, would be in clear conflict with Article 23, not to mention render it meaningless. Mexico’s reading of Article XX(d) would also render redundant<sup>63</sup> Article 22 of the DSU, which prescribes rules for the suspension of concessions, including seeking authorization to do so from the DSB. Mexico’s interpretation of Article XX(d), however, would permit suspension of concessions without DSB authorization and without any requirement to adhere to the rules established in Article 22 of the DSU.

48. Mexico’s reading of “laws or regulations” is not only incompatible with the ordinary meaning of the term based on the customary rules of treaty interpretation, but has other far reaching consequences as well. The threat presented by Mexico’s concept of Article XX(d) can best be understood by exploring where such a use of Article XX(d) would lead. If “laws or regulations” are read to include international agreements, then any Member can invoke Article XX(d) as justification for actions depriving others of their rights under the GATT to the extent needed to “secure compliance” with any other international agreement. For example, Mexico’s reading would also authorize trade measures by any Member to coerce compliance by another Member with treaty-based boundary claims or other international agreements.

49. Against the above, Mexico has offered little in support of its proposition that “laws or regulations” may include obligations owed it under the NAFTA or any other international agreement. Mexico’s point that “there are no GATT or WTO precedents that reject Mexico’s interpretation” only highlights the fact that not a single WTO Member or GATT 1947 contracting party has advocated such a position before a dispute settlement panel.<sup>64</sup> Notably, in *US – Shrimp*,

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<sup>62</sup> DSU Art. 23.1.

<sup>63</sup> See *U.S. – Gasoline*, AB Report, p. 23 (finding that treaty interpretation should not result in reducing whole clauses or paragraphs of a treaty to redundancy or inutile).

<sup>64</sup> In fact, every GATT or WTO dispute settlement proceeding in which Article XX(d) has been invoked, other than Mexico’s in this dispute, has involved a domestic law enforcing another domestic regime. See *U.S.-Spring Assemblies*, GATT Panel Report and *US - Section 337*, GATT Panel Report (exclusion order to enforce domestic patent law); *Canada - FIRA*, GATT Panel Report (purchase undertakings to implement domestic investment screening law); *Japan - Agricultural Products*, GATT Panel Report (import restrictions to support domestic price stabilization schemes and an import monopoly); *EEC - Parts and Components*, GATT Panel Report (measures to secure compliance with antidumping duties); *U.S.-Tuna-Dolphin I/II* GATT Panel Reports (intermediary nations embargo to secure compliance with direct U.S. embargo on certain tuna imports); *U.S.-Malt Beverages* GATT Panel

on which Mexico repeatedly relies (including for its contention that Article XX(d) encompasses obligations under an international agreement),<sup>65</sup> the United States did not argue that its import ban was necessary to secure enforcement of the Inter-American Convention on the Protection and Conservation of Sea Turtles. Instead, it raised its Article XX defense under the exception “relating to the conservation of exhaustible natural resources,”<sup>66</sup> citing the Inter-American Convention as evidence that sea turtles constituted an exhaustible natural resource and that its import ban was not arbitrary or unjustifiable discrimination.

50. Moreover, Mexico appears to argue, on the one hand, that Article XX(d) must be “interpreted in accordance with the customary rules of international law” – which the United States presumes means the customary rules of interpretation of public international law, as those are the customary rules of international law to which the DSU refers<sup>67</sup> – but, on the other hand, must be interpreted “with a view to the change[] in the international legal milieu that have occurred since Article XX was drafted in 1947,” which Mexico contends is the greater concern States have “nowadays with the protection of their trading interests than they [did] when [the] GATT was drafted.”<sup>68</sup> The customary rules of interpretation to which Mexico presumably refers, and which are applicable in WTO dispute settlement, provide that the terms of a treaty are to be interpreted based on their ordinary meaning in their context and in light of the treaty’s object and purpose.<sup>69</sup> Mexico makes no effort to interpret Article XX(d) by reference to this fundamental rule, and does not explain how or why its vague and unsupported references to “changes in the international milieu” or “concern for trade interests” should affect the analysis under this rule. Indeed, there is no basis for concluding that they should.

51. Mexico also offers that “laws or regulations” encompass obligations under an international agreement because the Statute of the International Court of Justice “defines” “international law” to include “international conventions.”<sup>70</sup> Mexico’s reasoning is circular.

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Report (in-state wholesaler distributor requirement argued to be necessary to secure enforcement of state excise tax laws); *U.S.-Auto Taxes*, GATT Panel Report (assessment of penalties to secure compliance with Corporate Average Fuel Economy law); *U.S.-Gasoline*, AB and Panel Reports (baseline establishment methods claimed necessary to secure compliance with U.S. environmental laws); *Canada-Periodicals*, Panel Report (Tariff Code 9958 import restriction claimed necessary to secure compliance with Canadian income tax laws); *Korea – Various Measures on Beef*, Appellate Body and Panel Reports (dual retail system claimed necessary to secure compliance with domestic unfair competition laws); *Argentina – Hides and Leather*, Panel Report (special treatment of imports found necessary to secure compliance with value-added tax and income tax laws); *Wheat Exports and Grain Imports*, Panel Report (laws on treatment of foreign grain claimed to be necessary to secure compliance with domestic laws on competition, grain, and the Canadian Wheat Board); *Dominican Republic – Import and Sale of Cigarettes*, Panel Report (stamp and bond requirements claimed to be necessary to secure compliance with domestic tax laws and regulations).

<sup>65</sup> See Mexico Responses to the Questions of the Panel, p. 15 (courtesy translation).

<sup>66</sup> *US – Shrimp*, Panel Report, paras. 7.24.

<sup>67</sup> DSU Art. 3.2.

<sup>68</sup> Mexico Response to the Questions of the Panel, p. 13.

<sup>69</sup> VCLT, Art. 31.

<sup>70</sup> Mexico Responses to the Questions of the Panel, pp. 12-13 (courtesy translation).

Mexico has not established that phrase “laws or regulations” as used in Article XX(d) means or includes “international law.” As explained above, “laws or regulations” mean the domestic laws or regulations of a government. It is, therefore, irrelevant whether international conventions are included in the “definition” of “international law.”<sup>71</sup> Moreover, there is a clear textual difference between “laws or regulations” and “international law.” For starters, one uses the singular “law” while the other uses the plural “laws.” While one may speak of international “law” in the same sense as one speaks about “common law” or the “law of the sea,” international law is not ordinarily used in the plural. For example, Article 3.2 of the DSU provides that the dispute settlement system serves to clarify the provisions of the covered agreements “in accordance with the customary rules of interpretation of public international *law*.”<sup>72</sup>

52. Moreover, the fact that the United States may refer to arguments raised in the context of NAFTA proceedings as “legal” arguments<sup>73</sup> does not make U.S. obligations under the NAFTA “laws or regulations” under Article XX(d). Mexico’s argument merely assumes the conclusion that “laws or regulations” include international agreements, simply because international agreements provide international legal obligations. The argument does not address the point, however, of whether obligations – legal or otherwise – under an international agreement are included “laws or regulations” within the meaning of Article XX(d).

53. Finally, the United States is compelled to point out that, contrary to Mexico’s suggestion in response to Question 25 of the Panel, the United States has not conceded that NAFTA is a law.<sup>74</sup> Rather, as explained in the U.S. opening statement, while a Member may adopt domestic laws in order to implement the terms of an international agreement, such as the NAFTA, obligations owed that Member by another Member under the terms of that agreement do not constitute “laws or regulations” within the meaning of Article XX(d). Specifically, the United States articulated before the Panel:

Article XX(d) allows a Member, under certain conditions, to adopt or enforce measures necessary to secure compliance with that Member’s own laws and

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<sup>71</sup> Article 38 of the Statute of the ICJ to which Mexico refers concerns the “competence of the court” and indicates that “[t]he Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”

<sup>72</sup> DSU Art. 3.2 (emphasis added). The difference in usage of “laws” versus “law” in the Spanish and French texts is even more striking. The Spanish text of Article 3.2 of the DSU refers to “public international *law*” as “*del derecho internacional público*” while the Spanish text of Article XX(d) of the GATT 1994 refers to “*laws or regulations*” as “*las leyes y de los reglamentos*.” Similarly, the French text of Article 3.2 refers to “public international *law*” as “*du droit international public*” while the French text of Article XX(d) refers to “*laws or regulations*” as “*des lois et règlements*.”

<sup>73</sup> See Mexico Responses to the Questions of the Panel, p. 13 (courtesy translation).

<sup>74</sup> See Mexico Responses to the Questions of the Panel, p. 12.

regulations – for example, those laws and regulations Mexico may have in place to implement its own NAFTA obligations. It does not, however, permit a Member to claim an Article XX(d) exception for measures to secure compliance by another Member with its obligations under an international agreement. It should go without saying that an "international agreement" is distinct from a "law" or "regulation."<sup>75</sup>

54. The United States stands by this statement. As explained above, the phrase "laws or regulations," interpreted in accordance with the customary rules of treaty interpretation, means the domestic laws and regulations of the Member invoking the Article XX(d) exception, not an international agreement or obligations owed it thereunder.

55. Mexico's interpretation of "laws or regulations" completely ignores these rules of treaty interpretation. Instead, the interpretation Mexico offers distorts the ordinary meaning of "laws or regulations" to create a new Article XX exception for unilateral treaty enforcement. Article XX contains no such exception, and the Panel should decline Mexico's invitation to create one. Mexico has not claimed that Mexico's tax measures secure compliance with any domestic laws or regulations. For this reason, Mexico's tax measures are outside the scope of any possible justification under Article XX(d). If the Panel finds to this effect, it need not go further in its analysis under Article XX.

#### **B. Mexico's Tax Measures Are Not Designed to "Secure Compliance"**

56. Even if one could read "laws or regulations" to mean obligations owed another Member under an international agreement, Mexico's tax measures are not designed to "secure compliance" within the meaning of Article XX(d) of the GATT 1994.

57. Although Mexico claims to have imposed its tax measures to secure or induce U.S. compliance with the NAFTA, Mexico's position presupposes that the United States is not in compliance with its NAFTA obligations. This position, however, is solely Mexico's own determination. To be clear, it is the firm view of the United States that it is in full compliance with its NAFTA obligations on market access for Mexican cane sugar. That Mexico disagrees on this point does not convert its *allegation* that the United States has not complied with its NAFTA obligations into a breach of that agreement.<sup>76</sup> Nor may that disagreement be resolved in

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<sup>75</sup> U.S. Opening Statement at the First Meeting of the Panel, para. 9.

<sup>76</sup> In *India – Quantitative Restrictions*, the Appellate Body rejected a similar plea by a responding party to create a new exception to GATT rules. In that dispute, India claimed that certain quantitative restrictions found in breach of Article XI of the GATT 1994 were justified under Article XVIII:B. In doing so, India attempted to read into Article XVIII:B a prohibition on the reviewability of the justification for such restrictions by WTO panels and cited as a basis for this position the "principle of institutional balance." The Appellate Body rejected India's argument: "We . . . consider that India failed to advance any convincing arguments in support of the existence of a principle of institutional balance that requires panels to refrain from reviewing the justification of balance-of-payments restrictions under Article XVIII:B. We note, in addition, that such a requirement would be



a WTO panel proceeding.<sup>77</sup> Indeed, such an undertaking would be outside the Panel’s terms of reference.

58. Moreover, Mexico even agrees that there is a genuine dispute over the precise obligations the United States owes Mexico under the NAFTA<sup>78</sup>. Mexico’s tax measures cannot be designed to secure “compliance” with obligations the United States does not have or with obligations it has already fulfilled.<sup>79</sup>

59. Furthermore, as Mexico itself has confirmed, its tax measures apply to soft drinks and syrups and non-cane sugar sweeteners imported from *any* WTO Member, not just those from the United States. At no point, however, has Mexico explained how taxing soft drinks and syrups in this manner in any way contributes to U.S. compliance with the NAFTA. Rather, regardless of the source of the soft drinks and syrups or non-cane sugar sweeteners, a tax on their transfer or use protects Mexico’s own cane sugar industry.

### C. Mexico’s Tax Measures Are Not “Necessary”

60. Even assuming *arguendo* that Mexico’s tax measures somehow contributed to NAFTA compliance, they are not “necessary” to secure such compliance as required by Article XX(d).

61. As the Appellate Body articulated in *Korea – Various Measures on Beef*, “‘necessity’ normally denotes something that cannot be dispensed with or done without, requisite, essential, needful.” Although “necessary” connotes a “range of degrees of necessity,” the Appellate Body has stated that “a ‘necessary’ measure is ... located significantly closer to the pole of ‘indispensable’ than to the opposite pole of simply ‘making a contribution to.’”<sup>80</sup> In determining the necessity of a measure, the Appellate Body has characterized Article XX(d) as involving a

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inconsistent with Article XXIII of the GATT 1994, as elaborated and applied by the DSU, and footnote 1 to the BOP Understanding which, as discussed above, clearly provides for the availability of the WTO dispute settlement procedures with respect to any matters relating to balance-of-payments restrictions.” *India – Quantitative Restrictions*, AB Report, para. 105; *see also India – Quantitative Restrictions*, Panel Report, para. 5.114 (“If India’s interpretation were endorsed, a mere notification by a Member under Article XVIII:B could deprive other Members of their procedural rights under the WTO dispute settlement provisions and therefore also of the effective protection of their substantive rights. This would also be contrary to the principle expressed in Article 3.2 of the DSU, which provides that the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system.”)

<sup>77</sup> This is a point on which Mexico agrees. Mexico Opening Statement to the Panel, p. 9 (courtesy translation) (“Mexico recognizes that a WTO panel has jurisdiction only over the covered agreements; that it cannot take jurisdiction over issues raised under the NAFTA.”)

<sup>78</sup> *See, e.g.*, Mexico Closing Statement at the First Meeting of the Panel, p. 1 (WTO English translation).

<sup>79</sup> Although NAFTA obligations and compliance with them are irrelevant to these proceedings, the United States notes that it is difficult to reconcile, for example, the fact that Mexico committed under the NAFTA to allow duty-free market access for a minimum of 7,258 MT of U.S. sugar per year, with the fact that Mexico has not yet provided this level of market access commitment in the 11 years since NAFTA’s entry into force.

<sup>80</sup> *Korea – Various Measures on Beef*, AB Report, para. 161.

“process of weighing and balancing a series of factors which prominently include [1] the contribution made by the compliance measure to the enforcement of the law or regulation at issue, [2] the importance of the common interests or values protected by that law or regulation, and [3] the accompanying impact of the law or regulation on imports or exports.”<sup>81</sup> Mexico’s tax measures come up considerably short in this balance.

62. First, as reviewed above, despite Mexico’s claims, its tax measures do not contribute to enforcement of the NAFTA. In addition to the points reviewed above, Mexico’s tax measures have done nothing to contribute to the resolution of the dispute the United States and Mexico have over their obligations under NAFTA.

63. Second, with respect to the “common interests or values” that Mexico’s tax measures are designed to protect, these are nothing more than the interests of Mexican sugar producers to be protected from competition from imported HFCS and other non-cane sugar sweeteners. The protection of a domestic industry from imports cannot be an “important” interest in the context of Article XX.<sup>82</sup>

64. Third, as Mexico has stated, its concerns with NAFTA involve certain provisions pertaining to market access for Mexican sugar. Mexico’s tax measures, however, concern HFCS and soft drinks and syrups sweetened with HFCS and have had a devastating effect on imports of these products. The first U.S. submission explained, for example, that Mexico’s tax measures have so severely penalized the use of imported HFCS that since enactment of the tax measures, Mexican imports of HFCS have fallen to less than six percent of their pre-tax level and use of imported HFCS as a sweetener soft drinks and syrups has ceased.<sup>83</sup> It is difficult to understand how this harm imposed on HFCS and soft drinks and syrups sweetened with HFCS is designed to “secure compliance” with unrelated provisions under the NAFTA on market access for sugar.

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<sup>81</sup> *Korea – Various Measures on Beef*, AB Report, para. 164.

<sup>82</sup> In prior disputes, important interests considered by previous panels in the context of Article XX(d) have not involved the protection of a specific domestic industry. *See, e.g., Canada - Wheat Exports and Grain Imports*, Panel Report, para 6.224 (finding that maintaining the integrity of a commercial system is an important interest, but not as important as the protection of human life or health); *Dominican Republic - Import and Sale of Cigarettes*, Panel Report, para. 7.215 (finding the collection of tax revenue is an important interest for any country); *Korea – Various Measures Beef*, Panel Report, para. 655 (finding there could be “non-protectionist” reasons for deterring acts of misrepresentation or other types of fraudulent practices with respect to the origin of beef).

<sup>83</sup> U.S. First Written Submission, paras. 23, 25; Exhibit US-8 (consumption of HFCS); Exhibit US-11 (imports of HFCS).

65. In analyzing the extent to which a measure is “necessary,” prior panels<sup>84</sup> have also considered whether an alternative measure that is not inconsistent with the GATT is reasonably available.<sup>85</sup> Mexico had any number of alternative measures reasonably available to it – short of breaching its national treatment obligations – to assist its domestic cane sugar industry and/or resolve its disagreement with the United States over the exact terms of the NAFTA. As the party invoking Article XX(d), Mexico bears the burden of demonstrating that this was not in fact the case. Mexico has not done so. For example, Mexico has yet to explain why it is necessary to breach its national treatment obligations owed all WTO Members to resolve a bilateral trade dispute with the United States.

66. Mexico’s suggestion that no alternative measures were available to it because the “United States has refused to submit to dispute settlement” under the NAFTA and “has preferred to drag on bilateral discussions”<sup>86</sup> is misplaced on several levels. In the first instance, the United States has not “refused” to submit to dispute settlement under the NAFTA. In fact, as Mexico explained in response to Question 8 of the Panel, the United States has engaged in and completed two of the NAFTA’s three “stages” of dispute settlement.<sup>87</sup> The United States is currently engaged in the third stage.<sup>88</sup> Mexico’s suggestion that the United States is somehow “blocking” the process in breach of its obligations under the NAFTA is, again, based on Mexico’s own interpretation of the NAFTA and its own determination as to whether the United States is acting

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<sup>84</sup> *Canada – Wheat Exports and Grain Imports*, Panel Report, paras. 6.229-239, 6.308-316 (finding that Canada could have adopted an alternative measure of allowing foreign grain to be received into elevators subject to a segregation requirement); *Korea – Various Measures on Beef*, Panel Report, paras. 659-674 (finding that alternative measures existed for dealing with misrepresentation of origin); *Korea – Various Measures on Beef*, AB Report, paras. 165-172 (upholding *Korea – Beef* panel finding); *EC – Asbestos*, Panel Report paras. 8.204-8.212 (finding that alternative measures of controlled use or reliance on existing international standards were not reasonably available); *EC – Asbestos*, AB Report, para. 174 (finding that “controlled use” alternative would not would not allow France to achieve its chosen level of health protection); *US – Section 337*, GATT Panel Report, para 5.26 (“[A] contracting party cannot justify a measure inconsistent with another GATT provision as ‘necessary’ in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it.”).

<sup>85</sup> The Appellate Body in *Korea – Beef* stated that the “weighing and balancing” process it outlined “is comprehended in the determination of whether a WTO-consistent alternative measure which the Member concerned could ‘reasonably be expected to employ’ is available ...” *Korea – Various Measures on Beef*, AB Report, para. 166.

<sup>86</sup> Mexico First Written Submission, para. 124; Mexico Responses to the Questions of the Panel, p. 14 (courtesy translation) (“repeated efforts to block the creation of a panel that could determine whether in fact it has acted in conformity with its NAFTA obligations”).

<sup>87</sup> Mexico Response to Questions of the Panel, p. 5 (courtesy translation).

<sup>88</sup> The United States is confused by Mexico’s repeated references to the NAFTA sugar dispute being removed from the U.S. Trade Representative’s website. See Mexico First Written Submission, para. 76; Mexico Closing Statement at the First Meeting of the Panel, p. 1 (WTO English translation); Mexico Response to Questions of the Panel, pp. 4-5 (courtesy translation). The NAFTA sugar dispute has been, and continues to be, listed as a pending NAFTA Chapter 20 dispute in the “Overview of WTO and NAFTA Dispute Settlement Matters Involving the United States” available at [http://www.ustr.gov/assets/Trade\\_Agreements/Monitoring\\_Enforcement/Dispute\\_Settlement/asset\\_upload\\_file316\\_5697.pdf](http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/asset_upload_file316_5697.pdf).

in accordance those obligations. For the record, the United States does not view any of its actions as being inconsistent with the provisions of the NAFTA’s dispute settlement mechanism. Who is right or wrong on this issue, however, is not for a WTO panel to decide.<sup>89</sup> The issue is simply beyond the terms of reference of this dispute.

67. For this reason and the others stated above, Mexico has failed to demonstrate that its tax measures are provisionally justified under Article XX(d) as measures “necessary to secure compliance with laws or regulations.” The United States respectfully requests that the Panel find to this effect, in which case it would not be necessary to further consider Mexico’s arguments with respect to the chapeau of Article XX. If a measure does not meet the requirements of one of the paragraphs of Article XX(d), it is not relevant whether it meets the elements of the chapeau.

#### **D. Mexico’s Tax Measures Are Incompatible with the Chapeau to Article XX**

68. Should the Panel, nonetheless, continue its analysis, it should also find that Mexico has failed to demonstrate that its tax measures meet the requirements of the chapeau to Article XX because Mexico’s application of its tax measures amounts to a disguised restriction on international trade.

69. The chapeau generally works to prevent the abuse of the exceptions of Article XX by providing that measures falling within one of its paragraphs must not be applied in a manner that constitutes “a means of arbitrary or unjustifiable discrimination between countries” or a “disguised restriction on trade.” The Appellate Body has explained: “The chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the General Agreement. If those exceptions are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned.”<sup>90</sup> The Appellate Body has also stated that, “disguised restrictions” embrace “restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX.”<sup>91</sup> Because Mexico’s tax measures do not meet the elements of paragraph (d), Mexico cannot possibly demonstrate that application of its tax measures are “formally within the terms of an exception listed in Article XX” and applied in a manner that does not constitute arbitrary or unjustifiable discrimination or a disguised restriction on trade.

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<sup>89</sup> Again, this is a point on which Mexico agrees. Mexico Opening Statement to at the First Meeting of the Panel, p. 9 (courtesy translation) (“Mexico recognizes that a WTO panel has jurisdiction only over the covered agreements; that it cannot take jurisdiction over issues raised under the NAFTA.”)

<sup>90</sup> *US – Gasoline*, AB Report, p. 22.

<sup>91</sup> *Id.*, p. 25.

70. Further, Mexico has openly stated that its tax measures are designed to protect its cane sugar industry.<sup>92</sup> Yet, in asserting its Article XX(d) exception, Mexico contends that its tax measures are designed to secure U.S. compliance with the NAFTA. In other words, Mexico claims its tax measures are, for purposes of asserting its Article XX(d) defense, measures to secure U.S. compliance with NAFTA. But this asserted purpose of its tax measures does not match with the repeated statements by the Mexican government and Supreme Court, as documented in the U.S. first submission, that its tax measures are designed to protect Mexican production of cane sugar. Accordingly, Mexico's tax measures are not in fact a legitimate Article XX(d) measure, but rather are nothing more than disguised restrictions on trade – namely, measures to protect its domestic cane sugar industry from imported HFCS.

71. Mexico's references to *US – Shrimp* in this respect<sup>93</sup> are essentially irrelevant. Mexico has referred to *US – Shrimp* to argue that an attempt to negotiate an agreement is sufficient to authorize a WTO Member to breach its WTO obligations. Mexico's argument does not reflect a correct reading of the report in that dispute.<sup>94</sup> In *US – Shrimp*, the measure at issue had already been found to be provisionally justified under Article XX(g) as a measure relating to the conservation of a natural resource.<sup>95</sup> As stated above, Mexico cannot provisionally justify its tax measures under Article XX(d). Moreover, *US – Shrimp* does not stand for the proposition that once a Member attempts to negotiate a solution to a "dispute," it is then free to breach its WTO obligations.<sup>96</sup>

72. In sum, Mexico's tax measures are not provisionally justified under Article XX(d), nor are they applied in a manner consistent with its chapeau. There is no Article XX exception for measures designed to secure a Member's compliance with obligations owed another Member under an international agreement – whether that agreement is the WTO Agreement, the NAFTA or any other international agreement. The Panel should reject Mexico's Article XX(d) defense accordingly.

73. Mexico makes other general assertions about "international law" and its importance.<sup>97</sup> Leaving aside the fact that Mexico has not identified what principles of "international law" these may be, the rights and obligations of WTO Members are found in the text of the WTO

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<sup>92</sup> Mexico First Written Submission, para. 136-137 (suggesting that its tax measures are not disguised restrictions because their purpose has "been stated by members of Congress and analyzed by the Supreme Court of Justice.")

<sup>93</sup> Mexico First Written Submission, paras. 129-134.

<sup>94</sup> See also U.S. Responses to Questions of the Panel, paras. 56-58.

<sup>95</sup> *U.S. – Shrimp*, AB Report, para. 145; *U.S. – Shrimp (21.5)*, Panel Report, para. 5.42; *U.S. – Shrimp (21.5)*, AB Report, para. 82 (noting the 21.5 panel's finding was not appealed).

<sup>96</sup> Rather, in *US – Shrimp*, the Appellate Body looked to the issue of negotiations with some Members but not others as an indication of unjustifiable discrimination as the phrase is used in the chapeau. *US – Shrimp*, AB Report, para. 172; *US – Shrimp (21.5)*, AB Report, para. 128.

<sup>97</sup> See, e.g., Mexico Responses to the Questions of the Panel, p. 24-25; Mexico Opening State at the First Meeting of the Panel, p. 8 (courtesy translation).

Agreement, and with respect to whether Mexico is entitled to an exception for its tax measures under Article XX(d), in the text of Article XX(d).

#### IV. CONCLUSION

74. For the reasons set out above, the United States respectfully requests the Panel to find that Mexico’s tax measures are:

*With respect to sweeteners:*

- (1) inconsistent with GATT Article III:2, second sentence as a tax applied on imported HFCS which is “directly competitive or substitutable” with Mexican cane sugar which is “not similarly taxed” (HFCS soft drink tax);
- (2) inconsistent with GATT Article III:2, second sentence as a tax applied on the agency, representation, brokerage, consignment and distribution of HFCS which is “directly competitive or substitutable” with Mexican cane sugar which is “not similarly taxed” (distribution tax);
- (3) inconsistent with GATT Article III:2, first sentence as a tax applied on imported beet sugar which is “like” Mexican cane sugar and is taxed “in excess of” Mexican cane sugar (HFCS soft drink tax);
- (4) inconsistent with GATT Article III:2, first sentence as a tax applied on the agency, representation, brokerage, consignment and distribution of beet sugar “in excess of those applied to like domestic products” (distribution tax);
- (5) inconsistent with GATT Article III:4 as a law that affects the internal use of imported HFCS and imported beet sugar and accords HFCS and beet sugar “treatment ... less favorable than that accorded to like products of national origin” by
  - (a) taxing soft drinks and syrups that use HFCS or beet sugar as a sweetener (HFCS soft drink tax),
  - (b) taxing the agency, representation, brokerage, consignment and distribution of soft drinks and syrups sweetened with HFCS or beet sugar (distribution tax), and
  - (c) subjecting soft drinks and syrups sweetened with HFCS or beet sugar to various bookkeeping and reporting requirements (reporting requirements);

*With respect to soft drinks and syrups:*

(6) inconsistent with GATT Article III:2, first sentence as a tax applied on imported soft drinks and syrups sweetened *inter alia* with HFCS and beet sugar, “in excess of those applied to like domestic products” (HFCS soft drink tax);

(7) inconsistent with GATT Article III:2, first sentence as a tax applied on the agency, representation, brokerage, consignment and distribution of soft drinks and syrups sweetened *inter alia* with HFCS and beet sugar, “in excess of those applied to like domestic products” (distribution tax);

(8) inconsistent with GATT Article III:2, second sentence as a tax applied on imported soft drinks and syrups sweetened with HFCS, which are directly competitive or substitutable with domestic soft drinks and syrups which are “not similarly taxed” (HFCS soft drink tax); and

(9) inconsistent with GATT Article III:2, second sentence as a tax applied on the agency, representation, brokerage, consignment and distribution of soft drinks and syrups sweetened with HFCS, which are directly competitive or substitutable with domestic soft drinks and syrups which are “not similarly taxed” (distribution tax).