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

Opening Statement of the United States
First Meeting of the Panel

December 2, 2004

1. Thank you Mr. Chairman, and members of the Panel, for this opportunity to appear before you today. We appreciate your willingness to devote your time and energies to this dispute.

2. This dispute is about a 20 percent tax Mexico enacted, effective January 1, 2002, on soft drinks and syrups other than those sweetened exclusively with cane sugar. This tax – which is embodied in the Law on the Special Tax on Production and Services (the IEPS by its Spanish acronym) – was imposed to stop the displacement of Mexican cane sugar by imported high-fructose corn syrup (HFCS) in Mexican soft drink production. That is what the Mexican Supreme Court has said, and what Mexico concedes in its first submission.[1] This tax has had the desired effect. Today, despite the fact that Mexico is the second largest consumer of soft drinks in the world, imports of HFCS for soft drink use have ceased; total HFCS exports from the United States are just barely four percent of their pre-tax levels.

3. HFCS and cane sugar are directly competitive and substitutable products as sweeteners for soft drink and syrup production: Mexico concedes this point in its first submission.[2] Cane sugar and HFCS are not similarly taxed: the tax is not imposed on soft drinks and syrups

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[1] Mexico First Written Submission, para. 111.

[2] Mexico First Written Submission, paras. 5, 34, 112.

sweetened only with cane sugar, and it is prohibitively high, over four times the cost of the HFCS used in a typical soft drink.[3] Mexico's tax is inconsistent with Mexico's obligations under the second sentence of Article III:2 as a tax on HFCS and soft drinks and syrups sweetened with HFCS. Similarly, Mexico's tax discriminates in favor of Mexican soft drinks and syrups sweetened with cane sugar, and against soft drinks and syrups sweetened with HFCS, in breach of the first sentence of Article III:2. In addition, the tax rewards Mexican soft drink producers for using domestic cane sugar and punishes them for using HFCS, in breach of Article III:4.

4. The U.S. first submission presents a complete and documented *prima facie* case, including evidence and argument sufficient to establish a presumption that Mexico has infringed its Article III obligations. The United States has met its burden of proof.

5. In its first submission, rather than contesting the U.S. *prima facie* case under Article III, Mexico attempts to change the subject by raising issues that are irrelevant or otherwise outside the Panel's terms of reference – including the economic importance of the Mexican sugar industry, bilateral negotiations on sugar trade, and bilateral obligations under the North American Free Trade Agreement ("NAFTA"). The Panel need not and should not engage itself on these issues. These issues are outside the Panel's terms of reference.

6. In light of its extended discussion of issues irrelevant to this dispute, Mexico's first submission, while lengthy, appears actually to narrow the issues before you. In fact, Mexico affirmatively states that it "will not respond" to our Article III claims.[4] That in effect leaves

[3] U.S. First Written Submission, para. 45.

[4] Mexico First Written Submission, para. 114.

Mexico's so-called request for a "preliminary ruling" and its Article XX(d) defense as the only contested issues before you today. For that reason, we will not repeat in our statement today the extensive arguments in our first submission detailing Mexico's breach of its obligations under Articles III:2 and III:4 of the GATT 1994. Instead, having established our *prima facie* case, we will operate on the assumption – as Mexico does in its first submission – that Mexico's tax is in breach of Article III and proceed to address Mexico's Article XX(d) defense of that breach and its preliminary ruling request.

Article XX(d)

7. Turning first to Article XX(d), Mexico asserts that alleged U.S. noncompliance with NAFTA obligations can justify action by Mexico in violation of its WTO obligations. There is absolutely no basis in Article XX(d), the DSU, or elsewhere in the WTO Agreement for Mexico's proposition. Simply nothing in those agreements supports the contention that a WTO Member may violate its WTO obligations in order to punish another Member because it thinks that Member has not complied with its obligations under another international agreement.

8. Accordingly, Mexico cannot possibly satisfy the burden of demonstrating that its tax satisfies the conditions for justification under Article XX(d). While Article XX(d) permits a Member to maintain measures that are "necessary to secure compliance with laws or regulations which are not inconsistent" with the provisions of the GATT 1994, NAFTA is not a "law or regulation," and Mexico's tax is not "necessary to secure compliance."

9. In the first instance, international obligations owed Mexico by other countries under the NAFTA and other international agreements are not "laws" or "regulations" within the meaning

of Article XX(d). Rather, 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 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."

10. For these reasons and others which I can elaborate further in subsequent submissions, Mexico has wholly failed to meet its burden of establishing a *prima facie* basis for its Article XX(d) defense. There is simply nothing in the WTO Agreement to support its claim.

Developing Countries

11. Separately, Mexico asserts that the Panel must take into account that the "WTO Agreement contains principles and provisions the purpose of which is to grant more favorable treatment to developing countries." While the covered agreements do in fact contain certain provisions that accord special and differential treatment to developing countries, Mexico has not identified any provision that might permit Mexico to accord less favorable treatment to products of another WTO Member than it accords to its own like products or to discriminate against directly competitive or substitutable products of another Member in favor of domestic production.

Recommendations

12. Mexico also asks the Panel to make a specific recommendation that "the parties in this dispute take steps under NAFTA to resolve the entire dispute relating to trade in sweeteners." It is unclear in what context Mexico proposes the Panel make such a recommendation. As the DSU makes clear under Article 19.1, a panel only makes a recommendation after having found a Member's measure inconsistent with that Member's WTO obligations and, even then, may only recommend that the Member bring its WTO-inconsistent measure into conformity.[5] Panel suggestions under Article 19.1 are likewise limited to being directed at the Member whose measure was found to be WTO-inconsistent. The Panel should reject Mexico's request.

Preliminary Ruling Request

13. Turning to Mexico's so-called "preliminary ruling" request, first this is not a request for a "preliminary ruling." If anything, it is a request for a "non-ruling" and there would be nothing "preliminary" about it. Mexico seeks to resolve the entire dispute on a definitive basis in this manner. It is not that Mexico questions the Panel's jurisdiction and seeks a preliminary ruling in order to clarify that jurisdiction for purposes of this proceeding. Rather, Mexico admits that the Panel has jurisdiction to hear and decide the U.S. claims, but asks the Panel to refrain from exercising that jurisdiction.[6] Let us present the situation plainly and clearly: Mexico admits that it imposed the IEPS – a measure it does not contest is in breach of Article III – to stop the displacement of Mexican cane sugar by imported HFCS. Mexico then claims that it has done so

[5] *See* DSU Articles 11, 19.1.

[6] Mexico First Written Submission, para. 93.

to coerce its desired solution to a bilateral dispute. And now Mexico wishes the Panel to assist it in this WTO-inconsistent action by denying the United States its right to WTO dispute settlement.

14. There is absolutely no basis for Mexico's request. In fact, the DSU and the Panel's terms of reference in this dispute specifically preclude it. Article 7.2 of the DSU states that panels "*shall* address the relevant provisions in any covered agreement or agreements cited by the parties" to a dispute. The DSU further instructs panels in Article 11 to make an "objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements."[7] In this respect, the Dispute Settlement Body ("DSB") has defined the Panel's terms of reference in this dispute as follows:

> To examine, in the light of the relevant provisions of the covered agreements cited by the United States in document WT/DS308/4, the matter referred to the DSB by the United States in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[8]

The "matter referred to the DSB by the United States" in its panel request covers Mexico's tax on HFCS and soft drinks and syrups sweetened with HFCS, and the consistency of that tax with Mexico's obligations under Article III of the GATT 1994. Given the explicit instructions set forth in the DSU and the Panel's terms of reference, Mexico's argument that the Panel should simply decline to exercise jurisdiction over this dispute is untenable.

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[7] *See also* DSU Article 12.7.

[8] WT/DS308/5/Rev.1.

15. Mexico's attempt to liken its request for the Panel to decline jurisdiction to past panels' use of "judicial economy" is misplaced.[9] Judicial economy is a concept under which panels have declined to address certain claims raised by a party when resolution of such claims is not needed for the Panel to resolve the matter at issue in the dispute. Judicial economy is typically used by panels when a complaining party alleges that a measure breaches several provisions of the WTO Agreement, but a finding of breach with respect to some, but not all, of the provisions is sufficient for the DSB to recommend that the measure be brought into conformity with the WTO Agreement.[10] It is not a concept a panel may draw upon as a basis for declining to exercise jurisdiction over each and every claim raised by the complaining party. For a panel to decline jurisdiction over each and every claim raised would, of course, leave the DSB unable to make any recommendations or rulings with respect to the matter. Such an outcome is clearly incompatible with the function of panels to "assist the DSB in making the recommendations and . . . rulings provided for in the covered agreements." As the Appellate Body found in *Australia Salmon*, under the DSU panels are obligated "to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings."[11]

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[9] Mexico First Written Submission, para. 94.

[10] *See, e.g.,* Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted on 23 May 1997, p. 17.

[11] *See, e.g.,* Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, para 223.

16. Equally unsupported by the DSU is Mexico's argument that the Panel's exercise of jurisdiction would be incompatible with the "aim of the dispute settlement mechanism to secure a positive solution to a dispute." In Mexico's view, "a positive solution" to the dispute can only be found before a NAFTA panel. However, this "dispute" is a WTO dispute that has been brought before this WTO dispute settlement Panel to resolve a dispute over Mexico's obligations under the covered agreements. Although Mexico attempts to recast this dispute as involving U.S obligations under the NAFTA, it is Mexico's WTO obligations that comprise the matter in dispute. The NAFTA is not a covered agreement, nor is it within this Panel's terms of reference. Accordingly, the United States has not cited to the NAFTA. We do note, however, that the United States has a markedly different view than Mexico of the relevant NAFTA provisions and the series of events transpiring under the NAFTA. And that is just the point – this Panel is not in a position to make findings on those NAFTA issues, so there is no reason to elaborate on the parties' differing positions on those issues. Moreover, although not relevant to this dispute, the United States notes that neither Mexico nor the United States have agreed in the NAFTA to prejudice their WTO rights. Indeed, under the NAFTA the parties begin by affirming their GATT rights and obligations.

17. Mexico also argues that although the Panel has *prima facie* jurisdiction over the present dispute, the more "appropriate" forum for its resolution is before a NAFTA panel.[12] Again, Mexico's proposition finds no basis in the DSU or elsewhere in the WTO Agreement. That WTO Members may *choose* to settle disputes involving a mixture of WTO and non-WTO rules

[12] Mexico First Written Submission, para. 97.

in other fora, as Mexico observes, hardly justifies a WTO panel refusing to exercise jurisdiction over the dispute for which it was established.

18. One party's determination that another forum is more "appropriate" similarly does not justify such a refusal to exercise jurisdiction.[13] In fact, in *India – Quantitative Restrictions,* the Appellate Body dismissed India's arguments that the panel lacked jurisdiction to decide claims that India thought more appropriately resolved before the WTO Balance of Payments Committee. The Appellate Body stated:

> According to Article XXIII, any Member which considers that a benefit accruing to it directly or indirectly under the GATT 1994 is being nullified or impaired as a result of the failure of another Member to carry out its obligations, may resort to the dispute settlement procedures of Article XXIII. The United States considers that a benefit accruing to it under GATT 1994 was nullified or impaired as a result of India's alleged failure to carry out its obligations regarding balance-of-payments restrictions under Article XVIII:B of the GATT 1994. Therefore, the United States was entitled to have recourse to the dispute settlement procedures of Article XXIII with regard to the dispute.

19. Likewise, the United States is entitled to recourse to the dispute settlement procedures of Article XXIII and the DSU with respect to Mexico's failure to carry out its obligations under Article III of the GATT. For this reason, and others I have mentioned, the Panel should deny Mexico's request for it to decline jurisdiction in this dispute.

[13] Appellate Body Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R, adopted on 22 September 1999, para. 84; *see also* Panel Report, *Turkey – Restrictions on Imports of Textiles and Clothing*, WT/DS34/R, adopted on19 November 1999, paras. 9.15-9.17.

Conclusion

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