

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

**March 15, 2005**

**Answers of the United States to Questions of the Panel in Relation to the  
Second Substantive Meeting with the Parties**

**1. For both parties**

**Q52. The Panel recalls that, in its response to Panel questions Nos. 45 and 50, Mexico stated that “as of 1 January 2005, imported soft drinks, syrups and concentrates for preparing soft drinks will be exempt from payment of the IEPS, as long as they are sweetened only with cane sugar.” Could parties please provide more information in this regard?**

**The Panel further notes that, in its rebuttal submission, the United States has said that “The January 1, 2005 amendment to the HFCS soft drink tax is outside the Panel’s terms of reference.” Do parties have any additional comments on the matter? Could they please explain how the new amendment works and how it has changed the previous relevant provisions of the law.**

1. The measures within a panel’s terms of reference are those identified in the panel request.<sup>1</sup> The U.S. panel request in this dispute does not identify the January 1, 2005 amendment, principally because the amendment was published on December 3, 2004, nearly six months after June 10, 2004, the date of the panel request.<sup>2</sup> The January 1, 2005 amendment is, therefore, outside this Panel’s terms of reference. As a result, the Panel should not make findings on the January 1, 2005 amendment.

2. The Panel also should not consider the January 1, 2005 amendment in making findings on the IEPS as it existed at the time of the U.S. panel request. First, the United States has established a *prima facie* case that Mexico’s tax measures (as they existed at the time of the U.S. panel request) are inconsistent with Mexico’s obligations under Article III of the GATT 1994. Mexico has not rebutted that case and, in fact, Mexico has stated that it does not contest that its tax measures breach Article III.

3. Second, although the January 1, 2005 amendment is outside the Panel’s terms of reference, the United States would note that the amendment in actuality does not appear to eliminate the discrimination Mexico’s tax measures impose on soft drinks and syrups imported

---

<sup>1</sup> Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, para. 184; Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R, adopted 19 December 2002, para. 124.

<sup>2</sup> WT/DS308/4.

from the United States. As mentioned below, the January 1, 2005 amendment appears simply to amend the IEPS to substitute one form of discrimination against imports for another.<sup>3</sup>

4. Third, there is the concern expressed by the Appellate Body in *Chile – Price Bands* of a “moving target.” In that report,<sup>4</sup> the Appellate Body stated that “a practice of amending measures during dispute settlement proceedings if such changes are made with a view to shielding a measure from scrutiny by a panel or by us” was not to be condoned and that “generally speaking, the demands of due process are such that a complaining party should not have to adjust its pleadings throughout dispute settlement proceedings in order to deal with a disputed measure as a ‘moving target.’”<sup>5</sup> The United States shares the concern of the Appellate Body in that it should not have to – indeed the DSU does not ask it to – adjust its arguments in this dispute to take into account an amendment to Mexico’s tax measures that was published nearly six months after its panel request and that was notified to the Panel only after its first meeting with the parties.<sup>6</sup>

5. With respect to the operation of the January 1, 2005 amendment, it amends Article 13 of the IEPS to add soft drinks and syrups (products identified in Article 2(g) and (h) of the IEPS) sweetened exclusively with cane sugar to the list of imports exempt from the IEPS. In the limited time the United States has had to understand the amendment, the amendment appears to be limited to the application of the IEPS to importations of soft drinks and syrups and not to affect the IEPS as it applies to the internal transfer or distribution of imported soft drinks and

---

<sup>3</sup> In this regard, the Panel should find the IEPS inconsistent with Article III of the GATT even if it were to assesses the IEPS inclusive of the January 1, 2005 amendment.

<sup>4</sup> In *Chile – Price Bands*, although the Appellate Body upheld the panel’s decision to make findings on the measure inclusive of amendments made to the measure after the panel’s establishment, the Appellate Body did so after first concluding that the amended measure “[did] not change the price band system into a measure *different* from the price band system that was in force before the Amendment.” Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002, para. 137. As stated above, the Panel’s terms of reference in this dispute do not include the January 1, 2005 amendment to the IEPS.

<sup>5</sup> Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002, para. 144.

<sup>6</sup> Faced with similar situations, prior panels have made findings with respect to measures within their terms of reference that were (or allegedly were) amended or terminated after the date of the panel request. See Panel Report, *Canada - Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/R, adopted 30 August 2004, as amended by the Appellate Body Report, WT/DS276/AB/R, para. 6.259 (noting that the substantive terms of the amended and unamended measures were essentially the same and that a ruling on the unamended measure would be meaningful for resolution of the dispute); Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products* (“*Chile – Price Band System*”), WT/DS207/R, adopted as modified by the Appellate Body on 23 October 2002, paras. 7.124 7-125 (making findings on an expired preliminary safeguard measure and noting the complaining party’s argument that it had suffered nullification or impairment as a result of the expired measure); Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, adopted 23 July 1998, para. 14.9 (making findings with respect to a measure Indonesia alleged had been terminated). The *Canada – Wheat* and *Indonesia – Autos* panels note several disputes in which findings were made on allegedly terminated or amended measures. Panel Report, *Canada – Wheat*, para. 6.259 n.334; Panel Report, *Indonesia – Autos*, para. 149 n.642.

syrups sweetened with non-cane sugar sweeteners. It also does not appear to have any effect on the way in which the IEPS discriminates against imported non-canes sugar sweeteners used to produce soft drinks and syrups in Mexico.

6. As to importations, it appears that the January 1, 2005 amendment amends the IEPS to exempt importations of soft drinks and syrups sweetened exclusively with cane sugar from the IEPS, whereas prior to the amendment the IEPS subjected all soft drinks and syrups regardless of the type of sweeteners used to the IEPS. The January 1, 2005 amendment thus appears to extend the same exemption afforded to the internal transfer of soft drinks and syrups sweetened exclusively with cane sugar to the importation of soft drinks and syrups sweetened exclusively with cane sugar. In this regard, the amendment appears to continue to discriminate against like or directly competitive or substitutable imports from the United States.<sup>7</sup>

**Q53. In its response to Panel question No. 46, Mexico stated that the “soft drinks tax”, as it had been in place before December 2004, did not discriminate based on the origin of the product. Does Mexico mean that internal transfers of imported soft drinks are exempt from the “soft drinks tax” as long as those soft drinks are sweetened with cane sugar under the measures at issue, even though no exemption is allowed for the same imported products at the time of importation? In other words, is it correct to understand that the “soft drinks tax” operates differently depending on the two specific times when the tax is imposed, i.e., upon importation and upon any internal transfer occurred within the market? Could the United States also provide its comments?**

7. Although on its face the IEPS exempts internal transfers of soft drinks and syrups sweetened exclusively with cane sugar and does not distinguish in this regard between imported and domestically produced soft drinks and syrups, as the United States has explained, in providing an exemption for the internal transfer of soft drinks and syrups sweetened exclusively with cane sugar, the IEPS discriminates *de facto* against imports from the United States which are sweetened with non-cane sugar sweeteners. Mexico’s response to Question 46 simply ignores this *de facto* discrimination.

8. The Panel is correct that IEPS operates differently depending on the two specific times when the tax is imposed. With respect to application at the time of importation, the IEPS applies to all soft drinks and syrups, even those sweetened exclusively with cane sugar. When the IEPS applies on internal transfers, however, it differentiates between the type of sweetener used: internal transfers of soft drinks and syrups sweetened exclusively with cane sugar are exempt from the tax.

---

<sup>7</sup> The exemption for internal transfers is specified in Article 8 of the IEPS, whereas the January 1, 2005 amendment adds the exemption for imports of soft drinks and syrups sweetened exclusively with cane sugar to the list of imports already exempted in Article 13 of the IEPS. *See Se Reforman Y Adicionan Diversas Disposiciones De La Ley Del Impuesto Especial Sobre Producción Y Servicios*, Diario Oficial (Dec. 1, 2004).

**54. Do the parties view the so-called “bookkeeping requirements” as a separate measure from the “soft drinks tax” and the “distribution tax”, or rather as a measure which is ancillary to the two last. If it is an ancillary measure, would that fact have any consequence on the way the Panel should analyse those “bookkeeping requirements”?**

9. While the bookkeeping and reporting requirements clearly relate to the HFCS soft drink and distribution taxes, they impose separate requirements, and should be treated as separate measures. Compliance with Mexico’s obligations under Article III requires elimination not only of its dissimilar taxation of non-cane sugar sweeteners such as HFCS, but also the elimination of requirements that disadvantage the use of imported non-cane sugar sweeteners. As explained in prior U.S. submissions, the bookkeeping and reporting requirements imposed by the IEPS disadvantage the use of import non-cane sugar sweeteners by requiring soft drink and syrup producers who use non-cane sugar sweeteners to comply with certain bookkeeping and reporting requirements including a requirement to report their main 50 clients and suppliers to the Mexican Government. These same requirements are not imposed on soft drink and syrup producers who use the like domestic sweetener cane sugar. If Mexico were to amend its tax measures to eliminate the dissimilar taxation, but continued to impose the bookkeeping and reporting requirements, Mexico would not have eliminated the disadvantage imposed on the use of imported non-cane sugar sweeteners. The IEPS would, therefore, continue to treat imported sweeteners less favorably than like domestic sweeteners in breach of Mexico’s obligations under Article III:4 of the GATT 1994.

10. As the United State recalled in its responses to the Panel’s questions after the first meeting, the Appellate Body emphasized in *Australia – Salmon* that panels are “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 in order to ensure effective resolution of disputes to the benefit of all Members.”<sup>8</sup> Findings in this dispute that would enable the DSB to make sufficiently precise recommendations and rulings would be those that addressed each of the ways in which Mexico discriminates against imports of non-cane sugar sweeteners (including HFCS and beet sugar) and imports of soft drinks and syrups.

**55. The Panel recalls that, in its response to Panel question No. 21, the United States asserted that “The IEPS as a tax on HFCS may properly be examined under both Article III:2 and III:4 of the GATT 1994”. During the second substantive meeting (paragraph 53 of written version), Mexico expressed its doubts that, as a matter of WTO law, a same measure may violate both Article III:2 and Article III:4. Do the parties have additional views on the matter? Could they also clarify**

---

<sup>8</sup> U.S. Responses to the Questions of the Panel, para. 2; Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, para. 223.

**whether, if in a particular case, simultaneous claims were raised against the same measure under both Article III:2 and III:4, a panel should proceed in any particular order when dealing with such claims?**

11. As to whether the IEPS as a tax on HFCS (HFCS soft drink and distribution taxes) may properly be examined under Articles III:2 and III:4 of the GATT 1994, the United States disagrees with Mexico’s analysis in paragraph 53 of its opening statement at the second panel meeting. The HFCS soft drink and distribution taxes may properly be analyzed under both Article III:2 and III:4 of the GATT.

12. By its terms, Article III:2 applies to any “internal taxes or other internal charges of any kind” which are “applied, directly or indirectly, to . . . products.” As the GATT panel on *Superfund Taxes* pointed out, excise taxes are subject to Article III:2.<sup>9</sup>

13. A tax subject to Article III:2, however, may also be a law affecting imported products within the scope of Article III:4. Article III:4 refers to “all laws, regulations and requirements affecting [the] internal sale, offering for sale, purchase, transportation, distribution or use” of imported products. Article III:4’s use of the word “all” indicates that any law, including laws imposing taxes on products, may fall within the scope of Article III:4, provided the law affects the internal sale, offering for sale, purchase, transportation, distribution or use of imported products. The terms “laws, regulations or requirements affecting” in Article III:4 are also “general terms that have been interpreted as having a broad scope.”<sup>10</sup> A tax provision that influences a taxpayer’s choice whether to purchase like imported or domestic inputs is a measure “affecting” the internal use of imported products, within the meaning of Article III:4.<sup>11</sup>

---

<sup>9</sup> *United States – Taxes on Petroleum and Certain Imported Substances*, BISD 34S/136, 154, para. 5.1.1. Other examples of excise taxes evaluated under Article III:2 include various federal and state taxes on beer and wine in the United States, in *United States - Measures Affecting Alcoholic and Malt Beverages* (BISD 39S/206); excise taxes on cigarettes in *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes* (BISD 37S/200) and in *Dominican Republic -Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/R, paras. 7.317ff; an excise tax on automobiles in *Indonesia–Autos*, WT/DS54/R, paras. 14.104-14.114; excise taxes on certain periodicals in *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, pp. 20-23; and excise taxes on distilled spirits in *Japan–Taxes on Alcoholic Beverages* (WT/DS8/AB/R), *Korea-Taxes on Alcoholic Beverages* (WT/DS75/AB/R) and *Chile-Taxes on Alcoholic Beverages* (WT/DS87/AB/R).

<sup>10</sup> Panel Report, *United States – Tax Treatment for “Foreign Sales Corporations” – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/RW, adopted 29 January 2002, as modified by the Appellate Body Report, WT/DS108/AB/RW, para. 8.144 (citing *EC - Bananas*, WT/DS27/AB/R, para. 220; *Canada – Autos*, WT/DS139/R, para. 10.80; and *Italian Agricultural Machinery*, BISD 7S/60, para. 12); Appellate Body Report, *United States – Tax Treatment for “Foreign Sales Corporations” – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002, para. 210.

<sup>11</sup> Appellate Body Report, *United States – Tax Treatment for “Foreign Sales Corporations” – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002, para. 212-213.

14. The HFCS soft drink and distribution taxes are both taxes “applied directly or indirectly to ... products” as well as “laws ... affecting [the] internal ... use” of imported products. On the one hand, the HFCS soft drink and distribution taxes are taxes levied “directly or indirectly” on non-cane sugar sweeteners. The fact that these taxes are collected on the transfer and distribution of the downstream product (soft drinks and syrups) does not change the fact that the taxes are applied to HFCS. The United States has already demonstrated how Mexico’s tax measures on soft drinks and syrups translate to a prohibitive tax on HFCS<sup>12</sup> and Mexico has stated that its tax measures target HFCS imported from the United States.<sup>13</sup> The structure of Mexico’s tax measures is not unlike the “internal charges” considered by a GATT panel in *EEC – Parts and Components*. These internal charges were imposed on certain products assembled within the EC, if the products in question included excessive amounts of imported parts and components. The panel analyzed the charges under Article III:2 of the GATT and found that the internal charge on finished products subjected imported parts and components to an internal charge in excess of that applied to like domestic products in breach of Article III:2.<sup>14</sup>

15. On the other hand, the HFCS soft drink and distribution taxes are measures “affecting” the use of imported HFCS. Through their application to soft drinks and syrups sweetened with HFCS, but not soft drinks and syrups sweetened with Mexican cane sugar, the HFCS soft drink and distribution taxes provide an effective incentive for bottlers to cease using HFCS and to switch to using domestic cane sugar. The HFCS soft drink and distribution taxes, therefore, fall under Article III:4.

16. If there is overlap with respect to Articles III:2 and III:4 in this dispute, it is because of the particular tax measures Mexico has chosen to employ to discriminate against HFCS. Indeed, a discriminatory excise tax on a product, which also punishes users of that product for using imported inputs, would fit under both provisions.

17. As to the order in which to analyze the U.S. claims, the United States found it helpful in its first and second written submissions to analyze the consistency of the HFCS soft drink and distribution taxes with respect to sweeteners first under Article III:2 and second under Article III:4. The Panel could employ the same order of analysis.

18. With respect to the bookkeeping and reporting requirements of the IEPS, the U.S. challenge is limited to Article III:4.

---

<sup>12</sup> U.S. First Written Submission, para. 45.

<sup>13</sup> Mexico Second Written Submission, paras. 3, 81.

<sup>14</sup> GATT Panel Report, *EEC – Regulations on Imports of Parts and Components*, BISD 37S/193, adopted on May 16, 1990, paras. 5.9. The internal charge in the dispute constituted so-called “anti-circumvention duties” which the panel found constituted an “internal charge” within the meaning of Article III:2 rather than a “customs duty” within the meaning of Article II:1(b). *Id.* paras. 5.8-5.9.

**56. Does the so-called “distribution tax” operate on its own or is it dependent on the operation of the “soft drinks tax”? Does its existence depend on the “soft drinks tax”? Is it in any other manner linked to the so-called “soft drinks tax”?**

19. The distribution tax (i.e., the 20 percent tax imposed on the distribution, representation, brokerage, agency, and consignment of soft drinks and syrups sweetened with non-cane sugar sweeteners) operates on its own and discriminates against imported sweeteners and soft drinks and syrups made with imported sweeteners independently of the HFCS soft drink tax (i.e., the 20 percent tax imposed on the importation of soft drinks and syrups and on the internal transfer of soft drinks and syrups made with non-cane sugar sweeteners). As recounted in the U.S. first submission,<sup>15</sup> the IEPS taxes three types of activities: the importation, the internal transfer and the distribution (along with the representation, brokerage, agency, and consignment) of soft drinks and syrups made with non-cane sugar sweeteners.<sup>16</sup> Taxation of any one of these activities results in discriminatory treatment for non-cane sugar sweeteners and soft drinks and syrups made with such sweeteners and does not depend on whether non-cane sugar sweeteners and soft drinks and syrups made with such sweeteners are also taxed on their importation, internal transfer or distribution, respectively. Thus, for example, if Mexico were to amend the IEPS to eliminate the 20 percent tax on the internal transfer of soft drinks and syrups made with non-cane sugar, the IEPS would nonetheless continue to discriminate against imported sweeteners and soft drinks and syrups by taxing the distribution, representation, brokerage, agency, and consignment of soft drinks and syrups made with non-cane sugar sweeteners.

**57. In the view of the parties, can Article III:2 of the GATT cover a measure that imposes a tax on services related to specific products?**

20. Article III:2 covers measures that subject imports directly or indirectly to taxes in excess of those applied to like or directly competitive or substitutable domestic products. The IEPS subjects imported sweeteners and soft drinks and syrups made with such sweeteners to taxation that is in excess of, and dissimilar from, that imposed on like and directly competitive or substitutable products produced in Mexico, namely cane sugar and soft drinks and syrups made with cane sugar. The IEPS accomplishes this by way of a 20 percent tax imposed on the importation, internal transfer and distribution (along with the representation, brokerage, agency, and consignment) of soft drinks and syrups made with non-cane sugar sweeteners. The fact that the distribution tax subjects imported sweeteners and soft drinks and syrups made with such sweeteners to excess or dissimilar taxation at the time they are distributed and calculates the amount of tax owed on the value of the distribution service does not remove it from the purview of Article III:2. The distribution tax is simply another means by which to subject imported sweeteners and soft drinks and syrups to excess and dissimilar taxation in breach of Article III:2.

---

<sup>15</sup> U.S. First Written Submission, paras. 37-39.

<sup>16</sup> With respect to importations, the IEPS taxes all soft drinks and syrups regardless of the type of sweetener used. *See supra* response to Question 52.

21. In this regard, the United States views the distribution tax as a tax applied on a product (whether soft drinks and syrups or the sweeteners they contain) that applies at the time the product is distributed and that is calculated on the value of the service rendered. The fact that the distribution tax involves services supplied in conjunction with particular goods (soft drinks and syrups sweetened with non-cane sugar sweeteners) does not change the fact that the distribution tax discriminates against those goods. Measures can be subject to both the GATT and the GATS. In *EC – Bananas*, for example, the Appellate Body explained that measures “that involve a service relating to a particular good or a service supplied in conjunction with a particular good” may properly be examined under both the GATT and the GATS.<sup>17</sup>

**58. During the second substantive meeting (paragraph 33 of written version), Mexico has said that its measures may be justified under the NAFTA. Further, in its closing statements, Mexico argued that a NAFTA panel could find that the tax measures imposed by Mexico would be acceptable countermeasures. Does the United States agree with this statement? Could Mexico please elaborate on its statements and provide reference to the provisions of the NAFTA agreement under which its measures would be justified.**

22. Whether Mexico’s tax measures might be justified under the NAFTA is not relevant to resolution of this dispute, which concerns the consistency of Mexico’s tax measures with its obligations under the WTO Agreement.

23. There is nothing in the text of the NAFTA providing parties the right to take countermeasures in the manner Mexico contends in this dispute. Like the DSU, the NAFTA dispute settlement provisions proscribe rules for the suspension of benefits including that any suspension be *preceded* by a finding of breach by a NAFTA panel.<sup>18</sup> In addition, the suspension of benefits authorized under NAFTA dispute settlement provisions would be benefits accruing under the NAFTA, not those under another international trade agreement such as the WTO Agreement – which Mexico has breached vis-a-vis the United States and every other WTO Member by imposing its discriminatory tax measures.

24. Mexico’s contention that it has “directed the Panel to examples of counter-measures being taken or being reserved in the NAFTA context as well as to other instances where the United States has reserved the right to take action of the type that Mexico took”<sup>19</sup> is incorrect. Neither “example” Mexico cites with respect to the NAFTA<sup>20</sup> constitute an instance where a

---

<sup>17</sup> Appellate Body Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted on 25 Sept. 1997, para. 221.

<sup>18</sup> NAFTA Arts. 2018 and 2019.

<sup>19</sup> Mexico Second Submission, para. 8.

<sup>20</sup> Mexico Second Submission, paras. 27-31, 33-35 (discussing a NAFTA panel report on Agricultural Products and a U.S. – Canada Memorandum of Understanding on wheat).



party maintained, as Mexico does in this dispute, that the NAFTA or any principle of international law justified the party’s breach of NAFTA rules.

**59. Do the parties consider that the NAFTA Agreement is part of the United States’ domestic “laws or regulations”? What implication would that fact have for the expression “laws or regulations” as used in paragraph (d) of Article XX of the GATT in this dispute?**

25. The NAFTA is an international agreement and does not have direct effect in the United States. It is not self-executing. It is also not a domestic law or regulation of the United States. The NAFTA has not been passed by the U.S. Congress pursuant to its legislative powers under the U.S. Constitution, nor was the NAFTA submitted as a treaty to the U.S. Senate for its advice and consent.

26. It was precisely because the NAFTA itself is not U.S. law that it was necessary for Congress to pass implementing legislation so that U.S. laws would be changed to accord with the international obligations of the United States under the NAFTA. Mexico’s assertions about the NAFTA to the contrary are simply incorrect.<sup>21</sup>

27. Even if the NAFTA were part of U.S. domestic laws or regulations, however, Mexico could not claim an Article XX(d) exception for a measure necessary to secure compliance with *another* Member’s laws or regulations. Article XX(d) provides an exception for measures necessary to secure compliance with the laws or regulations of the Member claiming the Article XX(d) exception. In *Korea – Beef*, for example, the Appellate Body stated that “[i]t is not open to doubt that Members of the WTO have the right to determine for themselves the level of enforcement of *their* WTO-consistent laws and regulations.”<sup>22</sup> Article XX(d) is not a provision by which Members might seek to enforce the domestic laws and regulations of *other* Members. If it were, Article XX(d) would in effect become a tool for one sovereign to enforce the domestic laws and regulations of another.

**60. As parties are aware, the Appellate Body has stated that, in order to evaluate the “necessity” of a measure under Article XX(d), a panel would need to examine, among other factors, “the relative importance of the common interests or values that**

---

<sup>21</sup> With respect to paragraph 13, it is Mexico’s reading of *Corus Staal* that is too narrow. In that case, Corus Staal had argued: “[the U.S. Department of] Commerce’s zeroing methodology violates the United States’ obligation to interpret section 1677(35) to conform to World Trade Organization (“WTO”) decisions prohibiting zeroing.” The court found: “Because zeroing is in fact permissible in administrative investigations and because Commerce is not obligated to incorporate WTO procedures into its interpretation of U.S. law, Corus’ arguments fail.” The court explained: “Neither the GATT nor any enabling international agreement outlining compliance therewith (e.g., the ADA) trumps domestic legislation; if U.S. statutory provisions are inconsistent with the GATT or an enabling agreement, it is strictly a matter for Congress.”

<sup>22</sup> Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, para. 176 (emphasis supplied).

**the law or regulation to be enforced is intended to protect” (Appellate Body Report, *Korea - Various Measures on Beef*). Could parties please explain, in their view, what would be “the common interests or values” that the NAFTA Agreement is intended to protect.**

28. Because the United States does not consider that Article XX(d) can apply to international obligations, the United States is not in a position to identify what “common interests or values” (as the Appellate Body used the phrase in *Korea – Beef*) could be served by the NAFTA. In any case, Mexico has certainly not identified any such “common interests or values.”

**61. Could parties share their views on whether a successful invocation of an Article XX(d) defence would require that the contested measure be necessary to prevent or correct a breach of the underlying “law or regulation”?**

29. It is difficult to comment on the issues raised in this question in the abstract, and, for the reasons already described, the United States does not consider that the Article XX(d) defense is available to a Member asserting the need to secure compliance with an international agreement.

30. Having said this, the United States notes that the panel in *Korea – Beef*, for example, found that a measure that served to “prevent acts inconsistent with” a Korean law (the Unfair Competition Act) prohibiting misrepresentation as to the origin of beef “was put in place at least in part, in order to secure compliance with” that law.<sup>23</sup> The panel then turned to analyze whether the measure was “necessary to prevent misrepresentation as to the origin of beef.”<sup>24</sup> On appeal, however, the Appellate Body did not address whether “secure compliance” might include “preventing” a breach of the Unfair Competition Act, but simply examined whether the measure was ““necessary” to secure compliance with the Unfair Competition Act.”<sup>25</sup>

**62. Is there any provision in the NAFTA Agreement that can be considered equivalent to Article 23(2) of the DSU in the sense that a unilateral determination by a party that a violation has occurred, or that its benefits have been nullified or impaired or that the attainment of any objective of the covered agreement has been impeded, is prohibited and such decisions can only be made through recourse to dispute settlement in accordance with the rules and procedures under that Agreement?**

31. There is no provision in the NAFTA containing language identical or similar to Article 23.2 of the DSU. There is also no provision in the NAFTA that justifies a breach of the NAFTA

---

<sup>23</sup> Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/R, WT/DS169/R, adopted on 10 January 2001, para. 658.

<sup>24</sup> *Id.*, paras. 659 *et seq.*

<sup>25</sup> Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, paras. 159 *et seq.*

on the fact or assertion that another party has breached its obligations under the NAFTA. The only provision that would authorize a NAFTA party to take countermeasures is Article 2019, which by its terms only applies “[i]f in its final report a panel has determined that a measure is inconsistent with the obligations of the [NAFTA]” and the parties have not agreed on a solution to the dispute within 30 days.

32. NAFTA Article 2004 provides that except for antidumping and countervailing duty matters and as otherwise provided in the NAFTA Agreement, “the dispute settlement provisions of this Chapter [20] shall apply with respect to the avoidance or settlement of all disputes between the Parties regarding the interpretation or application of this Agreement or wherever a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the provisions of this Agreement ....” Article 2019 provides a right to temporarily suspend benefits, but only after a panel determination under Chapter 20. Article 2019 articulates the procedures to be followed in suspending benefits.

**63. In its second written submission and also during the second substantive meeting (paragraphs 43-52 of written version), Mexico has stated that a WTO panel does not have a legal obligation to issue findings on the claims raised by a complaining Member, but rather has the flexibility to decide whether to issue rulings or to make recommendations, as appropriate. Is it the parties view that that discretion, if it in fact exists, is vested by the WTO agreements on panels or rather on the Dispute Settlement Body (or the Contracting Parties acting jointly, in the case of the GATT)?**

33. For the reasons stated in prior U.S. submissions,<sup>26</sup> a WTO panel does have a legal obligation to issue findings on the claims raised by a complaining party and, therefore, does not have the flexibility to “decide whether to issue rulings or make recommendations, as appropriate.” The Panel has already stated in its denial of Mexico’s request for a “preliminary ruling”: “Under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), [the Panel] does not have the discretion, as argued by Mexico, to decide not to exercise its jurisdiction in a case that has been properly brought before it.”<sup>27</sup> In stating that it did not have the discretion to decline to exercise jurisdiction over this dispute, the United States understands the Panel to have concluded that it must issue findings on the U.S. claims, as the U.S. claims are what comprise this dispute.

34. A WTO panel likewise does not have the flexibility to decide what an “appropriate” recommendation might be. Mexico’s reliance on Article XXIII:2 of the GATT in this regard is misplaced. Although Article XXIII:2 of the GATT instructs the CONTRACTING PARTIES to make “appropriate” recommendations, what is an “appropriate” recommendation from a WTO

---

<sup>26</sup> U.S. Responses to Questions of the Panel after the First Meeting, paras. 1-11; U.S. Opening Statement to the Panel at the First Meeting of the Panel, paras. 13-15.

<sup>27</sup> Letter from the Chairman of the Panel to the Parties (Nov. 3, 2005).

panel has been definitively answered by Article 19.1 of the DSU. Article 19.1 of the DSU provides:

Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or the Appellate Body may suggest ways in which the Member concerned could implement the recommendations.<sup>28</sup>

Therefore, pursuant to Article 19.1 of the DSU, whenever a panel finds a violation of the GATT or any other covered agreement, the panel must recommend that the violation be brought into conformity the agreement; the panel has no discretion to do otherwise. Article 19.1 also does not provide any discretion for a panel to make any additional recommendations, to any party, that would go beyond the correction of a violation. Mexico’s argument that Article XXIII of the GATT allows WTO panels greater flexibility than this simply ignores the terms of DSU Article 19.<sup>29</sup>

35. In any event, to the extent that Article XXIII:2 continues to afford authority to make further recommendations (an issue which the Panel need not reach), it affords that authority to the WTO Members, not a panel or the Appellate Body.

**64. Mexico has said throughout the case that the Panel would not need to interpret NAFTA rules. However, in an Article XX(d) defence, a panel may need to interpret the underlying “law or regulation” to assess whether a measure is actually justified. Would that mean, in the parties’ opinion, that this Panel may in fact have to interpret NAFTA rules?**

36. The Panel’s question highlights another reason why Mexico’s Article XX(d) defense is untenable and why Article XX(d) does not cover measures to secure compliance with obligations under an international agreement. There is no way for a panel to find a measure “necessary to secure compliance” with obligations under an international agreement, unless it were first to determine what the agreement’s obligations were and whether the Member against whom the measure was taken was not in compliance with those obligations.<sup>30</sup> However, as the United States articulated at the second panel meeting, this would effectively convert WTO dispute

---

<sup>28</sup> DSU Art. 19.1 (footnote omitted).

<sup>29</sup> Another panel has recently reached the conclusion that the DSU does not authorize panels to make recommendations beyond the specific recommendation authorized (and mandated) by DSU Article 19.1. Panel Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/R, circulated on October 15, 2004 (appeal on other issues pending), para 7.353.

<sup>30</sup> U.S. Opening Statement at the Second Meeting of the Panel, para. 7; U.S. Closing Statement at the Second Meeting of the Panel, para. 7.

settlement into a forum of general dispute resolution for all international agreements. The United States has previously explained some of the difficulties and some of the the implications of this proposal.<sup>31</sup>

37. Mexico apparently shares the U.S. concern in this regard as it has clearly stated: “This Panel has no jurisdiction to decide whether the United States has complied with its market access commitments [under the NAFTA].”<sup>32</sup> Yet, Mexico cannot avoid the fact that, in order for the Panel to determine that its tax measures are necessary to secure U.S. compliance with the NAFTA, the Panel would first need to examine what the obligations of the NAFTA are and whether the United States has complied with those obligations. Mexico’s attempts to argue otherwise are simply a request for this Panel to find its tax measures justified under Article XX(d) without an examination of what the “laws or regulations” are with which compliance is sought or whether the measures for which the Article XX(d) exception is sought are necessary to “secure compliance” with such laws or regulations. Mexico cannot avoid these examinations, however, if it is to meet its burden of proof on its Article XX(d) defense.

38. Mexico has also taken pains to explain why its interpretation of Article XX(d) would not lead to the results suggested by the United States. Mexico is incorrect. If the Panel were to accept Mexico’s invitation to use Article XX(d) as a means to justify its WTO breach, there is no reason why another Member could also not claim that a WTO-inconsistent measure was necessary to secure compliance with an international agreement to which it was a party. To meet its burden of proof on any such defense, the Member would have to convince a panel, and the panel would have to determine, what the obligations of the international agreement were and whether the Member against which the WTO-inconsistent measure was taken was in compliance with those obligations. While Mexico claims that the circumstances surrounding imposition of its tax measures are “extraordinary,” there is nothing about Mexico’s interpretation of Article XX(d) that would limit its invocation to those “extraordinary” circumstances.<sup>33</sup>

**65. In the view of the parties, does the provision contained in Article 3.10 of the DSU, whereby it is “understood that complaints and counter-complaints in regard to distinct matters should not be linked” have any relevance for the present case?**

39. Mexico’s complaint with respect to U.S. obligations under the NAFTA and the present U.S. complaint under the WTO Agreement are two distinct matters. One matter arises solely under NAFTA and concerns access to the U.S. market for Mexican cane sugar; the other matter arises under the WTO Agreement and the GATT, and concerns protectionist tax discrimination by Mexico against imported HFCS and other sweeteners that compete with Mexican cane sugar.

---

<sup>31</sup> U.S. Opening Statement at the Second Meeting of the Panel, para. 7.

<sup>32</sup> Mexico Opening Statement at the Second Meeting of the Panel, para. 33.

<sup>33</sup> See Mexico Closing Statement at the Second Meeting of the Panel, paras. 2-7.

40. Article 3.10 of the DSU concerns alleged breaches of the WTO Agreement and states that it is “understood that complaints and counter-complaints in this regard to distinct matters should not be linked.” The Panel might view Article 3.10 as supporting that, even if Mexico had claimed that the United States were in breach of its WTO obligations, dispute settlement proceedings over Mexico’s tax measures would not be the forum in which to address Mexico’s separate claim against the United States.<sup>34</sup>

**66. Could the parties please expand upon the views they hold regarding the relevance of Article 23 of the DSU to the present dispute?**

41. Article 23 is relevant context for the fact that the phrase “laws or regulations” in Article XX(d) does not mean or include obligations under an international agreement. Specifically, if the phrase “laws or regulations” in Article XX(d) did mean obligations under an international agreement, then it would also include obligations under the WTO Agreement. Article 23 of the DSU, however, provides that when Members seek the redress of a violation of WTO obligations they will abide by DSU rules. Mexico’s reading of “laws or regulations” to mean obligations under an international agreement renders Article 23 of the DSU inutile.<sup>35</sup>

**67. In the view of the parties, does the list of subjects contained in paragraph (d) of Article XX (customs enforcement; enforcement of monopolies; protection of patents, trade marks and copyrights; and prevention of deceptive practices) suggest that there are certain types of laws or regulations which would be covered by the exception contained in that provision? Can parties suggest any GATT or WTO precedents that may throw light on this issue?**

42. While not an exhaustive list as demonstrated by the word “including” in Article XX(d), “[c]ustoms enforcement; the enforcement of monopolies ..., the protection of patents, trade marks and copyrights, and the prevention of deceptive practices” all suggest laws or regulations that are the domestic laws or regulations of the Member claiming the XX(d) exception. As for prior GATT 1947 or WTO reports, every other time an Article XX(d) defense has been considered in the context of GATT 1947 or WTO dispute settlement, the laws or regulations at issue have been the domestic laws or regulations of the Member asserting the XX(d) defense. None have involved obligations owed another Member under an international agreement.<sup>36</sup>

---

<sup>34</sup> See also U.S. Answers to Questions of the Panel after the First Meeting, para. 15 (referencing Article 3.10 of the DSU in the context of Mexico’s request for a “preliminary ruling” and whether a NAFTA panel might deal “comprehensively” with the issues Mexico asserts are relevant in this dispute).

<sup>35</sup> U.S. Second Written Submission, para. 47; U.S. Opening Statement at the Second Meeting of the Panel, para. 6.

<sup>36</sup> See GATT Panel Report, *United States - Imports of Certain Automotive Spring Assemblies*, L/5333, adopted 26 May 1983, BISD 30S/170 (exclusion order to enforce domestic patent law); GATT Panel Report, *United States - Section 337 of the Tariff Act of 1930*, L/6439, adopted 7 November 1989, BISD 36S/345 (exclusion order to enforce domestic patent law); GATT Panel Report, *Canada - Administration of the Foreign Investment Review Act*, L/5504, adopted 7 February 1984, BISD 30S/140 (purchase undertakings to implement domestic investment

43. The negotiating history of Article XX(d) confirms that obligations under an international agreement were intentionally not included in the scope of Article XX(d). In particular, during the second session of the Preparatory Committee in Geneva (1947), India tabled a proposal that “a Member should be allowed temporarily to discriminate against the trade of another Member when this is the only effective measure open to it to retaliate against discrimination practised by that Member outside the purview of the Organization, pending a settlement of the issue through the United Nations.”<sup>37</sup> This proposal was forwarded to the Havana Conference but was ultimately rejected, and was not included in Article 45, the commercial policy exceptions provision of the Havana Charter. Article XX(d) of the GATT has been unaltered since October 1947.<sup>38</sup>

**68. In the opinion of the parties, does Article 60 of the Vienna Convention on the Law of Treaties codify a principle of international law by which a material breach of a bilateral treaty by one of the parties may allow the other to invoke that breach as a ground for, inter alia, suspending the operation of that treaty in whole or in part, but not for suspending the operation of a different multilateral treaty?**

44. Interpretation and application of Article 60 of the Vienna Convention is not relevant to the Panel’s task in this dispute, which concerns determining whether Mexico’s tax measures are

---

screening law); GATT Panel Report, *Japan - Restrictions on Imports of Certain Agricultural Products*, L/6253, adopted 2 February 1988, BISD 35S/163 (import restrictions to support domestic price stabilization schemes and an import monopoly); GATT Panel Report, *EEC - Regulation on Imports of Parts and Components*, L/6657, adopted 16 May 1990, BISD 37S/132 (measures to secure compliance with antidumping duties); GATT Panel Report, *United States - Restrictions on Imports of Tuna*, DS21/R, 3 September 1991, BISD 39S/155 (intermediary nations embargo to secure compliance with direct U.S. embargo on certain tuna imports); GATT Panel Report, *United States - Restrictions on Imports of Tuna*, DS29/R, 16 June 1994 (intermediary nations embargo to secure compliance with direct U.S. embargo on certain tuna imports); GATT Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages*, DS23/R, adopted 19 June 1992, BISD 39S/206 (in-state wholesaler distributor requirement argued to be necessary to secure enforcement of state excise tax laws); GATT Panel Report, *United States - Taxes on Automobiles*, DS31/R, 11 October 1994 (assessment of penalties to secure compliance with Corporate Average Fuel Economy law); Appellate Body Report, *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996 (baseline establishment methods claimed necessary to secure compliance with U.S. environmental laws); Panel Report, *Canada - Certain Measures Concerning Periodicals*, WT/DS31/R and Corr.1, adopted 30 July 1997 (Tariff Code 9958 import restriction claimed necessary to secure compliance with Canadian income tax laws); Appellate Body Report, *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001 (dual retail system claimed necessary to secure compliance with domestic unfair competition laws); Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather*, WT/DS155/R and Corr.1, adopted 16 February 2001 (special treatment of imports found necessary to secure compliance with value-added tax and income tax laws); Panel Report, *Canada - Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/R, adopted 27 September 2004 (laws on treatment of foreign grain claimed to be necessary to secure compliance with domestic laws on competition, grain, and the Canadian Wheat Board); Panel Report, *Dominican Republic - Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/R, 26 November 2004 (stamp and bond requirements claimed to be necessary to secure compliance with domestic tax laws and regulations).

<sup>37</sup> Working Party on Technical Articles, Report, E/PC/T/103 dated 16 June 1947, p. 43.

<sup>38</sup> *GATT Analytical Index*, p. 596.

inconsistent with Mexico’s obligations under the WTO Agreement. As the United States noted at the second panel meeting, the WTO dispute settlement system exists to resolve WTO disputes, that is, disputes over Members’ rights and obligations under the covered agreements.<sup>39</sup> A WTO panel’s mandate does not extend to determining the rights and obligations of countries under general principles of international law or under Article 60 of the Vienna Convention in particular.<sup>40</sup> Moreover, Article 60 does not reflect a customary rule of interpretation of public international law, the only principles of international law identified in the DSU.<sup>41</sup>

45. For these reasons, the Panel is not in a position to decide whether a principle such as the one posited in its question would be grounds for deciding in favor of the United States in this dispute.<sup>42</sup>

**69. Could parties expand on their views of whether the challenged measures may be considered to be a “disguised restriction on international trade” or an “arbitrary or unjustifiable discrimination between countries where the same conditions prevail”, under the chapeau of Article XX?**

46. The United States explained in its second submission that Mexico’s tax measures do not meet the requirements of the chapeau to Article XX because: (1) Mexico’s tax measures are not provisionally justified under any of the paragraphs of Article XX, specifically under paragraph (d);<sup>43</sup> and (2) Mexico’s tax measures constitute a “disguised restriction on international trade.”

47. With respect to the latter, the United States has explained that Mexico’s tax measures constitute a “disguised restriction on international trade” because, while Mexico for purposes of its Article XX(d) defense argues that its tax measures are to secure compliance with the NAFTA, Mexico has been quite open in other contexts, including in this dispute, that its tax measures are applied to protect its domestic cane sugar industry – in particular, to protect its domestic cane sugar from being displaced by imports of HFCS from the United States.<sup>44</sup> The protectionist application of Mexico’s tax measures is highlighted by the fact that to date Mexico has been unable to explain how measures designed to protect its cane sugar industry and discriminate against imports results or contributes to compliance with the NAFTA.<sup>45</sup>

---

<sup>39</sup> DSU Arts. 1.1, 3.2 and 3.4.

<sup>40</sup> See DSU Art. 7.1, DSU Art. 11.

<sup>41</sup> DSU Art. 3.2.

<sup>42</sup> As a subsidiary matter, we also note that by its own terms Article 60 of the Vienna Convention does not appear to cover situations where in response to a breach of one treaty by one party another party proposes to suspend benefits under a different treaty.

<sup>43</sup> U.S. Second Written Submission, para. 69.

<sup>44</sup> U.S. Second Written Submission, para. 70; see also Mexico First Written Submission, para. 111 (conceding that its tax measures were imposed to stop the displacement of Mexican cane sugar by imported HFCS); U.S. First Written Submission, paras. 48-55 (recounting the numerous Mexican legislative and judicial statement as to the purpose of Mexico’s tax measures being to protect its domestic cane sugar industry).

<sup>45</sup> U.S. Opening Statement at the Second Panel Meeting, para. 16.



48. Rather than demonstrate that its tax 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,” Mexico has instead focused on whether it has made a “good faith effort” to resolve the NAFTA sugar dispute. Most recently in its opening statement at the second panel meeting, Mexico stated: “Mexico’s good faith efforts to resolve this long-standing dispute clearly meet the requirements set out by the Appellate Body in *United States – Shrimp*.”<sup>46</sup> Contrary to Mexico’s belief, the chapeau to Article XX does not contain a requirement that Members make a good faith effort to negotiate before taking a measure falling within the scope of one of Article XX’s paragraphs. Nor does the chapeau to Article XX provide that good faith efforts to negotiate before taking a measure immunize the measure from constituting a means of arbitrary discrimination or a disguised restriction on trade. Mexico misreads the Appellate Body report in *US – Shrimp* in this regard.<sup>47</sup>

49. To date, Mexico has not even addressed how its tax measures are applied. This is significant, because the chapeau to Article XX requires that the measure not be “*applied* in a manner that which would constitute a means of arbitrary or unjustifiable discrimination ... or a disguised restriction on international trade.” Mexico’s discussions of events that preceded imposition of its tax measures are not discussions of how Mexico applies those measures and thus Mexico has not met the requirements of the chapeau.

## 2. For the United States

**Q70. For clarification, could the United States please confirm that the scope of the products which it refers to under the expression “soft drinks and syrups”, coincides with the definitions used in the Mexican legislation for “soft drinks” (“refrescos”) and “hydrating or rehydrating drinks” (“bebidas hidratantes o rehidratantes”), currently contained in Article 3 of the Law on the Special Tax on Production and Services (Ley del Impuesto Especial sobre Producción y Servicios).**

50. As explained in the U.S. response to Question 71, the term “soft drinks and syrups” as used in the U.S. submissions and statements refers to the products identified in Article 2(G) and (H) of the IEPS. The “soft drinks” and “hydrating and rehydrating drinks” are two of the products identified in Article 2(G). The terms “soft drinks” and “hydrating and rehydrating drinks” are defined in Article 3 of the IEPS.

**71. Could the United States please confirm that it is asking the Panel to assume that the information that it has provided with respect to the “likeness” and the “substitutability” of “soft drinks and syrups” is also applicable to the following other categories of products also falling within its complaint, such as “hydrating or**

---

<sup>46</sup> Mexico Second Written Submission, para. 85.

<sup>47</sup> See U.S. Second Written Submission, para. 71; U.S. Responses to Questions from the Panel, paras. 56-

**rehydrating drinks”, “concentrates, powders, syrups, essences or flavour extracts that can be diluted to produce soft drinks and hydrating or rehydrating drinks” and “syrups or concentrates for preparing soft drinks sold in open containers which use automatic, electric or mechanical equipment”.**

51. The United States is not asking the Panel to *assume* that the information that it has provided with respect to the likeness and the substitutability of “soft drinks and syrups” is also applicable to “hydrating or rehydrating drinks,” “concentrates, powders, syrups, essences or flavour extracts that can be diluted to produce soft drinks and hydrating or rehydrating drinks” and “syrups or concentrates for preparing soft drinks sold in open containers which use automatic, electric or mechanical equipment.” Rather, the term “soft drinks and syrups” as used in the U.S. submissions and statements includes all products identified in Article 2(G) and 2(H) of the IEPS.<sup>48</sup>

52. Therefore, the information the United States provided with respect to “soft drinks and syrups” pertains to “soft drinks, hydrating and rehydrating beverages, as well as concentrates, powders, syrups, flavor extracts or essences, which may be diluted to produce soft drinks, hydrating and rehydrating beverages” as identified in Article 2(G) and “syrups or concentrates for preparing soft drinks sold in open containers, using mechanical or automatic equipment” identified in Article 2(H). The United States used the terms “soft drinks and syrups” to avoid having to repeat the foregoing list each time it mentioned the products identified in Articles 2(G) and 2(H).

53. It should also be emphasized that the “like” or “directly competitive or substitutable” analyses in this dispute would not be any different if conducted individually for each product identified in Article 2(G) and 2(H). This is because the dividing line between whether a product identified in Article 2(G) and 2(H) is subject to the IEPS is whether (a) it is sweetened with cane sugar (in which case it is not subject to the IEPS) or (b) it is sweetened with non-cane sugar sweeteners such as HFCS or beet sugar (in which case it is subject to the IEPS).<sup>49</sup>

54. To explain this in more concrete terms, take the example of a soft drink, such as a bottle of Coke, and a hydrating drink, such as a bottle of Gatorade. A bottle of Coke sweetened with HFCS or beet sugar is “like” or “directly competitive or substitutable” with a bottle of Coke sweetened with cane sugar *for the reasons* a bottle of Gatorade sweetened with HFCS or beet sugar is “like” or “directly competitive or substitutable” with a bottle of Gatorade sweetened with cane sugar. The use of HFCS or beet sugar, on the one hand, versus cane sugar, on the other, does not change the color, smell, chemical composition, calories, digestion, ingredient label, end-use, distribution, tariff classification or consumer preference for a bottle of Coke or a bottle of Gatorade. The same can be said for the use of HFCS versus cane sugar in a concentrate, powder,

---

<sup>48</sup> U.S. First Written Submission, paras. 1 and 37 et seq.

<sup>49</sup> See also U.S. First Written Submission, para. 67.

syrups, flavor extracts or essences that may be diluted to produce a finished soft drink as well as for a syrup or concentrate for preparing soft drinks sold in open containers, using mechanical or automatic equipment (i.e., syrups and concentrates mixed with water, typically at a restaurant or bar, to produce a fountain drink).

55. Although the individual products identified in Article 2(G) and 2(H) may well be “like” or “directly competitive or substitutable” with each other (e.g., because they share the same end-use and have identical or at least very similar physical characteristics) this is not something the needs to be decided in this dispute. Rather, the relevant question is whether the products identified in Articles 2(G) and 2(H) sweetened with non-cane sugar sweeteners, such as HFCS and beet sugar, are “like” and/or “directly competitive or substitutable” with the products identified in Articles 2(G) and 2(H) sweetened with cane sugar. The evidence provided in the U.S. first and second written submission more than amply demonstrates that the answer to this question is yes.

**72. In its first submission, the United States has stated that there are three different grades of High-Fructose Corn Syrup (HFCS), which have different industrial applications. For clarification, could the United States please confirm if each of the three grades of HFCS (namely, HFCS-42, HFCS-55 and HFCS-90) can be considered to be “directly competitive or substitutable products” with each other, as well as with cane sugar, and on what basis.**

56. Because Mexico has chosen to apply its tax measures on HFCS by taxing soft drinks and syrups that use HFCS, the only relevant industrial application for purposes of determining whether HFCS and cane sugar are “like” or “directly competitive or substitutable” products is their use as sweeteners for soft drinks and syrups.<sup>50</sup> As demonstrated in the U.S. first submission, HFCS is “like” or “directly competitive or substitutable” with cane sugar as a sweetener for soft drinks and syrups.

57. In addition, as was similarly mentioned in response to Question 71 with respect to soft drinks and syrups, the relevant inquiry in this dispute is whether HFCS is “like” or “directly competitive or substitutable” with cane sugar as a sweetener for soft drinks and syrups. This inquiry does not depend on additionally finding that HFCS-42, HFCS-55 and HFCS-90 are “like” or “directly competitive or substitutable” with each other.

58. The U.S. first submissions more than amply demonstrate that HFCS is “like” and “directly competitive or substitutable” with cane sugar as a sweetener for soft drinks and syrups and the “like” and “directly competitive or substitutable” analyses contained therein apply to the three grades of HFCS: HFCS-42, HFCS-55 and HFCS-90.<sup>51</sup> As explained in the U.S. first

---

<sup>50</sup> See also U.S. First Written Submission, para. 96.

<sup>51</sup> The U.S. first submission demonstrates that HFCS and cane sugar are “directly competitive or substitutable” in paragraphs 94-130 and that HFCS and cane sugar are “like” in paragraphs 156-158.

submission, although HFCS-55 was developed primarily as a sweetener for soft drinks and syrups, HFCS-42 is also used as sweeteners for soft drinks and syrups.<sup>52</sup> HFCS-90 may also be used as a sweetener for soft drinks and syrups if first blended with HFCS-42 to produce HFCS-55. The fact that imported HFCS-90 could be blended to produce HFCS-55 is what led Mexico to extend application of its antidumping duty order on HFCS-55 to also cover HFCS-90.<sup>53</sup> Mexico explained: “[G]rade 90 HFCS belongs to the same family as grade 55 HFCS, despite their difference in fructose concentration. In fact, grade 90 HFCS is one of the inputs in the manufacturing of grade HFCS 55, which is the main use, and explains why, once mixed, it is sold to the same final consumers as the products subject to compensatory duties.”<sup>54</sup>

59. Further, as Exhibit US-10 demonstrates imports of HFCS-42 plummeted just as imports of HFCS-55 and HFCS-90 did from 2001 to 2002, the years prior to, and immediately following, imposition of Mexico’s tax measures.<sup>55</sup> After imposition of Mexico’s tax measures, use of HFCS in any grade in soft drinks and syrups became cost prohibitive and Mexican soft drink and syrup producers switched back to cane sugar. The essential point is that HFCS – of any grade – competes and is directly competitive with cane sugar as a sweetener for soft drinks and syrups.

60. In terms of physical appearance, HFCS-42, -55 and -90 are virtually identical. They are all odorless, colorless solutions of glucose and fructose molecules and small amounts of other saccharides. What distinguishes the three grades is their glucose-fructose ratio. However, for purposes of this dispute, the different fructose-glucose ratios of HFCS-42, -55 and -90 do not affect whether they are “like” or “directly competitive or substitutable” with cane sugar as a sweetener for soft drinks and syrups.

**73. During the second substantive meeting (paragraph 36 of written version), Mexico has asked the Panel to make several factual determinations. Does the United States concur with the facts listed by Mexico? Does it dispute any specific one of them? If possible, could the United States refer in its response, as appropriate, to the evidence that has been brought to the record by the parties.**

---

<sup>52</sup> U.S. First Written Submission, paras. 12-13. The attached Exhibit US-58 provides a listing of popular U.S. soft drinks and their corresponding sweetener, HFCS-42 or HFCS-55.

<sup>53</sup> See “Secretaria de Comercio y Fomento Industrial, Resolución final de la investigación sobre elusión del pago de cuotas compensatorias impuestas a las importaciones de jarabe de maíz de alta fructosa grado 55, mercancía clasificada en la fracción arancelaria 1702.60.01 de la Tarifa de la Ley del Impuesto General de Importación, originarias de los Estados Unidos de América, independientemente del país de procedencia,” *Diario Oficial* (September 8, 1998) (final decision of the investigation of circumvention of the payment of duties on HFCS-55).

<sup>54</sup> “Resolución Por La Que Se Declara De Oficio El Inicio De La Investigación Sobre Elusión Del Pago De Cuotas Compensatorias Impuestas A Las Importaciones De Jarabe De Maíz De Alta Fructosa Grado 55, Mercancía Clasificada En La Fracción Arancelaria 1702.60.01 De La Tarifa De La Ley Del Impuesto General De Importación, Originarias De Los Estados Unidos De América, Independientemente Del País De Procedencia,” *Diario Oficial* 71, 72 (January 23, 1998) (decision to initiate an investigation of circumvention of the payment of duties on HFCS-55).

<sup>55</sup> Prior to 2002, Mexico’s tariff schedule did not contain separate categories for HFCS-55 and HFCS-90 but included both grades under the tariff subheading 1702.60.

61. Paragraph 36 of Mexico’s second oral statement requests the Panel to make six “determinations of fact,” most of which would also involve determinations of contested legal issues. The United States disputes almost all of these proposed determinations as addressed in turn below. These proposed determinations, however, do not concern “facts” that this Panel needs to determine to fulfill its mandate in this dispute – which concerns the consistency of Mexico’s tax measures with Mexico’s WTO obligations and not alleged U.S. actions under the NAFTA. The “determinations of fact” Mexico identifies are, therefore, not ones this Panel should agree to make.

62. With respect to the first bullet in paragraph 36, Mexico refers to the negotiation of a “preferential trade regime which includes HFCS and sugar, products that compete in certain market segments.” The United States agrees that there have been trade negotiations with respect to HFCS and cane sugar although, as noted, the United States does not agree with Mexico’s understanding of the outcome of those negotiations. The United States does agree that HFCS and cane sugar compete in certain market segments, specifically the soft drink and syrup industry.

63. With respect to the second bullet in paragraph 36, the United States agrees there is a dispute between the United States and Mexico over the exact terms of the NAFTA with respect to market access for Mexican cane sugar. The United States disagrees, however, with Mexico’s suggestion that this NAFTA sugar dispute and the dispute for which this Panel was established are part of the same “dispute” for purposes of WTO dispute settlement. They are not.

64. With respect to the third bullet in paragraph 36, although it is correct that Mexico and the United States have engaged in bilateral discussions on the trade in sweeteners and dispute settlement under the NAFTA, the United States is not of the view that these avenues for resolving our differences have been exhausted or that Mexico has tried every means – short of breaching its WTO obligations – to resolve its grievances with respect to sugar under the NAFTA. In fact, negotiations between the United States and Mexico as well as the private interests continue on the issue. Mexico even noted before the DSB that it thought the U.S. panel request was premature because of these ongoing negotiations.<sup>56</sup>

65. With respect to the fourth bullet in paragraph 36, the United States notes that Mexico’s contention is not an assertion of fact, but rather a conclusion drawn based on Mexico’s view of how dispute settlement (or other means to address party grievances) should proceed under the NAFTA. As the United States noted in earlier submissions, the United States believes it is in full compliance with the dispute settlement provisions of the NAFTA.

66. With respect to the fifth bullet in paragraph 36, Mexico essentially raises two points, which, as in the fourth bullet, are not actually limited to a recitation of facts. First, the United

---

<sup>56</sup> See U.S. Responses to Questions of the Panel, para. 77.

States has not refused to submit to NAFTA dispute settlement. As stated in our response to questions after the first meeting, the United States has engaged in consultations with Mexico under NAFTA’s dispute settlement provisions and a NAFTA panel has been established. Second, the United States does not agree that Mexico’s tax measures are a response to a U.S. “refusal to submit to NAFTA dispute settlement.” In fact, Mexico’s statement is wholly inconsistent with the numerous and repeated statements of its legislators and Supreme Court that Mexico’s tax measures were imposed to “protect[] the national sugar industry” in Mexico. Mexico has not contested the accuracy of these statements.

67. With respect to the sixth bullet, it is likewise not a recitation of “fact.” Rather it depends on Mexico’s selective and out-of-context reading of statements made by the United States, including statements made outside of and prior to the existence of the WTO dispute settlement mechanism. For the record, the United States does not take the position that under the terms of the WTO Agreement it or any other Member may validly take countermeasures in the form of a WTO breach when another Member has refused to submit to an international agreement’s dispute settlement mechanisms. Furthermore, the text of the WTO Agreement does not provide for the defense Mexico raises in this dispute.

**74. Could the United States please explain with more detail in what manner does the internal application of the “soft drinks tax” and the “distribution tax” subject imported products to internal taxes in excess of those applied to like domestic products, in respect to beet sugar.**

68. As the U.S. second submission reviews, beet sugar and cane sugar are chemically and functionally identical. They have identical end-uses. They are sold through the same channels of distribution and to the same customers. They are classified under the same four-digit tariff heading. Beet sugar and cane sugar are “like” products.

69. Because beet sugar and cane sugar are virtually identical, it follows that soft drinks and syrups sweetened with them are also virtually identical. The U.S. second submission demonstrates that soft drinks sweetened with beet sugar have the same physical appearance, end-uses, channels of distribution, consumer preferences and tariff classifications as soft drinks and syrups sweetened with cane sugar.<sup>57</sup> Soft drinks and syrups sweetened with beet sugar are, therefore, “like” soft drinks and syrups sweetened with cane sugar.

70. Mexico does not produce beet sugar or soft drinks and syrups sweetened with beet sugar.

71. Under the IEPS, soft drinks and syrups that contain any sweetener other than cane sugar are subject to a 20 percent tax on their importation and internal transfer (HFCS soft drink tax) as well as a 20 percent tax on their distribution, representation, brokerage, agency and consignment

---

<sup>57</sup> U.S. Second Written Submission, paras. 27-29.

(distribution tax).<sup>58</sup> In addition, soft drinks and syrups sweetened with non-cane sugar sweeteners are subject to certain bookkeeping and reporting requirements, including a requirement for the soft drink or syrup producer to report its top 50 suppliers and customers to the Mexican Government.<sup>59</sup>

72. Because the IEPS is structured so as to apply to all soft drinks and syrups and then to exempt only those soft drinks and syrups sweetened with cane sugar, the IEPS discriminates against *all* non-cane sugar sweeteners and soft drinks and syrups made with non-cane sugar sweeteners. HFCS and beet sugar are examples of non-cane sugar sweeteners and the United States has presented evidence that HFCS is “like” and “directly competitive or substitutable with” cane sugar and that beet sugar is “like” cane sugar. The United States has also presented evidence that soft drinks and syrups sweetened with HFCS are “like” and “directly competitive or substitutable” with soft drinks and syrups sweetened with cane sugar and that soft drinks and syrups sweetened with beet sugar are “like” and soft drinks and syrups sweetened with cane sugar.

73. The IEPS discriminates against imported non-cane sugar sweeteners and imported soft drinks and syrups sweetened with non-cane sugar sweeteners because it applies (1) a 20 percent tax on the internal transfer and (2) a 20 percent tax on the distribution of soft drinks and syrups sweetened with non-cane sugar sweeteners that it does not apply to soft drinks and syrups sweetened with cane sugar. The IEPS also discriminates against imported soft drinks and syrups because it applies a 20 percent tax on their importation, regardless of the type of sweetener they contain, but does not tax the internal transfer of soft drinks and syrups sweetened exclusively with cane sugar.

74. As explained in the U.S. submissions, the vast majority of soft drinks and syrups produced in the United States are sweetened with HFCS. U.S. producers may also use beet sugar to sweeten soft drinks in syrups, as do their European counterparts. By contrast, in Mexico most soft drinks and syrups are sweetened with cane sugar. (This is true even before application of the IEPS to soft drinks and syrups when cane sugar comprise over 70 percent of the sweeteners used in Mexican soft drinks and syrups.)<sup>60</sup> The IEPS, thus, subjects imported soft drinks and syrups to a 20 percent tax on their importation, internal transfer and distribution. These taxes (HFCS soft drink and distribution taxes) do not apply to most soft drinks and syrups produced in Mexico.

---

<sup>58</sup> The IEPS accomplishes this as follows: Article 1 subjects the importation and internal transfer of, and the provision of certain services in connection with, goods identified in Article 2 to the provisions of the IEPS. Article 2 identifies the goods subject to the IEPS as well as the tax rate for those good. Article 2.I(G) and 2.I(H) provide that soft drinks and syrups (see U.S. response to Question 71) are subject to a 20 percent tax rate. Article 2.II identifies distribution, representation, brokerage, agency and consignment which if provided in connection with goods identified in Article 2.1(G) and (H) are subject to the IEPS. Article 8 then provides that transfers of products identified in Article 2(G) and (H) are not subject to the IEPS if they are sweetened exclusively with cane sugar. Article 2.II exempts the provision of services in connection with goods identified in Article 8.

<sup>59</sup> IEPS as amended, Art. 19. See U.S. First Written Submission, paras. 37, 46.

<sup>60</sup> U.S. First Written Submission, para. 23 and Exhibits US-15 and 57.

The HFCS soft drink and distribution taxes are, therefore, taxes applied to imports “in excess of” and dissimilar than those applied to “like” and “directly competitive or substitutable” domestic products. This is the case regardless of whether the imported products are soft drinks and syrups sweetened with HFCS, beet sugar or any other non-cane sugar sweetener. Said another way, the IEPS subjects imports to taxes in “excess of” and dissimilar than those applied to “like” and “directly competitive or substitutable” domestic products because the IEPS specifically excludes those domestic products from the scope of the IEPS.

75. The same is true with respect to non-cane sugar sweeteners used in soft drinks and syrups. Prior to application of the IEPS to soft drinks and syrups, HFCS comprised over 99 percent of Mexican sweetener imports, but only between five and ten percent of Mexican sweetener production.<sup>61</sup> As for beet sugar, it is not produced in Mexico and, therefore, to the extent it exists in Mexico, is an imported sweetener.<sup>62</sup> By subjecting soft drinks and syrups sweetened with non-cane sugar sweeteners to a 20 percent tax but not subjecting soft drinks and syrups sweetened with cane sugar to that same tax, the IEPS subjects imported sweeteners – whether those sweeteners are HFCS or beet sugar – to taxation that is dissimilar and “in excess of” that applied to the like domestic product, cane sugar.

76. The bookkeeping and reporting requirements also discriminate against beet sugar in the same manner they discriminate against HFCS. Only soft drinks and syrups made with non-cane sugar sweeteners (including HFCS and beet sugar) are subject to the requirements. Exclusive use of the “like” and “directly competitive or substitutable” domestic product, cane sugar, results in exemption from the bookkeeping and reporting requirements.

**75. The Panel notes that, in its rebuttal submission (paragraph 53), the United States has said that obligations owed to a Member by another Member under the terms of an international agreement would not be part of the former Member’s “laws or regulations” under Article XX(d) of the GATT. Does the United States mean that, in its opinion, this would always be the case or whether, under the facts of this particular case it considers that the United States’ obligations under the NAFTA would not be part of a Mexico’s “laws or regulations”?**

77. In the U.S. view, the international obligations owed to one Member by another Member under the terms of an international agreement are not “laws or regulations” within the meaning of

---

<sup>61</sup> U.S. First Written Submission, paras. 24-25.

<sup>62</sup> Mexico does not import beet sugar. This fact, however, does not change the fact that the IEPS discriminates against beet sugar as a sweetener for soft drinks and syrups. For example, in *EC – Bananas*, the fact that the U.S. “never exported a single banana” did not change the fact the EC regime for the importation and sale of bananas constituted a breach of Article III of the GATT or the presumption that the EC regime, therefore, nullified and impaired benefits accruing to the United States. The Appellate Body noted that the U.S. had a “potential export interest” in bananas. See Appellate Body Report, *EC – Bananas*, WT/DS27/AB/R, adopted on 25 September 1997, paras. 208-216, 249-254.



Article XX(d). This is true regardless of whether the international obligations asserted to be “laws or regulations” are U.S. obligations under the NAFTA or any country’s international obligations under any international agreement. In addition, the phrase “laws or regulations” pertains to the laws or regulations of the Member claiming its breach of GATT rules is justified by Article XX(d). It does not pertain to the laws or regulations of the Member whose GATT rights have been impaired by the other Member’s GATT-inconsistent measure.

**76. The United States has argued that it “is currently engaged in the third stage” of dispute settlement under the NAFTA procedures, regarding its dispute with Mexico on market access commitments for Mexican exports of sugar to the United States’ market. Could the United States please expand on that statement. How long would that third stage generally take? What would happen, under NAFTA rules, if the panel is not established?**

78. With respect to the first part of the question, under ten years of experience with WTO dispute settlement, dozens of panels have been formed and it is possible to discern patterns and develop expectations about this process. Since the NAFTA was implemented eleven years ago, only three panels have been formed (Canada Agriculture Products, U.S. Brooms, and U.S. Trucks). With such a small number of disputes, it is impossible to suggest norms or set expectations. It is correct, as a matter of fact, that the time taken to constitute each of these three panels was longer than provided for under the NAFTA.

79. With respect to the second part of the question, under the NAFTA, panel establishment is automatic. That is, if parties to the dispute are unable to resolve the dispute after proscribed time periods and one of the parties delivers a request for the establishment of a panel, the NAFTA Free Trade “Commission shall establish an arbitral panel.”<sup>63</sup> An arbitral panel has been “established” in the NAFTA sugar dispute. Unlike the DSU, which permits a party to request that the Director-General appoint panelists 20 days after the panel’s establishment if the parties are unable to agree,<sup>64</sup> there is no parallel provision in the NAFTA. As Mexico concedes: “NAFTA’s Chapter Twenty lacks the automaticity of the DSU.”<sup>65</sup> In this regard, the NAFTA Secretariat did not appoint panelists in the NAFTA sugar dispute pursuant to Mexico’s request,<sup>66</sup>

---

<sup>63</sup> NAFTA Art. 2008(2).

<sup>64</sup> The Secretariat’s most recent overview of dispute settlement cases in WT/DS/OV22 reflects the fact that even panel composition in the WTO can take a long time. *See, e.g., Australia – Certain Measures Affecting the Importation of Fresh Fruit and Vegetables (Philippines) (DS270)* (panel established on Aug. 29, 2003, not yet composed); *Australia – Quarantine Regime for Imports (EC) (DS287)* (panel established on Nov. 7, 2003, not yet composed); (3) *United States – Countervailing Duties on Imports of Steel Plate from Mexico (Mexico) (DS280)* (panel established on Aug. 29, 2003, not yet composed).

<sup>65</sup> Mexico Second Written Submission, para. 3.

<sup>66</sup> *See* Mexico First Written Submission, para. 75 n.41; Mexico Second Written Submission, para. 3; Mexico Opening Statement at the Second Meeting of the Panel, para. 78; Mexico Responses to the Questions of the Panel, p. 6 (WTO translation).

because under NAFTA dispute settlement rules the NAFTA Secretariat does not have the authority to appoint panelists.

**77. In its response to Panel question No. 30, the United States has said that there are alternative means “diplomatic or otherwise - short of breaching its WTO obligations” that Mexico could have pursued to address its concerns regarding the bilateral trade in sweeteners under the NAFTA, such as bilateral negotiations between governments and between the private sectors of both countries. Could the United States please elaborate on this assertion and explain what are some of the alternative means that Mexico could have reasonably pursued in order to address its concerns regarding the bilateral trade in sweeteners under the NAFTA. Would this include suspension of benefits under the NAFTA Agreement that are not part of Mexico’s obligations under the WTO agreements?**

80. As an initial matter, the existence of “alternative measures” is an analytical tool the panels and the Appellate Body have employed to assess the extent to which a GATT-inconsistent measure, for which a defense under Article XX(d) is raised, is in fact “necessary.” Thus, in other disputes complaining parties have suggested that the existence of an alternative measure that secures compliance with the relevant laws or regulations and that is GATT-consistent means that the disputed measure is not “necessary.” Whether a GATT-consistent alternative measure exists, however, does not answer the question of whether the Member invoking Article XX(d) has established that the dispute measure is “necessary” to secure compliance with laws or regulations. Therefore, regardless of whether the United States identifies a GATT-consistent alternative measure, it is Mexico’s burden in the first instance to establish that its tax measures are “necessary” to secure compliance with laws or regulations.

81. With that in mind, diplomatic means exist under the NAFTA for Mexico to pursue its concerns regarding bilateral sweeteners trade, including periodic meetings at official and ministerial level and Mexico has, in fact, pursued and is currently pursuing these means. In addition, the sweeteners industries of both countries have pursued unofficial discussions in aid of a mutually acceptable solution for bilateral sweeteners trade, and these discussions continue. Industry officials involved in the talks brief the governments periodically.

82. It is also useful to keep in mind that the tax measures at issue violate the GATT rights not just of the United States, but those of Canada, the EC and other Members. The United States rejects the proposition that Article XX(d) can be used to resolve disputes under other international agreements, as Mexico has argued in this case. However, even if such use of Article XX(d) were acceptable, it would not justify impairing the rights of all WTO Members because of a bilateral dispute.

83. With respect to the suspension of benefits under the NAFTA, the United States points out that Mexico has already suspended benefits under the NAFTA with respect to HFCS by applying NAFTA-inconsistent antidumping duties against HFCS imported from the United States from

1997 through April 2002. And with respect to sugar, as noted in the U.S. second submission,<sup>67</sup> the United States finds it difficult to reconcile 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 it has not provided this level of market access in the 11 years since NAFTA’s entry into force.

**78. During the second substantive meeting (paragraph 23 of written version), the United States used the expression “whether recognized or not” referring to principles of international law. What would the expression “ recognized or not” mean in that context?**

84. The reference in paragraph 23 referred to paragraphs 120-125 of the *Hormones* decision, in which the Appellate Body rejected arguments by the EC that the “precautionary principle” is a “general customary rule of international law” that would override the provisions of Articles 5.1 and 5.2 of the SPS Agreement. The Appellate Body found that it was “less than clear” that Members of the WTO had accepted the precautionary principle as a principle of general or customary international law and it declined to take any position on this question. The Appellate Body then provided guidance that is quite germane to the present dispute. It found that “the precautionary principle does not, by itself, and without a clear textual directive to that effect, relieve a panel from the duty of applying the normal (i.e. customary international law) principles of treaty interpretation in reading the SPS Agreement.”<sup>68</sup>

85. Thus, general principles of international law could only be relevant if there were a clear textual directive in the WTO Agreement that makes them relevant. General principles of international law cannot be used to override the text of the WTO Agreement, to create new exceptions to WTO obligations, or otherwise to abridge the rights and obligations of WTO Members. This would be the case even for a “recognized” principle of international law, let alone something (like the “precautionary principle” in *Hormones*) which has not been recognized as a principle of international law.

**79. In a preliminary response to the previous question when it was posed orally by the Panel during the second substantive meeting, Mexico stated that it is not asking the Panel to rule on the dispute under NAFTA. Could the United States’ comment on that response, particularly in light of the statement by the United States during the second substantive meeting (paragraphs 6 and 7 of written version) that acceptance of Mexico’s interpretation of “law or regulations” to include obligations owed to Mexico under the NAFTA would require WTO panels and the Appellate Body to determine if there was, in fact, “a breach of the underlying agreement”.**

86. The United States refers the Panel to its response to Question 64 above.

---

<sup>67</sup> U.S. Second Written Submission, para. 58 n.79.

<sup>68</sup> Appellate Body Report, *EC – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, para. 124.

**80. Could the United States please clarify the specific scope, for the purpose of this dispute, of each imported product group at issue that is allegedly being discriminated against when compared to domestic products. In particular, as for imported soft drinks and syrups, is the product scope: (a) imported soft drinks and syrups; (b) imported soft drinks and syrups sweetened with nutritive sweeteners; (c) imported soft drinks and syrups sweetened with non-cane sugar sweeteners; (d) imported soft drinks and syrups sweetened with HFCS and beet sugar; or (e) imported soft drinks and syrups sweetened with HFCS? As for imported sweeteners, is the product scope: (a) imported sweeteners; (b) imported nutritive sweeteners; (c) imported non-cane sugar sweeteners; (d) imported HFCS and beet sugar; or (e) imported HFCS?**

87. With respect to soft drinks and syrups, the answer to the question depends on the point at which the IEPS is being applied. With respect to the IEPS as applied on the importation of soft drinks and syrups, the answer is (a): the IEPS discriminates against imported soft drinks and syrups regardless of the type of sweetener they contain. With respect to the IEPS as applied on the internal transfers and the distribution, representation, brokerage, agency and consignment of soft drinks and syrups, the answer is (c): the IESP discriminates against imported soft drinks and syrups sweetened with non-cane sugar sweeteners including HFCS and beet sugar.

88. With respect to sweeteners, the answer is (c): The IEPS discriminates against imported non-cane sugar sweeteners including HFCS and beet sugar.

**TABLE OF EXHIBITS**

<b>Exhibit US-</b>	<b>Title of Exhibit</b>
58	Beverage Digest Fact Book 2004: Statistical Yearbook of Non-Alcoholic Beverages: Date Spanning 1985 to 2003 with Detailed Trend Analysis; Ninth Annual Edition (selected pages).