Mexico – Tax Measures on Soft Drinks and Other Beverages

(WT/DS308)

Third Party Submission
of the
European Communities

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# GLOSSARY

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<td>DSU</td>
<td>Understanding on Rules and Procedures Governing the Settlement of Disputes</td>
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<td>EC</td>
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<td>FWS</td>
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<td>GATT</td>
<td>General Agreement on Tariffs and Trade 1994</td>
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<td>HFCS</td>
<td>High Fructose Corn Syrup</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<td>NAFTA</td>
<td>North American Free Trade Agreement</td>
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I. **INTRODUCTION**

1. The European Communities (the “EC”) thanks the Panel for this opportunity to present its views in these proceedings.

2. The EC intervenes in this case because of its systemic interest in the correct interpretation and application of the WTO Agreements, and in particular of Articles III and XX GATT, and of the DSU.

3. In the present submission, the EC will comment on the following issues:
   - the preliminary ruling requested by Mexico that the Panel should decline to exercise its jurisdiction;
   - the relationship of the WTO Agreement to other international agreements;
   - the claims raised by the United States under Article III:2 of the GATT;
   - the defence presented by Mexico under Article XX (d) of the GATT.

4. On each of these points, the EC will limit itself to commenting on those legal issues which are of a particular systemic interest to it. The EC does not intend to take a position on the overall dispute between the United States and Mexico and notably on the question whether Mexico is in breach of its WTO obligations.

5. Given the shortness of time available in particular for considering the arguments of Mexico, the EC reserves the right to elaborate its arguments further at the third party session with the Panel. Moreover, the fact that the EC does not comment on a specific issue raised by the parties should not be interpreted as either agreement or disagreement with the arguments of the parties.
II. THE PRELIMINARY RULING REQUESTED BY MEXICO THAT THE PANEL SHOULD DECLINE TO EXERCISE ITS JURISDICTION

6. In its defence, Mexico has stated that it considers that the dispute before the Panel has its roots in a wider dispute with the United States in the context of NAFTA.\(^1\) For this reason, Mexico has requested the Panel to issue a preliminary ruling by which the Panel should decline to exercise its jurisdiction.\(^2\)

7. In its defence, Mexico has recognised that the Panel does have *prima facie* jurisdiction to hear the case brought by the United States.\(^3\) However, Mexico also submits that the Panel has competence to decline to exercise its jurisdiction. In support of this view, Mexico refers in particular to the possibility for WTO panels to exercise “judicial economy”.\(^4\) Mexico further submits that the US case is part of a larger dispute under NAFTA, and that addressing the US claims under the GATT would therefore not secure a positive solution to the dispute.\(^5\)

8. Article 11 of the DSU describes the function of panels as follows (emphasis added):

   The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. [...] 

9. This function is also reflected in the standard terms of reference provided for in Article 7 (1) of the DSU, which provide that the task of Panels is (emphasis added):

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\(^1\) Mexico’s FWS, para. 1, 88.

\(^2\) Mexico’s FWS, para. 93 et seq.

\(^3\) Mexico’s FWS, para. 93.

\(^4\) Mexico’s FWS, para. 94.

\(^5\) Mexico’s FWS, para. 102.
To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s).

10. In the present case, the US claims are based on Article III GATT, i.e. a provision of a covered agreement. There is no doubt, and Mexico does not contest, that the Panel therefore has jurisdiction to examine the US claims under this provision, and to make findings to assist the DSB in making appropriate recommendations.

11. The EC does not agree, however, that the Panel could decline to exercise this jurisdiction on the basis of the notion of “judicial economy”.

12. The notion of “judicial economy” was explained as follows by the Appellate Body in *US – Wool Shirts and Blouses*:6

> Nothing in this provision or in previous GATT practice requires a panel to examine all legal claims made by the complaining party. Previous GATT 1947 and WTO panels have frequently addressed only those issues that such panels considered necessary for the resolution of the matter between the parties, and have declined to decide other issues. Thus, if a panel found that a measure was inconsistent with a particular provision of the GATT 1947, it generally did not go on to examine whether the measure was also inconsistent with other GATT provisions that a complaining party may have argued were violated.

13. On the other hand, the Appellate Body has also clarified that the notion of judicial economy has its limits. In particular, the Appellate Body stressed in *Australia – Salmon* that a Panel must address all claims on which a finding is necessary to provide a resolution to the dispute:7

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The principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system. This aim is to resolve the matter at issue and "to secure a positive solution to a dispute". To provide only a partial resolution of the matter at issue would be false judicial economy. A panel has 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."

14. In accordance with the jurisprudence of the Appellate Body, the notion of judicial economy enables a Panel to omit making a finding on a specific claim, when such a finding is not necessary for resolving the dispute under the covered agreements, for instance because the measure has already been found to be in violation of another provision of the covered agreements. In contrast, the notion of judicial economy does not entitle a panel to abstain completely from making findings in a dispute properly before it.

15. In support of its view, Mexico has referred to the Panel Report in United States – Trade Measures affecting Nicaragua. However, in this case, which predates the entry into force of the WTO Agreement, the Panel’s terms of reference specifically excluded consideration of the United States’ defence under Article XXI (b) (iii) GATT. Accordingly, this report cannot serve as precedent for the present Panel, which has standard terms of reference in accordance with Article 7 (1) of the DSU.

16. The EC would like to add that it is not unusual that the same dispute might arise, fully or partially, under the WTO and under international agreements outside the WTO. This should not necessarily prevent a WTO panel to resolve a dispute properly brought before it. A recent example in point would be Argentina – Poultry, in which the Panel considered the dispute despite the fact that the same measures had previously been the subject of dispute settlement under Mercosur.

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8 Mexico’s FWS, para. 95.
9 GATT Panel Report, United States - Trade Measures affecting Nicaragua, para. 1.4.
10 Panel Report, Argentina – Poultry, para. 7.33 et seq.
17. The EC takes note that Mexico has also complained that the United States has not agreed to submit the broader dispute to dispute settlement under NAFTA. The EC is not in a position to comment on the dispute settlement procedures under NAFTA. However, the absence of recourse to dispute settlement under NAFTA cannot justify an exercise of “judicial economy” on the part of a WTO panel. Whether the attitude of the United States might be legally relevant in other regards under the WTO agreements, for instance from the point of view of good faith or estoppel, need not be further examined here, since Mexico has not so far raised this question.

III. THE RELATIONSHIP OF THE WTO AGREEMENTS AND OTHER INTERNATIONAL AGREEMENTS

18. In its submission, Mexico has set out in considerable detail the background of what it considers to be its “broader dispute” with the United States in the context of NAFTA.

19. The EC is not in a position to comment on Mexico’s dispute with the United States under NAFTA. However, since Mexico has evoked the NAFTA context in the present dispute, the EC considers it appropriate to offer some preliminary remarks regarding the relationship between the WTO Agreements and other international agreements.

20. In accordance with Articles 7 (1) and 11 of the DSU, the function of the Panel is to make findings in the light of the provisions of the covered agreements. However, this does not mean that the Panel cannot take into account other provisions of international law, when such provisions are relevant to the dispute before it. In fact, the Appellate Body has confirmed that the WTO Agreements are not to be read in “clinical isolation” from public international law. In the view of the EC, it is therefore not excluded that applicable rules of international law may also

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11 Mexico’s FWS, para. 99.
12 Mexico’s FWS, para. 27 et seq.
include bilateral or multilateral agreements between the parties, when such rules are relevant for the decision of a dispute before a panel.

21. In the present case, Mexico has so far not invoked any specific provision of NAFTA or general rules of public international law in its defence against the claims of the United States. The Panel may therefore not need to address the complex question of the relationship between the WTO agreements and other bilateral or multilateral agreements. However, should this issue arise, the EC submits that the Panel should approach it bearing in mind the fundamental importance of this question and taking into account the considerations set out above.

IV. THE CLAIMS RAISED BY THE UNITED STATES UNDER ARTICLE III:2 OF THE GATT

22. In its first written submission, the United States claims that the Mexican measures constitute a violation of Articles III:2 and III:4 GATT. The EC would like to comment on a number of systemic points raised by the US claims under Article III:2 GATT. In this context, the EC will distinguish between beverages containing HFCS or other sweeteners, on the one hand, and syrups or other concentrates used for preparing beverages, on the other hand.

A. Discriminatory taxation of beverages sweetened with cane sugar and with other sweeteners

23. The EC would like to consider the question of whether the Mexican measure, as described in the first written submission of the United States,\(^\text{14}\) constitutes discriminatory taxation contrary to Article III:2 of the GATT of beverages sweetened with cane sugar and with other sweeteners.

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\(^\text{14}\) US FWS, para. 37 – 47.
1. **The US claim under the first sentence of Article III:2 GATT**

24. The United States has claimed that the Mexican measure constitutes discriminatory taxation of beverages contrary to the first sentence of Article III:2 GATT.\(^{15}\) This provision reads as follows:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.

25. In its submission, the United States has explained in considerable detail that beverages sweetened with HFCS and beverages sweetened with cane sugar are like products.\(^{16}\) The EC shares this analysis of the United States. The EC would like to add, however, that this applies not only in the comparison of beverages sweetened with HFCS and cane sugar. For instance, it is clear that beverages sweetened with other types of sugar, and notably with beet sugar as the main type of sugar produced in the EC, would equally have to be considered to be “like” beverages sweetened with cane sugar.

26. Subsequently, the US examines whether the Mexican measure involves taxation of imported beverages in excess of domestic beverages.\(^{17}\) The US analysis in this respect calls for a number of comments.

27. The US analysis appears to be based on a comparison between beverages sweetened with HFCS and beverages sweetened with cane sugar. The understanding therefore seems to be that all beverages sweetened with cane sugar, whether domestic or imported, are exempted from the Mexican tax measure. However, in the factual part of the US submission, the United States has interpreted the Mexican measure to impose the tax on imported beverages sweetened with any sweetener, including beverages sweetened with cane sugar.\(^{18}\)

\(^{15}\) US FWS, para. 62 et seq.

\(^{16}\) US FWS, para. 64 et seq.

\(^{17}\) US FWS, para. 84.

\(^{18}\) US FWS, para. 39.
If this interpretation, on which Mexico has not so far commented, were correct, then at least as far as beverages sweetened with cane sugar are concerned, the Mexican measure would clearly constitute taxation of imported beverages in excess of domestic beverages, i.e. *de jure* discrimination against imports.

28. In contrast, the situation may be somewhat different in so far as the US challenges the Mexican taxation of imports of HFCS-sweetened beverages. The US submits that whereas virtually all beverages produced in the US are sweetened with HFCS, all beverages regular soft drinks and syrups produced in Mexico are sweetened with cane sugar.\(^\text{19}\) Whereas this may be true at present, this statement was not true at the time the Mexican measure was adopted. In fact, the US itself submits that before the imposition of the Mexican tax measure, Mexican soft drink producers had begun to switch over to use of HFCS, and that accordingly a sizeable proportion of soft drinks produced in Mexico was sweetened with HFCS.\(^\text{20}\)

2. **The US claim under the second sentence of Article III:2 GATT**

29. The United States has raised its claim regarding discriminatory taxation of beverages also under the second sentence of Article III:2 GATT.\(^\text{21}\)

30. In this respect, given in particular the introductory language of the Ad note to Article III:2 GATT, it might be questioned whether a measure which is incompatible with the first sentence of Article III:2 GATT can also be incompatible with the second sentence thereof. In any event, should the Panel find that the Mexican treatment of imported beverages is incompatible with the first sentence of Article III:2 GATT, it may no longer need to address the US claim under the second sentence.

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\(^\text{19}\) US FWS, para. 86; similarly US FWS, para. 149.

\(^\text{20}\) US FWS, para. 34.

\(^\text{21}\) US FWS, para. 141 et seq.
B. Discriminatory taxation of HFCS and other sweeteners

31. The US has also made the claim that the Mexican tax measure, as applied to HFCS as such, is inconsistent with the second sentence of Article III:2 GATT.\textsuperscript{22}

32. The second sentence of Article III:2 GATT provides that no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1. The Ad note to Article III:2 provides further that a “tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product, and, on the other hand, a directly competitive or substitutable product which was not similarly taxed”.

33. In its submission, the US has discussed whether HFCS and cane sugar can be regarded as directly competitive or substitutable products.\textsuperscript{23} In this respect, the EC would remark that there are certain differences between HFCS and cane sugar as regards end-uses and consumer preferences. In particular, HFCS is exclusively used in industrial production of beverages and possibly other products. In contrast, cane sugar is also used in households for a variety of purposes, which is not the case for HFCS. This notwithstanding, the EC would agree that there is a considerable overlap in end-uses and preferences between HFCS and cane sugar. For this reason, the EC can agree with the US submission that HFCS and cane sugar are directly competitive or substitutable products at least to the extent that use for the sweetening of beverages is concerned.

34. Furthermore, it follows from the US submission that HFCS is largely imported from the US, whereas cane sugar is largely a domestic and not an imported

\textsuperscript{22} US FWS, para. 93 et seq. Although the United States has also referred to “syrups” in its claim under the first sentence of Article III:2 GATT, the EC understands that the US did not intend to raise a claim regarding the taxation of HFCS as such under the first sentence of Article III:2 GATT. This understanding is supported by the fact that the US submission examines exclusively whether soft drinks sweetened with HFCS and soft drinks sweetened with cane sugar are like (US FWS, para 64 et seq.). In contrast, the US has not attempted to show that HFCS and cane sugar are “like products” within the meaning of the first sentence.

\textsuperscript{23} US FWS, para. 94 et seq.
product in Mexico. Accordingly, it can be considered that the Mexican measure involves taxation of imported products in excess of domestic products.

V. THE DEFENCE PRESENTED BY MEXICO UNDER ARTICLE XX (D) OF THE GATT

35. In its defence, Mexico has argued that its measure is justified by Article XX (d) of the GATT. Article XX (d) is drafted as follows:

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

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices

36. In support of this defence, Mexico has argued that NAFTA is a “law or regulation” within the meaning of Article XX (d) GATT, and that its measure is necessary to secure compliance by the United States with the provisions of NAFTA concerning the access of Mexican sugar to the US market.

37. The EC cannot comment on Mexico’s claim against the United States under NAFTA. However, the EC considers that Mexico’s defence under Article XX (d) GATT in the present case raises serious systemic issues and therefore warrants several remarks.

38. First, Article XX (d) justifies only measures necessary to secure compliance with “laws or regulations”. Such laws or regulations must be laws or regulations applicable in the internal legal order of the WTO Member in question. At a general
level, the EC would not exclude that an international agreement concluded by a WTO Member might also constitute a “law or regulation” within the meaning of Article XX (d) GATT, provided that the agreement is directly applicable in the internal legal order of such member, and is therefore capable of being directly enforced on individuals. However, Mexico has not provided any information on the status of NAFTA in its internal legal order. More importantly still, it appears that the provisions invoked by Mexico impose obligations primarily on the United States, and are therefore not capable of being enforced in the legal order of Mexico.

39. Secondly, the measure must be necessary to “secure compliance” with the law or regulation. As just set out, this compliance must be secured within the legal order of the Member in question. The object and purpose of measures under Article XX (d) GATT is not to secure compliance with the obligations incumbent on other WTO Members under public international law. This is also apparent from the examples listed in Article XX (d) GATT, which include customs enforcement, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices.

40. Third, the EC notes that the Mexican measure does not only apply to beverages sweetened with HFCS imported from the United States, but would also apply to, for instance, beverages sweetened with beet sugar imported from any other WTO Member, including the EC. It is clear, that this could not be justified as securing compliance with obligations under NAFTA.

41. At a systemic level, Mexico’s interpretation would transform Article XX (d) GATT into an authorisation of counter-measures within the meaning of public international law. It must be assumed, however, that if the contracting parties had intended such an interpretation, they would have expressed this in a clearer way. Moreover, under customary international law, as codified in the ILC’s Articles on Responsibility of States for Internationally Wrongful Acts, counter-measures are
subject to strict substantive and procedural conditions, which are not contained in Article XX (d) GATT.

42. The EC notes that Mexico has not so far justified its measure as a counter-measure under customary international law. Such a justification would already meet the objection that the Mexican measure does not only apply to products from the US, but from anywhere. In any event, should Mexico still attempt such a justification, then this would also raise the difficult question of whether the concept of counter-measures is available to justify the violation of WTO obligations. In accordance with Article 50 of the ILC’s Articles on Responsibility of States for Internationally Wrongful Acts (Exhibit EC-1), this would not be the case if the WTO agreements are to be considered as a *lex specialis* precluding the taking of counter-measures. This complex question has been addressed in the report of the ILC at its fifty-third session (Exhibit EC-2), to which the EC would like to refer here (emphasis added):

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26 Cf. UN General Assembly Resolution A/Res/56/83, Annex, Articles 49 – 54 (Exhibit EC-1).
States may agree between themselves on other rules of international law which may not be the subject of countermeasures, whether or not they are regarded as peremptory norms under general international law. This possibility is covered by the *lex specialis* provision in article 55 rather than by the exclusion of countermeasures under article 50 (1) (D). In particular a bilateral or multilateral treaty might renounce the possibility of countermeasures being taken for its breach, or in relation to its subject matter. This is the case, for example, with the European Union treaties, which have their own system of enforcement. Under the dispute settlement system of the WTO, the prior authorization of the Dispute Settlement Body is required before a Member can suspend concessions or other obligations under the WTO agreements in response to a failure of another Member to comply with recommendations and rulings of a WTO panel or the Appellate Body. Pursuant to Article 23 of the WTO Dispute Settlement Understanding (DSU), Members seeking “the redress of a violation of obligations or other nullification or impairment of benefits” under the WTO agreements, “shall have recourse to, and abide by” the DSU rules and procedures. This has been construed both as an “exclusive dispute resolution clause” and as a clause “preventing WTO members from unilaterally resolving their disputes in respect of WTO rights and obligations”. To the extent that derogation clauses or other treaty provisions (e.g. those prohibiting reservations) are properly interpreted as indicating that the treaty provisions are “intransgressible”, they may entail the exclusion of countermeasures.

VI. CONCLUSION

43. The EC requests the Panel to rule on the United States’ claims and Mexico’s requests taking into account the observations set out above.
## List of Exhibits

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