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## The Fight at the Soda Machine: Analyzing the Sweetener Trade Dispute Between the United States and Mexico Before the World Trade Organization

Patricia Larios

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# THE FIGHT AT THE SODA MACHINE: ANALYZING THE SWEETENER TRADE DISPUTE BETWEEN THE UNITED STATES AND MEXICO BEFORE THE WORLD TRADE ORGANIZATION

PATRICIA LARIOS\*

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## INTRODUCTION

The current United States-Mexico dispute before the World Trade Organization (“WTO”) involves a Mexican tax measure which imposes a twenty-percent tax on soft drinks, beverages, and syrups using sweeteners other than cane sugar (“HFCS tax”).<sup>1</sup> Beginning in

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1. See Ley del Impuesto Sobre Produccion Y Servicios [Law on the Special Tax on Production and Services], art. 2, D.O., 12 de enero de 2004 (Mex.) [hereinafter HFCS Tax] (describing the Mexican tax measures and their

the 1970s, U.S. manufacturers developed High Fructose Corn Syrup (“HFCS”), a corn-based sweetener, as a low cost sugar substitute for use in the food and soft drink industry.<sup>2</sup> Since the 1980s, HFCS has been the principal sweetener in the U.S. soft drink market.<sup>3</sup>

Beginning in the 1990s, Mexico also used HFCS as a major sweetener in its soft drink industry,<sup>4</sup> and by 2001 HFCS comprised thirty percent of the Mexican soft drink market share.<sup>5</sup> The HFCS tax

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applicability to soft drinks and syrups using sweeteners other than cane sugar), available at <http://www.cddhcu.gob.mx/leyinfo/pdf/78.pdf> (last visited Apr. 5, 2005); see also *Reformas y adiciones a la Ley del Impuesto Especial sobre Produccion y Servicios*, DECIDIR Mexico (Dec. 1, 2004) (presenting the latest amendment to the Mexican tax measures effective January 1, 2005), available at <http://www.decidir.com.mx/noticias.asp?idpnews=9951&tema=POGOAF> (last visited Apr. 5, 2005); Mexico – Tax Measures on Soft Drinks and Other Beverages, Request for the Establishment of a Panel by the United States, WT/DS308/4, at 1 (June 11, 2004) [hereinafter Mexico, Panel Request] (providing a brief overview of the dispute and a discussion of the Mexican tax measures), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm#2004](http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm#2004) (last visited Apr. 5, 2005).

2. See CORN REFINERS ASS’N, CORN ANNUAL 2000: HISTORY OF CORN REFINING IN THE U.S. (2002) (suggesting that the improvement of HFCS technology led to the creation of HFCS-55, a primary sweetener in the U.S. soft drink industry), available at <http://www.corn.org/web/cachpt2-1.htm> (last visited Apr. 5, 2005).

3. See WILLIAM MOORE, TRENDS IN U.S. SOFT DRINK CONSUMPTION – DEMAND IMPLICATIONS FOR LOW-CALORIE AND OTHER SWEETENERS – U.S. DEP’T OF AGRIC., ECONOMIC RESEARCH SERVICE REPORT, in SITUATION & OUTLOOK REPORT: SUGAR & SWEETENER (1991) (describing the increasing trends in HFCS consumption in the United States), available at [http://www.findarticles.com/p/articles/mi\\_m3796/is\\_1991\\_Sept/ai\\_11917708/print](http://www.findarticles.com/p/articles/mi_m3796/is_1991_Sept/ai_11917708/print) (last visited Apr. 5, 2005).

4. See Press Release, Office of the U.S. Trade Representative, United States Requests WTO Panel Against Mexico Over Beverage Taxes (June 22, 2004) [hereinafter Press Release on Beverage Taxes] (asserting that the Mexican bottling industry began to substitute HFCS for cane sugar), available at [http://www.ustr.gov/Document\\_Library/Press\\_Releases/2004/June/U.S.\\_Requests\\_WTO\\_Panel\\_Against\\_Mexico\\_Over\\_Beverage\\_Taxes.html](http://www.ustr.gov/Document_Library/Press_Releases/2004/June/U.S._Requests_WTO_Panel_Against_Mexico_Over_Beverage_Taxes.html) (last visited Apr. 5, 2005).

5. See Mexico - Tax Measures on Soft Drinks and Other Beverages, First Submission of the United States of America, WT/DS308, ¶ 35 (Sept. 30, 2004) [hereinafter U.S. First Submission] (noting that prior to the introduction of HFCS, cane sugar was the dominant nutritive sweetener in Mexico), available at [http://www.ustr.gov/assets/Trade\\_Agreements/Monitoring\\_Enforcement/Dispute\\_](http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_)

dispute is particularly significant to U.S. manufacturers because Mexicans are the second largest per-capita soft drink consumers in the world<sup>6</sup> and the largest per-capita consumers of Coca-Cola.<sup>7</sup> Overall, Mexicans consume over 15 billion liters of soft drinks annually.<sup>8</sup>

The current dispute began in 1998, when Mexico imposed anti-dumping duties on U.S. HFCS imports.<sup>9</sup> In January 2000, the WTO

Settlement/WTO/Dispute\_Settlement\_Listings/asset\_upload\_file565\_6449.pdf (last visited Apr. 5, 2005).

6. See ECONOMIST INTELLIGENCE UNIT, EXECUTIVE BRIEFING MEXICO, MEXICO: FOOD, BEVERAGES AND TOBACCO BACKGROUND 4 (2004) (explaining that foreign companies dominate the Mexican soft drink market), available at 2004 WLNR 14004998. See generally *Sins of the Fleshy*, THE ECONOMIST, Dec. 16, 2004, at 1-2 (discussing that fizzy drinks, beans, tortillas, and meat have led to an obesity and diabetes epidemic in Mexico).

7. See Kevin Pang, *Mexican Coke a Hit in the U.S.: A Taste of Home Aficionados Say It's the Cane Sugar*, SEATTLE TIMES, Oct. 29, 2004, at A2 (discussing that Mexicans consumed 55.2 billion cans of Coca-Cola products last year which equals about 526 servings per person), available at 2004 WLNR 4020352. By comparison, Americans consumed 414 servings of Coke last year. *Id.*; see also *Mexico Mulls Soft Drink Tax*, BBC NEWS, Nov. 16, 2001 [hereinafter *Soft Drink Tax*] (stating that “[i]n other countries people refresh themselves with a Coca-Cola . . . [b]ut in Mexico they eat Coca-Cola”), at <http://news.bbc.co.uk/2/hi/business/1661200.stm> (last visited Apr. 5, 2005); FOMENTO ECONÓMICO MEXICANO, S.A. DE C.V. (“FEMSA”), ANNUAL REPORT 2003: NEW HORIZONS 16 (2003) (asserting that Mexico comprises the largest market share of Coca-Cola), available at [http://www.femsa.com/informe2003/FMX\\_English03AR.pdf](http://www.femsa.com/informe2003/FMX_English03AR.pdf) (last visited Apr. 5, 2005).

8. See GRUPO CONTINENTAL, S.A., ANNUAL REPORT 2001 16-19 (2001) [hereinafter CONTINENTAL REPORT] (detailing the sales volume, per-capita consumption, market share, and distribution networks of the Mexican soft drink industry), available at <http://www.contal.com/report01.pdf> (last visited Apr. 5, 2005); see also *Big Cola Close to 5% of Market*, EL FINANCIERO (Mexico), July 21, 2003, at 27 (stating that Coca-Cola and Pepsi make up seventy percent of Mexico’s soft drink industry which has a value of twelve billion dollars), available at 2003 WLNR 256723.

9. See REMY JURENAS, CONGRESSIONAL RESEARCH SERVICE ISSUE BRIEF IB95117, SUGAR POLICY ISSUES (2001) (stating that “[i]n January and September 1998, following two additional investigations, Mexico imposed final anti-dumping duties on imports of three HFCS products from four U.S. companies”), available at [http://www.ncseonline.org/NLE/CRSreports/Agriculture/ag-27.cfm?&CFID=1575435&CFTOKEN=66313909#\\_1\\_27](http://www.ncseonline.org/NLE/CRSreports/Agriculture/ag-27.cfm?&CFID=1575435&CFTOKEN=66313909#_1_27) (last visited Apr. 5, 2005).

Panel ruled that these duties were inconsistent with the General Agreement on Tariffs and Trade (“GATT”).<sup>10</sup> Similarly, the North American Free Trade Agreement (“NAFTA”)<sup>11</sup> dispute resolution panel found that Mexico’s anti-dumping actions were inconsistent with NAFTA.<sup>12</sup> In August 2000, prior to both the NAFTA and WTO rulings, Mexico requested a dispute resolution panel to interpret

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10. See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT], available at [http://www.wto.org/english/docs\\_e/legal\\_e/gatt47.pdf](http://www.wto.org/english/docs_e/legal_e/gatt47.pdf) (last visited Apr. 5, 2005). The World Trade Organization (“WTO”) was established on April 15, 1994. Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 [hereinafter GATT 1994], available at [http://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm](http://www.wto.org/english/docs_e/legal_e/final_e.htm) See Mexico-Antidumping Investigation of High Fructose Corn Syrup (HFCS) from the United States, Report of the Panel, WT/DS132/R, ¶ 8.2 (Jan. 28, 2000) (finding that Mexico inadequately considered the impact of U.S. imports on its domestic industry as well as the threat of material injury to the Mexican sugar industry), available at 2000 WTO DS LEXIS 1; see also Mexico-Antidumping Investigation of High Fructose Corn Syrup (HFCS) from the United States, Report of the Appellate Body, WT/DS132/RW, ¶ 135 (Oct. 22, 2001) (holding that Mexico failed to implement the Panel’s original recommendations and ordering Mexico to conform to the obligations of GATT), available at 2001 WTO DS LEXIS 29; GATT, art. VI (discussing the anti-dumping principles and dispute settlement mechanisms governing the trade relationships among member-states).

11. North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289 (pts. 1-3); 32 I.L.M. 605 (pts. 4-8) (entered into force Jan. 1, 1994) [hereinafter NAFTA].

12. See Review of the Final Determination of the Antidumping Investigation on Imports of High Fructose Corn Syrup, Originating from the United States of America, Case: MEX-USA-98-1904-01, ¶¶ 112-13 (Aug. 3, 2001) [hereinafter NAFTA Corn Syrup I] (determining that the Investigating Authority failed to find a threat of injury to Mexico’s domestic sugar industry), available at [http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA\\_Chapter\\_19/Mexico/ma98010e.pdf](http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_19/Mexico/ma98010e.pdf) (last visited Apr. 5, 2005); see also Review of the Final Determination of the Antidumping Investigation on Imports of High Fructose Corn Syrup, Originating from the United States of America, Case: MEX-USA-98-1904-01, ¶ 23 (Apr. 15, 2002) [hereinafter NAFTA Corn Syrup II] (holding that after multiple investigations and reconsiderations, the Investigating Authority failed to demonstrate to the Panel that HFCS imports from the United States pose a threat of injury to Mexico’s domestic sugar market, and concluding that the anti-dumping duties violated international provisions and laws), available at [http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA\\_Chapter\\_19/Mexico/ma98011e.pdf](http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_19/Mexico/ma98011e.pdf) (last visited Apr. 5, 2005).

whether the United States was violating its NAFTA obligations by limiting Mexico's access to the U.S. sugar market.<sup>13</sup> In January 2002, Mexico imposed a twenty-percent tax on soft drinks made with sweeteners other than cane sugar.<sup>14</sup>

In June 2004, the Office of the U.S. Trade Representative asked the WTO to establish a dispute settlement panel and challenge Mexico's tax measures.<sup>15</sup> The United States claims that Mexico's HFCS tax is inconsistent with the national treatment provisions under Article III:2 and Article III:4 of the GATT.<sup>16</sup> Mexico does not

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13. See *USTR Challenges Mexican HFCS Tax in WTO with Corn Refiners Support*, INSIDE U.S. TRADE, Mar. 19, 2004, at 7-8 [hereinafter *USTR Challenges*] (noting that the case hinges on a side letter to the original NAFTA, submitted by the United States to Congress as part of the implementing bill, limiting Mexico's access to the U.S. sugar market). Mexico contends that it never signed the side letter agreement. *Id.*

14. See Elisabeth Malkin, *In Mexico, Sugar vs. U.S. Corn Syrup*, N.Y. TIMES, June 9, 2004, at W1 (explaining that Mexico imposed the soft drink tax as a response from the U.S. failure to accept its surplus sugar imports replaced by HFCS), available at 2004 WLNR 5417601; see also *Soft Drink Tax*, *supra* note 7 (asserting that Mexico imposed the twenty-percent beverage tax to reform its struggling tax system). The United States and Mexico engaged in discussions relating to the soft drink tax, but they failed to arrive at a resolution. *Id.*

15. See Press Release on Beverage Taxes, *supra* note 4 (contending that Mexico's soft drink tax violates WTO rules by discriminating against U.S. HFCS products and severely restricting U.S. exports of corn based sweeteners); see also Mexico – Tax Measures on Soft Drinks and Other Beverages, Constitution of the Panel Established at the Request of the United States, Note by the Secretariat, Revision, WT/DS308/5/Rev.1, ¶ 1 (Aug. 25, 2004) (establishing the Dispute Settlement Body (“DSB”) in accordance with Article 6 of the Dispute Settlement Understanding (“DSU”)), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/distpu\\_status\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/distpu_status_e.htm) (last visited Apr. 5, 2005).

16. See Mexico – Tax Measures on Soft Drinks and Other Beverages, Request for Consultations by the United States, WT/DS308/1 (Mar. 18, 2004) (providing background to the soft drink dispute), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm) (last visited Apr. 5, 2005); see generally Mexico – Tax Measures on Soft Drinks and Other Beverages, Answers of the United States to Questions of the Panel in Relation to the First Substantive Meeting with the Parties, WT/DS308, (Dec. 20, 2004) [hereinafter U.S. Answers I] (presenting the first U.S. response to questions from the WTO Panel), available at [http://www.ustr.gov/assets/Trade\\_Agreements/Monitoring\\_Enforcement/Dispute\\_Settlement/WTO/Dispute\\_Settlement\\_Listings/asset\\_upload\\_file169\\_6449.pdf](http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file169_6449.pdf) (last visited Apr. 5, 2005); Press Release, U.S. Sen. Comm. on Fin., Grassley

contest the Article III allegations, and instead argues that the HFCS tax falls within the Article XX(d) exception.<sup>17</sup> The Mexican government also requests that the WTO panel decline jurisdiction over the dispute and remove the case to a NAFTA panel.<sup>18</sup>

This Comment explores whether the HFCS tax violates Article III:2 and/or Article III:4, and whether the HFCS tax is justified under the Article XX(d) exception.<sup>19</sup> Part I explains the relevant provisions in Article III and Article XX<sup>20</sup> and discusses previous Article III and Article XX jurisprudence.<sup>21</sup> Part I also provides background on the

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Urges President Bush to Raise Corn Syrup Dispute With Mexican President (Mar. 22, 2005) (requesting that President Bush discuss the HFCS dispute with the Mexican President Vicente Fox at the leaders' meeting), *available at* <http://www.senate.gov/~finance/press/Gpress/2005/prg032205.pdf> (last visited Apr. 9, 2005).

17. See *Mexico Argues HFCS Dispute Should Be Settled in NAFTA, Not WTO*, INSIDE U.S. TRADE, Nov. 5, 2004, at 15 [hereinafter *Mexico: NAFTA, Not WTO*] (claiming that its tax measures are justified to secure compliance with NAFTA); see also Mexico – Tax Measures on Soft Drinks and Other Beverages, Second Submission of the United States of America, WT/DS308 (Jan. 21, 2005) [hereinafter U.S. Second Submission] (repeating Mexico's claim that the United States breached its NAFTA obligations to Mexico), *available at* [http://www.ustr.gov/assets/Trade\\_Agreements/Monitoring\\_Enforcement/Dispute\\_Settlement/WTO/Dispute\\_Settlement\\_Listings/asset\\_upload\\_file577\\_6449.pdf](http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file577_6449.pdf) (last visited Apr. 5, 2005).

18. See *Mexico: NAFTA, Not WTO*, *supra* note 17, at 15 (declaring that the United States failed to abide by the trade sugar agreements in the original NAFTA). Mexico also claims that the United States blocked the appointment of panelists to the NAFTA dispute. *Id.* But see Mexico – Tax Measures on Soft Drinks and Beverages, Opening Statement of the United States, First Meeting of the Panel, WT/DS308, ¶ 13 (Dec. 2, 2004) [hereinafter U.S. Opening Statement I] (maintaining that Mexico concedes that the WTO Panel has jurisdiction to hear the present dispute), *available at* [http://www.ustr.gov/assets/Trade\\_Agreements/Monitoring\\_Enforcement/Dispute\\_Settlement/WTO/Dispute\\_Settlement\\_Listings/asset\\_upload\\_file793\\_6449.pdf](http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file793_6449.pdf) (last visited Apr. 5, 2005).

19. See Peter M. Gerhart & Michael S. Baron, *Understanding National Treatment: The Participatory Vision of the WTO*, 14 IND. INT'L & COMP. L. REV. 505, 530-31 (2004) (discussing the application of Article III and Article XX in GATT jurisprudence). The authors also point out that an Article III violation turns on whether there is a competitive relationship between the products in question. *Id.*

20. See discussion *infra* Part I.A (providing an overview of the national treatment and general exception principles).

21. See discussion *infra* Part I.A (reviewing Article III:2, Article III:4, and



HFCS tax,<sup>22</sup> as well as U.S. and Mexican arguments regarding the HFCS tax dispute.<sup>23</sup> Part II analyzes these arguments in light of pertinent Article III, Article XX(d), and Article XX jurisprudence.<sup>24</sup> Part III offers recommendations as to how Mexico should alter its tax measures to remain consistent with Article III.<sup>25</sup> Part III also proposes that the United States and Mexico should seek a resolution under NAFTA.<sup>26</sup>

## I. BACKGROUND

### A. THE WORLD TRADE ORGANIZATION – GATT 1994

#### 1. Article III - National Treatment

National treatment is a central principle of the GATT multilateral trading system.<sup>27</sup> The fundamental premise of the Article III national treatment obligation is that contracting parties will treat imported products similar to domestic products.<sup>28</sup> The first sentence of Article III:2 prohibits the application of internal taxes, directly or indirectly,

Article III:4 jurisprudence).

22. See discussion *infra* Part I.B (describing the Mexican tax measures, which led to the present dispute).

23. See discussion *infra* Parts I.C & I.D (relating the major arguments that the United States and Mexico submitted to the WTO).

24. See discussion *infra* Part II (analyzing U.S. and Mexican arguments using Article III and Article XX case law).

25. See discussion *infra* Part III (discussing the impact of the Mexican tax measures and suggestions on how Mexico could conform to Article III of GATT).

26. See discussion *infra* Part III (suggesting that both parties should abide by their NAFTA obligations and submit their dispute before a NAFTA Panel).

27. See John H. Jackson, *National Treatment Obligations and Non-tariff Barriers*, 10 MICH. J. INT'L L. 207, 208-13 (1989) (providing commentary on the national treatment principle and its application by the GATT dispute settlement body); see also Frederick M. Abbott, *GATT and the European Community: A Formula for Peaceful Coexistence*, 12 MICH. J. INT'L L. 1, 16 (1990) (discussing the national treatment principle in relation to Article XXIV).

28. See GATT, *supra* note 10, art. III (establishing the national treatment principle with respect to internal taxation and regulation); see also Michael Trebilcock, *The National Treatment Principle in International Trade Law*, 8 U. TORONTO L.J. 1, 2 (2004) (stating that the relevance of the national treatment principle grew as a result of the worldwide reduction of tariffs in the 1980s).

to imported products “in excess of those applied, directly or indirectly to like domestic products.”<sup>29</sup> Article III:2, second sentence, states that contracting parties shall not apply internal taxes to imported or domestic products inconsistent with their obligations under Article III:1,<sup>30</sup> which prohibits the application of internal taxes or charges “to imported or domestic products so as to afford protection to domestic production.”<sup>31</sup> Parties can prove an Article III:2, second sentence violation where two directly competitive or substitutable (“DCS”) products are not similarly taxed.<sup>32</sup> Finally, Article III:4 states that contracting parties shall provide no less than favorable treatment to imported products.<sup>33</sup>

*a. Article III:2, First Sentence: Japan – Taxes on Alcoholic Beverages*

The first step in proving an Article III:2, first sentence violation involves a “like products” analysis.<sup>34</sup> The Appellate Body reporting in *Japan – Taxes on Alcoholic Beverages* (“*Japan Beverages*”)<sup>35</sup>

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29. GATT, *supra* note 10, art. III:2, first sentence.

30. *Id.*, art. III:2, second sentence.

31. *Id.*, art. III:1.

32. See *id.* Annex I, Ad. art. III, ¶ 2 (noting that an internal tax under III.2, first sentence is considered inconsistent with provisions of III.2, second sentence only where there is direct competition between the taxed product and a DCS product which is not similarly taxed); see also Henrick Horn & Petros C. Mavroidis, *Still Hazy After All These Years: The Interpretation of National Treatment in the GATT/WTO Case-law on Tax Discrimination*, 15 EUR. J. INT’L L. 39, 41 (2004) (highlighting three WTO cases involving Article III:2, first and second sentences).

33. See GATT, *supra* note 10, art. III:4 (providing that imported products shall receive equal favorable treatment in all laws or regulations that affect the “sale, purchase, transportation, distribution or use” of like domestic products).

34. See *Japan – Taxes on Alcoholic Beverages*, Report of the Appellate Body, WT/DS58/AB/R; WT/DS10/AB/R; WT/DS11/AB/R (Oct. 4, 1996) [hereinafter *Japan Beverages*, Report of the Appellate Body] (establishing that the term “like product” has the same strict interpretation in both Article III:2 and Article III:4), available at 1996 WTO DS LEXIS 5, at \*42-50. The Appellate Body discussed that Panels should narrowly interpret the like products standard. *Id.*; see also Gerhart & Baron, *supra* note 19, at 530-31 (noting that Border Tax Adjustments and the Japan Alcohol cases established the appropriate standard for evaluating like products). The authors emphasized that WTO Panels evaluate the likeness of two products in the marketplace. *Id.*

35. See *Japan Beverages*, Report of the Appellate Body, *supra* note 34, at \*1-4 (evaluating whether the Japanese Liquor Tax Law violated Article III, first and

evaluated likeness based upon the products' tariff classification, end-uses in the market, consumers' tastes and habits, and the product's properties, nature, and quality.<sup>36</sup> With respect to the "in excess" clause of Article III:2, first sentence, the Appellate Body found that "even the smallest amount of 'excess' is too much."<sup>37</sup>

The *Japan Beverages* decision involved Japan's Liquor Tax Law, which taxed their domestic liquor, *shochu*, at a lower rate than imported liquors.<sup>38</sup> The Appellate Body found that *shochu* and vodka were like products as they were both white/clean liquors composed of similar raw materials, had similar physical characteristics and end-uses, and had a comparable tariff schedule under the Harmonized System ("HS") Classification System.<sup>39</sup> Thereafter, the Appellate

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second sentence of GATT); *see also* Japan – Taxes on Alcoholic Beverages, Report of the Panel, WT/DS8/R; WT/DS10R; WT/DS11/R, ¶¶ 6.23-6.25 (July 11, 1996) [hereinafter *Japan Beverages*, Report of the Panel] (conducting a like products analysis between domestic and foreign alcoholic beverages), *available at* 1996 WTO DS LEXIS 6.

36. *See* *Japan Beverages*, Report of the Appellate Body, *supra* note 34, at \*42-50 (asserting that Panels decide likeness on a case-by-case basis); *see also* Trebilcock, *supra* note 28, at 7 (noting that previous WTO Panels also rely on the Working Party Report on "Border Tax Adjustments" when evaluating like products).

37. *Japan Beverages*, Report of the Appellate Body, *supra* note 34, at \*50 (discussing that a party who fails to afford "identical or better tax treatment" than a like product will likely fall into the in excess category).

38. *See id.* at \*17-19 (evaluating whether Japan's Liquor Tax Law violated Article III:2 of GATT); *see also* Edward S. Tsai, "Like" is a Four-Letter Word – GATT Article III's "Like Product" Conundrum, 17 BERKELEY J. INT'L L. 26, 30-32 (1999) (describing the 1987 Japanese Alcoholic Beverage Report in which the Panel decided whether *shochu* and other alcoholic beverages were like products under Article III:2). *See generally* Ramon R. Gupta, *Appellate Body Interpretation of the WTO Agreements: A Critique in Light of Japan-Taxes on Alcoholic Beverages*, 6 PAC. RIM. L. & POL'Y J. 683, 704 (1997) (commenting that the Liquor Tax Law taxed whisky six times higher than *shochu*, the local liquor).

39. *See* *Japan Beverages*, Report of the Panel, *supra* note 35, ¶ 6.23 (noting that a 1987 Panel considered whether Japan's Liquor Tax Law violated Article III:2, similarly found that *shochu* and vodka were like products); *see also* *Japan Beverages*, Report of the Appellate Body, *supra* note 34, at \*45-46 (analogizing likeness to an accordion and stating that "the accordion of likeness stretches and squeezes in different places as different provisions of the WTO"); Peggy Chaplin, *An Introduction to the Harmonized System*, 12 N.C. J. INT'L L. & COM. REG. 417, 418 (1987) (explaining that the HS Classification System provides a standard classification structure for internationally traded goods). The author discusses that

Body held that the tax on imported liquors was in excess of those on like local liquors.<sup>40</sup> As a result, the Appellate Body found that the Japanese Liquor Tax violated Article III:2, first and second sentences.<sup>41</sup>

*b. Article III:2, Second Sentence: Korea –  
Taxes on Alcoholic Beverages*

In addition to raising an Article III:2, first sentence violation, a party may also raise an Article III:2, second sentence violation.<sup>42</sup> The Appellate Body reporting in *Korea – Taxes on Alcoholic Beverages* (“*Korea Beverages*”),<sup>43</sup> held that a like products characterization is a “sub-set”<sup>44</sup> of DCS products.<sup>45</sup> Thus, it appears that a WTO panel will evaluate whether two products are DCS based on their cross-price elasticity, elasticity of substitution, common end-uses,

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the Customs Cooperation Council created the HS System to establish a uniform reporting system in international trade transactions. *Id.*

40. See Japan Beverages, Report of the Appellate Body, *supra* note 34, at \*50 (defining that “in excess of” is “any amount of tax on imported products ‘in excess of’ the tax on domestic like products”).

41. See *id.* at \*70-72 (recommending that Japan conform its Liquor Tax Law to GATT).

42. See Horn & Mavroidis, *supra* note 32, at 52 (explaining that in order for a party to prove an Article III:2, second sentence violation, they must show that there is a DCS relationship between two products, that they are “not similarly taxed,” and that the tax measure “affords protection to the domestic industry”).

43. See *Korea - Taxes on Alcoholic Beverages*, Report of the Appellate Body, WT/DS75/AB/R; WT/DS75/AB/R; WT/DS84/AB/R, ¶ 2 (Jan. 18, 1999) [hereinafter *Korea Beverages*, Report of the Appellate Body], available at 1999 WTO DS LEXIS 3; see also *Korea – Taxes on Alcoholic Beverages*, Report of the Panel, WT/DS75/R; WT/DS84/R, ¶ 11.1 (Sept. 17, 1998) [hereinafter *Korea Beverages*, Report of the Panel] (finding a DCS relationship between the domestic and foreign alcoholic beverages), available at 1998 WTO DS LEXIS 10. The Panel recommended that Korea change its laws and conform with its GATT obligations. *Id.*

44. See *Korea Beverages*, Report of the Appellate Body, *supra* note 44, ¶ 118 (noting that the DCS classification is broader than the like products category).

45. See *id.* (discussing that a Panel can evaluate “imperfectly substitutable products” under Article III:2 second sentence and “perfectly substitutable products” under Article III:2, first sentence). The reverse does not hold, however, because if a Panel finds that products are DCS, they are not directly regarded as like products. *Id.*

consumers' tastes and habits, the products' properties, and tariff classifications.<sup>46</sup>

In *Korea Beverages*, the Appellate Body held that two Korean liquor tax laws—which imposed fixed and variable tax rates on imported spirits<sup>47</sup>—violated Article III:2, second sentence of GATT, finding that Korean *soju* and other distilled beverages were DCS products.<sup>48</sup> The Appellate Body affirmed the Panel's holding that their similar physical properties rendered them DCS products, despite the different filtration and aging processes involved in producing *soju* and the imported liquors.<sup>49</sup> In distinguishing the products as DCS, the Appellate Body recognized that *soju* and other liquors had comparable end-uses and similar marketing strategies.<sup>50</sup> Additionally, the Appellate Body found that *soju* and other liquors

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46. See Horn & Mavroidis, *supra* note 32, at 52 (maintaining that potential competition and evidence from other markets are relevant factors in determining a DCS relationship).

47. See *Korea Beverages*, Report of the Appellate Body, *supra* note 43, ¶ 1 (noting that the government would apply the tax rate depending on which one of the eleven fiscal categories the alcoholic beverages fell in); see also *Korea Beverages*, Report of the Panel, *supra* note 43, ¶ 2.20 (discussing that the domestic liquor, *soju*, had a tax rate of thirty-five and fifty percent, while imported distilled liquors had a tax rate of 80 to 100 percent).

48. See *Korea Beverages*, Report of the Appellate Body, *supra* note 43, ¶ 169 (concluding that *soju* and the imported liquors were DCS products, and that the different tax rates imposed on the imported products afforded protection to the domestic industry); see also *Korea Beverages*, Report of the Panel, *supra* note 43, ¶ 10.98 (maintaining that the physical characteristics, end-uses, channels of distribution and prices led the Panel to determine that *soju* and the other imported liquors were DCS products); Dukgeun Ahn, *Korea in the GATT/WTO Dispute Settlement System: Legal Battle for Economic Development*, 6 J. INT'L ECON. L. 597, 612-13 (2003) (suggesting that the Korea Alcoholic Beverage cases initiated a recognition of the WTO among the Korean public).

49. See *Korea Beverages*, Report of the Panel, *supra* note 43, ¶ 10.67 (observing that the different filtration and aging processes were an insufficient basis to preclude a finding of non-substitutability); see also *Korea Beverages*, Report of the Appellate Body, *supra* note 43, ¶ 169 (upholding the Panel's decision).

50. See *id.* ¶¶ 10.78-10.79 (emphasizing that the Panel evaluated market trends when making its DCS determination). The Panel concluded that the products competed in the same market. *Id.*

had similar channels of distribution and points of sale because similar retail outlets sold them.<sup>51</sup>

*c. Ad Article III: Chile – Taxes on Alcoholic Beverages*

After establishing a DCS relationship, a Panel will evaluate whether the domestic products are “not similarly taxed.”<sup>52</sup> The Appellate Body considering *Chile – Taxes on Alcoholic Beverages* (“*Chile Beverages*”)<sup>53</sup> held that a party must show that a tax differential is more than *de minimis* to meet the “not similarly taxed” standard.<sup>54</sup> After a Panel finds that a product is “not similarly taxed,” then it must inquire whether the measure affords protection to the domestic industry.<sup>55</sup>

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51. See *id.* ¶¶ 10.85-10.86 (noting that restaurants and cafes were major points of distribution for both *soju* and the imported alcoholic beverages).

52. See GATT, *supra* note 10, Annex I, Ad. art. III, ¶ 2; see also Japan Beverages, Report of the Appellate Body, *supra* note 34, at \*58-61 (discussing the significance of the distinction between in excess of and not similarly taxed). The Appellate Body held that not similarly taxed involves a different standard than in excess of. *Id.*

53. See Chile – Taxes on Alcoholic Beverages, Report of the Appellate Body, WT/DS87/AB/R; WT/DS110/AB/R (Dec. 13, 1999) [hereinafter Chile Beverages, Report of the Appellate Body], available at 1999 WTO DS LEXIS 28.

54. See *id.* ¶ 80 (finding that the Chilean Liquor Tax did not similarly tax imported alcoholic beverages and afforded protection to the domestic industry); see also Japan Beverages, Report of the Appellate Body, *supra* note 34, at \*58-61 (holding that panels decide on a case-by-case basis whether a taxation amount is *de minimis* and that a burden must be more than *de minimis* to meet the not similarly taxed provision). An imported product is not similarly taxed if it is DCS with domestic products and the taxation level is more than *de minimis*. *Id.* Observers point out that WTO Panels have not defined the term *de minimis*. Horn & Mavroidis, *supra* note 32, at 51.

55. See Japan Beverages, Report of the Appellate Body, *supra* note 34, at \*61 (asserting that “[i]f the measure is applied to imported or domestic products so as to afford protection to domestic production, then it does not matter that there may not have been any desire to engage in protectionism in the minds of the legislators or the regulators who imposed the measure”). Instead of evaluating legislative intent, a Panel analyzes how parties apply the tax measure. *Id.* at \*61-62; see also Chile Beverages, Report of the Panel, WT/DS87/R; WT/DS110/R, ¶ 7.115 (June 15, 1999) [hereinafter Chile Beverages, Report of the Panel] (noting that the dispute settlement panels conduct their so as to afford protection inquiry on a case-by-case basis and analyze the protective application of a tax by its design, architecture, and the structure of the measure), available at 1999 WTO DS LEXIS

The *Chile Beverages* Appellate Body affirmed the Panel's holding that the Chilean liquor law violated Article III:2, second sentence of GATT.<sup>56</sup> The Chilean law taxed seventy-five percent of the local liquor at the lowest rate of twenty-seven percent, while taxing ninety-five percent of imported liquors at the highest rate of forty-seven percent.<sup>57</sup> The Appellate Body found that the difference in taxation was more than *de minimis*, and as such, that the Chilean law did not similarly tax domestic and foreign products.<sup>58</sup> The Appellate Body also concluded that the structure of the tax measure and the large margin between the tax rates resulted in a taxation scheme that afforded protection to the domestic industry.<sup>59</sup>

*d. Article III:4: Canada – Automotive Industry*

The central objective of Article III:4 is to provide a competitive relationship in the marketplace for domestic and imported products.<sup>60</sup> To prove an Article III:4 violation, a complaining party must show (1) that the imported and domestic products are “like,”<sup>61</sup> (2) that the

12. The Panel in this dispute did evaluate legislative intent. *Id.*

56. See *Chile Beverages*, Report of the Panel, *supra* note 55, ¶ 7.88 (concluding that Chilean *pisco* and the imported distilled spirits and liqueurs were directly competitive and substitutable).

57. See Raj Bhala & David Gantz, *WTO Case Review 2000*, 18 ARIZ. J. INT'L & COMP. L. 1, 37 (2001) (discussing that the WTO Panel questioned the structure of the Chilean Tax Law in addition to its application).

58. See *Chile Beverages*, Report of the Appellate Body, *supra* note 53, ¶ 80 (upholding the Panel's finding regarding the interpretation and application of the term not similarly taxed); see also *Chile Beverages*, Report of the Panel, *supra* note 55, ¶ 7.104 (maintaining that the dissimilar taxation inquiry is separate from the so as to afford protection inquiry).

59. See *Chile Beverages*, Report of the Appellate Body, *supra* note 53, ¶ 71 (noting that Chile had not offered sufficient countervailing arguments to preclude a finding that its different tax rates intended to afford protection to its domestic industry); see also *Chile Beverages*, Report of the Panel, *supra* note 55, ¶ 7.141 (finding that the structure of the Chilean tax was discriminatory where the domestic industry was the sole beneficiary).

60. See *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Report of the Appellate Body, WT/DS161/AB/R; WT/DS169/AB/R, ¶ 1 (Dec. 11, 2000) [hereinafter *Korea Beef*, Report of the Appellate Body] (affirming that Article III:4 strives to guarantee equal market access and market opportunities for imported and domestic products), available at 2000 WTO DS LEXIS 36.

61. See Trebilcock, *supra* note 28, at 35 (explaining that Article III:4 applies

measure at issue is a “law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use” and (3) that the measure extends “less favourable treatment” to the imported product than to the domestic product.<sup>62</sup>

In *Canada – Certain Measures Affecting the Automotive Industry* (“*Canada Automotive*”)<sup>63</sup> the Panel evaluated Canadian measures which granted a duty-free exemption to motor vehicles.<sup>64</sup> The duty-free treatment only applied to motor vehicles that had a minimum amount of Canadian value added (“CVA”) and a certain production-to-sales ratio in its local production of motor vehicles.<sup>65</sup> The Panel found that CVA requirements provided domestic products with an advantage over imported products.<sup>66</sup> As a result, the Panel concluded that the Canadian measures afforded imported products less

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only to like products and not to DCS products). However, panels use the same like products standard for Article III:2, first sentence and Article III:4. *Id.* at 45.

62. European Communities – Regime for the Importation, Sale and Distribution of Bananas, Report of the Appellate Body, WT/DS27/AB/R, ¶ 210 (Sept. 9, 1997) [hereinafter European Communities, Report of the Appellate Body], available at 1997 WTO DS LEXIS 27; see *id.* ¶ 216 (noting that Article III:4 makes no mention of Article III:1, and as such, “a determination of whether there has been a violation of Article III:4 does *not* require a separate consideration of whether a measure ‘afford[s] protection to domestic production’”); see also Trebilcock, *supra* note 28, at 36 (discussing that Article III:4 is a more specific provision than Article III:1). The author asserts that a party does not have to prove the issue of so as to afford protection because Article III:4 functions independently of Article III:1. *Id.*

63. See *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/R; WT/DS142/R, ¶¶ 2.1-2.2 (Feb. 11, 2000) [hereinafter *Canada Automotive*, Report of the Panel] (providing a background to the Canadian measures in dispute), available at 2000 WTO DS LEXIS 72; see also Trebilcock, *supra* note 28, at 39-41 (analyzing the *Canada Automotive* decision with respect to Article III:4).

64. See *Canada Automotive*, Report of the Panel, ¶¶ 2.3 - 2.5 (stating that the measures arose out of the Auto Pact treaty which sought to expand trade of motor vehicles and parts between the United States and Canada).

65. See *id.* ¶ 2.3 (establishing that a motor vehicle importer had to meet the requirements of a “manufacturer” to qualify for the duty exemptions); see also Bhala & Gantz, *supra* note 57, at 22-24 (clarifying the three tests that importers had to satisfy to qualify as a “manufacturer” under the Auto Pact treaty).

66. See *Canada Automotive*, Report of the Panel, ¶ 10.82 (concluding that the advantage created by the CVA requirements affected the internal sale or use of domestic products).



favorable treatment than domestic products, inconsistent with Article III:4.<sup>67</sup>

## 2. Article XX – General Exceptions

Article XX provides a party defending against a claimed breach of GATT obligations with a series of defenses which are based upon public policy concerns.<sup>68</sup> The most frequently-litigated public policy exceptions to members' obligations include protection of health, enforcement of laws and regulations, and conservation measures.<sup>69</sup> For an Article XX defense to apply, the WTO ruling body must first conclude that the measure violates a GATT provision.<sup>70</sup> Thereafter, the WTO panel analyzes whether the measure falls within one of the Article XX exceptions.<sup>71</sup>

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67. See *id.* ¶ 10.85 (finding that the advantage created by the CVA requirements upset the competitive relationship between domestic and imported products); see generally Italian Discrimination Against Imported Agricultural Machinery, Report of the Panel for Conciliation, L/833 – 7S/60 (Oct. 23, 1958) [hereinafter Italian Discrimination, Report of the Panel for Conciliation] (finding that an Italian law which granted special credit facilities to domestic agricultural machinery violated Article III:4), available at 1958 GATTPD LEXIS 1.

68. See GATT *supra* note 10, art. XX (providing ten general exceptions to member-states' GATT obligations); see also Salman Bal, *International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT*, 10 MINN. J. GLOBAL TRADE 62, 69 (2001) (elaborating on the scope and practice of Article XX); United States – Restrictions on Imports of Tuna, Report of the Panel, DS29/R, ¶ 5.26 (June 1994) [hereinafter U.S. Tuna, 1994 Report of the Panel] (establishing that Panels should narrowly interpret the Article XX exception under GATT), available at 1994 GATTPD LEXIS 7.

69. See JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS, CASES, MATERIALS AND TEXT § 13.1 (4th ed. 2002) (providing an overview of Article XX and jurisprudence on the most frequently litigated provisions); see also GATT *supra* note 10, arts. XX(b), XX(d), XX(g) (providing exceptions for protection of health, enforcement of laws and regulations, and conservation measures, respectively).

70. See United States – Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, WT/DS58/AB/R, ¶ 150 (Oct. 12, 1998) [hereinafter Shrimp Turtle, Report of the Appellate Body] (affirming that a measure must first have a discriminatory impact), available at 1998 WTO DS LEXIS 13; see also Alan O. Sykes, *The Least Restrictive Means*, 70 U. CHI. L. REV. 403, 405 (2003) (noting that a party can invoke Article XX as an affirmative defense in response to an accused breach of GATT).

71. See United States – Section 337 of the Tariff Act of 1930, Report of the

*a. Article XX(d): Korea – Measures on Beef*

Article XX(d) allows a party to secure enforcement of its laws or regulations through the use of an otherwise inconsistent GATT measure.<sup>72</sup> In *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (“*Korea Beef*”)<sup>73</sup> the Appellate Body stated that a party who seeks to invoke an Article XX(d) defense must first prove that the measure is provisionally justified, by demonstrating that the measure (1) secures compliance with laws or regulations consistent with GATT and (2) is necessary to secure the stated compliance.<sup>74</sup>

The *Korea Beef* Appellate Body analyzed whether Korea’s dual retail system for imported and domestic beef fell under the Article XX(d) exception of GATT.<sup>75</sup> The dual retail system created separate distribution channels for domestic and imported beef.<sup>76</sup> The Appellate Body found that Korea established the regulation to ensure

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Panel, L/6439 - 36S/345, ¶ 5.9 (Nov. 7, 1989) [hereinafter U.S. Tariff, Report of the Panel] (stating that the Panel considered the Article XX(d) exception after finding that a measure was inconsistent with a GATT provision), *available at* 1989 GATTPD LEXIS 2; *see also* United States - Standards for Reformulated and Conventional Gasoline Report of the Panel, WT/DS2/R, ¶ 6.20 (Jan. 29, 1996) [hereinafter U.S. Gasoline, Report of the Panel] (declaring that the party who invokes an Article XX exception has the burden of proof), *available at* 1996 WTO DS LEXIS 2.

72. *See* United States – Restrictions on Imports of Tuna, Report of the Panel, DS21/R - 39S/155, ¶ 5.40 (Sept. 3, 1991) [hereinafter U.S. Tuna, 1991 Report of the Panel] (holding that the laws or regulations the member-state seeks to enforce under XX(d) must themselves comply with GATT rules), *available at* 1991 GATTPD LEXIS 1.

73. *Korea Beef*, Report of the Appellate Body, *supra* note 60.

74. *See id.* ¶ 157 (noting that a party who seeks to claim an Article XX(d) affirmative defense has the burden of proving both elements); *see also* Canada – Certain Measures Concerning Periodicals, Report of the Panel, WT/DS31/R, ¶ 5.7 (Apr. 5, 1997) [hereinafter Canada, Report of the Panel] (same), *available at* 1997 WTO DS LEXIS 5.

75. *See* Sykes, *supra* note 70, at 407 (explaining that Korea’s dual retail system required that small stores only carry domestic *or* imported beef—with the choice of which type of beef to sell—while larger stores had to sell domestic *and* imported beef, but in separate sections of the store).

76. *See* Raj Bhala & David A. Gantz, *WTO Case Review 2001*, 19 ARIZ. J. INT’L & COMP. L. 457, 474 (2002) (explaining that the dual system required retail store owners to distinguish between domestic and imported beef products in their store displays).

against deceptive practices which were inconsistent with Korea's Unfair Competition Act.<sup>77</sup> The Appellate Body found, however, that the dual retail system was not necessary to secure compliance with the Unfair Competition Act, and that Korea could enforce the Act through more cost-effective and conventional WTO-consistent measures.<sup>78</sup> Moreover, the Appellate Body established a balancing test and found that Korea did not require a dual retail system in other product areas where similar fraudulent practices could arise.<sup>79</sup>

*b. The Chapeau to Article XX: United States – Shrimp Turtle*

In addition to proving that a measure is provisionally justified under one of the paragraphs of Article XX, a party must prove that the measure meets the standard set forth in the introductory phrase to Article XX, also known as the chapeau.<sup>80</sup> The central objectives of the chapeau are to prevent discrimination and guard against

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77. See Korea Beef, Report of the Appellate Body, *supra* note 60, ¶ 158 (explaining the rationale of the Korean legislation in enacting the dual retail system).

78. See *id.* ¶¶ 172-74 (agreeing with the Panel's finding that Korea could enforce its Unfair Competition Act with WTO-compatible enforcement measures). The Appellate Body noted Korea implemented WTO-compatible enforcement measures for the Unfair Competition Act, such as investigations, prosecutions, fines and record-keeping, in other related product areas. *Id.*; see also MELAKU GEBOYE DESTA, *THE LAW OF INTERNATIONAL TRADE IN AGRICULTURAL PRODUCTS, FROM GATT 1947 TO THE WTO AGREEMENT ON AGRICULTURE* 43 (2002) (describing the necessity standard with respect to agricultural products under GATT). The author noted that Panels consistently interpret "necessary" under the different GATT provisions. *Id.* at 44; Bal, *supra* note 68, at 97-98 (commenting on the current scope and interpretation of the necessary prong under Article XX).

79. See Korea Beef, Report of the Appellate Body, *supra* note 60, ¶ 164 (asserting that WTO panels should weigh the contribution of the measure in securing the enforcement of a law, the common interests or values sought by the law, and the impact that the measure has on the imports or exports).

80. GATT, *supra* note 10, art. XX; see Allan Rosas, *Non-Commercial Values and the World Trade System: Building on Article XX*, in *ESSAYS ON THE FUTURE OF THE WTO: FINDING A NEW BALANCE* 80 (Kim Van der Borgh et al. eds., 2003) (reflecting on the strict application of the chapeau in previous WTO jurisprudence). The author discusses two situations where parties failed to satisfy the chapeau after meeting the provisional requirements under Article XX. *Id.* at 80-81.

protectionist policies.<sup>81</sup> Specifically, the chapeau states that, in its application, measures cannot arbitrarily or unjustifiably discriminate between countries “where the same conditions prevail,” nor can they be a “disguised restriction on international trade.”<sup>82</sup>

In *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (“*Shrimp Turtle*”),<sup>83</sup> the Appellate Body analyzed whether a U.S. law prohibiting shrimp imports from countries that failed to use turtle-excluder devices satisfied the chapeau.<sup>84</sup> The Appellate Body concluded that the law unjustifiably and arbitrarily discriminated between countries, mainly because of the United States’ failure to negotiate via an international agreement.<sup>85</sup> The Appellate Body also highlighted the coercive effect that the law had on the policy decisions of foreign nations, which had the effect of compelling the United States’ trading partners to adopt a similar regulatory program as the United States’.<sup>86</sup> The Appellate Body

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81. See Rosas, *supra* note 80, at 81 (noting that when a country discriminates against imported products, it raises a presumption of protectionism).

82. See Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 37 J. WORLD TRADE 817, 830-31 (stating that previous panels have held that publicly announced trade measures are not considered protectionist policies violating the disguised discrimination provision of the chapeau); see also Bal, *supra* note 68, at 71-75 (providing a discussion on how the WTO has applied the chapeau exception).

83. See *Shrimp Turtle*, Report of the Appellate Body, *supra* note 70, ¶¶ 1-8 (providing the factual and legal background of the *Shrimp Turtle* dispute at the panel stage).

84. See Terence P. Stewart & Mara M. Burr, *Trade and Domestic Protection of Endangered Species: Peaceful Coexistence or Continued Conflict? The Shrimp-Turtle Dispute and the World Trade Organization*, 23 WM. & MARY ENVTL. L. & POL’Y REV. 109, 135-139 (1998) (observing that the United States argued that its measures fell under sections (b) and (g) of Article XX).

85. See *Shrimp Turtle*, Report of the Appellate Body, *supra* note 70, ¶¶ 171-72 (highlighting that the parties should have attempted to resolve their dispute through the Inter-American Convention). The Inter-American Convention was an international agreement that set forth policies relating to the conservation and protection of sea turtles. *Id.* ¶ 169.

86. See *id.* ¶¶ 173-75 (finding that the rigid certification and procedural requirements of the law constituted arbitrary discrimination or a disguised restriction on trade); see also Gregory Shaffer, *International Trade-WTO-Quantitative Restrictions-Environmental Protection-Endangered Species-U.S. Import Ban on Shrimp*, 93 AM. J. INT’L L. 507, 513 (1999) (comparing the

ruled, therefore, that the U.S. law was not justified under the chapeau of Article XX.<sup>87</sup>

## B. MEXICAN TAX MEASURES

In January 2002, the Mexican government imposed a twenty-percent sales tax and a twenty-percent distribution tax on beverages, soft drinks, and syrups made from sweeteners other than cane sugar.<sup>88</sup> The Law on the Special Tax on Production and Services (“Ley del Impuesto Especial Sobre Produccion y Servicios”) taxes the internal transfer or the importation of all soft drinks and syrups using sweeteners other than cane sugar.<sup>89</sup> In addition, the Law on the Special Tax on Production and Services (“Reglamento de la Ley del

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Appellate Body’s rationale in previous GATT disputes relating to environmental disputes in international trade).

87. See Shrimp Turtle, Report of the Appellate Body, *supra* note 70, ¶ 186 (finding that the U.S. law constituted arbitrary and unjustifiable discrimination).

88. See Rebecca Hasset, *Sugar War*, BUS. MEX., May 1, 2004, at 12 (discussing the history of the sugar dispute and Mexico’s rationale for imposing the HFCS beverage tax), available at 2004 WLNR 11255785.

89. See HFCS Tax, *supra* note 1, arts. 1-2 (establishing the twenty percent rate applicable to soft drinks, beverages, syrups, concentrates, powders and flavor extracts or essences); see also Mexico, Panel Request, *supra* note 1 (reflecting the numerous laws passed by the Mexican Congress related to the HFCS beverage tax); Mexico – Tax Measures on Soft Drinks and Other Beverages, Answers of the United States to Questions of the Panel in Relation to the Second Substantive Meeting with the Parties, WT/DS308, ¶¶ 1-3 (Mar. 15, 2005) [hereinafter U.S. Answers II] (arguing that Mexico’s January 1, 2005 amendment of the HFCS tax is outside the Panel’s terms of reference), available at [http://www.ustr.gov/assets/Trade\\_Agreements/Monitoring\\_Enforcement/Dispute\\_Settlement/WTO/Dispute\\_Settlement\\_Listings/asset\\_upload\\_file22\\_6449.pdf](http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file22_6449.pdf) (last visited Apr. 5, 2005). The United States also highlights the changes in the 2005 amendment, but asserts that the tax continues to discriminate against U.S. imports sweetened with non-cane sugar sweeteners. *Id.* ¶¶ 5-8. But see Mexico – Tax Measures on Soft Drinks and Other Beverages, Comments of the United States on Mexico’s Answers to Questions of the Panel in Relation to the Second Substantive Meeting with the Parties, WT/DS308, ¶¶ 1-3 (noting Mexico’s claim that panels have an obligation to evaluate amendments to contested measures even after the establishment of a panel), available at [http://www.ustr.gov/assets/Trade\\_Agreements/Monitoring\\_Enforcement/Dispute\\_Settlement/WTO/Dispute\\_Settlement\\_Listings/asset\\_upload\\_file756\\_6449.pdf](http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file756_6449.pdf) (last visited April 5, 2005). The United States counters Mexico’s assertion and states that Article 11 of the Dispute Settlement Understanding does not require that panels evaluate amended measures after a panel request. *Id.* ¶¶ 1-4.

Impuesto Especial sobre Produccion y Servicios)<sup>90</sup> and the Miscellaneous Fiscal Resolution for 2004 (“Resolucion Miscelanea Fiscal para 2004”)<sup>91</sup> impose a twenty-percent sales tax on services relating to the transfer and distribution of beverages and syrups not using cane sugar.<sup>92</sup> Specifically, the distribution tax mandates that manufacturers, producers, bottlers, and importers pay a separate tax whenever they transfer their goods separately through representatives, brokers, consignment agents, or distributors.<sup>93</sup>

### C. U.S. ARGUMENTS

The United States asserts that it established a prima facie case that the HFCS taxes violate Article III:2 and Article III:4 of GATT.<sup>94</sup> First, the United States contends that the HFCS tax violates Article III:2, first sentence.<sup>95</sup> Specifically, the United States claims that the

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90. Reglamento de la Ley del Impuesto Especial Sobre Produccion y Servicios [Regulation on the Law on the Special Tax on Production and Services], D.O., 15 de Mayo de 1990 (Mex.) [hereinafter RHFCS], available at [http://www.shcp.gob.mx/ucef/nuevo\\_marcojuridico/ReglamentodelaLeydelIESPS.pdf](http://www.shcp.gob.mx/ucef/nuevo_marcojuridico/ReglamentodelaLeydelIESPS.pdf) (last visited Apr. 5, 2005).

91. Resolucion Miscelanea Fiscal para 2004 [Fiscal Resolution for 2004], tit. 6, D.O., 5 de enero de 2004 (Mex.) [hereinafter RMF], available at <http://www.mexicofiscal.com.mx/novedades/RESOLUCION%20Miscel%C3%A1nea%20Fiscal%20para%202004.htm> (last visited Apr. 5, 2005).

92. See Mexico, Panel Request, *supra* note 1 (describing the Mexican tax measures with respect to the transfer of beverages, soft drinks, and syrups).

93. See HFCS Tax, *supra* note 1, art. 5-A (affirming that the distribution tax only applies to soft drinks, beverages, or syrups that are not sweetened with cane sugar).

94. See U.S. Second Submission, *supra* note 17, ¶ 6 (claiming that Mexico conceded that HFCS and cane sugar are DCS products).

95. See Mexico – Tax Measures on Soft Drinks and Other Beverages, Executive Summary of the Second Submission of the United States of America, WT/DS308, ¶¶ 6-19 (Oct. 14, 2004) [hereinafter First Executive Summary] (maintaining that soft drinks and syrups sweetened with HFCS, and soft drinks and syrups sweetened with cane sugar are like products and that HFCS soft drinks and syrups are taxed in excess of soft drinks and syrups made with cane sugar), available at [http://www.ustr.gov/assets/Trade\\_Agreements/Monitoring\\_Enforcement/Dispute\\_Settlement/WTO/Dispute\\_Settlement\\_Listings/asset\\_upload\\_file544\\_6449.pdf](http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file544_6449.pdf) (last visited Apr. 5, 2005).

HFCS tax discriminates against beet sugar, HFCS, and beet sugar-sweetened soft drinks and syrups.<sup>96</sup>

According to the United States, beet and cane sugar soft drinks and syrups are like products because they share identical chemical and functional characteristics.<sup>97</sup> In addition, cane sugar and beet sugar occupy the same HS tariff heading, further supporting the suggestion that they are like products.<sup>98</sup> With respect to HFCS sweetened soft drinks and syrups and cane sugar soft drinks and syrups, the United States argues they are also like products because they share a comparable physical structure.<sup>99</sup> Furthermore, soft drinks made from HFCS, beet sugar, and cane sugar all have similar end-uses and channels of distribution;<sup>100</sup> they are also marked by

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96. See U.S. Second Submission, *supra* note 17, ¶ 10 (asserting that the United States analyzed its beet sugar claims under the first sentence of Article III:2 while focusing most of its HFCS arguments on the second sentence of Article III:2). The United States explains that soft drinks and syrups are sweetened with HFCS in the United States, cane sugar in Mexico, and beet sugar in the European Communities. *Id.* ¶ 29. The United States incorporated beet sugar in its second submission to bolster the European Communities position. *Id.*

97. See *id.* ¶ 19 (explaining that cane sugar and beet sugar are both made up of 99.95 percent sucrose and have the same molecular structure). See also TRUESTAR HEALTH ENCYCLOPEDIA (defining “Refined Sweeteners” and explaining that white sugar is known by many names, including sucrose, table sugar, cane sugar, beet sugar, grape sugar, refined sugar, or granulated sugar), at [www.truestarhealth.com/Notes/1904005.html](http://www.truestarhealth.com/Notes/1904005.html) (last visited Apr. 5, 2004). It is derived from the juice of sugar cane and sugar beets, and once extracted the sugar cane or sugar beet juice is processed extensively to produce a white, granulated substance. *Id.*

98. See U.S. Second Submission, *supra* note 17, ¶ 10 (noting that both beet sugar and cane sugar fall under HS classification heading 1701).

99. See U.S. First Submission, *supra* note 5, ¶¶ 68-69 (declaring that HFCS and cane sugar are both colorless and odorless and are similarly digested and absorbed by the human body); see also GUY. H. JOHNSON, FACTS ABOUT FRUCTOSE AND OBESITY [hereinafter FACTS ON FRUCTOSE] (discussing that upon digestion, the human body does not distinguish between HFCS and any other sweetener), at [http://www.refreshments.ca/en/behealthy/template\\_5\\_show.asp?id=118&section=c](http://www.refreshments.ca/en/behealthy/template_5_show.asp?id=118&section=c) hoices (last visited Apr. 5, 2005).

100. See U.S. First Submission, *supra* note 5, ¶¶ 106-16 (arguing that Mexican bottlers use HFCS and cane sugar interchangeably and buy them through comparable distribution channels). The United States also contended that the Mexican authorities stated that “HFCS and [cane] sugar fulfill the same functions and are commercially interchangeable in the marketplace.” *Id.* ¶ 112; see also U.S.

similar consumer preferences.<sup>101</sup> Finally, the United States contends that the HFCS tax law taxes beet sugar, HFCS, and beet sugar soft drinks and syrups in excess of cane sugar soft drinks and syrups.<sup>102</sup>

The United States also argues that the HFCS tax is inconsistent with Article III:2, second sentence.<sup>103</sup> First, the United States notes Mexico's concession that HFCS and cane sugar are DCS products.<sup>104</sup> Second, the United States cites the findings of the NAFTA panel in the Mexico-United States anti-dumping dispute, which held that HFCS and sugar were like products<sup>105</sup> and commercially interchangeable.<sup>106</sup> Additionally, the United States claims that HFCS and cane sugar have comparable end-uses, as Mexican bottlers use both products interchangeably in soft drink production.<sup>107</sup> The United States also argues that HFCS and cane sugar are sold through similar channels of distribution—from producer to bottler—and in some cases the same company sells both HFCS and sugar to similar

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Second Submission, *supra* note 17, ¶ 29 (evaluating the end-uses and consumer preferences of soft drinks and syrups sweetened with beet sugar and cane sugar in Europe).

101. See U.S. First Submission, *supra* note 5, ¶¶ 106-10 (highlighting that the Mexican government also conducted a taste test and that tasters did not prefer HFCS over other sugars). The United States relies on data compiled by Coca-Cola showing an absence of consumer preferences for HFCS or beet sugar sweetened soft drinks versus cane sugar sweetened soft drinks. *Id.*

102. See Horn & Mavroidis, *supra* note 32, at 50 (stating that a minimal difference in taxation levels will satisfy the in excess standard of Article III:2, first sentence).

103. See U.S. First Submission, *supra* note 5, ¶¶ 93, 141-55 (referring to the discriminatory nature and purpose of the beverage tax).

104. See *id.* ¶ 143 (maintaining that an individual cannot distinguish between a soft drink sweetened with HFCS compared with cane sugar when looking at the actual product or ingredients).

105. See NAFTA Corn Syrup I, *supra* note 12, ¶ 506 (holding that HFCS and sugar are like products because of their sweetening power and nutritional features).

106. See U.S. First Submission, *supra* note 5, ¶ 112 (stating that the Mexican authorities concluded that HFCS and sugar “fulfill the same functions and are commercially interchangeable in the marketplace”).

107. See First Executive Summary, *supra* note 95, ¶ 30 (noting Mexican bottlers use varying ratios of HFCS and cane sugar in the soft drink production process). The United States manufactured HFCS with the objective of entering into the soft drink industry. *Id.*



customers.”<sup>108</sup> Although the United States admits that HFCS and cane sugar have different tariff headings, it contends that Mexico’s tariff classification system<sup>109</sup> does not differentiate between soft drinks and syrups sweetened with HFCS or cane sugar.<sup>110</sup> Finally, the United States argues that there is a direct price and market relationship between HFCS and cane sugar, and asserts that the HFCS tax created a shortage of sugar and subsequent sugar price increases in Mexico.<sup>111</sup>

In addition, the United States maintains that the HFCS tax is not similarly applied to cane sugar,<sup>112</sup> and that the tax affords protection solely to the Mexican sugar market.<sup>113</sup> The United States points to Mexican legislative history and claims that Mexico imposed the tax to protect its sugar industry.<sup>114</sup> Furthermore, the United States alleges that the HFCS tax violates Article III:4 because the measures grant a tax exemption to products made of cane sugar, but not to HFCS or

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108. See U.S. First Submission, *supra* note 5, ¶¶ 114-16 (discussing the major channels of distribution for cane sugar and HFCS).

109. See ASIA PACIFIC ECON. COOPERATION TARIFF DATABASE, MEXICO ECONOMY INFORMATION, TARIFF VIEWING OPTIONS [hereinafter MEXICAN TARIFF] (listing the tariff headings of the Mexican Tariff Schedule), at <http://www.apectariff.org/tdb.cgi/ff3235/apeccgi.cgi?MX> (last visited Apr. 5, 2005).

110. See U.S. First Submission, *supra* note 5, ¶ 82 (describing the tariff headings of soft drinks and syrups). The United States maintains that soft drinks and beverages fall into tariff headings 2202.10 and 2202.90, while syrups fall into tariff headings 2101.11, 2101.12, 2101.30, 2106.90.05, 2106.90.06, and 2106.90.07. *Id.*

111. See *id.*, ¶ 121 (noting a shortage of sugar, the rise in sugar prices, and complaints by Mexican consumers of sweeteners).

112. See U.S. First Submission, *supra* note 5, ¶ 131 (claiming that the twenty-percent tax results in a 400 percent tax on HFCS soft drink and syrup products).

113. See *id.* ¶ 137 (stating that the HFCS tax applies to all sweetener imports and less than ten percent of domestic sweetener products). The United States alleges that Mexican sugar remains in an untaxed category. *Id.*

114. See GACETA PARLAMENTARIA, CAMARA DE DIPUTADOS (MEX.), No. 911-IV (Dec. 30, 2001) (establishing that one of the incentives for the soft drink tax is to protect the sugar industry), available at <http://gaceta.cddhcu.gob.mx/Gaceta/58/2001/dic/Anexo-IV-30Dic.html> (last visited Apr. 5, 2005); see also U.S. First Submission, *supra* note 5, ¶ 139 (asserting that the Mexican Supreme Court ruled that the purpose of the soft drink tax was to protect domestic sugar production).

beet sugar products.<sup>115</sup> Specifically, the United States contends that the HFCS tax affords cane sugar products an advantage over HFCS and beet sugar products.<sup>116</sup> These tax measures provide less favorable treatment to HFCS and beet sugar products.<sup>117</sup>

In response to Mexican claims as to the legality of its tax measures, the United States argues that the terms “laws or regulations” within the meaning of Article XX(d) do not include international obligations such as NAFTA.<sup>118</sup> Instead, the United States argues that the term “laws or regulations” only encompasses the domestic laws of a country.<sup>119</sup> Furthermore, the United States asserts that the HFCS tax will not ensure compliance with NAFTA, especially as the measures apply to all WTO members.<sup>120</sup> Finally, the

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115. See U.S. First Submission, *supra* note 5, ¶ 161 (explaining that the tax applies to the transfer and distribution of HFCS products). The United States also maintains that the HFCS tax imposes bookkeeping and reporting requirements on sweeteners other than cane sugar. *Id.*; see also U.S. Second Submission, *supra* note 17, ¶ 36 (asserting that cane sugar and beet sugar are like products and that the tax exemption violates Article III:4).

116. See U.S. Second Submission, *supra* note 17, ¶ 36 (stating that cane sugar is primarily a domestic product, while HFCS and beet sugar are predominantly foreign products).

117. See U.S. First Submission, *supra* note 5, ¶ 161 (arguing that the Appellate Body broadly interprets the less favorable treatment standard).

118. See U.S. Second Submission, *supra* note 17, ¶ 44 (comparing the “laws or regulations” language in paragraph (d) of Article XX and the “obligations under” language of paragraph (h) of Article XX).

119. See U.S. Answers I, *supra* note 16, ¶ 55 (declaring that all of GATT and WTO jurisprudence involving an Article XX(d) affirmative defense involved internal laws or regulations). *available at* [http://www.ustr.gov/assets/Trade\\_Agreements/Monitoring\\_Enforcement/Dispute\\_Settlement/WTO/Dispute\\_Settlement\\_Listings/asset\\_upload\\_file169\\_6449.pdf](http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file169_6449.pdf) (last visited Apr. 5, 2005).

120. See Mexico – Tax Measures on Soft Drinks and Other Beverages, Closing Statement of the United States, First Meeting of the Panel, WT/DS308, ¶ 9 (Dec. 3, 2004) [hereinafter U.S. Closing Statement I] (maintaining that the United States has fully complied with its NAFTA obligations), *available at* [http://www.ustr.gov/assets/Trade\\_Agreements/Monitoring\\_Enforcement/Dispute\\_Settlement/WTO/Dispute\\_Settlement\\_Listings/asset\\_upload\\_file117\\_6449.pdf](http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file117_6449.pdf) (last visited Apr. 5, 2005).

United States argues that the Mexican tax measures are not necessary<sup>121</sup> and are incompatible with the chapeau of Article XX.<sup>122</sup>

#### D. MEXICO'S ARGUMENTS

In its submissions to the WTO, Mexico concedes that HFCS and cane sugar are DCS products, and that the government imposed the twenty-percent tax to protect its domestic industry.<sup>123</sup> However, Mexico does not address the merits of the Article III allegations; rather it asserts that the HFCS tax falls under the Article XX(d) exception.<sup>124</sup> Mexico claims that the United States is in breach of its NAFTA obligations by failing to open its sugar market to Mexico.<sup>125</sup>

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121. See U.S. Second Submission, *supra* note 17, ¶ 65 (contending Mexico has other reasonable alternatives by which to promote its sugar industry and resolve the NAFTA sweetener dispute with the United States); see also Tatjana Eres, *The Limits of GATT Article XX: A Back Door for Human Rights?*, 35 GEO. J. INT'L L. 597, 620-30 (2004) (providing a historical overview of the necessity standard and its current application in WTO jurisprudence).

122. See U.S. Second Submission, *supra* note 17, ¶ 70 (insisting that Mexico's tax measures are a disguised restriction on international trade); see also Jan Klabbers, *Jurisprudence in International Trade Law, Article XX of GATT*, 26 J. WORLD TRADE 63, 90-91 (discussing the inconsistencies with the interpretation of "disguised restriction" within GATT and WTO case law).

123. See *Mexico: NAFTA, Not WTO*, *supra* note 17, at 15 (asserting that the Mexican government imposed the tax measures as a response to the U.S. breach of its NAFTA obligations); see also U.S. Opening Statement I, *supra* note 18, ¶ 2 (positing that the Mexican Supreme Court imposed the HFCS tax to prevent the displacement of cane sugar).

124. See U.S. Closing Statement I, *supra* note 120, ¶ 2 (showing that Mexico would not challenge the Article III claims in the current proceedings); see also Mexico – Tax Measures on Soft Drinks and Other Beverages, Opening Statement, Second Meeting of the Panel, WT/DS308, ¶¶ 4-18 (Feb. 23, 2005) [hereinafter U.S. Opening Statement II] (detailing and analyzing Mexico's Article XX(d) defenses in its first and second submissions), available at [http://www.ustr.gov/assets/Trade\\_Agreements/Monitoring\\_Enforcement/Dispute\\_Settlement/WTO/Dispute\\_Settlement\\_Listings/asset\\_upload\\_file629\\_6449.pdf](http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file629_6449.pdf) (last visited Apr. 3, 2005).

125. See *Mexico Extends HFCS Tax, Increases Above TRQ Duty on White Corn*, INSIDE U.S. TRADE, Jan. 2, 2004, at 1 [hereinafter *Mexico Extends Tax*] (explaining that the Mexican industry refuses to negotiate the NAFTA sugar market agreements in 2008); see also Mexico – Tax Measures on Soft Drinks and Other Beverages, Closing Statement of the United States, Second Meeting of the Panel, WT/DS308, ¶¶ 3-8 (Feb. 24, 2005) [hereinafter U.S. Closing Statement II] (evaluating Mexico's opening statement with respect to its NAFTA allegations),

The Mexican government counters U.S. arguments by asserting that a “law or regulation” includes international agreements, and as such, that NAFTA falls within the Article XX(d) exception.<sup>126</sup> Specifically, Mexico asserts that its imposition of the HFCS tax was necessary, as it was the only means by which to ensure U.S. compliance with NAFTA.<sup>127</sup>

Mexico also requests the WTO panel to decline jurisdiction over the dispute and remove the case to the NAFTA panel.<sup>128</sup> This is based upon the *Shrimp Turtle* decision, in which the WTO asserted that the parties should attempt to resolve their differences according to the Inter-American Convention on the Protection and Conservation of Sea Turtles (“Inter-American Convention”), before seeking a WTO ruling.<sup>129</sup> Likewise, Mexico makes a jurisdictional challenge, insisting on resolving the sweetener dispute under NAFTA before the WTO Panel decides whether the HFCS tax is inconsistent with the national treatment principle under GATT.<sup>130</sup>

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available

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[http://www.ustr.gov/assets/Trade\\_Agreements/Monitoring\\_Enforcement/Dispute\\_Settlement/WTO/Dispute\\_Settlement\\_Listings/asset\\_upload\\_file273\\_6449.pdf](http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file273_6449.pdf)  
(last visited Apr. 4, 2005).

126. See U.S. Second Submission, *supra* note 17, ¶ 45 (evaluating Mexico’s arguments with respect to Article XX(d)).

127. See *Mexico: NAFTA, Not WTO*, *supra* note 17, at 15 (noting that WTO panels narrowly interpret “necessary” under the Article XX(d) exemption).

128. See U.S. Opening Statement I, *supra* note 18, ¶¶ 16-17 (explaining that Mexico insists that a NAFTA panel is more likely to appropriately resolve the sweetener dispute); see also *Mexico: NAFTA, Not WTO*, *supra* note 17, at 15 (contending that the United States failed to abide by the original provisions relating to sugar market access under NAFTA).

129. See *Mexico: NAFTA, Not WTO*, *supra* note 17, at 15 (explaining that the United States and the complaining parties were also members of an international agreement). See generally, Craig A.A. Dixon, *Environmental Survey of WTO Dispute Panel Decisions Since 1995: “Trade at All Costs?”*, 24 WM. & MARY ENVTL. L. & POL’Y REV. 89, 105-10 (providing an overview of the *Shrimp Turtle* decision and its impact on international environmental measures).

130. See *Mexico: NAFTA, Not WTO*, *supra* note 17, at 15 (claiming that the Mexican government imposed its tax measures in response to the U.S. breach of its NAFTA obligations); see also U.S. Answers I, *supra* note 16, ¶ 1 (addressing Mexico’s request that the WTO panel remove jurisdiction based on judicial economy).

## II. ANALYSIS

With respect to Mexico's removal request, the Panel will likely rule that it has jurisdiction to hear the dispute.<sup>131</sup> Moreover, after evaluating the parties' arguments, the Panel will likely conclude that the United States has met its burden of proof showing that the HFCS tax violates Article III of GATT.<sup>132</sup> The Panel is also likely to reject Mexico's assertion that the tax measures qualify under the Article XX(d) exception.<sup>133</sup>

### A. THE HFCS TAX IS INCONSISTENT WITH ARTICLE III:2, FIRST SENTENCE

The WTO Panel will likely find that HFCS, beet sugar, and cane sugar are like products.<sup>134</sup> Similar to the *Japan Beverages* rationale, where the Panel found that *shochu* and vodka were like products in their diluted form,<sup>135</sup> this Panel will probably conclude that HFCS, beet sugar, and cane sugar are like products because they exist in a similar physical state—liquid form—in either soft drinks or

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131. See GATT 1994, *supra* note 10, Annex 2, art. (establishing that the WTO Panel will hear disputes brought under the GATT agreements); see also *id.* Annex 2, art. 7.1 (affirming that the WTO Panel will examine the terms of reference cited by the parties).

132. See Turkey – Restrictions on Imports of Textile and Clothing Products, Report of the Panel, WT/DS34/R, ¶¶ 9.20-10.2 (May 31, 1999) [hereinafter Turkey, Report of the Panel] (finding that India met its burden of proof after Turkey's failure to rebut and provide evidence against India's allegations), available at 1999 WTO DS LEXIS 15.

133. See Conciliation United States – Imports of Certain Automotive Spring Assemblies, Report of the Panel, L/5333 - 30S/107, ¶ 53 (May 26, 1983) [hereinafter U.S. Spring Assemblies, Report of the Panel] (finding that Article XX(d) applied to national laws and regulations consistent with GATT obligations), available at 1982 GATTPD LEXIS 1; see also Korea Beef, Report of the Appellate Body, *supra* note 60, ¶ 158 (noting that the Korean government unsuccessfully invoked Article XX(d) as a basis to enforce a domestic law which was in violation of GATT).

134. See Tsai, *supra* note 38, at 30-33 (discussing the like products interpretation in Article III jurisprudence).

135. See Japan Beverages, Report of the Panel, *supra* note 35, ¶ 6.23 (noting that vodka and *shochu* share most physical characteristics despite differences in their filtration processes).

syrops.<sup>136</sup> Moreover, beet and cane sugar's identical chemical and molecular structures will likely persuade the Panel to find a like products relationship.<sup>137</sup>

With regard to HFCS and cane sugar, the Panel may narrowly interpret whether they are like products.<sup>138</sup> Specifically, the Panel in *Japan Beverages* refused to establish a like products relationship between *shochu* and the liqueurs gin and genever; nor did the Panel arrive at a like products finding regarding the liquors rum, whisky, and brandy because of the use of additives, ingredients, and differences in physical appearance.<sup>139</sup> This Panel may also find that HFCS and cane sugar are not like products because they lack similar and physical characteristics in their natural form:<sup>140</sup> HFCS exists in liquid form while cane sugar exists in granular form.<sup>141</sup>

136. See U.S. First Submission, *supra* note 5, ¶¶ 101-02 (explaining that HFCS' form as a liquid sweetener does not distinguish it from cane sugar as a sweetener for soft drinks and syrups, as bottlers mix cane sugar with water and various ingredients during the bottling process to manufacture a soft drink); see also U.S. Second Submission, *supra* note 17, para 27 (asserting that beet sugar and cane sugar are interchangeable in soft drinks and syrups).

137. See Mexico – Tax Measures on Soft Drinks and Other Beverages, Executive Summary of the Second Submission of the United States of America, WT/DS308, ¶ 16 (Feb. 4, 2005) [hereinafter Second Executive Summary] (maintaining that cane sugar and beet sugar contain a similar percentage of sucrose), *available* *at* [http://www.ustr.gov/assets/Trade\\_Agreements/Monitoring\\_Enforcement/Dispute\\_Settlement/WTO/Dispute\\_Settlement\\_Listings/asset\\_upload\\_file408\\_6449.pdf](http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file408_6449.pdf) (last visited Apr. 5, 2005); see generally THE SUGAR BUREAU, ALL ABOUT SUGAR: GENERAL INFORMATION (suggesting that beet sugar and cane sugar undergo a similar manufacturing process during refinement), *at* [http://www.sugar-bureau.co.uk/general\\_information/all\\_about\\_sugar/details.html?act=detail&id\\_item=471](http://www.sugar-bureau.co.uk/general_information/all_about_sugar/details.html?act=detail&id_item=471) (last visited Feb. 17, 2005).

138. *But see* Second Executive Summary, *supra* note 137, ¶ 19 (discussing that Article III:2, second sentence permits a broader consideration of the products that are subject to tax measures).

139. See *Japan Beverages*, Report of the Panel, *supra* note 35, ¶ 6.23 (stating the 1987 Panel determined that only vodka and *shochu* were like products).

140. See NAFTA Corn Syrup I, *supra* note 12, ¶ 504 n.45 (describing the major physical distinctions between HFCS and cane sugar). The differences between HFCS and cane sugar include their molecular weight, physical presentation, solubility, humidity, and chemical reduction capacity. *Id.*

141. See *id.* ¶ 504 (arguing that their different chemical properties translate to differences in their market function and application); see also U.S. First

With respect to the chemical composition of the sweeteners, the Panel may consider that HFCS and cane sugar have different ratios of fructose and glucose, thereby showing that a soft drink sweetened with HFCS is not identical to a soft drink sweetened with cane sugar.<sup>142</sup> Conversely, beet sugar and cane sugar share the same ratio of sucrose, a factor that will likely persuade the Panel to find a like products relationship.<sup>143</sup> The Panel may also draw on the rationale in *Japan Beverages* and evaluate whether the lack of similarity in raw materials used to make HFCS, beet sugar, and cane sugar—corn, beets, and sugarcane, respectively—should prevent a like products determination.<sup>144</sup> The Panel, however, will most likely consider these minimal differences in physical and chemical characteristics between HFCS, beet sugar, and cane sugar insufficient to preclude a like products finding.<sup>145</sup> In making its final determination, the Panel will probably evaluate the physical characteristics of HFCS, beet sugar, and cane sugar as they exist in soft drinks or beverages, where they share identical physical and chemical traits.<sup>146</sup>

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Submission, *supra* note 5, ¶ 101 n.158 (observing that bottlers receive fifty kilogram bags of sugar at their warehouses). The Mexican bottling industry customarily receives sugar in granular form for soft drink production. *Id.*

142. See FACTS ON FRUCTOSE, *supra* note 99 (indicating that HFCS is either made of forty-two or fifty-five percent fructose, while sugar has fifty percent fructose and glucose).

143. See discussion *supra* note 97 (discussing the nearly identical physical and chemical structure of beet sugar and cane sugar).

144. See *Japan Beverages*, Report of the Panel, *supra* note 35, ¶ 6.23 (discussing how the similarity of physical characteristics between vodka and *shochu* led to the Panel's like products determination).

145. See *id.* (finding that vodka and *shochu* shared most, but not all physical characteristics sufficient to find a like products determination); see also U.S. First Submission, *supra* note 5, ¶ 70 (observing that the difference in glucose levels between HFCS and cane sugar rests between three to five percent); NAFTA Corn Syrup I, *supra* note 12, ¶ 505 (holding that HFCS and cane sugar both had glucose and fructose as elemental compounds). The Panel also stated that both products were "ternary organic compounds of carbon, hydrogen and oxygen . . ." *Id.*; U.S. Second Submission, *supra* note 17, ¶ 19 (arguing that beet sugar and cane sugar are "chemically and functionally identical" to each other).

146. See U.S. First Submission, *supra* note 5, ¶ 68 (asserting that both HFCS and cane sugar appear colorless in a soft drink solution). The United States also noted that HFCS and cane sugar almost have an identical ratio of fructose and glucose in a soft drink, beverage, or syrup. *Id.* ¶ 69; see also U.S. Second

Moreover, the fact that HFCS, beet sugar, and cane sugar share comparable end-uses<sup>147</sup> and are marked by comparable consumer preferences will likely persuade the Panel to find that they are like products.<sup>148</sup> The Panel in *Korea Beverages* held that common end-uses between two products factored into the determination of market competitiveness.<sup>149</sup> Like the products compared in *Korea Beverages*, HFCS, beet sugar, and cane sugar all compete for the same share of the soft drink bottling industry.<sup>150</sup> Indeed, Mexican bottlers use HFCS, beet sugar, and cane sugar for the same purposes.<sup>151</sup> Similar to the goods in *Korea Beverages*, Mexican bottlers use the same marketing and business strategies regardless of whether they use HFCS, beet sugar, or cane sugar to sweeten soft drinks.<sup>152</sup> Moreover,

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Submission, *supra* note 17, ¶ 27 (stating that beet sugar and cane sugar are interchangeable in soft drinks and syrups).

147. See NAFTA Corn Syrup I, *supra* note 12, ¶ 517 (finding that both HFCS and cane sugar share similar functions and are commercially interchangeable). The Panel observed the overlap in end-uses between HFCS and cane sugar in the food and beverages sector, including the soft drink industry. *Id.*; see also U.S. Second Submission, *supra* note 17, ¶ 29 (showing that consumers in Europe drink soft drinks sweetened with either beet sugar or cane sugar for similar purposes, without any differentiation).

148. See U.S. First Submission, *supra* note 5, ¶ 79 (discussing that the lack of consumer preferences for HFCS over cane sugar resulted in a 100-percent substitution of HFCS for sugar by the mid-1980s in the United States).

149. See *Korea Beverages*, Report of the Panel, *supra* note 43, ¶ 10.78 (noting that when two products share common end-uses, potential competition, or substitutability may result in the future).

150. See U.S. Second Submission, *supra* note 17, ¶ 29 (stating that U.S. soft drink producers refer to soft drink sweeteners as *sugar* and not as cane sugar, beet sugar, or HFCS) (emphasis added).

151. See *id.* ¶ 29 (maintaining that Coca-Cola bottlers choose HFCS, beet sugar, and cane sugar in their soft drink production based on availability and cost); see also *Korea Beverages*, Report of the Panel, *supra* note 43, ¶ 10.80 (showing how current market trends are helpful in determining whether products have similar end-uses).

152. See *Korea Beverages*, Report of the Panel, *supra* note 43, ¶ 10.79 (noting that the parties submitted evidence showing similar advertising strategies between the domestic and imported alcoholic beverages); see also CONTINENTAL REPORT, *supra* note 8, at 25 (discussing the soft drink company's marketing and advertising strategies for Latin America, and more specifically, in Mexico).



in both the NAFTA Bi-National decision<sup>153</sup> and its first submission to the WTO, Mexico conceded that HFCS and cane sugar fulfill the same commercial functions and are interchangeable in the marketplace.<sup>154</sup>

However, the Panel may also evaluate the findings in the NAFTA decision in which the Bi-National Panel noted that cane sugar has broader end-uses than HFCS.<sup>155</sup> Likewise, the Panel could consider that sugar is a leading sweetener and preferred over HFCS in industries other than the soft drink market.<sup>156</sup> As a result, if HFCS has more limited end-uses than sugar, then arguably its channels of distribution are probably more limited compared with cane sugar.<sup>157</sup> With respect to consumer preferences, the Panel will likely evaluate what factors influence a consumer's decision to purchase one product over another—such as price, presentation, and environmental impact—in making its like products determination under Article III:2, first sentence.<sup>158</sup> Moreover, the Panel might find persuasive Mexico's concession that HFCS and cane sugar have identical end-uses in the soft drink industry.<sup>159</sup>

Furthermore, with respect to the channels of distribution and points of sale analysis, the Panel will likely find that comparable

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153. See NAFTA Corn Syrup I, *supra* note 12, ¶ 514 (affirming that HFCS and cane sugar have overlapping functions in the beverage and food industries).

154. See *Mexico: NAFTA, Not WTO*, *supra* note 17, at 15 (reporting that Mexican sources stated that sugar and HFCS are substitutable in soft drinks).

155. See NAFTA Corn Syrup I, *supra* note 12, ¶ 510 (comparing the uses of HFCS to cane sugar). *But see* U.S. First Submission, *supra* note 5, at 39 n.167 (conceding that HFCS does have some differing end-uses in the baking industry, but asserting that the HFCS tax only affects soft drinks and beverages sweetened with HFCS).

156. See NAFTA Corn Syrup I, *supra* note 12, ¶ 510 (reciting HFCS' distinguishing characteristics, which include its "singular functional properties such as its capacity to form bulks (sic), toasted capacity and crystallization").

157. See *id.* ¶ 488 (asserting that HFCS and cane sugar have different distribution channels, selling points, and separate functional characteristics).

158. See *id.* ¶ 511 (arguing that the difference in consumer preferences of HFCS compared with cane sugar precludes a like products determination).

159. See Korea Beverages, Report of the Panel, *supra* note 43, ¶ 10.78 (finding that the Panel based its analysis solely on the end-uses relevant to the dispute).

retail outlets sell HFCS, cane sugar, and beet sugar.<sup>160</sup> Likewise, the panels in *Chile Beverages* and *Korea Beverages* found the fact that the products at issue in each case had similar retail outlets for off-premise consumption to be an indicator of an overlap of channels of distribution and points of sale.<sup>161</sup>

Another factor likely to persuade the Panel to conclude that beet sugar and cane sugar are like products is that they fall under the same HS tariff heading, just like the liquors in *Japan Beverages*.<sup>162</sup> On the other hand, HFCS and cane sugar do not share a similar tariff classification.<sup>163</sup> Tariff classification, however, is only one factor that Panels consider when making a like products determination.<sup>164</sup> The Panel will likely find persuasive the fact that the Mexican tariff schedule fails to make a distinction between soft drinks sweetened with cane sugar versus those sweetened with beet sugar or HFCS.<sup>165</sup>

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160. See U.S. First Submission, *supra* note 5, ¶ 29 n.124 (discussing that soft drink bottlers sell over seventy-five percent of soft drinks and beverages in small retail stores); see also Second Executive Summary, *supra* note 137, ¶ 16 (indicating that soft drink and syrup producers distribute beet sugar and cane sugar-based products interchangeably).

161. See *Chile Beverages*, Report of the Panel, *supra* note 55, ¶¶ 7.55-7.58 (noting that the practice of grouping goods together in a retail outlet is a factor supporting substitutability); see also *Korea Beverages*, Report of the Panel, *supra* note 43, ¶¶ 10.83-10.84 (observing that alcohol manufacturers sold *soju* and other alcoholic beverages in restaurants and cafes); Trebilcock, *supra* note 28, at 29 (stating that quantitative data is also helpful in determining commercial overlap between two products).

162. See *Japan Beverages*, Report of the Panel, *supra* note 35, ¶ 6.23 (finding that vodka and *shochu* were like products). The fact that vodka and *shochu* had the same tariff schedule was a major factor in the Panel's like products determination. *Id.*

163. See FOREIGN TRADE ONLINE, HARMONIZED SYSTEM CODES (2005) [hereinafter HARMONIZED SYSTEM CODES] (displaying the four different tariff classifications used for various sugar products), at <http://www.foreign-trade.com/reference/hscode.cfm?code=1701> (last visited Mar. 21, 2005).

164. See Trebilcock, *supra* note 28, at 23 (asserting that the WTO panels also look at the physical characteristics, end-uses, and the marketplace in making a like products determination); cf. Horn & Mavroidis, *supra* note 32, at 52 (explaining that Panels require a detailed description of a product's tariff classification).

165. See MEXICAN TARIFF, *supra* note 109 (limiting cane sugar, beet sugar, and fructose to their chemically pure form); see also *Japan Beverages*, Report of the Panel, *supra* note 35, ¶ 6.23 (considering as a factor in favor of like products

Similarly, the HS Classification System does not differentiate between soft drinks sweetened with HFCS, beet sugar, or cane sugar.<sup>166</sup>

A factor which may preclude a like products determination is the fact that HFCS and cane sugar are comprised of different raw materials and that the two products are finished by means of distinct refining processes.<sup>167</sup> The Panel in *Japan Beverages* based its like products determination, in part, on the fact that *shochu* and vodka were made of similar raw materials.<sup>168</sup> That Panel also found that *shochu* was not like whisky or brandy because different manufacturing processes were involved.<sup>169</sup> Using the rationale in the *Japan Beverages* Panel decision, this Panel may find that HFCS and cane sugar are not like products.<sup>170</sup>

Ultimately, however, the Panel will likely conclude that HFCS, beet sugar, and cane sugar are like products.<sup>171</sup> If the Panel finds that HFCS and cane sugar are like products, it will also find that Mexico's tax measures on beet sugar and HFCS in excess of cane

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determination, that at the time of negotiation, vodka and *shochu* were classified under the same heading in the Japanese tariffs). As of January 1, 1996, approximately 7 months before the Panel decision was issued, Japan changed its tariff classifications placing vodka under heading 2208.90 and *shochu* under heading 2208.60. *Id.*

166. See HARMONIZED SYSTEM CODES, *supra* note 163 (distinguishing between cane sugar, beet sugar, "Cane or Beet Sugar, Chemically Pure Sucrose," and "Other Cane or Beet Sugar, Chemically Pure Sucrose").

167. See discussion *supra* notes 134-146 and accompanying text (describing the differences in chemical and physical properties between HFCS and cane sugar); see also discussion *supra* note 137 (noting that beet sugar and cane sugar undergo comparable manufacturing processes).

168. See *Japan Beverages*, Report of the Panel, *supra* note 35, ¶ 6.23 (finding that vodka and *shochu* shared most of the same physical characteristics).

169. See *id.* (noting that the Panel would evaluate whisky, brandy, and *shochu* under a directly competitive or substitutable analysis).

170. See *id.* (holding that differences in manufacturing, use of ingredients, and appearance disqualified the other alcoholic beverages from *shochu*, the domestic liquor).

171. See NAFTA Corn Syrup I, *supra* note 12, ¶ 503 (holding that HFCS and cane sugar were like products because they had similar sweetening capacities and nutritional properties); see also discussion *supra* note 97 (including cane sugar and beet sugar under the white sugar category).

sugar in violation of Article III:2, first sentence.<sup>172</sup> Similar to the Liquor Tax Law in *Japan Beverages*, the HFCS tax does not provide identical tax treatment to HFCS, beet sugar, and cane sugar.<sup>173</sup> In making its determination, the Panel will likely consider the rationale in *Japan Beverages*, which established that in-excess taxation is a very low standard.<sup>174</sup> Thus, the Panel will hold that the HFCS tax violates Article III:2, first sentence.<sup>175</sup>

#### B. THE HFCS TAX IS INCONSISTENT WITH ARTICLE III:2, SECOND SENTENCE

If the Panel holds that HFCS and cane sugar are like products, then it will likely find that they are DCS products.<sup>176</sup> However, even if the Panel does not conclude that HFCS and cane sugar are like products, it will still determine that they are DCS products based on their common end-uses, consumer preferences, and channels of distribution.<sup>177</sup> The Panel will likely find it very persuasive that

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172. See HFCS Tax, *supra* note 1, arts. 1, 2 (reflecting that the HFCS taxes soft drinks sweetened with anything other than sugar at a twenty-percent tax rate).

173. See *Japan Beverages*, Report of the Panel, *supra* note 35, ¶ 6.24 (discussing that countries may choose to implement any taxation system so long as they do not tax imported goods in excess of like domestic products).

174. See *Japan Beverages*, Report of the Appellate Body, *supra* note 34, at \*50 (establishing that even a small difference in taxation is “too much”); see also *Horn & Mavroidis*, *supra* note 32, at 50 (noting that a minimal difference in taxation meets the in excess standard).

175. See *Horn & Mavroidis*, *supra* note 32, at 41 (establishing that a Panel will find an Article III:2, first sentence violation by establishing a like products relationship between two products and by finding that the measure taxes the foreign product in excess of the domestic product).

176. See *Korea Beverages*, Report of the Appellate Body, *supra* note 43, ¶ 118 (noting that like products are a subset of DCS products). The Appellate Body held that like products are, by classification, DCS products. *Id.*; see also *Japan Beverages*, Report of the Appellate Body, *supra* note 34, at \*4-7 (finding a DCS relationship between *shochu* and other foreign alcoholic beverages and a like products relationship between vodka and *shochu*); *Horn & Mavroidis*, *supra* note 32, at 45 (asserting that if a Panel considers two products like, then they are *per se* DCS).

177. See U.S. First Submission, *supra* note 5, ¶¶ 106-16 (detailing the similarities in end-uses, consumer preferences, and channels of distribution between HFCS and cane sugar); see also discussion *supra* notes 147-161 and accompanying text (finding that HFCS and cane sugar compete in the same

Mexico has conceded that HFCS and cane sugar are DCS products.<sup>178</sup>

The Panel will determine that HFCS and cane sugar are DCS products, similar to the products in *Korea Beverages*, because both HFCS and cane sugar act as sweeteners in soft drinks and thereby compete in the same marketplace.<sup>179</sup> The Panel, however, may note the fact that cane sugar has different channels of distribution than HFCS, as Mexican bottlers receive HFCS imports primarily from the United States while they receive cane sugar directly from a local sugar mill or a distributor.<sup>180</sup> These findings, however, are unlikely to preclude a finding of a DCS relationship between HFCS and cane sugar.<sup>181</sup> With regard to consumer preferences, the Mexican government conducted a taste test and established that consumers did not find a difference between HFCS and cane sugar.<sup>182</sup> Moreover, as discussed in the previous section, HFCS and cane sugar have similar points of sale.<sup>183</sup> This evidence, coupled with the NAFTA anti-dumping determination that HFCS and cane sugar were

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marketplace and that producers interchangeably use both products in their soft drink production).

178. See *Mexico: NAFTA, Not WTO*, *supra* note 17, at 15 (maintaining that HFCS and sugar are substitutable in soft drinks); see also U.S. Opening Statement I, *supra* note 18, ¶ 3 (affirming Mexico's assertion in its first submission that HFCS and cane sugar are DCS products).

179. See *Korea Beverages*, Report of the Panel, *supra* note 43, ¶ 10.78 (showing that the domestic and foreign alcoholic beverages had a comparable competitive relationship and that both products competed for a similar market). The Panel also noted that both products had similar advertising strategies. *Id.*

180. See U.S. First Submission, *supra* note 5, ¶ 115 (discussing the origins of U.S. HFCS trade with the Mexican soft drink bottling industry). The United States concedes that the differences in channels of distribution result from the fact that the U.S. exports most of its HFCS. *Id.*

181. *Cf.* *Chile Beverages*, Report of the Panel, *supra* note 55, ¶ 7.59 (maintaining that if products were regularly presented separately, it would be "one piece of evidence that perhaps consumers did not group them together in their perceptions").

182. See U.S. First Submission, *supra* note 5, ¶ 112 (stating that thirty taste testers were empanelled).

183. See discussion *supra* notes 160-161 and accompanying text (finding that HFCS and cane sugar are sold in similar retail outlets).

commercially interchangeable, will lead a Panel to conclude that they are DCS products.<sup>184</sup>

On the other hand, the Panel may find that because HFCS is used in other industries, there is, in fact, no direct market competition between cane sugar and HFCS.<sup>185</sup> With regard to price difference, Mexico may argue that HFCS is significantly cheaper than cane sugar,<sup>186</sup> and that this price disparity negates any suggestion of an elasticity of substitution between HFCS and cane sugar.<sup>187</sup> Ultimately, however, the Panel is likely to find the fact that HFCS and cane sugar compete for the same market as evidence of their DCS relationship.<sup>188</sup>

Once the Panel determines that HFCS and cane sugar are DCS products, it is also likely to find that the HFCS tax does not similarly tax HFCS as compared to cane sugar, a violation of Article III:2, second sentence.<sup>189</sup> The Panel in *Chile Beverages* asserted that whether a taxation scheme involves a tax differential that is greater than *de minimis* varies on a case-by-case basis.<sup>190</sup> Similar to the

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184. See NAFTA Corn Syrup I, *supra* note 12, ¶ 517 (showing that HFCS and cane sugar have similar functions in the food and beverages sector). Specifically, the Panel noted that the HFCS and cane sugar had comparable end-uses in the soft drink, baking, candy, and dairy sectors. *Id.*

185. See *id.* ¶ 510 (arguing that sugar is still the dominant sweetener over HFCS in various industries). Specifically, the complainants note that producers use sugar in the candy, bakery, cereal, milk, and institutional food industries. *Id.*

186. See Moore, *supra* note 3 (discussing the fact that HFCS replaced sugar because of its low price of eighteen cents a pound in 1991). In 1985, HFCS cost twenty cents a pound while sugar cost twenty-three cents. *Id.*

187. See U.S. v. Archer-Daniels-Midland Co., 866 F.2d 242, 246 (8th Cir. 1988) (holding that the price differential between sugar and HFCS shows that sugar is not interchangeable with HFCS and does not belong in the same relevant product market with HFCS).

188. See U.S. First Submission, *supra* note 5, ¶¶ 119-21 (showing an inverse economic relationship between HFCS and cane sugar).

189. See Horn & Mavroidis, *supra* note 32, at 51 (observing that the tax difference between two DCS products has to be greater than *de minimis*); see also Trebilcock, *supra* note 28, at 24 (noting that the not similarly taxed standard is different than the in excess standard under Article III:2, first sentence).

190. See Chile Beverages, Report of the Panel, *supra* note 55, ¶¶ 7.90-7.91 (noting that in some instances a small difference in taxation levels could lead to a *de minimis* determination, while in other cases a larger difference in taxation levels

decision in *Chile Beverages*,<sup>191</sup> this Panel will likely conclude that a twenty-percent difference is enough to establish dissimilar taxation between HFCS and cane sugar,<sup>192</sup> thereby violating the “not similarly taxed” provision under Article III:2, second sentence.<sup>193</sup>

As discussed above, Mexico concedes that it enacted the HFCS tax to protect its domestic industry.<sup>194</sup> Although the ruling body in *Japan Beverages*<sup>195</sup> discussed the irrelevance of legislative intent (because of the difficulties in discerning actual legislative intentions), the Appellate Body in *Chile Beverages* stated that a Panel will evaluate objective governmental purposes.<sup>196</sup> This Panel is also likely to consider Mexico’s legislative intent because of Mexico’s previous assertions discussing the protective nature of its tax measures.<sup>197</sup>

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might be insufficient to make a *de minimis* finding). The Panel also noted that a *de minimis* analysis should depend on the respective market and may take governmental policies into consideration. *Id.*

191. See *Chile Beverages*, Report of the Appellate Body, *supra* note 53, ¶ 2 (stating that over ninety-five percent of the foreign spirits fell into the higher tax category, while over seventy-five percent of the domestic liquors fell into the lower tax bracket); see also *Chile Beverages*, Report of the Panel, *supra* note 55, ¶¶ 2.1-2.29 (describing the Chilean tax structure in detail).

192. See *HFCS Tax*, *supra* note 1, art. 2 (showing that all soft drinks, beverages, and syrups using a sweetener other than cane sugar are subject to the twenty-percent tax).

193. See e.g., *Chile Beverages*, Report of the Appellate Body, *supra* note 53, ¶ 80 (upholding the Panel’s finding that the Chilean liquor law, which taxed ninety-five percent of imported liquors at the highest tax rate as opposed to only twenty-seven percent of local liquor, violated Article III:2, second sentence).

194. See discussion *supra* note 114 and accompanying text (noting that Mexico publicly acknowledged the purpose of the HFCS tax was to protect its domestic sugar industry); see also *Mexico: NAFTA, Not WTO*, *supra* note 17, at 15 (reporting that the Mexican government imposed the HFCS tax to protect its domestic sugar industry against the U.S. failure to grant market access to Mexican cane sugar).

195. See *Japan Beverages*, Report of the Appellate Body, *supra* note 34, \*61-62 (stating that the issue whether legislators applied a tax measure to afford protection to its domestic industry is not a question of legislative intent).

196. See *Horn & Mavroidis*, *supra* note 32, at 49 (noting the Appellate Body in *Chile Beverages* stated that “statutory purposes or objectives” are pertinent to the extent that they “are given objective expression in the statute itself”).

197. See Donald H. Regan, *Further Thoughts on the Role of Regulatory Purpose*

The fact that the HFCS tax only applies to HFCS and not to cane sugar further suggests that the measure is intended to afford protection to the Mexican sugar industry.<sup>198</sup> Mexico produces all of its own cane sugar; therefore, the HFCS tax exclusively favors domestic sugar producers.<sup>199</sup> Similar to the imported products in *Chile Beverages*, which were taxed at a higher rate, HFCS is also taxed at a greater tax rate compared to cane sugar; this differential in tax treatment is sufficient to meet the “so as to afford protection” standard, and is ultimately a violation of Article III:2, second sentence.<sup>200</sup>

### C. THE HFCS TAX IS INCONSISTENT WITH ARTICLE III:4

The Panel will probably find that the Mexican tax measures violate Article III:4.<sup>201</sup> WTO panels use the criteria of Article III:2,

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*under Article III of the General Agreement on Tariffs and Trade*, 37 J. WORLD TRADE 737, 739 (2003) (explaining that the *Chile Beverages* Appellate Body examined legislative intent when analyzing whether the Chilean System afforded protection to its domestic industry).

198. See Bhala & Gantz, *supra* note 57, at 43 (stating that the tax differentials imposed by the Chilean Liquor Tax led the Appellate Body to conclude that the measures afforded protection to the domestic industry).

199. See ROBERT KNAPP, U.S. DEP’T OF AGRIC., MEXICO AND SUGAR: HISTORICAL PERSPECTIVE (stating that sugar comprises Mexico’s largest agricultural crop), available at <http://www.fas.usda.gov/htp/sugar/2004/History%20of%20sugar%20dispute%20final.pdf> (last visited Mar. 20, 2005). The author also stated that the Mexican sugar industry provides over 300,000 jobs and that 2.2 million people work in the sugar industry. *Id.*

200. See *Chile Beverages*, Report of the Appellate Body, *supra* note 53, ¶ 80 (finding that the Chilean Liquor Tax met the not similarly taxed standard and the so as to afford protection standard, thereby violating Article III:2, second sentence).

201. See United States – Tax Treatment for “Foreign Sales Corporations” – Recourse to Article 21.5 of the DSU by the European Communities, Report of the Appellate Body, WT/DS108/AB/RW, ¶¶ 220-22 (Jan. 14, 2002) (concluding that a fair market rule that would frequently grant a tax exemption to domestic products and less often to imported products afforded less favorable treatment to imported products and violated Article III:4), available at 2002 WTO DS LEXIS 4; see also *Korea Beef*, Report of the Appellate Body, *supra* note 60, ¶¶ 146-48 (finding that Korea’s dual retail system, which imposed separate channels of distribution requirements for imported and domestic beef products, modified market conditions inconsistently with Article III:4).



first and second sentence in determining a like products relationship under Article III:4.<sup>202</sup> Thus, if the Panel finds that HFCS, beet sugar, and cane sugar are like products under Article III:2, first sentence, it will also conclude that they are like products according to Article III:4.<sup>203</sup>

First, the HFCS tax is an internal law that affects the sale, distribution, and use of cane sugar and beet sugar, as well as HFCS soft drinks and syrups.<sup>204</sup> Moreover, since HFCS and beet sugar are imported products while cane sugar is primarily a domestic product, the tax exemption affords more favorable treatment to Mexican sugar.<sup>205</sup> Mexico's favorable treatment of its domestic industry is comparable to the facts at issue in *Canada Automotive* case, where a GATT Panel found that Canada's CVA requirements afforded less favorable treatment to domestic motor vehicles inconsistent with Article III:4.<sup>206</sup> Although Mexico may argue that the HFCS tax does

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202. See European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, ¶ 99 (Mar. 12, 2001) (discussing that the meaning of like products under Article III:4 is broader than Article III:2, first sentence, but not broader than both the first and second sentences of Article III:2), available at 2001 WTO DS LEXIS 12; see also Sydney M. Cone, III, *The Asbestos Case and Dispute Settlement in the World Trade Organization: The Uneasy Relationship Between Panels and the Appellate Body*, 23 MICH. J. INT'L L. 103, 124 (2001) (inferring that the scope of like products under Article III:4 extends to DCS products under Article III:2, second sentence).

203. See U.S. Gasoline, Report of the Panel, *supra* note 71, ¶ 6.8 (stating that the Panel in *Japan Beverages* considered the criteria for determining like products to be applicable to the like products analysis under Article III:4); see also Trebilcock, *supra* note 28, at 48 (noting that the principal criteria in analyzing likeness under Article III:4 involves an examination of the competitive relationship between domestic and imported products).

204. See HFCS Tax, *supra* note 1, arts. 1.II, 2.II(A) (establishing that the HFCS tax applies to beverages that use sweeteners other than cane sugar and that it also applies to the distribution of non-cane sugar sweeteners).

205. See FARM FOUNDATION, TRADE DISPUTES IN AN UNSETTLED INDUSTRY: MEXICAN SUGAR (noting that Mexicans consume over eighty-five percent of their domestic sugar production), available at <http://www.farmfoundation.org/flags/shwedel.pdf> (last visited Mar. 22, 2005). The author also notes that the Mexican sugar industry creates over 700,000 jobs, which affects over four million people in Mexico. *Id.*

206. See *Canada Automotive*, Report of the Panel, *supra* note 63, ¶ 10.85 (noting that the Canadian measures upset the competitive relationship between domestic and imported motor vehicles); see also *U.S. Asks WTO to Arbitrate*

not make a distinction between imported or domestic products because it grants the exemption to *all* cane sugar products, the application of the HFCS tax only benefits domestic products; thus, the measure is inconsistent with Article III:4.<sup>207</sup>

#### D. THE HFCS TAX IS NOT PROVISIONALLY JUSTIFIED UNDER ARTICLE XX(D)

The Panel will likely find that the HFCS tax is not provisionally justified under Article XX(d).<sup>208</sup> In addition, the Panel will probably conclude that the HFCS tax does not satisfy the chapeau of Article XX, and will ultimately hold that the Mexican tax measures are not permissible under Article XX(d).<sup>209</sup>

##### 1. NAFTA is Not a Law or Regulation Under Article XX(d)

Since Mexico's primary argument is that the HFCS tax falls under Article XX(d) as necessary to enforce NAFTA, Mexico has the burden of proving that NAFTA is a "law or regulation" within the meaning of Article XX(d).<sup>210</sup> Mexico's failure to cite in its submissions previous Article XX(d) WTO or GATT jurisprudence involving compliance with an international regulation will most likely preclude Mexico from succeeding in its invocation of the Article XX(d) exception.<sup>211</sup>

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*Fructose Dispute*, BUS. MEX., July 1, 2004, at 11 (stating that the Mexican President enacted the HFCS tax to "protect Mexico's struggling sugar industry"), available at 2004 WL 65679227.

207. See *Korea Beef*, Report of the Appellate Body, *supra* note 60, ¶ 134 (stating that Article III:4 ensures equal market opportunities for like domestic and imported products).

208. See *U.S. Spring Assemblies*, Report of the Panel, *supra* note 133, ¶ 53 (noting that Article XX(d) pertains to domestic laws or regulations); see also *U.S. Tariff*, Report of the Panel, *supra* note 71, ¶ 5.8 (examining a U.S. patent law under the Article XX(d) exception).

209. See *Rosas*, *supra* note 80, at 80-81 (discussing that although the parties met the first requirement of Article XX, the Panel found that their measures did not meet the chapeau standard).

210. See *Korea Beef*, Report of the Appellate Body, *supra* note 60, ¶ 157 (establishing that the party who invokes the Article XX(d) affirmative defense has the burden of proving the elements).

211. See *Second Executive Summary*, *supra* note 137, ¶ 44 (stating that neither a

The Panel may, however, consider Mexico's argument that the failure of previous GATT or WTO bodies to define "laws or regulations" within the context of Article XX(d) would allow a Panel to expand the scope of the provision to include international laws or agreements.<sup>212</sup> Furthermore, the clause "laws or regulations" fails to incorporate limiting terms such as "domestic" or "internal," another factor tending in favor of a broader interpretation of the Article XX(d) provisions.<sup>213</sup> The United States' argument comparing Article XX(d)'s "laws or regulations" language to Article XX(h), which includes "international commodity agreement,"<sup>214</sup> will likely persuade the Panel to limit Article XX(d)'s scope to domestic laws and regulations.<sup>215</sup>

Moreover, previous WTO decisions that have examined "laws or regulations" within the Article XX(d) exception have all involved disputes pertaining to domestic laws,<sup>216</sup> whereas NAFTA is an international agreement between the United States, Mexico, and Canada.<sup>217</sup> As a result, the Panel is exceedingly likely to find that

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contracting party of GATT nor a member of the WTO have ever challenged the assertion that laws or regulations under Article XX(d) include international agreements).

212. See U.S. Second Submission, *supra* note 17, ¶ 49 (remarking on Mexico's argument regarding the lack of GATT or WTO jurisprudence rejecting Mexico's reading of laws or regulations).

213. See Bal, *supra* note 68, at 87-89 (proposing a more expansive interpretation to the laws or regulations provision within Article XX(d)). The author contends that laws or regulations should include international agreements and that "there is no persuasive argument for limiting the application of Article XX(d) to domestic laws or regulations." *Id.*

214. See GATT, *supra* note 10, art. XX(h) (providing an exception for measures "undertaken in pursuance of obligations under any intergovernmental commodity agreement").

215. See U.S. Second Submission, *supra* note 17, ¶ 44 (insisting on a different interpretation of "laws or regulations" compared to "international commodity agreement" under Article XX).

216. See, e.g., Korea Beef, Report of the Appellate Body, *supra* note 60, ¶ 158 (declaring that the Korean government invoked Article XX(d) to secure compliance with its national laws to prevent deceptive practices); see also U.S. Tariff, Report of the Panel, *supra* note 71, ¶¶ 5.8-5.9 (analyzing whether Section 337 of the U.S. Tariff Act fell under the Article XX(d) exception).

217. See NAFTA, *supra* note 11, pmbl. (establishing that the governments of Canada, Mexico, and the United States will cooperate to ensure "harmonious"

both the lack of GATT or WTO jurisprudence on an expanded interpretation of “laws or regulations,” and the distinction between paragraphs (d) and (h) of Article XX, are sufficient to show that NAFTA is not a law or regulation within Article XX(d).<sup>218</sup>

In addition, Mexico’s reliance on the *Shrimp Turtle* decision to bolster its claim that Article XX(d) includes an international agreement is equally unpersuasive.<sup>219</sup> Although the case involved an international agreement—the Inter-American Convention—the dispute fell under Article XX(g) which relates to conservation of exhaustible natural resources.<sup>220</sup> Also, the parties in *Shrimp Turtle* were not seeking to enforce an international agreement, as Mexico asserts that it is in this dispute.<sup>221</sup>

## 2. *The HFCS Tax is Not Necessary to Secure Compliance with NAFTA*

Even assuming the Panel finds that NAFTA falls within the scope of Article XX(d), the HFCS tax is not necessary to secure compliance with NAFTA.<sup>222</sup> First, as the WTO lacks jurisdiction to decide whether the United States is in compliance with NAFTA, the Panel will only evaluate the Article III claims, and not laws

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international trade cooperation).

218. See discussion *supra* notes 210-221 and accompanying text (examining U.S. and Mexican arguments regarding the applicability of XX(d) to NAFTA).

219. See *Mexico: NAFTA, Not WTO*, *supra* note 17, at 15 (noting that the parties in the *Shrimp Turtle* dispute were also signatories to an international agreement).

220. See GATT, *supra* note 10, art. XX(g) (providing an exception for measures “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption”); see also Bradley Condon, *Multilateral Environmental Agreements and the WTO: Is the Sky Really Falling?*, 9 TULSA J. COMP. & INT’L L. 533, 544-45 (2002) (discussing the jurisdictional issues that arose in the *Shrimp Turtle* decision in light of Article XX(g)).

221. See *Shrimp Turtle*, Report of the Appellate Body, *supra* note 70, ¶¶ 10-28 (restating the United States’ arguments regarding the necessity of its measures under Article XX(g)).

222. See Klappers, *supra* note 122, at 91 (stating that WTO Panels evaluate whether there are GATT consistent alternative measures in making a necessity determination); see also *Mexico Extends Tax*, *supra* note 125, at 10 (discussing the complexities of the sweetener dispute between the United States and Mexico over sugar market access according to NAFTA).

established under NAFTA.<sup>223</sup> Indeed, Mexico agrees with the United States that the WTO only has jurisdiction over the GATT agreements and not over NAFTA issues.<sup>224</sup>

Past WTO and GATT panels have narrowly interpreted whether a measure qualifies under the “necessary” exception.<sup>225</sup> The Panel will likely evaluate the “necessity” of the Mexican tax measures under the balancing test applied in *Korea Beef*.<sup>226</sup> Mexico has not made a showing as to how the HFCS tax will have any bearing on U.S. compliance with NAFTA.<sup>227</sup> In addition, since the implementation of the HFCS tax, there has been no resolution between the United States and Mexico regarding their NAFTA obligations.<sup>228</sup>

Included in the balancing test the Appellate Body set forth in *Korea Beef* was the question of whether there are any “common interests or values” protected by the particular law or regulation.<sup>229</sup> The present Panel will likely find that Mexico’s interest in protecting and obtaining market access for its sugar industry is incompatible with the interests envisioned under Article XX(d).<sup>230</sup> Just as the

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223. See GATT 1994, *supra* note 10, Annex 2, art. 1 (establishing that the WTO dispute settlement body will hear disputes related to the covered agreements).

224. See *id.* Annex 2, art. 11 (setting forth that the purpose of the panels is to evaluate claims under GATT); see also U.S. Second Submission, *supra* note 17, ¶ 57 n.77 (citing to Mexico’s First Opening Statement and asserting that Mexico concedes that the dispute settlement body does not have the power to hear claims unrelated to the covered agreements under GATT).

225. See *Bal*, *supra* note 68, at 99-102 (criticizing the WTO panels’ narrow construction of the necessary prong of Article XX); see also *Mexico: NAFTA, Not WTO*, *supra* note 17, at 15 (observing that the *Shrimp Turtle* Panel, as well as other panels, interpreted the Article XX exemptions narrowly).

226. See *Korea Beef*, Report of the Appellate Body, *supra* note 60, ¶ 164 (establishing that a necessity analysis involves factors such as the “contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation imports or exports”).

227. See U.S. Answers I, *supra* note 16, ¶ 24 (noting that the United States and Mexico disagree as to their obligations under NAFTA).

228. See *USTR Challenges*, *supra* note 13, at 7-8 (commenting that the NAFTA sugar dispute between the United States and Mexico began in 1998).

229. *Korea Beef*, Report of the Appellate Body, *supra* note 60, ¶ 164.

230. See *Rosas*, *supra* note 80, at 80-81 (noting that panels will reject a party’s

*Korea Beef* Appellate Body noted that “common interests” are different from protectionist policies, this Panel will likely also conclude that Mexico’s interests fail to meet or satisfy the values protected by the Article XX(d) exception.<sup>231</sup> Thus, the Panel will likely find that the HFCS tax is not sufficiently “necessary” to fall within the Article XX(d) exception.<sup>232</sup>

Additionally, while Mexico’s contention that it lacks reasonable alternative means by which to pursue the sweetener dispute may be deemed persuasive, it is probably insufficient to satisfy the “necessary” standard.<sup>233</sup> Previous GATT and WTO decisions have strictly interpreted whether a party has reasonable alternative measures in resolving their trade disputes.<sup>234</sup> Panels rarely find that measures are necessary, even in situations where the parties failed to cooperate with international agreements.<sup>235</sup> As a result, Mexico’s allegation that the United States blocked the establishment of a NAFTA Panel is unlikely to convince this Panel to find that the measures were necessary, especially since the sweetener dispute is still pending before NAFTA.<sup>236</sup>

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invocation of Article XX if the measures have a protective application).

231. *See Korea Beef*, Report of the Appellate Body, *supra* note 60, ¶ 181 (finding that Korea could have enforced its laws by more cost effective and WTO consistent means).

232. *See Klabbbers*, *supra* note 122, at 92 (stating that when a party invokes the Article XX(d) exception, the measures must have a specific objective to meet the necessary test).

233. *See Bal*, *supra* note 68, at 101-02 (criticizing the narrow interpretation of the necessary standard in GATT and WTO jurisprudence). The author discusses that the dispute settlement panels “have created a high threshold for the term necessary.” *Id.*; *see also Sykes*, *supra* note 68, at 407-15 (providing a historical overview of Article XX’s alternative measures standard in GATT and WTO jurisprudence).

234. *See U.S. Tuna*, 1994 Report of the Panel, *supra* note 68, ¶¶ 5.34-5.39 (rejecting a U.S. argument that it had no reasonable alternative measures under Article XX).

235. *See Bal*, *supra* note 68, at 100 (opining that in *U.S. Tuna*, the Panel rejected the United States’ argument that there was no other reasonable alternative, even though the United States showed that dispute settlement efforts under a different international agreement had proven ineffective).

236. *See id.* (observing that the Panel found the U.S. measure was not necessary under Article XX even though Mexico had been unwilling to cooperate pursuant to

Finally, the Panel will consider the impact of the HFCS tax on imports and exports.<sup>237</sup> Mexico's strongest argument is that the United States' failure to abide by certain NAFTA provisions limited Mexico's market access for sugar exports by millions of dollars.<sup>238</sup> However, the appropriate inquiry focuses on the impact that the HFCS tax has on both exports and imports.<sup>239</sup> Similar to the *Korea Beef* opinion, where a Panel found that the measures translated into high-cost imported goods and hurt retailers of imported goods, this Panel will likely find that the HFCS tax measures have a significant monetary impact on HFCS imports, which is likely dissuade the Panel from finding that the tax measures are "necessary" under Article XX(d).<sup>240</sup>

### 3. *The HFCS Tax Does Not Satisfy the Chapeau of Article XX*

In addition to finding that the HFCS tax is not provisionally justified under Article XX(d), the Panel will also likely find that the tax measures do not meet the standard set forth in the chapeau.<sup>241</sup> Although the Panel may find that the HFCS tax does not rise to the level of "arbitrary or unjustifiable," the protectionist nature of the

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their international arrangements).

237. See *Korea Beef*, Report of the Appellate Body, *supra* note 60, ¶ 164 (emphasizing that the necessary balancing test includes the consideration that a measure has on imports or exports).

238. See *Mexican Sugar-Cane Growers Protest Government's Plan to Change Pricing Mechanisms*, SOURCEMEX ECON. NEWS & ANALYSIS ON MEX., Jan. 26, 2005 [hereinafter *Sugar-Cane Growers*] (noting that the failure of the United States to abide by its NAFTA obligations and HFCS competition have hurt the Mexican sugar industry), available at 2005 WL 66533302.

239. See *Korea Beef*, Report of the Appellate Body, *supra* note 60, ¶ 172 (examining the effects that the dual retail system had on imported goods and retailers of imported goods).

240. See *Mexico Extends Tax*, *supra* note 125, at 10 (explaining that the Mexican tax measures have adversely affected U.S. HFCS exports for over two years).

241. See discussion *supra* note 81 and accompanying text (stating that the central objectives of the chapeau are to prevent discrimination and guard against protectionist policies); see also Rosas, *supra* note 80, at 80 (reflecting on the restrictive and narrow application of the chapeau of Article XX).

HFCS tax constitutes a disguised form of discrimination and thus does not satisfy the chapeau of Article XX.<sup>242</sup>

Mexico will likely try to prove that its tax measures are neither arbitrary nor unjustifiably discriminatory.<sup>243</sup> As Mexico has shown, it has negotiated and consulted with the United States via NAFTA dispute settlement mechanisms since 2000.<sup>244</sup> Thus, unlike the parties in *Shrimp Turtle*—who failed to engage foreign governments in consultations regarding their trade dispute—Mexico has shown that it did attempt to resolve the sweetener dispute through the mechanisms provided for under NAFTA.<sup>245</sup> Moreover, the Panel is also likely to find that the HFCS tax does not exhibit the same coercive nature or rigid requirements as the measures at issue in *Shrimp Turtle*.<sup>246</sup> Unlike the laws involved in *Shrimp Turtle*, which effectively forced all foreign countries to adopt a regulatory program

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242. See Charnovitz, *supra* note 82, at 47 (remarking that the central objective behind the chapeau of Article XX is to prevent against protectionist policies).

243. See *Shrimp Turtle*, Report of the Appellate Body, *supra* note 70, ¶ 172 (asserting that the United States' failure to seriously negotiate with certain parties to the Inter-American Convention who export shrimp, but negotiated seriously with others, was "plainly discriminatory, and in our view, unjustifiable"); see also Klabbers, *supra* note 122, at 89 (stating that panels simultaneously interpret the arbitrary or unjustifiable discrimination provisions of Article XX).

244. See, e.g., U.S., *Mexico Sweetener Talks Advance on Most Critical Hurdle*, INSIDE U.S. TRADE, Feb. 6, 2004, at 9 (examining the negotiations made by Mexico and the United States to resolve the NAFTA sweetener dispute); see also *U.S. Mexican Industries Make New Stab at Resolving Sweetener Dispute*, INSIDE U.S. TRADE, Apr. 23, 2004, at 13-14 (discussing that the two main issues regarding the NAFTA dispute involve Mexico's access to the U.S. sugar market and its above-quota tariff rate after 2008, as originally envisioned in the original NAFTA agreement).

245. See *Mexico: NAFTA, Not WTO*, *supra* note 17, at 15 (noting that Mexico requested the establishment of a NAFTA panel in 2000, which the United States subsequently blocked); see also United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia, Report of the Appellate Body, WT/DS58/AB/RW, ¶ 122 (June 15, 2001) (maintaining that a panel is less likely to find arbitrary and unjustifiable discrimination when countries make a good faith effort to negotiate via international agreements), available at 2001 WTO DS LEXIS 19.

246. See *Shrimp Turtle*, Report of the Appellate Body, *supra* note 70, ¶ 163 (noting the rigid and unbending nature of the U.S. measure at issue).



similar to the U.S. law, the HFCS tax does not have such coercive requirements or effects.<sup>247</sup>

Nonetheless, the Panel is likely to find that the HFCS tax is a disguised form of discrimination because of the protectionist policy underlying the tax.<sup>248</sup> Mexico unpersuasively argues that the HFCS tax is not a disguised restriction on trade because it has publicly announced its tax measures.<sup>249</sup> Article XX's purpose, however, is to guard against protectionist measures.<sup>250</sup> Since Mexico concedes that it enacted the tax to protect its sugar industry, it is very unlikely that the Panel will find that the HFCS tax is not a disguised restriction on international trade.<sup>251</sup> As a result, the Panel will likely find that the HFCS tax is a disguised form of discrimination, thereby failing to the requirements for the chapeau of Article XX(d).<sup>252</sup>

### III. RECOMMENDATIONS

The WTO Panel should conclude that the HFCS tax violates Article III:2 and Article III:4 of GATT and should recommend that Mexico revise its tax structure to conform with its national treatment obligations.<sup>253</sup> Specifically, Mexico should eliminate or lower its tax

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247. See *id.* (discussing that the U.S. law does not consider other measures taken by countries to comply with the conservation of sea turtles).

248. See Bal, *supra* note 68, at 73-74 (confirming that the goal of the "disguised restriction" term of Article XX is to prevent parties from engaging in protectionist measures).

249. See U.S. Second Submission, *supra* note 17, ¶ 70 n.92 (citing Mexico's First Submission to the WTO panel, in which it states that their purpose in passing the law "has 'been stated by members of Congress and analyzed by the Supreme Court of Justice'").

250. See Rosas, *supra* note 80, at 81 (stressing that the central goal of Article XX is to guard against protectionist policies); *cf.* Klabbers, *supra* note 122, at 90-91 (criticizing the disguised restriction analysis under Article XX as it revolves around the term "disguised" instead of "restriction").

251. See Michael O'Boyle, *Nafta's Birthday Party*, BUS. MEX., Feb. 1, 2004, at 28 (stating that Mexico imposed the HFCS tax as a response to the U.S. failure to increase Mexico's annual sugar quota), available at 2004 WLNR 11183777.

252. See Klabbers, *supra* note 122, at 89 (affirming that a party must satisfy all of the provisions of Article XX in order for the otherwise inconsistent measures to circumvent the requirements of GATT).

253. See Chile Beverages, Report of the Appellate Body, *supra* note 53, ¶ 81

rate<sup>254</sup> to meet its Article III:2 obligations, and should remove the tax exemptions on cane sugar-based soft drinks and beverages to satisfy Article III:4.<sup>255</sup> The Panel should conclude that the HFCS tax is not provisionally justified under XX(d) to secure compliance with NAFTA; however, it should still recommend that Mexico and the United States make concerted efforts to resolve their long-standing NAFTA dispute.<sup>256</sup> By implementing any one of these measures, Mexico can avoid the continuing violation of Article III.<sup>257</sup>

#### A. MEXICO SHOULD TAX CANE SUGAR-BASED SOFT DRINKS AND BEVERAGES SIMILAR TO BEET SUGAR AND HFCS-BASED PRODUCTS

If the WTO Panel finds that the HFCS tax violates Article III:2, first and second sentences, Mexico must revise its tax measures in order to meet its Article III obligations under GATT.<sup>258</sup> Indeed,

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(requesting that Chile conform its tax laws with its national treatment obligations of GATT); *see also* Japan Beverages, Report of the Appellate Body, *supra* note 34, at \*70-72 (upholding the Panel's finding that the Japanese Liquor Tax Law violated Article III:2, first and second sentences and recommending that Japan conform with its GATT obligations).

254. *See* Bhala & Gantz, *supra* note 57, at 43-44 (noting that WTO Panels are increasingly skeptical of national taxation measures that seek to prevent competition from foreign products).

255. *See* Italian Discrimination, Report of the Panel for Conciliation, *supra* note 67, ¶ 25 (requesting that the Italian government revise its laws granting more favorable credit terms to its domestic agricultural machinery in accordance with Article III:4).

256. *See generally* O'Boyle, *supra* note 251 (indicating the failure of the NAFTA dispute settlement mechanism to effectively manage the NAFTA sweetener dispute). The author comments that the United States and Mexico have failed to agree on the applicability of side agreements in relation to Mexico's access to the U.S. sugar market. *Id.*; Rafael Fernandez de Castro & Rossana Fuentes Berain, *Hands Across North America*, N.Y. TIMES, March 28, 2005, at A17 (proposing that the United States, Mexico, and Canada engage in a shared customs union to resolve their economic disagreements under NAFTA), *available at* 2005 WLNR 4818153.

257. *See* Trebilcock, *supra* note 28, at 5 (showing that the central inquiry of a national treatment violation focuses on whether governments discriminate between foreign products and domestic products).

258. *See* Japan Beverages, Report of the Appellate Body, *supra* note 34, at \*1-4 (finding that the Panel found that the Japanese Liquor Tax Law was inconsistent with Article III:2 and that as a result, Japan had to revise its tax measures).

Mexico can meet the requirements of Article III:2, first sentence, by either eliminating the tax altogether or applying the tax to soft drinks and beverages sweetened with cane sugar.<sup>259</sup> The Mexican government admitted that it imposed the soft drink tax to boost its economy, as the soft drink market comprises a major share of the country's economic output.<sup>260</sup> In order to meet its financial goals, Mexico should impose the soft drink tax equally, on both cane sugar-based beverages and soft drinks and the HFCS and beet sugar-based products,<sup>261</sup> thereby receiving tax revenues from both markets.<sup>262</sup> Mexico can also eliminate the soft drink tax altogether and turn to other sources of revenue to meet its fiscal and budgetary goals.<sup>263</sup> Ultimately, by taxing HFCS, beet sugar, and cane sugar-based beverages similarly, Mexico will bring its laws into conformity with Article III:2.<sup>264</sup>

#### B. MEXICO MUST LOWER THE TAX RATE CURRENTLY APPLIED TO SOFT DRINKS AND BEVERAGES SWEETENED WITH HFCS

If the Panel concludes that HFCS and cane sugar are like products, then it will also find that that the two products are in a DCS

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259. See Horn & Mavroidis, *supra* note 32, at 41 (noting that excessive taxation under Article III:2, first sentence or dissimilar taxation under Article III:2, second sentence is a violation of GATT's national treatment obligations).

260. See *Soft Drink Tax*, *supra* note 7 (stating that Mexico wanted to reform its tax system especially since its economy shrank by 1.6 percent within three months). The author noted that the U.S. economic slowdown also led to the contraction of Mexico's economy. *Id.*

261. See Malkin, *supra* note 14 (discussing that the soft drink tax ensured the continued operation of the sugar mills and a stronger cane sugar market).

262. See *Mexico Lifts Corn Syrup Tax*, AGJOURNAL, Mar. 5, 2002 (reporting that Mexico imposed the soft drink tax with the stated goal of boosting government income), at [http://www.agjournal.com/story.cfm?story\\_id=1807](http://www.agjournal.com/story.cfm?story_id=1807) (last visited Feb. 22, 2005).

263. See *Mexico Lifts Corn Syrup Tax*, *supra* note 276 (showing that the United States argued that the twenty-percent tax on HFCS sweetened soft drinks and beverages would not raise enough income for Mexico).

264. See Horn & Mavroidis, *supra* note 32, at 50 (discussing the tax differentials on like and DCS products that violate Article III:2, first and second sentences of GATT).

relationship.<sup>265</sup> Mexico must lower its taxes on soft drinks and beverages that use sweeteners other than cane sugar in order to conform with Article III:2, second sentence of GATT.<sup>266</sup> Specifically, the Mexican government should lower the tax rate it currently applies to beverages sweetened with HFCS to a level that meets the *de minimis* standard.<sup>267</sup> As discussed above, the Appellate Body in *Chile Beverages* found that a tax difference over twenty percent exceeded the *de minimis* standard.<sup>268</sup> The Appellate Body noted that future Panels should decide whether measures exceed the *de minimis* standard on an individual basis.<sup>269</sup> With respect to this dispute, Mexico has a greater chance of complying with the Article III:2, second sentence obligations if the tax rate is less than twenty percent.<sup>270</sup> For example, the Mexican government could tax soft drinks using sweeteners other than cane sugar at a ten percent or five percent rate.<sup>271</sup> A smaller tax differential between HFCS and cane sugar-based beverages might bring Mexican tax provisions below the

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265. See *Korea Beverages*, Report of the Appellate Body, *supra* note 43, ¶ 118 (establishing that panels evaluate imperfectly substitutable products under Article III:2, second sentence). It also noted that the DCS standard is broader than the like products standard. *Id.*; see also *Horn & Mavroidis*, *supra* note 32, at 45 (maintaining that panels consider all like products to fall within the DCS category).

266. See *Gupta*, *supra* note 38, at 703-04 (showing that the Panel in *Japan Beverages* found that the fact that the tax rate was six times higher on foreign alcoholic beverages was sufficient to find an Article III:2, first and second sentence violation).

267. See *Trebilcock*, *supra* note 28, at 24 (demonstrating that a party must show that an internal tax is more than *de minimis* in order to meet the not similarly taxed standard of Article III:2, second sentence).

268. See discussion *supra* Part I.A.1.c (explaining the structure and application of the Chilean Liquor Tax).

269. See *Chile Beverages*, Report of the Appellate Body, *supra* note 53, ¶ 54 (holding that the issue of whether products are not similarly taxed is distinct from the so as to afford protection analysis).

270. See *Trebilcock*, *supra* note 28, at 24 (discussing that the complaining party must prove that the tax burden on the foreign products is higher than on domestic products).

271. See *Bhala & Gantz*, *supra* note 57, at 42 (stating that a twenty-percent taxation difference between the local and imported alcoholic beverages was more than *de minimis*, thereby meeting the not similarly taxed standard).

*de minimis* threshold, allowing the Mexican government to maintain the HFCS tax law.<sup>272</sup>

### C. MEXICO MUST REMOVE THE TAX EXEMPTIONS ON CANE SUGAR-BASED SOFT DRINKS AND SYRUPS

Currently, Mexico's HFCS tax provides an advantage to cane sugar, almost exclusively a domestic product, and a disadvantage to HFCS and beet sugar, primarily imported products.<sup>273</sup> As a result, Mexico's tax measures provide less favorable treatment to foreign products compared with its national product.<sup>274</sup> As such, Mexico should remove its tax exemptions on cane sugar-based soft drinks and syrups in order to fulfill its Article III:4 commitments.<sup>275</sup>

### D. THE UNITED STATES AND MEXICO SHOULD RESOLVE THEIR LONG-STANDING NAFTA DISPUTE

As the United States and Mexico have failed to resolve the sweetener dispute through negotiations, they should attempt to work out their differences through a NAFTA dispute settlement body.<sup>276</sup> The United States should not unilaterally block the appointment of panelists and evade its NAFTA commitments.<sup>277</sup> By blocking panelists and avoiding its NAFTA obligations, the United States undermines the dispute settlement process provided for under

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272. See Horn & Mavroidis, *supra* note 32, at 51 (noting that WTO Panels have not defined *de minimis*, and determine this standard on a case-by-case basis).

273. See, e.g., Second Executive Summary, *supra* note 137, ¶ 32 (confirming that the tax exemption only applies to cane sugar products).

274. See Korea Beef, Report of the Appellate Body, *supra* note 60, ¶ 133 (affirming that parties cannot afford less favorable treatment to like imported products).

275. See Italian Discrimination, Report of the Panel for Conciliation, *supra* note 67, ¶ 25 (finding that the Italian law violated Article III:4 and recommended that the government eliminate its laws in conformity with GATT).

276. See *USTR Challenges*, *supra* note 13, at 7 (discussing that the sugar dispute between the United States and Mexico stems from a disagreement over NAFTA provisions regarding Mexican sugar access).

277. See *Mexico: NAFTA, Not WTO*, *supra* note 17, at 15 (reporting that the United States has not cooperated with Mexico in the appointment of panelists in a NAFTA dispute settlement body).

NAFTA.<sup>278</sup> The United States and Mexico should submit to a panel under NAFTA and find an efficient resolution to their dispute.<sup>279</sup>

## CONCLUSION

The HFCS tax Mexico imposed on soft drinks and beverages that do not use cane sugar as a sweetener violates Article III of GATT.<sup>280</sup> The WTO Panel will likely find an Article III:2, first sentence violation and conclude that HFCS, beet sugar, and cane sugar are like products and that the HFCS tax taxes beet sugar and HFCS in excess of cane sugar.<sup>281</sup> In addition, the Panel will establish an Article III:2, second sentence violation by finding that HFCS and cane sugar are in a directly competitive and substitutable relationship, are not similarly taxed, and that the tax measure affords protection to the domestic sugar industry.<sup>282</sup> With regard to Article III:4, the Panel will probably find that Mexico's tax measures afford less favorable treatment to HFCS and beet sugar.<sup>283</sup> Finally, Mexico's Article XX(d) affirmative defense is unlikely to persuade the Panel.<sup>284</sup>

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278. See generally O'Boyle, *supra* note 251 (remarking on the inadequacy of the NAFTA dispute settlement mechanism to resolve the sweetener dispute).

279. See U.S., *Mexican Sweetener Industries Set for Fresh HFCS Talks Next Week*, INSIDE U.S. TRADE, May 21, 2004, at 19 (explaining Mexico's willingness to cooperate and discuss the significance of the original NAFTA provisions); see also U.S. Answers II, *supra* note 89, ¶ 79 (discussing that the United States and Mexico had to agree on the appointment of panelists before the NAFTA Secretariat could appoint panelists in the sugar dispute).

280. See discussion *supra* Parts II.A, II.B, II.C (explaining that beet sugar, HFCS, and cane sugar are like products and that HFCS and cane sugar are DCS products; evaluating the tax differentials of the Mexican soft drink tax).

281. See discussion *supra* Part II.A (evaluating the physical characteristics, end-uses, consumer preferences, channels of distribution, and tariff classifications of HFCS and cane sugar).

282. See discussion *supra* Part II.B (noting that the DCS products standard depends on market competitiveness).

283. See discussion *supra* Part II.C (finding that the HFCS tax exemptions create a market advantage for the domestic industry).

284. See discussion *supra* Part II.D (asserting that NAFTA is not provisionally justified under Article XX(d) nor does it satisfy the chapeau of Article XX).

In order to satisfy its Article III obligations, Mexico must revise or eliminate the HFCS tax with regard to soft drinks and beverages.<sup>285</sup> With these changes in place, the United States and Mexico will be more likely to resolve their long-running sweetener dispute under NAFTA<sup>286</sup>

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285. See discussion *supra* Part III (recommending that the Mexican government revise or eliminate its tax laws to conform with its national treatment obligations under Article III:2).

286. See discussion *supra* Part III (recommending that the United States allow for the appointment of NAFTA panelists).