

ORAL STATEMENT OF THE UNITED STATES
AT THE ORAL HEARING OF THE APPELLATE BODY

Mexico – Certain Tax Measures on Soft Drinks and Other Beverages

(AB-2005-10)

1. Good morning, Mr. Chairman and members of the division. On behalf of the United States, we thank you for the opportunity to appear here today.

Introduction

2. We would like to begin by recalling what this dispute is about. As the Panel found, Mexico has imposed tax measures on soft drinks and other beverages whose “intentional objective” is “to afford protection to Mexican production of cane sugar.”¹ Moreover, those tax measures were imposed “to stop the displacement of domestic cane sugar by imported HFCS”², and they discriminate against imported HFCS under Articles III:2 and III:4 of the GATT 1994. In fact, while it is the United States that is the complainant in this dispute – because of the substantial harm to U.S. trade that these measures cause – Mexico’s tax measures in fact discriminate against imported non-cane sugar sweeteners from all WTO Members.

3. Mexico defends these measures on the contention that it may breach its WTO obligations, because it alleges that the United States has breached its NAFTA obligations. Mexico’s defense takes two forms. First, Mexico argues that the Panel had discretion to decline jurisdiction over the dispute and should have exercised that discretion due to “problems arising under the NAFTA.”³ Mexico makes this argument notwithstanding its acknowledgment that the

¹ Panel Report, para. 8.91.

² Panel Report, para. 8.2.

³ Mexico Appellant Submission, para. 73.

dispute was properly before the Panel. Second, Mexico argues that its tax measures are justified under Article XX(d) of the GATT 1994 because, in its view, they are “necessary to secure compliance with” alleged U.S obligations under the NAFTA. The Panel rightly rejected both defenses finding them contrary to the text of the WTO Agreement.

4. The Appellate Body should affirm the Panel’s findings. It should also reject Mexico’s contention that the Panel breached its obligations under Article 11 of the DSU. For the many reasons why it should, I refer the Appellate Body to our appellee submission. Rather than repeat each of those reasons here, I will use today’s statement to emphasize a few brief points.

Article XX(d)

5. Starting with Mexico’s defense under Article XX(d), let us be clear what Mexico is asking with this defense. It is asking that Article XX(d) be read to permit it to breach its WTO obligations because it alleges that another Member has breached obligations under another international agreement. In other words, Mexico seeks to “secure compliance” with alleged U.S. NAFTA obligations at the expense of Mexico’s WTO obligations, and contends that the WTO Agreement permits such action. Mexico’s defense is untenable on a number of levels. But let me start with the most fundamental.

6. Obligations under international agreements are not “laws or regulations” within the meaning of Article XX(d). As set out in detail in our appellee submission, the ordinary meaning of the phrase “laws or regulations” read in its context and in light of the Agreement’s object and purpose means the domestic laws or regulations of a Member, and not the provisions of other international agreements. Mexico’s reading of the phrase to include international agreements is supported by none of the definitions of the words “laws” or “regulations” cited in this dispute.⁴

7. Nor is it supported by the context in which those words appear – either as part of Article

⁴ U.S. Appellee Submission, paras. 30, 32.

XX or more broadly as part of the GATT and the WTO Agreement.⁵ With respect to the former, it bears emphasizing that the phrase “laws or regulations” appears as part of the phrase “laws or regulations that are not inconsistent with this Agreement.”⁶ Article XX(d) thus clearly contemplates that there will be some judgment as to whether the “laws or regulations” are “not inconsistent with” the GATT 1994. But in the case of international agreements, what basis or standard would there be by which a WTO panel or the Appellate Body might judge whether the international agreement – such as a bilateral agreement on investment, anti-competitive practices, or mediation and arbitration – is “not inconsistent with” the GATT? The GATT 1994 sets out disciplines on and commitments regarding measures taken by Members, thereby establishing the criteria for assessing their consistency with the GATT 1994. The GATT 1994 does not, however, provide general guidance to panels or the Appellate Body on how to assess whether another international agreement or customary public international law is consistent with the GATT 1994, let alone how they might do so when two Members disagree on the meaning of that international agreement. Mexico’s defense is silent on these very real and difficult questions. The silence as to how to address them only reinforces the conclusion that the phrase “laws or regulations” does not include international agreements or public international law, but rather means the domestic laws or regulations of a Member.

8. Mexico’s reading of the phrase “laws or regulations” also ignores that if the phrase includes obligations under international agreements, then it also includes obligations under the WTO Agreement. Mexico has apparently recognized this conflict.⁷ It would mean that Article XX(d) permits Members to unilaterally suspend obligations under the WTO Agreement to remedy an alleged breach of that agreement, without DSB authorization and without any requirement to adhere to the rules established in Article 22 of the DSU. It would also permit Members to do so notwithstanding DSU Article 23’s instruction that “[w]hen Member seek the redress of a violation of obligations ... under the covered agreements...they shall have recourse to, and abide by, the rules of procedures of the [DSU].” Mexico attempts to resolve this conflict

⁵ U.S. Appellee Submission, paras. 33-38, 42-44..

⁶ U.S. Appellee Submission, para. 33.

⁷ Mexico Opening Statement at the Second Meeting of the Panel, paras. 71-72.

by reading the phrase “laws or regulations” to mean obligations under international agreements but not those under the WTO Agreement. There is no textual basis – even under Mexico’s erroneous approach – to read the phrase “laws or regulations” to include obligations under some international agreements but not others. This conflict, of course, does not present itself if the phrase “laws or regulations” is read, as its ordinary meaning and context suggest, to mean the domestic laws or regulations of Members.

9. Because the phrase “laws or regulations” does not include obligations under international agreements, the Appellate Body need not analyze Mexico’s defense any further. Its tax measures cannot be justified under Article XX(d), because Article XX(d) does not extend to measures designed to secure compliance with international agreements, including alleged U.S. obligations under the NAFTA.

10. Our appellee submission also explains why Article XX(d) does not apply to measures designed to pressure another Member to comply with obligations under an international agreement and why Mexico’s tax measures are not designed to secure U.S. compliance with the NAFTA. These explanations confirm that the Panel’s findings with respect to both these issues were correct. But, again, the Appellate Body need not reach them if upon reading the phrase “laws or regulations” it concludes, as the United States has shown, that it does not include obligations under international agreements.

Jurisdiction

11. As to Mexico’s defense that the Panel should have declined jurisdiction over this dispute, the U.S. appellee submission sets out in detail the reasons why Mexico’s defense must fail. A WTO panel does not have the authority to decline to exercise jurisdiction over a dispute properly set before it – that is, to decide not to perform the task that the DSB established it to do, and that the DSU and its terms of reference mandate that it do. Mexico’s contention that some “implied jurisdictional power” “inherent” to international adjudicative bodies should override the express text of the DSU and the Panel’s terms of reference is simply not credible. It is not supported by other “powers” WTO panels may have, for example, to interpret parties’ submissions, devise

rules to safeguard confidential information or decide which claims fall within its terms of reference.⁸ Each of these are actions a panel exercises in furtherance of its mandate, not in order to decline to perform the task the DSB has set before it. Mexico's defense is also not supported by the principle of judicial economy. Judicial economy permits a panel not to decide some claims before it in certain situations; it does not mean that the panel may choose to decide **none** of the claims before it.

12. As a WTO panel does not have the authority to decline jurisdiction over a dispute that is properly before it, the AB should reject Mexico's defense and uphold the Panel's legal conclusion that it had no discretion to decline to exercise jurisdiction in this dispute. Accordingly, the Appellate Body need not reach the issue of whether the Panel should have declined to exercise jurisdiction over this dispute because of problems arising under the NAFTA. That said, as the Panel correctly observed, there is no legal standard by which to judge when the existence of separate claims under another international agreement might justify declining jurisdiction over a WTO dispute. Acceptance of Mexico's defense in the absence of such a standard, would thus mean, as the Panel also correctly observed, that the "decision to exercise jurisdiction would become political rather than legal in nature."⁹

Article 11

13. Mexico additionally argues that the Panel erred in its appreciation of the evidence and arguments submitted in this dispute and, accordingly, breached its obligations under Article 11 of the DSU. Mexico's arguments under Article 11 fundamentally misunderstand the standard required to sustain an Article 11 claim of error. Mexico has not identified any evidence or arguments put before the Panel that the Panel "willfully disregarded", nor any findings of the Panel that "lack a basis in the evidence contained in the panel record."¹⁰ Mexico merely

⁸ See Mexico Appellant Submission, para. 67.

⁹ Panel Report, para. 7.17.

¹⁰ U.S. Appellee Submission, para. 116 (quoting Appellate Body Report, *United States – Carbon Steel*, WT/DS213/AB/R, para. 142 and Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, WT/DS276/AB/R, para. 181).

reargues that the Panel ought to have found persuasive Mexico's contention that breaching its WTO obligations in order to attract the attention of the United States so that it would comply with the NAFTA, constitutes a measure designed to secure compliance with laws or regulations under Article XX(d). The Panel duly considered and rejected Mexico's contention; Mexico cannot support an Article 11 claim of error by merely arguing that in considering this contention the Panel ought to have reached a different result.

14. It is also noteworthy that Mexico's appellant submission limits its Article 11 claim of error to the Panel's finding that "Mexico has not established that its measures contribute to securing compliance in the circumstances of this case" as it appears in paragraph 8.186 of the panel report.¹¹ In other words, Mexico does not contest the Panel's other findings of fact nor the Panel's decision not to make certain findings of fact, including those relating to the facts and status of the NAFTA dispute.

Conclusion

15. Before concluding my statement today, I again wish to recall what is at stake in this dispute. First, may a panel – established by the DSB to make findings under a covered agreement, so as to assist the DSB in making recommendations or rulings under that agreement – tell the DSB that it will not in fact perform that function? Second, can Article XX(d) of the GATT 1994 be read to permit a Member to breach its WTO obligations, and to ignore the provisions of the covered agreements concerning the suspension of obligations under the WTO Agreement, any time the Member asserts that such action is necessary to address another Member's alleged breach of some international agreement? For the reasons stated today and in our submissions to the Appellate Body and the Panel, it is simply not tenable to answer either question in the affirmative. The Panel rightly rejected Mexico's arguments to the contrary, as should the Appellate Body.

16. Mr. Chairman, members of the Division, this concludes my opening statement. We look

¹¹ Notice of Appeal, para. 3; Mexico Appellant Submission, para. 165.

forward to any questions you may have.