

BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

Mexico – Tax Measures on Soft Drinks and Other Beverages

(AB-2005-10)

APPELLEE SUBMISSION
OF THE UNITED STATES OF AMERICA

January 6, 2006

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SERVICE LIST

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Table of Contents

Table of Reports i

I. INTRODUCTION 1

II. BACKGROUND 2

III. ARGUMENT 5

 A. The Panel Correctly Found That Mexico’s Tax Measures Are Not Designed to Secure Compliance With Laws or Regulations Within the Meaning of Article XX(d) of the GATT 1994 5

 1. The Panel Correctly Found that “Laws or Regulations” Do Not Include International Agreements Such As the NAFTA 7

 2. The Panel Correctly Found that “To Secure Compliance” Does Not Apply to Measures to Induce A Member to Comply With Obligations Owed Under An International Agreement 14

 3. The Panel Correctly Found that Mexico’s Tax Measures Are Not Designed to Secure Compliance 18

 4. Completing the Panel’s Analysis 26

 (i) Mexico’s Tax Measures Are Not “Necessary” To Secure Compliance 27

 (ii) The Appellate Body Should Reject Mexico’s Efforts to Introduce New Evidence on the “Necessity” of its Tax Measures 30

 (iii) Mexico’s Tax Measures Do Not Pass Muster Under Article XX’s Chapeau 31

 B. Mexico’s Claims Under DSU Article 11 Are Without Merit 34

 C. The Panel Correctly Found That A WTO Panel Cannot Decide to Refrain From Exercising Validly Established Jurisdiction 36

IV. CONCLUSION 40

Executive Summary 41

Table of Reports

SHORT TITLE	FULL TITLE AND CITATION
Panel Report	Panel Report, <i>Mexico - Tax Measures on Soft Drinks and Other Beverages</i> , WT/DS308/R, circulated 7 October 2005, notice of appeal submitted to Appellate Body on 6 December 2005
<i>Argentina – Hides and Leather</i>	Panel Report, <i>Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather</i> , WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V, 1779
<i>Australia - Salmon</i>	Appellate Body Report, <i>Australia - Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327
<i>Canada - Aircraft</i>	Appellate Body Report, <i>Canada - Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377
<i>Canada - FIRA (GATT)</i>	GATT Panel Report, <i>Canada - Administration of the Foreign Investment Review Act</i> , L/5504, adopted 7 February 1984, BISD 30S/140
<i>Canada - Periodicals</i>	Panel Report, <i>Canada - Certain Measures Concerning Periodicals</i> , WT/DS31/R and Corr.1, adopted 30 July 1997, as modified by the Appellate Body Report, WT/DS31/AB/R, DSR 1997:I, 481
<i>Canada - Wheat Exports and Grain Imports</i>	Appellate Body Report, <i>Canada - Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/R, adopted 27 September 2004
<i>Canada - Wheat Exports and Grain Imports</i>	Panel Report, <i>Canada - Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/R, adopted 27 September 2004
<i>Dominican Republic - Importation and Sale of Cigarettes</i>	Appellate Body Report, <i>Dominican Republic - Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/AB/R, adopted 19 May 2005
<i>Dominican Republic - Importation and Sale of Cigarettes</i>	Panel Report, <i>Dominican Republic - Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/R, 26 November 2004, adopted 19 May 2005, as modified by the Appellate Body Report, WT/DS302/AB/R

<i>EC - Bananas III (US)</i>	Panel Report, <i>European Communities - Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/R/USA, adopted 25 September 1997, as modified by the Appellate Body Report, WT/DS27/AB/R, DSR 1997:II, 943
<i>EC - Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
<i>EEC - Parts and Components (GATT)</i>	GATT Panel Report, <i>EEC - Regulation on Imports of Parts and Components</i> , L/6657, adopted 16 May 1990, BISD 37S/132
<i>EC - Tariff Preferences</i>	Panel Report, <i>European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries</i> , WT/DS246/R, adopted 20 April 2004, as modified by the Appellate Body Report, WT/DS/246/AB/R
<i>EC - Trademarks and Geographical Indications (US)</i>	Panel Report, <i>European Communities - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by the United States</i> , WT/DS174/R, adopted 20 April 2005
<i>India – Quantitative Restrictions</i>	Appellate Body Report, <i>India – Quantitative Restrictions on Imports of Agricultural, Industrial and Textile Products</i> , WT/DS90/AB/R, adopted 22 September 1999, DSR 1999:IV, 1763
<i>Indonesia - Autos</i>	Panel Report, <i>Indonesia - Certain Measures Affecting the Automobile Industry</i> , WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1, 2, 3, and 4, adopted 23 July 1998, DSR 1998:VI, 2201
<i>Japan - Agricultural Products (GATT)</i>	GATT Panel Report, <i>Japan - Restrictions on Imports of Certain Agricultural Products</i> , L/6253, adopted 2 February 1988, BISD 35S/163
<i>Korea - Various Measures on Beef</i>	Appellate Body Report, <i>Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, 5
<i>Korea - Various Measures on Beef</i>	Panel Report, <i>Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/R, WT/DS169/R, adopted 10 January 2001, as modified by the Appellate Body Report, WT/DS161/AB/R, WT/DS169/AB/R, DSR 2001:I, 59

<i>Mexico - Corn Syrup</i>	Panel Report, <i>Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States</i> , WT/DS132/R and Corr.1, adopted 24 February 2000, DSR 2000:III, 1345
<i>Mexico - Corn Syrup (Article 21.5 - US)</i>	Appellate Body Report, <i>Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States - Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675
<i>Mexico - Corn Syrup (Article 21.5 - U.S.)</i>	Panel Report, <i>Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States - Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS132/RW, adopted 21 November 2001, as upheld by the Appellate Body Report, WT/DS132/AB/RW, DSR 2001:XIII, 6717
<i>Turkey - Textiles</i>	Panel Report, <i>Turkey - Restrictions on Imports of Textile and Clothing Products</i> , WT/DS34/R, adopted 19 November 1999, as modified by the Appellate Body Report, WT/DS34/AB/R, DSR 1999:VI, 2363
<i>US - Auto Taxes (GATT)</i>	GATT Panel Report, <i>United States - Taxes on Automobiles</i> , DS31/R, 11 October 1994
<i>US - Carbon Steel</i>	Appellate Body Report, <i>United States - Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002
<i>US - FSC</i>	Panel Report, <i>United States - Tax Treatment for "Foreign Sales Corporations"</i> , WT/DS108/R, adopted 20 March 2000, as modified by the Appellate Body Report, WT/DS108/AB/R, DSR 2000:IV, 1675
<i>US - Gambling</i>	Appellate Body Report, <i>United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005
<i>US - Gambling</i>	Panel Report, <i>United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/R, adopted 20 April 2005, as modified by the Appellate Body Report, WT/DS285/AB/R

<i>US - Gasoline</i>	Appellate Body Report, <i>United States - Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
<i>US - Gasoline</i>	Panel Report, <i>United States - Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/R, adopted 20 May 1996, as modified by the Appellate Body Report, WT/DS2/AB/R, DSR 1996:I, 29
<i>US - Hot-Rolled Steel</i>	Appellate Body Report, <i>United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697
<i>US - Lead and Bismuth II</i>	Appellate Body Report, <i>United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom</i> , WT/DS138/AB/R, adopted 7 June 2000, DSR 2000:V, 2595
<i>US – Malt Beverages (GATT)</i>	GATT Panel Report, <i>United States – Measures Affecting Alcoholic and Malt Beverages</i> , DS23/R, adopted 19 June 1992, BISD 39S/206
<i>US - Offset Act (Byrd Amendment)</i>	Appellate Body Report, <i>United States - Continued Dumping and Subsidy Offset Act of 2000</i> , WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003
<i>US - Section 337 (GATT)</i>	GATT Panel Report, <i>United States - Section 337 of the Tariff Act of 1930</i> , L/6439, adopted 7 November 1989, BISD 36S/345
<i>US – Shrimp (21.5)</i>	Appellate Body Report, <i>United States - Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia</i> , WT/DS58/RW/AB/R, adopted 21 November 2001, DSR 2001:XIII, 6481
<i>US - Shrimp</i>	Appellate Body Report, <i>United States - Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
<i>US - Softwood Lumber V</i>	Appellate Body Report, <i>United States - Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/AB/R, adopted 31 August 2004
<i>US - Spring Assemblies (GATT)</i>	GATT Panel Report, <i>United States - Imports of Certain Automotive Spring Assemblies</i> , L/5333, adopted 26 May 1983, BISD 30S/107

<i>US - Tuna/Dolphin I (GATT)</i>	GATT Panel Report, <i>United States - Restrictions on Imports of Tuna</i> , DS21/R, 3 September 1991, BISD 39S/155
<i>US - Tuna/Dolphin II (GATT)</i>	GATT Panel Report, <i>United States - Restrictions on Imports of Tuna</i> , DS29/R, 16 June 1994
<i>US - Wheat Gluten</i>	Appellate Body Report, <i>United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717
<i>US - Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323

I. INTRODUCTION

1. In this appeal, Mexico does not contest that since January 1, 2002 it has maintained discriminatory tax measures on soft drinks and other beverages to protect its domestic cane sugar industry, in violation of its obligations under Article III of the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”).
2. The Panel found that Mexico’s tax measures are inconsistent with Mexico’s obligation to provide national treatment to the products of all WTO Members under Article III:2 and III:4 of the GATT 1994, and Mexico has not appealed those findings. Indeed, during the panel proceeding, Mexico did not deny that its tax measures are discriminatory, and Mexico has not appealed the Panel’s findings or conclusions regarding Article III.
3. Instead, Mexico has again raised two novel defenses, which the Panel rightly rejected. Both are based on Mexico’s unilateral assertion that the United States has breached its obligations under the North American Free Trade Agreement (“NAFTA”).
4. The first is that the Panel – although expressly established to “examine, in the light of the relevant provisions in” the cited covered agreement and charged with making “such findings as will assist the Dispute Settlement Body (“DSB”) in making the recommendations or in giving the rulings provided for in” that agreement – should have refused to perform the task for which it was established. And this refusal would be notwithstanding the fact that, as Mexico concedes, the Panel was properly seized of jurisdiction over the matter before it. In other words, in Mexico’s view, panelists are free to commit to serving on 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 covered agreement, and then to tell the DSB that they will not in fact perform that service. There is no basis in the Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”) or the covered agreements for Mexico’s position. The Panel rightly rejected Mexico’s argument, finding that to decline jurisdiction over the dispute would breach the Panel’s duties under the DSU. The Appellate Body should affirm the Panel's findings.
5. Mexico’s second defense is that even though its tax measures impair the rights of all WTO Members, they are justified because they are “designed” to “rebalance” its sugar market and to pressure the United States to comply with Mexico’s view of U.S. NAFTA obligations. Mexico has renewed this argument on appeal, arguing that Article XX(d) of the GATT 1994 permits it to impose GATT-inconsistent “countermeasures” to “attract the attention” of the United States to Mexico’s concerns in the NAFTA sugar dispute, and that the Panel erred in denying Mexico’s defense. In other words, Article XX(d) of the GATT 1994 grants a Member free license to breach the covered agreements and to ignore the provisions of the covered agreements concerning the suspension of concessions or other obligations, as long as that Member asserts that another Member has breached some other international agreement. Again, there is no basis in the text of Article XX(d) for Mexico’s radical approach.

6. The Panel properly found that Mexico had not established that its tax measures are provisionally justified under Article XX(d), as they do not “secure compliance with laws or regulations that are not inconsistent with” the GATT 1994. The Appellate Body should affirm the Panel’s findings.

7. In connection with its Article XX(d) defense, Mexico asserts that the Panel breached its obligation under Article 11 to make an “objective assessment” of the matter, specifically with respect to the Panel’s findings (1) that Mexico had not established that its tax measures “contribute to securing compliance in the circumstances of” the dispute, and (2) with respect to Mexico’s request for “determinations of fact, status and relevance of the NAFTA dispute.”¹ Mexico fails to support its assertions; the Panel adhered to its obligations under Article 11.

II. BACKGROUND

8. At issue in this dispute are protectionist² and discriminatory³ tax measures imposed by Mexico since January 1, 2002, including a 20 percent tax on the transfer and importation of soft drinks, syrups and other beverages,⁴ except for those sweetened exclusively with cane sugar (the “soft drink tax”); a 20 percent tax on specific services such as distribution, when such services are provided for the purpose of transferring products subject to the soft drink tax (“distribution tax”); and bookkeeping requirements imposed on taxpayers subject to the soft drink and distribution taxes.⁵

9. These tax measures are imposed under the *Ley del Impuesto Especial sobre Producción y Servicios* (Law on the Special Tax on Production and Services, or “LIEPS”), as a result of the amendments to the LIEPS approved by the Mexican Congress and published on January 1, 2002, and further amendments effective as from January 1, 2003 and January 1, 2004.⁶ When these amendments were proposed, they were officially described as providing an exemption for soft drinks and other beverages sweetened exclusively with cane sugar “[i]n order to not cause a

¹ Mexico’s Article 11 claim of error with respect to its request for determinations of fact, status and relevance of the NAFTA dispute appears in its Notice of Appeal but not in its Appellant Submission. *See* Mexico Notice of Appeal, para. 4.

² Panel Report, para. 8.91 (“The protective effect of the measures on Mexican domestic production of sugar does not seem to be an unintended effect, but rather an intentional objective.”)

³ Panel Report, conclusions in para. 9.2.

⁴ Mexico’s tax measures apply to “soft drinks, hydrating and rehydrating beverages, as well as concentrates, powders, syrups, flavor extracts or essences, which may be diluted to produce soft drinks, hydrating and rehydrating beverages” and “syrups or concentrates for preparing soft drinks sold in open containers, using mechanical or automatic equipment.” *See* U.S. First Written Submission, paras. 1, 27, 37. These beverages and syrups are referred to in this submission collectively as “soft drinks and other beverages.”

⁵ Panel Report, para. 2.2.

⁶ Panel Report, paras. 2.3-2.5.

major injury to the sugar industry” and “to protect the domestic sugar industry”.⁷ The tax measures result is an effective tax rate as high as 400 percent on the use of non-cane-sugar sweeteners in soft drinks and syrups, such as on high-fructose corn syrup (HFCS).⁸

10. Mexico has acknowledged that these tax measures were adopted to protect its highly-protected and politically important sugar producers.⁹ During this dispute, Mexico has acknowledged how significant the sugar sector is in Mexican politics and emphasized the economic and social importance of its sugar sector.¹⁰ Indeed, the Mexican government directly participates in the sugar sector through its ownership of sugar mills that it expropriated in 2001.¹¹ Thus, the Mexican government itself has both a political and a financial interest in protecting its domestic sugar industry against competition from HFCS.

11. The Mexican government has affirmed at the highest levels that its tax measures were adopted for the purpose of protecting Mexico’s sugar industry. As discussed in the Panel Report, in March 2002, a Mexican Presidential decree suspended imposition of the tax measures. The Chamber of Deputies of the Mexican Congress then brought a constitutional challenge against the President’s decree. In its July 12, 2002 judgment assessing this challenge, the Mexican Supreme Court of Justice evaluated the motives that prompted the Mexican Congress to enact the amendments that imposed the tax measures. It concluded that the legislative intent was “that of protecting the sugar industry,” and it further concluded that the Executive action had violated the “extra-fiscal objective that was expressed in the legislative procedure, that is the protection of the domestic sugar industry.” The Presidential decree was annulled and the tax measures were reinstated effective July 17, 2002.¹²

12. Before imposition of Mexico’s tax measures, HFCS imports (from the United States and Canada) were competing with sugar in the Mexican market. Mexican imports of HFCS from the United States began in the early 1990s and grew rapidly until Mexico imposed WTO-inconsistent antidumping duties on U.S.-produced HFCS.¹³ Mexican imports of HFCS from the United States peaked in 1997 at nearly 270,000 metric tons (MT), declining sharply after provisional

⁷ U.S. First Written Submission, para. 48 and Exhibits US-28 and US-29; Panel Report, para. 8.92.

⁸ Panel Report, para. 8.82.

⁹ Panel Report, para. 8.88.

¹⁰ Panel Report, para. 8.90.

¹¹ U.S. First Written Submission, para. 19.

¹² Panel Report, paras. 8.93-8.94; U.S. First Written Submission, paras. 49, 51-53 (citing Supreme Court judgment in Exhibit US-31).

¹³ A WTO panel, a compliance panel under Article 21.5 of the DSU and the Appellate Body found repeatedly in 2000-2001 that Mexico’s antidumping duties on HFCS were inconsistent with Mexico’s WTO obligations, in *Mexico - Corn Syrup* and *Mexico - Corn Syrup (Article 2.15 - U.S.)*.

antidumping duties were imposed in June 1997, but averaging 234,000 MT per year in 1998-2000.¹⁴

13. Imposition of Mexico’s tax measures had an immediate and dramatic effect on trade in HFCS. After imposition of Mexico’s tax on January 1, 2002, HFCS imports from the United States virtually ceased. In 2002, Mexican imports of HFCS totaled less than 30,000 MT, falling again to just over 12,000 MT in 2003 or barely six percent of the imports’ pre-tax volumes.¹⁵ Bottlers of soft drinks and other beverages subject to the tax measures ceased purchases of HFCS and reverted back to use of exclusively cane sugar.¹⁶

14. As both parties and the Panel have agreed, the present dispute fundamentally concerns the treatment of sweeteners, even though the measures at issue are imposed on soft drinks and other beverages.¹⁷ Both parties further agree that although the measures at issue are tax measures that apply to soft drinks and other beverages, these measures were imposed “to stop the displacement of domestic cane sugar by imported HFCS and soft drinks and syrups sweetened with HFCS.”¹⁸

15. Mexico asserts that it adopted its tax measures not to afford protection to its sugar industry, but in response to alleged NAFTA breaches by the United States.¹⁹ Mexico made the same assertion during the panel proceeding²⁰ and the Panel found in response that “[t]he protective effect of the measure on Mexican domestic production does not seem to be an unintended effect, but rather an intentional objective.”²¹ While Mexico argues on appeal that certain of the Panel’s factual findings were inconsistent with the Panel’s obligation under Article 11 of the DSU to make an “objective assessment of the matter” this finding is not among those.

16. During the panel proceeding and in its appellant submission, Mexico has made a series of misleading, incorrect and irrelevant assertions regarding NAFTA obligations on sugar and NAFTA dispute settlement procedures. Although the Panel duly noted Mexico’s assertions in its report, it properly did not make findings with respect to them except as follows. The Panel found that (1) the United States and Mexico “have differing interpretations regarding the conditions provided under the NAFTA for access of Mexican sugar to the United States’ market”²²; (2) “there is a dispute under the NAFTA that ‘is presently in the panelist selection stage’²³; and (3)

¹⁴ U.S. First Written Submission, para. 14 and Exh. US-10.

¹⁵ *Id.*

¹⁶ U.S. First Written Submission, para. 34.

¹⁷ Panel Report, paras. 8.1-8.2.

¹⁸ Panel Report, para. 8.2.

¹⁹ Appellant’s Submission, para. 21.

²⁰ Mexico’s response to Panel question 83.

²¹ Panel Report, para. 8.91.

²² Panel Report, para. 7.12; *see also* para. 8.232.

²³ Panel Report, para. 7.12.

“neither the subject matter nor the respective positions of the parties are identical in the dispute under the NAFTA ... and the dispute before us.”²⁴

17. The Panel specifically declined to make factual findings with respect to Mexico’s contentions as to the “fact[s], status and relevance” of the NAFTA dispute including Mexico’s contentions as to what NAFTA’s dispute settlement procedures provide. The Panel clearly stated in its report, and at the behest of Mexico, that “any findings made by this Panel...only relate to Mexico’s rights and obligations under the WTO covered agreements, and not to its rights and obligations under other international agreements, such as the NAFTA, or other rules of international law.”²⁵

18. On appeal, Mexico implicitly invites the Appellate Body to reassess the Panel’s factual findings on these issues and to re-evaluate which factual findings the Panel found necessary to make in order to assess the conformity of Mexico’s tax measures with the relevant covered agreements.²⁶ The Appellate Body should not accept this invitation. Article 17.6 of the DSU clearly limits appeals to “issues of law covered in the panel reports and legal interpretations developed by the panel.” Nor should the Appellate Body undertake itself to assess the correctness of Mexico’s assertions as to what the NAFTA requires. As Mexico conceded before the Panel, such an assessment is outside the terms of reference of this dispute.²⁷ In this regard, the Panel’s restraint on these issues was not only proper, but mandated by the DSU.

III. ARGUMENT

A. The Panel Correctly Found That Mexico’s Tax Measures Are Not Designed to Secure Compliance With Laws or Regulations Within the Meaning of Article XX(d) of the GATT 1994

19. Before the Panel, Mexico argued that its tax measures are designed to secure U.S. compliance with the NAFTA and therefore are justified as measures to “secure compliance with laws or regulations” within the meaning of Article XX(d) of the GATT 1994.

20. The Panel rightly rejected Mexico’s arguments.²⁸ The Panel correctly found that: (1) “secure compliance” does not include measures to induce another Member to comply with obligations under a non-WTO treaty;²⁹ (2) Mexico’s tax measures are not designed to secure

²⁴ Panel Report, para. 7.14; *see also* para. 8.232.

²⁵ Panel Report, para. 7.15.

²⁶ DSU Article 11.

²⁷ Mexico Opening Statement at the Second Meeting of the Panel, para. 33.

²⁸ Panel Report, para. 9.3.

²⁹ Panel Report, para. 8.181.

compliance with laws or regulations;³⁰ and (3) the phrase “laws or regulations” does not include obligations under international agreements.³¹ Mexico appeals each of these findings. None of Mexico’s arguments, however, provide a basis for reversing these findings or conclusion. The Appellate Body should uphold them.

21. Article XX(d) provides:

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

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

Article XX(d) thus provides an exception for measures otherwise inconsistent with the GATT 1994 if such measures are “necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement” and do not constitute “arbitrary discrimination between countries where the same conditions prevail” or a “disguised restriction on trade.”

22. A party invoking an Article XX exception bears the burden of proof with respect to that exception.³² Thus, in the present dispute, the Panel correctly found that Mexico, as the party invoking Article XX(d), bears the burden of proving that its tax measures – which are inconsistent with Article III – are justified under Article XX(d).³³

23. The Panel also correctly recalled from the Appellate Body's report in *Korea – Beef* that for a measure to be provisionally justified under Article XX(d) it must meet two elements: it must be “designed to ‘secure compliance’ with laws or regulations that are not themselves inconsistent with some provisions of” the GATT 1994 and it must be “‘necessary’ to secure such compliance.”³⁴

³⁰ Panel Report, para. 8.190.

³¹ Panel Report, para. 8.194.

³² Panel Report, para. 8.166.

³³ Panel Report, para. 8.166.

³⁴ Panel Report, Para. 8.166 (citing Appellate Body Report in *Korea – Beef*, para. 157); *see also* Appellate Body Report, *Dominican Republic – Cigarettes*, para. 65.

24. The Panel therefore began its analysis by examining whether Mexico's tax measures are “designed to secure compliance with laws or regulations.” The Panel broke this inquiry into three parts. First, the Panel examined the meaning of the words “secure compliance.” Second, it examined whether Mexico’s tax measures are designed to secure compliance with laws or regulations. And, finally, it examined the phrase “laws or regulations” and in particular whether that phrase means or includes obligations owed under international agreements.

25. Although the Panel reached the correct findings in each respect, in approaching Article XX claims, panels and the Appellate Body have generally begun by determining whether the measures sought to be justified are within the scope of the policies identified by Article XX (e.g., “exhaustible natural resources” or “laws or regulations not inconsistent with” the GATT). They have then analyzed whether the measures had the required degree of relationship to that policy objective (e.g., “necessary” or “related to”) and, if the measures were provisionally justified under a paragraph of Article XX, they have next examined the applicability of the Article XX *chapeau*.³⁵ Since Article XX(d) concerns GATT-consistent domestic laws and regulations, the first step in an analysis of Article XX(d) would start with a determination of whether the underlying measures constitute “laws or regulations that are not inconsistent with” the GATT 1994. Such an analysis confirms the correctness of the Panel’s finding that Article XX(d) does not include measures designed to induce another Member to comply with obligations under an international agreement, and that this finding should be upheld.

1. The Panel Correctly Found that “Laws or Regulations” Do Not Include International Agreements Such As the NAFTA

26. The Appellate Body should uphold the Panel’s finding that the phrase “laws or regulations” refers to domestic laws or regulations and not to obligations under international agreements.³⁶ The Appellate Body should reject Mexico’s assertions that these findings were in error.

27. In analyzing Mexico’s contentions, the Panel correctly began its analysis with the ordinary meaning of the phrase “laws or regulations.” The Panel noted that the word “law” could be defined as a “rule of conduct imposed by secular authority” or as “[a]ny of the body of individual rules in force in a State or community”, while the word “regulation” could be defined

³⁵ For instance, the Panel on *EC - Geographical Indications and Trademarks (US)* started its analysis of the EC’s Article XX(d) claim by determining whether the underlying Regulation was a “law or regulation.” Panel Report, *EC - Geographical Indications and Trademarks (US)*, paras. 7.296-7.297. Another recent panel also began its Article XX(d) analysis in the same manner, with “laws and regulations.” Panel Report, *Dominican Republic - Import and Sale of Cigarettes*, para. 7.209-7.211. Similarly, in the case of Article XX(b), the Appellate Body has first asked whether the policy in respect of the measures for which Article XX(b) was invoked falls within the range of policies to protect human, plant or animal life or health; then it has asked whether the inconsistent measures for which the exception was being invoked were “necessary” to fulfill the policy objective; then it has examined the applicability of the *chapeau* of Article XX. See, e.g., Panel Report, *EC - Tariff Preferences*, paras. 7.197-7.199.

³⁶ Panel Report, paras. 8.194-8.195.

as a “rule prescribed for controlling some matter, or for the regulating of conduct.” The Panel found these dictionary definitions “too general to resolve the question of the meaning of the terms in Article XX(d), and in particular whether, as argued by Mexico, they included the rules of international agreements, such as those of the NAFTA.”³⁷

28. The Panel then correctly examined the context of the terms “laws or regulations.” In this regard, the Panel suggested that the phrase “laws or regulations” was “most closely linked with the opening words of the paragraph: ‘to secure compliance with.’” The Panel found that because the phrase “secure compliance” does not apply to obligations owed another Member under a non-WTO treaty, the phrase “laws or regulations” did not apply to obligations under international agreements.³⁸ The Panel additionally noted that “[t]he use of the terms in the text of the GATT 1994 and the WTO Agreement suggest that such terms relate principally to domestic rules issued by the authorities of Members (or of GATT contracting parties) and not to obligations under international agreements.”³⁹

29. A further examination of the ordinary meaning and context of the phrase “laws or regulations” provides additional support for the Panel’s finding that the phrase does not apply to obligations under international agreements, but, rather, refers to domestic laws or regulations of a Member and not obligations owed another Member under an international agreement.

30. A standard legal dictionary previously relied on by the Appellate Body defines “laws” as:

Rules promulgated by government as a means to an ordered society. Strictly speaking, session laws or statutes and not decisions of court; though in common usage refers to both *legislative and court made law*, as well as to administrative rules, regulations and ordinances.⁴⁰

The same dictionary defines “regulations” as:

Such are issued by various governmental departments to carry out the intent of the law. Agencies issue regulations to guide the activity of those regulated by the agency and of their own employees to ensure uniform application of the law.⁴¹

In contrast, the same dictionary defines “international agreement” as:

³⁷ Panel Report, para. 8.193.

³⁸ Panel Report, para. 8.194.

³⁹ Panel Report, para. 8.195.

⁴⁰ U.S. Response to Panel Question 30 (citing *Black’s Law Dictionary* 887 (1990) (emphasis added)). The Appellate Body has used *Black’s Law Dictionary*, for example, in Appellate Body Report, *Korea – Beef*, para. 160.

⁴¹ U.S. Response to Panel Question 30 (citing *Black’s Law Dictionary* 1286 (1990) (emphasis added)).

Treaties and other agreements of a contractual character between different countries or organizations of states (foreign) creating legal rights and obligations.⁴²

Thus, as the United States explained to the Panel, the ordinary meaning of “laws” and “regulations” is that these are rules (e.g. in the form of a statute) issued by a government and not obligations under an international agreement.⁴³

31. The United States also pointed out before the Panel that Article XX(d) uses the plural form of “laws” and “regulations”. Thus, while one may refer to international “law” one does not ordinarily refer to international law in the plural.⁴⁴ Indeed, the two instances in the WTO Agreement that reference international law do so in the singular. Specifically, DSU Article 3.2 and Antidumping Agreement Article 17.6 refer to “public international law.” Moreover, as the United States also noted before the Panel, the Spanish and French texts of the WTO Agreement use a different word to refer to public international “law” as it appears in Article 3.2 of the DSU and Article 17.6, than to word “laws” as it appears in Article XX(d).⁴⁵

32. Furthermore, although the Panel focused on the definition of “law” (rather than the plural “laws” as it appears in Article XX(d)) the definition it cited further supports the interpretation that “laws or regulations” means domestic laws and regulations, not obligations under international agreements. The definition cited by the Panel defines a “law” as a “rule of conduct imposed by secular authority” or as “[a]ny of the body of individual rules in force in a State or community.”⁴⁶ The same dictionary cited by the Panel further defines “law” as “[t]he body of rules, whether formally enacted or customary, which a particular State or community recognizes as governing the actions of its subjects or members and which it may enforce by imposing penalties” or “[t]he statute and common law.”⁴⁷ Each of these definitions suggests that “law” means domestic laws and not obligations under international agreements.

33. The context in which the phrase “laws or regulations” appears – namely, Article XX of the GATT 1994 and more broadly the GATT1994 and the WTO Agreement as a whole –

⁴² *Black’s Law Dictionary* 816 (1990).

⁴³ U.S. Response to Panel Question 30; *see also* U.S. Second Written Submission, para. 43; U.S. Opening Statement at the Second Meeting of the Panel, paras 5-6.

⁴⁴ U.S. Second Written Submission, para. 51.

⁴⁵ The Spanish text of Article 3.2 of the DSU refers to “public international law” as “*del derecho internacional público*” while the Spanish text of Article XX(d) of the GATT 1994 refers to “laws or regulations” as “*las leyes y de los reglamentos.*” Similarly, the French text of Article 3.2 refers to “public international law” as “*du droit international public*” while the French text of Article XX(d) refers to “laws or regulations” as “*des lois et règlements.*” *See* U.S. Second Written Submission, para. 51 & n.72; *see also* U.S. Opening Statement at the Second Meeting of the Panel, para. 9.

⁴⁶ Panel Report, para. 8.193 (emphasis added).

⁴⁷ *New Shorter Oxford English Dictionary*, p. 1544 (1993) (emphasis added).

supports interpreting the phrase to mean the domestic laws and regulations of a Member and not obligations under international agreements. In Article XX(d), the phrase “laws and regulations” immediately precedes “not inconsistent with this Agreement.” The word “inconsistent” appears elsewhere in the GATT in connection with domestic measures (e.g., an internal tax or balance of payment restriction) that are “inconsistent” (or “not inconsistent”) with a provision of the GATT.⁴⁸ Similarly, in the DSU the word “inconsistent” is used in connection with domestic measures that are inconsistent with the covered agreements.⁴⁹ By contrast, the WTO Agreement uses the word “conflict,” not “inconsistency” to describe differences in treaty obligations,⁵⁰ as have panels and the Appellate Body.⁵¹

34. Since Article XX(h) deals explicitly with international agreements, it can be seen that the architecture and drafting of Article XX distinguish between “laws and regulations” on the one hand, and “obligations” under an international “agreement” on the other. While Article XX(d) provides a defense for measures necessary to secure compliance with “laws or regulations,” Article XX(h) provides a defense for measures “undertaken in pursuance of obligations under any intergovernmental commodity agreement.” There would be no reason for the different phrasing had the drafters intended “law or regulations” to mean the same thing as “obligations under” an international agreement.

35. Other provisions of the GATT 1994 also distinguish between “laws” and “regulations” on the one hand and “agreements” and “obligations” on the other.⁵² The United States cited several examples in its submissions to the Panel.⁵³ For example, Article X:1 makes a distinction between “laws, regulations, judicial decisions and administrative rulings” and “agreements affecting international trade policy between government[s]” Article X:1 states:

⁴⁸ See, e.g., Articles III:3, X:3(b), XII:4(d), XV:5, XVIII:12(d).

⁴⁹ See, e.g., DSU Articles 3.7, 19.1, 22.1 and 22.8.

⁵⁰ See *Marrakesh Agreement Establishing the WTO*, Article XVI:3; Note to Annex 1A of the WTO, and DSU Article 1.2.

⁵¹ See, e.g., Panel Report, *Indonesia - Autos*, para. 14.27-14.36, 14.47-14.52 and references in *id.*, fn. 649; Panel Report, *EC - Bananas*, para. 7.115-7.116; Appellate Body Report, *U.S. - Hot-Rolled Steel*, para. 55.

⁵² The Panel Report agrees that the use of the terms “laws” and “regulations” in the GATT and the WTO agreements “suggests that these terms relate principally to domestic rules issued by the authorities of Members . . . and not to obligations under international agreements.” See Panel Report, para. 8.195. While the Panel Report also notes the use of the word “regulations” in Articles VI and VII of the *Marrakesh Agreement Establishing the WTO*, those references are to internal financial and personnel “regulations” that bind the WTO as an international organization, not to any treaty obligation on Members. The Panel therefore rightly concludes that these references to organizational “regulations” do not affect its conclusion that the phrase “laws and regulations” in Article XX(d) refers to enforcement rules within a domestic legal system, not to international obligations. Moreover, Mexico did not argue that the NAFTA is a “regulation.” *Id.*

⁵³ U.S. Response to Panel Question 30, paras. 72-74; U.S. Second Written Submission, paras. 37, 44-46; U.S. Opening Statement at the Second Meeting of the Panel, paras.6, 9; see also Panel Report, para. 8.195.

*Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall also be published.*⁵⁴

36. Further, the phrase “obligations under this Agreement” appears throughout the GATT 1994 – itself an international agreement.⁵⁵ Not once does the GATT 1994 reference “*laws* under this Agreement.” In addition, Article XXI:(c) references “obligations under the United Nations Charter”; it similarly does not reference “laws” under the Charter. This phrasing recognizes, of course, that commitments under an international agreement are “obligations” not “laws.” In addition, when the drafters intended a reference to “law” to pertain to rules of international law, they stated so expressly. Thus, Article 3.2 of the DSU and Article 17.6 of the Antidumping Agreement state that the WTO Agreement should be interpreted in accordance with the customary rules of interpretation of public “international law.”

37. Furthermore, Article 23 of the DSU provides that “[w]hen Members seek the redress of a violation of obligations... under the covered agreements ... they shall have recourse to, and abide by, the rules and procedures of this Understanding.” Since the WTO Agreement is an international agreement, Mexico’s reading of Article XX(d) would authorize action by any Member, outside the rules of the DSU, to secure compliance with another Member’s obligations under the WTO Agreement. This result would be in clear conflict with Article 23.⁵⁶ When this fact was pointed out in the panel proceedings, Mexico responded by stretching its interpretation of the phrase “laws or regulations” to mean “obligations under international agreements, except for the WTO Agreement.”⁵⁷ If the phrase “laws or regulations” includes “international obligations,” it is not clear how that phrase would include only some international agreements

⁵⁴ GATT 1994 Art. X:1 (emphasis added).

⁵⁵ See, e.g., GATT 1994 Arts. XII:4(d), XV:6, XVIII:12, XVIII:16, XVIII:18, XVIII:21, XVIII:22, XIX:1 and XXIII.

⁵⁶ See U.S. Answer to Panel Question 66.

⁵⁷ Mexico Opening Statement at the Second Meeting of the Panel, paras. 71-72.

and specifically exclude the WTO Agreement.⁵⁸ The more logical way to resolve the conflict would be to read “laws or regulations” to mean the domestic laws or regulations of a Member and not to include obligations under an international agreement.

38. Mexico’s reading of Article XX(d) would also undermine Article 22 of the DSU. Article 22 of the DSU prescribes rules for the suspension of concessions or other obligations, including obtaining authorization to do so from the DSB, in certain circumstances when a Member has breached its WTO obligations. Mexico’s interpretation of Article XX(d), however, would essentially permit the suspension of concessions for alleged breaches of the WTO Agreement without a finding of WTO-inconsistency, without DSB authorization and without any requirement to adhere to the rules established in Article 22 of the DSU.⁵⁹ Mexico’s interpretation would undermine the system of multilateral review set out in the DSU.

39. The negotiating history of Article XX(d) confirms the conclusion that the phrase “laws or regulations” means the domestic laws or regulations of a Member and not obligations under international agreements.⁶⁰ As the Panel noted, the drafters of the GATT 1947 specifically rejected a proposal that the GATT include an exception for measures taken to retaliate against another Member for matters outside the purview of the GATT.⁶¹ Moreover, there is not one GATT panel or WTO dispute settlement report that supports the proposition that the phrase “laws or regulations” includes international agreements. In fact, in every Article XX(d) dispute to date, the “laws or regulations” at issue have concerned a domestic law or regulation of the Member asserting the Article XX(d) defense.⁶²

⁵⁸ Mexico appears to agree as it argues in its Second Written Submission: There is no evident reason why the term “laws” should encompass only the WTO “covered agreements,” one set of international treaties, but not other international treaties” Mexico Second Written Submission, para. 67.

⁵⁹ As with Article 23, Mexico argues that its interpretation does not lead to this result because the phrase “laws or regulations” includes only non-WTO agreements (*see* Mexico Opening Statement at the Second Meeting of the Panel, paras. 71-72). Under Mexico’s interpretation, it would be easier for a Member to suspend concessions or other obligations under the WTO Agreement to seek redress for breaches of other international agreements than to seek redress for breaches of the WTO Agreement.

⁶⁰ Article 32 of the Vienna Convention states that recourse may be had to the preparatory work of a treaty to confirm the meaning resulting from the application of Article 31 of the Convention when the interpretation according to Article 31 (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable. In the U.S. view, it is clear from examination of the ordinary meaning of the phrase “laws or regulations” that it does not include obligations under international agreements. Thus, recourse to the Article’s negotiating history is unnecessary; the United States notes it merely as confirmation that the phrase “laws or regulations” does not include obligations under international agreements.

⁶¹ Panel Report, para. 8.176 (citing Preparatory Committee of the International Conference on Trade and Employment, Doc. E/PC/T/180 (19 August 1947), p. 97).

⁶² *See U.S.-Spring Assemblies*, GATT Panel Report and *US - Section 337*, GATT Panel Report (exclusion order to enforce domestic patent law); *Canada - FIRA*, GATT Panel Report (purchase undertakings to implement domestic investment screening law); *Japan - Agricultural Products*, GATT Panel Report (import restrictions to support domestic price stabilization schemes and an import monopoly); *EEC - Parts and Components*, GATT Panel

40. Article XX(d), read according to the customary rules of interpretation of public international law, avoids the far-reaching consequences of Mexico’s interpretation. If the phrase “laws or regulations” is read to include international agreements, then any Member could invoke Article XX(d) as justification for actions depriving other Members of their rights under the GATT 1994 any time that Member considers such actions are “necessary to secure compliance” with obligations under any international agreement.

41. Reading the phrase “laws or regulations” to include obligations under international agreements, would also mean that WTO panels and the Appellate Body would be called upon to examine any international agreement that was the subject of such a claim of breach to determine if the trade measures adopted were “necessary to secure compliance” with that agreement. To do so would require WTO panels or the Appellate Body to determine if there was, in fact, a breach of the underlying agreement.⁶³ In other words, WTO dispute settlement would become a forum for WTO Members to allege and obtain findings as to the consistency of another Member’s measure with any non-WTO agreement. Such a result would be a departure from the function the WTO dispute settlement system was established to serve: “to preserve the rights and obligations of Members under the covered agreements.”⁶⁴ Similarly, Mexico’s reading would require WTO panels or the Appellate Body to determine if other international agreements were “not inconsistent with” the GATT 1994. Again, there is no basis – either in the text of Article XX(d), its context, or the object and purpose of the GATT 1994 or the negotiating history – for finding that Article XX(d) converts the WTO dispute settlement system into a process for judging all other public international law in terms of its consistency with the provisions of the GATT 1994.

42. Mexico’s only arguments that the phrase “laws or regulations” in Article XX(d) includes obligations under international agreements is that, in its view, nothing in the GATT 1994 or

⁶² (...continued)

Report (measures to secure compliance with antidumping duties); *U.S.-Tuna-Dolphin I/II* GATT Panel Reports (intermediary nations embargo to secure compliance with direct U.S. embargo on certain tuna imports); *U.S.-Malt Beverages* GATT Panel Report (in-state wholesaler distributor requirement argued to be necessary to secure enforcement of state excise tax laws); *U.S.-Auto Taxes*, GATT Panel Report (assessment of penalties to secure compliance with Corporate Average Fuel Economy law); *U.S.-Gasoline*, AB and Panel Reports (baseline establishment methods claimed necessary to secure compliance with U.S. environmental laws); *Canada-Periodicals*, Panel Report (Tariff Code 9958 import restriction claimed necessary to secure compliance with Canadian income tax laws); *Korea – Various Measures on Beef*, Appellate Body and Panel Reports (dual retail system claimed necessary to secure compliance with domestic unfair competition laws); *Argentina – Hides and Leather*, Panel Report (special treatment of imports found necessary to secure compliance with value-added tax and income tax laws); *Wheat Exports and Grain Imports*, Panel Report (laws on treatment of foreign grain claimed to be necessary to secure compliance with domestic laws on competition, grain, and the Canadian Wheat Board); *Dominican Republic – Import and Sale of Cigarettes*, Panel Report (stamp and bond requirements claimed to be necessary to secure compliance with domestic tax laws and regulations).

⁶³ Or otherwise stated, a mere allegation of another Member’s breach of an international agreement could provide justification for a Member to breach its WTO obligations.

⁶⁴ DSU Article 3.2.

WTO Agreement demonstrates that the phrase excludes them and that “other contextual elements, ignored by the Panel, support Mexico’s position.⁶⁵ As these “other contextual elements,” Mexico cites other paragraphs of Article XX that it argues apply to activities outside the territory of a State. The paragraphs of Article XX(d) Mexico cites do not support its position.

43. Mexico refers to paragraphs (b) and (g) of Article XX as invoked in *US – Shrimp and Tuna Dolphin II*.⁶⁶ Mexico argues that, because in those disputes “exhaustible natural resources” were interpreted as including the conservation of exhaustible natural resources outside the territory of the United States, Article XX(d)’s reference to “laws or regulations” must include obligations under international agreements.

44. Mexico’s argument is unfounded. In both *US – Shrimp* and *Tuna Dolphin II*, regardless of whether the “conservation of exhaustible natural resources” occurred within or outside the territory of the United States, it still concerned the “conservation of exhaustible natural resources.” Mexico on the other hand is not arguing that the phrase “laws or regulations” includes “laws or regulations” outside the territory of Mexico. It is arguing that “laws or regulations” includes something other than “laws or regulations,” namely obligations under international agreements.

45. Mexico additionally argues that the Panel’s finding that the phrase “laws or regulations” does not apply to international obligations is erroneous, because that finding relies on the Panel’s finding that the phrase “secure compliance” does not apply to measures to induce another Member to comply with obligations under an international agreement.⁶⁷ As addressed below, the Panel correctly found that the phrase “secure compliance” does not apply to measures to induce another Member to comply with obligations under an international agreement. Accordingly, the Panel’s findings with respect to the phrase “secure compliance” provide no basis for reversal of the Panel’s findings with respect to the phrase “laws or regulations.”

46. For the reasons above, the Appellate Body should uphold the Panel’s finding that the phrase “laws or regulations” does not include obligations owed under international agreements and reject Mexico’s contention to the contrary.

2. The Panel Correctly Found that “To Secure Compliance” Does Not Apply to Measures to Induce A Member to Comply With Obligations Owed Under An International Agreement

47. In contrast to its assertions with respect to the phrase “laws or regulations,” Mexico devotes a great deal of energy to responding to the Panel’s finding that the phrase “secure

⁶⁵ Mexico Appellant Submission, paras. 129-136.

⁶⁶ Mexico Appellant Submission, paras. 130-134.

⁶⁷ Mexico Appellant Submission, para. 126.

compliance” with laws or regulation does not apply to measures designed to induce another Member to comply with a non-WTO treaty. As an initial matter, the United States notes that there was no basis – factual or jurisdictional – for the Panel to find whether there was any “compliance” with the NAFTA for Mexico's discriminatory tax measures to “secure.” And the Panel did not attempt to make any such finding. Mexico simply asserted that the United States was not in compliance and expected the Panel simply to accept that unilateral assertion. Accordingly, even aside from the fact that the NAFTA is not a “law or regulation,” Mexico failed to establish even the basic element of its Article XX(d) defense that there was any “compliance” to “secure,” let alone that the measures it chose to introduce were “necessary” for that purpose.

48. Rather than base its arguments on why the phrase “secure compliance” means actions to induce another Member to comply with an international agreement, Mexico’s approach on appeal has been to emphasize largely irrelevant aspects of the Panel’s reasoning and misconstrue the Panel’s findings to make them appear reversible by the Appellate Body. The Panel correctly found that the phrase “to secure compliance” does not apply to measures taken by one Member to induce another Member to comply with obligations owed it under a non-WTO treaty⁶⁸ and the Appellate Body should uphold this finding.

49. The Panel correctly began its analysis by examining the ordinary meaning of the words “compliance” and “secure.” The Panel noted that the word “compliance” meant “the action of complying with a request, command, etc.” and that to “comply” with is to “act in accordance with.”⁶⁹ With respect to “secure”, the Panel noted that the word meant “to make (something) certain or dependable. Now [especially] ensure (a situation, outcome, result, etc.)”.⁷⁰ The Panel then found that, in the context of the phrase “secure compliance with laws or regulations,” “to secure compliance” meant “to enforce” compliance.⁷¹ In this regard, the Panel noted that two of the examples provided in Article XX(d) of the measures to secure compliance with laws or regulations specifically mention the word “enforcement.”⁷² Mexico does not appear to contest that “secure compliance” means enforce compliance.

50. To confirm its reading that “secure compliance” means “enforce compliance,” the Panel turned to the negotiating history of Article XX(d). Examining the preparatory work of the GATT 1947, the Panel noted that earlier drafts of Article XX(d) differed from the present version in that they used the phrase “to induce compliance” rather “to secure compliance.” The Panel also noted that a proposal to include an exception for international retaliatory measures was not accepted in the final version of the GATT 1947.⁷³ The Panel found additional confirmation of its reading in the fact that the Appellate Body has referred to measures within the meaning of Article XX(d) as

⁶⁸ Panel Report, para. 81.81.

⁶⁹ Panel Report, para. 8.172.

⁷⁰ Panel Report, para. 8.174.

⁷¹ Panel Report, para. 8.175.

⁷² Panel Report, para. 8.175.

⁷³ Panel Report, para. 8.176.

“enforcement instruments.”⁷⁴ Mexico again does not appear to contest the Panel’s findings in this regard.

51. With the understanding that “secure compliance” means “enforce compliance,” the Panel next examined whether countermeasures could be considered actions to “secure” or “enforce” compliance within the meaning of Article XX(d). In this regard, the Panel reasoned that countermeasures are “actions to persuade other states to respect their [international] obligations” and as such are not actions to enforce compliance.⁷⁵ The Panel contrasted this with actions to enforce laws or regulations which could be enforced through the use of coercion if necessary.⁷⁶ The Panel went on to note that the examples of measures identified in Article XX(d) which concerned customs, monopolies, patents, trademarks and copyrights, and deceptive practices are in essence matters that are regulated in the first instance under domestic law.⁷⁷ The Panel’s reasoning outlined in this paragraph appear to be the only aspects of the Panel’s findings on the meaning of the phrase “to secure compliance” with which Mexico takes issue as, described below.

52. Based on the above, the Panel found that the “phrase ‘to secure compliance’ in Article XX(d) does not apply to measures taken by a Member in order to induce another Member to comply with obligations owed to it under a non-WTO treaty.”⁷⁸

53. Mexico’s argument on appeal is that the Panel was incorrect to interpret “secure compliance” as meaning “enforcement through coercion” and to conclude that Article XX(d) “applies only to intra-state relations (susceptible of coercive actions) and do[es] not apply to state-state relations” and to “Mexico’s countermeasures” in particular. Mexico explains at length that “the notion of enforcement” can exist at the international level and does not require coercion.⁷⁹

54. Mexico’s explanations are irrelevant. For purposes of this dispute, it is not necessary to resolve the question of whether “the notion of enforcement” exists at the international level. Even if the “notion of enforcement” exists at the international level, the question would remain as to whether a measure designed to “induce” or “pressure” a Member to comply with obligations under an international agreement is a measure to “secure compliance” with laws or regulations. As to Mexico’s argument that the Panel equated “the concept of ‘enforcement’ with that of ‘coercion,’” Mexico misconstrues the Panel’s findings. The Panel did not create a requirement that in order to justify a measure under Article XX(d), a Member must establish that it could “coerce” compliance with laws or regulations. The Panel’s references to coercion were

⁷⁴ Panel Report, para. 8.177.

⁷⁵ Panel Report, para. 8.178.

⁷⁶ *Id.*

⁷⁷ Panel Report, para. 8.179.

⁷⁸ Panel Report, para. 8.181.

⁷⁹ Mexico Appellant Submission, paras. 83, 88.

nothing more than observations on differences on enforcement at the domestic and international level,⁸⁰ intended to merely reinforce the Panel’s view that “enforcement” does not refer to the international level.⁸¹ Again, the question of whether the concept of “enforcement” exists at the international level, is not one that needs to be resolved to answer the question whether a measure designed to “induce” or “pressure” a Member to comply with obligations under an international agreement is a measure designed to “secure compliance” with laws or regulations.

55. As to that question, as explained above, the phrase “laws or regulations” in Article XX(d) means the domestic laws or regulations of a Member and not obligations under international agreements. Therefore, contrary to Mexico’s assertions, the phrase “secure compliance” with laws or regulations cannot mean measures to induce another Member to comply with obligations under an international agreement.

56. Even aside from the fact that “laws or regulations” do not include obligations under international agreements, the Panel correctly found that Article XX(d) does not provide an exception for measures designed to induce a Member to comply with obligations under international agreements. Article XX(d) provides an exception for measures to “secure compliance” with laws or regulations, and Mexico offers nothing to support its assertion that the Panel ought to have read “secure compliance” to mean actions to “pressure”⁸² a State to comply with obligations under an international agreement.⁸³

57. Further, it is evident from the Panel’s discussion on whether Mexico’s tax measures are designed to secure compliance, that the Panel considered that Mexico had to show that the measures are at least designed to contribute to compliance.⁸⁴ This interpretation is consistent with prior panel and Appellate Body reports addressing the phrase “secure compliance” with laws or regulations as it appears in Article XX(d). For example, in *Korea – Beef*, in assessing whether the measure at issue was designed to “secure compliance” with Korean laws prohibiting deceptive practices with respect to the origin of beef, the panel considered whether the measure “appear[ed] to reduce the opportunities and thus the temptations for butchers to misrepresent foreign beef for domestic beef.”⁸⁵

58. The phrase “secure compliance” occurs in connection with the word “necessary.” As the United States discusses below whether a measures is necessary to secure compliance with laws or

⁸⁰ In this connection, it is worth recalling the Panel used the phrase “if necessary,” referring to the fact that coercion is an authority available in the domestic context.

⁸¹ Panel Report, paras. 8.175, 8.178.

⁸² Mexico Appellant Submission, para. 58, 83, 166 (using the word “pressure”).

⁸³ Mexico Appellant Submission, para. 83; *see also id.* para. 53, 166.

⁸⁴ Panel Report, para. 8.186.

⁸⁵ Panel Report, *Korea – Beef*, para. 658; *see also* Appellate Body Report, *Korea – Beef*, para. 161 (summarizing the panel’s findings).

regulations involves weighing and balancing *inter alia* the contribution the measure makes to securing compliance.

59. For these reasons, the Panel’s finding that the phrase “to secure compliance” does not apply to measures to induce another Member to comply with obligations owed under an international agreement is correct, and should be upheld by the Appellate Body.

3. The Panel Correctly Found that Mexico’s Tax Measures Are Not Designed to Secure Compliance

60. Mexico’s next claim of error is that the Panel erred in determining that Mexico’s tax measures are not designed to secure compliance within the meaning of Article XX(d). Mexico makes several arguments in this regard, each of which should be rejected. The Panel correctly found that Mexico’s tax measures are not designed to secure compliance with laws or regulations. The Appellate Body should uphold the Panel’s findings.

61. In making its findings, the Panel appropriately recalled the Appellate Body’s findings in *Korea – Beef* that for a measure, otherwise inconsistent with the GATT 1994, to be provisionally justified under Article XX(d) it must first be demonstrated that the measure is “designed to ‘secure compliance’ with laws or regulations that are themselves not inconsistent with some provisions of the GATT 1994.”⁸⁶ The Panel additionally recalled the two elements the panel in *Korea – Beef* found persuasive in concluding that the measure at issue in that dispute was designed to secure compliance with Korean legislation against deceptive practices: the measure was put in place at a time when misrepresentation in the beef sector was widespread and the measure appeared to reduce opportunities for misrepresentation.⁸⁷

62. Similar to the approach in *Korea – Beef*, the Panel looked for an explanation from Mexico as to how “its measures will make any significant contribution to securing compliance on the part of the United States” with the NAFTA.⁸⁸ The Panel found that Mexico had not provided such an explanation and had “claimed only that its tax measures had the effect of ‘attracting the attention’ of the United States.”⁸⁹ The Panel then noted that “attracting the attention of a Member is not equivalent to securing compliance of that Member with a law or regulation.”⁹⁰ The Panel reasoned that even if international countermeasures were potentially capable of qualifying as measures designed to secure compliance, Mexico had “not established that its measures contributed to securing compliance in the circumstances of this case.”⁹¹

⁸⁶ Appellate Body Report, *Korea – Beef*, para. 157.

⁸⁷ Panel Report, paras. 8.182-183.

⁸⁸ Panel Report, para. 8.186.

⁸⁹ Panel Report, para. 8.186.

⁹⁰ Panel Report, para. 8.186.

⁹¹ Panel Report, para. 8.186.

63. The Panel next recalled, based on its examination under Article III of the GATT 1994, that the design and operation of Mexico’s tax measures were such so as to afford protection to domestic production. It noted that even Mexico had acknowledged that its tax measures were intended to “rebalance the sugar market.” The Panel considered these findings to “further undermine Mexico’s claim that, in the circumstances of this case, its measures are designed to secure compliance with laws or regulations.”⁹²

64. Mexico’s first argument on appeal is that because the Panel’s interpretation of “secure compliance” with laws or regulations is, in Mexico’s view, flawed so too are its findings as to whether Mexico’s tax measures are designed to secure compliance with laws or regulations.⁹³

65. As explained above, the Panel correctly concluded that the phrase “secure compliance” does not apply to measures designed to induce another Member to comply with obligations under an international agreement. Mexico’s argument is therefore without merit.

66. Mexico second argument is that the Panel should have focused on the “purpose” or “objectives behind Mexico’s measures” and not on the “certainty regarding their effectiveness.”⁹⁴ In Mexico’s view, the uncertainty regarding the effectiveness of a measure should not be considered when analyzing whether a measure is “designed” to secure compliance with laws or regulations. Mexico’s arguments are incorrect.

67. First, the Panel did not require Mexico to show certainty as to its tax measures’ effectiveness. The Panel simply, and appropriately, sought from Mexico some explanation as to how its tax measures would contribute to securing compliance the NAFTA.⁹⁵ As the Panel noted, Mexico did not provide that explanation and only asserted that its tax measures attracted the attention of the United States. The Panel did not find this persuasive evidence that Mexico’s tax measures are designed to secure compliance.⁹⁶ Mexico’s arguments on appeal appear to be little more than an attempt to take issue with the Panel’s factual finding as to whether Mexico’s tax measures are designed to secure compliance.

68. Second, there is no basis for Mexico’s assertion that the Panel’s analysis of the “design” of Mexico’s tax measures should have been on the “purpose of” or the “objective behind” those measures to the exclusion of any consideration as to the operation or effect of those measures. For example, the panels in *Korea – Beef* and *Canada – Periodicals*, as discussed below, both considered whether the measures at issue appeared to have an effect on compliance with the cited laws or regulations. In addition, the Appellate Body explained in *United States – Gambling*

⁹² Panel Report, para. 8.189.

⁹³ Mexico’s Appellant Submission, paras. 94-97.

⁹⁴ Mexico’s Appellant Submission, paras. 99-100.

⁹⁵ Panel Report, paras. 8.185-8.186.

⁹⁶ Panel Report, para. 8.186.

when determining whether a measure was “necessary” to protect public morals under Article XIV(a) of the GATS:

To be sure, a Member’s characterization of a measure’s objectives and of the effectiveness of its regulatory approach – as evidenced, for example, by texts of statutes, legislative history, and pronouncements of government agencies or officials – will be relevant in determining whether the measure is, objectively, “necessary”. A panel is not bound by these characterizations, however, and may also find guidance in the structure and operation of the measure and in contrary evidence proffered by the complaining party. In any event, a panel must, on the basis of the evidence in the record, independently and objectively assess the “necessity” of the measure before it.⁹⁷

69. But even if the Panel had focused solely on the stated objectives of Mexico’s tax measures, those objectives, *inter alia* by Mexico’s Congress and Supreme Court, are that they are designed to protect Mexico’s sugar industry.

70. Mexico’s third argument is that Panel wrongly found that measures with an “uncertain outcome” are “*a priori* ineligible” as measures to secure compliance with laws or regulations.⁹⁸ Mexico misconstrues the Panel’s findings. The Panel did not require certainty. Rather, as discussed above, the Panel required some explanation from Mexico as to how its tax measures would contribute to securing compliance with the NAFTA. Having received no such explanation, the Panel found that Mexico had not established that its tax measures are designed to secure compliance with alleged U.S. obligations under the NAFTA.

71. As the United States noted in its comments on the Panel’s interim report,⁹⁹ the Panel’s analysis on this point could have admittedly been clearer. The United States understands the Panel’s remarks that Mexico’s “countermeasures” are “inescapably uncertain”¹⁰⁰ and “inherently unpredictable,”¹⁰¹ however, as simply reflecting the Panel’s characterization of the lack of any evidence as to how Mexico’s tax measures are designed to contribute to U.S. compliance with the NAFTA. These references did not impose a requirement that Mexico prove without a doubt that its tax measures secure U.S. compliance with the NAFTA. As the Panel correctly found, Mexico had not put forth *any* evidence that its tax measures were designed to contribute to U.S. compliance with the NAFTA. Accordingly, it would have made little sense for the Panel to create a “certainty” requirement, as Mexico contends it did.¹⁰²

⁹⁷ Appellate Body Report, *United States – Gambling*, para. 304.

⁹⁸ Mexico Appellant Submission, paras. 104-105.

⁹⁹ U.S. Comments on the Panel’s Interim Report, para. 25.

¹⁰⁰ Panel Report, para. 8.185.

¹⁰¹ Panel Report, para. 8.186.

¹⁰² Mexico Appellant Submission, para. 104-106.

72. Mexico additionally argues that the Panel’s analysis with respect to measures of “uncertain outcome” “leads to results that are manifestly unreasonable.”¹⁰³ In Mexico’s view, such a rule would “impose an unreasonable burden upon WTO Members that seek to invoke GATT Article XX(d)” and is not what the drafters intended. First, as explained above, the Panel did not create a “certainty” requirement. Second, the United States agrees with Mexico: Article XX(d) does not require the party invoking the defense to establish that its measure will, without a doubt or with certainty, secure compliance with laws or regulations.¹⁰⁴ It must nevertheless provide some evidence that the measure is “designed” to secure such compliance. Mexico has been unable to produce any such evidence.

73. Mexico also takes issue with the Panel’s discussion of the Appellate Body’s report in *United States – Gambling*.¹⁰⁵ As stated in its comments on the Panel’s interim report, the United States agreed that the Panel’s discussion of *Gambling* is misplaced.¹⁰⁶ The Panel had already found, however, that Mexico’s tax measures were not designed to secure compliance with the NAFTA. The Panel’s discussion of *Gambling* is therefore unnecessary and not needed to uphold the Panel’s finding that Mexico’s tax measures are not designed to secure compliance with laws or regulations.

74. In connection with its argument that the Panel created a certainty requirement, Mexico asserts that the Panel diminished Members’ rights under the WTO Agreement in contravention of Articles 3.2 and 19.1 of the DSU.¹⁰⁷ As the Panel did not create the certainty requirement Mexico contends, its ancillary argument that to do so is inconsistent with Articles 3.2 and 19.1 is without merit.

75. Mexico’s fourth argument is that the Panel’s analysis of the design of Mexico’s tax measures renders Article XX(d) inutile. Mexico contends that the Panel found that Mexico’s tax measures were not designed to secure compliance with laws or regulations because the Panel had already found that Mexico’s tax measures were “designed to afford protection to domestic production” under Article III. Mexico explains that such a finding renders the exception in Article XX(d) meaningless as a measure found in breach of Article III could never qualify as a measure designed to secure compliance under Article XX(d).

76. Mexico again misconstrues the Panel’s findings. In particular, the Panel did not find that Mexico’s tax measures were not designed to secure compliance with laws or regulations *because* they were designed to afford protection to Mexico’s sugar industry. Indeed, the Panel had already found that Mexico’s tax measures were not designed to secure compliance with laws or regulations because Mexico had failed to provide any evidence that those measures were

¹⁰³ Mexico Appellant Submission, para. 111.

¹⁰⁴ See U.S. Comments on the Panel’s Interim Report, para. 21.

¹⁰⁵ Mexico Appellant Submission, paras. 107-109.

¹⁰⁶ U.S. Comments on the Panel’s Interim Report, para. 25.

¹⁰⁷ Mexico Appellant Submission, paras. 16, 110, 116; see also Mexico Notice of Appeal, para. 5.

designed to secure compliance with laws or regulations.¹⁰⁸ Rather, the Panel, having found no evidence that Mexico’s tax measures were designed to secure compliance, noted that it had found evidence that Mexico’s tax measures were designed to afford protection to Mexican domestic production and that this “serve[d] to further undermine ... that ...its tax measures are designed to secure compliance.”¹⁰⁹ The United States recalls that Mexico has not appealed the Panel’s factual finding that the “design and operation of the soft drink tax and the distribution tax indicate that they afford protection to Mexican production of cane sugar” and that such protection is “an intentional objective” of Mexico’s tax measures.¹¹⁰

77. Further, Mexico appears to be under the mistaken impression that a panel’s examination of whether a measure is designed to secure compliance with laws or regulations must ignore its other factual findings and be based solely on the assertion of the party who has raised the Article XX(d) defense as to the measure’s design. In this regard, Mexico’s reliance on *United States – Gasoline* is misplaced. The issue in *Gasoline* was whether the reference in Article XX’s chapeau to “discrimination” was to the same type of discrimination prohibited under Article III:4. In the Appellate Body’s view, it was not. To find a measure constituted “arbitrary or unjustifiable discrimination” under the chapeau required evidence above and beyond that used to establish that discrimination existed for purposes of establishing a breach of Article III:4.¹¹¹ *Gasoline* does not stand for the proposition that the Panel should have ignored its earlier factual findings regarding the “design, the architecture, and the revealing structure” of Mexico’s tax measures.¹¹² Nor does it stand for the proposition that the Panel should have applied some different “standard” or analytical “parameters” to understand what Mexico’s tax measures are designed to do. When the Panel examined Mexico’s tax measures, it found evidence that Mexico’s tax measures are designed to afford protection to domestic production; it did not find any evidence that Mexico’s tax measures are designed to contribute to compliance. The Panel appropriately did not find persuasive Mexico’s contention that its tax measures are designed not to afford protection to its sugar industry but to secure compliance with the NAFTA.

78. The United States offers two other points supporting the Panel’s finding that Mexico had not established that its tax measures are designed to secure compliance with the NAFTA. First, although Mexico contends that its tax measures are designed to “secure compliance with laws or regulations,” Mexico cannot explain how a 20 percent tax on soft drinks made with non-cane

¹⁰⁸ Panel Report, para. 8.186.

¹⁰⁹ Panel Report, para. 8.189.

¹¹⁰ Panel Report, paras. 8.86, 8.91.

¹¹¹ Appellate Body Report, *United States – Gasoline*, p. 30; The Appellate Body further explained its findings on this issue in *United States – Shrimp*: “As we stated in *United States – Gasoline*, the nature and quality of this discrimination is different from the discrimination in the treatment of products which was already found to be inconsistent with one of the substantive obligations of the GATT 1994, such as Articles I, III or XI.” Appellate Body Report, *United States – Shrimp*, para. 150.

¹¹² Panel Report, para. 8.85.

sugar sweeteners contributes to compliance with the NAFTA.¹¹³ (In fact, that tax would appear to detract from compliance with the NAFTA, as the NAFTA has incorporated Article III by reference and, therefore, prohibits the same type of discriminatory treatment found in this dispute.)¹¹⁴ Rather, Mexico explains that its tax measures “initiate [a] process leading to compliance with” the NAFTA by putting “economic pressure” on the United States that “can have effects over time.” Mexico argues that “the effects of measures at issue have contributed to securing compliance ...by changing the dynamic of the NAFTA dispute and forcing the United States to pay attention to Mexico’s grievances.”¹¹⁵

79. Mexico’s description of how its tax measures “secure compliance” is unlike any other measure found to fall under Article XX(d). Unlike Mexico’s tax measures, those measures have themselves been designed to contribute to compliance by requiring or prohibiting some other action that improves or advances compliance with laws or regulations. In *Korea – Beef*, for example, the panel found that there was a widespread problem of misrepresentation of the origin of beef and that the measure at issue – which required domestic and foreign beef to be sold in separate stores – tended to reduce such misrepresentation.¹¹⁶ Similarly, in *Gambling*, the panel explained how the challenged measures (Wire Act, Travel Act and the Illegal Gambling Business Act) contributed to compliance with the Racketeer Influenced and Corrupt Organizations (RICO) statute – a measure against organized crime:

Given that the Wire Act prohibits suppliers of betting and wagering services from using a wire communication facility for, *inter alia*, the transmission in interstate or foreign commerce of bets or wagers, we consider that it assists in enforcing, at least in part, the RICO statute. In particular, it helps to curb organized crime operations that might rely upon the use of wire communication technologies for the supply of gambling and betting services across state and international borders. Therefore, we find that the Wire Act “secures compliance” with the RICO statute.

The Travel Act prohibits the supply of gambling services through mail or “any facility” in interstate or foreign commerce. We consider that this Act assists in enforcing, at least in part, the RICO statute. In particular, it helps to curb organized crime operations that might rely upon the use of mail or other “facilities” for gambling across state and international borders. Thus, we find that the Travel Act “secures compliance” with the RICO statute.

¹¹³ See U.S. Oral Statement at the Second Meeting of the Panel, para.16.

¹¹⁴ In fact, Mexico appears to concede that its tax measures are inconsistent with the NAFTA. It states in its Appellant Submission: “...GATT 1994 Article III is expressly incorporated in NAFTA Article 301. Therefore, a decision to impose the tax at issue was thus a decision to *suspend the operation* of NAFTA Article 301...” Mexico Appellant Submission, para. 53.

¹¹⁵ Mexico Appellant Submission, paras. 166-167; *see also id.* para. 145.

¹¹⁶ Panel Report, *Korea – Beef*, para. 658.

Finally, we find that the Illegal Gambling Business Act assists in enforcing the RICO statute because it prohibits conducting, financing, managing, supervising, directing or owning all or part of an "illegal gambling business", which may have links to organized crime.¹¹⁷

80. On the other hand, when the measure itself is not designed to contribute to compliance with laws or regulations it does not qualify as a measure designed to “secure compliance” with those laws or regulations. In *Canada – Periodicals*, for example, the panel examined a measure that essentially banned the importation of foreign periodicals (Tariff Code 9958). Canada argued that measure was designed to secure compliance with certain tax provisions prescribing rules on tax deductions for advertisements in domestic periodicals (Section 19 of the Income Tax Act). The panel rejected Canada’s defense because the measure itself was designed to contribute to compliance with laws or regulations:

Tariff Code 9958 cannot be regarded as an enforcement measure for Section 19 of the Income Tax Act. It is true that if a government bans imports of foreign periodicals with advertisements directed at the domestic market, as does Canada in the present case, the possibility of non-compliance with a tax provision granting tax deductions for expenses incurred for advertisements in domestic periodicals will be greatly reduced. It would seem almost impossible for an enterprise to place an advertisement in a foreign periodical because there would be virtually no foreign periodical available in which to place it. Thus, there would be no way for the enterprise legally to claim a tax deduction therefor. However, that is an incidental effect of a separate measure distinct (even though it may share the same policy objective) from the tax provision which is designed to give an incentive for placing advertisements in Canadian, as opposed to foreign, periodicals. We thus find that Tariff Code 9958 does not "secure compliance" with Section 19 of the Income Tax Act.¹¹⁸

Thus, in *Periodicals* it was not enough that the measure and “laws or regulations” at issue were linked through a common objective. Rather, the panel in *Periodicals* considered that the measure for which the Article XX(d) defense is claimed has to have an effect – that is not an incidental effect – on the law or regulation it supposedly enforces.

81. The present dispute is not unlike the situation in *Periodicals*. In the present dispute, Mexico’s tax measures discriminate against the use of imported sweeteners in Mexican soft drinks and other beverages. The effect of that discrimination is to effectively prohibit the use of imported HFCS in Mexican soft drinks and to dramatically reduce U.S. exports of HFCS to Mexico. That effect itself has no effect on the “laws or regulations” – in this case, U.S. obligations under the NAFTA – that Mexico seeks to enforce. That Mexico’s tax measures

¹¹⁷ Panel Report, *United States – Gambling*, paras. 6.554-6.556.

¹¹⁸ Panel Report, *Canada – Periodicals*, para. 5.10.

might as an incidental effect “attract the attention” of the United States is not sufficient to consider these measures ones designed to “secure compliance” with the NAFTA.

82. The second point supporting the Panel’s conclusion that Mexico’s tax measures are not designed to secure compliance with laws or regulations is that Mexico’s tax measures cannot contribute to U.S. compliance with the NAFTA because the United States is already in compliance with the NAFTA and was in compliance with the NAFTA at the time Mexico imposed its tax measures. That Mexico disagrees, does not convert its *allegations* that the United States is not in compliance with the NAFTA into a breach of that agreement.

83. Mexico cites two alleged breaches of the NAFTA: a breach concerning obligations on market access terms for sugar and a breach concerning obligations on dispute settlement procedures.¹¹⁹ Mexico is unable to sustain that either of these breaches in fact exist. In fact, with respect to the former, Mexico agrees that there is a genuine dispute over the precise obligations the United States owes Mexico under the NAFTA.¹²⁰ As Mexico explains with respect to NAFTA’s sugar provisions:

Mexico’s position is (and has been) that it had the right to export the total amount of its sugar surplus; the position of the United States is that Mexico could only do so up to a maximum limit of 250 thousand metric tonnes. The Parties also differed in respect of the methodology used to calculate the surplus.¹²¹

84. With respect to obligations concerning dispute settlement procedures, Mexico is unable to even identify the nature of the alleged breach. Although Mexico gives the impression that NAFTA’s dispute settlement provisions provide authority for the relevant section of the NAFTA Secretariat to appoint panelists – similar to the WTO Director General’s authority to appoint WTO panelists – NAFTA’s dispute settlement provisions do not in fact provide such authority.¹²² What Mexico appears to be doing is conflating what it perceives as shortcomings of the NAFTA’s dispute settlement provisions with allegations that the United States has breached those provisions. In any event, as the United States explained before the Panel, the United States believes it is in full compliance with its obligations under NAFTA’s dispute settlement mechanism.

85. The questions raised by Mexico’s Article XX(d) defense as to whether the United States is or is not in compliance with its NAFTA obligations further highlight the reasons why Mexico’s Article XX(d) defense is untenable and why Article XX(d) does not cover measures to secure compliance with obligations under an international agreement. There is no way for a panel or the Appellate Body to find a measure is “necessary to secure compliance” with obligations under an international agreement, unless it were first to determine what the

¹¹⁹ Mexico Appellant Submission, paras. 3-4, 21-24.

¹²⁰ See, e.g., Mexico Closing Statement at the First Meeting of the Panel, p. 1 (WTO English translation).

¹²¹ Mexico Appellant Submission, para. 25.

¹²² See U.S. Response to Panel Question 64, para. 79.

agreement's obligations were and whether the Member against whom the measure was taken was not in compliance with those obligations.¹²³ However, this would effectively convert WTO dispute settlement into a forum of general dispute resolution for all international agreements.¹²⁴

86. Mexico apparently shares the U.S. concern in this regard as it clearly stated to the Panel that it had "no jurisdiction to decide whether the United States has complied with its market access commitments [under the NAFTA]."¹²⁵ Yet, Mexico cannot avoid the fact that, in order for the Panel to have determined that its tax measures were necessary to secure U.S. compliance with the NAFTA, the Panel would first have needed to examine what the NAFTA requires and whether the United States has complied with those obligations.

87. Mexico's arguments to the contrary simply asked the Panel, and now ask the Appellate Body, to approve a reading of Article XX(d) that essentially allows the mere allegation of a breach of a non-WTO agreement to provide the basis for suspending concessions under the WTO Agreement. This cannot be what Article XX(d) was intended to provide.

88. In sum, Mexico cannot sustain the position that its tax measures are designed to "secure compliance" with the NAFTA – either with respect to market access for sugar or dispute settlement procedures – as there is no evidence as to any lack of compliance with the NAFTA and, consequently, no situation of non-compliance that its tax measures might be designed to correct. Rather all that exists are Mexico's allegations that a breach exists. And it is with this mere allegation that Mexico asks the WTO to sanction its imposition of a tax measures which Mexico does not even contest are in breach of its WTO obligations.

4. Completing the Panel's Analysis

89. Because the Panel had already concluded that Mexico's tax measures were not designed "to secure compliance with laws or regulations" it declined to consider whether its tax measures were "necessary" to that end or whether Mexico's tax measures were consistent with Article XX's chapeau. Mexico contends the Panel erred in not considering whether Mexico's tax measures were "necessary"¹²⁶ and asks the Appellate Body to complete the Panel's analysis in the

¹²³ U.S. Opening Statement at the Second Meeting of the Panel, para. 7; U.S. Closing Statement at the Second Meeting of the Panel, para. 7; U.S. Response to Panel Question 64, para. 36.

¹²⁴ See U.S. Opening Statement at the Second Meeting of the Panel, para. 7; U.S. Response to Panel Question 64, paras. 36-37.

¹²⁵ Mexico Opening Statement at the Second Meeting of the Panel, para. 33.

¹²⁶ In this regard, the United States points out that having found Mexico's tax measures are not designed to secure compliance with laws or regulations, the Panel had no obligation to consider whether those measures were "necessary." The Panel rightly exercised judicial economy in this respect. Mexico, other than to aver the Panel erred in not considering Mexico's "necessary" arguments, does not appear to contest the Panel's resort to judicial economy in this regard. See Mexico Appellant Submission, para. 137. Accordingly, the United States does not pursue the issue further in this submission.

event that it reverses the Panel and agrees with Mexico that its tax measures are designed to secure compliance with laws or regulations.¹²⁷

90. As the United States has maintained, the Panel correctly found that Mexico’s tax measures are not designed to secure compliance with laws or regulations. Therefore, examination of whether Mexico’s tax measures are “necessary” or consistent with the chapeau is unnecessary. The Panel was correct in reaching this conclusion. In the event the Appellate Body should nonetheless analyze whether Mexico’s tax measures are “necessary” or consistent with the chapeau, the United States provides the following rebuttal of the arguments set out in Mexico’s appellant submission.

(i) Mexico’s Tax Measures Are Not “Necessary” To Secure Compliance

91. With respect to whether its tax measures are necessary, Mexico argues that its tax measures are necessary to secure compliance with laws or regulations because, in its view, its tax measures at least make a contribution toward compliance and no alternative measure is available to achieve U.S. compliance with the NAFTA. According to Mexico, “to the extent that there are no reasonable alternatives to achieve its legitimate objective, one must conclude that such measure is “necessary” within the meaning of Article XX.”¹²⁸ Mexico misstates what is required to establish that a measure is “necessary” under Article XX(d). The Appellate Body should reject Mexico’s arguments and find that Mexico’s tax measures are not “necessary” within the meaning of Article XX(d).

92. First, the ordinary meaning of “necessary” is something that “that cannot be dispensed with or done without, requisite, essential, needful.”¹²⁹ Examining this word in *Korea – Beef*, the Appellate Body explained: “[a]s used in Article XX(d), the term ‘necessary’ refers ... to a range of degrees of necessity” with a “‘necessary’ measure ...located significantly closer to the pole of ‘indispensable’ than to the opposite pole of simply ‘making a contribution to’.”¹³⁰ Contrary to Mexico’s assertion, a measure that merely contributes to compliance does not qualify as a measure that is “necessary.” Therefore, even assuming for the moment that Mexico’s tax measures make a contribution to compliance with laws or regulations, Mexico must establish more than a mere contribution to meet its burden of establishing that its tax measures are “necessary” under Article XX. As explained above, Mexico has not even established that its tax measures make any contribution to compliance, and, therefore, cannot sustain its claim that its tax measures are “necessary” within the meaning of Article XX(d).

93. Second, Mexico has been unable to explain why, having negotiated and agreed to a specific mechanism to address any alleged breaches of the NAFTA, it would be “necessary” to

¹²⁷ Mexico Appellant Submission, paras. 137-138, 168..

¹²⁸ Mexico Appellant Submission, para. 140.

¹²⁹ *New Shorter Oxford English Dictionary*, p. 1895.

¹³⁰ Appellate Body Report, *Korea – Beef*, para. 161.

take measures outside that mechanism. Presumably Mexico negotiated what it considered to be the “necessary” means to address any inconsistency with the NAFTA. Mexico did not consider it “necessary” to provide in addition a means for a NAFTA Party to independently apply WTO (and NAFTA) inconsistent measures whenever that Party believed another Party to be in breach. There is no basis for Mexico now to claim that a different approach to perceived NAFTA problems is “necessary.”

94. Third, while the existence of reasonably available alternative may be evidence that the measure in dispute is not “necessary,” the absence of such alternatives alone does not make the measure “necessary.” Rather, as the Appellate Body has explained, examination of the existence of a reasonably available alternative measure is an analytical tool to understand the necessity of a measure. If the complaining party is able to identify a reasonably available alternative to the measure at issue that would be consistent with the GATT 1994 and the responding party is not able to explain why that measure is not in fact a reasonably available alternative, this is evidence that the measure in dispute may not be “necessary.”¹³¹

95. What Mexico argues here, however, is that because the United States has not identified a reasonably available alternative, its tax measures must be “necessary.” Mexico turns its burden of proof on its head. Even if the United States said nothing in response to Mexico’s claim that its tax measures are necessary, Mexico would still have to establish a *prima facie* case that its tax measures are necessary to secure compliance with laws or regulations. Mexico has not done this and, therefore, cannot sustain its Article XX(d) defense. Furthermore, as explained below, the United States has identified reasonably available alternatives.

96. Mexico also contends that because compliance with the NAFTA is an “important interest” its tax measures are “necessary” to secure compliance with laws or regulations. Mexico again misconstrues Article XX(d). While Mexico correctly identifies the interest allegedly served by the measure as a factor, it ignores the other factors the Appellate Body has identified that must be weighed and balanced with this factor to determine if a measure is “necessary” under Article XX(d). Specifically, the Appellate Body explained in *Korea – Beef*:

[D]etermination of whether a measure, which is not “indispensable”, may nevertheless be “necessary” within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include 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 on imports or exports.

97. As explained above, Mexico’s tax measures do not contribute to compliance with the NAFTA. Moreover, as the United States explained before the Panel, the impact of Mexico’s tax

¹³¹ See, e.g., Appellate Body Report, *Korea – Beef*, para. 182.

measures was to essentially prohibit the use of imported HFCS in Mexican soft drinks and other beverages and to reduce import volumes to barely six percent of their pre-tax volumes.¹³²

Furthermore, although Mexico argues its tax measures are “necessary” to secure U.S. compliance with the NAFTA, Mexico’s tax measures affect not only U.S. exports of HFCS but exports of HFCS from any WTO Member. It is difficult to understand how discriminating against imports from potentially every WTO Member is “necessary” to secure U.S. compliance with obligations under the NAFTA.

98. With respect to the interests protected by the law or regulations, Mexico contends that compliance with the NAFTA is an important interest. The United States does not disagree. However, that important interest does not make up for the fact that Mexico’s tax measures do not contribute to protecting that interest. The United States further recalls that Mexico’s tax measures themselves appear inconsistent with the NAFTA and, in its appellant submission, Mexico appears to concede as much.¹³³ The United States finds it difficult to understand how measures that are themselves inconsistent with the NAFTA contribute to protecting the important interest of NAFTA compliance.

99. Accordingly, it appears that none of the factors under the weighing and balancing approach set forth by the Appellate Body favor Mexico’s contention that its tax measures are “necessary” to secure compliance with laws or regulations.

100. Mexico additionally argues, that a measure does not have to actually achieve compliance to be deemed “necessary” to securing compliance and that, in any event, it was the Panel that “has deprived Mexico of the possibility of [its tax measures] achieving [their] objective.”¹³⁴ As the United States has stated above, what is relevant to the inquiry of whether a measure is “necessary” to secure compliance is *inter alia* the contribution the measure makes to securing compliance. Mexico, however, has not met its burden of demonstrating that its tax measures make any contribution to compliance with the NAFTA (and thus the Panel has not “deprived” Mexico of a possibility that was not there). In this regard and in connection with its “necessary” arguments, Mexico cites a press report quoting the president of the Mexican National Chamber of the Sugar and Alcohol Industries as stating: “Thanks to the tax, they [American sugar and corn growers, sugar refiners, and HFCS producers] are sitting at the negotiating table... Without the tax, they would not even answer the telephone.”¹³⁵ This is hardly evidence that Mexico’s tax measures have contributed to U.S. compliance with the NAFTA and, in any event, is the reported opinion of a single individual (who represents the industry benefitting from Mexico’s tax measures) about the actions of private parties.

¹³² U.S. First Written Submission, paras. 23, 25; Exhibit US-8 (consumption of HFCS); Exhibit US-11 (imports of HFCS).

¹³³ Mexico Appellant Submission, para. 53.

¹³⁴ Mexico Appellant Submission, paras. 156-158.

¹³⁵ Mexico Appellant Submission, para. 145.

101. As for reasonably available alternatives, it is important to keep in mind what Mexico argues is the effect of its tax measures: attracting the attention of the United States with the aim “over time” of “inducing” U.S. compliance with Mexico’s view of what the NAFTA requires.¹³⁶ The United States notes that there are any variety of actions Mexico could have pursued to attract the attention of the United States. For example, diplomatic means exist under the NAFTA for Mexico to pursue its concerns regarding bilateral sweeteners trade, including periodic meetings at official and ministerial level. Mexico has, in fact, pursued and is currently pursuing these means. In addition, the sweeteners industries of both countries have pursued unofficial discussions in support of a mutually acceptable solution for bilateral sweeteners trade, and these discussions continue. Mexico’s suggestion that it was only after it imposed its tax measures that United States started to “pay attention to Mexico’s grievances” is incorrect.¹³⁷ The United States had been engaging with Mexico regarding both Parties’ concerns on U.S.-Mexico sweeteners trade long before Mexico imposed its tax measures.¹³⁸

(ii) The Appellate Body Should Reject Mexico’s Efforts to Introduce New Evidence on the “Necessity” of its Tax Measures

102. In the context of its “necessity” argument, Mexico cites in paragraphs 160 and 161 of its Appellant Submission recent announcements by the United States and Mexico to provide market access for Mexican sugar and U.S. HFCS respectively, and a letter from U.S. Ambassador Rob Portman to U.S. Senator Tom Harkin mentioning these announcements. Mexico argues that these announcements are evidence that Mexico’s tax measures “are having [their] desired effect.”¹³⁹

103. The “evidence” Mexico cites, however, was not in existence at the time of the panel proceeding and could not have been considered by the Panel. Accordingly, this evidence is simply irrelevant to this appeal. Article 17.6 provides: “An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.” As the Appellate Body has explained, Article 17.6 “manifestly precludes” the Appellate Body from evaluating new facts that were not before the Panel and were not considered by the Panel.¹⁴⁰ Accordingly, the Appellate Body should not consider this new evidence cited by Mexico.

¹³⁶ See, e.g., Mexico Appellant Submission, para. 166.

¹³⁷ E.g. Mexico Appellant Submission, paras. 42 and 157.

¹³⁸ See, e.g., U.S. Closing Statement at the First Meeting of the Panel, para. 11.

¹³⁹ Mexico Appellant Submission, paras. 159-162.

¹⁴⁰ Appellate Body Report, *Canada – Aircraft*, para. 211; see also *id.* para. 210 (concluding that an argument by Brazil was made for the first time on appeal because Brazil did not identify any submission to the Panel in which the argument was made); Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 222 (finding that certain documents referred to in a U.S. submission were not part of the Panel record and constitute new evidence, even if they are available on the public record; further finding that for these reasons, the Appellate Body is precluded from taking these documents into account in deciding that appeal); see also Appellate Body Report, *US - Softwood Lumber V*, para. 9 (agreeing that information regarding an event occurring after conclusion of the Panel proceeding constituted new factual evidence and, pursuant to Article 17.6, fell outside the scope of the appeal).

104. The United States points out, however, that Mexico’s discussion of this evidence misrepresents the facts. Mexico wrongly asserts that Mexico’s tax measures precipitated the announced market openings, when what precipitated the U.S. announcement was nothing more than the continued U.S. commitment to adhere to its NAFTA commitments. As Mexico explained, in the view of the United States, the NAFTA provides that if Mexico is a “net surplus producer” of sugar it may ship the amount of that surplus up to 250,000 MT to the United States duty-free.¹⁴¹ Last year, the United States calculated, as it does every year, whether Mexico could be projected to be a net surplus producer. Those calculations showed that for fiscal year 2006, Mexico was projected to be a net surplus producer of at least 250,000 metric tons. The results of this calculation were not surprising as Mexico had record sugar production in 2005. Therefore, in accordance with its NAFTA commitment, the United States allocated Mexico a duty-free quota for 250,000 metric tons of sugar.

105. In this regard, the United States recalls that in Mexico’s view the NAFTA requires the United States to accept the entirety of Mexico’s surplus sugar production to the United States without a 250,000 metric ton ceiling. Thus, even on its own terms, Mexico’s argument that its tax measures have contributed to compliance with Mexico’s view of NAFTA requirements is not supported by the U.S. announcement.

**(iii) Mexico’s Tax Measures Do Not Pass Muster Under Article XX’s
Chapeau**

106. Mexico contends that its tax measures meet the elements of the chapeau to Article XX as they do not constitute “arbitrary or unjustifiable discrimination” or a “disguised restriction on trade.” Mexico’s assertion is incorrect.

107. To support its contention that its tax measures do not constitute arbitrary or unjustifiable discrimination, Mexico relies on the Appellate Body’s findings in *United States – Shrimp*. Mexico asserts:

The parallels with the instant case are obvious:

- the United States made market access commitments for Mexican sugar in the NAFTA, a subject that falls outside of the WTO agreements (although expressly permitted by Article XXIV of the GATT 1994);
- a disagreement arose as to the nature of those commitments;

¹⁴¹ Mexico Appellant Submission, para. 26.

- Mexico constantly sought a resolution of the disagreement, including through its request for the establishment of the NAFTA Panel and numerous efforts to achieve a negotiated solution;
- the United States refused to submit to the Panel proceedings and bilateral negotiations have proved fruitless; and
- therefore, the United States has essentially blocked Mexico's ability to have its grievance resolved.¹⁴²

108. Mexico's "parallels" between *United States – Shrimp* and the present dispute, however, fail from the outset. Although the Appellate Body in *Shrimp* looked to the Inter-American Convention as (i) evidence of a reasonably available alternative for the protection of sea turtles and, (ii) evidence that the United States had pursued this alternative with some Members and not others, *Shrimp* did not concern a "disagreement ... as to the nature of [any] commitments" under the Inter-American Convention, and an alleged breach of the Inter-American Convention was not asserted as justification for the measures in dispute.

109. Further, in *Shrimp* the Appellate Body found that the measure at issue was applied in a manner resulting in arbitrary and unjustifiable discrimination *inter alia* because, prior to imposing its ban, the United States had engaged in negotiations with some exporting countries (leading to the Inter-American Convention), but had not engaged in negotiations on a solution to the protection of sea turtles with the complaining parties affected by the import ban. The Appellate Body considered it arbitrary and unjustifiable to negotiate with only some countries but to impose the ban on all of them.¹⁴³

110. Mexico argues its tax measures do not constitute a "disguised restriction on international trade," Mexico because its tax measures are transparent and were published and that the United States "knows perfectly well" that they were "motivated by" the NAFTA dispute.¹⁴⁴ Contrary to Mexico's contention the mere fact that the measure at issue is "transparent" or published does not mean it is not a "disguised restriction on trade." For example, in *United States – Shrimp* the measure at issue was also published, yet still found to constitute a "disguised restriction on trade."¹⁴⁵ Likewise, whether the United States knows or does not know the motivation for Mexico's tax measures does not render them not a "disguised restriction on trade." In any event, from what the United States has read outside Mexico's submissions in these proceedings – for

¹⁴² Mexico Appellant Submission, para. 180.

¹⁴³ Appellate Body Report, *United States – Shrimp* 21.5, paras. 122-123 (summarizing its early findings), 128.

¹⁴⁴ Mexico Appellant Submission, para. 183.

¹⁴⁵ See, e.g., Panel Report, *United States – Shrimp*, para. 2.6.

example, the statements by Mexico’s Congress and Supreme Court – it appears to the United States that Mexico’s tax measures are motivated by a desire to protect Mexico’s sugar industry.¹⁴⁶

111. Mexico also asserts that its tax measures do not constitute “arbitrary or unjustifiable discrimination” or a “disguised restriction on trade” because its tax measures are “international countermeasures.”¹⁴⁷ Mexico cites no support for the proposition that measures ostensibly taken as “international countermeasures” cannot constitute “arbitrary or unjustifiable discrimination.” The United States fails to see how Mexico’s mere characterization of its tax measures as “international countermeasures” immunizes them from constituting “arbitrary or unjustifiable discrimination” or a “disguised restriction on trade” under Article XX of the GATT 1994.

112. Mexico cites no other evidence to support its contention that its tax measures do not constitute “arbitrary or unjustifiable discrimination” or a “disguised restriction international trade.” As Mexico’s cited reasons do not support its contention, Mexico has failed to establish that its tax measures – which in any event are not provisionally justified under Article XX(d) – satisfy the requirements of Article XX’s chapeau. Having failed to do so, Mexico cannot meet its burden of proof with respect to its Article XX affirmative defense.

113. Further to the above points, the United States recalls its discussion of the issue before the Panel. Before the Panel, the United States explained that Article XX’s chapeau generally works to prevent the abuse of the exceptions of Article XX by providing that measures falling within one of its paragraphs must not be applied in a manner that constitutes “a means of arbitrary or unjustifiable discrimination between countries” or a “disguised restriction on international trade.” The Appellate Body has explained:

The chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the General Agreement. If those exceptions are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned.¹⁴⁸

In other words, the chapeau to Article XX serves to protect against abusive invocations of the exceptions set out in paragraphs (a) through (j) by assuring that a Member’s legal right to invoke an Article XX defense is balanced against its obligations to adhere to the GATT’s substantive provisions

¹⁴⁶ U.S. First Written Submission, paras. 49, 51-53; Panel Report, paras. 8.92-8.94.

¹⁴⁷ Mexico Appellant Submission, paras. 181-182.

¹⁴⁸ *US – Gasoline*, AB Report, p. 22.

114. Despite these explanations, what Mexico essentially asks the Appellate Body to find is that its tax measures are not a “disguised restriction on trade” because Mexico has been transparent about the fact that its tax measures are designed to restrict HFCS imports from the United States. The United States finds it difficult to accept that a Member might avoid a finding that its measure constitutes a “disguised restriction on international trade” by merely being “transparent” about the measure’s trade restrictive intent. Moreover, Mexico’s argument ignores that the chapeau’s reference to a “disguised” restriction on international trade assumes that the measure for which the Article XX defense has been asserted does not have as its core function the restriction of trade, but rather, e.g., the protection of public morals, the conservation of exhaustible natural resources or securing compliance with GATT-consistent laws or regulations. Here, however, Mexico admits, and the Panel found, that the purpose and effect of its tax measures are to restrict HFCS imports from the United States.

B. Mexico’s Claims of Error Under DSU Article 11 Are Without Merit

115. In addition to its allegations of legal error with respect to the Panel’s findings that its tax measures are not “designed to secure compliance with laws or regulations,” Mexico claims the Panel breached its duty under Article 11 of the DSU to make “an objective assessment of the matter” (1) with respect to its conclusion that Mexico’s tax measures do not contribute to compliance with laws or regulations¹⁴⁹ and (2) with respect to Mexico’s “request for determinations of fact, status and relevance of the NAFTA dispute.”¹⁵⁰ Mexico’s claims should be rejected. The Panel made an objective assessment of the matter in both respects and (1) correctly found that the record evidence did not support a finding that Mexico’s tax measures contribute to securing compliance and (2) correctly declined Mexico’s request for determinations on the fact, status and relevance of the NAFTA dispute.

116. The Appellate Body explained in *US - Carbon Steel* and *Canada - Wheat Exports and Grain Imports* that:

Article 11 requires panels to take account of the evidence put before them and forbids them to wilfully disregard or distort such evidence.¹⁵¹ Nor may panels make affirmative findings that lack a basis in the evidence contained in the panel record.¹⁵² Provided that panels’ actions remain within these parameters, however, we have said that “it is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings”,

¹⁴⁹ Mexico Appellant Submission, paras. 163-167 (citing the Panel’s fact finding in paragraph 8.186 of the Panel’s report)..

¹⁵⁰ Mexico’s Article 11 claim with respect to its request for determinations of fact, status and relevance of the NAFTA dispute appears in its Notice of Appeal but not in its Appellant Submission. See Mexico Notice of Appeal, para. 4.

¹⁵¹ Appellate Body Report, *EC - Hormones*, para. 133 (citation in original).

¹⁵² Appellate Body Report, *US - Wheat Gluten*, paras. 161-162 (citation in original).

and, on appeal, we “will not interfere lightly with a panel’s exercise of its discretion”.¹⁵³

The Appellate Body has further explained that a finding of inconsistency under Article 11 cannot be based merely upon the conclusion that the Appellate Body might have reached a different conclusion than that reached by the Panel: rather, the Appellate Body “must be satisfied that the panel has exceeded the bounds of its discretion, as a trier of facts, in the appreciation of the evidence.”¹⁵⁴

117. Mexico’s Article 11 arguments do not meet the requirements for establishing that the Panel breached its obligation to make an “objective assessment of the matter” either with respect to its conclusion that Mexico had not substantiated its contention that its tax measures contribute to compliance with U.S. obligations under the NAFTA or with respect to the Panel’s decision not to make the factual findings requested by Mexico with respect to the NAFTA dispute.

118. Beginning with the former, Mexico contends that the Panel “ignored” both its arguments and evidence. In particular, Mexico asserts that the Panel ignored its argument and supporting evidence that “in order to secure United States’ compliance with its NAFTA obligations, Mexico had to first initiate the process leading to such compliance and that achieving the objectives sought by the countermeasure can take time,” and that that demonstrated that its tax measures have contributed to securing U.S. compliance with the NAFTA.¹⁵⁵ The Panel Report shows, however, that the Panel considered this argument¹⁵⁶ and Mexico does not cite any evidence or arguments that the Panel failed to consider.¹⁵⁷ In this regard, Mexico’s Article 11 argument appears to be no more than a reiteration of its legal arguments that its tax measures are designed to “secure compliance” because they are designed to “induce” or “pressure” the United States to comply with Mexico’s view of what the NAFTA requires, and that the Panel erred in finding to the contrary. Thus, the legal errors they assert relate to the interpretation of Article XX, and do not support a conclusion that the Panel breached Article 11. Moreover, for the reasons described above, however, the Panel did not err on this issue.

¹⁵³ Appellate Body Report, *US - Carbon Steel*, at para. 142; passage cited in Appellate Body Report, *Canada - Wheat Exports and Grain Imports*, para. 181; *see also* Appellate Body Report, *EC - Hormones*, para. 133 (noting that while deliberate disregard of evidence can constitute reversible error, such disregard implies “not simply an error of judgment in the appreciation of evidence but rather an egregious error that calls into question the good faith of the panel”); Appellate Body Report, *Dominican Republic - Importation and Sale of Cigarettes*, para. 125. (“[T]here is no obligation upon a panel to consider each and every argument put forward by the parties in support of their respective cases, so long as it completes an objective assessment of the matter before it, in accordance with Article 11 of the DSU.”).

¹⁵⁴ Appellate Body Report, *US - Wheat Gluten*, para. 151

¹⁵⁵ Mexico Appellant Submission, paras. 166-167.

¹⁵⁶ Panel Report, para. 8.186; *see also* para. 8.170 (citing Mexico’s submissions to the Panel making the points that Mexico’s tax measures contribute to compliance because they initiate a process that over time will induce U.S. compliance with the NAFTA)..

¹⁵⁷ Mexico Appellant Submission, paras. 166-167.

119. Mexico’s second Article 11 claim of error is that the Panel “failed to make an objective assessment of the matter before it, including the facts of the case, inconsistently with its obligation under Article 11 of the DSU, with respect to Mexico’s request for determinations of fact, status and relevance of the NAFTA dispute between the parties.”¹⁵⁸ Although Mexico includes this claim of error in its Notice of Appeal, Mexico does not address this issue in its Appellate Submission,¹⁵⁹ and should be deemed to have abandoned it. Moreover, as discussed at the outset of this submission, the Panel properly declined to issue the findings Mexico requested with respect to the NAFTA dispute. There is no basis to find that the Panel failed to adhere to its Article 11 mandate in this regard. Indeed, had the Panel issued findings on the meaning and application of the NAFTA, it would have exceeded its terms of reference.¹⁶⁰

120. Mexico has therefore failed to meet its burden of proof regarding its claims of error under Article 11 of the DSU and the Appellate Body should therefore reject them.

C. The Panel Correctly Found That A WTO Panel Cannot Decide to Refrain From Exercising Validly Established Jurisdiction

121. Mexico also appeals the Panel’s finding that it lacked the discretion to refrain from exercising jurisdiction over this dispute. Both parties and the Panel agreed that the Panel had substantive jurisdiction to hear and decide the U.S. claims in this dispute.¹⁶¹ Mexico argued that, although the U.S. claims were properly before it, the Panel should nevertheless “refrain from exercising validly established jurisdiction” in favor of a NAFTA arbitral panel.¹⁶² The Panel correctly rejected Mexico’s request for the Panel to decline jurisdiction over the dispute. The Appellate Body should affirm the Panel’s findings.

122. The Panel’s reasoning was sound and should be affirmed. First, the Panel recalled its function under Article 11 of the DSU and the Appellate Body’s statement in *Australia – Salmon* that a panel “has to address the claims on which a finding is necessary to enable the DSB to make sufficiently precise recommendations or rulings to the parties.”¹⁶³ The Panel then correctly found that “[a] panel would seem therefore not to be in a position to choose freely whether or not to exercise its jurisdiction.”¹⁶⁴ The Panel also correctly pointed out that were a panel to choose not to exercise its jurisdiction in a particular dispute, the panel would be failing to perform its

¹⁵⁸ Mexico Notice of Appeal, para. 4.

¹⁵⁹ Perhaps Mexico declined to pursue it in light of the irony involved in simultaneously claiming that a panel has “inherent” discretion not to make any findings at all - indeed to decline jurisdiction altogether - and claiming it to be legal error for a panel not to make the particular findings requested by Mexico.

¹⁶⁰ Mexico Opening Statement at the Second Meeting of the Panel, para. 33.

¹⁶¹ Panel Report, para. 7.4, citing Mexico’s First Written Submission, para. 93; Mexico’s response to Panel Question 35; U.S. opening statement for the first Panel Meeting with the parties, para. 13; and U.S. response to Panel Question 2, para. 10.

¹⁶² Mexico Appellant Submission, para. 65.

¹⁶³ Panel Report, para. 7.8.

¹⁶⁴ Panel Report, para. 7.8.

duties under Article 11 of the DSU,¹⁶⁵ and this failure would diminish the rights of the complaining Member contrary to Articles 3.2 and 19.1 of the DSU.¹⁶⁶ The Panel also correctly noted that Article 23 of the DSU provides that a WTO Member that considers its WTO benefits have been nullified or impaired has the right to bring its case to the WTO dispute settlement system.¹⁶⁷

123. Moreover, even if other international adjudicative bodies have the power to decline to exercise validly established jurisdiction, as Mexico contends, WTO panels very clearly do not. The express text of the DSU and the structure of the WTO dispute settlement mechanism make this clear.

124. Article 11 of the DSU provides for panels to “make findings as will assist the DSB in making the recommendations and in giving the rulings provided for in the covered agreements.” The Panel’s terms of reference similarly provide for the Panel to “make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in [the GATT 1994].”¹⁶⁸ If the Panel had declined to exercise jurisdiction over this dispute, or had agreed to Mexico’s request that it refrain from issuing findings and recommendations, the Panel would have made no findings on the U.S. claims that Mexico’s tax measures are inconsistent with Article III of the GATT 1994. This in turn would leave the DSB unable to give any rulings or (as is appropriate in this dispute) to make any recommendations in accordance with the rights and obligations under the DSU and the GATT 1994. Such a result is incompatible with the text of the DSU and would have required the Panel to disregard the mandate given it by the DSB.

125. Further, Article 7.1 of the DSU states that panels (with standard terms of reference as this Panel has) are “to examine ... the matter” referred to the DSB by the complaining party and “to make such findings as will assist the DSB” in making recommendations and rulings. Article 7.2 of the DSU further states that panels “shall address the relevant provisions in any covered agreement or agreements cited by the parties” to a dispute.¹⁶⁹ The Panel’s own terms of reference in this dispute instructed the Panel “to examine ... the matter referred to the DSB by the United States” – the consistency of Mexico’s tax measures with Article III of the GATT 1994 – and “to make such findings as will assist the DSB in making” the recommendations and rulings provided for under that Agreement.¹⁷⁰

126. These conclusions with respect to Articles 11 and 7 of the DSU are supported by the context provided by other provisions of the DSU. As the Panel correctly noted, under Articles 3.2 and 19.2 of the DSU, a panel may not add to or diminish the rights and obligations of WTO

¹⁶⁵ Panel Report, para. 7.8.

¹⁶⁶ Panel Report, paras. 7.8-7.9.

¹⁶⁷ Panel Report, para. 7.9.

¹⁶⁸ WT/DS308/5/Rev.1.

¹⁶⁹ DSU, Article 7.2 (emphasis added).

¹⁷⁰ WT/DS308/5/Rev.1.

Members provided in the covered agreements.¹⁷¹ If a panel were to decline to exercise its jurisdiction over a particular dispute, it would diminish the rights of the complaining Member under the DSU and other WTO covered agreements.

127. Prior reports of panels and the Appellate Body provide further support for the Panel’s findings. In the earlier dispute regarding Mexico’s antidumping measures on HFCS, the Appellate Body recognized “panels are required to address issues that are put before them by the parties to a dispute.”¹⁷² In the FSC dispute, the panel found:

Under Article XXIII of GATT 1994, the DSU and Article 4 of the SCM Agreement, a Member has the right to resort to WTO dispute settlement at any time by making a request for consultations in a manner consistent with those provisions. This fundamental right to resort to dispute settlement is a core element of the WTO system. Accordingly, we believe that a panel should not lightly infer a restriction on this right into the WTO Agreement; rather, there should be a clear and unambiguous basis in the relevant legal instruments for concluding that such a restriction exists.¹⁷³

128. Mexico has provided no substantive support for its assertion that other international adjudicative bodies, much less WTO panels, have the so-called “implied jurisdictional power” it describes.¹⁷⁴ Nor has it provided any basis for such an “implied jurisdictional power” to permit a panel to fail to perform the task required of it under the DSU or to override the rights of WTO Members to bring a dispute to the WTO dispute settlement system.

129. Mexico refers to “judicial economy” as an example of “situations where WTO panels have refrained from exercising validly established substantive jurisdiction on certain claims that are before them.”¹⁷⁵ However, when a panel exercises judicial economy, it does not decline to

¹⁷¹ Panel Report, para. 7.9.

¹⁷² Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 - US)*, para. 36; *see also* Appellate Body Report, *India – Quantitative Restrictions*, para. 84; Panel Report, *US - FSC*, paras. 7.12-7.19; Panel Report, *Turkey – Textiles*, paras. 9.15-9.17 (rejecting Turkey’s argument that the appropriate forum for resolution of India’s claims under the GATT 1994 was in the first instance the WTO Textile Monitoring Body (TMB) and, therefore, that the panel lacked jurisdiction over the dispute until India’s remedies under the TMB had been exhausted).

¹⁷³ Panel Report, *US – FSC*, para. 7.17.

¹⁷⁴ Mexico Appellant Submission, para. 65; *see also* Mexico First Written Submission, paras. 93-103 (containing no support for the existence of an implied power of tribunals to decline validly established jurisdiction); Mexico Opening Statement at the First Meeting of the Panel, paras. 27-38 (containing no support for the existence of an implied power of tribunals to decline validly established jurisdiction); Mexico Response to Panel Question 2 (containing no support for the existence of an implied power of tribunals to decline validly established jurisdiction); U.S. Closing Statement at the First Meeting of the Panel, para. 6 (noting that Mexico bases its argument on the “implied jurisdictional power” to decline validly established jurisdiction on what Mexico admits is an undefined principle of international law which “is not written down”).

¹⁷⁵ Appellant Submission, para. 68.

exercise substantive jurisdiction either over a dispute or certain claims in a dispute. Rather, the panel, acting in exercise of its jurisdiction, declines to make findings on certain claims when resolution of such claims is not necessary for the panel to fulfill its mandate under Article 11 of the DSU and its terms of reference.¹⁷⁶

130. Judicial economy means that a panel need not *over*-do its job, but it does not relieve a panel from its duty to carry out its mandate under Articles 7 and 11 of the DSU to resolve the dispute presented to it. In *Australia – Salmon*, the Appellate Body pointed out that panels may exercise judicial economy, but only if consistent with the purpose of WTO dispute settlement and a panel’s mandate:

The principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system. This aim is to resolve the matter at issue and “to secure a positive solution to a dispute”. To provide only a partial resolution of the matter at issue would be false judicial economy. A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings¹⁷⁷

131. Thus, judicial economy may only be applied where a panel has already carried out its task fully to address the issues in a dispute, and further findings would be duplicative. The situation in the present dispute is very different. The Panel could not have resolved the matter at issue in the WTO dispute – that is, the U.S. claims regarding the inconsistency of Mexico’s tax measures with Article III of the GATT 1994 – without exercising jurisdiction over that matter and issuing findings thereon.

132. For the reasons above, the Panel correctly concluded that, under the DSU, it had no discretion to decide whether or not to exercise its jurisdiction in a dispute properly before it. The Appellate Body should affirm this conclusion and the Panel’s findings in support thereof.

133. Mexico, assuming that panels have discretion to decline to exercise validly established jurisdiction, additionally argues that the Panel should have exercised its discretion to decline jurisdiction over this dispute.¹⁷⁸ Since the Panel had no such discretion, the propriety of exercising such discretion is a moot point.

¹⁷⁶ Appellate Body Report, *US – Wool Shirts*, p. 19 (“A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute.”); Appellate Body Report, *Canada - Wheat Exports and Grain Imports*, para. 133 (finding that the practice of judicial economy “allows a panel to refrain from making multiple findings that the same measure is inconsistent with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute”); *see also* Appellate Body Report, *US - Lead Bismuth II*, para. 70 (quoting the Appellate Body in *Wool Shirts*).

¹⁷⁷ Appellate Body Report, *Australia – Salmon*, para. 223 (in connection with a ruling that the panel in that dispute had improperly exercised judicial economy); *see also* Appellate Body Report, *Canada – Wheat and Grain Exports*, para. 133.

¹⁷⁸ Mexico Appellant Submission, paras. 72-74..

IV. CONCLUSION

134. For the reasons set forth in this submission, the United States respectfully requests that the Appellate Body reject each of Mexico's appeals and requests for findings and determinations and uphold all of the relevant Panel findings in their entirety.

EXECUTIVE SUMMARY

135. The Panel found that Mexico’s tax measures are inconsistent with Mexico’s obligation to provide national treatment to the products of all WTO Members under Article III:2 and III:4 of the GATT 1994, and Mexico has not appealed those findings. During the panel proceeding, Mexico did not contest that its tax measures were inconsistent with Article III but rather raised two novel defenses: (1) that the Panel should decline to exercise validly established jurisdiction and (2) that Mexico’s tax measures are justified under Article XX(d) as measures “necessary to secure compliance with laws or regulations.” The Panel rejected both of Mexico’s defenses. Mexico appeals the Panel’s findings and conclusions in both respects and, in addition, asserts the Panel breached its obligations under Article 11 of the DSU with respect to (1) its finding that Mexico had not established that its tax measures “contribute to securing compliance in the circumstances of” the dispute and (2) its denial of Mexico’s request for “determinations of fact, status and relevance of the NAFTA dispute.” Mexico’s arguments on appeal are without merit.

136. First, the Panel rightly rejected Mexico’s arguments that its tax measures are designed to secure U.S. compliance with the NAFTA and therefore are justified as measures to “secure compliance with laws or regulations” within the meaning of Article XX(d) of the GATT 1994. The Panel correctly found that: (1) “secure compliance” does not include measures to pressure another Member to comply with obligations under a non-WTO treaty; (2) Mexico’s tax measures are not designed to secure compliance with laws or regulations; and (3) the phrase “laws or regulations” does not include obligations under international agreements.

137. The Appellate Body should uphold the Panel’s finding that the phrase “laws or regulations” refers to domestic laws or regulations and not to obligations under international agreements. In particular, examination of the ordinary meaning of the phrase “laws or regulations” in its context supports the Panel’s finding that the phrase does not apply to obligations under international agreements but, rather, refers to domestic laws or regulations of a Member. Mexico’s arguments that the phrase “laws or regulations” includes obligations under international agreements are unsupported and would have far-reaching consequences, essentially permitting Members to use Article XX as justification for actions depriving other Members of their rights under the GATT 1994 any time that Member considers such actions are “necessary to secure compliance” with obligations under any international agreement.

138. Mexico also argues that the Panel erred in finding that the phrase “secure compliance” with laws or regulations does not apply to measures designed to pressure another Member to comply with a non-WTO treaty. Mexico’s arguments on appeal emphasize largely irrelevant aspects of the Panel’s reasoning and misconstrue the Panel’s findings to make them appear reversible by the Appellate Body. The Panel correctly found that the phrase “to secure compliance” does not apply to measures taken by one Member to pressure another Member to comply with obligations under a non-WTO treaty, and the Appellate Body should uphold this finding.

139. Mexico’s next claim of error is that the Panel erred in determining that Mexico’s tax measures are not designed to secure compliance within the meaning of Article XX(d). Mexico makes several arguments in this regard, each of which should be rejected. Mexico makes four arguments in this connection. The first is that because the Panel’s interpretation of “secure compliance” with laws or regulations is, in Mexico’s view, flawed so too are its findings as to whether Mexico’s tax measures are designed to secure compliance with laws or regulations. As explained above, the Panel correctly concluded that the phrase “secure compliance” does not apply to measures designed to induce another Member to comply with obligations under an international agreement.

140. Mexico’s second argument is that the Panel should have focused on the “purpose” or “objectives behind Mexico’s measures” and not on the “certainty regarding their effectiveness.” The Panel, however, did not require Mexico to show certainty as to its tax measures’ effectiveness. The Panel simply, and appropriately, sought from Mexico some explanation as to how its tax measures would contribute to securing compliance the NAFTA. Mexico did not provide that explanation. There is no basis for Mexico’s assertion that the Panel’s analysis of the “design” of Mexico’s tax measures should have been on the “purpose of” or the “objective behind” those measures to the exclusion of any consideration as to the operation or effect of those measures. In any event, the stated objectives of Mexico’s tax measures, for example by Mexico’s Congress and Supreme Court, are that they are designed to protect Mexico’s sugar industry. It is only in the context of this dispute that Mexico first alleged that its discriminatory tax measures are designed to “secure compliance” with the NAFTA.

141. Mexico’s third argument is that Panel wrongly found that measures with an “uncertain outcome” are “*a priori* ineligible” as measures to secure compliance with laws or regulations. Mexico misconstrues the Panel’s findings. The Panel did not require certainty. Rather, the Panel required some explanation from Mexico as to how its tax measures would contribute to securing compliance with the NAFTA. Having received no such explanation, the Panel found that Mexico had not established that its tax measures are designed to secure compliance with alleged U.S. obligations under the NAFTA.

142. Mexico’s fourth argument is that the Panel found that Mexico’s tax measures were not designed to secure compliance with laws or regulations because the Panel had already found that Mexico’s tax measures were “designed to afford protection to domestic production” under Article III and that this renders Article XX(d) inutile. Mexico’s argument misconstrues the Panel’s findings. In particular, the Panel did not find that Mexico’s tax measures were not designed to secure compliance with laws or regulations *because* they were designed to afford protection to Mexico’s sugar industry. Rather, the Panel, having found no evidence that Mexico’s tax measures were designed to secure compliance, noted that it had found evidence that Mexico’s tax measures were designed to afford protection to Mexican domestic production and that this “serve[d] to further undermine . . . that . . . its tax measures are designed to secure compliance.”

143. The United States offers two other points supporting the Panel’s finding that Mexico had not established that its tax measures are designed to secure compliance with the NAFTA. First, Mexico cannot explain how a 20 percent tax on soft drinks made with non-cane sugar sweeteners contributes to compliance with the NAFTA. Mexico only explains that its tax measures “initiate [a] process leading to compliance with” the NAFTA by putting “economic pressure” on the United States that “can have effects over time.” Mexico’s description of how its tax measures “secure compliance” is unlike any other measure found to fall under Article XX(d). Second, Mexico’s tax measures cannot contribute to U.S. compliance with the NAFTA because the United States is already in compliance with the NAFTA and was in compliance with the NAFTA at the time Mexico imposed its tax measures. That Mexico disagrees, does not convert its *allegations* that the United States is not in compliance with the NAFTA into a breach of that agreement.

144. Mexico’s arguments amount to asking the Appellate Body to approve a reading of Article XX(d) that essentially allows the mere allegation of a breach of a non-WTO agreement to provide the basis for suspending concessions under the WTO Agreement. This cannot be what Article XX(d) was intended to provide. In sum, the Panel correctly found that Mexico’s tax measures are not designed to secure compliance with laws or regulations. The Appellate Body should uphold the Panel’s findings.

145. Mexico next contends the Panel erred in not considering whether Mexico’s tax measures were “necessary” and asks the Appellate Body to complete the Panel’s analysis in the event that it reverses the Panel and agrees with Mexico that its tax measures are designed to secure compliance with laws or regulations. The Panel correctly found that Mexico’s tax measures are not designed to secure compliance with laws or regulations; therefore, examination of whether Mexico’s tax measures are “necessary” or consistent with the chapeau is unnecessary.

146. With respect to whether its tax measures are necessary, Mexico argues that its tax measures are necessary to secure compliance with laws or regulations because, in its view, its tax measures at least make a contribution toward compliance and because the United States has not identified a reasonably available alternative to its tax measures. Mexico misstates what is required to establish that a measure is “necessary” under Article XX(d). The Appellate Body should reject Mexico’s arguments and find that Mexico’s tax measures are not “necessary” within the meaning of Article XX(d).

147. While Mexico correctly identifies NAFTA compliance as an important interest, it ignores the other factors the Appellate Body has identified that must be weighed and balanced with this factor to determine if a measure is “necessary” under Article XX(d), in particular the contribution the measures makes to compliance and the impact of the measure on trade. Mexico’s tax measures make no contribution to alleged U.S. compliance with the NAFTA and have an enormous impact on trade – after imposition of its tax measures imports of HFCS virtually ceased. Moreover, it is difficult to understand how discriminating against imports from potentially every WTO Member is “necessary” to secure U.S. compliance with obligations under the NAFTA.

148. In the context of its “necessity” argument, Mexico cites evidence that was not in existence at the time of the panel proceeding and could not have been considered by the Panel. This evidence is irrelevant to this appeal. Moreover, because Article 17.6 limits appeals to issues of law, the Appellate Body should not consider it.

149. Mexico contends that its tax measures meet the elements of the chapeau to Article XX. Mexico is incorrect. Mexico relies on an irrelevant discussion of *United States – Shrimp* and the untenable position that Mexico’s tax measures do not constitute a “disguised restriction on international trade” because they are “transparent” and that the United States “knows perfectly well” that they were “motivated by” the NAFTA dispute. Mexico’s argument ignores that the chapeau’s reference to a “disguised” restriction on international trade assumes that the measure for which the Article XX defense has been asserted does not have as its core function the restriction of trade; Mexico admits, and the Panel found, that the purpose and effect of its tax measures are to restrict HFCS imports from the United States.

150. Mexico also claims the Panel breached its duty under Article 11 of the DSU to make “an objective assessment of the matter” (1) with respect to its conclusion that Mexico’s tax measures do not contribute to compliance with laws or regulations and (2) with respect to Mexico’s “request for determinations of fact, status and relevance of the NAFTA dispute.” Mexico’s Article 11 arguments do not meet the requirements for establishing that the Panel breached its obligation to make an “objective assessment of the matter” in either respect. The Panel in fact made an objective assessment of the matter in both respects.

151. Mexico also appeals the Panel’s finding that it lacked the discretion to refrain from exercising jurisdiction over this dispute which it agreed was properly before the Panel. The Panel correctly rejected Mexico’s request for the Panel to decline jurisdiction over the dispute. For the Panel to have found otherwise would have been inconsistent with Article 11 of the DSU. Panels are to make an objective assessment of the matter referred to it so as to assist the DSB in making the recommendations and in giving the rulings provided for in the covered agreements. Articles 7, 3.2, and 19.2 of the DSU as well as prior reports of panels and Appellate Body further support the Panel’s findings. Mexico has not supported its assertion that other international adjudicative bodies, much less WTO panels, have the so-called “implied jurisdictional power” it describes. Mexico’s citation of the exercise of judicial economy do not support its position.

152. For the reasons set forth in this submission, the United States respectfully requests that the Appellate Body reject each of Mexico’s appeals and requests for findings and determinations and uphold all of the relevant Panel findings in their entirety.