

7.747 We further recall that, in the presentation of its arguments to the Panel under the TBT Agreement, Mexico consistently referred the Panel to its arguments under Articles I:1 and III:4 of the GATT 1994 (and the United States similarly referred to its own responses under the GATT 1994). In that context, Mexico argued that Article 2.1 of the TBT Agreement contains two non-discrimination obligations applicable to technical regulations, one that is similar to the national treatment obligation in Article III:4 and the other that is similar to the most-favoured-nation obligation in Article I:1, and that although language used in Article 2.1 is different from that used in Articles III:4 and I:1, both of these GATT 1994 provisions offer guidance on how to interpret Article 2.1.⁹⁸⁵ Mexico has not provided any explanation for its contrary view expressed in the context of its request that the Panel refrain from exercising judicial economy, that it was necessary to rule on these claims under both agreements and under both contexts (national treatment and MFN) because the nature, scope and application of the claims under Articles I:1 and III:4 of the GATT 1994, and Article 2.1 of the TBT Agreement, are different, and address different rights and obligations which, in turn, will have different implications during the implementation phase of this dispute.⁹⁸⁶

7.748 In light of the fact that we have addressed, in the context of our examination of Mexico's claims under the TBT Agreement, all aspects of Mexico's claims, including non-discrimination aspects under Article 2.1, and other aspects under Article 2.2 and 2.4, and in light of our findings under these provisions, we are not persuaded that it is necessary for us to consider separately and additionally Mexico's claims under Articles I:1 and III:4 of the GATT 1994. Accordingly, we exercise judicial economy in respect of these claims and decline to rule on them.⁹⁸⁷

VIII. RULINGS AND RECOMMENDATIONS

8.1 In light of the above findings, the Panel finds that the US dolphin-safe provisions:

- (a) are not inconsistent with Article 2.1 of the TBT Agreement;
- (b) are inconsistent with Article 2.2 of the TBT Agreement because they are more trade-restrictive than necessary to achieve a legitimate objective, taking into account the risks that non-fulfilment would create;
- (c) are not inconsistent with Article 2.4 of the TBT Agreement.

⁹⁸⁵ Mexico's response to Panel question No. 58 para. 172.

⁹⁸⁶ Mexico's response to Panel question No. 114 para. 69.

⁹⁸⁷ We note in this respect the following determinations of the Appellate Body in relation to the completion of the analysis in the context of Peru's claims under Articles 2.1, 2.2 and 2.4 of the TBT Agreement and Article III:4 of GATT 1994 in *EC – Sardines*:

"Peru submits that, if we conclude that the EC Regulation is consistent with Article 2.4, it would be appropriate for us to complete the Panel's analysis and resolve the dispute by making findings on those provisions of Article 2 of the *TBT Agreement* on which the Panel did not make any findings, namely Articles 2.2 and 2.1 of the *TBT Agreement*. Although Peru made a claim before the Panel under Article III:4 of the GATT 1994, Peru does not ask us to complete the analysis by addressing that provision. The European Communities objects to the completion of the analysis, expressing the view that there are not sufficient undisputed facts in the record to do so.

Because we have found that the EC Regulation is *not* consistent with Article 2.4 of the *TBT Agreement*, the conditions to Peru's request have not been met, and, therefore, we do not think it is necessary for us to make a finding under Articles 2.2 and 2.1 of the *TBT Agreement* in order to resolve this dispute. Equally, we do not think it is necessary to make a finding under Article III:4 of the GATT 1994 in order to resolve this dispute. Therefore, we decline to make findings on Articles 2.2 and 2.1 of the *TBT Agreement*, or on Article III:4 of the GATT 1994." (Appellate Body Report, *EC – Sardines*, paras. 312-313).

8.2 For the reasons explained in Section VII of this Report, the Panel exercises judicial economy with respect to Mexico's claims under Articles I:1 and III:4 of the GATT 1994.

8.3 Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that, to the extent that the United States has acted inconsistently with the provisions of the TBT Agreement, it has nullified or impaired benefits accruing to Mexico under that Agreement. We therefore recommend that the DSB request the United States to bring its measures into conformity with its obligations under the TBT Agreement.
