

considered that such a conclusion would be bolstered by Article 2.4 of the SPS Agreement, which states that SPS measures which conform to the relevant provisions of the SPS Agreement shall be presumed to be in accordance with the obligations under the GATT 1994 which relate to the use of SPS measures, in particular Article XX(b).³⁴²⁴

7.2319. The Panel has found that Costa Rica has acted inconsistently with Articles 2.2, 5.1, 5.2, 5.3 and 5.5 of the SPS Agreement. The Panel does not consider it necessary to make findings under the GATT 1994 to resolve the matter between the parties.³⁴²⁵ In light of the foregoing, the Panel considers it appropriate to exercise judicial economy with regard to Mexico's claims under Articles III:4 and XI:1 of the GATT 1994, and to Costa Rica's defence under Article XX(b) of the GATT 1994.

7.10.3 Overall conclusion of this section

7.2320. The Panel exercises judicial economy with regard to Mexico's claims under Articles III:4 and XI:1 of the GATT 1994, and to Costa Rica's defence under Article XX(b) of the GATT 1994.

8 CONCLUSIONS AND RECOMMENDATIONS

8.1. In light of the foregoing findings, the Panel has reached the following conclusions:

- a. Regarding the scope of the SPS Agreement:
 - i. Mexico has demonstrated that Resolutions DSFE-002-2018 and DSFE-003-2018, which contain the phytosanitary requirements, individually constitute phytosanitary measures subject to the SPS Agreement.
 - ii. Mexico has failed to demonstrate that Reports ARP-002-2017 and ARP-006-2016 and Manual NR-ARP-PO-01_M-01 individually constitute phytosanitary measures subject to the SPS Agreement.
 - iii. Mexico has failed to demonstrate the existence of one phytosanitary measure consisting of the five measures identified by Mexico taken as a whole. However, in order to analyse the claims put forward by Mexico, this Panel decided that it would read Resolutions DSFE-002-2018 and DSFE-003-2018, which contain the phytosanitary requirements, together with Reports ARP-002-2017 and ARP-006-2016 and Manual NR-ARP-PO-01_M-01, and would make any necessary findings and recommendations in relation to those instruments, with a view to securing a positive solution to the dispute.
- b. Regarding Mexico's claims on risk assessment:
 - i. Costa Rica has acted inconsistently with Article 5.1 of the SPS Agreement, by failing to ensure that its phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to plant life or health.
 - ii. Costa Rica has acted inconsistently with Article 5.2 of the SPS Agreement, because, in the assessment of risks, it failed to take into account available scientific evidence and the prevalence of specific disease or pests.
 - iii. Costa Rica has acted inconsistently with Article 5.3 of the SPS Agreement, because, in assessing the risk to plant life or health and determining the measure to be applied for achieving the appropriate level of phytosanitary protection from such risk, it failed to take into account as relevant economic factors: the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of ASBVd; the

³⁴²⁴ Panel Report, *US – Animals*, para. 7.730.

³⁴²⁵ The Panel observes that Mexico's claims under the GATT 1994 pertain only to the consistency with the GATT 1994 of Resolutions DSFE-002-2018 and DSFE-003-2018, which contain the phytosanitary requirements. The Panel has found that those measures are inconsistent with certain provisions of the SPS Agreement.

costs of control or eradication in Costa Rica's territory; and the relative cost-effectiveness of alternative approaches to limiting risks.

- iv. Costa Rica has acted inconsistently with Article 2.2 of the SPS Agreement, by failing to ensure that its phytosanitary measures, i.e. Resolutions DSFE-002-2018 and DSFE-003-2018, which contain the phytosanitary requirements, are based on scientific principles and are not maintained without sufficient scientific evidence.
- c. Regarding Mexico's claims on discrimination:
- i. In respect of the first two situations that Mexico has indicated as comparable, i.e. fresh avocados imported for consumption from countries where ASBVd is present *vis-à-vis* domestic Costa Rican avocados in which ASBVd is likely to be present, there are arbitrary or unjustifiable distinctions in the levels of protection that Costa Rica considers to be appropriate in different situations, which result in discrimination or a disguised restriction on international trade. Therefore, Costa Rica has acted inconsistently with Article 5.5 of the SPS Agreement.
 - ii. Costa Rica's phytosanitary measures, i.e. Resolutions DSFE-002-2018 and DSFE-003-2018, which contain the phytosanitary requirements, arbitrarily or unjustifiably discriminate between its own territory and that of Mexico, and are applied in a manner which constitutes a disguised restriction on international trade. Thus, Costa Rica has acted inconsistently with the first and second sentences of Article 2.3 of the SPS Agreement.
- d. Regarding Mexico's claim on trade restrictiveness, Mexico has failed to demonstrate that Costa Rica's phytosanitary measures, i.e. Resolutions DSFE-002-2018 and DSFE-003-2018, which contain the phytosanitary requirements, are more trade-restrictive than required to achieve its appropriate level of phytosanitary protection, taking into account technical and economic feasibility. Therefore, Mexico has failed to demonstrate that Costa Rica has acted inconsistently with Article 5.6 of the SPS Agreement.
- e. Regarding the claims concerning adaptation to regional conditions:
- i. Mexico has failed to demonstrate that Costa Rica has acted inconsistently with its obligation under the first sentence of Article 6.1 of the SPS Agreement to ensure that its sanitary or phytosanitary measures are adapted to the phytosanitary characteristics of the area to which the product is destined.
 - ii. Mexico has failed to demonstrate that Costa Rica has acted inconsistently with its obligation under the second sentence of Article 6.1, in assessing the sanitary or phytosanitary characteristics of a region, to take into account, *inter alia*, the level of prevalence of specific diseases or pests, the existence of eradication or control programmes, and appropriate criteria or guidelines which may be developed by the relevant international organizations.
- f. Regarding Mexico's claims on harmonization, the Panel exercises judicial economy with regard to Mexico's claims under Articles 3.1 and 3.3 of the SPS Agreement.
- g. Regarding Mexico's claims relating to general conformity with the SPS Agreement:
- i. Costa Rica has acted inconsistently with Article 1.1 of the SPS Agreement, by failing to develop and apply its phytosanitary measures, i.e. Resolutions DSFE-002-2018 and DSFE-003-2018, which contain the phytosanitary requirements, in accordance with the provisions of the SPS Agreement.
 - ii. Costa Rica has acted inconsistently with Article 2.1 of the SPS Agreement, by adopting phytosanitary measures, i.e. Resolutions DSFE-002-2018 and DSFE-003-2018, which contain the phytosanitary requirements, that are inconsistent with the provisions of the SPS Agreement.

- h. Regarding Mexico's claims and Costa Rica's defence under the GATT 1994, the Panel exercises judicial economy with regard to Mexico's claims under Articles III:4 and XI:1 of the GATT 1994, and to Costa Rica's defence under Article XX(b) of the GATT 1994.

8.2. Pursuant to 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 accruing under that agreement. In view of the foregoing, the Panel concludes that, insofar as Costa Rica has acted inconsistently with the provisions of the SPS Agreement, it has nullified or impaired benefits accruing to Mexico under that Agreement.

8.3. Pursuant to Article 19.1 of the DSU, the Panel recommends to the DSB that Costa Rica be asked to bring its measures into conformity with its obligations under the SPS Agreement.
