



**COSTA RICA – MEASURES CONCERNING THE IMPORTATION OF
FRESH AVOCADOS FROM MEXICO**

REPORT OF THE PANEL

Addendum

This addendum contains the annexes A to D of the Report of the Panel to be found in document WT/DS524/R.

LIST OF ANNEXES**ANNEX A**

WORKING PROCEDURES OF THE PANEL

Contents		Page
Annex A-1	Working Procedures of the Panel	4
Annex A-2	Additional Working Procedures of the Panel for consultations with experts	11
Annex A-3	Additional Working Procedures of the Panel on meetings with remote participants	14

ANNEX B

ARGUMENTS OF THE PARTIES

Contents		Page
Annex B-1	Integrated executive summary of the arguments of Mexico	18
Annex B-2	Integrated executive summary of the arguments of Costa Rica	44

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

Contents		Page
Annex C-1	Integrated executive summary of the arguments of Canada	73
Annex C-2	Integrated executive summary of the arguments of the European Union	75

ANNEX D

PRELIMINARY RESOLUTION OF THE PANEL

Contents		Page
Annex D-1	Preliminary Resolution of the Panel	78

ANNEX A

WORKING PROCEDURES OF THE PANEL

Contents		Page
Annex A-1	Working Procedures of the Panel	4
Annex A-2	Additional Working Procedures of the Panel for consultations with experts	11
Annex A-3	Additional Working Procedures of the Panel on meetings with remote participants	14

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 16 July 2019

Revised on 25 June 2021

General

1. (1) In this proceeding, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). In addition, the following Working Procedures apply.

(2) The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

(3) Consistent with Article 13 of the DSU and Article 11.2 of the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement"), the Panel may seek expert advice from experts and from international organizations and adopt additional procedures to this end, as appropriate.

Confidentiality

2. (1) The deliberations of the Panel and the documents submitted to it shall be kept confidential. Members shall treat as confidential information that is submitted to the Panel which the submitting Member has designated as confidential.

(2) In accordance with the DSU, nothing in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.

(3) If a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

(4) Upon request, the Panel may adopt appropriate additional procedures for the treatment and handling of confidential information after consultation with the parties.

Submissions

3. (1) Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel.

(2) Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel with the parties, a written rebuttal, in accordance with the timetable adopted by the Panel.

(3) Each third party that chooses to make a written submission prior to the first substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.

(4) The Panel may invite the parties or third parties to make additional submissions in the course of the proceeding, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

Preliminary rulings

4. (1) If Costa Rica considers that the Panel should issue a ruling prior to the issuance of the Report that certain measures or claims in the panel request or the complainant's first written submission are not properly before the Panel, the following procedure applies. Exceptions to this procedure shall be granted upon a showing of good cause.
 - a. Costa Rica shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. Mexico shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.
 - b. The Panel may issue a preliminary ruling on the issues raised in such a preliminary ruling request prior to the submission of the written rebuttals, if possible, or the Panel may defer a ruling on the issues raised by a preliminary ruling request until it issues its Report to the parties.
 - c. In the event that the Panel finds it appropriate to issue a preliminary ruling prior to the issuance of its Report, the Panel may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Report.
 - d. Any request for such a preliminary ruling by the respondent before the first meeting, and any subsequent submissions of the parties in relation thereto before the first meeting, shall be served on third parties. The Panel may provide all third parties with an opportunity to provide comments on any such request, either in their submissions as provided for in the timetable or separately. Any preliminary ruling issued by the Panel before the first substantive meeting on whether certain measures or claims are properly before the Panel shall be communicated to all third parties.
- (2) This procedure is without prejudice to the parties' right to request other types of preliminary or procedural rulings in the course of the proceeding, and to the procedures that the Panel may follow with respect to such requests.

Evidence

5. (1) Each party shall submit all evidence to the Panel no later than during the first substantive meeting, except evidence necessary for purposes of rebuttal, or evidence necessary for answering questions or commenting on answers provided by the other party. Additional exceptions may be granted upon a showing of good cause.
 - (2) If any new evidence has been admitted upon a showing of good cause, the Panel shall accord the other party an appropriate period of time to comment on the new evidence submitted.
6. (1) Where the original language of an exhibit or portion thereof is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of the exhibit or relevant portion into the WTO working language of the submission. The Panel may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause.
 - (2) Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next submission or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds for the objection and an alternative translation.
7. (1) To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. Exhibits submitted by Mexico should be numbered with MEX-1, MEX-2, etc. Exhibits submitted by Costa Rica should be numbered CRI-1, CRI-2, etc. If the last exhibit in connection with the first submission was numbered MEX-5, the first exhibit in connection with the next submission thus would be numbered MEX-6.

(2) Each party shall provide an updated list of exhibits (in Word or Excel format) together with each of its submissions, oral statements, and responses to questions.

(3) If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again.

(4) If a party includes a hyperlink to the content of a website in one of its submissions and wishes for the cited content to form part of the official record, this party shall provide the cited content of the website as an exhibit.

Editorial Guide

8. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions (electronic copy provided).

Questions

9. The Panel may pose questions to the parties and third parties at any time, including:
- a. Prior to any meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally in the course of a meeting. The Panel may ask different or additional questions at the meeting.
 - b. The Panel may put questions to the parties and third parties orally in the course of a meeting, and in writing following the meeting, as provided for in paragraphs 15 and 21 below.

Substantive meetings

10. The Panel shall meet in closed session.
11. The parties shall be present at the meetings only when invited by the Panel to appear before it.
12. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.
- (2) Each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.
13. Each party shall provide to the Panel the list of members of its delegation no later than 5.00 p.m. (Geneva time) three working days preceding the first day of the meeting with the Panel.
14. A request for interpretation by any party should be made to the Panel as early as possible, preferably at the organizational stage, to allow sufficient time to ensure availability of interpreters.
15. The first substantive meeting of the Panel with the parties shall be conducted as follows:
- a. The Panel shall invite Mexico to make an opening statement to present its case first. Subsequently, the Panel shall invite Costa Rica to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters.

- b. Each party should avoid lengthy repetition of the arguments in its submissions. Each party is invited to limit the duration of its opening statement to 45 minutes. If either party considers that it requires more time for its opening statement, it should inform the Panel and the other party at least five days prior to the meeting, and it should also provide, at the same time, an estimate of the length of its statement. The Panel will accord equal time to both parties for their statements.
 - c. After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments or ask the other party questions.
 - d. The Panel may subsequently pose questions to the parties.
 - e. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Mexico presenting its statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its closing statement, if available.
 - f. Following the meeting:
 - i. Each party shall submit a final written version of its opening statement and, if applicable, of the exhibits attached to this statement, no later than 5.00 p.m. (Geneva time) on the second working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting.
 - ii. Each party shall send in writing, within the timeframe established by the Panel prior to the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.
 - iii. The Panel shall send in writing, within the timeframe established by the Panel prior to the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.
 - iv. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the timeframe established by the Panel prior to the end of the meeting.
16. The second substantive meeting of the Panel with the parties shall be conducted in the same manner as the first substantive meeting with the Panel, except that Costa Rica shall be given the opportunity to present its oral statement first. If Costa Rica chooses not to avail itself of that right, it shall inform the Panel and the other party no later than 5.00 p.m. (Geneva time) three working days prior to the meeting. In that case, Mexico shall present its opening statement first, followed by Costa Rica. The party that presented its opening statement first shall present its closing statement first.

Third party session

- 17. Each third party may present its views orally during a session of the first substantive meeting with the parties set aside for that purpose.
- 18. Each third party shall indicate to the Panel whether it intends to make an oral statement during the third party session, along with the list of members of its delegation, in advance of this session and no later than 5.00 p.m. (Geneva time) three working days before the third party session of the meeting with the Panel.
- 19. (1) Each third party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

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20. A request for interpretation by any third party should be made to the Panel as early as possible, preferably upon receiving the working procedures and timetable for the proceeding, to allow sufficient time to ensure availability of interpreters.
21. The third party session shall be conducted as follows:
- a. All parties and third parties may be present during the entirety of this session.
 - b. The Panel shall first hear the oral statements of the third parties, who shall speak in alphabetical order. Each third party making an oral statement at the third party session shall provide the Panel and other participants with a provisional written version of its statement before it takes the floor. If interpretation of a third party's oral statement is needed, that third party shall provide additional copies for the interpreters.
 - c. Each third party should limit the length of its statement to 15 minutes, and avoid repetition of the arguments already in its submission. If a third party considers that it requires more time for its opening statement, it should inform the Panel and the parties at least five days prior to the meeting, and it should also provide, at the same time, an estimate of the length of its statement. The Panel will accord equal time to all third parties for their statements.
 - d. After the third parties have made their statements, the parties shall be given the opportunity to pose questions to any third party for clarification on any matter raised in that third party's submission or statement.
 - e. The Panel may subsequently pose questions to any third party.
 - f. Following the third party session:
 - i. Each third party shall submit the final written version of its oral statement, no later than 5.00 p.m. (Geneva time) on the first working day following the meeting.
 - ii. Each party may send in writing, within the timeframe to be established by the Panel before the end of the meeting, any questions to a third party or parties to which it wishes to receive a response in writing.
 - iii. The Panel may send in writing, within the timeframe to be established by the Panel before the end of the meeting, any questions to a third party or parties to which it wishes to receive a response in writing.
 - iv. Each third party choosing to do so shall respond in writing to written questions from the Panel or a party, within a timeframe established by the Panel before the end of the meeting.

Descriptive part and executive summaries

22. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of the integrated executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These integrated executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.
23. Each party shall submit an integrated executive summary. The integrated executive summary shall summarize the facts and arguments as presented to the Panel in the party's written submissions, oral statements, and if possible, its responses to questions following the substantive meetings. The timing of the submission of the integrated executive summary shall be indicated in the timetable adopted by the Panel.
24. The integrated executive summary shall be limited to no more than 30 pages.

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25. The Panel may request the parties and third parties to provide executive summaries of facts and arguments presented in any other submissions to the Panel for which a deadline may not be specified in the timetable.
 26. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed six pages. If a third party submission and/or oral statement does not exceed six pages in total, this may serve as the executive summary of that third party's arguments.

Interim review

27. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.
28. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

Interim and Final Report

29. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

30. The following procedures regarding service of documents apply to all documents submitted by parties and third parties during the proceeding:
 - a. Each party and third party shall submit all documents to the Panel by submitting them with the DS Registry (office No. 2047).
 - b. Each party and third party shall submit two paper copies of its submissions and one paper copy of its Exhibits to the Panel by 5.00 p.m. (Geneva time) on the due dates established by the Panel. The DS Registrar shall stamp the documents with the date and time of submission. The paper version submitted to the DS Registry shall constitute the official version for the purposes of submission deadlines and the record of the dispute. If any documents are in a format that is impractical to submit as a paper copy, then the party may submit such documents to the DS Registrar by email or on a CD-ROM, DVD or USB key only.
 - c. Each party and third party shall also send an email to the DS Registry by 5.00 p.m. (Geneva time) on the due dates established by the Panel, attaching an electronic copy, preferably in Microsoft Word format and PDF format, of all documents that it submits in paper. All such emails to the Panel shall be addressed to DSRegistry@wto.org, and copied to other WTO Secretariat staff whose email addresses have been provided to the parties in the course of the proceeding. Where it is not possible to attach all the Exhibits to one email, the submitting party or third party shall provide the DS Registry with four copies of the Exhibits on USB keys, CD-ROMs or DVDs.
 - d. In addition, each party and third party is invited to submit all documents through the Digital Dispute Settlement Registry (DDSR) within 24 hours following the deadline for the submission of the paper versions. If the parties or third parties have any questions or technical difficulties relating to the DDSR, they are invited to consult the DDSR User Guide (electronic copy provided) or contact the DS Registry at DSRegistry@wto.org.

- e. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve directly on the third parties its first written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and on all other third parties. A party or third party may serve its documents on another party or third party only by email or other electronic format acceptable to the recipient without having to serve a paper copy, unless the recipient party or third party has previously requested a paper copy. Each party and third party shall confirm, in writing, that copies have been served on the parties and third parties, as appropriate, at the time it provides each document to the Panel.
- f. Each party and third party shall submit its documents with the DS Registry and serve copies on the other party (and third parties if appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel.
- g. As a general rule, all communications from the Panel to the parties and third parties will be via email. In addition to transmitting them to the parties by email, the Panel shall provide the parties with a paper copy of the Interim Report and the Final Report.

Correction of clerical errors in submissions

- 31. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected, and should be made promptly following the filing of the submission in question.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES OF THE PANEL FOR CONSULTATIONS WITH EXPERTS¹

Adopted on 18 October 2019

Revised on 11 February 2021

1. In the course of the proceedings, the Panel shall determine whether there is a need to seek expert advice.² In addressing matters concerning scientific and/or technical advice from experts, the Panel shall have regard to the provisions of the DSU and, *inter alia*, to the objective of conducting these proceedings in an efficient and timely manner and at a reasonable cost. Should the Panel decide to consult experts, the procedures described below shall apply.
2. The Panel may ask any international organization or relevant entity, as well as the parties, for suggestions of possible experts. Parties shall not engage in direct contact with the individuals suggested (whether by the parties or the international organizations or relevant entities) on any matter related to this dispute.
3. The Panel shall provide the parties with a list of possible experts, their curricula vitae and declarations of potential conflicts of interest. In their declaration, each potential expert shall be instructed to disclose information which shall include the following:
 - a. financial interests (e.g. investments, loans, shares, interests or other debts); business interests (e.g. directorship or other contractual interests); and property interests relevant to the dispute in question;
 - b. professional interests (e.g. a past or present relationship with private clients or the relevant industry, or any interests the person may have in domestic or international proceedings, and their implications, where these involve issues similar to those addressed in the dispute in question);
 - c. other active interests (e.g. active participation in public interest groups or other organizations which may have a declared agenda relevant to the dispute in question);
 - d. considered statements of personal opinion on issues relevant to the dispute in question (e.g. publications, public statements);
 - e. employment or family interests (e.g. the possibility of any indirect advantage or any likelihood of pressure which could arise from their employer, business associates or immediate family members); and
 - f. any other relevant information.
4. Parties shall have the opportunity to comment and to make known any compelling objections to any particular expert.
5. The Panel shall select the experts on the basis of their qualifications and the need for specialized scientific expertise, and shall not select experts whom the Panel considers to have a conflict of interest either after self-disclosure or otherwise. The Panel shall decide the number of experts in light of the number and type of issues on which advice shall be sought, as well as of the different areas on which each expert can provide expertise.

¹ These procedures are adopted in accordance with paragraph 1(3) of the Working Procedures of the Panel adopted on 16 July 2019.

² For the purpose of these Working Procedures, the term "expert" may be used to refer to individuals, institutions, research bodies or international organizations.

6. The Panel shall inform the parties of the experts and international organizations or relevant entities it has decided to consult, in accordance with the timetable adopted by the Panel. Experts shall act in their personal capacities and not as representatives of any entity. However, should the Panel seek advice from an international organization or relevant entity, the advice received shall be deemed to be received from the international organization or relevant entity and not the individual staff members or representatives of the international organization or institution. Moreover, any staff members of such international organizations or relevant entities that attend a meeting with the Panel, shall be deemed to do so in a representative capacity, on behalf of the respective organization.

7. The experts shall be subject to the DSB's Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes (WT/DSB/RC/1), a copy of which shall be provided to them by the Panel.

8. The Panel shall prepare written questions for the experts. The parties shall be invited to suggest a limited number of questions that the Panel could include in its questions to the experts. The experts shall be requested to provide responses in writing to the Panel's questions within a time-period specified by the Panel. The experts shall be requested to respond only to questions on which they have sufficient knowledge. The Panel shall provide the parties with copies of the responses, in accordance with the timetable adopted by the Panel. The parties shall have the opportunity to comment in writing on the responses from the experts.

9. The Panel may provide the experts, on a confidential basis, with the parties' submissions, including exhibits, as well as with any additional information deemed necessary. The experts shall have the opportunity to request, through the Panel, additional factual information or clarifications from the parties, if it shall aid them in answering the Panel's questions.

10. The Panel may schedule a meeting with the experts prior to or in conjunction with the second substantive meeting with the parties. Prior to the Panel's meeting with the experts, the Panel shall ensure that:

- a. the parties' comments on the experts' responses are provided to all experts;
- b. each expert is provided with the other experts' responses to the Panel's questions; and
- c. each expert is provided with any advance questions from the parties to the experts, in accordance with paragraph 11.b. below.

11. The Panel's meeting with the experts would be conducted as follows:

- a. The Panel shall invite each expert to make an opening statement. This statement may include any clarification of their written responses to the Panel questions requested by the Panel or the parties, or information complementary to these responses. The experts that intend to make an opening statement shall provide the Panel and the parties with written versions of their statements, before they take the floor.
- b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask the experts questions or make comments through the Panel. To help the experts prepare for the meeting, each party may send in writing in advance of the meeting, within a time-frame to be determined by the Panel, any questions to the experts to which it wishes to receive an oral response at the meeting. Each expert shall be invited to respond orally to the questions asked by the parties during the meeting and to react to the parties' comments.
- c. The Panel may subsequently pose questions to the experts. The expert to whom the question is addressed shall be invited to respond orally to the Panel's questions. The Panel may also give the other experts the opportunity to ask questions or make comments.
- d. Once the questioning has concluded, the Panel shall afford each expert an opportunity to present a brief closing statement that may include further clarification regarding their responses, or information supplementing those responses.

- e. The Panel may pose additional written questions or schedule additional meetings with the experts if necessary.

12. The Secretariat shall prepare a compilation of the experts' written replies to the Panel's questions, as well as a full transcript of any meeting with the experts for inclusion in the record of the Panel proceeding, but these shall not be annexed to the Panel report. The experts shall be given an opportunity to verify, before the texts are finalized, the drafts of these texts to ensure that they accurately reflect the information they provided. The parties shall likewise be given an opportunity to verify that the transcript of any meeting with the experts accurately reflects the parties' own interventions.

ANNEX A-3

ADDITIONAL WORKING PROCEDURES OF THE PANEL ON MEETINGS WITH REMOTE PARTICIPANTS

Adopted on 12 November 2020

General

1. These additional Working Procedures set out terms for holding meetings with the Panel where all participants attend remotely via the Cisco Webex platform.

Definitions

2. For the purposes of these Procedures:

"**Host**" means the designated person within the WTO Secretariat responsible for the management of the platform for remote participants to participate in the meeting with the Panel.

"**Platform**" means the software or system through which remote participants participate in the meeting with the Panel. In these Procedures, the platform used is Cisco Webex.

"**Remote participant**" means any person participating in the meeting with the Panel by remote means. This includes members of the parties' delegations, experts appointed by the Panel, and interpreters.

Equipment and technical requirements

3. Each party shall ensure that the remote participants from its delegation join the meeting using the designated platform, and meet the minimum equipment and technical requirements set out by the platform provider for the effective conduct of the meeting.

Technical support

4. (1) The host shall assist participants in the planning, tests and holding of the virtual meeting, and shall provide remote participants with technical assistance relating to the platform and its functionality.

(2) In order to ensure the timely provision of technical assistance, the host shall prioritize assistance for remote participants who are designated as lead speakers in the delegation lists.

(3) In view of the limitations of remote assistance, each party shall be responsible for its own technical support relating to computer and interconnection systems.

Pre-meeting

Registration

5. Each party shall provide to the Panel, no later than 5:00 p.m. (Geneva time) on Tuesday 1 December 2020, the list of the members of its delegation, using the form that shall be provided to it by the Panel Secretary. This list shall include all the members of each party's delegation. Each party shall indicate which of their remote participants are to be their lead speakers.

Advance testing

6. Remote participants shall hold two testing sessions with the WTO Secretariat before the meeting with the Panel. One of these shall be a joint session with all the meeting's remote participants, including the panelists joining remotely. These sessions shall seek to reflect, as far as possible, the conditions of the proposed meeting. Remote participants should make themselves available for the test sessions.

Confidentiality and security

7. The meeting shall be confidential. All remote participants shall follow any security and confidentiality protocols and guidelines provided by the Panel in advance of the meeting.
8. Remote participants shall connect to the virtual meeting via a secure Internet connection and shall avoid using any open or public Internet connection.
9. Participants are strictly forbidden from:
 - (1) Recording the virtual meeting, or any part of it, via audio, video or screen shot.
 - (2) Allowing anyone who is not a participant to access, see, listen to or record the virtual meeting or any part of it, via audio, video or screen shot.

Conduct of the meeting

Access to the virtual meeting room

- 10 (1) The host shall invite remote participants via email to join the virtual meeting room on the designated platform.
 - (2) For security reasons, access to the virtual meeting room shall be password-protected and limited to authorized participants. Remote participants should not forward or share the meeting link or password to anyone who is not an authorized participant, or retransmit the signal, image or audio by any other means to anyone who is not a participant.
 - (3) Each party shall ensure that only authorized members of its delegation enter the virtual meeting room.

Advance log-on

11. (1) The virtual meeting room shall be accessible 60 minutes in advance of the scheduled start time of each session of the meeting with the Panel.
 - (2) Remote participants shall log on to the platform at least 30 minutes in advance of the scheduled start time of each session of the meeting with the Panel.

Document sharing

12. (1) Before each party or expert takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement.
 - (2) Any participant wishing to share a document with the other participants during the meeting shall ensure that all the other participants have received it before referring to that document during the meeting.

Technical issues

13. (1) Each party shall designate a contact person who can liaise with the host during the course of the meeting to report any technical issues that arise with respect to the platform. The host can be contacted via the platform, by sending an email to leslie.stephenson@wto.org, or by calling +41(0) 22 739 6148.

(2) The Panel shall pause the session until the technical issue is resolved, unless the affected party agrees to continue the session without the issue having been resolved.

Relationship with the Working Procedures of the Panel and the additional Working Procedures of the Panel for Consultations with Experts

14. These additional Working Procedures complement the Working Procedures of the Panel, adopted on 16 July 2019, and the additional Working Procedures of the Panel for Consultations with Experts, adopted on 18 October 2019, and take precedence over them in the event of any conflict.

ANNEX B

ARGUMENTS OF THE PARTIES

Contents		Page
Annex B-1	Integrated executive summary of the arguments of Mexico	18
Annex B-2	Integrated executive summary of the arguments of Costa Rica	44

ANNEX B-1**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF MEXICO****I. INTRODUCTION**

1. Mexico initiated this proceeding because of measures imposed by the *Servicio Fitosanitario del Estado*, SFE (State Phytosanitary Service)¹ of Costa Rica under the pretext of mitigating an alleged risk associated with the importation of fresh avocados for consumption from Mexico. While Mexico recognizes Costa Rica's right to adopt phytosanitary measures, it also notes that the adoption of such measures must be in strict observance of and compliance with the obligations set out in the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). In particular, Mexico considers that Costa Rica should have based its measures on a risk assessment based on scientific principles and evidence, appropriate to the circumstances and taking into account risk assessment techniques developed by the relevant international organizations.

2. As context, the trade in fresh avocados for consumption between Mexico and Costa Rica began in 1993 with the signing of the Free Trade Agreement between the United Mexican States and the Republics of Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua (Single FTA). The trade flow of fresh avocados for consumption from Mexico remained uninterrupted and with steady growth until 2015, when Costa Rica imposed the measures that are the subject of this dispute. During that period, both nations maintained close trade links in the trade in fresh avocados for consumption, reaching a total volume of 137,492.46 tons of fresh avocados for consumption from Mexico. In more than 20 years of trade, not a single case of the occurrence of Avocado Sunblotch Viroid disease, or the ASBVd pathogen has ever been reported in fresh avocados imported from Mexico. Costa Rica has also never indicated the existence of cultural practices involving diversion from intended use or the registration of an alleged spontaneous germination from the more than 687,462,300 avocado seeds resulting from this trade.

3. Over more than 20 years of bilateral trade, the product from Mexico became very important in the Costa Rican market, which had an impact on the fall in demand for Costa Rican native avocados. Mexico considers that this situation led the SFE to design and implement measures that would benefit the domestic avocado industry. In fact, since the imposition of the measures that preceded those currently at issue in this dispute, avocado production in Costa Rica has increased by almost 1,000% (912.65%). This situation was complemented by the granting of support to domestic avocado producers through the National Plan to Strengthen the Avocado Sector.

4. Costa Rica argues that there is an allegedly high risk associated with the likelihood of entry, establishment and spread of ASBVd via fresh avocados imported for consumption. However, this assertion is at odds with its own declaration of absence of ASBVd. Indeed, there is an insurmountable contradiction between the two assertions as they are mutually exclusive if one considers that, despite maintaining uninterrupted trade with Mexico and other countries with ASBVd for more than 20 years, Costa Rica alleges that there has not been a single outbreak or symptom of ASBVd in its territory as a result of such trade. Therefore, the logical conclusion to be drawn is that:

- i. there is no or negligible risk associated with the likelihood of entry, establishment and spread of ASBVd via fresh avocado for consumption; or
- ii. ASBVd is already present in Costa Rica.

5. Indeed, Costa Rica's determination of absence is questionable. Mexico has submitted evidence suggesting that ASBVd is present in the territory of Costa Rica. For example, Mexico argued that, even after the imposition of the measures in 2015, Costa Rica continued to import fresh avocados from countries with ASBVd present in their territories (namely Peru, Guatemala and the United States). In addition, it was demonstrated that the viroid has been detected in several of the shipments from those countries. This situation leads to the presumption that Costa Rica has openly

¹ The SFE is a body attached to the *Ministerio de Agricultura y Ganadería* Ministry of Agriculture and Livestock (MAG) of Costa Rica.

tolerated the alleged high risk from the entry of some shipments that – following its own border inspection methodology – were not tested and that, in addition, have been distributed throughout the territory of Costa Rica. Furthermore, this highlights the lack of rigour in the surveillance system implemented by Costa Rica.

6 In any event, the existence of this contradiction is *prima facie* evidence that Costa Rica's measures: (i) are not necessary; (ii) are not based on sufficient scientific evidence; (iii) are not based on a risk assessment appropriate to the circumstances, taking into account the risk assessment techniques developed by the International Plant Protection Convention (IPPC); and (iv) are not based on relevant international standards.

7. It should be noted that the presence of ASBVd in Mexican territory has not had a negative impact on the protection and production of avocados. On the contrary, Mexico has established itself as the world's leading avocado producer and exporter. In fact, other major avocado producing and exporting countries, like Mexico, do not regulate ASBVd as a quarantine pest in fresh avocados for consumption, namely the Dominican Republic, Peru, Indonesia, Colombia and the United States.

8. Although there are countries that regulate ASBVd as a quarantine pest, their measures are based on a proper risk analysis and in appropriate circumstances. For example, Exempt Resolution No. 8182 issued by Chile on 23 December 2013 prohibits the use of avocado (*Persea americana*) seeds for propagation, the origin of which is fresh avocados for consumption imported from countries of origin where ASBVd is present. It is worth noting that Chile did not implement measures that would impose a burden on the exporting country. Another example is the case of New Zealand, which established specific phytosanitary standards regulating the importation of avocados following its pest risk analysis (PRA) for "Import Health Standard Commodity Sub-class: Fresh Fruit/Vegetables Avocado, *Persea Americana* From Australia". While New Zealand requires nursery owners to test plants used as propagative material for ASBVd, the particular circumstances in New Zealand are not comparable to those in Costa Rica. For its part, the United States conducted a risk analysis in 2014 for the importation of fresh avocados into its territory, including Hawaii and Puerto Rico. The US authorities concluded that the risk associated with ASBVd from the importation of fresh avocados was low. Mexico is not aware of any other countries that have issued measures based on a risk analysis related to an alleged risk arising from the likelihood of entry, establishment or spread of ASBVd with respect to the importation of fresh avocados for consumption.

9. It is clear that Costa Rica has taken advantage of this procedure to justify its measures with evidence expressly created and submitted *ex post* on the imposition of the measures under dispute. For example, the amendment to Manual NR-ARP-PO-01_M-01 demonstrates this situation and how Costa Rica is seeking to rectify the inconsistencies of its measures with the SPS Agreement within the framework of the procedure.

10. Despite this improper practice by Costa Rica, Mexico considers that the SPS Agreement is applicable in the present dispute in accordance with the first sentence of Article 1.1 of the SPS Agreement. Moreover, the measures adopted by Costa Rica are, individually and as a whole [*en conjunto*], phytosanitary measures in view of paragraph 1 of Annex A of the SPS Agreement. Similarly, the measures adopted by Costa Rica are inconsistent with the SPS Agreement and the General Agreement on Tariffs and Trade 1994 (GATT 1994) because:

- They are not based on international standards, guidelines or recommendations, contrary to Article 3.1 of the SPS Agreement;
- They lack justification for deviating from the international standards, guidelines and recommendations without scientific justification for Costa Rica's level of phytosanitary protection or as a result of a level of phytosanitary protection determined to be appropriate in accordance with Articles 5.1 to 5.8 of the SPS Agreement, which is contrary to Article 3.3 of the SPS Agreement;
- They are not based on a risk assessment appropriate to the circumstances, contrary to Article 5.1 of the SPS Agreement;

- They failed to take into consideration existing scientific evidence, relevant production methods and sampling and testing inspection methods, contrary to Article 5.2 of the SPS Agreement;
- Costa Rica did not take into account the relevant economic factors, the costs of control or eradication of pests in its territory, or the cost-effectiveness of alternative methods, contrary to Article 5.3 of the Agreement;
- The measures are not based on scientific principles and are being maintained without sufficient scientific evidence, which is inconsistent with Article 2.2 of the SPS Agreement;
- Their application implies arbitrary or unjustifiable distinctions in Costa Rica's levels of protection, resulting in discrimination or restriction on international trade, contrary to Article 5.5 of the SPS Agreement;
- They constitute a disguised restriction on international trade and arbitrarily and unjustifiably discriminate between Costa Rica and Mexico, contrary to Article 2.3 of the SPS Agreement;
- They are more trade-restrictive than required to achieve Costa Rica's appropriate level of protection (ALOP), given the existence of reasonably available measures, which is contrary to Article 5.6 of the SPS Agreement;
- They are not adapted to the characteristics of the destination areas by failing to take into account, inter alia, the level of prevalence of pests, the existence of eradication or control programmes, and appropriate criteria developed by relevant international organizations, which is contrary to Article 6.1 of the SPS Agreement;
- They are applied in a manner that affects international trade and are not applied in accordance with the SPS Agreement, which is contrary to Article 1.1 of the SPS Agreement;
- They constitute prohibitions or restrictions on the importation of avocados for consumption, other than customs duties, taxes or other charges, contrary to Article XI:1 of the GATT 1994;
- They accord less favourable treatment to fresh avocados for consumption from Mexico than that accorded to avocados originating in Costa Rica, contrary to Article III:4 of the GATT 1994.

11. Mexico therefore wishes Costa Rica to bring such measures into conformity with its obligations under the SPS Agreement and the GATT 1994 of the World Trade Organization (WTO).

II. FACTUAL BACKGROUND

A. The product in question

12. The avocado (*Persea americana* Mill.) is a fleshy, pear-shaped fruit, light green to dark green on the inside and purple to black on the outside, with a rough skin, yellowish green flesh and a very large central seed. There are three "races" of avocado: the West Indian, Guatemalan and Mexican. By combining the latter two, the Hass cultivar is obtained, which is distinguished by having greater competitive advantages. However, the use of the Hass seed is not a viable technological alternative for use as a rootstock due to its high genetic variability and deficiencies in fruit production and quality (it produces weak, thin plants with straggly, poor-quality roots).

13. An avocado seed is characterized by its recalcitrant nature. It is distinguished by its rapid loss of viability and its sensitivity to desiccation and cold; it therefore has a very short shelf life after harvesting, even in a hydrated state. Once the pulp has been removed from an avocado seed, in normal humidity and temperature conditions its viability is less than five days.

14. Due to their recalcitrant nature, avocado seeds do not tolerate long storage periods, unless they are subjected to special preservation procedures, including pre-storage treatments, such as cryopreservation, as well as fungicide treatments to prevent attacks from pathogens such as endemic fungi and seeds from rotting or drying out. Final storage in low-temperature and high-humidity conditions also makes them susceptible to attack by endemic fungi or to developing other diseases. The storage and maintenance of avocado seed viability is generally more of a problem in tropical regions due to the environmental temperature and humidity conditions.

15. Currently, there is no scientific study that can confirm the viability of a seed extracted from a Hass avocado imported for consumption under the specific humidity and temperature conditions of Costa Rica. There is also no scientific evidence to evaluate the viability of seeds extracted from fresh avocados imported for consumption in Costa Rica that are subjected to sudden temperature changes due to prior processes used in transporting and storing the fruit.

16. Although avocado seed germination occurs naturally, its viability will depend on factors such as climate, humidity, correct seed disinfection, soil conditioning and water absorption capacity. By this logic, an avocado seed from a fresh fruit originally imported for consumption and discarded, devoid of specific treatment to ensure its adaptation, is prone to desiccation and loss of embryo viability due to multiple factors. Therefore, humidity and a tropical climate cannot be considered as the only determining factors for avocado seed germination. Currently, there is no scientific evidence that addresses the spontaneous germination of avocado seeds in virtually any location such as fields, farms and landfill sites within the territory of Costa Rica. Consequently, there are also no studies that demonstrate or evaluate the existence of a high likelihood of the establishment and spread of Avocado Sunblotch Viroid disease and the ASBVd pathogen via fresh avocados for consumption in Costa Rican territory.

B. Avocado Sunblotch Viroid disease and its causal agent, the ASBVd pathogen

17. Avocado Sunblotch Viroid disease is caused by the ASBVd pathogen, which has the following variants related to viroid symptomatology: ASBVd-B (bleaching); ASBVd-V (variegation); and ASBVd-Sc (asymptomatic). There is no scientific evidence to confirm a causal link between variants and specific symptoms.

18. ASBVd can occur on avocado trees asymptotically or symptomatically. Symptoms of the disease include the appearance of thin streaks on young branches and stems, bleaching and deformation of leaves, with fruits often developing white, yellow or pinkish sunken spots or streaks, and are usually small and deformed. Symptoms are unevenly distributed on the infected tree. A tree with the disease may develop typical symptoms as a result of stress conditions such as radical pruning of tree foliage or external events such as fire. In practice, producers, when detecting lower yields from trees or confirming the presence of the disease, remove infected trees.

19. Symptoms of the disease were first observed in 1914, in the US state of California, and arose following the placing on the market of propagative material from that country. It is thought that from 1920 to 1950 this disease spread to third countries such as Australia and Palestine. In Mexico, symptoms of the disease were recorded for the first time in 1948; however, its presence was not confirmed until 2009, in the article *First Report of Avocado Sunblotch Viroid in Avocado from Michoacán, Mexico*, a publication that refers to the detection of the disease in two commercial plantations located in Tingambato, Michoacán. Given that it is not considered a pest of economic importance in Mexico, neither the authorities nor the domestic industry have allocated resources to research into the disease. Thus, no evaluation of the prevalence and geographical distribution of the disease in Mexico has been carried out.

20. There is currently no scientific evidence to confirm the transmission of Avocado Sunblotch Viroid disease arising from imports of fresh avocados for consumption, nor are there any scientific studies evaluating the economic relevance of the pest on avocado production, which confirms the insignificance of the economic impact on the industry.

21. Transmission of the disease is closely linked to the trade in propagative material. In particular, transmission pathways are: the use of pruning and cutting tools during harvesting; vegetative propagation through the use of infected propagative material; through pollen; and through root intertwining. The likelihood of disease transmission by natural means, such as spontaneous germination, is low.

C. Relevant international standards, guidelines and recommendations

22. The SPS Agreement defines international standards on plant protection as those developed by the IPPC. Mexico considers ISPM 1 (*Phytosanitary principles for the protection of plants and the application of phytosanitary measures in international trade*), ISPM 2 (*Framework for pest risk analysis*), ISPM 5 (*Glossary of phytosanitary terms*), ISPM 6 (*Guidelines for surveillance*), ISPM 8 (*Determination of pest status in an area*), ISPM 11 (*Pest risk analysis for quarantine pests*) and ISPM 32 (*Categorization of commodities according to their pest risk*) as relevant to this dispute.

D. Presence of the ASBVd pathogen and Avocado Sunblotch Viroid disease in Costa Rica

23. Costa Rica's determination of absence of disease is questionable for several reasons. Firstly, its surveillance system was not implemented in accordance with ISPM 6, in that it contains omissions, errors and defects that call into question the objectivity, consistency and rigour of the results of the sampling conducted from 2014 to date. Some of the defects in the surveillance system include: inaccurate, incomplete and disorderly processing of specific surveillance records, inconsistencies in laboratory reports, lack of tests to allow traceability of samples, lack of scientific rigour in carrying out diagnostic tests.

24. Second, even after the imposition of measures in 2015, Costa Rica continued to import fresh fruit from countries where ASBVd is present (namely Peru and Guatemala), despite the fact that the viroid has been detected in several shipments from these countries. This situation suggests that Costa Rica has openly tolerated the alleged high risk involved in the entry of some shipments that –following its own border inspection methodology – were not analysed and that, moreover, have been distributed throughout Costa Rican territory.

25. Third, throughout its submissions, Mexico submitted evidence giving reason to presume that ASBVd is present in Costa Rican territory. This evidence consists of affidavits from traders and importers in Costa Rica; an official letter from the University of Costa Rica's *Centro de Investigación en Biología Molecular* (molecular biology research centre) showing positive results for ASBVd; samples taken in 2014 and from 2015 to 2016 in Costa Rica; and evidence presupposing the importation of propagative material likely to be infected with ASBVd from the US state of California to Costa Rica through the *Centro Agrícola Cantonal Tarrazú* (Tarrazú district agricultural centre).

E. Prior measures relating to the measures at issue adopted by Costa Rica

26. Prior to the implementation of the disputed measures, Costa Rica implemented measures for countries with ASBVd, including Mexico. These measures included:

- Resolution DSFE-03-2015 (Emergency Measure). Issued on 22 April 2015 by the SFE. It ordered the temporary suspension of the issuance of phytosanitary import certificates for fresh avocados for consumption from Australia, Spain, Ghana, Guatemala, Israel, Mexico, South Africa and Venezuela. The US state of Florida was subsequently included. This measure was withdrawn on 16 October 2017.
- Resolution DSFE-11-2015 (First Mexico-specific measure). Issued on 10 July 2015. This measure established the requirement to certify: (i) that the product came from plants grown in nurseries certified by the national plant protection organization of the country of origin as free of ASBVd, and previously recognized by the SFE of Costa Rica; and (ii) that the product came from a place of production free of ASBVd, and previously recognized by the SFE of Costa Rica. The amendment to this measure was notified on 16 October 2017, leading to the specific measures at issue.
- Report ARP-003-2015 "Pest risk analysis initiated following the review of a policy on the importation of fresh avocados (*Persea Americana* Mill.) from Mexico for consumption". Written in 2015. It proposed the implementation of measures in addition to the phytosanitary certificate, such as: (i) verification of origin based on the respective technical regulation; (ii) verification that the product comes from a place of production free of ASBVd, and previously recognized through the procedures described in ISPM 29 by the SFE Costa Rica; and (iii) the additional declaration in the official phytosanitary certificate that the product comes from a place of production free of ASBVd (place must be named).

III. SPECIFIC MEASURES AT ISSUE

27. The specific measures at issue by which Costa Rica restricts, individually and as a whole, the importation of fresh avocados for consumption from Mexico are:

- **Final specific resolution for Mexico (Resolution DSFE-003-2018) and final general resolution (Resolution DSFE-002-2018).** Issued on 29 January 2018, the Resolutions establish import requirements specifying that:
 - (i) the consignment is accompanied by a phytosanitary certificate stating that the avocados are free of *Avocado Sunblotch Viroid*; or
 - (ii) the consignment is accompanied by a phytosanitary certificate stating that the avocados come from a place of production free of ASBVd (previously recognized by the SFE); or
 - (iii) comply with a bilaterally established systems approach programme.
- **Reports ARP-002-2017 and ARP-006-2016.** Prepared by the SFE's Pest Risk Analysis Unit in July 2017, they provide the basis for justifying the Resolutions. Although later in 2019 *corrigenda* were issued on the analyses, these were only to provide clarifications and corrections of inaccuracies. ARP-002-2017 and ARP-006-2016 are similar in their conclusions, the difference being that the latter includes the risk analysis for the importation of avocado plants for planting.
- **Manual NR-ARP-PO-01_M-01:** The Manual was approved by the Executive Director of the SFE on 11 May 2016, and is binding on the Risk Analysis Unit when it is conducting qualitative pest analyses for an entry pathway. Its purpose is to guide the analyst through the scientific evaluation available to determine whether an organism is a regulated pest, assess its risk and identify risk management options, in compliance with the Costa Rican Phytosanitary Protection Law and international regulations. The 2016 Manual should be analysed even if it is not in force, as it was the instrument used for the preparation of ARP-002-2017 and ARP-006-2016, and therefore it must be part of the findings of this Panel. The new Costa Rican Manual adopted in 2018 serves only to put into context and understand the Costa Rican authorities' actions in this matter.

IV. ANALYSIS OF THE MEASURES AT ISSUE INDIVIDUALLY AND AS A WHOLE

28. The specific measures at issue are those by which Costa Rica restricts, individually and as a whole, the importation of fresh avocados for consumption from Mexico. The Resolutions, the PRAs and the Manual are administrative acts under the responsibility of the SFE Pest Risk Analysis Unit, which in turn belongs to the MAG. They therefore constitute "measures" for the purposes of a dispute settlement procedure.

A. Evaluation of measures as a whole

29. The measures must be evaluated *as a whole* because of their design and functionality. This is because: (i) many of the elements of the measures are interrelated and can be mutually justified, resulting in a measure that is independent of the measures analysed individually; and (ii) because the possible inconsistency of any of the measures individually with the provisions of the SPS Agreement would necessarily affect the other measures as a whole. Thus, if the Manual is found to be inconsistent with the SPS Agreement, this could have an impact on the PRAs. Similarly, if it is found that the PRAs were not subject to the requirement to carry out a risk assessment appropriate to the circumstances, this would necessarily affect the Resolutions that are based on them. In other words, the five measures operate as a whole in a systemic way so that it is a separate measure from the measures analysed individually.

30. In particular, the Resolutions establish the phytosanitary requirements to be met by exports of fresh avocados for consumption, the PRAs establish the alleged reasoning behind recommending the adopted requirements, while the Manual constitutes the guide used by the risk analyst to carry

out the PRAs. In this respect, the Resolutions make specific reference to the PRAs, insofar as they cite the Manual as the source for their development. In other words, individual instruments cannot be understood in isolation or separately given that they are closely linked.

31. In this regard, the requirements contained in Resolutions DSFE-002-2018 and DSFE-003-2018, reports ARP-006-2016 and ARP-002-2017, as well as their methodology contained in Manual NR-ARP-PO-01_M-01,, are linked and together constitute the basis on which Costa Rica *de facto* prohibits or restricts the importation of fresh avocados for consumption from Mexico.

32. In addition, the design and structure of the measures operate in such a way that, as a whole, they affect exports to Costa Rica of avocados for consumption from Mexico and unjustifiably accord treatment more favourable to its domestic avocado industry in the face of foreign competition. In particular, Costa Rica's measures have an impact on trade with Mexico.

B. Evaluation of measures individually

33. Mexico requests the Panel, in its analysis of the provisions and obligations subject to the complaint, to rule on each measure individually. In applying the SPS Agreement with respect to each of the measures individually, the Panel could identify the specific elements in each of the measures that lead to a violation of the SPS Agreement, which make them independent from one another and from the measure as a whole. This is because the specific violation may vary depending on the characteristics and form of each measure. In other words, the same element, such as uncertainty and diversion from intended use, may have a different scope in the Manual, the PRA or the Resolutions.

34. Failure to proceed in this way would run the risk that the specific violations in each of these measures would remain if they were to comply with the Dispute Settlement Body (DSB)'s recommendations.

V. LEGAL ARGUMENTS

35. In designing, implementing and maintaining the challenged measures, Costa Rica has acted inconsistently with Articles 1.1, 2.2 and 2.3, 3.1 and 3.3, 5.1, 5.2, 5.3, 5.5 and 5.6, and 6.1 of the SPS Agreement, as well as Article XI:1 of the GATT 1994. Moreover, Costa Rica's measures are not justified under Article XX(b) of the GATT 1994.

A. Costa Rica's measures are phytosanitary measures under the SPS Agreement, in accordance with Annex A(1)(a) and Article 1.1 of the SPS Agreement

36. The measures in dispute are, individually and as a whole, phytosanitary measures under Article 1.1 of the SPS Agreement because: (i) they are phytosanitary measures as defined in Annex A(1)(a) of the SPS Agreement; and (ii) individually and as a whole they directly and indirectly affect international trade.

37. With respect to the first element, the five measures, individually and as a whole, are legal acts designed, implemented and maintained with the aim of protecting avocado (*Persea americana* Mill.) trees in Costa Rica from risks arising from the likely entry, establishment or spread of ASBVd in its territory. They are also legal acts that are clearly and objectively related to the objective set out in Annex A(1)(a) of the SPS Agreement, thus complying with the second part of Annex A(1) of the SPS Agreement.

38. They also satisfy the second condition of Article 1.1 in that the five measures identified by Mexico, when operating as a whole, have had a real and immediate impact on trade since 2015, given that all exports of fresh avocados from Mexico were stopped.

39. With regard to the analysis of measures individually, the measures affect international trade, as the Resolutions had the effect of stopping Mexico from exporting fresh avocados for consumption to Costa Rica. The PRAs recommended the implementation of certain requirements and concluded that, as the measures were considered by the authority at the time risk management was being defined, they hindered international trade and, in the case of Mexico, they *de facto* prohibited the importation of fresh avocados for consumption. Lastly, the Manual resulted in the development of an unsuitable PRA that led to the implementation of requirements that affected international trade

of fresh avocados for consumption between Mexico and Costa Rica. In other words, the impact of the application of the Manual extends to the SFE Resolutions and thus they have an indirect effect on international trade.

40. As for the GATT 1994, it is applicable to Resolutions DSFE-002-2018 and DSFE 003-2018, in particular Articles XI:1 and III:4.

B. The measures adopted by Costa Rica are inconsistent with Article 3.1 of the SPS Agreement

41. Pursuant to Article 3.1, Costa Rica was required to base its measures on international standards. The Appellate Body has noted that the relevant international standards referred to in Article 3 are those established or developed under the auspices of the international organizations referred to in Annex A(3) of the SPS Agreement. International standards developed under the auspices of the IPPC are identified as relevant to plant protection. In addition, the DSB noted that Members should base their measures on relevant international standards, guidelines or recommendations.

42. In this regard, ISPMs 1, 2, 5, 6, 8, 11 and 32 are relevant for the purposes of this case, as they are standards issued by the IPPC, and relate to issues directly applicable to this case, as they were relevant to the implementation of the measures at issue in this dispute.

43. The SFE itself has made it clear how relevant the ISPMs are by: (i) explicitly stating in the PRAs that the evaluation was conducted "in a way that was harmonized" with ISPM 11; (ii) referring in its Manual that it was "in accordance" with ISPMs 1, 2, 11 and 21; and (iii) developing the specific surveys to determine the ASBVd situation in Costa Rica, "in accordance" with ISPMs 6 and 8.

44. Mexico demonstrated that, by conducting a joint analysis of the measures and ISPMs, the Panel will be able to ascertain that there are contradictions that represent a fundamental departure from the relevant ISPMs, namely:

- Resolutions DSFE-002-2018 and DSFE-003-2018 are inconsistent with ISPM 1 by departing from the principles of necessity, managed risk, minimal impact, non-discrimination and technical justification;
- Reports ARP-006-2016 and ARP-002-2017, with respect to ISPM 2, do not correctly define the PRA area in terms of the endangered area, and do not clearly identify the initiation point of the risk management analysis. With respect to ISPM 11, given that they presume zero risk, they fail to identify ways to react to the risk, fail to assess the efficacy of these actions, fail to identify the most appropriate options, and fail to consider the principles of minimal impact and equivalence. Lastly, the PRAs are not designed around the intended use of the product, which is consumption;
- Costa Rica's declaration on the absence of ASBVd in its territory is inconsistent with ISPMs 6 and 8. In this regard, phytosanitary status forms a key part of Costa Rica's PRAs as it is the premise on which its risk assessments are based. Therefore, its measures were not based on a PRA appropriate to the circumstances because its determination of absence is based on serious errors and omissions, *inter alia*: (i) the documents were not approved by the head of the SFE; (ii) there is no evidence that these documents predate the specific surveys; (iii) the selection of farms for sampling is based on a questionable statistical formula; (iv) the sampling does not cover the whole of Costa Rican territory; and (v) the SFE officials did not sample asymptomatic trees during their visits;
- Manual NR-ARP-PO-01_M-01 contradicts the specifications of ISPMs 2, 11 and 32 by omitting some relevant sections such as criteria for pest categorization, criteria to be taken into account for the risk assessment of pests that have been identified and categorized as quarantine pests, and the different pathways that commodities may represent according to their pest risk. Had these been considered, SFE officials would have reached a resolution that did not conclude there was a high risk related to the likelihood of entry, establishment and spread of ASBVd via fresh avocados for consumption.

45. In conclusion, Costa Rica did not base its measures on relevant international standards, namely ISPMs 1, 2, 4, 6, 8, 11 and 32.

C. The measures adopted by Costa Rica are inconsistent with Article 3.3 of the SPS Agreement

46. In establishing its measures at a higher level of protection than that established by the relevant ISPMs, Costa Rica did not fulfil any of the following conditions: (i) that there should be a scientific justification; and (ii) that it was as a consequence of the level of phytosanitary protection in accordance with the relevant provisions of Articles 5.1 to 5.8 of the SPS Agreement. Costa Rica's actions were therefore inconsistent with Article 3.3 of the SPS Agreement.

47. In this connection, it should be noted that the design of an international standard, particularly its specificity regarding a pest, is not a circumstance that prevents a Member from achieving a specific ALOP. In addition, the text of the SPS Agreement does not mention that an international standard must establish a specific ALOP as a parameter of the principle of harmonization, nor as a *sine qua non*-requirement for the application of Article 3 of the SPS Agreement.

48. Regarding the first element, it should be noted that Costa Rica did not provide a scientific justification for why the relevant ISPMs lacked efficacy in achieving its ALOP. In its PRAs, Costa Rica merely stated that in cases where the standards failed to achieve its appropriate level of protection or where the standards were non-existent, it reserved its right to exercise its right to apply appropriate measures, justified on scientific grounds and supported by a PRA. While this was stated in its PRAs, conversely Costa Rica failed to justify why, if it applied the relevant ISPMs, the appropriate level of protection it would achieve would be lower than the level that should be achieved based on its ALOP, which, in turn, it also failed to justify with scientific information or in its own PRA.

49. While the ALOP established by Costa Rica in its PRAs is a "maximum level of phytosanitary protection", it is questionable that throughout the dispute Costa Rica established multiple clarifications of its ALOP. This situation makes the application of this provision difficult, particularly the definition of the ALOP.

50. Regarding the second element, there is no scientific justification or information in the PRAs to enable Costa Rica to determine a better or higher level of protection than it would obtain by basing its measures on the relevant ISPMs. In particular, as far as the scientific evidence is concerned, it is not sufficient to justify a higher ALOP than would have been achieved if the relevant ISPMs had been taken into account.

51. In fact, most of Costa Rica's central reasoning for justifying the existence of a high risk, which it uses to justify its maximum appropriate level of protection, are based on a socio-economic study – CONSULSANTOS 2010. This report lacks methodological rigour and scientific proof, in addition to the fact that the conclusions drawn by Costa Rica in its PRAs are therefore neither objective nor consistent and are not sufficiently supported by scientific evidence regarding the entry pathway of fresh avocados imported for consumption.

52. In conclusion, Costa Rica did not base its measures on the relevant ISPMs, nor did it justify why those ISPMs lacked efficacy in achieving its ALOP. Indeed, Costa Rica failed to provide a scientific justification, or to demonstrate that the determination of its "maximum" ALOP is the result of an analysis conducted under Articles 5.1 to 5.8 of the SPS Agreement, which implies that its measures are inconsistent with Articles 3.1 and 3.3 of the SPS Agreement.

D. The measures adopted by Costa Rica are inconsistent with Article 5.1 of the SPS Agreement

53. Analysing the consistency of a phytosanitary measure with Article 5.1 of the SPS Agreement involves evaluating: (i) whether the Member adopting the measure conducted a risk assessment in accordance with Annex A(4) of the SPS Agreement; (ii) whether the assessment is "appropriate to the circumstances"; (iii) whether the risk assessment "took into account" risk assessment techniques developed by relevant international organizations; and (iv) whether the Member ensured that the phytosanitary measures adopted "are based on" the risk assessment.

a. Costa Rica's measures are not based on a risk assessment as defined in Annex A(4) of the SPS Agreement

54. The Appellate Body, in *Australia – Salmon*, noted three elements in considering whether a Member had developed an assessment within the meaning of Article 5.1 of the SPS Agreement.

- i. *Identify the pests, whose entry, establishment or spread Costa Rica wants to prevent in its territory, as well as the associated potential economic and biological consequences*

55. Costa Rica did not identify or differentiate between the nature, characteristics, effects, symptoms and risks of Avocado Sunblotch Viroid disease and those of the different variants of the viroid that cause the disease, ASBVd. Furthermore, Costa Rica did not provide justification for the assumption that the biological and economic consequences it listed in its PRAs might have resulted from the entry of ASBVd into its territory.

- ii. *Evaluate the likelihood of entry, establishment or spread of Avocado Sunblotch Viroid disease and the ASBVd viroid, as well as the associated potential biological and economic consequences*

- Costa Rica did not evaluate the likelihood of entry of ASBVd

56. Costa Rica did not submit scientific evidence to demonstrate the fundamental premise underlying its PRAs, namely the absence of ASBVd in its territory. In fact, there is no reasoned or systematic analysis in its PRAs, let alone evidence to demonstrate that the pathogen and the disease it causes were absent from its territory.

57. Costa Rica notes that it identified two entry pathways (avocados for consumption and plants for planting) in its PRAs, which remains merely an assertion because it is not supported by scientific evidence. In other words, the PRAs do not meet the specificity criteria set by the Appellate Body in *Japan – Apples*. In fact, Costa Rica claimed to justify a risk associated with the pathway of fresh fruit for consumption in general information relating to ASBVd and through the pathway of importation of propagative material, and not specific scientific evidence referring to the pathway under assessment. In any event, as Mexico has argued, Costa Rica was required to obtain the additional information needed to develop a more objective and consistent risk assessment.

58. In the absence of specific scientific evidence, Costa Rica was required to follow ISPMs 6 and 8, which state that pest status is determined using information from individual records, pest records from surveys and historical records of absence; in other words, findings through general surveillance, as well as scientific publications and databases. However, it did not adhere to these standards.

59. Mexico demonstrated that the literature cited in the PRAs by Costa Rica was taken out of context or misinterpreted by its phytosanitary authority. In this regard, Costa Rica failed to point out specifically what evidence it had used as a basis for justifying the risk associated with the pathway of fresh avocados imported for consumption.

60. Mexico has demonstrated that Costa Rica based its assessment on general observations about the possibility, not the likelihood, of entry of the ASBVd pathogen, while virtually ignoring Avocado Sunblotch Viroid disease. In addition, Costa Rica:

- Failed to identify all relevant pathways for entry of the ASBVd pathogen within its territory, and made errors in attempting to assess the frequency of pathogen movement with respect to the pathway of importation of fresh avocados – whether symptomatic or asymptomatic;
- Did not associate the disease with its prevalence in the place of origin;
- Did not assess in its PRAs, either qualitatively or quantitatively, the risk related to the likelihood of importation of asymptomatic avocados within the total volume and frequency of movements of fresh avocados from Mexico;

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- Did not take into consideration certain circumstances that contribute to the survival of ASBVd, such as temperature and the recalcitrant nature of the seed and, furthermore, did not evaluate, based on scientific evidence, recalcitrant avocado seed viability for germination after transportation and storage;
 - Did not evaluate factors such as seasonality, as the higher the temperature, the greater the chance of symptom outbreak and hence the lower the chance of asymptomatic avocados being exported;
 - Did not consider estimating the likelihood of entry with respect to the origin of the avocados, as the prevalence of the viroid has not been confirmed in states such as Jalisco;
 - Did not correctly evaluate the likelihood of transfer to a suitable host, under natural conditions such as those surrounding the alleged diversion from intended use, through spontaneous germination;
 - Did not consider other scientific evidence that in Mexico's view should have been used when evaluating the likelihood of entry of ASBVd viroid into the territory of Costa Rica;
 - Did not identify the prevalence of ASBVd viroid in Mexico and the percentage of avocados that might be asymptomatic in plantations in Mexico;
 - Did not identify the approximate number of cases where the ASBVd viroid might be present in fresh avocados for consumption packaged and prepared for export, originating from Michoacán, Mexico; and
 - Did not identify, from the approximate number of avocados exported from Mexico, which of them could be asymptomatic, to rule out an approximate percentage of infected fresh avocados that were damaged between transportation and arrival at the point of sale on the shelf, meaning that the avocado seed was still viable for germination.

61. In addition, it would appear that Costa Rica, in reviewing the risk assessment and noting its finding that there was a "high" likelihood of entry, made an assumption that 100% of fresh avocados for consumption imported from Mexico are carriers of the asymptomatic variant of ASBVd. In fact, Mexico sampled packs of produce destined for export to determine the prevalence of avocados infected with ASBVd, which turned out to be zero, as 100% of the samples tested negative for ASBVd. In other words, evidence was presented disproving the alleged high likelihood that avocados exported by Mexico carry ASBVd. It is therefore clear that Costa Rica overstated the results of the risk assessment.

- Costa Rica did not dispute the fact that the practice of diversion from intended use and spontaneous germination of discarded avocado waste was a risk that had an impact on the likelihood of the establishment of the ASBVd viroid through fresh avocados for consumption

62. In Costa Rica's PRAs, the risk associated with the likelihood of the disease establishing itself in Costa Rican territory arising from diversion from intended use through cultural practices and the spontaneous germination of discarded avocado waste is not supported by scientific evidence. This is also demonstrated using the mathematical formula that Mexico presented in its second written submission showing that, if the likelihood of introduction through a pathway is low, as it is in the present case, the risk of establishment is therefore negligible.

63. Costa Rica draws from merely theoretical constructions and possibilities in evaluating the likelihood of ASBVd establishment. Indeed, the evidence provided in this proceeding shows that there is no scientific evidence or practical experience demonstrating that discarded avocado skins are a source of ASBVd transmission, let alone that throwing the discarded seeds in landfills sites or fields in Costa Rica could result in a "spontaneous germination" of the seeds in all cases.

64. Costa Rica also made the assumption – without a systematic calculation – that all seeds would be used as propagative material, thus considering them a high risk. However, the source referred to in its PRAs (CONSULSANTOS 2010 and CONSULSANTOS 2017) indicates that there is no statistical data on the quantity of imported avocados whose seed is used as propagative material.

65. Costa Rica also made the assumption that all seeds would be used as rootstock or that all discarded avocado seeds would germinate spontaneously. It did so without taking into account specific factors or conditions required for a seed from a freshly consumed avocado to germinate, such as: the recalcitrant nature of the seed; reproductive strategy and germination viability; susceptibility to attack by pathogens and factors conducive to seed rot; and the fact that this practice is not commercially viable.

66. In this regard, in order to calculate the likelihood of establishment, Costa Rica had to estimate qualitatively or quantitatively:

- The number of cases where the seed was removed from the fresh avocado for consumption and the number of occasions on which it was used for planting (diversion from intended use) or dumped in fields, backyards, gardens, farms, waste disposal centres, rubbish dumps and landfill sites;
- Of the percentage of likely cases where the avocado seed was removed for planting (diversion from intended use) or dumped in a landfill site, rubbish dump, farm or field, only the approximate number of cases where the seed had not lost its viability due to factors such as the recalcitrant nature of the seed, pathogens (such as fungi and bacteria), temperature, humidity and soil conditions should have been considered;
- Of the percentage of likely cases where the viroid survived, the percentage of seeds that might have entered and established within Costa Rican territory, in other words those that germinated, should have been considered;
- Of the percentage of seeds that germinated, only cases where the seed that germinated survived factors such as root rot and developed into a seedling and subsequently into a viable tree should have been considered as being likely;
- Of this percentage of likelihood, only cases where the tree spread within Costa Rican territory and then transmitted ASBVd by natural means should also have been considered.

67. It should be noted that the evidence shows that the main pathway for the spread of the pathogen is through propagative material. Therefore, unless Costa Rica analyses the frequency of diversion from intended use, or the survival of the seed when so used, it cannot claim that the importation of fresh avocados is the main pathway for the spread of ASBVd.

- Costa Rica did not evaluate the likelihood of spread of ASBVd

68. As for the likelihood of spread of a plant infected with ASBVd, the ability of the pest to spread from the pathway – a seed obtained from an asymptomatic avocado imported for consumption – to the receiving environment must first be considered. Mexico has noted that a pathway may carry a pest, but that the pest may not necessarily have the ability to transfer itself into the environment and thus spread.

69. In analysing the risk of spread arising from cultural practices of diversion from intended use of the seed obtained from avocados imported for consumption, Costa Rica did not take into account the following considerations:

- Mexico does not export propagative material to Costa Rica, so the likelihood of transmission via ASBVd-positive propagative material such as infected shoots, seedlings and stems is zero (this is the main ASBVd method of transmission);
- Given that the likelihood of entry and establishment of the viroid is negligible, the likelihood of spread is even lower; and

- In reviewing the PRAs, it does not appear that Costa Rica has supported with scientific evidence the practice of grafting Hass onto Hass, which is neither technically nor commercially viable.

70. Mexico maintains that the Hass avocado seed is not a technically viable alternative for use as a rootstock in commercial plantations, given that the fruit obtained by this means does not retain the characteristics of the Hass crop. The main reason is that the seed has a high genetic variability, which makes it difficult to predict potential production and quality of the fruit. In Mexico, a Hass avocado seed used as a rootstock often produces weak, thin seedlings with poor-quality, straggly roots.

71. Regarding the risk from spontaneous germination of waste from avocados, Mexico has demonstrated that no scientific evidence considered by Costa Rica in its risk assessment confirms the risk that may result from the spread of the viroid through spontaneously germinated seeds in landfill sites, farms or backyards.

72. Mexico demonstrated that the likelihood of germination of an avocado seed discarded in landfill sites is virtually zero due to the recalcitrant nature of the seed and the likelihood of the seed rotting or becoming infected by the soil conditions themselves.

- Costa Rica did not to evaluate the potential economic and biological consequences of the entry, establishment and spread of ASBVd

73. Mexico demonstrated that Costa Rica did not properly analyse this requirement, as it merely transcribed the risk factors presented in its Manual. Similarly, in its PRAs, Costa Rica concludes that there is a predominantly "high risk", based on the following elements:

- Loss of crops, production and quality;
- Impact on access to operating markets;
- Changes in costs for producers or in demand for inputs, including costs of control;
- Changes in internal or external consumer demand for a product as a result of variations in quality;
- Viability and cost of eradication or containment.

74. However, these elements are unrepresentative samples, do not relate to the facts, do not mention the fact that ASBVd is not considered a quarantine pest of economic concern to major producers, or that the likelihood of export of infected fresh avocados is minimal, or that eradication costs are minimal compared to other pests, as mentioned above by Mexico and experts.

75. Thus, from real-life experience, it can be demonstrated that ASBVd does not have serious economic consequences in terms of loss of crops, production and quality of avocado fruit. From Mexico's viewpoint, it is a question of quality, safety and traceability throughout the chain involved in the trade in fresh avocados, which together weaken the real potential impact of this viroid. That said, Mexico does not deny the fact that a tree carrying the viroid may be affected in terms of its yield or the quality of its fruit. However, Mexico rejects the claim that fresh avocados imported for consumption from Mexico constitute a high-risk pathway justifying a *de facto* ban such as that imposed by Costa Rica.

76. Although scientific literature exists that makes reference to the potential losses related to ASBVd, these conclusions cannot be extrapolated without further analysis in the way that Costa Rica did. Costa Rica merely presents scientific evidence from experts such as Carabez *et al.* and Vallejo López *et al.* without taking into account that these studies must be considered on the basis of the specific characteristics of the territory to which the results are to be extrapolated. In light of the above, it is clear that Costa Rica misrepresented the scientific evidence regarding the potential economic consequences of the entry of the viroid into its territory.

77. With regard to the biological consequences, Costa Rica claims that there is a negative impact on "the germplasm of the native avocado and a detriment to biodiversity". However, Costa Rica did not substantiate these claims with scientific evidence to link such biological consequences to the importation of fresh avocados for consumption from Mexico.

iii. Costa Rica did not evaluate the likelihood of entry, establishment or spread of ASBVd according to the phytosanitary measures which might be applied

78. It is not possible to see in the PRAs whether the SFE has carried out an evaluation of alternative measures that could be applied. Mexico identified four measures (three of them alternatives) that could be applied and that were not evaluated by Costa Rica when it conducted its risk assessment. In addition, it cannot be concluded that Costa Rica has evaluated any other possible alternatives other than those reflected in Resolutions DSFE-03-2018 and DSFE-002-2018. It can therefore be concluded that these are *ex post facto* measures, designed and implemented for the sole purpose of affecting the import trade of fresh avocados for consumption from Mexico.

b. Costa Rica's SPS measures are not based on a risk assessment "appropriate to the circumstances"

79. The term "appropriate to the circumstances" refers to the manner in which a risk assessment is to be carried out. This expression gives Members some flexibility to take into account, *inter alia*, specific methodological difficulties, as well as specific circumstances relating to the origin and substance of the risk, as recognized by the Appellate Body. In this regard, Mexico considers that Costa Rica failed to take into consideration certain circumstances in drawing up its PRAs, namely:

- The existence of evidence inferring that ASBVd and Avocado Sunblotch Viroid disease are present in Costa Rica. This information makes reference to the lack of an ISPM 6- and 8-compliant declaration of absence of the viroid. Indeed, it was demonstrated that Costa Rica's surveillance system is flawed and deficient, starting with its sampling procedures, which do not make it possible to ensure that Costa Rica is actually free of the viroid;
- The climatic conditions of the Santos region are not a circumstance that justifies an increased likelihood of ASBVd transmission;
- The recalcitrant nature of the seed when evaluating each of the steps that had to be followed to evaluate the likelihood of entry, establishment and spread of ASBVd via fresh avocados for consumption from Mexico;
- The Trade in fresh avocados for consumption for more than 20 years between Mexico and Costa Rica, without any reported cases of Avocado Sunblotch Viroid disease or ASBVd;
- The Trade to date between Costa Rica and other countries with the presence of Avocado Sunblotch Viroid disease or the ASBVd pathogen;
- The fact that Mexico is the world's leading producer and exporter of fresh avocados for consumption, and that the presence of ASBVd in its territory has not affected this market position.

80. Costa Rica did not develop its risk assessments taking into consideration the specific circumstances of the pathway of fresh avocados imported for consumption, or the circumstances relating to the origin and destination of the product in dispute. Costa Rica's measures are therefore inconsistent with Article 5.1 of the SPS Agreement.

c. Costa Rica did not take into account the risk assessment techniques contained in the ISPMs

81. ISPM 2 (*Framework for pest risk analysis*) and ISPM 11 (*Pest risk analysis for quarantine pests*) are the risk assessment techniques referred to in Article 5.1 of the SPS Agreement, as they are specific standards on risk assessment techniques that have been developed by the IPPC.

82. In addition, ISPM 6 (*Guidelines for surveillance*) is applicable, as the determination of Costa Rica's absence from disease was considered as a core premise for the development of the PRAs.

83. Mexico argues that relevant sections of ISPMs 2 and 11 were omitted which, if they had been taken into consideration, would have led to conclusions favouring international trade. Some of the omissions referred to are as follows:

- With regard to ISPM 2, the PRA area in terms of the area at risk is not correctly defined, and the initiation point of the risk management analysis is not clearly identified;
- With regard to ISPM 11, given that zero risk is assumed, ways to respond to the risk are not identified, the effectiveness of the responses are not evaluated, the most appropriate options are not identified, and the principles of minimal impact and equivalence are not taken into account. Lastly, the PRAs are not designed around the intended use of the product, which is consumption.

d. Costa Rican SPS measures are not based on PRAs

84. According to the Appellate Body, a Panel must analyse whether: (i) a determination that the scientific basis of the risk assessment comes from a respected and qualified source and can therefore be considered a "legitimate scientific opinion" under the standards of the scientific community concerned and can accordingly be considered "legitimate science" according to the standards of the relevant scientific community; and (ii) a determination that the reasoning of the risk assessor is objective and consistent and that, therefore, its conclusions find sufficient support in the underlying scientific basis.

85. It appears from a comprehensive analysis of the PRAs prepared by Costa Rica that the assessment does not comply with Article 5.1, as it is based on central reasoning that is not supported by scientific evidence. In addition, the PRAs do not take into account relevant factors related to the risk associated with the pathway of fresh avocado imported for consumption with respect to the likelihood of entry, establishment and spread of ASBVd. Rather, Costa Rica's risk assessment appears to presuppose a higher risk than that associated with the pathway under its analysis (avocado imported for consumption). Most of the reasoning presented in the PRAs is not scientifically supported. The source provided is merely a socio-economic census carried out by a company, which does not justify the legitimacy of the studies carried out or the conclusions reached on the basis of these studies.

86. In particular, the measures applied by Costa Rica are not based on a risk assessment, given that:

- The assessor's reasoning is based, for the most part, on mere claims and sweeping assertions devoid of scientific support and rigour. It is therefore natural that the conclusions reached in both PRAs are not objective and consistent with real-world experience;
- The facts and evidence presented by Mexico and drawn from real-world experience is at odds with the facts presented by Costa Rica in its risk assessment and throughout its submissions;
- The assessments lack scientific support to demonstrate that the spontaneous germination of discarded seeds of imported avocados constitutes a risk of entry, establishment and spread of ASBVd;
- The risk assessments are not substantiated by scientific evidence to support a diversion from intended use of the seeds of imported avocados for consumption; and
- The evident lack of scientific, technical and statistical basis emerged when Costa Rica provided ad hoc evidence prepared especially in response to Mexico's first written submission and the Panel's questions.

87. The lack of specificity in the risk assessed by Costa Rica signifies non-compliance with the SPS Agreement. The central risk stems from the diversion from intended use of avocados imported for consumption without being tested. Instead, a risk is assumed that the viroid enters through the very importation of avocados and a *per se* risk of diversion from intended use is assumed.

88. Mexico has pointed out that the errors in the risk assessment are sufficiently serious that they demonstrate the lack of consistency between the risk assessments and the phytosanitary measures applied with the aim of protecting Costa Rican avocado trees from an alleged HIGH risk associated with the likelihood of entry, establishment and spread of ASBVd via fresh avocados imported for consumption. This is an alleged risk that cannot be confirmed or substantiated based on the analysis conducted by the Costa Rican phytosanitary authority, or derived from the scientific evidence presented in support of the risk assessment or the documentary evidence that has been presented by Costa Rica throughout this proceeding.

89. It follows from the above that, due to the lack of specific scientific evidence and the lack of consistency between the analysis conducted by Costa Rica and the phytosanitary measures applied by the phytosanitary authority, there has been a failure to comply with the standard of basing measures on a risk assessment, appropriate to the circumstances, of the likelihood of entry, establishment and spread of the viroid set out in Article 5.1 of the SPS Agreement.

E. The measures adopted by Costa Rica are contrary to Article 5.2 of the SPS Agreement

90. Article 5.2 of the SPS Agreement complements the obligation contained in Article 5.1 and sets out the elements that Members must take into account when assessing risks. As to the relationship between Articles 5.1 and 5.2, in *Australia - Apples*, the Panel indicated that Article 5.2 is "inextricably linked" to Article 5.1, as it lists factors that Members must take into account in their risk assessments. Meanwhile, Article 5.2 lists factors that Members must take into account in their risk assessments such as existing scientific evidence.

a. Costa Rica did not consider "existing scientific evidence" when assessing risks in ARP-002-2017 and ARP-2006-2016

91. In order to determine whether the risk assessor has taken into account available scientific evidence, the relationship between the risk assessor's conclusions and the relevant available scientific evidence must be analysed. The obligation under the SPS Agreement does not imply that it is sufficient to cite scientific literature; rather, it is to demonstrate and relate objectively and consistently why such literature is applicable and specific to the particular case. Otherwise, it would be sufficient for WTO Members to justify the consistency of their measures with the SPS Agreement by arguing that the risk assessments contain literature generally or indirectly related to the particular risk, even if it does not support their conclusions.

92. Costa Rica did not base its conclusions in the PRAs on relevant scientific evidence, given that: (i) there is no scientific evidence in the PRAs to support the risk assessment on the alleged "high" likelihood of entry, establishment and spread of the pathogenic agent ASBVd via the importation of fresh avocados for consumption from Mexico; (ii) the PRAs are based on isolated evidence, which has no scientific or statistical support; and (iii) no tests, experiments or surveys were carried out, or any other tools used to collect scientific and statistical data that would help to support the conclusions contained in the PRAs.

93. In this regard, the bibliographical sources cited in the PRAs are scientific evidence that Costa Rica uses to draw erroneous and out-of-context conclusions. Moreover, some of the statements cited by Costa Rica: (i) are based on errors in the translation of the original text, which results in the quoted text having a different meaning and scope from the original; and (ii) consist of sweeping assertions with no scientific basis whatsoever.

94. While there must be a "relationship between the conclusions of the risk assessor and the relevant available scientific evidence", the scientific evidence used by Costa Rica presents serious problems, as it is not specific to the risk associated with the pathway of importation of fresh avocados imported for consumption. Rather, it is isolated evidence used out of context and inapplicable to the present case. Moreover, the assessment carried out by Costa Rica omitted the uncertainty analysis, by failing to evaluate and assess elements that must be considered when conducting a risk analysis.

95. In addition, Costa Rica based several of its assertions on the economic studies conducted by CONSULSANTOS in 2010 and 2017, both of which are non-scientific research, as they are documents prepared by a commercial legal entity, which is neither engaged in research nor enjoys a reputation for compiling scientific evidence in the terms prescribed under WTO precedent. Consequently, the sources cited by Costa Rica in drawing up its PRAs are not sufficient for its PRAs to be deemed to be based on scientific evidence.

b. Costa Rica did not consider "relevant inspection, sampling and testing methods" in its risk assessment

96. None of the PRAs make reference to the protocol and methodology used by Costa Rica to inspect and sample the trees tested to confirm the alleged absence of ASBVd in the country. Nowhere in the PRAs is there any mention of or justification for the suitability of the method used to inspect the trees tested, nor is any other method used to corroborate results. In addition, the surveillance system that has been implemented by Costa Rica since 2014 has errors and omissions that possibly affected the results of the monitoring.

97. In addition, there are problems in the scientific methodology used by Costa Rica that contradicts the SFE's declaration of absence of the viroid, namely:

- Costa Rica inspected only one economic region (East Central) and 244 hectares of the 2,095 hectares planted in the country (11.64%);
- Costa Rica inspected an area with a very low avocado yield per hectare;
- There is no information indicating that backyard market gardens were inspected;
- The inspection only looks for symptomatic trees in order to collect leaves for subsequent analysis. This eliminates the detection of asymptomatic trees;
- Sampling is neither based on statistics nor on the scientific method. There is also no visual evidence of the inspection, selection and sampling process;
- Sampling was carried out on a small number of leaf samples, without considering quantitative differences in the concentration of the viroid; in other words, its distribution.

98. The analysis of the sampling carried out by Costa Rica in 2014 and 2015, in view of ISPM 6, shows that Costa Rica did not carry out a survey plan approved by the national plant protection organization. As a result, the viroid status in its territory was incorrectly determined. Indeed, the fact that 16 positive and five suspicious results were found in the 2014 sampling was overlooked. Costa Rica also failed to analyse in its sampling the six economic regions in its territory. Likewise, the statistical results indicate that the sampling is neither representative nor reliable. Furthermore, the random sampling provided for in article 2.3 of ISPM 6 was omitted.

99. Mexico submitted evidence – *Comparativo de Protocolos de muestreo de ASBVd de México y Costa Rica (2019)* (Comparison of the ASBVd sampling protocols of Mexico and Costa Rica (2019)) – which challenges the diagnostic method of detecting ASBVd currently used by the SFE.

c. Costa Rica did not consider the prevalence of ASBVd in its risk assessment

100. Costa Rica should have analysed the prevalence of the presence of the ASBVd pathogen at the place of origin, in a specific area or at a specific time.

101. In this regard, although Costa Rica stated that ASBVd is present in Mexico, it did not support this statement in its PRA with specific information regarding its distribution in Mexican territory, which is why prevalence is not properly supported in its PRA. Therefore, Costa Rica should have based its risk analysis on a prevalence assessment and not on mere suppositions or assertions without a precise scientific basis, in accordance with ISPM 11.

102. Costa Rica claimed to justify the prevalence of ASBVd in Mexican territory based on the study by Vallejo *et al.*, 2017, which states that in "Michoacán the incidence of ASBVd is 14%". However,

this study is not representative as it does not cover all the likely places of origin of Hass avocados exported to Costa Rica. Furthermore, it only refers to sampling in a commercial plantation in the municipality of Tingambato, Michoacán. For the Panel's reference, Tingambato makes up 0.00322% of the territory of Michoacán and 0.000096% of the territory of Mexico.

103. Moreover, Michoacán is not the only state that produces avocados in Mexico. In fact, there are other Mexican states that produce avocados, namely Aguascalientes, Baja California, Baja California Sur, Campeche, Colima, Chiapas, Durango, Estado de México, Guanajuato, Guerrero, Hidalgo, Jalisco, Morelos, Nayarit, Nuevo León, Oaxaca, Puebla, Querétaro, San Luis Potosí, Sinaloa, Sonora, Tabasco, Tlaxcala, Veracruz, Yucatán and Zacatecas.

d. Costa Rica did not take quarantine treatments into account in its risk assessment

104. The PRA Manual does not establish a general criterion for assessing this factor in Costa Rican PRAs. In addition, there is no specific mention of existing quarantine treatments.

e. Costa Rica did not take into account other relevant factors

105. In *EC - Hormones*, the Appellate Body noted that there was no indication that the factors listed in Article 5.2 were intended to be a closed list. That is, the list of factors is *numerus apertus* and allows for other factors to be considered, for example:

- **Although the viroid is present in Mexico, it has not affected the industry:** It is easily eliminated and no substantial growth has been demonstrated. This confirms the low economic relevance of ASBVd;
- **Mexico has exported avocados to Costa Rica for more than 22 years:** A factor that clearly demonstrates Costa Rica's inconsistencies, given that from 1993 to 2015 hundreds of thousands of tons of avocados were imported for consumption, with no reports of the presence of ASBVd;
- **Costa Rica has not yet detected ASBVd in shipments from Mexico:** It is mentioned in the PRAs that information on the detection of ASBVd in avocados from Mexico was requested; however, the SFE gave assurances that no positive occurrences had been detected;
- **Diversion from intended use of seeds from avocados imported for consumption:** Costa Rica claims that all imported avocados are infected, that their seeds will subsequently be diverted from intended use and that the pathogen will spread when germinating. However, it does not provide scientific evidence to confirm this claim;
- **Costa Rica fails to distinguish between the ASBVd pathogen and the Avocado Sunblotch Viroid disease it causes**

106. Costa Rica assumes that simply by citing the same sections and subparagraphs of ISPM 11, the Panel must consider that it took into account the factors listed in Article 5.2 of the SPS Agreement. However, citing the same (or almost all of the paragraphs) of ISPM 11 does not imply that Costa Rica has made a reasoning based on that instrument. Furthermore, Costa Rica took out of context and adapted some of the scientific evidence cited so that it corroborated its hypotheses.

107. In order to demonstrate this situation, Mexico submitted evidence relating to the affidavits of scientific experts in Avocado Sunblotch Viroid disease and ASBVd and in avocado production, which, although cited by Costa Rica in its PRAs as scientific justification for its risk assessments, conversely they demonstrated that Costa Rica extrapolated and took out of context the scope of their scientific articles. The experts are: Salvador Ochoa Ascencio, Ramón Ayala, Rodolfo de la Torre Almaráz and Gabriel Gutiérrez.

108. Lastly, Costa Rica also failed to evaluate relevant factors that, in Mexico's view, have an impact on the risk estimate, such as the processes and production methods used by Mexico in the production of fresh avocados for export.

F. Costa Rica failed to comply with Article 5.3 of the SPS Agreement by not taking into account relevant economic factors in assessing risk and determining its measures

109. Costa Rica was required, in assessing risk, to take into account the relevant economic factors listed in Article 5.3, and not other economic factors. Although Costa Rica was not required to consider all of the factors listed in that provision, it should have taken into account the relevant factor or factors to support the risk analysis and to determine the measure to be applied to achieve the appropriate level of protection.

110. In addition, based on Article 5.3 of the SPS Agreement, the Member must take into account economic factors that are relevant to support its measures and its ALOP. While this aspect does not mean that Costa Rica has an obligation to justify why it decided to take into account the factors invoked, it does mean that it should demonstrate that it took them into account in its decision.

111. Costa Rica's PRAs did not take into account the potential damage due to loss of production or sales in the event of entry, establishment or spread of ASBVd. Furthermore, the costs of eradication in Costa Rican territory were not analysed, nor was a cost-effectiveness analysis of other possible methods to limit the risks carried out. In particular, Costa Rica's PRAs have the following shortcomings:

- Costa Rica based its determination with respect to the loss of 30% of avocado production as a result of ASBVd on a study that is not representative and consequently does not demonstrate an acceptable and valid estimate of losses caused by the viroid;
- Costa Rica's PRAs reflect that no analysis has been made of the potential gains or benefits that are no longer available. In other words, there is no calculation based on losses involving at least the following factors: total avocado production in Costa Rica; average retail price of avocados to the public in Costa Rica; possible decline in production and yield; possible reduction in retail and consumer prices; possible percentage fall in actual yield of ASBVd on avocado trees. Moreover, no variables were presented that consider different scenarios such as: spread of the disease in the largest producing area of Costa Rica, in backyard market gardens; and potential impact on exports;
- Costa Rica did not take into account pest control or eradication costs that could serve as a basis for the calculation of economic losses in the event of entry, establishment or spread of ASBVd within its territory via fresh avocados imported for consumption;
- Although Costa Rica mentioned the possibility of the existence of control and eradication or containment costs, it did not carry out a comprehensive study on these factors. In this regard, it should have considered, *inter alia*: direct and indirect eradication programme costs; budget for materials used to eradicate ASBVd; hours of work required; impact on the SFE budget of pest control and eradication; and comparison with costs generated in Mexico to control the viroid;
- Costa Rica did not carry out a cost-effectiveness analysis of other possible methods to limit risks;
- As regards Resolutions DSFE-002-2018 and DSFE-003-2018, there is no quantitative or qualitative analysis of the potential economic damage in relation to the impact of implementation of the measure.

112. The fact that Costa Rica has cited the same or almost all paragraphs of ISPM 11 does not mean that its PRAs contain a reasoning based on that instrument and that they have therefore been prepared in compliance with Article 5.3 of the SPS Agreement.

113. It is therefore clear that Costa Rica's measures are inconsistent with Article 5.3 of the SPS Agreement by failing to take into account the relevant economic factors.

G. Costa Rica's SPS measures are inconsistent with Article 2.2 of the SPS Agreement

114. Mexico demonstrated that Costa Rica's measures: (i) are not necessary for the protection of avocados; (ii) are not based on scientific principles; and (iii) are maintained without sufficient scientific evidence, contrary to Article 2.2 of the SPS Agreement. It can also be confirmed that the scientific evidence used in the risk assessment is not sufficient to demonstrate the existence of the risk that the measure is supposed to address.

115. In particular, Mexico notes that Article 2.2 excludes not only insufficiently substantiated information, but also non-demonstrated hypotheses. In this regard, Mexico demonstrated throughout its submissions that Costa Rica's PRAs are based on assertions that are not supported by scientific evidence and yet are central to its reasoning for determining risk and the SPS measures applied. These assertions and reasoning are as follows:

- The document entitled "CONSULSANTOS 2010" makes no reference to a greater tendency of producers to use the seeds of imported avocados for consumption for planting. There is therefore no evidence of a practice of diversion from intended use. In fact, the PRA acknowledges that there are no statistics on the quantity of imported fruit from which seed is extracted;
- CONSULSANTOS 2010 does not present scientific evidence that seeds falling onto the ground germinate on their own; in other words, without human assistance. Such an assertion is intended to increase the risk of intentional or unintentional diversion from intended use;
- CONSULSANTOS 2010 does not reflect evidence on the climatic conditions particular to avocado cultivation, but refers to coffee cultivation, which is an associated crop. In addition, while the PRA addresses the virtually spontaneous germination of seeds, it does not present evidence on how the dry season is taken into account in the risk posed by the importation of avocados for consumption at that time of the year. Despite the above, Costa Rica appears to presuppose a high risk due to the volume of imports that occur throughout the year;
- Costa Rica presupposes a high risk from imports without calculating the likelihood of imported avocados containing the viroid in its asymptomatic form. It also presupposes a high likelihood of diversion from intended use given their distribution throughout the territory, without demonstrating the link between importation and the likelihood that each seed is used for a purpose other than consumption throughout the territory. Therefore, although Costa Rica's central concern is based on diversion from intended use, the risk assessment is not specific to that risk;
- The high likelihood determined by Costa Rica regarding the introduction, establishment and spread of ASBVd is not consistent with the assertion that ASBVd is not present in its territory. This is in view of the fact that Costa Rica claims there is a practice of diversion from intended use and makes an assumption that there is a high risk from the volume of avocado imports from Mexico, which has been the main exporter to Costa Rica for several years;
- Costa Rica did not carry out an assessment in accordance with the measures that could be applied;
- The deficiencies in the PRA's reasoning imply: on the one hand, the lack of a rational relationship between the scientific evidence and the risk assessment; and, on the other hand, between the measures that purport to address the risk identified by Costa Rica and the risk assessment, as these are not sufficiently supported by scientific evidence as required by the SPS Agreement;
- The above-mentioned CONSULSANTOS 2010 and CONSULSANTOS 2017 censuses do not support Costa Rica's conclusions that the use of seeds from imported fresh avocados from Mexico is a risk factor for the transmission of Avocado Sunblotch Viroid disease and the ASBVd pathogen;

- Although Costa Rica submitted *ex post* information throughout the dispute, it does not demonstrate the actual existence of a risk; on the contrary, it demonstrates that Costa Rica could have collected more information to allow it to make an objective and consistent assessment.

116. Under WTO precedent, given that the Panel found a violation of Articles 5.1 and 5.2, Costa Rica's measures will also be contrary to Article 2.2 of the SPS Agreement.

H. Costa Rica's measures adopt arbitrary and unjustifiable levels of protection, contrary to Article 5.5 of the SPS Agreement

117. Costa Rica adopted arbitrary and unjustifiable distinctions in levels of protection. In *EC – Hormones*, the three-step legal standard applicable to the determination of a violation of Article 5.5 of the SPS Agreement was established, namely:

a. Costa Rica adopted different levels of sanitary protection for avocados in comparable situations

118. In the *United States – Poultry (China) case*, the Panel set up a review of the first criterion of the analysis contained in Article 5.5, which is the existence of: (i) different situations; and (ii) different appropriate levels of protection in those situations.

119. In this regard, in *Australia – Salmon*, the Appellate Body found that situations may be compared if they involve a risk of entry, establishment or spread of the same disease or a risk of potentially related biological and economic consequences.

120. Costa Rica adopted levels of phytosanitary protection in at least three different but comparable situations:

121. The first comparable situation is: *fresh avocados imported for consumption from countries with ASBVd vis-à-vis Costa Rican domestic avocados with the likely presence of ASBVd*. Both situations are comparable because they involve the same high risk of entry, establishment and spread of ASBVd.

122. The second comparable situation is: *fresh avocados imported from Mexico vis-à-vis avocados imported from countries with an ASBVd presence that issue certificates*. Both situations are comparable because, although Mexico does not certify its exports as ASBVd-free, the countries that do so, namely Peru and Guatemala, have sent exports with a presence of ASBVd.

123. Lastly, the third comparable situation demonstrated by Mexico concerns: *fresh avocados imported for consumption with ASBVd vis-à-vis avocado plants for planting*. In this regard, Costa Rica acknowledges *motu proprio* that there is a comparable risk between fresh avocados imported for consumption from countries where ASBVd is present and avocado plants for planting.

b. The existence of different appropriate levels of protection in comparable situations

124. It is undisputed that Costa Rica failed to indicate its ALOP with sufficient precision. However, it indicated in a statement that its ALOP involves "adopting the necessary measures that minimize the risk of entry of the quarantine pest in question the most". On this basis, Mexico noted the following distinctions:

- Costa Rica's application of a high ALOP to avocados imported from countries with ASBVd is "a maximum level of phytosanitary protection", while the ALOP applied to avocados produced in its own territory is zero; in other words, full tolerance;
- Costa Rica's adoption of an alleged maximum level of protection for imports of fresh avocados imported for consumption from countries with ASBVd that do not issue "ASBVd-free" certificates, while for the same countries that have ASBVd and do issue certificates with the aforementioned wording, it accepts a medium risk of protection that could even be classified as low;

- Costa Rica decided to adopt a maximum ALOP for imports of fresh avocados imported for human consumption from countries with ASBVd. Similarly, it considers that the same high risk of entry, establishment and spread of ASBVd exists for: (i) imports of fresh avocados imported for consumption and (ii) plants for planting.

c. The levels of protection applied by Costa Rica show arbitrary and unjustifiable distinctions in their treatment of comparable situations

125. The Appellate Body has clarified that, if the distinction in sanitary measures and corresponding levels of protection is not justified, the distinction may be considered to be arbitrary or unjustifiable.

126. In the first situation, Costa Rica has not justified why it is unnecessary to apply any regulations to domestic avocados, given that the viroid is likely to be in its territory due to the high risk associated with the likelihood of entry, establishment and spread arising from the trade in avocados for more than 20 years with Mexico, Peru, Guatemala and the United States. Moreover, there is no justification for regulating only imported avocados and not domestic avocados.

127. Regarding the second situation, there is no justification whatsoever to explain why Costa Rica applies a maximum ALOP to fresh avocados imported from Mexico, while the ALOP applied to avocados imported from countries where ASBVd is present, such as Peru and Guatemala, which issue certificates, is in practice medium or low, despite the fact that their exports have been shown to have ASBVd even though certifying to the contrary.

128. Lastly, as regards the third situation, there is no technical or scientific reason to explain why a similar ALOP applies to two situations that constitute clearly different risks, namely: (i) the importation of fresh avocados for consumption; and (ii) the importation of plants for planting.

129. Furthermore, by failing to provide such justifications, we can affirm that there is no objective relationship between the measures, as required by the chapeau of Article XX of the GATT 1994, which is closely linked to the analysis of Article 5.5, as established in WTO jurisprudence.

d. Arbitrary and unjustifiable distinctions result in discrimination or a disguised restriction on international trade

130. In this section, two elements are of utmost importance and must be considered in order to demonstrate compliance with this last point of the cumulative review: the first is discrimination which, as noted above, is the result of being in comparable situations with differential treatment unjustifiable under WTO jurisprudence; and the second is the disguised restriction on international trade.

131. To demonstrate the second element, we rely primarily on the ruling of the Appellate Body in *Australia – Salmon*, in which it found that an SPS measure not based on a risk assessment constitutes a strong indication that the measure in question is not intended to protect the objectives of the SPS Agreement. In other words, it constitutes a disguised restriction on international trade. This aspect has been addressed on multiple occasions during this dispute and enables us to affirm that we are dealing with a disguised restriction on international trade.

132. In addition, Mexico has noted that there is a restriction on international trade, given that the differences in the levels of protection are arbitrary and unjustifiable, and that the extent of the discrepancy between the levels of protection is significant and considerable.

133. As a result, we can affirm that Costa Rica's measures are discriminatory and constitute disguised restrictions on international trade. This is because they establish arbitrary distinctions that cannot be justified in their levels of protection, even in comparable situations, which is inconsistent with Article 5.5 of the SPS Agreement.

I. Costa Rica's phytosanitary measures are inconsistent with Article 2.3 of the SPS Agreement

134. Mexico considers that, according to WTO precedent, once a violation of Article 5.5 has been established, a consequential violation of Article 2.3 of the SPS Agreement can be confirmed.

J. The measures adopted by Costa Rica are contrary to Article 5.6 of the SPS Agreement

135. In *Australia – Salmon*, the Appellate Body identified three elements for finding a violation of Article 5.6 of the SPS Agreement, which are cumulative. In other words, all three elements must be present, namely: (i) the demonstration of the existence of a reasonably available alternative measure, taking into account its technical and economic feasibility; (ii) that the alternative achieves the Member's appropriate level of protection; and (iii) that the alternative is significantly less trade-restrictive than the challenged SPS measure.

a. Alternative measures to the measures adopted in Resolutions DSFE-003-2018 and DSFE-002-2018 are reasonably available, taking into account their technical and economic feasibility

136. Mexico has demonstrated that, since Costa Rica implemented the measures in dispute, alternative phytosanitary measures have been reasonably available to Costa Rica, taking into account their technical and economic feasibility, namely: (i) regulation to prevent the diversion from intended use of seeds from fresh avocados for consumption as a means of propagating new plants; and (ii) certification that shipments are free of ASBVd pathogen symptoms.

137. With respect to the first alternative measure, Mexico has noted that this is a phytosanitary measure reasonably available to Costa Rica, taking into account its technical and economic feasibility. In fact, throughout its submissions Mexico demonstrated that this alternative measure has been implemented by Chile in Exempt Resolution No. 8182, which not only makes it theoretically feasible but also practically feasible.

138. Costa Rica has confirmed that this alternative measure is reasonably available, as on 23 September 2019 it implemented Decree No. 41995-MA, which is a regulation prohibiting the planting of seeds from avocados imported from countries with ASBVd. In addition, these two elements should have been taken into account by the Costa Rican phytosanitary authority to reduce the uncertainty alleged by Costa Rica.

139. Furthermore, there is certification that shipments are free of ASBVd pathogen symptoms. This measure is also reasonably within Costa Rica's reach, as it is not an alternative that imposes an undue or heavy burden.

140. This alternative represents a measure that is less restrictive, as avocados with visible symptoms would be discarded, as opposed to carrying out laboratory tests that are overly burdensome, and no action by the Costa Rican Government is required, as the burden of certifying that fresh avocados are free of visible symptoms of ASBVd would fall on the Mexican authorities.

b. Mexico's proposed alternatives achieve Costa Rica's appropriate level of protection

141. The SPS Agreement tacitly imposes an obligation on the Member applying phytosanitary measures to determine its appropriate level of protection. The ALOP is an objective and SPS measures are the instrument chosen to achieve that objective. While the setting of the ALOP does not require a determination in quantitative terms, an importing Member cannot determine it in ambiguous or misleading terms, as clarity in its determination is required in order to apply other relevant provisions of the SPS Agreement, especially the obligation contained in Article 5.6.

142. Costa Rica did not define its ALOP with sufficient precision and is not consistent in its objective evaluation of the facts, which is ambiguous and confusing, defining its ALOP as a "maximum level of phytosanitary protection" without taking into account the principle of "managed risk".

143. Exempt Resolution No. 8281 is a model for a regulatory alternative to prevent the diversion from intended use of the seeds of fresh avocados for consumption as a means of propagating new avocado plants in order to achieve Costa Rica's level of phytosanitary protection. The SFE would have to regulate the diversion from intended use of the seeds of fresh avocados for consumption as the only pathway for the ASBVd pathogen to enter, establish and spread in Costa Rican territory.

144. Mexico reiterates that fresh avocados do not represent a risk, or at least they represent a significantly low risk, due to the need to sow the seeds of this fruit. Under this premise, this acceptable risk should not restrict the importation of fresh avocados for consumption. The measure should therefore be aimed at preventing the diversion from intended use and not the entry of fresh Mexican avocados.

145. Furthermore, there is certification that shipments are free of ASBVd pathogen symptoms as another proposed alternative available to Costa Rica to achieve the ALOP.

146. Assuming that Costa Rica is free of ASBVd, it could be argued that the importation of fresh avocados for consumption poses no risk, otherwise Costa Rica would have been negatively impacted by its trade with Mexico, which has a 20-year history. Therefore, the simple certification that avocados are free of ASBVd symptoms is feasible and would achieve the same level of protection that Costa Rica seeks to achieve.

c. The alternatives proposed by Mexico are significantly less trade restrictive than Resolutions DSFE-003-2018 and DSFE-002-2018

147. Mexico submitted evidence showing that there was zero prevalence of the ASBVd asymptomatic variant in packs of avocados from Mexico. It is therefore possible to say that the alternatives presented meet Costa Rica's "maximum" phytosanitary protection level.

148. The proposed alternatives do not involve import restrictions, as they do not impose additional obligations on the product or on the exporting country. As mentioned above, individual laboratory tests place excessive burdens on imports, which discourages imports, so that the alternative measures, being less burdensome, are less trade restrictive. It is important to draw attention to what was mentioned by the Panel in the *India - Agricultural Products* case, where it is established that any measure that imposes conditions on imports, however stringent, would be significantly less trade restrictive than an outright ban, as is the case here, where we are faced with a *de facto* ban, which has stopped all imports of fresh avocados from Mexico to Costa Rica.

K. Costa Rica's measures are inconsistent with Article 6.1 of the SPS Agreement

a. Costa Rica's assessment did not take into account the factors in the second sentence of Article 6.1

149. While a Member imposing phytosanitary measures must ensure that such measures are adapted to the sanitary circumstances of the area of origin and destination of the product, Costa Rica did not do so for the following reasons:

- i. Costa Rica did not take into account the level of prevalence of ASBVd in its territory and in the exporting countries*

150. Costa Rica failed to analyse the level of prevalence of the pest in its territory. This lack of appropriateness to the circumstances is reflected in its PRA Manual, given that it does not require the analysis of specific areas but the mere existence of reports on the distribution of the pest. This makes it clear that Costa Rica did not take into account the different levels of prevalence of ASBVd.

151. It should be noted that Costa Rica did not demonstrate that it had based the declaration of absence of ASBVd in its territory on ISPM 6 and 8. Mexico drew the Panel's attention to the fact that the importance of its surveillance system taking ISPMs 6 and 8 into account is that the system is a tool to achieve the objective of regionalization.

152. Costa Rica should have observed the circumstances within its own territory, so as to adapt its measures to the phytosanitary characteristics of the areas of destination of the product without applying more restrictive measures to international trade than necessary. However, it failed to do so.

- ii. Costa Rica did not take into account the existence of eradication or control programmes*

153. Costa Rica's measures do not appear to have taken into account the existence of an ASBVd eradication or control programme in its territory. In fact, the shortcomings apparent in Costa Rica's surveillance system confirm this situation.

iii. Costa Rica did not take into account appropriate criteria or guidelines developed by the relevant international organizations

154. While no specific guidelines have been issued with respect to ASBVd, as demonstrated above, the IPPC has issued relevant international standards that serve to encourage the proper application of phytosanitary measures. In this case, if Costa Rica had taken ISPMs 6 and 8 into account, it would not have failed to make an appropriate determination of its phytosanitary status and to properly adhere to its surveillance system. This would have led to adopting phytosanitary measures appropriate to its actual phytosanitary status. From the 2014, 2015–2016, 2017–2018 and 2019 samplings, it does not appear that a proper and rigorous surveillance system has been implemented to provide assurance to Costa Rica's trading partners regarding its phytosanitary status.

b. Costa Rica did not ensure that its measures were adapted to the phytosanitary characteristics of its territory

155. WTO precedents have determined that adapting a measure means ensuring that it is tailored to the specific sanitary or phytosanitary characteristics of the area in question and must meet various specifications, including that if the area of origin of a product presents a lower level of risk than the rest of the territory of an exporting member, the importing member would be required to impose less stringent conditions on imports of products from that area. In this connection, the measures implemented by Costa Rica should be relaxed because there is evidence in Costa Rica of the presence of ASBVd where avocados are produced.

L Costa Rica's measures are inconsistent with the second sentence of Article 1.1 and Article 2.1 of the SPS Agreement

156. Given that Costa Rica's measures are: (1) not based on relevant international standards; (2) not based on scientific evidence; (3) adopted without an appropriate risk analysis; (4) more restrictive than necessary and arbitrarily and unjustifiably discriminatory, they are also arguably inconsistent with Article 1.1 and Article 2.1 of the SPS Agreement.

CLAIMS UNDER THE GATT 1994

M. Costa Rica's measures are inconsistent with Article XI:1 of the GATT 1994

157. Article XI:1 of the GATT 1994 provides that no contracting party may maintain prohibitions or restrictions on the importation of any product. To demonstrate non-compliance, an analysis of two elements is required under this provision, which are: (i) that the measure involves "duties, taxes or other charges"; and (ii) that it constitutes a prohibition or restriction on the importation or exportation or sale for export of a product.

a. The measures adopted by Costa Rica comprise "other measures" within the meaning of Article XI:1 of the GATT 1994

158. Resolutions DSFE-002-2018 and DSFE-003-2018 represent measures that restrict or prohibit the importation of fresh avocados through the imposition of sanitary certificates. Therefore, the first element of the analysis has been fulfilled, as this imposition falls within the scope of the phrase "duties, taxes or other charges".

b. The measures adopted by Costa Rica constitute a restriction on the importation or exportation or sale for export of avocados from Mexico

159. The measures have had a limiting effect on imports, as the exportation of fresh avocados from Mexico has been halted due to the burden generated by sanitary certificates, which have created a *de facto* restriction since 2015. Consequently, there has been a violation of Article XI:1 of the GATT 1994.

N. Costa Rica's measures are inconsistent with Article III:4 of the GATT 1994

160. As stated in the analysis of the violations of Article 5.5 of the SPS Agreement, Costa Rica, by imposing the aforementioned measures, accorded less favourable treatment to fresh avocados from Mexico as compared to fresh avocados for consumption from other countries with ASBVd and their domestic avocados. Costa Rica's measures are therefore inconsistent with Article III:4 of the GATT 1994.

a. Elements for demonstrating inconsistency with Article III:4 of the GATT 1994

161. The product at issue in this dispute is the Hass avocado variety, of the class *Persea Americana* Mill. Consequently, the properties, nature and quality of avocados from Mexico and those from Costa Rica are similar. As far as the final use of the product is concerned, it is avocado for consumption. When talking about consumer tastes and habits, it should be noted that consumers do not care about the origin of the avocado. Lastly, fresh avocados have the same tariff classification (subheading 080440). This demonstrates that we are dealing with like products under Article III:4 of the GATT 1994.

162. Moreover, the measures violating this Article are Resolutions DSFE-002-2018 and DSFE-003-2018, which are regulations within the Costa Rican legal system and which impose requirements only for the importation of fresh avocados, thus creating a competitive disadvantage with respect to exported avocados. Thus, the second requirement of paragraph 4 of Article III:4 has been met.

163. Lastly, as regards the less favourable treatment accorded to like products compared to those of domestic origin, it is worth noting what has been mentioned above, given that it creates a competitive disadvantage for imported avocados over Costa Rican avocados. In particular, it should be recalled that the Costa Rican Ministry of the Economy, Industry and Commerce recognized that "the presence of Mexican imports leads to an increase in supply, resulting in increased competition in the Costa Rican market, and consequently in rivalry between companies in terms of prices and quality. Imposing non-tariff barriers on the entry of avocados from the country from which more than a third of the total imports of this fruit are imported, amounts to a reduction in supply. This reduction can therefore be translated into an increase in prices, a decrease in the quality offered or, in other words, a decrease in competition in that market", thus confirming the competitive disadvantage faced by imported avocados.

VI. CONCLUSIONS

164. It is demonstrated from the facts and arguments submitted by Mexico over the course of the proceeding that the measures adopted by Costa Rica are inconsistent with Articles 1.1, 2.2 and 2.3, 3.1 and 3.3, 5.1, 5.2, 5.3, 5.5 and 5.6, and 6.1 of the SPS Agreement, as well as with Articles III.4 and XI.1 of the GATT 1994. Moreover, Costa Rica's measures are not justified under the provisions of the WTO covered agreements.

165. Costa Rica's measures are not justified under Article XX(b) of the GATT 1994 for the following reasons. What was established by the Panel in the *United States - Poultry (China)* case is relevant because, when analysing the consistency between Article XX(b) of the GATT 1994 and the SPS Agreement, it was considered that when an SPS measure is inconsistent with Articles 2 and 5 of the SPS Agreement, the disciplines of the same paragraph are no longer applicable, as in the case at hand. Moreover, the measures do not meet the necessity analysis, as Mexico has argued that there is no scientific evidence to demonstrate that fresh avocados for consumption are a pathway for the introduction of the viroid into Costa Rica, and therefore the measures do not contribute to the intended purpose and do not meet the level of scrutiny necessary to invoke the aforementioned article.

ANNEX B-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF COSTA RICA

1 INTRODUCCIÓN

1.1. This dispute concerns certain measures laid down by Costa Rica in respect of the importation of fresh avocados for consumption originating in countries in which the pest Avocado Sunblotch Viroid (ASBVd), the causal agent of Sunblotch, is present. ASBVd is a pest of major economic significance that affects avocado groves and is present in several countries where avocados are grown, including Mexico. The pest is absent from Costa Rica.

1.2. In view of the risk of introducing a pest such as ASBVd that would have irreparable consequences for avocado crops, Costa Rica complied with the multilateral obligations incumbent upon it and laid down measures based on scientific evidence in a manner consistent with the principles of reasonableness, proportionality, non-discrimination and transparency. Costa Rica has merely exercised its sovereign right to adopt measures to mitigate the risk of introducing this pest while seeking to minimize to the greatest extent possible the negative effects on international trade.

1.3. In Costa Rica's view it is only to be expected that Mexico, a major exporter with significant resources in the avocado sector, may have concerns that a relatively small country such as Costa Rica might impose measures of this kind. However Costa Rica, like the other Members of the World Trade Organization (WTO), regardless of its relative impact on international trade, has the right (and in fact the duty) to safeguard phytosanitary integrity within its territory as recognized in the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and WTO law generally. Costa Rica has adopted the measures at issue and defends them openly in these proceedings.

1.4. Mexico submits that Costa Rica's phytosanitary requirements in relation to ASBVd are disproportionate or unusual, when in reality they are not. Other countries where this pest is absent, such as New Zealand, Panama or New Caledonia, impose similar measures.¹ Furthermore, Mexico itself regulates plant products *for consumption* (e.g. potato) with respect to pests of concern to it by imposing phytosanitary requirements identical to those adopted by Costa Rica in this case.² The countries that do not regard ASBVd as a quarantine pest are countries that do not grow avocados or that already have the viroid within their territories. Consequently, the measures taken by Costa Rica are completely understandable in view of the devastating economic impact of ASBVd on avocado crops and the significant ability of the pest to be introduced into and spread across a country from which it is absent.³ Mexico also recognizes that there is no cure for ASBVd and that the viroid is transmitted in many ways, including through avocado seeds.⁴

1.5. The phytosanitary requirements imposed by Costa Rica on avocados originating in Mexico are the same as those imposed on avocados from any other country where the ASBVd pest is present. Those requirements are as follows: any load of fresh avocados for consumption from a country with the pest may enter Costa Rica where accompanied by a phytosanitary certificate attesting that the consignment or its place of production is free from ASBVd, or where a work plan previously agreed between the two countries has been adhered to.⁵ Costa Rica will verify the pest absence certificate at the point of entry through sampling and laboratory testing (RT-PCR).⁶ Additionally, Costa Rica has a surveillance programme that to date continues to confirm the absence of ASBVd from its

¹ See Costa Rica's response to Panel question No. 97, and the MAF, New Zealand's requirements (1998), Exhibit CRI-25; Resolution, AGROCALIDAD, Ecuador, Exhibit CRI-26; Requisitos fitosanitarios Panamá, Exhibit CRI-109; and Requisitos fitosanitarios Nueva Caledonia, Exhibit CRI-110.

² Medidas fitosanitarias de México para papa, Exhibit CRI-32.

³ Costa Rica's first written submission, para. 3.8.

⁴ Mexico's first written submission, paras. 48-50.

⁵ Costa Rica's first written submission, paras. 3.29-3.30.

⁶ As Costa Rica explained in its response to Panel question No. 45, laboratory analysis is conducted to verify adherence as declared in the phytosanitary certificates. Costa Rica also conducts regular laboratory testing for monitoring purposes.

territory.⁷ Accordingly, in the view of Costa Rica, it would appear inappropriate for Mexico to suggest in these proceedings that Costa Rica has failed to act expeditiously or in conformity with the obligations incumbent upon it by imposing the measures at issue.

1.6. Mexico has submitted claims under the SPS Agreement and the General Agreement on Tariffs and Trade 1994 (GATT), but has failed to substantiate them.

1.7. In this written submission, Costa Rica will address the following matters:

- Mexico's claims contain obvious flaws from the outset. Mexico is seeking a decision from the Panel on Costa Rica's Pest Risk Analysis Manual ("the Manual"), Pest Risk Analyses (PRA) and phytosanitary requirements "as a whole" ["en conjunto"], but has failed to establish that such an overarching measure exists. Accordingly the Panel should reject outright Mexico's request for findings on a measure "as a whole". Even when the measures are considered individually, Mexico still fails to establish that the Manual and the PRAs constitute phytosanitary measures, as defined in Annex A.1 to the SPS Agreement, that affect international trade, within the meaning of Article 1.1 of the SPS Agreement. Consequently, the Panel should dismiss all Mexico's claims seeking findings in respect of the Manual and the PRAs.
- Moreover, Mexico has tried improperly to include as part of this dispute the determination that the pest is absent from Costa Rican territory, which is not a measure at issue covered in Mexico's request to the Panel. It is difficult to discern whether Mexico is challenging that determination as a measure in its own right, as part of the PRA or whether it is a factual aspect intended to substantiate its claims. Given that this is a moving target, both Costa Rica's right of defence and the making by the Panel of an objective assessment of the matter have been impeded. Furthermore, the late submission of the claims has prevented third parties from being able to express their views in that regard. In any event, the determination of absence of a pest is a sovereign endeavour for each Member's phytosanitary authorities. Costa Rica has explained in detail the procedures followed. Mexico questions those procedures on the basis of mere conjecture. For example, Mexico states that Costa Rica issues documents *ex post* to support the absence of surveillance programmes. However, Mexico fails to identify the alleged *ex post* documents.⁸ By contrast, Costa Rica has acted transparently and provided all the explanations and information requested by the Panel on its surveillance work. Therefore Costa Rica asks the Panel to declare inadmissible Mexico's request for a Panel ruling on the determination of pest absence, and the claims related thereto.
- With regard to harmonization, Mexico has failed to establish the existence of *relevant* international rules governing ASBVd, since none of the ISPMs to which it refers reflects any level of protection against the risk that this pest poses. Even in the event that the ISPMs referred to by Mexico are considered relevant, and the Manual and PRAs are to be regarded as phytosanitary measures that affect international trade, those instruments would not be subject to the harmonization obligation because they do not result in any level of protection. In any event, Mexico has failed to establish that Costa Rica's measures are not *based* on the ISPMs to which Mexico refers. Therefore the Panel should dismiss outright Mexico's claims in respect of harmonization.
- In relation to risk assessment, the SPS Agreement only requires Costa Rica to perform a risk assessment that complies with the requirements laid down in that Agreement. It is clear from the evidence submitted to the Panel that Costa Rica conducted that risk assessment and based its phytosanitary requirements on it, in conformity with the SPS Agreement. Although Mexico might like the Costa Rican phytosanitary authorities to conduct risk assessments as detailed, sophisticated and lengthy as those performed by countries such as Australia⁹, such assessments are not required under the SPS Agreement. Mexico has failed to establish that Costa Rica's phytosanitary requirements are not based on the scientific and technical

⁷ See for example Costa Rica's first written submission, paras. 3.18-3.27; Report of Costa Rica in response to the Panel's request for information and supporting documentation in dispute DS524 before the WTO, 14 September 2020.

⁸ See for example Costa Rica's response to Panel question No. 137.

⁹ Mexico's opening statement at the first substantive meeting of the Panel, paras. 49-50, and Exhibit MEX-173.

conclusions of an appropriate pest risk assessment. Therefore the Panel should dismiss Mexico's claims in respect of the risk assessment.

- Where trade restriction is concerned, there are no less restrictive measures for controlling a quarantine pest than those applied by Costa Rica. Even if the Panel were of the view that the risk of entry, establishment and spread of ASBVd in Costa Rica is "low", the measures applied by Costa Rica would be the same as those that apply currently, for example the consignment would have to be certified as pest-free. Mexico itself applies these measures to low-risk pests.¹⁰ Mexico has not submitted any alternative that achieves Costa Rica's Appropriate Level of Protection (ALOP). First, Mexico suggests domestic regulations that prohibit diversion from [intended] use. However, the measure in question already exists as a supplement to phytosanitary import requirements and is not by itself sufficient to achieve Costa Rica's ALOP. Secondly, Mexico suggests certification of consignments as free of *symptoms* of ASBVd. However this option amounts to a mere quality control that ignores the existence of *asymptomatic* fruits. Therefore the Panel should dismiss Mexico's claims in respect of trade restriction.
- The matter of discrimination and regionalization of the territory of Costa Rica is very straightforward: ASBVd is present in Mexico and is not present in Costa Rica. Costa Rica is not under an obligation either to treat different situations in a like manner or to regionalize its territory, from which the pest is absent in its entirety. Therefore the Panel should dismiss Mexico's claims in respect of discrimination and regionalization of Costa Rica's territory.

1.8. In conclusion, Mexico has submitted a case based on trade concerns but which is entirely lacking in legal substance under WTO law. Accordingly, Costa Rica respectfully requests the Panel to dismiss all of Mexico's claims.

2 FLAWS IN MEXICO'S CLAIMS

1.9. The measure or measures that Mexico is challenging and the specific Panel findings that it is seeking in respect of each of them remain unclear despite the many opportunities to explain that Mexico has been afforded. As this subsection will explain, the Panel should dismiss Mexico's request for its claims to be evaluated on the basis of an "as a whole" measure. Additionally the Panel should also dismiss Mexico's claims under Articles 3.1 and 3.3 of the SPS Agreement in respect of PRAs and the Manual, which are not phytosanitary measures that affect international trade and are not, therefore, subject to those provisions.

1.10. It is clear from Mexico's response to Panel question No. 99 that Mexico itself is unclear about its own claim. On the one hand, Mexico states that "the measures operate together, as an inseparable whole" and expressly states that it "does not seek a separate decision for each of the measures".¹¹ On the other hand, Mexico states in a table which of Costa Rica's "measures", separately, violate each obligation under the SPS Agreement.¹² For instance Mexico singles out the Manual as relevant only in respect of its claims under Articles 3.1, 3.3 and 1.1 of the SPS Agreement and not in respect of any other provision. Mexico also states that its claim under Article 5.1 of the SPS Agreement concerns only the PRAs, and that its claim on discrimination relates only to the Resolutions.¹³ Mexico's two positions here are obviously contradictory. The lack of clarity in the

¹⁰ Requisitos México para plagas cuarentenarias de riesgo bajo, Exhibit CRI-107.

¹¹ Mexico's response to Panel question No. 99, para. 121.

¹² Mexico's response to Panel question No. 99, para. 120.

¹³ In addition to contradicting its request for the measures to be examined as an inseparable whole, the table shows that Mexico confuses the concepts of "measure" and "legal instrument", which are different things. A "measure" is an act or omission attributable to a WTO Member which in turn may be reflected in one or more "legal instruments". The *measure*, not the legal instruments, is to be examined in the light of the obligations entered into under the covered agreements. Mexico's table separates the "*Measure(s)*"¹¹ (Mexico's wording) at issue in each claim, which are exactly the same as the "five different *legal instruments* in this dispute"¹ (Mexico's wording once again) identified in its response to Panel question No. 99, namely the two Resolutions, the two PRAs and the Costa Rican Manual. Accordingly it is clear that in the eyes of Mexico, measures and legal instruments are the same thing, which is legally erroneous. The confusion could explain why the characterization of the measure at issue changes with each written submission Mexico makes, and why it is such a complicated task to understand the exact nature of the complainant's real concern in this dispute.

complainant's case requires the Panel to act with extreme caution when issuing its conclusions given that it is not its function "to make good the absence of argumentation on a party's behalf".¹⁴

1.11. In particular, Costa Rica notes that Mexico has not made any effort to prove that Costa Rica's measures operate "together as an inseparable whole". Challenging measures "as a whole" is a task that requires certain assumptions to be verified. Measures of this kind, also known as overarching measures, have previously been challenged at the WTO and WTO case law provides a clear and detailed guide about what a complainant has to prove in such claims. In *Argentina – Import Measures* for instance, the Appellate Body stated that a complainant that challenges an overarching measure will need to provide evidence in relation to two elements, namely (a) "how they operate together as part of a single measure", and (b) "how a single measure exists as distinct from its components".¹⁵

1.12. In order to demonstrate "how they operate together as part of a single measure", the complainant must identify the purported components of the measure and explain how they operate together. As to "how a single measure exists as distinct from its components", the complainant needs to demonstrate that the overarching measure is clearly distinct from its components. This is particularly important where the components of the overarching measure are challenged as separate measures. Accordingly, as the Panel noted, in *United States – Export Restraints*, the global or overarching measure must have "a functional life of its own", independent of any other such measure, for it to be able to "give rise independently to a violation of WTO obligations".¹⁶

1.13. Mexico has failed to establish any of those elements. Therefore the Panel should determine that it is irrelevant to evaluate Mexico's claims on the basis of an overarching measure or a measure "as a whole".

1.14. Having said this, in the event that the measures/instruments identified by Mexico are examined separately, Costa Rica reiterates that Mexico has failed to meet the basic burden of proof in respect of the applicability of the SPS Agreement to each of the measures/instruments in question. Mexico has failed to establish how the PRAs and the Manual comply with the definition of phytosanitary measure provided for in Annex A.1 of the SPS Agreement, which refers to [any] "measure [...] applied [...] to protect [...] plant life or health" from certain risks. Unlike the phytosanitary requirements, the PRAs and the Manual are not measures "applied" with the objective or purpose of protecting avocado cultivars in Costa Rica. PRAs constitute the technical grounds for phytosanitary requirements, whereas the Manual is an internal guide used by Costa Rica's State Phytosanitary Service (SFE) for conducting pest risk analysis generally. Neither has Mexico explained how the PRAs and the Manual allegedly affect international trade under Article 1.1 of the SPS Agreement, even in its response to Panel question No. 100, where the Panel expressly requested an explanation to that end. In fact in that response, Mexico states "assuming that the Manual and the PRAs do not affect trade *per se*".¹⁷ The direct consequence of this, by virtue of Article 1.1 of the SPS Agreement, is that the Manual and the PRAs do not constitute phytosanitary measures that are subject to the obligations under the SPS Agreement.

1.15. Consequently, in the light of the definitions set out in Annex A.1 of the SPS Agreement and Article 1.1 of the SPS Agreement, Mexico has failed to satisfy the basic burden of proof in respect of the applicability of the SPS Agreement to the PRAs and the Manual. Therefore the Panel should dismiss all of Mexico's claims in respect of those instruments.

3 DETERMINATION OF ABSENCE OF THE PEST IS OUTSIDE THE TERMS OF REFERENCE OF THIS DISPUTE

1.16. Another matter of utmost importance is the alleged presence of the ASBVd pest in Costa Rica that Mexico has improperly sought to introduce into this dispute. According to Mexico, "the Panel has a mandate to determine and evaluate whether the declaration of absence of the [viroid] in the territory of Costa Rica" is inconsistent with Article 3.3 of the SPS Agreement.¹⁸ However, as Costa Rica explained¹⁹, Articles 7.1 and 6.2 of the DSU limit this Panel's terms of reference and,

¹⁴ Appellate Body Report, *United States – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.176.

¹⁵ Appellate Body Report, *Argentina – Import Measures*, para. 5.108. (emphasis added).

¹⁶ Panel Report, *United States – Export Restraints*, para. 8.85.

¹⁷ Mexico's response to Panel question No. 100, para. 125.

¹⁸ Mexico's comments on Costa Rica's Surveillance Report, para. 15.

¹⁹ Communication of Costa Rica of 6 October 2020.

therefore, its jurisdiction, to the content of the request for the establishment of a panel. There is no question whatever that Mexico did not include in its request for the establishment of a panel "the declaration of absence of the Sunblotch viroid in the territory of Costa Rica" as a measure at issue, much less any alleged incompatibility between that measure and Article 3.3 of the SPS Agreement.²⁰ Consequently, neither the determination of the pest's absence, nor the alleged incompatibility of that determination with Article 3.3 of the SPS Agreement are part of the matter before the Dispute Settlement Body; they are therefore outside the Panel's mandate.

1.17. In addition, Costa Rica is of the view that the determination of the viroid's absence should not become a "moving target" that Costa Rica must continually defend in diverse ways, depending on Mexico's changing litigation strategy. This would clearly be prejudicial to Costa Rica's right of defence and would impede the Panel in its duty under Article 11 of the DSU to make an objective assessment of the matter. As Costa Rica has explained in detail in prior communications²¹, it is difficult to identify whether Mexico is challenging the determination of the pest's absence from Costa Rica as a measure in itself, as part of the risk assessment, or whether it constitutes a factual element or premise to substantiate its case in respect of harmonization, discrimination and regionalization. Neither has Mexico indicated which provisions of the covered agreements are related to or inconsistent with the determination of the viroid's absence from Costa Rica.

1.18. Moreover, the late submission of these claims has prevented third parties from expressing their views on this matter and is contrary to the Panel's working procedures, which reflect the understanding that claims and arguments should be submitted at an early stage in the proceedings.²² In view of the foregoing, Costa Rica reiterates its request that the Panel should declare inadmissible Mexico's request for a Panel ruling on the determination of absence of the pest, and the claims related thereto.

1.19. In any event, Costa Rica places on record that a declaration of absence of a pest in a territory is a matter of national sovereignty, as the experts have acknowledged. The NPPO of Costa Rica is the relevant organization for the purposes of determining the absence of quarantine pests within the country's territory and is responsible for surveillance work.²³ Indeed, surveillance "is the job of the national NPPO"²⁴ and is performed on the basis of "official information" from that body.²⁵ As has been explained throughout these proceedings and in Costa Rica's Surveillance Report, Costa Rica followed the general guidelines set out in ISPMs Nos. 6 and 8 (and their respective guides) for determination of absence and deployed – and continues to deploy – its best efforts to conduct good general and specific surveillance. In that regard the experts have made it quite clear that there is no such thing as a perfect surveillance system²⁶ and that in its surveillance work, Costa Rica maintained sample representativeness²⁷, and adequate sample traceability.²⁸ As to "laboratory testing [...] the methods used are appropriate, the PCR techniques are the techniques currently in force".²⁹ Additionally, "the standards are guidelines, they are not procedural manuals that tell us what to do step by step"³⁰, for example they do not state the specific number of samples to take³¹ or the number of days sampling should last.³² "Based on [the] general surveillance [conducted by Costa Rica] there is no reason for Costa Rica to believe that Sunblotch is present in their country".³³ Additionally, as "we don't have guidance from the standards that help us understand what level of

²⁰ In Section II of its request for the establishment of a Panel, headed "Specific measures at issue", Mexico includes only the following: "Resolutions DSFE 003-2018 and DSFE-002-2018 issued by the SFE of the Ministry of Agriculture and Livestock of Costa Rica, of 29 January 2018. 2. Reports ARP-002-2017 and ARP-006-2016 drawn up by the Pest Risk Analysis Unit of the SFE of 10 July 2017, and Manual NR-ARP-PO-01_M-01 setting out the qualitative methodologies used in pest risk analysis".

²¹ Communication of Costa Rica of 6 October 2020.

²² Panel's Working Procedures, adopted on 16 July 2019, paras 3.1, 4.1, and 5.1.

²³ See for example the Experts' Responses to Panel question No. 174.

²⁴ Transcript of the expert hearing, third day, p. 57 (Mr Cortese). See also the Transcript of the expert hearing, fourth day, p. 22 (Mr Cortese).

²⁵ Transcript of the expert hearing, third day, p. 58 (Mr Cortese).

²⁶ Transcript of the expert hearing, second day, p. 62 (Mr Griffin).

²⁷ Transcript of the expert hearing, fourth day, p. 20 (Mr Cortese).

²⁸ Transcript of the expert hearing, fourth day, p. 11 (Mr Cortese).

²⁹ Transcript of the expert hearing, fourth day, p. 32 (Mr Cortese).

³⁰ Transcription of the expert hearing, third day, p. 36 (Mr Cortese). See also the transcript of the expert hearing, second day, p. 61 (Mr Griffin).

³¹ Transcript of the expert hearing, fourth day, p. 51 (Mr Cortese).

³² Transcript of the expert hearing, third day, p. 14 (Mr Griffin).

³³ Transcript of the expert hearing, second day, p. 61 (Mr Griffin).

surveillance would be required" in each case we can say that Costa Rica has made a good faith effort to demonstrate the absence of the pest.³⁴

1.20. In view of the foregoing, Costa Rica respectfully asks the Panel to declare inadmissible Mexico's request for the Panel to rule on the determination of absence of the pest, and the claims related thereto.

4 MEXICO HAS FAILED TO SUBSTANTIATE ITS CLAIMS UNDER THE SPS AGREEMENT

4.1 Mexico has failed to substantiate its claims on harmonization

1.21. Mexico claims that Costa Rica's phytosanitary requirements, the Manual and the PRAs should be based on ISPMs Nos. 1, 2, 4, 6, 8, 11 and 32. However, Mexico has failed to establish that any of those ISPMs is relevant for regulations that seek to achieve a level of protection against ASBVd. Even in the event that the ISPMs referred to by Mexico are regarded as relevant, Costa Rica's measures are indeed based on them. Therefore the Panel should dismiss Mexico's claims in respect of harmonization.

4.1.1 Articles 3.1 and 3.3 of the SPS Agreement

1.22. Article 3 of the SPS Agreement, on harmonization, provides as follows:

1. To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3.
- ...
3. Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5. Notwithstanding the above, all measures which result in a level of sanitary or phytosanitary protection different from that which would be achieved by measures based on international standards, guidelines or recommendations shall not be inconsistent with any other provision of this Agreement. (emphasis added).

1.23. There is an obligation to "base" phytosanitary measures on international standards, as provided for in Article 3.1 of the SPS Agreement, to the extent that "relevant" international standards *exist*.³⁵ Relevance must be established in the light of their scope or content, in particular whether this reflects a level of protection in respect of the risk covered by the measure at issue. As Canada commented "[o]ne way to determine relevance is to compare the *content* of the standard to the measure" at issue.³⁶

1.24. This is confirmed by Article 3.3 of the SPS Agreement. Both the measure at issue and the international standard must reflect a certain level of protection if they are to be compared to determine whether the measure goes beyond the recommendations of the standard, in contravention

³⁴ Transcript of the expert hearing, third day, p. 62 (Mr Griffin).

³⁵ Despite the fact that the term "relevant" does not occur in Article 3.1 of the SPS Agreement, the immediate context provided by Article 3.3 of the SPS Agreement (to which Article 3.1 expressly refers) confirms that Article 3.1 applies with respect to "relevant" international standards. This is the established case-law when examining claims under Article 3.1 of the SPS Agreement. (Panel Reports, *Australia – Salmon*, para. 8.46; *United States – Animals*, para. 7.222; and *Russia – Pigs*, para. 7.262; and Appellate Body Reports, *EC – Hormones*, para. 171; and *United States/Canada – Continued Suspension*, para. 693). This is also how it is interpreted by the European Union which, in its third party communication, stated that "[w]hile the word 'relevant' does not appear in Article 3.1 of the SPS Agreement, a standard which is not 'relevant' could not very well be used in the sense that a measure is 'based on' or 'conforms with' such standard within the meaning of Article 3.1 or 3.2 of the SPS Agreement." (Third party written submission of the European Union, para. 10).

³⁶ Canada's Statement, para. 10 (emphasis added).

of Article 3.3 of the SPS Agreement. Where an international standard does not reflect or recommend any type of action in respect of a specific risk, then by definition it is not possible to determine whether the measure at issue is "more exacting than the level of protection implied in the relevant standards, guidelines or [...] recommendations".³⁷

4.1.2 Mexico has failed to provide evidence that the measures at issue are inconsistent with Articles 3.1 and 3.3 of the SPS Agreement

1.25. Mexico has failed to establish that any of the ISPMs it has identified are "relevant" for the purposes of Articles 3.1 and 3.3 of the SPS Agreement.³⁸ Mexico has not even tried to comply with the burden of proof incumbent on it in that regard and at no time has it explained, in its view, what level of protection those ISPMs may reflect.

1.26. The content of the vast majority of the ISPMs relates to procedure (e.g. guidance for developing risk analysis, guide for listing regulated pests, guide for conducting eradication programmes, guide for establishing pest free areas), and each country implements them in accordance with their capacity and ALOP. By contrast, ISPM No. 28 for example does set out phytosanitary treatments (and therefore a degree of substantive content on possible protection methods) but only in respect of the specific pests listed in the annexes thereto; ASBVd is not among them however.³⁹

1.27. In the view of Costa Rica it is clear that none of the ISPMs referred to by Mexico is "relevant" for the purposes of this case. At the outset Mexico identified the following ISPMs, the content of which is stated below:

- ISPM No. 1 → Framework standard setting out the basic and operational phytosanitary *principles* for the protection of plants and the application of phytosanitary measures in international trade.⁴⁰
- ISPM No. 2 → Framework for pest risk analysis. As ISPM No. 2 itself states, "[t]his standard is *conceptual* and is not a detailed operational or methodological guide for assessors".⁴¹
- ISPM No. 4 → Standard setting out the requirements for the establishment of Pest Free Areas.⁴² Costa Rica notes that Mexico gave up its claims concerning ISPM No. 4 when it recognized that Costa Rica is under no obligation to establish that it is an ASBVd pest free area.⁴³
- ISPM No. 6 → Standard setting out guidelines for surveillance in order to determine the presence or distribution of pests in an area.⁴⁴
- ISPM No. 8 → Standard concerning the determination of pest status in an area.⁴⁵
- ISPM No. 11 → Standard providing details for the conduct of pest risk analysis for quarantine pests.⁴⁶
- ISPM No. 32 → Standard providing criteria on how to categorize commodities according to their pest risk.⁴⁷

³⁷ Appellate Body Report, *EC – Hormones*, para. 176.

³⁸ As Costa Rica has previously emphasized, if there were a relevant international standard for managing the risk posed by ASBVd, Costa Rica could have adopted measures in conformity with it, thereby benefitting from the presumption of compatibility with the SPS Agreement and the GATT under Article 3.2 of the SPS Agreement. There is no such international standard however. The absence of a relevant international standard is precisely why there is a lack of harmonization in phytosanitary measures concerning ASBVd among the various pest-free avocado-growing Members of the WTO such as Costa Rica, Chile, Ecuador or New Zealand. (Costa Rica's Response to Panel question No. 103a, para. 6).

³⁹ The full list of the IPPC ISPMs can be consulted at:

<https://www.ippc.int/en/core-activities/standards-setting/ispm/>

⁴⁰ ISPM No. 1, Exhibit MEX-71.

⁴¹ ISPM No. 2, Exhibit MEX-72, p. 6. (emphasis added).

⁴² ISPM No. 4, Exhibit MEX-73.

⁴³ Mexico's specific comments on the Experts' Responses to Panel questions Nos. 164, 165 and 167 to the experts; and Mexico's response to Panel question No. 129 after the second substantive meeting.

⁴⁴ ISPM No. 6, Exhibit MEX-75.

⁴⁵ ISPM No. 8, Exhibit MEX-76.

⁴⁶ ISPM No. 11, Exhibit MEX-77.

⁴⁷ ISPM No. 32, Exhibit MEX-78.

1.28. All the ISPMs referred to by Mexico are procedural and methodological in nature. They do not reflect any level of protection against the risk that Costa Rica is seeking to mitigate, namely the introduction and spread of ASBVd. Costa Rica shares Canada's view that "a standard that merely sets out procedures for assessing risks but do not themselves pre-determine the appropriate regulatory response to such risks, may not be 'relevant'".⁴⁸ Costa Rica wonders what level of protection Mexico considers ISPMs Nos. 1, 2, 6, 8, 11 and 32 to reflect, or how one could determine that a phytosanitary measure goes beyond the level of protection provided for in these procedural international standards, in contravention of Article 3.3 of the SPS Agreement.⁴⁹ For instance, Mexico identified ISPM No. 1 as the relevant international standard for Costa Rica's phytosanitary requirements.⁵⁰ Given that ISPM No. 1 is a framework international standard, it is difficult to see how Mexico can expect the Panel to *compare* Costa Rica's specific phytosanitary requirements concerning ASBVd with the general principles provided for in that ISPM. In the context of Article 3.3 of the SPS Agreement it stands to reason that it is impossible for Costa Rica's phytosanitary requirements to *go beyond* the level of protection provided for in a standard that *does not reflect any level of protection*.

1.29. Costa Rica does not contest the importance of the ISPMs and maintains that they must be taken account of by the WTO Members' phytosanitary authorities. In fact there are already other obligations under the SPS Agreement that expressly require Members to take account of international standards when performing risk assessments (Article 5.1) or when regionalizing their measures (Article 6.1). The matter at issue here, however, is the relevance of the ISPMs *for the purposes of the harmonization obligation provided for in Article 3.1 of the SPS Agreement*. It is clear that none of the ISPMs is "relevant" to a specific phytosanitary measure seeking to achieve a certain level of protection against the ASBVd pest.

1.30. Even assuming that the ISPMs referred to by Mexico were "relevant" (*quod non*), two of the measures/instruments identified by Mexico do not result in any level of protection. Both the measure at issue and the international standard must reflect a certain level of protection if they are to be compared in order to determine, for example, whether the measure goes beyond the recommendations of the standard, in contravention of Article 3.3 of the SPS Agreement. Neither the PRAs nor the Manual (which, as stated previously, do not in Costa Rica's view even fall into the category of measures subject to the SPS Agreement) result in an effective level of protection, but instead are the initial steps taken by the SFE prior to adoption of the measure imposed on imports of fresh avocados. The PRAs and the Manual are therefore not measures subject to Articles 3.1 and 3.3 of the SPS Agreement.

1.31. In any event, the obligation provided for in Article 3.1 of the SPS Agreement is to "base" phytosanitary measures on relevant international standards. In order to be "based on" a standard that contains *general principles* (such as ISPM No. 1), the measure must be "founded" upon or "supported by" those general principles without contradicting them.⁵¹ Given that by definition principles have no specific interpretation, any measure adopted in good faith that follows those principles must be regarded as "based on" them.⁵² Costa Rica's phytosanitary requirements follow the general principles of ISPM No. 1 without contradicting them and therefore are based on that ISPM. Similarly, in order to be "based on" a standard that contains methodology, techniques or *procedures* (such as ISPMs Nos. 2, 11 and 32) there must be no contradiction or fundamental deviation from those procedures. Nonetheless a procedural international standard describes steps to take rather than specific outcomes. Therefore, where a methodology follows the steps provided

⁴⁸ Canada's Statement, para. 10.

⁴⁹ As the Panel in *United States – Animals* noted, Article 3.3 of the SPS Agreement "codifies Members' autonomous right to establish their own ALOP and to adopt SPS measures that achieve a higher level of protection than would be achieved by a measure based on" the relevant "international standards, guidelines or recommendations" (Panel Report, *United States – Animals*, para. 7.256 (referring to the Appellate Body Report, *EC – Hormones*, paras. 104 and 172) (emphasis added)). Therefore the factor that determines the relevance of the ISPMs under Article 3.3 of the SPS Agreement (as under Article 3.1) is their *content*. An ISPM will be relevant in the context of the obligations under Articles 3.1 and 3.3 when it reflects a level of protection that can be compared to the level of protection sought under the measure at issue. Given that ISPM No. 1 does not reflect any level of protection, it is simply not possible to evaluate whether a measure achieves a higher level of protection than that reflected in ISPM No. 1.

⁵⁰ ISPM No. 1, Exhibit MEX-71.

⁵¹ Appellate Body Reports, *EC – Hormones*, para. 163; and *EC – Sardines*, paras. 242, 245 and 248.

⁵² As Costa Rica explained in its response to Panel question No. 107, the phytosanitary measures imposed on the import of avocados should in any event be regarded as "based on" ISPM No. 1, given that Costa Rica complied with all the principles laid down therein.

for in the international standard it must be regarded as "based on" it, regardless of the conclusions reached.⁵³ The Manual and the PRAs follow the relevant procedural ISPMs (ISPMs Nos. 2, 11 and 32) without contradicting them, and are therefore based on those ISPMs.

1.32. In conclusion, Mexico has failed to establish that the ISPMs referred to are "relevant" international standards for the purposes of the harmonization obligation. On those grounds the Panel should dismiss all the claims submitted by Mexico under Articles 3.1 and 3.3 of the SPS Agreement. Even in the event that the Panel takes the view that the ISPMs referred to by Mexico are "relevant", Mexico has failed to establish that the PRAs and the Manual are phytosanitary measures subject to the SPS Agreement generally or to the harmonization obligation in particular. In any event, Mexico has failed to establish that the measures/instruments at issue are not "based on" those ISPMs, much less that they go beyond the level of protection that would be achieved by measures based on them. Therefore, the Panel should also dismiss all the claims submitted by Mexico under Articles 3.1 and 3.3 of the SPS Agreement.

4.2 Mexico has failed to substantiate its claims in respect of risk assessment

1.33. Mexico has failed to establish that Costa Rica's risk assessment does not comply with the requirements provided for in the SPS Agreement. Specifically, Mexico has failed to establish that Costa Rica's "risk assessment" is inconsistent with the definition set out in Annex A.4 of the SPS Agreement or does not comply with the elements provided for in Articles 5.1, 5.2 and 5.3 of the SPS Agreement. Mexico has also failed to establish that the phytosanitary measure applied by Costa Rica to imports of avocados is not "based on" the scientific and technical conclusions of the risk assessment. Therefore the Panel should dismiss Mexico's claims in respect of the risk assessment.

4.2.1 Articles 2.2, 5.1, 5.2, and 5.3 of the SPS Agreement

1.34. Costa Rica recalls that the relevant part of Article 2.2 of the SPS Agreement contains the following general obligation:

Members shall ensure that any sanitary and phytosanitary measure ... is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.

1.35. Meanwhile, Articles 5.1, 5.2 and 5.3 of the SPS Agreement lay down the following specific obligations implementing the general obligation:

1. Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.
2. In the assessment of risks, Members shall take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment.
3. In assessing the risk to animal or plant life or health and determining the measure to be applied for achieving the appropriate level of sanitary or phytosanitary protection from such risk, Members shall 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 a pest or disease; the costs of control or eradication in the territory of the importing Member; and the relative cost-effectiveness of alternative approaches to limiting risks.

⁵³ As Costa Rica also explained in its response to Panel question No. 107, the risk assessment was performed following the Manual that is "based on" ISPMs Nos. 2, 11 and 32 referred to by Mexico. The Manual is founded on those ISPMs and there is no contradiction between the provisions of the standards and the content of the Manual. Costa Rica's risk assessment followed each and every one of the steps provided for in ISPM No. 11 without fundamentally departing from them in any way.

1.36. Article 5.1 of the SPS Agreement requires Members to "base" their phytosanitary measures on a risk assessment; in other words, there must be a "*rational relationship*" between the measure and the risk assessment".⁵⁴ Any "risk assessment" in a phytosanitary context must comply with the definition set out in Annex A.4 of the SPS Agreement.⁵⁵ Although the risk assessment must be "appropriate to the circumstances", Members are free to conduct it in the manner they deem most appropriate, without an obligation to follow any particular "methodology".⁵⁶ Additionally, the risk assessment must be performed "*taking into account* risk assessment techniques developed by the relevant international organizations". Such techniques should therefore be considered relevant without necessarily respecting "each and every aspect of them".⁵⁷

1.37. Articles 5.2 and 5.3 of the SPS Agreement do not contain stand-alone, independent obligations; rather they are subject to Article 5.1 and inform the obligations laid down therein. Accordingly a panel should address Articles 5.1, 5.2 and 5.3 jointly. In particular, Article 5.2 requires, in the assessment of risks, certain technical factors to be taken into account, whereas Article 5.3 requires the three economic factors referred to therein to be taken into account in assessing the risk. Case-law has interpreted the expression "take into account" as meaning that there is no implication of an obligation to be "in conformity with" or "based on"⁵⁸, but as meaning "take into consideration", "notice".⁵⁹ In other words, the expression "take into account" does not imply "a particular course of action"⁶⁰, nor does it "prescribe a specific result to be achieved".⁶¹

1.38. Finally, in respect of the applicable standard of review, the panel's task "is not to determine whether the risk assessment undertaken by a WTO Member is correct, but rather to determine whether that risk assessment is supported by coherent reasoning and respectable scientific evidence and is, in this sense, objectively justifiable".⁶²

4.2.2 Mexico has failed to establish that Costa Rica's measures do not comply with Articles 2.2, 5.1, 5.2, and 5.3 of the SPS Agreement

1.39. Costa Rica is in compliance with the obligations incumbent upon it under the SPS Agreement and adopted measures with a technical and scientific basis that have also been implemented by other Members with much more sophisticated phytosanitary protection systems, such as New Zealand. Mexico itself imposes identical measures on plant products for consumption (such as potatoes) in respect of pests of concern to it.⁶³

1.40. The relevant question is whether Mexico has established that Costa Rica failed to perform an appropriate risk assessment under the definition set out in Annex A.4 of the SPS Agreement, failed to take into account the relevant ISPMs and the factors listed in Articles 5.2 and 5.3 of the SPS Agreement., and failed to base its measures on that assessment, within the meaning of Article 5.1 of the SPS Agreement. As discussed below, Mexico has failed to establish any of those points.

4.2.2.1 Mexico has failed to establish that the "risk assessment" is inconsistent with Article 5.1 and Annex A.4 of the SPS Agreement

1.41. As noted previously, a "risk assessment" in a phytosanitary context must be consistent with the definition set out in Annex A.4 of the SPS Agreement, in other words, it must be an "evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and

⁵⁴ Appellate Body Report, *EC – Hormones*, para. 193.

⁵⁵ Appellate Body Reports, *Australia – Salmon*, para. 121; and *Japan – Apples*, para. 196.

⁵⁶ Appellate Body Report, *Japan – Apples*, paras. 204 and 205.

⁵⁷ Panel Report, *Japan – Apples*, para. 8.241.

⁵⁸ Panel Report, *Japan – Apples*, para. 8.241.

⁵⁹ Panel Report, *Russia – Pigs*, para. 7.763 (referring to the Panel's interpretation in *United States – Animals* in the context of Article 5.4 of the SPS Agreement). Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1620.

⁶⁰ Panel Report, *Russia – Pigs*, para. 7.767.

⁶¹ Panel Report, *Russia – Pigs*, para. 7.765 referring to the Panel Report in *EC – Approval and Marketing of Biotech Products*, para. 7.1620.

⁶² Appellate Body Report, *Canada – Continued Suspension*, para. 590.

⁶³ Medidas fitosanitarias de México para papa, Exhibit CRI-32.

of the associated potential biological and economic consequences".⁶⁴ That is the definition of risk assessment that applies pursuant to Article 5.1 of the SPS Agreement⁶⁵ and, as we will show, Mexico has failed to establish how Costa Rica's risk assessment is inconsistent with Annex A.4 of the SPS Agreement.

1.42. Mexico has also failed to establish how Costa Rica's risk assessment was not "appropriate to the circumstances" within the meaning of Article 5.1 of the SPS Agreement. Although the SPS Agreement does not explain the meaning of that expression, it has been interpreted in case-law as referring to an assessment of risk "on a case by case basis, in terms of product, origin and destination, in particular country-specific situations".⁶⁶ Thus for example relevant circumstances have included the fact that the importing country is free of the pest subject to the analysis or that its climatic conditions make it a potentially favourable environment for the pest to spread.⁶⁷ In accordance with the case-law, Costa Rica performed a specific risk assessment for the ASBVd pest and the pathway of fresh avocados for consumption, noting "in particular the country-specific situation" such as absence of the viroid from Costa Rica and the country's favourable climatic conditions. Contrary to the arguments made by Mexico, Costa Rica is not of the view that in order to perform a risk assessment "appropriate to the circumstances" it was necessary to take account of Mexico's position as the world's leading exporter of avocados.⁶⁸ One factor that Costa Rica did indeed take into account was that Mexico has historically been the leading exporter of avocados to Costa Rica, exporting around 50 million avocados annually. Accordingly, since 2013 when Costa Rica learned of the presence of ASBVd in Mexico, all necessary courses of action have been taken to ensure that appropriate risk mitigation measures consistent with all the obligations incumbent upon Costa Rica under the SPS Agreement have been maintained, including the obligation not to discriminate between products of different origins that pose the same phytosanitary risk.⁶⁹ None of the arguments made by Mexico have in any way established that Costa Rica's risk assessment was not "appropriate to the circumstances".

1.43. Finally, Mexico has failed to establish how Costa Rica's risk assessment failed to "take into account" the risk assessment techniques drawn up by the relevant international organizations (in this case the ISPMs under the International Plant Protection Convention (IPPC)) and the technical and economic factors listed in Articles 5.2 and 5.3 of the SPS Agreement respectively. With respect to phytosanitary measures, the risk analysis techniques for quarantine pests are primarily set out in ISPM No. 11. Thus, while it is not necessary to comply with each and every one of the aspects included in ISPM No. 11⁷⁰ nor to achieve a specific result⁷¹, the risk analyst should "take into consideration" or "notice"⁷² the provisions of that ISPM. Costa Rica notes that the technical and economic factors set out in ISPM No. 11 are the same as those listed in Articles 5.2 and 5.3 of the SPS Agreement:

- The seven *technical factors* contained in Article 5.2 of the SPS Agreement are reflected in ISPM No. 11 as follows: (i) "technical justification"⁷³ (available scientific evidence); (ii) "practices employed during the cultivation/production of the host crops"⁷⁴ (processes and production methods); (iii) "inspection or testing for freedom from a pest"⁷⁵ (inspection, sampling and testing methods); (iv) "prevalence of the pest in the source area"⁷⁶ (prevalence

⁶⁴ The second clause of Annex A.4 to the SPS Agreement addresses risk assessments evaluating the "potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs". As such, the second clause does not define the type of risk assessment relevant to this dispute concerning the ASBVd pest, which affects avocado cultivars.

⁶⁵ Appellate Body Report, *Australia – Salmon*, para. 121; and *Japan – Apples*, para. 196.

⁶⁶ Panel Report, *Japan – Apples*, para. 8.239.

⁶⁷ Panel Report, *Japan – Apples*, para. 8.240.

⁶⁸ Mexico's first written submission, para. 405.

⁶⁹ Costa Rica's first written submission, paras. 5.155-5.168.

⁷⁰ Panel Report, *Japan – Apples*, para. 7.761.

⁷¹ Panel Report, *Russia – Pigs*, para. 7.765 (referring to Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1620).

⁷² Panel Report, *Russia – Pigs*, para. 7.763 (referring to the Panel's interpretation in *United States – Animals* in the context of Article 5.4 of the SPS Agreement). Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1620.

⁷³ ISPM No. 11, Exhibit MEX-77, p. 10.

⁷⁴ ISPM No. 11, Exhibit MEX-77, p. 16.

⁷⁵ ISPM No. 11, Exhibit MEX-77, p. 24.

⁷⁶ ISPM No. 11, Exhibit MEX-77, p. 14.

of specific diseases or pests); (v) "pest-free area"⁷⁷ (existence of pest- or disease-free areas); (vi) "suitability of environment"⁷⁸ (relevant ecological and environmental conditions); and (vii) quarantine-related trade restrictions"⁷⁹ (quarantine or other treatment).

- The three *economic factors* provided for in Article 5.3 of the SPS Agreement are also reflected in ISPM No. 11 as follows: (i) "effect of pest-induced changes to producer profits"⁸⁰ (potential damage in terms of loss of production or sales); (ii) "feasibility and cost of eradication or containment"⁸¹ (the costs of control or eradication in the territory of the importing Member); and (iii) "control measures [...], their efficacy and cost"⁸² (relative cost-effectiveness of alternative approaches to limiting risks).

1.44. Consequently, when a Member "takes into account" the risk analysis techniques contained in ISPM No. 11, it also "takes into account" the technical and economic factors listed in Articles 5.2 and 5.3 of the SPS Agreement. Costa Rica is fully aware of the importance of the IPPC guidelines and the procedural guidance set out in the ISPMs. Accordingly, Costa Rica even went beyond the obligation contained in Article 5.1 of the SPS Agreement to "take into account" the ISPMs. Costa Rica drew up a Manual for conducting pest risk analysis that transfers the recommendations in ISPM No. 11 into a domestic instrument that has binding effect on the SFE. The Manual, which was adopted voluntarily by Costa Rica rather than in compliance with any obligation under the SPS Agreement, and which is periodically reviewed to incorporate improvements, helps to increase transparency over the manner in which the SFE pest risk analysis is conducted and specifically ensures that risk analyses take into consideration the relevant factors in ISPM No. 11. In view of this, Costa Rica is hugely surprised that Mexico is arguing that Costa Rica did not take the relevant international standards into account when performing the risk analysis. However it comes as no surprise that Mexico has been unable in any way to demonstrate that the ISPMs and the relevant factors were not taken into account. Indeed, the experts in this dispute have confirmed that both Costa Rica's Manual and its PRA comply fully with the spirit and the factors set out in ISPM No. 11.⁸³

1.45. In any event, the best way of examining whether the Costa Rican phytosanitary authority "took into account" the international standards and the technical and economic factors in Articles 5.2 and 5.3 of the SPS Agreement is by addressing those elements in the risk assessment analysis within the framework of Article 5.1 of the SPS Agreement.⁸⁴ When the Panel examines whether Costa Rica performed a risk assessment consistent with Annex A.4 and Article 5.1 of the SPS Agreement, it may also, as part of the same analysis, examine whether Costa Rica took into account ISPM No. 11 and the factors referred to in Articles 5.2 and 5.3 of the SPS Agreement.

1.46. As has been noted, the definition of "risk assessment" contained in Annex A.4 of the SPS Agreement contains three elements:

- (i) evaluation of the likelihood of entry, establishment or spread of a pest within the territory of an importing Member
- (ii) according to the sanitary or phytosanitary measures which might be applied,
- (iii) and of the associated potential biological and economic consequences.

1.47. Costa Rica will now explain how it addressed each of those three elements in its risk assessment, and how it "took into account" ISPM No. 11 – as prescribed in Article 5.1 of the SPS Agreement – and the factors set out in Articles 5.2 and 5.3 of the SPS Agreement.

⁷⁷ ISPM No. 11, Exhibit MEX-77, p. 25.

⁷⁸ ISPM No. 11, Exhibit MEX-77, p. 16.

⁷⁹ ISPM No. 11, Exhibit MEX-77, p. 20.

⁸⁰ ISPM No. 11, Exhibit MEX-77, p. 20.

⁸¹ ISPM No. 11, Exhibit MEX-77, p. 19.

⁸² ISPM No. 11, Exhibit MEX-77, p. 11.

⁸³ See, e.g., Experts' Responses to Panel question No. 137.

⁸⁴ Panel Report, *Japan – Apples*, para. 8.232.

(i) Evaluation of the likelihood of entry, establishment or spread of ASBVd

1.48. By way of a preliminary remark, Costa Rica recalls that Mexico's first argument concerning Costa Rica's risk assessment (subsequently repeated in various claims⁸⁵) was that in order to evaluate the likelihood of entry, Costa Rica first should have systematically demonstrated, justifying its reasoning, that the pathogen and the disease it causes were absent from its territory, and confirmed that absence in the form of a statement declaring the territory of Costa Rica a PFA [pest free area].⁸⁶ Costa Rica notes that Mexico is asserting, as a fact, that ASBVd is present in Costa Rica and thus "is responsible for providing proof thereof".⁸⁷ Piece by piece, Costa Rica has rebutted the "evidence" submitted by Mexico to that end, making it clear that Mexico has no evidence whatever that the viroid is present in Costa Rica.⁸⁸ Instead, in fact, the many samples and diagnostic tests provided by Costa Rica in these proceedings are hard evidence that the virus is absent from the country. Moreover throughout these proceedings, Costa Rica has responded to countless Panel questions on the determination of Costa Rica's phytosanitary status as ASBVd-"absent", explaining in detail pest surveillance and control procedures.⁸⁹

1.49. Rather, Mexico's continued insistence on the alleged presence of ASBVd in Costa Rica indicates that the viroid's presence is in fact the *only* aspect that could call Costa Rica's methods into question and imbue Mexico's case with an air of reasonableness. However, Mexico is aware that if the pest is absent from Costa Rica, which it is, the phytosanitary measures in place must have a technical and scientific basis, be legitimate and constitute entirely standard requirements in the area of international trade in plant products.

1.50. Mexico has also failed to establish that Costa Rica did not evaluate the likelihood of the entry of ASBVd into its territory by taking into consideration the factors listed in the Manual, which are the same as those in ISPM No. 11. In particular when Costa Rica considered: (i) the pathway for entry of the pest⁹⁰; (ii) the probability of the pest being associated with the pathway at origin⁹¹; (iii) the probability of survival during transport or storage⁹²; (iv) the probability of pest surviving existing pest management procedures⁹³; and (v) the probability of transfer to a suitable host⁹⁴, all of which are contained in ISPM No. 11.

1.51. In particular, Costa Rica took into account the *prevalence of the pest* in the source area, which is one of the factors expressly listed in Article 5.2 of the SPS Agreement. As Costa Rica explained to the Panel⁹⁵, information in that regard was requested directly from Mexico.⁹⁶ In view of the fact that no reply was ever forthcoming, Costa Rica referred to the *available scientific evidence* in the literature which, again, is a factor listed in Article 5.2 of the SPS Agreement. The study by Vallejo Pérez *et al.* (2017) states that in Michoacán – the main avocado-producing area in Mexico, where "86.3% of avocados are produced in Mexico"⁹⁷ – the incidence of ASBVd is 14% and the rate of contagion is

⁸⁵ See the claims related to alleged discrimination (Articles 2.3 and 5.5 of the SPS Agreement), and the alleged lack of regionalization in Costa Rica (Article 6.1 of the SPS Agreement).

⁸⁶ Mexico's first written submission, para. 280. As Costa Rica stated in its first written submission, the presence or absence of a pest in the territory of an importing Member is not determinative of the probability of entry of a pest. Mexico also confuses determination of pest *status* in an area (ISPMs Nos. 6 and 8) with the establishment of *pest free areas* (ISPM No. 4), which are very distinct concepts that apply in very different contexts. It is perhaps after Mexico recognized its confusion that it decided to abandon its claims in respect of ISPM No. 4.

⁸⁷ Appellate Body Report, *United States – Wool Shirts and Blouses*, p. 14.

⁸⁸ Costa Rica's reply to Panel question No. 26 after the first substantive meeting.

⁸⁹ See for example Costa Rica's first written submission, paras. 3.18-3.27; Report of Costa Rica in response to the Panel's request for information and supporting documentation in dispute DS524 before the WTO, 14 September 2020.

⁹⁰ Costa Rica identified two entry pathways for ASBVd: fresh *avocados* for consumption and avocado *plants* for planting. These are the only two avocado products that Costa Rica imports from other countries. The title of the General PRA for ASBVd includes both pathways (fruits and plants). Where the ARP-002-2017 is concerned, only the fresh avocados pathway is considered, as can also be discerned from the title of the PRA, because avocado fruits are the only avocado product that Costa Rica imports from Mexico.

⁹¹ ARP-002-2017, Exhibit MEX-84, p. 34; ISPM No. 11, Exhibit MEX-77, p. 14.

⁹² ARP-002-2017, Exhibit MEX-84, p. 35; ISPM No. 11, Exhibit MEX-77, p. 14.

⁹³ ARP-002-2017, Exhibit MEX-84, p. 36; ISPM No. 11, Exhibit MEX-77, p. 14.

⁹⁴ ARP-002-2017, Exhibit MEX-84, p. 36; ISPM No. 11, Exhibit MEX-77, p. 14.

⁹⁵ See for example, Costa Rica's reply to Panel question No. 57.

⁹⁶ Solicitud de información a México, Exhibit CRI-42.

⁹⁷ El aguacate en México, Exhibit MEX-40, p. 1.

4.75% annually⁹⁸ Costa Rica also expressly asked Mexico whether the country has any [ASBVd] *pest-free areas*, which is another factor listed in Article 5.2 of the SPS Agreement. Mexico also failed to respond to this request and thus far has not stated that there are any areas of Mexico that are free of ASBVd. Indeed, it has acknowledged that "no study, whether official or otherwise, has been conducted in Mexico to determine the prevalence of ASBVd".⁹⁹ Costa Rica also took into account the possible existence of viroid control or monitoring programmes in Mexico. However, as Mexico itself acknowledges, the country has no specific domestic regulations to control ASBVd that would reduce its incidence in the field.¹⁰⁰ Therefore Costa Rica concluded that ASBVd is present in Mexico and is not subject to any official control mechanism to mitigate its spread; on that basis it is reasonable to assume that the prevalence of the pest is likely to increase over time.

1.52. Costa Rica also took into account the specific characteristics of ASBVd and whether it can be managed in some way during the *avocado production process* or cultivation, another factor listed in Article 5.2 of the SPS Agreement. It was noted that the scientific literature (Ploetz *et al.* (2011)) indicates that ASBVd is distributed systemically throughout the avocado plant, meaning that the viroid is present in all its tissues (seeds, leaves, branches, fruits and roots)¹⁰¹ and remains active as long as the plant tissues remain in good condition. Accordingly, the conditions in which avocados are transported or stored, and temperature variation, have no effect whatever on pest survival. This is also why there is no cure for ASBVd that can be applied during the production process; the only option is to destroy infected trees (Coit (1928), Hadidi *et al.* (2003), Suarez *et al.* (2005)).¹⁰² Similarly, in relation to one of the other factors listed in Article 5.2 of the SPS Agreement, namely the *inspection, sampling and testing methods*, Costa Rica noted that although Mexico performs a post-harvest visual inspection at time of packaging and discards fruits with ASBVd symptoms, this does not resolve the issue of *asymptomatic* infected fruits that pass quality controls and are exported to Costa Rica. Indeed, given that not all avocados infected with ASBVd express symptoms (Mohamed and Thomas (1980), Desjardins (1987), Schnell *et al.* (2001))¹⁰³, the only way to be certain whether a fruit is infected is by a laboratory test, preferably using the RT-PCR technique for diagnosis¹⁰⁴ (Schnell *et al.* (1997)¹⁰⁵). Costa Rica therefore found that there are no crop treatments or post-harvest inspections that can be effective in Mexico against the risk posed by asymptomatic fruits, which are the product of concern to Costa Rica.

1.53. Costa Rica also noted that the risk of entry of ASBVd arises because of the waste from imported avocados, especially the seeds.¹⁰⁶ The scientific literature agrees that seed-borne viroid transmission is very high for seeds obtained from asymptomatic fruits, at close to 100% (Vargas *et al.* (1991), Hadidi *et al.* (2003), Ochoa Ascencio (2013)).¹⁰⁷ Thus germination of a seed from an asymptomatic avocado fruit would introduce the pest into Costa Rica. Therefore analysis was conducted on seed viability after commercial procedures (e.g. refrigeration) were applied to consignments of avocados. It was noted that much lower temperatures than those reached in commercial consignments were required in order to reduce seed viability (Wutscher *et al.* (1969)).¹⁰⁸ Account was also taken of the scientific evidence on germination of avocado seeds of the Lula variety, which was still 100% after two months' storage at 4.4°C in closed polyethylene bags (Spalding *et al.* (1976)).¹⁰⁹ Costa Rica found therefore that the seed of asymptomatic infected avocados is viable for germination after importation,

⁹⁸ ARP-002-2017, Exhibit MEX-84, p. 34; Vallejo Pérez *et al.* (2017), Exhibit MEX-47.

⁹⁹ Mexico's first written submission, para. 57.

¹⁰⁰ ARP-002-2017, Exhibit MEX-84, p. 35; Mexico's first written submission, para. 598. The absence of any specific regulations governing ASBVd is also confirmed in the SINAVEF Report 2010, Exhibit CRI-13.

¹⁰¹ Ploetz *et al.* (2011), Exhibit MEX-56, p. 5; ARP-002-2017, Exhibit MEX-84, p. 34.

¹⁰² ARP-002-2017, Exhibit MEX-84, p. 35; Coit (1928), Exhibit CRI-9; Hadidi *et al.* (2003), Exhibit CRI-121; and Suarez *et al.* (2005), Exhibit CRI-136.

¹⁰³ ARP-002-2017, Exhibit MEX-84, pp. 13 and 37; Mohamed and Thomas (1980) Exhibit CRI-125; Desjardins (1987), Exhibit CRI-101; and Schnell *et al.* (2001), Exhibit CRI-131.

¹⁰⁴ Transcript of the expert hearing, fourth day, p. 43 (Mr Pliego Alfaro).

¹⁰⁵ ARP-002-2017, Exhibit MEX-84, p. 62; Schnell *et al.* (1997), Exhibit MEX-68.

¹⁰⁶ ARP-002-2017, Exhibit MEX-84, p. 38.

¹⁰⁷ ARP-002-2017, Exhibit MEX-84; Vargas *et al.* (1991), Exhibit CRI-137; Hadidi *et al.* (2003), Exhibit CRI-121; and Ochoa Ascencio (2013), Exhibit CRI-128.

¹⁰⁸ ARP-002-2017, Exhibit MEX-84, p. 36; Wutscher *et al.* (1969), Exhibit MEX-132. Temperatures of between -6.7°C and -7.8°C are required in order to reduce seed viability by 50%, and a temperature of -8.9°C to reduce germination by 100%. Temperatures greater than -5.6°C have no impact on germination and the average temperature of a commercial consignment is between 5°C and 7°C.

¹⁰⁹ ARP-002-2017, Exhibit MEX-84, p. 36; Spalding *et al.* (1976), Exhibit MEX-133.

and is extremely likely to transmit the viroid. The experts explicitly confirmed the risk of introducing ASBVd through seed from avocados for consumption.¹¹⁰

1.54. Mexico has also failed to establish that Costa Rica did not evaluate the likelihood of establishment of ASBVd in Costa Rica. The facts prove that Costa Rica did precisely that. As provided in the Manual, which sets out several "examples of factors" stated in ISPM No. 11¹¹¹, Costa Rica evaluated: (i) the availability of suitable hosts, alternate hosts and vectors in the PRA area; (ii) the pest's environmental suitability; (iii) cultural practices and control measures; and (iv) other characteristics of the pest affecting the probability of establishment.¹¹² It was noted that germination of seed from asymptomatic infected fruit produced avocado trees that were also systemically infected with the pest. Accordingly, Costa Rica took into account the *environmental conditions* in its territory, which is a factor listed in Article 5.2 of the SPS Agreement. The risk assessment noted that *wet* and *very wet* tropical premontane forest life zones together with tropical dry forest are predominant in Costa Rica (Holdridge 1987).¹¹³ As Mexico acknowledges, for recalcitrant seed such as that of the avocado, "moisture is the most critical factor, in determining the viability and longevity of the seeds" because they are "sensitive to desiccation".¹¹⁴ In point of fact, Costa Rica's wet, tropical climate prevents desiccation of avocado seed and for most of the year provides conditions that are suitable for the germination of avocado seed.¹¹⁵ It is for that very reason that Costa Rica has endemic avocado varieties (Galindo-Tovar *et al.* (2008)).¹¹⁶ Thus Costa Rica found that its climatic conditions are favourable to germination of avocado seed. The experts also confirmed that this was the case.¹¹⁷

1.55. Seed germination can occur naturally or be forced. Natural germination of seeds in open ground or small backyards is normal in Costa Rica.¹¹⁸ If the seed falls on suitable land and the required humidity and temperature conditions are met, the seed will germinate spontaneously.¹¹⁹ The experts also confirmed this point.¹²⁰ Indeed, in Costa Rica, "it is very common for a few avocado trees to seed themselves without producers sowing them as part of a plan".¹²¹

1.56. But the factor that most increases the likelihood of ASBVd becoming established is the widespread cultural practice in Costa Rica of planting the seed of avocados intended for consumption (diversion from intended use).¹²² As Costa Rica has explained, and the experts have unanimously confirmed¹²³, diversion from intended use is a practice that occurs in most of the world – including in Mexico.¹²⁴ However, it is a difficult practice to document because it is seldom reported.¹²⁵ Therefore estimating the degree of diversion from intended use in a particular area is a complex task.¹²⁶ Nevertheless, diversion from intended use in Costa Rica was noted by CONSULSANTOS in 2017¹²⁷, and in the 2019 paper on "Prácticas culturales de siembra y manejo de semillas de aguacate en Costa Rica".¹²⁸ It was found that it is normal for producers, especially at less technically

¹¹⁰ Transcript of the expert hearing, first day, pp. 14 and 38 (Mr Pliego Alfaro); and second day, p. 36 (Mr Griffin).

¹¹¹ ISPM No. 11, Exhibit MEX-77, numbered paragraph 2.2.2.

¹¹² ARP-002-2017, Exhibit MEX-84, pp. 38 and 39.

¹¹³ ARP-002-2017, Exhibit MEX-84, p. 7; Holdridge (1987), Exhibit CRI-122.

¹¹⁴ Mexico's first written submission, para. 24.

¹¹⁵ As explained in Costa Rica's first written submission, the edapho-climatic requirements of Hass avocado are an altitude of 1 000-2 000 msnm, temperature of 16-18°C, and annual precipitation of 1 200 mm (Zona de los Santos (2007), Exhibit MEX-97, p. 8.). In Zona de los Santos the altitude is 1 200-1 900 msnm, the average annual temperature is 19°C and average annual precipitation 2 400 mm (CONSULSANTOS 2010, Exhibit MEX-119, p. 15).

¹¹⁶ ARP-002-2017, Exhibit MEX-84, p. 7; Galindo-Tovar *et al.* (2008), Exhibit MEX-22. See also Aguacate criollo en Costa Rica, Exhibit CRI-58.

¹¹⁷ Transcript of the expert hearing, first day, pp. 13, 21, and 46-47 (Mr Pliego Alfaro).

¹¹⁸ ARP-002-2017, Exhibit MEX-84, p.7.

¹¹⁹ OR-HN-049-2019, Exhibit CRI-69; OR-BR-FUN-0014-2019, Exhibit CRI-70; and OR-CS-0003-2019, Exhibit CRI-71.

¹²⁰ Transcript of the expert hearing, first day, p. 64 (Mr Pliego Alfaro).

¹²¹ Estudio sobre manejo de semillas en Costa Rica, Exhibit CRI-44, p. 14.

¹²² CONSULSANTOS 2010, Exhibit MEX-119. pp. 24 and 26; and CONSULSANTOS (2017), Exhibit MEX-118.

¹²³ See for example Costa Rica's response to Panel question No. 14; and Transcript of the expert hearing, first day, pp. 28-29 (Mr Griffin).

¹²⁴ Extracto ARP de México para papa, Exhibit CRI-31, p. 9.

¹²⁵ Secretaría de la CIPF, "Diversion from intended use" (2016), Exhibit MEX-124, p. 6.

¹²⁶ ARP-002-2017, Exhibit MEX-84, p. 8.

¹²⁷ ARP-002-2017, Exhibit MEX-84, pp. 6-7; CONSULSANTOS (2017), Exhibit MEX-118.

¹²⁸ Estudio sobre manejo de semillas en Costa Rica, Exhibit CRI-44.

sophisticated holdings, not to use nurseries to procure certified propagation material¹²⁹, but instead to use seeds whose origin is not always known.¹³⁰ Additionally, the practice of using *Hass* rootstock in commercial crops and nurseries increases the probability of diversion in the use of seed from consumed *Hass* avocados. Rootstock is selected by its performance in the growing area (Bender *et al.* (2012)).¹³¹ In Costa Rica, the performance of *Hass* rootstock is "one of the best for the local soil"¹³² and *Hass* scions on *Hass* are regarded as a good combination because of their hardiness and the quality of the fruit produced.¹³³ Finally, although diversion from intended use is difficult to verify in a laboratory, there is no question that it constitutes "risk in human societies as they actually exist"¹³⁴ as in the Costa Rican example. Costa Rica also took account of diversion from intended use as a risk factor that increases the probability of establishment of the ASBVd pest.

1.57. Paradoxically, Mexico itself is of the view that diversion from intended use is a risk factor that should be taken into account in its own risk assessments. As Costa Rica has noted, Mexico's PRA for potato imports expressly states that "in Mexico, as in almost all countries, it is common for potato to be diverted from its intended use as a consumable to that of a seed, given the farming culture and socioeconomic circumstances of a large proportion of farmers (CONPAPA, (2007))".¹³⁵ The PRA adds that the existence of this diversion from intended use "shows that the import of potato tubers are highly likely to be the means of introduction and spread of quarantine pests".¹³⁶ As a result, Mexico imposes phytosanitary measures on the import of fresh potato from the United States and Canada comprising a certificate that the product is free of certain pests, as well as sampling and laboratory tests upon arrival.¹³⁷ These are the same measures as those contested in the present dispute.

1.58. Finally, in respect of the likelihood of propagation or spread of ASBVd once the pest has been introduced into Costa Rica, Mexico has not submitted any proof at all that Costa Rica has not conducted an evaluation of that eventuality. In point of fact, in conformity with the scientific literature, Costa Rica found that the chief form of viroid spread is by graft and that mechanical transmission is also possible:

The main method of infection is transmission by graft during propagation, or implanted tissues and the introduction of seedlings infected with ASBVd-seedlings that have budded from infected rootstock. Outbreaks of ASBVd arise when seedlings used as rootstock are derived from seeds obtained from symptomless fruits, which have very high rates of seed-borne transmission (95%) (Hadidi *et al.*, (2003)). Mechanical transmission by slash inoculation and/or leaf rub with extracts from infected tissues is possible, although less efficient than transmission by rootstock (Hadidi *et al.*, 2003). Desjardins *et al.* (1979) demonstrated a pollen transmission rate of between 1 and 4%. Additionally Whitsell (1952) demonstrated natural root graftage as a means of transmission.¹³⁸

1.59. As previously noted, both the procurement of *Hass* rootstock from seed, and the use of *Hass* scions on *Hass* rootstock are farming practices that are widely used in Costa Rica.¹³⁹ If a farm contains *Hass* trees infected with ASBVd – either because they grew naturally or were obtained after planting uncertified seed of unknown origin – the scions and the use of pruning tools could spread

¹²⁹ CONSULSANTOS 2010, Exhibit MEX-119; Estudio sobre manejo de semillas en Costa Rica, Exhibit CRI-44, p. 12.

¹³⁰ Manual de Viveros, Exhibit CRI-43, p. 20.

¹³¹ Bender *et al.* (2012), Exhibit CRI-112.

¹³² Zona de los Santos (2007), Exhibit MEX-97, p. 7.

¹³³ Estudio sobre manejo de semillas en Costa Rica, Exhibit CRI-44, p. 14.

¹³⁴ Appellate Body Report, *India – Agricultural Products*, para. 5.19. The Appellate Body has recognized that there are factors that "are not susceptible of quantitative analysis by the empirical or experimental laboratory methods commonly associated with the physical sciences". (Appellate Body Report, *Australia – Apples*, para. 207).

¹³⁵ Extracto ARP de México para papa, Exhibit CRI-31, p. 9.

¹³⁶ Extracto ARP de México para papa, Exhibit CRI-31, p. 9.

¹³⁷ Medidas fitosanitarias de México para papa, Exhibit CRI-32.

¹³⁸ ARP-002-2017, Exhibit MEX-84, p. 62; Hadidi *et al.* (2003), Exhibit CRI-121; and Suarez *et al.* (1980), Exhibit CRI-116; Whitsell (1952), Exhibit MEX-42.

¹³⁹ Estudio sobre manejo de semillas en Costa Rica, Exhibit CRI-44, p. 14; CONSULSANTOS 2010, Exhibit MEX-119; Estudio sobre manejo de semillas en Costa Rica, Exhibit CRI-44, p. 12; and Manual de Viveros, Exhibit CRI-43, p. 20.

the viroid very efficiently, as shown by the scientific evidence and confirmed by the experts.¹⁴⁰ A single productive *Hass* tree infected with ASBVd can be the source of many cuttings for grafting and consequently can infect many seedlings. Thus spread of the viroid after its introduction into an area is very straightforward. Costa Rica therefore found that there is a high probability that ASBVd will spread if the pest is introduced into the country.

1.60. In conclusion, the facts show that Costa Rica evaluated the likelihood of the entry, establishment and propagation of ASBVd within its territory, in conformity with the first element of the definition of "risk assessment" contained in Annex A.4 of the SPS Agreement. Costa Rica supported its risk assessment with "coherent reasoning and respectable scientific evidence"¹⁴¹, and took into account the risk analysis techniques set out in ISPM No. 11 and the relevant technical factors listed in Article 5.2 of the SPS Agreement. The risk that ASBVd may be introduced and spread in Costa Rica through symptomless infected avocados exists, and is genuine, as the experts appointed by the Panel confirmed.¹⁴² Quite apart from the fact that Mexico does not share the risk analyst's qualitative ratings it cannot deny that existence of the risk "find[s] sufficient support in the [available] scientific evidence".¹⁴³

1.61. To conclude, Costa Rica notes that the scientific literature dating from *after* Costa Rica's risk assessment confirms the significance of ASBVd and the risk posed by avocados. The paper by Everett *et al.* (2018) on New Zealand states that "ASBVd infects avocados in a number of countries with climates similar to New Zealand so there is a high risk of it establishing in New Zealand. Of particular concern is its possible importation in *fruit from symptomless plants or seeds*".¹⁴⁴ Additionally, the paper by Saucedo Carabez *et al.* (2019) states that strategies to manage ASBVd need to be implemented, "[t]he use of ASBVd-free avocado plants from certified nurseries needs to be encouraged, and regulatory actions must regulate the movement of [] avocado material to avoid ASBVd spread."¹⁴⁵

(ii) According to the phytosanitary measures which might be applied

1.62. Mexico has also failed to establish in what respect Costa Rica failed to comply with the second element of the definitions of "risk assessment" provided for in Annex A.4 of the SPS Agreement. In the view of Costa Rica it is unlikely that Mexico can demonstrate a failure in that regard since it is clear that Costa Rica considered "the measures which might be applied, not merely [] the measures that [were] being applied" at the time the risk assessment was conducted.¹⁴⁶ Costa Rica recalls that the measures recommended in the PRA¹⁴⁷ are distinct from the suspension of phytosanitary authorizations that applied until 2018 and which is not the object of this dispute. At no time did the risk assessment attempt to justify *ex post* the provisional suspension of the importation of fresh avocados.

1.63. In its risk analysis, Costa Rica took into account the *relative cost-effectiveness of alternative approaches to limiting risks*, which is one of the three economic factors listed in Article 5.3 of the SPS Agreement. Indeed the risk assessment considered the method of "inspection conducted at points of entry".¹⁴⁸ Nonetheless, while this option – submitted by Mexico as an alternative in its claim under Article 5.6 of the SPS Agreement – carries a lesser cost than the measure finally recommended, it is wholly ineffective in containing the risk of concern to Costa Rica, namely the introduction of ASBVd through *symptomless* infected avocados. As the experts confirmed¹⁴⁹, visual inspection alone is ineffective in detecting the viroid in fruits that do not express visual symptoms of the pest. Accordingly the most cost-effective measures were indeed recommended, namely certification of absence of the *viroid* (not of its symptoms), in the consignment or the place of production in the exporting country, and verification by sampling and laboratory tests at the point of entry.

¹⁴⁰ See for example, Experts' Responses to Panel question No. 62.

¹⁴¹ Appellate Body Report, *Canada – Continued Suspension*, para. 590.

¹⁴² See for example, Experts' Responses to Panel question No. 62.

¹⁴³ Appellate Body Report, *Canada – Continued Suspension*, para. 591.

¹⁴⁴ Everett *et al.* (2018), Exhibit CRI-27, p. 33. (emphasis added).

¹⁴⁵ Saucedo Carabez *et al.* (2019), Exhibit MEX-175, p. 9.

¹⁴⁶ Appellate Body Report, *Japan – Apples*, para. 208, citing the Panel report, *Japan – Apples*, para. 8.283. (emphasis in the original).

¹⁴⁷ ARP-002-2017, Exhibit MEX-84, pp. 42-43.

¹⁴⁸ ARP-002-2017, Exhibit MEX-84, p. 42.

¹⁴⁹ See for example Experts' Responses to Panel questions Nos. 95, 116-117 and Transcript of the expert hearing, second day, p. 47 (Mr Griffin).

1.64. Moreover, taking account of the shared responsibility between the exporting country and the importing country where there is a risk of diversion from intended use, the risk assessment recommended the adoption of internal measures that Costa Rica has made every effort to implement. Thus "active surveillance in avocado-producing areas" has been maintained by verifying the absence of ASBVd through extensive sampling – most recently in 2019 – and diagnostic tests.¹⁵⁰ Efforts have also increased in the provision of "good agricultural practice schemes in respect of avocados" and in "training producers in the importance of using certificated seed".¹⁵¹ Finally, with regard to recommendation to assess the risk of "regulating the use as propagation material of seeds from avocados imported for consumption"¹⁵², Costa Rica adopted the Regulation of 23 September 2019 prohibiting the sowing of seeds of avocado fruits imported from countries where ASBVd is present.¹⁵³ All these measures are intended to reduce the risk inherent in diversion from intended use, but cannot completely eliminate the risk of introducing ASBVd. Accordingly, countries with a mechanized avocado industry where there are no problems of diversion from intended use, such as New Zealand, also have phytosanitary measures in place on the importation of fresh avocados for consumption.

(iii) And of the associated potential biological and economic consequences

1.65. Finally, Mexico has also failed to establish that Costa Rica did not evaluate the potential biological and economic consequences of the introduction and spread of ASBVd within its territory, in conformity with the third element provided for in the definition contained in Annex A.4 of the SPS Agreement.

1.66. It is unclear how this lack of evaluation could come about given that Costa Rica took account of the fact that avocado (*Persea americana* Mill.) would appear to be the only host for ASBVd in nature (Horne (1934))¹⁵⁴, reducing the likelihood of *biological* consequences arising from other plant species becoming infected. However there is uncertainty over the viroid's potential to infect other plants of the *Persea* genus, and in any event the introduction of the pest would have an adverse effect on the avocado germplasm, to the detriment of biodiversity.¹⁵⁵

1.67. Neither do we understand how it can be argued that there was no evaluation of the potential *economic* consequences when in its risk assessment Costa Rica expressly stated the following:

Saucedo Carabez *et al.* (2013) state that there was a significant reduction in yield from symptomatic sunblotch-infected trees. Yield of asymptomatic trees was reduced by 15-30% for Hass avocados. The reduction in symptomatic trees can be as great as 75% and the average weight of fruits fell by up to 40%. The incidence of symptomatic Hass fruits was 46-62%. The symptomatic fruits ripen in irregular fashion and there are effects on the ethylene-production rate and oil content (Mohamed and Thomas, (1980)).

Attempts were made to inactivate sunblotch in budwood, seed, and budlings by heat therapy, indicating that ASBVd can withstand any heat treatment regimen that the avocado tissue could (Desjardins *et al.*, (1980)).

[...] The removal of infected trees is the only method known to control the viroid (Hadidi *et al.* (2003)). The disease is difficult to control, there are no therapeutic methods or resistant varieties.¹⁵⁶

¹⁵⁰ ARP-002-2017, Exhibit MEX-84, p. 43; and Informe final sobre muestreo de 2019, Exhibit CRI-21.

¹⁵¹ ARP-002-2017, Exhibit MEX-84, p. 43; and Plan Nacional Aguacatero, Exhibit CRI-1, pp. 21 and 22.

¹⁵² ARP-002-2017, Exhibit MEX-84, p. 43.

¹⁵³ Reglamento sobre uso de semilla de aguacate, Exhibit CRI-53.

¹⁵⁴ ARP-002-2017, Exhibit MEX-84, p. 56; Horne (1934), Exhibit CRI-138.

¹⁵⁵ ARP-002-2017, Exhibit MEX-84, p. 41.

¹⁵⁶ ARP-002-2017, Exhibit MEX-84, pp. 63-64; Saucedo Carabez *et al.* (2014), Exhibit MEX-45; Mohamed and Thomas (1980) Mohamed and Thomas (1980), Exhibit CRI-125; Desjardins *et al.* (1980), Exhibit CRI-116; Hadidi *et al.* (2003), Exhibit CRI-121.

1.68. As can be seen, Costa Rica took into account the *potential damage in terms of loss of production or sales* and the *costs of control or eradication* in its territory, both factors that are listed in Article 5.3 of the SPS Agreement. The scientific literature is unanimous in its view that ASBVd leads to losses in yield and quality.¹⁵⁷ The paper by Vallejo Pérez *et al.* (2017), which focuses on Mexico, estimated economic losses of up to USD 6 650 per hectare per year, and crop losses of up to 1 710 kg per hectare.¹⁵⁸ Even the evidence submitted by Mexico states that ASBVd "is a pest of high economic significance, and as a result is included on several countries' lists of quarantine pests."¹⁵⁹ Accordingly Costa Rica was surprised that in Mexico's response to Panel question No. 4, Mexico stated that ASBVd is not "a threat to Mexican avocado production" since it did not have a "significant economic impact" when at the same time it acknowledges that it regards ASBVd as a "quarantine pest in respect of [...] the importation of propagation material".¹⁶⁰ The inconsistency is plain. If Mexico did not regard ASBVd as economically significant it would not categorize it as a *quarantine* pest. The scientific literature also confirms the high costs of control and eradication of the pest. Since there is no cure for the viroid the only option is to remove all infected trees expressing symptoms and to identify by testing any symptom-free carrier trees so that they too can be destroyed.¹⁶¹ Mexico itself recognizes that "once the disease and the viroid are in an area, it is *very difficult* to eradicate".¹⁶² The experts also confirm this.¹⁶³ Costa Rica therefore found that there was the potential for biological consequences and the serious economic impact to which the introduction of ASBVd would give rise.

1.69. In view of the foregoing, Mexico has failed to establish a *prima facie* case that Costa Rica did not perform a "risk assessment" consistent with Annex A.4 of the SPS Agreement, that considered the likelihood of entry, establishment or spread of ASBVd within its territory according to the phytosanitary measures which might be applied, and of the associated potential biological and economic consequences. Costa Rica notes that Mr Griffin, one of the experts appointed by the Panel, who is recognized internationally for his experience in risk analysis, expressly confirmed that Costa Rica's PRA has substantial evidence for reaching the conclusions it reached".¹⁶⁴ Additionally, in conformity with Article 5.1 of the SPS Agreement, the risk assessment was "appropriate to the circumstances" and the risk analysis techniques set out in the relevant ISPMs (in particular in ISPM No. 11), together with the technical and economic factors listed in Articles 5.2 and 5.3 of the SPS Agreement, were "taken into account".

4.2.2.2 Mexico has failed to establish that Costa Rica's measures are not "based on" the risk assessment

1.70. Article 5.1 of the SPS Agreement lays down the requirement that having performed the risk assessment, any sanitary or phytosanitary measures adopted are to be "based on" that assessment. The Appellate Body has clarified that the requirement that a measure "be based on" a risk assessment is a "substantive requirement that there be a *rational relationship* between the measure and the risk assessment".¹⁶⁵ In the light of the requirement for such a "rational relationship" between the measures and the risk assessment, Mexico has failed to establish in what respect the phytosanitary requirements imposed on the importation of fresh avocados do not flow or arise from Costa Rica's risk analysis, when it is clearly the case that they do.

¹⁵⁷ See Semancik (2003), Exhibit MEX-46, p. 171; and Ploetz *et al.* (2011), Exhibit MEX-56, p. 5.

¹⁵⁸ ARP-002-2017, Exhibit MEX-84, p. 41; Vallejo Pérez *et al.* (2017), Exhibit MEX-47.

¹⁵⁹ ARP frutos frescos 2015, Exhibit MEX-61, p. 5.

¹⁶⁰ Mexico's response to Panel question No. 4, para. 17.

¹⁶¹ ARP-002-2017, Exhibit MEX-84, p. 35; Coit (1928), Exhibit CRI-9; Hadidi *et al.* (2003), Exhibit CRI-121; Suarez *et al.* (2005) Suarez *et al.* (2005), Exhibit CRI-136; and Saucedo Carabez *et al.* (2013), Exhibit MEX-45.

¹⁶² Mexico's first written submission, para. 388, point 4. (emphasis added)

¹⁶³ See for example Experts' Responses to Panel questions Nos. 58, 61, 67, 76, 77.

¹⁶⁴ Transcript of the expert hearing, second day, p. 36 (Mr Griffin).

¹⁶⁵ Appellate Body Report, *EC – Hormones*, para. 193.

1.71. In any event, Mexico has failed to establish that the phytosanitary requirements imposed on the importation of fresh avocados do not have a scientific and technical basis in the risk assessment performed by the SFE and therefore that there is no "rational relationship" between them. The scientific evidence, empirical studies, and the experts assisting the Panel in this dispute, state that there is a risk associated with asymptomatic, ASBVd-infected avocados. In particular, it has been found that:

- The viroid is systemic in the tissues of the avocado plant, including the fruit and its seed.¹⁶⁶
- There are *asymptomatic* avocado fruits in which it is impossible to detect ASBVd by inspection alone.¹⁶⁷
- The seed of imported avocados remains viable during transportation and storage.¹⁶⁸
- Costa Rica's climatic conditions are suitable for natural germination of an avocado seed.¹⁶⁹
- The practice of diversion from intended use increases the risk that ASBVd-infected seeds of unknown origin will germinate.¹⁷⁰
- The likelihood that germination of seeds from *asymptomatic* infected fruit will transmit the viroid to the new tree is very high, close to 100%.¹⁷¹
- Once introduced, the viroid spreads primarily through scions and the use of contaminated material.¹⁷²
- There is no cure for ASBVd and the only option is to destroy the infected trees.¹⁷³
- ASBVd has highly significant economic consequences.¹⁷⁴

1.72. On that basis, Costa Rica implemented phytosanitary requirements to ensure the absence of ASBVd from *asymptomatic* avocados. In conformity with Resolutions 002-2018 and 003-2018, the exporting country can select from among three equally acceptable alternatives, including the standard requirement for certification attesting that a consignment is ASBVd-free.¹⁷⁵ Costa Rica will verify the certification of pest absence at the point of entry through sampling and laboratory tests (RT-PCR).¹⁷⁶ This measure has a clear, "rational relationship" with the conclusions reached in the risk assessment as summarized above. Indeed, the measure has a scientific and technical basis even if the qualitative assessment of the risk as "high" or "medium" is disputed. The crucial points are that the risk exists (the seed from an asymptomatic fruit has extensive ability to transmit the viroid) and that ASBVd is a quarantine pest in Costa Rica (absent from the country and has serious economic consequences). In view of that risk the minimum requirement is certification of consignments as ASBVd-free together with verification upon arrival. This is the most standard and common measure

¹⁶⁶ Ploetz *et al.* (2011), Exhibit MEX-56, p. 5; ARP-002-2017, Exhibit MEX-84, p. 34.

¹⁶⁷ ARP-002-2017, Exhibit MEX-84, pp. 13, 37 and 62; Mohamed and Thomas (1980) Mohamed and Thomas (1980), Exhibit CRI-125; Desjardins (1987), Exhibit CRI-101; Schnell *et al.* (2001), Exhibit CRI-131; and Schnell *et al.* 1997, Exhibit MEX-68.

¹⁶⁸ ARP-002-2017, Exhibit MEX-84, p. 36; Wutscher *et al.* (1969), Exhibit MEX-132; Spalding *et al.* (1976), Exhibit MEX-133.

¹⁶⁹ ARP-002-2017, Exhibit MEX-84, p. 7; Holdridge 1987, Exhibit CRI-122; Galindo-Tovar *et al.* (2008), Exhibit MEX-22; CONSULSANTOS 2010, Exhibit MEX-119, p. 15; and Aguacate criollo en Costa Rica, Exhibit CRI-58.

¹⁷⁰ ARP-002-2017, Exhibit MEX-84, pp. 6-7; CONSULSANTOS (2017), Exhibit MEX-118; CONSULSANTOS 2010, Exhibit MEX-119; Estudio sobre manejo de semillas en Costa Rica, Exhibit CRI-44, p. 12; and Manual de Viveros, Exhibit CRI-43, p. 20.

¹⁷¹ ARP-002-2017, Exhibit MEX-84, p. 62; Vargas *et al.* (1991), Exhibit CRI-137; Hadidi *et al.* (2003), Exhibit CRI-121; and Ochoa Ascencio (2013), Exhibit CRI-128.

¹⁷² ARP-002-2017, Exhibit MEX-84, p. 62; Hadidi *et al.* (2003), Exhibit CRI-121.

¹⁷³ ARP-002-2017, Exhibit MEX-84, p. 35; Coit (1928), Exhibit CRI-9; Hadidi *et al.* (2003), Exhibit CRI-121; and Suarez *et al.* (2005) Suarez *et al.* (2005), Exhibit CRI-136.

¹⁷⁴ ARP-002-2017, Exhibit MEX-84, pp. 63-64; Saucedo Carabez *et al.* (2013), Exhibit MEX-45; Mohamed and Thomas (1980) Mohamed and Thomas (1980), Exhibit CRI-125; Desjardins *et al.* (1980), Exhibit CRI-116; Hadidi *et al.* (2003), Exhibit CRI-121.

¹⁷⁵ See ISPM No. 12 (on phytosanitary certificates), Exhibit CRI-97, p. 16.

¹⁷⁶ See Costa Rica's response to Panel question No. 45.

that there is and one that Mexico would have no difficulty in meeting if it wished, as do other countries where ASBVd is present that currently export avocados to Costa Rica. It is worth noting that these requirements are exactly the same as those that Mexico applies to quarantine pests that it regards as "low" risk.¹⁷⁷

1.73. Consequently, Mexico has failed to establish that Costa Rica's measure is not "based on" the risk assessment in conformity with Article 5.1 of the SPS Agreement.

4.2.2.3 Conclusion

1.74. Mexico has failed to establish that the "risk assessment" does not comply with the definition of Annex A.4 of the SPS Agreement or with the requirements of Articles 5.1, 5.2 and 5.3 of the SPS Agreement. Mexico has also failed to establish that Costa Rica's measure is not "based on" the scientific and technical conclusions reached in the risk assessment. Conversely, Costa Rica has demonstrated that its phytosanitary requirements are based on the scientific and technical conclusions of an appropriate risk assessment. Therefore the Panel should dismiss Mexico's claims under Articles 5.1, 5.2 and 5.3 of the SPS Agreement. Consequently the Panel should also dismiss Mexico's claim under Article 2.2 of the SPS Agreement.

4.3 Mexico has failed to establish that Costa Rica is restricting trade more than is required

1.75. Mexico has argued that Costa Rica's phytosanitary requirements are more trade-restrictive than required, but has not submitted any less restrictive alternative that achieves Costa Rica's ALOP. Even in the event that the Panel considered the risk of entry, establishment and spread of ASBVd in Costa Rica to be "low", there are no measures that are less restrictive for controlling a quarantine pest than those applied by Costa Rica. Moreover, the alternatives put forward by Mexico are inappropriate. Therefore the Panel should dismiss Mexico's claims in respect of trade restrictiveness.

4.3.1 Article 5.6 of the SPS Agreement

1.76. Costa Rica recalls that Article 5.6 of the SPS Agreement provides as follows:

Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.³

³ For purposes of paragraph 6 of Article 5, a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade.

1.77. Essentially, in order to establish that a measure is inconsistent with Article 5.6 of the SPS Agreement, a complainant must provide evidence that there is an alternative measure that: (i) is reasonably available taking into account technical and economic feasibility (ii) achieves the Member's ALOP; and (iii) is significantly less restrictive to trade than the measure at issue.¹⁷⁸ Those requirements must be demonstrated in cumulative fashion¹⁷⁹ and the burden of proof lies with the complainant.¹⁸⁰ It should be noted that the determination of the ALOP is a *prerogative* [of the] respondent and not of a panel or of the Appellate Body.¹⁸¹ Annex A.5 of the SPS Agreement defines the "[a]ppropriate level of sanitary or phytosanitary protection" as "[t]he level of protection *deemed*

¹⁷⁷ Requisitos México para plagas cuarentenarias de riesgo bajo, Exhibit CRI-107.

¹⁷⁸ Appellate Body Reports, *Korea – Radionuclides*, para. 5.22, referring to Appellate Body Reports, *India – Agricultural products*, para. 5.203; and *Australia – Salmon*, para. 194.

¹⁷⁹ Appellate Body Reports, *Korea – Radionuclides*, para. 5.21; and *India – Agricultural products*, para. 5.203.

¹⁸⁰ Panel Report, *United States – Animals*, para. 7.431, referring to Appellate Body Report, *Japan – Agricultural Products II*, para. 126 and Panel Report, *India – Agricultural products*, para. 7.525.

¹⁸¹ Appellate Body Report, *India – Agricultural products*, para. 5.205 citing the Appellate Body Report, *Australia – Salmon*, para. 199. (emphasis in the original).

appropriate by the Member establishing a sanitary or phytosanitary measure". Accordingly a panel would be expected to accord weight to the respondent's articulation of its ALOP, even more so in circumstances where that ALOP was specified with sufficient precision and has been consistently expressed as in this case.¹⁸²

4.3.2 Mexico has failed to establish that Costa Rica's measures do not comply with Article 5.6 of the SPS Agreement

1.78. Before addressing Mexico's claims under Article 5.6 of the SPS Agreement, Costa Rica would like to reiterate that Mexico has not submitted claims relating to Article 2.2 of the SPS Agreement in respect of the alleged restrictiveness of the measures implemented by Costa Rica. In response to Panel question No. 98 addressing this very matter, Mexico merely argued that its arguments under Article 5.6 of the SPS Agreement apply *mutatis mutandis* to Article 2.2 of the SPS Agreement and that that is sufficient for a finding of consequential violation.¹⁸³ Mexico added only that the Panel in *Australia – Apples* "exercised judicial economy" under Article 2.2 of the SPS Agreement having found a violation of Article 5.6 of the SPS Agreement. In any WTO dispute it is for the complaining party to explain its case. It is not for the responding Member to defend itself against arguments that have not been made, nor is it the function of the Panel "to make good the absence of argumentation on a party's behalf".¹⁸⁴ The fact that the Panel in *Australia – Apples* exercised judicial economy with respect to New Zealand's claim under Article 2.2 of the SPS Agreement, does not mean that Mexico is absolved from making its case under that Article, as New Zealand did. Accordingly, the Panel should limit its findings with respect to the alleged restrictiveness of Costa Rica's measures solely to Article 5.6 of the SPS Agreement.

1.79. That being said, with respect to Article 5.6 of the SPS Agreement, Mexico argues first that Costa Rica's phytosanitary requirements are "impossible to meet"¹⁸⁵ and are "*de facto* prohibitions".¹⁸⁶ This argument does not hold water. The Costa Rican market is fully open to imports of fresh avocado for consumption and the only requirement is for those imports to be certified free of ASBVd – a seed-borne pest of established economic significance. Countries where ASBVd is present, such as Peru or Guatemala, currently export fresh avocados to Costa Rica¹⁸⁷ and their products compete on an equal footing with local avocados on the Costa Rican market. Mexico itself sent a shipment of fresh avocados for consumption certified as ASBVd-free to Costa Rica, proving that Mexico is in a position to meet Costa Rica's phytosanitary requirement, if it wants to do so.¹⁸⁸ This demonstrates that Costa Rica's phytosanitary measure, far from constituting the insurmountable barrier that Mexico suggests, can be met as a matter of course if the will to export is there.

1.80. Even assuming that Costa Rica's phytosanitary requirements do involve a degree of restrictiveness, that restrictiveness is the minimum possible for achieving its ALOP. Costa Rica's phytosanitary measure provides the exporting country with full flexibility to choose the method it regards as most appropriate in order to ensure that the exported avocado fruits are free of ASBVd: (i) completion of a bilaterally agreed work plan (systems approach); or (ii) certification that the fruits originate from place of production that is free from ASBVd; or (iii) certification that the consignment is free of ASBVd. Any of these three alternatives is acceptable and they all satisfy Costa Rica's ALOP of doing everything possible to prevent the introduction of ASBVd in order to retain Costa Rica's phytosanitary status as a territory from which the pest is absent. Costa Rica adopted alternative requirements with the very objective of minimizing adverse effects on trade, as provided for in Article 5.4 of the SPS Agreement. Where no bilateral systems approach has been agreed or where it is undesirable to certify places of production as [pest] free (for example because there are no places where all mother plants have been certified as ASBVd-free), the consignments can be certified as viroid-free. The exporting country can choose the option it prefers.

¹⁸² Appellate Body Report, *India – Agricultural products*, para. 5.221.

¹⁸³ Mexico's response to Panel question No. 98, para. 112.

¹⁸⁴ Appellate Body Report, *United States – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.176.

¹⁸⁵ Mexico's first written submission, para. 579.

¹⁸⁶ Mexico's first written submission, paras. 579-580.

¹⁸⁷ Non-compliance with phytosanitary requirements, Exhibit CRI-40; and Guatemalan Phytosanitary Certificate, Exhibit CRI-94.

¹⁸⁸ On 23 April 2018 the, National Agriculture and Food Health, Safety and Quality Service of Mexico's Directorate-General of Plant Health certified several tonnes of avocados as ASBVd-free. See Exhibit CRI-38.

1.81. Costa Rica recalls that requesting a consignment to be free of a quarantine pest is the *minimum* requirement that an importing country can impose on the exporting counterpart. This is precisely the suggestion in ISPM No. 12 (on phytosanitary certificates), which recommends the following standard clause for phytosanitary certificates in general:

This is to certify that the plants, plant products or other regulated articles described herein have been inspected and/or tested according to appropriate official procedures and are considered to be free from the quarantine pests specified by the importing contracting party and to conform with the current phytosanitary requirements of the importing contracting party, including those for regulated non--quarantine pests.¹⁸⁹

1.82. Moreover, as referred to above, Mexico itself has phytosanitary measures of this kind in respect of *low risk* quarantine pests¹⁹⁰ and presumably does not regard them as prohibitions or unnecessary restrictions, but as minimum requirements even in circumstances of lower risk.¹⁹¹

1.83. In its arguments under Article 5.6 of the SPS Agreement, Mexico refers to two alternative measures, namely: (i) a domestic regulation in Costa Rica to prevent diversion from intended use of the seed of fresh avocados for consumption and (ii) certification of shipments free of ASBVd symptoms. However, as discussed below, neither of these measures complies with the relevant elements of Article 5.6 of the SPS Agreement.

1.84. Where the first "alternative" is concerned, the domestic regulation on diversion from intended use in relation to seed is a measure already adopted by Costa Rica in addition to import requirements. Indeed, the Regulation of 23 September 2019 on the use of avocado seed¹⁹², implements one of the general recommendations of Costa Rica's PRA.¹⁹³ This Regulation is a supplementary measure that cannot independently achieve Costa Rica's ALOP with respect to the risk of introduction of ASBVd. First, the obligation laid down in the Regulation falls entirely on the consumer and it is supremely difficult for any State to verify strict compliance. Although it is expected that nursery gardeners and producers will be aware of the Regulation because of their daily work and will comply with the obligations laid down therein, it is more difficult for a consumer, whether rural or urban, to be certain about the origin of the fruit they consume or aware of the prohibition on sowing the seed of fruit following consumption. The Costa Rican authorities' ability to control compliance with the Regulation by all consumers is also much more limited than it is for nursery gardeners and producers, who are duly registered.

1.85. Secondly, although diversion from intended use is a significant risk factor for introduction of the pest, it is not the only one. Because of Costa Rica's favourable climate and the fact that avocado seeds remain viable for several days after removal from the fruit¹⁹⁴, requiring no specific treatment in order to germinate, the seeds can germinate without human assistance if they fall on suitable ground.¹⁹⁵ The risk inherent in avocado waste (i.e. the seed) for the introduction of ASBVd explains why countries with technically sophisticated avocado industries where there are no problems of diversion from intended use, such as New Zealand, maintain phytosanitary measures on avocados so that as importers they can retain their pest absence status.

1.86. In view of the foregoing, although Costa Rica does not dispute that this Regulation contributes to reducing the risk of introducing ASBVd and, therefore, supplements the phytosanitary requirements for the import of fresh avocados, it is not possible to conclude that it is an alternative measure that would independently achieve Costa Rica's ALOP. In Costa Rica's view, in the event that the Regulation applied alone it would only be a question of time before ASBVd were introduced into the country. Accordingly, Costa Rica has chosen to implement the Regulation alongside border

¹⁸⁹ ISPM No. 12, Exhibit CRI-97, p. 15CHECK. (emphasis added).

¹⁹⁰ Requisitos México para plagas cuarentenarias de riesgo bajo, Exhibit CRI-107.

¹⁹¹ See for example Costa Rica's response to Panel question No. 85.

¹⁹² Reglamento sobre uso de semilla de aguacate, Exhibit CRI-53.

¹⁹³ The PRA recommendation is to "[r]egulate the use, as propagation material, of seeds from avocados imported for consumption" (ARP-002-2017, Exhibit MEX-84, p. 43).

¹⁹⁴ ARP frutos frescos 2015, Exhibit MEX-61, p. 8.

¹⁹⁵ Estudio sobre manejo de semillas en Costa Rica, Exhibit CRI-44, p. 14. See also El aguacate criollo, Exhibit CRI-74.

measures that are similar to those adopted by other countries such as New Zealand, Panama or New Caledonia.

1.87. In relation to the second alternative, i.e. certification of shipments free of ASBVd *symptoms*, this is a measure that by definition is not suitable for managing the risk presented by *asymptomatic* avocados that are infected with the viroid. The experts roundly confirmed as much.¹⁹⁶ As Mexico itself acknowledges, ASBVd is a viroid that often "does not express symptoms in fruits".¹⁹⁷ This means that regardless of the scope of post-harvest inspections and checks to ensure that no symptomatic fruits are exported, asymptomatic ASBVd-infected fruit will continue to be present in shipments along with seeds capable of transmitting the pest at a rate close to 100%.¹⁹⁸ The "alternative" put forward by Mexico is no more than a quality standard that Mexico already applies to its exports. Essentially this "alternative" amounts to the absence of any phytosanitary measure and leaves Costa Rica fully exposed to the risk of ASBVd being introduced into its territory through the seed of asymptomatic fruit. It is obvious that avocados with blotches or grooves are not of sufficiently high quality to sell and thus are discarded in Mexico prior to export. However the avocados *that have no symptoms* are precisely the avocados of concern to the Costa Rican phytosanitary authorities. In view of the risk posed by such avocados, certification of symptom-free status is absolutely pointless and would in no way achieve Costa Rica's ALOP.¹⁹⁹

1.88. In conclusion, Mexico has failed to establish that the domestic Regulation on diversion from intended use of the seed of imported avocados or certification of consignments as free of ASBVd symptoms are alternatives that meet the requirements of Article 5.6 of the SPS Agreement. Accordingly, Costa Rica respectfully asks the Panel to dismiss Mexico's claim that the phytosanitary requirements contained in Resolutions 002-2018 and 003-2018 are more restrictive than required in a manner inconsistent with Article 5.6 of the SPS Agreement.

4.4 Mexico has failed to establish that Costa Rica is practising discrimination or failing to comply with the obligation incumbent upon it to regionalize its territory

1.89. Costa Rica will address Mexico's claims on alleged discrimination and lack of regionalization jointly because the main argument underlying both claims is in principle the same, namely that ASBVd is present in Costa Rica. As discussed below, that argument is factually incorrect because ASBVd is absent from Costa Rican territory in its entirety and Mexico has not submitted any proof whatever to the contrary. Therefore the Panel should dismiss Mexico's claims in respect of the alleged discrimination and lack of regionalization of Costa Rica.

4.4.1 Articles 2.3, 5.5 and 6.1 of the SPS Agreement

1.90. Article 2.3 of the SPS Agreement imposes a general obligation of non-discrimination:

Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.

1.91. The relevant part of Article 5.5 of the SPS Agreement more specifically elaborates on the obligation of non-discrimination and provides as follows:

With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade.

¹⁹⁶ See for example Experts' Responses to Panel questions Nos. 95, 116-117 and Transcript of the expert hearing, second day, p. 47 (Mr Griffin).

¹⁹⁷ Mexico's first written submission, para. 579.

¹⁹⁸ See for example Hadidi *et al.* (2003), Exhibit CRI-121; and Ochoa Ascencio (2013), Exhibit CRI-128.

¹⁹⁹ See for example Costa Rica's first written submission, paras. 5.226-5.246 and Costa Rica's second written submission, paras. 3.62-3.74.

1.92. Articles 2.3 and 5.5 of the SPS Agreement lay down the principle of non-discrimination in the application of phytosanitary measures where the underlying circumstances are "comparable situations". Where no such comparability exists, it does not require that measure to be applied to "different situations".

1.93. For its part, Article 6.1 of the SPS Agreement provides as follows:

Members shall ensure that their sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area – whether all of a country, part of a country, or all or parts of several countries – from which the product originated and to which the product is destined. In assessing the sanitary or phytosanitary characteristics of a region, Members shall 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.

1.94. Article 6.1 of the SPS Agreement requires Members to ensure that their measures are "adapted" to the SPS characteristics of the areas from which the products at issue originate and to which they are destined²⁰⁰, taking into account "all the evidence relevant to 'assessing' the SPS characteristics of an area".²⁰¹

1.95. In the light of the preliminary ruling issued by the Panel on 18 December 2019, the only claim by Mexico that is within the Panel's terms of reference is that concerning the alleged lack of regionalization of Costa Rica's phytosanitary requirements to "the area to which the product is destined", namely, Costa Rican territory.

4.4.2 Mexico has failed to establish that Costa Rica's measures do not comply with Articles 2.3, 5.5 and 6.1 of the SPS Agreement

1.96. Mexico's claims under Articles 2.3, 5.5 and 6.1 of the SPS Agreement are based on the premise that the ASBVd pest is present in Costa Rica.²⁰² Mexico claims that Costa Rica's measures discriminate between imported Mexican avocados and Costa Rican avocados (in contravention of Articles 2.3 and 5.5 of the SPS Agreement) and are not adapted to the phytosanitary characteristics of the different areas of Costa Rican territory (in contravention of Article 6.1 of the SPS Agreement).

1.97. However, Mexico's premise is factually incorrect. The situations in Mexico and in Costa Rica are different and cannot be compared: ASBVd is present in Mexico; it is not present in Costa Rica. Mexico has not provided a shred of evidence establishing that ASBVd is present in Costa Rica. In its response to Panel question No. 26, Costa Rica rebutted one by one the "evidence" submitted by Mexico that allegedly proves that ASBVd is present in Costa Rica. However much Mexico argues to the contrary, to date, all laboratory tests conducted on all samples collected over many years by Costa Rica's SFE have been negative for the presence of ASBVd. Moreover, throughout these proceedings, Costa Rica has given detailed explanations of its surveillance and control procedures for regulated pests, and of the methodology used to collect samples. Costa Rica has noted that there is a register of farms in Costa Rica and has explained how the geographical selection of sampling areas is made, ensuring the random nature and representativeness of those areas, including back yards. Costa Rica has also addressed in detail the laboratory techniques used to verify the presence or absence of the viroid in samples, i.e. RT-PCR, the best diagnostic technique for ASBVd in terms of cost-effectiveness and time. Similarly, Costa Rica has given extensive explanations of how it took ISPMs Nos. 6 and 8 into account in its surveillance work and in its determination of the country's phytosanitary situation. Therefore Mexico has failed to establish that ASBVd is present in Costa Rica.

1.98. The reality is that the phytosanitary situations of Mexico and Costa Rica in relation to the ASBVd pest are not "comparable". Accordingly, Costa Rica's phytosanitary requirements apply only to *imports* of avocados originating in countries where ASBVd is present. This also means that there are no areas in Costa Rica where there is a higher or lower prevalence of ASBVd or any programmes

²⁰⁰ Appellate Body Report, *Russia – Pigs*, para. 5.57.

²⁰¹ Appellate Body Report, *Russia – Pigs*, para. 5.59.

²⁰² Mexico's first written submission, paras. 525, 592 and 595.

to eradicate or control the viroid within the meaning of Article 6.1 of the SPS Agreement because the pest is quite simply absent from Costa Rican territory in its entirety.

1.99. In relation to Article 5.5 specifically, in its second written submission Mexico provided additional arguments. According to Mexico, Costa Rica applies an identical level of protection to imported avocados for consumption and to imported avocado plants for planting, when the latter pose a greater phytosanitary risk.²⁰³ Contrary to Mexico's argument, Costa Rica's levels of protection for fresh fruit and plants for planting are not the same. The importation of plants for planting poses a greater risk than the importation of fresh fruit for consumption and this is clearly reflected in the measures recommended in Costa Rica's General PRA for pests.²⁰⁴ Where plants for planting are concerned, the recommended measures are much stricter, namely the plants for planting must be certified as having been obtained from indexed mother plants that are tested at least twice a year, and be accompanied by the laboratory test results; additionally, plants for planting will be subject to post-entry quarantine for no longer than 6 months, until the tests to indicate that they are free of Avocado Sunblotch viroid have been completed.²⁰⁵ Therefore, Mexico's claim that there is no consistency between the levels of protection that Costa Rica considers appropriate for fresh avocados imported for consumption where ASBVd is present compared with avocado plants for planting does not hold water.

1.100. Mexico also attempts to compare levels of protection that are considered appropriate for the import of fresh avocados from Mexico with avocados imported from countries where ASBVd is present that do issue certification. The situation suggested by Mexico is a fiction – it neither does nor could exist. The requirements imposed on Mexico are the same as those that apply to any country where ASBVd is present. In the event that Mexico (or any other country where ASBVd is present) decides not to comply with Costa Rica's phytosanitary requirements, it will not be possible for Costa Rica to import its avocados. Accordingly it is untenable to state that Costa Rica applies a different level of protection for avocados imported from countries with ASBVd that discriminates against Mexico.

1.101. In conclusion, owing to the fact that ASBVd is present in Mexico and absent from Costa Rica, Mexico has failed to establish that the situations in both countries are comparable. Therefore, Mexico has failed to substantiate its claims under Articles 2.3, 5.5 and 6.1 of the SPS Agreement.

4.5 Mexico has failed to establish that Costa Rica is not in compliance with the SPS Agreement

1.102. As Costa Rica has noted, the phytosanitary measures it imposes on imports of avocados from countries with ASBVd have been developed and are applied "in accordance with the provisions of ... [the SPS] Agreement", within the meaning of Article 1.1 of that Agreement. Mexico has failed to establish that "such measures are ... inconsistent with the provisions of ... [the SPS] Agreement", within the meaning of Article 2.1 of the SPS Agreement.

1.103. In view of the foregoing, the Panel should dismiss Mexico's claims that Costa Rica's measures are inconsistent with the obligations laid down in Articles 1.1 and 2.1 of the SPS Agreement.

5 MEXICO HAS FAILED TO SUBSTANTIATE ITS CLAIMS UNDER THE GATT

1.104. Costa Rica recalls that, in accordance with Article 2.4 of the SPS Agreement, "Sanitary or phytosanitary measures which conform to the relevant provisions of [the SPS] Agreement shall be presumed to be in accordance with the obligations of the Members under the provisions of GATT 1994 [] in particular the provisions of Article XX(b)". Accordingly, any phytosanitary measure adopted by a Member in accordance with the SPS Agreement must be regarded as compatible with the general disciplines of the GATT, without the need for an evaluation under the GATT. Therefore, Mexico has failed to establish that Costa Rica's measures are inconsistent with the SPS Agreement.

²⁰³ Mexico's second written submission, para. 237.

²⁰⁴ ARP-006-2016, Exhibit MEX-85.

²⁰⁵ ARP-006-2016, Exhibit MEX-85, pp. 33-34.

5.1 Articles III:4 and XI:1 of the GATT

1.105. Article III:4 of the GATT lays down the obligation of national treatment and provides as follows in the relevant part:

The products of the territory of any [Member] imported into the territory of any other [Member] shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. [...]

1.106. In conformity with the Supplementary Note to Article III of the GATT, the measures that apply at the time or point of importation are covered by Article III of the GATT *only if* they "appl[y] to an imported product and to the like domestic product".

1.107. The relevant part of Article XI:1 of the GATT provides as follows:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import ... licences or other measures, shall be instituted or maintained by any [Member] on the importation of any product of the territory of any other [Member].

1.108. Articles III:4 and XI:1 of the GATT are in principle, mutually exclusive. Article XI:1 of the GATT regulates *border* measures that apply solely to imports, whereas Article III:4 of the GATT regulates *internal* measures that apply both to imported and domestic products.²⁰⁶

5.2 Mexico has failed to establish that Costa Rica's measures do not comply with Articles III:4 and XI:1 of the GATT

1.109. As Mexico itself acknowledges, Costa Rica's phytosanitary requirements "apply only to imported products and do not apply to domestic products".²⁰⁷ Accordingly the measure in question falls within the scope of application of Article XI:1 of the GATT and not that of Article III:4 of the GATT. Accordingly, the Panel should dismiss outright Mexico's claim under Article III:4 of the GATT, since the measure is not covered by that provision.

1.110. Where Article XI:1 of the GATT is concerned, Costa Rica notes that its phytosanitary requirements are phytosanitary formalities inherent to the import process that are permitted under Article VIII:4 of the GATT. In light of Article VIII:4 of the GATT – which has been regarded as "context" for the interpretation of Article XI:1 – Members recognize "that import formalities and requirements can have trade-restricting effects", and are not therefore prohibited.²⁰⁸ Moreover, the Panels in *Colombia – Textiles (Article 21.5) (Colombia) (Panama)* were of the view that "the findings under Article XI:1 of the GATT 1994 cannot have as a consequence the prohibition of [...] formalities permitted by other provisions of the covered agreements".²⁰⁹ Therefore the phytosanitary formalities permitted under Article VIII:4, such as phytosanitary inspection, analysis and certification, could not violate Article XI:1 of the GATT. In any event, Mexico has failed to establish that the measures are "excessively burdensome" such that they constitute a restriction of such magnitude that they restrict imports within the meaning of Article XI:1 of the GATT.²¹⁰ Consequently, the Panel should dismiss Mexico's claim under Article XI:1 of the GATT.

1.111. In any event, Costa Rica's phytosanitary requirements are justified under Article XX(b) of the GATT. The requirements are designed to "protect plant life" in Costa Rica since imports cannot be ruled out as potential carriers of the viroid, thus Costa Rica's requirements "are not incapable" of dealing with the potential entry of the pest.²¹¹ Moreover, the phytosanitary requirements are

²⁰⁶ Panel report, *India – Autos*, para. 7.224.

²⁰⁷ Mexico's first written submission, para. 649. (emphasis added).

²⁰⁸ Appellate Body Report, *Argentina – Import Measures*, para. 5.233.

²⁰⁹ Report of the Panels, *Colombia – Textiles (Article 21.5) (Colombia) (Panama)*, para. 7.169. Note that this report has been appealed. At the time of writing, the Appellate Body has not issued its report in this matter.

²¹⁰ Report of the Panels, *Colombia – Textiles (Article 21.5) (Colombia) (Panama)*, para. 7.200. At the time of writing, the Appellate Body has not issued its report in this matter.

²¹¹ Appellate Body Report, *Colombia – Textiles*, paras. 5.129 and 5.131.

"necessary" to protect the health of avocados in Costa Rica and to maintain its status as a country from which ASBVd is absent, which implies an *objective* of utmost importance to the Costa Rican State. The requirements clearly *contribute* to the attainment of that objective given that they enable Costa Rica to satisfy itself, to the maximum extent possible, that imported avocados, even if symptom-free, are not infected with the viroid. Furthermore, the requirements are not especially *restrictive*. The importation of Mexican avocados is not prohibited, merely subject to a requirement for certification and verification that an ASBVd-infected product is not entering the Costa Rican market. Finally, the measures also comply with the provisions of the chapeau to Article XX of the GATT, since they are applied to avocados originating in countries in like situation, namely countries with the pest. In view of the foregoing, the measures are fully justified under Article XX(b) of the GATT.

6. CONCLUSION

1.112. Mexico's claims contain obvious flaws in terms of approach. Mexico requests a Panel ruling on the measures "as a whole", but has failed to establish the existence of an overarching measure. Accordingly the Panel should reject outright Mexico's request for findings on a measure "as a whole". With regard to the individual measures, Mexico has failed to establish that the Manual and the PRAs constitute phytosanitary measures that affect international trade, within the meaning of Article 1.1 of the SPS Agreement. Thus the Panel should refrain from issuing findings in respect of those two measures/instruments.

1.113. With regard to the determination of absence of the pest, this is a measure that is outside the terms of reference of this dispute, and Mexico's criticism of it is based on mere conjecture. Therefore Costa Rica requests that the Panel should declare inadmissible Mexico's request for a Panel ruling on the determination of absence of the pest, and the claims related thereto.

1.114. Essentially Mexico has submitted four claims. None of them has any substance and they all fail on their own merits.

- First, in respect of harmonization, there are no relevant international rules for ASBVd as none of the ISPMs identified by Mexico reflects any level of protection. Even in the event that the said ISPMs are regarded as relevant, Costa Rica's measures are indeed based on them.
- Second, with regard to the risk assessment, Mexico has failed to establish that Costa Rica's "risk assessment" is inconsistent with Annex A.4 of the SPS Agreement or does not comply with the elements provided for in Articles 5.1, 5.2 and 5.3 of the SPS Agreement. Mexico has also failed to establish that Costa Rica's measures are not "based on" the scientific and technical conclusions reached in the risk assessment.
- Third, with regard to the trade-restrictiveness, there are no measures that affect trade less than those applied by Costa Rica. Moreover, Mexico has not submitted any alternative that achieves Costa Rica's Appropriate Level of Protection. Mexico has suggested a measure that is already in place and that would not by itself achieve Costa Rica's ALOP, and certification that symptoms are absent, which ignores the existence of asymptomatic fruits and constitutes merely a quality control.
- Fourth, with regard to discrimination and regionalization, Mexico has failed to establish that Mexico and Costa Rica's phytosanitary situations are comparable. The reality is that they are not: the pest is present in Mexico and is not present in Costa Rica. Thus, Costa Rica is not under an obligation either to treat different situations in a like manner or to regionalize its territory, from which ASBVd is absent in its entirety.

7 REQUEST FOR RULINGS

1.115. In view of the foregoing, Costa Rica respectfully requests that this Panel should dismiss all the claims submitted by Mexico and refrain from issuing recommendations.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

Contents		Page
Annex C-1	Integrated executive summary of the arguments of Canada	73
Annex C-2	Integrated executive summary of the arguments of the European Union	75

ANNEX C-1**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA****I. MEXICO'S CLAIM THAT COSTA RICA IS IN BREACH OF THE OBLIGATION IN THE FIRST SENTENCE OF SPS Agreement ARTICLE 6.1 FOR NOT ADAPTING ITS MEASURE TO THE CHARACTERISTICS OF THE AREA OF ORIGIN IS OUTSIDE THE PANEL'S TERMS OF REFERENCE**

1. Mexico's reference to Costa Rica's failure to adapt to the characteristics of the area of origin expanded Mexico's claims in its first written submission beyond the scope of the Panel's terms of reference.

2. Canada notes that the claim of a failure to adapt to the characteristics of the area of origin is fundamentally different in nature from a claim that the Member has not adapted to the characteristics of the area of destination. These are separate claims under Article 6.1. The claims will involve evaluation of different risks and therefore documentation and evidence demonstrating that the respondent has done a proper evaluation. Forcing Costa Rica to defend an origin claim at this stage in the proceedings, (i.e. after receiving the first written submission) would seriously prejudice Costa Rica's ability to put forward a defence and undermine due process. Accordingly, Mexico's attempt to introduce the origin claim in its first written submission should fail.

II. INTERNATIONAL STANDARDS UNDER SPS AGREEMENT ARTICLE 3.1 AND INTERNATIONAL RISK ASSESSMENT TECHNIQUES UNDER SPS AGREEMENT ARTICLE 5.1

3. International standards, guidelines and recommendations considered under Article 3.1 can include risk assessment techniques if developed by international standard setting bodies referred to in Annex A.3 of the SPS Agreement.

4. That said, it is Canada's view that in circumstances where the main issue in a dispute is the consistency of the respondent's risk assessment with the SPS Agreement, the Panel should focus its analysis on Article 5. Article 5 sets out detailed obligations with respect to the conduct of a risk assessment and whether the Member has taken into account risk assessment techniques developed by international standard setting bodies.

5. ISPM No. 2 and 11 were developed by the IPPC which is a "relevant international organization" recognized in Annex A, paragraph 3, as an international body that develops international standards, guidelines and recommendations. In Canada's view, both ISPM No. 2 and No. 11 are "risk assessment techniques" relevant to an analysis under Article 5.1. As the Appellate Body in *Australia – Apples* confirmed, ISPM No. 2 and 11 "present a general framework for conducting a risk assessment". The Appellate Body in that case applied these risk assessment techniques in evaluating Australia's risk assessment under Article 5.1.

III. THE MEANING OF THE TERM "BASED ON" UNDER SPS AGREEMENT ARTICLE 3.1 AND UNDER SPS AGREEMENT ARTICLE 3.3.

6. The Appellate Body has interpreted the term "based on" under Article 3.3 to mean "founded or built upon, or is supported by [...]"¹ The Appellate Body's interpretation of the "based on" under Article 3.3 should apply to Article 3.1.

7. The international standard that a measure must be 'based on' under Article 3.1 must be appropriate to the circumstances – in other words "relevant" to the measure. For instance, a standard that permits the importation of products after certain risks are addressed would not be relevant to a measure that completely bans the importation of a product.

¹ Appellate Body Report, *EC – Hormones*, para. 165 and Panel Report, *US – Animals*, para. 7.233.

IV. SPS AGREEMENT ARTICLES 5.2 AND 5.3 ARE OBLIGATIONS THAT ARE SEPARATE BUT RELATED TO THE OBLIGATIONS IN SPS AGREEMENT ARTICLE 5.1

8. Article 5.1 requires WTO Members to ensure their SPS measures are based on a risk assessment. Articles 5.2 and 5.3 apply to the assessment of these risks. They set out the factors that a WTO Member must consider in assessing risks. More generally, they "qualify" the way a risk assessment must be conducted².

9. The phrase "as appropriate in the circumstances" in Article 5.1 applies to the assessment of risks conducted by the WTO Member pursuant to that provision. Pertinent to this dispute, risk assessment techniques developed by the relevant international organizations, as well as scientific opinions, may shed light on what is a risk assessment "appropriate to the circumstances".³ The phrase is intended to provide WTO Members "with a certain degree of flexibility in meeting the requirements under Article 5.1"⁴, but does not "annul or supersede" the obligation to base a measure on a risk assessment.⁵

10. The phrase "as appropriate in the circumstances" does not apply to Articles 5.2 and 5.3. Thus, there is no flexibility provided by that phrase with respect to the obligations to take into account the factors set out in Article 5.2 or Article 5.3 when conducting a risk assessment. However, we note the term "relevant" in various parts of Articles 5.2 and 5.3 provides flexibility for the risk assessor when conducting a risk assessment. Further, the factors considered in the assessment of risk under Articles 5.2 and 5.3 inform what is relevant to the "circumstances" that are appropriate under Article 5.1.

V. THE MEANING OF THE TERMS "TAKING INTO ACCOUNT" UNDER SPS AGREEMENT ARTICLE 5.1 AND "SHALL TAKE INTO ACCOUNT" IN SPS AGREEMENT ARTICLES 5.2 AND 5.3

11. The Panel in *Russia – Pigs (EU)* interpreted "take into account" under Article 5.3 as meaning "give consideration".⁶ This phrase has the same meaning in Articles 5.1 and 5.2.

12. The obligation to "take into account" under Articles 5.1, 5.2 and 5.3 will vary according to the specific facts of the case, the SPS risks at issue and the risk assessment conducted by the Member. The obligations for WTO Members under these provisions will depend on these variables.

² Panel Report, *Australia – Salmon*, para. 8.57.

³ *Ibid*, para. 8.71.

⁴ Appellate Body Report, *EC – Hormones*, para. 129.

⁵ Panel Report, *Australia – Salmon*, para. 8.57.

⁶ Panel Report, *Russia – Pigs (EU)*, para. 7.767.

ANNEX C-2**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION****1. Article 3 of the SPS Agreement**

1. Article 3.1 of the SPS Agreement covers not only standards that are specific to a particular disease or pathogen. Rather, that article has to be understood as also covering more general texts, such as the ISPMs to which Mexico makes reference. According to the EU, therefore, the ISPMs 1, 2, 4, 6, 8, 11 and 32 are therefore covered by the definition contained in Annex A(3)(c) of the SPS Agreement.

2. Article 3.3 of the SPS Agreement can be applied to the ISPMs which are not disease- or pathogen specific by examining their content and by ascertaining the substantive standards and benchmarks which they set. Once that substantive content has been ascertained, a second step consists in comparing the measures adopted by Costa Rica. Insofar as those measures are stricter than the substantive content of the ISPMs referred to by Mexico, it can be said that Costa Rica has "projected for itself a higher level of sanitary protection than would be achieved by a measure based on an international standard" and is subject to the disciplines of Article 3.3 of the SPS Agreement.

3. The reference to "international standards, guidelines or recommendations" in Article 3.3 of the SPS Agreement is to standards which determine a given level of sanitary or phytosanitary protection.

4. The absence of the word "relevant" in Article 3.1 does not negate the importance of "relevance" for identifying standards on which measure can be based.

2. Article 5 of the SPS Agreement

5. If ISPMs 2 and 11 include rules regarding risk assessment, according to the case law on Article 5.1 of the SPS Agreement, the respondent is not required to adopt all the elements regarding risk assessment unless the measure fundamentally departs from ISPMs 2 and 11. If ISPMs No. 2 and 11 include risk assessment techniques, according to the case law, the respondent is merely required to "take them into account" but not to comply with such techniques.

6. The phrase "as appropriate to the circumstances" in Article 5.1 of the SPS Agreement means that WTO Members have to assess the risk, on a case-by-case basis, in terms of product, origin and destination, including, in particular, country specific situations. It provides some flexibility for Members in the conduct of their risk assessment without absolving them of their duty to base their measures on a risk assessment. In line with the case law, the EU considers that whether the elements set forth in Articles 5.2 and 5.3 were taken into account is also relevant to a determination of whether the risk assessment was "appropriate to the circumstances".

7. The expressions "shall take account of" and "shall take into account" set out in Articles 5.1, 5.2 and 5.3 of the SPS Agreement appear to have an identical meaning, namely to "to take into consideration" and do not require any particular result of that consideration.

8. Regarding Article 5.3 of the SPS Agreement, the EU considers that there is nothing to indicate that the list of relevant economic factors set out in this provision is a "closed list". Since the risk assessment has to be "as appropriate to the circumstances", there is no reason to limit the economic factors that are relevant to the assessment of risk to animal or plant life or health. The EU considers that a Member is obliged to take into consideration the factors listed in Article 5.3 of the SPS Agreement and this consideration should be found in its risk assessment and risk management, even if it does not lead to a particular outcome.

9. Further, it is the complaining party that bears the burden of proving that the defendant did not take into account the relevant economic factors referred in Article 5.3 of the SPS Agreement.

10. The EU agrees with the finding of the panel in *Russia-Pigs (EU)* that Article 5.4 and 5.6 of the SPS Agreement are part of the context in which a Member is required to take into account the relevant economic factors listed in Article 5.3 of the SPS Agreement when determining the measure it will apply to achieve its ALOP.

ANNEX D

PRELIMINARY RESOLUTION OF THE PANEL

Contents		Page
Annex D-1	Preliminary Resolution of the Panel	78

ANNEX D-1**PRELIMINARY RULING BY THE PANEL****1. PROCEDURAL HISTORY**

1.1. In its first written submission of 25 September 2019, Costa Rica submitted a request for a preliminary ruling on Mexico's claim that Costa Rica acted inconsistently with Article 6.1 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). Costa Rica considers that Mexico's claim regarding the adaptation of Costa Rica's measures to the area from which the product originated falls outside the Panel's terms of reference.

1.2. Costa Rica requested that the Panel resolve this matter through a preliminary ruling as soon as it had given the parties an opportunity to present their views orally at the first substantive meeting and, in any event, prior to setting the timetable for the submission of the parties' second written submissions, the possible participation of the experts and the other subsequent stages of the proceedings.¹

1.3. In accordance with Rule 4.1(a) of the adopted Working Procedures², the Panel granted Mexico the opportunity to respond to Costa Rica's request for a preliminary ruling prior to the first substantive meeting. Mexico submitted its response to Costa Rica's request on 15 October 2019. Both parties had the opportunity to pronounce themselves on Costa Rica's request for a preliminary ruling during the first substantive meeting. In addition, the Panel posed three written questions to the parties related to this issue.³

1.4. In accordance with Rule 4.1(d) of the adopted Working Procedures⁴, the Panel also provided third parties with the opportunity to comment on Costa Rica's request for a preliminary ruling. Canada submitted its comments on 22 October 2019.

1.5. Rule 4.1(b) of the adopted Working Procedures states that "[t]he Panel may issue a preliminary ruling on the issues raised in such a preliminary ruling request prior to the submission of written rebuttals, if possible, or the Panel may defer a ruling on the issues raised by a preliminary ruling request until it issues its Report to the parties." In addition, Rule 4.1(c) of the Working Procedures provide that "[i]n the event that the Panel finds it appropriate to issue a preliminary ruling prior to the issuance of its Report, the Panel may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Report."

1.6. In accordance with the adopted Working Procedures, the Panel has chosen to issue, at this stage of the proceedings, a preliminary ruling on whether Mexico's claim under Article 6.1 of the SPS Agreement, as regards the alleged failure to adapt Costa Rica's measures to the sanitary or phytosanitary characteristics of the area from which the product originated, falls within or outside its terms of reference.

¹ Costa Rica's first written submission, para. 4.2.

² Rule 4.1(a) provides in the relevant part that "Mexico shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request."

³ See Panel questions Nos. 1, 2, 3 and 4.

⁴ Rule 4.1(d) provides in its relevant part that "[t]he Panel may provide all third parties with an opportunity to provide comments on any such request, either in their submissions as provided for in the timetable or separately."

2 MAIN ARGUMENTS OF THE PARTIES AND THIRD PARTIES

2.1 Costa Rica

2.1. Costa Rica argues that Mexico has introduced a claim in its first written submission that is not within the Panel's terms of reference, namely the claim of inconsistency with Article 6.1 of the SPS Agreement, with regard to the adaptation of Costa Rica's measures to the area from which the product originated.⁵

2.2. Costa Rica submits that Article 6.1 of the SPS Agreement contains two main obligations, namely: (i) the importing Member's obligation to adapt its measures to the area from which the product originated; and (ii) the importing Member's obligation to adapt its measures to the area to which the product is destined.⁶ Costa Rica asserts that in its request for the establishment of a panel, Mexico only claims that Costa Rica violated its obligation to adapt the measures to the area to which the product is destined.⁷

2.3. Costa Rica submits that the specific legal problem presented by Mexico in its panel request is that Costa Rica allegedly fails to adapt the measures at issue to Costa Rica's sanitary or phytosanitary characteristics.⁸ Costa Rica notes, however, that in its first written submission, Mexico not only addresses Costa Rica's alleged violation of adapting its measures to the destination area within Costa Rica, but also includes a new claim regarding Costa Rica's failure to comply with the obligation to adapt the measures to the area from which the product originated.⁹

2.4. Costa Rica asserts that simply listing articles in a panel request is not sufficient insofar as the listed articles do not establish a single and clear obligation, but rather a plurality of obligations and that, in such cases, the panel request must specify which one is being challenged.¹⁰

2.5. Costa Rica adds that Mexico was clear in its panel request by specifying which of the two obligations was the basis for its complaint: failure to adapt to the area to which the product is destined. In Costa Rica's view, Mexico thus left the other obligation outside the scope of this dispute.¹¹

2.6. Costa Rica is of the view that accepting Mexico's claim regarding the obligation to adapt measures to the area from which the product originated would effectively amount to modifying the panel request, by expanding the initial claim, or to acknowledging that the legal issue underpinning the panel request was not sufficiently clear.¹²

2.7. Therefore, Costa Rica requests the Panel to find that Mexico's claim under Article 6.1 of the SPS Agreement, with respect to the alleged failure to adapt Costa Rica's measures to the area from which the product originated, falls outside the scope of this dispute.¹³

⁵ Costa Rica's first written submission, para. 4.1.

⁶ Costa Rica's first written submission, para. 4.10; responses to Panel questions Nos. 1 and 2.

⁷ Costa Rica's first written submission, para. 4.11.

⁸ Costa Rica's first written submission, para. 4.12.

⁹ Costa Rica's first written submission, para. 4.13; opening statement at the first meeting of the Panel, para. 22.

¹⁰ Costa Rica's first written submission, para. 4.16 (referring to Appellate Body Report, *Korea – Dairy*, para. 124; and Panel Report, *Korea – Pneumatic Valves*, para. 7.26).

¹¹ Costa Rica's first written submission, para. 4.16.

¹² Costa Rica's first written submission, para. 4.18; opening statement at the first meeting of the Panel, para. 22.

¹³ Costa Rica's first written submission, para. 4.18; opening statement at the first meeting of the Panel, para. 22.

2.2 Mexico

2.8. Mexico argues that Costa Rica has misinterpreted Article 6.2 of the DSU and Article 6.1 of the SPS Agreement, due to the fact that: (i) it confuses the concepts of claim and argument under the DSU; and (ii) is mistaken about the scope of the obligation being challenged.¹⁴

2.9. Mexico submits that, if the article at issue contains a single obligation, it makes no sense to require clarification of which obligation is being challenged. Mexico asserts that identification of the particular provision alleged to have been violated is insufficient only when it contains multiple obligations.¹⁵

2.10. Mexico asserts that it is clear from the reading of its panel request that it did refer to and specifically identify the obligation contained in Article 6.1 of the SPS Agreement.¹⁶

2.11. Mexico argues that it complied with the standard of Article 6.2 of the DSU by expressly and unambiguously referring to the particular provision that it claims that Costa Rica has violated. Mexico submits that Costa Rica confuses the concepts of claim and argument, because the reference to "the area to which the product is destined" in its panel request forms part of the arguments that Mexico has no obligation to develop, and the reference to Article 6.1 of the SPS Agreement establishes the claim.¹⁷ Mexico adds that while it decided to refer to one of the arguments in its panel request, this does not mean that it is now limited to addressing other arguments in support of its claim.¹⁸

2.12. Mexico also submits that Costa Rica misrepresents the scope of the obligation contained in Article 6.1 of the SPS Agreement. Mexico asserts that the Appellate Body has referred to a single obligation under Article 6.1 of the SPS Agreement¹⁹, so it is a single obligation that regulates two situations.²⁰ For Mexico, Costa Rica erroneously considers that Article 6.1 the SPS Agreement contains two main obligations, namely: (i) to adapt its measures to the area from which the product originated; and (ii) to adapt its measures to the area to which the product is destined.²¹

2.13. Mexico argues that Article 6.1 of the SPS Agreement does not contain multiple obligations, but rather a single one, and that its panel request contains elements that go beyond merely referring to the relevant provision as, for example, setting out a potential argument to be addressed in its first written submission, but that it was neither necessary nor compulsory to develop it in its entirety.²²

2.14. Mexico therefore considers that the Panel should reject Costa Rica's request for a preliminary ruling²³ and requests the Panel to issue its preliminary ruling prior to the submission of the second written submissions.²⁴

¹⁴ Mexico's response to Costa Rica's request for a preliminary ruling, para. 2.

¹⁵ Mexico's response to Costa Rica's request for a preliminary ruling, para. 7 (referring to Appellate Body Reports, *Indonesia – Iron or Steel Products (Chinese Taipei)*, paras. 5.81 and 5.78; *China – HP-SSST (Japan)*, para. 5.15; and *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8); response to Panel questions Nos. 1 and 2.

¹⁶ Mexico's response to Costa Rica's request for a preliminary ruling, para. 10.

¹⁷ Mexico's response to Costa Rica's request for a preliminary ruling, para. 11.

¹⁸ Mexico's response to Costa Rica's request for a preliminary ruling, para. 12.

¹⁹ Mexico's response to Costa Rica's request for a preliminary ruling, para. 15 (referring to Appellate Body Reports, *India – Agricultural Products*, para. 5.132; and *Russia – Pigs (EU)*, para. 5.58).

²⁰ Mexico's response to Costa Rica's request for a preliminary ruling, paras. 16 and 17.

²¹ Mexico's response to Costa Rica's request for a preliminary ruling, paras. 20 and 21.

²² Mexico's response to Costa Rica's request for a preliminary ruling, paras 22 and 23.

²³ Mexico's response to Costa Rica's request for a preliminary ruling, para. 24.

²⁴ Mexico's response to Costa Rica's request for a preliminary ruling, para. 25.

2.3 Third parties

2.3.1 Canada

2.15. Canada considers that Mexico's reference in its first written submission to a new basis for its allegation of a breach of Article 6.1 of the SPS Agreement expands Mexico's claim in its panel request and is therefore outside the Panel's terms of reference.²⁵

2.16. Canada notes that Mexico did not simply list Article 6.1 of the SPS Agreement in its panel request, but also added more specificity, by indicating that the breach was due to the failure to adapt the measure to the characteristics of the area of destination for the avocados. Thus, the claim was narrowed to the failure to adapt to the characteristics of the area of destination.²⁶

2.17. Canada agrees with the Appellate Body's characterization of Article 6.1 of the SPS Agreement in *India – Agricultural Products* as a single obligation requiring adaptation to the characteristics of two areas or regions: origin and destination.²⁷

2.18. Canada is of the view that Mexico has narrowed its claim to the failure to adapt to the characteristics of the area of destination. If the Panel accepted Mexico's submission with respect to the failure to adapt to the characteristics of the area of origin, it would be addressing a part of the claim that did not appear in the panel request.²⁸

2.19. Canada explains that relevant question for the Panel is whether the inclusion of the failure to adapt to the area of origin in Mexico's first written submission amounts to a new claim.²⁹ Canada notes that Mexico's panel request includes a specific allegation of a breach of Article 6.1 due to a failure to adapt to the characteristics of the area of destination. In Canada's view, Mexico's first written submission contains a different basis for that breach, thereby expanding the claim expressed in its panel request. In Canada's opinion, such a new basis is not within the scope of the Panel's terms of reference.³⁰

3 ANALYSIS BY THE PANEL

3.1. Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), whose requirements have been characterized by the Appellate Body as "central to the proper establishment of the jurisdiction of a panel"³¹, provides in the relevant part:

The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

3.2. The Appellate Body has noted that the panel request "governs a panel's terms of reference and delimits the scope of [its] jurisdiction".³² In fulfilling this function, it also fulfils a due process objective, by providing the respondent and third parties with notice regarding the nature of the complainant's case and by enabling them to respond accordingly.³³

3.3. Whether the panel request complies with the requirements of Article 6.2 of the DSU must be determined "on the face of the panel request, on a case-by-case basis".³⁴ A panel must "scrutinize carefully the panel request, read as a whole, and on the basis of the language used".³⁵

²⁵ Canada's comments on Costa Rica's request for a preliminary ruling, para. 2.

²⁶ Canada's comments on Costa Rica's request for a preliminary ruling, para. 8.

²⁷ Canada's comments on Costa Rica's request for a preliminary ruling, paras. 10-11 (referring to Appellate Body Report, *India – Agricultural Products*, para. 5.131).

²⁸ Canada's comments on Costa Rica's request for a preliminary ruling, para. 12.

²⁹ Canada's comments on Costa Rica's request for a preliminary ruling, para. 13.

³⁰ Canada's comments on Costa Rica's request for a preliminary ruling, para. 16.

³¹ Appellate Body Report, *Korea- Pneumatic Valves*, para. 5.8.

³² Appellate Body Report, *Korea- Pneumatic Valves*, para. 5.8.

³³ Appellate Body Report, *Korea- Pneumatic Valves*, para. 5.8.

³⁴ Appellate Body Report, *Korea- Pneumatic Valves*, para. 5.8.

³⁵ Appellate Body Report, *Korea- Pneumatic Valves*, para. 5.5 (referring to Appellate Body Report, *China – HP-SSST (Japan)/China – HP-SSST (EU)*, para. 5.13; and *EU – Fasteners (China)*, para. 562).

3.4. Moreover, "[d]efects in the request ... cannot be cured in the subsequent submissions of the parties during the panel proceedings"³⁶, but such subsequent submissions or statements, in particular the first written submission of the complaining party, may be consulted "in order to confirm the meaning of the words used in the panel request".³⁷

3.5. This dispute concerns whether Mexico's claim under Article 6.1 of the SPS Agreement, as regards the alleged failure to adapt Costa Rica's measures to the phytosanitary characteristics of the area from which the product originated, falls within the terms of reference of this Panel. Under the terms of Article 6.2 of the DSU, whether, with respect to Mexico's claim under Article 6.1 of the SPS Agreement concerning the alleged failure to adapt Costa Rica's measures to the phytosanitary characteristics of the area from which the product originated, Mexico provided "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" within the meaning of the last part of the second sentence of that article.

3.6. To provide "a brief summary of the legal basis of the complaint sufficient to present the problem clearly", "a panel request must plainly connect the measure(s) with the provision(s) of the covered agreements claimed to have been infringed."³⁸ The degree of brevity that is permissible "is a function of its clarity in presenting the problem".³⁹

3.7. The Appellate Body has explained that "[t]he identification of the treaty provision claimed to have been violated by the respondent is 'always necessary' and a 'minimum prerequisite'"⁴⁰, but it may not be sufficient to meet the requirements of Article 6.2, "depending on the particular circumstances of a case".⁴¹ The Appellate Body has also stated that "[s]uch circumstances include the nature of the measure at issue and the manner in which it is described in the panel request, as well as the nature of the provision of the covered agreements alleged to have been breached."⁴² The Appellate Body has noted as an example that "to the extent that a provision contains not one single, distinct obligation, but rather multiple obligations, a panel request might need to specify which of the obligations contained in the provision is being challenged".⁴³

3.8. Lastly, it is important to clarify that a "panel request need only provide the 'legal basis of the complaint', that is, the *claims* underlying this complaint and not the *arguments* in support thereof".⁴⁴

3.9. The Panel first notes that, in Section III (Brief summary of the legal basis of the complaint) of its panel request, Mexico stated its claim under Article 6.1 of the SPS Agreement as follows:

Mexico considers that the measures at issue, either individually or jointly, are inconsistent with Costa Rica's obligations under the SPS Agreement and the GATT 1994, specifically with:

(...)

- Article 6.1 of the SPS Agreement, since Costa Rica's measures were not adapted to the sanitary or phytosanitary characteristics of the area to which the product is destined, that is, of its territory.⁴⁵

³⁶ Appellate Body Report, *Korea – Pneumatic Valves*, para. 5.8.

³⁷ Appellate Body Report, *Korea – Pneumatic Valves*, para. 5.8.

³⁸ Appellate Body Report, *Korea – Pneumatic Valves*, para. 5.9.

³⁹ Appellate Body Report, *Korea – Pneumatic Valves*, para. 5.6.

⁴⁰ Appellate Body Report, *Korea – Pneumatic Valves*, para. 5.9 (referring to Appellate Body Reports, *China – HTP-SST (Japan) / China – HP-SSST (EU)*, para. 5.14; *Korea – Dairy*, para. 124; *Brazil- Desiccated Coconut*, note 21, p. 24; *EC – Bananas III*, paras. 145 and 147; and *India – Patents (United States)*, paras. 89 and 92-93).

⁴¹ Appellate Body Report, *Korea – Pneumatic Valves*, para. 5.9.

⁴² Appellate Body Report, *Korea – Pneumatic Valves*, para. 5.9.

⁴³ Appellate Body Report, *Korea – Pneumatic Valves*, para. 5.6 (referring to Appellate Body Reports, *US – Countervailing Measures (China)*, para. 4.9; *China – Raw Materials*, para. 220; *Korea – Dairy*, para. 124; *EC – Fasteners (China)*, para. 598; and *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8).

⁴⁴ Appellate Body Report, *Korea – Pneumatic Valves*, para. 5.6 (referring to Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.14; *Korea – Dairy*, para. 139; and *US – Countervailing Measures (China)*, para. 4.9).

⁴⁵ Request for the establishment of a panel by Mexico, WT/DS524/2, Section IIIA, point 12.

3.10. Article 6.1 of the SPS Agreement provides as follows:

Members shall ensure that their sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area - whether all of a country, part of a country, or all or parts of several countries - from which the product originated and to which the product is destined. In assessing the sanitary or phytosanitary characteristics of a region, Members shall 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.

3.11. The Panel notes that Mexico does not refer in its panel request, either in its claim under Article 6.1 of the SPS Agreement or in any other claim or section, to the failure to adapt Costa Rica's measures to the sanitary or phytosanitary characteristics of the area from which the product originated. In fact, Mexico expressly specifies in its panel request, beyond the text of Article 6.1 of the SPS Agreement, that the area to which the product is destined refers to "its territory", that is, the territory of Costa Rica.

3.12. In its first written submission, however, Mexico sets forth for the first time the problem of the alleged failure to adapt Costa Rica's measures to the phytosanitary characteristics of the area from which the product originated. Mexico claims that Costa Rica's measures are inconsistent with Article 6.1 of the SPS Agreement, because Costa Rica failed to take into account the level of prevalence of ASBVd in its territory *or in exporting countries*⁴⁶; or the existence or absence of ASBVd eradication and control programmes in its territory *and in exporting countries*⁴⁷; or the existence of WTO, IPPC or other RPP0 criteria and guidelines, in particular with regard to taking into account the robustness and reliability of *Mexico's and other avocado-exporting countries'* phytosanitary infrastructure, or any of their knowledge and experiences.⁴⁸ In addition, Mexico claims that Costa Rica failed to ensure that its measures were adapted to the phytosanitary characteristics of its territory *and those of other avocado-producing countries*, arguing that Costa Rica should have adjusted its SPS measures *for Mexico, and the other avocado-producing countries exporting to its territory* in accordance with: (i) the phytosanitary status of ASBVd and sunblotch disease *in its territory*; and (ii) the prevalence of ASBVd and sunblotch disease *not only in Mexico and the other avocado-producing countries, but in areas in which the presence of ASBVd has specifically been recorded*.⁴⁹ These arguments, insofar as they concern Mexico or other exporting countries, relate to the alleged failure to adapt Costa Rica's measures to the sanitary or phytosanitary characteristics of the area from which the product originated. Mexico submits that its claim of inconsistency with Article 6.1 of the SPS Agreement, with respect to the adaptation of Costa Rica's measures to the sanitary or phytosanitary characteristics of the area from which the product originated, falls within the Panel's terms of reference. Mexico presents two main arguments in this regard: (i) that Article 6.1 of the SPS Agreement contains a single obligation, consequently identification of the provision in question is sufficient to meet the requirements of Article 6.2 of the DSU; and (ii) that the reference to "the area to which the product is destined" in its panel request forms part of the arguments and not the claim.⁵⁰

3.13. This Panel is not convinced by Mexico's first argument. The Panel does not consider that the references of panels and the Appellate Body to "the obligation" in the cases cited by Mexico are determinative for the case at hand. All these references were made in the context of generally explaining Article 6.1 of the SPS Agreement and not in the context of a discussion on the Panel's terms of reference⁵¹, and in particular on whether the obligation contained in Article 6.1 is a "single, distinct obligation".⁵²

⁴⁶ Mexico's first written submission, paras. 590-595. (emphasis added)

⁴⁷ Mexico's first written submission, paras. 596-599. (emphasis added)

⁴⁸ Mexico's first written submission, paras. 600-603. (emphasis added)

⁴⁹ Mexico's first written submission, paras. 604-608. (emphasis added)

⁵⁰ See, for example Mexico's response to Costa Rica's request for a preliminary ruling, para. 42.

⁵¹ Mexico refers to Appellate Body Reports, *India – Agricultural Products*, paras. 5.131-5.132 and 5.152, and *Russia – Pigs (EU)*, para. 5.58; and Panel Reports, *US – Animals*, para. 7.642; and *Russia – Pigs (EU)*, paras. 7.462 and 7.473.

⁵² Appellate Body Report, *Korea – Pneumatic Valves*, para. 5.9 (referring to Appellate Body Reports, *US – Countervailing Measures (China)*, para. 4.9; *China – Raw Materials*, para. 220; and *Korea – Dairy*,

3.14. In any event, the Panel does not consider it necessary in this particular case to determine whether the first sentence of Article 6.1 of the SPS Agreement, which requires Members to ensure that their measures are adapted to the sanitary or phytosanitary characteristics of the area from which the product originated and to which the product is destined, must be characterized as a single obligation, as Mexico indicates, or as two distinct obligations, as Costa Rica contends. The fact is that the provision obliges Members to adapt their SPS measures to the sanitary or phytosanitary characteristics of two areas, that from which the product originated and that to which it is destined, which implies two different adaptation scenarios, and in its panel request Mexico only referred to the alleged failure to adapt Costa Rica's measures to the sanitary or phytosanitary characteristics of the area to which the product is destined, and even explicitly specified that the area to which the product is destined refers to the territory of Costa Rica.

3.15. Nor is the Panel convinced by Mexico's second argument that the reference to "the area to which the product is destined" in its panel request forms part of the arguments and not the claim. For the purposes of Article 6.2 of the DSU, the word "claim" refers to an allegation "that the responding party has violated ... an identified provision of a particular agreement"⁵³, while the arguments "are statements put forth by a complaining party 'to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision'".⁵⁴ The Panel does not consider that simply mentioning the alleged failure to adapt to the sanitary or phytosanitary characteristics of the area to which the product is destined in Mexico's panel request can be characterized as an argument. Mentioning it, without further detail or explanation, cannot be considered as a statement put forth by Mexico to demonstrate that Costa Rica's measure does indeed infringe upon Article 6.1 of the SPS Agreement.

3.16. In addition, under the particular circumstances of the matter that has been referred to this Panel for a preliminary ruling, the most important thing is that the panel request fulfils a due process objective, by providing the respondent and third parties with notice regarding the nature of the complainant's case and by enabling them to respond accordingly.⁵⁵

3.17. As mentioned earlier, in the claim under Article 6.1 of the SPS Agreement in its panel request, Mexico made no mention of the alleged failure to adapt Costa Rica's measures to the sanitary or phytosanitary characteristics of the area from which the product originated. On the contrary, it expressly mentioned the failure to adapt Costa Rica's measures to the sanitary or phytosanitary characteristics of the area to which the product is destined. In view of the foregoing, Costa Rica could not foresee that Mexico would include in its first written submission arguments concerning the alleged failure to adapt Costa Rica's measures to the phytosanitary characteristics of the area from which the product originated. This has prejudiced Costa Rica's ability to defend itself on this point.

3.18. For the reasons set out above, this Panel considers that, in its panel request, Mexico limited its claim under Article 6.1 of the SPS Agreement to the alleged failure to adapt Costa Rica's measures to the sanitary or phytosanitary characteristics of the area to which the product is destined. In view of the foregoing, as regards the alleged failure to adapt Costa Rica's measures to the phytosanitary characteristics of the area from which the product originated, Mexico failed to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly", pursuant to Article 6.2 of the DSU.

para. 124; *EC – Fasteners (China)*, para. 598; and *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8).

⁵³ Appellate Body Report, *Korea – Pneumatic Valves*, para. 5.31 (referring to Appellate Body Reports, *China – HP-SST (Japan) / China – HP-SSST (EU)*, para.5.14; and *Korea – Dairy*, para. 139).

⁵⁴ Appellate Body Report, *Korea – Pneumatic Valves*, para. 5.31 (referring to Appellate Body Reports, *China – HP-SST (Japan) / China – HP-SSST (EU)*, para. 5.14; and *Korea – Dairy*, para. 139).

⁵⁵ Appellate Body Report, *Korea – Pneumatic Valves*, para. 5.8.

4 CONCLUSION

4.1. Accordingly, the Panel concludes that the claim under Article 6.1 of the SPS Agreement, with respect to the alleged failure to adapt Costa Rica's measures to the phytosanitary characteristics of the area from which the product originated, falls outside the Panel's terms of reference.

4.2. This preliminary ruling will become an integral part of the Panel's report, subject to any elaboration of the reasoning in the Panel's report.
