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1 ARTICLE 26

1.1 Text of Article 26

Article 26

1. Non-Violation Complaints of the Type Described in Paragraph 1(b) of Article XXIII of GATT 1994

Where the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable to a covered agreement, a panel or the Appellate Body may only make rulings and recommendations where a party to the dispute considers that any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the application by a Member of any measure, whether or not it conflicts with the provisions of that Agreement. Where and to the extent that such party considers and a panel or the Appellate Body determines that a case concerns a measure that does not conflict with the provisions of a covered agreement to which the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable, the procedures in this Understanding shall apply, subject to the following:

(a) the complaining party shall present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement;

(b) where a measure has been found to nullify or impair benefits under, or impede the attainment of objectives, of the relevant covered agreement without violation thereof, there is no obligation to withdraw the measure. However, in such cases, the panel or the Appellate Body shall recommend that the Member concerned make a mutually satisfactory adjustment;

(c) notwithstanding the provisions of Article 21, the arbitration provided for in paragraph 3 of Article 21, upon request of either party, may include a determination of the level of benefits which have been nullified or impaired, and may also suggest ways and means of reaching a mutually satisfactory adjustment; such suggestions shall not be binding upon the parties to the dispute;

(d) notwithstanding the provisions of paragraph 1 of Article 22, compensation may be part of a mutually satisfactory adjustment as final settlement of the dispute.

2. Complaints of the Type Described in Paragraph 1(c) of Article XXIII of GATT 1994

Where the provisions of paragraph 1(c) of Article XXIII of GATT 1994 are applicable to a covered agreement, a panel may only make rulings and recommendations where a party considers that any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the existence of any situation other than those to which the provisions of paragraphs 1(a) and 1(b) of Article XXIII of GATT 1994 are applicable. Where and to the extent that such party considers and a panel determines that the matter is covered by this paragraph, the procedures of this Understanding shall apply only up to and including the point in the proceedings where the panel report has been circulated to the Members. The dispute settlement rules and procedures contained in the Decision of 12 April 1989 (BISD 36S/61-67) shall apply to consideration for adoption, and surveillance and implementation of recommendations and rulings. The following shall also apply:

(a) the complaining party shall present a detailed justification in support of any argument made with respect to issues covered under this paragraph;

(b) in cases involving matters covered by this paragraph, if a panel finds that cases also involve dispute settlement matters other than those covered by this paragraph, the panel shall circulate a report to the DSB addressing any such matters and a separate report on matters falling under this paragraph.

1.2 Article 26.1: non-violation complaints of the type described in Article XXIII:1(b) of the GATT 1994

1.2.1 General

1. For further information on panel and Appellate Body reports on claims brought under Article XXIII:1(b), see the Section on Article XXIII:1(b) on the GATT 1994.

1.2.2 "benefit accruing"

2. In *US – COOL (Article 21.5 – Canada and Mexico)*, the Panel rejected the United States' argument that the term "benefit accruing" refers to the concessions that are actually enjoyed or applied to trade in the relevant goods. The Panel stated that this approach "would potentially bar Members from relying on WTO concessions for claims of non-violation when their trade was being conducted under a preferential trade agreement."[1] The Panel pointed out that "the phrase 'benefit accruing' in Article XXIII:1(b) of the GATT 1994 and Article 26.1 of the DSU extends to multilateral WTO market access concessions even when the relevant products are directly traded under a regional trade agreement according preferential market access."[2]

1.2.3 Table of non-violation nullification and impairment disputes under the WTO dispute settlement system

3. Under the WTO dispute settlement system, there have been eight disputes in which a non-violation nullification and impairment (NVNI) claim was substantively considered by a panel. The following table provides information on these disputes. It is updated to 31 December 2020.

DS No.	Dispute	Outcome
DS2	*US – Gasoline*	Conditional NVNI claim rejected – failure to meet conditions.
DS26, DS48	*EC – Hormones*	Conditional NVNI claim rejected – failure to meet conditions.

[1] Panel Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 7.689.
[2] Panel Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 7.689.

DS No.	Dispute	Outcome
DS44	*Japan – Film*	NVNI claim rejected – failure to meet burden of proof.
DS135	*EC – Asbestos*	NVNI claim rejected – failure to meet burden of proof.
DS163	*Korea – Procurement*	NVNI claim rejected – failure to meet burden of proof.
DS234	*US – Offset Act (Byrd Amendment)*	NVNI claim rejected – failure to meet burden of proof.
DS339, DS340, DS342	*China – Auto Parts*	Conditional NVNI claim rejected – failure to meet conditions.
DS384, DS386	*US – COOL (Article 21.5 – Canada and Mexico)*	The Panel exercised judicial economy with regard to the non-violation claims under Article XXIII:1(b) of the GATT 1994.

1.2.4 Article 26.1(a): "detailed justification in support of any complaint"

4. In *Japan – Film*, the Panel examined the issue of which party bears the burden of proof in a claim involving non-violation under Article 26.1 of the DSU. The Panel stated:

> "In a case of non-violation nullification or impairment pursuant to Article XXIII:1(b), Article 26.1(a) of the DSU and GATT jurisprudence confirm that this is an exceptional remedy for which the complaining party bears the burden of providing a *detailed justification* to back up its allegations.
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> …
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> Consistent with the explicit terms of the DSU and established WTO/GATT jurisprudence, and recalling the Appellate Body ruling that 'precisely how much and precisely what kind of evidence will be required to establish … a presumption [that what is claimed is true] will necessarily vary from … provision to provision', we thus consider that the United States, with respect to its claim of non-violation nullification or impairment under Article XXIII:1(b), bears the burden of providing a detailed justification for its claim in order to establish a presumption that what is claimed is true. It will be for Japan to rebut any such presumption."[3]

5. In *EC – Asbestos*, the Panel confirmed that:

> "Where the application of Article XXIII:1(b) is concerned, Article 26.1(a) of the Understanding and panel practice in the context of the WTO Agreement and the GATT 1947 confirm that this is an exceptional course of action requiring the complaining party to carry the burden of presenting a detailed justification in support of its complaint."[4]

6. The Panel further stated that:

> "[B]ecause of the importance conferred on them *a priori* by the GATT 1994, as compared with the rules governing international trade, situations that fall under Article XX justify a stricter burden of proof being applied in this context to the party invoking Article XXIII:1(b), particularly with regard to the existence of legitimate expectations and whether or not the initial Decree could be reasonably anticipated."[5]

7. In *US – COOL (Article 21.5 – Canada and Mexico),* the Panel highlighted that "the complainants must establish 'a clear correlation between the measures and the adverse effect on the relevant competitive relationships'. The criterion of causality consists in showing that the

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[3] Panel Report, *Japan – Film*, paras. 10.30 and 10.32.
[4] Panel Report, *EC – Asbestos*, para. 8.275.
[5] Panel Report, *EC – Asbestos*, para. 8.282.

amended COOL measure 'has made more than a *de minimis* contribution to nullification or impairment'."[6]

1.2.5 Article 26.1(b): remedies in the context of non-violation nullification or impairment

8. In *India – Patents (US)*, the Appellate Body explained that, in the context of non-violation complaints, the "ultimate goal is not the withdrawal of the measure concerned, but rather achieving a mutually satisfactory adjustment, usually by means of compensation" and noted that "[t]his is codified in Article 26.1(b) of the DSU".[7]

9. In *EC – Asbestos*, the panel and Appellate Body rejected the European Communities' argument that the rules on non-violation nullification or impairment cannot apply to measures justified under Article XX of the GATT 1994. In that context, the Panel stated that:

> "The application of Article XXIII:1(b) does not prevent either the adoption or the enforcement of the Decree concerned. Article 26:1(b) stipulates that even where a measure has been found to nullify or impair benefits under, or impede the attainment of objectives, of the GATT 1994 without violation thereof, there is no obligation to withdraw the measure. Accordingly, there is no contradiction between the invocation of Article XX and the application of Article XXIII:1(b). However, that Article must be applied in such a way as to protect the balance of rights and duties negotiated.
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> …
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> A finding based on Article XXIII:1(b) of the GATT 1994 and Article 26.1 of the Understanding never results in an obligation not to apply or to withdraw the measure in question. The Member concerned can only be asked to make 'a mutually satisfactory adjustment'. Article 26:1(b) also specifies that compensation may be part of a mutually satisfactory adjustment as final settlement of the dispute.216 The Member adopting a public health protection measure is totally free to continue to apply the measure concerned as it stands while offering in exchange compensation for the benefits nullified or impaired."[8]

10. The Panel in *US – Gambling (Article 21.5 – Antigua and Barbuda)* explained that compliance in cases involving measures found to be inconsistent with the covered agreements requires a change that eliminates the inconsistency with the covered agreements. The Panel then stated that:

> "This can be contrasted with a recommendation that the Member concerned make a 'mutually satisfactory adjustment', applicable in so-called 'non-violation' cases under Article 26.1(b) of the DSU. In such cases, there is no obligation to make any change to bring the measure at issue into conformity with the Member's obligations because the measure is *already* in conformity, or consistent, with those obligations."[9]

1.3 Article 26.2: situation complaints of the type described in Article XXIII:1(c) of the GATT 1994

11. The Panel in *US – Gambling (Article 21.5 – Antigua and Barbuda)* contrasted the situation under the WTO dispute settlement system with prior GATT practice, according to which Members were able to block adoption of panel reports. In that context, the Panel noted:

> "The previous GATT practice was to adopt panel reports by consensus, without prejudice to the GATT provisions on decision-making: see the Decision of 12 April 1989 on improvements to the GATT dispute settlement rules and procedures, para.

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[6] Panel Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 7.714.
[7] Appellate Body Report, *India – Patents (US)*, para. 41 and fn 29.
[8] Panel Report, *EC – Asbestos,* paras. 8.263 and 8.270.
[9] Panel Report, *US – Gambling (Article 21.5 – Antigua and Barbuda)*, fn 35.

G.3 (BISD 36S/61-67). This practice remains applicable to so-called 'situation complaints' under Article 26.2 of the DSU."[10]

1.4 Relationship with other provisions of the DSU

1.4.1 Article 21.5

12. The Panel in *US – COOL (Article 21.5 – Canada and Mexico)* confronted the issue of whether a compliance panel under Article 21.5 of the DSU has jurisdiction to review non-violation claims in accordance with Article XXIII:1(b) of the GATT 1994 and Article 26.1 of the DSU. The United States argued that the proceedings under Article 21.5 of the DSU concern, among others, the consistency of measures taken to comply with DSB recommendations and rulings with covered agreements, and that such an inquiry "does not entail the question of *non-violation* nullification or impairment, which by definition concerns a measure that does not conflict with the provisions of a covered agreement."[11] The Panel disagreed:

> "The Appellate Body has clarified that 'Article XXIII:1(b) of the GATT 1994 sets forth a separate cause of action for a claim that, through the application of a measure, a Member has 'nullified or impaired' 'benefits' accruing to another Member, 'whether or not that measure conflicts with the provisions' of the GATT 1994. Thus, it is not necessary, under Article XXIII:1(b), to establish that the measure involved is inconsistent with, or violates, a provision of the GATT 1994.'Although the Appellate Body used the word 'inconsistent' in its clarification of non-violation claims, it was not addressing the term 'consistency' in the specific context of Article 21.5 of the DSU. Nor was it presented with the question of the jurisdiction of compliance panels. Indeed, the Appellate Body stressed the narrowness of the specific question raised on appeal in that dispute, which related to the scope of application of Article XXIII:1(b). We therefore decline to read the Appellate Body's analysis as dispositive of the jurisdictional issue before us in the present dispute.
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> The objective of Article 21.5 of the DSU is 'to promote the prompt compliance with DSB recommendations and rulings … by making it unnecessary for a complainant to begin new proceedings and by making efficient use of the original panelists'.It is clear that excluding non-violation claims from Article 21.5 proceedings would not promote prompt compliance with DSB recommendations and rulings and would not be efficient. Such exclusion could plausibly result in the original complainant having to request the establishment of an entirely new panel to adjudicate the non-violation complaint following the original respondent's measures to comply with a recommendation or ruling. Indeed, the Appellate Body has clarified a compliance panel's 'mandate to assess whether a 'measure taken to comply' is *fully* consistent with WTO obligations' – in recognition of the possibility that 'a 'measure taken to comply' may be inconsistent with WTO obligations in ways different from the original measure. 'If non-violation claims were inadmissible under Article 21.5, a Member could avoid review under that Article by taking measures that do not violate the covered agreements, but that nevertheless nullify or impair benefits accruing to another Member."[12]

Current as of: December 2020

[10] Panel Report, *US – Gambling (Article 21.5 – Antigua and Barbuda)*, fn 68.
[11] Panel Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 7.647.
[12] Panel Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 7.658 and 7.661.