

1 ARTICLE XXIII	1
1.1 Text of Article XXIII	1
1.2 Article XXIII:1	1
1.2.1 Relationship with Article 3.8 of the DSU.....	1

1 ARTICLE XXIII

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Dispute Settlement and Enforcement

1. If any Member should consider that any other Member fails to carry out its obligations or specific commitments under this Agreement, it may with a view to reaching a mutually satisfactory resolution of the matter have recourse to the DSU.

2. If the DSB considers that the circumstances are serious enough to justify such action, it may authorize a Member or Members to suspend the application to any other Member or Members of obligations and specific commitments in accordance with Article 22 of the DSU.

3. If any Member considers that any benefit it could reasonably have expected to accrue to it under a specific commitment of another Member under Part III of this Agreement is being nullified or impaired as a result of the application of any measure which does not conflict with the provisions of this Agreement, it may have recourse to the DSU. If the measure is determined by the DSB to have nullified or impaired such a benefit, the Member affected shall be entitled to a mutually satisfactory adjustment on the basis of paragraph 2 of Article XXI, which may include the modification or withdrawal of the measure. In the event an agreement cannot be reached between the Members concerned, Article 22 of the DSU shall apply.

1.2 Article XXIII:1

1.2.1 Relationship with Article 3.8 of the DSU

1. In *EC – Bananas III*, the Appellate Body considered that the Panel had erred in extending the scope of the presumption of nullification or impairment in Article 3.8 of the DSU to violation claims made under the GATS:

"We observe, first of all, that the European Communities attempts to rebut the presumption of nullification or impairment with respect to the Panel's findings of violations of the GATT 1994 on the basis that the United States has never exported a single banana to the European Community, and therefore, could not possibly suffer any trade damage. The attempted rebuttal by the European Communities applies only to one complainant, the United States, and to only one agreement, the GATT 1994. In our view, the Panel erred in extending the scope of the presumption in Article 3.8 of the DSU to claims made under the GATS as well as to claims made by the Complaining Parties other than the United States."¹

2. The Panel in *Mexico – Telecoms* understood these statements by the Appellate Body to mean that the GATS does not require that, in the case of a violation complaint (Article XXIII:1 of the GATS), "nullification or impairment" of treaty benefits has to be claimed by the complaining WTO Member and examined by a Panel:

"Unlike some other covered agreements (e.g. GATT Article XXIII:1 in connection with Article 3.8 of the DSU), the GATS does not require that, in the case of a violation

¹ Appellate Body Report, *EC – Bananas III*, para. 250.

complaint (GATS Article XXIII:1), 'nullification or impairment' of treaty benefits has to be claimed by the complaining WTO Member and examined by a Panel. Whereas Article XXIII:1 of the GATT specifically conditions access to WTO dispute settlement procedures on an allegation that a 'benefit' or the 'attainment of an objective' under that agreement are being 'nullified or impaired', the corresponding provision in the GATS (Article XXIII:1) permits access to dispute settlement procedures if a Member 'fails to carry out its obligations or specific commitments' under the GATS. In this respect, we note that the Appellate Body in *EC – Bananas III* stated that the panel in that case 'erred in extending the scope of the presumption in Article 3.8 of the DSU to claims made under the GATS'. Having found that Mexico has violated certain provisions of the GATS, we are therefore bound by Article 19 of the DSU to proceed directly to the recommendation set out in that provision."²

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² Panel Report, *Mexico – Telecoms*, para. 8.4.