

the intent and the effect of the Order by permitting a small quantity of foreign species to use the term "coquilles Saint-Jacques". However, France intended the Order to have the effect of limiting imports of scallops from Canada and other countries.⁶⁰

3. Nullification or Impairment

85. In the guise of asking the Panel to make a ruling on a "procedural" issue, the EC is also requesting a finding on a substantive issue. It argues that "[T]he absence of a clear reference to Article XXIII:1(b) also cannot be squared with the requirement of Article 26:1(a) of the DSU which enjoins the complaining party to present 'a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement.'"⁶¹ Whether Canada has fulfilled the requirements of Article 26(1) of the DSU is a matter to be decided by the panel on the basis of all the information presented to it in both the first and second written and oral submissions.

86. The EC has made two separate and distinct allegations in respect of non-violation nullification or impairment:

- a. first, that Canada has failed to raise properly non-violation nullification or impairment as it was not set out specifically in the consultations and the request for the establishment of a panel; and
- b. second, that Canada has failed to satisfy the conditions of Article 26(1) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU").

87. The first allegation is a procedural argument, while the second allegation is a substantive argument. The two arguments must be considered separately, although the substance of the non-violation nullification or impairment argument need not be addressed unless the Panel determines that the Order is consistent with the provisions of the GATT and the TBT Agreement.⁶²

⁶⁰ *Supra*, paragraphs 61-68.

⁶¹ See paragraph 7 of the EC's first written submission.

⁶² GATT 1947 panels have not found it necessary to examine claims of non-violation nullification or impairment where the impugned measure was found inconsistent with one or more other provisions of the GATT as nullification or impairment is presumed where violation occurs.