1 ARTICLE XXIII

1.1 Text of Article XXIII

Article XXIII

Nullification or Impairment

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

(*a*) the failure of another contracting party to carry out its obligations under this Agreement, or

(*b*) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or

(*c*) the existence of any other situation,

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

> 2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1 (*c*) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultation necessary. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary[1] to the Contracting Parties of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.
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> (*footnote original*)[1] By the Decision of 23 March 1965, the CONTRACTING PARTIES changed the title of the head of the GATT secretariat from "Executive Secretary" to "Director-General".

1.2 General

1.2.1 Relationship between Articles XXIII:1(a) and XXIII:1(b)

1. In *EC – Asbestos*, Canada claimed that the French ban on the sale and import of products containing asbestos nullified or impaired benefits accruing to it under Article XXIII:1(b). In response, the European Communities raised preliminary objections, arguing on two grounds that the measure fell outside the scope of application of Article XXIII:1(b). The Panel rejected both objections. In addressing the European Communities appeal against the Panel's rejection of these preliminary objections, the Appellate Body explained the relationship between Articles XXIII:1(a) and XXIII:1(b):

> "Article XXIII:1(a) sets forth a cause of action for a claim that a Member has failed to carry out one or more of its obligations under the GATT 1994. A claim under Article XXIII:1(a), therefore, lies when a Member is alleged to have acted inconsistently with a provision of the GATT 1994. Article XXIII:1(b) 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. Cases under Article XXIII:1(b) are, for this reason, sometimes described as 'non-violation' cases; we note, though, that the word 'non-violation' does not appear in this provision. The purpose of this rather unusual remedy was described by the panel in *European Economic Community - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins …* in the following terms:
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> > 'The idea underlying [the provisions of Article XXIII:1(b)] is that the improved competitive opportunities that can legitimately be expected from a tariff concession can be frustrated not only by measures proscribed by the General Agreement but also by measures consistent with that Agreement. In order to encourage contracting parties to make tariff concessions they must therefore be given a right of redress when a reciprocal concession is impaired by another contracting party as a result

> of the application of any measure, whether or not it conflicts with the General Agreement.[1] (emphasis added)'"[2]

1.3 Article XXIII:1(b)

1.3.1 Overview of the non-violation complaint

2. In *EC – Asbestos*, Canada claimed that the French ban on the sale and import of products containing asbestos nullified or impaired benefits accruing to it under Article XXIII:1(b). The Appellate Body stated that "[l]ike the panel in [*Japan – Film*], we consider that the remedy in Article XXIII:1(b) 'should be approached with caution and should remain an exceptional remedy.'"[3] The Appellate Body went on to refer to the Panel's finding in *Japan – Film* referenced in paragraph 3 below.

3. In *Japan – Film*, the United States argued, under Article XIII:1(b) of GATT 1994, that certain Japanese "measures", relating to commercial distribution of photographic film and paper, large retail stores and sales promotion techniques nullified or impaired benefits accruing to the United States based on tariff concessions made by Japan in the course of three rounds of multilateral trade negotiations. In addressing the United States' claims, the Panel made a general statement about the significance of the non-violation remedy within the WTO/GATT legal framework, holding that "the non-violation nullification or impairment remedy should be approached with caution and treated as an exceptional concept":

> "Although the non-violation remedy is an important and accepted tool of WTO/GATT dispute settlement and has been 'on the books' for almost 50 years, we note that there have only been eight cases in which panels or working parties have substantively considered Article XXIII:1(b) claims.[4] This suggests that both the GATT contracting parties and WTO Members have approached this remedy with caution and, indeed, have treated it as an exceptional instrument of dispute settlement. We note in this regard that both the European Communities and the United States in the *EEC - Oilseeds* case, and the two parties in this case, have confirmed that the non-violation nullification or impairment remedy should be approached with caution and treated as an exceptional concept.[5] The reason for this caution is straightforward. Members negotiate the rules that they agree to follow and only exceptionally would expect to be challenged for actions not in contravention of those rules."[6]

4. The Panel in *Japan – Film* also noted that under Article XXIII:1(b), "each case should be examined on its own merits".[7]

1.3.2 Purpose

5. The Panel in *Japan – Film* elaborated upon the purpose of Article XXIII:1(b) as follows:

> "[The purpose of Article XXIII:1(b) is] to protect the balance of concessions under GATT by providing a means to redress government actions not otherwise regulated by

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[1] Panel Report, *EEC – Oilseeds I*, para. 144.
[2] Appellate Body Report, *EC – Asbestos*, para. 185.
[3] Appellate Body Report, *EC – Asbestos*, para. 186.
[4] *(footnote original)* Report of the Working Party on *Australia - Ammonium Sulphate*; Panel Report, *Germany – Sardines*; [Panel Report,] *Uruguay - Recourse to Article XXIII*, ; Panel Report, *EC - Citrus* ; Panel Report, *EEC – Canned Fruit*; [Panel Report,] *Japan - Semi-Conductors*; *EEC – Oilseeds I*; [Panel Report,] *US – Sugar Waiver*.
[5] *(footnote original)* In *EEC – Oilseeds I*, the United States stated that it "concurred in the proposition that non-violation nullification or impairment should remain an exceptional concept. Although this concept had been in the text of Article XXIII of the General Agreement from the outset, a cautious approach should continue to be taken in applying the concept". *EEC – Oilseeds I*, para. 114. The EEC in that case stated that "recourse to the 'non-violation' concept under Article XXIII:1(b) should remain exceptional, since otherwise the trading world would be plunged into a state of precariousness and uncertainty". Ibid, para. 113.
[6] Panel Report, *Japan – Film*, para. 10.36.
[7] Panel Report, *Japan – Film*, para. 10.37. See also Panel Report, *US – COOL*, para. 7.902.

> GATT rules that nonetheless nullify or impair a Member's legitimate expectations of benefits from tariff negotiations.[8]"[9]

1.3.3 Scope

6. In *EC – Asbestos*, the Appellate Body rejected the European Communities argument that Article XXIII:1(b) only applies to measures which do not otherwise fall under other provisions of the GATT 1994. The Appellate Body emphasized the phrase, contained in Article XXIII:1(b), "whether or not [the measure] conflicts with the provisions of this Agreement":

> "The text of Article XXIII:1(b) stipulates that a claim under that provision arises when a 'benefit' is being 'nullified or impaired' through the 'application … of any measure, *whether or not it conflicts with the provisions of this Agreement* '. (emphasis added) The wording of the provision, therefore, clearly states that a claim may succeed, under Article XXIII:1(b), *even if the measure 'conflicts' with some substantive provisions of the GATT 1994*. It follows that a measure may, *at one and the same time*, be inconsistent with, or in breach of, a provision of the GATT 1994 *and*, nonetheless, give rise to a cause of action under Article XXIII:1(b). Of course, if a measure 'conflicts' with a provision of the GATT 1994, that measure must actually fall within the scope of application of that provision of the GATT 1994. We agree with the Panel that this reading of Article XXIII:1(b) is consistent with the panel reports in *Japan – Film* and *EEC – Oilseeds*, which both support the view that Article XXIII:1(b) applies to measures which simultaneously fall within the scope of application of other provisions of the GATT 1994. [10] Accordingly, we decline the European Communities' first ground of appeal under Article XXIII:1(b) of the GATT 1994."[11]

7. In *EC – Asbestos*, the Appellate Body further rejected the European Communities argument that it is possible to have "legitimate expectations" only in connection with a purely "commercial measure" unlike the measure at issue, which had allegedly been taken to protect human life or health. The Appellate Body stated that "the text [of Article XXIII:1(b)] does not distinguish between, or exclude, certain types of measures" and that such distinctions would be "very difficult in practice":

> "[W]e look to the text of Article XXIII:1(b), which provides that 'the application by another Member of *any measure*' may give rise to a cause of action under that provision. The use of the word 'any' suggests that measures of all types may give rise to such a cause of action. The text does not distinguish between, or exclude, certain types of measure. Clearly, therefore, the text of Article XXIII:1(b) contradicts the European Communities' argument that certain types of measure, namely, those with health objectives, are excluded from the scope of application of Article XXIII:1(b).
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> In any event, an attempt to draw the distinction suggested by the European Communities between so-called health and commercial measures would be very difficult in practice. By definition, measures which affect trade in goods, and which are subject to the disciplines of the GATT 1994, have a commercial impact. At the same time, the health objectives of many measures may be attainable only by means of commercial regulation. Thus, in practice, clear distinctions between health and commercial measures may be very difficult to establish. Nor do we see merit in the argument that, previously, only 'commercial' measures have been the subject of Article XXIII:1(b) claims, as that does not establish that a claim *cannot* be made under Article XXIII:1(b) regarding a 'non-commercial' measure."[12]

1.3.4 Test under Article XXIII:1(b)

8. In *Japan – Film*, the Panel summarized the elements of a non-violation case:

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[8] *(footnote original)* GATT Panel Report, *EEC – Oilseeds I*, para. 144.
[9] Panel Report, *Japan – Film*, para. 1050.
[10] (*footnote original*) See Panel Report, para. 8.263, which refers to the Panel Report in *Japan – Film*, *supra*, footnote 187, para. 10.50, and footnote 1214; and *EEC – Oilseeds*, *supra*, footnote 186, para. 144.
[11] Appellate Body Report, *EC – Asbestos*, para. 187.
[12] Appellate Body Report, *EC – Asbestos*, paras. 188-189.

> "The text of Article XXIII:1(b) establishes three elements that a complaining party must demonstrate in order to make out a cognizable claim under Article XXIII:1(b): (1) application of a measure by a WTO Member; (2) a benefit accruing under the relevant agreement; and (3) nullification or impairment of the benefit as the result of the application of the measure. "[13]

9. In *EC – Asbestos*, the Panel followed the three part test of the *Japan – Film* Panel.[14] The Panel's application of this test was not appealed.

1.3.4.1 Comparison with Articles I:1 and III:4 of the GATT 1994

10. In *EC – Seal Products*, the Panel recalled the findings of the panel in *Japan – Film*, and observed parallels between the elements of the legal tests under Articles I:1, III:4, XXIII:1(b) of the GATT 1994:

> "The panel in *Japan – Film*, after reviewing WTO/GATT case law under Articles I and III of the GATT 1994 concerning de facto discrimination, considered that 'the reasoning contained therein appears to be equally applicable in addressing the question of de facto discrimination with respect to claims of non-violation nullification or impairment'. In identifying this similarity, the panel stated that non-violation claims relate not to 'equality of competitive conditions' but to the upsetting of 'relative conditions of competition' created by tariff concessions. The panel further elaborated this statement as follows:
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> > [I]t could be argued that the standard we enunciated and applied under Article XXIII:1(b) – that of 'upsetting the competitive relationship' – may be different from the standard of 'upsetting effective equality of competitive opportunities' applicable to Article III:4. However, we do not see any significant distinction between the two standards apart from the fact that this Article III:4 standard calls for no less favourable treatment for imported products in general, whereas the Article XXIII:1(b) standard calls for a comparison of the competitive relationship between foreign and domestic products at two specific points in time, i.e. when the concession was granted and currently."[15]

1.3.5 Burden of proof

11. The Panel in *Japan – Film* explained that the burden of proof under Article XXIII:1(b) falls upon the complaining party:

> "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."[16]

12. In *EC – Asbestos*, Canada claimed that the French ban on the sale and imports of products containing asbestos nullified or impaired benefits accruing to it under Article XXIII:1(b). The Panel's finding on the burden of proof, which was not appealed, was that "with respect to its claims of non-violation, Canada bears the primary burden of presenting a detailed justification for its claims.[17]"[18] In support of its proposition, with reference to Article 26.1 of the DSU, the Panel cited the Panel in *Japan – Film*.[19]

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[13] Panel Report, *Japan – Film*, para. 10.41. See also Panel Report, *Korea – Procurement*, para. 7.85.
[14] Panel Report, *EC – Asbestos*, para. 8.283.
[15] Panel Report, *EC – Seal Products*, para. 7.681.
[16] Panel Report, *Japan – Film* para. 10.32.
[17] Previous Panels have not defined the precise scope of the concept of detailed justification.

13. In *EC – Asbestos*, Canada argued, citing the Appellate Body Report on *India – Patent (US)*[20] and the Panel Report on *Japan – Film*[21], that when a complainant proves that it enjoys a tariff concession and the respondent subsequently adopts a measure that affects the value of this concession, the complainant benefits from the presumption that it could not reasonably anticipate that this concession would be nullified or otherwise impaired by this measure. The Panel, in a finding that was not appealed, rejected this argument:

> "We do not consider that Canada has correctly interpreted the Panel report in *Japan – Film.* First of all, the presumption to which the Panel refers is that, if it is shown that a measure has been introduced after the conclusion of the tariff negotiations in question, then the complainant should not be considered as having anticipated that measure, which is only one of the tests applied by the Panel. Moreover, if the interpretation of the burden of proof suggested by Canada were followed, the obligation to present a detailed justification for which Article 26.1(a) provides might in certain cases be evaded. Accordingly, we do not follow the interpretation proposed by Canada but the rule laid down in *Japan – Film.*
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> Furthermore, in the light of our reasoning in paragraph 8.272 above, we consider that the special situation of measures justified under Article XX, insofar as they concern non-commercial interests whose importance has been recognized *a priori* by Members, requires special treatment. By creating the right to invoke exceptions in certain circumstances, Members have recognized *a priori* the possibility that the benefits they derive from certain concessions may eventually be nullified or impaired at some future time for reasons recognized as being of overriding importance. This situation is different from that in which a Member takes a measure of a commercial or economic nature such as, for example, a subsidy or a decision organizing a sector of its economy, from which it expects a purely economic benefit. In this latter case, the measure remains within the field of international trade. Moreover, the nature and importance of certain measures falling under Article XX can also justify their being taken at any time, which militates in favour of a stricter treatment of actions brought against them on the basis of Article XXIII:1(b).
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> Consequently, the Panel concludes that because 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."[22]

14. Further, the Panel stated that the burden of proof for a claim concerning a concession which had been made a long time previously "must be all the heavier inasmuch as the intervening period has been so long":

> "[W]e consider that in view of the time that elapsed between those concessions and the adoption of the Decree (between 50 and 35 years), Canada could not assume that, over such a long period, there would not be advances in medical knowledge with the risk that one day a product would be banned on health grounds. For this reason, too, we also consider that the presumption applied in *Japan – Film* cannot be applied to the concessions granted in 1947 and 1962. Any other interpretation would extend the scope of the concept of non-violation nullification well beyond that envisaged by the Panel in *Japan – Film*. On the contrary, it is for Canada to present detailed evidence showing why it could legitimately expect the 1947 and 1962 concessions not to be affected and could not reasonably anticipate that France might adopt measures restricting the use of all asbestos products 50 and 35 years, respectively, after the negotiation of the concessions concerned. In the present case, the burden of proof must be all the heavier inasmuch as the intervening period has been so long. Indeed,

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[18] Panel Report, *EC – Asbestos*, para. 8.278.
[19] Panel Report, *EC – Asbestos*, para. 8.277.
[20] Appellate Body Report, *India – Patents (US)*, para. 41.
[21] Panel Report, *Japan – Film*, para. 10.79.
[22] Panel Report, *EC – Asbestos*, paras. 8.280-282.

> it is very difficult to anticipate what a Member will do in 50 years time. It would therefore be easy for a Member to establish that he could not reasonably anticipate the adoption of a measure if the burden of proof were not made heavier."[23]

1.3.6 "measure"

15. In the Panel in *Japan – Film*, Japan argued that a measure, in order to be classified as such, must provide a benefit or impose a legally binding obligation. The Panel stated that even non-binding actions "can potentially have adverse effects on competitive conditions of market access":

> "[A] government policy or action need not necessarily have a substantially binding or compulsory nature for it to entail a likelihood of compliance by private actors in a way so as to nullify or impair legitimately expected benefits within the purview of Article XXIII:1(b). Indeed, it is clear that non-binding actions, which include sufficient incentives or disincentives for private parties to act in a particular manner, can potentially have adverse effects on competitive conditions of market access. For example, a number of non-violation cases have involved subsidies, receipt of which requires only voluntary compliance with eligibility criteria."[24]

16. The Panel in *Japan – Film* noted that the WTO Agreement is an international agreement signed by national governments and customs territories. According to the Panel, the term "measure" in Article XXIII:1(b) and Article 26.1 of the DSU "refers only to policies or actions of governments, not those of private parties."[25]

17. The Panel in *Japan – Film* held that the non-violation remedy is limited to measures that are currently being applied, and found confirmation for this finding in GATT/WTO precedent:

> "The text of Article XXIII:1(b) is written in the present tense, viz. 'If any Member should consider that any benefit *accruing* to it directly or indirectly under this Agreement *is* being nullified or impaired … as the result of … (b) the application by another Member of any measure, whether or not it *conflicts* with the provisions of this Agreement'. It thus stands to reason that, given that the text contemplates nullification or impairment in the present tense, caused by application of a measure, 'whether or not it conflicts' (also in the present tense), the ordinary meaning of this provision limits the non-violation remedy to measures that are currently being applied.
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> Moreover, GATT/WTO precedent in other areas, including in respect of virtually all panel cases under Article XXIII:1(a), confirms that it is not the practice of GATT/WTO panels to rule on measures which have expired or which have been repealed or withdrawn.[26] In only a very small number of cases, involving very particular situations, have panels proceeded to adjudicate claims involving measures which no longer exist or which are no longer being applied. In those cases, the measures typically had been applied in the very recent past.[27]

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[23] Panel Report, *EC – Asbestos*, para. 8.292.
[24] Panel Report, *Japan – Film*, para. 10.49.
[25] Panel Report, *Japan – Film*, para. 10.52.
[26] *(footnote original)* See Panel Report on *US – Gasoline*, para. 6.19, where the panel observed that "it had not been the usual practice of a panel established under the General Agreement to rule on measures that, at the time the panel's terms of reference were fixed, were not and would not become effective". See also Panel Report on *Argentina – Footwear, Textiles and Apparel*, pp. 84-86.
[27] *(footnote original)* See, e.g., Panel Report on *US – Wool Shirts and Blouses*, where the panel ruled on a measure that was revoked after the interim review but before issuance of the final report to the parties; Panel Report on *EEC - Measure on Animal Feed Proteins*, where the panel ruled on a discontinued measure, but one that had terminated after the terms of reference of the panel had already been agreed; Panel Report on *United States – Prohibitions on Imports of Tuna and Tuna Products from Canada*, para. 4.3., where the panel ruled on the GATT consistency of a withdrawn measure but only in light of the two parties' agreement to this procedure; Panel Report on *EEC – Restrictions on Imports of Apples from Chile*, where the panel ruled on a measure which had terminated before agreement on the panel's terms of reference but where the terms of reference specifically

> [W]e do not rule out the possibility that *old* 'measures' that were never officially revoked may continue to be applied through continuing administrative guidance. Similarly, even if measures were officially revoked, the underlying policies may continue to be applied through continuing administrative guidance. However, the burden is on the United States to demonstrate clearly that such guidance does in fact exist and that it is currently nullifying or impairing benefits."[28]

1.3.7 "benefit"

18. In *Japan – Film*, the Panel examined whether the benefits legitimately expected by a Member can be derived from successive rounds of tariff negotiations. The Panel recalled that in all GATT cases dealing with Article XXIII:1(b), except one, the claimed benefit was that of legitimate expectations of improved market-access opportunities arising out of relevant tariff concessions.[29] The Panel referred to Article 1(b)(i) of the GATT 1994 and went on to state that "[t]he conclusion that benefits accruing from concessions granted during successive rounds of tariff negotiations may separately give rise to reasonable expectations of improved market access is consistent with past panel reports":

> "GATT 1994 incorporates both 'protocols and certifications relating to tariff concessions' under paragraph 1(b)(i) and 'the Marrakesh Protocol to GATT 1994' under paragraph 1(d). The ordinary meaning of the text of paragraphs 1(b)(i) and 1(d) of GATT 1994, read together, clearly suggests that all protocols relating to tariff concessions, both those predating the Uruguay Round and the Marrakesh Protocol to GATT 1994, are incorporated into GATT 1994 and continue to have legal existence under the WTO Agreement.
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> Where tariff concessions have been progressively improved, the benefits -- expectations of improved market access -- accruing directly or indirectly under different tariff concession protocols incorporated in GATT 1994 can be read in harmony. This approach is in accordance with general principles of legal interpretation which, as the Appellate Body reiterated in *US - Gasoline*, teach that one should endeavour to give legal effect to all elements of a treaty and not reduce them to redundancy or inutility.
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> The conclusion that benefits accruing from concessions granted during successive rounds of tariff negotiations may separately give rise to reasonable expectations of improved market access is consistent with past panel reports.[30] The panel in *EEC – Canned Fruit* found that the United States had a reasonable expectation arising from the EEC's 1974 tariff concessions pursuant to Article XXIV:6 negotiations and 1979 Tokyo Round tariff concessions (even though the panel separately found that the United States could have anticipated certain subsidies in respect of the Tokyo Round tariff concessions).[31] And the *EEC – Oilseeds* panel found that the United States had a reasonable expectation arising from the EEC's 1962 Dillon Round tariff concessions.[32] As the United States points out, these findings would not have been possible if subsequent multilateral tariff agreements or enlargement agreements were deemed to extinguish wholesale the tariff concessions in prior tariff schedules."[33]

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included the terminated measure and, given its seasonal nature, there remained the prospect of its reintroduction.

[28] Panel Report, *Japan – Film*, paras. 10.57-10.59.

[29] Panel Report, *Japan – Film*, para. 10.62. The Panel cited GATT Panel Reports on *Australia – Ammonium Sulphate*; *Germany – Sardines*; *Uruguay – Recourse to Article XXIII*; *EC - Citrus*; *EEC – Canned Fruit*; *Japan – Semi-Conductors*; *EEC – Oilseeds I*; *US – Sugar Waiver*. The Panel then stated:

> "Only in *EC – Citrus Products* did the complaining party claim that the benefit denied was not improved market access from tariff concessions granted under GATT Article II, but rather GATT Article I:1 ('most-favoured-nation') treatment with respect to unbound tariff preferences granted by the EC to certain Mediterranean countries."

[30] *(footnote original)* See Panel Reports on *EEC – Canned Fruit*; and *EEC – Oilseeds I*.

[31] *(footnote original)* Panel Report on *EEC – Canned Fruit*, para. 54.

[32] *(footnote original)* Panel Report on *EEC – Oilseeds I*, paras. 144-146.

[33] Panel Report, *Japan – Film*, paras. 10.64-10.66.

19. After making the finding referenced in paragraph 18 above, the Panel in *Japan – Film* then quoted with approval the following excerpt from the GATT Panel Report on *EEC – Oilseeds I*:

> "'In these circumstances, the partners of the Community in the successive renegotiations under Article XXIV:6 could legitimately assume, in the absence of any indications to the contrary, that the offer to continue a tariff commitment by the Community was an offer not to change the balance of concessions previously attained. The Panel noted that nothing in the material submitted to it indicated that the Community had made it clear to its negotiating partners that the withdrawal and reinstitution of the tariff concessions for oilseeds as part of the withdrawal of the whole of the Community Schedule meant that the Community was seeking a new balance of concessions with respect to these items. There is in particular no evidence that the Community, in the context of these negotiations, offered to compensate its negotiating partners for any impairment of the tariff concessions through production subsidies or that it accepted compensatory tariff withdrawals by its negotiating partners to take into account any such impairment. The balance of concessions negotiated in 1962 in respect of oilseeds was thus not altered in the successive Article XXIV:6 negotiations. The Panel therefore found that the benefits accruing to the United States under the oilseed tariff concessions resulting from the Article XXIV:6 negotiations of 1986/87 include the protection of reasonable expectations the United States had when these concessions were initially negotiated in 1962'."[34]

20. The Panel in *Japan – Film* ultimately reached the following conclusion:

> "We consider, therefore, that reasonable expectations may in principle be said to continue to exist with respect to tariff concessions given by Japan on film and paper in successive rounds of Article XXVIII*bis* negotiations."[35]

21. The Panel in *EC – Asbestos* held, in a statement not appealed:

> "[T]he Panel in *Japan – Film* recalled that, with only one exception, in all the previous cases in which Article XXIII:1(b) was invoked the benefit claimed consisted in the legitimate expectation of improved market access opportunities resulting from the relevant tariff concessions. We first need to know what benefit Canada could legitimately have expected from the Community concessions on chrysotile asbestos. We note, however, that previous panels approached the question differently, insofar as they appear to have assumed the existence of a benefit in the form of improved market access opportunities and then considered whether a party could have had a *legitimate expectation* of a given benefit."[36]

1.3.8 Legitimate expectations

22. In *Japan – Film*, the Panel examined whether the United States could not have anticipated that the benefits related to improved market access would be offset by the subsequent application of a measure by Japan. The Panel held that if measures were anticipated, no legitimate expectations of improved market access could exist with respect to the impairment caused by these anticipated measures:

> "As suggested by the 1961 report,[37] in order for expectations of a benefit to be legitimate, the challenged measures must not have been reasonably anticipated at the time the tariff concession was negotiated. If the measures were anticipated, a Member could not have had a legitimate expectation of improved market access to the extent of the impairment caused by these measures.
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> Thus, under Article XXIII:1(b), the United States may only claim impairment of benefits related to improved market access conditions flowing from relevant tariff

[34] Panel Report, *EC – Oilseeds I*, para. 146, quoted in Panel Report, *Japan – Film*, para. 10.67.
[35] Panel Report, *Japan – Film*, para. 10.70.
[36] Panel Report, *EC – Asbestos*, para. 8.285.
[37] The "1961 report" referenced to is the GATT Panel Report, *Operation of the Provisions of Article XVI*, adopted on 21 November 1961, BISD 10S/201.

> concessions by Japan to the extent that the United States could not have reasonably anticipated that such benefits would be offset by the subsequent application of a measure by the Government of Japan."[38]

23. The Panel in *Japan – Film* then considered the standard by which to ascertain the existence of "reasonable anticipation". Where measures had been introduced after tariff negotiations had taken place, the Panel held that a presumption would exist that the United States, the complaining party, should not be held to have anticipated these measures:

> "We consider that the issue of reasonable anticipation should be approached in respect of specific 'measures' in light of the following guidelines. First, in the case of measures shown by the United States to have been introduced subsequent to the conclusion of the tariff negotiations at issue, it is our view that the United States has raised a presumption that it should not be held to have anticipated these measures and it is then for Japan to rebut that presumption. Such a rebuttal might be made, for example, by establishing that the measure at issue is so clearly contemplated in an earlier measure that the United States should be held to have anticipated it. However, there must be a clear connection shown. In our view, it is not sufficient to claim that a *specific* measure should have been anticipated because it is consistent with or a continuation of a past *general* government policy. As in the *EEC - Oilseeds* case[39], we do not believe that it would be appropriate to charge the United States with having reasonably anticipated all GATT-consistent measures, such as 'measures' to improve what Japan describes as the inefficient Japanese distribution sector. Indeed, if a Member were held to anticipate all GATT-consistent measures, a non-violation claim would not be possible. Nor do we consider that as a general rule the United States should have reasonably anticipated Japanese measures that are similar to measures in other Members' markets. In each such instance, the issue of reasonable anticipation needs to be addressed on a case-by-case basis."[40]

24. After holding that "the issue of reasonable anticipation needs to be addressed on a case-by-case basis" and that it was "not sufficient to claim that a *specific* measure should have been anticipated because it is consistent with or a continuation of a past *general* government policy", the Panel in *Japan – Film* held that with respect to measures introduced prior to the conclusion of the tariff negotiations at issue, a presumption would exist that the complaining party "should be held to have anticipated those measures":

> "[I]n the case of measures shown by Japan to have been introduced prior to the conclusion of the tariff negotiations at issue, it is our view that Japan has raised a presumption that the United States should be held to have anticipated those measures and it is for the United States to rebut that presumption. In this connection, it is our view that the United States is charged with knowledge of Japanese government measures as of the date of their publication. We realize that knowledge of a measure's existence is not equivalent to understanding the impact of the measure on a specific product market. For example, a vague measure could be given substance through enforcement policies that are initially unexpected or later changed significantly. However, where the United States claims that it did not know of a measure's relevance to market access conditions in respect of film or paper, we would expect the United States to clearly demonstrate why initially it could not have reasonably anticipated the effect of an existing measure on the film or paper market and when it did realize the effect. Such a showing will need to be tied to the relevant points in time (i.e., the conclusions of the Kennedy, Tokyo and Uruguay Rounds) in order to assess the extent of the United States' legitimate expectations of benefits from these three Rounds. A simple statement that a Member's measures were so opaque and informal that their impact could not be assessed is not sufficient. While it is true that in most past non-violation cases, one could easily discern a clear link between a product-specific action and the effect on the tariff concession that it allegedly impaired, one can also discern a link between general measures affecting the

[38] Panel Report, *Japan – Film*, paras. 10.76-10.77.
[39] *(footnote original)* Panel Report on *EEC – Oilseeds I* paras. 147 and 148.
[40] Panel Report, *Japan – Film*, para. 10.79.

> internal sale and distribution of products, such as rules on advertising and premiums, and tariff concessions on products in general."[41]

25. In *EC – Asbestos*, in examining a non-violation claim by Canada, the Panel decided to assess whether the measure in question could reasonably have been anticipated, as referenced in paragraph 22 above. With regard to what factors should *not* be taken into account to answer this question, the Panel considered, in a finding not reviewed by the Appellate Body:

> "[P]revious panels found that a number of elements were not relevant. We consider it necessary to assess their applicability in relation to the circumstances of the present case.
>
> (a) First of all, we note that the reports in *Japan – Film* and *EEC – Oilseeds* concluded that a specific measure could not be considered foreseeable solely because it was consistent with or a continuation of a past general government policy. However, we note that, in contrast to the two cases mentioned above, France had already developed a specific policy in response to the health problems created by asbestos before the adoption of the Decree. This factor must certainly be taken into account in our analysis.[42]
>
> (b) The Panel in *Japan – Film*, also concluded that it would not be appropriate to charge the United States with having reasonably anticipated all GATT-consistent measures. Consequently, we do not consider that Canada reasonably anticipated all GATT-consistent measures, or even possible measures justifiable under Article XX.
>
> (c) Finally, insofar as the Decree postdates the most recent tariff negotiations, we could apply the presumption applied by the Panel in *Japan – Film,* according to which normally Canada should not be considered to have anticipated a measure introduced after the tariff concession had been negotiated. However, we do not consider such a presumption to be consistent with the standard of proof that we found to be applicable in paragraph 8.272 above in the case of an allegation of non-violation nullification concerning measures falling under Article XX of the GATT 1994."[43]

26. After listing some of the elements which it considered should not be taken into account when determining the existence of legitimate expectations, the Panel in *EC – Asbestos* distinguished the case before it from that in *Japan – Film*:

> "Moreover, the circumstances of the present case seem to us to be different from the situation envisaged in *Japan – Film*. In that case, the measures in question concerned the organization of the Japanese domestic market. They were therefore economic measures of a kind that a third country might find surprising and, accordingly, difficult to anticipate. Here, it is a question of measures to protect public health under Article XX(b), that is to say, measures whose adoption is expressly envisaged by the GATT 1994. We therefore consider that the presumption applied in *Japan – Film* is not applicable to the present case."[44]

27. Following the finding referenced in paragraphs 25-26 above, in deciding that Canada had no legitimate expectations of maintaining or even developing its exports of certain asbestos products at the conclusion of the Uruguay Round, the Panel in *EC – Asbestos* noted that the increasing evidence showing the hazardous nature of asbestos and the growing number of international and Community decisions concerning the use of asbestos "could not do other than create a *climate* which should have led Canada to anticipate a change in the attitude of the

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[41] Panel Report, *Japan – Film*, paras. 10.76-10.77 and 10.79-10.80.

[42] *(footnote original)* In our opinion, there is a difference between, on the one hand, an import ban following upon a series of national measures gradually reinforcing, since 1977, the measures taken to protect public health against the effects of asbestos and, on the other, the relationship which the EC tried to establish in *EEC – Oilseeds* between the existence in 1962 of oil-seeds subsidies in certain member States of the European Communities and the development of a subsidy programme insulating oil-seed producers from competition from imports (see para. 149 of the panel report).

[43] Panel Report, *EC – Asbestos*, para. 8.291.

[44] Panel Report, *EC – Asbestos*, para. 8.291.

importing countries, especially in view of the long-established trend towards ever tighter restrictions on the use of asbestos":

> "As we have found … the presumption applied by the Panel in *Japan – Film* cannot be applied to the present case.[45] Unlike Canada, which claims that no recent scientific development could have made the measure foreseeable, we consider that there is evidence to show that regulations restricting the use of asbestos could have been anticipated. First of all, the hazardous nature of chrysotile has long been known.
>
> Moreover, in the light of the information submitted by the parties and the experts, we consider that the study of the diseases associated with the inhalation of asbestos is a field of science in which any possible conclusion would appear to be based on the observation of pathological cases day by day.
>
> On the other hand, the accumulation of international and Community decisions concerning the use of asbestos, even if it did not necessarily make it certain that the use of asbestos would be banned by France, could not do other than create a *climate* which should have led Canada to anticipate a change in the attitude of the importing countries, especially in view of the long-established trend towards ever tighter restrictions on the use of asbestos. We also note that the use of chrysotile asbestos was banned by Members of the WTO well before it was banned by France. Admittedly, in *Japan – Film* the Panel considered that the adoption in other Members' markets of measures similar to the measures in question could not make the latter foreseeable. However, here again it was a question of commercial measures. We consider that in the present case the situation is different since it concerns public health and the competent international organizations have already taken a position on the question. The adoption, in an already restrictive context, of public health measures by other States, faced with a social and economic situation similar to that in France, creates an environment in which the adoption of similar measures by France, is no longer unforeseeable.
>
> Moreover, as noted above, at the end of the Uruguay Round France already had in place a number of measures regulating the use of asbestos. These included, in particular, measures relating to the exposure of workers taken after asbestos was recognized as a carcinogen by the IARC (Decree 77-949 of 17 August 1977) and the adoption of ILO Convention 162, as well as for the purpose of implementing Community directives applicable. The Panel also notes that Decree 88-466 of 28 April 1988 on products containing asbestos had prohibited the use of chrysotile asbestos in the manufacture of certain products.[46]"[47]

28. The Panel in *Korea – Procurement*, referring to the finding of the Appellate Body in *EC – Computer Equipment*, discussed the relevance of negotiation history in addressing issues of reasonable or legitimate expectation in cases relating to non-violation:

> "At the outset of our analysis of this issue, we must address some relevant issues relating to use of negotiating history which arose in the *European Communities – Computer Equipment* dispute. In that dispute, the Appellate Body specifically found that the standard of reasonable expectation or legitimate expectation existing with respect to non-violation cases had no role in reviewing negotiating history in order to aid in resolving the issues pertaining to a violation case. One of the reasons is that in a non-violation case the relevant question is what was the reasonable expectation of the complaining party. However, if it is necessary to go beyond the text in a violation case, the relevant question is to assess the objective evidence of the mutual understanding of the negotiating parties.[48] This involves not just the complaining and

[45] *(footnote original)* Even if it were applicable, we consider that the EC rebutted this presumption by their references to the systems established at international and Community level concerning the use of asbestos.

[46] *(footnote original)* See Annex II, reply of the European Communities to the Panel's question No. 4 at the Second Meeting with the Parties, paras. 254 to 261.

[47] Panel Report, *EC – Asbestos*, paras. 8.295-8.298.

[48] *(footnote original)* Appellate Body Report on *EC – Computer Equipment* at paragraphs 81-84, 93.

> responding parties, but also involves possibly other parties to the negotiations. It is also important to note that there is a difference in perspectives of the reasonable expectations of one party as opposed to the mutual understanding of all the parties. The information available at the time of the negotiations may be available to some parties but not all. In other words, the evidence before the panel may be different in the two analyses and the weighting and probative value may also differ."[49]

1.3.9 "nullified or impaired"

29. In *Japan – Film*, the Panel examined the third element required for a claim of non-violation, i.e. "nullification and impairment". The Panel equated "nullification and impairment" with "upsetting the competitive relationship" between domestic and imported products and held that the complaining party "must show a clear correlation between the measures and the adverse effect on the relevant competitive relationships":

> "[I]t must be demonstrated that the competitive position of the imported products subject to and benefitting from a relevant market access (tariff) concession is being *upset by* ('nullified or impaired … as the result of') the application of a measure not reasonably anticipated. The equation of 'nullification or impairment' with 'upsetting the competitive relationship' established between domestic and imported products as a result of tariff concessions has been consistently used by GATT panels examining non-violation complaints. For example, the *EEC - Oilseeds* panel, in describing its findings, stated that it had 'found … that the subsidies concerned had impaired the tariff concession because they *upset the competitive relationship between domestic and imported oilseeds*, not because of any effect on trade flows'.[50] The same language was used in the *Australian Subsidy* and *Germany - Sardines* cases. Thus, in this case, it is up to the United States to prove that the governmental measures that it cites have upset the competitive relationship between domestic and imported photographic film and paper in Japan to the detriment of imports. In other words, the United States must show a clear correlation between the measures and the adverse effect on the relevant competitive relationships."[51]

30. The Panel in *Japan – Film* then sub-divided the issue of "causality" into four separate issues: the degree of causation, origin-neutrality of the measure at issue, the relevance of intent with respect to causality and "the extent to which measures may be considered collectively in an analysis of causation":

> "As to the first issue … Japan should be responsible for what is caused by measures attributable to the Japanese Government as opposed, for example, to what is caused by restrictive business conduct attributable to private economic actors. At this stage of the proceeding, the issue is whether such a measure has caused nullification or impairment, i.e., whether it has made more than a *de minimis* contribution to nullification or impairment.
>
> In respect of the second issue … even in the absence of *de jure* discrimination (measures which on their face discriminate as to origin), it may be possible for the United States to show *de facto* discrimination (measures which have a disparate impact on imports). However, in such circumstances, the complaining party is called upon to make a detailed showing of any claimed disproportionate impact on imports resulting from the origin-neutral measure. And, the burden of demonstrating such impact may be significantly more difficult where the relationship between the measure and the product is questionable.
>
> We note that WTO/GATT case law on the issue of *de facto* discrimination is reasonably well-developed, both in regard to the principle of most-favoured-nation treatment

[49] Panel Report, *Korea – Procurement*, para. 7.75.
[50] *(footnote original)* Follow-up on the GATT Panel Report on *EEC - Oilseeds*, BISD 39S/91, para. 77 (emphasis added).
[51] Panel Report, *Japan – Film*, para. 10.82.

> under GATT Article I[52] and in regard to that of national treatment under GATT Article II[53]…We consider that despite the fact that these past cases dealt with GATT provisions other than Article XXIII:1(b), the reasoning contained therein appears to be equally applicable in addressing the question of *de facto* discrimination with respect to claims of non-violation nullification or impairment, subject, of course, to the caveat, that in an Article XXIII:1(b) case the issue is not whether equality of competitive conditions exists but whether the relative conditions of competition which existed between domestic and foreign products as a consequence of the relevant tariff concessions have been upset.
>
> The third issue is the relevance of intent to causality… We note … that Article XXIII:1(b) does not require a proof of intent of nullification or impairment of benefits by a government adopting a measure. What matters for purposes of establishing causality is the impact of a measure, i.e. whether it upsets competitive relationships. Nonetheless, intent may not be irrelevant. In our view, if a measure that appears on its face to be origin-neutral in its effect on domestic and imported products is nevertheless shown to have been intended to restrict imports, we may be more inclined to find a causal relationship in specific cases, bearing in mind that intent is not determinative where it in fact exists.
>
> Finally, as for the US position that the Panel should examine the impact of the measures *in combination* as well as individually (a position contested by Japan), we do not reject the possibility of such an impact. It is not without logic that a measure, when analyzed in isolation, may have only very limited impact on competitive conditions in a market, but may have a more significant impact on such conditions when seen in the context of -- in combination with -- a larger set of measures. Notwithstanding the logic of this theoretical argument, however, we are sensitive to the fact that the technique of engaging in a combined assessment of measures so as to determine causation is subject to potential abuse and therefore must be approached with caution and circumscribed as necessary."[54]

31. In *EC – Asbestos*, Canada claimed that the French ban on the sale and imports of products containing asbestos nullified or impaired benefits accruing to it under Article XXIII:1(b). In this regard, the Panel stated:

> "[T]he Panel finds it appropriate to consider that in view of the type of measure in question the 'upsetting of the competitive relationship' can be assumed. By its very nature, an import ban constitutes a denial of any opportunity for competition, whatever the import volume that existed before the introduction of the ban. We will therefore concentrate on the question of whether the measure could reasonably have been anticipated by the Canadian Government at the time that it was negotiating the various tariff concessions covering the products concerned."[55]

1.3.10 Non-violation complaints in relation to the Agreement on Government Procurement

32. In *Korea – Procurement*, the Panel noted the three requirements enunciated by the Panel in *Japan – Film* as necessary for a claim of non-violation under Article XXIII:1(b). The Panel observed that the key difference between a traditional non-violation case and the case involving the *Agreement on Government Procurement* before it was that the question of "reasonable expectation" in a traditional non-violation case is whether or not it was reasonable to be expected that the benefit under an existing concession would be impaired by the measures, but in the instant case, the question was "whether or not there was a reasonable expectation of an

[52] *(footnote original)* See, e.g., Panel Report on *European Economic Community - Imports of Beef from Canada*, paras. 4.2, 4.3.
[53] *(footnote original)* See Panel Reports on *US – Section 337* para. 5.11; *Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies* paras. 5.12-5.14 and 5.30-5.31; *US - Malt Beverages*, para. 5.30; and Panel Reports on *US – Gasoline*, para. 6.10; *Japan - Alcoholic Beverages II*, para. 6.33; and *EC – Bananas III*, paras. 7.179-7.180.
[54] Panel Report, *Japan – Film*, paras. 10.83-10.88.
[55] Panel Report, *EC – Asbestos*, para. 8.289.

entitlement to a benefit that had accrued pursuant to the negotiation rather than pursuant to a concession". The Panel continued:

> "[T]he non-violation remedy as it has developed in GATT/WTO jurisprudence should not be viewed in isolation from general principles of customary international law. As noted above, the basic premise is that Members should not take actions, even those consistent with the letter of the treaty, which might serve to undermine the reasonable expectations of negotiating partners. This has traditionally arisen in the context of actions which might undermine the value of negotiated tariff concessions. In our view, this is a further development of the principle of *pacta sunt servanda* in the context of Article XXIII:1(b) of the GATT 1947 and disputes that arose thereunder, and subsequently in the WTO Agreements, particularly in Article 26 of the DSU. The principle of *pacta sunt servanda* is expressed in Article 26 of the *Vienna Convention*[56] in the following manner:
>
> > 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.'"[57]

33. The Panel in *Korea – Procurement* then addressed the issue of "error in treaty negotiation":

> "One of the issues that arises in this dispute is whether the concept of non-violation can arise in contexts other than the traditional approach represented by *pacta sunt servanda.* Can, for instance the question of error in treaty negotiation be addressed under Article 26 of the DSU and Article XXII:2 of the GPA? We see no reason why it cannot. Parties have an obligation to negotiate in good faith just as they must implement the treaty in good faith."[58]

34. The Panel in *Korea – Procurement* explained its decision to review the claim of nullification or impairment within the framework of principles of international law which are generally applicable not only to the performance of treaties but also to treaty negotiation as follows:

> "[W]e will review the claim of nullification or impairment raised by the United States within the framework of principles of international law which are generally applicable not only to performance of treaties but also to treaty negotiation.[59] To do otherwise potentially would leave a gap in the applicability of the law generally to WTO disputes and we see no evidence in the language of the WTO Agreements that such a gap was intended. If the non-violation remedy were deemed not to provide a relief for such problems as have arisen in the present case regarding good faith and error in the negotiation of GPA commitments (and one might add, in tariff and services commitments under other WTO Agreements), then nothing could be done about them within the framework of the WTO dispute settlement mechanism if general rules of customary international law on good faith and error in treaty negotiations were ruled not to be applicable. As was argued above, that would not be in conformity with the normal relationship between international law and treaty law or with the WTO Agreements."[60]

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[56] *(footnote original)* A reference to the rule of *pacta sunt servanda* also appears in the preamble to the Vienna Convention.

[57] Panel Report, *Korea – Procurement*, para. 7.93.

[58] Panel Report, *Korea – Procurement*, para. 7.100.

[59] *(footnote original)* We note that DSU Article 7.1 requires that the relevant covered agreement be cited in the request for a panel and reflected in the terms of reference of a panel. That is not a bar to a broader analysis of the type we are following here, for the GPA would be the referenced covered agreement and, in our view, we are merely fully examining the issue of non-violation raised by the United States. We are merely doing it within the broader context of customary international law rather than limiting it to the traditional analysis that accords with the extended concept of *pacta sunt servanda*. The purpose of the terms of reference is to properly identify the claims of the party and therefore the scope of a panel's review. We do not see any basis for arguing that the terms of reference are meant to *exclude* reference to the broader rules of customary international law in interpreting a claim properly before the Panel.

[60] Panel Report, *Korea – Procurement*, para. 7.101.

1.3.11 Relationship with other WTO Agreements

1.3.11.1 DSU

36. The Panel in *US – COOL (Article 21.5 – Canada and Mexico)* stated that Article 21.5 compliance panels may have jurisdiction to examine non-violation claims. The Panel explained that the "subject-matter" of the compliance proceedings under Article 21.5 of the DSU does not *a priori* preclude the complainants' claims under Article XXIII:1(b) of the GATT 1994:

> "The Appellate Body has clarified 'the appropriate subject-matter of Article 21.5 proceedings' by explaining that, '[a]s in original dispute settlement proceedings, the 'matter' in Article 21.5 proceedings consists of two elements: the specific measures at issue and the legal basis of the complaint (that is, the claims).' In their requests for the establishment of a compliance panel, the complainants identify the specific measure at issue, namely the amended COOL measure, and include claims under Article XXIII:1(b) of the GATT 1994. In turn, our terms of reference require us '[t]o examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB' in the complainants' requests for the establishment of a compliance panel. Accordingly, the 'subject-matter' of these compliance proceedings does not a priori preclude the complainants' claims under Article XXIII:1(b) of the GATT 1994.
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> …
>
> To the extent that 'conflict(s)' and 'violation' can be considered equivalents, we draw further support from Article 23.1 of the DSU, which provides that '[w]hen Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements … they shall have recourse to, and abide by, the rules and procedures of this Understanding.' Thus, as part of strengthening the multilateral system, WTO Members have envisaged that non-violation nullification or impairment is to be redressed through the DSU, without exclusion of any provisions therein."[61]

37. The Panel in *US – COOL (Article 21.5 – Canada and Mexico)* further added that excluding the examination of non-violation claims from the scope of Article 21.5 proceedings would undermine the imperative of "prompt compliance" as enshrined in Article 21 of the DSU:

> "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.
>
> In such a situation, a complainant would have to pursue both a compliance panel and an entirely new panel to adjudicate the violation and non-violation aspects of the same measure taken to comply. This seems incongruous with the objective of prompt dispute settlement enshrined in Article 3.3 of the DSU, which specifically refers to 'situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member'. It would also be at odds with the principle of '[p]rompt compliance with recommendations or rulings of the DSB' found in Article 21.1 of the DSU, and reflected in the design of Article 21.5 of the DSU, which prescribes an expeditious

[61] Panel Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 7.651.

> procedure including, wherever possible, resort to the original panel. In our view, such systemic considerations weigh strongly against excluding non-violation claims from the jurisdiction of compliance panels established under Article 21.5 of the DSU. Additionally, it seems to us that such a reading would lead to increased litigation costs for all Members involved in disputes and increased costs for the WTO."[62]

38. The Panel in *US – COOL (Article 21.5 – Canada and Mexico)*, in interpreting the term "benefit", drew parallels between Article XXIII:1(b) of the GATT 1994 and Article 26.1 of the DSU:

> "By protecting benefits that accrue 'directly or indirectly', both Article XXIII:1(b) of the GATT 1994 and Article 26.1 of the DSU suggest a possibly broad scope for the term 'benefit'. Further, both Articles refer to 'any' benefit. Given the dictionary definition of the word 'any', these provisions might apply 'no matter which, or what' particular benefit is at issue. This would not support narrowing the term 'benefit' to a specific manner of enjoyment or entitlement.
>
> …
>
> We decline to read Article XXIII:1(b) of the GATT 1994 and Article 26.1 of the DSU in a manner that would render inutile multilateral concessions and key obligations in the covered agreements and frustrate their enforceability. In light of the above, we conditionally conclude that the United States' relevant Uruguay Round multilateral concessions for cattle can be covered by the term 'benefit accruing' in the sense of Article XXIII:1(b) and Article 26.1 of the DSU."[63]

1.3.11.2 GATT 1994

39. The Panel in *US – COOL (Article 21.5 – Canada and Mexico)* clarified that "Articles III:4 and XXIII:1(b) of the GATT 1994 are distinguishable in respect of their standards of discrimination":

> "Whereas Article III:4 concerns the 'effective equality' of relative conditions of competition for like products of foreign and domestic origin, Article XXIII:1(b) calls for a temporal inquiry that compares 'the competitive relationship between foreign and domestic products at two specific points in time, i.e. when the concession was granted and currently'."[64]

1.3.11.3 TBT Agreement

40. The Panel in *US – COOL (Article 21.5 – Canada and Mexico)* pointed out that, although a measure that modifies the conditions of competition may be consistent with Article 2.1 of the TBT Agreement when stemming from a legitimate regulatory distinction, it may still cause nullification or impairment of a benefit under Article XXIII:1(b) of the GATT 1994:

> "First, our finding of violation under Article 2.1 of the TBT Agreement reflects the fact that Article 2.1 of the TBT Agreement does not prohibit all detrimental modifications of the conditions of competition, but only those that do not stem exclusively from a 'legitimate regulatory distinction'. Hence, a measure that modifies the conditions of competition pursuant to a legitimate regulatory distinction may be consistent with Article 2.1 of the TBT Agreement, while still causing nullification or impairment of a benefit under Article XXIII:1(b) of the GATT 1994. In such a case, compliance with findings of violation under Article 2.1 of the TBT Agreement would not necessarily remove the basis for nullification or impairment."[65]

[62] Panel Report, *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 7.661–7.662.
[63] Panel Report, *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 7.682 and 7.690.
[64] Panel Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 7.668.
[65] Panel Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 7.666.

1.3.11.4 Anti-Dumping Agreement

41. With respect to the relationship between Article XXIII of the GATT 1994 and Article 17 of the Anti-Dumping Agreement, see the Section on Article 17 of the Anti-Dumping Agreement.

1.4 Article XXIII:1(c)

42. See *GATT Analytical Index*, pages 668-671 and 689-90, and the Section on Article 26.2 in of the DSU.

1.5 Article XXIII:2

43. Regarding practice under Article XXIII:2 in general, see the Sections on Articles 4, 6.1, 11 and 22 of the DSU.

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