

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. 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. [FN188] (emphasis added)

187. Against this background, we turn now to the European Communities' argument that Article XXIII:1(b) does not apply to measures that fall within the scope of application of other provisions of the GATT 1994. 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. [FN189] Accordingly, we decline the European Communities' first ground of appeal under Article XXIII:1(b) of the GATT 1994.

188. The European Communities also contends that the Panel erred in finding that Article XXIII:1(b) applies to measures which pursue health, rather than commercial, objectives and which can, therefore, be justified under Article XX(b) of the GATT 1994. Once again, we 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).

*53 189. 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.

190. An important aspect of the European Communities' argument is that a Member cannot have reasonable expectations of continued market access for products which are shown to pose a serious risk to human life or health. However, the paragraphs of the Panel Report appealed by the European Communities involve exclusively the Panel's findings on the threshold issues of the scope of application of Article XXIII:1(b). This particular argument of the European Communities, important as it is, simply does not relate to those threshold issues. Rather, the European Communities' argument relates to the substance of a claim that has been determined to fall within the scope of application of Article XXIII:1(b) and, in particular,