

- a. the negotiation of a tariff concession;
- b. the subsequent introduction of a government measure that upsets the competitive relationship between the bound product with regard to like or directly competitive imported products; and
- c. the government measure could not have been reasonably anticipated at the time of the negotiation of the tariff concession.³⁹

75. All three conditions are satisfied in this case. First, the EC tariff rate for scallops (tariff items 0307.21 and 0307.29 in the EC tariff schedule) was bound at 8% in 1964 and 1973, and has not been altered since.

76. Second, the introduction of the Order, and its subsequent amendments, have upset the competitive relationship between Canadian and French scallops. As discussed above, there is ample evidence that the labelling regulation has and continues to upset the competitive relationship between Canadian and domestic imported scallops in the French market.

77. Third, at the time the tariff binding was negotiated, Canada could not have reasonably foreseen the introduction of the Order. At the time the tariff concession was negotiated, there was no indication that the French would take steps to undermine the value of that binding through the imposition of an unnecessary internal labelling requirement.

78. Therefore, benefits accruing to Canada under the WTO Agreement have been nullified or impaired.

79. Moreover, the Order impedes the attainment of the trade-liberalizing objectives of the WTO Agreement, the GATT and the TBT Agreement, contrary to GATT Article XXIII:1(b).⁴⁰

³⁹ *The Australian Subsidy on Ammonium Sulphate*, Report of the Working Party adopted on 3 April 1950, BISD II/188; *Treatment by Germany of Imported Sardines*, Report of the Panel adopted on 31 October 1952, BISD IS/53; and *European Community: Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, Report of the Panel adopted on 25 January, 1990, BISD 37S/86.

⁴⁰ Article 26.1 of the DSU provides that "[W]here the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable to a covered agreement, a panel ... 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 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." [Emphasis added] The provisions of GATT Article XXIII:1(b) are applicable to the WTO Agreement (as the GATT is an integral part of the WTO Agreement pursuant to Article 2.2 of the WTO