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της

Αντιγόνης Ηλία Ματθαίου

Αριθμός Μητρώου (Α.Μ.): 7340011917014

"Responses to nullification or impairment of benefits under WTO Law: Non-Violation complaints as a means of redress for measures permitted under the GATT 1994"

Επιβλέπων

Γουργουρίνης Αναστάσιος

Τριμελής Επιτροπή

Γουργουρίνης Αναστάσιος
Κυριακόπουλος Γεώργιος
Παζαρτζή Φωτεινή

Αθήνα, 30/11/2018

TABLE OF CONTENTS

I. INTRODUCING THE CONCEPT OF "NULLIFICATION OR IMPAIRMENT

The concept of nullification or impairment is an important feature of the Understanding on Rules and Procedures governing the Settlement of Disputes [DSU] of the World Trade Organization [WTO].[1] A WTO Member that claims another Member's failure to carry out its obligations under the 1994 General Agreement on Tariff and Trade [GATT 1994], must, pursuant to Article XXIII:1, argue that this failure to follow the law has led to the nullification or impairment of a benefit accruing to it under the GATT 1994. Moreover, even in the case where there has been no infringement of any of the WTO covered agreements,[2] as long as a Member demonstrates that either a measure or any other situation has resulted in such nullification or impairment of benefits is given a right to seek redress. In particular, Article XXIII:1 of the GATT 1994 reads as follows:

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,

[1] F. Roessler, 'The Concept of Nullification and Impairment in the Legal System of the World Trade Organization' in E.-U. Petersmann (ed.) *International Trade Law and the GATT/WTO Dispute Settlement System* (1997) 125.

[2] The Marrakesh Agreement Establishing the World Trade Organization (the WTO Agreement) consists of a short umbrella agreement of sixteen articles and numerous other agreements included in the annexes to this basic agreement; both the basic and the annexed agreement are referred to as covered agreement. There are four Annexes to the WTO Agreement which in turn contain both substantive and procedural rules. Most of the substantive WTO law is found in the agreements contained in Annex 1. This Annex consists of three parts. Annex 1A contains thirteen multilateral agreements on trade in goods; Annex IB contains the General Agreement on Trade in Services (the 'GATS'); and Annex 1C the Agreement on Trade- Related Aspects of Intellectual Property Rights (the 'TRIPS Agreement). The WTO dispute settlement system applies to all disputes brought under the WTO Agreements listed in Appendix 1 of the Dispute Settlement Understanding (DSU), which on its self in located on Annex 4 to the WTO Agreement.

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.

The introduction of a cause of action that does not presuppose the breach of a rule,[3] is inextricably linked with the multifaceted function of the WTO. The foundation and aim of the WTO system is to achieve a harmonization between the benefits of unilateral free trade and the interdependence of national economies, especially in the verge of globalization.[4] As such, the Organization is not only an arena ensuring the regulation of international trade with substantive multilateral rules; but also a forum tasked with guaranteeing the working of a versatile system, heavily dependent on its Member's voluntary and committed participation.[5] Yet, mindful of the different economic realities throughout the globe and the sovereign prerogative of States to determine their policy preferences, this attempted harmonization has been embedded by a liberal structure.[6] In specific, the WTO Agreement operates on the basis of a trade-off: on the one hand, WTO rules promote economic efficiency, while on the other hand, they give the leeway for *rampant* inefficiency by letting Members to pursue non-efficient trade and non-trade policies, through e.g. health regulations.[7] This construction has, as a result, often enabled Members to act in a manner contrary to free-trade and non-discriminatory competition.[8] In response, the Non-Violation nullification or impairment [NVNI] remedy

[3] A. Gourgourinis, *Equity and Equitable Principles in the World Trade Organization: Addressing Conflicts and Overlaps Between the WTO and Other Regimes* (Routledge, 2015) 126.

[4] M.J. Trebilcock & R. Howse, *The Regulation of International Trade* (Routledge, 2001), at p. 57; A.O. Sykes, 'Comparative Advantage and the Normative Economics of International Trade Policy' (1998) 1 *JIEL* 49, 49-57; D.-W. Kim, *Non-Violation Complaints in WTO Law: Theory and Practice* (Peter Lang, 2006) 29.

[5] T. Cottier & K.N. Schefer, 'Non-Violation Complaints in WTO/GATT Dispute Settlement: Past, Present and Future' in E.-U. Petersmann (ed.), *International Trade Law and the/WTO Dispute Settlement System* (Kluwer Law International, 1997) 146.

[6] E.A. Laing, Equal Access/Non-Discrimination and Legitimate Discrimination in International Economic Law (1996) 14 *Wis. Int'l. L.J.* 246, 263; J.H. Jackson, *Restructuring the GATT System* (The Royal Institute of International Affairs, 1990) 10-1; J.H. Jackson, *The Jurisprudence of the GATT and the WTO: Insights on Treaty Law and Economic Relations* (CUP 2000), pp. 408-410.

[7] D.-W. Kim, *Non-Violation Complaints in WTO Law: Theory and Practice*, (n5) 31; A.O. Sykes, 'Regulatory Protectionism and the Law of International Trade' (1999) 66 *University of Chicago Law Review* 1, pp. 13-15; J.H. Jackson, *World Trade and the Law of the GATT* (Bobbs-Merrill, 1969) 601.

[8] E.-U. Petersmann, 'The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System since 1948 (1994) 31 *Common Market Law Review* 1157, 1160.

in Article XXIII:1(b) of the GATT 1994, known as "*GATT's equity concept*",[9] requires WTO members to observe not only the agreed WTO rules, but also the underlying *ratio* of the treaty regime.[10] For this reason, the NVNI remedy is often described as a "*balancing mechanism*" set out to preserve the longevity of the entire system.[11]

Despite their unusual character making them "*one of the most intriguing aspects of WTO jurisprudence*",[12] NVNI complaints are not a unique concept.[13] Rather, their origins are traced back to the 1920's and their textual evolution has undergone many stages before reaching its final form under Article XXIII:1(b) of the GATT 1994.[14]

First, the NVNI concept emerged as a tool against the proliferation of government policies affecting international trading relations during the 1920's. In that respect, the League of Nations, in an attempt to combat "*indirect protectionism*" during the London Monetary Conference in 1933, proposed the "Equitable Treatment Draft", whose final clause read:

> "*If subsequent to the conclusion of the treaty, one of the Contracting Parties introduces any measure, which even though it does not result in an infringement of terms of the treaty, is considered by the other Party to be of such a nature as to have the effect of nullifying or impairing any object of the treaty, the former shall not refuse to enter into negotiations with the*

[9] R.E. Hudec, 'A Statistical profile of GATT Dispute Settlement Cases: 1949-1989' (1993) 2 *Minn. Journal of Global Trade* 1 6; E.-U. Petersmann, 'Violation Complaints and Non-Violation Complaints in Public International Trade Law' (1991) 34 *German Y.B. Int.'l L.* 175 225; T. Cottier & K.N. Schefer, 'Non-Violation Complaints in WTO/GATT Dispute Settlement: Past, Present and Future' (n9) 48; A. Gourgourinis, *Equity and Equitable Principles in the World Trade Organization: Addressing Conflicts and Overlaps Between the WTO and Other Regime* (n3) 126.

[10] J.P. Durling & S.N. Lester, 'Original Meanings and the Film Dispute: The Drafting History, Textual Evolution, and Application of the Non-Violation Nullification or Impairment Remedy' (1999) 32 *George Washington J. of Int'l L. and Economics* 2, pp. 258–260; E.-U. Petersmann, 'Violation and Non-Violation Complaints in Public International Trade Law' (n9) , pp. 222–224; A. von Bogdandy, 'The Non-Violation Procedure of Article XXIII:2 of GATT: Its Operational Rationale', 26(4) *Journal of World Trade* 95 110.

[11] D.-W. Kim, *Non-violation Complaints in WTO Law: Theory and Practice* (n5) 11-13; T. Cottier & K.N. Schefer, 'Non-Violation Complaints in WTO/GATT Dispute Settlement: Past, Present and Future' (n9) 146.

[12] J.P. Durling & S.N. Lester, 'Original Meanings and the Film Dispute: The Drafting History, Textual Evolution, and Application of the Non-Violation Nullification or Impairment Remedy' (n10) 212.

[13] T. Cottier & K.N. Schefer, 'Non-Violation Complaints in WTO/GATT Dispute Settlement: Past, Present and Future' (n9) 149.

[14] D.-W. Kim, *Non-violation Complaints in WTO Law: Theory and Practice* (n5) 20; J.P. Durling & S.N. Lester, 'Original Meanings and the Film Dispute: The Drafting History, Textual Evolution, and Application of the Non-Violation Nullification or Impairment Remedy' (n10) 218.

purpose either of an examination of proposals made by the latter or of the friendly adjustment of any complaint preferred by it".[15]

Following the recommendations of the League of Nations many states inserted an equitable treatment clause into their bilateral trade agreements.[16] Notably, the United States during the period between 1935 and 1940 negotiated multiple reciprocal trade agreements with European and Central and South American States, which provided for a NVNI remedy.[17] Indicatively, the Reciprocal Trade Agreement between the US and the Honduras, which is no longer in force, stipulated in Article XIV that in case one of the parties "*adopts any measure which, even though it does not conflict with the terms of this Agreement*" and insofar as this measures "*is considered by the Government of the other country to have the effect of nullifying or impairing any object of the Agreement*", the party that adopted such measure shall considered the proposal of the affected party for a "*mutually satisfactory adjustment of the matter*".[18] Similarly, many European States included during that time such equitable clauses to their trade agreements.[19]

This bilateral treaty practice predated the Havana Subcommittee Negotiations for the International Trade Organization [ITO] Charter [Havana Charter].[20] During these multilateral negotiations which lasted from 1946 to 1948, the United States lobbied for the expansion of equitable clauses to the dispute settlement provisions of the Havana Charter.[21] Ultimately, Article 93.1 of the proposed Charter was formulated as follows:

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[15] Draft Report Prepared by the Drafting Committee Appointed to Combine in a Dingle Text the Various Drafts Submitted for the Equitable Treatment Clause and other Questions of indirect protectionism, League of Nations Doc. Conf. M.E./C.E.86 (1993) [Equitable Treatment Draft]; Suggestion Submitted by the Delegate of USA. Concerning DOC. M.E./C.E.86, League of Nations Doc. M.E./C.E./86 (1933).

[16] Negotiating Group on Dispute Settlement, 'Non-Violation Complaints Under GATT Article XXIII:1' Note by the Secretariat MTN.GNG/NG13/W/31 (14 July 1989) 3.

[17] T. Cottier & K.N. Schefer, 'Non-Violation Complaints in WTO/GATT Dispute Settlement: Past, Present and Future' (n9) 149; R.E. Hudec, 'Thinking about the New Section 301: Beyond Good and Evil' in J. Bhagwati & H.T. Patrick (eds.) *Aggressive Unilateralism: America's 301 Trade Policy and the World Trading System* (University Michigan Press, 1990) 25.

[18] Reciprocal Trade Agreement, US – Honduras, Article XIV, 49 Stat. 3851, 3863 (entered into force on 2 March 1936; terminated 28 February 1961).

[19] E.-U. Petersmann, 'Violation Complaints and Non-Violation Complaints in Public International Trade Law' (n9) 197.

[20] D.-W. Kim, *Non-violation Complaints in WTO Law: Theory and Practice* (n5) 22.

[21] T. Cottier & K.N. Schefer, 'Non-Violation Complaints in WTO/GATT Dispute Settlement: Past, Present and Future' (n9) 152.

1. If any Member considers that any benefit accruing to it directly or indirectly, implicitly or explicitly, under any of the provisions of this Charter other than Article 1, is being nullified or impaired as a result of

a) a breach by a Member of an obligation under this Charter by action or failure to act, or

b) the application by a Member of a measure not conflicting with the provisions of this Charter, or

c) the existence of any other situation

the Member may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to such other Member or Members as it considers to be concerned, and the Members receiving them shall give sympathetic consideration thereto.[22]

Although the Havana Charter never came into effect, the dispute settlement provisions negotiated thereunder were incorporated into the GATT 1947, with only minor alterations, and later retained in the WTO Agreement, [23] mainly as part of the GATT 1994, the General Agreement on Trade in Services (GATS)[24] and the Agreement on Trade-Related Aspects of International Property Rights (TRIPS).[25]

However, most commentators consider that NVNI complaints made sense in the first half of the twentieth century, when international trade agreements were of a limited scope, mostly focusing of the reduction of tariffs and the elimination of quantitative

[22] Havana Charter for an International Trade Organization (Havana Charter, ITO Charter 1948) (United Nations [UN]) UN Doc E/CONF.2/78.

[23] T. Cottier & K.N. Schefer, 'Non-Violation Complaints in WTO/GATT Dispute Settlement: Past, Present and Future' (n9) 153; E.-U. Petersmann, 'Violation Complaints and Non-Violation Complaints in Public International Trade Law' (n9) , 199-200; .P. Durling & S.N. Lester, 'Original Meanings and the Film Dispute: The Drafting History, Textual Evolution, and Application of the Non-Violation Nullification or Impairment Remedy' (n10) 239.

[24] A. Al- Kashif, 'GATS's Non-Violation Complaint: Its Element and Scope Comparing to GATT 1994' in K. Alexander & M. Andenas (eds.) *The World Trade Organization and Trade in Services* (Martinus Nijhoff, 2008), pp. 509–558; L.S. Klaiman, 'Applying th GATT Dispute Settlement Procedures to a Trade in Services Agreement: Proceed with Cautions' (1990) 11 *UPenn Journal of International Journal of Business Law* 657, 659.

[25] F.M. Abbott, 'WTO Dispute Settlement WTO Dispute Settlement and the Agreement on Trade-Related Aspects of Intellectual Property Rights' in E.-U. Petersmann (ed.) *International Trade Law and the GATT/WTO Dispute Settlement System* (Kluwer Law International, 1997), pp. 387-409; F.M. Abbott, Report: TRIPS in Seattle: The Not-So-Surprising Failure and the Future of the TRIPS Agenda (2000) 18 *Berkeley J. of Int'l L.* 165, 172.

restrictions.[26] Indeed, at the time there was a gap when it came to a wide array of trade-distorting domestic measures, like subsidies, taxes, technical regulations, voluntary export restraints.[27] This gap taken together with the then prevailing positivist school of legal thought, posed the risk of circumvention of the objectives of the liberal trade rules.[28] However, with the adoption of the GATT 1947 and the gradual expansion of the subject-matter of the GATT/WTO rules through the successive rounds of negotiations, the usefulness of the NVNI remedy has been viewed as deprived of its practical significance.[29]

Along the same lines, GATT and WTO jurisprudence also demonstrate that WTO Members have been reluctant to bring claims under Article XXIII:1(d), while GATT and WTO Panels have been reluctant to accept them.[30] During the GATT era, there were eleven cases in which NVNI claims have been substantively analyzed by the Working Parties and GATT Panels.[31] Out of those only three yielded a positive finding of

[26] T. Cottier & K.N. Schefer, 'Non-Violation Complaints in WTO/GATT Dispute Settlement: Past, Present and Future' (n9) 147; S.-J. Cho, 'GATT Non-Violation Issues in the WTO Framework: Are They the Achilles' Heel of the Dispute Settlement Process?' (1998) 39 *Harvard Int. L. J.* 31, 313; R.E. Hudec, 'GATT Dispute Settlement after the Tokyo Round: An Unfinished Business' (1980) 13 *Cornell Int'l L. J.* 145 167; D.-W. Kim, *Non-Violation Complaints in WTO Law: Theory and Practice* (n5) 145; F. Roessler, 'The Concept of Nullification and Impairment in the Legal System of the World Trade Organization' (n1) 134.

[27] F. Roessler, 'The Concept of Nullification and Impairment in the Legal System of the World Trade Organization' (n1) 132.

[28] T. Cottier & K.N. Schefer, 'Non-Violation Complaints in WTO/GATT Dispute Settlement: Past, Present and Future' (n9) 164; C.R. Rossi, *Equity and International Law: A Legal Realist Approach to International Decisionmaking* (Brill-Nijhoff, 1993), p 13; *The Case of the S. S. Lotus* (France v. Turkey), Merits, 3 PCIJ Rep, Series A, No. 10 (7 Sep.1927) 18-19.

[29] F. Roessler, 'The Concept of Nullification and Impairment in the Legal System of the World Trade Organization' (n1) p 134; D.-W. Kim, *Non-Violation Complaints in WTO Law: Theory and Practice* (n5) 145.

[30] C. Larouer, 'WTO Non-Violation Complaitns: A Misunderstood Remedy in the WTO Dispute Settlement System' (2006) 53 *NILR* 197, pp. 110-111

[31] Working Party Report, *The Australian Subsidy on Ammonium Sulphate* [hereinafter *Australia – Subsidy*], BISD II/188, adopted 3 April 1950; GATT Panel Report, *Treatment of Germany Imports of Sardines* [hereinafter *Germany – Sardines*], BISD IS/53, adopted 31 October 1952; GATT Panel Report, *Uruguayan Recourse to Article XXIII*, adopted 16 November 1962, L/1923, BISD 11S/95; GATT Panel Report, *Spain – Measures Concerning Domestic Sale of Soyabean Oil* [hereinafter *Spain – Soyabean Oil*], circulated 17 June 1981 (unadopted); GATT Panel Report, *European Community – Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region* [hereinafter *EC – Citrus*], L/5776, circulated 7 February 1985 (unadopted); GATT Panel Report, *European Economic Community – Production Aids Granted on Canned Peached, Canned Pears, Canned Fruit Cocktail and Dried Grapes* [hereinafter *EEC – Canned Fruit*]; L/5778, circulated 20 February 1895 (unadopted); GATT Panel Report, *Japan – Trade in Semi-Conductors* [hereinafter *Japan – Semi-Conductors*], L/6309, 35S/116 adopted 4 May 1988, paras. 154-155; GATT Panel Report, *United States – Trade Measures Affecting Nicaragua* [hereinafter *US – Nicaragua Trade*], L/6053, circulated 13 October 1986 (unadopted); GATT Panel Report, *European Economic Community – Payments and Subsidies paid to Processors and Products of Oilseeds and Related-Animal Feed Proteins* [hereinafter *EEC – Oilseeds*], L/6627, BISD 37S/86, adopted January 1990; GATT Panel Report, *United States – Restrictions on the Importation of Sugar and Sugar-Containing Products*

nullification or impairment and were actually adopted.[32] Moreover, twenty-five years after the establishment of the WTO, the list of cases that have dealt substantively with NVNI complaints is even narrower, containing three cases under Article XXIII:1(b) of the GATT 1994,[33] one case under Article 5.1(b) of the Agreement on Subsidies and Countervailing Duties [SCM],[34] one case under the WTO plurilateral Agreement on Government Procurement[35] and one case under Article 64 of the TRIPS.[36]

This paper aims to challenge the widespread belief that NVNI complaints have become redundant. It intends to serve as a remembrance that constellations calling for the right of WTO Members to have redress even in cases where no violation occurs, are not going to disappear.[37] For as per the exact words of Professors Cottier and Schefer "*no law is so comprehensive as to remove all possibility of evasion of its principles*".[38] In this lights, the paper will focus on one of the most interesting aspects of NVNI complaints, namely their operation against measures, the *prima facie* WTO-inconsistency of which has been justified though the application of one of the WTO exceptions.[39] In fact, cases involving this kind of circumstances have been the subject to GATT and WTO dispute

Applied under the 1955 Waiver and under the Headnote to the Schedule of Tariff Concessions [hereinafter *US – Sugar Waiver*]; L/6631, BISD 37S/228, adopted 7 November 1990; GATT Panel Report, European Economic Community – *Follow-up on the Panel Report, Payments and Subsidies Paid to Processors and Products of Oilseeds and Related Animal-Feed Proteins* [hereinafter *EEC – Oilseeds II*], L/6627, BISD 37S/86, adopted 25 January 1990.

[32] Working Party Report, *Australian – Ammonium Sulphate*, ibid; GATT Panel Report, *Germany – Sardines*, ibid; GATT Panel Report, *EEC – Oilseeds*, ibid.

[33] Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper* [hereinafter *Japan – Film*], WT/DS44/R, adopted 22 April 1998, DSR 1998: IV, 1179; Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* [hereinafter *EC – Asbestos*], WT/DS135/AB/R, adopted 5 April 2001, DSR 2001: VII, 3243 Panel Report, *EC – Asbestos*, WT/DS135/R and Add. 1, adopted 5 April 2001, as modified by Appellate Body Report WT/DS135/AB/R, DSR 2001: VIII, 3305; Panel Report, *United States – Certain Country of Origin Labelling (COOL) Requirements Recourse to Article 21.5 of the DSU by Mexico and Canada* [hereinafter *US – COOL (Article 21.5 – Mexico and Canada*], WT/DS384,386/RW, circulated 20 October 2014.

[34] Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000* [hereinafter *US – Offset Act*], WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, DSR 2003: I, 375.

[35] Panel Report, *Korea – Measures Affecting Government Procurement* [hereinafter *Korea – Procurement*], WT/DS163/R, adopted 19 June 2000.

[36] Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* [hereinafter *India – Patents*], WT/DS50/AB/R, adopted 16 January 1998, DSR 1998: I, 9; Panel Report, India – Patents, WT/DS50/R, adopted 16 January 1998, as modified by Appellate Body Report WT/DS50/AB/R, DSR 1998: I, 41.

[37] R.W. Staiger & A.O. Sykes, 'Non-Violations' (2013) 16 *JIEL* 741, 762-763.

[38] T. Cottier & K.N. Schefer, 'Non-Violation Complaints in WTO/GATT Dispute Settlement: Past, Present and Future' (n9) 158.

[39] like Article XX or XXI of the GATT 1994.

settlement four times since 1947.[40] The main issue underlying these disputes was whether the right of WTO Members to pursue legitimate policy objectives could be restricted by the NVNI remedy.[41]

With this in mind, the present author takes issue with recent developments in the field of international trade that touch upon the operation of NVNI complaints against WTO-justified policy measures. On March 2018, the United States imposed additional tariffs pursuant to Section 232 of Trade Expansion Act of 1962 to certain aluminum and steel imports from various countries, allegedly, on the basis of national security concerns.[42] As of November 2018, the WTO Dispute Settlement Body agreed to entertain the request of seven affected states, namely, the EU, China, Canada, Mexico, Norway, Russia and Turkey for the establishment of panels to examine the US measures. The US is expected to employ the highly self-judging National Security Exception of Art. XXI GATT. As such, it is possible that the US might after all be able to justify their discriminatory tariffs. Even though no NVNI complaint made its way to the stage of the establishment of the panels, Mexico did include in its request for consultations the provision of Article XXIII:1(b) as one of the legal bases of its complaint.[43]

It is this author contention that NVNI complaints have notable usefulness in cases when the WTO dispute settlement system is faced with measures, allegedly, pursuing some legitimate policy objective, and especially under the so-called "*self-judging*" national security exception.[44] For, even though the policy space of WTO Members to adopt regulatory measures must be preserved, the harm inflicted on other Members' trade needs to be offset with some kind of redress. As the AB noted in *China – Publications*, even though "*the right to regulate qualifies as an inherent power enjoyed by a Member's*

[40] GATT Panel Report, *EEC – Canned Fruit* (n31) ; GATT Panel Report, *EEC – Citrus* (n31); GATT Panel Report, *US – Nicaragua Trade* (n31); Panel Report, *EC – Asbestos* (n31); Appellate Body Report, *EC – Asbestos* (n31).

[41] R.W. Staiger & A.O. Sykes, 'Non-Violations' (n38) 758.

[42] C.P. Bown, Trump's Long-awaited Steel and Aluminum Tariffs Are Just the Beginning (Peterson Institute For International Economics, 26 March 2018) <https://piie.com/blogs/trade-investment-policy-watch/trumps-long-awaited-steel-and-aluminum-tariffs-are-just> accessed 27 November 2018.

[43] Request for Consultations by Mexico, *United States – Certain Measures on Steel and Aluminium Products*, WT/DS551/1, G/L/1246, G/SG/D56/1, circulated 7 June 2018 3.

[44] P. Van Den Bossche & W. Zdouc, *The law and policy of the World Trade Organisation* (CUP, 2013), pp. 595-599; H.P. Hestermeyer, 'Article XXI Security Exeptions' in R. Wolfrum *et al* (eds.) *WTO – Trade in Goods* (Martinus Nijhoff, 2011) 569; R. P. Alford, 'The Self-Judging WTO Security Exception' (2011) 3 *Utah L. Rev.* 697 698; V. Pogoretskyy, *Freedom of Transit and Access to Gas Pipeline Networks under WTO Law* (CUP, 2018) 181.

government […] *the WTO Agreement* […] *operate*[s] *to, among other things, discipline the exercise of each Member's inherent power to regulate*".[45]

With this in mind, the present master thesis will focus on the operation of Article XXIII:1(b) of the GATT 1994 as a means of redress from measures permitted under the GATT 1994. Section II, will analytically present GATT and WTO jurisprudence addressing the interpretation and application of Article XXIII:1(b), in terms of the requirements that a Complainant must meet for making a cognizable NVNI claim under Article XXIII:1(b), the applicable burden and standard of proof, as well as, the available remedies in case of a finding of nullification or impairment. Then, Section III, will move on to examine the operation of NVNI complaints in cases where the measure at issue has been justified under one of the exceptions contained in the GATT 1994. To this end, it will briefly present the exceptions provided for under the General Agreement and then, it will focus on GATT and WTO practice touching upon the issue at stake.

Conclusively, the present thesis excludes from its scope the operation of NVNI complaints under the GATS, the TRIPS or the other WTO covered agreements, since the jurisprudence in this area is extremely scarce and recourse by Members has been limited.

II. THE OPERATION OF NVNI COMPLAINTS IN THE GATT 1994

This Section aims to comprehensively explore how Article XXIII:1(b) has been interpreted and applied both in GATT and WTO panel practice. For this reason, we will analyse *first*, the requirements prescribed by the Article XXIII:1(b) for NVNI complaints (**A**); *second*, the burden and the standard of proof required for NVNI complaints (**B**); and, *third*, the remedies available for NVNI complaints (**C**).

A. The requirements prescribed by Article XXIII:1(b) of the GATT 1994

Article XXIII:1(b) of the GAT 1994 stipulates that a WTO Member have a cause of action to challenge the "*application by any other contracting party of any measure whether or not it conflicts with the provisions of this Agreement*" if it "*considers that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired* […] *as a result of*" the application of the measure in question. This provision has been interpreted as establishing three elements that a complaining party must demonstrate in order to make out a cognizable claim under Article XXIII:1(b) of the

[45] Appellate Body Report, *China – Measure Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* [hereinafter *China – Publications*], WT/DS363/AB/R, DSR 2010: II 261 222.

GATT 1994: the application of a measure by a WTO Member **(1)**; a benefit accruing under the relevant agreement, and for the purposes of the present thesis, under the GATT 1994 **(2)**; and nullification or impairment of the benefit as a result of the application of the measure at hand**(3).**[46]

1. The application of a measure by a WTO Member

According to Article XXIII:1(b) of the GATT 1994, it takes for the application of "*any measure*" by a WTO Member, that nullifies or impairs the benefits accrued under the WTO Agreement to another Member, for the possibility of recourse to a NVNI complaint to sprung.[47] The notion of a "measure" connotes a sequence of concrete actions, which have to be taken by the government of a WTO Member, since "*the WTO Agreement is an international agreement, in respect of which only national governments and separate customs territories are directly subject to obligations*".[48]

The interpretation of the term "*measur*e", as conducted by the Panel in *Japan – Film*, pursuant to Article 31(1) of the VCLT and Article 3.2 of the DSU,[49] departs from the term's ordinary meaning:

> "*The ordinary meaning of measure as it is used in Article XXIII:1(b) certainly encompasses a law or regulation enacted by a government. But in our view, it is broader than that and includes other governmental actions short of legally enforceable enactments.*[1513] *At the same time, it is also true that not every utterance by a government official or study prepared by a non-governmental body at the request of the government or with some degree of*

[46] Panel Report, *Japan –Film*, (n33) [10.41]; Panel Report, *Korea – Procurement*, (n35) [7.098-7.111]; Appellate Body Report, *EC – Asbestos*, (n33) [186-187]; Panel Report, *United States – Offset Act*, (n34) , [7.120-7.123, 7.124-7.125].

[47] Panel Report, *Japan – Film*, (n33) [10.52].

[48] Panel Report, *Japan – Film*, (n33), paras. 10.43, 10.52; D.W. Kim, Non-violation Complaints in WTO Law, (n5) 116; J.P. Durling & S.N. Lester, 'Original Meanings and the Film Dispute: The Drafting History, Textual Evolution, and Application of the Non-Violation Nullification or Impairment Remedy', (n10), 241.

[49] VCLT Art.31,.1(a); DSU Art.3.2; Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts* [hereinafter *EC – Chicken Cuts*], WT/DS269/ AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr. 1, DSR 2005: XIX, 9157 175; Appellate Body Report, *US – Offset Act* (n34) 248; Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* [hereinafter *US – Gambling*], WT/ DS285/AB/R, adopted 20 April 2005, DSR 2005: XII, 5663 (Corr. 1, DSR 2006: XII, 5475) 166; O. Dörr, 'Article 31: General Rule of Interpretation', in O. Dorr & K. Schmalenbach (eds.) *Vienna Convention on the Law of Treates: A Commenary* (2nd ed., Springer, 2018) 581; I. van Damme, *Treaty Interpretation by the WTO Appellate Body* (OUP, 2009) 75.

government support can be viewed as a measure of a Member government."[50]

Particularly, in the *Japan – Film* dispute, the United States claimed that various laws, regulations, as well as, industrial policies implemented by Japan through "*other less formal or concrete forms of governmental action, such as general policy statements by government agencies and officials*" nullified or impaired its expectations of enhanced market access benefits regarding different types of photographic film and paper.[51] The main issue was whether the fact that the government of Japan acted through the provisions of administrative guidance was enough to qualify as "*any measure*" under Article XXIII:1(b) of the GATT 1994, or whether official legislative acts were necessary.[52]

The Panel found that the administrative guidance provided by Japan to private businesses, even though not being mandatory, fell under the scope of application of Article XXIII:1(b). Even though the company receiving the guidance was not legally bound to act in accordance with it, the company was expected to comply. Expected compliance was assessed on the basis of the power enjoyed by the government, the operation of a diverse system of government incentives or disincentives and the Japanese government's overall involvement in the economy. Thus, the administrative guidance provided by Japan to private companies, be it "*financial, non-financial, direct or indirect*" was found to have effects similar to that of binding measures.[53]

Even though, in GATT Panel practice most of the cases concerning NVNI complaints dealt with domestic subsidies,[54] the *Japan – Film* finding is supported by two GATT cases, namely by the reports of the GATT Panels in *Japan – Semi Conductors* and

[50] Panel Report, *Japan – Film* (n33) [10.43].

[51] Panel Report, *Japan – Film* (n33) [10.41]; W. H. Barringer, 'Competition Policy and Cross Border Dispute Resolution: Lessons Learned from the U.S.-Japan Film Dispute' (1998) 6 *Geo. Mason L. Rev.* 459 472; N. Komuro, 'Kodak – Fuji Film Dispute and the WTO Panel Ruling' (1998) 32(5) *Journal of World Trade* 161, 162.

[52] Panel Report, *Japan – Film* (n33) [10.44]; D-W. Kim, *Non-violations complaints in WTO Law: Theory and Practice* (n5) 118; J.P. Durling & S.N. Lester, 'Original Meanings and the Film Dispute: The Drafting History, Textual Evolution, and Application of the Non-Violation Nullification or Impairment Remedy', (n10) 261.

[53] Panel Report, *Japan – Film* (n33) [10.45, 10.47-10.51]; N. Komuro, 'Kodak – Fuji Film Dispute and the WTO Panel Ruling' (n54) 190; J. Goldman, 'Bad Lawyering or Ulterior Motive – Why the United States Lost the Film Case before the WTO Dispute Settlement Panel' (1999) 30 *Law & Pol'y Int'l Bus.* 417 427.

[54] GATT Working Party Report, *Australia – Ammonium Sulphate* (n31) [5-6]; GATT Panel Report, *EEC – Canned Fruit* (n31) [14]; GATT Panel Report, *EEC – Oilseeds* (n31) [36].

in *Japan – Agricultural Products*.[55] The GATT Panels in that instances took a broad view on the scope of the measures falling under Article XXIII:1(b) of the GATT 1994. They focused as well on the substance of the Japanese measures in question, instead of fixating on their legal status.[56] Furthermore, the AB in *EC-Asbestos* endorsed a broad and all-encompassing interpretation of the term "*measure*" that places "*measures of all types*" within the scope of application of Article XXIII:1(b) of the GATT 1994.[57]

2. A benefit accruing under the GATT 1994

The second pillar of the legal test for the determination of the application of Article XXIII:1(b) of the General Agreement concerns the existence of a benefit. GATT and WTO Panel practice have focused on two elements when examining this requirement: *first*, the nature of the benefit; and *second*, whether there is a legitimate expectation of a benefit. Notably, GATT and WTO panels have adopted divergent interpretations towards the term "*benefit*" of Article XXIII:1(b).[58] On the one hand, their majority has endorsed a restrictive reading of the term. Under that approach, an Article XXIII:1(b) benefit is a market access advantage arising from Article II of the General Agreement and specific tariff concessions; while the determination of a legitimate expectation of that benefit is linked to a strict standard of non-foreseeability of the challenged measure.[59] On the other hand, part of the caselaw suggests a broader interpretation of the term, in respect of the

[55] GATT Panel Report, *Japan –Semi-Conductors*, (n31) [154-155]; GATT Panel Report, *Japan – Restrictions on Imports of Certain Agricultural Products* [hereinafter *Japan – Agricultural Products*], L/6253, 7S/607, adopted 23 October 1958 [242].

[56] GATT Panel Report, *Japan – Semi-Conductors*, ibid; GATT Panel Report, *Japan – Agricultural Products*, ibid; D.-W. Kim, *Non-violation Complaints in WTO Law: Theory and Practice*, (n5) 118.

[57] Appellate Body Report, *EC – Asbestos*, (n33) [188].

[58] D.-W. Kim, *Non-Violation Complaints in WTO Law: Theory and Practice*, (n5) 145; E.-U. Petersmann, 'The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System since 1948' (n8) 1230; T. Cottier & K.N. Schefer, 'Non-Violation Complaints in WTO/GATT Dispute Settlement: Past, Present and Future' (n9) 160.

[59] R.E. Hudec, 'A Statistical profile of GATT Dispute Settlement Cases: 1949-1989' (n9) 7; J.H. Jackson *et al, Legal Problems of International Economic Relations: Cases, Materials and Text* (West Group, 1995) 363-64; S.-J. Cho, 'GATT Non-Violation Issues in the WTO Framework: Are They the Achilles' Heel of the Dispute Settlement Process?' (n26) 328; T. Cottier & K.N. Schefer, 'Non-Violation Complaints in WTO/GATT Dispute Settlement: Past, Present and Future' (n9) 181-182; E.-U. Petersmann, 'The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System since 1948' (n8) 1188; F. Roessler, 'Should Principles of Competition Policy Be Incorporated into WTO Law Through Non-Violation Complaints?' (1999) 2 *JIEL* 413, 418; A. Chua, 'Reasonable Expectations and Non-Violation Complaints in GATT/WTO Jurisprudence' (1998) 32 *Journal of World Trade* 2, 15; D.-W. Kim, *Non-Violation Complaints in WTO Law: Theory and Practice*, (n5) 125.

nature of the benefits falling under the provision, by including also market access benefits arising from general GATT rights and obligations.[60]

Accordingly, this part will *first* address the issue of the nature of benefits falling under the protective ambit of Article XXIII:1(b) of the General Agreement **(a)**. Next, it will delve into the requirement that the benefit in question must be legitimately expected by the complaining WTO Member **(b)**. Finally, having analyzed the different approaches adopted by GATT and WTO Panels, this section will present the reasons warranting for a narrow interpretative approach **(c)**.

a. <u>The nature of the "*benefit*"</u>

Pursuant to the Article XXIII:1(b) of the GATT 1994, WTO Members have a cause of action to complaint about the nullification or impairment of "*any benefit*" accruing to them, either directly or indirectly, under the GATT 1994. The idea of "*benefit*" appears textually broad.[61] The ordinary meaning of the term "*benefit*" is that of "*advantage*".[62] This open-ended textual choice raises the concerns of uncertainty regarding the applicable scope of NVNI complaints.[63]

Early GATT jurisprudence suggests that what is meant to be protected from nullification or impairment is only tariff and thus market access benefits.[64] Indeed,

[60] D.-W. Kim, *Non-Violation Complaints in WTO Law: Theory and Practice*, (n5) 150; J. Linarelli, 'The Role of Dispute Settlement in World Trade Law: Some Lessons from the Kodak-Fuji Dispute' (2000) 31 *Law and Policy in Int. Bus.* 2, 35; T.M. Abels, 'The World Trade Organization's First Test: The United States-Japan Auto Dispute' (1996) 44 *UCLA Law Review* 467, 526; D.A. Daul, 'A Picture worth more than a Thousand Words: A Unique Cause of Action at the World Trade Organization to Enforce American Trade Eights against Japan' (1995) 17 *Hamline Journal of Public Law and Policy* 121, 148-150; A. von Bogdandy, 'The Non-Violation Procedure of Article XXIII:2' (n10), 98-99; Bagwell et al, 2002 A. Hindley, 'Competition Law and the WTO: Alternative Structures for Agreement' in J. Bhagwati & R.E. Hudec (eds.) *Fair Trade and Harmonization: Prerequisites for Free Trade?* (Vol. 2, CUP, 1996) 333.

[61] T. Cottier & K. N. Schefer, 'Non-Violation Complaints in WTO/GATT Dispute Settlement: Past, Present and Future' (n9) 160; A. Hindley, 'Competition Law and the WTO: Alternative Structures for Agreement' (n63) 334.

[62] *Black's Law Dictionary* (9th ed., West Publishing, 2009) 176; Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft* [hereinafter *Canada – Aircraft*], WT/DS70/AB/R, adopted 20 August 1999, DSR 1999: III, 1377 [157].

[63] D.-W. Kim, *Non-violation complaints in WTO Law: Theory and Practice*, (n5) 145; E.-U. Petersmann, 'The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System since 1948' (n8) p 1230; T. Cottier & K. N. Schefer, 'Non-Violation Complaints in WTO/GATT Dispute Settlement: Past, Present and Future' (n9) 160; A. Hindley, 'Competition Law and the WTO: Alternative Structures for Agreement' (n63) 334.

[64] D.-W. Kim, *Non-violation complaints in WTO Law: Theory and Practice*, (n5) 122; F. Roessler, 'The Concept of Nullification and Impairment in the Legal System of the World Trade Organization' (n1) 130.

seven[65] out of the eleven[66] complaints brought under the GATT 1947 with respect to Article XXIII:1(b) concerned the nullification or impairment of benefits flowing from negotiated tariff concessions and the contracting parties' rights and obligations under Article II of the GATT 1947.[67] Indicatively, we turn to examine the three out of these cases that were eventually adopted.

In the first dispute where NVNI complaints were examined, namely the *Australia-Ammonium Sulfate* case, a close connection between benefits protected under Article XXIII:1(b) and Article II of the GATT 1947 was drawn.[68] Australia, during the time of war, granted a subsidy to ammonium sulphate and sodium nitrate, as a response to the scarcity of fertilizers faced at the time.[69] After the end of the war, the subsidy was removed, though only with respect to sodium nitrate.[70] Chile argued that the sudden difference in treatment of the two fertilizers upset the competitive relationship of the two products, thus, nullifying the benefits accrued to it under the GATT 1947.[71] The report of the GATT Working Party, which was later adopted, found that the removal of the subsidy only with respect to sodium nitrate indeed nullified the benefits accrued to Chile. In particular, the Working Party concluded that this difference in treatment upset the competitive relationship between sodium nitrate and ammonium sulphate which was crystallized during the tariff negotiations between the two parties. For, Chilean imports were directly benefited from Australia's binding of a duty-free-rate for both sodium nitrate, as well as, indirectly, from Chile's belief that by securing this concession of a duty-free-rate, a certain competitive relationship was achieved.[72]

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[65]GATT Working Party Report, *Australia – Ammonium Sulphate* (n31); GATT Panel Report, *Germany – Sardines*, (n31); GATT Panel Report, *EEC – Canned Fruit* (n31); GATT Panel Report, *EEC – Citrus* (n31); GATT Panel Report, *Japan – Semi-Conductors* (n31); GATT Panel Report, *Uruguayan Recourse to Article XXIII* (n31); GATT Panel Report, *EEC – Oilseeds* (n31); GATT Panel – Report, *US – Sugar Waiver* (n31); GATT Panel Report, *US – Nicaragua Trade* (n31); GATT Panel Report, Spain – Soyabeen Oil (n31); GATT Panel Report, *EEC – Oilseeds II* (n31).

[66] GATT Panel Report, *EEC – Canned Fruit* (n31); GATT Panel Report, *EEC – Citrus* (n31); GATT Panel Report, *Japan – Semi-Conductors* (n31); GATT Panel – Report, *US – Sugar Waiver* (n31).

[67] D.-W. Kim, *Non-violation complaints in WTO Law: Theory and Practice*, (n5) 123.

[68] G. Cook, 'The Legalization of the Non-Violation Concept in the GATT/WTO System' (2018) <SSRN: http://dx.doi.org/10.2139/ssrn.3272165> accessed 26 November 2018; E.-U. Petersmann, 'Violation Complaints and Non-Violation Complaints in Public International Trade Law' (n8) 200;

[69] GATT Working Party Report, *Australia – Ammonium Sulphate* (n31) [3].

[70] GATT Working Party Report, *Australia – Ammonium Sulphate* (n31) [4-5].

[71] GATT Working Party Report, *Australia – Ammonium Sulphate* (n31) [12].

[72] GATT Working Party Report, *Australia – Ammonium Sulphate* (n31) [12].

Similarly, in *Germany – Sardines*, Norway complained about Germany's tariff, tax and quantitative measures affecting the trade of certain but not all types of canned sardines, which during tariff negotiations had received the same tariff treatment by Germany. Particularly, Norway claimed that there was tariff discrimination of certain types of imported sardines, discriminatory application of a turnover tax only to certain types of imported sardines and discriminatory maintenance of quantitative restrictions only for some types of imported sardines.[73] The adopted GATT Panel Report, after concluding that there was no violation of Article I:1 and XIII:1 of the GATT 1947,[74] found that these GATT 1947 consistent measures had nullified:

> "*the validity of the assumptions which governed the attitude of the Norwegian delegation and substantially reduced the value of the concessions obtained by Norway, the Panel [on Complaints] found that the Norwegian Government is justified in claiming that it had suffered an impairment of a benefit accruing to it under the General Agreement."* [75]

In the same vain, on the third and last adopted GATT Panel Report concerning NVNI complaints, namely the *EEC – Oilseeds* brought in 1990, the United States argued that the benefits accruing to it under the tariff concessions on oilseeds and oilcakes granted by the Community pursuant to Article II had been nullified or impaired as a result of the introduction and the increase of producer and processor subsidies granted on Community oilseeds and protein animal-feed components.[76] Illustrating the underlying concept of non-violation complaints, the GATT Panel draw a close connection between Article XXIII:1(b) and the safeguarding of benefits arising out of tariff negotiations.[77] In particular, it reasoned that "*the idea underlying*" the provision of Article XXIII:1(b) is that "*the improved competitive opportunities* […] *expected from a tariff concession can be frustrated* […] *by measures consistent with the Agreement*", in such a way that "*a right of redress*" must be given to contracting parties.[78] Further, it stated that "*the main value of a tariff concession is that it provides an assurance of better market access through*

[73] GATT Panel Report, *Germany – Sardines*, (n31) [5, 6, 8].

[74] GATT Panel Report, *Germany – Sardines*, (n31) [12, 15].

[75] GATT Panel Report, *Germany – Sardines*, (n31) [17].

[76] GATT Panel Report, *EEC – Oilseeds* (n31) [53].

[77] G. Cook, 'The Legalization of the Non-Violation Concept in the GATT/WTO System' (n71); E.-U. Petersmann, 'Violation Complaints and Non-Violation Complaints in Public International Trade Law' (n9) , 218.

[78] GATT Panel Report, *EEC – Oilseeds* (n31) [144].

improved price competition", that contracting parties negotiated tariff concessions "*primarily to obtain that advantage*", and that they "*must therefore be assumed to base their tariff negotiations on the expectation that the price effect of the tariff concessions will not be systematically offset*".[79]

Contrary to the above narrow approach, four GATT Panel Reports rejected the idea that recourse to Article XXIII:1(b) was exclusively reserved for claims relating to specific tariff concessions; rather, they suggested that NVNI complaints may well be based on general rights and obligation of the GATT 1947.[80] However, out of these four GATT Panel Reports, only two were adopted by the contracting parties, namely the two that did not reach a positive finding of nullification or impairment.

In the adopted report on *United States – Sugar Waiver*, the GATT Panel examined EEC's claims of nullification or impairment of the benefits flowing from Article XI of the GATT 1947. In this case, the measures at issue were quantitative limitations placed by the United States on imports of sugar.[81] Even though the measures were, *prima facie*, in violation of Article XI of the GATT 1947, they had been implemented in conformity with a waiver granted to the US by the contracting parties in 1955, according to Article XXV:5(a) of the GATT 1947.[82] Ultimately, the GATT Panel did not uphold the NVNI Complaint due to the lack of detailed justification from the part of EEC.[83] Nonetheless, it stressed that nothing in the language and the drafting history of Article XXIII:1(b) excludes from its scope claims of nullification or impairment based on provisions of the GATT 1947, other than Article II.[84]

Similarly, the GATT Panel report on *Japan – Semi Conductors*, which was also later adopted by the contracting parties, proposed a broad understanding of the term "*benefit*". The dispute between EEC and Japan concerned a series of measures adopted by the Japanese government pursuant to a bilateral arrangement concluded between the Respondent and the United States in 1986 regulating market access, dumping and procedural issues regarding the trade of semi-conductors.[85] The GATT Panel upheld

[79] GATT Panel Report, *EEC – Oilseeds* (n31) [148].

[80] D.-W. Kim, *Non-violation Complaints in WTO Law: Theory and Practice* (n5) [123].

[81] GATT Panel Report, *US – Sugar Waiver*, (n31) [2.1].

[82] GATT Panel Report, *US – Sugar Waiver*, (n31) [2.4].

[83] GATT Panel Report, *US – Sugar Waiver*, (n31) [5.23].

[84] GATT Panel Report, *US – Sugar Waiver*, (n31) [5.21].

[85] GATT Panel Report, *Japan – Semi-Conductors*, (n31) [11].

some of the violation claims put forward by the EEC regarding Article XI:1 of the GATT 1947.[86] With reference to the measures allegedly discriminating between the United States and the EEC on the basis of market access, EEC argued that even if they were not in violation of Article I of the GATT 1947, they nullified and impaired the benefits accruing to it under the Agreement.[87] The GATT Panel, even though it dismissed the claims due to the lack of sufficient justification, it took a broad view of the term "benefit" as "*benefits accruing to it under the General Agreement"*.[88]

In the same vein, in *EEC – Canned Fruit*, the measure at issue was a production aid awarded by the EEC to producers of certain canned fruit and dried grapes.[89] The United States argued that the stated objective of the subsidy was to eliminate the price differentiation between domestic and imported products.[90] Thus, the subsidy had, substantially, the same trade-restrictive effects as the imposition of additional tariffs, in the sense, that it nullified or impaired the tariff concessions made by the EEC with respect to the products in question.[91] The EEC argued that the NVNI complaint should be dismissed because the United States did not have initial negotiating rights with respect to the tariff concessions that formed the basis of the complaint.[92] Yet, the GATT Panel clarified that there was "*no legal justification*", neither in Article XXIII nor in past GATT practice, for restricting the right of the Contracting Parties to challenge the nullification or impairment of benefits arising from the MFN treatment of tariff concessions under Article I of the GATT 1947.[93] Nevertheless, the report was ultimately not adopted, because the parties reached a settlement before the end of the proceedings.[94]

Lastly, the GATT report on the *EEC – Citrus* dispute, adopted the same broad approach to the interpretation of the term benefit. In that case, the GATT Panel examined EEC's tariff preferences accorded to imports of citrus from certain Mediterranean countries. The above preferences were introduced on the basis of interim agreements

[86] GATT Panel Report, *Japan – Semi-Conductors*, (n31) [123].
[87] GATT Panel Report, *Japan – Semi-Conductors*, (n31) [69].
[88] GATT Panel Report, *Japan – Semi-Conductors*, (n31) [131].
[89] GATT Panel Report, *EEC – Canned Fruit*, (n31) [7].
[90] GATT Panel Report, *EEC – Canned Fruit*, (n31) [14].
[91] GATT Panel Report, *EEC – Canned Fruit*, (n31) [18].
[92] GATT Panel Report, *EEC – Canned Fruit*, (n31) [32].
[93] GATT Panel Report, *EEC – Canned Fruit*, (n31) [50].
[94] G. Cook, 'The Legalization of the Non-Violation Concept in the GATT/WTO System' (n71).

leading to the formation of a customs union or a free-trade-area according to Article XXIV of the GATT 1947.[95] The GATT Panel found that the benefits accrued to the United States under Article II of the GATT 1947 and EEC's tariff concessions were not nullified or impaired on the basis of legitimate expectations.[96] However, it underlined that "[the] *basic purpose of Article XXIII:1(b) was to provide for offsetting or compensatory adjustment in situations in which the balance of rights and obligations of the contracting parties had been disturbed*".[97] With this in mind and recalling the drafting history of Article XXIII of the GATT 1947, it noted that Article XXIII:1(b) is not limited to safeguarding the benefits deriving from Article II and tariff bindings.[98]

Overall, the GATT Panel accepted that the benefits accruing to the United States on the basis of Article I of the GATT 1947, which is applicable both to bound and unbound tariff items, fell under the scope of Article XXIII:1(b) of the GATT 1947.[99] However in the end this GATT Panel report was not adopted by the Contracting Parties. Notably, during the discussions it was suggested that it would be a dangerous precedent towards the undue extension of the non-violation standard.[100]

After the establishment of the WTO in 1994, in the first WTO dispute involving a non-violation complaint, namely the *Japan – Film* dispute, the facts of which were presented above under section, the Panel at the outset of its analysis adopted the narrow interpretation of the term "*benefit*" of Article XXIII:1(b) of the GATT 1994.[101] It underlined that in almost all the GATT cases, "*the claimed benefit has been that of legitimate expectations of improved market-access opportunities arising out of relevant tariff concessions*". Forgoing any further interpretation of the term "*benefit*", the Panel focused its inquiry on whether the benefits claimed by the United Studies to be nullified or impaired by the Japanese measures could legitimately be expected as a result of successive negotiation rounds.[102] Similarly, both the Panels in *EC-Asbestos* and *US* –

[95] GATT Panel Report, *EEC – Citrus*, (n31) [2.10].

[96] GATT Panel Report, *EEC – Citrus*, (n31) [4.35].

[97] GATT Panel Report, *EEC – Citrus*, (n31) [4.37].

[98] GATT Panel Report, *EEC – Citrus*, (n31) [4.36].

[99] GATT Panel Report, *EEC – Citrus*, (n31) [4.37].

[100] G. Cook, 'The Legalization of the Non-Violation Concept in the GATT/WTO System' (n71); S.-J. Cho, 'GATT Non-Violation Issues in the WTO Framework: Are They the Achilles' Heel of the Dispute Settlement Process?' (n26) 319; E.-U. Petersmann, 'Violation Complaints and Non-Violation Complaints in Public International Trade Law' (n9) 164.

[101] Panel Report, *Japan – Film* (n33) [10.61].

[102] Panel Report, *Japan – Film* (n33) [10.72].

COOL (Article 21.5 – Mexico and Canada) upheld the previous interpretations of GATT Panels by identifying in a straightforward manner that the benefits protected under Article XXIII:1(b) of the GATT 1994 are benefits flowing from tariff negotiations and tariff bindings.[103]

b. The existence a legitimate expectation of a benefit

According to both GATT and WTO jurisprudence, the term "benefit" under Article XXIII:1(b) has been interpreted as encompassing only those benefits that the complaining party may reasonably expect to obtain from a tariff negotiation.[104] Pursuant to two GATT study groups that explored the issue of legitimate expectations in the context of subsidies, "*in order for expectations to be legitimate, the challenged measure must not have been reasonably anticipated at the time the tariff concession was negotiated*".[105] For, unless such pertinent facts were available at the time the tariff concession was negotiated, the complaining Member may reasonably contend to have expected the benefits accrued would not be nullified or impaired by the implementation of the challenged measure.[106]

To qualify that the measure at stake could not have been reasonably anticipated, the GATT Panel in *Australia – Ammonium Sulphate* noted that all pertinent circumstances need to be taken under consideration. [107] In this regard, it is suggested that the most significant element underpinning the determination of legitimate expectations is the "*non-foreseeability*" of the measure in question.[108] In detail, the factors assessed by GATT and WTO practice in order to discern the existence of a legitimate expectation of benefit for the purposes of NVNI complaints under Article XXIII:1(b) of the GATT 1994 are the following: the timing of the measure at issue **(i)**, the pre-existing competitive conditions between the products at issue **(ii)**, the negotiating practice and conduct of the responding WTO Member **(iii)**, as well as, the international prevalence of similar measures among WTO Members **(iv)**.

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[103] Panel Report, *US – COOL (Article 21.5 – Canada and Mexico)* (n33) 7.684

[104] Panel Report, *Japan – Film* (n33) [10.72].

[105] Working Party Report on Other Barriers to Trade, adopted on 3 March 1955, BISD 3S/222, 224 13; Panel Report, *Japan – Film* (n33) [10.76].

[106] Panel Report, *Japan – Film* (n33) [10.74].

[107] GATT Working Party Report, *Australia – Ammonium Sulphate* (n31) [12].

[108] D.-W. Kim, *Non-violation complaints in WTO Law: Theory and Practice*, (n5) 146; T. Cottier & K.N. Schefer, 'Non-Violation Complaints in WTO/GATT Dispute Settlement: Past, Present and Future' (n9) 162-63.

i. The timing of the measure at issue

The starting point for determining whether a measure was reasonably anticipated is to assess the timing of the adoption of the measure,[109] namely whether the measure in question was introduced before or after the the relevant round of negotiations (1); whether it was introduced many years after the negotiations in question (2); as well as, the impact of successive tariff negotiations on Complainant's legitimate expectations (3).

1) Whether the measure was adopted before or after the granting of the tariff concession

According to the thorough analysis of the Panel in *Japan – Film*, for measures implemented subsequently to the negotiations of the tariff concessions, which forms the benefit at stake, there exists a presumption that they cannot have been anticipated.[110] Yet, this presumption may be rebutted by the Respondent by establishing that the measure under examination constitutes the continuance of an earlier measure. However, the Respondent need not only prove that the measure in question was contemplated in a previous measure, rather it must establish that there is clear connection. Notably, as the Panel reasoned "*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*".[111]

In the same vein, the GATT Panel in *EEC – Oilseeds* opined that it cannot be reasonably expected from the complaining WTO Member to anticipate the introduction of the whole array of GATT-consistent measures.[112] In that case, the GATT Panel found that absent specific facts, the United States could not be assumed to have anticipated the introduction of the contested EEC subsidies given, especially given that they operated in a way that completely shielded domestic producers of oilseeds from the fluctuations of import prices.[113]

With reference measures that have been introduced prior the conclusion of the tariff negotiations at issue, the Panel in *Japan – Film* stipulated that there exists a

[109] Panel Report, *Japan – Film* (n33) [10.78]; Panel Report, *US – COOL (Article 21.5 – Canada and Mexico)* (n33) [7.692]; Panel Report, *EC – Asbestos* (n33) [8.291].

[110] Panel Report, *Japan – Film* (n33) [10.79].

[111] Panel Report, *Japan – Film* (n33) [10.79].

[112] GATT Panel Reports, *EEC – Oilseeds* (n31) [148].

[113] GATT Panel Reports, *EEC – Oilseeds* (n31) [149].

presumption that the complaining Member should have anticipated them.[114] However, this presumption is equally rebuttable if the interested party clearly demonstrates that it could not have reasonably anticipated the effect of an existing measure on the competitive conditions of the products at issue.[115] For example, a vague measure could be given substance through enforcement policies that are initially unexpected or later changed significantly. Yet, demonstrating the connection between the time when the benefits were generated and the time when the impact became visible to the complaining Member is necessary.[116]

2) Whether the measure was adopted many years after the granting of the tariff concession

The second relevant factor when it comes to the timing of the adoption of the measure is the temporal gap between the coming into being of the measure and the granting of concessions of markets access.[117] In the cases where the GATT Panels reached a positive finding on legitimate expectations, the introduction of the measure at issue was soon after the relevant negotiating round. In *Australia Ammonium Sulphate*, the challenged measure (i.e. the removal of the subsidy on sodium nitrate) was taken in July 1949, following the tariff concession granted in 1947.[118] In *Germany – Sardines*, the three sets of challenged measures were imposed in October/November 1951 and April 1952, following tariff concessions agreed in the Torquay Round in 1951.[119] In *EEC – Canned Fruit*, the contested subsidies on the four products at stake were introduced in 1978 and 1979, while the relevant concessions were granted on 1974 pursuant to Article XXIV:6 negotiations and 1979 during the Tokyo Round of negotiations.[120]

3) The impact of successive tariff negotiations on Complainant's legitimate expectations

In *EEC – Citrus* the GATT Panel dealt with the issue of successive tariff concessions and concluded that, *in casu*, there was a close nexus between the challenged

[114] Panel Report, *Japan – Film*, (n33) [10.80].

[115] Panel Report, *Japan – Film*, (n33) Ibid.

[116] Panel Report, *Japan – Film* (n33) Id.

[117] Panel Report, *US – COOL (Article 21.5 – Canada and Mexico)* (n33) [7.692]; Panel Report, *EC – Asbestos* (n33) [8.292].

[118] GATT Working Panel Report, *Australia – Ammonium Sulphate* (n31) [4].

[119] GATT Panel Report, *Germany – Sardines* (n31) [9].

[120] GATT Panel Report, *EEC – Canned Fruit* (n31) [52].

1962 EEC Schedule and the tariff concessions granted successively in 1962 and 1986/87.[121] To this end, the Panel held that the benefits accruing to the United States under the oilseed tariff concessions resulting from the Article XXIV:6 negotiations of 1986/87 included the protection of reasonable expectations the United States had when these concessions were initially negotiated during the Dillon round in 1962.[122]

The Panel in *Japan – Film* dealt with a similar issue regarding the United States claims of reasonable expectations of benefits accruing to it as the result of tariff concessions granted by Japan on black and white film and paper during the Kennedy Round (1967), on colour and black and white film and paper during the Tokyo Round (1979) and on colour and black and white film and paper during the Uruguay Round (1994).[123] Ultimately, the Panel found that:

> "*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 XXVIIIbis negotiations. Nevertheless, the establishment of a case based on expectations from rounds concluded 18 or 30 years ago may be difficult. The United States must show that those expectations, as well as its more recent ones, are currently nullified or impaired*".[124]

ii. Pre-existing conditions of competition between the products at issue

The underlying notion of NVNI complaints is that market access benefits accruing to WTO Members under specific tariff concessions and, arguably, under general WTO obligations like Article I or XI of the GATT 1994, are to be protected.[125] For, Article XXIII:1(b) of the GATT 1994 takes issue with the conditions of competition that exist between the products of the complaining Member and domestic products as a consequence of the relevant tariff concessions.[126] This is to be distinguished from the scope of Articles I or III of the GATT 1994 which extends to the prospective equality of competitive conditions.[127] As the Panel reasoned in *Japan – Film*, for a NVNI complaint

[121] GATT Panel Report, *EEC – Citrus*, (n31) [4.30, 4.32-4.33].

[122] GATT Panel Report, *EEC – Citrus*, (n31) [4.34].

[123] Panel Report, *Japan – Film*, (n33) [10.63].

[124] Panel Report, *Japan – Film*, (n33) [10.69].

[125] Panel Report, *Japan – Film* (n33) [10.77].

[126] Panel Report, *Japan – Film* (n33) [10.86].

[127] Panel Report, *Japan – Film* (n33) [10.86].

to be successful it must be demonstrated that the relative competitive position already held by the imported products subject to and benefitting from the tariff concession are being upset by the application of a measure not reasonably anticipated. Therefore, the existence of a competitive relationship is the crux of a NVNI complaint; for, only if there is a competitive relationship in place there may exist reasonable expectations from the importing WTO Member that the conditions of competition forged by the market access concessions will not be undermined through other means.[128]

In most cases concerning NVNI complaints the determination of a competitive relationship between the products in question was more or less straightforward. In *Australia – Ammonium Sulphate*, both the tariff concession and the challenged measure concerned a single, indistinguishable product, namely sodium nitrate;[129] in *Germany – Sardines*, the challenged measures were specific to the products that were the subject of the agreed concessions, *i.e.* the three varieties of sardines at issue;[130] in *EEC – Oilseed*, the challenged measures were product-specific subsidies that were granted on the basis of origin;[131] while, in *Japan – Film*, the measures in question concerned both colour and black and white film paper, while the concessions relied on by the United States concerned the tariff treatment of film and paper.[132]

In *EC – Asbestos*, however, the determination of the competitive relationship in question was not as undemanding. The EC claimed that Canada failed to demonstrate how the French measure upset the competitive relationship between asbestos and fibrous or non-fibrous substitute products. In specific, the EC argued that there was no "*similarity*" between asbestos and fibrous or non-fibrous substitute products. Because of their different characteristics there could be no legitimate expectation that that the relative conditions of competition between these products would not be upset. The Panel, summarily, dismissed this claim by stating that the concept of competition as envisaged under Article XXIII:1(b) of the GATT 1994 is not limited to products that fall in the same tariff heading, but rather it encompasses a broader standard.[133]

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[128] A. Chua, 'Reasonable Expectations and Non-Violation Complaints in GATT/WTO Jurisprudence' (n62) 36.

[129] GATT Working Panel Report, *Australia – Ammonium Sulphate* (n31) 6.

[130] GATT Working Party, *Australia Ammonium – Sulphate* (n31) [12].

[131] GATT Panel Report, *EEC – Oilseeds* (n31) [1.1]

[132] Panel Report, *Japan – Film* (n33) [10.43].

[133] Panel Report, *EC – Asbestos* (n33) [fn 228 to 8.288].

With a more concrete reference, the unadopted *EEC – Cirtus* GATT Panel stated that one of the three conditions necessary for determining that a benefit has been nullified or impaired is that:

> "*a governmental measure, not inconsistent with the General Agreement, had been introduced* […] *which upset* ***the competitive relationship between the bound product with regard to directly competitive products from other origins***".[134] [emphasis added]

Nonetheless, in its analysis, the GATT Panel, did not look into this condition; rather it assumed the existence of a competitive relationship between the products in question, since the challenged measures discriminatorily accorded preferences to particular products, *i.e.* canned fruits and dried grapes, on the basis of origin. [135]

iii. The negotiating practice and conduct of the responding WTO Member

Moreover, another element that Panels have contemplated when examining the legitimate expectation of benefit is the negotiating practice, as well as the conduct and the statements of members during negotiations.[136] In *Germany – Sardines*, Norway's expectations that the types of imported sardines at stake would receive equal treatment by Germany were founded, among others, on the fact that the equality of treatment was discussed in negotiations between Germany and the complainant, Norway.[137] Furthermore, the *EEC – Oilseeds* GATT Panel Report established that indeed legitimate expectations are inextricably linked with past negotiating practice. In that case, the EEC had included duty-free tariff bindings for oilseeds in its 1962 Schedule, following the tariff negotiations with the United States and others during the 1962 Dillon Round of negotiations.[138]

On the occasion of each of its successive enlargements as a customs union pursuant to Article XXIV of the GATT 1947, the EEC entered into negotiations with its trading partners under Article XXIV:6 of the GATT 1947. As a result, a new Schedule was established each time replacing the previous one. Each of these new Schedules

[134] GATT Panel Report, *EEC – Citrus* (n31) [4.26].

[135] GATT Panel Report, *EEC – Citrus* (n31) [4.30].

[136] A. Chua, 'Reasonable Expectations and Non-Violation Complaints in GATT/WTO Jurisprudence' (n62) 34.

[137] GATT Panel Report, *Germany – Sardines* (n31) [16].

[138] GATT Panel Report, *EEC – Oilseeds* (n31) [144-146].

maintained that duty-free treatment.[139] At the time of the dispute, the most recent Schedule had been concluded in 1986/1987. The GATT Panel stressed that this consistent negotiating practice gave rise to the United States reasonable expectation that the benefits accruing under the tariff treatment granted would not be nullified or impaired as a result of the introduction of later imposed product-specific subsidies.[140]

iv. The international prevalence of similar measures among WTO Members

Another element taken into consideration by Panels when determining the existence of legitimate expectations is the proliferation of similar national, regional or international measures by other WTO Members. In *Japan – Film*, the Panel did not 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*".[141]

Rather, as it was stressed by the Panel *US -COOL (Article 21.5, Mexico and Canada)*, it must be shown that there is a high degree of international prevalence or similarity of the measures from other jurisdictions.[142] In that case, the Panel observed that the United States, the responding government, had provided for only one other measure, *i.e.* an EU measure, similar to the amended COOL measure in question, *i.e.* to the United States' country of origin labelling (COOL) requirements for beef and pork contained in the Agricultural Marketing Act of 1946.[143] In that regard, the Panel denied the relevance of the proposed evidence; for, only the existence of a "*trend*" capable of giving rise to a "*climate*" in which the measure at stake could have been reasonably anticipated in the specific case would be able to substantially affect a Panel's determination of the existence of a legitimate expectation of a benefit with regards to market access.[144]

[139] GATT Panel Report, *EEC – Oilseeds* (n31) [144].

[140] GATT Panel Report, *EEC – Oilseeds* (n31) [146].

[141] Panel Report, *Japan – Film* (n33) [10.79].

[142] Panel Report, *US – COOL (Article 21.5 – Canada and Mexico)* (n33) [7.706].

[143] Ibid.

[144] Panel Report, *US – COOL (Article 21.5 – Canada and Mexico)* (n33) [7.707].

c. The scope of interpretation of the term "benefit"

The prevailing narrow approach in the interpretation of the term "*benefit*" under Article XXIII:1(b) of the GATT 1994 ascribes to the term the meaning of market access opportunities arising from the reciprocity of tariff concessions.[145] Simultaneously, the same approach reads into the text of Article XXIII:1(b) of the General Agreement a strict standard of "non-foreseeability" of the measure at stake. This narrow construction of NVNI complaints proposed by the majority of GATT and WTO Panel practice is supported by the need to objectivize the inherently subjective notion of "*benefit nullification or impairment*".[146]

With reference to "*non-forseeability*", the underpinning of this strict standard that elaborates the legitimate expectations requirement is the exceptional nature of NVNI complaints.[147] While violation complaints serve to enforce compliance with the rules, NVNI complaints serve to secure the effectiveness of what has been agreed, irrespective of whether WTO Members have complied with the rules.[148] However, the fact that NVNI complaints are treaty-based remedies that have nothing to do with compliance, makes the provision of Article XXIII:1(b) inherently ambiguous.[149] This ambiguity is intensified when one thinks of the core WTO mandate, namely that of ensuring the stability and predictability of the international trading system. Indeed, the main policy that governs the WTO dispute settlement system is that of the "*the continuity of GATT principles*",[150] in the sense envisaged by Article XVI of the WTO Agreement, which stipulates that "*the WTO rules shall be guided* [except if otherwise provided] *by decisions, procedures and customary practices followed by the Contracting Parties to the GATT 1947*". Similarly, Articles 3.2 and 19.2 of the DSU stress that the recommendations and rulings of the DSB,

[145] E.-U. Petersmann, 'The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System since 1948' (n8) 1230; F. Roessler, 'The Concept of Nullification and Impairment in the Legal System of the World Trade Organization' (n 1 131; T. Cottier & K. N. Schefer, 'Non-Violation Complaints in WTO/GATT Dispute Settlement: Past, Present and Future' (n9) 159; D.-W. Kim, *Non-Violation Complaints in WTO Law: Theory and Practice* (n5) 144.

[146] R.E. Hudec, 'Thinking about the New Section 301: Beyond Good and Evil' (n17) 37-47; T. Cottier & K. N. Schefer, 'Non-Violation Complaints in WTO/GATT Dispute Settlement: Past, Present and Future' (n9) 162-6; D.-W. Kim, *Non-Violation Complaints in WTO Law: Theory and Practice* (n5) 125.

[147] Appellate Body Report, *EC – Asbestos* (n33) [181].

[148] E.-U. Petersmann, 'Violation Complaints and Non-Violation Complaints in Public International Trade Law' (n9) 224-225.

[149] S.-J. Cho, 'GATT Non-Violation Issues in the WTO Framework: Are They the Achilles' Heel of the Dispute Settlement Process?' (n26) 313.

[150] T. Cottier & K. N. Schefer, 'Non-Violation Complaints in WTO/GATT Dispute Settlement: Past, Present and Future' (n9) 158.

the Panels and the AB "*cannot add to or diminish the rights and obligations provided in the covered agreements*".

The undesirability of the NVNI concept's inherent ambiguity is further explained by the fact that such ambiguity may lead to an extremely broadened scope of application of Article XXIII:1(b) of the GATT 1994. This risk has been aptly illustrated by Professor Hudec, who reflected on the so-called "*undesirable and inappropriate cases*" that may arise under Article XXIII:1(b).[151] These would be cases that touch upon issues which have not yet substantively been handled by WTO Members through the creation of specific norms; or cases revolving around policy questions that impinge upon each Members sovereign prerogative to determine its policy and regulatory approach.[152] The proliferation of this kind of disputes would pose the "*risk of over-adjudication*" and the "*risk of politicization*", in a way that would undermine the bargaining outcomes achieved by WTO Members, thus, ultimately impairing the legitimacy of the WTO system as a whole.[153]

In response to the above-described criticism, the Panel in *Korea – Procurement* offered a reading of the concept of NVNI complaints that attempts to bridge the gap between the concept's ambiguity and the WTO's quest for legal certainty. In particular the Panel noted that even though the NVNI remedy appears not to be linked with the objective of securing compliance with treaty norms, in fact, it constitutes an elaboration of the principle of *pacta sunt servanda* and good faith.[154] In the same vein, Professor Petersmann described the WTO NVNI remedy as functioning in a manner similar to Articles 18 and 26 of the VCLT, which provide that the signatory states to a treaty must refrain from acts that frustrate the object of the treaty and that the treaty must always be

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[151] R.E. Hudec, 'GATT Dispute Settlement after the Tokyo Round: An Unfinished Business' (1980) 13 *Cornell Int'l L. J.* 145, 159; W. J. Davey, 'Dispute Settlement in GATT' (1987) 11 *Fordham Int'l L. J.* 51, 67-78.

[152] Robert E. Hudec, Reforming GATT Adjudication Procedures: The Lessons of the DISC case (1988) 72 *Minn. L. Rev.* 1443, 1508-09; A. von Bogdandy, 'The Non-Violation Procedure of Article XXIII:2' (n10) 110; S.-J. Cho, 'GATT Non-Violation Issues in the WTO Framework: Are They the Achilles' Heel of the Dispute Settlement Process?' (n26) 330.

[153] A. von Bogdandy, 'The Non-Violation Procedure of Article XXIII:2' (n10) 110; P. M. Nichols, 'Participation of Non-government Parties in the World Trade Organization: Extension of Standing in World Trade Organization Disputes to Non-government Third Parties' (1996) 17 *U. Pa. JIEL.* 295, 327; S.-J. Cho, 'GATT Non-Violation Issues in the WTO Framework: Are They the Achilles' Heel of the Dispute Settlement Process?' (n26) 330.

[154] Panel Report, *Korea — Procurement* (n35) [7.93, 7.95, 7.96]: The Panel stressed that these principles of customary international law apply to all WTO agreements to the extent that Members had not 'contracted out'.

performed in good faith.[155] In this regard, Article XXIII:1(b) should be perceived as a provision serving for nothing more than the maintenance or restoration of what has been agreed by the WTO Members. In order for this narrow function to be achieved the "*legitimate expectation*" requirement, and particularly, the "*non-foreseeability*" standard, play a critical role. Indeed, Professors Cottier & Schefer have stressed that this requirement operates as "*an objectivization of a fundamentally subjective view of the* [benefits] *impairment*".

However, this *ratio* does not seem to justify the narrow construction of the nature of the Article XXIII:1(b) benefits as covering only benefits flowing from specific tariff commitments. Rather, a broader approach appears warranted.[156] The requirement for a connection between the claimed benefit and a tariff binding is the result of the history of NVNI complaints, as a concept that evolved in response to tariff protectionism. Yet, as the GATT Panel on *EEC – Canned Fruit* observed, there is no legal justification neither in Article XXIII nor in past GATT practice, for restricting the right of the Contracting Parties to challenge the nullification or impairment of benefits arising from general provisions of the GATT 1947.[157]

This does not mean that the broader understanding of the nature of benefits in NVNI cases disregards the risks posed by the potentially expanded scope of the provision's application. To the contrary, the four GATT Panel Reports that adopted a wider interpretation, being mindful of the need to constraint the NVNI remedy,[158]

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[155] E.-U. Petersmann, 'Violation Complaints and Non-Violation Complaints in Public International Trade Law' (n9) 225; O. Dörr, 'Obligation not to defeat the object and purpose of a treaty prior to its entry into force' in O. Dorr & K. Schmalenbach (eds.) *Vienna Convention on the Law of Treates: A Commenary* (2nd ed., Springer, 2018), 219; K. Schmalenbach, 'Pacta sunt Servanda' in O. Dorr & K. Schmalenbach (eds.) *Vienna Convention on the Law of Treates: A Commenary* (2nd ed., Springer, 2018), 219.

[156] D.-W. Kim, *Non-Violation Complaints in WTO Law: Theory and Practice*, (n5) 150; J. Linarelli, 'The Role of Dispute Settlement in World Trade Law: Some Lessons from the Kodak-Fuji Dispute' (2000) 31 *Law and Policy in Int. Bus.* 2, 35; T.M. Abels, 'The World Trade Organization's First Test: The United States-Japan Auto Dispute' (1996) 44 *UCLA Law Review* 467, 526; D.A. Daul, 'A Picture worth more than a Thousand Words: A Unique Cause of Action at the World Trade Organization to Enforce American Trade Eights against Japan' (1995) 17 *Hamline Journal of Public Law and Policy* 121, 148-150; A. von Bogdandy, 'The Non-Violation Procedure of Article XXIII:2' (n10), 98-99; Bagwell et al, 2002 A. Hindley, 'Competition Law and the WTO: Alternative Structures for Agreement' in J. Bhagwati & R.E. Hudec (eds.) Fair Trade and Harmonization: Prerequisites for Free Trade?' (Vol. 2, CUP, 1996) 333.

[157] GATT Panel Report, *EEC – Canned Fruit* (n31) [50].

[158] D.-W. Kim, *Non-Violation Complaints in WTO Law: Theory and Practice* (n5) [150]; A. von Bogdandy, 'The Non-Violation Procedure of Article XXIII:2' (n10) [103].

introduced the concept of adverse effects.[159] In specific, the *EEC – Citrus* Panel illustrated the requirement for adverse effects in cases where there is no connection between the benefit claimed under the NVNI concept and a concrete tariff concession, as follows:

> "*The Panel considering that* […] *reached the conclusion that in this particular situation the balance of rights and obligations underlying Articles I and XXIV of the General Agreement had been upset to the disadvantage of the contracting parties not parties to these agreements and that the United States was therefore entitled to offsetting or compensatory adjustment* ***to the extent that the grant of the preferences had caused substantial adverse effects to its actual trade or its trade opportunities***".[160] [emphasis added]

In this way, the GATT Panels recognized that the NVNI concept would be overextended if the legitimate expectations were assessed solely on the basis of the improvement of trade opportunities, irrespective of a tariff binding.[161] However, instead of going contrary to the open-ended ordinary meaning of the term "benefit" and rejecting a relatively broad interpretation, they introduced the concept of "*adverse effect*", which achieves the same end of narrowing down the scope of application of Article XXIII:1(b) of that General Agreement.[162]

3. The nullification or impairment of a benefit as a result of the application of the measure

The third limb of the Article XXIII:1(b) test for NVNI complaints is that the benefit accruing to the WTO Member "*is nullified or impaired as the result of the introduction of the challenged measure by another WTO Member*".[163] Accordingly, this Section seeks to examine the applicable standard for a determination of nullification or impairment of benefits **(a)**, as well as the requirement of causal link **(b)**.

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[159] GATT Panel Report, *EEC – Citrus* (n31) [4.37]; GATT Panel Report, *Japan – Semi-conductors* (n31) [131]; GATT Panel Report, *EEC – Canned Fruit* (n31) [76]; GATT Panel Report, *US – Sugar Waiver* (n31) [4.2].

[160] GATT Panel Report, *EEC – Citrus* (n31) [4.37].

[161] D.-W. Kim, *Non-Violation Complaints in WTO Law: Theory and Practice* (n5) 150; A. von Bogdandy, 'The Non-Violation Procedure of Article XXIII:2' (n10) 103.

[162] Ibid.

[163] Panel Report, *US – COOL (Article 21.5 – Canada and Mexico)*, (n33) [7.713]; Panel Report, *Japan – Film*, (n33) [10.82].

a. The standard of nullification or impairment

A complaining WTO Member bringing a NVNI complaint has the burden of proving that the measure at issue has nullified or impaired the benefits accruing to it.[164] Pursuant to both GATT and WTO jurisprudence, the term nullification or impairment is to be interpreted as encompassing the "*upsetting of the competitive relationship*" established between domestic and imported products by virtue of the granting of the relevant tariff concessions. [165]

In *EEC – Oilseeds*, the GATT panel 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*".[166] In *casu*, the GATT Panel concluded that the product-specific subsidies at stake operated in a way that immunized completely the domestic producers from the movements of import prices and thereby prevented the tariff concessions from beneficially affecting the competitive relationship between domestic and imported oilseeds, as legitimately expected by the United States.[167]

From the above case it follows that a finding of nullification or impairment is grounded on the effect of the challenged measure on the conditions of competition between the products at issue, and not to the demonstration of concrete effects on trade flows.[168] Likewise, in *Australia – Ammonium Sulphate*, the GATT Working Party did not calculate whether the removal of the subsidy replicated the protective effect of the pre-existing tariff treatment, rather it explored whether the removal of the subsidy in question would have a similar price effect on the relevant product to that of the applied tariff pre-dating the granting of the subsidy.[169]

Similarly, the GATT Panel in *Germany – Sardines*, applied the above described standard of nullification or impairment and reasoned that "*impairment would exist if the*

[164] Panel Report, *US – COOL (Article 21.5 – Canada and Mexico)*, (n33) [7.713]; Panel Report, *Japan – Film*, (n33) [10.82].

[165] GATT Working Party Report, *Australia – Ammonium Sulphate* (n31) [12]; GATT Panel Report, *Germany – Sardines*, (n 31) [16]; Panel Report, *US – COOL (Article 21.5 – Canada and Mexico)*, (n33) [7.713]; Panel Report, Japan – Film, (n33) [10.82].

[166] GATT Panel Report, *EEC – Oilseeds* (n31) [77].

[167] GATT Panel Report, *EEC – Oilseeds* (n31) [148].

[168] E.-U. Petersmann, 'Violation Complaints and Non-Violation Complaints in Public International Trade Law' (n9) 223.

[169] GATT Panel Report, *Germany – Sardines* (n31) [12].

action of the German Government […] *resulted in upsetting the competitive relationship between preparations of clupea pilchardus and preparations of the other varieties of the clupeoid family*".[170] Even though this GATT Panel proceeded in a more fact-intensive analysis and employed the available evidence on trade flows[171] in order to conclude that the measures adopted by Germany had the effect of "*substantially reduc*[ing] *the value of the concessions obtained by Norway*",[172] its interpretation of the "nullification or impairment" standard was in line with that in *Australia – Ammonium Sulphate*.

Bearing this in mind, the approach of the Panel in *US – Offset Act* is of interest, insofar as it illustrates with more clarity the operation of the "*nullification or impairment*" standard. Even though in *casu* the NVNI complaint was brought under Article 5(b) of the SCM Agreement, the Panel at the outset of its analysis clarified that pursuant to footnote 12 of the SCM Agreement to Article 5(b), the term "*nullification or impairment*" is used in the SCM Agreement in the same manner as it is used in the GATT 1994.[173] Thus, the Panel stipulated that the application of Article 5(b) of the SCM Agreement should be in line with the practice of application of the relevant GATT 1994 provisions.[174] Accordingly, we will use the *US – Offset Act* reasoning in order to shed light to the interpretation of Article XXIII:1(b) of the GATT 1994.

To begin with, Panel, drawing from the GATT Panel report on *EEC – Oilseeds*, reformulated the "*nullification or impairment*" standard in the following manner:

> "[N]*on-violation nullification or impairment would arise when the effect of a tariff concession is systematically offset or counteracted by a subsidy programme. This is a reasonable approach, since a standard of 'systematic offsetting/counteracting' would preserve the exceptional nature of the 'non- violation' nullification or impairment remedy*."

On the basis of this interpretation, the Panel sought to examine "*at a minimum*" the amount of the subsidy to be provided by the United States in relation to the amount of the relevant tariff concessions, so as to determine whether the granting of the subsidy

[170] GATT Panel Report, *Germany – Sardines* (n31) [16].

[171] GATT Panel Report, *Germany – Sardines* (n31) [9].

[172] GATT Panel Report, *Germany – Sardines* (n31) [17].

[173] Panel Report, *US – Offset Act* (n34) [7.120].

[174] Id.

in question was offsetting the benefits accruing to Mexico.[175] In *casu*, the subsidies granted by the United States were disbursed pursuant to the US Continued Dumping and Subsidy Act of 2000 [CDSOA], under which anti-dumping and countervailing duties assessed "*on or after*" the 1st October 2000 were to be distributed to the affected domestic producers for qualifying expenditures.[176] The Panel found that since a clear correlation between the level of the relevant tariff concessions and the amount of the subsidies could not be discerned, there was no certainty that the effect of the subsidies in the competitive conditions between the products in question would be that of systematically offsetting or counteracting the benefits accruing to Mexico.[177]

Notably, Mexico argued that the maintaining of the CDSOA program *per se* nullified or impaired the benefits accruing to Mexico; for, due to the subsidy it was impossible for Mexican exporters to predict the relative conditions of competition, in a way that the predictability of conditions for future trade was refuted.[178] The Panel, in response to that argument, clearly stipulated that that commitments made under the GATT 1994 do not include an express or implied promise of total predictability. It underlined that if the predictability of competitive conditions was to be protected under Article XXIII:1(b) of the GATT 1994, this would unduly extend the provisions scope to a variety of GATT-consistent measures.[179] Such an interpretation of the term "*nullification or impairment*" would have "*far-reaching consequences*"[180] and would not be in line with the AB's statements in *EC – Asbestos* that the NVNI remedy "*should be approached with caution and should remain an exceptional remedy*".[181]

b. <u>The standard of causation</u>

The text of Article XXIII:1(b) provides that NVNI complaints are available to WTO Members only when the benefits accruing under the GATT 1994 have been nullified or impaired as a result of the application of the measure at issue. The term "*as a result of*" designates the requirement of a causal link between the finding of nullification

[175] Panel Report, *US – Offset Act* (n34) [7.128].

[176] Ibid.

[177] Ibid.

[178] Panel Report, *US – Offset Act* (n34) [7.129].

[179] Panel Report, *US – Offset Act* (n34) [7.130].

[180] Panel Report, *US – Offset Act* (n34) [7.130].

[181] Appellate Body Report, *EC – Asbestos* (n33) [186]; Panel Report, *US – Offset Act* (n34) [7.126].

or impairment and the measure under examination.[182] The standard of causation was articulated for the first time from the Panel in *Japan – Film* on the basis of four factors: the degree of causation required **(i)**; the relevant of "origin-neutral" character of the challenged measure **(ii)**; the relevance of intent **(iii)**.[183]

i. The degree of causation

At the outset of the analysis, the Panel examined the degree of causation that must be shown, *i.e.* whether a "*but for*" test was necessary or whether a lower standard was enough. Without revealing its interpretative reasoning, the Panel reasoned that a finding that the measure in question has caused nullification or impairment requires a determination of whether it has made more than a *de minimis* contribution to the challenged nullification or impairment.[184] Unfortunately, the Panel's examination did not result into a positive finding of nullification or impairment, so that to materially illustrate the content of the causation standard.[185] Nonetheless, in rejecting the complainant's arguments, it gave due regard to the design of the measures at issue.[186]

This interpretation was later reiterated in *US—COOL (21.5 - Mexico and Canada)*. The Panel in that case stressed that complaining parties must establish "*a clear correlation between the measures and the adverse effect on the relevant competitive relationships*". It further clarified that the standard of causality required a demonstration that the amended COOL measure "*has made more than a de minimis contribution to nullification or impairment*".[187]

However, the interpretative approach adopted by the Panels in *Japan – Film* and *US – COOL (21.5 - Mexico and Canada)* has been criticized as disregarding the exceptional nature of NVNI complaints and implementing a very low standard without any textual support.[188] Even the winning party, Japan, expressed its concern the Panel's

[182] D.-W. Kim, *Non-violation Complaints in WTO Law: Theory and Practice* (n5) 131; J.P. Durling & S.N. Lester, 'Original Meanings and the Film Dispute: The Drafting History, Textual Evolution, and Application of the Non-Violation Nullification or Impairment Remedy' (n10) 265; N. Komuro, 'Kodak – Fuji Film Dispute and the WTO Panel Ruling' (n54) 195.

[183] Panel Report, *Japan – Film* (n33) 10.84.

[184] Id.

[185] Panel Report, *Japan – Film* (n33) 10.349.

[186] Panel Report, *Japan – Film* (n33) [10.173, 10.211, 10.236].

[187] Panel Report, *US – COOL (Article 21.5 – Canada and Mexico)* (n33) [7.714].

[188] J.P. Durling & S.N. Lester, 'Original Meanings and the Film Dispute: The Drafting History, Textual Evolution, and Application of the Non-Violation Nullification or Impairment Remedy' (n10) 265; D.-W. Kim, *Non-violation Complaints in WTO Law: Theory and Practice* (n5) 131.

reasoning did not pay due regard to the exceptional nature of NVNI complaints. In particular, it stressed that by adopting a "*de minimis*" requirement, the Panel gave the impression that it favored a low and less strict standard for the determination of causation; one that could be subject to potential abuse in future cases.[189]

Indeed, it appears that the Panel failed to take into account, on the one hand, the ordinary meaning of the term "*as the result of*" and, on the other hand, the drafting history of the ITO charter.[190] Specifically, when Article XXIII:1(b) of the GATT 1947 was drafted there was a shift from the proposed treaty term "has the effect of" to the ultimately adopted treaty term "as the result of".[191] The term "effect" appears closely related to the term "result", yet is more open-ended, encompassing a wider scope of consequences.[192] The ordinary meaning of the term effect is that of "result, consequence results in general"; while that of the term "result" is "the effect, consequence or outcome of some actions, proves, or design".[193] Notably, the use of the term "as the result of" narrows the idea of nullification or impairment, as it purports to include only the subset of instances of nullification or impairment that occur "as the result of" a measure.[194] As Professors Durling and Lester stipulated:

> "*even though the drafters made no explicit reference to a goal of narrowing the NVNI complaint causation standard. Given the context of the Geneva discussions, however, in which the South African criticisms resulted in an attempt to better define the boundaries of the remedy, it is reasonable to interpret this change in language as an effort to limit the scope of NVNI complaint with a strict causation standard*".[195]

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[189] N. Komuro, 'Kodak – Fuji Film Dispute and the WTO Panel Ruling' (n54) 214.

[190] Suggested Charter for an International Trade Organization, Article 30, United States. Department of State. Publication 2598. Commercial policy series No.93 (Sept. 1946) p. 23

[191] Amendment Proposed by the Australian Delegation, U.N. ESCOR, 2d Sess., at 1-2, U.N. Doc. E/PC/T/W/170 (1947).

[192] J.P. Durling & S.N. Lester, 'Original Meanings and the Film Dispute: The Drafting History, Textual Evolution, and Application of the Non-Violation Nullification or Impairment Remedy' (n10) 251.

[193] English Oxford Dictionary <https://en.oxforddictionaries.com/definition/result> <https://en.oxforddictionaries.com/definition/effect> accessed 29 November 2018.

[194] J.P. Durling & S.N. Lester, 'Original Meanings and the Film Dispute: The Drafting History, Textual Evolution, and Application of the Non-Violation Nullification or Impairment Remedy' (n10) 266.

[195] J.P. Durling & S.N. Lester, 'Original Meanings and the Film Dispute: The Drafting History, Textual Evolution, and Application of the Non-Violation Nullification or Impairment Remedy' (n10) 251

ii. The relevance of the "origin-neutral" character of the measure

Further, the Panel contemplated the relevance of the origin-neutral nature of a measure to causation of nullification or impairment. It perceived the "origin-neutral" character of a measure as a deterrent in the establishment of a causal relationship for the purposes of Article XXIII:1(b) pf the GATT 1994. However, it stressed that even in the absence of *de jure* discrimination (measures which on their face discriminate as to origin), it may be possible for a complainant to show *de facto* discrimination (measures which have a disparate impact on imports). Nonetheless, 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. In such a case the burden of demonstrating such impact may be significantly more difficult where the relationship between the measure and the product is questionable.

iii. The relevance of intent

Moreover, the Panel examined the relevance of intent to causality. In that respect it noted 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. As such, the Panel opined that 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, it 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.

B. <u>The burden and the standard of proof applicable to NVNI complaints</u>

The burden of proof, namely the burden of raising a claim, producing arguments and evidence for substantiating the claim and thus, ultimately proving the claim,[196] both in WTO law, as well as, generally in civil and common law,[197] lies with the party, either

[196] J. Pauwelyn, 'Defences and the Burden of Proof in International Law' in L. Bartels & F. Paddeu (eds.) *Exceptions and Defences in International Law* (2019, OUP) <https://ssrn.com/abstract=2863962> accessed 28 November 2018.

[197] J.H. Jackson *et al*, *Legal Problems of International Economic Relations: Cases, Materials and Text* (West Group, 1995) 355; D.-W. Kim, *Non-violation Complaints in WTO Law: Theory and Practice* (n5) 133.

the plaintiff or the defendant, who "*substantially asserts the affirmative of the issue*".[198] As the AB in *US – Shirts and Blouses* noted, if a party adduces evidence which are sufficient to establish a *prima facie* presumption that what had been claimed is true, then the burden shifts to the other party which now has to produce sufficient evidence to rebut the presumption which was raised.[199] This generally-accepted canon of evidence, has been followed in GATT and WTO jurisprudence dealing with NVNI complaints.[200] The GATT Panel in *US – Uruguayan Recourse to Article XXIII* clarified that:

> "*While it is not precluded that a prima facie case of nullification or impairment could arise even if there is no infringement of GATT provisions, it would be in such cases incumbent on the country invoking Article XXIII to demonstrate the grounds and reasons for its invocation. Detailed submissions on the part of that contracting party on these points were therefore essential for a judgment to be made under this Article*".

However, when it comes to the standard of proof, in the sense of the "*amount, level or quantum of proof that the party having the burden of proof must provide to prevail on its claim*",[201] it appears like that the above excerpt takes into account the exceptional nature of the NVNI complaints[202] and mandates something more than the mere demonstration of a *prima facie* case.[203] For, it is required by the Complainant to provide "*a detailed submission*" for its claim of nullification or impairment.[204]

This reading of the standard of proof required for a claim brought under Article XXIII:1(b) of the General Agreement, was later codified in the Annex to the 1979

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[198] M.N. Howard et al, *Phison on Evidence* (14th ed., Sweet & Maxwell, 1990) 52; M. Kazazi, *Burden of Proof and Related Issues: A Study on Evidence before International Tribunals* (Martinus Nijhoff, 1996) 117.

[199] Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* [hereinafter *US – Shirts and Blouses*], WT/DS33/AB/R, adopted 23 May 1997, and Corr. 1, DSR 1997: I, 323 [6.6]; Article 3.8 DSU.

[200] GATT Working Party Report, *Australia – Ammonium Sulphate* (n31) [11]; GATT Panel Report, *Germany – Sardines* (n31) [15].

[201] J. Pauwelyn, 'Defences and the Burden of Proof in International Law' (n199).

[202] Appellate Body Report, *EC – Asbestos* (n33) [188].

[203] Appellate Body Report, *US – Shirts and Blouses* (n203) [4]; Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)* [hereinafter *EC – Hormones*], WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998: I, 135, [104]: "*a prima facie case is one which, in the absence of effective refutation* […] *requires a panel, as a matter of law, to rule in favour of the* […] *party presenting the prima facie case*".

[204] GATT Panel Report, *US – Uruguayan Recourse to Article XXIII* (n31) [15]; GATT Panel Report, *US – Sugar Waiver* (n31) [5.21].

Understanding on Dispute Settlement [1979 Understanding]. On this basis, the GATT Panel in *US – Sugar Waiver*, recalled the 1979 Understanding and stated that the application of Article XXIII:1(b) calls for a cautious approach and requires the party bringing the NVNI complaint to explain in detail that the benefits accruing to it under a tariff concession have been nullified or impaired.[205] In similar vein, the GATT Panel in *Japan – Semi Conductors*, rejected the claims brought forward by the United States, on the basis that the Respondent failed to prove in "*a tangible and concrete manner*" that the measure at issue had caused actual nullification or impairment.[206]

Following the Uruguay Round and the coming into force of the WTO Agreement, the accumulation of GATT panel practice approaching the application of Article XXIII:1(b) as an exceptional course of action imposing a higher burden on the Complainant,[207] led to the drafting of Article 26 of the DSU which is titled "Non-violation complaints of the type described in Paragraph 1(b) of Article XXIII of GATT 1994".[208] In particular, the DSU states paragraph 1(a) of Article 26 that "*the complaining party shall present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement*".

The Panel in *Japan - Film* at the outset of its analysis, reaffirmed the past practice by reaffirming a complaining party's duty to provide "*a detailed justification for its claim in order to establish a presumption that what is claimed is true*".[209] Yet, in response to an argument produced from the United States, it recognized that the requirement of a "*detailed justification*" should not be construed as imposing a "*heightened evidentiary standard*". Rather, it should be perceived as a "*pleading requirement*", *i.e.* a screening exercise set to dismiss any inadequately articulated non-violation claims from the consideration of the Panel.[210]

It seems that the Panel in *Japan – Film* read Article 26.1(a) of the DSU, as complementing the burden of production of arguments and evidence imposed on the

[205] GATT Panel Report, *US – Sugar Waiver* (n31) [5.21].

[206] GATT Panel Report, *Japan – Semi-Conductors* (n31) [131]; R.W. Staiger & A.O. Sykes, 'Non-Violations' (n38) 751.

[207] Panel Report, *EC – Asbestos* (n33) [8.276].

[208] G. Cook, 'The Legalization of the Non-Violation Concept in the GATT/WTO System' (n 71).

[209] Panel Report, *Japan – Film* (n33) [10.32].

[210] Panel Report, *Japan – Film* (n33) [9.5]; G. Cook, 'The Legalization of the Non-Violation Concept in the GATT/WTO System' (n 71).

complainant, and not as setting a higher standard proof.[211] This interpretative choice, led the Panel to articulate the standard of causation under Article XXIII:1(b) of the GATT 1994 as encompassing a low threshold, namely that of "*more than a de minimis contribution*".[212] Nonetheless, in analyzing the causal relationship between the Japanese measures and the alleged upsetting of the competitive conditions of market access for imported US film and paper, the Panel opined that:

> "*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***".[213] [emphasis added]

The reluctance of the Panel to recognize a heightened standard of proof, at the same time when it, in fact, applied such a standard is striking. This mixed *dictum* has been perceived as "*essentially eliminating*" the "*detailed justification*" standard required for NVNI complaints.[214] Even more, the Panel's attempt to classify the detailed justification standard as a procedural requirement neglects that when it comes to the procedural requirements of bringing a claim, Article 4.4 and 6.2 of the DSU remain the core provisions.[215] In particular, Article 4.4 of the DSU stipulates that the request of a WTO member for consultations shall be submitted in writing and include an "*identification of the measures at issue and an indication of the legal basis of the complaint*". In a similar manner, Article 6.2 directs complaining WTO members to submit requests for the

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[211] J. Pauwelyn, 'Defences and the Burden of Proof in International Law' (n199).

[212] Panel Report, *Japan – Film* (n33) [10.84].

[213] Panel Report, *Japan – Film* (n33) [6.458].

[214] D.-W. Kim, *Non-violation Complaints in WTO Law: Theory and Practice* (n5) 137; Durling & S.N. Lester, 'Original Meanings and the Film Dispute: The Drafting History, Textual Evolution, and Application of the Non-Violation Nullification or Impairment Remedy' (n10) 267.

[215] F. Schorkopf, 'Article 4 DSU' in R. Wolfrum *et al* (eds.) *WTO – Institutions and Dispute Settlement* (Martinus Nijhoff/Leiden, 2006) 317; P.C. Mavroidis, 'Article 6 DSU' in R. Wolfrum *et al* (eds.) *WTO – Institutions and Dispute Settlement* (Martinus Nijhoff/Leiden, 2006) 338.

establishment of a panel by "*identify*[ing] *the specific measures at issue and provid*[ing] *a brief summary of the legal basis of the complaint sufficient to present the problem clear*". As it was pointed out by Professors Durling and Lester, these provisions are the ones that set the "*initial pleading requirements*", since they ensure that claims brought "*are made properly and sufficiently*", as well that the parties to a dispute "*are given adequate notice*". To the contrary, "*the 'detailed justification' standard has nothing to do with notice; it sets the evidentiary standard that a claim must meet. 'Detailed justification' appears in a different section of the DSU, in a context that does not suggest a pleading requirement*".[216]

C. The remedies available for NVNI complaints

The remedies provided under the WTO Agreement for violation complaints are described in Article 19.1 of the DSU. WTO Panels or the AB, shall, upon a finding of inconsistency with WTO Law, recommend that the Member concerned bring the measure into conformity with that agreement, while they may also make, non-binding, suggestions on the ways in which the concerned Member may implement the recommendations.[217] Additionally, in case the recommendations and rulings are not implemented within a reasonable period of time, compensation and the suspension of concessions or other obligations are available as temporary remedies under Article 22.1 of the DSU to WTO Members.[218]

However, when it comes to non-violation complaints, both Article 26.1(b) of the DSU states that:

> "*where a measure has been found to nullify or impair benefits under, or impede the attainment of objectives, of the relevant covered agreement without violation thereof,* ***there is no obligation to withdraw the measure****. However, in such cases, the panel or the Appellate Body shall recommend that the Member concerned make a* ***mutually satisfactory adjustment***". [emphasis added]

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[216] Durling & S.N. Lester, 'Original Meanings and the Film Dispute: The Drafting History, Textual Evolution, and Application of the Non-Violation Nullification or Impairment Remedy' (n10) 267.

[217] Article 19.1 DSU; Panel Report, Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico [hereinafter *Guatemala – Cement*], WT/DS156/R, adopted 17 November 2000, DSR 2000: XI, 5295 [8.2]; M. Matsushita *et al*, *The World Trade Organization: Law, Practice and Policy* (OUP, 2003) 80.

[218] P.T. Stoll, 'Article 22 DSU' in R. Wolfrum *et al* (eds.) *WTO – Institutions and Dispute Settlement* (Martinus Nijhoff/Leiden, 2006) 529, 535.

Therefore, a successful NVNI complaint gives rise to an obligation of the responding WTO Member to make a mutually satisfactory adjustment. Such an adjustment could, by virtue of Article 26.1(d) of the DSU include compensation as the final settlement of the dispute.[219]

However, the exact content of a "*mutually satisfactory adjustment*" remains unclear. GATT Panels practice suggests that the essence of achieving a "*satisfactory*" adjustment is that of redeeming the inequality created. In most GATT cases the contracting parties have recommended that "*the party against which a finding has been made consider ways and means to remove the competitive inequality brought about by the measure at issue*".[220] Even more, the fact that the losing party is under the obligation to do only what is mutually satisfactory makes the way that such an adjustment is to be determined uncertain.[221] Procedurally, Article 26.1(c) of the DSU offers the option of arbitration for achieving a mutually satisfactory adjustment at the request of either party; whereby the arbitrator may be asked to determine the level of benefits which have been nullified or impaired, or to provide suggestions on how the desired adjustment will be reached.[222]

While there is no reference in Article 26 of the remedy of suspension of concessions or other obligations, this does not mean that the said Article contracts out of the DSU procedures that apply to retaliation.[223] Indeed, the text of Article XXIII:1(b) of the GATT 1994 corroborates this argument. Paragraph 2 of Article XXIII:1(b) stipulates that:

> "*if no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time* […] [and] *if the contracting parties consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties of such concessions or*

[219] G. Cook, 'The Legalization of the Non-Violation Concept in the GATT/WTO System' (n71); GATT Working Party Report, *Australia – Ammonium Sulphate* (n31) [16]; GATT Panel Report, *EEC – Citrus* (n31) [5.2]; GATT Panel Reprt, *EEC – Canned Fruit* (n31) [82]; GATT Panel Report, *US – Nicaragua Trade* (n31) [5.8].

[220] GATT Panel Report, *EEC – Canned Fruit* (n31) [82]; GATT Working Party Report, *Australia – Ammonium Sulphate* (n31) [16]; GATT Panel Report, *EEC – Oilseeds* (n31) [157].

[221] J. Waincymer, *WTO Litigation: Procedural Aspects of Formal Dispute Settlement* (Cameron May, 2002) 636-637.

[222] M. Matsushita *et al*, *The World Trade Organization: Law, Practice and Policy* (n220) 86; D.-W. Kim, *Non-violation Complaints in WTO Law: Theory and Practice* (n5) 143.

[223] G. Cook, 'The Legalization of the Non-Violation Concept in the GATT/WTO System' (n71).

other obligations under this Agreement as they determine to be appropriate in the circumstances".

III. THE OPERATION OF NVNI COMPLAINTS AGAINST MEASURES PERMITTED UNDER THE "EXCEPTIONS" OF THE GATT 1994

This Part aims to explore the operation of NVNI complaints brought against measures, which, even though, *prima facie* conflict with one of the provisions of the GATT 1994, they are ultimately justified due to the application of one of the exceptions incorporated in the General Agreement. In such cases, a measure, which on its face appears to infringe one of the obligations provided for under the GATT 1994, is ultimately permitted. The reason is that the drafters decided that the objective served by that measure deserves to be accommodated within the nexus of rights and obligations created by the General Agreement. However, even if a WTO-inconsistent measure is legitimately justified under one of the GATT 1994 exceptions, there may be cases when another Member may find that this, otherwise, permissible measure adversely affects its benefits accruing under the GATT 1994, in a way that reaches the threshold of nullification or impairment.

In such situations, two interests seem to collide: on the one hand, the interest of the complaining WTO Member to protect the balance of the tariff concessions granted through the application of Article XXIII:1(b) of the GATT 1994; on the other hand, the interest of the WTO Member implementing the measure at stake to permit the adoption and enforcement of a certain *prima facie* GATT-inconsistent measure, in order to promote a legitimate trade or non-trade policy objective, by utilizing one of the justifications provided for under the GATT 1994.

Bearing these divergent interests in mind, this part aims to examine the relevance of policy considerations to the interpretation and application of Article XXIII:1(b) of the GATT 1994. Is the operation of NVNI complaints affected when the challenged WTO-inconsistent measure legitimately pursues trade and non-trade policy objectives and is thus justified under one of the GATT 1994 exceptions? In order to explore this question, at the outset of the analysis, we will provide a brief overview of the exceptions provided under the GATT 1994, how they operate in the WTO treaty environment and how they are classified (**A**). Then, we will focus on GATT (**B**) and WTO (**C**) jurisprudence analyzing NVNI complaints concerning policy measures otherwise permitted under the

exceptions of the General Agreement, attempting to evaluate the impact that the various policy objectives have on the interpretation and the application of Article XXIII:1(b) of the GATT 1994.

A. "Exceptions" in the GATT 1994

There are numerous "exception" clauses incorporated in the GATT 1994. Article XXIV permits the formation of customs unions and free trade areas among WTO Members,[224] justifying any inconsistency with the most-favored-nation principles set out in Article I, as well as, with other general obligations. Article XII permits WTO Members to implement and maintain restrictions in order to address balance of payment problems. Article XVIII, similarly, permits the implementation and maintenance of restrictions so as to allow for certain forms of governmental assistance to economic development. Article XI:2 permits the implementation of quantitative restrictions for, among others, the prevention or relief of critical shortages of foodstuffs. Articles VI and XIX enable WTO Members to apply anti-dumping and countervailing duties, as well as, safeguard measures. Article III:8(a) enables the imposition of discriminatory restrictions deriving from laws, regulations or requirements governing the procurement by government agencies of products purchased from governmental purposes. Article XX and XXI allow for the adoption and enforcement of restrictions that address, among others, human health, environmental protection or security concerns.

The multiple "exceptions" encompassed in the GATT 1994, operate on the basis of various "*legal techniques*" common in international treaty making, which distinguish on the basis of whether, as a result of the operation of the exception, the rule in question is either not applicable or not applied. [225] The distinction between the applicability and the application of a norm has been summarized in following excerpt from Professors Hage, Watermann and Arosemena:

> "*A rule is applicable to a case if the rule is valid, and if its ordinary and scope conditions are satisfied by the case. If a rule is applied to a case, the rule attaches its legal consequences to the facts of the case. Normally the*

[224] With reference to developing and least-developed WTO Member States, the Enabling Clause provides for the same exception but with more flexibilities and less strict requirements.

[225] J.E. Viñuales, 'Seven Ways of Escaping a rule: Of exceptions and their avatars in International Law' in L. Bartels & F. Paddeu (eds.) *Exceptions and Defences in International Law* (OUP, 2019) < https://ssrn.com/abstract=2888963>; L.D. d'Almeida, *Allowing for Exception: A Theory of Defences and Defeasibiliy in Law* (OUP, 2015) 32.

applicability of a rule to a case is a contributory reason why the rule should be applied to the case. An exception to a rule in a case is defined as the situation in which a rule is applicable to, but nevertheless not applied to the case." [226]

With this in mind, we note that some exceptions in the WTO Agreement operate as carve-outs, scope provisions or derogations,[227] in the sense that their application excludes a particular category of measures from the scope of application of the general obligations.[228] For example, In *Canada – Renewable Energy*, the Panel classified Article III:8(a) of the GATT 1994 as a "scope provision".[229] Further, the AB concluded that:

"*Article III:8(a) … establishes a derogation from the national treatment obligation of Article III for government procurement activities falling within its scope. Measures satisfying the requirements of Article III:8(a) are not subject to the national treatment obligations set out in other paragraphs of Article III. Article III:8(a) is a derogation limiting the scope of the national treatment obligation and it is not a justification for measures that would otherwise be inconsistent with that obligation*."[230]

In a similar vein, in *China – Raw Materials* the AB considered the different nature of Articles XI:2 and XX of the GATT 1994, and stated that:

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[226] J. Hage et al, 'Exceptions in International Law' in L. Bartels & F. Paddeu (eds.) *Exceptions and Defences in International Law* (OUP, 2019) < www.jaaphage.nl/html/ExceptionsInInternationalLaw.htm>.

[227] Appellate Body Reports, *Argentina – Measures Affecting the Importation of Goods* [herein after *Argentina – Import Measures*] WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015, DSR 2015:II, 579 [5.234]; Panel Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* [hereinafter *India – Quantitative Restrictions*], WT/DS90/R, adopted 22 September 1999, upheld by Appellate Body Report WT/DS90/AB/R, DSR 1999:V, 1799 [5.103]; Panel Report, *United States – Anti-Dumping Act of 1916* [US – 1916 Act], *Complaint by the European Communities*, WT/DS136/R and Corr.1, adopted 26 September 2000, upheld by Appellate Body Report WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, 4593 [6.220]; Panel Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan* [hereinafter *US – Cotton*], WT/DS192/R, adopted 5 November 2001, as modified by Appellate Body Report WT/DS192/AB/R, DSR 2001:XII, 6067 [44].

[228] J.E. Viñuales, 'Seven Ways of Escaping a rule: Of exceptions and their avatars in International Law' (n228); L.D. d'Almeida, *Allowing for Exception: A Theory of Defences and Defeasibiliy in Law* (n) 38; J. Hage et al, 'Exceptions in International Law' (n228).

[229] Panel Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program* [hereinafter *Canada – Renewable Energy*], WT/DS412/R and Add.1 / WT/DS426/R and Add.1, adopted 24 May 2013, as modified by Appellate Body Reports WT/DS412/AB/R / WT/DS426/AB/R, DSR 2013:I, 237 [fn 263 to 7.113].

[230] Appellate Body Reports, *Canada –Renewable*, WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013, DSR 2013:I, 7 [7.24-7.25].

"Members can resort to Article XX of the GATT 1994 as an exception to justify measures that would otherwise be inconsistent with their GATT obligations. By contrast, Article XI:2 provides that the general elimination of quantitative restrictions shall not extend to the items listed under subparagraphs (a) and (c) of that provision. This language seems to indicate that the scope of the obligation not to impose quantitative restrictions itself is limited by Article XI:2(a). Accordingly, where the requirements of Article XI:2(a) are met, there would be no scope for the application of Article XX, because no obligations exist"[231]

In *Indonesia – Autos*, the Panel considered Article XIX of the GATT 1994 is an escape clause providing for the imposition of restrictions in the form of safeguard measures, thus permitting the deviation from the obligations of the GATT 1994.[232] In *Indonesia – Safeguards*, the AB in a recent *dictum* which seems to classify Article XIX as an exemption highlighted the distinction between the inquiry of the applicability of the escape clause of Article XIX of the GATT 1994 and that of the WTO-consistency of a measure.[233]

Yet, there other exception clauses in the WTO Agreement which perate as exceptions *stricto sensu*, in that they justify a *prima facie* finding of violation and, thus, their operation presupposes the application of a primary WTO rule, as well as, a finding of breach.[234] Indeed, the AB in *Thailand – Cigarettes (Philippines)* clarified in that regard that:

"[In] *examining a specific measure, a panel may be called upon to analyze a substantive obligation and an affirmative defence, and to apply both to that measure. It is also true that such an exercise will require a panel to find and apply a "line of equilibrium" between a substantive obligation and an exception. Yet this does not render that panel's analyses of the*

[231] Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, 3295, [334].

[232] Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry* [hereinafter *Indonesia – Autos*], WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, Corr.1 and Corr.2, adopted 23 July 1998, and Corr.3 and Corr.4, DSR 1998:VI, 2201[5.325].

[233] Appellate Body Report, *Indonesia – Safeguard on Certain Iron or Steel Products* [hereinafter *Indonesia – Iron or Steel Products*], WT/DS490/AB/R, WT/DS496/AB/R, and Add.1, adopted 27 August 2018 [6.7].

[234] J.E. Viñuales, 'Seven Ways of Escaping a rule: Of exceptions and their avatars in International Law' (n 228); S. Zleptnig, *Non-Economic Objectives in WTO Law: Justification Provisions of GATT, GATS, SPS and TBT Agreements* (Martinus Nijhoff, 2010) 129.

obligation and the exception a single and integrated one. On the contrary, an analysis of whether a measure infringes an obligation necessarily precedes, and is distinct from, the "further and separate" assessment of whether such measure is otherwise justified." [235]

Furthermore, a basic distinction drawn in literature is that of "business" and "non-business" exceptions.[236] The first category comprises of "exceptions", which address special economic situations and promote economic objectives.[237] A vibrant example of such economic exceptions is Article XXIV of the GATT 1994, which allows WTO Members to adopt WTO-inconsistent measures through the conclusion of regional or preferential trade arrangements that liberalize the trade between them.[238] This Article recognizes the desirability of increasing the freedom of trade through enhancing closer integration between the economies of WTO Members.[239] The main *ratio* underpinning this exception is that trade liberalization in the regional context may eventually initiate multilateral developments, thereby contributing to a generalized lowering of trade barriers[240].

Particularly, in a free-trade area, the members agree to eliminate tariffs and other trade restrictions on "*substantially all the trade*" within the free-trade areas; while in a

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[235] Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines* [hereinafter Thailand – Cigarettes], WT/DS371/AB/R, adopted 15 July 2011, DSR 2011:IV, 2203 [173].

[236] J. Pauwelyn, Conflitct of Norms in Public International Law: How WTO Law Related to Other Rules of International Law (CUP, 2003) 353; P. C. Mavroidis, *The General Agreement on Tariff s and Trade: A Commentary* (OUP, 2005) 184; J.H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (MIT Press, 1997) 54; S. Zleptnig, *Non-Economic Objectives in WTO Law: Justification Provisions of GATT, GATS, SPS and TBT Agreements* (n237) 126; P. Van Den Bossche & W. Zdouc, *The law and policy of the World Trade Organisation* (n47) 543, 606.

[237] Other economic exceptions are the exceptions of Article XII and XVIII of the GATT 1994, which enable members to adopt WTO-inconsistent measures in order to safeguard their balance of payments.

[238] J.H. Jackson, *World Trade and the Law of the GATT* (n7) 576; P. Hilpold, 'Regional Integration according to Article XXIV: GATT Between Law and Politics' in Bogdandy and Wolfrum (eds.) *Max Planck Yearbook of United Nations Law* (2003) 219; Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres* [hereinafter *Brazil – Retreated Tyres*], WT/DS332/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS332/AB/R, DSR 2007:V, 1649 [7.272].

[239] Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products* [hereinafter *Turkey – Textiles*], WT/DS34/AB/R, adopted 19 November 1999, DSR 1999:VI, 2345 [46]; Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* [hereinafter *Korea – Dairy*], WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3 [77]; N.JS. Lockhart & A.D. Mitchell, 'Regional Trade Agreements under GATT 1994: An Exception and Its Limits' in Mitchell A.D (ed.) *Challenges and Prospects for the WTO* (Cameron May, 2005) 230; G. Marceau & C. Reiman, 'When and How Is a Regional Trade Agreement Compatible with the WTO' (2010) 28 *Legal Iss Econ Integ* 297, 313.

[240] Eun Sup Lee, *World Trade Regulation: International Trade under the WTO Mechanism* (Springer, 2012) 358.

customs union, they additionally have to establish "*substantially the same duties and other regulations*" for external goods imported into the customs union.[241]

The second category, that of "non-business" exceptions, permits the introduction of certain trade restrictions and deviations from the GATT 1994 on non-economic grounds, like Article XX or XI.[242] Article XX of the GATT 1994, titled as the General Exception, is the beacon for the promotion of non-economic objectives, such as the protection of health or the environment, within the WTO System.[243] Article XX operates so as to achieve a "*line of equilibrium*" between the agreed WTO rules serving the liberalization of international trade and the interest of WTO Member states to adopt and enforce measures which aim at the pursuit of public, non-trade concerns.[244] Therefore, even when a measure violates one the provisions of the GATT 1994, it has a second chance for survival under Article XX, provided that it complies with the strict two-part requirement enshrined in both the subparagraphs of Article XX and the chapeau.[245] In particular, the regulatory measure in question must be necessary for the pursuit of various objectives, like the protection of public morals,[246] human, animal or plant life and health,[247] compliance with laws of regulations,[248] or it must be related to the conservation

[241] Appellate Body Report, *Turkey – Textiles* (n43) [57]; M.F. Nsour, *Regional Trade Agreements in the Era of Globalization: A Legal Analysis, North Carolina Journal of International Law and Commercial Regulation* (Spring, 2008) 7; R. Adlung & P. Morisson, 'Less than the GATS: 'Negative Preferences' In regional Services Agreements' (2010) 13(4) *JIEL* 1103, 1108.

[242] S. Zleptnig, *Non-Economic Objectives in WTO Law: Justification Provisions of GATT, GATS, SPS and TBT Agreements* (n237) 127.

[243] Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* [hereinafter *EC – Seal*], WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014, DSR 2014:I, 7 [5.200-5.201].

[244] Appellate Body Report, *US – Shrimp* (n43) [156, 159].

[245] Appellate Body Report, *US – Gasoline* (n43) [22]; Appellate Body Report, *US – Shrimp* (n43) [119-120]; Appellate Body Report, *Brazil – Retreated Tyres* (n241) [139]; J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Related to Other Rules of International Law* (n239) 381

[246] Appellate Body Report, *China – Publications* (n48) [7.759]; Appellate Body Report, *EC – Seal Products* (n246) [5.199].

[247] Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* [hereinafter *EC – Tariff Prefences*] WT/DS246/AB/R, adopted 20 April 2004, DSR 2004:III, 925 [7.2012]; Appellate Body Report, *Brazil – Retreaded Tyres* (n241) [156]; Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* [hereinafter *Korea – Beef*] WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, 5164; Appellate Body Report, *EC – Asbestos* (n33)[172]; Appellate Body Report, *US – Gambling* (n52) 306; Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes* [hereinafter *Dominican Republic – Import and Sale of Cigarettes*] WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, 7367 [70].

[248] Appellate Body Report, *India – Certain Measures Relating to Solar Cells and Solar Modules* [hereinafter *India – Solar Cells*] WT/DS456/AB/R and Add.1, adopted 14 October 2016, DSR 2016:IV, 1827 [5.58]; Appellate Body Report, *Colombia – Measures Relating to the Importation of Textiles, Apparel*

of an exhaustible natural resources.[249] Simultaneously, the measure must comply with the conditions of the chapeau, namely it must not be an arbitrary or unjustifiable discrimination between countries were the same conditions prevail,[250] or a disguised restriction on international trade.[251]

On the other hand, Article XXI of the GATT 1994 allows Members to adopt WTO-inconsistent measures in view of the pursuit of a close list of security interests, like safeguarding strategic domestic production capabilities or imposing trade sanctions and restrictions of export goods for military use.[252] The provision constitutes an affirmative defense, which may be invoked to justify a measure that would be otherwise inconsistent with any of the obligations imposed by the GATT 1994.[253] In detail, WTO Members may invoke this exception when they are trying to avoid a requirement "*to furnish any information the disclosure of which* [the Member] *considers contrary to its essential security interest*"; when they are trying to make an "*action which* [they] *consider*[] *necessary for the protection of* [their] *essential security interest*"; and, lastly, when they are taking an action to pursue the "*obligations under the United Nations Charter for the maintenance of international peace and security*".[254]

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and Footwear [hereinafter *Colombia - Textiles*], WT/DS461/AB/R and Add.1, adopted 22 June 2016, DSR 2016:III, 1131 [5.134 – 5.135]; Panel Report, *Indonesia – Measures Concerning the Importation of Chicken Meat and Chicken Products* [hereinafter *Indonesia – Chicken*], WT/DS484/R and Add.1, adopted 22 November 2017 [7.248 – 7.249]; Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages* [hereinafter *Mexico – Soft Drinks*], WT/DS308/AB/R, adopted 24 March 2006, DSR 2006:I, 3 [69].

[249] Appellate Body Report, *EC – Tariff Preferences* (n250) [95]; Appellate Body Report, *US – Shrimp* (n248) [43]; Appellate Body Report, *US – Gasoline* (n43) [18]; Appellate Body Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum* [hereinafter *China – Rare Earths*], WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, adopted 29 August 2014, DSR 2014:III, 805 [5.94].

[250] Appellate Body Report, *Brazil – Retreated Tyres* (n241) [229-230]; Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico* [hereinafter *US – Tuna II (Mexico) (Article 21.5 – Mexico)*] WT/DS381/AB/RW and Add.1, adopted 3 December 2015, DSR 2015:X, 5133 [7.316]; Appellate Body Report,, *US – Shrimp* (n) [161]; Appellate Body Report, *EC – Seal Products* (n246) [5.299-5.301]; Appellate Body Report, *Indonesia – Importation of Horticultural Products, Animals and Animal Products* [hereinafter *Indonesia – Import Licensing Regimes*], WT/DS477/AB/R, WT/DS478/AB/R, and Add.1, adopted 22 November 2017 [5.99].

[251] Appellate Body Report, *US – Gasoline* (n43) [25]; Appellate Body Report, *Brazil – Retreaded Tyres* (n241) [239].

[252] P. Van Den Bossche & W. Zdouc, *The law and policy of the World Trade Organisation* (n47) 665; H.P. Hestermeyer, 'Article XXI Security Exeptions' (n47) 571.

[253] GATT, Decision Concerning Article XXI of the General Agreement, L/5426, distributed 2 December 1982.

[254] J. Lee, 'Commercializing National Security? National Security Exceptions' Outer Parameter under GATT Article XXI' (2018) 13(2) *Asian Journal of WTO & IHL Law and Policy* 227, 13

Additionally, the WTO Agreement introduces in Article IX:3 a waiver system, whereby the Ministerial Conference may on a case-by-case basis waive the obligations imposed on a WTO member under the GATT 1994.[255] This system of waivers provides the necessary flexibility required in trade relations;[256] while, at the same time, introducing a fragmented approach with the WTO legal system.[257] For this reason, Article IX:3, along with Article XXV:5 of the GATT 1994 sets a substantive standard intended to limit the discretion of the Ministerial Conference in granting waivers, by necessitating the existence of "*exceptional circumstances not elsewhere provided for*".[258]

B. NVNI complaints concerning permissible WTO-inconsistent measures under the GATT 1947

During the GATT era, three NVNI complaints were brought by the GATT contracting parties, in order to safeguard their market access benefits from the nullification or impairment allegedly caused by *prima facie* GATT-inconsistent measures permitted under the exceptions of the General Agreement. The main issue arising out of this GATT Panel practice was the applicability of Article XXIII:1(b) of the GATT 1947 to *prima facie* WTO-inconsistent measures that were otherwise justified.

To begin with the *EEC – Citrus* case, which even though resulted in an un-adopted GATT panel report, offers a valuable insight on how the Contracting Parties conceived this issue of applicability of Article XXIII:1(b). In 1982, the United States presented a claim under Article XXIII:1(b) of the GATT 1947 complaining that the granting of preferences by the EEC to imports of citrus products from certain Mediterranean states adversely affected the United States citrus exports, in a way that nullified or impaired the benefits of market access flowing from the tariff concessions granted by the EEC.[259] The EEC argued that the citrus preferences challenged by the United States were granted on the basis of preferential trade agreements between the EEC and individual Mediterranean

[255] R. Wolfrum, 'Article IX WTO Agreement' in R. Wolfrum *et al* (eds.) *WTO – Institutions and Dispute Settlement* (Martinus Nijhoff/Leiden, 2006) 114.

[256] GATT Panel Report, *US – Sugar Waiver* (n33) [3.30]; J.H. Jackson, *The Jurisprudence of GATT and WTO: Insights on Treaty Law and Economic Relations* (CUP, 2000) 189.

[257] J. Pauwelyn, 'WTO Compassion or Superioty Complex?: What to Make of the WTO Waiver for "Conflict Diamonds"' (2003) 24(4) *Mich. J. Int'l L.* 1177, 1198.

[258] R. Wolfrum, 'Article IX WTO Agreement' (n258) 116; D.Marinberg, 'GATT/WTO Waivers: "Exceptional Circumastences" as Applied to the Lome Waiver' (2001) 19 *B. U. Int'l L. J.* 129, 325.

[259] GATT Panel Report, *EEC – Citrus* (n31) [1.1].

countries, e.g. Egypt, Israel, Lebanon, Morocco, Tunisia and Turkey, which had been notified under Article XXIV of the GATT 1947.[260] In particular, the EEC contended that

> "[i]*t would effectively become impossible for contracting parties to implement agreements under this Article* [XXIV], *if the mere existence of a tariff preference granted within the framework of an agreement covered by Article XXIV were considered to be a nullification or impairment of GATT benefits, on the grounds that it upset the competitive relationship between products originating in the beneficiary country and those originating in other contracting parties. Therefore, the use of Article XXIII:1(b) should be rejected as a form of indirect legal challenge to agreements which had not been declared inconsistent with Article XXIV*".[261]

The *EEC – Citrus* GATT Panel before addressing the NVNI complaint of the United States,[262] noted that by virtue of Article XXIV:7(b), the examination of the consistency of the preferential trade agreements with the said Article lies with the Contracting parties, which are then to make any relevant recommendations.[263] However, *in casu* there was a lack of consensus among the contracting parties regarding the conformity of the agreements concluded by the EEC.[264] Thus, pending the decision by the contracting parties, the implementation of the agreements could neither be considered as precluding any infringement, in the sense of an agreement sanctioned under Article XXIV of the GATT 1947, nor as constituting a *prima facie* case of nullification or impairment resulting from the application of an inconsistent measure in the sense of Article XXIII:1(a).[265] Despite the still undetermined legality of the measures in question, the GATT Panel proceeded to the analysis of the NVNI complaint lodged by the United States and, thus, it implicitly rejected EEC's arguments.[266] Next, it turned to examine the

[260] GATT Panel Report, *EEC – Citrus* (n31) [2.9-2.10]
[261] GATT Panel Report, *EEC – Citrus* (n31) [3.36].
[262] GATT Panel Report, *EEC – Citrus* (n31) [4.21].
[263] GATT Panel Report, *EEC – Citrus* (n31) [4.15].
[264] GATT Panel Report, *EEC – Citrus* (n31) [4.19].
[265] GATT Panel Report, *EEC – Citrus* (n31) [4.20].
[266] GATT Panel Report, *EEC – Citrus* (n31) [4.25].

substantive issues of the complaint, without, however, reaching a finding of nullification or impairment.[267]

In the same vein, the GATT Panel in *US – Sugar Waiver* reaffirmed the above interpretation of Article XXIII:1(b) of the General Agreement, as an open-ended provision applicable to both GATT-consistent and inconsistent measures otherwise justified under the GATT 1947. In that case, the measure at issue was the US Section 22 amendment to the Agricultural Adjustment Act of 1933, which provided for the possibility of restrictions on sugar imports in the form of fees or quantitative limitations. Notably, actions taken under Section 22 were sanctioned by a waiver granted by Contracting parties to the United States in 1955 on the basis of Article XXV of the GATT 1947.[268] The GATT Panel clearly stipulated that Article XXIII:1(b) applies whether or not the measure at issue conflicts with the GATT 1947,[269] and it noted that:

> "*the question of whether a measure inconsistent with Article XI:1 remains inconsistent with the General Agreement even if covered by a waiver cannot, by itself, determine whether it nullifies or impairs benefits accruing under the General Agreement within the meaning of that provision*".[270]

Earlier than the GATT Panel report, the 1955 Report of the Working Party, on Import Restrictions Imposed by the United States under Section 22 of the U.S. Agricultural Adjustment Act", which drafted the text of US waiver, had pointed in the same direction, by noting that:

> "*the obligations of the Agreement are waived without prejudice to the right of the affected contracting parties to have recourse to the appropriate provisions of Article XXIII* [and to] *the right of other contracting parties to have recourse to the provisions of Article XXIII is not limited to such cases only, but applies to the Decision as a whole*".

Another GATT Panel Report that touched upon the issue of the availability of NVNI complaints for WTO-inconsistent policy measures permitted under the GATT

[267] GATT Panel Report, *US – Sugar Waiver* (n31) [5.1].

[268] GATT Panel Report, *US – Sugar Waiver* (n31) [2.1-2.14].

[269] GATT Panel Report, *US – Sugar Waiver* (n31) [5.17].

[270] GATT Panel Report, *US – Sugar Waiver* (n31) [5.21].

1947 is the *US – Nicaragua Trade*. In that case, the GATT Panel was faced with a complaint concerning the 1985 US Executive order prohibiting all trade with Nicaragua, as well as, transactions relating to air and sea transportation between Nicaragua and the United States. Pursuant to the United States, this measure was adopted on the basis of national security reasons.[271] The GATT panel did not reach a conclusion with reference to Nicaragua's violation claims, since the examination of the justification presented by the United States on the basis of the Article XXI exception was outside the Panel's terms of reference. Accordingly, it continued with the analysis of the NVNI complaints brought by Nicaragua. It reasoned that, even though, the consistency of the measure at issue with the GATT 1947 could not be discerned, "*a contracting party has to be treated as if it is observing the General Agreement until it is found to be acting inconsistently with it*", and thus recourse to the remedy of NVNI complaints cannot be denied.[272] However, concerning the basic question of whether actions taken under Article XXI could nullify or impair GATT benefits of the adversely affected contracting party in a way that raises claims under Article XXIII:1(b) of the GATT 1947, the GATT Panel decided not to propose any ruling.[273]

In that respect, the Decision concerning Article XXI of the General Agreement of 30 November 1982 offers some guidance. Particularly the Decision states that "[w]*hen action is taken under Article XXI, all contracting parties affected by such action retain their full rights under the General Agreement*".[274]

C. NVNI complaints concerning permissible WTO-inconsistent measures under the GATT 1994

The above presented GATT practice focused only on the issue of the applicability of Article XXIII:1(b). It remained reluctant to delve into the intricacies of how the balance aimed to be achieved through the operation of Article XXIII:1(b) will be shaped, in cases when the challenged measure brings legitimate policy concerns into the mix. In the WTO era, one case had the chance to address this issue, namely the *EC – Asbestos* case, which focused on regulatory health measures justified under Article XX(b) of the GATT 1994.

[271] GATT Panel Report, *US – Nicaragua Trade* (n31) [3.1-3.3].

[272] GATT Panel Report, *US – Nicaragua Trade* (n31) [5.5].

[273] GATT Panel Report, *US – Nicaragua Trade* (n31) [5.11].

[274] GATT, Decision Concerning Article XXI of the General Agreement, L/5426, adopted 30 November 1982.

This Section will first, analyze the approach followed in the *EC - Asbestos* dispute **(1)**, and, then, it will turn to assess the potential usefulness of the conclusions reached in cases involving measures justified under exceptions of the GATT 1994, other than Article XX **(2)**.

1. The *EC – Asbestos* dispute: Measures justified under Article XX of the GATT 1994

In 1996, the French government introduced a Decree which banned almost completely the manufacture, sale and importation of asbestos and asbestos-containing products.[275] France, in justifying this measure, put forward the health risks posed by the inhalation of asbestos fibres and claimed that the decree was a measure aiming to protect workers and consumers from the risk of cancer.[276] Canada, a large importer of chrysotile asbestos fibres in the EU, claimed that the French measure even though seemingly banned all asbestos and asbestos products, it discriminated *de facto* between imported chrysotile asbestos fibres and domestic alternative fibres.[277] According to the allegations of the complaining government, chrysotile asbestos fibres and alternative fibres of polyvinyl alcohol, cellulose and glass [PGG], which could be substituted as asbestos fibres, were "like products" within the meaning of the national treatment obligation enshrined in Article III:4 of the GATT 1994.[278] Ultimately, the Panel found that even though the measures were a violation of Article III:4,[279] the were justified under Article XX(b) of the GATT 1994, as measures necessary to protect health.[280]

Along with the violation claim brought forward by the Complainant, a NVNI complaint was also filed.[281] Canada contented that even in case the Decree at stake was found to be consistent with the GATT 1994, the French ban disrupted the competitive relationship in the French market between, on the one hand, chrysotile asbestos fibre and products containing it and, on the other, like and competitive French products, thus creating a monopoly for substitute fibres. In detail, Canada argued that the said benefits accrued to it on the basis of the relevant tariff concession made by France and the EU

[275] Panel Report, *EC – Asbestos* (n33) [2.3].
[276] Panel Report, *EC – Asbestos* (n33) [2.4].
[277] Panel Report, *EC – Asbestos* (n33) [3.10].
[278] Panel Report, *EC – Asbestos* (n33) [3.12].
[279] Panel Report, *EC – Asbestos* (n33) [8.158].
[280] Panel Report, *EC – Asbestos* (n33) [8.241].
[281] Panel Report, *EC – Asbestos* (n33) [8.243].

prior and during the Uruguay Round negotiations.[282] The EC attempted to refute the applicability of Article XXIII:1(b) to measures justified under Article XX of the GATT 1994, by claiming that only consistent measures fall under the ambit of Article XXIII:1(b); that the introductory clause of Article XX does not permit the applicability of Article XXIII:1(b) to measures justified under the general exception; and that, in any event, regulatory measures pursuing legitimate policy objectives cannot be compromised or restricted by the concept of NVNI complaints.[283]

The Panel was thus called to address the relevance of the WTO Agreement's recognition of specific objectives as permitting deviation from the agreed rules to the applicability and the application of Article XXIII:1(b) of the General Agreement.[284] Accordingly, it first dealt with the question of the applicability of Article XXIII:1(b) to WTO-inconsistent measures permitted under the GATT 1994 General exception (**a**). After resolving the issue of the applicability and thus reaffirming past GATT practice,[285] the Panel went on to examine the substantive part of Canada's complaint. It formed its analysis on the legal test introduced in *Japan – Film*.[286] However, the special nature of the measure in question, *i.e.* that of a regulatory measure pursuing legitimate policy objectives justified under Article XX(b) of the GATT 1994, affected the reasoning of the Panel in the formulation of the required standard of proof (**b**), as well as, in the interpretation and application of the requirements prescribed in Article XXIII:1(b) of the GATT 1994 (**c**). What is more, during the AB proceedings, the findings of the Panel on the applicability of Article XXIII:1(b) in *casu*, were upheld **(d)**.

a. <u>The applicability of Article XXIII:1(b) of the GATT 1994 to WTO-inconsistent measures permitted under Art. XX GATT 1994</u>

As briefly mentioned, the EC produced three main arguments for the inapplicability of Article XXIII:1(b) to measures justified under the GATT 1994 general exception: one relating to the interpretation the term "*whether or not it conflicts*" of Article XXIII:1(b) **(i)**; one relating to the interpretation of the *chapeau* of Article XX of

[282] Panel Report, *EC – Asbestos* (n33) [8.245].

[283] Panel Report, *EC – Asbestos* (n33) [8.255, 8.257].

[284] Panel Report, *US – COOL (Article 21.5 – Mexico and Canada)* (n33) [7.708].

[285] Panel Report, *EC – Asbestos* (n33) [8.274].

[286] Panel Report, *Japan – Film* (n33) [10.41].

the GATT 1994 **(ii)**; and one relating to the overriding importance of regulatory measures justified under Article XX of the GATT 1994 **(iii)**.

i. Any measure "whether or not it conflicts" as any measure not regulated by GATT rules

With reference to the first argument, the main element in support of EC's restrictive interpretation of Article XXIII:1(b) was the reasoning of the Panel in *Japan – Film*, which found that Article XXIII:1(b) provides "*the means to redress government action not otherwise regulated by GATT rules*".[287] According to the EC, that statement delimited the operation of NVNI complaints as a means of redress available to WTO Members only against measures not in conflict with a provision of the GATT.[288] In particular, the EC stressed that when a measure is justified on the basis of Article XX

> "[it] *creates a legal situation different, on the one hand, from the situation in which the measure violates a provision of the GATT 1994 and, on the other, from the situation in which the measure does not fall under the provisions of the GATT 1994*".[289]

Even more, the EC submitted that the introductory clause of Article XX, which stipulates that "[n]*othing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures*" should be read as not permitting the applicability of Article XXIII:1(b) of the GATT 1994 to measures deemed necessary under Article XX.[290]

The Panel begun its interpretation from the text of Article XXIII:1(b) of the GATT 1994 and Article 26.1 of the DSU, which read "*measure, whether or not it conflicts with the provisions* [of the particular agreement]".[291] It further noted that the very wording of Article XXIII:1(b) demonstrates "*unequivocally*" that this provision applies both in situations in which a measure conflicts and in situations in which it does not conflict with the provisions of the GATT 1994.[292] Indeed, as the AB later verified, a measure may, "*at one and the same time*", be inconsistent with, or in breach of, a provision of the GATT

[287] Panel Report, *Japan – Film* (n33) [10.50]

[288] Panel Report, *EC – Asbestos* (n33) [8.260].

[289] Ibid.

[290] Panel Report, *EC -Asbestos* (n33) [8.255].

[291] Panel Report, *EC -Asbestos* (n33) [8.261].

[292] Ibid.

1994 and, nonetheless, give rise to a cause of action under Article XXIII:1(b).[293] The fact that, in view of judicial economy, previous jurisprudence has opined that a finding of violation renders an examination of non-violation nullification or impairment of benefits under Article XXIII:1(b) unnecessary, does not change the fact that the applicability of the provision at stake is permitted in both instances.[294]

Recalling its *prima facie* finding of violation with Article III:4 of the GATT 1994, the Panel found that the measure at stake fell under the scope of application of the GATT 1994, in the sense envisaged by Article XXIII:1(b).[295] However, the question remained whether *prima facie* inconsistent measures conforming with the requirements of Article XX of the GATT 1994 and thus ultimately justified

> "[are] *considered still to be in conflict with Article III:4 or* [are] *considered no longer to conflict with Article III:4 because* [they are] *justified under Article XX*, [and] *under the terms of Article XXIII:1(b) the latter continues to be applicable to it*".[296]

At the outset, the Panel noted that the interpretation of the term "*whether or not it conflict*" reached by the Panel in *Japan – Film*,[297] could be read as restricting the scope of application of Article XXIII:1(b) only to situations in which other provisions of the GATT 1994 do not apply.[298] However, it stressed that this *dictum* should not be examined in isolation from the previous relevant GATT Panel report on *EEC – Oilseeds*, which found that the essence of NVNI complaints is that

> "*improved competitive opportunities* […] *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*".[299]

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[293] Appellate Body Report, *EC – Asbestos* (n33) [187].

[294] Panel Reports, *EC – Seal* (n246) [7.680]; Panel Report, *US – COOL (Article 21.5 – Mexico and Canada)* (n33) [7.904].

[295] Appellate Body Report, *EC – Asbestos* (n) [187]; Panel Report, *EC – Asbestos* (n) [8.263]; PR, Japan – Film (n) [10.50]; GATT Panel Report, *EEC – Oilseeds* (n31) [144].

[296] Panel Report, *EC -Asbestos* (n33) [8.261].

[297] Panel Report, *Japan – Film* (n33) [10.50].

[298] Panel Report, *EC -Asbestos* (n33) [8.263].

[299] GATT Panel Report, *EEC – Oilseeds* (n31) [144].

Therefore, the Panel adopted an inclusive interpretation of the term, permitting the application of Article XXIII:1(b) to any measure which complies with the Agreement, no matter the terms under which such compliance has been induced. For, measures justified under Article XX, do comply with the GATT 1994, yet this compliance is the result of the operation of Article XX as an exception *stricto sensu*, in the sense analyzed above in Section III.A of the thesis.[300] As the AB in *Thailand – Cigarettes* stipulated, the operation of Article XX of the GATT 1994 presupposes a *prima facie* finding of violation with a WTO obligation, which then is justified by virtue of particular considerations. Indeed, a Panel may be required to examine a substantive obligation, as well as an affirmative defense, and, ultimately, to apply both to the measure in question. Such an analysis, however, is two-fold, in the sense that the inquiry of whether a measure violated an obligation necessarily precedes and is distinct from the assessment of whether the measure may be, nonetheless justified under the exception. Even though, the Panel must aim to ensure that a "*line of equilibrium*" is achieved between a substantive obligation and an exception, this does not render the analysis of the obligation and the exception a single and integrated one.[301]

Furthermore, the AB in *EC – Asbestos* underlined that the "*different inquiries occur under these two very different Articles*", *i.e.* Article III:4 and Article XX(b) of the GATT 1994.[302] In the same vein, in *US – Gasoline*, the AB clearly stipulated that the question of whether there is inconsistency with a substantive rule, is not to be confused with the "*further and separate*" question arising under Article XX as to whether that inconsistency was nevertheless justified.[303]

Against this background, the Panel in *EC – Asbestos* reasoned that even though in instances when Article XX is applied there is a *prima facie* breach of the relevant primary WTO obligation, ultimately the defense operates so as to completely justify the infringement and assimilate the *prima facie* inconsistent measure with a measure "*not in conflict*" with the GATT 1994, as envisaged under Article XXIII:1(b).[304] Therefore, it stipulated that the term "*whether o*r *not it conflict*" permits the consideration of a broad

[300] J.E. Viñuales, 'Seven Ways of Escaping a rule: Of exceptions and their avatars in International Law' (n228).

[301] Appellate Body Report, *Thailand – Cigarettes* (n238) 173.

[302] Appellate Body Report, *EC – Asbestos* (n33) [151].

[303] Appellate Body Report, *US – Gasoline* (n43), 23.

[304] Panel Report, *EC – Asbestos* (n33) [8.264].

array of measures, including measures to which the GATT 1994 does not apply, as well as, measures consistent with the GATT 199 "*whether* [they are] *consistent with the GATT because the GATT does not apply* […] *or* [they are] *justified by Article XX*" [305]

ii. The chapeau of Article XX as precluding the applicability of Article XXIII:1(b)

Turning to EC's argument that the *chapeau* of Article XX of the GATT 1994, precludes the application of Article XXIII:1(d) to measure justified under the General exception, the Panel underlined that the text of the chapeau of Article XX makes specific reference to "*the adoption and enforcement*" of measures. Based on this textual reference, it considered that the chapeau should be interpreted so as to preclude only those courses of action under the GATT 1994 that hinder the adoption or enforcement of regulatory measures conforming with the conditions set out in Article XX.[306] However, when it comes to NVNI complaints, Article 26:1(b) of the DSU clearly notes that there is no obligation to withdraw a measure which has been found to nullify or impair the benefits of the complaining WTO Member.[307] Thus, the Panel concluded that there is nothing in the text of Article XX that contradicts to the right of affected Members to have recourse to Article XXIII:1(b) of the GATT 1994.[308]

iii. The "measure" under Article XXIII:1(b) as a commercial measure

Moreover, with regard to the last argument put forward for the inapplicability of Article XXIII:1(b) of the General Agreement, the Respondent suggested that the term "*measure*" under the provisions in question must be interpreted as encompassing solely commercial measures. In particular, the EC reasoned that it is not possible to claim legitimate expectations with regard to a measure adopted to protect human health;[309] for, the "fundamental duty to protect human health" cannot be curtailed by the concept of NVNI complaints.

Against to what appears to be a teleological, or more accurately, an interpretation on the basis of the object and purpose of the WTO Agreement,[310] namely, that Article XXIII:1(b) is only to be applied so long as the "*fundamental duty*" of protecting human

[305] Panel Report, *EC – Asbestos* (n33) [8.264].

[306] Panel Report, *EC – Asbestos* (n33) [8.262].

[307] Ibid.

[308] Panel Report, *EC – Asbestos* (n33) [8.270].

[309] Panel Report, *EC – Asbestos* (n33) [8.257].

[310] I. van Damme, *Treaty Interpretation by the WTO Appellate Body* (n33) 263.

health is not compromised or restricted,[311] the Panel replied on the basis of text and context. It contended that neither the text of Article XXIII:1(b) of the General Agreement, nor that of Article 26:1 of the DSU support the reading of the term "*measure*" as "*commercial measure*". Additionally, it argued that neither Article XX of the GATT 1994, which serves as context to Article XXIII:1(b), supports the contention that regulatory measures pursuing legitimate policy objectives are to be excluded from the scope of application of Article XXIII:1(b).[312]

As to the core of the EC's argument, namely that it is the object and purpose of the WTO Agreement is to safeguard that WTO Members enjoy adequate policy space to discharge the fundamental duty to protect public health, the Panel replied that even in the event of a finding of nullification or impairment, the responding Member will never be obliged "not to apply or to withdraw the measure in question".[313] What will be required by the said Member in exchange for the nullification or impairment caused would only be to make "*a mutually satisfactory adjustment*"; compensation being potentially part of it as final settlement of the dispute.[314]

Thus, the Panel rejected the interpretation suggested by the EC. However, being mindful of the exceptional character of NVNI complaints as dispute settlement instruments[315] and the special situation of measures falling under Article XX of the GATT 1994,[316] it stressed that:

> "*while recognizing that Article XXIII:1(b) applies to measures that fall under Article XX, we are justified in treating recourse to Article XIII:1(b) as particularly exceptional in relation to measures justified by Article XX(b)* […] *All this leads the Panel to consider that, in practice, even if in a particular case a mutually satisfactory adjustment may be made under Article XXIII:1(b), in general, the risk of an effective increase in the cost of measures necessary to protect public health because of the applicability of Article XXIII:1(b) to measures justified under Article XX can only be very*

[311] Panel Report, *EC – Asbestos* (n33) [8.257].

[312] Panel Report, *EC – Asbestos* (n33) [8.266].

[313] Panel Report, *EC – Asbestos* (n33) [8.270].

[314] Panel Report, *EC – Asbestos* (n33) [8.270]; GATT Panel Report, *EEC – Oilseeds* (n31) [147-148].

[315] Panel Report, *Japan – Film* (n33) [10.36]; GATT Panel Report, *EEC – Oilseeds* (n31) [113].

[316] Appellate Body Report, *US – Gasoline* (n43) 18, 30.

marginal. In fact […] *very few measures of this kind could give rise to the application of Article XXIII:1(b)*".[317]

b. The burden and standard of proof

Having resolved the matter of applicability and before delving into the substantive requirements of NVNI complaints, the Panel addressed the issue of the burden and the standard of proof. At the outset of its analysis it referred to the provision of Article 26 of the DSU and to the "detailed justification" standard, as it was specified in the *Japan – Film* Panel Report.[318] It reaffirmed that the "*primary burden of proof of presenting a detailed justification for its claims*" lies with the Complainant.[319] Also, it noted that "*previous Panels have not defined the precise scope of detailed justification*".[320]

Further, the Panel stressed that measures justified under the exception of Article XX of the GATT 1994 constitute special situation and require special treatment. For, the intended objective of such measures, *i.e.* that of pursuing regulatory interests *a priori* recognized by the WTO Members, bears such importance that deviation from the agreed WTO rules is permitted.[321] The incorporation of policy exceptions in the General Agreement recognizes that there are instances when the benefits of WTO Members might be nullified or impaired as a result of a regulatory measure. Yet, the significance of the adoption of such measures, has been rated higher than the seriousness of the nullification or impairment caused.[322]

Indeed, the Panel contemplated that:

"[t]*his 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*

[317] Panel Report, *EC – Asbestos* (n33) [8.272-8.273].

[318] Panel Report, *EC – Asbestos* (n33) [8.276-8.277]; Panel Report, *Japan – Film* (n33) [10.32].

[319] Panel Report, *EC – Asbestos* (n33) [8.278].

[320] Panel Report, *EC – Asbestos* (n33) [fn 223 to 8.278].

[321] Panel Report, *EC – Asbestos* (n33) [8.272].

[322] Panel Report, *EC – Asbestos* (n33) [8.283].

time, which militates in favour of a stricter treatment of actions brought against them on the basis of Article XXIII:1(b)".[323]

Ultimately, the Panel concluded that situations falling under Article XX of the GATT 1994 should be treated as particularly exceptional. For that reason, it applied a stricter standard of proof, particularly with regard to the existence of legitimate expectations and to whether the measure could have been reasonably anticipated.[324]

c. The interpretation and application of the requirements prescribed in Article XXIII:1(b) of the GATT 1994

Next, the Panel turned to assess the three substantive elements that a complaining party must establish in order to make out a cognizable claim under the provision of Article XXIII:1(b) of the GATT 1994, namely, the application of a measure by a WTO Member; the existence of a legitimately expected benefit accruing under the relevant agreement; and the nullification or impairment of the benefit as a result of the application of the measure at issue.[325] With reference to the requirements for the application of a measure and the determination of nullification or impairment, the Panel did not engage in an extensive analysis. Rather, it appears to have applied the following standard: nullification or impairment exists if the measure

"*has the effect of upsetting the competitive relationship between Canadian asbestos and products containing it, on the one hand, and substitute fibres and products containing them, on the other*".[326]

In particular, it reasoned that the French import ban was on its face a government measure that constituted a denial of any opportunity for competition, in a way that nullification or impairment was assumed.[327]

Thus, the Panel focused on the second condition of a NVNI complaint, that of the existence of a benefit. At the outset of its analysis, it reaffirmed the previous Panel practice. It noted that what is at stake when determining the existence of a benefit in the sense envisaged under Article XXIII:1(b), is the existence of legitimate expectations of

[323] Panel Report, *EC – Asbestos* (n33) [8.283].

[324] Panel Report, *EC – Asbestos* (n33) [8.282].

[325] Panel Report, *Japan – Film* (n33) [10.41].

[326] Panel Report, *EC – Asbestos* (n33) [8.288].

[327] Panel Report, *EC – Asbestos* (n33) [8.289].

improved market access resulting from tariff concessions.[328] However, it stressed that the special circumstances underpinning the case at hand, mandate for a more restrictive interpretation of the term "*benefit*"; one that protects the balance of rights and duties negotiated by WTO Members,[329] including the right of Members to pursue important State interests.[330]

Contemplating the specific case of non-economic measures justified under Article XX of the GATT 1994, the Panel considered that by accepting the WTO Agreement, WTO Members also accept, *a priori*, through the introduction of exceptions, as Article XX of the GATT 1994, that other Members "*will be able at some point to have recourse to this exception*".[331] In other words, the Panel cautioned that this *a priori* permission[332] to WTO Members to pursue important State objectives,[333] curtails the breadth of expectations of market access that could legitimately be claimed for the purposes of a NVNI complaints.[334]

Bearing the need for a restrictive approach in mind, the Panel found that it was required to depart from previous panel practice.[335] Preceding panel reports have approached the interpretation of the term "benefit" by first, assuming that a benefit in the form of improved market access opportunities exists without any inquiry, and second, focusing on whether a party could have had a legitimate expectation of this assumed benefit.[336] However, for the purposes of the analysis of Article XXIII:1(b) and NVNI complaints concerning measures justified under Article XX of the GATT 1994, the Panel noted that an analysis distinguishing between, on the one hand, the concept of the legitimate expectation of a benefit **(i)** and, on the other hand, that of the reasonable foreseeability of the measure at stake **(ii)** was best suited.[337]

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[328] Panel Report, *EC – Asbestos* (n33) [8.285].

[329] GATT Panel Report, *EEC – Oilseeds* (n31) [148].

[330] Appellate Body Report, *US – Gasoline* (n43) 18.

[331] Panel Report, *EC – Asbestos* (n33) [8.272].

[332] Appellate Body Report, *Thailand – Cigarettes* (n238) [73].

[333] Appellate Body Report, *US – Gasoline* (n43) 30.

[334] Panel Report, *EC – Asbestos* (n33) [8.272].

[335] Panel Report, *EC – Asbestos* (n33) [8.286].

[336] Panel Report, *EC – Asbestos* (n33) [8.285].

[337] Panel Report, *EC – Asbestos* (n33) [8.286].

i. The existence of a legitimate expectation of benefit

As a first task, the Panel turned to examine the existence of a legitimate expectation of benefit. To begin with, it underlined that the present case referred to benefits deriving from concessions with respect to products that pose a known risk to health. Accordingly, it opined that Canada's expectations with regard to the market access of such products, could not be as high as for products that posed no known risk to health. Rather, the Panel noted that with regard to such products there would be a rebuttable presumption that WTO members could only legitimately expect a gradual decline in exports. In this way, it would be even more onerous for a complainant to establish that a measure "*upsets the competitive relationship*" between domestic products and competitive imported products that pose a known risk to health. Particularly, it stressed that the relevant facts which could corroborate or, alternatively overturn, this presumption, would be that of market trends in world production and consumption of the product at issue, as well as, evidence on the number of countries which have restricted or banned the use of such product by increasing reliance of substitutes.[338]

However, *in casu*, since the above proposed analysis would require a quantification of the relevant elements, the Panel refrained from further examining the issue, on the basis of lack of sufficient evidence.[339]

ii. The reasonable foreseeability of the measure in question

The second step towards the determination of whether there was a benefit the nullification or impairment of which would lead to a finding under Article XXIII:1(b) GATT 1994, was the examination of the Canadian government's reasonable anticipation of the French Decree, when it was negotiating the tariff concessions in question. These concessions were in fact the concessions made by France by France in 1947, by the European Economic Community in 1962 and by the European Communities at the end of the Uruguay Round, and they were not contested by the EC. The Panel, focused its inquiry on three factors that had emerged from previous jurisprudence: the timing of the measure at issue **(1)**; the international prevalence of similar measures **(2)**; and the consistency of past regulatory practice **(3)**. Ultimately, it concluded that Canada had not

[338] Panel Report, *EC – Asbestos* (n33) [8.286].

[339] Panel Report, *EC – Asbestos* (n33) [8.287].

met its burden of proof and it rejected its claim of nullification or impairment under Article XXIII:1(b) of the GATT 1994.[340]

1) The timing of the measure at issue

With reference to the timing of the introduction of the measure in question, the Panel, first, examined the relevance of the rebuttable presumption introduced in *Japan – Film*, according to which a measure adopted after the tariff concessions at stake has been negotiated, should be deemed as not anticipated, unless proven otherwise. It stressed that this presumption is not consistent with the highest standard of proof applicable to NVNI complaints against measures justified under Article XX of the GATT 1994. What is more, it found that the very nature of the measure in question, as a measure protecting public health in a manner supported by Article XX (b) of the GATT 1994, rendered the aforementioned presumption unfit for the case at hand. [341]

2) The international prevalence of similar measures among WTO Members

As discussed above, Panels have considered that the proliferation of similar measures as the one at stake before the Panel, emanating from different jurisdictions could have an impact on the determination of legitimate expectations, yet there is a high threshold for such evidence to positively affect a finding under Article XIII:1(b) of the GATT 1994.[342] In *EC – Asbestos* the Panel, examined the effect of the emergence of restrictive regulations concerning the use of asbestos both at the end and after the Uruguay Round of negotiations. It examined the implementation of regulations by the World Health Organization, the International Labor Organization, the International Agency for Research on Cancer and the EU.[343] Notably, it clarified that even though the

> "*the accumulation of international and Community decisions concerning the use of asbestos* […] *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*".

[340] Panel Report, *EC – Asbestos* (n33) [8.301].

[341] Panel Report, *EC – Asbestos* (n33) [8.291].

[342] Panel Report, *Japan – Film* (n33) [10.79]; Panel Report, *US – COOL (Article 21.5 – Mexico and Canada)* (n33) [7.706-7.707].

[343] Panel Report, *EC – Asbestos* (n33) [8.295].

Further the Panel recalled the *Japan – Film* case, which advocated for a case-by-case analysis and found that a Member cannot de deemed to have reasonably anticipated measures similar to that introduced in other Members' markets. To the contrary, when it comes to foreseeability of non-commercial measures, as in case regulatory health measures, the situation is quite 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*".

As a result, it opined that the examination pertaining to the foreseeability of the measures justified under Article XX of the GATT 1994 is much more sensitive to regulatory developments both at the national and the international level. For this reason, the burden placed on the complainant to prove that it had legitimate expectations of developing or even maintaining its exports is even more onerous.[344]

3) The consistency of past regulatory policy

At last, the Panel considered Canada's argument that it could not reasonably have anticipated the adoption of the French Decree, since the responding government had failed to display the required consistency in its regulation of the use of chrysotile and other hazardous products posing known risk to health, such as lead and copper.[345] Here, it appears like the Complainant attempted to place a strict burden on the respondent party in cases involving NVNI complaints as redress for measures justified under Article XX of the General Agreement. It suggested that only states with proactive and across the board regulatory activity could reasonably be anticipated to impose regulatory measures pursuing non-economic objectives.

However, the Panel, following once again a narrow approach and being mindful of the strict standard of proof placed on the Complainant, summarily dismissed this argument.[346] In particular, it noted that:

[344] Panel Report, *EC – Asbestos* (n33) [8.299].

[345] Panel Report, *EC – Asbestos* (n33) [8.302].

[346] Panel Report, *EC – Asbestos* (n33) [8.303].

"*Although it is true that lead and copper, like asbestos, are hazardous and that France has not yet taken any measure with respect to lead and copper, essentially this means that Canada cannot legitimately expect the lead market not to be the subject of some public health measure, even though France has not yet taken any such measure. It is our opinion that each Member is free to adopt the health policies it deems appropriate and to give each such policy the priority it deems necessary*".[347]

d. The AB proceedings

On appeal, the EC challenged the Panel's findings that "Article XXIII:1(b) applies to a measure whether it is consistent with the GATT because the GATT does not apply to it or is justified by Article XX", irrespective of whether the measure is necessary to protect public health.[348] This being the first case ever before the AB with regards to a NVNI complaint, the AB report at the outset of its analysis stressed that the remedy provided in Article XXIII:1(b) "should be approached with caution and should remain an exceptional remedy".[349] Then, focusing on the text of Article XXIII:1(b) of the GATT 1994, it underlined that a measure may, "at one and the same time", infringe a provision of the GATT 1994 and, nonetheless, give rise to a cause of action under Article XXIII:1(b). It goes without saying that if a measure violates a provision of the GATT 1994, that measure must actually fall within the scope of application of that provision of the GATT 1994.[350]

Moreover, the Panel dismissed EC's attempt to curtail the scope of application of Article XXIII:1(b) on the basis of a distinction between commercial and non-commercial measures.[351] It noted that the text of Article XXIII:1(b) does not distinguish between any types of measures. Even more, it argued that:

"*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*

[347] Panel Report, *EC – Asbestos* (n33) [8.302].

[348] Appellate Body Report, *EC – Asbestos* (n33) [37]; Panel Report, *EC – Asbestos* (n33) [8.264].

[349] Appellate Body Report, *EC – Asbestos* (n33) [186]; Panel Report, *Japan – Film* (n33) [10.37].

[350] Appellate Body Report, *EC – Asbestos* (n33) [188]; Panel Report, *EC – Asbestos* (n33) [8.263]; Panel Report, *Japan – Film* (n33) [10.50]; GATT Panel Report, *EEC – Oilseeds* (n31) [144].

[351] R.W. Staiger & A.O. Sykes, 'Non-Violations' (2013) (n38) 773.

means of commercial regulation. Thus, in practice, clear distinctions between health and commercial measures may be very difficult to establish".[352]

All in all, the AB upheld the findings of the Panel and rejected EC's preliminary objections on the applicability of Article XXIII:1(b) to measures justified under Article XX of the GATT 1994.[353]

2. Assessment of the EC – Asbestos findings

The Panel and the AB in the *EC – Asbestos* case dealt with a difficult task. Not only they were faced with a situation where two WTO provisions claim applicability in the same set of factual circumstances; rather, they had before them a situation where both potentially applicable provisions operate so as to secure a different kind of delicate balance: on the one hand, Article XX operates so that to accommodate essential and legitimate policy concerns even at the expense of legal compliance;[354] while, on the other hand, Article XXIII:1(b) of the General Agreement operates so that to safeguard the aims of the Agreement, even in cases where the Member has not breached any provision.[355] Thus, what was at stake was the difficult task of striking a middle line between the particular object and purpose of the two provision in question, in a way that respects the GATT 1994's overall inherent balance.[356] Ultimately, the resolution offered was that of introducing an even more heightened standard of proof compared to the already high standard applicable in NVNI complaints brought against WTO consistent-measures.

Consequently, it would be extremely difficult for a complaining party to establish a *prima facie* case of nullification or impairment as a result of a measure falling under

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[352] Appellate Body Report, *EC – Asbestos* (n33) [189].

[353] Appellate Body Report, *EC – Asbestos* (n33) [191].

[354] Appellate Body Report, *US – Shrimp* (n43) [156, 159] ; Appellate Body Report, *US – Gasoline* (n43) 3; Appellate Body Report, *Turkey – Textiles* (n43) [46]; Appellate Body Report, *Korea – Dairy* (n43) [77]; N.JS. Lockhart & A.D. Mitchell, 'Regional Trade Agreements under GATT 1994: An Exception and Its Limits' (n43) 230; G. Marceau & C. Reiman, 'When and How Is a Regional Trade Agreement Compatible with the WTO' (n43) 313.

[355] R.E. Hudec, 'A Statistical profile of GATT Dispute Settlement Cases: 1949-1989' (n9) 6; E.-U. Petersmann, 'Violation Complaints and Non-Violation Complaints in Public International Trade Law' (n9) 225; T. Cottier & K.N. Schefer, 'Non-Violation Complaints in WTO/GATT Dispute Settlement: Past, Present and Future' (n9) 48; A. Gourgourinis, *Equity and Equitable Principles in the World Trade Organization: Addressing Conflicts and Overlaps Between the WTO and Other Regime* (n3) 126.

[356] Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines, Recourse to Article 21.5 of the DSU by the Philippines* [hereinafter *Thailand – Cigarettes (Article 21.5 - Philippines)*], WT/DS371/RW, adopted 12 November 2018 [7.755]: The Panel stipulated that the various WTO Agreements have an inherent balance which reflects their object and purpose.

Article XX of the GATT 1994. However, the question of the potential application of the findings reached in the *EC – Asbestos* case to disputes involving NVNI complaints as redress for measures falling under other exceptions of the GATT 1994, like Article XXIV or Article XXI, remains unsettled. The following Section reflects on the potential usefulness of the *EC – Asbestos* findings to such disputes, *first*, in regard to the applicability of Article XXIII:1(b) of the GATT 1994 **(a)**, *second*, in regard to the application of a heightened standard of proof to the requirement of "*legitimate expectations*" **(b)**.

a. <u>The applicability of Article XXIII:1(b) to future disputes concerning measures justified under Articles XXIV or XXI of the GATT 1994</u>

On the issue of the applicability of Article XXIII:1(b) of the GATT 1994, the Panel and the AB interpreted the term "*whether or not it conflicts*" in Article XXIII:1(b) as encompassing measures not falling under the scope of the General Agreement, as well as measures which are WTO-consistent and measures which are WTO-inconsistent. This interpretation provides for an umbrella term which in future disputes could be utilized for the lodging of NVNI complaints against measures justified by exceptions *stricto sensu*, like Article XX, or any other type of exception provided for in the GATT 1994, like carve-outs, derogations etc, as presented above in Section III.A.

However, considering the Panel's *dictum* on whether the chapeau of Article XX precludes the applicability of Article XXIII:1(b) of the GATT 1994 to measures justified thereunder, it appears that this could be an obstacle for NVNI complaints against measures justified under Article XXIV or XXI of the GATT 1994. The Panel's interpretation of the introductory clause of Article XX is based on the text and the immediate context provided by the provision of the *chapeau*, in accordance with Article 31.1 of the VCLT.[357] This begs the question, of whether this reasoning could extend to cases where the measure in question is justified under Article XXI or XXIV of the GATT 1994. For, Article XXI stipulates that "[n]*othing in this Agreement shall be construed* […] *(a) to require any contracting party to furnish information* […] *(b) to prevent any contracting party from taking any action* […] *(c) to prevent any contracting party from taking any action* […]". Similarly, Article XXIV:3 of the General Agreement states that

[357] Article 3.2 DSU; Appellate Body Report, EC – Chicken Cuts (n52) [193]; Appellate Body Report, *US – Gasoline* (n43) [17]; Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* [hereinafter Japan – Alcoholic Beverages II], WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97 [10]; I. van Damme, *Treaty Interpretation by the WTO Appellate Body* (n52) 213.

"[t]*he provisions of this Agreement shall not be construed to prevent* […] *(a) Advantages accorded by any contracting party* […] *(b) Advantaged accorded to the trade* […]".

On the basis of the text of these provisions, it appears that the absence of a specific refence to "*adoption and enforcement*" of measures implies that the policy space awarded to WTO Members under these provisions is wider. Accordingly, even though the *dicta* of the GATT Panels in *EEC – Citrus* and *US – Nicaragua Trade,*[358] gave some leeway for the future application of Article XXIII:1(b) to measures justified under Article XXI and XXIV, the *EC – Asbestos* Panel's textual approach to the interpretation of the introductory clause of Article XX seems to raise barriers for the applicability of Article XXIII:1(b) in such instances.

b. The application of the "*legitimate expectations*" requirement in future disputes concerning measures justified under Articles XXIV or XXI of the GATT 1994

The compliance Panel in *UC – COOL (Article 21.5 – Mexico and Canada)* reaffirmed the heightened standard of proof applied by the Panel in *EC – Asbestos* with regard to the requirement of "*legitimate expectations*" in cases where the measure at issue is justified under Article XX of the GATT. However, this compliance Panel elected a more generalized formulation, not focusing on measures justified under Article XX of the GATT, but rather generally to measures pursuing legitimate policy objectives.[359] It reasoned that the level of exceptionality of such measures justifies the heightened standard of proof suggested in *EC – Asbestos*. Further, it added that this standard of proof is indeed welcomed, since it raises awareness among WTO Members of the possibility that other Members may benefit from the exceptions of the General Agreement in ways nullifying or impairing WTO concessions.[360]

Nevertheless, the Panel in *EC – Asbestos* in a *dictum* which was not addressed by the AB it remarked that:

> "*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*

[358] GATT Panel Report, *EEC – Citrus* (n31) [4.25]; GATT Panel Report, *US – Nicaragua Trade* (n31) [5.11].

[359] Panel Report, *US – COOL (Article 21.5 – Canada and Mexico* (n33) [7.709].

[360] Panel Report, *US – COOL (Article 21.5 – Canada and Mexico* (n33) [7.710].

> *creating the right to invoke exceptions in certain circumstances* [through Article XX], *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***".[361]

In view of this excerpt, the Panel seems to have considered that changes in regulatory policy, provided that they are motivated by genuine concerns for non-trade matters, such as public health, might be deemed foreseeable and thus as not frustrating the legitimate expectations of benefits.[362]

It appears that the main consideration driving the Panel's reasoning in applying a heightened standard of proof on the issue of a regulatory measure's non-foreseeability was the nature of the objective at stake, namely that of a non-trade concern, and not the fact this objective was *a priori* recognized by the WTO Agreement. If this was indeed the case, then it could be suggested that the standard of proof burdening a Complainant bringing a NVNI claims against trade measures justified under the economic exception of Article XXIV of the GATT 1994 would not be as high, in a way that the non-foreseeability standard would be easier to meet.

Yet, even though not a high as for non-trade measures, it would seem that the standard of proof applied in cases where the measure at issue is justified under one of the economic exceptions of the GATT, like Article XXIV, would not be the same as the one applied in normal NVNI cases. This is supported by the *dictum* of the Panel in *US – Offset Act*, which, even though in the context of subsidies, approached the issue of the conflict between a Member's right to impose domestic regulations for economic reasons and the breadth of NVNI complaints by implicitly applying a stricter standard of proof. In particular, the Panel considered that:

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[361] Panel Report, *EC – Asbestos*, (n33) [8.281].

[362] P.W. Staiger & A.O. Sykes, 'Internaitonal Trade, National Treatment, and Domestic Regulation' (2011) 40(1) *The Journal of Legal Studies* 149, 193.

> "[t]*here is a tension between the right of a Member to subsidize (except prohibited subsidies), on the one hand, and the legitimate expectations of improved market access resulting from negotiated tariff concessions, on the other. Any subsidy to domestic producers is likely to have some adverse effect on the competitive relationship between domestic and imported products. However, the fact that there will* ***be some impact should not be sufficient to uphold a claim of non-violation nullification or impairment****. Otherwise, any specific domestic subsidy programme which is related to a product on which there is a tariff concession could constitute the non-violation nullification or impairment of benefits. This would hardly make non-violation nullification or impairment an "exceptional" or "unusual" remedy, as the Appellate Body has said it should be*".[363] [emphasis added]

Turning to measures justified under Article XXI of the GATT, and particularly subparagraph (b) (iii) which covers measures taken, among others, in time of an "*emergency in international relations*", it appears that the applicable standard of proof in the case of NVNI complaint would be the same as the one employed in *EC – Asbestos*. Since, the safeguarding of security interests falls in the realm of non-trade concerns. However, a possible difference in the application of the "*legitimate expectations*" requirement could be the conceptualization of the non-foreseeability standard. For, contrary to the case of a measure protecting *e.g.* public health, the foreseeability of which is supported by emerging scientific evidence, as well as by the proliferation of similar international and national regulatory practice,[364] a measure protecting national security interests in a manner justified under Article XXI:b(iii) would be adopted in response of an emergency, *i.e.* a serious, unexpected, and often dangerous situation requiring immediate action.[365] In other words, such a measure would be by definition un-foreseeable.

Thus, it could be argued that the term "*benefit*" of Article XXIII:1(b) does not include the expectation that the market access opportunities established on the basis of a tariff concessions or other general rights and obligation of the GATT 1994, would not be

[363] Panel Report, *US – Offset Act*, (n33) [fn 341 7.127].

[364] Panel Report, *EC – Asbestos* (n33) [8.296-8.298].

[365] English Oxford Dictionary < https://en.oxforddictionaries.com/definition/emergency> accessed 29 November 2018.

nullified or impaired in the case of an "*emergency in international relations*". Such an interpretation would be effectuated on the basis of the customary rules on interpretation, as crystallized in Articles 31, 32 and 33 of the VCLT,[366] and by virtue of the context[367] provided by Article XXI:b(iii) of the GATT 1994.

Offering a somewhat similar reasoning, the Review Working Party on Quantitative Restrictions tasked with the redrafting of Article XVIII of the GATT 1947 in the 1950's, noted that in a case where a measure is justified under one of the exceptions of the GATT 1947, *i.e.* in that case Article XVIII, what would be under examination is whether the application of the exception affects, as a matter of fact, the extent of the benefits falling under the protective ambit of the NVNI complaint.[368]

Nevertheless, taking into account *first*, the viewpoint of the GATT Panel in *US – Nicaragua Trade*, which considered that measures justified under Article XXI could form the basis of NVNI complaints;[369] and, *second*, the inherent balance[370] of the GATT 1994 which, without any indication to the contrary, is achieved by a nexus of rights and obligations where both Article XXI:b(iii) and Article XXIII:1(b) are on a par with each other, it could also be argued that a measure justified under Article XXI could indeed nullify or impair benefits accruing to WTO Members under the GATT 1994. If this was the case, then the affected State would have a claim to a "*mutually satisfactory adjustment*", potentially including compensation. However, it remains for a Panel to make a determination on this issue.

[366] Article 3.2 DSU, Appellate Body Report, *US – Gasoline* (n43) [17]; Appellate Body Report, *Japan – Alcoholic Beverages II* (n361) [10].

[367] Appellate Body Report, *EC – Chicken Cuts* (n52) [193]; I. van Damme, *Treaty Interpretation by the WTO Appellate Body* (n52) 213.

[368] GATT, Report of Review Working Party I on Quantitative Restrictions, L/332/Rev.1 and Addenda, adopted 2, 4 and 5 March 1955.

[369] GATT Panel Report, *US – Nicaragua Trade* (n31) [5.5].

[370] Panel Report, *Thailand – Cigarettes (Article 21.5 - Philippines)* (n) [7.755]: where it was stipulated that the various WTO Agreements have an inherent balance which reflects their object and purpose.

IV. CONCLUSION

The present Master Thesis thoroughly examined the operation of NVNI complaints, as a cause of action available to WTO members under Article XXIII:1(b) of the GATT 1994. Part I, introduced the concept of "*nullification or impairment*" by going through its underlying *ratio* and its origins, while it also set the aims of the Master Thesis, namely that of examining the operation of NVNI complaints both with respect to straightforward WTO-consistent measures, as well as, to *prima-facie* WTO-inconsistent measures justified under one of the exceptions provided for in the GATT 1994. Part II, delved into the relevant GATT and WTO Panel practice attempting to provide for an analytical framework on the application of Article XXIII:1(b) of the GATT 1994. Part III, dealt with the issue of the applicability of Article XXIII:1(b) of the GATT 1994 to WTO-inconsistent measures permitted under the GATT 1994 by virtue of the exceptions provided for in the General Agreement.

The underpinning of the relevant GATT and WTO jurisprudence is that NVNI complaints should be treated as exceptional remedies available only in a narrow set of circumstances. This cautious approach has been materialized in the adoption of a narrow scope to the interpretation of Article XXIII:1(b) of the GATT 1994; in the formulation of a high standard proof; as well as, in the choice of the available remedies, to which the obligation to withdraw or modify the measure found to nullify or impair the benefits of a WTO Member in the sense of Article XXIII:1(b) is not included. This reluctance is even more intensified in cases where the measure challenged by a NVNI complaint is one that falls under the protective ambit of one the exceptions integrated into the GATT 1994, *i.e*. a measure that in its design pursues an *a priori* WTO-recognized legitimate policy objective. As a result, the standard of proof applied in such cases is even more heightened, thus narrowing down the array of WTO-justified measures falling under the scope of application of Article XXIII:1(b) of the GATT 1994.

The disinclination towards NVNI complaints is fueled by the view that the availability of a cause of action against States for actions which do not breach WTO law, impinges upon state sovereignty, since it discourages domestic regulatory initiatives that pursue non-trade concerns through the use of trade-related measures. In support of this criticism, Professors Staiger and Sykes have noted that trade agreements pose the risk of the so-called "*regulatory chill*". The term is explained when considering the example of a national government which under-regulates product health and safety due to the fact

that such regulations could impair the interests of producers and consumers. Then, to the degree that the applicable trade agreement further discourages State regulation, *e.g.* through the provision of a NVNI remedy, the State's regulatory practice becomes even more sub-optimal.[371]

Yet, even though the restrictive approach appears justified, both GATT and WTO jurisprudence have remained mindful of the political reasons that urged the incorporation of Article XXIII:1(b) to the GATT 1947. For, as elaborated above in Section I, the introduction of an "*equity concept*"[372] had the function to balance the drafter's choice to model the WTO after a liberal structure in recognition of the sovereign prerogative of States to regulate domestically. As a result, WTO Panels and the Appellate Body have treated the NVNI remedy as an existing and functional remedy which, nonetheless, needs to be delineated in a narrow manner, through the imposition of strict requirements, thus accomplishing the accommodation of the various divergent interests.

On this basis, it is the present author's contention that Article XXIII:1(b) GATT 1994 could be potentially applied in cases involving measures justified under e.g. Art. XXIV or, even, XXI of the GATT 1994.

[371] R.W. Staiger & A.O. Sykes, 'Non-Violations' (n38) 793-795.

[372] R.E. Hudec, 'A Statistical profile of GATT Dispute Settlement Cases: 1949-1989' (1993) (n9) 6; E.-U. Petersmann, 'Violation Complaints and Non-Violation Complaints in Public International Trade Law' (n9) 225; T. Cottier & K.N. Schefer, 'Non-Violation Complaints in WTO/GATT Dispute Settlement: Past, Present and Future' (n9) 48; A. Gourgourinis, *Equity and Equitable Principles in the World Trade Organization: Addressing Conflicts and Overlaps Between the WTO and Other Regime* (n3) 126.

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ΔΗΛΩΣΗ ΠΕΡΙ ΜΗ ΠΡΟΣΒΟΛΗΣ ΔΙΚΑΙΩΜΑΤΩΝ ΠΝΕΥΜΑΤΙΚΗΣ ΙΔΙΟΚΤΗΣΙΑΣ

Δηλώνω υπεύθυνα ότι η διπλωματική εργασία, την οποία υποβάλλω, δεν περιλαμβάνει στοιχεία προσβολής δικαιωμάτων πνευματικής ιδιοκτησίας σύμφωνα με τους ακόλουθους όρους τους οποίους διάβασα και αποδέχομαι:

1. Η διπλωματική εργασία πρέπει να αποτελεί έργο του υποβάλλοντος αυτήν υποψήφιου διπλωματούχου.

2. Η αντιγραφή ή η παράφραση έργου τρίτου προσώπου αποτελεί προσβολή δικαιώματος πνευματικής ιδιοκτησίας και συνιστά σοβαρό αδίκημα, ισοδύναμο σε βαρύτητα με την αντιγραφή κατά τη διάρκεια της εξέτασης. Στο αδίκημα αυτό περιλαμβάνεται τόσο η προσβολή δικαιώματος πνευματικής ιδιοκτησίας άλλου υποψήφιου διπλωματούχου όσο και η αντιγραφή από δημοσιευμένες πηγές, όπως βιβλία, εισηγήσεις ή επιστημονικά άρθρα. Το υλικό που συνιστά αντικείμενο λογοκλοπής μπορεί να προέρχεται από οποιαδήποτε πηγή. Η αντιγραφή ή χρήση υλικού προερχόμενου από το διαδίκτυο ή από ηλεκτρονική εγκυκλοπαίδεια επιφέρει τις ίδιες δυσμενείς έννομες συνέπειες με τη χρήση υλικού προερχόμενου από τυπωμένη πηγή ή βάση δεδομένων.

3. Η χρήση αποσπασμάτων από το έργο τρίτων είναι αποδεκτή εφόσον, αναφέρεται η πηγή του σχετικού αποσπάσματος. Σε περίπτωση επί λέξει μεταφοράς αποσπάσματος από το έργο άλλου, η χρήση εισαγωγικών ή σχετικής υποσημείωσης είναι απαραίτητη, ούτως ώστε η πηγή του αποσπάσματος να αναγνωρίζεται.

4. Η παράφραση κειμένου, αποτελεί προσβολή δικαιώματος πνευματικής ιδιοκτησίας.

5. Οι πηγές των αποσπασμάτων που χρησιμοποιούνται θα πρέπει να καταγράφονται πλήρως σε πίνακα βιβλιογραφίας στο τέλος της διπλωματικής εργασίας .

6. Η προσβολή δικαιωμάτων πνευματικής ιδιοκτησίας επισύρει την επιβολή κυρώσεων. Για την επιβολή των ενδεδειγμένων κυρώσεων, τα αρμόδια όργανα της Σχολής θα λαμβάνουν υπόψη παράγοντες όπως το εύρος και το μέγεθος του τμήματος της διπλωματικής εργασίας που συνιστά προσβολή δικαιωμάτων πνευματικής ιδιοκτησίας. Οι κυρώσεις θα επιβάλλονται, ύστερα από γνώμη της τριμελούς εξεταστικής επιτροπής με απόφαση της Συνέλευσης της Σχολής, και μπορούν να συνίστανται στον μηδενισμό της διπλωματικής εργασίας (με ή χωρίς δυνατότητα επανυποβολής), τη διαγραφή από τα Μητρώα των μεταπτυχιακών φοιτητών , καθώς και την επιβολή πειθαρχικών ποινών, όπως η αναστολή της φοιτητικής ιδιότητας του υποψήφιου διπλωματούχου.

Επιπλέον, παρέχω τη συναίνεσή μου, ώστε ένα ηλεκτρονικό αντίγραφο της διπλωματικής εργασίας μου να υποβληθεί σε ηλεκτρονικό έλεγχο για τον εντοπισμό τυχόν στοιχείων προσβολής δικαιωμάτων πνευματικής ιδιοκτησίας.

Ημερομηνία **Υπογραφή Υποψηφίου**

30/11/2018