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THE INTERPRETATION AND APPLICATION OF GATT'S ARTICLE XXIII TO ANTI-DUMPING LAW AND PRACTICE.

By

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A THESIS

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To Vlad Movshovich for his friendship and academic advice,

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DECLARATION

I, LUZ HELENA HANAUER, declare that this thesis is my own unaided work. It is submitted in fulfilment of the requirements of the degree of Doctor of Philosophy (PhD) in the Faculty of Commerce, Law and Management at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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Abstract

The research is divided in seven sections where the problem of the interpretation and applicability of Art XXIII GATT to the Laws and Practices under the Anti-Dumping Agreement is examined. Chapter I identifies the problems, raises the research question and gives an overview of the current state of the matters under observation.

In Chapter II the general theory of interpretation is studied and subsequently applied to Art XXIII specifically, taking into account the meaning, scope, historical evolution and current interpretations of Art XXIII. Chapter III revises the theory of coherent interpretation of Art XXIII in connection with the Anti-Dumping Agreement specifically. The constitutional structure and principles of the WTO are questioned, dissected and supported to decant a handful of fundamental principles which shall inform the rest of the interpretation applied in the research. This chapter takes the interpretation from an abstract perspective to a material view of a coherent interpretation of both Art. XXIII and the Anti-Dumping Agreement.

Chapter IV revises the facts, laws and practices of Anti-Dumping being used as a protectionist measure in disguise both using procedural and substantial arguments which are illustrated in the laws and practices of seven countries. The findings in Chapter IV lead to Chapter V which questions the legitimacy and validity of considering the possible applicability of Art XXIII to the anti-Dumping Agreement as it is currently implemented by the WTO membership. Those reflections lead to the

consideration and mention of Competition as a public good in international trade in Chapter VI, which is a key element for the final findings of this research.

The conclusion of this research is inclined to suggest that in order to keep the legal system of the WTO functional, a stronger economic constitutional approach that allows for the application of art XXIII in situations subversive to the principles of free trade is necessary. The adaptation of a theory of an economic constitution is proposed.

THE INTERPRETATION AND APPLICATION OF GATT'S ARTICLE XXIII TO ANTI-DUMPING LAW AND PRACTICE.

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THE INTERPRETATION AND APPLICATION OF GATT'S ARTICLE XXIII TO ANTI-DUMPING LAW AND PRACTICE

I. PROBLEM OUTLINE

This research proceeds from two observations and one question:

Observation 1: Art. XXIII is not being interpreted to its full potential.

This research aims to find clarity in the role of Art XXIII of GATT in the different circumstances where it can be applied. This includes situations of breach and non - breach of the WTO agreements. The question to be considered will take into account the meaning and interpretation of Art XXIII and its interaction with other provisions under WTO law. Despite a number of studies focused on this provision; its nature, scope, the legal theory that supports it and its practical application are still the subject of much debate[1]. As the WTO agreements expand their coverage of areas of trade, the nullification and impairment provision seems to be out of place and its relationship with ordinary and extraordinary complaints, as well as with the rest of the agreement, continues to be an interesting question.

Observation 2: The Anti-Dumping Agreement is being abused.

Anti-dumping was created as a trade remedy to correct the distortions created by dumped goods in the importing market. This means that Anti-Dumping measures emerged with the purpose to be a relief to unfair trade[2]. Anti-dumping measures

[1] PESCATORE P. "The GATT dispute Settlement Mechanism- Its present Situation and its prospects, J.W.T, No. 1 1993 at 5-19 and the debate in detail in SPITZER F. "The non-violation complaint in WTO Law". Juristische Reihe TENEA/www.jurawelt.com.V.56 p.1 -48.

[2] BARCELO J. "A History of GATT Unfair Trade Remedy Law- Confusion of Purposes". Cornell Law Faculty Publications. Paper 517. 1991. p. 312.

were designed with the "*basic idea that it is illegal to sell a product in a foreign market for either less than some construed cost or at a lower price than on the product's domestic market if the imports materially injure a domestic industry in the importing country*"[3]. Originally, anti-dumping regulations emerged as part of competition legislation in the form of anti-trust[4]. This was because, internationally, dumping was understood as a form of anti-competitive conduct (specifically, predation - lowering prices with the aim of eliminating competitors).

Many observations indicate that the Anti-Dumping Agreement is in fact being used with mercantilist[5] and protectionist[6] purposes by the different participants in world trade. This is caused partly by the focus given to the injury caused to *competitors* rather than the injury caused to ***competition***[7]*.*The countries have found a way to legally undermine the Agreement's purpose and avoid complying with their obligations by indirectly balancing a percentage of the tariff removals or reductions with a correlative anti-dumping measure[8] or another non-tariff trade remedy[9]. This defeats the original purpose of the Anti-Dumping Agreement.

[3] WEINRAUCH R. "Competition Law in the WTO. The rationale for a framework agreement."Neue Juristische Monografien- Band 25.NWV. 2004. p. 59.

[4]MESSERLIN P. & REED G. "Antidumping Policies in the United States and the European Community". The Economic Journal, Vol. 105, No. 433, (Nov. 1995). p. 1565.

[5] GOWAN P. "Industrial Development and International Political Conflict in Contemporary Capitalism" in ANIEVAS A. "Marxism and World Politics: Contesting Global Capitalism" Routledge, 2012. P131.

[6]DEBROY B and CHAKRABORTY D. (Eds). "Anti-Dumping: Global Abuse of a Trade Policy Instrument". Academic Foundation. 2007. pp. 20-29.

[7]*"(…) under an **injury to competition standard**, something more would be required. A complainant might have to show that the price cutting arose out of **genuinely predatory motives** - for example, that it involved below-marginal-cost prices (money-losing even in the short run) by a dominant firm in a concentrated industry. (…)An anti-dumping policy aimed solely at predatory dumping would apply an 'injury-to-competition' test of dumping injury, in line with antitrust goals. Thus, dumping 'unfairness' would refer to predatory actions threatening the competitive process itself. (…)GATT anti-dumping law has not acknowledged his basic distinction between injury-to-competition and injury-to- competitors. Instead it is a hybrid of antitrust and safeguard policies, awkwardly resting on a confused notion of 'unfairness.' **Early commentators on dumping seemed automatically to associate the practice with predatory motives, but in modern application anti-dumping measures have almost exclusively burdened non predatory dumping**"* [Emphasis added]. Supra BARCELO. pp. 313-314.

[8] This practice has been found to reach its political goal, which is to keep domestic firms in trade, but it also has been found to reduce welfare and distort aggregate trade. See BOWN C. "Taking Stock of Antidumping, Safeguards, and Countervailing Duties, 1990–2009". Policy Research Working paper 5436. The World Bank research Group Trade and Integration Team. 2010. P3. See also,

Question 1: Can the application of Art. XXIII unlock the values of the Anti-Dumping agreement?

The first question that arises is whether Art. XXIII can be applied with a view to provide a corrective to the domestic use given to the Anti-Dumping Agreement which is currently subversive of the principles of the WTO.

The exercise of answering this question is the key debate presented in this research. In order to find out if its application to the Anti-Dumping Agreement is possible, this paper shall explore a legal account of Art XXIII in both case law and academic interpretations, plus a report of the use of Anti-Dumping in different trade systems, the economic models and theories behind it and its material consequences. Once the current state of affairs is established, the next relevant question for this research arises. This is the question of whether the **current legal understanding** of Art XXIII can be applied to Anti-Dumping measures and on what terms.

This study is constructed upon, but not limited to, a legal review and analysis Art XXIII; and an economic analysis that compares economic models and policy to determine when Anti-Dumping may be subject to balance by the application of Art XXIII. In this exercise, the presence of key issues such as competition in international law, are not only unavoidable, but indispensable to reach an answer to the fundamental question mentioned above.

RUHL K. "Anti-Dumping in the Aggregate" [preliminary and incomplete] New York University Stern School of Business. 2012. Available at http://www.frbatlanta.org/documents/research/seminars/seminar_ruhl_030212.pdf p. 22.

[9] Anti-Dumping Duties coexist with other trade remedies such as Safeguards and Countervailing Duties. All these remedies are sometimes used to block competitive importers illegitimately distorting their original purpose. The combined use of trade remedies has been shown to destabilize the markets, have a great impact on trade flows and affect welfare negatively. See supra BOWN C. p. 31.

The Anti-Dumping Agreement was chosen as an illustration of the possibilities locked in Art XXII, especially because in the application of this Agreement it is possible to clearly detect how a WTO agreement can be interpreted and applied in a manner that is subversive of fundamental principles. This Agreement has been extensively used by the membership with different standards of compliance. The more heterogeneous this application becomes, the less transparency and predictability remains for exporters, who are then dependant on the behaviour of the administrative authorities of each country. The Anti-Dumping Agreement is indeed a key instance where there is a problem and hence, where there is a possibility for Art. XXIII to play a correcting role for the anomalies found in its application and interpretation.

The Anti-Dumping Agreement is the primary applicable set of rules that discipline anti-dumping measures and it is routinely applied independently of any other standard. This means that the relationships of Art XXIII with the Anti-Dumping agreement have not been much considered.

One hypothetical scenario is that article XXIII is interpreted in an extensive manner, so that the Nullification and Impairment provision becomes applicable to even the minor administrative faults committed by the importing country in the application of the Anti-Dumping Agreement. This possibility means that Article XXIII could absorb the Anti-Dumping Agreement and diminish its content beyond the extent that was intended by the contracting parties. This is plainly unacceptable because the provision of Art XXIII could never eclipse and annul the agreements reached on anti-dumping.

The idea of this study is to explore the meaning of Article XXIII in depth and to explain it in relation to its possible application to the anti-dumping actions by local

authorities[10] without prejudice to the remedies contained therein. This would result in a theoretical and practical idea of the coherent application of the Anti-Dumping Agreement and its relations with Article XXIII. In addition, this would serve as an example of the potential integration and applicability of Article XXIII to other WTO provisions.

Therefore, it is pertinent to ascertain whether Article XXIII can be applied by the adjudicators of the WTO to the cases of abuse of anti-dumping measures and if so, what the scope of the provision is. This entails defining in detail three key aspects:

a. Interpretation of the provision contained in Article XXIII.

b. Analysis of the Anti-Dumping Agreement, cases in which Anti-Dumping is being applied beyond its **trade remedy** purpose. In addition, its current application in specific economies and internal remedies in the law and practices of those members.

c. Possible applicability of Article XXIII to measures taken within the terms of the Anti-Dumping Agreement.

The competition issue emerging from the inadequate use of anti-dumping as a protectionist measure must certainly also be taken into account, in two ways:

a. Competition issues generated directly from the application of the Anti-Dumping Agreement.

b. Competition issues generated in the normal course of trade which are not regulated by any of the WTO agreements. This is a very delicate and controversial matter as there are several provisions in the DSU preventing any interpretation to add or diminish from the content of the negotiated agreements. However, it is plausible to explore whether the economic

[10] Especially administrative actions and actions related to calculation of margins. Some of these have been treated by the Appellate Body (Zeroing) but the scope for detrimental administrative actions is so overarching that in some events some of these actions could be subject of challenge through Art. XXIII.

rationale of free trade underpinning the WTO agreements itself require some degree of fair competition to be viable at all.

This study will be dedicated to constructing a plausible interpretation of Article XXIII and to use that interpretation to project the interaction of the nullification and impairment provision with the Anti-Dumping Agreement as a sample of the interaction of Article XXIII with the WTO agreements. It is also intended to question whether it is possible to include competition considerations in the context of nullification and impairment. If this scope is wide enough to cover agreements like the one on anti-dumping, a harmonious interpretation between the Non-Violation nullification and impairment provision and the Anti-Dumping Agreement will be attempted in view of the problematic trade outcomes of the measures allowed by the latter.

More specifically, this research is aimed at establishing the events in which the nullification and impairment complaint is applicable with a degree of clarity[11] depending on the source of the benefits found to be covered by the provision. Hence, this investigation will mention the applicability of nullification and impairment claims to benefits generated in GATT as a general proposition but that have been approached outside the WTO context. More specifically, it will traverse the issue of competition in an international context as a pivotal matter arising in relationship to the subject matter.

The first step must be then to determine the meaning of the provision contained in Article XXIII in order to produce an acceptable interpretation that enables its applicability. Secondly, the Antidumping Agreement will be reviewed in the context of its current application by specific countries and the economic consequences of that application. Then, the possible application of Art XXIII to Anti-Dumping measures that nullify or impair benefits for the Members shall be explored and finally the consideration of competition in the trade context in connection to the issues raised by Anti-Dumping and Nullification or Impairment of benefits shall be subject of revision.

[11] To GATT and provisions contained within the WTO Agreements.

1.1 GATT's Article XXIII applicability in the current WTO system

The nullification and impairment provision contained in Article XXIII of GATT has not been a frequently used part of the agreement. Despite the fact that in a handful of cases it has been applied by the pre-WTO panels[12], there is scarce case law to extract an interpretation from them. However, the provision is still a valid part of the regulatory body[13].

The understanding of the content of the Art XXIII agreement has remained obscure during the whole existence of the GATT and there have been few interpretation attempts that give it meaningful application. Further, those attempts are rather isolated and come from academics rather than consistent reports from the panels or the Appellate Body, leaving the matter still unresolved and making it hard to use the provision as a valid argument in WTO litigation.

The scope of the Nullification and Impairment provision is not clear; in fact, most of the contents and meanings of the provision are not clear, which makes them difficult to apply in a specific case.

On the one hand, the Nullification or Impairment provision has been understood in such a restrictive manner that it is practically inapplicable. It has failed to be properly invoked by complainant parties or it has been interpreted too restrictively by the WTO panels and Appellate Body. On the other hand, allowing an overly extensive

[12] BISD 37/86 Panel Report EEC- Oilseeds I, 1990; WT/DS135/AB/R Appellate Body Report on EC- Measures Affecting Asbestos and Asbestos Containing Products, 2001; GATTCP.4/39 Working Party Report on The Australian Subsidy on Ammonium Sulphate, 1950; BISD 1S/53 Panel Report on Treatment by Germany of imports of Sardines, 1952; BISD11S/95 Panel report on Uruguay- Recourse on Art XXIII, 1965;L/5776 Panel Report on EC Citrus 1985; L/5778 Panel Report EEC Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes 1985; BISD 35S/116 Panel Report on Japan Trade in Semi-Conductors; BISD 37S/786 Panel Report United States Restrictions on the Importation of Sugar and Sugar Containing Products Applied Under the 1955 Sugar Waiver and Under the Head note to the Schedule of Tariff Concessions; WT/DS44/AB/R Appellate Body Report Japan Measures Affecting Consumer Photographic Film and Paper, 1998; WT/DS163/R Panel Report on Korea Measures Affecting Government Procurement, 2000; WT/DS50/R Appellate Body report on India Patent Protection for Pharmaceutical and Agricultural Chemical Products, 1990; WT/DS62/AB/R Appellate Body report EC Custom Classification on Certain Computer Equipment 1998.

[13] SPITZER F. "The non violation complaint in WTO Law". Juristische Reihe TENEA/www.jurawelt.com.V.56 p.1.

interpretation of Nullification and Impairment claims would tend to undermine and limit the WTO agreements in an unacceptable manner outside GATT, despite the heavily negotiated details of their wording.

In the system of the WTO that has a rule-oriented dispute settlement process, all disputes have to be either adjudicated or mediated, but political intervention has been reduced to a minimum by the very structure of the system which has been, by consensus, shifted from a power-oriented approach towards a rule-oriented one, supported by the most powerful players in the economic field such as the United States and the European Union[14].

1.2 The Anti-Dumping Agreement in light of The Nullification and Impairment Provision.

The Anti-Dumping Agreement has an economic rationale on its own. This rationale is underpinned by an economic theory which gives Anti-Dumping measures an economically coherent justification and a place in the scheme of free trade. The Anti-Dumping Agreement is then articulated based on the principles that fit within the logic of free trade. In the event that its application is discordant with its economic rationale, the question of whether Art XXIII can be used to protect the economic rationale is a valid one.

In the last two decades, after the Uruguay Round, there have been a growing number of anti-dumping measures implemented both by "traditional"[15] anti-dumping users and "new" users[16] of the measures[17] due to the shift from national-based implementation to sector-originated complaints. These industries are also likely to lobby and force their governments to negotiate export restraints with dumping

[14] BREWSTER V. "Rule-Based Dispute Resolution in International Trade Law" Virginia Law Review Vol. 92, No. 2 (Apr., 2006), p. 251.
[15] United States, Canada, New Zealand, Australia, South Africa and the European Community.
[16] All other users of AD measures, predominantly developing countries. See below: Ch. 4.1 Historical Background of Anti-Dumping.
[17] PRUSA. "On the spread and impact of Anti-Dumping" Canadian Journal of Economics Vol. 34 No.3 p. 592.

countries rather than get the prices of the imports to reflect the costs of production because that is an easier way to control foreign competition[18].

Furthermore, it has been corroborated that users of anti-dumping measures are producers in consolidated sectors with a dominant position in the market[19]. These sectors are mostly heavy industry and manufactured raw materials such as chemicals and metal products[20] as the statistics from 1995 to 2012 show:

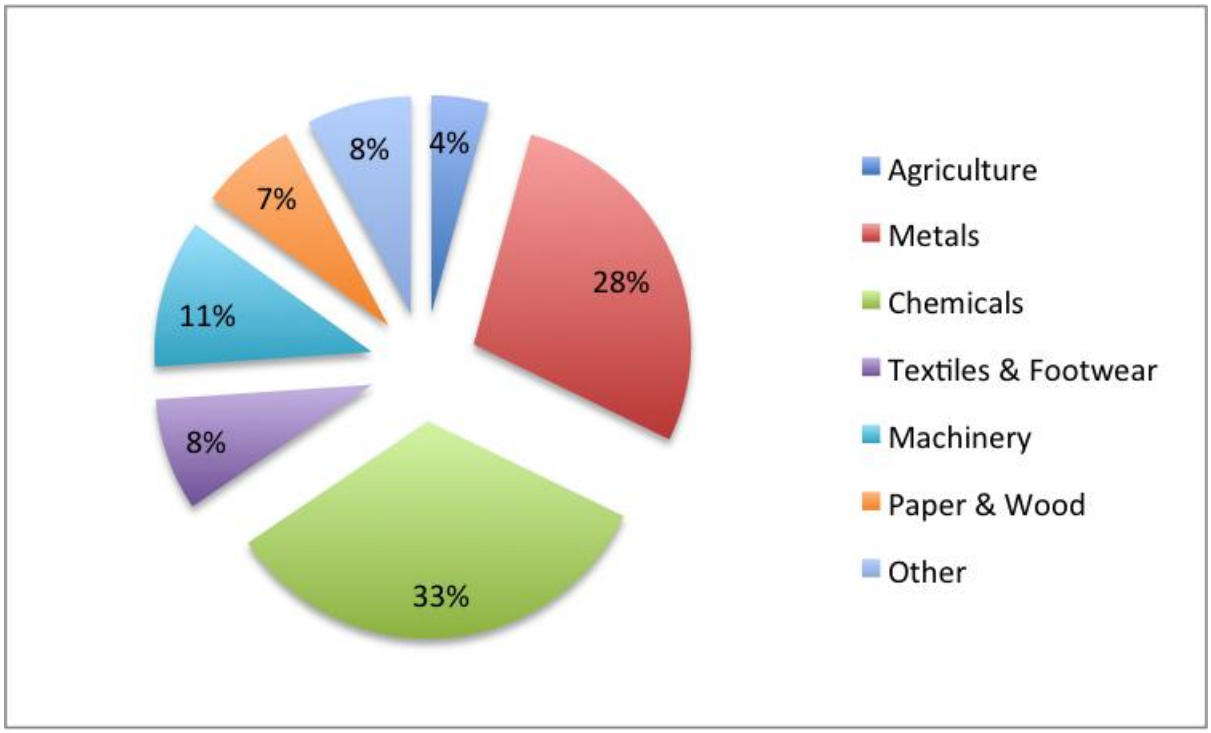


Figure 1: Split by industry, Anti-Dumping cases from 1995-2012 were dominated by the Metals and Chemical industries, being industries with large, dominant market players were able to use their influence to institute an investigation.

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Anti-dumping investigations increased by more than 50% amongst the members of WTO between 1995 and 2006 in comparison with the period between 1990 and

[18] Supra PRUSA 603.
[19] DE BIEVRE & ECKHARDT. The Political Economy of Anti-Dumping Reform" European Centre for International Political Economy, ECIPE. Working Paper No. 3/2010 p. 3.
[20] MESSERLIN P. "Measuring the Costs of Protection in Europe: European Commercial Policy in the 2000s". The Peterson Institute for International Economics. Washington D.C.
[21] Statistics are drawn from the WTO website: www.wto.orgby AntiDumpingPublishing.com: http://www.antidumpingpublishing.com/info/Free-Resources/Anti-Dumping-Statistics.aspx

1994[22]. Developing countries have been responsible for greatest significant part of this increase[23].*The massive rate of increase in the number of measures imposed by developing countries, compared to the increase in the measures imposed by developed countries, is all the more proof that developing countries have become active users of anti-dumping in the first twelve years of the WTO[24].* Even though the trade remedies were carefully negotiated between the countries to give them certain prerogatives, their original purpose was never to render null the tariff reduction or become an obstacle to trade, less so to be a protectionist tool for national authorities against foreign competitors.

1.3 Relevance

The nullification and impairment tool has been left out of use for different reasons[25]. After the Uruguay Round and the establishment of the WTO as a formal institution, its applicability became more arcane and difficult. An enquiry of its interpretation and its possible applicability to one of the most sensitive areas of trade remedies can shed light not only on the correct interpretation of Article XXIII of GATT, but also provide a tool to improve the current situation of anti-dumping in international trade.

The analysis of Art XXII and the Anti-Dumping agreement have always been pursued by the academy separately. In other words, there is limited literature on the interpretation of Article XXIII and abundant writings on the application and effects of anti-dumping measures in international trade. However there have not been sufficient attempts to spot points where the provision in Article XXIII can be applied to anti-dumping measures, regardless of whether they are compliant with the Anti-Dumping Agreement or not.

[22]YILMAZ M. "Trends in the use of Anti-Dumping measures during the first twelve years of the World Trade Organization" Available at www.mfa.gov.tr/data/Kutuphane/.../dergi-%20AD%20trends.pdf p. 9.
[23] Supra YILMAZ p.9.
[24] Supra YILMAZ p.9.
[25] Caution in the interpretation and application of the provision has been suggested in the Panel Reports (Japan-Film para. 10.36) where it is suggested that Art XXIII is treated as an exceptional measure giving deference to the agreements actively made by the Members, and in the academic literature because of the dangers that it poses as an *easy escape from the obligations imposed by the General Agreement.* (See supra PESCATORE P.).

This raises questions about the application of remedies contained in the Anti-Dumping Agreement, and what exact benefits are acquired by Member States that could be claimed in a hypothetical nullification and impairment complaint in WTO litigation. Those questions have been addressed extensively in this study and some conclusions have been singled out in application of the *ut res magis valeat quam pereat* principle. The anti-dumping law and application of it in the four most important emergent economies is studied in detail in order to draw some relevant conclusions from the regulations and practices in connection with the applicability of Article XXIII.

Also, besides the application of Article XXIII in the Anti-Dumping Agreement in the current status quo, a hypothetical interpretation of the Anti-Dumping Agreement in a broader scenario where there are more considerations of competitions in international trade is taken into account. The Anti-Dumping Agreement as an expression of specific reciprocity is analysed and the possibility of an economic constitution that guides the actions of the WTO is explored.

II. INTERPRETATION, SCOPE, CASE LAW, HISTORICAL REVIEW, EVOLUTION AND CURRENT STATE OF ARTICLE XXIII.

Every legal system has developed guidelines to interpret the law and the system of international law is no exception[26]. Interpretation, as a holistic exercise intended to understand the rules has been defined as: … "*one integrated operation which uses several tools simultaneously to shed light from different angles on the interpreted text; these tools should not be seen as watertight compartments, or a series of separate sub operations but, rather, as connecting (even overlapping) and mutually reinforcing parts of a whole, of a continuum or a continuous and multifaceted process that cannot be reduced to a mechanical operation and which partakes as much of art (the art of judgment), as of science,(the science of law)"*[27].

The interpretation of the WTO provisions in a holistic approach is even more significant because of the binding idea of single undertaking, where the agreement is accepted as a whole despite its possible contradictions in terms and tone due to the different times and conditions in which the different WTO agreements were concluded. Therefore the interpretation of the WTO agreements cannot be mechanical, not only due to the very nature of the WTO agreements as described above, but also because the principles of interpretation of international law contain an inherent mandate of judicial creativity. In other words, the principles of interpretation of international law help understand why *a rule is to be given one interpretation and not another*[28].

There are a number of schools of thought that give heavier weight to a particular aspect of the interpretation process which results in different outcomes from the same provisions. A number of their ideas are pondered by the GATT panels and the

[26] VAN DAMME I. "Treaty Interpretation by the WTO Appellate Body". International Economic Law Series. Oxford University Press. 2009. p. 39.
[27] ABI-SAAB G. "The Appellate Body and treaty interpretation" in SACERDOTI, YANOVICH and BOHANNES "The WTO at Ten - The Contribution of the Dispute Settlement System". Cambridge University Press, Cambridge 2006 p. 459.
[28] Supra VAN DAMME p. 39.

Appellate Body in the interpretation of Article XXIII, especially regarding literal interpretation. Some academics have also approached other schools of interpretation to provide functionality to the provision. Nonetheless, literal interpretation is the starting point in conformity with the structure provided by the Vienna Convention on Law of Treaties.

The Vienna Convention on Law of Treaties has been a stable source of interpretation guidelines and it must be used in order to interpret international agreements in which the WTO agreements are included. The Vienna Convention of Law of Treaties was, in fact, a codification of the customary international law that was drafted in 1969 and entered into force in 1980. Since the bases of the Vienna Convention are not only the uses of customary international law but also general principles of law, it is considered that even though some countries have not yet adhered to it, they are still bound by its substantial content[29].

The meaning of the provisions to be interpreted is put under the test of the plain meaning of the words. That is endorsed by Article 31 of the Vienna Convention[30] on the law of treaties which gives priority to this method of literal interpretation[31]. In the

[29]JACKSON J.H. "The World Trading System: Law and Policy Of International Economic Relations" 2nd Edition. MIT Press 1997 p. 121.

[30] Vienna Convention on the Law of Treaties, Section 3 Interpretation of Treaties - Article 31:
General rule of interpretation
1. **A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose**. [Emphasis added]
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

[31] BIANCHI A. "Textual Interpretation and (International) Law Reading: The Myth of (in) Determinacy and the Genealogy of Meaning" in BEKKER, DOLZEL, WAILBEL (Eds) "Making Transnational Law Work In The Global

words of the Appellate Body: a *"treaty interpreter must begin with and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision; read in their context, that the object and purpose of the states parties to the treaty must first be sought. Where the meaning imparted by the text is equivocal or inconclusive, or where confirmation of correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought"*[32].

This follows the logic that words have an ordinary meaning which should be plain and that this language is determined enough to allow an objective interpretation. The understanding of the words having a plain meaning is widespread amongst the WTO Dispute Settlement Body which frequently uses the dictionary as a primary tool to interpret the meaning of the words[33].

This method of interpretation is favoured both in national and international ambits as it is understood by both legal and linguistics experts that within the boundaries of any given language, the literal meaning of the terms is in itself a constraint to further interpretation[34]. However it is essential to take into account that the meaning of the terms in legal provisions relies in great part on the context of creation and application of the normative proposition. In other words, the clarity of the text is linked not only to the meaning of the words, but to the common use of those words in the specific context where they are to be used.

Indeed, what makes the words clear or unambiguous is not their actual linguistic meaning but the meaning of the context in which they are used. In other words, the text is clear *not because the meaning is uncontroversial but because the text is*

Economy - Essays In Honour Of Detlev Vagts". Lauterpacht Centre for International Law. University of Cambridge, December 28, 2010.pp. 34-56.

[32]WT/DS58/AB/R Report of the Appellate Body on United States – Import Prohibition of Certain Shrimp and Shrimp Products. 6 November, 1998.

[33] EHLERMANN C. "Six Years on the Bench of the World Trade Court, Some personal Experiences as member of the Appellate Body of the World Trade Organisation". Journal of World Trade, 36. 2002 p.616.

[34] Supra BIANCHI. pp.- 34-56.

uncontested[35]*.* In fact, it is a fallacy to state that there are self-explanatory words that require no interpretation. If the meaning of a given word seems so evident that it does not require any interpretation, it probably means that the interpreter is so immersed in the contextual setting that he does not perceive the act of understanding as an interpretive act; *the context is so deeply assumed that it becomes invisible to the observer*[36]*.*

Also, legal rules must be flexible so that they can adapt to social changes without becoming obsolete. Not accepting this would lead to a rigid understanding of the norms; a strict and literal understanding of the rules that gives great prevalence to formalism may lead to absurd outcomes in adjudication.

2.1 Interpretation and Construction.

The interpretation of GATT and other rules contained in the WTO agreements is influenced by different legal traditions and it is fed by the interpretation taking place at the Panels and Appellate Body as well as by the numerous discussions taking place in academic scenarios. Some of the interpretation methods have their origin in long standing systems of law applied in national States; while many of the features of the WTO norms are configured according to the Public International Law system.

The complexity in the interpretation of WTO rules is related to its exceptional structure in the context of international law. In principle, the WTO could be defined as the institutional host of a set International Public law agreements focused on the specific subject matter of trade.

The structure of the WTO is not a structure of checks and balances like many national systems that implement a constitutional democracy. Instead, it is a

[35] PERELMAN C. "La lógica jurídica y la nueva retórica, Trad. Luis Diez – Picazo, Madrid, Editorial Civitas (Monografías), 1988. p. 250.
[36] Supra BIANCHI. pp. 34-56.

hierarchical structure[37]. In this structure, the Ministerial Conference is composed by representatives of all the membership and has a legislative position stands at the top of the system. The General Council is also representative of all members and it has the functions of Dispute Settlement Body and of Trade Policy Review Body. In its function as a Dispute Settlement Body, the General Council has, formally, a judicial role. Finally, the Secretariat has an administrative role which derives its powers from the Director General, who in turn obtains his duties and role definition from the Ministerial Conference[38]. Its unique structure influences theinterpretation of rules in the WTO agreementsto a certain extent.

Due to the strength of the Dispute Settlement Body as main interpreter of the WTO law, it is important to establish how this role compares to other judicial bodies, what are the similarities and differences with national systems and with Public International Law models of adjudication, and what their scope of action is. Understanding what the WTO adjudication body can do in terms of normative interpretation, will allow a realistic view of the potential applicability of Art XXIII to the WTO agreements, and more precisely to the Anti-Dumping Agreement.

2.1.1 Interpretation in national law systems, public international law and WTO Law.

Within the world of legal interpretation, since the very beginning of the adjudication activity, there has been a dichotomy in opinion about what the scope of action of the judges should be in respect of the written regulation[39]. From the definition of the concept of “interpretation” there are disagreements throughout the history of law. On the one hand, to interpret is understood by academics as the mere logical operation aimed to reveal the meaning of the norm[40]. On the other hand, many jurists – led by

[37] BROUDE T. “International Governance in the WTO: Judicial Boundaries and Political Capitulation”. Cameron May Publishing. 2004. p. 131.
[38] Supra BROUDE T. 2004. 132.
[39] For a thorough comparative study on Interpretation theories and practice in the different legal currents see: LOPEZ D. “El derecho de los jueces: Obligatoriedad del precedente constitucional, análisis de sentencias y líneas jurisprudenciales y teoría del derecho judicial”. Ediciones Uniandes y Legis. Bogotá, 2000.
[40] DWORKIN R. Law’s Empire. Harvard University Press. 1988. p. 83.

Hans Kelsen – faithful to the Germanic attitude to the influence of the will in all actions generating legal consequences, consider interpretation as a complex judicial process of creating individual norms within the frame established by a more general norm contained in the written provision[41].

Civil law

Customarily, the continental tradition of civil law has been inclined to favour the literal interpretation of statutes and regulations due to their extensively codified system. According to this tendency, each judge should be able to apply his mind to the facts, connect them to the law and arrive at a reasonable conclusion able to withstand a validity test. This opinion is justified in two main arguments. Firstly, the legislative organ undergoes a long process to deliver a regulation that has been subject to debate, thorough analysis and consensus; thus the volition of the legislative organ is expressed in the words of the text and it is not the task of the judges to modify what the legislator has put together after such a tortuous process. To admit otherwise would imply that the judges have also had conferred the prerogative of effective legislators.

The previous argument corresponds to the primitive concept of exegesis, born in France during the XIX century when the Civil Law System aimed to reach completion through adopting exhaustive codification of the areas of higher socio–legal impact and a set of general principles applicable to all non-regulated situations. Furthermore, interpretation rules were created in an attempt to solve possible antinomies and fill eventual lacunae, thus reducing the possibility of judicial law-making to the minimum yet not extinguishing it completely. The specific method of exegesis was strongly criticised for its rigidity and excessive tribute to formality. It was eventually softened and replaced by milder methods of interpretation that varied in form and style, but did not abandon the fundamental definition of interpretation and its conceptual limitation.

[41]KELSEN H. Pure Theory of Law. Translation by Max Knight. University of California Press. Berkeley and Los Angeles, 1978.p. 350.

Secondly, the independence of the judiciary and of each individual judge to act with discretion, limited only by the actual positive law, is a value in this system of law. The *stare decisis* is regarded as overly restrictive of that discretionary understanding that the positive law is already imposing clear limits to the adjudication. If the written norm is the limit, any other restraint would imply an underestimation of the lesser judges' ability to produce valid and reasonable decisions[42] independently (i.e. to apply the norm to the facts as a mere logical operation).

The WTO as a mixed system displays features from the civil law despite not being a civil law system itself. This is because the civil law is one of the "building blocks"[43] of the system to which the WTO belongs. One feature from the civil law system that can be observed in the WTO configuration is the fact that binding codifications on trade law are created by the membership in anticipation of the need for regulations[44]. The binding effect of the approved agreements is important because it means that all existing provisions are subject to application. The treaties derive their efficacy from their validity as they were discussed and agreed upon by all members. In the event of anomies, it is the duty of the judiciary to resolve them without rendering void the content of any provision in force at the time of adjudication.

From the perspective of application of WTO law into the domestic systems of the civil law tradition, adjudication is bound to the existing domestic laws and should be done under the light of the *pacta sunt servanda* principle. Therefore, from the perspective of the Member States, the interpretation of domestic rules can be made in accordance with the *doctrine of consistent interpretation*[45] which establishes that when national rules allow for different interpretations, the interpretation that is consistent with international obligations. This assists Member States to comply with

[42] In the context of the WTO, it is pertinent to clarify that panels produce recommendations to the DSB which are different from the decisions produced by the domestic judiciary in the sense that decisions by domestic judges have intrinsic force and do not need further validation.
[43] PICKER C. "International Law's Mixed Heritage: A Common/Civil Law Jurisdiction". Vanderbilt Journal of Transnational Law. Vol. 41. 2008. p. 1110.
[44] Supra PICKER. p. 1108.
[45] COTTIER T & SCHEFER K. "The Relationship between World Trade Organization Law, National and Regional Law" in COTTIER (Ed). "The Challenge of WTO Law: Collected Essays". Cameron May. 2007. p. 266.

the obligations acquired through the signature of the WTO Agreements, and to incorporate WTO law into their national law through judicial interpretation.

The application of the rule of consistent interpretation is deemed feasible regardless of the monist or dualist nature of the national system[46]. This is particularly useful for countries of Civil Law tradition that do not have codified or sufficiently detailed trade law regimes, because they can benefit from the abundance and detail of WTO rules, to define the content of rights and obligations[47] in their trade law disputes. In other words, the application of the rule of consistent interpretation allows national judges to access the WTO "codifications" in all the cases where they are compatible with domestic law.

Common Law

Conversely, common law has been closer to the idea that adjudication is a process of law making. This is an obvious consequence of the system's configuration and evolution. In this type of system very general bills and acts were produced as a framework for higher judges to set up principles and rules upon solution of specific cases. Those decisions were vested with triplicate binding effects. In other words, the principles outlined by higher courts are binding *inter partes*, becoming obligatory to the lower judges in a similar way that positive law is binding to judges in the continental systems – as rules – and they also have *erga omnes* effects. This phenomenon has been extrapolated to the majority of the modern constitutional systems where constitutional courts or constitutional review has been introduced in the already established high courts[48] without regard to the legal tradition of the adopting countries. Judicial independence was guaranteed, according to the common law architects, by providing immediate endorsement of judicial decisions when the facts accommodated themselves to the rules created in binding precedent.

[46]Supra COTTIER & SCHEFER. 2007. p. 268.
[47]Supra COTTIER & SCHEFER. 2007. p. 25.
[48] Modern Constitutionalism has permeated both Continental and Common Law systems of law in a remarkable way. This has somehow blurred the differences between the conceptual approaches of the systems. However, the normative structure of the different countries remains faithful to their traditional system and so does the academic positions about interpretation, which makes that this definition continues to be clearly differentiated.

Also, a collateral benefit was the dissociation of the judges from political vacillations and undue influences in their reasoning, even when adjudicating in unstable environments.

As the lacunae in the common law system were filled by judicial decisions and the passage of time demanded specific positive regulation of certain topics, the common law system reached completion mostly through precedent and residually through statutory legislation. General principles were also decanted from the jurisprudence and a hierarchy of interpretation was derived, not from a statutory provision, but from the very structure of the judiciary. The precedent system serves the purpose of a non-codified exhaustive regulation of all areas of legal relevance whilst keeping the possibility open of solving antinomies and giving plenitude to the system when a concrete case poses the opportunity to do so.

It is possible to observe common law characteristics in the structure of the WTO as an institution hosting a legal system under the framework of a number of treaties. The system of law taking place at the WTO has been considered a mixed system for which the common law is a "building block". Two of the most prominent features of common law that can be encountered at the WTO are firstly ad hoc agreements created to solve specific problems without taking into account all implications in the context in which they will be applied[49]. This is a common law situation generated in great part by the limited scope of the WTO, which narrows the subject matters that can be approached by the Agreements and the adjudication bodies. This limited approach leaves out of the calculations and considerations key stakeholders that may be affected by the application of the agreements[50]. On the other hand, this approach allows the organisation to be manageable at an international level where there is decreasing concentration of hegemonic power in one single country and there is a multiplicity of contradicting interests at stake.

Secondly, de facto reliance on judicial precedent is one of the practices of the WTO dispute resolution bodies. Although judicial decisions are secondary to treaty law

[49] Supra PICKER. p. 1111.

[50] This could be one of the reasons that inspired stakeholder demonstrations at the Seattle ministerial.

according to the ICJ statute, the WTO system of dispute resolution is permanently informed by judicial precedent, establishing a strong jurisprudential binding effect[51].

Public International Law

International law is a body of norms applicable between sovereign states and other entities with international personality (status acknowledged by the international community). Those norms are prescriptive propositions formulated as hypothetical imperatives[52], which means that they are potentially capable of enforcement through sanctions, providing the existence of an executive institutional facility of sorts.

The system of public international law is significantly younger than the systems of national law. It is therefore naturally less complete and its enforceability not yet a material reality. This means that the provisions of international public law, for being practically unenforceable (or appreciably harder to enforce than national laws) does not have the fundamental attribute of the norms, i.e. the ability to promote, discourage and modify human actions by providing legal consequences to hypothetical factual premises.

In the system of Public International Law there are different theories of interpretation. The most salient and contrasting are the positivistic theory and the counter positivistic theories which vary in their tone and radical separation from the positivistic approach. As the system of public international law was being constructed, and from its early roots, it has been equated to the natural law. The Romans called it *ius gentium* or law of peoples, as opposed to the *ius civile*, the civil law intended to serve the Roman citizens, and from there on it has been understood as natural law. Only in modern times has public international law attempted to get

[51] Supra PICKER. p. 1112.
[52] BOBBIO N. "Teoria dell'ordenamiento giuridico". G Giappichelli- Editore.Turin. 1960. p. 57.

codified by means of treaties and international agreements of all kinds[53] and by the acceptance of the international customary law as binding.

Legal positivism has been defined in relation to the existence of the law. John Austin stresses that (…)*The existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry[54].* According to Bentham and Austin, law is a phenomenon of large communities that have a sovereign. A sovereign is a specific person or group of persons who have supreme and absolute de facto power. The laws in that community are fractions or divisions of the sovereign's commands which in turn are general orders applicable to certain actions and types of people and that can be enforced by the coactions of a "sanction"[55].This theory identifies the existence of legal systems with patterns of command and obedience that can be ascertained without considering whether the sovereign has a moral right to rule or whether his commands have substantial merits of deontological foundation to be binding; and that is why it is called positivistic.

Two other features are characteristic of the positivistic theory. Firstly, it is considered a monistic theory inasmuch as it represents all laws as having a single form which is an imperative that imposes obligations on all subjects except for the sovereign[56]. Legal positivism accepts that legislative power may be self-limiting, or limited externally by what public opinion will tolerate, and also that legal systems contain provisions that are not imperatives (for example, permissions, definitions, and so on). However these other imperatives are considered as pertaining to the non-legal material that is necessary for, and part of, every legal system.

[53] HALL S. "The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism" European Journal of International Law - EJIL Vol. 12 No. 2 pp. 279-270.
[54] AUSTIN J. "The Province of Jurisprudence Determined". rep. London: Weidenfeld & Nicolson, 1954 p. 157.
[55] GREEN L. "Legal Positivism", The Stanford Encyclopaedia of Philosophy (Fall 2009 Edition), ZALTA E.N. (ed.). Available at http://plato.stanford.edu/archives/fall2009/entries/legal-positivism/
[56] Supra GREEN 2009.

Amongst the positivists, there are different degrees of adherence to this position some, like Austin, are more liberal about it. Secondly, legal positivism is considered a *reductivist* theory, because it affirms that the normative language used in describing and stating the law – talk of authority, rights, obligations, and so on – can all be analysed without remainder in non-normative terms, ultimately as chains of statements about power and obedience[57].

In the twentieth century it was attempted to include the theory of legal positivism into international law unsuccessfully. Further attempts to use positivistic interpretation in international law have failed because of the material incapacity of legal positivism to explain why international law is binding[58]. This view evolved to the understanding that the system of international law is a simplified form of social structure only with primary rules of obligation. This, however, does not explain why international law is binding and includes only the concepts of Custom and Treaties, leaving the General Principles of Law[59] out of the coverage of the positivistic view of public international law.

On the other hand, the non-positivistic theory of interpretation mirrors the international law to the national laws and concludes that they are similar in their

[57]Supra GREEN 2009.

[58] Due to the fact that legal positivism only gives legal relevance to the acts emanated from a sovereign power and international law is an act that is not entirely founded in sovereign will, it is impossible for the theory of legal positivism to justify the binding character of International Law. See Supra HALL 2001 p. 271.

[59] The generally recognised authoritative statement on the sources of international law is the Statute of the International Court of Justice (ICJ), Article 38, which specifies that the Court, in deciding disputes, shall apply:
- international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
- international custom, as evidence of a general practice accepted as law; the general principles of law recognised by civilized nations;
-subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
The first three of these - treaties, custom, and principles of law - are sometimes referred to by lawyers and librarians with a common law background as "primary sources" of international law. The last two - judicial decisions and the teachings of publicists - are sometimes referred to as "secondary sources" or evidence of international law rules.
See: AUST A. ”Handbook of International Law” (2010), pp. 5-11. BROWNLIE I. ”Principles of Public International Law”, (2008), pp. 3-29. BUERGENTHAL T and MURPHY S.D., Public International Law in a Nutshell (2007), pp. 18-34. See also Sources of International Law available at
http://www.law.northwestern.edu/library/research/international/gettingstarted/sourcesofintllaw/

construction as systems with primary and secondary rules[60], and this evidence of the level of sophistication of the system refuted the idea that the public international law was a simplified system. As for the idea of the impossibility of enforcing decisions made in the international tribunals, there is positive evidence that despite not having the conventional coactive approach used in the nations, the decisions made by international tribunals of different natures are in most cases adopted and complied with. Also, the jurisprudence shaped by the international tribunals is followed in the countries as binding, so this argument, despite its formal validity, is contested by the overwhelming evidence against it.

WTO Law – principles and structure

The WTO as the institution in charge of trade provides a specialised international law sub-ordinance. Contrary to common misunderstanding, the WTO *treaty is just one branch of the bigger tree of public international law. The WTO is not some purely economic construct or private club where trade concessions are exchanged. The WTO, and the disciplines it imposes on its Members, is based on an international treaty. This treaty is, in and of itself, and like all other treaties between states, part of public international law[61].*

The WTO features several characteristics of Public International Law. For example, its model of adjudication is similar to the traditional models of international

[60] Later on the legal positivism developed a more refined concept of positivism which included primary and secondary legal rules. In this understanding of primary and secondary rules, a primary rule governs conduct and a secondary rule allows for the creation, alteration, or extinction of primary rules. See HART H.L.A. "The Concept of Law" OUP (1997).

[61] PAWELYN J. "The Role of Public International Law in the WTO" Sustra International Workshop, organised by Ecologic, Institute for International and European Environmental Policy. Berlin 9-10 December (2002).

adjudication in the fact that it is only granted to States[62] as opposed to individuals and its rulings do not have direct effect in the legal Systems of the Members[63].

However and despite being part of the system of public international law, the WTO has some special characteristics that set it apart from the rest of the international organisations. Some of those special characteristics are:

- Strong administrative support by a permanent structure in the secretariat, and a body of panelists that can provide adjudication of matters presented to the WTO within the time frame established in the WTO Dispute Settlement System, the DSU. Some international public law institutions have administrative structures, but the combination of a fairly small administrative body and a strong adjudicating structure is unique to the WTO.

- A Dispute Settlement mechanism that is automatic and compulsory. Under the Dispute Settlement understanding, a Dispute Settlement Body composed of panel and Appellate Body, adjudicates the trade disputes amongst the Member States. A member may invoke the compulsory jurisdiction of the Dispute Settlement Body by requesting the conformation of a panel in order to settle a dispute[64]. Moreover, there is a right to appeal the decision of the panel. The Appellate Body solves questions regarding the content and meaning of the WTO agreements, and some of them raise important international law issues[65].

- An enforcement system based on retaliatory sanctions instead of compensation.

[62]Supra, BROUDE T. 2004.P. 134.
[63]Supra, BROUDE.P. 134.
[64] CAMERON J & GRAY K. "Principles of International Law on the WTO Dispute Settlement Body". International and Comparative Law Quarterly. Vol. 50.(2001) p. 248.
[65] Supra CAMERON & GRAY 2001. p. 248.

- The WTO concept is largely a process of "negative integration[66]", setting out negative prohibitions ("thou shalt not" discriminate, impose quotas, etc.)[67]. The WTO does not generally impose positive obligations on its members, for example, to grant a certain amount of market access, to have certain policies in place or to achieve certain minimum standards (with the notable exception of the TRIPS Agreement). This makes ensuring compliance with WTO rules (basically, prohibitions of certain things) easier than ensuring compliance with many other rules of public international law where a positive obligation of result or achieving certain minimum standards is imposed[68].

Despite those unique features, the WTO is subject to the rules of public international law for the interpretation of the WTO agreements and to other public international law principles that apply on the creation, application and interpretation of the existent and new WTO rules and procedures. In the area of interpretation, the Appellate Body has accepted that there is a need to clarify the meaning of the WTO agreements by reference to Article 31 of the Vienna Convention of the Law of Treaties even though some of the members of the WTO are not parties of the Vienna Convention. The Appellate Body has explained that the Vienna Convention is applicable to all the WTO membership, not as a treaty to which the parties are signatories, but as a codification of binding customary international law[69].

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[66] On the concept of "Negative Integration" see PETERSMANN E-U. "From Negative to Positive Integration: Time for Mainstreaming Human Rights into the WTO?" Common Market Law Review 37. Kluwer Law International. 2000. pp 1363-1382.

[67] "*Legislative solutions – known in this context as 'positive integration' – might develop regimes of harmonization or recognition, or blended regimes of harmonization and recognition, (…) These legislative solutions could enjoy greater political support than judicial decisions addressing the same issues.*
It is in this regard that negative integration devices, such as those in the WTO that may be used to strike down domestic regulatory regimes, may create demand for positive integration devices, such as those associated with majority voting. Deregulation through negative integration may create demand for re-regulation at the central level through majority-voting-based legislative capacity." TRACHTMAN J. "The Constitutions of the WTO". Eur J Int Law (2006) 17 (3): 623-646. Available at http://ejil.oxfordjournals.org/content/17/3/623.full#sec-4

[68] Supra PAWELYN (2002).

[69] WT/DS2/9/AB/R United States - Standards for Reformulated and Conventional Gasoline, adopted 20 May 1996, para. 23. See also CAMERON & GRAY (2001).

Flowing from the Vienna Convention, another principle of interpretation in public international law that is applicable to the WTO is the principle of *ut res magis valeat quam pereat*or the principle of effectiveness. This principle means that the norms must be read with an interpretation that gives effect and meaning to the provision. The Appellate Body has expressed that "a fundamental tenet of treaty interpretation emerging from the general rule of interpretation set out in Article 31 is the principle of effectiveness"[70]. This is important in the process of understanding of the WTO agreements which are also supposed to be interpreted under the principle of Single Undertaking, which makes the task to apply the principle of effectiveness a very delicate one, as the effectiveness in full of one provision may mean the elimination of another one, which is equally valid and applicable.

A third principle of international law that becomes a tool for interpretation of the WTO agreements in the principle of *in dubio mitius*[71], or deference to the sovereignty of the states when there is doubt in international adjudication[72]. This principle has been applied extensively by WTO Panels and Appellate Body[73].

[70] "[o]ne of the corollaries of the 'general rule of interpretation' in the Vienna Convention is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility Supra US-Reformulated Gasoline, para. 23. See also, WT/DS8/AB/R WT/DS10/AB/R WT/DS11/AB/R. Japan - Taxes on Alcoholic Beverages 1996.

[71]*In Dubio Mitius means that the interpreter should chose the meaning which is the least restrictive on the sovereignty of the parties, if the term to be interpreted has different meanings.* KRAJEWSKI M. "National Regulation and Trade Liberalization in Services: The Legal Impact of the General Agreement of Trade in Services (GATS) on National Regulatory Autonomy. KLUWER Law International. 2003. p. 50.

[72] The Permanent Court of Justice defined this principle explaining that *if the wording of a treaty or a provision is not clear, in choosing between several admissible interpretations, the one which involves the minimum of obligations for the parties should be adopted.* See Frontier Between Turkey and Iraq (1925), Series B, No. 12 at 25. See also CAMERON & GRAY (2001).

[73] In WT/DS26/AB/R EC Measures Concerning Meat and Meat Products (Beef Hormones) adopted 13th Feb 1998,para 165; the Appellate Body accepted the applicability of the in dubio mitius principle in deference to the sovereignty of the States. In WT/DS108/AB/R United States, Tax Treatment for Foreign Sales Corporations, adopted in 2000,para 179; the Appellate Body recognized the sovereign right of every country to decide on its taxation regulations. Other cases where the sovereignty of the Members has been upheld are: WT/DS8/AB/R WT/DS10/AB/R WT/DS11/AB/R. Japan - Taxes on Alcoholic Beverages, 1996 and WT/DS2/9/AB/R United States - Standards for Reformulated and Conventional Gasoline, 1996.

Despite being the most sophisticated of the international public law structures, the WTO has a scope of action limited to trade[74], and a restrictive body of regulations[75] that can be used in eventual conflicts within the framed trade operational area. This is relevant because with the existing rules, the system is incomplete and ambiguous, which means that the role of the adjudicating bodies, and especially of the Appellate Body, is stronger due to the current incompleteness of the system[76].

Following the argumentative logic described above, a more complete system requires less judicial intervention and the same is valid vice versa. The extensive requirement for judicial intervention in the WTO is naturally conceded; the remaining questions are then which methods are ideal, and where the limits of this intervention must be drawn.

WTO Law - Interpretation and Precedent

WTO interpretation starts from the rules established by the membership in different agreements which have a binding effect in DSU, which as administered by the DSB contains the "hard law" of the WTO agreements and includes rules of implementation, interpretation and also it includes substantive rules[77]. Following the DSU, and in the events where there is textual ambiguity[78], the DSB acts as part of

[74] About the limitations of the WTO with regards of subject matter see WT/DS58/AB/R WTO Appellate Body Report on U.S. - Import Prohibition of Certain Shrimp and Shrimp Products, November, 1998).

[75] GATT and WTO agreements.

[76] About the issue of completeness of the system: "*Increased legalization led members to specify with greater detail aspects of the trade contract. Still, gaps and ambiguities remained, often a result of an inability to agree on details. This ambiguity posed a challenge to the new judicial system established in the WTO. Consistent with a view taken by many national judicial bodies, the WTO Appellate Body has seen its mandate as clarifying and ensuring the completeness of WTO law. The result has been a new judicial culture in the WTO that favours making law--a role for the Appellate Body far different from what was expected by its creators.*" See BARTON JH, GOLDSTEIN JL, JOSLING TE &STEINBERG RH (Eds). "The evolution of the Trade Regime". Princeton University Press. 2009. pp. 16-24.

[77] MERCURIO & TYAGI. "Treat Interpretation in WTO Dispute Settlement: The Outstanding Question of the Legality of Local Working Requirements. Minnesota Journal of International Law. Vol. 19:2. 2010 p. 277

[78] Textual ambiguity can occur either because of the very diverse nature of each of the agreements composing the "package deal of the WTO". Ambiguity in the agreements can also be a purposeful strategy by the treaty drafters in order to in order to reach agreements between parties with different inclinations without completely compromising their respective mandates. See Supra MERCURIO & TYAGI. p. 278

the judiciary[79] of the WTO by endorsing the interpretations and clarifications contained in the reports of the Panels and the Appellate Body.

In a specific dispute, the Panels and Appellate body have the duty to elucidate and indicate the actual meaning and application of the provisions contained in the different treaties where the meaning of the provisions or their interaction is obscure. In strict sense, the reports of the panels and Appellate Body are binding for the parties only[80], yet they are still an important (and, to a certain extent mandatory), interpretative resource of WTO rules[81] in cases with similar facts and similar questions of law.

The course of performance so far has demonstrated that in the pursuit of certainty and stability of the WTO system, judicial precedent has been applied in different cases. This has contributed to the construction of a strong body of law that gives legal reasoning prevalence over political considerations[82]. Therefore, even though reports are strictly binding inter-partes, the practice has demonstrated that they are an authoritative precedent.

The practice of following the precedent established by previous reports is customary in the WTO. Customary does not necessarily mean in this case that it becomes part of customary international law, but that once the precedent has been followed on a single point of law, legitimate expectations are created amongst the membership and

[79] In the sense that it is not acting as a political decision maker, but merely endorsing the adjudicating work of the panels or the Appellate Body.

[80] On the question about the erga omnes binding effect of Adopted Reports, the Appellate Body in report No. WT/DS11/AB/R Japan- Taxes on Alcoholic Beverages (p. 14) established as follows: "*We do not believe that the CONTRACTING PARTIES, in deciding to adopt a panel report, intended that their decision would constitute a definitive interpretation of the relevant provisions of GATT 1947. Nor do we believe that this is contemplated under GATT 1994. There is specific cause for this conclusion in the WTO Agreement. Article IX: 2 of the WTO Agreement provides: "The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements". Article IX: 2 provides further that such decisions "shall be taken by a three-fourths majority of the Members". The fact that such an "exclusive authority" in interpreting the treaty has been established so specifically in the WTO Agreement is reason enough to conclude that such authority does not exist by implication or by inadvertence elsewhere".*

[81] PAWELYN J. "Conflict of Norms in Public International Law". Cambridge University Press. 2008. p. 46.

[82] CHUA A. "Precedent and Principles of WTO panel Jurisprudence". Berkeley Journal of International Law. V. 16. 1998. p. 173.

thus, the precedent needs to be taken into account in the solution of subsequent cases[83].

Furthermore, the Appellate Body has established that in absence of a justifiable reasoning against the established position on a point of law, it shall stand as of mandatory application[84]. Even though stare decisis is not applied in strict sense in the WTO it can be said that a *de facto*[85] precedent has been established and it must be followed until a reasonable justification is presented by the Appellate Body to change the existing reasoning on a point of law. This means that the panels are expected[86] to take into account the reasoning on legal matters[87] contained in previous Appellate Body reports.

The precedent created by the Appellate Body reports is limited to the reasoning on points of law and excludes recommendations and specific decisions taken to solve individual disputes[88]. This means that the Appellate Body reasoning in adopted

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[83] "*Adopted panel reports are an important part of the GATT acquis. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute*."WT/DS8/AB/R, WT/DS10/AB/R,WT/DS11/AB/R. Japan-Alcoholic Beverages II. Paras. 107-108.

[84]WT/DS/344/AB/RUS anti-dumping measures and designed stainless steel*"(...) absent cogent reasons, an adjudicating body will resolve the same legal questions in the same way in subsequent cases"*. Para 160.

[85]FOLTEA M. "International Organizations in WTO Dispute Settlement: How Much Institutional Sensitivity? Cambridge University Press. Nov 2012. P138. For a comprehensive discussion on this matter see BHALA R. "The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)" Journal of Translational Law 9- 1999. pp. 1-151.

[86] This is confirmed in the Appellate Body report WT/DS58/AB/R, US- Shrimp, paras 107 to 109 when indicating that panels are correct to use previous Appellate Body reasoning in the construction of their reports *"...Indeed **we would have expected the Panel to do so**. The Panel had necessarily to consider our views, as we had overruled certain aspects of the findings of the original panel on this issue, and, more important, had provided interpretative guidance for future panels, such as the Panel in this case".* [Emphasis added].

[87] DAVID F. "The Role of Precedent in WTO Law- New Horizons" Maastricht Faculty of Law- Working Paper 2009-12. 2009. p. 6.

[88] While there is no stare decisis rule, the panel's reasoning should have enough persuasive weight to convince future panels to apply the reasoning on clarified points of law. "*The report of a panel or the Appellate Body also relates to that specific matter in the dispute between these Members. Even if adopted, the reports of panels and the Appellate Body are not binding precedents for other disputes between the same parties on other matters or different parties on the same matter, even though the same questions of WTO law might arise. As in other areas of international law, there is no rule of stare decisis in WTO dispute settlement according to which previous rulings bind panels and the Appellate Body in subsequent cases. This means that a panel is not obliged to follow previous Appellate Body reports even if they have developed a certain interpretation of exactly the provisions which are now at issue before the panel. Nor is the Appellate Body obliged to maintain the legal interpretations it has developed in past cases. The Appellate Body has confirmed*

reports over matters of law is presumed to have already considered the rules of customary rules of interpretation of international law[89] and done the interpretation process in *good faith* according to the *ordinary meaning of the words* in the *context* of the specific treaty *and taking into account their object and purpose*[90].

The existence of this presumption gives Appellate Body decisions a strong persuasive power, because the Appellate Body's task of clarifying points of law serves the purpose of giving predictability and stability to a system which is intrinsically ambiguous[91]. However, this does not mean that the WTO jurisprudence is immovable; instead it means that the practice has created a process to change the established jurisprudence.

In that process, the panels are subject to the Appellate Body reports in all matters of law, but the Appellate Body can depart from its own precedent, should it find "cogent reasons"[92] to do so. Cogent reasons do not yet have a technical and all comprising definition. Therefore, the possibility of finding and justifying reasons to depart from the existent precedent is open for the Appellate Body. By allowing itself to depart from its own precedent presenting cogent reasons, the Appellate Body kept the

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that conclusions and recommendations in panel reports adopted under GATT 1947 bound the parties to the particular dispute, but that subsequent panels were not legally bound by the details and reasoning of a previous panel report." Dispute Settlement System Module. Ch. 7 Legal effect of panel and appellate body reports and DSB recommendations and rulings. 7.2 Legal Status of adopted/unadopted reports in other disputes. Available at https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c7s2p1_e.htm

[89] As established by Art 3.2 of the DSU.

[90] According to Art 31(1) Vienna Convention on the Law of Treaties.

[91] In WT/DS350/AB/R United States – Continued Existence and Application of Zeroing Methodology, para. 306, a member of the Appellate Body made a statement explaining the complexity of the interpretative task at the level of the Appellate Body and indirectly explaining why the clarifications given in the reports are key for the system's stability: "*The interpretation of the covered agreements requires scrupulous adherence to the disciplines of the customary rules of interpretation of public international law. Those disciplines are directed towards arriving at a coherent and harmonious interpretation to develop an answer to an interpretative problem and thereby provide certainty as to the rights and obligations of the parties. Variability, contradiction, and uncertainty stalk the interpretative enterprise, but they are the hallmarks of its failure, not its success. Just as the interpreter of a treaty strives for coherence, there is an inevitable recognition that a treaty bears the imprint of many hands. And what is left behind is a text, sometimes negotiated to a point where an agreement to regulate a matter could only be reached on the basis of constructive ambiguity, carrying both the hopes and fears of the parties. Interpretation is an endeavour to discern order, notwithstanding these infirmities, without adding to or diminishing the rights and obligations of the parties*".

[92] Supra Japan Alcoholic Beverages II para 160.

freedom of revising, and modifying its own reasoning when it considers it proportionate, necessary, reasonable and appropriate[93].

The open ended contract theory: Article XXIII

Because the WTO agreements are not implicit social contracts (as national legal systems are), but can be treated as contracts in a strict sense[94], it is plausible to consider all the WTO agreements as open-ended contracts in which rules of specific content are either reached by consensus or, when that is not possible, by using legal *reasoning techniques* in the understanding that the positive norms in the agreements set out general dogmatic rules (programmatic agreements) with a broad meaning for the judges to complete with case related organic rules (factual premise/legal consequence)[95] in their judgments[96].

Rules vs. Standards: Wording of the WTO agreements

The previous statement presupposes that when the agreements do not exhaust the regulatory needs to govern trade situations, they are not rules in strict sense as they lack a clear factual condition and a specific consequence. Instead, they are seen as guidelines or standards to be aimed for in each judgment[97]. Other standards of public international law are also acceptable as reference points for the sake of

[93] Supra VAN DAMME p. 199.

[94] International agreements cannot be called contracts in strict sense. However, because of the fact that they are concluded between *de iure equals* they have been treated like *de facto contracts.* In this regard, the US Supreme Court has been strongly inclined to understand treaties as contracts as opposed to understanding them legislative acts. It has interpreted that "*treaty interpretation is different from statutory interpretation because treaties are contracts, not acts of legislation".* MAHONEY C. "Treaties as Contracts: Textualism, Contract Theory and Interpretation of Treaties" The Yale Law Journal. Vol. 116, No. 4 (Jan., 2007). P. 829 et ss.

[95] Some of the aspects that are taken into account when interpreting international agreements as contracts come from the theory of contracts such as Good Faith, Course of Performance and prevention of extrinsic elements for the further construction of the terms of the agreement. See Supra MAHONEY C. pp 849-851.

[96] KIM D-W. "Non-Violation Complaints in WTO Law: Theory and Practice" Studies in Global Economic Law. Peter Lang. Berne. 2006. p. 102.

[97] On Rules and Standards see "Rules and Standards in International Law" New York University. 2003. p. 10 . See also KAPLOW L " Rules vs. Standards an economic analysis" Duke Law Journal Vol 42. 1992. pp 557-624. Available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3207&context=dlj

argumentative strength and logic and to ensure a steady jurisprudential precedent is constructed with regular ratio decidendi/obiter dicta structures to allow the extraction of rules in a systematic manner. That exercise has been labelled as constructivism, and seems adequate for the WTO adjudication process given the abovementioned circumstances.

So far it is not clear whether the Non-Violation claim is an appropriate tool to defeat anti-dumping measures acting as a trade barrier by affecting international competition[98], but it is possible to conclude that the provision is applicable in that unique situation. The onus lies on the complainant who would need to provide proof of the following:

- Impaired or nullified GATT benefit (non-tariff trade barrier).
- Anti-dumping measure with anti-competitive aim.
- Causal Link.

Further development of these requirements, their validity as precedent and possible interpretations will provide a substantial and thorough understanding of the nullification and impairment provision to the Anti-Dumping Agreement in a sensible way for both the specific agreement and free trade as a desirable goal.

Despite these considerations, it must be remarked that the WTO jurisprudence has been inclined to literal interpretation, as it has been considered a source[99] of *security*

[98] The obscurity rests in the fact that few further regulations expand on the scope of application of the norm, i.e. the DSU and the understanding of Art XXIV (applicability of Art XXIII with respect to restrictive measures taken for balance of payment purposes and matters related to customs unions, free trade areas or interim agreements leading to the formation of the latter. See ROESSLER F. "The institutional Balance of WTO" in BRONCKERS (Ed.) "New Directions in International Economic Law, Essays in Honor of John J Jackson" Kluwer Law International. 2000.
Some provisions like the Agreement on Textiles and Clothing eliminate altogether its applicability to the specific subject matter. In the rest of the universe of WTO rules, there is no clear argument of why and how the application of Art XXIII, especially Art XXIII (b) has to be subject of a restrictive interpretation.

[99] PETERSMANN E-U. "Ten years of the WTO Dispute Settlement System: Past, Present and Future" Journal of International Law and Policy. Vol. III. University of Pennsylvania 2005 p. 9.

and predictability to the multilateral trading system[100].Using this kind of interpretation, Article XXIII will be scrutinised in order to obtain clarity on its meaning.

Notwithstanding all the limitations, critics and mistakes that can possibly affect the provision, its validity is uncontested and it remains part of GATT as an applicable norm. It is necessary to engage with the different interpretation theories to give a coherent meaning to this provision in relation to the rest of the agreement. Additionally, the different methods of interpretation will be used to construct the links between the provisions contained in Article XXIII and non-WTO regulated areas of international trade.

2.2 State of the art doctrinal interpretation: Conduct covered and grants made by Article XXIII

Article XXIII is a unique type of regulation in the GATT agreement. This is because the nullification and impairment clause has implications for both the actual breach of international obligations, and the "*defeat of reasonable expectations for enhanced exports and trade"*[101]*.*

The first finding to be made is the object of Article XXIII. In other words, what are the behaviours covered by the provision that can give rise to a legal complaint under the terms of the article in question. According to the text of Article XIII: 1, there are three kinds of conduct or *causes of action* that can trigger the application of Article XXIII and they are located in Article XXIII: 1 in its sub-paragraphs a, b, and c[102]. The text of the provision contains a factual requirement, which is a benefit nullification or impairment:

[100]Understanding on Rules and Procedures Governing the Settlement of Disputes. Apr 15 1994. Marrakesh Agreement Establishing the World Trade Organization, Annex 2, legal Instruments- Results of the Uruguay Round , 33 I.L.M, Art. 3.2.

[101] JACKSON J. "Designing and Implementing Effective Dispute Settlement Procedures: WTO Dispute Settlement, Appraisal and Prospects." In KRUEGER A. "The WTO as an International Organisation". Published by University of Chicago Press, 1998 p. 166.

[102] KIM, D.W. "*Non-Violation Complaints in WTO Law. Theory and Practice".* Studies in Global Economic Law Series No. 9. Peter Lang. Bern, 2006 p. 7.

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 . . .*[103]

Such requirement can be fulfilled as a result of three kinds of conduct:

- ***Violation:*** *[(a) the failure of another contracting party to carry out its obligations under this Agreement*[104]*]*, or
- ***Non – violation*** *[(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement*[105]*]*.
  Or
- ***Situation:*** *[(c) the existence of any other situation, the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it*[106]*].*

It is important to note that the term *Non-Violation* is not part of the original text of the norm. However the early jurisprudence defined its purpose and consolidated the expression in the case of *European Economic Community - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins* ("*EEC – Oilseeds*") in the following terms:

[103] Art XXIII: 1 chapeau [Emphasis added].
[104] Art XXIII: 1 (a) GATT.
[105] Art XXIII: 1 (b) GATT.
[106] Art XXIII: 1 (c) GATT.

> "The idea underlying [the provisions of Article XXIII:1(b)] is that *the improved competitive opportunities that can legitimately be expected from a tariff concession can be frustrated not only by measures proscribed by the General Agreement but also by measures consistent with that Agreement*. In order to *encourage Contracting Parties to make tariff concessions* they must therefore be given a right of redress when a reciprocal concession is impaired by another contracting party as a result of the application of any measure, whether or not it conflicts with the General Agreement."[107][Emphasis added]

The behaviours to trigger the application of Article XXIII are mutually exclusive as it must be understood that the term "or" is disjunctive and not copulative. Otherwise, the provision would be illogical[108] as a whole. On the one hand, Article XXIII: 1 (a) deals with actions that are in breach of the WTO agreements, being violations. Violations of the WTO agreements are dealt with by the DSU. There is clarity about the legal procedure that a member state must follow upon a breach, so there is no moot point on these actions. On the other hand, sub-paragraphs b and c of Article XXIII: 1, have been understood as either actions which are **not in breach** of GATT (and the WTO agreements) or mere *situations*, regardless of whether they are actual actions of either party involved or just a set of circumstances beyond the control or outside the will of the parties. The actions that are **not** in breach of the agreement have been considered as *Non Violations.*

Despite being different, and due to the nonexistence of a breach requirement, the potential complaints contained in sub-paragraphs (b) and (c) of Article XXIII: 1 have been called collectively *Non-Violation complaints.* However, there is agreement in

[107]EEC Oilseeds- 1990, BISD 37S/86, para. 144.

[108] While in general a factual measure can be captured by two normative categories. In the specific case of Art XXIII a factual measure can't be deemed in breach and in compliance of the WTO agreements at the same time. An action capable of triggering the consequences provided for in Art XXIII must be a breach or a compliant action that produces the Non-Violation category.

the doctrine and jurisprudence about the complete absence of successful *situation* complaints in the whole existence of GATT[109] and the unlikelihood of their appearance in the future[110].

Having ascertained that, and taking into account the aspects that contain a true moot point, the interpretation of the scope of Article XXIII by the academics[111] has been focused mostly on the Non-Violation complaints as defined by sub-paragraph (b) of Article XXIII: 1.

Understanding the meaning of each word of the provision, and then putting that meaning in context with its creation and evolution is the method prescribed by the Vienna Convention of Treaty Interpretation for the interpretation of treaty provisions when their meaning is obscure, as is the case of Article XXIII of GATT. This method shall be followed to draw conclusions regarding the actual meaning of the provision to then compare it with the existing case law. Furthermore, the found meaning shall be applied to the abovementioned Anti-Dumping Agreement to suggest a harmonic interaction between them.

2.3 Literal Interpretation of the terms in Article XXIII: dissecting the rule in the search for the meaning of the words.

[109]Supra KIM. pp. 7-10 See also, Appellate Body Report: "Art XXIII: 1(c) has never been a foundation for a recommendation or ruling of the GATT Contracting Parties or the Dispute Settlement Body". *India Patent I (AB),* par.39.

[110]Supra KIM. pp. 7-10 See also, Kennedy K. "Foreign Direct Investment and Competition Policy at the World Trade Organisation" George Washington International Law Review. (2001).

[111] See among others READ R. "Trade Dispute Settlement Mechanisms: The WTO dispute settlement understanding in the wake of GATT" Lancaster University Management School. Working paper 2005/012 available at http://www.pf.uni-lj.si/media/wto.dispute.pdf
See also: FAUNCE, NEVILLE & WASSON "Non Violation Nullification of Benefit Claims: Opportunities and Dilemmas for Australia in the WTO Dispute Settlement System" AUSTRALIAN PERSPECTIVES ON WTO DISPUTE SETTLEMENT, Bray, M., ed., pp. 123-129, Australian Department of Foreign Affairs and Trade, 2009. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1409504 .A different perspective is provided by BOWN when he submits that Art XXIII is mostly used when countries are responding to illegal actions (violations) under this article in order to provide a forum for direct retaliation in case of nullification and impairment. BOWN C. " The Economics of Trade Disputes, The GATT Art. XXIII and the WTO's Dispute Settlement Understanding". Department of Economics and Graduate School of Economics and Finance. Brandeis University. 2002.

A literal interpretation of each of the sentences in Art XXIII will be done in order to detect its sense, spirit and meaning as follows,

Article XXIII: Nullification or Impairment

- ***If any contracting party:*** Contracting Parties are currently part of an organisation (the WTO) established by an agreement. In the text of Art XXIII "any contracting party" means, any of the Member States of the WTO. Initially, when GATT was first created in 1947, no text was written in a language that showed the creation of an organisation as GATT as merely a trade treaty. Administrative functions were assigned to the CONTRACTING PARTIES, indicated in capital letters; this meant that all countries that were part of GATT were commissioned administrative tasks including dispute resolution, meeting and all other activities requiring collective action. Also the contracting parties, in small letters, referred to the parties of GATT as trade partners[112]. Only until 1994, when the GATT became part of an official institution could the term "Member States" be used to refer as the contracting parties acting as trade partners. A member state is a country that has acceded into the WTO either through the transition GATT-WTO or after the constitution of the WTO. New members accede to the WTO by signing on to its agreements[113].

[112] LOWENFELD A. "International Economic Law". International Economic Law Series. Oxford University Press, Oxford. 2003. p. 29.

[113] See JACKSON J. "The jurisprudence of GATT and the WTO insights on treaty law and economic relations". Cambridge University Press. Cambridge. 2007. pp. 29: *There are basically four ways to become a "contracting party" of GATT. Three involve accession by a government: by the Protocol of Provisional Application; by subsequent protocol and agreement under Art XXXIII of GATT and by directly accepting the GATT itself under article XXVI (2)(…) These methods of accession are preceded by a tariff negotiation, the"Ticket of Admission", and often these negotiations extend for several years, during which time by special declaration (protocol), the applicant is given "Provisional Accession" to GATT, or relations with GATT are established by other special arrangements. The Fourth "Route" to Membership is open to "customs territories" in respect of which a contracting party has accepted this Agreement: when such territory "possesses or acquires full autonomy in the conduct of its commercial relations"…In 157 GATT set forth a series of recommended procedures to guide this sponsorship route to membership, which enabled a newly independent government to have a de facto participation in GATT pending a final decision as to entry into GATT.* See also WTO glossary of terms. http://www.wto.org/english/thewto_e/glossary_e/glossary_e.htm.

- ***should consider that any benefit accruing to it directly or indirectly under this Agreement:*** The wording *should consider* means that the affected party is given the discretion to raise a complaint should they consider that a conduct has nullified or impaired a benefit accruing under GATT.

A benefit under GATT today must be understood to be a benefit under GATT 1994 and it can also be interpreted to be a benefit under the Multilateral Agreements on Trade in Goods contained in Annex 1a of the Marrakesh Agreement. This can be done in application of the principle of single undertaking. Both agreements form part of the WTO agreements. Furthermore, there is a relationship between GATT and the Multilateral Agreements of trade in Goods under Annex 1a (The trade remedies agreements, including the Anti-Dumping agreement, belong to this group) that can be seen in the following features. Firstly, Trade Remedies Agreements contain both cross referencing and conceptual developments based on GATT 1994 as a foundation[114]. Secondly, The subject matter of the agreements under Annex 1a is specifically trade in goods, which is within the area of scope of GATT (GATS and TRIPS, for example, are excluded from this scope due to the nature of their subject matters).Thirdly, in the General interpretative note to Annex 1a it is provided that in case of **conflict** between the provisions in GATT and those contained in the agreements of Annex 1a, the latter shall prevail. This means that in other spheres, the agreements can be interpreted in a way that allows for them to supplement, clarify and elaborate each other[115]. [Emphasis added]

The scope of Art XXIII GATT can be extended to cover the benefits emerging from the Agreements on Multilateral Trade in Goods provided that there are not provisions in express contradiction with Art XXIII. In other words, since the Multilateral Agreement of Trade in Goods has similar objectives and subject matter to GATT, and they have a relationship of interdependence, particularly aimed to protect and

[114] This is evident, for example in the fact that the Anti-Dumping Agreement is called *Agreement on Implementation of Art VI of the General Agreement on Tariffs and Trade.* See QURESHI A. "Interpreting WTO Agreements: Problems and Perspectives" Cambridge University Press. 2006. p. 208.
[115] Supra QURESHI A. p. 208.

enhance pre-existing benefits under GATT in addition to the new benefits contained in them; it can be concluded that Art XXIII can also be applied to the benefits emerging from the specialist agreements under Annex 1a.

Benefits covered by Art XXIII must be separated into protection from infringements[116], market access and improved legal positions[117]. The inclusion of infringements into the scope of Art XXIII obeys the fact that in principle, the infringement of a rule does not necessarily damage, nullify or impair the rights or expectations of another party[118].

Furthermore, in early practice a formal infringement did not necessarily cause substantial damage. This does not have any practical application anymore as the evaluation of damage does not explore the amounts of trade flowing as a primary source, but the competitive position of the affected party[119].

Improved legal positions have been defined in the Oilseeds case as the *assurance of a better market access through improved price competition"*[120]. Legal positivism in the interpretation of the provision has dominated the jurisprudence and the doctrine limiting the scope of the cause of action based on non-violation complaints. The arguments to limit the scope of non-violation complaints range from the specific and varied multiplicity of regulated subject matters to the vague terms of the provision and the growing applicability of general principles of law to WTO law[121].

These arguments are valid, convenient and they are supported by the majority of the academic and jurisprudential literature. However, they do not offer a solution to effectively apply the provision in Art XXIII and foster a fair trade law system as per

[116]Covered by Art XXIII (a), the violation provision of Art XXIII.
[117] Included in Art XXIII 9b), the non violation provision of Art XXIII. See VON BOGANDY A. "GATT non violation procedure" Journal of World Trade. V. 26 Issue 4. p. 97.
[118] COTTIER T, and SCHEFER K. "Protection of legitimate expectations in WTO" in BRONCKERS M (ED)" New Directions in International Economic Law, Essays in Honor of Johan Jackson" Kluwer Academic Publishers (2006) p. 58.
[119]Supra COTTIER T, and SCHEFER K. p. 58.
[120] EC-Oilseeds footnote 15. See Supra VON BOGANDY. p. 97.
[121] Supra COTTIER T and SCHEFFER K. p. 59.

the mentioned principles of GATT with the available and valid provisions currently in force.

The complexity inherent to the definition of what constitutes a benefit can be crucial to the understanding and thus the application of this provision in a legal but also in an economically viable manner. In other words, vested rights are clearly benefits but so are legitimate expectations and improved legal positions. Legitimate expectations are included in art XXIII as one of the few expressions[122] in protection of the principles of good faith in GATT[123]. The protection provided by art XXIII (b) can be understood as a codified expression of both, the restriction of abuse of right and the protection of legitimate expectations in an attempt to include the doctrine of good faith in the International Trade agreements[124].

Initially, one of the first benefits emerging from GATT was tariff concessions, as well as MFN (Most Favoured Nation) and National Treatment[125]. Therefore it is possible to affirm that tariff concessions are the first advantage possessed by the Member States that can be considered as a benefit under the terms of Article XXIII. However, tariff concessions are the less likely advantage to be affected by any situation in the current world of trade. Non-compliance with tariff concession constitutes a violation which is unlikely to occur due to all the support systems around tariff concessions and the extensive knowledge about them by domestic enforcement authorities.

The word *benefit* could not then be restricted to tariff concessions, as this would give an overly restrictive meaning to Article XXIII, which has not been accepted by the panels. On the other hand, the concept of benefits can be interpreted as extensive advantages beyond the negotiated tariff concession.

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[122] Supra COTTIER T and SCHEFFER K. p. 51.

[123] A prominent example of the protection to this principle can be found in the jurisprudence related to Art XX GATT.

[124] Supra COTTIER T and SCHEFER K. p. 53.

[125] *GATT's initial purpose was to negotiate tariff concessions among members and to establish a code of conduct and procedures for the resolution of trade disputes by negotiation. Successive negotiations (called rounds) have also focussed on the code of conduct for nontariff barriers. The GATT was founded on the principles of non-discrimination and multilateralism in international trade. Non-discrimination* (sic) *is expressed via unconditional Most Favoured Nation status for all contracting parties.* See WILLIAMS M. "A Brief History of GATT and NAFTA". Women's alternative Economic Network.2006. Available at http://www.greens.org/s-r/06/06-15.html.

Academics have understood that it is not possible to have a legitimate expectation when there is not a concession as countries are free to impose any tariff without other legal constraints emanating from GATT[126].Therefore, the extension of the interpretation of the word "benefits" in Art XXIII(b) goes beyond the formal compliance with tariff concessions, to cover legitimate expectations; but it is restricted to legitimate expectations of an improved market access position which are created in relation to the concessions granted.

This is based on the argument that when there is no commitment on a tariff reduction there is no expectation to be formed, and even if an expectation is generated by the course of performance of a specific member state, this does not emerge directly from the Agreement and thus the scope of Art XXIII (b) does not extend to those expectations[127]. However, that argument can be refuted reviewing the wording following the word *benefit* in the provision which explicitly mentions that the benefit must have been accrued *directly or indirectly under this agreement.*

It is plausible to affirm that the direct benefits accrued under the agreement consist of concessions and explicit advantages emerging from the agreement and the indirect benefits are collateral benefits that are generated practically by the execution of the agreement by the different Member States. In addition, benefits in the form of legitimate expectations are not restricted to commercial measures as the text of the article does not *distinguish between or exclude* certain type of measures[128].

In fact, in two adopted panel reports[129] as well as in two un-adopted panel reports[130], it has been understood that the word *benefits* in Article XXIII includes but is not limited to tariff concessions. The panels have extended the meaning of benefits from

[126] ROESSLER F. "The concept of Nullification and Impairment in the Legal System of the World Trade Organisation" in PETERSMANN (Ed.) "International Trade Law and the GATT dispute settlement system" (Studies in Transnational Economic Law Set) .Kluwer Law International (1997). p. 125. See also Supra KIM (2006) p. 122.
[127]Supra ROESSLER (1997). See also KIM (2006) p. 122.
[128]Appellate Body report on EC-Asbestos. Paragraphs 188-189.WTO Analytical Index: Volume 1. Guide to Law and Practice, WTO. Cambridge 2007.
[129]United States Sugar Waiver. 1990 and Japan – Trade in Semi-Conductors. 1998.
[130] EC Citrus 1947 and EC Canned Fruit 1985.

plain tariff concessions to any benefits under the General Agreement[131] and have gone further; expressing explicitly that there is no legal justification to restrict Article XXIII to tariff concessions and that such restriction has not been part of previous panel proceedings[132].

It is clear then, that benefits are more than mere tariff concessions and also include breach of general obligations. It is also undisputed that *a competitive position or relationship* originated directly on a tariff concession is a benefit for the purposes of Art XXII[133]. While this is helpful and necessary, it is not sufficient to establish the exact scope of the word *benefits* in the provision of Art XXIII.

According to the US Sugar Waiver panel report, Article XXIII: 1(b)*does not exclude claims of nullification and impairment based on provisions of the General Agreement other than Article II*[134]*.* Due to its very nature, it could be said that a collateral or *indirectly accrued* benefit from GATT would be ease of access into foreign markets. This can only be materialised by the creation of *competitive opportunities*[135]*.* Those competitive opportunities are also qualified by the panels from the early jurisprudence that exposed the topic. In other words, the competitive relationship upset by a measure is not just a competitive relation that could potentially exist; instead, it must be a competitive opportunity that is *reasonably anticipated*[136]*.*

The panels, despite giving an extended interpretation to the word benefits, have limited that scope by including a passive qualification of the benefit. This means that

[131] In EC Citrus, document E/PC/T/A/PV/12 OF 12 June 1947 the panel indicates: *The drafting history of Article XXIII confirms that this Article, including paragraph 1 (b) thereof, protected any benefit under the General Agreement. p.* 7.

[132] EC Canned Fruits 1985.

[133]Supra VON BOGANDY. p. 98. On benefits emerging **directly** from tariff concessions see also Australian Subsidy on Ammonium Sulphate at 188. Production Aids Granted on Canned Fruits and Dried Grapes, L/5778 at 17.

[134] US Sugar waiver 1990 par. 261-262: The panel recognised that Article XXIII: 1 (b) does not exclude claims of Nullification or impairment based on provisions in the General Agreement other than Article II.

[135]Supra KIM 2006.p. 68. See also *and Japan –Film 1998: … to show nullification or impairment as a result of the application of a Measure, it must be demonstrated that the competitive position of the imported product subject to and benefitting from a relevant market access [tariff] concession is being upset by the application of a measure not reasonably anticipated.*

[136]*Australian Subsidy 1950: such impairment would exist is the action of the Australian government which resulted in upsetting the competitive relationship between sodium nitrate and ammonium sulphate could not reasonably been anticipated by the Chilean Government.*

they have placed a burden of proof on the beneficiaries of the provision in Article XXIII by adding a reasonable limitation to it, but have also placed a greater burden on all Member States on their compliance with the WTO agreements.

In other words, mere literal compliance is not sufficient for Member States; if a conduct beyond compliance (course of performance) has caused a legitimate expectation on the other Member States, then such conduct can be considered as a benefit and thus it can be covered by Article XXIII, despite the fact that its observance was originally voluntary and its non–observance may not constitute in itself a breach of the agreement.

To elaborate on this thought, it must be said that benefits or legitimate expectations must be generated either by a legal concession, or by conduct originated by a member state that is compliant with the general part of the agreement that has produced a benefit for another member state. Benefits emanating from a tariff concession are supposed to be linked to reasonable expectations according to case law.

Despite the arguments expressed in favour of a more extensive interpretation of the concept of benefits in art XXIII, the practice has been restrictive and the adopted reports[137] have always introduced a final caveat to the applicability of Art XXIII. This has been due to the pressure of the Member States and with the argument that the original and only legitimate purpose of the provision is to keep the balance of tariff concessions[138].

Legitimate expectations must be studied on a case by case basis because it is not clear to what extent the legitimate expectation could be extended without affecting the value of a tariff concession. It would be unreasonable to expect that a balance of tariff concessions that have been established in the past – and hence the expectations – must be kept in force indeterminately.

[137] EC Citrus (unadopted) presents a broader interpretation of the non –violation complaint by extending the benefits to all benefits originated in GATT. This position has been rejected by the Membership before the Uruguay Round.

[138] Compliance in the reciprocally granted tariff concessions has been pointed as the main purpose of the provision in the case law. See Oilseeds.

Therefore, Member States are restricted by Article XXIII to create and enforce measures that would indirectly result in the detriment of the real value of the concessions previously agreed upon, but this needs to be examined on a case by case basis in order to find out:

- Whether the expectation is created by a country with whom there is bilateral reciprocity[139] in terms of concessions: the expectation that a third country has for a benefit negotiated between two different parties is substantially different than the negotiating party as the latter one expects reciprocity in a specifically negotiated area whereas the former one obtains the benefit by virtue of MFN principle. Therefore, the level of expectation and the type of benefit differ from party to party.

- Whether in the given circumstances it is reasonable to expect the benefit.

This could also apply to other benefits deriving from the WTO agreements and which are not tariff concessions because after the creation of the WTO all members are under a rule of law system, so despite previous reiterated GATT practice in relation to the provision, political inconvenience and resistance to a broader interpretation of Art XXII, the panels are independent to study and establish the scope of the interpretation bound by the provision and by the principles of single undertaking and effectiveness. In addition, a review of the impact of the measures in dispute on the real economy with different models, and keeping in mind the principle of progressive liberalization could allow for the acceptance of a greater scope of application of Art XXIII.

[139] According to Art II: 7 all concessions are part of the terms of the Treaty. This means that while the tariff reductions are negotiated bilaterally, their effect is multilateral and thus reciprocity is diffuse. While this means that the negotiating country cannot expect equivalent returns to the concessions given to a specific recipient as they will immediately be *"multilateralized*". However, the relation between bilateral negotiators is generally one of supplier-recipient, which means that there is an existing commercial relationship before the negotiations between two given countries. This in turn, means that the complexity of their relations and transactions lead them to bargain and therefore to raise a particular expectation of reward. See BAGWELL K. STAIGER R. "The WTO Theory And Practice" Staff Working Paper Economic Research and Statistics Division ERSD- 2009-11. 2009. p 4. The concept of diffuse reciprocity can be defined as follows: "*Diffuse reciprocity puts more significance on contingency than on equivalence. It implies that the given side can expect consequent rewards from the receiving side but cannot expect symmetrical return"* YANAI, A. "Reciprocity in Trade Liberalization" IDE APEC Study Center. Working paper Series 00/01 – No. 02. March 2001. p 15.

The next group of complaints that can be considered under *benefits nullified or impaired* is the case of complaints emerging from non-tariff concessions. The study of these complaints poses an extra challenge which is that they either belong to a special area of the WTO which has been separately negotiated; or they are not negotiated WTO matters at all. In the case of matters that have not been negotiated at all, they can only be taken into account when they are considered part of the objectives and benefits that governments legitimately expect to receive for their commitments in different areas of trade. This leads to the study of the next part of the chapeau in order to establish what exactly is covered by the scope of Article XXIII.

- ***Is being nullified or impaired or that the attainment of any objective of the agreement is being impeded:*** Nullification, impairment and the impediment to attain any of the objectives of the WTO agreements are covered by this provision. It is necessary to determine what the essential content in this phrase is in order to fully understand the scope of the article. The article lists three results that are covered by the provision: Nullification, impairment and impediment to attain any of the objectives of the agreement.

Nullification and impairment can be grouped in conducts that substantially undermine a benefit without doing so formally. In other words, nullification and impairment of benefits refer to measures which upset the balance established by concessions and other WTO agreements rendering them null, or impairing their successful enjoyment by the affected party. The only substantial difference between nullification and impairment is a difference of degree. Whilst to nullify means to render null, invalidate or deprive of any value or use; to impair means to make weaker, damage or injure[140]. In both words there is a degree of deterioration, but nullification is greater than impairment. Despite this difference in degree, it is possible to assemble nullification and impairment in one group, because the level of affectation must assert a significant detriment in order for any action or measure to be justifiably covered by the provision.

[140] See Supra KIM (2006) pp. 126-130. See also: Oxford English Dictionary Nullify – Impair.

The terminology Nullification or Impairment comes from the Equitable Treatment Clause proposed originally by the United States and it focuses on the results of a measure. Initially, the introduction of the nullification or impairment measure was directed to prevent non-tariff measures that rendered the tariff reductions absurd because the contracting parties did not have any other commitments on trade measures other than the tariff concessions. The measure has to be the *cause* of the final incapacity to enjoy a vested benefit, which was either a tariff concession or a competitive relationship as explained before. In this light, two types of measures could be the source of nullification or impairment; firstly a non-tariff measure that was equivalent to a tariff – i.e. technical barriers, but not technically a breach of the agreement, and secondly a measure in open breach of the commitments made by the agreement.

The impediment to attain any of the objectives of the agreement has not been explored by the panels. The WTO jurisprudence has not performed any *attainment of any objective* test to qualify or disqualify a measure from being covered under Article XXIII. Furthermore, this form of complaint was disputed from the very beginning of GATT since in the Havana Conference of 1948 it was deleted from the text of Article XXIII[141]. The academics explain that this test is, in practice, very difficult to perform because there would be a need to establish or determine the actual objectives of the agreement[142] which is a complicated task because each contracting party had different and potentially conflicting objectives and motives when signing the agreement[143].

The argument that it is difficult to establish the objectives of GATT and the WTO agreements is only partially true because all the WTO agreements have also included a set of common objectives which have to be taken into account when making the analysis of Article XXIII. This is true despite the previous approaches by the panels and the Appellate Body of the WTO that have not addressed this part of

[141] WAINCYMER J. "WTO litigation: procedural aspects of formal dispute settlement" Cameron. (2002) p. 86.
[142] Supra WAINCYMER (2002) p. 88.
[143] Supra WAINCYMER (2002) p. 430.

the provision. Literally, GATT contains its own set of objectives in its preamble that reads as follows:

> *The Governments of the Commonwealth of Australia, the Kingdom of Belgium, the United States of Brazil, Burma, Canada, Ceylon, the Republic of Chile, the Republic of China, the Republic of Cuba, the Czechoslovak Republic, the French Republic, India, Lebanon, the Grand-Duchy of Luxemburg, the Kingdom of the Netherlands, New Zealand, the Kingdom of Norway, Pakistan, Southern Rhodesia, Syria, the Union of South Africa, the United Kingdom of Great Britain and Northern Ireland, and the United States of America:*
>
> *Recognising that* ***their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods****,*
>
> *Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous* ***arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce***[144]***.***

From this preamble it may be assumed that GATT has five objectives:

1. Raising standards of living

2. Ensuring full employment

3. A large and steadily growing volume of real income and effective demand

4. Developing the full use of the resources of the world

5. Expanding the production and exchange of goods.

[144] The General Agreement on Tariffs and Trade (GATT 1947) – Preamble.

The parties, when signing the agreement believed that the best way to achieve these purposes was by reducing tariffs and other barriers to trade as well as eliminating discriminatory treatment in international commerce. GATT has integrated developed and developing countries in a multilateral trade platform and these objectives must be read as principles embodied in an unprecedented agreement[145], but they can be contradictory amongst themselves.

Indeed, a trade practice such as dumping, which effectively raises the standards of living and provides a large and steadily growing volume of real income and effective demand for the products of one country, can decrease full employment and diminish the production and exchange of goods in another country or even in another group of countries. This is applicable to many of the trade actions and measures used by trading partners, hence the difficulty of establishing a clear account of the objectives of the agreement.

Nonetheless, even if the objectives themselves can be contradictory and ambiguous, the methods established in the preamble give some guidance as to how to apply the objectives, allowing the interpreter to establish some principles that can guide the execution of the agreement in a coherent manner. Additionally some of the dogmatic provisions of GATT are also useful for this interpretative exercise. The most remarkable dogmatic provisions in GATT are without doubt Articles I and III, which contain the most favoured nation principle and the national treatment principle respectively. Also, from different panel reports, Appellate Body decisions and the official WTO declarations, it is possible to extract a group of principles that illustrate the objectives and purpose of the WTO as an institution and of GATT as an agreement. The WTO grouped such principles as follows[146]:

1. Non-Discrimination[147]: As was mentioned above, the two provisions that protect the system of international trade against international and domestic

[145]Supra WAINCYMER (2002) p. 430.
[146] Understanding the WTO: Principles of the trading System available at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm
[147] Understanding the WTO: Principles of the trading System in http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm

discrimination are the MFN principle and the National Treatment principle[148]. This principle requires not to treat "similarly situated" members differently[149]

MFN entails treating all trade partners equally by extending all special concessions made to favourite trade partners to all members of the agreement. This principle is contained in Article I of GATT, II of GATS and IV in TRIPS. However, this principle is not absolute and contains considerable exceptions, which make the special concessions in practice more of a rule than an exception.

The principle of national treatment means treating foreign and local products in the same way. However, it does not mean that foreign goods have an unrestricted right of entry. Domestic and foreign products must be treated evenly according to NT, but this only applies once the imported goods have had access to the domestic market.

2. Freer trade[150]: This liberalisation of the market is deemed to happen in a gradual way. In other words, before GATT there were no tariff commitments, so all the countries could impose the tariff that they considered useful for their economic strategy. After signing GATT the countries committed to a ceiling of tariffs for the trade of goods, which was a first step. Upon the advent of the WTO, the restrictions were lowered even more as the agreements expanded to services and intellectual property and an institutional support was created. This meant that the countries would commit to lowering trade barriers, but would also encourage trade by committing to allow free trade by avoiding at the very least, measures such as import bans or quotas in order not to restrict imports in a selective way.

[148]QIN J. "Defining Non-Discrimination under the Law of the World Trade Organization". Boston University International Law Journal. Vol. 23.2005 pp. 216-220.
[149]WT/264/AB/R. European Communities- Conditions for the granting of Trading Preferences to Developing Countries. Para 173. See also supra QIN. p. 283.
[150] Understanding the WTO: Principles of the trading System in http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm

Liberalisation of the markets develops with the painstaking negotiations held periodically by the Member States and these negotiations have gradually introduced changes to the system of trade. The most revolutionary round of negotiation – the Uruguay Round – launched the WTO as an institution and included many aspects of trade that were obliterated by GATT. Since then, progress has been rather slow, countries have failed to agree to regulate detailed aspects of trade, and yet they are not regulated in the international system. This has placed a toll on the gradual liberalisation of the markets and has led to some of the legal controversies in sister areas such as International Investment Law.

3. Predictability[151]: With the creation of the WTO as a structure of support for the WTO agreements, which are binding on the parties and have a third neutral party as an adjudicator in cases of controversy, the trade atmosphere has gained stability. The Member States are of the opinion that transparency, stability and predictability encourage foreign investment, which in turn, in the best case scenario, is an incentive for job creation and consumer satisfaction. The multilateral trading system is an endeavour by the contracting parties to make both the domestic and the international business environment steady and predictable[152].

4. Promoting fair competition[153]: By providing an environment that is stable, transparent and predictable, the system aims for open and unhampered competition in the international markets of goods or services. This does not mean that all barriers to trade are lifted or that trade is completely free of protective measures. The system allows for the imposition of tariffs and protective measures but caps them with a limit. This limit is given by the tariff ceilings and by the WTO agreements that list protectionist measures and

[151] Understanding the WTO: Principles of the trading System in http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm

[152] In fact, the DSB was created with the purpose of giving predictability and security to the system as it is stated in Art 3.2 of the DSU.

[153] Understanding the WTO: Principles of the trading System in http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm

regulate the circumstances and methods that countries can use in order to be able to apply them. This guarantees fairness to all trade partners and intends to eliminate distortions in international markets.

5. Encouraging development and economic reform[154]: Another consensus that exists on different levels amongst the Member States of the WTO is that a system that guarantees trade contributes to development by encouraging growth. The WTO structure also allows different levels of commitment for countries at different developmental stages. On the one hand, developed countries are supposed to commit to more concessions and to do that in short periods of time. On the other hand developing countries are given flexibility in the measures they are supposed to implement and they are also given flexible times to implement the system's agreements so that the adjustment is not too abrupt for them and does not become detrimental to their growth efforts.

These principles make the task of applying the chapeau of Article XXIII more attainable. It is plausible to affirm that when Article XXIII mentions that ***the attainment of any objective of the agreement is being impeded,*** it refers to any of the principles listed above. Therefore, whenever a member state suffers discrimination, more restrictive trade, unpredictable behaviour from trade partners, unfair competition, or its development is discouraged by a specific measure or practice of another member state, the affected member could resort to Article XXIII to challenge the measure or practice through WTO litigation.

The affected member would have to prove the course of action and the causal link. Article XXIII 1 provides three courses of action:

- ***As the result of:***

(a) The failure of another contracting party to carry out its obligations under this agreement: The nullification, impairment or impossibility of attainment of

[154] Understanding the WTO: Principles of the trading System in http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm

the abovementioned objectives can be caused by the failure of a contracting party to fulfil its obligations. This means that the first cause of action for this claim is clearly breach. Breaching an obligation means an infraction or violation of that obligation and, in this case, the obligations were acquired by the contracting parties who previously agreed to bind themselves by the Treaty.

Literal (a) of Article XXIII: 1 does not take into account whether there are other remedies to solve the breach. In other words, it does not exclude other possible remedies for the breach of obligation. Reading this provision, it is possible to infer that other remedies available are applicable in case of breach. In the same sense, logically, this means that the remedy provided in Article XXIII is not excluded by the existence of any other available remedy.

The question arises then whether the choice of remedies is left to the aggrieved party and whether multiple remedies, including the provision in Article XXIII, are applicable simultaneously or if the application of one remedy extinguishes the possibility of resorting to another. To analyse the final effect, both the provisions containing remedies and Article XXIII should be compared on a case by case basis. However, should there be an elimination of choice, it does not emanate from Article XXIII: 1 (a), which does not contain in its wording any indication of remedy elimination nor does it qualify its applicability in any other way. This means that as far as Article XXIII is concerned, the existence and applicability of other remedies to a situation of breach does not exclude the procedure contemplated by the nullification and impairment norm. Such norm may well be invoked by the affected member state concomitantly, in exclusion or separate to any other breach procedure, provided that the latter does not preclude the use of other remedial resources.

The breach that gives a cause of action under which Article XXIII is applicable to the General Agreement on Tariffs, and which is in accordance with the single undertaking principle, extends to all the WTO agreements that have not been

explicitly nullified and impaired, either rejecting this remedy[155] or modifying its conditions of applicability[156].

Additionally, the presumption of nullification and impairment caused by a violation of the GATT was established in early jurisprudence[157] and accepted by the contracting parties during the Tokyo Round of negotiations but later the presumption itself has been the object of academic controversy. Initially, it was thought that the presumption of nullification and impairment was rebuttable, and the demonstration of lack of ″adverse impact″ would be enough to disprove it[158]. However the jurisprudence considered that presumption of causation irrefutable[159], and the reasons for the later jurisprudence to consider that presumption irrefutable are that the object of protection is not the actual adverse impact on trade flows, but the *trade potential or competitive conditions[160].* This has been reiterated by several panel decisions and it is accepted by the doctrine[161] as far as understanding that a member's potential trade benefit is sufficient to establish a dispute settlement panel[162].

[155] Art. 8.10 Agreement on Textiles and Clothing.
[156] Art. 64.2 of the TRIPS Agreement.
[157] See Infra Uruguayan Recourse to Art XXIII par. 15.
[158]Supra ROESSLER (1997) p. 127 See also KIM (2006) p. 129.
[159] United States - Taxes on Petroleum and Certain Imported Substances. Report of the Panel adopted on 17 June 1987 (L/6175 - 34S/136): Para. 3.1.6 (…)*A contextual analysis of paragraphs 4 and 5of the Annex to the 1979 Understanding on dispute settlement thus clearly showed* ***that there was an irrefutable presumption that a breach of the rules of the General Agreement caused nullification or impairment within the meaning of Article XXIII*** *and that the question of trade effects was relevant only for a decision to authorise compensatory action and for determining the extent of compensation owed when the immediate withdrawal of an illegal measure could not be secured.* (…) [Emphasis added].
[160]European Economic Community – Follow-up on the Panel Report, Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins ("EEC – Oilseeds II"), 31 March 1992, BISD 39S/91: Para 77 (…)***the subsidies concerned had impaired the tariff concessions because they upset the competitive relationship*** *between domestic and imported oilseeds,* ***not because of any effect on trade flows***(…) [emphasis added].
[161] Infra Australian Subsidy para12: Panel Report*, Treatment by Germany of Imports of Sardines*("*Germany – Sardines*"), adopted 31 October 1952 *It was agreed that* ***such impairment would exist if the action of the Australian Government which resulted in upsetting the competitive relationship between sodium nitrate and ammonium sulphate could not reasonably have been anticipated by the Chilean Government****, taking into consideration all pertinent circumstances and the provisions of the General Agreement, at the time it negotiated for the duty-free binding on sodium nitrate.*(…) [emphasis added]; GATT Panel Report*, Treatment by Germany of Imports of Sardines* ("*Germany – Sardines*"), adopted 31 October 1952 Para. 16 (…)*It agreed that such impairment would exist if the action of the German Government,* ***which resulted in upsetting the***

In conclusion, the mere breach of the WTO agreements is a cause of action covered by Article XXIII, regardless of its material consequences on trade flows as it is presumed that the breach of any clause of the WTO agreement affects *per se* the potential trade and competitive conditions of trade partners. This presumption is unique to Article XXIII: 1 (a), as the following clauses in this provision are unique in their nature and applicability, and may not be read with the same criteria used for the violation complaints.

(b) The application by another contracting party of any measure, whether or not it conflicts with the provisions of this agreement: The most controversial, ambiguous and obscure section of Article XXIII is Article XXIII: 1 (b). This article has been difficult to interpret and therefore difficult to apply since the very beginning of GATT. It has been called the Non-Violation complaint because it gives a course of action to a member who has suffered nullification or impairment or impossibility to attain the objectives of the agreement by the application of a measure taken by another member, regardless of whether such application is made in compliance with the text of the rest of the provisions of the Treaty.

By the precedent section of this provision, it is possible to determine that this specific section does not refer to breaches, as the breach as a cause of action has been exhausted in Article XXIII: 1 (b). The concept of Non-Violation has been grasped from the historical development of the ratified agreement and

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competitive relationship *between preparations of clupea pilchardus and preparations of the other varieties of the clupeoid family could not reasonably have been anticipated by the Norwegian Government at the time it negotiated for tariff reductions on preparations of clupea sprattus and clupea harengus.*(…) [emphasis added]; GATT Panel Report, *Panel on Japanese Measures on Imports of Leather,* L/5623, adopted 15 May 1984, BISD 31S/94. Para 50 (…)*in any event, the Panel wished to stress that the existence of quantitative restrictions should be presumed to cause nullification or impairment* ***not only because of any effect it had on the volume of trade, but also for other reason, e.g. it would lead to increased transaction costs and would create uncertainty which would affect investment plans***(…) [emphasis added].

[162] Supra KIM (2006) p. 130.

also from the further developments in the Havana Charter[163] despite the fact that it was never entered into force. The Havana Charter clarifies the language of the ambiguous Article XXIII GATT leaving the Non-Violation clause free of obscurity as it words the provision in more plain language: *"The application by a member of a measure* ***not conflicting*** *with the provisions of this Charter"*[164].

From these and other preparatory works it is possible to deduct that Article XXIII: 1 (b) is referred to as a measure that does not constitute a violation of the agreement, and that it is commonly called Non-Violation in academic circles[165]. With the advent of the WTO the clause has been kept valid and thus applicable to new sectors of the international trade in all the cases where there has not been a specific provision overruling or modifying the content of Article XXIII[166]. This has proven problematic in different ways and has given rise to different interpretative methods to solve the problems emanating from the features of the Non-Violation clause contained in Article XXIII: 1 (b).

Some of the developments in the construction of the concept the Non-Violation clause are found in the case law that exists so far; but the fact that Article XXIII: 1 (b) is considered to be a relic of the diplomatic system contradicts the legal nature of the WTO, which is bound to use the rule of law to solve all disputes brought by the Member States. This obeys the original context where the article was created which involved a diplomatic dispute resolution mechanism, instead

[163]See UN Doc. E/Conf. 2178.Havana Charter for an International Trade Organisation (Havana Charter).March 24 (1948).
[164]Havana Charter. Consultation and Arbitration clause.
[165] The expression Non-Violation is used widely amongst WTO academic, practitioners and in dispute resolution. See WT/DS50/AB/R India- Patent Protection for Pharmaceutical and Agricultural Chemical Products. 1998. Para 39. See also, SKYES A. "The Dispute Settlement Mechanism: Ensuring Compliance" Ch. 25 in NARLIKAR A., DAUNTON M., & STERN R. "The Oxford Handbook on the World Trade Organization" OUP. 2012. p. 565; and LINARELLI J. "Global Procurement Law in Times of Crisis: New Buy American Policies and Options in the WTO System" in ARROWSMITH S. & ANDERSON R. (Eds). "The WTO Regime on Government Procurement: Challenge and Reform" Cambridge University Press, 2011. P798. See also, "(…) *the term "Non-Violation Complaints" has never been precisely defined by the CONTRACTING PARTIES"* See MTN.GNG/NG13/W/31 "Non Violation Complaints under Article XXIII: 2" Note by the Secretariat. Negotiating Group on Dispute Settlement. 1989. p. 2. Available at http://www.worldtradelaw.net/history/urdsu/w31.pdf.
[166] Some of the specific agreements have excluded it or limited its application i.e. TRIPS.

of a system of rule of law. The diplomatic form of dispute resolution implied a mediation made by the delegates of the contracting parties, whereas the system of rule of law necessitates an interpretation and adjudication over the content of the provision and the merit of the complaint.

The evolution from a diplomatic mediation to a legal adjudication has been gradual and parallel to the evolution from "power-orientated" international relationships to different systems of "rule orientated" relations[167]. This has affected the way in which international treaties are interpreted and applied and, in the case of Article XXIII of GATT, the attitude of some members who show a predilection for the negotiations – soft law, or adjudication – hard law – in the dispute resolution of international trade disputes[168] has contributed to the contradictions in their address to this circumstance.

Due to these reasons, the case law available contains *unaddressed inherent ambiguity*[169]which confuses the contracting parties about the proper use of the provision. Both in adopted and unadopted reports, some of the decisions equate violations to Non-Violations in order to solve the complaints. Furthermore, according to the panels, Article XXIII: 1 (b) on its own is not enough to bring a case in the GATT system; in other words, Article XXIII: 1 (b) does not provide an *independent and definite cause of action*[170]*.* It is the

[167] JACKSON J. "Perspective on the Jurisprudence of International Trade: Costs and benefits of Legal Procedures in the United States" 82 Michigan Law Review (1984) p. 1572.

[168] The main positions have been pro-diplomatic and flexible approach endorsed strongly by the European Union and the pro-adjudication and rule of law promoted by the United States. The EU argues that since GATT has a considerable degree of ambiguity and that international trade disputes contain a high amount of sovereign decisions, it is more convenient to have a flexible system that allows compromises, negotiations and mediations. On the other hand, the United States advocate for the reinforcement of predictability, transparency and shield against populist protectionist sprouts in the domestic environment by the enforcement of the WTO rules with a clear rule of law by means of adjudication. See a detailed explanation on US-EU interactions in the WTO in: BUSCH M & REINHARDT E. "Transatlantic Trade Conflicts and GATT/WTO Dispute Settlement" in PETERSMANN EU. & POLLACK M. (Eds.)"Transatlantic Economic Disputes: The EU, the US and the WTO" OUP (2003.)p. 466.

[169] CHO, S. "GATT Non-Violation Issues in the WTO Dispute Settlement Framework: Are They the Achilles' Heel of the WTO Dispute Settlement Process?"Harvard International Law Journal, Vol. 39, No. 2, 1998 pp. 322.

[170]Supra CHO p. 322.

understanding of the panels that it is only a subsidiary remedy in case the violation argument does not prosper. The contracting parties, confused by this case law outcome have been increasing the confusion by presenting cases with Non-Violation complaints paired up with violation claims[171].

However, the decision on the Japan-Film case[172] clarified that Non-Violation measures could only be considered as the cause of nullification and impairment when the complaining party proves the link between the measures and the nullification or impairment. In other words, the complainant carries the burden of proving a clear correlation between the measures and the alleged nullification or impairment[173].

Another problem posed by the Non-Violation concept is that its development has been confined to the interpretation of GATT. This interpretation is unacceptable in other areas of trade such as the trade in negotiated services and regulated by GATS. The interpretation parameters given in the scarce case law are only useful if the complaint is related to trade concessions, but when the subject changes to trade in services, or specifically negotiated areas of trade such as textiles and intellectual property, the guidelines created by the cases fail and are rendered useless.

For instance, the notion of legitimate expectation as understood by the case law is incompatible with the GATS system of Schedules of Specific Commitments[174] which are made individually and at different levels as per the principle of progressive liberalisation. As these are not made with the concept of reciprocity governing them, a different type of legitimate expectation must be created. Originally, legitimate expectations were connected to tariff

[171] In 14 out of 26 Non-Violation complaints (1947-1990) the complaining parties filed a Non-Violation complaint as an alternative to a violation claim. See CHO, S. "Overview of Non-Violation (Art XXIII: 1 (b)) Complaints Cases: (1947-1990)". Harvard International Law Journal, Vol. 39, No. 2, 1998 p. 355.
[172] This can also be seen in the Japan- Film case(1998).
[173] Infra Japan- Film (1998) para. 10.83.
[174] GATS Art XX schedules of Specific Commitments.

concessions. In the case of GATS, legitimate expectations can only be connected to the schedule of the country, but if they are not given in exchange of anything specific, the link of causation becomes feeble between the concession and the expectation, and therefore it is difficult to construct the link to allow Non-Violation complaints in this context.

Even the benefits mentioned above are subject to modification in accordance with the text of other WTO agreements such as GATS. For example, a competitive market that is so clearly a benefit for the trade in goods becomes unclear as a benefit in the area of trade of services as defined by GATS. This occurs because trade in goods is governed by border measures whereas trade in services is regulated by domestic law[175]. For cases like this there is no case law framework to give guidelines to be used in the application of the Non-Violation provision. This leaves all the decision-making to the panels that are entrusted to decide on a given case whether there has been nullification and impairment of benefits, and they have to accept or reject the benefits argued by the complainant party.

These problems amongst other practical difficulties have led scholars to suggest some methodological interpretative exercises to try to overcome the problem. **The first approach that was attempted was to shift the Non-Violation concept into a violation**[176] by seeing the measures brought under Non-Violation complaints as formal disguises of a discriminatory measure, which substantially would amount to a violation of the treaty[177].

This would mean that many of the issues raised under the Non-Violation complaint would be treated as a breach of one of the obligations contained in the WTO agreements, narrowing the scope of Article XXIII: 1 (b). This reading

[175] O'NEAL TAYLOR C, *"The Limits of Economic Power: Section 301 and the World Trade Organisation Dispute Settlement System",* 30 VAND. J. TRANSNAT'L L. 209, 274 (1997) p. 234.
[176] See CHO: Violationize refers to a positive and intentional shift in perspective from bilateral (Contract Like) reciprocity to adjudicated rule of law.
[177] Supra CHO p. 333.

has an implicit advantage which is the adaptation of Article XXIII: 1 (b) from the context of GATT, which considered diplomatic and political dispute resolution as acceptable, to the context of the WTO, which is an institution that intends to apply the rule of law. However, this approach is not completely novel as it encourages the panels and Appellate Body to read beyond the mere text of the provisions to look into the objectives and purposes of GATT in the context of the WTO, which is exactly what the chapeau of Article XXIII prescribes.

The thought that general and specific obligations may be read beyond the products and situations to which they are bound under Article II restricts the content of Article XXIII: 1 (b) whilst expanding the scope of application of Article XXIII: 1 (a), by regarding as violations some conduct that may be formally in line with the WTO law, but that in fact detracts from the substantial purpose of a specific norm. The consequence of such interpretation is that benefits and market situations that have been outside the scope of the WTO deliberately by the lack of will of the Member States would come in through the back door of adjudication.

With this positive approach it would be unjustifiable, for example, not to take into account competition policies detrimental to international trade. More specifically, it may be discriminatory, as an integral part of the considerations necessary to solve disputes over most areas of trade. Administrative actions, policies and practices of the governments that evidence a bias against foreign competitors[178] can also be interpreted as discriminatory and the national treatment provision can be read in a broad manner using the proposed interpretation of the Non-Violation provision, which was explained above.

The previous interpretation would expand the scope of legal obligations under the WTO system[179], but it would not be against the DSU provision that allows

[178] Supra O'NEAL TAYLOR C p. 236.
[179] Supra CHO p. 335.

interpretation as long as it does not add or diminish the rights and obligations covered in the agreements, as the rights and obligations would be maintained and their content would be understood to be in accordance with the original negotiated principles and objectives of the WTO agreements.

There are practical challenges faced by this interpretation which render it inapplicable, and not theoretically plausible. Firstly, it defies the existing jurisprudence that reinforces the concept of Non-Violation and its application broadens the scope of the WTO agreements which is a politically unstable position that could lead to the deterioration of the whole organisation. Secondly, it requires an institutional framework that currently does not exist in the WTO and that demands technical experts as the process to convert Non-Violations into violations is intensive in fact-finding and technically complex.

The current structure of the WTO utilises panellists who are either *trade diplomats,* who represent their countries on the different WTO committees, or they are *trade bureaucrats* who have served as senior trade policy officials of the Member States[180]. This structure allows for technical, advisory or expert counselling, but should the panels be used in each Non-Violation claim with a view to converting the claim into a violation, it would be unfeasible due to the varied professional areas in which litigation can take place within the WTO[181].

[180] Supra CHO p. 341. See also DSU Art. 8.1.

[181] According to Art .806 of the DSU, the panels are composed by nominees proposed by the Secretariat. They can be chosen from an indicative list, or considered ad hoc. *"Traditionally, many panelists are trade delegates of WTO Members or capital-based trade officials, but former Secretariat officials, retired government officials and academics also regularly serve on panels. These individuals perform the task of a panelist on a part-time basis, in addition to their usual professional activity."* Even though there are people serving the panels that are not trade diplomats and have not been senior trade policy officials, they are normally academics or retired government officials. There is absence of technical and industry experts, which impedes the conversion of Non-Violations into Violations due to lack of technical and industry specific expertise.
See "Dispute Settlement Training Module". Chapter 6. "The process- Stages in a typical WTO dispute settlement case". 6.3 The panel stage. Available at
http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s3p2_e.htm

It is known that the secretariat of the WTO is not capable of providing the kind of technical and professional support that would allow the panels to create violations from Non-Violation complaints. This challenge should not be underestimated as it is the administrative structure of the whole organisation that leads the way dispute resolution is understood in the field of international trade[182].

A second approach to interpret the contents of Article XXIII: 1 (b) is the shift of the standards of review, where more relevance is given to the policies and measures implemented by the local governments in cases which involve cultural or policy decisions[183] and measures that would in principle be considered nullifying or impairing a benefit, are put in place. This deference to the opinion of local governments over what is and what is not nullification or impairment of a benefit emerging from the WTO agreements, implies that the panels faced with controversies containing cultural characteristics defined by local governments need to do pre-reasoning before approaching the resolution of the dispute. Such pre-reasoning consists of deciding if the domestic governments have correctly determined what constitutes the essence of the case unless their determination is arbitrary and unjustifiable by any means.

In other words, the test of proportionality of the measure taken by a local government would start with a presumption that the domestic authorities are acting within the spirit of the WTO agreements provided that: a. they are not in clear breach, b. their action is justified for policy or cultural reasons and c. the measure is not so arbitrary as to appear to clearly transgress the spirit of the WTO agreements. Should the measure be so arbitrary, it would in itself constitute a violation.

[182]VERMULST AND DRIESSEN. "An Overview of the WTO Dispute Settlement System and Its Relationship with the Uruguay Round Agreements". Journal of World Trade V. 29 (1995) pp.131-136.
[183] For example measures relating to protection to the balance of payments. See CHO at 343.

The difficulty with this approach is that it deviates too widely from the textual meaning of the provision and changes its content too drastically. In order to apply this interpretation in a non-conflict area, it has been suggested that it would be useful to solve the Non-Violation conflicts by searching for a way of cooperation between the parts in conflict[184] before a dispute arises[185]. This is typical of the diplomatic cooperative system from which the WTO is trying to be separated and does not provide an acceptable interpretation of the valid provision contained in Article XXIII: 1 (b).

In summary, the two methodological approaches that have intended to explain or apply Article XXIII: 1 (b) in a different way from what the text suggests are unenforceable because of the gap that separates the suggested interpretation and the legal text. Article XXIII: 1 (b)covers conduct that is clearly not in breach of the contents of GATT. It is applicable independently from any breach or any other complaint based on Article XXIII: 1 (a). This is why, despite having a specific procedure, certain areas of trade that have been specifically regulated and that do not expressly exclude the application of Article XXIII are covered by this provision in addition to the rules governing such specific areas of trade.

A third approach to the interpretation of Non-Violation complaints is the separation between specific obligations and legitimate expectations as general obligations. When specific obligations are established by the parties they are codified in the agreements and their breach leads to a violation of the agreements. Legitimate expectations on the other hand are derived either from general obligations or from the course of performance.

[184] A conflict emerges when there is unrest in a Member State due to the measures or to the form in which measures are applied by another Member States. A dispute arises when this conflict is brought to the adjudicator [in this case, a WTO panel] for dispute resolution.

[185]Report of the Group of Experts on restrictive Business Practices- Arrangements for Consultations, June 2 1960 GATT B.I.S.D. (9th Supp.).

The concept of legitimate expectations deriving from a general obligation is connected to the concept of a *duty of care*[186]. According to this understanding and in application of the *neighbour principle*, a WTO member would be liable for a WTO compliant action every time that this action affected a trade partner to whom a duty of care was owed. Member States stand in a care relationship to their trade partners to the extent that they can **reasonably** foresee a nullification or impairment for that specific trade partner emerging from their WTO compliant action. It can be stated that reasonable care can be deemed to have been applied whenever a measure is enforced with good faith and taking into account possible objections from the affected trade partners[187].

This explains the need to prove legitimate expectations besides the nullification and impairment of benefits as well as the causal link between a measure taken in compliance with the WTO agreements and the undesired consequence.

The Non-Violation provision of Article XXIII provides a standard of objective liability. In other words, the standard is one of results, where a member state is liable for the consequences caused by its legitimate action. In this case, liability is attributed to the member state despite recognising that no responsibility is attributed to it, which reinforces the idea that the member state did not commit any wrong in relation to WTO law.

While no responsibility, in the sense of obligation [factual supposition] plus juridical consequence [in the form of sanction or otherwise] is attributed to the Member States that are attributed a *duty of care* towards their trading partners, liability is attributed to them in the mere sense of the obligation to provide

[186] According to the common law duty of care principle, or the neighbour principle, coined by Lord Atkins in Donoghue v. Stevenson [1932] All ER Rep 1; [1932] AC 562; House of Lords: Not every moral wrong can have a practical effect in law so it must be limited to taking "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour." A neighbour is a person so closely connected with and directly affected by (proximate to) my act (or omission) that I should have had them in mind when I committed the act (or omission).

[187] Supra KIM 2006 p. 249.

reparations as a consequence of an injury [nullification or impairment], regardless of the absence of subjective responsibility on the causation of the injury.

In the words of Alan Boyle, *Initially the [International Law] Commission used these [responsibility and liability] terms interchangeably, but it eventually adopted the view that "Responsibility" was appropriate in cases involving a breach of obligation, while liability should be used in connection with activities which are otherwise lawful or involve no wrongful acts*[188].

This reasoning is constructed for the interpretation of Article XXIII: 1 (b) and derives from an examination of the international law[189] beyond the WTO agreements in the assumption that despite being quite comprehensive, the WTO is not a self-contained system. This construction is allowed and suggested by Article 3.2 of the DSU[190].

[188] BOYLE A. "State Responsibility and International Liability for Injurious Consequences of Acts not Prohibited by International Law: A Necessary Distinction? International and Comparative Law Quarterly 39 (1990),pp 7-8

[189] Draft Articles on State Responsibility prepared by the International Law Commission on first reading, U.N.G.A.A/CN4/L528/Add2.

Art. 1: Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

United Nations Convention on the Law of the Sea:

Article139

Responsibility to ensure compliance and liability for damage

1. States Parties shall have the responsibility to ensure that activities in the Area, whether carried out by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, shall be carried out in conformity with this Part. The same **responsibility** applies to international organisations for activities in the Area carried out by such organisations.

2. Without prejudice to the rules of international law and Annex III, article 22, damage caused by the **failure of a State Party or international organisation to carry out its responsibilities under this Part shall entail liability**; States Parties or international organisations acting together shall bear joint and several liability. […]

3. States Parties that are members of international organisations shall take appropriate measures to ensure the implementation of this article with respect to such organisations.

[190] Art 3.2 of the Dispute Settlement Understanding:

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognise that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

Therefore, the Non-Violation provision provides a **liability** in the sense explained by international law, as the consequence of a lawful measure[191]. To demonstrate its existence there must be a justification in treaty provisions or in customary international law. To equate the concept of Non-Violation with the concept of liability facilitates the task of interpretation and application in dispute resolution because the concept of liability is more known and understood in international jurisprudence than Non-Violation. This allows the use of conventional jurisprudence in the task of interpretation and application of the provision by the Member States to their trade partners and in the context of WTO litigation.

A fourth plausible understanding of this provision is the understanding that a member can access its protection when its rights or legitimate expectations are being affected by measures of uncertain legality[192]. In this case, the measure can be attacked by the affected member whenever it is impairing and nullifying benefits and its legality is not clear. In this event, the lawfulness and legality of the measure would not be a valid defence by the respondent member, which can extend the scope of the provision. This, however, is a discretionary power of the panels who are supposed to ascertain if measures affect WTO benefits or legitimate expectations even if they are not linked to any concession.

This possibility has been rejected with virulence by the established doctrine and the case in which it was contained has been called a "wrong case"[193].

(c) <u>The existence of any other situation</u>: The study of the situation complaint has not been attempted by any scholar or by the panels who have considered the application of the provision contained in Article XXIII: 1 (c)unattainable as this would be against the predictability and transparency of the system of the

[191] See Supra KIM (2006) p. 256. See also Supra JACKSON (2000) p. 132.
[192] Supra VON BOGANDY p. 99.
[193] The case in mention is EEC- Citrus. See Supra SPITZER p. 46, See also Supra CHO. p. 322.

WTO. In fact, the existence of any other situation implies that any situation different from a breach and different from a measure that is taken legitimately and that creates a nullification or impairment to the complaining party. This means that whilst the provisions in Article XXIII: 1 (a) and (b) cover the situations created voluntarily – illegitimately or legitimately – by a member state; the provision in Article XXIII: 1 (c) is directed to cover all the situations nullifying or impairing benefits regardless of whether they were expected or intended by the Member States. Situations generated by force majeure and acts of God would be covered by this provision if it was applied according to its text.

The inapplicability of this provision is undisputed amongst the adjudicating bodies in the WTO and the academy as its text is quite separated from the idea of negotiated concessions and reciprocal benefits. Also, it would undermine the idea of gradual liberalisation and would place the Member States in an environment of uncertainty and lack of sovereignty that is simply unsustainable for a multilateral organisation like the WTO that derives its institutional identity from the cooperation, negotiations and regulations of its members.

In any event, a complaint of this sort may be brought by the members but it is deemed that it will not prosper since, should there be a situation outside the will of the Member States that affects the benefits of another member[194], it probably also affects the internal balance and it would seem unreasonable to demand compensation, reparations or a change of conduct put in place to solve an unexpected and undesired situation.

- ***The contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus***

[194] Situations in the sense of the provision can be natural disasters, wars, civil unrest and political instability in the Member States.

approached shall give sympathetic consideration to the representations or proposals made to it: Article XXIII provides a first procedural step in the nullification and impairment complaints. Naturally, due to its diplomatic origin, it requires a bilateral communication with the party in potential conflict. It is important to note that this communication is not limited to a complaint or a mere description of the problematic situation by the aggrieved party, but it is designed to be a constructive exercise where the affected party may bring up a proposal to resolve the situation. The communication must be done in writing and it shall be addressed to either one party or all the parties involved in the issue concerning the affected party.

There are two relevant aspects to highlight from the first step in the procedure of Article XXIII. Firstly, it is a parallel procedure from that established in the DSU, which can operate autonomously and directly between the parties in potential conflict. This is meant to facilitate diplomatic encounters, but it can also be useful to resolve communication problems that seem to be a source of conflict and once elucidated may avoid litigation. Secondly, the affected party is required to make representations and proposals to the other contracting party. This means that the affected party must have identified the problem, and must describe it in a way that is correct and represents not only the facts, but also the legal consequences – what exactly is the nullification or impairment, possible damages, links of causation, measures disputed, possible breach of obligations; and also, the aggrieved party is allowed to make proposals with a view to adjusting the matter satisfactorily. In other words, the affected party can produce a micro negotiation environment where both its interests and the ones of the other member are taken into account in order to lead to a resolution to the matter. The receiving party is obliged to give sympathetic consideration to such representations.

The meaning of sympathetic considerations can be ethereal, but it may be described as the action of acknowledging receipt of the written representations and the action of giving them some degree of importance, thought, examination, contemplation, deliberation, attention and a response or consequence. The level of action can vary

in the country's administrative capacity and bureaucratic ability, but a reasonable period can always be determined on a case by case basis.

This step is a threshold requirement that has to be exhausted in all the events of violation and Non-Violation complaints. If the complaint is based on a situation, the written representations can be left out in order to proceed directly to the second procedural aspect of this Article.

- ***If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1 (c) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organisation in cases where they consider such consultation necessary:*** The second step described in the provision itself, in the procedure established by Article XXIII gives the contracting parties direct access and jurisdiction to investigate the matter referred to them and make the corresponding recommendations or a ruling. Should the contracting parties find that it is justifiable, they may authorise the aggrieved party to lift concessions or waive them from their obligations under GATT. The party affected by this sanction has two options: a. to accept the waiver and continue its membership in the WTO or b. to withdraw from GATT. A third option could be formal dispute settlement.

This section of the Article raises the question of whether it is possible for the WTO panels to recognise jurisdiction of the matters raised under Article XXIII over the direct knowledge of the matter by the contracting parties. The answer to this question becomes complicated due to the arrival of the WTO and WTO agreements in a principle of single undertaking to complement and be in harmony with GATT. More specifically, the query to be solved is whether this dispute resolution procedure

is supposed to be read independently from the dispute settlement understanding[195] created in the Uruguay Round of negotiations which creates a whole system of panel review and appeal process within the WTO, or if it is supposed to be read as part of it, and if its rules are applicable to it.

The jurisdiction of the WTO over the trade disputes can be identified with a test of the relevant elements of jurisdiction:

a. Subject-matter jurisdiction (the particular types of claims and proceedings that may be brought before a WTO tribunal[196];

b. Applicable law (the law that a panel or the Appellate Body may interpret and apply); and

c. Inherent jurisdiction (the WTO's innate prerogatives, derived from its nature as a judicial body)[197].

There are a number of disputes in which the DSB has considered requests referred to provisions in GATT. Art XXIII is subject to the DSU[198] and thus the jurisdiction of it over Art. XXIII is inherent. Therefore, provided that the nullification and impairment claim is related to any of the aspects covered by the WTO agreements and its objectives and purposes, and that Article XXIII is invoked as applicable law, it can be confirmed that the WTO dispute settlement procedures are applicable due to the

[195]Understanding on Rules and Procedures Governing the Settlement of Disputes [hereinafter DSU], Annex 2, Marrakesh Agreement Establishing the World Trade Organisation, opened for signature Apr. 15, 1994, 1867 U.N.T.S. 3.

[196] This refers to jurisdiction over claims as opposed to jurisdiction to apply law. See TRACHTMAN "*Jurisdiction in WTO Dispute Settlement*", in Key Issues in WTO Dispute Settlement—The First Ten Years 132, 134 YERXA R & WILSON B eds., (2005). p. 135.

[197]MITCHELL A. "Legal Principles in WTO Disputes". Cambridge Studies in International and Comparative Law No. 68 (2008). See also MITCHELL A. and HEATON D. "The Inherent Jurisdiction of WTO Tribunals: The Select Application of Public International Law Required by the Judicial Function" Michigan Journal of International Law, Vol. 31, pp. 561-621, 2010: the term "jurisdiction" is used to refer to subject-matter jurisdiction; "applicable law" to refer to the jurisdiction of a WTO Tribunal to apply certain norms; and "inherent jurisdiction"(or "inherent power(s)") to refer to applicable law deriving from the WTO Tribunal's position as an international tribunal. Inherent jurisdiction is also sometimes called "implied" or "incidental" jurisdiction

[198]Art 1 DSU.

inherent jurisdiction given to them in the DSU, which must be read in conjunction with Article XXIII.

In the jurisprudence established in the case of *Mexico – Soft Drinks,* the Appellate Body has established that the WTO panels have jurisdiction over WTO covered matters as follows:

> *WTO panels have certain powers that are inherent in their adjudicative function. Notably, panels have the right to determine whether they have jurisdiction in a given case, as well as to determine the scope of their jurisdiction. In this regard, the Appellate Body has previously stated that "it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative and to satisfy itself that it has jurisdiction in any case that comes before it." Further, the Appellate Body has also explained that panels have "a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated[199]."*

This indicates that despite the fact that Article XXIII gives jurisdiction to the contracting parties to consider and give a ruling over the matter, by signing the DSU; the contracting parties delegated that competence to the WTO panels, which, due to their inherent adjudicative function, are in a position to accept such jurisdiction and delimit its scope.

- ***If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorise a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this agreement as they determine to be appropriate in the circumstances. If the application to any***

[199] T/DS308/AB/R Appellate Body Report, Mexico— Tax Measures on Soft Drinks and Other Beverages, (Mar. 6, 2006).

contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary to the contracting parties of its intention to withdraw from this agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him: The second question that arises from the last paragraph of Article XIII refers to the remedies available for a situation of nullification, impairment or impossibility to attain WTO objectives when invoking Art XXIII as a cause of action. In most trade disputes solved by the WTO panels and reviewed by the Appellate Body, the remedies available are the withdrawal of the measure affecting a member state within a reasonable period of time as is described in Article 19 of the DSU:

Article 19: Panel and Appellate Body Recommendations

1. *Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.*

6. *In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements*.

There are critics of this system of dispute resolution who argue that the remedies do not provide a satisfactory outcome of the issues presented to the panels because the system does not provide for specific remedies and leaves the adjudicating bodies free to suggest any recommendation that they deem convenient. It is argued then, that Customary International Law could be applicable to the WTO adjudication because it belongs inherently to the WTO system as it is not a self–contained system

of law[200]. It must be specified that Customary International Law only applies in the event of an internationally wrongful act, which would exclude the Non-Violation and situation complaints from its scope. However, this argument is useful in the application of Article XXIII because if it is possible for the WTO panels to apply norms that do not belong to the trade system according to the theory of inherent jurisdiction, it is even more plausible for them to incorporate the remedies of the DSU to the ones provided by Article XXIII. Furthermore, this is reinforced by the fact that Article XXIII does not contain any restrictive clause or wording that indicates that the remedies thereby contained are available exclusive of other remedies subsequently added to GATT.

This reading makes the applicability of the nullification or impairment provision more plausible in practice because the specific remedy for the situations in which the panels[201]find that the nullification or impairment justifies it. The remedy in Art XXIII only allows for the waiver of the obligation and authorisation to lift concessions previously negotiated and does not contain any resource of appeal or revision, which makes it quite stringent and impractical. Meanwhile, by applying Article 19 of the DSU, the panels can suggest an array of measures to settle the situation without imposing a burden as onerous as the waiver of obligations and the possible withdrawal from the WTO of the member that has nullified or impaired the benefits of another with its conduct.

Apart from its evident practicality and the natural convenience of this reading of the provision, it is also in accordance with the principle single undertaking and the fact that the DSU was issued subsequent to Article XXIII and that instead of providing an alteration to its composition it provides an alternative method for the settling of the dispute. In other words, Article 19 is not self-contradictory because it does not add or diminish to the provision contained in the last paragraph of the nullification and impairment article, but instead it provides a general and alternative procedure; it is

[200] MAVROIDIS P. "Remedies in the WTO legal System: Between a Rock and a hard Place". European Journal of International Law, Volume 11, Number 4, 2000, pp. 763-813.
[201]Acting as delegates of the Contracting Parties.

the prerogative of the adjudicators to use their discretion to use either of the available procedures.

In summary it can be said that Article XXIII contains damage (nullification, impairment of vested benefits emanating from the agreement, or impossibility to attain the agreement's objectives) that needs to be proven and linked to one of the causes of actions described in the same provision and that could be described as a cascade of causes of actions. The first level of causation that can trigger the application of Article XXIII departs from a positive action or omission from the affecting the member state which results in a **violation of a provision contained in the WTO agreements** – without prejudice to other available remedies contained elsewhere in the agreement.

The second level of causation can be understood as a positive action or omission from the affecting member state that is **compliant with the agreement at least formally**, which has been called by the academia Non-Violation.



Figure 2: Graphical depiction of the dimensions of Nullification and Impairment

Finally, the third part of the causation sequence described in Article XXIII ends in a **mere situation not caused or intended by the affecting Member State** that can be an act of God, an unforeseen natural situation or an externality in the economic sense of the word[202].

Since the panorama for the interpretation and application scenarios of Article XXIII is still quite obscure, it is imperative to revise the origins in depth, justifications and

[202] An externality in the economic sense of the word is a consequence of an economic activity that is experienced by unrelated third parties. An externality exists whenever one individual's actions affect the well-being of another individual – whether for the better or for the worse – in ways that need not be paid for according to the existing definition of property rights in the society. See JOHNSON P. Dr.*"A Glossary of Political Economy Terms"*http://www.auburn.edu/~johnspm/gloss/externality

construction of Article XXIII to be able to give a reasonable estimate of its applicability in a WTO context.

2.4 Historical Account of the provisions contained in Article XXIII GATT

In order to produce an analysis of the applicability of Article XXIII in the context of the WTO, it is pertinent to conduct an historical account of the provisions. This will lead to an exact understanding of the purposes for which it was created and will help to design a strategy to implement it within the context of WTO. Firstly, it must be remarked that when GATT was drafted, the only concessions offered were tariff reductions and it was understood that tariff reductions could be bypassed by measures not contained in the agreement such as competition policy, subsidies, and product regulation with legitimate aims. In order to prevent the frustration of the agreement's object, the unconventional remedy of Non-Violation complaints was created, and it responded to the reality of the political character of the GATT 1947[203].

2.4.1 Negotiation

The political environment of GATT negotiations was marked by the end of the Second World War, since the GATT, as part of the Bretton Woods system, was seen as a tool to reach the goals of the system through free trade using the format of the already established bilateral trade agreements that the United States had created before the Second World War[204]. The keynote of those agreements was the concept of reciprocity which the United States considered fundamental for its negotiations. Therefore, GATT was designed to be a system of tariff reductions with reciprocity[205].

[203] Supra, KIM (2006) pp. 35-36.
[204] Supra CHO (1998) p. 313.
[205] PETERSMANN, "The dispute settlement system of the World Trade Organisation and the evolution of the GATT Dispute Settlement System since 1948". 31 Common Market Law Review 1994. pp. 1157, 1171.

The provision of Nullification and Impairment emerged in an environment of legal uncertainty from the drafters of GATT. Even more so, the lack of sound permanence and the probability of contracting parties evading the agreed tariff reductions by implementing measures not covered in the agreement[206] created suspicion amongst the signing countries. The Non-Violation provision contained in Article XXIII of GATT was designed as a political solution created to assure the countries that they could still take action in the absence of a tangible breach when their benefits in GATT were nullified or impaired. Should this be the case, the affected country, in the mind of the GATT drafters, could resort to the Non-Violation provision and obtain compensation for the lost benefit.

The main concern at the time was to ensure that the contracting parties effectively obtained the tariff concession. The distinction between breach and Non-Violation action was as important for the negotiation as it was to provide an emergency escape door for the countries that saw their agreed benefit diminished due to another party's actions. This escape valve was inserted without a thorough analysis, so the ambiguity of its wording has been present since the very beginning of GATT. Some experts in the field classify this provision as one of the "birth defects" of GATT[207].

2.4.2 Crafting of Article XXIII

The final text adopted as Article XXIII was achieved only after six stages of drafting[208]:

1. League of Nations suggestion on Equitable Treatment Draft (July 1933): After the war, countries were interested in promoting trade by implementing what

[206]Supra CHO (1998).
[207]JACKSON J.H. *The Uruguay Round and the Launch of the WTO – Significance and challenges* in Stewart T. "The World Trade Organisation: The multilateral framework for the 21st century in the US Implementing Legislation". American Bar Association, International Law and Practice Section. 1996. Ch 1.
[208]Supra KIM (2006). pp. 27-28.

was called a *customs truce*[209] and the negotiators were concerned that the success of the concessions would be jeopardised by non-tariff protectionist measures that would render the effect of the concessions worthless. An early report from the League of Nations (International Economic Conference, Geneva 1927) stated that there were four types of indirect protection:

- Subsidies
- Dumping and Anti-Dumping Legislation
- Discrimination arising from the conditions of transport, and
- Fiscal measures discriminating against foreign goods[210].

However, after the 1927 report no measures were taken and discussions were reopened in the Conference of the League of Nations in 1930, where the need to abolish indirect protectionism was reiterated and the mandate to create an extensive list of the measures used as indirect protectionism was given to the secretariat. A duty to inform the secretariat of these measures was extended to all the Member States.

Finally, the London Monetary Economic Conference held in 1933 addressed the issue. The US department of Commerce drafted a memorandum specifically pointing out that:

a. The measures that were susceptible to becoming indirect protectionism were not condemnable in all cases.

b. Many of the measures that could constitute indirect protectionism had *legitimate purposes*[211].

[209]HILL M. The Economic and Financial Organisation of the League of Nations: A Survey of Twenty Five Years' Experience. Carnegie Endowment for International Peace, Division of International Law. Washington: 1946.
[210]DURLING AND LESTER. Original Meaning and the *Film Dispute:* The Drafting History, Textual Evolution, and Application of the Non-Violation Nullification and Impairment Remedy. 32 George Washington Journal of International Law and Economics. 1999. p. 211.
[211]Supra DURLING AND LESTER 220.

c. The relevant question in order to safeguard Member States from indirect protectionism was not whether the measures would be acceptable, but to what extent.

In the words of the US Department of Commerce representative, Henry Chalmers:

I shall, *therefore*, *assume in this study that under the term* "*indirect protectionism*" might be included all measures – other than regular import duties and routine customs regulations – whether legislative of origin, or whether originating with ministerial, regulatory or administrative branches of governments, which in their purpose, or in their effect, tend ***unreasonably*** *to hamper the movement of International trade, and to afford additional protection to the domestic producers, through the increasing difficulty of effecting importations*[212]*.*

This insight generated the formation of a sub-commission dedicated to study and address the problematic area of measures that could be justifiable but harmful to trade at the same time. The submission of Yugoslavia highlighted in an exhaustive manner the possible problems that the *tariff truce* could face should the League of Nations neglect to address the issue of indirect protectionism; also the Yugoslav representative proposed three clauses to promote good faith amongst the parties:

a. The parties would agree not to impose new burdens on trade without informing the other parties

b. The parties would agree to restrain from implementing new burdens on trade that would affect goods already en route*, and*

c. The parties would restrain from creating new burdens on trade during exporting season[213].

[212]Supra DURLING AND LESTER 220. See CHALMERS H. types of Administrative or Indirect Protectionism. May 25, 1933 at 2 in *Special Memoranda prepared for the American Delegation to the International Monetary and Economic Conference* (July 1933).
[213]Proposals by the Yugoslav Delegation, League of Nations Doc. Conf. M.E./C.E./55 (1933). Supra DURLING AND LESTER 220.

These proposals were pondered by the parties under the international law premises of the time. At that time, the principle of good faith was not part of the international law principles and a legal positivist approach prevailed during the time of the negotiations. Nonetheless, the generalised feeling was that a broader and more general provision was more effective than the most comprehensive and exhaustive list of possible *indirect protectionism* measures.

At the meeting of the sub-commission, a proposal previously prepared by the American delegate Fred Nielsen upon request from the secretariat was put forward. This proposal contained the clause that was originally included by the United States in its bilateral agreements. The proposed version of a fair and equitable clause was finally presented as:

> *The High Contracting Parties agree that, if one of the Contracting Parties introduces, after the conclusion of the present treaty, any measure, even of an internal nature, capable of materially altering the de facto situation, created by the present treaty, to the Prejudice of the other Party, the first party shall not refuse to consider in a friendly spirit any complaints or proposals that may be made by the other Party, or to enter into negotiations with that Party with a view to seeking the best means of re-establishing the disturbed equilibrium*[214]

Slight modifications to the text of the clause were made before final submission and a fair and equitable clause introduced the expression of nullification and impairment in the London conference final report as follows:

> *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*

[214]League of Nations. Doc Conf. M.E./C.E 86: Draft Report Prepared by the Drafting Committee appointed to combine in a Single Text the Various Drafts Submitted for the Equitable Treatment Clause and Other Questions of Indirect Protectionism. [Equitable Treatment Draft] (1933).

> *treaty, is considered by the other party to be of such 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 purpose either of an examination of proposals made by the latter or of the friendly adjustment of any complaint preferred by it*[215]*.*

This clause was understood by the parties to be a simple and effective strategy against all forms of indirect protectionism that were not addressed specifically in the conference[216] and that would no doubt emerge in international trade. It was adopted in the Conference Report.

2. Bilateral trade agreements 1930 and 1940:

At the London conference it was suggested that the parties should create a sub-commission on indirect protection, which in its turn suggested the inclusion of a fair and equitable treatment clause in the bilateral trade agreements. This marks the second stage of evolution of the current *Nullification and Impairment* clause in GATT. The United States had great influence in the International Trade Organization(ITO) discussions, the language used in its own bilateral trade agreements was supported and pushed in the ITO not only by the United States themselves, but also by their trade partners with whom they had already signed bilateral trade agreements.

After the London conference, the US Congress passed the US Reciprocal Trade Act in 1934 where the terms of the fair and equitable clause from the London conference came back under the instructions of Secretary of State Cordell Hull as a guarantee to

[215] Suggestion Submitted by the Delegate of the UNITED STATES Concerning Doc M.E/ C.E./86 League of Nations M.E/ C.E./86 (1933). See Supra DURLING and LESTER (1999). See also JACKSON J.H. *The World Trading System: Law and Policy for International Economic Relations* MIT Press. (1997).

[216] The forms of indirect protectionism that were dealt with in the conference were: Marks of Origin and Phyto-patological measures. These were dealt with in separate agreements as it is accounted for in the *Monetary and Economic Conference Reports approved by the Conference on July 27th 1933 and resolutions Adopted by the Bureau and the Executive Committee. 18 League of Nations Doc C435 M220 1933 II.* This is documented in Supra DURLING AND LESTER (1999).

secure the negotiated tariff concessions and as a way of keeping them from *indirect protectionism by very definite substitutes for the functions of a tariff*[217].

The fair and equitable treatment clause was not for the exclusive use of the United States. Other countries decided to use either the same clause or a very similar one[218] and in some cases even a broader clause[219] in their own bilateral trade agreements. Some countries included more specific clauses in their trade agreements[220], but they were all intended to tackle the issue of unforeseen trade flow distortions.

3. Suggested charter for International Trade Organisation (ITO) (September 1946):

Despite the fact that the ITO was never ratified and an international trade organisation with a binding rule of law was not launched until the creation of the WTO, the GATT as a multilateral treaty contained the trade regulations discussed and adopted by the member countries.

The United States submitted a suggested charter for the ITO in 1946 in which it included five chapters: Commercial Policy, Employment Policy, Restrictive Business Practices and Commodity Agreements. The initial Nullification and Impairment (including Non Violation) clause was meant to be applicable only to the Commercial Policy chapter despite the fact that the dispute settlement mechanism they had proposed was intended to cover all chapters. This showed their intention of making

[217] Supra DURLING & LESTER (1999) at 227. *Reciprocal Trade Agreements on H.R. 8430 before the House of Comm. On Ways and Means.* (Cong 1934).Statement of Cordell Hull, Secretary of State.
[218]Trade Agreement between Canada and Haiti. Apr 23, 1937.
[219]Commercial Agreement between the Kingdom of Hungary and the Kingdom of Yugoslavia. May 15, 1933. See Also Exchange of Notes between the Government of New Zealand and the Swiss Government constituting a Trade Agreement. May 5, 1938.
[220] The United Kingdom used very specific clauses to ensure a specific volume of exports of specific products to the Scandinavian countries in the following agreements: Agreement between the Government of the United Kingdom and the Government of Iceland Relating to Trade and Commerce; May 19, 1933. Commercial Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and Finland; Sep 29, 1933. Commercial Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of Denmark; Apr 24 1933.

Commercial Policy a separate agreement[221]. The text of the suggested Article 30 was as follows:

> *Each member shall accord sympathetic consideration to, and will afford adequate opportunity for consultation regarding, such representation as may be made by any other member with respect to the operations of customs regulations and formalities, quantitative and exchange regulations, state trading operations, sanitary laws and regulations for the protection of human, animal or plant life or health, and generally all matters affecting the operation of this chapter. Moreover,* ***if any member should consider that any measure adopted by any other member, whether or not it conflicts with the terms of this Chapter, has the effect of nullifying or impairing any object of this Chapter, such other Member shall give sympathetic consideration to such written representations or proposals as may be made with a view to effecting a mutually satisfactory adjustment to the matter****. If no such adjustment can be effected, either Member shall be free to refer the matter to the Organisation, which shall investigate the matter and make appropriate recommendations to the members concerned. The Organisation, if it considers the case serious enough to justify such action, may determine that the complaining Member is entitled to suspend the application to the other Member of specified obligations or concessions under this Chapter, and if such obligations or concessions are in fact suspended, such other Member shall then be free, within sixty days after such action is taken to withdraw from*

[221] Supra DURLING & LESTER (1999), pp. 232.

the Organisation on sixty's days' written notice to the Organisation[222].

This text kept the spirit of the suggestions presented formerly by the US government but goes beyond it by including a set of institutional remedies to facilitate negotiations between the members concerned. Additionally, it allows the member whose conduct is nullifying or impairing the rights of another member, to exit from the Organisation should the negotiations fail and the previously authorised withdrawal of trade concessions occur.

4. London Draft 1946

During the London conference nullification and impairment was altered in two meaningful manners. Firstly, its scope of application was broadened as in the suggested Charter it was intended to be applicable only to the Commercial chapter, but in the London conference the same provision, intended to be applicable for the whole Charter, that is, the restriction to the Commercial Policy chapter was eliminated, extending the scope of the provision to the whole agreement[223]. Also, in this provision there is an interesting remark in the sense of broadening the applicability of this Article by modifying the suggested Charter in order to allow any *member […] to request the Organisation to set aside any Obligations under Chapter V;* it also authorises *the organisation to set aside such obligation* ***in the event on any situation arising****,* ***whether or not caused by action by another member****, which would nullify or impair* ***any object of the charter***[224].

The vague circumstances in which it was conceived that a contracting party could request consultations and the ILO could set aside any obligations under the chapter of *Inter-Governmental Commodity Arrangements* was suggested by the US Delegate Hawkins, who saw this expansion as an attempt to protect not only the letter of the

[222]Suggested Charter for an International Trade Organisation, art 30. (U.S. State Department Proposal)September 1946. [Emphasis added].

[223] Report on the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment U.N. Doc E/P/T/33 (1946) [London Draft]. Chapter III: General Commercial Policy, Section A- 4 Consultations- Nullification and Impairment.

[224] Supra – London draft.

agreement, but also its spirit[225]. What this remark can tell us is that since the London draft there has been an interest in protecting the Member States not only from breaches as conventionally known, but also to protect the objectives and purposes of the GATT within an institutional framework despite the legal loopholes to circumvent concessions. It is clear that this referred exclusively to tariff concessions, which could be easily bypassed by many non-tariff measures, but also by the use of legitimate prerogatives given by the system in detriment of a contracting party. This version was very controversial because it posed an *unjustified sanction* in the sense that any party could be the subject of action despite its substantial adherence to the treaty.

5. Geneva Draft 1947

The ample scope given to the nullification and impairment article was a worrisome matter for the negotiators, who redrafted it in the negotiation session that took place in Geneva. In this draft the tone of the current structure of the provision was achieved by using the new proposals offered during the Geneva negotiating session. These proposals were brought by the Australian delegate who presented a more moderated provision which allowed a complaint if *any benefit accorded to it* [the complaining contracting party] *directly or indirectly by this Charter is being nullified or impaired* or *the promotion by it of any of the Purposes of this Charter is being impeded*[226].

Also, the *cause of action* was restricted by the acceptance of the Australian delegate's proposal to give a cascade of three types for which these complaints could be brought; these three types are *[i] the application by another member of any measure, whether or not it conflicts with the provisions of this Charter; or [ii] the failure of another member to carry out its obligations under this Charter; or [iii] the existence of any other situation.*

[225] E/PC/T/C.II/PRO/PV/9. Connie Hawkins at the Preparatory Committee of the International Conference on Trade and Employment - Verbatim Report of the Ninth Meeting of the procedure Sub-Committee of Committee II, 9th November, 1946.

[226] E/PC/T/W/170 Amendment proposed by the Australian Delegation. UN ESCOR, 2ND Session.

By creating causes of actions, the scope of the provision was defined in terms of benefits. One aspect remained in the provision of the Geneva draft from the London draft, it was the fact that a complaint could originate in benefits originated anywhere in the Charter and thus the benefits were not confined to the Commercial Policy chapter. Finally, another significant modification to the proposal was the creation of categories of claim[227]; this meant that the affected benefits should have a causal link to a defined measure contained in any of the types proposed, which in turn allowed a different standard of proof for each type of *cause of action*[228].

The structure of the Geneva draft was an important evolutionary advance for the nullification and impairment concept because it was an attempt to narrow the scope and give exactitude to the proposals made by the US delegate during the London session. Additionally it created the idea of types of complaints which later became interpreted as degrees for the vertical structure in which the Article is drafted.

6. <u>October 1947- Final GATT text.</u>

Before the Havana Charter of 1948, a group of 25 countries negotiated an agreement separately. This agreement was an accord on tariffs drafted under the auspices of the Preparatory Committee in charge of the draft of the final ITO charter. Using the Geneva draft and schedules of tariff commitments made by the 25 countries GATT was born as the *Geneva Final Act*[229]. It was signed as a temporary arrangement before the ITO was established. As the Havana Charter was never ratified, the agreement signed in October 1947 was the final text that ruled on the trade in goods for most of the rest of the century[230].

The Nullification and Impairment provision was included in GATT as it was drafted in the Geneva session of negotiations, but the references to the Organisation were

[227]Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment - Verbatim Report. Twelfth Meeting of Commission A. Geneva. 1947.
[228]Supra DURLING AND LESTER (1999) at 238. See also KIM (2006) at 25.
[229]GATT 1947- The legal Texts (1995) p. 486.
[230] HUDEC R. "Thinking about the New Section 301: Beyond Good and Evil."" In JAGDISH, BHAGWATI & PATRICK Eds. "Aggressive Unilateralism: America's 301 Trade Policy and the World Trading System". Ann Arbor: University of Michigan Press. (1990). pp. 113-159.

removed because at the time of its signature there was no organisation in place. The term Organisation was replaced by “Contracting Parties”. The provision with that sole modification was placed in Article XXIII.

Remarkably, the nullification and impairment procedure was the only dispute settlement provision included in GATT[231]. There was a Protocol of Provisional Application which became instrumental in the GATT period of operation.

2.4.3 Documentation of the Drafts and final version of the GATT 1947[232]

Table 1: Chronological documentation towards the final GATT - Draft name, description and document number[233].

Document	**Document No.**
A Proposal for an International Commercial Union (James Meade): In this document the notion of an International Clearing Union is introduced as a regulatory institution to keep the balance of payments of all members adjusted. This was conceived as a premise for a Commercial Union. The works of the Clearing Union would allow the members to withdraw concessions **if and when balance of payments has an excess debit** according to the Clearing Union. Upon creation of a Commercial Union, the concept of National Treatment was outlined with several exceptions to provide for post-war recovery. There is no mention of nullification and impairment measures.	None
Suggested Charter for an International Trade	None

[231]Supra HUDEC. See also Supra KIM, 27.
[232]The summary of the drafts as well as each draft in PDF version can be found in http://www.worldtradelaw.net/misc/gatttexts.htm
[233] Table contents sourced from http://www.worldtradelaw.net/misc/gatttexts.htm

Organisation of the United Nations (U.S. State Department Proposal) September 1946: In the Suggested Charter 1946 the US government includes and explains in detail the concepts of Most Favoured Nation and National Treatment as the basis of a Multilateral Trade Agreement. In Article 30 of this document the idea of nullification and impairment is applicable only to the commercial chapter.	
London Draft. November 1946: As was explained above, the London draft was mostly controversial for its implicit protection of the spirit of the Treaty.	E/PC/T/33
Tentative and Non-Committal Draft Suggested by the Delegation of the United States. February 7, 1947	E/PC/T/C.6/W.53
Draft of February 15, 1947	E/PC/T/C.6/85
New York Draft. March 5, 1947	E/PC/T/34
Draft of July 24, 1947	E/PC/T/135
Geneva Draft August 30, 1947. The London draft was moderated to include the structure that was kept in the final agreement. Types of causes of actions were created. The ambiguous language in Article XXIII: 1 (b) was introduced in this draft[234].	E/PC/T/189
Draft of September 10, 1947	E/PC/T/186
Draft of September 13, 1947	E/PC/T/196
Draft of October 4, 1947 (Draft Final Act)	E/PC/T/214, Add.1, Rev.1

[234]Art XXIII: 1 (b) the application by another contracting party of any measure *whether or not* it conflicts with the provisions of this Agreement.

Final Act, GATT and Protocol of Provisional Application **October 30, 1947**	None
FINAL ACT OF THE UNITED NATIONS CONFERENCE ON TRADE AND EMPLOYMENT: **Havana Charter**	None
HAVANA CHARTER FOR AN INTERNATIONAL TRADE ORGANISATION **March 24, 1948** The Havana Charter provided for the creation of the International Trade Organisation (ITO). This organisation was meant to take its place beside the other institutions of Bretton Woods, the IMF and the World Bank. The Havana Charter contained a Commercial Policy chapter – which was contained in GATT 1947 – as well as chapters on economic activity, development, reconstruction, and restrictive trade practices. The Havana Charter was never ratified by the United States; therefore it never entered into force[235]. However in this Charter the provision of nullification and impairment underwent two subtle changes that can clarify and also modify the interpretation of this rule. Firstly, the name was changed from nullification and impairment to **Consultation and Arbitration.** This leads one to believe that the nullification and impairment norms were intended to be integral part of an incipient system of dispute resolution within the ITO.	UN Doc. E/Conf. 2178

[235] DEMARET P. "The Metamorphosis of the GATT: From the Havana Charter to the World Trade Organisation" 34 Columbia Journal of Transnational Law (1995) p. 127

Secondly, the chapeau was drafted in a broader manner than the Geneva draft and the final text of GATT by including the words *implicitly or explicitly.* Finally, the Havana Charter draft clarified the types of courses of action into a breach, a measure not conflicting with the Charter, that is, a non-breach, in other words, a Non-Violation*;* and any other situation. This last category was not given any further qualification in the Havana Charter, hence its scope and actual significance remains obscure in this particular draft: ***Consultation and Arbitration*** 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* 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.*	

It is recognised that the provision in Article XXIII was a tool for the contracting parties to veto undesired trade actions from foreign countries. However, the understanding of this rule has been slightly shaped, subjecting its use to the moderation of the WTO judicial structure and restricting it to a favourable decision from a panel or the

Appellate Body. This implies that the original meaning of Article XXIII has been weakened in substantial content because the existence of a benefit nullified or impaired is subject to approval from the Appellate Body and thus to its interpretation of the effective content of the Non-Violation claim. In the words of a former WTO insider:

> *The negotiators of the GATT thus regarded the concept of Non-Violation nullification or impairment as a benchmark guiding consultations, negotiations and multilateral decision-making. They did not envisage the application of the concept in binding third-part adjudication procedure. The Contracting Parties to the GATT 1947 applied the concept in the context of procedures under which each contracting party had the possibility to block the adoption of a finding of nullification or impairment. The open-ended nature of the concept of nullification or impairment did not entail a threat to the sovereignty of the Contracting Parties. Under the WTO Agreement, however, the decisions determining the benefits that might accrue under a provision in addition to the benefit of its observation would be determined by the Appellate Body, whose decisions must be unconditionally accepted. What has thus happened, more by accident than by design, is that the power of an independent tribunal to hand out licenses to retaliate is defined by a legal concept that originally served to define the scope of the obligation to consult under bilateral trade agreements*[236].

At this point it is pertinent to take into account that the dispute settlement system designed by GATT was meant to be solved by the Member States directly, and there was no delegation to an independent third party at any point of the dispute. This system was completely diplomatic as opposed to legal; the main legal achievement meant by the parties was the granting of tariff concessions[237], the rest of the system

[236] ROESSLER F, "Should Principles of Competition Policy be incorporated into WTO Law through Non-Violation Complaints?" 2 Journal of International Economic Law. 1999. p. 418.

[237] The other legal achievements include MFN and NT as well as the elimination of quotas and VERs.

was conceived to be a diplomatic facilitation rather than a juridical order with binding adjudication.

Due to the evolution of the trading system and the creation of the WTO, the dispute resolution system has shifted from a diplomatic solution to a rule of law adjudication which is regulated in the DSU without prejudice to other procedures contained in the GATT. As was explained above, the DSU contains procedural rules of mandatory application. However, they did not overrule the procedures contained in GATT, including the one contained in Art XXIII. Yet, it must be reiterated that the procedure contained in the DSU gives a possible and acceptable outcome of the dispute settlement, whereas Article XXIII, read in isolation, is simply inapplicable due to the great burden it places on the parties involved.

2.5 Scope of Article XXIII

In order to apply the consequences of Article XXIII to any of the Non-Violation behaviours specified above, a survey of its structure, design and evolution must take place. This will also help to understand the mandate of the Appellate Body with regards to the application of this Article and eventually will lead to an interpretation that harmonises with the rest of the WTO agreements with the provision contained in Article XXIII. That survey must be linked to the second question to answer regarding the interpretation of Article XXIII, which is whether Article XXIII can be interpreted to extend the Non-Violation claims to:

2.5.1 Conducts included in the negotiated agreements but which cause nullification and impairment of benefits accrued to the member state by GATT or any of the WTO agreements

When subparagraph (b) of Article XXIII: 1 states that any member may bring a complaint when it considers that a benefit has been impaired by "*the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement"* the letter of the provision suggests that actions that are

compliant with the agreement can also trigger its application as long as **in the opinion of the member state** there is a nullification or impairment of such benefits.

It is important to note that the wording of the chapeau[238] gives a broad spectrum for the member state to define the conduct when it leaves the power of defining the nullification or impairment to the discretion of the affected member state. At a first glance, a perfectly compliant measure of a negotiated agreement could potentially become subject to a Non-Violation complaint. However, the Member States would not have the liberty of defining a conduct as nullifying or impairing within the areas subject to existing agreements because they have exercised their sovereignty, and freely limited their scope of action in the areas where they have defined lawful and unlawful conducts and remedies for them.

In principle, the issue of conducts that are included in the negotiated agreements but that cause nullification and impairment of benefits accrued to the member state by GATT or any of the WTO agreements would be settled by the rationale mentioned above. This reasoning appeals *prima facie* as logical and could be strongly defended if it was not for the incoherence that emerges when examining the content of the different WTO agreements with respect to these types of claims. Some agreements, like the TRIPS[239]and the Agreement on Agriculture[240] have expressly excluded the Non-Violation complaint from the scope of their dispute resolution mechanism for a specific period of time. Others, like GATS[241] have limited the scope[242] of Non-

[238]***Art XXIII- Chapeau:*** *If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired*

[239] Art. 64.2 of the TRIPS Agreement: Subparagraph 1(b) and 1(c) of Article XXIII of the GATT 1994 shall not apply for the settlement of disputes under this Agreement for a period of five years from the date of entry into force of the WTO agreement.

[240] Art. 13 (a) iii of the Agreement on Agriculture: During the implementation period, notwithstanding the provisions of the GATT and the Agreement on Subsidies and Countervailing Measures (referred to in this Agreement as the Subsidies Agreement) (a) domestic support measures that conform fully to the provisions of Annex 2 to this Agreement shall be:…
(iii) Exempt from actions based in Non-Violation nullification or impairment of the benefits of tariff concessions accruing to another Member under Article II of GATT 1994, in the sense of paragraph 1(b) of Article XXIII of GATT 1994.

[241] Art XIV GATS: Dispute Settlement: 12. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked with respect to any matters arising from the application of those provisions of Article XXIV relating to customs unions, free-trade areas or interim agreements leading to the formation of a customs union or free-trade area.

Violation complaints, and some, like the Agreement on Textiles and Clothing[243], have gone even further by definitively excluding the Non-Violation complaints from their dispute settlement system[244].

There is a problem in the fact that some WTO agreements that have not taken into account the provisions of Article XXIII are excluded from the application of the Non-Violation provisions only for the specific nature of the commitments contained in them, and yet its interpretation cannot be extended to existing WTO agreements that do not expressly exclude its application. This issue is partially solved by understanding the complaints emerging from negotiated conducts as "violations" and by giving them the procedure and remedies foreseen in their specific WTO regulation, or by applying subparagraph (a) of Article XXIII. The problem is then reduced to actions that are in compliance of all WTO agreements but that a member state considers a nullification or impairment of its benefits under the WTO undertakings.

This problem can occur in two different forms: either as exceptions under Article XX, which are susceptible to challenge under Article XXIII; or in the form of regulatory protectionism[245]. As exceptions under Article XX, the Non-Violation complaints have been raised in residual arguments of Member States against the exception provided

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[242] Art XXIII (3) GATS: *If any Member considers that any benefit it could reasonably have expected to accrue to it under a specific commitment of another Member under Part III of this Agreement is being nullified or impaired as a result of the application of any measure which does not conflict with the provisions of this Agreement, it may have recourse to the DSU. If the measure is determined by the DSB to have nullified or impaired such a benefit, the Member affected shall be entitled to a mutually satisfactory adjustment on the basis of paragraph 2 of Article XXI, which may include the modification or withdrawal of the measure. In the event an agreement cannot be reached between the Members concerned, Article 22 of the DSU shall apply.* In this provision complaints based upon an impediment to the attainment of an objective are excluded. Also, it limits the legitimate expectation of accrual of a benefit to application of a measure not conflicting with the agreement (excluding other reasons).

[243] Art. 8.10 Agreement on Textiles and Clothing.

[244] LAROUER C. "WTO Non-Violation Complaints: A Misunderstood Remedy in the WTO Dispute Settlement System". NILR, 2006.LIII p. 108.

[245] Regulatory Protectionism refers to measures that are WTO compliant but create excessive hazard to foreign firms. Those measures are not needed to obtain legitimate (non-protectionist) regulatory objectives. SKYES A. "Regulatory Protectionism and the Law of International Trade". University of Chicago Law Review, winter 1999.*Regulatory measures that raise the costs of foreign firms relative to domestic firms are exceptionally wasteful protectionist devices, however, with deadweight costs that can greatly exceed those of traditional protectionist instruments such as tariffs and quotas*.

in Article XX; this is the case of *EC-Asbestos*[246] where the Non-Violation complaints were used as a last resort to defend the legitimacy of a complaint that was against basic environmental regulations. In the specific *EC-Asbestos* case, the use of the provision was senseless because the measure against trade could have been reasonably expected; it is unreasonable to expect countries to allow trade of hazardous items. Furthermore, the use of Article XXIII against measures covered by the exceptions of Article XX is not legally feasible, because the acceptance given to the Article containing the exceptions is in itself a self-restricting positive action that makes it *unreasonable* to *expect benefits* in contradiction of it.

On the other hand, it may be more plausible to engage in the issue of the applicability of Article XXIII in the scenario of regulatory protectionism. In this case, a member state can formally comply with the WTO agreements, but the local regulations may be a real obstacle in attaining trade objectives. In the past, these considerations have been made in the handful of cases that dealt with Non-Violation complaints either in GATT or in the WTO creating the precarious and sometimes contradictory jurisprudence about the issue in international trade law.

2.5.2 Case Law Survey

In comparison with the number of reports before and after the WTO was constituted, it is remarkable that the number of reports regarding Non-Violation complaints is only slightly more than a dozen, and that the cases that have engaged with the analysis of the Article are just five. From this scarce jurisprudence, it is very difficult to draw meaningful jurisprudential landmarks to clarify the meaning of the provision in Article XXIII (b). However, the reports shed some light on the requirements needed to lodge a complaint of the Non-Violation sort. Also, the very absence of heavy litigation on the point indicates that the point of Non-Violation complaints are not one of moot. Nonetheless, and in the interest of coherence and plenitude of the legal system of international trade law, it is important to explore whether the use of this kind of

[246] WTO Appellate Body Report, *EC- Asbestos (AB) para. 190.* See Also KIM (2006) pp. 76-78.

complaint is available as a tool for controlling the disguised protectionist conduct of Member States.

In the Asbestos case[247], the Appellate Body cites all the cases where the Non-Violation complaints have been raised as well as their outcomes[248]. According to this panel report and with the addition of US-Offset Act[249]*there have been 15 cases in which a claim under Article XXIII: 1(b) has been considered by working parties, panels, and, now, the Appellate Body. In six of these cases, the claim under Article XXIII: 1(b) was successful and, on three of these occasions, the report was adopted. The successful claims were made in: Australia – Ammonium Sulphate (adopted 3 April 1950), Germany – Sardines (adopted 31 October 1952), EC – Citrus Products (unadopted), EEC – Canned Fruit (unadopted), EEC – Oilseeds (adopted 25 January 1990) and EEC – Oilseeds II (unadopted)[250].*

Each of the adopted cases has introduced one or more aspects to take into account for the interpretation of Article XXIII and they also give some clues about the applicability of the provision of conduct covered by the WTO agreements. A case by

[247] Appellate Body Report on European Communities – Measures Affecting Asbestos and Asbestos Containing Products (Complaint by Canada), WT/DS135/AB/R. page 68, footnote 188.

[248] Claims under Article XXIII:1(b) have been considered in the following reports: Working Party Report, Working Party Report, *The Australian Subsidy on Ammonium Sulphate* ("*Australia – Ammonium Sulphate*"), adopted 3 April 1950, BISD II/188 (Articles I and III:4 of the GATT 1947); Panel Report*, Treatment by Germany of Imports of Sardines*("*Germany – Sardines*"), adopted 31 October 1952. Panel Report, Uruguayan Recourse to Article XXIII, adopted 16 November 1962, BISD 11S/95;Panel Report, *Spain – Measures Concerning Domestic Sale of Soyabean Oil* ("*Spain – Soyabean*"),L/5142, 17 June 1981, unadopted (Article III:4 of the GATT 1947);Panel Report, European Community – Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region ("EC – Citrus Products"), L/5776, 7 February 1985, unadopted; Panel Report, European Economic Community – Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes ("EEC – Canned Fruit"), L/5778, 20 February 1985, unadopted; Panel Report, Japan – Trade in Semi-Conductors, adopted 4 May 1988, BISD 35S/116; Panel Report, United States – Trade Measures Affecting Nicaragua, L/6053, 13 October 1986, unadopted; Panel Report, EEC – Oilseeds; Panel Report, United States – Restrictions on the Importation of Sugar and Sugar-Containing Products Applied under the 1955 Waiver and under the Head note to the Schedule of Tariff Concessions, adopted 7 November 1990, BISD 37S/228;Panel Report, Japan – Film, Adopted 22 April 1998, WT/DS44/R; Panel Report, Korea – Measures Affecting Government Procurement, WT/DS163/R, adopted 19 June 2000. We note that claims under Article XXIII:1(b) of the GATT 1947 were also examined in the Panel Report, European Economic Community – Follow-up on the Panel Report, Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins ("EEC – Oilseeds II"), 31 March 1992, BISD 39S/91, unadopted.

[249]Supra KIM, 78.

[250] Appellate Body Report on European Communities – Measures Affecting Asbestos and Asbestos Containing Products (Complaint by Canada), WT/DS135/AB/R. page 68, footnote 188.

case analysis is pertinent in order to have accurate findings from the jurisprudence before performing a thorough interpretative analysis. It is important to note that all the adopted cases are pre-Uruguay Round, thus the jurisprudence regarding this provision emerges from pre WTO cases where the report has either not been adopted and from WTO cases where the claim for application of Article XXIII has not been successful.

Australia – Ammonium Sulphate (adopted 3 April 1950)[251]

Measure challenged: *The removal, on 1 July 1949, of nitrate of soda from the pool of nitrogenous fertilizers which was subsidised by the Australian Government.*

It was then considered whether the measure taken by the Australian Government constituted a failure by the Australian Government to carry out its obligations under the Agreement, within the terms of Article XXIII

Relevant Findings :(...) *the Chilean Government* ***could not have been expected during the negotiations in 1947 to have foreseen such action or the reasons which led to it****.* [Emphasis added]

Application of Article XXIII: *There is in their view nothing in Article XXIII which would empower the CONTRACTING PARTIES to require a contracting party to withdraw or reduce a consumption subsidy such as that applied by the Government of Australia to ammonium sulphate, and the recommendation made by the working party should not be taken to imply the contrary.*

The ultimate power of the CONTRACTING PARTIES under Article XXIII is that of authorising an affected contracting party to suspend the application of appropriate obligations or concessions under the General Agreement. The sole reason why the adjustment of subsidies to remove any competitive inequality between the two

[251]The Australian Subsidy on Ammonium Sulphate. Report adopted by the CONTRACTING PARTIES on 3 April 1950(GATT/CP.4/39)II/188.

products arising from subsidisation is recommended is that, in this particular case, it happens that such action appears to afford the best prospect of an adjustment of the matter satisfactory to both parties.

Type of measure in dispute (Covered by GATT or not covered by GATT): GATT consistent measure.

(…) the value of a concession granted to Chile had been impaired as a result of a measure which did not conflict with the provisions of the General Agreement, the working party came to the conclusion that there was no infringement of the Agreement by Australia. Since Chile had not applied for a release from any of its obligations, under the provision of the last two sentences of Article XXIII, paragraph 2, and it was moreover hoped that an adjustment of the matter satisfactory to both parties could be reached (without prejudice to the views of either on the merits of the case).

Analysis: This case has applied Article XXIII to a measure that is GATT consistent, meaning that the scope analysed by the working party was within the conduct that is covered and allowed by the relevant agreements, GATT in this case. It is important because it brings two relevant considerations regarding the applicability of Non Violation complaints.

Firstly, it introduces the notion of legitimate or reasonable expectations by pointing out that the issue in dispute could not have been expected or foreseen by the complainant. This concept will be refined in future cases as will be explained below.

Secondly, it clarifies the scope of the provision by explaining that under Article XXIII, the affected party may only seek authorisation to remove a concession equivalent to the nullification or impairment suffered in order to level the playing field. In other words, the limits of the provision according to this case are that the affected party may reduce a concession in proportion to the nullification or impairment proven by a

legitimate measure that was not reasonably expected or foreseen at the time of acquisition of the GATT commitments.

In summary, from this case three requirements can be extracted in order to apply NVNI (Non-Violation Nullification and Impairment) claims:

(1) A concession that was negotiated and exists;
(2) A measure that when applied upsets the established **competitive relationship**; and
(3) The measure could not have been reasonably anticipated at the time the concession was negotiated.

Germany – Sardines 1952[252]

Measures Challenged:

a) The imposition, as from 1 October 1951, of an import duty of14 per cent on preparations of clupea pilchardus as compared with a duty of 20 per cent for clupea harengus and 25 per cent for clupea sprattus,

b) The application as from 16 November 1951 of a charge equivalent to the German turnover tax at a rate of 4 per cent on preparations of clupea pilchardus and of 6 per cent on preparations of clupea sprattus and clupea harengus, and (c) the removal of quantitative restrictions on preparations of clupea pilchardus while these restrictions were maintained on the preparations of the other varieties. It then considered whether the aforementioned measures taken by the Government of the Federal Republic of Germany constituted, within the terms of Article XXIII:1 (a), a failure by that Government to carry out its obligations under the Agreement[253]*.*

[252]Treatment by Germany of Imports of Sardines Report adopted by the CONTRACTING PARTIES on 31 October 1952 G/26 - 1S/53.
[253] Supra- Sardines.

Relevant Findings: *11. The Panel noted that the difference of treatment was not based on the origin of the goods but on the assumption that preparations of clupea pilchardus, clupea sprattus and clupea harengus are not "like products" within the terms of Article I and Article XIII.*

Application of Article XXIII: *(…) impairment would exist if the action of the German Government, which resulted in upsetting the* ***competitive relationship*** *between preparations of clupea pilchardus and preparations of the other varieties of the clupeoid family,* ***could not reasonably have been anticipated by the Norwegian Government****.*

(…) it would be appropriate for the CONTRACTING PARTIES to make a recommendation to Germany and Norway in accordance with the first sentence of paragraph 2 of Article XXIII. This recommendation should aim at restoring, as far as practicable, the competitive relationship which existed at the time when the Norwegian Government negotiated at Torquay and which that Government could reasonably expect to be continued[254]*.*

Type of measure in dispute: The measure was found to be GATT consistent.

Analysis: This report is mostly valuable as a jurisprudential source of law because it makes reference to the concept of like products and defines them in a clear manner. Regarding Article XXIII, this report highlights the need for an existing ***competitive relationship*** between the parties at the moment of the measure causing impairment. This competitive relationship is, according to the Sardines case, at the same time the object of Article XXIII and the one subject to reconstruction by means of the implementation of Article XXIII. Also, this jurisprudence reiterates the requirement of breach of a legitimate expectation in order to trigger the provisions contained in Article XXIII. Furthermore, it is important to note that the measure subject to this report was legitimate according to the Torquay agreement.

[254] Supra- Sardines.

Uruguayan Recourse to Article XXIII 1962[255]

Measures: Restrictive measures in the form of:

1. Import permit requirements and quotas;
2. Health regulations; and
3. State trading.
4. Production or Turnover taxes

Over a variety of agricultural products enforced in different proportions and combinations by:

Austria, Belgium, Canada, Czechoslovakia, Denmark, Finland, France, Federal Republic of Germany, Italy, Japan, The Netherlands, Norway, Sweden, Switzerland and the United States of America.

Relevant Findings: *The Panel had been unable to find nullification or impairment under the General Agreement in respect of a large number of items. In many of such cases, the contracting party concerned was nevertheless urged to remove the measure in question or any adverse effect which it might have on Uruguayan exports*[256].

Application of Art XXIII: Article XXIII was not applied in this case because the complaining party – Uruguay – failed to provide a detailed justification of its claim:

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 of 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. *[Emphasis Added]*

[255] Report of The Panel on Uruguayan Recourse to Art XXIII Report adopted on 16 November 1962 (L/1923 - 11S/95).

[256] Supra – Uruguayan Recourse to Art XXIII p. 3.

However, *the panel had also suggested that the Uruguayan authorities should seek mutually beneficial solutions through bilateral or multilateral consultations with the importing countries concerned*[257].

Type of measure in dispute: *In a number of the cases presented in the original Uruguayan submissions, the Uruguayan Government did not wish to challenge the contention of the contracting parties concerned that the measures in question were either fully consistent with GATT or, though not consistent, were permitted under the terms of the relevant protocol of application, and* ***the panel refrained from examining the legal question of consistency in these cases***[258]*. [Emphasis added]*

Analysis: The panel abstained from giving a ruling as it considered that a *ruling* is only appropriate when there is a disagreement on a point of law or fact. However, they still proceeded to make recommendations in order to settle the matter without applying the provision contained in Article XXIII. The recommendations were coherent in that they suggested the removal of all measures affecting Uruguayan imports but, in this case, the point to highlight is that despite that prima facie nullification and impairment can be proven, a detailed submission, after using all the available channels, is the only instrument that would render the situation as "serious enough" to allow the panel to consider authorising the suspension of concessions.

In other words, despite proving the prima facie nullification and impairment, according to this report, if the measure is GATT consistent or covered by a protocol in force[259], the complainant can only obtain authorisation to suspend concessions as a matter of last resort. In this particular case, most of the parties involved unilaterally removed the trade affecting measures and conciliation was agreed upon[260].

[257]Supra – Uruguayan Recourse to Art XXIII.
[258]Supra – Uruguayan Recourse to Art XXIII p. 3.
[259] In WTO language, this could be read as covered by any of the WTO agreements.
[260]CONCILIATION Uruguayan Recourse to XXIII. Report of the Panel (July 1963) adopted on 3 March 1965(L/2074 - 13S/35).

In this case, the jurisprudence was settled with regard to the violation complaints. It was presumed by the panel that a breach of the GATT agreement (nowadays it can be read that the imposition of any WTO inconsistent measure) *causes* nullification or impairment, in the words of the panel:

(…) In cases where there is a clear infringement of the provisions of the General Agreement, or in other words, where measures are applied in conflict with the provisions of GATT and are not permitted under the terms of the relevant protocol under which the GATT is applied by the Contracting Party, the action would prima facie, constitute a case of nullification or impairment and would ipso facto require consideration of whether the circumstances are serious enough to justify the authorisation of suspension of concessions or obligations[261]*.*

This jurisprudence was adopted and the rebuttable presumption of nullification and impairment was codified and GATT rules by the Contracting Parties during the Tokyo Round as follows:

In cases where there is an infringement of obligations assumed under the General Agreement, the action is considered prima facie to constitute a case of nullification and impairment[262]*.*

Japan – Trade in Semi-Conductors 1988[263]

Measure Challenged: Japan and the United States concluded an agreement to facilitate trade of semi-conductors.

The arrangement was linked ***to the suspension of anti-dumping procedures initiated in the United States against imports of certain categories of Japanese semi-conductors*** *and to the suspension of the Section 301 proceedings on access to the Japanese market for US-made semi-conductors.*

[261] Uruguayan Recourse to Article XXIII para. 15.
[262] Annex to the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, adopted on 28 November 1979. –Tokyo Codes. Para. 5.
[263] Japan- Trade in Semi-Conductors. Report of the Panel adopted on 4 May 1988 (L/6309 - 35S/116).

The EEC claimed that the benefits accruing to it from the General Agreement were being nullified or impaired by the very nature of certain provisions of the arrangement between Japan and the United States which constituted an unacceptable interference with the trade in, and production of, semi-conductors of contracting parties not parties to the arrangement. ***Some of the measures so introduced were upsetting international competitive relationships unilaterally and artificially***[264]*. [Emphasis Added]*

Relevant Findings: Despite finding that several of the measures implemented by the Japanese government in the framework of the Agreement concluded with the United States were GATT inconsistent, the panel did not find that those which were GATT consistent "serious enough" as to allow them to authorise measures contemplated in Article XXIII: 2

Application of Art XXIII: The panel reiterates the jurisprudential pattern set in Uruguayan Recourse to Article XXIII by not applying Article XXIII arguing that there is not a detailed justification:

A contracting party claiming that benefits accruing to it under the General Agreement had been nullified or impaired as a result of a measure consistent with the General Agreement would be called upon to provide a detailed justification. The Panel considered that the evidence submitted by the EEC relating to access to the Japanese market did not permit it to identify any measure by the Japanese Government that put EEC exporters of semi-conductors at a competitive disadvantage vis-à-vis those of the United States and that might therefore nullify or impair benefits accruing to the EEC under the General Agreement and impede the attainment of objectives of the General Agreement within the meaning of Article XXIII[265]*.*

[264]Supra- Japan Trade in Semi-Conductors 30 p. 8.
[265]Supra- Japan Trade in Semi-Conductors 131 p. 34.

Type of Measure in dispute: Measures covered by the GATT agreement: export related measures.

a. Measures related to exports to third country markets were found to be inconsistent with Article XI: 1

b. Measures related to Japanese Market Access: GATT consistent.

Analysis: In this case there is a broad scope of the term measure[266], as the agreement reached between the United States and Japan and its whole implementation were considered as measures subject to be considered by the panel. In terms of Article XXIII the jurisprudence is reiterated; even though the Uruguayan recourse to Article XXIII case is not cited, the principle of a detailed justification is applied without a very clear definition of what a "detailed justification" is and what the elements are that make a justification detailed enough to trigger the application of Article XXIII.

EEC –Oilseeds[267]

Measure Challenged: *Community's payments and subsidies paid to processors and producers of oilseeds and related animal-feed proteins.*

Relevant Findings: *Compliance with the finding on Article III thus could, but would not necessarily, eliminate the basis of the United States complaint that the benefits accruing to the community producers of oilseeds impair the community's tariff concessions for oilseeds.*

Application of Article XXIII: *The idea underlying [the provisions of article XXIII:1(b)] is that the improved competitive opportunities that can legitimately be expected from a tariff concession can be frustrated not only by measures proscribed by the General Agreement but also by measures consistent with that Agreement. In order to*

[266]Supra- KIM, 79.

[267] European Economic Community - Payments and Subsidies paid to processors and producers of oilseeds and related animal-feed proteins Report of the Panel adopted on 25 January 1990(L/6627 - 37S/86).

encourage Contracting Parties to make tariff concessions they must therefore be given a right of redress when a reciprocal concession is impaired by another contracting party as a result of the application of any measure, whether or not it conflicts with the General Agreement.

Type of Measure in dispute: Measure covered in the GATT agreement that was found to be inconsistent with Article III.

Analysis: The EEC-Oilseeds case is a landmark in the interpretation of Article XXIII because it laid the foundation for the distinction between violation and Non-Violation cases and explains the content of Article XXIII. Furthermore, it expresses the purpose of the differentiation between violation and Non-Violation complaints. It also clarifies the objective of the Non-Violation complaints as a tool to protect the agreed tariff concessions from other measures – regardless of whether they are tariff or non-tariff measures – that have as an effect the nullification of the negotiated tariff prerogative.

US- Sugar Waiver 1990[268]

Measure Challenged: The EEC lodged a complaint against the United States to attack their sugar quotas and the implementation of the waiver for import restrictions on sugar and sugar products.

Relevant Findings: *The Panel therefore concluded that the fact that the restrictions found to be inconsistent with Article XI: 1 conform to the terms of the Waiver does not prevent the EEC from bringing a complaint under Article XXIII: 1(b) of the General Agreement but it is up to the EEC to demonstrate that a nullification or*

[268]United States- Restrictions on the Importation of sugar and sugar- containing products applied under the 1955 Waiver and Under the Headnote to the Schedule of Tariff Concessions. Report of the Panel adopted on 7 November 1990 (L/6631 - 37S/228).

impairment of benefits accruing to it under the General Agreement has resulted from these restrictions[269]*.*

The Panel found that the EEC failed to provide the needed detailed justification for its claim that the nullification or impairment suffered by the US actions entitled it to compensation.

Application of Art XXIII: a) A measure that is inconsistent with GATT, regardless of it being covered by a waiver is subject to application of Article XXIII: 2
b) Reiteration of the doctrine of the "Detailed Justification". The benefits impaired or nullified must be expressed in an exhaustive manner: *A complaint under Article XXIII: 1(b) must therefore be supported by a justification that goes beyond a mere characterisation of the measure at issue as inconsistent with the General Agreement*[270]*.*

Type of measure in dispute: The measures were implemented within a waiver provision, so despite being GATT inconsistent, they were legitimate.

Analysis: Apart from the evident reinforcement of the already established doctrine of the "Detailed Justification", this case also offers some light with regards to the acceptable origin of a Non-Violation complaint when it permits the EEC to lodge a Non Violation Nullification and Impairment complaint despite the existence of a waiver, giving a literal interpretation to the provision in Article XXIII: 1; in other words, this jurisprudence allows a challenge under Article XXIII despite the fact that the measures are found to be in conformity with other provisions of the agreement. Under the new WTO configuration, this must be interpreted extensively so that it can be understood to be applicable to all WTO agreements.

[269]Supra US- Sugar Waiver 5.17 p. 28.
[270]Supra US- Sugar Waiver 5.21 p. 28.

Japan- Film 1998[271]

Measure Challenged: *Actions by the Japanese Government affecting the distribution, offering for sale, and internal sale of imported consumer photographic film and paper, in particular, (i) distribution measures; (ii) restrictions on large retail stores; and (iii) promotion measures[272].*

Relevant Findings: *The Panel found that the United States failed to demonstrate that the measures at issue nullified or impaired benefits accruing to the United States within the meaning of Article XXIII: 1(b).*

Application of Art XXIII: Article XXIII was not applied due to the finding mentioned before. However, the panel reiterated the requirements for application of Art XXIII *(…) the Panel considered that a complaining party must demonstrate three elements under Article XXIII: 1(b): (i) application of a measure by a WTO Member; (ii) a benefit accruing under the relevant agreement: and (iii) nullification or impairment of the benefit as the result of the application of the measure.*

Type of measure in dispute: Measures outside the scope of the WTO agreements that were found to be compatible with them.

Analysis: The first case of the WTO era in which Non-Violation complaints were meaningfully considered, was the Kodak-Fuji dispute between the United States and Japan[273], and in which the United States failed to meet the requirements set in Oilseeds and Sardines. The decision however is not a clear landmark for the interpretation of Article XXIII and the concept of Non-Violation compensation rights[274]. Having occurred recently after the Uruguay Round, the facts of this case

[271]Panel Report, Japan — Measures Affecting Consumer Photographic Film and Paper, WT/DS44/R, adopted 22 April 1998, DSR 1998: IV, 1179.
[272]Supra Japan-Film.
[273] Japan- Measures affecting Consumer Photographic Film and paper WT/DS44/R.
[274]Supra. The final decision is based on failure provide evidence, a procedural requirement. Substantial clarification of the problematic aspect of the provision and its relationship with the rest of the GATT was not sufficiently addressed.

inured themselves to a harmonising interpretation, yet the panel and Appellate Body failed to produce a thorough analysis of the applicability of Article XXIII, the binding effects of pre-Uruguay Round cases, i.e. they failed to establish the scope of application of Article XXIII on national behaviour not contemplated in the GATT regulations or multilateral agreements of sorts, but in local statutes affecting international trade relationships.

It can be perceived by the position adopted in the Kodak-Fuji case that the panels and the Appellate Body are very respectful of the countries' will to regulate certain aspects of their trade under the WTO and reserve some others for themselves. In fact in this particular case, the message clearly produced was that the WTO is not a tool for extraterritorial application of national laws referring to aspects that have not been subject to regulation within the multilateral forum (competition). It is evident then, that the only possibility of enabling the Non-Violation nullification and impairment claim to be successful is when it is associated with measures taken as the result of legitimately implementing a provision included in GATT (and related agreements) that produces a collateral and inevitable damage to another contracting party.

In other words, the provision is not so ample as to allow member countries to seek compensation for loss of benefits emanating from their own domestic laws because that would involve other members' portion of sovereignty that they did not agree to compromise by joining the WTO. There is still a grey zone of ambiguity in respect of non WTO international law binding on the contracting parties in conflict; unfortunately the facts of the case did not fit in this hypothesis, thus that analysis was not triggered.

With respect to the area which was addressed by the panels the Kodak–Fuji case concludes by reinforcing three of the requirements alluded to in previous jurisprudence of Non Violation complaints. They are:

(1) The application of a measure by a WTO member;
(2) A benefit accruing under the relevant agreement; and

(3) Nullification of the benefit as the result of the application of the measure[275].

From the causation point of view, the Kodak-Fuji case explains the application of Article XIII in the event of Non-Violation complaints by saying that Article XXIII can only be applied if the causation between the relevant measures and the nullified or impaired benefits is confirmed – as opposed to the jurisprudence on violation complaints which contains an irrefutable presumption of nullification and impairment with the mere confirmation of the non-compliant measure. In the words of the panel:

[The complainant] must show a clear correlation between the measures and the adverse effect on the relevant competitive relationship[276].

Also, for the first time, the panel established a standard of causation with four referents[277]:

a. The degree of causation that must be evidenced or the standard of proof: the panel determined almost a negative proof standard in the case of Non-Violation complaints by giving the complainant of a Non-Violation the burden of proving that a given measure affected its benefits to a considerable extent which should be more than *de minimis.* On the one hand, this seems reasonable given the fact that the measure at stake is WTO compliant. On the other hand, as it was mentioned before, the benefits from the agreement that can be nullified or impaired such as a competitive relationship in a given area of trade are difficult to measure and to prove in the conventional manner.

   Hence, this requirement is too onerous for the complainants in the future because they will practically never be able to succeed with their complaints due

[275] Japan - Film, para 10.41.
[276] Supra Japan Film para 10.83.
[277] Supra Japan Film para. 10.83: First, the question of the degree of causation that must be shown - **"but for" or less**. Second, the **relevance of the origin-neutral nature of a measure** to causation of nullification or impairment. Third, **the relevance of intent to causality**. And fourth, **the extent to which measures may be considered collectively in an analysis of causation**. [Emphasis added].

to the impossibility to comply with this evidence requirement. This means that only measurable benefits such as tariff concessions can be considered under this understanding of the standards of proof for Non-Violation complaints; in fact this has been applied in previous cases where the failure to meet this standard of proof has been decisive for the failure of the complaint[278].

b. The relevance of ″origin neutral″ measures: The panel did not discard that it is possible to have a nullification and impairment complaint from a measure that could be formally compliant, as a *de facto* discrimination, as it has been understood in connection with the principle of MFN. Nonetheless, it imposed the burden of proof of a detailed description of the impact of trade flows and a link of causation with the measures to the complainant[279].

c. The relevance of intent: despite the fact that the complainant must prove the effect on trade flows and the link of causation with the measure applied by the government of the trade partner, the panels may consider the intention to restrict imports – which must be evident or at least beyond reasonable doubt – as one of the factors to establish the existence of a causal link between the measure and the nullification or impairment.

d. The extent to which collective effect of the measures may be considered: The panel did not discard the possibility of this consideration but broached the possibility with extreme caution as it could be subject to potential abuse.

One of the most important jurisprudential changes and a remarkable separation from previous decisions is made by the Kodak-Fuji panel when in its reasoning it implicitly

[278]Supra Japan- Semi-Conductors (1988) and Supra US- Sugar Waiver (1990).

[279] Supra Japan Film para. 10.85: 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. [Emphasis added].

removed the requirement of a *detailed justification* of the evidentiary standards in acceptance of the arguments brought by the United States[280]. This was heavily criticised as a misunderstanding from the panel. It was argued by the academics that the *detailed justification* is not supposed to be a procedural standard, but rather a material or substantial requirement which has to be taken into account in order to ascertain the existence of a valid Non-Violation claim[281].

Korea –Procurement 2000[282]

Measure Challenged: *the assignment to Korea Airport Corporation (KAA) of the responsibility for Inchon International Airport (IIA) procurement.*

Relevant findings: *(…) even if the principles of a traditional Non-Violation case were applicable in this situation, the United States has failed to carry its burden of proof to establish that it had reasonable expectations that a benefit had accrued.*

Application of Article XXIII: *Unlike traditional Non-Violation claims there is no actual schedule commitment in this case. If there was a commitment, the case would probably be a violation case because the measures cited by the United States as the basis for the Non-Violation nullification case (e.g., inadequate bid deadlines and*

[280] Supra Japan- Film para. 9.5 (…) Second, the United States argues that the interim report construes the "detailed justification" requirement as imposing a heightened evidentiary standard in Non-Violation cases, while for the United States it is rather a pleading requirement, i.e., a screen to dismiss inadequately articulated Non-Violation claims from a panel's consideration. The United States emphasizes that the fact that Article XXIII: 1(b) provides for an exceptional remedy does not justify requiring a quantum of proof that is higher than the one applied under other GATT articles. We recall that in para. 10.84 we stated that "**at this stage of the proceeding, the issue is whether such a measure has caused nullification or impairment, i.e., whether it has made more than a de minimis contribution to nullification or impairment." In our view, we did not apply the "detailed justification" requirement as a heightened evidentiary standard.**(…) [Emphasis Added]

[281] Supra DURLING and LESTER (1998) p. 268: The DSU provides the procedural requirements for a claim in Articles 4.4 and 6.2. Art 4.4 provides that requests for consultations must be submitted in writing and include an ″identification of the measures at issue and indication of the legal basis of the complaint″. Similarly, Art 6.2 directs complaining parties, when submitting requests for the establishment of a panel to ″identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly″. These requirements are the initial ″pleading″ requirements. They ensure that claims are made properly and sufficiently and that parties are given adequate notice. By contrast, **the ″detailed justification″ standard has nothing to do with notice; it sets the evidentiary standard that a claim must meet**. [emphasis added].

[282] Korea – Measures Affecting Government Procurement WT/DS163/R1 May 2000(00-1679).

insufficient challenge procedures) would, if they were substantiated, result in a violation. A traditional Non-Violation case could, therefore, not be sustained in this situation.

Type of measure in dispute: Measures not covered under Appendix 1 of the Government Procurement Agreement (hereinafter GPA), and not covered by the general obligations of Korea under the GPA.

Analysis: The Korea procurement case clarifies a few of the questions that the Kodak-Fuji case merely suggested. The Korea-Procurement case is emphatic in restraining to concede relief under the provision with "legitimate expectations", and reinforces the requirement of a firm concession or a representation of it. It places the burden of proof of the misrepresentation on the applicant, meaning that if there is an error that induces the claimant to believe that there is agreement upon a specific concession of a benefit, this error has to be proven beyond reasonable doubt by the claimant in order to trigger the provision of Article XXIII: 2.

This narrows the scope of the meaning of Non-Violation, reducing it to a legitimate use of a concession that has caused collateral damage to the claimant. The panel takes into account that by the time the dispute arises the NVNI provision was still in the negotiation stage of the Government Procurement Agreement, and thus it could not be extended to it as agreement on whether it was going to be included or excluded was still uncertain.

EC Asbestos 2001[283]

Measure Challenged: *Canada claimed that Decree No. 96-1133 concerning asbestos and products containing asbestos is inconsistent with a number of obligations of the European Communities under Article 2 of the Agreement on Technical Barriers to Trade (the "TBT Agreement"), Articles III and XI of the General*

[283]Report of the Appellate Body. European Communities- Measures Affecting Asbestos and Asbestos-Containing Products WT/DS135/AB/R.

Agreement on Tariffs and Trade 1994 (the "GATT 1994"), and that, under Article XXIII:1(b) of the GATT 1994, the Decree nullified or impaired advantages accruing to Canada directly or indirectly under the Marrakesh Agreement establishing the World Trade Organisation (the "WTO Agreement"), or impeded the attainment of an objective of that Agreement.

Relevant Findings: The panel found that: *Canada failed to provide a detailed justification of why it could legitimately have expected that France would not adopt measures restricting the use of any asbestos product*[284].

However, the Appellate Body found that: ***The measure may give rise to a cause of action under Article XXIII: 1(b) of the GATT 1994. [Emphasis added]***

Application of Article XXIII: The exceptions of Article XX are applicable despite the fact that a measure is found inconsistent with the Agreements.
Article XX was applied to the claim arising from Article XXIII (b) of the GATT 1994. This application was not appealed by Canada, and thus it was not considered by the Appellate Body.

Type of measure in dispute: The measure in dispute was contained in the TBT agreement and was found to be consistent with the WTO agreements through the use of the exceptions contained in Article XX GATT.

Analysis: In the appeal of this case the Appellate Body addresses for the first time the interpretation and applicability of Article XXIII in light of the WTO. In its considerations, the Appellate Body differentiates between the application of Article XXIII: 1 (a), and Article XXIII: 1 (b), giving complete support to the interpretation regarding violation and Non-Violation complaints explained in the EEC-Oilseeds case where the foundations of the concept of Non-Violation claims were laid as was

[284]Report of the Panel. European Communities- Measures Affecting Asbestos and Asbestos Containing Products WT/DS135/R 18 September 2000.

explained above. The Appellate Body found that the measure considered in the asbestos case could be the subject of a Non-Violation complaint. This opinion was contrary to the one expressed by the panel and opened the door for future consideration. However, the Appellate Body did not delve into the details of such a potential complaint as that was not one of the points specifically appealed by Canada.

Another relevant matter for the purposes of this investigation in which this case is illustrative about the applicability of Article XXIII is in the interaction of Article XXIII with Article XX. According to both the panel and the Appellate Body, the exceptions of Article XX are applicable to claims brought by virtue of Article XXIII not considering whether the complaint is a violation or a Non-Violation. In other words, nullification and impairment measures can be justified under the exception contained in Article XX, as are the measures that, proven inconsistent with the agreements, are shown to be justified under the exceptions of Article XX according to the Appellate Body.

2.5.3 Summary of the Requirements for Non-Violation complaints

The Non-Violation complaint has some requirements mentioned in the case law of adopted and un-adopted reports. These requirements are established in cases where the panels look to re-establish the original value of a given tariff concession that has been somehow distorted. They are called *supplementary mode cases*[285]. The requirements extracted from the cases, and the provisions contained in Article XXIII GATT and Articles 3.2, 19.2, 26 DSU, can be grouped in three:

i. The measure must not be reasonably anticipated[286].
ii. Abstract adverse change in competition[287]: distortion of a competitive relationship between two products in question.

[285] CHO, S. GATT Non-Violation Issues in the WTO Dispute Settlement Framework: Are They the Achilles' Heel of the WTO Dispute Settlement Process?"Harvard International Law Journal, Vol. 39, No. 2, 1998.
[286] Supra –Oilseeds.

iii. Detailed justification: proof of causal link[288] between the invoked measure and the nullified or impaired benefit: despite the affirmations made in the Kodak-Fuji case, and according to Articles 4.4 and 6.2 from the DSU, it is clear that the detailed justification is not a pleading or procedural requirement but a substantive requisite for the existence of Non-Violation complaints.

The jurisprudence before the establishment of the WTO fluctuated between **Restraint and Activism[289]**. In the restraint cases, it was inclined to narrow the scope of the provision and to declare it as a measure of last resort. This is the case in both adopted and unadopted reports such as *Australian subsidy on Ammonium Sulphate[290], EEC Canned Fruits[291], Oilseeds[292], Sardines[293] and Japan- Semi Conductors[294]*. This group of cases gave birth to the abovementioned requirements for the application of the Non Violation provision of Article XXIII.

In the activism phase of the panels, some of the reports applied Article XXIII and accepted the Non-Violation complaint without having a link between tariff concessions and legitimate expectations emerging from such concessions. This is the case of the reports in *Japan – Nullification and Impairment of Benefits[295].* Also, an attempt to expand the scope of the provision and legitimise expectations not arising from the tariff concessions was made in the *Citrus*[296]case. The reports produced

[287] Supra- Sardines.
[288] Supra Japan- Semi Conductors.
[289]Supra CHO, S.
[290]The Australian Subsidy on Ammonium Sulphate. Report adopted by the CONTRACTING PARTIES on 3 April 1950(GATT/CP.4/39)II/188.
[291] EEC- Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes. L/5778, C/W/46.
[292] EEC- Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins31 March 1992, BISD 39S/91.
[293]Treatment by Germany of Imports of Sardines Report adopted by the CONTRACTING PARTIES on 31 October 1952 G/26 - 1S/53.
[294]Supra Japan – Semi Conductors.
[295]Japan- Nullification and Impairment of Benefits and Impediment to the attainment of GATT Objectives, L5479, C/M/167.
[296]EEC- Tariff Treatment of Citrus Products from Certain Mediterranean Countries. Feb 7, 1985. L/5776, C/M/186.

following an activist logic advocated a broader protection of benefits expected as a result of reciprocal undertakings. However the attempts of activism from the panels before the WTO were not adopted and with the advent of the Uruguay Round the possibility of using that logic became not only remote, but unsustainable.

In other words, an activist approach to dispute resolution in terms of the Citrus and Japan - nullification and impairment cases would be impossible to apply in the current state of affairs of the WTO due to the stringent restrictions of the DSU regarding the powers of the panels and the Appellate Body[297] as they are strictly instructed by the DSU not to add or diminish the rights and obligations covered in the agreements and because the DSU also provides a qualification of the requirements drawn by the jurisprudence[298]. It is important to also note, that the solution for a successful Non Violation complaint does not necessarily end up in a withdrawal of the nullifying or impairing measure as this is not mandatory according to the DSU[299]. Furthermore, the recommendations of the panel and the Appellate Body are not

[297] Dispute Settlement Understanding Art 3.2, 19.2 and 26.

[298] Art. 26:1.DSU Non-Violation Complaints of the Type Described in Paragraph 1(b) of Article XXIII of GATT 1994.

Where the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable to a covered agreement, a panel or the Appellate Body may only make rulings and recommendations where a party to the dispute considers that any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the application by a Member of any measure, whether or not it conflicts with the provisions of that Agreement. Where and to the extent that such party considers and a panel or the Appellate Body determines that a case concerns a measure that does not conflict with the provisions of a covered agreement to which the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable, the procedures in this Understanding shall apply, subject to the following:

(a) 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;
(b) 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**;
(c) notwithstanding the provisions of Article 21, the arbitration provided for in paragraph 3 of Article 21, upon request of either party, **may include a determination of the level of benefits which have been nullified or impaired, and may also suggest ways and means of reaching a mutually satisfactory adjustment; such suggestions shall not be binding upon the parties to the dispute**;
(d) notwithstanding the provisions of paragraph 1 of Article 22, **compensation may be part of a mutually satisfactory adjustment as final settlement of the dispute**.

[299] Supra DSU Art. 26:1.

binding on the parties and as a unique case in the WTO provisions, there is place for compensation as part of the settlement agreement between the parties.

Despite the important definitions made in the different cases traversed in this investigation, the factual situations reviewed and reported by the panels and the Appellate Body were never situations concerning anti-dumping measures applied during the lifetime of the Anti-Dumping Agreement. Therefore, the jurisprudence did not address the problem of acting under GATT specific prerogatives (the Anti-Dumping Agreement) in a manner contrary to international non-binding standards of conduct (OECD) and to domestic laws (competition laws) that nullify or impair benefits legitimately expected by the membership to GATT itself (Objectives of GATT and WTO, general provisions of GATT). Numerous questions remain about the anti-dumping/competition conflict in international trade, and the substantial content of the Non-Violation provision itself.

2.6 Evolution and Current Structure

Initially the application of GATT was directly entrusted to the Member States to take the decisions when a dispute arose. In that model of dispute resolution, the procedure allowed for any contracting party to block the adoption of a decision related to Non -Violation complaints; hence there was not a real threat to the sovereignty of the contracting parties[300]. However, with the creation of the institutional support of the WTO, the procedure for dispute resolution is left ultimately in the hands of the Appellate Body. Technically the decisions have to be adopted by the DSB, and some disputes may end at the panel level when they are not appealed, yet the substantial deliberation and the creation of procedural reference and substantial jurisprudence remains in the hands of the Appellate Body. This is due to

[300]ROESSLER F. "Should Principles of Competition Policy be incorporated in WTO Law through Non-Violation Complaints?"2 Journal of International Economic Law 1999. pp. 413-419.

the procedural introduction of the concept of *reverse consensus* during the Uruguay Round[301].

To extend the scope of Non-Violation complaints would necessarily mean giving the Appellate Body the licence to grant an un-negotiated benefit[302]. This occurred due to the original circumstances of drafting, negotiation and approval of Article XXIII and the rapid evolution in the multilateral system in the past three decades[303].

The subjects not included in the negotiated agreements that are particularly sensitive to the interpretation of Article XXIII are Competition, Environment Protection and Investment. Each area is very different in its international system and therefore they deserve separate attention in order to find out whether the nullification and impairment, and especially the Non Violation complaints, can ever be applicable to any of these subjects.

[301] The idea of Reverse Consensus emerges as the solution of a challenge that was affecting decision making under GATT. The original requirement for consensus to adopt any decision turned decision making into a long, burdensome and slow procedure. Adoption of a Panel Report by Reverse Consensus means that *for a Report to become legally binding , it no longer has to be adopted by consensus (...) A panel report is adopted by "reverse consensus" unless there is a consensus* ***not*** *to adopt the report. It is clear that the latter situation is unlikely to occur. Under the new WTO dispute settlement system, the adoption of the Panel Reports is thus quasi-automatic.* VAN DEN BOSSCHE P. "From Afterthought to Centerpiece: The WTO Appellate Body and Its Rise to Prominence in the World Trading System" Maastricht Faculty of Law. Working Paper 2005/1. Maastricht. 2005. p. 6.

[302] Supra, ROESSLER F. 1999.

[303] ROESSLER F and GAPPAH P. "A Re- Appraisal of Non-Violation Complaints Under the WTO Dispute Settlement Procedures" Ch. 29 in MACRORY, APPLETON and PLUMMER (eds.) The World Trade Organisation: legal, economic and political analysis, Volume 1. Springer (2005) p. 1383.

III. THEORY OF COHERENT INTERPRETATION

3.1 General Theory of Coherent Interpretation

In a coherent system of norms the juridical order is described by non-contradictory statements[304]. In other words, in a coherent system of norms, the interpreter shall aim to understand all norms in harmony with the other norms in the system, making this understanding in such a way that all norms keep a substantial content in the form of permission, prohibition or prescription.

An antinomy occurs in the event that a rule contains a proposition that is incompatible with another equally valid rule and within the same sphere of hierarchy in a given legal system. This has been defined as the situation in which one norm permits a conduct and another norm in the same level of validity prohibits the same conduct, or when one prescribes and the other permits the contrary, or when one prescribes (obliges) and the other prohibits[305]. In law, antinomies occur because opposed values are rooted in the legal system. For example, freedom and security are opposing values, because to ensure security, one must restrict liberty and the guarantee of freedom generally acts in detriment of security[306].

To determine when two norms are incompatible, the interpreter must always take into account the type of norm to be interpreted. In order to achieve this it is imperative to determine the relationships between the normative qualifications (permission, prescription and prohibition). Norms are incompatible in the following three cases:

1. Prescription against prohibition –In this case the rules are in a relationship of contrariety.

[304]KELSEN H. "Pure Theory of Law. Translation by Max Knight. University of California Press. Berkeley and Los Angeles, 1978." pp. 214-215.
[305]BOBBIO N. "Teoriadell'ordenamientogiuridico". G Giappichelli- Editore. Turin. 1960. p. 188.
[306]GARCIA MURILLO JG. "Las Antinomias En El Derecho, El Por Qué De Su Origen Y El Cómo De Sus Posibles Soluciones". Revista Electrónica De Derecho Del Centro Universitario De La Ciénaga. Universidad de Guadalajara. Revista Número 05, Otoño, Septiembre 2007 –México, 2008.

2. Prescription against permission not to do the prescribed conduct – The rules are in a relationship of contradiction.

3. Prohibition against permission to do the prohibited conduct – In this case the rules are in a relationship of contradiction[307].

Rules can be contrary or contradictory and still be compatible if they belong to a legal system which has a system of coordination or subordination that indicates the prevalence or specific application of one norm above the other in a given context that needs to be contained within the propositions in the norms themselves. In other words, if the scope of application of one norm does not overlap with the scope of application of the other because of special, temporal, material or temporal differences, the norms can be contradictory but they are not incompatible. These are not antinomies as such, as the norms are totally compatible because they have exclusive applicability in a specific scope.

There are, however, partial incompatibilities which can be solved through different interpretation criteria, in which case the antinomy is not real, it is apparent[308]. The criteria to determine whether there are real antinomies or not are: the chronological criteria, the hierarchical criteria and the specialty criteria. In other words, in a juridical system, the rule that has been issued later prevails over the one issued earlier; the norm that has been issued by a superior instance prevails over the one issued by an inferior instance and the special norm prevails over the general norm[309].

3.1.1 Different Theories of Coherence

There have been several theories of coherence which give this concept a different value in the justification of the legal systems. The most prominent of them are Neil

[307] Supra GARCIA MURILLO p. 7.
[308] The term was coined by Norberto Bobbie. See Supra BOBBIO.
[309] Supra GARCIA MURILLO p. 7.

McCormick's theory of the normative coherence[310], Peczenik's model of interpretation[311] and Dworkin's theory of the law as integrity[312]. Each theory revisits and re-evaluates the criteria to determine the existence of antinomies between incompatible norms, and has a method for clarifying the actual concept of antinomy[313].

The pioneer in coherence studies was Neil MacCormick, who differentiated between narrative coherence and normative coherence: the latter being only relevant for the justification of legal conclusions over factual situations, MacCormick considered the coherence as an essential element of the law[314]. For MacCormick, coherence is a necessary and essential value of the legal justification. However he does not conceive coherence as a sufficient condition for legal justification. In this sense, the theory of MacCormick has been considered as weak because according to him, a decision can't be justified solely based on arguments of coherence. This theory understands that the coherence only allows identifying a group of justifiable decisions.

Dworkin adds another angle to the understanding of coherence. Dworkin affirms that a legal decision of whatever nature is justified if it is coherent with the principles informing the legal practice under the light of a political morality[315]. This theory is more comprehensive and it entails the existence of a political morality that has been generally identified and accepted. In fact, this theory compromises the concept of truth by connecting it with the concept of coherence.

Finally, Alexy and Peczenik have formulated a theory of legal argumentation that gives coherence a larger role in the justification of decisions and the construction of

[310] See MacCORMICK N. "Argumentation and Interpretation in Law."Ratio Iuris 6 (1993); Legal Reasoning and Legal Theory. Oxford: Clarendon Press, 1994; Rhetoric and the Rule of Law: A Theory of Legal Reasoning. Oxford: Oxford University Press, 2005.

[311]See PECZENIK A, "Coherence Truth and Rightness in the Law" in "Law, Interpretation, and Reality. Essays in Epistemology, Hermeneutics and Jurisprudence", edited by NERHOT. Dordrecht: Kluwer, 1990.

[312] See DWORKIN R. "A Matter of Principle". Cambridge: Harvard University Press, 1985.

[313]AMAYA A. "La coherencia en el Derecho" Universidad Nacional Autónoma de México available in SSRN http://ssrn.com/abstract=2049990 orhttp://dx.doi.org/10.2139/ssrn.2049990Mexico, 2012.

[314] Supra AMAYA.

[315] Supra AMAYA.

the law[316]. Alexy and Peczenik proposed criteria to grade the coherence of a theory[317]. They affirm that coherence is crafted along the process of a judicial decision though a pondering process. Legal justification is a balance between a group of relevant reasons including moral and legal reasons. According to this theory, the decisions reached will be not only justifiable, but completely justified.

For the purposes of the present analysis, a theory of coherence that justifies decisions when they are coherent, not only with other norms but with moral principles underpinning those norms shall be used. This means that the theory proposed by Dworkin will be applied with some of the aspects referred to by Alexy and Peczenik with regards to the pondering[318] process shall be deemed relevant for ascertaining a coherent understanding of Article XXIII of GATT and the Anti-Dumping Agreement from a normative point of view.

The reason why the theory proposed by Dworkin is privileged in this analysis is that for *"Dworkin, good interpretation is concerned with elaborating these abstract constitutional principles. At least in the context of the textual clauses that are of the most concern to Dworkin, the Constitution represents the abstract intentions of the Founders, and those abstract intentions are more fundamental than any concrete*

[316] ALEXY & PECZENIK. "The Concept of Coherence and its Significance for Discourse Rationality", Ratio Iuris 3. 1990. p. 132.

[317] Criteria for coherence proposed by ALEXY AND PECZENIK:

1. Number of supportive relations.
2. Length of supportive chains.
3. Strong Support between statements.
4. Connections between supportive chains.
5. Priority order between reasons.
6. Reciprocal justification statements.
7. Generality of concepts and arguments.
8. Conceptual cross connections.
9. Number of cases covered.
10. Diversity of fields of life covered.

For a deeper description of each of the contents of the criteria see Supra ALEXY &PECZENIC. p. 132-145.

[318] The criteria to attain coherence established by Alexy and Peczenik is useful and shall be considered as a guide to obtain an idea of which are the important aspects to be taken into account at the moment of reading and interpreting the provision object of this study. However, the criteria are not sufficient because they are focused solely in the quantitative aspect of the support structure of a theory and not in the qualitative aspects of the theory itself. For a full account of the critiques to the Concept of Coherence by Alexy and Peczenik see SILTALA R. "Law, Truth and Reason: A Treatise on Legal Argumentations". Law and Philosophy Library Series Vol. 97.Springer. 2011. pp. 55-59.

intentions that they may have had"[319]. In consequence, it is necessary to clarify the abstract constitutional principles in the WTO and in the Anti-Dumping Agreement in order to apply Dworkin's theory of interpretation correctly to the WTO agreements. This in turn will be a tool to utilise the fundamental principles in applicable and concrete norms that underpin the WTO as an institution, and those fundamental principles upon which the Anti-Dumping Agreement is constructed.

Such interpretation is instrumental for this analysis as only by unveiling the deeper meaning of the WTO rules and understanding that the principles have a pervasive effect on the content of the rules in which they occur, the true morality and sense of the WTO agreements can be verified and the need for coherence amongst the rules can be satisfied.

3.1.2 Applicability of Interpretation theories based in a constitutional structure to the WTO

The question that arises then is the applicability of Dworkin's theory to the WTO. Indeed, the theories of interpretation formulated by Dworkin, as well as the theories developed by Alexy and Peczenik are established on the basis of a national organisation, in the form of a constitutional state. The problem is that the WTO is not a state nor has it a defined constitution. The attempt to use the fundamental principles as a constitutional structure requires a strong theoretical justification.

There are already voices advocating for the idea of understanding the WTO as an institutional body governed by a constitutional structure. *Might we understand efforts to constitutionalize the WTO as a move to address these regime-specific concerns, as well as broader concerns about the discipline of international law? A constitutionalized WTO would possess the strength and vigour that other international norms may lack; a constitutionalized WTO would have the stability that*

[319]WHITTINGTON K. "Dworkin's "Originalism": The Role of Intentions in Constitutional Interpretation" The Review of Politics, Vol. 62, No. 2 (Spring, 2000), pp. 197-229. Cambridge University Press for the University of Notre Dame du lac on behalf of Review of Politics. p. 203.

other treaty norms lack; and a constitutionalized WTO would no longer be understood as a complex, messy negotiated bargain of diverse rules, principles and norms, but rather as a ***coherent, integrated structure***[320]***.*** [Emphasis added]

To speak about fundamental principles underpinning the WTO necessarily implies the existence of the constitutional aspect of the WTO as an international law institution and as a set of international law agreements. The analysis to follow can only be undertaken under the premise that the WTO is in fact a constitutional structure and that its institutionalism is subject to be analysed with the ideas formulated by Dworkin, which are directed primarily to the open-ended nature of constitutions.

It has been heavily debated whether the national constitutional concept can be transmissible to the fundamental principles of the WTO, not only to defend the WTO system on the predicate of principles, but also to make those principles permeate all the normative structure in a substantive way.

The constitutional features of the WTO are present in both its procedural and substantive dimensions. Procedurally, the WTO has introduced and enforced the rule of law which is applied within the organization and extends all the way to the domestic regimes of the Member States[321]. Other procedural constitutional principles already existing in the WTO are the duty of publication, neutral and just implementation of trade regulations, transparency in policy making and due process[322].

The substantive constitutional pillars of the WTO are the principles of non-discrimination which is materialized in the Most Favoured Nation and National Treatment provisions and their developments; and the principle of the use of *uniform*

[320] DUNOFF J. "The Politics of International Constitutions: The Curious Case of the World Trade Organization" in DUNOFF & TRACHTMAN (Eds) "Ruling the World? Constitutionalism, International Law and Global Governance" Cambridge University Press. 2009. p. 201.
[321] SCHMID C. "A Theoretical Reconstruction of WTO Constitutionalism and Its Implications for the Relationship with the EU" EUI Working Paper Law No. 2001/05. European University Institute. Florence. 2001. p. 7.
[322] Supra SCHMID. p. 7.

and proportionate policy instruments[323] which is materialized in the prohibition of quantitative restrictions and the implementation of tariffs to manage trade flows in the least intrusive manner possible[324].

There are four main objections to the idea that the fundamental principles of the WTO can be equated to a constitutional structure. A review of such objections and the arguments against them will be dissected to finally pursue an interpretation based on constitutionally originated doctrines, which should lead to a more coherent view of the WTO system of norms.

a. Inappropriateness: This argument is related to the manner in which constitutional methodologies and values are used in the normative hierarchy to resolve antinomies and other normative conflicts. The inappropriateness reason is raised by those who see the constitutional tools as a solution *historically tailored* to the specific problems of nation-states and their focused and unique relevance to those institutions. The argument is that constitutional techniques and principle are not "one size fits all" solutions for all kinds of normative systems and they may not be extended through interpretation to other structures – such as international law bodies – because the problems that the constitutionalism aims to solve are not relevant or appropriate for any other structure different to nation-states[325].

   The argument of inappropriateness can be refuted by stating that even though it is true that constitutional theories are crafted for a specific type of system which must have a specific sort of structure, international institutions experience the same kind of challenges, just on a different scale. Even more so, international organisations do have a very similar structure to nations even if they do not share the national model in a complete manner. Therefore, the techniques and reasoning used in constitutionalism applied to nations can be

[323] A term coined by PETERSMANN "Constitutional Functions and Problems of International Economic Law". Fribourg University Press. 1991. p. 230 cited in Supra SCHMID p. 9.
[324] Supra SCHMID. p. 10.
[325] WALKER N. "Taking Constitutionalism Beyond the State". POLITICAL STUDIES ASSOCIATION: 2008 VOL 56, 519–543. University of Edinburgh.2008 p. 521.

replicated in the international institutions keeping the proportionality of scope and limited concentration of political power.

b. Inconceivability: The inconceivability argument poses the question of the category in which international law institutions belong and it is somehow an extension of the inappropriateness argument in that it insists that constitutions and constitutional theories are specifically created for nations with the characteristics that only a nation, and a particular form of nation, can have (land, government, separation of powers).This argument indicates that the use of constitutional theories to attempt good governance practices in international institutions is not suitable because the concept of an autonomous sovereign group of people represented by their elected agents is absent and impossible to conceive in the current international law panorama[326].

   As this argument is practically an extension of the inappropriateness argument, it can be contradicted by liberating constitutionalism of the *epistemic understanding* of it which presupposes and refers to a particular form of state[327]. This separation can be done by recognising that the premises on which a constitutional state is rooted are not exclusive to national organisations and can exist in international organisations in different proportions maintaining the essential elements of autonomy, society and a given institutionalism. The strongest pro-constitutionalism argument for international organisations, however, is the empirical facts that show how international organisations are successfully managed with constitutional approaches even though the conceptual definitions have not been completely clarified. This has been of critical importance in key decisions in international organisations[328] that have taken place using the principles as a fundamental norm, thus giving them constitutional character.

[326]Supra WALKER p. 521.
[327]Supra WALKER p. 521.
[328] I.e. Tuna Dolphin/Shrimp Turtle cases in the WTO where the Appellate Body used the principle of proportionality and fixed the "constitutional limits" of the principles ruling the WTO.

c. Improbability: *"The argument of improbability refers to the way in which constitutionalism is implicated in existing relations of authority*"[329]. Constitutional theories imply a specific political organisation and a normative framework to manage it. Since each state has a portion of authority which remains private in the international organisations the agreements are amongst peers or between sovereigns. In other words, international institutions are governed by arrangements in which it is not probable to bind all members to an all-encompassing normative framework of compulsory compliance and supreme hierarchy, simply because states keep their sovereign powers and self-determination while participating in international agreements.

This argument then is reliant on a fallacy which is that constitutionalism can only exist in a national state[330], which as explained previously, this is not true. The fallacy presupposes one true statement which is that it is unlikely that international organisations bind their members in the same form and organisation as a national state; the argument is then continued on a false premise which is that constitutional theories are only applicable to organised nation states.

The argument of improbability contains an error of concept in radicalising the application of constitutional theories to strict and clearly differentiated organisational structures, ignoring the existence of fundamental principles and other structures in which constitutionalism can conceptually and practically fit[331]. Therefore, due to such fallacy, improbability is not a valid argument to reject the application of constitutional theories to international law organisations which

[329]Supra WALKER p. 521.

[330] MÜLLER JM. "Three Constitutionalist Responses to Globalization", in: MACEDO and TULLIS (Eds.), The Limits of Constitutional Democracy (Princeton: Princeton UP, forthcoming). p. 24. available at http://www.princeton.edu/~jmueller/MurphyFS-Constitutionalism-JWMueller

[331]COTTIER & HERTIG. "The Prospects of 21st Century Constitutionalism". Max Planck Yearbook of United Nations Law No. 7. 2003. pp. 327-328. Available at http://www.mpil.de/files/pdf3/mpunyb_cottier_hertig_7.pdf

have the basic elements of an organisation – a normative system with a constitution as a fundamental norm.

d. Illegitimacy: "*The argument of illegitimacy, finally, concerns the manner in which constitutionalism is frequently invoked as an ideological claim, as a way of adding or detracting symbolic value from an actual or projected state of affairs on the basis of its supposedly 'constitutional' or 'unconstitutional' qualities.*

The case here is a straightforward consequential one. If constitutionalism, on one or more of the three grounds considered above, can only properly be conceived as a matter of and for the state, then any attempt to assume the mantle of constitutionalism beyond the state is by necessary inference illegitimate. If a claim of constitutional status is made on behalf of an entity or a set of regulatory practices in circumstances where the tools are inappropriate to the problem, or where the requisite underlying belief system is not in place, or where the necessary de facto authority is absent, then that claim becomes an empty or misleading one"[332]*.*

The argument of illegitimacy of international law institutions and regulatory bodies is self-explanatory. It is clear that some international law organisations lack de facto authority to implement the regulations that they issue. However, the WTO is a sophisticated institution with common views, internal fundamental principles, norms drafted in the form of rule-sanction, and an authority to apply them as well as a hierarchy in the dispute resolution system. Indeed, the WTO mimics the characteristics of a national state almost identically with a legislative body which deliberates and creates binding norms, an executive body which enforces the administrative matters and a judiciary which is organised and bound by the rule of law. The fact that the majority of the decisions taken by the

[332]Supra WALKER. p. 522.

panels and Appellate Body are implemented voluntarily by the members is a compelling argument about the legitimacy of the organisation.

It is pertinent at this point to proceed with a coherent interpretation of the Anti-Dumping Agreement in relation to Article XXIII. It is important to take into account that some of the tools to be used in such interpretation are purely constitutional including the core theory (As described by the Theory of Dworkin) that informs the methodology and ideology of the analysis.

This affirmation does not necessarily mean that the debate of whether constitutional principles are applicable to international institutions is a closed one. It just indicates that the current arguments against constitutionalism in international organisations are not persuasive enough to override the arguments and facts which advocate a constitutional understanding of some international institutions, provided of course, that the organisations have the abovementioned indispensable elements which characterise a constitutional structure.

3.2 Coherent interpretation of the Anti-Dumping Agreement in relation to Article XXIII

Indeed, it is then possible to accept that the fundamental principles of the WTO may be used in a constitutional manner to correctly interpret the WTO agreements under the predicate that they constitute the foundational grounds which are comprehensive of the full structure. That structure comprises the 20 full agreements, 7 understandings, several decisions, and all tariff and service schedules of the Member States[333].

As was mentioned previously, it is only through an approach that considers Dworkin's theory that a coherent interpretation of the Anti-Dumping Agreement in

[333]COTTIER T. "Current State and Prospects of Multilateralism". Paper presented at the First Annual International Law Update at the Mandela Institute. School of Law. University of the Witwatersrand. Johannesburg, 1st of November 2012. p. 3.

relation to the rest of the provisions of the WTO agreements can be achieved. Therefore, and in order to comply with his proposed method, the first step is to gather the "constitutional" principles of the WTO to study the norms both in form and substance. The second step is to observe them in their application throughout an interpretation that shall include a formal assessment on the structure desired by the negotiators as well as a substantial assessment of the principle or principles motivating it. The final step is to analyse how that principle or principles should animate a specific interpretation.

3.2.1 Fundamental Principles of the WTO and their interaction with the foundational principles of the Anti-Dumping Agreement

According to the doctrine, the main 5 principles of GATT which passed to the WTO agreements are: non-discrimination[334], reciprocity[335], enforceable commitments[336], transparency[337], and safety valves[338]. They should permeate all WTO law and practice as they are the pillars where all the institutional apparatus and the justification for the complex system of rules lie. Hence the need to explain their content in order to make it available for application in the specific rules to be studied within this investigation:

a. Non-Discrimination: as it was previously mentioned, the principle of non-discrimination has a twofold composition: firstly, the Most-Favoured Nation (MFN) rule, and secondly, the National Treatment principle. Both dimensions of the non-discrimination principle are expressed throughout all the WTO agreements in one form or another. However their scope is determined by

[334]HOEKMAN B. "The WTO, Functions and Basic Principles" in HOEKMAN, MATOO and ENGLISH (Eds.) "Development, Trade and the WTO, A Handbook". World Bank Press. Washington 2001.p. 41.
[335]Supra HOEKMAN.2001 p. 41.
[336]Supra HOEKMAN.2001 p. 41.
[337]Supra HOEKMAN.2001 p. 41.
[338]Supra HOEKMAN.2001 p. 41.

each agreement depending on the relevance of the principle to the specific situation and the negotiated nuances of each set of rules[339].

b. National Treatment: does not apply to trade in services as it was specifically excluded from GATS. The principle of national treatment entails that external goods which have met the entry requirements of a country are treated *as if* they were domestic i.e. they must not have differentiated taxes or burdens just because they are foreign (Article III, GATT). This prevents the importer country from applying specific regulations to importer goods that become equivalent to the reduction of the tariff, rendering such reduction null.

c. Most Favoured Nation: Unlike the national treatment principle, the MFN principle does not have any conditions to it. However, it is acceptable to make special concessions to certain trade partners for reasons of regional integration, trade areas or customs unions. Additionally, least developed countries have an altogether different treatment and developing countries have the possibility of obtaining better treatment depending on the circumstance of trade. This keeps the members from trying to increase trade barriers or to give preferences to most lucrative trade partners, excluding the other countries. Once a negotiation has been accepted it benefits all members equally[340].

d. Reciprocity: The fourth principle, which is a pillar of the WTO negotiations, is the principle of reciprocity. During the negotiations, each member receives *something in exchange* for their liberalisation from a trade partner. With this method, all countries receive extended benefits at a limited cost, as all the benefits are extensive and the concessions are restrictive, and there is a greater liberalisation in general.

e. Binding and Enforceable Commitments: A key pillar of the WTO is the principle that entails the binding effect of the commitments. This is contained

[339]Supra HOEKMAN p. 42.
[340] Supra HOEKMAN p. 42.

in the schedules of concessions as well as in the Dispute Settlement Understanding, which establishes that the commitments contained in the agreements are binding and have a clear and well structured dispute settlement mechanism.

"Once tariff commitments are bound, it is important that there be no resort to other, nontariff measures that have the effect of nullifying or impairing the value of the tariff concession"[341]. This appears in a number of articles and agreements amongst which the most prominent are Article XI GATT (on quantitative restrictions), the Agreement on Subsidies and Countervailing Measures, and the Anti-Dumping Agreement itself. Most of the protective mechanisms against nullification or impairment of the benefits emerging from the different agreements are contained in specific provisions within the agreements addressing remedies for breaches affecting particular concessions, rights or benefits.

Additionally, the clause of nullification and impairment included in Article XXIII covers the benefits and rights that are affected for violations not contained in other provisions and even for actions which formally are not violations, but that materially nullify or impair the benefits (vested rights or legitimate expectations) of the affected country. Therefore,*"(…)if a country perceives that actions taken by another government have the effect of nullifying or impairing negotiated market access commitments or the disciplines of the WTO, it may bring this situation to the attention of the government involved and ask that the policy be changed. If satisfaction is not obtained, the complaining country may invoke WTO dispute settlement procedures, which involve the establishment of panels of impartial experts charged with determining whether a contested measure violates the WTO. Because the WTO is an intergovernmental agreement, private parties do not have legal standing before the WTO's dispute settlement body; only*

[341] Supra HOEKMAN. p. 43.

governments have the right to bring cases. The existence of dispute settlement procedures precludes the use of unilateral retaliation"[342].

f. Transparency: The principle of transparency is central to maintaining trust amongst members and the effectiveness of the agreements. Transparency as a principle is exercised in the disclosure of information during the negotiation phases as well as during the execution phases of the WTO agreements. It is contemplated in Article X of GATT, and it includes not only disclosing the correct and complete information during negotiations, but the update of any trade policy change at the WTO secretariat. The transparency principle is not exclusively applicable for internal communications, but must be understood to extend to internal actions which may affect trade partners such as administrative investigations, judicial procedures and other internal administrative actions which may indirectly affect the benefits or rights of other members. This understanding aims to prevent domestic authorities circumventing other members' rights and benefits procedurally, and to increase the legal certainty both in the multilateral and in the domestic environments[343].

g. Exceptions (or Safety Valves): Another principle that underpins the WTO agreements is the existence of exceptions in specific situations in which the countries cannot be held accountable for the commitments made in the WTO due to circumstances that affect their system in a significant way. In some cases governments are allowed to restrict trade, either to prevent unfairness against their own manufacturers and producers (to avoid unfair competition), or to pursue urgent non-economic objectives (such as public health, national security, affirmative action with the aim to empower a previously disadvantaged community), or for purely economic reasons (to improve the balance of payments or to overcome an economic crisis)[344].

[342]Supra HOEKMAN p. 44.
[343]Supra HOEKMAN p. 45.
[344]Supra HOEKMAN 46.

h. Single Undertaking: Perhaps the most important principle in relation to the coherence of the WTO agreements, the single undertaking principle, is difficult to define because of its complex historical development[345]. However, at the WTO it has been understood that *"virtually every item of the negotiation is part of a whole and indivisible package and cannot be agreed separately"*[346]. This applies not only to the negotiation, but also has an effect later, during the implementation and interpretation of the agreed package.

Since everything is agreed as a whole and in the negotiations it is understood that every previous regulation is taken as is, the single undertaking principle materially means that each country accepts all of the existing rules, plus the ones agreed on a specific round where it participates, and must apply them all in a coherent way.

In other words, existing members build over the foundations of the rules already in place, and new members enter under the condition that they bind themselves to the rules in place for other members in order to level the playing field for all members. The effect of the single undertaking principle must not be underestimated, as this principle is necessary to providing a coherent interpretation of all provisions in force within the WTO agreements, and allows certain interpretation privileges, over others, due to the necessity that it creates to give validity and efficacy to all the rules pre-existing any new agreement.

These are the principles that shall be used to apply a Dworkinian analysis to the interaction of two specific rules: the Anti-Dumping Agreement and Article XXIII of GATT. This is intended to provide a harmonious interpretation of both provisions and

[345] WOLFE R. "Arguing and bargaining in the WTO: Does the Single Undertaking make a difference?"School of Policy Studies. Queen's University. (Prepared for the Canadian Political Science Association Held 4-6 June 2008, available at http://www.cpsa-acsp.ca/papers-2008/Wolfe.pdf).

[346]WTO Doha Development Agenda. Available at http://www.wto.org/english/tratop_e/dda_e/work_organi_e.htm

will lead to an idea of their correct interpretation in procedural and substantial aspects which shall be analysed in the chapters below.

3.2.2 Interaction of anti-dumping rules with Article XXIII for a coherent interpretation under the light of the principles of the WTO.

Using the theory of coherent interpretation of the norms presented above, and the underpinning principles that must inform the interpretation of all WTO rules, the rules contained in the Anti-Dumping Agreement shall be classified and a hypothetic interaction with the rule contained in Article XXIII shall be made available in order to continue with the examination of the current anti-dumping practices and analyse them in light of Article XXIII.

Firstly it is necessary to divide the organic norms in the Anti-Dumping Agreement from the dogmatic ones, that is, the norms containing principles and not directly applicable, from the ones containing express and directly applicable prescriptions, prohibitions or permissions. The former ones have a different interpretation process as they have to be connected to the set of principles ruling GATT and the rest of the WTO agreements, whilst the latter can have direct interaction with Article XXIII.

It is uncontested amongst the doctrine of legal interpretation (both in the ambit of domestic public and private law, as well as in the field of international law) that the rules which do not provide a prescriptive or prohibitive proposition contain in themselves permission for the recipient. In the case of the Anti-Dumping Agreement this is applicable too. The recipient of most of the rules in the Anti-Dumping Agreement is the domestic authority of a given member state who shall apply the norms.

The interpretation flaw that has been consistently occurring in the interpretation of the Anti-Dumping Agreement is the widespread acknowledgement that whenever there is a permission in the agreement, explicit or implied, the domestic authority has complete freedom to regulate and act as they deem fit. This is mistaken because it

does not give application to the principle of single undertaking, which is a constitutional principle of the WTO, and thus it permeates all the rules, allowing for coherence of the system.

An interpretation that took into account the single undertaking principle and other constitutional principles (such as the principle of transparency and the binding effect of commitments) of both the WTO and the Anti-Dumping Agreement would certainly follow a Dworkinian approach by seeing how these principles thread into the rules. This would not only produce a different outcome from the domestic authorities in their own interpretation, but also would allow the members to see the true meaning and limits of the discretion awarded to local authorities under WTO law.

In the specific case of the Anti-Dumping Agreement and its relation to Article XXIII there is a patent case of the idea expressed above. The norms contained in the Anti-Dumping Agreement have different formal structures depending on their purpose, but in all areas where there is neither a prohibition nor a prescription, the proposition must be read in harmony with the principles of single undertaking, national treatment and most-favoured nation, amongst all the other constitutional principles already mentioned.

Specifically, this means that in all the permissions contained in the text and annexes of the Anti-Dumping Agreement there is an inner prescription to conduct all the discretionary acts (regulatory or executive) under the framework provided by all the WTO agreements in force. Article XXIII of GATT is part of that framework, which in turn means that in the discretionary acts of the domestic authority under the Anti-Dumping Agreement, all the benefits of the trade partner must be known, taken into account, and the discretion limited by this provision which protects all members against nullification or impairment of their benefits.

This is applicable for substantial aspects as well as for procedural aspects because material benefits emerge from both dimensions of the application of the Anti-Dumping Agreement. The following account of the structure of the norms in the Anti-Dumping Agreement will show the prescriptions, prohibitions and permissions

(implied and express) contained in the text of the Anti-Dumping Agreement. Additionally, it will highlight the applicability of Article XXIII of GATT to these permissions and, in a further section, the outcomes of the current interpretation shall be exposed to a comparison of the outcomes that a coherent interpretation, in the terms herein proposed, could provide for the plenitude and harmony of the system of the WTO.

3.2.2.1 Descriptive and Prescriptive propositions in the Anti-Dumping Agreement

All the provisions stated below contain more than one form of normative structure. Therefore, the main structure will be used in a general description and in the event that the same provision contains both prescriptive and permitting norms or prescriptions and prohibitions, the weaker form of normative structure within the articles shall be examined separately. Hence, the norms included in this section are considered as prescriptive because the majority of their content features specific prescriptive or descriptive propositions in its format.

a. Incomplete Definition and Determination of Dumping-Article 2: This article defines the events when a product is to be considered dumped and it lays the foundation for the domestic investigation procedures. The framework established for the procedures imposes (prescribes) the phases in which the process must be taken by the domestic authorities when defining the *like product*[347]*, market value*[348]*, export price construction*[349] *and fair comparison*[350]*.*

   Article 2 established a limited but mandatory set of criteria. This is clear by the specific provision stating that the authority *may* construct the export price under certain conditions. The conditions are prescriptive and inform the

[347] Art 2.1 and 2.6 (express interpretation of the term Like product) Anti-Dumping Agreement.
[348] Art 2.2 Anti-Dumping Agreement.
[349] Art 2.3 Anti-Dumping Agreement.
[350] Art 2.4 and 2.5 Anti-Dumping Agreement.

action of the authorities. These criteria are necessary but not sufficient to determine the existence and scope of dumping.

In this sense, the prescriptive content of Article 2 may not be modified through interpretation of Article XXIII. However, due to the fact that its content is incomplete (as the application of the criteria do not necessarily lead to the accurate establishment of whether or not there was dumping and its scope) any additions to the expressly prescribed rules of this provision must be made in the least intrusive manner for the importing trade partner in accordance with a coherent reading of Article XXIII GATT and Article 2 of the Anti-Dumping Agreement. This provides recourse for all violations and Non-Violations that create a nullification or impairment of the benefits acquired through GATT or any of the WTO agreements by the importing trade partner.

b. Determination of Injury – Article 3: This is another example of a prescriptive proposition in the text of the Anti-Dumping Agreement: The determination of injury is prescriptive as it clearly commands the elements to take into account when determining injury to the domestic industry.

Furthermore, the need for collective evaluation of all injury factors in the determination of injury is reinforced in the fact that even for the establishment of *a threat* of material injury, the factors seen as an inseparable unit are the correct tool to foresee the probability of material injuries: "*No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur*."

The prescriptive form of this provision takes the form of categorical imperatives of a norm of special nature which was issued after the GATT[351].

[351] In 1967, During the Kennedy round, an Agreement on Anti-Dumping Practices was negotiated and incorporated to GATT. However the United States did not sign it, this made it lose its strength and relevance. Later, in the Tokyo Round another framework on Anti-Dumping was agreed upon and it was incorporated into GATT. The second Anti-Dumping "Code" entered into force in 1980. It was also limited by several controversial

In contrast, Article XXIII is a norm of a general nature. Therefore, an interpretation of these norms in a coherent assessment must give prevalence to the posterior and special norm over the general provisions of Article XXIII in all the rulings *contained expressly* within it.

However, the statements that are vague or obscure must be read in accordance with the necessity, proportionality and rationality criteria in order to read Article 3 of the Anti-Dumping Agreement in coherence and harmony with Article XXIII. In other words, the areas of the procedure of determination of injury that are not expressly regulated in Article 3 must be crafted in light of Article XXIII and the rest of the WTO agreements in order to provide a single undertaking approach to the interpretation and implementation of international rules.

Additionally, the prescriptive nature of the provision is limited to the obligation to take into account all injury factors. This has been remarked by the WTO panels and the Appellate Body in several cases[352]. However, the Appellate Body has made a distinction between the obligation to evaluate all injury factors and the manner in which this evaluation must be done.

According to this distinction, the analysis of the injury factors is at the discretion of the domestic authorities. It has been accepted by the Appellate Body that even an *implicit evaluation* of the factors is valid[353]. On the discussion of whether an implicit evaluation of the factors is acceptable, the United States introduced the concept that what is important is that the *decisional path is reasonably discernible.* This was based on Appellate Body

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matters and by the fact that only 27 parties accepted it as a binding agreement. This means that the Anti-Dumping Agreement as a set of rules applicable to all the WTO membership can be understood to be posterior to GATT.

[352] See for example WT/DS132/R Mexico- Anti-Dumping Investigation of High Fructose Corn Syrup from the United States, and WT/DS122/AB/R Thailand- Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland.

[353] In WT/DS219/AB/R European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil (EC- Tube or Pipe Fittings) para. 160-161, the Appellate Body recognizes that an authorities' evaluation of a factor may be implicit in the analyses of other factors.

jurisprudence[354]instead of demanding a discussion of each factor[355].This further clarified the separation of the obligation to consider all factors from the method of evaluation chosen for each of them.

c. The discretion given to domestic authorities on their choice of analysis and evaluation does not allow them to escape the obligation to evaluate the indicated injury factors in totality as it is understood that the material injury determination can only be established by examining them as a group. Definition of Domestic Industry – Article 4: This article prescribes the form in which domestic industry shall be understood and does not leave space for ambiguity; hence it is not subject to further interpretation.

d. Initiation and subsequent investigation – Article 5: This article sets a strict framework which must be complied with by all domestic procedures. However, this procedure is by no means complete and the domestic authorities must create the missing steps to obtain a full anti-dumping procedure. In the space that is given to the domestic authorities to regulate aspects not contained in Article 5, they must take into account that such action is the implementation of a WTO agreement and thus it must be made in accordance with the terms agreed on in all the agreements as part of the single undertaking commitment.

e. Evidence: the description of the provision, evaluation and handling of evidence by the parties and by the investigating authorities is stated in Article 6. However, there is not much detail provided in this provision. Much discretion in this matter is left to the domestic authorities of the Member States.

f. Retroactivity: Article 10 prescribes the events and forms in which retroactivity shall be understood and applied in the agreement. This article is thorough enough to regulate the issue and does not leave room for local discretionary

[354]Supra EC-Tube or Pipe Fittings, para. 160-161.
[355]Panel Report. WT/DS277/R United States- investigation of the International Trade Commission in Softwood Lumber from Canada, para. 7.64.

interpretation, therefore it is applicable as is and no other article from the WTO agreements can be invoked in this matter as this is particularity agreed upon and fully regulated by Article 10 of the Anti-Dumping Agreement. However, it must be noted that within Article 10, the provisions in Art 10.2 and 10.6 are permissive as they allow they authorities to act with discretion by using the word “may” in their provisions.

g. Article 11 prescribes the procedure for the duration and revision of the anti-dumping duties and undertakings. In 11.2, it specifically uses the word *reasonable* when it refers to the local authorities who must review the continued imposition of a duty in what is called an interim review. In addition, in 11.3, the provision establishes the possibility to review the measures once the initial period has elapsed. This is called the “Sunset Review”. The maximum period of an anti-dumping duty is five years. However, it is up to the domestic investigating authorities to determine it. This means that they have been given such prerogative and might not be challenged in their choice before the five year limit unless there is clear, sufficient and strong evidence of the unreasonableness of their choice of term.

   This article establishes the term and the nature of the possible reviews that can be applied to an anti-dumping duty in the internal procedure. It does not indicate the form in which such reviews must be made, except to mention that they shall me made expeditiously and take no longer than 12 months. It is then the responsibility of the domestic authorities to establish and implement the review procedure. Besides from being ‘swift’ as per the wording of the provisions in Art 11, the procedure must be conducted following the foundational principles of the WTO. Its configuration as well as its implementation may give rise for Nullification and Impairment claims in the event that the procedure design by a specific Member affects the benefits and legitimate expectations of another.

h. Public notices are clearly explained and regulated in Article 12 and there is no room for interpretation, the focus is on implementation at the most basic administrative level.

i. Article 13 prescribes in a categorical way that the judicial review of administrative action must be available in all the countries that have anti-dumping proceedings. In addition, it mandates that the judicial review is performed by an authority that is independent from the administration authority in charge of the management of anti-dumping procedures and measures.

j. Article 14 occupies itself with the applications on behalf of a third party in a twofold manner. Firstly it prescribes the requirements to do so by the interested party, and in a second instance, the article has a minority of permission where it allows the importing country to decide whether or not to proceed with a procedure initiated on behalf of a third party.

k. Article 15 prescribes a special treatment for developing economies in a dogmatic manner. This article is subject to ample interpretation and its implementation depends on other rules contained in the WTO agreements. It is not clear whether this article establishes an obligation for all the membership or if it is applicable upon request. If so, members from developing countries would be entitled to request alternative remedies in all the matters that are subject to anti-dumping investigations and that affect their essential interests. However the dogmatic nature and formulation leads one to think that as a dogmatic proposition it needs to be developed further in an organic set of norms which can either be separate from the Anti-Dumping Agreement or can be linked to it as implementing regulations from either the membership or the domestic authorities in their investigation procedures.

So far, the provision has been interpreted by the DSU[356]in the sense that it is applicable only to developed countries and that the obligation contained therein is limited to “considering” constructive remedies.

l. A committee on anti-dumping practices is created by Article 16 of the Anti-Dumping Agreement in a prescriptive manner. Its functions are briefly but clearly stated and it receives several types of information from the membership. All members are obliged by Article 16 to submit the information to the committee and, in turn, make it available to the public amongst other precise functions. This article is not subject to contest as it has already been implemented and it contains a comprehensive explanation of its scope and application.

m. Consultation and Dispute settlement: apart from the confidentiality considerations, Article 17 is a prescriptive norm which describes the manner in which the DSB must process anti-dumping disputes[357]. This article relies on the DSU and it expressly states that it is applicable in everything that is not expressly regulated otherwise in the Anti-Dumping Agreement.

3.2.2.1 Prohibitions in the Anti-Dumping Agreement

a. The term in which provisional measures must take place is indicated as a prohibition in Article 7.3, which is worded as follows “*Provisional measures*

[356]WT/DS141/R European Communities – Anti-Dumping Duties on Imports of Cotton – Type Bed Linen. Para 7.2: *The Panel found that Art. 15 requires that a developed country explore the possibilities of "constructive remedies", such as the imposition of anti-dumping duties in less than the full amount and price undertakings, before applying definitive anti-dumping duties to exports from a developing country.*

[357] ADAMANTOPOULOS K. & DE NOTARIS D. “The Future of the WTO and the Reform of the Anti-Dumping Agreement: A legal Perspective”. Fordham Law Journal Vol. 24.Issue 1. 2000. p. 33. In principle, in the event that a number of interpretations are possible, *“the interpretation that is most restrictive to the use of Anti-dumping should prevail*”, noting that the article was drafted to allow discretion in the interpretation given by the domestic authorities of the Anti-Dumping Agreement.

shall not be applied sooner than 60 days from the date of initiation of the investigation"[358].

b. The condition contained in Article 8.2 related to price undertakings is a clear prohibition which is qualified by the events in which it is not applicable. In other words, it could be stated that this prohibition is a negative prescription, but its formal layout is clearly intended to create the scenario where an action – offering a price undertaking before a preliminary affirmative determination – is prohibited and as a consequence it is rejected from the investigating authorities, as it is clearly described in the actual norm: "*Price undertakings shall not be sought or accepted from exporters unless the authorities of the importing Member have made a preliminary affirmative determination of dumping and injury caused by such dumping"*.

c. Article 9.3 and 9.4 are worded as prohibitions and refer to the limitations to the imposition of anti-dumping duties described in Article 2 and Article 6. These descriptions refer to margins of dumping and calculations which are specified in Art 2, as the margin of dumping.

d. Confidential information provided to the panel is subject to the prohibition of being made available to the public by Article 17.7 unless there is express authorisation to do so. This is a standard clause applied both in public and private law and even though it is not fully regulated it is clearly expressed and its formulation does not leave room for further interpretation.

3.2.2.1 Permissions in the Anti-Dumping Agreement

a. Provisional measures and the actions are allowed in Article 7 conditionally. The conditions to permit provisional measures are described in the text as the norm so as to exclude all other circumstances from a provisional measure. In that sense, this can be seen as a passive prohibition. However

[358] Art 7.3 Anti-Dumping Agreement.

the structure of the norm is written in a permissive sense, thus making it suitable to be included amongst the permissive norms in the Anti-Dumping Agreement. Additionally, it indicates which form can take the provisional measures.

This procedure is a general framework that does not cover all the administrative actions required to take the whole procedure to fruition. This means that the administrative procedure of provisional measures, outside the wording of Article 7, is left to the discretion of the investigating authority. Nonetheless, they are not completely autonomous to regulate the procedure as the rest of the WTO agreements are applicable to the empty procedural space left by Article 7. It is in these procedures where Article XXIII is fully applicable and all measures taken must objectively be those which affect the importing trade partner the least. Acting otherwise can trigger the application of a nullification and impairment claim in its form of a Non-Violation complaint. This does not mean that the provision of Art XXIII is being read into the Anti-Dumping Agreement, but that some measures taken under it can be subject to claims of nullification and impairment in the event that they undermine benefits of the affected party.

b. Price undertakings in the Anti-Dumping Agreement are worded generally as a permissive statement that allows an investigated country to opt for a price undertaking. The regulation for this procedure is contained in Article 8 and it is a permissive statement except for Article 8.2 explained above.

c. The imposition of an anti-dumping duty is a permission directed to the investigating authorities, except for the limit worded as a prohibition in Article 9.3, as explained above.

d. Article 13 briefly allows the existence of judicial review in the anti-dumping procedure stating only one condition which is their separation from the investigating authorities. The judicial review procedure shall be established by each country without prejudice to the applicability of other WTO norms in

the implementation of this procedure. At this point, however, it is important to mention that the intention of the article was to use the domestic systems already in place to facilitate the review of anti-dumping investigations. In that case, the room for application of other WTO rules to the domestic civil or commercial procedure in place is narrowed both by the form and intention of Article 13.

IV.ANTI DUMPING MEASURES AS A PROTECTIONIST TOOL FORGOVERNMENTS

4.1 Historical Background

Anti-dumping measures are not new in the international trade panorama. Indeed they have been around since the early 20th Century. The first modern anti-dumping law was passed in Canada in 1904 with New Zealand and Australia following close behind in 1905[359] and 1906 respectively. South Africa adopted Anti-Dumping legislation in 1914[360]. By 1921, the U.S., France, Britain and most of the British Commonwealth had passed similar laws[361]. However, in 1958, when the contracting parties carried out a survey amongst themselves about the use of anti-dumping measures, the result was that in total only 37 anti-dumping decrees were in effect between all GATT contracting parties[362].

Anti-dumping did not enter into common use until the early eighties[363]. This can be explained by two main reasons. The first one is that during the mid decades of the century, tariffs were higher, and there was a mercantilist approach to international

[359] WAINCYMER J. "Implications for anti-dumping and countervailing". Paper delivered at the Conference, An Australian-United States Free Trade Agreement -- Opportunities & Challenges. Session 5B: Competition Policy and Subsidies, Hyatt Hotel, Canberra, 2001. P5. Available at http://www.apec.org.au/docs/waincymerfta.pdf

[360] *"South Africa in 1914 became the fourth country in the world to adopt anti-dumping legislation, while in 1921 it became the first to impose anti-dumping duties. It has consistently been one of the biggest users of the instrument, especially when measured as the number of investigations or anti-dumping duties per thousand dollars of trade."* BRINK G. "Anti-Dumping in South Africa" TRALAC Working paper No.D12WP07/12.Stellenbosch. 2012. p. 5 Available at http://www.tralac.org/files/2012/07/D12WP072012-Brink-Anti-Dumping-in-SA-20120725final.pdf

[361] PRUSA & SKEATH "The Economic and Strategic Motives for Antidumping Filings" Working Papers Wellesley College, Department of Economics, No. 2001,05 (2001) Available at http://hdl.handle.net/10419/23228 p. 3

[362] Supra PRUSA & SKEATH 2001. pp. 6–7.

[363] Despite the fact that Anti-Dumping Laws exist from as early as 1904 (Canada), and that its use has been observed with certain regularity since the early fifties (Including the exceptionally heavy use of Anti-Dumping measures by South Africa in the period between 1948-1958), it is in only since early eighties that it has been observed that"…*AD has been spreading worldwide in two dimensions. On the one hand, the number of AD petitions has been growing in the so called traditional users (i.e., Australia, Canada, EEC, New Zealand and US). On the other hand more and more countries have implemented AD law and many of them have followed the traditional users' example and started to strongly rely on this policy tool".* ZANARDI M. "Anti-Dumping: A Problem in International Trade". Tilburg University Discussion Paper No. 2005-85. 2005. Available at http://arno.uvt.nl/show.cgi?fid=53783.p. 17.

trade which made domestic industries feel less threatened by foreign imports. The second reason is that up to the eighties, rules for imposing anti-dumping duties were not uniform, the United States had a stringent system of calculation that made it relatively difficult to impose an anti-dumping duty and Anti-Dumping was not a widespread practice bar the traditional users and exceptional cases like South Africa. The United Stated amended its Anti-Dumping regulations in 1974, introducing changes that made it easier to apply duties. This change in legislation resulted in an *explosion of Anti-Dumping cases in the 1980s*[364]*.* The increase in the decade of the eighties was exponential but it was somehow still reduced to the group of traditional users.

Anti-dumping use was seen as the privilege of a few countries known as the traditional users. By the end of the eighties, the traditional users were joined by other contracting parties who were from then on known as new users[365]. New users started using anti-dumping following the patterns established by the traditional users[366]. Article VI of GATT contains the foundation of the anti-dumping regime. In this article GATT disapproves export sales below normal value when they cause or threaten to cause material injury to the domestic industry of the importing country or if they are materially impeding or delaying the creation of a local industry without justification.

Sales are considered to be below normal value when the export price is lower than the comparable price for products destined for consumption in the exporting country, in the ordinary course of trade. In the event that those circumstances are verified and that the causal link between the sales below normal value and the injury is proven;

[364] LINDSEY & IKENSON "Coming Home to Roost: Proliferating Antidumping Laws and the Growing Threat to U.S. Exports" CATO Institute. Trade Policy Analysis No. 14. 2001. p. 5.

[365] "*During the 1990s, antidumping use increased by 50 percent relative to the '80s. The surge in new cases reflects the proliferation of antidumping laws in the developing world. Developing countries accounted for only seven investigations during 1980-87; by contrast, developing countries brought over 700 cases during the second half of the 1990s"* Supra LINDSEY & IKENSON pp. 1-6.

[366] Supra YILMAZ. p. 11.

the importing country can impose anti-dumping duties equal to the difference between the normal value and the export price[367].

The Anti-Dumping Agreement developed throughout the different rounds of negotiations and was decanted until reaching its present state. In the Kennedy Round of negotiations, discussions on the procedural rules for the imposition of anti-dumping duties resulted in the 1967 Agreement on the Implementation of Article VI, also known as the Anti-Dumping Code[368]. The Anti-Dumping Code laid out detailed criteria and procedures for the invocation of anti-dumping actions but it did not make any reference to the part of Article VI related to countervailing duties. In the Tokyo Round of negotiations, the 1967 Anti-Dumping Code was revised, primarily with respect to causality and injury determination[369]. The Anti-Dumping Code was

[367] Supra, INTERNATIONAL TRADE CENTER. 2009.

[368] Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade.(Anti-Dumping Code). Geneva 1969.

[369] Agreement on implementation of Article VI of the General Agreement in Tariffs and Trade.(Anti-Dumping Code).Geneva 1979 (Adopted 1980).

Article 3: Determination of Injury

1.A determination of injury for purposes of Article VI of the General Agreement shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and their effect on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

2.With regard to volume of the dumped imports the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing country. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing country, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

3.The examination of the impact on the industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry such as actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

4. **It must be demonstrated that the dumped imports are, through the effects of dumping, causing injury within the meaning of this Code. There may be other factors which at the same time are injuring the industry, and the injuries caused by other factors must not be attributed to the dumped imports**. [Emphasis added]

5.The effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of production in terms of such criteria as: the production process, the producers' realizations, profits. When the domestic production of the like product has

renegotiated in the Uruguay Round and a new Anti-Dumping Agreement was adopted[370].

Historically, multilateral negotiations on anti-dumping have been exceptionally delicate. Indeed, some academics feel that was one of the factors that delayed consensus on the agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Anti-Dumping Agreement) and that retarded the finalisation of the Uruguay Round of negotiations for almost two years[371]. During the Uruguay Round there were few but significant achievements with regards to the anti-dumping regulation. For example, one important development of the Uruguay Round which was included in the Anti-Dumping Agreement was the introduction of mandatory sunset reviews which the US did not have at the time (Canada, Australia and the EU already had various forms of sunset provisions)[372]. The reason for introducing such mandatory reviews was that anti-dumping measures tended to last for very long periods, some cases stretching over decades. The risk was then that the proliferation of anti-dumping measures around the world would lead to a ratchet effect, with made-to-measure protection creeping back through the back door to replace declining MFN tariffs and other trade barriers[373].

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no separate identity in these terms the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

6. A determination of threat of injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.

7. With respect to cases where injury is threatened by dumped imports, the application of anti-dumping measures shall be studied and decided with special care.

[370]Supra INTERNATIONAL TRADE CENTER, 2009.

[371]DUNN A. "Antidumping." In Stewart, Terence P., ed., "The World Trade Organization: The Multilateral Trade Framework for the 21st Century and U.S. Implementing Legislation", Washington, DC: American Bar Association, (1996), p. 246.

[372]CADOT, de MELO, TUMURCHUDUR. "Anti-Dumping Sunset Reviews: The Uneven Reach of WTO Disciplines" CEPR Discussion Paper No. DP6502. (2007) Available at SSRN: http://ssrn.com/abstract=1140029. The EU introduced a five-year sunset clause as part of 1984 amendments to its basic Regulation as well as interim-review procedures which were used in 165 cases between 1980 and 1995. Canada also introduced a five year sunset clause in 1984, while Australia, which supported the introduction of a sunset clause in multilateral negotiations, introduced one as part of packages of reform gradually introduced between 1988 and 1996 (Australian Customs Service 2000). Besides the US, among major Anti-Dumping users only New Zealand did not have a sunset clause before the Uruguay Round agreement.

[373] Supra CADOT, de MELO, TUMURCHUDUR. (2007).

New users have shifted the balance of anti-dumping use since the decade of the nineties. The cumulative effect of anti-dumping activity by new users was such that the five traditional users accounted for only slightly more than half (56%) of the cases filed in the nineties. This fact emphasises the manner in which the increased anti-dumping filings by non-traditional users eclipsed traditional user behaviour. An interesting fact of the development of anti-dumping is that most countries were subject to anti-dumping measures against them before they started applying their own anti-dumping regimen. This means that the countries were familiarised with the anti-dumping process as well as the fact that some of the measures started by the new users were animated by a policy of strategic retaliation[374]. The statistical trends clearly indicate that anti-dumping has not been understood and it has been used several times as a way of punishing unfair trade[375].

4.2 General perspective

Trade remedies are laws used by countries to diminish the negative effect of different trade practices on local industries and workers. Anti-dumping laws are intended to neutralise the material injury suffered by domestic industries as a result of competing imports being sold at prices shown to be less than their fair market value. Anti-dumping laws and actions have been controversial as they have proven to be used as protectionist tools and trade experts have pointed this out[376]. On the other hand, governments and industries see them as fundamental tools to reduce

[374] Supra PRUSA & SKEATH (2001) p. 10.
[375] Supra PRUSA & SKEATH (2001) p. 27.
[376] BOLTON R. "Anti-Dumping and Distrust: Reducing Anti-Dumping Duties under the W.T.O. through Heightened Scrutiny", 29 Berkeley J. Int'lLaw. 66 (2011).p. 70.
On Anti-Dumping protectionism in Europe seeDAVIS L. "Ten years of Anti-Dumping in the EU: economic and political targeting".European Centre for International Political Economy – ECIPE. Working paper No. 02 (2009).P 14. See also, FUNKE N. "Trends in protectionism, Anti-Dumping and trade related investment measures". Intereconomics: Review of European Economic Policy · Volume 29, Issue 5, 1994. pp. 219-225.
On Anti-Dumping protectionism in the United States see McGEE R. "Antidumping Laws as Protectionist Trade Barriers: The Case for Repeal ".Florida International University (FIU) - School of Accounting. Policy Analysis No. 14. 1996. pp. 54, 68, 70 Available at SSRN: http://ssrn.com/abstract=91268 or http://dx.doi.org/10.2139/ssrn.91268.

the undesirable impact of unfair trade on domestic companies, workers, and the communities in which they are located[377].

It is important to understand that dumping per se is not a censurable practice. Indeed, it is recognised that producers sell their goods at different prices to different markets. It is also not unusual for prices to vary from time to time in the light of supply and demand conditions. It is also known that price discrimination in the form of dumping is a common international commercial practice, and it is not strange that the export prices are lower than the domestic prices. Therefore, from the point of view of anti-dumping practices, there is nothing inherently illegal or immoral about the practice of dumping[378]. *It is quite obvious though; that the consumers of a dumped product gain while the producers of a like product may suffer a loss. Anti-dumping is, therefore, viewed as having no economic justification*[379]. Anti-dumping measures are applicable only in the event the dumping practice causes damage to the local industry. This rests in the logic that in a competitive market, dumping that causes damage to the domestic producers is creating an unfair competitive advantage, which affects domestic industries and also affects international markets as it encourages the creation of monopolies and dominant positions of a few suppliers, which is against the purposes of liberalisation and wealth creation of the WTO. Once dumping and injury have been determined, there is place for imposing anti-dumping duties which are aimed at levelling the playing field for the domestic producer facing the imported product.

The Anti-Dumping Agreement stipulates fairly detailed procedural rules governing dumping investigations. These comprise the rules relating to the complaints of domestic producers and to the establishment of transparency provisions on

[377] JONES V. "WTO: Antidumping Issues in the Doha Development Agenda". Congressional Research Service. Report for Congress. April. 2006.

[378]Directorate General of Anti-Dumping & Allied Duties Ministry of Commerce. "Anti-Dumping, a guide". Commerce Secretary Government of India New Delhi-110 011. Available at http://commerce.nic.in/traderemedies/Anti_Dum.pdf

[379]KRISHNA R. "Antidumping in Law and Practice". World Bank Policy Research Working Paper No. 1823.(1998) Available at SSRN: http://ssrn.com/abstract=604967 p. 8.

investigation and decision-making. Additionally, the Anti-Dumping Agreement contains substantive rules with regards to the methods that are applicable in the evaluation and measure of the dumping margin, the determination of the existence of injury and the establishment of the causal link between dumping and injury.

According to the Anti-Dumping Agreement, a product is being dumped if the export price is lower than the normal value, which is generally calculated by using the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country[380]. A member cannot impose an anti-dumping measure unless it determines, after having performed an investigation that is compliant with the Anti-Dumping Agreement. The requirements are: (a) there are dumped imports; (b) the domestic industry is materially injured or is threatened with material injury, or that the establishment of a domestic industry is being materially retarded; and (c) there is a causal link between the dumped imports and the injury.

The Anti-Dumping Agreement expresses that the only remedy against dumping available to the contracting parties, is the application of anti-dumping measures. The measures allowed by the Anti-Dumping Agreement are provisional measures, definitive anti-dumping duties and price undertakings[381].This should be read without prejudice to the other provisions of the GATT agreement and the most logical way of understanding it is that whenever there is a situation of dumping, the contracting parties have the Anti-Dumping Agreement as a sole recourse within WTO law.

However, this has more than one dimension because the passive party who is receiving the application of an anti-dumping measure according to the Anti-Dumping Agreement is able to use not only the provisions of the Anti-Dumping Agreement in its defence with regards to substantial aspects contained therein, but also Article

[380] Although it is not mandatory to determine the value on the basis of domestic sales and this is not a requirement of the text of the Anti-Dumping agreement. Not all calculations are determined on the basis of the domestic sales. However, the most common form of calculating the existence of Dumping is by reference to domestic sales.

[381]INTERNATIONAL TRADE CENTER. "Business Guide to Trade Remedies In Brazil Anti-Dumping, Countervailing and Safeguard Legislation, Practices and Procedures". Geneva: ITC, (2009). Xv. pp. 21–22.

XXIII in the case that any of its legitimately expected benefits are nullified or impaired in the exercise of the anti-dumping prerogative.

In other words, the application of the Anti-Dumping Agreement is not carte blanche for the importing members to reduce the benefits granted by virtue of all the WTO agreements by the exporting member. It is proposed in this review that it is plausible that in the event that nullification or impairment of rights or legitimate expectations are experienced by exporting members in application of legitimate anti-dumping measures, the exporting member may act towards the re-establishment of its vested or legitimately expected benefits by using the provision of Article XXIII in WTO litigation. It is necessary then to know the composition and constitutional aspects of the anti-dumping system of rules in detail in order to understand its application and to explain a possible interaction with Article XXIII in the status quo of the WTO dispute resolution system.

As a response to the increasing trade liberalisation and globalisation of the markets, anti-dumping measures have been applied in an exponential way for the protection of local industries against unfair competition. The WTO has reported and documented, between January 1995 and June 2011, 3922 anti-dumping initiations and 2543 anti-dumping measures applied. The ideal is that anti-dumping is used to ensure fair competition between domestically produced products and imports. In practice, and depending on the local implementation procedures and practices, it could be misused as a protectionist measure to raise trade barriers[382].

It is important to note that even before the creation of the WTO, the need for an international mediator was envisaged[383] as a necessary relief in order to implement

[382] THI THUY VAN L. & TONG S. "China and Anti-Dumping: Regulations, Practices and Responses". East Asia Institute. National University of Singapore Working Paper No. 149 (2009).

[383] "(...) *by the 1980s several problems had surfaced with the GATT apparatus. Firstly, the dispute resolution mechanism of GATT was not functioning as effectively as had been hoped. Countries with longstanding disagreements were unable to reach any sort of resolution on a number of issues, ranging from government subsidies for exports to regulations regarding foreign direct investment. Secondly, a number of commodities, most importantly, agricultural products and textiles were widely exempt from GATT disciplines. Thirdly, it was*

international trade in fair conditions, or at least to contain the overwhelming protectionism of major players in the international trade arena to a moderate extent. In the United States, for example, anti-dumping was applied in an unreasonable manner by imposing minimum revenue for exporters[384] and punishing exporters who sold at lower prices abroad; thus heavily limiting the variety of products allowed in the market and significantly raising the consumer's costs[385]. Therefore, the creation of the WTO was warmly welcomed[386] by academics and practitioners[387] who hoped that the creation of an authority and international agreement would significantly reduce the intervention of the US government in the international markets.

Anti-dumping, in spite of the great *de iure* effort and success achieved in the Uruguay Round, has partially failed in both its original purposes a) as an expression of bilateral rearrangement of the WTO agreements whenever needed in order to restore the conditions of the original negotiation and b) as an instrument to rectify economic policy of the Member States whenever their law and policy was restrictive of the free market proposed by the WTO agreements.

4.3 Anti-Dumping as an expression of specific reciprocity

More than a mere trade remedy, anti-dumping could be understood as a kind of specific reciprocity on the market for market-access rights and as an exception to the Most-Favoured Nation rule. In other words, the provisions contained in the Anti-

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widely believed that certain forms of trade protection-anti-dumping duties, voluntary export restraints and countervailing duties- were restricting trade and distorting trade patterns in many important sectors. Fourthly, trade in services was expanding rapidly and GATT and no rules regarding trade in services (...)". CROWLEY M. "An Introduction to the WTO and GATT". Economic Perspectives. Federal Reserve Bank of Chicago. Vol. 27.Issue 4. 2003. p. 43.

[384] 8% of minimum revenue was forced upon importers in the United States. Whenever they obtained less revenue than that, they were immediately penalised for dumping under the pre-WTO United States Anti-Dumping laws.

[385] BOVARD J. "Two cheers for GATT" Policy Backgrounder No. 135. The National Centre for Policy Analysis. New York, Nov (1994) p. 8.

[386] Supra CAMERON & GRAY. p. 249.

[387] SHUKLA S.P. "From GATT to WTO and beyond". UNU/ World Institute for Development. Economic Research. Working papers 195. 2000. p. 31.

Dumping Agreement can be explained as the possibility of bilateral renegotiation of trade conditions within the WTO agreements[388] in cases where the balance has been disturbed by the income of new members or conducts that only have an impact on a particular trade partner. In those cases, the renegotiation of a whole agreement would have impossible transactional costs and the operation of actual trade would be unreasonably hindered. The anti-dumping regulations, then, were meant to allow a bilateral mechanism for renegotiation to restore the original parity of conditions. This is coherent with the aims of GATT and with the ultimate beneficiary of the Anti-Dumping Agreement itself, which is the consumer.

This system is partially flawed in the sense that in not all cases this unilateral restoration of the trade balance is possible. There are several scenarios where this can be escaped by the protectionist countries but the most salient is the case in which cross subsidies are used in order to avoid the dumping factual proposition, that is, the case in which internal prices are artificially raised in order to protect a certain industry and dumping is impossible to prove.

4.4 Anti-Dumping Use, Laws and Practices

In order to understand the interaction between the anti-dumping application and the nullification and impairment provision, it is necessary to observe the actual use that countries give to the Anti-Dumping Agreement. An aggregate of statistics can show which countries are the most frequent users, and a review of these countries can offer reasons and possibly expose internal practices where anti-dumping may have been used as a protectionist tool.

[388] PILLATH C.H. "Reciprocity and the hidden constitution of World Trade". Handbook of International Economics, edition 1, volume 3, chapter 29, Elsevier. pp. 1495-1551.

Table 2: Top ten Anti-Dumping Users up to 2012[389].

1.	India	677
2.	US	469
3.	EU	451
4.	Argentina	303
5.	Brazil	279
6.	Australia	247
7.	South Africa	217
8.	China	200
9.	Canada	166
10.	Turkey	162

There are several reasons why anti-dumping laws and practices need to be studied on a country by country basis. The first is the need to ascertain which countries are using anti-dumping measures as hidden protectionism and single out problematic rules and practices[390] that could be subject to a nullification and impairment action. The second reason is to explore the domestic procedures that are applied to the anti-dumping measures as the procedures and actual application of the Anti-Dumping Agreement is a prerogative of each government. Some governments decide to centralise the management of the anti-dumping regulation in a single institution – which is called a singular or unitary system – and some others have separate institutions to deal with different aspects of the application of the agreement – what is called a bifurcated or binary system[391] – and each country is free to decide the timing for hearing and other procedural aspects[392]. Country-specific knowledge will allow conclusions to be drawn for each of the most representative members,

[389] Anti-Dumping Measures: By initiations. Source WTO. Statistics available at http://www.antidumpingpublishing.com/statistics.html

[390] NAKAGAWA J. "Anti-Dumping Laws and Practices of the New Users". Cameron May. London (2007) p. 19.

[391] Singular and binary systems are also known as "unitary" and "bifurcated" Systems. In the singular or unitary systems both aspects of the investigation are reviewed by a single body, usually separated from the government. This is the case of Mexico, South Africa, Brazil, New Zealand, Venezuela, Korea and the EC. In bifurcated or binary systems the dumping and the injury investigations are made by separate institutions. This is the case of Canada, the United States and Argentina. See CZAKO, HUMAN & MIRANDA. "A Handbook on Anti-dumping investigations". WTO. Cambridge University Press. 2003. p. 5.

[392] Supra NAKAGAWA (2007) p. 19.

leading to clarity on the application of the Anti-Dumping Agreement provisions and, most importantly, if some of the practices, laws and uses are actionable under Article XXIII in cases of nullification or impairment.

Some general remarks on anti-dumping flawed practices affecting exporting members which may be subject to generalisation are:

(a) Vaguely established key terms such as: “Related Party”, “Costs”, “parts’ costs”, “Value Added”, “Price Ex Works”[393].

(b) Tendency from domestic authorities to apply anti-dumping measures in cases where dumping is circumstantial/ incidental and not a systematic practice: i.e. in the event of currency fluctuations, uneven economic cycles or the countries variation of models used to calculate the dumping margin[394].

Cost calculations are made by comparing the domestic and the foreign market instead of considering the real cost of production[395]. This distorts the objectiveness of the calculation by subjecting the exporting country to the economic reality to the importing country and not its real costs of production.

Despite the general considerations mentioned above and due to its specific features in each country; the study of anti-dumping is better done as a matter of comparative law rather than an exclusive issue of public international law or a trade law issue that can be studied as a conglomerate. Hence, the study of the international legal status

[393]VERMULST E. “Antidumping in the Second Millennium” in BRONCKERS E (Ed) New Directions in “International Economic Law. Essays in Honor of John Jackson”. Kluwer Law International.2000. p. 268.
[394] Supra VERMULST E. p. 263.
[395] Supra VERMULST E. p. 263.

quo must be combined with comparative legal analysis of the most salient anti-dumping users in order to obtain the whole picture of anti-dumping[396].

Additionally it is important to note that the study of anti-dumping by the traditional users[397] has been overly documented and its consequences are well understood. It is clear to the WTO membership when the traditional users, especially the United States and the European Union[398], have used anti-dumping as a trade remedy as well as when it is abused and it becomes a protectionist tool[399].

Many studies have been dedicated to observing and explaining the conduct of the traditional users and therefore they will not be explored in this study. The increase in anti-dumping users and measures applied is, on the other hand, an interesting phenomenon where the new users, who have either recently joined the WTO or whose economies have recently grown in a significant way, play an important role. This poses the question of who the main new users are and how they are managing the prerogative given by the Anti-Dumping Agreement, and for the purposes of this study, whether that use and management could possibly lead to nullification or impairment either in the form of violations or in the form of Non-Violations.

[396]Supra NAKAGAWA (2007) p. 20.

[397] The United States and the European Union are considered the most representative traditional users of Anti-Dumping. Anti-Dumping sanctions were imposed almost exclusively by four trading powers: the United States, European Communities ("EC"), Canada, and Australia—collectively known as the "traditional users" of antidumping, later New Zealand was also an early adopted of Anti-Dumping, but it did not use Anti-Dumping measures as frequently as the other four countries. See WU M. "Antidumping in Asia's Emerging Giants". Harvard International Law Journal Volume 53, Number 1, winter 2012. p. 8. Although South Africa has been a heavy user of Anti-Dumping since the 1950s, it has not been classified as a traditional user.

[398] This has eroded the new negotiations because traditional Anti - Dumping users, especially the United States, have shown strong resistance to further reform and have implemented past reform in a minimalist fashion. See MOORE M. "Antidumping Reform in the Doha Round: A Pessimistic Appraisal". Paper prepared for "The Economics of the Doha Round and the WTO" University of Hong Kong December 16-17, 2005.

[399] See amongst others: McGEE. R. "Antidumping Laws as Protectionist Trade Barriers: The Case for Repeal" Florida International University (FIU) - School of Accounting. Policy Analysis No. 14. July 1996. CHENG L, QIU L, PONG WONG K. "Anti-Dumping Measures as a Tool for Protectionism: A Mechanism Design Approach"The Canadian Journal of Economics / Revue canadienne d'Economie Vol. 34 No. 3 2001. BOWN C. "Antidumping, safeguards, and protectionism during the crisis: Two new insights from 4th quarter 2009". Development Research Group, Trade and International Integration (DECTI), World Bank. 2010. Available at http://www.voxeu.org/index.php?q=node/4635.

Fortunately, the increase in the use of anti-dumping measures has been well documented; the interesting part is that the increase of anti-dumping use does not necessarily come from the traditional users, but developing economies have increasingly become significant users of the Anti-Dumping Agreement[400]. The statistics can be found by sector, by initiating country, by exporting country and by reporting country. **It is interesting to see that the statistical report of anti-dumping measures by sector** presented below, updated to 2011, perpetuates the pattern presented from 1995 to 2008, where the heavily protected sectors of the industry such as metals[401] and chemicals[402].

In a number of disputes brought before WTO panels, it has been the case that occasionally new users of anti-dumping have applied measures which are inconsistent with WTO rules[403]. This may be due to their inexperience in dealing with

[400] Traditional users are the five countries that have applied Anti-Dumping measures frequently during the 1970s-1980s: Australia, Canada, The European Community, New Zealand and the United States. New Users, on the other hand, are all the countries that started applying Anti-Dumping measures with frequency from the decade of the nineties regardless of the existence of Anti-Dumping Laws from the early twentieth century. NAKAGAWA J. "Anti-Dumping Laws and Practices of the New Users". Cameron May. London (2007). Despite being a user of Anti-Dumping since its early stages, with at least 653 investigations conducted up to 1975, South Africa has not been considered as a traditional user by the academic literature.

[401] MAVROIDIS P, MESSERLIN P, WAUTERS J. "The Law and Economics of Contingent Protection in the WTO". Edward Elgar Publishing. 2010. p. 141.

[402] BANKS G. "The Anti-Dumping Experience of a GATT Fearing Country" in FINGER, NELLIE & ATIS (Eds) "Anti-Dumping, How it Works and Who Gets Hurt". University of Michigan Press, 1993.p. 194.

[403] See for example: Venezuela - Anti dumping Investigation in respect of Imports of Certain Oil Country Tubular Goods (OCTC)(DS 23); Guatemala Cement I (DS 60); Mexico - Anti-Dumping Investigation on High Fructose Corn - Syrup (HFCS) from the United States (DS 101); Thailand – H- Beans (DS 122); Mexico - Corn Syrup (DS 132); Guatemala Cement II (DS 156); Argentina - Definitive Anti-Dumping Measures on Imports of Drill Bits from Italy (DS 157); South Africa - Anti Dumping Duties on Certain Pharmaceutical Products from India (DS 168); Ecuador - Provisional Anti-Dumping Measure on Cement from Mexico (DS 182); Trinidad and Tobago – Anti-Dumping Measures on Pasta from Costa Rica (DS 185); Trinidad and Tobago – Provisional Anti-Dumping Measures on Macaroni and Spaghetti from Costa Rica (DS 187); Argentina – Ceramic Tiles (DS 189); Ecuador – Definitive Anti-Dumping Measure on Cement from Mexico (DS 191); Mexico – Measures Affecting Trade in Live Swine (DS 203); Turkey – Anti-Dumping Duty on Steel and Iron Pipe Fittings (DS 208); Philippines – Anti-Dumping Measures regarding Polypropylene Resins from Korea; Mexico – Provisional Anti – Dumping Measure on electric Transformers (DS 216); Brazil – Anti-Dumping Duties on Jute Bags from India (DS 229), Argentina – Poultry Anti – Dumping Duties; Peru – Provisional Anti-Dumping Duties on Vegetable Oils from Argentina (DS 272); South Africa – Definitive Anti-Dumping Measures on Blanketing from Turkey (DS 288); Mexico – Anti-Dumping Duties on Rice (DS 295); India – Anti-Dumping Measures on Imports from Certain Products from the European Communities (DS304); India – Anti-Dumping Measure on Batteries from Bangladesh (DS 306); Korea – Certain Paper (DS 312); India – Anti Dumping Measures on Certain Products from the separate Customs territory of Taiwan, Penghu, Kinmen and Matsu (DS 318); and Mexico – Steel Pipes and Tubes (DS 331).

the Anti-Dumping Agreement, which may mean that the new users are still in the process of learning how to use anti-dumping measures in a WTO consistent way, but it also evidences that there is an increasing interest in developing, and specially emerging economies to protect, encourage and safeguard their domestic industry, sometimes in detriment to their international commitments.

The traditional users of anti-dumping which are more relevant in understanding the intricacies of the anti-dumping practice are the United States and the European Union. Their cases have been overly documented by scholars around the world. This study will therefore be limited to essential remarks on their most controversial laws and practices without making a detailed analysis of their institutions and specific regulations on substantial and procedural aspects.

The new users whose domestic laws and practices will be considered in this study in detail are China, Brazil, India and South Africa. The choice of countries is based firstly on their anti-dumping use; secondly on the fact that they are, except for South Africa, frequent targets of anti-dumping action by other Member States. Additionally, they are all the main representatives of their region, and their cases pose interesting questions on the use and understanding that they have given to the Anti-Dumping Agreement. Some of the other top ten users that have been excluded either do not represent the region in size and importance or have a very specific reason to use anti-dumping the way they do, as is the case of Argentina[404].

The economies and legal systems chosen for this study are important because they combine natural resources, a considerable market, fair technological development and regional influence. An additional consideration is that they are all starting to

[404] Since the crisis of the peso in 2001, Argentina has increased protectionism in many forms, including more frequent and stricter Anti-Dumping Measures and to a limited extent Countervailing Duties and Safeguards. This was exacerbated by the global economic crisis in 2008. See MOORE M. "Argentina: There and Back Again?"Institute for International Economic Policy. Working Paper Series No. IIEP-WP-2011-06. Elliott School of International Affairs. The George Washington University. 2011. p. 24.

compete in the international market with the traditional users of anti-dumping, which makes the competition considerations in international trade more relevant than ever.

This means that the way that these particular countries understand and apply the Anti-Dumping Agreement is likely to shape the future negotiations on this topic. Also, their use of anti-dumping measures may clarify when and how such use can become a trigger for Article XXIII, and gives clues as to how an exporter country can use the existing legal resource of the nullification or impairment complaint. The conclusions drawn by this analysis cannot be deemed as general for all membership of the WTO, but they can be used as an indication of practices and regulations that, despite being in formal adherence to the WTO agreements, could in fact be affecting the benefits of other members and thus be covered by Article XXIII.

4.4.1 United States and European Union

4.4.1.1 United States

The United States has traditionally been the most frequent[405] user of anti-dumping measures and its system of anti-dumping is sophisticated and complex. The uses that the United States have given to anti-dumping have been documented thoroughly, thus this study will not replicate the previous analysis but just refer to it on the most pertinent aspects. It is submitted that one of the reasons for the proliferation of anti-dumping duties in the post Uruguay Round era is that the codification of U.S. and European Union anti-dumping practices into accepted WTO

[405] The United States was the major user of Anti-dumping under GATT. Under WTO and upon the raise of emerging economies, the use of Anti-Dumping increased in developing countries, which surpassed the United States in their use of this trade remedy. India, Brazil, China and Argentina are some of the countries who have recently used Anti-Dumping in a higher proportion than other developing countries. See VILJOEN W. "Trade Remedies and Safeguards in BRICS countries" TRALAC Working Paper. Stellenbosch. 2013. p. 5.

practices in the Uruguay Round has made it easier for Member States to adopt and administer WTO-consistent anti-dumping policies of their own[406].

The United States provides anti-dumping measures as a relief to domestic industries when the US Department of Commerce determines that a product is being sold in the US markets at less than its fair value; and the International Trade Commission (ITC) determines that an industry is suffering material injury or threat thereof. An investigation is initiated either upon verification of the existence of dumping in terms of the Anti-Dumping Agreement by the Department of Commerce on the basis of the available information, or upon request from a domestic industry that claims injury. Dumping margins are obtained by calculating the average amount by which the fair market value of the alleged dumped product exceeds the price of the like product in the United States[407].

It is proven that in the United States there is a disconnection between the rhetoric of anti-dumping supporters and the reality of anti-dumping practice since the late nineties. The law as currently written and enforced in the United States does not reliably identify either price discrimination or below-cost sales[408]. The most artificial practices that the United States has adopted, and the weak justification of them which has led the use of anti-dumping as a protectionist tool instead of a fair trade facilitating instrument, can be summarised as:

1. Omission of certain factors in the calculation of losses: The Department of Commerce initiates investigations upon request of the interested industry regardless of whether the loss is not acute, severe or chronic, or prolonged in time. It also fails

[406] BLONIGEN B. ″U.S. Antidumping Filings and the Threat of Retaliation″. University of Oregon and NBER. Available at http://ctrc.sice.oas.org/geograph/antidumping/bloni.pdf

[407] LONG Q. ″Conflicting Positions but Common Interests: an Analysis of the United States Anti-Dumping Policy towards China″. 7 Richmond Journal of Global Law& Business (2008) p. 135.

[408] LINDSEY B. ″The U.S. Antidumping Law: Rhetoric versus Reality″. CATO Institute. Centre for Trade Policy. Trade Analysis Number 7.(1999) p. 20.

to take into account normal commercial practices such as market positioning of new products or externalities outside the control of the exporter, for example, when the product originates in a non-market economy. When these factors are taken into account, the margins of dumping are diminished to zero or reduced significantly[409]. Another factor that is omitted by the Department of Commerce in the determination of damages is the size of the foreign market which can have an influence on the price of the exports. A small domestic market offers no potential for significant cross-subsidisation of export sales[410].

2. Comparison of Like Products: When the U.S. Department of Commerce compares physically different merchandise; it adjusts for differences in materials, direct labour, and variable overhead costs. This is in line with the Anti-Dumping Agreement and the objectives of the WTO. However, in practice the comparison happens without explaining that actual price differences may be more or less than the differences in variable manufacturing costs and duties are imposed on those calculations which may or may not be true indications of the existence of dumping and significant injury[411].

3. Protectionist Standards of Anti-Dumping due to the pressures of the big domestic industries who see their monopolies and big revenues threatened by the influx of

[409] "*With respect to acute losses, the dumping margins of Liaoning (respondent in the NME investigation of cut to- length steel plate from China) and Dieng/Surya Jaya (respondent in the constructed- value investigation of preserved mushrooms from Indonesia) were recalculated for purposes of this study by comparing U.S. prices to an estimate of variable costs (as opposed to full unit costs plus profit). Dumping margins for both companies disappeared completely: Liaoning's margin fell from 17.33 percent to zero, and Dieng/Surya Jaya's fell from 7.94 percent to 0.04 percent (de minimis). These results show that the Commerce Department's affirmative dumping determinations cannot be taken as reliable indicators of acute below-cost sales. For chronic losses, the period investigated by the Commerce Department in antidumping cases is only 12 months. Consequently, Commerce lacks the evidentiary record to determine whether a company's losses are abnormally persistent. Because Commerce does not take a longer view, it cannot determine whether losses reflect a temporary market downturn or business reversal, or whether they flow from a conscious growth-oriented strategy for a new company or a new product."* Supra LINDSEY (1999) p. 17

[410] Supra LINDSEY (1999) p. 19.

[411] See JOHNSON B "A Guide to Anti-Dumping Laws: America's Unfair Practice". The Heritage foundation, Backgrounder No. 906 on Trade and Economic Freedom. Available at: http://www.heritage.org/research/reports/1992/07/bg906nbsp-a-guide-to-antidumping-laws See also, http://www.meti.go.jp/english/report/data/gCT9905e.html

foreign imports. It is true that import-competing industries (especially the steel industry) use anti-dumping laws in their interest regularly. These industries exercise a strong lobby and hold relevant positions in government, which makes them politically powerful. "*For them, results are all that count: anything that makes it easier for domestic industries to win protection makes the law better, and anything that makes protection harder to achieve is a step backward. That standard, of course, has nothing to do with any notions of fair trade; it is a protectionist standard, pure and simple"*[412].

4.4.1.2 European Union

The European Union has also been criticised for their use of anti-dumping to protect their domestic industry. In the EU anti-dumping practice, five main tendencies have been identified by empirical corroboration[413]:

1. The main targets of investigations and measures are exporters from emerging markets, particularly in Asia – a growing source of global competition;

2. Targeted products are concentrated in sectors where European comparative advantage is declining, i.e. raw materials, industrial input goods and textiles;

3. Dumping margins reflect this pattern, being particularly high in the chemical and steel sectors;

4. Duty levels are significantly higher than bound tariffs, particularly in the higher-end technology sector.

5. Once an anti-dumping investigation has been initiated, definitive measures are the most likely outcome[414].

[412] LINDSEY & IKENSON. "Reforming the Antidumping Agreement: A Road Map for WTO Negotiations". CATO Institute centre for Trade Policy. Trade Analysis No. 21.(2002) p. 5.
[413] DAVIS L. "Ten years of Anti-Dumping in the EU: economic and political targeting".European Centre for International Political Economy – ECIPE. Working paper No. 02 (2009) pp. 1–17.

Other objections to the European anti-dumping practice are:

1. Definition of like products in spite of the requests of the investigated countries: The European Authority does not take into account that lower prices of imported products from developing economies do in fact reflect the low level of technology and value added[415].The EU practice has shown that once a product is defined, it is almost invariably found as a like product despite a possible difference in its technical characteristics[416].

2. In the Determination of Injury: The European Union takes into account all the factors required in the Anti-Dumping Agreement but it gives important weight to market share evolution of the foreign importer, price undercutting[417] and price depression within the EU markets. However, other key aspects that could favour the foreign exporters are seldom taken into account by the Commission such as EU employment and capacity utilisation[418]. This suggests that the injury determination is biased to a certain extent.

3. Causal link determination: It has been verified empirically that in the determination of causal link between dumping and injury, the Commission tries to understand whether other factors may explain the condition of the EU industry apart from dumped imports. However, these factors are limited to the evolution of demand in the community market, imports from third countries and the situation on the world market. If the Commission is not satisfied that these factors cause or contribute to the injury experienced by the EU domestic industry, it makes the immediate

[414]DAVIS L. ″Ten years of Anti-Dumping in the EU: economic and political targeting″.European Centre for International Political Economy – ECIPE. Working paper No. 02 (2009) pp. 1–17.
[415] LIU & VANDENBUSSCHE "EU Antidumping Cases Against China: An Overview and Future Prospects With respect To China's WTO Membership". LICOS Centre for Transition Economics Catholic University of Leuven, Belgium .Discussion Paper 119 (2002) pp. 11-12.
[416] VAN BAEL & BELLIS. "EU Anti-Dumping and Other Trade Defence Instruments". Kluwer Law International. 2011. p. 238.
[417]McGOVERN E. "EU Anti-Dumping and Trade Defence Law and Practice". Globefield Press. 2013. p. 54.
[418]Supra LIU & VANDENBUSSCHE (2002) pp. 12–13.

assumption that injury was caused by dumped goods without undertaking a proper causation test[419].

4. Application of a Community Interest Test: When the benefit for consumers is weighed against the detriment to the domestic industry in terms of short term gains for consumption and long term losses for production for the EU, the Commission supports the domestic industry by arguing that not supporting it would lead to the domestic industry closing down, and explaining the collateral impact of this situation. In reality, most of these ″endangered″ domestic producers are in a highly concentrated industry, often involving only one producer[420], with a fair amount of political influence. Some academics have linked this to the causation issue by explaining that if a domestic industry that is a monopoly or an oligopoly is threatened with closing down because of cheaper imports, this is more likely to be due primarily to their economic inefficiencies than to an unfair practice from a foreign exporter[421].

5. Concentrated EU Industries: In most of the cases filed in the EU, it is interesting to observe the very concentrated nature of the EU industry filing for protection. In the majority of cases, a small number of EU complainants represented well over 50% of total EU production. This seems to confirm political economic studies that have indicated that concentrated industries are more successful when applying for protection than diffused industries[422], which gives monopolies and oligopolies that are already overly protected a stronger chance of obtaining further protection through anti-dumping action.

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[419] *"An example is a reviewed case silicon carbide originating from China, Russia and Ukraine. As a result of the previous antidumping measure, China and Ukraine had lost significant sales volume and their market share was minimized over time. However, the Russian imports did not decrease sharply and remained stable, and imports from other third countries, such as Venezuela and the Czech Republic, had significantly increased their market shares substantially during the initial antidumping conviction. However, in the review case, the Chinese exporters did not reply to the information demand of the Commission. As a result the review case was decided with new protectionist antidumping measures against China, Ukraine and Russia, whereby the Commission applied the highest definitive duty to China (China: 52.6%; Russia: 23.3%; Ukraine: 24%)."* Supra LIU & VANDENBUSSCHE (2002) pp. 13-14

[420] Supra LIU & VANDENBUSSCHE (2002)pp. 15-16.

[421] Supra LIU & VANDENBUSSCHE (2002) pp. 15-16.

[422] Supra LIU & VANDENBUSSCHE (2002) p. 18.

6. Targeted subjects of investigation: The economic trends and statistic information available show that there are some trade partners that are systematically being targeted by the EU complainants for dumping, amongst which China and India are the primary targeted partners, which encourages a retaliatory attitude from all trade partners and anti-dumping users in the WTO.

It is known that the EU has a highly protected agricultural industry and other industries, cartels and oligopolies that claim protection cause a threat of increasing their dominant position by using anti-dumping rules to strengthen their position in the market[423]. Indeed, the anti-dumping practices of the EU can perpetuate unfair trade rather than *level the playing field* by protecting European industries that are becoming obsolete or being threatened by the impact of globalisation[424].

4.4.1.3 Non-Market Economies of the EU and the United States.

One of the issues that both the United States and the European Union have shared in the past decades is the issue of non-market economies. As international trade law offers no guidance on how to define a non-market economy, it is up to each state to decide which countries qualify as market economies for the purposes of anti-dumping law[425]. Non-market economies are considered to exist when it is not

[423]See Supra DAVIS L. (2009) p. 15: "*Some recent cases illustrate the point. For example, definitive duties were imposed on imports of polysulphide polymers from the US, following a complaint from the sole EU producer in Germany. The US Company ceased trading in the EU as a result, leaving a monopoly in the EU market. Interestingly, this was predicted during the Community interest investigation, but obviously not heeded (or heeded and a decision to award a monopoly made) in the decision to impose duties (Polysulphide polymers, United States. OJ L255, 17 September 1998, p.1). What is striking about this case is that the EC's defence of Anti-Dumping law rests strongly on the theory that Anti-Dumping measures can create a competitive trading environment that cannot be achieved with competition law alone. 'Free and fair' trade is the alleged goal of allowing temporary duties above and beyond bound tariffs, in order to prevent monopolisation of global markets. The inherent contradiction of this case (and others not detailed here) is that the imposition of Anti-Dumping measures themselves created a monopoly position.* Another case for reinforcement of this point is: *Certain candles, tapers and the like, China*. OJ L306, 14 November 2008, p. 22."

[424]Supra DAVIS L (2009) p. 16.

[425] INTERNATIONAL BAR ASSOCIATION. "Anti-Dumping Investigations against China in Latin America". IBA Divisions Project Team, supported by the IBA Trade and Customs Law Committee and the IBA Latin American Regional Forum (2010) pp. 10–11.

possible to calculate the margin of dumping comparing the price at which the product is sold to importers in the importing country (the export price) and the 'normal value' of the product because there is no reliable home market price. In these cases the price can be construed either making the comparison with a *surrogate market* which is a comparable third country or by constructing a synthetic price[426]. A surrogate market is a country that is classified as market economy that has comparable conditions of the country subject to the examination, whereas a synthetic price is constructed with hypothetic assumptions.

To assess whether a country has market economy status, the EU examines the aspects that they consider essential for a market economy on a case by case basis. These aspects are the degree of government influence over the allocation of resources and decisions of enterprises and the existence of state-induced distortions in the operation of enterprises linked to privatisation. It takes into account the existence and implementation of transparent and non-discriminatory company law, the enactment of a coherent, effective and transparent set of laws relating to property rights and bankruptcy, and the establishment of a genuine, independent financial sector subject to adequate supervision[427]. The EU has done this assessment of China and has considered it an economy in transition because, despite the big improvements in the abovementioned aspects that have taken place in the past two decades, not all aspects are fulfilled. However, the EU has granted Market Economy Status to some Chinese companies that meet all the criteria on a case by case basis[428].

[426]Supra INTERNATIONAL BAR ASSOCIATION. pp. 10–11.
[427]Supra INTERNATIONAL BAR ASSOCIATION. pp. 10–11.
[428] In 1998 the EU adapted its trade defence rules to permit that individual companies claim market economy status if they can prove that their individual practice meets the Market Economy Criteria. European Commission. Practical Manual for Chinese Producers and Exporters. Annex A: Form For Companies Claiming Market Economy Status And/or Individual Treatment In Anti-Dumping Proceedings: *"Market economy treatment will be granted to those exporting producers which submit a duly completed claim form and can demonstrate that they meet the conditions defined in Article 2(7) (c) of the basic Regulation. To the extent that market conditions prevail, this treatment may lead to the application of domestic prices and costs from the exporting producer in question where analogue third country data would otherwise have been used. This also implies that, in the event of antidumping measures being imposed, the company would be subject to its own individual duty rate, if any, instead of the single country-wide duty, i.e. it would automatically be deemed to be eligible for individual treatment.*

The United States, instead, has implemented a law that contains a broad description of what a non-market economy is. According to Section 771 (18) of the Tariff Act of 1930, a non-market economy is a country that does not operate on market principles of cost or pricing structures so that sales of merchandise in such a country do not reflect the fair value of the merchandise. The criteria used in the United States to determine whether a country is a market economy is similar to the EU approach in certain ways only.

One similarity is that the Department of Commerce, just like the EU, takes into account the extent of government control over the means of production and over the allocation of resources and companies' business decisions. It also looks at currency convertibility, free wage bargaining and openness to foreign private or public investment. However, a clause allows the Department of Commerce to take into account other factors that it may consider appropriate, such as the existence and operation of anti-monopoly laws and the operation of a securities exchange[429].

The Department of Commerce applies a standard test called the Market Oriented Industry Test[430] which is not in their written regulations but is applied in their

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Individual treatment can be granted where an exporting producer can show that its decisions concerning export sales (in terms of prices and quantities) are made independently from the State. In this context, emphasis will be put on whether the export activities are totally free from State intervention and thus that there is no risk of circumvention of anti-dumping measures by the exporting producer requesting individual treatment, should the investigation result in the finding that there is injurious dumping and that anti-dumping measures are not contrary to the interests of the Community. The granting of individual treatment on export sales means the determination of an individual dumping/injury margin for an exporting producer, which applies as an exception from the single country-wide dumping/injury margin. An exporting producer receiving individual treatment on its export sales would, in the event of anti-dumping measures being imposed, be subject to its own individual duty-rate, if any, instead of the country-wide duty. For companies receiving individual treatment but not market economy status, normal value will be established on the basis of information obtained in the analogue country, which will then be compared with the exporting producer's own export prices to the Community."

[429] Supra INTERNATIONAL BAR ASSOCIATION. pp. 11–12.

[430] The test is aimed to establish "*Whether the NME government exercises de facto control is indicated by (a) whether the company's export prices are set by the government; (b) whether the company is free to sign negotiate and sign contracts without government involvement or approval; (c) whether the company retains its export sales revenue and makes its own decisions regarding how to use its profits or finance its losses."* Department of Commerce, International Trade Administration, Antidumping Methodologies in Proceedings

investigations, and no economy that has been subjected to it has approved it. There is no provision in the WTO that specifies which methods can be used to determine the normal value in cases where goods are imported from non-market economy countries so the countries are free to apply what they consider convenient.

This is important because of the interaction of the United States and the EU as trade partners with one of the non-market economies, China, which is at the same time one of the most active users of anti-dumping as well as a frequent target of them, and the treatment that is given to its status by the most significant anti-dumping users will set the trend for the rest of the countries until a formal provision is made or until the terms provided in the protocol of accession of China expires[431].

The fact that China is classified as a non-market economy by both the EU and the US means that the surrogate country method is applied to Chinese exports in anti-dumping investigations carried out in these jurisdictions. This method is often perceived – not only by the Chinese Government and industry but also by some European and American anti-dumping lawyers – as inaccurate, unpredictable and arbitrary because the country that is chosen as a surrogate can either be a developing country with great differential economic elements or a developed country with significant differences in population and income like Norway, Austria and France[432].

Involving Non–Market Economy Countries: Surrogate Country Selection and Separate Rates" 72 Federal Register 13246, 13248.March 21, 2007. See also, GANTZ D. Polyethylene Retail Carrier Bags: Non-Market Economy Status and U.S. Unfair Trade Actions against Vietnam" North Carolina Journal of International Law and Commercial Regulation, Vol. 36, 2010. p. 103.

[431] Despite the fact that the United States and the EU insist in exercising their right to treat China as a non-market economy, at least 57 countries granted China Market Economy Status. Some of those countries are Australia, New Zealand, South Africa, Brazil, Argentina, Russia and Malaysia. See RAVENHILL & JIANG. "China's Move to Preferential Trading: An Extension of Chinese Network Power?" Paper presented at the international conference "Made in China vs. Made by Chinese: Global Identities of Chinese Business". University of Durham. United Kingdom. 2007. p. 23 note 41.

[432] See generally Supra LONG (2008).

4.4.2 China

China joined the WTO in December 2001 and as a preparation to their accession, a major institutional transformation and development has taken place in order to adapt to the WTO regulations. China agreed in its protocol of accession to the WTO to be granted non-market economy status for 15 years from the date of accession[433], and China has always been the principal target of anti-dumping actions by all WTO Member States[434]. It is important to understand the structure of the authorities and procedures in place for anti-dumping investigations, measures and duty collections since it is in them and in the international trade policies that practices originate.

Due to its rapid industrial development, China has been the target of an increasing and significant amount of anti-dumping litigation, but also in its short membership of the WTO it is one of the largest anti-dumping users[435]. China has a low incidence of targeting developing countries, which could be explained by the fact that China naturally cannot target itself[436], which does not impede action against traditional anti-dumping users and developed countries such as the United States and the European Union. In fact, China was implementing anti-dumping actions previous to its consolidation as a WTO member. "*Before its accession to the WTO, China initiated 33 anti-dumping investigations, under the 1997 regulations"*[437]. Almost half of

[433] This is contained in paragraph 15(a) of China's accession protocol. The automatic consideration of China as a Market economy upon expiry of the 15 year period has been subject of much debate. It is argued that the accession protocol allows for discretionary interpretation of paragraph 15(a), and thus, China can be treated as a Non-Market Economy after 2016 until it satisfies the market economy criteria stipulated in domestic laws. However, a reading of paragraph 15(a) as a conditional derogation clause and its clear text establish that upon expiry of the prescribed term, China must be automatically treated as a Market Economy by other WTO members. For a more detailed illustration on this debate see O'CONNOR B. "The Myth of China and Market Economy Status in 2016", available at http://worldtradelaw.typepad.com/files/oconnorresponse.pdf, see also RAO "China's Market Economy Status under WTO Anti-Dumping Law after 2016". Tsinghua China Law Review. Vol. 5:151. 2013. p. 155. See also WT/DS397/AB/R European Communities- Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China. 2011.

[434] Supra INTERNATIONAL BAR ASSOCIATION. pp. 13–14.

[435] China is the eight biggest user in the world of Anti-Dumping Measures having reported 148. See statistics of Anti-Dumping Measures : By Reporting Member 01/01/1995 -30/06/2011: http://www.wto.org/english/tratop_e/adp_e/adp_e.htm

[436] KOMMERSKOLLEGIUM/NATIONAL BOARD OF TRADE, Sweden. Report: The Use of Antidumping in Brazil, China, India and South Africa – Rules, Trends and Causes. Stockholm. 2005. p. 10.

[437] The Regulations on Anti-Dumping and Countervailing Measures were issued by the State Council of People's Republic of China on March 23, 1997.

such cases were not reported to the WTO Committee on Anti-Dumping Practice because they were finalized before China's accession to the WTO[438]. The first anti-dumping investigation was initiated in 1997 on import of newsprints from Canada, United States and South Korea[439].

In industry, despite the fact that the chemical industry is China's third largest following textiles and machinery[440], "*China has a trade deficit in that sector. Indeed, China is the world's second largest consumer of basic chemical products and relies greatly on imports of these products[441]. With the commitment to lower tariffs on chemicals after its WTO accession, domestic producers in the sector are facing increasing competition from imports; hence, the increase of anti-dumping investigations and imposition of anti-dumping measures in that sector*"[442].

The following chart briefly describes the legal framework of anti-dumping in China and the authorities who are in charge of the different aspects related to anti-dumping procedures. The most substantial procedures will be explored in order to find out whether:

- They formally comply with the Anti-Dumping Agreement.
- They lead to practices which are adjusted to the WTO's principles and objectives.

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[438] Supra THI THUY VAN L & TONG S (2009) p.12. THI THUY VAN L & TONG S in their text also indicate that "*Six of the 33 cases were terminated without the imposition of Anti-Dumping duties due to a negative determination on injury".*

[439] "*Receiving complaints from nine domestic newsprint companies, Moftec and SETC started an antidumping investigation in December 1997. The investigators concluded that the invasion of newsprint from the U.S., Canada and South Korea had serious material injury for Chinese newsprint industry. Newsprint prices dropped 9.1%, the total profits of the nine companies dropped 88%, leading to inventory build up and large-scale layoffs. Moftec and SETC issued its final verdict of China's first antidumping case in June 1999, imposing punitive antidumping tariffs on newsprint imports from the U.S., Canada and South Korea. The antidumping tariff rate for each country was based on a normal price, which is determined based on the CIF value of the product. Due to the variation in costs and market prices from company to company, the U.S., Canada, and South Korea were subject to tariff rates of 78%, 57-78%, and 55% respectively*". Citing NING & ROSS (2001) YIN J. Z., "China: How to fight the Anti-Dumping war". China and Global Business. Stillman School of Business. Selton Hall University, 2003. P.8

[440] Sectoral distribution of AD measures by China by CZAKO J. "Anti-Dumping selected Statistics and Trends" Rules Division WTO Secretariat. Sep 2010.

[441] Supra THI THUY VAN L. & TONG S. (2009) p. 14.

[442] Supra THI THUY VAN L. & TONG S. (2009) p. 14.

- They could be triggering Article XXIII and in which form this article would be applicable to anti-dumping practices in China.

Table 3. Anti-Dumping Legislation and Implementing Authorities in China[443]

Local regulation of the Anti-Dumping regime	**Administrative and Judicial Authorities for Anti-Dumping Matters**
1. Article 142 Civil Law of China: If any international treaty concluded by or acceded to by the People's Republic of China contains provisions differing from those in the civil laws of the People's Republic of China, the provisions of the international treaty shall apply, unless the provisions are ones on which the People's Republic of China has announced reservations. 2. the regulations of the People's Republic of China on Anti- Dumping – 2004 (The regulations): The 2004 regulations are the result of a long process of regulatory adaptation to be able to comply with the WTO agreements and they contain the regime under which all	1. Bureau of Fair Trade for Imports and Exports (BOFT): this office reports to the Ministry of Commerce (MOFCOM) is in charge of dumping investigations. 2. Bureau of Industry Injury (BII): also depends on MOFCOM and it is in charge of injury investigations and causal link investigations not only for anti-dumping investigations, but also for countervailing duty and safeguard investigations 3. State Council Tariff Commission (SCTC): the SCTC is in charge of making decisions on the imposition of provisional and definitive anti-dumping duties and the refund of extra duties based on the proposal by MOFCOM. Its powers are more formal than substantial 4. Customs General Administration (CGA): Customs offices in China are under the control of the State Council. The CGA controls China's customs offices. Regarding

[443] Substantial table contents sourced from regulations referred by Supra NAKAGAWA P.37

anti-dumping procedures are to be held.	anti-dumping, their function is to collect provisional and definitive anti-dumping duties. In addition they are in charge of refunding extra duties. They also verify the data of exports of the products subject to price undertaking[444].

The substantial aspects that the authorities take into account to determine whether they will impose an anti-dumping duty or not are essential to understand when and how the anti-dumping laws and practices can be "undercover protectionism", and which of those actions or omissions may be the subject of a nullification or impairment complaint. The five essential concepts are:

1. Causality

2. Dumping

3. Material Injury

4. *Like Product*

5. Public Interest

This review will focus on the last four elements mentioned above. Anti-dumping investigations begin from the point of comparing products that are alike and determining whether one of those products has been sold at a price below normal value in order to obtain an unfair advantage in the foreign markets. Therefore, the first substantial consideration that is made in all anti-dumping procedures is the consideration of **like products.** Article 2.6 of the Anti-Dumping Agreement provides

[444]Supra NAKAGAWA (2007) p. 37.

a stringent definition of the term like product[445]. Establishing what a like product is gives an object to the anti-dumping investigations and it is essential to determine whether there has been a material injury.

In China, the procedure to identify like products is contained in the following norms: Article 12 of the 2004 Regulations, Article of the Rules on Investigations of Industry Injury for Anti-Dumping, Article 14 (2) of the 2004 Regulations and Article 11 (3) of the Provisional Rules on Initiation of Anti-Dumping Investigations[446]. These regulations require detailed descriptions and numerous facts to be taken into account to determine when there is a case of like products. Despite the fact that they are formally in force and that their requirements are clear, they are not followed as strictly in practice. Some of the flaws of the current practice of determining like products in China are:

1. Application documents for the initiation of an anti-dumping investigation that cover a broad range of products which are not limited to the dumped product. Furthermore, when the application documents specifically mention the dumped product, they contain sales data of a broader range of products. This is not normal practice in China but it has occurred in more than one case. It is not a flaw exclusive to the Chinese practice. Indeed, it can be observed in a variety of countries. In China, when faced with this situation, the exporter has the possibility of correcting the problem by submitting a request for an adjustment of product scope within twenty days from the date of public notice of initiation of an investigation[447]. Also, it is possible to submit simplified requests with brief descriptions and a detailed description at a later stage of the investigation, and a similar request is allowed after the preliminary determination.

[445] Anti-Dumping Agreement Art 2.6: Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

[446] Art 11(3) of the Provisional Rules on Initiation of Anti-Dumping Investigations describes the requirement to provide a detailed description of the allegedly dumped product.

[447] Art 5 (1) of the Provisional Rules on the Procedure for Adjusting Product Scope in Anti- Dumping Investigations.

2. Investigations by the MOFCOM may be initiated without specification of the product scope. Investigations initiated without specification of the product scope are a violation of Art. 12.1 of the Anti-Dumping Agreement. However, in practice, China does publish the scope of the investigation in its initiation notices in a very vague manner. This does not allow the exporters to cooperate properly.

3. Some products are considered ″like″[448] products by the MOFCOM when in reality they have different composition, presentation, uses and target users[449]. This practice in itself constitutes a breach of Article 2.6 of the Anti-Dumping Agreement and therefore is subject to the remedies contained therein. Additionally, should the classification of like products affect the benefits of the WTO agreements vested in a member state who is a trading partner of China, Article XXIII 1:(a) is applicable without prejudice to the other remedies available. In this situation it is possible to conclude that the affected party has a choice of remedies that can be used either as a principal and a subsidiary or independently, but not concomitantly, as the remedies are different in their form and their consequences exclude each other.

In order to determine the existence of **dumping**, the regulations have established a method to ascertain the **normal value** of goods[450]:

Where there is a comparable price for the like product of the import in the ordinary course of trade in the domestic market of the exporting country or region, such comparable price shall be either (i) the comparable price of the like product when exported to an appropriate third country or region, or (ii) the cost of production of the like product in the country or region of origin plus a reasonable amount for expenses and profits.[451]

[448] MOFCOM has understood to have discretion to decide whether to apply the likeness factors indicated in the AD Rules as it say that the authorities *may* consider them to establish the likeness of two products. See MOFCOM Public Notice No. 51/2010 in WT/DS427/R China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States. See also Evaluation of the European Union Trade Instruments. Contract No. SI2.581682. Final Evaluation Study. Volume 1: Main Report. BKP Development Research and Consulting. 2012. p. 150.
[449] See Supra NAKAGAWA (2007) pp. 59-60.
[450] 2004 Regulations.
[451] Art 4 of the 2004 Regulations.

China applies the methodology of constructed value (ii) as a standard procedure. The methodology (i) that refers to third party exports price has never been applied despite the fact that it is formally allowed by the regulations.

In order to establish a potential dumping margin, a price comparison must be made. Price comparison in China is always made on the basis of a comparison of weighted average normal value with weighted average of prices of all comparable export transactions. The method of comparing the normal value and export price on a transaction by transaction basis is not used despite being compliant with the Anti-Dumping Agreement and formally included in the 2004 regulations[452]. A comparison between weighted average normal values with prices of individual export transactions is allowed in the cases where export prices differ significantly among buyers, provinces or time periods and it is too onerous to make a comparison with any of the previous two methodologies[453]. However, this last methodology is also not used by China despite being contemplated as possible and compliant with the Anti-Dumping Agreement.

The price comparison methodology used in China can be problematic in the cases of:

(A) Processing Trade: when parts and materials imported under the processing trade regime which are exempt from duty[454] are included in the calculation of the margin of dumping. This is a case of lack of transparency because MOFCOM does not disclose the details of its calculation of the margin of dumping and the methodology of calculation may be affecting the exporters by including the parts and materials that are supposed to be exempt of duty in the calculation.

[452] Art 6.3 of the 2004 Regulations.
[453] Art 6.4 of the 2004 Regulations.
[454] Under the processing trade regime, first introduced in 1979, China designates export processing zones and invites foreign investors to establish manufacturing facilities there for processing and export. Those parts and materials imported for processing are exempt from Chinese Customs Duties and export value added taxes tariffs, on the condition that the processed products are exported. See "Guide to Doing Business in China" Hong Kong Trade Development Council (HKTDC) Research Department (2004/ 2005), Sec 2.3. See also NAKAGAWA (2007) pp. 62–63.

(B) Transactions not conducted in the ordinary course of Trade: transactions not conducted in the ordinary course of trade are exempt from the determination of a normal value as per Article 4 of the 2004 regulations. MOFCOM has recognised, upon request from exporters, two types of transactions under this category and accepts to exclude them from the calculation of a normal value. The transactions accepted by MOFCOM are swap transactions[455] and consignment production[456]

(C) Transactions between related companies: in the case of the transactions between related companies MOFCOM has some procedures that despite being legitimate may lead to the inclusion of some transactions that are technically considered to be between related companies, in the dumping margin calculation.

(D) Price Adjustments: MOFCOM has not accepted including the increased indirect sales costs for exports in the price adjustments, which are naturally higher than costs for domestic sales due to the incremented need for sale promotion activities. Additionally, MOFCOM has not disclosed under what conditions it conducts an adjustment of the levels of trade.

The events that could be subject to nullification and impairment complaints are the most evident cases of a breach committed in the price adjustment calculation of dumping margins and price comparisons in the case of processing trade in which the MOFCOM process is not transparent enough. Again, the breach of the Anti-Dumping Agreement has a specific remedy contained in the Agreement which is not exclusive of the application of Article XXIII until it has been chosen by the complainant.

[455] A Swap refers to an agreement between two parties to exchange one or more cash flows measured by different rates or prices with payments calculated by reference to a principal base (notional amount). See YOUND, DUNCAN, KAPLAN "CFTC Adopts Large Trader Reporting Rules" Skadden, Arps, Slate, Meagher & Flom LLP, July 22, 2011. Available online at: http://www.skadden.com/Index.cfm?contentID=51&itemID=2490. A Swap transaction is subdivided in two: location swap, which refers to the place of production where the price of a commodity does not have real economic importance; and time swap which refers to inventory cycles of different producers.

[456] Consignment manufacturing, as opposed to turnkey manufacturing can be best thought of as “partial” outsourcing. It describes a model in which the technology producer maintains some portion of the overall manufacturing supply chain in-house – typically, purchasing and/or system assembly (box and build). Under a consignment model, in-house purchasing, shipping and receiving groups are responsible to obtain materials, sort and package them for production and deliver them to the contract manufacturer for assembly.
Definition by OCM Manufacturing available at:
http://www.ocmmanufacturing.com/resources/tip_docs/OCM_TurnkeyVsConsignment_ShortPaper_FINAL.pdf

The determination of **material injury** is mostly compliant and respectful of the rules of the Anti-Dumping Agreement. The main controversial issues with regards to the material injury do not originate in the rules themselves but in the practices of MOFCOM. For example, the rules on cumulation are almost a transliteration of Articles 3.3 and 5.8 of the Anti-Dumping Agreement. Nonetheless, the MOFCOM applies them without making a full examination of substantive factors such as *conditions of competition between the imported product and the like domestic product*[457]*.* The complaint is that MOFCOM rejects requests for non-application of cumulation from responding companies based on detailed evidence and data and conducts the cumulation without explaining substantial grounds for their decision.

One practice of MOFCOM that may affect benefits granted by the Anti-Dumping Agreement occurs during the injury investigation when there is insufficient disclosure of the bases of the assessment. In its preliminary determination and final determination, the MOFCOM provides the data on the factors contributing to injury without explaining how it reached injury determination[458]. In aspects like this, disguised protectionism can operate freely as there is no information available to the exporter on the basis of the anti-dumping investigation. In the process there may be opportunities to refute some of the findings, but if the data that is used to establish an injury is not disclosed to the respondent exporter, it is impossible to contest the injury determination.

Another situation that may result in an Article XXIII complaint is when the MOFCOM initiates investigations without specifying the product scope and which is concluded with a wide range of products. Again, this is not an exclusive practice of the Chinese trade authorities and can be seen almost everywhere in the world. However, this does not mean that this practice is acceptable or that it would not be a cause of action in an eventual Non-Violation complaint, or even in a violation complaint as a breach of the agreement.

[457] As mandated by Art 15.1(2) of the Rules on Investigations of Industry Injury for Anti-Dumping. See Supra NAKAGAWA (2007) p. 65.

[458] NORTON P.M. & BUSH N.G. "Anti-Dumping: Investigations in China: Developments and Problems". Fair Trade Center. 2005.

In the determination of a **causal link**, a similar flaw has been detected in the practices of the MOFCOM. There is insufficient information given to the exporters of the foundations of their causal link evaluation which on occasion leads to arbitrary determinations of a causal link that can be unreasonable. Also the cumulation practice by MOFCOM does not allow them to differentiate between imports that cause injury and imports that do not[459], leading to the imposition of measures on imports that do not pose a material or potential injury.

Finally, the consideration of **public interest** is contained in Article 37 of the 2004 regulations which state that: ″imposition and collection of anti-dumping duties shall be in the public interest″. No other elaboration on the implementation of this rule has been enacted. Anti-dumping investigation remains without public participation mechanisms. The progress made by China can be seen in the injury investigations where public hearings are held and written submissions from the public are admitted[460].

Possible Non-Violation complaints are more difficult to spot in the substantial aspects of the implementation of anti-dumping rules as protectionism is rarely contemplated in the substantial regulations and considerations and it becomes more evident in the practices and procedural aspects of the Anti-Dumping Agreement implementation. In order to understand the practices, the procedure established by the 2004 regulations must be examined. This will assist in the process of spotting compliant situations where a Non-Violation complaint may exist and also will assist in understanding the structure and steps of an anti-dumping procedure in China:

Firstly, the conditions that give place to applying anti-dumping measures are:

(a) An imported product is dumped into China's market[461];

[459]Supra NAKAGAWA (2007) pp. 66- 67.
[460] Art 17 and 30 of the Rules on Investigations of Industry Injury for Anti-Dumping.
[461]Unless the margin of dumping is less than 2% (Article 27, the 2004 Regulations).

(b)The dumping action causes or threatens to cause material injury to an established domestic industry; or causes material obstruction to the establishment of such an industry[462].

Initiation of the process:

MOFCOM shall formally initiate the investigation by publishing a notice of initiation, within 60 days from the date of receipt of the complaint, which is normally filed by Chinese domestic producers or their association, if MOFCOM is satisfied with its examination of the complaint. As a normal practice, MOFCOM will notify the relevant exporting countries prior to the publishing date of the notice of initiation (initiation date)[463].

Appearance registration:

Any interested party such as domestic industry, foreign exporter or producer, importer, end-user, association and governmental agency that is willing to participate in the investigation, is required to file an appearance registration within 20 days from the initiation date[464]. The interested party could file its preliminary comments on product scope, complainant's standing, subject, country and other relevant matters, as stated in the notice of initiation with MOFCOM, within 20 days of the initiation date[465].

Preliminary Determination and Provisional Measures:

The MOFCOM does not establish the investigation schedule for specific cases. In the preliminary findings, MOFCOM normally grants 20 days to all interested parties

[462]Unless the volume of dumped imports is negligible (Article 27, the 2004 Regulations). The volume of dumped imports shall normally be regarded as negligible if (i) the volume of dumped imports from a country (region) is less than 3% of total like products imported or (ii) the volume of dumped imports from several countries (regions), which individually accounts for less 3%, is less than 7% Item 2, Article 9, the 2004 Regulations).

[463] YANG L. "China - Overview". The Handbook of Trade Enforcement.Global Competition Review: Special Report. 2011.

[464]Supra YANG 2011.

[465]Supra YANG 2011.

to present their comments on the preliminary findings[466]. The MOFCOM has usually made the preliminary findings within six to eight months from the initiation date[467]. On the basis of the findings, the MOFCOM must make a preliminary determination on dumping and injury as well as on the existence of a causal link between dumping and injury. This determination must be published in accordance with the terms of Article 24 of the 2004 regulations which states that the MOFCOM must terminate the investigation in the following circumstances:

(i) The application has been withdrawn by the applicant;

(ii) There is insufficient evidence of the existence of dumping, injury and the causal link between the two;

(iii) The margin of dumping is less than 2 per cent;

(iv) The actual or potential volume of dumped imports or the injury is negligible;

(v) Other circumstances that MOFCOM considers not appropriate to continue the anti-dumping investigation.

According to Article 7.1 (iii) of the Anti–Dumping Agreement, provisional measures may be applied only when the authorities consider that there may be a danger of damage due to the dumping during the course of the investigation[468]. In practice, MOFCOM has never applied (v), and the provisional measures are always applied without justifying its concern of possible injury during the course of investigation. This attitude may be read under two plausible interpretations. The first one is that MOFCOM understands that in all the cases when there is determination of dumping, injury and a causal link, there is automatically a reasonable concern of possible injury during the course of the investigation. In this case this attitude of MOFCOM would be formally compliant with the Anti-Dumping Agreement, and a Non-Violation complaint could be brought about by a member state whose industry has been

[466]Supra YANG 2011.
[467]Supra YANG 2011.
[468] Anti- dumping Agreement Art 7.1 Provisional measures may be applied only if:
(…)(iii) the authorities concerned judge such measures necessary to prevent injury being caused during the investigation

affected by the provisional measures, provided that the complainant can prove that there was no reasonable danger of injury during the investigation.

The second possible interpretation is that MOFCOM, by failing to justify its concern and the need to prevent injury during the investigation is not applying the text of the Anti-Dumping Agreement in the strict sense. This could in itself constitute a violation, but the probability that a panel decides this in detriment of the country's prerogatives and sovereignty in the implementation of the Anti-Dumping Agreement is remote.

When MOFCOM makes an affirmative preliminary determination it is entitled to apply one of the following anti-dumping measures:

1. Imposition of provisional anti-dumping duties
2. Provision of deposits, bonds or other forms of security[469].

For practical reasons, the MOFCOM always has required the provision of deposits, as the imposition of provisional anti-dumping duties could result in having to calculate them and return them should the results of the investigation favour the exporter. Also, the provision of deposits is an autonomous decision of MOFCOM, whereas the imposition of provisional duties requires a joint effort between SCTC and MOFCOM[470], making it a more complicated process.

The period for applying provisional measures is four months that can be extended to nine months in special circumstances in accordance with Article 30.1 of the 2004 regulations. The special circumstances are defined by Article 7.4 of the Anti-Dumping Agreement[471]. In a strict sense, this means that China accepts applying a

[469] Art. 28 of the 2004 Regulations.

[470] In order to impose provisional duties, the MOFCOM must make a proposal to the SCTC, which in turn must make a decision accepting the MOFCOM proposal.

[471] Ant-Dumping Agreement Art 7.4: The application of provisional measures shall be limited to as short a period as possible, not exceeding four months or, on decision of the authorities concerned, upon request by exporters representing a significant percentage of the trade involved, to a period not exceeding six months. When authorities, in the course of an investigation, examine whether a duty lower than the margin of dumping would be sufficient to remove injury, these periods may be six and nine months, respectively.

lesser duty rule. In practice it has not been applied but it remains a possibility in the Chinese anti-dumping system[472].

Price undertakings:

Foreign producers or the government of an exporting country (region) can offer price undertakings to MOFCOM after the preliminary findings. The MOFCOM may suggest price undertakings to an exporter but it may not force an exporter to enter into price undertakings[473]. This is a measure is compliant with the Anti-Dumping Agreement.

In anti-dumping investigations, price undertaking offers shall be filed with MOFCOM within 45 days from the publishing date of preliminary findings. The consent of the government of the exporting country (region) is not a precondition of MOFCOM's acceptance of an offer of price undertaking[474].

Under a price undertaking the exporter should increase its selling price by an amount equivalent to the dumping margin established in the preliminary determination. It can be less than that as long as the increase in price removes the actual or potential injury to the domestic industry[475]. In case where the MOFCOM considers that a price undertaking is acceptable and it benefits the public interest[476], the MOFCOM may suspend or terminate the investigation without imposing provisional or definitive measures.

There are two aspects of the Chinese practice on price undertakings that can be problematic and may give rise to a nullification or impairment complaint. The first one is related to the provisional rules on price undertakings where MOFCOM is allowed to accept only those proposals submitted by *exporters who have been sufficiently cooperative during the investigation procedure*[477]*.* The Anti-Dumping Agreement provisions mention that the undertakings offered are not of mandatory acceptance

[472]NAKAGAWA (2007) pp. 41–45.
[473] Art 31 of the 2004 Regulations.
[474]Supra YANG 2011.
[475]According to Art 15 of the provisional rules on Price Undertakings in Anti-Dumping Investigations.
[476]For example by benefiting consumers with a wider offer and a price moderation.
[477]Article 11, Provisional Rules on Price Undertakings in Anti-Dumping Investigations.

and do not need to be accepted if the authorities consider their acceptance *impractical* or for reasons of *general policy;* the exporter must be given reasons for rejection of the undertaking and the opportunity to comment[478]. However, there is not a clear standard of what it means to be *sufficiently cooperative*, and the understanding of sufficient cooperation varies from case to case. Therefore, this standard is likely to be formally consistent with the Anti-Dumping Agreement, but substantially detrimental to the benefits given by Article 8.3 to the exporters[479], which could give rise to a nullification and impairment claim, either as a violation, if the imposition of a standard that is not consistently applied is considered a breach of the agreement; or in the event that the Chinese authorities do not provide reasons of rejection or an opportunity to make comments. Also, it can be considered a Non-Violation if the standard of sufficient cooperation is found to be compliant, but its inconsistent application implies a material impairment for the exporter.

In its written reply to questions from Mexico to the Committee on Anti-Dumping Practices, China explained that if a company does not cooperate during the investigation process, it would be hard to ascertain whether the company's adherence to such price undertaking could in fact be monitored[480]. Hence, China considers it impractical to accept those offers. This reasoning is not convincing because there is no necessary correlation between the conduct of the companies during the investigation process and their undertaking of the implementation process[481].

Furthermore, Article 8.6 of the Anti-Dumping Agreement has already provided the anti-dumping authorities with effective tools of monitoring uncooperative exporters,

[478] Art 8.3 Anti-Dumping Agreement on Price Undertakings: 8.3 Undertakings offered need not be accepted if the authorities consider their acceptance impractical, for example, if the number of actual or potential exporters is too great, or for other reasons, including reasons of general policy. Should the case arise and where practicable, the authorities shall provide to the exporter the reasons which have led them to consider acceptance of an undertaking as inappropriate, and shall, to the extent possible, give the exporter an opportunity to make comments thereon.

[479] CHOI WM & GAO HS."Procedural Issues in the Anti-Dumping Regulations of China: A Critical Review under the WTO Rules". Chinese Journal of International Law (2006) 5 (3): 663-682.p. 675.

[480] Committee on Anti-Dumping Practices, Committee on Subsidies and Countervailing Measures, Notification of Laws and Regulations Under Articles 18.5 and 32.6 of The Agreements, Replies to the Questions from Mexico Regarding the Notification of China, G/ADP/Q1/CHN/43, G/SCM/Q1/CHN/43, 23 April 2004, 7.

[481] Supra CHOI WM & GAO HS. 2006. pp. 675-678.

i.e. the power to collect information from the exporters and to apply provisional measures using the best information available in the event of violation of an undertaking[482].

The second objection to the Chinese rules and practice on price undertakings emerges from the rules on breach of price undertaking arrangements. In them, it is stipulated that Chinese authorities may resume investigations based on the best information available, and decide to apply provisional measures and levy anti-dumping duties retroactively on the products imported within 90 days prior to the application of such provisional anti-dumping measures, provided that the products imported before violation of the undertaking are not subject to such retroactive duties[483]. The provisional rules on price undertakings also specify that if the definitive anti-dumping duty imposed in the final determination is lower than the amount of cash deposit established in the preliminary determination, the difference must be refunded. This is all compliant with the Anti-Dumping Agreement.

The potential breach of the Anti-Dumping Agreement arises with the part of the rules stating that *"if the definitive Anti-Dumping duty established in the final determination is higher than the amount of cash deposit established in the preliminary determination, the difference shall be levied"*[484]*,* which is in clear contradiction of Article 10.3 of the Anti-Dumping Agreement which states that *"if the definitive Anti-Dumping duty is higher than the provisional duty paid or payable, the difference shall not be collected"*. The norm is evidently in breach of the Anti-Dumping Agreement, and its justification in policy considerations is remote, as the exporters are already exposed to a less advantageous situation when evaluated with the best information available on a breach of price undertakings, which would make the collection of cash deposits a double and unjustified punishment to the exporter[485].

[482]Supra CHOI WM & GAO HS. 2006. pp. 675-678.
[483]Article 36, Anti-Dumping Regulations; Article 27, Provisional Rules on Price Undertakings in Anti-Dumping Investigations.
[484]Article 27, Provisional Rules on Price Undertakings in Anti-Dumping Investigations.
[485]Supra CHOI WM & GAO HS. 2006. pp. 675-680.

Final Determination and Final Measures:

In conformity with the Anti-Dumping Agreement, the anti-dumping investigation shall be concluded within 12 months as per Article 26 of the 2004 regulations. However, the practice indicates that investigations took approximately 18 months up to 2007[486]. From 2007 onwards, most investigations have concluded within the compliance period[487]. Anti-dumping duties are applied on products after the date of publication of the final determination and, in special cases where the final determination establishes an injury or a serious threat thereof; they are applied prior to the final determination. The anti-dumping duties can be collected retroactively in the following cases[488]:

a. When there is a history of the dumped imports causing injury to the domestic industry, or the importer of the dumped import was, or should have been, aware that the exporters practice dumping and that such dumping would cause injury to the domestic industry; and
b. The dumped imports were massively imported in a short period of time and were likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied[489].

These two circumstances have never been present simultaneously; hence there has been no retroactive application of the anti-dumping duties[490].

The maximum period for the collection of an anti-dumping duty is five years, which means that a duty can be imposed for a shorter period, although a reduced period has never been applied in practice. This is not an exclusive practice of China and it

[486] Supra NAKAGAWA 2007.
[487] WU X. "Antidumping Law and Practice in China". Global Trade Law Series. Kluwer Law International. The Netherlands. 2009 p. 321
[488] Naturally, Anti-Dumping Duties always have a retrospective effect. The situations described refer to the special events where the duty affects a period prior to the application of provisional measures. Even though the occurrence of these events is not frequent, it is permitted in the Chinese Anti-Dumping regime.
[489] Art 44 of the 2004 Regulations in compliance with Art 10.6 of the Anti-Dumping Agreement.
[490] See Supra NAKAGAWA 2007.

is understood by most of the countries as a standard procedure to apply the maximum period of anti-dumping duties. The possibility of a shorter period is a benefit deriving from the Anti-Dumping Agreement for the exporters and could substantiate a Non-Violation complaint, depending on the dimension of the duty imposed.

Review:

In the Chinese regulations on anti-dumping there are three types of review: administrative review, sunset review and judicial review. The administrative review takes place upon the request of an interested party who must submit substantial evidence, as long as a reasonable period of time has elapsed[491]. The administrative review should be completed within the same time period as an initial investigation, that is, it should be completed within twelve months[492].

The sunset review is the review that allows the imposition of an anti-dumping duty to be extended beyond the maximum of 5 years[493] imposed by the Anti-Dumping Agreement and contained in the 2004 regulations. A sunset review can extend the anti-dumping duty in the event that its termination could lead to a new incident of dumping and its related injury or threat of injury to the domestic industry. The norm that allows and regulates sunset reviews in China is contained in Article 48, Chapter V of the 2004 regulations.

Finally, a judicial review may be requested by an interested party in the event that one of the following reasons to impose a duty is not satisfactory to the interested party:

[491] Art 49, Chapter V of the 2004 Regulations.
[492] Art 59 of the 2004 Regulations.
[493] Members can reduce this term in bilateral trade agreements or unilaterally. Currently, New Zealand and Singapore are the only countries to have signed a bilateral trade agreement modifying the maximum duration of Anti-Dumping Duties. This modification is contained in Article 9.1 (e) of the Agreement between on a Closer Economic Partnership as follows: *(e) the period for review and/or termination of anti-dumping duties provided for in Article 11.3of the WTO Anti-Dumping Agreement is reduced from five years to three years".* Full text available at http://wits.worldbank.org/GPTAD/PDF/archive/NewZealand-Singapore.pdf.
Countries can impose duties for less than the maximum period of five years.

(a) The final determination of dumping, injury or causal link between the two;
(b) The decision on whether or not to impose an anti-dumping duty or the decision to impose anti-dumping duty retroactively;
(c) The decision on a duty refund or imposition of an anti-dumping duty on a new exporter;
(d) The results of an administrative or sunset review[494].

China has a generally compliant system of anti-dumping regulations and provides a fairly complete procedure which also contains mostly compliant substantial rules for determination of dumping and calculation of damages, with the exception of some problematic rules that are not as exhaustively constructed as is required by the Anti-Dumping Agreement[495]. Additionally, some of the regulations do not adjust themselves to the requirements of the Anti-Dumping Agreement[496]. That does not mean that China is necessarily operating in violation of the WTO agreements, but some of the practices rather than the gaps in regulation may be the basis of Non-Violation complaints, albeit with the intrinsic difficulty in their standard of proof.

4.4.3 Brazil

Brazil has been a contracting party of GATT since its beginning in 1947. However, it only started implementing anti-dumping regulations as late as 1987, after the congress ratified the Tokyo Round anti-dumping code in 1986[497] and enacted an implementing decree in January 1987[498]. After the creation of the WTO the Brazilian Congress adopted the final act of the Uruguay Round of multilateral trade negotiations and proceeded to update the legislation related to trade accordingly.

[494]Article 53, Chapter VI of the 2004 Regulations.
[495] Examples as described in THI THUY VAN L. & TONG S. (2009) include: (i) provision on dumping margin or comparison between export price and normal value; (ii) provisions on provisional Anti-Dumping measures; and (iii) provisions on information and evidence for an antidumping investigation. See. Supra THI THUY VAN L. & TONG S. (2009) p. 11.
[496]Such as (i) provision to initiate an Anti-Dumping investigation; 25 and (ii) provision on preliminary determination and applying provisional Anti-Dumping measures. Also indicated in THI THUY VAN L. & TONG S. 2009 p. 12.
[497]Legislative decree No. 20 of 1986, promulgated on the 5th of December 1986.
[498] Decree No. 93.941, 19 January 1987.

In Brazil, the sectors which have dominated anti-dumping investigations are natural or cultured pearls, precious or semi-precious stones, precious metals, metals clad with precious metal and derived articles; imitation jewellery, base metals and articles of base metal and plastic and rubber[499].

Brazil is an interesting case in international trade with regards to anti-dumping measures because despite its late growth as an emerging economy, and the fact that it does use anti-dumping measures enough to be included in the top 20 users of anti-dumping in the world[500], it has been considered a restricted user of anti-dumping measures due to the frequent use of the lesser duty rule[501], the low success rate of anti-dumping investigations in relation to the requests, the size of the Brazilian market, and the non-WTO prescribed anti-dumping procedures that go beyond the basic requirements of the Anti-Dumping Agreement[502]. This can be the consequence of several reasons:

a. The reaction to the Brazilian experience of having been victims of foreign anti-dumping measures, specially by the United States,
b. As it experienced a series of hyperinflation in the eighties, domestic price depressive effects of dumping tend to be welcome; and
c. The Brazilian domestic industry tends to be reluctant to file requests for initiation of investigations which are very costly[503].

[499] Anti-Dumping Sectoral Distribution of Measures: By Exporting Country - Brazil 01/01/1995 - 30/06/2011. Available at http://www.wto.org/english/tratop_e/adp_e/ad_sect_distrib_meas_rep_member_e.pdf

[500] Top 20 users of Anti-Dumping 1995-2008 (by initiations). Available at http://www.antidumpingpublishing.com

[501] The lesser duty rule means that a duty may be imposed to remove the effects of dumping on imports of a particular product. An assessment is also made of the level of duty needed to remove the injurious effects of dumping. Measures will be imposed at the level of dumping or injury whichever is the lower. See http://ec.europa.eu/trade/tackling-unfair-trade/trade-defence/Anti-Dumping/index_en.htm

[502] These are unique mechanisms that have not been implemented by most Anti-Dumping users and that enhance transparency in Anti-Dumping investigations and thus reduce the abuse of Anti-Dumping measures in Brazil. The specific measures are: Final Public Hearings contained in Art 33 of the 1995 Decree; and the actual provision for Suspension of the Anti-Dumping Measures contained in Art 60 of the 1995 Decree. See Supra NAKAGAWA (2006) p. 331.

[503] Supra NAKAGAWA, (2006) p. 331.

The following chart contains a summary of the current anti-dumping authorities and the legal status of the WTO agreements in Brazil:

Table 4. Anti-Dumping Legislation and Implementing Authorities in Brazil[504]

Local regime of Anti-Dumping	**Administrative and Judicial Authorities for Anti-Dumping Matters**
The Final Act of the Uruguay Round, which included the Anti-Dumping Agreement was approved by a Legislative Decree and incorporated into the local legislation through an Ordinary Decree. In Brazil, international agreements which are incorporated into the domestic system have the same status as ordinary laws, and are subordinate to the Constitution of the Federal Republic of Brazil.	1. SECEX: Secretaria de Comercio Exterior of the Ministry of Industry, Commerce and Tourism (Minsterio do Desenvolvimiento Industria e Comercio Exterior). 2. DECOM: Departamento de Defensa Comercial – Commercial Defence Department: This department is a subdivision of the SECEX and its functions are: a. To examine the merit of anti-dumping investigation petitions with a view to protecting domestic industry; b. To open and conduct investigation for the application of Anti-Dumping measures; c. To recommend the application of commercial defence measures according to the WTO agreements; d. To accompany the discussions related to rules and application of the commercial defence agreements along with the WTO; e. To participate in international negotiations related to commercial defence, and f. To accompany and follow the investigations of commercial defence opened against Brazilian

[504] Table contents and structure are sourced from the regulations referred to by NAKAGAWA p. 331 et infra and the indicated bibliography.

Ordinary decrees are ranked lower than ordinary laws. The provisions of the Anti-Dumping Agreement are applicable directly in the case that the decrees have a gap in specific rules.	exporters and to assist their cases in coordination with other government departments and with the private sector[505]. 3. CAMEX: The Chamber of Foreign Trade (CAMEX) is responsible for the formulation and changes of the tariff and for its approval. The function of the CAMEX is to provide the country with better institutional coordination between the various ministries and agencies with decision-making power in the Brazilian foreign trade[506]. The CAMEX is governed by a Council of Ministers, composed of the Ministers of Finance; Development, Industry and Foreign Trade; External Relations; Agriculture; and Planning and Budget; as well as the Civil Cabinet Minister; it is presided over by the Minister of Development, Industry and Foreign Trade. The CAMEX also comprises an Executive Management Committee, in which representatives from other ministries and agencies participate, an Executive Secretariat, and a Private Sector Consultative Council (CONEX), comprising 20 representatives of the private sector[507].

In the substantive aspects, it is necessary to study how Brazil understands and applies the concept of like product, dumping, material injury and public interest as well as the practices around these concepts.

[505] Functions available in Portuguese in:
http://www.mdic.gov.br/sitio/interna/interna.php?area=5&menu=228,

[506] DA COSTA RAMOS G. ″CAMEX and USTR: An Institutional Analysis of the Conduct of Trade Policy in Brazil and the U.S.″ The Institute Of Brazilian Business & Public Management Issues Minerva Program. George Washington University - spring 2010 p. 16.

[507] WTO, Report by the Secretariat. Trade Policy Review – Brazil WT/TPR/S/140.1 November 2004.

The 1995 Decree makes a WTO compliant definition of **like product** which not only includes the definition of like product but also the definitions of domestic industry and the exceptions to it, which are also compliant with the Anti-Dumping Agreement as they are almost a literal reproduction of it[508].

Likewise, in order to determine **dumping,** the concept of normal **value** is included in the 1995 Decree. Normal value in Brazil is considered the price that is charged for like products in the ordinary course of trade for internal consumption in the exporting country, is compliant with the Anti-Dumping Agreement, as well as the supplementary rules for deciding the normal value of a specific product[509]. The Decree contains two different methods to determine the normal value of a product (representative export price and constructed value). In practice, DECOM does not give priority to a specific method, but in each case it uses a method which is decided upon by the information provided by the interested parties[510].

The price comparisons made to establish the dumping margin are drafted in accordance with the Anti-Dumping Agreement. It is required to make a fair comparison between the export price and the normal value at the same level of

[508] Art 5.1 of the 1995 Decree: The term like product shall be understood as an identical product that is equal in all aspects to the product being examined, or, in the absence of such a product, another product that although not exactly equal in all aspects, has characteristics closely resembling those of the product under consideration. Art 17 of the 1995 Decree: The term Domestic Industry shall be interpreted as referring to (i)the domestic producers as a whole of the like products, or (ii) those of them whose collective output of the product constitutes a major proportion of the total domestic production of those products.

[509] Art 5.3 1995 Decree: The Sales of the like product for internal consumption in the exporting country shall be normally considered as being of sufficient quantity for determining their normal value if they constitute at least **five percent of the products' sale to Brazil,** but this allows a lower percentage when it is demonstrated that domestic sales at this percentage do occur in sufficient quantity to permit adequate comparison.

The two alternative methodologies in the event that the normal value cannot be determined with reference to sales on the domestic market are as follows:
Art. 6 1995 Decree: If there is no sales of the like product in the ordinary course of trade in the domestic market, or when, for reasons of special market conditions or low sales volume, adequate comparison is impossible, the normal value shall be based:

(i) On the price of the like product being charged in exporting operations to a third country as long as this price is representative, or

(ii) On the value as determined in the country of origin, taking into account the cost of production in the country of origin plus a reasonable amount for administrative and selling cost, in addition to a margin of profit.

[510] WTO Committee on Anti-Dumping Practices, Replies of Brazil to questions posed by Mexico, G/ADP/Q1/BRA/9 9of July 1998 p. 2.

trade[511]. DECOM gathers the information necessary by requesting it from the parties without imposing too onerous a burden on them[512]. Price adjustments, transactions between related companies, sales below cost are all compliant with the Anti-Dumping Agreement and their appearance in the Decree resembles closely the workings of the Anti-Dumping Agreement.

The Lesser Duty Rule contained in Article 42.1 of the 1995 Decree is worthy of remark because as was mentioned above, it is drafted in accordance with the Agreement but, in practice, it is actually applied by Brazil, which is not a common practice amongst the majority of Member States of the WTO[513]. DECOM calculates the injury margin according to the mode of injury, evaluates the degree of competition between the investigated product and the domestic product, and then establishes the definitive anti-dumping duty.

In terms of **material injury,** the requirements to determine its existence and the factors to be taken into account as well as the establishment of threat of injury conform to the Anti-Dumping Agreement as the wording of the provisions is almost a reproduction of the Anti-Dumping Agreement[514]. Nonetheless, in some cases, DECOM has added some other injury factors besides the ones stipulated in the Anti-Dumping Agreement[515]. One of them is the consideration of whether market

[511]Normally, ex works.
[512]Art 9 1995 Decree.
[513] The lesser duty rule is applied by several members including Korea, Argentina (Decree766/94), Australia (In Australia, the application of the he lesser duty rule is currently being revised at the Customs Amendment (Anti-Dumping Commission Bill 2013), New Zealand, South Africa and Turkey. It has been established that countries that do apply the lesser duty rule tend to be more rule oriented, whereas the countries that have not adopted the lesser duty rule have a more discretionary anti-dumping practice. HANSEN, MEINEN & NIELSEN. "Elasticity of Substitution and Anti-Dumping Decisions". Conference paper presented at the AFSE Congress. Centre Vaugirard. Pantheon – Assas University, 2012. p. 16 Available at: http://www.touteconomie.org/conference/index.php/afse/aim/paper/viewFile/295/111. See also THERON N. "Anti-Dumping Procedures: Lessons for Developing Countries with Special Emphasis in the South African Experience"In Anti-Dumping: Global abuse of a trade policy instrument, Academic Foundation, Liberty Institute, Delhi, India, 2007. p. 9. See also NOGUES & BACARAT. "Political Economy of Anti-Dumping and Safeguards in Argentina" World Bank Policy Research Working Paper No.3587, Washington, D.C.: The World Bank. 2005. pp. 7, 17-18.
[514]Art 14 and Art 16 of the 1995 Decree.
[515]BARRAL W and BROGINI G. "Antidumping in Brazil" in KOMMERSKOLLEGIUM/NATIONAL BOARD OF TRADE, Sweden.(2005) p. 17.

reduction or technological obsolescence has occurred in the affected industry[516]. DECOM has also considered the variation on tariff, the reduction of the consumer market, the entrance of new competitors, and imports from other sources[517]. A third determination of injury was based on the rapid build-up of stocks of the dumped imports, which in turn led to the conclusion of injury, once compared with the reduction of market share[518].

In terms of **causal link,** Article 15.1 of the 1995 Decree introduces a norm that is not considered in the Anti-Dumping Agreement and that provides that *the impact of the process of liberalisation of imports on domestic prices is among the relevant factors to be considered that could cause injury to a domestic industry besides the dumped imports[519].* The reason behind this exception is that a substantial amount of the trade liberalisation conducted by Brazil was made through tariff reductions and suppression of quantitative restrictions during the decade of the nineties; these liberalisations lead the government to expressly exclude the impact of trade liberalisation on a local industry in the determination of a causal link between the dumped import and the injury to the domestic industry[520].

DECOM is strict in the injury determination and this means that the amount of anti-dumping measures imposed in comparison to all the initiation cases is rather low. Indeed, the majority of the cases that end without the imposition of anti-dumping duty are cases where DECOM found no injury[521].

The **public interest** is taken into account in two possible ways in the anti-dumping investigations in Brazil. The first one is when SECEX or CAMEX make anti-dumping determinations based on the recommendations of the DECOM. Either SECEX or CAMEX may take the public interest into account in order to make their own

[516]DECOM, Investigation no. 52100-069040/2002-11 (Steel blade for stone cutting from Italy).
[517]DECOM, Investigation no. 52100-008067/2001-57 (Glyphosate from China).
[518]DECOM, Investigation no. 52100-007526/2001-85 (Ammonium nitrate from Estonia, Russia and Ukraine).
[519] Art 15.1 of the 1995 decree, translation NAKAGAWA (2006) p. 321.
[520] WTO Committee on Anti-Dumping Practices, Brazil's reply to questions posed by Canada and by the United States, G/ADP/Q1/BRA/7,8 May 1998, p. 6.
[521]Except for those cases that are terminated for the withdrawal of the request by the domestic producers. See NAKAGAWA (2006) p. 321.

determination. A recommendation by the DECOM to impose a definitive anti-dumping measure may be rejected by SECEX or CAMEX in view of the public interest. This is not a widespread practice and it has been exercised scarcely, but it is a possibility within the Brazilian system. Some remarkable cases where it has been used are:

1. Investigation on the imports of soda ash (*barrilha*) from Bulgaria, Poland and Romania[522]. In this case, the public interest clause was used. It was assumed that the application of an anti-dumping measure could severely affect the glass and cleaning industries[523].

2. Investigation on the imports of bicycle tyres from India and China[524]. In this case, the national interest clause was broached arguing that the measure would possibly negatively affect Brazilian relationships with China and India.

The second possibility to include considerations of public interest is when an investigated product is sold on the Brazilian retail market. In this case, the DECOM notifies the initiation of the investigation to both the representatives of the consumers and the representatives of the industrial users so that these parties also have the opportunity to participate in the investigation by providing relevant information. DECOM has the prerogative to decide whether that information is acceptable and if it will use it in the context of the investigation or if it must be rejected and not taken into consideration[525].

The procedural aspects of the anti-dumping investigations in Brazil are also regulated by the 1995 Decree and most of them are in strict compliance with the Anti-Dumping Agreement.

Initiation of the Investigation:

[522]DECOM, Investigation no. 52100-000016/1996-11.
[523]Supra BARRAL and BROGINI. (2005) p. 18.
[524]DECOM, Investigation no. 52100-085489/2002-27.
[525]Supra NAKAGAWA (2006) p. 323.

The anti-dumping investigation may be initiated by request of the domestic industry or ex officio[526]. However, ex officio investigations are more the exception than the rule as the majority of the investigations are initiated upon the request of an interested party. The only situations where ex officio investigations are launched are when there is an application against one country and the DECOM finds that there are, in fact, dumped products, but not from the exporter country that originated the application from another country for which there is no application.

The authority that can decide whether or not to initiate an investigation is the SECEX, which is also in charge of making the preliminary examinations. The applications shall be rejected in a case where:

a. There is insufficient evidence of the existence of dumping or of injury caused by dumping.

b. The application was not submitted by the domestic industry on its behalf.

c. The domestic producers supporting the application account for less than 25% of the total production of the like domestic product[527].

The period of investigation to establish whether there is dumping is 12 months and under exceptional circumstances it can be 6 months but never less than that. The period to determine the existence of injury shall be no less than three years. Dumping and injury are separate matters but are supposed to be examined simultaneously, giving a longer term to the injury determination. However, the period of injury determination includes the time during which dumping is investigated as they are not seen as two completely separate investigations[528].

Provisional measures are only applicable if the four criteria established in the 1995 Decree are fulfilled:

[526] Art 24 of the 1995 Decree.
[527] Art 21.1 of the 1995 Decree.
[528] Art 25.1 and 25.2 of the 1995 Decree.

1. *An investigation has been initiated, a public notice of the decision to initiate an investigation has been published, and the interested parties have been given an adequate opportunity to submit information and make comments;*

2. *The DECOM has made a preliminary affirmative determination of dumping and consequent injury to a domestic industry;*

3. *The CAMEX judges such measures necessary to prevent injury being caused during the investigation; and*

4. *At least 60 days have passed since the date of the initiation of the investigation*[529].

The provisional anti-dumping measures are taken as duties or securities from four to nine months depending on the case. The general rule is that the provisional measure shall remain in place no longer than four months, but the DECOM may request it to be extended for six months; and in case that the measure imposed is less than the provisional margin of dumping to eliminate injury, it can be extended up to nine months[530].

Price Undertakings:

Exporters are not obliged to propose price undertakings and should they propose them voluntarily the DECOM shall recommend to the CAMEX to accept them as long as in the understanding of the DECOM, those undertakings eliminate the injury generated by dumping. The DECOM can also propose undertakings to the exporters, who are free to accept them or reject them. Once price undertakings have been accepted, the exporters acquire some obligations towards the DECOM regarding the submission of information and verification of data. Breach of these

[529] Art 34 of the 1995 Decree. The CAMEX came to be the competent authority to judge the imposition of measures as necessary from 2001. The original text of the 1995 Decree gave this competence to the Ministry of Industry, Trade and Tourism, which was later changed to the current MDCE.
[530] Arts 34.1, 34.2, 34.9 of the 1995 Decree, Art 9.1 of the Provisional Measure No. 926 of 1995. G/ADP/N/1/BRA/1, G/SCM/N/1/BRA/1

obligations is considered a violation of the undertakings and the DECOM is entitled to resume the investigation with the best information available[531].

Final Determination and Final Measures:

At any time during the investigation the applicant may request the termination of it. This request may be approved or rejected. If approved, the investigation shall be finished, if rejected the decision shall be notified to the applicant[532]. Termination without imposition of anti-dumping measures may occur in any of the following cases:

1. When there has not been sufficient evidence of the existence of dumping or of any injury;

2. When the margin of dumping is de minimis, namely, below two percent of its export price; or

3. The volume of actual or potential dumped imports, or the injury caused, are negligible, that is, individually less than three percent, or collectively, less than seven percent of the total imports of the like product in Brazil[533].

In the event that SECEX determines the existence of dumping, injury and causal link between them, a final determination shall be made by CAMEX and published in the official gazette. The imposed duty can be ad valorem or specific duties that can, in turn, be variable or fixed. The ad valorem duty shall be imposed on a CIF basis whereas the specific duty is set is USD and then converted into Reals, the Brazilian currency.

The duration of the duty shall be no more than five years and can be removed as soon as there is no need for it to counteract an injury[534].

Review:

[531] Arts 35, 36, 37 and 38 of the 1995 Decree.
[532] Art 40 of the 1995 Decree.
[533] Art 41, 14.7 and 14.3 of the 1995 Decree.
[534] Art 45 1995 Decree.

There is no initial administrative review procedure for the anti-dumping measures, but the affected exporters can request a mid-term review to the SECEX once the measure has been in place for at least a year. Only in exceptional cases can the mid-term review be made in a shorter period than the one mentioned above. It is the burden of the interested party to demonstrate that the duty is no longer necessary, the injury is not likely to recur or the duty is not sufficient to actually neutralise the dumping which is causing injury. This procedure is drafted in accordance with Article 11 of the Anti-Dumping Agreement.

Furthermore, Brazil has an interesting procedure of willingness to suspend anti-dumping measures provided that provisional alterations occur in market conditions and it is clear that the injury will not revive after the suspension of the measure and the domestic industry is consulted[535]. The suspension may be initiated upon request of the interested parties or ex officio and the duration thereof can be a year which can be extended for another similar period. This procedure is not very exhaustive and has not been applied but the fact that it was considered and included in the implementing regulations shows the will to implement the Anti-Dumping Agreement in a way that serves the purposes of the WTO agreements of liberalisation, as opposed to being a clear tool of protectionism as has been used in other countries.

In Brazilian law, there is a sunset review as prescribed by the Anti-Dumping Agreement, but with the particularity that Brazil gives the opportunity to the interested parties to have a period of five months prior to the end of the definitive anti-dumping duties to respond in writing about the suitability of the review and to request a hearing. In the Anti-Dumping Agreement the term prescribed is *a reasonable period of time prior to the expiry of the definitive Anti-Dumping measures*[536]*.* The effect of the five month term is that anti-dumping measures and price undertakings are extended for as short a time as possible[537], whereas in other

[535] Art 60.1 of the 1995 Decree. The consultation to the domestic industry is mandatory but the opinions of the representatives of the local industry are not binding upon the DECOM at the moment of making a decision.
[536] Art 11.3 Anti-Dumping Agreement.
[537] Supra NAKAGAWA (2006) pp. 302-303.

regulations it extends unreasonably despite the fact that the sunset review later denies the extension of the sanction.

The judicial review of anti-dumping measures is not regulated in the 1995 Decree or in any norm of the same level. Access to judicial review stems directly from the 1988 Constitution of the Federal Republic of Brazil which in its Article 5 (35)[538] guarantees recourse to the judicial system to any person. This is also applicable in the matters related to the application of specific provisions of the legal instruments on trade defence. Judicial recourse should pertain to the application by the investigative authority of a specific provision, and may be based on due administrative process, legal interpretation, or offence to upper rules (including constitutional principles)[539]. Thus, judicial review in the Brazilian legal system is remarkably broad, which explains why some trade measures have been reviewed by means of recourse to the judiciary, including appeals to the Superior Court of Justice[540].

In practice, the judicial system is not too strong and is not aware of the many technicalities involving the anti-dumping system. It is a general perception that the Brazilian judicial system is unreliable and unpredictable with respect to reviewing administrative matters[541]. In the event that an exporter is affected by compliant anti-dumping measures and wished to put them under judicial review, the lack of judicial reliability and transparency could eventually substantiate the recourse to a Non-Violation complaint. This possibility is remote because, as has been explained above, the administrative system is strong and fair, and the overall tendency in Brazil

[538]Article 5. All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms:
35. The law shall not exclude any injury or threat to a right from the consideration of the Judicial Power.
[539]Supra BARRAL and BROGINI.(2005) p. 21.
[540] The Superior Court of Justice (STJ) is the highest federal court in Brazil, and appeals to its jurisdiction shall be grounded on the violation of federal law or international treaties (1988 Brazilian Federal Constitution, article 105). Cases: STJ, MS 4516/DF, 13.Nov.96 [revoked Anti-Dumping measures on procedural grounds]; MS 5628/DF , 06.Nov.98 [refused claim for revocation of Anti-Dumping measures]; MS 7045/DF 22.Nov.00 [did not concede claim for nullification of Anti-Dumping measure]; STJ, MS 8236/DF, 29.Sep.02 [asserted its jurisdiction to review administrative acts related to trade measures]; STJ, MS 8913/DF, 25.June.03 [did not suspend Anti-Dumping measure against the non-investigated company].
[541]Supra NAKAGAWA (2006) pp. 302-303.

is to reduce the measures imposed to the minimum for the different reasons already explored.

In the Doha Negotiations, Brazil was part of the *friends of Anti-Dumping* group and it proposed many changes to the Anti-Dumping Agreement as it considers it an important matter to be re-negotiated. It is important to note that Brazil perceives anti-dumping measures to affect Brazilian exports in a negative manner. Some of the proposals are briefly listed below to give a clearer idea of the Brazilian position in the rounds of negotiation:

a) Lesser duty: As Brazil already frequently applies the lesser duty rule, it has proposed to amend Articles 9.1, 9.3 and 9.4 of the Anti-Dumping Agreement in order to implement the mandatory application of the lesser duty rule. Additionally, Brazil has proposed that in Annex III, Article 2.4, including the prohibition of zeroing, applies mutatis mutandis to the calculation of the lesser duty level[542].

b) Sunset reviews: Similarly to the lesser duty rule, Brazil already has somewhat shorter periods of sunset review, so as to extend the existing duty as little as possible. In the Doha Round, Brazil proposed that a new anti-dumping investigation, either at the member's own initiative or based on a petition, should only take place no sooner than one year following the termination of the anti-dumping measure, unless there are exceptional circumstances that justify the initiation in a shorter period, which shall not be less than six months[543].

c) Facts available: Brazil has proposed to amend Article 6.8 to explicitly state that "facts available" are to be used only for the purpose of substituting missing or rejected information. Brazil proposed to amend Annex II.1 to state that the authorities must make all reasonable efforts to obtain necessary information from the respondents instead of resorting to "facts available" in an investigation or review[544].

[542]WTO, TN/RL/W/119.
[543]WTO, TN/RL/W/76.
[544]WTO, TN/RL/W/93.

d) Reviews: Brazil has proposed that the provisions of Articles 2 (Determination of Dumping), 3 (Determination of Injury), 4 (Definition of Domestic Industry), 5 (Initiation and Subsequent Investigation), and 6 (Evidence) should also apply to the reviews, whenever applicable, under Articles 9.3, 9.5 and 11.2, with the exception of the specific rules concerning these reviews. In particular, the de minimis rule and/or its threshold in Article 5.8 should be applied to these reviews to the extent that it is appropriate. Brazil has proposed to specify that the request for Article 9.3 reviews can only be made by exporters or importers. In addition, Brazil has proposed that the margin of dumping in an Article 9.3 review shall be based on all imports from a specific exporter that were entered into the importing member for not less than one year, and not on an individual import basis. Brazil seeks to improve the rule so that the reviews are not unfairly extended to the prejudice of the responding parties. Finally, Brazil would like to clarify, through the development of harmonised indicative lists relating to the assessment of dumping and the "likelihood of injury" under Article 11.2, that the burden of proof is on those parties advocating the continuation of the anti-dumping order[545].

e) Price undertakings: Brazil has proposed to reduce the national authorities' discretion to refuse offers of price undertakings, such as requiring authorities to provide, in a public notice, the criteria and reasons for non-acceptance of a price undertaking offer[546].

f) Special treatment (Article. 15 Anti-Dumping Agreement) for developing countries: Specify the obligations of developed countries when investigating exports originating from developing countries. Developed country authorities should offer advice to exporters involved in the process of the possibility of price undertakings, and the obligation rests on the investigating authorities to take the initiative to explore constructive measures before the imposition of the preliminary duties[547].

[545]WTO, TN/RL/GEN/10. See also Supra BARRAL and BROGINI. (2005) p. 23.
[546]WTO, TN/RL/GEN/2.
[547]WTO, G/ADP/AHG/W/127.

4.4.4 India

India imposed its first anti-dumping duty in 1992[548]. The absence of earlier use of anti-dumping is explained by the highly protectionist trade regime that was in place from independence in 1947 to 1991[549].In the words of an academic: *on the customs tariff side, the import-weighted average tariff for all imports was as high as 87 percent – for consumer goods as high as 153 percent and for manufactured goods 92 percent*[550]. Combined with restrictive licensing and quantitative restrictions, there was no need for anti-dumping[551].

As that system of protectionism was being dismantled, the use of anti-dumping increased with the liberalisation of policies. Up to 1997 it increased slowly, only to find a peak since 1997-8[552]. The use of anti-dumping in India was originally restricted to the traditional users. As the local industry started experiencing the impact of foreign imports from other countries besides the traditional users, the use of anti-dumping measures in India spread to other non-traditional users[553]. Despite the general policy to liberalise, domestic industries demand protection which pressures the government to increase the initiation of investigations and end the investigations with the imposition of measures for the importers. According to previous studies, the most frequently offered justification for anti-dumping measures is predatory pricing[554]. However, economic studies have concluded that in the majority of the cases an anti-dumping policy cannot be justified on economic grounds; instead the political economy argument is the strongest argument in explaining India's current anti-

[548] Nonetheless, Anti-Dumping enforcement was first authorised in India in 1985 and the existing regulations were modified in 1995 in order to make them WTO compliant.
[549] FEINBERG R.M. "Trends and Impacts of India's Antidumping Enforcement".Office of Economics Working Paper.US Trade Commission. October 2010. Available at: http://www.usitc.gov/publications/332/working_papers/EC201010A.pdf
[550]NARAYANAN P. "Antidumping in India – Present State and Future Prospects," Journal of World Trade, December, Vol. 40, No. 6, 2006. pp. 1081-1097.
[551]Supra FEINBERG 2010.
[552]Infra TAIRA S, HAMADA T, AND MAKINO N 2006.
[553]Supra FEINBERG 2010.
[554]AGGARWAL A. "Anti Dumping Law And Practice: An Indian Perspective" Working Paper 85, Indian Council for Research in International Economic Relations - ICRIER, Delhi.(2002) p. 65.

dumping actions. Such actions have given protection to highly concentrated industries, where dominant producers lobby and litigate anti-dumping cases. In the process, they incur huge expenditure, sacrificing economic efficiency[555].

The industries that have been most protected through the use of anti-dumping in India are the chemical, petrochemical, pharmaceutical, plastics, rubber and manmade fibre industries. Due to the fact that these are competing with China, which is another emerging economy, India has targeted anti-dumping investigations towards China and the United States in these sectors[556].

The structure of the anti-dumping system in India is organised as explained in the chart below:

Table 5. Anti-Dumping Legislation and Implementing Authorities in India[557].

Local Anti-Dumping regime	**Administrative and Judicial Authorities for Anti-Dumping Matters.**
The anti-dumping legislation was introduced in India in 1982 when the Custom Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules 1985 were framed. These rules were amended in 1995 [hereinafter the Anti-Dumping Rules 1995 or simply the Rules] and they form the legal basis for anti-dumping investigations	Directorate General of Anti-Dumping & Allied Duties (DGAD): The Directorate is a division of the Department of Commerce that depends on the Ministry of Commerce and Industry. The DGAD is responsible for carrying out investigations and to recommend, where required, under the Customs Tariff Act, the amount of anti-dumping duty/countervailing duty on

[555]Supra AGGARWAL (2002) p. 65.
[556]Supra FEINBERG 2010 pp. 6–7.
[557] Anti-Dumping, a guide. Directorate General of Anti-Dumping & Allied Duties Ministry of Commerce. Commerce Secretary Government of India New Delhi-110 011. Available at: http://commerce.nic.in/traderemedies/Anti_Dum.pdf. See also Supra AGGARWAL (2002)

and for the levying of anti-dumping duties. These laws are in consonance with the WTO Agreements on Anti-Dumping measures. Since 1995, three amendments have been incorporated into the Rules[558].	the identified articles which would be adequate to remove injury to the domestic industry[559]. Investigations and Recommendations by Designated Authority, Ministry of Commerce Imposition and Collection by Ministry of Finance[560]. Customs, Excise and Service Tax Appellate Tribunal (CESTAT): The law provides that an order of determination of existence, degree, and effect of dumping is appealable before the CESTAT. An appeal against the order of CESTAT can be made to the Supreme Court of India. Various High Courts also hear these matters under their writ jurisdiction[561].

The DGAD is a very responsive authority to allegations affecting the Anti-Dumping Agreement. In the early years of the WTO, India saw an exponential growth in anti-dumping initiations, which led the European Union to complain to the WTO of the abuse of this agreement. This situation would have also been a possible trigger for

[558] These were introduced in 1999 (vide Notification No. 44/1999), 2001 (vide Notification No. 28/2001) and 2002(vide Notification No. 1/2002). See also Supra KOMMERSKOLLEGIUM (2005).
[559]http://business.gov.in/growing_business/organisational.php
[560]Anti-Dumping, a guide. Directorate General of Anti-Dumping & Allied Duties Ministry of Commerce. Commerce Secretary Government of India New Delhi-110 011. Available at: http://commerce.nic.in/traderemedies/Anti_Dum.pdf
[561]AGGARWAL A. Indian Council for Research on International Economic Relations."Antidumping in India", in KOMMERSKOLLEGIUM/NATIONAL BOARD OF TRADE, Sweden. Report: The Use of Antidumping in Brazil, China, India and South Africa – Rules, Trends and Causes. Stockholm (2005).

the complaints based on nullification or impairment, as this is a unique case where the use and abuse of measures contemplated within the WTO agreements is detrimental to the very objectives and purposes of such agreements[562].

In substantial aspects, Indian law has taken into account all the rulings of the Anti-Dumping Agreement by implementing norms for like products, establishment of domestic industry, dumping determination, normal value, injury, causal link and public interest. They have also made a procedure available that is formally compliant although may incur some challenges in practice, especially the resistance of the authorities to revise and waive measures in place during the set review periods. In the majority of the investigations, the petitioners hold a considerable amount of market share, 50% or more, having a clear dominant position in the Indian market[563]. The substantial definitions and application thereof are generally not problematic except for some of the features explained below:

The definition of **like products** contained in Rule 2 (b) has practically the same wording as the definition of the Anti-Dumping Agreement. However, the DGAD interprets it liberally and this interpretation gives flexibility to the scope of like products[564]. This has occurred in different cases[565], where different criteria have been applied for the definition of like products. This is due to the discretion offered by the rules to the designated authority to include or exclude such producers who are

[562] TAIRA S, HAMADA T, AND MAKINO N. "India" in NAKAGAWA ed. "Anti Dumping Laws and Practices of the New Users". Cameron May. London (2007) pp. 165-166.
[563] Supra AGGARWAL A. in KOMMERSCOLLEGIUM (2005).
[564] Supra TAIRA S, HAMADA T, AND MAKINO N. (2007) p. 185.
[565] I.e. Ministry of Commerce Notification 14/1/96ADD 19th of March 1998: investigation against Purified Terephtalic Acid (PTA) from Thailand, Korea and Indonesia. In this case, the Designated Authority decided to initiate the investigation on the basis of an application filed by a domestic producer of Di-Methyl Terephtalate (DMT). When the domestic producer of DMT filed an application, a domestic producer, which produced in India but also imported PTA to India, was excluded from the scope of the domestic industry. According to the Designated Authority PTA and DMT are like products since they have closely resembled characteristics. Ministry of commerce Notification 18/1/97/ADD 2nd of February 1999: investigation against Fused Magnesia from China. In this case the authority accepted an application filed by a domestic producer of Sintered Sea Water Magnesia. According to the authority both products were closely resembled and used for the same purpose. Ministry of commerce notification 14/1/97/ADD 18th November 2000: investigation against hot rolled Coils/Sheets from Russia, Ukraine and Kazakhstan. In this case the designated authority did not exclude the domestic producer who held 7.17 percent of the shares of the importing company and had one common director. See also Supra TAIRA S, HAMADA T, AND MAKINO N. (2007) pp. 186-187.

related exporters or importers themselves of the challenged products, or are importers themselves of such products[566]. The DGAD tends to extend the measures to all related products despite the fact that some of them are not even included in the initial application[567].

These practices leave a sense of uncertainty and lack of transparency from the administrative authorities. They certainly do have the prerogative to decide what products are like and to impose the measures that they consider appropriate, in compliance with the Anti-Dumping Agreement. However, erratic behaviour regarding the definitions in an arbitrary manner can affect the legitimately expected benefits from the exporters who, in a case like this, are entitled to use the provision of Article XXIII. Practices like the one mentioned above are generally subject to criticism because they erode the confidence in the local authorities and act in detriment to the free flow of goods across the international markets.

The determination of **normal value** is a difficult process in India because of its characteristics in the international market. *Since India is an inconsequential trade partner of most countries, exporting firms abstain from investing on defence. Therefore, the DA is faced with a major problem of non-response or incomplete /inaccurate / inconsistent information on prices and costs provided by the exporters. It has also been observed that many exporters do not cooperate, citing concerns over confidentiality. In a majority of the cases therefore, normal value needs to be constructed. In a large number of cases, the investigating authority, for constructing normal values, rely on the best available information[568].*

The margin of **dumping** is calculated based on rules that are identical to the ones established in Article 2.2 of the Anti-Dumping Agreement. The special feature of the Indian regulations in comparison to the Anti-Dumping Agreement is the

[566] Supra TAIRA S, HAMADA T, AND MAKINO N. (2007) p. 186.
[567] I.e. Ministry of Commerce Notification 32/1/97/ADD of 24th December 1998: Acrylic fibre from Japan, Spain, Portugal and Italy. Defensive Anti-Dumping duties were imposed to both acrylic staple fibres and acrylic filament tow. However, the initial claim had only requested the investigation of acrylic staple fibres. Additionally, the exporter explained that it did not export general purpose fibres, which was ignored by the authority.
[568] Supra AGGARWAL A. in KOMMERSKOLLEGIUM/NATIONAL BOARD OF TRADE, (2005) p. 35.

establishment of the margin of dumping. In India, the existence of the margin of dumping is determined on the basis of a comparison of a weighted average normal value and export prices on a transaction to transaction basis[569]. In the Anti-Dumping Agreement[570] the margin of dumping must be established on the basis of the comparison of a weighted average of prices for all comparable export transactions or by a comparison of the normal value and export prices on a transaction to transaction basis[571]. The issue that is criticised by the exporters is that the authority does not divulge a comprehensive procedure to calculate the normal value, or for comparing between a normal value and export prices. This could be considered a violation of the agreement[572], but even if it does not fit into the violation criteria, for the deference given to the governments in implementation or interpretation of the agreement, this practice is detrimental to the benefit of an explanation provided by Article 2.4.2 of the Anti-Dumping Agreement.

In order to establish **material injury** the Indian rules are mostly compliant with Article 3.1 of the Anti-Dumping Agreement and have created a procedure where the authority objectively examines the volume of dumped imports and the effect on prices in the domestic market for like products, as well as the impact of dumped imports on domestic producers and their potentially negative effect on cash flow, inventories, employment, wages, ability to raise capital investments, and other economic factors such as declines in sales, declines in profits, loss of market share, declines in productivity, slowdown of investment return rates, and fall of the capacity usage. The Indian authorities have expressed that all the factors are taken into account, not as a mere checklist where some bureaucrat ticks boxes, but as part of a

[569] Principle 6, Annexure I of the Anti-Dumping Rules 1995.

[570] Anti-Dumping Agreement Art 2.4.2: *Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions* ***if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.*** [Emphasis added].

[571] Art 2.4.2 of the Anti-Dumping Agreement. See also TAIRA S, HAMADA T, AND MAKINO N. (2007) p. 189.

[572] Supra TAIRA S, HAMADA T, AND MAKINO N. (2007) p. 189.

meaningful assessment to examine the existence and consequences of injuries that are a consequence of dumped products[573].

In order to be able to impose an anti-dumping measure, the **causal link** must be proven. The rules for causal link examination are contained in Principle V, Annexure II of the Anti-Dumping Rules 1995. Those rules reproduce in great part the provisions of the Anti-Dumping Agreement. In practice and despite the fact that the rules exclude the attribution of injury to dumped goods whenever there is injury caused by other factors, the designated authority makes an analysis that is unclear. This makes it difficult to ascertain whether the non-attributable factors are being taken into account or not at the moment of imposing an anti-dumping duty. The anti-dumping rules do not make any provision for **public interest** in the anti-dumping investigations. In practice, it may be taken into account in the investigation in the form of a public hearing, or by accepting submissions from the interested parties. The decision to admit written submissions and listen to the spoken interventions during the public hearing is at the discretion of the designated authority. There are a few cases where public interest has influenced the decision of not imposing an anti-dumping duty in spite of the proven existence of dumping and injury. This tends to occur whenever there is strong public participation and domestic interests may be affected by the imposition of an anti-dumping measure[574].

The procedure for anti-dumping investigations and the imposition of measures is contained in the Anti-Dumping Rules 1995. Initiation may be done upon application by or on behalf of the domestic industry. An application is understood to be made by or on behalf of the domestic industry when it is supported by at least fifty percent of the total local production of the like product challenged. An initiation may only take place if there is sufficient evidence of dumping, injury and causal link. Also the

[573]Lubrizol India PVT Ltd. V Designated Authority, 2005 (187) E.L.T. (Tri Del) para. 17.

[574] I.e. Newsprint case from Canada: In this case user industries, including the media opposed the application of an Anti-Dumping measure. See also P. Tert Butyl Catechol case against France, PSF case against Korea, Thailand, Taiwan and Indonesia, and Trimethoprim case against China. See also, supra AGGARWAL A. in KOMMERSKOLLEGIUM/NATIONAL BOARD OF TRADE, (2005) p. 44 and TAIRA S, HAMADA T, AND MAKINO N. (2007) p. 191.

initiation only takes place if at least 25 percent of the total product of the like product by the domestic industry actively supports the petition or application[575].

In the table below a comparison between the times scheduled by the rules and the times that the procedure takes in practice is illustrated.

Table 6. Regulation vs. Normal practices in Anti-Dumping procedures in India[576]

Procedural Stage	**Law**	**Normal time taken in practice according to the government of India**
Preliminary Findings		90-105 days of the initiation of investigation.
Provisional Duty	No such duty before the expiry of 60 days from the date of initiation.	Imposed within four-six weeks of the date of issue of provisional findings.
Period of provisional duty	The provisional duty will remain in force only for a period not exceeding six months, extendable to nine months under certain circumstances[577].	Remains in force for a period not exceeding six months.
Final Finding	One year not extendable beyond six	One year not extendable beyond six

[575] Anti-Dumping Rules, Rule 5.
[576] Supra AGGARWAL A. in KOMMERSKOLLEGIUM/NATIONAL BOARD OF TRADE, (2005) p. 43.
[577] Anti-Dumping Rules. Rule 13.

	months.	months.
Levy of Duty	Within three months of the date of publication of final findings.	Within three months of the date of publication of final findings.
Withdrawal of Duty [if final finding is negative]	Within 40 days of the date of publication of final findings.	

Preliminary findings must be substantiated according to Rule 12 (1), with enough information on the determination of dumping and injury. According to the rule, preliminary findings must contain:

a. Names of suppliers, or when this is impracticable, the names of the countries involved.

b. Description of the product which is sufficient for customs' purposes.

c. Margins of dumping established. These margins must contain a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value.

d. Considerations relevant to the injury determination.

e. Main reasons leading to the determination.

The preliminary findings with this information shall be notified to the parties by means of a public notice[578]. The Central Government may impose provisional duties as long as they do not exceed the margin of dumping on the basis of preliminary findings of the designated authority[579].

Lesser Duty Rule:

[578]Anti-Dumping Rules. Rule 12.
[579]Anti-Dumping Rules. Rule 13.

Under the Indian law (as amended in 1999), the Government is obliged to restrict the anti-dumping duty to the lower of the two i.e. dumping margin and the injury margin[580]. The designated authority must estimate a non-injurious price for the domestic industry. In the estimation they must include an analysis of relevant factors[581]. The value for this purpose includes CIF value + one percent towards landing charges + any applicable customs duty. As a result, the anti-dumping duty actually levied is normally a variable duty equal to the injury margin[582].

Price Undertakings:

There are a few price undertakings: some of those in force in the past were the cases of *Hexamine from Iran, White Cement from UAE, Potassium Carbonate from Taiwan, Lead Acid Batteries from Korea and Black & White Photographic Paper[583]*. This shows that price undertakings are not common in the Indian anti-dumping practice as they are in some other members.

Review:

The anti-dumping rules provide for new shipper, administrative (known as mid-term reviews), sunset and judicial review. According to Rule 23, the designated authority may review the need for the continued imposition of anti-dumping [administrative review] duty and shall, if it is satisfied that there is no justification for the continued imposition of the duty, recommend to the Central Government to withdraw it.

The rule is unclear as to whether that review should be made ex officio or by demand of the affected party. Also, it does not establish whether the affected party

[580] Supra AGGARWAL A. in KOMMERSKOLLEGIUM/NATIONAL BOARD OF TRADE, (2005) p. 43. See also, Anti-Dumping, a guide. Directorate General of Anti-Dumping & Allied Duties Ministry of Commerce. Commerce Secretary Government of India New Delhi-110 011. Available at: http://commerce.nic.in/traderemedies/Anti_Dum.pdf

[581] Some relevant factors are usage of raw materials, usage of utilities, captive consumption, expenses during the time of the investigation: investments, capacity utilization. See Ministry of Commerce & Industry, Department of Commerce: Anti-Dumping and Anti-Subsidy Measures, Answers to Frequently Asked Questions Available at http://commerce.nic.in/faq#h1

[582] Supra TAIRA S, HAMADA T, AND MAKINO N. (2007) p. 177.

[583] Supra AGGARWAL A. in KOMMERSKOLLEGIUM/NATIONAL BOARD OF TRADE, (2005) p. 44.

has a vested right to request the review or not. In practice, the administration initiates a mid-term review on request from the affected party[584].

The sunset review can be initiated before the period of expiry of the measures – which expire in five years, in line with the anti-dumping rules and the Anti-Dumping Agreement. The judicial review is structured in the form of an appeal against any anti-dumping related measure. It takes place before the Customs, Excise and Service Tax Appellate Tribunal – CESTAT. The CESTAT is empowered to hear the appeals against orders passed by the designated authority with regard to anti-dumping duties[585]. Except in the matters relating to classification and valuation of goods, the Tribunal is the final appellate authority though a referral to the High Court can be made on a question of law. In classification and valuation matters, the appeal against the order of the Tribunal lies only with the Supreme Court of India[586].

In terms of substantial application, the judicial review in India follows the tradition of the rule of law and this contributes to its reliability in the appeal instances. The time that the procedure of judicial review takes, in practice, is too long, and hence it does not guarantee the rights of the importers. The average time taken to obtain a decision from the CESTAT is 518 days from the date of application until the day of final findings. In the world of international trade 17 months for deciding an appeal[587] may be normal in many countries, but it is an obstruction of the benefits provided by GATT to the exporters.

Some experts have suggested that the anti-dumping policy that is designed to ensure fair competition and improve economic efficiency may in fact reduce them, and that a strategy that may help prevent the problem of abuse of anti-dumping is to integrate anti-dumping policies with competition policies. In other words, this would imply that *the competitive merits of anti-dumping requests in that case will be evaluated by the competition authorities using the same standards and the*

[584]Supra TAIRA S, HAMADA T, AND MAKINO N. (2007) p. 179.
[585]Customs, Excise and Service Tax Appellate Tribunal website http://cestat.gov.in/
[586] Supra CESTAT website http://cestat.gov.in/
[587] See KUMARAN L. "Law and Practice of Anti-Dumping Law in India". Research report on the Reality of Anti-Dumping Instruments in Asian Countries and Regions. Fair Trade Centre.(2005) pp. 369-421.

framework of competition policies. This will result in the adoption of stricter criteria for determining predation in such cases and will prevent its misuse. Moreover, the injury standard for anti-dumping cases should also be brought closer to the anti-trust standard, which takes into account the behaviour's effect on the competitive structure of the industry as a whole, rather than the material injury it causes to domestic firms. This however requires the implementation of comprehensive competition policies and credible enforcement agencies[588], which is currently not the case in India and, despite the fact that it is a desirable outcome; it is impractical and unlikely that it will occur unilaterally and spontaneously.

4.4.5 South Africa

South Africa has one of the oldest anti-dumping systems in the world[589], with legislation available since the inclusion of anti-dumping measures in the Customs Tariff Act, 26 of 1914. South Africa was an important user of anti-dumping measures during the early twentieth century and, upon its accession to the WTO, it became an assiduous user of the system. Indeed, South Africa has been considered the fifth biggest user of anti-dumping measures after the traditional four main users[590]. At the time of accession to the WTO, South Africa participated in the multilateral negotiations as a developed country and thus was bound to acquire more stringent commitments than developing countries[591].

The industrialised South African economy was founded during the late nineteenth century by diamond and gold mining. Mining encouraged industrial development and replaced agriculture as the major engine of economic activity. Since the mid-1920s successive governments have implemented policies to encourage industrialisation

[588] Supra AGGARWAL A. (2002).

[589] It was the fourth country to acquire Anti-Dumping legislation after Canada, Australia and New Zealand.

[590] EDWARDS L. ″Anti-Dumping in South Africa, from Proliferation to Moderation″(2011) in ″The Great Recession And Import Protection: The Role Of Temporary Trade Barriers″, BOWN, C. P., ed.., London, CEPR and the World Bank, 2011. Available at SSRN: http://ssrn.com/abstract=1871948

[591] Supra EDWARDS (2011)during the Uruguay Round, South Africa committed to bind 98% of its tariffs, rationalize the over 12,000 tariff lines, and replace the quantitative restrictions with tariffs on agricultural products.

through import substituting protectionism[592]. In recent years, the anti-dumping policy has been re-directed to what could be called *peer trade partners,* or similar emerging economies like China and India[593]. South Africa has been one of the highest users of anti-dumping, which is disproportionate to the relatively small size of its market. This raises concerns amongst trading partners about its protectionist policies.

However, there are some considerations that need to be made before jumping to conclusions. Firstly, it must be taken into account that South Africa was excluded from international trade due to trade sanctions generated by its policy of apartheid. This had an impact on its protection of domestic industry even after apartheid was abolished and South Africa joined the WTO[594]. Secondly, as the largest economy in Africa, South Africa receives and processes imports for other countries in the region. This also explains the unique arrangement [595]of the customs union SACU and the Development Community SADC. Additionally, South African industry is atomised, which means that different industries operate in a reduced proportion, which makes them sensitive to injury shortly after the accession of dumped goods on the market. Finally, unlike the United States or the European Union, the South African market does not have medium or big markets for each type of product and generally, some of the industries are dominated by a monopoly or oligopoly, which diminishes their competitiveness and effectiveness. On the one hand, this makes dumped goods evident at the slightest increase of imports, also increasing the possibility of injury[596].

[592]McCARTHY C. "Anti-Dumping in South Africa" in KOMMERSKOLLEGIUM/NATIONAL BOARD OF TRADE, (2005) p. 49.
[593] Supra EDWARDS L. (2011)
[594]Supra MCCARTHY C. (2005) p. 50.
[595] DINKA T & KENNES W. "Africa's Regional Integration Arrangements: History and Challenges." European Centre for Development Policy Management (ECDPM).Discussion Paper 74. Maastricht. 2007. pp. 10-11. "*The deep integration aspect of SACU is partly reflected in the mechanism of pooling of all tariff and excise revenue together with a formula to share the revenue in a manner that provides compensation for the polarisation effects within SACU. The new arrangement also introduced joint decision making on customs issues, which previously had been the sole responsibility of South Africa. While the revenue sharing approach is interesting from a development point of view, it also implies a high dependence of the BLNS, especially Lesotho and Swaziland, on the customs revenue. All the SACU members are also in SADC, but because SACU has a unified trade policy this is not a problem. In other words SACU is an example of variable geometry within the wider SADC"*
[596]BRINKG & KOBAYASHI T. "South Africa" in NAKAGAWA ed. "Anti Dumping Laws and Practices of the New Users". Cameron May. London (2007) p. 229.

On the other hand, the monopolies and oligopolies have a powerful political lobby that acts effectively in protecting their domestic market share[597].

Apart from minerals, the sectors that are most developed in South African industry are the manufacturers of non-durable and semi-durable consumer goods[598]. There is a fair investment in chemical, steel, paper and engineering sub sectors. Having developed in a relatively closed economy, South African manufacturing is also characterised by high levels of concentration and a lack of competition[599].
The structure of the South African anti-dumping institutions is peculiar and it has been marked by its very particular history and its recent integration to the Southern Africa Customs Union SACU.

Table 7. Anti-Dumping Legislation and Implementing Authorities in South Africa.

Local regulation of the Anti-Dumping regime	***Administrative and Judicial Authorities for Anti-Dumping Matters***
1. Southern African Customs Union Agreement 2002 – SACU Part VArticle 19: *The new SACU Agreement has important implications for the anti-dumping regime within the customs union. It changed the way in which tariff decisions, including anti-dumping tariffs, are made, and it also requires Member States to develop legislation on contingency trade remedies such as anti-dumping for the region, and to establish national*	2. International Trade Administration Commission – ITAC: When South Africa wants to impose an anti-dumping measure,

[597]Supra MCCARTHY C. (2005) p. 50.
[598] Anti-Dumping Sectoral Distribution of Measures: By Exporting Country – South Africa 01/01/1995 - 30/06/2011. Available at:
http://www.wto.org/english/tratop_e/adp_e/ad_sect_distrib_meas_rep_member_e.pdf
[599]Supra McCARTHY (2005) p. 50.

bodies to administer these remedies within the different countries[600]*.* 2. International Trade Administration Act 71 of 2002 – ITA Act: The ITA Act is the rule that was issued to establish the International Trade Administration Commission; to provide functions for this commission and for the regulation of its procedures; to provide for the implementation of certain aspects of the Southern African Customs Union SACU; and to provide, within the framework of the SACU Agreement, for continued control of import and export of goods and amendment of customs duties and to provide for matters connected therewith[601]. Detailed anti-dumping regulations were promulgated on November 2003 by ITAC through the Ministry of Trade and Industry. They consist of five parts with all the substantive and procedural aspects for the conducting of anti-dumping investigations 3. Promotion of Administrative Justice Act No. 3 of 2000 PAJA, S. 3(2) b: requires that the commission gives to all parties adequate notice of the proposed administrative action, a reasonable opportunity to make representations, notice of the review mechanism and the right to request reasons. It contains the principles of natural justice, audi alteram partem and nemo iudex in rem sua[602].	ITAC is responsible for conducting the investigation and under the new SACU Agreement, ITAC is now obliged to make any recommendations directly to the SACU Tariff Board[603].

[600] JOUBERT N. ″The Reform of South Africa's Anti-Dumping Regime″Managing The Challenges Of WTO Participation: Case Study 38. Available at: http://www.wto.org/english/res_e/booksp_e/casestudies_e/case38_e.htm

[601] Preamble of the International Trade Act 71 of 2002.

[602] CURRIE I & KLAAREN J. ″The Promotion of Administrative Justice Act Benchbook″ Claremont: Siber Ink. (2001) pp. 133-149.

Substantive aspects regulated by the ITA Act are compliant with the Anti-Dumping Agreement as the ITA Act almost completely reproduced the agreement into South African law as South Africa has a dualistic system of international law in which the WTO agreements are not self-executing but need a national regulation to execute and implement them.

The definition of **like products** is constructed by the characteristics established before the constitution of ITAC. Those criteria are physical characteristics, raw materials used, method of manufacture, tariff classification, end use sustainability and price. They are still being used to determine whether a product can be labelled as a like product, and one of the most important factors, being the end use of the product[604]. The commission tends to compare products that compete as like products, even if they are different in many aspects. There are no further specific criteria to match or adjust between the product under investigation and the SACU domestic like product[605]. The term domestic industry is defined in sections 1 and 7 of the anti-dumping regulations. However the administrative practice has shown inconsistencies in determining the existence of a domestic industry[606].

The determination of dumping is contained in S. 32 of the ITA Act, where the concepts of **normal value, export price and fair comparison** are defined. The definition of normal value includes the concept of constructed value:

S 32 (2)(b): *For the purpose of considering an application alleging the dumping or subsidised exports of goods in the common area:*

(b) Normal Value, in respect of any goods means:

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[603] JOUBERT N. ″The Reform of South Africa's Anti-Dumping Regime″Managing The Challenges Of WTO Participation: Case Study 38. Available at http://www.wto.org/english/res_e/booksp_e/casestudies_e/case38_e.htm

[604] Supra BRINK G & KOBAYASHI T. (2007) p. 225.

[605] BRINK G. "Anti-Dumping and Countervailing Investigations in South Africa: A Practitioner's Guide to the Practice and Procedures of the Board on Tariffs and Trade" Maroelana: Gosh Trading (2002) p. 128.

[606] In one case, the authorities found that the alleged domestic products qualified as such even though they were manufactured with imported raw materials in a proportion over 75 percent of the cost of production. See BRINKG & KOBAYASHI T. (2007) p. 224.

(i) the comparable price paid or payable in the ordinary course of trade for like goods intended for consumption in the exporting country of origin; or

(ii) in the absence of information on a price contemplated in subparagraph (i) either-

(aa) the constructed cost of production of the goods in the country of origin when destined for domestic consumption plus a reasonable addition for selling, general and administrative costs and for profit; or

(bb) the highest comparable price of the like product when exported to an appropriate third or surrogate country, as long as that price is representative.

In the calculation of normal value**,** South Africa initially uses the home market price, while in only a few cases is a constructed value calculated. Sometimes a combination of the two methods is used. This is reassuring, as the abuse of the constructed value method might indicate unnecessary protection, based on higher dumping duties[607].

The provision gives two options for the calculation of a normal value in the absence of information about the comparable price. In practice, the ITAC hardly ever uses the highest comparable price of the like product. This is a discretion that is given to the ITAC and they are free to choose any method according to the language of the provision that allows the ITAC to choose *either* of the alternatives. This practice is beneficial for the exporters as the calculation preferred by the ITAC generally tends to establish lower margins of dumping. If the calculations are too inaccurate this results in a lack of protection of the domestic industry in cases where it legitimately deserves to be protected[608]. Export prices are determined ex-works, with the appropriate adjustments to the invoiced FOB or CIF price[609].

[607] THERON N. "Anti-Dumping Procedures: Lessons for Developing Countries with Special Emphasis in the South African Experience"In Anti-Dumping: Global abuse of a trade policy instrument, Academic Foundation, Liberty Institute, Delhi, India, 2007 pp. 74-75.
[608]Supra BRINK G & KOBAYASHI T. 2007.p. 225.
[609]Amended definition 1995.

In spite of the fact that there is no formal obligation to apply the **lesser duty rule**, the Commission applies it whenever there are circumstances of full cooperation as per the provision in Section 17 of the anti-dumping regulations. The lesser duty is defined by Section 1 of the anti-dumping regulations[610] and the margin of injury is the price disadvantage to which the domestic industry is subjected. This disadvantage is the extent to which the price of the imported product is lower than the unsuppressed selling price of the SACU product[611].

Fair comparison must be made in all cases. Special reasonable allowances must be made whenever the conditions of sale, taxation, physical characteristics, levels of trade and quantities of the product are different[612]. According to Section 11 of the anti-dumping regulations, adjustments must include those conditions but are not limited to them and they must be made at ex-works conditions. The Commission may only determine the margin of dumping on the basis of a comparison of a weighted average normal value to the export prices of individual transactions under prescribed conditions, and in such cases, it has to provide reasons for its decision in a published report[613].

For the determination of **material injury** the relevant provision is S.13[614] of the anti-dumping regulations. Section 13.2 lists the factors which shall be taken into account for the determination of material injury such as sales, volume, profit and loss, output, market share, productivity, return on investments, capacity utilisation, cash flow, inventories, employment, wages, growth, ability to raise capital or investments and any other relevant factors placed before the Commission. The rest of the factors required by the Anti-Dumping Agreement are included in S.16.1 of the anti-dumping regulations. This section is dedicated to causality and it lists import volumes, price

[610] S.1 Anti-Dumping regulations: Lesser Duty is the payment or duty imposed at the lesser of the margin of dumping or the margin of injury, and which is deemed to be sufficient to remove the injury caused by the dumping.
[611] Supra McCARTHY2005.p. 62.
[612] Section 32 (3).
[613] Supra BRINK G & KOBAYASHI T. (2007) p. 225.
[614] S 13.1 of the Anti-Dumping regulations: In determining **material injury** to the SACU industry the Commission shall consider whether there has been a significant depression or suppression of the SACU industry prices.

undercutting, magnitude of the dumping margin and other factors affecting domestic prices as related to the causality. All the elements required by Article 3.4 of the Anti-Dumping Agreement are listed in the anti-dumping regulations, scattered around different sections. In practice, the Commission provides abridged indications of each factor taken into account for injury determination, referred to in indexed data such as tables[615]. This does not meet the standard determined as acceptable by the WTO in its jurisprudence[616], as the mere listing of the data is not considered an evaluation in the sense of Article 3.4 of the Anti-Dumping Agreement. Rather, there must be specific evaluations of total effect and positive indicators[617].

This can lead to an eventual problem for South Africa in WTO litigation, whether it is connected to an Anti-Dumping Agreement breach, a defence that will not be accepted by the panels in view of the existing jurisprudence or as grounds for a Non-Violation complaint, should the determination of material injury lead to the imposition of definitive anti-dumping measures in detriment to the benefits of the trade partner subject to the investigation.

There is currently no provision in the anti-dumping regulations that includes **public interest** in the determination and imposition of anti-dumping duties. However, as the acts of the Commission are considered administrative acts, they are covered by the PAJA, which contains some provisions to allow for written submissions and public

[615] Supra BRINKG & KOBAYASHI T. (2007) p. 227.

[616] Report of the Panel WT/DS132/R Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States. Adopted by the DSB on 24 of February 2000.
The question which next must be answered is what is the nature of the consideration of the Article 3.4 factors required in a threat of injury determination. The text of Article 3.4 is mandatory:
*"The examination of the impact of the dumped imports on the domestic industry concerned **shall include** an evaluation of **all relevant economic factors** and indices having a bearing on the state of the industry, **including**…" [Emphasis added]*
In our view, this language makes it clear that the listed factors in Article 3.4 must be considered in all cases. There may be other relevant economic factors in the circumstances of a particular case, consideration of which would also be required. In a threat of injury case, for instance, the AD Agreement itself establishes that consideration of the Article 3.7 factors is also required. But consideration of the Article 3.4 factors is required in every case, even though such consideration may lead the investigating authority to conclude that a particular factor is not probative in the circumstances of a particular industry or a particular case, and therefore is not relevant to the actual determination. Moreover, the consideration of each of the Article 3.4 factors must be apparent in the final determination of the investigating authority.

[617] Supra BRINK G & KOBAYASHI T. (2007) p. 227.

hearings in certain cases of administrative action. Submissions have been admitted in specific cases exposing considerations of public interest with regards to dumped goods in the South African market[618].

The anti-dumping procedure is contained in the anti-dumping regulations. Anti-dumping investigations have three phases: the pre-initiation or merit phase, the preliminary phase and the final investigation phase. The pre-initiation or merit phase starts upon the application, which is evaluated to determine whether there is a *prima facie* case of dumping and material injury[619]. Once the investigation has been initiated and published in the Government Gazette, the preliminary determination phase takes place. The parties are granted a term of 30 days to fill in standard questionnaires developed by the Commission[620]. Once the parties have responded the Commission proceeds to make the preliminary findings. It does not have a deadline to submit it; hence preliminary determinations have historically taken from 98 days to 504 days[621]. When the preliminary decision has been published, the final investigation phase is started.

Price Undertakings:

The anti-dumping regulations do not forbid price undertakings. Indeed, the procedures of offering, acceptance and violation of price undertakings are regulated in S.39 of the anti-dumping regulations. However, the Commission does not make

[618] See written submission about public interest of BLACK P. on behalf of Sasol Dyno Nobel (Pty) Ltd. In the investigation against Detonating fuses and delay detonators from China – commonly known as shock-tubes. This investigation was initiated in 2005 and terminated in 2006. In Notice 142 of 2006 the Commission indicated that written and oral submissions were admitted, verified by the Commission and considered as part of the information available to take the decision of terminating the investigation.

[619] See Chairman of the Board v Brennco 2001(4) SA 511(SCA) 526 F-G: In the *first place* the so-called merit investigating phase during which the information contained in a complaint or petition lodged is checked or verified so as to determine whether there is *prima facie* evidence of dumping and material injury, whereupon the Board may, if satisfied that there are reasonable grounds for dumping and damage, accept the complaint for formal investigation and the Board's decision is published in the *Government Gazette* for general notice and interested parties are requested to fill in certain questionnaires.

[620] Standard questionnaires available at http://www.itac.org.za/docs.asp?cID=1&scID=8

[621] See Board report No. 3822 Glass Microspheres from Austria and the UK; Board Report No. 4067 Garlic from China; Board report No. 4173 wire ropes and cables from China, Germany, India, Korea, Spain and the UK. See also supra BRINKG & KOBAYASHI T. (2007) p. 213.

use of price undertakings because it seems to be *ultra vires* to the ITA Act[622], so this is an aspect in which despite the existence of a formal adherence to the Anti-Dumping Agreement in practice, there is, at least, a lack of implementation of it.

Final Determination:

Before making a final determination an essential facts letter is issued by the Commission where all the facts that will justify the final determination are explained to all interested parties, and the parties then have a seven day period in which to comment. In practice, the Commission has issued more than one essential facts letter to each party, which can become confusing and unnecessarily delay the completion of the investigations[623].

Review:

Administrative and judicial reviews are available in South Africa, as well as the sunset review as contained in the Anti-Dumping Agreement.

One form of administrative review for anti-dumping measures in South Africa is the Interim Review which is contemplated in Section 44 of the anti-dumping regulations. It can be requested by any interested party after the first year of the publication of the final determination and as long as the parties can prove *significantly changed circumstances* as required in Section 45 of the regulations. There is no clear definition of what constitutes *significantly changed circumstances,* but it has been understood that circumstances must have changed significantly either to the extent that the domestic industry does not exist anymore, the dumping has ceased to exist, or that injury will not occur if the duty is removed. The interim review can be quite lengthy in duration and it may lead to confirmation, increase, decrease or withdrawal of the originally imposed anti-dumping duty according to Section 49 of the anti-dumping regulations. Interim reviews are very frequent in South African practice and all the outcomes possible have occurred in a number of cases.

[622]Supra BRINK G & KOBAYASHI T. (2007) p. 214.

[623] See for example Investigation against Russia and the Ukraine about Cold-rolled steel and Sunset Review investigation against Egypt, India and Korea about Carbon black. See also Supra BRINKG & KOBAYASHI T. (2007) pp. 214–215.

The sunset review in the South African system has been strongly criticised by the domestic academia. They argue that it is much more difficult to maintain a duty in a sunset review than to impose it directly. Also, they bring into the discussions the fact that some of the sunset reviews that have denied the maintenance of the measure fail upon judicial review[624]. The legal foundation of the sunset review lies in the anti-dumping regulations, from Section 53 to Section 59. There are no ex officio initiations; instead, an interested party that represents the domestic industry must submit information indicating that there is a likelihood of injury in the event that the duty is removed. Exporters and foreign producers also have the opportunity to present their submissions to the Commission[625]. The sunset review in South Africa is meant to have a single investigation phase. According to the High Court, in sunset reviews the ITAC must only investigate average dumping margins of dumping for export from countries that were found to be dumping, so that the likelihood of injury is not mistaken by the inclusion of margins of dumping from countries that were not dumping in the first place[626].

The judicial review of final determinations made by the Commission can be taken to the High Court and appealed to the Supreme Court of Appeals. In the event of a constitutional concern in the decision of ITAC, the Constitutional Court can revise the case. The judicial review at the High Court and eventually at the Supreme Court of Appeal will explore the validity and legality of the administrative action by the Commission. It may be corrected, set aside, confirmed or a different remedy may be granted[627]. South African courts are generally reluctant to grant compensations as remedies against the government[628].The anti-dumping regulations allow the possibility to have a judicial review of final and provisional determinations. Judicial

[624] BRINK G. ″Sunset Reviews in South Africa: New Direction given by the High Court ″ TRALAC trade brief No. XXX Stellenbosch: US Printers (2007).
[625]Anti-Dumping Regulations S. 57.
[626]Supra BRINK G. (2007).
[627] HOEXTER C. ″The future of Judicial review in South African Administrative Law″(2000) 117(3) South African Law Journal p. 485
[628]This is partly because s. 8 of the PAJA lists the powers of the review court, and even though the section indicates that the section provides that "*The court or tribunal, in proceedings for judicial review in terms of section 6 (1), may grant any order that is just and equitable*" it proceeds to include a list of reliefs and remedies that is reasonably comprehensive and in which compensation for damages is not included.

review of anti-dumping measures is infrequent in South Africa, but when it occurs it can be controversial due to the interpretations and explanations of the courts that show a lack of deep understanding of the issue of anti-dumping in the perspective of international trade[629].

[629] International Trade Administration Commission v SCAW South Africa [2010] ZACC 6 (9 March 2010)

V.APPLICABILITY OF NON-VIOLATION COMPLAINTS TO ANTI-DUMPING MEASURES IN THE CURRENT SYSTEM OF THE WTO.

5.1 Nature and essential elements of Nullification and Impairment Complaints

It has been extensively explained in previous chapters that the nullification and impairment remedy, especially in its form of Non-Violation complaint, has not been applied recently by the WTO. The rule is obscure and its interpretation has led to discussions with scholars who have presented opposite views. The dispositions contained in Article XXIII have been both mistakenly approached by complaining parties[630] and evaded by the panels as evidence of their lack of understanding of this provision. All rules are constructed with essential, natural and accidental elements. Essential elements of the rules are those that determine the very existence of the rule and if they are eliminated the rule itself is suppressed because they constitute its essence, hence the name *essential*. Natural elements of a rule are those that due to the nature of the situation are considered part of it in which the norm occurs and when applied but that are not fundamental for its existence. Although it is difficult to imagine a norm of a certain nature without certain elements, it is possible in abstract and practice. Accidental elements of a rule are those that are convenient, practical, accepted and used in the interpretation and application of a rule, but that are additional and their disappearance causes no effect to the existence or validity of the norm.

The nullification and impairment provision contains three essential elements which are:

1. Object: the benefits derived from the WTO agreements, including the Anti-Dumping Agreement; and the attainment of the objectives of GATT and the WTO agreements.

[630] Japan-US Kodak- Fuji Film: UNITED STATES did not present proof of the impediment or nullification.

2. Action: a nullification of the abovementioned benefits which means a complete suppression of them or an impairment of those benefits. This means the imposition of obstacles to obtain the benefits or to achieve the objective or purposes of the agreement. It is not defined to what extent the burden of the impairment has to be onerous for the member state in order for the action to constitute itself as one of the essential elements.

3. Causation: a violation, Non-Violation or situation. The violation supposes a breach of the agreement which may have other remedies that can be applicable without prejudice to the preference of Article XXIII of the complainant. The Non-Violation provision essentially means that in the WTO system a member can claim against another member despite the other member's compliance with the agreement whenever the action of the latter deprives the complaining member of the benefits it expected to obtain when it entered the agreement[631]. The situation complaint is any event in which a nullification or impairment can occur that is not caused by a violation or a Non–Violation.

These elements can be found in some of the practices of both traditional and new anti-dumping users to different degrees of intensity in each practice. Some of the most common anti-dumping burdens on the exporter members noted in the examination of the case by case anti-dumping law and practice were:

1. The terms of the administrative procedure;

2. The choice of methodology to calculate the normal value of the goods;

3. Weak judicial protection: incompetence of judicial authorities;

4. A negative attitude from the countries to accept price undertakings;

5. The lack of wide application of the lesser duty rule;

6. A lack of transparency in the administrative procedures; and

[631] ABBOTT F. M. "Commentary: The International Intellectual Property Order Enters the 21st Century". Vanderbilt Journal of Transnational Law. [Vand. J. Transnat'l L] V. 29.p. 477.

7. Imprecision of some of the substantial and procedural rules;

The question then arising is which other benefits vested through the provisions or the purposes of the GATT and the rest of the WTO agreements can be affected by these practices.

5.2 GATT benefits restricted by the Anti-Dumping Agreement

In order to pursue a deeper analysis of the cases in which Article XXIII of GATT would be applicable to measures emanating from the Anti-Dumping Agreement provisions, a detailed description of the benefits potentially impaired by it has to be done.

In general, the immediate benefit that is impaired by the application of the Anti-Dumping Agreement is market access, translated to mean significant reductions of exports to the country where those measures are applied. This reduction is desirable to the extent that it counterbalances the effect of dumping but further than that it is an actual unilateral tariff barrier to trade, which is being sponsored by the loopholes in the WTO legal order.

As a rule, any adjudication within the WTO has to be based on an action that is incompatible with the WTO regulations and it must have an actual or potential adverse impact on the international trade of the member concerned[632]. In fact, the harmful impact of any breach of the WTO obligations is presumed[633], thus the burden of proof falls on the respondent party[634] regardless of whether the alleged damaged is actual or potential. The WTO obligations include, but are not limited to, eliminating or reducing to the maximum possible the impact of:

a. High tariffs;

[632] GAZZINI T. The legal nature of WTO Obligations and the Consequences of their Violation. The European Journal of International Law. Vol. 17 No. 4.2006 p. 132.
[633] WT/DS189/R 28 Argentina- Definitive Anti-Dumping measures on Imports of Ceramic Floor Tiles from Italy. Sep 2001: the presumption that benefits are nullified or impaired means that there is a presumption of "harm"
[634] BHALA R. International Trade Law: Theory and practice. Lexis Nexis 3rd Ed. 2008. p. 218.

b. Pervasive non-tariff barriers such as: (quotas, licences, registration requirements, “Buy local” legislation, restrictive technical, labelling, and sanitary standards, and embargoes);
c. Restrictive trading rights;
d. Restrictive distribution rights;
e. Investment restrictions; or
f. Voluntary export restraints[635].

Also, in the Uruguay Round it was agreed by the members that more detail would be provided to GATT members with effective tools against “dumping”; understanding dumping as the importation of a product sold at an unfairly discounted export price. This gave birth to the Anti-Dumping Agreement, which regulates the way in which a country is allowed to impose a tariff barrier in order to repair the unfair advantage gained in a given internal market by the imports of products sold below production cost[636]. The Anti-Dumping Agreement is limited by Article III of GATT that obliges members of the WTO to *provide equality of competitive conditions for imported products in relation to domestic products*[637]. This means that all measures deriving from the WTO agreements must fulfill their particular aim always *avoiding protectionism, requiring equality of competitive conditions and protecting expectations of equal competitive relationships*[638].

Anti-dumping measures naturally limit the scope of GATT, so it is necessary to carefully review which of these limitations are legitimate according to the abovementioned premise and which exceed both the Anti-Dumping Agreement and the GATT. Finally, it is important to find out how many of those measures that have excessively limited the WTO agreements have had a tangible consequence in balancing the market, restoring the trade freedom intended by the members of the WTO. Measures exceeding the scope of ADA and GATT will be in breach and

[635] HUNTER R. & LOZADA H. “A Primer on Issues in International Trade: International Trade Involves the Purchase, Sale or Exchange (Barter Transactions) of Goods and Services across National Borders.”International Research Journal of Finance and Economics - Issue 47 2010. p. 98.
[636]Supra. (HUNTER R. & LOZADA). pp. 98-99.
[637] *Japan- Taxes on Alcoholic Beverages* WT/DS50/AB/R 4 Oct 1996.
[638] *Korea- Taxes on Alcoholic beverages* WT/DS75/AB/R 18 Jan 1999 para. 120.

normal procedures for breach should be followed. This means that Article XXIII GATT is not used in those cases because it refers to Non-Violation claims only.

A brief review of the nullification and impairment claims presented will direct the analysis to the benefits that the members perceive to be the most affected upon application of an anti-dumping procedure.

5.2.1 Non-Violation Anti-Dumping impaired benefits – unjustified falls of imports, proportionality and reduction of potential trade

As mentioned above, these are the benefits that would give place to a Non-Violation nullification and impairment action based in Article XXIII. This means that a perfectly legitimate action within the limits of GATT and the WTO agreements could be subject to challenge within the WTO dispute resolution scheme.

1. Anti–dumping investigations have a significant impact on trade. Even when an anti-dumping dispute is rejected, imports fall by about 20%[639]. This is a quantifiable benefit that can be legitimately expected by any member and that is directly impaired by anti-dumping investigations that are rejected.

2. Anti-dumping duties are disproportionate to the metric extent of the unfair pricing[640].Once dumping is verified, the anti-dumping duty does not have a limit of the percentage of the duty levied. This leads to the imposition of duties exceeding 100 per cent the price of the goods after elimination of the price discrimination below cost. This means that the anti-dumping complainant is protected against the competition of the dumping product beyond the mere correction of the market conditions for free trade.

3. Uncertainty of future losses to exporters due to disproportionate anti-dumping measures applied regularly may prevent potential exporters from becoming

[639]PRUSA. "Of spread and impact of Anti-Dumping" Canadian Journal of Economics Vol. 34 No.3.p. 594.
[640]Supra – PRUSA p. 598.

active[641]. This is impossible to measure but it is a possible claim within the scope of Article XXIII.

Apart from these benefits, and considering competition as a public good in international trade, absence of competition can be regarded as an impaired benefit for the international market, rather than for a specific litigator. However, this must be considered by the adjudicator at least in their *dictum* if the Appellate Body selects to be overly cautious, or even more adventurously, in their *ratio decidendi* if they find enough merits for this public good to become a legitimate expectation made binding via judicial holdings or precedent.

5.3 Non-Violation Nullification and Impairment Provision: An Option to Tackle Anti-competitive Anti-Dumping Measures?

Taking into account the historical evolution of Article XXIII and the abovementioned consideration of the fact that Article XXIII was kept deliberately without modification in the GATT agreement, the question about its functionality and applicability arises in the midst of a dark panorama. After the Uruguay Round, the WTO agreements rearranged multilateral trade relationships by pushing governments to adopt more liberal policies[642] with the ultimate idea of adjusting the WTO to the modern needs of international trade. It seems then inexplicable that this effort has not been able to include one of the most used legal trade tools in the domestic and regional trade system, such as competition regulation.

There are a few aspects that have traditionally been untouchable for the adjudicating bodies of the WTO, and they have to do with the competition policy of the WTO as a **whole.** This excludes the possibility of having competition consideration in the *ratio decidendi* of the decisions and limits them to be part of the *obiter dicta*. However, on

[641] DE VILLE F. "European Union regulatory Politics in the Shadow of the WTO: A Critical Historical Institutionalist Perspective". Centre for EU Studies. Department of Political Science. Ghent University. Diverging Paradigms on EU Trade Policy workshop. Leuven. 16-17 December 2010. p. 15.

[642] VAN ELSUWEGE P. "The Problem of GATT/WTO in the European Union Legal Order". Ghent University. May 2010 p. 8.

a case by case basis, the Appellate Body has the authority to include competition criteria in their judgments because it is conceptually logical from the nullification and impairment point of view. This means that in a given situation (like the Fuji-Kodak case) it is coherent for the Appellate Body to include market access in competitive conditions within the benefits derived from the WTO agreements. A decision of such sort would not have "welfare enhancing effects"[643] of a great scope; neither would it be using competition policy as a method of redistributing income and surplus[644]. The adjudicating body's action would be delimited by the clearly identified legitimate benefit impaired by an anti-competitive anti-dumping measure that under the WTO agreements would be a Non-Violation act.

It is true that a challenge for the application of competition considerations is that there is insufficient guidance for the panels in the body of rules to establish if a conduct in general is anti-competitive[645]. Nonetheless, specific application of the anti-dumping agreement with the procedural and substantial flaws illustrated above, with the clear effect and intention to restrict imports[646] may allow the panels to allow the application of Art XXIII (b).

Some arguments against the possibility establish that there are no WTO rules compelling for minimum standards of competition and even if there were using the Non-Violation complaint would be very burdensome to the complaining party due to the need to prove causal relationship between the challenged measure and the injury. This argument can be contested by providing the clear and limited definition of benefits, which would ease the burden of proof on the complaining party.

Another argument against the use of Non-Violation complaints in the event of anti-competitive situations is that *if the focus of WTO agreements is on market access and competitiveness, many types of anticompetitive conduct that reduce global welfare would not necessarily be addressed through non-violation*

[643] RAGHAVAN C. "WTO competition policy ignores political economy" Third World Economics, 16-31 January 1998. South-North Development Monitor (SUNS). Available online http://www.twnside.org.sg/title/ign-cn.htm
[644] Supra RAGHAVAN C.
[645] Supra NOONAN p. 431.
[646] Supra NOONAN p. 431.

complaints[647]because a) Should a non-violation complaint succeed, the respondent is not compelled to withdraw the measure and b) some measures that are anticompetitive are consistent with other underlying principles of the WTO.

These arguments are valid, but they do not take into account the specific situation of Anti-Dumping where the anti-competitive conduct is formally consistent with the rules of the WTO agreement but inconsistent in effect with the same rules and the underlying principles of the institution. The argument of the impracticality is also valid, but it does not consider that even though the solution provided by Art XXIII (b) is not ideal, it is more practical both politically and economically than allowing no recourse at all. The effect derived from this possibility is that the countries would have more self-restraint in applying anti-dumping measures by using them only when strictly necessary and with the least detriment to trade as possible. In other words, the anti-dumping measures would be restricted by testing their proportionality, necessity and rationality, just like many other domestic and international rules subject to pondering by different adjudicating bodies.

A Non-Violation nullification and impairment claim can emerge from anti-competitive remedies. This complaint can be justified, exposing how the anti-competitive anti-dumping measures are a barrier to trade that cause unjustified detriment in the reasonable expectations of exporter countries affected by them. Their effectiveness is yet to be proven as there is no unanimity in the existing jurisprudence.

5.4 Concrete situations in which a Non-Violation Complaint might be applicable.

5.4.1 Procedural Fairness

According to the benefits mentioned above, there are two situations in which nullification and impairment can be invoked in anti-dumping cases. The first one is in the event of anti-dumping investigations which have been made in formal

[647] Supra NOONAN p. 427.

compliance with the procedural framework outlined by the Anti-Dumping Agreement. These undermine procedural rights of the investigated parties, and therefore, they are inconsistent with the WTO agreements.

This understanding indicates that there could be a qualified obligation to comply with the Anti-Dumping Agreement, which goes beyond its textual content, and must be read in conjunction with the whole agreement by the domestic investigating authorities. This would ensure that they apply the highest standards of transparency, are stricter with deadlines and deliver their service with the utmost care. This procedural application of Non-Violation complaints to anti-dumping investigations can take place as the sole reason to dispute the imposition of a duty on the basis of procedural fairness.

In different cases, actions which are consistent with the Anti-Dumping Agreement in a strict sense could give rise to a Non-Violation complaint as an additional procedural requirement in the anti-dumping investigation to act with fairness and utilise a case by case criteria of evaluation instead of a general rule that does not necessarily fit all the cases of the importers.

5.4.1.1 Zeroing

In certain events, the Anti-Dumping Agreement and the interpretation made of it by the WTO has been enough to provide the required procedural fairness in the cases of normal value calculation and margins of dumping[648]. More specifically, the Appellate Body has created a jurisprudence that has grown more complete and comprehensive with regards to the practice of zeroing. Zeroing has been one of the most controversial procedural practices in anti-dumping, and it has been implemented mostly by the United States. Zeroing consists of reducing the negative

[648] Due to the fact that the Anti-Dumping agreement is not clear on the economic methodology to be used in the calculation of the Dumping Margin, the local authorities used their discretion to use the economic model of their choice even if it constituted an unfair practice. See COMNENUS G. "Anti-dumping Investigations applied in USA, EU and PRC". Tilburg University. 2013. p. 48. Available at http://arno.uvt.nl/show.cgi?fid=131416 accessed on 22 Oct 2013.

differences found between the normal value and US value of a foreign product, to zero.

In other words, when the normal value calculated price from the originating countries is found to be lower than the US importing price, the US Department of Commerce considers such difference in price as zero[649]. In effect, the US applies the costs that it deems appropriate as the actual cost, zeroing out the cost differential claimed by the exporting country, and then applies a percentage duty to correct the price to their deemed appropriate amount.

Zeroing has repeatedly been found inconsistent with the Anti-Dumping Agreement by different panels and by the Appellate Body. In the EU-Bed Linen case[650] the Appellate Body found that zeroing is not compatible with the Anti-Dumping Agreement because the comparison it makes is not fair. In their own words: *"we are also of the view that a comparison between export price and normal value that does not fully take into account the prices of all comparable export transactions – such as the practice of "zeroing" at issue in this dispute – is not a "fair comparison" between export price and normal value, as required by Article 2.4 and by Article 2.4.2"*[651].

However, there is jurisprudence that indicates that zeroing is inconsistent with the Anti-Dumping Agreement only in one of its forms, and it has been understood that if

[649] IKENSON D. "Zeroing In: Antidumping's Flawed Methodology under Fire". Centre for Trade Policy Studies - CATO. Free Trade Bulletin No. 11. April 2004: "*(Zeroing's) application is a significant cause of the systemic overestimation of dumping margins and subsequent application of inflated antidumping duties.*
To appreciate the impact of zeroing, it is important to understand how the U.S. Department of Commerce calculates dumping margins. In a typical antidumping investigation, DOC calculates weighted-average net prices for each product sold in the United States. It then compares each of those U.S. prices to the product's normal value, which can be calculated a number of different ways but is ideally the weighted-average net price of the most similar product sold in the home market. Zeroing is introduced after the comparison of the U.S. price and normal value.
When normal value is higher than the U.S. price, the difference is treated as the dumping amount for that sale or that comparison. When, however, the U.S. price is higher, the dumping amount is set to zero rather than its calculated negative value. All dumping amounts are then added and divided by the aggregate export sales amount to yield the company's overall dumping margin. Zeroing thus eliminates "negative dumping margins" from the dumping calculation. In so doing, it can create dumping margins out of thin air."

[650] WT/DS141/AB/R. Appellate Body Report, European Communities — Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, adopted 12 March 2001.

[651] Supra WT/DS141/AB/R EU- Bed Linen Case.

calculated in another manner, it could be consistent with the Anti-Dumping Agreement.

In fact, *in the EU-Bed Linen case, the Appellate Body concluded that zeroing is WTO-inconsistent because it prevents true average-to-average comparisons as called for by Article 2.4.2 of the Anti-Dumping Agreement. This reasoning leaves it open to the possibility that zeroing may be permissible when dumping is calculated in another way. Indeed, since the Agreement explicitly allows individual-to-average comparisons under certain circumstances, and since those comparisons would yield exactly the same results as average-to-average comparisons unless zeroing is employed for the former, there is a plausible argument that zeroing is implicitly permitted under current WTO rules whenever individual-to-average comparisons are allowed. Thus, zeroing may be consistent with Article 2.4.2 as currently worded in targeted dumping cases*[652].

There are many forms of crafting an anti-dumping investigation procedure, and domestic authorities have the prerogative of doing so, whilst the Appellate Body is not able to pre-empt all of the possible procedural nuances in the jurisprudence, as it is also an ex post facto judgment[653]. As such, the possibility of invoking Article XXIII in the event that the calculation methodology for normal value and margins of dumping is formally compliant with the Anti-Dumping Agreement, but objectively unfair, could be one of the practical applications of the nullification and impairment provision from a procedural point of view.

[652] Supra IKENSON D. Cato – Free Trade Bulleting No. 11.

[653] See WT/DS350/AB/R United States - Continued Existence and Application of Zeroing Methodology - AB-2008-11 - Report of the Appellate Body. At the moment, the US and the EU informed the DSB of a Memorandum between the United States and the European Commission which envisages a roadmap addressing the issue of zeroing as the result of a dispute started in where the issue of zeroing was addressed by the panel and the Appellate Body.

5.4.1.2 Provision and Cases subject to further procedural fairness requirements from Article XXIII

A concrete provision whose interpretation would be affected by the interpretation of further procedural fairness requirements attributable to the inclusion of Article XXIII in the interpretation of the Anti-Dumping Agreement is:

a) *Article 17.6(i) of the Anti-Dumping Agreement* which provides:

"*In its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned.*"

The panels have understood that the disposition above sets up a *bonus pater familias* or, in terms of US tort law, ***a reasonable person's standard*** to the importing countries' authorities in their assessment of the facts of the matter. This has been done by interpreting that a *proper establishment of the facts* and an *unbiased and objective evaluation* of them imply that the local authority limits itself to accept the documentation provided by the **domestic industry**[654], and not encouraging further investigation from the authorities.

Furthermore, the establishment of the facts has been assumed to be correct by the panels left to the discretion of the local authorities[655], and only the unbiased and objective evaluation is actually scrutinised by the DSB in the event of a dispute. This keeps the examination of the *establishment of the facts* from the panel's scope of action and thus reduces the scope of the provision. Additionally, this norm is read to

[654] Which is evidently interested in the protection regardless of whether the protection sought is legitimate or not.

[655] This has been done in WT/DS179/R Panel Report: United States – Anti-Dumping Measures on Stainless Steel Plate In Coils And Stainless Steel Sheet And Strip From Korea and WT/DS132/R Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup : (para. 7.95): "Our approach in this dispute will … be to examine whether the evidence before SECOFI at the time it initiated the investigation was such that an unbiased and objective investigating authority evaluating that evidence could properly have determined that sufficient evidence of dumping, injury and causal link existed to justify initiation."

mean that there is no need for the exigency of an objective standard of review at the point of the *establishment of the facts*. That reading of the norm is mistaken and has led the panels to declare proper establishment of the facts in cases that in reality have an incomplete establishment of the facts by the local authorities.

Further, the panels have concluded that *Article 17.6(i) of the* Anti-Dumping *Agreement* ***does not impose any obligations on the investigating authorities of WTO Members in*** **Anti-Dumping*investigations that could be the subject of a finding of violation***[656]*.* It is true that the article itself and the Anti-Dumping Agreement in isolation do not impose extra investigation obligations on the domestic authorities. However, reading the Anti-Dumping Agreement in harmony with the rest of GATT is an obligation originating in the principle of single undertaking.

Therefore, this provision should be read in conjunction with Article XXIII in order to raise the standard of the domestic authorities to the utmost care, without the false belief that this will unreasonably burden the local trade authorities whose job is, indeed, to undertake trade investigations with the interests of both domestic producers and consumers in mind. A shift on the interpretation of this sole procedural aspect could put some limits on the openly protectionist policies of regions such as the United States and the EU. Such practices in the calculation of normal value, currency conversion and investigation procedures have not always been found to be inconsistent with the Anti-Dumping Agreement but are, in fact, undermining trade and affecting trade partners in a way that their benefits acquired through GATT are nullified or impaired.

Additionally, a retrospective analysis of the cases in which the interpretation of more comprehensive procedural requirements could have been applied, with the exception of the zeroing cases, allows for the hypothetical application of Article XXIII. Some of the cases where the nullification and impairment provision could have been relevant to keep the benefits of exporting countries from spurious procedural practices include:

[656]DS405European Union — Anti-Dumping Measures on Certain Footwear from China.

b) *US- Korea Measures on Stainless Steel*[657]:

In this case Korea challenges the imposition of anti-dumping measures by the DOC alleging that they are applying standards of investigation in detriment of the Korean industry. More specifically, they argue that the DOC in the case of stainless steel plate, made a mistake in the comparison of POSCO's (the domestic company representing Korean Industry) 'internal exchange rate' to the wrong U.S. exchange rate. The mistake was recognised by the DOC. The panel however did not find an inconsistency in this because it considered that the mistake did not give rise to a violation. In other words, the panel understood that *"(…) the question is rather whether certain factual errors vitiate a determination, thus giving rise to a violation"*[658].

Indeed, the findings of the panel with respect to "local sales" were consistent with the position of the DOC. "*The United States in the Plate investigation did not act inconsistently with its obligations under Article 2.4.1, Article 2.4 chapeau ("fair comparison"), and Article 12.2 of the AD Agreement nor with its obligations under Article X:3(a) of GATT 1994*"[659].

In a strict sense, a mistake in the exchange rate comparison is not considered a violation in itself of the Anti-Dumping Agreement because the construction of the export price as a whole was not found to be in breach of the Anti-Dumping Agreement. This is because the facts used by the DOC were assumed to be correct by the panel. However, this would be one of the events in which Article XXIII would provide a reinforced procedural guarantee for the investigated country and would force the investigating countries to provide transparency and fairness in their procedures. In this case, there are two questions that could have changed the outcome of the panel's report. The first one is whether multiple averaging in the calculation of the normal value is acceptable in the light of the benefits acquired under Article XXIII and despite being acceptable – according to the panel – in the

[657]WT/DS179/R Panel Report: United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea.
[658]Supra WT/DS179/R US- Korea on Stainless Steel.
[659]Supra WT/DS179/R. US- Korea on Stainless Steel Para.7.1 (a).

light of the Anti-Dumping Agreement. This leads to a second question that may seem pivotal to this issue but that in terms of the possibility of using Article XXIII results is key, which is if the establishment of facts made by the DOC was proper. Since deference is given to governments to establish the facts and organise a suitable procedure, the nullification and impairment norm could be a resource for the investigated country to ensure a fair procedure.

In other words, the affected country has the possibility of defending its industry against procedural unfairness either at the stage of fact establishment or in the value calculations if it is understood that a fair procedure in anti-dumping investigations is one of the benefits acquired under GATT. This implies that the Anti-Dumping Agreement only offers a limited framework which must be complied with but is not comprehensive of all the requirements of the internal regulations affecting the domestic anti-dumping investigations.

c) *Non WTO cases: the problem of choice of surrogate economies to calculate Normal Value for Non Market Economies: the USA v. China pulse.*

The choice of surrogate economies is only applicable to those economies that do not have the recognition of *market economies* by the WTO, and yet participate in the international market as competitors in the production and export of goods and services. The case of China in this context is unique because of its rapid growth in the last two decades and the panic that its exports have caused in different productive sectors around the world. The United States has a well-known history of protectionism of its industries which has generated two situations that are specific to the United States – China economic relationship. The first one is the unique interpretation of the concepts of fair value held by the different industries in the United States as explained below. The second is the internal strength of the domestic industries of the United States to procure undue protection for themselves and to push through import restrictions in the form of anti-dumping investigations as a deterrent to competitive importers.

Hereunder, some of the cases are presented where this practice has been verified; in all these cases the proposed choice of surrogate economies has been accepted by the US authorities without further investigation. It is important to note that in some of these cases, the comparison to propose a surrogate economy is at least informal and so it can be confirmed by investigating the sources from which they come (newspaper articles and uninformed estimates).

- Preserved Mushrooms Case: USA. Case No. USTIC 1998 A 3-6

In this case the Department of Commerce of the United States initiated an investigation against 36 mushroom exporters from China upon petition submitted by a coalition of mushroom producers in the United States[660]. Due to the fact that China is not a market economy, the United States chose a surrogate economy with which to compare it. In this particular case Indian consumption data was used in order to ascertain whether canned mushrooms were being sold at less than normal value[661]. The preliminary investigation endorsed the petition and used the data provided by the coalition.

- Carbon Steel Plate: USA Case No. USITC 1996a A: 6

In this particular case, two big steel companies filed a petition[662] against imports from Russia, China, South Africa and the Ukraine, alleging sales at prices below fair value and injury to the domestic industry. Initially the petition was under representing the industry, but at a further point, three big steel conglomerates joined the petition[663].

The surrogate country for comparing Chinese exports chosen by the petitioners was Indonesia, with the lowest port charges from Brazil based on information found in a news article. Additionally, the profit percentages were compared to the ones of India. The DOC accepted these surrogates without further investigation and estimated the

[660] Coalition for Fair Preserved Mushroom Trade composed by : L.K Bowman Inc.; Modern Mushroom Farms, Inc.; Avondale PA, Monterrey Mushrooms, Inc.; Mount Laurel Canning Corp; Mushroom Canning Co.; Kenneth Square, PA; Sunny Dell Foods, Inc and United Canning Corp.
[661] McGEE R, YOON Y and BLOCK W. "Anti-Dumping and the People's Republic of China: Five case Studies" Dumont Institute for Public Policy Research Working Paper 98.2. May 1998. p. 212.
[662] Geneva Steel Company and Gulf States Steel Inc.
[663] Bethlehem Steel Corp. United Steel Workers of America and US Steel Group.

dumping margin to range from 10 to 45%. Agreement was reached and China limited its exports of steel plate to 150.000 metric tons between 1997 and 1998[664].

- Collated Roofing Nails: USA Case No. USITC 1997e A: - 5 & 6

This petition was brought about by the Paslode division of Illinois Tool Works Inc, who alleged that Chinese imports of collated roofing nails were being sold below fair value. India was chosen as the surrogate country to calculate normal value with the argument that India produces similar merchandise and it has a similar per capita gross national product. No further investigation on the actual value of collated roofing nails was undertaken and a preliminary investigation calculated dumping margins from 106 to 118%. Final dumping margins ranged from 0 to 48%.

- Brake drums and Rotors Case No. USITC 1997 e: A – 5 & 6

The Coalition for the preservation of American Brake Drums and Rotors Aftermarket presented a petition against Chinese Brake Drums and Rotors which were, or were likely to be, sold below fair value. They used the Indian economy as a surrogate to estimate costs. An agreement was reached and exports were restricted unilaterally[665].

- Certain Non-Frozen Apple Juice Concentrate from the People's Republic of China: Notice of Preliminary Results of the New Shipper Review, 75 Fed. Reg. 47,270, 47,273 (Aug. 5, 2010).

The producers of non-frozen concentrated apple juice filed a petition against Chinese producers. At the time of the investigation, approximately 16 U.S. firms produced non-frozen concentrated apple juice using apples designated for juicing. About half of the production by these firms was processed further by these same firms into retail products, with the other half sold to outside processors[666].

[664] Supra McGEE. p. 213.
[665] Supra McGEE. pp. 214–216.
[666] REYNOLDS K AND SU Y. "Anti-Dumping on Agriculture: Case Studies on Anti-Dumping". National Research Initiative of the Cooperative State Research, Education and Extension Service, USDA. American University. Washington, 2005.p. 13.

At the moment of choosing a surrogate country the authorities decided to use India without taking into account that India was not a competitor in terms of volumes of apple juice production. Furthermore, this choice of surrogate country was made in spite of the fact that juicing apples are heavily subsidised in India, which significantly alters the market[667], and thus leads to an inappropriate calculation of normal value.

This decision was appealed by the Chinese exporters, and two years after bearing high anti-dumping duties, it was found by the US Court of International Trade that the calculation was actually mistaken and another surrogate country should have been chosen. This decision lowered the duties imposed to almost zero. In this case, recourse to the nullification and impairment provision would not have provided a swifter solution to the unfair duty imposed on China, but it would have allowed the Chinese government to propose a suitable solution to their unique and troublesome situation of being a non-market economy.

The Chinese situation is special because of its status as a non-market economy and its large-scale production of a variety of goods and services at rates that are highly competitive. Cases like the ones mentioned above lead to the conclusion that domestic producers in the United States confuse the notion of normal value with a very particular idea of *fair value,* which implies the protection of their industry and status quo against any sort of competition. This is deducted from the choice of different surrogate economies for different types of costs, and the assumption that the Chinese product is necessarily being dumped because the costs do not reflect the cost reality faced by the producers in the United States.

It is in these scenarios that a greater degree of diligence should be asked from the domestic authorities as the information to construct, in this case, the normal value of a non–market economy, is provided solely by the petitioners, who are parties with a vested interest, which naturally compromises their impartiality in the choice of a surrogate economy. The lack of further investigation in the procedure, where the surrogate country has very different conditions from the non-market economy, or when several surrogates are chosen, leads to a clear nullification and impairment of

[667]Supra REYNOLDS K. p. 13.

benefits through procedural deference, which is actionable behind the WTO under Article XXIII.

Indeed, the recourse to Article XXIII could give China the possibility of creating a proposal that allows the solution of the surrogate country problem. In receiving and discussing a Chinese proposal of that nature, the United States gets a chance to assess the different positions and almost negotiate a mutually beneficial solution, whilst improving the bilateral relationships and solving one controversial aspect[668] of the US internal anti-dumping procedure.

Other procedural issues which could give rise to a nullification and impairment claim also exist in the world of international trade. However, the ones presented above strongly represent the abstract concept that generates the argument in favour of a more active interpretation and use of the nullification and impairment provision in the context of trade remedies and, more specifically, in the context of anti-dumping.

5.4.2 Substantive Motives

The second scenario where anti-dumping measures could be challenged by nullification and impairment complaints in the form of Non-Violation complaints would be the events in which regardless of procedural formalities, the substantive decision of initiating an anti-dumping investigation and imposing a duty is subjectively taken by the governments for different reasons than to defend their industries from unfair imports.

This is the case of protectionism and retaliatory anti-dumping. This argument is valid only in the events where the subjectivity of the investigating country can be clearly elucidated. This interpretation of a subjective Non-Violation whilst somewhat problematic, is nonetheless necessary to give harmony to the system and to provide a solution to the abuse of anti-dumping. In the situations where subjective

[668] Surrogate countries choice in different cases.

protectionism is clear, the nullification and impairment provision must be a tool for relief available for the affected country.

The case presented below is an example of the situation in which a member state is blatantly using protectionism to keep competition away and conserve an industry that has become uncompetitive under the disguise of the legitimate exercise of the rights agreed in the Anti-Dumping Agreement:

Table 8. Case review: EU shoe imports from China and Vietnam. [669]

Chronology of the case	**Date**	**Evolution**
Complaint by the domestic industry	30-May 2005	European shoe industry mainly from Spain and Portugal lodged an anti-dumping petition alleging the injury to the domestic industry following the end of import quotas and the rapid increase of Chinese and Vietnamese imports[670].
Investigation	07-Jul 2005	The commission initiates the investigation on the imports of footwear from China and Vietnam[671].
Provisional Duties	06-Apr 2006	A duty of 4.8 % was imposed on Chinese imports of footwear and one of 4.2 % was imposed on Vietnamese imports.
Definite duties	15-Sep 2006	19.4 % for China and 16.8% for Vietnam[672].

[669]Table 8's contents are extracted from: AHREN M. Anti-dumping as protectionism in the EU? - A case study of shoe imports from China and Vietnam- Bachelors Thesis presented at the LUNDS University under the supervision of Maria Persson.
[670]L 98/52 Official Journal of the European Union 6.4.2006.
[671]L 98/52 Official Journal of the European Union 6.4.2006.
[672]Supra L 98/52.

Request for review	30-Jun 2008	A prolongation of the duration of the definite duties was requested by the domestic industry claiming that domestic production was harmed even whilst a restriction on imports from the dumping countries existed[673]. Economic data suggests that this was due to the domestic shoe producers' lack of ability to compete as a result of inefficiency in production, and not increased imports.
Definite duties	03-Oct 2008	16.5% for China and 10% for Vietnam
WTO Complaint	04-Feb 2010	China filed a complaint to the WTO DSB about the European Union's anti-dumping duties on shoes with leather parts. China claimed that the anti-dumping duties were inconsistent with the GATT provision on Anti-Dumping Agreement (1994).
Panel Report	28-Oct 2011	The panel found Article 9(5) of the Basic Anti-Dumping Regulation inconsistent with the European Union's WTO obligations, and that the European Union had acted inconsistently with the Anti-Dumping Agreement in some aspects of the original investigation and expiry

[673] L 352/67 Official Journal of the European Union 30.12.2009.

		review, but rejected the bulk of China's specific claims of violation in connection with the original investigation and expiry review, resulting Definitive and Review Regulations[674].
Adoption	22-Feb 2012	At its meeting on 22 February 2012, the DSB adopted the panel report.

In this specific case of footwear imports from China and Vietnam into the EU, protectionism has been clear since the beginning of the proceedings. This case goes beyond the procedural aspects and has proven with evidence that the restrictions were motivated by a decision (policy) to protect the shoe industry of the EU[675]. The report by the WTO panel found that the anti-dumping imposition was in contravention of the Anti-Dumping Agreement. However, the shoe industry from China and Vietnam was subject to measures for four years before the case reached the WTO.

Very few cases where a nullification and impairment of rights occurs make it to the DSB, or do so at a stage where the nullification has occurred and has had tangible economic effects for the affected country. In the case of shoe imports from China[676], should China have had the possibility of bringing a nullification and impairment complaint at the point of imposition of the duty, and regardless of whether the case was a violation of the Anti-Dumping Agreement or not (in this case it was found to be a violation), the protectionist motives, which were evident from the beginning of the imposition of the duty would have, in the light of the proposed interpretation of the provision, allowed the affected countries to obtain a swifter resolution and thus shorten the period of time in which they were affected by the spurious duty.

[674] WT/DS405/R European Union — Anti-Dumping Measures on Certain Footwear from China.
[675] Supra AHREN.
[676] Supra WT/DS405/R EU — Anti-Dumping Measures on Certain Footwear from China.

Alternatively, the nullification and impairment complaint could have been used in addition to the normal dispute resolution procedure with the idea of obtaining a commonly agreed solution. This would have given China and Vietnam the opportunity to propose an outcome that went beyond the mere withdrawal of the measures and to give a deeper consideration to the damages already caused to the shoe industry in those countries.

Indeed, even though the panel found the measure inconsistent with the Anti-Dumping Agreement in some aspects of the original investigation and expiry review, it rejected the majority of China's claims in relation to the original investigation. More particularly, the panel rejected the claims in relation to:

a. *Article 6.10.2 of the AD Agreement in the examination of individual treatment requests of four Chinese producers in the original investigation;*

b. *Article 6.10 of the AD Agreement in selecting the sample for the dumping determination in the original investigation;*

c. *Article 11.3 of the AD Agreement in the procedure for and selection of Brazil as the analogue country in the expiry review;*

d. *Articles 2.1 and 2.4 of the AD Agreement and Article VI:1 of the GATT 1994 in the procedure for and selection of Brazil as the analogue country in the original investigation;*

e. *Article 2.6 of the AD Agreement, read together with Articles 3.1 and 4.1 of the AD Agreement, with respect to the scope of the product under consideration, or the like product;*

f. *Articles 3.1 and 6.10 of the AD Agreement and Article VI:1 of the GATT 1994 in the procedure for and selection of the sample for the injury analysis in the*

original investigation and the expiry review;

g. *Article 11.3 of the AD Agreement in the procedure for and selection of the sample for the injury determination in the expiry review;*

h. *Article 3.3 of the AD Agreement in making a cumulative assessment in the original investigation;*

i. *Article 11.3 of the AD Agreement in finding likelihood of continuation or recurrence of injury in the expiry review;*

j. *Articles 3.4, 3.1 and 3.2 of the AD Agreement in the evaluation of injury indicators in the original investigation;*

k. *Articles 3.5 and 3.1 of the AD Agreement in determining causation in the original investigation;*

l. *Article 6.1.1 of the AD Agreement and paragraph 15(a) of China's Accession Protocol in allowing less than 30 days to respond to the MET/IT claim forms in the original investigation;*

m. *Article 6.1.2 of the AD Agreement with respect to certain questionnaire responses in the expiry review;*

n. *Article 6.4 of the AD Agreement, and as a consequence or independently, Article 6.2 of the AD Agreement, with respect to certain information in the original investigation and expiry review;*

o. *Article 6.5 of the AD Agreement, and as a consequence or independently, Article 6.2 of the AD Agreement, in the confidential treatment of certain*

information in the original investigation;

p. *Article 6.5.1 of the AD Agreement, and as a consequence or independently, Article 6.2 of the AD Agreement, in connection with the non-confidential summarisation of certain information in the original investigation;*

q. *Article 6.5.2 of the AD Agreement, and as a consequence, Article 6.2 of the AD Agreement, with respect to certain information in the non-confidential questionnaire responses of the sampled EU producers in the original investigation;*

r. *Article 6.5 in the confidential treatment of certain information in the expiry review;*

s. *Article 6.5.1 of the AD Agreement in connection with the non-confidential summarisation of certain information in the expiry review;*

t. *Article 6.5.2 of the AD Agreement with respect to certain information in the expiry review;*

u. *Article 6.2 of the AD Agreement with respect to certain information in the expiry review;*

v. *Articles 3.1 and 6.8 of the AD Agreement in not applying facts available in the expiry review;*

w. *Article 6.9 of the AD Agreement with respect to the* ***time provided for submission of comments on the Additional Final Disclosure in the original investigation****;*

x. *Article 12.2.2 of the AD Agreement in connection with the **information and explanations provided in respect of specific issues** in the original investigation and expiry review; and.*

y. *Articles 3.1, 3.2, 9.1 and 9.2 of the AD Agreement with respect to the imposition and collection of anti-dumping duties in the original investigation*[677]*.*

Additionally, Article 17.6 (i) was misinterpreted by the Chinese because it was read in isolation from Article XXIII. China erred in failing to invoke Art XXIII and in explaining its connection with Art 17.6.The given interpretation ignores the nullification and impairment of benefits in the anti-dumping investigation procedure and does not take into account the principle of single undertaking. It is important to note that Article 17.6 should be read with a wide interpretation to make a fair assessment in the anti-dumping investigation and that this is independent from the substantial findings or lack thereof of violations of the Anti-Dumping Agreement.

The claims that were rejected refer to situations in which the panel considered that the EU was acting *formally* in accordance with the Anti-Dumping Agreement. Some of the claims may have been subject to rejection due to lack of evidence and some others due to judicial economy. However, some of the claims were rejected because the panel considered that the EU was legitimately complying with the Anti-Dumping Agreement.

Each of the claims rejected by the panel individually shows a disagreement in the procedural behaviour of the domestic investigating authority, or a mild discretionary decision from it. However, read together, all the claims compound and show an intention and a positive attitude to protect the domestic industry that is difficult to dissimulate, despite the fact that the European authorities were covering themselves under the pretension of formal compliance with the Anti-Dumping Agreement. What

[677] Supra WT/DS405/R EU — Anti-Dumping Measures on Certain Footwear from China.

is clear in this case is that long before the dispute came to the attention of the WTO there was sufficient documented evidence of protectionism in the shoe industry of the EU which lead to the application of the anti-dumping measures in the first place. Hence, the nullification and impairment provision was applicable regardless of the compliance or non-compliance of the EU with the Anti-Dumping Agreement.

This case is only one example in a myriad of cases[678] where there is publicly known protectionism in the form of anti-dumping measures and it is very difficult for the affected countries to protect their rights to trade using the Anti-Dumping Agreement in isolation. In some cases, they might find some remote procedural flaw and win the dispute, as occurred in the EU-China footwear case. However as it can be seen in the case presented above, formal compliance can hide a protectionist agenda, which is actionable with the provision of nullification and impairment as a Non-Violation complaint since it affects the importing country and undermines its benefits and vested rights conferred by the WTO agreements.

5.5 Open ended Contract Theory: The spirit of the rule.

Article XXIII contains a clear inclination of the open-ended contract theory, considered by some as the most adequate for international treaties of great scope. This inclination is evident in the discussions and writings of the drafters of GATT who decided to include Article XXIII in GATT despite the warnings of it being the punishment of anybody who commits a *"sin which we have not discovered yet, and which after long examinations we cannot define"*[679].

In other words, the drafters of the agreement were foreseeing the existence of conducts detrimental to trade, but impossible to isolate. As such, they anticipated and compiled an abstract set of rules. More specifically, the concern of the United

[678] For further illustration on this matter see LINDSEY & IKENSON. "Antidumping Exposed: The Devilish Details of Unfair Trade Law" CATO Institute, Oct 2003. pp. 103-145.

[679] World Trade Organisation, Negotiating Group on Dispute Settlement, 'Non-Violation Complaints under GATT Article XXIII: 2, Note by the Secretariat of the WTO', MTN.GNG/NG13/W/31, 14 July 1989, fn. 12, available at: <www.worldtradelaw.net/history/urdsu/urdsu.htm>.

States and other members was that when the countries lowered the tariffs, they found replacing measures, not covered by the scope of GATT, to bypass the norms of the agreement thereby defeating the whole purpose of GATT. They understood that the *course of performance* of the members of GATT would create situations deserving a sanction, and even considered making the Non-Violation complaint a major dispute settlement mechanism[680]. It was precisely because of the dangers of making it a general rule instead of a mechanism of last resort that the drafters resisted making it a key dispute settlement mechanism, leaving it as a latent defence for indirect protectionism[681]. This was also in order to deal with the United States' worry during the negotiations about infringement of trade commitments[682]. Hence the provision of Article XXIII was finally included in the original agreement.

5.6 Dispute Resolution, between activism and restraint

The interpretation of Article XXIII has been difficult since the first implementation of GATT. The WTO has been unclear about the correct interpretation and there have been jurisprudential swings which have created even more confusion about the applicability of the Non-Violation remedy. In some areas of the WTO regulation, the rules that intend to distinguish conducts that are permitted from conducts that are forbidden are often incoherent. This results in a distortion of the full effects of domestic government intervention in trade[683], amongst other interpretative inconveniences.

The critics of Article XXIII as a remedy against an action not sanctioned by GATT defend an interpretation in which the Non-Violation nullification and impairment

[680] LAROUER C. "WTO Non-Violation Complaints: A Misunderstood Remedy in the WTO Dispute Settlement System". Netherlands International Law Review, 2006.LIII p. 99.
[681] Indirect protectionism refers to measures that are intended to impede international trade and those which are not intended to do so, but that have that effect.
[682] DURLING & LESTER. "Original Meanings and the Film Dispute: The Drafting History, Textual Evolution, and Application of the Non-Violation Nullification or Impairment Remedy" 32 Geo. Wash. J. Int'l L. & Econ. 211 (1999). pp. 215-220.
[683] SKYES A. "The Questionable Case for Subsidies Regulation: A Comparative Perspective" Journal of Legal Analysis. Vol. 2 No. 2 Fall 2010. p. 474.

situation occurs within negotiations and multilateral decision-making, and not as a part of a binding judicial decision[684]. This is based on the initial idea of multilateral rules being constantly discussed and adopted by the members, who were supposed to be at the same time, the ones deciding about the benefits accruing to a provision. Therefore, according to this view, it would not be the task of the panel or the Appellate Body to determine whether a member has suffered impairment to the benefits accruing from the agreement and impose a consequence by giving effect to Article XXIII, because it might exceed or modify the points on which the members agreed. This would lead to accepting a judicial intervention in the law-making process which, according to this vision, is restricted only for the member parties in the negotiation rounds.

The problem with this interpretation is that it is not consistent with the consequence contained in the rule. The interpretation is an elaboration that does not take into account the literary layout of the rule and is based on a mistaken premise which is that the concept of Non-Violation complaints is applicable in *a priori* scenario, almost as a pre-requisite for the law-making process in bilateral agreements. Instead, Article XXIII is clearly written as a standard norm, linking a factual proposition to a legal consequence in a multilateral context where the members were well aware of the existence of third party adjudication of some sort. Additionally, this interpretation reduces the reach from the adjudicating bodies of the WTO to the contents of Article XXIII having as a consequence its inapplicability.

On the other hand, despite its reduced appearance in decisions, the active interpretation of Article XXIII has been demanded by complaining parties on several occasions. These demands have not succeeded in the Appellate Body, most of the time because there are not enough factual merits to consider the claim. However, the underlying point of the Appellate Body is that the WTO agreements to which Article XXIII would be applied are delicately crafted by negotiators in the search for a balance between different interests, generally on sensitive issues for the members.

[684] ROESSLER F. "Should Principles of Competition Policy Be Incorporated into WTO Law through Non-Violation Complaints?"Journal of International Economic Law, 1999, vol. 2, issue 3, p. 418.

The acceptance of a Non-Violation claim would disturb that balance and grant the adjudicating body legislative faculties that not even the negotiators themselves had when creating the WTO agreements.

This reasoning appeals *prima facie* as logical and could be strongly defended if it was not for the incoherence that emerges when examining the content of the different WTO agreements with respect to this type of claim. Some agreements, like the TRIPS[685]and the Agreement on Agriculture[686], have expressly excluded the Non-Violation complaint from the scope of their dispute resolution mechanism for a specific period of time. Others, like GATS[687], have limited the scope[688] of Non-Violation complaints, and some, like and the Agreement on Textiles and Clothing[689], have gone even further by definitively excluding the Non-Violation complaints from their dispute settlement system[690].

It is then curious that other WTO agreements that have not taken into account the provisions of Article XXIII are excluded from the application of the Non-Violation

[685] Art. 64.2 of the TRIPS Agreement: Subparagraph 1(b) and 1(c) of Article XXIII of the GATT 1994 shall not apply for the settlement of disputes under this Agreement for a period of five years from the date of entry into force of the WTO agreement.

[686] Art. 13 (a) iii of the Agreement on Agriculture: During the implementation period, notwithstanding the provisions of the GATT and the Agreement on Subsidies and Countervailing Measures (referred to in this Agreement as the Subsidies Agreement) (a) domestic support measures that conform fully to the provisions of Annex 2 to this Agreement shall be: (…)
(iii) Exempt from actions based in Non-Violation nullification or impairment of the benefits of tariff concessions accruing to another Member under Article II of GATT 1994, in the sense of paragraph 1(b) of Article XXIII of GATT 1994.

[687] Art XIV GATS: Dispute Settlement: 12. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked with respect to any matters arising from the application of those provisions of Article XXIV relating to customs unions, free-trade areas or interim agreements leading to the formation of a customs union or free-trade area.

[688] Art XXIII (3) GATS: *If any Member considers that any benefit it could reasonably have expected to accrue to it under a specific commitment of another Member under Part III of this Agreement is being nullified or impaired as a result of the application of any measure which does not conflict with the provisions of this Agreement, it may have recourse to the DSU. If the measure is determined by the DSB to have nullified or impaired such a benefit, the Member affected shall be entitled to a mutually satisfactory adjustment on the basis of paragraph 2 of Article XXI, which may include the modification or withdrawal of the measure. In the event an agreement cannot be reached between the Members concerned, Article22 of the DSU shall apply.* In this provision complaints based upon an impediment to the attainment of an objective are excluded. Also, it limits the legitimate expectation of accrual of a benefit to application of a measure not conflicting with the agreement (excluding other reasons).

[689] Art. 8.10 Agreement on Textiles and Clothing.

[690] LAROUER C. "WTO Non-Violation Complaints: A Misunderstood Remedy in the WTO Dispute Settlement System". NILR, 2006.LIII p. 108.

provisions only due to the specific nature of the commitments contained in them. Some WTO agreements such as the Anti-Dumping Agreement contain restrictions to the benefits initially acquired from GATT. Thus they provide the ideal scenario for a Non-Violation claim. By allowing this interpretation, the scope of the specific agreements post GATT would be significantly limited by the possibility of Non-Violation claims, despite the heavily negotiated filigree of their wording. Not allowing the Non-Violation prescription to permeate those agreements would, on the other hand, implicitly dismantle the original GATT clauses, rendering them void.

VI. COMPETITION AS A PUBLIC GOOD IN INTERNATIONAL TRADE

Anti-dumping measures share a common origin with the pro-competitive regulations of anti-trust or competition regulations. They both hold the same original purpose to obtain economic efficiency[691] and depending on their enforcement, they can assist or conflict with one another.

Competition laws all over the world have understood certain behaviours by private economic actors as anti-competitive. These behaviours normally include the formation of cartels, monopolies, trusts, abuse of a dominant position and restrictions to market access. Due to the fact that anti-competitive conducts are clearly framed and regulated, competition procedures are generally *more transparent, procedurally fairer and less discriminatory against foreign firms than trade remedy laws*[692].

Governmental action can also have an anti-competitive outcome which is not foreseen in domestic antitrust law. Anticompetitive trade action[693] fostered by governments may result in the restriction of markets that are supposed to be free.

Anti-dumping is often used as an anti-competitive tool to protect domestic industries. Undue protection of domestic industries is counteracted by competition rules included in bilateral agreements (as is the case of the United States that signs free trade agreements with its relevant trading partners including Canada, Chile, Mexico and Peru amongst others) or in regional cooperation treaties (such as the European Union). If these tools are unavailable in the jurisdiction of the trading countries, anti-dumping measures have more probability of becoming barriers to trade by promoting protectionism.

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[691] On the common objective of Trade and Competition policies, see 1992 OECD Ministerial Meeting Note *Trade and Competition Policies have a common objective: economic efficiency. But these policies have sometimes impinged on each other.* In NOONAN C. "The emerging principles of International Competition Law". International Economic Law Series. (Gen Ed. John Jackson) OUP. New York 2008. p. 139.

[692] Supra NOONAN. p. 140.

[693] For example trade petitions can diminish competition and trade by allowing otherwise forbidden price fixing (via sharing of information towards structuring a trade petition), or the acceptance of Voluntary Export Restraints in dispute settlement (which is currently not permitted under WTO law). See supra NOONAN . pp. 140-141.

A number of studies have analysed the links between competition and anti-dumping law and have concluded that there is a gap in the international economic law regulations that creates an imbalance which affects international trade in a significant manner[694].One of the causes of the phenomenon is that domestic competition law and Anti-Dumping regulations sometimes overlap and both sets of rules are applicable to the same situation in the same country but instead of having complementary results, they are contradictory[695]. This can lead to the unfortunate results of industries colluding in pursuit of trade remedies undermining competition in detriment of a foreign industry.

Lack of progress in industries which have a secure position shows the disadvantages of such behaviour. They do not see themselves as obliged to raise standards of quality, lower prices and innovate to attract clients. These negative effects form a cycle in which other measures such as safeguards, tariffs and quota restrictions are used to maintain the status quo[696]. This premise is true for developed economies, and for fast growing emergent economies, such as China, India, Brazil and South Africa; but does not apply to developing countries in the lower middle level[697]or to least developed countries. This is because developing countries do not have the infrastructure and wealth to resist economic liberalisation. They are dragged into a state of greater poverty due to the flooding of their economies with cheaper products than what they can actually compete with, lack of durable investment, and privatisation of the public industries which provide basic services.

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[694] See for example BAYLIS, K. & NISHA MALHOTRA."Predatory Pricing: The Effect of Anti-Dumping on Domestic Competition Policy." University of British Colombia: Vancouver.(2008) and MESSERLIN. Anti-Dumping Regulations of Procartel Law?: The EC Chemical Cases. World Bank Working Paper WPS 397. World Bank: Washington DC. (1990).

[695]Supra NOONAN p. 141.

[696]GUASH & RAJAPATIRANA. "Total Strangers or Soulmates? Antidumping and Competition Policies in Latin America and the Caribbean" Policy research Working Paper 1958. The World Bank. Latin America and the Caribbean Region. Finance Private Sector, and Infrastructure Group. 1998. p. 5.

[697] Developing countries are defined by the world bank according to their Gross National Income per capita, "*based on its GNI per capita, every economy is classified as low income, middle income (subdivided into lower middle and upper middle), or high income."* http://data.worldbank.org/about/country-classifications

In developed countries, companies are big enough to exercise market power[698]; therefore, the government's intervention in the market to keep its competitiveness is justified. However, problems arise from both the recipient country's inability to control the anti-competitive company and the exporting nation's absence of interest in controlling it[699]. To avoid this and also preclude resurrecting trade barriers, countries have opted to apply anti-dumping measures, which are allowed by multilateral agreements and which are politically more easily justified, even though the economic justification is improbable.

Some academics have proposed a multilateral comprehensive and flexible statute of competition law as an ideal solution to the issue of competition in international trade designed and enforced by the WTO. This should include "core principles" of competition to be implemented by each country and compliance would be supervised by the WTO. The adoption of competition standards within the WTO would guarantee all member countries' participation and therefore their serious commitment. On the other hand, previous attempts to include competition by the WTO, and the failure of the last rounds of negotiation[700], show that a multilateral solution by consensus is likely to be the most difficult option.

A possible approach that the WTO may take is to include the trade values more actively in its adjudication, which would mean that the WTO could consider competition issues in anti-dumping adjudication. This would be possible because competition is indeed a trade value[701] underpinning the WTO agreements and especially the Anti-Dumping Agreement.

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[698] Companies with market power have the ability of setting prices and may create a monopoly for themselves. Without government intervention, competition may be diminished and the interest of the consumers affected. In this sense government intervention in the form of Competition or Antitrust regulations is justified. See BRUX J. "Economic Issues and Policy". Cengage Learning. 2010. p. 300.

[699] WOOTON I & ZANARDI M. "Anti-Dumping vs. Antitrust. Trade and Competition Policy" in CHOI K. & ARTIGAN J (editors), Handbook of International Trade. Volume II: Economic and Legal Analysis of laws and Institutions. Oxford UK and Cambridge, MA. Blackwell Publishers. 2005. p. 3.

[700] In both Cancun Ministerial meeting and Doha rounds the issue of competition has failed to succeed in the negotiations due to the differences in understanding and policy of developed and developing countries.

[701] As opposed to non-trade values which have been increasingly brought up to the Appellate Body with the request for them to be actively including them in the WTO regulation. Inclusion of non-trade values has been

This would imply that a country which is affected by the use of anti-dumping as a strategy to hinder competition (both as a private or governmental initiative, and with credible proof), could advance a case. For example, a claim might be that its benefit to market access is being blocked. Therefore, Article XXIII would be operative and the WTO could intervene.

The logic of the argument is that if the benefits of liberalisation are being hindered by the application of anti-dumping measures, countries would be allowed to invoke the nullification or impairment clause (Article XXIII: 1 (b)), even if the measures are allowed by other provisions of the agreement. This is because the other country would be failing to comply with its obligations to allow market access. The problem with this reading, apart from the strict mandate given by the DSU to the adjudicators in the WTO, is that the burden of proof in the WTO always requires that the complainant provides some initial proof of its claim as it was established in the WTO jurisprudence:

> *Within the terms of reference of the working party, the examination of the relevant provisions of the General Agreement thus led it to the conclusion that no evidence had been presented to show that the Australian Government (the respondent) had failed to carry out its obligations under the Agreement*[702]*.*

There is also a conceptual problem with the possibility posed above which is the causation provision to be invoked. Impeding market access could be technically a breach of the agreement, in which case the violation complaint could take place. However, applying anti-dumping measures legitimately is not a violation of the agreement, so a Non-Violation complaint could be relevant.

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understood as unacceptable as it is illegitimate and creates norms away from the consensus established by the Members. See KELLY. "Judicial Activism at the World Trade Organization. Development Principles of Self Restraint". Northwestern Journal of International Law & Business. Vol. 22 Issue 3 (spring). 2002. p. 387.

[702] Supra Australian Subsidy para.11.

This is not a minor discussion on the choice of an applicable provision, as to consider the WTO agreements applicability when the issue at stake is an issue of competition, which is not covered by the agreements, may hardly find conceptual foundations to be justified by a WTO panel.

A practical difficulty of the attempt of including competition considerations in the WTO agreements through the nullification and impairment provisions is that it may not be swift enough to respond to anti-competitive anti-dumping measures as it is swift and effective in the domestic systems that have competition law. By the time the controversy is resolved through WTO litigation, which is costly, long and politically burdensome for both members; permanent damage could have been caused to the industry suffering the anti-competitive measure. For instance, when the company using the benefits of anti-dumping measures is a big enterprise and the affected one is a small or medium enterprise (hereinafter SME), by the time processes of consultation and investigation are finished, the SME could be permanently damaged, or even failed.

There is still a long way to go before a “global single market” can be structured. There is no doubt that one of the first steps is to include competition regulations in the international trade system. Those regulations should be binding and enforceable within the WTO and its existing systems of dispute resolutions. Anti-dumping measures must be re-evaluated and renewed so they are part of the evolving international trade system.

Alternatives like the nullification and impairment clause could be used to protect international competition until consensus has been reached because it is unlikely that the most negative consequences from its application would come into effect. Political will from all parties is needed, as are positive actions to show this. This should create reliability in the international trade system and its representative institution, the WTO.

It is clear that anti-dumping measures are not going to disappear because they have proven politically convenient for many governments. They represent an escape valve that cannot be closed for the moment despite all the negative economic implications of maintaining them. The next rounds of negotiation should produce regulations that prevent them being used for anti-competitive purposes following the spirit of the negotiations and the rules emanated from the Uruguay Round. This is urgent because as trade increases, interaction between competition and anti-dumping will increase as well; thus controversies of this nature will become more frequent.

International trade operates in a soft law environment of international law with different authorities which have diverse scope of reach. In this context, the WTO as one of the multiple mediators is the strongest law maker and adjudicator. Within the multilateral and supranational economic system it is important to define the role of the adjudicator and law maker in order to find the boundaries of its action as well as to understand its role within its range of authority which is framed in the perspective of the WTO agreements – it must necessarily be understood as a single undertaking.

In order to meet the dogmatic declarations of the WTO it is necessary to apply an economic model that suits them and yet is flexible enough to cater for the demands of international markets. At this point it is important to remember that all participants in the dispute resolution system of the WTO are entities of public law. Thus the international economic law herein applied is ruled by the principles of international public law[703].

6.1 Economic Constitution[704]

[703] Despite the great influence entities of private law in most of the trade action of the Member States, the participation in the Dispute resolution system continues to be restricted to the Member States. This means that internally, the branch of law that occupies itself of the revision of any issues pertaining international trade with relationship to the WTO is the administrative law of each Member State.

[704] "*Constitutional economics brings a positive analytical perspective to constitutions. Under this approach, constitutions are simply instruments of human interaction: mechanisms by which to share authority in order to facilitate the establishment of rules. Constitutional rules are not natural law; instead, they are political settlements designed to maximize the achievement of individual citizens' preferences. In a transaction cost or*

Domestic policy in tax, trade, property and contracts shape the internal markets making them more or less prone to receiving foreign competition. This also pre-disposes the industries to adapt to a highly competitive or highly protected market and has a direct impact in the lives and minds of workers and political actors. The policy choice is at the discretion of the sovereign nations, which are free to incline their legal system more or less to international trade. This discretion however, affects the international markets in a substantive manner, especially when coming from the major players in the global economy. Thus the need for a clear general economic policy emanating from the WTO that can be, at least, operative in the field of dispute resolution.

There seems to be a basic understanding within the WTO about the conditions in which international trade will take place. However the interpretation of these conditions has not been harmonised leading to the misunderstandings that end up in situations like the abuse of trade remedies as protectionist strategies from the Member States; yet the system survives through the adjudicating body which fairly responds to the needs of the ever evolving international markets at a much faster pace than the legislative institution, which is far too big and complex to react efficiently to the urgency of the demands of trading parties.

The WTO is just an institutional framework for a number of contractual obligations[705], but the existence of a constitution and its composition is evident from its structure and the course of performance given to it by the Member States. At this stage of development of international law, the WTO is the only multilateral and open institution[706] with enough coactive power to discipline its members and to develop a coherent interpretation of the multiplicity of rules applicable in it's the world trade system. Such power was received in a perfect exercise of "social contract". Consequently, scrutinising the constitutional character of the WTO as the only

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strategic model, constitutions are designed to overcome transaction costs or strategic barriers to Pareto superior outcomes. TRACHTMAN J. "The Constitutions of the WTO". Eur J Int Law (2006) 17 (3): 623-646. Available at http://ejil.oxfordjournals.org/content/17/3/623.full#sec-4

[705] BOVARD J. "Two cheers for GATT" Policy Backgrounder No. 135. The National Centre for Policy Analysis. New York, Nov 1994 p. 9.

[706] As opposed to closed institutions such as the regional economic communities (NAFTA, MERCOSUR, CAN) and more sophisticated, yet closed, institutions of regional cooperation such as the EU.

international institution that replicates the domestic government's structure will lead to finding an acceptable economic model that will be suitable for the needs of international trade in its current state of affairs. Such model is much needed so that all the parties can have homogeneous expectations and a harmonising interpretation of the legal provisions can be produced by the Appellate Body in the resolution of the coming disputes.

In the words of the Freiburg scholars[707], an *economic constitution* refers to the formal legal institutional framework (in this case the WTO agreements as a whole) and informal conventions and traditions that govern the economic activity in the respective communities (in this case, in the international community of trading nations)[708]. Naturally, none of the models developed for national economies can be transplanted into the international system because all of them rely heavily on national government institutionalism, which at the international level is absent.

What would produce better results is the apprehension of the applicable principles of liberal economies that do not depend on governmental action, that is, those that refer directly to the market and are structured based on market logics. Also, other principles can be assumed to fit the incipient international institutionalism, and may delimit its scope of action and strengthen it in the areas where its authority is clear and uncontested.

Along these lines, considering competition as a public good, or as an intrinsic benefit that is legitimately expected by the Member States in the system of dispute

[707] VAN SUNTUM S, BOHM T, OELGEMOLLER J and ILGMANN C. "Walter Eucken`s Principles of Economic Policy Today". CAWM [Centrum fürangewandteWirtschaftsforschung Munster] Discussion Paper No. 49. Available at http://www.wiwi.uni-uenster.de/cawm/forschen/Download/Diskbeitraege/DP-49_Euckens-Principles-of-Economic-Policy-Today.pdf: "*Walter Eucken was the head of the Freiburg school of economics, a circle of German ordoliberal scholars of the interwar period, whose thoughts were highly influential in the immediate post war period. Being disillusioned by what he called the "age of experiments"- the failure of both classical liberalism and socialism - he formulated eleven principles for what he called a market economy, in which competition would not only limit the extent of private economic power, but also lead to an efficient allocation of resources and hence to economic prosperity. Although the principles never received much international attention, in light of recent economic research on both institutions and welfare economics, the essence of Eucken's work appears to be very modern indeed*."

[708] See EUCKEN, W. "A Policy for Establishing a System of Free Enterprise".In Ludwig-Erhard-Stiftung, Standard texts on the Social Market Economy, pp. 115–31.Stuttgart 1982.

resolution in the WTO, would have a considerable impact in the decision-making process of the Appellate Body. This would solve the problem of anti-competitive internal policies as a non-tariff trade barrier as well as the abuse of remedies (namely subsidies and anti-dumping duties) for protectionist purposes. Another benefit that emerges from adopting competition as a principle of adjudication is legal surety which would give predictability to the judgments, and would, eventually, facilitate an agreement on more sophisticated international competition rules.

It is relevant to note here that both the Cancun Ministerial meeting and the Doha Round have failed precisely because of the lack of consensus over what should and what should not be included in a system of international anti-trust. The position of both developing and developed countries is confused and contradictory and it seems difficult to understand what their point of disagreement is[709]. Adjudication, as a positive corollary, may lead to the clarification of the economic policy position of Member States through reflection in the actual litigation with a minimum of pro-competition activism from the Appellate Body.

The state of the art is clear for all Member States and the fact that international trade can't flourish unless in a system of free competition seems to be a concept in all theories of international trade. The question that remains is then, how could the Appellate Body substantiate a pro-competitive judgment without disturbing the harmony of the already delicate and slightly contradictory coexisting agreements.

6.2 Ordo Liberal principles applied to the WTO agreements as an Economic Constitutional Foundation.

[709] See KEKTAR P. "Deadlock at Cancun: A New Beginning". Institute for Peace and Conflict Studies Issue Brief No. 12. September 2003 available at http://www.ipcs.org/pdf_file/issue/1906937507IB12-PrafullaKetkar-DeadloackAtCancun.pdf*Some of the key concerns for developing countries at Cancun were:* Agriculture, TRIPs, Public Health, Non Agricultural Market Access – NAMA. For a detailed analysis of the issues of Competition, Investment, Transparency in Government Procurement and Trade Facilitation, otherwise known as the Singapore Issues See: WOOLCOCK S "The Singapore Issues in Cancun: a failed negotiation ploy or a litmus test for global governance?"London School of Economics. International Trade Policy Unit. Available at http://www2.lse.ac.uk/internationalRelations/centresandunits/ITPU/docs/woolcocksingaporeissues.pdf

It is possible to grasp from the preamble of GATT and from the very text of the WTO agreements that the Member States are engaged in a contract that presupposes a market economy on an international level. An economic model that is compatible with this idea fits the definition of Ordo Liberalism as delivered by the Freiburg scholars in which an economic constitutional order is developed to be the underpinning fundamental base of the legal framework that the Member States have accepted and adopted as a single undertaking.

To have international *unhampered markets*[710]as defined by the Ordo Liberalism from the Freiburg school means that **policy intervention** or **dogmatic ruling** is acceptable as long as the ruling body[711]does not interfere in the operations of businesses by means of orders and prohibitions[712]. This can be achieved by a minimum of legislative work that allows the market to be self-regulating up to the maximum level of market freedom, yet contains administrative supervision in order to prevent major market distortions. The areas that should be guaranteed in order to provide a planned order of economic and legal nature are:

- Competition;

- Levels of law compliance; and

- Supervision of international cartels[713].

6.3 The issue of legitimacy in the WTO

[710]VANBERG VJ. "The Freiburg School: Walter Eucken and Ordoliberalism". Freiburg Discussion Papers on Constitutional Economics.Institut für Allgemeine Wirtschaftsforschung; Abteilung für Wirtschaftspolitik; Albert-Ludwigs-Universität Freiburg, 04/11. p. 4.

[711] In the atypical case of the WTO the ruling body is considered to be the adjudicator(Appellate Body) firstly because of its permanent dedication to the Member States issues; secondly because the legislative body of the WTO, the Rounds of negotiation of the Member States is also, under other conditions, the very same party in the trade disputes that arise; and finally because the decisions of the Appellate Body create *stare decisis* or precedent rulings that are considered binding for the Member States and for the Appellate Body itself .

[712]Supra, VANBERG.

[713]BOHM F. "Das problem der privaten Macht. Ein Betrag zur Monopolfrage". Grundtexte zur Freiburger Tradition der ordnungsőkonomik. Walter Eucked institutUntersuchungen zur Ordnungstheorie und Ordnungspolitik 50. Mohr Siebeck. Tubingen, 2008. p. 47.

Within the WTO, agreement has been reached about a) the system of dispute resolution and b) the principles and cooperative rules of non-discrimination. This can be understood, in principle, as the constitutional configuration of the organisation[714]. The problem of legitimacy has emerged on previous occasions where the limits of the jurisdiction of the WTO as an international trade authority were not clear for the public in general, and the legal questions to be answered were related to sensitive issues of current affairs. The Seattle demonstrations[715] left a clear message that in order to have a coherent, yet operative system of international trade dispute resolution, legitimacy is of key importance. If an economic constitution is to be conceptually created and applied it needs to have a legitimate foundation in both its ontological (validity and scope) and deontological (justice) aspects in order to guarantee its material enforceability (efficacy) as a legal norm of constitutional status.

The fact that the WTO already contains constitutional elements is reassuring and it feeds legitimacy into the system.

Thus, it is not excessive to differentiate this form of judicial activism[716] with other topics of a polemic nature in the WTO such as human rights and environmental affairs. Competition is, by its very nature, an *essential* element of free trade. It is essential because if its existence is suppressed from the imaginary of free trade, it

[714] ORCALLI G. "A constitutional Interpretation of the GATT/ WTO". Constitutional Political Economy 14.Journal of Economic law. Padua. 2003. p. 151.

[715] See, OLDHAM K. "WTO Meeting and Protests in Seattle (1999) -- Part 2" Essay 9213, Nov 2009, available at http://www.historylink.org/index.cfm?DisplayPage=output.cfm&file_id=9213 […] *"When Seattle elected officials and civic leaders won the bid to host the Third Ministerial Conference of the World Trade Organisation (WTO), they hoped to link Seattle's name to a new round of negotiations aimed at promoting and regulating international trade. What happened during the conference did indelibly link Seattle and the WTO, although not in the way that boosters hoped. Tens of thousands joined in rallies and marches against WTO policies that they said hurt the environment, farmers, workers, consumers, and others. Thousands more successfully (albeit temporarily) "shut down the WTO" through nonviolent civil disobedience. A much smaller group used property destruction to protest the WTO and big corporations. Seattle authorities responded with a massive show of police force and creation of a "no protest zone," drawing widespread criticism for both their lack of preparation and their subsequent crackdown."*

[716] There are strong dissident positions against this statement regarding the clear limitation for judicial activism in the WTO. They are based in the wording of the objectives of the DSU as it is tasked to *clarify* rather than *interpret* the existing provisions. While they are valid, they are also debatable under the light of the essential elements of trade. See STOLL & SCHORKOPF "WTO – World Economic Order, World Trade Law". Max Planck Institute for Comparative Public Law and International Law. Martinus Nijhoff Publishers. Leiden. 2003

would stop being so. Competition adjudication is then *natural* to free trade as it comes by default in a hypothetical plan where free trade would occur, and this is the stage where the proposed economic constitution principles and procedures would fit in. Finally, competition regulations are *accidental* to the international markets to be framed within free trade, because they may or may not exist without affecting the very existence of it. That is precisely why these formalities are left to the rounds, where the Member States discuss whether they would like to widen or narrow the reach and span of the adjudicator without, in any event, considering the possibility of eliminating competition from the free trade panorama.

An economic constitution as conceived by the Freiburg scholars could, in light of the abovementioned reflections, be adapted to the international system of trade law provided that the WTO keeps its openness and flexibility to new topics in the rounds of negotiation so that it keeps its legitimacy as a supra-national organisation.

VII. CONCLUDING REMARKS

The legal structure of the WTO is far from perfect. It contains contradictory provisions, substantial obligations that are in practice impossible to enforce and it is incomplete in its scope of application. However, it is the most developed institution in international economic law environment and it functions with a system that mirrors the division of powers within nation states. The powers in the WTO are divided into executive, legislative and judicial, with a reduced executive represented in the secretariat, an ample legislative, where all the membership is represented and a rotating first instance of adjudicating body which is composed of the panels, with a mechanism of appeal that has a more permanent seat. It is in this context that the study of the application of Article XXIII of GATT was portrayed taking into account the interpretative constraints, the normative boundaries and the institutional limitations.

Article XXIII of GATT is applicable to all WTO agreements with exception to those that have either limited its scope to specific cases or the ones that have expressly eliminated its application to their subject matter[717]. This occurs by virtue of the principle of single undertaking without prejudice to the specific remedies contained in the particular agreements because its jurisdiction is not exclusive, but concomitant with them. The forms in which Article XXIII can be applied in a rational manner are violation and Non-Violation as a situation complaint would be politically unacceptable in any event. However, it is important to note that once a route of remedial action has been taken, it means that other available remedies are forfeited; otherwise the mandate of the DSU to settle the disputes in a definitive manner would be violated. It is not surprising that there are contradictory texts and interpretations as the WTO agreements are the result of a long process of negotiations. Article XXIII is a special case of WTO rules where one norm can call for different types of interpretation in its different sections.

[717] TRIPS, Agreement on Textiles and Clothing, Balance of Payments Understanding.

A completely formal interpretation is not acceptable because it renders the contents of the article null, but a completely abstract approach leaves behind the cautiously and painstaking negotiation that the members underwent to reach agreement in some algid areas of trade. On the other hand a completely creative interpretative solution is not logical and also unacceptable as the WTO operates under a system of Rule of Law. An acceptable interpretation is one that offers coherence between the internal text of Article XXIII and the rest of the agreements, especially in the section relating to Non-Violation complaints. Coherence within Article XXIII can be achieved by the clarification of the meaning of key concepts within the provision such as the concepts of *benefit an objective of the agreement*[718].

In other words, Article XXIII contains two classes of **benefits**: vested and legitimately expected benefits. The nullification and impairment of *vested benefits* is a breach of the WTO regime, it leads to a liability, it generally has other remedies within the normative text of the corresponding specific agreement, and it triggers the application of Article XXIII: 1(a), without prejudice to other available remedies for the same situation. On the other hand the nullification and impairment of *legitimately expected benefits,* and the impediment to attain the *objectives of the agreement* trigger the application of Article XXIII: 1 (b). Legitimately expected benefits include the customary obligations of WTO law, the general principles of international law, the consideration, at least, of the objectives and purposes of the WTO agreements and the actions that have raised expectations due to a specific course of performance by a member state. The objectives of the agreement are contained in the agreement itself and their interpretation has been explained above. The scope of Article XXIII: 1 (b), or Non-Violation complaints is extended to all the measures that are WTO consistent and non-discriminatory in their formal aspect, but that entice disguised discrimination or hidden protectionism. Non-Violation complaints are subject to increase as the scope of the WTO agreements expands in further negotiations. This would keep the coherence and harmony of the system internally and would ensure a more complete single undertaking.

[718] Supra KIM (2006) p. 297.

In relation with the Anti-Dumping Agreement, the application of Article XXIII can be a useful tool to tackle the uses and practices of the Member States that undermine the actual objective of the Anti-Dumping Agreement, and become a protectionist tool for the most powerful industrial consortia in the different regions. Indeed, recourse to Article XXIII can lead to the modification of practices that are formally acceptable, but substantially detrimental to free trade. Both acceptable dimensions of Article XXIII can be applicable to the anti-dumping practices of Member States. When the practice is WTO inconsistent as a breach, and provided that a nullification, impairment or impediment to attain the objectives of the WTO agreements is proven, Article XXIII: 1 (b) is applicable in virtue of the coherence that all the WTO agreements must have amongst themselves.

The fact that Article XXIII provides a first possibility of a direct and amicable understanding for the parties is extremely valuable for trade partners who can address some of the issues encountered in anti-dumping in a pre-adjudicatory instance in a cooperative manner. Furthermore, in case of failure of the proposals offered by the affected party, Article XXIII provides a unique jurisdiction to the panels that are competent in this exclusive case to suggest creative alternatives to solve the dispute. This specific and rare recourse in Article XXIII can allow the parties to request some solutions from the panels which would otherwise be impossible in WTO adjudication, such as more transparency in the anti-dumping procedures, ex officio exercise of the power of subpoena to request relevant information, and the use of more favourable methods of value calculations.

This could diminish the use of anti-dumping and increase target-tailored protectionism on the one hand and be used as a retaliatory measure on the other hand. The solutions proposed by the complainants may provide proven formulae that can lead to further negotiations on the restructuring of the regime on the basis of empirical evidence tailored by the contracting parties on a case by case basis.

In the area of competition, it is clear that the Member States have decided to leave the issue out of the jurisdiction of the panels for different reasons. There is no doubt of the urgent need to include competition considerations in the WTO dispute

resolution framework; and also, there is clarity about the anti-competitive motivations of some countries use of anti-dumping. It seems clear that the parties are aware of the inseparable ties that anti-dumping and competition have which is proven by the fact that a number of them have included competition considerations in their bilateral free trade agreements.

The Appellate Body has reiterated in the decisions related to the environment – Tuna-Dolphin and Shrimp-Turtle – that the adjudicating body of the WTO is not a creative authority but that it is bound to execute the existent norms as they are, and not as they should be. They also made a point to circumscribe the intervention of the WTO to facilitate, regulate and settle disputes of trade in goods and services only in the subjects that had been self-regulated by the membership in the different negotiation rounds.

The application of an economic constitution as understood by the Freiburg scholars can only be possible in the scenario of the WTO once the Member States have agreed on the creation of an application of a comprehensive policy, which they, being the legislative body of the WTO, must craft and agree upon before it is available for the jurisdiction of panels and the Appellate Body. Also it must be taken into account that since the WTO system does not count on a strong institutional and overreaching structure, the economic constitution policy must be tailored to empower and, at the same time hold accountable, the domestic implementing authorities who are the ones interpreting and applying the agreements in the actual field.

Therefore, it is not possible to justify under the terms of Article XXIII adjudication that takes into account competition considerations that the parties have expressly decided to leave out of the WTO structure. This stems from the very concepts of benefit, legitimate expectations and objectives of the agreement, which have been defined and cannot be extended by means of jurisprudence, but only by means of express agreement or course of performance which at this point is unlikely.

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