## II. EXCEPTIONAL CHARACTER OF THE NON-VIOLATION REMEDY

7. The view has been expressed that non-violation nullification and impairment (the "non-violation remedy") has an exceptional character.[5] It has been noted that the Panel in *Japan - Film* considered that "the non-violation remedy should be approached with caution and should remain an exceptional remedy".[6] The view has been expressed that non-violation complaints could only succeed under the TRIPS Agreement in a very limited number of cases.[7] It has been argued that neither the existence of safeguards nor the limited number of cases is relevant to the question whether non-violation complaints should be admissible in the TRIPS context and, if so, on what conditions and within what limits.[8] It has been suggested that the exceptional character of the remedy could have a bearing on the scope of non-violation complaints entertained under the TRIPS Agreement.[9]

## III. PURPOSE OF THE NON-VIOLATION REMEDY

8. The issue of the purpose of the non-violation remedy and whether it is necessary or desirable in the TRIPS context has been discussed. In this context, delegations have expressed views on the systemic implications of the application of the non-violation remedy in the TRIPS area.

9. One issue that has been discussed in this connection is **whether the non-violation remedy is necessary for the security and predictability of benefits** that should flow from the TRIPS Agreement, including whether it can be applicable to benefits flowing from rules of general application or is only applicable to benefits deriving from tariff and other market access concessions. In this context, points have been made about the **implications of the application of the non-violation remedy for the balance of rights and obligations under the TRIPS Agreement and whether it would enhance or reduce certainty.**

10. On the one hand, it has been noted that experience with the non-violation remedy under GATT has usually concerned the benefits of negotiated tariff concessions.[10] It has been noted that the scope of the non-violation remedy has been reduced under Article XXIII:3 of GATS which limits non-violation complaints under that Agreement to benefits accruing from specific commitments undertaken by Members.[11] It has been recalled that the Appellate Body said in its report on *India – Patents* that:

> "Under Article XXIII:1(b) of the GATT 1994, a Member can bring a 'non-violation' complaint when the negotiated balance of concessions between Members is upset by the application of a measure, whether or not this measure is inconsistent with the provisions of the covered agreement. The ultimate goal is not the withdrawal of the measure concerned, but rather achieving a mutually satisfactory adjustment, usually by means of compensation." [12]

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[5] IP/C/M/28, para.192. *See* IP/C/W/249, Sec. II, page 1; *Similar statements can be found at* IP/C/M/22, para. 145; IP/C/M/21, para 120; IP/C/M/23, para. 117; IP/C/M/23, para.122; IP/C/M/23, para. 126; IP/C/M/24, para. 105; IP/C/M/24, para. 106; IP/C/M/26, para 104; IP/C/M/27, para. 162; IP/C/M/27, para. 164; IP/C/M/29, para. 223; IP/C/M/29, para. 225; IP/C/M/30, para. 203; IP/C/M/32, para. 153.

[6] IP/C/W/212, sec. IV, page 7, citing Panel Report on *Japan - Film*, WT/DS44/R, para. 10.37. *See also* IP/C/W/127, Issues of Concern , page 2 and IP/C/W/385, para. 2; *Similar statement can be found at* IP/C/M/30, para. 204; IP/C/M/22, para. 136; IP/C/M/28, para. 192; IP/C/M/32, para. 156.

[7] IP/C/W/194, page 4 .

[8] IP/C/M/24, para. 105.

[9] IP/C/W/212, page 8.

[10] IP/C/W/124, paras. 27-28 and IP/C/W/385, paras. 13-14; IP/C/M/40, para. 152.

[11] IP/C/M/32, para. 156; IP/C/W/385, para. 15.

[12] WT/DS50/AB/R, para. 41, cited at IP/C/W/194, page 6.

It has been argued that, even with regard to negotiated concessions, the need for non-violation complaints to protect tariff concessions has been largely removed since the establishment of the WTO, by the adoption of d

as there was a danger that the private rights protected under the TRIPS Agreement would thereby be elevated over the interests of users and public policy concerns.[25] As the obligations under the TRIPS Agreement, unlike tariff bindings, could not be revised between individual parties, the introduction of non-

15. It has been further argued that international law has not evolved in such a way that states or Members can be penalized for acts or omissions for which they are not otherwise responsible. In international law, the rule still is that one is liable for the consequences of breaches of contract or acts which constitute a tort. The concept of non-violation complaints goes further than this. It seeks to render a Member liable for situations in which it has not violated any agreement and even for situations over which it has no control.

requirements could then be challenged under the TRIPS Agreement[46] which would amount to establishing a new cause of action under the TRIPS Agreement.[47] Non-violation and situation complaints under TRIPS were unnecessary to protect market access commitments embodied in the

DSU requires the complaining party in such cases to present a detailed justification in support of its complaint and that, to remedy a case of non-violation, there is no obligation to withdraw the measure.

**(a) Objectives and principles**

22. It has been argued that an assessment of benefits and objectives of the TRIPS Agreement should pay heed to the stated objectives and the Preamble to the Agreement. The relevant factors in relation to benefits under TRIPS could include: adequate standards and principles concerning the availability, scope and use of intellectual property rights; the balance of rights and obligations; the promotion of technological innovation and transfer and dissemination of technology; the mutual advantage of producers and users of technological knowledge; social and economic welfare; and ensuring that intellectual property right enforcement does not impede legitimate trade.[53]

23. It has been argued that the Council needs to take into account the role played by the objectives and principles of the Agreement in Articles 7 and 8. The TRIPS Agreement is intended to achieve a balance between the protection of intellectual property rights and other social and economic policies and it is important that Members have the necessary flexibility to adjust intellectual property rights to maintain the desired balance.[54] It has been argued that non-violation complaints are not necessary to protect the balance between right holders and users as these do not concern the balance of obligations between Members.[55] It has been said that the status of Articles 7 and 8 of the TRIPS Agreement does not seem to be exactly the same as Article XX of GATT 1994 since Article 8 is subject to the other provisions of the Agreement.[56]

24. It has been argued that the TRIPS Agreement's connection with market access lies only in its basic principles as enunciated in Part I, including national treatment, MFN treatment, the objectives of transfer and dissemination of technology and the reasonable expectations of transfer and dissemination through the promotion of technological innovation.[57] It has been argued that the inherent tension in the TRIPS Agreement, between promoting international trade and technological innovation on the one hand and a pursuit of public interests with the protection of private intellectual property rights on the other, would be heightened by the introduction of non-violation and situation complaints, as both sides might seem to have grounds for complaints.[58]

25. It has been argued that any benefits accruing under the TRIPS Agreement were adequately described in the text of the Agreement and that Members had not agreed to any benefits beyond the boundaries of the text.[59] As Article 1 explicitly provided that "Members shall give effect to the provisions of this Agreement" and that "Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement", there were no legitimate expectations of benefits beyond the effective protection of intellectual property rights.[60] It has been argued that these benefits would be best achieved by a good faith performance of the obligations of the TRIPS Agreement.[61] It has been argued that, in respect of an agreement which contained rules

[53] IP/C/W/212, Section B, page 4.
[54] IP/C/M/28, para. 193.
[55] IP/C/W/385, para. 32; IP/C/M/37/Add.1, para. 267.
[56] Job(00)/6166, paras.17-18.
[57] IP/C/M/28, para. 194.
[58] IP/C/M/37/Add.1, para. 281.
[59] IP/C/W/385, paras. 38-39; IP/C/M/37/Add.1, para. 267, 269; IP/C/M/37/Add.1, para. 281; IP/C/M/38, para. 277; ; IP/C/M/40, para. 159; IP/C/M/40, para. 166.
[60] IP/C/M/37/Add.1, para. 276; IP/C/M/39, para. 167; IP/C/M/40, para. 158.
[61] IP/C/W/385, paras. 38-39.

and disciplines such as the TRIPS Agreement, there could be no nullification if there was no violation or infringement.[62]

**(b) Intellectual property protection**

26. The TRIPS Agreement provides minimum standards with regard to the acquisition or exploitation of intellectual property rights and on their scope, as well as procedures and measures to enforce those rights, notably by enabling effective action against unauthorized use of those rights by third parties. It has been suggested that complaints could be considered as falling within a possible ambit of a non-violation case under the TRIPS Agreement when they are primarily linked to benefits that can reasonably be expected to result from the conferral of intellectual property rights and their exclusivity, i.e. those that are specific to the TRIPS Agreement, rather than to any resulting economic returns which are covered by market access concessions under the GATT or the GATS. Cases where limitations on the availability, maintenance and enforcement of an intellectual property right are the specific object of a complaint might fall within this category. When (a restriction on) market access is the principal object of a complaint, by contrast, this should be filed exclusively under the relevant procedures provided in the GATT and GATS.[63] The reasonable expectations under Part II onwards were only of the minimum standards prescribed and not market access.[64]

27. It has been noted that Article 63.1 of the TRIPS Agreement defines the "subject-matter of this Agreement" as "the availability, scope, acquisition, enforcement and prevention of the abuse of intellectual property rights".[65] It has been argued that, even if the TRIPS Agreement is a market access agreement, it has its own distinctive character and, therefore, additional considerations are more or less needed to analyse the application of non-violation under it.[66]

**(c) Exploitation of rights**

28. It has been argued that the "benefit" conferred under the TRIPS Agreement is the ability to "acquire, maintain and enforce" intellectual property rights. This "benefit" does not automatically concern the exploitation of the subject-matter of those rights. There are also different forms of non-economic benefits to consider.[67] The TRIPS Agreement provides patentees only the right to prevent third parties from taking certain actions; it does not guarantee the patentee that it can exploit its rights if other provisions of law, otherwise consistent with the WTO agreements, prohibit that exploitation.[68]

**(d) Market access**

29. It has been argued that the TRIPS Agreement is a market access agreement because it helps reduce market distortions that existed prior to its negotiation by establishing adequate standards and principles concerning the availability, scope and use of trade-related intellectual property rights and by ensuring that effective and appropriate means for the enforcement of those rights are available without themselves becoming barriers to legitimate trade.[69] Its preamble begins with the words "Members, desiring to reduce distortions and impediments to international trade …".

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[62] IP/C/M/37/Add.1, para 280.

[63] IP/C/M/27, para. 159; see also IP/C/W/385, para. 35 which argues that applying non-violation complaints to the TRIPS Agreement was therefore unnecessary to address these cases.

[64] IP/C/M/28, para. 194; IP/C/W/385, para. 33-36 ; IP/C/M/37/Add.1, para. 267; IP/C/M/39, para. 175.

[65] IP/C/M/27, para. 182.

[66] IP/C/M/27, para. 168.

[67] IP/C/W/249, under the subheading 'Benefit Accruing Under the TRIPS Agreement', page 3.

[68] IP/C/W/194, under the subheading 'The TRIPS Agreement is One Part of a Coherent System of Agreements', page 3.

[69] IP/C/W/194, under the subheading 'The TRIPS Agreement is a Market Access Agreement', page 2.

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38. It has been argued that, unlike the GATT, the TRIPS Agreement is not about regulating competitive relationships. Indeed, it could be argued that the TRIPS Agreement is, in a sense, anti-competitive in nature where it seeks to reward inventors.[90] The TRIPS Agreement is about minimum standards of treatment, not about equal treatment of competitors. The non-violation remedy is intended to protect reciprocal tariff concessions and is simply inapplicable in the context of the TRIPS Agreement.[91]

**(f) Private right holders**

39. It has been argued that an ordinary market access agreement involves a government granting, say, tariff concessions for reciprocal tariff concessions. The concessions are made by one government to another and, if there were a non-violation complaint, the adverse effect would be borne by the other government. However, the TRIPS Agreement is *sui generis*; it is about giving private parties certain rights.[92]

40. In response, it has been argued that, although the TRIPS Agreement's obligations are couched in terms of rights granted to Members' nationals, rather than treatment to which goods or services originating in Members' territories are subject in the territory of other Members, this difference is not as significant as may be perceived. It is only because intellectual property rights are granted to persons rather than applied directly to goods that there is a perception that the TRIPS Agreement somehow differs from other WTO agreements. The TRIPS Agreement's rules determine the way in

## V. NATURE OF MEASURES THAT COULD BE AT ISSUE

43. Article XXIII:1(b) of the GATT 1994 provides that a complaint under that provision must concern the application by another Member "of any measure, whether or not it conflicts with the provisions of this Agreement". The views that have been expressed on the question of what type of measures could give rise to a non-violation complaint in the TRIPS area are summarized in this section.

44. The concern has been expressed that uncertainty regarding such measures may unduly constrain governments in the development of policy. It has been noted that measures and policies enacted in pursuit of legitimate **public policy objectives**

47. It has been questioned whether "measure" in this context has a broader meaning than **government instituted measures**. "Measure" has not yet been explicitly defined but GATT cases, like for example *Japan – Film* (WT/DS44/R) suggest that WTO panels might interpret this term broadly, extending it to all aspects of government action. Laws and regulations appear to be covered and, in some cases, panels have found administrative guidelines to be measures as well, in particular if officials applied them as if they were mandatory.[107]

48. It has been questioned whether "measure" in this context can refer to **actions of courts or law enforcement authorities**, particularly in light of the enforcement obligations in the TRIPS Agreement.[108] The potential application of the non-violation remedy in relation to decisions of domestic courts and tribunals could not only lead to use of the non-violation remedy as a means of appealing national judicial decisions, but might also have more complex legal implications in relation to matters such as sovereignty and the division of power and authority, which were issues that went beyond the purview of the Council.[109]

49. It has been doubted whether the **acts of private parties** should be taken into account in addition to national laws and regulations and possibly other legally enforceable government actions, in the consideration of the existence of a "measure". Both Article XXIII:1(b) of GATT 1994 and Article 26.1 of the DSU speak about government measures, i.e. the application of measures "by another contracting party" and "by a Member" respectively. In GATT/WTO experience, it seems to be essential that the complaining party show the existence of a measure attributable to the respondent party.[110] It has been argued that acts of private parties should not be considered when determining whether a "measure" exists.[111]

50. It has been questioned whether "measure" could include **non-action**.[112] It has been argued that in a scenario where domestic laws and regulations were in apparent conformity with hasath by a M5BT1 0 1 7--

Example A: A Member may decide to ban the manufacture, processing, importation and distribution of materials or products that contain a prohibited substance. This could affect foreign intellectual property right holders who may be the main providers of such products to that market.[117]

*Another Member responded to this example:* This example would seem relevant primarily to patents

TRIPS Agreement that might be consistent with the express terms of the Agreement but nonetheless might be argued to undermine the anticipated value of IPRs; enforcement measures which were under protective or overprotective of IPRs and therefore reduced the expected value of IPRs.[125]

55. Other specific examples were mentioned: bans on publication of a book on the grounds of national security; laws on libel, pornography and hate literature as applied to copyright works; a registration scheme for hand guns that leads to a reduction in exports of patented hand guns; import controls on patented products such as pharmaceuticals, electronic goods and machine parts; prohibitions by schod arts;

- for a complaint under GATT Article XXIII:1(c), an analogous situation has arisen.

against anti-competitive abuse of IPRs consistent with Article 40.2.[173] Other provisions were also suggested, such as Articles 21, 27.2, 27.3 and 31.[174]

76. It has been noted that Article 26.2 of the DSU effectively provides that reports on "situation" complaints can still only be adopted by **positive consensus**.[175] However, with respect to "non-violation" complaints, in the absence of specific wording to the contrary in Article 26.1 of the DSU, it would appear that "non-violation" decisions would be adopted by "negative" consensus. However, it has been questioned whether, in the context of the TRIPS Agreement, "non-violation" complaints and "situation" complaints should not share the same process for adoption of decisions, namely "positive" consensus (i.e. all Members would need to agree to a report before it was adopted).[176] In response, it has been argued that this suggestion might be going too far as it raises a systemic issue and seems to call for an amendment of the DSU.[177]

77. In an informal meeting of the TRIPS Council, held on 23 May 2003[178], the Chair noted that with regard to **concrete proposals** for action by the Council, with specific reference to the Cancún Ministerial Conference, four main options would be logiBT1 0 .9t

78. These options were discussed at that informal meeting and at the Council's meeting on 4-5 June 2003. The footnotes to these options in the previous paragraph indicate the support given to each of them at that Council meeting as well as on earlier occasions.

79. In the light of these reactions and subsequent consultations, the following text was incorporated into the Second Revision of the Draft Cancún Ministerial Text.[182]

> "We take note of the work done by the Council for Trade-Related Aspects of Intellectual Property Rights pursuant to paragraph 11.1 of the Doha Decision on Implementation-Related Issues and Concerns and direct it to continue its examination of the scope and modalities for complaints of the types provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 and make recommendations to the first Ministerial Conference to be held after 1 August 2004. It is agreed that, in the meantime, Members will not initiate such complaints under the TRIPS Agreement."[183]

Given the overall outcome of the Cancún meeting, this text was not adopted. The text that was finally adopted on this matter in the 1 August 2004 Decision of the General Council is reproduced in paragraph 4 of this note.

## XI. SITUATION COMPLAINTS

80. Article XXIII:1(c) of GATT 1994 refers to complaints based on "the existence of any other situation", so-called "situation" complaints.

81. It has been noted that, under Article 26.2 of the DSU, the usual practice of adopting panel

## XII. IMPEDIMENT TO ATTAINMENT OF AN OBJECTIVE

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|---|---|---|---|
| Argentina, Bolivia, Brazil, Colombia, Cuba, Ecuador, Egypt, India, Kenya, Malaysia, Pakistan, Peru, Sri Lanka and Venezuela | IP/C/W/385 | Non-violation and situation nullification or impairment under the TRIPS Agreement | 30 October 2002 |

**MINUTES OF MEETINGS OF THE COUNCIL FOR TRIPS AT WHICH THE ISSUE OF NON-VIOLATION AND SITUATION COMPLAINTS HAS BEEN DISCUSSED**

| | |
|---|---|
| IP/C/M/21 | Meeting held on 1-2 December 1998 |
| IP/C/M/22 | Meeting held on 17 February 1999 |
| IP/C/M/23 | Meeting held on 21-22 April 1999 |
| IP/C/M/24 | Meeting held on 7-8 July 1999 |
| IP/C/M/25 | Meeting held on 20-21 October 1999 |
| IP/C/M/26 | Meeting held on 21 March 2000 |
| IP/C/M/27 | Meeting held on 26-29 June 2000 |
| IP/C/M/28 | Meeting held on 21-22 September 2000 |
| IP/C/M/29 | Meeting held on 27-30 November and 6 December 2000 |
| IP/C/M/30 | Meeting held on 2-5 April 2001 |
| IP/C/M/32 | Meeting held on 18-22 June 2001 |
| IP/C/M/33 | Meeting held on 19-20 September 2001 |
| IP/C/M/34 | Meeting held on 27-28 November 2001 |
| IP/C/M/35 | Meeting held on 5-7 March 2002 |
| IP/C/M/36/Add.1 | Meeting held on 25-27 June 2002 |
| IP/C/M/37/Add.1 | Meeting held on 17-19 September 2002 |
| IP/C/M/38 | Meeting held on 25-27 and 29 November, and 20 December 2002 |
| IP/C/M/39 | Meeting held on 18-19 February 2003 |
| IP/C/M/40 | Meeting held on 4-5 June 2003 |
| IP/C/M/45 | Meeting held on 21 September 2004 |