Non-Violation Complaints under the TRIPs Agreement: Time to Let Go

By Betty Berendson

The concept of non-violation and situation remedies refers to cases where a WTO Member can bring a dispute against another Member, claiming that a measure or "any other situation" has nullified or impaired a benefit even if no WTO provision has actually been violated.

The application of this remedy in the context of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs) raises a number of fundamental questions and concerns. WTO Members have expressed on numerous occasions that the dispute settlement mechanism should be transparent, predictable and equitable. The mere fact that a Member has the possibility of bringing a complaint, even if the other Member is in full compliance with the WTO Agreements, contradicts this basic principle.

The implementation of the TRIPs Agreement does not require recourse to the legally imprecise notion of non-violation and situation complaints.

This situation is of special concern in the context of the TRIPs Agreement, as the availability of GATT Article XXIII:1(b) – which establishes the basic rules on non-violation complaints, see box on page 2 – would tend to guide panels and the Appellate Body away from a constructive interpretation of the obligations under the Agreement, and therefore have effects contrary to those sought by its original proponents. Article XXIII:1(b) may also undermine the regulatory authority and infringe Members' sovereign rights and limit the use of the flexibilities inherent in the TRIPs Agreement to achieve objectives relating to issues of public interest in sectors of vital importance to socio-economic and technological development.

Grounds for the Concept Are Weakening

What led to a rules-based trading system allowing challenges based on something other than the rules in the first place? The non-violation and situation remedies stem from early bilateral trade agreements. Not part of the corpus of international law, these concepts were specifically developed for the GATT[1] in order to prevent the intended effect of a tariff reduction from being frustrated by measures that the GATT did not regulate, such as domestic subsidies. Since the GATT did not contain any substantive commitments on such internal measures, procedures for the adjustment of tariff concessions following their introduction were required.

The purpose of Article XXIII:1(b) and (c) was thus to protect the balance of tariff negotiations by addressing the misuse of non-tariff and other trade-restrictive measures that, while consistent with basic GATT disciplines, might affect agreed market-access commitments. To date, the non-violation concept has been applied in only a limited number of GATT cases, most of which addressed subsidies that undermined agreed market-access commitments. There is no history of situation complaints under the GATT.

Since the early days of the GATT, the evolution of the multilateral trading system and the establishment of the WTO – including the adoption of extensive rules on non-tariff measures and a binding dispute settlement system – has weakened the traditional justification of non-violation complaints and largely removed the need for such complaints to protect tariff concessions.[2] The non-violation remedy has also been narrowed in scope under GATS Article XXIII:3, which limits complaints to benefits accruing from specific commitments undertaken by Members. Additionally, non-violation complaints would rarely be necessary to protect the exchange of rights and obligations in the TBT and SPS Agreements, and the other agreements in Annex 1 of the Marrakesh Agreement, as these include substantial flexibility within their rules to address borderline cases, without resorting to the legally-imprecise notion of non-violation and situation complaints.

Today, resort to these remedies is difficult to justify within the rules-based WTO system. By introducing legal uncertainty they undermine the predictability and security that the system seeks to provide all WTO Members. The application of non-violation complaints to the TRIPs Agreement raises an additional set of problems. It is unnecessary to achieve the Agreement's effective implementation and may upset its delicate balance.

Progress in Negotiations to Date

Discussion on the "scope and modalities" of non-violation nullification or impairment complaints under the TRIPs Agreement was initiated in 1999 in the TRIPs Council. Although several WTO Members have submitted communications on this issue, the Council has not yet been able to reach any conclusions on the application of these complaints to the Agreement.

In order to advance the negotiations and to fulfil the Mandate given by the Doha Ministerial Conference, a group of 14 developing countries[3] proposed in September 2002 that the TRIPs Council recommend to the 5th Ministerial Conference that the violations of the type identified in Article XXIII:1(b) and (c) of the GATT 1994 be determined inapplicable to the TRIPs Agreement.

The co-sponsors, as well as other WTO Members and legal scholars, consider that the concept of allowing non-violation complaints in a rules-based system is incompatible with a transparent, predictable and equitable mechanism for settling trade-related disputes concerning intellectual property. Several WTO Members have noted that the non-violation remedy should remain an exception and be applied with considerable caution.

In the view of the co-sponsors, it is a priority task for the Council to reach a consensus on non-violation and situation complaints with respect to the TRIPs Agreement in accordance with the Ministerial mandate. The co-sponsors believe that it is wrong to assert that the expiration of the deadline provided in Article 64.2 of the TRIPs Agreement might make non-violation and situation complaints automatically applicable to the TRIPs Agreement. Article 64.1 of the TRIPs Agreement established that the GATT non-violation clause was applicable to the intellectual property rights regime subject to TRIPs Articles 64.2 and 64.3. Thus, despite the expiration of the time-period provided in Article 64.2, non-violation/situation complaints should only be applicable to the TRIPs Agreement in conformity with the procedures established in Article 64.3, i.e. once consensus has been achieved on the issue.

Unlike other WTO Agreements, the TRIPs Agreement was not designed to protect market access but rather to establish minimum standards of intellectual property protection, which, if abused, might even undermine market access. Non-violation and situation

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complaints are unnecessary to protect any balance of rights and obligations internal to the TRIPs Agreement, as these are reflected in its principal obligations and flexibilities, and the Agreement explicitly states that WTO Members are not obliged to implement more extensive protection. Furthermore, rights and obligations in the TRIPs Agreement are best secured through WTO Members' good-faith application of its provisions in accordance with established principles of international public law recognised by the Appellate Body of WTO. The implementation of the TRIPs Agreement does not require recourse to the legally imprecise notion of non-violation and situation complaints.

The co-sponsors believe that the benefits accruing under the TRIPs Agreement are adequately described in its text, including its preamble, objectives and principles, which fully take into account the development dimension. Implementation of the Agreement should bring mutual benefits to producers and users of technological know-how in order to enhance social and economic well-being. The balance between rights and obligations, protection of public health and nutrition, and promotion of public interest in sectors of vital importance for social, economic and technological development, should ensure that intellectual property rights protection does not limit trade in an unjustifiable manner (or be detrimental to) international transfer and dissemination of technology. Such benefits, which accrue to Members rather than to private entities, are adequately protected through good-faith application of the Agreement.

Some other WTO Members have proposed to clarify and narrow the definition of measures that might give rise to non-violation and situation complaints. However, defining "measure", even narrowly, would not address concerns that the remedy would infringe sovereign rights and undermine the Agreement's flexibilities. These concerns arise not merely from a lack of clarity about which measures could be challenged, but more fundamentally from the legal uncertainty inherent in the concept of non-violation and situation complaints. There is insufficient guidance in Article 26 of the DSU and in GATT dispute settlement practice for panels and the Appellate Body to apply non-violation and situation complaints in the context of the TRIPs Agreement. Extending the non-violation and situation remedy – and with it the right to challenge measures that were otherwise consistent with WTO obligations – might unbalance the proper distribution of responsibilities between WTO Members, panels and the Appellate Body. All these concerns raise fundamental challenges to the multilateral trading system. Introducing non-violation and situation complaints in the TRIPs context is unnecessary and creates tension with the security and predictability provided by the multilateral trading system. It is incompatible with the long-term best interests of the multilateral trading system and of all WTO Members.

The proposal by the 14 developing countries has received support from many WTO Members, such as the ASEAN countries, Australia, Canada, Chile, China, the Czech Republic, the EU, Hong Kong-China, New Zealand, Nigeria, the Slovak Republic, Hungary and Korea. The Swiss delegate suggested, as a compromise, that the moratorium mentioned in paragraph 11 of the Decision on Implementation-Related Issues and Concerns be prolonged so that the non-violation and situation complaints would not be available at this time. The Singapore delegate suggested that a practical way to end a debate that has been going on for several years with no agreement in sight would be to extend the moratorium indefinitely. Only one Member, namely the United States, has openly opposed the proposal, as it still maintains that non-violation and situation remedies should be readily applicable in the context of the TRIPs Agreement. This question must be decided by the 5th WTO Ministerial Conference – to be held from 10 to 14 September 2003, in Cancun, Mexico – and is probably one of the few issues that stand a good chance of commanding consensus.

Betty Berendson is Minister Counsellor at the Permanent Mission of Peru in Geneva.

[1] Kuyper. 1994. *The Law of GATT as a Special Field of International Law*, in Netherlands Yearbook of International Law, pp. 227-257, Volume XXV.
[2] See Kuyper, op. cit.
[3] Argentina, Bolivia, Brazil, Colombia, Cuba, Ecuador, Egypt, India, Kenya, Malaysia, Pakistan, Peru, Sri Lanka and Venezuela (IP/C/W/385).

A number of WTO agreements, decisions and declarations refer to non-violation complaints. GATT Article XXIII establishes the basic rules on the remedy. It states:

"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 ...
(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
(c) the existence of any other situation ...".

Article 26.1 of the Dispute Settlement Understanding provides that the DSU's procedures will apply to non-violation complaints subject to certain stringent requirements including that "the complaining party shall provide a detailed justification in support of any complaint". Article 26.2, and the dispute settlement rules and procedures contained in the Decision of 12 April 1989 (BISD 36S/61-67), stipulates that in the case of situation complaints "the practice to adopt panel reports by consensus shall be continued".

Article 64 of the TRIPs Agreement addresses the application of non-violation complaints to settlement of disputes. Paragraphs 2 and 3 of Article 64 provide the following:

2. Subparagraphs 1(b) and 1(c) of Article XXIII of the GATT 1994 shall not apply to the settlement of disputes under this Agreement for a period of five years from the date of entry into force of the WTO Agreement.
3. During the time-period referred to in paragraph 2, the Council for TRIPs shall examine the scope and modalities for complaints of the type provided for under subparagraphs 1(b) and 1(c) of Article XXIII of the GATT 1994 made pursuant to this Agreement, and submit its recommendations to the Ministerial Conference for approval. Any decision of the Ministerial Conference to approve such recommendations or to extend the period in paragraph 2 shall be made only by consensus, and approved recommendations shall be effective for all Members without further formal acceptance process.

The Doha Ministerial Conference adopted a Decision on Implementation-Related Issues and Concerns stating that:

"The TRIPs Council is directed 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 the GATT 1994 and make recommendations to the Fifth Session of the Ministerial Conference. It is agreed that, in the meantime, Members will not initiate such complaints under the TRIPs Agreement." *WT/MIN(01)/W/10, paragraph 11.1*