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NOTE

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ABSTRACT

While the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) provided for the applicability of non-violation and situation complaints to the settlement of disputes in the area of intellectual property (IP), when the World Trade Organization (WTO) agreements were adopted in 1994, a moratorium was put in place until WTO Members could agree on the scope and modalities for the application of such complaints. However, for more than two decades, discussions in the TRIPS Council on the subject have remained inconclusive. The biannual WTO Ministerial Conference has granted extensions of the moratorium with regularity. This paper reviews the debate on the applicability of non-violation and situation complaints under the TRIPS Agreement, including the arguments consistently held by two WTO Members that if the moratorium is not extended by consensus, non-violation and situation complaints would become automatically applicable. This paper argues that a consensus decision by the WTO Ministerial Conference is required to determine the scope and modalities and, hence, the applicability of such complaints under the TRIPS Agreement. Even if the moratorium was not extended, the WTO Ministerial Conference should still adopt a decision calling on the TRIPS Council to continue examination of the scope and modalities of such complaints. It also argues that in the absence of an extension of the moratorium on initiating such complaints—and although they would not be applicable—a situation of uncertainty would be created that may lead to a de facto limitation in the use of flexibilities allowed under the TRIPS Agreement.

Alors que l'accord sur les aspects des droits de propriété intellectuelle qui touchent au commerce (ADPIC) prévoyait la possibilité que le mécanisme des plaintes en situation de non-violation et des plaintes motivées par une autre situation s'applique au domaine de la propriété intellectuelle (PI), un moratoire a été mis en place en 1994, au moment où les accords de l'Organisation mondiale du commerce (OMC) ont été adoptés, afin de permettre aux membres de l'OMC de s'entendre sur la portée et les modalités d'application de ce mécanisme. Pendant plus de deux décennies, des discussions ont eu lieu au sein du Conseil des ADPIC sur ce sujet, sans résultat, ce qui a placé la conférence ministérielle semestrielle de l'OMC dans la position de devoir le prolonger régulièrement. Le présent document propose une analyse des débats concernant l'application du mécanisme des plaintes en situation de non-violation et des plaintes motivées par une autre situation dans le cadre de l'accord sur les ADPIC, y compris les arguments constamment avancés par deux membres de l'OMC selon lesquels à défaut de prolongation du moratoire par consensus le mécanisme des plaintes en situation de non-violation et des plaintes motivées par une autre situation deviendrait automatiquement applicable. Il défend l'idée qu'une décision consensuelle de la Conférence ministérielle de l'OMC est nécessaire pour déterminer la portée et les modalités et, partant, l'application de ce mécanisme dans le cadre de l'accord sur les ADPIC. Même si le moratoire n'était pas prolongé, la Conférence ministérielle de l'OMC devra néanmoins adopter une décision demandant au Conseil des ADPIC de poursuivre l'examen de la portée et des modalités du mécanisme. Il fait également valoir qu'en l'absence d'une prolongation du moratoire concernant le dépôt de ce type de plaintes, et bien qu'elles ne soient pas applicables, s'ouvrirait une période d'incertitude qui pourrait conduire à une limitation de facto de l'utilisation des flexibilités autorisées par l'accord sur les ADPIC.

Pese a que el Acuerdo sobre los Aspectos de los Derechos de Propiedad Intelectual relacionados con el Comercio (ADPIC) contemplaba la aplicabilidad de reclamaciones en los casos en que no existe infracción y en casos en que existe otra situación para la solución de diferencias en materia de propiedad intelectual (PI), cuando se adoptaron los Acuerdos de la Organización Mundial del Comercio (OMC) en 1994, se estableció una moratoria hasta que los Miembros de la OMC pudieran lograr un consenso sobre el alcance y las modalidades de la aplicación de dichas reclamaciones. Sin embargo, las conversaciones entabladas al respecto en el Consejo de los ADPIC siguen sin ser concluyentes tras más de dos décadas. La Conferencia Ministerial bienal de la OMC ha prorrogado la moratoria con regularidad. En este documento se examina el debate sobre la aplicabilidad de reclamaciones en los casos en que no existe infracción y en casos en que existe otra situación en el ámbito del Acuerdo sobre los ADPIC, incluidos los argumentos que han sostenido sistemáticamente dos Miembros de la OMC de que, si la moratoria no se prorroga por consenso, las reclamaciones en los casos en que no existe infracción y en casos en que existe otra situación se convertirían automáticamente en aplicables. Este documento sostiene que la Conferencia Ministerial de la OMC debe tomar una decisión por consenso para determinar el alcance y las modalidades, y, por lo tanto, la aplicabilidad de dichas reclamaciones en el marco del Acuerdo de los ADPIC. Aunque no se prorrogara la moratoria, la Conferencia Ministerial de la OMC debería adoptar una decisión aun así que inste al Consejo de los ADPIC a proseguir el examen del alcance y las modalidades de dichas reclamaciones. También sostiene que, de no haber una prórroga de la moratoria en relación con la presentación de dichas reclamaciones —y aunque no serían aplicables—, se crearía una situación de incertidumbre que podría conducir a una limitación de hecho al uso de las flexibilidades que permite el Acuerdo de los ADPIC.

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I. INTRODUCTION

One of the unique features of the dispute settlement mechanism of the World Trade Organization (WTO) is the possibility for members to dispute a trade-related measure under a covered WTO agreement, even if the measure *does not* violate the obligations under the agreement, on the grounds of nullification or impairment of the benefit that a member would have reasonably expected to arise under a covered agreement. Such complaints are known as non-violation or situation complaints.

The application of non-violation and situation complaints as such has had a controversial history since the introduction of this kind of claim under the dispute settlement system (DSS) of the predecessor of the WTO: the General Agreement on Tariffs and Trade (GATT) of 1947. Thus, the admissibility of such complaints under the WTO's dispute settlement mechanism has been criticized as a "dangerous construction" (Pescatore, 1993).

The admissibility of non-violation and situation complaints was incorporated in Article XXIII of the GATT in 1947 (see Box 1). However, the scope of such complaints was not specifically defined and was left to be interpreted in the context of specific cases by working parties[1] and dispute settlement panels.[2] An ambiguous expression—the "nullification or impairment" of benefits accruing to a GATT contracting party rather than a breach of a legal obligation—was admitted as the basis for setting the dispute settlement mechanism of the GATT in motion (Jackson, 1998). This reflected the initial orientation of the GATT DSS toward diplomatic negotiation-based solutions rather than a legalistic approach to dispute settlement based on the establishment of a breach of a legal obligation under a treaty. As the dispute settlement mechanism in the GATT evolved from a negotiating to a more juridical process, the idea of two types of disputes, violation cases and non-violation cases, was developed (Jackson, 1996).

[1] Under the dispute settlement mechanism in the GATT, the disputes were referred to working parties composed of representatives of all interested GATT contracting parties to the dispute, including the parties to the dispute. The procedure was oriented toward seeking a negotiated settlement to the dispute rather than a legal adjudicatory process.

[2] Gradually, the working parties in the GATT dispute settlement mechanism were replaced by dispute settlement panels comprising three or five independent experts who are unrelated to the parties to the dispute.

Box 1. **Article XXIII of the GATT**

Nullification or Impairment

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

(a) the failure of another contracting party to carry out its obligations under this Agreement,

(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,

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.

2. 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 intergovernmental organization in cases where they consider such consultation necessary. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize 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 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[1] to the Contracting Parties of its intention to withdraw from this Agreement, and such withdrawal shall take effect on the sixtieth day following the day on which such notice is received by him.

(footnote original) [1] By the Decision of March 23, 1965, the "CONTRACTING PARTIES" changed the title of the head of the GATT secretariat from "Executive Secretary" to "Director General."

In the pre-WTO period, non-violation complaints were considered in eight cases by GATT working parties and panels, and the complaints were upheld in five such cases. The GATT panel rulings in these cases consistently required the complainant to prove that following the negotiation of a tariff concession, the respondent had applied a measure that could not have been reasonably anticipated at the time the tariff concession was made, and the effect of such a measure was to undermine the market access that the complainant would have legitimately expected to result from the tariff

concession (Cook, 2018). The GATT dispute settlement procedures were progressively codified during the Kennedy and Tokyo rounds of multilateral trade negotiations, which were elaborated and replaced by the Dispute Settlement Understanding (DSU) following the establishment of the WTO (Petersmann, 1997).

The WTO DSU established a rule-oriented DSS in the WTO in a significant departure from the dispute settlement mechanism in the GATT. The DSU laid down separate procedures and remedies for violation and non-violation cases. However, it did not resolve the ambiguity in the scope of non-violation and situation complaints and merely adopted the language of Article XXIII of the GATT 1947 of the WTO agreement.

The WTO DSS applies to all the multilateral agreements that are part of the WTO: the GATT, the General Agreement on Trade in Services (GATS), and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Each of these agreements has specific provisions that make the DSS applicable to disputes arising under them. The language in the relevant provisions in these agreements, however, varies from the corresponding provision in the GATT. For example, Article XXIII of the GATS states that a member may have recourse to the DSU against another member on the grounds of failure by the latter to carry out its obligations or specific commitments under GATS. It also specifically allows a non-violation complaint if a member considers that any benefit it could reasonably have expected to accrue to it under a specific commitment of another member under GATS is being nullified or impaired as a result of the application of any measure that does not conflict with the provisions of GATS. It also clarifies that if the DSB finds a measure to have nullified or impaired a benefit accruing because of a specific commitment under GATS, the affected member shall be entitled to a mutually satisfactory adjustment, which may include modification or withdrawal of the measure. On the other hand, the TRIPS Agreement generally extends Articles XXII and XXIII of the GATT to disputes under the TRIPS Agreement while providing for an extendable moratorium on the application of the GATT provisions on non-violation and situation complaints to examine the scope and modalities for such complaints.

The non-violation and situation complaints were introduced into the final text of the TRIPS Agreement at a very late stage of TRIPS negotiations, after considerable resistance by developing countries (Correa, 2020). To partially address the concerns of those countries, a five-year moratorium on non-violation and situation complaints was provided under Article 64.2 of the TRIPS Agreement. The TRIPS Council was requested to examine the scope and modalities of non-violation complaints under TRIPS during this period and submit recommendations to the WTO Ministerial Conference. However, the TRIPS Council has been unable to arrive at an agreement on this issue despite that the moratorium has been extended six times by the WTO Ministerial Conference, with the latest extension made by the eleventh ministerial conference in Buenos Aires in 2017.

Most WTO members have raised concerns regarding the application of such complaints to the TRIPS Agreement in their submissions to the TRIPS Council. In 2015, nineteen WTO members proposed that the WTO Ministerial Conference adopt a decision making such complaints permanently non-applicable to the settlement of disputes under the TRIPS Agreement.[3] In contrast, the United States and Switzerland have consistently supported the applicability of such complaints in the TRIPS context and contended that they would automatically become applicable if the moratorium on

[3] WTO Document IP/C/W/607, July 29, 2015. Available at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=134756,133575&CurrentCatalogueIdIndex=1&FullTextSearch=

its application is not extended, implying the possibility of not joining consensus in the future on further extension of the moratorium.

This paper explores the possible implications of a non-extension of the moratorium on non-violation and situation complaints for developing countries. It addresses, in particular, the following issues:

1) Would non-violation and situation complaints become automatically applicable to disputes under the TRIPS Agreement if the moratorium is not extended?

2) What would be the implications of a non-extension of the moratorium regarding legal certainty? Could it have a chilling effect on the adoption of measures consistent with TRIPS flexibilities?

3) If non-violation and situation complaints were to apply to disputes under the TRIPS Agreement, will it be effective in terms of the remedies available under the DSU for such complaints?

II. NEGOTIATING HISTORY OF ARTICLE 64

Article 3.2 of the WTO DSU states that the role of the WTO DSS is to provide security and predictability to the multilateral trading system, and to that end, "Members recognize 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 the customary rules of public international law." WTO adjudicating bodies have extensively relied on the provisions of the Vienna Convention on the Law of Treaties (VCLT) to interpret the provisions of the covered agreements, although the DSU does not specifically refer to the convention (Babu, 2009).

Article 32 of the VCLT states that the preparatory work of a treaty and the circumstances of its conclusion can be relied on as supplementary means of interpretation of the provisions of a treaty. In this regard, the history of the negotiations on Article 64 of the TRIPS Agreement can be an important tool for interpreting the question of applicability of non-violation and situation complaints under the TRIPS Agreement in the current context. While no official negotiating history of the WTO agreements exists, the VCLT allows the use of any evidence concerning the preparatory work on a treaty provision and the circumstances of its adoption. Hence, secondary references to the negotiating history and the circumstances around the adoption of specific provisions in the WTO agreements may be used for the interpretation of the provisions.

The inclusion of intellectual property (IP) under a covered WTO agreement in itself was an issue of intense contention during the Uruguay Round negotiations, with developing countries initially opposing it. In addition to the general opposition to the adoption of an IP agreement, developing countries were also hesitant to apply a new legalized DSS to any eventual agreement on IP.[4] The different drafts of TRIPS show how contentious the issue of the DSS for trade-related IP actually was (UNCTAD-ICTSD, 2005). In the Anell draft, developing countries proposed to limit the dispute settlement procedure to consultations between the parties to arrive at a mutually satisfactory solution within a reasonable period and the possibility of recourse to alternative dispute settlement procedures in the form of good offices, conciliation, mediation, or arbitration with the agreement of both parties if a mutually satisfactory solution could not be reached within a reasonable period. Developed countries preferred to apply GATT Articles XXII and XXIII to the settlement of disputes on IP. Three options were proposed in the annex to the Brussels draft, which included the approach that was finally adopted in TRIPS, that is, bringing trade-related IPRs fully under a binding dispute settlement mechanism, including the recourse to cross-retaliation. The Dunkel draft fully applied GATT Articles XXII and XXIII and the Understanding on Rules and Procedures Governing the Settlement of Disputes under these articles (which was subsequently replaced by the WTO DSU) to the TRIPS Agreement. No modification could be made to this provision without the consensus of all members (UNCTAD-ICTSD, 2005).

While the full application of the dispute settlement procedures under the GATT was included in the Dunkel draft, it did not address the question of the application of non-violation and situation complaints to the TRIPS Agreement. This question came up in the legal drafting group in 1992–1993, when some developing countries as well as Canada and the European Communities (EC) pointed to the difference in the nature of the TRIPS Agreement with general obligations and the GATT or GATS with specific

[4] The possibility of enforceable dispute settlement decisions adopted through reverse consensus was perceived as a threat to sovereignty in the context of the threats from the United States to apply higher tariffs to products from countries that would not adopt higher IP standards (UNCTAD-ICTSD, 2005).

tariff concessions or commitments by members. A major concern for these countries was the possibility of using non-violation complaints to compel countries to apply higher (TRIPS-plus) standards of IP protection than required under TRIPS (UNCTAD-ICTSD, 2005). For example, Canada was particularly concerned that pharmaceutical price control measures could be subjected to a nullification and impairment case under a non-violation clause (Gero, 2015). These countries suggested that non-violation complaints should not apply to the TRIPS Agreement at all as how it could apply to the obligations under the agreement was unclear. Other countries, such as the United States, contended that the absence of non-violation complaints would enable governments to adopt lawful but narrow interpretations of the TRIPS obligations (UNCTAD-ICTSD, 2005).

The difference of views on the application of non-violation and situation complaints to disputes under the TRIPS Agreement arose at a time when the negotiations on the WTO agreements were nearing completion. As a pragmatic approach to ensure that this issue did not delay the adoption of the agreements under a single undertaking, members agreed to a moratorium on the application of non-violation and situation complaints and to undertake discussions on the scope and modalities of the application of such complaints. According to one account of the negotiations, the proposal for a five-year moratorium to non-violation and situation complaints was made by the United States to obtain consensus in support of another U.S. proposal to restrict the grounds for issuing compulsory licenses on semiconductor technologies (Field, 2015).

The negotiating history and the circumstances under which Article 64 of the TRIPS Agreement was adopted clearly demonstrate that while there was agreement on the application of the GATT dispute settlement provisions per the procedures under the DSU to disputes under the TRIPS Agreement, the question of the extent of the applicability of non-violation and situation complaints to disputes under the TRIPS Agreement remained unresolved. However, the United States regarded the five-year moratorium as limited and stated that non-violation and situation complaints would automatically apply if the moratorium is not extended by consensus (Field, 2015), noting that the five-year moratorium constituted a concession and that any further delay in the application of non-violation and situation complaints would upset the equilibrium of concessions reached at the Uruguay Round negotiations (UNCTAD-ICTSD, 2005). This position in favor of the applicability of such complaints has been reaffirmed by the United States and Switzerland in various submissions to the TRIPS Council.[5] On the other hand, many WTO members do not see any scope for the application of non-violation and situation complaints to the TRIPS Agreement and have called for making their non-applicability permanent.

[5] See, for example, WTO document IP/C/M/27, August 14, 2000; WTO document IP/C/M/29, March 6, 2001; WTO document IP/C/M/30, June 1, 2001; WTO document IP/C/M/32, August 23, 2001; WTO document IP/C/W/194, July 17, 2004; WTO document IP/C/W/599, June 10, 2014; WTO document IP/C/M/89 Add.1, September 13, 2018; WTO document IP/C/M/90 Add.1, January 15, 2019; and WTO document IP/C/M/91 Add.1, September 2, 2019.

III. DISCUSSIONS IN THE TRIPS COUNCIL AND MINISTERIAL DECISIONS

Discussions on the scope and modalities regarding non-violation and situation complaints under TRIPS have remained inconclusive despite the issue being on the agenda of the TRIPS Council for more than two decades. Broadly, two distinct views have been articulated by members in the discussions on this issue from the outset. The proponents of this application, comprising the United States and Switzerland, regard non-violation and situation complaints to be automatically applicable on expiry of the moratorium on such complaints, guided by the provisions of Article 26 of the DSU. This would mean that such complaints would be applicable *even in the absence* of a consensus on the scope and modalities. On the other hand, the majority of WTO members, including both developing and developed countries, consider it inappropriate to apply non-violation and situation complaints to TRIPS and have expressed the need for further extension of the moratorium unless a consensus is reached on the issue of the scope and modalities for the application of such complaints to TRIPS.

III.1 Discussions during the Initial Five-Year Moratorium

To clarify the terms of this controversy, it is pertinent to look back at how the issue of the scope and modalities for the application of non-violation and situation complaints was considered by WTO members during the first five years of the moratorium granted by Article 64.2.

During the twentieth meeting of the TRIPS Council in September 1998, the issue of the scope and modalities on non-violation and situation complaints was taken up under a specific agenda item on Article 64.3 of the TRIPS Agreement. The chair undertook informal consultations and suggested that an initial exchange of views on the work to be done could take place in the following session of the TRIPS Council. The WTO secretariat was requested to prepare a factual background note on the experience on disputes under the TRIPS Agreement, including any references made to non-violation issues, the negotiating history of Articles 64.2 and 64.3, the experience with non-violation complaints under the GATT/WTO, and any information available on the use of the non-violation concept in IP disputes elsewhere (Council for Trade-Related Aspects of Intellectual Property Rights, 1998). Accordingly, an initial exchange of views took place at the following meeting of the TRIPS Council in December 1998. The Republic of Korea pointed out that in view of the nature of TRIPS as a minimum standards agreement to be implemented within the respective legal systems and practices of member states, providing for the non-violation route is unnecessary. Korea also noted that as developing countries and LDCs were, at that time, under a transitional exemption from implementing the TRIPS Agreement, it was difficult for them to assess the possible implications of the application of non-violation complaints by the end of the transition period. Canada reiterated its concerns about such application that had been raised during the Uruguay Round negotiations. India associated itself with the views of Korea and Canada. The United States reaffirmed its position that non-violation complaints should apply to TRIPS and also that Article 26 of the DSU provided sufficient guidance about the scope and modalities. The United States also stated that the moratorium should be allowed to expire at the end of the five-year period, on January 1, 2000 (WTO, 1998).

The twenty-second meeting of the TRIPS Council in February 1999 received a factual background note by the WTO secretariat (IP/C/W/124) and a paper by Canada (IP/C/W/127). In its submission, Canada pointed to the distinct nature of the TRIPS

Agreement from the GATT and the GATS in that it created general obligations for all members without specific commitments from members on market access. In this context, the application of non-violation complaints on the grounds of nullification or impairment of reasonably expected benefits would require a dispute settlement panel to interpret the benefit that could be expected from the obligations under TRIPS in a void, given that the meaning of benefit in an IP context has not been substantially discussed and that different views exist on this. This would render the outcome of non-violation complaints very uncertain and would have a chilling effect on the exercise of legitimate regulatory authority, including in the areas of health, safety, and the environment. The concerns expressed by Canada were shared by India, the ASEAN countries, Japan, Hong Kong (China), Korea, New Zealand, Mexico, and the Philippines. The United States continued to reaffirm its position in support of non-violation and situation complaints.

In the next session of the TRIPS Council in April 1999, Egypt submitted a joint proposal with Cuba, the Dominican Republic, Indonesia, Malaysia, and Pakistan (IP/C/W/141) calling for an extension of the moratorium for "an adequate time" until the implications of non-violation and situation complaints in the field of IP were better understood and the possible scope and modalities had been adequately addressed in accordance with Article 64.3 of TRIPS. Many members supported the proposal for an extension of the moratorium. Hungary, on behalf of the Central European Free Trade Agreement (CEFTA) countries, expressed similar concerns to those raised by Canada. India stated emphatically that instead of an extension of the moratorium, the TRIPS Council should recommend to the ministerial conference that non-violation complaints should henceforth cease to apply to TRIPS. Korea also expressed a preference for the exclusion of non-violation complaints from TRIPS or, in the alternative, an extension of the moratorium. Notably, the EC seemed to take the middle path by aligning with the U.S. view that non-violation and situation complaints would apply automatically if no further extension of the moratorium was granted while expressing the need for discussion on the scope and modalities to allay the concerns raised by many members.

At the following session of the TRIPS Council in July 1999, Hungary, on behalf of the CEFTA countries and Latvia, stated that in their view, the requirement under Article 64.3 for a decision by consensus on the scope and modalities was a precondition for the application of non-violation and situation complaints in terms of Article XXIII 1(b) and 1(c) of the GATT and that "irrespective of the expiration of the five-year period provided for by Article 64.2, non-violation complaints would remain inadmissible under the TRIPS Agreement until a decision was taken by consensus at the Ministerial Conference on the approval of the TRIPS Council's recommendation on the scope and modalities of those complaints." It called for the extension of the moratorium for an adequate time to allow for discussions on the scope and modalities while stressing that many CEFTA countries did not regard such complaints as admissible. In its statement on this matter, the United States further clarified its reading of Article 64.3 in contrast to that suggested by Hungary on behalf of the CEFTA countries and Latvia. According to the United States, non-violation and situation complaints would become applicable to TRIPS if the moratorium is not extended by consensus, as required by Article 64.3, and in the absence of any guidance on the scope and modalities from the ministerial conference, "dispute panels themselves would have to interpret the provision in the context of a particular case."

In view of the continuing divergence of views, at the October 1999 meeting of the TRIPS Council, the chair proposed to submit in its annual report to the general council that most members were in favor of a further extension of the moratorium to allow for a discussion on the scope and modalities, while one member (the United States) clearly

expressed that it was not in a position to join the consensus on the extension of the moratorium. In response, the Philippines suggested that the proposal should be modified to reflect the view of many members that no room existed for non-violation and situation complaints from January 1, 2000, if no consensus was established on the scope and modalities. This was agreed to be included, with an additional sentence stating that some members did not agree with the view expressed by the Philippines and other like-minded members.

The third ministerial conference of the WTO was held in Seattle from November 30 to December 3, 1999. As part of the preparatory process for the ministerial conference, Canada had submitted a proposal to the general council (WT/GC/W/256) for an extension of the moratorium and suggested that the moratorium be extended until work on the examination of the scope and modalities of the application of non-violation and situation complaints to TRIPS is completed. In support of this proposal, Canada pointed to the fact that no substantive discussion in the TRIPS Council had been made on such an examination, which the moratorium was intended to facilitate. Colombia submitted a proposal (WT/GC/W/316) calling for an extension of the moratorium on the same grounds. Venezuela similarly proposed the general council to recommend to the ministerial conference to extend the moratorium for another five years (WT/GC/W/282). However, the Seattle Ministerial Conference could not reach a consensus on the extension of the moratorium (Abbott, 2000). Furthermore, the Seattle Ministerial Conference could not arrive at a consensus on any issue on the agenda and decided to suspend the work of the ministerial conference to, among others, allow the WTO director-general time to "discuss creative ways in which to bridge the remaining differences in areas where consensus did not yet exist so that the Ministerial Conference could resume and complete its work." Thus, technically, the consideration of the question of the extension of the moratorium was kept open for further consultation to enable the ministerial conference to resume and complete its work on this issue.

The five-year moratorium under Article 64.2 came to an end on January 1, 2000, with the above-stated divergent positions being held by the WTO members. In this situation, some WTO members tried to engage in further discussions on the scope and modalities in the TRIPS Council, as shown below.

III.2 Discussions since 2000

The first meeting of the TRIPS Council after the deadline of January 1, 2000, for the five-year moratorium took place on March 21, 2020, and included an agenda item titled "Examination of Scope and Modalities for Non-Violation Complaints." A noticeable change was observed in the title of the agenda under which this issue was now being discussed. While the agenda was titled "Article 64.3" in previous sessions, the new title suggested a specific focus on the scope and modalities and not on the other aspects of Article 64.3, which included the question of the extension of the moratorium. The proposal for including this new agenda item was made by the EC, which clearly stated that the intent behind the proposal was to have focused discussions on the scope and modalities. The need for such discussions was supported by Canada, Poland on behalf of the CEFTA countries, Korea, Australia, Singapore, Japan, India, and Pakistan. However, the United States refused to agree to any discussion on the scope and modalities. The United States contended that the moratorium had expired on January 1, 2000, and that non-violation and situation complaints had become applicable to TRIPS in accordance with the procedure under Article 26 of the DSU applicable to

such complaints. No consensus was possible, and thus, the TRIPS Council agreed to keep this issue on the agenda for its next session to continue discussions.

The next session of the TRIPS Council in June 2000 received a joint submission from Brazil, Canada, the Czech Republic, the EC, Hungary, and Turkey (IP/C/W/191) that advanced certain ideas concerning the scope of non-violation complaints. The joint submission contended that TRIPS is not a market access agreement as such and that possible non-violation complaints could arise in the TRIPS context only when they are linked to benefits that can be reasonably expected to arise from the grant of IP rights rather than economic returns that are covered under market access concessions in the GATT or GATS. Thus, the submission suggested that non-violation complaints specifically relating to limitations on the availability, maintenance, or enforcement of IP rights might fall within this category. The submission also suggested that to maintain the coherence among different WTO agreements, measures that fall within the general exceptions under the GATT or GATS should not be subject to dispute settlement under a non-violation challenge under the TRIPS Agreement.

The United States made a separate submission (IP/C/W/194) that reaffirmed that the period for the discussion of views on the scope and modalities of non-violation complaints had passed and that no purpose would be served in continuing discussions. The United States also rejected the argument by other members that TRIPS was not a market access agreement or that non-violation complaints under TRIPS could undermine the overall coherence among WTO agreements. Most members supported the need for further discussion on the scope and modalities. India reaffirmed its preference for a decision to make non-violation complaints inapplicable to TRIPS.

In the following session, in September 2000, Australia made a submission (IP/C/W/212) that partially accepted the U.S. view that the moratorium had technically expired but also acknowledged that very limited discussions had taken place on the scope and modalities, hence a need to continue such discussions. The submission also stated that the mandate of the TRIPS Council was limited to the examination of the scope and modalities and not the extension of the moratorium, which was suggested to be within the ambit of the ministerial conference, and that the issue of such an extension should be dealt separately from that of the scope and modalities. Thus, it suggested that the TRIPS Council should focus on what is meant by “scope” and “modalities,” the key concepts of “benefits accruing directly or indirectly under the Agreement,” “nullification or impairment,” and the “impediment to the attainment of any objective” under the TRIPS Agreement. Elaborating on these issues, the submission stated that the “scope” of non-violation complaints in the TRIPS context could be understood in the sense of a limited range of measures or situations that could give rise to non-violation complaints (e.g., measures against the anticompetitive abuse of IP consistent with Article 40.2 of TRIPS) and that “modalities” could be understood as the factors to be considered and the methods to be followed in determining nullification or impairment. The submission went on to make suggestions on the possible elements of a recommendation on the scope and modalities. Korea also made an informal submission on the possible requirements necessary for a cognizable non-violation claim (JOB (00)6166).

India recalled the decision of the Seattle Ministerial Conference to suspend its work to allow time for exploring creative ways in which remaining differences in areas where consensus could not be reached could be bridged and stressed on the need for the TRIPS Council to resume discussions with a view to arrive at a consensus on the issue of non-violation and situation complaints. India also emphasized that in her view, the work under Article 64.3 of TRIPS would not conclude until a consensus is reached on the issue.

At the following meeting of the TRIPS Council, the delegations restated their positions. Switzerland aligned with the U.S. position that the moratorium had expired at the end of 1999 and that non-violation and situation complaints had become automatically applicable to TRIPS. However, unlike the United States, Switzerland also expressed the need for engaging in discussions on the scope and modalities in light of the concerns expressed by other members.

The next meeting of the TRIPS Council in April 2001 received a new submission from Canada (IP/C/W/249). The submission reiterated the distinct nature of the TRIPS Agreement as a minimum standards agreement rather than a market access agreement and the need to ensure that non-violation complaints do not impede the adoption of measures in furtherance of public policy objectives, in accordance with Articles 7 and 8 of the TRIPS Agreement. Thus, the submission pointed to the need to explore what kind of measures would fall within the ambit of a non-violation complaint, the need to consider what kind of "benefits" could be expected to arise from the obligations under TRIPS that could be the subject of a non-violation complaint, the modalities of quantifying the extent of nullification or impairment to determine the level of compensation as a remedy in terms of Article 26 of the DSU, and an understanding of the time when the TRIPS Agreement negotiations were concluded to determine the reasonable expectations at that point.

In the following session, in June 2001, the chair of the TRIPS Council presented a room document (JOB(01)/70) listing the following headings under which the various submissions received on the scope and modalities of non-violation and situation complaints would be organized—the nature of the "benefit," the measure (nature, reasonable expectations, timing), the causality, the burden of demonstration of nullification and impairment, and the remedy. Most members supported the organization of the proposals in the suggested order, but the United States maintained its opposition to any further work on the scope and modalities. In September 2001, Bolivia, on behalf of the Andean Community, stated that the debate on scope and modalities should continue in the TRIPS Council until the issues are clarified.

The work of the TRIPS Council remained inconclusive at the end of 2001 with two broad divisions between WTO members. While most members favored the continuation of discussions on the scope and modalities, the United States was opposed to any such discussion and held the view that non-violation and situation complaints applied in accordance with Article 26 of the DSU pertaining to such complaints. The annual report of the TRIPS Council to the general council in 2001 (IP/C/23) did not make any recommendation on this issue.

However, WTO members submitted proposals on the issue of non-violation and situation complaints to the general council on recommendations regarding decisions to be taken by the Doha Ministerial Conference scheduled for November 9–14, 2001. The African Group—along with Bangladesh, Barbados, Bolivia, Brazil, Cuba, the Dominican Republic, Ecuador, Haiti, Honduras, India, Indonesia, Jamaica, Pakistan, Paraguay, the Philippines, Peru, Sri Lanka, Thailand, and Venezuela—submitted a text on a draft declaration by the Doha Ministerial Conference on the TRIPS Agreement and Public Health (WT/GC/W/450), which included a paragraph stating that during the examination of the scope and modalities of the application of non-violation and situation complaints by the TRIPS Council, in no event shall such complaints be rendered applicable to measures adopted and approved by members to protect public health. However, this provision was not adopted as part of the Doha Ministerial Declaration on the TRIPS Agreement and Public Health. Nevertheless, the Doha

Ministerial Conference also adopted a decision[6] on implementation-related issues and concerns pertaining to all the WTO agreements, in which, in relation to TRIPS, it directed the TRIPS Council to continue its examination of the scope and modalities for non-violation and situation complaints and to make recommendations to the next (fifth) session of the ministerial conference. It was also agreed that in the meantime, members will not initiate such complaints (see Box 2). This language, in relation to the examination of the scope and modalities and the non-initiation of non-violation and situation complaints, has been repeated in subsequent ministerial declarations except the declaration of the fifth ministerial conference in Cancun in 2003.

Box 2. **Doha WTO Ministerial Decision on Implementation-Related Issues and Concerns**

11. Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

11.1 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 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.

It is interesting to compare the language used in the ministerial decision regarding the non-initiation of non-violation and situation complaints and the moratorium under Article 64.2. While Article 64.2 clearly states that Article XXIII 1(b) and 1(c) of the GATT *shall not apply* to the settlement of disputes under the TRIPS Agreement for the duration of the moratorium, the Doha Ministerial Declaration expresses an agreement among members *not to lodge* such non-violation and situation complaints during the stipulated period therein, which has been subsequently extended by other ministerial conferences. In other words, while Article 64.2 made the GATT provisions on non-violation and situation complaints expressly inapplicable during the moratorium, the ministerial declarations or decisions since Doha have only effectively frozen the initiation of non-violation and situation complaints without determining the question of the applicability of such complaints to TRIPS. Given consensus on this language in the ministerial declarations and decisions, it seems to accommodate the interests of all members—those who wish to undertake discussions on the scope and modalities without the legal uncertainty of a possible non-violation complaint as well as the United States and Switzerland, who regard such complaints to be legally applicable since 2000 but temporarily not implementable in view of the ministerial decisions.

Indeed, at the TRIPS Council session in March 2002, the United States reaffirmed that its position on the issue of non-violation and situation complaints had not changed following the Doha Ministerial Conference. At the September 2002 session, a joint communication (IP/C/W/385) from Argentina, Bolivia, Brazil, Cuba, Ecuador, Egypt, India, Kenya, Malaysia, Pakistan, Peru, Sri Lanka, and Venezuela restated the understanding shared by many members that non-violation and situation complaints did not become automatically applicable on the expiry of the moratorium under Article 64.2 but would require a consensus decision by the ministerial conference on the scope and modalities in terms of Article 64.3 to become applicable to TRIPS. The joint

[6] WTO document WT/MIN(01)/17, November 20, 2001. Available at https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_implementation_e.htm#trips

communication also took the view that the application of non-violation and situation complaints in TRIPS is unnecessary. This was based on the following reasons:

a) The TRIPS Agreement is a sui generis agreement that is not intended to provide market access or balance tariff concessions.

b) In view of the balance of rights and obligations in the TRIPS Agreement and the explicit statement in Article 1 of TRIPS that members are not required to grant more extensive protection of IP than required under TRIPS, it does not create any expectation of benefits extraneous to the express provisions of TRIPS.

c) Non-violation complaints under TRIPS are not necessary to protect commitments under the GATT or GATS.

d) The good-faith implementation of TRIPS in accordance with the general principles of international law is sufficient.

It was pointed out that attempts by proponents of allowing non-violation and situation complaints in TRIPS by clarifying and narrowing the definition of measures under TRIPS that could give rise to non-violation complaints do not prevent the creation of legal uncertainty and the possibility of undermining the TRIPS flexibilities. It was also pointed out that Article 26 of the WTO DSU and GATT/WTO jurisprudence on non-violation and situation complaints does not provide sufficient guidance for assessing the implication of allowing such complaints under TRIPS. Therefore, it was proposed that the TRIPS Council should recommend to the ministerial conference that non-violation and situation complaints be determined to be inapplicable to TRIPS.

The impasse continued as the Cancun Ministerial Conference of 2003 approached. In March 2003, the United States stated in the TRIPS Council that no proposal had been made on the scope and modalities since the Doha Ministerial Conference and that there should not be any extension of the moratorium granted by the Doha Ministerial Conference (IP/C/M/39). In May 2003, the TRIPS Council chairperson proposed four possibilities for a recommendation on this issue: (1) banning non-violation complaints in TRIPS completely, (2) allowing the complaints to be handled under the WTO's dispute settlement rules as applies to goods and services cases, (3) allowing non-violation complaints but subject to special "modalities" (i.e., ways of dealing with them), and (4) extending the moratorium. The majority of delegations, including many developed countries, preferred the first option of completely excluding the application of non-violation and situation complaints from TRIPS. However, no consensus could be reached as the United States and Switzerland did not support this option. The TRIPS Council could not make any recommendation in this regard to the fifth ministerial conference.

The Cancun Ministerial Conference ended without any consensus on a ministerial declaration. Though the issue of non-violation and situation complaints in relation to TRIPS was not specifically addressed, a draft ministerial declaration requested the concerned WTO bodies to continue discussions on the outstanding implementation issues in accordance with the Doha Ministerial Declaration, which included the mandate given to the TRIPS Council to examine the scope and modalities of the application of non-violation and situation complaints. Whether a continuation of the Doha mandate with regard to non-violation and situation complaints would have been specifically objected to if consensus could have been reached on all other issues in the Cancun Ministerial Conference is unclear.

In any case, the lack of a specific decision by the Cancun Ministerial Conference on the issue of non-violation and situation complaints under TRIPS made the situation regarding the initiation of such complaints uncertain. No discussion on the scope and modalities was undertaken in 2004 in the TRIPS Council after the Cancun Ministerial Conference ended without any decision. In August 2004, the general council adopted a decision (WT/L/574) to resume the Doha Work Program and conclude the negotiations launched at the Doha Ministerial Conference. This decision reaffirmed the mandate of the Doha Ministerial Decision on implementation-related issues and instructed all concerned WTO bodies (including the TRIPS Council) to redouble their efforts to find appropriate solutions as a priority. This decision effectively renewed the mandate conferred by the Doha Ministerial Decision on the examination of the scope and modalities of non-violation and situation complaints by the TRIPS Council as an implementation issue. The general council decision also specifically extended the moratorium granted by the Doha Ministerial Decision on the non-initiation of non-violation and situation complaints until the sixth ministerial conference of the WTO. Following this decision, the TRIPS Council meeting in September 2004 (IP/C/M/45) agreed to place this topic on the agenda for discussion at its next session.

Since the resumption of discussions on the scope and modalities in the TRIPS Council, members have maintained their previously stated positions. Discussions in the TRIPS Council have remained inconclusive, and the ministerial conferences have renewed the mandate for discussion on the scope and modalities in the TRIPS Council and the moratorium on the non-initiation of non-violation and situation complaints. At the first session of the TRIPS Council after the resumption of discussions on this issue post-Cancun, Canada pointed out near unanimity among the members that non-violation and situation complaints should not apply to TRIPS and called on the members supporting the application of non-violation and situation complaints to make proposals on the scope and modalities. The proponents (the United States and Switzerland), on the other hand, have contended that non-violation and situation complaints are applicable to TRIPS and that the burden of proof of its application could not lie on countries that read Article 64 of TRIPS in that light.

Following the TRIPS Council discussions, most WTO members have been in favor of excluding non-violation and situation complaints completely, similar to the proposal by developing countries under IP/C/W/385, or of extending the moratorium. The other option of allowing non-violation complaints under TRIPS as applicable in the GATT or GATS will be absolutely detrimental to the interests of developing countries and can impair the full use of the TRIPS flexibilities by developing countries. However, since 2002, discussions on allowing non-violation complaints through special modalities have remained inconclusive.

The WTO Hong Kong Ministerial Conference in December 2005 extended the mandate of the TRIPS Council to discuss the scope and modalities of non-violation and situation complaints under TRIPS and also extended the moratorium on non-violation complaints until the next ministerial conference. However, following the Hong Kong Ministerial Conference, from 2006 to March 2009, the issue was merely featured as a standing agenda item in the TRIPS Council without much substantial discussion, and the TRIPS Council merely took note of the status quo. At the March 2009 session of the TRIPS Council, Nigeria requested the TRIPS Council to “explore ways of initiating or resuming the discussions on this issue.” India supported the proposal by Nigeria and recalled the joint proposal by developing countries that favored an absolute exclusion of non-violation and situation complaints from the TRIPS Agreement. The TRIPS Council agreed to invite the chair to hold consultations on the issue. Perhaps the matter received renewed attention from the TRIPS Council as the seventh session of

the ministerial conference was scheduled to be held in Geneva in 2009 after a hiatus of four years following the Hong Kong Ministerial Conference.

The chair undertook informal consultations prior to the June 2009 session of the TRIPS Council and reported that delegations reiterated their usual positions in the matter. The TRIPS Council agreed to continue the mode of informal consultations. At the following session of the TRIPS Council, which was the last session before the seventh ministerial conference, the chair informed the TRIPS Council that on the basis of informal consultations, it had been agreed to place the issue of non-violation and situation complaints in the provisional agenda of the ministerial conference. The chair requested the TRIPS Council to consider whether it could agree on any recommendation for a decision by the ministerial conference on this issue. Members reaffirmed their previously stated positions, and the TRIPS Council agreed to continue in the mode of informal consultations by the chair prior to the ministerial conference.

Significantly, for the first time, the United States and Switzerland seemed inclined to make a trade-off between the moratorium on non-violation and situation complaints and a moratorium on customs duties on electronic transmissions (generally referred to as the e-commerce moratorium), which the WTO members have agreed to through ministerial conference decisions since 1998. This moratorium restrains WTO members from imposing customs duties on e-commerce trade, in which developed countries are mostly dominant. For developing countries, customs duties on e-commerce trade, which has grown phenomenally in recent years, can be a source of substantial revenue generation.[7] Conversely, for developed countries like the United States, a restricted tariff regime on e-commerce transactions is of particular interest. Hence, for countries like the United States that are major exporters in e-commerce trade, the continuation of the moratorium on e-commerce is considered highly desirable, while for many developing countries, the lifting of the moratorium can provide a source of significant revenues. In the run-up to the Geneva Ministerial Conference in 2009, the United States sought to leverage the non-violation moratorium to ensure an extension of the e-commerce moratorium. Thus, as the U.S. delegate stated in the TRIPS Council, the United States had shown considerable flexibility in joining consensus to place the issue of non-violation and situation complaints on the agenda of the ministerial conference, but it regretted that "this flexibility had not been reciprocated in another important area of work for the Ministerial Conference." Switzerland had also aligned with the U.S. position, conditioning its willingness to discuss the non-violation moratorium in the ministerial conference to undertaking "related discussions in other forums in the WTO." While the U.S. statement diplomatically did not specifically refer to the e-commerce moratorium, this was a clear reference to the e-commerce moratorium from the statement by Pakistan in the same session of the TRIPS Council, where Pakistan specifically stated that "the establishment of a linkage with electronic commerce was not helpful."

The seventh ministerial conference in Geneva agreed to extend both the TRIPS non-violation and e-commerce moratoriums until the next ministerial conference in 2011. Following the ministerial conference of 2009, discussions in the TRIPS Council went back to the usual practice of members reaffirming their stated positions. In June 2011, the chair of the TRIPS Council expressed the intention to undertake informal consultations prior to the following meeting of the TRIPS Council in October 2011. Members continued to reaffirm their positions during the chair's consultations. Eventually, the eighth ministerial conference also extended the non-violation moratorium on the same terms as previous extensions until the next ministerial

[7] According to a joint communication to the WTO General Council, the estimated tariff revenue loss to developing countries accruing from the e-commerce moratorium is about $10 million.

conference in 2013. A similar pattern of reasserting stated positions resumed in the TRIPS Council until agreement was reached based on informal consultations at the last session of the TRIPS Council in October 2013 before the ninth ministerial conference in Bali in December 2013.

The renewal of the moratorium and the mandate for the TRIPS Council to discuss the scope and modalities of non-violation and situation complaints with no change in the stated positions of the members had become a routine affair until the United States presented a new paper in June 2014 reviving its argument for the end of the moratorium on non-violation and situation complaints under TRIPS (IP/C/W/599). At the October 2015 session of the TRIPS Council, a joint proposal by nineteen members (IP/C/W/607) proposed a decision text for the tenth ministerial meeting in Nairobi, stating that Article XXIII 1(b) and 1(c) shall not apply to the settlement of disputes under the TRIPS Agreement. These submissions reinforced the stated positions of the members. In spite of this, the tenth ministerial conference in Nairobi agreed to a decision to extend the moratorium on non-violation and situation complaints and to discuss the scope and modalities for the same until the next meeting of the ministerial conference in 2017.

Before the session of the TRIP Council in June 2016, the chair of the TRIPS Council undertook informal consultation and suggested that some elements describing possible scope and modalities be put together that could, in principle, frame the application of non-violation and situation complaints under TRIPS. However, some member states held the view that proposals regarding the scope and modalities for the applicability of non-violation and situation complaints should be made by interested member states and should not be the initiative of the WTO secretariat or the chair of the TRIPS Council. Some member states also held the view that discussions on the scope and modalities are redundant if non-violation and situation complaints are inapplicable to disputes arising under TRIPS. Discussions remained inconclusive, and the TRIPS Council requested the chair to continue informal consultations with the delegations. The situation remained unchanged at the end of the June 2017 session of the TRIPS Council.

In the run-up to the eleventh WTO Ministerial Conference in Buenos Aires in 2017, the United States reiterated its position, recommended allowing the moratorium on non-violation and situation complaints to expire, and refused to support a draft decision text by the chair of the TRIPS Council that proposed an extension of the moratorium. This view was also echoed by Switzerland. However, most of the other members supported the proposal for further extension of the moratorium. Significantly, these countries included not only those that specifically proposed an absolute exclusion of non-violation and situation complaints under TRIPS but also many developed countries that did not co-sponsor that proposal but still echoed similar concerns in their statements in the TRIPS Council. These include Australia, Canada, the EU, Japan, New Zealand, and the Republic of Korea. This demonstrates that many developed country members continue to regard non-violation and situation complaints to be inapplicable to TRIPS.

Following the extension of the moratorium by the eleventh to the twelfth ministerial conference, which is now scheduled to be held in Kazakhstan in June 2020, the chair of the TRIPS Council urged members to reconsider their stated positions to make progress on this issue. However, while all delegations expressed readiness to engage, the chair noted that “no advances could be detected during informal contacts with delegations.” The United States and Switzerland continued to reaffirm their stated position that non-violation and situation complaints would automatically apply if the moratorium is not extended by consensus as well as their preference to allow the moratorium to expire. Switzerland also stated that in its view, any consideration of the

issue of applicability of non-violation and situation complaints to TRIPS is beyond the mandate under Article 64 as it is limited to an examination of the scope and modalities of application (rather than the application itself). However, as described above, this view is not supported by most members, including many developed countries. The WTO General Council adopted a decision in December 2019 (WT/L/1080) that directed the TRIPS Council to continue the examination of the scope and modalities of non-violation and situation complaints and make recommendations to the twelfth ministerial conference.

IV. APPLICABILITY OF NON-VIOLATION AND SITUATION COMPLAINTS TO TRIPS

The debate in the TRIPS Council on the issue of non-violation and situation complaints under the TRIPS Agreement is on the following fundamental issues:

1. Are non-violation and situation complaints applicable as such to the TRIPS Agreement?
2. If such complaints apply to TRIPS, to what extent and how would they apply to TRIPS?

The views of WTO members are divided around these issues. The United States and Switzerland are of the view that non-violation and situation complaints have always been applicable to the TRIPS Agreement but have not been operationalized pursuant to the moratorium. They have contended that if the moratorium is not extended, non-violation and situation complaints can be made in relation to disputes under TRIPS. As described in the previous section, the majority of WTO members, including both developed and developing countries, do not subscribe to this view. These members consider the question of the applicability of non-violation and situation complaints as integral to the examination of the scope and modalities. As part of the debate on the scope and modalities, many members have stated that non-violation and situation complaints do not apply to TRIPS and have proposed a decision to exclude such claims under the TRIPS Agreement. This section analyzes these interpretative issues.

IV.1 Article 64 of the TRIPS Agreement

A literal reading of Article 64 suggests that the dispute settlement provisions of the GATT have been made applicable to TRIPS, but exceptions in Article 64 that limit the extent of the application of the GATT dispute settlement provisions may be specified, as elaborated by the DSU. Article 64.2 introduces a five-year moratorium during which the TRIPS Council is specifically mandated under Article 64.3 to examine the scope and modalities for non-violation and situation complaints. Article 64.3 is a singular clause that deals with the work (examination of the scope and modalities) to be done during the moratorium and the procedure concerning the outcome of that work. It mandates the TRIPS Council to "examine [the] scope and modalities." Examination connotes a deep analysis of the extent to which non-violation and situation complaints can apply (their scope) to TRIPS and the possible ways in which these complaints could be applied (modalities). The description of the preparatory work and circumstances surrounding the conclusion of the TRIPS negotiations, particularly on the question of dispute settlement provisions, clearly supports a reading of Article 64 in this light. The issue of dispute settlement came up very late in the negotiations, and many members had concerns about the application of the GATT dispute settlement provisions, particularly non-violation and situation complaints, to TRIPS. At the time of adoption of the TRIPS Agreement, it was clear that no consensus was made on the application of non-violation and situation complaints, and this issue required greater examination. The subsequent practice of the members also demonstrates that most WTO members did not have the understanding that non-violation and situation complaints would become applicable if the moratorium was not extended, as borne from the statements delivered in various sessions of the TRIPS Council.

Given that no clear consensus exists on the application of non-violation and situation complaints to the TRIPS Agreement at the time of its adoption, the contextual reading

of Article 64 as a whole that is confirmed by the history of the preparatory work and the circumstances of the negotiations as well as the subsequent positions reaffirmed consistently by WTO members in the TRIPS Council seems to confirm that non-violation and situation complaints have not been made applicable to TRIPS by Article 64. Therefore, the U.S. and Swiss argument that non-violation and situation complaints had been made applicable per se to the TRIPS Agreement and were only suspended for a temporary duration is untenable. There would be no point in the negotiators agreeing to make something legally applicable in principle and then provide a limited period for a deep analysis of the scope and modalities of its application.

The fact that an examination of the scope of non-violation and situation complaints can involve an examination of whether such complaints should apply and, if so, to what extent is best illustrated by the dispute settlement provision in the GATS. Article XXIII of the GATS limited the application of non-violation complaints only to the nullification or impairment of reasonably expected benefits accruing to a member under a specific commitment by another member under Part III of the GATS and not to the general obligations created by the GATS. Further, the GATS also made situation complaints inapplicable to disputes under it.

The United States has also argued that Article 26 of the DSU provides adequate guidance on the scope and modalities of the application of non-violation and situation complaints under Article XXIII of the GATT to other covered agreements. However, Article 26 of the DSU is a general provision for such complaints and does not consider the specific nature of any particular agreement and the scope of application of such complaints to those agreements. Rather, it merely addresses the procedural modalities with regard to how a panel should address a non-violation or situation complaint, to the extent that they are applicable under the respective covered agreements.

IV.2 The Moratorium

While making the GATT dispute settlement provisions as elaborated by the DSU applicable to TRIPS, Article 64.2 specifically excluded the application of non-violation and situation complaints for a period of five years from the entry into force of the WTO agreement, that is, until January 1, 2000. The United States has argued that on the expiry of this five-year period, non-violation and situation complaints would become available under TRIPS unless the moratorium was renewed by consensus. This point needs further examination.

The negotiating history of the TRIPS Agreement shows that the United States had proposed a five-year moratorium as a concession to ensure the adoption of another U.S. proposal for restriction on the grounds of issuing compulsory licenses on semiconductor technologies. It should also be noted that the five-year moratorium ran alongside the transition period that was provided to developing countries under Article 65.2, which exempted them from applying the substantive TRIPS obligations for a period of five years from the entry into force of the WTO agreement. Hence, even without the moratorium under Article 64.2, developing countries and least developed countries (LDCs) would not have been required to implement the TRIPS obligations, including its dispute settlement provision, during the transition period. Indeed, even without the TRIPS moratorium, LDCs are currently exempted from implementing the TRIPS obligations under a transition period for LDCs under Article 66.1, which is currently available until 2021 generally and until 2033 for pharmaceutical products and can be extended further by the TRIPS Council. Thus, the moratorium proposed by the United States under Article 64.2 was, at best, a limited concession that was of greater value for developed countries that had reservations about the application of non-

violation and situation complaints but did not have a general transitional exemption unlike developing countries and LDCs.

Moreover, a built-in review of the TRIPS Agreement was incorporated in Article 71. It was stipulated under Article 71.1 that the TRIPS Council "shall" review the implementation of the agreement at the end of the transition period granted to developing countries under Article 65.2. This meant that a reasonable expectation existed among the TRIPS negotiators that the implementation of the agreement shall be subjected to an overall review after five years following the entry into force of the WTO agreement. This review would have also included a review of the dispute settlement provisions under TRIPS, including the issue of non-violation and situation complaints. This also further weakens the U.S. argument that non-violation and situation complaints would become automatically applicable on the expiry of the moratorium under Article 64.2 unless extended by consensus by the ministerial conference in terms of Article 64.3, when the entire TRIPS Agreement was expected to be subjected to a review under Article 71. Though the review has not taken place as mandated, what is relevant here is whether at the time of adoption of the TRIPS Agreement, a common understanding and reasonable expectation existed among all members that the TRIPS Agreement would be subjected to an overall review, including its dispute settlement provisions, after January 1, 2000.

Article 64.3 instructed the TRIPS Council to use the period of the moratorium granted under Article 64.2 to examine the scope and modalities. However, this does not mean that this examination was limited to the five-year period. Article 68 of the TRIPS Agreement mandates the TRIPS Council to monitor the operation of the agreement and the members' compliance with their TRIPS obligations as well as provide the opportunity to the members to consult on matters relating to TRIPS. Moreover, Article 68 states that the TRIPS Council "shall, in particular, provide any assistance requested by them in the context of dispute settlement procedures." Thus, even after the expiry of the moratorium under Article 64.2, regardless of the decision on its extension, the TRIPS Council is required to provide the opportunity to discuss any question relating to dispute settlement procedures in particular, including the scope and modality of application of non-violation and situation complaints. The TRIPS Council could also make any recommendation in relation to the matters in discussion, including the grant of new moratoriums.

In 1999, Canada had proposed a ministerial conference decision to extend the moratorium period under Article 64.2 until work on the scope and modalities by the TRIPS Council could be concluded. The 1999 Seattle Ministerial Conference suspended consideration of all issues, following which the United States had argued in the TRIPS Council that the moratorium had expired and that non-violation and situation complaints had become available. Most members rejected the contention that non-violation and situation complaints had become available. Thereafter, the Doha Ministerial Decision on TRIPS implementation issues granted a mandate to the TRIPS Council to continue the examination of the scope and modalities and stated that members had agreed not to initiate such complaints until the next ministerial conference. This decision has been renewed by subsequent ministerial conferences.

The language in the ministerial decisions concerning the moratorium since the Doha Ministerial Conference might suggest that the agreement of members not to initiate non-violation and situation complaints implies that such complaints are available, but members have agreed not to make use of this route during the moratorium. However, the ministerial decisions are not exclusively about the moratorium. Rather, these decisions are primarily about the mandate of the TRIPS Council to examine the scope and modalities, which, as argued in this paper, would include the issue of the

applicability of non-violation and situation complaints. In that light, the agreement by members not to initiate such complaints should be viewed without prejudice to the question of the availability of such complaints, which is a matter to be determined under the examination of the scope and modalities. The agreement not to initiate such complaints avoids a possible scenario where a complaint is filed with uncertainty around the question of its applicability, which the TRIPS Council is mandated to determine. The TRIPS Council could decide that such complaints are applicable or not applicable. Until then, members have agreed not to create uncertainty by filing such complaints.

The possibility of such uncertainty is borne from the experience of the panel report in the *India (Patents)* case. The panel engaged in an interpretative exercise of the TRIPS Agreement and held that a good-faith interpretation of the provisions of TRIPS "requires the protection of legitimate expectations derived from the protection on intellectual property rights provided for in the Agreement," and accordingly, when interpreting the TRIPS Agreement, "the legitimate expectations of WTO members concerning the TRIPS Agreement must be taken into account." The appellate body (AB) had overruled this interpretation and held that the panel had ignored the distinction between violation complaints and non-violation complaints. It should be noted that the panel adopted this interpretation even though the United States had not filed a non-violation complaint. In the absence of an express moratorium on the initiation of non-violation and situation complaints, it is possible that the WTO dispute settlement panels would have been called on to determine the admissibility of such claims that would have been open to creative interpretations by the panel or the AB. The moratorium effectively makes non-violation and situation complaints under TRIPS inadmissible while mandating the TRIPS Council to examine its scope and modalities.

IV.3 IP-related Non-Violation and Situation Complaints under the GATT

While the question of the applicability of non-violation and situation complaints to disputes arising under the TRIPS Agreement has been the subject of debate over which different views exist, challenging an IP measure in a non-violation and situation complaint under the GATT may also be possible (Kennedy, 2016). For instance, such a complaint could claim that a market access benefit that could be reasonably expected by a member to arise under the GATT has been nullified or impaired by an IP-related measure taken in accordance with the TRIPS Agreement.

While many members have argued in TRIPS Council discussions that TRIPS is not a market access agreement wherein reciprocal market access concessions are made, Kennedy (2016) suggests that the objective of TRIPS was to "preserve expectations of market access accruing under concessions negotiated under GATT."[8] Even though the TRIPS Agreement lays down general legal obligations rather than specific market access concessions, it is similar to most WTO agreements on trade in goods under Annex IA of the WTO agreement.[9] The TRIPS negotiations were officially part of the Uruguay Round negotiations on trade in goods from the outset, unlike the GATS negotiations, which took place in a separate track. This linkage of TRIPS to the objective of preventing distortion to the concessions under the GATT makes it possible

[8] The first sentence in the preamble to the TRIPS Agreement expresses the desire to reduce distortions and impediments to international trade.

[9] Annex 1A of the WTO Agreement includes a number of agreements on trade in goods, including the GATT, as well as specific agreements on agriculture, sanitary and phytosanitary measures, textiles and clothing, technical barriers to trade, trade-related investment measures, agreements on the implementation of Articles VI and VII of the GATT, pre-shipment inspection, rules of origin, import licensing procedures, subsidies and countervailing procedures, and safeguards.

to make a violation claim under the GATT with a corresponding non-violation claim in relation to a measure consistent with TRIPS (Kennedy, 2016). However, so far, no WTO member has taken this approach to challenge a TRIPS-compliant IP measure through a non-violation complaint under the GATT.

In view of the possibility of challenging an IP measure through a non-violation complaint under the GATT, it can be argued that a non-violation claim "should not lie under TRIPS itself." This could suggest that a discussion on the scope of non-violation complaints under TRIPS is redundant. A speculative non-violation claim under TRIPS in relation to a product on which there is no tariff concession under the GATT is unlikely to be successful as the complainant would have to base that claim on the grounds of circumvention of a substantive legal rule under TRIPS, which could be rejected by a panel on the grounds that non-violation claims can only concern scheduled concessions and commitments on market access (Kennedy, 2016). However, the text of Article XXIII of the GATT and Article 26 of the DSU do not restrict the availability of non-violation and situation complaints specifically to the nullification or impairment of benefits that could be reasonably expected by a member to arise from the individual tariff concessions or market access commitments by another member. Both these provisions refer to benefits accruing directly or indirectly, and even if a speculative non-violation claim is based on the circumvention of substantive legal obligations under TRIPS, the expectation of market access could be indirectly associated with a product that is not covered by a specific concession. Thus, whether the circumvention of substantive legal obligations can be a basis for a non-violation and situation complaint under TRIPS is unclear at present. The claim that if non-violation and situation complaints were made applicable to disputes under TRIPS, such claims would be limited to claims in relation to the nullification or impairment of market access concessions, as can be currently filed under the GATT, cannot be concluded definitively.

IV.4 Non-Violation Complaints in the Context of TRIPS Obligations

Though IP was negotiated alongside goods in the Uruguay Round and the preamble of the TRIPS Agreement expresses the desire to reduce distortions and impediments to international trade, it does not specifically refer to the preservation of market access concessions under the GATT as an objective of TRIPS. On the contrary, the preamble also recognizes the underlying public policy objectives of national systems for the protection of IP. Legally, TRIPS was not placed in Annex 1A with the other goods agreements but as a separate agreement under Annex 1C, similar to the GATS as a specialized agreement under Annex 1B. Thus, TRIPS was finally accorded the status of a specialized trade-related IP agreement rather than a goods agreement. While it is linked to the GATT, as clearly described in the preamble that makes the basic principles of the GATT applicable, the agreement pursues other objectives. For example, the preamble also refers to the provision of "adequate" standards and principles concerning the availability, scope, and use of trade-related IP; the provision of "appropriate and effective" means of enforcement; and transitional arrangements aiming at full participation in the results of the negotiations. Whether a non-violation complaint can be initiated under TRIPS to challenge the adequacy of the standard of IP protection that a member provides in accordance with the obligations and flexibilities available under the TRIPS Agreement is unclear.

For example, a major flexibility available under the TRIPS Agreement in the area of patents is the ability of countries to determine the standard of patentability criteria that are adequate to their contexts. Article 27.1 of TRIPS requires members to grant patents without discrimination for inventions in all fields of technology as long as they

meet the criteria of novelty, inventive step, and industrial applicability. As these criteria are undefined in the agreement, WTO members have defined these criteria narrowly or broadly. However, as a TRIPS negotiator from a developing country has observed, this omission of the definition of the patentability criteria in the TRIPS Agreement was not due to the belief among negotiators that these criteria were sufficiently clear for patent examination purposes. That this lack of a specific definition could be used by countries like India to introduce measures like Section 3(d) in the Indian patent law was "not anticipated at the time of the negotiations" (Watal, 2015). If non-violation complaints were to be allowed in TRIPS, potentially, such measures could be challenged.

The obligations under TRIPS are subject to exceptions that can limit the scope of potential non-violation and situation complaints under TRIPS (Kennedy, 2016). Article 6, for instance, stipulates that "nothing in this Agreement shall be used to address the issue of exhaustion of intellectual property rights." Thus, the parallel importation of a product based on the application of the doctrine of exhaustion of rights—which may be determined to be global, regional, or national in scope—cannot be challenged even under a non-violation and situation complaint as the dispute settlement provisions of TRIPS are excluded altogether from being applicable to that provision. The Doha Declaration on TRIPS and Public Health provided a guidance that the TRIPS Agreement should be interpreted and implemented in a manner supportive of the WTO members' right to protect public health and, in particular, to promote access to medicines for all. Article 31 of the TRIPS Agreement, which incorporates the special compulsory licensing mechanism established pursuant to paragraph 6 of the Doha Declaration, states that "Members shall not challenge any measures taken in conformity with the provisions of this Article and the Annex to this Agreement under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994." Article 40.2 of TRIPS also states that nothing in the agreement shall prevent members from specifying in their laws licensing practices or conditions that may, in particular cases, constitute an abuse of IP rights having an adverse effect on competition in the relevant market.

Furthermore, Article 8.1 of TRIPS provides the flexibility for members to adopt measures necessary to protect public health and nutrition and to promote the public interest in sectors of vital importance to their socioeconomic and technological development, provided that such measures are consistent with the provisions of TRIPS. Article 8.2 also recognizes that appropriate measures may be needed to prevent the abuse of IP rights or the resort to practices that unreasonably restrain trade or adversely affect the international transfer of technology, provided they are consistent with the provisions of TRIPS. This provision excludes such measures from the scope of non-violation and situation complaints as no condition is specified in the provision that such measures, in spite of their consistency with TRIPS, should not lead to any nullification or impairment of benefits (Kennedy, 2016). Article 8 created reasonable expectations that measures necessary to protect public health or promote the public interest in sectors of vital importance etc. could be taken by a member and thus would exclude a non-violation claim asserting that such measures are unanticipated (Abbott, 2004). However, even if a measure that falls within the scope of Article 8 can be defended against a non-violation claim on the grounds that such a measure could have been anticipated at the time of adoption of TRIPS, the scope of such measures may hypothetically be challenged under a non-violation claim, seeking a remedy of limiting the measure instead of withdrawing it completely.

This means that even if non-violation (and situation) complaints were to apply to disputes arising under the TRIPS Agreement, certain measures adopted in line with Article 8 of TRIPS—such as defining rigorous patentability standards, applying competition laws to prevent abuses of IP rights (including excessive pricing), considering certain licensing practices as anti-competitive per se, and adopting other

measures necessary to protect public interest—would be, under a proper legal interpretation, outside the reach of non-violation complaints. However, a non-violation claim could still be made to limit the scope of the measure should non-violation complaints apply.

IV.5 Situation Complaints

A situation complaint is “an obscure and residual cause of action” (Kennedy, 2016) available under Article XXIII 1(c) of the GATT. It is covered under the moratorium and work program on the examination of the scope and modalities of non-violation and situation complaints under Article 64 of the TRIPS Agreement. Situation complaint claims have never been made under the GATT or under any other WTO agreement. It is a residual cause of action in the sense that situation claims cannot be made for situations that constitute a violation of a covered agreement or the actual application of a measure that allegedly nullifies or impairs benefits arising from an agreement. Such complaints could be made to challenge the failure to apply a measure even though such failure does not violate the agreement (Kennedy, 2016).

As discussed above, TRIPS seeks to establish minimum standards on the availability, use (in some respects), and enforcement of IP rights. However, members may (but are not obliged to) implement in their law more extensive protection than required under the agreement (Article 1 of TRIPS). Members have also agreed to cooperate with one another with a view to eliminating international trade in goods infringing IP rights and, in particular, promote the exchange of information and cooperation among customs authorities with regard to trade in counterfeit trademark goods and copyright pirated goods (Article 69). In several bilateral and regional free trade agreements as well as pursuant to unilateral trade pressures and demands from developed countries like the United States, many developing country WTO members have agreed to more extensive standards of protection and enforcement. While such TRIPS-plus measures are not required to be applied under the TRIPS obligations, a situation complaint could potentially challenge the non-application of a TRIPS-plus measure. However, sustaining such a challenge would be very difficult as the parties can block the adoption of the report because the negative consensus requirement for the adoption of panel or AB reports does not apply to reports on situation complaints in terms of Article 26.2 of the DSU (Kennedy, 2016).

V. REMEDIES IN NON-VIOLATION AND SITUATION COMPLAINTS

The general principles in the DSU apply to the implementation of the recommendations or rulings of the DSB. In addition, specific rules concerning remedies in cases of non-violation and situation complaints are also applicable. For non-violation complaints, a panel or the AB cannot create an obligation for the withdrawal of the measure but can only recommend that the member concerned make a mutually satisfactory adjustment to the measure (Article 26.1(b)). A recommendation to make a mutually satisfactory adjustment to the measure is the primary remedy in a non-violation complaint.

Panel or AB rulings or recommendations are required to be implemented within a reasonable period. This also applies to recommendations in cases of non-violation and situation complaints. In determining the reasonable period, the procedure laid down under Article 21 of the DSU applies.[10] Article 21.2 lays down that particular attention should be paid to matters affecting the interests of developing countries with respect to measures that have been subject to dispute settlement. In addition, Article 26.1(c) states that if the determination of the reasonable period for the implementation of the recommendation on a non-violation complaint is subjected to binding arbitration in terms of Article 21.3(c), either party may request the determination of the level of benefits nullified or impaired and suggest ways and means of reaching a mutually satisfactory adjustment. However, the recommendations from the arbitration on these issues shall not be binding.

The compensation and suspension of concessions or other obligations are available as temporary measures if the recommendations and rulings are not implemented within a reasonable period (Article 22.1). The member concerned is required to enter into negotiations with the party that invoked the dispute settlement procedure, with a view to developing a mutually acceptable compensation (Article 22.2). However, the compensation or suspension of measures is not considered under Article 22 as a preferred solution over the full implementation of a recommendation to bring a measure into conformity with the covered agreement. Importantly, Article 26.1(d) of the DSU makes an exception in the application of the rules relating to compensation under Article 22 to the effect that compensation determined mutually under this article in relation to a non-violation claim would be considered as part of “a mutually satisfactory adjustment as final settlement of the dispute.”

As mentioned in Article 26.1(c), an arbitration recommendation on compensation or on the extent of nullification or impairment of benefits in respect to a non-violation claim is not binding on the parties. In the event that the arbitration recommendation is not implemented by the party who is required to make the mutually satisfactory adjustment, the rules under Article 22 of the DSU concerning the suspension of concessions would apply (Kennedy, 2016). Retaliation has to be first sought within the sector and agreement under an annex, and another covered agreement could be subjected to retaliation only when that approach is not practicable or effective (DSU, Article 22.3). This makes the placement of a covered multilateral trade agreement in Annex 1 very

[10] Within thirty days of the adoption of the panel or AB report, the member concerned has to inform the DSB of its intentions in respect of the implementation of the rulings or recommendations. If complying with the same immediately is impracticable, the member shall have a reasonable period to do so. In determining this period, the DSB may consider any proposal for such a period by the member. In the absence of approval for such a proposed period from the DSB, the two parties to the dispute may mutually agree on the period, or in the absence of a mutual agreement within a period of forty-five days, the reasonable period to comply with the recommendations may be determined through binding arbitration. See Article 21, “Understanding on Rules and Procedures Governing the Settlement of Disputes,” Annex 2 of the WTO Agreement, https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm.

relevant for the purpose of retaliation in terms of the DSU rules. The placement of TRIPS in a separate annex from the other agreements on trade in goods was driven by a desire to restrict the use of retaliatory sanctions on other goods agreements for an alleged derogation of TRIPS (Kennedy, 2016). Thus, if a non-violation claim is made under TRIPS, retaliation can only be sought in the first place within the TRIPS Agreement. This could, for instance, constitute a suspension of the obligation by a complaining developed country party to provide technical assistance to developing countries under Article 67 or the suspension of the obligations under Article 66 to provide incentives to enterprises and institutions in their territories for the transfer of technology to LDCs. However, such a suspension of concessions is unlikely to hurt developing countries to any substantial extent as these obligations have not been implemented in a meaningful manner by developed countries. Nevertheless, the complaining party to the dispute can always argue that the suspension of obligations within TRIPS will not be effective and seek the authorization of cross-retaliation from the DSB. A covered agreement can exclude the application of suspension of concessions or obligations by the DSB. At present, the TRIPS Agreement does not do so, but this can be part of any consideration on the scope and modalities of non-violation and situation complaints by the TRIPS Council.

Thus, in case of a non-violation complaint being upheld by a panel or the AB, the remedy would be a mutually satisfactory adjustment of the measure between the parties to the dispute and not the withdrawal of the measure. If a mutually satisfactory adjustment is not reached within a reasonable period, the complaining party could seek retaliation through the suspension of concessions or obligations. Compensation can be part of the mutually satisfactory adjustment. While market access commitments can be renegotiated as part of such a mutually satisfactory adjustment for non-violation cases under agreements like the GATT and the GATS, rules established under TRIPS through multilateral agreements cannot be renegotiated bilaterally as part of the mutually satisfactory adjustment (Kennedy, 2016). However, Article 1 of the TRIPS Agreement allows members to provide higher levels of protection than required under TRIPS. Hence, TRIPS-plus standards of IP protection could be part of a mutually satisfactory adjustment.[11] If both parties agree, such an adjustment could also be done through compensation under a different agreement, following the practice of parties in *EC (Hormones)*[12] and *China (Publications and Audiovisual Services)*[13] of negotiating market access compensation in exchange for non-compliance with the rules (Kennedy, 2016).

Another issue that could be considered as part of the examination of the scope and modalities of non-violation complaints under TRIPS is whether the implementation of a panel or AB report on such claims could lead to an open-ended renegotiation of the substantive rules (Kennedy, 2016), but this may risk introducing into the WTO TRIPS-plus rules that limit the policy space now available to design and implement IP laws and regulations.

In respect of situation complaints, as described above, Article 26.2 makes the DSU procedures applicable only until the circulation of the panel report—that is, the DSU

[11] A major constraint to the full use of the TRIPS flexibilities to address public policy objectives such as access to medicines is posed by the adoption of TRIPS-plus standards of protection and enforcement that limit the scope of the flexibilities available under the TRIPS Agreement. See e.g., Carlos M. Correa (2017), *Mitigating the Regulatory Constraints Imposed by Intellectual Property Rules in Free Trade Agreements*, Research Paper 74, South Centre, Geneva. Available at https://www.southcentre.int/wp-content/uploads/2017/02/RP74_Mitigating-the-Regulatory-Constraints-Imposed-by-Intellectual-Property-Rules-under-Free-Trade-Agreements_EN-1.pdf

[12] WTO document WT/DS26/29, April 17, 2014.

[13] WTO document WT/DS363/19, May 11, 2012.

rules do not extend to the adoption of the panel or AB report by the DSB as well as the procedures concerning the implementation of the recommendations of the panel or AB. In case of a disagreement regarding the consistency of a measure taken to implement a recommendation or ruling with a covered WTO agreement, the matter has to be decided through recourse to the WTO dispute settlement procedures, including resorting to the original panel wherever possible.[14]

[14] Article 10.4, "Understanding on Rules and Procedures Governing the Settlement of Disputes," Annex 2 of the WTO Agreement, https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm

VI. IMPLICATIONS OF THE NON-EXTENSION OF THE MORATORIUM

In spite of the majority view against the automatic application of non-violation and situation complaints to TRIPS on a possible expiry of the current moratorium, in the absence of a definitive interpretation on the matter through a decision by the TRIPS Council, there will be uncertainty as to how a WTO dispute settlement panel might interpret this question. In the absence of clarity on the scope and modalities of the application of non-violation and situation complaints, the admission of a possible non-violation or situation complaint would, as noted, entail the risk of leaving the matter to interpretations by panels or the AB. Such an approach could be more suitable to the interest of developed countries than developing countries (Gad, 2016). This legal uncertainty and the possibility of initiating a non-violation and situation complaint can have a chilling effect on the use of TRIPS flexibilities by WTO members, particularly developing countries and LDCs. Under such circumstances, non-violation and situation complaints can, de facto, become another form of unilateral coercion in addition to measures such as the inclusion of a country in the U.S. Special Section 301 Watchlist. The remedy in a non-violation complaint to provide a mutually satisfactory adjustment, with the possibility of retaliatory measures to ensure compliance, could also coerce countries to reform their IP laws to adopt TRIPS-plus standards of IP protection and enforcement.

The implications of the non-extension of the moratorium on not initiating non-violation and situation complaints to disputes arising under the TRIPS should also be assessed in light of the recent developments regarding the AB as it has become dysfunctional because of the United States not joining consensus on appointments to fill the vacancies in the membership (Danish and Kwa, 2019). The possible non-availability of recourse to the AB would add to the legal uncertainty of a non-violation complaint being admitted and upheld by a panel without any recourse to the appellate process.

In the event that the moratorium on the initiation of non-violation and situation complaints is not extended, members who believe that such complaints are now applicable to disputes under TRIPS could start to make such complaints. If the issue is not resolved through consultations, the claim may be made submitted to a ruling by a panel. At this stage, the panel can make either of the following decisions: (1) consider that non-violation and situation complaints are not applicable to TRIPS in the absence of a consensus decision by the ministerial conference on their scope and modalities; or (2) regard the complaint as admissible under the TRIPS Agreement. If the complaint is determined to be admissible, the complaining member will be requested to present evidence in support of the claims, and the panel will finally make recommendations on the claim.

In general, the burden of proof on the complaining party would make identifying situations in which justified non-violation complaints can be made and pursuing those cases legally much more difficult (Horn and Mavroidis, 1999). The history of non-violation and situation complaints under the GATT suggests that the high burden of proof that rests on the complainant makes it extremely difficult to articulate them. Under the GATT 1947, non-violation claims were brought in eight cases. The non-violation claims were successful in three cases where the reports were adopted by the panel, while two cases were successful but the report was not adopted by the panel, and three cases were unsuccessful. Since the establishment of the WTO, non-violation claims have been brought in five cases. However, none of the post-WTO non-violation cases have been successful (see Table 1).

Table 1. Non-Violation Disputes under the GATT and the WTO

Pre-WTO Disputes with Non-Violation Claims

Dispute	Year	Claim	Outcome on Non-Violation Claim
Australia (Ammonium Sulfate)	1950	Violation, alternatively non-violation	Adopted by panel
Germany (Sardines)	1952	Violation, alternatively non-violation	Adopted by panel
EEC (Oilseeds)	1990	Violation, alternatively non-violation	Adopted by panel
EEC (Citrus)	1985	Violation, alternatively non-violation	Not adopted
EEC (Canned Fruit)	1985	Non-violation	Not adopted
Uruguayan Recourse	1962	Non-violation	Claim rejected
Japan (Semiconductors)	1960	Violation, alternatively non-violation	Claim rejected
United States (Agricultural Waiver)	1990	Non-violation	Claim rejected

Post-WTO Disputes with Non-Violation Claims

Dispute	Year	Agreement	Claim	Outcome on Non-Violation Claim
Japan (Film)	1998	GATT	Violation, alternatively non-violation	Claim rejected
EC (Asbestos)	2000	GATT, SPS, TBT	Violation, alternatively non-violation	Claim rejected
EC (Asbestos)	2001	GATT, SPS, TBT	Violation, alternatively non-violation	Claim rejected
Korea (Government Procurement)	2000	Agreement on Government Procurement	Violation, alternatively non-violation	Claim rejected
India (Patents)	1997	TRIPS, DSU	Violation, non-violation under Article 3.8 of the DSU	Claim rejected

It is noteworthy that most of the few cases in GATT-WTO jurisprudence where non-violation claims have been brought were not solely based on non-violation claims but presented as complementary to specific claims of violations of relevant provisions of applicable trade agreements. It is also noteworthy that since the establishment of the WTO with a diverse range of rules on multiple aspects of trade going beyond tariff concessions, no successful non-violation claim has been made. Further, no non-violation claim has been brought under the GATS.

Since the introduction of non-violation complaints in the GATT, for over sixty years, only two WTO members (the United States and the EC) have brought non-violation complaints. Horn and Mavroidis (1999) have observed that non-violation complaints are mainly open to countries with significant legal human capital, making it an unaffordable luxury to the immense majority of WTO members. Moreover, the lack of uniformity and clarity regarding non-violation complaints in WTO jurisprudence has jeopardized the security and predictability of the WTO DSS. While in some cases, the panels have refrained from interpreting what constitutes non-violation complaints, in other cases, panels have adopted diverse and conflicting interpretations. Nor have the panels been able to consistently define the scope of the application of non-violation complaints.

This is particularly relevant in the context of discussions on the modalities and scope of non-violation complaints under TRIPS. Since the WTO jurisprudence itself does not provide clarity on the meaning and scope of non-violation complaints, the admission of any non-violation or situation complaint by a WTO panel without any agreement in the TRIPS Council on the scope and modalities of such complaints will render greater uncertainty to the use of TRIPS flexibilities. This uncertainty may be exploited by members to initiate non-violation complaints to seek satisfactory adjustments to measures adopted by other members to make full use of the TRIPS flexibilities.

Although, as mentioned, non-violation or situation complaints are unlikely to succeed, the following measures could be potentially subjected to the threat or initiation of such complaints under the TRIPS Agreement:

1. *Application of standards of rigorous patent examination:* Many developing countries have adopted statutory provisions or patent examination guidelines to apply rigorous standards of patent examination, particularly in the field of pharmaceuticals. This is a choice fully consistent with the TRIPS Agreement.[15] If applicable, a non-violation complaint could be initiated against such regulations or guidelines claiming that such measures were not reasonably expected at the time of adoption of TRIPS and had nullified or impaired the expected benefit of a wider scope of patent protection. The remedy available in non-violation complaints to negotiate a mutually satisfactory adjustment of the measure could force the member that has taken such a measure to negotiate amendments to the patent examination regulations or guidelines, which could lead to the grant of more secondary patents in pharmaceuticals, leading to the evergreening of patents on such products and compromising access to affordable medicines.

2. *Disclosure of country of origin/source for genetic resources and traditional knowledge:* No restriction exists in the TRIPS Agreement on WTO members requiring the patent applicant to disclose the country of origin/source of a genetic resource or associated traditional knowledge that is utilized in an invention over

[15] See, for example, Olga Gurgula (2019), *The "Obvious to Try" Method of Addressing Strategic Patenting: How Developing Countries Can Utilise Patent Law to Facilitate Access to Medicines*, Policy Brief 59, April 2019, South Centre, Geneva. Available at https://www.southcentre.int/policy-brief-59-april-2019/

which a patent is claimed. However, the application of a disclosure requirement could be subjected to a non-violation complaint to seek an adjustment of the scope of the disclosure requirement and limit the same.

3. *Price control measures:* Price control measures for patented products such as pharmaceuticals has been regarded by many WTO members as a necessary policy instrument to ensure that patent rights do not restrict the affordability of medicines. A recent WHO resolution also exhorts WHO member states to take necessary measures toward the transparency of prices of pharmaceutical products.[16] Many countries apply such measures.[17] Developing countries have promoted a discussion thereon in the TRIPS Council.[18] Nevertheless, the United States has raised unilateral concerns on the adoption of price regulatory mechanisms on patented pharmaceutical products by many developed as well as developing countries. While such measures do not violate the TRIPS Agreement, a non-violation complaint could challenge such measures.

4. *Plant variety protection:* WTO members have the flexibility under the TRIPS Agreement to design a sui generis system of plant variety protection (PVP) instead of granting patent protection to plant varieties. Some WTO members have adopted PVP laws that attempt to balance the rights of plant breeders with the rights of farmers to save, use, and exchange seeds. Such laws could, however, be challenged under a non-violation complaint, and a remedy in terms of restricting the scope of farmers' rights could be sought as an adjustment of the measure. A situation complaint could also be made on the grounds of not providing effective PVP protection per the 1991 Act of the UPOV Convention.

5. *Grounds for issuing compulsory licenses:* No restriction exists under Article 31 of TRIPS on the grounds for issuing compulsory licenses. Nevertheless, a non-violation complaint could be initiated to seek a mutually satisfactory adjustment of the compulsory licensing regulations of a member, including the substantive and procedural regulations relating to the grant of a compulsory license.

6. *Recognition of data exclusivity:* The United States and the European Union have argued that Article 39.3 of the TRIPS Agreement requires WTO members to provide data exclusivity over undisclosed test data to the originator of such data. A situation complaint could be initiated against WTO members who have not recognized this interpretation and thus do not provide data exclusivity at present. However, as noted, in the event of a situation complaint, the adoption of the panel report can be blocked in the DSB if no consensus on its adoption exists. For WTO members who have recognized data exclusivity with some limitations on its scope and exceptions to the same, these could be subjected to a non-violation complaint

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[16] World Health Assembly resolution WHA72.8, May 28, 2019. Available at https://apps.who.int/gb/ebwha/pdf_files/WHA72/A72_R8-en.pdf

[17] For example, in Canada, the price of patented drugs is monitored against the price of the same drugs in a number of other reference countries to ensure that the price of the drugs in Canada do not exceed the price in the reference countries. This review is undertaken by an independent quasi-judicial body called the Patented Medicines Pricing Review Board (PMPRB). See Government of Canada, Patented Medicines Price Review Board. Available at http://www.pmprb-cepmb.gc.ca/en/regulating-prices/price-review

[18] At the October 2019 session of the TRIPS Council, South Africa called for sharing experiences among WTO members on how TRIPS flexibilities have been used to address high prices and barriers to access to medical technologies and medicines. See WTO document IP/C/M/93 Add.1, December 9, 2019. Available at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=261281,259624,258929,256990,255786,254926,252827,252792,251680,250889&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True

to seek an adjustment of the measure by expanding the scope of data exclusivity and limiting the exceptions and limitations to the same.

7. *Use of TRIPS flexibilities in IP enforcement:* The TRIPS Agreement requires members to provide effective mechanisms for the enforcement of IP rights in accordance with their own legal systems. No obligation exists for the members to establish specialized IP courts or extend the scope of border measures by customs authorities, e.g., seizures of IP infringing goods in transit. Non-violation or situation complaints could be initiated in a number of instances to reform IP enforcement laws to TRIPS-plus standards.

8. *Patent linkage:* While no obligation exists under TRIPS to link marketing approval of a product to the patent status on the same, patent linkage has been a constant demand by developed countries in bilateral and regional trade negotiations. Based on the commitment by members to engage in mutual cooperation on IP issues, the lack of patent linkage by members may be subjected to situation complaints.

9. *Patent term extension*: TRIPS does not require members to grant patent protection for more than twenty years. However, a non-violation complaint could be based on the loss of effective patent protection for twenty years because of delays in regulatory approval for marketing authorization or for delays in patent examination.

10. *Use of transition period by LDCs:* Under Article 66.1, LDCs have a transition period during which they are not required to implement the substantive obligations under the TRIPS Agreement. In implementing this transition period, any measure to reduce the existing levels of IP protection by an LDC is possible. However, such a measure could be challenged under a non-violation complaint. A situation complaint can also challenge the inadequate use of the transition period to progressively implement TRIPS obligations.

The above examples show areas where there may be a potential use of non-violation or situation complaints to raise the level of IP protection beyond the TRIPS requirements and in a manner that may be detrimental to various public interest objectives of the targeted countries. As discussed above, if such complaints were submitted, the burden of proof would be on the claimant; they would be very unlikely to be successful if the TRIPS and other WTO rules are properly interpreted and applied in conformity with the VCLT. The major risk is, however, that some members may choose to exploit the uncertainty around the admissibility of such complaints to threaten other members' measures (or lack thereof) and to induce them, notably developing countries and LDC, to adopt TRIPS-plus standards. Such threats should be consistently condemned by the WTO membership.

VII. CONCLUSION

A literal reading of the text of Article 64 of TRIPS, the negotiating history of the provision, and discussions in the TRIPS Council demonstrate that no consensus exists on whether non-violation and situation complaints are applicable to the TRIPS Agreement and whether it would become automatically applicable if the moratorium on initiating such complaints is not extended by the WTO Ministerial Conference. On the contrary, an overwhelming majority of WTO members consider that non-violation and situation complaints have no place in the TRIPS Agreement. An examination of the scope and modalities of such complaints, as mandated under Article 64.3 in the context of a five-year moratorium (extended by subsequent ministerial decisions), should necessarily include an examination of the applicability of such complaints; hence, such complaints cannot become automatically applicable on expiry of the moratorium.

It should also be noted that the moratorium on the application of non-violation and situation complaints was proposed by the United States under Article 64.2 to secure commitments on limitations on compulsory licensing on semiconductor technologies. The use of the moratorium as a leverage for other issues in the WTO has continued with the trend in recent years of using the moratorium as a quid pro quo for the moratorium on e-commerce, which restricts WTO members from imposing custom duties on electronic transmissions. Some WTO members who wish to impose such duties on e-commerce transactions would like the moratorium to expire. This could, however, impact the extension of the TRIPS moratorium. It will be important that WTO members delink the two moratoriums and examine the question of the extension of both moratoriums in their specific contexts and adequately weigh their respective legal and economic impacts.

In the present circumstances, if the moratorium on initiating non-violation and situation complaints is not extended by the WTO Ministerial Conference because of the lack of consensus, it will be, de facto, left to a WTO panel to determine in a future dispute the question of the applicability of such complaints in the context of the TRIPS Agreement. GATT and WTO jurisprudence demonstrates that initiating a successful non-violation and situation complaint under any WTO agreement is very difficult, and this will be even more difficult under the TRIPS Agreement in view of the nature of TRIPS's provisions as general minimum legal obligations without specific market access concessions. Even if a non-violation or situation complaint were admitted and upheld, a WTO panel or the AB could not recommend withdrawal of the measure. The adoption of a panel report in a situation complaint can be blocked by a member by not joining consensus as the negative consensus rule for rejection of a panel report by the DSB does not apply to situation complaints. Nevertheless, at least in the case of non-violation complaints, the available remedy of a mutually satisfactory adjustment to the measure could be used strategically as a means to bring the respondent member to negotiate a mutually satisfactory adjustment to a measure that implements a TRIPS flexibility or to seek the adoption of TRIPS-plus obligations.

The possibility of non-violation and situation complaints being initiated and the fact that a panel recommendation may not be subjected to an AB review given its prevailing dysfunctional status will create substantial legal uncertainty around the question of the applicability of non-violation and situation complaints. This legal uncertainty will render the threat of a possible non-violation and situation complaint very strong, similar to the threat posed by the placing of a country in the unilateral U.S. Special Section 301

Watchlist. This can have a chilling effect on the ability of WTO members to fully implement the TRIPS flexibilities, particularly by developing countries and LDCs.

Hence, it would be desirable that the moratorium on the non-initiation of non-violation and situation complaints is continued until a consensus is reached on the question of the scope and modality, including the applicability, of such complaints. Nevertheless, if the moratorium is not extended, the ministerial decision should extend the mandate of the TRIPS Council to continue the examination of the scope and modalities and make a recommendation for the adoption of the outcome of such an examination by the ministerial conference by consensus, in accordance with Article 64.3 of TRIPS. A non-extension of the moratorium should not amount to an end of the work under Article 64 of TRIPS to examine the scope and modalities of non-violation and situation complaints. While certain provisions of the TRIPS Agreement, such as Articles 6 and 31, exclude the scope of non-violation and situation complaints in certain specific cases, many other aspects exist with regard to which the scope of non-violation and situation complaints are unclear. For instance, beyond the question of whether non-violation and situation complaints should apply to TRIPS, any discussion on the scope and modalities by the TRIPS Council could also consider whether to exclude the suspension of concessions or obligations as a retaliatory measure in case of non-violation and situation complaints.

Article 64 of the TRIPS Agreement made the dispute settlement provisions of the GATT applicable to TRIPS subject to the exceptions specified in that provision. The only exception specified was in relation to non-violation and situation complaints, on which it was agreed that further examination on the scope and modalities of such complaints to TRIPS was required. Pending an agreement on this fundamental question, it would be pragmatic to keep the initiation of non-violation and situation complaints under suspension, which the moratorium does. This should not lead, however, to the payment of a disproportionate “price” to get the moratorium renewal. In particular, such a renewal should be delinked from a parallel renewal of the e-commerce moratorium, which should be evaluated and decided on the basis of its own legal and socio-economic impact, particularly with regard to the development efforts of developing countries and LDCs.

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