A Preliminary Excursion into TRIPS and Non-Violation Complaints

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INTRODUCTION

In late November 1999 the Ministerial Conference of the World Trade Organization, meeting in Seattle to discuss the Agenda for the Millennium Round of trade negotiations, was disrupted by protesters numbering more than 25,000 and representing a diverse coalition of environmental, labour and consumer interests.[1] At so conspicuous a gathering of global elites from business and government,[2] those left politically disaffected and socially alienated by the impact of economic globalization[3] sought to protest the naked privileging of global capital over the welfare of local communities. While the loss of local autonomy is popularly identified with the WTO as the locus global business regulation, on considering the implications of non-violation complaints made under the Agreement on Trade-Related Aspects of Intellectual Property Rights,[4] I was nonetheless surprised to find that this notoriously recondite area of GATT law may be seen as the very touchstone of the current regulatory dilemma concerning the extent to which the demands of global capital for the protection of its

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[1] See *The Battle for Seattle*, The Australian, 2 December 1999 at 1; R. Falk, *The Case for Democratic Globalization*, The Australian Financial Review, 7 January 2000, at 17.

[2] K. Van der Pijl, *Transnational Classes and International Relations*, Routledge, London, 1998.

[3] Economists define globalization narrowly in as much as the term is used to refer to "internationally integrated production": Economic Planning Advisory Commission, *Globalization: Issues for Australia*, Commission Paper No. 5, AGPS, Canberra, 1995, 3. In this sense the term "globalization" is primarily used to describe key aspects of economic transformation in the latter twentieth century: Report of the Commission on Global Governance, *Our Global Neighbourhood*, Oxford University Press, Oxford, 1995, at 10. Concerning the meaning and concept of globalization see also H. Steiger, *Plaidoyer pour une Juridiction Internationale Obligatoire*, in J. Makarczyk (ed.), in *Theory of International Law at the Threshold of the 21st Century*, Kluwer Law International, The Hague, 1998, at 824–126; and H.G. Krenzler, *Globalization and Multilateral Rules*, 1998, 4 (4), Journal of International Trade Law & Regulation, p. 144, at 145. See further J.A. Hart and A. Prakash, *Globalization and Regionalisation: Conceptual Issues and Reflections*, 1996, 6 International Trade Law & Regulation, p. 205, at 206; D. Held and A. McGrew, *Globalization and the Liberal Democratic State*, in Y. Sakamoto (ed.), *Global Transformation: Challenges to the State System*, United Nations University Press, New York, 1994, 58–59.

[4] Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Marrakesh Agreement Establishing the World Trade Organization, signed at Marrakesh (Morocco), 15 April 1994 (hereinafter the WTO Agreement), Annex 1C, Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter the TRIPS Agreement or TRIPS), reprinted in *The Results of the Uruguay Round of Multilateral Trade Negotiations—The Legal Texts*, WTO/GATT Secretariat, Geneva, 1994, 1–19, 365–403.

investments in intellectual property should be accommodated at the expense of the basic human right to life. The interpenetration of science and technology with the matrix of human and natural life means that intellectual property has become inextricably entwined with human rights in both their positive and negative senses.[5] Consequently, a catastrophe of the dimensions of the AIDS epidemic in sub-Saharan Africa will have a disproportionate impact upon the social, economic and political structure of the nation. International intellectual property law does not currently have the capacity to accommodate a national emergency of such an acute and protracted character as that where a government seeks to facilitate the import, production and distribution of life-saving drugs at affordable prices for an indefinite period of time.

In view of the fact that key decisions as to law- and policy-making regarding intellectual property have been transferred to the transnational level, we should be asking the following question: in situations which pose an imminent danger to the health of a people and the social welfare of the nation, to what extent should the "welfare economics" of the market continue to dominate public policy-making? As a matter of humanity, the answer is obvious. As a matter of law and economics, the logic does not as easily allow such a response. The concept of allocative efficiency, as embodied in the principles of most-favoured-nation (MFN) and national treatment, is concerned with the cumulative effect of resource allocation, not with the ethics of its distributive consequences. Allocative efficiency might be a necessary condition but it is not a sufficient one for the maximization of a social welfare function that includes a judgment regarding the value of various members of society. In fact, as Veljanovski stresses, inefficiency might be acceptable if it were to bring about a more ethnically appealing distribution of resources.[6]

The fact that intellectual property is now under the authority of a transnational regime, whose constitutional principles of non-discriminatory trade admit of few exceptions and even less readily of a social action agenda, only serves to exacerbate the difficulty in formulating an appropriate legal response. The comprehensive and mandatory provisions of TRIPS significantly constrain the autonomy of national legislatures to shape intellectual property laws in the public interest.[7] While TRIPS Article 31 provides for procedures that would allow for more serious curtailments of patent rights on adequate remuneration to right holders, the negotiating history of the Agreement indicates that such exceptions might typically be applied in cases of failure to work the patent, to respond to anti-competitive practices,[8] or to respond to national emergencies.[9]

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[5] See D. Campbell and N.D. Lewis (eds.), *Promoting Participation: Law or Politics?* Cavendish Publishing, London, 1999.

[6] C. Veljanovski, *The New Law and Economics*, Oxford University Press, Oxford, 1982, at 31–44.

[7] G.E. Evans, *Lawmaking under the Trade Constitution: A Study in Legislating by the World Trade Organization*, Studies in Transnational Economic Law, Kluwer Law International, London, 2000, Chap. 5.

[8] Article 31(c) and (k).

[9] Concerning the interpretation of Article 31 of the TRIPS Agreement see, *Canada—Patent Protection of Pharmaceutical Products (Canada–Patents)*, 17 March 2000, WT/DS114/R at 14, 36, 48 and 51: «http://www.wto.org».

Moreover, in as much as non-violation claims act to censure all forms of *de facto* discrimination, they would effectively reinforce the operation of free trade principles, even in the absence of a TRIPS violation. Although Uruguay Round negotiators, uncertain as to the implications of allowing non-violation claims in respect of TRIPS, placed a moratorium on such complaints, subsequent submissions concerning their scope and modalities appear not to fully appreciate the serious political and social dimensions of this issue.[10] While there is no jurisprudential obstacle to non-violation complaints under the TRIPS Agreement, such claims would effectively operate to strengthen the enforcement of intellectual property rights by means of a generalized trade instrument, and in so doing further limit the autonomy of Member States to circumscribe law and policy in the national interest. Accordingly, Section I of the article describes the status of non-violation complaints under the TRIPS Agreement, offers a possible scenario in which the complainant might seek to rely on a non-violation claim; and canvasses the kinds of arguments that have been submitted in opposition to such claims. Section II explains intellectual property as an integral part of a regime dedicated to non-discriminatory trade; Sections III and IV examine the application of non-violation complaints and their accompanying jurisprudence to the TRIPS Agreement. Section VI considers non-violation complaints under TRIPS with regard to national policy-making; and Section VII discusses whether there is a need to integrate human and socio-economic rights within the Charter of the WTO.

I. NON-VIOLATION COMPLAINTS AND THE ENFORCEMENT OF TRIPS

Under the constitution of the WTO, the world-wide implementation of the Agreement on TRIPS is administered, reviewed and enforced by the cumulative efforts of the Council for TRIPS,[11] the Trade Policy Review Mechanism and a sophisticated

[10] Communication from Canada, *Non-Violation, Nullification or Impairment under the Agreement on Trade-Related Aspects of Intellectual Property Rights*, IP/C/W/127, 10 February 1999. Communication from Kenya on behalf of the African Group, *The TRIPS Agreement, Preparations for the 1999 Ministerial Conference*, WT/GC/W/302, 6 August 1999. Minutes of Meeting, *Council for Trade-Related Aspects of Intellectual Property Rights*, IP/C/M/21, 22 January 1999. Note by the Secretariat, *Non-Violation Complaints and the TRIPS Agreement*, IP/C/W/124, 28 January 1999. Proposal from Cuba, the Dominican Republic, Egypt, Indonesia, Malaysia and Pakistan, *Non-Violation, Nullification or Impairment under the Agreement on Trade-Related Aspects of Intellectual Property Rights*, IP/C/W/141, 29 April 1999.

[11] The TRIPS Council's review process is governed by TRIPS Article 63.2, which requires WTO Members to notify the laws and regulations made effective by that Member pertaining to the subject-matter of TRIPS in order to assist the Council in its review of the operation of the Agreement. These notifications are the basis for reviews of implementing legislation carried out by the Council. In the fields of copyright and trademarks, for example, notifications were received from twenty-eight countries (mostly advanced economies) and the European Commission; in the field of patents, twenty-five countries and the European Commission filed notifications: see «www.wto.org». The notifications usually refer to the changes made to legislation in the area concerned, and contain answers to specific questions put by other Members. Those questions usually show where possible disagreements on the interpretation of TRIPS might surface: further see D. Gervais, *An Overview of TRIPS: Historical and Current Issues*, Fordham International Intellectual Property Conference, New York, 1999, at 3–4.

dispute settlement mechanism, which functions as a supranational court.[12] To date, Member States have made complaints alleging direct violation or infringement of TRIPS obligations.[13] For example, in the *United States v. India* (discussed further below in Section VI.A), the complainant claimed that India had failed to carry out its obligations under Article 70 of the TRIPS Agreement, which requires every Member State to have a means by which patent applications for pharmaceutical and agricultural chemical products can be filed and receive exclusive marketing rights.[14]

A. *Non-Violation Complaints under TRIPS*

In addition to bringing a violation complaint under Article 26.1 of the Dispute Settlement Understanding (DSU), Member States may bring a non-violation complaint of the type described in Article XXIII:1(b) of GATT 1994 as follows:

> "If any [Member] should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of ...
> (b) the application by another [Member] of any measure, whether or not it conflicts with the provisions of this Agreement.
> ...
> the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party..."

In other words, as provided in Article 26.1 of the DSU, Members may request that a panel hear the complaint under one of the Covered Agreements, GATT, the General Agreement on Trade in Services (GATS) or TRIPS, if they can show that they have been deprived of an expected benefit because of some governmental action, even if it does not violate the Agreement in question.[15] However, in so far as the application of Article XXIII:1(b) to the TRIPS Agreement is concerned, the issue was left unresolved at the conclusion of the Uruguay Round. Unable to agree on the nature and scope of non-violation claims in respect of TRIPS, negotiators were, in the end, overtaken by time. Pressed to conclude the Round, they simply placed a moratorium on such claims in order to allow further investigation. In the result, TRIPS Article 64 limits the availability of non-violation complaints in the following terms:

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[12] Mary Volcansek characterizes the WTO dispute settlement mechanism, together with the European Court of Justice, as a "supranational court" which may be distinguished from the classical institutions of international law by reason of its compulsory jurisdiction, binding decision-making and impact on individual citizens: M.L. Volcansek (ed.), *Law above Nations: Supranational Courts and the Legalization of Politics*, University of Florida, Gainesville, 1997, at 1–4, 124–126.

[13] Article 23(1)(a) of the Dispute Settlement Understanding.

[14] As of January 1995, Article 70.8 required every country, including developing countries, to have a means by which patent applications for pharmaceutical and agricultural chemical products could be filed. These applications go into a box, known as a mailbox, and if a patent is eventually granted, the patent term "will be counted from the filing date". TRIPS Article 70.9 provides that when such a patent application has been received, exclusive marketing rights shall be granted for a period of five years.

[15] According to Article 64:1 of the TRIPS Agreement, the "provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement except as otherwise specifically provided herein."

"2. Subparagraphs 1(b) and (c) of Article XXIII of GATT 1994 shall not apply to the settlement of disputes under this Agreement for a period of five years from the date of entry into force of the WTO Agreement."

During the intervening period Article 64.3 requires the TRIPS Council to examine the scope and modalities of non-violation complaints made pursuant to the TRIPS Agreement and submit its recommendations to the Ministerial Conference for approval.[16] However, as 1 January 2000 approached, the TRIPS Council received submissions from Members, representing both developed and developing States, recommending an extension of the moratorium on non-violation claims until their possible consequences were better understood. In the event, the moratorium has been allowed to lapse.

B. *Possible Scenario for a TRIPS Non-Violation Complaint*

With the aim of assessing how complainants might utilize Article XXIII:(1)(b) and how the kinds of considerations it raises might impact upon the decision-making of WTO panels, consider the following scenario:

> There is an AIDS epidemic in sub-Saharan Africa. In order to import, produce and distribute AIDS drugs at cheaper prices, in November 1997, the South African government amends the Medicines and Related Substances Control Act to permit parallel imports and compulsory licensing. Amendment 15(c) not only gives the Health Minister the right to deny patent rights but also grants to that official sweeping powers over the pricing, sale, safety and registration of medicines.
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> For its part, the U.S. pharmaceutical industry claims that the amendment constitutes an unlawful expropriation since it is discriminatory of the U.S. investment. The Pharmaceutical Manufacturers' Association, seeking remedial action at the the local level, asks the South African Constitutional Court to declare the amendment invalid. In addition, with a view to protecting its national interest in maintaining the price of pharmaceuticals, the United States initiates unilateral action under Section 301, placing South Africa on the "Watch List" of countries lacking adequate intellectual property protection and threatening trade sanctions if the situation was not suitably resolved.[17]
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> At the international level, responding to the request of the pharmaceutical industry to take its case to the WTO, the United States claims that Article 15(c) of the South African amendment abrogates patent rights and violates Article 27.1 which prohibits discrimination with respect to patentable subject-matter; and Article 28 in respect of the exclusive rights to be conferred on the patent owner. In the

[16] Any decision of the Ministerial Conference to approve such recommendations or to extend the period in paragraph 2 shall be made only by consensus, and approved recommendations shall be effective for all Members without further formal acceptance process.

[17] Further see Taylor C. O'Neal, *The Limits of Economic Power: Section 301 and the World Trade Organization Dispute Settlement System*, 30 Vanderbilt Journal of Transnational Law 209, 1997.

alternative, the United States claims, in accordance with Article XXXIII:1(b), that the South African amendment, while not inconsistent with Members' obligations under TRIPS, has the effect of impairing the benefits that it could legitimately expect under the Agreement.[18]

In response, South Africa defends its action by invoking the TRIPS exemptions under Articles 8 and 31. South African argues that the Act in question is the kind of measure Members may adopt under Article 8.1 in order "to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development."[19] In this regard it contends that the government is simply affirming the importance of public health, a value expressly recognized in Article 8.1, through promoting access to cost-effective generic medicines, while also taking account of the legitimate interests of individuals, private insurers and public sector entities that finance health care in maintaining access to affordable medicines.

The complainant reminds South Africa that any measures taken by the government under Article 8.1 are subject to the proviso that they are consistent with the provisions of the TRIPS Agreement. This stipulation demonstrates, it argues, that the public health and other public interests are to be considered subordinate to the protection of the intellectual property rights in so far as the minimum rights guaranteed by the TRIPS Agreement are concerned. However, South Africa claims that the qualification in Article 8.1 simply indicates that Members should not be subject to claims for non-violation nullification and impairment when taking measures consistent with the TRIPS Agreement in pursuit of societal interest, even where these measures could nullify and impair TRIPS' rights in some way.

Further, while the complainant concedes that TRIPS Article 31 allows Members in "case of a national emergency or other circumstances of extreme urgency", to use "the subject-matter of a patent without the authorization of the right holder", whether in fact the spread of AIDS in South Africa meets the public safety exemption in respect of compulsory licensing, is nevertheless the subject of intense dispute between the South African government and the pharmaceutical manufacturers.

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[18] The TRIPS compromise was founded on increased protection for the major exporters of intellectual property in exchange for market access for developing countries: T.P. Stewart (ed.), *The GATT Uruguay Round: A Negotiating History (1986–1992)*, Kluwer Law and Taxation Publishers, Deventer, 1993, Vol. II, 2284–2287, and 2313. See further D. Hartridge and A. Subramanian, *Intellectual Property Rights: The Issues in GATT*, 22 Vanderbilt Journal of Transnational Law 893, 1989, at 895–96; F.M. Abbott, *Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework*, 22 Vanderbilt Journal of Transnational Law, 1989, at 689; M.A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 Iowa Law Review, 1991, at 273.

[19] The December 1990 Brussels text of Article 8 was, in substance, the same as that presently contained in Article 8 with the exception that, in paragraph 1, the qualifying phrase "provided that such measures are consistent with the provisions of this Agreement" read "provided that Parties do not derogate from the obligations arising under this Agreement"; and that a similar difference was also contained in the draft of paragraph 2. On the interaction of Article 31 with Article 8 see, *Canada–Patents*, *supra*, footnote 9, at 17, 26 and 50.

As no mutually satisfactory solution is reached during consultations, the United States has requested the Dispute Settlement Body (DSB) to establish a panel to examine the matter. In the interim, Member States, representing both developed and emerging economies, have made submissions to the TRIPS Council against the use of non-violation complaints in respect of disputes involving intellectual property.

C. *Arguments Opposing Non-Violation Complaints under TRIPS*

In their submissions Member States and commentators alike have opposed the application of Article XXIII:1(b) to TRIPS for reasons ranging from the substantive, to the procedural and systemic.[20] The first argument, and the one most often advanced, is based on the fact that historically, the non-violation provision has been largely applied and interpreted in relation to tariff concessions. This line of argument seeks to distinguish the subject-matter of intellectual property from tariff concessions, and to discount existing GATT jurisprudence in regard to non-violation actions on the basis that it has been developed in the context of, and is characterized by, tariff-based claims. Thus it is argued that non-violation applies only to tariffs since (a) it is ill-adapted to inter-governmental intellectual property disputes; and (b) that the jurisprudence has evolved with reference to tariff concessions.

Second, it is said that from a procedural point of view, the non-violation provisions are a relic of the past, part of the old GATT diplomatic mode of dispute settlement now superseded by the new legalistic, rule-based system.[21] Finally, it is argued that given the generality and scope of Article XXIII:1(b), such actions could, when taken in relation to the distinct subject-matter of intellectual property, bring the dispute settlement system itself into disrepute, bringing uncertainty and unpredictability to world trade.

II. UNDERSTANDING INTELLECTUAL PROPERTY AS PART OF THE TRADE REGIME

It is submitted that the arguments advanced in opposition to non-violation complaints have largely failed to appreciate the new-found role and significance of intellectual property as part of the trade regime. Instead they reflect the distinctive conceptual bases that supported the public norms of international trade and the private norms of intellectual property in the once discrete institutions of GATT and the Great Conventions administered by the World Intellectual Property Organization (WIPO). Conceptually, arguments one and two above are based on the assumption that

[20] See, for example, K. Lee and S. Von Lewinski, *The Settlement of International Disputes in the Field of Intellectual Property*, in F.K. Beier and G. Schricker (eds.), *From GATT to TRIPS—The Agreement on Trade-Related Aspects of Intellectual Property Rights*, VCH Publishers, Cambridge, 1996, at 312 *et seq.*; E.-U. Petersmann, *Violation Complaints and Non-Violation Complaints in Public International Trade Law*, German Yearbook of International Law 175, 1991; S. Cho, *GATT Non-Violation Issues in the WTO Framework: Are they the Achilles' Heel of the Dispute Settlement Process?* 39(2) Spring, Harvard International Law Journal 312, 1998.

[21] Cho, id.

intellectual property still remains outside the compass of international trade law. Consequently, they fail to acknowledge that the linkage of trade and intellectual property during the Uruguay Round was more than simply a matter of form but, in as much as it represents the centrality of intellectual property to the new wealth of nations, sees a dramatic change in the role of intellectual property law and its impact on the constitution of the WTO.

With the conclusion of the TRIPS Agreement, the traditional subject-matter of intellectual property came under the authority of a regime that is constituted by the free trade principles of MFN and national treatment. In so far as these principles prohibit discrimination, they function to translate the theory of free trade[22] into law.[23] Their affirmation in TRIPS Articles 3 and 4 means that any Act of the national legislature may be challenged as invalid on the ground that it is discriminatory of a particular Member State's intellectual property rights.[24] In the case of violation complaints the free trade principles underpin the interpretation of TRIPS provisions. In the case of non-violation complaints their impact would be potentially even greater, since they would extend beyond the substantive text of the Agreement to further constrain intellectual property law- and policy-making at the national level in accordance with the principles of non-discrimination.

Of course, strictly following the logic of free trade theory, it might be argued, as indeed developing States argued during TRIPS negotiations, that *government* intervention to protect intellectual property should be perceived as a barrier to international trade. However, in order to maintain their dominance in the field of technology, the major proprietary States preferred to adopt the logic of "market failure" whereby they successfully promoted the view that the absence of effective intellectual property protection and the resulting loss of revenue, constituted an obstacle to their investing in foreign markets.[25] It was thus that the private became public in so far as the

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[22] The theory of free trade is inspired by the arguments of classical economists. It invokes the allocative and distributive arguments for free trade that Adam Smith formulated and David Ricardo had refined: D. Ricardo, *On the Principles of Political Economy and Taxation*, 1821, Ch. vii, in P. Sraffa (ed.), *The Works and Correspondence of David Ricardo*, Vol. 1, Cambridge University Press, Cambridge, 1953.

[23] For a discussion of how the permissive norms of liberal society translate into the constitutional law of States and facilitate the transnationalization of civil society see J.-P. Robe, *Multinational Enterprises: The Constitution of a Pluralistic Legal Order*, in G. Teubner (ed.), *Global Law without a State*, Dartmouth Publishing, Aldershot, England, 1997, 61–62.

[24] Although WTO rules contain exceptions—notably the general exceptions in GATT Article XX—designed to prevent undue encroachment on national governments' efforts to pursue legitimate economic and social policies, these exceptions require the State whose rule is at issue to prove its non-discriminatory basis; case-law shows that this can be a difficult burden. See *United States—Restrictions on Imports of Tuna*, BISD, 39th Supplement, 1993, at 155, 197. Cf scope of power within the concept of WTO non-violation nullification and impairment of benefits with the residual power of the Council to take action if action by the Community should prove necessary to attain one of the objectives of the Community: P. Pescatore, *The Law of Integration*, Sijthoff, Leiden, 1974, 41. Cf the potential use of the principles of non-discrimination by the European Court of Justice (ECJ) in interpreting the trade laws of EEC Members: E.-U. Petersmann, *Strengthening the Domestic Legal Framework*, in E.-U. Petersmann and M. Hilf (eds.), *The New GATT Round of Multilateral Trade Negotiations: Legal and Economic Problems*, Kluwer, Deventer, 1988, at 85–86.

[25] Concerning the instrumentalization of intellectual property see H. Ullrich, *TRIPS and Technology Protection*, in Beier and Schricker (eds.), *supra*, footnote 20, at 381–382.

Uruguay Round saw private rights in intellectual property promulgated comprehensively and substantively—and enforced globally—under the authority of an international trade regime; and the public became private in so far as individual rights were significantly impacted by the mandate to implement TRIPS in the domestic law of Member States.[26] This transposition of private legal norms to the sphere of public law is the true significance of the designation "trade-related". This is no term of art. Intellectual property became a negotiable item, akin to a tariff concession, that is, an instrument in the bargaining process for market entry.

It is axiomatic that, having acknowledged the significance of the linkage of trade and intellectual property, any plausible examination of the implications of non-violation claims under TRIPS must be undertaken from within the parameters of the trade regime. In Sections III, IV and V of this article it will be shown that, to the extent that each of the arguments advanced in opposition to non-violation complaints fails to do so, it is open to attack.

III. BARGAINING AND DEFENDING WORLD-WIDE MARKET ACCESS

From Bargaining Lower Tariffs to Bargaining Intellectual Property Protections

The argument that Article XXIII:1(b) was drafted to apply in relation to tariffs cannot be sustained since it misconceives the nature of the WTO as a regime of constitutional dimensions, underpinned by the principles of free and non-discriminatory trade. Admittedly, as excised from the Havana Charter, the GATT of 1947 shared a common heritage with treaties of friendship and commerce.[27] In fact, much of performance substance of GATT originated from U.S. bilateral trade agreements in the decade preceding World War II emphasizing bilateral tariff reductions and bargained-for exchange. However, with the demise of the International Trade Organization,[28] the GATT was subject to a process of constitutionalization and transformation. The limited short-term document rapidly became both the bases of the rules governing international trade and the principal organization of international trade.[29] Over a period of seven Rounds, GATT rose to control tariff and an ever increasing number of non-tariff barriers to trade. For historical reasons, therefore, most of the cases of non-violation nullification or impairment have dealt with situations where a GATT-consistent domestic subsidy for

[26] TRIPS Article 1; see further Evans, *supra*, footnote 7. See also D. Campbell, *The Hybrid Contract and the Merging of the Public and Private Law of the Allocation of Economic Goods*, in Campbell and Lewis (eds.), *supra*, footnote 5, at 45–48.

[27] In bilateral treaties of friendship, navigation and commerce (FNC treaties) States grant each other certain preferences in relation to imports and exports, rights of establishment and free movement of services, trade in general, and rights of carriage of goods by sea: H. Van Houtte, *The Law of International Trade*, Sweet & Maxwell, London, 1995, 3; further on the origins of GATT as a contractarian regime, see W.J. Feld, R.S. Jordan and L. Hurwitz, *International Organizations: A Comparative Approach*, Praeger, Westport, Connecticut, third edition, 1994, 252–254.

[28] R.E. Hudec, *The GATT Legal System and World Trade Diplomacy*, Praeger, New York, 1975, at 53–55.

[29] M. Hilf, F.G. Jacobs and E.-U. Petersmann (eds.), *The European Community and GATT: Studies in Transnational Economic Law*, Kluwer, Deventer, 1986, at 24.

the producer of a product has been introduced or modified following the grant of a tariff concession on that product; but, in view of the contemporary constitutional dimensions of the WTO, this does not in itself serve as a valid rationale for limiting the nature and scope of the action.

Moreover, in as much as international intellectual property protection now comes within the jurisdiction of a trade regime dedicated to securing the progressive opening of foreign markets, there is no inconsistency in the jurisprudence of non-violation. In the *EEC–Oilseeds* case,[30] the Panel stated that the underlying purpose of non-violation actions was to safeguard the process of reciprocal tariff concessions under Article II. If we decide to accept the instrumental logic of the regime—that intellectual property protection is simply another negotiated concession—then there is no incongruity. What the Panel said in *Oilseeds* with reference to tariffs can be applied equally *pari passu* to the trade-related aspects of intellectual property, in as much as "the idea underlying the provisions of Article XXIII:1(b) is that the improved competitive opportunities that can legitimately be expected" from intellectual property protection can be frustrated not only by measures proscribed by the TRIPS Agreement but also by measures consistent with that Agreement.

While the literature on non-violation claims seeks to distinguish TRIPS on the basis that it is concerned with the harmonisation of private rights in intellectual property as opposed to the issue of reciprocal market-access rights,[31] this is not the case, at least in so far as its political perspective does not accord with contemporary economic reality. On the contrary, intellectual property as a trade issue is all about global competition for markets. As was once the case with tariffs, intellectual property protection has become a bargaining chip to be traded against access to the sizeable markets of the United States and the European Union for the commodities of client States. In fact, TRIPS Article 7, dedicated to the objectives of the Agreement, puts this beyond doubt by failing to expressly refer to copyright, patent and trademark law, and by stating that the aim of the Agreement is "the promotion of technological innovation ... the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge".[32] If the protection of technologies by means of exclusive rights is related to the dynamics of competition, it must also correspond to the level at which the competition takes place.[33] The transfer of domestic technological production to locations in developing States in accord with the international division of labour, constitutes a threat to the supremacy of the industrialized States. As the competitiveness

[30] *European Economic Community—Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal Feed Proteins (EEC–Oilseeds)*, 1990 BISD 37S/86, 128–129, para. 144.

[31] Frieder Roessler, *The Concept of Nullification and Impairment in the Legal System of the World Trade Organization*, in E.-U. Petersmann (ed.), *International Trade Law and the GATT/WTO Dispute Settlement System*, Kluwer Law International, Deventer, 1997, 125–142; R.E. Hudec, *Regulation of Domestic Subsidies under the MTN Subsidies Code*, in Wallace, Loftus and Krikorian (eds.), *Interface Three: The Legal Treatment of Domestic Subsidies*, International Law Institute, 1984, 7; Cho, *supra*, footnote 20.

[32] Ullrich, *supra*, footnote 25, at 375–379.

[33] Ibid., at 397–399.

of foreign technological industries begins to improve, so these foreign markets must be protected commensurately with their increased potential. Proprietor States must defend their comparative advantage by seeing to the opening and protection of these new markets.

As a matter of empirical analysis, we need only consider the new content of the national treatment principle to understand that TRIPS is principally concerned with competition for world markets. Whereas non-violation claims once protected the reciprocity of tariff concessions, they would now protect the reciprocity of intellectual property concessions. The new content of national treatment makes this change in the role and function of international intellectual property protection manifest.[34] As the principle of national treatment operates within TRIPS, it has been transformed from a guarantee of functional reciprocity, as it once was within the sphere of the Great Conventions, into a principle of material reciprocity or the equivalence of intellectual property rights, in accord with which the requirement of the preservation of sovereignty is replaced by that of the adequate scope of the protection granted to a State's own citizens in another Member State. According to this standard, the adequacy of protection will be measured in terms of the size of markets lost. This is so because, as Professor Ullrich points out, the level of promotion for the purposes of Article 7 is the potential revenue of the aggregated markets of all Member States.[35] In sum, the whole trade mechanism of TRIPS may be seen as based on the mutual opening of markets as they are defined and controlled at the State level, to the effect that the optimum exchange of benefits can be achieved by Member States who have the largest domestic markets available for use in the bargaining process.[36]

IV. NON-VIOLATION JURISPRUDENCE: INTELLECTUAL PROPERTY GOES TO MARKET

Opponents of non-violation claims voice the kindred argument that non-violation jurisprudence, as it has evolved under GATT, is only appropriate in so far as it relates to tariff concessions. However, if non-violation complaints are not tariff-specific as submitted, then the general purpose of such claims must be to preserve the balance of market-access opportunities struck during multilateral negotiations. It will further be seen that, although the accompanying non-violation jurisprudence is inconsistent with the body of intellectual property law as received, it is not inconsistent with understanding non-violation complaints as an alternative means of preserving the integrity of protections negotiated during the Uruguay Round.

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[34] G.E. Evans, *The Principle of National Treatment and the International Protection of Industrial Property*, 18(3) European Intellectual Property Review, 1996, 149–160; Evans, *supra*, footnote 7, Chap. 3.

[35] Ullrich, *supra*, footnote 25, at 381–384.

[36] Ibid.

A. *Nullification or Impairment of Benefits Accruing under TRIPS*

One of the key elements needed to establish a case of non-violation nullification or impairment under Article XXIII:1(b) is the existence of a benefit accruing to a Member State under the agreement in question. The claimed benefit concerns the reasonable expectations of improved competitive or market-access opportunities arising out of that agreement.[37] For an expectation to be reasonable, the jurisprudence requires that the Member also take into account whether the measure could have been reasonably anticipated at the time of the concession.[38] Obviously, had the measure been foreseeable, there could be no legitimate expectation of improved market access to the extent of the impairment caused by the measure.[39] For example, in *Australian Subsidy on Ammonium Sulphate*,[40] the Working Party found that the withdrawal by Australia of a wartime subsidy on sodium nitrate fertilizer while maintaining a subsidy on ammonium sulphate fertilizer, although not inconsistent with Australia's obligations, nullified or impaired benefits accruing to Chile under the GATT. The Working Party agreed that impairment would exist if the Australian action which resulted in upsetting the competitive relationship between sodium nitrate and ammonium sulphate could not reasonably have been anticipated by the Chilean government, taking into consideration all pertinent circumstances and the provisions of the GATT, at the time it negotiated for the duty-free binding on sodium nitrate. The Working Party concluded that the government of Chile had reason to assume, during these negotiations, that the wartime fertilizer subsidy would not be removed from sodium nitrate before it was removed from ammonium sulphate. For these reasons, the Working Party further concluded that the Australian action should be considered as relating to a benefit accruing to Chile under the Agreement, and that it was therefore subject to the provisions of Article XXIII:1(b).

The Australian case serves to show that the key conceptual elements of a non-violation claim are those of the market in so far as the jurisprudence speaks of the benefits and expectations arising from a course of bargaining and agreement. The process of treaty-making has been likened to that of contract.[41] Contract is, above all, a vehicle for economic and financial exchange. In the particular case of non-violation claims and TRIPS, the interpolation of concepts relating to contractual undertakings and intellectual property is quintessentially incongruous. In the latter case, private rights that have a significant cultural and social dimension are being dealt with. While the common-law has traditionally emphasized the economic exploitation of intellectual property, its statutes nonetheless recognize that the subject-matter is not only concerned with returns due to publishers and producers but also about the progress of silence, the flourishing of

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[37] *Japan–Film*, WT/DS44/R, para. 10.35. See further, A. Chua, *Reasonable Expectations and Non-Violation Complaints in GATT/WTO Jurisprudence*, 32 J.W.T. 2, April 1998, 27.

[38] *Japan–Film*, ibid.

[39] *Germany–Sardines*, BISD IS/53, 58, 59.

[40] *Report of the Working Party on Australian Subsidy on Ammonium Sulphate*, (1950) BISD II/188, 192–3.

[41] See J.P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 Harv. Int'l L.J., 1999, 333; E.J. Pan, *Recent Development: Authoritative Interpretation of Agreements—Developing More Responsive International Administrative Regimes*, 38 Harv. Int'l L.J., 1997, 503.

the arts and the circulation of knowledge in society. It is precisely these cultural and social aspects of intellectual property law that sit so uneasily with its characterization as a commodity for exchange within the jurisprudence of non-violation actions.

B. *Non-Violation Jurisprudence as the Harbinger of Market Instability*

Those who oppose the extension of non-violation to TRIPS, further argue that non-violation claims, when made in relation to the highly contested subject-matter of intellectual property, could bring uncertainty and unpredictability to the entire dispute settlement system, given the generality and potential scope of Article XXIII:1(b). This argument is based on the premise that since the jurisprudence is not sufficiently discriminating there would be a large number of non-violation claims relating to TRIPS obstructing the efficient functioning of the dispute settlement system. *Prima facie*, the principal contention that non-violation claims would admit an unnecessarily large volume of cases to dispute settlement appears valid if we consider the jurisprudence relating to the term "measure". In so far as Article XXIII:1(b) requires the application of a "measure" by another Member State, GATT panels have been prepared to entertain a broad range of non-violation-based claims in order to ensure that obligations are being met in good faith.

The jurisprudence indicates that panels are open to a broad interpretation of the term "measure" for purposes of Article XXIII:1(b), in so far as they have been prepared to entertain not only laws or regulations that come within the ordinary meaning of the word, but also other governmental actions short of legally enforceable enactments.[42] Thus, non-binding actions, which include sufficient incentives or disincentives for private parties to act in a particular manner, may be considered as potentially having adverse effects on the competitive conditions of market access. For example, in the *Japan–Film* case, where the facts showed that there was substantial reliance on administrative guidance and other more informal forms of collaboration between government and business, the Panel found that non-binding, hortatory wording in a government statement of policy might have a similar effect on private actors as that of a legally binding measure. It took the view that a government policy or action need not necessarily have a substantially binding or compulsory nature for it to entail a likelihood of compliance by private actors in a way so as to nullify or impair legitimately expected benefits with the purview of Article XXIII:1(b).

However, the broad interpretation given the term "measure" is not determinative of the scope of the non-violation action as whole. It is, in fact, the concepts of "benefit" and "nullification or impairment" that play the decisive role in determining the outcome of a claim. The complainant bears the burden of providing detailed specifications of how the measure at issue causes the alleged nullification or impairment

[42] *Japan–Film*, *supra*, footnote 37.

of benefits. It cannot, therefore, be plausibly argued that the jurisprudence would fail to distinguish valid from invalid cases of non-violation. Given that the history of the action shows so few successful claims, there is little reason to believe that in respect of TRIPS, the jurisprudence would be employed with any less discrimination.

V. NON-VIOLATION CLAIMS AND THE NEW TRADE LEGALISM

As a matter of process and system, it is argued that non-violation claims have no place within the new legalistic, rule-based WTO, since they belong to the diplomatic mode of dispute settlement that prevailed under the original GATT of 1947. Once again, however, if we accept the logic of a trade regime underpinned exclusively by the principles of non-discriminatory and free trade, this argument is just as untenable as the previous ones. In fact, the issue as to whether or not non-violation claims can justifiably form part of the WTO Charter goes only indirectly to the characterization of the dispute settlement system. On the contrary, the central question and focus of this debate concerns the characterization of non-violation claims.

Discharging WTO Obligations in Good Faith

While the notion of damage, loss or detriment without some express infringement of rights is largely unfamiliar to the law of intellectual property, as a matter of customary international law, States have always been required to carry out their treaty obligations in good faith. Analogously, the private law of obligations requires the promiser to carry out its obligations in good faith. This is an adverbial notion suggesting the avoidance of sharp practice in carrying out the terms of an agreement.[43] Quite consistently, it may be argued that the real basis of non-violation claims is the doctrine of good faith. As we have seen, Article XXIII:1(b) simply refers to "a benefit accruing, directly or indirectly, under this Agreement" and does not further define or explain what benefits are referred to. WTO jurisprudence considers that such benefits constitute those that a Member may reasonably or legitimately expect to obtain from a negotiated concession on market access.[44] Admittedly, we have the vagueness inherent in establishing the system of background expectations, given that it is not susceptible to a factually identifiable specification.[45] Thus the Panel Report on *EEC–Canned Fruit* noted that "benefits accruing from bound tariffs under Article II also encompass future trading opportunities", so that "complaints by contracting parties regarding nullification and impairment should be admissible even if there was not yet statistical evidence of trade damage."[46] Consequently, in deciding whether there is nullification or impairment of

[43] C. Fried, *Contract As Promise: A Theory of Contractual Obligation*, Harvard University Press, 1981, at 74.
[44] *EEC–Citrus Products*, L/5776, not adopted, paras. 4.27–4.34.
[45] Fried, *supra*, footnote 43, at 87.
[46] Panel Report, *EEC—Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes (EEC–Canned Fruit)*, L/5778, dated 20 February 1985, not adopted.

benefits, the complaining party need not present evidence of declining trade flows, such as decreases in imports or market share, in order to prevail with its claim. Equally, the responding party cannot defeat a claim by presenting evidence of the complaining party's improving trade flows, such as increases in imports or market share. This tends to indicate that the jurisprudence is based on good faith rather than any objectively measureable standard.

Hence, in the argument concerning the inappropriateness of diplomacy as a means of dispute settlement, there is the suggestion that the imposition *ab extra* of a decision is outside the rules of the game. In this regard, the doctrine of good faith challenges the concept of the sufficiency of the text of the agreement, because it implies that duties not explicitly assumed under the agreement may nonetheless be imposed if required by good faith.[47] This makes the specification of meaning look more like a matter of choice rather than understanding, and choice, of course, is governed by values. Consequently, it appears that even where there has been an explicit agreement, it is not the agreement but judgments of fairness that define how States should behave towards each other.[48] Since the application of good faith depends on a tribunal's judgment of fairness, it seems as if trade relations are dependent not on the will of Member States but on externally imposed substantive judgments of what the relations between them should be. Such a view, of course, begs the question, to which we will turn later, as to whether WTO adjudicators should be involved in active law-making of this kind.

Notwithstanding, the question remains whether such non-violation claims are incompatible with the rule of law? I submit they are not. Nothing in the operation of the doctrine compels the conclusion that good faith in the performance of TRIPS undermines the autonomous nature of its obligations. In each case, a reasonable interpretation of the Agreement and of Members' intentions, against the background of normal practices and understandings of the kind of obligation at issue, is sufficient to provide a satisfactory resolution. The fact that we cannot be said to know beforehand of all instances that may account to an unacceptable performance of an obligation or implementation of a provision, does not mean *per se* that our designation of a novel instance is an arbitrary decision. The obligation itself determines our decision, although we cannot know that determination beforehand.[49] Hence, a decision to eliminate the non-violation claim from the WTO Charter cannot feasibly be made on the new legalistic basis of the dispute settlement system. In fact, the evolution of legal systems indicates that the converse may be argued, that the greater the commercial complexity, the more need there is that a dispute settlement system should contain the means of tempering general principles with doctrines pertaining to the discharge of obligations in good faith.

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[47] Fried, *supra*, footnote 43, at 75.

[48] A.M. Groos, *International Trade and Development: Exploring the Impact of Fair Trade Organizations in the Global Economy and the Law*, 34(3) Texas International Law Journal, 1999, 379.

[49] Fried, *supra*, footnote 43, at 87–88.

VI. NON-VIOLATION CLAIMS AS A FURTHER CONSTRAINT ON NATIONAL INTELLECTUAL PROPERTY POLICY

Thus far we have found nothing in the text of Article XXIII:1(b) or its jurisprudence that would *prima facie* present an obstacle to non-violation claims in respect of TRIPS. Nonetheless, we seem almost no closer to being in a position to make an economically and politically informed decision as to whether it would, in fact, be prudent policy to allow non-violation claims. In principle, we know that the instrument serves the estimable purpose of ensuring that Members carry out their obligations in good faith; but we also know that panels have exercised extreme caution in its application. Moreover, we know from the making and implementation of the TRIPS Agreement that intellectual property challenges the very constitution of the trade regime.[50] Empirical analysis shows that, given the unexpected creation of the WTO and reforms to the dispute settlement system, intellectual property is a highly contested area of private law that is capable of pushing the organization in new and politically uncharted directions.[51] Therefore we need to consider (a) the impact of non-violation claims on intellectual property law and policy at the national level; and (b) whether such claims might operate to unjustifiably privilege the interests of some Member States over those of others.

A. *The Impact of Non-Violation Claims at the National Level*

Non-violation jurisprudence indicates that the breadth given to the term "measures" for the purposes of Article XXIII:1(b) would allow WTO adjudicators to go beyond official statements of government policy to a consideration of informal practices that impact upon values and customs unique to a particular culture, as a potential nullification or impairment of the TRIPS Agreement. Thus, in the *Japan–Film* case, the Panel found that, in cases where there is a high degree of co-operation and collaboration between government and business, non-binding, hortatory wording in a government statement of policy—which includes sufficient incentives or disincentives for private parties to act in a particular manner—could potentially have adverse effects on competitive conditions of market access.[52] Moreover, while the result of a successful non-violation claim is a "mutually satisfactory adjustment", this is not the "soft" remedy it may ostensibly appear. For example, in the *Japan–Film* case, a successful claim would have allowed the United States to request a form of affirmative action whereby primary wholesalers handling domestic brands, including Konica's subsidiaries, were forced to deal with Kodak as a means of "mutually satisfactory adjustment". Leaving aside for present purposes the merits of the complaint's case concerning the closed nature of the

[50] Evans, *supra*, footnote 7.
[51] Ibid., Chap. 7.
[52] *Japan–Film*, *supra*, footnote 37. See also *Japan—Restrictions on Imports of Certain Agricultural Products*, where the Panel found that the informal administrative guidance used by the Japanese government to restrict production of certain agricultural products could be considered to be a governmental measure within the meaning of GATT Article XI:2 because it emanated from the government and was effective in the Japanese context.

Japanese film market, such a remedy would effectively involve the panel in the restructuring of the Japanese distribution sector. Consequently, for a panel to make such a decision on the basis of a non-violation complaint would constitute a manifest exercise in "judicial" law-making and a radical expansion of the authority presently granted it under the DSU. In view of the fact that there is currently no consensus on regulating restrictive trade practices among WTO Members, this would constitute a remedy whose legitimacy was open to challenge.[53]

Therefore, one important reason Member States might decide to disallow non-violation claims in relation to intellectual property is the potential for such claims to further erode what has traditionally been an area of law-making reserved largely to national legislatures.[54] Governments world-wide, in particular those in newly industrializing and developing Member States, are still in the course of implementing the TRIPS Agreement. As it is, TRIPS places significant restraints on the autonomy of national legislatures.[55] Its mandatory and enforceable provisions not only address all the major subject areas including copyright, neighboring rights, patents, trademarks, geographical indications, integrated circuits, industrial designs, and trade secrets,[56] but also, in unprecedented form and substance, set down detailed procedures for the enforcement of intellectual property rights. As India found, in its patent dispute with the United States,[57] the constitutional court of the WTO has jurisdiction to rule that governments must amend or repeal domestic laws that are inconsistent with world trade norms or risk the imposition of trade sanctions.[58] Therefore, as matters stand, TRIPS has a direct impact upon the political and legal options available to governments and private individuals alike. In such an unparalleled situation, we have to question the legitimacy of allowing non-violation claims in so far as they would provide panels with the means to pressure Members to amend law and policy that is *prima facie* consistent with TRIPS, in a manner that goes beyond the present watching brief of the TRIPS Council and Trade Policy Review Mechanism.

B. *Non-Violation Claims as a Generalized Instrument of Trade Policy*

The non-violation action would effectively operate as a *de facto* and generalized instrument of trade policy with the potential to further restrain the ability of governments to make legislative and administrative decisions in the national interest. In as much as non-violation claims act to censure all forms of *de facto* discrimination, Member States would have a trade policy instrument that serves to reinforce the

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[53] See further R. Dreyfuss and A. Lowenfeld, *Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together*, 37(2) Winter, Virginia Journal of International Law 276.

[54] R. Cunningham, *Sovereignty Revisited: Settlement of International Trade Disputes—Challenges to Sovereignty: A U.S. Perspective*, 24 Case Western Reserve University School of Law Canada–United States Law Journal 103, 1998.

[55] Evans, *supra*, footnote 7, Chaps. 4 and 5.

[56] Ibid.

[57] See *India—Patent Protection for Pharmaceuticals and Agricultural Chemical Products*, Report of the Panel, 5 September 1997, WT/DS50/R; Appellate Body Report, 19 December 1997, WT/DS50/AB/R.

[58] See Evans, *supra*, footnote 7, Chap. 6.

operation of the free trade principles, even in the absence of a TRIPS violation. In particular, Article XXIII:1(b) and MFN have a common purpose, since they both protect the value of concessions previously negotiated and in doing so seek to prevent an inequality of competitive conditions in international markets. In complementary fashion, the principle of national treatment serves the needs of foreign traders for equal access to legal rights and remedies in international markets by requiring that Members uniformly implement the extensive provisions of the TRIPS Agreement. Whereas TRIPS Article 1 allows Members at least a margin of discretion as to the manner of implementation, non-violation claims would act as a further constraint on the policy choices and bargaining positions open to governments. Thus, in the case of *India–Patent Protection*, in the event Article XXIII:1(b) had been available, it would have allowed the United States to complain, in the alternative, that even if India was not in breach of its obligations under Article 70, due to certain administrative measures of the Indian government, benefits the United States expected under TRIPS were nevertheless being nullified or impaired.[59]

The critical question here is whether the free trade principles of non-discrimination, underpinned by the doctrines of comparative advantage, wealth maximization and allocative efficiency,[60] are sufficient to allow prudent policy-making in respect of intellectual property at the national level.[61] Evidently not, judging from the narrow scope the Panel had in the *United States v. India* to introduce a theoretical paradigm that neither reflected the impact of patenting on a predominantly agricultural society,[62] or gave any consideration to questions of cultural relativity.[63]

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[59] Id.

[60] *An Inquiry into the Nature and Causes of the Wealth of Nations*, Liberty Fund Inc., New York, 1981, Book I, at 22–23; and Book II at 371–375.

[61] See G.E. Evans, *TRIPS and the Sufficiency of the Free Trade Principles*, 2 J.W.I.P. 5, September 1999, 707–725, arguing that the "trade bias" inherent in the WTO's dispute settlement process, in the case of adjudicated disputes as well as negotiated settlements, threatens the integrity of domestic policy; see also A.D. Smith, *Executive-Branch Rulemaking and Dispute Settlement in the World Trade Organization: A Proposal to Increase Public Participation*, 94 Michigan Law Review 1996, 1267, at 1269–1270. The principle of comparative advantage is open to many criticisms, for a public choice perspective see: P.B. Stephan, *Barbarians Inside the Gate: Public Choice Theory and International Economic Law*, 10 American University Journal of International Law and Policy, 1995, 745. See also, M. Trebilcock and R. Howse, *The Regulation of International Trade*, Routledge, London/New York, 1995, on comparative advantage at 2–4; and on public choice at 14–17. See further J.H. Bhagwati, *Challenges to the Doctrine of Free Trade*, 25 New York University Journal of International Law and Politics, 1993, 219–234.

[62] On theories of global justice and equity see: T. Cottier, *The Impact of New Technologies on Multilateral Trade Regulation and Governance*, 72 Chicago-Kent Law Review, 1996, p. 415, at 435. On the need for rich countries to compensate poor countries for the "untimely" imposition of expensive regulatory schemes, see B. Kingsbury, *The Tuna-Dolphin Controversy, The World Trade Organization and the Liberal Project of Reconceptualised International Law*, 5 *Yearbook of International Environmental Law*, Clarendon Press, Oxford, 1995, 36. Further, and more generally on institutions and problems of distributive justice see J. Rawls, *A Theory of Justice*, Oxford University Press, Oxford, 1973, 274 *et seq.*

[63] Arguing that culture is joining labour, capital and technology to become the hitherto underestimated factor of competitive production see C.R. Ezetah, *Patterns of an Emergent World Trade Organization Legalism—What Implications for NAFTA Cultural Exemptions?* 21 W. Comp. 5, September 1998, at 123–125; also see R. Müllerson, discussing cultural differences, levels of societal development and universal human rights as *Justice among Individuals and Justice among Nations*, in Makarczyk (ed.), *supra*, footnote 3, at 953. Generally, on the relationship between autonomy, justice and cultural identity see L.M. Friedman, *Introduction: Nationalism, Identity, and Law*, 28(3) Indiana Law Review, 1995, 503–508; and Z. Ziembinski, arguing that declarations concerning the ideals of justice should be supported by a consensus as to what justice among free and civilised nations actually means, in Makarczyk (ed.), ibid., at 342–349. On rethinking development policy in cultural, political and institutional terms see D. Kennedy, *The Disciplines of International Law and Policy*, 12 Leiden Journal of International Law 9, 1999, at 111–133.

C. *Weighing the Balance of Interests in Non-Violation Claims*

Notwithstanding the potential impact of non-violation claims, given the centrality of intellectual property to the creation of wealth, proprietor States will undoubtedly urge the retention of Article XXIII:1(b) in so far as it has the capacity to bring allegedly discriminatory trade practices under global scrutiny. In fact, the origins and nature of the TRIPS Agreement itself will serve to justify the avowed need for such a generalized instrument of trade policy. For TRIPS may be seen as a strategic move carried out using trade policy instruments, in which the industrialized countries, on the basis of their own wealth and market strength, have determined the conditions of the competition between themselves and their future commercial rivals in the industrializing world.[64] Further, in accord with the traditional approach, TRIPS premises the international protection of intellectual property upon the principle of territoriality, as evidenced by Article 1(3), mandating that each Member accord the substantive *minima* set down in the Agreement to the nationals of other Members.[65] In turn, the principle of territoriality permits the State with the largest internal market the twofold advantage of not only being able to reap the most benefits from the protection and exploitation of intellectual property, but also to expediently use the size of its market as leverage in trade policy disputes.[66]

In accordance with this logic, it makes perfect sense for proprietor States to continue to advocate the use of trade policy instruments in order to ensure that client States do not, by some unforeseen means, escape their obligations under TRIPS, and to secure compliance on the most favourable terms possible.[67] After all, in the period prior to the conclusion of TRIPS, Section 301 proved most effective not only in raising international awareness of the need for such an Agreement, but also in achieving a marked increase in the level of protection and market access in South America and the Asia Pacific Region.[68] Analogously with Article XXIII:1(b), under Section 301

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[64] A. Samuel Oddi, *TRIPS—Natural Rights and a "Polite Form of Economic Imperialism"*, 29(3) Vanderbilt Journal of Transnational Law, 1996, 415; M. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29(3) Vanderbilt Journal of Transnational Law, 1996, 613.

[65] J.H. Reichman, *Universal Minimum Standards of Intellectual Property Protection under the TRIPS Component of the WTO Agreement*, in C.M. Correa and A.A. Yunst (eds.), *Intellectual Property and International Trade—The TRIPS Agreement*, Kluwer Law International, Deventer, 1998.

[66] Ullrich, *supra*, footnote 25, at 383.

[67] A. Otten and H. Wager, *Compliance with TRIPS: The Emerging World View*, 29(3) Vanderbilt Journal of Transnational Law, 1996, 391; J.H. Reichman and D. Lange, *Bargaining Around the TRIPS Agreement: The Case for Ongoing Public-Private Initiative to Facilitate Worldwide Intellectual Property Transactions*, 9 Duke Journal of Comparative & International Law, 1999, 13–67; J.H. Reichman, *Compliance with the TRIPS Agreement: Introduction to a Scholarly Debate*, 29(3) Vanderbilt Journal of Transnational Law, 1996, 363; *idem, Beyond the Historical Lines of Demarcation: Competition Law, Intellectual Property Rights, and International Trade after the GATT's Uruguay Round*, 20(1) Brook J. of International Law, 1993, 75.

[68] See K. Chang, *Super 301 and Taiwan: A Case Study of Protecting U.S. Intellectual Property in Foreign Countries*, 15 Northwestern Journal of International Law and Business, 1995, p. 206, at 213; C. Antons, *Intellectual Property in ASEAN Countries: A Survey*, 3 European Intellectual Property Review, 1991, at 78–84; C.-S. Yang and J.Y.C. Chang, *Recent Development in Intellectual Property Law in the Republic of China*, 13(1) Pacific Basin Law Journal, 1994, 70–86; D. Dessler, *China's Intellectual Property Protection: Prospects for Achieving International Standards*, 19 Fordham International Law Journal, 1995, 181–246; but note J.R. Floum, *Counterfeiting in the People's Republic of China*, 28 J.W.T. 5, October 1994, p. 36, at 58–59, stressing that, while intellectual property protection is necessary to trade and investment in China, they have little cultural grounding or general acceptance.

petitioners may seek relief that is broadly based on the "unreasonable", or "discriminatory" acts, policies or practices of foreign governments.[69] The possibility of also making a non-violation claim would allow major proprietary States and transnational corporations to defend their intellectual property rights as equally aggressively as they have done in initiating violation actions.

VII. Integrating Human and Socio-Economic Rights within the Global Economic Community of the WTO

In the aftermath of the Seattle protests, it would further damage the political credibility of the WTO if powerful proprietary interests were to bring a non-violation claim in respect of weak or non-existent intellectual property protection involving particularly sensitive areas of national policy pertaining to health and security.[70] In the event that a developing State has to contend with problems of severe social or economic dislocation, its intellectual property policy might well come into conflict with the unqualified pursuit of increasing economic efficiency, and in so doing upset the competitive relationship between domestic and imported products in a way that could give rise to an Article XXIII:1(b) claim.

No doubt recognizing its delicate relationship with national economic and social policy, former GATT panels traditionally approached this remedy with caution and, indeed, have treated it as an exceptional instrument of dispute settlement. Although the non-violation complaint is an important and accepted tool of dispute settlement there have only been eight cases in which panels have substantively considered Article XXIII:1(b) claims.[71] Uruguay Round negotiators, similarly aware of the scope and potential damage Article XXIII:1(b) might cause the dispute settlement system, sought to codify its jurisprudence within the DSU.[72] In addition, the European Union, no doubt cognizant of the potential within non-violation claims for "judicial" rule-making,

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[69] The Trade Act of 1974, as amended by the Omnibus Trade and Competitiveness Act of 1988, allows the United States Trade Representative (USTR) to investigate a wide variety of perceived "unfair" trade practices on an expedited basis; further concerning Section 301 see J.C. Bliss, *The Amendments to Section 301: An Overview and Suggested Strategies for Foreign Response*, 20 Law & Policy in International Business, 1988–89, 501–528. The EC has a similar trade policy instrument which is designed to afford private petitioners the opportunity to complain of foreign unfair trade practices. However, Reg. No. 2641/84 primarily seeks to protect the Common Market against foreign unfair trade practices, and securing access to export markets for Community industries appears to be a secondary concern: see Council Regulation 2641/84 EEC O.J. Eur. Comm. (No. L 252) 1 (1984).

[70] S. Charnovitz, *Symposium: The Universal Declaration of Human Rights at 50 and the Challenge of Global Markets: Trading Away the Human Rights Principle*, 25 Brooklyn Journal of International Law, 1999, 113; R. Galli (ed.), *Rethinking the Third World: Contributions Toward a New Conceptualization*, Taylor & Francis, New York, 1992; and see generally A. Carty (ed.), *Law and Development*, Dartmouth, England, 1992.

[71] See Note by the Secretariat, *Non-Violation Complaints and the TRIPS Agreement*, IP/C/W/124, 28 January 1999, at 9–10.

[72] Article 26.2 of the non-violation action is "on the table" from the Uruguay Round. Attempts in the Uruguay Round to specify the possible scope of its application did not come to fruition. Initially, negotiators considered clarifying the requirements for invoking non-violation complaints in the dispute settlement understanding including an explanation of "reasonable expectation": see "Understanding on the Interpretation and Application of Article 22 and 23 of the General Agreement on Tariffs and Trade (Draft Understanding)" which was part of the "Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (Brussels Draft Final Act; Stewart (ed.), *supra*, footnote 18, 785–786.

proposed denying complainants leave to appeal, allowing recourse only to arbitration. In the event, although unsuccessful in their attempts to reach agreement on matters of codification or appeal, the caution of negotiators is reflected procedurally in the decision to retain the requirement for a positive consensus before a panel report is adopted in the singular case of non-violation complaints.[73]

While it is well to retain such precautionary measures, the WTO will find it increasingly difficult to sustain a trade policy in respect of intellectual property which fails to take account of economic problems that also involve basic and universal human rights. In addition, complex legal and ethical questions associated with the economic development and the distribution of pharmaceuticals or the application of biotechnological techniques to agriculture, will require new ways of thinking about the legal integration of economic with social policy goals.[74] In the beginning this might be achieved with relatively small steps and modest proposals, such as elaborating the exemptions in Article 31 to include, for example, a non-exclusive list of situations considered to constitute a national emergency. Nonetheless, given the complexity of a global society, it is arguable that international jurisprudence needs to move beyond the current dichotomy between intellectual property and human rights to the more mature kind of philosophical enquiry characteristic of national legal phenomena.[75] For in the end, law- and policy-makers must work to bring human rights, where necessary redefined as socio-economic rights,[76] at present marginalized as a kind of Esperanto, into the global economic community of the trade regime.[77]

CONCLUSION

The foregoing analysis has shown that while there is no jurisprudential obstacle to non-violation claims in respect of the TRIPS Agreement, to allow such complaints effectively gives powerful proprietary interests a generalized instrument of trade policy which will, even in the absence of an infringement, operate as a serious restraint on the ability of governments to address problems of social and economic dislocation. In view of the current democratic deficit in WTO law-making,[78] popularly manifested in the

[73] D. Palmeter and P. Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure*, Kluwer Law International, London, 1999; J. Croome, *Guide to the Uruguay Agreement*, Kluwer Law International, The Hague, 1999; Petersmann (ed.), *supra*, footnote 31; E.-U. Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations, and Dispute Settlement*, Kluwer Law International, London, 1997.

[74] H. Gensler, *Ethics, A Contemporary Introduction*, Routledge, London, 1998.

[75] T. Franck, *The Power of Legitimacy Among Nations*, Oxford University Press, Oxford, 1990, at 8–9.

[76] M. Seneviratne, *The Case for Social and Economic Rights*, in D. Campbell and N.D. Lewis (eds.), *Promoting Participation: Law or Politics?* Cavendish Publishing, London, 1999, at 272–276.

[77] F. Garcia, *Symposium: The Universal Declaration of Human Rights at 50 and the Challenge of Global Markets: Trading Away the Human Rights Principle*, 25 Brooklyn Journal of International Law, 1999, 51; see also J.L. Dunoff and J.P. Trachtman, *Economic Analysis of International Law*, 24(1) Winter, The Yale Journal of International Law, 1999, 1.

[78] See generally Evans, *supra*, footnote 7. See further, T. Risse-Kappen, *Bringing Transnational Relations Back In: Non-State Actors, Domestic Structures and International Institutions*, Cambridge University Press, Great Britain, 1995; J. Rosenau and E.-O. Czempiel (eds.), *Governance without Government: Order and Change in Politics*, Cambridge University Press, Cambridge, England, 1992.

Seattle protests, as a matter of priority law- and policy-makers should act expeditiously during the Millennium Round to redress the balance of legal rights and their incumbent social responsibilities, particularly in regard to the developing world, by seeking to integrate human and socio-economic rights within the interstices of the TRIPS Agreement.[79]

[79] L.R. Helfer, *Adjudicating Copyright Claims under the TRIPS Agreement: The Case for a European Human Rights Analogy*, 39 Harv. Int'l L.J., 1998, 357.