

INTERPRETING THE DOCTRINE OF LEGITIMATE EXPECTATIONS IN WTO JURISPRUDENCE

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INTRODUCTION

The doctrine of legitimate expectation is one, which resides at the heart of international law. It has also been evidenced to be an emerging principle in World Trade Organization law.¹ In the context of the general principles of international law, it is used to determine the consistency of domestic measures taken by a party to a treaty as part of a balance of rights and obligations or to observe a duty by not damaging the fundamental interests of another party to the agreement.² It is largely an accepted axiom that promises, practices, and policies form the basis of this doctrine.³ A party can be said to have legitimate expectations when two elements are present. *First*, pursuant to conduct when those expectations are justifiable and legitimate in the light of the relevant conduct and other circumstances; and *second*, when the first party acts in reliance on the conduct of the second party and for the second party not to continue to honour those legitimate expectations would result in damage to the interests of the first party.⁴

¹ Appellate Body Report, *Japan –Alcoholic Beverages II*, ¶ 13, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996). [hereinafter JAPAN – ALCOHOLIC BEVERAGES II]. Panel Report, *Japan - Measures Affecting Consumer Photographic Film and Paper*, ¶ 1050, WT/DS44/R (March 31, 1998). [hereinafter JAPAN-FILM CASE]. See also 1 WTO ANALYTICAL INDEX: GUIDE TO WTO LAW AND PRACTICE 283 (Cambridge: Cambridge University Press, 2nd ed. 2007).

² Laurent Ruessmann, *The Place of Legitimate Expectations in the General Interpretation of the WTO Agreements* (Institute for International Law, Working Paper No 36: Leuven, December, 2002) footnote 5, explaining that legitimate expectation falls under good faith interpretation. See also IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 640-642 (Oxford: Clarendon Press, 1990).

³ Joseph Raz, *Promises and Obligations*, in *LAW, MORALITY AND SOCIETY: ESSAYS IN HONOUR OF HLA HART* 219 (Peter Hacker et Joseph Raz eds., Oxford, New York: Oxford University Press, 1977).

⁴ International Court of Justice decision in the *El Salvador - Honduras Land, Island and Maritime Frontier Case*, [1990] I.C.J. Rep., 92, 118 in 1 ROBERT JENNINGS AND ARTHUR WATTS, *OPPENHEIM'S INTERNATIONAL LAW* 527 (Peace, Harlow-UK: Longman, 1992).

There have been fundamental differences within the WTO system with respect to the distinction that can be drawn between these two concepts. While the panel in *Japan-Film* case emerged the concept of “legitimate expectation” with that of “reasonable expectation”, the Panel in *Korea-Measures Affecting Government Procurement*, accepted the usage of both terms interchangeably.⁵ However, in *EC-LAN*, the AB reversed the Panel’s findings when the panel had confused the concept legitimate expectations with that of reasonable legitimate expectations.⁶ A further look at the findings of the Panel and AB, it can be reasoned that as a matter of WTO jurisprudence, the non-violation nullification and impairment provisions protect “legitimate expectations” as opposed to the “reasonable legitimate expectation”.⁷

FRAMEWORK FOR NON-VIOLATION COMPLAINTS WITHIN THE WTO REGIME

Resolving trade disputes is one of the core functions of the WTO. The WTO DSU mandates member states to submit their complaints under the procedure and mechanism delineated in the Marrakesh Agreement. So, where any WTO member adopts a trade policy measure or takes some action that are inconsistent with the obligations of that member, or contrary to the overriding objectives of the WTO agreements, and its principles members are free to initiate proceedings after consultations. As a prescriptive matter, there are two types of complaints which play a practical role in the WTO dispute settlement process. These are the violation complaint and, far less frequently, the NVC.⁸

There are three main WTO provisions of relevance to NVCs and the TRIPS agreement: 1) Article XXIII of GATT 1994; 2) Article 64 of the TRIPS agreement; and 3) Article 26 of the DSU. The basic provision governing “non-violation” and “situation” complaints are

⁵ The Panel in *Korea-Measures Affecting Government Procurement*, ¶ 7.75, WT/ DS163/R (May 1, 2000) [hereinafter KOREA-PROCUREMENT CASE].

⁶ The Appellate Body Report in *EC – Customs Classification of Certain Computer Equipment*, ¶¶ 80-111, WT/DS62/AB/R (Jun. 5, 1998) [hereinafter EC-LAN].

⁷ The Panel Report, *EC – Measures Affecting Asbestos and Products Containing Asbestos*, ¶ 8.285, WT/DS135/R (Sept. 18, 2000). [hereinafter EC-ASBESTOS]. The Panel Report, *EC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins*, ¶¶ 80-88, DS28/R (31 Mar. 31, 1992). [hereinafter EC-OILSEED]. EC – LAN, *supra* note 10, paras. 83–84. The Panel Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, ¶¶ 45-62, WT/DS50/R (Sept. 5, 1997). [hereinafter INDIA-PATENT]. The Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, ¶¶ 125-127, WT/ DS75/AB/R (Jan. 18, 1999), paras. 125–127. [hereinafter KOREA ALCOHOLIC BEVERAGES] KOREA –PROCUREMENT, *supra* note 9, para. 7.9ff and 7.75.

⁸ WORLD TRADE ORGANISATION SECRETARIAT. A HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM 35 (Cambridge, Cambridge University Press, 2004). [Hereinafter HANDBOOK ON THE WTO DSU]

established in Article XXIII of GATT 1994. The aim of NVCs is very simple: to generally preserve the balance of benefits struck during multilateral negotiations.⁹

Article 64.1 of the TRIPS agreement incorporates by reference Article XXIII of the GATT 1994 as the general dispute settlement provision governing the TRIPS agreement, however, the TRIPS establishes a *moratorium* on the application of the non-violation remedy to the agreement, and commits WTO members to examine how the concept might apply in the context of the TRIPS agreement. Article 26.1 of the DSU specifically addresses NVCs in the sense of Article XXIII:1(b) of GATT 1994 and requires the complainant to 'present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement'.¹⁰ No presumption applies in non-violation cases as regards nullification or impairment. The text of Article XXIII:1(b), combined with the concept of nullification or impairment of a benefit gives rise to three conditions whose existence a complainant must establish, in order to be successful with a NVC.¹¹ These three conditions are:

- the application of a measure by a member of the WTO;
- the existence of a benefit accruing under the applicable agreement; and
- the nullification or impairment of a benefit as a result of the application of the measure.¹²

While some WTO members have in the past relied on the principle of legitimate expectation as the basis of claiming a nullification or impairment of a benefit as a result of the application of a measure,¹³ the WTO suggests that it would be wrong to believe that the NVC has a wide scope of application and is suitable to address all sorts of measures otherwise consistent with GATT 1994 and the other covered agreements.¹⁴ The members have agreed not to use non-violation claims under the TRIPS regime, although such claims remain consistent with the WTO law. Pursuant to Article 64(2), this *moratorium* was initially intended to last for the first five years of the WTO (i.e. 1995–99), but has since been extended.¹⁵ However, certain members (the US and Switzerland) recently advanced the argument that NVCs should be allowed in order to discourage members from engaging

⁹ JAPAN – FILM CASE, *supra* note 1, para. 10.50.

¹⁰ HANDBOOK ON THE WTO DSU, *supra* note 18, at 33.

¹¹ JAPAN-FILM CASE, *Supra* note. 1, para. 10.32.

¹² *Ibid.* para. 10.41.

¹³ INDIA –PATENT, *supra* note 9, paras. 42, 45 and 48.

¹⁴ HANDBOOK ON THE WTO DSU, *supra* note 18, at 33.

¹⁵ Thomas Cottier, and Krista Schefer, *Good Faith and the Protection of Legitimate Expectations in the WTO*, in NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW 49 (Marco Bronckers and Reinhard Quick eds., The Hague: Kluwer Law, 2000).

in “creative legislative activity” that would allow them to get around their TRIPS commitments.¹⁶

THE CONCEPT OF REASONABLE LEGITIMATE EXPECTATIONS

Over the last century there has been a major transformation in the international trading regime. This necessitated a regulatory mechanism that would also include settling disputes among members.¹⁷ With the WTO establishing a framework for trade policies,¹⁸ dispute settlement has been one of the key functions of the organization.¹⁹ Interpretation of WTO agreements is at the center of dispute settlement since most disputes involve questions of law relating to clarification of the relevant rules governing relationships between members.²⁰ Article 3.2 of the DSU recognizes that interpretative issues that arise in WTO dispute settlements should be resolved through the application of customary rules of interpretation of public international law.²¹ The panel in *Korea – Procurement* held that the customary rules of international law apply to WTO treaties, and to the process of treaty formation under the international trading regime in defining the economic relations between members.²² This reflects a measure of recognition that the general agreements embodied under the WTO are not to be read in clinical isolation from public international

¹⁶ Communication from the United States, Scope and Modalities of Non-Violation Complaints Under the TRIPS Agreement, IP/C/W/194 (July 17, 2000) at 7, Appendix, under the subheading ‘Legal Basis for the Position of the US Regarding Expiration of the “Moratorium” on Non-Violation Cases’. see Minutes of the Council for TRIPS Meeting (Geneva, meeting held on Mar. 8-9 and 31, 2005) IP/C/M/47, para. 238; IP/C/M/49, para. 230; IP/C/M/64 - Meeting held on Oct. 26-27, 2010, para. 312; IP/C/M/67 - Meeting held on Oct. 26-27 and Nov. 17 2011, para. 252.

¹⁷ Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes. Marrakesh Agreement Establishing World Trade Organization, Annex 2, Apr. 15, 1994. THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, 1869 U.N.T.S. 401, 33 I.L.M. 1226. [hereinafter DSU].

¹⁸ Bernard Hoekman, *The WTO: Functions and Basic Principles in DEVELOPMENT, TRADE AND THE WTO: A HANDBOOK* 42 (Bernard et al., eds., World Bank, 2002), noting that the WTO is concerned with setting the rules of the trade policy games.

¹⁹ Fabien Gelinas, Dispute Resolution as Institutionalization in International Trade and Information Technology, 74 FORDHAM L. REV. 2, 503 (2005), stating that by all accounts, the success of the WTO is largely due to the success of its dispute settlement system.^[SEP]

²⁰ Andrew Guzman and Beth Simmons, Power Plays & Capacity Constraints: The Selection of Defendants in WTO Disputes, 34 J. Legal Stud. 2, 558 (2005).

²¹ Appellate Body Report, *US - Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, ¶ 61, 62 WT/DS213/AB/R, WT/DS213/AB/R/Corr.1 (Nov. 28, 2002)

²² The Panel in *Korea – Measures Affecting Government Procurement*, ¶ 7.75, WT/ DS163/R (May 1, 2000) [hereinafter KOREA-PROCUREMENT CASE].

law. This reasoning accommodates the practical doctrine that aims to protect reasonable legitimate expectations. Thus, for the sake of consistency and legitimacy, the doctrine of protection of legitimate expectations is considered to be a dominant element or one of the major components of the standards of fair and equitable treatment of a treaty.²³ More significantly, it is well settled in WTO case law that the principles codified in Articles 31 and 32 of the VCLT make up such customary rules, and must be respected and applied in interpreting the TRIPS agreement. Subsequently, the changes brought by TRIPS pursuant to strict patent protection have pushed the trading system into new and difficult directions to the detriment of developing countries.²⁴ Therefore, it is important to consider some decisions of the WTO/DSU and the question of whether the doctrine of legitimate expectations can be interpreted in a way that might operate to justifiably limit the rigidity of IP law to privilege the interests of developing country members over developed countries, or at least balance their mutual legitimate expectations.

Reasonable Legitimate Expectations in *Japan-Film*

On 13 June 1996, the US requested consultations with Japan concerning Japan's laws, regulations and requirements affecting the distribution, offering for sale and internal sale of imported consumer photographic film and paper. The US alleged that the measure at issue - the Japanese Government treated imported film and paper less favorably through these measures, in violation of GATT Articles III and X, and that these measures nullify or impair benefits accruing to the US (a non-violation claim) within the meaning of Article XXIII:1(b) of GATT.²⁵ In response, Japan contested the foregoing allegation under the following: first, Japan contended that any interpretation of GATT should be in accordance with customary rules under Article 3.2 of the DSU, which refers to the general principles of interpreting WTO agreements as part of public international law.

Second, Japan urged the panel to take a cautious approach and refrain from adding to or diminishing the rights and obligations of members under WTO agreements in accordance with Articles 3.2, and 19.2 of the DSU that provides for the same principle with respect to the findings and recommendations of panels and the AB.

²³ Saluka Investments BV v. The Czech Republic, ¶ 302, UNCITRAL-PCA (Partial Award, Mar. 17, 2006); Generation Ukraine, Inc. v. Ukraine, ¶ 20.37 (ICSID Case No. ARB/00/9, Award, Sept. 16, 2003); EDF (Services) Limited v. Romania, ¶ 216 (ICSID Case No. ARB/05/13, Award, Oct. 8, 2009).

²⁴ Gail Evans, A Preliminary Excursion into TRIPS and Non-Violation Complaints, 3 JWIP 6, 871-972 (2000) SEP.

²⁵ Appellate Body Report, *Japan – Alcoholic Beverages II*, ¶ 13, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996). [hereinafter JAPAN – ALCOHOLIC BEVERAGES II]. Panel Report, *Japan - Measures Affecting Consumer Photographic Film and Paper*, ¶ 1050, WT/DS44/R (March 31, 1998). [hereinafter JAPAN-FILM CASE]

Furthermore, Japan submitted that the scope of Article XXIII:1(b) in the GATT jurisprudence is well defined, and may be discerned by reference to key expressions in the text of the provision taking into account that there must be a “benefit” accruing under the agreement. This “benefit” consists of the legitimate expectations of opportunities arising out of relevant concessions. For expectations to be legitimate, they must take into account all measures that a party making the concession could impose subject to being reasonably anticipated at the time of the concession.²⁶ There must be the application of a “measure” by another WTO member, wherein the term “measure” refers to a government policy or action.²⁷ “Measures” under the abovementioned Article must either provide “benefits” or impose obligations. The complaining party must show that the “benefit” in question is being “nullified or impaired” as the result of the application of the “measure”.

The Panel examined that giving a broad definition to measure does not expand the scope of the Article XXIII:1(b) remedy, and should not be defined in an unduly restrictive manner. It was noted that the term “measure” in Article XXIII:1(b) and Article 26.1 of the DSU ‘refers only to policies or actions of governments, not those of private parties’.

The Panel’s analysis of the foregoing elements underscores the link between the legitimacy of any expected benefit and whether any measure thereof would have been reasonably anticipated. If the measures were anticipated, a member could not have had a legitimate expectation of improved market access to the extent of the impairment caused by these measures. Therefore, the broad interpretation given the term “measure” is not determinative of the scope of the non-violation action as a whole.

Reasonable Legitimate Expectations in *India-Patent Protection*

Prior to the *India – Patent*,²⁸ certain GATT practices such as conditions of competition, internal measures on quantitative restrictions, tariff commitments, and concessions had all helped to establish broadly two concepts to protect legitimate expectations: the protection of competitive relationship expectations in the context of violation complaints (under Article XXIII:1(a) of GATT) involving Articles III and XI of GATT; and the protection of legitimate expectations relating to market access concessions in the context of NVCs (under Article XXIII:1(b) of GATT) (to protect reciprocal Article II tariff concessions). The panel dealt with the provisions of TRIPS in a situation outside the scope of the two specific concepts developed earlier.

²⁶ John Jackson, *The WTO Dispute Settlement Procedures: A Preliminary Appraisal in THE WORLD TRADING SYSTEM: CHALLENGES AHEAD* 163 (Jeffrey Schott ed., Washington D.C., Peterson Institute for International Economics, 1996)

²⁷ JAPAN-FILM CASE, *supra* note 1, para 6.15

²⁸ INDIA – PATENTS CASE, *Supra* note. 9.

The measure at issue: (i) India's "mailbox rule" – under which patent applications for pharmaceutical and agricultural chemical products could be filed; and (ii) the mechanism for granting exclusive marketing rights to such products. It was alleged that the measure does not make patent protection available for inventions concerning pharmaceutical and agricultural chemical products as provided in Article 27 of the TRIPS agreement, nor does it provide rules that conform to obligations of the TRIPS agreement regarding the acceptance of applications and the grant of exclusive marketing rights. As a consequence, it was alleged that India's legal regime or measure remains inconsistent with its obligations under the TRIPS agreement. To interpret the TRIPS provisions at issue, the panel sought to protect legitimate expectations on the basis of customary rules of public international law- specifically, the rule of interpreting international instruments in "good faith", stating that "good faith interpretation requires the protection of legitimate expectations derived from the protection of intellectual property rights provided for in the Agreement."²⁹ The panel reasoned that India has not complied with its obligations under Article 70.8(a) and, in the alternative, paragraphs 1 and 2 of Article 63 of the TRIPS agreement, because it has failed to establish a mechanism or "means" that adequately preserves novelty and priority in respect of applications for pharmaceutical and agricultural chemical product patents under Article 65 of the agreement, and to publish and notify adequately information about such a mechanism; and that India has not complied with its obligations under Article 70.9 of the TRIPS agreement,³⁰ because it has failed to establish a system for the grant of exclusive marketing rights.³¹ The panel on that basis concluded that India's mailbox application system for patents was in violation of the TRIPS rules. One of the reasons for that finding was that the Indian system did not protect the legitimate expectations of other WTO members. The panel interpreted the doctrine of protection of legitimate expectations in line with the right of patentees. Thus, its interpretation is consistent with the letter as opposed to the spirit of law as this account truly rejects the legitimate expectations of the public on the basis of good faith application of the law.

Although India lost on the substance claim, on appeal, the AB overturned one of the panel's core reasoning on a matter of law. The AB rejected the panel's use of a legitimate expectations standard, which derives from the non-violation concept, as a principle of interpretation for the TRIPS agreement.³² The AB based its conclusion on the following: (i) the protection of legitimate expectations is not something that was used in GATT practice as a principle of interpretation; and (ii) the panel's reliance on the Article 31 of the

²⁹ *Id.*, para 7.18.

³⁰ *Ibid.* paras 6.34 and 7.60.^[SEP]

³¹ *Ibid.* para 6.67.^[SEP]

³² Appellate Body Report, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, ¶ 48, WT/DS50/AB/R (Dec. 19, 1997).

VCLT for its legitimate expectations interpretation was not correct because the 'legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself.

From a developing country perspective, the AB's decision is particularly interesting because it limits the scope of TRIPS obligations, thus pre-empting possible policy freedom available to India to determine the appropriate method of implementing its obligations under the TRIPS agreement within the context of its own legal system³³ to promote the public interest, which remains a central principle underpinning the Indian patent system.

Reasonable Legitimate Expectations in the *EC-LAN*

EC-LAN involved an alleged violation of Article II of GATT 1994 that prohibits members from applying tariffs inconsistent with their schedule of concessions. The AB approved of the panel's examination of the context of the object and purpose of the WTO agreement; of which the legitimate expectations are an integral part.³⁴ The report of the AB reversed the findings of the panel that the US was entitled to legitimate expectations.³⁵

EC had argued that the existence of a common intention forms the basis for the mutual consent of the signatories to be bound by an international agreement. This common intention finds its authentic expression in the text of the treaty, not in the subjective expectations of one or other of the parties to the agreement. In the view of the EC, the balance of mutual concessions among members, which is the result of the successive rounds of negotiations in the framework of the GATT/WTO, would be severely upset if the legitimate expectations of one member would, through the principle of Most Favored Nation, apply to all other members whose balance of reciprocal concessions was based on substantially different and variable legitimate expectations.³⁶ Consistently, the legitimate expectation according to the AB of members is consistent with the principle of good faith under Article 31 of the VCLT.³⁷ The AB characterized legitimate expectations to be beyond the realm of the principle of good faith if such expectations were unilaterally based on the subjective interpretations of one party to a treaty, rather than an objective, ascertainable conduct of parties. This understanding persuasively questions the validity of subjective expectation of the US, which in particular, consistently attempts to put pressure on developing countries to abandon the use of compulsory licenses to obtain affordable medicines for public health protection.³⁸

³³ AB INDIA-PATENT, *Supra* note. 9, para 59.

³⁴ The Appellate Body Report in *EC – Customs Classification of Certain Computer Equipment*, ¶¶ 80-111, WT/DS62/AB/R (Jun. 5, 1998) [hereinafter *EC-LAN*].

³⁵ *Id.*

³⁶ *Ibid* para 16.

³⁷ *Ibid* para 32.

³⁸ Thaddeus Manu, *Essential Medicines and the Complexity of Implementing Nationally Based*

TRIPS AND THE ISSUE OF “BENEFITS” DERIVED FROM MARKET ACCESS

Article XXIII: 1(b) of the GATT simply refers to any “benefit” accruing, directly or indirectly, under the agreement. Nevertheless, it does not further define or explain what “benefits” are referred to.³⁹ Significantly, WTO law considers that such “benefits” constitute those that a member may reasonably or legitimately expect to obtain from a negotiated concession on market access.⁴⁰

Remarkably, while existing decisions on the non-violation remedy in the GATT context provide a useful framework for the overall analysis, nevertheless, they are of limited use in defining “benefits” in the context of TRIPS.⁴¹ The concept of a “benefit” under TRIPS is very different from that in the GATT perspective. The idea of “benefits” is more obscure in TRIPS than in GATT, which embodies specific market access commitments. As a *sui-generis* agreement that establishes minimum standards of IP protection, TRIPS facilitates IP rights, and thus it can be argued that the agreement is not a market access arrangement as such, as it is concerned with rights associated with products and not products *per se*.⁴²

However, it must be noted that IP rights have tremendous impact on market access. Therefore, it can also be argued that TRIPS is a market access agreement because it helps reduce market distortions that existed prior to its negotiation by establishing adequate minimum standards regarding the availability, scope and use of trade-related IP rights, and by ensuring effective and appropriate means for the enforcement of those rights.⁴³ The perception of differences between the agreements governing market access (GATT and

Compulsory Licensing: On the Need for a Regional System of Compulsory Licensing in Sub-Saharan Africa, 36 E.I.P.R 1, 47 (2014) ^[L]_{SEP}

³⁹ The Panel Report, *EEC-Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region (EEC-Citrus)*, ¶ 4.27, 4.34, L/5776 (Feb. 7, 1985 [not adopted]).

⁴⁰ Further Consideration of Non-Violation Nullification or Impairment Under the Agreement on Trade-Related Aspects of Intellectual Property Rights. Communication from Canada. Council for TRIPS, ¶ II(B), IP/C/W/249 (Geneva, Mar. 29, 2001).

⁴¹ Council for Trade-Related Aspects of Intellectual Property Rights, Minutes of Meeting, ¶ 223, IP/C/M/29 (Geneva, meeting held on Nov. 27-30 and Dec. 6 Dec. 2000) [Restricted].

⁴² Council for Trade-Related Aspects of Intellectual Property Rights, Minutes of Meeting, ¶ 280, IP/CM/37/Add.1 (Geneva, meeting held on Nov. 17-19, 2002). *See also* Council for Trade-Related Aspects of Intellectual Property Rights, Minutes of Meeting, ¶ 62, IP/C/M/62 (Geneva, Meeting held Mar. 2-3, 2010) [Restricted].

⁴³ Council for Trade-Related Aspects of Intellectual Property Rights, Minutes of Meeting, ¶ 280, IP/CM/37/Add.1 (Geneva, meeting held on Nov. 17-19, 2002). *See also* Council for Trade-Related Aspects of Intellectual Property Rights, Minutes of Meeting, ¶ 62, IP/C/M/62 (Geneva, Meeting held Mar. 2-3, 2010) [Restricted].

GATS) and TRIPS exists because the rights under TRIPS are granted to persons rather than applied to goods.⁴⁴ The alternative proposition is that TRIPS is a market access agreement, but of a distinctive character⁴⁵ and that from a typical developing country perspective additional measures are more or less needed in order to accrue “benefits” from the agreement. With this premise in mind, nothing should stop developing countries from circumventing the rigidity of the enforcement provisions under TRIPS pursuant to pharmaceutical patents with a view to demanding “benefit” from the agreement, which seems to have already eroded their legitimate expectation on access to medicines for public health protection.

TRIPS NEGOTIATIONS AND THE PROMISE OF MARKET ACCESS AND TECHNOLOGY TRANSFER

So far, the foregoing discussion has established that the WTO does permit use of customary international law and thus, legitimate expectations must be respected if they are a result of mutual intention and if they also satisfy other requirements as seen in *Japan-Film* and *EC-LAN*. However, in light of the conclusion reached in the analysis of *India-Patent*, it seems that the DSB respected legitimate expectations but that of developed countries. What can thereupon tilt the balance in favour of developing countries would be the use of negotiating history to bring out promises unfulfilled by the developed countries and thus, make already present flexibilities such as compulsory licensing even broader.

It is important to note that if a party was misled about the extent of their obligations and benefits due to opposing positions, the negotiation history of TRIPS can be adduced to protect legitimate expectations.⁴⁶ The DSB has persuasively stressed that the correct approach towards interpretation of any of the WTO agreements is to focus on the intention of the parties to the agreement.⁴⁷ More importantly, the negotiating history of a treaty falls within the category of “Supplementary Means of Interpretation”, as given under Article 32 of the VCLT. Notably, in *Japan - Alcoholic Beverages*, the AB announced that: “There can be no doubt that Article 32 of the Vienna Convention, dealing with the role of supplementary means of interpretation, has attained the status of customary or general international law”.⁴⁸ As evidenced in the minutes of the negotiations up to December 1991,

⁴⁴ Council for TRIPS. Non-Violation and Situation Complaints, Summary Note by the Secretariat, ¶ 34, IP/C/W/349/Rev.2, (Oct. 19, 2012).

⁴⁵ Council for Trade-Related Aspects of Intellectual Property Rights, Minutes of Meeting, ¶ 27, IP/C/W/349/Rev.2 (Geneva, Meeting held on Jun. 19, 2002).

⁴⁶ ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 197 (Cambridge: Cambridge University Press, 2000)

⁴⁷ The Appellate Body Report, *US - Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 153, WT/DS58/AB/R (Oct. 12, 1998).

⁴⁸ JAPAN – ALCOHOLIC BEVERAGES, at 9^[SEP]

nothing indicated that the parties were entertaining the complete prohibition of compulsory licensing, except remarkably, for the final draft, which was not negotiated but instead determined by the GATT Secretariat. Given that the GATT Secretariat determined the final draft, which fell outside the negotiated or agreed draft, the actual intentions of the parties at the conclusion of the TRIPS agreement are difficult to understand. Thus, the wording in the final TRIPS agreement cannot indicate anything about the negotiators' intentions, and certainly not in the way that a genuine consensus would have done. With respect to the idea of maximum flexibility for developing country members most of the WTO Ministerial Declarations have recognised that even though developing countries have undertaken significant new commitments, both substantive and procedural, key promises made by developed country members pursuant to market access and technology transfer objectives are yet to be met.⁴⁹ However, these countries were promised real benefits including market access and technology transfer that they expected as *quid pro quo* for the opening of farm and textiles markets. This explicitly leaves open the question of whether a party could have expectations for NVC purposes in relation to continued shortages and high costs or relatively lesser market access for certain products, (for example, essential medicines) whose absence is shown to pose a serious risk to human life or health.⁵⁰ This understanding, if taken to its natural conclusion, would suggest that the developing countries have no inherent obligation to seek clarification when there is a basis to expect that actual flexibility or fairer treatment will be maintained under TRIPS.

CONCLUSION

The doctrine of legitimate expectations and the need for it to operate as a pivotal mechanism is to ensure diverse interests under the WTO system. Although, WTO panels and the AB have ruled on doctrine of legitimate expectations, no deliberation has taken place on understanding legitimate expectations in relation to the granting of compulsory licences. However, the use of this doctrine coupled with that of fairness seeks to ensure a balance of rights and obligations, which will help counter any NVCs in the application of TRIPS flexibilities. Moreover, the application of the doctrine can be used to address several trade related issues and at the same time ensuring use of TRIPS in a manner to meet wider goals of public health policy, via technology transfer. Such terms of negotiation is considered the basis that compelled developing countries to form legitimate expectations that the TRIPS flexibilities such as compulsory licensing will be used for the protection of legitimate public health.

⁴⁹ Fourth WTO Ministerial Conference. Ministerial Declaration, ¶¶ 4, 6, 13, 16, 17, 37 and 38, WT/MIN(01)/DEC/1 (Doha, Nov. 20, 2001)

⁵⁰ EC-ASBESTOS, para. 190.

So far, it has been successfully established that the WTO does permit use of customary international law and thus, the doctrine of legitimate expectations must be respected if they are a result of mutual intention and if they also satisfy other requirements as seen in *Japan-Film* and *EC-LAN*. The issue however arises with the analysis given in the *India-Patent* case, where the DSB respected legitimate expectations but only that of developed countries. Therefore, in order to tilt the balance in favour of developing countries, the use of negotiating history can expose the unfulfilled promises made to the developing countries and proceed to make existing flexibilities such as compulsory licensing even broader.