CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW

NON-VIOLATION COMPLAINTS AND THE TRIPS AGREEMENT: SOME CONSIDERATIONS FOR WTO MEMBERS

BY

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I. INTRODUCTION[i]

1. As noted by many WTO Members, the non-violation remedy should remain an exceptional concept and be applied with considerable caution.[ii] This remedy, which has existed since the inception of the GATT but which has rarely been applied, permits a WTO Member to challenge another's measure, not because it contravened an agreed obligation, but on the basis that a benefit arising under a WTO agreement has been "nullified or impaired" by an otherwise WTO-consistent measure.

2. The concept of allowing non-violation complaints in a rules-based system remains controversial with many WTO Members, legal scholars and commentators. The potential application of the non-violation remedy to the TRIPS Agreement is particularly problematic. Many WTO Members are concerned that the extension of the non-violation remedy will further imbalance the implementation of the TRIPS Agreement, and have negative implications for their trade and development prospects.

3. This paper builds on the analysis of non-violation complaints included in the recent paper in this series that examined the Article 71.1 review of the TRIPS Agreement. It explores in more detail the concerns raised by non-violation complaints, and concludes that WTO Members should not apply non-violation complaints to the TRIPS Agreement. As a step towards this goal, it recommends that WTO Members extend the moratorium on the application of the non-violation remedy until further experience is gained with the implementation of the TRIPS Agreement, including as part of the Article 71.1 review.

II. BACKGROUND

A. RELEVANT WTO PROVISIONS

4. There are three main WTO provisions of relevance to non-violation complaints and the TRIPS Agreement: 1) Article XXIII of GATT 1994; 2) Article 64 of the TRIPS Agreement; and 3) Article 26 of the WTO Understanding on the Settlement of Disputes (DSU).

5. The basic rules on "non-violation" and "situation" complaints are established in Article XXIII of GATT 1994. This provision permits a WTO Members to challenge another's measure on the basis not of a failure to comply with an agreed obligation, but rather where the attainment of the Agreement's objectives is being impeded, or where a benefit under the Agreement is being "nullified or impaired", due to:

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

6. These GATT provisions are referred to in Article 64 of the TRIPS Agreement, which establish 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 64, paragraph 2 and 3, provide:

> "2. Subparagraphs 1(b) and 1(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.
>
> "3. During the time period referred to in paragraph 2, the Council for TRIPS shall examine the scope and modalities for complaints of the type provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 made pursuant to this Agreement, and submit its recommendations to the Ministerial Conference for approval. Any decision of the Ministerial Conference to approve such recommendations or to extend the period in paragraph 2 shall be made only by consensus, and approved recommendations shall be effective for all Members without further formal acceptance process."

7. The manner in which non-violation complaints will be applied in WTO disputes – including any under the TRIPS Agreement – is established in Article 26 of the DSU. Article 26(1) sets out specific rules that apply to complaints arising under subparagraphs 1(b) of Article XXI of GATT 1994 under the WTO's dispute settlement system. First, complaining parties must provide "detailed justification in support of any complaint". Second, a finding of non-violation nullification or impairment shall not give rise to an obligation to withdraw the measure; rather, the panel or the Appellate Body may merely "recommend that the Member concerned make a mutually satisfactory adjustment". Third, arbitration may include a determination of the level of benefits that have been nullified and impaired, and may suggest ways to find a mutually satisfactory outcome, but these shall not be binding on the parties to the dispute.

8. Article 26(2) sets out rules that apply to "situation" complaints of the type described in paragraph 1(c) of Article XXIII of GATT. In the case of situation complaints, the provisions of the DSU only require a panel to circulate a separate report regarding this aspect of the case to the DSB, and there is no obligation to withdraw the measure or provide compensation.[iii] As there been no successful "situation complaints" in the history of the GATT, this paper focuses primarily on non-violation complaints as they apply to the TRIPS Agreement.[iv]

B. STATUS OF THE "MORATORIUM" ON THE APPLICATION OF THE NON-VIOLATION COMPLAINT TO THE TRIPS AGREEMENT

9. Under Article 64.2 of the TRIPS Agreement, the moratorium on the application of the non-violation remedy to the TRIPS Agreement was stipulated to apply until a period of five years from the date of entry into force of the WTO Agreement (i.e. 1 January 2000). Article 64.2 requires the TRIPS Council, within this period, to examine possible scope and modalities for the remedy, and to submit its recommendations to the Ministerial Conference for approval. The Ministerial Conference, in turn, may approve the recommendations or extend the period of the moratorium. The failure of the TRIPS Council to make recommendations before 1 January 2000, combined with the failure of the Seattle Ministerial, now raises questions about the status of the moratorium.

10. A number of views about the status of the moratorium have been expressed in the TRIPS Council. On the basis of papers submitted to and discussions in the TRIPS Council, it seems that only one country, the United States, supports unqualified application of the non-violation remedy to the TRIPS Agreement. It has argued that the

moratorium is over and that the non-violation remedy thus applies to the TRIPS Agreement.[v] It has also asserted that "the period for discussion of views on scope and modalities of non-violation complaints has passed and that no purpose will be served in continuing discussions".[vi]

11. Some other developed countries have adopted the view that that the moratorium is over, but remain concerned about the application of the remedy to the TRIPS Agreement. They argue that the TRIPS Council has an undischarged responsibility to examine scope and modalities, and that a "failure to address the issue collectively may lead to the matter being determined case by case in the course of specific dispute settlement processes, with a consequent loss of predictability and clarity."[vii]

12. Many developing countries, by contrast, believe that the non-violation remedy should not be applied to the TRIPS Agreement. Any discussion about scope and modalities should thus be undertaken under the protection of a moratorium as contemplated in Article 64. To support this view, developing countries have argued that the requirement in Article 64.3 (that the Council make recommendations and submit them to Ministerial Conference) is a condition precedent to the expiration of the moratorium in Article 64.2. Consequently, the failure of the Council to submit recommendations, combined with the failure of the WTO Seattle Ministerial, has left the moratorium open-ended. Given the differing views surrounding the status of the moratorium, developing countries may wish to call for a "continuation" of the moratorium with the dual goal of maintaining the protection it provides, and influencing the discussion by other Members of scope and modalities, until WTO Members have had an opportunity to fully consider the implications of extending the non-violation remedy to the TRIPS Agreement.

III. PROBLEMS ASSOCIATED WITH APPLICATION OF NON-VIOLATION COMPLAINTS TO THE TRIPS AGREEMENT

13. Many WTO Members, academics and commentators have noted problems arising from the application of the non-violation remedy generally within the WTO system and, in particular, from its potential application to the TRIPS Agreement. This Part III sets out, in summary form, the main bases of concern regarding the application of non-violation complaints, both in relation to the WTO agreements generally, and to the TRIPS Agreement.

A. CONCERNS ABOUT THE APPLICATION OF NON-VIOLATION COMPLAINTS TO THE WTO AGREEMENTS GENERALLY

14. The non-violation remedy stemmed from the early bilateral trade agreements, and was subsequently included in the GATT to protect the balance of tariff negotiations by addressing the misuse of non-tariff and other trade-restrictive measures that, while consistent with basic GATT disciplines, may have affected the agreed deal. The non-violation concept was not part of the corpus of international law, but was rather a specific concept developed for the GATT.[viii] The concept has only been applied in a very limited number of GATT cases, most of which addressed subsidies that undermined agreed market access commitments.

15. The evolution of the multilateral trading system and the establishment of the WTO – including its extensive rules on non-tariff measures and binding dispute settlement system – has largely removed the traditional justification of non-violation complaints. A number of factors support this conclusion.

16. First, the development of trade disciplines through progressive rounds of trade negotiations on subsidies and other non-tariff measures has removed the need for non-violation complaints to protect tariff concessions. As noted by P.J. Kuyper (Director WTO Legal Affairs Division):

> "since GATT/WTO law is becoming more and more comprehensive and complete, and since what was called the "legal vacuum" around GATT is shrinking, in particular in respect of subsidization, there will be less and less scope for "non-violation" cases …"[ix]

17. Similar views have been expressed by other authors:

> "With the considerable growth of international trade regulation in terms of scope and subject matter, the potential role of the non-violation complaint has been considerably reduced. It will be further reduced as general principles of law are applied in the process of interpreting WTO law."[x]

18. Second, non-violation complaints are unnecessary in relation to new disciplines. Applying the non-violation remedy to disciplines – including those in the TBT and SPS Agreements, and the other Agreements in Annex 1 of the Marrakesh Agreement – is difficult to reconcile with the traditional view that non-violation complaints were designed to protect the balance of tariff concessions. Moreover, these agreements include substantial flexibility within their rules to address borderline cases, without resorting to the legally imprecise notion of "non-violation" complaints.

19. Third, the use of complaints based on a "non-violation" of agreed commitments is difficult to resolve with the binding nature of the WTO's dispute settlement system. As noted by Frieder Roessler (ex-Director WTO Legal Affairs Division):

> "The negotiators of the GATT thus regarded the concept of non-violation nullification or impairment as a benchmark guiding consultations, negotiations and multilateral decision-making. They did not envisage the application of the concept in binding third-party adjudication procedure. The Contracting Parties to the GATT 1947 applied the concept in the context of procedures under which each contracting party had the possibility to block the adoption of a finding of nullification or impairment. The open-ended nature of the concept of nullification and impairment therefore did not entail a threat to the sovereignty of the contracting parties. Under the WTO Agreement, however, the decisions determining the benefits that might accrue under a provision in addition to the benefit of its observation would be determined by the Appellate Body, whose decisions must be unconditionally accepted. What has thus happened, more by accident than by design, is that the power of an independent tribunal to hand out licenses to retaliate is defined by a legal concept that originally served to define the scope of the obligation to consult under bilateral trade agreements."[xi]

20. As noted in the recent communication from Canada, the Czech Republic, the European Communities, Hungary and Turkey ("Canadian paper"), "the uncertainty

regarding the application of such non-violation complaints needs to be resolved so as to minimize the possibility of unintended interpretation."[xii] Developing countries have also expressed concern about expansive interpretations of WTO obligations, and the "activist" nature of the Appellate Body. Decisions of the Appellate Body cannot easily be reversed by WTO Members. Expanding the non-violation remedy – and with it the right to challenge measures that are otherwise consistent with WTO obligations – may further imbalance the proper distribution of responsibilities between WTO Members, and panels and the Appellate Body.

21. In sum, use of the non-violation remedy is difficult to justify within the rules-based WTO system. With the development of substantive rules to address non-tariff barriers, it has become progressively less necessary as a tool to protect market access commitments, and, by introducing legal uncertainty, it operates in tension with the predictability and security that the system seeks to guarantee.

B. CONCERNS ABOUT THE APPLICATION OF NON-VIOLATION COMPLAINTS TO THE TRIPS AGREEMENT

22. In addition to the concerns above – many of which apply equally to the TRIPS Agreement – there are numerous specific concerns that arise out of the specific nature of the TRIPS Agreement as an agreement establishing minimum standards of protection for the rights of private parties. Opposition to the extension of the non-violation remedy to the TRIPS Agreement stems from the fact that it: 1) raises systemic concerns for the WTO system as a whole; 2) may further imbalance the TRIPS Agreement against the interests of the public and developing countries; and 3) raises serious practical challenges for developing country Members.

1. The Application of non-violation complaints to the TRIPS Agreement raises systemic concerns for the WTO system

23. WTO Members have identified two main sources of systemic concern relating to the application of non-violation complaint to the TRIPS Agreement.

24. First, non-violation complaints may give rise to incoherence among WTO agreements. A number of WTO Members have noted with concern that non-violation complaint under the TRIPS Agreement may give rise to incoherence among the WTO Agreements. The danger of incoherence was raised in the Canadian paper, which noted that otherwise WTO consistent measures such as taxes and advertising requirements could potentially be challenged under the TRIPS Agreement. It noted "it is highly questionable whether WTO Members would be in favour of leaving the option open for countries to file a non-violation complaint under the TRIPS Agreement, if the measure is found to be in full compliance with … the GATT and its annexed agreements or the GATS." The response by the United States that such measures would not give rise to non-violation complaints under the TRIPS Agreement is unconvincing. Its argument that Article 3.2 will prevent the dispute settlement body from changing the rights and obligations under existing WTO agreements fails to acknowledge that applying non-violations to the TRIPS Agreement amounts to establishing an entirely *new* cause of action under that agreement.[xiii] Similarly, its argument that "it is highly unlikely … that a panel would determine that something a WTO Member agreed to accept under one part of that

single undertaking could nullify and impair benefits in another area" fails to acknowledge that, as part of a single undertaking, all WTO obligations apply cumulatively, and consequently something that is consistent with one WTO agreement (e.g. GATT) may still be found to nullify and impair benefits under another (e.g. TRIPS).[xiv] Moreover, the United States rebuttal of the specific examples of incoherence raised in the Canadian paper is unconvincing; it merely asserted that a non-violation complaint could not be established in each of the specific situations identified, as "no benefit would arise" upon which to base a claim.[xv] It provided no examples of when it considers that a non-violation complaint *would* be justified, or why such a situation could not be addressed through application of the Agreements substantive rules. In the absence of a sufficient answer, the concern that non-violation complaints may give rise to incoherence among WTO agreements remains.

25. Second, application of non-violation complaints to the TRIPS Agreement threatens to undermine regulatory authority and to infringe sovereign rights. A number of developing countries (Cuba, the Dominican Republic, Egypt, Indonesia, Malaysia and Pakistan) have stated that they "share Canada's concern that applying the non-violation remedy in intellectual property may constrain Member's ability to introduce new and perhaps vital social, economic development, health, environmental and cultural measures. It may also have a profound effect on existing policies in these areas".[xvi] In response to these concerns, the United States has stated that when considering measures to promote such goals Members should consider "what effect, if any, those measures might have on the intellectual property rights of foreign nationals. If *an adverse effect is likely*, the Members should then consider whether the measures being contemplated *could have been foreseen* when the Uruguay Round negotiations were under way (emphasis added)." If literally applied, the practical effect of this approach would be to require developing countries to compensate foreign nationals (or their host Member) for measures that *adversely affect* foreign holders of intellectual property rights, and that *were not foreseen* during the Uruguay Round. Such an approach would arguably catch a large number of national laws, and may undermine the TRIPS Agreement's preambular goal of ensuring maximum flexibility in the domestic implementation of laws and regulations. It could also "chill" the enjoyment by WTO Members of their sovereign rights to develop new laws to protect the public interest and to achieve other important national policy goals.

2. The application of non-violation complaints may further unbalance the TRIPS Agreement by elevating private rights over the interests of the users of intellectual property – both within and between countries – and over other public policy considerations

26. In addition to these systemic concerns, application of non-violation complaints to the TRIPS Agreement may further unbalance the Agreement by elevating private property rights over the interests of the users of intellectual property and over other important national public policy considerations. A number of issues have been raised by WTO Members and by commentators.

27. First, non-violation complaints may have the effect of creating new un-negotiated responsibilities (in the TRIPS Agreement and also in other WTO

Agreements). Roessler notes that application of the non-violation complaint to any general, non-renegotiable obligation (such as those under the TRIPS Agreement) may have the effect of creating new unnegotiated responsibilities.[xvii] Unlike tariff bindings, obligations under the TRIPS Agreement cannot be revised as between individual parties. Consequently, the non-violation remedy may allow the Member claiming the non-violation to "expose the impairing member to the threat of retaliatory actions equivalent to those available in the case of a violation of the TRIPS Agreement if the impairing measure is not withdrawn. Under the TRIPS Agreement the remedy of nullification and impairment would thus not operate as a *clausula rebus sic stantibus* (obligation to renegotiate) but as a legal principle capable of creating unknown new benefits and corresponding responsibilities."[xviii] The creation of un-negotiated responsibilities is inconsistent with Article 3.2 of the DSU, which provides that rulings of the DSB must not "add to or diminish the rights and obligations provided in the covered agreements."

28. Second, non-violation complaints may have the effect of narrowing existing obligations (in the TRIPS Agreement and also in other WTO Agreements). In addition to the above concern, Roessler notes that application of the non-violation complaint to the TRIPS Agreement may have the effect of narrowing existing negotiated obligations.[xix] The experience under GATT demonstrates that in cases where the non-violation remedy is applied, panels may prefer to adopt a narrower reading of substantive obligations (than they would have in the absence of the non-violation remedy), and rely instead on the non-violation remedy. In the case of the TRIPS Agreement, this would simultaneously reduce the effectiveness of the substantive TRIPS obligations as instruments for the effective protection of intellectual property rights, and introduce greater uncertainty into WTO dispute settlement. This, again, threatens to imbalance the proper allocation of rights and obligations that is protected by Article 3.2 of the DSU.

29. Third, non-violation complaints may encourage unilateral pressure and speculative claims to force countries to raise protection beyond minimum requirements, or to refrain from using TRIPS-consistent measures such as compulsory licensing. Already a number of developing countries have been pressured, particularly in relation to patents over pharmaceuticals, to offer protection beyond the level required by the TRIPS Agreement. This tendency is likely to be exacerbated if the non-violation remedy is made available. Among other things, the uncertainty surrounding the remedy will make it harder for countries to rely on the text of the TRIPS Agreement to define their rights and obligations in the face of unilateral pressure by other, more powerful WTO Members. Non-violation complaints may be used to pressure developing countries not to fully explore their right to use measures such as compulsory licensing to ensure access to essential medicines (to implement the human right to health), or to guarantee access to technology. Unilateral pressure based on non-violation complaints may also be applied to constrain the adoption of national measures adopted under Article 8 to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development.

30. Fourth, non-violation complaints may give rise to claims for compensation that extend beyond the confines of the TRIPS Agreement. Some Members are concerned not only about the scope of potential non-violation complaints, but also about the remedies that may be requested. In particular, developing countries may wish to address the claim by the United States (and the Appellate Body in *India-Patents*) that achieving a

mutually satisfactory adjustment "is usually achieved through compensation in the form of additional concessions."[xx] As noted, there is very little GATT practice on which to base a judgment of what is "usual" in relation to non-violation claims; this is especially true in the case of the TRIPS Agreement, where there is no practice upon which to base such a judgment. Moreover, Article 26 of the DSU states that "compensation *may* be part of a mutually satisfactory adjustment", and that arbitration may "suggest ways and means of reaching a mutually satisfactory adjustment: such suggestions *shall not be binding*" (emphasis added).

31. Fifth, the TRIPS Agreement does not involve the same exchange of rights and obligations as exist in the GATT and the GATS, and it remains unclear how non-violation complaints will apply to minimum regulatory standards that protect private property rights. The non-violations remedy has traditionally been applied to maintain the balance of concessions made during tariff negotiations. As noted by some WTO Members, unlike the GATT and the GATS, the TRIPS Agreement does not involve such an exchange of concessions.[xxi] The United States, however, argues that such concessions were made within the larger package negotiated in the Uruguay Round. The argument that non-violation complaints are required in the context of the TRIPS Agreement, either to protect market access commitments made elsewhere in the WTO agreements, or to protect the agreed minimum standards in the TRIPS Agreement, is however difficult to accept.

32. As noted already, the development of non-tariff rules have made non-violation complaints progressively less necessary to protect market access commitments made elsewhere in WTO agreements. Arguably, the TRIPS Agreement itself reduces, and does not increase, the need for non-violation complaints in the WTO. If, as argued by the United States, the TRIPS Agreement "reduces impediments and distortions" to international trade and thus protects market access, then the TRIPS Agreement actually reduces the need for non-violation complaints in the WTO system. As noted above, the development of new WTO rules reduces the "legal vacuum" around the GATT, and hence the need for the legally imprecise device of non-violation complaints to protect market access commitments.

33. Moreover, it is also difficult to argue that non-violation complaints are required to protect concessions made in the TRIPS Agreement itself. The United States has offered no explanation of why existing obligations in the TRIPS Agreement are inadequate to protect the standards established in the Agreement. Moreover, they offer no suggestions about how or when the non-violation remedy would apply to the TRIPS Agreement, and how this would benefit WTO Members.[xxii] Indeed, as noted above, in response to each of the specific examples of incoherence with other WTO Agreements cited in the Canadian paper, the United States argued that non-violation complaints would *not* apply, as no benefit would arise that could be nullified or impaired.[xxiii]

34. The view that the TRIPS Agreement does not in fact involve an exchange of rights and obligations is supported by GATT/WTO experts:

> The purpose of complaints on legal measures under the GATT and the GATS is to protect the balance of rights and obligations resulting from the exchange of scheduled tariff concessions and commitments on trade in services. There is no comparable balance of rights and obligations under the TRIPS Agreement. In the

> international negotiations on intellectual property rights, the countries in which the production of technological knowledge was concentrated and those to which this knowledge was disseminated or transferred generally took conflicting positions … The balance of advantages between WTO members is not to be found in the TRIPS Agreement taken in isolation but in the WTO Agreement as a whole. Given this background it would be disingenuous to maintain that the TRIPS Agreement establishes a balance of advantages between the holders and users of intellectual property rights which needs to be protected by an application of Article XXIII:1(b).[xxiv]

35. Finally, there is insufficient guidance – including in Article 26 of the DSU and in GATT dispute practice – for panels and the Appellate Body to apply non-violation complaints in the context of the TRIPS Agreement. The United States asserts that "The history of disputes under Article XXIII:1(b) … coupled with the guidelines for such disputes in Article 26 of the Dispute Settlement Understanding … would enable a panel and the Appellate Body to reach an appropriate conclusion in connection with a non-violation dispute." Yet, only three successful non-violation complaints were adopted in the entire history of the GATT, leaving WTO Members with little substantive development and application of the concept.[xxv] Moreover, Article 26 merely restates the traditional view that detailed justification must support a complaint, and that a finding of non-violation does not require withdrawal of the measure but rather some other mutually satisfactory adjustment. It provides no guidance on the proper nature and scope of non-violation complaints, the appropriate modalities, or how they may be applied in the specific context of the TRIPS Agreement. Consequently, in the absence of appropriate guidance, panels or the Appellate Body would be required to apply the concept of non-violations to the TRIPS Agreement on an ad-hoc, case-by-case basis. As noted by one author:

> "… the concept of nullification and impairment developed under the GATT and transposed into the GATS could not be applied under the TRIPS Agreement, and … a panel or the Appellate Body, when requested to make ruling that a legal measure had impaired benefits accruing under the TRIPS Agreement, would be facing a normative void which cannot appropriately be filled by judicial fiat."[xxvi]

3. The application of non-violation complaints to the TRIPS Agreement raises serious practical challenges for WTO Members, especially developing countries

36. The concerns identified above are compounded by a series of more practical challenges about how the non-violation complaint will affect WTO Members, especially developing countries.

37. First, extending the non-violation remedy introduces legal uncertainty that may exacerbate the difficulties faced by developing countries when responding to the claims of other Members. Many WTO Members, especially some developing countries, lack the resources to make full use of the WTO's dispute settlement system to protect their rights to secure trade. Extending the non-violation remedy to the TRIPS Agreement may increase the number and complexity of claims facing developing countries, making it more difficult for them to defend their interests against challenges by more powerful WTO Members.

38. Second, many developing countries have not had the benefit of direct experience on the scope and modalities of the non-violation remedy. As noted, the use of non-violation complaints under GATT was limited. Developing countries have thus had little experience with this concept, and are consequently not well placed to determine its appropriate use in the context of the TRIPS Agreement. In addition, there is currently little experience with the application of the DSU provisions to the TRIPS Agreement. It would seem wiser for developing countries to adopt a "wait and see" attitude, both in relation to the application of non-violation in other agreements, and the application of the DSU provisions to the TRIPS Agreement, before deciding to apply non-violations to TRIPS.

39. Third, developing countries that are still enjoying transitional periods have not had an opportunity to assess the implications of non-violations under the TRIPS Agreement. As noted in the paper by Cuba, the Dominican Republic, Egypt, Indonesia, Malaysia and Pakistan, during the run up to the Seattle Ministerial, there is concern that "developing countries are currently enjoying transitional periods and therefore "most developing countries will be unable to assess the implications of the application of the non-violation remedy in the area of intellectual property." This concern is still valid for many developing countries, including the least developed among them, which are still in transitional periods.

40. Finally, application of non-violation complaints under TRIPS may lead to an influx of complaints. In its paper, the United States argues that the non-violation remedy will not give rise to a "tremendous influx of non-violation complaints".[xxvii] In support of this, it argues that the traditional requirements applicable to non-violation complaints "are not easy hurdles to clear". Arguably, the traditional requirements, as well as the experience of GATT practice, do not provide a clear indication of how non-violation complaints will play out in the context of the TRIPS Agreement, which is a substantially different kind of agreement, backed by powerful industry lobbies. Already, the United States has cited the potential for non-violation complaints in a number of bilateral consultations about intellectual property rights, and so its position that the remedy will not give rise to an influx of complaints should be viewed with caution.

IV. POSSIBLE NEXT STEPS

41. In conclusion, the non-violation remedy has become progressively less appropriate in the broader context of the WTO agreements, and is particularly inappropriate in the context of the TRIPS Agreement. As noted by many WTO Members, its application to the TRIPS Agreement raises a series of practical problems for developing countries, threatens to further imbalance the implementation of the TRIPS Agreement against the interests of the public and developing countries, and gives rise to systemic issues of coherence among WTO Agreements. In light of these factors, WTO Members may wish to give consideration to the following recommendations:

1. Request a continuation of the moratorium on the application of the non-violation remedy to the TRIPS agreement

42. So far, the TRIPS Council has not undertaken its mandated review of scope and modalities for the application of non-violation remedy to the TRIPS Agreement, nor

have recommendations been made to the Ministerial Council as required by Article 64. Consequently, the Article 64 moratorium on the application of the non-violation remedy to the TRIPS Agreement should be retained until this examination has occurred, and until Members agree by consensus that sufficient experience has been gained (including through the Article 71.1 review) with the application of the Agreement and that the non-violation remedy if adopted will not increase Members' level of obligations.

2. Build a record in the TRIPS Council of concerns and problems regarding the application of the non-violation remedy to the TRIPS Agreement

43. Developing countries may wish to continue to articulate, in greater detail, the many concerns regarding the application of the remedy to the TRIPS Agreement. This may influence the ongoing discussions in the TRIPS Council about the appropriate scope and modalities for the non-violation remedy, and inform future panels and the Appellate Body in the event Members do not agree to continue the moratorium (or agree on scope and modalities). WTO Members that are concerned about the remedy's implications, however, should give careful consideration before being drawn into a discussion about scope and modalities, which will likely contribute to further legitimise the concept of non-violation within the WTO.

3. Argue that findings of non-violation nullification and impairment are *not* binding under the DSU

44. Developing countries may wish to suggest a narrow reading of the provisions of the DSU that apply to non-violation remedy, including that: 1) non-violation complaints are subject to a more stringent burden of proof than normal WTO matters ("detailed justification"); 2) compensation may, *but is not required to be*, part of the non-binding determination of an arbitration; and 3) the results of arbitration (and presumably also panel and Appellate Body decisions – in keeping with past GATT practice regarding non-violation complaints) are non-binding. This final point finds support in the writings of some international scholars. Cottier and Schefer write:

> "Under the Dispute Settlement Understanding (DSU), restitution can only be required in the case of a successful complaint that a Member has violated its obligations as set forth in one of the WTO agreements (so-called "violation complaint"). For complaints of injury stemming from a "non-violation" of the agreements, *the DSU explicitly excludes a right to force a Member to grant restitution*. Rather, while changed behavior may be suggested and while compensation "may be part of a mutually satisfactory adjustment", there is *no binding demand that the dispute settlement body can make of the injuring Member* (emphasis added)."[xxviii]

45. Arguably, such an approach is supported by the ordinary language of Article 26. It is also supported by its context, including the more binding language of Article 21 which is applicable to violation complaints, and the less binding provisions applicable to "situation complaints", which merely provide that the procedures of the DSU shall apply only up to and including the point in the proceedings where the panel report has been circulated to the Members. This approach, if successfully promoted by developing countries, would significantly limit the potential negative implications of the non-violation

remedy (including as a tool for unilateral pressure), not only in relation to the TRIPS Agreement, but also to all other WTO agreements.

4. Ensure appropriate evolution of WTO jurisprudence on the non-violation remedy

46. WTO Members may wish to follow panel and Appellate Body decisions that consider the non-violation remedy. The first Appellate Body decision to formally consider non-violations remedy will be the Asbestos Case. The non-violation remedy was given significant coverage in the panel report, which suggested that non-violation complaints could, at least potentially, over-ride the Article XX exceptions to the GATT. Statements by developing countries, as parties or third parties to WTO disputes, (and in the TRIPS Council and elsewhere) may provide the Appellate Body with some important context as it considers how to WTO jurisprudence on the non-violation remedy should evolve.

5. In the longer term, seek to have the non-violation remedy deemed inapplicable to the TRIPS Agreement

47. In the longer term, developing countries may wish to seek to have the non-violation remedy deemed inapplicable to the TRIPS Agreement. Pressure is mounting on the WTO, from civil society and many governments, to rebalance the TRIPS Agreement in order to strike an adequate balance between private property interests, and the broader interests of the public and developing countries. This pressure is likely to provide increased political space in the future to have the non-violation remedy deemed inapplicable to the TRIPS Agreement and to reform the Agreement to ensure it promotes the public welfare and the trade and development prospects of developing countries.

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[i] The views expressed are those of the authors and do not necessary reflect those of CIEL, South Centre or The Rockefeller Foundation.

[ii] According to the United States "non-violation nullification or impairment should remain an exceptional concept. Although this concept had been in the text of Article XXIII of the General Agreement from the outset, a cautious approach should continue to be taken in applying the concept." EEC – Oilseeds, BISD 37S/86, 118, para. 114. Similarly, the European Economic Community has stated "recourse to the 'non-violation' concept under Article XXIII:1(b) should remain exceptional, since otherwise the trading world would be plunged into a state of precariousness and uncertainty." *Id.,* para. 113.

[iii] Article 26(2) provides that the dispute settlement rules and procedures contained in the Decision of 12 April 1989 (BISD 36S/61-67) shall apply to consideration for adoption, and surveillance and implementation of recommendations and rulings.

[iv] For a discussion of non-violation complaints see the Note by the Secretariat, *Non-Violation Complaints and the TRIPS Agreement*, (IP/C/W/124). In all, eight complaints (3 successful and adopted; 3 successful but unadopted; and 2 rejected) were heard during the entire history of the GATT.

[v] See, Communication from the United States, *Scope and Modalities of Non-Violation Complaints Under the TRIPS Agreement*, (IP/C/W/194).

[vi] *Id.,* at p1.

[vii] *See, for example,* Communication from Australia, *Non-violation Complaints under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)*, at p.1, (IP/C/W/212).

[viii] P.J. Kuyper, *The Law of GATT as a Special Field of International Law,* in Netherlands Yearbook of International Law, pp 227-257, Volume XXV (1994). (stating "The so-called "non-violation nullification and impairment" is a unique legal phenomenon that occurs only in the GATT, although it would seem that provisions comparable to Article XXIII:1(b) of GATT have figured in pre-World War II treaties of

commerce.") Notably, the non-violation remedy has now been transplanted also to the NAFTA. *See,* Note by the WTO Secretariat, *Non-Violation Complaints and the TRIPS Agreement*, (IP/C/W/124).

[ix] *See,* Kuyper, *supra note 7*, (stating "Unfortunately, it was not possible to convince the legal fantasists during the Uruguay Round of negotiations; it was not possible to agree on a definition of 'non-violation" which would have restricted its application to the classic cases. Only some special procedural rules for "non-violation" cases were agreed upon. Any restraint on the concept will have to be judicial restraint by panels and the Appellate Body.")

[x] T. Cottier and K. Schefer, *Good Faith and the Protection of Legitimate Expectations in the WTO*, in New Directions in International Economic Law, Klewer, (2000).

[xi] F. Roessler, *Should Principles of Competition Policy be Incorporated into WTO Law Through Non-Violation Complaints?*, Journal of International Economic Law, p.418, September 1999.

[xii] *See,* Communication from Canada, the Czech Republic, the European Communities and their member States, Hungary and Turkey, *Non-Violation Complaints under the TRIPS Agreement – Suggested Issues for Examination of Scope and Modalities under Article 64.3 of the TRIPS Agreement*, at para. 13, (IP/C/W/191).

[xiii] *See,* Communication from the United States, *supra note 4,* p.3.

[xiv] *Id.*

[xv] *Id.*

[xvi] *See,* Proposal from Cuba, the Dominican Republic, Egypt, Indonesia, Malaysia and Pakistan, *Non-Violation or Impairment under the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS),* at para. 4, (IP/C/W/141).

[xvii] F. Roessler, *The Concept of Nullification and Impairment in the Legal System of the World Trade Organization, in* International Trade Law and the GATT/WTO Dispute Settlement System, p. 136, Klewer (1997).

[xviii] *Id.*

[xix] *Id.*

[xx] *See,* Communication from the United States, *supra note 4*, at p.6. See also, *India – Patent Protection For Pharmaceutical and Agricultural Chemical Products*, (AB-1997-5) at p.4.

[xxi] Consequently, as noted above, applying the non-violation remedy to obligations that, unlike tariff bindings, cannot be readjusted on a bilateral basis will have the effect of introducing new *de facto* obligations that extend beyond those currently in the TRIPS Agreement.

[xxii] As noted below, the United States' main contribution to a discussion of scope and modalities has been to assert that GATT jurisprudence, combined with Article 26 of the DSU, will be sufficient to allow panels and the Appellate Body to develop rules on the application of non-violation complaints to the TRIPS Agreement on a case-by-case basis.

[xxiii] *See,* Communication from the United States, *supra note 4*, at p.3.

[xxiv] *See,* Roessler, *supra note 13*, at p. 136.

[xxv] *See,* Note by the Secretariat, *supra note 3*.

[xxvi] *See*, Roessler, *supra note 13*, p. 136.

[xxvii] *See*, Communication from the United States, *supra note 3*, at p.9.

[xxviii] *See*, Cottier and Schefer, *Good Faith and the Protection of Legitimate Expectations in the WTO*, in New Directions in International Economic Law, 47, at 66 (M. Bronkers and R. Quick eds., 2000).