



## NON-VIOLATION COMPLAINTS UNDER THE TRIPS AGREEMENT

### COMMUNICATION FROM THE UNITED STATES

The following communication, dated 10 June 2014, is being circulated at the request of the delegation of the United States.

#### 1 INTRODUCTION

1.1. The applicability of non-violation complaints to the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is a matter of considerable importance to WTO Members. Numerous WTO Members have intervened on this topic during meetings of the TRIPS Council as well as in other bodies of the WTO and General Agreement on Tariffs and Trade (GATT),<sup>1</sup> and have also submitted several communications to the TRIPS Council on this issue.<sup>2</sup> While the views of Members may vary, Members have consistently agreed on the importance of continued examination of this issue. This agreement was reflected most recently at the WTO Ministerial Conference in Bali, where Ministers decided on 7 December 2013:

We take note of the work done by the Council for Trade-Related Aspects of Intellectual Property Rights pursuant to our Decision of 17/12/2011 on "TRIPS Non-Violation and Situation Complaints" (WT/L/842), and direct it to continue its examination of the scope and modalities for complaints of the types provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 and make recommendations to our next Session, which we have decided to hold in 2015. It is agreed that, in the meantime, Members will not initiate such complaints under the TRIPS Agreement.<sup>3</sup>

1.2. The decision of the United States to join consensus on that decision is without prejudice to its continued position that non-violation and situation complaints are fully appropriate in the context of the TRIPS Agreement. In fact, the U.S. decision to join consensus was premised on the interest expressed by Members to take up intensified work on this issue in the TRIPS Council following the 2013 Bali Ministerial, which was reflected in the statement of the Chair of the TRIPS Council at the 10-11 October 2013 meeting of the Council, where he explained:

<sup>1</sup> See, e.g., Summary Note by the Secretariat: Revision, 19 October 2012, IP/C/W/349/Rev.2; Summary Note by the Secretariat: Revision, 24 November 2004, IP/C/W/349/Rev.1; Summary Note by the Secretariat, 19 June 2002, IP/C/W/349; Note by the Secretariat, 28 January 1999, IP/C/W/124.

<sup>2</sup> See, e.g., Communication from Argentina, Bolivia, Brazil, Colombia, Cuba, Ecuador, Egypt, India, Kenya, Malaysia, Pakistan, Peru, Sri Lanka and Venezuela, 30 October 2002; Communication from Canada, 29 March 2001, IP/C/W/249; Communication from Australia, 27 September 2000, IP/C/W/212; Communication from the United States of America, 17 July 2000, IP/C/W/194; Communication from Canada, the Czech Republic, the European Communities and their member States, Hungary and Turkey, 22 June 2000, IP/C/W/191; Proposal from Cuba, the Dominican Republic, Egypt, Indonesia, Malaysia and Pakistan, 29 April 1999; IP/C/W/141; Communication from Canada, 10 February 1999, IP/C/W/127.

<sup>3</sup> WT/MIN(13)/31, WT/L/906, emphasis added.

At the same time, Members had indicated readiness to engage early next year in intensified work on the examination of the scope and modalities for such complaints with the intent of finding a way out of the current cycle of extending the non-violation moratorium from one Ministerial Conference to the next.<sup>4</sup>

1.3. This paper is intended to advance the Council's intensified examination of non-violation complaints under the TRIPS Agreement. The following summarizes: the relevant provisions of the GATT 1994, the TRIPS Agreement, and the Dispute Settlement Understanding (DSU); relevant GATT and WTO panel and Appellate Body reports; and responses to issues raised by other WTO Members regarding the applicability non-violation complaints under the TRIPS Agreement.

## 2 PROVISIONS OF THE WTO AGREEMENT RELATING TO NON-VIOLATION COMPLAINTS

2.1. Provisions of the WTO Agreement relating to non-violation complaints include Article XXIII of GATT 1994, Article 64 of the TRIPS Agreement, and Articles 3.2 and 26 of the DSU. Article XXIII of GATT 1994 allows a WTO Member to challenge another Member's measures which nullify or impair a benefit under the Agreement. Article XXIII limits non-violation complaints to those which may be brought by a member state if a "benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired." A benefit is nullified or impaired for one of three reasons under this article: 1(a) the failure of another WTO Member to carry out its GATT obligations; 1(b) the application of another WTO Member's measure, whether or not it is GATT-inconsistent (non-violation complaint); or 1(c) the existence of any other situation (situation complaint).

2.2. Article 64 of the TRIPS Agreement incorporates Articles XXII and XXIII of the GATT 1994 into the TRIPS Agreement. The language of the TRIPS Agreement is clear that the inclusion of non-violation complaints was contemplated by WTO Members. Article 64.1 states:

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.<sup>5</sup>

2.3. Article 64.2 then provides that the provisions of non-violation and situation complaints in GATT Article XXIII will not apply for a period of five years following the entry into force of the WTO Agreement. It is clear that after five years, those provisions would apply to the TRIPS Agreement. Finally, Article 64.3 is explicit and unambiguous that any extension of the five-year period must be agreed by consensus. It is clear from the text of Article 64 of the TRIPS Agreement that non-violation complaints were envisioned by the Agreement's drafters as applying to the Agreement.

2.4. During 1999, the TRIPS Council did examine, during its meetings, the scope and modalities of non-violation complaints. The Council, however, reached no conclusions and made no recommendations. On 1 January 2000, the delay in application provided by Article 64.2 ceased. It was only on 14 November 2001, that Ministers decided to continue to examine the scope and modalities for such complaints and to make recommendations to the Fifth Session of the Ministerial Conference, which include an agreement not to initiate such complaints under the TRIPS Agreement until the 2003 Ministerial. However, no such recommendations were adopted at the 2003 Cancun Ministerial, meaning that the moratorium lapsed for a second time. It was not until July 2004 that the General Council agreed by consensus to a new moratorium on non-violation complaints. At the 14-15 March 2006, TRIPS Council meeting, WTO Members agreed to keep non-violation and situation complaints as a regular item on the agenda.<sup>6</sup>

2.5. Article 3.2 of the DSU states, "Recommendations and rulings of the Dispute Settlement Body cannot add or diminish the rights and obligations provided in the covered agreements". WTO panels and the Appellate Body are bound by Article 3.2. Because the Marrakesh Agreement and its subsidiary agreements were the results of a single undertaking, it is highly unlikely, even if Article 3.2 did not exist, 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. One of the conditions that panels have held must exist for a non-violation complaint to succeed is

<sup>4</sup> IP/C/M/74, para. 7.4, emphasis added.

<sup>5</sup> Emphasis added.

<sup>6</sup> IP/C/M/50, paras. 87-89.

that the action complained of should not have been foreseeable at the time of the negotiations. Obviously, if another WTO agreement expressly provides for an action to be taken, that action was foreseen at the time of the negotiations and the complaining party would not be able to demonstrate that it is entitled to succeed in its non-violation claim under the TRIPS Agreement.

2.6. Article 26 of the DSU also contemplates non-violation complaints by setting out the manner in which they are to be applied in the WTO. That Article limits the remedies available for non-violation complaints to a "mutually satisfactory adjustment" with the implementing Member being under "no obligation to withdraw the measure."

### 3 GATT AND WTO PANEL AND APPELLATE BODY REPORTS ADDRESSING NON-VIOLATION COMPLAINTS

3.1. Under the GATT, complaining parties included non-violation complaints in eight disputes.<sup>7</sup> In three GATT disputes, the panel upheld the non-violation complaint and GATT Members adopted the panel report. In two GATT disputes, the non-violation complaint was upheld, but GATT Members did not adopt the panel report. Finally, in three GATT disputes, the non-violation complaint was not upheld by the panel. The WTO dispute settlement mechanism has also addressed eight non-violation complaints.<sup>8</sup> In addition, WTO dispute settlement mechanism has discussed non-violation in the context of the TRIPS Agreement.<sup>9</sup> In those disputes, the panels either did not uphold the non-violation complaints or exercised judicial economy with respect to those complaints. Through these disputes, GATT and WTO panels and the Appellate Body have provided extensive guidance regarding non-violation complaints. These disputes have stressed the importance of maintaining the availability of non-violation complaints.

#### 3.1 An Exceptional and Important Remedy

3.2. The United States has previously recognized that "the number of instances in which a non-violation complaint could succeed" by meeting these requirements under the TRIPS Agreement "is very limited."<sup>10</sup> GATT and WTO panels have acknowledged the need for caution with respect to such complaints, noting that they "should remain an exceptional remedy."<sup>11</sup> Adjudicative bodies have also noted that "[t]he reason for this caution is straightforward. Members negotiate the rules that they agree to follow and only exceptionally would expect to be challenged for actions not in contravention of those rules."<sup>12</sup>

<sup>7</sup> Report of the Working Party on *Australian Subsidy on Ammonium Sulphate*, adopted on 3 April 1950, BISD II/188; Panel Report on *Treatment by Germany of Imports of Sardines ("Germany - Sardines")*, G/26, adopted on 31 October 1952, BISD 1S/53; *Uruguayan Recourse*, adopted on 16 November 1962, BISD 11S/95; Panel Report on *EC - Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region ("EC - Citrus Products")*, GATT document L/5576, dated 7 February 1985 (unadopted); Panel Report on *EEC - Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes ("EEC - Canned Fruit")*, GATT document L/5778, dated 20 February 1985 (unadopted); *Japan - Semi-conductors*, adopted on 4 May 1988, BISD 35S/116; *EEC - Oilseeds*, adopted on 25 January 1990, BISD 37S/86; *United States - Agricultural Waiver*, adopted on 7 November 1990, BISD 37S/228.

<sup>8</sup> *United States - Standards for Reformulated and Conventional Gasoline*, panel and Appellate Body Reports adopted 20 May 1996, DS 2; *EC - Measures Concerning Meat and Meat Products (Hormones)*, panel and Appellate Body reports adopted 16 January 1998, DS43; *Japan - Measures Affecting Consumer Photographic Film and Paper*, panel report adopted 22 April 1998, DS 44; *Korea - Measures Affecting Government Procurement*, panel report adopted 19 June 2000, DS 163; *EC - Measures Affecting Asbestos and Product Contain Asbestos*, panel and Appellate Body reports adopted 5 April 2001, DS 135; *United States - Continued Dumping and Subsidy Offset Act of 2000*, panel and Appellate Body reports adopted on 16 January 2003, DS 234; *China - Certain Measures Affecting Imports of Automobile Parts*, panel and Appellate Body reports adopted on 12 January 2009, DS 339; *EC - Measures Prohibiting the Importation and Marketing of Seal Products*, Appellate Body circulated on 22 May 2014, DS 400.

<sup>9</sup> *United States - Section 211 Omnibus Appropriations Act of 1998*, panel Report, circulated 6 August 2001, 2 adopted January 2002, DS176/2 at 9.2 (the panel held that "there is nullification or impairment of the benefits accruing to the European Communities under the TRIPS Agreement," and *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products* panel (paragraphs 7.18 - 7.22 and footnote 81) and Appellate Body Reports (paragraph 36 - 41) adopted 16 January 1998, DS 50.

<sup>10</sup> IP/C/W/194, p. 3.

<sup>11</sup> *EC - Asbestos*, para. 186.

<sup>12</sup> Panel Report, *Japan - Measures Affecting Consumer Photographic Film and Paper ("Japan - Film")*, WT/DS44/R, adopted 22 April 1998, para. 10.36.

3.3. Nonetheless, even cases noting the limited circumstances for pursuing a non-violation claim recognize that "the non-violation remedy is an important and accepted tool of WTO/GATT dispute settlement."<sup>13</sup> Thus, non-violation is not intended as a method of reducing the certainty of an agreement, but rather in providing an "exceptional remedy" in certain circumstances to ensure that benefits accruing under the relevant WTO agreement are not nullified or impaired by a measure of another WTO Member.

3.4. Non-violation complaints "discourage actions that evade obligations without directly violating them."<sup>14</sup> The purpose of including non-violation complaints under Article XXIII:1(b) is "to protect the balance of concessions under GATT by providing a means to redress government actions not otherwise regulated by GATT rules that nonetheless nullify or impair a Member's legitimate expectations of benefits from tariff negotiations."<sup>15</sup> The basic premise of non-violation remedies is that "Members should not take actions, even those consistent with the letter of the treaty, which might serve to undermine the reasonable expectations of negotiating partners," not just in the context of tariff negotiations but in other contexts as well.<sup>16</sup>

3.5. Although this purpose is somewhat similar to the principle of international law under *pacta sunt servanda*, described in Article 26 of the Vienna Convention as meaning that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith," the "non-violation doctrine goes further than just respect for the object and purpose of the treaty" expressed under principles of international law.<sup>17</sup> Under the non-violation doctrine, there must be respect for "actual provisions (i.e., concessions) as far as their material effect on competitive opportunities."<sup>18</sup> This is an "extension of the good faith requirement."<sup>19</sup> Therefore, even though non-violation remedies are rarely applied, they nonetheless have "an important role – that of protecting the reasonable expectations of competitive opportunities through negotiated concessions."<sup>20</sup>

### 3.2 Existing Template: Three Elements, Reasonably Anticipated, Case-by-Case Analysis

3.6. In *Japan – Measures Affecting Consumer Photographic Film and Paper (Japan – Film)*, the panel identified three required elements of a non-violation complaint:

- (1) application of a measure by a WTO Member;
- (2) a benefit accruing under the relevant agreement; and
- (3) nullification or impairment of the benefit as the result of the application of the measure.<sup>21</sup>

3.7. The panel's analysis of these elements underscores the link between the legitimacy of an expected benefit and whether the measure was reasonably anticipated. According to the panel:

In order for expectations of a benefit to be legitimate, the challenged measures must not have been reasonably anticipated at the time the tariff concession was negotiated. 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.<sup>22</sup>

<sup>13</sup> *Japan – Film*, para. 10.36.

<sup>14</sup> IP/C/W/194, p. 4.

<sup>15</sup> *Japan – Film*, para. 10.50. See also Panel, EEC – Oilseeds I, para. 144 ("The idea underlying [the provisions of Article XXIII:1(b)] is that the improved competitive opportunities that can legitimately be expected from a tariff concession can be frustrated not only by measures proscribed by the General Agreement, but also by measures consistent with that Agreement.").

<sup>16</sup> *Korea – Procurement*, para. 7.93.

<sup>17</sup> *Korea – Procurement*, para. 7.95.

<sup>18</sup> *Korea – Procurement*, para. 7.95. See also *Japan – Film*, para. 10.82 (equating "nullification or impairment" with "upsetting the competitive relationship" between domestic and imported products).

<sup>19</sup> *Korea – Procurement*, para. 7.95.

<sup>20</sup> *Korea – Procurement*, para. 7.98.

<sup>21</sup> *Japan – Film*, para. 10.41.

<sup>22</sup> *Japan – Film*, para. 10.76.

3.8. Relying on the *EEC – Oilseeds* report, the panel in *Japan – Film* further clarified that "we do not believe that it would be appropriate to charge the United States with having reasonably anticipated all GATT-consistent measures." Rather, the panel reasoned that reasonable anticipation needs to be addressed on a case-by-case basis.<sup>23</sup>

### 3.3 Scope of Non-Violation Complaints Not Limited To Tariff Concessions

3.9. The availability of a non-violation complaint is not limited in terms of the type of measure that may be challenged. In *EC – Asbestos*, for example, the Appellate Body rejected the European Communities' argument that the principle could only be applied to "commercial measures," noting that "the text [of Article XXIII:1(b)] does not distinguish between, or exclude, certain types of measures" from its application.<sup>24</sup> GATT Article XXIII:1(b) is also not limited to tariff benefits.<sup>25</sup>

3.10. In *Korea – Procurement*, the panel recognized the difference between "traditional" non-violation complaints based upon concessions and "non-traditional" non-violation complaints based upon negotiations under the WTO Agreement on Government Procurement. In that dispute, the panel provided for greater flexibility in the required elements outlined above and adopted a slightly different test to apply non-violation complaints in the context of government procurement negotiation rather than pursuant to a concession. The panel assessed four elements of a non-violation dispute:

- (1) there was an agreed concession on entities;
- (2) resulting from that there was a reasonable expectation of enjoying competitive bidding opportunities;
- (3) an action which does not violate GPA rules is taken by the Member that made the concession, including the concessions on entities; and
- (4) resulting from that, the expected competitive bidding opportunities are not available and the benefits of the concession have been nullified and impaired.<sup>26</sup>

3.11. Because the concern has been raised that "a non-violation remedy under the TRIPS Agreement would be unpredictable without a common view on the essential elements of the remedy in relation to intellectual property," the adoption of these modified elements demonstrates the flexibility of such elements to adapt to different contexts.<sup>27</sup>

## 4 ISSUES OF CONCERN TO OTHER MEMBERS

4.1. Some WTO Members have raised questions regarding the application of non-violation complaints to the TRIPS Agreement. These questions are addressed below.

### 4.1 Non-Violation Complaints are Unnecessary Because the TRIPS Agreement is Not Designed to Protect Market Access

4.2. Some Members have expressed their view that, unlike other WTO agreements, the TRIPS Agreement is a *sui-generis* agreement which establishes minimum standards of intellectual property protection rather than protecting market access.<sup>28</sup> Some Members have also argued that even if the Agreement is a market access agreement, it is of a "distinctive character and, therefore, additional considerations are more or less needed to analyse the application of non-violation under it."<sup>29</sup> Another view is that the TRIPS Agreement is not designed to protect market

<sup>23</sup> *Japan – Film*, paras. 10.79.

<sup>24</sup> *EC – Asbestos*, paras. 188-189.

<sup>25</sup> See IP/C/W/349/Rev.2, para. 12 (citing 1985 Panel Report, *European Economic Community - Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes*, L/5778, not adopted; 1988 Panel Report on *Japan -Semi-conductors*; and 1990 Panel Report on *United States - 1955 Waiver*, cited in IP/C/W/212 at page 6 and IP/C/W/124, Annex 4.).

<sup>26</sup> *Korea – Procurement*, para. 7.103.

<sup>27</sup> IP/C/W/349/Rev.2, para. 68.

<sup>28</sup> IP/C/W/385, p. 1.

<sup>29</sup> IP/C/W/349/Rev.2, para. 27.

access but "to establish standards of IP protection, which, if abused, may even undermine market access."<sup>30</sup>

4.3. It is the view of the United States that the TRIPS Agreement is a market access agreement. As stated in its preamble, the TRIPS Agreement is intended "to reduce distortions and impediments to international trade ... and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade."<sup>31</sup> The Agreement also helps to reduce market distortions that existed prior to its negotiation by establishing minimum standards on the scope of trade-related intellectual property rights.

4.4. While it is true that the standards and procedures established in the agreement are in part to protect the enjoyment of private rights, this type of protection is not unique to the TRIPS Agreement – the Agreement on Technical Barriers to Trade and the Agreement on Sanitary and Phytosanitary Measures, for example, also establish minimum requirements that governments must meet before imposing limitations on goods. Furthermore, it is essential to note that intellectual property rights have the potential to impact market access. For example, in the context of an anticipated increase in market access resulting from a negotiated tariff reduction, such reductions for a product may not be realized if others could market identical products freely in spite of the existence of a patent claiming that product or a trademark associated with these products.

4.5. The United States is also of the view that there is no substantial difference between GATT, GATS and the TRIPS Agreement as they are all part of the overall package of the WTO System. The perception of differences between the agreements exists because the TRIPS Agreement's rights are granted to persons rather than applied to goods. However, like any other WTO Agreement, the rules set forth in the TRIPS Agreement determine the way in which a WTO Member's goods and services should be treated in the territories of other members, making the agreements more alike than different in their application and purpose.<sup>32</sup>

4.6. Notably, WTO adjudicative bodies have also found that non-violation complaints are not limited to tariff concessions and commercial benefits. For example, in *EC – Asbestos*, the Appellate Body rejected the argument of the responding party in that dispute that it is possible to have "legitimate expectations" only in connection with a purely "commercial measure". The Appellate Body stated that "the text [of Article XXIII:1(b)] does not distinguish between, or exclude, certain types of measures" and that such distinctions would be "very difficult in practice". Likewise, as explained above, the panel in *Korea – Procurement*, distinguished between "traditional" non-violation complaints based upon concessions and "non-traditional" non-violation complaints based upon negotiations under the WTO Agreement on Government Procurement.

4.7. In addition, according to a note prepared by the GATT Secretariat, non-violation and situation complaints originated out of an effort "to protect agreed tariff reductions as well as the reciprocal 'balance of concessions' from being undermined by non-tariff barriers or by other government measures (e.g., outside of the trade sphere)."<sup>33</sup>

## **4.2 Non-violation Complaints are Unnecessary to Protect any Balance of Rights and Obligations Inherent in the TRIPS Agreement**

4.8. Some Members have expressed their concerns that non-violation and situation complaints are unnecessary to protect any balance of rights because WTO Members are not obliged to implement more extensive protections under the TRIPS Agreement and because the Agreement already accurately reflects such obligations.<sup>34</sup>

4.9. The United States disagrees with the view that non-violation complaints would be at odds with the balance of rights and obligations in the TRIPS Agreement. The application of non-violation complaints was clearly envisioned by the drafters of the TRIPS Agreement, as evidenced by the language of Articles 64.1 and 64.2 which explicitly state that, after five years, complaints under

<sup>30</sup> IP/C/M/75/Add.1 at 126.

<sup>31</sup> Preamble to the TRIPS Agreement, first paragraph.

<sup>32</sup> IP/C/W/349/Rev.2, para. 41.

<sup>33</sup> 14 July 1989, MTN/GNG/NG13/W/31.

<sup>34</sup> IP/C/W/349/Rev.2, para. 13.



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Article XXIII:1(b) and (c) of GATT would be available under the Agreement. Therefore, the United States is of the view that these drafters intended for non-violation complaints to constitute an additional obligation to Members that is not expressed elsewhere in the provisions of the Agreement.

#### **4.3 Permitting Non-Violation Complaints will Introduce Incoherence Among WTO Agreements and Upset the Balance by Elevating Private Rights over the Interests of the Users of Intellectual Property**

4.10. Some Members have raised concerns that allowing non-violation remedies under the TRIPS Agreement would "unsettle [the] delicate balance of rights and obligations" provided for under the agreement and elevate the interests of private rights over the interests of public policy concerns. These members are concerned that by allowing non-violation complaints, Members' previously WTO consistent measures such as taxes and advertising requirements will be subject to challenge.<sup>35</sup>

4.11. The United States does not believe that the availability of non-violation measures will raise these systemic concerns. As described in preceding sections, WTO adjudicatory bodies will continue to be bound by Article 3.2 of the DSU, which clearly states that "[r]ecommendations and rulings of the Dispute Settlement Body cannot add or diminish the rights and obligations provided in the covered agreements." Additionally, Article 3.5 of the DSU provides that all solutions to matters raised must also be consistent with those agreements. Even absent these express provisions, however, it is unlikely that a panel would ever determine that something a WTO Member had agreed to under one part of the Marrakesh Agreement would nullify or impair benefits agreed to under another part of the single undertaking.

4.12. Furthermore, past GATT and the WTO rulings provide sufficient guidance on the scope of such complaints, which ensure that the scope of any non-violation complaint would have to be precisely drawn and clearly supported with detailed justification. Finally, as explained above, non-violation complaints are an "exceptional" remedy. The United States considers it unlikely that a limited remedy such as a non-violation complaint would have the destabilizing impact that concerns some Members.

#### **4.4 Application of Non-Violation Complaints will Undermine Regulatory Authority and Infringe Sovereign Rights Inherent in the TRIPS Agreement**

4.13. Some Members have suggested that the availability of non-violation complaints will limit the ability and flexibility for states to secure objectives relating to public health, nutrition, the transfer of technology and other issues of public interest. They also suggest that their sovereign rights will be limited by exposing to challenge any measure that affects intellectual property that could not have been foreseen at the time of the Uruguay Round.<sup>36</sup>

4.14. The United States is of the view that the availability of non-violation complaints will protect Members from intentional evasions of obligations under the TRIPS Agreement while preserving the ability of any Member to implement legitimate social, economic development, health, environmental and cultural policies. Non-violation complaints will only be successful if they could not have been foreseen when the Uruguay Round negotiations were underway. Because there are a number of ways to implement social and cultural policy goals, a Member may take this element of non-violation complaints into consideration when crafting measures to protect these goals.

4.15. In this regard, the United States also notes the following considerations conveyed by Switzerland at the February 2014, meeting of the TRIPS Council:

A number of delegations in their interventions today referred to their concern as to the potential impact of the application of non-violation complaints on their rights and obligations under TRIPS and more particularly the flexibilities contained in the Agreement. Let me be clear on this important point: It is our firm view that a non-violation complaint cannot be brought against another

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<sup>35</sup> IP/C/W/385, p. 2.

<sup>36</sup> IP/C/W/385, p. 2.

Member for utilizing a flexibility foreseen in the TRIPS Agreement. One of the necessary conditions that the complaining party must demonstrate is that the offending measure could not have been foreseen. That a Member may make use of a flexibility provided in the TRIPS Agreement is, just as any other right under the TRIPS Agreement, foreseeable by other Members. After all, they were written into the Agreement, agreed by all Members and, as far as pertaining to public health, also confirmed in the Doha Ministerial Declaration on the TRIPS Agreement and Public Health of 14/11/2001.<sup>37</sup>

#### **4.5 Rights and Obligations in the TRIPS Agreement are Best Performed through Good Faith Application of its Provisions**

4.16. Some Members have argued that rights and obligations arising under the TRIPS Agreement are better performed in accordance with established principles of international law rather than under the non-violation principle. These Members note their concern that the application of such provisions would not be as "legally imprecise" as the notion of non-violation complaints.<sup>38</sup>

4.17. The United States disagrees that the good faith application of the Agreement's provisions will in all circumstances fully protect Members in the same way that the availability of non-violation complaints will. The United States notes the discussion of the application of international law as put forward in *Korea – Procurement*. In that dispute, the panel noted that the "non-violation doctrine goes further than just respect for the object and purpose of the treaty" as protected under the principle of *pacta sunt servanda* principle under international law.<sup>39</sup> That dispute also noted that the non-violation provision is needed because, while most of the time actions taken by Members will be consistent with both the letter and the spirit of the treaty, "upon occasion, it may be the case that some actions, while permissible under one set of rules (e.g., the Agreement on Subsidies and Countervailing Measures is a commonly referenced example of rules in this regard), are not consistent with the spirit of other commitments."<sup>40</sup>

#### **4.6 There is Insufficient Guidance on Remedies and Dispute Settlement for Non-Violation Complaints under the TRIPS Agreement**

4.18. Some Members believe there is "insufficient guidance" in Article 26 of the DSU and GATT dispute practice for panels and the Appellate Body to apply non-violation and situation complaints in the context of the TRIPS Agreement.<sup>41</sup> Others have found sufficient guidance and addressed non-violation as part of a complaint.<sup>42</sup>

4.19. The United States does not believe that questions regarding the implementation of a provision of the TRIPS Agreement should serve as a barrier to such implementation. Article 64 is no different than any TRIPS Agreement provision on to the extent that no TRIPS Agreement provisions is so detailed as to anticipate all possible variations of implementation precisely. Such clairvoyance is not demanded of other TRIPS Agreement provisions. In fact, any provision of any WTO agreement is similarly situated – each agreement lays out a series of rights and obligations agreed by WTO Members. Where WTO Members need clarification regarding such rights and obligations, they have recourse to the WTO panel and Appellate Body system.

4.20. It is the role of the dispute settlement body to preserve those rights and obligations and to clarify the provisions of the covered agreements. As affirmed in DSU Article 3.2, the WTO dispute settlement system "is a central element in providing security and predictability to the multilateral trading system." Critically, however, the dispute settlement system cannot add to or diminish those rights and obligations.

4.21. It is within these well-established confines that GATT panels and the Appellate Body have already conducted significant analysis of non-violation provisions of the GATT 1994, which provides

<sup>37</sup> IP/C/M/75/Add.1, para. 169.

<sup>38</sup> IP/C/W/385, p. 1.

<sup>39</sup> Panel Report, *Korea – Measures Affecting Government Procurement* ("Korea – Procurement"), WT/DS163/R, adopted 19 June 2000, para. 7.95.

<sup>40</sup> *Korea – Procurement*, para. 7.99.

<sup>41</sup> IP/C/W/385, pp. 2-3.

<sup>42</sup> *US – Section 211 Appropriations Act*, *supra* at 9.



appropriate guidance on the applicability and use of non-violation complaints. This guidance, combined with the additional guidance provided by panels and the Appellate Body in past GATT and WTO disputes, provides WTO Members with an appropriate scope and set of modalities applicable to non-violation complaints also under the TRIPS Agreement. As explained above, these include a set of three required elements, which have been elaborated and refined through dispute settlement and which include an assessment of reasonable anticipation and a case-by-case determination.

4.22. Ultimately, the questions regarding the implementation of Article 64 have to a great extent been answered, in part by the text of the relevant covered agreements and in part by the GATT and WTO dispute settlement system. Where additional questions remain, dispute settlement continues to be the mechanism agreed by WTO Members to further clarify provisions of the covered agreement, including Article 64. Members endeavoring to divine such answers in the abstract divorced from a case-by-case analysis in the dispute settlement system is at odds with the agreed rules of the road of the WTO.

## **5 CONCLUSION**

5.1. Non-violation complaints are fully appropriate in the context of the TRIPS Agreement, and have have long been part of the WTO and the GATT. Non-violation complaints serve an interest all WTO Members share, which is to assist Members in protecting against measures that nullified or impaired concessions. Non-violation complaints were part of the balance of rights and obligations in the TRIPS Agreement. TRIPS Article 64 clearly provides that the provisions of non-violation and situation complaints in GATT Article XXIII would apply after a period of five years following the entry into force of the WTO Agreement, but also unambiguously provides that any extension of the five-year period must be agreed by consensus. The time has come to allow the moratorium on non-violation complaints to expire.

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