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NON-VIOLATION AND SITUATION NULLIFICATION OR IMPAIRMENT UNDER THE TRIPS AGREEMENT

COMMUNICATION FROM ARGENTINA, PLURINATIONAL STATE OF BOLIVIA, BRAZIL, CHINA, COLOMBIA, CUBA, ECUADOR, EGYPT, INDIA, INDONESIA, KENYA, MALAYSIA, PAKISTAN, PERU, RUSSIAN FEDERATION, SRI LANKA AND BOLIVARIAN REPUBLIC OF VENEZUELA

Revision

The following communication, dated 22 May 2015, has been received from the Permanent Mission of Brazil on behalf of Argentina, Plurinational State of Bolivia, Brazil, China, Colombia, Cuba, Ecuador, Egypt, India, Indonesia, Kenya, Malaysia, Pakistan, Peru, Russian Federation, Sri Lanka and Bolivarian Republic of Venezuela with the request that it be circulated to Members. Earlier versions of this document were circulated as IP/C/W/385 on 30 October 2002 and as an advance copy during the Council for TRIPS meeting held on 17-19 September 2002.

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EXECUTIVE SUMMARY

We share the interest, expressed by other Members, in a transparent, predictable and equitable mechanism for settling trade-related disputes concerning intellectual property. Like many WTO Members, however, we believe that the application of non-violation and situation complaints to the TRIPS Agreement raises fundamental concerns, which are summarized below and set out in the attached paper.

Application of non-violation and situation complaints is unnecessary

- The TRIPS Agreement, unlike other WTO agreements, is a *sui-generis* agreement which is not designed to protect market access or the balance of tariff concessions but rather to establish minimum standards of intellectual property protection, which, if abused, may even undermine market access (see, e.g., Article 8).

- Non-violation and situation complaints are unnecessary to protect any balance of rights and obligations inherent in the TRIPS Agreement, as these are reflected in the Agreement's principal obligations and flexibilities, and the Agreement explicitly states that WTO Members are not obliged to implement more extensive protection (Article 1).

- Non-violation and situation complaints are unnecessary to protect market-access commitments embodied in the GATT or GATS, or any other notion of a balance of concessions struck in the Uruguay Round, as these are adequately protected by those agreements and other Annex 1 agreements.

- Rights and obligations in the TRIPS Agreement are best performed through good faith application of its provisions, in accordance with established principles of international law recognized by the Appellate Body, and do not require recourse to the legally imprecise notion of non-violation and situation complaints.

Application of non-violation and situation complaints raises systemic concerns

As well as being unnecessary to achieve the Agreement's goals, we believe that applying non-violation and situation complaints to the TRIPS Agreement is undesirable and threatens to:

- Introduce incoherence among WTO agreements by allowing something which a WTO Member has agreed to accept in one part of the single undertaking (e.g. the GATT or the GATS) to be challenged on the basis that it could nullify or impair benefits in another area (e.g. TRIPS);

- upset the delicate balance of rights and obligations in the TRIPS Agreement by elevating private rights over the interests of the users of intellectual property – both within and between countries – and over other important public policy considerations in a manner inconsistent with Article 3.2 of the DSU;

- undermine regulatory authority and infringe sovereign rights by exposing to challenge any measure that affects intellectual property and that could *not have been foreseen* at the time of the Uruguay Round;

- limit use of the flexibilities inherent in the TRIPS Agreement to secure objectives relating to public health, nutrition, the transfer of technology and other issues of public interest in sectors of vital importance to socio-economic and technological development.

Nature of the benefit

- As stated in the attached paper, we believe that benefits accruing under the TRIPS Agreement are adequately described in its text, including its preamble, objectives and principles, and take full account of the development dimension. Such benefits accrue to Members rather than private entities, are adequately protected through good faith[1] application of the Agreement's rights and obligations, and do not require recourse to the legally imprecise notion of non-violation and situation complaints.

Nature of measures that can give rise to non-violation complaints

- We welcome attempts by other Members to clarify and narrow the definition of measures that may give rise to non-violation complaints. However, defining the term "measure" even narrowly would not address concerns that the remedy will infringe sovereign rights and undermine the Agreement's flexibilities. These concerns arise not merely from a lack of clarity about which measures could be challenged, but more fundamentally from legal uncertainty inherent in the concept of non-violation and situation complaints, and their application through the TRIPS Agreement to *any* measure.

Remedies and dispute settlement

- We continue to believe there is insufficient guidance in Article 26 of the DSU and in GATT/WTO dispute practice for panels and the Appellate Body to apply non-violation and situation complaints in the context of the TRIPS Agreement. Expanding the non-violation and situation remedy – and with it the right to challenge measures that are otherwise consistent with WTO obligations – may imbalance the proper distribution of responsibilities between WTO Members, and panels and the Appellate Body.

- We believe that, viewed individually and collectively, these concerns raise fundamental challenges to the multilateral trading system. Introducing non-violation and situation complaints in the TRIPS context is unnecessary, because it would undermine the security and predictability provided by the multilateral trading system and is in our view inconsistent with the long-term best interests of the multilateral trading system and all its Members.

[1] Vienna Convention on the Law of Treaties Signed at Vienna 23 may 1969, entry into force: 27 January 1980 , SECTION 3. INTERPRETATION OF TREATIES, Article 31 General rule of interpretation 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Proposal

– In light of the concerns expressed above and set out in detail in the following paper, we propose that the Council for TRIPS recommend to the Ministerial Conference that complaints of the type provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 shall not apply to the settlement of disputes under the TRIPS Agreement.

NON-VIOLATION AND SITUATION NULLIFICATION OR IMPAIRMENT UNDER THE TRIPS AGREEMENT

1 INTRODUCTION

1. The discussion on scope and modalities for complaints of the types provided for under Article XXIII:1(b) and (c) of GATT 1994 made pursuant to the TRIPS Agreement (so-called "non-violation and situation complaints") was initiated in 1999 in the Council for TRIPS. Since then, several WTO Members have submitted communications on this issue. In response to the requests from the Council for TRIPS, the Secretariat provided a Summary Note of the points raised in the substantive discussion of this issue in 2004 (IP/C/W/349) and updated it in 2004 (IP/C/W/349/Rev.1) and 2012 (IP/C/W/349/Rev.2). Nevertheless, the Council for TRIPS has been unable to reach any conclusions on the application of these complaints to the Agreement.

2. As noted by several WTO Members and stated by the Appellate Body, the non-violation remedy should remain an exception and be applied with considerable caution.[2] 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 any 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.

3. We share the interest, expressed by the other Members, in a transparent, predictable and equitable mechanism for settling trade-related disputes concerning intellectual property. The concept of allowing non-violation complaints in a rules-based system, however, remains controversial with a number of WTO Members and legal scholars and commentators. The potential application of these remedies to the TRIPS Agreement raises an additional set of challenges and is in our view unnecessary to secure the Agreement's effective implementation.

4. Following this introduction, this communication sets out some legal and historical background to non-violation complaints. It identifies systemic questions arising from the application of non-violation remedies to the TRIPS Agreement. It explores specific issues arising from discussions of scope and modalities, including uncertainty regarding the nature of any "benefits" arising under the TRIPS Agreement, the nature of "measures" that may give rise to non-violation complaints, and available remedies. The communication then offers some brief observations on situation complaints, and concludes by proposing that the Council for TRIPS should recommend to the Ministerial Conference that situations of the type identified in Article XXIII:1(b) and (c) of the GATT 1994 be determined inapplicable to the TRIPS Agreement.

2 BACKGROUND

2.1 Relevant WTO provisions and mandates

5. A number of WTO agreements, decisions and declarations refer to non-violation complaints. GATT Article XXIII establishes the basic rules on the remedy. It states:

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

[2] 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 paragraph 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." *Idem*, paragraph 113. In *EC - Asbestos*, the Appellate Body stated that it agreed with the statement by the Panel in *Japan – Film* that the non-violation remedy "should be approached with caution and should remain an exceptional remedy". Appellate Body Report, *EC – Asbestos, para. 186. The United States in its communication, IP/C/W/599 has also recognised the exceptional nature of the remedy.*

(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. Article 26.1 of the Dispute Settlement Understanding provides that the DSU's procedures will apply to non-violation complaints subject to certain stringent requirements including that "the complaining party shall provide a detailed justification in support of any complaint". Article 26.2, and the dispute settlement rules and procedures contained in the Decision of 12 April 1989 (BISD 36S/61-67), stipulate that in the case of situation complaints "the practice to adopt panel reports by consensus shall be continued".

7. Article 64 of the TRIPS Agreement addresses the application of non-violation complaints to settlement of disputes under the TRIPS Agreement. Paragraphs 2 and 3 of Article 64 provide the following:

2. Subparagraphs 1(b) and 1(c) of Article XXIII of the 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 the 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.

8. Taking into consideration that no decision has yet been adopted on scope and modalities, the 4th Ministerial Conference adopted a Decision on Implementation-Related Issues and Concerns stating that:

> The TRIPS Council is directed to continue its examination of the scope and modalities for complaints of the types provided for under subparagraphs 1(b) and 1(c) of Article XXIII of the GATT 1994 and make recommendations to the Fifth Session of the Ministerial Conference. It is agreed that, in the meantime, Members will not initiate such complaints under the TRIPS Agreement.[3]

9. This decision is referred to in the Ministerial Declaration, which provides that "outstanding implementation issues shall be addressed as a matter of priority by the relevant WTO bodies, which shall report to the Trade Negotiations Committee … by the end of 2002 for appropriate action".[4] Members subsequently extended the moratorium at the 2005 Hong Kong Ministerial Conference,[5] at the 2009 Geneva Ministerial Conference,[6] at the 2011 Geneva Ministerial Conference[7] and most recently at the 2013 Bali Ministerial Conference[8].

2.2 Article 64 requires consensus by WTO Members

10. We believe that achieving consensus on the relationship between non-violation and situation complaints and the TRIPS Agreement is an essential priority for WTO Members. It is required by

[3] WT/MIN(01)/W/10, paragraph 11.1.
[4] WT/MIN(01)/DEC/W1, paragraph 12.
[5] WT/MIN(05)/DEC, para. 45.
[6] Decision of the Ministerial Conference on "TRIPS non-violation and situation complaints" (WT/L/783) of 2 December 2009.
[7] Decision of the Ministerial Conference on "TRIPS non-violation and situation complaints" (WT/L/842) of 17 December 2011.
[8] Decision of the Ministerial Conference on "TRIPS non-violation and situation complaints" (WT/L/906) of 11 December 2013.

the Agreement in Article 64.3. Ministers, similarly, have directed the Council for TRIPS to make recommendations to the 5th Ministerial Conference.[9]

11. One Member has suggested that after the expiry of the time-period under Article 64.2, non-violation and situation complaints should automatically apply to the TRIPS Agreement irrespective of whether a consensus has been reached by a Ministerial Conference on the issue of scope and modalities.[10] It has been further suggested that no purpose will be served by continuing to discuss the issue of application or non-application of non-violation and situation complaints to the TRIPS Agreement. We believe that in the Doha Decision on Implementation-Related Issues and Concerns Ministers have dispelled this suggestion by reiterating the importance of continuing the examination mandated under Article 64.3.

12. Members view with utmost seriousness the assertion that the expiry of the time-period under Article 64.2 makes non-violation and situation complaints automatically applicable to the TRIPS Agreement. This assertion, is in our view, incorrect. Article 64.1 establishes that GATT Article XXIII applies to the TRIPS Agreement except as otherwise provided in Articles 64.2 and 64.3. Notwithstanding the expiry of the time-period under Article 64.2, non-violation and situation complaints only apply to the TRIPS Agreement in accordance with the procedure established under Article 64.3. Complying with this procedure, the importance of which Ministers reaffirmed through their adoption of the Decision on Implementation-Related Issues and Concerns, should be a matter of priority for the Council for TRIPS. It needs to be recalled that non-violation and situation complaints would be applicable to TRIPS only when there is a consensus on the scope and modalities as envisioned in Article 64.3 of the TRIPS Agreement.

2.3 Historical background

13. Why was the possibility to bring complaints about otherwise legal measures originally introduced into the GATT? The non-violation and situation remedies stemmed from early bilateral trade agreements. The GATT's drafters realized that the intended effect of a tariff reduction could be frustrated by measures that the GATT did not regulate, such as domestic subsidies. Since the GATT did not contain any substantive commitments on such internal measures, procedures for the adjustment of tariff concessions following the introduction of such measures were required.

14. The purpose of Article XXIII:1(b) and (c) was thus 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 agreed market-access commitments. The non-violation and situation concepts were not part of the corpus of international law. Rather, they were specific concepts developed for the GATT.[11] To date, the non-violation concept has been applied in only a limited number of GATT cases, most of which addressed subsidies that undermined agreed market-access commitments. Under the WTO, although non-violation claims were brought in a limited number of cases, none of the panels found in favour of it. There is no history of situation complaints under the GATT or the WTO.

15. Since the early days of the GATT, the evolution of the multilateral trading system and the establishment of the WTO – including the adoption of extensive rules on non-tariff measures and a binding dispute settlement system – has weakened the traditional justification of non-violation complaints. Disciplines on subsidies and other non-tariff measures have largely removed the need for such complaints to protect tariff concessions.[12] The non-violation remedy has also been

[9] See paragraph 11.1 of the Decision on Implementation-Related Issues and Concerns.

[10] The United States in its communication IP/C/W/599 states "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."

[11] 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 ("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 the GATT have figured in pre-World War II treaties of commerce."). Notably, the non-violation remedy has now transposed into the NAFTA. See also Note by the WTO Secretariat, *Non-Violation Complaints and the TRIPS Agreement* (IP/C/W/124).

[12] See Kuyper, *op. cit.* (stating "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

narrowed in scope under GATS Article XXIII:3, which limits complaints to benefits accruing from specific commitments undertaken by Members. Additionally, non-violation complaints would rarely be necessary to protect the exchange of rights and obligations in the TBT and SPS Agreements, and the other agreements in Annex 1 of the Marrakesh Agreement, as these include substantial flexibility within their rules to address borderline cases, without resorting to the legally imprecise notion of non-violation and situation complaints.

16. Today, resort to these remedies is difficult to justify within the rules-based WTO system. They have become progressively less necessary as a tool to protect market-access commitments. By introducing legal uncertainty they undermine the predictability and security that the system seeks to guarantee. We believe that application of non-violation complaints to the TRIPS Agreement raises an additional set of problems. It is unnecessary to achieve the Agreement's effective implementation. It may upset the delicate balance struck within the TRIPS Agreement. And it may undermine the balance struck more broadly within the multilateral trading system, with implications for the predictability and security that the system seeks to provide all WTO Members.

3 SYSTEMIC CONCERNS ABOUT NON-VIOLATION NULLIFICATION OR IMPAIRMENT UNDER THE TRIPS AGREEMENT

17. Application of non-violation claims to the TRIPS Agreement raises a number of systemic concerns both for the TRIPS Agreement and for the multilateral trading system more generally.

3.1 Introducing incoherence between WTO Agreements

18. WTO Members have noted with concern that non-violation complaints under the TRIPS Agreement may give rise to incoherence among the WTO agreements. The danger of incoherence was raised in a paper by Canada, the Czech Republic, the European Communities and their member States, Hungary and Turkey, which noted that otherwise WTO-consistent measures such as taxes and advertising requirements could potentially be challenged under the TRIPS Agreement. It noted that "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."[13]

19. It has been argued in response 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".[14] This, however, fails to acknowledge that, as part of a single undertaking, WTO obligations apply cumulatively and so a measure consistent with one WTO agreement (e.g. the GATT) can still be found to nullify and impair benefits under another (e.g. TRIPS). Similarly, the response that Article 3.2 of the DSU will prevent the dispute settlement body from adding to or diminishing the rights and obligations under existing WTO agreements[15] begs the question and fails to recognize that applying non-violation complaints to the TRIPS Agreement amounts to establishing a new cause of action under the TRIPS Agreement.

20. Moreover, the rebuttal of specific examples of incoherence identified in the Canadian paper is unconvincing; it merely asserts that a non-violation complaint could not be established in those instances as "no benefit would arise" upon which to base a claim.[16] As yet, we have seen no examples of when a non-violation complaint *would* be considered justified, or why such a situation could not be addressed through application of the Agreement's substantive rules. In the absence of clear arguments to the contrary, the concern that non-violation complaints may give rise to incoherence among WTO agreements remains.

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subsidization, there will be less and less scope for 'non-violation' […]. 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.").

[13] IP/C/W/191, paragraph 11 ("Canadian paper").

[14] IP/C/W/194. See also IP/C/W/599.

[15] *Idem*.

[16] *Idem*.

3.2 Upsetting the balance of rights and obligations in the TRIPS Agreement

21. As well as introducing incoherence between WTO agreements, the application of non-violation complaints may upset the balance of rights and obligations in 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. The provisions in the TRIPS Agreement, as noted in its objectives, seek to promote the mutual advantage of producers and users of technological knowledge, and to provide a careful balance of rights and obligations.

22. Application of a 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. 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 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 an obligation to renegotiate but as a legal principle capable of creating unknown new benefits and corresponding responsibilities.

23. Members failing to agree on any such benefits may be subject to retaliation equivalent to the retaliation applicable in the case of a violation. Again, the creation of unnegotiated obligations 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".

3.3 Undermining regulatory authority

24. We remain concerned that application of non-violation complaints to the TRIPS Agreement threatens to undermine regulatory authority and to infringe sovereign rights. A number of developing countries 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".[17]

25. In response to these concerns, one Member has said 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).[18] Yet, if literally applied, this approach to non-violation complaints would require one WTO Member to compensate another for measures that *adversely affect* foreign holders of intellectual property rights and that *were not foreseen* during the Uruguay Round. [19] Such an approach would arguably cover a whole range of domestic measures, may undermine the Agreement's flexibilities, including in the area of public health, and could "chill" the enjoyment of WTO Members' sovereign right to develop new laws to protect the public interest.

26. We also note that, unlike the GATT and the GATS, the TRIPS Agreement fails to protect measures designed to achieve important national policy goals, such as protecting health and the environment, through a general exception. These measures are likely to be placed at a further disadvantage if open to challenge through non-violation complaints.

3.4 Limiting the flexibility inherent in the TRIPS Agreement

27. The application of non-violation complaints may also undermine the flexibility inherent in the Agreement. Ministers affirmed the importance of such flexibility in the Doha Declaration on the TRIPS Agreement and Public Health, which reaffirms the "right of WTO Members to use, to the full,

[17] 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)*, paragraph 4 (IP/C/W/141).

[18] Job No. 4437, page 5.

[19] See Matthew Stilwell and Elisabeth Tuerk, Non-Violation Complaints and TRIPS Agreement: Some consideration for WTO Members, May 2001, available at www.ciel.org/Publications/Nonviolation_Paper1.pdf.

the provisions in the TRIPS Agreement, which provide flexibility" in order to "protect public health and, in particular, promote access to medicines for all". The Declaration provides a non-exhaustive list of flexibilities including that "each provision of the TRIPS Agreement shall be read in light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles". The importance of flexibility to least-developed countries is also noted in the Agreement's preamble, which recognizes the "special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base". Thus, the preamble to the TRIPS Agreement recognizes the inherent policy flexibility of WTO Members when it states that the TRIPS Agreement recognizes "the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives." It has been argued 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.[20] However, since any intentional evasion of a TRIPS obligation can be challenged as a violation of that obligation itself there is no need for the "non-violation" route to address the same. It is of concern that what is more likely to be questioned in a non-violation complaint is the exercise of available policy flexibility.

28. The application of non-violation complaints is, therefore, incompatible with maintaining the flexibility of the TRIPS Agreement. The flexibility that the TRIPS Agreement provides to a country while crafting its measures is that the minimum standards of the Agreement are not compromised. The preamble also recognises that there is no singular system of policy objectives that WTO members are required to adhere to. They are contextual, depending on a Member's state of economic and technological development. 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 to ensure access to essential medicines (to implement the human right to health) or guarantee access to technology. It may facilitate unilateral pressure to constrain the adoption of domestic measures under Article 8 to protect public health and nutrition and to promote the public interest in sectors of vital importance to socio-economic and technological development. The uncertainty surrounding the non-violation remedy will make it harder for Members to rely on the agreed text of the TRIPS Agreement to define their rights and obligations in the face of unilateral pressure by other, more powerful WTO Members.

29. These systemic concerns about non-violations in the TRIPS context are underpinned by a number of more specific concerns regarding the possible elements of a non-violation claim, which are discussed in the following section.

4 SPECIFIC CONCERNS ARISING FROM DISCUSSIONS OF SCOPE AND MODALITIES

4.1 Discussions regarding the scope and purpose of non-violation complaints

30. Extending the scope of the non-violation remedy to the TRIPS Agreement is inappropriate for a number of reasons. As noted by a number of WTO Members, the TRIPS Agreement is a *sui generis* agreement within the WTO system, and consequently the non-violation remedy is unnecessary to protect the balance of rights and obligations inherent in the TRIPS Agreement, the market-access commitments made in other agreements, or any other balance of rights and obligations inherent in the Uruguay Round package.

31. First, as a *sui generis* agreement within the WTO system, the TRIPS Agreement is significantly different from the GATT and the GATS. The non-violation remedy has traditionally been applied to maintain the balance of concessions made during tariff negotiations. Unlike the GATT and the GATS, the TRIPS Agreement does not involve such an exchange of concessions, and it remains unclear how non-violation complaints would apply to minimum regulatory standards that protect private property rights. It has been argued, however, that differences between the TRIPS Agreement and other WTO agreements are not as significant as they may seem. The view has been expressed that the TRIPS Agreement helps to reduce market distortions and that this is supported by its preamble, which commences with the words "... *Desiring* to reduce distortions and

[20] Para 4.14, IP/C/W/599.

impediments to international trade".[21] While intellectual property rights may in some cases facilitate international trade and investment, the TRIPS Agreement's obligations cannot be characterized as market access concessions in the same way as obligations can be characterized under the GATT or the GATS. The results of WTO market access negotiations are recorded in the respective GATT and GATS schedules, but not in the TRIPS Agreement. Indeed, in some cases intellectual property rights may undermine market access; Article 8, for example, explicitly notes that domestic measures may be needed "to prevent … the resort to practices which unreasonably restrain trade". That the remedy has been applied under the GATT and the GATS does not render it appropriate for the TRIPS Agreement.

32. Second, non-violation complaints are not required to protect any balance of rights and obligations inherent in the TRIPS Agreement. As noted, the TRIPS Agreement is not a market access agreement. It has been argued nevertheless that the TRIPS Agreement embodies an exchange of rights and obligations, including longer implementation periods for developing countries and certain exceptions and limitations to intellectual property rights that should be protected by the non-violation remedy. To the extent that the Agreement does involve an exchange of rights and obligations, these differ in kind from tariff concessions, as they principally define the balance between the producers and users of intellectual property and not between WTO Members. This delicate balance is adequately reflected in the Agreement's principal obligations, and in the flexibilities inherent in the Agreement, and does not require the non-violation remedy for their protection. Indeed, applying such a remedy may introduce uncertainty and upset this delicate balance of rights and obligations.

33. Third, applying non-violation complaints to the TRIPS Agreement is not required to protect market-access commitments made in other WTO agreements. The primary goal of the TRIPS Agreement – unlike other agreements in Annex 1 of the Marrakesh Agreement – is not to protect market-access commitments under other agreements. It has been argued that the rules established by the TRIPS Agreement determine the way in which a WTO Member's goods and services are treated in other Member's territory and that such treatment benefits the Member in the same way that it benefits under the rules established by other WTO agreements. We remain unconvinced by this assertion for a number of reasons. One is that the nature of the effect is different. Whereas other Annex 1 WTO agreements protect market access for the like products of all Members, the TRIPS Agreement's minimum standards enable private interests in one Member to exclude all others from using the subject-matter of the right. A second difference is that while Annex 1 agreements such as the TBT and SPS Agreements do not contain explicit commitments to certain levels of market access, maintaining market access is their primary objective, and their substantive provisions are designed specifically to secure market-access commitments. The TRIPS Agreement's rules, by contrast, do not focus on protecting market access but are designed specifically to establish minimum standards of intellectual property protection. Whereas other WTO agreements tend to increase competition, the basic effect of the TRIPS Agreement's rules is to reduce competition to provide incentives for innovation.

34. Fourth, non-violation complaints are not required to protect any overall package of concessions made under the Uruguay Round. One Member asserts that concessions given in the TRIPS Agreement were granted in exchange for benefits gained in another area/sector, implying that non-violations are somehow required to protect this exchange. If indeed the argument that the TRIPS Agreement "reduces distortions and impediments" to international trade were correct, then the Agreement actually reduces the need for non-violation complaints in the WTO system. And as noted above, the development of WTO rules on non-tariff barriers reduces the "legal vacuum" around the GATT, and hence the need for the legally imprecise mechanism of non-violation complaints to protect market-access commitments. The argument that non-violation complaints are required in the TRIPS Agreement to protect market-access commitments made in other WTO agreements or to protect the agreed minimum standards in the TRIPS Agreement is thus difficult to accept.

35. Lastly, the protection conferred by the TRIPS Agreement does not extend to economic returns resulting from market access concessions under the GATT or the GATS or to economic benefits arising from the commercial exploitations of the subject-matter of such rights. In the case of patents, the TRIPS Agreement merely grants patent holders the right to prevent third parties from taking certain actions. Article 63.1 of the Agreement defines the "subject-matter of this

[21] Job No. 4437, page 4.

agreement" as "the availability, scope, acquisition, enforcement and prevention of the abuse of intellectual property rights". Complaints regarding measures pertaining to commercial exploitation, competition or market access should be filed under relevant provisions of the GATT and the GATS; applying the non-violation remedy to the TRIPS Agreement is unnecessary to address these cases. The TRIPS Agreement does not guarantee the patent holder that it can exploit rights if other legal provisions consistent with WTO agreements do not allow such exploitation.

36. As yet we have seen no convincing explanation why existing provisions of the TRIPS Agreement are inadequate to protect its minimum standards. Nor have we seen any clear explanation of how or when the non-violation remedy would apply to the TRIPS Agreement, and how this would benefit WTO Members.

4.2 Uncertainty as to the nature of the benefits addressed by non-violation complaints

37. Despite ongoing discussion in the TRIPS Council there is still a great deal of uncertainty as to the nature of benefits that would be addressed by non-violation complaints. The nature of benefits under the TRIPS Agreement is significantly less clear than in an agreement with specific market-access commitments. As a contribution to this discussion, we have the following comments.

38. We believe that any benefits accruing under the TRIPS Agreement are adequately described in the text of the Agreement. Article 1 explicitly provides that "Members shall give effect to *the provisions of this Agreement*" and that "Members may, *but shall not be obliged to*, implement in their law more extensive protection than is required by this Agreement" (emphasis added). We do not believe that WTO Members agreed at the end of the Uruguay Round to benefits beyond the boundaries of the text. There was not common understanding among the negotiators that this Agreement creates a legitimate expectation of benefits that go beyond the effective protection of intellectual property rights. Indeed, we believe that the purpose of the TRIPS Agreement is achieved with the good faith performance of the obligations set out in the TRIPS Agreement. If additional advantages were accorded to them under Article XXIII:1(b) in response to measures perfectly consistent with that Agreement, they would be getting more than they "paid" for.

39. Any benefits of the TRIPS Agreement are expressed in its preamble, objectives and principles and should take full account of the development dimension. These include: ensuring that measures and procedures to enforce intellectual property rights do not become barriers to legitimate trade; promotion of technological innovation and the transfer and dissemination of technology; mutual advantage of producers and users of technological knowledge; social and economic welfare; a balance of rights and obligations; protection of public health and nutrition; promotion of the public interest in sectors of vital importance to the Members' socio-economic and technological development; and ensuring that intellectual property rights do not unreasonably restrain trade or adversely affect the international transfer of technology. As stated in the text of the TRIPS Agreement, intellectual property rights play a role in promoting broader development and in furthering the achievement of technological and socio-economic objectives. It is these benefits, if any, that should be the focus of discussions of "benefits" for the purposes of the non-violation remedy in the Council for TRIPS.

40. Any relevant benefits of the TRIPS Agreement must accrue to Members rather than private entities. Rather than addressing the benefits accruing to a Member under the TRIPS Agreement – as set out in Article 26 of the DSU – one Member has focused on a narrower category of benefits accruing to individual intellectual property holders from acquiring, maintaining and enforcing intellectual property rights. It has been argued that the benefits accruing under the TRIPS Agreement are just as clear as those deriving from the GATT, and include national treatment and most-favoured-national treatment, the level of protection provided for each form of intellectual property covered by the TRIPS Agreement, and other benefits. The two, however, are quite different. First, both Article XXIII of the GATT and Article 26 of the DSU identify the benefits as accruing to a *Member*. The benefits to Members under the TRIPS Agreement should not be conflated with the interests of private right holders. Second, all the benefits to Members are, in our view, reflected in the text of the Agreement and include socio-economic benefits – not merely the narrower rights of private parties to acquire, maintain and enforce an intellectual property right (which are merely means of achieving broader socio-economic benefits). Lastly, tariff concessions of the kind traditionally safeguarded by Article 26 of the DSU require multilateral dispute settlement procedures, whereas private intellectual property rights are enforced through domestic courts in order to safeguard benefits derived from protection.

41. The notion of "competitive relationship" – often associated with non-violation complaints as applied to other WTO agreements -–cannot be transposed into the TRIPS context. It has also been argued that the benefits may somehow involve the notion of "competitive relationship", which has been used in GATT panel reports addressing non-violation complaints. We doubt that this notion can be transposed into the TRIPS context. First, the TRIPS Agreement addresses minimum standards of intellectual property protection rather than establishing a particular level of market access. Second, intellectual property rights strike a subtle balance between those of intellectual property holders and users of intellectual property, the objective being to promote social and economic welfare. A narrow focus on intellectual property holders' rights threatens to upset this balance. Third, the Agreement's minimum standards, rather than promoting competitive relationships, are in effect anti-competitive in order to reward inventors.

42. Finally, non-violation complaints are not the best way to protect benefits arising from the Agreement. We have yet to hear arguments why the provisions of the TRIPS Agreement are not sufficiently flexible to address the concerns raised by Members who support such a remedy. We believe that, rather than relying on the legally imprecise notion of non-violation, a focus on the text of the Agreement, supported by other principles in the existing corpus of international law, is a preferable approach. According to Article 3.2 of the DSU, one of the purposes of the dispute settlement system is to clarify the provisions of the agreements covered by the DSU "in accordance with the customary rules of interpretation of public international law". According to Articles 26 and 31 of the Vienna Convention, all treaties must be interpreted and performed in good faith. The Appellate Body has confirmed the importance of the concept of good faith in interpreting obligations under the WTO Agreement:

> [The principle of good faith], at once a general principle of law and a general principle of international law, controls the exercise of rights by States. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a State's rights and enjoins that whenever the assertion of a right "impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably". An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting.[22]

43. The principles of international law already require the bona fide, reasonable application of the TRIPS Agreement by all WTO Members. This requirement is sufficient to guarantee any benefits embodied in the TRIPS Agreement and obviates the need for recourse to the legally imprecise and uncertain notion of non-violation complaints.

4.3 Uncertainty as to the nature of "measures" that can give rise to non-violation complaints

44. Article XXIII:1(b) of the GATT 1994 provides that a non-violation complaint may arise over the application by another Member "of any measure, whether or not it conflicts with the provisions of this Agreement". Discussions in the Council for TRIPS have so far failed to identify the nature of measures that could be challenged.

45. We share the concerns, expressed by other Members, that a wide range of measures could be challenged. These may include government-instituted measures to promote social or economic development, health or environmental and cultural goals. They may also encompass actions of courts or law-enforcement authorities, leading to the use of the non-violation remedy as a means of appealing national legal decisions and upsetting the balance between State bodies. In addition to direct challenges to these measures, we are concerned that application of non-violation complaints to the TRIPS Agreement may be used to "chill", through bilateral pressure, the development of a wide range of domestic measures relating to intellectual property holders.

46. We would welcome examples from the proponents of the non-violation remedy of what they would consider as falling within and outside the definition of the term "measure", as a contribution to the Council for TRIPS's work on this agenda item. We are, however, of the view that defining "measure", even narrowly, would not address the concerns raised in Section III.C above, which do

[22] *United States–Import Prohibition of Certain Shrimp and Shrimp Products,* adopted on 6 November 1998, WT/DS58/AB/R, paragraph 158.

not merely arise from a lack of clarity about which "measures" could be challenged, but more fundamentally from legal uncertainty inherent in the concept of non-violation and its application through the TRIPS Agreement to *any* domestic measure. There are no examples of the kind of measure that can be addressed by non-violation complaints rather than claims of violation.

4.4 Concerns regarding remedies and dispute settlement

47. 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. One Member has asserted 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."[23]

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.[24]

48. Moreover, Article 26 of the DSU merely restates the traditional view that any complaint must be supported by detailed justification 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 have to apply the concept of non-violation to the TRIPS Agreement on an ad hoc, case-by-case basis. As noted by one author:

> " … [T]he 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."[25]

49. In addition to concerns about the lack of guidance for WTO dispute settlement bodies, we believe that non-violation complaints may give rise to claims for compensation that extend beyond the confines of the TRIPS Agreement. We are concerned about the notion, offered by one WTO Member and noted by the Appellate Body in *India-Patents*, that achieving a mutually satisfactory adjustment "is usually achieved through compensation in the form of additional concessions".[26] As pointed out above, there is very little GATT practice on which to base a judgement of what is or should be "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 judgement. 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).

50. Finally, we believe that use of complaints based on a "non-violation" of agreed commitments under the TRIPS Agreement is difficult to reconcile with the binding nature of the WTO's dispute settlement system. As noted by one author:

> "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

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[23] Job No. 4437, page 5.

[24] See Note by the Secretariat, *supra* Note 11.

[25] F. Roessler, *Should Principles of Competition Policy be Incorporated into WTO Law Through Non-Violation Complaints?*, Journal of International Economic Law, page 136, September 1999.

[26] IP/C/W/194, page 6. See also *India-Patent Protection for Pharmaceutical and Agricultural Chemical Products* (AB-1997-5) page 4.

> 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 licences to retaliate is defined by a legal concept that originally served to define the scope of the obligation to consult under bilateral trade agreements."[27]

51. Similarly, as noted in the 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".[28] We do not agree with the claim that GATT panels and the Appellate Body have already conducted sufficient analysis of non-violation provisions of the GATT 1994 and thus provided appropriate guidance on the applicability and use of non-violation complaints. It has been argued that non-violation complaints will be successful only when these could not have been *'foreseen when the Uruguay Round negotiations were underway"*. The practical effect of this approach could be to require Members to compensate for measures that adversely affect foreign holders of intellectual property rights, and that were not foreseen during the Uruguay Round.. Thus, we remain concerned about the ambiguities in the applicability of non-violation complaints to the TRIPS Agreement. We are also concerned about potentially expansive interpretations of WTO obligations. Decisions of panels and 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.

4.5 Effect on the predictability and security of the multilateral trading system

52. In light of the concerns arising from the possible elements of a non-violation complaint and the systemic concerns identified above, we believe that extending the non-violation remedy may entail consequences for the predictability and security of the multilateral trading system. The latest communication by one Member[29]does not address, in our view, the fundamental concerns that several Members have consistently raised with regard to non-violation complaints under the TRIPS Agreement.

53. Applying non-violation complaints to the TRIPS Agreement introduces legal uncertainty that may exacerbate the difficulties faced by WTO Members when responding to the claims of other Members. It will likely increase the number and complexity of claims facing WTO Members, making it more difficult for them to defend their interests against challenges by more powerful Members. In response to such concerns, one WTO Member has argued that the traditional requirements applied to non-violation complaints "are not easy hurdles to clear".[30] It may also be argued, however, that the traditional requirements, as well as GATT practice, do not provide a clear indication of how the remedy will play out in the TRIPS context. Already, the potential for bringing non-violation complaints has been cited in a number of bilateral consultations about intellectual property rights, and so the view that the remedy would not give rise to an influx of complaints should be viewed with extreme caution.

54. Applying non-violation complaints to the TRIPS Agreement introduces legal uncertainty into the WTO system more generally. Such uncertainty is likely to further increase public concern over the impact of the TRIPS Agreement on important issues such as public health, biodiversity protection and the transfer of technology, with implications for the WTO's relationship with the public. As noted already, it is also likely to introduce incoherence between WTO agreements and may open a broad range of domestic measures – including those consistent with other WTO agreements or introduced under the TRIPS Agreement's flexibility mechanisms – to challenge. In light of these and other concerns, we believe that application of non-violation complaints to the TRIPS Agreement is inappropriate. It is unnecessary to achieve its effective implementation. It is

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[27] F. Roessler, *op. cit.*, page 418.

[28] 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*, paragraph 13 (IP/C/W/191).

[29] IP/C/W/599.

[30] IP/C/W/194, page 9.

likely to upset the delicate balance struck within the TRIPS Agreement. And it can be expected to have a range of broader implications for the multilateral trading system that may affect the predictability and security which the system seeks to provide for all WTO Members.

5 SITUATION COMPLAINTS

55. The concerns expressed above apply equally to situation complaints. The concept of situation complaint is predicated upon the existence of any other situation that nullifies or impairs benefits to a Member or that impedes the attainment of an objective which is not covered by Article XXIII:1(a) or (b) of the GATT. In more than 50 years of GATT and WTO history there has been no dispute based on a situation complaint. In view of this, and in light of the profound uncertainty that would be introduced into the TRIPS Agreement and the multilateral trading system more generally by allowing claims under the TRIPS Agreement based on "any situation", we believe there is no justification for introducing this remedy into the TRIPS Agreement.

6 PROPOSAL

56. In light of the aforementioned issues, we believe that introducing non-violation and situation complaints into the TRIPS Agreement is unnecessary and inconsistent with the interests of the WTO Members. Any benefits arising from the Agreement can be adequately protected by applying the text of the Agreement in accordance with accepted principles of international law, and without introducing the legally uncertain notion of non-violation and situation complaints. The absence of non-violation complaints in the TRIPS context does not in any manner threaten or dilute the enforceability of TRIPS related rights and obligations. On the contrary, the application of non-violation complaints in the TRIPS context could potentially present issues relating to rights of intellectual property right holders versus the legitimate exercise of regulatory policy choice by Governments.

57. Consequently, we propose that the TRIPS Council recommend to the Ministerial Conference that complaints of the type provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 shall not apply to the settlement of disputes under the TRIPS Agreement.

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