

Pending the Moratorium: the Status of Non-Violation and Situation Complaints Under the TRIPS Agreement Following MC14

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ABSTRACT

The 14th WTO Ministerial Conference (MC14), held in Yaoundé, Cameroon, concluded on 30 March 2026 without extending the moratorium on non-violation and situation complaints (NVSCs) under the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement). This policy brief argues that the expiry of the moratorium does not render NVSCs automatically applicable to disputes under the Agreement. The requirement under Article 64.3 for the TRIPS Council to examine the scope and modalities of NVSCs and for the WTO Ministerial Conference to adopt a consensus decision thereon, has not been fulfilled.

Until such a decision is taken, NVSCs remain inapplicable to TRIPS disputes. However, unless the implications of the non-extension are addressed, it may discourage the adoption of measures in the public interest by developing countries and least developed countries (LDCs) which would be fully legitimate under the TRIPS Agreement. Any attempt to suggest that NVSCs are now applicable to the obligations under this Agreement in the interim should be firmly contested. Resolving this issue through continued discussions in the TRIPS Council must be prioritized.

KEYWORDS: *Moratorium, Non-violation and Situation Complaints (NVSCs), Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement), 14th WTO Ministerial Conference (MC14), TRIPS Council, TRIPS Flexibilities, General Council, Least Developed Countries (LDCs), United States, Switzerland*

La 14e Conférence ministérielle de l'OMC (CM14), qui s'est tenue à Yaoundé, au Cameroun, s'est achevée le 30 mars 2026 sans que le moratoire sur les plaintes en situation de non-violation au titre de l'Accord sur les aspects des droits de propriété intellectuelle qui touchent au commerce (Accord sur les ADPIC) n'ait été prolongé. Ce document soutient que l'expiration du moratoire ne rend pas automatiquement applicables les plaintes en situation de non-violation aux différends dans le cadre de l'Accord. L'obligation prévue à l'article 64.3, selon laquelle le Conseil des ADPIC doit examiner la portée et les modalités des plaintes en situation de non-violation et la Conférence ministérielle de l'OMC doit adopter une décision par consensus à ce sujet, n'a pas été remplie.

Tant qu'une telle décision n'aura pas été prise, les plaintes en situation de non-violation resteront inapplicables aux différends dans le cadre de l'Accord sur les ADPIC. Toutefois, à moins que les implications de la non-prorogation ne soient traitées, cela pourrait décourager l'adoption, par les pays en développement et les pays les moins avancés (PMA), de mesures d'intérêt public qui seraient pleinement légitimes au regard de l'Accord sur les ADPIC. Toute tentative visant à suggérer que les plaintes en situation de non-violation sont désormais applicables aux obligations découlant du présent Accord à titre provisoire doit être fermement contestée. Il convient de donner la priorité à la résolution de cette question par la poursuite des discussions au sein du Conseil des ADPIC.

MOTS-CLÉS: *Le moratoire, Les plaintes en situation de non-violation, L'Accord sur les aspects des droits de propriété intellectuelle qui touchent au commerce (Accord sur les ADPIC), La 14e Conférence ministérielle de l'OMC (CM14), Le Conseil des ADPIC, Les mesures d'assouplissement prévues par l'Accord sur les ADPIC, Le Conseil général, Les pays les moins avancés (PMA), Les États-Unis, La Suisse*

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KEY MESSAGES

- The non-extension of the moratorium at MC14 does not render NVSCs automatically applicable to TRIPS disputes.
- The situation created by the non-extension may undermine the effective use of TRIPS flexibilities.
- Continued discussions in the TRIPS Council under the mandate of Article 64.3 and in the General Council remain the path toward the extension of the moratorium or a decision on the permanent non-applicability of NVSCs to TRIPS disputes.

La 14.ª Conferencia Ministerial de la OMC (CM14), celebrada en Yaundé (Camerún), concluyó el 30 de marzo de 2026 sin prorrogar la moratoria sobre las reclamaciones por no violación y por situación (NVSC en inglés) en el marco del Acuerdo sobre los Aspectos de los Derechos de Propiedad Intelectual relacionados con el Comercio (Acuerdo sobre los ADPIC). Este informe de política sostiene que la expiración de la moratoria no implica que las NVSC pasen a ser automáticamente aplicables a las diferencias en el marco del Acuerdo. El requisito establecido en el artículo 64.3 de que el Consejo de los ADPIC examine el alcance y las modalidades de las NVSC y de que la Conferencia Ministerial de la OMC adopte una decisión por consenso al respecto, no se ha cumplido.

Hasta que se adopte dicha decisión, las NVSC seguirán sin ser aplicables a las controversias en materia de ADPIC. Sin embargo, a menos que se aborden las implicaciones de la no prórroga, ello podría desalentar la adopción de medidas de interés público por parte de los países en desarrollo y los países menos adelantados (PMA), aun cuando dichas medidas serían plenamente legítimas conforme al Acuerdo sobre los ADPIC. Cualquier intento de sostener que las NVSC son ahora aplicables a las obligaciones derivadas de este Acuerdo durante este período transitorio debe ser firmemente rechazado. La resolución de esta cuestión mediante la continuación de las discusiones en el Consejo de los ADPIC debe considerarse una prioridad.

PALABRAS CLAVES: La moratoria, Las reclamaciones por no violación y por situación, El Acuerdo sobre los Aspectos de los Derechos de Propiedad Intelectual relacionados con el Comercio (Acuerdo sobre los ADPIC), La 14.ª Conferencia Ministerial de la OMC (CM14), El Consejo de los ADPIC, Las flexibilidades del Acuerdo sobre los ADPIC, El Consejo General, Los Países Menos Adelantados (PMA), Los Estados Unidos, La Suiza

2026年3月30日，在喀麦隆雅温得举行的第14届世贸组织部长级会议（MC14）闭幕，会议未延长《与贸易有关的知识产权协定》（TRIPS协定）下关于非违反之诉和情境之诉（NVSCs）的暂停期。本政策简报认为，暂停期的届满并不意味着非违反之诉和情境之诉将自动适用于《与贸易有关的知识产权协定》下的争端。《与贸易有关的知识产权协定》第64.3条规定，TRIPS理事会应审查非违反之诉和情境之诉（NVSCs）的范围与模式，并由世贸组织部长级会议就此通过一项共识决定，但该要求尚未得到履行。

在作出此类决定之前，非违反之诉和情境之诉仍不适用于《与贸易有关的知识产权协定》争端。然而，除非解决暂停期未获延长所带来的影响，否则这可能会阻碍发展中国家和最不发达国家（LDCs）采取符合公共利益的措施。这在《与贸易有关的知识产权协定》下是完全合法的。任何试图暗示在过渡期内非违反之诉和情境之诉现已适用于本协定项下义务的说法，都应予以坚决反对。当前的首要任务应是在《与贸易有关的知识产权协定》理事会内继续磋商来解决这一问题。

关键词： 暂停、非违反之诉和情境之诉（NVSCs）、《与贸易有关的知识产权协定》（TRIPS协定）、第14届世贸组织部长级会议（MC14）、与贸易相关的知识产权理事会、《与贸易有关的知识产权协定》规定的灵活性、总理事会、最不发达国家（LDCs）、美国、瑞士

I. Introduction: Missed Opportunity in Yaoundé

The WTO Ministerial Conference has, since the Doha Ministerial Decision of 2001, regularly extended the moratorium on the initiation of non-violation and situation complaints (NVSCs) under the Agreement on Trade Related Aspects on Intellectual Property Rights (TRIPS Agreement). This moratorium, originally established under Article 64.2 of the TRIPS Agreement for a five-year period (see Box 1) and continuously renewed by successive Ministerial Conferences, has served to preserve legal stability and provide the space for WTO Members to examine within the TRIPS Council the scope and modalities for the application of NVSCs.¹

Box 1.

TRIPS Article 64. Dispute Settlement

1. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement except as otherwise specifically provided herein.
2. Subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 shall not apply to the settlement of disputes under this Agreement for a period of five years from the date of entry into force of the WTO Agreement.
3. During the time period referred to in paragraph 2, the Council for TRIPS shall examine the scope and modalities for complaints of the type provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 made pursuant to this Agreement, and submit its recommendations to the Ministerial Conference for approval. Any decision of the Ministerial Conference to approve such recommendations or to extend the period in paragraph 2 shall be made only by consensus, and approved recommendations shall be effective for all Members without further formal acceptance process.

¹ South Centre Background Note, TRIPS and Transfer of Technology Related Issues for the 14th WTO Ministerial Conference, Health, Intellectual Property and Biodiversity Programme, March 2026.

The most recent mandate in force ahead of MC14 stemmed from the MC13 decision of 2 March 2024,² which directed the TRIPS Council to continue its examination of the issue and to make recommendations to MC14, and maintained the moratorium in the interim (Box 2).

Box 2.

Decision of the 13th WTO Ministerial Conference

We take note of the work done by the [TRIPS Council] pursuant to our Decision of 17 June 2022 on “TRIPS Non-Violation and Situation Complaints” (document WT/L/1137), 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 the 14th Ministerial Conference. It is agreed that, in the meantime, Members will not initiate such complaints under the TRIPS Agreement.

In the run-up to MC14, Colombia submitted a Draft Ministerial Decision on TRIPS Non-Violation and Situation Complaints (WTO Document IP/C/W/731, 25 February 2026). The proposal invited Ministers to instruct the TRIPS Council to continue examining the scope and modalities of NVSCs and to present recommendations to MC15, while maintaining the moratorium in the interim. Despite this proposal, and other proposals including from the Least Developed Countries (LDCs),³ and an informal meeting convened by the Chair of the TRIPS Council to hear Members’ views on how best to proceed, no agreement was reached at MC14, reflecting the continuing divergence of views among Members.

MC14 thus concluded without a consensus decision to extend the moratorium.⁴ This is the first time since the initial expiry of the five-year moratorium under Article 64.2 on 1 January 2000 that a Ministerial Conference has not renewed the explicit agreement among Members not to initiate NVSCs. As a result, WTO Members now confront the question of what the non-extension of the moratorium means for the applicability of NVSCs to disputes under the TRIPS Agreement.

This policy brief finds that the non-extension of the moratorium at MC14 does not, as a matter of legal interpretation, render NVSCs automatically applicable to disputes under TRIPS. Recommendations are advanced for the steps WTO Members, particularly developing countries and LDCs, should take to manage this situation and preserve the integrity of TRIPS flexibilities, i.e., of the policy space available under the Agreement to pursue public interest objectives.

II. Background: The Moratorium and Its History

Non-violation and situation complaints are a distinctive feature of the WTO dispute settlement system. Unlike standard violation complaints, which allege a breach of a covered agreement’s obligation, NVSCs allow a Member to challenge a measure that does not breach the text of an agreement but nevertheless nullifies or impairs a benefit that another Member could reasonably have expected to arise under that agreement. Situation complaints similarly address circumstances where a benefit may be impaired even without an identifiable measure. The legal basis for this mechanism is found in Article XXIII(1)(b) and (c) of the GATT 1994.

The application of NVSCs to intellectual property disputes was contested from the outset of the TRIPS negotiations.⁵ Developing countries, Canada, and the European Communities raised concerns about how the concept of “nullification or impairment of benefits” could apply to an agreement creating general minimum standards of intellectual property (IP) protection, rather than specific market access concessions. A central concern was that NVSCs could be used to compel countries to adopt TRIPS-plus standards of IP protection beyond what the Agreement requires. To address these concerns without blocking the adoption of the WTO agreements under the single undertaking, negotiators agreed to a five-year moratorium on NVSCs under Article 64.2, alongside a mandate for the TRIPS Council to examine the scope and modalities of such complaints under Article 64.3.

Discussions in the TRIPS Council over more than two decades have failed to produce consensus on the interpretation of these provisions. An overwhelming majority of WTO Members, including not only developing countries but also developed country Mem-

² WTO document WT/MIN(24)/39, Ministerial Decision on TRIPS Non-Violation and Situation Complaints, 4 March 2024.

³ LDC Group Priorities at the World Trade Organization, WTO Document WT/GC/W/979/Rev.1, 9 February 2026, paragraph 1.7.

⁴ MC14 Chairperson’s Summary, WTO Document WT/MIN(26)/35, 31 March 2026, paragraph 1.7 (noting that the moratorium on TRIPS Non-Violation and Situation Complaints “also expires at this Conference”).

⁵ UNCTAD-ICTSD, Resource Book on TRIPS and Development (Cambridge University Press, 2005).

bers such as Australia, Canada, the European Union, Japan, New Zealand, and the Republic of Korea, have consistently expressed the view that NVSCs are inappropriate in the TRIPS context and that the moratorium should be extended or NVSCs made permanently inapplicable. Only a small number of Members, principally the United States and Switzerland, have expressed a different view and maintained that NVSCs would become automatically applicable upon expiry of the moratorium without consensual renewal.⁶

The Doha Ministerial Decision on Implementation-Related Issues and Concerns (WT/MIN(01)/17) directed the TRIPS Council to continue its examination of the scope and modalities and agreed that in the meantime Members would not initiate such complaints.⁷ This language was renewed by subsequent Ministerial Conferences. The persistence of the moratorium through successive renewals reflects the recognition among Members that applying non-violation complaints to TRIPS raises significant public policy concerns and could potentially disturb the negotiated balance of rights and obligations in the TRIPS Agreement.

At the last meeting of the TRIPS Council in November 2025, Members agreed to keep the agenda item on NVSCs open with a view to resuming discussions when Members would be in a position to take a decision. Following the referred to Colombia's submission of a Draft Ministerial Decision (IP/C/W/731), as noted, the Chair of the TRIPS Council convened an informal meeting, but no agreement was reached during these discussions and the MC14 concluded without any decision. No decision was made either on customs duties for electronic commerce⁸. The moratoriums for both lapsed in MC14.

III. The Legal Question: Why NVSCs do not Apply to TRIPS

III.1 The Majority View: No Automatic Applicability

The majority view among WTO Members, documented extensively in TRIPS Council submissions over more than two decades, is that NVSCs do not become automatically applicable upon expiry of the moratorium. This view rests on several mutually reinforcing legal grounds, each of which retains full force following MC14.⁹

First, Article 64 of the TRIPS Agreement, read as a whole, reflects the unresolved nature of the question of applicability. The mandate of Article 64.3 is substantive, not merely procedural. The examination of "scope and modalities" necessarily encompasses the threshold question of whether and to what extent NVSCs should apply to the TRIPS Agreement at all. As a joint communication from Argentina, Bolivia, Brazil, Cuba, Ecuador, Egypt, India, Kenya, Malaysia, Pakistan, Peru, Sri Lanka, Venezuela, African Group, LDC group and Kyrgyz Republic argued, the application of NVSCs is unnecessary given that the TRIPS Agreement is a *sui generis* agreement creating general minimum legal obligations, rather than specific market access concessions.¹⁰

Second, the negotiating history and circumstances of the adoption of Article 64, admissible as supplementary means of interpretation under Article 32 of the Vienna Convention on the Law of Treaties (VCLT), confirm that no consensus existed at the time of adoption on the applicability of NVSCs.¹¹ The provisions of Article 64 represent a carefully negotiated compromise: the full application of GATT dispute settlement procedures was agreed, but the question of NVSCs was expressly set aside for further examination. That no such examination has produced a consensus after more than three decades is itself evidence that the issue remains unresolved.

Third, the subsequent practice of WTO Members in TRIPS Council discussions, itself a legitimate interpretive element under Article 31(3)(b) of the VCLT, overwhelmingly supports the view that NVSCs are not automatically applicable. As Hungary, on behalf of the Central European Free Trade Agreement (CEFTA) countries, stated before the TRIPS Council in 1999: "irrespective of the expiration of the five-year period provided for by Article 64.2, non-violation complaints would remain inadmissible under the TRIPS Agreement until a decision was taken by consensus at the Ministerial Conference on the approval of the TRIPS Council's recommendation on the scope and modalities of those complaints."¹² That condition has not been met.

Fourth, the nature of the TRIPS Agreement as a minimum standards agreement, as opposed to a market access agreement creating specific concessions, makes the application of the non-violation doctrine conceptually problematic. As Canada observed in the TRIPS Council as early as in 1999, applying NVSCs in the TRIPS context would require a panel to determine in a vacuum what benefit a Member could "reasonably expect" from TRIPS obligations, given that the meaning of "benefit" in an IP context has not

⁶ See e.g., WTO Document IP/C/M/27, 14 August 2000; WTO Document IP/C/M/29, 6 March 2001; WTO Document IP/C/W/599, 10 June 2014; WTO Document IP/C/W/194, 17 July 2004.

⁷ WTO Document WT/MIN(01)/17, 20 November 2001, paragraph 11.1 (Doha Ministerial Decision on Implementation-Related Issues and Concerns).

⁸ The US, Canada, Japan and the European Union, among others, proposed a permanent extension of the moratorium. The African, Caribbean and Pacific Group proposed for an extension of the moratorium until the next Ministerial Conference. India and several other developing countries have opposed extension of the moratorium, given the significant fiscal revenue that can derive from customs duties.

⁹ Nirmalya Syam, Non-Violation and Situation Complaints under the TRIPS Agreement: Implications for Developing Countries, South Centre Research Paper No. 109 (Geneva: South Centre, May 2020).

¹⁰ Joint communication from Argentina, Bolivia, Brazil, Cuba, Ecuador, Egypt, India, Kenya, Malaysia, Pakistan, Peru, Sri Lanka, Venezuela, African Group, LDC Group, Kyrgyz Republic, WTO Document IP/C/W/385, September 2002, Add.1 and Add.2.

¹¹ Vienna Convention on the Law of Treaties, Article 32.

¹² Statement of Hungary on behalf of the CEFTA countries, TRIPS Council meeting, WTO Document IP/C/M/24, July 1999.

been substantively agreed and “different views exist on this”. A different interpretation of Article 64 may create uncertainty and de facto constrain Members’ policy space under the TRIPS Agreement, including in the areas of health, safety, and the environment.¹³

Fifth, and critically, Article 64.3 of the TRIPS Agreement requires the TRIPS Council to make recommendations to the Ministerial Conference, and the Ministerial Conference to adopt a consensus decision thereon. That consensus decision has not been made. The non-extension of the moratorium at MC14 does not constitute such a decision, it is an absence of a decision, not a positive determination that NVSCs apply.

III.2 The Position of the United States and Switzerland

The United States and Switzerland have long contended that Article 64.1 of the TRIPS Agreement makes Articles XXII and XXIII of the GATT 1994 fully applicable to TRIPS disputes, including the NVSC provisions of GATT Article XXIII(1)(b) and (c). On this reading, the moratorium under Article 64.2 was a temporary suspension of an already-applicable right, and Article 64.3’s mandate to examine scope and modalities was a time-limited exercise that, once the moratorium expired without consensual renewal, leaves NVSCs operative.¹⁴ The United States has accordingly stated in various submissions to the TRIPS Council that, in the absence of Ministerial guidance on scope and modalities, dispute panels themselves would have to interpret the provision in the context of a particular case.¹⁵

This position is not supported by the text, negotiating history, or subsequent practice of the TRIPS Agreement, as described above. It is also inconsistent with the position of the majority of WTO Members, including many developed country Members who, as noted, have consistently rejected the automatic applicability argument. Any reliance on the non-extension of the moratorium at MC14 to advance the argument that NVSCs are now applicable to TRIPS disputes should be firmly contested by WTO Members.

III.3 No Automatic Applicability

The conclusion that follows from the foregoing analysis is that the non-extension of the moratorium at MC14 does not, in and of itself, render NVSCs applicable to disputes under TRIPS. The legal position remains as it was before MC14: the TRIPS Council is mandated to examine the scope and modalities of NVSCs and to make recommendations for a consensus decision by the Ministerial Conference.¹⁶

The political environment however has changed. The moratorium language since the Doha Ministerial Decision, that “Members will not initiate such complaints”, created a political commitment not to initiate NVSCs, and not a legal determination of their applicability. With that commitment no longer renewed at MC14, the political constraint on initiation is gone, even though the underlying determination of scope and modalities remains unresolved. This distinction is critical and must be clearly understood by all Members.

The commitment not to initiate such complaints should be differentiated from the question of the availability of such complaints, which is a matter to be determined following the examination of the scope and modalities. If a Member were to initiate an NVSC under the TRIPS Agreement, a WTO panel would be confronted with precisely this threshold question. A legally sound outcome, consistent with the text, negotiating history, and subsequent Member practice, would be for the panel to determine that NVSCs are not admissible in the absence of a consensus Ministerial decision on scope and modalities.

It is important to recall how the WTO dispute settlement system (DSS) operates in the TRIPS Agreement context, and what the admission of a NVSC would actually set in motion. The dispute settlement process has three main phases: (i) consultations between the parties; (ii) adjudication by panels and, if either party appeals a panel ruling, by the Appellate Body; and (iii) adoption of panel and Appellate Body report(s) by the Dispute Settlement Body (DSB) and implementation of the ruling, which includes the possibility of countermeasures in the event of failure by the losing party to implement the ruling.¹⁷ Most cases relating to matters of compliance with the requirements of the TRIPS Agreement have been resolved in bilateral consultations between the Members concerned, either in Geneva or in capitals, without invoking the dispute settlement procedures in the DSB. As a result, the settlement rate has so far been quite high in the area of TRIPS.¹⁸

The WTO dispute settlement process means that even if a NVSC were initiated, the first phase would consist of bilateral consultations aimed at a mutually acceptable solution, an outcome far preferable to adjudication on an unresolved legal question. Second,

¹³ Canada, submission to the TRIPS Council, 1999 (WTO Document IP/C/W/127).

¹⁴ United States, WTO document IP/C/W/599, June 2014.

¹⁵ *Ibid.* at XIV, Para 4.21.

¹⁶ Nirmalya Syam and Viviana Munoz Tellez, Analysis of Intellectual Property Issues Ahead of the WTO 14th Ministerial Conference, South Centre Policy Brief No. 154, 25 February 2026.

¹⁷ Antony Taubman, Hannu Wager, and Jayashree Watal (eds.), *A Handbook on the WTO TRIPS Agreement* (Cambridge: Cambridge University Press / World Trade Organization, 2012).

¹⁸ *Ibid.*

the real coercive power of a NVSC lies not only in the prospect of a panel ruling but in the pressure that the initiation of formal proceedings itself generates, pressure that a developing country with limited legal resources may find difficult to resist. This reinforces the importance of resolving the applicability question definitively before any such complaint can be filed.

Nevertheless, there is a certain level of uncertainty which is consequential. Whether a panel would in practice reach the conclusion of non-applicability of NVSCs is not guaranteed. The dysfunctionality of the WTO Appellate Body, a consequence of the United States not joining consensus on appointments to fill vacancies in its membership, means there would be no avenue for an appellate review of a panel ruling admitting a NVSC under TRIPS, if this occurred. This underscores why the matter must remain actively contested and resolved through the TRIPS Council without delay.

IV. De Facto Risks: The Undermining of TRIPS Flexibilities

As noted above, even if NVSCs are not legally applicable to TRIPS, the threat of their initiation, and the uncertainty about whether a panel would admit them, may de facto constrain the policy space of WTO Members under the TRIPS Agreement, particularly that of developing countries and LDCs.

The TRIPS Agreement is not a uniform law and leaves WTO Members considerable policy space to interpret and implement its provisions in different manners, including in the areas of patent examination standards, compulsory licensing, plant variety protection, and IP enforcement, to mention a few. As documented by Carlos M. Correa, both developed and developing country Members have exercised these flexibilities, and the Doha Declaration on the TRIPS Agreement and Public Health confirms that each provision of the TRIPS Agreement must be read in the light of its object and purpose as expressed in its Articles 7 and 8.¹⁹ The risk posed by NVSCs is precisely that this interpretive policy space, exercised legitimately by Members, could be challenged through the dispute settlement mechanism. The TRIPS flexibilities are the instruments through which developing countries and LDCs exercise their sovereign right to design IP systems based on their levels of development and national contexts including public health needs.²⁰

A range of policy measures that, although fully consistent with the TRIPS Agreement, could be potentially targeted by NVSCs or the threat thereof. These include:

- The application of rigorous standards of patent examination, such as the rigorous interpretation of patentability criteria in the field of pharmaceuticals.
- Price control measures on patented pharmaceutical products, including mechanisms for monitoring and regulating the price of medicines.
- Disclosure requirements relating to the country of origin or source of genetic resources and associated traditional knowledge in patent applications.
- The use of compulsory licensing provisions in accordance with Article 31 of the TRIPS Agreement.
- IP enforcement flexibilities, including the non-extension of border measures to goods in transit.

In each of these cases, a Member considering adopting such a measure may face the prospect of an NVSC, with attendant legal costs and diplomatic pressure. A NVSC can, de facto, become another form of unilateral coercion in addition to measures such as the inclusion of a country in the United States' Special Section 301 Watchlist.²¹ The remedy available in non-violation complaints, a "mutually satisfactory adjustment" of the challenged measure, could, in practice, coerce countries to reform or apply their IP laws in the direction of TRIPS-plus standards.

This situation may deter the use of TRIPS flexibilities even if NVSCs ultimately prove unsuccessful. The mere possibility that a complaint could be admitted and that a panel could require a negotiated adjustment of a TRIPS-consistent measure may be sufficient to induce self-censorship among governments considering the use of flexibilities. This concern is particularly acute for developing countries and LDCs, which often lack the legal human capital and resources to defend complex WTO dispute settlement proceedings.

There is, however, a further dimension to this risk that extends well beyond the formal WTO dispute settlement arena. The non-extension of the moratorium is liable to be exploited as leverage in bilateral and regional trade negotiations. Developing countries are frequently subject to pressure from developed country trading partners to accept IP commitments that exceed the minimum standards required under the TRIPS Agreement. The potential use of NVSCs adds a new instrument for such pressure. A trading partner may suggest, explicitly or implicitly, that a developing country's failure to provide higher levels of IP protection, whether through extended patent terms, data exclusivity, broader patentability standards, or strengthened enforcement mechanisms, could

¹⁹ Carlos M. Correa, *Interpreting the Flexibilities Under the TRIPS Agreement*, South Centre Research Paper No. 132 (Geneva: South Centre, June 2021).

²⁰ See for example, *The Doha Ministerial Declaration on TRIPS and Public Health on its Twentieth Anniversary*, Policy Brief No. 107, South Centre, November 2021; Reto Hilty and Carlos Correa (Eds), *Access to Medicines and Vaccines: Implementing Flexibilities Under Intellectual Property Law*, Springer, 2021.

²¹ See for example, Viviana Munoz Tellez, Nirmalya Syam, Tamara Romero, *Time for a Collective Response to the United States Special 301 Report on Intellectual Property*, Policy Brief No. 65, South Centre, July 2019; Carlos Correa, *Special Section 301: US Interference with the Design and Implementation of National Patent Laws*, Research Paper No. 115 (Geneva: South Centre, July 2020).

expose it to a non-violation complaint under the TRIPS Agreement. The threat need not be formalised to have a coercive effect. In contexts where trade access or aid flows are at stake, the invocation of NVSC risk could induce a developing country to accept TRIPS-plus obligations they are not legally required to assume.

This dynamic could transform the non-extension of the NVSCs moratorium into a de facto instrument of IP standard-setting through bilateral pressure rather than multilateral consensus, an outcome the moratorium was designed to prevent. Thus, clarification of the legal status of NVSCs would serve as a safeguard against added coercion in the wider landscape of international trade and IP negotiations. Developing countries must be alert to this dynamic and should collectively resist any attempt to use NVSC risk as a bargaining chip in bilateral negotiations.

V. Recommendations: The Path Forward from MC14

The situation following MC14 calls for prompt and coordinated action by WTO Members to restore legal clarity and protect the policy space that the TRIPS Agreement affords. The following steps are recommended.

V.I Contest Any Claim That NVSCs Are Now Applicable to TRIPS

The most immediate priority for developing countries following MC14 is to firmly and collectively contest any suggestion – whether in the TRIPS Council, in bilateral discussions, or in the context of dispute settlement proceedings – that the non-extension of the moratorium has rendered NVSCs applicable to disputes under the TRIPS Agreement. The legal grounds for contesting this position are strong, as set out in Section III of this brief. Any attempt to initiate an NVSC in the current circumstances should be met with a coordinated and principled legal response by the developing country membership of the WTO, invoking the overwhelming majority interpretation of Article 64 and the absence of the consensus Ministerial decision required by Article 64.3. WTO Members should condemn any attempt to extend NVSCs application through concrete statements in the TRIPS Council, in the General Council, and in any other WTO body where the issue is raised. This would be consistent with the long-established legal position that a large coalition of developing countries has maintained.²²

V.II Continued Negotiation in the TRIPS Council for a Durable Resolution

The non-extension of the moratorium at MC14 does not extinguish the mandate of the TRIPS Council under Article 64.3 to examine the scope and modalities of NVSCs. Article 68 of the TRIPS Agreement separately mandates the TRIPS Council to monitor the operation of the agreement and to provide the opportunity for Members to consult on matters relating to TRIPS, including specifically any assistance requested in the context of dispute settlement procedures. Even after the expiry of the moratorium under Article 64.2, regardless of the decision on its extension, the TRIPS Council is required to provide the opportunity to discuss any question relating to dispute settlement procedures, including the scope and modality of application of NVSCs. The TRIPS Council could also make any recommendation in relation to the matters in discussion, including the adoption of new moratoriums.

Continued discussions in Geneva within the TRIPS Council framework are therefore both legally appropriate and strategically necessary, to examine the scope and modalities and develop recommendations for MC15, while Members refrain from initiating NVSCs in the interim. Members sharing the majority view should table a specific proposal in the TRIPS Council to conclude the examination, with a recommendation to MC15 that NVSCs be permanently excluded from TRIPS disputes. A coalition of countries should work together on a joint proposal, such as that tabled in 2015 by a group of 19 WTO Members in WTO Document IP/C/W/607 (July 2015).

Resolving this issue must be treated as a priority for developing countries in the Geneva WTO agenda. The failure to deliver an extension during the MC14 should strengthen the resolve of WTO Members to bring this long-standing matter to a definitive conclusion that protects the policy space that developing countries require and provides legal certainty to the implementation of the TRIPS Agreement.

V.III Build Legal Preparedness and Coordinate Defensively

Developing countries and LDCs should, in the interim, strengthen their legal preparedness to defend against any NVSC that may be filed in relation to TRIPS-consistent measures. This includes building expertise on the substantive and procedural aspects of NVSCs, documenting the legal basis for TRIPS-consistent measures that could be targeted, and coordinating defensive positions among like-minded Members. The South Centre can provide technical assistance to developing countries in this area.

²² Ibid. at 10, section B.12: "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 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 TRIPS Council."

VI. Conclusion

The failure of MC14 to take a decision on NVSCs under the TRIPS Agreement does not render NVSCs automatically applicable to TRIPS disputes. The requirement for a consensus Ministerial Conference decision on scope and modalities under Article 64.3 has not been fulfilled. This requirement is not a procedural formality; it is a substantive condition for applicability, reflecting the unresolved nature of the question at the time of the TRIPS Agreement's adoption and the consistent subsequent practice of the overwhelming majority of WTO Members.

What has changed at MC14 is the political environment. The absence of a moratorium removes the political commitment not to initiate NVSCs. This Policy brief advances the view that the absence of a Ministerial consensus decision on scope and modalities means that NVSCs have not yet been made applicable to TRIPS disputes. Any interim suggestion to the contrary must be firmly contested.

The TRIPS Council has been instructed to conduct the examination of the scope and modalities for NVSCs and to make recommendations to the Ministerial Conference. That instruction was not extinguished by the lapse of the moratorium at MC14. Article 64.3 requires to be completed before any determination on applicability can be made. Members in Geneva must continue to pursue this examination with renewed urgency. Continued discussions in Geneva within the TRIPS Council on scope and modalities and the General Council must be a priority for developing countries to resolve the question definitively by making NVSCs permanently inapplicable to the TRIPS Agreement.

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