

TIME FOR A PERMANENT TRIPS NON-VIOLATION COMPLAINT MORATORIUM: A WIN-WIN FOR ALL

WHAT IS AT STAKE?

Non-violation complaints (NVC) allow a Member of the World Trade Organization (WTO) to challenge another Member even without a breach of obligations of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), on the grounds that expected benefits were undermined. Under Article 64.2 of the TRIPS Agreement, a “moratorium” was to last for the first five years of the WTO. But, since then, it has been regularly renewed, pending agreement on the scope and modalities for operationalizing such complaints. At the 13th Ministerial Conference in Abu Dhabi in 2024, ministers agreed to once again extend the moratorium until the 14th Ministerial Conference occurring in Cameroon from 26-29 March 2026. Each renewal of the moratorium has been supported by developing countries and nearly all developed countries, with only a few exceptions.

Members have long maintained this moratorium on non-violation and situation complaints. A permanent moratorium would lock in this long-standing practice and provide legal certainty. It is a win-win for all WTO Members.

WHY A PERMANENT MORATORIUM MAKES SENSE

1. ENSURES LEGAL CERTAINTY IN THE INTELLECTUAL PROPERTY (IP) SYSTEM

- The TRIPS Agreement reflects a carefully negotiated balance between intellectual property (IP) protection and policy space. Allowing NVCs would introduce uncertainty, any country could be challenged despite complying with the rules of the TRIPS Agreement.
- Both developed and developing countries have used the policy space allowed by the TRIPS Agreement to incorporate limitations and exceptions in their various IP laws. These also drive major economic activity.

- In the US itself, industries dependent on the copyright fair use exceptions account for 18% of the US GDP, \$4.9 trillion in value added, and \$10.2 trillion in revenues in 2023, employing one in seven American workers, according to the Computer & Communications Industry Association.¹

- Many core internet services rely on copyright exceptions—search engines index content, previews show snippets, and cloud platforms store user data, without negotiating licenses each time. E.g. to view a website, the user’s computer must make a temporary copy of the website, and this is only permitted by exceptions to copyright. Internet companies rely on fair use in their daily operations, and search engines such as Google rely on exceptions to copyright since their software crawls the web and copies data into their database to be able to operate.

- Every economy betting on AI-driven growth has a direct interest in ensuring copyright exceptions remain beyond the reach of an NVC challenge.

A permanent moratorium provides clarity and predictability for governments and industries alike.

2. PROTECTS IMPORTANT PUBLIC POLICY MEASURES

- Governments in developed and developing countries rely on TRIPS flexibilities to address their various national needs, including public health, education, and economic needs.
 - E.g. Switzerland does not allow patents on: plant and/or animal varieties, inventions contrary to public policy and/or morality etc., and it has exceptions to patents for: compulsory licences, transport temporarily passing through Switzerland, experimental research and/or educational purposes, prior use etc.²
 - Similarly, in the United Kingdom (UK), computer software, plant and/or animal varieties,

¹<https://ccianet.org/news/2025/12/new-study-finds-fair-use-industries-amount-to-18-percent-of-the-u-s-economy/>

²<https://www.wipo.int/en/web/wipolex/index>

the human body, discoveries, theories, mathematical methods etc are not patentable. It also has exceptions to patents for compulsory licences, experimental research and/or teaching purposes, preparation of prescribed medicines, prior use, transport temporarily passing through the UK.³

- Any of these exceptions can be challenged by another WTO Member using NVC, if the WTO member determines that the benefits expected by the IP holder will be undermined.

- NVC creates a pathway for legitimate TRIPS-compliant national policies that affect IP holders to be challenged. Such policies could include, among others, rules on patentability of inventions, compulsory licensing and copyright limitations and exceptions, including the US fair use doctrine. NVC challenges against TRIPS-compliant policies can have significant consequences in matters of great national importance, such as access to affordable medicines and educational materials, as well as for research and development.

- E.g. It is legitimate to grant compulsory licences under Article 31 of the TRIPS Agreement, to override the patent barriers to make or import generic versions of patented medicines which are usually more than 90% cheaper than patented medicines. Developed and developing countries alike use this flexibility. During COVID-19, compulsory licensing became an important tool for access to COVID-19 medical products and technologies. Developed and developing countries amended their laws to facilitate easier and quicker processes for compulsory licenses or government use licenses in the pandemic, while others actually utilised issued such licenses.⁴ These countries include Australia, Canada, Chile, Colombia, Ecuador, Germany, Hungary, and Indonesia.

- In 2017, a German Federal Court of Justice ordered a compulsory license allowing Merck to continue to market the HIV drug raltegravir (marketed as Isentress), despite objections from the patent holder Shionogi.⁵

³ <https://www.wipo.int/en/web/wipolex/index>

⁴ https://msfaccess.org/sites/default/files/2021-05/COVID_TechBrief_MSFA_IP_CompulsoryLicensesTRIPSWaiver_ENG_21May2021_0.pdf

⁵ https://unctad.org/ippcaselaw/sites/default/files/ippcaselaw/2020-12/MSD%20v%20Shionogi%20%282017%29%2C%20German%20Federal%20Court%20%20Justice_0.pdf

- The United States courts and regulatory agencies also have the power to impose compulsory licenses on IP to remedy a broad array of actual, or in the case of mergers, even potential antitrust violations and this power has often been exercised in practice.⁶

The TRIPS NVC moratorium safeguards policy space without undermining IP protection.

3. AVOIDS COSTLY AND UNPREDICTABLE DISPUTES

- NVCs lack clear legal standards, making disputes complex, speculative, and difficult to adjudicate.

- Every WTO member is at risk of expensive litigation with uncertain outcomes. Some WTO Members may be less concerned by the lapse of the NVC moratorium, since the Appellate Body (AB) is currently not functioning. However, the AB may come back to life. Further, for an increasing number of WTO Members who have been joining the optional Multi-Party Interim Appeal Arbitration Arrangement (MPIA), decisions can still be enforced.⁷

A permanent moratorium reduces legal and financial risks for all Members.

4. PRESERVES THE BALANCE OF RIGHTS AND OBLIGATIONS

- TRIPS represents a delicate compromise between IP holders and public interests.

- NVCs could tilt this balance, allowing additional claims beyond agreed obligations.

The moratorium protects the integrity of the negotiated framework.

BOTTOM LINE: A permanent TRIPS non-violation complaint moratorium locks in certainty, protects policy space, avoids unnecessary disputes, and preserves the balance of the TRIPS Agreement—making it a practical and mutually beneficial outcome for both developing and developed countries.

⁶ https://www.keionline.org/wp-content/uploads/Annex_A_US_Compulsory_Licenses_7Mar2014_8_5x11.pdf

⁷ https://unctad.org/system/files/official-document/ictsd2003ipd5_en.pdf

⁷ https://yttoplurilaterals.info/plural_initiative/the-mpia/