

WTO NON-VIOLATION COMPLAINT: A MISUNDERSTOOD REMEDY OF THE DISPUTE SETTLEMENT SYSTEM?

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Resume

The dispute settlement system of World Trade Organization is supposed to be unique one. The up to date shape and structure of the procedure is a child of Uruguay Round but the roots of this system were already in 1947 when was created GATT. The system of dispute settlement was contained only into two GATT provisions, namely article XXII and XXIII. The number of GATT contracting parties and latter WTO members has during the time rapidly increased from 23 contracting parties which signed GATT 1947 to 153 members of World Trade Organization nowadays. That two GATT provisions about dispute settlement were not enough to regulate disputes between so many members. The improvement of the dispute settlement was on the agenda of the Uruguay Round negotiations and this situation gave born to the new Understanding on Rules and Procedures Governing the Settlement of Disputes providing more precise rules and guidance of dispute settlements.

WTO dispute settlement system contains three different types of complaints, which can be found in article XXIII. The most common complaint is the so-called violation complaint. To use this kind of complaint requires nullification or impairment of benefit as a result of the failure of another member to carry out its obligation under GATT 1994 or that the situation when the attainment of any objective of GATT 1994 is being impeded. The second type is non-violation complaint which may be used to challenge any measure applied by another member, even if it does not conflict with the GATT 1994 provisions. There also needs to be nullification or

impairment of some benefit. The third type is situation complaint which cover any situation whatsoever as long as it results in nullification or impairment. This complaint is not almost used and it was never issued any panel report regarding this complaint. In summary, it can be said that there are two types of complaints which play a practical role in the WTO dispute settlement process, namely violation complaint and far less frequently used non-violation complaint.

This article is concerned in non-violation complaint. In the history there was a handful of this type of complaint. All together was recorded 14 non-violation complaints and 6 of them were successful. It would be wrong to believe that the non-violation complaint has a wide scope of use and is suitable to address all sorts of measures otherwise consistent with GATT 1994 and the covered agreements. Panels and the Appellate Body have mostly stated that non-violation complaint should be approached with caution and should remain an exceptional remedy. The most famous cases which have influenced the up to date image of non-violation complaint were for example EEC – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins, Japan – Measures Affecting Consumer Photographic Film and Paper, EC – Measures Affecting Asbestos and Asbestos-Containing Products.

Aside from GATT 1994 is non-violation complaint regulated also in GATS and its article XXIII named “*Dispute Settlement and Enforcement*” is the one, which deals with the issue of non-violation complaint in its subparagraph 3. The other source of non-violation complaint we can find in Agreement on Trade-Related Aspects of Intellectual Property Rights and its article 64 named “*Dispute Settlement*”. Subparagraph 2 of this article deals with five years moratorium for non-violation and situation complaints. During this period the TRIPS Council was supposed to agree the scope and modality for above mentioned complaints¹. The deadline already passed in 2000 and any goal was not so far reached yet. Similar to TRIPS also Agreement on Agriculture contains in Article 13 named “*Due Restraint*” a provision about moratorium in its subparagraph (a) (iii). This provision is not in force anymore. The last legal source, which should be mentioned here is Understanding on Rules and Procedures Governing the Settlement of Disputes. In this legal source we can find the issue of non-violation complaint in Article 26. Here is written, that

¹ Evans, E.G. A Preliminary Excursion into TRIPS and Non-Violation Complaints, vol. 3, nr. 6, 2000, str. 875.

where the provisions of paragraph 1 (b) of Article XXIII of GATT 1994 are applicable to a covered agreements.

The core idea of non-violation complaint is to improve competitive opportunities that can be legitimately expected from a tariff concession and to encourage contracting parties to make tariff concessions. The non-violation clause is used to obtain the fairness of the dispute settlement system. The opinions about this remedy differ a lot some people consider it as a legal fantasy and useless and dangerous construction that should have never been included in WTO law, other point to non-violation complaint as keystone element of the WTO dispute settlement system. The international trade agreements were ahead of their time when they contained the concept of non-violation complaint as a protection of legitimate expectations, but today, is however, the concept of non-violation complaint paradoxically behind modern international law.

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