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

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Abstrakt

Na základě čl. XXIII odst. 1 GATT mohou být v případě potřeby podány tři druhy stížností. Výše zmíněný článek začíná úvodní klauzulí a dále dává vymezuje tři možné situace. Prvním a zároveň nejvíce používaným druhem stížnosti je tzv. „violation complaint (stížnost podaná při porušení konkrétních ustanovení práva WTO), druhou možností je pak podání tzv. „non-violation complaint“ (stížnost podaná v případě zrušení či zhoršení již garantovaných výhod či zhoršení dosažení některého cíle GATT). Jako třetí přichází v úvahu tzv. „situation complaint“ (může být podána za všech určitých ostatních okolností). Tento příspěvek se bude zabývat tématem „non-violation complaint“ jako v minulosti možná nepochopeného a často kritizovaného právního prostředku v rámci řešení sporů před WTO. Tento druh stížnosti není sice nejhojněji používán, avšak význam jeho existence již mnohokrát podpořily panely či odvolací orgán WTO.

Klíčová slova

Světová obchodní organizace, řešení sporů, odpovědnost za jednání právem WTO nezakázaným, právní nástroj, právo mezinárodního obchodu, odvolací orgán WTO, panel.

Abstrakt

According to the article XXIII 1 GATT, three kinds of complaints can be provided. This article starts with an introductory clause and offers three alternative options. The first, and by far, the most common complaint is „violation complaint“. The second type is the so-called „non-violation complaint“ and finally the third type is „situation complaint“. This article addresses the issue of „non-violation complaint“ as a maybe misunderstood and often critized remedy of the WTO Dispute settlement system. It is not the most common remedy, but still it is a part of WTO legal instruments and its importance was in the past supported by WTO panels and the Appellate Body.

Key words

World Trade Organization, Dispute Settlement Understanding, International trade law, legal [1]remedy, Non-violation complaint, WTO dispute settlement system, Violation complaint, The Appellate Body, Panel.

1. Past and Present of the WTO Dispute Settlement System

The WTO dispute settlement is a well organized and institutionalized procedure operating since 1 January 1995. But it is not a novel system, it was built on almost fifty years of experience from GATT disputes. GATT 1947 was not international organization for trade but treaty and it contained only two short provisions relating to dispute settlement, namely article XXII and XXIII. A dispute, which was not successfully resolved through consultations, was in early years given to the working parties. The members of such working parties were representatives of all interested Contracting Parties, including the parties to the dispute. Decisions were made in consensus. In 1950s were disputes usually firstly heard by a so-called panels of three to five independent experts. Those experts were from GATT Contracting Parties, but any other the involved in the dispute. This panel reported to the GATT Council.

All above mentioned practices and procedures and some more were codified and in 1983 was established GATT Legal Office within the GATT Secretariat. During the time the legal quality of panel reports improved in one hand with increasing confidence of the Contracting Parties. While the GATT dispute settlement has been rather considered as successful, one could observe also some serious shortcomings. In so far that the improvement of the dispute settlement was on the agenda of the Uruguay Round negotiations. The number of improvements to the GATT dispute settlement system was reached already in 1989. Finally one of the Uruguay Round outcomes was new Understanding on Rules and Procedures Governing the Settlement of Disputes providing more precise rules and guidance of dispute settlements. The WTO dispute settlement is a tool for helping to ensure regulated trade with its rules and a structure for overseeing procedural norms[2].

[1] Course on Dispute Settlement, Geneva: United Nations, 2003, str. 39. (celkem 63)
[2] Cottier, T. The Challenge of WTO Law: Collected Essays, London: Cameron May, 2007, str. 75.

The WTO dispute settlement system has been operated for almost 13 years now as one of the most prolific and known of all international dispute settlement systems. This long period of development influenced also types of possible complaints. Their names didn't changed but their use and content were created together with the evolution of dispute settlement system. The dispute settlement system is often described as a most significant activity of the WTO – the jewel in its crown – but in recent years has been the subject of various controversy[3].

2. Types of Complaints within the frame of WTO Dispute Settlement System

Types of complaints are mentioned in Article XXIII 1) GATT 1994. It provides for three alternative options. However, this article starts with an introductory clause giving a condition that if a Member should consider that any benefit accruing to it directly or indirectly under that agreement is being nullified or impaired or that the attainment of any objective of GATT 1994 is being impeded, as a result of one of the scenarios specified in subparagraphs such as[4]:

- (a) the failure of another member to carry out its obligations under GATT 1994
- (b) the application by another contracting party of any measure, whether or not if conflicts with the provisions of GATT 1994
- (c) the existence of any other situation

In connection with above mentioned situation, the recognized types of complaints are following[5]:

- violation complaint – it is the most common complaint pursuant to the Article XXIII 1) (a) of GATT 1994. This complaint requires nullification or impairment of a benefit as a result of the failure of another member to carry out its obligations. It is a case of legal inconsistency with GATT 1994 and nullification or impairment is a result of it,

[3] Jakson, J. Sovereignty, the WTO and Changing Fundamentals of International Law, New York: Cambridge University Press, 2006, str. 135.
[4] The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations, Cambridge: Cambridge University Press, 1999, str. 457.
[5] A Handbook on the WTO Dispute Settlement System, New York: University Press, 2004, str. 30.

- non–violation complaint – this second type of complaint is pursuant to Article XXIII 1) (b) of GATT 1994. It may be used to challenge any measure applied by another Member, even if it does not conflict with GATT 1994, provided that it results in nullification or impairment of a benefit. Few of such complaints appeared under the GATT and in the WTO system,

- situation complaint – as a third type of complaint is pursuant to Article XXIII 1) (c) of GATT 1994. According to the text of the provision, it could cover any situation whatsoever, as long as it results in nullification or impairment. In a history few such situation complaints have been raised under the GATT, none of them has ever resulted in a panel report. Any complainant has not invoked that kind of complaint in front of WTO dispute settlement organs.

3. The legal roots of non-violation complaint

3.1 General Agreement on Tariffs and Trade 1994

Under the GATT is non-violation complaint mentioned in Article XXIII 1) (b) named "*Nullification or Impairment*".. According to this article a member who considers that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that attainment of any objective of the Agreement is being impeded as the result of the application by another member of any measure, whether or not it conflicts with the provisions of this Agreement, may make written representations of proposals to the other member or members which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representation or proposals made to it.

3.2 General Agreement on Trade in Services

Article XXIII named "*Dispute Settlement and Enforcement*" is the one, which deals with the issue of non-violation complaint in its subparagraph 3. Here is stated, that if any member considers that any benefit it could reasonably have expected to accrue to it under a specific

commitment of another Member under Part III of GATS is being nullified or impaired as a result of the application of any measure which does not conflict with the provisions of GATS, it may have recourse to the DSU. If the measure is determined by the DSB to have nullified or impaired such a benefit, the affected member shall be entitled to a mutually satisfactory adjustment on the basis of paragraph 2 of Article XXI. If the event an agreement cannot be reached between the concerned members, Article 22 of the DSU shall apply. Contrary to non-violation in GATT, under GATS can not be this remedy used so widely. Here the affected member can not argue that the attainment of any objective was being impeded as a result of non-violation behavior of the other member.

3.3 Agreement on Trade – Related Aspects of Intellectual Property Rights

Another legal source of non-violation complaint is Article 64 of Agreement on Trade – Related Aspects of Intellectual Property Rights. This article is named *"Dispute Settlement"*. It states that 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.

But subparagraph 2 of this article deals with five years moratorium for non-violation and situation complaints and states, that these shall not apply to the settlement of disputes for that period from the date of entry into force of the WTO Agreement. During this period the TRIPS Council was supposed to agree the scope and modality for above mentioned complaints[6]. The deadline already passed in 2000 and any goal was not so far reached yet. This situation is apprehended about, because of the different positions of developing and developed countries. The five years transition period for developing countries to enforce intellectual property regimes expired simultaneously with a five-year moratorium on non-violation and situation complaints. The opinion of developed countries is, that their developing partners indifference to intellectual property right prejudices copyright, patent and trademark based industries ability to trade abroad[7].

[6] Evans, E.G. A Prelimitary Excurcion into TRIPS and Non-Violation Complaints, vol. 3, nr. 6, 2000, str. 875.
[7] Samahon, T.N. TRIPS Copyright Dispute Settlement after the Transition and Moratorium: Nonvilation and Situation Complaints against Developing Countries. In Law and Policy in International Business,vol. 31, nr. 3, 2000.

The Article 45 of Hong - Kong Ministerial Declaration is a commitment of ministers to continue in examination of the scope and modalities of this issue and make recommendation to the next Session. It was agreed, that meantime, members would not initiate such complaints under the TRIPS Agreement.

3.4 Agreement on Agriculture

Similar to TRIPS also Agreement on Agriculture contains in Article 13 named *"Due Restraint"* a provision about moratorium in its subparagraph (a) (iii). According to this provision during the implementation period was domestic support measures which were in conformity with the provisions of Annex 2 to that agreement, were exempted from actions based on non-violation complaint. This provision as well as TRIPS Article 64 and its subparagraph 2 have temporarily excluded the non-violation complaint form the scope of their dispute settlement mechanism. This provision is not in force anymore.

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

4. Case law connected with non-violation complaints

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In a history there have been only a handful of non-violation cases arising under Article XXIII (1) b) of the GATT. No panel reports have been ever issued about a non-violation complaint based upon the impediment to the attainment of an objective. So that GATT/WTO reports have been in majority focused upon non-violation complaints based on nullification or impairment. All together 14 non-violation complaints arisen and 6 from them were successful.

The panel´s report in Japan – Fuji Film became the standard of non-violation cases in the latter jurisprudence of the WTO. In this case, the United States argued, under Article XIII (1) b) of

GATT 1994, that certain Japanese measures, relating to commercial distribution of photographic film and paper, large retail stores and sales promotion techniques nullified or impaired benefits accruing to the United States based on tariff concessions made by Japan. The Panel made a general statement about the significance of the non-violation remedy within the GATT/WTO legal framework, stating that the non-violation nullification or impairment remedy should be approached with caution and treated as an exceptional concept. The same opinion had the Appellate Body in case EC – Asbestos and stated, that to the non-violation complaint as a remedy should be approached with caution and should remain as an exception[8].

The purpose of this rather unusual remedy was described by the panel in the case EEC – Oilseeds and Related Animal-Feed Proteins as following:

"The idea underlining is that the improved competitive opportunities that can legitimately be expected from a tariff concession can be frustrated not only by measures proscribed by the General Agreement but also by measures consistent with the Agreement. In order to encourage contracting parties to make tariff concessions they must therefore be given a right of redress when a reciprocal concession is impaired by another contracting party as a result of the application of any measure, whether or not it conflicts with the General Agreement.

In cases EEC – Tariff Treatment on Imports of Citrus Products and EEC – Production Aids Granted on Canned Peaches found the panel the non-violation complaints justified but the panel report were not adopted. In cases as for example Japan – Semi-conductors, US – Agricultural waiver, the non-violation claims failed for lack of detailed justification. The theoreticians highlight non – violation complaint as a essential part of GATT/WTO dispute settlement system, however lawyers and other practitioners would never prefer this remedy to violation one.

[8] WTO Analytical Index: Guide to WTO Law and Praktice, New York: Cambridge University Press, vol. 1, second edition, str. 282 – 283.

6. Conclusion

There are three types of complaints that can be made under the GATT/WTO Dispute settlement system. Namely a violation complaint in Article XXIII (1) a), non-violation complaint in Article XXIII (1) b) and finally situation complaint in Article XXIII (1) c). Under non-violation complaint the complaining Member does not allege any specific breaches of WTO rules, but contends that the adoption of a measure by the responding party has nevertheless nullified or impaired its benefits or legitimate expectations or under the GATT 1994. The other possibility to invoke non-violation complaint is that the attainment of any objective of GATT 1994 is being impeded.

Non-violation complaint has been used almost sixty years and this fact leads into two deductions. The number of non-violation complaint is not very numerous by virtue of its exceptional mettle. The contracting parties to GATT and member of WTO clearly didn't trust its application without problems. The other remark is, that only some of GATT parties or WTO members were able to use this unusual remedy. This can be a result of inequality of parties in front of the dispute settlement organs.

The scope of the WTO dispute settlement system is broader than other international dispute settlement systems which are based only on violations of agreements and its provisions. On the other hand, the WTO dispute settlement system is much narrower than those others systems in the point of view that a violation must also result in nullification or impairment or possibility of impeded attainment of an objective. The WTO is also not the only international organization which have codified the use of non-violation complaint, but the approach to this remedy is not the same. For example the members of the North American Free Trade Agreement (NAFTA) have immensely learned from their GATT/WTO dispute settlement experience. It was refered to WTO panels reports involving non-violation complaints to argue their case before NAFTA panels.

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.

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