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陈 安 主编 蔡从燕 执行编辑

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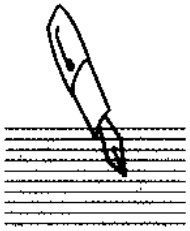

序言

《国际经济法学刊》(简称《学刊》,原名《国际经济法论丛》)是全国性、开放性的国际经济法专业优秀学术著述的汇辑,是国际经济法理论界与实务界笔耕的园地、争鸣的论坛和"以文会友"的平台。其宗旨是:立足我国改革开放与建立社会主义市场经济体制的实践,借鉴国外的先进立法经验和最新研究成果,深入研究和探讨国际经济关系各领域的重要法律问题,开展国内、国际学术交流,推动我国国际经济法教学与科研的发展,并为我国积极参与国际经济法律实践以及我国的涉外经济立法、决策和实务操作,提供法理依据或业务参考。

《学刊》主要设立以下栏目:国际经济法理论;国际经济法专题研究;世界贸易组织法专题研究;典型国际经贸案件评析;优秀国际经济法专业博士、硕士学位论文选登;国外优秀研究成果选译;学术评论;最新学术动态。

本期为《学刊》第13卷第2期,共设5个专栏:国际学术研讨会特稿、国际经济法理论、世界贸易组织法、国际金融法和区域一体化问题,此外还刊发一篇学术资料。

2005年12月25日,由解决投资争端国际中心(ICSID)、经合组织(OECD)及联合国贸发会议(UNCTAD)在法国巴黎联合主办了"充分利用国际投资协定:共同议程"全球性专题研讨会。ICSID秘书长Roberto Dañino先生、OECD副秘书长Richard Hecklinger先生以及UNCTAD国际协定处处长James X. Zhan先生分别代表主办方致开幕

词，其中包含了国际投资协定及国际投资争端领域的最新的、丰富的信息。厦门大学陈安教授作为中国政府指派的ICSID仲裁员之一，应邀与会并在大会上作了发言。应陈教授约稿，并经作者授权，本刊将上述三篇开幕词以中英双语刊登。晚近，国际投资协定在双边、区域和区域间的层面上均得到进一步发展，构成了日益复杂的多层次、全方位的国际投资规则框架。**《国际投资规则的制定：晚近趋势及对发展的影响》**一文是James X. Zhan先生提交给2005年11月在柏林召开的《国际法与经济发展：法律全球化及其对发展政策与发展合作的影响》研讨会的论文，该文阐述了20世纪90年代以来国际投资规则制定上的五大发展趋势，并讨论这些趋势对国际投资规则制定总体层面上的影响，以及对发展中国家的特别影响，最后指出在探讨如何应对这些趋势所带来的挑战上，诸如UNCTAD这样的国际组织可以发挥其独特的作用。

在国际经济法理论专栏中，何易副教授的**《论普惠制实施中的差别待遇——兼论WTO发展中国家成员分类问题》**一文，通过对WTO争端解决机构相关裁决的分析，探讨了对发展中国家的分类和普惠制差别待遇的合法性问题，并进一步指出，某些西方国家学者所主张的发展中国国家分类对有竞争力的发展中国家十分不利，对中国尤其如此，中国应当旗帜鲜明地反对对WTO发展中国家成员进行分类。在**《WTO制度特征与成员方完善国际贸易行政行为审查制度的关联》**一文中，周洪钧教授、朱淑娣副教授认为，WTO制度的利益交互性与规则导向性表明成员方有必要完善国际贸易行政行为审查制度，普适殊别性表明成员方可以设计独特的行政行为审查制度，双向兼顾性与程序正义性特征要求成员方在改革国际贸易行政行为审查制度时应该兼顾贸易自由与贸易公平及正当程序要求。在**《从国际法的效力根据析"与国际接轨"之误区——兼论全球化下我国对国际法的态度》**一文中，马忠法讲师认为，国际法的效力根据是国家间意志的协调；"与国际接轨"指"一国的立法、司法等活动与国际条约或国际惯例相一致或相适应的行为或状况"，其中的"国际"应被明确限定。全球化下众多国际条约是发达国家意志的产物，是它们国内私法行为公法化结果的国际化。我国不应盲目提倡"与国际接轨"，而应基于国家利益，充分利用国际谈判舞台，参与甚或主导国际规则的制定和完善；同时，对于

我国加入的国际条约，应随着形势发展修正过时承诺。在**《国际习惯法的效力问题研究——从国际社会存在的角度》**一文中，江海平博士生首先对各理论学派就国际法效力来源问题的解释进行述评，进而指出，对于国际法效力问题的解释与国际社会这个概念密不可分：国际社会是国际法渊源形成的背景，也是国际法渊源服务的对象，更是解释国际法效力问题的关键所在。国际习惯法作为国际法最重要的渊源之一，其效力问题的解决也必须从国际社会着手。只有从国际社会的互动特征出发，才能给出一个比较合理的关于国际习惯法效力来源的解释，包括对国际习惯法在整个国际法渊源体系中的效力层次地位的解释。

在世界贸易组织法专栏中，张玉卿教授、蒋成华博士生在**《论WTO的保障措施纪律——以不可预见的发展和因果关系为视角的分析》**一文中，首先考察了多边贸易体制内保障措施规则及争端解决实践的发展，在此基础上紧密结合WTO争端解决机构的实践，侧重从不可预见的发展和因果关系的视角，讨论了实施保障措施的条件问题，以期有助于对保障措施规则的理解。莫世健教授与杨国华博士分别从微观与宏观角度讨论了近年来困扰中国的纺织品贸易法律问题。在**《针对中国的纺织品特保条款"市场扰乱"概念解析》**一文中，莫世健教授对《中国加入工作组报告书》第242条中的"市场扰乱"概念作了深入分析，认为在第242条没有明确界定该概念情况下，恰当的解释对于保护中国的合法权益，防止或减少该条款被滥用具有重要意义，主张"市场扰乱"概念必须依据国际法解释原则解释，认为中国在WTO法律概念解释和适用方面必须掌握话语权，否则就永远不能摆脱被动处境，建议中国必须合理有效地采取和发展对自己最有利的"市场扰乱"概念解释。在**《纺织品特殊保障措施：风雨五十年》**一文中，杨国华博士考察了相关GATT工作组决定、短期纤维协定、长期纤维协定、多种纤维协定和《纺织品与服装协定》中的特殊保障措施条款，揭示了采取特殊保障措施的条件趋于严格的规律，认为针对中国纺织品采取特殊保障措施应当符合严格的条件、遵守严格的纪律。此外，在**《近期补贴争端案件对WTO补贴规则的澄清》**一文中，李詠箑女士详尽考察了WTO争端解决机构专家组与上诉机构在若干个最新补贴争端案件对《补贴与反补贴措施协定》中的若干重要法律概念、《农业协定》与《补贴与反

补贴措施协定》间的关系及不挂钩收入支持、农产品出口信贷担保和国内支持"溢出"的问题的司法解释，认为研究这些案例可以为我国提供借鉴。WTO 争端解决机制运作已逾十年，考察该机制十年来的运行实况、现实与制度设计是否相符等问题，对于深化认识争端解决机制本身以及未来的改革都具有重要意义，在**《1995～2006：WTO 争端解决的实践分析》**一文中，纪文华博士经过详尽的实证考察，认为该机制的实践运作总体较为顺畅，但实践中也存在与 DSU 规则不一致之处，他还分析探究了问题的本源和可能解决途径。

在国际金融法专栏中，张庆麟教授和毛晓晓博士生从不同角度讨论了近年来引发国内外广泛关注的人民币汇率问题。在**《论国家调整汇率的权利与义务——兼论人民币汇率调整的国际法律问题》**一文中，张庆麟教授认为，虽然汇率已经不单纯是一国国内事务，但习惯国际法没有发展出关于汇率问题的专门规则，而由国家依国际法一般原则予以处理。IMF 协定确立了汇率问题的国际制度，但效果有限。根据习惯国际法原则，国家在不违背《国际货币基金协定》有关规定的情况下有权独自处理货币升值与贬值事务，但如涉及外国私人财产的损失，也会产生国际争端。人民币汇率制度的确立及其法定升值与贬值是中国主权范围内的事。2005 年 4 月 6 日，美国参议院通过人民币汇率修正案，要求中国政府 6 个月内提高人民币汇率水平，否则将征收汇率关税，并认为其合法性源于 GATT 第 21 条。对此显然有必要从法律上深入讨论，以揭示其违法性。在**《从 GATT 第 21 条看美国"汇率关税"问题》**一文中，毛晓晓博士生认为，依据 GATT 第 21 条(b)款的审查标准，美国主张的"汇率关税"不具备合法性，主张中国可以向 WTO 提出"违约之诉"，并认为中国还可以提出"非违约之诉"。

在区域一体化问题专栏中，赵云博士的**《全球化时代的区域贸易一体化——关于中国—东盟自由贸易区的构建》**一文重点探讨了东盟—中国全面经济合作框架协议，指出这是自北美自由贸易区建立以来最具挑战性的一项区域自由化计划，中国和东盟之间贸易和投资的拓展具有巨大的潜力，最后探讨了中国—东盟自由贸易区构建过程中面临的挑战，提出一种可行的自由贸易区架构以供参考。**《论〈北美自由贸易协定〉之分散型争端解决机制》**一文中，傅明、张讷律师分析了 NAFTA 争端解决机制，认为分设的争端解决机构、多重的争端解决法

律渊源、有差别的争端解决程序与执行方式，以及私人主体的不同参与方式等使其具有分散型特点，值得 WTO 借鉴。

学术交流国际化是中国国际经济法学者的必然选择，在英文法学刊物发表论文是实现学术交流国际化的重要途径，而不了解美国法学刊物的编辑制度则是中国学者普遍面临的问题。令人高兴的是，基于对本刊学术声誉的信任并有意从编辑角度推动中国学者更多地在美国法学刊物上发表论文，*Temple International & Comparative Law Journal* 原主编 David B. McGinty 先生专门撰写了**《向由学生编辑的美国法学杂志投稿指南》**一文并授权本刊发表，该文有助于我国学者了解美国法学评论的编辑制度与规范，本刊亦以中英双语发表，期待该文对于推动中国国际经济法研究的国际化有所裨益。

在本刊发表的论文，其所论证的各种观点，未必是本刊编辑部所持的立场和见解。秉着“百家争鸣”的方针，欢迎持有不同见解的学界同仁惠赐佳作，以本刊作为平台，针对各有关问题，各抒己见，深入探讨，互相补益，共同提高。

《国际经济法学刊》编辑部

2006 年 4 月 13 日

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ICSID is Facing New Challenges*

■ Robert Dañino**

Good morning. I am pleased to join **Richard Hecklinger** and **James Zhan** in welcoming you to this very timely and important Symposium on "*Making the Most of International Investment Agreements*".

The ICSID Convention, as a multilateral legal framework for the settlement of international investment disputes, has clearly had a meaningful impact on the formulation of international investment law. We believe it also

* This Opening Remarks was presented by Robert Dañino at Symposium on "Making the Most of International Investment Agreements: A Common Agenda" Co-organized by ICSID, OECD and UNCTAD (12 December 2005, Paris). The title is added by the editor of Journal of International Economic Law.

** Robert Dañino was Secretary General, ICSID at the time giving this remark.

has contributed to the improvement of the investment climate in many developing countries.

Typically, the countries that have ratified the ICSID Convention are also parties to bilateral, regional and multilateral agreements that include investment protection provisions. Together with the ICSID Convention, these international instruments aim to contribute towards creating a predictable legal framework, which is necessary for sustained economic development.

The increase in the volume of foreign private financing into developing countries during the recent past has been enormous—from some US $75 billion in the early 1990s to over US $400 Billion by the end of 2004. Equally impressive has been the increase in the number of bilateral investment treaties. We now have more than 2000 bilateral investment treaties, with **more than 1500 providing for ICSID as the forum for the settlement of investment disputes.**

As a result, the demand for ICSID's services has grown exponentially, and today this probably constitutes ICSID's main challenge. Merely a decade ago, ICSID had a caseload of five (5) pending cases for an aggregate amount of US $15 Million in claims, whereas today, we have 113 pending cases for an aggregate amount exceeding US $30 Billion in claims.

The overwhelming majority of the new cases have been brought to ICSID under the investor-State arbitration provisions of investment treaties. Indeed, of the 113 cases pending with ICSID, 96 have been brought under investment treaties. It is foreseeable that these trends of growing investment flows, together with more international instruments, will continue increasing the number of ICSID cases. ICSID will likely, therefore, continue to play a key role in contributing to the conditions necessary for the promotion of capital flows into developing countries.

I would like to focus the remainder of my remarks on the **implications that this substantial increase of investment disputes will have for ICSID's future role.**

After its first 40 years, ICSID has begun a new chapter in its institu-

tional life. The Centre will have to face the new challenges posed by the large and growing demand for its services, while preserving its neutrality, professionalism and efficiency.

For this reason, over the last year we have been immersed in a process of stocktaking and of identification of what improvements we need to implement to successfully address our future challenges. We started this process with a client survey to measure the quality of our services. We have also held a series of consultations with a large number of stakeholders around the world regarding their perception of the strengths and weaknesses of ICSID and sought their recommendations for the future development of the institution. The results have been both useful and encouraging.

Based on the trends described earlier and on the feedback we have received, I believe that ICSID may face two types of challenges. One is to maintain its efficiency in handling a caseload which is increasing in number and complexity. The other is to preserve its reputation of professionalism, impartiality and integrity. Let me address each of these.

Addressing the Efficiency Challenge

We have taken several initiatives to **increase the efficiency of our services.** The principal one is to expand the cadre of professionals at ICSID. We have now an excellent and motivated staff of fifteen lawyers, five paralegals and five support staff. It is still a small team but composed of high quality individuals, and considerably larger than two years ago. To afford the increase of our staff, we have also periodically increased our fees and charges. We will continue doing so as the demand for our services may require additional staff.

In response to concerns that **delays in registering requests** for arbitration might be hurting the perception of ICSID's efficiency, I should note that from our review of the recent caseload, much of the delay is driven by the parties. Nevertheless, as regards those aspects which are under our control, we have worked hard and have been successful in **reducing the**

time period required for decisions on registration requests. In am pleased to report that most of our recent decisions on registration are now being made within 45 days.

We have also promoted a **greater use of the ICSID conciliation mechanisms** as an alternative to arbitration. Our interest lies, of course, in the promotion of even faster and more economic methods of dispute settlement, where circumstances allow. Therefore, it has now become our practice to remind the parties of the availability of the conciliation mechanism as soon as we acknowledge receipt of a request for arbitration. Progress on this area is still relatively slow.

We have also taken note that a large percentage of ICSID cases are ultimately settled between the parties. As of November 2005, 7 out of the last 10 arbitration cases were settled. Therefore, ICSID has led an effort to explore the establishment of a mediation facility within the World Bank Group. The system would be somewhat similar to a process of ***assisted negotiation.*** This system would be an informal and voluntary one, allowing parties to discuss their differences confidentially with the help of an independent third party who may or may not have subject-matter expertise, with a view to arriving at an amicable resolution of the dispute. The process would be devoid of the formalities of arbitration or national court litigation, or even the form of conciliation presently offered by ICSID. In effect, the Centre would simply be involved in making it possible for parties to communicate, without loosing face, in a neutral environment and with the assistance of an independent expert. The process would, of course, be without prejudice to the Fights of the parties to resort to other forms of dispute resolution, and might indeed be conducted alongside arbitration proceedings. The result could, however, be binding on the parties, especially if a settlement agreement were incorporated into an award of an arbitral tribunal.

ICSID also has worked on a number of **amendments to its Rules and Regulations** this past year. The key proposed amendments concern preliminary procedures in regard to provisional measures and expedited review of requests for dismissal of unmeritorious claims; access of third parties to