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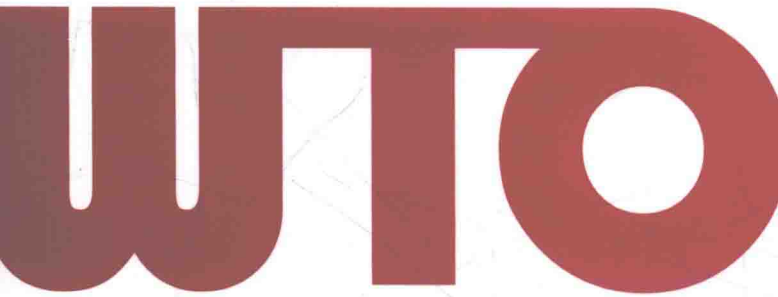

Research on the Retaliation Regime in WTO Dispute Settlement System

孟琪 著

上海人民出版社

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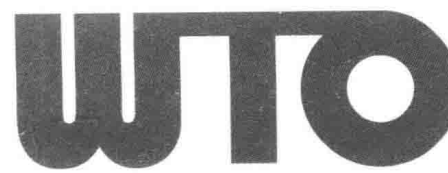

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缩略语表(Abbreviation)

缩略语	全　　称
DSB	世界贸易组织争端解决机构 (Dispute Settlement Body)
DSU	《关于争端解决规则与程序的谅解》 (Understanding on Rules and Procedures Governing the Settlement of Disputes)
GATS	《服务贸易总协定》 (General Agreement on Trade in Services)
GATT	《关税与贸易总协定》 (General Agreement on Tariffs and Trade)
ICJ	联合国国际法院 (International Court of Justice)
ILO 宪章	《国际劳工组织宪章》 (International Labour Organization Charter)
ITO	国际贸易组织 (International Trade Organization)
MAS	双方同意的解决办法 (Mutually Agreed Solutions)
NAFTA	《北美自由贸易协定》 (North American Free Trade Agreement)
OECD	经济合作与发展组织,简称经合组织 (Organization for Economic Co-operation and Development)
RPT	合理期限 (Reasonable Period of Time)
SCM	《补贴与反补贴措施协定》 (Agreement on Subsidies and Countervailing Measures)
TPIPS	《与贸易有关的知识产权协定》 (Agreement on Trade-Related Aspects of Intellectual Property Rights)
WTO	世界贸易组织 (World Trade Organization)

与报复制度有关的重要案件名称一览表

序号	案　号	案　件　全　称	案件简称
1	DS27	欧共体—香蕉进口、销售和分销体制案	欧共体—香蕉案
2	DS26 DS48	欧共体—荷尔蒙牛肉和牛肉制品措施案	欧共体—荷尔蒙案
3	DS46	巴西—飞机出口融资计划案	巴西—飞机案
4	DS108	美国—海外销售公司税收待遇案	美国—FSC 案
5	DS136	美国—《1916 年反倾销法》案	美国—1916 年法案
6	DS160	美国—美国版权法第 110(5)节案	美国—版权法案
7	DS217 DS234	美国—《2000 年持续倾销和补贴抵消法》案	美国—伯德修正案
8	DS222	加拿大—支线飞机的出口信贷和贷款担保案	加拿大—飞机案
9	DS267	美国—高地棉花补贴案	美国—棉花案
10	DS285	美国—影响跨境赌博和博彩服务供应措施案	美国—博彩案

注：1.为简化案件名称，本书中大量采用案件简称；2.鉴于部分案件有多个起诉方以及为了便于案件说明和解释，本书中的部分案件简称后面会注明起诉方。

序

作为整个国际贸易体系和有效执行乌拉圭回合谈判成果的“关键所在”，WTO 争端解决机制被誉为 WTO 体制“皇冠上的明珠”。1995 年世界贸易组织成立以来，WTO 争端解决机制在维护国际贸易体系稳定，推动国际贸易规则不断发展等方面发挥了重要作用。迄今为止，WTO 争端解决机构受理的案件数量已经高达 509 起，遥遥领先于国际法院的国际司法机构的受案数量。从实践看，DSB 做出的绝大多数裁定都获得了 WTO 成员方的自觉遵守与执行，而因一方不予执行而申请授权报复的案件数量则非常有限。2016 年恰逢中国加入世界贸易组织的第 15 个年头，在过去的 15 年里，除了作为第三方参与的争端解决案件以外，WTO 涉华贸易争端案件数量已达 49 个，其中我国作为申请方的案件为 13 起，作为被诉方的案件则达 36 起。迄今为止中国在作为败诉方的案件中都自觉履行了 DSB 的裁决，并未招致其他成员方的“报复”。同时，在我国胜诉的案件中也尚未出现对其他成员方实施报复措施的先例。

作为 WTO 争端解决机制的有机组成部分以及不执行裁决的最后救济手段，报复制度无疑对整个争端解决机制的成功运作发挥了重要作用。作为维护国家核心贸易利益的最后手段，包括中国在内的 WTO 成员方不会轻易动用报复措施。不过，随着中国面临越来越多的执行问题，中国对不执行 WTO 裁决的败诉方实施报复措施的可能性也在增大，同时中国也应当对其他成员方对我国运用“报复”措施有所准备和防范。因此，对 WTO 报复机制系统进行深入研究，将有助于对报

复制度的深入理解，更好利用这一机制维护我国的核心贸易利益。

中国加入世界贸易组织以来，国内有关 WTO 争端解决的研究取得了丰硕的研究成果。但以 DSU 第 22 条“补偿和中止”为核心的报复机制的系统、深入、完整的理论和实证研究成果依然罕见。孟琪博士选取了这一极具理论意义与实践价值的课题作为她的博士论文，呈现在读者面前的成书描绘了一幅构思缜密且完整的 WTO 报复机制图画。本书将 WTO 争端解决机制中的“报复制度”置于宏大的国际法报复制度之下进行研究，通过深入的法理分析，厘清了 WTO 报复机制的国际法理基础；通过历史分析的方法，全面回顾了 WTO 报复制度的历史沿革，以及在 GATT 基础上建立起来的报复机制的创新与发展；通过对 WTO 报复机制之核心条款——DSU22 条的规则解构，作者对交叉报复、报复仲裁以及轮候报复、集体报复、货币补偿制度、追溯性报复制度等衍生制度的内涵及其在实践中的运用进行了充分的解析与论证。作者提出的应增加新的报复实施方式和内容、增加新的报复措施，解决 DSU 规则自身存在的问题，明确 DSB 建议和裁决的法律性质及效力等观点新颖、独特；作者对我国运用报复机制以及应对其他成员报复机制（措施）的策略建议言之有据，值得我国相关主管部门的借鉴与重视。

作为上海第二工业大学的副教授，孟琪长期从事国际经济法的教学科研工作，并有在境外长期访问研究的经历，她国际法基础扎实，英语水平优秀，研究能力出众。四年前，她以优异的成绩考入复旦大学法学院攻读国际经济法方向的博士学位。作为在职博士生，她克服了本职工作繁重的困难，与全日制学生一样全身心投入博士生的学习中，身为母亲、妻子和女儿，她很好地平衡了家庭、学业和工作的关系，以优异的答辩成绩如期获得博士学位。作为她的导师，我相信这部凝聚了孟琪心血与智慧的著作必将为我国 WTO 争端解决机制领域研究添上浓墨重彩的一笔。

陈　力

2016 年 9 月 25 日

中文摘要

本书探讨世界贸易组织(WTO)争端解决机制中的报复制度问题。《关于争端解决规则与程序的谅解》(DSU)第22条"补偿和中止减让"是关于WTO报复制度规定的最核心条款,也是本书研究的主要内容。根据DSU的规定,报复是WTO争端解决机制中不执行WTO裁决重要的救济措施,也是"最后的手段",其根本目的是促使败诉方及时有效地执行WTO裁决。虽然到目前为止,适用WTO报复制度的案件并不多,但在实践中其已经发挥了一定的威慑效力。由于WTO报复制度规定本身存在一些法律问题,在实践应用中也遇到了一些现实困难,导致WTO报复制度的有效性并没有得到充分的发挥,且理论界对WTO报复制度存在不同的观点和看法,使得WTO报复制度的研究尚未受到足够的重视,需要对WTO报复制度进行全面、深入和系统的研究。截至目前,关于修改WTO报复制度的DSU改革谈判尚未取得有效的成果,因此,应在现阶段对WTO报复制度进行全面考察和深度剖析,找到WTO报复制度在法律规定和实践应用中存在的主要问题,提出具有针对性和可行性的解决方案,通过完善WTO报复制度进一步促进和提高WTO成员对报复制度的有效运用,最终实现促使败诉方及时有效地执行WTO裁决的目的,增强WTO体制的可预见性和可靠性。

本书主体部分共分为五章。第一章是概述,首先界定国际法中的报复、WTO报复等基本概念;通过比较研究的方法介绍国际法中报复

制度的历史发展和从GATT时期到WTO时期报复制度的历史演进过程；并对WTO争端解决执行机制和裁决执行的三种实施方式进行重点介绍和分析。在此基础上，第二章和第三章分别重点研究WTO报复制度中的交叉报复制度和报复仲裁制度；第四章针对报复制度中的轮候报复、集体报复、货币补偿制度和追溯性报复四个衍生问题进行深度剖析。通过研读法律规定、考察立法起源、分析相关适用WTO报复制度的实践情况和典型案例等方法，对上述三章提出的WTO报复制度中存在的主要法律问题进行理论探讨和实证研究。基于上述分析和研究，第五章重点列明WTO报复制度中存在的主要问题；介绍和评论了多哈回合期间DSU改革谈判中各成员方有关修改WTO报复制度的提案和建议；并在此基础之上，提出重构WTO报复制度体系的大胆想法和具体建议；最后，对中国将来适用WTO报复制度进行策略研究和前景展望。

WTO报复制度是在GATT报复制度基础之上逐步发展而来，已经形成一套独具特色的报复制度体系。根据DSU第22条关于报复制度的规定，补偿和报复作为败诉方不执行WTO裁决的两种临时救济措施，在适用时具有层级性，报复是促使WTO裁决得以执行的最终措施。现行WTO报复制度主要设立了“交叉报复”和“报复仲裁”两项法律制度，确定了报复水平的“等同”原则。WTO报复制度对适用交叉报复规定了严格的实体和程序条件，且申请适用交叉报复必须遵循“等级顺序”，使得到目前为止，只有三起案件由世界贸易组织争端解决机构(DSB)授权胜诉方实施交叉报复，但由于胜诉方均是发展中国家，最终在这三起案件中都没有实际实施交叉报复措施，而是通过谈判协商最终达成双方均可接受的方案的方式解决争端和终止报复。WTO报复制度规定了报复水平“等同”原则，但因没有规定报复水平的计算方法，导致在实践中仲裁庭创设出多种计算报复水平的方法，充分发挥自由裁量权，相对“随意”的裁定报复水平，没有统一的标准。由于DSU规则本身的矛盾和冲突，在实践应用中产生

了“顺序问题”，在通过修改 DSU 规则根本解决这一问题之前，仲裁庭和涉案成员方发挥了“主观能动性”，提出并应用了多种解决“顺序问题”的方案，但各方案都存在一些问题且不能从根本上解决“顺序问题”。

针对上述问题，通过对 WTO 报复制度法律规定的分析和实践案例的实证研究，本书提出：重构 WTO 报复制度体系势在必行。但对解决上述问题的一些有效方案，如在 WTO 报复制度体系中增加轮候报复、集体报复、货币补偿和追溯性报复四项制度，理论界和实务界都存在不同的观点和看法，本书将这四项极其重要且具有争议的制度作为 WTO 报复制度的焦点问题予以专门和深入的研究。本书认为，由美国倡议并在实践中得以应用的“轮候报复”措施；由发展中国家提出并得到众多 WTO 成员支持的集体报复措施；由美国和欧盟在实践中已经应用并使得争端得以有效解决的货币补偿制度和能够解决发展中国家通过适用报复制度实现有效救济问题的追溯性报复制度，都能够在一定程度上发挥有效促使败诉方执行 WTO 裁决的作用，但必须限定其适用的条件和程序。

在多哈回合期间关于澄清和改进 DSU 的谈判过程中，WTO 各成员针对报复制度存在的法律条文本身的缺陷和冲突、有效性不足、实力悖论、宗旨悖论和缺乏必要的正当性等问题都提出了不少建议，值得关注和研究。本书在 WTO 成员提出的改革提案和建议的基础上，基于对现行 WTO 报复制度存在的主要问题的根本解决，大胆地提出重构 WTO 争端解决机制中报复制度体系的想法，并提出重构后的 WTO 报复制度体系的基本框架和具体建议。希望从根本上解决 WTO 报复制度存在的一些主要问题，并引起 WTO 各成员的广泛关注，最终为下一轮 DSU 改革谈判提供一些可以借鉴的可行性建议。随着中国经济和国际贸易的快速增长，中国运用 WTO 争端解决机制处理与其他成员之间贸易争端的案件越来越多，也即将面临 WTO 裁决执行的高发期和突发期，不排除因败诉方不执行 WTO 裁决而适用

报复制度的可能性，不管是实施或是承受报复措施，中国必须加强对适用WTO报复制度的策略研究，提前做好准备工作，迎接可能到来的新挑战。

关键词：报复　WTO争端解决机制　WTO裁决执行机制　WTO报复制度

中图分类号：D996

Abstract

The dissertation focuses on the retaliation regime in the WTO dispute settlement system. Article 22 of DSU "suspension of concessions or other obligations" is the most core clause of the provisions of the WTO retaliation regime and the main content of this dissertation. According to the regulation of DSU, retaliation is the important remedy and the "last resort" when the losing party didn't implement the WTO ruling in the WTO dispute settlement system, and the sole objective of WTO retaliation regime is to induce compliance. So far, though the cases applying to WTO retaliation regime are not so much, but it has played quite strong deterrent force in practice. Because the WTO retaliation regime itself have some legal problems and have met with some difficulties in the practical application, leading to the effectiveness of the WTO retaliation regime has not been fully developed, and the theoretical circle have different opinions and views to the WTO retaliation regime, leading the study of the WTO retaliation regime has not been enough attention, so we need a comprehensive, in-depth and systematic study on the WTO retaliation regime. So far, DSU reform negotiations about modifying the WTO retaliation regime has not effective results, therefore, we should conduct a comprehensive investigation and in-depth study on the

WTO retaliation regime in the present stage, find the problems existing in the statute and practical application, put forward with pertinence and feasibility solutions on improvements of the WTO retaliation regime, promote and improve the effective use of it by Members, induce the losing party timely and effectively implement the WTO ruling, enhance the predictability and reliability of the WTO system.

This dissertation is composed of six chapters. Chapter one is a general introduction. Firstly, it defines some fundamental concepts such as retaliation in the international law, WTO retaliation. It introduces the history development of retaliation regime in international law by using the method of comparative study and the historical evolution process of retaliation regime from GATT to WTO period. It introduces and analyzes the execution mechanism of the WTO dispute settlement rulings and three kinds of implementation methods. On this basis, Chapter two and three of this dissertation respectively focuses on the cross-retaliation regime and retaliation arbitration system. Chapter four in-depth analyzes four focus issues of the carouse retaliation, the collective retaliation, the monetary compensation system and the retrospective retaliation. By interpreting the relevant provisions, examining the origins of rules and analyzing relevant the WTO retaliation regime practices and typical cases, the above three chapters conduct the theoretical and empirical studies on the main legal issues existing in the WTO retaliation regime. Based on the above analysis and research, Chapter five analyzes the main problems existing in the WTO retaliation regime, introduces and comments on proposals and suggestions of Members on the improvements of the WTO retaliation regime in the

DSU reform negotiations in Doha Round period, and on this basis, puts forward the bold ideas and specific suggestions of reconstruction of the WTO retaliation regime system, finally, this dissertation carries on the strategy research and gives an outlook of the potential utility of the WTO retaliation regime in China.

The WTO retaliation regime has developed from the GATT retaliation regime. At present, it is a unique retaliation regime system. According to the regulation of article 22 of DSU, compensation and retaliation as two temporary remedies when the losing party didn't implement the WTO ruling have hierarchy when applicable and retaliation is the final measure to induce the WTO ruling to implement. The WTO retaliation regime has set up two legal systems of cross-retaliation and retaliation arbitration, and determines the principle of "equal" of retaliation level. The WTO retaliation regime provisions certain substantive and procedural requirements to apply to cross-retaliation and must follow the hierarchy of remedies when applying to cross-retaliation. So far, only three cases are authorized prevailing party to implement cross-retaliation by DSB, due to the prevailing parties are developing countries, eventually, the prevailing parties in all three cases had not actually implement cross-retaliation measures, but two parties reached a mutually acceptable solution to solve dispute and terminated retaliation through negotiation. The WTO retaliation regime has determined the principle of "equal" of retaliation level, but there are no rules for specific calculation methods to determine retaliation level, in practical cases, the arbitration tribunal created a variety of ways to calculate retaliation level, give full play to the right of discretion, judged the retaliation level optionally, not have unified standard. Due to the contradiction and conflict

of the rules of DSU itself, there is "sequencing issue" in practical application. The arbitration tribunal and the Members involved played a "subjective initiative", put forward and applied to a variety of solutions before solving the "sequencing issue" through amending the rules of DSU, but there are some problems in the solutions and they can not fundamentally solve the "sequencing issue".

According to the above problems, through the analysis of the WTO retaliation regime and empirical research of the practical cases, the dissertation puts forward that reconstruction of the WTO retaliation regime system is imperative. But some effective solutions to solve these problems, such as adding four regimes of the carouse retaliation, the collective retaliation, the monetary compensation system and the retrospective retaliation to the WTO retaliation regime system, the theoretical circle and practical circle have different opinions and views. The dissertation carries on specific and in-depth research on these four extremely important and controversial regimes as the focus issues of the WTO retaliation regime. The dissertation holds that the carouse retaliation initiated by the United States and applied in the judicial practice, the collective retaliation put forward by the developing countries and supported by many Members, the monetary compensation system applied by the United States and the European Union in practice and effectively solved the dispute and the retrospective retaliation regime that can solve the problem of realizing effective remedy in the developing countries can give play the role of induce compliance in a certain extent, but the WTO retaliation regime must limit their applicable conditions and procedures.

During the negotiations on the clarification and improvement of the rules and procedures of DSU in the period of the Doha Round,

suggestions put forward by Members on the flaws and conflicts of the retaliation regime itself, lack of effectiveness, power paradox, objective paradox and lack of legitimacy are worthy of attention and research. Based on the proposals and suggestions put forward by the Members and fundamentally solving the main problems existing in the current WTO retaliation regime, the dissertation boldly puts forward the thought of reconstruction of the WTO retaliation regime system and the framework and concrete suggestions of the WTO retaliation regime system after reconstruction. Hoping to fundamentally solve some major problems of the WTO retaliation regime, cause the extensive concern of the Members and provide some feasibility proposals for the next Round of DSU reform negotiations. With its growing economy and international trade, it is probable that the cases which are dealt with through WTO dispute settlement mechanism by China are more and more and China also will face the high and sudden season of the WTO rulings execution, not rule out the possibility of applying to retaliation when the losing party would not implement the WTO ruling in the future. Whether to implement or inherit the retaliation, China must strengthen the strategy research on the WTO retaliation regime, get ready to work to meet the coming new challenges.

Key words: retaliation WTO dispute settlement system WTO ruling execution mechanism WTO retaliation regime

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