

厦门大学国际经济法文库 总主编/陈安

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——十五年的实施与反思

On the Implementation Institution of WTO DSB Report
——Enforcement and Reflection of Fifteen Years

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序 言

国际经济法是发展中的边缘性法学学科。在世界范围,国际经济法作为独立的法学学科,已有近 60 年的发展史。在中国,经过 20 多年的发展,国际经济法已成为法学各学科中理论研究最活跃、实践性最强的学科之一。当前,在经济全球化和中国加入世界贸易组织的新形势下,国际经济法更呈现其鲜明的时代性和蓬勃的生命力。

得改革开放风气之先,厦门大学在我国较早开展国际经济法的教学和研究。经原国家教委批准,厦门大学于 1981 年和 1985 年在全国率先招收国际经济法专业硕士生和本科生,1986 年开始招收国际经济法专业(1997 年后调整扩大为国际法专业)博士生。1987 年成立厦门大学国际经济法研究所。1995 年,厦门大学“国际经济法及台港澳法研究”学科点被列为全国高校“211”工程重点建设项目。2002 年,厦门大学国际法专业由教育部批准为国家重点学科。长期以来,厦门大学国际法专业学术群体秉承“自强不息,止于至善”的校训,囊萤映雪,开展了一系列国家急需的国际经济法理论和实务研究工作,为我国的法治建设和学科发展作出了应有的贡献。同时,经过不断探索,本专业逐渐形成“出人才”和“创成果”相互促进、相辅相成的研究生培养模式,培养了大批“懂法律、懂经济、懂外语”的国际经济法专门人才。

把本专业建成我国国际法领域的重要研究基地和人才培养基地是我们的奋斗目标。“厦门大学国际经济法文库”的编辑出版,是本专业学科建设和发展的长期性工作。“文库”的宗旨是以系列学术专著的形式,集中展现国际经济法领域的专题研究成果,促进学术和社

会发展。“文库”立足出版厦门大学学者、校友在国际经济法领域的研究成果,更欢迎海内外国际经济法学者惠赐佳作。“文库”坚持作品的原创性标准,崇尚严谨治学,鼓励学术创新和争鸣。在出版国际经济法专家学者力作的同时,尤其关注国际经济法学界的新人新作,包括在优秀博士学位论文基础上发展的学术专著。我们期望“文库”成为国际经济法专家学者辛勤耕耘的园地,源源不断地产出智慧之果,启迪思想,弘扬学术。同时,更希望“文库”发挥国际经济法“智库”的功能,为我国的国际经济条约实践、涉外经贸立法以及涉外经贸实务提供有益的理论指导或参考。

“厦门大学国际经济法文库”编辑委员会

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内容摘要

WTO 争端解决机制被誉为皇冠上的明珠。与其他国际性法律争端解决机构相比,就数量而言,WTO 争端解决机制独占鳌头,成绩斐然,令人刮目相看。任何争端解决机制,裁判是中心,执行是命脉。要使 WTO 争端解决机制名实相符,其执行制度举足轻重,至关重要。

至 2009 年 12 月 31 日,WTO 争端解决机制运作整整 15 年,DSB 通过了 118 个案件的报告,其中 101 个案件的 DSB 报告需要执行。

彼得·萨瑟兰领导的“素帕猜·巴尼巴迪总干事顾问委员会”称:“争端解决机制迄今运行良好”,这种乐观态度究竟是否可取?要找到客观正确的答案,对上述需要执行报告的执行情况进行实证研究不可或缺。

对 DSB 报告执行制度的研究意义主要在于,发现 DSB 报告执行制度实施中存在的实质性问题,反思该制度的实质性缺陷,提出该制度实质性变革的方案,寻找实现该制度实质性变革方案的有效路径。

本书主体部分由导论、本论和结论构成,本论包括四章内容。

导论对本书研究论题“DSB 报告执行制度”中的关键概念予以解析,并对该论题的研究范围予以界定。该部分还阐明了论题的研究背景、现状与意义。

第一章为“DSB 报告执行制度的建构”。该章对 DSB 报告执行制度生成过程、具体内容和功能进行了研究,指出中止减让或其他义务是一种对不可替代的为一定行为的请求权的间接强制执行措施,论证了 DSB 报告执行制度具有促进在多边贸易体制内实现国际法治的功能。

第二章为“DSB 报告执行制度的实施”。该章分析了到 2009 年 12 月 31 日止需要执行的 101 个案件的 DSB 报告执行的及时性、相符性和强制性,进而论证了 DSB 报告执行制度的以下实质性缺陷:执行时限约束疲软,

瑕疵执行损失救济缺失,强制执行措施强制不力。

第三章为“DSB报告执行制度变革的目标”。该章对DSB报告执行制度的价值、基本原则和变革方案进行了研究。该章论证了作为DSB报告执行制度变革指针的该制度的价值目标体系和基本原则体系。以此为基础,对DSB报告执行制度的实质性缺陷提出如下变革方案:取消延迟执行的合理期间,由DSB建议执行期间和延迟执行的合理期间;建立瑕疵执行损失救济措施,可选择的方案包括强制支付迟延履行金和赔偿损失;建立公力实施性间接执行措施,但并不废止中止减让或其他义务的私力实施性间接执行措施。

第四章为“DSB报告执行制度变革目标的实现”。该章对DSB报告执行制度变革的法律路径选择、参与主体和参与制度进行了研究。该章揭示了实现DSB报告执行制度变革目标的不同法律路径中的不同方案对DSB报告执行制度的实质性变革的不同意义。为了实现DSB报告执行制度的实质性变革,主张全面审查DSU的谈判应设定时限,应允许与DSU外部的谈判议题进行交换,有关DSB报告执行条款的谈判可以与DSU内部的谈判议题进行交换;此外,还主张要有DSB报告对执行期间具体化、DSB建议追溯性赔偿和DSU修正决策制度采用多数表决制的配套。该章指出了DSB建议追溯性赔偿在法学、伦理学、经济学和契约理论上的根据。

结论归纳了本论各章的研究成果,并展望DSB报告执行制度变革的未来。

附录“DSB报告执行情况简表”,对第二章研究成果进行了系统化和明晰化处理,并充实了该章内容。

关键词:DSB报告;执行;WTO

ABSTRACT

The WTO dispute settlement mechanism is praised as the bright pearl on the crown of WTO. As far as quantity is concerned, it occupies the first place and achieves splendid results, which causes every head to turn in admiration, in contrast with other international legal dispute settlement bodies. For any dispute settlement mechanism, judgment is center and enforcement is lifeline. To achieve deserved reputation, WTO dispute settlement mechanism is decisive and vital.

As of 31 December 2009, WTO dispute settlement mechanism had been operating for fifteen years. By this time, DSB had adopted reports of 118 cases in which reports of 101 cases need to be implemented.

The Consultative Board to the Director-General Supachai Panitchpakdi headed by Peter D. Sutherland proclaimed that “So far so good-the system has worked”. Whether on earth the optimistic attitude is advisable? To obtain objective and correct answer, empirical study on implementation status of aforementioned reports needed to be implemented is indispensable.

The meaning of doing research on the implementation institution of DSB report mainly consists in finding out the substantial problems while applying the implementation institution of DSB report, reflecting upon its substantial deficiency and putting forward some projects about the substantial transformation of this institution, as well as looking for effective routes to realize these projects.

The book consists of introduction, main body and conclusion, and the

main body has 4 chapters.

The introduction throws light on critical concepts of the subject for discussion that is “the implementation institution of DSB report”, and defines the scope of researching to the subject for discussion. This part also elucidates the background, current situation and meaning of researching to the subject for discussion.

Chapter 1 discusses the construction of the implementation institution of DSB report. It studies the generation process, concrete contents and functions of the institution. It points out that the suspending concessions and other obligations are indirect enforcement measures to obligation to do act that should not be replaced. The author demonstrates that the implementation institution of DSB report has the function of promoting to realize international rule of law in multilateral trading system.

Chapter 2 examines the enforcement of the implementation institution of DSB report. It analyzes the timely, consistent and compulsive characteristic to implement DSB report in need of implementation in 101 cases, as of 31 December 2009, from which demonstrates that there are substantial deficiencies in the implementation institution of DSB report: weak restriction on the implementation time limit; lack of remedies for the damage of flawed implementation; weak compulsive power of enforcement measures.

Chapter 3 focuses on the objective of transformation on the implementation institution of DSB report. It studies the values, the basic principles and the projects of the transformation of the institution. It demonstrates the system of the value objective and basic principles directing the transformation of the implementation institution of the DSB report. Based on this demonstration, this dissertation provides the transformation projects to cope with the substantial deficiency of the implementation institution of DSB report: canceling the reasonable period of time for deferring implementation, the implementation period and the reasonable period of time for deferring implementation should be recommended by DSB; establishing the remedies for the damage of flawed implementation, including compulsory payment for deferring implementation and compensation for deferring

implementation; establishing indirect enforcement measures enforced by public power, but not abolishing indirect implementation measures enforced by self, namely, the suspending concessions and other obligations.

Chapter 4 is devoted to the realization of transformation objective on the implementation institution of DSB report. It studies the choice of the legal routes, the participation subjects and institutions of this institution transformation. It reveals that the various projects of different legal routes to realize the transformation of the implementation institution of DSB report have different significance on the substantial transformation of the institution. To realize the substantial transformation of the implementation institution of DSB report, the author advocates that we shall set a time limit for the negotiation on examining the DSU fully, and allow to exchange the negotiation topics with those out of the DSU, and exchange the negotiation topics between the rules of DSB report implementation and the interior topics of the DSU. Besides, it advocates that we shall require that DSB report should embody the time period of implementation, DSB should recommend the retrospective compensation, and WTO should adopt the majority vote mechanism for the decision-making system of revising the DSU. It points out the bases of DSB recommending the retrospective compensation on the science of law, ethics, economics and contract theory.

The conclusion sums up the research findings in the chapters of main body, and looks forward to the future of the transformation on the implementation institution of DSB report.

The appendix, short form on implementation status of DSB reports, deals with the research findings of Chapter 2 systematically and explicitly. It also replenishes the content of this chapter.

Key Words: DSB report; implementation; WTO

International Economic Law

缩略语

BISD	<i>Basic Instruments and Selected Documents</i> (published by GATT) (《基本文件资料选编》)(由 GATT 出版)
DSB	Dispute Settlement Body (争端解决机构)
DSU	<i>Understanding on Rules and Procedures Governing the Settlement of Disputes</i> (《关于争端解决规则和程序的谅解》)
EC	European Communities (欧洲共同体)
EU	European Union (欧洲联盟)
GATT	<i>General Agreement on Tariffs and Trade</i> (《关税与贸易总协定》)
ITO	International Trade Organization (国际贸易组织)
MTO	Multilateral Trade Organization (多边贸易组织)
S&D 待遇	special and differential treatment (特殊和差别待遇)
《SCM 协定》	<i>Agreement on Subsidies and Countervailing Measures</i> (《补贴与反补贴措施协定》)

《SPS 协定》	<i>Agreement on the Application of Sanitary and Phytosanitary Measures</i> (《实施动植物卫生检疫措施的协定》)
TNC	Trade Negotiation Commission (贸易谈判委员会)
《TRIPs 协定》	<i>Agreement on Trade-Related Aspects of Intellectual Property Rights</i> (《与贸易有关的知识产权协定》)
TWN	Third World Network (第三世界网络)
WTO	World Trade Organization (世界贸易组织)
《WTO 协议》	<i>Marrakesh Agreement Establishing the World Trade Organization</i> (《建立世界贸易组织马拉喀什协议》)

案例表

一、WTO 案例^①

[1] DS366—Colombia-Indicative Prices and Restrictions on Ports of Entry, 20 May 2009.

[2] DS362—China-Measures Affecting the Protection and Enforcement of Intellectual Property Rights, 20 March 2009.

[3] DS360—India-Additional and Extra-Additional Duties on Imports from the United States, 17 November 2008.

[4] DS350—United States of America-Continued Existence and Application of Zeroing Methodology, 19 February 2009.

[5] DS345—United States-Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties, 1 August 2008.

[6] DS344—United States-Final Anti-Dumping Measures on Stainless Steel from Mexico, 20 May 2008.

[7] DS343—United States-Measures Relating to Shrimp from Thailand, 1 August 2008.

[8] DS341—Mexico-Definitive Countervailing Measures on Olive Oil from the European Communities, 21 October 2008.

[9] DS339, DS340, DS342—China-Measures Affecting Imports of Automobile Parts, 12 January 2009.

^① 列举限于本书着重研究之 WTO 案例, 未及全部。案名以 DSB 所通过报告为准, 日期为报告通过日。

[10] DS337—European Communities-Anti-Dumping Measure on Farmed Salmon from Norway, 15 January 2008.

[11] DS336—Japan-Countervailing Duties on Dynamic Random Access Memories from Korea, 17 December 2007.

[12] DS335—United States-Anti-Dumping Measure on Shrimp from Ecuador, 20 February 2007.

[13] DS334—Turkey-Measures Affecting the Importation of Rice, 22 October 2007.

[14] DS332—Brazil-Measures Affecting Imports of Retreaded Tyres, 17 December 2007.

[15] DS331—Mexico-Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala, 24 July 2007.

[16] DS322—United States-Measures Relating to Zeroing and Sunset Reviews, 23 January 2007.

[17] DS321—Canada-Continued Suspension of Obligations in the EC-Hormones Dispute, 14 November 2008.

[18] DS320—United States-Continued Suspension of Obligations in the EC-Hormones Dispute, 14 November 2008.

[19] DS315—European Communities-Selected Customs Matters, 11 December 2006.

[20] DS312—Korea-Anti-Dumping Duties on Imports of Certain Paper from Indonesia, 28 November 2005.

[21] DS308—Mexico-Tax Measures on Soft Drinks and Other Beverages, 24 March 2006.

[22] DS302—Dominican Republic-Measures Affecting the Importation and Internal Sale of Cigarettes, 19 May 2005.

[23] DS301—European Communities-Measures Affecting Trade in Commercial Vessels, 20 June 2005.

[24] DS299—European Communities-Countervailing Measures on Dynamic Random Access Memory Chips from Korea, 3 August 2005.

[25] DS296—United States-Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors(DRAMs) from Korea, 20

July 2005.

[26] DS294—United States-Laws, Regulations and Methodology for Calculating Dumping Margins(Zeroing), 9 May 2006.

[27] DS295—Mexico-Definitive Anti-Dumping Measures on Beef and Rice, 20 December 2005.

[28] DS291, DS292, DS293—European Communities-Measures Affecting the Approval and Marketing of Biotech Products, 21 November 2006.

[29] DS285—United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services, 20 April 2005.

[30] DS282—United States-Anti-Dumping Measures on Oil Country Tubular Goods(OCTG) from Mexico, 28 November 2005.

[31] DS277—United States-Investigation of the International Trade Commission in Softwood Lumber from Canada, 26 April 2004.

[32] DS276—Canada-Measures Relating to Exports of Wheat and Treatment of Imported Grain, 27 September 2004.

[33] DS273—Korea-Measures Affecting Trade in Commercial Vessels, 11 April 2005.

[34] DS269, DS286—European Communities-Customs Classification of Frozen Boneless Chicken Cuts, 27 September 2005.

[35] DS268—United States-Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina, 17 December 2004.

[36] DS267—United States-Subsidies on Upland Cotton, 21 March 2005.

[37] DS265, DS266, DS283—European Communities-Export Subsidies on Sugar, 19 May 2005.

[38] DS264—United States-Final Dumping Determination on Softwood Lumber from Canada, 31 August 2004.

[39] DS257—United States-Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada, 17 February 2004.

[40] DS248, DS249, DS251, DS252, DS253, DS254, DS258, DS259—U-

nited States-Definitive Safeguard Measures on Imports of Certain Steel Products, 10 December 2003.

[41] DS246—European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries, 20 April 2004.

[42] DS245—Japan-Measures Affecting the Importation of Apples, 10 December 2003.

[43] DS244—United States-Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan, 9 January 2004.

[44] DS243—United States-Rules of Origin for Textiles and Apparel Products, on 21 July 2003.

[45] DS241—Argentina-Definitive Anti-Dumping Duties on Poultry from Brazil, 19 May 2003.

[46] DS238—Argentina-Definitive Safeguard Measure on Imports of Preserved Peaches, 15 April 2003.

[47] DS236—United States-Preliminary Determinations with Respect to Certain Softwood Lumber from Canada, 1 November 2002.

[48] DS231—European Communities-Trade Description of Sardines, 23 October 2002.

[49] DS222—Canada-Export Credits and Loan Guarantees for Regional Aircraft, 19 February 2002.

[50] DS221—United States-Section 129(c)(1) of the *Uruguay Round Agreements Act*, 30 August 2002.

[51] DS219—European Communities-Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil, 18 August 2003.

[52] DS217, DS234—United States-*Continued Dumping and Subsidy Offset Act of 2000*, 27 January 2003.

[53] DS213—United States-Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany, 19 December 2002.

[54] DS212—United States-Countervailing Measures Concerning Certain Products from the European Communities, 8 January 2003.

- [55] DS211—Egypt-Definitive Anti-Dumping Measures on Steel Rebar from Turkey, 1 October 2002.
- [56] DS207—Chile-Price Band System and Safeguard Measures Relating to Certain Agricultural Products, 23 October 2002.
- [57] DS206—United States-Anti-Dumping and Countervailing Measures on Steel Plate from India, 29 July 2002.
- [58] DS204—Mexico-Measures Affecting Telecommunications Services, 1 June 2004.
- [59] DS202—United States-Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe From Korea, 8 March 2002.
- [60] DS194—United States-Measures Treating Export Restraints as Subsidies, 23 August 2001.
- [61] DS192—United States-Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan, 9 November 2001.
- [62] DS189—Argentina-Definitive Anti-Dumping Measures on Carton-Board Imports from Germany and Definitive Anti-Dumping Measures on Imports of Ceramic Tiles from Italy, 5 November 2001.
- [63] DS184—United States-Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, 23 August 2001.
- [64] DS179—United States-Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea, 1 February 2001.
- [65] DS177, DS178—United States-Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from New Zealand, 16 May 2001.
- [66] DS176—United States-Section 211 of the *Omnibus Appropriations Act of 1998*, 2 January 2002.
- [67] DS174, DS290—European Communities-Protection of Trade-marks and Geographical Indications for Agricultural Products and Food-stuffs, 20 April 2005.
- [68] DS170—Canada-Term of Patent Protection, 12 October 2000.
- [69] DS166—United States-Definitive Safeguard Measures on Im-