上海WTO事务咨询中心系列丛书　　总主编　王新奎

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傅星国 著

THE COMPLIANCE MECHANISM

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前　言

世界贸易组织(WTO)是当今世界唯一规范全球贸易的国际组织,其争端解决机制在有效解决贸易纠纷、维护成员利益方面发挥着重要且独特的作用,被誉为 WTO“皇冠上的明珠”。该机制所作出的裁决是 WTO 法律体系不可或缺的核心要件,裁决执行的好坏关系到多边贸易体制的稳定与发展。

然而,WTO 裁决的执行问题一直是各方争论的焦点。成员在 WTO 中败诉后怎么办? WTO 裁决究竟有没有法律约束力? 败诉方是否必须执行裁决? 能否用补偿或报复替代执行裁决? 等等。

在回答这些问题之前,有三项事实不容回避:其一,WTO 在法律上并未明文规定其裁决具有法律约束力;其二,与其他国际组织一样,WTO 并没有一个超国家的强制执法机构;其三,WTO 裁决执行情况良好,WTO 自 1995 年生效以来共受理 400 多起争端,作出 116 项裁决,几乎所有裁决都得到败诉方的执行。

这三项事实既相互联系,又相互矛盾,使有关 WTO 裁决执行的讨论变得更加扑朔迷离。其核心问题是,WTO 作为一个国际组织,究竟通过什么机制和手段来促使其成员执行其裁决?

通过对 WTO 裁决执行的法律及其实践进行实证考察,本书认为,就 WTO 而言,争端无非是激化了的谈判。每一起争端案件都像一次“局部地震”,是多边贸易体制各“板块”(成员)之间贸易摩擦导致的“地壳运动”,既反映出经济全球化浪潮下各国资源配置与比较优势的变化及其引起的竞争关系的变化,也凸显了针对这种变化各国采取相应政策所引发的矛盾和冲突。而争端解决就是在 WTO 多边法律框架下,成员对“利益的丧失

或减损”进行救济、通过利益交换最终恢复或调整权利与义务平衡的过程。

裁决是WTO对成员所采取措施合法性的(准)司法判断,一方面代表了败诉方在WTO中所需承担纠正违法措施的义务,另一方面也代表着胜诉方在WTO多边贸易体制下获得救济的权利。执行裁决是救济的兑现和落实,执行的好坏主要受三大要素影响:一是WTO裁决及其执行机制;二是WTO成员国内(域内)执行裁决机制;三是WTO成员对裁决及其执行所持的立场和看法。裁决执行阶段汇聚了成员与成员,胜诉方与败诉方、国际法与国内法、开放与保护、规则导向与权力导向、违法与救济等诸要素之间的各种矛盾,是争端解决机制乃至WTO多边贸易体制中矛盾斗争最为激烈的领域之一。

正因为如此,WTO非常注重裁决执行问题,专门创设了一整套制度安排,包括通报执行意向、全程监督执行、对执行的合理期限及报复水平进行仲裁、对执行异议进行复审,以及允许作为临时措施提供补偿或最终授权报复等。这套融政治、法律、经济手段为一体的执行程序为WTO裁决执行提供了制度上的保障,在实践中积累了大量丰富的案例。现阶段深入研究并把握裁决执行阶段的特点和规律,对有效参与WTO争端解决机制不仅十分必要,而且十分迫切。

国际关系是一国根据其他国家的行为或反应作出抉择的过程。在WTO裁决执行方面,本书认为,最终促使裁决得以执行的是一种“内力”和“外力”相互作用的合力。

所谓“内力”,源自WTO成员的内驱力,即成员认识到自身在争端解决机制中胜败皆有可能的客观现实,从确保自身核心利益出发,在计算不执行裁决的违法成本与执行裁决的收益基础上,维护自身在多边贸易体制中的形象,并兼顾其他成员的反应,在执行裁决方面采取的某种合作态度。

所谓“外力”源于两个方面:一方面是裁决的合法性;即裁决是全体WTO成员一致同意建立的准司法机制的产物,裁决的产生过程便是裁决获得合法性和有效性的过程,成员接受和执

行裁决源自裁决的合法性；另一方面是 WTO 裁决执行机制作为一套制度安排所释放出来的规范性压力。本书认为，国际机制是一种力量。WTO 创设的裁决执行机制充分发挥了监督、裁定和监管的作用，从机制上对败诉方产生了促其执行裁决的推动力。

在 WTO 裁决执行机制运行实践中作出的一系列司法解释和判决，澄清了许多条款的法律概念，使 WTO 相关规则更加明确、有效和具有操作性。该机制的运行体现了实践中来、实践中去以及逐步法典化的过程。从这个意义上讲，WTO 裁决执行机制及其运行中积累的判例和经验，推动了 WTO 法的发展与完善，对国际公法的发展也具有一定的借鉴作用。

本书聚焦于 WTO 裁决执行机制，从实证角度出发，通过对该机制在通报执行意向、全程监督执行、对执行的合理期限以及报复水平进行仲裁、对执行异议进行复审，以及允许作为临时措施提供补偿或最终授权报复等各环节的实践进行深入考察，在研究 WTO 成员参与该机制的态度和行为的基础上，深入地分析了 WTO 如何利用该机制有效地监督、跟踪、判断裁决的执行情况，并最终促使裁决得以执行，同时对该机制的未来发展趋势提出了思路和建议。

ABSTRACT

The World Trade Organization(WTO) is the only international organization that governs the global trade and its WTO dispute settlement system, hailed as "the Jewel in the Crown" of the WTO, plays an increasingly important and unique role in effectively resolving disputes among its Members and maintaining the balance of rights and obligations. The recommendations and rulings made by Panels and the Appellate Members are the *sine qua non* of the WTO legal system and implementation of such rulings is essential to preserving the security and predictability of the WTO multilateral trading system.

However, implementation of WTO rulings has long been one of the most controversial issues in the WTO. The controversy derives from three facts. First, WTO law has no provisions that unambiguously stipulate that WTO ruling is binding. Second, like other international organizations, the WTO has no centralized law enforcement mechanism. Third, there has been a fairly good record of compliance since entry into force of the WTO, among 116 rulings made out of some 400 cases filed, almost all rulings have been implemented by the losing Member(s).

These contradictory facts give rise to a long list of questions. What should a Member do if the measures it maintains are ruled illegal under the WTO? Is WTO ruling binding? Is the losing Member obliged to comply with the rulings? Is the

Member concerned free to substitute implementation with compensation or retaliation?

Centering around these questions, there have been persistent theoretical debates both at policy and academic levels on legal meaning and implications of WTO rulings, which insofar have led to no convincing conclusion, but stalled at an *impasse*. As such, it inevitably calls for a new understanding of how the WTO, as an international organization, functionally makes its Members comply with the rulings that it gives.

Through empirical study, this Book specifically focuses on the compliance mechanism of the WTO rulings, and investigates law, practice and case-by-case jurisprudence of such mechanism, including but not limited to, notification of intent of compliance, all-time surveillance, arbitration on reasonable period of time and level of retaliation, judicial review of compliance disputes, and compensation or authorized retaliation as temporary means before the full compliance.

This Book posits that disputes are merely intensified and escalated negotiations. Each dispute is like an earthquake, representing the movement of earth crust characterizing as trade frictions between Members. Such collision demonstrates not only changes in allocation of resources, comparative advantages and competitive relationship, but also conflict of interests caused by policies and measures taken respectively by Members in response to dealing with these mounting changes. As such, the WTO dispute settlement system serves to provide remedies to benefits "nullified or impaired", and to restore the balance of rights and obligations between Members.

Recommendations and rulings are judicial judgment on legality of measure(s) taken by Members. On the one hand, such rulings embody the obligations to be assumed by the los-

ing Member in terms of correcting the illegal measures. On the other hand, they represent the legitimate right of the winning Members to receive remedies under the WTO legal system.

Implementation of rulings is materialization of remedies under the WTO, and such implementation is influenced by, among other things, three major factors: one, the WTO ruling and its compliance mechanism; two, domestic compliance system of Members, and three, Members' views on the WTO rulings and compliance.

The fact that the WTO law as a branch of public international law has no centralized enforcement does not necessarily mean its law or rulings cannot be or are not enforced. Instead, there exists a whole range of mechanisms through which Members are made to conform to the WTO obligations which they have agreed to. The WTO specifically has designed a compliance mechanism combining political, legal, economic means, which serves to monitor, track and adjudicate compliance, ultimately, making compliance happen.

This compliance mechanism produces, case by case, a rich body of jurisprudence, which shows a process of bottom-up codification through jurisprudence and a constant thickening of legality of WTO system. The judicial rulings and interpretations given by Panels and the Appellate Body in the compliance stage have clarified ambiguities that are not particularly specified in the rules-making negotiations, and most importantly, made WTO law more precise, effective and operational. In this sense, the WTO compliance mechanism and its operation together with lessons and experiences have promoted the development of the WTO law, and made due contribution to the public international law.

International institutions are powerful tools in securing

observance of rules endorsed by nations. The WTO compliance mechanism is a vivid example in this regard as it plays a unique role of monitoring, adjudicating and managing compliance, and ultimately, such mechanism produces "push and pull" force combining the internal force and the external force that serves to make compliance happen.

The internal force originates from the Members themselves, and it is the cooperative attitude adopted by Members in the process of compliance. Such attitude comes from Members' awareness of the reality that any Member could win or lose in the dispute settlement process, and of the reality that one has to behave in light of the enlightened self-interest and dealing with normative pressures, based on calculation of the cost and benefit of non-compliance.

The external force derives from two sources: the first is legitimacy of the rulings. As enforcement alone cannot qualify the WTO rulings with validity; it is ultimately the legitimacy and acceptability that ensure compliance with such rulings. This is because the WTO rulings are legitimate outcome of an independent judicial body established through overall consent by all WTO Members, and process of making such rulings represents a process of acquiring legitimacy and validity, which engenders a formally binding force to such rulings and calls for implementation by the responding Member.

The second is the unique role played by the compliance mechanism. Despite of the fact that the WTO law as primary rules does not explicitly state that its rulings are binding, such rulings could be made *de facto* binding through a full-fledged compliance mechanism, a well-developed set of secondary rules combining surveillance, adjudication on compliance and remedial approach of compensation or retaliation. As such, this

compliance mechanism, with each of its components working interactively and in tandem, constitutes *ipso facto* a binding process that exerts distinct compliance pull and normative pressure on the implementing Member by detecting how well such Member complies or non-compliance, and eventually by authorizing retaliation in case of non-compliance.

Hence, this Book concludes that it is ultimately the enlightened self-interest of each WTO Member concurred with a sense of community among all the Members that generates the will to comply with the WTO rulings. Such will to comply can be strengthened by legitimacy of the WTO rulings and, more importantly, tested and reinforced by a functional compliance mechanism combining surveillance, post-verdict adjudication, and authorized retaliation as a last resort.

目　录

第一章 导 论

“徒善不足以为政，徒法不能以自行。”①

中国古代思想家孟子的这句名言既令人茅塞顿开，也让人迷惑费解。古今中外，不同的人对这句话有着不同的理解。

宋代朱熹认为：“徒，犹空也。有其心，无其政，是谓徒善；有其政，无其心，是为徒法。”②清代焦循认为：“有善心而不行之，不足以为政，但有善法度而不施之，法度亦不能独自行也。”③现代国内学界对此也是众说纷纭。杨伯峻认为，此句意为光有好心，不足以治理政治；光有好法，好法自己也动作不起来。（好心和好法必须配合而行。）④有观点认为，孟子在“强调法律还得靠人来掌握和贯彻”；⑤“法”离开了人的运用就不能“行”；⑥愈是完备的法律愈是要高素质的人来建立和执行。⑦也有观点认为，此句反映了儒家崇尚贤人政治、重礼轻法的德治理想。⑧还有观点认为，立法与司法均为重要；⑨强调法律的实施对于实现法律所追求的目标极其重要。⑩

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