

WTO 规则中英文教程

AN INTRODUCTION TO WTO RULES

(English/Chinese Edition)

栾信杰 编著

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WTO 规则中英文教程

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序

对外开放是促进中国社会政治、经济、文化等各个领域全面变革和发展的重要力量。加入 WTO 后,中国的对外开放也进入了一个新阶段。作为已全面融入国际主流社会的 WTO 成员,中国不能仅仅按照自己的思维方式、行为方式从事改革开放和对外经济贸易活动,还要接受 WTO 多边体制的制约。自觉遵守 WTO 规则无疑具有非常积极的意义。

“追根溯源”是一种值得提倡的学习方式。对于学习 WTO 知识来讲,直接阅读 WTO 协定官方文本(有英文、法文和西班牙文本)最好,但困难较大。这本《WTO 规则中英文教程》以中英双语的形式介绍 WTO 特定的规则,既不失 WTO 协定原文本的语言特色,又简明易懂,具有很强的适用性、可读性。本书对于一些重要规则有叙有议,这也体现了作者一贯坚持的求实、求是的学术风格。

作者对 WTO 规则的研究用功颇多,发表了大量学术论文,也为 WTO 知识的普及做了大量的工作。本书是他几年来讲授、研究 WTO 规则的成果。

是为序。

对外经济贸易大学中国 WTO 研究院教授、博士

桑百川

2003 年 3 月 12 日

前 言

“入世”是我国现代化进程中的“里程碑”。我们学习 WTO 知识,掌握 WTO 规则,使其为我所用,决不是一时之“役”。

WTO 的官方语言是英语、法语和西班牙语。WTO 协定文本(正是这些文本确立了 WTO 规则)也是用这些语言写就的。这本《WTO 规则中英文教程》以 WTO 协定英文本为基础,分 15 章对 WTO 主要规则作了介绍。为满足各专业学习 WTO 知识的需要,本教程在编写体例上有一个特点,即对涉及到的 WTO 具体规则用中英文形式介绍(英文部分主要源自文本原文及 WTO 官方网站)。须说明的 WTO 协定英文文本共 550 页,协定条款相互嵌套,表述繁缛,而本教程则可用《圣经》上的一句话来定性:“The light of body is the eye。”“body”即是 WTO 协定文本,本教程则是“eye”。相信本书会有助于读者将 WTO 规则看得更真切一些。尽管本书是作者焚膏继晷、对 WTO 协定文件字斟句酌的结果,但所述内容是对 WTO 协定内容的提炼(包括作者个人对 WTO 规则的阐释),并非是 WTO 协定及各协定实质内容的全部,请读者在阅读时务必注意。

本书内容具体包括:WTO 的基本知识(第一、二、三章)、WTO 贸易政策审查和争端解决规则(第四章)、WTO 农产品贸易、纺织品与服装贸易、服务贸易规则(第五、六、七章)、WTO 反倾销、反补贴和保障措施规则(第八、九、十章)、WTO 与贸易有关的知识产权保护规则(第十一章)、WTO 与贸易有关的投资措施、进口许可程序、原产地和海关估价规则(第十二、十三、十四章)及我国入世规则(第十五章)。

本书在撰写及出版过程中得到对外经贸大学中国 WTO 研究

院、对外经贸大学国际贸易学院桑百川教授的悉心指导和帮助 ,也得到了对外经贸大学出版社以及我的领导和同事们的大力支持 ,作者在此表示诚挚的谢意。 错漏当查 ,文中不当之处 ,请专家、读者不吝指教(有关意见或建议可发至电子信箱 :luanxjie@sina. com)。

栾信杰

2003 年 3 月

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第一章 概述

Essentials of WTO

第一节 WTO 的基本概念

Basic Conceptions of WTO

一、WTO 的定义(Definition of WTO)

WTO 英文全称为 World Trade Organization ,译为世界贸易组织 ,简称“ 世贸组织 ”。WTO 在其官方网站中将 WTO 定义为 :

The World Trade Organization (WTO) is the only global international organization dealing with the rules of trade between nations. At its heart are the WTO agreements , negotiated and signed by the bulk of the worlds trading nations and ratified in their parliaments. The goal is to help producers of goods and services , exporters , and importers conduct their business.

世界贸易组织(WTO)是惟一处理不同国家之间贸易规则的全球性组织。它的核心内容是由诸多参加世界贸易的国家^①谈判、签署并经其国会批准的一系列 WTO 协定。WTO 的目标是帮助商品和服务的生产商、出口商和进口商进行商业活动^②。

① WTO 的成员被称为“ Contract Party”(“ 缔约方 ”) ,或“ Member”(“ 成员 ”) ,本书一般称之为“ 成员 ”。

② What is the WTO ? Available at <http://www.wto.org/english/thewto-e/whatis-e/whatis-e.htm>

从这个定义中可看出 WTO 有这样三个特点 (1)WTO 是一个国际经济组织 ,所规范的是商业行为 ,原则上并不涉及意识形态问题 (2)WTO 是依其一揽子协定规则来运作的 ,这些规则是 WTO 核心组成部分 (3)WTO 主要以商品和服务为管辖客体 ,在 WTO 规则中与商品和服务有关的贸易规则占有极其重要的地位。

二、WTO 所管辖的范围(Presidial Scopes of WTO)

WTO《关于建立世界贸易组织的协定》第 2 条规定：

WTO provides both the common institutional framework and legal instruments for the conduct of trade relations among its Members.

WTO 通过所达成的协定为成员国之间处理贸易关系提供共同的制度框架和 WTO 协定文件中所规定的法律手段。

也就是说 ,WTO 成员通过 WTO 协定建立了彼此之间的贸易联系 ,这些协定也确立了各成员国应共同遵守的法律规则。须说明的是 ,WTO“ 多边贸易协定 ”(Multilateral Trade Agreements)对所有成员国都具有拘束力 ; 接受才生效的诸边贸易协定 ”(Plurilateral Trade Agreements)^①对于那些尚未接受它们的国家则既不产生权利 ,也不产生义务。

三、WTO 的目标和宗旨(WTO Objectives and Tenets)

(一)目标(Objectives)

WTO《关于建立世界贸易组织的协定》(Agreement Establishing the World Trade Organization)开宗明义地提出了 WTO 的目标：

1. Raising standards of living ;

^① 对于具体协定 ,见本章第四节。

2. Ensuring full employment and a large and steadily growing volume of real income and effective demand ;
3. Expanding the production of and trade in goods and services ;
4. Allowing for the optimal use of the world's resources in accordance with the objective of sustainable development ;
5. Seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development ;
6. Ensuring that developing countries , and especially the least developed among them , secure a share in the growth in international trade commensurate with the needs of their economic development.

WTO 的目标是 :1. 提高生活水平 2. 保证充分就业和实际收入与有效需求的大幅度稳定增长 3. 扩大商品与服务的生产和贸易 ; 4. 允许根据可持续发展目标合理地利用世界资源 5. 与各国不同的经济发展水平所决定的各自需求与关注的问题相一致寻求保护和维持环境 ,并改进保护和维持环境的方法 6. 保证发展中国家 ,特别是它们中间的最不发达国家在国际贸易增长中获得与他们的经济发展需要相适应的份额。

需特别提出的是环境与贸易协调发展是 WTO 基本目标之一。WTO《关税与贸易总协定 1994》(General Agreement on Tariffs And Trade 1994 ,简称《GATT 1994》)第 20 条(“一般例外”)中规定 :

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail , or a disguised restriction on international trade , nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures :

(a) necessary to protect public morals ;

(b) necessary to protect human , animal or plant life or health ;

...

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption ;

...

若下述措施在具备相同条件的国家之间不会构成任意的或无理的歧视 ,或者不是对国际贸易变相的限制 ,则不应认为本协定阻止任何缔约方采取或实施以下这些措施 (1)为维护公共道德所必须者 ; (2)为维护人类及动植物生命必需者 ;.....(7)关系到养护可用竭的天然资源的 ,凡此措施同限制国内生产与消费一道实施者。

这一规则为 WTO 成员设置“绿色壁垒”提供了法律依据。所谓“绿色壁垒”,简言之,即要求采用“与环境友好”(environmentally-friendly)的方法进行出口商品的生产。泰国、印度、巴基斯坦、马来西亚等诉美国海龟—海虾(turtle-Shrimp)案(1996年)^①即涉及到贸易与环境问题,引人注目。该案的起因是,1989年美国通过立法来推动其他国家使用 TED(Turtle Excluded Device),以加大对海龟的保护力度。美国要求,自1991年5月1日起,禁止那些用传统的对海龟造成不利影响的商业性渔业技术(Commercial Fishing Technology)而非 TED 技术捕捉的海虾的进口。专家组判定美国的禁虾措施违背了《GATT 1994》第11.1条“禁止和限制一切数量限制”的规定。同时专家组认为,如果依据《GATT 1994》第20条的例外允许进口方以某种国内政策(包括环境政策)作为市场准入的条件,将影响 WTO

① WTO document No. WT/DS 58 , available at www.wto.org. Also , see Robert Howse , The Turtles Panel-Another Environmental Disaster in Geneva , JWT , Vol. 32 , No. 5 ,1998.

多边贸易体制的安全性和可预测性,因而美国的上述单边措施不能得到第 20 条的支持。美国及一些环保组织(WWF、Green Peace、World Summit)对专家组的裁决不服。1998 年 10 月 12 日上诉机构(Appellate Body)作出终审报告。上诉机构认为,依据《GATT 1994》第 20.7 条“可被用竭的自然资源”(Exhaustible Natural Resources)一项可以确认美国所采取的措施在第 20 条所确立的“例外”范围之内,但又认为,美国的要求损害了其他成员的立法自主权;要求各出口成员均装备使用 TED,而不考虑各地特殊和具体情况(Conditions Prevailing),美国无法保证其政策是适当的;美国给予加勒比国家 3 年的过渡期,却仅给予其他包括申诉国在内的出口成员 4 个月多一点的准备时间,这实际构成了对不同成员之间的歧视。由此可知,美国的差别待遇和实施过程的武断而非其绿色保护主义导致美国的败诉。总之,环境与贸易的协调发展将是经济增长的重要模式。

(二)宗旨(Tenets)

《GATT 1994》开篇即申明其以下宗旨:

Raising standards of living , ensuring full employment and a large and steadily growing volume of real income and effective demand , developing the full use of the resources of the world and expanding the production and exchange of goods.

《GATT 1994》的宗旨是提高生活水平,保证充分就业,保证实际收入和有效需求的大幅持续增长,充分利用世界资源,扩大商品的生产与交换。

《GATT 1994》是 WTO 的最基本文件,故这个宗旨也是 WTO 的宗旨。从中看出,WTO 的核心是贸易和发展,这是 WTO 在世界范围内越来越有吸引力、影响也越来越大的原因。

四、WTO 的法律地位(Legal Status of WTO)

WTO is a permanent international organization and is of equality in legal status with such international organizations as UN , etc. It has legal personality with the privileges and immunities.

WTO 是一个独立于联合国的永久性国际组织 ,在法律上与联合国等国际组织是平等的 ,并享有法人地位及特权和豁免权。

五、WTO 的标志(WTO Mark)

The Mark of WTO was devoted to use on 9 Oct. 1997. It is composed of six lines of upswept pitch arc with colors of red , blue and green respectively. In the whole , this mark is filled with the dynamic sense , which coherent with the vigor of WTO.

WTO 的标志是 1997 年 10 月 9 日启用的。该标志由 6 道依次以红、蓝、绿、红、蓝、绿 3 种颜色上下排列的向上弯曲的弧线组成。从整体看 ,标志具有动感 ,这与 WTO 充满活力是相一致的。

第二节 WTO 的历史概况

An Historical Survey of WTO

WTO 的发展历史分为两个阶段 ,一是关税与贸易总协定(WTO 的前身)时期(1948 年 1 月 1 日 ~ 1994 年 12 月 31 日) ,二是 WTO 时期(1995 年 1 月 1 日 ~)。

WTO 的产生过程十分曲折 ,在此简单介绍如下 :

建立 WTO 的设想最早可追溯至 1944 年 7 月在美国新罕布尔州 (New-Hampshire State)举行的布雷顿森林会议(Bretton Woods Conference)上。第二次世界大战结束以后 ,美国成为世界头号经济强国。为了称霸世界 ,美国积极策划从国际金融、投资和贸易方面对外扩张。为此美国提出“ 贸易自由化 ”口号 ,并倡导建立一个以实现贸

易自由化为目标的“国际贸易组织”(International Trade Organization, ITO),把它作为与国际货币基金组织(IMF,1945年成立)、国际复兴与开发银行(统称“世界银行”,1946年成立)并重的(即货币——金融——贸易三位一体)、专门协调各国对外贸易政策和国际经济贸易关系的第三个国际性组织。1946年2月联合国经济和社会理事会接受了建议并成立了筹备委员会;1947年4月在联合国经济和社会理事会的主持下召开了第二次筹备会议,23个与会国,包括澳大利亚联邦政府、比利时王国、巴西合众国、缅甸、加拿大、锡兰、智利共和国、中国、古巴共和国、捷克斯洛伐克共和国、法兰西共和国、印度、黎巴嫩、卢森堡大公国、荷兰王国、新西兰、挪威王国、巴基斯坦、南罗得西亚、叙利亚、南非联邦共和国、大不列颠与北爱尔兰联合王国、美利坚合众国讨论并通过了“国际贸易组织宪章草案”,并将草案中有关关税的条文和123个双边关税减让协议汇编成一个文件,称为《关税和贸易总协定》(简称《关贸总协定》,英文缩写为GATT)。这个协定只是规定了一些临时性的规则,准备在各成员国政府批准“国际贸易组织宪章”后就以“国际贸易组织宪章”代替“关税与贸易总协定”;1947年10月30日,23个国家签署了《关贸总协定临时适用议定书》,定于1948年1月1日《关贸总协定》临时生效。1947年10月在哈瓦纳举行的联合国贸易与就业会议上,各国代表审议并通过了《国际贸易组织宪章》(通称《哈瓦纳宪章》)。但随后有关成员国(美国)国会没有批准《国际贸易组织宪章》,于是《关贸总协定》这个“临时”的协定自1948年1月1日临时生效后,即成为各缔约国调整对外贸易政策和措施、处理国际经济贸易关系的法律准则,并在该协定的基础上产生了一个名称仍为“关税与贸易总协定”的国际组织。随着国际经济的发展,至20世纪80年代关贸总协定在法律地位、职能范围、管辖内容和运行机制等方面的局限性越来越明显,因此在1986年乌拉圭回合谈判启动后,欧共体和加拿大于1990年分别正式提出成立WTO的议案,在该回合后期,以更完善的和更具有

综合性的国际经济组织取代已运行 40 多年的“临时”的关贸总协定的呼声也愈来愈大。1993 年 12 月 15 日乌拉圭回合谈判实质性地结束。1994 年 4 月 15 日,标志乌拉圭回合多边贸易谈判结果的最后文件(共 28 个)在摩洛哥马拉喀什(Marrakesh)通过。根据该回合达成的《建立世界贸易组织的协定》,一个前所未有的国际经济组织——WTO 于 1995 年 1 月 1 日取代了关贸总协定,正式开始运作。

第三节 对 WTO 的质疑与解释

Queries about WTO and Explanations Thereto

WTO 作为一个国际组织受到人们的一些质疑^①,WTO 将这些质疑(WTO 称之为“Misunderstandings”)归纳为以下 10 个方面:

1. WTO dictates ?
2. Blindly for trade ?
3. Ignores development ?
4. Anti-green ?
5. Anti-health ?
6. Wrecks jobs ?
7. Small left out ?
8. Tool of lobbies ?
9. Weak forced to join ?
10. Undemocratic ?

但这些质疑归结起来可形象地分为两类,即一种认为 WTO 是“狼”,一种认为 WTO 是“没有牙齿的老虎”。这两类认识都有其片面性。

^① These misunderstandings and the corresponding illustration are all available at http://www.wto.org/english/thewto_e/whatis_e/10mis_e/10m00_e.htm

一、WTO 是“狼”(WTO Is a Wolf)

WTO 是“狼”也即意味着 WTO 对一国的经济发展和社会福利有着消极的影响。这种观点主要有：

1. WTO 只重视维护发达国家的利益

There exist special provisions under WTO agreements that take into account the situations that developing countries face. Developing countries are allowed more transitional time to apply numerous provisions of the WTO agreements. For example, Least-Developed Countries receive special treatment on the review of domestic trade policies.

在 WTO 协定中有一些特定的条款考虑到了发展中国家面临的情况。允许其有更长的过渡期以适应 WTO 相关条款的规定,如对最不发达国家国内贸易政策的审查即给予特殊优惠。

Taking service trade as another example. Article IV. 3 of WTO GATS requires that particular account be taken of the serious difficulty of the least-developed countries in accepting negotiated specific commitments in view of their special economic situation and their development, trade and financial needs.

再以服务贸易为例。WTO《服务贸易总协定》第 4.3 条规定,鉴于最不发达国家的特殊经济状况及其发展、贸易和财政需要,对它们在接受谈判达成的具体承诺方面存在的严重困难应予特别考虑。

1947 年 GATT 签署时有 23 个缔约方,截至 2002 年 12 月 31 日, WTO 已经有 145 个成员,其中发达国家仅 33 个,发展中国家和地区达 112 个,占 3/4 多。WTO 的成员结构已经发生根本改变。WTO 每个成员有一票投票权。按 WTO 决策全体成员协商一致(Consensus)或 3/4 成员通过的原则,发展中国家可以影响 WTO 重大问题的决

策。

2. WTO 造成失业和企业破产

Trade can be a powerful force for creating jobs and reducing poverty. Free-flowing and more stable trade boosts economic growth.

贸易是创造就业岗位和减少贫穷的重要力量。自由流动和更稳定的贸易会促进经济增长。

In the WTO , liberalization is gradual , allowing countries to make the necessary adjustments. When countries feel the necessary adjustments cannot be made , they can and do resist demands to open the relevant sections of their markets.

WTO 所倡导的贸易自由化是渐近的 ,允许其成员做必要的调整。当成员不能做必要的调整时 ,他们能并确实可以拒绝开放相关的市场部门。

WTO 倡导平等、自由、公开、竞争、发展。如果认为加入 WTO 即意味着“ 失业和企业破产 ”则有失偏颇。

3. WTO 要求成员出让经济主权

The rules of the WTO system are agreements resulting from negotiations among member governments and ratified by members parliaments. What is more , the decisions taken in the WTO are virtually all made by consensus among all Members.

WTO 规则是各成员国政府通过谈判达成的协议。这些规则都经由各成员国国会批准。而且 ,WTO 的决议实质上是在所有成员国协商一致的基础上达成的。

WTO 透明度原则有助于其成员完善其外经贸体制 ,建立更加持久、稳定、科学的政府运行机制。这种运行机制也必然惠及单个经济

经营者。由此 WTO 对改善其法律地位也起着重大的作用。归根结底 ,WTO 体制的核心在于保护和服务个人。从这个角度说 ,WTO 也为个人创设了权利。

二、WTO 是“ 没有牙齿的老虎 ”(WTO Is a Tiger without Teeth)

WTO 是“ 没有牙齿的老虎 ”也即是说 WTO 规则没有强制力和拘束力 ,如认为 :

1. WTO 是自由贸易组织

One of the principles of the WTO system is for countries to lower their trade barriers and to allow trade to flow more freely. After all , countries benefit from the increased trade that results from lower trade barriers. But just how low those barriers should go is something member countries bargain with each other. Their negotiating positions depend on how ready they feel they are to lower the barriers , and on what they want to obtain from other members in return. One country's commitments become another country's rights , and vice versa. Also , WTO spell out when and how governments can protect their domestic producers. Here , the objective is fair trade.

WTO 的原则之一是成员国降低贸易壁垒 ,促进商品的自由流动 ,毕竟 ,成员国获利于降低贸易壁垒所导致的贸易的扩大。但各成员降低贸易壁垒的水平、进程需要通过谈判确定 ,其谈判地位取决于它想如何降低贸易壁垒以及由此对方所给予的回报。一个成员国的承诺会变成另一个成员国的权利 ;反之亦然。并且 WTO 也明确规定了成员国何时或如何保护国内产业。这里 WTO 的目标是公平贸易。

与所谓“ 自由贸易 ”相反的是 ,WTO 所许可使用的贸易保护措施 (如保障措施、反倾销、反补贴)有被滥用的危险。总之 ,一个国家加入 WTO ,并不意味着外国商品和服务在国内市场畅通无阻 ,长驱直入。

2. WTO 规则没有拘束力

WTO possesses a dispute-settling mechanism , which absent from any other regional organizations and international agreements. This mechanism introduces the settlement of disputes in international trade into multilateral trading systems and is thus called by Renato Ruggiero , the former Director-General , as “ the most individual contribution ”. With strict procedures and compulsory effects , it accords the equivalent rights and obligations to all Members and , no modus operandi of one party shall be pressed on the other parties. WTO DSU provides four modes for the dispute settlement , namely , (a) entering a mutually agreed solution ; (b) Withdrawing the measure concerned ; (c) resorting the corresponding compensation ; (d) Suspending the application of concessions or other obligations.

WTO 具有任何其他区域性组织和国际协议都不具备的争端解决机制。这种争端解决机制将国际贸易争端解决纳入了多边贸易体系 ,被 WTO 前任总干事鲁杰罗称为 WTO “ 最独特的贡献 ”。该机制程序较为严格 ,具有强制力。在该机制下 ,各成员权利与义务对等 ,任何一方不能将其不符合 WTO 的做法强加于另一方。WTO《关于争端解决的规则与程序的谅解》第 3.7 条规定了 4 种争端解决方式 ,包括 (1)通过磋商达成一个为争端各方共同接受的与有关协定相一致的解决方案 (2)撤消不符合 WTO 协定条款的措施 (3)在立即撤消这种措施尚不可行的情况下 ,提供一种临时性的补偿 (4)在 WTO 争端解决机构的授权下 ,只对这一措施的实施国中止实施减让或其他义务。

下述委内瑞拉、巴西诉美国汽油标准案^①即充分说明 WTO 任何成员不能将其不符合 WTO 的做法强加于另一成员。

1995 年 1 月 23 日 ,委内瑞拉根据《GATT 1994》第 22.1 条、《贸

① WTO document No. WT/DS , available at www.wto.org

易技术壁垒协议》第 14.1 条和《关于争端解决的规则与程序的谅解》(DSU)第 4 条,要求与美国磋商。委内瑞拉指出,美国环境保护局 1993 年 12 月 15 日发布的名为《汽油与汽油添加剂规则——改良汽油与普通汽油标准》的法律不符合 GATT 规定。两国之间的协商于 1995 年 2 月 24 日开始,由于没能取得令人满意的结果,3 月 25 日,委内瑞拉请求 DSB 成立专家组。这是 WTO 协议生效以来成立的第一个专家组。1996 年 1 月 29 日,专家组报告向成员方散发。专家组的报告指出,美国政府规定汽油标准的方法不符合《GATT 1994》第 3.4 条,也不符合《GATT 1994》第 20.2 条、第 20.4 条和第 20.7 条的例外,专家组建议 DSB 要求美国修改这一部分规定。1996 年 2 月 21 日,美国正式向 DSB 上诉机构上诉。1996 年 4 月 20 日,上诉机构作出了报告,变更了专家组的部分对事实的认定与结论,但仍认定美国的有关措施违反了《GATT 1994》。1996 年 4 月 20 日,争端解决机构通过了上诉庭对“美国——汽油标准案”的报告以及经上诉机构修改的专家组报告。1997 年 8 月 19 日美国宣布它已经实施了专家组建议。

第四节 学习 WTO 规则应注意的问题

Issues of Which Should Be Taken Note in WTO Learning

一、学习 WTO 规则应以其具体的协定文本为基础(Basing on the Specific Text of WTO Agreements in WTO Learning)

WTO 文件主要是乌拉圭回合谈判的最终决议文本(Final Act)。这些文件确立了 WTO 商品贸易、服务贸易、知识产权、争议解决和贸易政策审查等重大领域的规则。乌拉圭回合决议由 20 项重要协定、28 个“部长决定和声明”及各成员国的单项承诺等构成(WTO 协

定见图 1 - 1)。

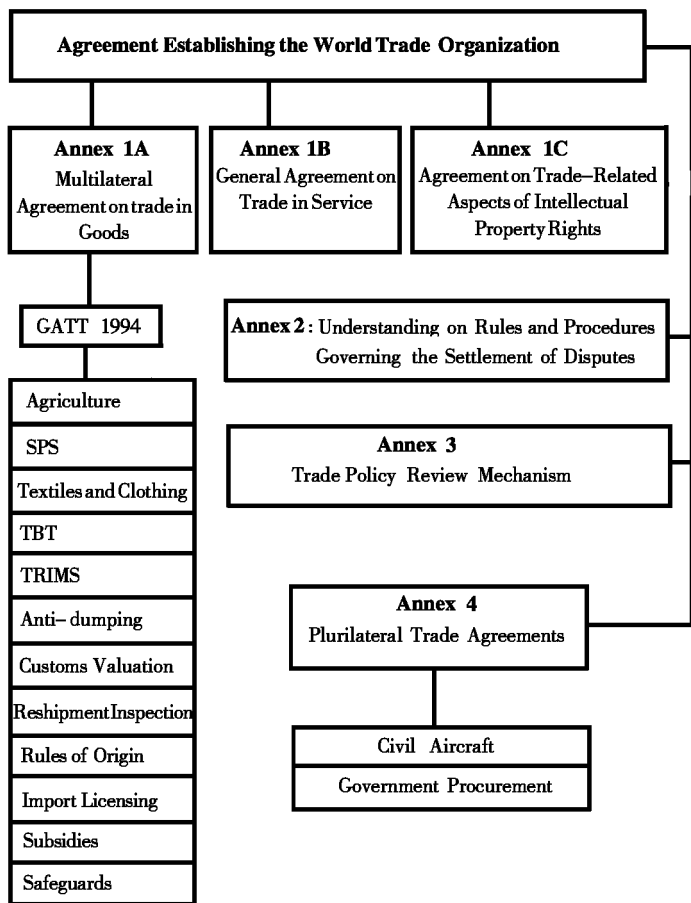


figure1 - 1 : WTO Agreements

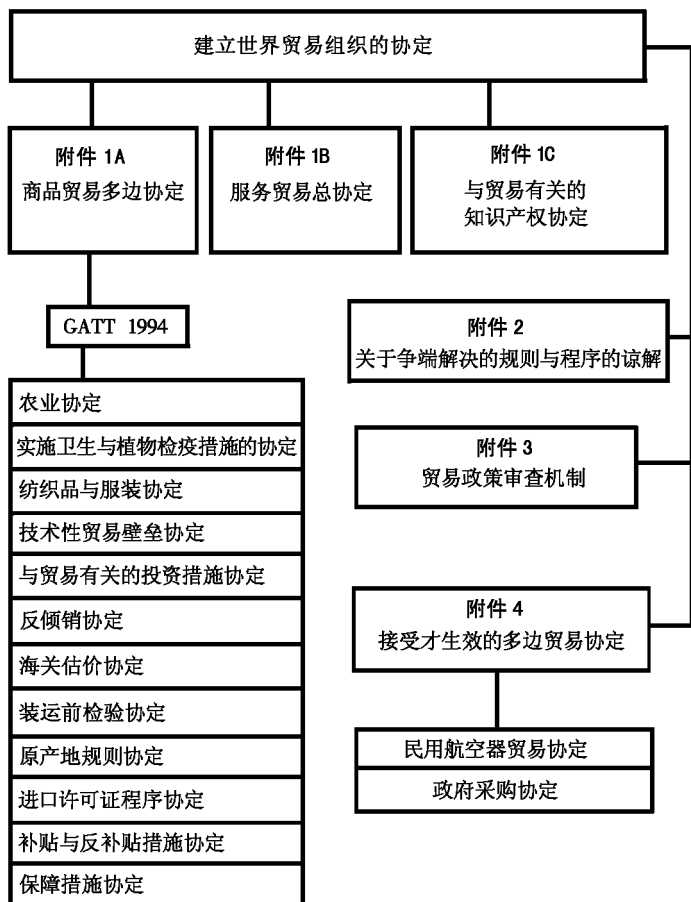


图 1 - 1 WTO 协定

WTO 文件涉及以下议题：

I . Goods

- Agriculture and agriculture negotiations
- Anti-dumping
- Balance of payments
- Customs valuation
- GATT and the Goods Council
- Import licensing
- Information technology products
- Rules of origin
- Safeguards (contingency trade barriers)
- Sanitary and phytosanitary measures (food safety , animal and plant health and safety)
- Schedules of concessions on goods
- State trading enterprises
- Subsidies and countervailing measures
- Technical barriers to trade
- Textiles
- Trade facilitation

II . Services

The General Agreement on Trade in Services (GATS) , financial services , telecommunications , etc.

III. Intellectual property

The Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS Agreement)

IV. Dispute settlement

V. Other topics

- Accessions
- Civil aircraft
- Competition policy
- Development
- Technical cooperation and training
- Electronic commerce
- Environment
- Government procurement
- Investment and trade
- Regionalism
- Trade policy reviews

学习 WTO 知识必须从学习这些具体文件开始,这是因为 WTO 规则包含在这些文件中。如果不了解有关协定文件的实质内容,言及 WTO 即是无源之水、无本之木。

二、学习 WTO 规则还应以我国入世文件内容为重点(Putting Emphasis on Chinese WTO-Accession Documents in WTO Learning)

中国加入世界贸易组织法律文件(Compilation of the Legal Instruments on China's Accession to the World Trade Organization)^①包括:

^① Available at <http://www.chinawto.gov.cn/article/articleview/555/1/280/>

Table1 - 1 Compilation of the Legal Instruments
on China's Accession to the TWO

Titles in English
Decision : Accession of the People's Republic of China
Protocol on the Accession of the People's Republic of China
- Annex 1A : Information to be Provided by China in the Context of the Transitional Review Mechanism
- Annex 1B : Issues to be Addressed by the General Council in Accordance with Section 18.2 of China's Protocol of Accession
- Annex 2A1 : Products Subject to State Trading (Import)
- Annex 2A2 : Products Subject to State Trading (Export)
- Annex 2B : Products Subject to Designated Trading
- Annex 3 : Non - Tariff Measures Subject to Phased Elimination
- Annex 4 : Products and Services Subject to Price Controls
- Annex 5A : Notification Pursuant to Article XXV of the Agreement on Subsidies and Countervailing Measures
- Annex 5B : Subsidies to be Phased Out
- Annex 6 : Products Subject to Export Duty
- Annex 7 : Reservations by WTO Members
- Annex 8 : Schedule CLII - People's Republic of China
Part I : Most-Favored-Nation Tariff
Section I : Agricultural Products
Section I - A : Tariffs
Section I - B : Tariff Quotas
Section II : Other Products
Part II : Preferential Tariff (if applicable)
Part III : Non - tariff Concessions
Section A : Tariff-rate Quotas on Fertilizer and Wool Tops
Section B : Other Non-tariff Concessions
Part IV : Agricultural Products : Commitments Limiting Subsidization
Section I : Domestic Support : Total AMS Commitments
Section II : Export Subsidies : Budgetary Outlay and Quantity Reduction Commitments
Section III : Commitments Limiting the Scope of Export Subsidies Attachment B
Annex I : Staging Matrix for Section I-A(Agricultural Tariffs)
Annex II : Staging Matrix for Section II(Other Products)
- Annex 9 : Schedule of Specific Commitments on Services
List of Article II MFN Exemptions
Report of the Working Party on the Accession of China

表 1 - 1 中国加入世界贸易组织法律文件一览表

标题(仅供参考)
关于中华人民共和国加入的决定
中华人民共和国加入议定书
- 附件 1A :中国在过渡性审议机制中提供的信息
- 附件 1B :总理事会依照《中国加入议定书》第 18 条第 2 款处理的问题
- 附件 2A1 :国营贸易产品(进口)
- 附件 2A2 :国营贸易产品(出口)
- 附件 2B :指定经营产品
- 附件 3 :非关税措施取消时间表
- 附件 4 :实行价格控制的产品和服务
- 附件 5A :根据《补贴与反补贴措施协定》第 25 条作出的通知
- 附件 5B :需逐步取消的补贴
- 附件 6 :实行出口税的产品
- 附件 7 :WTO 成员的保留
- 附件 8 :第 152 号减让表—中华人民共和国 :
第一部分 :最惠国税率
第 1 节 :农产品
第 1 - A 节 :关税
第 1 - B 节 :关税配额
第 2 节 :其他产品
第二部分 :优惠关税(如果适用)
第三部分 :非关税减让
A 节 :化肥和毛涤关税配额
B 节 :其他非关税减让
第四部分 :农产品 :限制补贴的承诺
第 1 节 :国内支持 :综合支持总量承诺
第 2 节 :出口补贴 :预算与数量削减承诺
第 3 节 :限制出口补贴范围的承诺
《信息技术协定》附表 B
附件 1 :第 1 - A 节逐年减让表(农产品)
附件 2 :第 2 节逐年减让表(其他产品)
- 附件 9 :服务贸易具体承诺减让表
第 2 条最惠国待遇豁免清单
中国加入工作组报告书

WTO 协定规则与我国入世文件两者之间是普遍和特殊的关系 , 正如我国入世文件之——《中国加入工作组报告书》第 9 段所言 , 中国是一个发展中国家 , 有权享受给予发展中国家的所有特殊和更优惠待遇 ; 为适应中国加入 WTO 的特定情况 , 在少数领域采取了务实方式 , 而且“ 中国在加入过程中作出的所有承诺仅为中国所有 ”(All commitments taken by China in her accession process were solely those of China)。这些文件所包含的特定规则是我国入世后市场开放的主要法律依据。所以我们在学习 WTO 知识时 , 应重点掌握我国入世文件所确立的一些特殊性规则。须特别提醒的是我国入世文件不以汉文译本为依据(These instruments are not authentic in the Chinese language)。

三、学习 WTO 规则应关注 WTO 规则发展的动向(Paying Attention to the Developing Trends of WTO Rules in WTO Learning)

现行的 WTO 规则内容比较系统 , 但并非完善 , 这决定了 WTO 规则也是不断向前发展的。以 WTO 反倾销规则为例 , 由于现行的反倾销规则导致竞争发生扭曲 , 国际社会已提出了多种反倾销与竞争政策协调方案 , 包括以竞争政策取代反倾销规则、通过签署自由贸易协定来取消反倾销规则、在现行反倾销规则中引入以“ 竞争 ”为方向的内容 , 如以出口国国内市场具有不可竞争性、进口国国内工业被迫退出竞争为基础的掠夺性定价标准代替 WTO 现行反倾销协定中的倾销和损害认定标准、将“ 国内工业 ”定义为“ 它是由相同的产品再加非相同的但直接竞争的或可替代的产品构成的 ”等等。可见 WTO 规则不是“ 静止 ”的不再需要进一步发展和完善的法律规则。对于 WTO 规则的发展动向 , 我们应注意学习、掌握。

本章小结

本章对 WTO 的定义、目标和宗旨、历史概况 ,WTO 规则的构成等作了简要的介绍。WTO 是一个国际经济组织 ,在世界经济发展及处理国与国之间经济贸易关系方面起着举足轻重的作用。本章第三节对一些误解作了解释。学习 WTO 规则应从学习 WTO 规则本身开始 ,以学习我国入世文件的特定规则为重点。WTO 规则也不断地被得以完善。

思考题

1. 何谓 WTO ? 其目标是什么 ?
2. 为什么不能说 WTO 是“ 狼 ”或是“ 没有牙齿的老虎 ”?
3. WTO 协定文件有哪些 ? 我国入世文件有哪些 ?
4. 学习 WTO 规则应注意哪些问题 ?

第二章 WTO 的职能、组织 机构与运作方式

Functions , Institutional Structures and Operating Modes of WTO

《建立世界贸易组织的协定》(Agreement Establishing the World Trade Organization) ,也被称作《建立世界贸易组织的马拉喀什协定》(Marrakesh Agreement Establishing the World Trade Organization) ,在 WTO 文件中被简称为《WTO 协定》(WTO Agreement)。它是 WTO 最基本文件之一 ,对 WTO 这一国际组织作了更明确的定义。

第一节 WTO 的职能 Functions of WTO

一、《WTO 协定》所确立的 WTO 的主要职能(Main Functions of WTO Established by WTO Agreement)

根据《建立世界贸易组织的协定》第 3 条 ,WTO 的职能是 :

1. Facilitating the implementation , administration and operation of WTO agreements.
2. Providing the forum for negotiations among its members concerning their multilateral trade relation.
3. Administering the Understanding on Rules and Procedures Governing the Settlement of Disputes , i. e. DSU.

4. Administering the Trade Policy Review Mechanism , i. e. TPRM.
5. Cooperating with IMF and World Bank , etc.
1. 促进协定的实施、管理和运作 ;
2. 为成员国就涉及多边贸易关系的问题举行谈判提供一个场所(forum) ;
3. 实施《关于指导争端解决的规则与程序的谅解》 ;
4. 实施《贸易政策审查机制》 ;
5. 与国际货币基金组织和世界银行等进行合作。

二、WTO 网站中所阐明的 WTO 的职能(Functions Demonstrated in WTO Website)^①

在 WTO 网站中 ,WTO 的职能有以下 6 项 :

1. Administering WTO trade agreements ;
2. Forum for trade negotiations ;
3. Handling trade disputes ;
4. Monitoring national trade policies ;
5. Technical assistance and training for developing countries ;
6. Cooperation with other international organizations.
1. 实施 WTO 贸易协定 ;
2. 贸易谈判的场所 ;
3. 解决贸易争端 ;
4. 审议各成员国的贸易政策 ;
5. 为发展中国家成员提供援助和培训 ;
6. 与其他国际组织合作。

^① http://www.wto.org/english/thewto_e/thewto_e.htm

其中第 5 项职能值得关注。事实上 WTO 将促进发展中国家经济和贸易的发展作为其重要目标之一 ,如 WTO 在 2002 年财政预算中将 1500 万瑞士法郎用于穷国的能力建设 ,还有 85 万瑞士法郎用于非英语国家成员代表团的翻译服务费用等等。

三、WTO 的三大主要职能(Three Important Functions of WTO)

在前述 WTO 各项职能中 ,最主要的三大职能是 :

1. 制定国际多边贸易规则(Setting down and Applying Multilateral Trading Rules)

WTO 制定和实施的一整套多边贸易规则涵盖面非常广泛 ,几乎涉及到当今世界经济贸易的各个方面 ,从原先纯粹的货物贸易 ,到后来的服务贸易、与贸易有关的知识产权、投资措施 ,一直延伸到新一轮多边贸易谈判可能要讨论的一系列新议题 ,如 :贸易与环境、竞争政策、贸易与劳工标准以及电子商务等。

2. 组织多边贸易谈判(Organizing Multilateral Trading Negotiation)

在关贸总协定的主持下 ,共举行了 8 个回合(轮)多边贸易谈判 [具体情况可参见表 2 - 1(Table 2 - 1)]。通过 8 轮回合的多边谈判 ,各成员大幅度削减了关税和非关税壁垒 ,极大地促进了国际贸易的发展。

自关贸总协定成立以来的 50 年间 ,发达国家的加权关税水平已从 1948 年的 40% 左右 ,降到目前的 3.8% 左右 ,发展中国家的加权关税水平已降到 12.3% 左右。

Table 2 - 1 Multilateral Trade Negotiation under the Auspice of GATT / WTO

Round No.		Round Name	Time	Participating Members	Tariff margin reduced (%)
GATT	1	Geneva	Apr. ~ Oct. 1947	23	35
	2	Annecey	Apr. ~ Oct. 1949	33	35
	3	Torquay	Sep. 1950 ~ Apr. 1951	38	26
	4	Geneva	Jan. ~ May 1956	26	15
	5	Dillon	Sep. 1960 ~ Jul. 1962	45	20
	6	Kennedy	May 1964 ~ Jun. 1967	54	35
	7	Tokyo	Sep. 1973 ~ Jul. 1979	99	30
	8	Uruguay	Sep. 1986 ~ Dec. 1993	123	40
WTO		Doha	Jan. 2002 ~ Jan. 2005 (scheduled)		

Source : compiled by the author.

3. 解决成员国之间的贸易争端(Settling the Disputes between or among the Members)

WTO 的争端解决机制在保障 WTO 各协议有效实施以及解决成员国间贸易争端方面发挥了重要的作用 ,为国际贸易顺利发展创造了稳定的环境。越来越多的 WTO 成员 ,特别是发展中国家成员开始利用争端解决机制。从 1995 年 WTO 成立至 2002 年 7 月 30 日 , WTO 共受理了 262 起争端投诉。故 WTO 争端解决机制有 WTO‘ 皇冠上的明珠 ’(the Jewel on the Crown)之誉。

显然 ,WTO 在国际经济中的作用越来越大。

第二节 WTO 的组织结构

Institutional Structures of WTO

一、部长会议(Ministerial Conference)

The Ministerial Conference is composed of representatives of all the Members , which usually meets once every two years. It has the authority to take decisions on all matters under any of the Multilateral Trade Agreements.

WTO 部长会议是由所有成员国代表组成 ,部长会议通常每两年举行一次会议。部长会议有权对多边贸易协定项下事项作出决定。

部长会议是 WTO 最高决策机构。

二、总理事会(General Council)

The General Council , composed of representatives of all the Members , meets as appropriate and , conducts the functions of the Ministerial Conference in the intervals between meetings of the latter. It convenes to discharge the responsibilities of DSB or TPRB.

WTO 总理事会由所有成员国的代表组成 ,并在适当时机召开会议。在部长会议闭会期间 ,由其代替部长会议行使职权。它可为检查 DSB 或 TPRB 履行职能情况召集会议。

三、各理事会及其专业委员会(Councils and Specific Committee)

各理事会在总理事会的指导下工作 ;各专业委员会是各理事会所设立的下属机构。

Table 2 - 2 WTO Councils and Specific Committees

Council for Trade in Goods
Committee on Market Access
Committee on Agriculture
Committee on Sanitary and Phytosanitary Measures
Committee on Technical Barriers to Trade
Committee on Subsidies and Countervailing Measures
Committee on Anti-dumping Measures
Committee on Customs Valuation
Committee on Rules of Origin
Committee on Import Licensing
Committee on Trade-related Investment Measures
Committee on Safeguards
Council for Trade in Services
Committee on Trade in Financial Services
Committee on Telecommunication Services
Committee on Movement of Natural Persons
Committee on Maritime Transport Services
Committee on Specific Commitment
Council for TRIPS
Others
Committee on Trade and Environment
Committee on Trade and Development
Committee on Balance-of-Payment Restriction
Committee on Budget , Finance and Administration

Source : compiled by the author.

表 2 - 2 WTO 各理事会及其专业委员会

商品贸易理事会
市场准入委员会
农产品委员会
卫生与植物检疫措施委员会
技术性贸易壁垒委员会
补贴和反补贴委员会
反倾销委员会
海关估价委员会
原产地规则委员会
进口许可证委员会
与贸易有关的投资措施委员会
保障条款委员会
服务贸易理事会
金融服务委员会
电讯服务委员会
人员流动委员会
海运服务委员会
专业服务委员会
与贸易有关的知识产权理事会
其他
贸易和环境委员会
贸易和发展委员会
收支规则委员会
预算、财政与管理委员会

资料来源 笔者编制。

四、秘书处(The Secretariat)

WTO 在日内瓦设有秘书处。秘书处由总干事(Director-General)主持工作。总干事由部长会议任命。总干事及秘书处工作人员专司国际事务(be exclusively international in character) ,他们不得实施与其国际官员身份不相称的行为。

自 1996 年 7 月 11 日中国提出“ 复关 ”申请以来 ,GATT/WTO 历任总干事分别为邓克尔、萨瑟兰、鲁杰罗、麦克·穆尔。现任总干事是泰国前副总理、商业部长素帕猜·巴尼巴滴博士(Dr. Supachai Panitchpakdi ,任期是 2002 年 9 月 1 日—2005 年 8 月 31 日)。

Annex : The Brief Biography of WTO Director-General Dr. Supachai Panitchpakdi

附 :WTO 总干事素帕猜·巴尼巴滴博士小传^①

Supachai , born in Bangkok in 1946 , attended school there at St. Gabriel s College and Triam Udom School. From 1963 - 1973 , under scholarship from the Bank of Thailand , Dr. Supachai received his Master s Degree in Econometrics , Development Planning and his Ph. D. in Economic Planning and Development at the Netherlands School of Economics (now known as Erasmus University) in Rotterdam.

In 1973 , Dr Supachai completed his doctoral dissertation on Human Resource Planning and Development under supervision of Professor Jan Tinbergen-the first Nobel laureate in economics. His dissertation was subsequently published under the title Educational Planning and Growth in Developing Countries by Rotterdam Press and widely used by universities in Europe.

^① [http ://www. wto. org/english/thewto - e/dg - e. . html](http://www.wto.org/english/thewto-e/dg-e.htm)

That same year , was accepted as a visiting Fellow at Cambridge University and conducted research on development models.

Dr. Supachai began his professional career at the Bank of Thailand in 1974 , working initially in the Research Department. Later , he moved to other divisions , including the International Finance Division and the Financial Institutions Supervision Department.

During his tenure at the BOT , which lasted until 1986 , his expertise in economics and financial matters was widely recognized. Dr. Supachai acted as spokesman for the BOT for a brief period. He was a principal figure in devising measures to bail out troubled financial institutions in the early 1980s and was instrumental in the BOT's tight control on the public sector's external borrowings as well as the passage of legislation aimed at abolishing non-formal and illegal financial institutions in the system.

In 1986 , Dr. Supachai relinquished his post as the Director of the Financial Institutions Supervision Department to run for Parliament. With his notable track record at the BOT and his successful campaign , he was appointed Deputy Minister of Finance.

After dissolution of Parliament in 1988 , Dr. Supachai was appointed Director and Advisor , and subsequently President , of the Thai Military Bank. As bank president , he vigorously promoted its overseas expansion. His involvement in the business sector deepened through his chairmanship of several corporations. At the same time , he maintained his contacts in academic circles through contributions to a number of universities.

In 1992 , he was appointed Senator and led a sub-committee to draw up Thailand's Seventh National Economic and Social Development Plan (1992 - 1996).

Returning to politics in 1992 , Dr. Supachai became Deputy Prime Minister entrusted with oversight of the country's economic and trade policy making. He supervised key economic offices , including the Budget Bureau , the National Economic and Social Development Board , the Ministry of Commerce , the Ministry of Industry , and the Ministry of Agriculture and Cooperatives. In the process , he set policy directives on macro-economic management for the country. He held the position of Deputy Prime Minister until 1995.

As chairman of Thailand's International Economic Policy Committee , Dr. Supachai was highly influential in charting the country's international trade and economic policies.

In 1993 , he convinced the public and the private sectors on the need for Thailand to accept the Uruguay Round package and consequently helped steer its ratification through Parliament. Dr. Supachai represented Thailand at the signing ceremony of the Uruguay Round Agreement in Marrakesh and he has ensured his government's full and faithful implementation of its obligations under the World Trade Organization (WTO).

Dr. Supachai was the first to push for the formation of the Asia Europe Meeting (ASEM) that draws together heads of governments from Asia and Europe to foster closer ties between the nations of the two continents. He first proposed the formation of ASEM at the East Asia Economic Forum in Singapore in 1992.

Following the change of government in November 1997 in the wake of Thailand's financial crisis , Dr. Supachai was appointed Deputy Prime Minister in charge of economic policies , and Minister of Commerce.

In 2001 , he was appointed Visiting Professor of the International Institute for Management Development in Lausanne.

He has published a Number of books including Globalization and Trade in the New Millenium (2001) and China and WTO : Changing China Changing WTO (2002 , co-authored with Mark Clifford).

In September 1999 , he was elected Director General of World Trade Organization (WTO) taking office on 1 September 2002.

Dr. Supachai is married to Mrs. Sasai and has a son and a daughter.

第三节 WTO 运作方式

Operating Modes of WTO

一、决策方式(Decision-making Mode)

WTO decision-making is by consensus , or where a decision cannot be arrived at by consensus , by voting. Each Member of the WTO has one vote. Decisions of the Ministerial Conference and the General Council are taken by a majority of the votes cast.

WTO 以全体成员意见协商一致的原则进行决策。但当某一决定不能根据全体成员意见协商一致的原则作出时 , 采用投票的办法进行决定。每个 WTO 成员国有一票表决权。部长会议和总理事会的决定由投票数的多数票通过。

“ 协商一致 ” (Consensus) 是 WTO 最有特色的决策方式。

二、加入 WTO 的规则(WTO Accession Requirements)

WTO《 建立世界贸易组织的协定 》第 13 条确立了一个国家(或独立关税区) 加入该协定(事实上即加入 WTO) 的下述重要程序规则 :

Any state or separate customs territory possessing full autonomy in

the conduct of its external commercial relations may accede to WTO. Decisions on accession are taken by the Ministerial Conference, which shall be approved by a two-thirds majority of the Member of the WTO.

任何国家或者在对外贸易关系方面享有充分自主权的独立关税地区均可加入 WTO。由部长会议决定是否批准加入。经 WTO 成员国三分之二以上多数通过,该国或独立关税区可加入 WTO。

当然,加入 WTO 须经申请加入国国会的批准,而 WTO 规则在被纳入成员国的法律体系后才能直接产生法律效力。但从中国入世历程可看出,中国入世则曲折得多。

中国是关贸总协定 23 个创始缔约国之一。1948 年 4 月 21 日,当时的中国政府签署了《临时适用议定书》,同年 5 月 21 日,中国成为关贸总协定缔约方。在未得到中国惟一合法政府——中华人民共和国授权的情况下,台湾当局擅自于 1950 年 3 月 6 日以“中华民国”的名义通知联合国秘书长,决定退出关贸总协定。1950 年 5 月 5 日正式退出。显然,这一退出决定是无效的。但由于受当时国内外政治、经济环境的制约,我国未能及时提出恢复关贸总协定缔约国地位的申请。1965 年 1 月台湾又成为观察员,1971 年 10 月中止观察员资格。

随着我国 1978 年实行改革开放政策取得巨大经济成就,我国经济与世界经济联系日益紧密。从加快实行改革开放政策、进一步发展国民经济的需要出发,中央于 1986 年作出了申请恢复我关贸总协定缔约国地位的决定;

1986 年 7 月 11 日我国正式提出恢复我缔约方地位;

1987 年 3 月关贸总协定成立了“中国工作组”,开始中国的“复关”谈判;

1989 年中国工作组完成对中国外贸制度的评估;

1991 年中国复关谈判答疑阶段结束;

1992 年 10 月中美达成《中美关于市场准入谅解备忘录》；

1995 年 1 月 ,世界贸易组织成立 ,从当年 7 月起我复关谈判转为加入 WTO 谈判。

1995 年 7 月 ,WTO 决定接纳中国为该组织的观察员；

1997 年 WTO 中国工作组就中国加入 WTO 议定书中关于非歧视原则和司法审议两项主要条款达成协议；

1998 年 ,江泽民提出中国入世三原则 :第一 ,世贸组织既然是一个国际组织 ,没有中国这个最大的发展中国家的参加是不完整的 ,第二 ,中国只能作为一个发展中国家加入 ,第三 ,中国加入世贸组织其权利和义务一定要平衡。

1999 年 11 月 ,中美双方就中国加入 WTO 达成一揽子协议。

2001 年 5 月 ,中国与欧盟达成有关中国加入 WTO 的双边协议 ,中国入世工作重点从双边谈判转入多边谈判。

2001 年 9 月 ,中墨就中国加入 WTO 达成双边协议。

2001 年 ,WTO 中国工作组完成中国入世多边法律文件 ,中国入世实质性工作全部结束。

2001 年 11 月 10 日 ,WTO 第四届部长级会议审议《中国加入 WTO 的决定》。

外经贸部于 2001 年 11 月 12 日在其网站上公布了“中国加入世界贸易组织法律文件”的英文文本。2001 年 11 月 11 日 ,外经贸部部长石广生代表中国政府在中国入世议定书上正式签字 ,并向 WTO 秘书处递交了由国家主席江泽民签署的中国加入世界贸易组织批准书。

2002 年 12 月 11 日中国正式成为 WTO 成员。^①

① MOFTEC Website <http://www.moftec.gov.cn>

本章小结

本章介绍了 WTO 的职能、组织机构和运作方式。从 WTO 三大职能中可看出 WTO 在世界经济贸易发展中的重要性。WTO 组织机构简明,运作规范。但中国入世的艰难曲折,则在 WTO 的历史上留下了重重的一笔。

思考题

1. WTO 的职能是什么？
2. 加入 WTO 的主要程序有哪些？
3. 简述我国的入世历程。

第三章 WTO 的基本原则

Basic Principles of WTO

WTO 有很多重要的原则,这些原则主要是由《GATT 1994》(General Agreement on Tariffs and Trade 1994)^①确定的。《GATT 1994》是 WTO 有关国际贸易行为规范的框架协议,也是 WTO 最重要文件之一,内容包括 4 部分(其中第 4 部分“贸易与发展”是 1965 年补加的),38 条。WTO《GATT 1994》所确立的基本原则使 WTO 成为推动世界经济贸易发展的重要载体。

第一节 WTO 非歧视性原则

WTO Non-discriminatory Principle

一、最惠国待遇原则(Principles of Most-Favoured-Nation Treatment, MFN)

(一)最惠国待遇原则的内涵(Meaning of MFN)

The definition of MFN is that, in such matters as customs duties and charges, the method of levying such duties and charges, all rules and formalities, internal taxes or other internal charges and all laws, regulations and requirements, any advantage, favour, privilege or immu-

① 《GATT 1994》的核心内容是《GATT 1947》(General Agreement on Tariffs and Trade 1947),但事实上《GATT 1947》包含着 1947 年之后修订的内容。在表述中通常以《GATT 1994》代表《关税与贸易总协定》文本。

nity granted by any member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other members.

“最惠国待遇原则”被定义为,在关税和费用及其课征方法方面,在规章手续、国内税和国内费及所有法令、条例和规定方面,任何成员国对来自或运往其他国家的产品所给予的利益、优惠、特权或豁免,应当立即无条件地给予源自或运往其他所有成员国的相同产品。

这里所谓的“最惠国待遇原则”,是指“一般最惠国待遇原则”,其核心是“一国得益,众国皆得益”(favourate one, favourate all),是WTO的基石。“最惠国待遇原则”在WTO商品贸易协定、服务贸易协定及有关的知识产权和投资措施协定中均有具体的规定(详见下述各章)。

(二)最惠国待遇原则的特殊例外(Special Exceptions of MFN)

WTO关于边境贸易(Frontier Trade)、关税同盟(Customs Unions)和自由贸易区(Free-trade Areas)的规则是WTO最惠国待遇原则的例外。

WTO construes that, it is of desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the Members. The purpose of a customs union or of a free-trade area is to facilitate trade between the constituent territories and not to raise barriers to the trade of other Members. The formation shall not be prevented of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation

of a customs union or of a free-trade area.

WTO 认为 ,通过自愿协定使成员国之间形成经济一体化 ,是扩大自由贸易所需要的。成立关税同盟或自由贸易区的目的 ,是为了促进关税同盟或自由贸易区内各国之间的贸易 ,但对其他成员国不得增加壁垒。不应阻止建立关税同盟或自由贸易区 ,也不应阻止实施设立关税同盟或自由贸易区的过渡性协定。

总之 ,建立区域经济集团是 WTO 所允许的 ,这也是区域性经济一体化组织在当今世界不断涌现并且它们可以对非成员实施差别待遇(即歧视性待遇)的原因。

二、国民待遇原则(Principle of National Treatment)

“ 国民待遇原则 ”也是 WTO 的基石。概括起来 ,针对国内税(Internal Taxation)和其他国内费用(Other Internal Charges)的国民待遇要求主要有以下内容 :

Internal taxes and other internal charges , and laws , regulations and requirements affecting the internal sale , offering for sale , purchase , transportation , distribution or use of products , and internal quantitative regulations requiring the mixture , processing or use of products in specified amounts or proportions , should not be applied to imported or domestic products so as to afford protection to domestic production.

国内税和其他国内费用及影响产品的国内销售、供货、购买、运输、分销或使用的法令、条例和要求 ,以及对产品的成分要求条例 ,在被适用于进口产品或本国产品时 ,不应用来对国内生产提供保护。

No Member shall establish or maintain any internal quantitative regulation , which requires , directly or indirectly , that any specified amount or proportion of any product must be supplied from domestic sources or

that such amount or proportion must be allocated among external sources of supply.

任何成员国不应制定或使用数量限制条例来直接或间接要求某一产品的特定数量或比例必须由国内供应,或把这种数量或比例在国外供应商之间进行分配。

上述国民待遇原则其实质可归结为“爱邻如爱己”(love thy neighbour as thyself^①)。同 WTO 最惠国待遇原则一样,国民待遇原则也具体体现于下述各协定之中,是 WTO 成员所必须遵守的。对此加拿大诉欧盟扇贝贸易名称案^②极有说服力。1993 年 3 月,欧盟禁止加拿大出口到欧盟的扇贝用“noix de saint jacques”作名称,而只能用“saint jacques”(法文为 petoncle,意为小扇贝),大大降低了加拿大扇贝产品在法国市场上的竞争力。加拿大认为法国的做法违反了 WTO 最惠国待遇原则(《GATT 1994》第 1 条)和国民待遇原则(《GATT 1994》第 3 条)。1995 年 7 月 19 日,DSB 成立了专家组,1996 年 7 月,加拿大和欧盟通知 DSB,称双方已达成协议。法国起草了新的条例,放弃对加扇贝产品的特殊名称要求。

第二节 关税减让原则

Principle of Tariff Concession

WTO 要求各成员国降低关税壁垒,将非关税措施关税化。这一原则即称为关税减让原则。

一、取消数量限制(General Elimination of Quantitative Re-

① See Bible : NT/Luke 10 25 - 28.

② See the pertinent WTO document : WT/DS7 , available at www.wto.org

striction)

WTO 提倡关税化 ,所以关税之外的一切贸易保护措施 ,包括“ 数量限制 ”(Quantitative Restriction)都应取消(但特殊情况除外)。

No prohibitions or restrictions other than duties ,taxes or other charges , whether made effective through quotas , import or export licences or other measures , shall be instituted or maintained on the importation of any product or on the exportation or sale for export of any product.

除征收关税、国内税或其他费用以外 ,WTO 成员国不得通过设立或维持配额、进出口许可证或其他措施来禁止或限制产品的进出口。

What excepted are :

(a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other essential products ;

(b) Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification , grading or marketing of commodities in international trade ; and

(c) Import restrictions on any agricultural or fisheries product , which aim to restrict the quantities or remove a temporary surplus of the like domestic product , etc.

但以下三项例外 :

(1)为防止或缓和粮食或其他必需品的严重短缺而临时实施的禁止或限制出口的措施。

(2)为在国际贸易中适用商品归类、分级和销售的标准和规则而有必要实施的进出口禁止或限制措施。

(3)对任何农产品和水产品实施的进口限制措施。实施这种措施的目的是为了限制国内相同产品的生产或销售量或减少其暂时库存量等。

从中看出 ,上述第 2 项“例外”(也称“豁免”)是 WTO《技术性贸易壁垒协定》的主要法律渊源。

二、关税减让的依据是减让表(Schedules of Concession)

WTO 关税减让原则是通过减让表来实施的。减让表是各成员国承诺给予其他成员国的优惠及优惠程度的文件依据。

The Schedules of Concession are in fact preferential schedules submitted by Members. Those products described in the Schedule are , on their importation into the territory and subject to the terms , conditions or qualifications set forth in that Schedule , exempted from ordinary customs duties and all other duties or charges in excess of those set forth and provided therein.

减让表实质是成员国提供的优惠表。减让表中规定的商品在进入该成员国时 ,若满足相应的条件和资格要求 ,即免除超额课征的关税及其他税费。

The pertinent provisions in GATT 1994 are that , if any Member considers that a product is not receiving from another contracting party the treatment which the first contracting party believes to have been contemplated by a concession provided for in the appropriate Schedule , it may bring the matter directly to the attention of the other Members. If the latter agrees that the treatment contemplated was that claimed by the first Member , but declares that such treatment cannot be accorded , the two Members , together with any other Members substantially interested , may enter promptly into further negotiations with a view to a compensatory adjustment of the matter.

GATT 1994 对其所作的规定是 ,如果成员国认为某一产品应享

受的待遇在另一成员国的减让表中已有规定,并认为后者未给予此种待遇时,该成员国可以直接提请后者对此加以关注。后者若同意减让表所规定的待遇确系对方所要求的待遇但声明不能给予这项待遇时,则这两个成员国及其他有实质利害关系的成员国,可立即进行谈判以对此作补偿性的调整。

Nothing shall prevent any Member from imposing at any time on the importation of any product :

(a) a charge equivalent to an internal tax imposed consistently with the national treatment requirement to internal taxes or other internal charges ;

(b) any anti-dumping or countervailing duty applied consistently with the provisions of Article VI ;

(c) fees or other charges commensurate with the cost of services rendered.

WTO 成员国可在任何时间对进口产品征收 (1)符合国民待遇要求的国内税 (2)与《GATT 1994》第 6 条规定相一致的反倾销和反补贴税 (3)与其成本相当的服务费及其他费用。

第三节 合理的贸易保护原则

Principle of Reasonable Trade Protection

反倾销、反补贴及紧急保障措施是 WTO 允许合理使用的贸易保护措施。WTO《GATT 1994》第 6 条、第 16 条和第 19 条等对此作了原则性规定。

一、反倾销(Anti-dumping)^①

(一)倾销的定义(Definition of Dumping)

Dumping is referred to that , products of one country are introduced into the commerce of another country at less than the normal value of the products and thereof causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry.

“ 倾销 ”是指一国产品以低于正常价值的价格销往另一国 ,如倾销对某缔约国已建立的工业造成重大的损害或重大威胁 ,或者严重阻碍其国内产业的新建。

(二)倾销的认定(Establishment of Dumping)

The dumping is established where (a) Exporting price is less than the comparable price , in the ordinary course of trade , for the like product when destined for consumption in the exporting country ; or(b) In the absence of such domestic price , is less than either (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade , or (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit(i. e. constructed price).

在(1)出口价格低于正常贸易中在出口国国内消费的相同产品的可比较价格 ,或(2)出口价格低于对第三国的最高可比价格或原产国的生产成本加上合理的销售费用和利润(结构价格)时 ,倾销成立。

^① See Article VI of GATT 1994.

(三) 反倾销税(Anti-dumping Duty)

Anti-dumping duty should not be greater in amount than the margin of dumping in respect of such product. The margin of dumping is the price difference between the normal price and exporting price.

反倾销税不超过倾销差额。倾销幅度是正常价值与出口价格之间的差额。

二、反贴补(Countervailing)

(一) 贴补的定义及适用原则(Definition and Applying Principles of Subsidies)

WTO《GATT 1994》第 16 条确立了有关补贴的一些原则,这些原则是 WTO《补贴和反补贴协定》的渊源,或者说 WTO《补贴和反补贴协定》是《GATT 1994》第 16 条的实施细则。

The subsidy includes any form of income or price support. It shall be notified of the extent and nature, of the estimated effect on the quantity of the affected product(s) and of the circumstances making the subsidization necessary. In any case in which it is determined that serious prejudice to the interests of any other member is caused or threatened by any such subsidization, the possibility of limiting the subsidization shall be discussed.

贴补,包括任何形式的收入或价格支持,其程度和性质、对受影响产品的量的影响和导致产生补贴的情况都应通报。在任何情况下,若认定补贴对任何其他成员国的利益造成严重损害或产生严重威胁,WTO 全体成员应讨论是否限制这项贴补。

If subsidy is operated to increase the export of any primary product, such subsidy shall not be applied in a manner which results in the adop-

ting Member having more than an equitable share of world export trade in that product.

若贴补是为了增加初级产品的出口,则这种贴补不应使实施国在该产品的世界出口贸易中占有不合理的份额。

(二)反补贴税(Countervailing Duty)

Countervailing duty means a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise. The levied countervailing duty shall be less than the amount equal to the estimated bounty or subsidy determined to have been granted directly or indirectly.

反补贴税是指为了抵消商品在制造、生产或输出时所直接或间接接受的任何奖金或贴补而征收的一种特别关税。征收的反补贴税,在金额上不得超过这种产品在原产国或输出国制造、生产或输出时,所直接或间接得到的奖金或贴补的估计数额。

须特别注意的是反倾销与反补贴适用的限制(applying restriction):

No product of the territory of any member imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization.

对同一成员国的同一产品不得将反倾销和反补贴同时实施。

三、对特定进口产品的紧急措施(Emergency Action on Imports of Particular Products)

根据《GATT 1994》第19条,采取紧急措施的基本条件是(1)情况发生不可预见的变化(2)成员国承担减让义务导致进口量的大

幅增长 (3)由此对国内相同产品或竞争产品生产造成损害或损害威胁。这种紧急措施是一种重要的贸易保护措施。

If , as a result of unforeseen developments and of the effect of the obligations incurred by a Member including tariff concessions , any product is being imported in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products , the Member shall be free , in respect of such product , and to the extent and for such time as may be necessary to prevent or remedy such injury , to suspend the obligation in whole or in part or to withdraw or modify the concession.

如因情况意外或因成员国承担义务(包括关税减让)使某一产品进口量急剧增长 ,对国内相同产品或与它直接竞争产品的国内生产者造成严重损害或产生严重的威胁 ,该成员国在防止或纠正这种损害所必需的程度和时间内 ,可以对上述产品全部或部分地暂停实施其所承担的义务 ,或者撤消或修改减让。

Before any Member takes action , it shall give notice as far in advance as may be practicable and shall afford exporting members with substantial interest an opportunity to consult with it in respect of the proposed action. In critical circumstances , where delay would cause damage which it would be difficult to repair , the action may be taken provisionally without prior consultation , on the condition that consultation shall be effected immediately after taking such action.

在成员国采取行动之前 ,它应即早发出通知 ,并对相关出口国提供机会使出口国能够同它进行磋商。在若延误则损害很难弥补的紧急情况下 ,可不经磋商即采取临时措施。但在实施后应立即进行磋商。

If agreement among the interested members is not reached , the

member shall , nevertheless , be free to do so. If such action is taken or continued , the affected members shall then be free , not later than ninety days after such action is taken , to suspend the application to the trade of the member taking or requesting such action of such substantially equivalent concessions or other obligations.

如有有利害关系的成员国之间不能达成协议 , 则该成员国仍然可以实施这项措施。当它这样做以后 , 受到影响的成员国在采取这项行动以后的 90 天内 , 对采取或要求采取这项行动的成员国 , 暂停实施实质上对等的减让或其他义务。

四、保障国际收支而实施的限制(Restriction to Safeguard the Balance of Payments)

Trade restriction to safeguard the balance of payments is permitted under GATT 1994 , i. e. in order to safeguard its external financial position and its balance of payments , any member may restrict the quantity or value of merchandise.

在《GATT 1994》项下 , 为保障国际收支而实施贸易限制是允许的 , 即为了保障对外金融地位和国际收支 , 成员国可以对商品进口加以限制。

Import restrictions instituted , maintained or intensified shall not exceed those necessary (a) to forestall the imminent threat of , or to stop , a serious decline in its monetary reserves , or (b) to achieve a reasonable rate of increase in its reserves.

这种设立的、保留的或强化的进口限制措施以阻止外汇储备面临减少的威胁或实际严重的减少 , 或以储量合理增加为限。

The restrictions should avoid unnecessary damage to the commercial

or economic interests of any other member , and not fully prevent unreasonably the importation of any description of goods or otherwise impair regular channels of trade ; and not prevent the importations of commercial samples or prevent compliance with patent , trade mark , copyright , or similar procedures.

这些限制措施不应应对任何其他成员的贸易或经济利益造成不必要的损害 , 不合理地完全禁止某种商品的进口(如完全禁止进口会损害正常贸易) , 也不影响商业样品的输入或阻碍遵守专利权、商标、版权或及其他规则的实施。

The member applying import restrictions should immediately after instituting or intensifying such restrictions (or , in circumstances in which prior consultation is practicable , before doing so) consult with the members as to the nature of its balance of payments difficulties , alternative corrective measures which may be available , and the possible effect of the restrictions on the economies of other members.

适用进口限制的成员在设立或加强这种限制后应立即针对其国际收支困难的特点、可供选择的救济措施及这种限制对其他成员国经济的影响进行磋商(如情况许可也可提前进行磋商)。

Beginning one year after reviewing date , members shall enter into consultations annually. If finding that the restrictions are not consistent with the provisions thereof in the course of consultations , the Members shall indicate the nature of the inconsistency and may advise that the restrictions be suitably modified.

从审查日期之后的 1 年开始进入年度磋商。如果在磋商过程中发现这种限制与上述规定不一致 , 成员国全体应说明不一致点并建议对此作相应的调整。

As a result of the consultations , the Members determine that , the applied restrictions are an inconsistency of a serious nature and damage to the trade is caused or threatened thereby , they shall make appropriate recommendations for securing conformity with such provisions within the specified period of time. If such Member does not comply with these recommendations within the specified period , the Members may release from such obligations.

若经磋商最终认定适用的措施与上述规定严重不符 ,并对其他成员国造成损害或损害威胁 ,全体成员国应向该成员国提出确保一定期间内与上述规定相一致的建议。如果该成员在特定期间内仍不符合建议要求 ,则成员国全体的相应义务也会得以豁免。

可见 ,为保障国际收支而实施贸易限制是 WTO 所允许的一种非关税壁垒。在发生金融危机的国家 ,这种贸易保护措施具备适用的前提条件。对此我们应加以关注。

五、“一般例外”(General Exception)

“一般例外”也称“一般豁免”,如第一章第一节所言,以下措施在 WTO 豁免范围之内,即:

- (a) protecting public morals ;
- (b) protecting human , animal or plant life or health ;
- (c) relating to the importations or exportations of gold or silver ;
- (d) securing compliance with related laws or regulations ;
- (e) relating to the products of prison labour ;
- (f) protecting national treasures of artistic , historic or archaeological value ;
- (g) conserving exhaustible natural resources ;

(h) undertaking in pursuance of obligations under any intergovernmental commodity agreement ;

(i) restricting exports of domestic materials as part of a governmental stabilization plan ;

(j) acquiring or distributing products in short supply.

(1)维护公共道德的措施 ;

(2)保障人民、动植物的生命或健康的措施 ;

(3)与输出或输入金银有关的措施 ;

(4)保证有关法令或条例实施的措施 ;

(5)有关监狱劳动产品的措施 ;

(6)为保护本国具有艺术、历史或考古价值的文物而采取的措施 ;

(7)保护可能用竭的天然资源的有关措施 ;

(8)履行政府间商品贸易协定义义务的措施 ;

(9)作为政府稳定计划的一部分 ,限制原料出口的措施 ;

(10)获取或分销短缺产品的措施。

上述规则充分地说明 ,WTO 并不是一个自由贸易组织 ,在 WTO 框架下 ,自由贸易与贸易保护并行不悖。

第四节 WTO 贸易便利化原则、透明度 原则和保护竞争原则

WTO Principles of Trade Facilities , Transparency and Competition Protection

一、贸易便利化原则(The Principle of Trade Facilities)

应该说 ,贸易便利化也是 WTO 的一个重要原则。贸易便利化关键在于减免与国际贸易有关的规费(Fees)和手续(Formalities)。

WTO considers that Fees and Formalities connected with Importation may adversely influence the trading facilitation and thus they shall not represent an indirect protection to domestic products. On the contrary , minimizing the incidence and complexity of import and export formalities and , decreasing and simplifying import and export documentation requirements are all appreciated.

WTO 认为 ,进出口规费和手续会影响贸易便利化。所以这些规费和手续不应成为对本国产品的一种间接保护。相反应减少进出口手续的偶然性和复杂性 ,减少和简化进出口文件要求^①。

Generally speaking , these Fees and Formalities above-mentioned are extended to such fees , charges , formalities and requirements as that dealt with in the following matters :

- (a) Consular invoices and certificates ;
- (b) Quantitative restrictions ;
- (c) Licensing ;
- (d) Exchange control ;
- (e) Statistical services ;
- (f) Documents , documentation and certification ;
- (g) Analysis and inspection ; and
- (h) Quarantine , sanitation and fumigation.

一般说来 ,上述规费和手续包括出具领事发票及证明、数量限制、许可证、外汇管制、统计服务、文件、单据和证明、分析和检查与检疫、卫生及蒸熏消毒中所涉及的规费、费用、手续及要求。

二、WTO 透明度原则(WTO Transparency Principle)

^① See Article VIII of GATT 1994.

WTO《GATT 1994》第 10 条关于贸易条例的公布和实施(Publication and Administration of Trade Regulations)的规则确立了 WTO 一个很重要的原则 ,即‘ 透明度原则 ’(Transparency Principle)。其主要内容是 :

All the Laws , regulations , judicial decisions and administrative rulings of general application pertaining to the classification or the valuation of products for customs purposes , or to rates of duty , taxes or other charges , or to requirements , restrictions or prohibitions on imports or exports or on the transfer of payments therefor , or affecting their sale , distribution , transportation , insurance , warehousing , inspection , exhibition , processing , mixing or other use , shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy shall also be published.

与税则归类或海关估价、关税税率、税收或其他费用有关的 ,或与进出口的规定、限制或禁止或转移支付有关的 ,或有关影响对进出口货物及其转移支付的规定、限制和禁止 ,以及关于影响进出口货物的销售、分销、运输、保险、存仓、检验、展览、加工、混合或其他事项的法令、条例与司法判决及一般适用的行政决定 ,都应迅速公布 ,以使各成员国政府及贸易商得以知悉。影响国际贸易政策的协定 ,也必须公布。

No measure of general application effecting an advance in a rate of duty or other charge on imports under an established and uniform practice , or imposing a new or more burdensome requirement , restriction or prohibition on imports , or on the transfer of payments therefor , shall be enforced before such measure has been officially published.

已制定的统一适用的提高进口关税税率或增加其他费用的措

施 ,或者对进口货物及其转移支付施加新的更苛刻的规定、限制或禁止的措施 ,非经正式公布 ,不得实施。

WTO requires that the laws , regulations , decisions and rulings of each Member be administered in a uniform , impartial and reasonable manner. Judicial , arbitral or administrative tribunals or procedures for the purpose , inter alia , of the prompt review and correction of administrative action relating to customs matters shall also be maintained , or instituted as soon as practicable.

WTO 要求各成员国应统一、公正和合理地实施其法令、条例、判决和决定。特别是为了从速审议和纠正与关税有关的行政行为、司法、仲裁或行政法庭或程序也应尽力保留或建立起来。

WTO 的透明度原则无疑有利于建立公开、公正的市场环境。

三、保护竞争原则(Competition Protection Principle)

WTO 的保护竞争原则主要是通过对国营贸易企业(State Trading Enterprise)的活动加以规范来体现的。

State trading enterprise with exclusive or special privileges shall make purchases or sales consistent with the general principles of non-discriminatory treatment and solely in accordance with commercial considerations , including price , quality , availability , marketability , transportation and other conditions of purchase or sale and , afford the enterprises of the other Members adequate opportunity , in accordance with customary business practice , to compete for participation in such purchases or sales. Upon request by an adversely affected Member , it shall supply information about its operation.

具有独占权或特权的国营贸易企业在购买或销售时应遵守非歧

视性原则,只以商业考虑(包括价格、质量、产品可获得性、产品适销性、运输及其他交易条件)为根据,并按照商业惯例为其他成员国的国营企业参与交易竞争提供充分的机会。应受影响的成员的要求,它应提供其与经营有关的信息。

第五节 规范实施贸易管理手段的原则

Principle of Corrective Application of Trading Administrative Means

《GATT 1994》也对 WTO 成员所采取的一些贸易管理手段如海关估价、原产地规则的实施等提出了原则性的要求。

一、海关估价(Valuation for Customs Purposes)

《GATT 1994》第 7 条是专门针对海关估价问题制定的。该条所确立的 WTO 海关估价的基本原则是：

The value for customs purposes of imported merchandise is based on its actual value or like merchandise on which duty is assessed and, should not be based on the value of merchandise of national origin or on arbitrary or fictitious values.

对进口商品的海关估价,应以进口商品或相同商品的实际价格而不得以本国产品的价格,或者以武断的或虚构的价格作为计征关税的依据。

Actual value is the price at which, at a time and place determined by the legislation of the country of importation, such or like merchandise is sold or offered for sale in the ordinary course of trade under fully competitive conditions. When the actual value is not ascertainable in accord-

ance with suitable quantities , such as the comparable ones , the value for customs purposes should be based on the nearest ascertainable equivalent of such value.

“ 实际价格 ”是指 ,在进口国法定的时间和地点 ,在正常贸易过程中 ,在充分竞争的条件下 ,某一商品或其相同商品出售或供货价格。若不能根据合适交易量(如可比交易量)确定实际价格时 ,海关的估价应以可确定的最接近于实际价格的价格为根据。

The value for customs purposes of any imported product should not include the amount of any internal tax , applicable within the country of origin or export , from which the imported product has been exempted or has been or will be relieved by means of refund.

原产国或出口国实施的、但对进口产品已予免征或退还 ,或将要予以退还的任何国内税不包括在课税价格范围之内。

二、原产地标志(Marks of Origin)

In adopting and enforcing laws and regulations relating to marks of origin , the basic WTO principles are that , the difficulties and inconveniences which the measures may cause to the commerce and industry of exporting countries should be reduced to a minimum. It is also necessary to have due regard for protecting consumers against fraudulent or misleading indications.

在适用和实施与原产地标志有关的法令和条例时 ,WTO 的基本原则是 ,这些措施对出口国的贸易和产业可能造成的困难及不便应被减少到最低程度 ;同时也要保证消费者的利益免遭欺骗性的或引起误解的标志的侵害。

WTO stipulates that the misrepresentation of the true origin of a

product shall be prevented from causing the detriment to such distinctive regional or geographical names of products as that protected by the legislation of member concerned.

WTO 规定 ,应制止假冒产品原产地的不实陈述 ,以免使有关成员国受法律保护的产品其特殊区域名称或地理名称受到损害。

总之 ,这些贸易管理手段不能成为非关税壁垒 ,不能藉此对贸易实行变相的限制。

第六节 给予发展中国家以特殊 优惠待遇原则

Principle of Special Preferential Treatment to Developing Countries

WTO“ 给予发展中国家以特殊优惠待遇原则 ”主要体现于 WTO 允许发展中国家的政府对其经济发展予以特别的支持 ;同时要求发达国家给予发展中国家以差别待遇。

一、发展中国家政府对本国经济发展的支持(Governmental Assistance to Domestic Economic Development)

It is necessary ,in order to implement programmes and policies of economic development designed to raise the general standard of living of their people ,to take protective or other justified measures affecting imports. Those members taking these measures should enjoy additional facilities to enable them (a) to maintain sufficient flexibility in their tariff structure to be able to grant the tariff protection required for the establishment of a particular industry and ,(b) to apply quantitative restric-

tions for balance of payments purposes in a manner which takes full account of the continued high level of demand for imports likely to be generated by their programmes of economic development.

为了实施旨在提高人民生活水平的经济发展计划和政策,有必要采取限制进口的保护性或其他合理的措施。采取这些措施的成员国应享有更多的便利,使它们(1)在关税结构上更有灵活性,为特定产业的建立提供相应的关税保护(2)在充分考虑其实施经济发展计划所导致的持续高水平的进口需求的情况下,能够为国际收支目的而实施数量限制。

The Member who can only support low standards of living and is in the early stages of development, shall be free to deviate temporarily from the concerning provisions so as to modify or withdraw a concession.

那些只能维持低生活水平并在发展的初级阶段的成员国可以暂时背离相关规定,修改或撤消减让。

In order to safeguard its external financial position and to ensure a level of monetary reserves adequate for the implementation of its programme of economic development, a above-mentioned member control the general level of its imports, provided that the import restrictions instituted, maintained or intensified shall not exceed those necessary (a) to forestall the threat of, or to stop, a serious decline in its monetary reserves, or (b) to achieve a reasonable rate of increase in its reserves.

为维护国际金融地位,确保实施其经济发展计划所需的外汇储备,上述成员可以限制进口,但这种设立的、保留的或强化的进口限制不应超过(1)停止损害或避免外汇储备急剧减少的需要;或(2)保证其外汇储备合理增长率的需要。

二、国际合作与支持(International Cooperation and Support)

(一)原则和目的(Principles and Objectives)

WTO 所倡导的国际合作与支持的原则和目的是：

There is need for positive efforts designed to ensure that less-developed Members secure a share in the growth in international trade commensurate with the needs of their economic development.

努力保证发展中国家在国际贸易中占有与其经济发展要求相适应的份额。

There is need to provide in the largest possible measure more favourable and acceptable conditions of access to world markets for these primary products so as to provide them with expanding resources for their economic development.

尽最大可能为发展中国家初级产品进入世界市场提供更有利的条件 ,为其经济发展提供更多的资源。

There is need for increased access in the largest possible measure to markets for processed and manufactured products currently or potentially of particular export interest to less-developed Members.

努力增加与发展中国家目前或潜在的出口利益特别有关的加工品或制成品的出口机会。

Trade and financial assistance to development shall be provided for least-developed Members.

应对最不发达国家提供贸易和财政援助以推动经济发展。

The developed Members do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed Members.

发达国家对发展中国家承诺的减少或消除关税和其他壁垒的义务,是非互惠的。

(二)发达国家的承诺(Commitments of Developed Countries)

为达到上述目的,发达国家作出以下承诺:

According high priority to the reduction and elimination of barriers to products currently or potentially of particular export interest to less-developed Members.

优先减少和消除与发展中国家目前或潜在的出口利益特别有关的产品的壁垒。

Refraining from introducing, or increasing the incidence of, customs duties or non-tariff import barriers on products currently or potentially of particular export interest to less-developed Members.

对上述产品不建立新的关税或非关税壁垒,或加强已有的壁垒。

Refraining from imposing new fiscal measures, and in any adjustments of fiscal policy accord high priority to the reduction and elimination of fiscal measures.

不实施新的财政限制措施。在调整其财政政策时,优先减少和消除财政限制措施。

(三)国际协调(International Harmonization)

Promoting the development of trades and economies of least-devel-

oped Members through international arrangements , appropriate collaboration with the United Nations and its organs and , through international harmonization and adjustment of national policies and regulations , etc.

WTO 通过国际安排和与联合国及其附属机构合作 ,通过国际性的协调和调整各国的政策和规章等 ,促进发展中国家经济贸易的发展。

本章小结

本章介绍了 WTO 的一个最基本文件 ,即《GATT 1994》。从《GATT 1994》中 ,可以了解 WTO 基本原则 ,如非歧视性原则、权利和义务平衡原则、关税保护原则、透明度原则、公平贸易原则、对发展中国家的特殊优惠原则等源自何处 ;也可以了解哪些是合乎 WTO 规范的贸易保护措施 ,以求为我所用。实质上该协定是下述各章协定的“基本法” ,但若《GATT 1994》条款与下述各商品贸易协定有关条款存在冲突时 ,后者优先适用^①。

思考题

1. 根据《关税和贸易总协定 1994》可以归纳出 WTO 有哪些基本原则 ?
2. 《关税和贸易总协定 1994》对发展中国家成员国有哪些优惠待遇 ?

^① See “ general interpretative note to Annex 1A ” , Multilateral Agreements on Trade in Goods.

第四章 WTO 贸易政策审查和 争端解决规则

WTO Rules of Trade Policy Reviews and of Dispute Settlement

第一节 WTO 贸易政策审查规则 WTO Rules on Trade Policy Reviews

如前述第二章第一节所言,审查各国的贸易政策是 WTO 重要职能之一。WTO 贸易政策审查机制(TPRM)是由 WTO 文件《贸易政策审查机制》(Trade Policy Review Mechanism , TPRM)确立的。《贸易政策审查机制》内容分目标、国内透明度、审查程序、报告、与《GATT 1994》和 GATS 的收支条款的关系、对机制的评价及国际贸易环境发展的总评价等 7 部分。

一、WTO“ 贸易政策审查 ”的含义(Signification of Trade Policy Reviews)

The Trade Policy Reviews carried out by WTO Trade Policy Review Body(TPRB) are to review and assess the trade policies , practices of Members and the corresponding impact on multilateral trading systems so as to contribute to improved adherence by all Members to WTO rules and their respective commitments and to achieve greater transparency in , and understanding of , the trade policies and practices of Members.

WTO“ 贸易政策审查 ”是由 WTO 贸易政策审查机构(TPRB)对每个成员的贸易政策、做法及其对多边贸易体制的影响进行的审查和评估 ,以确保 WTO 多边贸易规则及各成员的承诺得到更好的遵守 ,增加各成员贸易政策和做法的透明度 ,并加强成员彼此之间的理解。

WTO 贸易政策审查是提高 WTO 各成员贸易政策法规透明度的重要手段。但需说明的是这种审查不是适用 WTO 争端解决机制的基础 ,也并不因此要求成员作出新的政策上的承诺。另一方面 , WTO 也鼓励 WTO 成员增强其在有关贸易政策国内决策方面的透明度。当然这必须建立在自愿的基础上并且由各成员国根据其法律和政治制度自主决定是否这样做。

二、WTO 贸易政策审查规则(WTO Reviewing Rules on Trade Policies)

(一)审查频率安排(Arrangement for Frequency of Review)

1. 一般规则(General Rules)

The trade policies and practices of all Members will be subject to periodic review. The frequency of reviews is decided by a Member's share of world trade in a recent representative period. The first four trading entities so identified (for example , US , Japan , European Union and Canada , i. e. the so-called “ four-horse carriage ” in the present world trade) are subject to review every two years. The next 16 will be reviewed every four years. Other Members will be reviewed every six years. Nevertheless , a longer interval will be fixed for least-developed country Members.

所有 WTO 成员的贸易政策和做法将被定期审查。这种审查的

频率主要决定于各成员在最近代表期内占世界贸易的份额。以此确定的前 4 个贸易实体(如美国、日本、欧盟和加拿大,即当前世界贸易中的“4 驾马车”)每 2 年审查一次,随后的 16 个成员每 4 年审查一次,其他成员国每 6 年审查一次,但是对最不发达成员国的审查间隔期将更长。

In addition, if changes in a Member's trade policies or practices have a significant impact on its trading partners, the TPRB may bring forward its next review of the related policies or practices of this Member.

另外,如果一个成员的贸易政策和做法的变化对其贸易伙伴有重大的影响,TPRB 可提前进行新的审查。

2. 针对中国的特殊安排(Special Arrangement for China)

2002 年中国的对外贸易额居世界第 5 位,按上述规则,WTO 对中国贸易政策的审查应每 4 年审查一次,但在我国《加入议定书》中规定:

The review of the implementation by China of the WTO rules and the provisions of the Protocol on the Accession of the PRC will take place after accession in each year for eight years. There will be a final review in Year 10 or at an earlier date decided by the General Council.

对中国实施 WTO 规则和《中国加入议定书》中规定的审查将在中国加入 WTO 后的 8 年内每年都要进行。在加入后的第 10 年进行最后的审查,或由总理事会决定提前进行这种最后的审查。

这是 WTO 专门针对中国制定的特殊的贸易政策审查规则。

(二)审查程序(Procedure for Review)

WTO 贸易政策审查程序主要包括以下 5 个步骤：

1. The TPRB meetings will concentrate on discussing the Members trade policies and practices.

2. The TPRB will establish a programme of reviews for each year in consultation with the Members directly concerned.

3. The TPRB shall base its work on a full report describing the trade policies and practices supplied by the Member or Members under review.

4. The reports by the Member under review and by the Secretariat , together with the minutes of the respective meeting of the TPRB , will be published promptly after the review.

5. These documents above-said will be forwarded to the Ministerial Conference.

1. TPRB 会议将集中讨论各成员的有关贸易政策和惯例。

2. TPRB 为审查制定计划。

3. TPRB 根据成员提交的一份完整的报告和秘书处根据有关信息或有关成员的报告起草的一份新的报告进行工作。

4. 成员提交的报告及 TPRB 每次会议纪要在实施贸易政策审查后都应立即公布。

5. 上述这些文件将被提交给部长会议。

三、贸易政策审查中的通报制度(Reporting Provision in TPRM)

In order to achieve the fullest possible degree of transparency , WTO requires each Member report fully and regularly to the TPRB the trade policies and practices pursued by the Member or Members concerned and , between reviews , provide brief reports on any significant changes in their trade policies.

为了保证各国贸易政策最大程度的透明度 ,WTO 要求每个成员

定期地向 TPRB 全面报告其或其他成员所实行的贸易政策和做法、其年度统计信息 ,并提供有关在审查期间贸易政策作重大调整的简要报告。

四、其他(Others)

1. For the sake of balance of payments restrictions ,the trade policy review may be postponed by not more than 12 months.

2. The TPRB may undertake appraisals of the TPRM at intervals.

3. An annual overview of developments in the international trading environment which are having an impact on the multilateral trading system will also be undertaken by the TPRB.

1. 由于成员国际收支的限制 ,对其贸易政策的审查可延期进行 ,但不得超过 12 个月。

2. WTO 贸易政策审查机构可以不定期地对 TPRM 进行审议。

3. WTO 贸易政策审查机构也要对影响多边贸易体制的国际贸易环境的发展进行年度审议。

第二节 WTO 争端解决规则

WTO Rules of Settlement of Disputes

解决贸易争端是 WTO 极其重要的职能 ,正如 WTO《关于争端解决的规则与程序的谅解》(Understanding on Rules and Procedures Governing the Settlement of Disputes ,DSU)第 3 条“ 总则 ”(General Provisions)所言 ; WTO 争端解决机制在保证多边贸易体制的安全性和可预测性方面处于中心地位(Central Element)”。《谅解》确定了 WTO 争端解决的规则和程序。

一、WTO 争端解决机制的适用范围及其规范 (DSU Applying Coverage and Requirements Thereof)

这包括以下两方面内容：

1. The DSU is adapted to the disputes under WTO Agreement , Multilateral Agreements on Trade in Goods , GATS , TRIPS , DSU , TPRM and Plurilateral Trade Agreements.

2. Where there is a difference between the rules and procedures of DSU and the special or additional rules and procedures set forth in the agreements above , the special or additional rules and procedures shall prevail.

1. WTO 争端解决机制适用于《WTO 协定》、《商品贸易多边协定》、《服务贸易总协定》、《与贸易有关的知识产权协定》、争端解决机制、贸易政策审查机制、《诸边贸易协定》下的各种争端。

2. 如果 DSU 规则和程序与有关协定所包括的争端解决的特别或附加规则和程序之间有矛盾 ,有关协定的特别或附加规则与程序将优先适用。

以保障措施争端为例。根据世贸组织 DSU 第 22 条 ,如果有关纠正不符合 WTO 协定的措施(包括保障措施)的建议(Recommendations)和裁决(Rulings)在合理的期间内没有得到执行 ,且随后申诉方与措施实施方自合理期限届满之日起 20 天内也没有达成满意的补偿协议 ,那么援用争端程序的任何成员可以请求 WTO 争端解决机构批准其中止对有关成员适用有关协定规定的减让或其他义务 ,即行使报复权。由此看来 ,按照 DSU 在贸易争端中要行使报复权须具备两个重要的前提条件 ,即(1)一种贸易措施经裁定违反了 WTO 规则 ;(2)行使报复权要经过 WTO 争端解决机构的批准。而针对保障措施争端 ,WTO《保障措施协定》第 8 条则规定 ,如果申诉方与保障措施实施方不能达成谅解协议 ,而且商品贸易理事会也没有批准这项保障措施 ,则受影响的出口成员可自由地采取相应的报复措施。

相比较而言 ,WTO《保障措施协定》对针对保障措施启用报复机制的条件限制更少。在具体适用时《保障措施协定》所确立的报复机制优先适用。

特别或附加的争端解决协定条款见表 4 - 1 :

Table 4 - 1 Special or Additional Rules and Procedures of Dispute Settlement under Specific Agreements

Agreement Title	Corresponding Dispute-settling Clause(s)
SPS Agreement	11. 2
ATC	2. 12 , 2. 21 , 4. 4 , 5. 2 , 5. 4 , 5. 6 , 6. 9 , 6. 10 , 6. 11 8. 1 through 8. 12
TBT Agreement	14. 2 through 14. 4 , Annex 2
AD Agreement	17. 4 through 17. 73
Customs Valuation	19. 3 through 19. 5 , Annex II , 2(f) 3 9 21
SCM Agreement	4. 2 through 4. 12 , 6. 6 , 7. 2 through 7. 10 , 8. 5 , footnote 35 , 24. 4 , 27. 7 , Annex V
GATS	XXII 3 , XXIII 3
GATS Annex on Financial Services	4
GATS Annex on Air Transport Services	4
Decision on Certain Dispute Settlement Procedures for the GATS	1 through 5

表 4 - 1 特定协定下的特别或附加的争端解决规则和程序

协定名称	相应的争端解决条款
《卫生与植物检疫措施协定》	11.2
《纺织品与服装协定》	2.14, 2.21, 4.4, 5.4, 5.6, 6.9, 6.10, 6.11 8.1 至 8.12
《技术性贸易壁垒协定》	14.2 至 14.4, 附件 2
《反倾销协定》	17.4 至 17.7
《海关估价协定》	19.3 至 19.5, 附件 2, 2(f) 3.9, 21
《补贴与反补贴措施协定》	4.2 至 4.12, 6.6, 7.2 至 7.10, 8.5, 脚注 35, 24.4, 27.7, 附件 5
《服务贸易总协定》	22.3, 23.3
《关于金融服务的附件》	4
《关于航空运输服务的附件》	4
《关于 GATS 某些争端解决程序的决定》	1 至 5

二、WTO 争端解决的主要原则(Main Principles of WTO Dispute Settlement)

Where the rules and procedures of DSM provide for the DSB to take a decision, it does so by consensus.

DSB 依据 WTO 争端解决机制所确立的规则和程序作决定时, 是以“协商一致”的方式进行的。

The alternative schemes WTO provides for dispute-settlement are as follows in turn : (1) raising a mutually agreed solution ; (2) withdrawing the relevant measures ; (3) resorting to compensation ; (4) suspending the application of concession or other obligations.

WTO 争端解决的可选择的方案依次为 (1) 提出一个相互同意的解决方案 (2) 撤销有关的措施 (3) 提供补偿 (4) 暂停适用减让或其他义务。

三、争端解决程序(Procedures for Dispute Settlement)

WTO 争端解决程序包括磋商(Consultation)和斡旋(Good Offices)、协调(Conciliation)与调解(Mediation)、专家组裁决(Panel Findings)及上诉审查(Appellate Review)、DSB 作出最终决议(DSB Decisions)等等。

(一)磋商(Consultation)

磋商是争端解决的第一步。DSU 第 4 条规定：

The Member to which the consultation request is made by complaining party shall reply to the request within 10 days after the date of its receipt and shall enter into consultations in good faith within a period of no more than 30 days after the date of receipt of the request , otherwise the Member that requested the holding of consultations may proceed directly to request the establishment of a panel.

被要求与申诉方进行磋商的成员应在接到磋商请求之日后的 10 日内对该项请求作出答复 ,并在接到请求之日后最多 30 天内进行真诚的磋商 ,否则要求进行磋商的成员国可以直接要求成立专家组。

If the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations , the complaining party may request the establishment of a panel.

如果在接到磋商请求后的 60 天内 ,没有通过磋商解决争端 ,申诉方可请求成立专家组。

In cases of urgency , including those which concern perishable goods , Members shall enter into consultations within a period of no more than 10 days after the date of receipt of the request. If the consultations

have failed to settle the dispute within a period of 20 days after the date of receipt of the request , the complaining party may request the establishment of a panel.

在紧急情况下(包括涉及易腐物品的情况) ,各成员应在接到请求之日后最多 10 天内进行磋商。如果在接到请求之日后 20 天内通过磋商仍未解决争端 ,申诉方可要求成立专门小组。

以阿根廷对智利桃制品(Preserved Peaches)保障措施争端案^①为例。2001 年 1 月 15 日 ,阿根廷将其针对智利桃制品(包括桃罐头及其他形式的制品 ,《南锥体共同市场条约》税则号为 2008. 70. 10 和 2008. 70. 90)发起的保障措施调查通报了 WTO ,并根据 WTO《保障措施协定》第 12. 4 条将适用的临时性保障措施预先通知了 WTO 商品理事会下的保障措施委员会(Committee on Safeguards)。2001 年 1 月 30 日 ,智利政府也依据世贸组织《保障措施协定》第 12. 4 条要求与阿方进行磋商。实际的磋商是 3 月 2 日在日内瓦进行的 ,但没有产生积极的结果。2001 年 7 月 17 日 ,阿根廷将智利桃制品对本国相关工业造成了严重损害的调查结论及终裁适用保障措施的决定通告了世贸组织。8 月 7 日 ,阿根廷经济部关于对智利桃制品以每千克课征 0. 50 美元特定关税的形式采取保障措施的第 348/2001 号终裁决议在官方公报(Official Bulletin)上公布。随后智利政府根据 WTO《保障措施协定》第 12. 3 条要求同阿根廷政府进行新一轮磋商。这次磋商是 8 月 16 日在阿根廷首都布宜诺斯艾利斯进行的 ,同样也没有取得任何积极的成果。9 月 14 日 ,智利政府又依据《关税与贸易总协定 1994》第 23. 1 条、《关于争端解决的规则与程序的谅解》第 4 条和 WTO《保障措施协定》第 14 条要求同阿根廷进行协商以更好地了解彼此的立场。11 月 2 日阿、智双方在日内瓦进行了协

^① WTO documents :WT/DS238/1 and WT/DS238/2 available at <http://www.wto.org>

商,但最终没能提出令双方满意的解决方案。于是在 2001 年 12 月 6 日智利政府根据《关于争端解决的规则与程序的谅解》第 4 条和第 6 条要求 WTO 争端解决机构成立专家组,并要求争端解决机构在其 2001 年 12 月 18 日会议上将这一争端纳入议事日程。可见,磋商是争端解决中非常必要的也是极其重要的程序。积极寻求通过磋商解决贸易争端可避免争端扩大化。

(二) 斡旋、协调与调解(Good Offices ,Conciliation and Mediation)

Good offices ,conciliation and mediation are procedures that are undertaken voluntarily ,which may begin and be terminated at any time. When they are entered into within 60 days after the date of receipt of a request for consultations , the complaining party must allow a period of 60 days after the date of receipt of the request for consultations before requesting the establishment of a panel. The complaining party may request the establishment of a panel during the 60 - day period if the parties to the dispute jointly consider that the good offices ,conciliation or mediation process has failed to settle the dispute.

斡旋、协调与调解是 WTO 成员自愿采用的程序。这些程序可以随时开始和被终止。当斡旋、协调或调解是在收到一项磋商请求之日后 60 天内进行的,在请求成立专家组前,起诉一方须允许斡旋、协调或调解有在接到磋商请求后 60 天的期限。如果争端各方均认为斡旋、协调或调解程序不能解决争端,申诉方可以在 60 天期限内要求成立专家组。

(三) 专家组的裁决(Award of Panel)

专家组的裁决程序及最终报告是 WTO 争端解决机制中最核心的内容。但专家组最终报告并无法律拘束力,可由上诉审而改变。

1. 专家组的成立与构成(Establishment of Panel and Its Panelists)^①

A panel will be established at the DSB meeting following that at which the request first appears as an item on the DSB's agenda , unless at that meeting the DSB decides by consensus not to establish a panel. The panel is composed of three or five governmental and/or non-governmental individuals with well-qualified experience or expertise who are chosen from an indicative list.

申诉方提出的成立专家组的请求一旦列入 DSB 日程 ,那么在列入之后的 DSB 会议上即成立专家组 除非在此次会议上 DSB 一致同意不成立该专家组。专家组由三位或五位从推荐名单中选定的具备相应经验或专长的政府和/或非政府人士组成。

2. 专家组程序(Panel procedures)

根据 DSU 附录 3 ,专家组程序主要是 :

The panel meets in closed session. The parties to the dispute , and interested parties , will present at the meetings only when invited by the panel to appear before it.

专家组会议是封闭的。争端各方及利益相关方只有在专家组邀请时方可出席会议。

Before the first substantive meeting of the panel , the parties to the dispute shall transmit to the panel written submissions in which they present the facts of the case and their arguments. At its first substantive meeting , the panel will ask the party which has brought the complaint to present its case and , the party against which the complaint has been

^① See Article 6 and 8 of USD.

brought to present its point of view. All interested third parties will also be invited in writing to present their views.

在专家组首次正式会议前,争端各方向专家组提交有关案件事实和其意见的书面报告。在首次正式会议上,专家组将要求申诉方介绍案情,被控方陈述其观点,所有利益相关第三方也会被邀请书面阐明其意见。

Formal rebuttals shall be made at a second substantive meeting of the panel. The parties shall submit, prior to that meeting, written rebuttals to the panel.

正式的辩驳应在专家组第二次正式会议上提出。在该次会议之前,各方均应向专家组提交书面的辩驳意见。

The panel may at any time put questions to the parties and ask them for explanations either in the course of a meeting with the parties or in writing.

专家组可以在任何时候向争端各方提出问题,并要求其在会议当中解释或以书面形式另行解释。

Following the consideration of rebuttal submissions and oral arguments, the panel will issue the descriptive (factual and argument) sections of its draft report to the parties to the dispute for their comments. Following the expiration of the set period of time for receipt of comments, the panel shall issue an interim report to the parties, including both the descriptive sections and the panel's findings and conclusions. Within a period of time set by the panel, a party may submit a written request for the panel to review precise aspects of the interim report prior to circulation of the final report to the Members. At the request of a par-

ty , the panel will hold a further meeting with the parties on the issues identified in the written comments. If no comments are received from any party within the comment period , the interim report will be considered the final panel report and circulated promptly to the Members.

在考虑了各方的辩驳书和口头辩论之后 ,专家组将其裁决报告草案的说明部分(包括事实和争论点)发给争端各方 ,供其评论。当接收各方评论规定的期限截止时 ,专家组将临时裁决报告(包括陈述部分、专家组的裁决和结论)分发给各方。在专家组规定的期限内 ,各方可书面要求专家组在将最终报告分发给各成员之前对临时报告的细节问题进行审议 ;应争端方要求 ,专家组将同争端方举行新的会议讨论在所收取的书面评论中所阐明的问题。如果在规定的期限内没有收到争端方的任何评论 ,临时报告即被视为最终报告立即分发给 WTO 各成员。

The period in which the panel shall conduct its examination from the date that the composition and terms of reference of the panel have been agreed upon until the date the final report is issued to the parties to the dispute , shall , as a general rule , not exceed six months , or be within three months in cases of urgency. In no case should the period exceed nine months.

专家组进行裁决的期限 ,即从专家组成立及其权限范围(Term of Reference)确定之日起到向争端各方散发最终报告止 ,一般不超过 6 个月。在紧急情况下 ,不超过 3 个月。但无论如何 ,不应超过 9 个月。

Table 4 - 2 Proposed Timetable for Panel Work^① :

Steps	Time Limits
1. Receipt of first written submissions of the parties :	Complaining Party : 3 - 6 weeks ; Party complained against : 2 - 3 weeks
2. Date , time and place of first substantive meeting with the parties ; third party session :	1 - 2 weeks
3. Receipt of written rebuttals of the parties :	2 - 3 weeks
4. Date , time and place of second substantive meeting with the parties :	1 - 2 weeks
5. Issuance of descriptive part of the report to the parties :	2 - 4 weeks
6. Receipt of comments by the parties on the descriptive part of the report :	2 weeks
7. Issuance of the interim report , including the findings and conclusions , to the parties :	2 - 4 weeks
8. Deadline for party to request review of part(s) of report :	1 week
9. Period of review by panel , including possible additional meeting with parties :	2 weeks
10. Issuance of final report to parties to dispute :	2 weeks
11. Circulation of the final report to the Members :	3 weeks

① The above calendar may be changed in the light of unforeseen developments. See Paragraph 12 of Annex 3 to DSU.

表 4 - 2 专家组工作时间表(建议)

程序步骤	期限
1. 收取争端各方书面意见	申诉方 3 - 6 周 被控方 2 - 3 周
2. 确定争端各方及第三方参与的专家组首次会议日期、时间与地点	1 - 2 周
3. 接收争端各方的书面辩驳	2 - 3 周
4. 确定争端各方参与的专家组第二次会议的日期、时间与地点	1 - 2 周
5. 将专家组报告的说明部分发给各利益相关方	2 - 4 周
6. 收取各利益相关方对报告说明部分的评论	2 周
7. 向各利益相关方发出临时报告(包括裁决与结论)	2 - 4 周
8. 要求对报告进行审议的期限	1 周
9. 专家组审议期限(包括与各利益相关方进行的特别会议)	2 周
10. 向争端各方发出最终报告	2 周
11. 向 WTO 各成员散发最终报告	3 周

3. 专家组报告的通过(Adoption of panel reports)

The final reports will not be adopted by the DSB until 20 days after the date they have been circulated to the Members. Members having objections to a panel report shall give written reasons to explain their objections for circulation at least 10 days prior to the DSB meeting at which the panel report will be considered. Within 60 days after the date of circulation of a panel report to the Members , the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. If a party has notified its decision to appeal , the report by the panel shall not be adopted until after completion of the appeal.

专家组最终报告在分发给各成员 20 天以后生效。反对专家组报告的成员应在 DSB 讨论是否通过专家组报告的会议之前至少 10 天对反对的理由作出书面解释。除争端方通知 DSB 上诉或 DSB 协商一致决定不通过专家组最终报告外,专家组最终报告在分发给各成员 60 天以后生效。如果争端方决定上诉,则专家组最终报告在上诉审结束之后才能生效。

(四) 上诉审查(Appellate Review)^①

The DSM establishes a Standing Appellate Body for hearing appeals from panel cases. It is composed of seven persons with recognized authority and with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government.

DSM 设立常设上诉机构以审理来自于专家组案件。常设上诉机构由 7 名人士组成,他们被公认为权威并且在法律、国际贸易方面和对有关协定项下的问题有明显的专长。他们不附属于任何政府。

What should be stressed here is that only parties to the dispute, not third parties, may appeal a panel report.

在此须强调的是,只有争端各方而不是第三方可对专家组报告提出上诉。

The appellate review proceedings shall not exceed 60 days in general from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. In no case shall the proceedings exceed 90 days.

^① See Article 17 of DSU.

上诉审查程序(自争端方正式通知其上诉的决定起至上诉机构散发其裁决报告止)一般不得超过 60 天,无论如何,不超过 90 天。

The DSB requires an appeal be limited to issues of law covered in the panel report and legal interpretations developed by the panel. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.

DSB 要求上诉方应仅就专家组报告所涉及的法律问题和专家组所作的司法解释提起上诉。上诉机构可以维持、修改或者推翻专家组的法律裁决和结论。

An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members.

上诉机构报告应由 DSB 通过,争端各方应无条件地予以接受,除非在该报告散发到各成员 30 天内 DSB 经全体协商一致不通过上诉报告。

(五)DSB 作出最终建议或裁决(Final Recommendations or Findings of DSB)

The period from the date of establishment of the panel by the DSB until the date the DSB considers the panel or appellate report for adoption (i. e. makes out the final recommendations and rulings), shall as a general rule not exceed nine months where the panel report is not appealed or 12 months where the report is appealed. Where either the panel or the Appellate Body has acted to extend the time for providing its report, the additional time taken shall be added to the above periods.

自 DSB 成立专家组之日起至 DSB 决定通过专家组或上诉机构报告(即作出最终建议与裁决)止的期限,一般为 9 个月(若专家组报告没有被上诉)或 12 个月(若专家组报告被上诉)。无论专家组还是上诉机构,若延长其提交相应报告的时间,则上述期限也相应地延长。

The Member concerned shall inform the DSB of its intentions in respect of implementation of DSB's recommendations and rulings of the DSB within 30 days after the date of DSB's adoption of the panel or Appellate Body report. The period from the date of establishment of the panel until the date of determination of the period of time for complying with the recommendations and rulings shall not exceed 15 months in general, or 18 months in extended circumstances.

有关成员应在 DSB 通过专家组或上诉机构报告后的 30 日内将其实施 DSB 的建议或裁决的意图通知 DSB。从专家组成立之日起到有关成员做到与 DSB 建议与裁决相一致之日止的期限一般不超过 15 个月,若延长的话则不超过 18 个月。

从前述 WTO 争端解决规则中可以看出, WTO 争端解决时限过长,这对受害方不利。

(六) 争端解决的方式选择(Alternative for Dispute Settlement)

The primary alternative for dispute settlement is the implementation of DSB's recommendations and rulings, otherwise compensation and the suspension of concessions or other obligations will be available as temporary measures. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party

having invoked the dispute settlement procedures may request to apply the rights of trade retaliation. Concretely speaking, requesting authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations, which may be in the same or other sectors under the covered, or in the sectors under another covered agreements.

争端解决的首要的选择是实施 DSB 的建议和裁决,其次可适用补偿和中止减让或其他义务等临时性措施。如果自合理期限届满之日后 20 天内没有达成满意的补偿协议,援用争端解决程序的任何成员可以请求行使贸易报复权。具体说来,即请求 DSB 授权其中止对有关成员适用减让或其他义务。这种中止减让或其他义务或者适用于同一协议下相同部门,或者适用于同一协议下不同部门,或者适用于其他有关协议下的部门。

简言之,上述经 DSB 授权的贸易报复分为三种类型,即“并行报复”(Parallel Retaliation);“跨部门报复”(Cross-sector Retaliation)和“跨协定报复”(Cross-agreement Retaliation)。其中“部门”(Sector)是指 WTO 所定义的货物贸易协定下的部门(1 个)、服务贸易协定下的部门^①(11 个)和知识产权协定下的部门^②(9 个)。

四、WTO 争端解决机制下的仲裁(Arbitration under DSU)

WTO 争端解决机制下的仲裁有其自身特点,这主要表现在以下几个方面:

1. 诉诸仲裁的事项(Matters Resorted to Arbitration)

① See the “Services Sectoral Classification List” in document MTN.GNS/W/120.

② Each of the categories of intellectual property rights covered in section 1 ~ 7 of Part II, the obligations under Part III and Part IV of the Agreement on TRIPS.

If the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures have not been followed where a complaining party has requested authorization to adopt cross-sector retaliation or cross-agreement retaliation, the matter shall be referred to arbitration.

如果有关成员反对 DSB 所建议的减让水平,或认为申诉方要求授权实施“跨部门报复”或“跨协定报复”不符合其实施原则和程序,则可提起仲裁。

也就是说,WTO 争端解决机制下的仲裁中主要是针对“减让水平”(即关税提高幅度)或实施“跨部门报复”或“跨协定报复”是否符合相应的规则要求而提起的。当然根据 DSU 第 21 条第 3(c)段,对 DSB 建议或裁决的实施期限也可通过仲裁来确定。

2. 仲裁基本规则(Basic Arbitration Rules)

DSU requires such arbitration be carried out by the original panel or by an arbitrator appointed by the Director-General and be completed within 60 days. Concessions or other obligations shall not be suspended during the course of the arbitration.

WTO 争端解决机制要求由原专家组或 WTO 总干事任命的一名仲裁员进行仲裁。仲裁在 60 天内完成。在仲裁期间减让或其他义务的中止照常实施。

The arbitration do not aim at the examination of the nature of the concessions or other obligations to be suspended but to determine whether the level of such suspension is equivalent to the level of nullification or impairment. The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered a-

greement. However ,if the matter referred to arbitration includes a situation that the principles and procedures above-said have not been followed ,the arbitrator shall also examine that arbitrating claim.

仲裁不是审理被中止的减让或其他义务的性质 ,而是要审理这种中止的水平是否与申诉方被抵消或损害的利益水平相当。仲裁员也可以决定所建议的中止减让或其他义务在有关协定项下是否被允许。不过 ,如果提交仲裁的事项包括前述原则和程序没有被遵守的情况 ,仲裁员也应审理该项仲裁请求。

3. 仲裁的效力(Effect of Arbitration)

The arbitrator's decision is accepted as final one and the parties concerned shall not seek a second arbitration. The DSU requests the decision of the arbitrator to be informed promptly of DSB and to grant authorization to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator , unless the DSB decides by consensus to reject the request.

仲裁员的决定是终局的 ,并且有关各方不得寻求第二次仲裁。DSU 要求迅速将仲裁员的决定通知 DSB ,并且若中止减让或其他义务的请求与仲裁员的决定相一致的话 ,可授权中止减让或其他义务 ,除非 DSB 通过全体协商一致拒绝该项请求。

五、WTO 争端解决机制下的非违法之诉(Non-violation Complaints under DSU)

(一)“ 非违法之诉 ” 的含义(Meaning of Non-violation Complaints)

The non-violation complaints originates from paragraph 1 (b) and paragraph 1 (c) of Article XXIII of GATT 1994 , by which it is concluded that the non-violation complaints refers to as complains against the measures or any other situation other than the failure of the Member to carry out its obligations under WTO agreements concerned nullifying or impairing the benefits of a Member , or impeding the attainment of any objective of specific WTO agreement. Whereas the measures above-said taken by the Member do not conflict with the provisions of that WTO agreement.

“ 非违法之诉 ” 源于《 GATT 1994 》第 23 条第 1(b)段和第 1(c)段。从中我们可以得知“ 非违法之诉 ”是指针对 WTO 成员适用的措施或并非 WTO 成员不履行有关 WTO 协定项下义务的其他情况而提起的申诉。这些措施或其他情况使成员的利益丧失或受到损害 , 或影响有关 WTO 协定目标的实现 , 但成员采取的上述措施并不与有关 WTO 协定条款相冲突。

(二)“ 非违法之诉 ” 的法律适用(Legal Adoption of Non-violation Complaints)

The Member taking such measure may be recommended to make a mutually satisfactory adjustment such as compensation. But the Member taking the measure has no obligation to withdraw such measure , and the arbitration on the level of benefits which have been nullified or impaired by the measure and also the corresponding suggestions have no binding

upon the parties to the disputes.

DSB 会建议采取这种措施的成员作出令争端各方均满意的调整(如补偿)。但采取这种措施的成员没有义务撤消这种措施。针对这种措施所导致的利益丧失或损害的程度的仲裁及其相应的建议对争端各方也无拘束力。

As for “any other situation”, a panel may only make rulings and recommendations where a party considers that any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded.

至于在前述“其他情况”下,争端方认为其在有关协定项下直接或间接得到的利益丧失或受到损害,或者该协定的任何目标的实现受到阻碍。对此专家组仅作出裁决并提出相应的建议而已。

本章小结

如前所述,审查各成员国的贸易政策与解决贸易争端是 WTO 的两项重要职能。本章介绍了 WTO 贸易政策审查与解决贸易争端的规则。WTO 审查机制所审查的是“每个成员所有的贸易政策、惯例及其对多边贸易体制的影响”。各成员国贸易政策的公开、透明,符合 WTO 规范是 WTO 贸易政策审查机制所要求的。正如 WTO 前总干事鲁杰罗(Renato Ruggiero)所言,争端解决机制是 WTO“最独特的贡献”(Most Individual Contribution),尽管 DSM 程序过于冗长,但将贸易争端诉诸 DSM 仍是弱小成员国维护自身经济利益的一种重要手段。

思考题

1. 简述 WTO 贸易政策审查程序。
2. WTO 争端解决的原则是什么？
3. WTO 专家小组裁决的程序是什么？
4. 简述 WTO 上诉审查的程序。

第五章 WTO 农产品贸易规则

WTO Rules of Trade in Agricultural Products

WTO 农产品贸易规则主要包含在 WTO《农业协定》(Agreement on Agriculture) 中。WTO《农业协定》是 WTO 多边商品协定之一,它由 13 部分、21 条以及作为该协定重要组成部分的 6 个附录构成。

Table 5 - 1 6 Annexes to Agreement on Agriculture

Annex 1. Product Coverage
Annex 2. Domestic Support : the Basis for Exemption from the Reduction Commitments
Annex 3. Domestic Support : Calculation of Aggregate Measurement of Support
Annex 4. Domestic Support : Calculation of Equivalent Measurement of Support
Annex 5. Special Treatment with Respect to Paragraph 2 of Article 4
Attachment to Annex 5 : Guidelines for the Calculation of Tariff Equivalents for the Specific Purpose Specified in Paragraphs 6 and 10 of this Annex

Source : Compiled by the author.

表 5 - 1 WTO《农业协定》的 6 个附录

附录 1. 产品范围
附录 2. 国内支持——免除减让承诺的依据
附录 3. 国内支持——支持总量的计算
附录 4. 国内支持——支持等量的计算
附录 5. 关于第 4 条第 2 段的特别处理
附录 5 的附录、附录 5 第 6 段和第 10 段规定的为特殊目的计算关税等量的原则

资料来源 笔者编制。

WTO《农业协定》由 WTO 农业委员会(Committee on Agriculture)负责实施。

第一节 WTO 关于农产品贸易 的基本原则

Basic Principles of Trade in Agricultural Products

一、WTO 农产品贸易原则(WTO Principles on Agricultural Products)

WTO《农业协定》开宗明义地确立了农产品贸易主要原则：

Establishing a fair and market-oriented agricultural trading system.
建立一个公平的市场导向的农产品贸易体系。

Providing for substantial progressive reductions in agricultural support and protection and resulting in correcting and preventing restrictions and distortions in world agricultural markets.

要逐步实质性地减少对农业的支持和保护 ,纠正和制止对世界农产品市场的限制和扭曲。

Achieving specific binding commitments in the area of market access , domestic support and export competition.

在农产品市场准入、国内支持和出口竞争领域 ,作出具体的约束性承诺。

Providing for a greater improvement of opportunities and term of access for agricultural products of particular interest to developing country

Members.

给予发展中国家成员具有特定利益的农产品更多的市场准入机会,更大程度地改善其市场准入条件。

Pertinent commitments should be made in an equitable way among all Members, having regard to non-trade concerns, including food security and the need to protect the environment and to special and differential treatment for developing countries.

所有 WTO 成员之间所作的有关承诺要保持平衡,要考虑一些非贸易问题(包括食品安全与环境保护需要)及对发展中国家的特殊和差别待遇。

从上述原则中看出,WTO 农产品贸易规则也包括农业支持与保护(如农业补贴)的规则,即涉及农产品生产领域。所以农产品贸易规则较一般商品贸易规则更为复杂。

二、WTO《农业协定》涉及的重要概念(Important Concepts Dealt with in WTO Agreement on Agriculture)

WTO《农业协定》涉及以下几个重要概念:

1. 综合支持量(Aggregate Measurement of Support, AMS)

Aggregate Measurement of Support(AMS) means the annual level of support, expressed in monetary terms, provided for an agricultural product in favour of agricultural producers.

综合支持量(AMS)是指以货币形式表示的有利于农产品生产者的年度支持水平。

2. 支持等量(Equivalent Measurement of Support)

Equivalent Measurement of Support refers to the annual level of

support , expressed in monetary terms , provided to agricultural producers through the application of one or more measures , the calculation of which in accordance with the AMS methodology is impracticable.

“ 支持等量 ”是指以货币形式表示的、通过使用一项或多项措施向农产品生产者提供的、不能依据 AMS 方法计算的年度支持水平。

3. 出口补贴(Export Subsidies)

Export subsidies refers to subsidies contingent upon export performance , such as :

出口补贴指视出口实绩而给予的补贴 如 :

(a) direct ones provided by governments or their agencies to a firm , to an industry , to producers of an agricultural product , to a cooperative or other association of such producers , or to a marketing board ;

(1)向公司、企业、农产品生产者、此类生产者的合作社或其他协会或销售机构提供的直接补贴 ;

(b) the sale or disposal for export by governments or their agencies of non-commercial stocks of agricultural products at a price lower than the comparable price charged for the like product to buyers in the domestic market ;

(2)政府或其代理机构出口销售或处理非商业性农产品库存 , 价格低于向国内市场购买者收取的相同产品的可比价格 ;

(c) payments on the export of an agricultural product that are financed by virtue of governmental action , including payments that are financed from the proceeds of a levy imposed on the agricultural product concerned or on an agricultural product from which the exported product

is derived ;

(3)政府提供资金为一种农产品支付出口成本 ,包括利用对有关农产品或对用于生产该出口产品的农产品征税产生的收益而提供支付资金 ;

(d) the provision of subsidies to reduce the costs of marketing exports of agricultural products (other than widely available export promotion and advisory services) including handling , upgrading and other processing costs , and the costs of international transport and freight ;

(4)为减少出口农产品的营销成本 ,包括进一步的处理、改进和其他加工成本 ,以及国际运输成本和运费(但出口均可获得的出口促进和咨询服务除外)而提供的补贴 ;

(e) internal transport and freight charges on export shipments , provided or mandated by governments , on terms more favourable than for domestic shipments ;

(5)政府提供或批准的出口货物的国内运费 ,其条件优于国内销售货物 ;

(f) subsidies on agricultural products contingent on their incorporation in exported products.

(6)视出口产品成分而对该农产品提供的补贴。

上述这些补贴不应超过各成员减让表中规定的相应预算费用水平和数量承诺水平。

4. 综合支持总量(Total AMS)

Total AMS means the sum of all domestic support provided in favour of agricultural producers ,calculated as the sum of all aggregate measure-

ments of support.

综合支持总量指有利于农业生产者的所有国内支持的总和 ,是所有 AMS 之和。

第二节 有关农产品贸易的特定承诺

Specific Commitments Relative to the Trade of Agricultural Products

WTO《农业协定》所确立的有关农产品贸易的特定承诺包括四个方面 :市场准入减让 ;国内支持承诺 ;出口竞争承诺 ;出口补贴承诺。

一、市场准入减让(Market Access Concessions)

Market access concessions mainly relate to bindings and reductions of tariffs , and non-tariff border measures are replaced by tariffs that provide substantially the same level of protection , which briefly called as tariffication. These measures include quantitative import restrictions , variable import levies , minimum import prices , discretionary import licensing , non-tariff measures maintained through state-trading enterprises , voluntary export restraints , and similar border measures other than ordinary customs duties.

市场准入减让主要是为了约束和降低关税 ,将非关税措施由提供相同关税保护水平的关税所代替(简称非关税措施的关税化)。这些非关税措施包括进口数量限制、可变进口征税、进口限价制、差别性的进口许可制、通过国营贸易企业维持的非关税措施及在课征正常关税之外采取的其他相似边境措施。

Tariffs resulting from this tariffication process are to be reduced by an average 36 per cent over six years in the case of developed countries and 24 per cent over ten years in the case of developing countries , with minimum reductions for each tariff line being required. Whereas least-developed countries are not to reduce their tariffs.

对非关税措施关税化后的关税 ,要求发达国家成员在 6 年内至少降低 36% ,发展中国家成员在 10 年内至少降低 24% ,最不发达国家则不要求降低其关税^①。

According to Annex 5 to WTO Agreement on Agriculture , minimum access opportunities in respect of primary agricultural product and its worked and/or prepared products (i. e. “ designated products ”) out of tariffication correspond to 4 per cent of base period(1986—1988) domestic consumption of the designated products from the beginning of the first year of the implementation period and , thereafter , are increased by 0.8 per cent of corresponding domestic consumption in the base period per year for the remainder of the implementation period.

根据 WTO《农产品协定》附录 5 ,对于非关税化的初级农产品及其制品(即“ 指定产品 ”)的最低限度的市场准入机会是 ,自实施期第一年年年初起占指定产品基期(1986—1988 年)国内消费量的 4% ,此后在实施期内其余各年 ,每年以基期内相应国内消费量的 0.8% 比例增长。

二、国内支持承诺(Domestic Support Commitments)

国内支持承诺是有利于农业生产者的国内支持措施。它以综合

^① A Summary of the Final Act of the Uruguay Round , available at <http://www.wto.org/english/docs - e/legal - e/ursum - e . htm>

支持总量(Total AMS)及年度和最终约束性承诺水平(Annual and Final Bound Commitment Levels)来表示。

Article 6. 3 of WTO Agreement on Agriculture stipulates that a Member shall be considered to be in compliance with its domestic support reduction commitments in any year in which its domestic support in favour of agricultural producers expressed in terms of Current Total AMS does not exceed the corresponding annual or final bound commitment level specified in its Schedule.

WTO《农产品协定》第 6.3 条规定,一个 WTO 成员在任何年度里给予有利于其农产品生产者的以现行综合支持总量表示的国内支持没有超过其减让表中具体规定的相应年度或最终约束承诺水平,那么该成员就被认为履行了其减让表中规定的削减国内支持承诺。

Domestic support measures for which exemption from the reduction commitments is claimed shall meet the fundamental requirement that they have no, or at most minimal, trade-distorting effects or effects on production. Accordingly, all measures for which exemption is claimed shall conform to the following basic criteria:

要求免除减让承诺的国内支持措施应无贸易扭曲作用并对生产不产生影响,或此类作用或影响非常小。因此,要求免除削减承诺的所有措施应符合下列基本标准:

(a) the support in question shall be provided through a publicly-funded government programme (including government revenue foregone) not involving transfers from consumers;

(b) the support in question shall not have the effect of providing price support to producers.

(1)这种支持应通过公共融资政府项目提供(包括放弃政府税

收),而不涉及来自消费者的转让;

(2) 所涉支持不得具有对生产者提供价格支持的作用。

Article 6(4) of WTO Agreement on Agriculture stipulates that a Member shall be exempt from reduction commitments the following domestic supports:

WTO《农产品协定》第6.2和6.4条规定,以下国内支持免除减让承诺:

(i) government measures of assistance, whether direct or indirect, to encourage agricultural and rural development; (ii) investment subsidies which are generally available to agriculture in developing country Members; (iii) agricultural input subsidies generally available to low-income or resource-poor producers in developing country Members; (iv) product-specific domestic support where such support does not exceed 5 per cent (or 10 per cent in the case of developing countries) of that Member's total value of production of a basic agricultural product during the relevant year, and non-product-specific domestic support where such support does not exceed 5 per cent (or 10 per cent in the case of developing countries) of the value of that Member's total agricultural production.

(1) 政府直接或间接地鼓励农业和农村发展的援助措施 (2) 发展中国家普遍采用的投资补贴 (3) 发展中国家将对低收入或资源贫乏的生产者普遍采用的农业投入补贴 (4) 不超过有关年度内该成员基础农产品生产总值的5%(发展中国家为10%)的特定产品国内支持及不超过该成员农业生产总值的5%(发展中国家为10%)的非特定产品国内支持。

但对其中“低收入”和“资源贫乏”并没有明确定义。

The following government service programmes may also be excepted from the reduction commitments :

下述政府的各类服务项目也可以免除国内支持减让承诺：

(i) general services(such as research , pest and disease control , training services , extension and advisory services , inspection services , marketing and promotion services , and infrastructural services) ; (ii) public stockholding for food security purposes ; (iii) domestic food aid ; (iv) direct payments to producers ; (v) decoupled income support ; (vi) government financial participation in income insurance and income safety-net programmes ; (vii) payments for relief from natural disasters ; (viii) structural adjustment assistance ; (ix) payments under environmental programmes ; (x) payment under regional assistance programmes.

(1)一般服务(研究 , 防疫 , 培训 , 推广和咨询 , 健康和安全检查 , 营销和非价格性的促销 , 社会基础设施等方面) (2)以粮食安全保障为目的的公共储备 (3)国内粮食援助 (4)满足基本标准的对生产者的直接支付 (5)与生产无直接关系的收入减少支持 (6)收入保险和收入安全财政支持计划 (7)自然灾害的补贴 (8)环境保护项目的补贴 (9)结构调整援助 (10)地区援助项目补贴。

上述这些项目对贸易的影响很小 , 故形象地称为“绿箱”政策 (“ Green Box ” Policies)。

三、出口竞争承诺(Export Competition Commitments)

Export Competition Commitments refers not to providing export subsidies otherwise than in conformity with WTO Agreement on Agriculture and with the commitments as specified in the Members Schedule.

所谓出口竞争承诺是指各成员所提供的出口补贴符合 WTO《农产品协定》并与各成员承诺表中规定的承诺相一致。

四、出口补贴承诺(Export Subsidy Commitment)

Members are required to reduce the value of mainly direct export subsidies to a level 36 per cent below the 1986—1990 base period level over the six-year implementation period , and the quantity of subsidized exports by 21 per cent over the same period. In the case of developing countries , the reductions are two-thirds those of developed countries over a ten-year period(with no reductions applying to the least-developed counties).

WTO 要求其成员在 6 年的实施期内主要的直接补贴额降低 36% ,以基期(1986—1990)为准 ;补贴量降低 21% 。发展中国家则有 10 年的实施期 ,上述两项降低幅度为发达国家的 2/3(对最不发达国家则无降低要求)。

参见本章第一节所述的出口补贴享有免于关税化的特殊待遇 (Special Treatment)。

第三节 WTO 农产品特别保障 措施实施规则

WTO Applying Rules of SSG of Agricultural Products

WTO 农产品特别保障措施(Special Safeguard Measures , SSG)实体规则与一般保障措施实体规则不同 ,其实施的标准条件更为具体。

一、WTO 农产品特别保障措施的适用条件(Applying of SSG)

WTO《农产品协定》第 5.1 条确立了农产品特别保障措施实施的基本条件。

A Member ever taking such kinds of measures on the importation of its agricultural products as minimum import prices , discretionary import licensing , voluntary export restraints and otherwise which have been converted into an ordinary customs duty may implement special safeguard measures. The products bound are marked in the Member s Schedule with the symbol “ SSG ” as being the subject of a market access concession.

对农产品进口采取过最低进口价、差别性进口许可制、自动出口限制及其他措施 ,而这些措施现已转换为正常关税的成员可以实施特别保障措施。适用于特别保障措施的产品在各成员减让表用符号“ SSG ”注明 ,以示包括在市场准入减让范围之内。

但具体实施还要满足下列两个条件中的一个：

Condition I : the volume of imports of that product during any year exceeds a trigger level , i. e. imports as a percentage of corresponding

domestic consumption during the three preceding years for which data are available , which relates to the existing market access opportunity.

条件一 :在任一年内这种产品的进口量超过了由现行市场准入机会(即按可获得数据的前 3 年相应国内消费量的一定比例确定的进口许可量)决定的触发水平。

Condition II the CIF import price , expressed in terms of its domestic currency , of that product falls below a trigger price equal to the average 1986—1988 reference price for the product concerned.

条件二 :该产品以国内货币表示的 CIF 进口价低于触发价格 (该价格等于相关产品 1986—1988 年平均参考价)。

二、具体的特别保障措施——课征进口附加税(Specific SSG : Levying Additional Duty)

(一)“ 条件一 ”下的进口附加税(Additional duty under Condition I)

The additional duty imposed under Condition I above may only be levied at a level not exceeding one third of the level of the ordinary customs duty in effect in the year in which the action is taken , and it should be maintained until the end of the year in which it has been imposed.

上述“ 条件一 ”下进口附加税不应超过采取保障措施当年有效的正常关税水平的 1/3 ,其有效期至课税当年年底。

The trigger level hereinto shall be set respectively according to the following different circumstances :

其中 ; “ 条件一 ”下的触发水平根据以下不同情况分别确定 :

(a) where such market access opportunities for a product are less

than or equal to 10 per cent , the base trigger level shall equal 125 per cent ;

(b) where such market access opportunities for a product are greater than 10 per cent but less than or equal to 30 per cent , the base trigger level shall equal 110 per cent ;

(c) where such market access opportunities for a product are greater than 30 per cent , the base trigger level shall equal 105 per cent.

(1)若产品的市场准入机会低于或等于 10% ,则基础触发价格应为 125% ;

(2)若产品的市场准入机会高于 10% ,但低于或等于 30% ,则基础触发价格应为 110% ;

(3)若产品的市场准入机会在 30% 以上 ,则基础触发价格应为 105% 。

In all cases , the additional duty may be imposed in any year where the absolute volume of imports of the product concerned exceeds the sum of the base trigger level (not less than 105 per cent) multiplied by the average importing quantity and the absolute volume change in domestic consumption in the most recent year compared.

无论如何 ,如任何一年有关产品的绝对进口量超过(1)以上所列基础触发水平与可获得数据的最近三年平均进口量的乘积与(2)最近一年有关产品的国内消费量与前一年相比的绝对变化量之和 ,则可征收附加关税 ,但是触发水平不得低于以上(1)中平均进口量的 105% 。

(二)“ 条件二 ”下的进口附加税(Additional duty under Condition II)

Table 5 - 2 Additional Duty under Condition II

The Difference Between Import Price and Trigger Price (D)	Additional Duty
(a) $D \leq 10\%$	none
(b) $10\% < D \leq 40\%$	30% of Trigger Price (TP)
(c) $40\% < D \leq 60\%$	50% of TP +(b)
(d) $60\% < D \leq 75\%$	70% of TP +(b) +(c)
(e) $D \geq 75\%$	90% of TP +(b) +(c) +(d)

Source : Compiled by the author.

Note :(a) if the difference between the CIF import price (hereinafter referred to as “ import price ”) and the trigger price is less than or equal to 10 per cent of the trigger price , no additional duty shall be imposed ;

(b) if the difference between the import price and the trigger price (hereinafter referred to as the “ difference ”) is greater than 10 per cent but less than or equal to 40 per cent of the trigger price , the additional duty shall equal 30 per cent of the amount by which the difference exceeds 10 per cent ;

(c) if the difference is greater than 40 per cent but less than or equal to 60 per cent of the trigger price , the additional duty shall equal 50 per cent of the amount by which the difference exceeds 40 per cent , plus the additional duty allowed under (b) ;

(d) if the difference is greater than 60 per cent but less than or equal to 70 per cent of the trigger price , the additional duty shall equal 70 per cent of the amount by which the difference exceeds 60 per cent of the trigger price , plus the additional duty allowed under (b) and (c) ;

(e) if the difference is greater than 75 per cent of the trigger price , the additional duty shall equal 90 per cent of the amount by which the difference exceeds 75 per cent , plus the additional duties allowed under (b) , (c) and (d).

表 5 - 2 “ 条件二 ”下的进口附加税

进口价与触发价格之差(D)	附加税
(a) $D \leq 10\%$	不课征
(b) $10\% < D \leq 40\%$	触发价格(TP)的 30%
(c) $40\% < D \leq 60\%$	触发价格的 50% +(b)
(d) $60\% < D \leq 75\%$	触发价格的 70% +(b)+(c)
(e) $D \geq 75\%$	触发价格的 90% +(b)+(c)+(d)

资料来源 笔者整理。

What should be added is , in the base period , different reference prices (i. e. trigger price) for different corresponding periods may be used under Condition II.

须补充的是 ,在“ 条件二 ”下可以使用基期内不同时间段内的相应不同的参考价(即触发价)。

三、实施特别保障措施的其他重要规则(Important Procedural Rules about the Application of Special Safeguard)

A Member taking safeguard action shall give notice in writing to the Committee of Agriculture as far in advance as may be practicable and in any event within 10 days of the implementation of such action. Where the volume of imports of the products concerned are declining , although import price falls below a trigger price , Members shall not take special safeguard measure on the products. Meanwhile , where special safeguard measures are taken , any other remedies shall not be sought.

采取保障措施的成员均应以书面形式通知农业委员会 ,通知应尽可能提前作出 ,且无论如何应在采取该保障行动后 10 天内作出。当有关产品进口量在下降过程中 ,虽然进口价格低于触发价格 , WTO 成员也不应对该产品采取特别保障措施。同时 ,在采取特别保

障措施时 ,采取措施的成员不应再寻求其他的救济。

本章小结

本章从三个方面介绍了 WTO 农产品贸易规则。一是 WTO 农产品贸易原则 ,从中看出 ,WTO《农业协定》涉及农业生产领域 ;二是农产品贸易的特定承诺 ,这些承诺确立了各成员农产品市场开放与保护的基本规范 ;三是关于农产品的特别保障措施。这是 WTO《农业协定》所涉及的一个特殊问题。

思考题

1. 解释以下两个术语的含义 (1)综合支持量 (2)支持等量。
2. 根据 WTO《农产品协定》,哪些国内支持可以免除减让承诺 ?
3. 根据 WTO《农产品协定》,实施 SGM 的条件是什么 ?

第六章 WTO 纺织品与 服装贸易规则

WTO Rules of Textiles and Clothing Trade

WTO 纺织品与服装贸易规则是由 WTO《纺织品与服装协定》(Agreement on Textiles and Clothing, ATC)^①确立的。该协定的主要内容包括“纺织品和服装贸易”一体化(Integration)的规则、过渡期保障条款、反规避条款、设立纺织品监督局的规定、协定所适用的产品范围在附录中列出。

第一节 WTO 纺织品与服装一体化的 特定产品及其过渡期安排

Specific Integrated Products of Textiles and Clothing and Transitional Arrangements Thereof

WTO 所确立的纺织品与服装贸易规则中实现所谓“一体化”(Integration),是该协定内容中最重要的部分。

^① This agreement consists of eight articles and one annex.

一、“一体化”的含义(Meaning of Integration)

“一体化”是 WTO《纺织品与服装协定》中的一个重要概念。WTO 对“一体化”也下了一个简单的定义^①：

Integration means that trade in the products of textiles and clothing will be governed by the general rules of GATT.

一体化是指纺织品和服装的贸易将由 GATT 一般贸易规则所管辖。

具体说来，“一体化”即是在过渡期内(Transitional Period)取消数量限制，将纺织品和服装部门逐步纳入《GATT 1994》。

二、一体化产品范围(Scopes and Coverage of Integrated Products)

According to Article 2.6 of ATC and Annex thereto , the products to be integrated encompass from each of the following four groups : Tops and yarns , fabrics , made-up textile products and clothing , which deal with 800 HS Headings or so at the six-digit level.

根据 WTO《纺织品与服装协定》第 2.6 条及该协定附录，纳入一体化的纺织品和服装产品包括毛条和纱、机织物、纺织制成品和服装 4 个组中的每一个组，涉及约 800 个 6 位数字的 HS 税号的产品。

三、过渡期一体化安排(Integration Arrangements in Transitional Period)

过渡期一体化安排包括内容：

All quantitative restrictions within bilateral agreements maintained in force on the day before the entry into force of WTO Agreement shall , within 60 days following such entry into force , be notified to the Textiles Monitoring Body (TMB). The restrictions not notified within 60 days a-

bove shall be terminated forthwith.

在《WTO 协定》生效前有效的双边协定项下的所有数量限制,在《WTO 协定》生效 60 天内均应通知该协定下的纺织品监督机构 (TMB)。若在此 60 天内未通知纺织品监督机构,则这些限制措施立即被终止实施。

On the date of entry into force of the WTO Agreement(i. e. on 1 January 1995), each Member shall integrate into GATT 1994 products which accounted for not less than 16 per cent of the total volume of the Member s 1990 imports of the products. The following step is no less than 17 per cent of remaining products to be integrated on the first day of the 37th month(1 January 1998) that the WTO Agreement is in effect , and then no less than 18 per cent of remaining products to be integrated on the first day of 85th month (i. e. 1 January 2002) that the WTO Agreement is in effect. Finally , on the first day of the 121st month (i. e. 1 January 2005) that the WTO Agreement is in effect , the textiles and clothing sector shall stand integrated into GATT 1994 , all restrictions under this Agreement having been eliminated.

在《WTO 协定》生效之日(即 1995 年 1 月 1 日),每一成员应将不低于其 1990 年该产品总进口量的 16% 纳入《GATT 1994》。接下来是自《WTO 协定》生效后的第 37 个月的第一天(即自 1998 年 1 月 1 日)起,至少将剩余产品的 17% 纳入《WTO 协定》。然后自《WTO 协定》生效后的第 85 个月的第一天(即自 2002 年 1 月 1 日)起,至少再将剩余产品的 18% 纳入《WTO 协定》。最后,自《WTO 协定》生效后的第 121 个月的第一天(即自 2005 年 1 月 1 日)起,纺织品和服装部门应纳入《WTO 协定》,该协定项下的所有限制均应取消。

除此之外,WTO《纺织品与服装协定》还规定,对于各成员在过

渡期内保留的数量限制(配额),在上述第三阶段即自协议生效后的第 85 个月至第 120 个月期间(2002 年—2004 年),其增长率不低于第二阶段增长率的 27%^①。由于第二阶段的增长率是第一阶段增长率(16%)的 25%,所以第三阶段的实际增长率是很低的。

第二节 WTO《纺织品与服装协定》 下的反规避规则

Anti-circumvention Rules under ATC

一、WTO《纺织品与服装协定》下反规避的含义(The Meaning of Anti-circumvention under ATC of WTO^②)

According to Article 5.1 of ATC, circumvention is referred to mean frustrating the implementation of this Agreement by transshipment, re-routing, false declaration concerning country or place of origin, and falsification of official documents.

根据 WTO《纺织品与服装协定》第 5.1 条,规避是指通过转运,改变生产或销售渠道,虚报原产国或原产地,伪造官方文件等方式而影响《纺织品与服装协定》的执行。

Another Circumvention is of false declaration concerning fibre content, quantities, description or classification of merchandises.

另一种规避是对商品纤维成分、数量、品名或类别的虚报。

① Legal texts : the WTO Agreements, available at <http://www.wto.org/english/docs - e/legal - e/ursum - e.htm>

② See Article 2.14 of ATC.

二、反规避适用规则(Applying Rules of Anti-circumvention)

(一)磋商(Consultation)

In the existence of circumvention , WTO Members concerned will consult with each other with a view to seeking a mutually satisfactory solution. Such consultations should be held promptly , and within 30 days when possible. If a mutually satisfactory solution is not reached , the specific matter may be referred by any Member involved to the TMB for recommendation.

若规避存在 , 则有关 WTO 成员将进行磋商以寻求达成相互满意的解决方案。这种磋商应从速进行 , 并且如可能的话 , 在 30 内进行。若不能达成彼此满意的解决方案 , 这一特定事项可由有关成员提交至纺织品监督机构 , 由纺织品监督机构提出解决的建议。

(二)规避事实的认定(Establishment of Anti-circumvention Facts)

WTO considers the establishment is of importance of the relevant facts in the places of import , export and , if any , transshipment. The Members shall cooperate in the investigation of circumvention practices which increase restrained exports to the Member maintaining such restraints ; exchange of documents , correspondence , reports and other relevant information to the extent available ; and facilitation of plant visits and contacts.

WTO 认为对进出口和转运(如果有的话)进行实地事实认定是重要的。WTO 成员在对设限国家增加受限商品的出口的规避行为的调查时应加以合作 , 在文件、信件、报告及其他相关可获信息的互换方面也要进行合作 , 并为实地调查和联系提供方便。

(三)具体的反规避措施(Specific Actions against Circumvention)

The anti-circumvention actions may include the denial of entry of goods or , where goods have entered , the adjustment of charges to restraint levels to reflect the true country or place of origin.

反规避措施包括禁止进口、调整收费(若货物已经进口)等措施 ,以反映真正的原产国(地)。

第三节 过渡期内针对纺织品与 服装的特别保障措施

Special Safeguard Actions Against Textiles and Clothing in Transitional Period

WTO《纺织品与服装协定》第6条规定了特别保障措施的特定的适用范围及其适用规则。

一、具体适用范围(Specific Applying Scopes)

Basing on Article 6.1 of ATC , the transitional safeguard may be applied by any Member to products covered by the Annex , except those integrated into GATT 1994 during ten years of the transitional period.

根据 WTO《纺织品与服装协定》第6.1条 ,在10年过渡期内 ,任何成员对尚未纳入《GATT 1994》的纺织品和服装产品 ,可以适用过渡期保障措施。

According to Annex to ATC , actions under the ATC shall not apply the following products :

根据 WTO《纺织品与服装协定》附录 ,该协定下的过渡期保障措

施不适用于以下产品：

(i) developing country Members exports of handloom fabrics of the cottage industry , or hand-made cottage industry products made of such handloom fabrics , or traditional folklore handicraft textile and clothing products , provided that such products are properly certified under arrangements established between the Members concerned ;

(ii) historically traded textile products which were internationally traded in commercially significant quantities prior to 1982 , such as bags , sacks , carpetbacking , cordage , luggage , mats , mattings and carpets typically made from fibres such as jute , coir , sisal , abaca , maguey and henequen ;

(iii) products made of pure silk.

(1)发展中国家家庭手工业生产的手织布料或用毛制成的家庭手工业产品和传统民间手工艺品 ,只要这些产品不超出有关成员国之间订立的协定规定范围。

(2)1982 年以前在国际贸易中已具有很大商业交易量的传统贸易的纺织品 ,如黄麻、柳丝、西沙尔麻、波罗麻、龙舌兰纤维和黑纳纤维制造的包装袋、麻袋、地毯底布、箱包、衬垫、席编和地毯等产品。

(3)纯真丝产品。

二、适用规则(Rules of Application)

(一)主要实体规则(Major Substantial Rules)

WTO《纺织品与服装协定》第 6.2 条规定：

Safeguard action above may be taken by a Member when a particular product is being imported in such increased quantities as to cause serious damage , or actual threat thereof , to its domestic industry producing

like and/or directly competitive products. The causal linkage must exist between serious damage or actual threat thereof and increased quantities in total imports of that product. Such other factors as technological changes or changes in consumer preference is out of consideration in safeguard investigation.

当某一产品增加的进口量对本国生产相同和(或)直接竞争产品的工业已造成严重危害或实际的威胁,可对进口产品适用保障措施。严重危害或实质威胁与该产品进口增加总量之间必须要有因果关系。其他诸如技术上的改变或消费偏好变化等因素不在保障措施调查范围之内。

In determination serious damage or actual threat thereof, the Member concerned shall examine such relevant economic variables as output, productivity, utilization of capacity, inventories, market share, exports, wages, employment, domestic prices, profits and investment.

在确定严重的损害或严重损害威胁时,有关成员应考虑诸如产量、生产率、开工率、库存、市场份额、出口、工资、就业、国内价格、利润和投资等经济变量。

The Member or Members, to whom serious damage or actual threat thereof is attributed, shall be determined on the basis of a sharp and substantial increase in imports, actual or imminent, from such a Member or Members individually, and on the basis of the level of imports as compared with imports from other sources, market share, and import and domestic prices at a comparable condition. However, what should be emphasis is none of these factors, either alone or combined with other factors, can necessarily give decisive guidance.

应依据从 WTO 成员进口急剧地与大量地增加(这种增加是实

际的或迫近的)、依据在与其他进口渠道相比较的进口量、市场份额以及在可比较条件下的进口价格和国内价格,作出 WTO 成员是否造成严重损害或实质威胁的结论。但应强调的是只根据单独某项因素或几项因素,均不能作出肯定性的结论。

The safeguard measures invoked may be maintained (a) for up to three years without extension , or (b) until the product is integrated into GATT 1994 , whichever comes first.

保障措施可适用 3 年,不得延长;或适用至该产品纳入《GATT 1994》。以先到期者为准。

(二)重要程序规则(Important Procedural Rules)——磋商 (Consultation)

According to Article 6.7 of ATC , the Member proposing to take safeguard action shall seek consultations with the Member or Members which would be affected by such action and indicate the specific level at which imports of the product in question are proposed to restrain. The Member or Members concerned shall respond to the consulting request promptly , and the consultation normally be completed within 60 days of the date on which the request was received.

根据 WTO《纺织品与服装协定》第 6.7 条,决定采取保障措施的成员应与受该措施影响的成员进行磋商,并说明有关产品进口的拟定受限水平。有关成员应对磋商要求作出快速反应,磋商应在收到磋商要求之日后的 60 天内完成。

If , in the consultations , there is mutual understanding that the situation calls for restraint on the exports of the particular product from the Member or Members concerned , the level of such restraint will be fixed at

a level not lower than the actual level of exports or imports from the Member concerned during the 12 - month period terminating two months preceding the month in which the request for consultation was made.

如果在磋商中彼此之间对限制特定出口产品的情况达成了谅解,则这种限制水平将低于在提出磋商要求 2 个月前的 12 个月内实际的出口或进口水平。

If there has been no agreement between the Members after the expiry of the period of 60 days from the date on which the request for consultations was received , the Member which proposed to take safeguard action may apply the provisional restraint by date of import or date of export within 30 days following the 60 - day period for consultations.

如果自收到磋商的要求之日起 60 天后,成员国之间没有达成协议,拟定采取保障措施的成员可以在 60 天磋商期满后 30 天内在进口日或出口日采取临时限制措施。

In highly unusual and critical circumstances , where delay would cause damage which would be difficult to repair , action may be taken provisionally on the condition that the request for consultations and notification to the TMB shall be effected within no more than five working days after taking the action.

在极端的和关键的情况下,若拖延会造成无法挽回的损失,则也可以临时采取保障行动,条件是应在采取该项行动后不超过 5 个工作日内进行磋商并通知纺织品监督机构。

最后说明的是,为了监督《纺织品与服装协定》的贯彻执行并审查按协议规定所采取的各项措施是否符合规定,WTO 货物贸易委员

会专门设置了一个纺织品监督机构(Textiles Monitoring Body , TMB)^①。该机构由 1 名主席和 10 名委员组成。

纺织品监督机构与专家组作用是不同的。纺织品监督机构委员可参与解决涉及本国的争端。但 DSU 下专家组不同,争端一方的任何国民都不能成为解决该争端的专家组的成员。专家组成员可以发表不同意见(Dissenting Opinion) ,而委员会只能全体一致作出决定。有关纺织品与服装的贸易争端提交给纺织品监督机构后,该机构经过调查作出报告,对结果仍不满意的 WTO 成员可以直接请求成立专家组。简言之,该机构有关程序可以代替 DSU 下的磋商程序。一般说来,纺织品与服装争端应当先根据 ATC 协议进行磋商,协商未果的提交给纺织品监督机构审查。如果一方对纺织品监督机构审查结论不满意的,可以向 DSB 提出请求成立专家组。

本章小结

本章主要从三个方面对 WTO 纺织品与服装贸易规则作了介绍。第一部分内容是 WTO 纺织品与服装一体化的安排。须注意的是,WTO《纺织品与服装协定》在 2005 年 1 月 1 日到期。因此本章另外两部分内容,即 WTO 纺织品与服装反规避规则和保障措施规则,均只在这一过渡期内适用。反规避规则和保障措施规则颇为复杂。而纺织品监督机构的职能与 WTO 争端解决机制下的专家组也是不同的。

思考题

1. WTO《纺织品与服装协定》中“一体化”的含义是什么？

^① For details , see Article 8 of ATC.

2. 针对纺织品与服装的反规避措施有哪几种？
3. TMB 的职能与 DSU 下的专家组职能相比有何特点？

第七章 WTO 服务贸易规则

WTO Rules of Trade in Services

WTO Rules on Trade in Services are established in WTO General Agreement on Trade in Services (GATS). This Agreement forming integral part of WTO Agreement rests on three pillars. The first is a Framework Agreement containing basic obligations which apply to all member countries (i. e. the text of General Agreement on Trade in Services). The second concerns national schedules of commitments^① which will be the subject of a continuing process of liberalization. The third is a number of annexes addressing the special situations of individual services sectors.

WTO 服务贸易规则是由 WTO《服务贸易总协定》确立的。这个协定之所以成为《WTO 协定》的组成部分,主要基于以下三个方面:第一是包含着适用于所有成员国的基本义务的框架协议(即 WTO《服务贸易总协定》正文文本)。第二是各成员国均提出承诺减让表,这些减让是持续的自由化进程的目标。第三是专门适用于个别服务部门的具体情况的多个附录。

① The main contents of Schedules of Specific Commitments are as follows :

- (a) terms , limitations and conditions on market access ;
- (b) conditions and qualifications on national treatment ;
- (c) undertakings relating to additional commitments ;
- (d) where appropriate the time-frame for implementation of such commitments ; and
- (e) the date of entry into force of such commitments.

WTO《服务贸易总协定》共有 6 部分 29 条及 8 个附录。

Table 7 - 1 Annexes to GATS

Annex on Article II Exemptions
Annex on Movement of Natural Persons Supplying Services under the Agreement
Annex on Air Transport Services
Annex on Financial Services
Second Annex on Financial Services
Annex on Negotiations on Maritime Transport Services
Annex on Telecommunications
Annex on Negotiations on Basic Telecommunications

Source : compiled by the author.

表 7 - 1 WTO《服务贸易总协定》的 8 个附录

《关于第 2 条豁免的附录》
《关于提供 服务贸易总协定 下服务的自然人移动的附录》
《关于航空运输服务的附录》
《关于金融服务的附录》
《关于金融服务的第二附录》
《关于海运服务谈判的附录》
《电讯附录》
《关于基础电讯谈判的附录》

资料来源 笔者编制。

第一节 WTO 有关服务贸易 的原则和定义

WTO Principles and Definitions of Trade in Services

一、WTO 有关服务贸易的主要原则(Major Principles of Trade in Services)

WTO《服务贸易总协定》开宗明义地提出了制定和实施服务贸易规则的基本原则。

First , what should be affirmed is the growing importance of trade in services for the growth and development of the world economy , just as Charlene Barshefsky , the former United States Trade Representative , said “ service is the backbone of modern economy ”.

首先 ,肯定服务贸易对世界经济增长和发展日益重要。正如美国前贸易谈判代表沙琳·巴尔舍夫斯基所言“服务是现代经济的支柱”。

Secondly , establishing a multilateral framework (i. e. GATS) for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization.

其次 ,通过建立一个有关服务贸易多边框架(即 WTO《服务贸易总协定》) ,在透明和逐步自由化的条件下扩大服务贸易。

Thirdly , bringing forward the achievement of progressively higher levels of liberalization of trade in services , while giving due respect to national policy objectives.

第三 ,提出在给予各成员国家政策目标应有尊重的同时 ,推动服务贸易自由化发展。

Fourthly , affirming that Members , especially the developing country Members thereinto , have the right to regulate , and to introduce new regulations on the supply of services within their territories in order to meet national policy objectives.

第四 ,肯定各成员(尤其是发展中国家)有权对其领土内的服务进行管理和采用新的法规 ,以实现其国家政策目标。

Fifthly , facilitating the increasing participation of developing countries in trade in services and the expansion of their service exports , inter alia , through the strengthening of their domestic services capacity and its efficiency and competitiveness.

第五 ,特别要通过增强其国内服务能力、效率和竞争力 ,便利发展中国家更多地参与服务贸易和扩大服务出口。

Finally , it is stipulated that , while establishing the rules on trade in services , taking particular account of the serious difficulty of the least-developed countries in view of their special economic situation and their development , trade and financial needs.

最后 ,规定在制定服务贸易规则时应特别考虑到最不发达国家由于特殊的经济状况及其在发展、贸易和财政方面的需要而存在的严重困难。

二、服务贸易的定义(Definition of Service Trade)

根据 WTO《服务贸易总协定》第 1.2 条 ,服务贸易是指以下服务提供方式 :

(a)from the territory of one Member into the territory of any other Member , i. e. cross-border supply ;

(b)in the territory of one Member to the service consumer of any other Member , i. e. consumption abroad ;

(c)by a service supplier of one Member , through commercial presence in the territory of any other Member , i. e. commercial presence ;

(d)by a service supplier of one Member , through presence of natural persons of a Member in the territory of any other Member , i. e. movement of natural persons or presence of natural persons.

(1)自一成员领土向任何其他成员领土提供服务 ,即跨境交付 (Cross-border Supply) ;

(2)在一成员领土内向任何其他成员的服务消费者提供服务 ,即境外消费 (Consumption Abroad) ;

(3)一成员的服务提供者通过在任何其他成员领土内的商业存在提供服务 ,即商业存在 (Commercial Presence) ;

(4)一成员的服务提供者通过在任何其他成员领土内的自然人存在提供服务 ,即自然人流动 (Movement of Natural Persons , Presence of Natural Persons)。

“ Service ” includes any service in any sector except services supplied in the exercise of governmental authority where “ a service supplied in the exercise of governmental authority ” means any service which is supplied neither on a commercial basis , nor in competition with one or more service suppliers.

其中 “ 服务 ” 包括任何部门提供的任何服务 (政府机关履行其政府职能时提供的服务除外) , 而 “ 履行其政府职能时提供的服务 ” 意指既非在商业基础上 , 又非在与一个或多个服务供应商竞争基础上提供的服务。

具体说来 ,WTO 将服务按部门分为以下 12 大类^①

1. 商业服务(Business Services) ,包括 :专业性(包括咨询)服务 ,计算机及相关服务 ,研究与开发服务 ,不动产服务 ,设备租赁服务 ,其他服务。

2. 通讯服务(Communication Services) ,主要包括 :邮电服务 ;信息服务 ;电信服务 ;视听服务 ;其他电信服务。

3. 建筑服务(Construction Services) ,主要指工程建筑从设计、选址到施工的整个服务过程。

4. 销售服务(Distribution Services) ,指产品销售过程中的服务交换。主要包括 :商业销售 ,主要指批发业务 ;零售服务 ;与销售有关的代理费用及佣金等 ;特许经营服务 ;其他销售服务。

5. 教育服务(Educational Services) ,指各国间在高等教育、中等教育、初等教育、学前教育、继续教育、特殊教育和其他教育中的服务交往 ,如互派留学生、访问学者等。

6. 环境服务(Environmental Services) ,指污水处理服务 ;废物处理服务 ;卫生及相似服务等。

7. 金融服务(Financial Services) ,主要指银行和保险业及相关的金融服务活动。包括 :①银行及相关的服务 ;②保险服务等。

8. 健康及社会服务(Health-related and Social Services) ,主要指医疗服务、其他与人类健康相关服务 ;社会服务等。

9. 旅游及相关服务(Tourism and Trade-related Services) ,指旅馆、饭店提供的住宿、餐饮服务、膳食服务及相关的服务 ,旅行社及导游服务。

10. 文化、娱乐及体育服务(Recreational ,Cultural and Sporting

^① See Group on Negotiations on Services(1991) “ Services Sectorial Classification List” ,TN. GNS/W/120.

Services) 指不包括广播、电影、电视在内的一切文化、娱乐、新闻、图书馆、体育服务等。

11. 交通运输服务(Transport Services) ,主要包括 :货物运输服务 ,如航空运输、海洋运输、铁路运输、管道运输、内河和沿海运输、公路运输服务等等。

12. 其他服务(Others)

WTO 网站([www. wto. org](http://www.wto.org))中《服务部门清单》(List of Sectors)^①所具体列出的服务部门则有 22 个 ,它们是(1)会计服务(Accountancy Services) (2)广告服务(Advertising Services) (3)建筑和工程服务(Architectural and Engineering Services) (4)视听服务(Audiovisual Services) (5)商业服务(Business Services) (6)计算机和相关服务(Computer and Related Services) (7)建设和相关工程服务(Construction and Related Engineering Services) (8)销售服务(Distribution Services) (9)教育服务(Education Services) (10)能源服务(Energy Services) (11)环境服务(Environmental Services) (12)快递服务(Express Delivery Services) (13)金融服务(Financial Services) (14)健康及社会服务(Health and Social Services) (15)法律服务(Legal Services) (16)后勤及相关服务(Logistics and Related Services) (17)邮政和快寄服务(Postal and Courier Services) (18)职业服务(Professional Services) (19)体育服务(Sporting Services) ; (20)电讯(Telecommunications) (21)旅游服务(Tourism Services) ; (22)运输服务(Transport Services)。

上述这些服务均在 WTO《服务贸易总协定》管辖范围之内。

① Available at [http ://www. wto. org/english/tratop _ e/serv _ e/serv _ sectors _ e. htm](http://www.wto.org/english/tratop_e/serv_e/serv_sectors_e.htm)

第二节 WTO 关于服务贸易的最惠国 待遇原则、国民待遇原则 和市场准入规则

Principles of Most-Favoured-Nation Treatment and National Treatments as well as Market Access Rules under GATS

一、最惠国待遇原则(Principle of Most-Favoured-Nation Treatment)

如前所述 ,最惠国待遇原则是 WTO 最基本的原则之一。在服务贸易领域 ,最惠国待遇原则的内容是 :

With respect to any measure , excepted that listed in the Annex on Article II Exemptions , covered by GATS , each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.

对于《服务贸易总协定》下的任何措施(《关于第 2 条豁免的附件》所列措施除外) ,每一成员应立即和无条件地给予任何其他成员的服务和服务提供者不低于任何其他国家相同服务和服务提供商所享有的待遇。

However , according to Article 2. 3 of this Agreement , it is not so construed as to prevent any Member from conferring or according advantages to adjacent countries in order to facilitate exchanges limited to contiguous frontier zones of services that are both locally produced and con-

sumed.

但根据该协定第 2.3 条,任何成员可对相邻国家授予或提供优惠,以便利其生产和消费的服务在这些毗连边境区进行交换。

二、国民待遇原则(Principle of National Treatments)

WTO《服务贸易总协定》中与国民待遇原则有关的规定有下述三项:

1. In the sectors inscribed in its Schedule , and subject to any conditions and qualifications set out therein , each Member shall accord to services and service suppliers of any other Member , in respect of all measures affecting the supply of services , treatment no less favourable than that it accords to its own like services and service suppliers.

1. 在减让表规定的服务部门中及在受到减让表所规定的条件和限制约束的前提下,每个成员在影响服务提供的所有措施方面给予任何其他成员的服务或服务提供者的待遇不应低于其给予国内相同服务或服务提供者的优惠待遇。

2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member , either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.

2. 一个 WTO 成员给予任何其他成员的服务或服务提供者的待遇,在形式上与其给予国内相同的服务或服务提供者的待遇相同或不相同。在这种情况下,上述要求也得以满足。

3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like

services or service suppliers of any other Member.

3. 如果形式上相同的或不相同的待遇使竞争条件调整至有利于本国的服务和服务提供商而不利于任何其他成员的服务或服务提供商,则这些形式上相同的或不相同的待遇应被认为是低于优惠待遇。

从上述规则中可以看出,WTO与关于商品贸易的国民待遇原则最基本的不同是,服务贸易的国民待遇原则既涉及到“服务”(Services),也涉及到“服务提供者”(Services Providers)。除此之外,两者还有以下几个方面的差异:

1. 在商品贸易中那种俗称为“爱邻如爱己”(love thy neighbour as thyself)^①的国民待遇原则是一般性原则,但WTO对服务贸易所确立的国民待遇原则有具体的条件限制。根据上述第1项的规定,其他WTO成员的服务和服务提供商能否享有一个WTO成员的国民待遇要受到减让表所规定的条件和限制的约束。减让表,即“具体承诺减让表”(Schedules of Specific Commitments),是WTO各成员针对服务部门所作的承诺,其内容包括市场准入的规定、限制和条件,国民待遇的条件和限制,与不受减让表约束的影响服务贸易的措施(包括限制、标准和许可等)有关的附加承诺,履行这些承诺的时间框架以及这些承诺的生效日期等。WTO成员在自承诺生效之日起已过3年的任何时间里可以修改或撤销其减让表中的任何承诺。WTO关于服务贸易的有条件的国民待遇原则使各成员可根据其国内政策决定是否给予其他成员的服务和服务提供商以国民待遇。

2. WTO关于服务贸易的国民待遇原则的标准要求较商品贸易中的国民待遇原则为低。根据上述第2项规定,一成员可以给予其

① Aaditya Mattoo 'National Treatment in the GATS', Journal of World Trade, Vol. 31, No. 1, 1997 P107.

他成员相同的服务和服务提供商有差别的国民待遇 ,只要这种差别待遇同样存在于国内相同的服务和服务提供商之间。据此可能会出现这样的结果 ,即其他成员的某些服务或服务提供商不能享有本国某些服务或服务提供商所享有的国民待遇(如图 7 - 1 所示)。但这是符合 WTO 关于服务贸易的国民待遇原则的。

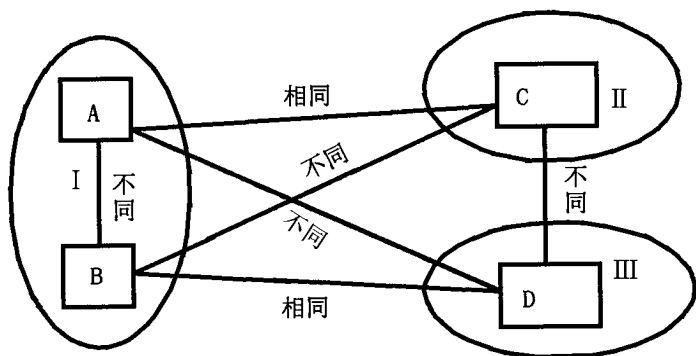


图 7 - 1 有差别的国民待遇

资料来源 编者编制。

说明：

- ① I 为一个 WTO 成员 ,II、III 为另一个 WTO 成员或另两个不同的 WTO 成员；
- ② A、B 为一个 WTO 成员内享有不同国民待遇(如 A 较 B 享有更优惠的国民待遇)的相同服务或服务提供商 ,C、D 为任何其他 WTO 成员内享有 I 成员给予的不同的国民待遇的相同服务或服务提供商；
- ③ D 与 A 享有的国民待遇是不同的(如 D 不能享有 A 所享有的国民待遇) ,C 与 B 享有的国民待遇也不同。

3. 一个 WTO 成员可给予任何其他成员的服务或服务提供商以“超国民待遇”(Super-national Treatment)。从上述第 1 项规定还可看出 ,原则上 ,一个 WTO 成员给予其他成员的服务和服务提供商的待遇不应低于其给予国内相同服务或服务提供商的优惠待遇 ,而对

于是否可以给予其他成员服务和服务提供商较国内相同的服务和服务提供商高的待遇(即“超国民待遇”)则不作限制。事实上,WTO《服务贸易总协定》第5条(“经济一体化”)第3项则明确规定,在参加服务贸易自由化协定的成员国为发展中国家时,协定成员内实质从事服务贸易活动的法人可享受更优惠的待遇(More Favourable Treatment)。

三、市场准入规则(Market Access Rules)

WTO《服务贸易总协定》第16条确定了WTO服务贸易项下市场准入的一般规则。

WTO requires that, in sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:

WTO要求各成员对其作出市场准入承诺的部门,不得在部分区域或其全境内维持或采取如下措施(除非在其减让表中另有规定):

(a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;

(1)无论以数量配额、垄断、专营服务提供者的形式,还是以经济上要求进行必需的测试形式对服务提供者实施数量限制;

(b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;

(2)以数量配额或经济上要求进行必需的测试的形式对服务交易总值或资产总值的限制;

(c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test ;

(3)以配额或经济上要求进行必需的测试的形式 ,限制服务量或以特定数量单位表示的服务产出总量 ;

(d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for , and directly related to , the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test ;

(4)以数量配额或经济需求测试要求的形式 ,限制特定服务部门或服务提供者可雇佣的、提供具体服务所必需且直接有关的自然人总数 ;

(e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service ;

(5)限制或要求服务提供者通过特定类型的法律实体或合营企业提供服务的措施 ;

(f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

(6)以外国股权最高百分比限制或单笔或总体外国投资总额限制的方式限制外国资本的参与。

第三节 服务贸易一体化

Integration in Trade of Services

一、服务贸易一体化的定义(Definition of Integration in Trade of Services)

在现有的服务贸易发展水平上 ,服务贸易一体化是指服务部门的一体化。

Any of WTO Members shall not be prevented from being a party to or entering into an agreement liberalizing trade in services , provided that such an agreement : (a) has substantial sectoral coverage , and (b) provides for the absence or elimination of substantially all discrimination between or among the parties in the covered sectors through elimination of existing discriminatory measures and/or general prohibition of new or more discriminatory measures.

任何 WTO 成员都可以成为服务贸易自由化协定的参加方或达成服务贸易自由化协定 ,只要这样的协定 (1)有具体的部门范围 ,且 (2)通过消除现行的和 (或)普遍禁止新的或更多的歧视性措施 ,在协定涵盖的部门内 ,在各参加方之间不实施或消除所有的差别待遇。

二、WTO 服务贸易一体化的基本原则(Basic Principles of Integration of Trade in Services)

从 WTO《服务贸易总协定》第 5 条及第 5(bis)条可归纳出以下 WTO 关于服务贸易一体化的基本原则 :

1. Any integration agreement on trade in services shall be designed to facilitate trade between the parties to the agreement and shall not in respect of any Member outside the agreement raise the overall level of barriers to trade in services compared to the level applicable prior to such

an agreement.

1. 任何服务贸易一体化协定都旨在促进协定参加方之间贸易的发展,而不对协定外的任何 WTO 成员较先前提高服务贸易壁垒的整体水平。

2. A service supplier of any other Member that is a juridical person constituted under the laws of a party to an agreement shall be entitled to treatment granted under such agreement, provided that it engages in substantive business operations in the territory of the parties to such agreement.

2. 任何其他成员的服务提供者,若属于根据一个协定参加方的法律所设立的法人,则可享受该协定项下给予的待遇,只要该服务提供商在该协定的参加方境内从事实质性商业经营活动。

3. WTO Member which is a party to any agreement referred to above may not seek compensation for trade benefits that may accrue to any other Member from such agreement.

3. 任何属于上述服务贸易一体化协定参加方的 WTO 成员,不应因任何其他成员从此协定中获得贸易利益而要求对方予以补偿。

4. The Council for Trade in Services establishes a working party to examine such an agreement or enlargement or modification of that agreement and to report to the Council on its consistency with the integration provisions concerned.

4. 服务贸易理事会建立一个工作组来审查这样一种协定或这种协定的扩大和调整。工作组向理事会报告该协定是否与有关的一体化规定相一致。

5. Not preventing any of Members from being a party to an agree-

ment establishing full integration^① of the labour markets , provided that such an agreement (a) exempts citizens of parties to the agreement from requirements concerning residency and work permits (b) is notified to the Council for Trade in Services.

5. 不阻止任何成员成为实现劳动力市场完全一体化协定的参加方 ,只要这一协定 (1)对协定参加方的公民免除有关居留和工作许可的要求 (2)通知服务贸易理事会。

三、实现服务贸易一体化的途径(Achieving Approaches of Integration in Trade of Services)

WTO《服务贸易总协定》提出实现服务贸易一体化的途径主要有两条^② (1)通过“承认”(Recognition)实现服务贸易一体化 ;2、通过各成员“国内法规”(Domestic Regulation)的协调实现服务贸易一体化。当然 ,服务贸易应以渐进自由化(Progressive Liberalization)模式发展。

(一)“承认”及其规则(Recognition and Rules Thereof)

WTO 认为 ,“承认”是各 WTO 成员服务部门实现一体化的有效方式。WTO《服务贸易总协定》第 7.1 条所定义的“承认”是指 :

A Member may recognize the education or experience obtained , requirements met , or licenses or certifications granted in a particular country. Such recognition , which may be achieved through harmonization or otherwise , may be based upon an agreement or arrangement with the

① See Article VI and VII of GATS.

② According to the Note to Article V bis of GATS , such integration provides citizens of the parties concerned with a right of free entry to the employment markets of the parties and includes measures concerning conditions of pay , other conditions of employment and social benefits.

country concerned or may be accorded autonomously.

一成员可承认在特定国家已获得的教育或经历、已满足的要求、或已给予的许可或证明。这种可通过协调或其他方式实现的承认，可依据与有关国家的协定或安排给予，也可自动给予。

Where a Member accords recognition autonomously, it shall afford adequate opportunity for any other Member to demonstrate that education, experience, licenses, or certifications obtained or requirements met in that other Members territory should be recognized.

若一个 WTO 成员自动予以承认，则应向任何其他成员提供充分的机会让其说明在其境内接受的教育、获得的经历、许可或证明以及满足的要求应得到承认。

Recognition should be based on multilaterally agreed criteria. In appropriate cases, Members shall work in cooperation with relevant inter-governmental and non-governmental organizations towards the establishment and adoption of common international standards and criteria for recognition and common international standards for the practice of relevant services trades and professions.

承认即应以多边议定的准则为依据。当情况合适时，各成员应与有关政府间组织或非政府组织合作，以制定和采用关于承认的共同国际标准和准则以及有关服务行业和职业的公认的普遍接受的国际标准。

Not according recognition in a manner which would constitute a means of discrimination between countries in the application of standards or criteria for the authorization, licensing or certification of services suppliers, or a disguised restriction on trade in services.

在对服务提供商适用获得授权、许可或证明的标准或准则时,给予承认的方式不得构成在各国之间实施差别待遇的手段,或构成对服务贸易的变相限制。

(二)WTO 成员国内法规的协调(Harmonization of Domestic Regulations of WTO Members)

WTO《服务贸易总协定》第6条对服务贸易的“国内法规”作了如下原则要求:

All measures affecting trade in services are administered in a reasonable, objective and impartial manner, while ensuring that measures do not constitute unnecessary barriers to trade in service. What is more, the measures relating to qualification requirements and procedures, technical standards and licensing requirements shall be based on objective and transparent criteria and not be more burdensome than necessary to ensure the quality of the service, and, in the case of licensing procedures, not be in themselves a restriction on the supply of the service.

所有影响服务贸易的措施都应以合理、客观和公正的方式实施,不能构成对服务贸易的不必要的障碍。而且,各成员的与资格要求、程序、技术标准、许可要求有关的措施应客观、透明,在确保服务质量之外不再增加服务提供商的负担;许可程序本身也不能构成对服务贸易的限制。

In sectors where specific commitments regarding professional services are undertaken, each Member shall provide for adequate procedures to verify the competence of professionals of any other Member.

在已就专业服务作出具体承诺的部门,每一成员应规定适当程序,以核验任何其他成员的专业人员的能力。

但由于 WTO 各成员针对其特定的服务部门(如通讯服务、教育服务等等)通过制定特定的国内贸易政策来维护自身利益和权利,所以 WTO《服务贸易总协定》第 6.2 条又规定:

Maintain or institute judicial, arbitral or administrative tribunals or procedures for the prompt review of administrative decisions affecting trade in services shall not be construed to require a Member to institute such tribunals or procedures where this would be inconsistent with its constitutional structure or the nature of its legal system.

维持或设立司法、仲裁或行政法庭或程序来对影响服务贸易的行政决定迅速进行审查,不是要求一个 WTO 成员设立与其宪法结构或法律体系本质不一致的法庭或程序。

(三) 渐进自由化(Progressive Liberalization)

The progressive liberalization aims at achieving the objectives of GATS. WTO calls for the process of liberalization take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors. There shall be appropriate flexibility for individual developing country Members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation.

服务贸易渐进自由化目的在于实现《服务贸易总协定》所确立的目标。WTO 要求自由化进程中应适当尊重各成员的国家政策目标及其总体和各部门的发展水平。对个别发展中国家成员应予以适当的灵活性,他们可以开放较少的部门、放开较少类型的交易、以符合其发展状况的方式逐步扩大市场准入。

第四节 WTO 服务贸易保护规则

WTO Rules on the Protection of Service Trade

一、一般豁免与安全豁免(General Exceptions and Security Exceptions)

《服务贸易总协定》第 14 条规定了下述有关一般豁免的规则。

Nothing in GATS shall be construed to prevent the adoption or enforcement by any Member of such measures , unless they are applied in a manner of arbitrary or unjustifiable discrimination , or cause a disguised restriction on trade in services , as :

WTO《服务贸易总协定》不阻止其任何成员采取或实施以下措施(只要这些措施不是武断地或不合理地歧视性地予以实施 , 或对服务贸易产生变相的限制) :

1. necessary to protect public morals or to maintain public order ;
1. 为维护公共道德或公共秩序所必需的措施。

2. necessary to protect human , animal or plant life or health ;
2. 为保护人类、动物或植物生命或健康所必需的措施。

3. necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to :

(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts ;

(ii)the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts ;

(iii)safety ;

3. 确保与《服务贸易总协定》的规定不相抵触的法律或法规得到遵守所必需的措施 ,包括与下列内容有关的法律或法规 :

(1)防止欺骗和欺诈行为或处理服务合同违约而产生的影响 ;

(2)保护与个人信息处理和传播有关的个人隐私及保护个人记录和账户的机密性 ;

(3)安全。

4. inconsistent with national treatment under GATS , while ensuring the equitable or effective imposition or collection of direct service taxes ;

4. 为保证公平或有效的服务课税而与《服务贸易总协定》下国民待遇原则不一致的措施。

5. inconsistent with MFN under GATS , while avoiding double taxation.

5. 为避免双重课税而与《服务贸易总协定》下最惠国待遇原则不一致的措施。

WTO《服务贸易总协定》还规定了所谓“安全豁免”的规则 ,即允许各成员为维护至关重要的安全利益(Essential Security Interests) ,可以不向服务贸易理事会提供有关的信息等^①。

二、为维护国际收支而对服务贸易的限制(Restrictions on

^① In the specific Security Exceptions , see Article XIV bis of GATS.

Trade in Services to the Balance of Payments)

According to Article XII of GATS , in the event of serious balance-of-payments and external financial difficulties or threat thereof , a Member may adopt or maintain corresponding restrictions(i. e. corrective measures) on trade in services on which it has undertaken specific commitments , including on payments or transfers for transactions related to such commitments. However , the restrictions shall be temporary and be phased out progressively as the situation improves.

根据 WTO《服务贸易总协定》第 12 条 ,若发生严重国际收支和对外财政困难或面临其威胁 ,一个 WTO 成员可对其已作出具体承诺的服务贸易 ,包括与此种承诺有关的交易的支付和转让 ,采取或维持相应的限制(即实施纠正措施)。但这种限制是临时的 ,并应随着情况的改善而逐步取消。

In determining the incidence of such restrictions , the priority may be given to the supply of services which are more essential to Member's economic or development programmes. However , such restrictions shall not be adopted or maintained for the purpose of protecting a particular service sector.

在决定这种限制的范围时 ,WTO 成员可优先考虑对其经济或发展计划至关重要的服务的提供问题。不过 ,适用或维持这种限制不能以保护某一特定的服务部门为目的。

What should be mentioned is that aforesaid provisions may , in particular , adopt to the Members of economic transition with financial pressures.

需提及的是上述这些规定特别适用于面临财政压力的经济转型成员。

三、服务贸易紧急保障措施(Emergency Safeguard Measures Applying to Service Trade)

关于服务贸易的紧急保障措施是 WTO《服务贸易总协定》所涉及的一个特殊问题。但 WTO《服务贸易总协定》对此并没有同一般商品贸易那样规定具体的规则 , 只在第 5 条提出了一些原则性的要求。

1. The emergency safeguard measures applying to trade in services shall base on the principle of non-discrimination.

1. 服务贸易紧急保障措施规则应以非歧视性原则为基础。

2. In the period before the entry into effect of such emergency safeguard measures , any Member may modify or withdraw a specific commitment after a period of one year from the date on which its commitment enters into force , provided that the Member shows cause to the Council for Trade in Services that the modification or withdrawal cannot await the lapse of the three-year period from the date on which that commitment entered into force.

2. 在这种紧急保障措施生效之前 , 任何 WTO 成员在其承诺生效 1 年之后 , 可以修改或撤消特定的承诺 , 只要该成员向服务贸易理事会申明其为何不能等到承诺生效 3 年之后再修改或撤消承诺。

The provisions above shall cease to apply three years after the date of entry into force of the WTO Agreement.

这一规定在《WTO 协定》生效 3 年后不再适用。

最后须补充的是 , WTO 成员可在减让表中任何承诺生效 3 年后修改或撤销该承诺。修改或撤销承诺应通过谈判并达成协议 ; 若不

能达成协议 ,可提交仲裁 ;若仲裁未果 ,任何受影响的成员可以修改或终止相应的承诺^①。

本章小结

本章介绍了 WTO 服务贸易规则。WTO 服务贸易规则既管辖“服务”,也管辖“服务提供者”。WTO 关于服务贸易的最惠国待遇原则、国民待遇原则及市场准入规则特点明显。随着服务业重要性的日益提高《服务贸易总协定》为 12 个服务部门所确立的“一体化”、“承认”等运行规则将更加重要。

思考题

1. 服务贸易有哪几种提供方式?
2. WTO《服务贸易总协定》所确立的“国民待遇原则”有何特殊性?
3. 简述实现服务贸易一体化的模式。
4. 简述 WTO 关于实施《服务贸易总协定》中的一般豁免规则。

^① See Article XXI of GATS.

第八章 WTO 反倾销规则

WTO Anti-dumping Rules

WTO 反倾销规则是由 WTO《反倾销协定》规定的。WTO《反倾销协定》全称是《关于实施 关税与贸易总协定 1994 第 6 条的协定》(Agreement on Implementation of Article VI of the GATT 1994)^①。顾名思义,可以说 WTO《反倾销协定》是《GATT 1994》第 6 条的实施细则。众所周知,反倾销是一种重要的并被广泛使用的贸易保护手段,但 WTO 各成员具体实施反倾销措施时要受到 WTO 反倾销规则的约束。

第一节 WTO 倾销认定规则

WTO Rules on the Determination of Anti-dumping

一、倾销的基本定义(Basic Definition of Dumping)

WTO《反倾销协定》第 2.1 条对“倾销”作了一个基本定义:

A product is introduced into the commerce of another country at less than its normal value, if its export price is less than the comparable price in the ordinary course of trade for the like product when destined for consumption in the exporting country.

一产品以低于正常价值的价格进入另一国的商业领域,若其出

^① It consists of 3 parts, 18 articles and 2 annexes.

口价格低于在正常贸易过程中出口国供国内消费的相同产品的可比价格。

这一基于市场经济条件的基本定义一方面明确规定了反倾销措施只能适用于进入商业领域的进口产品 ;另一方面 ,它又涉及以下三个重要概念 :

1. 正常价值(Normal Value)

事实上上述定义中 “ 出口国供国内消费的相同产品的可比价格 ”即是一种最基本的“ 正常价值 ”。除此之外 ,正常价值还可以是 :

(a) a comparable price of the like product when exported to an appropriate third country ;

(b) the cost of production in the country of origin plus a reasonable amount for administrative , selling and general costs and for profits (i. e. constructed price).

(1)相同产品出口至一适当第三国的可比价格 ;

(2)原产国的生产成本加合理数量的管理、销售和一般费用及利润(即结构价格)。

后一种正常价值通常适用于所谓的“ 非市场经济国家 ”(Non-market Economy Countries)出口的产品。对这两种正常价值 ,WTO《反倾销协定》没有规定在何种条件下哪种正常价值优先适用。

2. 正常的贸易过程(Ordinary Course of Trade)

根据 WTO《反倾销协定》第 2.2.1 条和第 2.3 条 ,以下情况下的出口 ,即不是在“ 正常的贸易过程 ”中进行 :

(a) Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below constructed price may be treated as not being in the ordinary course of trade if such sales are made within an extended period of time (normally one year , but in no

case less than six months) in substantial quantities^① and are at prices which do not provide for the recovery of all costs within a reasonable period of time ;

(1)相同产品以低于结构价格在出口国国内市场销售或销往第三国 ,若在一持续时间内(一般为 1 年 ,但无论如何不能少于 6 个月)大量销售且不能在一段合理时间内收回成本 ;

(b) the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party.

(2)出口商与进口商或第三方之间结成联盟或作出补偿性安排 ,从而使出口价格不可信赖。

3. 相同产品(Like Product)

According to Article 2. 6 of WTO Anti-dumping Agreement , like product means a product which is identical , i. e. alike in all respects to the product under consideration , or in the absence of such a product , another product which , although not alike in all respects , has characteristics closely resembling those of the product under consideration.

根据 WTO《反倾销协定》第 2. 6 条 ,相同产品是指同样的产品 ,即与所涉进口产品在所有方面都相同 ;或 ,若没有这样的产品 ,则具有与该进口产品非常相似的特性的产品。

① Sales below per unit costs are made in substantial quantities when the weighted average selling price of the transactions is below the weighted average per unit costs , or that the volume of sales below per unit costs represents not less than 20 per cent of the volume sold in transactions.

这个“相同产品”概念较为笼统,没有明确地规定是否要考虑产品性能、生产技术、销售渠道、最终用途等因素。而且,相比之下,从产品的可替代性来定义“相同产品”则科学得多^①。例如,将相同产品定义为“它是由相同的产品再加非相同的但直接竞争的或可替代的产品构成”将更为合理。

二、确定倾销幅度(Determination of Dumping Margin)

WTO《反倾销协定》第 2.4 条针对如何确定倾销幅度制定了以下主要原则:

The dumping margin is determined by a fair comparison made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time.

通过公平地比较出口价格和正常价值来确定倾销幅度。这种比较应在相同贸易水平(通常以出厂价为基础)上进行,且尽可能针对同一时期销售的相同产品。

Specifically, the existence of margins of dumping shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions, or by a comparison of normal value and export prices on a transaction-to-transaction basis, or a weighted average normal value with prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods.

^① 详见笔者的一篇论文《反倾销损害分析的经济学方法及其应用》,载《外国经济与管理》1998 年第 11 期。

具体说来 ,即通过比较加权平均正常价值与全部可比出口交易的加权平均价格 ,或每笔交易(Transaction to Transaction)的正常价值与出口价格来确定倾销幅度 ,或加权平均正常价值与单笔出口交易价格(若出口价格在不同购买者、地区或时间之间差异很大)来确定倾销幅度。

第二节 WTO 关于倾销所造成的 损害的认定规则

WTO Rules of the Determination of Injury Caused by Dumping

一、“ 损害 ”认定在反倾销中的意义(Meaning of the Determination of Injury in Anti-dumping)

WTO 关于倾销所造成的损害的认定规则是 WTO 反倾销机制中最重要的内容。WTO《反倾销协定》第 1 条即明确规定实施反倾销措施的一般原则：

An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Anti-dumping Agreement.

反倾销措施仅(only)应适用于《GATT 1994》第 6 条所规定的情况 ,并应根据 WTO《反倾销协定》的规定发起和进行反倾销调查。

《GATT 1994》第 6 条(“ 反倾销税和反补贴税 ”)规定了实施反倾销措施的一般前提条件 ,即倾销及其损害之间存在因果关系。所以对进口产品实施反倾销措施只能在满足这样的条件下进行。简言之 ,没有倾销、没有由倾销所造成的损害即不能采取反倾销措施。但

在我国的现行《反倾销条例》第 56 条中,规定除因倾销及其损害可以采取反倾销措施之外;“任何国家(地区)对中华人民共和国的出口产品采取歧视性反倾销措施的,中华人民共和国可以根据实际情况对该国家(地区)采取相应的措施(即对该国进口产品也报复性地采取反倾销措施——笔者注)。”这是我国适用反倾销制度的特殊情况。当然,也因其不符合上述 WTO 反倾销规则及 WTO 贸易争端解决机制下的贸易报复规则而受到 WTO 其他成员的质疑,其操作性也受到很大的限制。

二、“损害”的定义及其认定(Definition of Injury and Determination Thereof)

The definition of injury under WTO anti-dumping rules is of broad one. It is taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of establishment of such an industry.

WTO 反倾销规则所定义的“损害”是一个广义上的“损害”。它是指对一个国内产业造成严重损害、严重损害威胁,或实质性地阻碍这样一个国内产业的建立。

这个损害定义涉及到四个概念:国内产业;严重损害;严重损害威胁;实质性地阻碍国内产业的建立。

1. 国内产业(Domestic Industry)

国内产业可由产品范围或地域范围来定义。合理确定“国内产业”的产品范围和地域范围是反倾销中的一个重要问题,产品范围和地域范围的大小对认定“损害”成立与否有着实质性的影响。

According to Article 4 of WTO Anti-dumping Agreement, the term “domestic industry” is interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output

of the products constitutes a major proportion of the total domestic production of those products.

根据 WTO《反倾销协定》第 4 条“国内产业”这一术语是指相同产品的所有国内生产商,或指其总产量占相同产品国内总产量大部分的国内生产商。

可见,据产品范围所确立的国内产业是由前述“相同产品”所定义的产品范围决定的。

However, the producers above are not related^① to the exporters or importers or are not themselves importers of the allegedly dumped product. Furthermore, where there is a concentration of dumped imports into an isolated market of the territory of one member while the demand in such market originally supplied only by producers located in that market and these producers sell all or almost all of their production of the product in that market, the producers in such market are regarded as a separate domestic industry. Of course, the anti-dumping duties are levied only within that market.

但上述生产商与进出口商没有关联或其本身并不是被诉倾销产品的进口商。而且,若倾销产品集中销往一个 WTO 成员境内的区域市场,但该市场对这种产品的需求原来主要由居于该市场内的生产商提供且这些生产商所生产的产品全部或几乎全部在这一市场销售,则这一市场内的生产商被视为一个独立的国内产业。当然,反倾

① Here, the word “related” means, between the exporters and importers, (a) one of them directly or indirectly controls the other; or (b) both of them are directly or indirectly controlled by a third person; or (c) together they directly or indirectly control a third person. In a word, the former is legally or operationally in a position to exercise restraint or direction over the latter. See Note to Article 4.1(i) of WTO Anti-dumping Agreement.

销税也仅在该市场内征收。

On the other hand , where two or more countries have formed a single , unified market through integration , the industry in the entire area of integration will be taken to be the domestic industry.

另一方面 ,若两个或两个以上国家通过一体化建立了一个统一的统一市场 ,则整个一体化地区的产业被视为“ 国内产业 ”。

所以从地域范围上看 ; “ 国内产业 ”可延伸至另一 WTO 成员市场 ,也可仅涉及本国国内市场的一部分。

2. 实质性损害(Material Injury)

An injury is determined based on an objective examination of the aspects such as (a) the volume of the dumped imports ;(b) the effect of the dumped imports on prices in the domestic market for like products ;and (c) the consequent impact of these imports on domestic producers of such products.

实质性损害是依据对以下方面的客观审查认定的 (1)倾销产品进口量 (2)倾销产品对国内市场相同产品的影响 (3)这些倾销产品对该产品国内生产商所造成的结果性影响。

Specifically , all the economic factors and indices related to the operation of domestic industry will be considered synthetically such as whether there has been a significant increase in dumped imports either in absolute terms or relative to production or consumption in the importing Member ; whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member , or whether the effect of such imports is otherwise to depress prices to a significant degree , or prevent price increases , which

otherwise would have occurred , to a significant degree ; actual and potential decline in sales , profits , output , market share , productivity , return on investments , or utilization of capacity ; factors affecting domestic prices ; the magnitude of the margin of dumping ; actual and potential negative effects on cash flow , inventories , employment , wages , growth , ability to raise capital or investments. This list is not exhaustive.

具体说来 ,要综合考虑与国内产业经营状况有关的所有经济因素和指标 ,如 :倾销进口产品的绝对数量或相对于进口成员中生产或消费的数量是否大幅增加 ;倾销进口产品是否大幅削低价格 ,或此类进口产品的影响是否是大幅压低价格 ,或是否在很大程度上抑制在其他情况下本应发生的价格增长 ;销售、利润、产量、市场份额、生产力、投资收益或设备利用率是否出现实际和潜在的下降 ,影响国内价格的因素 ,倾销幅度大小 ;对国内产业现金流动、库存、就业、工资、增长、筹措资金或投资能力的实际和潜在的不利影响。以上列举的因素和指标并非全部。

According to Article 3.5 of WTO Anti-dumping Agreement , causal relationship between the dumped imports and the injury to the domestic industry must be demonstrated. The injury caused by any known factors other than the dumped imports , must not be attributed to the dumped imports. These factors include , inter alia , the volume and prices of imports not sold at dumping prices , contraction in demand or changes in the patterns of consumption , trade restrictive practices , competition between the foreign and domestic producers , developments in technology and the export performance and productivity of the domestic industry.

根据 WTO《反倾销协定》第 3.5 条 ,要证明倾销与其对国内产业损害之间要有因果关系。除倾销产品之外的其他因素所造成的损害不能归咎于倾销产品。这些因素尤其包括不以倾销价格销售的进口

产品数量和价格、需求减少或消费模式的改变、贸易限制做法、外国生产商与本国生产商之间的竞争、技术的发展、本国产业的出口实绩及生产率。

3. 实质性损害威胁(A Threat of Material Injury)

根据 WTO《反倾销协定》第 3.7 条 ,实质性损害必须是明显的可预见并且是迫近的(must be clearly foreseen and imminent) ,不能仅仅依据宣称、推测或遥远的可能性(not merely on allegation , conjecture or remote possibility)。

WTO requires that such factors be consider , inter alia , as :

WTO 要求要着重考虑以下因素 :

(i) a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation ;

(1)倾销进口产品进入国内市场的大幅增长率 ;它用以表明进口实质增加的可能性。

(ii) sufficient freely disposable , or an imminent , substantial increase in , capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member's market , taking into account the availability of other export markets to absorb any additional exports ;

(2)出口商可充分自由处置的或即将实质增加的生产或出口能力 ;它表明补贴出口产品进入进口成员市场实质增加的可能性。同时考虑是否有可消化任何额外出口的其他出口市场。

(iii) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices , and would like-

ly increase demand for further imports ;

(3)进口产品是否以大幅度抑制或压低国内价格方式进入 ;是否会要求扩大进口。

(iv) inventories of the product being investigated.

(4)被调查产品的库存情况。

Through the total consideration of these factors , the conclusion must be lead to that further dumped exports are imminent and that , unless protective action is taken , material injury would occur.

通过全盘考虑这些因素必须得出如下结论 :倾销产品将更多地出口是迫近的 ,且除非采取保护性行动 ,否则实质损害将会发生。

4. 实质性地阻碍国内产业的建立(Material Retardation of Establishment of A Domestic Industry)

对此 ,WTO《反倾销协定》未作定义。但 WTO 成员的一些刚刚建立或正处于发展初步阶段的特定产业部门更有可能以竞争性的进口产品实质性地阻碍国内产业的建立为由而要求本国反倾销机关对国外进口产品实施反倾销行动 ,如韩国就曾以其新建企业未能按原定计划在开始运营的头三年内达到盈亏平衡点(Profit-and-Loss Point)而认定倾销的进口产品对国内产业造成了损害 ,并以此对国外进口产品采取反倾销措施^①。

^① 韩国对日本预敏化印刷线路板(PS 板)反倾销案(1993 年) ,可参考笔者的一篇论文 :《论韩国反倾销法》,载《外国经济与管理》1997 年第 6 期。

第三节 WTO 反倾销证据规则

WTO Rule of Anti-dumping Evidence

WTO《反倾销协定》第 6 条及与该条有关的关于“现场调查程序”(Procedures for On-The-Spot Investigations)和“最佳可获得信息”(Best Information Available, BIA)两个附录确立了反倾销中倾销及其损害证据获得与适用的基本规则。

一、证据的来源(Sources of Evidences)

(一)调查问卷(Questionnaire)

反倾销主管机关在反倾销调查中会向有关的出口商或外国生产商发放调查问卷。该问卷涉及与倾销与损害有关的基本信息,它是倾销与其损害认定的重要证据来源。对此,WTO《反倾销协定》第 6.1.1 条及其相应的注释规定:

Exporters or foreign producers receiving questionnaires will be given at least 30 days for reply. An extension of the 30 days should also be granted whenever practicable.

反倾销调查机关给予接受调查表的出口商或外国生产商至少 30 天的时间来作答复。只要可行,这个 30 天的期限也可延长。

As a general rule, the time-limit for exporters is counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week from the date on which it was sent to the respondent or transmitted to the appropriate diplomatic representative of the exporting Member.

这个期限对出口商通常是从其收到调查问卷开始起算。从反倾

销调查机关将调查问卷寄给出口商或发送给 WTO 出口成员的相关外交事务代表之日起算 ,一周后 ,出口商即被认为已收到调查问卷。

(二)现场调查(On-The-Spot Investigations)

The on-the-spot investigation is carried out after the response to the questionnaire has been received. Its main purpose is to verify information provided in the questionnaire or to obtain further details. However , it is only made at the request of an exporting firm if visits are to explain the questionnaire.

现场调查是在调查问卷的答卷收到之后进行。其主要目的是证实答卷中提供的信息或掌握更多的细节。但若实地走访出口企业是为了解释调查问卷答卷内容 ,则这样的现场调查只能在出口商提出这种要求后进行。

二、最佳可获信息的适用(Application of BIA)

BIA refers to information freely available to the anti-dumping authorities , which includes those contained in the application for the initiation of the investigation by the domestic industry. Its application bases on the fact that the information required from any interested party is not supplied within a reasonable time , and the authorities have to make determinations concerned depending on these evidences.

最佳可获信息是指反倾销机关可自由获得的信息。它包括国内产业发起调查申请中包含的信息。最佳可获信息的适用是基于利益相关方不能在合理的时间内提供所要求的信息 ,反倾销机关不得不依此证据来作出有关的裁决。

So , an individual favourable margin of dumping may be determined for any exporter or producer who submits the necessary information in

time during the course of the investigation , just as Article 6.10.2 of WTO Anti-dumping Agreement stipulates that voluntary responses shall not be discouraged.

这样 ,反倾销机关会对那些在调查期内及时提交必要信息的出口商或生产商会单独裁定对其有利的倾销幅度 ,正如 WTO《反倾销协定》第 6.10.2 所规定的那样“ 主动提供信息不应受到抑制 ”。

第四节 WTO 反倾销重要程序规则

Major WTO Rules of Anti-dumping Procedures

一、发起调查(Initiating Investigation)

An anti-dumping investigation aims to determine the existence , degree and effect of any alleged dumping. It shall be initiated upon a written application by or on behalf of the domestic industry. The application shall include sufficient evidence of the existence of (a) a dumping , (b) injury thereof , and (c) a causal link between the dumped imports and the alleged injury.

反倾销调查用于确定被指控的倾销是否存在、其程度及其影响。这种调查应在收到国内产业或代表国内产业提出的书面申请后发起。申请应包括充足证据以证明存在(1)倾销 (2)由此造成的损害 (3)倾销进口产品与宣称的损害之间的因果关系。

Specifically , the following information shall be contained in the application :

具体说来 ,申请应包括以下信息 :

(i) the identity of the applicant and a description of the volume and

value of the domestic production of the like product by the applicant. Where a written application is made on behalf of the domestic industry , the application shall include a list of all known domestic producers of the like product (or associations of domestic producers of the like product) and , to the extent possible , a description of the volume and value of domestic production of the like product accounted for by such producers ;

(1)申请人的身份和申请人对国内相同产品产量和产值的说明。如代表国内产业提出书面申请 ,则申请应包括一份生产相同产品的所有已知国内生产商的清单(或相同产品的国内生产者协会) ,并尽可能地说明此类相同产品生产商其国内产量和产值 ;

(ii) a complete description of the allegedly dumped product , the names of the country or countries of origin or export in question , the identity of each known exporter or foreign producer and a list of known persons importing the product in question ;

(2)对受到指控的进口产品的完整说明、所涉及的一个或多个原产国或出口国、每个已知的出口商或外国生产商的身份以及一份已知的有关进口商名单 ;

(iii) information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export (or , where appropriate , information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries , or on the constructed value of the product) and information on export prices or , where appropriate , on the prices at which the product is first resold to an independent buyer in the territory of the importing Member ;

(3)该产品在原产国或出口国国内市场供消费的销售价格信息

(或其从原产国或出口国销往第三国的价格信息 ,或结构价格信息)
和出口价格信息 ,或其首次售于进口国一独立买方的价格信息 ;

(iv) information on the evolution of the volume of the allegedly subsidized imports , the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry which demonstrated by above-mentioned injury-related factors and indices.

(4)被指控的倾销产品进口量增长情况的信息 ,这些进口产品在国内市场对相同产品价格的影响及由此对国内产业的影响(这些影响由前述与损害有关的因素和指标来证明)。

An investigation shall not be initiated unless the application shall be considered to have been made “ by or on behalf of the domestic industry ” , which represents that supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However , no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.

除非申请被认为是由国内产业或代表国内产业提出的 ,否则不得发起调查。如申请得到国内生产商(其总产量占国内产业中表示支持或反对申请的国内相同产品生产商总产量 50% 以上)的支持 ,则该申请应被视为“ 由国内产业或代表国内产业提出 ”。但是 ,如表示支持申请的国内生产商的产量不足国内相同产品总产量的 25% ,则不得发起调查。

In special circumstances , the authorities concerned may initiate an

investigation of their own accord. There shall be immediate termination in cases where the margin of a dumping is de minimis (i. e. the margin is less than 2 per cent of export price) , or where the volume of dumped imports , actual or potential , or the injury , is negligible (i. e. the volume of dumped imports from a particular country is found to account for less than 3 per cent of imports of the like product in the importing Member^①). An investigation shall not hinder the procedures of customs clearance and shall , except in special circumstances , be concluded within one year , and in no case more than 18 months , after their initiation.

在特殊情况下 ,有关反倾销主管机关可主动发起调查。若倾销幅度微不足道(即倾销幅度低于出口价格的 2%)或倾销进口产品的实际或潜在进口量或其损害可忽略不计(即从特定国家进口的倾销产品量不足进口成员相同产品总进口量的 3%) ,则应立即终止调查。调查不应妨碍通关程序。除特殊情况外 ,调查应在发起后 1 年内结束 ,但决不能超过 18 个月。

二、采取临时措施(Applying Provisional Measures)

根据 WTO《反倾销协定》第 7 条 ,临时措施只有在下列情况下方可实施 :

(i) an investigation has been initiated and a public notice has been given to that effect and interested parties have been given adequate opportunities to submit information and make comments ;

① Unless countries which individually account for less than 3 per cent of the imports of the like product in the importing Member collectively account for more than 7 per cent of imports of the like product in the importing Member. See Article 5.8 of WTO Anti-dumping Agreement.

(ii) a preliminary affirmative determination has been made of dumping and consequent injury to a domestic industry ; and

(iii) the authorities concerned judge such measures necessary to prevent injury being caused during the investigation.

(1)已发起反倾销调查 ,已为此发出公告 ,且已给予利害关系方提交信息和提出意见的充分机会 ;

(2)已作出关于倾销和由此产生的对国内产业的损害的初步肯定裁定 ;

(3)有关反倾销主管机关判定此类措施对防止“ 倾销 ”进口产品在调查期间对国内产业造成损害是必要的。

The form of provisional measures may be of a provisional duty or , preferably , a security by cash deposit or bond equal to the amount of the anti-dumping duty provisionally estimated , being not greater than the provisionally estimated margin of dumping. Withholding of appraisement is an appropriate provisional measure.

临时反倾销措施形式可以是征收临时反倾销税 ,采取现金保证金或保函等担保形式则更好。担保金额等于初步估算的反倾销税税额 ,但不会比初步估算的倾销幅度更高。预扣估算的反倾销税是一种合适的临时措施。

Provisional measures shall not be applied sooner than 60 days from the date of initiation of the investigation ,and shall not exceed four months. Or upon request by exporters representing a significant percentage of the trade involved , to a period not exceeding six months.

临时反倾销措施自发起调查之日起 60 天后实施 ,实施期不超过 4 个月 ;或 ,应在所涉贸易中占很大比重的出口商请求 ,可不超过 6 个月。

三、以价格承诺方式结案(Terminating the Anti-dumping Case with Price Undertakings)

“ 承诺 ”是一种无税结案方式 ,从结果看 ,它对出口商所造成的消极影响较被课征反倾销税要轻得多。

(一)WTO《反倾销协定》下承诺的内涵(Meaning of Undertakings under WTO Anti-dumping Agreement)

The undertakings under WTO Anti-dumping Agreement referred to that , the exporter agrees to revise its prices or to cease exports of dumped products so that the investigating authorities are satisfied that the injurious effect of the anti-dumping is eliminated , and thereby anti-dumping proceedings may be suspended or terminated without the imposition of provisional measures or anti-dumping duties.

WTO《反倾销协定》下的承诺是指出口商同意修订价格或停止出口倾销产品 ,从而使调查主管机关确信消除倾销的损害性影响。由此反倾销调查程序可以中止或终止 ,而不采取临时措施或征收反倾销税。

(二)有关承诺的规则(Rules on Undertaking)

WTO《反倾销协定》第 8 条规定了有关承诺的以下规则 :

Undertakings shall not be sought or accepted unless the authorities of the importing Member have made a preliminary affirmative determination of dumping and injury caused by such dumping. On the other hand , undertakings offered need not be accepted if the authorities of the importing Member consider their acceptance impractical.

除非 WTO 进口成员的反倾销主管机关已就倾销及其损害作出初步肯定性裁决 ,否则出口商不得寻求承诺 ,进口成员也不得接受承

诺。另一方面,若进口国反倾销主管机关认为接受承诺是不可行的,则进口国不必接受承诺。

However, the acceptance of an undertaking should not affect the investigation of dumping and injury if the exporting Member so desires or the importing Member so decides. In such a case, if a negative determination of dumping or injury is made, the undertaking shall automatically lapse. Alternatively, where an affirmative determination of dumping and injury is made, the undertaking shall continue consistent with its terms and the provisions of this Agreement.

但承诺的接受不应影响倾销和损害调查的继续进行,如果出口商期望或反倾销主管机关决定这样做。在这种情况下,如作出关于倾销或损害的否定性裁决,则承诺一般自动失效;反之,如果作出关于倾销和损害的肯定性裁定,则承诺应照常适用。

Price undertakings may be suggested by the authorities of the importing Member, but no exporter shall be forced to enter into such undertakings. In case of violation of an undertaking, the authorities of the importing Member may take expeditious actions which may constitute immediate application of provisional measures using the best information available (BIA). Under the circumstance of which, the definitive duties may be levied on products entered for consumption not more than 90 days before the application of such provisional measures, except that any such retroactive assessment shall not apply to imports entered before the violation of the undertaking.

WTO 进口成员的反倾销主管机关可提出价格承诺建议,但不得强迫出口商作出此类承诺。如果出口商违反承诺,则进口成员的主管机关可采取快速行动,包括使用最佳可获得信息(BIA)立即实施临

时措施。在此种情况下 ,可对在实施此类临时措施前 90 天内进口消费品征收最终反补贴税 ,但此追溯课征不得适用于违反承诺前已进口的产品。

四、课征最终反倾销税(Imposition and Collection of Definitive Anti-dumping Duties)

WTO《反倾销协定》第 9 条、第 10 条和第 11.3 条确立了最终课征反倾销税的规则 ,这是 WTO 反倾销程序规则的最重要组成部分。

The definitive anti-dumping duty shall be collected on a non-discriminatory basis on imports of like product from all sources found to be dumped and causing injury , and the amount of which shall not exceed the margin of dumping.

最终反倾销税是在非歧视基础上对已被认定倾销并造成损害的所有来源的相同进口产品征收 ;反倾销税税额不超过倾销幅度。

The anti-dumping duty may be assessed either on a retrospective basis or on a prospective basis. In the former case , the determination of the final liability for payment of anti-dumping duties shall take place normally within 12 months , and in no case more than 18 months , after the date on which a request for a final assessment of the amount of the anti-dumping duty has been made ; while in the case of latter , a refund of any duty paid in excess of the actual margin of dumping shall normally carry out within 12 months , and in no case more than 18 months , after the date on which a request for a refund , duly supported by evidence , has been made by an importer of the product related.

反倾销税既可在追溯基础上计算 ,也可在预期基础上计算。对前者 ,最终支付反倾销税的决定通常在提出最终课征反倾销税的请求之日起 12 个月内作出 ,无论如何不能超过 18 个月 ;对后者 ,要退

还超过实际倾销幅度的任何已付反倾销税 ,退还决定通常在有关进口商提出退还请求(以适当证据支持)之日起 12 个月内作出 ,无论如何也不能超过 18 个月。实际退还通常应在作出上述决定后 90 天内完成。

Where a definitive determination of injury(but not of a threat thereof or of a material retardation of the establishment of an industry) is made or , in the case of a final determination of a threat of injury , where the effect of the dumped imports would , in the absence of the provisional measures , have led to a determination of injury , anti-dumping duties may be levied retroactively for the period for which provisional measures , if any , have been applied. On the other hand , where a determination of threat of injury or material retardation is made(but no injury has yet occurred) , a definitive anti-dumping duty may be imposed only from the date of the determination of threat of injury or material retardation , and any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

若作出损害(而不是损害威胁或实质阻碍一产业建立)的最终裁定 ,或在作出损害威胁的最终裁定的情况下 ,若不采取临时措施将会导致对倾销进口产品的影响作出损害裁决 ,则可对已经实施临时措施(若有的话)的期间追溯征收反倾销税。另一方面 ,若作出损害威胁或实质阻碍(但未产生实际的损害)的裁定 ,则最终反倾销税只能自作出损害威胁或实质阻碍的裁决之日起征收。在实施临时措施期间所交纳的任何现金保证金应迅速予以退还 ,任何担保应从速予以解除。

No duties shall be levied retroactively on products entered for con-

sumption prior to the date of initiation of the investigation. However , it may be levied on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures , when the authorities determine that (i) there is a history of dumping which caused injury or that the importer was , or should have been , aware that the exporter practises dumping and that such dumping would cause injury , and (ii) the injury is caused by massive dumped imports of a product in a relatively short time and the imported product is likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied.

不对调查发起之日前进口供消费的产品追溯课征反倾销税 ,但可对在实施临时措施之日前 90 天内进口的产品征收 ,若主管机关认定 (1)出口商有造成损害的倾销的历史 ,或进口商已经知道或理应知道出口商实行倾销且此类倾销会造成损害 (2)倾销产品在相对较短时期内的大量进口并可能严重破坏即将适用的最终反倾销税的救济效果。

In normal case , any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition.

在一般情况下 ,任何最终反倾销税应在征收之日起 5 年内终止。

五、WTO 反倾销行政复审规则(Rules of Administrative Review of Anti-dumping)

WTO《反倾销协定》所包括的行政复审可归纳为三类 :对新出口商的快速复审、“情势变迁”复审、“落日”复审。

(一)对新出口商的快速复审(The Accelerated Review for

New Exporters)

The new exporters refer to these in the exporting country in question who export the product to the importing Member only after the expiration of the period of investigation. Individual margins of dumping for new exporters will be determined through an accelerated review if it can be shown that they are not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product. No anti-dumping duties will be levied on imports from such exporters or producers while the review is being carried out.

新出口商是指受到倾销指控的出口国的一些出口商在反倾销调查期满之后才向进口国出口产品。通过快速复审为其决定单独的倾销幅度,如果证明他们与出口国中该产品被征收反倾销税的任何出口商或生产者无关联。在复审期内对该出口商或生产商出口的产品不课征任何反倾销税。

(二)“情势变迁”复审(Review under Changed Circumstances)

A reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty , and if the circumstances have changed , the authorities shall review the need for the continued imposition of the duty. If , as a result of the review , the authorities determine that the anti-dumping duty is no longer warranted , it shall be terminated immediately.

课征最终反倾销税已持续了一段合理时间,如果情况发生变化,反倾销主管机关就应复审决定是否有继续征税的必要。如复审结果表明课税已无正当理由,则应立即终止征收反倾销税。

(三)“落日”复审(Sunset Review)

Just as said above , any definitive anti-dumping duty shall be in

general terminated on a date not later than five years from its imposition. But if a review initiated before that date (called Sunset Review visually) demonstrate that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury , the duty may remain in force.

如前所述 ,任何最终反倾销税应在征收之日起 5 年内终止 ,但在 5 年到期时进行的复审(形象地称之为“ 落日复审 ”)确定反倾销税的终止有可能导致倾销和损害的继续或再度发生 ,则继续课征反倾销税。

上述“ 情势变迁 ”复审和“ 落日 ”复审通常在自复审开始之日起 12 个月内结束^①。

六、适用磋商和争端解决规则(Applying the Rules of Consultation and That under DSU)

If any Member considers that any benefit accruing to it , directly or indirectly , under this Agreement is being nullified or impaired , or that the achievement of any objective is being impeded , it may request in writing consultations with the Member or Members in question.

若任何成员认为其在本协定项下直接或间接获得的利益正在丧失或减损 ,或任何目标的实现正受到阻碍 ,则可以书面形式请求与所涉成员进行磋商。

If the Member that requested consultations considers that the consultations have failed to achieve a mutually agreed solution , and if final action has been taken by the administering authorities of the importing

^① See Article 11.4 of WTO Anti-dumping Agreement.

Member to levy definitive anti-dumping duties or to accept price undertakings, it may refer the matter to the Dispute Settlement Body (DSB).

如请求磋商的成员认为磋商未能达成双方同意的解决办法,且如果进口成员的反倾销主管机关已经采取征收最终反倾销税或接受价格承诺的最后行动,则该 WTO 成员可将此事项提交争端解决机构(DSB)。

七、WTO 成员的通知义务 (Obligation Notifying Committee on Anti-dumping Practices)

WTO calls for its Members report without delay to the Committee on Anti-dumping Practices all preliminary or final anti-dumping actions taken and also submit, on a semi-annual basis, reports of any anti-dumping actions taken within the preceding six months.

WTO 要求各成员无延迟地向 WTO 反倾销措施委员会报告所有初步和最终反倾销行动,并应每半年提交关于在过去 6 个月内采取的任何反倾销行动的报告^①。

八、WTO 关于反规避的声明 (WTO Declaration on Anti-circumvention)

WTO《反倾销协定》最终并没有规定针对规避反倾销措施的反规避规则,WTO 仅通过乌拉圭回合“部长宣言”发布了一个“关于反规避问题的决定”(Decision on Anti-circumvention):

While the problem of circumvention of anti-dumping duty measures formed part of the negotiations which preceded the Agreement on Anti-dumping, negotiators were unable to agree on specific text. It is of desir-

^① Data on use of anti-dumping measures can be found in the WTO annual report. Available at <http://www.wto.org/english/thewto-e/tif-e/agrm-7-e.htm>

ability of the applicability of uniform rules in this area as soon as possible. This matter will be referred to the Committee on Anti-dumping Practices established under that Agreement for resolution.

在达成这个《反倾销协定》之前,规避反倾销税征税措施问题即成为谈判内容的一部分。但谈判各方不能同意具体的条文。望各方在这一领域尽快地使用统一的规则。反规避问题将提交反倾销措施委员会解决。

反规避条款被排除在 WTO 现行反倾销规则之外,意味着缺乏一种国际协议以决定在多大程度上采取以及如何采取反规避措施是允许的。这为一些 WTO 成员滥用反规避措施提供了空间。

本章小结

本章介绍了 WTO 反倾销规则。WTO《反倾销协定》规定采取反倾销措施必须具备三个条件(1)倾销成立(2)损害存在(3)倾销与损害之间存在因果关系。WTO《反倾销协定》为此制定了认定的规则。同时 WTO 反倾销证据规则也颇有特点,BIA 的使用颇受争议。在 WTO 反倾销程序规则中,反倾销行政复议问题尤其值得关注。

思考题

1. 根据 WTO《反倾销协定》,如何确定“正常价值”?
2. 解释 WTO《反倾销协定》中“损害”的含义。
3. 反倾销行政复议包括哪种情形?
4. 如何评价“反规避”?

第九章 WTO 补贴与反补贴规则

WTO Rules of Subsidies and Countervailing Measures

《GATT 1994》第 6 条和第 16 条确立了 WTO 关于补贴(Subsidies)和反补贴(Anti-subsidies)的基本原则。WTO《补贴与反补贴措施协定》(Agreement on Subsidies and Countervailing Measures , SCM Agreement)^①则是 WTO 关于补贴和反补贴的实施细则 ,它所确立的反补贴的程序和实体规则与前述 WTO 反倾销程序和实体规则有很大的相似性 ,但倾销是出口商(或生产商)的行为 ,补贴是政府行为 ; WTO 是政府间组织 ,它只对政府行为加以管辖 ,所以 WTO《反倾销协定》只约束了政府的反倾销行动 ,而 WTO《补贴和反补贴措施协定》则既规范政府补贴 ,也规范了政府的反补贴措施。

第一节 补贴的定义和分类

Definition and Classification of Subsidies

一、补贴的定义(Definition of Subsidies)

WTO《补贴和反补贴措施协定》所管辖的“ 补贴 ”是指那些专项的或特定的补贴 ,通过这种补贴使补贴接受方获得利益^②。

这些补贴主要是 :

1. Financial contribution by a government , i. e. where : (i) a gov-

① There are 11 parts or 32 articles , and 7 annexes in this Agreement.

② See Article 1 of SCM Agreement.

ernment practice involves a direct transfer of funds (e. g. grants , loans , and equity infusion) , potential direct transfers of funds or liabilities (e. g. loan guarantees) ; (ii) government revenue that is otherwise due is foregone or not collected (e. g. fiscal incentives such as tax credits) ; (iii) a government provides goods or services other than general infrastructure , or purchases goods ; (iv) a government makes payments to a funding mechanism , or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice , in no real sense , differs from practices normally followed by governments.

1. 下列情况下由政府提供的财政资助 (1) 涉及资金的直接转移(如赠款、贷款和资本投入)、潜在的资金或债务的直接转移(如贷款担保) 的政府行为 (2) 放弃或未征收在其他情况下应征收的政府税收(如税收抵免等财政支持) (3) 政府提供的一般基础设施之外的货物或服务 , 或政府购买货物 (4) 政府向一资本机构提供支付 , 或委托或指示一私营机构履行上述 (1) 至 (3) 列明的一种或多种通常应属于政府的职能 , 且此种行为与政府通常补贴行为并无实质差别。

2. Any form of income or price support under Article XVI of GATT 1994 , which operates directly or indirectly to increase exports of any product from or to reduce imports of any product into , its territory.

2. GATT 1994 第 16 条下的任何形式的收入或价格支持。这种支持直接或间接地扩大实施成员的出口或减少其进口。

只有专项性的补贴方受 WTO《补贴和反补贴措施协定》的约束。确定专向性 (Specificity) 补贴应适用下列原则 :

1. Such subsidy explicitly limiting access to a subsidy to certain en-

terprises shall be specific.

1. 明确限于某些企业的补贴应属专向性补贴。

2. If adopting objective criteria or conditions governing the eligibility for , and the amount of , a subsidy , specificity shall not exist , provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to.

2. 若适用于有关补贴资格和补贴数量的客观标准或条件 ,则不存在专向性 ,只要该资格要求是自动的 ,且此类标准和条件得到严格遵守。

3. The specificity may also be established by considering such factors as use of a subsidy programme by a limited number of certain enterprises , predominant use by certain enterprises , the granting of disproportionately large amounts of subsidy to certain enterprises , and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy.

3. 专向性补贴还可通过考虑这些因素来认定 :仅许某些企业使用补贴计划、某些企业是补贴的主要使用者、给予某些企业不成比例的大量补贴以及给予补贴的政府机构在作出补贴决定时的具体决策方式。

二、补贴的分类(Classification of Subsidies)

WTO《补贴和反补贴措施协定》将补贴分为禁止性补贴、可诉补贴与不可诉补贴。禁止性补贴是无条件的禁止 ,故称为“ 红灯补贴 ”;可诉补贴是有条件的禁止 ,故称为“ 黄灯补贴 ”;不可诉补贴一般说来是允许的 ,故称为“ 绿灯补贴 ”。补贴是否具有“ 专向性 ”是区别这三种补贴的主要依据。显然 ,下述禁止性补贴都为专向性补贴。

(一) 禁止性补贴 (Prohibited Subsidies)

Except as provided in the Agreement on Agriculture, the following subsidies shall be prohibited:

除《农业协定》的规定外,下列补贴应予禁止:

(a) Subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance;

(1) 法律或事实上视出口实绩为惟一条件或其他几个条件之一而给予的补贴;

(b) Subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.

(2) 视使用国产货物而非进口货物的情况为惟一条件或其他几个条件之一而给予的补贴。

换言之,基于出口实绩而给予补贴是 WTO 所不允许的;同时 WTO 也禁止其成员不合理地以补贴为手段来鼓励使用本国货物。

(二) 不可诉补贴 (Non-actionable Subsidies)

根据 WTO《补贴和反补贴措施协定》第 8.1 条和第 8.2 条,不可诉补贴包括:

1. Subsidies which are not specific within the meaning of specificity defined above;

1. 不属前述专向性补贴;

2. The following three kinds of specific subsidies:

2. 下列三种专向补贴:

(a) assistance for research activities conducted by firms or by higher education or research establishments on a contract basis with firms if the assistance covers not more than 75 per cent of the costs of industrial research or 50 per cent of the costs of pre-competitive development activity ; and provided that such assistance is limited exclusively to : (i) costs of personnel (researchers , technicians and other supporting staff employed exclusively in the research activity) ; (ii) costs of instruments , equipment , land and buildings used exclusively and permanently (except when disposed of on a commercial basis) for the research activity ; (iii) costs of consultancy and equivalent services used exclusively for the research activity , including bought-in research , technical knowledge , patents , etc. ; (iv) additional overhead costs incurred directly as a result of the research activity ; (v) other running costs (such as those of materials , supplies and the like) , incurred directly as a result of the research activity.

(1) 对公司进行研究活动的援助或对高等教育机构或研究机构依据与有关公司所签合同进行研究活动的援助 , 若援助不超过工业研究成本的 75% 或竞争前开发成本的 50% , 且仅限于 : 人事费用 ; 用于研究活动的仪器、设备、土地和建筑物费用 ; 专门用于研究活动的咨询及相似服务的费用(包括购进研究成果、技术知识、专利等费用) ; 因研究活动而直接发生的其他一般管理费 ; 其他日常费用(如材料、补给品和其他相同物品的费用) 。

(b) assistance to disadvantaged regions , within which the assistance is non-specific , provided that : (i) each disadvantaged region must be a clearly designated contiguous geographical area with a definable economic and administrative identity ; (ii) the region is considered

as disadvantaged on the basis of neutral and objective criteria ; such criteria must be clearly spelled out in law , regulation , or other official document , so as to be capable of verification ; (iii) the criteria shall include a measurement of economic development which shall be based on at least one of the following factors : one of either income per capita or household income per capita , or GDP per capita , which must not be above 85 per cent of the average for the territory concerned ; unemployment rate , which must be at least 110 per cent of the average for the territory concerned ; as measured over a three-year period.

(2)对落后地区的援助(在该地区内这种援助是非专向的) ,但每一落后地区必须是一个明确界定的毗连地理区域 ,具有可定义的经济或行政特征 ;依据中性和客观的标准 ,该地区被视为落后地区 ;此类标准必须在法律、法规或其他官方文件中明确说明 ,以便核实 ;标准应包括衡量经济发展状况的以下至少一个因素 :人均收入或人均家庭收入 ,或人均国内生产总值均不得高于有关地区平均水平的85% ;失业率必须至少相当于有关地区平均水平的110%。以上均按3年期测算。

(c) Assistance to promote adaptation of existing facilities to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms , provided that the assistance : (i) is a one-time non-recurring measure ; and (ii) is limited to 20 per cent of the cost of adaptation ; and (iii) does not cover the cost of replacing and operating the assisted investment ; and (iv) is directly linked to and proportionate to a firms planned reduction of nuisances and pollution , and does not cover any manufacturing cost savings which may be achieved ; and (v) is available to all firms which can adopt the new equipment and/or production processes.

(3)为使现有设施适应法律和(或)法规所确立的新的环境要求而提供的援助(这些要求对公司产生更多的压力和财政负担),只要此种援助,是一次性的不重复使用的措施;不超过所需费用的20%;不包括替代和实施援助性投资的费用;与公司计划性的减少废弃物和污染有直接联系且成比例,不包括任何可实现的制造成本节约,适用新设备和(或)生产工艺的公司均可获得。

(三)可诉补贴(Actionable Subsidies)

显然,禁止性补贴和不可诉补贴之外的其他补贴均为“可诉补贴”。WTO允许其成员在遵守下列条件的前提下实施可诉补贴(否则受影响的成员可以采取反补贴措施):

(a) no injury to the domestic industry of another Member;

(b) no nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994;

(c) no serious prejudice to the interests of another Member.

(1)对另一成员的国内产业不造成损害;

(2)不使其他成员在GATT 1994项下直接或间接获得的利益丧失或减损;

(3)不严重损害另一成员的利益。

无疑,确认上述各种补贴是一个较为复杂的技术性问题。为此WTO补贴和反补贴措施委员会设立一个由5名在补贴和贸易关系领域资深人士组成的“常设专家组”(Permanent Group of Experts),以对确认补贴是否存在及补贴的性质提出建议性意见(Advisory Opinions)^①。

^① See Article 24.3 and 24.4 of SCM Agreement.

第二节 对补贴的救济

Remedies on Subsidies

一、对禁止性补贴的救济(Remedies on Prohibited Subsidies)

对禁止性补贴的救济主要有以下几个步骤：

(一)磋商(Consultations)

Whenever a Member has reason to believe that a prohibited subsidy is being granted or maintained by another Member , such Member may request consultations with such other Member.

无论何时 ,当一个 WTO 成员有理由相信另一个 WTO 成员适用或维持一种禁止性补贴时 ,该成员可要求同实施这种补贴的成员进行磋商。

The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually agreed solution.

磋商的目的应是澄清事实并达成一个彼此满意的解决方案。

(二)诉诸 WTO 争端解决机构(Referring to the DSB)

If no mutually agreed solution has been reached within 30 days of the request for consultations , any Member party to such consultations may refer the matter to the Dispute Settlement Body (DSB) for the immediate establishment of a panel , unless the DSB decides by consensus not to establish a panel.

若提出磋商请求 30 天内没有达成一个彼此满意的解决方案 ,参与磋商的任何成员方可将争议事项提交 WTO 争端解决机构 ,要求

成立专家组 ,除非 WTO 争端解决机构协商一致决定不成立这样的专家组。

If the measure in question is found to be a prohibited subsidy ,which may be established with the assistance of Permanent Group of Experts (PGE) , the panel shall recommend that the subsidizing Member withdraw the subsidy without delay.

在常设专家组(PGE)的协助下 ,若一个成员所采取的补贴措施被认定为禁止性补贴 ,则 WTO 专家组将建议采取这种补贴措施的成员无延迟地取消补贴。

Where a panel report is appealed , the Appeal proceedings shall not exceed 60 days. The appellate report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute.

如果专家组报告被上诉 ,则上诉程序不超过 60 天。WTO 争端解决机构一般应采纳上诉机构的报告 ,并且争端各方也无条件地接受该报告。

In the event the recommendation of the DSB is not followed , the DSB shall grant authorization to the complaining Member to take appropriate countermeasures , unless the DSB decides by consensus to reject the request.

一旦争端解决机构的建议没有得到遵守 ,争端解决机构将授权投诉方采取适当的对应措施 ,除非 WTO 争端解决机构协商一致决定拒绝这种报复要求。

In the event a party to the dispute requests arbitration under the

Dispute Settlement Understanding (DSU) , the arbitrator shall determine whether the countermeasures are appropriate.

若争端一方据 WTO 争端解决机制(DSU)要求仲裁 ,仲裁员应裁定的是针对补贴所采取的对应措施是否是适当的。

Except for time-periods specifically prescribed above , time-periods applicable under the DSU for the conduct of such disputes shall be half the time prescribed therein.

对于此种争端 ,除上述具体规定的时间期间外 ,WTO 争端解决机制下的适用期限应减半。

二、对不可诉补贴的救济(Remedies on Non-actionable Subsidies)

WTO 对不可诉补贴并非放任不管 ,但对有关不可诉补贴争端的解决规定了特别的规则 ,简言之 ,不可诉补贴争端通过争端方之间的磋商和诉诸 WTO 补贴和反补贴措施委员会(不诉诸 WTO 争端解决机构)解决。

Where the non-actionable subsidies has resulted in serious adverse effects to the domestic industry of some Member , such as to cause damage which would be difficult to repair , such Member may request consultations with the Member granting or maintaining the subsidy.

若不可诉补贴对某一 WTO 成员的国内工业造成严重的不利影响(如损害难以修复) ,这一成员可同实施或维持这种补贴的成员进行磋商。

The matter may be referred to the Committee if no mutually acceptable solution has been reached in consultations. If the Committee deter-

mines that such effects exist , it may recommend to the subsidizing Member to modify this subsidy programme in such a way as to remove these effects.

如果通过磋商不能达成相互满意的解决方案 ,这一事项可提交给 WTO 补贴和反补贴措施委员会。若该委员会确认这种不利影响确实存在 ,它会建议补贴成员调整补贴计划 ,以消除这种不利影响。

In the event the recommendation is not followed within six months , the Committee shall authorize the requesting Member to take appropriate countermeasures commensurate with the nature and degree of the effects.

若该委员会的建议在 6 个月内仍未得到遵守 ,它将授权投诉成员采取与这种不利影响的特点及其程度相称的反措施。

三、对可诉补贴的救济(Remedies on Actionable Subsidies)

根据 WTO《补贴和反补贴措施协定》第 7 条 ,对可诉补贴的救济也同前述对禁止性补贴的救济方法一样 ,包括磋商、诉诸于 WTO 争端解决机制(包括仲裁)等。其基本规则包括 :

1. 适用救济的前提条件(Prerequisites to Remedies)

The terms and conditions for remedies are such actionable subsidy results in injury to its domestic industry , nullification or impairment or serious prejudice.

适用救济的前提条件是可诉补贴(1)对另一成员的国内产业造成损害 (2)使其他成员在 GATT 1994 项下直接或间接获得的利益丧失或减损 ,或(3)严重侵害另一成员的利益。

根据 WTO《补贴和反补贴措施协定》第 6.1 条和第 6.3 条 ,上述“严重侵害”(Serious Prejudice)是否成立由以下情况决定 :

(a) the total ad valorem subsidization of a product exceeding 5 per cent ;

(b) subsidies to cover operating losses sustained by an industry ;

(c) subsidies to cover operating losses sustained by an enterprise , other than one-time measures ;

(d) direct forgiveness of debt , i. e. forgiveness of government-held debt , and grants to cover debt repayment.

(1)对一产品从价补贴总额超过 5% ；

(2)用以弥补产业经营亏损的补贴 ；

(3)用以弥补企业经营亏损的补贴 ,但不对该企业重复使用的一次补贴性措施除外 ；

(4)直接债务免除 ,即免除企业政府债务和给企业偿还债款。

上述(3) ,即“ 用以弥补企业经营亏损的补贴 ” ,则具体要通过考查以下方面来确定其是否造成“ 严重侵害 ” :

(a) the effect of the subsidy is to displace or impede the imports of a like product of another Member into the market of the subsidizing Member.

(1)补贴是为了取代或阻碍另一 WTO 成员相同产品进入实施补贴成员国内市场。

(b) the effect of the subsidy is to displace or impede the exports of a like product of another Member from a third country market.

(2)补贴是为了取代或阻碍另一成员相同产品出口到第三国市场。

To this end , it would be necessary to consider such factors as a

change in relative shares of the market to the disadvantage of the non-subsidized like product. “ Change in relative shares of the market ” shall include any of the following situations :(a) there is an increase in the market share of the subsidized product ;(b) the market share of the subsidized product remains constant in circumstances in which , in the absence of the subsidy , it would have declined ;(c) the market share of the subsidized product declines , but at a slower rate than would have been the case in the absence of the subsidy.

对此 ,有必要考虑是否存在不利于未受补贴的相同产品相对市场份额变化这样一种因素。“ 相对市场份额变化 ”应包括下列任何一种情况 :①受补贴产品的市场份额增加 ;②受补贴产品的市场份额保持不变 ,但如果不存在该补贴 ,市场份额则会减少 ;③受补贴产品的市场份额减少 ,但若没有补贴其份额减少速度则更快。

(c) the effect of the subsidy is a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market or significant price suppression , price depression or lost sales in the same market.

(3)补贴导致与同一市场中另一成员相同产品价格相比接受补贴的产品的价格大幅削减 ,或在同一市场大幅价格抑制、价格压低或销售量损失。

According to Article 6. 4 of SCM Agreement , price undercutting shall be determined through a comparison of prices of the subsidized product with prices of a non-subsidized like product supplied to the same market. The comparison shall be made at the same level of trade and at comparable times , due account being taken of any other factor affecting

price comparability. However ,if such a direct comparison is not possible ,the existence of price undercutting may be demonstrated on the basis of export unit values.

根据 WTO《补贴和反补贴措施协定》第 6.4 条 ,价格削减通过对供应同一市场的受补贴产品与未受补贴产品的价格进行比较来确定。此种比较应在同一贸易水平上和基于可比较的时间期间内进行 ,同时适当考虑影响价格可比性的任何其他因素。但是 ,如不可能进行此类直接比较 ,价格削减则可依据出口单价来证明。

(d) the effect of the subsidy is an increase in the world market share of the subsidizing Member in a particular subsidized primary product or commodity as compared to the average share it had during the previous period of three years and this increase follows a consistent trend over a period when subsidies have been granted.

(4)补贴导致与以往 3 年内的平均市场份额相比实施补贴成员的受补贴的初级产品或商品的世界市场份额增长 ,且在实施补贴期间持续增长。

2. WTO 争端解决机制对可诉补贴的适用程序(Applying Procedures of DSU on Actionable Subsidies)

WTO 争端解决机制适用于针对不可诉补贴的争端。关于不可诉补贴争端解决的一般程序规则如下表 :

Table 9 - 1 General Applying Procedures on the Disputes of Actionable Subsidies

Procedures	Time Limits ^①	Beginning Date
Consultation	60 days	The date of requesting for consultation
The determination of panel	120 days	The date of composition and the establishment of panels terms of reference
The determination of appellate body	60 days	The date of notifying the intention of appeal
Compensation or countermeasures	6 months	The date of the DSB's adoption of the panel report or the Appellate Body report
Arbitration	60 days	The date of expiry of the reasonable period of time

Source : compiled by the author in accordance with Article 7 of SCM Agreement.

表 9 - 1 对可诉补贴一般适用的争端解决程序

程序	期限	开始日期
磋商	60 天	要求磋商之日
专家组裁决	120 天	专家组成立和其授权调查范围确定之日
上诉机构裁决	60 天	上诉通告之日
补偿或反措施	6 个月	DSB 通过专家组或上诉机构报告之日
仲裁	60 天	合理的时间期限界满之日

资料来源 笔者根据 WTO《补贴与反补贴措施协定》第 7 条整理而得。

须说明的是,仲裁也仅仅是决定投诉方经授权采取的反措施与可诉补贴所造成的不利影响的程序和性质是否相称^②。

① Any time limits mentioned here may be extended by mutual agreement. But in no cast shall the appellate proceedings exceed 90 days.

② See Article 7.10 of SCM Agreement.

第三节 反补贴措施

Countervailing Measures

WTO《补贴与反补贴措施协定》所规定的反补贴措施,特别是课征反补贴税与前述各种救济方法是不同的。课征反补贴税等反补贴措施不可与前述救济方法并行适用^①。

另一方面,WTO反补贴规则旨在维护“国内产业”(Domestic Industries)^②利益,也即是说,“国内产业”是反补贴的受益者。

一、WTO反补贴规则适用范围(Implied Scope of WTO Countervailing Rules)

In general sense, only are WTO countervailing rules adoptable to either prohibited subsidies or actionable-subsidies. However, where a member did not notify as provided of its non-actionable subsidies, or, when determining whether or not they are specific, WTO countervailing rules will also be utilized.

一般说来,WTO反补贴规则仅适用于禁止性补贴或可诉补贴。但是,如果WTO成员没有按规定通知其实施的不可诉补贴,或在确定这些不可诉补贴是否是专向性补贴时,WTO反补贴规则也将适用。

① See Note to Article 10 of SCM Agreement.

② As to the definition of domestic industry, see Article 16 of SCM Agreement, which is similar to that in WTO Anti-dumping Agreement.

二、WTO 反补贴实体规则(Substantial Countervailing Rules of WTO)

(一)反补贴调查的发起(Initiation of Countervailing Investigation)

A countervailing investigation aims to determine the existence , degree and effect of any alleged subsidy. It shall be initiated upon a written application by or on behalf of the domestic industry. The application shall include sufficient evidence of the existence of(a) a subsidy and , if possible , its amount ,(b) injury within the meaning of Article VI of GATT 1994 , and (c) a causal link between the subsidized imports and the alleged injury.

反补贴调查用于确定被指控的补贴是否存在、其程度及其影响。这种调查应在收到国内产业或代表国内产业提出的书面申请后发起。申请应包括充足证据以证明存在(1)补贴及补贴额(若可能的话) (2)《GATT 1994》第 6 条项下的损害以及(3)受到补贴进口产品与宣称的损害之间的因果关系。

Specifically , the application shall contain the following information :
具体说来 , 申请应包括以下信息 :

(i) the identity of the applicant and a description of the volume and value of the domestic production of the like product by the applicant. Where a written application is made on behalf of the domestic industry , the application shall include a list of all known domestic producers of the like product (or associations of domestic producers of the like product) and , to the extent possible , a description of the volume and value of domestic production of the like product accounted for by such producers ;

(1)申请人的身份和申请人对国内相同产品产量和产值的说

明。如代表国内产业提出书面申请,则申请应包括一份生产相同产品的所有已知国内生产商的清单(或相同产品的国内生产者协会),并尽可能地说明此类相同产品生产商其国内产量和产值;

(ii) a complete description of the allegedly subsidized product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;

(2)对受到指控的补贴产品的完整说明、所涉及的一个或多个原产国或出口国、每个已知的出口商或外国生产商的身份以及一份已知的产品进口商名单;

(iii) evidence with regard to the existence, amount and nature of the subsidy in question;

(3)存在所涉及的补贴、补贴额及其性质的证据;

(iv) evidence that alleged injury to a domestic industry is caused by subsidized imports; this evidence includes information on the evolution of the volume of the allegedly subsidized imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry.

(4)国内产业受到的所谓损害是由接受补贴的进口产品造成的证据,这种证据包括被指控的补贴产品进口量增长的信息,这些进口产品在国内市场对相同产品价格的影响及由此对国内产业的影响。

In no case, an investigation shall be initiated unless the application shall be considered to have been made "by or on behalf of the domestic industry", which represents that supported by those domestic producers

whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.

除非申请被认为是由国内产业或代表国内产业提出的,否则不得发起调查。如申请得到国内生产商(其总产量占国内产业中表示支持或反对申请的国内相同产品生产商总产量 50% 以上)的支持,则该申请应被视为“由国内产业或代表国内产业提出”。但是,如表示支持申请的国内生产商的产量不足国内相同产品总产量的 25%,则不得发起调查。

In special circumstances, the authorities concerned may initiate an investigation of their own accord. There shall be immediate termination in cases where the amount of a subsidy is *de minimis* (i. e. the subsidy is less than 1 per cent *ad valorem*), or where the volume of subsidized imports, actual or potential, or the injury, is negligible. An investigation shall not hinder the procedures of customs clearance and shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation.

在特殊情况下,有关主管机关可主动发起调查。若补贴额微不足道或补贴进口产品的实际或潜在进口数量或其损害可忽略不计,则应立即终止调查。若补贴不足从价金额的 1%,则补贴金额应被视为“微不足道”(*de minimis*)。调查不应妨碍通关程序。除特殊情况外,调查应在发起后 1 年内结束,但决不能超过 18 个月。

(二) 补贴及其损害证据的获得(*Acquirement of Evidences*

Related to Subsidies and Injuries Thereof)

In the acquirement of these evidences , Article 12 of WTO SCM Agreement stipulates that the countervailing authorities may (a) issue questionnaires , which will be replied within at least 30 days , to exporters , foreign producers or interested Members ;(b) carry out investigation on the spot. In cases in which any interested Member or interested party refuses access to , or otherwise does not provide , necessary information within a reasonable period or significantly impedes the investigation , preliminary and final determinations , affirmative or negative , may be made on the basis of the facts available.

为了获得有关的证据 ,WTO《补贴与反补贴措施协定》第 12 条规定 ,反补贴调查主管机关(1)可向出口商、外国生产者或利益相关成员发出调查问卷 ,并给予其至少 30 天时间作出答复 (2)进行实地核查 (3)若利害关系成员或利害关系方不允许使用或未在合理时间内提供必要的信息 ,或严重妨碍调查 ,则初步和最终裁定(无论是肯定的还是否定的)均可依据可获事实作出。

The authorities shall provide opportunities for industrial users of the product under investigation , and for representative consumer organizations in cases where the product is commonly sold at the retail level , to provide information which is relevant to the investigation regarding subsidization , injury and causality. They are also the particular Interested Parties.

主管机关应向被调查产品的工业用户 ,或在该产品通常用于零售的情况下 ,向具有代表性的消费者组织提供机会 ,使他们能够提供与补贴、损害和因果关系的调查有关的信息。他们也是所谓的“ 利害关系方 ”。

需特别提出的是 ,如前所述 ,反补贴由国内产业或代表国内产业提出 ,但反补贴主管机关在反补贴调查中还要考虑工业用户和消费者利益。这种对反补贴进行全面的“成本—收益分析”(Cost-Benefit Analyses)的做法更加科学。

(三)磋商(Consultations)

“磋商”也是反补贴争端解决的重要途径。WTO《补贴和反补贴措施协定》第 13.1 和第 13.2 条规定：

As soon as an application is accepted , before the initiation of any investigation and even through the whole period of investigation , Members the products of which may be subject to such investigation shall be invited for consultations and arriving at a mutually agreed solution.

提出的申请一经接受 ,在发起任何调查之前及在整个调查期间 ,应邀请产品可能接受调查的成员进行磋商 ,并达成双方同意的解决办法。

(四)计算补贴额(Calculating the Amount of a Subsidy)

WTO requires that any method used by the investigating authority to calculate the benefit to the recipient shall be transparent and adequately explained. Furthermore , any such method shall be consistent with the following guidelines :

WTO 要求 ,反补贴调查机关所使用的计算接受补贴者所获利益的任何方法应透明并作充分的解释。并且 ,任何这种方法应符合下列原则：

(a) government provision of equity capital shall not be considered as conferring a benefit , unless the investment decision can be regarded as inconsistent with the usual investment practice (including for the provision of risk capital) of private investors in the territory of that Member ;

(1)政府提供股本资金不得视为给予利益 ,除非投资决定被认为与该成员境内私营投资者的通常投资做法(包括提供风险资金)不一致 ;

(b) a loan by a government shall not be considered as conferring a benefit , unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market.

(2)政府提供贷款不得视为给予利益 ,除非接受贷款的公司支付政府贷款成本不同于公司支付实际可从市场上获得的可比的商业贷款成本 ;

(c) a loan guarantee by a government shall not be considered as conferring a benefit , unless there is a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by the government and the amount that the firm would pay on a comparable commercial loan absent the government guarantee. In this case the benefit shall be the difference between these two amounts adjusted for any differences in fees ;

(3)政府提供贷款担保不得视为给予利益 ,除非获得担保的公司支付政府担保贷款的成本不同于公司支付无政府担保的可比商业贷款的成本。在这种情况下 ,接受补贴方所获得的利益为在调整任何费用差别后的两者之差 ;

(d) the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration , or the purchase is

made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price , quality , availability , marketability , transportation and other conditions of purchase or sale).

(4)政府提供货物或服务或购买货物不得视为给予利益 ,除非提供所得的报酬低于适当水平 ,或购买支付高于适当水平。其是否适当应结合与所涉货物或服务在提供国或购买国现行市场条件(包括价格、质量、可获得性、适销性、运输和其他购销条件)来确定。

(五)确定损害 (Determination of Injury)

在反补贴调查中 “ 损害 ” 的确定是一个重要环节 ,也是一个复杂的技术问题。对此 ,WTO《 补贴和反补贴措施协定 》第 15 条作了明确的规定。

A determination of injury shall be based on positive evidence and involve an objective examination of both (a) the volume of the subsidized imports and the effect of the subsidized imports on prices in the domestic market for like products and (b) the consequent impact of these imports on the domestic producers of such products.

确定损害应根据肯定性证据 ,并客观地审查 (1)接受补贴的进口产品的数量及其对国内市场相同产品价格的影响 (2)这些进口产品随之对此类产品国内生产商产生的影响。

The investigating authorities shall consider whether there has been a significant increase in subsidized imports , either in absolute terms or relative to production or consumption in the importing Member , and shall also consider whether there has been a significant price undercutting by the subsidized imports as compared with the price of a like product of the

importing Member , or whether the effect of such imports is otherwise to depress prices to a significant degree or to prevent price increases , which otherwise would have occurred , to a significant degree.

调查主管机关应考虑补贴进口产品的绝对数量或相对于进口成员中生产或消费的数量是否大幅增加 ;并且也要考虑 ,与进口成员相同产品的价格相比 ,补贴进口产品是否导致本国相同价格大幅降低 ,或此类进口产品的影响是否大幅压低价格 ,或是否大幅度地抑制本应发生的价格增长。

Where imports of a product from more than one country are simultaneously subject to countervailing duty investigations , the investigating authorities may cumulatively assess the effects of such imports only if they determine that (a) the amount of subsidization established in relation to the imports from each country is more than de minimis as defined above and the volume of imports from each country is not negligible and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

如来自一个以上国家的某一产品的进口同时接受反补贴税调查 ,则调查主管机关只有在确定以下内容后 ,方可累积评估此类进口产品的影响 (1)来自每一国家的进口产品补贴额大于前述定义的“微不足道”水平 ,且来自每一国家的进口量不是可忽略不计的 (2)根据进口产品之间及进口产品与国内相同产品之间的竞争条件 ,对进口产品的影响进行累积评估是适当的。

The examination of the impact of the subsidized imports on the domestic industry shall include an evaluation of all relevant economic fac-

tors and indices having a bearing on the state of the industry , including actual and potential decline in output , sales , market share , profits , productivity , return on investments , or utilization of capacity ; factors affecting domestic prices ; actual and potential negative effects on cash flow , inventories , employment , wages , growth , ability to raise capital or investments and , in the case of agriculture , whether there has been an increased burden on government support programmes. This list is not exhaustive , nor can one or several of these factors necessarily give decisive guidance.

对接受补贴的进口产品对国内产业影响的审查 ,应包括对与产业状况有关的所有经济因素和指标的评估。这些经济因素和指标包括产量、销售量、市场份额、利润、生产力、投资收益或设备利用率的实际和潜在的下降 ,影响国内价格的因素 ;对现金流动、库存、就业、工资、增长、筹措资金或投资能力的实际和潜在的消极影响 ;对于农业 ,则是否给进口国政府支持计划增加了负担。以上所列不是穷尽的 ,这些因素中的一个或多个均未必能够起决定作用。

The demonstration of a causal relationship between the subsidized imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry. These factors include , inter alia , the volumes and prices of non-subsidized imports of the product in question , contraction in demand or changes in the patterns of consumption , trade restrictive practices of and competition between the foreign and domestic producers , developments in technology and the export performance and productivity of the domestic industry. The injuries caused by these other factors must not be attributed to the

subsidized imports.

证明补贴进口产品与对国内产业损害之间存在因果关系应以审查主管机关掌握的全部证据为依据。主管机关还应审查除补贴进口产品外的、同时正在损害国内产业的任何已知因素。这些因素特别包括未接受补贴的所涉产品的进口数量和价格、需求的减少或消费模式的变化、外国和国内生产者的限制性贸易惯例及它们之间的竞争、技术发展以及国内产业的出口实绩和生产率。这些因素造成的损害不得归咎于接受补贴的进口产品。

If separate identification of domestic production of the like product on the basis of such criteria as the production process , producers sales and profits is not possible , the effects of the subsidized imports shall be assessed by the examination of the production of the narrowest group or range of products , which includes the like product.

若不能依据生产工序、生产商的销售量和利润等标准单独确认相同产品的国内生产情况 ,则接受补贴的进口产品产生的影响应通过审查包括相同产品在内的最小产品组或产品系列的生产状况来评估。

A determination of a threat of material injury shall be based on facts and not merely on allegation , conjecture or remote possibility. The change in circumstances which would create a situation in which the subsidy would cause injury must be clearly foreseen and imminent. In making a determination regarding the existence of a threat of material injury , the investigating authorities should consider , inter alia , such factors as :

对实质损害威胁的确定应依据事实 ,而不是仅依据指控、推测或极小的可能性。补贴将造成损害发生的情形变化必须是能够明显预见且迫近的。在作出有关存在实质损害威胁的确定时 ,主管机关应

特别考虑下列因素：

(i) nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom ;

(ii) a significant rate of increase of subsidized imports into the domestic market indicating the likelihood of substantially increased importation ;

(iii) sufficient freely disposable , or an imminent , substantial increase in , capacity of the exporter indicating the likelihood of substantially increased subsidized exports to the importing Member s market , taking into account the availability of other export markets to absorb any additional exports ;

(iv) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices , and would likely increase demand for further imports ;

(v) inventories of the product being investigated.

(1) 补贴的性质和由此可能产生的贸易影响；

(2) 补贴进口产品进入国内市场的大幅增长率 ; 它用以表明进口实质增加的可能性；

(3) 出口商可充分自由处置的或即将实质增加的生产或出口能力 , 它表明补贴出口产品进入进口成员市场实质增加的可能性 , 同时考虑是否有可消化任何额外出口的其他出口市场；

(4) 进口产品是否以大幅度抑制或压低国内价格方式进入 ; 是否会要求扩大进口；

(5) 被调查产品的库存情况。

(六) 采取临时反补贴措施(Taking Provisional Countervailing Measures)

WTO 允许其成员在作出最终裁定之前采取临时反补贴措施。但采取临时反补贴措施要受以下规则的约束：

1. Meeting such conditions of taking provisional measures as :

(a) an investigation has been initiated in accordance with the provisions above , a public notice has been given to that effect and interested Members and interested parties have been given adequate opportunities to submit information and make comments ;

(b) a preliminary affirmative determination has been made that a subsidy exists and that there is injury to a domestic industry caused by subsidized imports ;

(c) the authorities concerned judge such measures necessary to prevent injury being caused during the investigation.

1. 实施临时措施须符合以下条件：

(1)已按照前述规定发起反补贴调查 ,已为此发出公告 ,且已给予利害关系成员和利害关系方充分机会以提交信息和提出意见；

(2)已作出关于存在补贴及其对国内产业造成损害的初步肯定裁定；

(3)有关反补贴主管机关判断此类措施对防止在调查期间造成损害是必要的。

2. The form of provisional measures may be of provisional countervailing duties guaranteed by cash deposits or bonds equal to the amount of the provisionally calculated amount of subsidization.

2. 临时反补贴措施可通过要求交付金额等于初步计算出的补贴额的现金保证金或以与该补贴额同等金额的保函担保的方式征收临时反补贴税。

3. Provisional measures shall not be applied , on a non-discriminatory basis , sooner than 60 days from the date of initiation of the investigation , and shall be limited to as short a period as possible , not exceeding four months.

3. 临时措施在自发起调查之日起 60 天后在非歧视性原则的基础上实施。其实施应限制在尽可能短的时间内 ,不超过 4 个月。

(七)WTO 反补贴承诺规则(Undertakings Rules under WTO Countervailing Agreement)

1. 承诺的内涵(Meaning of Undertakings)

WTO《补贴与反补贴协定》第 18.1 条规定了承诺的内容。

The undertakings referred to as the following two forms :(a) the government of the exporting Member agrees to eliminate or limit the subsidy or take other measures concerning its effects ; or (b) the exporter agrees to revise its prices so that the investigating authorities are satisfied that the injurious effect of the subsidy is eliminated. Countervailing proceedings may be suspended or terminated without the imposition of provisional measures or countervailing duties if the undertakings are accepted.

承诺指以下两种方式 (1)出口国政府同意取消或限制补贴 ,或采取其他相应的措施 ;或 (2)出口商同意修订价格 ,从而使调查主管机关确信消除补贴的损害性影响。若承诺被接受 ,则反补贴调查程序可以中止或终止 ,而不采取临时措施或征收反补贴税。

2. 有关承诺的规则(Rules on undertaking)

WTO《补贴与反补贴协定》第 18.2 至第 18.5 条规定了有关承诺的规则 ,这些规则与 WTO《反倾销协定》第 8 条确立的规则基本相同 ,在此不再赘述。

(八)最终反补贴税的征收(Imposition and Collection of Final Countervailing Duties)

根据 WTO《补贴和反补贴措施协定》第 19 条 ,课征最终反补贴税的原则是 :

Countervailing duty should be less than the total amount of the subsidy if such lesser duty would be adequate to remove the injury to the domestic industry. What is more , it shall be levied on a non-discriminatory basis on imports of product from all sources found to be subsidized and causing injury. Due account should be taken of representations made by domestic interested parties including consumers and industrial users whose interests might be adversely affected by the imposition of a countervailing duty. An individual countervailing duty rate for particular exporter may be established.

反补贴税应低于总补贴额 ,如果其足以消除对国内产业的损害。同时 ,要在非歧视基础上对已被认定接受补贴并造成损害的所有不同来源地的进口产品征收反补贴税。反补贴主管机关应适当考虑其利益可能会因征收反补贴税而受到不利影响的国内利益相关方(包括消费者和工业用户)所作的陈述。对特定的出口商可以适用单独反补贴税率。

In general case a definitive countervailing duty may be imposed only from the date of the final determination entering into force and , any definitive countervailing duty have to be terminated on a date not later than five years from its imposition unless the authorities determine on the basis of a review that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury thereof. Comparatively , any countervailing review shall normally be concluded within 1

year of the date of initiation of the review.

在一般情况下,最终反补贴税只应在最终裁决生效后开始课征,并且任何最终反补贴税要在自征收之日起的5年内终止,除非反补贴当局经复审认定终止课征反补贴税将导致继续或重新出现。反补贴复审则是在发起复审后的1年内终止^①。

(九)补贴与反补贴的通知(Notifications on Subsidies and Countervailing Duties)

为增加各成员实施补贴和反补贴措施的透明度,WTO要求各成员将其补贴和反补贴措施通知WTO补贴和反补贴措施委员会(Committee on Subsidies and Countervailing Measures)^②。

1. WTO stipulates that notifications of subsidies shall be submitted not later than 30 June of each year. Their notifications contain the following information : (i) form of a subsidy ; (ii) subsidy per unit or , the total amount or the annual amount budgeted for that subsidy ; (iii) policy objective and/or purpose of a subsidy ; (iv) duration of a subsidy , etc. ; (v) statistical data permitting an assessment of the trade effects of a subsidy. The alleged subsidy in question not thereafter notified promptly may be notified by any another member having effects of subsidy , which is called as adverse notification.

1. WTO要求各成员有关补贴的通知应不迟于每年6月30日提交。通知应包含下列信息 (1)补贴的形式 (2)单位补贴量或用于该补贴的预算总额或年度预算额 (3)政策目标和(或)补贴的目的 ; (4)补贴的期限 (5)据以评估补贴在贸易方面所产生影响的统计数

① See Article 21.4 of SCM Agreement.

② Data on use of countervailing measures can be found in the WTO annual report which available at <http://www.wto.org/english/thewto-e/whatis-e/tif-e/agrm-7-e.htm>.

据。受到指控的补贴若随后没有通知 WTO 补贴与反补贴委员会，则受该补贴影响的任何成员可通知 WTO 补贴与反补贴委员会，此即谓“反向通知”。

2. WTO also stipulates that members shall report without delay to the Committee all preliminary or final actions taken with respect to countervailing duties, and shall submit, on a semi-annual basis, reports on any countervailing duty actions taken within the preceding six months.

2. WTO 还要求各成员应无延迟地通知其所有初步或最终反补贴行动，同时要每半年提交关于在过去 6 个月内采取的任何反补贴行动。

(十)在反补贴中发展中国家成员享有的特殊和差别待遇(Special and Differential Treatment Favoring Developing Countries under WTO Countervailing Rules)

The above prohibited subsidies contingent upon export performance do not apply to developing country Members that have less than \$ 1000 per capita GNP, whereas other developing country Members enjoy a transitional period of eight years from the date of entry into force of the WTO Agreement.

前述以出口实绩为条件而给予的禁止性补贴不适用于人均 GNP 低于 1000 美元的发展中国家成员；其他发展中国家成员则享有 8 年的过渡期(自《WTO 协定》生效之日起算)。

The above prohibited subsidies contingent upon the use of domestic over imported goods do not apply to developing country Members for a period of five years and shall not apply to least developed country Members for a period of eight years from the date of entry into force of the

WTO Agreement.

前述视使用国产货物而非进口货物的情况为条件而给予的补贴自 WTO 协定生效后的 5 年内不适用于发展中国家成员 ,对最不发达国家过渡期则为 8 年。

For countries in the process of transformation from a centrally-planned into a market economy , prohibited subsidies shall be phased out with a period of seven years from the date of entry into force of the WTO Agreement. The subsidies effected such as direct forgiveness of debt are also non-actionable. ①

对于自计划经济向市场经济转型成员国 ,应在《 WTO 协定》生效后的 7 年内取消所有禁止性补贴。其直接的债务免除类补贴也是不可诉的。

WTO requires that a developing country Member which has reached export competitiveness in any given product shall phase out its export subsidies for such product(s) over a period of two years. Export competitiveness in a product exists if exports of that product have reached a share of at least 3.25 per cent in world trade of that product for two consecutive calendar years.

WTO 要求一个发展中国家成员应在 2 年内逐步取消其对已具备出口竞争力的产品的出口补贴 ,若该产品的出口连续 2 个日历年在该产品世界贸易中占到至少 3.25% 的份额 ,则该产品已具备出口竞争力。

Any countervailing duty investigation of a product originating in a

① See Article 29 of SCM Agreement.

developing country Member shall be terminated as soon as the authorities concerned determine that :

有关反补贴主管机关在确定下列内容后 ,应立即终止对原产自发展中国家成员的产品进行的任何反补贴调查 :

(a) the overall level of subsidies granted upon the product in question does not exceed 2 per cent(and from certain developing countries having eliminated prohibited export subsidies prior to the expiry of the transitional period of eight years 3 per cent) of its value calculated on a per unit basis ;

(1)对所涉产品给予补贴的总体水平不超过按单位计算的价值 的 2%(对在 8 年过渡期之前取消禁止性补贴的那些发展中国家成员为 3%) ;

(b) the volume of the subsidized imports represents less than 4 per cent of the total imports of the like product in the importing Member , unless imports from developing country Members whose individual shares of total imports represent less than 4 per cent collectively account for more than 9 per cent of the total imports of the like product in the importing Member.

(2)补贴进口产品的数量占进口成员同类产品总进口量不足 4% ,除非来自单个发展中国家成员的进口份额虽不足总进口量的 4% ,但这些成员的总进口量占进口成员同类产品总进口量的 9% 以上。

最后须说明的是 WTO 鼓励私有化 ,因此发展中国家成员所实施的与私有化有关的任何形式的补贴(包括放弃政府税收和其他债

务转移等)均不在可诉补贴范围之内^①。

本章小结

本章所介绍的是 WTO 补贴及反补贴规则。WTO《补贴与反补贴措施协定》将补贴分为三类:禁止性补贴、可诉补贴、不可诉补贴。反补贴措施主要适用于前两类补贴。“补贴”对发展中国家经济的发展具有特别重要的意义,但具备所谓“出口竞争力”的产品必须在 2 年内取消补贴。

思考题

1. 根据 WTO《补贴与反补贴措施协定》,哪些补贴应予禁止?
2. 简述 WTO 对可诉补贴救济的规则。
3. 根据 WTO《补贴与反补贴措施协定》,专向补贴是否均为可诉补贴?

^① See Article 27. 13 of SCM Agreement.

第十章 WTO 保障措施 适用规则

WTO Rules about Applying Safeguard Measures

WTO《保障措施协定》(Agreement on Safeguards)^①确定了 WTO 关于保障措施的适用规则。《保障措施协定》的主要目标是规范《GATT 1994》第 19 条“对某些产品进口的紧急措施”的实施,加强对保障措施(Safeguards or Safeguard Measures)的多边控制,消除逃避此类控制的措施,推动而非限制国际市场上的竞争。

第一节 WTO 关于适用保障措施 的主要实体规则

Principal Substantive Rules of the Application of Safeguards

一、适用保障措施的条件(Applying Prerequisites of Safeguards)

WTO《保障措施协定》第 2 条规定了适用保障措施的前提条件:
A product is being imported in such increased quantities , absolute

^① This Agreement consists of 14 articles.

or relative to domestic production , and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

一种产品的进口量相对于国内生产绝对或相对地增加 , 且对生产相同或直接竞争产品的国内产业造成严重损害或产生严重损害威胁。

须说明的是上述前提条件是适用保障措施的唯一条件。另外 , 与 WTO 反倾销规则和反补贴规则中的“国内产业”定义不同 , WTO《保障措施协定》下的“国内产业”明确包括生产与进口产品直接竞争产品的国内生产商。该协定第 4. 1(c)条规定 :

Domestic industry shall be understood to mean the producers as a whole of the like or directly competitive products operating within the territory of a Member , or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products.

“国内产业”应理解为在一成员领土内进行业务活动的相同产品或直接竞争产品的所有生产商 , 或指那些生产的相同产品或直接竞争产品的累积产量占该产品国内总产量大部分的生产商。

二、严重损害或严重损害威胁的认定(Establishment of Serious Injury or Threat Thereof)

(一)WTO《保障措施协定》下“严重损害”和“严重损害威胁”的定义(Definitions of Serious Injury or Threat Thereof)

Serious injury means a significant overall impairment in the position of a domestic industry ;

“严重损害”是指对一国内产业状况的重大全面的损伤 ;

Threat of serious injury means serious injury that is clearly imminent , which is determined based on facts and not merely on allegation , conjecture or remote possibility.

“ 严重损害威胁 ”是指明显的迫近的严重损害。对存在严重损害威胁的认定应根据有关的事实 ,而非仅凭指控、推测或存在极小的可能性。

(二)确定“ 严重损害 ”和“ 严重损害威胁 ”应考虑的主要因素 (Factors to be Consider in the Determination of Serious Injury or Threat Thereof)

In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry , the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry , in particular , the rate and amount of the increase in imports of the product concerned in absolute and relative terms , the share of the domestic market taken by increased imports , changes in the level of sales , production , productivity , capacity utilization , profits and losses , and employment.

在确定增加的进口是否对一国内产业已经造成严重损害或正在威胁造成严重损害的调查中 ,实施保障措施的职能机关应评估与该产业状况有关的所有客观和可量化的因素 ,特别是有关产品进口绝对和相对增加率和增加量 ,增加的进口占国内市场的份额以及销售水平、产量、生产率、设备利用率、利润和亏损及就业变化。

可见 ,WTO《保障措施协定》第 4 条所定义的上述“ 严重损害 ”和“ 严重损害威胁 ”与 WTO 反倾销、反补贴规则中定义的“ 实质性损

害’(Material Injury)和‘实质性损害威胁’(A Threat of Material Injury)除造成损害的原因不同外,其决定损害的因素并无实质性的差别。

三、保障措施的实施(Application of Safeguards)

The application of safeguards is only based on the investigation having demonstrated the existence of the causal link between increased imports of the product concerned and serious injury or threat Thereof, and only to the extent necessary to prevent or remedy serious injury.

只有在证明有关产品增加的进口与严重损害或严重损害威胁之间存在因果关系的情况下方可实施保障措施。该措施也仅应在防止或补救严重损害限度内实施。

According to Article 7.1 and Article 7.3 of WTO Agreement on Safeguards, in normal case, the applying period of safeguard measures will not exceed four years. The total period of application of a safeguard measure including the period of application of any provisional measure, the period of initial application and any extension thereof, shall not exceed eight years.

根据 WTO《保障措施协定》第 7.1 条和第 7.3 条,在正常情况下,保障措施的适用期限不超过 4 年。一种保障措施的全部实施期,包括临时措施的实施期、最初实施期及其任何延长,不得超过 8 年。

A safeguard measure with a duration of 180 days or less may be applied again to the import of a product if (a) at least one year has elapsed since the date of introduction of a safeguard measure on the import of that product; and (b) such a safeguard measure has not been applied on the same product more than twice in the five-year period immediately pre-

ceding the date of introduction of the measure.

实施期等于或少于 180 天的保障措施仍可再适用于一产品的进口,若(1)自上一次对该产品的进口适用保障措施之日起已至少过了 1 年;且(2)自上一次适用该保障措施之日前的 5 年期间内,该措施未对同一产品实施 2 次以上。

Article 10 of WTO Agreement on Safeguards call for that Members shall terminate all safeguard measures that were in existence on the date of entry into force of the WTO Agreement not later than eight years after the date on which they were first applied or five years after the date of entry into force of the WTO Agreement, whichever comes later.

WTO《保障措施协定》第 10 条要求各成员应在不迟于保障措施首次实施之日后 8 年内,或在《WTO 协定》生效之日后 5 年内(以后到期者为准)终止《WTO 协定》生效之日存在的所有保障措施。

四、对发展中国家成员的特殊规定(Special Provision for Developing Country Members)

WTO《保障措施协定》第 9 条对发展中国家成员规定了特殊的保障措施适用规则。

Safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned.

对于源自一个发展中国家成员的产品,只要其有关产品的进口在进口成员中所占份额不超过 3%,即不应对该产品实施保障措施。但是进口份额不超过 3% 的多个发展中国家成员份额总计不应超过

有关产品总进口的 9% ,否则仍要对这些成员适用保障措施。

A developing country Member may extend the period of application of a safeguard measure for a period of up to two years beyond the maximum period , and may apply a safeguard measure again to the import of a product which has been subject to such a measure , taken after the date of entry into force of the WTO Agreement , after a period of time equal to half that during which such a measure has been previously applied , provided that the period of non-application is at least two years.

一个发展中国家成员可将一保障措施的实施期在前述 8 年期限基础上再延长 2 年 ,也可对已经受在《 WTO 协定》生效之日后采取的保障措施约束的产品的进口 ,在等于以往实施该措施期限一半的期限后 ,再次实施保障措施 ,但两次保障措施之间时间间隔至少为 2 年。

第二节 WTO 关于适用保障措施 的主要程序规则

Basic Procedural Rules of the Application of Safeguards

一、保障措施调查(Investigation under Safeguard Measures)

只有在 WTO 成员的有关机构针对一种进口产品是否适用保障措施进行调查后方可实施保障措施。

This investigation includes reasonable public notice to all interested parties and public hearings or other appropriate means in which importers , exporters and other interested parties could present evidence and their views , including the opportunity to respond to the presentations of

other parties and to submit their views , inter alia , as to whether or not the application of a safeguard measure would be in the public interest.

保障措施调查包括对所有利益相关方发出必要的公告 , 举行公开听证会或其他合适的方式。进口商、出口商和其他利害关系方可藉此提出证据和意见 , 特别是关于保障措施的实施是否符合公共利益的意见。

可见 , 在 WTO《保障措施协定》中 “ 公共利益 ” 也是决定是否实施保障措施的一个因素。在 WTO《反倾销协定》或《补贴与反补贴措施协定》中并无此明确规定。

二、适用临时保障措施(Applying a Provisional Safeguard Measures)

In critical circumstances where delay would cause damage which it would be difficult to repair , a Member may take a provisional safeguard measure pursuant to a preliminary determination that there is clear evidence that increased imports have caused or are threatening to cause serious injury. The duration of the provisional measure shall not exceed 200 days. Such measures should take the form of tariff increases.

在迟延会造成难以弥补的损害的紧急情况下 , WTO 成员可根据有明确证据证明增加的进口已经或正在威胁造成严重损害的初步裁定采取临时保障措施。临时措施的期限不应超过 200 天。此类措施应以提高关税的形式实施。

三、适用最终保障措施(Applying a Definitive Safeguard Measures)

最终保障措施的形式可以是提高关税 , 也可以是数量限制 , 但不

能是自愿出口限制(Voluntary Export Restraints)、有序销售安排(Orderly Marketing Arrangements)或其他任何类似措施(Any Other Similar Measures)^①。

If a quantitative restriction is used , such a measure shall not reduce the quantity of imports below the level of a recent period which in general shall be the average of imports in the last three representative years for which statistics are available.

若保障措施是使用数量限制 , 则该措施不得使进口量减少至低于近期水平(该水平一般应为可获得统计数字的最近 3 个代表性年份的平均进口量)。

四、贸易补偿和中止减让(Trade Compensation and Suspension of Concession)

The export Members concerned may agree with the Member applying a safeguard measures on any adequate means of trade compensation for the adverse effects of the measure on their trade.

有关出口成员可就一保障措施对其贸易的不利影响与实施该措施的成员商定任何适当的贸易补偿办法。

If no agreement is reached within 30 days in the consultations , then the affected exporting Members shall be free , not later than 90 days after the measure is applied , to suspend , upon the expiration of 30 days from the day on which written notice of such suspension is received by the Council for Trade in Goods , the application of substantially equivalent concessions or other obligations under GATT 1994 , to the trade of the Member applying the safeguard measure , the suspension of which the

^① See Article 11. 1(b) of WTO Agreement on Safeguards.

Council for Trade in Goods does not disapprove.

如在磋商中有关方未能在 30 天内达成协议,则受影响的出口成员可在不迟于该保障措施实施后 90 天,并在货物贸易理事会收到中止减让的书面通知之日起 30 天期满后,对实施保障措施成员的贸易中止实施 GATT 1994 项下实质对等的减让或其他义务,只要货物贸易理事会对此中止不持异议。

The right of suspension shall not be exercised for the first three years that a safeguard measure is in effect, provided that the safeguard measure has been taken as a result of an absolute increase in imports and that such a measure conforms to the provisions of this Agreement.

若该保障措施是由于进口的绝对增长而采取的,并符合 WTO《保障措施协定》的规定,则出口成员在保障措施有效的前 3 年内不应行使中止减让的权利。

五、保障措施复审(Review of Safeguards)

WTO《保障措施协定》第 7.4 条确定了保障措施中期复审的基本规则。

If the duration of a safeguard measure exceeds three years, the Member applying such a measure shall review the situation not later than the mid-term of the measure and, if appropriate, withdraw it or increase the pace of liberalization.

若一种保障措施的期限超过 3 年,适用该措施的成员须在不迟于该期限的中期复审这一保障措施的适用情况。如果合适的话,撤销该措施或加快放宽进口限制的步伐。

六、通知和磋商(Notification and Consultation)

通知和磋商是适用保障措施的重要程序。对此, WTO《保障措施协定》第 12 条作了如下规定:

WTO requires a Member immediately notify the Committee on Safeguards upon : (a) initiating an investigatory process relating to serious injury or threat Thereof and the reasons for it ; (b) making a finding of serious injury or threat Thereof caused by increased imports ; and (c) taking a decision to apply or extend a safeguard measure.

WTO 要求其成员将下列情况立即通知保障措施委员会：

(1)发起与严重损害或严重损害威胁有关的调查程序及发起的原因；

(2)就因增加的进口所造成的严重损害或严重损害威胁所提出的调查结果；

(3)就实施或延长保障措施作出的决定。

The Member proposing to apply or extend a safeguard measure shall provide the Committee on Safeguards with all pertinent information , which shall include evidence of serious injury or threat Thereof caused by increased imports , precise description of the product involved and the proposed measure , proposed date of introduction , expected duration and timetable for progressive liberalization.

提议实施或延长保障措施的成员应向保障措施委员会提供所有有关信息 ,其中包括增加的进口所造成严重损害或严重损害威胁的证据、对所涉及的产品和拟议措施的准确描述、拟议采取措施的日期、预计的期限以及逐步放宽限制的时间表。

A Member shall make a notification to the Committee on Safeguards before taking a provisional safeguard measure. Consultations shall be initiated immediately after the measure is taken.

一成员在采取临时保障措施之前 ,应向保障措施委员会作出通知。有关方之间的磋商应在采取临时措施后立即开始。

The results of the consultations as well as the results of mid-term reviews , any form of compensation , proposed suspensions of concessions and other obligations , shall be notified immediately to the Council for Trade in Goods by the Members concerned.

磋商的结果、中期复审的结果、任何形式的补偿、拟定的中止减让或其他义务的中止 均应由有关成员立即通知货物贸易理事会。

这种通知要求无疑加强了对保障措施的多边约束 ,对规范保障措施的实施也起到有力的监督作用。当然 ,WTO 各成员(包括中国) 积极利用上述 WTO 保障措施规则更具有现实意义。

仍以前述阿根廷与智利桃制品保障措施争端为例。智利政府在 2001 年 9 月 24 日通过其驻 WTO 大使向 WTO 争端解决机构主席提交的申诉报告(编号为 WT/DS238/1)中提出 ,阿根廷对其桃制品实施保障措施不符合 WTO 规则 ,尤其是违反了 WTO《保障措施协定》第 2、4、5 和 12 条以及《关税与贸易总协定 1994》第 19.1.1 条的有关规定。12 月 6 日 ,在智利政府要求 WTO 争端解决机构成立专家小组的申请报告(编号为 WT/DS238/2)中 ,智利政府提出阿根廷的这项保障措施也违反了 WTO《保障措施协定》第 3 条。具体情况是 :

1. 根据《关贸总协定 1994》第 19.1.1 条“如因意外情况的发展(Unforeseen Developments)或因一缔约国承担本协议义务(包括关税减让)而产生的影响 ,使某一产品输入到这一缔约国领土的数量大幅增加 ,对这一领土内相同产品或与它直接竞争的产品的国内生产者造成重大损害或产生重大的损害威胁时 ,这一缔约国在防止或纠正这种损害所必需的程度和时间内 ” ,可以对上述产品采取保障措施。WTO《保障措施协定》第 2.1 条也规定 ,一个成员只有在已确定一种产品绝对增加的进口量或相对国内生产的相对增加的进口量对生产相同产品或直接竞争产品的国内工业造成严重损害或有造成

严重损害的威胁时 ,才可对这种产品适用保障措施。智利政府认为 ,从阿根廷对外贸易委员会(National Foreign Trade Commission)第 781 号会议纪要(Minutes)以及在做出适用保障措施终裁决定之前的技术报告(Technical Report)中看出 ,上述“ 因意外情况的发展 ”这一在采取保障措施之前应该满足的事实和法律条件并不存在 ,也没有调查结论或证据证明在阿根廷国内市场上 ,智利桃制品绝对进口量或相对国内生产的相对进口量的增加对阿生产相同或直接竞争的国内工业造成严重损害或有造成严重损害的威胁。

2. WTO《保障措施协定》第 3.2 条是关于保障措施调查所涉及的信息公开问题。该条规定 ,机密信息的提供方可应要求完成该机密信息的非机密摘要 ;如果机密信息不能被摘要 ,则信息提供方应说明不能摘要的理由 ,否则调查当局可以不考虑这样的信息。智利政府认为 ,从前述第 781 号会议纪要和技术报告中无法看出阿根廷对外贸易委员会或调查当局已对所有《关贸总协定 1994》第 19 条和 WTO《保障措施协议》所规定的与法律和事实有关的问题进行了充分、有效的调查 ,而这些问题是应当调查、分析、认定、发现和证实的。阿根廷政府在适用保障措施时信息披露不完整。

3. WTO《保障措施协定》第 4.1.1 条将“ 严重损害 ”(Serious Injury)定义为“ 对国内工业的重大的全面的损害。”第 4.1.2 条将“ 严重损害威胁 ”(Threat of Serious Injury)定义为“ 严重损害明显地即将发生 ”; 决定存在一项严重损害威胁 ,应当以事实为基础 ,而不是仅仅依据断言、推测或很小的可能性。”智利政府认为 ,根据阿根廷对外贸易委员会第 781 号会议纪要 ,不能认为阿根廷国内工业正受到 WTO《保障措施协定》第 4.1.1 条所定义的那种“ 严重损害 ”。对于“ 严重损害威胁 ”问题 ,在第 781 号会议纪要和前述技术报告中没有包含宣称对阿生产相同或直接竞争的国内工业正造成严重损害威胁的绝对进口增长或相对国内生产的进口增长的事实性证据 ,也即没有证据证明智利桃制品在不久的将来极有可能对阿根廷相关工业造

成损害。

4. WTO《保障措施协定》第 4.2 条规定,在决定增加的进口是否对一个国内工业已造成或正产生严重损害威胁的调查中,调查当局应估价所有客观的、可量化的与国内工业状况相关的因素,特别是这种产品进口的绝对和相对增长率和增长量,增加的进口所占国内市场的份额,销售、生产、生产率、生产能力利用、利润与损害以及就业水平的变化;应依据客观证据(Objective Evidence)来确定有关产品进口的增加与上述严重损害或严重损害威胁之间存在因果关系。智利政府认为,无论阿根廷对外贸易委员会的第 781 号会议纪要,还是适用保障措施之前的技术报告都没有提供充分的客观证据证明“进口增加”与“损害或损害威胁”之间存在因果联系。相反,第 781 号会议纪要认定存在一些导致所谓“国内工业市场份额损失”的客观和定量的与“增加进口”无关的因素。不过阿根廷政府对这些因素是否对造成“严重损害”或“严重损害威胁”有一定的作用没有进行充分、足够的分析。阿根廷调查当局没有预先进行因果分析即将所宣称的“损害”或“损害威胁”全部归咎于智利桃制品的“进口增加”。这不符合前述 WTO《保障措施协定》第 4.2 条的规定。

5. WTO《保障措施协定》第 5.1 条规定,“一个成员国应只在阻止或救济严重损害和有利于国内工业调整的必要限度内适用保障措施。”智利政府认为,阿根廷对智利桃制品以每千克课征 0.50 美元特定关税超出了上述 WTO《保障措施协定》第 5.1 条所规定的“必要的限度”。阿根廷对智利桃制品原税率为 19.6%,如果把每千克课征 0.50 美元的特定关税折算成从价税,则几乎是在原税率的基础上再加征原税率的 70%。如此高的关税等同于禁止进口,是不合理的,也是被禁止的。事实上,在阿根廷对智利桃制品实施保障措施后,阿根廷即没有登记任何一票来自智利的桃罐头。但是尽管每千克课征 0.50 美元的特定关税产生了禁止智利桃制品进口的结果,但阿根廷对外贸易委员会在实施其保障措施决定时,对课征的关税的

计算方法及税率没作任何解释。

6. WTO《保障措施协定》第 12.2 条规定,在成员国将适用一项保障措施通知 WTO 保障措施委员会时,成员国应向保障措施委员会提供所有有关的信息。这些信息应包括由增加的进口所导致的严重损害或严重损害威胁的证据等。智利政府认为,在阿根廷当局将智利桃制品的进口增加导致阿国内工业受到严重损害或严重损害威胁的调查结论通告保障措施委员会时,它没有向该委员会提供支持这一调查结论的证据。

可以看出,智利政府依据 WTO《保障措施协定》、DSU 及《GATT 1994》所确立的特定的规则和程序来谋求解决这起保障措施争端,并遵照 DSU 第 3.10 条以诚信(in good faith)的态度履行了作为申诉方在保障措施争端中所应承担的基本义务。

本章小结

本章归纳介绍了 WTO 保障措施规则。同 WTO 反倾销、反补贴规则不同,WTO《保障措施协定》明确将生产直接竞争产品的生产商纳入国内产业范围。这样的“国内产业”定义更为科学。在 WTO 确立的保障措施实施程序中,须特别注意的是临时保障措施的期限是 200 天,最终保障措施的形式是提高关税或适用数量限制。事实上,保障措施具有很强的贸易保护效力。

思考题

1. WTO《保障措施协定》对“国内产业”是如何定义的?
2. 最终保障措施可采取何种形式?
3. 分析如何依据 WTO 有关规则解决保障措施争端?

第十一章 WTO 与贸易有关的 知识产权的保护 和实施规则

WTO Rules about the Protection of Trade-related Intellectual Property Right

WTO 成员针对版权(Copyrights)、商标(Trademarks)、地理标志(Geographical Indication)、工业设计(Industrial Designs)、专利(Patents)、集成电路的布图设计(Layout-designs of Integrated Circuits)、未公开的信息(Unclosed Information)等知识产权的保护与实施达成了一个协定 ,即 WTO《与贸易有关的知识产权协定》(Agreement on Trade-related Aspects of Intellectual Property Rights , TRIPS)^①。这个协定确立了有关知识产权的规则和纪律 ;同 WTO《服务贸易总协定》一样 ,它也是 WTO 协定的重要组成部分。

^① TRIPS consists of seven parts and seventy-three articles.

第一节 WTO 知识产权保护和实施 的目标和原则

WTO Objectives and Principles of the Protection and Enforcement of Intellectual Property Rights

一、目标(Objectives)

WTO《与贸易有关的知识产权协定》第 7 条规定：

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology , to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare , and to a balance of rights and obligations.

知识产权的保护与实施应有利于推动技术创新、技术转让和传播 ,对技术知识的生产者与使用者均有利 ,知识产权的保护和实施的方式有益于社会及经济福利 ,有利于 WTO 成员间权利与义务的平衡。

二、原则(Principles)

(一)WTO 知识产权保护和实施的一般性原则(General Principles of the Protection and Enforcement of Intellectual Property Rights)

WTO 对知识产权保护与实施适用具有特定内容的国民待遇原则和最惠国待遇原则。

1. 国民待遇原则(The Principle of National Treatment)

According to Article 3 of TRIPS , each Member shall , in normal case , accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property which include matters affecting the availability , acquisition , scope , maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights.

根据《与贸易有关的知识产权协定》第3条 ,在一般情况下 ,每一成员就知识产权保护(包括影响知识产权的有效性、取得、范围、持久性和实施的事项以及影响知识产权使用的事项) ,对其他成员的国民所给予的待遇不得低于本国国民所享有的待遇。

2. 最惠国待遇原则(the Principle of Most-Favoured-Nation Treatment , MFN)

With regard to the protection of intellectual property , any advantage , favour , privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.

任何成员就知识产权保护给予另一成员国民的利益、优惠、特权或豁免应当立即、无条件地给予所有其他成员的国民。

但下列情况是最惠国待遇原则的例外：

(a) international agreements on judicial assistance or law enforcement of a general nature and not particularly confined to the protection of intellectual property ;

(1)一些关于司法协助及一般性质的法律实施的国际协定 ,这类协定并不是专门针对知识产权保护签订的；

具体说来 ,此类协定产生的优惠、利益、豁免或特权 ,仅适用于签订该类协定的成员 ,而不适用于世贸组织的其他成员。

(b) In accordance with the provisions of the Berne Convention (1971) or the Rome Convention , the treatment accorded is a function not of national treatment but of the treatment accorded in another country ;

(2)根据《伯尔尼公约》(1971 年)及《罗马公约》中的规定 ,不属国民待遇而由另一成员享有的待遇 ;

(c) the rights of performers , producers of phonograms and broadcasting organizations not provided under this Agreement are not restrained by the MFN ;

(3)WTO《与贸易有关的知识产权协定》中未加规定的表演者、录音制品制作者及广播组织的权利不受最惠国待遇约束 ;

(d) any advantage , favour , privilege or immunity is an exception of MFN derived from international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the WTO Agreement , provided that such agreements are notified to the Council for TRIPS and do not constitute an arbitrary or unjustifiable discrimination against nationals of other Members.

(4)根据《WTO 协定》生效前已经有效的知识产权保护国际协定获得的利益、优惠、特权、豁免 ,可以作为最惠国待遇的例外 ,若这些协定被通知与贸易有关的知识产权理事会 ,并且也不对其他成员国国民构成任意或不公正的歧视。

从上述条款中看出 ,WTO《与贸易有关的知识产权协定》所确立

的国民待遇原则和最惠国待遇原则与 WTO 普遍适用的国民待遇原则和最惠国待遇原则本质上是一致的。但须注意的是其中涉及到一些知识产权国际公约和条约,如《保护工业产权巴黎公约》(Paris Convention for the Protection of Industrial Property)、《保护文学和艺术作品的伯尔尼公约》(Berne Convention for the Protection of Literature and Artistic Works)、《保护表演者、唱片制作者和广播组织国际公约》(International Convention for the Protection of Performance, Producers of Phonograms and Broadcasting Organizations)、《关于集成电路的知识产权条约》(Treaty on Intellectual Property in Respect of Integrated Circuits)等等,而这些公约和条约所确立的有关国民待遇和最惠国待遇的规则优先适用。

(二)WTO 知识产权保护和实施的特定原则(Specific Principles of the Protection and Enforcement of Intellectual Property Rights)

WTO 知识产权保护和实施的基本原则包括以下两个方面:

On the one hand, any Member in formulating or amending its laws and regulations, can adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

一方面,任何成员在其制定与修改国内知识产权法律、法规时,可采取必要的措施(只要这些措施同《与贸易有关的知识产权协定》的规定相一致)保护公众的健康和营养的供给,不断提高对其社会经济和技术发展至关重要的部门的公共利益水平。

On the other hand, appropriate measures may be needed to prevent the abuse of intellectual property rights by right holders or the resort to

practices which unreasonably restrain trade or adversely affect the international transfer of technology.

另一方面 ,WTO 成员有必要采取适当的措施防止知识产权持有人滥用知识产权 ,或以不正当手段限制贸易或对国际技术转让产生消极影响。

(三)关于“权利利用尽”(Provision on Exhaustion)

TRIPS 第 6 条规定 :

For the purposes of dispute settlement under this Agreement , subject to the principles of MFN and National Treatment nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.

对于 TRIPS 下的争端解决 ,在符合国民待遇和最惠国待遇原则的前提下 ,该协定的任何条款均不用于解决知识产权权利利用尽问题。

知识产权的“权利利用尽”(Exhaustion)是指知识产权产品被售出之后 ,其他人不需经过许可即有权再销售或出口该产品。但从上述规定中看出 ,WTO《与贸易有关的知识产权协定》对此没有制定相应的适用规则。但对“权利利用尽”没作规定则必然会产生“平行进口”(Parallel Import)问题。以下以版权商品为例对平行进口问题作一分析。

何谓版权商品的平行进口?举例来说 ,如果一个外国的版权所有人通过独占许可协议(合同)将其版权转让给我国国内一家公司(A公司,版权受让人),并指定 A 公司制作的版权商品限于中国国内市场销售。如果外国的版权所有人又将其版权转让给第三国的一家公司(B公司,也是版权受让人),而我国一家进口商(C公司)又将 B 公司在第三国制作的版权商品进口到国内市场 ,这就构成了版权商品的平行进口。

版权商品的平行进口是一个比较棘手的问题,因为它是一个涉及到版权问题的贸易问题。从贸易角度看,平行进口的商品是合法制作的商品,而非假冒的盗版商品,因此对这种商品的进口不应加以禁止;但从版权角度看,受让人享有版权专有权,而这种专有权又可能包括受让人在某一地域销售的独占权,因此平行进口损害了版权受让人的权益,对平行进口应该加以禁止。

尽管WTO《与贸易有关的知识产权协定》开宗明义地指出该协定旨在消除对国际贸易的扭曲和阻碍,促进对知识产权的充分和有效的保护,确保行使知识产权的措施和程序对合法贸易不构成障碍。但对于各成员国应制订的版权所有人要求海关停止放行、不让侵权的进口商品进入自由流通的程序,该协定规定各成员国没有义务将其应用于由版权所有人或经他同意而投入到另一国市场的进口商品或过境商品^①。由于平行进口的版权商品不是假冒的盗版的商品,而平行进口的产生也非与版权所有人毫无关联,因此版权商品的平行进口被排除在该协定适用范围之外。

一些国际公约如《伯尔尼保护文学和艺术作品公约》(《伯尔尼公约》)也没有具体地涉及到版权商品的平行进口问题;而《世界版权公约》仅规定经许可出版的译本复制品可以输入到另一缔约国并在其境内销售,但条件是该国的通用语文与作品的译文是同一种语文,且该国法律对这种复制品的进口(也可能是平行进口——笔者注)销售不予禁止^②。可见该公约将版权商品的平行进口交由各缔约国按其国内法来处理,这就为各缔约国按照国内法或双边条约乃至国内贸易政策处理版权商品的平行进口问题留下了“空间”。

^① See Article 51 and Note thereto of TRIPs.

^② 《世界版权公约》第5条第2款第5项。

第二节 WTO 与版权和商标 有关的规则

WTO Rules Relative to Copyrights and Trademarks

一、版权(Copyrights)

(一) 版权保护的范 围(Scope and Coverage of Copyright Protection)

Article 9. 2 ,10 and 11 of TRIPS stipulates , copyright protection shall extend to expressions and not to ideas , procedures , methods of operation or mathematical concepts as such , and Computer Programs and Compilations of Data , and rental rights on computer programs and cinematographic works.

《与贸易有关的知识产权协定》第 9. 2 条、第 10 条和第 11 条规定 , 版权保护应延伸至表达方式(思想、程序、操作方法及其数学概念等不在此列)、计算机程序和数据汇编及计算机程序及电影作品的出租权。

换言之 , 在《与贸易有关的知识产权协定》下 , 版权所有人不仅仅享有翻译权、复制权、公演权、广播权、朗诵权、改编权、录制权、制版权等经济权利(但发表权、署名权、修改权及保护作品完整权等精神权利不在保护范围之内^①)。

^① See Article 9. 1 of TRIPS.

Performers shall have the possibility of preventing the following acts when undertaken without their authorization : the fixation of their unfixed performance and the reproduction of such fixation or the broadcasting by wireless means and the communication to the public of their live performance. Producers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms. Broadcasting organizations shall also have the right to prohibit the following acts when undertaken without their authorization : the fixation , the reproduction of fixations , and the rebroadcasting by wireless means of broadcasts , as well as the communication to the public of television broadcasts of the same.

表演者可以禁止下列未经其授权的行为 : 录制其未曾录制的表演并翻录这些录制品 ; 以无线方式广播和向公众播出其现场表演。唱片制作者有权授权或禁止他人复制发行并获得报酬的权利。广播组织有权禁止未经其授权的下列行为 : 录制其广播、复制其广播作品、通过无线方式重播或广播、原样向公众播送电视广播。

(二) 版权保护期限 (Term of Copyright Protection)

Whenever the term of protection of a work , other than a photographic work or a work of applied art , is calculated on a basis other than the life of a natural person , such term shall be no less than 50 years from the end of the calendar year of authorized publication , or , failing such authorized publication within 50 years from the making of the work , 50 years from the end of the calendar year of making.

作品(除摄影作品和实用艺术作品之外) 的保护期限 , 不是以自然人的生命为计算依据的。作品保护期为经授权出版之年年底起至少不少于 50 年。如果作品创作后 50 年内没授权出版 , 则从作品创作完成的那年年底开始计算 , 保护期为 50 年。

The term of the protection available under this Agreement to performers and producers of phonograms shall last at least until the end of a period of 50 years computed from the end of the calendar year in which the fixation was made or the performance took place. The term of protection shall last for at least 20 years from the end of the calendar year in which the broadcast took place.

对表演者和唱片制作者的有效保护期为自录制或节目表演当年年底开始起算至少 50 年。对广播组织的保护期限一般为开始广播那一年年底起至少 20 年。

二、商标(Trademarks)

(一) WTO《与贸易有关的知识产权协定》中商标的定义(Definition of Trademark under TRIPs)

《与贸易有关的知识产权协定》第 15 条规定：

Any sign , or any combination of signs , capable of distinguishing the goods or services of one undertaking from those of other undertakings , shall be capable of constituting a trademark. Such signs , in particular words including personal names , letters , numerals , figurative elements and combinations of colours as well as any combination of such signs , shall be eligible for registration as trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services , Members may make registrability depend on distinctiveness acquired through use. As a condition of registration , that signs should be visually perceptible.

任何使一个企业的产品或服务区别于其他企业的标志或标志的组合都可成为商标。这类标记 , 尤其是包括个人姓名的单词、字母、数字、图形和颜色混合以及这类标记的混合均可注册为商标。若标

记本身不能区分有关的商品和服务 ,则 WTO 成员可要求经使用才能注册 ,从而使该商标具有区别性。作为注册的一个条件 ,这些标记应是显而易见的。

(二)WTO 关于商标注册的规则(Rules on Trademark Registration)

WTO permits its Members to make registrability depend on use. However , actual use of a trademark shall not be a condition for filing an application for registration. An application shall not be refused solely on the ground that intended use has not taken place before the expiry of a period of three years from the date of application.

WTO 允许其成员依使用来注册。但商标的实际使用不应是提出注册申请的条件。注册申请不能只因为自提出注册申请之日起 3 年内未实际使用而被拒绝。

Each trademark shall be published either before it is registered or promptly after it is registered , and a reasonable opportunity for petitions to cancel the registration shall be afforded. In addition , Members may afford an opportunity for the registration of a trademark to be opposed.

每一种商标在注册前或注册后立即公布 ,并且为他人提出撤销注册的诉请提供合理的机会。另外 ,WTO 成员也应使他人有机会提出异议。

(三)WTO 关于商标使用的规则(WTO Rules on the Use of Trademarks)

Article 16. 1 of TRIPs lays down that the owner of a registered trademark have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar

signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. The rights described above shall not prejudice any existing prior rights , nor shall they affect the possibility of Members making rights available on the basis of use.

《WTO 与贸易有关的知识产权协定》第 16.1 条规定 ,注册商标所有权人享有独占权 ,以防止任何第三方未经其授权在相同或相似的商品或服务贸易中使用相同或相似的注册商标的标记(而这种使用会导致公众产生混淆)。商标所有权人在行使上述权利时不应损害任何已有的在先权 ,也不应影响 WTO 成员在使用后可获得相应权利。

WTO《与贸易有关的知识产权协定》没有具体规定“在先权”(Prior Rights)包括哪些权利。一般认为这种在先权应包括已获保护的商号权、已获保护的工业品外观设计专有权、版权、已获保护的原产地地理标志名称权、姓名权、肖像权等^①。

Initial registration , and each renewal of registration , of a trademark shall be for a term of no less than seven years. The registration of a trademark shall be renewable indefinitely.

原始注册商标及其每次续展后的保护期应不少于 7 年 ,注册商标可多次续展。

If use is required to maintain a registration , the registration may be cancelled only after an uninterrupted period of at least three years of non-use , unless valid reasons based on the existence of obstacles to such use

^① Available at www.wtoinfo.net.cn.

are shown by the trademark owner.

如果以使用来维持商标注册 ,只有在至少连续 3 年的期限内没有使用 ,商标所有权人也不能提出由于存在障碍使之无法使用的正当理由的情况下 ,才可取消其注册。

第三节 WTO 有关地理标志和 工业设计的规则

WTO Rules on Geographical Indications and Industry Design

一、地理标志(Geographical Indications)

(一)地理标志的定义(The Definition of Geographical Indications)

Geographical indications are indications which identify a good as originating in the territory of a Member , or a region or locality in that territory , where a given quality , reputation or other characteristic of the good is essentially attributable to its geographical origin.

地理标志指表明一商品来源于一成员境内 ,或境内的一个地区或一个地方的标志 ,而该商品的一种特定质量、声誉或其他的特性实质上即归因于这一地理来源。

从上述定义中看出 ,地理标志有两个方面的特点 (1)标志方式多样化 ,既可用 WTO 成员名称来标识 ,也可用成员境内的一个地区 ,甚至这种地区内的一个地方来标识(如“ 英格兰威士忌 ”、“ 庐山云雾茶 ”) (2)地理标志与商品的一种特定质量、信誉和其他特性具有本质上的联系。

account that consumers are not misled.

当葡萄酒的地理标记同音异义时,应对每一种标记都予以保护。但这种同音异义的标志彼此应有所区别,以免消费者被误导。

(三)一些例外规则(Some Exceptional Rules)

根据 WTO《与贸易有关的知识产权协定》第 24 条,有关地理标志使用与保护的例外规则主要涉及以下内容:

1. Nothing shall require a Member to prevent continued and similar use of a particular geographical indication of another Member identifying wines or spirits in connection with goods and services by any of its nationals or domiciliaries who have used that geographical indication in a continuous manner with regard to the same or related goods or services in the territory of that Member either (a)for at least 10 years preceding 15 April 1994 or (b)in good faith preceding that date.

1. 一个 WTO 成员的国民或居民已在该成员境内对相同或相关的产品或服务使用另一成员的葡萄酒或烈性酒的地理标记,且(1)在 1994 年 4 月 15 日之前已使用了至少 10 年;或(2)在此日期之前诚实地予以使用,则不要求该成员制止其国民或居民继续使用或以相似方式使用该地理标记。

2. Where a trademark has been applied for or registered in good faith, or where rights to a trademark have been acquired through use in good faith before the geographical indication is protected in its country of origin, measures adopted shall not prejudice eligibility for or the validity of the registration of a trademark, or the right to use a trademark, on the basis that such a trademark is identical with, or similar to, a geographical indication.

2. 地理标记在其原产国获得保护之前,已真实地申请或注册了

一个商标 ,或者已真实地通过使用获得了一个商标 ,则不得因为该商标与一个地理标记相同或相似而影响该商标注册的合格性或有效性 ,或者损害商标权所有人使用该商标的权利。

3. A Member may provide that any request in connection with the use or registration of a trademark must be presented within five years after the adverse use of the protected indication has become generally known in that Member or after the date of registration of the trademark in that Member provided that the trademark has been published by that date , if such date is earlier than the date on which the adverse use became generally known in that Member , provided that the geographical indication is not used or registered in bad faith.

3. 若任何有关商标的使用或注册权利要求早于人所共知的恶意使用地理标记之日 ,只要地理标记不被恶意地使用或注册 ,则成员国可以规定 ,这种要求必须在受保护的地理标记在该成员境内受到人所共知的恶意使用之日起的 5 年之内提出 ,或者是在该商标在该成员注册日之后提出(但商标须于注册日已公布)。

二、工业设计(Industrial Designs)

对工业设计保护 ,WTO《与贸易有关的知识产权协定》第 25 条和第 26 条作了具体规定。

The protection of industrial designs is to protect independently created industrial designs that are new or original. The designs are not new or original if they do not significantly differ from known designs or combinations of known design features. But such protection shall not extend to designs dictated essentially by technical or functional considerations.

所谓工业设计保护是要保护具有新颖性的或具有原创性的独立创作的工业设计。但这种保护不应延伸至实质上由技术因素或功能

因素决定的工业设计。

The owner of a protected industrial design has the right to prevent third parties not having the owner's consent from making , selling or importing articles bearing or embodying a design which is a copy , or substantially a copy , of the protected design , when such acts are undertaken for commercial purposes.

受到保护的工业设计的权利所有人有权禁止第三方为了商业目的未经其同意即制造、出售或进口一些物品 ,这些物品具有或包含着与受到保护的外观设计相同或基本上相同的外观设计。

The duration of protection available shall amount to at least 10 years.

工业设计的保护期限不少于 10 年。

第四节 WTO 与专利有关的规则

WTO Rules Relative to Patents

WTO《与贸易有关的知识产权协定》第 5 部分(第 27 条至 34 条)确立了与专利有关的规则。

一、可获专利的标的物(Patentable Subject Matter)

Patents shall be available for any inventions , whether products or processes , in all fields of technology , provided that they are new , involve an inventive step and are capable of industrial application.

专利应适用于所有技术领域中的任何发明 ,不论它是产品还是方法 ,只要具有新颖性、创造性及工业上的实用性。

The following items may exclude from patentability inventions :

(a) inventions preventing the commercial exploitation of which is necessary to protect ordre public or morality , including to protect human , animal or plant life or health or to avoid serious prejudice to the environment ;

(b) diagnostic , therapeutic and surgical methods for the treatment of humans or animals ;

(c) plants and animals other than micro-organisms , and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes.

以下各项可不授予专利权：

(1)阻止以保护公共秩序、社会公德为目的(包括保障本国人民、动物或植物的生命或健康 ,或避免对环境的严重损害)的商业开发的发明；

(2)对人或动物的诊断、治疗和外科手术方法；

(3)除微生物外的植物和动物 ;特别是除用微生物和非微生物方法生产的、主要是用生物过程生产的动物、植物品种。

二、专利权的范围(Rights Conferred)

《与贸易有关的知识产权协定》第 28 条规定 ,授予专利权人的独占权(Exclusive Rights)包括：

(a) where the subject matter of a patent is a product , to prevent third parties not having the owner's consent from the acts of : making , using , offering for sale , selling , or importing for these purposes that product ;

(1)当专利标的物是产品 ,则专利所有权人有权禁止第三方未经其许可从事制造、使用、提供销售、出售或为这些目的而进口该专利产品。

这里涉及到专利权下的“进口权”问题。“进口权”指专利权人有权制止他人未经其许可进口其享有专利权的产品,它与专利产品的平行进口问题有着密切的联系(有关平行进口问题可参见前述)。

(b) where the subject matter of a patent is a process , to prevent third parties not having the owner s consent from the act of using the process , and from the acts of : using , offering for sale , selling , or importing for these purposes at least the product obtained directly by that process.

(2)如果专利的标的物是方法 ,则权利人有权禁止第三方未经其同意使用该方法及从事使用、提供销售、销售或至少为这些目的进口由该方法直接获得的产品。

除了上述专利所有权人的独占权外 ,专利所有权人有权以转让 (Assignment)或继承方式转移(Transfer by Succession)专利权、签订合同^①。

三、关于强制许可的主要规则(Rules on the Use without Authorization of the Right Holder)

According to Article 31 of TRIPs , the major rules on the use without authorization of the right holder are as follows :

(a) the prerequisite is that the efforts to obtain authorization from the right holder have not been successful within a reasonable period of time ;

(b) the scope and duration of such use shall be limited to the pur-

^① See Article 28.2 of TRIPs.

pose for which it was authorized ;

(c) such use shall be non-exclusive ;

(d) any such use shall be authorized predominantly for the supply of the domestic market ;

(e) authorization for such use shall be liable to be terminated if and when the circumstances which led to it cease to exist and are unlikely to recur ;

(f) the right holder shall be paid adequate remuneration.

(g) the legal validity of any decision relating to the authorization of such use shall be subject to judicial review.

根据 WTO《与贸易有关的知识产权协定》第 31 条 ,关于强制许可的主要规则包括 :

(1)适用强制许可的前提条件是在一段合理的时间期间内向权利人获取使用授权的努力没有成功 ;

(2)强制许可的范围和期限限于其目的 ;

(3)实施强制许可不应有独占使用权 ;

(4)实行强制许可主要是为了供应国内市场 ;

(5)如果原来适用强制许可的情况不再存在或不再出现或当原来适用强制许可的情况不再存在或不再出现时 ,强制许可则应终止实施 ;

(6)专利人应得到足够的补偿 ;

(7)有关强制许可的决定 ,其法律上的有效性应受到司法审查。

四、专利保护期限(Term of Protection for Patents)

The term of protection available shall not end before the expiration of a period of twenty years counted from the filing date.

专利保护的有效期应不少于自提交申请之日后的 20 年。

第五节 WTO 有关集成电路的布图设计 和未公开的信息的保护规则

WTO Rules about the Protection of Layout-designs of Integrated Circuits and Unclosed Information

一、集成电路的布图设计(Layout-designs of Integrated Circuits)

集成电路的布局设计(以下简称“ 布图设计 ”)同时受到《集成电路知识产权条约》(Treaty on Intellectual Property in Respect of Integrated Circuits , ICIP)和 WTO《与贸易有关的知识产权协定》第 6 部分(第 35 条至第 38 条)的保护。

(一)WTO 确立的有关布图设计保护范围(Scope of Protection for Layout-designs Established by WTO)

According to Article 36 of TRIPs , the following acts will be considered unlawful if performed without the authorization of the right holder : importing , selling , or otherwise distributing for commercial purposes a protected layout-design , an integrated circuit in which a protected layout-design is incorporated , or an article incorporating such an integrated circuit only in so far as it continues to contain an unlawfully reproduced layout-design.

根据《与贸易有关的知识产权协定》第 36 条 ,在没有获得正当权利人授权时 ,下列行为将是不合法的 :为商业目的进口、出售或推销受保护的布图设计、含有受保护的布图设计的集成电路或者一种

融入集成电路的物品(这种物品带有非法复制的布图设计)。

The performance of any of above acts shall also not be considered unlawful where a person did not know and had no reasonable ground to know that articles incorporated an unlawfully reproduced layout-design. After the time that such person has received sufficient notice that the layout-design was unlawfully reproduced , that person may perform any of the acts with respect to the stock on hand or ordered before such time , but shall be liable to pay to the right holder a sum equivalent to a reasonable royalty.

当一个人不知道且没有合理的理由应当知道物品含有非法复制的布图设计时 ,则其实施上述任何行为均不是不合法的。在其得知所用布局设计属非法复制以后 ,他仍可对库存产品实施上述行为 ,但应向正当权利人支付相应的合理费用。

(二)关于布图设计的保护期限(On Term of Protection of Layout-designs)

WTO 有关布图设计保护期限的规定分以下 3 种情况 :

1. In the case of registration as a condition of protection , the term of protection of layout-designs shall not end before the expiration of a period of 10 years counted from the date of filing an application for registration or from the first commercial exploitation wherever in the world it occurs ;

1. 若以注册作为提供保护的条件 ,对布图设计的保护期不得少于自注册申请日起或者自在世界上任何地方首次投入商业性开发之日起 10 年的时间 ;

2. In the case of not requiring registration as a condition for protec-

tion , layout-designs shall be protected for a term of no less than 10 years from the date of the first commercial exploitation wherever in the world it occurs ;

2. 如果不要以注册作为提供保护的条件 ,对布图设计的保护期不少于自在世界上任何地方首次投入商业性开发之日起的 10 年的时间 ;

3. The term of protection shall also lapse 15 years after the creation of the layout-design.

3. 保护期也可作为作出布图设计之后的 15 年的时间。

二、未公开的信息(Unclosed Information)

So-called unclosed information (a) is secret in the sense that it is not generally known among or readily accessible to persons ; (b) has commercial value because it is secret ; and (c) has been subject to reasonable steps to keep it secret.

所谓“ 未公开信息 ”是指 (1)是非人所共知或他人不易接触到的秘密 (2)因其属于秘密而具有商业价值 (3)已采取合理的措施使之保密。

Protecting undisclosed test or other data relating to pharmaceutical or agricultural chemical products against unfair commercial use.

保护未公开的与药品和农业化学产品有关的测试数据或其他数据 ,以免在商业上被不正当地使用。

最后须说明的是 WTO《与贸易有关的知识产权协定》规定的对知识产权侵权的补救规则。这些规则是 : 司法部门应采取迅速而有效的临时措施以保护有关指控侵权的证据 ,并通过禁止进口产品进

入商业渠道来制止侵权行为的发生(第44条);当侵权行为确认后,法院应有权判决侵权人对知识产权所有人赔偿损失(第45条);法院有权勒令销毁侵权产品(第46条);如出现商业规模的商标假冒或盗版行为,按刑法规定侵权人应被提起公诉并判以监禁或罚款的处罚(第61条)。

本章小结

本章介绍了 WTO 关于知识产权保护和实施的规则。WTO《与贸易有关的知识产权协定》是 WTO 最重要的协定之一,它包含着版权、商标、专利、地理标志、工业设计、集成电路的布图设计、未公开信息等 7 个领域的规定。显然,它的内容突破了传统的知识产权内涵,将地理标志、工业设计、集成电路的布图设计也纳入其管辖的范围。在知识产权保护和实施中,最惠国待遇原则和国民待遇原则是适用的最基本原则,另一方面,WTO 也注重在知识产权的保护与防止知识产权持有人滥用知识产权或以不正当手段限制贸易之间保持平衡。知识产权涉及“权利穷竭”问题,与“权利穷竭”有关的平行进口问题也颇值得关注,尽管 WTO 对此未作规定。

思考题

1. WTO《与贸易有关的知识产权协定》适用哪几种知识产权?
2. 知识产权商品的平行进口是如何产生的?
3. 简述 WTO《与贸易有关的知识产权协定》针对“地理标志”所确立的基本规则。
4. 何谓专利的强制许可?对此,WTO《与贸易有关的知识产权协定》是如何规定的?

第十二章 WTO 与贸易有关的 投资措施规则和进 口许可程序规则

WTO Rules of Trade-related Investment Measures and of Import Licensing Procedures

第一节 WTO 与贸易有关的 投资措施规则

WTO Rules of Trade-related Investment Measures

WTO 与贸易有关的投资措施规则体现于《与贸易有关的投资措施协定》(Agreement on Trade-related Investment Measures ,also called as TRIMs Agreement)^①中。这些规则仅适用于与商品贸易有关的投资措施(Investment Measures Related to Trade in Goods only)^②。

① TRIMs comprises nine articles and one annex(i. e. Illustrative List).

② See Article 1 of TRIMs.

一、WTO 所禁止的投资措施(Investment Measures forbidden by WTO)

WTO 所禁止的投资措施主要限于不符合国民待遇原则和实施数量限制的措施^①。

(一)不符合国民待遇原则的措施(TRIMs Inconsistent with the Principle of National Treatment)

不符合国民待遇原则的措施有以下两类：

1. TRIMs that are inconsistent with the obligation of national treatment include those which are mandatory or enforceable under domestic law or under administrative rulings.

1. 不符合国民待遇原则的与贸易有关的投资措施 ,包括那些国内法律或行政条例规定的强制实施的措施。

2. TRIMs compliance with which is necessary to obtain an advantage ,and which require :(a) the purchase or use by an enterprise of products of domestic origin or from any domestic source , whether specified in terms of particular products , in terms of volume or value of products , or in terms of a proportion of volume or value of its local production ; or (b) that an enterprise s purchases or use of imported products be limited to an amount related to the volume or value of local products that it exports.

2. 可获得一项利益的与贸易有关的投资措施。这些措施要求：
(1)企业购买和使用本国生产的产品或源自本国的产品。这种要求具体到特定的产品 ,或者是对本国产品数量和价值上的要求 ,或者是对当地生产的产品数量和价值上的比例要求。或 (2)企业购买和

^① See Annex to TRIMs Agreement : Illustrative List.

使用的进口产品限于一定的数量 ,这个数量与其出口的当地产品的数量或价值相联系。

(二)不符合一般取消数量限制原则的措施(TRIMs Inconsistent with the Principle of General Elimination of Quantitative Restrictions)

1. TRIMs that are inconsistent with the obligation of general elimination of quantitative restrictions include those which are mandatory or enforceable under domestic law or under administrative rulings.

1. 不符合一般取消数量限制原则的与贸易有关的投资措施 ,包括那些国内法律或行政条例规定的强制实施的措施。

2. TRIMs complying with which is necessary to obtain an advantage , and which restrict : (a) the importation by an enterprise of products used in or related to its local production , generally or to an amount related to the volume or value of local production that it exports ; (b) the importation by an enterprise of products used in or related to its local production by restricting its access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise ; or (c) the exportation or sale for export by an enterprise of products , whether specified in terms of particular products , in terms of volume or value of products , or in terms of a proportion of volume or value of its local production.

2. 可获得一项利益的与贸易有关的投资措施。这些措施限制 :
(1)企业在当地生产中使用的或与生产相联系的产品的进口 ;这种产品的进口量与其出口的当地生产的产品的数量或价值相联系。
(2)企业在当地生产中使用的或与生产相联系的产品的进口 ;这种限制是通过限制企业持有外汇额来实施的(企业持有的外汇额是与

企业外汇流入相联系的)。或者(3)企业生产的产品出口或为出口而销售,这种限制或许具体到特定的产品,或许是对产品数量和价值上的要求,或许是对当地生产的产品数量和价值比例上的要求。

WTO 成员所实施的与贸易有关的投资措施要求主要有当地含量要求(即在生产中使用一定价值的当地投入)、贸易平衡要求(即进口要与一定比例的出口相当)、外汇平衡要求(即规定进口需要的外汇应来自公司出口及其他来源的外汇收入的一定比例)、国内销售要求、出口实绩要求(规定应出口一定比例的产品)、当地股份要求(规定公司股份的一定百分比由当地投资者持有)等等。从上述 WTO《与贸易有关的投资措施协定》所确立的规则中可看出,WTO 禁止使用的与贸易有关的投资措施主要有 3 项,即当地成分要求、外汇平衡要求和国内销售要求。

二、适用于发展中国家成员的特殊规则(Special Rules Applicable to Developing Country Members)

According to Article 4 of TRIMs, a developing country Member, in compliance with such provisions as Article XVIII of GATT 1994 and so on, shall be free to deviate temporarily from above-said principles.

根据《与贸易有关的投资措施协定》第 4 条,发展中国家成员可以暂时自由地背离前述国民待遇和一般取消数量限制原则,但这种背离应符合《GATT 1994》第 18 条^①等相关条款的规定。

也就是说,发展中国家成员为了平衡外汇收支和扶植国内幼稚产业等,可以暂时实施上述不符合国民待遇原则和一般取消数量限制原则的措施。

^① 具体内容参阅本书前述第三章第六节。

第二节 WTO 进口许可程序规则

WTO Rules of Import Licensing Procedures

WTO《进口许可程序协定》(Agreement on Import Licensing Procedures)确立了 WTO 进口许可程序规则。这些规则加强了对进口许可程序使用者的约束,增强了进口许可程序的透明度和可预测性。但这些规则适用的广泛性也将越来越小。

一、“进口许可”的含义(Meaning of Import Licensing)

Import licensing is defined as administrative procedures used for the operation of import licensing regimes requiring the submission of an application or other documentation (other than that required for customs purposes) to the relevant administrative body as a prior condition for importation into the customs territory of the importing Member.

“进口许可”被定义为进口许可制度的运作所使用的行政程序。这种进口许可制度的运作以要求向有关的行政管理机构提交申请表或其他文件(这些文件不是为海关管理所要求的)作为可将产品进口至进口成员关境内的先决条件。

二、WTO 关于进口许可程序透明度的基本要求(Principal Requirements of the Transparency of Import Licensing Procedures)

WTO《进口许可程序协定》第 1.4(a)条规定:

The rules and all information concerning procedures for the submission of applications, including the eligibility of persons, firms and institutions to make such applications, the administrative body(ies) to be

approached , and the lists of products subject to the licensing requirement shall be published in such a manner as to enable governments and traders to become acquainted with them. Such publication shall take place , whenever practicable , 21 days prior to the effective date of the requirement but in all events not later than such effective date.

WTO 成员应将 与进口许可的申请提交程序有关的规则和全部信息 , 包括提出申请的 个人、商号和机构的资格、受理申请的行政机构及有进口许可要求的产品清单 都应以使政府和贸易商知悉的方式公布。这种公布应在进口许可要求生效前 21 日内的任何可行时间进行 , 但无论如何不迟于生效日。

三、进口许可的分类及相应规则(Classification of Import Licensing and Rules Thereof)

进口许可分为两类 , 即自动进口许可和非自动进口许可。

(一) 自动进口许可(Automatic Import Licensing)

Automatic import licensing is defined as import licensing where approval of the application is granted in all cases , and the administration of which shall not be in such a manner as to have restricting effects on imports subject to automatic licensing.

“ 自动进口许可 ” 被定义为在所有情况下均批准进口申请 , 且自动许可程序的行政管理方式不应对受自动许可管理的进口产品产生限制作用。

Applications for licences when submitted in appropriate and complete form are approved immediately on receipt , to the extent administratively feasible , but within a maximum of 10 working days.

当许可申请以适当和完整的形式提交时 , 若在管理上可行 , 则要

在收到后立即批准。但批准的最长期限不超过 10 个工作日。

(二) 非自动进口许可程序(Non-automatic Import Licensing)

非自动进口许可是指不属上述自动进口许可程序定义范围的进口许可。WTO《进口许可程序协定》第 3 条确立的有关非自动进口许可的主要规则包括：

(a) WTO Members administering quotas by means of licensing shall publish the overall amount of quotas to be applied by quantity and/or value , the opening and closing dates of quotas , and any change Thereof , within the time periods specified and in such a manner as to enable governments and traders to become acquainted with them ;

(1) 通过许可程序管理配额的成员应在规定的期限内 , 并以使政府和贸易商知悉的方式 , 公布按数量和(或) 价值实施的配额总量、配额的发放和截止日期及其任何变更；

(b) The period for processing applications shall not be longer than 30 days if applications are considered on a first-come first-served basis , and no longer than 60 days if all applications are considered simultaneously.

(2) 若配额是以先来先领的方式考虑分配 , 则处理申请的期限不得超过 30 天 , 如所有申请同时予以考虑 , 则处理申请的期限不得超过 60 天。

(c) In allocating licences , the Member should consider the import performance of the applicant.

(3) 分配许可证时 , 各成员应考虑申请人的进口实绩。

四、有关进口许可程序的通知与反向通知(Notification and Adverse Notification of Import Licensing Procedures)

Article 5 of Agreement on Import Licensing Procedures sets out that Members which institute licensing procedures or changes in these procedures shall notify the Committee on Import Licensing of such within 60 days of publication.

《进口许可程序协定》第5条规定,设立许可程序或对这些程序作了改变的 WTO 成员应在其公布后的 60 天内通知进口许可委员会。

Any interested Member which considers that another Member has not notified the institution of a licensing procedure or changes therein may bring the matter to the attention of such other Member. If notification is not made promptly thereafter , such Member may itself notify the licensing procedure or changes therein , including all relevant and available information.

任何 WTO 成员若认为另一成员没有将设立的许可程序或其任何改变通知进口许可委员会,则它可提请另一成员对此加以注意。或此后仍未立即通知进口许可委员会,该成员可自行将许可程序及其变更(包括所有相关的及可获信息)通知进口许可委员会。

总之,WTO《进口许可程序协定》主旨在提高各成员进口许可程序的透明度,避免进口许可程序成为一种对贸易产生扭曲和限制的非关税壁垒。以巴西诉欧盟家禽肉进口措施案(1997年)^①为例。1997年2月,巴西向WTO投诉欧盟在对家禽肉进口颁发许可证方面违反了WTO《进口许可程序协定》,这包括欧盟没有将免税配额通

^① WT/DS69 available at www.wto.org.

知 WTO、经常修改颁发许可证的规则及缺少透明度等。专家组认为，欧盟未将配额内产品进口需要许可证这一措施通知 WTO，这不符合 WTO《进口许可程序协定》的透明度要求。WTO 上诉机构对此维持专家组结论。可见，在《进口许可程序协定》下，WTO 透明度原则也必须得到遵守。

本章小结

本章介绍了 WTO 与贸易有关的投资措施规则和 WTO 进口许可程序规则。WTO 禁止使用的与贸易有关的投资措施主要有 3 项，即当地成分要求、外汇平衡要求和国内销售要求。但对发展中国家给予特别待遇。WTO 进口许可程序规则主旨在于要求各成员增加进口许可程序的透明度。有关进口许可程序的通知与反向通知的规则也体现了 WTO 运作模式。

思考题

1. WTO 禁止使用的与贸易有关的投资措施主要有哪几种？
2. “进口许可”的含义是什么？
3. 简述 WTO 有关进口许可程序反向通知规则。

第十三章 WTO 原产地规则和 海关估价规则

WTO Rules of Origin and Customs Valuation

第一节 WTO 原产地规则 WTO Rules of Origin

顾名思义 ,WTO 原产地规则主要用于确定产品的原产地。WTO 有关原产地的规则体现于 WTO《原产地规则协定》(Agreement on Rules of Origin)^①中。制定这一规则的目的在于促进各成员国原产地制度的协调 ,使其原产地制度本身不致于成为不必要的贸易障碍 (Unnecessary Obstacles to Trade)。

一、WTO 原产地规则的定义和分类(Definition and Classification of Rules of Origin)

(一)原产地规则的定义(Definition of Rules of Origin)

WTO《原产地规则协定》第 1 条对“ 原产地规则 ”作了以下定义 :

Rules of origin are defined as those laws , regulations and administrative determinations of general application applied by any Member to

^① This Agreement consists of nine articles and two annexes.

determine the country of origin of goods.

“原产地规则”被定义为任何成员为确定货物原产国而实施的普遍适用的那些法律、法规和行政决定。

在国际贸易中,原产地规则具有十分重要的作用。如美国的各种原产地规则有十套之多,在很大程度上原产地规则成为实施贸易保护的“特洛伊木马”(Trojan Horse)。

(二)原产地规则的分类(Classification of Rules of Origin)

原产地规则分为两类,一类是优惠的原产地规则,一类是非优惠的原产地规则。

1. 非优惠的原产地规则(Non-preferential rules of origin)

Non-preferential rules of origin include all non-preferential rules of origin, such as these rules under most-favoured-nation treatment, anti-dumping and countervailing duties, safeguard measures, origin marking requirements and any discriminatory quantitative restrictions or tariff quotas. They shall also include rules of origin used for government procurement and trade statistics.

非优惠的原产地规则包括最惠国待遇、反倾销税和反补贴税、保障措施、原产地标记要求以及任何歧视性数量限制或关税配额下的原产地规则,也包括用于政府采购和贸易统计使用的原产地规则。

WTO《原产地规则协定》主要是针对非优惠的原产地规则制定的。

2. 优惠的原产地规则(Preferential Rules of Origin)

Preferential rules of origin are defined as those laws, regulations and administrative determinations of general application applied by any Member to determine whether goods qualify for preferential treatment un-

der contractual or autonomous trade regimes leading to the granting of tariff preferences.

“ 优惠的原产地规则 ”是指 WTO 成员为确定货物可否享受提供关税优惠的自主性或契约性贸易体制下的优惠待遇所实施的那些法律、法规及行政决定。

优惠的原产地规则适用于自由贸易区及其他经济一体化组织内部贸易产品原产地的确定 ,是 WTO 一般最惠国待遇原则的例外^①。

二、原产地的认定规则(Establishing Rules of Origin)

(一)原产地的认定标准及相应要求(Determining Criteria of Origin and Corresponding Requirement)

在原产地的认定时涉及两类产品 ,一类是“ 完全原产 ”的产品 ,另一类是发生“ 实质性改变 ”的产品。对前者原产地的认定毋需赘述 ,对后者原产地的认定则较为复杂 ,其认定标准有三种 :

1. Criterion of Change in Tariff Classification

Requirement : clearly specifying the subheading or heading within HS tariff nomenclature.

1. 税则归类改变标准

要求 :详细说明 HS 税目下的“ 目 ”和“ 子目 ”。

HS 全称为“ 商品的品名与编码协调制度 ”(Harmonized Commodity Description and Coding System , HS) ,是国际公认的统一的海关“ 语言 ”。一般说来 ,产品经加工后 ,在 HS 中四位数字级(章、目)发生改变 ,即证明已发生了实质性改变。

^① For details , see Annex I to Agreement on Origin.

2. ad valorem Percentages Criterion

Requirement :the method for calculating this percentage shall be indicated.

2. 从价百分比标准

要求 :说明计算这种百分比的方法。

从价百分比标准 ,也称为增值标准(Value-added Criterion) ,主要用于考查进口成分或受惠国本国成分在受惠国出口制成品价格中的百分比 ,从而确定其是否发生了实质性改变。

3. Criterion of Manufacturing or Processing Operation

Requirement :the operation that confers origin on the good concerned shall be precisely specified.

3. 制造或加工工序标准

要求 :应准确说明授予有关货物原产地的工序。

制造或加工工序标准规定 ,只要在产品的生产过程中有几个特定的生产阶段或生产工序是在一个 WTO 成员内进行的 ,则这种产品即以该成员为原产地。

上述三种实质性改变标准中 ,后两者为补充标准(Supplementary Criteria)。如果一种商品的生产涉及一个以上国家 ,则该产品的原产地为其最后发生实质性改变(the Last Substantial Transformation)的国家。

(二)其他规则(Other Rules)

Rules of origin are based on a positive standard. Rules of origin that state what does not confer origin (negative standard) are permissible as part of a clarification of a positive standard or in individual cases where a positive determination of origin is not necessary.

原产地规则应以肯定标准为依据。作为澄清肯定标准的一部分或在不需使用肯定标准确定原产地的个别情况下,可允许使用说明什么情况不授予原产地的原产地规则(否定标准)^①。

第二节 WTO 海关估价规则

WTO Rules on Customs Valuation

海关估价主要目的在于对进口商品的申报价值进行审查,以确定合理的完税价格。为此 WTO 专门制定了海关估价规则,这一规则体现于 WTO《关于实施 < GATT 1994 > 第 7 条的协定》(Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 j. e. Customs Valuation Agreement ,以下简称《海关估价协定》)^②中。

一、WTO 海关估价的主要原则(Major Principles of Customs Valuation)

Customs valuation systems should be fair , uniform and neutral and the use of arbitrary or fictitious customs values should be precluded ;

The basis for valuation of goods for customs purposes should , to the greatest extent possible , be the transaction value of the goods ;

The valuation procedures should be of general application without distinction between sources of supply ;

The valuation procedures should not be used to combat dumping.

海关估价制度应公平、统一和中立,杜绝使用武断的或虚构的海关完税价格 ;

① See Article 2(f) of Agreement on Origin.

② This Agreement consists of 24 articles and 3 annexes.

确定海关完税价格应在最大程度上依据成交价格；
估价程序应是普遍适用的，不应因供应来源不同而不同；
估价程序不应用来抵制倾销。

须说明的是，“进口货物的完税价格”(Customs Value of Imported Goods)指海关对进口货物征收从价税时所使用的价格。

二、WTO 海关估价重要规则(Important Rule on Customs Valuation)

WTO《海关估价协定》第 1、2、3、4、5、6 条确立了海关估价依次采用的价格依据。

The customs value of imported goods shall be the transaction value or the transaction value of identical goods sold for export to the same country of importation and exported at or about the same time as the goods being valued, or the transaction value of similar goods sold for export to the same country of importation and exported at or about the same time as the goods being valued, or, the unit price at which the imported goods or identical or similar imported goods are so sold in the greatest aggregate quantity, at or about the time of the importation of the goods being valued (but deducting the customs duties and the national taxes, etc), or a computed value.

进口货物的海关完税价格应为成交价格，或向同一国家出口销售的与被估货物在大体相同时间出售的相同货物的成交价格，或向同一国家销售的与被估货物在大体相同时间出售的相似货物的成交价格，或与被估货物在大体相同时间以最大量出售的相同或相似货物的单价（但扣除关税和其他国内税等），或一种估算价格。

上述“估算价格”(Computed Value)由下列各项组成：

(a) the cost or value of materials and fabrication or other processing employed in producing the imported goods ;

(b) an amount for profit and general expenses equal to that usually reflected in sales of goods of the same class or kind as the goods being valued ;

(c) the cost or value of all other expenses necessary to reflect the valuation option.

(1)生产进口货物所使用的原料和进行装配或其他加工的费用或价值 ;

(2)与被估货物同一级或同一类的货物反映的利润和一般费用 ;

(3)与估价有关的所有其他支出费用或价值。

Article 7. 2 of Customs Valuation Agreement provides no customs value shall be determined on the basis of : (a) the selling price in the country of importation of goods produced in such country ; (b) a system which provides for the acceptance for customs purposes of the higher of two alternative values ; (c) the price of goods on the domestic market of the country of exportation ; (d) the cost of production other than computed values ; (e) the price of the goods for export to a country other than the country of importation ; (f) minimum customs values ; or (g) arbitrary or fictitious values.

《海关估价协定》第 7.2 条规定 ,不得根据下列情况确定海关完税价格 (1)在进口国生产的货物的售价 (2)为海关管理目的而规定采用两个价格中较高者的制度 (3)货物在出口国国内市场上的价格 (4)估算价格之外的生产成本 (5)向进口国之外的国家出口的货物价格 (6)最低海关限价或 (7)武断价格或虚构价格。

对于按成交价格确定海关完税价格,在进口货物实付或应付的价格中应加入由买方承担而未包括在实付或应付价格中的佣金和经纪费、包装材料和劳务费用等及与进口货物出口生产和销售有关的由买方免费或减价提供的部分货物和劳务价值、专利许可费等^①。

本章小结

本章介绍了 WTO 原产地规则和海关估价规则。原产地规则有优惠的原产地规则和非优惠的原产地规则之分。相比较而言,后者更为复杂。实质性改变标准有三种,即税则归类改变标准、从价百分比标准和制造或加工工序标准。WTO 海关估价规则实务性强,它为确定海关完税价格制定了具体的规则。但应明确的是 WTO 海关估价规则不适用于反倾销。

思考题

1. 何谓“非优惠的原产地规则”?
2. 简述三种实质性改变标准。
3. 何谓“完税价格”?
4. 确定进口货物的海关完税价格的价格依据是什么?

^① For details, see Article 8 of Customs Valuation Agreement.

第十四章 WTO 关于卫生与植物 检疫措施适用规则和技术 性贸易壁垒适用规则

WTO Rules about the Application of Sanitary and Phytosanitary Measures and of Technical Barriers to Trade

第一节 WTO 关于卫生与植物检疫 措施适用规则

WTO Rules about the Application of Sanitary and Phytosanitary Measures

在国际贸易中,一些 WTO 成员借口保护人类、动物或植物的生命或健康、保护生态平衡,设置了一些不合理的检疫措施和标准,严重地影响了国际贸易的正常发展。为此 WTO 制定了关于卫生与植物检疫措施的适用规则。这些规则体现于 WTO《实施卫生与植物检疫措施协定》(Agreement on the Application of Sanitary and Phytosanitary Measures, SPS Agreement)^①中。

^① There are 14 articles and 3 annexes in SPS Agreement.

一、卫生与植物检疫措施的内涵(Meaning of Sanitary and Phytosanitary Measures)

(一)定义(Definition)

卫生与植物检疫措施是指用于下列目的的任何措施：

(a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry , establishment or spread of pests , diseases , disease-carrying organisms or disease-causing organisms ;

(1)消除虫害、病害、带病有机体或致病有机体的传入、生长或传播所产生的风险 ,以保护 WTO 成员境内的动物或植物的生命或健康；

(b) to protect human or animal life or health within the territory of the Member from risks arising from additives , contaminants , toxins or disease-causing organisms in foods , beverages or feedstuffs ;

(2)消除食品、饮料或饲料中的添加剂、污染物、毒素或致病有机体所产生的风险 ,以保护 WTO 成员境内的人或动物的生命或健康；

(c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals , plants or products thereof , or from the entry , establishment or spread of pests ;

(3)消除动物、植物或动植物产品携带的病害 ,或虫害的传入、生长或传播所产生的风险 ,以保护成员境内的人的生命或健康；

(d) to prevent or limit other damage within the territory of the Member from the entry , establishment or spread of pests.

(4)防止或控制 WTO 成员境内因虫害的传入、生长或传播所产生的其他损害。

(二)范围(Scopes and Coverage)

Sanitary or phytosanitary measures include all relevant laws , decrees , regulations , requirements and procedures including , inter alia , end product criteria ; processes and production methods ; testing , inspection , certification and approval procedures ; quarantine treatments including relevant requirements associated with the transport of animals or plants , or with the materials necessary for their survival during transport ; provisions on relevant statistical methods , sampling procedures and methods of risk assessment ; and packaging and labelling requirements directly related to food safety.

卫生与植物检疫措施包括所有相关法律、法令、法规、要求和程序 ,特别是最终产品标准 ;工序和生产方法 ;检验、检查、认证和批准程序 ;检疫处理 ,包括与动物或植物运输有关的或与在运输过程中为维持动植物生存所需物质有关的要求 ;有关统计方法、抽样程序和风险评估方法的规定及与粮食安全直接有关的包装和标签要求。

二、WTO 成员的基本权利和义务(Basic Rights and Obligations of WTO Members)

WTO《SPS 协定》第 2 条规定了其成员享有的权利和应承担的义务。

1. Members have the right to take sanitary and phytosanitary measures necessary for the protection of human , animal or plant life or health , provided that such measures are not inconsistent with the provisions of this Agreement.

1. WTO 各成员有权采取为保护人、动物或植物的生命或健康所

必需的卫生与植物检疫措施 ,只要此类措施与本协定的规定不相抵触。

2. Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human , animal or plant life or health , is based on scientific principles and in normal case , is not maintained without sufficient scientific evidence.

2. WTO 各成员应保证任何卫生与植物检疫措施仅在为保护人、动物或植物生命或健康所必需的限度内实施 ,这些措施应以科学原理为基础 ,如无充分的科学证据则一般不再维持适用。

3. Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail , including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.

3. WTO 各成员应保证其卫生与植物检疫措施不在情形相同或相似的成员之间 ,包括在其自身和其他成员之间构成任意或不合理的歧视 ,卫生与植物检疫措施在实施中不得构成对国际贸易的变相限制。

4. Sanitary or phytosanitary measures which conform to the relevant provisions of this Agreement shall be presumed to be in accordance with the obligations of the Members under the corresponding provisions of GATT 1994.

4. 应当认为符合 SPS 协定有关规定的卫生或植物检疫措施与《GATT 1994》下的相关规定是一致的。

三、WTO 关于卫生与植物检疫措施适用的主要规则(Principal Rules of Application of SPS)

(一)协调规则(Harmonization Rule)

Article 3 of SPS Agreement spells out that , to harmonize sanitary and phytosanitary measures on as wide a basis as possible , Members shall base their sanitary or phytosanitary measures on international standards , guidelines or recommendations , where they exist.

《SPS 协定》第 3 条规定 ,为在尽可能广泛的基础上协调卫生与植物检疫措施 ,WTO 各成员的卫生与植物检疫措施应根据现有的国际标准、指南或建议来制定。

(二)对等规则(Equivalence Rule)^①

Members shall accept the sanitary or phytosanitary measures of other Members as equivalent , even if these measures differ from their own or from those used by other Members trading in the same product , if the exporting Member objectively demonstrates to the importing Member that its measures achieve the importing Member's appropriate level of sanitary or phytosanitary protection.

如出口成员客观地向进口成员证明其卫生与植物检疫措施达到进口成员卫生与植物卫生保护的合适水平 ,则各成员应将其他成员的措施作为等效措施予以接受 ,即使这些措施不同于进口成员自己使用的措施或其他成员在同一产品贸易中使用的措施。

^① See Article 4 of SPS Agreement.

(三) 风险评估 (Assessment of Risk)

WTO《SPS 协定》第 5.1 条要求 WTO 成员的卫生与植物检疫措施的适用应基于风险评估。

Risk assessment is referred to the evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs.

风险评估是根据可能适用的卫生与植物检疫措施评价虫害或病害传入进口成员境内、在进口成员境内定居或传播的可能性;或评价相关潜在的生物学上的后果和经济后果;或评价食品、饮料或饲料中所含的添加剂、污染物、毒素或致病有机体对人类或动物的健康所产生的潜在不利影响。

In the assessment of risks, account should be taken of available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest-free or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment.

在进行风险评估时,应考虑可获得的科学证据、有关工序和生产方法、有关检查、抽样和检验方法、特定病害或虫害的流行、病虫害非疫区的存在、有关生态和环境条件以及检疫或其他处理方法^①。

^① See Article 5.2 of SPS Agreement.

(四) 关于地区条件的适用规则(Adaptation Rules of Regional Conditions)

WTO requires that the sanitary or phytosanitary measures of its Members adapt to the sanitary or phytosanitary characteristics of the area - whether all of a country , part of a country , or all or parts of several countries - from which the product originated and to which the product is destined. In assessing the sanitary or phytosanitary characteristics of a region , special account should be taken of the level of prevalence of specific diseases or pests , the existence of eradication or control programmes , and appropriate criteria or guidelines which may be developed by the relevant international organizations.

WTO 要求其成员实施卫生与植物检疫措施应适用于产品的产地和其最终销售、使用或消费地的卫生与植物检疫特点。在评估一地区的卫生与植物检疫特点时 ,要特别考虑特定病害或虫害的流行程度、是否存在根除或控制计划以及有关国际组织可能制定的适当标准或指南。

除上述规则之外 ,WTO 还在《SPS 协定》附件 2 中要求其成员通过及时公布所有的已实施的卫生与植物检疫法规、设立咨询点(Enquiry Points)及尽早通知所实施的特定的条例等来增加国内卫生与植物卫生法规的透明度。

总之 ,SPS 是一种特殊的贸易壁垒(也被称为绿色壁垒) ,也由此产生了一些贸易纠纷。美国诉日本关于限制农产品进口措施案^①很有代表性。本案涉及的是日本对部分农产品实行的进口限制。1987 年日本农林渔业部公布了两部试行检测指南：“取消进口禁令指南——蒸熏”和“昆虫死亡率比较测试指南——蒸熏”。这两个指南都

^① Case No. WT/DS76 , available at WWW. WTO. org.

没有公布。本案涉及的是第二个指南中的品种测试要求。美国提出,日本的这一要求不符合它根据 WTO《SPS 协定》所应当承担的义务。DSU 的最终结论是 (1)日本对苹果、樱桃、油桃和核桃维持品种测试要求,不符合其根据《SPS 协定》第 2.2 条承担的“除第 5.7 条规定外,在没有充分的科学依据的情况下”不采取植物检疫措施的义务 (2)日本对苹果、樱桃、油桃和核桃维持品种测试要求,不符合其根据《SPS 协定》第 5.6 条承担的“保证这类措施不超过恰当的保护所必需的限度”的义务 (3)日本没有公布这些测试标准,不符合《SPS 协定》附录 2 第 2 段的义务,因而违反了《SPS 协定》第 1 条; (4)确认日本对杏、梨、李子等实施的措施没有以风险评估为依据,不符合《SPS 协定》第 5.1 条。1999 年 12 月 31 日,日本据此取消了所有品种测试要求。可见, WTO 各成员在实施其卫生与植物检疫措施时,必须同《SPS 协定》保持一致。

第二节 WTO 技术性贸易 壁垒适用规则

WTO Rules about the Application of Technical Barriers to Trade

技术性贸易壁垒(Technical Barriers to Trade)作为一种非关税壁垒是 WTO 成员实施贸易保护的重要手段。WTO《技术性贸易壁垒协定》(Agreement on Technical Barriers to Trade)^①为此制定了技术性贸易壁垒的适用规则,以使技术贸易措施及其实施方式不构成任意或不公正歧视(Arbitrary or Unjustifiable Discrimination)的手段或对

^① This Agreement consists of 15 articles and 3 annexes.

一、技术性贸易壁垒的定义(Definition of Technical Barriers to Trade)

The technical barriers to trade are referred to as technical regulations , standards and conformity assessment procedures affecting international trade.

技术性贸易壁垒是指影响国际贸易的技术法规、标准及合格评定程序。

1. 技术法规(Technical Regulations)

Document which lays down product characteristics or their related processes and production methods , including the applicable administrative provisions , with which compliance is mandatory. It may also include or deal exclusively with terminology , symbols , packaging , marking or labelling requirements as they apply to a product , process or production method.

那些规定强制执行的产品特性或其相关工艺和生产方法、包括适用的管理规定在内的文件。该文件还可包括或专门涉及适用于产品、工艺或生产方法的专门术语、符号、包装、标志或标签要求。

2. 标准(Standards)

Document approved by a recognized body , that provides , for common and repeated use , rules , guidelines or characteristics for products or related processes and production methods , with which compliance is not mandatory. It may also include or deal exclusively with terminology , symbols , packaging , marking or labelling requirements as they apply to a product , process or production method.

经公认机构批准的、规定非强制执行的、供通用或重复使用的产品或相关工艺和生产方法的规则、指南或特性的文件。该文件还可包括或专门涉及适用于产品、工艺或生产方法的专门术语、符号、包装、标志或标签要求。

3. 合格评定程序(Conformity Assessment Procedures)

Any procedure used , directly or indirectly , to determine that relevant requirements in technical regulations or standards are fulfilled. Conformity assessment procedures include , inter alia , procedures for sampling , testing and inspection ; evaluation , verification and assurance of conformity ; registration , accreditation and approval as well as the combinations thereof.

任何直接或间接用以确定是否满足技术法规或标准中的相关要求的程序。特别包括 抽样、检验和检查 ,评估、验证和合格保证 ,注册、认可和批准以及前述各项的组合。

二、WTO 有关技术性贸易壁垒的主要规则(Principal Rules on the Application of Technical Barriers to Trade)

(一)与技术法规和合格评定程序有关的规则(Rules Relating to Technological Regulations and procedure for Assessment of conformity)

1. WTO requires any Member abide by the principles of national treatment and MFN. Namely , in respect of technical regulations , products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country. In the respect of conformity assessment procedures , suppliers should be granted access

of like products originating in the territories of other Members under conditions no less favourable than those accorded to suppliers of like products of national origin or originating in any other country , in a comparable situation.

1. WTO 要求各成员遵守国民待遇原则和最惠国待遇原则 ,即在技术法规方面 ,各成员应保证给予源自任何成员领土进口的产品不低于其给予本国同类产品或来自任何其他国家同类产品的待遇 ;在合格评定程序方面 ,应在可比的情况下以不低于给予本国相同产品的供应商或源自任何其他国家相同产品的供应商的条件 ,使源自其他成员领土内产品的供应商获得准入。

2. Where technical regulations are required and relevant international standards exist or their completion is imminent , Members shall use them , or the relevant parts of them , as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued^①. Also , where relevant guides or recommendations issued by international standardizing bodies exist or their completion is imminent , Members shall ensure that central government bodies use them , or the relevant parts of them , as a basis for their conformity assessment procedures^②.

2. 如需制定技术法规 ,而有关国际标准已经存在或即将拟就 ,则各成员应使用这些国际标准或其中的相关部分作为其技术法规的基础 ,除非这些国际标准或其中的相关部分对达到其追求的合法目标无效或不适当。同样 ,若国际标准化机构发布的相关指南或建议

① See Article 2.4 of TBT Agreement.

② See Article 5.4 of TBT Agreement.

已经存在或即将拟就,则各成员应保证中央政府机构一般应使用这些指南或建议或其中的相关部分,作为其合格评定程序的基础。

(二)与标准有关的规则(Rules Relating to Standards)

WTO《TBT 协定》附件3——《关于制定、采用和实施标准的良好行为规范》(Code of Good Practice for the Preparation, Adoption and Application of Standards, 简称《良好行为规范》)在标准方面确立了以下各成员标准化机构应接受并遵守的重要规则:

1. The standardizing body shall accord treatment to products originating in the territory of any other Member of the WTO no less favourable than that accorded to like products of national origin and to like products originating in any other country.

1. 标准化机构给予源自 WTO 任何其他成员的产品的待遇不得低于给予本国相同产品和源自任何其他国家相同产品的待遇。

2. The standardizing body shall ensure that standards are not prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.

2. 标准化机构应保证不制定、不采用或不实施在目的或效果上给国际贸易制造不必要障碍的标准。

3. Where international standards exist or their completion is imminent, the standardizing body shall use them, or the relevant parts of them, as a basis for the standards it develops, except where such international standards or relevant parts would be ineffective or inappropriate, for instance, because of an insufficient level of protection or fundamental climatic or geographical factors or fundamental technological problems.

3. 若国际标准已经存在或即将拟就,标准化机构应使用这些标

准或使用其中的相关部分作为其制定标准的基础,除非由于存在某些情况,如由于保护程度不足,或基本气候或地理因素或基本技术问题使此类国际标准或其中的相关部分无效或不适当。

4. With a view to harmonizing standards on as wide a basis as possible, the standardizing body shall, in an appropriate way, play a full part, within the limits of its resources, in the preparation by relevant international standardizing bodies of international standards.

4. 为在尽可能广泛的基础上协调标准,标准化机构应以适当方式,在力所能及的范围内,充分参与有关国际标准化机构制定国际标准的工作。

5. Wherever appropriate, the standardizing body shall specify standards in terms of performance rather than design or descriptive characteristics.

5. 只要适当,各成员标准化机构即应按产品的性能而不是内在设计或描述特征制定产品标准。

6. At least once every six months, the standardizing body shall publish a work programme containing the standards it is currently preparing and the standards which it has adopted in the preceding period. A notice of the existence of the work programme shall be published in a national or, as the case may be, regional publication of standardization activities.

6. WTO 成员的标准化机构应至少每 6 个月公布一次工作纲要,包括正在制定的标准及前一时期已采用的标准。工作纲要的通知应在国家或在区域有关标准化活动的出版物上公布。

除上述规则之外,WTO 还鼓励各成员相互承认合格评定程序,

给予其他成员的合格评定机构以国民待遇。同时要求每一成员设立咨询点,增加其技术法规、标准和合格评定程序的透明度。

本章小结

本章介绍了 WTO 卫生与植物检疫措施适用规则和技术性贸易壁垒适用规则。卫生与植物检疫措施和技术性贸易壁垒是贸易保护的重要手段,而且在未来国际贸易中将发挥重要的作用。WTO 对其制定的规则无疑将有利于抑制其贸易保护主义色彩。WTO 关于卫生与植物检疫措施的协调规则、对等规则及风险评估是 WTO《SPS 协定》的实质内容。WTO《TBT 协定》则强化了技术法规、标准和合格评定程序的使用规则,同时《关于制定、采用和实施标准的良好行为规范》也确立了 WTO 成员的标准化机构所应遵守的规则。

思考题

1. WTO 所定义的卫生与植物检疫措施的范围是什么?
2. 何谓“风险评估”?何谓“合格评定程序”?
3. 《良好行为规范》的主要内容是什么?

第十五章 中国入世规则

China WTO-Accession Rules

我国入世规则是由我国入世文件所确立的(具体文件目录见第一章第四节)。

What should be stressed is that rules and commitments established in China's WTO-entry instruments are an integral part of WTO rules. That both China and any other WTO Member shall abide by WTO rules also means with which the provisions in China's WTO-accession documents will be complied.

须强调的是,我国入世文件所确立的规则和承诺是 WTO 规则的组成部分。我国及其他 WTO 成员遵守 WTO 规则实质上包括遵守我国入世文件中的规定。

这些规则与前述 WTO 各协定确定的规则是普遍和特殊的关系,而在处理中国与 WTO 或 WTO 其他成员的关系问题上,我国入世的特殊规则优先适用。这即是我国入世文件所确立的规则的法律意义(Legal Significance of China's WTO-accession Rules)。

第一节 我国应履行的主要义务

Major Obligations that
shall be performed

《中华人民共和国加入议定书》(Protocol on the Accession of

PRC ,简称以下简称《加入议定书》或《议定书》),由“ 导言 ”(Preamble)、“ 一般条款 ”(Part I—General Provisions)、“ 减让表 ”(Part II—Schedules)、“ 最后条款 ”(part III—Final Provisions)四部分构成 ,其中“ 一般条款 ”是议定书的实质部分。《加入议定书》确立了我国入世后应履行的重要义务。事实上 ,这些义务也构成了此议定书的主要内容。

根据该《议定书》,我国应履行的主要义务可归纳为以下 11 项 :

(一)统一适用 WTO 规则(Uniform Administration of WTO Rules)

WTO rules shall apply to the entire customs territory of China , including border trade regions and minority autonomous areas , Special Economic Zones , open coastal cities , economic and technical development zones and special economic areas.

WTO 规则要适用于中国的全部关税领土 ,包括边境贸易地区、民族自治地方、沿海开放城市、经济技术开发区以及特殊经济区。

In general sense , in providing preferential arrangements for enterprises within special economic areas , WTO provisions on non-discrimination (i. e. MFN Principle) and national treatment will be fully observed.

一般说来 ,特别经济区对区内企业提供优惠时 ,应完全符合 WTO 非歧视性原则(即最惠国待遇原则)和国民待遇原则。

显然 ,经济特区不能是 WTO 非歧视性原则和国民待遇原则的例外。

China shall also apply and administer in a uniform , impartial and

reasonable manner all its laws , regulations and other measures of the central government as well as local regulations , rules and other measures issued or applied at the sub-national level pertaining to or affecting trade in goods , services , trade-related aspects of intellectual property rights (TRIPs) or the control of foreign exchange (emphasis added).

中国也要统一、公正和合理地适用和执行中央政府的有关或影响货物贸易、服务贸易、与贸易有关的知识产权(TRIPs)或外汇管制的所有法律、法规及其他措施以及下一级政府部门发布或适用的部门或地方条例、规则及其他措施(着重点为笔者所加)。

须特别注意的是上述我国《加入议定书》英文本中的“ the sub-national level ”的真实含义。笔者认为“ the sub-national level ”应译作“ 下一级政府部门 ”(实质上它已包括省一级地方政府)。同样 , 下述《中国加入工作组报告书》第 70 段中的“ local governments at the sub-national level ”也不是指“ 地方各级政府 ”而是指“ 省一级(包括自治区和直辖市)政府 ”。

In China , sub-national governments had no autonomous authority over issues of trade policy to the extent that they were related to the WTO Agreement and the Protocol. China commits that China would in a timely manner annul local regulations , government rules and other local measures that were inconsistent with China's obligations. The central government would ensure that China's laws , regulations and other measures , including those of local governments at the sub-national level , conformed to China's obligations undertaken in the WTO Agreement and the Protocol(emphasis added).

在中国 , 省(自治区、直辖市)一级地方政府对于与《WTO 协定》和议定书(草案)有关的贸易政策问题没有自主权。中国承诺 , 中国将及时废止与中国义务不一致的省(自治区、直辖市)一级地方性法

规、政府规章和其他地方性措施。中央政府将保证中国的法律、法规及其他措施,包括省(自治区、直辖市)一级地方政府的法规及其他措施符合中国在《WTO 协定》和议定书(草案)中承担的义务。

China commits that the central government would ensure that China's laws, regulations and other measures, including those of local governments at the sub-national level, conformed to China's obligations undertaken in the WTO Agreement and the Protocol.

中国承诺中央政府将确保中国(包括下一级地方政府)制定或实施的法律、法规及其他措施与中国在《WTO 协定》和议定书项下的义务相一致。

(二) 保证外贸政策的透明度(Ensuring the Transparency of Foreign Trade Policies)

1. 原则性要求(Fundamental Requirements)

WTO 对我国外贸政策透明度的基本要求可归结为“不公布,则不实施”(No publication, no implementation)。

Only those laws, regulations and other measures published and readily available to other WTO Members, individuals and enterprises, shall be enforced and, also made available to WTO Members before their implementation or enforcement.

中国只实施已公布的且其他 WTO 成员、个人和企业容易获得的法律、条例及其他措施,并且在这些措施实施或执行之前,其他 WTO 成员即应容易获得。

2. 保证措施

这些保护措施主要包括:

(1) establishing or designating an official regular journal dedicated

to the publication of all laws , regulations and other measures and , making copies of all issues of this journal readily available.

(2) providing a reasonable period for comment before these measures above-mentioned are implemented.

(3) establishing or designating an enquiry point where all information required to be published may be obtained.

设立或指定用于公布所有的法律、条例及其他措施的官方期刊 , 并且各期都易获得 ; 在实施这些措施之前 , 为各方评论提供合理的时间 ; 设立或指定咨询点 , 有关利益方在咨询点可获得所有要求公布的信息。

3. 提高进出口许可程序的透明度(Enhancing the Transparency of Import and Export Licensing)

如前所述 , 透明度原则是 WTO 最重要的原则之一。对我国进出口许可程序的实施 , WTO 就提出了很高的透明度要求。

WTO requires China publish on a regular basis the following in the official journal :

(1) The list of all organizations that are responsible for authorizing or approving imports or exports of specific products ;

(2) Procedures and criteria for obtaining such import or export licenses or other approvals , and the conditions for deciding whether they should be granted ;

(3) A list of all products , by tariff number , that are subject to tendering requirements , including information on products subject to such tendering requirements and any changes , pursuant to the Agreement on Import Licensing Procedures ;

(4) A list of , any changes to the list of , all goods and technologies whose import or export are restricted or prohibited ; these goods shall also

be notified to the Committee on Import Licensing.

WTO 要求中国定期在官方刊物中公布下列文件：

(1)所有负责授权或批准特定产品进出口的机构名单；

(2)获得此类进出口许可证或其他批准文书的程序和标准 ,以及决定是否发给进出口许可证或其他批准文书的条件；

(3)按照《进口许可程序协定》,按税号排列的实行招标管理的全部产品清单 ,包括关于招标产品及任何变更的信息；

(4)限制或禁止进出口的所有货物和技术清单(这些货物也应通知进口许可程序委员会)及其任何改变。

Copies of these submissions in one or more official languages of the WTO shall be forwarded to the WTO for circulation to WTO Members and for submission to the Committee on Import Licensing within 75 days of each publication.

这些文件的副本(用一种或多种 WTO 官方语言写成)在其公布后的 75 天内应被提交给 WTO ,以散发给各 WTO 成员及 WTO 进口许可委员会。

WTO requires China notify the WTO of all licensing and quota requirements remaining in effect and the quantities associated with the restriction , if any , and the justification for maintaining the restriction or its scheduled date of termination. Contemporarily , China is also asked to report annually its automatic import licensing procedures , explaining the circumstances which give rise to these requirements and justifying the need for their continuation. In general circumstances , the import licences issued with a minimum duration of validity of six months.

WTO 也要求中国要将仍然有效的所有许可和配额要求、与此有关的具体数量(如果有的话)以及保留此种限制的依据或拟定的终

止日期通知 WTO ,同时 ,要求中国每年向进口许可程序委员会通报其自动进口许可程序 ,解释产生这些要求的情况 ,并证明继续实行的必要。一般情况下 ,发放的许可证有效期最短为 6 个月。

Foreign individuals and enterprises and foreign-funded enterprises shall be accorded treatment no less favourable than that accorded to other individuals and enterprises in respect of the distribution of import and export licences and quotas.

对外国个人、企业和外商投资企业在进出口许可证和配额分配方面所给予的待遇 ,也不应低于其他个人和企业所享有的待遇。

4. 提高卫生与植物检疫措施的透明度(Enhancing the Transparency of Sanitary and Phytosanitary Measures)

WTO requests China notify to the WTO all laws , regulations and other measures relating to its sanitary and phytosanitary measures , including product coverage and relevant international standards , guidelines and recommendations.

WTO 要求中国向 WTO 通知其所有与卫生与植物检疫措施有关的法律、条例及其他措施 ,包括产品范围及相关国际标准、指南和建议。

(三)加强司法审查(Strengthening Judicial Review)

In this connection , WTO's requirements are that establishing or designating , and maintaining impartial and independent tribunals , contact points and procedures for the prompt review of all administrative actions relating to the implementation of laws , regulations , judicial decisions and administrative rulings of general application.

对此 ,WTO 要求我国设立或指定并维持公正的且独立的审查法

庭、联络点和审查程序,以便迅速审查所有与法律、法规、司法决定和普遍适用的行政裁决有关的行政行为。

(四) 实施非歧视性原则(Enforcing the Non-discrimination Principle)

WTO 要求我国给予外国个人、企业和外商投资企业非歧视待遇(Treat Equally without Discrimination),但不仅仅限于“一视同仁”。

In China , foreign individuals and enterprises and foreign-funded enterprises shall be accorded treatment no less favourable than that accorded to other individuals and enterprises in respect of the procurement of inputs , goods and services and the conditions in production and marketing. In respect of prices and availability of goods and services in areas including transportation , energy , basic telecommunications , other utilities and factors of production , and in respect of the provision of border tax adjustments , foreign individuals and enterprises and foreign-funded enterprises are also treated alike (emphasis added).

在中国,在生产所需投入物、货物和服务的采购及其货物生产、营销或销售的条件方面给予外国个人、企业和外商投资企业的待遇不应低于给予其他个人和企业的待遇;在运输、能源、基础电信、其他生产设施和生产要素等货物和服务的价格及其可获得性方面,在边境税管理规定方面,也应被如此对待(着重点为笔者所加)。

上文中“no less favourable than. . .”不仅仅是“treat equally without discrimination”(“一视同仁”),它还意味着可以给予外国个人、企业和外商投资企业以更优惠的待遇(More Favourable Treatment)。所以对外国个人、企业和外资企业以“超国民待遇”(Super-national Treatment)并不违反 WTO 规则,故不应全盘否定。

(五)放宽贸易权限制(Lessening the Limitation on Right to Trade)

Within three years after China's WTO-accession , all enterprises in China shall have the right to trade in all goods (except for that continued to be subject to state trading) throughout the customs territory of China. All foreign individuals and enterprises , including those not invested or registered in China , shall be accorded treatment no less favourable than that accorded to enterprises in China with respect to the right to trade.

在加入后 3 年内 ,在中国的所有企业均有在中国关境内经营全部货物(但继续实行国营贸易的货物除外)的贸易权。在贸易权方面给予所有外国个人、企业(包括未在中国投资或注册的外国个人和企业)不低于在中国的企业所享有的待遇。

(六)加强对国营贸易的约束(Strengthening the Restriction on State Trading)

WTO stipulates that import purchasing procedures and pricing mechanisms for exported goods of state trading enterprises are fully transparent and , any measure influencing or directing state trading enterprises as to the quantity , value , or country of origin of goods purchased or sold shall be forbidden.

WTO 规定我国国营贸易企业的进口购买程序和出口货物定价机制要完全透明 ,也禁止采取任何措施影响或决定国营贸易企业的购货量(额)或销售量(额) ,或从特定原产国购买商品。

(七)减少或消除非关税措施(Diminishing or Eliminating Non-Tariff Measures)

这包括以下 5 项 :

1. Implementing the schedule for phased elimination of the meas-

ures , i. e. annual quota growth rate of 15 HS tariff numbers of products with quota limitation should be by 15% and , the Import Licenses , Import Quotas or Import Tendering on 377 HS tariff numbers of products should be phased out at the latest of 2005. These NTMs will be eliminated as of 1 January of each calendar year as specified in the column of Phasing-out Period^①.

1. 实施非关税措施阶段性取消时间表。即 15 个税号的受配额限制的产品年配额增长率达 15% ,对 337 个税号产品的配额、许可证和招标限制至迟于 2005 年取消。这些非关税措施按规定的阶段性取消期限在每一日历年度的 1 月 1 日分期取消。

2. Complying with the TRIPs Agreement , without recourse to the provisions of Article 5 of the TRIPs Agreement in which stipulates that the exceptions of national treatment and most-favoured-nation treatment on the protection of intellectual properties do not apply to multilateral agreements concluded under the auspices of WIPO.

2. 遵守《TRIPs 协定》,但对其中知识产权保护的国民待遇和最惠国待遇原则的一些例外不适用于世界知识产权组织主持制定的多边协定的规定。

3. Eliminating and ceasing to enforce trade and foreign exchange balancing requirements , local content and export or performance requirements.

3. 取消并停止实施贸易平衡要求和外汇平衡要求、当地含量要求和出口实绩要求。

^① For more detail , see Annex 3 : Non-Tariff Measures Subject to Phased Elimination.

中国是国际货币基金组织的成员 ,并已接受下述《国际货币基金组织协定》第 8 条 :

No member shall , without the approval of the Fund , impose restrictions on the making of payments and transfers for current international transactions.

未经同意 ,任何成员不得对经常性国际交易的收支和转移施加限制。

所以我国取消外汇平衡要求是适当的。

4. Ensuring that the distribution of import licences , quotas , tariff-rate quotas , or any other means of approval for importation , the right of importation or investment by national and sub-national authorities , is not conditioned on whether competing domestic suppliers exist , or on the requirements of local content , offsets , the transfer of technology , export performance or the conduct of research and development in China.

4. 确保国家和次一级国家机关对进口许可证、配额、关税配额的分配或对进口、进口权或投资权的任何其他批准方式 ,不以是否存在相竞争的国内供应商为条件 ,也不以当地含量要求、补偿、技术转让、出口实绩、在中国进行研究与开发等为条件。

5. Import and export prohibitions and restrictions , and licensing requirements affecting imports and exports shall only be imposed and enforced by the national authorities or by sub-national authorities with authorization from the national authorities.

5. 进出口禁止和限制以及影响进出口的许可程序要求只能由

国家主管机关或由国家主管机关授权的次一级国家机关实施和执行^①。

(八)规范价格控制(Administrating Price Controls)

政府对价格的控制包括国家定价(State Pricing)、政府定价(Government Pricing)和政府指导价(Government Guidance Pricing)三种方式。

In formulating government prices and government guidance prices , the following criteria were taken into account : normal production costs , supply and demand situation , relevant government policies and prices of related products. When fixing prices of consumer goods , consideration was given to the limits of consumers purchasing power.

政府定价或政府指导价是通过考虑以下几个因素制定的 :正常生产成本、供需状况、相关政府政策和有关产品价格。在确定消费品价格时 ,还要考虑消费者购买力的局限性。

WTO requires China allow prices for traded goods and services in every sector to be determined by market forces , and multi-tier pricing practices for such goods and services be eliminated.

WTO 要求中国允许每一部门的商业货物和服务的价格由市场决定 ,并取消对此类货物和服务的多重定价。

The following goods and services listed may be subject to price controls , but these controls should be reduced and eliminated gradually.

以下列名的货物和服务属价格控制之列 ,但这些控制应被逐步

^① 在中国 ,许可证审批需 2 至 3 个工作日。许可证不能买卖或转让 ,有效期为一日历年 ,可延期一次 ,最长达 3 个月。

减少和取消^①：

表 15 - 1 属价格控制的货物和服务清单

Products Subject to State Pricing	Tobacco Edible salt Natural gas Pharmaceuticals
Products Subject to Government Guidance Pricing	Grain vegetable oil Processed oil Fertilizer Silkworm cocoons Cotton
Public Utilities Subject to Government Pricing	Price of gas for civil use Price of tap water Price of electricity Price of heating power Price of water supplied by irrigation works
Service Sectors Subject to Government Pricing	Postal and telecommunication services charges Entrance fee for tour sites Education services charges
Service Sectors Subject to Government Guidance Pricing	Transport services charges Professional services charges Charges for commission agents services Charges for settlement , clearing and transmission services of banks Selling price and renting fee of residential apartments Health related services

(九)取消有关的补贴(Elimination of Subsidies Concerned)

^① See Annex 4 :The Products and Services Subject to Price Controls.

WTO establishes the subsidies provided to state-owned enterprises classified as specific ones , and requires China eliminate the following subsidies :(a) subsidies contingent upon export performance ;(b) subsidies contingent upon the use of domestic over imported goods.

WTO 认定对国有企业提供的补贴为专向性补贴 ,并要求中国取消以下补贴 (1)按出口实绩给予的补贴 (2)为鼓励更多地使用本国商品而给予的补贴。

WTO stipulates that China shall not maintain or introduce any export subsidies on agricultural products.

中国不得对农产品维持或采取任何出口补贴。

(十)完善技术性贸易壁垒实施规则(Perfecting the Implementing Rules of Technical Barriers to Trade)

技术性贸易壁垒是我国入世后保护国内市场的重要手段。WTO 要求中国所适用的技术性贸易壁垒要公开、透明、符合 WTO 规范。

WTO requires that China publish in the official journal all criteria , whether formal or informal , that are the basis for a technical regulation , standard or conformity assessment procedure , and bring into conformity with the TBT Agreement all technical regulations , standards and conformity assessment procedures.

WTO 要求 ,中国要在官方刊物上公布作为技术条例、标准或合格评定程序依据的所有正式的或非正式的标准 ,并保证所有技术条例、标准和合格评定程序符合《TBT 协定》。

WTO also requires China apply conformity assessment procedures to imported products only to determine compliance with technical regula-

tions and standards. China shall ensure that such inspection of products for compliance with the commercial terms of contracts does not affect customs clearance or the granting of import licences for such products.

WTO 要求中国只为了决定进口产品是否符合相关技术条例和标准才对其适用合格评定程序。中国要保证针对产品是否满足商业合同条款要求进行的检验不影响此类产品的通关或其进口许可证的发放。

WTO stipulates that the same technical regulations , standards and conformity assessment procedures are applied to both imported and domestic products. Imported products shall not be subject to more than one conformity assessment.

WTO 规定 ,中国对进口产品和本国产品适用相同技术条例、标准和合格评定程序。不能对进口产品实施一种以上合格评定程序。

(十一)完善与贸易有关的知识产权制度(Perfecting Trade-related Intellectual Property Regime)

WTO 要求中国在所有知识产权方面 ,保证外国权利持有人所享有的国民待遇和最惠国待遇完全符合 WTO《与贸易有关的知识产权协定》的要求。中国在商标(包括服务商标)保护方面的具体承诺如下 :

Trademark law is to include the trademark registration of three-dimensional symbols , combinations of colours , alphabets and figures ; to add the content of collective trademark and certification trademark (including geographical indications) ; to introduce official symbol protection ; to protect well-known trademarks ; to include priority rights ; to modify the existing trademark right confirmation system and offer interested parties the opportunity for judicial review concerning the confirma-

tion of trademark rights ;to crack down on all serious infringements ;and to improve the system for providing damages for trademark infringement.

商标法中包括三维标志、颜色组合、字母和数字商标注册的规定 ;增加集体商标和证明商标(包括地理标识)的内容 ;引入对官方标志的保护 ;保护驰名商标 ;包括优先权 ;修改现行商标权确认体制 ,并且在商标权确认问题上为利害关系方提供寻求司法审查的机会 ;打击一切严重侵权行为 ;完善商标侵权赔偿制度。

以上所述即为中国作为 WTO 成员所应承担的主要义务。须重申的是 ,这些义务是议定书的主要内容。当然 ,在议定书中也规定了中国可行使一项特定的权利 ,即当其他成员对中国出口产品采取保障措施时 ,中国可以适用报复机制^①。具体规定是 :

If a safeguard measure is taken as a result of a relative increase in the level of imports , and remains in effect more than two years , China has the right to suspend the application of substantially equivalent concessions or obligations under the GATT 1994 to the trade of the WTO Member applying the measure. On the other hand , China also has the right to do so if the measure is taken as a result of an absolute increase in imports and remains in effect more than three years.

若一个 WTO 成员对中国出口产品所采取的保障措施是源于进口水平的相对增长 ,而且该项措施有效期超过 2 年 ,则中国有权针对实施该措施的 WTO 成员暂停实施 GATT1994 项下实质相等的减让或义务。另一方面 ,若这种保障措施是由于进口的绝对增长而采取的 ,且有效期超过 3 年 ,则中国也有权这样做。

显然 ,这项规则与 WTO 争端解决机制及 WTO《保障措施协定》

^① See Paragraph 16(6) of Part II of Protocol on the Accession of PRC.

所确立的适用报复机制的规定是不一致的。但这项规则优先适用，故我国在依据我国《对外贸易法》第 7 条和我国《保障措施条例》第 32 条对其他国家采取相应的措施时，应满足适用该规则的前提条件，否则可能被诉诸于 WTO 争端解决机构(DSB)。

第二节 WTO 其他成员的 特定权利和义务 Specific Rights and Obligations of Other Members

一、在反倾销中合理认定价格可比性(Reasonably Establishing the Price Comparability in Determining Dumping)

WTO 要求各成员在对中国产品采取反倾销措施时要合理地确定可比较价格(Comparative Price)，即正常价格(Normal Price)。

If the Chinese producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture , production and sale of that product , the WTO Member taking anti-dumping measure shall use Chinese prices or costs for the industry under investigation in determining price comparability (normal price).

若受调查的中国生产商能清楚地表明，生产相同产品的产业在制造、生产和销售该产品方面具备市场经济条件，则采取反倾销措施的 WTO 成员在确定价格可比性(正常价值)时，应使用受调查的中国产业的价格或成本。

By contraries , if the Chinese producers under investigation cannot clearly show that market economy conditions prevail in the industry pro-

ducing the like product with regard to manufacture , production and sale of that product , the WTO Member taking anti-dumping measure may use a methodology that is not based on a comparison with domestic prices or costs in China.

相反 ,若受调查的中国生产商不能清楚地表明生产该同类产品的产业在制造、生产和销售该产品方面具备市场经济条件 ,则采取反倾销措施的 WTO 成员可不使用与中国国内价格或成本进行比较的方法。

二、在反倾销中明确“ 市场经济标准 ”及其适用期限(Nailing-down the Criteria of Market Economy and Effective Duration Thereof)

Other Members taking anti-dumping measures on products of China s origin are required , first , to contain market economy criteria in their national law as of the date of China s WTO-accession ; secondly , to terminate the provisions on price comparability above-said where China has been established , in accordance with the criteria , that it is a market economy. In any case , the provisions utilizing the prices or costs of a third member shall expire 15 years after the date of China s WTO-accession , and moreover , should China has been established , pursuant to the criteria , that market economy conditions prevail in a particular industry or sector , the non-market economy provisions above shall no longer apply to that industry or sector.

WTO 要求其他对中国产品采取反倾销措施的成员首先在中国加入 WTO 之际在其国内法中包含确认市场经济的标准 ;第二 ,如果按该标准确认中国是一个市场经济国家 ,则终止适用前述认定价格可比较性的规定。无论如何 ,在中国加入 WTO 15 年后不再适用第三国的价格或成本来确定正常价值 ;而且若根据上述标准确认中国

特定产业或部门具备市场经济条件,则有关非市场经济的规定不再对中国该产业或部门适用。

应该说我国国有企业已基本按照市场经济规则运作,正如《中国加入工作组报告书》第 43 段所述:

In China, the government would no longer directly administer the human, finance and material resources, and operational activities such as production, supply and marketing. The prices of commodities produced by state-owned enterprises were decided by the market and resources in operational areas were fundamentally allocated by the market. The state-owned banks had been commercialized and lending to state-owned enterprises took place exclusively under market conditions.

在中国,政府将会不再直接管理国有企业的人、财、物及产、供、销等业务活动,国有企业生产的商品其价格由市场决定,业务领域的资源也基本由市场配置。国有银行已被商业化,并完全按市场条件向国有企业提供信贷。

但从前述规则中看出,在国外对华反倾销中认定中国是否是市场经济国家,或是否具备市场经济条件所依据的标准是对华采取反倾销措施的国家的国内法所确立的市场经济标准,我国由此在反倾销中居于十分被动的地位。这些规则是 WTO《反倾销协定》所没有的,这些特定的规则可称之为“WTO 反倾销规则的中国化”。这类将 WTO 规则“中国化”做法,并非反倾销领域所独有,下述“过渡期特定产品保障措施”(Transitional Product-specific Safeguard Mechanism, TPSSM)也是一例^①。

① That in the field of anti-subsidies is also an example. See Paragraph 15(b) of Part II of Protocol on the Accession of PRC.

三、实施过渡期特定产品保障措施(Implementing the TPSSM)

我国《加入议定书》最引人注目的内容是“ 过渡期特定产品保障措施 ”这一部分。如上所述，“ 过渡期特定产品保障措施 ”也是“ WTO 保障措施规则的中国化 ”,它为 WTO 其他成员抵制中国的出口产品提供了特殊的保障机制。

(一)实施过渡期特定产品保障措施的条件(Terms and Conditions for the Implementation of TPSSM)

Products of Chinese origin are being imported so as to cause or threaten to cause market disruption to the domestic producers of like or directly competitive products ,and that the existence of market disruption depends on the imports of an article are increasing rapidly ,either absolutely or relatively ,so as to be a significant cause of material injury ,or threat of material injury to the domestic industry.

进口的原产于中国的产品对生产同类产品或直接竞争产品的国内生产商造成市场扰乱或造成市场扰乱威胁。市场扰乱的存在决定于这种产品进口的绝对或相对大幅增长 ,并且这种增长是对进口国国内产业造成实质性损害或实质性损害威胁的主要原因。

(二)适用过渡期特定产品保障措施的主要程序和实体规则
(Main Procedural and Substantive Rules on the Application of TPSSM)

这些程序和实体规则主要包括：

(1) The WTO Member affected may request consultations.

(1) 受影响的 WTO 成员可要求同中国进行磋商。

(2) If necessary , China will take such action as to prevent or remedy the market disruption.

(2) 如果必要 , 中国采取阻止或救济市场扰乱的措施。

(3) If no agreement are reached within 60 days of the receipt of a request for consultation , the WTO Member affected shall be free to withdraw concessions or otherwise.

(3) 如果在收到磋商请求后的 60 天内没有达成协议 , 受影响的 WTO 成员可随意撤消减让或采取其他措施。

(4) The WTO Member effected shall provide written notice of the decision to apply a measure , including the reasons for such measure and its scope and duration.

(4) 受影响的 WTO 成员应提供一份适用保障措施决定(包括实施这项措施的理由、范围和期限) 的书面通知。

(5) In critical circumstances , the WTO Member affected may take a provisional safeguard measure , which not exceed 200 days , pursuant to a preliminary determination.

(5) 在紧急情况下 , 受影响的 WTO 成员根据其临时肯定性裁决可采取临时保障措施。该临时保障措施期限不超过 200 天。

(6) A WTO Member effected shall apply a measure only for such period of time as may be necessary to prevent or remedy the market disruption.

(6) 受影响的 WTO 成员只应在阻止或救济市场扰乱的必要期间内适用一种保障措施。

(7) Application to China of the TPSSM shall be terminated 12 years after the date of accession.

(7) 在中国入世 12 年后终止对中国适用过渡期特定产品保障措施。

最值得关注的是议定书第 2 部分第 16 (8) 段关于特定产品保障机制下“ 重大贸易转移 ” (Significant Trade Diversions) 问题的规定 , 这项规定使特定产品保障机制更加复杂化。其主要内容如下 :

If a WTO Member considers that a safeguard action under TPSSM taken by another Member causes or threatens to cause significant diversions of trade (i. e. the limited products enters or will enter its domestic market) , it may request consultations with China and / or the WTO Member concerned. If such consultations fail to lead to an agreement , the requesting WTO Member shall be free , in respect of such product , to withdraw concessions accorded to or otherwise limit imports from China , to the extent necessary to prevent or remedy such diversions.

如一个 WTO 成员认为另一成员依据特定产品保障措施规则采取的保障措施造成重大贸易转移或产生重大贸易转移威胁 (即受保障措施约束的产品转而进入或可能进入其国内市场) , 则该成员可请求与中国和 (或) 有关 WTO 成员进行磋商。如通过磋商不能达成协议 , 则它可在防止或补救此类贸易转移所必要的限度内 , 针对上述产品撤销相应的减让或实施进口限制。

According to Paragraph 248 of the Report of Working Party on the Accession of China , applying the following objective criteria in determining whether actions to prevent or remedy market disruption caused or threatened to cause significant diversion of trade :

根据《中国加入工作组报告书》第 248 段 ,在确定阻止或救济市场扰乱的保障措施是否导致重大的贸易扭曲或产生重大的贸易扭曲威胁时适用以下客观标准 :

(a) the actual or imminent increase in market share of imports from China in the importing WTO Member ;

(b) the nature or extent of the action taken or proposed by China or other WTO Members ;

(c) the actual or imminent increase in the volume of imports from China due to the action taken or proposed ;

(d) conditions of demand and supply in the importing WTO Members market for the products at issue ;

(e) the extent of exports from China to the WTO Member(s) applying a safeguard measure and to the importing WTO Member.

(1)在 WTO 进口成员国内 ,来自中国的进口产品市场份额的实际或迫近的增长 ;

(2)中国或其他 WTO 成员采取的或将采取的措施的性质或程度 ;

(3)由于这一采取的或将采取的措施造成的来自中国的产品进口量实际或迫近的增长 ;

(4)来自中国的进口产品在 WTO 进口成员国内市场的供求状况 ;

(5)自中国出口至适用保障措施的一个或多个 WTO 成员和

WTO 进口成员的程度。

A measure taken to address significant diversions of trade would be terminated not later than 30 days after the expiration of the action taken by the WTO Member or Members involved against imports from China.

为解决重大贸易转移问题而采取的保障措施,将在有关 WTO 成员针对来自中国的进口产品采取的保障措施期满后不迟于 30 天内终止。

从中看出,因“重大贸易转移”而对中国产品采取保障措施是一种所谓针对中国产品规避保障措施约束而采取的反规避措施。但上述规则中对“重大贸易转移”及“重大贸易转移威胁”定义仍不十分明确,由此导致这种反规避措施的实施具有随意性。

三、其他权利(Other Reserved Rights)

我国入世文件中规定, WTO 一些成员针对中国出口产品享有禁止进口、数量限制和其他特殊权利^①。这些特殊的权利作为 WTO 非歧视性原则和国民待遇原则的例外允许其他成员加以保留。当然, 这些禁止进口(Prohibitions)、数量限制(Quantitative Restrictions)和其他措施(Other Measures)应按有关成员与中国议定的条件和时间表逐步取消或规范。具体情况是:

^① For details, see Annex 7: Reservations by WTO Members.

表 15 - 2 WTO 一些成员针对中国出口产品所享有的特殊权利

Rights Reserved	WTO Members	Objective Products	Transition Period ^①
Specific duties	Argentina	Textiles , Clothing Footwear , Toys , etc.	five years ^②
Quotas	European Communities	Footwear Tableware , Kitchenware , etc.	proposed removal as of 2005
	Hungary	Footwear and ready-made clothing products , etc.	ibid.
	Slovak Republic	Footwear	ibid.
	Turkey	Footwear , etc.	removal as of 2005
Safeguard measures	Poland	Footwear Electric smoothing irons	ibid.
Anti-dumping measures	Mexico	Bicycles , Footwear , Candles , etc. ^③	six years

Source : compiled by the author according to Annex 7.

① The base time is the date of accession of China.

② After which a 35% ad valorem duty will apply.

③ All products included are bicycles , footwear and parts thereof , brass padlocks , baby carriages , door knob locks , malleable iron connections , non-refillable pocket lighters , gas-fuelled , fluorite , furazolidone , tools , textiles (yarns and fabrics of artificial and synthetic fiber) , toys , pencils , bicycle tires and inner tubes , electrical machines , appliances and equipment and parts thereof , parathion-methyl , clothing , organic chemicals , ceramic and porcelain dishware and loose articles , iron and steel valves , and candles.

第三节 中国在服务贸易领域的具体承诺

China's Specific Commitments in the Field of Service Trade

我国入世重要文件之一——《服务贸易特定承诺减让表 :第 2 条最惠国待遇原则例外清单》(Schedule of Specific Commitments on Services :List of Article II MFN Exemptions)分别适用于所有服务部门的水平承诺(Horizontal Commitments)和特定部门承诺(Specific Commitments)两大部分 ,分别列明了我国对四种服务提供方式——跨境交付、境外消费、商业存在、自然人流动及对 11 个部门所做的市场准入、国民待遇和其他承诺。这些承诺确立了我国服务部门对外开放的时间表 ,也是我国须遵守的重要义务。

一、我国的主要“ 水平承诺 ”(Major Horizontal Commitments of China)

水平承诺适用于所有服务部门。我国水平承诺主要是针对市场准入提出的 ,其主要内容是 :

(一)商业存在方面的市场准入要求(Market Access Requirements of Commercial Presence)

China requires the proportion of foreign investment in an equity joint venture shall be no less than 25 per cent of the registered capital of the joint venture.

中国要求 ,股权式合资企业中的外资比例不得少于该合资企业

注册资本的 25%。

The establishment of branches by foreign enterprises is , as a general rule , unbound. Representative offices of foreign enterprises are also permitted to establish in China , but they shall not engage in any profit-making activities.

对外国公司建立分支机构一般没有限制。中国也允许外国公司在中国建立代表处 ,但这些代表处不应从事营利活动。

In China , maximum term using land by enterprises and individuals is : (a) 70 years for residential purposes ; (b) 50 years for industrial purposes (c) 50 years for the purpose of education , science , culture , public health and physical education ; (d) 40 years for commercial , tourist and recreational purpose ; (e) 50 years for comprehensive utilization or other purposes.

在中国 ,企业和个人使用土地最长期限 (1)居住目的为 70 年 ; (2)工业目的为 50 年 (3)教育、科学、文化、公共卫生和体育目的为 50 年 (4)商业、旅游、娱乐目的为 40 年 (5)综合利用或其他目的为 50 年。

(二)自然人流动方面的市场准入承诺 (Market Access Commitments on Presence of Natural Persons)

China undertakes that senior employees of a corporation of a WTO Member that has established a representative office , branch or subsidiary in China , or senior employees of a corporation of WTO Members being engaged in the foreign invested enterprises in China , will be permitted entry for an initial stay of three years. Service salespersons are limited to

a 90 - day period.

中国承诺 对在中国已设立代表处、分公司或子公司的另一个 WTO 成员的公司的高级雇员及受雇于外商投资企业的高级雇员 ,允许其入境首期停留 3 年 ;服务销售人员入境停留期限为 90 天。

二、主要的“ 具体部门承诺 ”(Specific Commitments in Major Sectors)

针对 4 种服务提供方式 ,中国主要对以下服务部门(Sector or Sub-sector)完全开放 ,未作限制 :

表 15 - 3 中国开放的重要服务部门一览表

Modes of Supply :	Market Access	National Treatment
(1) Cross-border Supply	Law , Accounting , Audit , Taxation , Architecture , Engineering , Urban planning , Medicine , Franchising , Computer , Real Estate , Convention , Translation , Courier , Cinema Theatre , Hotels Restaurants Travel Agency and Tour Operator , Rail Transport , Road Transport	Law , Accounting , Audit , Taxation , Architecture , Engineering , Urban planning , Medical and dental , Computer real estate , Advertisement , Convention , Translation , Courier , Telecommunication , Cinema theatre , Franchising , Environment , Insurance , Banking , Securities , Hotels Restaurants , Travel Agency and Tour Operator , Rail Transport , Road Transport

(2) Consumption Abroad	Law , Accounting , Auditing , Architecture , Engineering , Urban planning , Taxation , Medicine , Computer , Real Estate , Convention , Translation , Courier , Telecommunication , Cinema Theatre , Wholesale Trade , Retail , Franchising , Education , Environment , Banking , Securities , Hotels and Restaurants , Travel Agency and Tour Operator , Travel Agency and Tour Operator , Air Transport Services Rail Transport , Road Transport , etc.	Law , Accounting , audit , Taxation , Architecture , Engineering , Integrated engineering , Urban planning , Medicine , Computer , Real Estate , Advertisement , Convention , Translation , Courier , Telecommunication , Cinema Theatre , Wholesale Trade , Retail , Franchising , Education , Environment , Insurance , Banking , Securities , Hotels and Restaurants , Travel Agency and Tour Operator , Travel Agency and Tour Operator , Travel Agency and Tour Operator , Air Transport , Rail Transport , Road Transport , etc.
(3) Commercial Presence	Computer :consultancy services related to the installation of computer hardware , data processing and tabulation services , time-sharing services	Accounting , Auditing Taxation , Computer , Real Estate , Advertisement Convention , Translation , Courier , Telecommunication , Cinema Theatre , Wholesale Trade , Retail , Environment , Securities , Hotels and Restaurants , Rail Transport , Road Tram-transport , etc.
(4) Presence of Natural Persons		

Source : compiled by the author according to Schedule of Specific Commitments on Services : List of Article II MFN Exemptions.

另一方面 ,我国除了对各服务部门的自然人移动大多未作承诺外 ,对一些服务部门的跨境交付也未作承诺(unbound)。表 15 - 4

对此作了归纳。

表 15 - 4 中国对“跨境交付”未作承诺的服务部门一览表

Modes of Supply	Market Access	National Treatment
Cross-border Supply	Commission Agency , Wholesale Trade , Retail(except for mail order) , Education , Environment(except for environmental consultation) , Air Transportation	Commission Agency , Wholesale Trade , Retail (except for mail order) , Education , Air Transportation

须说明的是“ 不作任何承诺 ”不等于“ 禁止 ”。如上表所示 ,我国没有承诺给予“ 跨境交付 ”方式下的教育服务以国民待遇。但“ 没有承诺给予国民待遇 ”并不意味着不能给予国民待遇。事实上 ,我国现在正积极参与国际远程教育服务。如 ,新加坡将筹建一所全球规模最大的网上大学——“ 全球 21 世纪大学 ”,并将在 2003 年招收第一批 1000 学生 ,全球 21 世纪大学将在新加坡开发、制作和包装课程软件 ,然后通过互联网等最先进的科技 ,将课程传递到世界各地。我国北京大学同新加坡国立大学、爱丁堡大学、墨尔本大学等其他 17 所大学共同成为该网上大学的参与者^①。这意味着我国也将对这种远程学习(Distance Learning)给予国民待遇。

其他具体承诺是：

(一) 法律服务承诺(Legal Services Commitments)

China stipulates in the field of the commercial presence that the

^① 参见《国外教育调研》2002 年第 3 期。

representatives of a foreign law firm shall be practitioner lawyers who are members of the bar or law society in a WTO member and have practiced for no less than two years outside of China. The Chief representative shall be a partner or equivalent of a law firm of a WTO member and have practiced for no less than three years.

中国在商业存在方面规定 ,外国律师事务所的代表应为执业律师 ,为一个 WTO 成员的律师协会或律师公会的会员 ,且在中国境外执业不少于 2 年。首席代表应为一个 WTO 成员的律师事务所的合资伙伴或同等职位人员且执业不少于 3 年。

In the national treatments , all representatives shall be resident in China no less than six months each year. The representative office shall not employ Chinese national registered lawyers outside of China.

在国民待遇方面 ,所有代表在华居留时间每年不少于 6 个月 ,代表处不得在中国境外雇佣中国国家注册律师。

(二) 税收服务承诺 (Taxation Services Commitments)

With regard to commercial presence , only the form of joint ventures , with foreign majority ownership is permitted. Within six years of China's accession , foreign firms will be permitted to establish wholly foreign-owned subsidiaries.

商业存在仅限于合资企业形式 ,允许外资拥有多数股权。中国加入后 6 年内 ,即取消限制 ,外国公司将被允许在中国设立外资独资子公司。

(三)建筑设计、工程服务、城市规划服务承诺(Commitments in Architectural Services , Engineering Services and Urban Planning Services)

As to commercial presence , only the form of joint ventures , with foreign majority ownership is permitted. Within five years of China's accession , foreign firms will be permitted to establish wholly foreign-owned subsidiaries.

商业存在仅限于合资企业形式 ,允许外资拥有多数股权。中国加入 WTO 后 5 年 ,即允许设立外商独资企业。

(四)医疗服务承诺(Medical Services Commitments)

As to commercial presence , Foreign service suppliers are permitted to establish joint venture hospitals or clinics with Chinese partners with quantitative limitations , with foreign majority ownership permitted. The majority of doctors and medical personnel of the joint venture hospital and clinics shall be of Chinese nationality.

Foreign doctors with professional certificates issued by their home country shall be permitted to provide short-term medical services in China after they obtain licenses from the Ministry of Public Health. The term of service is six months and may extend to one year.

对商业存在规定 ,允许外国服务提供者与中国合资伙伴设立合资医院或诊所(但有数量限制) ,允许外资拥有多数股权 ;合资医院或诊所的医生和医务人员应具有中国国籍。

允许持有其本国颁发的职业证书的外国医生在获得卫生部的许可后 ,在中国提供短期医疗服务。服务期限为 6 个月 ,也可延长至 1 年。

(五)建筑及相关工程服务承诺(Commitments in Construction and Related Engineering Services)

1. In the case of commercial presence , only the form of joint ventures , with foreign majority ownership is permitted.

1. 对商业存在规定 ,仅限于合资企业形式 ,允许外资拥有多数股权。

Within three years after China's accession to the WTO , wholly foreign-owned enterprises will be permitted. Wholly foreign-owned enterprises can only undertake the following four types of construction projects.

(1) Construction projects wholly financed by foreign investment and/or grants.

(2) Construction projects financed by loans of international financial institutions and awarded through international tendering according to the terms of loans.

(3) Chinese-foreign jointly constructed projects with foreign investment equal to or more than 50 per cent ; and Chinese-foreign jointly constructed projects with foreign investment less than 50 per cent but technically difficult to be implemented by Chinese construction enterprises alone.

(4) Chinese invested construction projects , which are difficult to be implemented by Chinese construction enterprises alone , can be jointly undertaken by Chinese and foreign construction enterprises with the approval of provincial government.

在中国加入 WTO 后 3 年之内 ,即允许设立外商独资企业。外商独资企业只能实施下列 4 种类型的建筑工程 :

(1)全部由外国投资和(或)赠款资助的建设项目。

(2)由国际金融机构贷款资助并据贷款条件通过国际招标授予

的建设项目。

(3) 外资等于或超过 50% 的中外联合建设项目及外资少于 50%、但因技术困难而不能由中国建筑企业独立实施的中外联合建设项目。

(4) 由中国投资、但中国建筑公司难以独立实施的建设项目,经省政府批准,可由中外建筑企业联合实施。

2. Within three years after China's accession to the WTO, none in national treatments.

2. 在国民待遇方面,在中国加入 WTO 后 3 年,即取消任何限制。

(六) 分销服务承诺(Distribution Commitments)

1. 批发服务(Wholesale Trades)

As for the market access, there is none of restriction, within three years after accession, except for chemical fertilizers, processed oil and crude oil within five years after accession.

在市场准入方面,在中国加入 WTO 3 年内,除化肥、成品油和原油之外,即对外国服务提供者没有任何限制;对化肥、成品油和原油的限制为 5 年。

2. 零售服务(Retailing Services)

With regard to the market access, the retailing of pharmaceutical products, pesticides, mulching films and processed oil within three years after accession and retailing of chemical fertilizers within five years after accession.

在市场准入方面,加入后 3 年内,即允许从事药品、农药、农膜和成品油的零售,加入后 5 年内,即允许从事化肥的零售。

3. 特许经营和无固定地点的批发或零售服务(Franchising , Wholesale or Retail Trade Services away from A Fixed Location)

Within three years after China's accession to the WTO , eliminating all the restrictions on market access and national treatments.

在中国加入 WTO 后 3 年内即取消市场准入和国民待遇限制。

(七) 环境服务承诺(Environmental Services Commitments)

As to the market access , foreign services suppliers engaged in are permitted to provide services only in the form of joint ventures , with foreign majority ownership permitted.

在市场准入方面 ,外国服务提供者只能以合资形式提供服务 ,允许外商拥有多数股权。

(八) 保险及相关服务承诺(Commitments in All Insurance and Insurance-related Service)

In such field as aviation , transport insurance and reinsurance etc. , upon accession , joint venture with foreign equity no more than 50 per cent will be permitted ; within three years after China's accession , foreign equity share shall be increased to 51 per cent ; within five years after China's accession , wholly foreign owned subsidiary will be permitted.

在诸如航空保险、运输保险和再保险等领域 ,自中国加入 WTO 时起 ,即允许合资企业外资至多占有 50% 的股份 ;自中国加入 WTO 后 3 年内 ,外资股份即可增至 51% 。在中国加入 WTO 后 5 年内 ,即允许外资设立全资子公司。

Upon accession , foreign life insurers will be permitted 50 per cent foreign ownership in a joint venture with the partner of their choice.

自中国加入 WTO 时起 ,即允许外国寿险保险人在合资企业占 50% 的股份 ,并可自主选择合资伙伴。

Within three years after China s accession , there will be no geographic restrictions.

中国加入 WTO 后 3 年内 ,即取消地域限制。

Within three years after accession , foreign insurers will be permitted to provide health insurance , group insurance and pension/annuities insurance to foreigners and Chinese.

中国加入 WTO 后 3 年内 ,即允许外国保险人向外国人和中国人提供健康险、团体险和养老金或年金险。

(九)银行及其他金融服务承诺(Banking and Other Financial Services Commitments)

For foreign currency business , there will be no geographic restriction upon accession. Within five years after accession , all geographic restrictions will be removed.

自中国加入 WTO 时起 ,无地域限制 ;对本币业务 ,在加入后 5 年内将取消所有地域限制。

Within five years after accession , foreign financial institutions will be permitted to provide services to all Chinese clients.

在中国加入 WTO 后 5 年内 ,即允许外国金融机构向所有中国客户提供服务。

China commits that within five years after accession , any existing

non-prudential measures^① restricting ownership , operation , and juridical form of foreign financial institutions.

中国承诺 ,加入后 5 年内应取消现行的限制所有权、经营范围及外国金融机构法律形式的任何非审慎性措施。

(十) 旅游及相关服务承诺(Commitments in Tourism and Travel Related services)

As to hotels and Restaurants , within four years after accession , wholly foreign-owned subsidiaries will be permitted , and to be exerted no restriction.

对饭店和餐馆 ,在中国加入 WTO 后 4 年内 ,取消限制 ,将允许设立外资独资子公司。

As to travel agency and tour operator , within six years after accession , wholly foreign-owned subsidiaries will be permitted and geographic restrictions will be removed.

对旅行社及旅游经营者 ,在中国加入 WTO 后 6 年内将允许设立外资独资子公司 ,并取消地域限制。

For national treatment , none of restriction will exist except that joint ventures or wholly-owned travel agencies and tour operators are not permitted to engage in the activities of Chinese travelling abroad and to Hong Kong China , Macao China and Chinese Taipei.

在国民待遇方面 ,合资或独资旅行社和旅游经营者不允许从事中国公民出境及赴中国香港、中国澳门和中国台北的旅游业务 ,除此之外没有限制。

① The prudential measures contain no economic needs test or quantitative limits on licenses.

(十一) 教育服务承诺(Educational Service Commitments)

Joint schools will be established , with foreign majority ownership permitted. Qualifications of service providers are as follows : possession of Bachelor s degree or above ; and an appropriate professional title or certificate , with two years professional experiences.

将允许建立外商拥有多数所有权的合资学校。对教育服务提供者的资格要求是 :具有学士或以上学位 ,并具有相应的专业职称或证书 ,有 2 年专业工作经历。

以上简要归纳了我国对服务部门的主要承诺。这些承诺明确了我国推动服务贸易自由化的模式和进程。笔者认为 ,这些承诺也是对我国“ 改革开放 ”这一抽象概念的“ 量 ”的定义。

第四节 中国贸易保护主要规则

Fundamental Rules of Chinese Trade Protection

毋庸置疑 ,中国入世后仍要在符合 WTO 规则的前提下 ,对国内产业、国内市场进行保护。这些贸易保护规则在我国另一重要入世文件——《中国加入工作组报告书》(Report of the Working Party on the Accession of China)^①作了承诺性的说明。

一、继续实施关税保护制度(Maintaining the Implementation of

① 该报告书内容包括 8 个部分 :1. 导言 2. 经济政策 3. 政策制定和执行的框架模式 ; 4. 影响货物贸易的政策 5. 与贸易有关的知识产权制度 6. 影响服务贸易的政策 7. 其他问题 8. 结论。

the System of Tariff Protection)

在对外贸易方面 ,关税保护制度具有确定性和可预见性的特点。在中国入世后 ,关税保护仍是最基本的贸易保护手段。

In China , the purpose of levying tariffs was twofold :(a) to regulate imports so as to promote and support domestic production ; and (b) to serve as an important source of revenue for the treasury of the central government. The basic principles for establishing duty rates were as follows. Duty-free or low duty rates were applied to imported goods which were needed for the national economy and the people s livelihood but which were not produced sufficiently domestically. Import duty rates on raw materials were generally lower than those on semi-manufactured or manufactured products. For parts or components of machinery , equipment and instruments which were not produced domestically , or at a sufficiently high standard , the import duty was lower than the duty on finished products. Higher duty rates were applied to products which were produced domestically or which were considered non-essential for the national economy and the people s livelihood. A higher duty was applied to imported products , the equivalent of which were produced domestically and the local manufacturer of which needed protection.

在中国课征关税的目的有两个 :一是规范进口 ,以促进和保护国内生产 ;二是作为中央政府财政收入的重要来源。制定关税税率的基本原则是 :对国民经济和人民生活需要但国内不能充分生产的进口商品适用免税或低关税 ;对原材料课征的关税税率一般比半制成品或制成品低 ;对国内不能生产的或不能保证足够高的质量的机器、设备和仪器零件或构件课征的关税税率比制成品低 ;对那些国内能生产的或并非是国民经济和人民生活所必须的产品适用较高关税税率。对国内能生产的或当地生产商需要保护的进口产品适用较高关税税率。

二、规范地适用原产地规则(Normatively Utilizing the Rules of Origin)

The criteria for making the determination of substantial transformation was : (a) change in tariff classification of a four-digit tariff line in the Customs Tariff ; or (b) the value-added component was 30 per cent or more in the total value of a new product. When an imported product was processed and manufactured in several countries , the country of origin of the product was determined to be the last country in which the product underwent substantial transformation.

确定实质性改变的标准是 (1) 4 位数关税税号的税则归类发生变化 ;或 (2) 增值成分所占新产品总值的比例达到或超过 30% 。 当一进口产品在几个国家加工和制造时 , 产品的原产国应是产品发生实质性改变的最后一个国家。

三、明确国内税对进口产品的适用(Clarifying the Applicability of Internal Taxes to Imports)

In China , there were three major types of taxes levied on products and services : (a) VAT levied on goods and services for processing , maintenance and assembling ; (b) the Consumption Tax on some selected consumer products ; and (c) the Business Tax on providing services , transferring intangible assets and selling real estate. Both the VAT and the Consumption Tax were applicable to entities importing goods. VAT and the Consumption Tax on imported goods were collected by General Customs Administration at the point of entry. VAT was reimbursed once goods were exported. Exported goods were exempted from the Consumption Tax.

中国对产品和服务征收的税主要有 3 种 (1) 对货物和加工、修

理和装配服务征收的增值税 (2)对选定的消费品征收的消费税 ;及 (3)对提供服务、转让无形资产和销售不动产征收的营业税。增值税和消费税均适用于进口商品的经济实体。对进口产品征收的增值税和消费税由海关总署在入境地征收。货物一经出口即退还增值税。出口货物免征消费税。

Import duty reductions or exemptions were available for the following goods :

(a) A consignment of goods , on which customs duties were estimated below RMB 10 yuan ;

(b) Advertising articles and samples , which were of no commercial value ;

(c) Goods and materials , which were rendered gratis by international organizations or foreign governments ;

(d) Fuels , stores , beverages and provisions for use en route loaded by any means of transport , which were in transit across the border ;

(e) Exported goods being replaced ;

(f) Goods damaged prior to Customs release ;

(g) Goods covered by international treaties providing for tariff reductions and exemptions which China had entered into or acceded to ;

(h) Goods temporarily imported ;

(i) Goods imported under inward processing programmes ;

(j) Goods imported at zero cost for replacement purposes ;

(k) Domestic or foreign-funded projects encouraged by the government ;

(l) Articles for scientific research , education and the disabled.

以下商品减征或免征进口关税 :

(1) 关税税额估计在人民币 10 元以下的货物 ;

- (2)无商业价值的广告品和货样 ;
- (3)国际组织或外国政府无偿赠送的物资 ;
- (4)以任何运输方式装载的过境运输途中使用的燃料、贮备物料和饮食用品 ;
- (5)被替换的出口货物 ;
- (6)结关前已经损坏的货物 ;
- (7)中国缔结或参加的国际条约规定减征或免征关税的货物 ;
- (8)暂时进口的货物 ;
- (9)进口加工计划项下的进口货物 ;
- (10)无成本的替代货物 ;
- (11)政府鼓励发展的内外资项目 ;
- (12)科研、教育与残疾人用品。

四、合理使用关税配额(Reasonably Adoption of TRQs)

In China ,TRQs will be administered on a transparent ,predictable , uniform , fair and non-discriminatory basis using clearly specified time-frames , administrative procedures and requirements that would provide effective import opportunities ; that would reflect consumer preferences and end-user demand ; and that would not inhibit the filling of each TRQ.

在中国 ,使用能够提供有效进口机会的、反映消费者偏好和最终用户需求的、不影响每一种关税配额的足额使用的十分确定的配额适用时限、管理程序和要求 ,在透明、可预测、统一、公平和非歧视的基础上使用关税配额。

五、加强对进口产品反倾销措施(Strengthening Anti-dumping Measures against Imports)

2002 年 1 月 1 日《中华人民共和国反倾销条例》、《中华人民共和国保障措施条例》和《中华人民共和国反补贴条例》开始实施。就反倾销情况看,在国家商务部组建之后,有 3 个政府机构负责反倾销事宜。这些机构的职责如下:

(a) Ministry of Commerce (MOC)

Receiving anti-dumping ; Conducting investigations on dumping and dumping margins and issuing relevant preliminary determination decisions and notices ; Negotiating with foreign interested parties on “ Price Undertaking ” if necessary ; Providing proposal on imposition of definitive anti-dumping or proposals on duty refund , Responsible for the investigation of injury caused to the domestic industry by the dumped imports , the extent of such injury and making injury findings.

(1) 商务部

接受反倾销投诉,对倾销和倾销幅度进行调查,并发布有关的初步裁定和公告,如果必要,与国外利害关系方就“价格承诺”进行谈判,就最终反倾销措施或退税等提出建议等。负责就倾销进口产品对国内产业造成的损害和此种损害的程度进行调查,作有关损害的调查结论。

(b) General Customs Administration

Coordinating anti-dumping investigations with MOFTEC ; enforcing anti-dumping measures such as collecting cash deposits and dumping duties , and monitoring implementation.

(2) 海关总署

与外经贸部协调进行反倾销调查,实施收取现金保证金、反倾销税等反倾销措施,并监督执行。

(c) Tariff Commission of the State Council (TCSC)

Making final decisions on whether or not to levy the anti-dumping based on the suggestions by MOFTEC with regard to imposing anti-dumping , and reimbursing excess amount of duties.

(3) 国务院关税税则委员会(TCSC)

根据外经贸部关于采取反倾销措施的建议 , 就是否征收反倾销作出最终决定 , 并负责退还多征的关税。

六、科学实施出口许可制度(Scientifically Implementing Export Licence System)

China applies export licence system to certain agricultural products , resource products and chemicals. The main criteria used in determining whether a product was subject to export licensing is as follows :(1) maintenance of national security or public interests ; (2) protection against shortage of supply in the domestic market or exhaustion of natural resources ; (3) limited market capacity of importing countries or regions ; or (4) obligations stipulated in international treaties.

中国对某些农产品、资源性产品和化学品实行出口许可证制度。决定受出口许可证管理的商品所使用的主要标准是 (1) 维护国家安全或公共利益 (2) 防止国内市场供应短缺或者保护可用竭的自然资源 (3) 输往国家或地区的市场容量有限 (4) 国际条约规定的义务。

Licences were valid for six months and could be extended once.
许可证有效期为 6 个月 , 并可延期一次。

除上述规则之外 , 中国还可利用技术性贸易壁垒、卫生与植物检疫措施、WTO 所许可的农业支持政策等等。如对于农业支持政策 ,

中国通过农业投资补贴和农业投入补贴等政府措施对农产品生产提供支持。中国可对特定产品支持援用等于相关年份一基本农产品生产总值 8.5% 的微量免除水平 ;对非特定产品支持可援用等于相关年份中国农业生产总值 8.5% 的微量免除水平(但 WTO《农业协定》第 6(4)条对发展中国家规定的微量免除水平是 10%)。这些措施都将对国内市场和国内产业进行有效的保护。

本章小结

本章介绍了我国入世规则 ,这些规则主要涉及到四个入世文件 :《加入议定书》、《WTO 成员的保留》、《服务贸易具体承诺减让表——第 2 条最惠国豁免清单》、《加入工作组报告书》。从这些文件中我们可以看出中国是以特殊的身份加入 WTO 的。在过渡期内 ,WTO 的一些基本原则(包括非歧视性原则)在很多领域并不适用于我国 ,换言之 ,WTO 一些成员在一定过渡期内仍可对我国适用差别待遇。这种状况在过渡期后可能有所改变。

思考题

1. “特定产品过渡保障措施”(TPSSM)的主要内容是什么?
2. 简述我国可以采取的主要贸易保护手段。
3. 我国要提高贸易政策透明度应做好哪些工作?

附录 :WTO 规则所涉及的重要 缩略语一览表

AD Anti-dumping Duties	反倾销税
AMS Aggregate Measurement of Support	支持总量
ATC Agreement on Textiles and Clothing	《纺织品与服装协定》
BISD Basic Instruments and Selected Documents	《基本文件资料汇编》
CVD Countervailing Duties	反补贴税
DSU Dispute Settlement Understanding , Understanding in Rules and Procedures Gov- erning the Settlement of Disputes	关于争端解决的规则和 程序的谅解
DSB Dispute Settlement Body	争端解决机构
GATS General Agreement on Trade in Services	《服务贸易总协定》
GATT General Agreement on Tariffs and Trade	关税和贸易总协定
HS Harmonized Commodity Description and Cod- ing System	《商品的品名和编码协调制度》
IMF International Monetary Fund	国际货币基金组织
IPRs Intellectual Property Rights	知识产权

PGE	常设专家组
Permanent Group of Exports	
MFN	最惠国待遇
Most-Favoured-Nation Treatment	
SCM	补贴和反补贴措施
Subsidies and Countervailing Measures	
SPS	卫生与植物检疫措施
Sanitary and Phytosanitary Measure	
SSG	特别保障措施
Special Safeguard	
S&D	特殊和差别待遇
Special and Differential Treatment	
TBT	技术性贸易壁垒
Technical Barriers to Trade	
TPRB	贸易政策审查机构
Trade Policy Review Body	
TPRM	贸易政策审查机制
Trade Policy Review Mechanism	
TPSSM	过渡期特定产品保障措施
Transitional Product-specific Safeguard Mechanism	
TRIMs	与贸易有关的投资措施
Trade-related Investment Measures	
TRIPS	与贸易有关的知识产权
Trade-related Aspects of Intellectual Property Rights	
TMB	纺织品监督机构
Textiles Monitoring Body	
WTO	世界贸易组织
World Trade Organization	

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