

試析丁香菸案後印尼要求授權報復所可能引發之法律爭議

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印尼於今 (2013) 年 8 月 23 日的世界貿易組織 (World Trade Organization, WTO) 爭端解決會議中提出, 美國未能於爭端解決機構 (Dispute Settlement Body, DSB) 所給予之履行期限 (即本年 7 月 24 日) 前修正或移除其已被判決與 WTO 規則不合致之禁止印尼丁香菸進口之相關措施, 因此要求授權其對美國產品課徵報復性關稅¹。然美國卻指稱印尼並未按照雙方協議之內容依循爭端解決規則與程序瞭解書 (Dispute Settlement Understanding, 以下簡稱 DSU) 第 21.5 條請求成立履行審查小組 (compliance panel), 以認定美國是否已將違法措施移除或改正, 而逕依 DSU 第 22 條請求 WTO 授權報復²; 而實際上, WTO 並未明確規定該二條文的適用順序, 也因而導致許多適用順序的爭端, 本文即試圖整理過往案件中爭端當事國於此議題之解決之道, 並試著分析本案後續可能引發之爭議。

本文以下將分為三大部分。首先將簡介 DSU 條文關於第 21.5 條和第 22 條中易引發的適用順序問題以及過往控訴國和被控訴國對此之解決方法, 以作為後續分析的背景認識。第二部分將分析若雙方已就該二條的適用順序產生共識, 而印尼卻逕自訴諸 DSB 請求授權報復所可能衍生之法律議題; 最後, 作一結論。

DSU 第 21.5 條與第 22 條中存在的適用順序爭議

DSU 第 21.5 條³規定, 若爭端當事國對敗訴國是否移除或修正其已被 DSB 認定違反 WTO 規範的措施有爭議時, 當事國之一方得依爭端解決程序要求成立履行審查小組, 而 DSU 第 22 條係規範敗訴會員國之補償及控訴方之貿易報復 (如暫停關稅減讓或其他義務), 其中第 2 項⁴明文規定, 如果敗訴國確實沒有於合理

¹ 美國強烈抨擊印尼要求加味香菸爭端案之報復金額, 貿易救濟動態週報, 經濟部貿易調查委員會, 2013 年 9 月 6 日, 網址:

<http://www.moeaitc.gov.tw/itcweb/Weekly/wFrmWeeklyN.aspx?type=6&weeklyseq=536> (最後瀏覽日: 2013 年 11 月 10 日)。

² *U.S., Indonesia Clove Cigarette Fight Raises Key DSU Issues In WTO*, INSIDE U.S. TRADE, Sept. 5, 2013.

³ Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 21.5: "Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report."

⁴ Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 22.2: "Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted

執行期間內移除或改正其與 WTO 不合致之措施，且當事國間在合理期間屆滿後二十日內未能獲致滿意之補償共識，提起爭端解決程序之任一當事國得要求 DSB 授權對敗訴會員國進行貿易報復，而同條第 6 項⁵續規定若有第 2 項之情事發生而 DSB 經控訴國請求後，應在合理期間屆滿後三十日內，授權暫停減讓或其他義務，惟 DSB 以共識決議拒絕該請求者，不適用之。

由上述條文之適用情形觀之，於 DSB 通過 DSU 第 21.5 條履行審查小組報告以認定敗訴會員所採行措施是否符合 DSB 裁決及建議之前，DSB 可能即授權控訴會員國對敗訴會員會實施報復，即控拆國若先請求成立履行審查小組，則可能面臨小組遲至合理期間屆滿三十日後始作出報告之情形，因而喪失請求授權報復之權利，故控訴國為避免該情事發生，可能不先行依 21.5 條請求成立小組，而逕行訴諸 DSB 授權報復，此種未俟履行審查小組報告出爐前即授與控訴國有權進行貿易報復之情事，即為 DSU 第 21.5 條及第 22 條之適用順序議題 (sequencing issue)。

關於該 DSU 條文適用順序之爭議源自於歐體香蕉案 (*EC—Bananas III*)⁶，於該案中，關於歐體是否應於請求授權報復前向 WTO 要求成立履行審查小組之爭論，幾乎導致該案訴訟程序於 1999 年中斷⁷。故從是時起，爭端當事國間對成立履行審查小組與否之問題大多經由締結適用順序協議 (*ad hoc sequencing agreement*) 來確認，除決定 DSU 條文的先後適用順序外，更重要的是該協議係為避免控訴國於進行 DSU 第 21.5 條之履行審查程序時，因請求報復的期限已過因而喪失向 DSB 請求授權報復的權利。而本文以下將簡介過往 WTO 爭端案件中當事國關於協議內容之具體作法，以作為後續分析本爭議之基礎。

WTO 爭端案件中關於適用順序協議內容之實務操作

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. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average to weighted average or transaction to transaction comparison.”

⁵ Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 22.6: “When the situation described in paragraph 2 occurs, the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request. However, if the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in paragraph 3 have not been followed where a complaining party has requested authorization to suspend concessions or other obligations pursuant to paragraph 3(b) or (c), the matter shall be referred to arbitration. Such arbitration shall be carried out by the original panel, if members are available, or by an arbitrator appointed by the Director-General and shall be completed within 60 days after the date of expiry of the reasonable period of time. Concessions or other obligations shall not be suspended during the course of the arbitration.”

⁶ Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (Sept. 9, 1997).

⁷ *Supra* note 1

(1) 先依 DSU 第 21.5 條請求成立履行審查小組，再視履行審查報告之結果決定是否援引 DSU 第 22 條之報復程序

於澳洲汽車皮革案 II (*Australia—Automotive Leather II*) 中，澳洲與美國在 1999 年 10 月 4 日達成關於 DSU 第 21.5 條及第 22 條適用順序之協議，美國同意在 DSU 第 21.5 條履行審查小組針對澳洲是否移除或修正其已被判決違反 WTO 規範之措施作成認定前，不循求 DSU 第 22 條之授權報復程序⁸。

(2) 同時進行 DSU 第 21.5 條與第 22 條之程序

於加拿大乳製品案 (*Canada—Dairy*) 中，加拿大與紐西蘭在 1999 年 11 月 23 日達成關於 DSU 第 21.5 條及第 22 條適用順序之協議，紐西蘭得同時依據第 21.5 條請求 DSB 成立履行審查小組和第 22 條請求 DSB 授權報復；或其亦可等待履行審查小組報告之後始依循第 22 條請求授權報復，惟若任何一方援引第 22.6 條請求進行仲裁判斷時，須待第 21.5 條履行審查小組 (或上訴機構) 報告被 DSB 通過後，始得發動 DSU 第 22.6 條仲裁程序⁹。

(3) 雙方就履行審查小組所為之報告不提起上訴程序

澳洲與美國亦於澳洲汽車皮革案 II 中就 DSU 第 21.5 條及第 22 條適用順序之協議中明文規定雙方將無條件接受第 21.5 條履行審查小組之報告，一旦該小組認定澳洲確實未移除或修正其已被判決違反 WTO 規範之措施，則澳洲不得提起上訴，而美國即可依協議內容向 DSB 請求授權貿易報復¹⁰。

(4) 視履行審查小組之報告結果，決定是否撤回已發動之請求授權報復程序

在美國海外銷售公司案 (*United States—FSC*) 中，美國與歐體在 2000 年 9 月 29 日達成關於 DSU 第 21.5 條及第 22 條適用順序之協議，一旦履行審查小組認定美國確實已移除或修正其已被判決違反 WTO 規範之措施，則歐體將撤回其已向 DSB 請求之報復授權程序；反之，若履行審查小組認定美國確實未移除或修正其已被判決違反 WTO 規範之措施，則原請求授權報復程序將繼續進行，而美國亦得就歐體所提出之報復程度提起仲裁程序¹¹。

⁸ Recourse by the United States to Article 21.5 of the DSU, *Australia—Subsidies Provided to Producers and Exporters of Automotive Leather*, WT/DS126/8 (Oct. 4, 1999).

⁹ Understanding between Canada and New Zealand regarding Procedures under Articles 21 and 22 of the DSU, *Canada—Measures Affecting Dairy Exports*, WT/DS113/14 (June 5, 2001).

¹⁰ Recourse by the United States to Article 21.5 of the DSU, *Australia—Subsidies Provided to Producers and Exporters of Automotive Leather*, ¶ 4, WT/DS126/8 (Oct. 4, 1999).

¹¹ Understanding between the European Communities and the United States Regarding Procedures under Articles 21 and 22 of the DSU and Article 4 of the SCM Agreement, *United States—Tax Treatment for “Foreign Sales Corporations”*, ¶ 12, WT/DS108/12 (Oct. 5, 2000).

(5) 逕行援引 DSU 第 22 條之授權報復

美國與歐體亦於美國海外銷售公司案就 DSU 第 21.5 條及第 22 條適用順序之協議中明文規定，若美國於合理報行期間屆滿前並未採行任何動作以移除或修正其已被判決違反 WTO 規範之措施，則歐盟無須先依照 DSU 第 21.5 條請求成立履行審查小組，得逕自援引 DSU 第 22.2 條請求 DSB 授權報復¹²。

(6) 爭端當事國不反對依據 DSU 第 22.6 條進行仲裁程序

於日本蘋果案 (*Japan – Apples*) 中，美國與日本在 2004 年 6 月 30 日達成關於 DSU 第 21.5 條及第 22 條適用順序之協議，若美國依照 DSU 第 22.2 條請求 DSB 授權報復，而日本欲依據 DSU 第 22.6 條就美國所提出之報復程度訴諸仲裁時，美國將不會對該仲裁程序進行掣肘¹³。

(7) 不適用 DSU 第 22.6 條第一句中關於在合理期間屆滿 30 天內請求授權報復之情形

於歐體棉質寢具案 (*EC – Bed Linen*) 中歐體與印度在 2001 年 9 月 13 日達成關於 DSU 第 21.5 條及第 22 條適用順序之協議，雙方同意即便印度未於 DSU 第 22.6 條所言之合理執行期間屆滿 30 天內向 DSB 請求授權報復，歐盟仍同意印度得依 DSU 第 22.2 條請求 DSB 授權報復¹⁴。

印尼逕援引 DSU 第 22 條請求授權報復可能衍生之法律議題

美國表示印尼並未按照雙方協議之內容請求成立履行審查小組以認定美國是否已將違反之措施移除或改正 (應較為接近上述 WTO 爭端實務處理適用順序議題之第 (1) 種情形)，而逕自訴諸 DSU 第 22 條請求 DSB 授權報復，代表印尼已先行單方面認定美國在本案下並未依循 DSB 之建議及裁決，故可能與 WTO 強調之多邊主義內涵有所衝突。蓋 DSU 第 23 條¹⁵係闡明會員國應以多邊爭端解

¹² Understanding between the European Communities and the United States Regarding Procedures under Articles 21 and 22 of the DSU and Article 4 of the SCM Agreement, *United States – Tax Treatment for “Foreign Sales Corporations”*, ¶ 9, WT/DS108/12 (Oct. 5, 2000).

¹³ Confirmed Procedures between Japan and the United States under Articles 21 and 22 of the DSU, *Japan – Measures Affecting the Importation of Apples*, ¶ 5, WT/DS245/10 (June 2, 2004).

¹⁴ Understanding between India and the European Communities Regarding Procedures under Articles 21 and 22 of the DSU, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, ¶ 5, WT/DS141/11 (Sept. 21, 2001).

¹⁵ Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 23.1: “When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.”; Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 23.2: “In such cases, Members shall:(a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has

決體系解決 WTO 爭端，不得單方面認定其他會員國違反 WTO 之規定，欲尋求救濟者，即必須依循 DSU 之規則，上訴機構亦於歐體荷爾蒙持續延宕 (*US—Continued Suspension*) 一案述明 WTO 不禁止控訴國對已被判決違反內括協定之敗訴國尋求補償，然其必須按照 DSU 所規範的程序始得為之¹⁶，而美國 301 貿易法案之小組 (*US—Section 301 Trade Act*) 則表示 WTO 爭端解決體系對 WTO 相關之爭端具有專屬管轄權，由於所有的會員均受其拘束，故其亦有強制性質，將 WTO 協定下之爭端，依照 DSU 規定之程序尋求解決，是會員國之義務也是權利¹⁷。是以印尼自行認定美國於合理期間期限內未修正或移除其已被判決與 WTO 規則不合致之禁止印尼丁香菸進口之相關措施可能有違反 DSU 第 23 條之虞。而印美雙方在確有協議之前提基礎之下，若未來爭端一方訴諸 DSU 第 22.6 條之仲裁程序時，仲裁人也應不會因印尼出爾反爾缺乏誠信原則而影響其仲裁判斷，蓋印尼確實依 DSU 第 22 條請求貿易授權報復，本案中之爭議僅再度突顯 DSU 長久以來之制度瑕疵罷了。

結論

美國指謫印尼未請求成立履行審查小組，針對美國為履行 DSB 裁決及建議所採行之措施是否存在及符合內括協定作成認定，而逕依 DSU 第 22 條請求 WTO 授權報復，此爭議乃長久以來 WTO 爭端實務上之「適用順序議題」，而本文藉由整理過往爭端當事國對此議題之解決方法作為背景認識，而後續分析印美雙方在有協議基礎之下，印尼逕行訴諸 DSU 第 22 條請求授權報復可能產生之法律議題，經檢視之後發現，印尼有違反 DSU 第 23 條禁止自行認定其他會員是否違反 WTO 規則之虞，且不遵守印美雙方之協議內容亦與誠信原則有違，然印尼可能主張其係依照 DSU 第 22 條之規定向 DSB 請求授權報復，符合 DSU 之規定，然此為 DSU 長久以來之制度漏洞，恐怕只有透過 DSU 改革談判方能根本性地解決此爭議。

been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding; (b) follow the procedures set forth in Article 21 to determine the reasonable period of time for the Member concerned to implement the recommendations and rulings; and (c) follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations under the covered agreements in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time.”

¹⁶ Appellate Body Report, *United States—Continued Suspension of Obligations in the EC—Hormones Dispute*, ¶ 373, WT/DS320/AB/R (Oct. 16, 2008).

¹⁷ Panel Report, *United States—Sections 301–310 of the Trade Act 1974*, ¶ 7.43, WT/DS152/R (Dec. 22, 1999).