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国際経済法研究会

# WTO 紛争処理における measure 概念
## ―国際通商における「法の支配」の射程―

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## I　問題の所在

・新興国の保護主義、米国の自国第一主義・二国間主義、中国の鉄鋼過剰供給問題 etc.
・WTO 法に基づくグローバル・レベルの「法の支配」、その実効性を担保する WTO 紛争処理
　→ 上述のような多種多様な事象に対して、WTO 紛争処理手続はいかに対応しうるか
・WTO 紛争処理における measure 概念への着目
　→ 紛争処理手続において申立ないし審理の対象となる（加盟国の）行為を指す、DSU 上の固有概念 ＝ measure に該当する行為のみが、審理を通じてその協定整合性を問われる
　　↓
・同概念の実質と射程を明らかにすることは、WTO 紛争処理手続の俎上に載りうる事象の範囲を明らかにすることを意味し、ひいては、同手続が国際通商における「法の支配」の実効性をいかなる範囲に対して確保しうるのか、その射程を見極めることにも繋がる
・実務上の位置づけと先行研究の状況

## II　measure 概念の不明瞭性

### （1）DSU における measure 概念の位置

● 関連規定：DSU3.3、3.7、4.2、4.4、6.2、19.1 etc.　[資料 1] p. 4
　・以上の諸規定から把握しうること 3 つ…
　　↓
　手続全体を貫く鍵となる概念であるにもかかわらず、定義は存在せず

### （2）先例における measure 概念の定式化

● AB Report, *US – Corrosion-Resistant Steel Sunset Review*（DS244）
　「WTO 加盟国に帰属するあらゆる作為または不作為が、原則として紛争処理手続上の measure となりうる」（para. 81）
● 分析視角の設定

以上の定式が含意する概念の広範さを踏まえつつ、①誰が（人的射程）、②どの時点で行った（時間的射程）、③いかなる行為が（事項的ないし行為類型の射程）、審理対象たる measure に該当しうるのかを分析

## III　概念の明確化

### （1）人的射程

● 行為主体は原則として WTO 加盟国　[資料 1] p. 4

● 私人の行為の位置づけ　*Korea – Beef* (DS161/169)、*US – COOL* (DS384/386) etc.

### （2）時間的射程

・DSU の関連規定は時間的側面からの制約に言及せず　[資料 1] p. 4

（a）過去の行為

● AB Report, *US – Upland Cotton* (DS267)　[資料 2] pp. 4-5

・主に勧告（DSU19.1 条）の可否の観点から、measure 該当性が問題に

（b）将来の行為

● GATT Panel Report, *US – Superfund*　[資料 3] pp. 5-6

・未発効の「法令」の measure 該当性

⇒ （a）（b）いずれの場合においても、問題となる行為の特性と関連する対象協定の規定内容が勘案されている。

### （3）事項的射程（行為類型の射程）

（a）as such/ as applied 申立の区分

● measure の類型に基づく申立の区分

● as such 申立が許容される基盤

（b）同区分の相対的・便宜的性格

● AB Report, *US – Continued Zeroing* (DS350) の意義　[資料 4] pp. 6-7

・いわゆる ongoing conduct が問題となった事例

・measure の類型把握における as such/ as applied 区分の絶対性を否定することによって、その両極の間にもいわばグラデーション状に measure が存在しうることを認め、申立国による measure の柔軟な構成に道を開くことに

## IV　概念の広範性・柔軟性が有する含意

### （1）measure の存在証明にかかる要件の流動性

●AB Report, *Argentina – Import Measures* (DS438/444/445)　[資料 5] pp. 7-8

・本件 measure（TRRs：貿易関連要求）の特殊性

unwritten measure、single measure、systematic and continued application

・存在証明のための要件は一定ではなく、measure 概念の広範性に呼応して流動的

### （2）申立国による創意工夫の重要性

●申立国には measure の構成をいかに行うかにつき広範な裁量あり

→ 従来のカテゴリカルな思考様式に依拠しすぎることは有益でない

●measure の構成に際して考慮すべき要素

①問題解決のためにはいかなる救済を獲得することが望ましいか

②以上の救済を獲得するためには measure をいかに構成すべきか

③当該 measure の存在証明のためにはいかなる要素の証明が必要となるか、またそのための十分な証拠と主張を実際に提示できるか

→ 申立国は事案の特性に応じてこれらを衡量し、創意工夫を凝らすことが求められる

●measure の構成如何が審理の結果を左右した例

成功例：*Argentina – Import Measures*　失敗例：*US – Shrimp II (Viet Nam)* (DS429)

●近年の潮流？：measure の構成とその存在証明への注力の例

・*Indonesia – Import Licensing Regimes* (DS477/478、申立国：米国・NZ)

・*Indonesia – Chicken* (DS484、申立国：ブラジル)

・*Russia – Tariff Treatment* (DS485、申立国：EU)

## V　結論

**【本報告の結論】**

・measure 概念は広範な射程を有する柔軟な概念として解釈・適用されてきており、それは、WTO 法上の保護法益の特質と事案毎に問題となる各協定固有の規律内容によって必要とされ、また DSU の関連規定の曖昧さによって許容されている。

・概念の広範性・柔軟性を踏まえれば、申立の対象を選択し構成するにあたっては事案の特性に応じた申立国の創意工夫こそが重要となってくる。一定の正解が存在するわけではないという意味で条約解釈同様 art の世界であり、それゆえ永遠の課題といえる。

・この種の創意工夫があってこそ、一定の限界はあれど、日々生起する多様かつ複雑な通商問

題の多くを強力な紛争処理手続の俎上に載せることができるのであり、ひいてはその工夫が国際通商に対する「法の支配」の実効性を確保することにも繋がる。

**【残された課題】**

（1）問題となる measure が不明確または複雑であればあるほど、申立国の負う証明責任は重くなり、証拠収集コストも増大せざるをえない → 保護主義の抜け道となる可能性？

（2）履行確認手続（DSU21.5 手続）の文脈における measure の射程の問題

[資料 1]　DSU 関連規定

3.3　The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.

3.7　… In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements….

4.2　Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former.

4.4　… Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.

6.2　... [The panel request] shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly….

19.1　Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement….

[資料 2]　AB Report, *US – Upland Cotton* (DS267, 2005)

271. The United States purports to find support for its position in the ruling of the Appellate Body in *US – Certain EC Products*, where the Appellate Body reversed the panel's decision to make a recommendation under Article 19.1 of the DSU that the United States bring the measure at issue in that case (the "3 March Measure") into conformity with the covered agreements, on the grounds that the panel had already found that the measure had expired. However, that case involved a situation different from the present one. There, the 3

March Measure had been the subject of consultations, but had expired. The expiry of the 3 March Measure did not prevent it being a "measure at issue" for purposes of Article 6.2 of the DSU. Indeed, neither the panel nor the Appellate Body found that the 3 March Measure was outside the panel's terms of reference, and both the panel and Appellate Body addressed that measure in their rulings.

272. The question whether an expired measure is susceptible to a recommendation under Article 19.1 of the DSU is a different matter…. [T]he fact that a measure has expired may affect what recommendation a panel may make. It is not, however, dispositive of the preliminary question of whether a panel can address claims in respect of that measure.

273. It is important to recognize the particular characteristics of subsidies and the nature of Brazil's claims against the production flexibility contract and market loss assistance subsidy payments. Article 7.8 of the SCM Agreement provides that, where it has been determined that "any subsidy has resulted in adverse effects to the interests of another Member", the subsidizing Member must "take appropriate steps to remove the adverse effects or ... withdraw the subsidy". The use of the word "resulted" suggests that there could be a time-lag between the payment of a subsidy and any consequential adverse effects. If expired measures underlying past payments could not be challenged in WTO dispute settlement proceedings, it would be difficult to seek a remedy for such adverse effects. Further—in contrast to Articles 3.7 and 19.1 of the DSU—the remedies under Article 7.8 of the SCM Agreement for adverse effects of a subsidy are (i) the withdrawal of the subsidy or (ii) the removal of adverse effects. Removal of adverse effects through actions other than the withdrawal of a subsidy could not occur if the expiration of a measure would automatically exclude it from a panel's terms of reference.

[資料 3]　GATT Panel Report, *US – Superfund* (1987)

5.2.2. … The general prohibition of quantitative restrictions under Article XI, which the Panel on Japanese Measures on Imports of Leather examined, and the national treatment obligation of Article III, which Canada and the EEC invoked in the present case, have essentially the same rationale, namely to protect expectations of the contracting parties as to the competitive relationship between heir products and those of the other contracting parties. Both articles are not only to protect current trade but also to create the predictability needed to plan future trade. That objective could not be attained if contracting parties could not challenge existing legislation mandating actions at variance with the General Agreement until the administrative acts implementing it had actually been applied to their trade. Just as the very existence of a regulation providing

for a quota, without it restricting particular imports, has been recognized to constitute a violation of Article XI:1, the very existence of mandatory legislation providing for an internal tax, without it being applied to a particular imported product, should be regarded as falling within the scope of Article III:2, first sentence. The Panel noted that the tax on certain imported substance had been enacted, that the legislation was mandatory and that the tax authorities had to apply it after the end of next year and hence within a time frame within which the trade and investment decisions that could be influenced by the tax are taken. The Panel therefore concluded that Canada and the EEC were entitled to an investigation of their claim that this tax did not meet the criteria of Article III:2, first sentence.

[資料 4]　AB Report, *US – Continued Zeroing* (DS350, 2009)

179. We share the Panel's view that the distinction between "as such" and "as applied" claims does not govern the definition of a measure for purposes of WTO dispute settlement. This distinction has been developed in the jurisprudence as an analytical tool to facilitate the understanding of the nature of a measure at issue. This heuristic device, however useful, does not define exhaustively the types of measures that may be subject to challenge in WTO dispute settlement. In order to be susceptible to challenge, a measure need not fit squarely within one of these two categories, that is, either as a rule or norm of general and prospective application, or as an individual instance of the application of a rule or norm.

180. In this dispute, the measures at issue consist of the use of the zeroing methodology in successive proceedings, in each of the 18 cases, by which the anti-dumping duties are maintained. The European Communities' claim regarding these measures is not an "as such" claim, in that its scope is narrower than a challenge to the zeroing methodology as a rule or norm of general and prospective application with regard to all imports into the United States from all countries. At the same time, the measures at issue are broader than specific instances in which the zeroing methodology was applied, such as a periodic review or sunset review determination. In other words, the measures at issue consist of the use of the zeroing methodology in a string of connected and sequential determinations, in each of the 18 cases, by which the duties are maintained. As the European Communities explains, its complaint is directed at "the zeroing methodology as used in the final order and programmed to continue to be used until such time as the United States eliminates zeroing from the particular anti-dumping duty under consideration."

181. Thus, the measures at issue consist of neither the zeroing methodology as a rule or norm of general and prospective application, nor discrete applications of the zeroing methodology in particular determinations;

rather, they are the use of the zeroing methodology in successive proceedings, in each of the 18 cases, by which duties are maintained over a period of time. We see no reason to exclude ongoing conduct that consists of the use of the zeroing methodology from challenge in WTO dispute settlement. The successive determinations by which duties are maintained are connected stages in each of the 18 cases involving imposition, assessment, and collection of duties under the same anti-dumping duty order. The use of the zeroing methodology in a string of these stages is the allegedly unchanged component of each of the 18 measures at issue. It is with respect to this ongoing conduct that the European Communities brought its challenge, seeking its cessation. At the oral hearing, the European Communities confirmed that it is not seeking the revocation of the 18 anti-dumping orders but, rather, the cessation of the use of the zeroing methodology by which the duties are calculated and maintained in these 18 cases. In our view, the European Communities, in seeking an effective resolution of its dispute with the United States, is entitled to frame the subject of its challenge in such a way as to bring the ongoing conduct, regarding the use of the zeroing methodology in these 18 cases, under the scrutiny of WTO dispute settlement.

[資料 5]　AB Report, *Argentina – Import Measures* (DS438/444/445, 2015)

5.103. We observe that the distinction between "as such" and "as applied" claims is typically employed in conjunction with claims against norms or rules of general and prospective application, such as those contained in legislation. Legislation prescribing such rules or norms can be challenged "as such". Alternatively, or additionally, a complainant may raise an "as applied" claim against one or more instances of application of the same legislation. The same, however, may not be true for other types of "measures" that are also attributable to a Member, and can thus be challenged in WTO dispute settlement. Rules and norms of general and prospective application are only one category of "measures" that can be challenged in WTO dispute settlement, which, as explained above, include any act or omission that is attributable to a Member.

5.104. In *US – Zeroing (EC)*, the Appellate Body considered a challenge against the "zeroing methodology" as an unwritten "'rule or norm' that constitutes a measure of general and prospective application". The Appellate Body stated that, when bringing an "as such" challenge against a "rule or norm", a complaining party must clearly establish that the alleged "rule or norm" is attributable to the responding Member, its precise content, and that it has general and prospective application. We observe that, in every WTO dispute, a complainant must establish that the measure it challenges is attributable to the respondent, as well as the precise content of that challenged measure, to the extent that such content is the object of the claims raised. In *US – Zeroing (EC)*, the additional features of general and prospective application were relevant to the type

of measure identified by the complainant, that is, the zeroing methodology as a rule or norm. Proving the existence of other measures that are also challengeable in WTO dispute settlement may require a complainant to demonstrate, in addition to attribution and precise content, other elements, depending on the particular characteristics or nature of the measure being challenged.

5.108. In any event, the constituent elements that must be substantiated with evidence and arguments in order to prove the existence of a measure challenged will be informed by how such measure is described or characterized by the complainant. Depending on the characteristics of the measure challenged, other elements in addition to attribution to a WTO Member and precise content may need to be substantiated to prove its existence. For instance, a complainant challenging a single measure composed of several different instruments will normally need to provide evidence of how the different components operate together as part of a single measure and how a single measure exists as distinct from its components. A complainant that is challenging a measure characterized as "ongoing conduct" would need to provide evidence of its repeated application, and of the likelihood that such conduct will continue.

5.117. … the complainants' descriptions of the challenged TRRs measure reveal their understanding of the defining characteristics of that measure. Although the terminology each complainant used differs to some extent, in our view, the constituent elements of the TRRs measure as described by the complainants appear to be as follows: (i) an unwritten measure in the form of a decision by the Argentine authorities; (ii) a single measure that is composed of several individual elements imposed in pursuit of the objectives of import substitution and trade deficit reduction; (iii) a measure that has systematic application; and (iv) a measure that has present and continued application. All these constituent elements serve to define the type of measure that is the object of the complainants' joint challenge.