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论私人结构性参与多边贸易体制

——对变动着的国际法结构的一种考察

Private Structural Participation
in Multilateral Trade System

——An Examination on the Changing Structure
of International Law

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内 容 摘 要

20 世纪 90 年代以来, 国际法伴随着社会、政治及思想基础的重大变化正在发生深刻的结构性变革, 其中私人以某种主体性身份日益广泛而深入地参与国际法实践尤其值得关注, 这一现象不仅将对整体意义上的国际法的未来发展产生深远影响, 也正影响着具体领域的国际法实践, 尤其 WTO 成立后的多边贸易体制——其运作与私人间的法律联系前所未有地密切了。反过来看, 作为当今国际法最活跃的领域, 多边贸易体制的相关法律实践——尚未出现或存在争议——也将影响一般国际法的未来发展。显然, 无论对于一般国际法, 抑或多边贸易体制, 私人的路径都是分析其现状, 探讨其未来的极佳选择。

鉴此, 本文运用国际法基本原理讨论私人参与多边贸易体制的有关法律问题。全文分为绪论、正文及结论三大部分, 其中正文分为五章。

绪论中, 笔者对研究命题予以了确定与界定, 简要评析了既有研究成果, 并介绍了本文基本框架及拟研究的主要问题。

鉴于 WTO 法是一般国际法的组成部分, 一般国际法的发展构成 WTO 相关实践的基础, 在第一章中, 笔者从私人路径出发, 考察 20 世纪 90 年代以来国际法的社会、政治及思想基础变迁, 认为国际法范式正在发生转换, 私人参与型国际法正在出现, 提出私人结构性参与国际法实践的模式。鉴于国内外语境发生重要变迁, 笔者也简要地讨论了中国国际法实践的应然发展, 认为应该适当调整封闭性的国际法实践模式, 适当支持私人参与国际法实践。

在第二章中, 笔者通过语境与文本分析揭示多边贸易体制与私人间的关系, 并评论有关反映此种关系的相关实践。笔者首先从调整范围、调整模式及调整工具三个方面分析了多边贸易体制半个多世纪的发展, 认为这些发展增强了私人参与多边贸易体制的正当性以及以法律方式实现参与的可能性。其次, 笔者通过历史文本、法律文本及裁判文本评论了反映多边贸易体制与私人间关

系的有关努力。鉴于近年来日益热烈的有关贸易宪政问题的讨论可能极大地影响 WTO 涉及私人问题的法律实践, 笔者最后从私人角度讨论了多边贸易体制的宪政问题, 认为应该侧重从功能性角度理解私人与多边贸易体制间的宪政联系。

从第三章起, 笔者讨论了私人参与多边贸易体制的具体问题, 包括参与的方式与场所。在第三章中, 笔者分析了国际法创制的语境变迁与晚近发展, 并从 WTO 与成员方的不同视角讨论私人参与多边贸易规则创制的价值与功能。笔者还讨论了私人参与多边贸易规则创制的具体问题。

在第四、五章中, 笔者分别从国际与国内场所角度讨论了私人参与多边贸易规则实施的法律方式。在第四章中, 笔者结合国际法国际实施机制的晚近发展, 讨论了私人以当事方、参加方及法庭之友身份参与 DSB 程序的问题: 关于私人作为程序当事方, 笔者批判了主张私人可以作为当事方的两种学说, 侧重从法律实施角度论证并反对私人作为当事方; 关于私人作为程序参加方, 笔者回顾了国际法院的实践, 分析了 DSB 程序中的第三方参加制度, 主张某些私人作为许可参加方; 关于私人作为法庭之友, 笔者讨论了法庭之友制度的制度变迁、功能演变、实际效用等一般问题, 分析了 DSB 的既有实践, 进而在法律实施语境中通过对争端解决过程中的角色分析, 主张私人有条件地作为法庭之友。

在第五章中, 在简要讨论国际法国内实施机制后, 笔者首先讨论了 WTO 成员方司法机构直接适用多边贸易规则问题。其间, 笔者借鉴法与理性的关系原则建构国际条约直接适用的模式, 评论了欧共体及中国司法机关在直接适用多边贸易规则方面的司法实践及学术论争, 分别从成员方与 WTO 角度讨论了使直接适用从可能性转变为现实性的问题。其次, 笔者讨论被忽视了的行政机关直接适用多边贸易规则问题, 认为行政机关直接适用国际条约具有不同于司法机关适用行为的独特功能, 并借助于美国、欧共体及中国的贸易壁垒调查制度对如何实现此种独特功能作了实证分析。

最后, 笔者根据绪论中提出的“拟研究的主要问题”归纳了研究过程中获

致的思维成果，并提出“因为私人在变动，所以国际法在变动”的国际法结构变动动力说。

本文创新之处主要体现在：

1. 借助国际法基本理论并从私人路径理解多边贸易规则（进而国际法规则）的形成与实施，从而形成了本文独立的学术范式；

2. 区别国际法的社会基础与国际社会基础，进而根据国际法的社会、政治与思想基础变迁提出并论证了国际法范式转换及建立私人参与型国际法的问题，提出并论证了私人结构性参与国际法实践的模式，认为封闭性的中国国际法实践应该根据变化了的语境进行适当调整；

3. 在理解私人在国际法上的地位方面形成独立的见解；

4. 紧密联系国际法创制的一般发展与多边贸易体制的具体语境，提出并论证了私人参与多边贸易规则创制的问题；

5. 紧密联系法律实施的基本原理、国际法国际实施机制的一般发展及多边贸易体制的具体语境，提出并论证了私人参与 WTO 争端解决机制的具体法律形式问题，尤其运用角色分析法讨论有关法庭之友问题；

6. 运用法与理性关系的基本原理建构国际条约的直接适用模式，并据此解释多边贸易规则的直接适用问题；

7. 对中国最高法院有关适用多边贸易规则的司法解释进行独立的分析；

8. 揭示了行政机构直接适用多边贸易规则的独特功能；

9. 提出“因为私人在变动，所以国际法在变动”的国际法结构变动动力说。

关键词：私人；多边贸易体制；国际法；参与；结构

厦门大学博硕士学位论文摘要库

Abstract

Since 1990s and with significant changes of social, political and ideological foundations, international law is experiencing deep reform, among which private persons' gradually extensive and deep participation, with some kind of subjectivity, in international law practice is merit of special attentions. Such phenomenon not only influences the future of international law generally, but influences the international law practice in specific fields, specially, MTS after the Inception of WTO, with unprecedentedly close relationship with private persons. Vis-à-vis, as the most energetic segment of international law, the relevant WTO operation would influence the future of the former. For the general international law and MTS, private path is the good choice to examine their status quo and explore their future.

Because of the above-mentioned reasons, the author is inspired to examine the legal issues of private participation in MTS in accordance with the fundamental of general international law. This dissertation is constructed into five chapters as corpus, in addition to the Introduction and Conclusion.

In Introduction part, the author first defines and explains the research theme. Furthermore, academic history is reviewed. The basic structure of this dissertation is introduced and major issues to be explored are defined.

Since WTO law is the inherent part of general international law, the author, in Chapter 1 and through the private path, analyzes the change

of social, political and ideological foundations of international law, argues that the paradigm of international law is changing and the private participatory international law is emerging, defines the structural participation pattern. Lastly, the author argues that China's international law practice should be adjusted to according to the change of international and internal contexts.

In Chapter 2, the author examines the relationship between private persons and MTS through analyzing the context and texts and gives general comments on endeavors concerned. First, from three perspectives of regulation scope, regulation patterns and regulation tools, the author examines developments of MTS in the past over half one century and their indications incurred upon the relationship between private persons and MTS. Second, endeavors intended to reflect such relationship are reviewed through the analysis on historical text, legal text and judicial text. Lastly, since fierce debates concerning trade constitution is of possible great influence on the WTO practice concerned, the author discusses the MTS constitution from the perspective of private persons.

From Chapter 3, the author discusses, in detail, private participation in MTS, including means and places of such participation. In Chapter 3, the author analyzes the contextual change and recent development of the creation of international law, and then defines the value and function of private participation in the creation of MTRs. Based on such examinations, current stipulations in WTO agreements and relevant endeavors, now and before, by international society, concerning private participation in MTS, are discussed.

In Chapters 4, 5 and from the international and internal perspective

respectively, the author discusses detailed means of private participation in the enforcement of MTRs. In Chapter 4, the author firstly examines recent development of international enforcement mechanism of international law and discusses the possibility of private participation in DSB procedure as the party, intervenor and amicus curiae respectively: As to private persons as the party to DSB Procedures, the author introduces and criticizes theories in support of private persons as the party to DSB procedures, reflects upon Analogy, a kind of methodology of international law; As to private persons as intervenor to DSB procedures, the author first reviews the legal practice in ICJ, then examines the current system and practice of third party participation in DSB procedures. Upon the basis of such examinations, the author probes the issue of participation of private person as intervenor to DSB procedures; As to amicus curiae, the author discusses generally the issue of amicus curiae, including its institutional evolution, change of function and practical value, reviews the DSB practice concerning amicus curiae in the past years. In the context of law enforcement and through analyzing the different roles in the dispute settlement process, the author supports conditionally the acceptance of amicus curiae in DSB.

In Chapter 5 and after general examination on the importance of internal enforcement mechanism and its relationship with international counterpart, the author, on the one hand, discusses judicial DA of MTRs. The author firstly constructs the pattern of DA of international treaty based on the relationship between law and reason, reviews judicial practice and academic debates in EC and China, and discusses how to make the possibility of DA of MTRs realistic from the different perspective

of WTO members and WTO itself. On the other hand, the administrative DA of MTRs ignored by many lawyers is discussed. Meanwhile, the author analyzes the special function of such DA, which is different from the DA by judicial organ. An empirical study on trade barriers investigation in USA, EC and Chins is also conducted to exemplify how to realize such special function.

In the concluding part, basic propositions in this dissertation are summarized.

Some innovative points are as follows:

1. Comprehend the creation and enforcement of MTRs in accordance with the fundamental of international law and from the private path, thereby establish the academic paradigm on the author's own;

2. Distinguish the social foundation of international law and international societal foundation, and then, considering changes of social, political and ideological foundation, propose the arguments of the transfer of paradigm of international law, establishment of the private participatory international law and the pattern of private structural participation in international law practice, and suggest that China's international law practice be adjusted in accordance with the changing contexts and support properly private participation therein;

3. Provide unique view on the issue of status of private in international law;

4. Discuss the issue of private participation in the creation of MTRs in the general context of international law and specific context of WTO;

5. Discuss the different legal means of private participation in

DSB in accordance with principle of legal enforcement and in the general context of international enforcement of international law and specific context of MTS;

6. Propose the pattern of DA of international treaty based on the relationship between law and reason, thereby discuss the issue of judicial DA of MTRs;

7. Analyze the judicial rules concerning the application of MTRs by the China's Supreme Court;

8. Discuss the unique function of DA of MTRs by administrative organ.

9. Provide the theory of motivation for the changing structure of international law: *Since private persons are changing, international law is changing.*

Key Words: Private Persons; Multilateral Trade System; International Law; Participation; Structure

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缩略语表

ADR	Alternative Dispute Resolution(非诉讼纠纷解决机制)
ATC	Agreement on Textile and Clothing(《服装与纺织品协定》)
CIEL	the Center for International Environmental Law(国际环境法中心)
CMC	the Center for Marine Conservation(海洋保护中心)
DA	Direct Application(直接适用)
DSB	Dispute Settlement Body(争端解决机构)
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes(《关于争端解决规则与程序的谅解》)
EC	European Community(欧共体)
ECJ	European Court of Justice(欧共体法院)
GATS	General Agreement on Trade in Service(《服务贸易总协定》)
GATT	General Agreement on Tariff and Trade(《关税及贸易总协定》)
ICC	International Criminal Court(国际刑事法院)
ICTR	International Criminal Tribunals (Rwanda)(卢旺达国际刑事法庭)
ICJ	International Court of Justice(国际法院)
ICSID	International Centre for Settlement of Investment Dispute(解决投资争端国际中心)
ICSID 公约	the Convention on the Settlement of Investment Disputes between

缩 略 语 表

民间投资	States and Nationals of Other States (《解决国家与他国国民争端公约》)
ICTY	International Criminal Tribunals (Former Yugoslavis) (前南斯拉夫国际刑事法庭)
IGO	Inter-governmental Organization (政府间国际组织)
IISD	The International Institute for Sustainable Development (国际可持续发展中心)
ILO	International Labor Organization (国际劳工组织)
IMF	International Monetary Fund (国际货币基金组织)
INGO	International Non-Governmental Organization (国际非政府组织)
ITO	International Trade Organization (国际贸易组织)
MIGA	Multilateral Investment Guarantee Agency (多边投资担保机构)
MTRs	Multilateral Trade Rules (多边贸易规则)
MTS	Multilateral Trade System (多边贸易体制)
NAFTA	North American Free Trade Agreement (《北美自由贸易区协定》)
NCPI	New Commercial Policy Instrument (新商业政策工具)
NGO	Non-governmental Organization (非政府组织)
OECD	Organization for Economic Cooperation and Development (经济与合作发展组织)
SCM	Agreement on Subsidies and Countervailing Measures (《补贴与反补贴协定》)
S&D	Special and Development (特殊与差别待遇)
SPS 协定	Agreement on the Application of Sanitary and Phytosanitary Measures (《实施卫生与植物卫生措施协定》)

缩 略 语 表

TBR	Trade Barrier Regulation(贸易壁垒条例)
TRIMs 协定	Agreement on Trade-Related Investment Measures(《与贸易有关的投资措施协定》)
TRIPs 协定	Agreement on Trade-Related of Intellectual Property Rights(《与贸易有关的知识产权协定》)
UNDP	United Nations Development Program(联合国开发计划署)
WIPO	World Intellectual Property Organization(世界知识产权组织)
WTO	World Trade Organization(世界贸易组织)

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