

美國於反傾銷及平衡稅調查程序中使用可得事實之 WTO 合致性

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摘要

在反傾銷稅及平衡稅的調查程序中，為計算傾銷差額或補貼金額來決定最終稅率，進口國之調查機關須蒐集相關價格及成本等資訊作為認定之基礎。而資訊的來源除了由申請展開調查的國內產業所提供外，大部分有賴於受調查之國外生產者或出口商提供。由於進口國之調查機關對於國外之受調廠商並無蒐集資訊之公權力得行使，為了避免調查機關在受調廠商不配合提供資訊之情況下，影響調查效率或無法做出認定，《反傾銷協定 (Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994)》第 6.8 條及《補貼暨平衡稅協定 (Agreement on Subsidies and Countervailing Measures)》第 12.7 條，均賦與調查機關得以可得事實 (facts available) 為基礎做成決定之權限。上開規定雖然解決了調查機關之調查效率問題，但是如何認定受調廠商不配合，而改用「可得事實」，且通常是不利於受調廠商之資訊做為決定稅率之基礎，長久以來一直是國際貿易法上之重要議題。美國以可得事實做為認定基礎而受到 WTO 會員國控訴之案件亦不在少數，自 2001 年「美國對日本熱軋鋼鐵課徵反傾銷稅案 (United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan)」以來，爭端解決小組及上訴機構即有不少相關案例對於在反傾銷及平衡稅調查程序中如何使用可得事實做出解釋。然而，有鑑於美中貿易關係緊張，美國於 2015 年貿易優惠延長法案中，對於反傾銷及平衡稅的調查程序亦做了若干修正，其中包括了減輕美國商務部在使用可得不利事實時之舉證責任及免除其考量商業真實性之義務等，此舉雖然減輕了商務部在使用可得不利事實上所面臨之困難，但另一方面，對常受到反傾銷調查之會員國而言，卻更容易構成貿易障礙。以韓國為例，即於 2018 年針對修法後之若干反傾銷措施、平衡稅措施及該法規本身提出控訴 (US—Anti-Dumping and Countervailing Duties, DS539)，該案之小組報告亦已於今年年初公布。本文擬從《反傾銷協定》第 6.8 條及第 12.7 條等規定之目的及功能出發，探討在美國反傾銷法及平衡稅法下商務部以不利事實認定傾銷及補貼之作法，包括 2015 年修法後之變革，並就美國法院對於相關案件之見解及於 WTO 爭端解決案件中小組及上訴機構之見解進行分析，以期了解調查機關使

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用不利事實做為課稅基礎的權限及實務認定，以及受調廠商在此類情況下得主張之權益。

關鍵字：可得事實、不利可得事實、反傾銷稅調查、平衡稅調查、證據法則

Abstract

For the purpose of calculating the dumping margins, subsidy amounts, and the subsequent duty rates in the anti-dumping and countervailing investigations, competent authorities have to require the interest parties, especially the exporters or foreign producers, to provide necessary information to be the basis when they make determinations. To avoid the difficulty and non-efficiency resulted from the lack of necessary information or the non-cooperation of foreign producers and exporters, Article 6.8 of the Anti-Dumping Agreement (ADA) and Article 12.7 of the Agreement on Subsidies and Countervailing Measures (ASCM) provide that the investigating authorities can resort to the facts available out of other sources, including the petitions of domestic industries which mostly unfavorable for the investigated companies. However, this is always both sides of one coin, more and more concerns about the uncertainty and arbitrary use of these discretions provided by the above-mentioned WTO regulations and domestic laws have risen, and several cases have been brought into the DSB for clarifying their consistency with WTO rules, *inter alia* the USDOC's practices about using adverse facts available (AFA) to cope with the lack of information and non-cooperation of interest parties. There are several cases involved both as applied claims and as such claims about the USDOC's AFA norm and practices, such as *US—Hot-Rolled Steel* (DS184) brought by Japan, *US—Anti-Dumping Methodologies* (DS471) by China and *US—Supercalendered Paper* (DS505) by Canada. Through the review of the issues and discussions in these cases will help us to get the knowledge of USDOC's practices about the AFA, the interpretation of the related terms, and the opinions expressed by the panels and the AB. Besides, in order to loosen the undue duties of corroboration and strict evidence rules established by the domestic courts, the US government enacted the Trade Preferences Extension Act (TPEA) in 2015 to allow investigating authorities not to consider several elements when they use the other facts available for their adverse inference, such as commercial reality. This enactment which empowers the investigating authorities the discretion not to consider the real situation of the non-cooperation parties also invokes suspicious about the non-punishment nature

of trade remedy regimes. Recently, Korea had accused the USDOC's ongoing conduct permitted by the TPEA to be the unwritten measure against Article 6.8 of the ADA and Article 12.7 of the ASCM and had brought this case into the WTO/DSB in 2018. This article will discuss the legal opinions provided in the above-mentioned cases and hope to get the whole picture of the USDOC's AFA norms and practices.

Keywords : facts available, adverse facts available, anti-dumping duty investigation, countervailing duty investigation, rules of evidence

