十、其他成员反倾销实践

对华反倾销中的单独税率问题

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中国加入世界贸易组织时承诺，在对中国企业进行反倾销调查时，可以继续将中国视为非市场经济国家对待，最长不超过 15 年，这就是入世承诺的“非市场经济条款”。据此，很多国家仍然视中国为非市场经济国家，在进行反倾销调查时，不承认中国企业的国内销售价格和成本数据，采用替代国价格认定中国企业的正常价值。但是，这些国家在不采纳中国企业国内销售价格作为正常价值的同时，继续认为中国企业的出口完全受国家控制，因此不给予中国企业单独税率，只给整个国家一个统一税率。本文试图从目前的法律规定中对单独税率问题进行分析，论证其是否合法。笔者认为，根据 WTO 的相关规定，以及中国加入世贸组织的法律文件，在单独税率问题上目前美国和欧盟的法律规定和做法与 WTO 规定不符。

一、WTO 框架下的法律渊源

关于非市场经济待遇和单独税率问题，在 WTO 法律框架下，可以援引的法律渊源包括 WTO 法律文本和中国加入世界贸易组织法律文件（相关条文附后）。

WTO 法律文本中涉及非市场经济问题的条款有 GATT 1947 第 6 条及其注释和补充规定，以及《反倾销协议》中的个别条文。

从 WTO 的法律条文上看，对于非市场经济国家，在进行价格比较时，满足一定条件的，可以认定出口价格与中国国内价格严格比较不适当，可以采用替代国的价格确定中国产品的正常价值。从法律条文的含义来看，该条文主要说的是如何确定中国产品正常价值的问题。GATT 1947 第 6 条规定：“…the price of the product exported from one country to another is less than the **comparable price,** in the ordinary course of trade, for the like product when destined for consumption in the exporting country…”该条注释的表述为：“…importing contracting parties may find it necessary to take into account the possibility that **a strict comparison with domestic prices** in such a country may not always be appropriate.”GATT 1947 第 6 条及其注释和补充规定中的用词为“可比价格”（comparable price）或“与国内价格严格比较”（a strict comparison with domestic prices），即主要说的都是在确定出口价格的可比价格——也就是正常价值——的时候可以对非市场经济国家采取不同的方法。此条文并未涉及如何认定出口价格问题，未允许调查机关可以不使用出口国企业的出口价格。（反倾销协议第 2.1 条和第 2.2 条文字表述与 GATT1947 第 6 条相同）

而反倾销协议第 6.10 条规定：“The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation.”按照此条规定，调查机关应当对每一个企业确定一个单独的倾销幅度，不能

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对整个所有中国企业给一个统一税率。

中国加入 WTO 法律文件的法律条文中，其文字表述也只涉及如何认定正常价值，不涉及如何认定出口价格的问题。中国加入 WTO 法律文件中涉及非市场经济问题的条款有中华人民共和国加入议定书第 15 条，和中国加入工作组报告书第 150、151 段。这些条款表述中，只是论述可以进行严格比较的条件，即不使用出口国国内价格确定正常价值的条件，不涉及对出口价格的认定。

中国加入议定书第 15 条规定："(a) In determining **price comparability** under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on **a strict comparison with domestic prices or costs** in China based on the following rules:""(i) If the 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 importing WTO Member **shall use Chinese prices or costs for the industry under investigation in determining price comparability**; (ii) The importing WTO Member may use a methodology **that is not based on a strict comparison with domestic prices or costs in China** if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product."中国加入工作组报告书第 150 段也是同样的文字表述。

在对上述条文中的"**comparable price**"，"**price comparability**"和"**a strict comparison with domestic prices**"进行解释时，能否意味着不涉及出口价格的确定，只涉及正常价值的确定呢？可以分析涉及"**comparable price**"的 WTO 争端解决机制的案例来得出答案。目前，有两个的案例涉及此问题，印度诉欧盟床单案（EC – Bed Linen）和韩国诉美国不锈钢板案（US – Stainless Steel）。

欧盟床单案对反倾销协议第 2.4.2 条中的"comparable"进行了解释。第 2.4.2 条规定："…the existence of margins of dumping during the investigation phase 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."WTO 专家组对此条中的"comparable"解释为："The ordinary meaning of the word 'comparable' is **'able to be compared'**. 'Comparable export transactions' within the meaning of Article 2.4.2 are, therefore, export transactions that are able to be compared. …" [1]

美国不锈钢案中，WTO 专家组对 2.4.2 条中涉及"comparable"的条文解释为"Article 2.4.2 provides that the existence of dumping shall normally be established 'on the basis of a comparison of a weighted average normal value with a weighted average of all *comparable* export transactions'. The inclusion of the word 'comparable' is in our view highly significant, as in its ordinary meaning it indicates that a weighted average normal value is not to be compared to a weighted average export price that includes non-comparable export transactions. It flows from this conclusion that a Member is not required to compare a single weighted average normal value to a single weighted average export price in cases where certain export transactions are not comparable to transactions that represent the basis for the calculation of the normal value." [2]

上述专家组在解释第 2.4.2 条中的"comparable"时，论述的是"comparable"后面的内容能否与"comparable"前面的内容进行比较，以及如何比较的问题。第 2.4.2 条文字为"all

[1] Appellate Body Report on EC – Bed Linen, paras. 56-58.
[2] Panel Report on US – Stainless Steel, paras. 6.111-6.114.

comparable export transactions”，因此，专家组论述的是“comparable”后面的“export transactions”能否与“comparable”前面的正常价值进行比较的问题，也即如何确定“comparable”后面的“export transactions”问题，不是如何确定“comparable”前面的正常价值的问题。

因此，从上述专家组的论述中可以得出结论，在 WTO 法律框架下，对涉及非市场经济条款进行解释涉及“comparable” 时，均是如何确定“comparable”后面的正常价值的问题，不涉及如何认定“comparable”前面的出口价格问题。

二、欧盟做法与 WTO 的相关规定

欧盟法律中涉及非市场经济国家单独税率问题的条款为 384/96 规则第 9.5 条：“An anti-dumping duty shall be imposed in the appropriate amounts in each case, on a non-discriminatory basis on imports of a product from all sources found to be dumped and causing injury, except as to imports from those sources from which undertakings under the terms of this Regulation have been accepted. The Regulation imposing the duty shall specify the duty for each supplier or, **if that is impracticable, and in general where Article 2(7)(a) applies**, the supplying country concerned.”其中第 2(7)(a)即为非市场经济国家的规定。

欧盟的此条规定与 WTO 反倾销协议第 9.2 条非常相似。WTO 反倾销协议第 9.2 条规定：“When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except as to imports from those sources from which price undertakings under the terms of this Agreement have been accepted. The authorities shall name the supplier or suppliers of the product concerned. **If, however, several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned.** If several suppliers from more than one country are involved, the authorities may name either all the suppliers involved, or, if this is impracticable, all the supplying countries involved.”

欧盟条文与 WTO 反倾销协议条文的区别为，WTO 反倾销协议中只允许当一个国家的出口企业众多，列出全部出口企业的名单**不现实**的时候，可以只列出出口国的名字。（If, however, several suppliers from the same country are involved, and it is **impracticable** to name all these suppliers, the authorities may name the supplying country concerned.）即只有满足“列出全部出口企业的名单不现实”这个条件之后，才可以不列出每一个出口企业的名单。而 WTO 反倾销协议 9.2 条中没有规定什么构成“impracticable”。欧盟则在其法律中加入了“涉及非市场经济国家的情况”这个条件，或者说欧盟法律将“impracticable”解释为在非市场经济国家情况下，列出每一出口企业的名单是**不现实**的。

欧盟将“impracticable”解释为是非市场经济国家的情况，是否符合 WTO 的规定呢？这将涉及如何认定“impracticable”的问题。WTO 反倾销协议第 6.10 条有关于“impracticable”的规定：“The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination **impracticable**, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be

investigated.”从此条文中可以看出，出口商数量众多，可以认定为为每一个出口商计算倾销幅度是“impracticable”。

美国 Merriam-Webster 词典中关于“impracticable”的解释为：“1: IMPASSABLE: incapable of being passed, traveled, crossed, or surmounted. 2: not practicable: incapable of being performed or accomplished by the means employed or at command.”其中第二个解释更适合本条款：“根据要求或者采用某种方法不能进行或者不能完成”因此，根据词典的解释“impracticable”应当理解为是：“操作上不可能，或者无法进行”。

欧盟法律规定的在非市场经济国家情况下，列出每一出口商的名字，或者为每一出口商计算单独的倾销幅度，能否构成 WTO 法律意义下的“impracticable”呢？按照欧盟的立法原意，不能为非市场经济国家的出口企业确定单独的倾销幅度，是担心非市场经济国家的出口企业全部为国家垄断，如果为每一出口企业确定不同的倾销幅度，可能会导致规避。这种理由并不是操作上是否可能或者是否无法进行的问题，而是是否合理或者是否公平的问题。

笔者认为，认定在非市场经济国家情况下，列出每一出口商的名字，或者为每一出口商计算单独的倾销幅度，能否构成 WTO 法律意义下的“impracticable”，只能依据 WTO 法律条文来认定，不能由各成员随意解释。特别是涉及非市场经济国家问题时，只能依据 WTO 法律条文和中国入世法律文件中的相关法律条文进行认定。WTO 反倾销协议第 6.10 条仅说明出口商数量众多可以构成“impracticable”。GATT 1947 第 6 条及其注释和补充规定，以及中国入世法律文件中关于中国非市场经济问题的规定均只涉及如何认定正常价值，没有涉及如何认定出口价格，也没有关于什么情况构成“impracticable”的认定。

另外，欧盟法律援引的 WTO 反倾销协议第 9.2 条，是自第一个反倾销协议——肯尼迪回合反倾销协议——以及其后的东京回合反倾销协议延续下来的，基本没有变化。肯尼迪回合反倾销协议第 8 条（b）规定：“When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury. The authorities shall name the supplier or suppliers of the product concerned. If, however, several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned. If several suppliers from more than one country are involved, the authorities may name either all the suppliers involved, or, if this is impracticable, all the supplying countries involved.”东京回合反倾销协议的规定与此基本相同。肯尼迪回合和东京回合反倾销协议中都没有关于抽样的规定，因此此条的目的，应该是指出口企业数量众多，列出每一出口企业名单不现实（也就是 WTO 反倾销协议中需要进行抽样的情况），调查机关可以只列出出口国。在乌拉圭回合中增加了关于抽样的规定，也保留了此条文。从谈判历史上看，此条似与非市场经济问题无关。

三、美国做法与 WTO 的相关规定

美国最近修改了其对非市场经济国家单独税率的政策，规定只有在出口企业能够证明其出口行为在法律上，或者事实上没有被政府控制的情况下（…a firm can demonstrate an absence of both *de jure* and *de facto* governmental control over its export activities.），才可以给予单独税率。新修改的政策还对出口企业申请单独税率规定了详细的程序和要求。

美国商务部出台新政策前，征求了各方的意见。公平贸易局在两次评论意见中都指出了美国的这种做法违反了其在 WTO 框架下承诺的义务。

支持此政策的美国国内企业代表的评论意见中，支持的理由均为给予非市场经济国家单独税率将导致中国的出口商可以从获得低税率的企业出口，从而规避反倾销税。

根据以上对欧盟法律的分析，美国的立法目的仍然是规避反倾销税的考虑，不是 WTO 法律框架下《反倾销协议》第 9.2 条的“impracticable”。WTO 法律文件和中国入世法律文件中涉及非市场经济的条款中没有关于出口价格认定的规定。因此，美国的做法与 WTO 规定不符。

附：相关法律条文

GATT 1947 第 6 条第 1 款：

1. The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it 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. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another

(*a*) 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.

Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.*

此条的注释和补充规定：

2. It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.

WTO 反倾销协议第 2.7 条和第 6.10 条：

2.7 This Article is without prejudice to the second Supplementary Provision to paragraph 1 of Article VI in Annex I to GATT 1994.

6.10 The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.

中国加入议定书第 15 条：

15. Price Comparability in Determining Subsidies and Dumping

Article VI of the GATT 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") and the SCM Agreement shall apply in proceedings involving imports of Chinese origin into a WTO Member consistent with the following:

(a) In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:

(i) If the 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 importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability;

(ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.

(b) In proceedings under Parts II, III and V of the SCM Agreement, when addressing subsidies described in Articles 14(a), 14(b), 14(c) and 14(d), relevant provisions of the SCM Agreement shall apply; however, if there are special difficulties in that application, the importing WTO Member may then use methodologies for identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks. In applying such methodologies, where practicable, the importing WTO Member should adjust such prevailing terms and conditions before considering the use of terms and conditions prevailing outside China.

(c) The importing WTO Member shall notify methodologies used in accordance with subparagraph (a) to the Committee on Anti-Dumping Practices and shall notify methodologies used in accordance with subparagraph (b) to the Committee on Subsidies and Countervailing Measures.

(d) Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession. In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession. In addition, should China establish, pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector, the non-market economy provisions of subparagraph (a) shall no longer apply to that industry or sector.