

Understanding the WTO Law Through Cases

法律制度

关税减让与取消一般数量限制 贸易救济措施 TRIPS协定

-----以案说法 (**二**)

朱榄叶◎编著



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编写说明

作为世界上成员最多的国际经济组织,世界贸易组织(World Trade Organization,WTO)成立17年来对世界经济发展的作用是有目共睹的。WTO 法律制度作为一类独特的国际法律制度,自WTO成立以来就受到广泛关注,相关的专著、论文不胜枚举。本教材选择WTO争端解决机构的专家组/上诉机构报告,通过这些报告来了解WTO基本原则和实践。WTO争端解决机制专家组/上诉机构报告是研究WTO各项规定最好的资料。但专家组和上诉机构报告的篇幅都很长,一般有150~500页,甚至长达1600多页,而且每一个案件通常涉及多个法律问题,要全文阅读理解,对大学本科同学有一定困难。

编写者根据多年的研究及教学经验,对专家组和/或上诉机构报告作了删节,每一个报告只保留对一个法律问题的分析内容,而以中文对案件所涉及的措施作概要介绍,以便于学生阅读理解。

本书选取的是涉及关税、贸易救济措施以及 TRIPS 的案例。

案例中段落的编号是为了方便阅读与教学而保留的,由于对原文作了删节,编号与原文不同。编者还删除了与内容无关的注释。要阅读报告原文的学生可以从WTO 官方网站 http://www.wto.org 下载。

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第一部分 关税减让与取消 一般数量限制

简介

关税减让原则是 GATT 自始就确立的基本原则,关税减让一直作为 GATT 各轮谈判的重要议题。关税减让原则是指通过谈判减让并尽可能消除关税壁垒,并且削减后的关税应得到约束,不得进一步提高。自从 1948 年 GATT 临时生效以来,通过多边贸易谈判,平均关税逐步大幅度下降,有的降到了零关税,同时大大完善了约束关税的整体程序。

取消一般数量限制原则,又称只允许关税保护原则,指在成员方实行规则允许的贸易保护措施时,禁止实行数量限制,而只允许实行关税手段。比如,对农产品的非关税出口限制实行"关税化",30%以上农产品的配额管理或限制措施被转化为关税,这些关税具有同以前的非关税措施同样水平的保护程度。在乌拉圭回合的农产品协议实施的6年中,这些关税逐步降低,农产品的市场准人承诺也将消除原来对特定产品的进口禁令。



欧共体电脑

European Communities-Customs Classificationof Certain Computer Equipment



案件背景

本案涉及的纠纷是由欧共体及其成员国对关税税目重新分类引起的。在乌拉 圭回合谈判结束时,欧共体对"自动信息处理器及其组件、磁性或光学阅读器、以编 码方式将资料输送给资料传媒的设备以及处理上述资料的设备",只要没有规定在 其他税目中的都规定在税目84.71(以下总称 ADP设备),其约束税率为2.5%(需 要从当时的4.9%降低到约束税率),其中部分产品为零关税。关税84.71 目下产 品的部件和附件分目是84.73,约束关税是2.0%。电话和电报设备属于关税税目 85.17, 其税率不等(乌拉圭回合结束时为4.6%~7.5%, 将下降到3.0%~3.6%)、 但总的来说高于 ADP 设备; 电视接收设备的税目是 85.28, 税率为 14%。据美国 说,在乌拉圭回合谈判期间及随后一段时间,欧共体海关当局,特别是英国和爱尔 兰海关一般都把局域网设备作为 ADP 设备。1995 年 5 月, 欧共体委员会通过了第 11165/95 号法规,把局域网适配器作为电子通讯设备重新分类在 85.17.35。据美 国说, 自那以后, 欧共体海关, 特别是英国和爱尔兰不仅把局域网适配器分在 85.17.35,而且把局域网设备作为电子通讯设备征税。1996年4月,英国的一个法 庭维持了海关将 PCTV(个人电脑和彩色电视的结合)作为电视接收器征税的决定。 1997 年 6 月, 欧共体委员会通过了第 1153/97 号法规, 把个人电脑作为 ADP 设备征 税,但对其中具有多媒体功能的个人电脑征收较高的关税(14%)。

美国指出,欧共体法规和对局域网设备重新分类,使涉及的产品所受待遇低于 关税减让表 LXXX 第一部分的待遇,因此不符合欧共体根据 GATT 第2条第1款 应当承担的义务。



专家组报告节选 Excerpt from the Panel Report

LAN Equipment

1. The United States claims that LAN equipment should have been accorded the tariff treatment of ADP machines or parts thereof under heading 84.71 or heading 84.73 in Schedule LXXX. The European Communities claims that its treatment of LAN equipment as telecommunication apparatus under heading 85. 17 of Schedule LXXX is justified and that it is entitled to levy the rate of duty under that heading accordingly. Thus, we need to determine the proper interpretation of Schedule LXXX regarding LAN equipment. As noted earlier, the general question of where LAN equipment should be classified in a tariff nomenclature is beyond our mandate. Our finding is specific to obligations under Schedule LXXX, and should not be taken as anything going beyond that.

Textual Analysis

2. Following the rules of the Vienna Convention, we start from the textual analysis. Schedule LXXX does not specifically refer to LAN equipment. It generally refers to "automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included" under heading 84. 71 and "parts and accessories of machines of heading No. 8471" under heading 84.73. In view



of the data processing capacities of LAN equipment, one might conclude that any type of LAN equipment is an ADP machine or part thereof. However, if one emphasizes the fact that LAN equipment is used for communication among various computer devices and the expression "not elsewhere specified", one could also argue that LAN equipment is an "electrical apparatus for line telephony or line telegraphy, including such apparatus for carrier current line systems" under heading 85.17.

3. Thus, for the purposes of Article II:1, it is impossible to determine whether LAN equipment should be regarded as an ADP machine purely on the basis of the ordinary meaning of the terms used in Schedule LXXX taken in isolation. However, as noted above, the meaning of the term "ADP machines" in this context may be determined in light of the legitimate expectations of an exporting Member.

Actual Tariff Treatment and Legitimate Expectations

- 4. The United States claims that it is entitled to tariff treatment of LAN equipment as ADP machines or parts thereof because customs authorities in the European Communities, particularly those in Ireland and the United Kingdom, actually treated LAN equipment that way when the tariff concession was being negotiated, thereby effectively creating legitimate expectations on the part of the United States that such tariff treatment would continue. The European Communities claims that the EC member States did not in fact treat these products uniformly during the Uruguay Round and therefore that the United States was not entitled to such expectations.
- 5. In addressing this issue, we consider it necessary (a) to weigh the evidence submitted by both parties regarding the actual tariff treatment of LAN equipment in the European Communities and, if the result supports the US claim, (b) to determine whether the actual tariff treatment entitles the United States to legitimate expectations in this regard.

Evaluation of the Evidence of Actual Tariff Treatment

6. In the *Shirts and Blouses* case, the Appellate Body made the following observation:

"We find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Also, it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption."

- 7. Accordingly, we first examine evidence produced by the United States to determine whether it has successfully raised a presumption that its claim on the actual tariff treatment of LAN equipment in the European Communities is true.
- 8. To support its claim, the United States has submitted Binding Tariff Information (BTI) issued by Ireland and letters from the UK Customs and Excise, which treated certain LAN equipment as ADP machines during the Uruguay Round. It has also produced letters from four of the leading US exporters of LAN equipment to Europe attesting to the fact that all of their LAN equipment exported to Ireland and the United Kingdom—which were their major market—between 1991 and 1994 had been treated as

ADP machines. The US industry appears to have been satisfied with this tariff treatment at that time, and did not voice any concerns in this regard to the US Government during the Uruguay Round.

- 9. Moreover, the BTIs submitted by the United States regarding other member States further support its position. They indicate that even after the conclusion of the Uruguay Round tariff negotiations, customs authorities in Denmark, France and the Netherlands treated LAN equipment as ADP machines. In the case of France, a statement by a French customs official at a meeting of the European Commission's Customs Code Committee is also cited as support of this claim. Although the United States cannot—and does not—claim that these BTIs formed the basis of its expectations because of the timing of their issuance, they lend supplementary support to the US claim on how LAN equipment was treated in the European Communities during the Uruguay Round in as much as there is no evidence to suggest that these BTIs were a particular departure from the prevailing practice in these member States.
- 10. We also note US export data showing that US exports of LAN equipment (classified under USX 847199 and 847330) to the European Communities continued to rise after the Uruguay Round, while EC import statistics, which formerly moved in the same direction as US export statistics, indicate a decline in the imports of "other ADP machines" (under CN 847199) from the United States and a simultaneous increase in the imports of telecommunication apparatus (under CN 851782) in 1995. These statistics are aggregated at a level that makes it difficult to draw specific conclusions in respect of the tariff treatment of LAN equipment. This evidence does, however, indirectly support the US argument in as much as it is consistent with the effects that would be anticipated if there was a change in tariff treatment in the European Communities after the Uruguay Round.
- 11. In light of the evidence described in the preceding paragraphs, we conclude that the United States has adduced evidence sufficient to raise a presumption that its claim that LAN equipment was treated as ADP machines in the European Communities during

the Uruguay Round is true.

- 12. Following the Appellate Body report on *Shirts and Blouses*, the burden now shifts to the European Communities. To rebut the presumption raised by the United States, the European Communities has produced documents which indicate that LAN equipment had been treated as telecommunication apparatus by other customs authorities in the European Communities. In Germany, the customs authorities treated certain LAN equipment as telecommunication apparatus already in 1989, a practice upheld by the German Federal Tax Court (Bundesfinanzhof) in 1991. The European Communities has also produced BTIs issued by the Dutch, French, German and UK customs authorities treating certain LAN equipment as telecommunication apparatus, although a close examination of these BTIs reveals that those from the Netherlands pertain to either multiplexers, which are outside the scope of our examination, or more generic networking equipment, which may or may not fall under the definition of LAN equipment used in this report.
- 13. The only direct counter-evidence against the US claim on practices in Ireland and the United Kingdom is a December 1993 BTI issued by the UK customs authority (HM Customs and Excise) to one of the US companies (CISCO), classifying one type of LAN equipment (routers) as telecommunication apparatus.

 Since it became effective only a week or so before the conclusion of the Uruguay Round negotiations, it is not in our view sufficient to rebut the above presumption, which was raised by more extensive

① We do not consider other BTIs issued by the HM Customs and Excise submitted by the European Communities (Annex 6, Table 1) to be relevant because they became valid after the conclusion of substantive tariff negotiations of the Uruguay Round. In this connection, we find it noteworthy that the European Communities did not produce any British or Irish BTIs issued prior to December 1993 to support its case on this important issue. The European Communities suggests that the fact that American Electronics Association had scheduled a meeting with Commission officials on 25 February 1994 in order to discuss a number of issues including classification difference in member States with respect to a number of products including LAN interface is another indication of the non-uniform treatment of LAN equipment within the European Communities. See paragraph 5. 29. However, in our view, the information was too vague and indirect to rebut the presumption mentioned above, even to the extent that it was unclear that the meeting had actually taken place.

and general evidence, that LAN equipment was generally treated as ADP machines in Ireland and the United Kingdom during the Uruguay Round.

- 14. Regarding France, the European Communities has submitted conflicting BTIs (i. e., ones that classify LAN equipment as telecommunication apparatus) issued after the conclusion of the Uruguay Round. Thus, in light of our reasoning in paragraph 8.37, ©it would be reasonable to conclude at least that the practice was not uniform in France during the Uruguay Round.
- 15. Germany appears to have consistently treated LAN equipment as telecommunication apparatus. As noted above, a 1991 Bundesfinanzhof ruling affirmed BTIs treating LAN equipment as telecommunication apparatus, although the BTIs involved in that case were issued to a non-US firm and could not have formed any basis for US expectations. In addition, the European Communities has submitted one German BTI, issued in 1992, treating LAN equipment as telecommunication apparatus.
- 16. In our view, the evidence produced by the European Communities does not rebut the presumption raised by the United States concerning the accuracy of its claim regarding the actual tariff treatment of LAN equipment during the Uruguay Round. The evidence concerning Ireland and the United Kingdom, which are the largest export market in the European Communities for the US industry, as well as the supplementary evidence concerning Denmark and the Netherlands, supports the US position, leaving Germany as the only member State with practices to the contrary.

Legitimate Expectations

17. We now turn to the examination of whether the actual tariff treatment of LAN equipment entitles the United States to legitimate expectations in this regard sufficient to establish its claim of a violation of Article II of GATT 1994 by the European

① 这是专家组报告原来的编号,现在参见本报告9。

Communities. In our view, an exporting Member's legitimate expectations regarding tariff commitments are normally based, at a minimum, on the assumption that the actual tariff treatment accorded to a particular product at the time of the negotiation will be continued unless such treatment is manifestly anomalous or there is information readily available to the exporting Member that clearly indicates the contrary. The existence of such expectations in tariff negotiations can be seen in the fact that negotiators normally use actual trade data to calculate the effect of "requests" and "offers", and to evaluate the resulting tariff reductions in terms of tradeweighted average. In other words, they work on the general assumption that the actual tariff treatment accorded to a particular product as traded is the relevant item for the purposes of negotiations.

- 18. In the present case, in view of the prevailing practice in the European Communities during the Uruguay Round, the United States would appear to have a legitimate expectation that LAN equipment would continue to be accorded tariff treatment as ADP machines in the European Communities. Certainly, such treatment could not be characterized as manifestly anomalous. Was there information readily available to the United States that indicated that the actual tariff treatment of LAN equipment would not be continued?
- 19. In this regard, the European Communities challenges the legitimacy of the United States' expectations by saying: "The US negotiators may find it difficult to admit now that their understanding of the tariff classification in the EC of the products they talk about now was erroneous; however, they only have themselves to blame. They should have come forward and requested clarification from the EC negotiators if they were not sure where these products should be classified in the EC especially since they themselves had reclassified these products only shortly beforehand." There are two distinct issues in this argument; (a) Were the US negotiators required to clarify where LAN equipment was to be classified in the draft Schedule LXXX during the negotiations? (b) Does the United States' own reclassification of LAN equipment from telecommunication apparatus to ADP machines affect the legitimacy of the United



States' expectations? We examine these issues in turn.

Requirement of Clarification

- 20. The European Communities argues that the United States should have clarified, during the negotiations, where LAN equipment would be classified. The question here is whether the exporting Member has any inherent obligation to seek clarification when it has been otherwise given a basis to expect that actual tariff treatment by the importing Member will be maintained.
- 21. In our view, to require exporting parties in negotiations to effectively work on the assumption that, absent a manifest anomaly, explicit and particular clarification should be sought at an item-by-item level would run fundamentally counter to the object and purpose of tariff negotiations (which in turn form the context for Article II and tariff schedules). On one level, it would both risk an erosion of the confidence upon which it is necessary for parties to rely in the conduct of tariff negotiations, as well as raising logistic difficulties which would make the actual management of them particularly onerous. More fundamentally, such a requirement would risk presumptively raising systemic doubt and uncertainty about the exact nature and scope of the actual tariff concessions themselves. Such an inherent tendency cannot be reconciled with one of the major objectives of the WTO, from which tariff negotiations pursuant to, inter alia, Articles XXVIII and XXVIII bis of GATT 1994 draw their purpose, viz: "reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs" (an expression common to the preambles of the WTO Agreement and GATT 1994). Any interpretation of Article II which would be prone to have the practical effect of more generally facilitating the occasions upon which Members may apply a higher rate of duty and/or undermine the stability of concessions made (other than, of course, circumstances under which such action is explicitly provided for pursuant to relevant provisions of the WTO Agreement would run counter to this objective).