

## 国际贸易 法律月刊

### 内容

#### 文章

中国出口商的市场经济地位 ..... 2

#### 贸易救济新闻

对中国采取的贸易救济行动 ..... 5

中国采取的贸易救济行动 ..... 8

案件分析 ..... 9

世贸组织新闻 ..... 9

新闻精华 ..... 10

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## Article 文章

### Market economy status for Chinese exporters

#### 中国出口商的市场经济地位

By Manoj Gupta

Recently the European Court of Justice gave a landmark ruling laying down certain parameters for granting market economy treatment to the individual exporters from non-market economy (NME) countries. The issue as the one before the court, being more factual, needs to be dealt with on case-to-case basis. However, looking at the trend, particularly during the last one year, it is becoming obvious that the approach towards the subject is not clear. The issue is increasingly getting relevant as the provision permitting non-market economy treatment to the exporters from China will expire after 11 December 2016.<sup>1</sup>

Market economy status, or the lack of it, traces its origin from Second Ad-note to paragraph 1 of Article VI of GATT, 1994 wherein it is provided that in case of imports from a country having complete or substantially complete monopoly of its trade and where *all* domestic prices are fixed by the State, strict comparison of export price with domestic prices may not be appropriate. This provision, which provides discretion to the authorities to avoid use of domestic prices of the exporting country, has also been incorporated in the WTO's Anti-dumping Agreement through Article 2.7. As the condition that *all* domestic prices are being fixed by the State is not a reality in the case of transitional economies, in respect of China, Article 15 allows exporters to establish that market economy conditions prevail for the firm(s) concerned, if not for the entire industry or the country as a whole.

If the market economy condition is not established then the authorities of the importing country may take the help of prices prevailing in another market economy

country (surrogate country) for determination of normal value or choose to construct the normal value. Normal value based on surrogate country prices or constructed normal value invariably leads to higher anti-dumping duty on Chinese exports.

#### State interference or influence?

Reverting to the ruling of the European Court of Justice, the Court in its order has clarified the meaning of 'significant State interference' in Article 2(7)(C) as it appears in the EC's anti-dumping Regulation. The same phrase i.e. "significant State interference" appears in Clause 8(3) of the first Annexure to the Indian Anti-dumping Rules also. In its order, the Court has held that firstly the provision is not directed at all types of State interference in producer undertakings, but only those that concern their decisions regarding prices, costs and inputs.<sup>2</sup> It was noted secondly, that use of the word 'interference' implies actual interference in the decisions and that it is not sufficient that a State has a certain amount of *influence* over those decisions. The court further added that the interference in such decisions must be 'significant' i.e. State interference which is, neither by its nature nor effect, capable of rendering a producer's decisions regarding prices, costs and inputs incompatible with market economy conditions cannot be considered 'significant'.

The ECJ acknowledged the fact that the State, even though held minority shares in the company, due to wide diversification of other shares, *de-facto* controlled shareholder meetings and appointment of board of

<sup>1</sup> See para 15(d) of the China's Accession Protocol. It provides that the provision permitting non-market economy treatment to the exporters from China will expire after 15 years from the date of accession.

<sup>2</sup> *Council of the European Union v. Zhejiang Xinan Chemical Industrial Group Co. Ltd.*, C 337/09 P, ECJ, 19 July 2012

directors, which gave the State a certain influence. The order, however, held that such ‘influence’ did not mean that there was significant State interference. Even the fact that some of the directors of the company were connected to it by employment contract or by contract for supply of services, was not found to be a determinative factor to conclude existence of State interference.

On the other front, the European Union has recently amended Article 9(5) of its Basic Regulations in order to comply with the WTO’s DSB Appellate Body report in *EU-Fasteners from China*. The Panel as well as Appellate Body of the WTO had held that the European Union’s provision [Article 9(5) of the EU’s Basic Regulation] was inconsistent with Articles 6.10 and 9.2 of the Anti-dumping Agreement (ADA)<sup>3</sup> as it presumed that a country-wide duty be imposed on producers/exporters in investigations involving non-market economies, unless they satisfy the conditions for individual treatment in that provision. Regulation (EU) No. 765/2012, dated 13th June 2012 issued for the purpose, came into force from 16th June 2012 and substitutes earlier para which read as,

*“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.”*

with new para which reads as,

*“The Regulation imposing anti-dumping measures shall specify the duty for each supplier or, if that is impracticable, the supplying country concerned. Suppliers which are legally distinct from other suppliers or which are legally distinct from the State may nevertheless be considered as a single entity for the purpose of specifying the duty. For the application of this subparagraph, account may be taken of factors such as the existence of structural or corporate links between the suppliers and the State or between suppliers, control or material influence by the State in respect of pricing and output, or the economic structure of the supplying*

*country.”*

So, the anomaly of any presumption has been removed. Now the provision itself provides that even distinct suppliers may be considered as single entity and be imposed a single anti-dumping duty. EC, in order to ensure conformity with the obligations under the Anti-dumping Agreement, has adopted the wordings of the Appellate Body as an amendment to its regulation.

It is seen that the phrase used in the *EC-Fasteners* dispute and in the new provision is ‘material influence by the State in respect of pricing and output’. Thus, while in terms of the latest ECJ judgement, ‘State influence’ is not enough, and ‘State interference’ is required for refusing individual treatment to reject the actual cost of the exporter for the purpose of determining normal value in case of imports from non-market economies, ‘State influence’ is enough for the purpose of treating exporter and country as ‘a single entity’, as per the latest amendment. ‘State influence’ may have different connotations and may result in a different interpretation from the word ‘state interference’. It will be interesting to see how EC will reconcile the two sets of provisions. So, one has to be careful and see when *influence* becomes *interference*.

One may argue that both the provisions are for different purposes as the ECJ judgement relates to determination of normal value by way of grant of individual treatment to exporters from NMEs whereas the latest amendment is in relation to imposition of individual anti-dumping duty rate for each exporter. It is therefore possible, atleast theoretically, for EC, in case of non-market economy country, in a particular fact situation, to first determine individual normal value for the exporter because of ‘inadequate state interference’, but reject individual treatment because of ‘material state

<sup>3</sup> Also see *EC-Footwear from China*, WT/DS405, Para 7.92 and 7.147

influence'. Word 'material influence' indicates a lower threshold of evidence compared to 'State interference'. In short, different interpretation adopted by the ECJ and the Appellate Body may give rise to contradiction while applying the EC law against the exporter from non-market economy country.

### **Sampling, how far effective**

In *EU-Footwear from China*, the Panel has held that in a case involving non-market economy, anti-dumping duties can be imposed on non-sampled exporters based on a finding of dumping involving an MET analysis on information provided by a limited number of examined producers<sup>4</sup>. It was noted that China failed to demonstrate that sampling was prohibited for the purpose of making market economy treatment determination.

However, the European Union's Court of Justice<sup>5</sup> has observed that provisions regarding sampling of exporters, when their number is huge, would not be applicable in cases involving normal value determination in imports from NME countries. The court noted that Article 2(7) of the basic (EU) Regulation, concerned solely with the determination of normal value and Article 17 thereof relating to provisions for sampling i.e. to methods for determining dumping margin, are different in content and purpose. Indian provisions *pari materia* with European provisions on NME and sampling are present in Clauses 7, 8 in Annexure-I, and, in Rule 17(3) of the Anti-dumping Rules, 1995 respectively.

The European Court observed that obligation for recognition of the economic conditions under which each producer operates i.e. grant of individual market economy treatment, in respect of concerned product, is not affected by the manner in which the dumping margin is to be calculated.

### **Present situation**

Interpretation by various authorities being divergent, there is no clarity on the issues identified herein. The amendments carried out to make the law more transparent are also leading to more questions than answers. The disputes between the two (EU and China) are on the rise, latest being the initiation of anti-dumping duty investigation by EU on import of solar panels from China.<sup>6</sup> There is also fear of Chinese retaliation to start similar investigation on the raw material from EU for the same solar panels. The German Chancellor, however, had stated that the said trade case targeting Chinese solar panel companies should be resolved through negotiations/dialogue rather than investigation, though it may be noted that the investigation itself was due to the efforts of a German company.<sup>7</sup>

The problem, it seems, may end after December 2016 when the provision permitting non-market economy treatment in the Chinese Accession Protocol will expire. However, it may be of interest to note that Australia has granted market economy status to China but allows for rejection of domestic selling prices of the exporter as the basis for normal value when there is a 'market situation' making sales not suitable for use in determining a price.<sup>8</sup>

The next few years would be very important to watch how the disputes develop between EU and China and also the stand taken by the other countries in relation to Non-market economy country, particularly China.

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<sup>4</sup> Paras 7.194-7.199 of DS405 - European Union-Antidumping duties on footwear from China

<sup>5</sup> P - Brosmann Footwear (HK) Ltd v. Council of the European Union, ECJ Order in Case C 249/10, 2nd Feb., 2012

<sup>6</sup> Notice of initiation of an anti-dumping proceeding concerning imports of crystalline silicon photovoltaic modules and key components (i.e. cells and wafers) originating in the People's Republic of China, Official Journal C 269, 06/09/2012 p. 5

<sup>7</sup> Financial Times – www.ft.com, dated 30-8-2012 and 2-9-2012

<sup>8</sup> Australian Customs & Border Protection's Dumping and Subsidy Manual

## Trade Remedy News 贸易救济新闻

### Trade remedy actions against China

#### 对中国采取的贸易救济行动

Product 产品	Country 国家	Measures 措施	Notification No. and date 通知文号及日期
Aluminum foils in rolls 铝箔卷	EU 欧盟	Provisional ADD imposed 征收临时反倾销税	Commission Regulation (EU) No. 833/2012, dated 17-9-2012 2012年9月17日, 欧盟委员会规定 第833/2012
Resin or Bonded wooden boards (specified) 树脂或结合木制板 (指定的)	India 印度	Provisional ADD imposed 征收临时反倾销税	43/2012-Cus. (ADD), dated 21-9-2012 2012年9月21日, 第43/2012-Cus. (ADD)
Carbon Black 碳黑	India 印度	ADD mid-term review - Time to complete investigation extended till 29-11-2012 反倾销中期复审-完成调查的日期被延期至 2012年11月29日	15/41/2010-DGAD, dated 21-9-2012 2012年9月21日, 第 15/41/2010-DGAD
Crystalline silicon photovoltaic modules or panels and cells and wafers 晶体硅光伏电池	EU 欧盟	ADD investigation initiated 发起反倾销调查	EU Announcement 2012/C 269/04, dated 6-9-2012 2012年9月6日, 欧盟公告 2012/C 269/04
Ductile iron Pipes 球墨铸铁管	India 印度	ADD extended till 12-9-2013 反倾销税被延期至2013年9月12日	41/2012-Cus. (ADD), dated 13-9-2012 2012年9月13日, 第 41/2012-Cus. (ADD)
Electrical Insulators 电子绝缘体	India 印度	Safeguard Duty recommended for 2 years 建议征收2年的保障措施税	D-22011/14/2011, dated 27-9-2012 2012年9月27日, 第D-22011/14/2011
Magnesium (pure, granular) 镁(纯的, 颗粒状)	USA 美国	Affirmative determination in ADD sunset review 反倾销日落复审做出肯定性裁决	USITC News Release 12-097, dated 12-9-2012 2012年9月12日, 美国国际贸 易委员会新闻 12-097

Product 产品	Country 国家	Measures 措施	Notification No. and date 通知文号及日期
Organic coated steel products 有机涂层板	EU 欧盟	Provisional ADD imposed 征收临时反倾销税	Commission Regulation (EU) No. 845/2012, dated 18-9-2012 2012年9月18日, 欧盟委员会规定第845/2012
Paracetamol 扑热息痛	India 印度	ADD extended till 2-9-2013 反倾销税被延期至2013年9月2日	42/2012-Cus. (ADD), dated 19-9-2012 2012年9月19日, 第42/2012-Cus. (ADD)
Phosphoric Acid 磷酸	India 印度	ADD extended till 12-9-2013 反倾销税被延期至2013年9月12日	45/2012-Cus. (ADD), dated 25-9-2012 2012年9月25日, 第45/2012-Cus. (ADD)
Polyester staple fiber 聚酯纤维	USA 美国	Affirmative determination in ADD sunset review 反倾销日落复审做出肯定性裁决	USITC News Release 12-101, dated 19-9-2012 2012年9月19日, 美国国际贸易委员会新闻12-101
Pre-sensitized Positive Offset Aluminum Plates/PS Plates of specified thickness 指定厚度的PS版	India 印度	ADD extended till 23-9-2013 反倾销税被延期至2013年9月23日	44/2012-Cus. (ADD), dated 25-9-2012 2012年9月25日, 第44/2012-Cus. (ADD)
Unitized Wall Modules 单元式幕墙	Canada 加拿大	Preliminary injury inquiry of dumping and subsidization terminated 倾销和补贴调查初步裁定无损害	Canadian International Trade Tribunal Press Release dated 14-9-2012 2012年9月14日, 加拿大国际贸易法庭
Zinc coated steel and aluminum zinc coated steel 涂锌钢和涂铝锌钢	Australia 澳大利亚	ADD investigation initiated 发起反倾销调查	Australian Customs Dumping Notice No. 2012/40, dated 5-9-2012 2012年9月5日, 澳大利亚海关倾销通知第2012/40
Pencil 铅笔	USA 美国	ADD review based on changed circumstances, excluding drumstick pencil 反倾销情势变更复审, 排除鼓槌铅笔	USDOC, dated 27-8-2012 2012年8月27日, 美国商务部

Product 产品	Country 国家	Measures 措施	Notification No. and date 通知文号及日期
Ceramic tableware 陶瓷餐具	Mexico 墨西哥	ADD investigation initiated 发起反倾销调查	Mexico Ministry of Economy, dated 30-8-2012 2012年8月30日, 墨西哥经济部 国际贸易惯例总局
PET 聚对苯二甲酸乙二酯	Argentina 阿根廷	Released ADD preliminary finding 发布反倾销初裁报告	Argentina Ministry of Economy and Public Finance, dated 29-8-2012 2012年8月29日, 阿根廷经济和 公共财政部国务秘书处
Talhas Manuais 手动升降滑轮	Brazil 巴西	ADD Expiry Review initiated 发起反倾销期终复审	Ministry of Development, Industry and Foreign Commerce, dated 29-8-2012 2012年8月29日, 巴西发展、工 业和外贸部
Ceramic Tiles 瓷砖	Argentina 阿根廷	Provisional ADD imposed 征收临时反倾销税	Argentina Ministry of Economy and Public Finance, dated 28-8-2012 2012年8月28日, 阿根廷经济和 公共财政部国务秘书处
Drawn Stainless Steel Sinks 不锈钢控制水槽	USA 美国	Released ADD preliminary finding 发布反倾销初裁报告	USDOC, dated 28-9-2012 2012年9月28日, 美国商务部
Bicycle 自行车	EU 欧盟	Anti-circumvention investigation initiated 发起反规避调查	Council Announcement, dated 25-9-2012 2012年9月25日, 欧盟委员会公告
Certain Copper Pipe Fittings 铜制管件	Canada 加拿大	ADD and countervailing re-investigation initiated 发起反倾销和反补贴调查	Canada Border Service Agency announced, dated 26-9-2012 2012年9月26日, 加拿大边境服务 署公告
Cotton textile and cotton mixture fabric 棉纺织品及棉混纺织 品	Egypt 埃及	Terminated safeguard investigation and preliminary safeguard measure 终止保障措施调查并取消临时保障措施	WTO announced, dated 24-9-2012 2012年9月24日, 世贸组织发布公告

Product 产品	Country 国家	Measures 措施	Notification No. and date 通知文号及日期
Single phase a.c. generator 单相交流发电机	Argentina 阿根廷	Provisional ADD imposed 征收临时反倾销税	Argentina Ministry of Economy and Public Finance, dated 7-9-2012 2012年9月7日, 阿根廷经济和公共财政部国务秘书处
Cold-rolled carbon steel 冷轧碳钢产品	Thailand 泰国	ADD investigation initiated 发起反倾销调查	Thailand Ministry of Commerce, dated 9-9-2012 2012年9月9日, 泰国商业部
Aluminum zinc coated steel 涂铝锌钢	Thailand 泰国	Provisional ADD imposed 征收临时反倾销税	Thailand Ministry of Commerce, dated 8-9-2012 2012年9月8日, 泰国商业部
Tyre for bicycle 自行车轮胎	Brazil 巴西	ADD investigation initiated 发起反倾销调查	Ministry of Development, Industry and Foreign Commerce, dated 6-9-2012 2012年9月6日, 巴西发展、工业和外贸部

## Trade remedy action by China

### 中国采取的贸易救济行动

Product 产品	Country 国家	Measures 措施	Notification No. and date 通知文号及日期
Pyridine 吡啶	India and Japan 印度和日本	ADD investigation initiated 发起反倾销调查	MOFCOM Announcement No. 55 of 2012, dated 21-9-2012 2012年9月21日, 商务部公告第55号
Stainless seamless tubes 不锈钢无缝钢管	EU and Japan 欧盟和日本	ADD investigation - Time to complete investigation extended till 8-3-2013 反倾销调查 - 完成调查的日期被延期至2013年3月8日	MOFCOM Announcement No. 54 of 2012, dated 31-8-2012 2012年8月31日, 商务部公告第54号



## Findings digest 案例分析

### 对来自中国的玻璃和陶瓷电子绝缘子保障措施案最终裁决

在此案调查中，出口商和进口商提出排除国内产业并不生产的玻璃绝缘子，并且提出玻璃绝缘子与国内产业生产的陶瓷绝缘子有不同属性。保障总局的局长认为即使相关的技术以及用于生产玻璃和陶瓷绝缘子的基本原材料不同，但是直接产品的属性相同，并且客户不愿意就通过不同技术、生产工艺和原材料所生产出的玻璃绝缘子而支付不同的价格。因此局长认为除非技术上、生产工业或原材料的差异能够导致不同的产品属性以及价格，否则这种差异完全是与案件无关。有趣的是，该调查包括了某些型号的绝缘子，即使他们是由国内产业的支持者生产而不是提出申请的国内生产商本身生产，而有一些其他型号的绝缘子被排除在外，因为这些型号不是由国内产业本身生产或销售。

主张调查应当包括由一些其他国内生产商生产的聚合物绝缘子也被拒绝了。调查机关认为一旦包括这类绝缘子无异于调查无法按照2002年海关关税法（过渡类型产品确定的保障税）第5条和第6条的条款。并且由于对判断市场扰乱或造成市场扰乱的威胁的参数数据需要根据该产品的生产商数据进行证实。

至于调查需要考虑的数据，调查机关认为不应考虑国内生产商在经济特区运营的数据，因为他们被视为在印度海关范围外运营并且与其他国内企业没有竞争关系。有趣的是，即使调查在涉案产品中包括了支持者生产的一些型号产品，但是在评估国内产业损害的过程中，这些支持者的损害参数没有被考虑。

## WTO News 世贸组织新闻

### 波音争议 – 欧盟要求世贸组织允许对美国采取反制措施

9月27日欧盟请求世贸组织授权对美国采取反补贴措施。由于美国无法按照世贸组织上诉机构（DS353）的裁决而取消补贴，根据欧盟预估所受到的损失，该反制措施的金额将达到120亿美元。按照争端解决机制第22.2条提出的请求将于2012年10月23日在争端解决机构会议中被讨论。之前，欧盟已经在9月25日请求与美国进行磋商，因为欧盟不同意美国采取的措施符合与争端解决机构的建议。欧盟认为美国仍然保留了特定的补贴并且有迹象显示与此同时美国授予波音更多的补贴。该争议于2005年被提交到世贸组织，欧盟已经请求与美国就后者给予大型民用航空器（波音）生产者所谓的禁止的和可诉的补

贴进行磋商。

### 争端解决机构 – 三个专家组请求和三个新提出的磋商

世贸组织争端解决机构已经收到三项请求，分别来自美国、中国和乌克兰要求为了解决争议而成立专家组。同时中国、美国和阿根廷三国分别提出磋商请求。

美国已经请求成立专家组以解决关于中国对某些来自美国的汽车采取的反倾销和反补贴税（DS440）争议。中国的请求涉及到美国对来自中国的某些产品征收反补贴税（DS437）。乌克兰抗议澳大利亚在烟草产品上使用素包装

的要求 ( DS434 )。9月28日,争端解决机构也同意就两个请求成立专家组,即DS434 ( 澳大利亚素包装案 ) 和DS437 ( 美国对来自中国的某些产品采取反补贴措施 )。然而,第一个成立专家组的请求即DS440 ( 中国的反倾销税 ) 被中国阻碍了。

美国,在同一天,即2012年9月17日,请求与中国就中国对在中国的汽车和汽车零部件企业实行补贴 ( DS450 ) 进行磋商。根据美国在争端解决机制第4.4条进行的交流,通过在中国形成汽车和汽车零部件产业“出口基地”的计划,中国提供了各种形式的以出口为条件的补贴。而这种做法不符合补贴和反补贴协议第3条。

美国,在同一天,即2012年9月17日,请求与中国就中国对在中国的汽车和汽车零部件企业实行补贴 ( DS450 ) 进行磋商。根据美国在争端解决机制第4.4条进行的交流,通过在中国形成汽车和汽车零部件产业“出口基地”的计划,中国提供了各种形式的以出口为条件的补贴。而这种做法不符合补贴和反补贴协议第3条。

通过2012年9月3日的沟通,阿根廷已经请求与美国就后者的措施影响了从阿根廷东北地区进口新鲜柠檬进行磋商。阿根廷认为美国的措施违反了1994关税和贸易总协定、卫生与植物卫生措施协定以及马拉喀什协议的有关条款。

## News Nuggets 新闻精华

### 关税上升 – 是否需要审查世贸组织的政策?

世贸组织近期讨论了国家之间对世贸组织协议多边政策与日俱增的不满,货物贸易继续与保护主义的呼声抗争,因为国家日益寻求保护他们的市场。世贸组织就对多边贸易一些领域形成新的方法如贸易简化、确定21世纪的争议以及明确有必要发布新法规的领域、以及在加强多边贸易体系中考虑非政府参与者的地位等进行了3天的讨论。

在关税方面,巴西和乌克兰已于最近宣布他们希望对超过100种的商品提高进口关税。然而巴西认为它的目的是阻止廉价进口商品涌入其市场,乌克兰则注重纠正其于2008年加入世贸组织后迅速发展的贸易赤字。乌克兰从关税和贸易总协定第二十八条的条文中获得支持,该条文使得成员国可以与其他可能受到修改成员国原先认可的让步的国家进行磋商并获

得同意之后修改其让步。成员国做出如此改变可能也需要向其他成员国提供充分的补偿。这种改变也可能造成其他成员国报复性地提高关税或减少让步。

其他的发展是,世贸组织成员将对厄瓜多尔的提议开展短暂的辩论,以确定在世贸组织法规下,国家对金融服务执行法律时可获得的政策空间。厄瓜多尔与印度、阿根廷、土耳其、巴西和南非希望达成一致,审查那些限制一成员国增强金融法规或资本控制能力方面的条文。

### 中国公司停止在美国建设风力田

美国总统已经停止了一家中国企业在美国俄勒冈州建设风力田。2012年9月28日发布的总统令把涉及国家安全作为阻止在靠近海军军事基地处建设风力田的理由。该公司由在另一个

中国企业集团的两名中国总经理拥有，被要求在规定的时间内销售四块风力田。该项目原本将使用由中国的企业集团制造的风力轮机来生产大约40兆瓦的电力。之前该中国企业已经提出诉讼反对美国对外投资委员会的命令要求该企业停止一切建设和运营。根据新闻的报道，中国企业计划提起诉讼反对美国总统，理由是即使涉及到国家安全，总统也并非凌驾于法律之上。

### 国际投资争端解决中心解释在中美自由贸易协定中的最低待遇标准

在2012年7月发布的国际投资争端解决中心的决定中危地马拉被认为违反了多米尼加共和国中美自由贸易协定 ( CAFTA-DR ) 所设定的

最低待遇标准。由于取消了给予国外投资者-铁路公司的让步而引起了行政程序“lesivo”的使用。该争议是根据危地马拉国内法进行考虑的。国际投资争端解决中心法庭认为尽管此争议不构成间接征用或违反国民待遇标准，但该行动是任意的、不公平的。危地马拉认为铁路公司已经无法执行其部分合同来建造铁路线，若要等待50年的合同期将对国家利益造成损害。国外投资者已经根据国际投资争端解决中心公约的第49条要求法庭重新考虑，认为在决定中没有考虑其在行政命令之前期间所受到的继续的损失，即他们“在决定衡量中被忽略了”。国际投资争端解决中心是否考虑由于违反了中美自由贸易协定之前期间的损失的主张仍有待观察。

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