学位論文及び審査結果の要旨

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論文の要旨

The dissertation studies the subsidy treatment of natural resources in the GATT/WTO law and implications of such treatment for natural resource conservation. In the subsidy context, governmental provision of underpriced natural resource products might be normal, but the provision of the right to natural resource exploitation can create a particular problem. Because the right to allocate natural resources directly connects to the natural resource sovereignty of a trading nation, any legal restraint against it is inherently controversial. The dissertation investigates the extent to which the multilateral subsidy rules regulate the natural resource subsidy practice. Then, the dissertation identifies any problems arising from such a subsidy discipline against the below-market natural resource allocation.

From the perspective of natural resource sustainability, natural resource underpricing can be an ill-advised trade policy. As suggested by environmental economists, steering market principles toward natural resource allocation may be the most effective solution. If the below-market allocation of natural resource exploiting rights is being placed under the market-based subsidy regime, countervailing duties can be employed against such a resource-wasteful practice. As a result, it can promote natural resource sustainability.

The dissertation aims to answer three questions with respect to placing natural resources within the intersection between subsidy law and the environment-competitiveness debate.

First, to what extent does the current WTO subsidy regime regulate the government's provision of under-priced natural resources as a form of governmental subsidy?

As mentioned above, the governmental provision of natural resource products (exploited resources) might not be a problem of the current subsidy rules; therefore, the main concern is the subsidy discipline against the governmental provision of below-market natural resource exploitation rights. However, the Subsidy Agreement does not have any textual basis for this practice. In the landmark dispute, *Softwood Lumber IV*, the WTO judiciary endorsed the legal foundation for the natural resource exploitation subsidy. The Appellate Body in this dispute understood natural resource exploitation rights as a mechanism of economic resource transfer rather than an economic resource by itself. Therefore, in its view, the governmental provision of natural resource exploitation is deemed to be equivalent to the governmental provision of goods under the Subsidy Agreement.

Relying on this expansive jurisprudence, the United States has challenged the below-market natural resource allocation in China (land-use rights), India (mining rights), Indonesia (timber rights). These national-level subsidy investigations subsequently became the multilateral-level disputes at the WTO. This is how the legal foundation in the *Softwood Lumber IV* has been developed.

Nevertheless, the author finds such natural resource exploitation jurisprudence to be a judicial overreach by the WTO judiciary. This jurisprudence perhaps was formulated by inappropriate interpretations to the legal text in ascertaining the ordinary meaning of the interpreted terms. It then may cause an applicable problem because the WTO judiciary in *US - Carbon Steel (India)* permitted using the prices of exploited resources rather than of exploitation rights to calculate the subsidy amount. It seems the WTO adjudicators underestimated the negotiating history's controversy regarding the natural resource exploitation issue. The Subsidy Agreement has been directly collided with the natural resource sovereignty principle by this judicial endorsement. Therefore, the author suggests that this substantial amendment to the Subsidy Agreement should be done by the legislative function rather than the existing judicial activism.

Second is whether the WTO subsidy law's development can imply the idea of using countervailing duties for environmental protection?

Based on existing jurisprudence regarding natural resource exploitation subsidy, the answer to this question is positive. That means, with the support of the WTO subsidy regime, countervailing duties can be employed against the below-market natural resource allocation. The U.S. anti-subsidy campaign, as mentioned above, is evidence of the practicability of this green trade instrument. Therefore, the dissertation adds a perspective to the past environment-competitiveness debate. As a result, the existing multilateral subsidy rules can be exploited for natural resource sustainability, but not necessarily for environmental protection in general.

However, when applying this green countervailing idea to the case of fisheries, the dissertation finds minimal applicability. The main reason is the unclear tendency towards market-based allocation of fishing rights. The open-access problem is so prevalent in the fishery

sector, which means the notion of below-market fishing rights is virtually unnoticeable. In addition, fishing activities' inherent uncertainties might defeat any fishing rights subsidy challenge because demonstrating the financial contribution element is too burdensome.

As a consequence, the dissertation comes to an observation on the applicability of this green trade instrument. Its legal foundation is unstable and controversial due to the judicial authorization rather than a treaty basis. This means such legal endorsement can be altered or even dismissed in future cases. The instrument might be feasible for specific industrial natural resources such as minerals or timber. By contrast, it might be ineffective to consumer natural resources such as fisheries. Therefore, the actual applicability of green countervailing duties has to be examined on a *case-by-case* basis.

Third, what are the problems arising from placing natural resources under the market-based WTO subsidy regime?

Given the sovereign nature of these natural assets, the first problem is the government's predominance in natural resource markets. This situation may create difficulties for the subsidy determination. In fact, the government's predominance in the natural resource sector can inactivate the subsidy calculation because all domestic prices used in calculating the alleged subsidy can be circular or being influenced by the government.

To overcome such an inutile status of the subsidy rules, the WTO judiciary in *Softwood Lumber IV* permitted using alternative benchmarks to calculate the alleged subsidy. Ironically, the question is whether such an alternative benchmarking mechanism endorsed by the judiciary is permissible by the legal text? Therefore, the natural resource factor might correctly attack a loophole of the Subsidy Agreement regarding the benefit calculation. Given the fact that the government's predominance in natural resource markets is likely similar to China's political economy situation, the dissertation argues that the natural resource subsidy debate at the WTO is a precursor to the subsidy response against China.

The second problem can be a collision between the market-based subsidy regime versus the non-market natural resource endowment. Sovereign nature and public policy dimensions of natural resources are likely to collide with the multilateral subsidy rules' market-based rationale. Using the anti-subsidy instrument with the marketplace power to challenge foreign natural resource allocation might be incompatible with the government's role in natural resource management. This collision can create a tense political situation, as observed through the U.S. practice.

The dissertation proposes using the cost-based and non-discrimination standards for identifying the natural resource subsidy. So, it could be a status quo solution for the above collision. Natural resources thus should be conferred a *lex specialis* treatment in the Subsidy Agreement. This *lex specialis* regime is expected to accommodate both the industrialist and sovereigntist interests toward the natural resource subsidy problem: the industrialist still can use the anti-subsidy instrument against distorted natural resource allocations abroad

while the sovereigntist can feel more comfortable with their natural resource sovereignty.

審査結果の要旨

「GATT・WTO の補助金規律体系における天然資源の位置づけとその天然資源保全への含意」と題する本論文は、WTO とその前身である GATT において天然資源に対して交付される国家補助金がどのように規律されてきたのかを考察し、それが天然資源に関する国際的規制の在り方にどのような政策的含意を有するかを検討したものである。

本論文は、序論と結論を除く本論として 5 つの章から成り足っている。

まず第 1 章において、GATT・WTO における補助金規律の概要を紹介すると共に、その規律形成の背後にあった米国議会・行政府における外国補助金に対抗するための関税（相殺関税）をめぐる論争と国家実行を紹介している。

第 2 章においては、米加針葉樹材紛争の経緯が紹介され、第 4 次の米加紛争に関する WTO 上級委員会の判断について分析されている。

第 3 章においては、前章で概略を紹介した事件における上級委員会の判断及び関連するパネルの判断について詳細に分析した上で、WTO の下で行われた補助金協定改正交渉（ドーハ開発アジェンダの一環）で提案された改正案について紹介している。

第 4 章においては、天然資源保全のために、環境に悪影響を与えるようなやり方で採掘、漁獲、伐採等された天然資源について、輸入国が相殺関税を課するという提案について分析している。

第 5 章においては、天然資源に対する補助金についての上級委員会の解釈の評価を試みている。

本論文の全般的結論をまとめると、次のようになる。多くの国で天然資源に対し主権的権利が主張されていることを踏まえると、天然資源の利用権設定とその結果採掘、伐採、漁獲等された天然資源そのものは区別して考えるべきである。ウルグアイラウンドの交渉過程で関係国の意見対立が原因で条文が確定しなかった問題を上級委員会が文言解釈によって一方的に判断するのは問題であって、行き過ぎた司法積極主義と言わざるを得ない。本件は最終的には交渉によって条文を明確化することでしか解決できないはずである。

本論文の特性は、GATT・WTO における天然資源に関する補助金の取り扱いについて、補助金協定の交渉史及び GATT・WTO の先例に基づいて詳細な検討と評価を行った点にある。その結果、従来当然のこととして取り扱われてきた上級委員会の解釈手法の問題性が明らかになった。これは、現下の WTO 紛争解決制度の危機についても重要な示唆を与える指摘である。

以上から、Duong Van Hoc 氏の学位請求論文「Natural Resources under the GATT/WTO Subsidy Regime and Implications for Natural Resource Conservation」は、博士(国際経済法学)の学位を授与するのにふさわしいものであると判断する。

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参考　　Duong Van Hoc 氏の指導委員会の構成員は以下のとおりである。

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