# 多哈会议后谈判反倾销问题和确定未决执行议题中的优先议题

## 参照近期实践和争端解决机构案例所做的初步探讨

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## 致　谢

本文件是贸发会议商品和服务国际贸易及初级商品司贸易谈判和商务外交处项目经理斯蒂芬诺·埃纳马先生撰写的。作者希望感谢比利时布鲁塞尔 Vermulst, Waer & Verhaegher 事务所合伙人 Edwin Vermulst 博士对本文件提出的宝贵建议。本文件中表示的意见是作者本人的意见，不一定反映贸发会议秘书处的观点。

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### 1. 导　言

世贸组织《部长宣言》[1] 第 28 条所述谈判任务，可能是两种主流意见认真妥协的产物。一方面，谈判**“旨在澄清和改进《关于实施 1994 年关税与贸易总协定第六条的协定》项下的纪律”**，反映了受害国(包括一些发展中国家)希望通过“澄清”来限制《反倾销协定》现存的某些漏洞或做法；另一方面，谈判应该**“维护《协定》的基本概念、原则和有效性”**，反映出某些世贸组织成员不愿意进一步讨论现行做法的意见。

理解以上任务，不能离开《与执行有关的问题和关切的工作计划》以及 2001 年 11 月 14 日的决定 [2]，从中可以看出在反倾销领域的某些具体执行问题上取得了一定进展。

在上述任务的范围内，还要讨论多哈部长级会议筹备期间提出的其他执行任务。本文第 3 章将详细论述这些执行问题。

在西雅图和多哈部长级会议筹备期间，执行问题和《反倾销协定》的改革是经常出现、发展中国家投入了部分谈判资本的议题之一。世贸组织反倾销委员会曾

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[1] 世贸组织，11 月 14 日通过的《部长宣言》，WT/MIN(01)DEC/1(2001 年 11 月 20)。

[2] 世贸组织，2001 年 11 月 14 日《关于与执行有关的问题和关切的决定》，WT/MIN(01)DEC/17(2001 年 11 月 20 日)。

就其成员执行反倾销立法的某些做法进行过激烈辩论和讨论，但有关执行阶段的一些建议与西雅图部长级会议筹备期间提出的建议差不多，没有多少新意。

近年来，人们逐步发现关于反倾销是南北问题的观点与事实不符。例如，在2000 年 12 月举行的一次贸发会议专家会议上[3] 有机会总结某些发展动态，讨论一些新的议题。乌拉圭回合以前，反倾销措施的主要使用者是发达国家，但1995－1999 年反倾销调查案件增长一倍，因为发展中国家也越来越多地采用反倾销手段。发展中国家也是反倾销争端解决案件中的积极上诉人。[4]

世贸组织建立之前，东京回合遗留下来的惯常观念是《反倾销协定》是**“富国的贸易补救办法”**。随着许多发展中国家不仅对发达国家、而且对其他发展中国家甚至对最不发达国家积极使用反倾销调查，这一观念在迅速变化。发展中国家历来使用的论点，即反倾销多边规则存在着漏洞或没有明确的纪律，增加了滥用和任意决定的可能性，现在也适用于它们的国内立法和行政管理。

在即将举行的谈判中，发展中国家必须认识到，规则的精确性和可预见性越大，规则的执行和反倾销手段的有效合法使用越困难。发展中国家有关当局的人力和财力有限，特别容易出现此种情况。有些发展中国家已遇到各种困难，并到世贸组织争端解决机构应诉过。[5] 在执行问题的辩论以及多哈会议筹备过程中，已

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[3] 贸发会议，“反倾销和反补贴行动影响问题专家会议的报告”，2000 年 12 月 4 日至 6 日，日内瓦，TD/B/COM.1/34(2000 年 12 月 28 日)。

[4] Inge Nora Neufeld,“反倾销和反补贴程序：使用还是滥用？对发展中国家的影响”，贸发会议，研究论文集，No.9(2001)。

[5] 世贸组织，“危地马拉对墨西哥普通水泥的最终反倾销措施案”，专家组报告，WTO/DS156/R(2000 年 10 月 24 日)。世贸组织，“阿根廷对意大利陶瓷地面砖进口的最终反倾销措施案”，专家组报告，WTO/DS189/R(2001 年 9 月 28 日)。

经提到了发展中国家、特别是最不发达国家利用反倾销手段遭遇的困难。有些国家提议为最不发达国家设立简化程序。[6] 毋庸置疑，增加技术援助和能力建设活动，可有助于加强这些国家执行反倾销法的能力。

在多哈会议后的情况下，加上反倾销问题的漫长、实际谈判前景，需要参照反倾销问题专家组和上诉机构取得的进展和案例法，回顾供谈判的某些未决问题。这样做对确定优先次序可能有所帮助。为避免谈判资本的不必要浪费，应该列出优先谈判议题，并充分评估所涉的技术问题。本文试图阐述多哈会议筹备阶段提出的某些谈判议题、专家组和上诉机构报告的裁决，[7] 以及反倾销诉讼中的一些做法。

本文最后将略加论述专家组和上诉机构报告的价值和影响。除已决问题外，还必须确切了解在国内采取了哪些行动执行专家组和上诉机构报告的裁决。有些谈判者说，即使上诉机构报告作出了严格解释《反倾销协定》某些条款的判决，但这类判决不具有法律先例的权威，仅适用于争端当事方。这些意见当然是对的。不过，专家组的实践和国家当局执行上诉机构报告的情况似乎表明，实际上很难无视上诉机构报告的裁决。[8] 这一点在谈判中必须予以考虑，以避免过于坚持从发展观点看可能不是最终决定预期收益或价值的议题。

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[6] 贸发会议，“反倾销和反补贴税行动的影响 - 贸发会议秘书处的背景说明”，TD/B/COM.1/EM.14/2(2000 年 10 月 24 日)。

[7] 对专家组和上诉机构该领域报告的详细分析，见 Edwin Vermulst and Folkert Graafsma, “世贸组织与商业辩护协议有关的争端解决机制“，喀麦隆(即将出版，2002 年 5 月)。

[8] 见 David Palmeter and Petros Mavroidis, “世界贸易组织的争端解决：做法和程序”，Klumer Law Internatioal(1999)。

2. 《部长决定》中提到的问题

部长级会议《关于与执行有关的问题和关切的决定》[9] (《决定》)第 7 段针对会议筹备阶段提出的某些执行问题阐述了各成员应采取的一系列行动。本章首先介绍会议作出了哪些决定，还有哪些问题没有解决。

[9] 见世贸组织，上文脚注 2。

题为“《关于执行 1994 年关税和贸易总协定第六条的协议》”第 7 段[10] 的内容如下：

“7.1 同意，在对同一成员的同一产品的调查得出否定裁决后的 365 天内，调查当局在受理任何启动反倾销调查申请前，应特别仔细地审查该申请，除非启动前审查表明情况已经变化，否则调查不应进行。

7.2 承认，虽然《关于执行 1994 年关税和贸易总协定第六条的协议》第 15 条是一项强制性条款，但加以澄清有利于执行该条款。为此，指示反倾销委员会通过其执行工作组审查这一问题，在 12 个月内提出如何执行该条款的适当建议。

7.3 注意到《关于执行 1994 年关贸总协定第六条的协议》第 5.8 条没有具体规定确定倾销进口品数量所使用的时限，规定不具体给该条款的实施造成不确定因素。指示反倾销委员会通过其执行工作组，研究这一问题，在 12 个月内提出建议，以确保在采用时限上尽可能具有可预测性和客观性。

7.4 注意到《关于执行 1994 年关税和贸易总协定第六条的协议》第 18.6 条要求反倾销委员会按照该协定的目标，每年审查《协议》的执行和运作情况。指示反倾销委员会提出改进年度审查的指导原则，并在 12 月内向总理事会提出意见和建议，以便作出决定。”

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[10] 见世贸组织，上文脚注 2。

2.1 接连投诉，《决定》第 7.1 段

“接连投诉”问题在多哈会议筹备工作中进行过长时间辩论。它是指国内工业对被指控的倾销产品连续提出投诉的情况。发展中国家寻求一项阻止该做法的条款。在多哈会议筹备过程中，这一问题被看做是必须解决的问题，并散发了拟议条款草案。主张优先考虑这一问题的人认为，没有禁止条款表明《反倾销协定》不平衡。

事实上，《反倾销协定》第 11.2 条规定，出口商只能在自征收反倾销税起已过去一段合理的时间后才能要求复审。以此类推，也应有一项类似条款，禁止国内工业在自做出不征税终止案件的裁决起已过去一段合理的时间之前提出新的投诉。

最后草案案文与多哈会议筹备期间散发的案文大致相同：“同意，在对同一成员的同一产品的调查得出否定裁决后的 365 天内，调查当局在受理任何启动反倾销调查申请前，应特别仔细地审查该申请，除非启动前审查表明情况已经变化，否则调查不应进行。”

鉴于实际起草工作的困难，一些评论者怀疑接连投诉是否属于如此重要的优先谈判议题。[11] 虽然有过一些接连调查，但总体而言不是一个严重的系统问题。对这一问题也应该实事求是地看待，尽管以前的某些时间对一些发展中国家可能是个关键性问题，以后也可能不时地出现。例如，在欧洲联盟，即使已符合倾销和损害调查的技术条件，但欧盟成员国为了国家利益，出于政治原因最终还是决定不征收反倾销税。要求反倾销救济的欧盟国内工业可能不满意，认为既然符合技术条件，可以再次提出投诉。

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[11] Compare Edvin Vermulst and Polya Mihaylova, “ 欧盟 1995 - 2000 年对纺织品的商业保护行动：未来谈判可吸取的教训” ，《国际经济法杂志》，牛津大学出版社(2001 年)。

在这种情况下，人们不禁要问欧盟委员会反倾销程序的受害者是否应该“算好钱就走”。事实上，有些欧盟案件第二轮程序也以不征税告终，棉纱案就是其中之一。[12]

[12] 这些案件没有正式终止，也没有发布任何终止公告。见 Vermulst and Mihaylova, 上文脚注 11。

《决定》中的案文，措词看起来是“最大努力”条款，所以不可能提供有意义的救济。案文包含四个限定词：

(a) 特别仔细；

(b) 同一产品；

(c) 否定裁决；

(d) 情况已经变化。

所以，回避该决定的实施范围似乎不难。例如，可以说棉布和未漂白棉布不属于同一产品。同样也可以说，不采取反倾销行动的政治决定不是《决定》意义内的“否定裁决”。最后，“特别仔细”和“情况已经改变”，如不加以进一步界定，也无任何意义。在这方面，《反倾销协定》第 5.3 条“审查”的经验可供借鉴。

## 2.2 第 15 条的实施，《决定》第 7.2 段

《反倾销协定》第 15 条是一项纳入多项世贸组织协定和《反倾销协定》通常列有的特殊和优惠待遇概念的专门条款，但其措辞看起来是一项“最大努力”条款，而非强制性条款。在执行问题辩论的过程中，这一条款的有限重要性很快成为《反倾销协定》改革议案的一个重点。

关于执行问题的决定明确指出，第 15 条是一项强制性条款，反倾销委员会应审查该条款的执行方式，并考虑如何解释。它指示委员会在 12 个月内提出如何执行该条款的适当建议。但问题是专家组和上诉机构近期报告对这一问题有哪些论述。

自关贸总协定专家组“**巴西—棉纱案**”[13] —巴西提出但败诉—报告发表以后，世贸组织成员国往往认为，第 15 条是形同虚设的政治宣言。在“**欧洲共同体**

[13] 关贸总协定，“欧盟对巴西棉纱进口征收反倾销税案”，专家组报告，ADP/137(1995 年 7 月 4 日)。

对印度棉床单进口的反倾销税案”(欧盟—棉床单案”)中，[14] 专家组报告有力地扭转了这一看法。专家组认为，第 15 条规定了在对发展中国家实施影响其核心利益的反倾销措施之前，有义务敞开思想，积极考虑采取建设性补救办法的可能性。[15] 单纯的被动不足以履行“探讨”建设性补救办法可能性的义务，尤其是在有关发展中国家已表示可能作出价格承诺的情况下。专家组严肃地裁决，欧盟除一味拒绝外，未以某种方式作出反应，特别是在已向其表示愿意作出价格承诺时，是没有“探讨建设性补救办法”。[16]

专家组以具体实例进一步说明了哪些措施可以成为“建设性补救办法”：它们可以是接受价格承诺和实施较低关税规则。专家组认为，建设性补救办法不是要

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[14] 关贸总协定，“欧盟对印度棉床单进口的反倾销税案”，专家组报告，WT/DS/141R(2001 年 10 月 30 日)；上诉机构报告，WT/DS/141/AB/R(2001 年 3 月 10 日)。

[15] 关于“在采取最终措施前”，探讨建设性补救办法的义务，见专家组对“欧盟—棉床单案”的裁决，第 6.233 段，“…鉴于这种情况，并考虑到第 15 条的目标和宗旨，我们确实认为，发达国家当局必须本着取得积极结果的愿望，积极地探讨各种可能性。我们认为，第 15 条虽然没有规定实际提供或接受任何可提出和/或提供的建设性补救办法的义务，但规定了在实施影响发展中国家核心利益的反倾销措施之前，需要敞开思想，积极地考虑这类补救办法可能性的义务。”

[16] 关于建设性补救办法的定义，见专家组“欧盟—棉床单案”的裁决，第 6.229 段，“对于本《协定》规定的建设性补救办法—即抵消损害性倾销影响的办法—一词的含义，除了参照《协定》本身外，我们无法得出任何结论。《协定》规定，在反倾销调查最后确定存在倾销、损害以及因果联系后，可按倾销幅度的全额或较小额征收反倾销税，或接受价格承诺。因此，我们认为，较少征税或接受价格承诺是第 15 条意义内的建设性补救办法。我们无法肯定还有哪些其他措施可被认为是第 15 条意义内的建设性补救办法，因为我们没有收到任何建议。”

求作出不向发展中国家征收反倾销税的决定。第 15 条规定，必须**在征收反倾销之前**探讨建设性补救办法，那么就产生了是在采取临时措施还是在采取最终措施之前探讨补救办法的问题。[17] 对此，专家组认为，只是在采取最终措施之前产生这一义务。[18]

将专家组关于“欧盟—棉床单案”的裁决与要求反倾销委员会实施该条款的任务相对比，我们不清楚《反倾销协定》可以在多大程度上超越“欧盟—棉床单案”报告的裁决的法律含义。如果可以超越，则要问《决定》对世贸组织“判例法”增添了哪些内容。

专家组最后认定：

(a) 小组认为，“建设性补救办法”可以是较低关税规则或价格承诺。这些裁决已经包含了对发展中国家十分有利的议题，因为它们支持自动

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[17] 关于调查当局积极考虑建设性补救办法的义务，见专家组“欧盟—棉床单案”裁决，第 6.238 段，“我们认为，欧洲共同体在 1997 年 10 月 22 日的来函中表示的拒绝，并没有表明探讨价格承诺的可能，而是断然拒绝了这种可能。根据事实，我们认定欧洲共同体没有在征收反倾销税前探讨建设性补救办法的可能性。欧洲共同体在本案中的作法与它在其他反倾销诉讼中的作法无异：它没有发布任何公告，也没有提供任何信息，说明探讨给予印度当事方建设性补救办法可能性的机会。因此，没有任何证据表明欧洲共同体积极履行了《反倾销协定》第 15 条规定的义务。我们还认为，纯粹的被动不是履行积极探讨建设性补救办法可能性的义务，特别是在有关发展中国家已表示有可能作出价格承诺的情况下。为此，我们认为，欧洲共同体除一味拒绝外，未以某种形式作出反应，特别是在已向它表示愿意作出价格承诺时，是没有探讨建设性补救办法的可能性。因此，我们认定欧洲共同体没有一贯地履行《反倾销协定》第 15 条规定的义务。”

[18] Edwin Vermulst and Folkert Craafsma，“世贸组织关于贸易应急措施的争端解决：有关问题”，《世界贸易杂志》，35：2, 209-229 ( 2001 年)。

适用较低关税规则和更多地使用价格承诺。这两项议题是发展中国家过去付出很多谈判资本的问题。

(b) 小组认定调查当局有责任证明它已积极考虑了“建设性补救办法”。

(c) 小组还认为，调查当局在决定征收反倾销税之前，必须积极地探讨“建设性补救办法”。

由于专家组的这些裁决，今后发展中国家提出价格承诺和建议实施较低关税规则时，调查当局在决定征收关税前有责任证明它们认真审查了这些请求。

我们还可以更进一步质疑发展中国家在专家组“欧盟－－棉床单案”裁决公布后，还坚持在多哈会议上讨论执行第 15 条的问题，是否是明智战略之举。诚然，专家组报告只对当事方具有约束力，而且不具备法律先例的权威性，但过去的实践表明，专家组和上诉机构报告在对其他案件适用第 15 条时会遵循一贯的推理。[19] 显而易见，除非反倾销委员会内的谈判将裁决编撰成法律，否则专家组“欧盟－－棉床单案”报告将一直是解释第 15 条的一个分水岭。

## 2.3 确定倾销进口品数量所使用的第 5.8 条时限

在执行问题辩论中讨论了第 5.8 条问题，因为需要为可忽略不计标准澄清确定倾销进口品数量所使用的时限。

《反倾销协定》第 5.8 条规定了最小倾销幅度和倾销进口品数量可忽略不计两项标准。根据该条，当倾销幅度以出口价格的百分比表示不足 2%，或倾销进口品数量不足进口成员国相同产品的 3%时，可驳回国内工业的启动调查申请，并立即终止调查。

过去的问题是，第 5.8 条没有设定计算倾销进口品数量的时限，如本年度、过去 6 个月、近期等。

使问题更为严重的是，各国贸易统计资料参差不齐。由于缺少明确的指导原则，调查当局可任意选择时限。谈判的目的是设立一个固定期限或时间范围，即使执行起来可能十分困难，但应普遍适用。从发展中国家的角度看，一个问题是这是否属于那类可以得到、所以需要认真考虑应提出什么要求的问题之一。

拟订的任何规则将适用于所有世贸组织成员，包括发展中国家。这些国家能否及时收集到贸易统计数据，以切实实施新制定的规则？

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[19] 见 Palmter and Mavroidis，**上文脚注** 8。

此外，贸易统计一般以《协调税则》为基础。但大多数国家为统计方便，又将《协调税则》从 6 栏税目细分成 8 栏或 10 栏税目。有时反倾销调查是针对某一特定产品进行的，甚至这些进一步细分的所谓“分税目”亦不能准确地反映受调查的产品。在这种情况下，则使用最接近的分税目来计算倾销进口品数量。有时该分税目既包括受调查产品的贸易量，也包括不受调查其他产品的贸易量，所以倾销进口品数量可能被人为夸大。这一技术性问题尚无明确的解决办法，但在谈判中可以澄清有关因素，增加标准的透明度和可预测性。

最后，迄今尚未讨论的另一重要方面，是调查当局与出口商之间举证责任的分配。应该明确指出，调查当局有责任证明它们的确采用了最小倾销幅度和倾销进口品数量可忽略不计标准。

### 2.4 按第 18.6 条对业务协议执行情况进行年度审查

为使委员会能够增加透明度，监督反倾销措施的使用，多哈会议筹备期间就此进行了讨论。大体而言，支持这种观点的国家希望委员会协助防止反倾销措施的滥用或任意使用。

目前，还难以预见如何改变委员会的作用，以满足这种意愿。与《反倾销协定》不相符合的滥用行为和做法最好由争端解决谅解机构来处理。

## 3. 未决问题

西雅图和多哈部长级会议筹备期间，各国提出了许多讨论议题和建议。讨论执行问题时，对许多建议重新拟订。筹备进程中，还将它们作为正式或非正式文件广泛散发。

有些议题反映了人们对《反倾销协定》某些条款缺乏透明度和可预见性的普遍关切。这种观点认为，缺乏法律确定性，为调查当局提供了过大的斟酌决定权。执行问题讨论中还提出了一些其他议题，也是为了对《反倾销协定》的某些方面进行重新审查，如提高最小倾销幅度和可忽略不计标准的临界值。许多成员认为，重新审查等同于重新谈判《反倾销协定》，不可能在讨论执行问题时加以解决。无论如何，按《部长宣言》规定的任务，多哈会议未作出决定的这些执行问

题，可能成为《反倾销协定》今后谈判的最直接议题。下一节将阐释和评审每项未决执行问题，以评估它们在未来议程中的优先地位。

3.1 较低关税规则

– “根据第 9.1 条，较低关税规则应是强制性的。”

《反倾销协定》规定，当征收较低关税可以消除损害时，可以斟酌采用小于倾销幅度的反倾销关税。这一规则虽然对目前不采用较低关税规则的国家可能有用，但有些评论员[20]认为，这项规则变成强制性后，是否得到有效执行实际上很难核查。特别是没有在行政保护令下公布机密信息制度的国家中。欧盟较低关税规则的经验表明，由于没有计算损害幅度规则，调查当局仍有很大的斟酌自主权，而且计算细节保密，所以无法进行检查。

根据欧盟作法的经验，有大约 50%的案件损害幅度低于倾销幅度。然而，大多数这类案件涉及非市场经济国家或日本，在那里因偏误的计算方法，倾销幅度非常高。[21] 在涉及发展中国家的案件中，倾销幅度往往低于损害幅度，因为当大幅度削低价格时，正常价值相对较低。

多哈部长级会议筹备期间讨论过一项案文，有的成员认为是一项最大努力条款，或是决定在谈判中审查这一议题，加上当时直至作出最后决定前使用较低关税规则的“政治决定/让步”。

这一想法在多哈谈判中没有得到足够的支持。鉴于其他未决问题，不妨考虑坚持将较低关税规则列为优先议题的利弊得失，至少从发展中国家的角度考虑有哪些好处和坏处。

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[20] Edwin Vermulst and Paul Waer, “在欧共体反倾销诉讼中如何计算损害幅度”，《世界贸易杂志》，25：6,5-43(1991 年)。

[21] 见 Vermulst and Waer 上文脚注 20。

3.2 《反倾销协定》第 2.2 条，“倾销幅度”

在多哈会议筹备过程中散发了各种执行问题案文，现将与第 2.2 条有关的议题摘述如下：

– “第 2.2 条应加以澄清，以便在倾销幅度方面进行适当比较。”

– 《协定》条款应加以改进，以防止采取任意或保护主义措施。需要重新考虑的条款应包括：(一) 《协定》所规定审查的标准、方法和程序(对新出口商的快速审查、最后审查和应请求的审查)；(二) 界定受调查产品；(三) 确定倾销幅度；(四) 课征关税；(五) “累计”条款。

这两项案文虽然都与第 2.2 条有关，但过于含混，缺少必要的重点，难以作为谈判的论点。

在执行问题的辩论中，人们承认需要就第 2.2 条的某些方面采取一定的行动。提出的一项建议是“指示反倾销委员会审查使用推定正常价值可能对发展中国家出口商造成的问题”，但没有提出进一步的细节。[22]

应该指出，第 2.2 条是《反倾销协定》中的关键性条款，含有实际的系统问题。需要查明这些问题，加以明确的阐释和准确的界定，才能在谈判中讨论与第 2.2 条有关的具体议题。

倾销幅度计算中最有争议的问题之一，是如何确定适当的正常价值。第 2.2 条序言及各分段阐述了调查当局在不同程序中使用的框架、原则和方法。通常有三个步骤：

(a) 销售在国内市场中是否具有代表性？通常按第 2.2 条脚注 2 所说 5%的标准来确定。脚注 2 指出，在国内市场中的足够销售量是正常贸易过程出口销售量的 5%或更多。不妨指出，这一标准一般适用于销售总量和不同型号产品的销售量。

[22] **至少本撰文者不知道。**

(b) 确定正常价值时应该考虑哪些国内销售？第 2.2.1 条提出了将不属于正常贸易过程的某些国内销售排除在外的规则。根据第 2.2 条脚注 5,低于单位成本的销售如果数量超过国内市场销售总量的 20%，则不属于非正常贸易过程的销售。在这种情况下，在确定正常价值时可以将低于成本的销售排除在外，然后以其余高于成本的销售为计算基础。[23]

(c) 如何计算生产成本，以确定低于成本销售的存在和计算有关销售量的推定正常价值？除了提出作为单独谈判议题的 5%和 20%这两个标准是否具有任意性之外，第 2.2 条还存在其他未决问题，也需要加以澄清。

关于第 2.2 条，最近的专家组和上诉机构报告表明，很难对调查当局认为”合理的”利润提出质疑。在“**欧盟── 棉床单案**”(使用的利润率为 18.6%)和“**泰国对波兰铁或非合金钢角材、型材和轧材以及工字钢材征收反倾销税案**”(“**泰国── 工字钢案**”)[24] (使用的利润率为 36.3%)，专家组认定，如果合理利润率是按第 2.2.2 条所列方法之一计算，这一计算“必然得出合理的利润额，不再需要另外的合理性标准。”[25]

这两份报告表明，专家组只审查第 2.2 条规定的方法是否得到正确的适用。如果方法之一导致 99%的利润，也将被认为符合《反倾销协定》的标准，无论离商业现实相差多远。因此，发展中国家可以提出，《反倾销协定》需要另一套合理性标准。

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[23] 将在第 3.4 节另行论述 20%临界值的任意性。

[24] 世贸组织，“泰国对波兰的铁或非合金钢角材、型材和轧材的反倾销税案”，专家组报告，WTO/DS/122/R(2000 年 9 月 28 日)。世贸组织，上诉机构报告，WT/DS/184/AB/R(2001 年 3 月 12 日)。

[25] “泰国── 工字钢案”，专家组报告，7.128。

3.3 提高第 5.8 条中的“最小倾销幅度”和“可忽略不计”标准

- “现行最小倾销幅度为出口价格的 2%，低于这一幅度将不征收反倾销税(第 5.8 条)，对发展中国家适用时，需要提高到 5%。”
- “对发展中国家进口品可忽略不计的倾销进口限量(第 5.8 条)应从现行的 3%增加到[5%][7%]。”
- “建议的 5%最小倾销幅度不仅对新案件，而且对退款或复审案件也适用。”

此外，还建议将单个符合可忽略不计标准的供应商集中起来共同使用的 7%规则加以提高或取消。人们广泛认为这项建议不言自明。最小倾销幅度标准的主要目的是消除小额案件。不过，某些限定是必要的，因为这项条款同时适用于发达国家和发展中国家，所以不可能被严格地界定为特殊和差别待遇条款。

这项建议的潜在弱点之一是，既然 2%的限值可能是任意性的，那么除非分析结果认为将临界值提高到 5%的建议可站得住脚，否则同样可以适用这一论点。贸发会议反倾销措施专家会议结束时[26] 正确地建议进行经验和分析研究，以查明此种提高的可能积极影响。

一份有关欧盟在 1995-2000 年的纺织品反倾销调查中使用 2%临界值的情况的文件所作的分析显示，[27] 有 6 个国家的 25 个生产商被排除在外。同一分析还显示，如果百分比提高到 5%，将有另外 9 个生产商被排除在外。

应在这一初次尝试基础上进行更广泛的分析，以进一步加强提高临界值的这一论点，同时考虑到调查当局仍可以找到高于最小幅度的倾销幅度。

此外，还可建议不仅对新的案件而且对退税和复审案件也适用 5%的最小倾销幅度，但必须为这一论点找到可行的理论基础，因为管理当局可能说，减少倾销幅度的理由是倾销措施在起作用。

另一建议是，将适用于发展中国家进口品的倾销进口数量的可忽略不计临界值从目前的 3%提高到 5%。

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[26] 见贸发会议，上文脚注 3。

[27] 见 Vermulst and Mihaylova，上文脚注 11。

有些评论员[28]提出，应该以市场份额标准代替数量标准，因为有时前者比世贸组织的数量标准更加宽松。实际上，欧盟的作法是实行市场份额标准，或在世贸组织标准较为宽松时，采用世贸组织标准。可以建议将这一做法变成法律，提高数量标准，同时规定可以使用市场份额标准，取两者中较宽松者。

3.4 低于成本的销售

“ 重大数量标准应从目前的 20%临界值提高到至少 40%。”

[28] 见 Vermulst and Mihaylova, 上文脚注 11,第 533-534 页：“ 与《反倾销协定》的规则不同，欧盟第 384/96 号反倾销条例第 5(7)条采用 1%和 3%市场份额标准。虽然欧盟的标准似乎更为严格，但分析表明事实并非如此。假定欧洲共同体市场或某一产品的消费为 1000。表 6 以 4 个实例将两项标准的结果加以比较。在较大市场份额中，欧共体的标准比世贸组织标准更宽松。不过，当进口量比较大，即欧共体工业拥有的市场份额小时，世贸组织的标准则较为宽松。

表 6：3%进口量和 1%市场份额标准的实施效果

| 总进口 | 国家进口 | 3%进口量标准 | 1%市场份额标准 |
|---|---|---|---|
| 100 | 9 | 不可忽略不计(9%) | 不可忽略不计(0.9%) |
| 290 | 9 | 不可忽略不计(3.1%) | 不可忽略不计(0.9%) |
| 340 | 10 | 不可忽略不计(2.94%) | 不可忽略不计(1%) |
| 700 | 20 | 不可忽略不计(2.85%) | 不可忽略不计(1%) |

因此世贸组织或欧盟的标准何者更加宽松，将取决于每一案件的具体情况。不过，当世贸组织标准较欧盟标准宽松时，欧盟委员会则使用世贸组织标准，以便不违反世贸组织义务。没有明确的法律规定要求这样做，不过这是欧洲委员会的实际做法。出口商也就是双赢者。

如前所述，计算正常价值的基本步骤之一是低于成本销售的标准。如果 20%以上的销售量低于成本价格，在计算正常价值时可对此种销售不予考虑，所以将出现高于平均值的正常价值，最终提高了倾销幅度。

这一建议触及了反倾销计算的核心问题，如获通过，将影响许多案件。

拟议的 40%临界值，可能无法完全解决在所谓商业周期之后影响各种产品的问题。例如，由于全球某些经济基本因素的波动，钢材或半导体生产商可能亏本销售，甚至 40%的幅度也不够，因为可能近乎于所有产量都亏本销售。这些产品是受经济基本因素波动影响的，国内工业和与之相竞争的出口商都被迫亏损销售。不过，在调查和计算倾销幅度时，国内工业的亏本销售则与调查当局的调查无关。

另一方面，可在建议中提及商品的货架寿命极短的问题，因为型号随市场趋势或技术创新不断变化。产品周期可能要求对一部分旧型号产品亏本销售，同时高价出售最新型号产品，最终补贴其他基本或旧型号产品。

将低于成本的销售排除在外，将提高正常价值，使倾销的确定更有可能。从以下的举例中可以看出这一点。以下我们假定全部生产成本为 50：

| 日　期 | 数量 | 正常价值 | 出口价格 |
|---|---|---|---|
| 1/8 | 10 | 40 | 50 |
| 10/8 | 10 | 100 | 100 |
| 15/8 | 10 | 150 | 150 |
| 20/8 | 10 | 200 | 200 |

在这一举例中，共有 4 批各 10 个单位的销售，8 月 1 日以 40 的价格所作的国内销售低于 50 的成本。由于它占国内总销售的 25%(>20%)，所以可以排除。那么，平均正常价值为(100＋150＋200/3＝)150,平均出口价格为(50＋100＋150＋200/4＝)125，倾销量为 100，倾销幅度为 20%。但是，如果采用 40%的国内销售量，平均正常价值则为 122.5，不发生倾销。[29]

[29] 见贸发会议反倾销教程(即将出版，2002 年 3 月)。

在这种情况下，目前的 20%临界值可能过重地处罚上述产业，从商业现实的角度来看是任意的，而且过低。

3.5 汇率波动

– **“第 2.4.1 条应包括处理倾销期间汇率波动问题的细节。”**

这一问题在多哈会议筹备期间分发的文件没有提及，是在贸发会议专家会议上提出的。一些代表团特别指出，第 2.4.1 条中“持续的变动”的定义[30]是实行浮动汇率国家十分关心的问题。汇率的短期波动和长期趋势应该加以明确区别，将长期趋势界定为“持续的变动”，为出口价格调整的目的通常指不超过 60 天的时限。

3.6 严重阻碍

– **“第 3 条应列入一项关于确定脚注 9 所指严重阻碍国内产业建立的详细条款。”**

事实上，严重阻碍引起的损害案件十分罕见。应该进行分析，具体确定该建议如获通过可能对实际案件产生哪些积极影响。

3.7 特殊和差别待遇

– **“应在协定中列入一项条款，规定假如符合某些条件，可推定发达国家向发展中国家倾销进口品。”**

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[30] 2001 年 12 月 4 日至 6 日在日内瓦举行的贸发会议反倾销和反补贴行动专家会议中提出了这一议题。见贸发会议，上文脚注 24。

发展中国家的贸易自由化意味着，进口增加对国内产业造成各种压力。有些发展中国家，特别是非洲国家，开始抱怨发达国家倾销产品，以及国内实施反倾销法中遇到困难。

提出上述建议，是希望通过建立简化的程序对发达国家向发展中国家市场倾销的进口品征收关税来缓解这类困难。这种宽泛办法比简单地推定发达国家倾销似乎更加合理。

实际上，很难制定“双重”的程序或轨道来解决这些问题，最好探讨另一反倾销行动机制。

国内产业受进口品竞争有许多因素，如因单边自由化而降低关税，执行海关估价协定遇到困难等。如果关税约束允许，临时提高关税，并在海关估价协定实施方面向国家海关提供技术援助，可有助于暂时缓解受影响国内产业的困难。

关于行政部门的人力和财力问题，应当增加有效的技术援助，以解决长期存在的机构能力不足问题。应该承认，这是影响最不发达国家和发展中国家行政当局的一个系统问题。

3.8 审查标准

– **“应该适当修订第 17 条，以便使世贸组织争端解决机制规定的一般审查标准平等全面地适用于反倾销领域的争端。”**

参照本文件和评论员[31]引述的某些上诉机构和专家组报告的裁决，我们不禁要问寻求修改第 17 条究竟有多大好处。乌拉圭回合后，人们十分担心《反倾销协定》第 17.6 (i) 条是否会限制上诉机构和专家组讨论调查当局如何确立事实。[32]

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[31] 见 Vermulst and Craafsma, 上文脚注 18。

[32] E.G.Horlick and Clarke, “在关贸总协定和世贸组织下审查反倾销裁决的标准”, (eds. )Petermann, 《国际贸易法与关贸总协定/世贸组织的争端解决机制》(1997 年)。

迄今为止，专家组只有一次作出了两种可允许的解释的裁决，但专家组的裁决在上诉时被推翻。[33]

[33] “欧盟—棉床单案”，专家组报告，第 6-87 段：“…我们认为，可允许对第 2.2.2 (ii) 条作以下解释：确定计算推定正常价值所使用的利润额时，可将非正常贸易过程的销售排除在外。”“欧盟—棉床单案”，上诉机构，第 84 段：“…我们撤销专家组的以下裁决：在根据《反倾销协定》第 2.2.2 (ii) 条计算利润数额时，成员可以将其他出口商或生产商非正常贸易过程的销售排除在外。”

对比而言，在“美国对日本某些热轧钢产品的反倾销措施案”[34]（“美国– – 热轧纲案”）中，上诉机构推翻了专家组关于联营公司在对国内市场无关用户销售中使用下游销售价格是对第 2.1 条作出可予允许的解释的裁决。[35]

近期做法表明，特别审查标准没有出现所担心的偏误效果；恰恰相反，大多数近期判例有助于增加透明度和正当程序。

我们可以问对第 17 条的修改是否仍有必要。坚持这样做的意见听起来好象是对《争端解决谅解协定》现有操作方式给予不恰当的批评。

## 4. 争端解决机构判例尚未正式或公开提出或已讨论过的议题

### 4.1 上诉机构和专家组的反倾销问题裁决

以上已经提及，专家组和上诉机构的一系列近期报告论述了西雅图和多哈部长级会议筹备期间提出或讨论过的一些议题。下一节概括介绍上诉机构和专家组对某些主要系统问题认真思考后作出的裁决。需要将这些判例的裁决与各国希望在目前谈判中继续探讨的建议和谈判议题加以比较和平衡。有些国家表示希望将“有利的”上诉机构和专家组报告编纂成法律。

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[34] 世贸组织，“美国对日本某些热轧钢产品的反倾销措施案”，专家组报告，WTO/DS/484/R(2001 年 2 月 28 日)。世贸组织，上诉机构报告，WTO/DS/184/AB/R(2001 年 7 月 24。日)

[35] 见“美国—热轧纲案”，上诉机构报告，第 172-173 段：“我们在本案中已说过，日本和美国同意将联营公司的下游销售看作是正常交易过程的销售。参与者还同意，所销售的产品属于“相同产品”，最终在出口国消费。在这种情况下，我们认为，美国商业部依赖下游销售来计算正常价值，是基于对《反倾销协定》第 2.1 条所作的一种解释。根据《维也纳公约》的条约解释规则，这种解释原则上是允许的。为此，我们撤消专家组报告第 8.1(c)段中的专家组以下裁决：美国商业部依赖与受调查的出口商联营的当事方之间的下游销售以及独立购买来计算正常价值，不符合《反倾销协定》第 2.1 条。

4.1.1 倾销幅度与正常价值

在“**欧盟—棉床单案**”中，[36] 欧盟使用的倾销幅度计算方式引起了三点要求。这些要求涉及如何确定有争议的问题：第 2.2 条前言所述的倾销幅度、第 2.2.2 (ii) 条和 2.4.2 条的公平比较。

4.1.1.1 第 2.2.2 (ii) 条，“在推定正常价值时确定合理的利润率”

国内市场的推定正常价值必须根据第 2.2 条前言计算时，可以采用第 2.2.2 (ii) 条。第 2.2.2 条规定了计算管理费用、销售费用、一般费用和利润的一般规则。如果无法采用一般规则计算这些费用，则可以采用第 2.2.2 (i)条、第 2.2.2 (ii) 条和第 2.2.2 (iii) 条的规则。

在“**欧盟—棉床单案**”中，专家组和上诉机构报告确认了关于不属于正常贸易过程中的销售这一重要问题。

印度认为，欧盟在适用第 2.2.2 (ii) 条规定时，使用了**正常贸易过程中**“产生和实现”的生产和销售数额，而不是在**所有交易中**“产生和实现”的生产和销售数额，因此不符合第 2.2.2 (ii) 条。实际上，将非正常贸易过程的销售排除在外，意味着所有低于成本价格的销售都不计算在内。欧盟调查当局这种做法，使利润增加，推定正常价值提高，导致了较高的倾销幅度。专家组不同意这种看法，认为虽然一成员不必为按第 2.2.2 条确定利润率的目的而将非正常贸易过程的销售排除在外，但此种排除不受《协定》禁止。[37] 印度对此提出上诉，上诉机构撤销了专家组裁决。它首先引述条款本身 [38]，特别指出第 2.2.2 (ii) 条提到其他出口商或生产商“产生和实现”的实际数额的加权平均值。这一条款不作任何例外或限制。因此，“产生和实现的实际数额”一语的一般意义包含了实际产生的销售费用和一般管理费用，以及其他出口商或生产商在原产国国内市场生产和销售相同

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[36] 见“**欧盟—棉床单案**”，**上文脚注** 14。

[37] 见“**欧盟—棉床单案**”，**专家组报告**，**第** 6.85 **段**。

[38] 见“**欧盟—棉床单案**”，**上诉机构报告**，**第** 80 **段**。

产品实现的利润或损失。上诉机构指出，将实际产生或实现的一些数额排除在“产生或实现的实际数额”之外在第 2.2.2 (ii) 条中找不到任何根据。因此，不允许一成员在按第 2.2.2 (ii) 条计算“加权平均值“时将非正常贸易过程的销售排除在外。上诉机构在该规定中为自己的解释找到了证据。[39]

4.1.1.2 计算倾销幅度中的“零化”问题

印度的另一要求与第 2.4.2 条有关。印度说，欧盟违反了第 2.4.2 条，在计算棉床单同类产品加权平均倾销幅度时将某些种类棉床单的“负倾销幅度”零化。

不同型号产品间“零化”的做法是复杂的技术性问题，为便于完全理解，不妨举若干实例。

**第 2.4.2 条规定的主要规则**

根据第 2.4.2 条，两个市场的价格应按加权平均对加权平均或按交易对交易进行比较。不妨以下述例子说明：

| 日　期 | 正常价值 | 出口价格 |
|---|---|---|
| 1 月 1 日 | 50 | 50 |
| 1 月 8 日 | 100 | 100 |
| 1 月 15 日 | 150 | 150 |
| 1 月 21 日 | 200 | 200 |

按照加权平均方法，加权平均正常价值(500/4＝125)与加权平均出口价格(同上)比较，结果是倾销幅度为零。

按照交易对交易方法，同一天或接近同一天发生的国内交易和出口交易彼此比较。在以上完全对称的例子中，1 月 1 日的交易彼此比较等等，结果倾销幅度也将为零。

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[39] 见“欧盟—棉床单案”，上诉机构报告，第 81-83 段。

**第 2.4.2 条主要规则的例外：加权平均正常价值对单独出口价格交易**

根据第 2.4.2 条，在例外情况下，如果当局发现出口价格模式在不同的购买人、地区或时间上存在很大差别，而且已解释为什么这些差别不能通过使用两种主要方法之一加以适当考虑，那么可以将加权正常价值与单独出口价格交易进行比较。

如果我们将例外方法适用于以上举例，结果将大不相同。

| 日　期 | 正常价值<br>(加权平均) | 出口价格<br>(交易对交易) | 倾销幅度 |
|---|---|---|---|
| 1 月 1 日 | 125 | 50 | 75 |
| 1 月 8 日 | 125 | 100 | 25 |
| 1 月 15 日 | 125 | 150 | -25 |
| 1 月 21 日 | 125 | 200 | -75 |

**零化问题**

在以上举例中，正倾销幅度为 100(前两笔交易为 75 和 25)，负倾销幅度也是 100(后两笔交易为－25 和－75)。发生负倾销幅度是因为出口价格实际高于正常价值。如果可以用负倾销幅度抵消正倾销幅度，那么便不存在倾销。但是，某些世贸组织成员的作法是不允许此种抵消，将负倾销幅度归零。这叫做零化做法。由于采用这种方法，以上举例的倾销幅度为 100，（简化)倾销幅度为 100/500×100＝20%。

使用这一方法在理论上意味着，即使只有一起交易倾销，999 起其他交易都不倾销，也可以发现倾销。[40]

在乌拉圭回合结束前，零化是某些积极使用反倾销措施者的标准做法。由于其他国家在谈判中施加的压力，才通过了第 2.4.2 条，世贸组织成员一般都使用加权平均方法。

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[40] **如果所有交易都属于倾销，那么加权平均方法和加权平均对交易的方法将得出同样结果。不过，这种情况较为罕见。**

不过，在加权平均方法内，有些世贸组织成员使用一种新的零化：不同型号产品间零化。例如，从以下计算中可以看出，如果 A 型号产品倾销，而 B 型号产品不倾销，那么成员不允许用 B 型号产品的负倾销抵消正倾销。

A 型号产品：棉床单

| 日　期 | 正常价值<br>(加权平均) | 出口价格<br>(加权平均) | 倾销幅度 |
|---|---|---|---|
| 1 月 1 日 | 125 | 75 | 50 |
| 1 月 8 日 | 125 | 75 | 50 |

B 型号产品：棉床单

| 日　期 | 正常价值<br>(加权平均) | 出口价格<br>(加权平均) | 倾销幅度 |
|---|---|---|---|
| 1 月 1 日 | 125 | 175 | -50 |
| 1 月 8 日 | 125 | 175 | -50 |

在这一举例中，欧盟将它所计算的 A 型号产品与 B 型号产品倾销量加在一起，但它把 B 型号产品的负倾销量当作零来处理，然后欧盟把 A 型号产品的正倾销幅度 75＋25 加上 B 型号产品的 0＋0 等于 100 后，再用各种型号产品所有出口交易的累计价值即 A 型号产品和 B 型号产品的出口交易价值来除这一总和 100。所有出口交易的价值为 50＋100＋150＋200，倾销幅度为 100/500×100%＝20%。

在棉床单一案中，印度质疑欧盟的做法并取得成功。欧盟就专家组的裁决向上诉机构上诉，但上诉机构完全赞同原判意见。

4.1.1.3　欧盟执行专家组和上诉机构裁决的情况

**“欧盟—棉床单案”**裁决之后，欧盟采取了一系列行动，执行专家组和上诉机构报告的结论。

欧委会颁布了一项条例[41]，授权欧委会理事会(a)“废除或修订有争议的措施；(b) 采取它认为合乎情况的任何其他特别措施”。[42] 这项条例并没有明文述及“欧盟—棉床单案”报告，因为序言第 4、5 段称它旨在于建立一项程序：

– “(4) 为了使欧共体能够在它认为适当的情况下，将根据欧共体第 384/96 号条例和第 2026/97 号条例[欧委会执行《反倾销协定》的主要法规]采取的措施与争端解决机构通过的报告中所载的建议和裁决保持一致，必须颁布具体的法规。”

– “ (5) 欧共体各机构可酌情废除或修订根据欧共体第 384/96 号条例和第 2026/97 号条例采取的措施，或采取任何其他特别措施，包括未按《争端解决谅解协定》付诸争端解决的措施，以便考虑争端解决机构报告所作的法律解释。此外，欧共体各机构应能够酌情暂停实行或审查这些措施。”

后一序言段和条例的相应第 2 条，不仅授权理事会根据委员会的建议修订有争议的反倾销条例，使其与专家组或上诉机构的裁决相一致，而且规定对“未按《争端解决谅解协定》付诸争端解决的”其他反倾销条例也可适用专家组和上诉机构的相同裁决或对世贸组织法律的解释，从而“暂停执行这些未有争议或未加修订的措施”。

这项规定的制衡机制是委员会仍保留着发起审查的权力。换句话说，私营当事方不得以专家组或上诉机构裁决为依据要求按第 2 条的程序对未有争议的措施进行审查。

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[41] 理事会 2001 年 7 月 23 日第 1515/2001 号条例，涉及世贸组织争端解决机构通过反倾销和反补贴报告后共同体可采取的措施，O.J.L.201(2001 年 7 月 26 日)。

[42] 见第 1515/2001 号条例第 1 条，上文脚注 41。

第二项条例[43]参照“**欧共体—棉床单案**”报告中的建议，修订了调查结论。根据该条例第 2.1 段 5 分段，按报告的以下建议对倾销幅度加以重新评估：“(a) **为推定正常价值目的，按基本条例第** 2 (c) (1)**条确定销售费、一般费用和管理费以及利润数额**；(b) **确定加权平均倾销幅度的“零化”做法。**”

在此基础上，欧共体当局对原有调查结果进行了重新评估，并根据上诉机构报告的裁决加以重新计算。[44]

必须指出，对结论的重新评估主要是按原始调查搜集的资料进行的。然而，欧共体当局在关于计算销售费、一般费用和管理费以及利润数额的条例第 74 段中公开承认，有些资料不是在原始调查时搜集的，可能影响对结论的重新评估。例如，关于损害问题，人们可能说重新评估没有为被告和原告建立一个公平的基础。

这种不平衡的根源是：国内产业提出投诉时，不需要列出表明损害的所有 15 种因素。换言之，对所有 15 种因素的审查和分析不是发起反倾销程序的必要条件。

如果调查当局象欧洲委员会那样，在原始调查中不收集所有 15 种要素的资料，那么可能很难客观地追溯评估各种损害因素。

因此，原始调查时若不收集所需要的数据，出口商必须依赖于调查当局的善意。“欧共体－棉床单案”专家组认为：“从要素清单[临时条例所列要素清单]中

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[43] **理事会** 2001 **年** 8 **月** 7 **日第**(EC)1644/2001 **号条例，修正关于对埃及、印度和巴基斯坦的棉床单进口实施最终反倾销税的第**(EC)2398/97 **号条例，停止对印度进口品实施该条例**，O.J.L.219/1(2001 **年** 8 **月** 14 **日**)。

[44] **例如见理事会第**(EC)1644/2001 **号条例第二部分(倾销)第** 9 **段**(见上文脚注 43)，**其中明确说明，“应该找出，在确定另外其他** 4 **个公司的利润幅度时，没有排除非正常贸易过程的销售。”第二部分(倾销)第** 11 **段还说：“为执行报告中的建议，在计算每一公司的总体倾销幅度时，没有实行零化”。**

可以看出，甚至未收集第 3.4 条所列所有要素的数据，更不用说欧共体调查当局评价了要素的数据。不收集有关数据，肯定无法对一种要素进行评价。”[45]

客观审查要求从头开始，即国内生产商的投诉应该列出客观评定所需要的所有 15 种要素的数据。投诉人和调查当局应该具有举证责任，出口商则有义务对调查当局的调查表及时提供准确资料，从而保持两者的平衡。如果原告和被告之间权利和义务不平衡，最终可能作为一个问题提出。

从这一角度来看，委员会对损害结论的重新评估似乎不可能不受到批评。

最后，有一项条例[46] 重新审查和评估了巴基斯坦和埃及倾销案的原始调查结论。重新评估是根据第 1515/2001 号条例第 2 条所述程序进行的。[47]

因此，这一重新评估是根据条例第二部分(倾销)第 6 段禁止“零化”的规定进行的。新的计算表明，巴基斯坦案中没有发生倾销，因此取消了对巴基斯坦的反倾销措施。关于埃及倾销案，委员会认为，由于原始调查缺乏数据，无法详尽地重新审查倾销幅度。[48] 但欧洲理事会考虑到一旦实行“零化”将降低倾销幅度，又考虑到埃及的出口量很低，逐决定停止实施反倾销措施。

## 4.2 相关当事方使用母国市场销售量

“美国－热轧钢案”[49] 所涉问题是美国商业部如何对待相关当事方在国内市场的销售。第 2.3 条就确定出口价格问题作了明确阐述，规定了此种情况下的做法。

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[45] 见“ 欧盟-棉床单案” ，6.167。

[46] 理事会 2002 年月 28 日第(EC)160/2002 号条例，修正关于对来自埃及、印度和巴基斯坦的棉床单进口实施最终的反倾销税的第(EC)2398/97 号条例，停止对巴基斯坦进口品的诉讼，O.J.L.26/1(2002 年 1 月 30 日)。

[47] 见第 1515/2001 号条例，上文脚注 41。

[48] 见理事会第 160/2002 号条例，第 15 段。上文脚注 46。

[49] 见世贸组织，上文脚注 34。

有时，公司不是直接向批发商或零售商销售，而是向设在出口市场的联营公司出售。由于进口商和出口商之间的联合或补偿安排，对联营公司的此种销售通常被认为不可靠。为此，《反倾销协定》第 2.3 条规定出口价格可以按“进口产品首次转售给独立买主时的价格进行推定。”

对国内市场的联营销售没有类似的规定。美国商业部的做法是，计算正常价值时，以联营公司首次对独立买主的销售替代生产商/出口商对联营公司的销售。

本专家组报告作出的最具革命性的决定可能是不允许将联营公司的转售价格当作正常价值(部分)的计算基础(或部分基础)。也就是说，专家组不同意在确定正常价值时使用“替代销售”，即以联营公司对独立买主的转售替代生产商/出口商对它们的销售。

专家组指出，尽管这些“替代销售”广义而言是正常贸易过程中的销售，但不是确定用于计算有关公司倾销幅度的正常价值时可以考虑的销售，因为不属于这些公司正常贸易过程的销售。[50] 专家组为了强调这一点，提请注意第 2 条的整体结构。[51] 例如，虽然明文允许相关进口商使用转售推定出口价格，但第 2 条没有为国内市场提供类似的可能性；明确提及出口方面的这种可能性正是表明有意不为国内市场保留这种可能性。[52] 所以，专家组认为，以联营公司对下游购买者的销售替代被排除的对联营公司的销售不符合《反倾销协定》第 2.1 条。

上诉机构否决了专家组的裁决，主要理由是美国商业部的做法依据的是对《反倾销协定》的一种解释，“根据《维也纳公约》的条约解释规则，这种解释原则上是‘允许的’。”

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[50] 见“美国-热轧钢案”，专家组报告，第 7.114 段。

[51] 见“美国-热轧钢案”，专家组报告，第 7.115 段。

[52] 比较“美国-热轧钢案”专家组报告脚注 89。

4.3 损　害

专家组和上诉机构在“墨西哥对美国高果糖玉米糖浆反倾销调查案”(“墨西哥－玉米糖浆案”)[53] 和“泰国－工字钢案”[54] 报告中阐述了与第 3 条有关的一些问题，并确定了确定损害时应考虑的各种经济因素。报告中特别说明了如何评价损害因素，此种评价必须可从记录中明显看出。专家组在“墨西哥－玉米糖浆案”中指出，第 3.4 条明确规定，第 3.4 条所列因素在所有案件中都必须予以考虑。在某一案件的具体情况下，可能还有其他有关经济因素需要考虑。不过，第 3.4 条所列因素是每起案件必须考虑的，即使此种考虑可能导致调查当局认为某一因素在某一产业或某一案件的具体情况下难以充作证据，因此与实际确定无关。专家组还认为，在调查当局的最终决定中必须可看出考虑了第 3.4 条的每一因素。[55]

专家组在“泰国－工字钢案”和“欧盟－棉床单案”和“危地马拉－水泥案”中坚持了类似方针，以同样的理由认为行政决定存在缺陷。

在 “泰国工字钢案”中，专家组再次强调，评价必须可从记录中清楚看出。它认为，泰国不仅没有考虑某些第 3.4 条因素，而且没有充分评价他们按第 3.4 条考虑的因素。因为就受到评价的因素而言，泰国没有充分地说明如何和为什么这么多的损害因素显示出正趋势，尽管如此，它裁定国内产业受到了损害。因此，损害决定不可能在“公平或客观评价”或“客观审查”所公布的事实基础上作出。[56] 泰国提出上诉后，上诉机构确认审查所有 15 种因素的规定是强制性的，并同意专家组的“全部”分析。[57]

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[53] 世贸组织，“墨西哥对美国高果糖玉米糖浆反倾销调查案”，专家组报告，WT/DS/132/R(2000 年 1 月 28 日)；世贸组织，上诉机构报告，WT/DS184/AB/4(2001 年 7 月 24 日)。

[54] 见世贸组织，上文脚注 24。

[55] 见“墨西哥-玉米糖浆案”，专家组报告，7.128 段。

[56] 见“泰国-工字钢案”，专家组报告，7.256 段。

[57] 见“泰国-工字钢案”，上诉机构报告，125 段。

波兰在“泰国－工字钢案”中说，泰国违反了第 3.1、3.3 和 3.4 条，因为泰国的损害确定不是依据“确凿证据”作出的，而且没有“客观审查”波兰进口数量和对价格的影响，也没有审查此种进口对泰国生产商的影响。[58] 专家组认为，第 3.1 条的规定要求调查当局担负建立损害确定的充分事实基础，为作出的损害确定提供合理解释的主要责任[59]，披露的事实如果不准确，不能被认为是“得到有效证实”。[60]

4.4 政府间会议上尚未正式提出的有关问题

在计算倾销幅度时，有一系列问题初看起来不明显，但在大多数反倾销案件中极其重要。改动或修改《反倾销协定》的建议，除非关注这些细节问题，否则不可能消除《反倾销协定》中的现有缺陷。

“欧盟－棉床单案”裁定不同型号产品间零化为非法，为第 2.4.2 条的主要规则做出了结论，但还应具体说明这一决定不会自动产生哪些意义或影响：

(a) 它没有论述利用第 2.4.2 条第二主要规则，即交易对交易方法，计算倾销幅度时的零化问题。

(b) 它没有说明在根据美国等国采用的追溯性反倾销税制度进行的年度审查过程中，是否允许零化。[61]

(c) 它没有说明在第 2.4.2 条(第二规则)(加权平均对交易方法)的例外情况下，是否仍然允许零化。由于在例外情况下禁止零化在计算上可能得

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[58] 见“泰国 - 工字钢案”，专家组报告，7.130 段。

[59] 见“泰国 - 工字钢案”，专家组报告，7.143 段

[60] 见“泰国 - 工字钢案”，专家组报告，7.188-7.189 段

[61] 在未来的某个时候，美国商业部将说，虽然计算“储存”率(下一年进口的倾销幅度)时不允许零化，但计算“评估”率(确定去年应付税)时仍然允许。这符合上诉机构在脚注 30 中为零化和征税问题仍保留一定余地的政策。

出与使用主要规则相同的结果，所以以逻辑推理在例外情况下零化是允许的。[62]

### 4.4.1 退　税

缺少具体规则可能影响反倾销调查结果的一个具体实例，是调查当局以缺少行政机构书面证据为理由拒绝接受退税要求。这对于发展中国家尤其构成问题，因为它们的平均进口税高于发达国家。

有些调查当局要求极为详细的书面证据，证明国内销售中含有进口税，而出口商品则未有此种课税或已退税，有时甚至要求出口商证实具体交易的征税情况。它们也往往不接受许多发展中国家退税制度中使用的投入/产出标准比率。最后，调查当局坚持要求进口投入确实与出口成品相联系，可能造成很多实际困难。对发展中国家许多大宗产品出口商而言，将仓库中内销和外销产品使用的国产投入和进口投入加以明确区分，实际上无法办到。有些投入物属于原料和可互换产品。出口商如不能确实证明出口成品中实际包含进口投入，那么调查当局可能拒绝退税请求，从而使正常价值增大。

### 4.4.2 贷款费用

贷款条件问题也特别相关。在计算净值过程中，通常扣除出口贷款费用，因为信用证中有明确记述。但是，在许多发展中国家，国内贷款条件往往是按产业政策制定的。有些调查当局不扣除此种国内贷款费用，理由是缺少“使用约定”。所以将包括贷款费用的正常价值与不包括贷款费用的出口价格相比较。由于发展中国家的短期借款利率高，国内贷款费用常常也高，这种不平衡的比较对它们尤其不利。

此外，为了考虑影响价格可比性的差异，还需要有更详细的规则。这里不妨指出，反倾销措施的某些传统使用者实际上将举证责任完全推给应诉者，让它们证

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[62] **这也符合《纺织品和服装协议》中在加权平均对交易方法中允许零化的规定。**

明影响价格可比性的贸易额或其他贸易和商业条件如何不同。第 2.4 条的规定为调查当局拒绝接受此种差异请求留出了过大的余地。

5. 程　序

审理“危地马拉对墨西哥普通水泥的最终反倾销措施案”[63] (“危地马拉－水泥案 II”)和“阿根廷对意大利陶瓷地面砖进口的最终反倾销措施案”[64] (“阿根廷－意大利地面砖案”)专家组的裁决可以作为范例，因为它们涉及许多程序要求[65]，以及行政当局遇到的各种困难。

“(a) 危地马拉认定有充分的倾销和损害威胁证据可以启动调查，不符合《反倾销协定》第 5.3 条。

(b) 危地马拉认定有充分的倾销和损害威胁证据可以启动调查，所以未驳回 Cementos Progreso 水泥公司的征收反倾销税申请，不符合《反倾销协定》第 5.8 条。

(c) 危地马拉没有根据《反倾销协定》第 5.5 条及时通报墨西哥，不符合该条规定。

(d) 危地马拉没有履行对启动调查予以公告的要求，不符合《反倾销协定》第 12.1.1 条。

(e) 危地马拉没有及时向墨西哥和 Cruz Azul 公司提供反倾销申请全文，不符合《反倾销协定》第 6.1.3 条。

(f) 危地马拉不允许墨西哥查阅调查档案，不符合《反倾销协定》第 6.1.2 和 6.4 条。

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[63] 见世贸组织，上文脚注 5。

[64] 见世贸组织，上文脚注 5。

[65] 上诉机构“美国-热轧钢案”报告和专家组“阿根廷 - 意大利地面砖案”报告在使用现有事实方面提供了很有意义的资料。

(g) 危地马拉在 1997 年 1 月 8 日前没有及时地将 Cementos Progreso 水泥公司 1996 年 12 月 19 日的投诉转告 Cruz Azul 公司，不符合《反倾销协定》第 6.1.2 条。

(h) 危地马拉没有按 Cruz Azul 公司的要求提供两套调查档案文本，不符合《反倾销协定》第 6.1.2 条。

(i) 危地马拉按 Cementos Progreso 水泥公司的要求延长调查期，但没有向 Cruz Azul 公司提供维护其利益的充分机会，不符合《反倾销协定》第 6.2 条。

(j) 危地马拉没有告知墨西哥在核查小组中有非政府组织专家，不符合《反倾销协定》附件一第 2 段。

(k) 危地马拉没有请 Cementos Progreso 水泥公司提供说明为什么不能对核查期间提交的信息加以概述的陈述，不符合《反倾销协定》第 6.5.1 条。

(l) 危地马拉自行决定对 Cementos Progreso 水泥公司 12 月 19 日申请给予保密，不符合《反倾销协定》第 6.5 条。

(m) 危地马拉没有向‘所有有关当事方通报它正在考虑的、据此可决定是否采取最终措施的重要事实’，不符合《反倾销协定》第 6.9 条。

(n) 危地马拉没有为作出最终倾销决定的目的诉诸‘可获得的最佳信息’，不符合《反倾销协定》第 6.8 条。”[66]

在“阿根廷－意大利地面砖案”中，专家组裁定：

“(a) 阿根廷的行动不符合《反倾销协定》第 6.8 条和附件二，因为它基本上没有考虑出口商为确定正常价值和出口价格而提供的信息，而且没有向出口商通报它拒绝考虑的理由；

(b) 阿根廷的行动不符合《反倾销协定》第 6.10 条，因为它没有确定受调查产品抽样中每个出口商的单个倾销幅度；

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[66] “危地马拉 - 水泥案”，专家组报告，第＃9 段。“AD Agreement”一词改为“ADA”。

(c) 阿根廷的行动不符合《反倾销协定》第 2.4 条，因为它没有为影响价格可比性的实物特点差异留有余地；

(d) 阿根廷的行动不符合《反倾销协定》第 6.9 条，因为它没有向出口商通报它正在考虑的、据此可决定是否采取最终措施的重要事实。”

## 6. 结论和建议

对未决执行议题、评论员和政府间会议提出的议题以及世贸组织争端解决机构近期判例进行综合分析后，可以初步提出某些优先谈判议题。

有人主张将有利的上诉机构和专家组报告“编纂成法律”，在《反倾销协定》中插入新的条款。考虑到世贸组织争端解决机构的既定原则和做法，打算在这项工作中付出的谈判资本，以及现行《反倾销协定》规则“上诉不加刑”的可能性，这一主张初看起来似乎有些多余。

反倾销诉讼和谈判中最困难的议题之一，是实现预期目标所需要的技术细节和准确程度。不仅需要有明确的谈判重点，并在事先提出，而且需要事先拟定必要的起草计划和替代方案。

同时，还需要事先决定在某些问题上应当付出多少谈判资本。本文件的初步分析显示，某些未决执行问题并不容易辩护，需要太多的谈判资本才能取得有限的实际效果。在未决执行问题中，对反倾销文书具有影响的议题可分为两类：实质性议题和程序性议题。在实质性议题中，正常价值计算是一个重点：

### 6.1 正常价值的计算

#### 6.1.1 第 2.2 条，“合理利润的定义”

即使世贸组织最新判例在这一问题上也相当保守。为避免“自动”裁定或第 3.2 节讨论的合理利润，应插入“合理的”一词的定义。

6.1.2 第 2.2.1 条，脚注 5,“低于成本的销售”

20%的临界值不符合商业现实，应该予以提高。

应优先考虑的其他问题与第 2.4、2.4.1 和 2.4.2 条有关。有些议题看不出是未决执行问题，应该首先加以说明。

6.2 正常价值与出口价格的比较

6.2.1 第 2.4 条，“公平比较”

应该重新审查本条，以考虑可能影响“公平比较”的各种因素，如：

(a) 应该有贸易额的可比性，以避免“美国－热轧钢案”一类的情况；

(b) 应允许一定的比较容限，以便针对贷款费用和退税问题进行“公平比较”。

6.3 其他未决问题

还可以对其他未决问题加以进一步分析或密切关注，如第 2.4.2 条。

6.3.1 第 2.4.2 条

如前所述，上诉机构“欧盟－棉床单案”报告明确指出，不同型号产品间零化是不允许的。不过，这一裁定可能没有充分考虑调查当局采用的做法和方法的变化。为此，谈判期间需要密切关注以下三个主要问题：

（1） 做法的变化是否导致在使用第 2.4.2 条第二主要规则、即交易对交易规则时实行零化；

（2） 在追溯性反倾销制度中是否仍实行零化；

（3） 由于“欧盟－棉床单案”报告，调查当局是否更经常地诉诸第 2.4.2 条的例外，该例外可能允许零化。

依上述各种可变因素、做法和争端解决机构判例而定，这些未决问题可能成为优先议题中的其他候选议题。

## 6.4 程序问题

### 6.4.1 第 5.8 条，“可忽略不计标准和最小倾销幅度”

应如以上分析的那样，重新审查这一条。[67] 应该进行一定分析，以确定拟作出的调整是否可能产生与将在该议题上付出的谈判资本相符合的重大效果。

### 6.4.2 第 5.3 条和第 5.4 条，“投诉人情况”和“举证责任”

出口商需要实际证明调查当局未满足第 5.3 条和第 5.4 条中有关投诉人情况的条件，这项做法应该加以扭转。应该由调查当局提供书面证据证明已达到 25%和 50%标准。关于第 53 条，开始调查前进行的审查，应该有书面证据支持，并在受影响的出口商提出要求时予以揭露。

此外，还可在程序事项下提出各种其他问题，如反倾销措施的期限、“夕阳产业”审查、调查表、调查当局的语言和价格承诺。在谈判过程中，有些程序问题可能成为辩论的主题。届时应该根据希望付出的谈判资本认真地评估每项议题的利弊。

除《反倾销协定》第 15 条，以及可忽略不计标准和最小倾销幅度标准之外，很难提出一项可行的横向综合条款来界定和体现特殊和差别待遇概念。

在世贸组织第四届部长级会议筹备期间，有人提出了如果符合某些条件可以推定来自发达国家的进口品对发展中国家倾销的议案。另一方面，考虑到最不发达国家主管机构的人力和财力限制，又有人建议为最不发达国家采取反倾销行动制订简化程序。[68]

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[67] 见上文第 3.2 段。

[68] 见世贸组织，“最不发达国家贸易部长会议”，2001 年 7 月 22 日至 24 日，WT/L/486(2001 年 8 月 6 日)。

可能产生此种“双轨”程序是否可行的问题，由于这一行动可能遇到的政治和技术困难，谈判之中极不容易推进。作为替代方案，应该制定不同的标准和尺度，通过对发展中国家进口的反倾销措施触发保护机制。应该对这一问题进行分析和研究，以提出合理和可行的建议。

首要目标可以是发达国家对最不发达国家的市场准入作出全面约束性承诺，保证不对最不发达国家发起反倾销调查。这一承诺可以是扎扎实实地改进最不发达国家市场准入的总体文书的一部分。[69]

本文件提出的某些实质性问题的解决、最小倾销幅度的承诺以及第 15 条得到令人满意的执行，是可以在第一阶段谈判合理地提出的谈判议题。

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[69] 详见“改善最不发达国家的市场准入”，UNCTAD/DITC/TNCD/4(2001 年 5 月)。

## ANNEX I

### Excerpt from WTO document WT/MIN(01)/DEC/1 of 20 November 2001:

### Ministerial Declaration – Adopted on 14 November 2001
### Ministerial Conference, Fourth Session, Doha, 9-14 November 2001

## WORK PROGRAMME

IMPLEMENTATION-RELATED ISSUES AND CONCERNS

12. We attach the utmost importance to the implementation-related issues and concerns raised by Members and are determined to find appropriate solutions to them. In this connection, and having regard to the General Council Decisions of 3 May and 15 December 2000, we further adopt the Decision on Implementation-Related Issues and Concerns in document WT/MIN(01)/17 to address a number of implementation problems faced by Members. We agree that negotiations on outstanding implementation issues shall be an integral part of the Work Programme we are establishing, and that agreements reached at an early stage in these negotiations shall be treated in accordance with the provisions of paragraph 47 below. In this regard, we shall proceed as follows: (a) where we provide a specific negotiating mandate in this Declaration, the relevant implementation issues shall be addressed under that mandate; (b) the other outstanding implementation issues shall be addressed as a matter of priority by the relevant WTO bodies, which shall report to the Trade Negotiations Committee, established under paragraph 46 below, by the end of 2002 for appropriate action.

WTO RULES

28. In the light of experience and of the increasing application of these instruments by Members, we agree to negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing Measures, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants. In the initial phase of the negotiations, participants will indicate the provisions, including disciplines on trade distorting practices, that they seek to clarify and improve in the subsequent phase. In the context of these negotiations, participants shall also aim to clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries. We note that fisheries subsidies are also referred to in paragraph 31.

29. We also agree to negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements. The negotiations shall take into account the developmental aspects of regional trade agreements.

## ANNEX II

### Excerpt from WTO document WT/MIN(01)17 of 20 November 2001:

### Implementation-Related Issues and Concerns – Decision of 14 November 2001
### Ministerial Conference, Fourth Session, Doha, 9-14 November 2001

7. Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994

7.1 Agrees that investigating authorities shall examine with special care any application for the initiation of an anti-dumping investigation where an investigation of the same product from the same Member resulted in a negative finding within the 365 days prior to the filing of the application and that, unless this pre-initiation examination indicates that circumstances have changed, the investigation shall not proceed.

7.2 Recognizes that, while Article 15 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 is a mandatory provision, the modalities for its application would benefit from clarification. Accordingly, the Committee on Anti-Dumping Practices is instructed, through its working group on Implementation, to examine this issue and to draw up appropriate recommendations within twelve months on how to operationalize this provision.

7.3 Takes note that Article 5.8 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 does not specify the time-frame to be used in determining the volume of dumped imports, and that this lack of specificity creates uncertainties in the implementation of the provision. The Committee on Anti-Dumping Practices is instructed, through its working group on Implementation, to study this issue and draw up recommendations within 12 months, with a view to ensuring the maximum possible predictability and objectivity in the application of time frames.

7.4 Takes note that Article 18.6 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 requires the Committee on Anti-Dumping Practices to review annually the implementation and operation of the Agreement taking into account the objectives thereof. The Committee on Anti-dumping Practices is instructed to draw up guidelines for the improvement of annual reviews and to report its views and recommendations to the General Council for subsequent decision within 12 months.

# ANNEX III

## AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

*Members* hereby *agree* as follows:

PART I

*Article 1*

*Principles*

An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated[1] and conducted in accordance with the provisions of this Agreement. The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations.

*Article 2*

*Determination of Dumping*

2.1 For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export 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.

2.2 When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country[2], such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is

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[1] The term "initiated" as used in this Agreement means the procedural action by which a Member formally commences an investigation as provided in Article 5.

[2] Sales of the like product destined for consumption in the domestic market of the exporting country shall normally be considered a sufficient quantity for the determination of the normal value if such sales constitute 5 per cent or more of the sales of the product under consideration to the importing Member, provided that a lower ratio should be acceptable where the evidence demonstrates that domestic sales at such lower ratio are nonetheless of sufficient magnitude to provide for a proper comparison.

representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.

2.2.1 Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if the authorities[3] determine that such sales are made within an extended period of time[4] in substantial quantities[5] and are at prices which do not provide for the recovery of all costs within a reasonable period of time. If prices which are below per unit costs at the time of sale are above weighted average per unit costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time.

2.2.1.1 For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs. Unless already reflected in the cost allocations under this sub-paragraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or

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[3] When in this Agreement the term "authorities" is used, it shall be interpreted as meaning authorities at an appropriate senior level.

[4] The extended period of time should normally be one year but shall in no case be less than six months.

[5] Sales below per unit costs are made in substantial quantities when the authorities establish that the weighted average selling price of the transactions under consideration for the determination of the normal value is below the weighted average per unit costs, or that the volume of sales below per unit costs represents not less than 20 per cent of the volume sold in transactions under consideration for the determination of the normal value.

current production, or for circumstances in which costs during the period of investigation are affected by start-up operations.[6]

2.2.2 For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:

(i) the actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products;

(ii) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;

(iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.

2.3 In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.

2.4 A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any

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[6] The adjustment made for start-up operations shall reflect the costs at the end of the start-up period or, if that period extends beyond the period of investigation, the most recent costs which can reasonably be taken into account by the authorities during the investigation.

other differences which are also demonstrated to affect price comparability.[7] In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

2.4.1 When the comparison under paragraph 4 requires a conversion of currencies, such conversion should be made using the rate of exchange on the date of sale[8], provided that when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used. Fluctuations in exchange rates shall be ignored and in an investigation the authorities shall allow exporters at least 60 days to have adjusted their export prices to reflect sustained movements in exchange rates during the period of investigation.

2.4.2 Subject to the provisions governing fair comparison in paragraph 4, 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. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

2.5 In the case where products are not imported directly from the country of origin but are exported to the importing Member from an intermediate country, the price at which the products are sold from the country of export to the importing Member shall normally be compared with the comparable price in the country of export. However, comparison may be made with the price in the country of origin, if, for example, the products are merely transshipped through the country of export, or such products are not produced in the country of export, or there is no comparable price for them in the country of export.

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[7] It is understood that some of the above factors may overlap, and authorities shall ensure that they do not duplicate adjustments that have been already made under this provision.

[8] Normally, the date of sale would be the date of contract, purchase order, order confirmation, or invoice, whichever establishes the material terms of sale.

2.6 Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

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

*Article 3*

*Determination of Injury*[9]

3.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both *(a)* the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and *(b)* the consequent impact of these imports on domestic producers of such products.

3.2 With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

3.3 Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that *(a)* the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible and *(b)* a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

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[9] Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

3.4 The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

3.5 It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

3.6 The effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits. If such separate identification of that production is not possible, the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

3.7 A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.[10] In making a determination regarding the existence of a threat of material injury, the authorities should consider, *inter alia*, such factors as:

(i) a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation;

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[10] One example, though not an exclusive one, is that there is convincing reason to believe that there will be, in the near future, substantially increased importation of the product at dumped prices.

(ii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;

(iii) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and

(iv) inventories of the product being investigated.

No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur.

3.8 With respect to cases where injury is threatened by dumped imports, the application of anti-dumping measures shall be considered and decided with special care.

*Article 4*

*Definition of Domestic Industry*

4.1 For the purposes of this Agreement, the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that:

(i) when producers are related[11] to the exporters or importers or are themselves importers of the allegedly dumped product, the term "domestic industry" may be interpreted as referring to the rest of the producers;

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[11] For the purpose of this paragraph, producers shall be deemed to be related to exporters or importers only if *(a)* one of them directly or indirectly controls the other; or *(b)* both of them are directly or indirectly controlled by a third person; or *(c)* together they directly or indirectly control a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers. For the purpose of this paragraph, one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.

(ii) in exceptional circumstances the territory of a Member may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if *(a)* the producers within such market sell all or almost all of their production of the product in question in that market, and *(b)* the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured, provided there is a concentration of dumped imports into such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such market.

4.2 When the domestic industry has been interpreted as referring to the producers in a certain area, i.e. a market as defined in paragraph 1(ii), anti-dumping duties shall be levied[12] only on the products in question consigned for final consumption to that area. When the constitutional law of the importing Member does not permit the levying of anti-dumping duties on such a basis, the importing Member may levy the anti-dumping duties without limitation only if *(a)* the exporters shall have been given an opportunity to cease exporting at dumped prices to the area concerned or otherwise give assurances pursuant to Article 8 and adequate assurances in this regard have not been promptly given, and *(b)* such duties cannot be levied only on products of specific producers which supply the area in question.

4.3 Where two or more countries have reached under the provisions of paragraph 8(a) of Article XXIV of GATT 1994 such a level of integration that they have the characteristics of a single, unified market, the industry in the entire area of integration shall be taken to be the domestic industry referred to in paragraph 1.

4.4 The provisions of paragraph 6 of Article 3 shall be applicable to this Article.

*Article 5*

*Initiation and Subsequent Investigation*

5.1 Except as provided for in paragraph 6, an investigation to determine the existence, degree and effect of any alleged dumping shall be initiated upon a written application by or on behalf of the domestic industry.

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[12] As used in this Agreement "levy" shall mean the definitive or final legal assessment or collection of a duty or tax.

5.2 An application under paragraph 1 shall include evidence of *(a)* dumping, *(b)* injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement and *(c)* a causal link between the dumped imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:

(i) the identity of the applicant and a description of the volume and value of the domestic production of the like product by the applicant. Where a written application is made on behalf of the domestic industry, the application shall identify the industry on behalf of which the application is made by a list of all known domestic producers of the like product (or associations of domestic producers of the like product) and, to the extent possible, a description of the volume and value of domestic production of the like product accounted for by such producers;

(ii) a complete description of the allegedly dumped product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;

(iii) information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export (or, where appropriate, information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries, or on the constructed value of the product) and information on export prices or, where appropriate, on the prices at which the product is first resold to an independent buyer in the territory of the importing Member;

(iv) information on the evolution of the volume of the allegedly dumped imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 3.

5.3 The authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation.

5.4 An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed[13] by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry.[14] The application shall be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.

5.5 The authorities shall avoid, unless a decision has been made to initiate an investigation, any publicizing of the application for the initiation of an investigation. However, after receipt of a properly documented application and before proceeding to initiate an investigation, the authorities shall notify the government of the exporting Member concerned.

5.6 If, in special circumstances, the authorities concerned decide to initiate an investigation without having received a written application by or on behalf of a domestic industry for the initiation of such investigation, they shall proceed only if they have sufficient evidence of dumping, injury and a causal link, as described in paragraph 2, to justify the initiation of an investigation.

5.7 The evidence of both dumping and injury shall be considered simultaneously *(a)* in the decision whether or not to initiate an investigation, and *(b)* thereafter, during the course of the investigation, starting on a date not later than the earliest date on which in accordance with the provisions of this Agreement provisional measures may be applied.

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[13] In the case of fragmented industries involving an exceptionally large number of producers, authorities may determine support and opposition by using statistically valid sampling techniques.

[14] Members are aware that in the territory of certain Members employees of domestic producers of the like product or representatives of those employees may make or support an application for an investigation under paragraph 1.

5.8 An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, or the injury, is negligible. The margin of dumping shall be considered to be *de minimis* if this margin is less than 2 per cent, expressed as a percentage of the export price. The volume of dumped imports shall normally be regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 3 per cent of imports of the like product in the importing Member, unless countries which individually account for less than 3 per cent of the imports of the like product in the importing Member collectively account for more than 7 per cent of imports of the like product in the importing Member.

5.9 An anti-dumping proceeding shall not hinder the procedures of customs clearance.

5.10 Investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation.

*Article 6*

*Evidence*

6.1 All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

6.1.1 Exporters or foreign producers receiving questionnaires used in an anti-dumping investigation shall be given at least 30 days for reply.[15] Due consideration should be given to any request for an extension of the 30-day period and, upon cause shown, such an extension should be granted whenever practicable.

6.1.2 Subject to the requirement to protect confidential information, evidence presented in writing by one interested party shall be made available promptly to other interested parties participating in the investigation.

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[15] As a general rule, the time-limit for exporters shall be counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week from the date on which it was sent to the respondent or transmitted to the appropriate diplomatic representative of the exporting Member or, in the case of a separate customs territory Member of the WTO, an official representative of the exporting territory.

6.1.3 As soon as an investigation has been initiated, the authorities shall provide the full text of the written application received under paragraph 1 of Article 5 to the known exporters[16] and to the authorities of the exporting Member and shall make it available, upon request, to other interested parties involved. Due regard shall be paid to the requirement for the protection of confidential information, as provided for in paragraph 5.

6.2 Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party's case. Interested parties shall also have the right, on justification, to present other information orally.

6.3 Oral information provided under paragraph 2 shall be taken into account by the authorities only in so far as it is subsequently reproduced in writing and made available to other interested parties, as provided for in subparagraph 1.2.

6.4 The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.

6.5 Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.[17]

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[16] It being understood that, where the number of exporters involved is particularly high, the full text of the written application should instead be provided only to the authorities of the exporting Member or to the relevant trade association.

[17] Members are aware that in the territory of certain Members disclosure pursuant to a narrowly-drawn protective order may be required.

6.5.1 The authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

6.5.2 If the authorities find that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.[18]

6.6 Except in circumstances provided for in paragraph 8, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based.

6.7 In order to verify information provided or to obtain further details, the authorities may carry out investigations in the territory of other Members as required, provided they obtain the agreement of the firms concerned and notify the representatives of the government of the Member in question, and unless that Member objects to the investigation. The procedures described in Annex I shall apply to investigations carried out in the territory of other Members. Subject to the requirement to protect confidential information, the authorities shall make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 9, to the firms to which they pertain and may make such results available to the applicants.

6.8 In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph.

6.9 The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

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[18] Members agree that requests for confidentiality should not be arbitrarily rejected.

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.

6.10.1 Any selection of exporters, producers, importers or types of products made under this paragraph shall preferably be chosen in consultation with and with the consent of the exporters, producers or importers concerned.

6.10.2 In cases where the authorities have limited their examination, as provided for in this paragraph, they shall nevertheless determine an individual margin of dumping for any exporter or producer not initially selected who submits the necessary information in time for that information to be considered during the course of the investigation, except where the number of exporters or producers is so large that individual examinations would be unduly burdensome to the authorities and prevent the timely completion of the investigation. Voluntary responses shall not be discouraged.

6.11 For the purposes of this Agreement, "interested parties" shall include:

(i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product;

(ii) the government of the exporting Member; and

(iii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.

This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties.

6.12 The authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organizations in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding dumping, injury and causality.

6.13 The authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and shall provide any assistance practicable.

6.14 The procedures set out above are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with relevant provisions of this Agreement.

*Article 7*

*Provisional Measures*

7.1 Provisional measures may be applied only if:

(i) an investigation has been initiated in accordance with the provisions of Article 5, a public notice has been given to that effect and interested parties have been given adequate opportunities to submit information and make comments;

(ii) a preliminary affirmative determination has been made of dumping and consequent injury to a domestic industry; and

(iii) the authorities concerned judge such measures necessary to prevent injury being caused during the investigation.

7.2 Provisional measures may take the form of a provisional duty or, preferably, a security - by cash deposit or bond - equal to the amount of the anti-dumping duty provisionally estimated, being not greater than the provisionally estimated margin of dumping. Withholding of appraisement is an appropriate provisional measure, provided that the normal duty and the estimated amount of the anti-dumping duty be indicated and as long as the withholding of appraisement is subject to the same conditions as other provisional measures.

7.3 Provisional measures shall not be applied sooner than 60 days from the date of initiation of the investigation.

7.4 The application of provisional measures shall be limited to as short a period as possible, not exceeding four months or, on decision of the authorities concerned, upon request by exporters representing a significant percentage of the trade involved, to a period not exceeding six months. When authorities, in the course of an investigation, examine whether a duty lower than the margin of dumping would be sufficient to remove injury, these periods may be six and nine months, respectively.

7.5 The relevant provisions of Article 9 shall be followed in the application of provisional measures.

*Article 8*

*Price Undertakings*

8.1 Proceedings may[19] be suspended or terminated without the imposition of provisional measures or anti-dumping duties upon receipt of satisfactory voluntary undertakings from any exporter to revise its prices or to cease exports to the area in question at dumped prices so that the authorities are satisfied that the injurious effect of the dumping is eliminated. Price increases under such undertakings shall not be higher than necessary to eliminate the margin of dumping. It is desirable that the price increases be less than the margin of dumping if such increases would be adequate to remove the injury to the domestic industry.

8.2 Price undertakings shall not be sought or accepted from exporters unless the authorities of the importing Member have made a preliminary affirmative determination of dumping and injury caused by such dumping.

8.3 Undertakings offered need not be accepted if the authorities consider their acceptance impractical, for example, if the number of actual or potential exporters is too great, or for other reasons, including reasons of general policy. Should the case arise and where practicable, the authorities shall provide to the exporter the reasons which have led them to consider acceptance of an undertaking as inappropriate, and shall, to the extent possible, give the exporter an opportunity to make comments thereon.

8.4 If an undertaking is accepted, the investigation of dumping and injury shall nevertheless be completed if the exporter so desires or the authorities so decide. In such a case, if a negative determination of dumping or injury is made, the undertaking shall automatically lapse, except in cases where such a determination is due in large part to the existence of a price undertaking. In such cases, the authorities may require that an undertaking be maintained for a reasonable period consistent with the provisions of this Agreement. In the event that an affirmative determination of dumping and injury is made, the undertaking shall continue consistent with its terms and the provisions of this Agreement.

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[19] The word "may" shall not be interpreted to allow the simultaneous continuation of proceedings with the implementation of price undertakings except as provided in paragraph 4.

8.5 Price undertakings may be suggested by the authorities of the importing Member, but no exporter shall be forced to enter into such undertakings. The fact that exporters do not offer such undertakings, or do not accept an invitation to do so, shall in no way prejudice the consideration of the case. However, the authorities are free to determine that a threat of injury is more likely to be realized if the dumped imports continue.

8.6 Authorities of an importing Member may require any exporter from whom an undertaking has been accepted to provide periodically information relevant to the fulfilment of such an undertaking and to permit verification of pertinent data. In case of violation of an undertaking, the authorities of the importing Member may take, under this Agreement in conformity with its provisions, expeditious actions which may constitute immediate application of provisional measures using the best information available. In such cases, definitive duties may be levied in accordance with this Agreement on products entered for consumption not more than 90 days before the application of such provisional measures, except that any such retroactive assessment shall not apply to imports entered before the violation of the undertaking.

*Article 9*

*Imposition and Collection of Anti-Dumping Duties*

9.1 The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry.

9.2 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.

9.3 The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.

9.3.1 When the amount of the anti-dumping duty is assessed on a retrospective basis, the determination of the final liability for payment of anti-dumping duties shall take place as soon as possible, normally within 12 months, and in no case more than 18 months, after the date on which a request for a final assessment of the amount of the anti-dumping duty has been made.[20] Any refund shall be made promptly and normally in not more than 90 days following the determination of final liability made pursuant to this sub-paragraph. In any case, where a refund is not made within 90 days, the authorities shall provide an explanation if so requested.

9.3.2 When the amount of the anti-dumping duty is assessed on a prospective basis, provision shall be made for a prompt refund, upon request, of any duty paid in excess of the margin of dumping. A refund of any such duty paid in excess of the actual margin of dumping shall normally take place within 12 months, and in no case more than 18 months, after the date on which a request for a refund, duly supported by evidence, has been made by an importer of the product subject to the anti-dumping duty. The refund authorized should normally be made within 90 days of the above-noted decision.

9.3.3 In determining whether and to what extent a reimbursement should be made when the export price is constructed in accordance with paragraph 3 of Article 2, authorities should take account of any change in normal value, any change in costs incurred between importation and resale, and any movement in the resale price which is duly reflected in subsequent selling prices, and should calculate the export price with no deduction for the amount of anti-dumping duties paid when conclusive evidence of the above is provided.

9.4 When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:

(i) the weighted average margin of dumping established with respect to the selected exporters or producers or,

(ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined,

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[20] It is understood that the observance of the time-limits mentioned in this subparagraph and in subparagraph 3.2 may not be possible where the product in question is subject to judicial review proceedings.

provided that the authorities shall disregard for the purpose of this paragraph any zero and *de minimis* margins and margins established under the circumstances referred to in paragraph 8 of Article 6. The authorities shall apply individual duties or normal values to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation, as provided for in subparagraph 10.2 of Article 6.

9.5 If a product is subject to anti-dumping duties in an importing Member, the authorities shall promptly carry out a review for the purpose of determining individual margins of dumping for any exporters or producers in the exporting country in question who have not exported the product to the importing Member during the period of investigation, provided that these exporters or producers can show that they are not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product. Such a review shall be initiated and carried out on an accelerated basis, compared to normal duty assessment and review proceedings in the importing Member. No anti-dumping duties shall be levied on imports from such exporters or producers while the review is being carried out. The authorities may, however, withhold appraisement and/or request guarantees to ensure that, should such a review result in a determination of dumping in respect of such producers or exporters, anti-dumping duties can be levied retroactively to the date of the initiation of the review.

*Article 10*

*Retroactivity*

10.1 Provisional measures and anti-dumping duties shall only be applied to products which enter for consumption after the time when the decision taken under paragraph 1 of Article 7 and paragraph 1 of Article 9, respectively, enters into force, subject to the exceptions set out in this Article.

10.2 Where a final determination of injury (but not of a threat thereof or of a material retardation of the establishment of an industry) is made or, in the case of a final determination of a threat of injury, where the effect of the dumped imports would, in the absence of the provisional measures, have led to a determination of injury, anti-dumping duties may be levied retroactively for the period for which provisional measures, if any, have been applied.

10.3 If the definitive anti-dumping duty is higher than the provisional duty paid or payable, or the amount estimated for the purpose of the security, the difference shall not be collected. If the definitive duty is lower than the provisional duty paid or payable, or the amount estimated for the purpose of the security, the difference shall be reimbursed or the duty recalculated, as the case may be.

10.4 Except as provided in paragraph 2, where a determination of threat of injury or material retardation is made (but no injury has yet occurred) a definitive anti-dumping duty may be imposed only from the date of the determination of threat of injury or material retardation, and any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

10.5 Where a final determination is negative, any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

10.6 A definitive anti-dumping duty may be levied on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures, when the authorities determine for the dumped product in question that:

(i) there is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practises dumping and that such dumping would cause injury, and

(ii) the injury is caused by massive dumped imports of a product in a relatively short time which in light of the timing and the volume of the dumped imports and other circumstances (such as a rapid build-up of inventories of the imported product) is likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied, provided that the importers concerned have been given an opportunity to comment.

10.7 The authorities may, after initiating an investigation, take such measures as the withholding of appraisement or assessment as may be necessary to collect anti-dumping duties retroactively, as provided for in paragraph 6, once they have sufficient evidence that the conditions set forth in that paragraph are satisfied.

10.8 No duties shall be levied retroactively pursuant to paragraph 6 on products entered for consumption prior to the date of initiation of the investigation.

*Article 11*

*Duration and Review of Anti-Dumping Duties and Price Undertakings*

11.1 An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.

11.2 The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review.[21] Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.

11.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.[22] The duty may remain in force pending the outcome of such a review.

11.4 The provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.

11.5 The provisions of this Article shall apply *mutatis mutandis* to price undertakings accepted under Article 8.

*Article 12*

*Public Notice and Explanation of Determinations*

12.1 When the authorities are satisfied that there is sufficient evidence to justify the initiation of an anti-dumping investigation pursuant to Article 5, the Member or Members the products of which are subject to such investigation and other interested parties known to the investigating authorities to have an interest therein shall be notified and a public notice shall be given.

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[21] A determination of final liability for payment of anti-dumping duties, as provided for in paragraph 3 of Article 9, does not by itself constitute a review within the meaning of this Article.

[22] When the amount of the anti-dumping duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding under subparagraph 3.1 of Article 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

12.1.1 A public notice of the initiation of an investigation shall contain, or otherwise make available through a separate report[23], adequate information on the following:

(i) the name of the exporting country or countries and the product involved;

(ii) the date of initiation of the investigation;

(iii) the basis on which dumping is alleged in the application;

(iv) a summary of the factors on which the allegation of injury is based;

(v) the address to which representations by interested parties should be directed;

(vi) the time-limits allowed to interested parties for making their views known.

12.2 Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 8, of the termination of such an undertaking, and of the termination of a definitive anti-dumping duty. Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.

12.2.1 A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular:

(i) the names of the suppliers, or when this is impracticable, the supplying countries involved;

(ii) a description of the product which is sufficient for customs purposes;

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[23] Where authorities provide information and explanations under the provisions of this Article in a separate report, they shall ensure that such report is readily available to the public.

(iii) the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2;

(iv) considerations relevant to the injury determination as set out in Article 3;

(v) the main reasons leading to the determination.

12.2.2 A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6.

12.2.3 A public notice of the termination or suspension of an investigation following the acceptance of an undertaking pursuant to Article 8 shall include, or otherwise make available through a separate report, the non-confidential part of this undertaking.

12.3 The provisions of this Article shall apply *mutatis mutandis* to the initiation and completion of reviews pursuant to Article 11 and to decisions under Article 10 to apply duties retroactively.

*Article 13*

*Judicial Review*

Each Member whose national legislation contains provisions on anti-dumping measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 11. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question.

*Article 14*

*Anti-Dumping Action on Behalf of a Third Country*

14.1 An application for anti-dumping action on behalf of a third country shall be made by the authorities of the third country requesting action.

14.2 Such an application shall be supported by price information to show that the imports are being dumped and by detailed information to show that the alleged dumping is causing injury to the domestic industry concerned in the third country. The government of the third country shall afford all assistance to the authorities of the importing country to obtain any further information which the latter may require.

14.3 In considering such an application, the authorities of the importing country shall consider the effects of the alleged dumping on the industry concerned as a whole in the third country; that is to say, the injury shall not be assessed in relation only to the effect of the alleged dumping on the industry's exports to the importing country or even on the industry's total exports.

14.4 The decision whether or not to proceed with a case shall rest with the importing country. If the importing country decides that it is prepared to take action, the initiation of the approach to the Council for Trade in Goods seeking its approval for such action shall rest with the importing country.

*Article 15*

*Developing Country Members*

It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.

PART II

*Article 16*

*Committee on Anti-Dumping Practices*

16.1 There is hereby established a Committee on Anti-Dumping Practices (referred to in this Agreement as the "Committee") composed of representatives from each of the Members. The Committee shall elect its own Chairman and shall meet not less than twice a year and otherwise as envisaged by relevant provisions of this Agreement at the request of any Member. The Committee shall carry out responsibilities as assigned to it under this Agreement or by the Members and it shall afford Members the opportunity of consulting on any matters relating to the operation of the Agreement or the furtherance of its objectives. The WTO Secretariat shall act as the secretariat to the Committee.

16.2 The Committee may set up subsidiary bodies as appropriate.

16.3 In carrying out their functions, the Committee and any subsidiary bodies may consult with and seek information from any source they deem appropriate. However, before the Committee or a subsidiary body seeks such information from a source within the jurisdiction of a Member, it shall inform the Member involved. It shall obtain the consent of the Member and any firm to be consulted.

16.4 Members shall report without delay to the Committee all preliminary or final anti-dumping actions taken. Such reports shall be available in the Secretariat for inspection by other Members. Members shall also submit, on a semi-annual basis, reports of any anti-dumping actions taken within the preceding six months. The semi-annual reports shall be submitted on an agreed standard form.

16.5 Each Member shall notify the Committee *(a)* which of its authorities are competent to initiate and conduct investigations referred to in Article 5 and *(b)* its domestic procedures governing the initiation and conduct of such investigations.

*Article 17*

*Consultation and Dispute Settlement*

17.1 Except as otherwise provided herein, the Dispute Settlement Understanding is applicable to consultations and the settlement of disputes under this Agreement.

17.2 Each Member shall afford sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, representations made by another Member with respect to any matter affecting the operation of this Agreement.

17.3 If any Member considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the achievement of any objective is being impeded, by another Member or Members, it may, with a view to reaching a mutually satisfactory resolution of the matter, request in writing consultations with the Member or Members in question. Each Member shall afford sympathetic consideration to any request from another Member for consultation.

17.4 If the Member that requested consultations considers that the consultations pursuant to paragraph 3 have failed to achieve a mutually agreed solution, and if final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties or to accept price undertakings, it may refer the matter to the Dispute Settlement Body ("DSB"). When a provisional measure has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer such matter to the DSB.

17.5 The DSB shall, at the request of the complaining party, establish a panel to examine the matter based upon:

(i) a written statement of the Member making the request indicating how a benefit accruing to it, directly or indirectly, under this Agreement has been nullified or impaired, or that the achieving of the objectives of the Agreement is being impeded, and

(ii) the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member.

17.6 In examining the matter referred to in paragraph 5:

(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;

(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

17.7 Confidential information provided to the panel shall not be disclosed without formal authorization from the person, body or authority providing such information. Where such information is requested from the panel but release of such information by the panel is not authorized, a non-confidential summary of the information, authorized by the person, body or authority providing the information, shall be provided.

PART III

*Article 18*

*Final Provisions*

18.1 No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.[24]

18.2 Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

18.3 Subject to subparagraphs 3.1 and 3.2, the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement.

18.3.1 With respect to the calculation of margins of dumping in refund procedures under paragraph 3 of Article 9, the rules used in the most recent determination or review of dumping shall apply.

18.3.2 For the purposes of paragraph 3 of Article 11, existing anti-dumping measures shall be deemed to be imposed on a date not later than the date of entry into force for a Member of the WTO Agreement, except in cases in which the domestic legislation of a Member in force on that date already included a clause of the type provided for in that paragraph.

18.4 Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question.

18.5 Each Member shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.

18.6 The Committee shall review annually the implementation and operation of this Agreement taking into account the objectives thereof. The Committee shall inform annually the Council for Trade in Goods of developments during the period covered by such reviews.

18.7 The Annexes to this Agreement constitute an integral part thereof.

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[24] This is not intended to preclude action under other relevant provisions of GATT 1994, as appropriate.

# ANNEX I

## PROCEDURES FOR ON-THE-SPOT INVESTIGATIONS PURSUANT TO PARAGRAPH 7 OF ARTICLE 6

1. Upon initiation of an investigation, the authorities of the exporting Member and the firms known to be concerned should be informed of the intention to carry out on-the-spot investigations.

2. If in exceptional circumstances it is intended to include non-governmental experts in the investigating team, the firms and the authorities of the exporting Member should be so informed. Such non-governmental experts should be subject to effective sanctions for breach of confidentiality requirements.

3. It should be standard practice to obtain explicit agreement of the firms concerned in the exporting Member before the visit is finally scheduled.

4. As soon as the agreement of the firms concerned has been obtained, the investigating authorities should notify the authorities of the exporting Member of the names and addresses of the firms to be visited and the dates agreed.

5. Sufficient advance notice should be given to the firms in question before the visit is made.

6. Visits to explain the questionnaire should only be made at the request of an exporting firm. Such a visit may only be made if *(a)* the authorities of the importing Member notify the representatives of the Member in question and *(b)* the latter do not object to the visit.

7. As the main purpose of the on-the-spot investigation is to verify information provided or to obtain further details, it should be carried out after the response to the questionnaire has been received unless the firm agrees to the contrary and the government of the exporting Member is informed by the investigating authorities of the anticipated visit and does not object to it; further, it should be standard practice prior to the visit to advise the firms concerned of the general nature of the information to be verified and of any further information which needs to be provided, though this should not preclude requests to be made on the spot for further details to be provided in the light of information obtained.

8. Enquiries or questions put by the authorities or firms of the exporting Members and essential to a successful on-the-spot investigation should, whenever possible, be answered before the visit is made.

# ANNEX II

## BEST INFORMATION AVAILABLE IN TERMS OF PARAGRAPH 8 OF ARTICLE 6

1. As soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response. The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.

2. The authorities may also request that an interested party provide its response in a particular medium (e.g. computer tape) or computer language. Where such a request is made, the authorities should consider the reasonable ability of the interested party to respond in the preferred medium or computer language, and should not request the party to use for its response a computer system other than that used by the party. The authority should not maintain a request for a computerized response if the interested party does not maintain computerized accounts and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble. The authorities should not maintain a request for a response in a particular medium or computer language if the interested party does not maintain its computerized accounts in such medium or computer language and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble.

3. All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made. If a party does not respond in the preferred medium or computer language but the authorities find that the circumstances set out in paragraph 2 have been satisfied, the failure to respond in the preferred medium or computer language should not be considered to significantly impede the investigation.

4. Where the authorities do not have the ability to process information if provided in a particular medium (e.g. computer tape), the information should be supplied in the form of written material or any other form acceptable to the authorities.

5. Even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability.

6. If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation. If the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determinations.

7. If the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they should do so with special circumspection. In such cases, the authorities should, where practicable, check the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation. It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate.

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