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ANTI-DUMPING PROCEDURES IN THE EURASEC CUSTOMS UNION

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ANTI-DUMPING PROCEDURES IN THE EURASEC CUSTOMS UNION²

The creation of the EurAsEC Customs Union and Russia's ascension into the WTO has led to a radical change in Russia's anti-dumping legislation. Anti-dumping regulation ceased to fall under national jurisdiction and was transferred to the Eurasian Economic Commission, a supranational regulator. This article analyzes the new anti-dumping legislation of the EurAsEC Customs Union, anti-dumping procedures, their principles, participants, and main stages, as well as the legal treatment of information used in the anti-dumping regulation.

Keywords: EurAsEC, customs union, anti-dumping measures, anti-dumping duty

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Introduction

Among the non-tariff measures used in contemporary international trade practices, anti-dumping measures occupy a special place. This tool is widely used in foreign trade practices, as well as within the EurAsEC Customs Union, to protect domestic producers of goods from the dumping of imports. Dumping refers to the import of goods at a price below their normal value.

We should note that during economic crises, dumping measures have a special place in the arsenal of non-tariff regulation of foreign trade, mainly due to the selective nature of their impact. If customs and tariff policy can be compared to “conventional weapons” that are not capable of selectively stopping the penetration of foreign goods into the domestic market, then anti-dumping duties are a “finely targeted means” of trade policy: they impede the appearance on the market of only those goods that distort the conditions of free trade.

The Legal Basis of Anti-dumping Regulation

The legal mechanism of anti-dumping regulation in the Russian Federation has recently undergone significant changes. First, with the formation of the EurAsEC Customs Union between the Republic of Belarus, the Russian Federation, and the Republic of Kazakhstan, the main anti-dumping regulation powers transferred from the national level to the supranational level, represented by the Eurasian Economic Commission (EEC). Second, Russia’s joining the WTO has resulted in the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (GATT Anti-dumping Code), concluded in Marrakesh on April 15, 1994, becoming part of the GATT legal system.³

Accepting WTO norms into its legal system, the Russian Federation undertook to follow the terms of the Anti-Dumping Code, including regulations establishing the procedures for anti-dumping investigations.

The consequences of the concurrent inclusion of the Russian Federation in the Customs Union have led to more tangible repercussions for Russian legislation on special protective, anti-dumping, and countervailing measures on imports of goods. The application of national legislation became limited and was made dependent on the position of the EurAsEC Customs Union’s customs legislation.

Before the establishment of the EurAsEC Customs Union, anti-dumping regulation in the Russian Federation, the Republic of Belarus, and the Republic of Kazakhstan was carried out in accordance with national legislation: in the Russian Federation the Federal Law from December 8, 2003, No. 165 - FZ “On Special Protective, Anti-dumping, and Countervailing Measures on

³ Sobranie zakonodatelstva Rossiyskoy Federacii (Collection of the legislation of the Russian Federation, hereinafter CL of RF), (2010), No. 37, (Annex, Part VI), Art. 2654-2678.

the Import of Goods”⁴; in the Republic of Belarus the Law of November 25, 2004 Number 346-Z “On Measures to protect the Economic Interests of the Republic of Belarus in Foreign Trade”⁵; and in the Republic of Kazakhstan the Law from December 28, 1998 Number 337-I “On Measures to protect the Domestic Market and the Imports of Goods” and the Law from July 13, 1999 Number 421-I “On Anti-Dumping Measures”⁶. Also of note, the national laws of these three states lack any significant differences in the legislative regulation of anti-dumping measures.

The creation of the EurAsEC Customs Union led to the formation of a single regulatory framework for anti-dumping regulation. On July 1, 2010, the Agreement on the Application of Special Protective, Anti-dumping, and Countervailing Measures against Third Countries from January 25, 2008, (hereinafter, the Agreement), came into force. It has established a framework for the legal regulation of protective measures in the trade of goods⁷.

The Agreement defines the concept of “anti-dumping measures”, (measures to counter dumped imports, which are used by the authorized body via *the introduction of anti-dumping duties*, including provisional anti-dumping duties, or *the approval of voluntary price commitments* made by the exporter), fixed general principles on the use of anti-dumping measures establishes the procedure for determining the margin of dumping, the damage to trade due to dumped imports, the introduction and application of anti-dumping measures, their validity and revision, and so forth. Particular attention is paid to procedural matters in the Agreement (Section V “The Conduction of Investigations”).

Along with the aforementioned Agreement, the source of anti-dumping law in the EurAsEC Customs Union is the Customs Code of the Customs Union, (hereinafter referred to as the Customs Code), as well as legally enforceable enactments of the supranational regulatory body, formally known as Decisions of the Eurasian Economic Commission (hereinafter referred to as the EEC).

Supranational Anti-dumping Regulation in the EurAsEC Customs Union

Anti-dumping regulation issues are discussed in several articles of the Customs Code. In Article 6 of the Code, the levying of anti-dumping duties, monitoring the correctness of their

⁴ CL of RF, (2003), No 50, Art. 4851.

⁵ Access to the texts of the legislative acts of the Republic of Belarus: The National Legal Internet Portal of the Republic of Belarus: <http://www.pravo.by>

⁶ Access to the texts of the legislative acts of the Republic of Kazakhstan: The Official Site of the Government of the Republic of Kazakhstan: <http://ru.government.kz>

⁷ In the Agreement, it is stipulated that its power is applicable only to trade in goods; its rules cannot be applied to the regulation of relations connected with the provision of services, works, the transfer of exclusive rights to intellectual property or the provision of the right to use intellectual property as well as investment and foreign exchange controls.

calculation and timely payment, as well as the application of measures for their involuntary collection is transferred to the authority of the customs bodies. Article 70 of the Customs Code establishes the principle according to which anti-dumping duties are set in accordance with the international treaties of the member states of the Customs Union and the laws of the member states of the Customs Union, and charged in the manner prescribed by the Customs Code for the collection of import duties, unless otherwise established by the Code⁸.

It should be noted that the transition to the supranational level of anti-dumping regulation did not occur within the Customs Union immediately. A transition period was provided for during which the authority to investigate – the basis that the anti-dumping measures were to be founded on – remained with the national authorities.

During the initial stage of the Customs Union, anti-dumping investigations by the supranational regulator, (the EEC's predecessor, the Commission of the Customs Union), proved difficult to carry out primarily due to the unpreparedness of the Commission's apparatus to implement such technically complicated types of administrative activities, which require special professional training and experience as well as competent national authorities and relevant expert skills and knowledge gathered by authorized national bodies, and corresponding expert experience and knowledge.

In addition, the sudden transition from investigation at the national level to investigations conducted by the Commission of the Customs Union has been linked by member states, and especially by the Russian Federation, with the risk of losing the ability to use anti-dumping procedures for trade and political purposes as a means of pressuring trade partners. That is why at the very beginning of the creation of the Customs Union the decision was made to apply anti-dumping measures following the rules of a "transition period".

As of July 1, 2010, the authority with respect to goods originating in the customs territories of third countries and destined for the single customs union territory was transferred to the Commission of the Customs Union, as provided by the Agreement (Decision of the Interstate Council at the Level of Heads of Government of 21 May 2010, Number 37). At the same time, the Commission for the transitional period itself commissioned authorized bodies of member states to conduct anti-dumping investigations.

The authorized national bodies, to whom were delegated the powers of the Customs Union Commission, were identified in the Decision of the Customs Union Commission of August 17, 2010, № 339: in the Russian Federation, this body became the Ministry of Industry

⁸ *Kozyrin, A. N.* The Scope of Supranational Regulation in the Single Economic Space EurAsEC (in Russian). *Reformi i pravo (Reforms and Law)*, 2013, No 3, p. 3-8; *Kozyrin, A. N.* The Organizational and Legal Basis of Customs Regulation in the EurAsEC Customs Union (in Russian). *Reformi i pravo (Reforms and Law)*, 2012, No 1, p. 3-15; *Yalbulganov, A. A., Troshkina, T. N.* Duties in the Mechanism of the State Regulation of Foreign Trade Activity (in Russian). *Finansovoye pravo (Financial Law)*, 2013, No 9, p. 19 - 23.

and Trade, in the Republic of Belarus it is the the Ministry of Foreign Affairs, and in Kazakhstan it is the Ministry of Economic Development and Trade.

In accordance with this decision, the authorized national bodies of the Commission were given the mandate for a transitional period of investigation regarding the performance of procedural actions in considering applications, initiation, conduct, and completion of investigations.

Upon the completion of investigations conducted by the authorized national bodies, all the cases were transferred to the Commission of the Customs Union, which, based on the results of investigations, decides on the use of protective measures, including anti-dumping duties.

The legal framework for anti-dumping regulation in the transition period was supplemented by the Agreement on the Application of Special Protective, Anti-dumping, and Countervailing Measures during the Transitional Period from November 19, 2010.

The mode of transition in respect to anti-dumping regulation also provided that measures to protect domestic markets that were previously introduced and applied in accordance with the national legislation of member states would continue to operate within the single customs territory. The legitimacy of the use of such anti-dumping measures comes from the Protocol on Certain Temporary Exemptions from the Mode of Operation of the Single Customs Territory of the Customs Union from July 5, 2010.

With the Decision of the Customs Union Commission from September 23, 2011, Number 802 “On Some Issues of Special Protective, Anti-dumping, and Countervailing Measures within the Common Customs Territory of the Customs Union”, the transition period for implementing anti-dumping regulation was, in fact, brought to a conclusion.

The body responsible for conducting investigations prior to the introduction of special protective, anti-dumping, and countervailing measures within the common customs territory of the Customs Union was the Department for Protective Measures in Foreign Trade of the Secretariat of the Customs Union Commission. As soon as the Decision from October 18, 2011, came into force the Department was given the mandate to conduct investigations and other procedural actions within the powers of anti-dumping regulation, and the authorized bodies of member states received the mandate to complete investigations of applications received before October 18, 2011.

Organizational changes in the structure of EEC led to the fact that, in accordance with the Decision of the Board of the EEC from May 16, 2012, Number 44 “On Some Issues of the Protection of the Domestic Market”, questions regarding anti-dumping investigations were to be realized within the framework of the EEC Department for the Protection of the Domestic Market.

***Anti-dumping Procedures in the EurAsEC Customs Union:
Principles, Stages, Documents***

Currently, the legal framework governing anti-dumping procedures that are conducted by the EEC are:

- The Agreement on the Application of Special Protective, Anti-dumping, and Countervailing Measures Against Third Countries (Moscow, January 25, 2008, as amended on October 18, 2011);

- The Protocol on the Procedure for the Designation of Bodies conducting Investigations, Findings, including those comprising Confidential Information, for the Purpose of Investigation, prior to the Introduction of Special Protective, Anti-dumping, and Countervailing Measures against Third Countries (St. Petersburg, November 19, 2010)⁹;

- The Regulations for Making and Drafting Decisions of the Eurasian Economic Commission Concerning Questions of Special Protective, Anti-dumping, and Countervailing Measures;

- The Provision for the Use and Protection of Confidential Information and Proprietary Information of Limited Distribution within the Investigating Body, (the latter two acts were approved by a Decision of the EEC Board on March 7, 2012, No. 1 “On Certain Issues in the Application of Special Protective, Anti-dumping, and Countervailing Measures in the Common Customs Territory of the Customs Union”).

The enquiry procedure is the most important step in establishing anti-dumping measures, reflecting the peculiarities of its legal nature as an instrument of non-tariff regulation, and thus differs from customs duty.

If import and export customs duties are paid upon the movement of goods across the customs border, and are fixed by a corresponding mark on the customs declaration, then the anti-dumping duties are levied upon the establishment of price dumping. The facts constituting the basis for the levying of anti-dumping duties are established as a result of an investigation by the competent body of the public administration in the prescribed manner, (the procedure of such an investigation is usually prescribed in detail in an international treaty or legal act).

The requirement for the conduction of a preliminary investigation before the introduction of anti-dumping measures was enshrined in article 3 of the Agreement on the Application of Special Protective, Anti-dumping, and Countervailing Measures against Third Countries. It is

⁹ This Protocol was adopted with the Decision of the EurAsEC Interstate Council from November 19, 2010, Number 59 “On International Agreements on the Application of Special Protective, Anti-dumping, and Countervailing Measures in the Customs Union within the Framework of the EurAsEC.” The Russian Federation ratified the Protocol in the Federal Law from July 11, 2011, Number 180-FZ “On the Ratification of The Protocol on the Procedure for the Designation of Bodies conducting Investigations, Findings, including those comprising Confidential Information, for the Purpose of Investigation, prior to the Introduction of Special Protective, Anti-dumping, and Countervailing Measures against Third Countries”, (CL of RF, (2011), No 29, Art. 4271).

also set out therein that on the basis of an investigation by a competent body, decisions are enacted concerning the introduction, revision, cancellation, or non-use of anti-dumping measures.

Investigations to determine whether dumped imports and the resulting material damage, the threat of causing such damage, or the substantial retardation of the establishment of economic sectors of a EurAsEC Customs Union member state are conducted by a competent body (currently the EEC) upon its own initiative, or on the basis of an application submitted in writing to the initiator of anti-dumping proceedings.

The statement initiating an anti-dumping proceeding may be submitted by the manufacturer of an analogous good in a state of the EurAsEC Customs Union or by an association of manufacturers, the majority of the participants of which produce similar goods. Also, the term “analogous good” in the anti-dumping proceedings is understood to be a completely identical good that is, or may come, under investigation, or in the absence of such a good, another good having characteristics similar to the characteristics of the good that is, or may come, under investigation.

Such applications must contain:

- Information about the applicant;
- A description of the good imported to the single customs territory, in respect to which an anti-dumping measure is requested;
- Identification of the exporting countries, countries of origin, or the origin of the product on the basis of customs statistics;
- Information about known producers and exporters of the product in the exporting country and known importers and known major consumers of this product in the countries of the Customs Union;
- Information about the change in the volume of imports to the single customs territory for the three years immediately preceding the date of application, in respect to which an anti-dumping measure is requested;
- Information about a change in the volume of exports of the analogous good from the single customs territory for the three years immediately preceding the date of application.

Besides the above listed information, the statement must include information about the presence of dumped imports of the product in respect to which an anti-dumping measure is requested, evidence of damage to property, threats of such damage, or significant retardation of the establishment of economic sectors of Customs Union nations due to dumped imports of the product, as well as a proposal for the introduction of anti-dumping measures, specifying the amount and duration of the measure.

Evidence is attached to the application which, in the anti-dumping proceeding, confirms that the share of the production of the analogous product by manufacturers in Customs Union member states who expressed support for the application account for at least 25% of the total volume of production of the analogous product within the territory of the Customs Union, on the condition that the volume of production of the analogous good by manufacturers in member states who express support for the application, account for more than half of the volume of the production of the analogous good by the manufacturers in member states expressing their opinion (support or opposition) to the application.

All information contained in the statement must be certified by the heads of the producers providing such information, as well as their employees responsible for accounting and financial reporting, in respect to information directly related to the data of production.

Evidence, information, and correspondence relating to anti-dumping investigations should be submitted to the EEC in Russian, and the original documents that are in a foreign language must be accompanied by a certified translation into Russian.

It should be noted that in 2012, the EEC Department for the Protection of the Domestic Market prepared and published¹⁰ Guidelines for the Preparation of Requests for the Application of Anti-dumping Measures. The recommendations include explanations about the requirements regarding the volume of information that must be included in the application and which can serve as a basis for a decision to initiate an investigation that could lead to the introduction of anti-dumping measures.

The recommended structure for a request includes six sections:

1) General provisions, including information about the applicants and the evidence supporting the request, a description of the product to be investigated, information about known foreign producers and exporters, and information about known importers and consumers within CU member states;

2) Evidence of dumped imports;

3) Foreign trade statistics data;

4) Evidence of material damage (or threat of material damage) to economic sectors of the CU;

5) Evidence of a causal link between the dumped imports of goods and material damage to economic sectors of the CU;

6) A proposal for the introduction of anti-dumping measures.

The application is submitted to the EEC Department for the Protection of the Domestic Market and the filing date is the date of its registration in the Department.

¹⁰ <http://www.eurasiancommission.org/ru/act/trade/podm/recomendacii/Pages/default.aspx>

The request for the application of anti-dumping measures can be rejected only due to the failure of the applicant to submit the necessary materials and to the unreliability of materials. Rejection of applications for other reasons is not permitted.

The EEC Department for the Protection of the Domestic Market must notify in writing the exporting country of the receipt of the request for the application of anti-dumping measures before a decision to initiate an investigation is made.

Prior to making a decision to initiate an investigation, the information contained in the request is checked. Within 30 calendar days from the date of the registration of the request, the EEC Department for the Protection of the Domestic Market verifies the sufficiency and reliability of the evidence, as well as other information contained in the request. The fixed period of one month may be extended, but not more than twice, if the investigating body requests additional information.

Before the decision to initiate an investigation, no information contained in the request is subject to public disclosure.

It should be noted that the applicant is entitled to withdraw the request. If it is done before the commencement of an investigation, the request is considered unfiled. If the request is withdrawn during the investigation, the investigation is terminated without the introduction of anti-dumping measures.

In accordance with the Rules of Procedure for Making and Drafting the Decisions of the Eurasian Economic Commission Concerning Questions of Special Protective, Anti-dumping, and Countervailing Measures (approved in the EEC Board Decision from March 7, 2012, No. 1), the decision to initiate an investigation, the refusal to hold it, the extension of an investigation and its completion in the absence of grounds for application, and the revision or abolition of anti-dumping measures is made by order of the Director of the EEC Department for the Protection of the Domestic Market on the agreement of a member of the Board for Trade – such as the minister. The decision to reject a request for the application of anti-dumping measures is made by the director of the Department.

Openness and transparency are fundamental principles of the anti-dumping process. An important legal guarantee of this principle is the notification, made by the investigating body, to interested parties on one procedure or another.

Thus, the authorized bodies of Customs Union member states send notice of the receipt of a request for the application of anti-dumping measures within five working days from the date of registration of such requests.

Notice of the initiation of an investigation is sent within five working days from the date of the commencement of the investigation by authorized bodies of member states with the goal of informing interested parties of their participation in the investigation.

The publication date on the official website of the EEC of a notice of the commencement of an investigation is recognized as the start date of an investigation.

Notice of a public hearing, conducted on the basis of a petition submitted in writing by any of the participants in the investigation, is sent to the competent authorities of member states no later than 15 calendar days before the date of the public hearing.

The period of investigation preceding the application of anti-dumping measures is established by the investigating body.

Interested parties may be included as participants in anti-dumping investigations. The latter must declare their intention to participate in the investigation by submitting a written statement of intent. From the moment of the submission of the statement of intent to participate in the investigation to the body conducting the investigation, the interested parties are considered as participants in the anti-dumping investigation.

As a participant in the anti-dumping proceedings, interested parties are entitled to submit information relevant to the investigation with sources indicated, in due time and without hindering the progress of the investigation.

The body conducting the investigation has the right to request more information from an interested party for investigation purposes. The response of the interested party must be submitted no later than 30 calendar days from the date of receipt of the request.

If the interested party fails to furnish the necessary requested information, or if it is not received by the specified time or contains inaccurate information, then the interested party is recognized as uncooperative and preliminary or final conclusions on the anti-dumping investigation can be made by the investigating body on the basis of the information available.

The body conducting the investigation provides participants with copies of the statement, or its non-confidential version if the statement contains confidential information.

During the investigation and upon request, the investigating body, taking into account the need to protect confidential information, provides participants of the investigation with the information submitted in writing by any interested parties as evidence relating to the object of investigation in order for them to familiarize themselves with this communication.

During the investigation, the investigation participants are given the opportunity to become acquainted with other communications relevant to the investigation and used during the investigation.

Important elements of the anti-dumping procedures include consultations concerning the object of the investigation. Such consultations are held upon the request of interested parties made to the investigating body.

The procedural guarantee of a fair and legally adversarial proceeding serves to give all interested parties the right to defend their interests in the investigation.

For this purpose, the body conducting the investigation provides all interested parties with an opportunity to meet so that they can present opposing points of view and offer rebuttal. It should be noted that all the interested parties are not required to attend the meeting; the absence of any interested party does not entail damage to their interests.

The following are vested with the right to submit information that is relevant to the investigation to the body conducting the investigation: Consumers using goods subject to investigation into their production, representatives of consumer associations, state agencies, local governmental bodies, and other parties entitled to present information that is relevant to the investigation to the body conducting the investigation.

The period of investigation is not to exceed 12 months from the date of the commencement of the investigation on the basis of a request to adopt anti-dumping measures. The body conducting the anti-dumping investigation may extend this period, but for not more than six months.

The completion date of the anti-dumping investigation is the date of the review of the EEC report on the investigation results and the draft decision on the adoption of anti-dumping measures.

If the body conducting the investigation comes to the conclusion that there is no basis for the application, revision, or cancellation of special protective, anti-dumping, or countervailing measures, then the date of the completion of the investigation is the publication date of the relevant notice from the body conducting the investigation.

In the event of the introduction of a provisional anti-dumping duty, the investigation should be completed before the expiration of the period of validity of the provisional duty.

A particularity in the conduction of an anti-dumping investigation is the possibility to terminate the investigation without introducing anti-dumping measures if the investigating body establishes that the margin of dumping is less than the minimum allowable margin,¹¹ or if the volume of an incident or possible incident of dumped imports,¹² or if the size of such imports causing material damage or threat of damage or substantial retardation of establishing economic

¹¹ The minimum allowable margin of dumping is understood to be a dumping margin, the amount of which does not exceed 2%.

¹² The volume of dumped imports from a particular exporting country is negligible if it is less than 3% of the total imports of the product under investigation to the single customs territory of the Customs Union as subject to the conditions specified in Art.31 of the Agreement.

sectors for any EurAsEC Customs Union member state are negligible (Article 31 of the Agreement on the Application of Special Protective, Anti-dumping, and Countervailing Measures against Third Countries).

The supranational regulator is notified in advance about the application of an anti-dumping measure by member states. The EEC sends draft decisions to the authorized bodies of member states (in Russia, this is the Ministry of Industry and Trade) on such anti-dumping measures as:

The introduction and application of a provisional anti-dumping duty, not later than 150 calendar days from the date of the commencement of the investigation;

The introduction and application of an anti-dumping duty, not later than 270 calendar days from the date of the commencement of the investigation;

The non usage of anti-dumping measures, not later than 60 calendar days before the expiration of the investigation.

In directing draft decisions on anti-dumping measures by authoritative bodies of EEC member states, reports of the results of the investigation are included, including those containing preliminary findings.

A pre-condition to decision-making on anti-dumping measures by the EEC is to discuss the draft decision at a meeting of the consultative body on trade.

The Legal Treatment of the Information used in Anti-dumping Procedures

Anti-dumping procedures involve the use of large amounts of information, including confidential information and proprietary information of limited distribution. This is why the legal treatment and protection of such information in the conduction of investigations becomes an important element in the legal regulation of the anti-dumping process.

In accordance with the Regulations on the Use and Protection of Confidential Information and Proprietary Information of Limited Distribution in the Body Responsible for Investigations (approved in the Decision of the Board of the EEC on March 7, 2012, No. 1) the head and personnel of the investigating body are required:

To not disclose confidential information and proprietary information of limited distribution;

To comply with the procedure for handling documents that contain confidential information and proprietary information of limited distribution;

To comply with work policies concerning the protection of information and access to documents in electronic form containing confidential information and proprietary information of limited distribution when they are processed;

To take measures to protect confidential information and proprietary information of limited distribution that prevent its unauthorized disclosure.

In the event of deliberate or negligent disclosure of confidential information and proprietary information of limited distribution, as well as the violation of the procedure for the use of documents containing such information, the manager and employee of the body conducting the investigation are subject to disciplinary responsibility.

Conclusion

The supranational regulation of anti-dumping procedures is one of the most important conditions for the formation of an organizational and legal decision-making mechanism for anti-dumping measures in the framework of the EurAsEC Customs Union. The meaning of the anti-dumping law of the EurAsEC Customs Union is difficult to overemphasize in modern conditions of increased competition in world markets, and thus there is an increased need to protect domestic producers from various manifestations of unfair competition, including the import of foreign goods at dumping prices. The new legal framework is already providing its first results: in 2013 there were three decisions for the introduction of anti-dumping duties (for stainless steel pipes and cast iron bath tubs originating in China, as well as light commercial vehicles originating from Germany, Italy, and Turkey), and also one decision to extend anti-dumping measures against roller bearings from China.

It is obvious that as the legal mechanism for applying anti-dumping measures within the territory of the EurAsEC Customs Union was created so rapidly that it is currently in need of improvements, one of which, in our opinion, is to bring it into conformation with the standards of anti-dumping proceedings established in the GATT Anti-dumping Code.

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