

## 国际贸易 法律月刊

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April  
2013

## Article 文章

### Price undertaking and discretion to authority– Rule 15.3 analyzed

#### 价格承诺及调查机关的自由裁量-对15.3条的分析

By **T.D. Satish**

The objective of imposing anti-dumping duty is not to penalize an exporter for selling goods at less than fair value, but to only create a level playing field for domestically produced articles to compete with imported articles. Anti-dumping provisions encourage exporters to fully participate and avail a favorable order including suspension of investigation, which will be sufficient to remove injurious effects caused by low priced imports. Article 8 of the WTO: Agreement on Anti-Dumping (WTO:ADA) provides for one such mechanism, whereby an investigation may be terminated or suspended based on an undertaking given by the exporter.

Article 8, in sum and substance, provides discretion to the investigating authority to accept or reject price undertaking given by an exporter to revise its prices or cease its exports at dumped prices, in order to eliminate injury to the domestic industry. Such revision in prices should preferably be less than the margin of dumping, enough to remove injury [Article 8.1]. However, Article 8.3 vests discretionary power with the investigating authorities to decline the price undertaking, wherever found impracticable. Article 8.3 further adds as illustrations that where the number of actual or potential exporters is great or for *other reasons, including reasons of general policy*, the investigating authority may reject the price undertaking application of the exporter. The generic wordings of Article 8.3 give the investigating authorities wide discretion to accept or reject the price undertaking.

This article endeavors to find the extent of discretion

that Indian investigating authority uses, while deciding the issue of price undertaking under Rule 15 of the Indian anti-dumping rules<sup>1</sup>, which is *pari-materia* with Article 8 of WTO:ADA.

Before coming to Indian practice, it is worth looking at the jurisprudence developed under WTO framework. On the issue of discretionary power under Article 8, there has been only one dispute. In *US — Offset Act (Byrd Amendment) [DS 217, 234]*, the Panel gave almost a free hand to the investigating authorities in deciding the issue of price undertaking. Panel held that Article 8.3 does not require an objective analysis of price undertaking so offered. The investigating authorities may ascribe manifold reasons to decline price undertaking including by reason of general policy. Thus the Panel report has only acknowledged and approved the wide discretionary power vested in investigating authorities. However, the Panel Report fails to shed light on the limit, if any, of such discretionary power.

In terms of Rule 15(3), Indian investigating authority (DGAD) may reject the request for price undertaking where it considers acceptance of such undertaking is ‘impractical’ or is unacceptable for ‘*any other reason*’. Unlike Article 8.3, wherein the principle of *ejusdem generis* could still be applied for the phrase “for other reasons”, which follows the specific illustration provided, i.e., “if the number of actual or potential exporters is too great”, there is no scope for such interpretation in the Indian provisions. However, the practice of DGAD through its various final determinations throws some light on

<sup>1</sup> Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules 1995

the interpretation of Rule 15(3).

There have been 23 anti-dumping investigations since 1998, wherein the issue of price undertaking has come before DGAD. Of these, investigations were suspended for 12 exporters in 10 different investigations as their price undertaking proposals were accepted. It is also to be noted that for 3 of the exporters<sup>2</sup>, price undertaking were subsequently revoked as DGAD found violation of terms of price undertaking. One price undertaking was subsequently set aside by Tribunal on appeal<sup>3</sup>. In remaining 13 investigations, the proposals of 15 exporters were rejected for one reason or another.

In the case of *Newsprint from Russia, Canada and USA (1998)*, the price undertaking proposals of 2 exporters from Russia were accepted, even though they did not provide sufficient information with respect to cost of production and normal value. In 2000, however, DGAD went against its own practice in the case of *Thermal Sensitive Paper from European Union*. In this case, even though the export price was accepted and a separate dumping margin was determined for the exporter requesting for price undertaking, however, DGAD rejected the application on the ground that since normal value had to be constructed, price undertaking could not be accepted. Again in 2011, same practice was continued in *PTFE from China PR*, wherein DGAD rejected the proposal of price undertaking made by an exporter on the ground that the exporter did not claim market economy treatment and as a result, there was no requisite information for normal value

and resultant dumping margin. It was also held that in such a scenario, there would be practical difficulty in monitoring price undertaking.

In *Nylon Tyre Cord Fabrics from China PR (2005)*, however, DGAD adopted a totally new approach. In this case, DGAD provided a detailed price undertaking proforma to the intending exporters as well as a personal hearing. Of the two exporters applying for price undertaking, DGAD accepted price undertaking proposal for only one exporter. The only reason for accepting one proposal while rejecting the other was for the fact that while one exporter agreed to revise its prices periodically in line with changes in raw material prices, the other refused to accept this condition. Moreover, the other exporter, whose proposal was declined, did not provide separate prices for different grades of the product concerned.

The practice of DGAD to reject the price undertaking offer of exporter is crystal clear in such cases where even though exporter had shown interest but failed to provide requisite information<sup>4</sup>. Similarly, where exporter was treated as non-cooperative on account of deficient questionnaire response and no separate dumping margin was determined, proposal of price undertaking was rejected<sup>5</sup>. But again, there have been cases, where DGAD considered the price undertaking request 'in detail' and accepted them as it removed the injurious effect of dumping<sup>6</sup>.

Constant technological changes leading to new product development<sup>7</sup>, undertaking linked to several conditions such as variation in raw material prices, export duty on the product, value addition norms,

<sup>2</sup> Fully Drawn yarn from Korea (2006); Potassium Carbonate from Taiwan (2004) and Hexamine from Iran (2003)

<sup>3</sup> Association of BOPP Manufacturers versus Designated Authority [2004 (167) ELT 185 (Tri-Del)]

<sup>4</sup> Graphite Electrodes from China PR (2000); Acrylic Fibre from Turkey (2000) and Partially Oriented Yarn from Indonesia (2002)

<sup>5</sup> Thermal Sensitive Paper from Indonesia (2005)

<sup>6</sup> Plain Medium Density Fibre Board from China PR, Malaysia, New Zealand, Thailand and Sri Lanka (2009)

<sup>7</sup> Cathode Ray Colour Television Picture Tubes from China, Malaysia, Korea RP and Thailand (2009)

reselling price<sup>8</sup>, etc have also been considered as reasons to reject price undertaking proposals apart from the fact that once price undertaking has been accepted, it can be later revoked, if the terms of price undertaking are violated<sup>9</sup>.

While past practices of DGAD shows instances and reasons, for which price undertaking was accepted or rejected, Tribunal had a chance to examine in detail the practice adopted by DGAD with respect to price undertaking. In *PT Polysindo Eka Parkasa v. Designated Authority*<sup>10</sup>, exporter challenged the determination of DGAD on the ground that the price undertaking proposal was rejected arbitrarily without objectively examining the proposal and without ascribing any reason as to why acceptance was not 'practicable'. The Tribunal while accepting the arguments of exporter, held that while considering the acceptance of price undertakings, following aspects are relevant for consideration:

- Whether the injury caused by dumping can be eliminated;
- Whether there exist effective measures to monitor its fulfillment;
- Whether such acceptance is consistent with public interest;
- Whether there exists any possibility of circumvention of the undertaking in any way; and
- Any other relevant factor that the Designated Authority may consider necessary to examine.

Furthermore, it was held by Tribunal that wherever DGAD found it impracticable or unacceptable, it should notify the concerned exporter of the reasons for such non acceptance and give an opportunity to offer their comments. The reason for non-acceptance should be explicitly stated in the final determination made by the DGAD. In fact, according to Tribunal, *the consideration of the price undertaking under Rule 15 is, therefore, a most crucial exercise to be undertaken by the Designated Authority for deciding whether to suspend or terminate the investigation or to reject it and impose the anti-dumping duty and that any arbitrary action of a non-acceptance of a price undertaking will amount to flouting the scheme of the Rules that contemplates a fair consideration of an offer of a price undertaking.*

The above practices of DGAD show that it indeed has a lot of discretion to accept or reject the price undertaking proposal. However, such practice has rarely been abused since in most of the cases, logical and cogent reasoning have been given. Though the wordings of Rule 15.3 are generic in nature, but the practice of DGAD along with appellate forum has tried to do justice with the object and purpose underlying the concept of price undertaking.

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<sup>8</sup> Acrylic yarn from Nepal (2002).

<sup>9</sup> Fully Drawn Yarn from Korea (2006), Potassium Carbonate from Taiwan (2004) and Hexamine from Iran (2003)

<sup>10</sup> 2005 (185) ELT 358 (Tri-del)

## Trade Remedy News 贸易救济新闻

### Trade remedy actions against China

#### 对中国采取的贸易救济行动

Product 产品	Country 国家	Measures 措施	Notification No. and date 通知文号及日期
Aluminium Extrusions 铝挤压品	Columbia 哥伦比亚	ADD investigation initiated 发起反倾销调查	Ministry of Trade and Industry of Columbia Announcement No.027, dated 27-2-2013 2013年2月27日, 哥伦比亚贸工 部外贸司第027号决议
Aluminium foils in rolls 成卷铝箔	EU 欧盟	Definitive ADD imposed 征收最终反倾销税	Council Implementing Regulation (EU) No. 217/2013, dated 11-3-2013 2013年3月11日, 欧盟委员会执 行规定第217/2013号
Barium Carbonate 碳酸钡	India 印度	Name of exporter changed 出口商名称变更	14/18/2009-DGAD, dated 28-2-2013 2013年2月28日, 14/18/2009-DGAD
Bicycle and frame 自行车及车架	Canada 加拿大	Non-initiation of ADD mid-term review 裁定不进行反倾销期中复审	Canadian International Trade Tribunal, Press Release dated 27-3-2013 2013年3月27日, 加拿大 国际贸易法院发布公告
Canned mushrooms 蘑菇罐头	US 美国	ADD administrative review preliminary determination 做出反倾销行政复审初裁	USDOC Press Release dated 12-3-2013 2013年3月12日, 美国商务部发布公告
Ceramic tableware 陶瓷餐具	Egypt 埃及	ADD sunset review investiga- tion initiated 发起反倾销日落复审	Intl Trade Policy Divn., Ministry of Trade & Industry, Egypt, dated 6-3-2013 2013年3月6日, 埃及工贸部国际贸易政策司
Cold-rolled plate 冷轧板卷	Indonesia 印度尼西亚	ADD final duty imposed 征收反倾销税	Dated 19-3-2013 2013年3月19日
Coke 焦炭	EU 欧盟	Terminated ADD measures 取消反倾销措施	Council Implementing Regulation (EU) dated 15-3-2013 2013年3月15日, 欧盟委员会执行规定



Product 产品	Country 国家	Measures 措施	Notification No. and date 通知文号及日期
Drawn stainless steel sinks 不锈钢控制水槽	USA 美国	Countervailing duty – Affirmative determination of material injury 反补贴税-肯定性裁定存在实质损害	USITC News Release dated 21-3-2013 2013年3月21日， 美国国际贸易委员会发布新闻
Flat Base Steel Wheels 平底车轮	India 印度	ADD re-imposed after sunset review 日落复审再次征收反倾销税	3/2013-Cus. (ADD), dated 26-3-2013 2013年3月26日， 3/2013-Cus. (ADD)
Frozen and Canned Warmwater Shrimp 冷冻和罐装暖水虾	US 美国	ADD administrative review preliminary determination 做出反倾销行政复审初裁	USDOC Press Release dated 12-3-2013 2013年3月12日， 美国商务部发布公告
Galvanized Steel Wire 镀锌钢丝	Canada 加拿大	ADD and Countervailing duty - Determination of reasonable indication of injury 反倾销和反补贴税-裁定有合理指标显示损害	Canadian International Trade Tribunal Press Release dated 22-3-2013 2013年3月22日，加拿大国际贸易法庭发布公告
Glass Cup 玻璃杯	Argentina 阿根廷	ADD sunset review investigation initiated 发起反倾销日落复审调查	Ministry of Economy and Public Finance of Argentina Regulation No.50, dated 13-3-2013 2013年3月13日，阿根廷经济与公共财政部2013年第50号决议
Harvesters 联合收割机	Customs Union of Russia, Kazakhstan and Belorussia 欧亚经济委员会	Safeguard investigation extended 延长保障措施调查	Notice dated 11-3-2013 2013年3月11日 通知
Hot rolled flat products of stainless steel of 304 grade 304级不锈钢热轧板材	India 印度	Safeguard action - Public hearing scheduled for 11-4-2013 保障措施-2013年4月11日 召开听证会	D-22011/06/2012, dated 14-3-2013 2013年3月14日， D-22011/06/2012
Hot rolled plate steel 热轧钢板	Australia 澳大利亚	Clarify the PUC of AD and Countervailing investigation 澄清反倾销和反补贴调查产品范围	Australian Customs, dated 12-2-2013 2013年2月28日，澳大利亚海关和边境服务署发布公告

Product 产品	Country 国家	Measures 措施	Notification No. and date 通知文号及日期
Lighters - Gas-fuelled, non-refillable pocket flint lighters 一次性充气打火机	EU 欧盟	ADD imposed on goods imported from Vietnam. Anti-circumvention action on goods from China 对自越南进口的产品征收反倾销税, 对来自中国的产品反规避调查	Council Implementing Regulation (EU) No. 260/2013, dated 18-3-2013 2013年3月18日, 欧盟委员会执行 规定第260/2013
Meta Phenylene Diamine 间苯二胺	India 印度	Provisional ADD imposed for 6 months 征收6个月的临时反倾销税	2/2013-Cus. (ADD), dated 22-3-2013 2013年3月22日, 2/2013-Cus. (ADD)
Newaeration off- the-road tyre 新充气工程机械 轮胎	US 美国	ADD New shipper review preliminary determination 做出反倾销新出口商复审初裁	USDOC pressed dated 5-3-2013 2013年3月5日, 美国商务部发布公告
Organic coated steel products 有机涂层钢板	EU 欧盟	Definitive ADD imposed 征收最终反倾销税	Council Implementing Regulation (EU) No. 214/2013 and 215/2013, both dated 11-3-2013 2013年3月11日, 欧盟委员会执行 规定第214/2013和215/2013
Peroxosulphates 过硫酸盐	India 印度	ADD recommended to be continued in sunset review 日落复审建议继续征收反倾销税	15/9/2011-DGAD, dated 12-3-2013 2013年3月12日, 15/9/2011-DGAD
Polyester staple 聚酯短纤	US 美国	ADD administrative review preliminary determination 做出反倾销行政复审初裁	USDOC Press Release dated 6-3-2013 2013年3月6日, 美国商务部发布公告
Polyethylene 聚乙烯聚合物	Columbia 哥伦比亚	ADD investigation initiated 发起反倾销调查	Ministry of Trade and Industry of Columbia Announcement No.031, dated 3-2013 2013年3月, 哥伦比亚贸工部外贸 司第031号决议
Printing textile, synthetize textile, dutex yarn textile 印花织物、合 成纤维、多彩 纺线织物	Peru 秘鲁	ADD sunset review –ADD extended for 2 years for printing textile; ADD terminated for synthetize textile and dutex yarn textile 对印花织物继续征收2年的反倾销税, 不再对合成纤维和多彩纺线织物征收反 倾销税	INDECOPI No. 082-2013/CFD- INDECOPI, dated 15-3-2013 2013年3月15日, 秘鲁国家竞争 和知识产权保护局倾销和补贴审 查委员会082-2013/CFD-INDE- COPI决议

<b>Product</b> 产品	<b>Country</b> 国家	<b>Measures</b> 措施	<b>Notification No. and date</b> 通知文号及日期
Refractory brick 耐火砖	Turkey 土耳其	ADD to be continued in sunset review 日落复审裁定继续征收反倾销税	Dated 15-3-2013 2013年3月15日
Seamless Carbon or Alloy Steel Oil and Gas Well Casing 无缝钢制油气套管	Canada 加拿大	ADD and Countervailing duty – Affirmative expiry review 反倾销和反补贴税-肯定性日落复审终裁	Canadian International Trade Tribunal, Press Release dated 11-3-2013 2013年3月11日，加拿大国际贸易法院发布公告
Small Diameter Graphite Electrodes 炉用小口径石墨电极	US 美国	ADD administrative review preliminary determination 做出反倾销行政复审初裁	USDOC pressed dated 8-3-2013 2013年3月8日，美国商务部发布公告
Stainless cold-rolled sheet 不锈钢冷轧板	Brazil 巴西	ADD investigation extended 延长保障措施调查	Ministry of Development Industry and Trade of Brazil, dated 14-3-2013 2013年3月14日，巴西发展、工业和外贸部发布公告
Stainless fasteners and accessories 不锈钢紧固件及其配件	EU 欧盟	ADD imposed on goods imported from Philippines. Anti-circumvention action on goods from China 对自菲律宾进口的产品征收反倾销税，对来自中国的产品反规避调查	Council Implementing Regulation (EU) dated 12-3-2013 2013年3月12日，欧盟委员会执行规定
Steel Nail 钢钉	US 美国	ADD administrative review final determination 做出反倾销行政复审终裁	USDOC Press Release dated 18-3-2013 2013年3月18日，美国商务部发布公告
Thermoelectric Coolers and Warmers 半导体冷热箱	Canada 加拿大	ADD and Countervailing duty – Expiry review initiated 发起反倾销和反补贴日落复审	Expiry Review No. RR-2012-004, dated 28-3-2013 2013年3月28日，期终复审第RR-2012-004
Tissue paper 薄绵纸	US 美国	ADD Circumvention preliminary determination 做出反倾销反规避初裁	USDOC pressed dated 6-3-2013 2013年3月6日，美国商务部发布公告
Tyres for Trucks and Buses 公共汽车和卡车轮胎	Egypt 埃及	ADD sunset review investigation initiated 发起反倾销日落复审调查	Ministry of Industry and Trade of Egypt 埃及工贸部国际贸易政策司



Product 产品	Country 国家	Measures 措施	Notification No. and date 通知文号及日期
Uncovered Innerspring Units 非封闭内置弹簧部件	US 美国	ADD administrative review final determination 做出反倾销行政复审终裁	USDOC Press Release dated 22-3-2013 2013年3月22日，美国商务部发布公告
Unframed mirrors 无框镜	South Africa 南非	Provisional ADD imposed 征收临时反倾销税	International Trade Administration Commission of South Africa, Media Release dated 12-3-2013 2013年3月12日 南非国际贸易委员会发布新闻
Vulcanized rubber conveyer belt 硫化橡胶传送带	Turkey 土耳其	ADD to be continued in sunset review 日落复审裁定继续征收反倾销税	Dated 15-3-2013 2013年3月15日
Zinc coated (galvanised) steel and aluminium zinc coated steel 镀锌板和镀铝锌板	Australia 澳大利亚	Extension of time granted to issue the Statement of Essential Facts for subsidy investigations 延迟对反补贴调查发布重要事实公告	Australian Customs Dumping Notice No. 2013/22, dated 14-3-2013 2013年3月14日，澳大利亚海关倾销通知第2013/22

## Trade remedy actions by China

### 中国采取的贸易救济行动

Product 产品	Country 国家	Measures 措施	Notification No. and date 通知文号及日期
Nonyl Phenol 壬基酚	India, Taiwan 印度和台湾	ADD extended for five more years 延长5年反倾销税	MOFCOM Announcement No. 15 of 2013, dated 28-3-2013 2013年3月28日，商务部公告第15号
Resorcinol 间苯二酚	Japan, USA 日本和美国	Definitive ADD imposed 征收最终反倾销税	MOFCOM Announcement No. 13 dated 22-3-2013 2013年3月22日，商务部公告第13号
Toluene Diisocyanate 甲苯二异氰酸酯	EU 欧盟	Definitive ADD imposed 征收最终反倾销税	MOFCOM Announcement No. 16 of 2013 dated 12-3-2013 2013年3月12日，商务部公告第16号

## WTO News 世贸组织新闻

### 世贸组织讨论修改农业规则

世贸组织上周讨论了印度与其他32个国家（被统称为G33）于去年11月提交的提案。发展中国家要求为了粮食安全的目的以及为了能够向这些国家的大批低收入农民提供粮食援助而允许公共储备。G33相信需要通过政府管理价格，从而能够在购买农产品时与私人行业竞争、促进生产和保证粮食的可用性和向农民提供公平价格以保护他们免于受到价格经常波动的影响。据报告，尽管所有的成员认为有必要储备粮食从而改善粮食安全，但是他们各自的做法不尽相同。一些国家希望讨论如何进行市场干预以避免曲解并且保证项目真正地针对贫穷的农民和消费者。

### 良好的法规规范-技术性贸易壁垒委员会开始制定指导方针

为了使规则以一个友好贸易的形式呈现，也就是良好的法规规范形式（GRP），世贸组织技术性贸易壁垒委员会已经着手制定指导方针。在3月6日、7日举行的会议上，中国、欧盟、印度尼西亚和美国发表

了各自的陈述以及特殊的案例研究。根据会议的主旨，会议关注良好法规规范中的一些关键机制和原则，特别是公开、透明、内部协调、利害关系人的磋商、平衡利害关系人之间的利益、规范影响评估和立法审查。作为技术性贸易壁垒委员会的成员之一，印度2012年的电子和信息技术产品（强制登记要求）法令和提议的2008年危险废物法修正案也在会议上与其他国家的非关税壁垒一起被首次提出讨论。印度禁止生产、销售、批发、进口或储存与规定标准不一致的充气轮胎。欧盟、日本和中国也再次讨论了印度对某些钢材要求强制认证的措施。

### “欧盟-海豹产品”争议公诸于众

世贸组织专家组根据各方的请求对“欧盟-禁止海豹产品进口和销售海豹产品的相关措施案”（DS400和DS401），已经同意向公众公开各方的第二次实质性会议。会议将与2013年4月29日和30日在世贸组织总部日内瓦召开。公开会议将通过中央电视台实时报道。公众成员以及认可的记者和非政府组织可以参加公开会议。

## News Nuggets 新闻精华

### 具体化金砖国家的主动权

近期结束的金砖国家峰会尽管在平衡受到发达国家控制方面没有看到创造性的成果，但是有讨论到提议建立一个由金砖国家提供资金和管理的发展银行的。并且巴西、俄罗斯、印度、中国、南非将尽可能

解决在提供资金、投票权模式和确保银行能够担任起国际货币基金组织或世界银行可行的选择。峰会还决定建立自我管理的意外准备金，以帮助国家稳定他们的本国货币，从而提供一张安全的金融网。旨在形成一个金砖国家联合商务委员会的动议

也受到支持。在峰会召开之前，中国和巴西签署了一项协议，同意在他们之间的贸易使用本国货币而非美元。值得关注的是金砖国家如何能开展一致行动来解决国家大小和经济实力上的差异。不同意见认为尽管将金砖国家融合在一起形成新的力量，但是不同的经济之间的共同点非常少。

### 促进健康贸易

“同意一致同意”也许是最好阐述成员国之间为形成友好监管货物或贸易实践的努力成果。第6个三年复审去年11月总结的技术性贸易壁垒协议的运作和执行情况同意更多交流信息、透明和建立标准。最近

结束的技术性贸易壁垒委员会会议发现并讨论了一系列争议。大部分争议集中在其他成员国对世贸组织规则的遵守方面。例如马拉维反对新的欧盟烟草产品要求在香烟盒的正面和背面75%的部分通过文字和图片组合的形式发布健康提醒，禁止描述味道、包装盒需要有一个唯一识别符从而能够再欧洲境内追溯并且还要有防伪标记。智利的试行条例要求在高糖分、高热量的警示标志旁加上停止标志，以制止年轻人中的肥胖者，这种做法也受到批评。这些问题已经列入争议列表，该列表中有美国调味香烟、澳大利亚普通包装法和印度禁止美国禽类进口的禁令。

## Ratio decidendi 判决理由

### 美国法院支持对非市场经济国家征收反补贴税

美国国际贸易法院在2013年3月12日支持美国新法律要求美国商务部门对来自非市场经济国家的货物自2006年起追溯征收反补贴税和合宪性。法院认为法律有合理基础支持因此并没有违反平等保护权和正当程序保障。法院还认为溯及既往条款也没有违反法律因为条款没有证明法律在本质上是惩罚性的。贸易关税是救济性的而不是

惩罚性的，反倾销税和反补贴税是对不同的不正当竞争行为进行抵销的单独的救济措施。因此征收一种税并没有排除需要征收另一种税。事实上法院支持了原告过分强调政府所有制和在中国法律下的政府控制之间的区别，并且商务部在确定政府控制方面获得实质证据的支持。[2013年3月12日美国国际贸易法院，广东伟经家居用品和五金器具有限公司诉美国政府]

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