# WORLD TRADE ORGANIZATION

**TN/RL/W/45**
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## REPLIES TO QUESTIONS TO OUR FIRST CONTRIBUTION (TN/RL/W/6)


Paper from Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Norway; Singapore; Switzerland and Thailand


We thank Members for the questions and comments put forward at the meetings of the Negotiating Group on Rules in October and November 2002. This paper replies to the questions to our first paper. The questions and comments would help further understanding by all Members of the issues which we have indicated, according to the Doha mandate, in our previous papers. Meanwhile, we would urge other Members to indicate the issues of their interest, if any, to the Negotiation Group on Rules as soon as possible.

### 1. Sales in the Ordinary Course of Trade

**[Comments from Australia]**

The proponents suggest strengthening Article 2.2.1 of the WTO Agreement on Anti-Dumping (ADA) to include a definition of "reasonable period of time" and to allow investigating authorities to disregard sales below cost when prices provide for the recovery of all costs in the period for dumping investigation.

"A reasonable period of time" is not defined in the ADA. However, the last sentence in Article 2.2.1 illuminates the meaning of "a reasonable period of time" by treating costs as being recoverable within a reasonable period of time should the criterion set out therein be satisfied. The rationale underlying this is probably to give effect to commercial reality that businesses do make losses from time to time, whether deliberately as a loss leader or merely due to global downturn in demands. Costs should however be regarded as recoverable if they can be recouped through sales over a longer period of time which in this case would be the investigation period.

Even though the meaning of "a reasonable period of time" is not defined in the ADA, that phrase, when read in light of the last sentence, can be taken to mean "period of investigation" as the test provided in Article 2.2.1 is whether the price of the goods is above the weighted average per unit costs for the period of investigation. This allows the exporter to assess the weighted average costs of the goods for the investigation period for the purpose of determining whether such product is profitable in the long run.

Based on the foregoing, Australia considers that the term "a reasonable period of time" is implicitly clear in light of the test set out in Article 2.2.1. Australia agrees that there would be some merit in examining the definition of "reasonable period of time" provided that definition is consistent with the present understanding of the phrase as set out in Article 2.2.1.

**[Question from the EC]**

Do the proponents have any views on whether the "reasonable period of time" in Article 2.2.1. ADA should be identical with the "investigation period on dumping"?

**[Question from the United States]**

Although the submission contains a heading on "sales in the ordinary course of trade", which is addressed in Article 2.2, the discussion is limited to the test for disregarding sales below the cost of production, as described in Article 2.2.1 (which is only one type of sale outside the ordinary course of trade).

Does the submission propose a discussion of the sales-below-cost test under Article 2.2.1, or of the broader "ordinary course of trade" concept under Article 2.2?

Reply

The current text of Article 2.2.1 provides several ways for the authorities to disregard home market or third country sales for the purpose of calculation of the normal value. Certain terms in the Article are left undefined or vaguely explained. Article 2.2.1 should be improved to provide a clear guidance to Members on which sales should be used for the calculation of the normal value.

The current text of Article 2.2.1 does not have a definition of "a reasonable period of time". We are of the opinion that, when determining cost recovery, a reasonable period must be found reflecting the normal operating cycle rule referred to in the general accepted accounting principles of the member countries. Such a reasonable period would normally cover more than one year. In addition, the AD Agreement does not have a provision setting forth an appropriate period of an investigation, as we separately propose to clarify.

In responding to a question from the United States, we understand that the discussion of sales "in the ordinary course of trade" is not limited to sales-below-costs but also include other sales like affiliated party transactions, which are discussed separately. The other aspects of "ordinary course of trade" may be explored separately.

## 2. Constructed Value

**[Comments from Australia]**

Document TN/RL/W/6 proposes that Article 2.2.2 of the ADA be elaborated to provide clear, comprehensive and representative criteria for calculating a constructed normal value.

- Do the proponents consider that Article 2.2.2 should provide a hierarchy of options?

Article 2.2.2 gives authorities discretion in calculating the selling, general and administrative costs and profit where actual data, pertaining to ordinary course of trade sales of like goods by the producer/exporter, is not available. Currently the discretion is limited to three non-hierarchical options.

Australia considers that while it may be possible to negotiate a hierarchy for the existing options, it is difficult to envisage useful criteria for the basis of the hierarchy. As pointed out in the *EC- Bed Linen* case "[g]iven … that each of the three options is in some sense 'imperfect' in comparison with the chapeau methodology, there is, in our opinion, no meaningful way to judge

which option is less imperfect – or of greater authority - than another …", (*EC-Bed Linen* WT/DS141/R, para 6.61).

The example provided in Document TN/RL/W/6 does illustrate the discretion available in article 2.2.2 but Australia considers that this is desirable, given the myriad of circumstances investigating authorities are faced with and the inherently imperfect nature of constructing a normal value.

**[Question from the EC]**

Would the issue raised also encompass the question as to whether there should be more than the 4 methods set out in Art. 2.2.2? Are there already any thoughts as to the introduction of a hierarchy of methods under Art. 2.2.2 and, if so, what hierarchy?

As far as each of the 4 methods set out in Article 2.2.2 is concerned, do the proponents envisage to add further criteria beyond the existing ones as interpreted by panel and AB reports?

**[Question from the United States]**

The submission asserts that Article 2.2.2 does not provide clear guidance for the use of information for the calculation of constructed value, leading to "anomalous results". The submission questions whether the Members should elaborate clearer, more comprehensive and representative criteria when calculations of constructed value are made. As an illustrative example of a situation presumably leading to "anomalous results", the submission describes a situation concerning the appropriate profit rate to use in calculating constructed value when home market sales of one of the companies subject to investigation are not representative and cannot be used for comparison to export sales. In the example, the investigating authority could choose to apply either a lower profit rate from the broader industry (tableware), or a weighted average of the profit rates of two other companies subject to the investigation that make the subject merchandise (disposable spoons).

(a) The concept of constructed value ultimately deals with the appropriate way to allocate costs of production and profit. Practices in this regard vary from Member to Member, industry to industry, and firm to firm. While the United States agrees that comprehensive rules are generally beneficial, this may be an instance in which greater flexibility is necessary to take into account the circumstances of each case. Could adoption of comprehensive criteria eliminate the necessary flexibility to consider the accounting practices of a particular firm or industry? For example, such criteria potentially may greatly increase the burden on responding exporters who could be required to report information as specified in Agreement rules, rather than in accordance with their books and records.

(b) Regarding the "illustrative example" given on page 2, should an investigating Member be concerned that profits from company B and C may be artificially depressed by the very alleged dumping they are investigating? Is there reason to believe that the profit margin for spoons is greater or less than that for tableware as a whole? If not, could an investigating Member reasonably conclude that a profit figure drawn from a broader spectrum of companies is likely to be more representative?

Reply

Article 2.2.2 of the AD Agreement does not provide clear guidance for the use of information to calculate constructed value. Owing to the lack of clarity and guidance in various aspects of this Article, investigating authorities could potentially abuse the ambiguities and arbitrarily "construct" artificially high dumping margins to the detriment of the interest of exporters and domestic users.

Such ambiguities are also not conducive to the predictability, consistency and transparency of the rules in determining "constructed value". Both Australia and EC have noted one such aspect for manoeuver: if the exporters or producers' actual data on administrative, selling and general costs and for profits is deemed not adequate, the investigating authority may use any of the three alternative methodologies set out under Article 2.2.2(i)-(iii) to determine the profit to be used in constructed value. There is no protection given to the exporters or producers concerned if the investigating authorities concerned happen to choose the methodology resulting in the highest margins. Such a possibility for "picking or choosing" of methodologies is one of the areas which could lead to arbitrarily high dumping margins.

Owing to the lack of clear, comprehensive and representative criteria on calculations of constructed value, there are other rooms for abuses such that constructed value could be artificially inflated, thus raising dumping margins arbitrarily. For example, investigating authorities may define "the same general category of products" under Article 2.2.2 (i) in such a way that only those products with higher margins of profits are included. Similarly, when data of "other exporters or producers subject to investigation in respect of production and sales of the like product" is used under Art. 2.2.2 (ii), there are rooms for abuses in "picking" those exporters or producers with higher profit margins or costs. It is the very nature under this article that so many different "methodologies" and therefore data could be picked and chosen which give rise to rooms for abuses. Clearer guidance and tighten discipline in this article could certainly deter abuses and enhance legitimate trade interests of all Members.

## 3. Cyclical Markets

**[Comments from Australia]**

The proponents suggest that Article 2.4 does not provide for the performance of cyclical markets, especially in the cases of perishable goods, to be taken into consideration when comparing normal value with export price.

- Can the current provisions be made to "fit" cyclical market situations?

**[Question from the EC]**

Could the proponents expand on which precise parameters should guide investigating authorities in setting the investigation period for perishable goods or goods in a rapidly growing manufacturing sector?

Reply

One form of a cyclical market is one where supply and/or demand changes according to a certain important and predictable pattern. The typical example is the cyclical supply of agricultural products in countries subject to seasons. Other types of cyclical markets are those where demand peaks during certain times of the year. In the case of a rapidly growing manufacturing sector, there are cases in which cost of production changes according to a certain important and predictable pattern.

We would like to clarify that we are not implying that Article 2.4. does not provide any guideline to the situation of cyclical markets. Article 2.4. says that 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 other difference which are also demonstrated to affect price comparability. In this regard even though

the current provisions contain some useful guidance to deal with the market situation, such as the " fair comparison " principle, it is important to elaborate a more specific commitment.

We have underlined that in some cases the unreasonable application of mechanical rules creates unfairness. One problem that we would like to solve is the artificial determination of dumping margins which affect perishable goods in particular.

An important perspective to tackle the problem would be that the investigation authorities, when setting the investigation period and when assessing a reasonable period of time, take into account the various economic and other relevant conditions pertaining to the cycle in question.

## 4. Prohibition of Zeroing

**[Comments from Australia]**

The proponents suggest that Article 2.4.2 should be clarified to explicitly rule out zeroing. Article 2.4.2 sets out the different methodologies for establishing dumping margin of the product during the investigation period. The methodologies set out therein are as follows:

- A comparison of a weighted average normal value with a weighted average of prices of **all** comparable export transactions; or
- A comparison of normal value and export prices on a transaction-to-transaction basis; or
- A comparison of a normal value established on a weighted average basis to prices of individual export transactions if certain conditions are satisfied.

The methodologies set out in Article 2.4.2 do not allow negative margins to be converted into zero value. Article 2.4.2 in fact requires comparison to be made between weighted average normal value with a weighted average of **all** comparable export prices or on a transaction-to-transaction basis which impliedly requires all transactions to be captured in the comparison exercise. By artificially inflating negative margins to zero value, the investigation authorities are in fact ignoring the negative margins by neutralising them into zero value. This seems to be at odds with the requirements of Article 2.4.2 which never allow this form of manipulation by the investigating authorities.

As the words used in Article 2.4.2 do not impliedly or expressly admit a construction which permits "zeroing" of negative margins, Australia considers that Article 2.4.2 does not require any clarification to expressly rule out zeroing.

**[Question from the EC]**

Does this proposal go beyond the ruling of the AB in *Bed Linen* on zeroing? Should the prohibition of zeroing also cover the method set out in the last sentence of Article 2.4.2? If so, what would be the difference between the first method described in the first sentence of Article 2.4.2 and the method set out in this last sentence?

**[Question from the United States]**

The submission asserts that Article 2.4.2 recognizes that average dumping margins should be based on the average of "all" comparisons, including those that generate negative margins. The submission proposes that Article 2.4.2 be clarified to explicitly rule out "zeroing".

Please explain further the assertion that average dumping margins should be based on an average of "all" comparisons, considering that such a requirement is not included in Article 2.4.2. What is the basis for the implicit view that Members are required to offset dumping amounts by the amount by which distinct products have not been dumped?

Reply

One of the purposes in an anti-dumping investigation is to determine whether a product under consideration, as a whole, is dumped during the period of investigation and, if so, to what extent its magnitude of dumping is. A zeroing practice, which picks a part of sales of a product during the period of investigation and rejects other sales of the same product, artificially creates "dumping", and artificially inflates the magnitude of dumping. This basic concept must apply to all cases, irrespective of dumping margin calculation methodologies, such as weighted average-to-weighted average, transaction-to-transaction, and weighted average-to-transaction comparison methodologies.

We note that the Appellate Body's decision correctly adjudicated in *Bed Linen*[1] that the AD Agreement prohibits zeroing. We are of the opinion that the AD Agreement should explicitly prohibit in all cases "zeroing" practices.

## 5. Cumulative Assessment of Injury

**[Comments from Australia]**

The proponents propose strengthening Article 3.3 to include the factors that should be taken into account when assessing the conditions of competition between the imported goods and the conditions of competition between the imported goods and the like domestic goods.

The question of developing criteria is currently being considered by the Working Group on Implementation. Australia considers that there would be merit in examining this issue in the light of the Working Group's consideration of proposed criteria.

**[Question from the EC]**

The example given seems also to raise the question of the "product concerned". What is the view of the proponents on the relationship between the issue of cumulation and the issue of the product concerned?

Reply

As mentioned in document TN/RL/W/6, we consider that it is important to review Article 3 in order to clearly set out the factors that should be analysed in order to determine whether a cumulative assessment of 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 domestic like product. We agree with Australia that, in doing so, it would be useful to examine this issue in the light of the Working Group on Implementation's consideration of proposed criteria.

With regard to the EC question, it is important to note that the question of the "product concerned" is a general one, that is, it applies to all investigations, regardless of the number of countries involved. As the Anti-Dumping Agreement does not establish criteria for the definition of

[1] *EC – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* (WT/DS141/R, WT/DS141/AB/R, adopted March 12, 2001).

the product under investigation, some aspects related to the definition of the products have been raised in the discussions on the criteria for cumulative assessment.

Nevertheless, it is important to keep in mind that even if an adequate definition of the product under investigation is adopted, in circumstances where more than one country is under investigation, it is necessary to examine whether the cumulative assessment of 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 product. Several aspects that have already been pointed out in document G/ADP/AHG/W/121/Rev.1 are relevant to this analysis such as: geographical areas, overlapping time-periods of sales, trends of prices, levels of price undercutting, etc.

## 6. Causal Relationship between Dumping and Injury

**[Comments from Australia]**

The proponents suggest that the provisions of Article 3.5 merit further elaboration by developing procedures and criteria to analyse the causal relationship.

Australia does not consider that there is a lack of clarity in Article 3.5. Article 3.5 requires that adequate regard be given to other factors.

The question of causal link has been the subject of several recent WTO dispute settlement cases relating to anti dumping and safeguards measures. The *Thailand Steel* case emphasised that although Article 3.5 requires that regard must be given by authorities to known factors other than dumped imports which are causing injury, this did not mean that there was an express requirement for an authority to examine these factors on their own initiative. However, they could choose to do so.

**[Question from the EC]**

Could the proponents explain whether they have already any preliminary ideas as to the practical implementation of the AB doctrine of "separate and distinguish"? Should there be a quantitative analysis? How should such methodologies work in practice?

Reply

The causal relationship between dumping and injury has recently been subject to several WTO dispute settlement cases.

In order to clarify and improve the Anti-Dumping Agreement some key aspects of the interpretation of recent panels regarding the causal link between dumping and injury should be incorporated into the Anti-Dumping Agreement.

*Inter alia*, in the AB ruling in "United States – anti-dumping measures on certain hot-rolled steel products from Japan", the panel found that the investigating authority, in order to comply with Article 3.5, must make an appropriate assessment of the injury caused to the domestic industry by the other known factors, and they must separate and distinguish the injurious effects of the dumped imports from the injurious effects of those other factors. In our view Article 3.5 should be clarified and improved accordingly.

Separating and distinguishing the injurious effects from the different causal factors could be a difficult exercise. However, if it is not possible to separate and distinguish the effects of the different factors it is not possible to say whether the injurious effects are caused by the dumped imports or not.

The particular methodology by which investigating authorities can separate and distinguish the injurious effects of dumped imports from the effects of the other known causal factors is not established in the Anti-Dumping Agreement. An appropriate methodology to separate and distinguish the effects of the factors should be found, so that the injuries caused by the other factors are not attributed to the dumped imports.

Procedural requirements for the investigating authority to consider these issues should be adjusted accordingly. For instance, the investigating authority should be required to respond to all of the arguments made by the parties on the issue of causation. Often, the foreign exporters raise causation arguments that are never addressed by the authority in the importing country. Finding of causation is a decisive element in the decision to impose anti-dumping duties, and it is reasonable to require the investigating authority to address and explain their evaluations of all the issues that are raised.

## 7. Threat of Material Injury

**[Comments from Australia]**

The proponents suggest that Article 3.7 should be strengthened to clearly define the factors to be considered when assessing threat of injury.

- What further factors should be considered?

Could the factors that lead to a determination that threat exists be more clearly set out in Article 3.7?

**[Question from the EC]**

Which factors other than those contained in Article 3.4 and declared applicable by the AB should be listed for a finding of threat of material injury under Article 3.7 ADA?

**[Question from the United States]**

The submission questions whether the "discipline" of Article 3.7 concerning determinations of threat of material injury should be strengthened and the description of the Article 3.7 factors be clarified and improved.

Do the proponents maintain that any of the current Article 3.7 factors are unclear? If so, which ones?

Reply

It follows from Article 3.7 that a determination of a threat of injury shall be based on facts and not merely on allegation, conjecture or remote possibility. Article 3.7 further identifies certain circumstances, which would give grounds for expecting future injury.

However, the article does not prescribe how to analyse the potential impact of such circumstances on the domestic producers of the like product. In our opinion Article 3.7 would be clarified and improved if the determination of threat of injury includes a specific requirement for an assessment of all the factors required to determine actual injury.

Existing terms are not clearly defined. It is, for instance, not clear which timeframe may be applied under the term "foreseen and imminent". However, it is clear that the further into the future one foresees a threat of material injury, the more this determination will be based on speculation, not facts. It may be appropriate to enter into discussions on detailing this and other terms used in Article 3.7.

Also, there may be additional factors that should be listed in Article 3.7. Based on the above, it is our view that Article 3.7 is in need of improvement.

## 8. Threshold under Article 5.8

**[Comments from Australia]**

The proponents suggest an increase of the *de minimis* margin of dumping and negligible volume of dumped imports to unspecified levels and the role of *de minimis* in the duty collection process.

- Do the proponents consider that the *de minimis* and negligible volume levels should be increased for both developed and developing countries?
- How do the proponents relate this to cumulatively assessing injury?
- Could the proponents explain when (that is, in what circumstances) would *de minimis* play a role in the duty collection?

**[Question from the EC]**

Do the proponents already have a precise idea as to the appropriate levels for *de minimis* and negligibility margins?

**[Question from the United States]**

The submission asserts that the current 2 per cent *de minimis* level contained in Article 5.8 is not sufficient to reflect the "high degree of variance and uncertainty resulting from crude methodologies". The submission suggests that the "role" of *de minimis* in the duty collection process could be revisited. Finally, the submission questions whether the 3 per cent negligible volume threshold is sufficient to justify injury when the volume of total imports is small.

(a) In light of the detailed methodologies provided in the Anti-Dumping Agreement, please explain why the proponents believe that the current 2 per cent *de minimis* dumping margin threshold is insufficient.

(b) Do the proponents contend that the reason for the existence of a *de minimis* threshold in the Agreement is concern about a degree of inaccuracy? If so, what is the basis for this contention?

(c) What evidence supports the conclusion that the degree of variance and uncertainty in dumping calculations is greater than 2 per cent?

(d) Please explain what is meant by "the role of *de minimis* in duty collection process".

(e) The submission states that the current 3 per cent negligible volume threshold is insufficient to justify injury when the volume of total imports is small. Does the comment go to whether the

current 3 per cent volume threshold in Article 5.8 is sufficient to justify a finding of material injury or whether it is sufficient to justify an investigating authority to conduct an injury analysis?

Reply

The AD Agreement does not explain the rationale for the current negligible thresholds and *de minimis*. These thresholds should be reviewed and improved, taking into account the actual impact on imports, uncertainty of dumping margin calculations, and the international business. The current three and seven percent negligible thresholds permit an investigation to proceed even where the actual volume of dumped imports is so insignificant that it is incapable of injuring the domestic industry. The current two percent *de minimis* threshold does not fully reflect various aspects of dumping margins and their calculations. These aspects may include, but not limited to, (i) unavoidable calculation errors in dumping margins and its base data; (ii) dumping margins that are incapable of injuring the domestic industry; and (iii) predictability of injurious dumping.

Article 9.3 of the AD Agreement establishes that "The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2" and contemplates two systems for the assessment of this duty: it could be assessed on a retrospective basis or on a prospective basis. Under the current system of duty collection, if a Member adopts the retrospective system, a determination of the actual final liability to be paid is made after the order has been in place for a given period of time; for this purpose, the Member calculates a new margin of dumping, which may be different from the one calculated in the course of the investigation. If this new margin is "*de minimis*", it would be reasonable that no anti-dumping duty be collected. Additionally, we understand that the same threshold established in Art. 5.8 should be applied when defining the "*de minimis*" margin for collection purposes. Likewise, if a Member adopts the prospective system, the Agreement establishes that the Member shall have a procedure for refund. In this case, it would be reasonable that if the Member determines that the margin of dumping is "*de minimis*", as established in Article 5.8, there should be prompt refund of the duty paid.

## 9. Facts Available

**[Comments from Australia]**

The proponents raise the issue of more stringent rules to provide more clarity to discipline the excessive use of “facts available”.

Australia considers that there may be merit in examining criteria that could be used to determine whether or not to grant an extension of time for information. The Working Group on Implementation has adopted a recommendation on the elements that are relevant in determining whether or not to grant an extension. This recommendation could also form the basis for setting out criteria in the ADA for granting an extension of time.

Australia notes the relevance of the Appellate Body (AB) findings in the *US – Hot Rolled* Steel case. The AB found that there was no failure by the exporter to cooperate and get information from an associated company and that the degree of cooperation was not an absolute standard and unreasonable burdens could not be imposed on exporters.

Reliance was placed on the wording of Article 6.8 that regard should be given to supply information in a “reasonable period” which was determined by having regard to (WT/DS184/AB/R, para 85)

(i) the nature and quality of the information submitted
(ii) the difficulties encountered by an investigating exporter obtaining the information
(iii) the verifiability of the information and ease with which it can be used
(iv) whether other interested parties would be prejudiced if the information is used
(v) whether the acceptance of the information would compromise the ability of the investigating authorities to conduct the investigation expeditiously and
(vi) the number of days by which the investigated exporter missed the applicable time limit.

**[Question from the EC]**

Which precise clarifications beyond Annex II to the ADA and the panel/AB doctrine do the proponents have in mind?

**[Question from the United States]**

The submission claims that the "facts available" are often used to "penalize" exporters who cannot submit certain data. The submission questions whether it is appropriate to elaborate more stringent rules to discipline the "excessive" use of "facts available". The submission provides an illustrative example of a situation where facts available are applied to a respondent that has not provided resale prices of a customer in which the respondent has a 10 per cent equity interest and over which it has no "legal" control.

(a) Given that legal control may stem from a basis other than equity ownership, in the proponents' view, what criteria should an investigating authority examine in assessing legal control?

(b) How should authorities assess facts which may indicate a degree of *de facto* control, even in the absence of legal control? For example, how should authorities examine cross-ownership, contractual or familial relationships, or indications of economic power between the entities (such as might exist if the respondent is the customer's sole supplier) which may indicate an ability of the producer to obtain the information?

(c) In the example given, to the extent the price between the exporter and importer is unreliable because of "association", such price may be disregarded under Article 2.3. In such a situation, the authority must have information regarding the importer's resales in order to conduct the analysis required by Article 2.4. Assuming the authority finds that there is no legal control between the parties, what importance would the proponents attach to a finding of a significant overlap in the boards of directors of the exporter and importer? What importance would the proponents attach to a finding that the owner of the exporter and the owner of the importer are, for example, brothers?

(d) Do the proponents agree that there is a danger of abuse from parties that claim lack of legal control, without revealing information about *de facto* control, and on that basis refuse to provide information necessary to the calculations under the Agreement?

Reply

We believe that the use of adverse facts available should be strictly limited. However, in fact, there are many cases where affirmative determinations are made on the basis of the adverse facts available in spite of the fact that respondents have acted to the best of their ability and been fully cooperative.

Article 6.8 of the AD Agreement and Annex II provide some guidance for the application of "facts available". However these rules are not clear enough to describe in which circumstances the authorities can resort to "facts available". In light of the basic understanding that the anti-dumping duties should be imposed to the extent necessary to counteract injurious effects of dumping, we consider that the abuse of the "facts available" should be strictly limited. The authorities should not be allowed to resort to such method unless they make necessary efforts to obtain information from respondents. The authorities, when they resort to the facts available method, should provide sufficient explanation, including the reasons why they consider the information invalid and the justification to what extent the information must be totally or partially rejected.

The questions from the US are related to the item of affiliated party transactions. Therefore replies provided in that section might be helpful in resolving the US's concern.

**10. Lesser Duty Rule**

**[Comments from Australia]**

Australia considers that this is an issue which merits examination.

- Do the proponents consider that the lesser duty rule, in some circumstances, should be a mandatory consideration or should be mandatory in application?

- The illustrative example also raises issues of the calculation of the lesser duty. Is this issue of concern to the proponents?

**[Question from the United States]**

Noting that Article 9.1 encourages, but does not require, the application of a duty no higher than that necessary to offset injury, the submission questions whether it is appropriate to apply anti-dumping duties that are higher than necessary to counteract injury.

While anti-dumping duties offset the amount of dumping, they may not counteract the injury suffered as a result of the dumping. For example, in an industry plagued by dumping, companies may have been forced to lay-off well-trained workers, shut production facilities, cut-back on research and development expenditures, and suffer other injuries which may take many years and significant investment to repair. What is the basis for the statement that anti-dumping duties are specifically designed to counteract injury being suffered by the domestic industry?

Reply

It is our common understanding that anti-dumping measures should only be applied to the extent necessary to counteract injurious dumping, which is one of the basic concepts of the AD Agreement. Although Article 9.1 is not a mandatory provision, it encourages Members to apply the duty less than the margin of dumping if such lesser duty would be adequate to remove the injury to the domestic industry. However, increasingly, anti-dumping measures are imposed in excess of what is required to address the injurious dumping. Our proposal simply aims at improving the Agreement by realizing the spirit of this Article. We will address the question of whether mandatory application rather than a mere consideration is appropriate in order to realize the spirit of this Article.

We recognise that the way to calculate lesser duty is an important area to be addressed in this negotiation.

## 11. Sunset of Anti-Dumping Orders

**[Comments from Australia]**

The proponents suggest that the exception rule in Article 11.3 is over-applied and invariably leads to a continuation of measures.

In the illustrative example provided, the exporter no longer exports to country A, but is still subject to anti-dumping action after the measures have been continued (following a sunset review).

- Do the proponents consider that measures should expire after the 5 year period, without the "likelihood" question being put?

**[Question from the EC]**

Which additional criteria can make sunset reviews more practical? Is the absence of imports in the proponents' view always a reason to automatically terminate measures in a sunset review?

**[Question from the United States]**

The submission asserts that the general rule in the AD Agreement is that anti-dumping orders should be terminated after five years; however, an expansive use of the "exception" in the Agreement has turned the continuation of the order into a *de facto* practice. The submission provides an illustrative example where, upon imposition of an order, a company stops shipping to the country that imposed the order. The company does not participate in the sunset review because it has no plans to export to that country again, yet the importing country continues the order anyway as a result of its sunset review.

(a) On what grounds do the proponents conclude that termination of orders after five years is a "general rule", and the conduct of a sunset review an exception, when, in fact, Article 11.3 states that orders should be terminated unless a sunset review indicates otherwise?

(b) What is the basis for equating the conduct of a sunset review with the continuation of an order, when a sunset review may reveal that an order should be terminated? What is the basis for the conclusion that the continuation of orders has become a "*de facto* practice"?

(c) Do the proponents agree that one reason a respondent may withdraw from a market is that it cannot sell in that market unless it engages in the unfair trade practices which have been remedied by the anti-dumping order?

(d) How would the proponents suggest that Members analyze the necessarily predictive question of the "likelihood" of future dumping and injury?

Reply

The wording of Article 11.3, on its face, makes it clear that the termination of a measure after five years is the general rule, which should be followed 'unless' particular circumstances can be identified that justify a departure from the rule. In other words, the phrase following 'unless' should be understood as providing a limited exception to the normal rule that measures expire after five years. Parties supporting continuation of the measure should bear the burden to demonstrate the likelihood of dumping and injury, in order to benefit from the exception.

At the end of the Uruguay Round, Article 11.3 was welcomed as a major achievement of the UR negotiations and it was expected that the provision would put an effective end to the practice of unduly extending anti-dumping measures. The record of the implementation of Article 11.3, however, has been discouraging. In many of the WTO Members, where anti-dumping measures have been frequently resorted to, the percentage of measures terminated through the Article 11.3 sunset review has been dismally low. There are several important reasons to explain this discrepancy between the initial expectations and the record of implementation.

First of all, in the practice of certain WTO Members, the burden of proof is reversed and placed disproportionately upon the exporters to demonstrate that the termination of measure is not likely to lead to dumping and injury. Often, the burden is excessively heavy. Such a practice is not consistent with Article 11.3, and it should be clarified that the parties supporting continuation of the measure bear the burden to demonstrate the likelihood of dumping and injury.

Secondly, Article 11.3 does not provide sufficient guidelines for determining the likelihood of continued dumping. As suggested by the US through its comments, the 'likely' standard of Article 11.3 is necessarily 'predictive'. The combination of the 'predictive' nature of the likely standard and the absence of clear guidelines to make such a prediction has allowed the investigating authorities to base their findings not upon facts, but on mere allegations and conjecture regarding future events.

In order to deal with this point, we are of the opinion that the WTO Members should agree upon a set of factors that should be considered by investigating authorities in making 'predictions' about the likelihood of dumping and injury. If Members are allowed to apply their different and often arbitrary standards to 'predicting' the likelihood, as today, there will be no means for the WTO to establish multilateral control over the sunset review and the discrepancy between initial expectation and the dismal record of implementation would continue.

## 12. Public Interest

**[Comments from Australia]**

The proponents suggest the ADA be strengthened to ensure that relevant information pertaining to public interest be taken into account in a more substantive manner.

The ADA contains no provisions dealing with public interest. Australia does not consider that a public interest test should be included in the Negotiating Group on Rules consideration of issues as it is ultimately a matter for each country to determine under its own law.

The discussion in the Working Group on Implementation on the question of public interest has highlighted various approaches to consideration of the question of public interest. One view is to approach the question of public interest in the context of the application of the lesser duty rule. However, this does not address the question of whether measures should not be imposed at all. For example, regard can be given to whether the industry will benefit from the imposition of measures or if the negative effect of the imposition of measures on interested parties would be disproportionate when compared to its positive effect.

**[Question from the EC]**

What are the proponents' ideas as to how a public interest test should be tailored? Should it only be a procedural requirement to collect certain information or should it also encompass a test with

substantive criteria to be taken into account by investigating authorities? If so, are there already any ideas as to possible substantive criteria?

Reply

Article 6.12 of the AD Agreement should be improved -- introducing more substantive criteria. The purpose of a public interest provision should be to lower or eliminate AD duty in view of broader public interest considerations.

The AD Agreement allows for the imposition of measures when the domestic industry is faced with injurious dumping. However, it is necessary to evaluate during the course of investigation how other interests (i.e. consumers, downstream users, etc.) may be affected, if measures are imposed in full or in part.

As Australia mentions, discussions were held in the Working Group on Implementation to the effect that there are a variety of practices as to which parties are allowed to present information (i.e. consumers, industrial users, competition authorities); when (i.e. at what stage of the investigation); and how the public interest is considered (i.e. which factors). Answering these questions –who, when and how—will guide the procedural as well as substantive issues related to public interest.

If no common understanding is reached as to how to consider public interest, it could very well happen that the negative effect of the AD duty on the consumers and industrial users of that good be larger than the positive effects of the AD duty for the domestic industry. In this case, the net impact for the country as a whole would be negative and consequently the measure would be contrary to the objectives of the WTO which are to improve overall welfare through trade and its disciplines.

Introducing more substantive obligations of public interest would also strengthen the content of article 6.12 of the AD Agreement, and give substance to the opportunity for industrial users and consumer organizations to provide information on an AD investigation.