

Negotiating Group on Rules**PROPOSAL ON THE DEFINITION OF DOMESTIC INDUSTRY
ARTICLE 4.1 OF THE ANTI-DUMPING AGREEMENT (ADA)**

Communication from Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea, Rep. of; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand

The following communication, dated 30 November 2004, is being circulated at the request of the Delegations of Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea, Rep. of; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand.

Description of Problem:

Article 4.1 of the ADA defines the term “domestic industry” as referring to (a) “the domestic producers as a whole of the like products” or to (b) “those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products”.

Although Article 4.1 encompasses the idea that the domestic industry shall refer if not to the producers as a whole at least to the major part of such producers, a former WTO panel¹ found that the term “a major proportion” does not require the majority (more than 50 per cent) but “important, serious or significant” proportion of total domestic production. In the absence of unequivocal guidance in the ADA on the issue, antidumping duties may be adopted on the basis of an injury determination found to exist in a quite limited proportion of the domestic production of the like product.

In a hypothetical example in which the authority defines “domestic industry” as the domestic producers whose collective output of the like product constitutes 30 per cent of the total domestic production of that product, antidumping duties could be imposed where 70 per cent of the domestic producers of the like product face no problems whatsoever related to dumped imports, potentially causing a serious economic distortion in the market.

Elements of Solution:

To avoid such a situation, it should be made clear that “a major proportion” refers to “the major proportion” of the domestic industry, that is to say, more than 50 per cent of the total domestic production.

¹ Argentina - Definitive Anti-Dumping Duties on Poultry from Brazil (WT/DS241/R).
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Proposal 1:

Amend Article 4.1 as follows²:

“For the purpose of this Agreement, the term “domestic industry” shall be interpreted as referring to the domestic producers as a whole of the like products or **in exceptional cases provided for in this Agreement³, to as high a proportion of the producers as possible, but not less than those of them whose collective output of the products constitutes the major proportion (more than 50%) of the total domestic production of those products, except that:**”

Description of Problem:

Article 4.1, as amended above, defines that “domestic industry” refers to the domestic producers as a whole of the like products or, exceptionally, to “the major proportion” of the total domestic production of the like product. Nevertheless, there is no clear discipline establishing the conditions or situations in which “the major proportion” of the total domestic production of the like product is to be used. The lack of clarity in this regard has a potential impact on how injury determinations are to be carried out.

Elements of Solution:

It is necessary to establish that the injury analysis carried out by the authorities must refer to the total production of the like product in the importing Member, as defined in Article 4.1.

In situations in which authorities clearly demonstrate that they do not have information concerning the total production of the like product, the injury analysis must be carried out with all information authorities may have regarding the domestic producers, provided that such information relates to the domestic producers whose collective output of the like product constitutes the majority of the total domestic production of that product, that is, more than 50 per cent of the total production.

The authorities shall demonstrate that, despite the opportunity given to all producers to respond to questionnaires, it was not possible to undertake the injury analysis on the total production of the like product.

Proposal 2:

Add a new provision to the ADA as follows:

“Authorities shall make every effort to obtain all relevant evidence concerning all domestic producers of the like product for the purpose of making an injury determination. In exceptional cases where it is not possible to obtain evidence which covers all domestic producers, authorities shall use all evidence obtained relating to domestic producers, provided that such evidence relates to as high a proportion of the producers as possible, but not less than those of them whose collective output of the products constitutes the major proportion (more than 50%) of the total domestic production of those products. In such a case, the authorities shall provide a reasoned explanation demonstrating why it could not base the injury assessment on evidence covering domestic producers as a whole.”

² Regarding current Article 4.1(i), FANs will, at a later stage, return to the question of whether, in specific situations or circumstances, certain parts of total domestic production may be excluded for the purpose of injury determination.

³ See proposal 2.