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## **1 ARTICLE 4**

### **1.1 Text of Article 4**

#### **Article 4**

##### *Definition of Domestic Industry*

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

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

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

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

4.2 When the domestic industry has been interpreted as referring to the producers in a certain area, i.e. a market as defined in paragraph 1(ii), anti-dumping duties shall be levied<sup>12</sup> only on the products in question consigned for final consumption to that area. When the constitutional law of the importing Member does not permit the levying of anti-dumping duties on such a basis, the importing Member may levy the anti-dumping duties without

limitation only if (a) the exporters shall have been given an opportunity to cease exporting at dumped prices to the area concerned or otherwise give assurances pursuant to Article 8 and adequate assurances in this regard have not been promptly given, and (b) such duties cannot be levied only on products of specific producers which supply the area in question.

(footnote original)<sup>12</sup> As used in this Agreement "levy" shall mean the definitive or final legal assessment or collection of a duty or tax.

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

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

## 1.2 Article 4.1

### 1.2.1 No hierarchy between the two definitions in Article 4.1

1. The Panel in *China – Broiler Products* held that there is not hierarchy between the two domestic industry definitions provided for in Article 4.1.<sup>1</sup> However, the Panel stressed that, given the link between the definition of domestic industry and the substantive provisions governing the injury determination, "the investigating authority must establish total domestic production in the same manner it would conduct any other aspect of the investigation, by actively seeking out pertinent information and not remaining passive in the face of possible shortcomings in the evidence submitted."<sup>2</sup>

2. The Panel in *China – Broiler Products* stated that in investigations where the domestic industry is defined on the basis of producers representing a major proportion of total production, an investigating authority will nevertheless have to assess the situation of domestic producers outside the domestic industry definition in order to understand "whether it is the impact of the subject imports that have explanatory force for the changes in the various economic factors and whether the strength of other domestic producers could be a possible separate cause of injury to the defined 'domestic industry'."<sup>3</sup>

### 1.2.2 "domestic industry"

3. Referring to Article 4.1 and footnote 9 to Article 3, the Panel in *Mexico – Corn Syrup* stated: "[t]hese two provisions inescapably require the conclusion that the domestic industry with respect to which injury is considered and determined must be the domestic industry defined in accordance with Article 4.1."<sup>4</sup>

4. The Panel in *Morocco – Hot-Rolled Steel (Turkey)* examined "whether the MDCCE did not properly assess the 'new industry' criterion in its establishment analysis". In so doing, the Panel did not consider *Ad Note* to Article XVIII of the GATT 1994 relevant for interpretation of the term "establishment":

"We see no basis for interpreting the term 'establishment' under Article VI:6(a) of the GATT 1994 and footnote 9 to the Anti-Dumping Agreement in terms of the clarification in the *Ad Note* to Article XVIII of the GATT 1994 pertaining to 'the establishment of particular industries'. That clarification was developed, and would apply, in the specific context of 'the establishment of particular industries', with a view to securing economic development in certain limited types of economies. In contrast, Article VI:6(a) and footnote 9 to the Anti-Dumping Agreement, and any requirements

<sup>1</sup> Panel Report, *China – Broiler Products*, para. 7.416.

<sup>2</sup> Panel Report, *China – Broiler Products*, para. 7.421.

<sup>3</sup> Panel Report, *China – Broiler Products*, para. 7.419.

<sup>4</sup> Panel Report, *Mexico – Corn Syrup*, para. 7.147. The Panel on *EC – Bed Linen* indicated that "[they] express no opinion as to the correctness *vela non* of the European Communities' interpretation of Article 4 of the *AD Agreement* or its application in this case". Panel Report, *EC – Bed Linen*, para. 6.175.

therein regarding the determination of injury in the form of material retardation of the establishment of the domestic industry, apply equally to all Members."<sup>5</sup>

5. The Panel looked into whether introduction of a new product necessarily amounts to creation of a new industry:

"If an existing industry chooses to introduce a new product unlike any other product currently being produced, the introduction of that new product will not necessarily result in the creation of a new industry. It may still be perceived as the introduction of a new product line into the existing industry, depending on the degree to which the overall infrastructure (including the productive, commercial, research, and administrative assets) of the existing industry is implicated. The greater the degree of overlap in the use of overall infrastructure, the less likely the perception that the introduction of the new product marks the establishment of a new industry. The fact that a domestic industry is defined by Article 4.1 of the Anti-Dumping Agreement by reference to like product, and that there are no pre-existing producers of that like product in the domestic market, does not preclude the possibility of that domestic industry utilizing existing infrastructure, such as customer contacts and distribution channels, in its introduction of that like product in the domestic market.

...

We agree with Turkey, however, that investments are required even where a company adds a new product line, and a company's investment to produce a different product line should not automatically lead to the conclusion that the company is creating 'a new industry'."<sup>6</sup>

6. In *US – Ripe Olives from Spain*, the Panel rejected the European Union's argument that the USITC was prevented from considering sections of the market, i.e., customer groups in the context of its injury analysis, because those sections had not been explicitly included in the USITC's definition of the domestic industry:

"Our interpretation of these provisions is consistent with the European Union's assertion that an injury determination must concern the domestic industry as defined by the relevant investigating authority in accordance with Article 4.1 and Article 16.1. We find no support, however, for the different proposition espoused by the European Union, which is that an investigating authority may only consider sections of a market while undertaking an injury analysis when it has explicitly identified these sections in the definition of the domestic industry. There is no reason that an investigating authority's analysis of market segments would necessarily imply that the final injury determination was not made with respect to the domestic industry as defined by the investigating authority. We therefore disagree that the USITC's analysis of market segments posed a risk of distortion. In particular, in this case the three customer groups collectively represented the whole market. Their analysis by the USITC would thus not necessarily leave parts of the domestic industry unexamined. We therefore do not see any material risk of distortion arising from the fact that the USITC did not incorporate into its definition of the domestic industry reference to the various market segments it later analysed. ...

We consequently reject the European Union's claim that the USITC was prevented from considering customer groups because such customer groups were not explicitly referred to in the definition of the domestic industry."<sup>7</sup>

### 1.2.3 "domestic producers"

7. Referring to provisions which use the plural form, but are applicable in the singular case, the Panel in *EC – Bed Linen* stated that "Article 4.1 of the *AD Agreement* defines the domestic industry in terms of 'domestic producers' in the plural. Yet we consider it indisputable that a single domestic producer may constitute the domestic industry under the *AD Agreement*, and that the

<sup>5</sup> Panel Report, *Morocco – Hot-Rolled Steel (Turkey)*, fn 313.

<sup>6</sup> Panel Report, *Morocco – Hot-Rolled Steel (Turkey)*, paras. 7.211 and 7.216.

<sup>7</sup> Panel Report, *US – Ripe Olives from Spain*, paras. 7.223 and 7.224.

provisions concerning domestic industry under Article 4 continue to apply in such a factual situation."<sup>8</sup>

8. The Panel in *EC – Bed Linen* examined whether, further to having defined the Community industry as a group of 35 producers and resorted to a sample of those producers, the European Communities was precluded from considering information relating to producers not within that sample, or not within the Community industry.

9. In the investigation at issue in *Russia – Commercial Vehicles*, the Russian investigating authority initially included two producers in the domestic industry definition, but, after reviewing their questionnaire responses, decided to exclude one of the producers from the domestic industry on the ground that its data were deficient.<sup>9</sup> The Panel pointed out that "[t]his sequence of events gives rise to an appearance of selecting among domestic producers based on their data to ensure a particular outcome, resulting in an obvious risk of material distortion in the subsequent injury analysis."<sup>10</sup> The Panel also noted that "the definition of domestic industry and the collection and use of data from that domestic industry are separate issues."<sup>11</sup> On this basis, the Panel found a violation of Article 4.1 and, consequently, Article 3.1:

"As a matter of fact, based on the events set out in the Investigation Report, we conclude that the DIMD defined the domestic industry as Sollers only after it received Questionnaire responses from both Sollers and GAZ. As a matter of law, we find that, for the reasons set out above, the DIMD acted inconsistently with Article 4.1 in its definition of 'domestic industry'. Where an investigating authority makes injury and causation determination on the basis of information related to an improperly defined domestic industry, it acts inconsistently with various provisions of Article 3. In the light of the claims of the European Union in this case, based on our findings above in respect of Article 4.1, we find that the DIMD consequently acted inconsistently with Article 3.1."<sup>12</sup>

10. The Appellate Body concluded that the Panel did not err in finding that the Russian investigating authority acted inconsistently with Article 4.1, and consequently Article 3.1, when it excluded one of the producers from the domestic industry on the ground that its data were allegedly deficient:

"Article 4.1 of the Anti-Dumping Agreement provides that the 'domestic industry' is composed of domestic producers of the like product. If an investigating authority were permitted to leave out, from the definition of domestic industry, the domestic producers of the like product that provided *allegedly* deficient information, a material risk of distortion would arise in the injury analysis. This is because the non-inclusion of those producers could make the definition of domestic industry no longer representative of the total domestic production. We do not consider that Article 3.1 of the Anti-Dumping Agreement allows investigating authorities to leave domestic producers of the like product out of the definition of domestic industry because of *alleged* deficiencies in the information submitted by those producers. The Anti-Dumping Agreement, in particular Article 6, sets out tools to address the inaccuracy and incompleteness of information. Thus, in our view, the Panel's interpretation of Article 4.1 does not create a conflict between the obligations in Article 3.1 and Article 4.1 of the Anti-Dumping Agreement. We also do not read the Panel's interpretation of Article 4.1 as having reduced the term 'major proportion' to inutility in this provision. Moreover, we do not consider that Articles 3.1 and 4.1 prevent an investigating authority from initially examining the information submitted by domestic producers before defining the domestic industry to the extent that the information collected is pertinent to defining the domestic industry. We do not consider that the Panel reached its finding solely on the basis of the fact that the

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<sup>8</sup> Panel Report, *EC – Bed Linen*, para. 6.72.

<sup>9</sup> Panel Report, *Russia – Commercial Vehicles*, para. 7.12.

<sup>10</sup> Panel Report, *Russia – Commercial Vehicles*, para. 7.15.

<sup>11</sup> Panel Report, *Russia – Commercial Vehicles*, fn 85.

<sup>12</sup> Panel Report, *Russia – Commercial Vehicles*, para. 7.16.

DIMD reviewed the information submitted by Sollers and GAZ before defining the domestic industry."<sup>13</sup>

#### 1.2.4 "a major proportion of the total domestic production"

11. The Panel in *Argentina – Poultry Anti-Dumping Duties* considered whether or not the phrase "a major proportion" implies that the "domestic industry" refers to domestic producers whose collective output constitutes the majority, that is, more than 50 per cent, of domestic total production. The Panel considered different dictionary definitions and noted that the word "major" is also defined as "important, serious, or significant".<sup>14</sup> The Panel therefore found that "an interpretation that defines the domestic industry in terms of domestic producers of an important, serious or significant proportion of total domestic production is permissible."<sup>15</sup>

12. The Panel in *EC – Salmon (Norway)* concluded that the European Communities had erred in excluding certain enterprises from the domestic industry and thus the European Communities assessment of whether the producers it did include accounted for a "major proportion" of domestic production of the like product was based on incorrect information. To avoid conducting a *de novo* review the Panel exercised judicial economy on this point.

13. The Appellate Body in *EC – Fasteners (China)* found that the EU authorities violated Article 4.1 by defining a domestic industry comprising producers accounting for 27 per cent of total estimated EU production of fasteners. As described by the Appellate Body, "the Commission selected six producers as part of the sample, obtained relevant information from them, and verified the information on their premises. The Commission then used the information obtained from the sampled producers for its analysis of the 'microeconomic' injury factors, but conducted its analysis of the 'macroeconomic' injury factors on the basis of information obtained from all of the 45 producers included in the domestic industry definition."<sup>16</sup> The Appellate Body found:

"A major proportion' ... should be understood as a proportion defined by reference to the total production of domestic producers as a whole. 'A major proportion' of such *total* production will standardly serve as a substantial reflection of the total domestic production. ...

In our view, the above interpretation is confirmed by the purpose of defining the domestic industry under the *Anti-Dumping Agreement*. As footnote 9 to Article 3 of the *Anti-Dumping Agreement* indicates, the domestic industry forms the basis on which an investigating authority makes the determination of whether the dumped imports cause or threaten to cause material injury to the domestic producers. ... 'a major proportion of the total domestic production' should be determined so as to ensure that the domestic industry defined on this basis is capable of providing ample data that ensure an accurate injury analysis.

... [T]o ensure the accuracy of an injury determination, an investigating authority must not act so as to give rise to a material risk of distortion in defining the domestic industry, for example, by excluding a whole category of producers of the like product."<sup>17</sup>

14. The Appellate Body summed up:

"In sum, a proper interpretation of the term 'a major proportion' under Article 4.1 requires that the domestic industry defined on this basis encompass producers whose collective output represents a relatively high proportion that substantially reflects the total domestic production. This ensures that the injury determination is based on wide-ranging information regarding domestic producers and is not distorted or skewed. In the special case of a fragmented industry with numerous producers, the practical constraints on an authority's ability to obtain information may mean that

<sup>13</sup> Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.40.

<sup>14</sup> Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.341.

<sup>15</sup> Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.341.

<sup>16</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 429.

<sup>17</sup> Appellate Body Report, *EC – Fasteners (China)*, paras. 412-414.

what constitutes 'a major proportion' may be lower than what is ordinarily permissible in a less fragmented industry. However, even in such cases, the authority bears the same obligation to ensure that the process of defining the domestic industry does not give rise to a material risk of distortion. A complainant alleging an inconsistency under the second method for defining the domestic industry bears the burden to prove its claim and to demonstrate that the domestic industry definition does not meet the standard of 'a major proportion'. Nonetheless, a domestic industry defined on the basis of a proportion that is low, or defined through a process that involves active exclusion of certain domestic producers, is likely to be more susceptible to a finding of inconsistency under Article 4.1 of the *Anti-Dumping Agreement*.<sup>18</sup>

15. The Appellate Body also declined to draw on the 25 per cent threshold in Article 5.4 as context for interpreting "a major proportion" in Article 4.1, because "the 25 per cent benchmark under Article 5.4 does not address the question of how the entire universe of the domestic industry *itself* should be defined."<sup>19</sup> Observing that the EC Regulation linked the "major proportion" requirement to the benchmark in Article 5.4, the Appellate Body found:

"[T]he Commission determined that a proportion as small as 27 per cent met the standard of 'a major proportion' simply because it exceeded a benchmark that was irrelevant to the issue of the definition of the domestic industry. As a result ... the domestic industry defined in the fasteners investigation covered a low proportion of domestic production, which significantly restricted the data coverage for conducting an accurate and undistorted injury determination.

...

... Even though, due to the fragmented nature of the fasteners industry, the practical constraints on obtaining information may justify the inclusion of a smaller proportion of domestic production in the domestic industry definition, the Commission's approach in excluding those who provided relevant information but were unwilling to be part of the sample was unrelated to, and cannot be justified by, such practical constraints."<sup>20</sup>

16. In *EC – Fasteners (China)*, the Appellate Body upheld a Panel finding that the EU authorities (having invited all known producers to come forward and indicate willingness to participate within 15 days after the notice of initiation of the investigation) did not violate Article 4.1 by excluding from the definition of domestic industry those producers who did not make themselves known within the 15-day deadline. The Appellate Body observed that "[g]iven the multiple steps that must be carried out in an anti-dumping investigation and the time constraint on an investigation, an investigating authority must be allowed to set various deadlines to ensure an orderly conduct of the investigation."<sup>21</sup>

17. The Panel in *China – Autos (US)* made a distinction between an *a priori* exclusion of producers from the domestic industry and data collection problems in the context of the injury determination. The Panel also added that an investigating authority did not necessarily have to include in the domestic industry a particular proportion of producers that opposed the complaint:

"However, merely because certain producers were not included in the domestic industry as defined by MOFCOM in this dispute, it does not necessarily follow that such producers were thereby excluded from the domestic industry definition. Rather, we see an important distinction between the *a priori* exclusion of producers from the domestic industry, as defined pursuant to Articles 4.1 and 16.1, and data collection problems that an IA may encounter after defining the domestic industry. While the latter scenario may raise concerns as to the consistency of the IA's injury determination with Article 3 of the Anti-Dumping Agreement and Article 15 of the SCM Agreement, unlike the former scenario, it would not necessarily bear upon Articles 4.1 and 16.1. We recall in this regard that Articles 4.1 and 16.1 do not establish any particular procedure or methodology for MOFCOM to follow in defining

<sup>18</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 419.

<sup>19</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 418.

<sup>20</sup> Appellate Body Report, *EC – Fasteners (China)*, paras. 425 and 429.

<sup>21</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 460.

the domestic industry. Nothing in these provisions thus precludes MOFCOM from establishing deadlines for producers to come forward to be considered for inclusion in the domestic industry, despite that such deadlines may ultimately prevent producers from participating in the investigations, where they fail to make themselves known in a timely manner. In our view, further, the mere fact that the domestic industry as defined does not include a particular proportion of producers opposing the complaint, does not demonstrate that MOFCOM acted inconsistently with Articles 4.1 and 16.1. With this in mind, we turn to the specific arguments with respect to this claim."<sup>22</sup>

18. The Panel in *China – Autos (US)* rejected the United States' argument that the Chinese investigating authority's registration requirement introduced self-selection among domestic producers:

"We find the US contention that MOFCOM's registration requirement introduced a material risk of distortion, as a process capable of leading to self-selection among domestic producers in the definition of the domestic industry, to be unconvincing. We note that there are multiple steps that must be taken in AD and CVD investigations, and IAs face logistical constraints in this regard. In previous cases, panels and the Appellate Body have concluded that an IA must be allowed some flexibility in how it ensures an orderly conduct of its investigations, for instance by establishing deadlines for interested parties to come forward to be considered for inclusion in the domestic industry. We consider that the same need for flexibility justifies the use of a registration process, which essentially requires interested parties to come forward by a deadline and make themselves known to the IA to be considered part of the domestic industry. The mere fact that some producers may choose not to do so, i.e., 'self-select' out of coming forward, to use the US terminology, does not, in our view, introduce a material risk of distortion in the IA's process of defining the domestic industry. In our view, merely that domestic producers might choose not to participate does not mean that the registration requirement leads to a definition of domestic industry inconsistent with Articles 4.1 and 16.1. Provided a registration requirement strikes an appropriate balance between the right of interested parties to participate in an investigation, and administrative efficiency, we see nothing in the relevant provisions that would preclude it.

In determining whether or not MOFCOM's registration requirement struck an appropriate balance in this regard, we recall that MOFCOM issued two notices of initiation and two notices calling for interested parties to register in the injury investigations, to which the registration forms were appended. All four notices contained information about how to contact the responsible MOFCOM officials. Further, MOFCOM placed these notices, information about the investigations, and the registration forms themselves on its website. The registration forms consisted of a questionnaire inviting prospective registrants to submit contact details and company-specific information on capacity, production, inventory, construction and expansion plans, and export/import volumes and values during the POI. MOFCOM, in these notices, specified a 20-day deadline for interested parties to register to participate in its investigations, expiring on 26 November 2009. In our view, MOFCOM communicated its notices and forms in an open manner, and the possibility of participation in the investigations was equally available to any interested party."<sup>23</sup>

19. In this regard, the Panel in *China – Autos (US)* also stated that MOFCOM's registration requirement contained a neutral request for information, and that therefore MOFCOM could not be blamed for the type of domestic industry that emerged in response to the:

"We disagree with the US contention that MOFCOM's use of a registration requirement created an inherent bias towards weaker-performing domestic producers in the Chinese automobile market, thereby leading to the imposition of higher duties. The data requested by MOFCOM in the registration notices was directly related to the inquiries MOFCOM would have to undertake in defining the domestic industry and making a determination of injury. We see nothing in the neutral request for

<sup>22</sup> Panel Report, *China – Autos (US)*, para. 7.212.

<sup>23</sup> Panel Report, *China – Autos (US)*, paras. 7.214-7.215.

information that would cause domestic producers posting the strongest performance to be more reluctant to come forward, provide this information to MOFCOM, and register to participate. Moreover, even if such producers did choose not to participate, we do not see how this can be attributed to the IA or the registration process."<sup>24</sup>

20. The Panel in *China – Autos (US)* rejected the United States' argument that the Chinese investigating authority had based its domestic industry definition on self-selection because the industry association that had filed the petition provided data from only some of its members for the injury determination. The Panel found it normal that, in general, weaker-performing producers would be more willing to participate in an investigation, and pointed out that this fact, alone, did not amount to self-selection:

"Turning to the second alleged distortion in MOFCOM's domestic industry definition, the United States argues that there was self-selection in this case, as a result of which the CAAM ultimately provided data to MOFCOM from only eight of its member producers resulting in actual distortion of the injury determination. This argument rests on speculation. The United States has pointed to nothing on the record which suggests that the CAAM orchestrated its members' participation in MOFCOM's investigations in any way that would make an affirmative injury determination more likely. Moreover, while it is true that only a subset of CAAM members chose to participate in MOFCOM's investigations, there is simply no evidence to suggest that this was because those companies were the weakest, and that producers posting stronger results chose not to participate for that reason. There are equally plausible other reasons which might explain the decision of CAAM members to participate in the investigations or not.

We note that there is nothing in the text of the Anti-Dumping or SCM Agreements establishing a methodology for defining the domestic industry in an investigation. In our view, the possibility that weaker-performing producers in a given industry will more strongly support an AD or CVD investigation or be more likely to participate actively is simply a reflection of the realities of trade remedy actions. The possibility of imposition of definitive AD and/or CVD measures will afford all producers relief from lower-priced imports, but producers performing less well will tend to have a greater incentive to seek initiation of and participate in an investigation. We fail to see how this fact, which is beyond the control of an IA, is affected by the requirement that producers register and provide certain information in order to participate. In the same vein, the fact that producers may choose to request and take part in an investigation by coordinating their actions through a trade association, which can gather individual company data to send to the IA, does not necessarily mean that a domestic industry defined as those producers is inconsistent with the requirements of Articles 4.1 and 16.1. We recall that Articles 5.4 of the Anti-Dumping Agreement and 11.4 of the SCM Agreement provide that an AD or CVD investigation may only be initiated based on an application made 'by or on behalf of' the domestic industry. Further, Articles 5.4 of the Anti-Dumping Agreement and 11.4 of the SCM Agreement preclude the initiation of an investigation where producers expressly supporting the application account for less than 25% of total production, or where producers supporting the application account for less than 50% of production of those producers expressing an opinion. Thus, the possibility that a domestic industry could, by self-selecting participation in the investigation obtain an AD or CVD measure which is unjustified seems extremely unlikely. Certainly nothing in the circumstances of this case suggests that this happened in the investigations at issue."<sup>25</sup>

21. The Panel in *EC – Fasteners (China)* rejected a claim regarding inclusion of importers, or parties related to exporters or importers of the allegedly dumped product. The Panel found that "the use of the term 'may' in Article 4.1 makes it clear that investigating authorities are not required to exclude related producers or importing producers" and that "there is nothing in

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<sup>24</sup> Panel Report, *China – Autos (US)*, para. 7.216.

<sup>25</sup> Panel Report, *China – Autos (US)*, paras. 7.224-7.225.



Article 3.1, or in Article 4.1, that limits the discretion of investigating authorities to exclude, or not, related or importing domestic producers."<sup>26</sup>

22. The Panel in *EC – Fasteners (China) (Article 21.5 – China)*, in a finding upheld by the Appellate Body, found that the EU Commission acted inconsistently with Article 4.1, and therefore Article 3.1, of the Anti-Dumping Agreement, by basing its domestic industry definition in the review investigation, following the DSB's adverse recommendations in the original proceedings, on producers that came forward in response to the notice of initiation in the original investigation, which stated that only producers willing to be included in the injury sample would be part of the domestic industry definition. The Panel explained the basis for its finding as follows:

"It is uncontested that in the review investigation the Commission did not issue a new call to domestic producers willing to participate in the investigation. The Commission re-defined the domestic industry on the basis of all European producers that had come forward within the deadline given in the notice of initiation of the original investigation. None of those producers was excluded from the new definition of domestic industry. The fact remained, however, that the boundaries of the Commission's domestic industry definition were set by the notice of initiation of the original investigation. The producers that the Commission included in the new definition of domestic industry were those that had come forward after the issuance of the original notice of initiation, which stated clearly that only those producers that agreed to be part of the injury sample would be considered as cooperating. To us, this shows that the self-selection, or the mixing of the definition of domestic industry and the establishment of an injury sample that the Appellate Body identified in connection with the original investigation, continued to exist in the review investigation. In our view, therefore, the Commission's domestic industry definition in the review investigation also continued to suffer from a self-selection process that introduced a material risk of distortion."<sup>27</sup>

23. On appeal, the Appellate Body stated that "a process of the domestic industry definition may be inconsistent with Articles 4.1 and 3.1 not only when distortion actually occurs, but also when the process in question risks or is susceptible to lead to distortion".<sup>28</sup>

24. The Appellate Body in *EC – Fasteners (China) (Article 21.5 – China)* cautioned against defining the domestic industry in a way that it would include, exclusively or predominantly, producers that considered themselves injured by the dumped imports:

"In the original proceedings, the Appellate Body found that, in special market situations such as a fragmented industry with numerous producers, the practical constraints on an investigating authority's ability to obtain information regarding domestic producers may justify defining the domestic industry on the basis of a lower proportion than would be permissible in a less fragmented market. Nevertheless, even if it relies on a lower proportion, an investigating authority should not seek to rely exclusively or predominantly on those domestic producers that consider themselves to be injured and may thus be willing to be part of the injury sample. We recall that 'objective examination' under Article 3.1 requires that the domestic industry, and the effects of dumped imports, 'be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation'. Where an investigating authority relies on a lower proportion of domestic producers to define the domestic industry in the case of fragmented industries, it is particularly important that the process used to select domestic producers does not introduce a material risk of distortion and that, therefore, the proportion of total production included in the domestic industry definition is representative of the total domestic industry."<sup>29</sup>

25. The Appellate Body in *EC – Fasteners (China) (Article 21.5 – China)* held that the "major proportion" requirement of Article 4.1 has both quantitative and qualitative connotations:

<sup>26</sup> Panel Report, *EC – Fasteners (China)*, para. 7.244.

<sup>27</sup> Panel Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 7.296. See also *ibid.* para. 7.299.

<sup>28</sup> Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.321.

<sup>29</sup> Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.319.

"These findings by the Appellate Body suggest that there is an inverse relationship between, on the one hand, the proportion of producers represented in the domestic industry and, on the other hand, the absence of a risk of material distortion in the definition of the domestic industry and in the assessment of injury. We thus read the requirement in Article 4.1 that domestic producers' output constitute a 'major proportion' as having both quantitative and qualitative connotations.

When the domestic industry is defined as the domestic producers whose collective output constitutes a major proportion of total domestic production, a very high proportion that 'substantially reflects the total domestic production' will very likely satisfy both the quantitative and the qualitative aspect of the requirements of Articles 4.1 and 3.1. However, if the proportion of the domestic producers' collective output included in the domestic industry definition is not sufficiently high that it can be considered as substantially reflecting the totality of the domestic production, then the qualitative element becomes crucial in establishing whether the definition of the domestic industry is consistent with Articles 4.1 and 3.1. While, in the special case of a fragmented industry with numerous producers the practical constraints on an authority's ability to obtain information may mean that what constitutes 'a major proportion' may be lower than what is ordinarily permissible, in such cases, the investigating authority bears the same obligation to ensure that the process of defining the domestic industry does not give rise to a material risk of distortion. An investigating authority would need to make a greater effort to ensure that the selected domestic producers are representative of the total domestic production by ascertaining that the process of the domestic industry definition, and ultimately the injury determination, does not give rise to a material risk of distortion."<sup>30</sup>

26. The Appellate Body in *EC – Fasteners (China)* (Article 21.5 – China) found 36% to be low in terms of the "major proportion" requirement of Article 4.1:

"We observe that the inclusion in the revised definition of the domestic industry of those producers that had come forward by the deadline but were excluded because they were not willing to be part of the sample increased the number of included producers from 45 to 70. We also note that the inclusion of these producers increased the proportion of total domestic production in the European Union from 27% in the original investigation to 36% in the review investigation. While the proportion relied upon in the review investigation is higher, a proportion of 36% of the total domestic production remains low, even in the context of the fragmented fasteners industry. Moreover, this low proportion could not be considered as a 'major proportion' within the meaning of Article 4.1, especially where the investigating authority relies on a process of defining the domestic industry that introduces a material risk of distortion and fails to ensure that the proportion of domestic producers selected is representative of the whole."<sup>31</sup>

27. In *Russia – Commercial Vehicles*, the Appellate Body concluded that the Panel did not err in finding that the Russian investigating authority acted inconsistently with Article 4.1, and consequently Article 3.1, when it excluded one of the producers from the domestic industry on the ground that its data were allegedly deficient. In response to Russia's argument that this finding would render the "major proportion" requirement in Article 4.1 *inutile*, the Appellate Body stated:

"[W]e recall that the Appellate Body has recognized the difficulty of obtaining information regarding domestic producers in certain situations, such as fragmented industries with numerous producers. In such special cases, the term 'major proportion' in Article 4.1 allows an investigating authority a certain degree of flexibility in defining the domestic industry. Nevertheless, an investigating authority continues to bear the obligation to ensure that the way in which it defines the domestic industry does not introduce a material risk of distortion into the injury analysis. In our view, the situation where an investigating authority is unable to collect any information at all from every domestic producer due to the fragmented nature of the industry is different from the situation where a domestic producer sought to cooperate in the

<sup>30</sup> Appellate Body Report, *EC – Fasteners (China)* (Article 21.5 – China), paras. 5.302-5.303.

<sup>31</sup> Appellate Body Report, *EC – Fasteners (China)* (Article 21.5 – China), para. 5.313.

investigation and did submit information that the investigating authority, however, considered to be deficient.

We consider that the Panel correctly recognized that an investigating authority could define the domestic industry as a 'major proportion' of the total domestic production as long as both the quantitative and qualitative elements are satisfied. The Panel also correctly found that Article 4.1 does not allow an investigating authority to leave out of the definition of domestic industry the domestic producers of the like product that provided allegedly deficient information. Thus, contrary to Russia's claim on appeal, we do not consider that the Panel's interpretation of Article 4.1 of the Anti-Dumping Agreement reduces the term 'major proportion' in this provision to inutility."<sup>32</sup>

28. In the investigation at issue in *China — AD on Stainless Steel (Japan)*, China's investigating authority faced two risks of double counting in the calculation of domestic production for purposes of defining the domestic industry. The authority's approach sought to avoid the first of such risks, but not the second. The Panel found this to be inconsistent with Article 4.1:

"However, as Japan notes, to the extent that billets (slabs) may be sold by one Chinese producer to another Chinese producer that consumed them to manufacture coils or plates, the same type of double counting problem that MOFCOM sought to address by relying on external sales volume would arise. Thus, we agree with Japan that on the facts before MOFCOM, double counting could arise in two scenarios:

- a. First, when a domestic producer in China captively consumes billets (slabs) and processes it into coils or plates.
- b. Second, when a domestic producer in China sells billets (slabs) to another producer in China, which, in turn processes it into coils and plates.

While MOFCOM acknowledged and sought to avoid the first of these two instances of possible double counting, it did not address that double counting might also arise in the second scenario.

In our view, faced with such circumstances, an unbiased and objective investigating authority determining whether the production of certain firms constituted a 'major proportion' of total domestic production should have either (a) described whether, and if so how, it avoided double counting arising from external sales to other Chinese producers who would use such billets (slabs) to manufacture coils or plates or, in the alternative (b) provided a reasoned and adequate explanation as to why it was unnecessary to address the double counting arising in this second scenario. MOFCOM's report addresses neither of these points."<sup>33</sup>

29. The Panel in *China — AD on Stainless Steel (Japan)* rejected Japan's argument that China's investigating authority had acted inconsistently with Article 4.1 by failing to explain the reasons for the discrepancy between the domestic industry's share in total production and its market share:

"We note that the 'major proportion' requirement in Article 4.1 focuses on the share of the domestic industry in total domestic *production*, and not the domestic industry's share in domestic *consumption* (or *market share*). We also note that Article 4.1 of the Anti-Dumping Agreement (or any other provision of the Anti-Dumping Agreement) does not specifically require an explanation of why there may be a difference between the domestic industry's market share and its share of domestic production. In the absence of any obligation, we do not consider that MOFCOM was required to explain in its determination any difference between the domestic industry's share of domestic production and its market share. Moreover, to the extent that Japan may be arguing that the difference in the domestic industry producers' market share compared with their share in total domestic production shows

<sup>32</sup> Appellate Body Report, *Russia – Commercial Vehicles*, paras. 5.28-5.29.

<sup>33</sup> Panel Report, *China — AD on Stainless Steel (Japan)*, paras. 7.36-7.37. See also *ibid.* para. 7.41.

that the latter data relied upon by MOFCOM were inaccurate, we note that, as Japan acknowledges, the sources of the different data sets are different. In our view, the difference in the market share of the domestic industry compared with its share of total domestic production is not, alone, sufficient to show that the data used to calculate the domestic industry's share in domestic production was unreliable. Japan has not demonstrated how exactly the data on domestic production was inaccurate.

Based on the foregoing, we find that Japan has not established that MOFCOM's definition of the domestic industry was inconsistent with Article 4.1 because of an absence in MOFCOM's final determination of any explanation with respect to the difference in the domestic industry's share of domestic production and its market share."<sup>34</sup>

30. The Panel in *China — AD on Stainless Steel (Japan)* rejected Japan's argument that China's investigating authority had failed to comply with the major proportion requirement of Article 4.1 by not ensuring that the domestic industry as defined by the authority did not reflect the total domestic production of each of the three product categories falling within the scope of domestic like product:

"In answering this question, we start by noting that, as previous DSB reports have also recognized, neither the product under consideration nor the domestic like product need to be homogenous, and thus products falling within the 'domestic like product' do not need to be like each other. However, to comply with the *qualitative* aspect of the 'major proportion' requirement under Article 4.1, the domestic industry as defined by the investigating authority must still be *representative* of domestic producers as a whole. If the domestic industry is unique compared to the rest of the domestic producers because, for example, it focuses on the production of a particular type of like product that is not produced by other domestic producers, then depending upon the facts, the domestic industry may potentially be unrepresentative of the domestic industry as a whole. However, the burden for demonstrating any such unrepresentativeness is on the complainant, and here it is up to Japan to make a *prima facie* case through arguments and evidence, that MOFCOM failed to define the domestic industry consistently with Article 4.1.

In our view, Japan has not established that the domestic industry as defined was not representative of the domestic industry as a whole because of differences between billets, coils, and plates. We noted above that neither the product under consideration nor the domestic like product need to be homogeneous. Thus, differences between the product categories forming part of the product under consideration or domestic like products are not determinative of whether the domestic industry as defined is representative of the domestic industry as a whole. While evidence in a particular case might lead to a conclusion that a domestic industry was not representative due to the mix of products it produced, in this case Japan has presented no such evidence."<sup>35</sup>

### 1.3 Relationship with other provisions of the Anti-Dumping Agreement

31. In *Mexico – Corn Syrup*, the Panel referred to footnote 9 to Article 3 in interpreting Article 4.1. See paragraph 3 above.

32. The Panel in *Argentina – Poultry Anti-Dumping Duties* rejected the argument that Article 4.1 does not contain an obligation, but is merely a definition which, as such, cannot be violated. The Panel considered that:

"Article 4.1 provides that the term 'domestic industry' 'shall' be interpreted in a specific manner. In our view, this imposes an express obligation on Members to interpret the term 'domestic industry' in that specified manner. Thus, if a Member

<sup>34</sup> Panel Report, *China — AD on Stainless Steel (Japan)*, paras. 7.44-7.45.

<sup>35</sup> Panel Report, *China — AD on Stainless Steel (Japan)*, paras. 7.51 and 7.54.

were to interpret the term differently in the context of an anti-dumping investigation, that Member would violate the obligation set forth in Article 4.1."<sup>36</sup>

33. In *Russia – Commercial Vehicles*, the Appellate Body upheld the Panel's finding that the Russian investigating authority acted inconsistently with Article 4.1 when it excluded one of the producers from the domestic industry on the ground that its data were allegedly deficient. In the course of its analysis, the Appellate Body considered the relationship between Article 4.1 and the "positive evidence" requirement in Article 3.1, and the provisions of Article 6.6, 6.7, and 6.8:

"Article 3.1 of the Anti-Dumping Agreement neither permits nor obliges an investigating authority to derogate from defining the domestic industry in relation to the domestic producers of the like product, so as to leave out producers that provided allegedly deficient data. Rather than being permitted or even required by Article 3.1, as Russia seems to argue, the non-inclusion of domestic producers of the like product in the domestic industry definition solely on the basis that they furnished allegedly deficient information is incompatible with the requirements of this provision. This is because, if an investigating authority were permitted to leave out, from the definition of domestic industry, domestic producers of the like product that provided *allegedly* deficient information, a material risk of distortion would arise in the injury analysis. The non-inclusion of this category of producers could make the domestic industry definition no longer representative of the total domestic production, thereby undermining the accuracy of the injury analysis.

Rather than leaving a producer of the like product that provided allegedly deficient information out of the domestic industry, the investigating authority should seek to obtain additional information from that domestic producer. In this respect, Article 6.6 of the Anti-Dumping Agreement provides that investigating authorities shall, 'during the course of an investigation', satisfy themselves as to the accuracy of the information supplied. Article 6.7 of the Anti-Dumping Agreement sets out additional actions that authorities may take to verify information provided or to obtain further details. Article 6.8 of the Anti-Dumping Agreement allows investigating authorities to make determinations on the basis of facts available in cases where an interested party refuses access to or otherwise does not provide necessary information, or significantly impedes the investigation. Thus, tools exist under the Anti-Dumping Agreement to address the inaccuracy and incompleteness of information. We therefore disagree with Russia's proposition that, in order to ensure the accuracy of the injury analysis, an investigating authority needs, from the outset, to leave out of the definition of domestic industry the domestic producers of the like product that provided allegedly deficient information."<sup>37</sup>

## **1.4 Relationship with other Agreements**

### **1.4.1 SCM Agreement**

34. As the text of Article 16 of the SCM Agreement parallels the text of Article 4 of the Anti-Dumping Agreement, see also the Section on Article 16 of the SCM Agreement.

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<sup>36</sup> Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.338.

<sup>37</sup> Appellate Body Report, *Russia – Commercial Vehicles*, paras. 5.21-5.22.