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1 ARTICLE 16

1.1 Text of Article 16

Article 16

Definition of Domestic Industry

16.1 For the purposes of this Agreement, the term "domestic industry" shall, except as provided in paragraph 2, 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 when producers are related⁴⁸ to the exporters or importers or are themselves importers of the allegedly subsidized product or a like product from other countries, the term "domestic industry" may be interpreted as referring to the rest of the producers.

(footnote original)⁴⁸ 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.

16.2. 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 subsidized imports into such an isolated market and provided further that the subsidized imports are causing injury to the producers of all or almost all of the production within such market.

16.3 When the domestic industry has been interpreted as referring to the producers in a certain area, i.e. a market as defined in paragraph 2, countervailing duties shall be levied 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 countervailing duties on such a basis, the importing Member may levy the countervailing duties without limitation only if (a) the exporters shall have been given an opportunity to cease exporting at subsidized prices to the area concerned or otherwise give assurances pursuant to Article 18, 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.

16.4 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 paragraphs 1 and 2.

16.5 The provisions of paragraph 6 of Article 15 shall be applicable to this Article.

1.2 General

1.2.1 Anti-Dumping Agreement

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

1.3 Article 16.1

1.3.1 "domestic industry"

1. In *China – Broiler Products*, the Panel addressed the issue of whether investigating authorities can choose between the two definitions of domestic industry as contained in Article 16.1 of the SCM Agreement and the corollary provision in the Anti-Dumping Agreement (namely Article 4.1). The two definitions are (i) "domestic producers as a whole" and (ii) those domestic producers "whose collective output of the products constitutes a major proportion of the total domestic production". The Panel considered that there is no hierarchy between these definitions:

"Although the texts of Articles 4.1 [of the Anti-Dumping Agreement] and 16.1 [of the SCM Agreement] do list one definition before the other, we see nothing that explicitly indicates a hierarchy or sequencing between the two definitions. Indeed, the texts of the provisions use the term 'or' rather than terms that would indicate a hierarchy, such as 'first' or 'if not, then'. The use of the term 'or' indicates the flexibility the agreements provide to investigating authorities with respect to defining the domestic industry. Moreover, the Appellate Body has confirmed that the use of 'a major proportion' within the meaning of Article 4.1 provides an investigating authority with flexibility to define the domestic industry in the light of what is reasonable and practically possible.¹ This inherent flexibility means that investigating authorities are not required by the agreements to first attempt to identify every domestic producer before they can define the domestic industry as those producers whose output constitutes a major proportion of total domestic production."²

2. The Panel further elaborated that "[d]omestic industries vary widely from investigation to investigation and what would be 'easier' in one situation may not be in another."³ The Panel explained that:

"[A]n investigating authority is not allowed to ignore the situation of other domestic producers in its injury determination. An investigating authority will make its analysis under Articles 3.2 and 3.4 with reference to the defined domestic industry, but will still need to assess the situation of other domestic producers in its evaluation of 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.'

For the foregoing reasons, Articles 4.1 and 16.1 do not require the investigating authority at the outset to attempt to define the domestic industry as the domestic producers as a whole or to have to make efforts to identify all domestic producers before then defining the domestic industry as producers whose output represents a

¹ Appellate Body Report, *EC – Fasteners (China)*, paras. 412-415.

² Panel Report, *China – Broiler Products*, para. 7.416.

³ Panel Report, *China – Broiler Products*, para. 7.417.

major proportion of total production. Nevertheless, the determination that a group of producers represents a "major proportion" of total domestic output must necessarily be determined in relation to the production of the domestic producers as a whole."⁴

3. The Panel insisted that, under either definition, the investigating authority is required to determine total domestic production. However, the Panel did not consider that this precludes the investigating authority from relying on information provided by a petitioner. The Panel explained that:

"It is only after establishing total domestic production that an investigating authority can determine whether it can define the domestic industry as the domestic producers as a whole; or those producers that represent a major proportion of total domestic production; or conclude that it does not have information on a 'domestic industry' within the meaning of Articles 4.1 and 16.1. This holds even if the petitioners claim to represent a major proportion of total domestic production, as without an understanding of the total universe of production an investigating authority will not be able to verify such an assertion. In light of the links between the definition of the domestic industry and the substantive provisions which require an analysis of that domestic industry, it is our view that 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.

This does not mean that investigating authorities may not rely on information provided to them by petitioners, particularly if it was gathered from independent sources. Investigating authorities must take reasonable and practicable efforts to assure themselves that the information they are relying on, whether derived from a petition or other sources, is accurate. However, as noted above, the United States has not argued that MOFCOM did not properly determine total domestic production nor does it contest that the 17 responses to the domestic producers' questionnaire constitute a major proportion of total domestic production."⁵

4. In *China – Autos (US)*, the Panel reiterated that there is no hierarchy between the two definitions of domestic industry, and further clarified that an investigating authority may not exclude a category of domestic producers of the like product from the definition of the domestic industry, except as contemplated under Article 16.1. The Panel explained that:

"Articles 4.1 and 16.1 define the domestic industry as either producers of the domestic like product 'as a whole', or a subset of those producers, who collectively account for a 'major proportion' of total domestic production. These provisions do not specify a hierarchy between these different bases for defining the domestic industry, and thus an IA may define the domestic industry in an investigation on either basis. Neither do Articles 4.1 or 16.1 establish any procedures or methodology for the IA in defining the domestic industry. However, it is clear that an IA may not exclude a category of domestic producers of the like product from the definition of the domestic industry. Articles 4.1 and 16.1 specify only two situations in which producers of the like product may be excluded from the domestic industry definition, namely, where these producers are importers, or are 'related' to exporters or importers of the like product, or where a market is fragmented or divided into a series of distinct competitive markets by the IA and producers in each market are regarded as a separate industry. Neither of these situations is the case in the present dispute."⁶

5. The Panel further explained that if the investigating authority defines the domestic industry under the "major proportion" approach, the percentage of production covered need not be more than 50% of total production, but must constitute an "important" or "significant" proportion of total production. The Panel stated that:

⁴ Panel Report, *China – Broiler Products*, para. 7.419-7.420.

⁵ Panel Report, *China – Broiler Products*, paras. 7.421-7.422.

⁶ Panel Report, *China – Autos (US)*, para. 7.206.

"When an IA defines the domestic industry as producers of the like product accounting for a 'major proportion' of total domestic production, it must ensure that the percentage of production covered is sufficiently large to qualify as an 'important, serious or significant' proportion of total production.⁷ That both the Anti-Dumping and SCM Agreements refer to 'a' major proportion as opposed to 'the' major proportion indicates that the percentage of production deemed a 'major proportion' need not be greater than 50% of total production. We note in this respect that a panel previously accepted 46% of total production as sufficiently 'important, serious or significant' to constitute a major proportion of total domestic production.⁸ Further, the Appellate Body in another dispute did not *a priori* exclude the possibility that a figure as low as 27% of total domestic production might constitute a major proportion of total domestic production, depending on the circumstances."⁹

6. In *US – Ripe Olives from Spain*, the Panel disagreed with the European Union's argument that an investigating authority is precluded from examining segments of the market during an injury analysis unless it has explicitly included these segments in its definition of the "domestic industry":

"The term 'injury' is thus defined as 'material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry'. The 'domestic industry' is, in turn, defined as the 'domestic producers as a whole of the like products' or those domestic producers 'whose collective output of the products constitutes a major proportion of the total domestic production'. A finding of injury must consequently be a determination that 'domestic producers as a whole' or those domestic producers representing 'a major proportion of the total domestic production' have been injured.

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."¹⁰

1.3.2 "producers"

7. In *Mexico – Olive Oil*, the Panel had to rule on the European Communities' claim that the definition of "domestic industry" in Article 16.1 of the SCM Agreement requires an enterprise or a group of enterprises to be producing actual output of the like product at the time of application and / or during the period of investigation, in order to be considered "producers" for the purpose of that provision. Turning to the dictionary definition of the term "producer", the Panel found that "the central element in these definitions is their focus on the *nature* of the activity undertaken – the bringing into existence or making of something. There is no suggestion in any of these definitions that being a producer is something that changes from one moment to the next depending on whether or not there is actual production of output at that moment."¹¹ The Panel

⁷ Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.341.

⁸ Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.344.

⁹ Panel Report, *China – Autos (US)*, para. 7.207 (referring to Appellate Body Report, *EC – Fasteners (China)*, para. 415).

¹⁰ Panel Report, *US – Ripe Olives from Spain*, paras. 7.222-7.223.

¹¹ Panel Report, *Mexico – Olive Oil*, para. 7.192.

agreed with the approach taken by the Panel and Appellate Body in *US – Lamb* which, according to the *Mexico – Olive Oil* Panel, "focus[ed] on the essential nature of the business activities of a given enterprise as determinative of whether that enterprise could be considered a producer of the like product and thus be included in the domestic industry for that product."¹² The Panel considered that a temporal approach to this issue, whereby enterprises might be excluded as domestic "producers" of the like product solely on the basis that they lack actual output at particular, defined moments, and regardless of the essential nature of their business activities, is fundamentally incompatible with the substantive approach taken in *US – Lamb*.¹³ After referring to various contextual arguments, the Panel stated:

"Most importantly, in our view, the European Communities' interpretation could lead to the result that an industry may be so badly injured by subsidized imports as to be forced to cease production for some period, but would be disqualified from obtaining the very remedy aimed at addressing such injury. We believe that this outcome would be absurd and contrary to the intention of the drafters of the *SCM Agreement*."¹⁴

8. As a result, the Panel in *Mexico – Olive Oil* rejected the European Communities' claim:

"Based on the ordinary meaning of Article 16.1 read in light of its context and object and purpose, we find that Article 16.1 does not require that an enterprise or group of enterprises seeking countervail remedies must actually produce output around the date of filing of an application or during the subsidy POI to be considered a 'producer' or 'producers' and therefore part of or the entire 'domestic industry' within the meaning of that Article."¹⁵

1.4 Relationship with other provisions

1.4.1 Article 4.1 of the Anti-Dumping Agreement

9. In *China – Broiler Products* the Panel addressed a claim that concerned two "sets of provisions", specifically "Article 3.1 of the Anti-Dumping Agreement and 15.1 of the SCM Agreement, which require an investigating authority to make an objective examination of the evidence of injury to that domestic industry, and Article 4.1 of the Anti-Dumping Agreement and Article 16.1 of the SCM Agreement, which set forth how to determine the composition of that domestic industry".¹⁶ In respect of Articles 4.1 and 16.1, the Panel explained that:

"Articles 4.1 and Article 16.1 set forth the definition for the domestic industry for purposes of each Agreement, either as the domestic producers as a whole or those of them whose collective output represents a major proportion of total domestic production. Investigating authorities may exclude producers that might otherwise fall within the definition, if they fall within one of the two listed exceptions. The domestic industry defined under those provisions forms the basis of an investigating authority's injury determination which is governed by Articles 3.1 and 15.1. Thus the two sets of provisions are inextricably linked."¹⁷

1.4.2 Article 15.1 of the SCM Agreement

10. As indicated above, the Panel in *China – Broiler Products* addressed two "sets" of claims under: (i) Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement; and (ii) Article 4.1 of the Anti-Dumping Agreement and Article 16.1 of the SCM Agreement. As indicated above, the Panel explained that these "two sets of provisions are inextricably linked".¹⁸ The Panel further elaborated on the relationship between the definition of domestic industry, as set forth in Article 16.1 of the SCM Agreement, and the obligation to base an injury determination on

¹² Panel Report, *Mexico – Olive Oil*, para. 7.196.

¹³ Panel Report, *Mexico – Olive Oil*, para. 7.196.

¹⁴ Panel Report, *Mexico – Olive Oil*, para. 7.203.

¹⁵ Panel Report, *Mexico – Olive Oil*, para. 7.204.

¹⁶ Panel Report, *China – Broiler Products*, para. 7.407.

¹⁷ Panel Report, *China – Broiler Products*, para. 7.408.

¹⁸ Panel Report, *China – Broiler Products*, para. 7.408.

an "objective examination", as required under Article 15.1 of the SCM Agreement. According to the Panel:

"The Appellate Body explained the relationship between the definition of the domestic industry in Article 4.1 of the Anti-Dumping Agreement and 16.1 of the SCM Agreement and the obligation to base injury determinations on an 'objective examination' in *EC – Fasteners (China)*. In particular, the Appellate Body clarified that to 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.

We note that in *EC – Fasteners (China)*, the Appellate Body did not explicitly state that an improper definition of domestic industry could result in a violation of Articles 3.1 and 15.1, independent from the obligations in Articles 4.1 and 16.1. Indeed, the only violation it found was with respect to Article 4.1 of the Anti-Dumping Agreement. However, it did leave open the possibility that such a claim could be made. In the Panel's view, the obligation to conduct an objective examination in Articles 3.1 and 15.1 would require an investigating authority to assess the significance, if any, of information it is made aware of during the process of defining the domestic industry for its assessment of injury. This would include, for instance, information related to known domestic producers, which may affect its analysis of the various economic factors and causation under Articles 3 and 15."¹⁹

11. In *China – Autos (US)*, the Panel highlighted that, in the anti-dumping context, an incorrect determination of the domestic industry resulted in the investigating authority's subsequent analysis being inconsistent with several other provisions of the Anti-Dumping Agreement.²⁰ The Panel agreed with this approach and considered that "a wrongly-defined domestic industry necessarily leads to an injury determination that is inconsistent with the Agreements", and that this "reasoning is equally apposite to Articles 16.1 and 15 of the SCM Agreement because the texts of these provisions are identical."²¹

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¹⁹ Panel Report, *China – Broiler Products*, paras. 7.412-7.413.

²⁰ Panel Report, *China – Autos (US)*, para. 7.210 (referring to Panel Report, *EC – Salmon (Norway)*, paras. 7.118 and 7.124).

²¹ Panel Report, *China – Autos (US)*, para. 7.210.