

PROPOSAL OF THE DEFINITION OF DOMESTIC INDUSTRY: EXCLUSION STANDARDS

Communication from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu

The following communication, dated 15 September 2005, is being circulated at the request of the Delegation of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu.

The submitting delegation has requested that this paper, which was submitted to the Rules Negotiating Group as an informal document (JOB(05)/185), also be circulated as a formal document.

This proposal refers to the definition of “domestic industry” contained in Article 4.1 of the Anti-Dumping Agreement (ADA) and, in particular, to its first item, which excludes producers who are related to exporters or importers or are themselves importers of the allegedly dumped imports from the definition of “domestic industry”.¹

Issue: Definition of Domestic Industry

Relevant Provision: Article 4.1(i) of the ADA.

Description of Problems:

The suggestions and proposals of Members on Article 4.1 of the ADA so far have revolved around the specific parameters as to what the minimum percentage of the domestic production can be considered to be a “major proportion” of domestic industry. However, little attention has been paid to the standards which allow the investigating authority to exclude some producers from the definition of “domestic industry”.

Article 4.1(i) of the ADA allows investigating authorities to exclude domestic producers who are related to the exporters or importers or are themselves importers of the alleged dumped product when defining the domestic industry. However, there are no criteria for such exclusions. The only guidance is provided in relation to the meaning of producer related to exporters/importers. The proponents believe that Members shall be benefited by further clarification on the conditions for excluding some domestic producers from the scope of domestic industry.

¹ The scope of the paper is limited to setting forth guidance on the exclusion of domestic importing producers from the scope of domestic industry. This paper does not address the other important issues in Article 4.1, such as “related party” and the definition of “major proportion”. Therefore, it should not be interpreted in a way to prejudice the position of the proponent on the other relevant issues. Some relevant proposals by the FANs on those other issues can be found in TN/RL/GEN/19, TN/RL/GEN/23 and TN/RL/GEN/27.

Without appropriate assessment, the definition of “domestic industry” can be narrowed to cover a smaller number of producers so as to meet the “standing” requirement provided in Article 5.4 of the ADA. Further, the exclusion of some producers may facilitate a finding of material injury. Consequently, it is proposed that the requirements to exclude producers from the definition of “domestic industry” must be clearly established in the ADA in order to ensure the representativeness of the petitioners and ensure a uniform application of the rules.

Elements of a Solution:

Improve the ADA by ensuring that the exclusion of certain producers from the definition of “domestic industry” is carried out under the basis of common, transparent and uniform criteria.

Proposal:

Amend Article 4.1(i) of the ADA to provide for clear factors that investigating authorities must take into account in order to exclude some producers from the definition of “domestic industry”. In particular, subject to further discussions, such a provision could be amended as follows (see the new wording underlined):

“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 the major proportion of the total domestic production of those products, except that:

- (i) when producers are related¹¹ 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;¹²

(...)

¹¹ 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 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.

¹² **A producer shall not be excluded from the definition of domestic industry where, e.g.:**

(i) the total import value of the product under consideration made by such producer during the period of investigation is relatively low (less than [X]% of its total sales of the like product into the domestic market); or

(ii) the imports of the product under consideration made by the producer only relate to a few models of the like product or were made to fill gaps in its range of products.

A producer may provide other justifications on why it should not be excluded. Such justifications shall be taken into account by the investigating authority.

Explanation:

The amendments in Article 4.1(i) of the ADA relate to the exclusion of producers importing product under investigation.

Producers importing product under investigation

There are no criteria to determine when producers importing product under investigation should be excluded from the definition of “domestic industry”. The factors enumerated in the new Footnote 12 of the ADA would help distinguish the cases where the imports made by the producer in question are of a nature which justifies its exclusion.

(i) Importance of imports in the producer’s sales

The mere fact that imports have taken place should not be sufficient to exclude a producer. Such imports should also have been significant in the producer’s sales.. The relevance of the imports for the producer’s activities could be measured in terms of the relative proportion of imported goods and domestic products which are sold on the domestic market by the producer. Exclusion would only be possible where the share of the dumped imports exceeds a certain threshold.

(ii) Imports as a complement of the product range

Imports made by producers to complete their product range to satisfy the need of their customers should be considered as a normal commercial practice. In some cases, producers import goods to be able to offer the full product range or even to protect market niches which would have disappeared without sales of the imported products. In those cases, the fact that the producer imported goods to complement its own-produced product range should not lead to its exclusion from the definition of “domestic industry”.

(iii) Additional factors for consideration

It should be noted that the above-mentioned two factors are illustrative only. The authorities shall also consider other relevant factors provided by domestic importing producers when making such assessment. For example, the domestic producer may provide evidence that its imports are non-dumped ones, and it has no intention to import the product under consideration for the purpose of gaining unfair competitive advantages in the domestic market. In this case, the authorities shall take into account the evidence provided by the producer before making a determination on exclusion.
