1 ARTICLE 4

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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*)[12] 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.[1] 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."[2]

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.'"[3]

1.2.2 "domestic industry"

3. Referring to Article 4.1 and footnote 9 to Article 3, the Panel in *Mexico – Corn Syrup* stated: "These 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".[4]

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"[5]:

> "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 creati

> 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.
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> ...
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> 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'."[6]

5. 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 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 partth

17. 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 le

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-

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

> Anti-Dumping Agreement reduces the term 'major proportion' in this provision to inutility."[33]

27. 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 [illegible] 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:
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> a. First, when a domestic producer in China captively consumes billets (slabs) and processes it into coils or plates.
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> b. Second, when a domestic producer in [illegible] two scenarios

> difference in the domestic industry's share of domestic production and its market share."[35]

29. 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.
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> 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."[36]

1.3 Relationship with other provisions of the Anti-Dumping Agreement

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

31. The Panel in *Argentina – Poultry Anti-*