



# USAID Trade Project

## Comparative Analysis of National Trade Defense Systems

### USAID Trade Project

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## Part A: Overview

### 1. Introduction

The World Trade Organization (WTO) is the primary global body regulating trade-related matters between member countries, including the imposition of anti-dumping, countervailing and safeguard measures. Member countries are not obligated to have a system for the imposition of such measures, but if a member does have such a system, it must conform to the relevant WTO Agreement (i.e., the Anti-Dumping Agreement, the Subsidies Agreement and the Safeguards Agreement).<sup>1</sup> These agreements establish the substantive rules governing when a member country may take action against dumping, subsidization, and a surge in imports as well as the procedural rules member countries must follow if they have a system that imposes trade measures to address these issues.

There is a measure of flexibility in the way the agreements can be implemented by member countries, however, which gives rise to some substantial differences between national anti-dumping, countervailing measures and safeguards systems. For example:

- Although the WTO Anti-Dumping Agreement requires a dumping investigation to take no longer than 12 months, or – if special circumstances exist – 18 months, the time limit for anti-dumping investigations specified in national legislation sometimes dictates a much shorter period; for example, Australia’s target time period is 155 days (one of the quickest in the world), not 12 months.
- Parties do not have access to confidential information under the national systems of Australia, the European Union (EU), India and New Zealand. In contrast, the United States (US) and Canada allow access to confidential information by way of “administrative protective orders”.
- National systems differ in the extent to which they treat China as a market economy when calculating normal values for dumping purposes. Australia and New Zealand treat China as a market economy. The US treats China as a non-market economy. In a given case, Canada has an initial presumption that China is a market economy. Under the national systems of EU and India, China is treated as an “economy in transition”.
- The EU and Canada explicitly require that the wider national “public interest” be taken into account when determining whether and to what extent to impose anti-dumping duties or countervailing measures. The systems of Australia, India, New Zealand and the US have no provisions authorizing the authorities to consider the national public interest when making an anti-dumping duty or countervailing measure determination; and
- The organizational structures for conducting investigations and making determinations with respect to trade defense measures differ significantly among countries. For example, Australia and India assign the responsibility for conducting safeguards investigations to a different body than that responsible for conducting anti-dumping and countervailing duties investigations. In Canada and the US, the injury element of an antidumping or countervailing duties case is determined by a body other than that responsible for the determination as to whether dumping or an actionable subsidy exists. In addition, in the US the body that is responsible for the injury determination in anti-dumping and countervailing duties cases also has exclusive responsibility for the conduct of safeguards investigation.

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<sup>1</sup> The official names of these three agreements are, respectively; the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*; the *Agreement on Subsidies and Countervailing Measures*; and the *Agreement on Safeguards*.

## **2. Summary of the WTO Agreements on Dumping, Subsidies and Safeguards**

The three WTO agreements that govern the implementation of trade defense measures in member countries are:

- The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, also known as the Anti-Dumping Agreement.
- The Agreement on Subsidies and Countervailing Measures, also known as the Subsidies Agreement.
- The Agreement on Safeguards, also known as the Safeguards Agreement

### **The Anti-Dumping Agreement**

The Anti-Dumping Agreement comprises 18 articles and two annexes. It establishes the rules that must be met in order for alleged dumping to be substantiated by the responsible national authorities. It also prescribes the procedures that national authorities must follow when investigating anti-dumping allegations, determining the existence and causes of injury (if any) to the domestic industry, and imposing anti-dumping duties. The agreement is substantially principles-based and a number of aspects are not highly detailed; thus, countries have a significant degree of flexibility in interpreting certain aspects of the agreement when developing their implementing national legislation. As a result, there are significant differences among national anti-dumping systems.

Articles 1-4 of the Anti-Dumping Agreement establish the basic substantive rules concerning dumping. The basic principle of the agreement is that member countries may not impose anti-dumping duties on imports unless there has been a systematic investigation by the relevant national authority and the findings demonstrate that the concerned imports have been (or will be) dumped and have caused (or will cause) either material injury to the domestic industry producing like goods or the material retardation of the establishment of such a domestic industry. The agreement requires that the investigating authority determine dumping on the basis of the definitions in the agreement. A good is considered to be dumped if it is exported to another country at below its normal value. The agreement outlines the methodologies to be used to calculate the normal value of the dumped good, particularly in circumstances where the price of the good in the supplier's home market is not a 'commercial' one, or information about its price is not readily available.

The agreement guides investigating authorities as to what constitutes injury to a local industry, as well as how to determine a threat of injury. It also requires that there be evidence of a causal link, and suggests factors other than dumping that might be causing injury to the local industry. Articles 5-15 of the agreement establish the procedural requirements for anti-dumping investigations. Member countries are bound to follow certain procedures; thus somewhat limiting their freedom to tailor a system that best suits their particular circumstances.

The rules outlined in the agreement deal with the initiation of cases and their subsequent investigation, including the evidence thresholds required before measures can be imposed. It specifies who "interested parties" are for the purposes of joining an investigation, and deals with the treatment of confidential information (including the requirement that parties provide non-confidential summaries of any confidential information submitted).

The agreement provides for the possible imposition of provisional measures while an investigation continues, and the imposition and collection of final dumping duties (and the retrospective imposition of measures). It specifies that a foreign producer or exporter may enter into an agreement with the investigating country wherein it makes certain pricing commitments in lieu of having the country impose anti-dumping duties. The Agreement also specifies the maximum duration of any measures imposed, and it requires investigating authorities to maintain a public record of all files in a dumping investigation, and that member countries provide for judicial reviews of cases.

### **The Subsidies Agreement**

The Subsidies and Countervailing Measures Agreement deals with similar issues to the Anti-Dumping Agreement, but given the different nature of subsidization, there are some variations. For example, the concepts of normal values and ascertained export prices are not relevant in countervailing cases. The agreement defines a subsidy, and then further delineates between 'prohibited' subsidies and 'actionable' and 'non-actionable' subsidies. It also specifies consultation requirements between the investigating authority and the country alleged to have provided a countervailable subsidy.

However, most of the procedural rules for countervailing cases are substantially the same as for anti-dumping cases, including in regard to applications, investigations, injury, evidence, definition of a domestic industry, and imposition of provisional and final measures.

### **The Safeguards Agreement**

The Safeguards Agreement establishes the rules for application of safeguard measures pursuant to Article XIX of GATT 1994. Safeguard measures are defined as "emergency" actions with respect to increased imports of particular products, where such imports have caused or threaten to cause serious injury to the importing member's domestic industry. Such measures generally involve the imposition of an import duty rate on imports of the concerned product above the Member's otherwise bound rate, but can also take the form of quantitative import restrictions.

The major principles of the Safeguards Agreement are that safeguards measures must: be temporary, be imposed only when imports are found to cause or threaten serious injury to the domestic industry, be applied on a non-discriminatory (i.e., Most Favored Nation, or MFN) basis, and be progressively liberalized while in effect. In addition, the member imposing them must pay compensation to the other members whose trade is affected.

The Agreement consists of 14 articles and one annex. It has four main components: Articles 1-2 are general provisions; Articles 3-9 establish the rules governing a member's application of safeguard measures; Articles 10-11 contain rules pertaining to pre-existing measures that were applied before the WTO's entry into force, which are now irrelevant; and Articles 12-14 govern multilateral surveillance and institutions. Only Articles 1-9 are of relevance to a national safeguards regime.

Safeguard measures may be applied only following an investigation conducted by the competent authority pursuant to previously published procedures. The Agreement does not contain detailed procedural requirements; however, it does require reasonable public notice of the investigation, and that interested parties (importers, exporters, producers, etc.) must be given the opportunity to present their views and to respond to the views of others. Among the topics on which views are to be sought is whether or not a safeguard measure would be in the public interest. The relevant authorities are obligated to publish a report presenting and explaining their findings on all pertinent issues, including a demonstration of the relevance of the factors examined. The Agreement also contains specific rules for the handling of confidential information in the context of an investigation.

### **3. National Differences in Anti-Dumping and Anti-Subsidy Systems**

Given the principles-based nature of the WTO agreements, there are various differences across countries in the configuration of anti-dumping systems. Some of the more important areas in which requirements and procedures vary include:

- The number of agencies involved in administering the system
- The time taken to complete investigations and the sequence of the investigative tasks
- The breadth and nature of appeals processes
- The treatment of non-market economies and economies in transition
- Whether there is provision to consider the broader public interest

## System Administration

There are differences in the number of agencies involved in administering anti-dumping and countervailing duties systems. Australia, New Zealand, India and the EU use one agency. In Canada, the Canada Border Services Agency (CBSA) investigates allegations of dumping and actionable subsidies, while the extent and cause of injury to the domestic industry is determined by the Canadian International Trade Tribunal (CITT). In the US, the Department of Commerce's (DOC) International Trade Administration (ITA) investigates allegations of dumping and actionable subsidies, but the extent and cause of injury to the domestic industry is determined by the US International Trade Commission (USITC), an independent agency.

The specified time from investigation initiation to the imposition of measures also varies. With a target timeframe of around 5 months, Australia has one of the quickest procedures in the world. In comparison, the scheduled timeframes are around 6 months in New Zealand, 7 months in Canada, 9 months in the US, and 12 months in the EU and India; however, all systems provide for "special circumstances" extensions, so in India, for example, the investigation process can be extended from 12 to 18 months. The differences in the normal target timeframes often reflect specific national factors (e.g., the 12 month timeframe in the EU has been attributed to the EU's requirement to consider "community interests" in all cases).

The following table summarizes some of the differences between the national anti-dumping and anti-subsidy systems of Australia, New Zealand, the US, Canada, the EU and India.

Select Differences in National Anti-Dumping and Anti-Subsidy Systems						
	Australia	New Zealand	US	Canada	EU	India
Bifurcated* Administration	No	No	Yes	Yes	No	No
Investigating Authority: Dumping and Subsidization	Australian Anti-Dumping Commission	Ministry of Economic Development	US Dept of Commerce; International Trade Admin	Canada Border Services Agency; Anti-Dumping and Countervailing Directorate	European Commission; DG Trade	Ministry of Commerce; DGAD
Investigating Authority: Injury and Causal Link	Australian Anti-Dumping Commission	Ministry of Economic Development	US International Trade Commission	Canadian International Trade Tribunal	European Commission; DG Trade	Ministry of Commerce; DGAD
Target investigation deadline	155	180	280	210	365	365
Treatment of China	Market Economy	Market Economy	Non-Market Economy	Presumption of Market Economy	Economy in Transition	Economy in Transition
Public interest Test	No	No	No	Yes	Yes	No
Decision maker for imposition of measures	Minister of Industry	Minister of Economic Development	US International Trade Commission	Canadian International Trade Tribunal	Council of the European Union	Minister of Finance
Lesser Duty Rule	Yes	Yes	No	Yes; as part of public interest test	Yes	Yes
* Bifurcated administration exists when the investigation of the existence of dumping or actionable subsidy and the investigation of injury to the domestic industry are conducted by separate agencies; however, even in countries without a formally bifurcated administration, (i.e., a country where both investigations are handled by one agency), the two investigations are normally handled by different groups of experts who generally conduct their activities independently of one another.						

Another significant difference between systems relates to the handling of confidential information provided by interested parties during the course of an investigation. In Australia, New Zealand, the EU and India, confidential information provided to the investigating authority cannot be disclosed to the opposing parties in the case. Those parties must rely on public non-confidential summaries of such information when responding to claims. In the US and Canada, confidential information can be provided to the outside legal counsel of an opposing party where that information is covered by an “administrative protective order” (APO) subjecting the legal counsel to severe penalties if the confidential information is disclosed to the client or anyone else not specifically identified by name in the APO. APOs can substantially enhance the transparency and proper outcome of a case because legal counsel for a party have full knowledge of (and can respond to) the specific allegations and assertions of an opposing party.

### **Appeals Process**

Article 13 of the Anti-Dumping Agreement requires, as a minimum, that each member country have some form of judicial or quasi-judicial review of anti-dumping measures and procedures, independent of the investigating authority. The nature of this review body is not prescribed and may take the form of a court, tribunal or other body. Moreover, Article 13 does not limit a member country's ability to complement judicial review provisions with other administrative review mechanisms.

Australia provides for appeals on points of law to the Federal Court. In New Zealand, decisions of the Trade Remedies Group (within the Ministry of Economic Development) and the Minister can be appealed to the High Court. In the US, interested parties may appeal to the Court of International Trade. Canada provides for appeals on both matters of fact and law to its Federal Court of Appeals, while India allows appeals to the Customs, Excise and Gold (Control) Appellate Tribunal. In the EU, appeals by interested parties may be brought before the European Court of First Instance.

### **Non-Market Economies and Economies in Transition**

In determining normal values for the purposes of assessing dumping, the WTO agreements allow countries to consider the “market situation” in the exporting country; that is, whether a country has a predominantly market economy, or whether there is substantial government involvement that artificially lowers the normal value of the goods. Article 15 of the Anti-Dumping Agreement further allows member countries to treat developing economies differently when calculating normal values and export prices.

Australian and New Zealand have granted market-economy status to China. This means that in dumping cases involving exports from China, in the first instance, Australia considers the Chinese domestic price to be the normal value of the goods concerned; however, through other non-country specific provisions, Australia can adopt alternative methodologies for constructing normal values when the domestic price of the allegedly dumped good is determined to be artificially low (for example, because of significant government intervention in the economy concerned). In contrast, the US treats China as a non-market economy. The EU and India adopt an intermediate position, based on Article 15 of the WTO's *Protocol on the Accession of the People's Republic of China*; and employ a rebuttable presumption that China is a “country in transition” to market principles. This allows for the use of alternative methodologies for constructing normal values (such as prices in a surrogate third country); however, if the importer can show that market economy conditions prevail in the Chinese industry concerned, then the Chinese domestic price may form the basis of the normal value for the purpose of determining whether there has been dumping. Canada's approach is close to that of Australia and New Zealand; the Canada Border Services Agency begins investigations with a presumption that the non-market alternative methodologies do not apply, unless there is evidence to suggest the overseas industry under investigation operates in a non-market fashion.

### **Public Interest Test**

A significant difference in anti-dumping systems is whether they embody a “public interest test” that allows for wider impacts to be taken into account in determining whether measures should be imposed. Australia, New Zealand, the US and India do not have such a test. In contrast, under the EU system, the “community interest” is assessed in all investigations. And in Canada, a lesser duty (which may be zero) may be applied if public interest considerations require.

## Part B: Country Summaries

### 1. Australia

Australia's anti-dumping and countervailing measures systems are administered by the Anti-Dumping Commission. Australia's safeguards regime is administered by another agency, the Productivity Commission.

#### **The Anti-Dumping Commission**

The Anti-Dumping Commission was created in mid-2013 as a result of Australia's reform of its anti-dumping and countervailing measures system. It was temporarily created as a division of the Customs and Border Protection Service, which reports to the Home Affairs Minister; however, it has since been transferred, and is now a division of the Ministry for Industry. It is headed by one Commissioner, who was appointed by the Home Affairs Minister but who now reports to the Minister for Industry on the Commission's anti-dumping and countervailing decisions. Other than the need to possess relevant qualifications, there are no restrictions on who may be appointed as Anti-Dumping Commissioner, meaning that a person from either the private sector or the public sector may be appointed. Immediately prior to his appointment, the current Commissioner had been working for several years in the private sector, but previously he held several positions in the public sector of Australia. The appointment has been viewed as being in line with the recommendations made in the Brumby Report (discussed below) to recruit and establish appropriate skills and experience due to the complexity and technical nature of the work the Commission performs.

Before the creation of the Anti-Dumping Commission, anti-dumping and countervailing measures investigations were handled by the Australian Customs and Border Protection Service. In late 2012, however, it was determined by the Australian Government, after considering the Brumby Report, a policy paper critiquing the administration of the anti-dumping and countervailing system, that it was desirable to create a new trade remedies authority. The Brumby Report, published in late 2012, considered the improvements that had already been made to the trade remedies regime and the challenges that remained.

The Brumby Report concluded that dumping in Australia is highly likely to increase in the future. During the research for the report, it was determined that the problem in anti-dumping administration was not "what" was being done, but "how" it was being done. The key outstanding issues were identified as: the skills and experience of officers, the transparency of the process, the rigor of the investigative process, monitoring compliance with decisions imposing anti-dumping duties or countervailing measures, the resources needed to address these issues, and the general culture of the administration. Consequently, the Brumby Report made several fundamental recommendations:

1. Establish a new trade remedies authority within the Customs and Border Protection Service (to utilize existing know-how), but separately and adequately fund and resource that authority, which will be headed by a Commissioner appointed by the Minister of Home Affairs (whose portfolio includes the Customs and Border Protection Service).
2. Locate the authority in a major capital city where there is a high concentration of Australian industry.
3. Provide for an immediate increase in resources to fund the new authority and combat the issues currently facing Australian manufacturers.
4. Recruit and establish appropriate skills and experience due to the complexity and technical nature of the work the authority performs.

The Brumby recommendations were accepted by the Federal Government of Australia, and the Anti-Dumping Commission was created on 1 July 2013 within the Customs and Border Service, however, it has since been determined to transfer the Commission to the Minister for Industry. That transfer is

now complete, and any future Commissioner will be appointed by the Minister of Industry. The Commission was given a \$24.4 million appropriation to cover its operations over the next four years. The Commission is also currently recruiting for 25 new positions to double the number of investigators to better equip the Commission to handle an increase in the level of cases. As noted above, the establishment of the Commission and the allocation of greater resources were among the primary recommendations of the Brumby Report.

The following is the current, basic, organizational chart for the Anti-Dumping Commission

Commissioner	
National Manager for Policy and Assistance	National Manager Operations
Director Strategic Policy	Director Operations 1
Director Operational Policy	Director Operations 2
Director Client Engagement and Business Support	Director Operations 3
Director Capability	
Director Transition and Consolidation	
Director Governance	

After receiving an application, the Commission has 20 days to determine if there are reasonable grounds to conduct an investigation. If that determination is positive the Commission will launch an investigation. The Commission has up to 155 days to investigate and report its final report and recommendations to the Minister for Industry, unless the investigation timeframe is extended by the Minister. (The basic 155-day investigation timeframe is one of the shortest investigation periods among WTO member countries.) Note that the Commission conducts both of the two basic inquiries of an anti-dumping or countervailing case: the investigation and the injury assessment. In accordance with what is seen as best practice, however, these two inquiries are carried out independent of one another within the Commission, although there are information exchanges between the persons leading the two inquiries.

Once the Commission issues its final report and recommendations, the Minister generally has 30 days to decide whether or not to accept the final report and recommendations. If the Minister accepts these, he publishes a notice imposing the recommended anti-dumping or countervailing measures. Certain decisions of the Minister and the Commissioner relating to dumping and countervailing investigations and inquiries may be reviewed by the Anti-Dumping Review Panel (see below). A flow chart describing the process can be provided if requested.

It should be noted that Australia does not have a “public interest test” (an assessment as to whether the recommended level of duties/measures, even though justified by law, are in the greater public interest). Australia does have a “lesser duty rule” (the authority of the Minister to impose a duty that is less than that recommended by the Commission, but that is nevertheless deemed sufficient to increase the price of the concerned good to a non-injurious level). Australia also has a detailed anti-circumvention procedure to address situations where anti-dumping duties or countervailing measures are being circumvented by the concerned foreign exporter or producer through one of a variety of strategies. Neither the lesser duty rule nor the public interest test are required by the WTO Agreements; these are optional measures that a country may use to reduce, in appropriate cases, the level of duties/measures that would otherwise be applied. In addition, due to the inability of WTO members to reach a consensus on the issue, the WTO Agreements do not currently explicitly regulate anti-circumvention procedures; however, their use by certain WTO members continues to generate controversy and formal disputes.

In June 2011, the Australian Government announced the first of its streamlining reforms to Australia's anti-dumping system. These reforms included the establishment of a new Anti-Dumping Review Panel (ADRP) to replace the existing Trade Measures Review Officer and administer administrative appeals of anti-dumping decisions, and the expansion of the categories of anti-dumping decisions that are reviewable to include decisions to continue measures or not following a continuation inquiry, and decisions to vary or revoke measures following a review.

The ADRP comprises three members, including a senior member. These memberships are statutory appointments made by the Minister of Industry. The ADRP's function is to review, upon application, certain decisions made by the Minister or the Commission. Upon reviewing a decision of the Minister the ADRP will provide a report to the Minister which makes recommendations. After considering such a report, the Minister will take a decision on whether and to what extent he will accept any or all of the recommendations; at that point the Minister's decision becomes appealable to the Federal Court of Australia.

### **The Productivity Commission**

As noted above, safeguard inquiries are conducted by the Productivity Commission. The Productivity Commission is the Australian Government's independent research and advisory body not just on safeguards (which is one of its least-used functions), but on a range of economic, social and environmental issues affecting the welfare of Australians. Its role is to help the Government make policies in the long term public interest.

It is important to note that the Productivity Commission is independent; it operates under the protection and guidelines of its own legislation. It has an arm's length relationship with the Government. While the Government largely determines its work program, it cannot tell the Productivity Commission what to say and the Commission's findings and recommendations are based on its own analyses and judgments.

The Productivity Commission is headed by a Chairperson and between 4 and 11 other Commissioners, who are appointed by the Governor-General (the Queen's representative in Australia) for periods up to five years. Associate Commissioners are appointed by the Treasurer on a full or part-time basis. The average number of employees in 2011-2012 was 197. The Commission reports formally through the Treasurer to the Australian Parliament, where its inquiry reports are tabled. Final inquiry reports must be tabled in Parliament within 25 sitting days of the Government receiving the report.

The Productivity Commission conducts inquiries in accordance with Australia's safeguards procedures. As well as investigating whether there are grounds for definitive safeguard measures, the Commission may also provide an accelerated report examining whether critical circumstances exist to justify provisional safeguard measures. The Commission must provide the accelerated report to the Government as soon as practicable and, in any event, within three months.

Unlike the anti-dumping or countervailing procedures implemented by the Anti-Dumping Commission, and unlike many other WTO members, the domestic industry may not seek to initiate a safeguards action on its own. An Australian industry desiring to activate Australia's safeguard procedures must first convince the relevant Minister. Positive evidence that unforeseen or unexpected surges in imports are causing serious injury to the industry needs to be provided. Such evidence may have been investigated or researched by the affected domestic industry or the relevant government agency as a result of ongoing concerns expressed by the affected domestic industry.

If the Australian Government decides to initiate a safeguard investigation, a reference is sent to the Productivity Commission by the Treasurer, possibly also asking for an early report on the issue of provisional safeguards which are allowed under WTO rules only in special circumstances. Public

notice of the initiation of a safeguard investigation is given by the Productivity Commission and the investigation then involves public hearings or other appropriate means to enable importers, exporters and other interested parties to present evidence and their views.

The Commission draws on the information it receives from participants and information, research and expertise assembled from other sources to formulate the report and any policy recommendations. The Commission may make recommendations on any matters it considers relevant to the inquiry, but it must take into account its policy guidelines. In framing its recommendations, the Commission is required to consider the interests of the community as a whole, in addition to the interests of those most immediately and directly affected by the recommendations. It must also regard the economic, social, regional and environmental consequences of its recommendations. The Commission usually makes a draft report publicly available for scrutiny and comment before its final report is completed. This approach is designed to ensure consistent and open consideration of the issues.

Once complete, the final report is forwarded to the Government and awaits release by Parliament. Final reports must be tabled within 25 sitting days after the Treasurer receives the report. The Commonwealth, State and Territory governments of Australia make the final decision on acceptance and implementation of the Commission's recommendations. There is no obligation to accept the Commission's advice. A flow chart describing the process can be provided if requested.

There is no special administrative appellate body to handle appeals of safeguards measures. Therefore the courts exercise primary jurisdiction in the same manner as with the review of other administrative actions.

## **2. Canada**

Under Canada's anti-dumping and countervailing duty laws, investigative jurisdiction is bifurcated. The Anti-Dumping and Countervailing Directorate (ADCD), a directorate within the Canada Border Service Agency (CBSA), is responsible for investigating and making determinations regarding dumping and subsidization. The Canadian International Trade Tribunal (CITT) decides whether the dumped or subsidized goods have caused, or are threatening to cause, material injury to the production of like goods in Canada, or have caused retardation of the establishment of an industry in Canada. This bifurcation reflects the division of responsibilities in Canada's Special Import Measures Act (SIMA), which assigns responsibility for its administration to both the CBSA and the CITT.

### **Anti-Dumping and Countervailing Directorate**

The CBSA has eight units/branches, one of which is the Programs Branch, which includes 10 directorates. One of the directorates of the Programs Branch is the ADCD. The ADCD has an Office of the Director General (The Director General of the ADCD is appointed by the President of CBSA), and three divisions: the Special Import Measures Act Operational Policy Division, the Consumer Products Division and the Industrial Products Division. Either the Consumer Products Division (which has 21 officers) or the Industrial Products Division (which has 25) conducts anti-dumping and anti-subsidy investigations, depending on the nature of the product in question.

It should be noted that the Programs Branch also has a Trade Programs Directorate, a division of which is the Trade Compliance Division, which monitors compliance with special import measures while they are in force.

### **Canadian International Trade Tribunal**

The CITT is a quasi-judicial institution that performs a number of trade-related functions, including conducting injury investigations in anti-dumping and countervailing measures investigations and conducting safeguards investigations. Among other things, the CITT is authorized to:

- Inquire into whether dumped or subsidized imports have caused, or are threatening to cause, injury to a domestic industry
- Hear appeals of anti-dumping and countervailing determinations made by the President of CBSA
- Inquire into and provide advice on such economic, trade and tariff issues as are referred to the Tribunal by other government officials
- Conduct safeguards investigations based on complaints by domestic producers that increased imports are causing, or threatening to cause, injury to domestic producers and make recommendations to the Government on an appropriate remedy
- The Tribunal also hears and decides appeals concerning the application, to imported goods, of a Tribunal finding or order concerning dumping or subsidization and the normal value or exported price or subsidy of imported goods.

The determination of dumping and subsidization is the responsibility of the CBSA, based on the results of investigations conducted by ADCA. The CITT determines whether such dumping or subsidizing has caused material injury or retardation or is threatening to cause material injury to a domestic industry. The CITT is responsible for the following activities: preliminary injury inquiries, final injury inquiries, interim and expiry reviews, and public interest inquiries.

One of the responsibilities of the CITT is to conduct inquiries to determine if Canadian producers are being seriously injured by increased imports of goods into Canada. CITT may initiate safeguard inquiries following a complaint by domestic producers. The Government may also direct the CITT to conduct safeguard inquiries. If the CITT determines that increased imports of goods have caused, or are threatening to cause, serious injury to the domestic industry, the CITT conveys its recommendation to the Government, which may apply safeguard measures on the concerned imports.

The CITT may be composed of up to nine full-time members, including a Chairperson and two Vice-Chairpersons, who are appointed by the Governor in Council on the recommendation of the Minister for Finance for a term of up to five years.

### **3. European Union**

Under the applicable EU regulations, the European Commission (EC) has overall responsibility for conducting all anti-dumping, anti-subsidy and safeguards investigations, including making decisions on whether to open investigations in response to industry complaints, imposing provisional measures, and conducting reviews of definitive measures currently in place; however, the EC has no authority to impose definitive measures. Where the outcome of an investigation warrants, the EC proposes definitive measures to the Council of the European Union (the Council). The Council may only impose definitive measures upon a recommendation from the EC. The Council requires the affirmative vote of a simple majority of its members to impose definitive anti-dumping duties or anti-subsidy (countervailing) measures; however, the imposition of definitive safeguard measures requires the support of a qualified majority of the EU's Member States.

Within the EC, it is the Directorate-General for Trade (DG Trade) that has been assigned responsibility by the EC for the conduct of all trade defense investigations; and within DG Trade there is one specific directorate, Directorate H (Trade Defense), that is actually responsible, operationally, for carrying out all aspects of trade defense investigations.

#### **Directorate General for Trade**

The Director General for Trade heads DG Trade and is appointed by the EC. DG Trade is composed of eight directorates, one of which, Directorate H (Trade defense), is responsible for conducting all aspects of an anti-dumping, anti-subsidy and safeguards investigation. The Director of Directorate H

is appointed by the Director General for Trade. Directorate H comprises the Director's Office and six units, five of which are responsible for various aspects of investigations.

If the EC receives an application to open an investigation, it must either reject the application or initiate an investigation within 45 days. If the EC accepts an application it refers the matter to DG Trade which in turn assigns it to Directorate H. Directorate H then assigns the investigation to a team of its officers to conduct the investigation. In an anti-dumping or subsidy investigation, the team is divided into two parts; one part handles the investigation as to whether and to what extent dumping or actionable subsidies exist, and the other part handles the investigation to determine whether the alleged dumping or subsidization has caused material injury or retardation or is threatening to cause material injury to a domestic industry. In a safeguards investigation, which does not require a finding of dumping or subsidization, the team is not divided.

Anti-dumping and anti-subsidy investigations can be initiated pursuant to written complaints filed by EU producers of the like product or by their representative trade or national association with the complaints office of DG Trade, and must contain sufficient evidence on the existence of dumping or subsidization of the particular product and the resulting injury. The EC has 45 days from the date of filing of the complaint to review and accept or reject it. In particular the Commission must review the adequacy and accuracy of the evidence provided to determine whether there is sufficient evidence justifying the initiation of the investigation, and to assess whether the complainants have sufficient standing, as mentioned above, such that the complaint can be considered as being filed by or on behalf of the EU industry. If any of these conditions are not met, the Commission can reject the complaint. Additionally, a complaint has to be rejected if it concerns imports from countries having less than 1 per cent of the EU market share unless collectively these countries account for 3 per cent or more of the market share.

It should be noted that the decision-making procedures in the EC are currently being reviewed and are likely to change in 2014. Currently the EC must consult the Anti-Dumping Committee, the Anti-Subsidy Committee (these committees have an advisory function and consist of representatives of the 28 EU member states) before accepting or rejecting a complaint. The rejection of a complaint is not publicly communicated but the complainants can appeal against a decision to reject a complaint before the EU's General Court. In addition to complaint-based investigations, EU anti-dumping and anti-subsidy laws also provide the possibility for ex officio investigations by the Commission when "special circumstances" exist and provided the Commission has sufficient evidence of dumping or subsidy and resulting injury. In practice, since 1995, only two ex officio anti-dumping investigations have been initiated by the Commission. Ex officio investigations – which may be necessary in cases where the EU producers face risk of retaliation if they file a complaint – are one of the areas being considered in the trade defense modernization initiative.

Safeguard investigations against WTO members can be initiated by the EC pursuant to the request of an EU member state or ex officio. Unlike anti-dumping and anti-subsidy complaints, the EU industry cannot directly lodge a safeguard complaint but has to convey it through a member state. If the Commission decides after consultation with the Safeguard Advisory Committee (which also comprises representatives of the 28 member states) that it has sufficient evidence, the investigation can be initiated within one month of receipt of the information from the member state or states (this is also likely to change with the implementation of new decision-making procedures).

Anti-dumping and countervailing investigations are required to be completed within 12 months; however, in special circumstances an anti-dumping investigation may be extended to 15 months and a countervailing investigation to 13 months. If the Commission decides to initiate an anti-dumping or anti-subsidy investigation, a notice of initiation is published in the Official Journal of the EU, which marks the date of the official commencement of the investigation and all deadlines start from this date.

This document contains a description of the product subject to the investigation, the countries concerned and a summary of the allegations made in the complaint. Through this public notice the Commission invites potentially interested parties, such as exporting producers, non-complainant EU producers, EU importers, distributors, retailers, users and their associations as well as any other upstream or downstream companies and consumer associations that may have a link with or economic interest in the product, to participate in the investigation. Additionally, known exporting producers that are expressly listed in the complaint or otherwise known to the Commission are also contacted. The starting point for exporting producers is to make themselves known to the Commission. In practice, exporting producers have 15 days from the date of the publication of the notice of initiation to register with the Commission.

#### **4. India**

India's anti-dumping and countervailing measures systems are administered by the Directorate General of Anti-dumping and Allied Duties (DGAD), an agency under the Department of Commerce of the Ministry of Commerce. India's safeguards regime is administered by another agency, the Directorate General (Safeguards), an agency under the Department of Revenue of the Ministry of Finance.

##### **The Directorate General of Anti-dumping and Allied Duties**

The Directorate General of Anti-dumping and Allied Duties (DGAD) is headed by its "Designated Authority" having the level of Additional Secretary to the Government. DGAD's Designated Authority is assisted by a Joint Secretary, an Adviser (Cost) and an Additional Economic Adviser. There are also twelve investigating and costing officers to conduct investigations. The Directorate is responsible for carrying out investigations and to determine, where appropriate, the amount of an anti-dumping duty or countervailing duty that is recommended for imposition on the concerned product. The determination as to whether and to what extent (India has a lesser duty rule) DGAD's recommendations are to be implemented is made by the Ministry of Finance. Thus, while DGAD recommends the anti-dumping/countervailing duty, it is the Ministry of Finance that actually imposes the duties.

The normal time allowed by the statute for conclusion of investigation and submission of final findings is one year from the date of initiation of the investigation. The above period may be extended by the Central Government for up to 6 months. These are the outer time limits permitted by the WTO Agreements.

DGAD conducts both of the two basic inquiries of an anti-dumping or countervailing case: the investigation and the injury assessment. It is uncertain whether these two inquiries are carried out independent of one another within the DGAD.

It should be noted that India does not have a "public interest test" (an assessment as to whether the level of recommended duties/measures, even though justified by law, are in the greater public interest); however, India does have a "lesser duty rule" (the authority of the Minister to impose a duty that is less than that recommended by DGAD, but that is nevertheless deemed sufficient to increase the price of the concerned good to a non-injurious level). DGAD also conducts anti-circumvention investigations, but the specific rules and procedures governing such an investigation, if they exist, are not readily available.

The Customs, Excise & Service Tax Appellate Tribunal (CESTAT) handles appeals against the order of determination or review thereof regarding the existence, degree and effect of any subsidy or dumping in relation to import of any article; however, various High Courts of the country also exercise their writ jurisdiction to hear these matters. Only the final findings/order of the Designated Authority or Ministry of Finance can be appealed to CESTAT, and only within 90 days from the date of issuance.

No appeal may be taken from the preliminary findings of the Designated Authority or any provisional duty imposed on the basis thereof.

**Directorate General (Safeguards)**

Safeguard measures are administered by the Directorate General (Safeguards), an agency under the Central Board of Excise & Customs within the Department of Revenue of the Ministry of Finance. DG (Safeguards) is headed by its Director General; it also has a Permanent Secretary, two Additional Commissioners, two Deputy Commissioners and nine Superintendents.

The domestic law to implement the provisions of the Agreement on Safeguards has been enacted under Section 8B and Section 8C of the Customs Tariff Act, 1975. The Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997 and Customs Tariff (Transitional Products Specific Safeguard Duty) Rules, 2002 govern the procedural aspects. The Director General is required under Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997 to investigate the existence of 'serious injury' or 'threat of serious injury' to the domestic industry as a result of increased imports of an article into India and submit his findings to the Central Government along with his recommendation regarding the duration and amount of safeguard duty adequate to remove the injury or threat of injury to the domestic industry. In addition, the Director General is required to investigate cases relating to transitional safeguard duty against imports originating from China under the Customs Tariff (Transitional Product Specific Safeguard Duty) Rules, 2002. In addition, the Directorate General needs to closely coordinate with the domestic industry/ trade associations.

DG (Safeguards) submits its recommendations to the Standing Board of Safeguards (chaired by the Commerce Secretary), which considers those recommendations and makes its own recommendations to the Minister of Finance on whether and to what extent to impose the safeguards recommended by the DG (Safeguards). It is then the ultimate responsibility of the Minister of Finance to determine whether to impose and to what extent to impose the safeguard measures recommended by the DG (Safeguards).

There is no special administrative appellate body to handle appeals of safeguards measures. Therefore the courts exercise primary jurisdiction in the same manner as with the review of other administrative actions.