## §2.09 CONCLUSIONS

Argentina is an active user of trade remedies, especially of anti-dumping measures. Indeed, relative to its share of global imports, Argentina has been by far the most intensive user of this instrument in the world in the WTO era and has tended to apply very high levels of duties. This is generally consistent with the protectionist principles that have governed the Argentinian foreign trade policy and national industrial policy over most of this period.

That said, in the last two years the number of initiations and measures applications has decreased sharply, a development that can arguably be attributed to retaliation measures taken by Argentina's major commercial partners, in particular by China and because of the application of other type of measures that have turned to be more effective for the government's purposes, that is to say to protect the trade balance and the national industry.

Anti-dumping investigations constitute one amongst a number of instruments aimed at that purpose. In this regard, formal claims submitted to the WTO by members affected by Argentina's other trade barriers such as the application of Non-Automatic Import Licenses and Anticipated Imports Affidavits may prompt a renewed increase in the use of anti-dumping.[89] In terms of process, the AD Decree is focused almost exclusively on procedural issues of anti-dumping investigations while the substantive matters are governed by the provisions of the ADA, which has been directly incorporated into Argentinian law. While Argentina has applied a number of interesting principles in its anti-dumping practice – such as frequent use of lesser duties and consideration of the public interest and of broader foreign relations issues – the limited amount of public information on its decisions unfortunately has constrained the extent of study of Argentinian practice in this area.

89. It must be taken into account that as from 25 Jan. 2013 import licenses are no longer in force.



# CHAPTER 3
# Australia

*Simon Lacey*



## §3.01 INTRODUCTION

### [A] Brief History

Unfair competition from dumped imports has been an issue since the earliest days of Australia's industrialization. As early as 1906, the Australian Industries Preservation Act was enacted to combat 'predatory' dumping in the broader context of similar initiatives being taken in Canada and New Zealand at the same time. However, the Act was never invoked as a basis for imposing anti-dumping measures, allegedly due to the difficulty of demonstrating – as the Comptroller-General of Customs was required to do before a Justice of the High Court – that a given importer was 'acting with intent to destroy or injure' an Australian industry.[1]

The requirement to prove predatory behaviour was abolished in a subsequent amendment to the Act in 1921, with the enactment in that year of the Customs Tariff (Industries Preservation) Act. Adopted following an inquiry by the then newly established Tariff Board, the Act established 'broader procedures for improving penalty duties on imports deemed to have been sold at prices lower than in their suppliers' home market',[2] and was loosely inspired by concurrent developments in the legislation and practice governing anti-dumping in countries like the United States and Canada.[3] It removed the role of the High Court, rendering matters considerably more streamlined in terms of procedure.[4] It also enacted changes to the normal value provisions that

1. Richard Whitwell, *The Application of Anti-Dumping and Countervailing Measures by Australia* 11 (Central Queensland University Press 1997).
2. Gary Banks, *Australia's Anti-dumping Experience*4 (The World Bank 1990).
3. Australian Productivity Commission, *Australia's Anti-dumping and Countervailing System*169 (Inquiry Report No. 48, 18 Dec. 2009).
4. Whitwell, *supra* n. 1, at 12.

broadened the notion of what constituted 'dumping' under the Act. At the institutional level, the 1921 Act entrusted the Tariff Board with the responsibility of conducting the requisite investigations and for advising the Minister, who was ultimately responsible for handing down the decision on whether or not to impose duties.[5]

With the enactment of the 1921 legislation, anti-dumping

was separated from policy addressing anticompetitive behaviour.[6] The implementation and operation of the anti-dumping provisions under the 1921 Act were reviewed in 1927, culminating in the 1929 Brigden Report,[7] which generally endorsed the anti-dumping rules that had been enacted in 1921, recommending that they be retained, except for those provisions on exchange rate dumping,[8] which it posited could be withdrawn given the fact that balance of payments volatility had stabilized after the end of WWI.[9] At the time, petitions for import relief from Australian industry were relatively limited, a phenomenon which most observers ascribe to the fact that the level of tariff protection was fairly high during the inter-war years,[10] with import licensing also playing an important role in restraining imports.[11] Between 1921 and 1960 (almost four decades), anti-dumping duties were imposed on only sixty occasions.[12]

A certain degree of momentum for change was brewing at the international level, particularly among discussions in the years leading up to the Kennedy Round at the General Agreement on Tariffs and Trade (GATT).[13] In Australia, it was the Tariff Board, in its 1958–1959 Annual Report, which indicated there was probably a need to revise existing legislation with regard to what Whitwell refers to as 'definitional problems' concerning concepts such as injury, transfer prices between affiliated companies and the calculation of production costs for firms producing in planned economies.[14] This resulted in the repeal of the Customs Tariff (Industries Preservation) Act 1921, and its replacement with the Customs Tariff (Dumping and Subsidies) Act 1961.

5. *Ibid.*, at 170.
6. Antitrust provisions continued to remain in force under the Australian Industries Preservation Act 1906, before they were repealed and replaced by the Restrictive Trade Practices Act 1965, which itself was repealed and replaced by the Trade Practices Act 1974, still in force today. See Australian Productivity Commission, *supra* n. 3, at 170.
7. See MahindaSiriwardana, *The Economic Impact of Tariffs in the 1930s in Australia: The Brigden Report Re-examined*, 35(67) Australian Econ. Papers 370 (1996) for more on the Brigden report and a subsequent (primarily econometric-based) analysis of its findings.
8. See John H. Jackson, *World Trade and the Law of GATT*404 (The Michie Company 1969) for a brief discussion of the four kinds of dumping (price, service, exchange rate and social) that were discussed for inclusion in the GATT, of which only price dumping made its way into the final text of the Agreement.
9. Whitwell, *supra* n. 1, at 13.
10. *Ibid.*
11. Import licensing was introduced on a broad range of imports as a wartime measure and continued after WWII on balance of payments grounds; see Australian Productivity Commission, *supra* n. 3, at 170.
12. Whitwell, *supra* n. 1, at 18.
13. See, by way of example, the First and Second Reports of the GATT Group of Experts on Anti-dumping and Countervailing Duties of 24 Apr. 1959 (L/978) and 19 Jan. 1960 (L/1141) respectively.
14. Whitwell, *supra* n. 1, at 17.





The importance of anti-dumping as a trade policy instrument rose significantly in Australia after 1960, when the country began to phase out the quantitative restrictions and attendant import licensing procedures it had put in place in the 1950s on balance of payments grounds.[15] Whitwell points out that in May 1961, only nine products had been subject to anti-dumping measures, whereas this number had risen to forty-six by July 1971.[16]

Other important developments during the 1960s affecting Australia's anti-dumping practices included the Vernon Report, issued in May 1965, and the negotiation and (significantly later) adoption of the GATT Kennedy Round Anti-dumping Code.

The Vernon Report was the culmination of almost two years of research by the Committee of Economic Inquiry, appointed by Prime Minister Menzies in 1963. The Committee had been given a broad scope of review, which included studying the benefits of tariffs and other forms of direct and indirect protection. The Committee essentially found in favour of the existing anti-dumping regime, stating that its removal or liberalization would cause undue pressure on tariff policy.[17] The Vernon Report resulted in a number of incremental changes to Australia's application of anti-dumping measures, particularly when determining export prices in related party transactions, as well as providing exemptions for the collection of anti-dumping duties where to do so would be in violation of an international agreement or where duty-free importation was possible as the like Australian goods were not reasonably available.[18]

The Kennedy Round Anti-dumping Code sought to bring about a measure of harmonization in the anti-dumping regimes of the then principal users of this instrument.[19] For Australia, the implications of the new Code were at first limited, since it chose not to accede immediately, fearing that it might constrain the discretionary powers of investigators under the prevailing arrangements.[20] However, under growing pressure to accede and following yet another governmental review of its anti-dumping legislation under the 1973-elected Whitlam government, the Customs Tariff (Anti-dumping) Act 1975 was enacted, repealing the Customs Tariff (Dumping and Subsidies) Act (1961), and giving effect to the Kennedy Round Anti-dumping Code.[21] The new legislation required that dumping be the 'principal' cause of injury before action

15. See GATT Document Australian Import Restrictions Statement by the Leader of the Australian Delegation, of 24 May 1960 (L/1204).
16. Whitwell, *supra* n. 1, at 18–19. Whitwell points out that in the period between 1961 to 1964, on average seventy-four applications for the imposition of dumping measures were filed each year with similar rates continuing until the end of the decade. He also notes that from this number, an average of seven applications were considered as sufficiently substantiated to warrant an investigation by the Tariff Board, with this average coming down to six towards the end of the decade.
17. See Whitwell, *supra* n. 1, at 20.
18. *Ibid.*
19. For a discussion of the negotiating history of the Code and the changes it brought about see John Rehm, *The Kennedy Round of Trade Negotiations*, 62 AJIL 403,427–434 (1968).
20. Australia only ratified the Kennedy Round Anti-Dumping Code in 1973 (in the middle of the Tokyo Round); see Richard H.Snape, Lisa Gropp&Tas Luttrell, *Australian Trade Policy 1965–1997: a documentary history*601 (Allen &Unwin 1998).
21. Whitwell, *supra* n. 1, at 23.

could be taken, thus giving force to the then newly adopted causation standard in the Code.[22] The 1975 Act also introduced some important institutional and procedural changes, including entrusting Customs with the conduct of anti-dumping investigations and making corresponding recommendations to the Minister on whether or not to impose duties.[23] The Tariff Board was also restructured, becoming the Industries Assistance Commission, which retained a role as a review body responsible for hearing appeals against Ministerial decisions.[24]

The Customs Tariff (Anti-Dumping) Act 1975 was amended in 1981 in order to implement the provisions of the Tokyo Round Code, including granting the investigating authority the power to accept price undertakings from exporters as well as the authority to retroactively apply anti-dumping duties where such undertakings are subsequently breached.[25]

In April 1983, a broad review of the Customs Tariff (Anti-Dumping) Act 1975 followed, resulting in a number of amendments to this legislation including allowing the Minister to completely disregard domestic sales in the exporting country if they did not incorporate all production and marketing costs, as well as allowing for the construction of a normal value that incorporated any conceivable costs, such as expenditures for production, selling and administration plus a reasonable profit.[26] Importantly, the language in the Act which required the Minister to refrain from taking action 'inconsistent' with Australia's international obligations' was also removed.[27] These changes arguably moved Australia closer to US anti-dumping practice.

The end of the 1970s and start of the 1980s saw an upsurge in dumping activity, which a number of observers have attributed as much to the aforementioned amendments as to the deteriorating economic situation prevailing both nationally and globally at the time.[28] One significant legislative change that sought to stem the tide of this upswing in protectionist activities was a 1984 amendment to the Customs Tariff (Anti-Dumping) Act 1975 introducing the lesser duty rule as well as a non-exhaustive list of factors for defining material injury.[29]

In 1985, industrial policy reforms saw the Australian government terminate a domestic support programme for fertilizer purchases. The Australian fertilizer industry, suffering from the withdrawal of the subsidy and historically low fertilizer prices on world markets, struggled to adapt to these changes and filed for import relief in the form of anti-dumping duties. These duties were then duly imposed on imports of fertilizer from the United States, with the unexpected result of producing a dramatic political backlash from farmers, who now had neither the benefit of the fertilizer

22. See Simon Lacey, *Causal Link, Non-Attribution and Contingency Protection in the WTO* (Working Paper, 2002, available at http://www.simonlacey.net) for the historical development of the causation standard in the various trade remedy instruments under the GATT and the WTO, with further references.
23. Australian Productivity Commission, *supra* n. 3, at 172.
24. Banks, *supra* n. 2, at 184.
25. Whitwell, *supra* n. 1, at 24.
26. Snape, Gropp&Lutrell, *supra* n. 20, at 604.
27. Australian Productivity Commission, *supra* n. 3, at 173.
28. See e.g., Whitwell, *supra* n. 1, at 24; see also Banks, *supra* n. 2, at 185.
29. Australian Productivity Commission, *supra* n. 3, at 173.





subsidy nor competitively priced fertilizer from the United States. An embarrassed Hawke Government was forced to provide temporary payments to farmers while at the same time promising a major review of Australia's anti-dumping legislation.[30] This review, which took place in 1986, has come to be known as the Gruen Review, after Professor Fred Gruen. The main changes enacted as a result of the Gruen Review, in 1988, include a bifurcated system for the conduct of anti-dumping investigations with Customs being responsible for the preliminary findings stage, and the newly established Anti-Dumping Authority (ADA) reviewing the findings of Customs and making a final recommendation to the Minister. The Industry Assistance Commission was also completely removed from the process at this time. In addition, a three-year sunset clause for anti-dumping measures was adopted as well as specific time frames for each step in the investigative process.[31] Importantly, although the Gruen Review recommended against the adoption of a public interest test, and even though this recommendation was accepted by the Hawke Government, it nevertheless provided that the Minister would take into account national interest criteria in exercising his/her discretion when acting on recommendations from the ADA.[32]

Anti-dumping activity fell sharply in the second half of the 1980s, but experienced another upsurge in the early 1990s, with the number of new investigations again reaching a historical high (although this did not result in a corresponding record number of new measures being imposed).[33] After a series of procedural changes in 1991 and 1992 intended to speed up the investigative process, Australia obtained the dubious dual honour of being the 'fastest processor of complaints in the world',[34] as well as the country 'reporting more initiations of anti-dumping investigations than any other signatory of the GATT Anti-dumping Agreement [1979]'.[35] Most observers tend to cite the 1991–1992 recession (the last Australia has experienced at the time of writing) as well as concurrent tariff reductions for this upsurge in anti-dumping activity in the early 1990s.[36]

The conclusion of the Uruguay Round and the entering into force of the new WTO Anti-dumping Agreement resulted in a number of amendments to the Australian anti-dumping legislation to bring it into conformity with the new ADA in terms of, *inter alia*, calculating dumping margins, de minimis thresholds, standing requirements, company-specific duties, and new shipper reviews.

In 1996, yet another review (the Willet Review) was commissioned by the Howard Government, which had come into office 'with a commitment to improve existing countervailing and anti-dumping procedures to ensure Australian producers

30. See Banks, *supra* n. 2, at 186.
31. Australian Productivity Commission, *supra* n. 3, at 174.
32. Whitwell, *supra* n. 1, at 32.
33. Australian Productivity Commission, *supra* n. 3, at 174.
34. Whitwell, *supra* n. 1, at 34.
35. *Ibid.*
36. See e.g., Donald Feaver& Kenneth Wilson, *An Evaluation of Australia's Anti-Dumping and Countervailing Law and Policy*, 29 J World Trade 207, 208 (1995).

The standard of review includes lack of evidence; misapplication of the rules, regulations or procedures; and the abuse of power.[430]

To date, no judicial reviews have been finalized, confirming the view that judicial review of anti-dumping investigations in China is still in its infancy.[431]

### [G] Other Reviews

China has special Product Scope Rules[432] in terms of which any interested party may request that a specific product should be excluded from the application of anti-dumping duties. All such applications are considered by MOFCOM and Customs has no jurisdiction in the matter. Parties have to clearly indicate how the product differs from the domestic industry product and the domestic industry and all other parties have the opportunity to comment before MOFCOM makes its finding. The change in scope is only effective from the date indicated in MOFCOM's final notice.[433]

## §6.09 CONCLUSION

Although China started conducting anti-dumping investigations in the late 1990s, it has significantly increased its use of the instrument since it became a WTO Member at the end of 2001. Between 2002 and 2011 it was the fourth most prolific user of the instrument, after India, the United States and the EU, which is in line with its increased share of global imports and, at least partially, the result of trade liberalization under which the level of its customs duties has decreased significantly. However, since 2007 its use of the instrument has decreased significantly.[434]

China has promulgated detailed rules and regulations related to most aspects of investigations; however, there remains a perceived lack of transparency that has been confirmed by recent WTO Panel and Appellate Body rulings concerning various aspects of China's procedures. China's response to these rulings remains to be seen.

430. *Ibid.*; Yu, *supra* n. 16, at 97 and 99.
431. Lingchen, *supra* n. 23, at 238; Yu, *supra* n. 16, at 99.
432. AD Rules (Product Scope).
433. Wu, *supra* n. 19, at 262–263.
434. Whereas China initiated 113 investigations between 2002 and 2006, it initiated only forty-eight investigations between 2007 and 2011, dropping it to 6th position behind India, Brazil, the United States, Argentina, and the EU, and just ahead of Pakistan (forty-six).



# CHAPTER 7
# European Union

*Derk Bienen*



## §7.01 INTRODUCTION

### [A] Brief History

The European Union's (EU's) use of anti-dumping measures started more than forty years ago – the European Community's[1] anti-dumping legislation was first enacted in 1968. Following the establishment of the World Trade Organization (WTO) and the entry into force on 1 January 1995 of the WTO Anti-Dumping Agreement (ADA), the Anti-Dumping Regulation (ADR)[2] was enacted. This regulation has been subsequently amended several times.

A comprehensive review of the EU anti-dumping system, which would have strengthened the position of interest groups negatively affected by measures, was initiated in 2006 but halted in January 2008,[3] with only minor amendments relating to improved transparency of proceedings implemented.

The Treaty of Lisbon[4], which entered into force on 1 December 2009, brought about significant changes to the institutional framework of the EU anti-dumping instrument. Details of the new legal framework are still under development.

1. Following the adoption of the Lisbon Treaty, the term 'Community' has been replaced by 'Union'. Hereinafter, 'Union' (or EU) is used except in quotations and historical references.
2. Council Regulation (EC) No 384/96 of 22 Dec. 1995 on protection against dumped imports from countries not members of the European Community, 1996 OJ (L 56) 1. This regulation consolidated amendments in several regulations implementing the Uruguay Round agreements and for the first time separated the anti-dumping regulation from the anti-subsidy regulation.
3. Commission Staff Working Document: Accompanying Document to the 28th Annual Report from the Commission to the European Parliament on the EU's Anti-Dumping, Anti-Subsidy and Safeguard Activities (2009), SEC(2010) 1194 final (2010), at 16.
4. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 2007 OJ (C 306) 1. The Treaty of Lisbon amended the EU's two core

Also, the Commission in October 2011 launched a 'modernisation review of trade defence instruments' with the objective of adjusting the instruments to the changed international economic environment. As a result, the Commission proposed a number of changes to the instruments in April 2013.[5]

### [B] Authorities, Decision-Making Process, and Time-Line

The EU does not have an independent investigating authority. Rather, the Trade Defence Directorate / Directorate-General for Trade (DG Trade) conducts investigations, while definitive measures are proposed by the Commission to a political body, the Council of the EU ('the Council'), which takes the decision following consultations with Member States.

DG Trade's responsibilities include decisions about: initiation of investigations; conduct of (original and review) investigations; and imposition of provisional measures, acceptance of undertakings and granting of refunds. DG Trade uses a semi-bifurcated system in which dumping and injury are determined by separate teams of case-handlers. However, there is no specialization – that is, the same case handler may work on injury in one case and on dumping in another (previously, dumping and injury were handled by separate directorates). Likewise, there is no sectoral specialization.

The Council, based on a proposal submitted by the Commission, imposes definitive duties (or amends measures, for example, following anti-absorption or anti-circumvention investigations), unless a simple majority rejects the proposal. With the same decision-making rule, the Council decides on the extension or suspension of duties. The Council can also, with a qualified majority, reject the termination of investigations proposed by the Commission or provisional measures imposed by the Commission.

Apart from the role of Member States exerted through the Council, they are consulted through the Advisory Committee, which consists of representatives of each Member State, with a representative of the Commission as chairperson. The Commission is not obliged to take into account the views of Member States expressed in the Advisory Committee consultations.

The Treaty of Lisbon has led to significant changes in the framework for the adoption of implementing acts in general, which include definitive anti-dumping duty regulations. The relevant provisions, in Article 291, provide no role for the European Parliament or the Council in terms of exerting control over the Commission's exercise of implementing powers. Such control can only be exercised by the Member States. A

treaties, the Treaty on European Union and the Treaty establishing the European Community; the latter was renamed the Treaty on the Functioning of the European Union. For the Consolidated Version of the Treaty on the Functioning of the European Union incorporating the changes introduced by the Treaty of Lisbon, see 2010 OJ (C 83) 47.

5. Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1225/2009 on protection against dumped imports from countries not members of the European Community and Council Regulation (EC) No 597/2009 on protection against subsidised imports from countries not members of the European Community, COM(2013) 192 final (10 Apr. 2013) [hereinafter: 2013 Commission Proposal].





legal framework to establish the mechanisms of such control was adopted and entered into force on 1 March 2011, regulating the control by Member States of the Commission's implementing powers (the new horizontal 'Comitology Regulation').[6] The Comitology Regulation introduces certain changes to the institutional structure and decision-making rules of EU trade defence. First and foremost, in addition to its current responsibilities, the Commission will also impose definitive measures. Conversely, the Council will no longer be actively involved in the operation of the anti-dumping instruments. The areas of involvement of the Council will be taken over by the Member States in the Anti-Dumping or Anti-Subsidy Committee. Under the new 'examination procedure' foreseen in Article 5 of the Comitology Regulation, proposals for certain acts are delivered to an examination committee (the Anti-Dumping Committee) which can reject the proposal by a qualified majority. If a simple majority of the committee rejects the proposal, it is referred to an appeal committee which can reject the proposal with a qualified majority. The stages in anti-dumping proceedings in which the examination procedure would be invoked as well as the overall timelines for proceedings are currently under discussion in the context of the Trade Omnibus 1 proposal.[7]

According to the ADR, investigations shall be completed within twelve months, where possible, and in any case within fifteen months from the date of the notice of initiation.[8] In practice, the full duration of fifteen months is nearly always required.

### [C] Applicable Legislation, Regulations and Guidelines/Procedures

In 2009, the various amendments that had been made to the basic regulations were consolidated and the new basic ADR was enacted.[9] The ADR constitutes the legal basis for the EU's anti-dumping practice.

### [D] Use of Anti-dumping

Anti-dumping has been by far the most frequently used trade defence measure by the EU, accounting for well over four-fifths of its trade defence proceedings. The EU is generally considered to be one of the main 'traditional' users of anti-dumping instruments, along with the United States, Canada, Australia, and New Zealand.

6. Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 Feb. 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, 2011 OJ (L 55) 13.
7. European Commission, Proposal for a Regulation of the European Parliament and of the Council amending certain regulations relating to the common commercial policy as regards the procedures for the adoption of certain measures, COM(2011) 82 final (2011). The proposed changes to the ADR are contained in section 24. The proposal is currently (Jul. 2012) under consideration.
8. Article 11(5) ADR.
9. Regulation 1225/2009 of 30 Nov. 2009 on protection against dumped imports from countries not members of the European Community, 2009 OJ (L 343) 51. For the EU's anti-subsidy instrument, the legal basis is constituted by Council Regulation (EC) No 597/2009 of 11 Jun. 2009 on protection against subsidised imports from countries not members of the European Community, 2009 OJ (L 188) 93.

Over the period 1995–2011, the EU initiated 437 investigations and imposed 282 measures, making it the third most active user of anti-dumping measures (after India and the United States) for the period as a whole, although in recent years (since 2005) it has been overtaken by China.

Anti-dumping measures are taken in a wide range of agricultural and industrial sectors, with a heavy concentration of cases in the chemicals and metal products sectors, and lesser spikes in the plastics and machinery and equipment sectors.

Fifty-four exporting countries have been the target of EU anti-dumping investigations since 1995. Most of these were developing economies; China accounted for 107 or over one-quarter of individual citations, and over one-third in cases since 2005.

EU anti-dumping duties as reported in the World Bank's anti-dumping data base have ranged from 5.4% to 90.6%.[10] The simple average of about 33% is much higher than the EU's average applied MFN duty in 2011 of 6.4%.[11]

Measures expire automatically after five years, unless extended pursuant to an expiry review. Approximately half of all EU measures are revoked during the initial five-year period or expire at the end of it without an expiry review, and an additional 15% are terminated following the expiry review. Thus, about two-thirds of all measures remain in place for only one term. About 20% of measures remain in place for ten or more years. The longest-standing measure is *Tungsten Carbide and Fused Tungsten Carbide*.[12] It was imposed in September 1990 and has a foreseen date of expiry of March 2016; by then it will have been in place for more than twenty-five years.

The share of EU imports subject to anti-dumping duties at any point in time is small; in 2009, the share of imports subject to all contingency measures, including anti-subsidy and safeguards as well as anti-dumping, was about 0.6%.[13]

## §7.02 CORE DEFINITIONS

### [A] Domestic Industry and Industry Standing

The ADR follows the ADA in defining the domestic industry (referred to as 'Union industry' in the EU system) as the 'Community producers as a whole of the like products or [...] those of them whose collective output of the products constitutes a major proportion [...] of the total Community production of those products'.[14]

The ADR also incorporates the ADA's standard exceptions from this general rule, allowing for exclusion of Union producers which are related to the exporters or which are also importers of the allegedly dumped product, and for considering the impact of dumping on a regional basis when separate geographical markets exist within the EU

10. Chad P. Bown, *Global Antidumping Database*, http://econ.worldbank.org/ttbd/gad/ (accessed 20 Jun. 2012).
11. WTO, Trade Policy Review: European Union, WT/TPR/S/248 (2011), at viii.
12. *Tungsten Carbide and Fused Tungsten Carbide* (China), 1990 OJ (L 83) 36.
13. WTO, *supra* n. 11, at 39.
14. Article 4(1) ADR.





that have little trade in the like product with the rest of the EU, and in which dumped imports are concentrated. The regional market exception came into play in *Large Rainbow Trout*.[15] In this case, exporting producers argued that the Finnish market constituted a separate market, but this was rejected by the Commission as the share of Finland's imports from other EU Member States represented more than 12%.[16]

The ADR also applies the ADA criteria for Union industry standing for initiation purposes: an application must be supported by Union producers accounting for at least 25% of total Union production of the like product, and by Union producers whose collective output constitutes more than 50% of the total production by that portion of the Union industry expressing either support for or opposition to the complaint.[17] In practice, the 25% threshold is the more relevant criterion since no cases have been made public in which a majority of producers consulted expressed opposition to a complaint.

According to EU case law, the above thresholds must be met only at the stage of initiating an investigation. For example, if the level of support drops below 25% during investigations, there is no obligation for the Commission to terminate.[18] However, this practice has been reassessed in view of the Appellate Body ruling in *EU – Fasteners (China)* that, for the purpose of injury analysis, the 'major proportion' definition is independent of the standing test[19] – the 2013 Commission Proposal would remove the link between the definition of the Union industry and the standing threshold currently contained in Article 4(1) ADR.

### [B] Like Product

Union industry is defined in terms of the producers of EU-origin 'like products'; consistent with the ADA, this means goods that are identical to or 'closely resemble' the imported goods.

The meaning of 'closely resemble' is determined in the Commission's practice by basic technical, physical and/or chemical characteristics, and substitutability of the domestic product for the imported good from the perspective of the user.[20] In cases where the product characteristics and its main use would lead to different product definitions, priority is given to the product characteristics.

Procedurally, 'likeness' is determined initially by the producers interacting with the Commission; users enter into the process only after a case has been launched, and

15. *Large Rainbow Trout* (Norway and the Faroe Islands), 2004 OJ (L 72) 23.
16. *Ibid.*, at recital 31.
17. See Article 5(4) ADR.
18. See Judgment of the CFI of 10 Mar. 2009 in Case T-249/06 *Interpipe Niko Tube and Interpipe NTRP v. Council* [2009] ECR II-383.
19. WTO Appellate Body Report, *EC – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, AB-2011-2 WT/DS397/AB/R, adopted 28 Jul. 2011, at 162.
20. See e.g., *Certain Tungsten Electrodes* (China), 2006 OJ (L 250) 10 (provisional), at recital 13. There, the Commission observed as follows: 'Based on the physical characteristics and the *substitutability of the different types of the product from the perspective of the user*, all [tungsten electrode products] are considered to constitute a single product for the purpose of this proceeding' (emphasis added).

CHAPTER 12

# South Africa

*Gustav Brink*

## §12.01 INTRODUCTION

### [A] Brief History

South Africa in 1914 was the fourth country in the world to adopt anti-dumping legislation,[1] although it had already taken countervailing action against subsidized sugar imports as early as 1903,[2] which made it probably the first country in the world to have applied trade remedies. Soon after the Board of Trade and Industry (hereinafter 'the Board') was set up in 1921[3] to deal *inter alia* with dumped and subsidized imports, South Africa became one of the major users of the instruments.[4] The Board was replaced by the International Trade Administration Commission (ITAC or 'the Commission') in 2003 following the promulgation of the International Trade Administration Act (ITA Act).[5]



1. Section 8(1) of the Customs Tariff Act 1914. Canada (1904), New Zealand (1905) and Australia (1906) preceded South Africa with anti-dumping legislation; see Jacob Viner, *Dumping: A Problem in International Trade* 192–209 (Reprint, Fairfield NJ: Augustus M Kelly 1991). For a detailed discussion of the history of anti-dumping in South Africa and additional sources, see Gustav Brink, *A Theoretical Framework for Anti-Dumping Law in South Africa* 19–91 (Unpublished LLD thesis, Pretoria: U. Pretoria 2004).
2. These were called 'bounty anti-dumping' duties; see, *Transvaal Customs Handbook* 24 (Johannesburg: Transvaal Customs Department 1905).
3. See *Government Gazette, Notices 1044* and *1045*, of 8 Jul. 1921.
4. See Gustav Brink, *Anti-Dumping and Countervailing Investigations in South Africa: A Practitioner's Guide to the Practice and Procedures of the Board on Tariffs and Trade* 3 (Pretoria: Gosh Trading 2002); and Brink, *supra* n. 1, at 54–58.
5. *International Trade Administration Act, 71 of 2002* (although accepted in Parliament in 2002, it was only promulgated in 2003). In this chapter, all references to ITAC in respect of investigations or reviews conducted prior to Jun. 2003 are to be read as references to the Board.

South Africa's anti-dumping regime has always applied de facto to the territory of the Southern African Customs Union (SACU), which came into existence in 1910 prior to the adoption of formal anti-dumping legislation by South Africa. SACU is presently comprised of Botswana, Lesotho, Namibia, South Africa and Swaziland. The ITA Act was constructed to apply on a SACU-wide basis. Since the envisaged SACU Tariff Board has not yet been operationalized, and since South Africa is the only Member State with an investigating authority, the SACU Council of Ministers has requested ITAC to make determinations on its behalf.[6] Since no industry with its production base in a SACU Member State other than South Africa has, to date, requested ITAC to conduct an investigation, the distinction between South African and SACU practice has so far been moot. In this chapter, except where otherwise noted, the term 'domestic' may be read as a reference to the SACU-wide economy.

Although South Africa's economy is diverse and produces a wide range of manufactured products, its relatively small market makes it is very easy to prove injury to domestic industry: in one bizarre instance a single imported container of clay pigeons amounted to nearly 40% of the annual market for the product.[7]

## [B] Authorities, Decision-Making Process, and Time-Line

ITAC is responsible for all aspects of an investigation, including determination of dumping, injury and causality, and the level of duties. It makes recommendations to the Minister of Trade and Industry who takes the final decision whether to implement anti-dumping duties.

ITAC is an independent institution that reports for administrative purposes to the Minister of Economic Development. It has three technical divisions responsible for, respectively: import and export control; the determination of levels of customs duties (including increases, decreases, and rebates); and trade remedies. There are currently two trade remedy directorates and investigations are assigned on the basis of available capacity, with each directorate responsible for all aspects of investigations assigned to it.

The Anti-Dumping Regulations (ADR)[8] provide that '[o]ther than final decision-making powers ITAC may delegate any of its functions in respect of anti-dumping investigations to its investigation staff'.[9] Bearing this provision in mind, Table 12.1 sets out the decision-making authority within ITAC.

6. This falls within the author's own knowledge acquired during his tenure at ITAC and has been confirmed by a source within the SACU Secretariat.
7. *Clay Pigeons* (France), Board Report 3384.
8. *Government Gazette* 25684 of 14 Nov. 2003.
9. ADR 67.





*Table 12.1 Decision-making powers in ITAC*

| | |
|---|---|
| Properly documented application | Senior Manager |
| Local verification | Senior Manager |
| Decision whether or not to initiate | Commission |
| Claims to confidentiality | Senior Manager; Commission |
| All Deficiencies | Senior Manager |
| Extensions granted up to fourteen days | Senior Manager |
| Extension granted longer than two weeks | Commission |
| Foreign verifications | Chief Commissioner |
| All verification reports | Senior Manager |
| Preliminary determination | Commission |
| Approval for oral hearings | Chief Commissioner |
| Final submission | ITAC recommends to Minister of Trade and Industry |
| Imposition of duty | Minister of Trade and Industry requests the Minister of Finance to impose duties |
| Implementation | South African Revenue Service (SARS) |

*Source*: ITAC

Since 1992, when the trade remedies unit was established, investigations have taken, on average, about sixteen months to complete, with preliminary duties established on average about eight months after initiation. Anti-dumping duties were imposed in a number of investigations that took more than eighteen months to complete, but these have remained unchallenged.

## [C] Applicable Legislation, Regulations and Guidelines/Procedures

The legislative framework is established by the ITA Act. All general substantive and procedural aspects of investigations are established by the ADR promulgated in 2003. No other guidelines or procedures have been published. International Agreements only obtain the force of law if promulgated in South Africa, although courts are required to consider international law in interpreting domestic law. Accordingly, although not having the force of law, courts do refer to Article VI of the General Agreement on Tariffs nad Trade (GATT) and to the ADA in interpreting South African anti-dumping law.[10]

10. S 233 of the *Constitution Act 1996*. See e.g., *The Chairman of the Board on Tariffs and Trade v. Brenco* 2001(4) SA 511 (SCA) 526; *Progress Office Machines v. SARS* [2007] SCA 118 (RSA) par 6; *Maluleke v. Minister of Internal Affairs* 1981 (1) SA 707 (BSC) 712 H; Gary S. Eisenberg, *The GATT and the WTO Agreements: Comments on their legal applicability to the Republic of South Africa*, 19 S Afr YIL 127 (1993/1994); Gustav Brink, *Anti-Dumping and Judicial Review in South Africa: An Urgent Need for Change*, 7(5) Global Trade & Cust J 274.

### [D] Use of Anti-dumping

South Africa has historically been one of the major users of anti-dumping, alongside the so-called traditional users – Australia, Canada, the European Union (the EU), and the United States. Although pre-WTO investigations were not notified to the GATT as South Africa was not a signatory to either the Kennedy Round or Tokyo Round Anti-Dumping Codes, evidence can be found of at least 851 investigations initiated between 1921 and the end of 1994.[11] Another 216 investigations were initiated as WTO Member over the period 1995–2011, albeit at a declining pace and 'success' rate over the period: while in the five-year period 1995–1999 130 cases were initiated and eighty-eight measures imposed, in the period 2005–2010 thirty-seven initiations led to fifteen measures. Thirty-five investigations were initiated against China, followed by twenty-one for India. Counting all EU Member States as a whole, forty-one investigations were initiated against the EU. Investigations were concentrated in the base metals sector, which saw sixty initiations.

## §12.02 CORE DEFINITIONS

### [A] Domestic Industry and Industry Standing

The ADR follows the ADA in defining 'domestic industry' as SACU producers as a whole, or those of them whose collective output constitutes a major proportion of the total domestic production, of the like product.[12] In addition, where a producer is related to an importer or exporter, or is itself an importer, the domestic industry 'may' be interpreted as referring to the rest of the producers.[13] The ADR do not, however, provide for dividing the SACU market into regional markets, as allowed under the ADA.[14]

For standing, the ADR apply the ADA requirements that an application must be supported by at least 25%, by production volume, of domestic producers, and by at least 50%, by production volume, of those producers expressing an opinion.[15] Provision is also made for ITAC to determine the support for the application by reference to the largest number of producers that can be reasonably included in the investigation or on the basis of statistically valid sampling techniques.[16]

In *PET*,[17] ITAC required both domestic producers to submit injury information before it was prepared to initiate an investigation on the basis that it would otherwise not be in a position to determine whether the injury experienced by one producer was

11. See Brink, *supra* n. 4, at 3 and Annex 7; and Brink, *supra* n. 1, at 55–56.
12. ADR 1.
13. ADR 7.2.
14. ADA Art. 4.1(ii) and 4.2.
15. ADR 7.3.
16. ADR 7.4.
17. *PET* (China, India, Indonesia, Korea, Chinese Taipei, and Thailand), ITAC Report 154.





caused by the alleged dumped imports or by the other producer. This procedure was repeated in *Shock Tubes*.[18]

### [B] Like Product

Until the ADR were promulgated in 2003, South African legislation had never defined 'like product'. Despite this, in *Starch*,[19] ITAC evaluated 'like product' in detail and developed the criteria to be used in the determination. These criteria were subsequently incorporated in ADR 1 as follows:

> (a) a product which is identical i.e., alike in all respects to the product under consideration; or
> (b) in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

The ADR further provide that:

> In determining whether the product has characteristics closely resembling those of the product under consideration the Commission may consider –
>
> (i) the raw materials and other inputs used in producing the products;
> (ii) the production process;
> (iii) physical characteristics and appearance of the product;
> (iv) the end-use of the product;
> (v) the substitutability of the product with the product under investigation;
> (vi) tariff classification; and/or
> (vii) any other factor proven to the satisfaction of the Commission to be relevant.
>
> No one or several of these factors can necessarily give decisive guidance.[20]

Using these criteria, ITAC has found, *inter alia*, the following products to be 'like':

- *Syringes*: ITAC found that 2-piece and 3-piece syringes – that is, syringes with and without rubber stoppers – were like products.[21]
- *Gypsum Plasterboard*: although the exporter claimed that it exported different sizes and thicknesses of plasterboard than those produced by the applicant and that there were differences as regards the extent to which the products sag, thermal insulation, sound and insulation properties, resistance, and fire ratings, ITAC found that the products were like products.[22]

18. Note that no report was issued in the *Shock Tubes* (China) investigation as ITAC wrongly (as confirmed by the High Court) decided to revoke the initiation of the investigation.
19. See *Unmodified Starch* (Belgium, Denmark, France, Germany, Portugal, Spain, Switzerland, and Thailand), Board Report 3486. Note that all references to 'Board Reports' are to reports pre-dating ITAC, i.e., through May 2003; reports on anti-dumping investigations issued from Jun. 2003 are ITAC Reports.
20. ADR 1.
21. *Syringes* (Belgium, Germany, Ireland, and Spain), Board Report 3949.
22. *Gypsum Plasterboard* (Thailand), ITAC Report 44, at 12–15.

CHAPTER 14

# United States

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## §14.01 INTRODUCTION

### [A] Brief History

The first United States (US) anti-dumping (AD) law was enacted in 1916, based on a competition law model and enforced by US federal courts.[1] By 1919, it had been criticized as 'not working' (how would anyone know so soon?) and was supplemented by a 1921 law based on the 1904 Canadian model (price discrimination, with no requirement to prove 'predation' or 'unfairness', and administered by political departments, not judges). That 1921 Antidumping Act remains the basis for US anti-dumping law (the 1916 Act was repealed after being found to be WTO-consistent), modified numerous times in ways large – after the General Agreement on tariffs and Trade (GATT) and World Trade Organization (WTO) agreements – and small (e.g., in response to WTO panel rulings on issues such as zeroing or domestic lobby pressure such as in the case of the Byrd Amendment).

### [B] Authorities

The United States employs a bifurcated system to determine whether a measure is ultimately applied. Three executive institutions, however, play a role in administering and enforcing these regulations: the US Department of Commerce (DOC or Commerce), the US International Trade Commission (ITC) and the Bureau of Customs and Border Protection (Customs).

1. The anti-dumping law was preceded by a countervailing duty (CVD) law enacted in 1890, limited to export subsidies on sugar imports and enforced by the Customs Bureau. It was extended to all products in 1897 and to all subsidies in 1922.

Commerce, a cabinet level executive branch Department, is the primary enforcer of US trade remedy laws. Commerce's responsibilities include: responding to allegations of dumping or subsidies by conducting the investigation to determine if dumping or subsidies exist; administrative reviews to determine definitive duty assessments; ruling on whether a product falls within the scope of a specific order; and conducting circumvention inquiries. The Secretary of Commerce delegates decision-making authority in all of these areas to the Assistant Secretary for Import Administration.

Commerce is led by a presidential appointee, as is Import Administration,[2] the agency within Commerce responsible for determining whether imports are unfairly traded. These positions change with the Administration and are considered 'political' in nature. For some members of the trade bar who primarily defend foreign respondents, the high percentage of affirmative determinations by Commerce is indicative of a political bias in favour of domestic interests. Others see it as the result of weeding out weak cases, either directly during pre-petition counselling or indirectly through the high cost of bringing a case. Overall, however, the robust transparency of the DOC process, described in detail below, contributes to the general perception among many US practitioners that the decisions of Import Administration are not overtly politically motivated. Judicial review is another factor in limiting the politicization of the process.

Separate from Commerce is the ITC, which is an 'independent' agency (meaning turnover does not coincide with new presidential administrations) comprised of six commissioners (three Democrats and three Republicans) appointed by the President for nine-year non-renewable terms. The ITC is responsible for making the injury determinations in original investigations as well as in expiry (or 'sunset') reviews. The ITC has a permanent staff of approximately 360.[3] The decision-making rules of the ITC are statutorily prescribed. For both the preliminary and final phases of an original investigation, an affirmative decision is rendered by the ITC if at least three Commissioners vote in the affirmative. In other words, a negative determination occurs only when at least four of the six Commissioners have voted in the negative.[4] Although each ITC Commissioner is appointed by the President of the United States and confirmed by the US Senate, the ITC is considered 'non-partisan' in nature. Because the Commission is comprised equally of Democrats and Republicans, and because the terms of individual Commissioners are set by statute, staggered, and transcend any one presidential administration, it would be extremely difficult for a President to exert political influence over an ITC determination. The ITC has budgetary independence as

2. Import Administration has a permanent staff of over 300. See US Department of Commerce Office of Budget, *FY 2011 Budget in Brief: International Trade Administration*, http://www.osec.doc.gov/bmi/budget/11BiB/ITA.pdf (accessed 10 Apr. 2013). Although some senior staff members are involved in the decision-making process, there is ultimately one decision-maker – the Assistant Secretary for Import Administration.
3. See US International Trade Commission Office of Human Resources, *Careers at USITC*, http://www.usitc.gov/employment/ (accessed 10 Apr. 2013). In addition to injury determinations in trade defence cases (including safeguards), the ITC is also responsible for conducting investigations under section 337 of the Tariff Act of 1930, as amended (19 U.S.C. §1337), and for preparing various trade and industry analyses (e.g., analyses of the impact of trade agreements on the US economy).
4. 19 U.S.C §1677(11).





well. Thus, although it is not uncommon for members of Congress to submit a statement or appear at a hearing in support of a constituent, US practitioners overwhelmingly concur that ITC determinations are free of political influence, from both the Administration and the US Congress.

Customs generally plays a ministerial rather than decision-making role in administration of trade remedy laws. In the area of enforcement, however, Customs has broad authority to address fraudulent duty evasion schemes.

Finally, the administrative agencies' actions are subject to judicial review by the US Court of International Trade (CIT') and its appellate court, the Court of Appeals for the Federal Circuit (CAFC'). While Commerce and the ITC's decisions are entitled to formal judicial deference, the CIT and the CAFC decisions are not a rubber stamp. The courts frequently reverse the agencies on one or more issues in a case and have shown a willingness to do so even on politically sensitive issues.[5]

US practitioners view the bifurcated system as a particular strength of the US system, especially compared with other countries. The determination of whether imports have been dumped and the determination of whether injury has been caused to the domestic industry are seen as separate and distinct, requiring unique expertise and capabilities. For this reason, the two determinations are codified as separate legal prerequisites to the imposition of measures. In a bifurcated process the line between the two issues is less likely to become blurred. Only the facts relevant to each agency's specific determinations are presented to that agency, and are presented in the context of the issues that agency is charged with deciding. Therefore, the fact that the processes to make these determinations are vested in separate agencies, with separate analysts and decision-makers, and including one apolitical agency, seems to enhance the credibility of decisions made in the US system.

The timeline for anti-dumping duty investigations is show below in Table 14.1.

*Table 14.1*

| *Stage* | *What Happens* | *Timing* |
|---|---|---|
| *Petition* | Industry files petition simultaneously with Commerce and the ITC | |
| *Initiation* | Commerce initiates an investigation against one or a number of countries.<br>The ITC begins investigation two to three days after filing of the petition | Twenty days for Commerce to decide whether to initiate; may be extended another twenty days if necessary to determine industry support |

5. See, e.g., *GPX International Tire Corp v. United States ('GPX I')*, 645 F. Supp. 2d 1231 (Ct. Int'l Trade 2009) (reversing Commerce's simultaneous application of the CVD law and special NME methodology), *aff'd on other grounds*, 666 F.3d 732 (Fed. Cir. 2011).

| *Stage* | *What Happens* | *Timing* |
|---|---|---|
| *ITC Preliminary Injury Determination* | The ITC determines whether there is a 'reasonable indication' of material injury; if the ITC preliminary determination is negative the investigation is terminated | Within forty-five days of the filing of the petition or, if Commerce extends the period of initiation, twenty-five days after receiving notice of Commerce's decision to initiate |
| *Commerce Preliminary Determination and Provisional measures* | If Commerce makes an affirmative preliminary determination, Commerce orders Customs to suspend liquidation of entries of the subject merchandise and to collect cash deposits or bonds; if Commerce makes a negative preliminary determination, the investigation continues but these provisional measures are not imposed | AD prelim within 140 days from initiation; can be extended to 190 days<br>Provisional AD measures may be imposed for four to six months |
| *Commerce Final Determination* | If Commerce makes an affirmative final determination, Commerce orders continued suspension of liquidation (i.e., suspension of final assessment); if Commerce makes a negative final determination, the investigation is terminated, suspension of liquidation is discontinued, bonds are released, and all cash deposits are refunded | Final determination within 75 days after prelim; may be extended to 135 days in AD cases |
| *ITC Final Injury Determination* | If the ITC makes an affirmative final determination of injury, Commerce issues an anti-dumping order; cash deposits at the rates established in Commerce's final determination are required for all entries of subject merchandise on or after the date of the ITC final determination, bonds are no longer sufficient. If the ITC determination is negative, Commerce orders Customs to discontinue suspension of liquidation and return all cash deposits | ITC final within 120 days of affirmative Commerce prelim, or 45 days of affirmative Commerce final, whichever is later. If Commerce prelim is negative but final is affirmative, 75 days from Commerce final<br>Commerce publishes AD Order within seven days of notification of ITC final |





### [C] Applicable Legislation

The laws governing US anti-dumping and other trade remedies and implementing its obligations under the WTO Agreements are found in Title VII (sections 701–783) of the Tariff Act of 1930, as amended, and codified in the US Code (U.S.C.) at 19 U.S.C. §§1671 et seq. The regulations that detail how these laws are to be administered and implemented in practice are found in Title 19 of the Code of Federal Regulations (C.F.R.), Parts 207 (ITC) and 351 (Commerce).

### [D] Use of Anti-dumping

Between 1 January 1995 and 31 December 2011, 458 anti-dumping cases were initiated. Of these 305 resulted in anti-dumping measures being imposed,[6] making anti-dumping by far the most common trade remedy used by the United States, and meaning that two-thirds of anti-dumping cases initiated result in measures being imposed. Those petitions that did not result in anti-dumping measures include those receiving a negative injury finding (preliminary or final), negative dumping determination by Commerce, petitions that Commerce declined to initiate, and petitions that were withdrawn.

Over time, the use of anti-dumping sharply increased from 1995 until 2001, peaking at seventy-seven initiations and thirty-three measures imposed in 2001, and then sharply fell over the next five years to a low of eight initiations and five measures in 2006. Since then, the use of anti-dumping has varied but at a relatively low level, with between sixteen and twenty-eight cases initiated each year.

In terms of exporting countries affected by US anti-dumping measures, China leads the list with ninety measures (30%) over the period 1995–2011, followed by Japan (7%), Taiwan and Korea (5% each). In total, measures were levied against forty-five different countries.

More than half of all measures over the period (162, or 53%) were in the base metals and articles of base metals sector, followed by textiles and textile articles (42, or 14%).

## §14.02 CORE DEFINITIONS

### [A] Domestic Industry and Industry Standing

Under US law, the domestic industry is defined as 'the producers as a whole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the

6. WTO, *Anti-dumping initiations: by reporting Member*, and *Anti-dumping measures: by reporting Member*, available at http://www.wto.org/english/tratop_e/adp_e/adp_e.htm (accessed 5 Jul. 2013).