

One Hundred Years of Anti-dumping in South Africa

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South Africa is one of the oldest and biggest users of anti-dumping as a form of trade protection, with more than 1,000 investigations conducted over the past 100 years. It has imposed anti-dumping duties both on services (ocean freight) and to address depreciated currencies, long before these became issues in the WTO. Existing procedures do not meet South Africa's WTO obligations and decisions are often influenced by political pressure to impose duties. Although there is an urgent need for a review tribunal, there have been some considerable improvements in transparency recently.

1 INTRODUCTION

Although older evidence can be found of South African action against subsidized imports,¹ South Africa's anti-dumping legislation dates back to 1914,² making it the fourth country after Canada, New Zealand and Australia³ to adopt specific anti-dumping legislation. This article provides a broad overview of these 100 years, with reference to some unique concepts and investigations, including issues that are currently being or have recently been debated, such as anti-dumping currency devaluations and anti-dumping on services.

South Africa is one of the traditional users of anti-dumping, but as it was not a signatory to the GATT Anti-Dumping Codes, it never notified its investigations to the GATT. Research shows that it had imposed its first anti-dumping duties by no later than 1921,⁴ and that it has conducted well over 1,000 investigations to date.

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¹ See *Transvaal Customs Handbook* (1905) 24, which refers to the imposition of 'bounty anti-dumping' duties on subsidized sugar imports in 1903.

² Customs Tariff Act 1914, ss 8–9.

³ See Viner (1966 reprint) *Dumping: A problem in international trade* 205–206.

⁴ See Board Report 42 (1924) which indicates anti-dumping duties on Australian flour and wheat in 1921.

Despite its long anti-dumping history, very little has been written on the subject in South Africa with only one detailed text book to date,⁵ along with a number of chapters in books,⁶ and fewer than fifty articles and research papers. Considering the huge impact of anti-dumping on trade in South Africa, this lack of research is startling. Likewise, there are very few consultants or law firms active in the field, most of which have ex-investigating authority members on their staff.

2 THE INSTITUTIONS

2.1 BOARD OF TRADE AND INDUSTRY AND BOARD ON TARIFFS AND TRADE

A part-time Board of Trade and Industry (the Board) was set up in 1921⁷ and was replaced with a permanent Board in 1924.⁸ The Board has been an independent statutory body since its establishment, with support staff seconded from the Department of Trade and Industry. From inception it was entrusted with the maintenance and development of South African industries, including responsibility for tariff increases and decreases, and for trade remedies.⁹

The Board followed a protectionist economic policy from as early as 1922. This included the promotion of import replacement industries, quotas and the selective application of tariffs, including formula duties.¹⁰ Prior to August 1992, the Board dealt with dumping on an ad hoc basis, that is, there was no specialist unit dealing with dumping, and the injury investigation was conducted by the directorate responsible for the product, while Customs conducted the dumping part of the

⁵ Brink (2002) *Anti-Dumping and Countervailing Investigations in South Africa: A Practitioner's Guide to the Procedures and Practices of the Board on Tariffs and Trade*.

⁶ Blumberg (1996) 'South Africa' in Steele (ed.) *Anti-Dumping under the WTO: A Comparative Review* 213–226; Brink (2013) 'South Africa: A complicated, unpredictable, long and costly judicial review system' in Yilmaz (ed.) *Domestic judicial review of trade remedies* 247–268; Brink (2013) 'South Africa' in Bienen, Brink and Ciuriack (eds) *Guide to International Anti-Dumping Practices* 521–568; Brink and Kobayashi (2007) 'Anti-Dumping in South Africa' in Nakagawa *Antidumping Laws and Practices of the New Users* 203–245; McCarthy (1998) 'Anti-dumping in South Africa' in *Kommerskollegium (ed.) The use of Antidumping in Brazil, China, India and South Africa: Rules, Trends and Causes* 49–63; and Steinhauer (1998) 'South Africa' in Santos (ed.) *The Compendium of Foreign Trade Remedy Laws* 275–287.

⁷ *Notices 1044 and 1045* of 8 Jul. 1921.

⁸ Board on Trade and Industries Act 33 of 1924.

⁹ See Board Report 1 (1921).

¹⁰ Hansard (1986) *Debatte van die Volksraad: Deel 11* (Debates of the House of Assembly: Part 11) 11562–11563; Hansard (1992) *Debatte van die Parlement: Deel 32* (Debates of Parliament: Part 32) 4808–4809.

investigation. In the period to 1958, many reports specifically referred to dumping,¹¹ although there are many gaps and evidence of the imposition of anti-dumping duties can often only be found in the withdrawal of such duties in later reports. In many cases reference to anti-dumping measures can only be found in annual reports.¹²

In 1986, the name was changed to the Board on Tariffs and Trade, but the functions and structure of the Board remained intact and it remained an independent institution reporting to and obtaining its budget from the Department of Trade and Industry.

2.2 CUSTOMS

Until 1992, Customs was responsible for conducting the dumping part of investigations. This was typically done through customs representatives stationed in various countries, who would obtain through inquiry the typical prices at which the like goods were sold in the exporting country, rather than through eliciting actual data from specific companies. Since August 1992, Customs has been responsible only for implementing and administering any anti-dumping duties.¹³

2.3 INTERNATIONAL TRADE ADMINISTRATION COMMISSION

The International Trade Administration Commission, generally known as ‘ITAC’,¹⁴ was officially set up in June 2003 in terms of the International Trade Administration (ITA) Act.¹⁵ ITAC has three specialist divisions, one of which is Trade Remedies. At present there are two investigation units with twenty-one investigating officers plus support staff.

With the exception of the final determination and the implementation thereof, ITAC is responsible for all aspects of investigations. It receives and evaluates applications; initiates investigations; conducts the dumping, injury and causality analyses; and conducts verification visits. Once it has concluded its investigation it makes a recommendation to the Minister of Trade for final determination.

¹¹ See, e.g., Board Report 30 (1923); Board Report 48 (1924); Board Report 174 (1934); Board Report 243 (1938); Board Report 380 (1957); Board Report 447 (1958); and Board Report 480 (1958). See Brink (2004), *A theoretical framework for anti-dumping law in South Africa* 21 for more details.

¹² See, e.g., Board Report 1915 (1979) 51; Board Report 2188 (1983) 56, 58 and 60; Board Report 2663 (1988) 35.

¹³ Customs Act 1964, ss 55–57.

¹⁴ Pronounced as ‘I-tack’.

¹⁵ International Trade Administration Act 71 of 2002.

ITAC is by law an independent authority and is subject only to the Constitution and the law and to policy directives issued by the Minister.¹⁶ All other organs of state are required to assist it in maintaining its independence and impartiality.¹⁷ At present, this is one of the biggest problems, as in practice ITAC has no independence and its policy is determined by the Minister of Economic Development, to whom it reports in line function, and the Minister of Trade, to whom it makes recommendations.¹⁸ The Minister of Trade has thus indicated that no countervailing action will ever be undertaken against imports from China.¹⁹ Although unconstitutional, this has resulted in at least two countervailing applications being rejected without initiation and in the non-submission of applications that may otherwise have been submitted.²⁰

2.4 MINISTER OF TRADE

Some provisions of the ITA Act were suspended from coming into operation until the Southern African Customs Union (SACU) Agreement became law in South Africa.²¹ However, although the SACU Agreement became law in July 2004, ITAC still applies the ITA Act as though those provisions have not come into operation and ITAC still makes recommendations to the Minister, rather than taking the final decision.²² At present, however, the Minister of Trade is the only person authorized to request the Minister of Finance to impose definitive anti-dumping duties.²³

3 ANTI-DUMPING LEGISLATION

3.1 EARLY LEGISLATION²⁴

The Customs Tariff Act 1914 introduced the concept of dumping and anti-dumping action into South African legislation²⁵ with effect from 7 July 1914.²⁶ Although the

¹⁶ ITA Act, s. 7(2).

¹⁷ *Ibid.*, s. 7(3).

¹⁸ See Brink (2013) 'The roles of the Southern African Customs Union Agreement, the International Trade Administration Commission and the minister of trade and industry in the regulation of South Africa's international trade' *Journal for South African Law* 419–436.

¹⁹ *Ibid.*

²⁰ These facts lie within the author's personal knowledge either as having made such applications on behalf of industry, having advised industry against making such submissions or from discussions with other consultants that had made such submissions.

²¹ ITA Act, s. 64(2).

²² See Brink (2013) 'ITAC and the Minister' for a discussion on why ITAC's position is unlawful.

²³ Customs Act, s. 55(2)(a).

²⁴ See Brink (2004) 28–45 for a more detailed discussion on the development of the law.

Customs Tariff Act 1914 was not very detailed as regards dumping, it defined normal value as:

the true current value for home consumption in the open market of similar goods in the principle markets of the country from which and at the time at which, the goods were imported, including carriage to the port of shipment and the cost of packing and packages, but not including agents' commission when such commission does not exceed five per cent.²⁷

It provided for an anti-dumping duty to be paid where dumping took place, limited to a maximum of 15%,²⁸ while providing for 'bounty dumping duties' in cases of subsidies granted by foreign governments. An anti-dumping duty was only effective from a date at least six weeks after publication of the measure in the *Gazette*.²⁹ The Act contained neither procedures on how anti-dumping investigations should be conducted, nor the rights and responsibilities of the different parties nor time frames.

In 1924, the Board conducted two investigations into the restructuring of the South African anti-dumping system.³⁰ This resulted in changes to the definition of normal value and the removal of the limitation on the level of duties other than by the margin of dumping.³¹

Several minor amendments were effected between 1925 and 1943, but the first major reform took place in the Customs Act 1944. It defined the 'time of importation of goods',³² provided that anti-dumping duties could be withdrawn under certain circumstances³³ and that no anti-dumping duty of any kind would be payable on products imported under rebate of the duty unless otherwise specified.³⁴ It regulated

²⁵ Transvaal Customs Department (1905) *Transvaal Customs Handbook* 24 indicates that 'bounty dumping' duties were provided for by the Transvaal (provincial) Customs Department in 1903. See also Viner (1966) 209.

²⁶ The Act was assented to on 3 Jul. 1914 and published in the *Gazette Extraordinary* No. 531 of 7 Jul. 1914.

²⁷ Customs Tariff Act 1914, s. 7.

²⁸ *Ibid.*, s. 8(1).

²⁹ *Ibid.*, s. 8(3).

³⁰ See Board Report 38 (1924); and Board Report 42 (1924). See Brink (2004) 29–30 for more details.

³¹ Board Report 42 (1924) 8.

³² Customs Act 1944, s. 28(2).

³³ *Ibid.*, s. 66.

³⁴ *Ibid.*, s. 85.

the application of anti-dumping duties on certain products³⁵ and redefined the terms ‘export price’,³⁶ ‘domestic value’,³⁷ ‘actual cost’³⁸ and ‘value for duty purposes’.³⁹

GATT Article VI was applied by South Africa under the Protocol of Provisional Application of GATT.⁴⁰ To give effect to South Africa’s obligations under GATT, South Africa promulgated the GATT Act,⁴¹ but GATT never became part of South African municipal law.⁴²

In 1972, the Minister of Finance established a Committee to investigate South Africa’s anti-dumping system and its report was published in 1975.⁴³ It compared South Africa’s anti-dumping legislation and procedures to Article VI of GATT, the Anti-Dumping Code 1967 and reports of the GATT Committee on Dumping Practices⁴⁴ and made recommendations on how the differences between the existing legislation and these documents should be addressed.⁴⁵

These findings led to legislative amendments, which included that an anti-dumping and a countervailing duty could not be imposed ‘on the same imported goods on account of the same circumstances’,⁴⁶ and that goods re-exported would not be subject to an anti-dumping duty.⁴⁷ The Act also provided for duties to be levied on the country of origin, rather than on the country of export;⁴⁸ defined origin as ‘the territory in which [goods] were produced or manufactured, whether or not it is also the territory of export in relation to those goods’;⁴⁹ provided for the imposition of

³⁵ *Ibid.*, ss 86–87.

³⁶ *Ibid.*, s. 84.

³⁷ *Ibid.*, ss 84 and 89. Domestic value was redefined in terms of the High Court’s ruling in *Watson’s Shipping Co. v. Commissioner of Customs* 1927 TPD 642. In terms of s. 89, it is indicated that the ‘proof of domestic value’ should be determined in terms of *Union Government v. Fig Bros* 1925 CPD 280, and that ‘ordinary course of trade’ should be determined in terms of *Watson’s Shipping Co. v. Commissioner of Customs supra*.

³⁸ Customs Act 1944, s. 84.

³⁹ *Ibid.*, s. 88.

⁴⁰ Eisenberg (1993) ‘The GATT and WTO Agreements: Comments on their Legal Applicability to the Republic of South Africa’ 19 *SAYIL* 129. The text of both the General Agreement and of the Protocol of Provisional Application was published in *Government Gazette* 3896 of 18 Nov. 1947.

⁴¹ Geneva General Agreement on Tariffs and Trade Act 29 of 1948.

⁴² Eisenberg (1993) 130.

⁴³ *Report of the Interdepartmental Committee on Dumping* (1975).

⁴⁴ *Ibid.*, 6.

⁴⁵ *Ibid.*, 91–101.

⁴⁶ Second Customs Amendment Act 1977, s. 15.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, s. 16.

⁴⁹ *Ibid.*

provisional anti-dumping duties for a period not exceeding three months;⁵⁰ and for the retrospective imposition of an anti-dumping duty to the date of the preliminary duty.⁵¹

In 1983, amendments changed the period for which a preliminary duty could be imposed,⁵² while the 1986 amendments included a fourth definition for dumping, providing that dumping would take place if the export price from a country was lower than ‘the highest comparable price for identical or comparable goods when exported from any other territory to the Republic in the ordinary course of trade’.⁵³ Although not stated in the Act, this was used only to determine dumping from non-market economies.

The 1986 amendments also expanded the territorial application of the Board’s findings to the whole of the Southern African Customs Union (SACU),⁵⁴ that is, to apply its decisions not only to South Africa, but also to Botswana, Lesotho and Swaziland (and, after its independence, to Namibia).

Some amendments were made in 1995 to bring the legislation more in line with the WTO AD Agreement, including the definition of normal value.⁵⁵

3.2 CURRENT LEGISLATION⁵⁶

The primary current legislation is contained in the ITA⁵⁷ Act, with the detailed provisions incorporated in the subordinate Anti-Dumping Regulations (AD Regulations). There are also specific provisions in the Customs Act that directly deal with anti-dumping. In addition, the Constitution, the Access to Information Act⁵⁸ and the Administrative Justice Act⁵⁹ all play a role in investigations, specifically ensuring access to non-confidential information and a fair administrative process, including transparency of proceedings.

⁵⁰ *Ibid.*, s. 18.

⁵¹ *Ibid.* See Brink (2004) 40–41 for a more detailed discussion on the changes brought about by this Act.

⁵² Customs Amendment Act 1983, s. 4.

⁵³ *Ibid.*, s. 7(b).

⁵⁴ Hansard (1986) 11555.

⁵⁵ Board on Tariffs and Trade Amendment Act 1995, s. 1(a).

⁵⁶ For more details, see Brink (2013) ‘South Africa’ 523; Brink (2012) ‘Anti-dumping in South Africa’ *Tralac Working Paper 2–7*.

⁵⁷ Pronounce ‘e-ta’.

⁵⁸ Promotion of Access to Information Act 2 of 2000.

⁵⁹ Promotion of Administrative Justice Act 3 of 2000.

The ITA Act defines dumping,⁶⁰ normal value⁶¹ and export price,⁶² provides that ITAC is responsible for conducting anti-dumping investigations⁶³ and that parties may apply to ITAC for anti-dumping protection.⁶⁴ It contains various provisions on confidentiality,⁶⁵ but does not contain any other substantive or procedural provisions.

The AD Regulations provide for the substantive issues, including the normal value methodology,⁶⁶ constructed export price,⁶⁷ margin of dumping,⁶⁸ material injury⁶⁹ and causality,⁷⁰ as well as the procedural.⁷¹ The Act and Regulations are generally in line with the WTO Anti-Dumping Agreement and in some instances provide greater clarity,⁷² but are in violation of the Agreement in other respects.⁷³

4 STATISTICS: SOUTH AFRICA AS TRADITIONAL OR NEW USER

South Africa imposed its first anti-dumping duties by 1921⁷⁴ and was a prolific user of the instrument right from the start. It conducted at least 137 investigations by advent of GATT.⁷⁵ Over the next ten years, South Africa initiated more than half (211) of all anti-dumping cases in the world and imposing nearly 60% of all anti-dumping duties.⁷⁶ Between 1958 and 1978, when the Interdepartmental Report was released, a further 265 cases were initiated.⁷⁷

During the 1970s and 1980s, South Africa was a closed economy with high tariffs to protect local industries. Several import replacement industries were founded, but

⁶⁰ ITA Act, s. 1.

⁶¹ *Ibid.*, s. 32(2)(b)(ii).

⁶² *Ibid.*, s. 32(2)(b)(i).

⁶³ *Ibid.*, s. 16(1)(a).

⁶⁴ *Ibid.*, s. 26(1)(c)(i).

⁶⁵ *Ibid.*, ss 33–37.

⁶⁶ AD Regulation 8.

⁶⁷ AD Regulation 10.

⁶⁸ AD Regulation 12.

⁶⁹ AD Regulation 13.

⁷⁰ AD Regulation 16.

⁷¹ AD Regulations 21–37.

⁷² See Brink (2004) 710–721; Brink (2012) *Anti-dumping in South Africa* 6–7; and Brink (2015) *X-raying injury* for discussions on how the Regulations conform to or differ from the AD Agreement.

⁷³ This relates for instance to ‘country-hopping reviews’ in AD Regulation 60.1(c), whereby dumping is based on the normal value of a country other than the exporting country.

⁷⁴ See Board Report 42 (1924), which indicates the imposition of anti-dumping duties on flour and wheat from Australia in 1921.

⁷⁵ See Brink (2004) 54–55 for details.

⁷⁶ GATT (1958) 14. In addition South Africa also applied seven ‘special duties’ which, in reality, were anti-dumping duties.

⁷⁷ See Brink (2004) 56 nn. 283 and 284 for more details.

these industries generally had relatively small capacities and could not compete against imports from efficient overseas producers.⁷⁸

In 1978, all anti-dumping duties were withdrawn on the basis that reference price duties based on prices in Western Europe were sufficient to protect the domestic industry against dumping.⁷⁹ Despite this, 270 cases were initiated between 1978 and the end of 1994.⁸⁰

Between 1995 and the end of 2014, South Africa initiated another 229 investigations, ranking it amongst the top ten users.⁸¹ In 1998, it initiated more cases than any other WTO Member and for the period 1995–2004 was by far the biggest user of the instrument when measured by the number of cases initiated by import value. Table 1 indicates the number of anti-dumping investigations initiated and measures imposed since 1995.

Table 1 AD Initiations and Measures by Year

<i>Year</i>	<i>Initiations</i>	<i>Duties</i>
1914–1947	137	N/A
1948–1958	211	29 ⁸²
1959–1978	265	N/A
1979–1994	270	N/A
<i>Total pre-WTO</i>	883	N/A
1995–1999	130	88
2000–2004	45	25
2005–2009	37	15
2010–2014	17	6(9*)
<i>Total under WTO</i>	229	134(137)

Source: WTO Rules Division, author's own database.

* Five of the investigations initiated in 2013–2014 had not been finalized by February 2015 (provisional duties had, however, been imposed in three of these cases). Thus, 134 measures were imposed in 224 finalized investigations, indicating that 60% of all cases resulted in duties.⁸³

The large number of cases in the period to 1999 results from the commitments undertaken by South Africa in the Uruguay Round, with applied duties sharply decreasing over a short period. Once industries adjusted, the number of cases decreased significantly. Since 2000, the local currency depreciated significantly, which provided industry with additional protection.

⁷⁸ See, e.g., Board Report 1686 (1976); and Board Report 3066 (1991).

⁷⁹ See *Report of the Interdepartmental Committee on Dumping* 37.

⁸⁰ See Brink (2004) 56 (nn. 285 and 286) and 740 for more details.

⁸¹ http://www.wto.org/english/tratop_e/adp_e/adp_e.htm (accessed 8 Dec. 2014).

⁸² This includes the seven 'special' duties.

⁸³ Note that 'finalized' investigations include cases that were withdrawn after initiation.

Between 1992 (the establishment of the anti-dumping unit) and 2003 (founding of ITAC), it took on average 238 days to issue a preliminary determination and 459 days to finalize an investigation,⁸⁴ with an average of twenty investigations per year. Since ITAC's establishment in 2003, it took on average 216 days to issue a preliminary determination and 430 days to finalize an investigation,⁸⁵ with an average of six investigations per year and double the staff complement. More recently, there has been increased pressure on ITAC to conclude investigations expeditiously.

5 INTERESTING CASES

5.1 THE EARLY CASES

Of the first fifteen dumping-specific reports issued by the Board, seven related to cement. After World War One, industry experienced increased import competition, especially as a result of the appreciation of the South African currency. The Board therefore recommended the imposition of 'exchange' anti-dumping duties to counter the effect of the cheap imports. In January 1923, the Commissioner of Customs imposed duties against Norway, Belgium and Denmark,⁸⁶ and against the UK in March 1923.⁸⁷

It is noteworthy that the issue of adjustments for differences in packaging between domestic and export market sales was discussed at length in this early report, as cement bags were returned on the domestic market but not returned on the export market.⁸⁸ By 1924, duties were also in place against cement imported from Canada, Germany, Mozambique and Sweden.⁸⁹

Later in 1924, the exporter in Mozambique requested termination of the duties on the basis that it was not dumping. The Board, however, found that it could not rely on domestic selling prices as these were all to related parties. As a result it found that dumping was still taking place and the anti-dumping duty was maintained. This was the first-ever review of an anti-dumping duty.

⁸⁴ Author's own calculations.

⁸⁵ Author's own calculations.

⁸⁶ Proclamation ss. 12/1923 and 19/1923.

⁸⁷ Proclamation 44/1923.

⁸⁸ At Board Report 30 (1923) 10 it is noted that '... the comparison has to be made between the export price including the gross cost of the packing and package, and the home consumption value including only the net cost, i.e., deducting from the gross cost the amount received for the return of the bags...'.
⁸⁹ See Board Report 48 (1924).

In 1927, Customs interviewed Norwegian cement manufacturers and explained the requirements in connection with the declaration of the domestic value of cement.⁹⁰ From this it appears that Customs provided exporters with an opportunity to cease dumping before any action was taken. The report also indicates that the normal value was adjusted for ‘the extra cost of packaging and packages for export, and all other charges incidental to placing the goods on board ship ready for exportation to the Union’.⁹¹

Another problematic product was sugar,⁹² where four reports against different countries were issued in the space of four years, not counting a specific report on a new sugar agreement and a suspended duty on sugar.⁹³

5.2 CURRENCY DEVALUATION

5.2[a] *General Currency Devaluations*

Immediately after the establishment of the Board in 1921 it reviewed the issue of competition resulting from depreciated currencies in exporting countries. Industry alleged ‘business is being damaged by such *goods being placed on the market in South Africa at a price less than the value of these goods as commodities, owing to the rate of exchange in the country of origin...*’.⁹⁴

After investigation the Board held that where the currency of the exporting country is depreciated and this resulted in goods being imported into South Africa at injurious prices, the Governor-General could determine the rate at which the currency would be converted into local currency. The difference between these values was then levied as an exchange anti-dumping duty.⁹⁵

The Board further investigated ‘exchange dumping’ and recommended that legislation be amended to provide that exchange anti-dumping duties would be determined on the basis of the difference between the export price before and after the devaluation of the exporting country’s currency.⁹⁶ Although use was first made of

⁹⁰ Board Report 77 (1927) 2.

⁹¹ *Ibid.*

⁹² Board Report 56 (1925); Board Report 98 (1929); Board Report 101 (1929); Board Report 103 (1929).

⁹³ Board Report 71 (1926).

⁹⁴ Board Report 1 (1921) 4 (underlining in original).

⁹⁵ *Ibid.*, 5.

⁹⁶ Board Report No. 127 (1931) 4.

exchange anti-dumping duties in the mid-1920s,⁹⁷ it reached its apex during the great depression, with at least twenty Board reports referring to such duties.⁹⁸ Japan was the biggest target of these duties, with six investigations against its exports.⁹⁹ The provision was not imposed again after 1935 and the last duty was withdrawn in 1940.¹⁰⁰

5.2[b] *Dumping of Sterling*

British silver coins were legal tender in South Africa¹⁰¹ and there were no duties on the importation of such coins. In 1931, Britain left the gold standard and its currency depreciated vis-à-vis the South African currency, making it possible to import such coins at roughly 80% of their denominated value, i.e., at a cost of 16 shillings to a pound, yet to then use the same coins to buy goods valued at 20 shillings in South Africa.

Following a request by the Secretary for Finance to investigate the damage to industry by the ‘dumping’ of British silver coins, the Board conducted an investigation and found that the ‘importation of British coins is facilitated to the detriment of the South African industry and commerce, and there is no question that such importation is contrary to the public interest’.¹⁰² It also found that South Africa was in a position ‘to supply the bulk of its requirements of silver coins’ and recommended the imposition of an exchange dumping duty on British silver coins.¹⁰³

This is likely to be the only case in the world of imposing an anti-dumping duty on physical currency.

5.3 ANTI-DUMPING ON SERVICES

The Board imposed a large number of ‘freight dumping duties’ on the basis that freight rates were discounted. The first of these was imposed on freight on superphosphates in 1927.¹⁰⁴ In essence, the Board determined what it deemed to be a

⁹⁷ No report could be found relating to the imposition of exchange anti-dumping duties before 1927.

⁹⁸ See Brink (2004) 55 n. 281 for details.

⁹⁹ See Board Reports 130, 131, 161, 164, 186 and 196.

¹⁰⁰ Board Report 262 (1940).

¹⁰¹ *Coinage Act 1922*.

¹⁰² Board Report 126 (1931) 1.

¹⁰³ *Ibid.*, 2.

¹⁰⁴ Board Report 85 (1927). Note that Board Report 42 (1924) 12–13 addressed the issue and found that freight anti-dumping duties were ‘a very arbitrary, unsatisfactory and unsound method of assisting local industries. It is an essentially arbitrary procedure ... since the determination of freight rates in general depends upon a variety of factors to be taken into consideration by shipping interests. It is also

reasonable amount of freight, generally based on the freight South African companies would pay for export to the same destination, and compared this to the freight charged on similar goods exported to South Africa. If this amount was lower, an anti-dumping duty could be imposed to address the ‘freight dumping’. Freight anti-dumping duties were imposed against a variety of products, but iron and steel products were most prone to such duties. Most of these duties were imposed between 1938 and 1940.¹⁰⁵ The last freight anti-dumping duty was imposed in 1958.¹⁰⁶

5.4. ANTI-DUMPING ON UNECONOMIC COMPETITION RESULTING FROM WARS

The Board, after careful analysis of the effect of the Second World War on industries in South Africa, and after finding that several industries had been established that would not have been viable under normal circumstances, recommended that legislation be promulgated to protect South African industries against ‘any form of uneconomic competition which may result from abnormal conditions obtaining after the war’.¹⁰⁷ This was to be done through the use of anti-dumping duties.

5.5 IMPORTS FROM HONG KONG

In 1968, the Board considered the issue of anti-dumping duties against goods imported from Hong Kong, as several anti-dumping duties had been imposed against such products over the years.¹⁰⁸ No actual domestic values were determined for Hong Kong and a specified percentage was added to the export price to determine the normal value. The first effect of this practice was that it meant that *all* products imported from Hong Kong were dumped by the specified margin. The second effect was that if an exporter increased its export price in order to negate dumping, the margin of dumping increased.

unsound in principle because the fixing of minimum freight rates ... is tantamount to placing a premium on high freight rates, whereas it is in the interest of the foreign trade of any country to secure the lowest possible shipping rates’.

¹⁰⁵ Board Report 238 (1938); Board Report 254 (1939); Board Report 250 (1939); Board Report 263 (1940).

¹⁰⁶ Board Report 481 (1958).

¹⁰⁷ See Board Report 271 (1942) 34.

¹⁰⁸ Board Report 1246 (1968) Annexure 1 indicates anti-dumping duties on industrial gloves, terry towelling, socks and stockings, clothing, towels and face cloths, bedroom slippers, hats, enamelled hollowware, mattocks and picks, spoons and forks, ballasts and transformers, torch filament lamps and on toilet brushes imported from Hong Kong.

Since many of the anti-dumping duties against Hong Kong had been in effect for several years, and considering the inherent unfairness thereof, the Board decided to withdraw most existing anti-dumping duties following review.

The significance of this report is that it constituted the first proper review of anti-dumping duties initiated *sua sponte* by the Board, rather than at the request of interested parties.

5.6 CANDLE WAX AND PUBLIC INTEREST

In *Semi-refined paraffin wax* (candle wax), the Board was confronted with a demanding public interest¹⁰⁹ issue. The domestic industry produced wax using coal, rather than crude oil, as raw material. This lent its fully refined paraffin wax specific chemical attributes that were highly sought after, leading it to increase its capacity by 150%. Dumping of candle wax was found in respect of China, as was materially injury. The problem existed that virtually all of the country's poor were dependent on candles for light. The imposition of the anti-dumping duty would have led to an increase of around 40% in the price of candles, which would directly and negatively affect more than 30 million people. Since public interest was not formally an issue that could be considered in the determination of a duty, South Africa eventually solved the problem by finding no causality, holding that the industry had caused its own injury by increasing its capacity to the extent it did and selling at less than import parity.¹¹⁰

6 PECULIAR ISSUES

6.1 INDUSTRY CONCENTRATION

South Africa has a relatively small but very diverse economy. As a result, many industries have only a single or a limited number of producers. These companies often do not enjoy the same economies of scale as their competitors in exporting countries and are therefore quick to experience material injury.¹¹¹ This is one of the reasons for the high number of anti-dumping investigations in South Africa when measured to

¹⁰⁹ See Brink (2009) 'National interest in anti-dumping Investigations' in 126(2) *SALJ* 316 for a detailed discussion on public interest in anti-dumping investigations.

¹¹⁰ Board Report 3492 (1994).

¹¹¹ In Board Report 3384 (1993) a single container of clay pigeons imported constituted 40% of the total consumption for a year, thus causing injury to the domestic industry.

total GDP or to total imports. Of the 291 investigations initiated between August 1992 and December 2014, 230 were brought by industries with only one or two players, or where one player was dominant and it was merely supported by the smaller players, with 166 applications brought by single-company industries.¹¹²

Industry concentration is especially high in the steel, plastics, paper, glass and pharmaceutical industries, all of which have lodged a large number of applications over the years.

6.2 ANTI-CIRCUMVENTION

The AD Regulations make provision for various types of anti-circumvention action. Like several other jurisdictions, it makes provision for circumvention in the form of assembly operations, whether in a third country or within South Africa; and for anti-absorption reviews.

More contentious, however, is the use of ‘country-hopping’ reviews.¹¹³ In terms of the regulations, ‘country-hopping’ takes place when, following the initiation of an investigation or the imposition of duties, exports are moved to a related party in another country.¹¹⁴ Thus, if anti-dumping action is initiated, or measures imposed, against exporter A-1 in country X, and supply then moves to related exporter A-2 in country Y, the industry can lodge a country-hopping anti-circumvention review. Provided the application is lodged within one year of the imposition of definitive duties in the original investigation, the industry is only required to show that export prices from exporter A-2 are lower than the normal value from the original exporting country. No new normal value, injury or causality information needs to be submitted. In practice, this ‘application’ is only a two-page letter.¹¹⁵

In gypsum plasterboard, the anti-circumvention investigation against Indonesia was initiated before the original investigation against Thailand had been completed. The industry did not update injury or causality information and determined dumping on the basis of a comparison of the normal value for Indonesia and the export price from Thailand. Import statistics showed that imports from Thailand were displaced by imports from Indonesia after initiation of the original investigation, with no imports from Indonesia prior to initiation of the Thailand investigation and no imports from

¹¹² Author’s own calculations.

¹¹³ See Brink (2009) for a more detailed discussion.

¹¹⁴ AD Regulation 60.8.

¹¹⁵ See, e.g., the applications in Tall oil fatty acid (Finland) and in Tall oil fatty acid (US).

Thailand thereafter. As a result, anti-dumping duties were imposed against Indonesia as well.¹¹⁶

In flat-rolled steel imports switched to Malaysia after duties were imposed against Australia.¹¹⁷ The applicant did not update injury or causality information and determined dumping on the basis of a comparison between the normal value in Australia and the export price from Malaysia. Although dumping and circumvention were found, ITAC found no price undercutting and it terminated the country-hopping investigation.

Following the imposition of provisional duties on tall oil fatty acid (TOFA) from Sweden, the industry alleged, first, that imports had switched to the United States (US)¹¹⁸ and, subsequently, to Finland.¹¹⁹ No new normal value, injury or causality information was supplied in either case and dumping was determined on the basis of a comparison of the normal value in Sweden and the export prices from the US and Finland, respectively. US data showed a significant decline in import volumes and did not support any allegation of country hopping, while the applicant confirmed that it had no proof that all TOFA from the US was imported from producers related to the producer in Sweden. Despite this ITAC still found that circumvention was taking place, although it terminated the review after not finding any dumping.¹²⁰

Finish data showed that imports from Finland had increased by only 40% of the decrease in imports from Sweden. Despite this, ITAC found that country-hopping had taken place, although it again terminated the review after not finding any dumping.¹²¹

6.3 LOW LEVEL OF WTO PARTICIPATION OR INVOLVEMENT

To date, South Africa has never declared a dispute in the WTO, nor has it participated in any dispute as a third country. Although it has been challenged in four cases, none of these cases proceeded to a panel as South Africa revoked the measure in question following consultations in three instances, while the other matter was not pursued.

In *Pharmaceutical products*, India alleged that ITAC had improperly determined the normal value and the constructed export price, that it had failed to determine injury on the basis of positive evidence, to evaluate all injury factors, to establish the

¹¹⁶ See ITAC Report 74 (2004).

¹¹⁷ ITAC Report 167 (2006).

¹¹⁸ Notice 625 in *Government Gazette* 32253 of 29 May 2009.

¹¹⁹ Notice 998 in *Government Gazette* 32415 of 24 Jul. 2009.

¹²⁰ See ITAC Report 321 (2010).

¹²¹ ITAC Report 328 (2010).

facts properly, that its analysis was neither unbiased nor objective, and that it had not taken into account India's special situation as a developing country.¹²² It is not clear why the case was not proceeded with and no records exist of the consultations that took place.

In *Acrylic blanketing material*, Turkey complained that ITAC had not followed the proper procedure in determining injurious dumping and imposing an anti-dumping duty on acrylic blanketing material.¹²³ After ITAC had imposed anti-dumping duties on acrylic blankets, the exporter started exporting blanketing material in roll form and ITAC initiated an anti-circumvention investigation, yet failed to notify the exporter and the Turkish government. Following consultations the anti-dumping duty was removed and a new investigation initiated.

In *Uncoated woodfree paper*, Indonesia complained that ITAC had not completed a sunset review well over four years after initiation thereof while still maintaining the duty.¹²⁴ As ITAC's essential facts letter had already indicated that the duty would not be maintained, it immediately revoked the duty.

In *Poultry*, Brazil challenged South Africa's preliminary decision to impose anti-dumping duties on certain frozen poultry products. Brazil alleged that ITAC had violated twenty-one provisions of the AD Agreement and its Annexes as it had failed *inter alia* to compare the normal value and export price at the same level of trade; failed to exclude unlike products from the comparison; failed to exclude non-subject products from the determination of the export price; erred in the determination of the residual dumping margins; did not make an objective examination based on positive evidence of material injury; failed to consider relevant factors other than dumping contributing to the material injury; had not properly established industry standing; initiated an investigation despite the application not containing sufficient evidence; did not provide parties with a full opportunity to defend their interests; failed to require proper non-confidential versions from the applicants; failed to apply the relevant procedures in on-the-spot verifications; applied facts available to cooperating parties; failed to provide parties with all the essential facts of the matter; and did not set out detailed explanations for its preliminary determination.

¹²² WTO *South Africa – Anti-dumping duties on certain pharmaceutical products from India* WT/DS168/1 (13 Apr. 1999).

¹²³ WTO *South Africa – Definitive Anti-Dumping Measures on Blanketing from Turkey* WT/DS288/1.

¹²⁴ WTO *South Africa – Anti-dumping measures on uncoated woodfree paper* WT/DS374/1 (16 May 2008).

Following consultations with Brazil, the Minister rejected ITAC's recommendation to impose definitive measures as he was not satisfied that it had properly addressed the issues raised in the consultation process. As no definitive measures were imposed, the basis for the dispute was removed.

Despite never declaring or joining trade remedies disputes as third party, South Africa has produced several trade remedy panellists, confirming that there is significant expertise available in South Africa.

6.4 DURATION OF ANTI-DUMPING DUTIES

Following judicial review,¹²⁵ the duration of anti-dumping duties has been shortened when compared to the duration in other countries.¹²⁶ The Supreme Court of Appeal (SCA) has ruled that where an anti-dumping duty has been imposed with retrospective effect to the date provisional measures were imposed, the five-year period starts on the day the provisional payment was imposed.¹²⁷

6.5 JUDICIAL REVIEW

Judicial review of anti-dumping is still in its infancy in South Africa and comes with many problems.¹²⁸ The judicial review process is cumbersome, lengthy and expensive, with no guarantee of success as few judges understand the technical economic and accounting issues in investigations. Accordingly, only five ITAC decisions have been challenged in court since 2003, two of which were appealed to the SCA¹²⁹ and one to the Constitutional Court.¹³⁰ In author's opinion all three of the latter cases were decided incorrectly,¹³¹ resulting in the decreased duration of anti-dumping measures, the nullification of all non-market economy provisions in the legislation and the impossibility to obtain interim relief against the Minister. These

¹²⁵ *Progress Office Machines v. SARS [2007] SCA 118 (RSA)*.

¹²⁶ For a full discussion on the case, see Brink (2008) 'Duration of anti-dumping duties shortened following court order in South Africa' 3:6 *GTCJ* 217–220.

¹²⁷ See *ibid.* and Brink (2008) 'Progress Office Machines v. SARS [2007] SCA 118 (RSA)' in 2008:4 *De Jure* 643 for more detailed discussions on the verdict.

¹²⁸ See in general Brink (2013) 'Judicial review' and Brink (2012) 'Anti-dumping and Judicial Review in South Africa: An Urgent Need for Change' in *GTCJ* 279–286.

¹²⁹ See *Progress Office Machines v. SARS [2007] SCA 118 (RSA)*; *ITAC v. SCAW CCT59/09 [2010] ZACC 6*.

¹³⁰ See *ITAC v. SATMC [2011] ZASCA 137*.

¹³¹ See Brink (2007) 'Sunset reviews in South Africa: How long is five years?' *Tralac Trade Brief*; Brink (2008) *Progress Office Machines v. South African Revenue Services Case [2007] SCA 118 (RSA)* 41:3 *De Jure* 643; and Brink (2010) 'Duration of anti-dumping duties shortened following court order in South Africa' 3:6 *Global Trade and Customs Journal* 217.

decisions have severely curtailed the rights of interested parties. In addition, one of the cases incorrectly decided was subsequently referred to the SCA for clarification, in which the SCA confused the issues even further and compounded the mistakes made in the earlier verdict.¹³²

Courts have in general refused to consider the merit of investigations and have focused almost exclusively on whether the correct procedures were followed in investigations, despite having been specifically requested to rule on technical issues such as whether certain adjustments should have been granted or not.¹³³ There is an urgent need for the establishment of a trade tribunal or specialized court that can expeditiously deal with anti-dumping matters on both a procedural and substantive basis.

7 RECENT INVESTIGATIONS

7.1 FASTENERS

Several fastener investigations and reviews have been conducted since 2010. These include a sunset review on nuts and bolts, and original investigations on threaded rod and on screws, all from China.¹³⁴ Of importance is the *Set screws* investigation.¹³⁵

In *Set screws (China)*, the domestic industry obtained export prices from China for four different categories of product, being mild and high tensile steel product, both galvanized and ungalvanized, but it only obtained normal values for ungalvanized mild steel products and specifically determined the margin of dumping only for this product. This notwithstanding, and despite ITAC not having any other information at its disposal and formal protests by interested parties, ITAC investigated the dumping of all four product categories and imposed duties on all these products. The industry never submitted separate injury information on the four categories and ITAC determined price depression, suppression and undercutting on the basis of average prices for the whole basket of products.¹³⁶ Regardless the issue being extensively canvassed by importers, no mention was made in any public documents of the vastly

¹³² *AMIE v. ITAC* (769, 770, 771/12) [2013] ZASCA 108.

¹³³ See Brink (2010) '*International Trade Administration Commission v. SCAW South Africa (Pty) Ltd* Case CCT 59/09 [2010] ZACC 6' De Jure 380.

¹³⁴ Note that the normal customs duties on virtually all fasteners were also increased recently. See ITAC Report 453 (2014).

¹³⁵ See also the analysis of this case in Brink (2015).

¹³⁶ See ITAC Report 408 (2012).

disparate performance of the domestic producers, where the performance of some improved significantly while that of others deteriorated.

It is submitted that if China were to challenge this in the WTO, ITAC would be found in violation of its WTO obligations in several respects.

7.2 FROZEN CHICKEN PRODUCTS

The domestic poultry industry has continuously requested additional protection against imports over the past few years, despite imports constituting less than 10% of the domestic market. This has resulted in anti-dumping investigations against Brazil, Germany, the Netherlands and the UK, as well as normal customs duty increases.

In 2011, ITAC initiated an anti-dumping investigation into frozen whole birds and frozen boneless portions from Brazil. The application in regard to whole birds showed that nearly 20% more whole birds were imported from Argentina than from Brazil, and at prices 40% lower than from Brazil, yet no investigation was initiated against Argentina. There was no price depression and domestic industry sales, output, profit, productivity, return on investment, employment, wages and growth had all improved, while the industry's ability to attract investments had not been affected and its capacity utilization had remained constant despite increased capacity. The only indicators showing injury were increased imports and import market share. For initiation purposes domestic prices were based on prices on a single day in a single place at retail level, before being adjusted on the basis of information on a single website to arrive at an ex-works level.

The problem further arose that whole birds and carcasses, that is, whole birds stripped of all portions, were classifiable under the same tariff heading, and that a significant proportion of the imports related to carcasses, which did not form part of the investigation.

The same problems of establishing a normal value using a single source on a single day at retail level also plagued the boneless portions part of the investigation, while the injury information showed only little injury. ITAC failed to verify the import figures submitted by the applicant, and which overstated imports from Brazil by more than 25%, despite information readily available from Customs. There was no or minimal price suppression, price depression or decrease in sales, while productivity, return on investment, cash flow, employment and wages all showed improvements.

During the course of the investigation ITAC disregarded several submissions relating to causality and rejected exporters' cost information that was based on net realizable values, insisting on reallocating costs on a volume basis. In addition, where an exporter's information did not fully comply with ITAC's requirements, it disregarded *all* of the exporter's information and relied on facts available. Brazil successfully challenged this in the WTO and the Minister terminated the investigation despite ITAC's recommendation that duties be imposed.

In October 2013, ITAC initiated an investigation into the alleged dumping of frozen bone-in chicken portions from Germany, the Netherlands and the UK. Despite the problems and the dispute in the Brazil case, the normal value was again based on prices obtained on a single day at a single venue and most of the domestic prices were determined on the basis of *fresh* chicken, which did not form part of the investigation. Injury was again not clear from the application. After initiation of the investigation ITAC refused extensions to virtually all exporters on the (verbal) basis that it did not believe the reasons offered by the exporters for requesting extensions. It accepted only two of at least seventeen cooperating exporters' information for purposes of its preliminary determination, and failed to provide reasons for rejecting the other exporters' submissions prior to the preliminary determination. It simply disregarded all submissions relating to injury and causality; refused to allow importers to make oral representations on these issues on the basis that it knew what it was doing, thereby allowing them to only make representations on dumping; regarded whole product groups as being a single product regardless the differences between the products and refused to make any adjustments for these differences or channels of distribution; and it issued the essential facts letter before all comments were due on verification reports. Again, if the European Union (EU) were to challenge ITAC's findings, ITAC would be found in violation of its WTO obligations in several respects.

7.3 FROZEN POTATO CHIPS

In June 2013, ITAC initiated an investigation into the alleged dumping of frozen potato chips from Belgium and the Netherlands. The period of investigation ended in December 2012, but the information shows that the last increase in imports was in 2010 and that imports had decreased by 40% thereafter. The industry's information further showed that there was no price suppression or depression; that industry's

sales, output, market share, capacity utilization and productivity had increased and that its losses had decreased significantly, including turning a gross loss into a gross profit, whilst showing strong growth, with significant investments being made during the investigation period. The only factor showing injury was employment, as the number of direct workers had decreased significantly. However, this happened at the same time production increased significantly and related to new technology installed at the major producer.

In this investigation, ITAC changed its methodology and required exporters to submit detailed cost build-ups for *every* subject product produced by the company, regardless of whether the product was exported to South Africa. Thus, one company that exported fewer than ten products was required to submit more than 300 individual cost build-ups. In addition, regardless of whether the products were sold on the domestic market, exporters had to supply export sales of all subject products to *all* international markets and indicate the adjustments on a transaction-by-transaction basis.

Since potato prices varied significantly over the investigation period, increasing by as much as 250%, exporters submitted cost build-ups on a monthly basis. Despite verifying this information and without providing any basis for its decision, ITAC rejected these monthly cost build-ups in its determination of sales made in the ordinary course of trade and held that all sales made at less than the *annual* average cost were sold at a loss.

ITAC also rejected an exporter's information after it had been requested to submit separate submissions for its two plants and failing to update the two columns in the cost build-up that related to other (non-subject) products and 'total company', despite judicial review finding that ITAC's procedure was reviewable.¹³⁷ ITAC also refused to issue a final report, indicating that it would only be issued once duties were actually implemented, and this would only happen once the safeguard duties had lapsed in another two years.

However, it is clear that if the EU were to challenge this investigation in the WTO, ITAC would be found in violation of its WTO obligations in several respects.

7.4 SODA ASH

¹³⁷ *Farm Frites v. ITAC* Case 1316/2014NG. Note that the court refused to grant interim relief on the basis that a final decision had not yet been implemented.

ITAC initiated an investigation into the alleged dumping of soda ash imported from the US on behalf of the industry in Botswana, as Botswana does not have an investigating authority.¹³⁸ All three US exporters are situated within a very small radius from each other and use the same transport infrastructure to move their products.

On the basis of the request for a duty of 11%, one exporter decided not to cooperate as its actual margin of dumping may have exceeded this margin. On the basis of the other two exporters' information, and for the first time since its establishment in 2003 without verifying exporters' information on site, ITAC found that one company was dumping at a margin of 13% and the other at a margin of 163%. Considering that the parties compete with each other both on the domestic and the international markets, such a discrepancy should have raised ITAC's concern. It is not clear why the information was not verified and why ITAC did not interrogate the difference in margins.

8 CURRENT PROBLEMS

8.1 BURDEN ON DOMESTIC INDUSTRY

Although the AD Regulations provide that the domestic industry only needs to prove a prima facie case of injury, ITAC requires industry to submit all injury information in its application. This information is also verified prior to initiation. This results in very significant delays between lodging applications and initiating investigations, results in the investigation period ending several months before initiation¹³⁹ and may have contributed to at least one industry closing down before an investigation had been completed.¹⁴⁰

In sunset reviews, the industry also has to prove the likelihood of a recurrence or continuation of *both* dumping and material injury before ITAC will initiate a review. Considering that exporters are fully aware of the upcoming sunset reviews, industry

¹³⁸ Botswana is part of the Southern African Customs Union (SACU) and ITAC decisions bind all SACU members. This is thus not an investigation in terms of Art. 14 of the AD Agreement.

¹³⁹ The investigation period in several recent investigations ended well over six months, and in some cases nearly ten months, prior to initiation, including in *Frozen bone-in chicken (Germany, Netherlands, UK)*, where the investigation periods 298 days before initiation.

¹⁴⁰ In *Graphite electrodes (China, India)* it took ITAC more than ten months after receiving the original application to initiate an investigation. The industry withdrew the application shortly after initiation as its situation had become so dire that it closed down. Although the time taken to initiate an investigation was not the only reason the industry closed down, it may have directly contributed thereto.

often finds it difficult to obtain normal values. This has led to a number of anti-dumping duties lapsing without sunset reviews being initiated.

8.2 LACK OF TRANSPARENCY

The South African anti-dumping process is opaque, which makes it difficult for interested parties to defend their interests. This lack of transparency is evident on at least four levels: the quality of non-confidential submissions; difficulty to obtain access to public files; lack of disclosure; and the failure to provide proper reasoning in public reports.

ITAC often accepts information submitted on a confidential basis as confidential without determining whether such information should be regarded as such. It seldom refers a non-confidential version back to a party, especially the domestic industry, on the basis that it does not constitute a proper non-confidential version. This has been challenged in internal processes on several occasions, but has seldom resulted in ITAC requiring the other party to supply more details.

The next problem is access to the public file. No public reading room exists and in practice ITAC only grants interested parties access to the public file. Consultants must submit a letter of appointment on behalf of an interested party before it will be granted access. Access is only granted on appointment, which can take up to two weeks to obtain.

The essential facts 'letter' typically includes a reasonably detailed disclosure of the normal values and export prices, indicating the volumes and values of each product used after exclusion of sales below cost, as well as the volumes and values of each product exported, the margin of dumping on a product-by-product basis and the weighting used to determine the overall margin of dumping. However, it fails to include any material injury or causality information, simply referring parties to the preliminary report, and also does not include any comments submitted by interested parties on the preliminary determination.

The final problem is that despite the requirement in the AD Regulations and the AD Agreement that all issues of fact and law considered in its deliberations must be included in public reports, this is not done. The reports contain the basic findings on dumping, including the adjustments accepted and refused, but contain scant information on the methodology. As regards injury, it merely recites the various indices in table format and then repeats in the subsequent text what was evident from

the tables, without conducting any analysis. Injury is often found despite most injury factors showing improvements in the industry's performance and no indication is given as to why the few injury factors that showed injury outweighed all the other factors. Parties' comments on injury are seldom reflected in the report. The same is applied to causal link, where a standard list of issues is reported on, although it does not appear as though any evaluation is conducted, while parties' comments on causality are seldom reflected. On the whole it appears that once an investigation has been initiated, ITAC will not properly take into consideration any comments on either injury or causality.

8.3 LACK OF WTO-CONSISTENT INJURY AND CAUSALITY

DETERMINATIONS

ITAC's injury and causality determinations are not compliant with the requirements of the WTO, especially in view of the most recent decisions of the DSB.¹⁴¹

ITAC does not require the domestic industry to provide information on a product-by-product basis, which means that it is not in a position to 'properly'¹⁴² determine price depression, suppression or undercutting. It also fails to evaluate the impact of positive factors and most recently found injury where only four of the nineteen injury¹⁴³ factors showed injury and where the industry loss decreased and its sales, output and market share had increased.¹⁴⁴ ITAC also fails to analyse the effect of other factors that have contributed to the industry's injury.¹⁴⁵

8.4 POLITICAL INTERVENTION AND UNCLEAR DECISION-MAKING

RULES

Under previous legislation, the Board made a recommendation to the Minister, who then had to make the final determination. However, the ITA Act provides that ITAC must make recommendation to the SACU Tariff Board which, in turn, must make a recommendation to the SACU Council of Ministers. This provision, along with some

¹⁴¹ For a full discussion on the failings in ITAC's injury and causality analyses, see Brink (2015) 'X-raying injury findings in South Africa's anti-dumping investigations' in *African Journal of International and Comparative Law* (forthcoming).

¹⁴² See *China – GOES* panel report para. 7.530; *China – X-ray equipment* panel report para. 7.42.

¹⁴³ Note that ITAC considers imports, all three price factors under Art. 3.2 and all fifteen injury factors under Art. 3.4.

¹⁴⁴ See ITAC report 458 (2013) *Frozen potato chips (Belgium, Netherlands)*.

¹⁴⁵ *Ibid.* See also ITAC Report 389 (2012).

others, was suspended from coming into operation until such time as the SACU Agreement became law in South Africa, which it did in July 2004.¹⁴⁶

Despite this, ITAC still makes recommendations to the Minister for final determination and does this in terms of the revoked legislation. The ITA Act clearly indicates that ITAC is an independent institution subject only to the Constitution and the law, and that all organs of state have to cooperate in ensuring ITAC's independence. However, with the Minister still making decisions, ITAC is violating the Act by failing to be independent and to make its own decisions. ITAC's independence is further undermined by pressure placed on it by both the Minister of Trade and Industry and the Minister of Economic Development for more protection for the domestic industry.

8.5 LACK OF SUBSTANTIVE (JUDICIAL) AND PROMPT REVIEW

South Africa's judicial system does not generally provide for a substantive review of anti-dumping decisions.¹⁴⁷ In addition, as the courts regard ITAC as a specialist institution, they defer on matters of substance. In the sole matter where the court ruled on substance, related to ITAC's methodology to determine the likelihood that dumping would recur in a sunset review,¹⁴⁸ ITAC failed to give effect to the ruling and let the duties lapse under a different pretext.¹⁴⁹

It is therefore imperative that a specialized Tribunal or court be set up that can promptly and substantively review ITAC's decisions.

9 LOOKING AHEAD

South Africa has entered a new protectionist phase since 2011. In a positive development, it appears that investigations are now finalized quicker, but this has come at the expense of correct procedure and recent cases have seen significant disregard for the procedures prescribed by law and the AD Agreement. This has already resulted in a WTO dispute. There is significant political pressure on ITAC to

¹⁴⁶ For a detailed discussion on how decision-making should work, see Brink (2013) 'ITAC and the Minister' 419–436.

¹⁴⁷ For more detail on judicial review of anti-dumping decisions, see Brink (2013) 'Judicial review' 247–268.

¹⁴⁸ *Algorax v. The International Trade Administration Commission* Case 18829/2001T.

¹⁴⁹ Following the ruling in *Progress Office Machines v. SARS* where the Court of Appeal ruled that the five-year duration of duties started on the date of the preliminary duty, ITAC terminated the duty on the basis that it had already been more than five years old when the sunset review had been initiated.

protect domestic industry and senior management in ITAC is on record propagating protection at all costs, even in violation of the AD Regulations and the AD Agreement on the basis that by the time a dispute has been resolved or a judicial review finalized, industry would have enjoyed several years of protection.¹⁵⁰

There is no reason why ITAC cannot significantly improve its procedures to ensure that investigations are conducted in a timely, fair and transparent way. ITAC has to insist on its legislated independence and make decisions on its own, that is, there should be no recommendation to the Minister.

Legislation needs to be redrafted as significant portions of the AD Regulations, including provisions related to injury and causality, are ultra vires the ITA Act, while regulations that are not in line with WTO jurisprudence or that have been found wanting should also be updated. The questionnaires need to be updated, while the public reports should be significantly more detailed and contain the various arguments raised by parties, as well as ITAC's conclusions in each case. A public reading room should also be set up.

Finally, in view of the courts' reluctance and inability to promptly and substantively review ITAC's determinations, it is vital that an international trade tribunal or specialized court be founded to substantively review ITAC decisions on a timely and cost-efficient basis.

¹⁵⁰ This was stated during an ITAC presentation at an event hosted by the South African Chamber of Commerce and Industry in 2013.