Farm Frites v International Trade Administration Commission Case 33264/14 GN

Urgency and prejudice in anti-dumping investigations – nullification of Anti-Dumping Regulations – removing only interim legal remedy available to interested parties

On 20 May 2014, in the High Court, Bam J passed judgement that may have far-reaching implications for the administration of the law of unfair international trade, specifically anti-dumping law, in South Africa. It is submitted that the decision could lead to abuse of administrative powers by the International Trade Administration Commission (ITAC), the authority responsible for conducting anti-dumping investigations. This is the second judgement that severely curtails the rights of interested parties, following on *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* Case CCT 59/09 2010 (CC) 6.

Before considering the merits of the case or the verdict, it is important to provide a brief background to the applicable law. The Anti-Dumping (AD) Regulations specifically provide for the judicial review of any interim decisions or procedures in an anti-dumping investigation. Regulation 64.1 provides as follows (own emphasis):

> Without limiting a court of law's jurisdiction to review final decisions of the Commission, *interested parties may challenge preliminary decisions or the Commission's procedures prior to the finalisation of an investigation* in cases where it can be demonstrated that –
>
> (a) [T]he Commission has acted contrary to the provisions of the *Main Act* or these regulations;
>
> (b) [T]he Commission's action or omission has resulted in serious prejudice to the complaining party; and
>
> (c) [S]uch prejudice cannot be made undone by the Commission's future final decision.

South Africa has also incurred international obligations in terms of the World Trade Organisation (WTO) Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 1994 (the AD Agreement) (see *Progress Office Machines v SARS* 2008 (2) SA 13 (SCA) par 6). The Constitutional Court has also held in the *ITAC v SCAW* Case (*supra* par 25) that (own emphasis):

> [T]he Anti-Dumping Agreement is *binding on the Republic in international law*, even though it has not been specifically enacted into municipal law. In order to give effect to the Anti-Dumping Agreement, Parliament has enacted legislation and, in turn, the Minister has prescribed Anti-Dumping Regulations.

Article 17.4 of the AD Agreement provides that:

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> [w]hen a provisional measure has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer such matter to the [Dispute Settlement Body].

This confirms that preliminary anti-dumping determinations should be subject to review. However, a clear differentiation needs to be drawn between the wording of Article 17.4 of the AD Agreement and AD Regulation 64.1. Article 17.4 provides for the review of "a provisional measure". This review considers not only a review of the procedures applied in an investigation, but also the substance thereof (see Art 17.6(i) of the Anti-Dumping Agreement, which provides that "in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective", and Art 11 of the WTO Understanding on Dispute Settlement, which provides that "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements").

AD Regulation 64.1, on the other hand, refers to "preliminary decisions or the Commission's procedures prior to the finalisation of an investigation". Thus, whereas Article 17.4 of the AD Agreement only refers to "a" provisional measure that can be reviewed (as happened recently when Brazil challenged a preliminary measure imposed by ITAC – see WTO *South Africa – Anti-dumping duties on frozen meat of fowls from Brazil* WT/DS439/1), the AD Regulation makes reference to "preliminary decisions" and to "procedures" in the plural. It is, therefore, clear that this does not only relate to the preliminary determination that may result in the imposition of provisional measures, but to any interim decision. This could thus relate, for instance, to the decision to initiate an investigation, to accept or reject a party's claim for confidentiality, to accept or reject a party's information, or any other relevant decision or procedure. The qualification is that the decision or procedure must have "resulted in serious prejudice", that is, the prejudice must not be something in the future, and that such prejudice cannot be undone by ITAC's future decision. It is not clear how any interim decision cannot be undone by a future final determination, which means that care should be taken in applying this provision so as not to nullify it. However, Bam J in *Farm Frites v ITAC* disregarded this, as will be clear from the analysis below.

In the present case, the applicant, Farm Frites, was accused of dumping frozen potato chips on the South Africa market. The applicant had operations in both Belgium and the Netherlands, but functioned as a single economic entity with a single set of financial accounts. It, therefore, made a single submission to ITAC, which rejected this and required that it make separate submissions for each plant. ITAC also required the applicant to submit individual cost build-ups for each of the more than 350 types of chips that it produced and not only for the nine types that it sold to South Africa, as well as its worldwide sales, on a

transaction-by-transaction basis, for each of the more than 350 types. The applicant could not complete all this information in time and its information was disregarded for purposes of ITAC's preliminary determination (AD Regulation 31.3). The applicant submitted a complete update of its information before the deadline for comments on the preliminary determination, which is also the deadline for addressing any deficiencies to its submissions (AD Regulation 35.5). However, in the process of splitting the costs and sales between the plants in Belgium and the Netherlands and preparing an additional more than 340 cost build-ups, the applicant neglected updating two columns in the overall cost build-up for the Netherlands, being those relating to "other products", that is, products not subject to the investigation, and "total company", being the total information for the specific plant. On 17 January 2014, ITAC indicated that it would verify the applicant's information, but five days later, without any further information submitted in the investigation by any party, it rejected the applicant's information *in toto*. The applicant liaised with ITAC in an attempt to convince it to take its information into consideration and was granted an oral hearing in March 2014. At the oral hearing, a commissioner asked why the outstanding information could not simply be submitted, which was then done on the same day.

On 14 April 2014, ITAC issued an essential facts letter. The purpose of this letter is to inform interested parties of all the essential facts that ITAC will take into consideration during its final deliberations (see WTO *EC – Salmon (Norway)* par 7.807 where the panel held that essential facts are the "body of facts essential to the determinations that must be made by the IA before it can decide whether to apply definitive measures. That is, they are the facts necessary to the process of analysis and decision-making by the IA, not only those that support the decision ultimately reached"). Whereas for all other exporters, this letter indicated their individual domestic sales volumes and values, their export sales volumes and values and margins of dumping, for the applicant, it was merely indicated that it was regarded as a non-cooperating party and that its information was rejected for a number of reasons, as indicated in the letter.

On 2 May 2014, the applicant lodged an urgent review application against ITAC in which it requested that ITAC be interdicted from taking a final determination pending a full review of ITAC's decision. The application was brought on an urgent basis as ITAC's final determination was to be made on 13 May 2014.

ITAC argued that there was no administrative procedure that could be reviewed as only the final determination would be reviewable, that there was no urgency, and that the applicant had experienced no detriment. However, both the High Court and the Supreme Court of Appeal have previously held that a procedure or determination, such as ITAC's essential facts letter, is a decision or step that affects the rights of others and that it must be regarded as an administrative action (see *Oosthuizen's Transport v MEC, Road Traffic Matters Mpumalanga* 2008 (2) SA570 (T);

Grey's Marine Hout Bay v Minister of Public Works 2005 (6) SA 313 (SCA)) and that a fatal flaw in this process affects the whole process (see *Minister of Finance v Paper Manufacturers of South Africa* Case 567/07 (SCA), not reported; *Chairman, Board on Tariffs and Trade v Brenco Inc* 2001 (4) SA 511 (SCA)). This issue was therefore moot.

As regards the other two issues, Bam J contradicted himself. First, he held that "I find it difficult to understand why the applicant brought the application *only at this stage*" (par 8, own emphasis). However, he then indicates that the application was "premature" and that ITAC would only have considered the relevant issues the day after the application was heard in court, that ITAC's recommendation could still have been favourable to the applicant and that the Minister "was enjoined to, independently, consider the recommendations of ITAC" (par 11). It is not clear how the application could have been brought too late, yet was still premature. Bam J did not deal with the issue of prejudice.

This notwithstanding, it is submitted that this is an incorrect interpretation of Regulation 64, which does not require a party to await the final decision by the Minister. On the contrary, it provides specifically that any preliminary determinations or procedures may be reviewed before a final determination is made, subject to certain criteria. These criteria include that ITAC has acted contrary to the provisions of the International Trade Administration Act or the AD Regulations, which Bam J essentially found to have been the case (see parr 10 & 12), that the action has resulted in serious prejudice and that such prejudice cannot be made undone by a final determination. The most important question that needs to be answered is what possible prejudice can be experienced as a result of preliminary determinations that cannot be made undone by a future final determination. If, as Bam J indicated, the application was premature as ITAC's final determination "could have been favourable to the applicant" despite all indications to the contrary, and that the Minister could still have reached a favourable determination, this would mean that a final determination could *always* overturn a negative preliminary determination. This would render the provision null and void. Accordingly, a different meaning has to be considered.

A decision to initiate an investigation without proper basis has an immediate and direct effect on importers and exporters. Even if it is subsequently found that no injurious dumping took place and no definitive anti-dumping duties are imposed, the interested party's trade is significantly affected by the uncertainty caused by the investigation and it may have to pay substantial fees to defend its interests in the matter. This prejudice cannot be made undone by future action. Likewise, a decision to impose a provisional duty against an exporter has an immediate and chilling effect on that exporter's exports to South Africa. Importers are seldom willing to pay provisional duties in the hope that the final decision will allow the exporter back into the market. This means that the exporter is often effectively prevented from competing in the South African market for the duration of the provisional duties, even

if no definitive duties are imposed. Again, this cannot be made undone by the future decision. Likewise, the decision to reject a party's information from being taken into consideration in the final determination has direct prejudicial effect as ITAC may consider *only* the essential facts made known to interested parties in its final determination. Thus, where the essential facts indicate that the party's information has been rejected, there are no other facts pertaining to that party before ITAC. ITAC cannot therefore make any determination other than treating that party as not cooperative and assigning it the highest possible margin of dumping, resulting in anti-dumping duties significantly higher than that for any cooperating party. It appears that the Court did not fully understand the significance of the essential facts letter (see Brink 'Anti-dumping and judicial review in South Africa: An urgent need for reform' 2012 *Global Trade and Customs Journal* 274-281 & Brink 'South Africa: A complicated, unpredictable, long and costly judicial review system' in Yilmaz *Domestic Judicial Review of Trade Remedies* 2013 247-268 regarding the problems with judicial review of anti-dumping measures in South African courts).

If the verdict in *Farm Frites v ITAC* is to remain unchallenged, this would effectively nullify the provisions of the AD Regulations. It is clear, however, that the Regulations were specifically drafted to counter such a situation. Accordingly, it is submitted that the decision is wrong and based on an error of law. It follows that that the relief requested should have been granted and that ITAC should have been instructed either to take the exporter's information into consideration or should have been interdicted from proceeding in the matter until a full review had been concluded, especially in light of the fact that Bam J twice indicated that there were proper grounds for review.

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