A nutshell guide to countervailing action
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1 INTRODUCTION
Although countervailing action corresponds to a large extent with anti-dumping action as regards procedure and substance, some important differences are highlighted in this article. It is a significantly more complex instrument than anti-dumping action and is used relatively infrequently.1 Two different methods can be used to address countervailing subsidies paid by foreign governments, namely, bilateral countervailing action and multilateral dispute resolution in the World Trade Organisation (WTO). This article considers bilateral countervailing action only, as this is all that is provided for in South African legislation and as South Africa has never pursued the multilateral route.2

OPSOMMING
’n Neutedopgids tot kontraregoptrede
Gesubsidieerde uitvoer vind plaas wanneer die regering of ’n instansie namens die regering in die uitvoerland ’n subsidie op die produk betaal. Wanneer sodanige uitvoer weselijke skade veroorsaak aan ’n bedryf in Suid-Afrika, kan addisionele doeaneregte (kontraregte) ingestel word om die marge van subsidie of die skade daardeur veroorsaak uit te wis, maar dusdanige optrede is aan streng maatreëls onderhewig. Hierdie artikel ondersoek die regsaspekte insake kontraregondersoeke en die instansies daarby betrokke en voorsien die tersaaklike omskrywings in hierdie verband. Die substantiewe elemente van ondersoeke word oorweeg aan die hand van ’n praktiese voorbeeld ter bepaling van die marge van subsidie vir verskillende subsidies. Daar word aan die hand gedoen dat die vereistes om weselijke skade en die verband tussen die subsidies en die weselijke skade te bepaal, ooreenstem met die dienooreenkomstige vereistes in “anti-dumping”-ondersoeke. Die verskille tussen kontrareg- en “anti-dumping”-ondersoeke en hersienings word ook uitgewys. Die artikel bevind dat die vakgebied selfs nog minder aandag in Suid-Afrika ontvang het as “anti-dumping”-optrede en dat daar aansienlike ruimte is vir verdere ontwikkeling.

1 Official WTO statistics indicate that a total of 3 044 anti-dumping investigations were initiated worldwide between 1995 and 2006, whereas only 191 countervailing investigations were initiated during the same period. Of these, South Africa initiated 200 anti-dumping and 11 countervailing investigations. South Africa has not initiated any countervailing investigations since 2002. See www.wto.org/english/tratop_e/adp_e/adp/_stattab2_e.xls (accessed 24 July 2007) (anti-dumping) and www.wto.org/english/tratop_e/scm_e/scm/_stattab2_e.xls (accessed 24 July 2007) (countervailing).

2 In order to challenge a subsidy within the dispute-resolution framework of the WTO, the affected domestic industry would have to convince the South African government that such a case should be pursued in the WTO.
Subsidised exports to South Africa take place when the government or an institution at the behest of the government in the exporting country grants a subsidy on the exported product or on an input used in the exported product. Where subsidised exports cause material injury to an industry in the importing country, authorities in the importing country may take action in the form of an additional customs (countervailing) duty to offset either the margin of subsidisation or the injury caused by the subsidised exports. Although in terms of the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) no injury needs to be proven in the case of prohibited subsidies, that is, subsidies contingent on the exportation of the product or on the use of domestic over imported materials, this remains a requirement in terms of South African law. As with anti-dumping action, stringent rules are attached to the use of the countervailing instrument that industries and their representatives need to be aware of.

This article briefly sets out the key issues to provide an introduction to the topic, as very little has been written on countervailing action in South Africa. Such a brief article, however, cannot properly set out each of the issues pertaining to countervailing investigations and these issues will have to be explored further in the future.

2 LEGISLATION AND INSTITUTIONS

2.1 Legal framework

Although South Africa had imposed countervailing measures as early as 1903, the first legislation in this regard was only enacted in 1914 with the promulgation of the Customs Tariff Act. In 1992 the South African trade remedy dispensation, including countervailing, was transformed when a specialist unit was set up to deal with all countervailing and anti-dumping investigations, whereas previously different sections within the Department of Trade and Industry dealt with the investigations relating to the products such section had responsibility for, for example, textiles or chemical products. Until 2003 the Board on Tariffs and Trade Act (the BTT Act) and chapter VI of the Customs and Excise Act (the Customs Act) were the only applicable legislation.

The International Trade Administration Act (the ITA Act) was promulgated in 2003 and revoked the BTT Act. The ITA Act provides for, inter alia, trade
remedy (anti-dumping, countervailing and safeguard) investigations. As regards countervailing actions, it authorises the International Trade Administration Commission (the Commission) to conduct investigations,11 and broadly defines a subsidy12 and export price.13 No guidelines are given as regards the calculation of the margin of subsidy. The Customs Act provides for the imposition of provisional countervailing payments14 (duties) on request by the Commission and for the imposition of definitive countervailing duties on request by the Minister of Trade and Industry after recommendation by the Commission.15

The countervailing regulations (CVR) promulgated in 200516 consist of 68 sections in five parts17 and provide for the substantive and procedural aspects of countervailing investigations, from the receipt of an application to the publication of the final report. The structure of the CVR is the same as that of the anti-dumping regulations that were promulgated in 2003 and to a large extent the regulation numbers and contents correspond with those in the anti-dumping regulations, with the necessary changes to reflect countervailing rather than anti-dumping action.18 Limited substantive changes were made, although there are also some nuanced differences that could lead to a different interpretation of the CVR than that accorded to the anti-dumping regulations.19

Since South Africa is a WTO Member, the relevant WTO Agreement also applies to countervailing investigations.20 In this regard, cognisance has to be taken of Article VI of the General Agreement on Tariffs and Trade (GATT) 1994 and of the SCM Agreement.

2.2 Institutions

A number of institutions play an important role in countervailing investigations. The most important of these is the Commission, which is the independent authority21 to which all countervailing applications must be submitted.22 The Commission is responsible for all investigative aspects of the process, as is shown in greater detail in paragraph 5 below. If the Commission makes a preliminary determination that subsidised exports are causing material injury to a domestic industry, it will request the Commissioner for the South African Revenue

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11 Ss 16(1)(a) and 26(2)(a) of the ITA Act.
12 S 32(2)(c).
13 S 32(2)(a).
14 S 57A of the Customs Act.
15 S 56A.
17 See Brink A theoretical framework for South African anti-dumping law (LLD thesis UP 2004) 711–720 for a detailed analysis of the outlay of the anti-dumping regulations. Effectively the same outlay applies to the CVR.
19 See idem 11–16.
20 In Degussa v International Trade Administration Commission unreported case 22264/2007 (T) the Commission confirmed that its investigations were conducted in accordance with the requirements of the relevant WTO Agreements. See also references to the SCM Agreements in Commission Application questionnaire: Countervailing duties July 2005 1 13 (available at www.itac.org.za/documents/ITAC%20countervailing%20application%20-questionnaire_200308.doc) (accessed 26 July 2007).
21 S 7(2)(a) of the ITA Act.
22 S 26(1)(c)(ii).
Service (SARS) to impose a provisional payment in the amount and for the period requested by the Commission.23

The Commission’s final determination is in the form of a recommendation to the Minister of Trade and Industry. If an affirmative finding of injurious subsidised exports is made, the Minister of Trade and Industry will request the Minister of Finance to impose the applicable countervailing duty.24 In terms of the Southern African Customs Union Agreement (SACU), however, all final recommendations should be made to the SACU Tariff Board,25 which, in turn, will make a recommendation to the SACU Council of Ministers.26 To date no appointments have been made to the SACU Tariff Board. The SACU Council of Ministers has requested the Commission to continue taking all countervailing decisions on behalf of all SACU Members.

3 DEFINITIONS

To understand countervailing action, it is essential to understand countervailing terminology. No action can be taken unless it is shown that subsidised exports are taking place, that the subsidies in question are actionable and that such exports cause material injury to a domestic industry. Subsidised export is defined in the ITA Act as

“goods exported into the Common Customs Area [of the Southern African Customs Union], in respect of which the government of, or a public body within, any country –

(i) has provided –

(aa) any form of financial aid;

(bb) any form of assistance with its production, manufacture, transportation or export; or

(cc) any similar assistance; or

(ii) has foregone any revenue that would otherwise be due to that government or public body”.27

The CVR, however, provide a more detailed definition of a subsidy, which is in line with that contained in the SCM Agreement, and which sets out the different ways in which financial contributions may be deemed to be made by or on behalf of the exporting country’s government.28 Once it has been determined that the

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23 S 57A(1) of the Customs Act.
24 Ss 55(2) and 56A(2).
25 A 14.1 of the SACU Agreement.
26 A 14.2.
27 S 32(2)(c) of the ITA Act.
28 CVR 8.1 defines a subsidy as follows:

“For the purpose of these regulations, a subsidy shall be deemed to exist if –

(a) there is a financial contribution by a government at any level or any public body within the territory of an exporting country, ie where:

(i) a government practice involves a direct transfer of funds, (eg grants, loans and equity infusion) potential direct transfers of funds or liabilities (eg loan guarantees);

(ii) government revenue that is otherwise due is foregone or not collected (eg fiscal incentives such as tax credits);(1)

(iii) a government provides goods or services other than general infrastructure, or purchases goods;

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to
exported goods are subsidised, as defined in the ITA Act, the Commission must
determine whether the subsidies in question are actionable subsidies, as defined
in CVR 9.1, which provides as follows:

"A subsidy shall be countervailable only if:
(a) such subsidy is specific, ie if the granting authority explicitly limits access to
a subsidy to an enterprise or industry or group of enterprises or industries, or
if the Commission finds in fact that the subsidy is used by a limited number of
enterprises or industries or a disproportionately large amount of the subsidy is
granted to a limited number of enterprises or industries [certain enterprises or
industries];29 and
(b) it causes material injury to the SACU industry producing the like product."

Export subsidies are automatically deemed to be specific subsidies.30

As indicated above, it must be shown that the domestic industry is experienc-
ing material injury as a result of the subsidised exports.31 This consists of two

(iii) above which would normally be vested in the government and the practice,
in no real sense, differs from practices normally followed by governments; or
(b) there is any form of income or price support by government; and
(c) a benefit is thereby conferred.
1. The exemption of an exported product from duties or taxes borne by the like prod-
uct when destined for domestic consumption, or the remission of such duties or
taxes in amounts not in excess of those which have accrued, shall not be deemed to
be a subsidy."

29 Note that the text in square brackets is contained in the original.
30 CVR 9.2. A 2 of the SCM Agreement, which should be read with the CVR, provides as
follows regarding specificity:

"2.1 In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is
specific to an enterprise or industry or group of enterprises or industries (referred to
in this Agreement as ‘certain enterprises’) within the jurisdiction of the granting au-
thority, the following principles shall apply:
(a) Where the granting authority, or the legislation pursuant to which the granting
authority operates, explicitly limits access to a subsidy to certain enterprises, su-
ch subsidy shall be specific.
(b) Where the granting authority, or the legislation pursuant to which the granting
authority operates, establishes objective criteria or conditions governing the
eligibility for, and the amount of, a subsidy, specificity shall not exist, provided
that the eligibility is automatic and that such criteria and conditions are strictly
adhered to. The criteria or conditions must be clearly spelled out in law, regula-
tion, or other official document, so as to be capable of verification.
(c) If, notwithstanding any appearance of non-specificity resulting from the applica-
tion of the principles laid down in subparagraphs (a) and (b), there are reasons to
believe that the subsidy may in fact be specific, other factors may be considered.
Such factors are: use of a subsidy programme by a limited number of certain
enterprises, predominant use by certain enterprises, the granting of dispropor-
tionately large amounts of subsidy to certain enterprises, and the manner in
which discretion has been exercised by the granting authority in the decision to
grant a subsidy. In applying this subparagraph, account shall be taken of the
extent of diversification of economic activities within the jurisdiction of the
granting authority, as well as of the length of time during which the subsidy pro-
gramme has been in operation.

2.2 A subsidy which is limited to certain enterprises located within a designated geo-
graphical region within the jurisdiction of the granting authority shall be specific. It
is understood that the setting or change of generally applicable tax rates by all levels
of government entitled to do so shall not be deemed to be a specific subsidy for the
purposes of this Agreement" (footnotes omitted).

31 A 11 of the SCM Agreement.
separate issues, being material injury\textsuperscript{32} and the causal link between the subsidised exports and the injury.\textsuperscript{33} Material injury is not defined in either the ITA Act or the CVR, while there is also no definition in Article VI of GATT 1994 or in the SCM Agreement. However, it is clear that such injury must be more than negligible,\textsuperscript{34} yet the requirement is lower than that of serious injury, which is the requirement in safeguard investigations.\textsuperscript{35}

The domestic industry is defined as all domestic producers of the like product or those producers whose output constitutes a major proportion of the SACU industry,\textsuperscript{36} while “like product” is defined as a product identical to the imported product, or, in the absence of such a product, another product that has characteristics closely resembling those of the product under investigation.\textsuperscript{37} It is not clear how the Commission will determine the like product as the factors indicated in regulation 1 of the anti-dumping regulations have been specifically excluded from the CVR, indicating that different criteria should be used.

4 SUBSTANTIVE ELEMENTS

4.1 Specificity
The first step in any countervailing investigation is to determine whether each alleged subsidy is specific. A subsidy is deemed specific if it is limited in its application to certain industries or enterprises\textsuperscript{38} or if it is a prohibited subsidy, that is, if it is an export subsidy or a subsidy contingent on the use of domestic over imported materials.\textsuperscript{39} Examples of subsidies found to be specific by the Commission or its predecessor, the Board on Tariffs and Trade, include an income tax exemption scheme whereby no corporate tax was payable on export earnings,\textsuperscript{40} the duty entitlement passbook scheme in terms of which rebates of

\textsuperscript{32} CVR 13–15 and a 11 of the SCM Agreement, read with a 20.2 of the SCM Agreement provide that material injury can be in the form of actual and present injury, a threat of injury or the material retardation of the establishment of an industry.
\textsuperscript{33} CVR 16.
\textsuperscript{34} A 11.9 of the SCM Agreement requires immediate termination of an investigation in cases where it is found that the injury experienced by the domestic industry is “negligible”, but this concept is also not further defined.
\textsuperscript{35} See reg 8.1 of the Safeguard Regulations.
\textsuperscript{36} CVR 7; aa 11.4 and 16.1 of the SCM Agreement.
\textsuperscript{37} CVR 1; note 46 to a 15.1 of the SCM Agreement.
\textsuperscript{38} CVR 9.1(a); a 2 of the SCM Agreement.
\textsuperscript{39} CVR 9.3; a 3 of the SCM Agreement.
\textsuperscript{40} See eg Board report 4116: Investigation into the alleged dumping of polyvinyl chloride, originating in or imported from India, Republic of Korea and Thailand and/or the alleged subsidised export of polyvinyl chloride, originating in or imported from India: Final determination (21/05/2001) 34–37; Board report 4137: Investigation into the alleged subsidised export of printed and dyed bed linen originating in or imported from Pakistan: Preliminary determination (05/11/2001) 33–34; Board report 4145: Investigation into the alleged dumping and/or subsidised export of polymers of vinyl chloride (PVC) based roll goods originating in or imported from China: Final determination (18/02/2002) 15–16; Board report 4173: Investigation into the alleged dumping of stranded wire, ropes and cables of iron or steel, not electrically insulated, originating in or imported from the People’s Republic of China (PRC), Germany, India, Korea, Spain and the United Kingdom (UK) and the alleged sub-

continued on next page
import duties were granted on raw material used in the production of exported final goods even if such raw materials were in fact bought domestically, and the duty-free importation of machinery used in the production of exported goods.

The following examples illustrate the determination of specificity:

(a) Where a government builds a new road that is available for use by the public, the financial contribution by the government cannot be regarded as a specific subsidy. However, if the government builds a road that is specifically designed to enable a specific industry or enterprise to transport its export goods to the harbour and use of the road is de jure or de facto limited to such industry or enterprise only, it becomes a specific subsidy that may be taken into consideration in the determination of whether subsidised exports are taking place.

(b) Where the government provides a general subsidy on diesel to enable its industries to compete, this would not be deemed a specific subsidy. However, if the subsidy is only available to certain industries, for example, the steel industry, or to industries that export part of their production, it will be deemed a specific subsidy.

Only subsidies that have been found to be specific in law or in fact will be further investigated to determine whether the total level of subsidisation exceeds the de minimis threshold of one per cent for developed and two per cent for developing countries.

42 Denominator used to determine margin of subsidy

Once it has been determined that a subsidy is specific, the Commission has to determine the basis for calculation of the subsidy, that is, it has to be determined whether the subsidy applies to total production or only to export sales, as this determines the denominator to be used. If the government of the exporting country provides a subsidy on the production of automotive tyres, but such subsidy is only payable in respect of tyres actually exported, the value of the subsidy has to be divided by the value of the exported tyres only. Unless a subsidy is specifically paid for exports to a specific destination, the subsidy has to be determined on the basis of all export sales and not only those to South Africa. However, if the subsidy is paid on all tyres produced provided the company in question exports at least a certain percentage of its total production, the total value of the subsidy has to be divided by the total turnover of tyres regardless of destination.

41 See Board report 4116 31–34; Board report 4159 16–18; Board report 4173 50–55.
42 See Board report 4137 26–28.
43 CVR 9.6 requires that “[a]ll subsidies shall be cumulated before a determination whether the total subsidy exceeds the de minimis standard, as contemplated in subsections 3 and 4, is made”.
44 CVR 9.3.
45 CVR 9.4.
46 CVR 11.2(h)(iii).
4.3 Export price

The export price has to be determined separately for each model under investigation.\textsuperscript{47} Thus, if the investigation is into the alleged subsidised export of tyres, a separate export price has to be calculated for each model of tyres exported. The exporter is therefore required to submit information separately for each model on a transaction-by-transaction basis for all export sales regardless of destination. Table 1 below sets out the calculated export prices for each model (note that, unlike in anti-dumping investigations, no adjustments are made to the free-on-board export price).

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<th>Date</th>
<th>Invoice</th>
<th>Model</th>
<th>Customer</th>
<th>Volume</th>
<th>Unit price</th>
<th>Total value</th>
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<td>901428</td>
<td>165/80R13</td>
<td>JAMW1</td>
<td>15 000</td>
<td>$18.00</td>
<td>$270 000.00</td>
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<td>$100 000.00</td>
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<td>165/80R13</td>
<td>RSAW2</td>
<td>5 000</td>
<td>$20.00</td>
<td>$100 000.00</td>
</tr>
<tr>
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<td>901443</td>
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<td>USAW3</td>
<td>8 000</td>
<td>$20.50</td>
<td>$164 000.00</td>
</tr>
<tr>
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<td></td>
<td></td>
<td>33 000</td>
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<td>RSAW2</td>
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<td>$23.00</td>
<td>$230 000.00</td>
</tr>
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<td>$1 021 000.00</td>
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4.4 Margin of subsidisation

The margin of subsidisation calculation may consist of several phases. Firstly, the margin of subsidy has to be determined separately for each subsidy programme,\textsuperscript{48} taking cognisance of the time value of money.\textsuperscript{49} Secondly, since some of the subsidies may relate to inputs, rather than the final product, the effect of the subsidy on the final product must be calculated.\textsuperscript{50} Thirdly, once all the individual programme margins have been determined, the total margin of subsidisation must be calculated by adding the subsidies.

\textsuperscript{47} The importance of calculating a separate export price for each model is illustrated in the practical example in para 4.4 below.
\textsuperscript{48} CVR 12.
\textsuperscript{49} CVR 11.1.
\textsuperscript{50} CVR 11.2(e).
The following example indicates the calculations that need to be made, assuming that the investigation period is calendar year 2007.\footnote{The example has been adapted from Brink (2002) 272–291.}

The government of Kala provided Grip Tyres with a grant of $1 million in 1999 for machinery purchases and the life cycle of the machinery is 10 years. Through the Development Bank of Kala, in 2004 it also provided Grip Tyres with a loan of $500,000 at a preferential rate of 6% whereas the market interest rate is 10%. The loan is repayable over a period of five years in equal annual instalments. The company’s export earnings are exempted from corporate tax, while domestic earnings are taxed at the standard rate of 30%. Grip Tyres uses domestically-produced rubber in its tyres, while it imports carbon black. Grip Tyres’ actual waste factor on carbon black is 10%, but the government of Kala allows a waste factor of 20% in determining the duty drawback. Carbon black for domestic consumption is dutiable at 50%. The carbon black price during the investigation period was $1,000 per ton. The government of Kala also pays natural rubber producers a direct subsidy of $50 per ton. The price of rubber during the investigation period was $1,000 per ton.

Grip Tyres used 3kg each of carbon black and natural rubber in a 165/80R13 tyre, 4kg each in a 165/80R14 tyre and 5kg each in a 165/80R15 tyre. It produced 100,000 units of each model at a total per unit cost (before carbon black customs rebates) of $17, $18 and $20, respectively. Grip Tyres’ total sales volume was 100,000 units of each model, of which 33,000, 46,000 and 19,000 units, respectively, were exported exclusively to South Africa. The export prices for the tyres are as indicated in Table 1, while the weighted average per unit domestic selling prices were $20, $22 and $26, respectively. Grip Tyres’ total production cost can be calculated to be $5,481,100 ($5,500,000 before carbon black rebate) and its total profit for the year (after interest but before tax) to be $1,293,900, with its export profit $390,900, giving it a total turnover of $6,775,000. The following paragraphs consider the determination of the level of subsidy for each programme.

\subsection{Grant\footnote{CVR 11.2(a) provides as follows: “Grants can be made in several different ways, including, but not limited to, equity infusion, the conversion of a loan into equity or by waiver of a debt due to agreement. The determination of the amount of subsidy countervailable in a particular year shall provide for the time value of money and shall include reference to the amount originally paid, the number of years that have lapsed since the grant was paid, the average life cycle of the plant or equipment and the interest rate payable in the country of origin.”}}

The margin of the subsidy needs to be calculated with reference to the annualised value of the grant. The grant is therefore annualised over the 10-year life cycle of the plant at the ruling interest rate (10%). The subsidy amount will change every year, with the highest value in the first year and the lowest value in the last year. Considering that the period under review is 2007 and that the grant was made in 1999, year eight is under review. The formula to determine the amount of the subsidy is as follows:

\[ Sk = \frac{y/n + [y - (y/n)(k - 1)]i}{(1 + i)} \]

where: \( Sk \) = the amount of the subsidy countervailable in year \( k \); \( k \) = the year under review; \( y \) = the face value of the grant; \( n \) = the average life cycle of the plant; and \( i \) = the interest rate.

\[ Sk = \frac{y/n + [y - (y/n)(8 - 1)]i}{(1 + i)} \]
The subsidy countervailable in year eight can thus be calculated as follows:

\[
Sk = \frac{1000000/10 + [1000000 - (1000000/10)(8 - 1)]0.1}{1 + 0.1} \\
= \frac{100000 + [30000][0.1]}{1.1} \\
= $118,181.81
\]

This subsidy is not an export subsidy and therefore it has to be calculated as a percentage of total turnover, or \(s\% = \frac{s}{TO}\). The subsidy percentage is therefore \(118,181.81/6,764,430 = 1.744\%\).

**4.4.2 Loan\(^{53}\)**

In this example the loan is subsidised by the difference between the market rate and the interest rate at which the loan was extended. As with the grant, the margin of subsidisation needs to be calculated with reference to the annualised value thereof. Considering that the period under review is 2007 and that the grant was made in 2004, year three is under review. The formula to determine the amount of the subsidy is as follows:

\[
Sk = \left\{\frac{y/n + [y - (y/n)(k - 1)(i_m - i_a)]}{[1 + (i_m - i_a)]} - y/n\right\} - \frac{y}{n}
\]

where: \(Sk\) = the amount of the subsidy countervailable in year \(k\); \(k\) = the year under review; \(y\) = the face value of the loan; \(n\) = the period over which the loan has to be repaid; \(i_m\) = market interest rate; and \(i_a\) = the actual interest rate paid on the loan.

The subsidy countervailable in year three can thus be calculated as follows:

\[
= \left\{\frac{500,000/5 + [500,000 - (500,000/5)(3 - 1)(0.1 - 0.06)]}{[1 + (0.1 - 0.06)]} - \frac{500,000}{5}\right\} - \frac{500,000}{5} \\
= \frac{100,000 + [500,000 - (100,000)(2)(0.04)]}{1.04} - 100,000 \\
= (112,000/1.04) - 100,000 \\
= $7,692.31
\]

This subsidy is not an export subsidy and therefore it has to be calculated as a percentage of total turnover. The subsidy percentage can be calculated as \(7,692.31/6,775,000 = 0.114\%\).

**4.4.3 Customs duty refund\(^{54}\)**

The margin of subsidy has to be calculated with reference to the amount by which the duty drawback exceeds the duty paid. The formula to determine the amount of the subsidy is as follows:

\[
53\text{ CVR 11.2(b) provides as follows: “Loans by the government at market equivalent rates shall not be deemed to be a subsidy, but the advantage gained through loans made under circumstances that loans would not normally be granted, or the lesser amount of interest paid or payable if loans are made at preferential rates shall be deemed to be subsidy. In the determination of the amount of subsidy countervailable in a particular year the Commission shall consider the time value of money and include reference to the original amount of the loan, the number of years that have lapsed since the grant was paid, the average life cycle of the plant or equipment, the interest rate payable on the loan and the market interest rate applicable in the country of origin.”}

\[
54\text{ CVR 11.2(f) provides as follows: “Over-reimbursement of customs duties occurs where a manufacturer imports raw materials that are used in the manufacture of final products that are exported and the duty paid on importation is over-reimbursed, or where the exporter cannot prove proof that the imported product, on which reimbursement was claimed, is actually incorporated in the exported product. In its determination of the margin of subsidy the Commission shall consider of the amount of customs duty payable and that rebated and/or refunded.”}
\]
s% = \[\frac{\text{Dr}(\text{Ma} - \text{Mu})(\text{Mc}) \times 100}{\text{Ep}}\]

Where: s% = subsidy percentage; Dr = duty rate; Ma = material allowed (volume); Mu = material used (volume); Mc = material cost per unit; Ep = export price.

Since different volumes are used for the different models, the margin of subsidy must be calculated separately for each model. Depending on the methodology followed, that is, (a) determining the total value of the subsidy for each model and dividing the aggregate by the total value of exports; or (b) determining the subsidy margin (percentage) for each model and then weighting by the ratio of export volume, different aggregate margins of subsidy will be found. However, since the Commission applies the latter methodology in anti-dumping investigations, it should apply the same methodology in countervailing investigations. The margin of subsidy for model 165/80R13 can therefore be determined as follows:

\[
s% = \left[\frac{0.5(0.30) \times 100}{19.21}\right] = 0.781\%
\]

When the same exercise is performed for the other two models, this will show the following subsidy margins:

165/80R14: 50\%(4.8 – 4.4) × $1.00 × 100/$22.20 = $0.20/$22.20 = 0.901%

165/80R15: 50\%(6.0 – 5.5) × $1.00 × 100/$25.58 = $0.25/$25.58 = 0.977%

The weighted average subsidy margin for this programme must then be calculated on the basis of the relative export volume of each model, that is, in the case of the 165/80R13 by multiplying the margin of 0.781% by the volume of exports for the particular model (33,000) and dividing by total export volume (98,000). This will give a margin of 0.263%. The same exercise is performed in respect of the 165/80R14 (0.423%) and the 165/80R15 (0.189%). These values are then added to derive a weighted average margin of 0.875%. (Note that methodology (a) above would have rendered a slightly different answer, being 0.883%.)

4.4.4 Corporate tax exemption

The margin of subsidy has to be calculated with reference to the effect of the non-payment of corporate tax. The formula to determine the amount of the subsidy is as follows:

S% = \[\frac{(\text{Ep} - \text{Ec})t \times 100}{\text{Ep}}\]

Where: S% = margin of subsidy; Ep = export price; Ec = export cost; t = tax rate.

55 See Brink “A Nutshell guide to anti-dumping” 2008 THRHR 255 262.
56 An analysis of the Commission’s countervailing reports shows that to date this issue has not arisen in countervailing investigations.
57 CVR 11.2(d) provides as follows: “Non-payment of corporate tax on export earnings is a prohibited subsidy and actionable except for developing countries listed in Annex VII of the Subsidies Agreement. In its determination of the margin of subsidy the Commission shall consider the company’s export earnings for the period under review and the corporate tax rate in that country. In its determination of the margin of subsidy regarding a tax holiday the Commission shall take cognisance of the amount of tax paid vis-à-vis the amount payable in the absence of such tax holiday, and the products to which such tax holiday applies.”
Since different volumes are used for the different models, the margin of subsidy must be calculated separately for each model on the same basis as for the over-refund of customs duties. The margin of subsidy for model 165/80R13 can therefore be determined as follows:

\[ s = \frac{[(19.21 - (17.00 - 0.15)) - 30% \times 100]}{19.21} = \frac{2.36 \times 30%}{19.21} = 3.686\% \]

When the same exercise is performed for the other two models, this will show the following subsidy margins:

- 165/80R14: \( (22.20 - 17.80) \times 30% / 22.20 = 5.946\% \)
- 165/80R15: \( (25.28 - 19.75) \times 30% / 25.58 = 6.563\% \)

These margins are then apportioned on the same basis as for the over-refund of customs duties and will render a weighted average subsidy margin of 5.304%.

445 Input subsidy

The margin of subsidy on the raw material subsidy, that is, on the natural rubber, must be calculated with reference to the effect such subsidy has on the production cost of each tyre model. Since the subsidy is a specific amount per volume, the effective subsidy can be calculated using the following formula:

\[ S\% = \frac{(s \times M \times 100)}{TO} \]

Where \( S\% \) = margin of subsidy; \( s \) = the subsidy per unit; \( M \) = the material used; \( TO \) = turnover.

The margin of subsidy for model 165/80R13 can therefore be determined as follows:

\[ S\% = \frac{(50 \times (0.003 \text{ tonnes} \times 100,000 \text{ units}) \times 100)}{1,974,000} = \frac{15,000}{1,974,000} = 0.760\% \]

When the same exercise is performed for the other two models, this will show the following subsidy margins:

- 165/80R14: \( 50 \times (0.004 \times 100,000) / 2,209,000 = 0.905\% \)
- 165/80R15: \( 50 \times (0.005 \times 100,000) / 2,592,000 = 0.965\% \)

These margins are then apportioned on the same basis as for the over-refund of customs duties and will render a weighted average subsidy margin of 0.886%.

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58 Note that although the total cost for the model is $17.00/unit for total manufacture, the refund of customs duties must be taken into consideration in the determination of the total cost for export purposes, failing which the full effect of the tax exemption subsidy will not be reflected in the calculations. The total per unit cost for export purposes is therefore only $16.85.

59 CVR 11.2(e) provides as follows: “An input subsidy is a subsidy paid on an input cost of a product that is subsequently exported. In its determination of the margin of subsidy the Commission shall consider the effect of the input subsidy on the cost or price of the product under investigation.”

60 Note that since the subsidy is calculated separately per model the turnover also has to be indicated per model.
4.4.6 Total margin of subsidy

The final step in the process is to determine the total margin of subsidy. In this step all individual subsidy programme margins are added. The weighted average margin of subsidy can therefore be determined as follows:

| Grant:               | 1.744% |
| Loan:                | 0.114% |
| Customs refund:      | 0.875% |
| Tax exemption:       | 5.304% |
| Input subsidy:       | 0.886% |
| **Total:**           | **8.923%** |

No countervailing duties may be imposed if the aggregate margin of subsidisation is *de minimis*, that is, if it is less than 1% in the case of developed countries and 2% in the case of developing countries.

4.5 Double counting

CVR 17.2 provides that “[t]he Commission . . . shall ensure that a product is not subject to both countervailing and anti-dumping duties to compensate for the same situation of dumping or export subsidisation”.

Where an enterprise sells a product on its domestic market for a price of R110 and exports it at a price of R100 on the basis that the government of that country provides it with an export subsidy of R10, the Commission may not find that both dumping and subsidised export take place and that total duties of R20 (R10 anti-dumping and R10 countervailing) must be imposed. However, it must be clearly determined whether the dumping and the subsidy compensate for the same situation.

In the example used in paragraph 4.4 above, the grant, the loan and the input subsidies would constitute subsidies that do not affect the export price specifically and that could be countervailed in addition to any anti-dumping action taken as these subsidies would also impact on the domestic selling price. The over-reimbursement of customs duties on the raw material is directly related to the export price and cannot be countervailed if this difference is anti-dumped.

The question of whether double counting takes place as regards the exemption of corporate tax on export earnings, however, is not straightforward. If the domestic selling price is R100, the export price is R80, the total cost is R60 and the corporate tax rate is 30%, it is clear that dumping is taking place at a margin of R20 or 25% (R20/R80). At the same time the exporter realises an export profit of R20 (R80 – R60) on which it should have paid R6 corporate tax, that is, a subsidy of R6. The question whether a countervailing duty of R6 or 7.5% (R6/R80) can be imposed in addition to an anti-dumping duty cannot be answered without considering the way in which the tax exemption operates. Had the exporter not dumped, that is, had it exported at R100, there would have been been...

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61 CVR 9.4 (developed countries) and 9.5 (developing countries). See also Board report 3997: Investigation into the alleged dumping and/or subsidised export of paper insulated, lead covered electric cable, originating in or imported from the Republic of India: Final determination (21/10/1999) 30–31; Board report 4073: Investigation into the alleged dumping and/or subsidised export of overhead aluminium conductor steel reinforced, originating in or imported from India and Bahrain: Final determination (20/12/2000) 26–27.

62 Note that no similar provision exists in the anti-dumping regulations.
a margin of subsidy of \(((R100 - R60) \times 30\%)\) 12%. On the other hand, had the exporter exported at a price of only R60, there would be no subsidy as the exporter would not have generated a profit on its export market and no corporate tax exemption takes place, but the margin of dumping would increase to \((R40/R60)\) 66.7%. This shows that the corporate exemption tax and the margin of dumping, although interactive, are not directly linked.63 Accordingly, an authority could impose both the anti-dumping duty of 25% and the countervailing duty of 7.5%.

Without properly considering whether the subsidies in question had an impact on the margin of dumping, the Commission on a number of occasions found, it is submitted erroneously that, where the margin of subsidy was lower than the margin of dumping, there was no need for the imposition of a countervailing duty.64

4.6 Material injury and causality65

Determining material injury to the domestic industry producing the like product to the imported product is the second leg of the countervailing investigation. Material injury in countervailing investigations, whether in the form of actual material injury, a threat of material injury or the material retardation of the establishment of an industry, is determined on exactly the same basis as in antidumping investigations66 and involves the evaluation of 15 prescribed injury factors, including both price and volume factors.

Likewise, the causality analysis is identical to that in an anti-dumping investigation67 and includes that all injury caused by factors other than subsidised export must be isolated and may not be attributed to the subsidised exports. Injury caused by concurrent anti-dumping and countervailing investigations may be accumulated, that is, there is no requirement to separate the injury caused by dumping and that caused by subsidised exports as both relate to unfair international trade.68

5 PROCEDURAL REQUIREMENTS

5.1 Application and merit evaluation

To a large extent the pre-initiation procedures are the same as those applicable to anti-dumping investigations. Any domestic industry can approach the Commission at any stage with a countervailing application made by or on behalf of the domestic industry, that is, by manufacturers representing at least 25% of the total

63 Note that the Commission’s predecessor, the Board, came to a different conclusion in Board Report 4102: Review of anti-dumping duties on acetaminophen originating in and imported from India and Singapore: Final determination and investigation into the alleged subsidised export of acetaminophen originating in or imported from India: Final determination (02/03/2001) 20–21.
64 See eg Board report 4102 20–21; Board report 4137 73.
66 See Brink 2008 THRHR 265 262–264 for a discussion on the determination of material injury and causality in anti-dumping investigations.
67 Ibid.
68 Note that this is not specifically provided for in either the CVR or the anti-dumping regulations, but is evident from an analysis of Commission and Board reports. See Board report 3997; Board report 4073; Board report 4102; and Board report 4116.
production volume of the product. “More than” 50% of the manufacturers by production volume that express an opinion on the application must support the application.69

Parties must submit a properly-documented application.70 This requires the applicant to submit such information as is reasonably available to it, including information relating to the subsidy programmes in the exporting country.71 Once the Commission is satisfied that all questions have been answered and all deficiencies pointed out have been addressed, it will proceed to verify the information in situ72 after which the investigating officers will prepare a merit submission to the commissioners. If the Commission finds that the application establishes a prima facie case of injurious subsidised exports it will inform the trade representatives of the countries under investigation prior to initiation and invite them to consultations regarding the alleged subsidy programmes.73 The consultations need not be finalised prior to initiation of an investigation.

If the Commission, however, finds that the application is without merit, it terminates the proceeding and informs the applicant accordingly. The applicant may lodge a new application at any stage thereafter.

5.2 Initiation and preliminary investigation

As with the pre-initiation phase the preliminary investigation phase is similar to that used in anti-dumping investigations. Once an investigation has been initiated through the publication of an initiation notice in the Government Gazette, the Commission will directly inform all known interested parties and supply them with a copy of the initiation notice, the non-confidential version of the application and the relevant questionnaire to be completed. These parties, including the government of the exporting country, will receive 37 days from the date of the letter to complete the questionnaires and submit any comments on the application.74 All parties not directly informed of the investigation will have 40 days to submit comments.75 Parties may request an extension,76 but the Commission will rarely grant an extension of more than 14 days.

69 CVR 7.3. Note the variance from the anti-dumping regulations which only require that “at least” 50% of those that express an opinion must support the application. As indicated by Brink (2005) 6–7, this may lead to a situation where there are two producers representing an equal production volume (as happened in the optical fibre anti-dumping investigation) and both would have to support the countervailing application, which would not be required in the anti-dumping investigation.

70 CVR 21 and 22.
71 CVR 23.
72 CVR 18 and 25.
73 CVR 27.3. Note that CVR 27.3 specifically indicates that the invitation to consultations shall take place “[f]ollowing the notification” of the receipt of a properly documented application, that is, a second and separate communication. This has not been tested as the Commission has not conducted any original countervailing investigations since the CVR were promulgated, but in earlier investigations the Commission (then still the Board) sent out a single letter containing both the notification and the invitation to consultations.
74 CVR 29.2 and 29.3.
75 CVR 29.4. The initiation notice is normally published on a Friday and the letters to known parties are seldom dispatched before Monday the following week. The 40-day deadline for unknown interested parties is therefore in line with the 37 days provided to known interested parties, where the letters to these parties are only sent on the Monday following initiation.
76 CVR 30.
Once the foreign government’s, exporters’ and importers’ submissions have been received, the Commission will study the responses to determine whether there are any deficiencies in the responses. These include failure to provide proper non-confidential versions of all submissions, the failure to answer all questions and the failure to attach the necessary supporting documents. This process will normally take between one and three weeks, depending on the workload of the specific investigating officers and the complexity of the specific investigation. As soon as the deficiencies have been identified, the Commission will send a deficiency letter to the specific party setting out all deficiencies. These have to be addressed within seven days of the letter, failing which the parties’ information will not be taken into consideration in the Commission’s preliminary determination.77

If the Commission is satisfied that it has received all the relevant information from the parties it will proceed to verify the importers’, foreign government’s and the exporters’ information in situ.78 The purpose of the verification is to determine the accuracy and completeness of the information submitted. This includes a comparison of the information submitted by the foreign government and the exporters, as well as determining whether either the government or the exporters show additional subsidies not listed in the application. Following verification, the Commission will issue a verification letter to the specific party that it pertains to and will place a non-confidential version thereof on the public file.79 The verification letter should set out the exact information verified, the process followed during verification and list all documents retained during verification, including a table indicating the confidentiality status of each document so retained.80

The remainder of the preliminary investigation phase procedures are the same as for anti-dumping investigations.81 Following verification the investigating officers will prepare another submission to the Commissioners for their consideration in their preliminary determination. If the Commission makes an affirmative preliminary determination, that is, it finds injurious subsidised exports, it will request SARS to impose a provisional payment at the lesser of the margin of subsidy and the margin of injury for a period of four months, which period may not be extended.82 If the Commission makes a negative preliminary determination it will publish a notice to this effect in the Government Gazette. The Commission will issue a preliminary report to all interested parties as soon as the preliminary determination has been published in the Government Gazette. This concludes the preliminary investigation phase.

77 CVR 32.
78 CVR 18.1 and 18.2.
79 CVR 19.1 and 19.2.
80 This was the case in the only proper review of countervailing duties conducted since the establishment of the Commission in 2003 – see the verification letter dated 18 April 2007 on the public file of the interim review of the countervailing duties on wire, rope and cable from Usha Martin in India. The Commission has not undertaken any original countervailing investigations since its establishment.
81 See Brink 2008 THRHR 255 265–267 for a discussion on the preliminary investigation procedures in anti-dumping investigations.
82 CVR 33.2. Note the difference from the duration of provisional payments in anti-dumping cases (six months that may be further extended). This results from an anomaly between a 7.4 of the Anti-Dumping Agreement and a 17.4 of the SCM Agreement.
5 3 Final investigation

The final investigation phase is identical to that of an anti-dumping investigation. The essential facts letter sets out all relevant issues of law and fact that the Commission will take into consideration in its final determination. Parties have seven days to comment on the essential facts letter, which comments are incorporated into the investigating officers’ final submission to the Commissioners. This is used as the basis for the final determination in the form of a recommendation to the Minister of Trade and Industry. If the Minister of Trade and Industry accepts the Commission’s recommendation that definitive countervailing duties be imposed, he requests the Minister of Finance to impose the requisite duties. The Minister of Finance, in turn, will instruct SARS to implement the duties. If a negative final determination is made, the Commission, after acceptance of the recommendation by the Minister, will publish a notice to this effect in the Government Gazette. Once the final determination has been published in the Government Gazette the Commission will issue its final report to all interested parties and publish the report on its website.

6 REVIEWS

The same reviews that are provided for in anti-dumping investigations are provided for in countervailing reviews. Virtually the same procedures are also applied in interim, sunset and new shipper reviews as in the corresponding anti-dumping reviews and the same applies to judicial reviews, although no countervailing determinations have been taken on judicial review to date. The minor differences between interim and sunset reviews of countervailing and anti-dumping duties are discussed in the next paragraph. The only other differences relate to anti-circumvention reviews, which are discussed thereafter.

6 1 Interim and sunset reviews

In an interim and a sunset review the Commission is required to determine the likelihood that subsidised exports will continue or recur if the countervailing duties were to be removed. In the only interim review and the only substantive sunset review of countervailing duties to date, which reviews related to the same product and parties and were for all practical purposes conducted concurrently, the Commission decided that it would not consider the likelihood of a recurrence of subsidised exports, but only whether there was a likelihood that there would be a recurrence of exports using the same subsidies as were countervailed following the original investigation. This follows despite the provision in

83 See Brink 2008 THRHR 255 267 for the final investigation procedures in anti-dumping investigations.
84 Note that in terms of CVR 37.1 the Commission will only issue an essential facts letter “provided there has been a change in the facts to be considered since the Commission issued its preliminary determination”.
85 See Brink 2008 THRHR 255 267–270 for a discussion of the anti-dumping review process.
86 Both reviews related to wire, ropes and cables imported from India. The interim review was initiated on 19 January 2007 per N 24 in GG 29535, while the sunset review application had to be submitted by 28 February 2007.
87 See eg para 3 of the essential facts letter dated 5 June 2007 in the interim review of the countervailing duties on wire, rope and cable from India, in which the Commission ind-
CVR 59.2 that the Commission’s recommendation “may result in the withdrawal, amendment or reconfirmation of the original countervailing duty” in sunset reviews and the specific provision in CVR 47.2 that “[t]he Commission may increase, decrease or confirm the scope of the application of such countervailing duty” in interim reviews (emphasis added).

Accordingly, in terms of the Commission’s current practice, the domestic industry would have to wait until it experienced material injury as a result of subsidies other than those originally countervailed before it can lodge an application that the new subsidies be countervailed. This position is highly unsatisfactory.

6 2 Anti-circumvention reviews

Anti-circumvention reviews are provided for in CVR 60 to 63, but are not provided for in the SCM Agreement. The domestic industry may request an anti-circumvention review in cases where it finds that the exporter is absorbing the countervailing duty, where assembly of the countervailed product takes place in a third country or in SACU, or where the product has been modified specifically to circumvent the duty. However, unlike in anti-dumping cases, no review can be brought in cases where supply of the subject product is moved to a related party in another country as the same subsidies do not exist in different countries. To date no anti-circumvention reviews of countervailing duties have been initiated.

As with anti-circumvention reviews of anti-dumping duties, the domestic industry is not required to submit new injury information if the application is lodged within one year of the publication of the final determination in the original investigation.

7 CONCLUSION

Countervailing action is a highly complex field of law that deals with issues of politics, economics and accountancy. The determination of the actual margin of subsidisation requires technical expertise of a high level in both the accountancy and legal fields, while the determination of injury requires economic skills. In addition, consultations must be held with the government of the exporting country regarding the application of each subsidy programme.

The process is less open to abuse by the domestic industry than the anti-dumping process, as it would be more difficult to find prima facie proof of subsidies than of dumping. However, it is more difficult for the Commission to determine whether the exporter under investigation receives additional subsidies not indicated in the application or in the exporter’s response to the questionnaire than it is to find whether dumping takes place. Accordingly, it may be difficult to countervail all subsidies received.

cated that “the Commission has no legal basis to investigate new subsidy programmes not covered in the original investigation”. This followed despite the provisions of CVR 9.6 (which requires that all subsidies be cumulated), CVR 10 (which entitles the Commission to take into consideration subsidies not alleged in the application), CVR 12 (which obliges the Commission to “determine the margin of each individual subsidy”) and arguments submitted by the South African industry indicating that both the United States International Trade Administration and the European Commission took all subsidy programmes into consideration in determining the likelihood of a recurrence of subsidised exports.
In the past and without carefully considering whether “double counting” was actually taking place, the Commission has erroneously indicated that there was no requirement for the imposition of countervailing duties where anti-dumping duties were imposed.

While little scrutiny has been given to anti-dumping action in South Africa, even less has been given to countervailing action and no judicial reviews have taken place to date. Additionally, while the Commission has conducted numerous anti-dumping investigations, it has only conducted 11 countervailing investigations since 1992 and only two substantive reviews (and no original investigations) since 2003. It therefore leaves a field of law that is ready for further development.

There is a worldwide and growing awareness of the particular vulnerability of children and of the fact that child abuse, including sexual exploitation of children, is a serious and ever-escalating problem. In South Africa, unfortunately, the extent of this problem is truly appalling. Some of the (alarming) statistics and of the factors that contribute to and exacerbate this problem have been highlighted by the South African Law Reform Commission.

To my mind, it is clear that the establishment of a legal age of consent to sexual activities – a chronological age which is a line separating “valid” and “invalid” consent – is perfectly in line with South Africa’s constitutional and international obligations. The State has a duty to protect children against sexual exploitation and the consequences thereof where such children have not reached an age at which, in the majority of cases, the child in question will have the requisite cognitive development and intellectual maturity to fully understand and appreciate the nature and consequences of sexual activities and to be able to give an informed consent to such activities. I therefore do not accept the argument that section 14(1)(b) of the Sexual Offences Act is unconstitutional in that it sets the general legal age of consent by either boys or girls to sexual intercourse and other sexual activities at higher than 12 years, even though there may be individual cases where the boy or girl in question might be capable of forming an intention and participating voluntarily in such sexual acts.

This brings me to the further constitutional question which this Court specifically drew to the attention of the parties and of the Minister before the hearing, namely whether the distinction drawn in section 14 of the Act between heterosexual and same-sex sexual activities by setting the legal age of consent at 16 and 19 years, respectively, is inconsistent with the Constitution. On the face of it, the same-sex/heterosexual legal age of consent distinction drawn in section 14 of the Act does unfairly discriminate against persons on the grounds of their sexual orientation, even when viewed in the light of the State’s constitutional and international obligations to protect young people against, inter alia, sexual exploitation.

Van Heerden JA in Geldenhuys v The State [2008] 3 All SA 8 (SCA) paras 62–64.