A nutshell guide to anti-dumping action

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OPSOMMING

'n Neutedopgids tot "anti-dumping" optrede

"Dumping" vind plaas wanneer 'n produk uitgevoer word teen minder as die normale waarde daarvan, gewoonlik die plaaslike verkoopsprys, en dui op prysdiskriminasie tussen die plaaslike en uitvoermarkte. Wanneer "dumping" wesenlike skade veroorsaak aan 'n bedryf in die invoerland, kan addisionele heffings ingestel word om die marge van "dumping" of die skade daardeur veroorsaak uit te wis, maar dusdanige optrede is aan streng maatreëls onderhewig. Hierdie artikel ondersoek die regsaspekte van toepassing op "anti-dumping" ondersoeke en die instansies daarby betrokke en voorsien die relevante omskrywings van toepassing op "anti-dumping" optrede. Die substantiewe elemente van ondersoeke word oorweeg aan die hand van praktiese voorbeelde ter bepaling van die uitvoerprys, normale waarde, billike vergelyking tussen die twee waardes en die berekening van die marge van "dumping", alvorens gekyk word na die vereistes om wesenlike skade en die verband tussen die "dumping" en die wesenlike skade te bepaal. Die verskillende prosesse van 'n ondersoek, by name die voor-inisiëringsondersoek en die voorlopige en finale ondersoek, word daarna oorweeg voordat na die verskillende hersienings tot beskikking van die betrokke partye gekyk word. Die artikel bevind dat die vakgebied nog bitter min aandag in Suid-Afrika ontvang het en dat daar ruimte vir verdere ontwikkeling is.

1 INTRODUCTION

Dumping takes place when a manufacturer exports a product at less than the price at which the same product is sold on its domestic market.[1] This indicates price discrimination between the domestic and export markets. Where dumping causes material injury to an industry in the importing country, authorities in the importing country can take action in the form of an additional customs duty to offset either the margin of dumping or the injury caused by the dumping. There are, however, stringent rules attached to the use of the anti-dumping instrument of which industries and their representatives need to be aware.

This article briefly sets out the key issues to provide an introduction to the topic, as very little has been written on anti-dumping in South Africa since the advent of the World Trade Organisation (the WTO) in 1995.[2] Such a brief note,

1 A VI of the General Agreement on Tariffs and Trade (GATT) 1994; s 1(2) of the International Trade Administration Act 71 of 2002 (the ITA Act).

2 See Petersen "Africa's dumping grounds: South Africa's struggle against unfair trade" 1996 *Boston Univ Int LJ* 375; Sibanda "The South African anti-dumping law: consistency with the GATT anti-dumping code" 2001 *CILSA* 242; Brink *Anti-dumping and countervailing investigations in South Africa: A practitioner's guide to the practices and procedures of the Board on Tariffs and Trade* (2002); De Lange *Business guide to trade remedies in*

continued on next page

however, cannot properly set out each of the issues pertaining to anti-dumping investigations and these issues will form the basis of more in-depth analysis in future.

2 LEGISLATION AND INSTITUTIONS

2 1 Legal framework[3]

In 1914 South Africa became the fourth country after Canada, Australia and New Zealand to promulgate anti-dumping legislation.[4] In 1992 the South African anti-dumping process was transformed when a specialist unit was set up to deal with all anti-dumping investigations,[5] whereas previously different sections within the Department of Trade and Industry dealt with investigations relating to the products such section had responsibility for. Until 2002 the Board on Tariffs and Trade Act[6] and chapter VI of the Customs and Excise Act[7] were the only applicable legislation.

The International Trade Administration (ITA) Act was promulgated in 2003 and revoked *inter alia* the BTT Act. The ITA Act makes provision for trade remedy investigations (anti-dumping, countervailing and safeguard investigations), tariff applications (increases and decreases in customs duties and rebate provisions) and import and export control. As regards anti-dumping, it authorises the International Trade Administration Commission (the Commission) to conduct investigations, defines dumping, export price and normal value, provides for the treatment of non-market economy countries, a fair comparison between the export price and the normal value and for confidentiality. The Customs Act provides for the imposition of provisional anti-dumping payments (duties) on request by the Commission and for the imposition of definitive anti-dumping duties on request by the Minister of Trade and Industry.

The anti-dumping regulations (ADR), promulgated in 2003,[8] consist of 68 sections in five parts[9] and provide for the substantive and procedural aspects of anti-dumping investigations from receipt of an application to the publication of the final report.

South Africa and the Southern African Customs Union: Anti-dumping, countervailing and safeguards legislation, practices and procedures (2003); Brink *A theoretical framework for South African anti-dumping law* (LLD thesis UP 2004), "The 10 major problems with the anti-dumping instrument in South Africa' in 2005 (1) *J of World Trade* 147, "Proposed amendments to the anti-dumping regulations: Are the amendments in order?" Tralac Working Paper 21/2006, "Dumping and injury margin calculations methods: Ten major problems in South Africa" 2007 (1) *Global Trade and Customs J* 59; Brink and Kobayashi "Anti-dumping in South Africa" in Nakagawa *Antidumping laws and practices of the new users* (2007) 203–245.

3 See Brink (2004) 19–45 690–739 for a more detailed discussion of the legislative history and the sources of anti-dumping law in South Africa.

4 S 8(1) of the Customs Tariff Act 26 of 1914. See also Basson *Ontwrigtende mededinging in Suid-Afrika se invoerhandel met spesifieke verwysing na dumping* (1980) 94; Brink (2002) 2. Note, however, that anti-dumping action against bounties (subsidies) granted by foreign governments on sugar exported to South Africa dates back to 1903 – see Basson (1980) 94.

5 Brink (2002) 5.

6 107 of 1986 (the BTT Act).

7 91 of 1964 (the Customs Act).

8 GN3197 in *GG* 25684 of 14 November 2003.

9 See Brink (2004) 711–720 for a detailed analysis of the outlay of the ADR.

Since South Africa is a WTO Member, the relevant WTO Agreements also apply to anti-dumping investigations.[10] In this regard, cognisance must be taken of Article VI of the General Agreement on Tariffs and Trade (GATT) 1994 and of the Agreement on Implementation of Article VI of GATT 1994 (the Anti-Dumping Agreement).

2 2 Institutions

A number of institutions play an important role in anti-dumping investigations. The most important of these is the Commission, which is the independent authority[11] to which all anti-dumping applications must be submitted.[12] The Commission is responsible for all investigative aspects of the process, as will be shown in greater detail in paragraph 5 below. If the Commission makes a preliminary determination that dumping is causing material injury, it will request the Commissioner for the South African Revenue Service (SARS) to impose a provisional payment in the amount and for the period requested by the Commission.[13]

Once the Commission has made an affirmative final determination, it will recommend to the Minister of Trade and Industry that an anti-dumping duty be imposed. The Minister of Trade and Industry will then request the Minister of Finance to impose the applicable anti-dumping duty.[14] In terms of the ITA Act, however, all final recommendations should be made to the Southern African Customs Union (SACU) Tariff Board, which, in turn, will make a recommendation to the SACU Council of Ministers. 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 anti-dumping decisions on behalf of all SACU Members.

3 DEFINITIONS

To understand anti-dumping action, it is essential to understand anti-dumping terminology. No action can be taken unless it is shown that dumping is taking place. Dumping is defined as taking place where the exporter from a foreign country exports a product to the Common Customs Area of SACU at a price lower than its normal value,[15] while normal value is usually defined as the selling price in the exporting country.[16] Where the like product is not sold in the exporting country or is not sold in significant quantities in the ordinary course of trade,[17] the normal value may be determined on the basis of either the constructed normal value,[18] that is, a cost and price build-up of the like product when sold for domestic consumption in the exporting country, or on the basis of the highest comparable export price to an appropriate third country.[19]

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10 See *Degussa v International Trade Administration Commission* unrep case 22264/2007 (T).
11 S 7(2)(a) of the ITA Act.
12 S 26(1)(c)(i).
13 S 57A(1) of the Customs Act.
14 Ss 55(2) and 56(1).
15 S 1(2) of the ITA Act; a VI.1 of GATT 1994.
16 S 32(2)(b)(i) of the ITA Act; a 2.2 of the Anti-Dumping Agreement.
17 ADR 8.2; aa 2.1 and 2.2 of the Anti-Dumping Agreement.
18 S 32(2)(b)(ii)(aa) of the ITA Act.
19 S 32(2)(b)(ii)(bb). Note that the order of these two alternatives has been reversed in the ITA Act from the Anti-Dumping Agreement, indicating that a hierarchy exists.

In addition, it must be shown that the domestic industry is experiencing material injury as a result of the dumping.[20] This consists of two separate issues, being material injury and the causal link between the dumping and the injury. Material injury is not defined in either the ITA Act or the ADR, while there is also no definition in article VI of GATT 1994 or in the Anti-Dumping Agreement. The United States of America defines material injury as "harm which is not inconsequential, immaterial, or unimportant".[21] Material injury can be established as actual and present injury, a threat of injury or the material retardation of the establishment of an industry.[22] In determining whether the domestic industry is experiencing material injury, the Commission has to consider up to 19 injury factors, including the volume of dumped imports, the domestic industry's prices, sales and production volumes, market share and employment. Once it has been established that the domestic industry is suffering material injury, it has to be shown that the injury is caused by the dumping and not by other factors.

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,[23] 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.[24] In determining whether the SACU product is a like product to the imported product, the Commission will consider factors such as raw materials and other inputs used, the production process used, the product's physical characteristics and appearance, the tariff subheading under which the product is classifiable and the end-use and substitutability of the products.[25]

4 SUBSTANTIVE ELEMENTS

4 1 Export price[26]

The first step in any anti-dumping investigation should be the determination of the export price.[27] This follows from the fact that the exported product is the product under investigation and that all comparisons should therefore be made to this product and its price. Export price is normally defined in the ITA Act as "the price actually paid or payable for goods sold for export, net of all taxes, discounts and rebates actually granted and directly related to that sale".[28]

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20 A 3 of the Anti-Dumping Agreement.
21 S 771(7)(A) of the Tariff Act of 1930 (19 USC 1677(7)(A)). According to Hufbauer and Erb *Subsidies in international trade* (1984) 24–33 this wording was chosen with care "both to erect a barrier against *de minimis* cases and to avoid placing an undue burden of proof on an injured industry. This language reflects legislative efforts both to comport with the code and to ensure that the newly legislated material injury test did not significantly increase the US trade-impact standard. As a result, the language leaves large gray areas for case-by-case interpretation".
22 ADR 13–15; a 3 of the Anti-Dumping Agreement.
23 ADR 7; aa 4.1 and 5.4 of the Anti-Dumping Agreement.
24 ADR 1; a 2.6 of the Anti-Dumping Agreement.
25 ADR 1.
26 See Brink (2004) 808–817 for a detailed discussion of export price.
27 Note that in practice the Commission first determines the normal value and then the export price.
28 S 32(2)(a) of the ITA Act. In cases of sales to related parties, export price will be defined differently: see s 32(5).

The export price has to be determined separately for each model under investigation. Thus, if the investigation is into the alleged dumping 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. Table 1 below sets out the basic information to be submitted by an exporter, while Table 2 indicates the calculated export prices for each model (prior to adjustments being made).

Table 1: Export price information submitted by exporter

Date	Invoice	Model	Customer	Volume	Unit price	Total value
20070118	901428	165/80R13	JAMW1	1 500	$17.95	$26,925.00
20070118	901428	165/80R14	JAMW1	2 000	$19.95	$39,900.00
20070118	901428	165/80R15	JAMW1	500	$22.95	$11,475.00
20070128	901442	165/80R13	JAMW2	500	$19.95	$9,975.00
20070128	901442	165/80R13	JAMW2	500	$19.95	$9,975.00
20070128	901442	165/80R14	JAMW2	1 000	$22.95	$22,950.00
20070128	901442	165/80R14	JAMW2	1 000	$22.95	$22,950.00
20070128	901442	165/80R15	JAMW2	500	$25.95	$12,975.00
20070128	901442	165/80R15	JAMW2	500	$25.95	$12,975.00
20070128	901443	165/80R13	JAMW3	800	$20.50	$16,400.00
20070128	901443	165/80R14	JAMW3	600	$23.50	$14,100.00
20070128	901443	165/80R15	JAMW3	400	$26.50	$10,600.00

Table 2: Export price by model

Model	Customer	Volume	Unit price	Total value	Exchange rate	Export price
165/80R13	JAMW1	1 500	$17.95	$26,925.00	31.4817	kr 565.10
165/80R13	JAMW2	500	$19.95	$9,975.00	31.4817	kr 628.06
165/80R13	JAMW2	500	$19.95	$9,975.00	31.4817	kr 628.06
165/80R13	JAMW3	800	$20.50	$16,400.00	31.4817	kr 645.37
Total		3 300	$19.17	$63,275.00	31.4817	kr 603.64
165/80R14	JAMW1	2 000	$19.95	$39,900.00	31.4817	kr 628.06
165/80R14	JAMW2	1 000	$22.95	$22,950.00	31.4817	kr 722.51
165/80R14	JAMW2	1 000	$22.95	$22,950.00	31.4817	kr 722.51
165/80R14	JAMW3	600	$23.50	$14,100.00	31.4817	kr 739.82
Total		4 600	$21.72	$99,900.00	31.4817	kr 683.70
165/80R15	JAMW1	500	$22.95	$11,475.00	31.4817	kr 722.51
165/80R15	JAMW2	500	$25.95	$12,975.00	31.4817	kr 816.95
165/80R15	JAMW2	500	$25.95	$12,975.00	31.4817	kr 816.95
165/80R15	JAMW3	400	$26.50	$10,600.00	31.4817	kr 834.27
Total		1 900	$25.28	$48,025.00	31.4817	kr 795.74

As indicated in Table 2, the determination of the export price also requires that the export price be calculated in the same currency as domestic sales.

4 2 Normal value[29]

Once the export price has been calculated, the normal value must be calculated for the same models. Domestic sales of models not exported to SACU are normally irrelevant for anti-dumping investigation purposes.[30] The exporter will have to submit domestic sales information in the same format as export sales information. Table 3 sets out the basic information to be submitted, while Table 4 sets out the calculated weighted average normal value for each model.

Table 3: Domestic sales information submitted by exporter

Date	Invoice	Model	Customer	Volume	Unit price	Total value
20070102	901412	165/80R13	DW1	438	kr 714.90	kr 313,126.20
20070102	901412	165/80R15	DW1	238	kr 849.70	kr 202,228.60
20070102	901413	165/80R14	DW2	664	kr 789.50	kr 524,228.00
20070107	901422	165/80R14	DO1	1 250	kr 709.50	kr 886,875.00
20070107	901422	165/80R15	DO1	1 250	kr 764.70	kr 955,875.00
20070112	901429	165/80R14	DRW1	560	kr 669.60	kr 442,120.00
20070112	901430	165/80R14	DW3	436	kr 789.50	kr 344,222.00
20070120	901438	165/80R13	DW1	176	kr 714.90	kr 125,822.40
20070120	901438	165/80R14	DW1	1 490	kr 737.50	kr 1,098,875.00
20070124	901447	165/80R14	DW2	1 350	kr 789.50	kr 1,065,825.00
20070124	901447	165/80R15	DW2	109	kr 854.70	kr 93,162.30
20070128	901468	165/80R13	DW1	440	kr 714.90	kr 314,556.00
20070128	901468	165/80R14	DW1	1 450	kr 737.50	kr 1,069,375.00
20070128	901468	165/80R15	DW1	291	kr 849.70	kr 247,262.70

Table 4: Domestic selling price by model

Model	Customer	Volume	Unit price	Total value
165/80R13	DW1	438	kr 714.90	kr 313,126.20
165/80R13	DW1	176	kr 714.90	kr 125,822.40
165/80R13	DW1	440	kr 714.90	kr 314,556.00
Total		1 054	kr 714.90	kr 753,504.60
165/80R14	DW2	664	kr 789.50	kr 524,228.00
165/80R14	DO1	1 250	kr 709.50	kr 886,875.00
165/80R14	DRW1	560	kr 669.60	kr 442,120.00
165/80R14	DW3	436	kr 789.50	kr 344,222.00
165/80R14	DW1	1 490	kr 737.50	kr 1,098,875.00
165/80R14	DW2	1 350	kr 789.50	kr 1,065,825.00
165/80R14	DW1	1 450	kr 737.50	kr 1,069,375.00
Total		7 200	kr 754.38	kr 5,431,520.00

29 See Brink (2004) 763–808 for a detailed discussion of normal value.

30 Other models may become relevant if the same models exported to SACU were not sold domestically. In such cases the Commission may use domestic sales of the model most closely resembling the exported model, but it has to make the adjustments for the differences to properly compare the domestically sold and exported products.

Model	Customer	Volume	Unit price	Total value
165/80R15	DW1	238	kr 849.70	kr 202,228.60
165/80R15	DO1	1 250	kr 764.70	kr 955,875.00
165/80R15	DW2	109	kr 854.70	kr 93,162.30
165/80R15	DW1	291	kr 849.70	kr 247,262.70
Total		1 888	kr 793.71	kr 1,498,528.60

4 3 Fair comparison[31]

While the information in Table 4 indicates that the domestic selling prices for two models (165/80R13 and 165/80R14) are significantly higher than the corresponding export prices, this does not necessarily indicate that dumping is taking place. The ITA Act, the ADR and the AD Agreement all require that a "fair comparison" must be made between the domestic selling price and the export price.[32] This requires that adjustments must be made to properly compare the prices to each other, including for differences in physical characteristics, taxes and terms and conditions of trade. For purposes of this brief note the following adjustments are considered: A domestic tyre disposal tax of kr50/unit; payment terms of 30 days on domestic sales and 120 days on export sales (both at 12% interest); and rebates of 2%, 2.5% and 5% for domestic customers DW1, DW2 and DW3, respectively.

The export price will be reduced by 4% (120 days at 12%). This will render net export price of kr579.49, kr656.35 and kr763.91 for the 165/80R13, 165/80R14 and 165/80R15 models, respectively. The domestic price will have to be reduced by the effect of the scrap tax, payment terms and the rebates. This can be done as follows:

Table 5: Adjustments to the domestic selling price

Model	Customer	Vol	Unit price	Total gross value	Rebate	Payment terms	Scrap tax	Total net value[33]	Net unit value
165/80R13	DW1	438	kr 714.90	kr 313,126.20	kr 6,262.52	kr 3,131.26	kr 21,900.00	kr 281,832.41	kr 643.45
165/80R13	DW1	176	kr 714.90	kr 125,822.40	kr 2,516.45	kr 1,258.22	kr 8,800.00	kr 113,247.73	kr 643.45
165/80R13	DW1	440	kr 714.90	kr 314,556.00	kr 6,291.12	kr 3,145.56	kr 22,000.00	kr 283,119.32	kr 643.45
		1054	kr 714.90	kr 753,504.60	kr 15,070.09	kr 7,535.05	kr 52,700.00	kr 678,199.46	kr 643.45
165/80R14	DW2	664	kr 789.50	kr 524,228.00	kr 13,105.70	kr 5,242.28	kr 33,200.00	kr 472,680.02	kr 711.87
165/80R14	DO1	1250	kr 709.50	kr 886,875.00	kr 0.00	kr 8,868.75	kr 62,500.00	kr 815,506.25	kr 652.41
165/80R14	DRW1	560	kr 669.60	kr 442,120.00	kr 0.00	kr 4,421.20	kr 28,000.00	kr 409,698.80	kr 731.61
165/80R14	DW3	436	kr 789.50	kr 344,222.00	kr 17,211.10	kr 3,442.22	kr 21,800.00	kr 301,768.68	kr 692.13
165/80R14	DW1	1490	kr 737.50	kr 1,098,875.00	kr 21,977.50	kr 10,988.75	kr 74,500.00	kr 991,408.75	kr 665.38
165/80R14	DW2	1350	kr 789.50	kr 1,065,825.00	kr 26,645.63	kr 10,658.25	kr 67,500.00	kr 961,021.13	kr 711.87

31 See Brink (2004) 817–828 for a detailed discussion of adjustments and the requirements of a fair comparison.

32 S 32(3) of the ITA Act; ADR 11; a 2.4 of the Anti-Dumping Agreement.

33 The rebate was determined by multiplying the applicable rebate percentage for each client by the total gross value, payment terms were determined by multiplying the gross value by 1% (30 days at 12%) and the scrap tax was determined by multiplying the volume of sales by the tax per unit. The total net value was determined by deducting each of the 3 adjustments from the gross value. All calculations were done on a transaction-by-transaction basis.

Model	Customer	Vol	Unit price	Total gross value	Rebate	Payment terms	Scrap tax	Total net value[33]	Net unit value
165/80R14	DW1	1450	kr 737.50	kr 1,069,375.00	kr 21,387.50	kr 10,693.75	kr 72,500.00	kr 964,793.75	kr 665.38
		7200	kr 754.38	kr 5,431,520.00	kr 100,327.43	kr 54,315.20	kr 360,000.00	kr 4,916,877.38	kr 682.90
165/80R15	DW1	238	kr 849.70	kr 202,228.60	kr 4,044.57	kr 2,022.29	kr 11,900.00	kr 184,261.74	kr 774.21
165/80R15	DO1	1250	kr 764.70	kr 955,875.00	kr 0.00	kr 9,558.75	kr 62,500.00	kr 883,816.25	kr 707.05
165/80R15	DW2	109	kr 854.70	kr 93,162.30	kr 2,329.06	kr 931.62	kr 5,450.00	kr 84,451.62	kr 774.79
165/80R15	DW1	291	kr 849.70	kr 247,262.70	kr 4,945.25	kr 2,472.63	kr 14,550.00	kr 225,294.82	kr 774.21
		1888	kr 793.71	kr 1,498,528.60	kr 11,318.88	kr 14,985.29	kr 94,400.00	kr 1,377,824.43	kr 729.78

The values indicated in bold print in Table 5 are the normal values, that is, the domestic selling prices after all adjustments have been made.

4 4 Margin of dumping[34]

The margin of dumping is the difference between the normal value and the net export price. However, this has to be determined for the product as a whole. In cases where there are different models, the margin of dumping has to be determined separately for each model, whence the weighted average margin will be determined by weighting the margins so calculated with the export volume for each model. Table 6 sets out the calculations.

Table 6: Margin of dumping calculations

	165/80R13	165/80R14	165/80R15	Total
Normal value	kr 643.45	kr 682.90	kr 729.78	
Export price	kr 579.49	kr 656.35	kr 763.91	
Margin of dumping	kr 63.96	kr 26.55	-kr 34.13	
Margin of dumping %	11.04%	4.04%	-4.47%	
Export volume	3,300	4,600	1,900	9,800
Weighted margin[35]	3.72%	1.90%	-0.87%	4.75%

While the margins of dumping for the three models are 11.04%, 4.04% and –4.47%, respectively, the weighted average margin of dumping can be calculated to be 4.75%. This is the anti-dumping duty that will be applied to all three models.[36]

4 5 Material injury[37]

Determining material injury to the domestic industry producing the like product to the imported product is the second leg of the anti-dumping investigation. The

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34 See Brink (2004) 828–836 for a detailed discussion of the calculation of the margin of dumping.

35 The weighted average margin of dumping is determined by multiplying the ratio that the export volume of the specific model represents of the total export volume by the margin of dumping determined for the specific model, that is, 11.04% x 3,330/9,800 = 3.72% in the case of the 165/80R13. The weighted average margin of dumping is then determined by adding the individual relative margins.

36 Note that the anti-dumping duty may never be higher than this level, but may be lower if the margin of injury is smaller.

37 See Brink (2004) 836–858 for a detailed discussion on material injury. See also Black "Dumping and 'material injury': a theoretical note" 2005 (3) *SA J of Economics* 363.

Commission must find that the domestic industry is experiencing material injury in the form of actual and present injury, a threat of material injury or the material retardation of the establishment of an industry, before it can recommend the imposition of anti-dumping duties.[38]

Although there are 19 injury factors under article 3 of the AD Agreement and 15 injury factors under ADR 13,[39] and despite both the ADR and the AD Agreement indicating that no one or several of the factors can give decisive guidance, two factors normally play a critical role in the determination. Industries can either experience price injury[40] or volume injury or a combination thereof. Thus, in the face of dumped import competition, the industry can either reduce prices to maintain volumes, thereby decreasing its profit margin, or it can hold prices and lose volumes, thereby also experiencing reduced profit. In some cases the domestic industry may have to reduce prices and still experience reduced sales volumes. Price suppression, that is, the inability to increase prices to the same extent as cost increases,[41] may be a factor of both price reductions and volume reductions, as a volume reduction often has an effect on per unit production cost. If volumes are reduced, this may have an effect, *inter alia*, on output, employment, wages, inventories, market share, growth and cash flow. A reduction in price may not affect as many factors negatively, but may still impact on profit, return on investment and wages. The Commission's predecessor, the Board, held in at least one instance that "the factors that were determinative were *price undercutting*, *price depression* and *declining profits* and the fact that the petitioner had to lower its prices in order to maintain market share".[42] On the other hand the Board has found injury in one instance where the domestic industry increased prices, volume and profits, yet lost a significant portion of the market to imports, as the market was growing at a significant rate and the domestic industry did not experience the same growth as that of the market.[43]

Some of the injury factors may be confusing, as an increased inventory can indicate the industry's inability to sell its production, while a decreased inventory can indicate that the industry has maintained stock for a specified period, for

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38 Note that there is no requirement of material injury in the ITA Act. While ADR 13 sets out the injury factors to be considered in the determination of material injury, it also fails to require that the domestic industry must experience material injury. Accordingly, this is only a requirement in terms of a 3 of the AD Agreement, but it has always been applied by the Commission and its predecessor, the Board.

39 A 3 of the AD Agreement provides for the volume of imports, price undercutting, the margin of dumping and factors affecting domestic prices as injury factors, while these are only included in ADR 16 as causality factors. It is submitted that these are not factors that indicate whether the domestic industry is experiencing material injury but rather points to the cause of injury. The 15 factors listed in ADR 13 are price suppression, price depression, decreased sales volume, decreased profit or increased loss, decreased output, decreased market share, decreased productivity, decreased return on investments, decreased capacity utilisation, decreased cash flow, changes in inventories, decreased employment, decreased wages, lack of growth and the inability to raise capital or investments.

40 Brink (2002) 141 indicates that "[u]nless the Board finds that prices decreased in line with costs the Board will view a positive finding of price depression as an absolute indication of material injury".

41 See ADR 1.

42 *Rhône Poulenc v Chairman of the Board on Tariffs and Trade* case no 98/6589 (T) 37 (emphasis added).

43 *Board report 4029: Investigation into the alleged dumping of single-mode optical fibre cable originating in or imported from South Korea: final determination (27/03/2000).*

example, for two weeks. Likewise, decreased capacity utilisation can be the result of either decreased production or increased capacity, while productivity is dependent on both employment and production figures.

A domestic industry must show that the injury is *material*, but this has never been defined.[44] In safeguard investigations the injury must be *serious*, which is a higher standard than material injury. Considering that a margin of dumping is regarded as *de minimis* if it is less than 2%, it may be argued that any change in an injury factor of more than 2% should be regarded as material, but this has not yet been tested. ITAC will consider all injury factors and make a single injury finding, that is, whether all factors when considered together indicates the presence of material injury or a threat thereof.[45]

4 6 Causality[46]

Before the Commission may recommend the imposition of anti-dumping duties, it must find that the material injury is caused by the dumped imports. As with material injury, two factors normally provide decisive guidance: (a) whether the landed cost of the imported product is lower than the ex-factory price of the domestic industry; and (b) whether the domestic industry has lost market share to the dumped products.

The analysis, however, needs to go further and each injury factor should be analysed to determine the reason for the trend identified, for example, whether capacity utilisation decreased as a result of increased capacity or whether worker productivity increased owing to the industry retrenching staff. Once all injury factors have been so analysed, the Commission must also consider all other factors contributing to the domestic industry's injury. This is called the non-attribution principle.[47] This would normally include at least an analysis of the volume and prices of undumped products, technological changes, product range and customer service. Whereas the appellate body of the WTO has held that injury caused by such other factors should not be attributed to the dumping, the Commission will typically find that the link between dumping and injury is broken once a significant proportion of the injury is caused by factors other than dumping, that is, it will not impose anti-dumping duties to prevent the injury actually caused by the dumping. Accordingly, if the margin of dumping is found to be 20%, but the margin of price disadvantage is 50%, the Commission will find that the industry will experience injury even if anti-dumping duties were imposed. It will then terminate the investigation,[48] rather than impose anti-dumping duties of 20% to protect the industry against that part of the injury caused by unfair international trade practices.

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44 In the USA material injury is defined as "harm which is not inconsequential, immaterial, or unimportant". See s 771(7)(A) of the Tariff Act of 1930 (19 USC 1677(7)(A)).

45 ITAC has only dealt with material retardation of the establishment of an industry on one occasion – see *Commission report 82: Investigation into the alleged dumping of forged or stamped, but not further worked, grinding balls or similar articles for mills originating in or imported from the People's Republic of China (PRC): final determination (02/11/2004)* 71.

46 See Brink (2004) 858–863 for a detailed discussion of causality.

47 WTO *United States – definitive safeguard measures on imports of wheat gluten from the European Communities* WT/DS166/R (31 July 2000) para 8.128.

48 See eg *Commission report 184: Investigation into the alleged dumping of toughened glass for incorporation in vehicles originating in or imported from the People's Republic of China: final determination (06/09/2006)* 20–23.

5 PROCEDURAL REQUIREMENTS[49]

5 1 Application and merit evaluation

Any domestic industry may approach the Commission at any stage with an anti-dumping application. The application must be made by or on behalf of the domestic industry, which means that manufacturers representing at least 25% of the total production volume of the product must supply the necessary information. In addition, at least 50% of the manufacturers by production volume that express an opinion on the application must support the application.[50] The Commission, however, now proposes to require at least 50% of the manufacturers by production volume to submit information and to request all manufacturers individually accounting for 35% or more of production volume to provide the required information.[51] This is ostensibly done to ensure that injury experienced by one manufacturer is caused by the dumped imports and not by another manufacturer.[52]

Parties must submit a properly documented application.[53] This requires the applicant to submit such information as is reasonably available to it, including information relating to normal values, export prices and injury.[54] 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 situ*.[55] The investigating officers will then write a merit submission to the Commissioners for their consideration. If the Commission finds that the application establishes a *prima facie* case of injurious dumping it will inform the trade representatives of the countries under investigation prior to initiation.[56] 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

Once an investigation has been initiated through publication of an initiation notice in the *Government Gazette*, the Commission directly informs all known interested parties and supplies them with a copy of the initiation notice, the non-confidential version of the application and the relevant questionnaire to be completed. These parties will receive 37 days from the date of the letter to complete the questionnaires and submit any comments on the application.[57] All parties not directly informed of the investigation will have 40 days to submit comments.[58]

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49 See Brink (2004) 863–901 for a more detailed discussion of ITAC's procedures.
50 ADR 7.3; AD Agreement a 5.4.
51 Proposed ADR 15.2 and 15.3, as published in N1606 of 2006 in *GG* 29382 of 10 November 2006.
52 Note that this point is currently one of the issues in dispute in *African Explosives Ltd v International Trade Administration Commission* (ongoing case 15027/06 (T)).
53 ADR 21 and 22.
54 ADR 23 and 24.
55 ADR 18 and 25.
56 ADR 26 and 27.
57 ADR 29.2 and 29.3.
58 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.

Parties may request an extension,[59] but the Commission will rarely grant an extension of more than 14 days.

Once the exporters' and importers' submissions have been received, the Commission studies the responses to determine whether there are any deficiencies in the responses. This includes failure to provide proper non-confidential versions of all submissions, the failure to answer all questions or the failure to attach the necessary supporting documents. This process normally takes between one and three weeks, depending on the workload of the specific investigating officers and the complexity of the specific investigation. Once the deficiencies have been identified, the Commission sends 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.[60]

Once the Commission is satisfied that it has received all the relevant information from the parties it proceeds to verify the importers' and the exporters' information *in situ*.[61] The purpose of the verification is to determine the accuracy and completeness of the information submitted. Following verification, the Commission issues a verification letter to the specific party that it pertains to and places a non-confidential version thereof on the public file.[62] The verification letter should set out the exact information verified, the process followed during verification and should list all documents retained during verification, including a list indicating the confidentiality status of each document so retained. In practice, however, most verification reports are meaningless and only indicate that domestic sales, export sales and costs were verified, without providing any indication as to how the process was conducted or which documents were scrutinised.

Once the verification visits have been completed, the investigating officers prepare another submission to the Commissioners for their consideration. This is for the preliminary determination, where the Commission decides whether provisional payments should be imposed or not. If the Commission makes an affirmative preliminary determination, that is, it finds injurious dumping, it normally[63] requests SARS to impose a provisional payment in the amount of either the margin of dumping or the margin of injury, whichever is the lower, for a period of six months.[64] If the Commission makes a negative preliminary determination it

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59 ADR 31.1.

60 ADR 32.

61 ADR 18.1 and 18.2. Note that the verification order is sometimes turned around and that the exporter's information may be verified prior to that of the importer. This happened most recently in the *Door locks* sunset review in 2007 (still ongoing at the time of the submission of this article).

62 ADR 19.1 and 19.2.

63 In the *Paperboard (Korea)* investigation the Commission refused to request the imposition of a provisional payment despite finding injurious dumping on the basis that it would be detrimental to the downstream industry. The downstream industry, however, had not made any submissions in the investigation, raising serious questions as to the Commission's rationale for not requesting provisional payments. See *Commission report 152: Investigation into the alleged dumping of paper and paperboard with a mass of 180g/m^2 or more, but not exceeding 550 g/m^2, coated on one side with kaolin clay, commonly known as "white liner" or "grey backed paperboard", originating in or imported from the Republic of Korea: Preliminary determination (14/02/2006).*

64 ADR 33.2.

publishes a notice to this effect in the *Government Gazette*. The Commission issues 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.

5 3 Final investigation

All interested parties are granted 14 days to comment on the report, but may not submit any new information.[65] Parties may request an extension for the submission of their comments, but such motivated request must reach the Commission at least seven days before the deadline for comments.[66] The Commission should[67] take all comments into consideration for its essential facts finding, which is essentially a pre-final determination. In the essential facts letter the Commission is required to set out all relevant issues of law and fact that it will take into consideration in its final determination. The letter often indicates only those facts that have changed since the preliminary determination, indicating that the other facts have remained unchanged. Parties have seven days to comment on the essential facts letter. Although the ADR specifically refer to an essential facts letter in the singular, the Commission has recently started to issue multiple essential facts letters in investigations and reviews, following challenges to the facts in each case. This has created uncertainty, as parties do not know whether the letter sets out the facts that will actually be taken into consideration. It also causes serious delays in finalising investigations, which is of great concern to all interested parties, as uncertainty exists in the market as long as the investigation is ongoing.

As soon as parties have commented on the essential facts letter, the investigating officers prepare a final submission to the Commissioners. This is used as the basis for the final determination. Contrary to the provisions of the ITA Act, the final determination is in the form of a recommendation to the Minister of Trade and Industry. The recommendation is made via the offices of the Director-General and the Deputy Minister. If the Minister of Trade and Industry accepts the Commission's recommendation that definitive anti-dumping 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. The process to implement definitive duties after the Commission has made its final determination therefore takes anywhere from four to eight weeks, depending on the availability of all key persons. Once the final determination has been published in the *Government Gazette*, the Commission issues its final report to all interested parties. It also publishes the report on its website.[68]

6 REVIEWS

Anti-dumping duties cannot remain in place indefinitely and parties may utilise various types of review, being interim (or changed circumstances) reviews,

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65 ADR 35.1.
66 ADR 35.3.
67 Despite the requirement of ADR 34.2(k), preliminary reports, essential facts letters and final reports seldom deal with all pertinent issues of law and fact that served before the Commission. This is a serious shortcoming that the Commission should address as a matter of urgency. See Brink (2005) 149.
68 www.itac.org.za.

sunset (or expiry) reviews, anti-circumvention reviews and new shipper reviews. Each of these reviews has its own procedures and purpose.

6 1 Interim (changed circumstances) reviews

At least one year after the imposition of anti-dumping duties, an interested party may request an interim review of the duties to determine whether the duties cannot be decreased or removed or whether such duties should be increased. Parties requesting the decrease or removal of anti-dumping duties must indicate the changed circumstances that have led to the request for a review. This cannot include that a party that did not co-operate during the original investigation is now willing to co-operate.[69]

The basic process for a changed circumstances review is similar to that of an original investigation, except that there is no preliminary determination and that parties receive 14 days, rather than only seven, to comment on the essential facts letter.[70] If the application is lodged by an exporter, the Commission will not verify its information prior to initiation, but only thereafter. The review may result in the maintenance, increase, decrease or removal of the anti-dumping duties. Although the ADR provides that a review may also consider the scope of the application of anti-dumping duties, the Commission in practice only considers narrowing the scope of the duties and never extending the scope. This is contrary to international best practice and may cause problems where there may be slight changes to a product, especially if circumvention of the duties cannot be proven.

6 2 Sunset (expiry) reviews

Anti-dumping duties may only remain in place for a period not exceeding five years from imposition or the last substantive review thereof. The five years are counted from the imposition of the definitive duty and not the applicable date therefor. Thus, if duties were imposed retroactively to the date of the provisional payments, the duties may effectively remain in place for a period of five years and six months.

In May each year the Commission publishes a list of all anti-dumping duties due to expire in the following calendar year.[71] The domestic industry then has 30 days to indicate whether it will request a sunset review for the maintenance of the duties. If the industry does not respond or if it indicates that the duties are no longer required, the duties will lapse five years after imposition thereof. If the industry indicates that it will request a sunset review, it has to submit a proper application at least six months prior to the lapse of the duty.

Unlike the requirements in other jurisdictions,[72] where only injury information is required from the domestic industry, the Commission also requires the domestic industry to submit proof of dumping. Considering that exporters are well aware of the upcoming sunset review, this may be problematic as it may be difficult to obtain the necessary normal value information.

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69 ADR 45.2.
70 ADR 43.2.
71 Note that this is contrary to ADR 54.1, which requires the Commission to publish such a notice in respect of each anti-dumping duty separately, approximately six months before the duties are due to lapse.
72 See the requirements of the European Commission and the United States International Trade Commission, as contained in their respective domestic industry questionnaires.

The sunset review must be initiated within five years from the imposition or last substantive review of the duties, failing which the anti-dumping duties will lapse. The process followed in a sunset review is the same as in an interim review, but the anti-dumping duties remain in place until the review has been finalised.[73]

In its sunset review the Commission must determine whether there is a likelihood that both dumping and injury would continue or recur. An affirmative finding will result in the maintenance of the duty, although the level of the duty can be varied. If a negative finding is made as regards either the likelihood that dumping or injury would continue or recur, the duties are terminated.

One major difference between an interim review and a sunset review is that whereas an interim review considers the effect of changed circumstances on the existing duties, a sunset review seeks to predict what the effect on the industry would be if the duty were to be removed. The industry is therefore required not only to submit actual injury information, but also an estimate of what its sales, price, market share and the like would be if the duties were removed.

The Commission has also faced the problem that exporters have ceased exporting to South Africa following the imposition of anti-dumping duties and that no export price exists to determine whether dumping is taking place or is likely to take place. In such instances the Commission requires exporters to submit all export sales to all destinations. It will then use this information to determine which third country to use for determining the export price or it may use the average export price. This practice, however, is likely to change following a successful challenge where the high court found that the methodology applied by the Commission was "irrational" and "an obfuscation of the facts".[74]

6 3 Anti-circumvention reviews

Anti-circumvention reviews are provided for in ADR 60 to 63, but are not provided for in the Anti-Dumping Agreement. The domestic industry may request an anti-circumvention review in cases where it finds that the exporter is absorbing the anti-dumping duty, supply of the subject product is moved to a related party in another country or where the product has been modified specifically to circumvent the duty. To date the Commission has investigated the first two types of circumvention[75] and although it had received a complaint regarding the third

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73 Note that a 11.3 of the Anti-Dumping Agreement provides that the duty may remain in place "pending the outcome of the review". This appears to indicate that any anti-dumping duty has to be withdrawn retroactively to the date on which it would have lapsed but for the review if a finding is made that there is not a likelihood of a recurrence of both dumping and injury.

74 See *Algorax v International Trade Administration* unrep case 18829/2006 (T) 13–15.

75 See *Board report 4189: Review of anti-dumping duties on carbon black originating in or imported from Egypt: Final determination (14/11/2002)* and *Commission report 74: Investigation into the alleged dumping of articles of plaster or of compositions based on plaster faced or reinforced with paper or paperboard only, commonly referred to as "gypsum plasterboard", originating in or imported from Indonesia: Final determination (02/09/2004)* respectively.

type of circumvention, this was not followed by a properly documented application and was never investigated.[76]

Special provisions apply to anti-circumvention investigations and 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. In cases involving "country hopping", that is, where supply is moved to a related party in another country, the industry is also not required to submit normal value information if it can show that dumping is taking place when a comparison is made between the export price from the new supplier and the normal value established for the original supplier.

6 4 New shipper reviews

In instances where an anti-dumping duty has been imposed against a country as a whole and an exporter that did not export to South Africa during the original investigation wishes to start exporting the product to South Africa, it may request a new shipper review. It has to prove that it did not export the product during the original investigation period and that it is not related to another party that had exported during that period.

The exporter has to submit normal value information and proof of a fixed export price, for example, a standing quote, to show either that no dumping will take place or that the margin of dumping will be significantly lower than the duty in place.

If the Commission accepts the application it will request SARS via the Minister of Trade and Industry and the Minister of Finance to withdraw the anti-dumping duty in respect of the specific exporter and to replace it with a provisional payment for an indefinite period pending the finalisation of the review. The provisional payment is imposed to ensure that a definitive duty, if any, can be imposed with retroactive effect to the date on which the duty was withdrawn. The remainder of the process is the same as that for an interim review requested by an exporter.

6 5 Judicial review

ADR 64.1 specifically provides that the Commission's preliminary determinations may be taken on judicial review. There is thus no requirement to exhaust internal remedies first, provided that it can be shown that the Commission has acted in violation of the ITA Act or the ADR and that the effect of its preliminary determination cannot be made undone through an amended final determination. To date, only one preliminary determination has been taken on judicial review,[77] and the importer submitted that the Commission had erroneously initiated an application when the facts did not establish a *prima facie* case of dumping. It further submitted that the Commission's preliminary determination had the effect of a final determination. The Commission[78] settled the matter out of court and terminated the investigation.

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76 In this instance, the domestic industry complained that the anti-dumping duty on spades with a maximum width of 230mm was being circumvented through the importation of spades with a width of between 231mm and 235mm.

77 *Interwil (Pty) Ltd v Chairman, Board on Tariffs and Trade* case 19162/2001 (T) – settled out of court.

78 Then still known as the Board on Tariffs and Trade.

7 CONCLUSION

Anti-dumping is a highly complex field of law that also deals with issues of economics and accountancy. The determination of normal value, export price and the margin of dumping require technical expertise of a high level in both the accountancy and law fields, while the determination of injury requires economic skills.

The process is open to abuse by both domestic industry lodging unnecessary applications and exporters not submitting all information properly, hoping that the Commission will not discover the actual facts during its short verification visit. Anti-dumping duties should be imposed at a level sufficient to remove the injury caused by dumping, but in practice often has the effect of eliminating import competition from the specific supplier completely, as duties are set at too high a level.

Little scrutiny has been given to the subject and very few judicial reviews have taken place. This leaves this field of law ready for further development.

In the present matter, the respondents have not been able to show that they have not contravened the National Health Act and that their continued access of the health records of the first applicant does not result in a continuous contravention of the provisions of the National Health Act. In fact, the contravention of the National Health Act by the respondents has on these papers been established. The Sunday Times *does not have any right to the medical records of the first applicant, either to possess or otherwise to have access to them. It also does not have a right to retain any copies of such records or any part thereof. In fact, in terms of the National Health Act these records are to be kept and maintained by the second applicant and access to these records is only permitted in very strict circumstances. It is the first applicant who has the right to authorise access or to deny such access. I see no reason why I should not make an order that would specify that the records pertaining to the treatment and the stay of the first applicant in the Cape Town Medi Clinic of the second applicant, which were in the possession of the respondents, be returned to the second applicant. It is generally the user under the relevant provisions of the National Health Act that has a right to determine who obtains access to her health records and to information relating to her health status, treatment and stay as a patient in a health establishment. Since the records contain private and confidential information of the first applicant (including information on her health status, treatment and stay in the Cape Medi Clinic) she is entitled to claim that those who are not authorised to have access, return it to either the first applicant or the second applicant.*

Jajbay J in Tshabalala-Msimang v Makhanya *[2008] 1 All SA 509 (W) para 33.*