



An Examination of the Effectiveness of Anti-dumping Laws in South Africa

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DECLARATION

I Ramathabathe Johannah Tabane declare that this research has been composed solely by myself and that it has not been submitted, in whole or in part, in any previous application for a degree. Except where stated otherwise by reference or acknowledgment, the work presented is entirely my own.

SIGNATURE

DATE

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I dedicate this research to my handsome son Thabang Dominic Tabane. I hope one day this research motivates you to achieve greater things in life and value education.

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ABSTRACT

Being in a country where the economy is in decline, it is imperative that we do our very best to ensure that we survive this economic climate. One the most important things we can do to protect our economy is to protect our industries from the dumping of goods. Several clothing companies have been closed due to the epidemic of dumping of goods and some industries like the textile and steel industries are at the verge of closing. To protect the country's economy, there has to be in place laws that govern the dumping of goods. South Africa is no stranger to the laws that govern dumping of goods, the country has laws in place that are meant to protect the economy from dumping of goods. However, to date dumping is still occurring and affecting the economy of the country negatively.

The aim of this research is to examine and analyse the anti-dumping laws that exist in South Africa and the world at large, as well as to explore the shortfalls and successes of such laws and practices. The research is concerned with how the anti-dumping laws in South Africa have evolved since the first enactment in 1914 until the recent legislation that was passed in 2012.

The first part of the research looks at the history of how the anti-dumping laws came about in the world and found their way to South Africa. The history of anti-dumping laws focuses on common law and international laws that led to the promulgation of anti-dumping laws in South Africa. The research further highlights the relevant legislation that deals with dumping of goods in South Africa at the present moment and explores through cases how the law has been applied. The research draws a number of sources from the world of academics and media, as well as the legislation cases that are both national and international. The research deals with the problems that are faced when the necessary anti-dumping laws are put in practice.

In conclusion, the research argues that the anti-dumping laws of South Africa are not effective and do not comply with international standards on dumping of goods and the practice and application of the law are at loggerheads. The research hopes to offer a different view of the laws on anti-dumping and to focus attention on the application of the latter laws because they are well drafted, if not well practised. The research finally hopes to collect existing legal material for the purpose of discovering new facts that will contribute to the body of knowledge in international trade and trade remedies

1. CHAPTER ONE

1.1.Background

The main reason for the imposition of anti-dumping duties is to protect the country's industry from dumped products that threaten the existence of local industries. It is for this reason that anti-dumping laws were promulgated.¹ Dumping occurs when an export by a country or company of a product is lower in the foreign market than the price charged in the domestic market.² In terms of Art. 2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade "a product is considered to being dumped if such product is introduced into the commerce of another country at less than its normal value, or if the export price of the product exported from one country to another is less than the comparable price in the ordinary course of trade for the like product when destined for consumption in the exporting country".

The General Agreement on Tariffs and Trade 1994 and the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade (hereinafter referred to as the 'Anti-Dumping Agreement/ADA') allows the imposition of anti-dumping measures in a situation where it has been proven that dumping of goods in an importing country causes injury to existing businesses. However, for anti-dumping measures to be imposed, extensive investigations must be done and such investigations must be in line with the Anti-Dumping Agreement.³

It has been argued that trade laws in their very nature are weapons used by governments to protect local businesses at the expense of foreign industries that export goods to such a state.⁴

¹ K Andersson, C Thuresson 'The Impact of an Anti-dumping Measure A Study on EU Imports of Chinese Footwear' (2008) available at <https://www.diva-portal.org/smash/get/diva2:3772/FULLTEXT01.pdf> accessed 2017-11-19. Pp. 1

² 'Dumping in Economics: Definition & Effects' available at <http://study.com/academy/lesson/dumping-in-economics-definition-effects.html> accessed 2016-05-22. WTO defines dumping as "a situation of international price discrimination, where the price of a product when sold in the importing country is less than the price of that product in the market of the exporting country."

³ Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade, Article I.

⁴ M Nkomo, M Van Wyk 'Competition and trade policy –frenemies?' (2014) available at <http://www.compcom.co.za/wp-content/uploads/2014/09/competition-and-trade-policy-frenemies.pdf> accessed 2016-05-22. Pp. 2.

⁴ O Illy 'Trade Remedies in Africa: Experience, Challenges and Prospects' available on

The regime of trade remedies is to some extent controversial. The controversy predominantly stems from an economic point of view that trade remedies⁵ are regarded as camouflaged anti-competition measures and contrary to the principle of free trade by some economists.⁶

1.2.The History of Anti-dumping Laws in South Africa

In the past, developed countries were the ones that mainly imposed dumping measures, the countries included ‘Australia, the European Union, Canada, and United States’.⁷ South Africa is among a few developing countries to implement anti-dumping laws to protect local industries.⁸ The practice of dumping in South Africa dates as far back as 1914⁹ when the first piece of legislation on dumping action and subsidies, as well as countervailing measures, was passed.¹⁰ During this time, the Governor -General had powers to impose measures on imported goods whose selling price was less than the price of the same produce in the ‘exporting country’. The Governor-General provided offending parties with six weeks’ notice before the imposition of the measure.¹¹ In 1923, the Board of Trade and Investigations (hereinafter called the BTI) was established.¹² The main purpose of the BTI was to investigate alleged dumping and further make recommendations regarding the imposition of anti-dumping measures, where appropriate.¹³ More than 90 countervailing and dumping investigations were carried out between 1921 and 1947.¹⁴

Noteworthy is that during the time of the Customs and Tariff Act, anti-dumping remedies were not discussed at an international trade level. Anti-dumping received very little attention and

<http://www.ictsd.org/bridges-news/bridges-africa/news/trade-remedies-in-africa-experiences-challenges-and-prospects>. Accessed 2016-05-22. pp. 2.

⁵ It is important to note that trade remedies are instruments used as intervention by the government to retain jobs and promote investments. They include amongst others anti-dumping measures, countervailing measures, safeguard measures and reviews.

⁶ Illy O ‘Trade Remedies in Africa: Experience, Challenges, and Prospects’ Working Paper available

<http://ebookbrowse.com/illy-trade-remedies-in-africa-pdf-d370532454> (accessed 2016-10-31) pp. 8.

⁷ <http://www.meti.go.jp/english/report/data/gCT9905e.html> accessed 2016-05-22

⁸ Ibid

⁹ N Joubert ‘The Reform of South Africa’s Anti-Dumping Regime’ (2012) Stellenbosch: TRALAC available at https://www.wto.org/english/res_e/booksp_e/casestudies_e/case38_e.htm accessed 2017-05-23

¹⁰ Customs Tariff Act of 1914, trade remedies were entailed in section 8 of this Act.

¹¹ C De Lange ‘An Overview of the History of Dumping in South Africa over the past one hundred years’ (2014) *tax talk* .47 .pp.44-46.

¹² Ibid

¹³ Ibid

¹⁴See N Joubert (2012).

was rarely practised internationally during the times of the 'General Agreement on Tariffs and Trade' (hereinafter referred to as GATT); that is, in the mid-1940s. Despite the little attention anti-dumping received, it was embodied in GATT 1947 in article VI and the 'Anti-Dumping Agreement'.¹⁵ Following its independence, South Africa enacted the Customs and Excise Act on 31 May 1964. The Customs and Excise Act came into operation and introduced Section 55, which states the anti-dumping measures to be imposed in situations where dumping has occurred.¹⁶ Section 55 of the Customs and Excise Act identifies the circumstances and the types of anti-dumping duties that can be enforced in circumstances where dumping has occurred.¹⁷

In the 1970s and 1980s, the imposition of anti-dumping measures extensively decreased. The decrease was because the GATT imposed on South Africa sanctions that prohibited the country from trading with other countries due to its discriminatory laws. In retaliation, South Africa replaced anti-dumping duties with import surcharges amongst other things. In 1978 all existing duties on dumping were removed and replaced with high tariffs to protect local industries.¹⁸ The position changed after the 1990s, when South Africa attained its democracy and all the sanctioned imposed on it were lifted. The high tariffs were dramatically reduced but they resulted in increased activities in South Africa of anti-dumping.¹⁹ When South Africa went back to the WTO, amendments were made to the Board of Tariffs and Trade Act²⁰ so as to align our anti-dumping laws with the laws of the WTO, the ADA and GATT article IV. The Act that embodied all these was the 'BTT Amendment Act of 1992'²¹

The definition of dumping was also changed to be in line with that of the ADA, which states that dumping happens when goods are brought into the import country and sold at a price lower than that in the country of export.²² The 1992 Act did not bring about any framework on how anti-dumping investigations should be carried out. To correct this problem the Board of Trade and Tariffs published a guide on anti-dumping. However, shortly after it was published it was withdrawn.²³

¹⁵ Agreement on Implementation of Article VI of the General Agreement on Tariffs on Trade.

¹⁶ Customs and Excise Act no 91 of 1964, section 55 names the five types of anti-dumping duties identified were ordinary anti-dumping duty, bounty anti-dumping duty, freight anti-dumping duty, exchange anti-dumping duty, and sales anti-dumping duty.

¹⁷ Ibid.

¹⁸ See N Joubert (2012.)

¹⁹ K Gupta, V Choudhury 'Anti-dumping & Developing Countries' (2011) [Vol. 10: 117] *Korea Law Review*. Hein online.

²⁰ The Board of Tariffs and Trade Act 107 of 1986.

²¹ Board on Tariffs and Trade Amendment Act of 1992.

²² Article II of the Agreement on Implementation of Article VI of the General Agreement on Tariffs on Trade.

²³ See K Gupta and V Choudhury (2011).

1.3. Introduction to the International Trade and Administration Act

The International Trade Administration Act (hereinafter referred to as the ITA Act) was enacted to amend the anti-dumping laws in order to ensure that they comply with the appropriate WTO agreements.²⁴ This led to the repealing of the BBT Act and the introduction of the International Trade Administration Act.²⁵ The ITA Act defines words such as “dumping”, “export price”, “fair comparison”, and “normal value” etc.

The ITA Act was promulgated in 2003. The main objective of this legislation was to do what the Board of Tariffs and Trade could not do effectively, which was to embody international law agreements into national law,²⁶ The ITA Act was also created to implement the SACU agreement.²⁷

The International Trade Administration Commission (hereinafter referred to as the ITAC/Commission) was created by the ITA Act to function as an institution that makes sure that the ITAC is followed and conducts investigations in accordance with the ITA Act.²⁸ The ITAC commonly deals with investigations of alleged dumping and outlines how the investigations should be carried out and further how to deal with matters relating to the parties involved in each case of alleged dumping; for example, the issues of confidentiality of the information submitted amongst others.²⁹

Even though the ITA Act plays a major role in anti-dumping matters, the Customs and Excise Act³⁰ also forms part of the dumping laws in South Africa because it still outlines the types of duties to be imposed as a measure to prevent dumping from happening or relief in cases of dumping. To be precise, the anti-dumping duties are outlined in chapter VI of this Act.³¹

²⁴ Ibid.

²⁵ International Trade Administration Commission Act 61 of 2002 (hereinafter called the ITAC/Commission).

²⁶ Ibid.

²⁷ International trade administration Act 61 of 2002, section 2.

²⁸ Section 15(3) of the international Trade Administration Act 61 of 2002.

²⁹ The functions of the Commission are provided for in in section 15 of the ITA Act and they include amongst others carrying out the functions assigned to it terms of the Act or by the Minister. The Commission must also carry out any function that arises out of an obligation of the Republic in terms of trade agreements.

³⁰ International Trade and Administration Act 61 of 2002, chapter IV.

³¹ Customs and Excise Act 71 of 1964, section 56.

1.4.The South African Anti-dumping Laws and International Laws on Dumping

The ADA is not part of the South African law because it has not been promulgated by parliament.³² However, the South African Constitution provides that when the courts interpret any legislation they must interpret it in such a way that it will be consistent with international law.³³

Section 39 of the Constitution was further emphasised in the case of *Brenco*³⁴, where it was held that the investigating officials were not obliged to adhere to agreements that South Africa had not signed, or agreements that came as a result of the Tokyo Round Negotiations on Technical Trade Barriers, as well as GATT 1994. However, international law would assist in evaluating how fair the administration of the investigative officials were when they carried out the anti-dumping investigations.³⁵

1.5.The Use of Anti-dumping Measures in South Africa

South Africa began using anti-dumping measures earlier than a number of countries in the world and it was very active in applying these measures. More than 90 investigations were conducted on countervailing and dumping between 1921 and 1947. Another 818 investigations were conducted during the period 1948 to 2001.³⁶ Total investigations from 1921 to 1994 were 938.³⁷ Although a large number of investigations are undertaken on dumping in South Africa, many shortfalls still exist with regard to the anti-dumping laws in the country.

Since the creation of the ITA Act it has been shown that the ITAC rarely manages to complete an anti-dumping investigation in less than the 12 months stipulated by the ADA. On occasion, the Commission fails to meet the deadline by months, despite the fact that the 12-month deadline might only be exceeded in 'special circumstances'. Analysis shows the average time taken in all investigations initiated between January 2004 and December 2006 was 444 days.³⁸

³² Section 231(1) of the Constitution of the Republic of South Africa, 1996, which states that an international agreement binds the republic after it has been promulgated into the municipal law through an Act of parliament.

³³ Section 39 of the Constitution of the Republic of South Africa, 1996.

³⁴ *The Chairman of the Board of Tariffs and Trade v Brenco* 2001(4) SA 511 SCA.

³⁵ Ibid.

³⁶ See N Joubert (2012).

³⁷ G Brink 'Anti-dumping in South Africa' (2012) Stellenbosch TRALAC. available at <http://www.tralac.org/files/2012/07/D12WP072012-Brink-Anti-Dumping-in-SA-20120725final.pdf> accessed 2016-05-22

³⁸ 'The material issues facing the south African textile industry SASTAC' (2014-11-26) available at http://www.mossgroup.co.za/wp.../09/Material-Issues-Report_Final_26Nov14.pdf accessed 2016-05-22.

1.6. The Shortfalls of the Dumping Laws in South Africa

Although it has been over 100 years since South Africa started using anti-dumping measures, there seem to be problems with the measures used to prevent dumping.³⁹ Despite the application of the anti-dumping laws in place, the country's industries remains vulnerable to cheap imports which have resulted in various industries being affected and a number of jobs lost because of the cheap goods that are being dumped in the country.⁴⁰

One of the industries majorly affected by cheap imports was the textile and clothing industries.⁴¹ One of the companies that was hit hard by the dumping of textiles was a textile mill in Pietermaritzburg.⁴² This company employed over 181 000 employees in 2002 but by the end of 2013 it had only 80000 employees because it could not keep up with the competition from cheap imports.⁴³

The steel industry was also affected by this influx of cheap imports in August 2015. Unions were faced with an onslaught of notices of retrenchment from steel companies. A task team was formed to try and save the industry.⁴⁴ They met government representatives and a range of interventions were agreed to. At least 20 companies were retrenching at that time and some workers were working shorter weeks. Many companies like Evraz Highveld Steel workers retrenched its workers and many more companies filed for business rescue.⁴⁵ Lastly, one of the recent dumping investigations pertains to the American chicken that is being sold in South Africa, which is allegedly made up of unwanted pieces, which are dumped at super low prices that are likely to affect negatively the local producers of chicken.⁴⁶

³⁹ G Brink 'One Hundred Years of Anti-dumping in South Africa' (2015) available at <https://www.kluwerlawonline.com/abstract.php?id=TRAD2015014> accessed 2016-05-22. pp.01.

⁴⁰ Ibid.

⁴¹ See 'the material issues facing the South African textile industry SASTAC' (2014).

⁴² Ibid.

⁴³ Ibid.

⁴³ S Evans 'SA steel industry on the brink of collapse' (2015) available at <http://www.mailandguardian.com> accessed 2016-03-31.

⁴³ Ibid.

⁴⁴ S Evans 'SA steel industry on the brink of collapse' (2015) available at <http://www.mailandguardian.com> accessed 2016-03-31

⁴⁵ Ibid.

⁴⁶ 'Unwanted American chicken dumped in South Africa' (2016-03-24) available at <http://www.health24.com/Diet-and-nutrition/Food-safety/unwanted-american-chicken-dumped-in-south-africa-20160324> Accessed 2016-05-22.

⁴⁶ 'Cheap Chinese imports in Africa , implications and remedies' (2014-03-06) available at <http://www.polity.org.za/article/cheap-chinese-imports-in-africa-implications-and-remedies-2014-03-06> accessed 2016-05-25.

It is evident that despite the existence of anti-dumping legislation it is not being correctly applied if at all applied. We need to question why legislation is even in place if it is not going to be applied or used.

1.7.Problem Statement

While consumers may benefit from the availability of cheaper goods, industries in African countries are slowly being forced out of trade, including the textile and clothing industry. An analysis by the South African Labour Development and Research Unit indicates that the local industries are under pressure due to the importation of Chinese cheap imports. The dumped goods are slowly affecting the economy and have led to a decline in employment, especially in the manufacturing industry.⁴⁷

Despite the legislative interventions introduced by the South African government, this has not prevented the importing of cheap products, which has adversely affected various industries and resulted in a number of job losses. This raises the question whether the anti-dumping legislation is effective in addressing dumping in the country.

1.8.Research Questions

This main question that this study sought to address is:

Are South Africa's anti-dumping laws effective in addressing dumping in the country?

In pursuit of an answer to this question, the following sub-questions were answered:

- A. What antidumping measures has South Africa introduced in the past? (The basic history of anti-dumping legislation in SA)
- B. How do the provisions of the ITA Act seek to prevent dumping in South Africa?
- C. How have the courts and the ITAC interpreted the provisions of the ITA Act.
- D. Have the anti-dumping legislative measures been successful in their application?

⁴⁷ Ibid.

1.9. The Aim and Objectives of the Research

The aim of the research was to explore whether or not the anti-dumping laws existing in south Africa and the international Anti-Dumping Agreements are effective or not.

The objective was to look at how the laws had been applied and interpreted by looking at different cases decided by the Commission and case law, both national and international case law. Furthermore the research analysed what other authors had written about anti-dumping laws generally and their perspectives on these laws. This research hopes to collect existing legal material for the purpose of discovering new facts that will contribute to the body of knowledge in international trade and trade remedies

1.10. Research Methodology

The research methodology required gathering of relevant data that would further be analysed to arrive at an understanding of the application of anti-dumping laws in South Africa. Primary data to be gathered was legislation, international agreements and case law. The secondary data to be gathered was from books, journal articles, and online resources and relevant newspaper articles, as well as research dissertations that were conducted prior to this one and are relevant to this research.

Qualitative evaluation was utilised for this research topic, as the data gathered was not numerical but literary, the qualitative research method was more relevant, as the data gathered was already existing data. It was hoped that such data could lead to conclusions that presented new revelations in the field of international trade and trade remedies.

The researchers used one method of collecting data: the desk-study-review method. The desk-study review collected secondary data. The researcher reviewed scholarly articles, books, journals and other publications as a means of collecting data for this study. The research mainly used secondary data on anti-dumping laws and trade data collected from internationally recognised websites such as World Trade Organisation and TRALAC amongst others.

1.11. Structure of the Research

The proposed structure of the research will be as follows:

- Chapter 1 will introduce the background of the research and it will also outline the research question and the objectives of the research
- Chapter 2 will explore the history of anti-dumping legislation in South Africa
- Chapter 3 will consist of an analysis of anti-dumping legislation and cases in South Africa
- Chapter 4 will critically analyse whether the laws that have been put in place to curb dumping in the country are achieving their purpose
- Chapter 5 will conclude the study and provide recommendations.

2. CHAPTER TWO

2.1.Introduction

Many countries during the World Wars embarked on created trade policies that blocked international trade completely. The trade policies laws were lessened at the end of World Wars I and international laws began slowly to pick up. However, international trade only began to increase in the 1970s.⁴⁸ The increasing trade liberalisation of the developed countries contrasted with the turn to import substitution and protectionist policies in much of the underdeveloped world.⁴⁹

This chapter looks at the history of anti-dumping in South Africa and in the world at large. The first part looks at the origin of anti-dumping on an international level. The second part then looks at the origin of anti-dumping laws in south Africa and it will look at the how the measures have been applied from the first anti-dumping legislation enacted in South Africa until the creation of the current legislation in place.

2.2.The Origin of Anti-dumping Measures

The beginning of anti-dumping measures goes as far back as the 16th century when Jacob Viner, the primary researcher, led a complete review on the subject of dumping. Viner represented a 16th-century English writer who accused exporters of selling paper at a low price than that of the new paper industry in England.⁵⁰

In the early years of America's independence, American producers complained that producers from England were dumping goods in their country with the main intention of destroying their still growing industries.⁵¹ Despite the fact that the expression "dumping" had existed in English since the Middle Ages, it was not until the start of the 20th century that it started to be part of the vocabulary of international trade. In the early 20th century "dumping" depicted the mentality of the producer of one state selling goods at generally lower costs in the country of import.⁵²

The first anti-dumping law emanates from Canada in 1904 and was created as a result of United States (hereinafter referred to as US) steelmakers unjustifiably dumping rails into the

⁴⁸ A Douglas Irwin 'Free trade under fire 3rd ed' (1962) *Princeton University Press 41 William Street, Princeton, New Jersey* pp.08.

⁴⁹ Ibid.

⁵⁰ O Illy 'Trade Remedies in Africa: Experience, Challenges, and Prospects' (2012) *This paper has been prepared for the 4th Global Leaders Fellowship Program Annual Colloquium, Princeton, 13-15 May 2012.* pp.02

⁵¹ Ibid

⁵² Ibid pp.05.

Canadian market, which was hurting the Canadian steel industry. The Canadians were followed soon by New Zealand in 1905, Australia in 1906, South Africa in 1914 and the US in 1916, which enacted their own particular laws to manage dumping of goods. Following all these, Great Britain approved its earliest law on dumping in 1921.⁵³

2.3.The Journey of Anti-dumping Laws In South Africa

The following is the anti-dumping legislative journey that has existed in South Africa from the first legislation that was passed in 1914 to the latest legislation, which was passed in 2012.

2.3.1. 1914: The Customs Tariff Act of 1914

Before 1910, South Africa did not have any law that governed dumping of goods or international trade policy that dealt with dumping. All the associations South Africa entered into were administered by the countries that colonised this country and those were Netherlands and later Britain. The Cullinan Commission was created in 1910 for the purpose of analysing the effectiveness of establishing local businesses.⁵⁴ This Commission created scenarios according to which businesses would qualify for protection from the government. Local businesses would qualify if they utilized local assets in production. The commission provided jobs for whites and also the industry's possibility of success should be high.⁵⁵

The revelations of the Commission resulted in the promulgation of the Customs Tariff Act of 1914. The Union of South Africa was among one of the principal nations in the whole world to authorise anti-dumping laws after Australia in 1906 and US in 1916. South Africa did so in 1914.⁵⁶

The Customs Tariff Act⁵⁷ catered for dumping and countervailing duties and, as indicated by section 8(1): "on account of products imported into the nation of a class or kind made or delivered in the nation and if the fare or genuine offering cost to a shipper in the nation be not exactly the genuine current estimation of similar merchandise when sold for home utilization in the typical and normal course in the nation from which they were fare to the Union at the season of their exportation thereto, there may, moreover, to the obligations generally endorsed, be charged, demanded, gathered and paid on those products on importation into the Union an

⁵³Ibid pp.07.

⁵⁴ C Murigi 'The development of a successful antidumping regime in Kenya' (2013) *unpublished* thesis, University of Western Cape pp 52.

⁵⁵ Ibid.

⁵⁶M TAO 'Dumping and antidumping regulations with specific reference to the legal framework in South Africa and China' (2006) *unpublished* Thesis University of The Free State.

⁵⁷ The Customs Tariff Act of 1914 (hereinafter called the Act).

extraordinary dumping duties equivalent to the distinction between the said offering cost of the products for fare and the genuine momentum esteem thereof for home utilization as characterized in this Act: Provided that the unique dumping duties should not regardless surpass fifteen percent, *ad valorem*".⁵⁸

The Customs Tariff Act further gave the Governor-General unrestricted authority to impose measures on imported goods whose selling price was less than the price of the same goods in the country of export. During this time offending parties were given six weeks' notice prior to the imposition of the measure. This function was taken over by the Board of Trade and Industries in 1923.⁵⁹ It was only after seven years that the legislation was used to impose an anti-dumping measure.⁶⁰

2.3.2. 1924: The Board of Trade and Industries

The Board of Trade and Industry (hereinafter referred to as the BTI) was established in February 1923 to assume the investigation of allegations of dumping and to make recommendations on imposing dumping duties. Over the years the names of the BTI has changed a few times, first the Board of Trade and Tariffs (the BTT) in 1992 and then The International Trade Administration Commission (the Commission) in 2003.⁶¹

The first anti-dumping investigation embarked on by the BTI was on cement dumping. The investigation was published under Report No.30, on 28 November 1923. The report resulted from an order by the then Acting Minister of Finance to impose duties on the cement in the country.⁶²

Another report pertaining to the dumping of cement was published in August 1924 by the BTI under report No.38. The report stated as follows "the board had gradually declined to investigate specific allegations of dumping until they have been dealt with by the Customs Department, they failed to investigate the questions on dumping even when urged by the Customs department, and in their defence they said they have a pressure of other work." The report went on to state "since then other complicated questions regarding dumping have

⁵⁸See C De Lange (2014) pp. 44-47.

⁵⁹ Ibid.

⁶⁰ G Brink 'Anti-dumping in South Africa' (2012) Stellenbosch TRALAC. available at <http://www.tralac.org/files/2012/07/D12WP072012-Brink-Anti-Dumping-in-SA-20120725final.pdf> accessed 2016-05-22 during the time of the Customs and Tariff Act, there was no separation between dumping and countervailing pp.02.

⁶¹ Ibid.

⁶² C Lombard 'Trade remedies decade' (2014) available at http://m.engineeringnews.co.za/article/trade-remedies-decade-2014-01-17/rep_id:4433 accessed 2016-07-23.

presented themselves and the board felt that the moment had arrived for dealing with the whole position.”⁶³ Between 1921 and 1947 more than 90 anti-dumping and countervailing investigations were undertaken.⁶⁴

Although it attracted little discussion, dumping of goods was included in GATT 1947, GATT Article VI (known as the Anti-Dumping Agreement).

2.3.3. 1964: Anti-dumping Duties

After South Africa’s independence in 1961, the Customs and Excise Act⁶⁵ was enacted introducing section 55 and 57 known as the anti-dumping duties, Section 55 recognised the situations and the types of “anti-dumping duties” that should be levied. Five types of anti-dumping duties identified were, “ordinary anti-dumping duty”, “bounty anti-dumping duty”, “freight anti-dumping duty”, “exchange anti-dumping duty”, and “sales anti-dumping duty.”⁶⁶ The Customs and Excise Act was amended in 1967⁶⁷ and it repealed all anti-dumping measures that existed prior to March 1967.⁶⁸

In 1977, in the annual report of the BTI, the BTI recommended that all existing anti-dumping provisions be withdrawn as from January 1978. It was said that the provision had been in place for a very long time and its withdrawal would not harm the industry in any way. It was further recommended that upon withdrawal, disruptive completion laws should be brought into place to remedy situations where goods are imported and sold in South Africa at a price lower than that in its country of export.⁶⁹ This practice continued until 1992.

2.3.4. 1992: Board of Trade and Industry Amendment Act 60 of 1992

In 1992, the anti-dumping laws were revised to create a precise explanation of dumping and how the law should be applied.⁷⁰ The amendments stretched to accommodate the territory where the legislation would be applicable; the jurisdiction would be the country and the Southern Africa Customs Union region. The duty to investigate anti-dumping cases and impose necessary measures was given to the BTT.⁷¹

⁶³ Ibid.

⁶⁴ See Joubert, N (2012).

⁶⁵ Customs and Excise Act 91 of 1964.

⁶⁶ Ibid section 57 of the Customs and Excise Act 91 of 1964.

⁶⁷ Customs and Excise Amendment Act of 1967.

⁶⁸ C Lombard ‘Trade remedies decade’ (January 17 2014) available at http://m.engineeringnews.co.za/article/trade-remedies-decade-2014-01-17/rep_id:4433 accessed 2016-06-23.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Board of Tariffs and Trade.

The BTT Act⁷² established the BTT, which replaced the BTI. The BTT published a report in 1992 called “Guide to the Policy and Procedure with regard to Action against Unfair International Trade Practices: Dumping, Subsidies and other forms of Disruptive Competition”, after which came a second report “Guide to the Policy and Procedure with Regard to Action against Unfair International Trade Practices: Dumping and Subsidized Export”. The second report was published in 1995. Both the guides were withdrawn.⁷³ The 1992 amendments aid as a suitable reference because more than the previous year’s anti-dumping duties were applied on a broader scale.⁷⁴

2.3.5. 1995: Board of Tariffs and Trade Amendment Act of 1995

South Africa’s National Economic Forum (hereinafter called the NEF)⁷⁵ in August 1995 stressed a demand for a law to be created that would govern dumping and countervailing, and also provide authority to oversee the application of the Broad of Tariffs and Trade Amendment Act.⁷⁶ The call by NEF resulted in the government amending the BTT Act⁷⁷; the amendment was called the “Board of Tariffs and Trade Amendment Act, 1995” (hereinafter called the 1995 Act). The 1995 Act was to amend the definition of dumping and other terminologies. This Act also applied in the homelands and it further provided a guide for anti-dumping investigations.⁷⁸ During this time South Africa was a frequent user of anti-dumping measures. From 1948 to 2001 818 investigations were carried out. It should, however, be noted that the investigations were not all dumping investigations and that they also included countervailing because there was no difference between dumping and countervailing before 1992.⁷⁹

2.3.6. 2002: The International Trade Administration Act

The creation of the International Trade Administration Act (ITA Act) in 2002 and the Anti-Dumping Regulations (hereinafter called ADR) in 2003 aimed to have the South African law on dumping comply with that of the WTO.

The ADR was issued in early 2003 for comments. In drafting the Regulations, the European law on dumping, the anti-dumping laws of the USA and Australia, as well as of New Zealand,

⁷² The Board of Tariffs and Trade Act of 1986.

⁷³ See V De Lange (2014) pp. 44-46.

⁷⁴ See N Joubert (2012).

⁷⁵ NEF is a tripartite body consisting of representatives from business, government and labour.

⁷⁶ Ibid.

⁷⁷ Board of Tariff and Trade Act of 1986.

⁷⁸ See V De Lange (2014) 44-4.

⁷⁹ See N Joubert (2012).

were used. The Anti-Dumping Agreement⁸⁰ was also taken into consideration. In November same year the regulations were approved.⁸¹

The two pieces of legislation passed in South Africa, the ADR and the ITA Act, were subject to review by the committee in the WTO. The review was in a form of questions that were asked by the WTO members during the meeting of the CADP. After the questions were asked the ITAC was under an obligation to give answers that were satisfactory. Despite all the questions that were raised, South Africa managed to effectively defend its newly promulgated regulations and legislation by giving satisfactory answers to the questions asked by the members.⁸²

The ITA Act was created to fulfil the requirements and to implement some of the aspects contemplated in the Southern African Customs Union (hereinafter referred to as SACU) agreement. The ITA Act was promulgated to further provide a framework for the SACU Agreement and for the control of import and export of goods and the amendment of custom duties.⁸³

According to the new SACU agreement the final decision regarding the anti-dumping duties of the member states of SACU lies with it the Counsel of the Ministers within SACU.⁸⁴ This should be embodied in the member state countries. The implementation of SACU into domestic law of South Africa was criticised by many people in South Africa during the ITAC bill public hearings. Two criticisms were that this would have a bad impact on the running of the ITAC and that it would undermine the sovereignty of our country.⁸⁵

The ITA Act created the International Trade Administration Commission, is a body created to carry out customs tariff investigations, impose trade remedies, and oversee import and export control. ITAC substituted its predecessor, the BTT that was established in 1986. The predecessor of the 'BTT' was the 'BTI', which dates back to 1924.⁸⁶

⁸⁰ Noteworthy is that when talking about Anti-Dumping Agreement the researcher refers to both Article IV of the GATT 1995 and The Implementation of the Anti-Dumping Agreement.

⁸¹ Ibid.

⁸² WTO [G/ADP/N/1/ZAF/2](#), 20 Jan. 2004. The official WTO languages are English, French and Spanish

⁸³ International Trade Administration Act 71 of 2002, Preamble.

⁸⁴ N Joubert (2012).

⁸⁵ Ibid.

⁸⁶ 'Overview of the ITAC' available at <http://www.itac.org.za/pages/about-itac/an-overview-of> accessed 2016-06-21.

2.4.South Africa and International Agreements on Dumping

The GATT came as a result of the Geneva negotiations held in 1947 whose intention was to create an International Trade Organization. The aim of the GATT was to reduce, if not eliminate, trade barriers.⁸⁷ South Africa became a signatory to the GATT in June 1948.⁸⁸

Article IV of the GATT deals particularly with anti-dumping and it allows member states to impose anti-dumping measures in a situation where dumping has occurred or where goods have been dumped in their country and will cause injury to their industries.⁸⁹ The agreement on the implementation of Article VI of GATT came as a result of the Tokyo Round on Multilateral Trade Negotiations, which were held from September 1973 to November 1979.⁹⁰ The Agreement does not illegalise anti-dumping laws but it supports dumping only if it “causes material injury to a domestic industry”; “poses a threat of material injury to a domestic industry”; and “causes material retardation of the establishment of a domestic industry.”⁹¹

In 1994 December South Africa went back to participating in world organisations after it had been removed in the 1960s for its discriminatory laws.⁹² South Africa signed an agreement establishing the WTO in 1994, thus becoming one of the founding members. In 1995 parliament approved the accession to be in accordance with the Constitution of South Africa.⁹³

As a consequence of South Africa signing the WTO agreement it became a signatory to the “Anti-Dumping Agreement”, “the Agreement on Subsidies and Countervailing Measures” and the “Agreement on Safeguards”. The last provision of these agreements was that they be incorporated into national laws by the signatories.⁹⁴

In 1995 South Africa notified not only the board Act but also the parts of the customs and excise Act to the WTO as the sources of its anti-dumping legislation.⁹⁵ However, the 1995 guide did not have any legal standing and therefore, was withdrawn.

⁸⁷ Article III of the General Agreement Tariffs and Trade of 1947.

⁸⁸ The 128 countries that had signed GATT by 1994 available at https://www.wto.org/english/thewto_e/gattmem_e.htm accessed 2016-06-21.

⁸⁹ Article VI of GATT 1995.

⁹⁰ Stewart et al Antidumping: The GATT Uruguay Round: A Negotiating History pp. 84.

⁹¹ Ibid.

⁹² See N Joubert (2012).

⁹³ See Stewart et al pp.84

⁹⁴ See V De Lange (2014) pp. 44-46

⁹⁵ WTO notification of laws and regulations under article 18.5 and 32.5 of the agreements: South Africa G/ADP/N/1/ZAF/1; G/SCM/N/1/ZAF/1 (1 December 1995).

Although South Africa never incorporated the anti-dumping agreement into the national law it was during the late 1990s amongst the most frequent anti-dumping-measure users on the planet; it was the fifth largest user of anti-dumping measures. According to the WTO, South Africa was the most active when it came to initiating anti-dumping investigations.⁹⁶ Moreover, South Africa was amongst the top anti-dumping users in developing countries. Apparently, South Africa, between the years 1995 and 2002, initiated 157 investigations and imposed 106 measures.⁹⁷

2.5. Conclusion

The discussion in this chapter has indicated that the history of anti-dumping actions dates back to at least one century ago, when Canada for the first time took such an action (1904). The discussion demonstrated that in due time, countries like US; Britain and Australia also enacted anti-dumping laws to protect their local industries. The chapter shows that South Africa is one of the early users of anti-dumping measures and from the above discussion it is clear that South Africa has been using these measures for over 100 years. With regards to international treaties, we observe that the Uruguay Round brought about the biggest reform of the world's trading system since GATT was created at the end of the 2nd World War. From the examination of all the pieces of legislation concerned with anti-dumping, we observe they have always had more defects than benefits. For example during the era of the BTI, the investigation of cement dumping, which was published under Report No.30, the BTT only acted after the then minister forced them impose anti-dumping duties on the dumped cement. In 1923, another investigation was conducted as a result of an order from the Minister of Finance.

Again, there was also The BTT Amendment Act of 1995 that was meant to embody the terms of the GATT VI and the WTO. This amendment Act failed; hence the introduction of the ADR and ITA Act of 2002. The ITA Act and the ADR are also criticised for not properly incorporating the provisions of the WTO. In conclusion, it is important to note that although South Africa has anti-dumping laws for over a 100 years, there is so much to be done to ensure absolute protection from dumping of goods.

⁹⁶ See V De Lange (2014) pp.44-46.

⁹⁷ See N Joubert (2012).

3. CHAPTER THREE

3.1. Introduction

Anti-dumping laws in South Africa are entailed in the Customs and Excise Act, the ITA Act and the ADR. The administration and the monitoring of dumping is governed by the ITAC. The ITAC does not work alone in the administration and monitoring of dumping; it works together with the South African Revenue Services (SARS) and the Department of Trade and Industry (DTI).⁹⁸ This chapter focuses on how the ITAC deals with anti-dumping investigation that are brought before it. The chapter explores laws that govern anti-dumping in South Africa and analyses them. The chapter will further analyse functions of the legislation and the procedures that should be followed from the time dumping is reported until the investigation and ruling is done in South Africa.

3.2. The International Legislative Structure

As a starting point, it is important to highlight Article I of the ADA, which states that “before imposing any anti-dumping measures a national government must undertake an investigation and consider substantial economic evidence”.⁹⁹ The Article further states that “unless it is determined through an investigation conducted in line with the procedural requirements, no anti-dumping measures should be imposed”. In calculating if dumping has taken place, the national government must calculate the normal value standard with which to compare with the export price.¹⁰⁰

Noteworthy is that in addition to calculating the normal value over export price there are other factors that need to be considered. The factors include amongst others material injury to the domestic industry.¹⁰¹ According to GATT, national authorities may impose anti-dumping duties after determining that the dumping causes or threatens “material injury” to an existing domestic industry.¹⁰²

⁹⁸ O Sibanda ‘Are anti-dumping measures in multilateral trade justifiable or not? A call for an academic debate in Africa’ (2011) pp. 91.

⁹⁹ Art. I of the Anti-Dumping Agreement 1994.

¹⁰⁰ Ibid.

¹⁰¹ Article VI: 6(a) of the GATT

¹⁰² M Mitsuo ‘Some International and Domestic anti-dumping Issues’ (2010) *Asian Journal of WTO & International Health Law & Policy*.

Although South Africa has not promulgated the Anti-Dumping Agreement into the law of the country, the Supreme Court of appeal (“SCA”) in the *Brenco case*¹⁰³ emphasised the importance of interpreting national laws in line with international law with respect to anti-dumping. The Supreme Court held that the point was not that the investigating authority was obliged to comply as a matter of law with the international agreements¹⁰⁴, but that such international practice was of some help in assessing the fairness of the investigating authority in conducting anti-dumping investigations, especially where our national laws were silent on such matters.¹⁰⁵

It is my view that since South Africa is not compliant with the ADA when it comes to the application of anti-dumping rules, it is imperative that we comply because failure to do so might lead to a situation where foreign countries refuse to trade with South Africa. Although the court in the case of *Brenco* created a precedent¹⁰⁶ that international law should be considered when applying our local laws, despite this, it is imperative that the provisions of the ADA should be put in a legislation to avoid any clash between South Africa and the rest of the world.

3.3.The Legislative Structure of Dumping in South Africa

The key legislation in South Africa dealing with anti-dumping is the ITA Act, which came into effect in 2003 and replaced the Board of Trade and Tariffs Act of 1996. The ITA Act provides for the establishment of the ITAC, which is a body responsible for anti-dumping investigations. Although the ITA Act is the key legislation dealing with anti-dumping, the ADR embodies the procedure to be followed in dumping cases.¹⁰⁷ Furthermore, the Customs and Excise Act provides for duties to be imposed in dumping cases.¹⁰⁸

The application of the above-mentioned laws governing the dumping of goods must be done within the ambit of the Constitution, which is the supreme law of the country. Therefore, when speaking of the laws that govern dumping of goods the first and most important is the Constitution,¹⁰⁹ which all laws should comply with. Then follows the Promotion of Administration of Justice Act (PAJA), which outlines how administration procedures must be

¹⁰³ *Chairman of the Board on Tariffs and Trade v Brenco* 2001(4) SA 511 (SCA). Par.33.

¹⁰⁴ See s26 of the ITA Act.

¹⁰⁵ Ibid.

¹⁰⁶ Precedent is a judicial decision that should be followed by a judge when deciding a later similar case

¹⁰⁷ See ITA Act and the ADR.

¹⁰⁸ The duties are provided for in chapter VI of the Customs and Excise Act.

¹⁰⁹ The Constitution of the Republic of South Africa Act 108 of 1996.

carried out “in a fair and reasonable manner”¹¹⁰ when the application of the law is carried out. Therefore, one would say that in the hierarchy of the laws that govern dumping of goods in South Africa, the piece of legislation that leads is the Constitution, followed by PAJA, then the Customs and Excise Act and, lastly, the ITA Act.

In line with the provisions of the ADA, the ITA Act provides for certain factors to be taken into consideration to determine whether dumping has occurred in a particular case. The features that need to be taken into account to determine if dumping has occurred are set out in the sections that follow.

3.3.1. Like products

Like products are defined as identical products by the Anti-Dumping Regulation. The products must be identical in all respects or the product characteristics must closely resemble those of the product in consideration.¹¹¹ The ADA provides that “like product shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration”.¹¹² The case that properly evaluated the like products was the case of *unmodified starch*.¹¹³ In this case the authority was called to decide whether the maize starch produced in South Africa was a like product to the various types of unmodified starch imported into the country. These included potato starch, cassava starch and rice starch. After having determined that all the products were derived from carbohydrates, were produced using similar processes and were generally used in similar applications, it was found that maize starch was indeed a like product to all the imported unmodified starch.¹¹⁴

In the investigation into the alleged dumping of circuit breakers from or originating from France, Spain, Italy and Japan, the domestic industry alleged that industrial circuit breakers were like products regardless of whether they applied thermal magnetic or hydraulic magnetic technology. The domestic industry argued that the products followed a similar production process, used similar raw materials, and were alike in physical appearance. The local industry only produces hydraulic magnetic circuit breakers. Even though this was the case the ITAC

¹¹⁰See the Promotion of Administration of Justice Act 3 of 2000.

¹¹¹ ADR Regulation I.

¹¹² Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Article 2.

¹¹³ Board report 3486 – the alleged dumping of unmodified starch exported or originated from Belgium, Denmark, France, Germany, Netherlands, Switzerland and Thailand (04/071994).

¹¹⁴ Ibid.

found that these were like products. Years later the same situation occurred in the US on South African circuit breakers and ITAC found that the products were not like products.¹¹⁵

The interpretation of like products in the unmodified starch case is in my opinion incorrect to a certain extent. Saying that the modified and unmodified starch are the same, when they are clearly not, is a way of blocking entry of foreign markets, which is unfair competition and results in the abuse of the dumping laws to protect local industries.

3.3.2. Export price

Export price is most imperative when an anti-dumping investigation is conducted. Export price is defined by the ITA Act as “the price paid or payable for goods sold for exports, this includes all the taxes, discounts and rebates that are directly and indirectly connected to the sale”.¹¹⁶ If no export price exists or it cannot be ascertained,¹¹⁷ then such export price will be the price that the first buyer in the importing country paid for the goods. This is normally the wholesaler in the importing country.¹¹⁸ The determination of an export should not pose any issues, as it would be the price the exported product is sold at in the domestic market.

3.3.3. Normal Price

The ITA Act defines normal value as “the equivalent price paid in the ordinary course of trade for like products made for consumption in the exporting country and the country of origin. In the absence of information on a price contemplated above then the normal price can be determined either on the basis of: a) The cost of production of the goods in the country of origin when destined for domestic consumption, plus a reasonable addition for selling, general and administrative costs and for profit; or b) The highest comparable price of the like product when exported to an appropriate third or surrogate country, as long as that price is representative”.¹¹⁹

The above method has been used in several investigations including “the Picks, Shovels and Spades, Rakes and Forks Originating from the People’s Republic of China, where the normal

¹¹⁵ ITAC-hydraulic magnetic circuit breakers from South Africa investigation no-731- TA -1033 (preliminary) (USITC investigation 3600, June 2003).

¹¹⁶ S32 (2) (a) of the ITA Act.

¹¹⁷ Brink, G ‘A Nutshell Guide to Anti-dumping Action’ (2008) *Lexis Nexis Vol 5* pp.258.

¹¹⁸ *ibid*

¹¹⁹ S 32(4) of the ITA Act and the ADR 8.14-8.16.

value was constructed using costs in SACU as the ITAC was of the view that the costs of production in China and of the SACU industries were alike”.¹²⁰

3.3.4. Fair Comparison

The ITA Act requires the ITAC to make reason allowances in the conditions and the terms of sale, differences in taxation and other differences affecting the price comparability in determining the margin dumping.¹²¹ In addition, the ADR provides for adjustments in respect of differences in conditions, terms of trade, taxation, and level of trade, physical characteristics and qualities. According to the ADR, adjustments should be requested in the exporter’s response to the exporter’s questionnaire and must be substantiated and directly related to the sale in consideration and clearly demonstrated to have affected the price comparability at the time prices were set.¹²²

In terms of the ADA “In order to effect a fair comparison between the export price and the domestic price in the exporting country (or the country of origin) or, if applicable, the price established pursuant to the provisions of Article VI: 1 (b) of the General Agreement, the two prices shall be compared at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for the differences in conditions and terms of sale, for the differences in taxation, and for the other differences affecting price comparability”.¹²³

According to Brink, in practice there have been several problems with the ascertainment of fair comparison, as the ITAC application of adjustments is inconsistent. In the tyre (China) investigation the ITAC gave adjustments for differences in the costs of advertising and in selling, general and administrative costs. However, ITAC refused to make the same adjustments for subsequent investigation. The ITAC has also failed to make adjustments for bank charges incurred in converting exporting currency to domestic currency, despite the fact that this has a direct impact on the price received by the exporter.¹²⁴

In my opinion, the definition of fair comparison as contemplated in the ITA Act is fine, the problem starts when the provision is being applied. As stated by Brink there is so many

¹²⁰ Ibid.

¹²¹ Section 32(3) of the ITA Act.

¹²² ADR regulation 11.

¹²³ ADA Art.2.

¹²⁴ G Brink ‘Anti-dumping in South Africa’ (2012) Stellenbosch *TRALAC*.available at <http://www.tralac.org/files/2012/07/D12WP072012-Brink-Anti-Dumping-in-SA-20120725final.pdf> accessed 2016-05-22

inconsistencies when adjustments have to be applied from one investigation to another investigation.

3.3.5. Weight average margin of dumping

The ITA Act defines the margin of dumping as “the extent to which normal value is higher than the export price, after adjustments have been for comparative purposes”.¹²⁵

The ADR 12.2 prescribes the methodology to be used to determine the margin of dumping as follows: “in the case where products cannot be separately identified by the South African revenue services the commissioner shall calculate the margin of dumping for each product separately and determine the weighted average margin of dumping for all products on the basis of the individual export volume of each product”.

A determination of dumping margin can be difficult in situations where there are diverse models of the same imported/dumped goods. An example of such is seen in the case of bed linen, which was made up of fitted sheets, flat sheets, duvets covers, wherein SARS had formerly imposed separate duties on various bed linen models notwithstanding a weighted average margin for each model; hence a weighted average of dumping was determined for all sheets, another for duvets and pillow cases.¹²⁶ This is in different from the investigation of EC-Bed Linen where the WTO Appellate Body held that in respect of a product under investigation as defined by the investigating authorities, only a single margin of dumping may be determined in respect of that product. In this case it should be “bed linen” and not the different types of sheets like king size amongst others.¹²⁷

3.4. Material injury

There is no mention of material injury in the ITA Act. However, it is embodied in the Customs and Excise Act.¹²⁸ The ADR also provides for this and states that the ITAC shall consider whether there has been substantial suppression or depression on the SACU prices in determining material injury. The factors that are normally considered in determining injury include factors such as sales, volume, profit and loss, output, market share, productivity, and

¹²⁵ International Trade Administration Act 71 Of 2002 Section 1.

¹²⁶ See C Murigi. (2013) pp 64.

¹²⁷ G Brink ‘Determining the weighted average margin of dumping’ (2011) Stellenbosch: TRALAC. Available at <http://www.tralac.org/2011/05/11/determining-the-weighted-average-margin-of-dumping/> accessed -05-2015

¹²⁸ Section 82(1) Excise and Customs Act 35 of 1944.

return on investments, capacity, cash flow, inventories, employment, and wages in growth and, lastly, the ability to raise capital or investments.¹²⁹

An analysis by Brink of reports written by the ITAC and the Board shows that some injury factors carry more weight than others in determining injury; for example, volume of sales, price depression, and price suppression.¹³⁰

According to the ADA “A determination of injury for purposes of Article VI of the General Agreement shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and their effect on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products”.

The ITAC reports provide summary indicators of each item of the injury determination. The ITAC collects data and lists it in the report but, however, does not evaluate that data.¹³¹ The panel in the WTO case of Egypt Steel Rebar¹³² held that an investigating authority should not only gather data but also analyse and interpret it in accordance with art.3.4 of the ADA, which talks to the determination of the impact of dumping on the local industries.

In terms of the ITAC, the factors that must be used to determine injury are price suppression, profit and price depression. The determination of injury in dumping investigations was emphasised in the case of Rhône Poulenc v Chairman of the Board¹³³ wherein the court held that price undercutting, price depression, and decline in profits were the major determinants of injury in a dumping investigation.

Indeed, price undercutting, which is selling products at a lower prices than in the country of origin, should be the main factor when determining if dumping has occurred. Without repeating what was said above, another important factor is the profits decline in the domestic industry due to the exported product. In my opinion, these factors play a very important role when it comes to dumping of goods.

¹²⁹ G Brink ‘Anti-dumping in South Africa’ (2012) Stellenbosch TRALAC. available at <http://www.tralac.org/files/2012/07/D12WP072012-Brink-Anti-Dumping-in-SA-20120725final.pdf> accessed 2016-05-22.

¹³⁰ Ibid.

¹³¹ Junji N & Brink G Anti-dumping Laws and Practices of the New Users (2007) pp.221.

¹³² WTO Panel Report *Egypt-Definitive Anti-dumping Measures on Steel Rebar from Turkey* WT/DS211/R.

¹³³ Rhône Poulenc v Chairman of the Board on Tariffs and Trade 1998/6589 37(T).

3.5.Causation

Again regarding causation there is no reference made in the ITA Act; reference is made only in the ADR, which states that before any anti-dumping measures are imposed there must be material injury to a domestic market.¹³⁴ According to Brink and Junji, when determining causation, the Commission must ensure a causal link exists between material injury and dumping.¹³⁵ Additional factors that need to be considered to determine causation include amongst others: the change in volume of dumped imports, price undercutting, market share of dumped imports, the magnitude of the margin of dumping, and the price of un-dumped imports in the market.¹³⁶ The Commission is allowed to consider other factors in the determination of causality but only in instances where an interested party has submitted those other factors or where the Commission on its own has identified those factors.¹³⁷

It is imperative that South Africa incorporate causation into domestic law because it plays a big role in determining whether dumping of goods has occurred or not, and establishing the impact on the respective industry. Although the regulations, in my opinion, provide an adequate solution to determining the causation of dumping there is still a need for this provision to be embodied in law.

3.6.Public Interest

In 2006, the ITAC published proposed draft amendments, which included public-interest provisions to the ADR, although promulgation has not yet taken place and South African law does not provide for a public interest clause. Nonetheless, Murigi in her Masters dissertation provides that “when determining injury only the impact of local industry is considered and not that of the consumers and other users”. Vermulst recommends that “the developing world should have a public interest clause as it would afford a safety valve if the anti-dumping action, for whatever reason, seems undesirable”.¹³⁸

I agree with the comments of Vermulst and Murugi that in certain instances public interest should be considered when determining dumping of goods in a country; reason being that sometimes local goods are expensive and therefore consumers cannot afford them. I think in

¹³⁴ ADR 16.4.

¹³⁵ N Junji, G Brink ‘Anti-dumping Laws and Practices of the New Users’ (2007) Stellenbosch: *TRALAC*. pp.221.

¹³⁶ See the ADR 16.1.

¹³⁷ See the ADR 16.5.

¹³⁸ C Murigi (2013) pp 66.

this case that dumping should be allowed or the government should subsidise the local companies in order to reduce their prices. However, the above should be allowed only on stable food. Therefore, because of the reasons given above, I think public interest should be embodied in the anti-dumping laws of South Africa.

3.7. Investigation Procedures

Three stages are involved in the investigation process of dumping. The first stage is the pre-initiation stage; the second is the preliminary investigation phase; and the last the final investigation process. These stages are discussed in more detail below.

3.7.1. Pre-initiation process

The first stage begins with an application by the interested party. The ITAC evaluates the document, whether it has been properly documented, checks the product, dumping the industry, the injury and the causality.¹³⁹ Before an initiation is conducted the ITAC will look at the injury to the domestic industry and check if everything is correct. Only after that can an initiation be conducted.¹⁴⁰ If the ITAC after investigation finds that the case is without merit, it will terminate the case and then inform the applicant of the reasons for the termination. The applicant might also request a discussion of the reasons for rejection in an oral hearing.¹⁴¹ Lastly it should be noted that the ITAC can also initiate an investigation without having received any application from a particular industry/party.¹⁴²

3.7.2. Preliminary determination

This stage when an investigation has been initiated in the government gazette through a notice, the information is dispatched with 3 to 4 days after the initiation and the parties are given 30 days to submit their information to the ITAC and 7 (“seven”) days in which to receive the information. The parties are given a further 40 days after the notice has been published in the gazette. This time period is for parties that did not get a direct notification from the Commission of the investigation.¹⁴³ The ITAC would, if it sees there is a good reason for doing so, grant a further extension of 14 days. Such an extension is requested by either of the parties to the case and will only be granted when the requesting party has given adequate reasons.¹⁴⁴ After both

¹³⁹ G Horlick, E Vermulst ‘the 10 major problems with the anti-dumping instrument: an attempt at synthesis Journal of World Trade 39(1)’ (2005) Kluwer Law International. Printed in The Netherland pp.67-73.

¹⁴⁰ Ibid.

¹⁴¹ See the ADR 26.2. 406 See the ADR 26.3.

¹⁴² 398 See the ADR 3.1 & 3.3.

¹⁴³ See ADR 29.

¹⁴⁴ See ADR 30.

parties have submitted the required documents to support their case, the ITAC then analyses the documents and if there are any that are short or defective the ITAC sends them back to the parties for correction or the addition of more documents. The documents must be submitted in both softcopy and hardcopy.

Where parties cooperate, the ITAC will verify the information given by the importers and exporters submitted during the preliminary investigations. The ITAC will first issue a confidentiality verification letter to the parties and once the veracity has been confirmed then a non-confidential version will be released to the public. However, in practice, Brink writes that the verification reports any substance and the verification report for several different exporters in the same investigation will be virtually identical. The only exception is the adjustments claimed.¹⁴⁵ Analysis shows that the preliminary investigation stage will take a minimum of 98 days, a maximum of 504, and an average of 204.¹⁴⁶

3.7.3. Final determination

According to the ADR, parties have 14 days to respond to the preliminary report published by the ITAC; an extension of 7 days may be granted. Parties are not allowed to give any new information during the final stage of investigation. This might, however, be changed in certain circumstances in that the ITAC will allow new information if it deems fit at the final stage.

The ITAC's final determination is submitted in a non-confidential manner to the Minister of Trade and Industry. If the minister accepts the affirmative findings then he will give them to the Minister of Finance to impose the anti-dumping duties.¹⁴⁷ The anti-dumping duties will last for 5 years. Although the final investigation stage normally takes 26 weeks, some investigations take a longer time, especially in cases where the ITAC has found a negative preliminary determination. Cases in final stage took an average of 253 days between 1995 and 2010.¹⁴⁸

The investigation process is well drafted and adequate. However, their application seems to be a problem. Often the prescribed dates are not met with regard to completing the investigation of cases and a decision has to be taken to either impose or not impose anti-dumping duties.

¹⁴⁵ G Brink 'Anti-dumping in South Africa' (2012) Stellenbosch *TRALAC*.available at <http://www.tralac.org/files/2012/07/D12WP072012-Brink-Anti-Dumping-in-SA-20120725final.pdf> accessed 2016-05-22.

¹⁴⁶ Ibid.

¹⁴⁷ Section 56 of the Customs and Excise Act of 1964.

¹⁴⁸ G Brink 'Anti-dumping in South Africa' (2012) Stellenbosch *TRALAC*.available at <http://www.tralac.org/files/2012/07/D12WP072012-Brink-Anti-Dumping-in-SA-20120725final.pdf> accessed 2016-05-22.

ITAC takes longer to complete investigations than other countries, such as Australia and New Zealand as mentioned above.

3.8. Reviews

If the parties are not happy with the finding of the ITAC, various types of reviews are afforded to them. The reviews include interim reviews, sunset reviews, anti-circumvention reviews, new shipper reviews and judicial reviews. It is important to note that the reviews are initiated through publishing in the government gazette.¹⁴⁹ The sections that follow make up a discussion of the different kinds of reviews available.

3.8.1. Interim reviews

This kind of review may be requested by any interested party at least a year after the publication of the final determination and imposition of the anti-dumping duties. Here the party will initiate this review to determine whether the duties can be decreased or withdrawn.

Interim reviews are similar to original investigations; the only difference is that interim reviews do not have a preliminary determination and interested persons get 14 days within which they must comment on the material facts.¹⁵⁰ As a final determination the duties imposed may be increased, decreased, continued or abandoned; this would come as a result of the recommendation to the Minister¹⁵¹ by the ITAC.¹⁵²

3.8.2. Sunset reviews

According to the ADR a notice must be published in the government gazette of an impending lapse of anti-dumping duties approximately six months before the lapse of such anti-dumping duties. However, in practice the ITAC publishes notices during May or June stating the anti-dumping duties that will expire the next year and requiring the domestic industry to oppose the withdrawal of the duties within 30 days.¹⁵³

¹⁴⁹ See the ADR 41.

¹⁵⁰ See the ADR 46 and 43.2.

¹⁵¹ It should be noted that Minister refers to the Minister of Trade and Industry.

¹⁵² Ibid.

¹⁵³ ADR 54.

The first sunset review initiated in South Africa was initiated in 1999 and between 1999 and 2007 a minimum of 64 sunset reviews were done.¹⁵⁴ Sunset reviews are self-initiating; a South African industry or any affected industry must initiate this review.¹⁵⁵

According to Brink, “the sunset review procedure in South Africa is not in line with the legislative requirements and several consultants including authors have complained about the procedure used by the ITAC in the sunset reviews are inappropriate and that it is more difficult to have anti-dumping duty maintained following a sunset review than it is to have an anti-dumping duty imposed in the first instance”.¹⁵⁶

In the dumping investigation of carbon black, the South African domestic industry lodged an application that anti-dumping duties be maintained. The ITAC found that there was no possibility that the dumping would recur, so it denied the application. The industry took the matter for judicial review on 19 June 2006 and in May 2007 the High Court ruled against the ITAC; the court found that its methodology for calculating the likelihood that dumping would not occur again was flawed.¹⁵⁷

A sunset review must be completed within a year; however, the ITAC takes longer. This was seen in the case of *ITAC v SCAW South Africa (Pty) Ltd*¹⁵⁸ where the ITAC completed the case after 17 months and 524 days to be exact, despite the WTO requiring a year. Lastly South Africa takes long to finalise its investigations as compared to other countries like New-Zealand and Australia that take fewer than 180 days.¹⁵⁹

The ITAC had established an interpretation of the 5-year period to be counted from the day of the publication of the notice imposing the definitive measure (similar to the position in the USA, the EU and India). However, in September of 2007 the issues of interpretation of the 5-year period, as well as anti-dumping duties applied retrospectively, were dealt with in *Progress office machines v SARS* and a finding different from that of the ITAC was made. The SCA¹⁶⁰

¹⁵⁴ Brink, G ‘Sunset review in South Africa: how long is five years?’ (2007) Stellenbosch: TRALAC. Available at http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/20071113_TB07_Brink_SunsetReviews5Years.pdf accessed 03-01-2018

¹⁵⁵ See the ADR 53.2.

¹⁵⁶ Brink, G ‘Sunset review in South Africa: how long is five years?’ (2007) Stellenbosch: TRALAC. Available at http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/20071113_TB07_Brink_SunsetReviews5Years.pdf accessed 03-01-2018

¹⁵⁷ Ibid.

¹⁵⁸ *ITAC v SCAW SA (PTY) LTD* (2010) CCT 59/09 ZACC.

¹⁵⁹ ‘The South African Tyre Manufacturers Conference has Levelled Some Stinging Criticisms at ITAC Following its Protracted Anti-dumping Struggle’ *Mail & Guardian* (2011-10-06) available at <http://mg.co.za/article/2011-10-06-criticisms-of-itac> Accessed 2016-08-03.

¹⁶⁰ Take note that SCA stands for Supreme Court of Appeal.

held that since legislation provided that anti-dumping duties could not be imposed for more than 5 years, if duties were imposed with retrospective effect, the 5 years should be counted from the retrospective date of application of the duties and not from the date of publication of the notice imposing such duties. This meant that the maximum duration of anti-dumping duties was 5 years from the date of application and not from the date of imposition.¹⁶¹

The SCA's decision has been criticised as being erroneous for two reasons, although it cannot be appealed unless it is taken to the Constitutional Court on a constitutional ground. First is the fact that the court in its interpretation of the legislation disregarded what was consistent with international law as required by s233 of the Constitution. Despite hearing that in the USA and the EU the 5-year period is determined in accordance with the ADA, the court still made its decision differently. Second, according to the ADR, definitive duties remain in place for 5 years from the date of publication of the ITAC's final determination; meaning that the 5 years are counted from the date the notice is published in spite of the duty being imposed with retrospective effect.¹⁶²

This decision of the SCA could have negative effects on the domestic industry, in the sense that all anti-dumping duties currently in place and that follow earlier sunset reviews would have to be revoked with retrospective effect, thereby denying the domestic industries protection against unfair trade. The ITAC now follows the SCA's decision when initiating sunset reviews.

3.8.3. Anti-circumvention reviews

Circumvention generally means “an attempt by parties subject to antidumping duties to avoid paying the duties by formally moving outside the range of the antidumping duties order while substantially engaging in the same commercial activities as before”.¹⁶³

According to the ITAC “circumvention shall be deemed to take place if a change in the pattern of trade between third countries and South Africa or the Common Customs area of the SACU which results from a practice, process or work for which there is no or insufficient cause or economic justification other than the imposition of the countervailing duty; and remedial effects of the countervailing duty are being undermined in terms of the volumes or prices of

¹⁶¹ *Progress office machines CC v South African Revenue Service and others* (2007) SCA 118 par.14

¹⁶² *ibid*

¹⁶³ <http://webcache.googleusercontent.com/search?q=cache:K4w0RbvLaMQJ:legal-dictionary.thefreedictionary.com/circumvention+&cd=2&hl=en&ct=clnk&gl=za> accessed 2016-08-04.

the products under investigation.”¹⁶⁴ Anti-circumvention rules are provided for in the ADR, with only 4 reviews being conducted since these came into force.¹⁶⁵

3.8.4. New shipper reviews

Where an anti-dumping measure has been imposed on a country an exporter from that country who, during the original investigation, did not import anything into the republic may request for a new shipper review if he wants to start exporting into the country. In order to obtain an individual duty-free rate the exporter has to prove first that it is not related to any party that formed part of the original investigations and that it is subject to the anti-dumping measures and that it did not export to the country during the original anti-dumping investigation.¹⁶⁶

The person requesting the new shipper review must provide information regarding the normal price; that is the price in the importing country and his export price. The purpose of the information will be to prove that dumping will not occur. If dumping is not to happen then the ITAC will grant his request and allow him to import into the country anti-dumping duty free.¹⁶⁷

“If the ITAC accepts the exporter’s application, it will request the SARS Commissioner to impose a provisional payment that remains in force pending the review’s finalisation and to withdraw the anti-dumping duties that were imposed on the exporter. The reason for the provisional payment is to ensure that if dumping is found and a definitive duty is imposed, it can be applied with retrospective effect to the date of withdrawing the duty”.¹⁶⁸

3.8.5. Judicial reviews

The parties not happy with the determination of the ITAC may apply to the High Court to have the determination reviewed. They can also appeal the matter at the Supreme Court of Appeal.¹⁶⁹ “Any interested party must give the ITAC at least 30 days’ notice prior to filing any judicial review”.¹⁷⁰ The ADR makes a specific provision for a judicial review, not only at the final phase but also on preliminary determination in certain circumstances.¹⁷¹ Although the court

¹⁶⁴ ADR 60.

¹⁶⁵ See G Brink (2007).

¹⁶⁶ ADR 49.1.

¹⁶⁷ See the ADR 51.3.

¹⁶⁸ Brink, G (2008) pp.270.

¹⁶⁹ G Brink ‘Anti-dumping in South Africa’ (2012) Stellenbosch TRALAC.available at <http://www.tralac.org/files/2012/07/D12WP072012-Brink-Anti-Dumping-in-SA-20120725final.pdf> accessed 2016-05-22.

¹⁷⁰ ADR 64.

¹⁷¹ Brink, G ‘Sunset review in South Africa: how long is five years?’ (2007) Stellenbosch: TRALAC.available at http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/20071113_TB07_Brink_SunsetReviews5Years.pdf accessed 03-01-2018

will not refer the matter back to, the ITAC for reconsideration it has never substituted its decision for that of the ITAC.¹⁷² Since the ITAC was established, the institution has appeared in domestic courts 24 times. Out of the 24 cases, 16 were ruled in favour of the ITAC and 8 against.¹⁷³

The only case that dealt with the underlying facts of the investigation was the case of *Algorax*¹⁷⁴ where the court strongly criticised the methodology used in determining the likelihood of the recurrence of dumping in sunset reviews and provided guidelines on how such guidelines should be established. Only 4 cases were taken to court between 1992 and 2004 and another 6 in 2005.¹⁷⁵

The law that prescribes the different reviews is adequate; the problem then arises when such laws need to be applied. The ADR has set regulations that prescribe who can apply for reviews and the period in which the investigations of such reviews must be completed. The application is adequate; for instance, the ADR provides that investigations for sunset reviews must be done within a year. However, in the case of *ITAC v SCAW*, the investigations took longer (17 months to be precise). Therefore, like most of the provisions that are embodied in the relevant acts governing dumping and were discussed earlier in this chapter, they are adequately drafted. Issues arise only when they have to be applied or interpreted.

3.9. Conclusion

In conclusion, it is important to note that between the years 1995 and 2010 a total number of 253 dumping allegations were reported to the ITAC. Although problems with the anti-dumping laws will be discussed in detail in the next chapter, this chapter highlighted a few of those problems in its long existence of the use of anti-dumping mechanisms. The chapter discussed the substantive aspects and procedural aspects of the applicable anti-dumping laws in South Africa. From this chapter we can observe that the law in place is good. However, practice is a different story, for example, the authorities do not adhere to the prescribed days for completing investigations and giving rulings. Again the authorities seem to mis-interpret the laws anti-dumping laws that are in place, for example, they in certain investigations fail to consider certain factors like adjustments when determining price.

¹⁷² Ibid.

¹⁷³ Annual Report 2014/15 International Trade Administration Commission of South Africa.

¹⁷⁴ *Algorax v The Chief Commissioner, International Trade Administration Commission* (unreported case 2533/2005).

¹⁷⁵ G Brink 'Anti-dumping in South Africa' (2012) Stellenbosch *TRALAC*. available at <http://www.tralac.org/files/2012/07/D12WP072012-Brink-Anti-Dumping-in-SA-20120725final.pdf> accessed 2016-05-22.

4. CHAPTER FOUR

4.1. Introduction

Dumping of goods can produce devastatingly negative consequences for the importing country and these negative consequences might also effect its domestic industries and the economy of such a country in large. It is because of the negative consequences that countries have drafted laws that seek to protect their local industries dumping of goods. Although numerous laws have been promulgated to prevent the dumping of goods, a large number of goods are being dumped in South Africa and the local industries of importing are being affected badly. The question arises as to where these pieces of legislation have failed in addressing the problem of dumping of goods. This chapter will highlight what the deficiencies are with the dumping laws that exist in South Africa.

South Africa currently has three pieces of legislation that govern the dumping of goods, as mentioned in the previous chapters. Despite the existence of the legislation governing the rate of dumped goods in the country, this rate remains high. This chapter will look to identify the gaps in the legislation and their causes. Lastly, the chapter will also look at critiques on the dumping of goods topic.

4.2. Problems With The Anti-dumping Laws Of South Africa

4.2.1. Problems with price comparison and price determination

One of the major problems with South African anti-dumping laws is that the methods adopted by the anti-dumping authorities have been quite tricky to work with, given the inconsistencies in determining whether the prices of the imported product and the domestic product are even comparable. Moreover, it rarely happens in the real world that goods being sold in the local industry of the exporting country and those being sold in the importing state are physically identical and sold under the same conditions in both markets.¹⁷⁶ This factor makes it difficult to determine whether goods have been dumped in a country or not. In a number of investigations the commission failed to consider factors that are relevant in creating adjustments that are adequate; for for example, in the tyre (China) investigation the ITAC gave

¹⁷⁶ S Khanderia 'Rice Comparisons under the South African Anti-dumping Laws the *Faux Pas* Continues?' (2016) available at <http://ftr.sagepub.com/content/early/2016/08/10/0015732516650823.abstract> accessed 2016-09-12.

adjustments for differences in the costs of advertising and in selling, general and administrative costs. However, ITAC refused to make the same adjustments for subsequent investigation. As Brink observes “this is one of the key concerns Brazil anticipated to raise at the WTO in its case against South Africa’s imposition of anti-dumping duties on its chicken. It complained that the ITAC when comparing prices did not take into account the 16.5% tax rate on poultry in Brazil.”¹⁷⁷

It is important for the ITAC to ensure that the normal value and the export price are comparable before concluding that dumping into the domestic market has occurred. According to Brink in practice there are several problems that have been experienced due to the ITAC’s inconsistency when making the adjustments. An example of this inconsistency can be seen in the ITAC’s investigation involving the importation of Chinese made tyres into South Africa.¹⁷⁸ As well as the ITAC’s continued failure to make adjustments for bank charges incurred by an exporter in conversion of his currency to the Rand.¹⁷⁹

Another example of the ITAC’s inconsistencies were again apparent in the case of American chicken being dumped in South Africa. Watson argues that South Africa failed to correctly determine the export price when it imposed anti-dumping duties on American chicken.¹⁸⁰

4.2.2. Problems Involving Transparency

The anti-dumping system in South Africa has shown relatively low transparency during the investigation process. The entire system has provided an inadequate platform for other stakeholders to participate directly in the process.¹⁸¹ Watson¹⁸² states that many USA exporters have expressed their concerns about transparency and due process with regard to the ITAC’s administration of trade-remedy laws in South Africa.

4.3. Procedural Issues

A number of problems exist with regard to the way investigations are handled within the ITAC. For example in the Brazilian chicken investigation, where provisional duties were imposed on

¹⁷⁷ G Brink ‘Anti-dumping in South Africa’ (2012) Stellenbosch *TRALAC*.available at <http://www.tralac.org/files/2012/07/D12WP072012-Brink-Anti-Dumping-in-SA-20120725final.pdf> accessed 2016-05-22.

¹⁷⁸ *ITAC V SA Tyre Manufacturer’s Conference* ZASCA par.137.

¹⁷⁹ Brink G 2012 ‘Anti-dumping in South Africa’ available at <http://www.tralac.org/2012/07/25/anti-dumping-in-southafrica/> (accessed 2016-10-31).

¹⁸⁰ W Watson ‘Antidumping Fowls Out: U.S.–South Africa Chicken Dispute Highlights the Need for Global Reform’ (2015) *free trade bulletin*.

¹⁸¹ See Gupta K. Choudhury V. (2011).

¹⁸² *Ibid*.

the whole and bone cuts chicken imported from Brazil that were dumped into the SACU,¹⁸³ the Brazilian poultry industry was not happy with the decision of the Commission and stated that it was going to ask its government to take the matter to the WTO. The Brazilian Poultry Association (“the Association”) argued that the ITAC erred in its findings and that it had violated the rules of the WTO’s Anti-Dumping Agreement and had various defects. The Association based its claims on the fact that the ITAC did not consider the information submitted by three of the four Brazilian companies included in the ITAC inquiry.¹⁸⁴

The WTO panel in the Guatemala-Cement II and Egypt-Steel Rabar case stressed that “investigating authorities have an obligation to provide interested parties with an opportunity to defend their interests, now, in relation to the above mentioned Brazilian case the question arises as to whether ITAC gave adequate opportunity to the Brazilian companies in regard to this process”.¹⁸⁵ More concerns were also raised by the Association of Meat Importers and Exporters (“AMIE”) before the parliamentary committee on Trade and Industry in relation to the experience they had with the ITAC’s investigation on the alleged dumping of poultry from Brazil. It raised irregularities on the part of the ITAC in observing and applying its internal process in line with the international and domestic laws that govern dumping of goods.¹⁸⁶

The AMIE felt that the quality of conduct in issuing of ITAC reports has decreased dismally. The peak was reached when the ITAC published a notice stating it was not intending to impose any definitive duties on Brazilian chicken and the interim duties had to be terminated. The anti-dumping duties were not imposed eventhough, the Minister of Trade and Industry, Rob Davies, advised the ITAC to impose the duties. According to Cronje, the manner in which the commission handled the investigation raises questions as to whether the agency has definitive capacity to execute its legislative directives. Cronje added that the way the ITAC handles most dumping cases will badly affect South Africa’s honour as a trading partner and its failure to correctly interpret and apply both national and international laws will lead to more cases being brought against South Africa in the WTO dispute body”.¹⁸⁷

¹⁸³ See Murigi C. (2013) pp. 87.

¹⁸⁴ W Viljoen ‘Anti-dumping on chicken from brazil’ available at (2012) <http://www.tralac.org/2012/02/15/antidumping-duty-on-chicken-from-brazil> accessed 2016-10-26.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

In the case of *International Trade Administration Commission and Another v SA Tyre Manufacturers Conference (Pty) Ltd and Others*¹⁸⁸ the South African Tyre Manufacturers applied for the investigation of alleged dumping of tyres from China.¹⁸⁹ After investigating for quite some time, the Minister recommended that the investigation should be ended. The applicants took the decision for review. An application was brought for review in terms of section 46(1) of the ITA Act, of the decision to terminate the anti-dumping investigation.¹⁹⁰

The applicants¹⁹¹ brought an application¹⁹², for the Commission to investigate and evaluate applications for the amendment duties on their anti-dumping duties and to issue recommendations about the rates of the duties imposed. The applicants alleged that the recommendations made by the ITAC were seriously faulty. They submitted that the methodology for determining the normal price of the exported goods was flawed. The ITAC, in this investigation, did not follow the guidelines that are provided in section 32(4) of the ITA Act.¹⁹³

Justice Hartzenberg held that the Commission failed to properly apply its mind to the investigation. The court further ordered the determination and recommendations to be set aside also that investigations should be finalised.¹⁹⁴

4.4. Non-Disclosure of Confidential Information

According to the ITA Act any interested party has a right to confidentiality in their anti-dumping investigations. Such a party may apply for their investigations to be kept confidential; however, they must give reasons for not wanting their information to be disclosed.¹⁹⁵ In practice, however, the Commission classifies a lot of information as confidential, therefore making it very difficult for interested parties to defend themselves adequately. An example of this was seen in the Rhone Poulenc case¹⁹⁶ where the court held that the ITAC must have

¹⁸⁸ *International Trade Administration Commission and Another v SA Tyre Manufacturers Conference (Pty) Ltd and Others* 738/2010 [2011] ZASCA 137 (23 September 2011).

¹⁸⁹ Ibid. par 3

¹⁹⁰ Ibid par.24

¹⁹¹ Note that the applicants are the SA Tyre Manufacturers.

¹⁹² Section 26 of the ITA Act.

¹⁹³ Section 34(2) which reads as follows: "If the Commission when evaluating an application concerning dumping, concludes that the normal value of the goods in question is, as a result of government intervention in the exporting country or country of origin, not determined according to free market principles, the commission may apply to those goods a normal value of the goods, established in respect of a third or surrogate country."

¹⁹⁴ 'Antidumping in South Africa: what is the local precedent?' (2014) available at Hooyberg Attorneys accessed 2016-12-07.

¹⁹⁵ See s33 (1) of the ITA Act.

¹⁹⁶ *Rhône Poulenc v Chairman of the Board on Tariffs and Trade* 1998/6589 (T)

provided the applicant with sufficient information so that he or she could be aware of the difficulties of the case he or she was facing.

The failure of the ITAC to disclose the material facts of the case that they might use in deciding whether to impose or not impose duties hinders the interested parties from defending themselves adequately against such allegations. Because of the lack of information, the parties involved in the investigations fail to comment on the findings and decisions of the investigating authorities before the final determination is made.¹⁹⁷

Courts are hesitant to verify the ITAC's decisions and the procedure it follows in applying the anti-dumping laws, if the courts does look at the decisions and procedures followed by the ITAC, it does so very slowly.¹⁹⁸ Brink agrees with this argument as he states that most of the decisions that interested parties bring to the court against the ITAC are referred back to the ITAC for review.¹⁹⁹

As concluding remarks, it is clear from the above discussion that the ITA Act lacks direction when it comes to the determination of which information should be made private and which should not be made private. It is for this reason that the ITAC treats almost all the information as private therefore, making it harder for the parties in the investigation to defend themselves.

4.5. Use of Incomplete Data

The data collected on dumping and anti-dumping investigations is made up of figures that are missing or not complete. There no dates as to when anti-dumping duties started and when those duties come to an end. Most times the hard copies of the preliminary and the final outcomes go missing.²⁰⁰ The Brazilian Poultry Association has also accused the Commission of using statistics that were not correct in the Brazilian chicken case, which led to misrepresentation of facts.²⁰¹

According to Wolpert, "the claim by the ITAC about the quantity of the poultry products imported in the country and the injury suffered by the local companies was false based on the

¹⁹⁷ E Vermulst. G Horlick '10 Major Problems with the AD Instrument: An Attempt at Synthesis' (2005) *Journal of World Trade* 39(1) pp.67-73.

¹⁹⁸ Ibid

¹⁹⁹ G Brink 'Anti-dumping in South Africa' (2012) Stellenbosch *TRALAC*.available at <http://www.tralac.org/files/2012/07/D12WP072012-Brink-Anti-Dumping-in-SA-20120725final.pdf> accessed 2016-05-22.

²⁰⁰ C Bown 'Global Anti-dumping Database Version 1.0' (2005) available at http://www.brandeis.edu/~cbown/global_ad/ (accessed 2016-10-31)

²⁰¹ Ibid

statistic given”.²⁰² Wolpert further states that all the information submitted by the Brazilian poultry industry and its government regarding the wrong and incomplete data that was used to come to a conclusion was not considered by the ITAC. He comments as follows “this whole behaviour affects the users’ confidence in the system that is used in South African to govern dumping of goods and it further make it impossible to reach a decision that is correct”.²⁰³

The administration system of the ITAC needs to be relooked at because it affects the decisions that are taken and this defeats the purpose for which the anti-dumping laws were created. The fact that ITAC uses information that is incorrect prejudices the parties in the case.

4.6. Self-initiating Investigations

In general anti-dumping investigations will only be initiated upon acceptance of a written application by a domestic industry. In special circumstances, just the same, the investigating authorities might initiate investigations on behalf of a domestic industry. The problem with initiation of dumping investigations is that no mention exists of what special circumstances are in all the pieces of legislation that govern the dumping of goods. In this way, it is difficult for the authorities to ever initiate anti-dumping investigations.²⁰⁴

It was proposed that the ADR include a provision that would outline exactly what circumstances would be seen as special circumstances. However, this was rejected by many on the basis that there was no need for such a provision because it is far-fetched. The reason why it was described as far-fetched was because the Commission and its predecessor the BTT had never initiated an investigation.²⁰⁵

The fact that the ITAC does not initiate investigations on its own prejudices the small industries that are not aware that anti-dumping laws exist and the ones that do not have money to initiate the investigation proceedings.

²⁰² D Wolpert “Dumping the Facts” available at <http://www.amiesa.co.za/news/12-newsflash/100-dumping-thefacts.html> (accessed 2016-10-31).

²⁰³ Ibid.

²⁰⁴ G Brink ‘Anti-dumping in South Africa’ (2012) Stellenbosch TRALAC. available at <http://www.tralac.org/files/2012/07/D12WP072012-Brink-Anti-Dumping-in-SA-20120725final.pdf> accessed 2016-05-22.

²⁰⁵ See L Ndlovu (2010) pp 325.

4.7.The Problem between South Africa and the United States over dumped Chicken

The US and South Africa recently resolved a long-standing dispute over trade in chicken alleged to have been dumped in South Africa. The issue started 15 years ago when South Africa claimed that chicken from America was dumped into the South Africa market. The duties imposed were so high that it completely locked the American producers of chicken out of the South Africa market. The issue was that both countries were not happy with the case or the outcomes of the case. When the duties were imposed a decade ago the US government claimed that the duties were not calculated properly, while South African industries also felt like the government had failed them by allowing the US chicken to be dumped into the country so that it could not be removed from Africa Growth Opportunity Act (hereinafter referred to as AGOA).

According to Watson,²⁰⁶ “the South African authorities relied on an illogical method for determining whether U.S. producers were dumping chicken in South Africa”.²⁰⁷ Watson argues that the ITAC ignored the U.S. producers’ home market sales and taking into consideration the constructed value which is estimated by calculating cost of production and adding estimated amount for profit. The WTO Anti-dumping Agreement allows the use of constructed value in two circumstances. Specifically, those circumstances are when a “particular market situation” exists or a lack of sufficient sales “in the ordinary course of trade” means that domestic sales “do not permit a proper comparison.”²⁰⁸

“The way South African authorities justified steep duties on U.S. chicken is a particularly egregious example of the larger global phenomenon of antidumping abuse. Rather than seek to mitigate these abuses one at a time through managed trade arrangements, the U.S. government should spearhead efforts to reform antidumping rules at the WTO”, writes Watson²⁰⁹

An agreement was reached in June 2015 where South Africa agreed to let America import a certain number of chickens into the republic. The deal was agreed upon after America threatened to remove South Africa from its place as one of the countries benefiting from AGOA. This was agreed upon on the basis that South Africa would not be removed from benefiting from the AGOA.

²⁰⁶W Watson‘Antidumping Fowls Out: U.S.–South Africa Chicken Dispute Highlights the Need for Global Reform’ (2015) free trade bulletin. Pp.03.

²⁰⁷ Ibid.

²⁰⁸ Ibid.

²⁰⁹ Ibid.

According to a South African analyst the importation of this chicken will increase on the basis of South Africa's domestic market growth over the next decade.²¹⁰ The costs of allocating a 65 000-tonne quota to the US can be estimated on the basis of the value of additional imports and losses in production were expected to amount to an aggregate loss of R1, 8 billion in 2016. The cost to industry will, in the long run, increase as the industry loses more production while increasing imports, assuming that no corrective measures are taken to avert and mitigate losses in industry competitiveness.²¹¹

The manner in which the dispute was solved raises concerns as to the sovereignty and supremacy of our laws in South Africa. The anti-dumping laws will never achieve their purpose if their application is selective and subject to the country that South Africa is dealing with. I understand the points raised by Watson. However, in my opinion the matter should not have been resolved on the basis of threats.

4.8. The Impact of FTAs on Anti-dumping Laws in South Africa

The increasing of Free Trade Areas ("FTAs") in recent years might have conflicting effects on anti-dumping practices among FTA parties, in that the states to FTA may lessen the application of anti-dumping amongst the member states and increase the application on the parties that do not form part of the FTA. South Africa is no stranger to FTAs; it is a part of a number of FTAs.²¹²

4.8.1. South Africa and EU the TDCA

In March 2013, the South African Poultry Association (hereinafter referred to as SAPA) submitted an application to the ITAC for an increase of the custom duties on poultry frozen goods. The products that SAPA wanted to be have duties imposed on were carcass, whole bird, boneless cuts, offal and bone in portions.

The reason SAPA wanted these products to be charged more custom duties was because the poultry industry is the largest agricultural sub-sector in South Africa. SAPA further stated that producers in Southern African Customs Union experienced financial distress, with their business threatened mainly by a large and rapid increase in the volume of imports of extremely

²¹⁰ T Kapuya 'US – AGOA deal and SA's domestic poultry industry' (2015) FarmBiz.

²¹¹ Ibid.

²¹² A Dukgeun, S Wonkyu 'Analysis of Anti-dumping Use in Free Trade Agreements' (2011) *Journal of World Trade*, vol. 45, no. 2, pp.431-456. Available at <http://ssrn.com/abstract=1739314> accessed 2016-12-07.

low-priced frozen poultry meat.²¹³ During its investigation, the ITAC found that the demand for these products had increased over the three-year period for which data was collected. According to SAPA, bone-in cuts are considered as “lower value” products in developed countries, since these countries prefer breast meat. As a result, the bone-in cuts being exported to SACU in relatively large quantities at low prices.²¹⁴

However, in terms of the South Africa /European Union Trade Development Cooperation Agreement (herein after referred to as TDCA).²¹⁵ The above-mentioned duties had no impact on imports of poultry meat from the European Union (Herein after referred to as EU). The import volumes from EU countries such as Germany, the Netherlands and the UK commenced to penetrate the SACU market in 2010 and continued to increase in volume, as the customs duties were reduced in accordance with the SA/EU TDCA.²¹⁶

During the dumping investigation, SAPA alleged that imports of frozen bone-in chicken portions originating in or imported from Germany, the Netherlands and the UK were being dumped on the SACU market, thereby causing material injury and a threat of material injury to the SACU industry.

Imports from the EU showed the most growth, increasing from 5% in 2010 to 32% in 2012 bone-in portions EU imports constituted 69% of total imports in 2012 up from 39% in 2010. However, due to the (“TDCA”) between South Africa and the European Union (hereinafter referred to as EU), the ITAC cannot address imports from the EU. After the EU, Brazil is the largest exporter of most of the products investigated.²¹⁷

South Africa decided not to impose anti-dumping duties on dumped goods from the EU because it feared jeopardising its benefits that it received from the TDCA. Now the question could then be asked whether imposing the duties on poultry from countries that constituted a very small percentage of the dumped goods market was necessary at all because it would not alleviate any problem that SAPA raised.²¹⁸

The problem with regard to EU dumping was very similar to that of the American chicken being dumped in South Africa. The ITAC omitted to impose duties on the chickens being

²¹³See ITAC report 442.

²¹⁴ Ibid.

²¹⁵ Ibid

²¹⁶ See A dukgeun, S Wonkyu (2011) pp. 431-456.

²¹⁷ See ITAC report 442.

²¹⁸ Nkomo M. Van Wyk M. ‘competition and trade policy – frene mies?’ (2014) pp.07.

dumped from the EU because of the trade relationship the country had with the EU. This omission again undermined the supremacy of our laws and the sovereignty of South Africa as a country.

4.8.2. The SACU agreement

South Africa is a member of SACU, together with Botswana, Lesotho, Namibia and Swaziland (“BLNS”). SACU Free Trade Agreement (hereinafter referred to as the new SACU Agreement) was entered into in 2002 but came into force in 2004. The aim was to democratise SACU and to create institutions that would enable the BLNS countries to participate more fully in the decision-making processes in the Customs Union. This is one of the main reasons why the ITA Act was enacted; so that an institutional basis could be provided.²¹⁹

According to the new SACU Agreement, “ITAC is responsible for conducting the investigation and under the new SACU Agreement, ITAC is now obliged to make any recommendations directly to the SACU Tariff Board”.²²⁰ SACU has a ‘final say’ when anti-dumping measures are imposed by any of their member states. The implementation of SACU in the domestic law of South Africa received a lot of criticism when it was proposed in the Bill of the ITA Act before it was passed as an Act. Concerns included that the referral of investigations to SACU would lead to delays in the completion of the dumping investigations/cases and again that this issue undermined the sovereignty of South Africa as a country.²²¹ Although the Tariff board had not been formed, the country has not evaded danger. When the Tariff board is formed the problems associated with it, will surface.²²²

The promulgation of SACU provisions and the fact that SACU will pronounce on the anti-dumping matters in South Africa will have a bad impact on the administration of anti-dumping because the commission will lose its powers to decide on how and when to impose anti-dumping duties. Again referral of investigations to SACU might cause unfair treatment when it comes to imposing anti-dumping duties on the states that are members of SACU. The referral would mean that the countries forming part of SACU would get preferential treatment over the other countries, which would defeat the purpose of the anti-dumping laws promulgated in South Africa.

²¹⁹ See N Joubert (2011).

²²⁰ Ibid.

²²¹ Comments by SACOB on the Proposed Ratification of the Final SACU Agreement by South Africa, November 2003.

²²² L Edwards ‘Anti-dumping in South Africa: from proliferation to moderation’ available at http://papers.ssrn.com/so13/papers.cfm?abstract_id=1871948 accessed 2016-10-31.

4.9. Why is there a Lack of Use of Anti-dumping Measures in South Africa

Very few industries in South Africa make use of the entire system of anti-dumping. This section will outline the reasons why not many people make use of this system. The data was gathered between the years 2011 and 2013 by way of interviews with trade officials and experts in South Africa and Geneva. South Africa is the main focus of the section.

4.9.1. High cost and lack of expertise

Imposing trade remedies can be very costly and time consuming. The high cost could be another reason that most industries affected by dumping of goods do not bother initiating dumping investigations. Very few cases initiated between 1995 and 2011 were completed within 12 months, at least 44 out of 211 were completed within 18 months, and some took longer to be finalised.²²³

Another obstacle experienced with regard to anti-dumping investigations is that they are very expensive. All the hearings involved, field investigations, and sometimes sending teams in other countries to conduct investigations can be very high in cost. Anti-dumping actions in South Africa cost an average of R350 000 of the government/tax payers' money.²²⁴ Trade-remedy investigations need well-trained specialised lawyers and economists. However, training these professionals appears to be very expensive and keeping them is more expensive. As we know, government pays very low salaries to its employees.²²⁵

4.9.2. Weakness, lack of awareness and poor organisation of local producers

Most local producers are not aware of the fact that there are institutions that deal with dumping investigations; some do not even know what dumping of goods refers to so are unable to report it; others view dumping as competition. Again, the officials are unable to properly interpret or apply the legislation and regulations practically. For example, South Africa has been brought before the WTO for not properly interpreting or applying the law.²²⁶

²²³ See G Brink (2012)

²²⁴ O Illy 'Trade Remedies in Africa: Experience, Challenges, and Prospects' Working Paper available at

<http://ebookbrowse.com/illy-trade-remedies-in-africa-pdf-d370532454> accessed 2016-10-31 pp.19.

²²⁵ Ibid.

²²⁶ See Illy O, foot note 213.

4.10. The Case of South Africa and the WTO and the Anti-Dumping Agreement

South Africa joined the WTO in 1995 – the year in which the WTO was created. Although South Africa ratified all the WTO agreements, these are not promulgated as laws in South Africa. For this reason the Anti-dumping Agreement was not promulgated. Just the same, the South African Constitution provides for reference to international laws and agreements when national law is interpreted.²²⁷

According to ADA, “the contracting parties may apply anti-dumping duties on imports of products that are dumped in the republic and if such dumping causes injury to the domestic industry of the importing country”.²²⁸

South Africa has been involved in very few WTO disputes in relation to the dumping of goods. The first case was initiated against South Africa by India and was related to anti-dumping duties imposed against amoxicillin and ampicillin imported by South Africa from India.²²⁹

India alleged that South Africa had violated articles 2, 3, 12, and 15 of the anti-dumping agreement, as well as articles I and VI of the GATT 1994. The government of India considered the definition and calculation of the normal value to be inconsistent with the provision of the then WTO and that an inaccurate methodology had been used to determine the value and the margin of dumping. The method of arriving at a constructed export price was also considered not reasonable, which resulted in a higher margin of dumping the government of India further the determination of injury was not based in positive evidence and did not include an evaluation of all relevant economic factors which led to an erroneous determination of material injury, India was also argued that South African way of establishing of the facts of the investigation was not proper and the evaluation was not unbiased or objective.²³⁰

The argument by India followed South Africa’s refusal to make an adjustment for differences in raw material costs used for domestically sold and exported products, as the exporter could not prove that the lower-price imported raw materials were exclusively used in the production of the exported products.²³¹

²²⁷ Section 39 of the Constitution of the Republic of South Africa Act of 1996.

²²⁸ N Joubert (2012.)

²²⁹ Board report 3799 (amoxicillin and ampicillin India).

²³⁰ Ibid.

²³¹ G Brink ‘Anti-dumping in South Africa’ (2012) Stellenbosch *TRALAC*. available at <http://www.tralac.org/files/2012/07/D12WP072012-Brink-Anti-Dumping-in-SA-20120725final.pdf> accessed 2016-05-22.

The South African- Indian WTO case shows clear indication of non-compliance on the part of South Africa with regard to the ADA. Perhaps it would be best to promulgate the provisions contemplated in the ADA into South African law to ensure compliance and easy reference for those that interpret the provisions and apply them to cases.

The second dispute brought before the WTO against South Africa was related to acrylic blankets imported from Turkey.²³² South Africa had originally imposed anti-dumping duties on acrylic blankets imported from Turkey. After the imposition of the duties, the exporter started importing into South Africa the blankets in raw form; that is, in the form of rolls of acrylic fabric already indicating the lines where the blankets had to be cut. South Africa initiated an anti-circumvention investigation and imposed anti-dumping duties on the altered product. Turkey indicated that South Africa failed to follow WTO rules applicable to investigations and reviews. Turkey specifically indicated that it considered South Africa as having failed to ensure proper notification in this case and that the establishment of the facts had been carried out in a manner that was not objective. The complaints were mainly in relation to the initiation of the investigation into this case, the conduct of the investigator, and the imposition of anti-dumping duty.²³³

The third dispute, a sunset review that was initiated on 2 April 2004, related to uncoated paper imported from Indonesia.²³⁴ Indonesia alleged that the ITAC on the 17 August 2005 had made a final determination that injurious dumping was unlikely to recur. The final decision had not been effected by 18 May 2008, the date of the Indonesian complaints. Indonesia indicated that the delay in the implementation was a result of a pending case against ITAC.²³⁵

Professor Colin McCarthy, acting head of the ITAC highlighted the fact that South Africa had always done its best to act in strict conformity with the WTO rules in conducting anti-dumping investigations. McCarthy highlighted that the requirements of Article VI of GATT and the ADA, especially the notice requirements, had always been strictly adhered to. Although this might have been the case in practice, South Africa's existing legislation did not fully reflect South Africa's obligations under GATT 1994 and the WTO. The Department of Trade and Industry's invitation for comments on South Africa's draft ADR stressed the fact that proper legislation and regulations were required to inform all stakeholders of the substance and the

²³² Board report 4132 and board report 4160 (acrylic fabrics turkey).

²³³ Ibid.

²³⁴ South Africa – anti-dumping measures on uncoated wood free paper from Indonesia (brought by Indonesia).

²³⁵ G Brink 'Anti-dumping in South Africa' (2012) Stellenbosch *TRALAC*. available at <http://www.tralac.org/files/2012/07/D12WP072012-Brink-Anti-Dumping-in-SA-20120725final.pdf> accessed 2016-05-22.

procedures involved in anti-dumping investigations.²³⁶ But with regards to the fact that South Africa conforms to international laws when it comes to dumping of goods, Ndlovu believes that South African anti-dumping laws are inconsistent with the laws of the WTO.²³⁷

4.11. Conclusions

The anti-dumping regime has many flaws. The first is that the authorities that govern dumping determine the price of goods incorrectly. The authorities fail to calculate the export prices of goods. If you look at the alleged dumped chicken from US investigation, the first thing US alleged was the fact that the export price was not adequately calculated. When establishing fair comparison, the ITAC fails to take into consideration all the necessary factors to assist in the making of proper adjustments. This is one of the key concerns Brazil anticipated raising at the WTO in its case against South Africa's imposition of anti-dumping duties on its chicken. Brink also argues that several things are not taken into consideration.

One might think their investigation is complete and successful but discover later that other parties to the investigation have substantive evidence that the procedure followed was incorrect. Take for instance the Tyres-China investigation, where the ITAC granted adjustments for differences in advertising costs, general costs and administration costs, but refused to do the same in other investigations.

The ITAC handles much information as confidential, which makes it very difficult for interested parties to defend themselves adequately. An example of this difficulty was seen in the case of Rhone Poulenc where the court held that the ITAC should have supplied the applicant with more information that would have enabled the client to know all the difficulties of the case brought against them. Local courts are hesitant to double check the ITAC's decisions and the process, if it is followed, is very slow. Brink agrees with this argument, as he states that most of the decisions that interested parties bring to the court against the ITAC are referred back to the ITAC for review.²³⁸

²³⁶ See N Joubert (2012).

²³⁷ See L Ndlovu. (2010) pp 332.

²³⁸ See G Brink (2012).

5.CHAPTER FIVE

5.1.Conclusions

For over 90 years South Africa has legislated and implemented anti-dumping measures to try and neutralise the problem of dumping that the country continues to face to this day. However despite the measures dumping is still a major problem for the country and to date and many industries have been affected by it. The problem of dumping of goods is still threatening the South African industries to date with some like the steel and poultry industries at the verge of closing down.

This chapter will focus on the summary of all the chapter and conclude with recommendations. The research has shown that the anti-dumping laws that we have in place in the country still lack in certain areas and should be given attention so the problem of anti-dumping can be solved, it is natural cause that there will always be problems in every system introduced but when a system has more problems than success and when every user of that system complains about, it is of paramount importance that such a system should be reviewed.

With the substantial amount of existence that the anti-dumping laws have been in South Africa, it is unsettling when one realises that there are still problems in this area. There are still problems with compliance with international trade treaties that South Africa is party, non-compliance might lead to sanctions being imposed the country.

The main problem faced with the anti-dumping laws in South Africa is interpretation and application of the legislations that are in place to govern dumping of goods. For example the ADR provides that some of the information should be treated as confidential, however, this has led to the Commission treating things that come to their hands as confidential.

Another problem that is faced with the anti-dumping laws of South Africa is that it does not cater for some of the important factors that should be considered when determining the dumping of goods in the country like determining injury amongst others. The reluctance of the courts to intervene in the decisions taken by the ITAC also adds salt to the wound because the commission will do as they please without taking into consideration the law due the fact the no one will intervene.

Brink mentions the Tyres-China investigation, where the ITAC granted adjustments for differences in advertising costs, general costs and administration costs, but refused to do the

same in the following investigations; as well as the ITAC's continued failure to make adjustments for bank charges incurred by an exporter in conversion of his currency to the Rand.

the ITAC handles a lot of information as confidential therefore making it very difficult for interested parties to defend themselves adequately, an example of this was seen in the case of Rhone Poulenc where the court held that the ITAC should have supplied the applicant with more information so that the applicant can be in a position to know all the difficulties of the case brought against it.

By addressing the above mentioned concerns, its anti-dumping laws will be more transparent and reliable in future. A refined anti-dumping instrument will assist South Africa's industries to improve their competitiveness and at the same time make sure that exporters do not view the country as a dumping ground.

5.2. Recommendations

The first recommendation is that a commission should be created that deals with investigations of dumping and other trade related investigations because the courts always returning them to the ITAC for reviewing without dealing with them in any way. The area of international trade is one field that many people do not pursue, and because of this even people who work for the offices that deal with trade remedies have very little knowledge on this topic. The lack of knowledge could be one of the reasons why most investigations are wrongly handled and most parties are not satisfied with the outcomes.

The government should see to it that everyone working in the trade remedies offices are well trained. Although trade remedies are not new to South Africa, very few people are aware that such remedies exist.

The Government should create awareness to let the people know that you can report dumping of goods, they should create an awareness through all forms of media so as to cater for everyone despite their age group.

Because South Africa has been accused of disregarding the WTO Anti-Dumping Agreement when imposing duties on dumped goods. The most important thing to do to ensure compliance with the WTO and the ADA, is to amend the legislations to adhere to international standards of dealing with dumping of goods.

There should be a commentary on the legislations governing dumping of goods that is compiled by the scholars of this field of study, so that when the authorities apply provisions in all the cases they are able to understand the provision thoroughly and how it should be applied because we a lot of investigations are dealt with differently even when the investigations are the same.

The courts should also get more involved because as a country, we rely on the court to interpret legislations. If the courts did not return the cases back to the ITAC for reviewing most of the time, the problem of interpreting provisions of the anti-dumping cases will be neutralised. A new legislation that deals with dumping only should be enacted because it is a very big area on its own hence it should have its own legislations governing it.

Lastly thorough investigations should be done before any measures are imposed because this makes other countries lose faith in our systems. The loss of faith in the South African system could result in the decrease in trade with other counties, which could in return have a negative impact on the economy of South Africa. Furthermore it is important to note that Free Trade Areas are for the growth of the countries involved. Now if such an FTA now forces a country to disregard its law because of it is not a good one and should therefore be looked at, I am saying in the light of how South Africa dealt with the AGOA and EU with regard to dumping chicken in the country. Again the fact the SACU has final say on the duties imposed on dumping in the country undermines us as a sovereign state and should seriously re-looked at and considered.

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