Anti-Dumping in South Africa

by Gustav Brink

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By Gustav Brink

1. Introduction

South Africa’s anti-dumping legislation dates back nearly a century and its first anti-dumping measure was imposed 90 years ago in 1921. It was one of the most frequent users of the instrument in the first three-quarters of the twentieth century and the single biggest user during the first 10 years of the General Agreement on Tariffs and Trade (GATT). It was again a major user in the first 15 years of the World Trade Organisation (WTO). Despite this long history, disproportionately little attention has been accorded the topic in South Africa.

This Section focuses on both substantive and procedural issues, with special emphasis on the application of anti-dumping against products of South American origin. Section 2 provides an overview of the South African anti-dumping environment, i.e. the applicable legislation and the institutional structure. Section 3 analyses the anti-dumping statistics, while Section 4 evaluates the substantive issues, as applied in South Africa. Section 5 evaluates the procedures, taking into consideration inconsistencies with WTO requirements and in the implementation of the legislation. Special attention is given to the impact on imports from South America.

1. Introduction
2. Legislation and institutional issues

2.1 Historical overview

In 1914 South Africa became the fourth country after Canada, Australia and New Zealand to adopt anti-dumping legislation. Only seven years later it imposed its first anti-dumping duty and it continued to initiate no fewer than 883 anti-dumping investigations prior to 1995, when the new dispensation of the WTO came into operation. Although the Board of Trade and Industry, later to become the Board on Tariffs and Trade, was officially responsible for anti-dumping investigations, in practice Customs conducted the dumping part of investigations, while the Board was responsible for investigating injury and causality and to make the necessary recommendations regarding the imposition of any duties. Amendments to the Board Act transferred full responsibility for investigations to the Board in August 1992. Further amendments were made to the Board Act in 1995 to enable a gradual transition toward consistency with the provisions of the Anti-Dumping Agreement of 1994. This entailed including the definitions of dumping, normal value, export price and fair comparison consistent with the Anti-Dumping Agreement. In 1995 South Africa notified not only the Board Act and the relevant parts of the Customs Act to the WTO as the sources of its anti-dumping legislation, but also the 1995 Guide which had no legal standing. Despite the 1995 Guide being withdrawn from circulation, the Board being replaced by the International Trade Administration Commission (ITAC) in 2003 and the promulgation of the Anti-Dumping Regulations, South Africa never notified the withdrawal of the 1995 Guide to the WTO Members.

2.2 Legislative environment

The current dispensation started in August 1992 when a separate anti-dumping unit, the Directorate for Dumping Investigations, was founded in response to the Board Amendment Act.  

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8 Board on Tariffs and Trade Amendment Act, 60 of 1992.
10 Board on Tariffs and Trade Amendment Act, 39 of 1995.
11 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade.
12 WTO Notification of laws and regulations under articles 18.5 and 32.6 of the agreements: South Africa G/ADP/N/1/2AF/1; G/SCM/N/1/2AF/1 (8 December 1995).
14 Brink (2002a: 5); De Lange (2003: 2 and 12).
However, it is only since November 2003, after the promulgation of detailed regulations, that South Africa’s anti-dumping legislation has provided operational guidelines on issues of both substance and procedure.\textsuperscript{17}

The South African Constitution\textsuperscript{18} provides the basis for all laws in South Africa and all laws must be consistent with the provisions of the Constitution. Relevant to anti-dumping investigations are those provisions that guarantee everyone access to ‘any information held by the state’;\textsuperscript{19} guarantee the right to ‘reasonable and procedurally fair’ administrative action;\textsuperscript{20} require that written reasons must be given in each instance where a party’s rights have been adversely affected by an administrative action;\textsuperscript{21} require the public administration to provided services ‘impartially, fairly, equitably and without bias’;\textsuperscript{22} and that require courts of law to interpret national legislation in line with international law.\textsuperscript{23}

Several other laws generally impact on anti-dumping investigations. The Promotion of Access to Information Act\textsuperscript{24} provides the basic principles of access to information, both regarding information held by the state and by individuals, including that a person is entitled to all information held by the state unless the information relates to ‘financial, commercial scientific or technical information … of a third party, the disclosure of which would be likely to cause harm to the commercial or financial interests of that third party’\textsuperscript{25} or confidentially submitted information that could prejudice the party that submitted such information.\textsuperscript{26} The Promotion of Administrative Justice Act,\textsuperscript{27} in turn, provides

\begin{flushleft}
\textsuperscript{16} The author was one of the six founding members of the Directorate.
\textsuperscript{17} Note that the previous authority, the Board on Tariffs and Trade, had issued separate Guides on anti-dumping procedures in 1992, 1994 and 1995, but these had no legal status. See National Economic Forum (1994: 9); Blumberg (1994: 7).
\textsuperscript{18} Constitution Act, 108 of 1996.
\textsuperscript{19} S 32 of the Constitution.
\textsuperscript{20} S 33 of the Constitution.
\textsuperscript{21} S 33(2) of the Constitution.
\textsuperscript{22} S 195 of the Constitution.
\textsuperscript{23} Ss 231 and 233 of the Constitution.
\textsuperscript{24} Promotion of Access to Information Act, 2 of 2000 (PAIA).
\textsuperscript{25} S 36(1)(b) of PAIA.
\textsuperscript{26} S 36(1)(c) of the PAIA.
\textsuperscript{27} Promotion of Administrative Justice Act, 3 of 2000 (PAJA).
\end{flushleft}
for fair administrative action, including the rules of natural justice, i.e. the *audi alteram partem*\(^{28}\) and *nemo iudex in propria causa*\(^{29}\) rules.

Anti-dumping duties are imposed in terms of the Customs Act.\(^{30}\) This Act specifically provides for the imposition of preliminary payments at the request of International Trade Administration Commission (ITAC) and at the level and for the time stated in such a request,\(^{31}\) as well as for the extension of such preliminary duties.\(^{32}\) It further provides for the imposition of definitive anti-dumping duties, including the retroactive imposition to the date that preliminary duties were imposed.\(^{33}\)

The WTO Agreement, including the Anti-Dumping Agreement, has not become part of South Africa’s municipal law\(^{34}\) as it has not been promulgated by Parliament.\(^{35}\) However, the *Constitution* provides that when a Court interprets ‘any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any interpretation that is inconsistent with international law.’\(^{36}\) Consequently, in the *Brenco* case\(^{37}\) the Supreme Court of Appeals held that

> the point is not that [the investigating authority] was obliged as a matter of law to comply with the two international agreements in question [Tokyo Round anti-dumping Code 1979 and the anti-dumping Agreement 1994] but that international practice is of some assistance in assessing the fairness of the practices of [the investigating authority] in conducting anti-dumping investigations.\(^{38}\)

In *Progress Office Machines v SARS* (2007) the Supreme Court of Appeals held that

\(^{28}\) The requirement that both sides to the argument must be heard.

\(^{29}\) The requirement that a person cannot be a judge in his own case.

\(^{30}\) *Customs and Excise Act, 91 of 1964.*

\(^{31}\) S 57A(1) of the Customs Act.

\(^{32}\) S 57A(2) of the Customs Act.

\(^{33}\) S 55(2)(b) of the Customs Act.

\(^{34}\) WTO G/SG/W/176 Section 2; WTO G/SCM/W/405 10; WTO G/ADP/W/395 10; Debates of the National Assembly of South Africa, 6 April 1995, columns 642 & 653; Debates of the Senate of South Africa, 6 April 1995, column 554; Gillespie (1996: 6); Brink (2002a: 7); Brink (2004: 702-703).

\(^{35}\) S 231(2) of the Constitution provides that ‘an international agreement binds the Republic [of South Africa] only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement [of a technical, administrative or executive nature] referred to in subsection (3)’.

\(^{36}\) S 233 of the *Constitution Act 1996.*

\(^{37}\) *The Chairman of the Board on Tariffs and Trade v Brenco* 2001(4) SA 511 (SCA).

\(^{38}\) *Ibid* 526.
The effect of international treaties on municipal law is regulated by ss 231, 232 and 233 of the Constitution. Section 231(4) provides that ‘[a]ny international agreement becomes law in the Republic when it is enacted into law by national legislation’. The WTO Agreement was approved by Parliament on 6 April 1995 and is thus binding on the Republic in international law but it has not been enacted into municipal law. Nor has the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade been made part of municipal law. No rights are therefore derived from the international agreements themselves. However, the passing of the International Trade Administration Act 71 of 2002 (“ITAA”) creating ITAC and the promulgation of the Anti-Dumping Regulations made under s 59 of ITAA are indicative of an intention to give effect to the provisions of the treaties binding on the Republic in international law. The text to be interpreted, however, remains the South African legislation and its construction must be in conformity with s 233 of the Constitution.\(^{39}\) (Footnotes omitted)

In \textit{ITAC v SCAW} the Constitutional Court held that the International Trade Administration Commission (ITAC) could not be interdicted from forwarding its recommendation to the minister as the minister had a constitutional duty to perform in anti-dumping investigations.

The primary legislation is the International Trade Administration Act\(^ {40}\) (ITA Act), which replaced the Board on Tariffs and Trade Act (the Board Act)\(^ {41}\) on 1 June 2003. The ITA Act established ITAC,\(^ {42}\) provides that ITAC is responsible for anti-dumping investigations,\(^ {43}\) defines dumping,\(^ {44}\) normal value\(^ {45}\) and export price\(^ {46}\) and provides for the treatment of confidential information.\(^ {47}\) All other substantive issues and the procedural issues are provided for in the Anti-Dumping Regulations.\(^ {48}\) The ITA Act also provides that parties may submit applications to ITAC, that ITAC has to consider


\(^{40}\) \textit{International Trade Administration Act, 71 of 2002}.

\(^{41}\) \textit{Board on Tariffs and Trade Act, 107 of 1986}.

\(^{42}\) S 7 of the ITA Act.

\(^{43}\) S 16 of the ITA Act.

\(^{44}\) S 1(2) of the ITA Act.

\(^{45}\) S 32(2)(b) of the ITA Act.

\(^{46}\) S 32(2)(a), s32(5) and s32(6) of the ITA Act.

\(^{47}\) S 33-37 of the ITA Act.

each application on its own merits, and that ITAC may request additional information from any party.\(^{49}\)

The Anti-Dumping Regulations, which comprise 68 sections, are divided into five parts. Part A (Section 1) consists of the definitions, while Part B (Sections 2 to 6) contains the general provisions. These include additional information on confidential information, representation by third parties, oral hearings and adverse party meetings. Part C (Sections 7 to 39) is entitled ‘Procedures’, and consists of four subparts. Subpart I addresses substantive, rather than procedural, issues, including the Southern African Customs Union (SACU) industry,\(^{50}\) normal value,\(^{51}\) the determination of the margin of dumping,\(^{52}\) material injury,\(^{53}\) threat of material injury,\(^{54}\) material retardation of the establishment of an industry,\(^{55}\) causality,\(^{56}\) the lesser duty rule,\(^{57}\) verifications\(^{58}\) and verification reports.\(^{59}\) Subparts II, III and IV relate with the pre-initiation,\(^{60}\) preliminary\(^{61}\) and final investigation phases\(^{62}\) respectively. These subparts include references to the time frames imposed on all interested parties, but refrain from imposing any meaningful time frames on the Board itself. Part D (Sections 40 to 66) covers the various types of reviews. Subpart I deals with general provisions applicable to reviews, including notification,\(^{63}\) initiation,\(^{64}\) responses by interested parties\(^{65}\) and the essential facts to be considered by ITAC,\(^{66}\) while Subparts II, III, IV, V and VI deal with interim (changed circumstances),\(^{67}\) new shipper,\(^{68}\) sunset,\(^{69}\) anti-circumvention\(^{70}\) and judicial reviews\(^{71}\)

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\(^{49}\) S 26 of the ITA Act.  
\(^{50}\) Anti-Dumping Regulation (ADR) 7.  
\(^{51}\) ADR 8.  
\(^{52}\) ADR 12.  
\(^{53}\) ADR 13.  
\(^{54}\) ADR 14.  
\(^{55}\) ADR 15.  
\(^{56}\) ADR 16.  
\(^{57}\) ADR 17.  
\(^{58}\) ADR 18.  
\(^{59}\) ADR 19.  
\(^{60}\) ADR 21-28.  
\(^{61}\) ADR 29-34.  
\(^{62}\) ADR 35-39.  
\(^{63}\) ADR 40.  
\(^{64}\) ADR 41.  
\(^{65}\) ADR 42.  
\(^{66}\) ADR 43.  
\(^{67}\) ADR 44-47.  
\(^{68}\) ADR 48-52.  
\(^{69}\) ADR 53-59.  
\(^{70}\) ADR 60-63.
respectively. Subpart VII deals with refund procedures.\textsuperscript{72} Finally, Part E (Sections 67 and 68) contains the final provisions, including delegation of power and transitional arrangements.

Draft amendments to the ITA Act were published on 14 October 2005 and interested parties were invited to comment.\textsuperscript{73} Draft amendments to the Anti-Dumping Regulations were published on 10 November 2006 and interested parties were invited to comment.\textsuperscript{74} However, the amendments had not been promulgated by November 2011.

The wording of the ITA Act and the Anti-Dumping Regulations in general follows those of the Anti-Dumping Agreement. Moreover, there are several provisions that provide for more detailed or more stringent rules than those prescribed by the Anti-Dumping Agreement, including the mandatory application of the lesser duty rule where both importers and exporters have cooperated in an investigation, while initiation standards for original investigations and sunset reviews are more stringent than required by the Anti-Dumping Agreement.\textsuperscript{75} In addition, the Anti-Dumping Regulations include detailed provisions for anti-circumvention review procedures that are inconsistent with the provision of the Anti-Dumping Agreement.\textsuperscript{76} On the other hand, there is a considerable margin of administrative discretion.\textsuperscript{77} Thus, one should focus on the actual administrative practice to properly evaluate the WTO consistency of the South African anti-dumping regime.

### 2.3 Institutional structure

The Board of Trade and Industries was established as an independent statutory body in 1921\textsuperscript{78} and was responsible \textit{inter alia} for anti-dumping investigations.\textsuperscript{79} It actively pursued anti-dumping for the

\textsuperscript{72} ADR 64.

\textsuperscript{73} ADR 65-66.

\textsuperscript{74} See the International Trade Administration Amendment Bill published under notice 1867 published in \textit{Government Gazette} 28137 on 14 October 2005.

\textsuperscript{75} Notice 1606 of 2006 in \textit{Government Gazette} 29382 of 10 November 2006. See Brink (2006) and Ndlovu (2010) for extensive comments on the proposed amendments.

\textsuperscript{76} See e.g. Brink (2004: 866-868 and 919-920); Brink (2006: 27); Brink (2008c: 268-269).

\textsuperscript{77} See e.g. Brink (2009c) and the discussion in Section 6.4 below.


\textsuperscript{79} Notices 1044 and 1045 of 8 July 1921. See also \textit{Board Report No. 1} p. 2.

\textsuperscript{79} See \textit{Board Report No.1}. See also s2(1)(g) of the \textit{Board of Trade and Industries Act 1924}; s9(2)(g) of the \textit{Board of Trade and Industries Act 1944}. 
protection of the domestic industry since the early 1920s.\textsuperscript{80} ITAC replaced the Board on 1 June 2003. In terms of the ITA Act, ITAC’s function is to foster economic growth and development in order to raise incomes and promote investment and employment in South Africa.\textsuperscript{81}

At present ITAC has four divisions, one of which is responsible for anti-dumping investigations. This division is responsible for all trade remedy investigations, including anti-dumping.\textsuperscript{82} The division consists of two directorates, Trade Remedy Investigations I and II. Both directorates are equally responsible for investigations, and investigations are allocated to the respective directorates on the basis of available capacity. Each directorate is responsible for the full investigation, i.e. it will conduct the dumping, injury and causal link investigations. The two Trade Remedy Investigations Directorates have a total of 21 investigating officers, two senior managers and four support staff, for a total staff complement of 27.\textsuperscript{83} Few, if any, of the investigating officers hold a postgraduate qualification, only one is skilled as an accountant, none as lawyers and virtually none have any experience outside the civil service. The directorates are also responsible for countervailing and safeguard investigations, but are not responsible for any other work, e.g. tariff investigations\textsuperscript{84} or trade negotiations. While all of the investigating officers have a basic economic background, few of the officers have any prior experience, i.e. they are recruited straight from university. At present only five of the investigating officers have each conducted more than five anti-dumping investigations.

ITAC may request the Commissioner for the South African Revenue Service (SARS) to impose preliminary anti-dumping payments, but its final determination is in the form of a recommendation to the Minister of Trade and Industry, who has to make the final decision. In practice he will seldom, if ever, amend or question a determination made by ITAC. If the Minister of Trade accepts an affirmative recommendation by ITAC, he will request the Minister of Finance to impose definitive anti-dumping duties to the amount recommended by ITAC. The enforcement and administration of anti-dumping duties fall full within the responsibility of SARS (Customs).

\textsuperscript{80} Hansard (1986: 11562-11563); Hansard (1992: 4808-4809).
\textsuperscript{81} S2 of the ITA Act.
\textsuperscript{82} S16(1)(a) of the ITA Act.
\textsuperscript{83} Staffing figures provided by the Senior Manager: Trade Remedies I in response to a question posed by the author. Written response on file with the author.
\textsuperscript{84} Customs tariffs and industrial rebates are the responsibility of two other directorates within ITAC, while trade negotiations form part of the Department of Trade and Industry’s responsibilities.
3. Statistics

Although generally regarded as one of the new users of anti-dumping, South Africa has been one of the major users of the instrument since the 1920s. 85 Except for the period from the 1970s to 1992, 86 during which period ‘formula duties’ based on prices in Western Europe were imposed on most imports, South Africa consistently imposed a large number of anti-dumping measures. As far as could be determined, a total of 938 anti-dumping investigations were initiated between 1921 and 1994. 87 However, as South Africa was not a signatory to either of the Anti-Dumping Codes under GATT it never reported its use of anti-dumping. Table 3.1 sets out the number of investigations initiated in each year since the establishment of the WTO, along with the number of cases in which definitive anti-dumping duties were imposed. Anti-dumping duties were imposed in 128 of the 212 88 cases initiated after the establishment of the WTO, i.e. since January 2005. 89 The following table indicates the number of initiations each year, with the number of affirmative findings for investigations initiated in that year.

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86 Replies of the South African Government to the questions posed by Argentina, Australia, EC, Hong Kong, India, and the US, G/ADP/W/395, 1; Belli, Finger and Ballivian (1993: 3 and 6).
87 See Brink (2004: 54-58 and 741).
88 Note that the official WTO statistics indicate that only 206 investigations were initiated during this period. However, analysis of all South Africa’s semi-annual reports to the WTO Anti-Dumping Committee shows that 211 investigations were initiated. It appears that the major discrepancy is in respect of 1996, where the WTO statistics indicate that 33 investigations were initiated whereas a total of 39 investigations were initiated that year.
Table 3.1: Anti-dumping Initiations and findings by year\(^{90}\)

<table>
<thead>
<tr>
<th>Year</th>
<th>Initiations</th>
<th>Duties</th>
<th>Terminations</th>
<th>Duties</th>
<th>Terminations</th>
</tr>
</thead>
<tbody>
<tr>
<td>1995</td>
<td>16</td>
<td>9</td>
<td>7</td>
<td>56.25%</td>
<td>43.75%</td>
</tr>
<tr>
<td>1996(^{a})</td>
<td>39</td>
<td>19</td>
<td>20</td>
<td>48.72%</td>
<td>51.28%</td>
</tr>
<tr>
<td>1997</td>
<td>23</td>
<td>12</td>
<td>11</td>
<td>52.17%</td>
<td>47.83%</td>
</tr>
<tr>
<td>1998</td>
<td>40</td>
<td>33</td>
<td>7</td>
<td>82.50%</td>
<td>17.50%</td>
</tr>
<tr>
<td>1999</td>
<td>16</td>
<td>13</td>
<td>3</td>
<td>81.25%</td>
<td>18.75%</td>
</tr>
<tr>
<td>2000(^{b})</td>
<td>21</td>
<td>15</td>
<td>6</td>
<td>71.43%</td>
<td>28.57%</td>
</tr>
<tr>
<td>2001</td>
<td>5</td>
<td>5</td>
<td>0</td>
<td>100.00%</td>
<td>0.00%</td>
</tr>
<tr>
<td>2002(^{c})</td>
<td>5</td>
<td>2</td>
<td>3</td>
<td>40.00%</td>
<td>60.00%</td>
</tr>
<tr>
<td>2003(^{d})</td>
<td>8</td>
<td>2</td>
<td>6</td>
<td>25.00%</td>
<td>75.00%</td>
</tr>
<tr>
<td>2004(^{e})</td>
<td>6</td>
<td>1</td>
<td>5</td>
<td>16.67%</td>
<td>83.33%</td>
</tr>
<tr>
<td>2005(^{f})</td>
<td>23</td>
<td>7</td>
<td>16</td>
<td>30.43%</td>
<td>69.57%</td>
</tr>
<tr>
<td>2006</td>
<td>3</td>
<td>1</td>
<td>2</td>
<td>33.33%</td>
<td>66.67%</td>
</tr>
<tr>
<td>2007</td>
<td>5</td>
<td>3</td>
<td>2</td>
<td>60.00%</td>
<td>40.00%</td>
</tr>
<tr>
<td>2008</td>
<td>3</td>
<td>3</td>
<td>0</td>
<td>100.00%</td>
<td>0.00%</td>
</tr>
<tr>
<td>2009</td>
<td>3</td>
<td>2</td>
<td>1</td>
<td>66.67%</td>
<td>33.33%</td>
</tr>
<tr>
<td>2010</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Total</td>
<td>216</td>
<td>127</td>
<td>88</td>
<td>58.80%</td>
<td>41.20%</td>
</tr>
</tbody>
</table>

Data obtained from the WTO\(^{91}\) indicate that South Africa initiated a total of 212 anti-dumping investigations between 1995 and 2010 and that 128 of these resulted in the imposition of anti-dumping duties, indicating a ‘success rate’ of 60.4%.

Analysis of WTO data show that four countries were the main targets of South African anti-dumping investigations, these being China (33 initiations), India (21), Korea (15) and Taiwan (11). If the EC-15\(^{92}\) is viewed jointly, it was subject to 31 investigations, i.e. roughly the same number as those aimed against China. The countries most subjected to the imposition of anti-dumping duties are

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\(^{90}\) Note that consolidated WTO statistics only reflect 206 initiations and 124 anti-dumping measures. The data in the table was calculated from the actual semi-annual reports and Government Gazette notices, rather than from the WTO consolidated calculations.

\(^{91}\) See http://www.wto.org/english/tratop_e/adp_e/adp_e.htm (accessed 16 November 2011).

\(^{92}\) This refers to the 15 states that made up the European Union until 2003. No anti-dumping investigations were initiated against any of the other 12 members of the current EU-27 after they became members of the EU.
China (17) and Korea (15). Despite the large number of anti-dumping investigations initiated by South Africa, most of these actions were aimed against imports from China, India and European Union countries.

South African industry has often complained that anti-dumping investigations take too long to finalise and provide inadequate protection against unfair trade. This is supported by an analysis of the 211 investigations initiated between 1 January 1995 and 31 December 2010, which shows that investigations took on average 482 days to complete, i.e. 240 days for preliminary determinations and a further 253 days for the final determination. Very few of the 211 investigations initiated between January 1995 and December 2010 were finalised within a period of 12 months (and most of these related to withdrawn cases), while at least 44 investigations (or more than 20% of all investigations) took longer than 18 months to complete. Since 14 November 2003, i.e. since the promulgation of the Anti-Dumping Regulations, and excluding cases withdrawn by the applicant, eight of the 52 cases initiated were concluded within 12 months, while three cases initiated during this period took more than 18 months to complete.

Note that the WTO statistics contain an error, as the statistics indicate that 16 duties were imposed following 15 investigations. Analysis of semi-annual reports shows that 15 investigations were initiated against Korea and that anti-dumping duties were imposed in every instance.

Note that these figures do not add up, as the preliminary time frames were determined with reference to only the cases in which preliminary determinations were made. No preliminary determinations were made in the cases that were withdrawn during this period.

These investigations related to Caustic soda (Iran, Saudi Arabia, US); Uncoated woodfree paper (Brazil, Indonesia, Poland, Sweden); Ceramic tiles (Italy); Passenger car tyres (China, Indonesia, Korea, Malaysia. Mozambique, Singapore, Slovak Republic, Taiwan); Paperboard (Austria, Germany, Netherlands, Spain); Aluminium overhead conductor (Bahrain, France, India); Carbon black (Australia, Thailand); Glass microspheres (China, France, Germany); Door locks and handles (China); PVC based roll goods (Germany, India, Netherlands, Thailand); Wire, rope and cable (China, Germany, India, Korea, Spain, UK); Cold rolled steel (Russia); Clear float glass (Indonesia) I; Chopped strand mats (China, Chinese Taipei); Clear float glass (Indonesia) II.

Wheat flour (India); Chopped strand mats (Brazil); Self-copy paper (USA); Citric acid (China); PVC rigid (China; Chinese Taipei); Tall oil fatty acid (Sweden); and Picks (India).

The two Chopped strand mats (China, Chinese Taipei) investigations were initiated on 14 November 2003 and were only finalised on 30 September 2005, i.e. after a total of 686 days or nearly 22 months, while the Clear float glass (Indonesia) investigation was initiated on 4 March 2005 and concluded on 3 October 2006, a total of 578 days or 19 months. Anti-dumping duties were imposed in the latter instance.
4. Substantive issues

4.1 Domestic industry

The *Anti-Dumping Regulations* define ‘domestic industry’ in accordance with Article 4.1 and 5.4 respectively of the Anti-Dumping Agreement, i.e. that at least 25% of the industry by production volume must support the application; that at least 50% by production volume of those producers that express an opinion must support the application; that producers related to importers or exporters or that are themselves importers may be excluded from the determination of the domestic industry and that a major proportion of the industry must supply injury information. In practice, however, a number of problems have been experienced. This follows from ITAC’s recent practice to require that where the domestic industry consists of only two or three major producers all the producers must submit injury information.\(^{98}\) Ostensibly this is to ensure that injury experienced by one company is not caused by the other. However, where there is clear information to show that imports increased and caused injury, this should not play a role. Thus, in the *Detonators (China)* case the application was lodged by one producer. It submitted information to show that it had lost a number of contracts for supply direct to imports from China, i.e. every single sale lost was directly linked to tenders lost to imports from China. Despite this, ITAC revoked its decision to initiate the investigation after it determined that there was another major producer in the market, even though the applicant had shown that the other producer had itself imported the product from China. ITAC only re-initiated the investigation two years later after a High Court order forcing it to continue with the investigation.\(^{100}\)

In the *Cathode ray televisions (China)* application in 2006 ITAC required that the domestic industry add 25% value to domestically sourced materials and components before it would be regarded as a domestic industry. ‘Value added’ was defined as the value *included* in the total production cost, excluding any materials and components sourced domestically. In practice this meant that even though the industry had sourced more than 25 percent of its materials and components domestically, this was disregarded in the determination of value added. Next, considering imported component cost of 100, the industry added value in the form of labour and manufacturing costs of

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\(^{98}\) ADR 7.

\(^{99}\) See e.g. *Shocktubes (China)* – note that no report was issued in this investigation.

\(^{100}\) *AEL v International Trade Administration Commission* (Unreported case 15027/2006T).
approximately 30. Most jurisdiction (and Customs in South Africa) would regard this as 30 percent value added. ITAC, however, determined this to be \(\frac{30}{13} = 23\) percent value added and decided that there was no domestic industry. It therefore refused to initiate an investigation.\(^{101}\) This followed despite ITAC having previously considered several tariff applications from the same industry and despite an industry support programme being operated by the Department of Trade and Industry at the time.

### 4.2 Like products

The Anti-Dumping Regulations define ‘like product’ as 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.\(^{102}\) This definition follows Article 2.6 of the Anti-Dumping Agreement verbatim. The definition additionally provides the following criteria to be used in the determination of like product:

- (i) the raw materials and other inputs used in producing the products;
- (ii) the production process;
- (iii) physical characteristics and appearance of the product;
- (iv) the end-use of the product;
- (v) the substitutability of the product with the product under investigation;
- (vi) tariff classification; and/or
- (vii) any other factor proven to the satisfaction of the Commission to be relevant.\(^{103}\)

The first case in which the issue of like product was properly evaluated was *Unmodified starch*.\(^{104}\) In this case the authority was called on to decide whether the maize starch produced in South Africa could be regarded as a like product to the various types of imported unmodified starch, including potato starch, cassava starch and rice starch. Having determined that the products were all derived

\(^{101}\) These facts fall within the author’s knowledge as he was representing the domestic industry.

\(^{102}\) ADR 1.

\(^{103}\) *Idem.*

\(^{104}\) Board Report 3486 – Investigation into Alleged Dumping of Unmodified Starches, Exported from or Originating in Belgium, Denmark, France, Germany, the Netherlands, Portugal, Switzerland and Thailand (04/07/1994).
from carbohydrates, were produced using similar production processes, were classifiable under the same five-digit tariff subheadings,\textsuperscript{106} and were generally used in similar applications, it was found that the maize starch was indeed a like product to all imported unmodified starches.\textsuperscript{106}

In the \textit{Supertension cable (Germany) II} investigation it was found that 400 mm\textsuperscript{2} copper cable and 640 mm\textsuperscript{2} aluminium cable were like products despite differences in raw materials and appearance. This followed the exporter’s bid for both these products for a single application tender invitation and at similar prices, in other words, the exporter itself regarded these as like products.\textsuperscript{107}

In the \textit{Circuit breakers (France, Italy, Japan, Spain)} investigation the domestic industry alleged that industrial circuit breakers were like products regardless of whether they applied the thermal magnetic or hydraulic magnetic technology. It argued that the products follow a similar production process, used similar raw materials, were alike in physical appearance and were virtually fully interchangeable. The domestic industry produced only hydraulic magnetic circuit breakers whereas both products were imported. Despite submissions by exporters to the contrary, ITAC found these products to be like products for the purposes of an anti-dumping investigation.\textsuperscript{108} Some years later the same company, when accused of dumping in the United States (US), successfully argued that the hydraulic magnetic breakers it exported and the thermal magnetic breakers produced in the US could not be regarded as like products.\textsuperscript{109} This showed how different authorities can interpret the same information in different ways and that the debate on like products has not been finalised.

\textsuperscript{105} This is the only case in the world the author is aware of that reference is made to a five-digit tariff heading. Reference is normally made to two-digit (chapter), four-, six-, eight- or ten-digit tariff headings.

\textsuperscript{106} Note that this decision was reached despite the fact that the products were classifiable under different six-digit tariff sub-headings, used different raw materials, had different physical characteristics and were not fully fungible with some of the imported products that could be applied in certain applications for which the domestically produced product was unsuitable.

\textsuperscript{107} Board Report 4031 – Investigation into the Alleged Dumping of Supertension Cable, Originating in or Imported from Germany: Final Determination (08/02/2000).

\textsuperscript{108} Board Report 3781 – Investigation into the Alleged Dumping of Industrial Circuit-Breakers Originating in France, Italy, Spain and Japan and Imported from France, Italy, Switzerland and Japan: Final Determination (18/07/1997).

4.3 Export price

The ITA Act defines the export price as ‘the price actually paid or payable for goods sold for export, net of all taxes, discounts and rebates actually granted and directly related to that sale’.\(^{110}\) When there is no export price, where there appears to be an association or compensatory arrangement in respect of the export price between the exporter and the importer, or where the export price actually paid or payable is unreliable for any other reason, the export price must be constructed on the basis of the price at which the product is sold to the first independent buyer less all costs (including the importer’s profit) between exportation and the point of resale.\(^{111}\) Where the imported product is not resold or not resold in the same condition, the export price may be determined on any reasonable basis.\(^{112}\) Accordingly, in this sense, ITAC is obliged to disregard the transaction price between the ‘related parties’\(^{113}\) as sales not in the ordinary course of trade,\(^{114}\) without further examination of whether such transaction prices are at arm’s length or not.\(^{115}\) In practice, the constructed export price will be determined on the basis of deducting all costs incurred between the exporter’s ex-factory price and the price to the first independent buyer, plus a deduction for the profit realised by the importer. The Anti-Dumping Regulations provide as follows:

10.2 In constructing such export price the Commission shall deduct –

(a) all costs between the exporter and the importer; and

(b) a reasonable profit.

10.3 The reasonable profit contemplated in subsection 2(b) may be determined by calculating –

(a) the total cost of the producer/exporter;

(b) the total cost of the importer, including all costs from the ex-factory export point of the producer/exporter; and

(c) the total profit realised by both the producer/exporter and the importer;

and by allocating the profit in the same ratio as the costs incurred by the two parties. The reasonable profit allocated shall not be less than zero.

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\(^{110}\) S 32(2)(a) of the ITA Act.

\(^{111}\) S 32(5) of the ITA Act, read with s 32(6).

\(^{112}\) S 32(5) of the ITA Act.

\(^{113}\) ADR 1.

\(^{114}\) ADR 8.2(b).

\(^{115}\) Brink (2005b: 155).
The following example illustrates the calculation:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exporter’s total production and other costs</td>
<td>$ 900</td>
</tr>
<tr>
<td>Exporter’s profit</td>
<td>$ 120</td>
</tr>
<tr>
<td>Ex-factory export price</td>
<td>$1,020</td>
</tr>
<tr>
<td>Inland freight and harbour costs</td>
<td>$ 50</td>
</tr>
<tr>
<td>Ocean freight and insurance</td>
<td>$ 100</td>
</tr>
<tr>
<td>Landing and clearing costs (duty 10% on FOB)</td>
<td>$ 105</td>
</tr>
<tr>
<td>Inland Transport</td>
<td>$ 45</td>
</tr>
<tr>
<td>Importer’s SGA costs</td>
<td>$ 150</td>
</tr>
<tr>
<td>Importer’s profit</td>
<td>$ 30</td>
</tr>
<tr>
<td>Selling price to independent buyer</td>
<td>$1,500</td>
</tr>
</tbody>
</table>

ITAC will now find that the total cost in the chain is $1,000, being $900 in respect of the exporter and $450 ($50+$100+$105+$45+$150) for the importer and the total profit $150 (exporter $120, importer $30). It will allocate the profit according to the cost ratio, i.e. 450/1350 or 33.3% of the profit, i.e. $50, will be allocated to the importer. The constructed export price will thus be as follows:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Selling price to independent buyer</td>
<td>$ 1,500</td>
</tr>
<tr>
<td>Importer’s allocated profit</td>
<td>$ 50</td>
</tr>
<tr>
<td>Importer’s SGA costs</td>
<td>$ 150</td>
</tr>
<tr>
<td>Inland transport</td>
<td>$ 45</td>
</tr>
<tr>
<td>Landing and clearing costs (duty 15%)</td>
<td>$ 105</td>
</tr>
<tr>
<td>Ocean freight and insurance</td>
<td>$ 100</td>
</tr>
<tr>
<td>Inland freight and harbour costs</td>
<td>$ 50</td>
</tr>
<tr>
<td>Constructed ex-factory export price</td>
<td>$1,000</td>
</tr>
</tbody>
</table>

This example shows a decreased export price when compared to the invoiced export price. The situation will depend entirely on where the parties choose to realise their profit. As far as could be ascertained the last time a constructed normal value was used in an investigation was in the Acrylic fabrics (Turkey) investigation which was initiated in 2003, while it has also been applied in the
Poultry (United States) and Picks, shovels, rakes and forks (China) sunset reviews, which were initiated in 2005 and 2007 respectively.

4.4 Normal value

The ITA Act defines the normal value as:

(i) the comparable price paid or payable in the ordinary course of trade for like goods intended for consumption in the exporting country or country of origin; or

(ii) in the absence of information on a price contemplated in subparagraph (i), either-

(aa) the constructed 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

(bb) the highest comparable price of the like product when exported to an appropriate third or surrogate country, as long as that price is representative.116

In addition, the ITA Act provides for the use of a normal value in a surrogate country in cases where the normal value of the goods are not established according to free-market principles as a result of government intervention.117 In practice, however, the latter provision is only used for initiation purposes in investigations against imports from China.118

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116 S 32(2)(b) of the ITA Act.
117 S 32(4) of the ITA Act; ADR 8.14-8.16.
118 See the Record of Understanding (2006), which provides that ‘In instances where information on domestic selling prices in China is not reasonably available to the SACU industries or the SACU industries is unable to determine whether prices are comparable to prices in the ordinary course of trade, it is necessary to allow SACU industries to use alternative methods, which are permitted by the WTO, of determining a normal value in China for the subject product for purposes of initiation of an investigation’. Although the text provides that the normal value for initiation purposes must be established on a basis ‘permitted by the WTO’, anti-dumping investigations are still initiated on the basis of the normal value determined in a third or surrogate country. ITAC, however, has indicated that once an exporter in China has cooperated it will automatically regard such exporter as operating under market conditions – see ITAC letter (original on file with author). This was reiterated during a meeting between ITAC and Business Unity South Africa (BUSA) on 13 October 2011. The Supreme Court of Appeals in ITAC v SATMC [2011] ZASCA 137 also found that ITAC did not have to conduct any investigation into whether exporters in a country, including China, were operating under market conditions even if the domestic industry had submitted information in this regard.
The Anti-Dumping Regulations qualify the determination of the normal value as follows:

‘Normal value’ as defined in section 32(2)(b)(i) of the Main Act shall be interpreted to mean –

(a) the price paid for like goods sold in the ordinary course of trade for home consumption in the country of export or the country of origin by the exporter, the producer or its related party under investigation; or

(b) where such price is not known, the price at which such like goods are sold on the same market by another seller or sellers in that market.

The regulations therefore specifically provide that where the product is not sold in the exporting country by the exporter or producer, the normal value has to be determined on the basis of the selling price of another seller or sellers in that market. In practice, however, this provision has never been applied despite some exporters not selling the like product or certain models thereof on its domestic market.

By far the majority of normal values in investigations are determined on the basis of the exporter’s or foreign manufacturer’s own domestic sales. It is notable, first, that ITAC may revert to the alternative methodologies for the determination of the normal value not only where there are no or insufficient sales in the ordinary course of trade on the domestic market of the exporting country, but also when no information on such prices are available. This indicates a decreased standard vis-à-vis the Anti-Dumping Agreement requirements, and, second, that the ITA Act has reversed the order of the alternative definitions of normal value from those in the Anti-Dumping Agreement, thereby effectively creating a hierarchy. In practice, therefore, ITAC almost always uses the constructed normal value rather than the export price to a third country where information on domestic market sales is not available. The calculation of the constructed value, however, poses several problems and experience has shown that no or lower margins of dumping are usually established in cases where the constructed methodology is used, despite the Anti-Dumping Regulations providing clear guidelines regarding the calculation of the constructed normal value.

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119 See e.g. ITAC Report 248 – Lysine (United States); ITAC Report 306 – Colour coated steel products (Australia).
120 Brink (2002a: 47); Brink (2004: 764).
This is in direct contrast to the experience in jurisdictions such as the European Communities and the US, where resort to the constructed normal value often results in higher normal values.\(^{122}\)

In recent investigations concerning more than one model ITAC has decided to determine the normal value (and consequently the margin of dumping) only for those models that were sold on the domestic market.\(^{123}\) Accordingly, it fails to determine the margin of dumping for ‘all comparable exported transactions’, as required by the WTO Appellate Body in *Bed linen*.\(^ {124}\) The effect of this limited determination, which conforms neither to the largest proportion of sales that can be reasonably investigated nor to a statistically valid sample, as required by the Anti-Dumping Agreement,\(^ {125}\) could have a significant impact on the margin of dumping calculation, either rendering a positive margin of dumping where none exists or finding no dumping when in fact dumping is taking place.

When ITAC cannot determine the normal value on the basis of domestic sales, it will determine the normal value on the basis of a constructed value.\(^ {126}\) In constructing the normal value ITAC must take into account production costs, overheads, selling, general and administrative costs, and any other costs it deems necessary to compare the constructed normal value to the export price and a reasonable profit.\(^ {127}\) The Anti-Dumping Regulations contain provisions prescribing how a reasonable margin for selling, general and administrative costs\(^ {128}\) and for profit must be determined.\(^ {129}\) ITAC’s reports do not contain details on how the constructed normal values were determined and it is therefore not possible to determined which subprovisions of the Anti-Dumping Regulations have been used.

### 4.5 Fair comparison

The ITA Act requires ITAC to make reasonable allowances for differences in the conditions and terms of sale, differences in taxation, and other differences affecting price comparability in

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\(^{122}\) Brink (2004: 332-335 (EC) and 531-532 (US)).

\(^{123}\) See e.g. ITAC Report 210 – *Automotive tyres (China)*; ITAC Report 362 – *Bolts and nuts (China)*.


\(^{125}\) Article 6.10 of the Anti-Dumping Agreement.

\(^{126}\) ADR 8.10-8.13. See e.g. ITAC Report 195 – *Poultry (US)*; ITAC Report 251 – *Picks, shovels, rakes and forks (China)*.

\(^{127}\) ADR 8.10.

\(^{128}\) ADR 8.12.

\(^{129}\) ADR 8.13.
determining the margin of dumping,130 while the Anti-Dumping Regulations provide further details in this regard.131 Thus, the Anti-Dumping Regulations specifically provide for adjustments in respect of differences in conditions and terms of trade,132 taxation,133 levels of trade,134 physical characteristics135 and quantities.136 In addition, the Anti-Dumping Regulations provide that adjustments should be requested in exporters’ original response to the exporters’ questionnaire and must be substantiated, verifiable, directly related to the sale under consideration and clearly demonstrated to have affected price comparability at the time prices were set.137

In practice, however, several problems have been experienced as ITAC’s application of adjustments is inconsistent.138 Thus, in the Tyres (China) investigation it granted adjustments for differences in advertising costs and in selling, general and administrative costs,139 but refused the make the same adjustments in subsequent investigations.140 It has also consistently failed to make an adjustment for bank charges incurred in converting the export currency to the domestic currency despite the fact that this has a direct effect on the price actually received by the exporter. Although these issues were raised before the High Court in SATMC v ITAC, the Court failed to rule on the issues.141

ITAC would typically make adjustments to the export price for payment terms, packing costs, commission paid to export agents, ocean freight and insurance, inland transport and Free on Board

130 S 32(3) of the ITA Act.
131 ADR 11.
132 ADR 11.1(a).
133 ADR 11.1(b).
134 ADR 11.1(c).
135 ADR 11.1(d).
136 ADR 11.1(e).
137 ADR 11.2.
138 See in general Brink (2002a: 75-102); Brink (2004: 817-828); Brink (2007c); Brink (2008c: 261-262) for discussions on the practical application of adjustments.
139 Note that none of these adjustments should have been granted as they do not meet the requirements of ADR 11.2(c), which entail that any adjustment must be ‘directly related to the sale under consideration’. This provision in the regulations is based on the provisions of Article 2(10) of European Union Basic Regulation 384/96, which provides inter alia in Regulation 2(10)(h) that an ‘adjustment shall be made for differences in the direct costs [as opposed to indirect costs] of providing warranties, guarantees, technical assistance and services’ and which does not provide for any adjustment to be made on the basis of differences in (indirect) selling and marketing costs or for advertising. (Own emphasis). The basis for South Africa’s regulations falls within the author’s personal knowledge having had the primary responsibility for drafting the regulations in his capacity as Director of Trade Remedies Policy at ITAC. See also Van Bael and Bellis (2004: 113) who indicate that ‘the adjustment is restricted to direct post-sale costs: no adjustment is normally granted, for instance, for salaries of personnel involved in staff training, research and development or promotional activities’. (Own emphasis, footnote omitted).
140 See e.g. ITAC Report 306 – Colour coated steel products (Australia)(sunset review).
141 SATMC v ITAC (Case 45302/07T).
(FOB) costs, but has consistently not made adjustments for Selling, General and Administrative (SGA) costs incurred on the export market even where such costs were adjusted to the normal value. Adjustments are normally made for the full cost effect to both the export price and the normal value, rather than making an adjustment only to the extent of the differences between cost incurred on the domestic and export markets.\(^{142}\)

Adjustments are typically made to the normal value for payment terms, packing costs, commission paid to export agents and inland transport.

4.6 Weighted average margin of dumping

Where there is more than one model of a product under investigation and ITAC needs to determine a weighted average margin of dumping, Anti-Dumping Regulation 12.2 prescribes the methodology to be used as follows:

In cases where more than one product is under investigation, the Commission shall normally determine the margin of dumping as follows:

(a) ... 

(b) in the case of products that cannot be separately identified by the South African Revenue Services, the Commission shall normally

(i) calculate the margin of dumping for each product separately; and

(ii) determine the weighted average margin of dumping for all products on the basis of the individual export volume of each product

This requires that the weighted average margin of dumping be determined with reference to the \textit{volume} of exports, rather than the \textit{value} of such exports, despite the fact that dumping is the price, and not volume, discrimination between markets. The definition is therefore WTO inconsistent.\(^{143}\)

\(^{142}\) It is submitted that this approach, which is also in line with that applied by the EC and the US, is the correct approach.  
\(^{143}\) See Brink (2011a) for a discussion on the effects of the definition vis-à-vis a comparison based on a weighting of values.
4.7 Material injury

No reference is made to injury in the ITA Act.\(^{144}\) While the Anti-Dumping Regulations do not specifically require that injury to the domestic industry must be established before any anti-dumping measures may be imposed, it implies that injury must be determined as it requires that the following factors be considered\(^{145}\) in determining material injury: sales, volume, profit and loss, output, market share, productivity, return on investments, capacity utilisation, cash flow, inventories, employment, wages, growth, ability to raise capital or investments, and any other relevant factors placed before ITAC.\(^{146}\) In addition, the factors listed in Articles 3.1, 3.2 and 3.4 of the Anti-Dumping Agreement and not included above, i.e. import volumes, price undercutting, magnitude of the dumping margin, and other factors affecting domestic prices, are covered by the Anti-Dumping Regulations in the section dealing with causality.\(^{147}\) Since these factors do not indicate injury per se, but rather the cause of injury, it is submitted that the separation in the Anti-Dumping Regulations is technically more correct than that in the Anti-Dumping Agreement.

\(^{144}\) Note that injury was previously a requirement in terms of s 82(1) of the Customs and Excise Act 35 of 1944 which provided that the Minister of Finance could impose and anti-dumping duty if he was satisfied that dumping was taking place and 'that detriment may ... result to an industry within the Union...' See also Hansard Debates van die Parlement: Deel 32 (1992: 4809) where it was specifically argued that the Board should always consider material injury in its anti-dumping investigations: 'Hierbenewens word aanvar dat die Raad op Tariewe en Handel deurentyd rekening sal hou met die vraag van dumping, wat plaasvind, skade aan plaaslike vervaardigers berokken en of dit in die openbare belang is om daarteen op te tree'. (Additionally, it is accepted that the Board on Tariffs and Trade will constantly consider the question as to whether dumping that is taking place is causing injury to domestic producers and whether it is in the public interest to act.)

\(^{145}\) Note that whereas ADR 13.1 only requires that 'the Commission shall consider whether there has been a significant depression and/or suppression of the SACU industry's prices' and whereas ADR 13.2 only requires that 'the Commission shall further consider whether there have been significant changes in the domestic performance of the SACU industry...' the WTO has found that 'the mere recital of data does not constitute explanation, or findings and conclusions, sufficient to satisfy the requirements ... of the AD Agreement'. See WTO Mexico – HFCS Panel Report note 610 to par 7.140. In WTO EC – Tube or Pipe Fittings Panel Report par. 7.314 the panel also remarked that 'an evaluation of a factor, in our view, is not limited to a mere characterisation of its relevance or irrelevance. Rather, we believe that an "evaluation" also implies the analysis of data through placing it in context in terms of the particular evolution of the data pertaining to each factor individually, as well as in relation to other factors examined'. (Footnotes omitted). In WTO Egypt – Rebar Panel Report par 7.44 the Panel stated that 'for an investigating authority to "evaluate" evidence concerning a given factor in the sense of Article 3.4, it must not only gather data, but it must analyze and interpret those data'. See also WTO Argentina – Preserved Peaches Panel Report par. 7.97; WTO U.S. – Hot-Rolled Steel Appellate Body Report par 197; WTO U.S. – Hot-Rolled Steel Panel Report par. 7.232-7.233.

practice, however, ITAC lists all 15 factors listed in Article 3.4 of the Anti-Dumping Agreement under the heading ‘Injury’ in all its reports despite the provisions of the regulations.\textsuperscript{148}

Analysis of Board and ITAC reports shows that some injury factors carry more weight than others in the determination of material injury. These include the volume of sales, price suppression\textsuperscript{149} and price depression,\textsuperscript{150} market share and profit. In addition, not all factors have to support a finding of injury. On the contrary, several anti-dumping investigations followed as a result of the domestic industry losing a large tender to the imported product.\textsuperscript{151} In such instances injury is determined on the basis of the \textit{conditio sine qua non} principle, i.e. the position of the industry vis-à-vis where it would have been but for the dumping. Taken to its most extreme position injury was found where the domestic industry’s sales, output, profit, employment and wages all increased significantly, but where the industry had lost 30 percent of the rapidly growing market as a result of dumping.\textsuperscript{152}

ITAC in its reports presents only a recital of the non-confidential facts established without providing any evaluation of the facts, often indicating that ‘the applicant alleged that’ rather than indicating what had been found during its investigation. In view of the finding of the WTO Dispute Settlement Panel in Mexico – HFCs,\textsuperscript{153} the mere listing of data do not meet the requirement of an evaluation as required by the Anti-Dumping Agreement\textsuperscript{154} and ITAC’s reports therefore do not conform to the requirements of the Anti-Dumping Agreement.

\textsuperscript{148} Brink (2005b: 155). See e.g. ITAC Report 328 – \textit{Tall oil fatty acid (Sweden)}; ITAC Report 332 – \textit{Polyester staple fibre (China)}.
\textsuperscript{149} Price suppression takes place where the domestic industry cannot increase prices in line with costs, i.e. where profit margins decrease – see ADR 1.
\textsuperscript{150} Price depression takes place where the domestic industry has to decrease prices – see ADR 1.
\textsuperscript{151} See e.g. Board Report 3329 – \textit{Tapered roller bearings for trains (US)}; Board Report 3799 – \textit{Amoxicillin and Amoxycillin (India)}; Board Report 3947 – \textit{Hypodermic Needles (Belgium, Germany, Ireland and Spain)}; Board Report 3949 – \textit{Syringes (Belgium, Germany, Ireland and Spain)}; Board Report 3997 – \textit{Paper insulated cable (India)}; Board Report 4029 – \textit{Optical fibre cable (Korea)}; Board Report 4031 – \textit{Supertension (high voltage) cable (Germany) II}; Board Report 4054 – \textit{Surgical sutures (Germany)}; Board Report 4073 – \textit{Aluminium overhead conductor (India)}; Board Report 4173 – \textit{Wire rope and cables (China, Germany, India, Korea, Spain, UK)}.
\textsuperscript{152} Board Report 4029 – \textit{Optical fibre cable (Korea)}.
\textsuperscript{153} \textit{Mexico} – \textit{HFCs Panel Report} footnote 610 to par. 7.140.
\textsuperscript{154} See Article 3.4 of the Anti-Dumping Agreement; Brink (2005b: 156).
4.8 Causality

No reference is made to causality in the ITA Act.\textsuperscript{155} The Anti-Dumping Regulations, however, specifically require that dumping must cause the material injury to the domestic industry before any anti-dumping measures may be imposed.\textsuperscript{156} In addition, it requires that the following factors be considered in determining the causal link between dumping and material injury: the change in the volume of dumped imports, price undercutting (i.e. the extent to which the landed prices of the imported products are lower than the ex-factory prices of the domestic industry), the market share of the dumped imports, the magnitude of the margin of dumping and the price of non-dumped products in the market.\textsuperscript{157}

ITAC virtually always finds causality where there is a combination of increased dumped imports and price undercutting, although ITAC may not necessarily determine whether imports from a particular country increased.\textsuperscript{158} ITAC is only required to consider other factors contributing to the industry’s material injury if ‘an interested party has submitted, or the Commission otherwise has, information on such factor or factors.’\textsuperscript{159} Since 2003, several investigations have been terminated despite an affirmative finding of both dumping and material injury.\textsuperscript{160} ITAC has found that the link between dumping and injury was broken where non-dumped imports increased significantly during the investigation period,\textsuperscript{161} where the volume of dumped imports from a particular country was low,

\textsuperscript{155} Note that injury was previously a requirement in terms of s 82(1) of the Customs and Excise Act 35 of 1944 which provided that the Minister of Finance could impose and anti-dumping duty if he was satisfied that dumping was taking place and ‘that detriment may ... result to an industry within the Union...’ (Own emphasis).

\textsuperscript{156} ADR 16.4.

\textsuperscript{157} ADR 16.1.

\textsuperscript{158} PVC based roll goods (Germany, India, Netherlands, Thailand)(Board Report 4158) par. 6.5.1 indicates that the prices from the Netherlands were significantly higher than those from India and Thailand, while it also found that imports from the Netherlands were decreasing. ITAC still found a causal link between dumping and injury on the basis that ‘the company was dumping, and as there was a price disadvantage’.

\textsuperscript{159} ADR 16.5.

\textsuperscript{160} See e.g. Cheddar cheese (Ireland)(Report 118); PET (China, India, Indonesia, Korea, Chinese Taipei, Thailand)(Report 154); Steel wheel rims (Brazil, China, Chinese Taipei, Turkey)(Report 125); Stainless steel tubes and pipes (China; India, Malaysia)(Report 160); Sunflower oil (Argentina, Brazil)(Report 162) – in respect of Argentina; Toughened glass (China)(Report 184); Lysine-40 (US)(Report 193); Tyres (China)(Report 210).

\textsuperscript{161} Steel wheel rims (Brazil, China, Chinese Taipei, Turkey)(Report 125); Toughened glass (China)(Report 184); Tyres (China)(Report 210). Note that this did not stop ITAC from imposing provisional payments in Poultry (Brazil)(Report 395), despite the fact that “whole birds” imports from Argentina significantly exceeded imports from Brazil and were priced 40% lower.
even though above negligible levels,\textsuperscript{162} where the margin of dumping was low, even though above the de minimis level,\textsuperscript{163} and where there was no price undercutting.\textsuperscript{164}

4.9 Public interest

In terms of the \textit{1995 Guide},\textsuperscript{166} ITAC’s predecessor could consider public interest in its determination on whether to impose anti-dumping duties after it had found injurious dumping. This was never applied and the \textit{Guide} was withdrawn in 1996. Currently there is no provision in legislation for the consideration of public interest. Despite this, parties have argued that it would be against the public interest to impose anti-dumping duties in at least one instance.\textsuperscript{166} ITAC has also used this argument, without calling it public interest, in at least one instance. This was done to justify the non-imposition of preliminary payments following a preliminary determination of injurious dumping on the basis that the imposition of preliminary payments would be detrimental to the downstream industry, despite the fact that the downstream industry itself had not made any submissions in this regard.\textsuperscript{167}

In 2006 ITAC published proposed draft amendments to the Anti-Dumping Regulations\textsuperscript{168} and provisions on public interest were included in this draft.\textsuperscript{169} Despite several comments against the inclusion of this test by industry and other interested parties, it appears that the public interest clause will be promulgated as part of the future Anti-Dumping Regulations, although not necessarily in the format originally included in the draft amendments.\textsuperscript{170}

\textsuperscript{162} PET (China, India, Indonesia, Korea, Chinese Taipei, Thailand)(Report 154); Stainless steel tubes and pipes (China; India, Malaysia)(Report 160).

\textsuperscript{163} Lysine-40 (US)(Report 193), where the margin of dumping was found to be 2.2%.

\textsuperscript{164} Grinding media (China)(Report 82).

\textsuperscript{165} Par. 7 to the Guide to the Policy and Procedure with Regard to Action against Unfair International Trade Practices: Dumping and Subsidised Export (September 1995), \textit{reprinted in} G/ADP/N/1/2AF/1 (8 December 1995). Note that public interest was also a requirement for the imposition of anti-dumping duties in terms of s 82(1) of the \textit{Customs and Excise Act} 35 of 1944.

\textsuperscript{166} Detonators (China). No report was issued in this case as ITAC revoked the initiation of the investigation on the basis that the domestic industry had knowingly submitted false information that led to the initiation. The revocation decision was successfully challenged in the High Court in \textit{AEL v ITAC} (Unreported case 15027/2006T) and on 3 July 2009 ITAC published Notice 916 in Government Gazette 32349 indicating the continuation of the investigation.

\textsuperscript{167} See ITAC Report 152 – \textit{Paperboard (Korea)}.

\textsuperscript{168} See Notice 1606 in \textit{Government Gazette} 29382 of 10 November 2006.

\textsuperscript{169} See s20 of the proposed amendments.

\textsuperscript{170} See Brink (2006) for a general discussion on the proposed amendments to the ADR, including the inclusion of a public interest clause (pp. 16-21), and Brink (2009a) for a detailed discussion on public interest in anti-dumping investigations. See also the amended public interest provisions in the draft amendments to the Countervailing Regulations, as published.
5. Investigation procedures

5.1 Pre-initiation

Original anti-dumping investigations consist of three investigative phases: the merit or pre-initiation phase, the preliminary investigation phase and the final investigation phase. The merit assessment begins once an application has been submitted.\(^{171}\) ITAC evaluates the application to see whether it is properly documented,\(^ {172}\) including sufficient information on the product, the industry, dumping, injury and causality.\(^ {173}\) All injury information must be submitted before ITAC will proceed to initiate an investigation.\(^ {174}\) ITAC will verify the injury information submitted by the domestic industry prior to initiation and the verification typically lasts one full day for each producer that supplied information. Only once the verification of injury information has been completed will ITAC consider the merits of the application.

No determination is made as regards the normal value information submitted by the applicant, although ITAC may indicate that additional supporting documentation needs to be supplied. In general, however, ‘an invoice indicating the price, quotes for domestic sales of the like product, price lists, international publications or any other reasonable proof of such domestic price shall be considered’ sufficient to establish the normal value for initiation purposes.\(^ {175}\) However, in the recent Nuts and bolts (China) sunset review ITAC accepted a quote obtained on behalf the SACU industry from a Chinese producer as sufficient proof of the normal value, despite the quote being provided in an export currency (US dollars) and for a very small volume, while no justification was


\(^ {171}\) ADR 21; Brink (2004: 866-868). In Chairman of the Board v Brenco 2001 (4) SA 511 (SCA) 526F-G, the Board is quoted as having indicated the first part of the investigation process as follows: ‘In the first place the so-called merit investigating phase during which the information contained in a complaint or petition lodged is checked or verified so as to determine whether there is prima facie evidence of dumping and material injury, whereupon the Board, may, if satisfied that there are reasonable grounds for dumping and damage, accept the complaint for formal investigation and the Board’s decision is published in the Government Gazette for general notice and interested parties are requested to fill in certain questionnaires.’ (Italics in original).

\(^ {172}\) ADR 22.

\(^ {173}\) ADR 23, 24 and 26.

\(^ {174}\) ADR 24 only requires that a prima facie case of material injury be established. ITAC, however, does not conduct any injury investigation after initiation, despite the requirements of Art. 5.7 of the AD Agreement that dumping and injury information be considered simultaneously both in the decision whether to initiate and thereafter.

\(^ {175}\) ADR 23.2.
given for the small number of models selected.\textsuperscript{176} The industry then disregarded several of these models without providing any justification for the exclusion. The total adjustments of 20 percent made to the normal value were completely unsubstantiated and were clearly inadequate as it was subsequently shown that the price included value added tax, which is levied at 17 percent in China. Despite these issues being raised as serious concerns by importers and exporters ITAC refused to terminate the review and insisted that it had had sufficient information to establish a \textit{prima facie} case of dumping.

ITAC will notify the trade representatives of the countries involved as soon as it has made a decision to initiate an investigation.\textsuperscript{177} This notification typically takes place approximately one week prior to the publication of the initiation notice in the \textit{Government Gazette}. Although the Anti-Dumping Regulations do not indicate the information required for lodging an application,\textsuperscript{178} they list the minimum information to be contained in the initiation notice.\textsuperscript{179} In addition, all applications must be based on the prescribed form, i.e. the application questionnaire.\textsuperscript{180} This questionnaire clearly indicates what information needs to be submitted.\textsuperscript{181} All initiation notices are published in the general \textit{Gazette} that appears on a Friday, unless the Friday is a public holiday, in which case it will be published on the last working day before the public holiday.

\section*{5.2 Preliminary determination}

The preliminary investigation phase\textsuperscript{182} starts as soon as the investigation has been initiated through notice in the \textit{Government Gazette}. The relevant documentation is normally dispatched only three to four days after initiation and parties receive 30 days in which to submit their information to ITAC, as

\textsuperscript{176} This information is available on the public file of the investigation.
\textsuperscript{177} ADR 27.1.
\textsuperscript{178} See the requirement in Art. 5.2 of the Anti-Dumping Agreement.
\textsuperscript{179} ADR 28.2 requires the notice to contain information regarding the basis of the alleged dumping, material injury and causality; the identity of the applicant; a detailed description of the product under investigation; the countries under investigation; a summary of the factors on which the allegation of injury is based; the address to which representations by interested parties should be directed; and the time frame for responses by interested parties.
\textsuperscript{180} ADR 21.1.
\textsuperscript{181} The questionnaire is available at http://www.itac.org.za/docs_page.asp?dID=37&cID=1&scID=8 (accessed 18 November 2011).
\textsuperscript{182} See in general Brink (2002a: 190-215); Brink (2004: 886-887 and 894-896); Chairman of the Board v Brenco 2001 (4) SA 511 (SCA) 526H.
well as seven days in which to receive the documents.\textsuperscript{183} Parties not directly informed of the initiation have 40 days from the date of initiation to submit their information.\textsuperscript{184}

The directorates regularly grant extensions for 14 days on good cause shown.\textsuperscript{185} ITAC uses standardised exporters’ questionnaires and does not amend the questionnaire for each individual investigation.\textsuperscript{186} If parties require an extension beyond 14 days, the requesting party must submit reasons for such longer period and the request will be referred to the commissioners.\textsuperscript{187} The directorate will send deficiency letters to parties that submit deficient responses, granting them seven days from the date of such letter, which could be two weeks or more after the original deadline, to address these deficiencies.\textsuperscript{188} If a party does not cooperate, ITAC may request the imposition of preliminary payments within a relatively short period of time.\textsuperscript{189}

Where parties cooperate ITAC will normally verify the information submitted by importers and exporters during the preliminary investigation period.\textsuperscript{190} It will first issue a confidential verification letter to the party in question and once the veracity thereof has been confirmed it will make a nonconfidential version thereof available on the public file.\textsuperscript{191} In practice, however, the verification report lacks any substance and the verification report for several different exporters in the same investigation will be virtually identical, the only exception being the adjustments claimed.\textsuperscript{192}

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\textsuperscript{183} ADR 29.2 and 29.3.  \\
\textsuperscript{184} ADR 29.4.  \\
\textsuperscript{185} The Board had the same practice. See Brink (2002: 192).  \\
\textsuperscript{186} See the exporters questionnaire available at http://www.itac.org.za/docs_page.asp?dID=42&cID=1&sID=8 (accessed 18 November 2011).  \\
\textsuperscript{187} See e.g. the letter from ITAC dated 12 August 2005 to Hofmeyr Herbstein Gihwala, Inc., which indicates that ‘As the Directorate have [sic] no mandate to approve further extensions, your request is referred to the International Trade Administration Commission for a decision’. The letter is available on the public file of the Detonating fuses (China) investigation or from the author.  \\
\textsuperscript{188} ADR 31.2. In practice some consultants have used this loophole to submit deficient responses on behalf of exporters and then work feverishly to complete the response by the time they receive the deficiency letter, well knowing what the deficiencies are when they submit the documentation.  \\
\textsuperscript{189} In cases where exporters do not cooperate, preliminary duties are often imposed in less than 200 days from the initiation – see e.g. Board Report 4044 – Garlic (China); Board Report 3822 – Glass microspheres (Austria, Belgium, UK); Board Report 4071 – Glass microspheres (China, France, Germany); Board Report 4119 – Wooden doors (Indonesia); ITAC Report 134 – PET (India, Korea); ITAC Report 135 – Stainless steel tubes and pipes (China, India, Malaysia) ITAC Report 135. ADR 33.1, in line with Art 7.3 of the Anti-Dumping Agreement, provides that no preliminary duty may be imposed within less than 60 days after the initiation of an investigation.  \\
\textsuperscript{190} ADR 18.  \\
\textsuperscript{191} ADR 19.  \\
\textsuperscript{192} See e.g. the exporter verification letters on the public file of the Tyres (China) investigation.
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Interested parties officially have seven days to respond to the verification letters, but in practice this could be a significantly longer period as there is no notification as to the date when such letters are placed on the public file, nor any record of when interested parties obtained what information from the public file.

Interested parties may request an oral hearing with ITAC during the preliminary investigation phase, provided they can show good cause why they cannot rely on written submissions only and provided they submit a detailed agenda and the information they wish to discuss at the oral hearing.

If ITAC makes an affirmative preliminary finding, it will request the Commissioner for the South African Revenue Service to impose a preliminary payment through notice in the Government Gazette. If, however, it makes a negative preliminary finding ITAC will publish a notice in the Government Gazette indicating the negative finding, but it will not terminate the investigation despite the requirements of the Anti-Dumping Agreement. ITAC will provide all interested parties with the preliminary report soon after the preliminary decision has been published. Although the Anti-Dumping Regulations (ADR) require that all issues of fact and law considered in reaching the preliminary determination must be reflected in the report, most of the newer reports do not contain any arguments raised by any interested party. This has the effect of seriously undermining transparency on anti-dumping investigations.

Analysis of past cases shows that the preliminary investigation phase can last anything from 98 days to 504 days, with an average of 240 days.

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193 ADR 19.3.
194 See the discussion in par. 5.6 below.
195 S57A of the Customs and Excise Act, 91 of 1964.
196 Art 5.8 of the Anti-Dumping Agreement requires the immediate termination of an investigation as soon as a finding is made that there are insufficient grounds to continue the investigation either on injury or dumping.
197 ADR 34.1. The report must be made available to interested parties within seven days after publication of the notice setting out the preliminary determination.
198 See e.g. ITAC Report 195 – Poultry (US); ITAC Report 210 – Tyres (China); ITAC Report 247 – Door locks and handles (China); ITAC Report 248 – Lysine (US); ITAC Report 288 – Wire, rope and cable (China, Germany, India, Korea, UK); ITAC Report 325 – Float glass (China, India); ITAC Report 360 – Mirrors (India); ITAC Report 361 – Polyethylene terephthalate (India); ITAC Report 365 – Paper insulated cable (India).
199 See Board Report 3822 – Glass microspheres (Austria, UK); Board Report 4067 – Garlic (China).
200 Board Report 4173 – Wire, ropes and cables (China, Germany, India, Korea, Spain, UK).
201 Brink (2005b) 152; author’s own calculations for all investigations up to 2010.
5.3 Final determination

In terms of the Anti-Dumping Regulations interested parties have 14 days to comment on ITAC’s preliminary report,\(^{202}\) while the directorate may grant an extension of seven days.\(^{203}\) In practice, however, parties often receive 30 days to respond and an extension of 14 days.\(^{204}\) Parties may not normally submit any new information during the final investigation phase, although this may be allowed under certain prescribed circumstances.\(^{205}\) If new information is accepted, ITAC will verify this before proceeding to its essential facts determination as all comments on the preliminary report are also taken into consideration. The essential facts letter is issued regardless of whether any change is anticipated to the preliminary determination.\(^{206}\) This letter sets out the major issues ITAC will consider, but in essence does not provide any information, except in instances where ITAC anticipates changing the preliminary determination.\(^{207}\)

All interested parties have seven days to comment on the essential facts letter, although ITAC may grant an extension.\(^{208}\) In a number of cases ITAC issued essential letters to the same parties more than once (in three cases three times each).\(^{209}\) However, it is submitted that this practice is not only confusing, but that it also unnecessarily delays the completion of investigations. Comments on the essential facts letters have to be taken into consideration in ITAC’s final determination.\(^{210}\)

ITAC’s final determination is submitted in nonconfidential format to the Minister of Trade and Industry via the offices of the Director-General.\(^{211}\) If the minister accepts an affirmative finding, he

\(^{202}\) In Chairman of the Board v Benco 2001 (4) SA 511 (SCA) 526I, the Board is quoted as having indicated the final phase to be as follows: “In the third place the so-called final investigation during which all parties are afforded an opportunity to render comments on a provisional report of the Board and, if they so wish, to submit further evidence or information and to do so by means of an oral hearing or by means of re-presentations in writing or both.” (Underlining in original)

\(^{203}\) ADR 35. Note that in practice the investigating officers are often grant parties 30 days with an extension of 14 days. This appears to be the result of investigating officers still applying pre-ADR procedures and not having familiarised themselves with the contents of the Anti-Dumping Regulations.

\(^{204}\) This is in line with the procedures applied prior to the promulgation of the ADR in 2003.

\(^{205}\) ADR 35.4 and 35.5, read with ADR 31 and 35.1.

\(^{206}\) ADR 37.1

\(^{207}\) See e.g. the essential facts letter in the Tall oil fatty acid (Sweden) investigation.

\(^{208}\) ADR 37.2 and 37.3. An extension of 7 days was granted inter alia in the Tyres (China) investigation.

\(^{209}\) See e.g. Cold-rolled steel (Russia, Ukraine) investigation; Carbon black (Egypt, India, Korea) sunset review; Steel wheels rims (Brazil, China, Chinese Taipei, Turkey) investigation.

\(^{210}\) ADR 37.4.

\(^{211}\) Note that this may pose some serious questions as the Constitutional Court has ruled that the minister must take the final decision and it is not clear how the minister will be in a position to take a decision on a complex accounting, economic and legal inquiry with only the nonconfidential facts to guide him.
requests the Minister of Finance to impose definitive anti-dumping duties. However, if he accepts a negative recommendation, the investigation is terminated as soon as ITAC publishes a termination notice in the Government Gazette.

Although the final investigation phase is usually completed in 26 weeks, several final investigations have taken considerably longer, especially in cases where ITAC rendered a negative preliminary determination. In addition, preliminary duties are always imposed for a period of six months, despite the fact that in several investigations the importer and/or the exporter did not cooperate, which means that ITAC did not consider the lesser duty rule in these instances. In such cases the preliminary duties may, in terms of Article 7.4 of the Anti-Dumping Agreement, only be imposed for a period not exceeding four months and the final investigation phase should be completed within this period.

Final investigations have taken an average of 253 days in all investigations initiated between 1995 and 2010.

### 5.4 Confidentiality

The ITA Act provides that an interested party may claim confidentiality and that any such claim must be supported by reasons for such claim and by a ‘written abstract’ of the information in nonconfidential form. It further provides that a distinction should be made between information

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212 S 56 of the Customs Act 1964. Although in the legislation this is phrased as a request the Minister of Finance has no discretion in this regard.

213 See inter alia Rockwool (Netherlands) (481 days), Aluminium overhead conductor (India) (400 days), Paperboard (Spain, Austria, Germany; Netherlands) (more than 1,600 days).

214 Author’s analysis of South Africa’s semi-annual reports to the Anti-Dumping Committee and Government Gazette notices.

215 S 33 of the ITA Act provides as follows:

1. A person may, when submitting information to the Commission, identify information that the person claims to be information that-
   - is confidential by nature; or
   - the person otherwise wishes to be recognised as confidential.

2. A person making a claim in terms of subsection (1) must support that claim with-
   - a written statement in the prescribed form-
     - (i) explaining, in the case of information that is confidential by its nature, how the information satisfies the requirements as set out in the definition of ‘information that is by nature confidential’ in section 1(2); or
     - (ii) motivating, in the case of other information, why that information should be recognised as confidential; and
   - either
that is confidential by its nature and information otherwise claimed to be confidential.\textsuperscript{216} The ITA Act defines ‘information that is confidential by its nature’ as trade, business or industrial information that –

(a) belongs to a person or the State;

(b) has a particular economic value; and

(c) is not generally available to or known by others, and the disclosure of which could –

(i) result in a significant adverse effect on the owner, or on the person that provided the information; or

(ii) give a significant competitive advantage to a competitor of the owner.”\textsuperscript{217}

The Anti-Dumping Regulations expand on this definition, by indicating that the following will normally be regarded as ‘information that is by nature confidential’:

(a) management accounts;

(b) financial accounts of a private company;

(c) actual and individual sales prices;

(d) actual costs, including cost of production and importation cost;

(e) actual sales volumes;

(f) individual sales prices;

(g) information, the release of which could have serious consequences for the person that provided such information; and

(h) information that would be of significant competitive advantage to a competitor;

provided that the party submitting such information indicates it to be confidential.\textsuperscript{218}

\textsuperscript{216} See s 33(1) of the ITA Act.
\textsuperscript{217} S 1(2) of the ITA Act.
\textsuperscript{218} ADR 2.3.
In terms of the ITA Act, information will only be regarded as confidential by nature if the disclosure of such information would ‘result in a significant adverse effect on the owner, or on the person that provided the information’ or gives ‘a significant competitive advantage to a competitor of the owner’.\(^{219}\) ITAC is required to decide in each instance whether information claimed to be confidential is in fact confidential\(^{220}\) and this decision may be challenged.\(^{221}\) The Anti-Dumping Regulations require a party to indicate in each instance where confidential information has been omitted,\(^{222}\) to supply the reasons for confidentiality in each instance,\(^{223}\) and to submit a nonconfidential version containing sufficient detail to permit a reasonable understanding of the information presented in confidence.\(^{224}\) Additionally, all information not specifically indicated to be confidential will be treated as nonconfidential,\(^{225}\) while ITAC may disregard any information claimed to be confidential where a proper nonconfidential version has not been received.\(^{226}\)

Where an interested party challenges an ITAC decision it may gain access to all the confidential information in the investigation file, but such information will only be made available to the party’s consultants and counsel.\(^{227}\)

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\(^{219}\) S 1(2) of the ITA Act.

\(^{220}\) S 34(1) of the ITA Act. It is submitted that as the ITA Act expressly provides that ITAC must make a decision regarding the confidentiality or otherwise of the information claimed to be confidential, this cannot be delegated to officials within the Administration. See *Shidiack v Union Government (Minister of Interior)* 1912 AD 642, where Innes ACJ p. 648 held that ‘where the legislator places upon any official the responsibility of exercising a discretion which the nature of the subject matter and the language of the section show can only be properly exercised in a judicial spirit, then that responsibility cannot be vicariously discharged’. See also *Attorney-General OFS v Cyril Anderson Investments (Pty) Ltd* 1965 (4) SA 628 (A) 639; *SA Airways Pilot Association v Minister of Transport Affairs* 1988 (1) SA 362 (W) 371B-373D.

Where the Act contains a specific provision that authorises delegation, as contained in general in s 15(4) of the ITA Act, it is incumbent on the authority to show that the delegation had been made properly. See *Chairman, Board on Tariffs and Trade and Others v Teltron (Pty) Ltd* 1997 (2) SA 25 (A) at 31F-H, where the Court held that ‘there is an onus on the Board to show that the delegation had been properly made’. See also *Rudolph and Another v Commissioner for Inland Revenue* 1997 (4) SA 391 (SCA) 396E-F.

\(^{221}\) S 35 of the ITA Act.

\(^{222}\) ADR 2.1(a).

\(^{223}\) ADR 2.1(b).

\(^{224}\) ADR 2.1(c).

\(^{225}\) ADR 2.4.

\(^{226}\) ADR 2.5.

\(^{227}\) For the specific application in anti-dumping cases see *Rhône Poulenc v Chairman of the Board on Tariffs and Trade* (Case 98/6589 T); *SATMC v ITAC* (Unreported Case 45302/07T). For general High Court rulings on access to confidential information with an economic affect see e.g. *Foulds v Minister of Home Affairs* 1996 (4) SA 137 (W); *ABBM Printing and Publishing (Pty) Ltd v Transnet Ltd* 1998 (2) SA 109 (W) 121; *Davis v Clutchco (Pty) Ltd* 2004 (1) SA 75 (C).
The release of confidential information constitutes a crime and is punishable ’to a fine not exceeding R250 000,00 or to imprisonment for a period not exceeding five years, or to both such fine and imprisonment.’

5.5 **On-the-spot verifications**

There are no guidelines regarding verification procedures in either the ITA Act or the Anti-Dumping Regulations. ITAC reports are silent on verification procedures, except mentioning in passing that the exporter’s information was verified on certain dates and the importer’s information on another date, or that the information has been verified. In terms of the ADR ITAC also has to issue verification reports and some of these reports are relatively detailed, indicating how information was verified. The verification reports, however, still fail to list all information verified and to indicate which documents were retained as proof of verification.

Domestic industry and importer verifications usually take one day per company, although two importers may be verified in a day if the information and other logistics allow this. Three days are normally budgeted for each exporter’s verification, but in practice the full time available is seldom used. A preverification letter is sent to each company to indicate the information that will be verified and that supporting documentation will be made available. The letter also indicates that further spot checks of any invoices and costs may be undertaken. Verifications are often undertaken without the investigating officers taking any investigation documentation with them and expecting the exporter to supply a clean set of documentation.

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228 S 55(1)(b) of the ITA Act.
230 Note that the ITA Act contains no reference to verifications. ADR 18 deals with verifications, but does not contain any guidelines indicating how the verification should be conducted.
231 See e.g. ITAC Report 298 – Tall oil fatty acid (Sweden).
232 ADR 19.
233 See e.g. the verification reports on the public files of the Carbon Black (Egypt, India, Korea) sunset review, the Cheddar cheese (Ireland) investigation and the Tall oil fatty acid (USA) investigation.
234 Note that this follows despite ITAC having obtained copies of the extremely detailed New Zealand verification report format specifically to assist them in drafting these reports. This falls in the author’s personal knowledge as the Director for Trade Remedies Policy at the time these documents were obtained. A discussion on the New Zealand verification methodology and format of the verification report is also contained in McPhail (2011).
235 This happened most recently in the Bolts and nuts (China) sunset review.
236 Note, however, that verification might sometimes also take longer, e.g. in complicated cases such as Circuit breakers (France, Italy, Japan, Spain), where verifications with the exporters in France and Japan each lasted four full days.
The first day of verification is normally used to visit the exporter’s factory to verify the production process.²³⁷ This may provide information on any possible cost differences with the South African’s industry’s process. Thus, in the *Picks (India)* investigation it was verified that the foreign producer applied a completely different production process that significantly decreased wastage, ensured higher production volumes using fewer production workers and that it incurred lower overhead expenses.²³⁸ The rest of the first day is often spent to acquaint the investigation officers with the foreign producer’s accounting systems and any other questions that may arise from scrutiny of the questionnaire response. Thus, in the *Syringes*²³⁹ and *Hypodermic needles*²⁴⁰ investigations²⁴¹ the exporter produced the products under consideration in different countries whence it was transported to a central warehouse in Belgium for Europe-wide distribution. Thus, products produced in Spain were trucked to Belgium and the retrucked to Spain for sales. Although *prima facie* this does not appear to make sense the single fully computerised warehouse cut down on the company’s warehousing costs to the extent that it outweighed the transport costs.

If any time remains on the first day this is normally spent on verifying production costs. This is continued on the second day, along with normal value and export price calculations.²⁴² The last day is normally used to verify claims for adjustments and to revisit any outstanding issues.²⁴³

In terms of the Anti-Dumping Regulations, ITAC is now required to make a verification report available to each company, while a nonconfidential report will be placed on the public file.²⁴⁴

²³⁸ The author was the investigating officer in this investigation.
²³⁹ See Board Report 3949 – *Syringes (Belgium, Germany, Ireland, Spain)*.
²⁴⁰ See Board Report 3947 – *Hypodermic needles (Belgium, Germany, Ireland, Spain).*
²⁴¹ Note that these investigations were conducted concurrently against the same exporters.
²⁴² Brink (2002: 204).
²⁴³ Over the past five years investigation officers have often concluded the overseas verification visit on the first day by only verifying the company’s financial structure, rather than performing a proper audit trail.
²⁴⁴ ADR 19.
5.6 Oral hearings

The Anti-Dumping Regulations provide for both ‘oral hearings’ and ‘adverse party meetings’. Any interested party may request an oral hearing during both the preliminary and the final investigation phases, although ITAC has on occasion refused to grant an oral hearing in the final investigation if an oral hearing had been granted in the preliminary investigation. In terms of the Anti-Dumping Regulations, parties are required to submit a detailed version, including a nonconfidential version, of the oral hearing to ITAC at the time the oral hearing is requested. This makes no sense, as it actually removes the rationale for requesting a hearing. No new information may be submitted during a hearing, but the opportunity may be used to either expatiate on information previously submitted or to ensure that the right emphasis is placed on information vital to the parties’ case.

A nonconfidential version of these documents must also be supplied with the request. This places an unfair burden on the interested parties, as it means that they effectively have to fully prepare for an oral hearing without any guarantee that they will be granted such opportunity, especially in view of the fact that ITAC has refused to grant oral hearings in a number of instances over the past five years. It is also not in line with the requirements of the Anti-Dumping Agreement which only requires that the information has to be reduced to writing after the oral hearing.

No request for an oral hearing will be considered more than 60 days, and no oral hearing will be heard more than 90 days after the publication of the preliminary determination. In theory, domestic producers and exporters have one hour each in which to address ITAC, while importers...

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245 ADR 5.
246 ADR 6.
247 ADR 5. See also Brink (2002a: 196-198).
248 This happened most recently in Automotive tyres (China). Note that ITAC reports seldom indicate whether oral hearings were held (or requested). From the reports it is clear that oral hearings were held for Gypsum plasterboard (Thailand) during the preliminary investigation (ITAC Report 16); in the Circuit breakers (France, Italy, Japan) sunset review (ITAC Report 18); Uncoated woodfree paper (Brazil, Poland) sunset review (ITAC Report 44) and in Automotive tyres (China) during the preliminary investigation (ITAC Report 182); and that a request for an oral hearing was rejected in the Lysine (US) sunset review (ITAC Report 248), but many more oral hearings were held and many more requests for oral hearings were refused.
249 ADR 5.4.
250 Art 6.3 of the AD Agreement.
251 ADR 5.2.
are granted half an hour.\textsuperscript{252} In practice, however, all parties receive only half the allotted time and the rest of the time is for commissioners to ask questions. This seldom happens, although there have been instances where individual commissioners would ask questions on issues they deemed relevant to the matter before them.\textsuperscript{253} Where a single consultant represents both an exporter and an importer and both these parties request an oral hearing, the time is normally restricted to only one hour in total. The same may apply in cases where a consultant represents more than one exporter who each requests an oral hearing. This practice removes the effectiveness of oral hearings for the relevant parties.

The same general rules apply to adverse party meetings as to oral hearings.\textsuperscript{254} Any interested party may request an adverse party meeting at which interested parties with opposing views may debate an issue before ITAC. All parties must indicate their intended participation as the agenda will only be made available direct to parties attending the meeting.\textsuperscript{255} No party may be forced to attend an adverse party meeting, and nonattendance by a party may not prejudice that party’s case.\textsuperscript{256} Only one adverse party meeting has been held since 1992\textsuperscript{257} and ITAC has indicated its preference not to hold adverse party meetings as the first such meeting resulted in chaos.\textsuperscript{258}

\textsuperscript{252} See the initiation notices, e.g. Government Gazette Notice 1099 of 8 July 2005 in respect of Detonators (China).
\textsuperscript{253} This happened in e.g. Automotive tyres (China), where the commissioners requested further information on the domestic industry’s submissions regarding the non-market economy status of Chinese producers. Neither the preliminary nor the final report, however, refers to any information submitted during the oral hearings, whether \textit{ab initio} or in response to commissioners’ questions.
\textsuperscript{254} ADR 6.
\textsuperscript{255} ADR 6.4, read with ADR 6.6.
\textsuperscript{256} ADR 6.10.
\textsuperscript{257} Note that no details of this meeting are available in any records, but these facts lie within the personal knowledge of the author, who was the investigating officer in the particular case, Roller bearings (United States).
\textsuperscript{258} The meeting lasted more than seven hours and until after 9 p.m., with the adversarial atmosphere not conducive for progress in the matter. The author was present in his capacity as investigating officer.
6. Reviews

6.1 Interim reviews

Any interested party can request an interim review, provided at least 12 months have lapsed since the publication of ITAC’s final determination in the original investigation or the last review thereof. Any application must show that there have been ‘significantly changed circumstances’. Interim reviews consist of a single investigation phase, i.e. ITAC will not make a preliminary determination but will proceed direct to a final determination. After it has taken into consideration all information submitted by interested parties, it will issue an essential facts letter on which parties have 14 days to comment. ITAC’s final determination, in the form of a recommendation to the minister, may result in an increase, decrease, the withdrawal or the reconfirmation of the existing anti-dumping duty. In addition, ITAC may increase, decrease or confirm the scope of the application of such anti-dumping duty, e.g. by exempting certain products from the application of anti-dumping duties where such specific products, although captured in the description of the subject product, are not produced by the domestic industry.

Only five interim reviews have been conducted since the promulgation of the Anti-Dumping Regulations and one of these related to a countervailing duty. One of the reviews was requested by the domestic industry, while the other four were lodged by exporters.

In the first review, an exporter in Malawi indicated that it was situated in an Export Processing Zone and that it did not have domestic sales. It therefore argued that ITAC could not have calculated its normal value on the basis of domestic sales in Malawi, but that it should have calculated its normal value on the basis of one of the two alternative normal value methodologies. ITAC then constructed a normal value and found no dumping in respect of one product and a lower margin of dumping.

259 ADR 44.
260 ADR 45.1.
261 ADR 46.1.
262 ADR43.
263 ADR 47.1.
264 ADR 47.2.
265 See e.g. Board Report 4158 – PVC based rolled goods (Germany), where a range of products not produced by the domestic industry were excluded from the application of the anti-dumping duty; ITAC Report 18 – Circuit breakers (France, Italy, Japan), where sizes not produced by the domestic industry were excluded.
266 See ITAC Report 327 – Garlic (China).
267 See ITAC Report 13 – Bed linen (Malawi); ITAC Report 157 – Cold rolled steel (Russia); ITAC Report 252 – Wire, rope and cables (India); and ITAC Report 236 – Wire, rope and cables (UK).
than the existing level of anti-dumping duties on a second product. Accordingly, ITAC recommended that the anti-dumping duties on the first product be revoked and that the duties on the second product be decreased to the level of dumping found.

In the Cold rolled steel review the exporter had indicated significant changes in the South African market.\(^{268}\) This included that the domestic industry, which consisted of a single producer, had become part of the biggest steel producer in the world and that extensive re-engineering and streamlining of the operations were introduced at the plant, thereby making it one of the lowest cash-cost producers of steel in the world. The exporter further cited high international prices which led to record profits for the domestic industry, the high level of capacity utilisation of plants in Russia, and ITAC’s own recent sunset review in another steel case against Russia, in which it had found that injury was not likely to recur as the exporters did not have to resort to dumping to enter the South African market.\(^{269}\)

The third review related to Wire, ropes and cables (UK).\(^{270}\) In this case the exporter alleged that the domestic industry had itself imported large volumes of dumped imports and had decreased its production range by 72 per cent to the detriment of its customers. It stated that this allegation was supported by the fact that the South African producer tried to obtain quotes for the supply of certain products from the exporter and by the removal of these products from the producer’s price list. On investigation, however, ITAC found that the producer’s price list merely reflected its standard products and that it still manufactured all other products on order. It was also determined that the industry’s imports from China represented less than one per cent of total imports of the product and that its imports related mostly to products not covered by the anti-dumping duties, even though they were imported under the same tariff subheading.\(^{271}\) ITAC therefore found that there were no changed circumstances and rejected the application, i.e. the anti-dumping duties remained in place.

\(^{268}\) See ITAC Report 157 – Cold rolled steel (Russia).
\(^{269}\) See ITAC Report 93 – Hot rolled plates and sheets (Russia, Ukraine).
\(^{270}\) See ITAC Report 236 – Wire, rope and cable (UK).
\(^{271}\) The anti-dumping duties were only applicable to products with a diameter of 8 mm or more.
In the fourth review, the review of countervailing duties in *Wire, ropes and cables (India)*, ITAC found that the revocation of a subsidy programme indicated the presence of changed circumstances. It continued to find, as was submitted erroneously, that the decrease in the level of another subsidy also constituted changed circumstances, despite indicating in its report that the subsidy programme in question ‘was subject to further review as the government of India may deem [relevant]’ despite the fact that industry had submitted proof that the Indian government was on the verge of increasing the countervailing duty. ITAC also failed to determine whether the changed circumstances affected the margin of subsidy by considering only those subsidy programmes originally contervailed and failed to consider new subsidy programmes, proof of which was supplied by the domestic industry. Although this review related to a countervailing, rather than an anti-dumping, measure, it is important for anti-dumping as it illustrates that changed circumstances do not have to be of a permanent basis before ITAC will take them into consideration for the purposes of a review.

In the final interim review the domestic industry submitted that the change in economic conditions worldwide and in China changed to the extent that dumping from China increased significantly. Following the review ITAC recommended that the level of anti-dumping duties be increased from R6.07/kg to R10.37/kg.

### 6.2 Sunset reviews

In terms of the Anti-Dumping Regulations notice must be given in the *Government Gazette* of the impending lapse of an anti-dumping duty approximately six months before such anti-dumping duty is due to lapse. In practice, ITAC publishes a list around May or June each year indicating all anti-dumping duties that will lapse in the following year and requiring the domestic industry to indicate within 30 days whether it will oppose the withdrawal of the duties. If no such request is

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272 See ITAC Report 252 – *Wire, rope and cable (India)*.
273 See Brink (2007e).
274 Ibid 9.
275 ADR 54.1. For a general discussion of South Africa’s sunset review procedures, see Brink (2002) 328-331; Brink (2004) 918-925.
277 ADRS4.3.
received, ITAC will recommend that the anti-dumping duties be revoked on the fifth anniversary of such duties.\textsuperscript{278} Where the domestic industry indicates that it will request a sunset review, it has to submit the necessary information approximately six months before the lapse of the duty.\textsuperscript{279}

The initiation standard for sunset reviews is \textit{higher} than those for investigations: the industry not only has to submit all information pertaining to normal values and export prices, but also has to submit injury information for a period longer than that required in original investigations, including an estimate of the injury that would be incurred if the anti-dumping duties were to be removed. These requirements are unnecessarily complex and cumbersome.\textsuperscript{280}

If the domestic industry does not submit the required information in time or if the information does not establish a \textit{prima facie} case that the lapse of the duty would lead to recurrence of injurious dumping, ITAC will recommend that the anti-dumping duty be terminated on its anniversary.\textsuperscript{281}

Once the domestic industry has submitted its information, ITAC will verify the injury information. Upon finding \textit{prima facie} evidence that injurious dumping is continuing or is likely to recur, ITAC informs the trade representatives of the countries concerned and initiates a sunset review.\textsuperscript{282}

The same general procedure is followed as in original investigations, i.e. a letter, a copy of the initiation notice, a copy of the non-confidential application and the relevant questionnaire are sent to all interested parties, who have 37 days to respond (plus a normal 14 days extension).\textsuperscript{283}

However, as for interim reviews, sunset reviews consist only of the merit and final investigation

\textsuperscript{278} See e.g. Board Report 4057 – \textit{Aluminium garden furniture (Hungary)}; Board Report 4176 – \textit{Aluminium hollowware (Zimbabwe)}; Board Report 4179 – \textit{Float glass (Singapore, Thailand)}; ITAC Report 67 – \textit{Acrylic blankets (Hong Kong, India)}; ITAC Report 90 – \textit{Sutures (Germany)}; ITAC Report 85 – \textit{Stainless steel sinks (Egypt, Korea, Malaysia)}; ITAC Report 198 – \textit{PTFE tape (China)}; ITAC Report 199 – \textit{Lysine (Indonesia)}; ITAC Report 330 – \textit{Acetaminophenol (France)}.

\textsuperscript{279} Note that ADR 1 defines the investigation period for dumping as the period normally ending not more than six months prior to initiation. In practice, ITAC requires that injury information submitted by industry may not be older than six months at the date of initiation. In sunset reviews, however, the information must be submitted six months in advance, which means that the actual injury will normally be significantly older than six months at the date of initiation. See e.g. ITAC Report 360 – \textit{Unframed glass mirrors (India)}, which was initiated on 20 August 2010, but the investigation period on 31 December 2009; and ITAC Report 306 – \textit{Colour coated steel products (Australia)}, where the review was initiated on 22 August 2008, but the period of investigation ended on 31 December 2007.

\textsuperscript{280} See Brink (2004) 1048-1050.

\textsuperscript{281} See e.g. ITAC Report 48 – \textit{Hypodermic needles and syringes (Belgium, Germany, Ireland, Spain)}; ITAC Report 70 – \textit{Nuts of iron or steel (Australia)}; ITAC Report 72 – \textit{Stainless steel hollowware (China, Chinese Taipei, Korea)}; ITAC Report 234 – \textit{Self-copy paper (Belgium, Germany, UK)}.

\textsuperscript{282} ADR 55.1.

\textsuperscript{283} ADR 42.3.
phases and only essential facts letters are issued prior to the final finding. Parties have 14 days to comment, although an extension of seven days may be granted on good cause shown.

In practice, it often happens that there are no exports to South Africa during the dumping investigation period, making it impossible to determine the export price on the basis of the invoiced price. In such cases ITAC often determines the likelihood that injurious dumping will recur if the anti-dumping duty is removed with reference to the average export price from the particular country to most or all destinations, and fails to consider the behaviour of the exporter during the period since the anti-dumping duty was imposed. This has led to several problems, including in the Carbon black (Egypt) case where the domestic industry took ITAC’s decision in this regard on judicial review. This followed after ITAC had found that Egypt did not dump in 27 of the 43 countries to which it exported (i.e. it was found to be dumping in 16 countries) and that approximately 77 percent of the total volume of its exports were not dumped (i.e. 23 per cent of its exports were dumped). The decision that dumping would not likely recur if the anti-dumping duties were removed followed despite the exporter switching supply to a related company in another country immediately after the imposition of duties and absorption of the duty after the alternate supply had also been anti-dumped. The High Court found

the use of an average dumping margin [is] totally irrational. It had the effect of wiping out or cancelling out evidence of dumping in 16 countries. A positive dumping margin in one country may have a technical explanation, but positive dumping margins in 16 countries point to deliberate dumping as part of a marketing strategy...

In my view one should look at the countries where there are positive dumping margins and establish, if dumping occurs there, whether it is likely to occur in the SACU.

ADR 56.1. See e.g. ITAC Report 365 – Paper insulated lead cable (India).
ADR 43.
See e.g. ITAC Report 42 – Uncoated wood-free paper (Brazil, Poland) 35 and 37; ITAC Report 58 – Stainless steel tubes and pipes (Chinese Taipei, Malaysia, South Korea) 13.
See ITAC Report 158 – Carbon black (Egypt).
See Board Report 4068 – Carbon black (Australia, Malaysia).
See Board Report 4189 – Carbon black (Egypt).
SACU is the Southern African Customs Union consisting of Botswana, Lesotho, Namibia, South Africa and Swaziland. All anti-dumping action relates to imports into SACU, rather than only South Africa. For ease of reference, however, in this chapter reference was made only to South Africa.
that this is a complex exercise that can involve various econometric models and that one cannot make simplistic findings based on the history of [the exporter]...

To negate the *prima facie* evidence of deliberate dumping by applying average dumping margins is, in my view, an exercise in obfuscation that defies logic. On this basis alone the final determination must be set aside...

...There must be an enquiry into the reasons why [the exporter] is dumping in 16 countries and it has to be established whether the factors that led to dumping in those countries or some of them, are also present in the SACU so as to make it likely that dumping will also occur in the SACU. There may even be other factors that are relevant. In the end the likelihood of a recurrence of dumping in the SACU is the issue that has to be determined...\(^{291}\) (Own underlining).

Where exporters do not fully cooperate, ITAC will either rely on the information contained in the application or will determine the normal value without making any adjustments. This will normally result in the re-imposition of the anti-dumping duties for another five years.\(^{292}\) Thus, in *Lysine (USA)* ITAC refused to make any adjustments to the exporter’s domestic selling prices after it had found that the exporter had failed to supply invoice-by-invoice data on sales to a related party on its domestic market.\(^{293}\) Sunset reviews typically take around 12 months to complete\(^{294}\) and if the anti-

\(^{291}\) See Algorax v The International Trade Administration Commission and others (Unreported case 18829/2006 TPD) 13-15. The effect of the referral was that the anti-dumping duties remained in place for several more years while ITAC failed to finalise the review. It eventually withdrew the anti-dumping duties on dubious grounds following the court ruling against ITAC in *Progress Office Machines V SARS and ITAC*, which ruled on the issue of the duration of anti-dumping duties – see the text to the next footnote.

\(^{292}\) ADR 58.2; ITAC Report 42 – *Uncoated wood-free paper (Brazil, Poland)* 24; ITAC Report 58 – *Stainless steel tubes and pipes (Chinese Taipei, Malaysia, South Korea)* 25; and ITAC Report 105 – *Nuts and bolts (China, Chinese Taipei)* 43 and 45. Despite the specific provisions of ADR 38.1 to the contrary, the Supreme Court of Appeals in *Progress Office Machines CC v South African Revenue Service and others* [2007] SCA 118 (RSA) found that the five-year duration of anti-dumping duties had to be counted from the date to which any duty had been retroactively imposed. See Brink (2007a), Brink (2008b) and Brink (2008d) for a discussion on the duration of anti-dumping duties.

\(^{293}\) ITAC Report 248 – *Lysine (USA)*. Note that in terms of ADR 9.2 ITAC must rely on sales to *unrelated* parties only in cases where there are sales to both related and unrelated parties and providing the sales to related parties are sufficient to establish the normal value. In this case the major proportion of sales were made to unrelated parties and details of these sales were submitted on a transaction-by-transaction basis, with total sales by volume and value by month submitted in respect of the related party sales. ITAC’s refusal to make the necessary adjustments is therefore both a violation of its own legislation and the Anti-Dumping Agreement.

\(^{294}\) Note, however, that Indonesia recently declared a WTO dispute against South Africa on the basis that it had taken four years and the review was still being finalised. Following the publication of the WTO dispute, South Africa immediately withdrew the anti-dumping duties.
dumping duty is maintained the five-year duration is counted from the date of imposition, i.e. it can then effectively be in place for more than six years, including the time taken to finalise the sunset review.

6.3 New shipper reviews

Where an anti-dumping duty has been imposed against a country, an exporter of that country that did not export to South Africa during the original investigation may request a new shipper review, if it wants to start exporting to South Africa. In order to obtain individual duty rate, the exporter has to prove, first, that it is not related to any party that formed part of the original investigation and that is subject to the anti-dumping duty; and, second, that it did not export to South Africa during the original investigation period. The exporter has to prove that it is not and will not be dumping the subject product.

ITAC will not accept an application indicating dumping at a rate lower than the existing anti-dumping duty level and will simply maintain the residual duty if any dumping is found. Where the exporter has not exported to South Africa, ITAC will require it to submit details of all its exports to other countries or will use its ‘planned export price list’. The margin of dumping will then be determined as the difference between the normal value and the export price so determined. It is submitted that the use of a planned export price opens the door to manipulation of new shipper reviews and that ITAC should amend its procedures in this regard either to take cognisance only of actual exports (of a sufficient quantity and product range), a firm contract to South Africa, or the export price to an appropriate third country. No injury investigation is conducted as the new shipper only has the opportunity to prove that it is not dumping.

295 See Brink (2002: 320-322) and Brink (2004: 925-927) for a general discussion of new shipper reviews.
296 ADR 48. See Stainless steel sinks (Egypt)(Board Report 4174); Aluminium hollowware (Egypt)(Commission Report 63)
297 ITAC Report 63 – Aluminium hollowware (Egypt). ADR 49.2 provides that where a new shipper has not exported to South Africa during the period under review, it will be required ‘to provide [ITAC] with the required information in the prescribed format’.
298 ITAC Report 63 – Aluminium hollowware (Egypt) 10.
299 Board Report 4174 – Stainless steel sinks (Egypt).
To date, ITAC has conducted only two new shipper investigations.\footnote{Board Report 4174 – Stainless steel sinks (Egypt); ITAC Report 63 – Aluminium hollowware (Egypt).} As a result of \textit{inter alia} the administrative process involved in having the anti-dumping duty against the new shipper removed before initiation of the review, it takes ITAC several months from receipt of the application to initiation. Before initiation ITAC will recommend to the minister that the anti-dumping duty be removed in respect of the particular exporter\footnote{Board Report 4174 – Stainless steel sinks (Egypt); ADR 50.1.} and request the Commissioner for SARS to impose a preliminary payment simultaneously with the withdrawal of the anti-dumping duty, and at the same level, to provide for the retroactive imposition of the anti-dumping duty if it finds dumping.

\section*{6.4 Anti-circumvention reviews}

Circumvention is defined in the Anti-Dumping Regulations as

(a) a change in the pattern of trade between third countries and South Africa or the common customs area of the Southern African Customs Union;

(i) which results from a practice, process or work;

(ii) for which there is no or insufficient cause or economic justification other than the imposition of the anti-dumping duty;

(b) remedial effects of the anti-dumping measure are being undermined in terms of the volumes or prices of the products under investigation;

(c) dumping can be found in relation to normal values previously established for the like or similar products.\footnote{ADR 60.1.}

The Anti-Dumping Regulations distinguish between five different types of circumvention: minor modification of the product, assembly operations, absorption of the duty, country hopping and declaration under a different tariff subheading.\footnote{ADR 60.2(b), (c), (d), (e) and (f) respectively.} Special rules apply to anti-circumvention, including that the applicant is not required to update its injury or causality data if the application is submitted within one year of the publication of the final determination in the original investigation.
Minor modification of the product takes place where the changes to the product are cosmetic and clearly designed to circumvent the anti-dumping duty. At least one complaint has been received in this regard, but this was never followed by a properly documented application and no review was initiated.\textsuperscript{305} The complaint followed after the imposition of anti-dumping duties on spades and shovels from China with a diameter of between 195 mm and 230 mm when products with a diameter of slightly below 195 mm and slightly above 230 mm were exported to South Africa.

Assembly operations, typically known as screw driver operations,\textsuperscript{306} take place where the anti-dumped product is imported in a disassembled format and only a simple operation is required to make the final product. To date, South Africa has had only one assembly operation anti-circumvention review, which was aimed against imports of acrylic fabric from China and Turkey. In the original investigation anti-dumping duties were imposed against acrylic blankets,\textsuperscript{307} after which the fabric was exported in roll form, with clearly marked lines indicating where the rolls had to be cut to make the blankets. Following an anti-circumvention review anti-dumping duties were also imposed against the acrylic fabric.\textsuperscript{308}

Absorption of the duty takes place where, following the imposition of anti-dumping duties, the exporter decreases the export price to absorb the duty and allow the importer to import the product at the same landed cost as prior to the imposition of duties. This indicates that the margin of dumping increases by the same margin that the export price decreases. South Africa has conducted three anti-circumvention investigations to date, all predating the Anti-Dumping Regulations. The first related to the alleged absorption of the anti-dumping duty on industrial circuit breakers imported from France. Although it was found that absorption was taking place, the findings in the review were never implemented and the review was formally terminated after more

\textsuperscript{305} Note that all complaints were made to the office of the author in his capacity as senior manager for trade remedies policy and liaison.
\textsuperscript{306} Assembly operations are known as “screw driver” operations as only a screw driver is often required to assemble the product, i.e. there is no complicated process involved. See e.g. Röder (2000); Torremans (1993).
\textsuperscript{307} Board Report 3979 – Acrylic Blankets (China, Hong Kong, India, South Korea, Turkey).
\textsuperscript{308} Board Report 4132 – Acrylic Blankets (China, Turkey). The investigation procedures, however, were not in line with WTO requirements, as the Turkish government was not informed of the investigation prior to initiation and exporters were not provided with an opportunity to submit their responses. Turkey challenged the outcome of the investigation in formal dispute settlement in the WTO – see WTO South Africa – Definitive Anti-Dumping Measures on Blanketing from Turkey WT/DS288/1 (15/04/2003). Following consultations in Ankara South Africa revoked the anti-dumping duties – see ITAC Report 25 – Acrylic Blankets (China, Turkey).
than four years. The second anti-circumvention review related to aluminium hollowware from Egypt, where the Egyptian exporter also decreased its price following the imposition of anti-dumping duties. As with the circuit breaker review this review was never concluded and was terminated in the same report. In the third anti-absorption review it was found that the exporter of carbon black from Egypt had decreased its price after the imposition of anti-dumping duties. However, it was also found that the decrease in price was not an attempt to absorb the anti-dumping duties, but as a result of a decrease in production costs following a decrease in the international oil price, the major raw material for the product. Accordingly, the anti-dumping duties were maintained without variation.

It is not clear on what basis declaration under a different tariff subheading is to be regarded as circumvention, as incorrect customs classification should be regarded as customs fraud and the relevant duties and penalties will be levied in such cases. To date, ITAC has not received any applications in this regard.

Country hopping may be regarded as one of the more controversial forms of circumvention and is not provided for in the WTO or in the legislation of any other country. Country hopping takes place where, following the initiation of an investigation or the imposition of preliminary or definitive anti-dumping duties, the exporter shifts supply of the product to a related party in a third country, i.e. where exports were made from Company A in Country B, exports are now made by Company A’s related party in Country C. In such instances the Anti-Dumping Regulations provide that the applicant, i.e. the domestic industry, does not have to update its injury information provided the application is lodged within one year from the date of the publication of the final decision in the original investigation. In addition, dumping may be established on the basis between a comparison of the normal value established in the original exporting country and the export price from the new exporting country, i.e. in clear violation of the requirements of Article VI.1 of GATT.

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309 See Board Report 4163 – Termination of the Following Investigations: Alleged Circumvention of Aluminium Hollowware (Egypt); Carton Board (Austria, Germany, the Netherlands, Spain); Alleged Circumvention of Circuit Breakers (France); Clear Float Glass in Sheets (Thailand, Singapore) (06/03/2002).
310 Idem.
311 See Board Report 4189 – Carbon black (Egypt).
312 See Brink (2009b) for a detailed discussion of country-hopping reviews.
313 ADR 62.2.
314 ADR 62.3.
the Anti-Dumping Agreement, and the ITA Act. ITAC and its predecessor have conducted at least eight country-hopping reviews to date, including four since the promulgation of the Anti-Dumping Regulations.

In the first of these investigations under the Anti-Dumping Regulations, ITAC investigated the change in supply of gypsum plasterboard from Thailand to Indonesia. The original investigation against gypsum plasterboard imported from Thailand had not been finalised by the time the anti-circumvention investigation against Thailand was initiated. The applicant did not update its injury and causality information and based its allegation of dumping on a comparison of the normal value for Indonesia and the export price from Thailand, despite the normal value for initiation purposes being determined at a time two years apart from the determination of the export price. The import statistics in that case clearly showed that imports from Thailand were displaced by imports from Indonesia after initiation of the original investigation, with zero imports from Indonesia prior to initiation of the Thailand investigation and zero imports from Thailand thereafter. As a result of the review, ITAC recommended the imposition of anti-dumping duties against Indonesia. Despite this, the investigation did not meet the requirements of the Anti-Dumping Agreement as regards \textit{inter alia} establishing a \textit{prima facie} case of (a) normal value; (b) dumping; (c) injury; or (d) causality; and the pre-initiation procedures also did not conform to the Anti-Dumping Agreement requirements. Accordingly, if Indonesia were to refer the matter for dispute settlement before a panel in the WTO, South Africa would have no option but to withdraw the anti-dumping duties.

The second country-hopping case related to flat rolled steel products imported from Malaysia after duties had been imposed on imports from Australia. Again, the applicant was not required to submit updated injury and causality information and the dumping was determined on the basis of a comparison between the normal value in Australia and the export price from Malaysia. This resulted in significantly outdated injury information being used in the determination of injury and no overlap between the injury and dumping investigation periods, indicating that no causality

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315 See Article VI.1 of GATT and Article 2.2 of the Anti-Dumping Agreement, which both define normal value as the price in the exporting country and does not make any provision for establishing the normal value in a third country.

316 Note that the anti-circumvention investigations conducted prior to the promulgation of the ADR required the applicant to submit a full application and the cases were considered \textit{de novo} investigations.

317 ITAC Report 74 – \textit{Gypsum plasterboard (Indonesia)}.

318 \textit{Ibid}.

319 ITAC Report 167 – \textit{Flat rolled goods (Malaysia)}.

320 Idem.
evaluation could be completed. ITAC finally found that there was no causal link as there was no price disadvantage present, i.e. the price of the imported product was higher than the unsuppressed selling price of the domestic industry. Accordingly, no anti-dumping duties were imposed against Malaysia.

The third and fourth country hopping investigations both relate to tall oil fatty acid (TOFA), imported from the US and Finland respectively, after preliminary anti-dumping duties had been imposed against Sweden. Again, no injury or causality update was requested and the dumping was determined on the basis of the alleged price in Sweden (no substantiating evidence supplied) and the export price from the US and Finland, respectively. ITAC failed to obtain a properly documented application and the letter requesting initiation in both instances was only seven pages long, being a three-page letter and four pages of import statistics. In the case of the US the data show a significant decline in import volumes and do not support any allegation of country hopping, while the applicant confirms that it is not certain that all TOFA from the US was imported from producers related to the producer in Sweden. It is therefore clear that there was no basis for the initiation of the investigation against the US. As regards imports from Finland, these had increased very significantly in percentage terms, but by only 120 tons in absolute terms, while imports from Sweden had decreased by more than 300 tons during the same period. It therefore also did not support a finding of circumvention. Eventually, ITAC found that no dumping was taking place from either Finland or the US but still came to the conclusion that country hopping had taken place, although no anti-dumping duties were recommended on the basis of the negative finding of dumping.

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323 See the public files of the respective reviews.
324 Note that a country-hopping review only targets exporters in the new country that are related to the exporter in the original exporting country and does not affect other producers in or exporters from that market. In this regard ADR 60.8 provides as follows:

Country hopping shall be deemed to take place if imports, following the imposition of anti-dumping duties or provisional payments or the initiation of an anti-dumping investigation switch to a supplier related to the supplier against which an anti-dumping investigation has been or is being conducted and that is based in another country or customs territory.

325 See ITAC Report 321 – Tall oil fatty acid (USA); and ITAC Report 328 – Tall oil fatty acid (Finland).
6.5 Judicial reviews

Interested parties not satisfied with ITAC’s final determination may take the determination on review before the High Court, whence it may be appealed to the Supreme Court of Appeals. The Anti-Dumping Regulations make specific provision for the judicial review not only of final determinations, but in certain circumstances also of preliminary determinations.

There is little scope for reviewing the substantive aspects of ITAC’s decisions in court and most review grounds would relate to the administrative action being unreasonable, irrational or where the authority did not apply its mind. The latter review ground, however, may reflect ITAC’s improper consideration of the facts before it, which means that the High Court will consider the substance of the decision to determine whether the decision was reasonable. Although a court need not refer a matter back to the authority for reconsideration and may make ‘any order that is just and equitable’, all decisions against ITAC have been remanded to ITAC for reconsideration and the court has never substituted its own decision for that of ITAC. The High Court’s decisions may be appealed to the Supreme Court of Appeal.

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326 For a more detailed discussion on judicial reviews of trade remedies in South Africa, see Brink (2012).
327 For a general discussion of judicial review, including the basis for and the nature thereof, see Baxter (1989: 299-342); De Ville (2003); Hoexter (2002: 64-124); Nurse (1995: 55-65); and Wiechers (1984: 292-343). See also Pharmaceutical Manufacturers of South Africa: In re Ex Parte President of the Republic of South Africa 2000 (2) SA 674 (CC); President of the Republic of South Africa v South African Rugby Football Union 2000 (1) SA 1 (CC).
328 ADR 64.1.
330 S6(2) of the Administrative Justice Act 2000 provides inter alia that an administrative action, which includes the failure to act, may be reviewed on the grounds that the administrator who took the decision was not authorised to do so by the empowering provision; that a mandatory and material procedure or condition prescribed by an empowering provision was not complied with; that the action was procedurally unfair; and that the action was materially influenced by an error of law. This section deals with other situations where administrative actions were taken for a reason not authorised by the empowering provision, for an ulterior purpose or motive or because irrelevant considerations were taken into account or relevant considerations were not considered; or where the action itself is not rationally connected to the purpose for which it was taken, the purpose of the empowering provision, the information before the administrator, or the reasons given for it by the administrator. See e.g. Hoexter (2002: 155); President of the Republic of South Africa v South African Rugby Football Union 2000 (1) SA 1(CC); Pharmaceutical Manufacturers of South Africa: In re Ex Parte President of the Republic of South Africa 2000 (2) SA 674 (CC).
331 Burns (2002: 308); Stadsraad Lichtenburg v Administrateur, Transvaal 1967 (1) SA 359 (T).
332 S172(1)(b) of the Constitution Act.
333 See e.g. Algorax v the Chief Commissioner, International Trade Administration Commission (Unreported case 25233/2005 T); Degussa Africa (Pty) Ltd v ITAC (Unreported case 22264/2007 T); SATMC v International Trade Administration Commission (Unreported case 45302/2007 T).
There were only four judicial reviews of anti-dumping determinations between 1992 and 2004, but another six since 2005. None of the decided cases touched upon substantive issues, despite substantive issues being raised before the High Court in the South African Tyre Manufacturers Conference (SATMC) case pending before the High Court, including the issues relating to sales in the ordinary course of trade by virtue of domestic sales at a loss and by virtue of sales to related parties, the determination of the normal value, granting of adjustments to the normal value for indirect expenses, the failure to grant adjustments to the export price for costs directly affecting such price, the failure to make adjustments to the export price for similar costs as had been adjusted to the normal value, the determination of the weighted average weighted margin of dumping, and the determination of causality.

The *Brenco* and *Rhône Poulenc* cases both addressed the issue of confidentiality in anti-dumping investigations, while the court in the *Algorax* case strongly criticised ITAC’s methodology for determining the likelihood of a recurrence of dumping in sunset reviews and provided some guidelines as to how such likelihood should be established. This remains the only case in which a court has really considered the underlying facts in an investigation. In *Progress Office Machines* the Supreme Court of Appeals erroneously ruled that where anti-dumping duties are imposed with retrospective effect to the date of the preliminary duties, the five-year duration of the anti-dumping

334 See *Brenco v Chairman of the Board* (Case 94/10652 T) and *Chairman of the Board v Brenco* 2001 (4) SA 511 (SCA) (in respect of Board Report 3329 - *Roller bearings (U.S.)*); *Rhône Poulenc v Chairman of the Board* (Case 98/6589 T) (in respect of Board Report 3789 – *Aldicarb (U.S.)*); *Ranbaxy v Chairman of the Board* (Case 659/98 T) (in respect of Board Report 3799 – *Penicillin (India)*); *Intervil v Board on Tariffs and Trade and others* (Case 19162/2001 T) (in respect of Board Report 4119 – *Wooden doors (Indonesia)*) – this matter was eventually settled out of court and the Board agreed to terminate the investigation and to terminate the preliminary duties.


336 These facts fall within the author’s knowledge as part of the SATMC’s counsel.

337 *Chairman of the Board v Brenco* 2001 (4) SA 511 (SCA).

338 *Rhône Poulenc v Chairman of the Board* (Case 98/6589 T).


340 This ruling is in violation of the Anti-Dumping Regulations and against the practice in all other countries in the world. See Brink (2007b); Brink (2008b); and Brink (2008d) for discussions of this erroneous decision.
duties have to be determined as five years from the date to which it applies, rather than from the date the notice appears in the Government Gazette. In the AEL matter the High Court overruled ITAC’s alleged policy which provides that where there are only a limited number of producers in the domestic market all such parties have to submit injury information, thereby indicating that ITAC could not impose criteria additional to those contained in the Anti-Dumping Regulations.

In SCAW v ITAC the domestic industry secured an order against ITAC preventing it from forwarding its recommendation to terminate the anti-dumping duties to the minister. ITAC, however, appealed direct to the Constitutional Court which erroneously ruled that no interdict could be granted against ITAC as the minister (despite two previous court decisions also granting interdicts against ITAC) had a constitutional duty to perform. The fact remains that in terms of the act the minister has no duty to perform. In fact, in terms of the act ITAC has to make a recommendation to the SACU Tariff Board which, in turn, has to make a recommendation to the SACU Council of Ministers. The Council of Ministers, however, has delegated its decision-making powers to ITAC. In terms of the delagatus delegare non potest rule ITAC cannot then delegate the decision making to the minister and has to take the final decision itself.

In the most recent case, the South African Tyre Manufacturers’ Conference took ITAC’s decision not to impose anti-dumping duties against Chinese exports on review. It argued inter alia that ITAC had granted the exporters market economy status without any information to support its finding; that ITAC had found Chinese domestic sales to be made in the ordinary course of trade when evidence on the record clearly showed it not to be the case; that ITAC had made unjustified adjustments to the normal value; that ITAC had failed to make the correct adjustments to the export price; that it had accepted incomplete submissions from the exporters; and that it had accepted an exporter submission that was submitted after the deadline for submissions. The High Court, without making reference to any of the other issues, ruled only on the issue of non-market economy status. ITAC appealed this decision to the Supreme Court of Appeals, which again failed to rule on any issue other than the issue of market economy status. The Supreme Court of Appeals, however, clearly did

341 AEL v ITAC (Unreported case 15027/2006 T).
342 SCAW v International Trade Administration Commission (Unreported case 48829/2008 T).
344 Strictly speaking this is also not correct, as the minister has to request the Minister of Finance to impose definitive duties.
345 See Brink (2010) for a detailed discussion of this case.
not understand the issue before it and not only confused information, e.g. finding that the information submitted could have been indicative of a normal value established on the basis of the export price to a third country when, in fact, such information related exclusively to the normal value determined in a surrogate country, but also disregarded all information that the domestic industry had submitted in support of its arguments that the industry in China was operating under non-market conditions. The Supreme Court went even further and found that ITAC did not have to consider any information related to market economy status that was submitted to it, which finding is clearly in violation of the Constitution.

It is therefore evident that every time a decision has been appealed from the High Court a wrong decision was reached. This clearly indicates the urgent need for a specialised court to be set up to hear reviews and appeals against ITAC’s decisions. In this regard it may be expedient to expand the powers of the Competitions Tribunal to also review ITAC’s decisions on request or to set up another body with powers similar to those of the Competition Tribunal insofar as they relate to the review of Competition Commission decisions.

7. WTO Dispute Settlement

To date, South Africa has been involved in three WTO disputes, all of which related to anti-dumping.\textsuperscript{346} The first case related to anti-dumping duties imposed against imports of amoxicillin and ampicillin imported from India.\textsuperscript{347} India alleged that South Africa had violated Articles 2, 3, 5, 12 and 15 of the Anti-Dumping Agreement, as well as Articles I and VI of GATT 1994. India alleged, in part, that

The Government of India considers that the definition and calculation of the normal values is inconsistent with the provisions of the WTO and an erroneous methodology was used for determining the normal value and the resulting margin of dumping. The method of arriving at constructed export price was also not reasonable which resulted in a higher margin of dumping. The Government of India further considers that the determination of injury was not based on positive

\textsuperscript{346} South Africa — Anti-dumping duties on import of certain pharmaceutical products from India (Brought by India), WT/DS168/1 (13 April 1999); South Africa — Definitive anti-dumping measures on blanketimg from Turkey (Brought by Turkey), WT/DS288/1 (15 April 2003); South Africa — Anti-dumping measures on uncoated woodfree paper from Indonesia (brought by Indonesia) WT/DS374/1 (16 May 2008).

\textsuperscript{347} Board Report 3799 – Ampicillin and Amoxycillin (India).
evidence and did not include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry which led to an erroneous determination of material injury suffered by the petitioner. India is also of the view that the South African authorities’ establishment of the facts was not proper and that their evaluation was not unbiased or objective. Moreover, the South African authorities have not taken into account the special situation of India as a developing country.  

This followed South Africa’s refusal to make an adjustment for differences in raw material costs used for the domestically sold and exported products as the exporter could not prove that the lower priced imported raw materials were exclusively used in the production of the exported product. Following the exporter’s decision to pursue the matter in the High Court in South Africa the WTO case was not pursued by the Indian Government.  

The second case related to acrylic blankets in roll form imported from Turkey. South Africa had originally imposed anti-dumping duties against acrylic blankets imported from Turkey. Following the imposition of anti-dumping duties, the exporter started exporting blankets in roll form, i.e. rolls of acrylic fabric already indicating the lines where blankets had to be cut. South Africa initiated an anti-circumvention investigation and imposed anti-dumping duties on the altered product, but failed to follow WTO rules applicable to investigations and reviews. Turkey specifically indicated that it considers that [South Africa] failed to ensure proper notifications in this case and that the establishment of the facts was not proper and that its evaluation of these facts was not unbiased and objective particularly in relation to:

(i) the initiation of the investigation into this case (the investigation),
(ii) the conduct of the investigation,
(iii) the imposition of the anti-dumping duty.

348 South Africa — Anti-dumping duties on import of certain pharmaceutical products from India (Brought by India), WT/DS168/1 (13 April 1999) 1.
349 Board Report 3799 – Ampicillin and Amoxycillin (India).
350 Ranbaxy v Chairman of the Board (Unreported case 659/98T).
351 Note that no notification has been made to the WTO to indicate that the matter has been resolved and it technically remains open, even though the anti-dumping duty has since been rescinded following a sunset review.
352 Board Report 4132 – Acrylic fabrics (Turkey) and Board Report 4160 – Acrylic fabrics (Turkey).
During consultations with the Turkish government in Ankara, Turkey, it transpired that South Africa had failed to notify the Turkish government of the receipt of the properly documented application, had not provided the exporters with a copy of the application and failed to provide the exporters with an opportunity to comment. South Africa undertook to withdraw the anti-dumping duties.  

The third case related to uncoated woodfree paper imported from Indonesia. This related to a sunset review that was initiated on 2 April 2004. Indonesia alleged that ITAC on 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 Indonesia’s complaint. Indonesia itself indicated that the delay in the implementation was the result of a pending court case against ITAC. ITAC withdrew the anti-dumping duty as soon as it became aware of Indonesia’s complaint.

8. Conclusion

This Working Paper reaffirms that South Africa has always been a major user of the anti-dumping instrument and that it cannot be regarded as a ‘new’ user. On the other hand, South African laws and practice since the 1990s show considerable differences from its past anti-dumping regime. Above all, the promulgation of both the ITA Act and the detailed Anti-Dumping Regulations in 2003 contributed significantly to making South Africa’s anti-dumping procedures more transparent in theory. In practice, however, South Africa’s anti-dumping system is highly unpredictable and the Anti-Dumping Regulations are often not properly applied, thereby creating uncertainty in the market and resulting in the imposition of duties that should not be imposed and the non-imposition of duties that should have been imposed.

It was also shown that judicial reviews of anti-dumping in South Africa are unreliable and that courts generally not only do not have a proper understanding of the issues before them, but that they are reluctant to reconsider the facts that served before ITAC. There is a clear need for a substantive change in the judicial review system as it relates to trade remedies.

353 ITAC Report 25 – Acrylic blankets (China, Turkey). Note that the duties were also withdrawn against China as ITAC recognised that the same incorrect procedures had also been followed in respect of China. See also Brink (2007d).
354 South Africa – Anti-dumping measures on uncoated woodfree paper from Indonesia (brought by Indonesia) WT/D374/1 (16 May 2008).
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