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Author Email:
gustav.brink@gmail.com

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Anti-dumping and trade policy in South Africa: 30 years of the WTO

GUSTAV BRINK

Extraordinary Lecturer, Department of Mercantile Law, University of Pretoria, South Africa

https://orcid.org/0000-0001-5097-3730

ABSTRACT

Anti-dumping is one of three tools that a government may use to protect its domestic industry from injurious imports. It is a key component of a country's trade policy. Its use, abuse, or lack of use can play a major role in establishing and protecting domestic industries but can also impact the downstream industry and consumers. The quicker, more efficient and transparent an anti-dumping investigation is, the less unnecessary impact it will have on interested parties. South Africa's trade remedies legislation has not been revised in more than 20 years, notwithstanding numerous World Trade Organization decisions that have interpreted specific provisions related to anti-dumping investigations. This article considers the role that anti-dumping has played in two key South African industries – poultry and glass – and considers the current protectionist bias built into the system. It proposes a complete overhaul of the legislation, internal processes and the documents used in investigations.

Keywords: anti-dumping; trade policy; International Trade Administration Commission; poultry; trade remedies; glass

1 INTRODUCTION

South Africa was a founding member of the World Trade Organization (WTO) in 1995. The WTO regulates international trade, including action that can be taken against unfair[1] international trade in the form of dumping. Dumping is to be condemned if it causes material injury to a domestic industry producing the like product in the importing country.[2] South Africa has a long history[3] of acting against injurious dumping, with evidence of "anti-dumping duties" against "bounty dumping" as far back as 1903.[4] In 1914, it became the fourth country after Canada, Australia and New Zealand to adopt anti-dumping legislation.[5] South Africa was one of the most prolific users of anti-dumping in the twentieth century.[6]

This article[7] adopts a doctrinal and empirical case-study approach in considering all anti-dumping investigations conducted in the two identified industries, as well as all WTO anti-dumping disputes lodged against South Africa. It discusses South Africa's use of anti-dumping and how it fits into the country's trade policy, and provides statistics on the use of the instrument in South Africa. It then considers the strategic use thereof to protect the poultry and glass domestic industries, before looking at the protectionist bias in the current system and at WTO disputes brought against South Africa. It concludes by proposing ways of moving forward to ensure that anti-dumping can be appropriately used as part of South Africa's trade policy.

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1 Lindsey B & Ikenson DJ *Antidumping exposed: The devilish details of unfair trade law* Washington, DC: Cato Institute (2003) at 17.

2 Article VI:1 of the General Agreement on Tariffs and Trade (GATT).

3 Internationally, the oldest reference to an anti-dumping duty imposed is found in Board on Tariffs and Trade *Report No. 42: Dumping or unfair competition* (1924), which refers to anti-dumping duties imposed on flour and wheat from Australia in 1921.

4 Transvaal Customs Department *Transvaal Customs handbook* Johannesburg: Transvaal Customs Department (1905) at 24.

5 See section 8(1) of the Customs Tariff Act 26 of 1914.

6 Brink G *A theoretical framework for South African anti-dumping law* (LLD thesis, University of Pretoria 2004) at 54–57.

7 This article is based on the keynote address the author gave at the African Society of Business Law and Economics Colloquium at Wits University in June 2024.

2 TRADE POLICY AND ANTI-DUMPING

2.1 Trade policy

South Africa has a small but highly diverse economy. Its producers seldom attain the economies of scale of their competitors in China, the European Union (EU), India and the United States of America (US), placing them at a distinct disadvantage. The distance from international markets may be both a blessing and a curse: while the market is relatively protected, it is difficult to access foreign markets. One goal of international economic policy is to maximise "national welfare through … the appropriate trade policy".[8] South Africa's 32.9 per cent unemployment rate[9] is an epidemic that threatens the economy, and it is important that every job be protected within municipal and international rules. The domestic industry generates not only jobs, but also a significant proportion of the exchequer's tax income through corporate tax,[10] and with an increasing annual shortfall, this income should be protected. International trade competition requires the government to consider its impact on the balance of payments, employment, environmental standards, and more.[11] Trade policy, as part of international economic policy, is a country's policy on domestic and international trade and is planned taking into account international obligations and domestic development programmes.[12] In terms of the International Trade Administration Act ("ITA Act"), the Minister of Trade, Industry and Competition ("Minister of Trade") may promulgate trade policy.[13]

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8 Jackson JH "Introduction" in Jackson JH (ed) *Michigan yearbook of international legal studies vol I Antidumping law: Policy and implementation* Ann Arbor: University of Michigan Press (1979) at 2.

9 Wasserman H "Unemployment worsens, 24% of young university graduates now jobless" (13 May 2025) *News24* available at https://www.news24.com/business/economy/unemployment-worsens-24-of-young-university-graduates-now-jobless-20250513-0667 (accessed 14 May 2025).

10 Corporate tax accounts for 19 per cent of South Africa's total tax income. See OECD, ATAF & ACU "Revenue statistics in Africa 2024 – South Africa" available at https://www.oecd.org/content/dam/oecd/en/topics/policy-sub-issues/global-tax-revenues/revenue-statistics-africa-south-africa.pdf (accessed 14 May 2025).

11 Adams W "Import restraints and industrial performance: The dilemma of protectionism" in Jackson JH (ed) *Antidumping law: Policy and implementation* Ann Arbor: University of Michigan Press (1979) 4.

12 Yanai A "South African trade policy: Interactions between trade policy and the WTO negotiations" in Makino K & Sato C (eds) *Public policy and transformation in South Africa after democratisation* Japan: Japan External Trade Organization (2013) 69.

13 Act 71 of 2002. In terms of section 5 of the Act, the "Minister may, by notice in the Gazette and in accordance with procedures and requirements established by the Constitution or any other relevant law, issue Trade Policy Statements or Directives".

Industrial policy support may come in the form of subsidies, access to below-market rates for capital, the provision of cheap inputs, or the strategic use of trade remedies. The goal thereof might be to offer temporary support that would allow firms to increase output, spread fixed costs over longer production runs, and become competitive. In South Africa, trade and industrial policies often come in the form of "Master Plans", such as the Steel and Poultry Master Plans, which include the targeted use of anti-dumping.[14] The strategic use of increased protection both raises the costs of imports through additional duties as well as lowering domestic costs through increased production. In theory, this should lead to increased export opportunities for the lower-cost domestic industry.

In the negotiations leading to the establishment of the WTO, South Africa was regarded as a developed country. As a result of becoming a WTO member, South Africa's simple mean Most Favoured Nation (MFN) rate for manufactured goods decreased from 16.2 per cent in 1996 to 6.0 per cent in 1999.[15] South Africa only agreed to decrease tariffs to this extent due to the possibility of using anti-dumping and other trade remedies where domestic industries were injured by imports under certain conditions.[16] This impacted severely on industry's ability to withstand international competition and, in turn, led to the significant use of anti-dumping in this period. The relatively low bound[17] rates on several products continue to play a major role in domestic industries' recourse to anti-dumping, as customs duties cannot be increased to levels sufficient to protect the industry against low-priced imports.

2.2 Anti-dumping

Dumping takes place when a product is exported from one country to another at a price which is lower than its "normal value",[18] that is, the price at which the product is sold for

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[14] Department Trade, Industry and Competition (DTIC) *The South African Steel and Metal Fabrication Master Plan 1.0* Pretoria: DTIC (2020) ("Steel Master Plan") at 12 and 45; DTIC *The South African Poultry Sector Master Plan* Pretoria: DTIC (2019) ("Poultry Master Plan") at 6 and 13.

[15] Yanai (2013) at 74–75.

[16] Matschke X & Schöttner A "Antidumping as strategic trade policy under asymmetric information" (2009) CESifo Working Paper No. 2536 Munich: Center for Economic Studies and IFO Institute (CESifo) 2.

[17] "Bound" rates are the agreed maximum duty for a product under South Africa's GATT concessions.

[18] Article VI:1 of GATT; article 2.1 of the Agreement on Implementation of Article VI of GATT (Anti-Dumping Agreement); section 1(2) of the ITA Act.

consumption on the domestic market of the exporting country.[19] Since the Anti-Dumping Agreement provides for discretion in several areas, in practice the instrument can be used to provide absolute protection or assist in establishing up domestic industries. Anti-dumping, then, is used to protect the domestic industry producing a like product from international price discrimination that injures such industry. The level of the anti-dumping duty is limited to the extent of the margin of dumping.[20]

2.3 Interaction between anti-dumping and trade policy

Anti-dumping can be used to support a country's trade and industrial policy to develop and promote the country's manufacturing capability. By creating uncertainty in a market, anti-dumping investigations may have a chilling effect on import volumes, one which provides the domestic industry with an opportunity to regroup, as importers do not know whether or when an anti-dumping duty will be imposed or at what level.[21] Decreased imports can lead to increased market share for the domestic industry, along with decreased costs given that overheads are spread over higher production and sales volumes. The strategic use (or abuse) of anti-dumping by a government may advance its industrial policy in a particular sector.[22] When anti-dumping duties are imposed, industry can extend its production and sales, thereby increasing cash flow and profit. This may impact industry's ability to attract capital and investments, as the company becomes more attractive to investors. This notwithstanding, anti-dumping is an indirect trade and industrial policy tool, generally being reactive rather than proactive. How anti-dumping impacts trade policy will depend on the discretion exercised by the investigating authority and other decision-makers.[23]

A quick, effective anti-dumping instrument is more likely to place importers and exporters on the alert and prevent dumping even before it takes place, whereas a long, slow process – like that in South Africa, where investigations take nearly 18 months to complete – would do nothing to deter such imports. Governments also need to consider

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19 Article VI:1(a) of GATT; article 2.1 of the Anti-Dumping Agreement; section 32(2)(b)(i) of the ITA Act.

20 Article 9.1 of the Anti-Dumping Agreement.

21 Vandenbussche H & Zanardi M "The chilling trade effects of antidumping proliferation" (2010) 54(6) *European Economic Review* 760 at 761.

22 Matschke & Schöttner (2009) 10–19.

23 See Lindsey & Ikenson (2003) 1–52, who indicate how anti-dumping can be used or abused depending on the political inclination of the investigating authority.

the impact of anti-dumping duties on the consumer. For instance, research has shown that anti-dumping duties have led to an increase of 18 per cent in retail prices of frozen potato chips and 16.2 per cent in the case of frozen chicken products.[24]

2.4 Countries using anti-dumping as part of trade policy

India is the world's biggest user of anti-dumping.[25] Its investigations and definitive measures cover a wide range of products, from steel, glass and fabrics to vitamins and plastic.[26] The US is the second largest user of anti-dumping, followed by the EU.[27] China has used anti-dumping widely as part of its trade policy (for instance, to set up its X-ray equipment industry),[28] but also as retaliation against measures or actions taken by other countries.[29] Other major users of anti-dumping include Argentina, Australia, Brazil, Canada, Korea, Mexico, New Zealand, and Turkey,[30] while Pakistan and Venezuela have now also conducted more than a hundred investigations each under the WTO.[31] In Africa, Egypt and Morocco are now also major users of anti-dumping.[32]

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[24] Edwards L, Ismail Z, Kamutando G et al. "The consumer price effects of specific trade policy restrictions in South Africa" *South African Reserve Bank Working Paper Series WP/22/15* (2022) at 5.

[25] World Trade Organization "Anti-dumping" Switzerland: WTO available at https://www.wto.org/english/tratop_e/adp_e/adp_e.htm (accessed 10 September 2024).

[26] World Trade Organization *Semi-annual report under Article 16.4 of the agreement* WTO G/ADP/N/391/IND (16 February 2024) Switzerland: WTO (16 February 2024).

[27] World Trade Organization "Anti-dumping".

[28] See World Trade Organization Panel Report, *China: Definitive anti-dumping duties on x-ray security inspection equipment from the European Union* WT/DS425/R Switzerland: WTO (26 February 2013).

[29] Article 40 of China's Anti-Dumping and Subsidy Regulation, State Council Order [1997] No. 214 specifically provided for China to take "corresponding measures against any country or region adopting discriminatory anti-dumping or anti-subsidy measures against [China's] exports". See also World Trade Organization Panel *European Communities – definitive anti-dumping measures on certain iron or steel fasteners from China* WT/DS397/R and Corr.1, at para 7.488 adopted 28 July 2011, as modified by Appellate Body.

[30] See Bienen D, Brink G & Ciuriack D *Guide to international anti-dumping practice* Alphen aan den Rijn: Wolters Kluwer (2013) for a discussion of these countries' anti-dumping systems, as well as discussions of China, the EU, India and the US.

[31] World Trade Organization "Anti-dumping" (accessed 10 September 2024).

[32] World Trade Organization "Anti-dumping" (accessed 10 September 2024).

3 SOUTH AFRICA'S ANTI-DUMPING STATISTICS

South Africa conducted at least 137 anti-dumping[33] and countervailing investigations from 1921 to 1947,[34] 211 from 1948 to 1958,[35] 478 from 1959 to 1991,[36] and 58 from 1992 to 1994[37] – a total of at least 884 investigations – before the Anti-Dumping Agreement came into force.

To date, South Africa is the only country in the world to have investigated the dumping of currency, as it imposed anti-dumping duties on the importation of pound sterling, which was legal tender in the country at the time. When Britain left the gold standard, the sterling devalued by 20 per cent. One could import one pound sterling for 16 shillings and then buy 20 shillings' worth of products in the Union.[38] This resulted in the imposition of "exchange" anti-dumping duties.[39] South Africa also imposed several anti-dumping duties on services in the form of "freight anti-dumping duties".[40] An early link between anti-dumping and trade policy was indicated in 1942 when the Board recommended the promulgation of legislation to protect South African industries against "uneconomic competition" resulting from the abnormal conditions that might prevail after the end of the Second World War.[41]

In the 1970s, in another manifestation of trade policy, South Africa adopted formula duties that ensured a minimum landed cost for various products and essentially

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33 Until 1992 there was no distinction between anti-dumping and countervailing measures.

34 Brink (2004) at 54 and footnote 281.

35 GATT *Anti-dumping and countervailing duties* Geneva: GATT (1958) at 14.

36 Brink (2004) at 56.

37 Brink G *Anti-dumping and countervailing investigations in South Africa: A practitioner's guide to the practice and procedures of the Board on Tariffs and Trade* Pretoria: Gosh Trading (2002) Annex 7 at 453–455.

38 Board Report 126: Exchange Dumping of British Silver Coins (15/10/1931).

39 Board Report 126: Exchange Dumping of British Silver Coins (15/10/1931). See also Board Report 262: Withdrawal of Exchange Dumping Duty on Bovine Whole Hides and Skins for use as Upper Leathers, and Case Hides (13/06/1940) for another case related to exchange-rate dumping.

40 See Board Reports 85: Freight Dumping of Superphosphates (13/12/1927); 250: Withdrawal of Freight and Ordinary Dumping Duties on Iron and Steel Plates (22/04/1939); 254: Freight Dumping Duty on Motor Cars and Light Motor Vans Imported from the United States of America and Canada (02/06/1939); 263: Intrekking van Vrag- en Gewone Dumpingregte op Yster- en Staalprodukte van die Verenigde State van Amerika ingevoer (15/03/1940); and Minutes of Board Meeting of 14 August 1953, item 9.

41 Brink G "One hundred years of anti-dumping in South Africa" (2015) *Journal of World Trade* 325 at 348.

addressed any dumping that could take place.[42] In the early 1990s, South Africa's economy opened up following sharp decreases in customs duties[43] that led to significantly increased imports.[44] The government recognised that domestic companies required protection against dumped imports, which led to amendments to existing legislation.[45] In August 1992 South Africa set up a dedicated anti-dumping unit (the Directorate Dumping Investigations)[46] responsible for all aspects of anti-dumping investigations, although the final recommendation was still made by the Board to the minister. When the country became a founding member of the WTO, legislation was amended to bring it more closely in line with the Anti-Dumping Agreement.[47] The timeline below shows the major events and developments in South Africa's anti-dumping system.

1914	AD legislation
1921	First AD investigation
1924	Need for separate AD legislation identified
1932	AD against currency
1942	AD and trade policy linked
1948–1958	South Africa imposed more than 50% of all AD duties worldwide
1970	Formula duties replace AD duties
1992	Separate AD unit set up
1995	Legislation amended to align with WTO
2003	First separate AD legislation

4 SOUTH AFRICA'S TRADE POLICY AND ANTI-DUMPING UNDER THE WTO

4.1 Introduction

Since 1995, South Africa's use of anti-dumping has had distinct phases, in line with the prevailing trade policy at the time. This included periods with very significant use of the instrument and periods with little or no use. There have been periods where anti-

[42] See, for example, Board Report 2290: Additional Tariff Assistance for the Industry Manufacturing Wrought Plates, Sheets, Strip and Foil of Copper (14/05/1984).

[43] See National Economic Forum *Anti-dumping and countervailing measures report: Discussion document – A review of anti-dumping and countervailing measures in the South (sic) African Customs Union* Pretoria: National Economic Forum (August 1994) at 2–3; Department of Trade and Industry *South Africa's Uruguay round tariff phase-down offer* Pretoria: Department of Trade and Industry (1994).

[44] Brink (2002) at 4.

[45] Board on Tariffs and Trade Amendment Act 60 of 1992; Customs and Excise Amendment Act 61 of 1992.

[46] Brink (2002) at 5.

[47] Board on Tariffs and Trade Amendment Act 39 of 1995.

dumping duties were imposed in every investigation where dumping was found (1992–2004, 2010–2014) and those in which many cases were terminated even where both dumping and injury were found on the basis of a lack of causality (2005–2009).[48] From August 2014 to July 2018, no anti-dumping investigations were initiated despite several applications. There have been times when injury was found yet the findings were not supported by evidence,[49] or when dumping was found because the Commission failed to make adjustments for significant product differences.[50]

Between 1995 and 1999, when South Africa decreased its customs duties on the basis of its Uruguay Round negotiations, it initiated more than half of all its anti-dumping investigations under the WTO to date, that is, the subsequent 25 years (2000 to 2024) saw fewer investigations than the first five years.[51] In the first five years of the WTO, South Africa initiated 132 investigations (26.4 per year), yet, in the most recent 10 years (from 2015 to 2024) it initiated only 23 in total.[52] From 2015 to 2019, only three investigations were initiated, with no initiations in 2015, 2016 or 2017. In 1997 and 1998, South Africa was the largest user of anti-dumping counted by number of investigations initiated,[53] and by far the largest user of anti-dumping when counting the number of initiations per million USD of imports.[54] This was a direct response to the fact that South Africa had negotiated in the Uruguay Round as a developed country.

Following the large number of investigations from 1995 to 1999, the country has, in the last 10 years, been surpassed by Egypt as the largest user of anti-dumping in Africa. Since Ebrahim Patel became Minister of Trade, there have been more anti-dumping and safeguard investigations, with anti-dumping duties always imposed if dumping was

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48 See, for example, International Trade Administration Commission ("Commission") *Report No. 118 Investigation into the alleged dumping of cheddar cheese originating in or imported from Ireland: Final determination* (3 June 2005); Commission *Report No. 125 Investigation into the alleged dumping of steel wheels originating in or imported from Brazil, the People's Republic of China, Chinese Taipei and Turkey: Final determination* (4 July 2005).

49 See, for example, Commission *Report No. 695 Investigation into the alleged dumping of frozen bone-in portions of the species* Gallus domesticus *originating in or imported from Brazil, Denmark, Ireland, Poland and Spain: Final determination* (10 June 2022) (Hereafter Commission "*Report 695 Bone-in portions"*).

50 See, for example, Commission *Report No. 502 Investigation into the alleged dumping of wheelbarrows originating in or imported from the People's Republic of China: Final determination* (31 July 2015).

51 World Trade Organization "Anti-dumping".

52 World Trade Organization "Anti-dumping".

53 World Trade Organization "Anti-dumping".

54 Stevenson C *Global anti-dumping handbook* London: Cameron May (1999) at 18.

found.[55] At present, South Africa has 45 anti-dumping duties in place (by product by country). These apply to a range of products, including agricultural products, glass and steel products, plastics, passenger car tyres, and cement.[56] Some of these duties have been in force for more than 20 years. The oldest anti-dumping duties relate to garden implements (China – 1993), float glass from China and India (1999), garlic from China (2000), bone-in chicken portions from the US (2000), wire ropes from China, Germany and the UK (2002), and gypsum plasterboard from Indonesia and Thailand (2004).[57]

4.2 Protectionist bias and other problems in the current system

The ITA Act provides that

> [t]he object of the Act is to foster economic growth and development in order to raise incomes and promote investment and employment in the Republic and within the Common Customs Area by establishing an efficient and effective system for the administration of international trade…[58]

As a consequence of the inherent bias in favour of the domestic industry in the ITA Act and the Minister's views, the Commission's current investigative procedures often actively discriminate against exporters, while other procedures are in violation of South Africa's WTO obligations. The problem is that an outsider, that is, a person who is not an interested party in an investigation, will often not be able to identify these deficiencies by reading the investigation reports, as the reports do not contain all relevant information.

First, once an exporter submits a questionnaire response, the investigating officers work through the response and identify deficiencies. If there are any, the questionnaire response is returned to the exporter. The exporter then has seven days to address the deficiencies and resubmit the response. However, the investigating officers often find additional deficiencies that were not pointed out in the deficiency letter even though they

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55 With one exception – see N 1681 in GG 48220 of 16 March 2023. Note that Commission *Report No. 720 Investigation into the alleged dumping of other flat-rolled products of iron or non-alloy steel, of a width of 600 mm or more, otherwise plated or coated with zinc, of a thickness of less than 0.45 mm originating in or imported from the People's Republic of China: Final determination* (31 August 2023) still sets out the Commission's finding rather than that of the Minister.

56 For the complete list of anti-dumping duties currently in force, see WTO G/ADP/N/399/ZAF (8 August 2024) at 8–11.

57 WTO G/ADP/N/399/ZAF (8 August 2024) at 8–11.

58 Section 2 of the ITA Act.

were in the original response.[59] The Commission then rejects the exporter's response from consideration for the preliminary determination, resulting in provisional measures that often block that exporter from the market for six months.[60] The Commission should not be able to disregard submissions on the basis of deficiencies it had failed to point out. In other jurisdictions, exporters are required to fix only the deficiencies identified, rather than make a complete resubmission.

The Anti-Dumping Agreement provides that certain information may be claimed as confidential, provided "good cause" is shown for confidentiality,[61] and on condition that a non-confidential version that provides a reasonable understanding of the information submitted in confidence is then submitted. In exceptional circumstances, a statement may be supplied as to why certain information cannot be so summarised.[62] However, in South Africa's investigations, the domestic industry is often allowed to claim as confidential such information that relates to the industry as a whole, even where there are more than two domestic producers who submitted information and there is no possibility of deducing the confidential information of any party.[63] At the same time, a significantly higher confidentiality standard is required of exporters. For example, in a recent poultry investigation, exporters were required to submit a redacted version of their cost build-ups, stating the exact cost items but excluding the values.[64] This was not required of domestic producers.

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59 This happened to a Brazilian and Irish exporter in *Frozen bone-in portions* and to a Chinese exporter in *Tyres*. This information is available from the public files in the respective investigations.

60 See Commission *Report No. 678 Investigation into the alleged dumping of frozen bone-in portions of the species* Gallus domesticus *originating in or imported from Brazil, Denmark, Ireland, Poland and Spain: Preliminary determination* (10 December 2021) at 102, which indicates that "no properly documented responses" were received from any exporters in Ireland. This led to all Irish exporters attracting a provisional payment of 158.4 per cent. The final margin of dumping for Manor Farm was found to be only 2.49 per cent (and the residual duty, 37.52 per cent). See Commission *Report No. 695 Bone-in portions* at 5 and 82–83.

61 Article 6.5 of the Anti-Dumping Agreement.

62 Article 6.5.1 of the Anti-Dumping Agreement.

63 Commission *Report No. 695 Bone-in portions* at para 6.6.4 shows the indexed total market share of the five producers, whereas the actual volumes are provided for imports. Bearing in mind that the volumes sold by non-participating domestic producers were not known, there would be no possibility of even calculating the overall size of the market, let alone the information pertaining to a specific company. See also, inter alia, paras 6.5.1 and 6.5.2 (industry's indexed average price, rather than the actual price); para 6.5.3 (industry's indexed average cost); and para 6.6.1 (industry's indexed total sales volume).

64 Commission *Report No. 695 Bone-in portions*.

Where an exporter's final submission contains deficiencies, the Commission rejects the exporter's full submission and indicates that it is a non-cooperating party. This violates article 6.8 and Annex II of the Anti-Dumping Agreement.[65] Article 6.8 provides that preliminary and final determinations may be made on the basis of the facts available to an investigating authority where "any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation". Annex II.3 provides that all information which is verifiable and submitted timeously must be used in any decisions, indicating that facts available may be applied only in respect of information which is missing or unverifiable.[66] Thus, where only some information is missing, the Commission cannot reject *all* information submitted by a party.

Annex II.5 further indicates that authorities may not disregard information even if it is not "ideal in all respects", while Annex II.7 requires that where an authority bases its decision on facts available, it must "do so with special circumspection" and it should "check the information from other independent sources at … [its] disposal". Thus, the Commission cannot simply disregard all information submitted by an exporter and, for the purposes of the preliminary determination, rely on the information in the application, especially not where other exporters had cooperated in the investigation.

Although the exporters' questionnaire requires exporters to provide transaction-by-transaction details of its domestic sales of the like product (which is not required from domestic producers), it does not require exporters to attach any copies of invoices to its questionnaire response. However, if such invoices are not attached, this is raised as a deficiency, often resulting in the rejection of all of the exporter's information for preliminary determination purposes. Article 6.4 of the Anti-Dumping Agreement requires that "timely opportunities" must be provided to all interested parties to see non-confidential information submitted by other interested parties. However, on several occasions the Commission has failed to grant parties access to the public files within less

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65 See, for example, Panel Report *US – steel plate* at para 7.55.

66 Panel Report *US – steel plate* at paras 7.72 and 7.74. See also Appellate Body Report *US – hot-rolled steel* at paras 81–83; Panel Reports *China – broiler products (article 21.5 – US)* at paras 7.342; *Mexico – steel pipes and tubes* at para 7.111; *Egypt – steel rebar* at para 7.161 .

than two weeks, and sometimes it has taken more than four weeks.[67] Several jurisdictions now provide online access to the public file at any time of the day or night. The Commission should do the same. Although the Promotion of Access to Information Act (PAIA)[68] provides that any person shall have access to all non-confidential information held by the state, and although the regulations specifically refer to a "public file",[69] the Commission typically refuses to grant access to the public files to any person who does not have a letter of appointment from an interested party.

The ITA Act require all parties to provide "a sworn statement" setting out the reasons why information cannot be summarised.[70] However, the concept of a sworn statement is unknown in most countries, and where it does exist (often in the form of an apostille), it can take two weeks to obtain, which makes it impossible for parties to meet deadlines, especially where they receive only seven days to address deficiencies.[71] In the recent poultry investigation, the Commission refused exporters oral hearings despite a specific, substantiated request, yet subsequently granted the domestic industry's oral hearing request.[72] This was not reflected in the public report. Many reports do not address all issues raised by parties, most likely indicating that the information was not considered by the Commissioners. For instance, in *Bone-in portions*, a Brazilian exporter submitted information showing clear differences between the product sold on its domestic market and the product that constituted by far its biggest volume sold to South Africa. All cost and price information was submitted to the Commission, but this was not addressed in the final report.[73] Again, no outside party would be aware of this, unless they obtained access to the public files.

Article 5.10 of the Anti-Dumping Agreement provides that all investigations should be completed within a period of 12 months from the date of initiation to the date on which

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67 This happened in the case of poultry – see Commission *Report No. 695: Bone-in portions*. This is not reflected in the report, which means that only interested parties will be aware of it.

68 Promotion of Access to Information Act 2 of 2000.

69 ADR 5.3, 6.5 and 19.2. See also *Association of Meat Importers v International Trade Administration Commission* (*AMIE v ITAC*) (9233/2022) [2023] ZAGPPHC 1790; [2024] 1 All SA 106 (GP) (12 October 2023) at para 41.

70 Section 33(2)(b)(ii) of the ITA Act.

71 ADR 31.2.

72 *AMIE v ITAC* at para 41.

73 This falls within the author's personal knowledge as consultant to the company concerned.

the final decision is published in the Gazette. It further provides that in "special circumstances" this period may be extended to 18 months. Fewer than 10 of the 95 investigations initiated since the establishment of the Commission, and fewer than 30 of the 254 investigations initiated since 1995, have been completed in under 12 months, with no special circumstances indicated in any instance. Several investigations have taken more than 18 months to complete, including the original investigations into wire rope (in regard to which anti-dumping duties have been in place now for more than 20 years). The average time to conclude an investigation since 2020 is 541.05 days.[74] Not only are parties still (or again, as this was not required during COVID-19) required to submit hard copies, but in the *Bone-in portions* investigation a deficiency was raised in that the party in question submitted the hard copy printed on both sides. There is no regulation which says this cannot be done; it also shows how out of touch the Commission is with the green economy.

Moreover, it is confusing that, based on available capacity, there are two separate directorates that conduct investigations, each often following vastly different procedures from the other and with vastly different requirements. A single example suffices. An application was submitted on behalf of the graphite electrodes industry, but it did not change the wording in the application where, in relation to injury information, the applicant was required to submit information for "your company". This was rejected as the applicant had to replace the words "your company" with the name of the company. Just one week later, another investigation, considered by the other directorate, was initiated with the words "your company" still in the application.

The Regulations provide that in investigations where there is more than one model or product code number (PCN), the weighted average margin of dumping must be determined with reference to the volume of exports for each model.[75] This is in violation of the panel's finding in *Morocco – exercise books*:

> As regards the formula's numerator, the spreadsheets show that MIICEN compared, for each exercise book model, the normal value and the export price and, in doing so, obtained a dumping amount per model that it then expressed as

[74] Author's analysis of South Africa's semi-annual reports to the WTO Committee on anti-dumping practices.

[75] ADR 12.2(b).

> a percentage of the export price. The problem identified by Tunisia does not stem from this intermediate calculation, but from the fact that MIICEN then, for each model, multiplied the exported amounts by the percentage of dumping obtained per model and presented this result as the "dumping amount" for each model. This result does not, however, represent the value of dumping per model, but simply a portion of the exports of each model. The sum of these "dumping amounts" is therefore, in reality, only a sum of fractions of exports by model. This figure is, logically, irrelevant to the calculation of a margin of dumping.[76]

In a recent investigation, the consultants could not calculate the margin of dumping the Commission determined in its essential facts letter despite the directions the Commission provided. When they subsequently requested the actual calculations, the investigating officer indicated that he no longer had the calculations and he was not prepared to redo the exercise. The means that the Commissioners do not have relevant information before them when they take decisions.[77]

4.3 The glass industry

The glass industry has resorted to numerous anti-dumping investigations since the establishment of the trade remedies division, with the first investigation (on float glass imported from China, Hong Kong, Singapore, Thailand) and imposition of anti-dumping duties (on Singapore and Thailand) taking place in 1993.[78] Since the founding of the WTO in 1995, there have been eight[79] more anti-dumping investigations into float glass, with anti-dumping duties imposed in six instances.[80] It should be noted that some of the duties

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76 World Trade Organization Panel Report, *Morocco – exercise books* at para 7.157.

77 This happened in the sunset review, *Bone-in chicken portions from Germany, the Netherlands and the UK*. This information lies within the author's personal knowledge either as consultant to the clients affected by decisions or through discussions with various other consultants acting both for the domestic industry and exporters.

78 *Board Report 3408 Imposition of anti-dumping duties on clear flat (sic) glass exported from Thailand and Singapore* (15 September 1993).

79 Investigations are counted by country by product. Thus, if there is a single proceeding against three countries, this is counted as three investigations.

80 *Board Report 3974 Investigation into the alleged dumping of clear float and sheet glass, originating in India, Israel and the People's Republic of China (or originating in the People's Republic of China and imported from Hong Kong): Final determination* (19 May 1999), with duties against all three countries; Commission Report 20: *Investigation into the alleged dumping of clear float glass originating in or imported from Indonesia: Final determination* (4 September 2003) – no duties; *Commission Report 186 Investigation into the alleged dumping of drawn and float glass originating in or imported from Indonesia: Final determination* (6 September 2006) at 31–32 – in this case the Commission did recommend duties

were imposed following a lack of cooperation by exporters. In January 2025, sunset reviews were initiated to consider the extension of anti-dumping duties on float glass from Saudi Arabia and the United Arab Emirates.[81]

The next product to have benefitted from the use of anti-dumping is unframed mirrors, which have seen investigations against four countries and duties imposed against three of them.[82] For both float glass and unframed mirrors, the company PFG is the only domestic producer. Three different automotive glass products have been subject to anti-dumping investigations.

The first, on automotive toughened glass, did not result in any anti-dumping duties, as no causal link was found despite findings of both dumping and injury,[83] while duties were imposed on both laminated safety glass[84] and windscreens[85] imported from China. PFG's subsidiaries are some of the biggest automotive glass producers, which means that, as a group, PFG has lodged 18 anti-dumping cases, with 13 duties imposed. On 25 March 2025, two anti-circumvention reviews were initiated against the alleged circumvention of anti-dumping duties on windscreens from China. The first related to an allegation of a

but as the 18-month deadline had been exceeded, no duties were imposed; Commission *Report No. 615 Investigation into the alleged dumping of clear float glass originating in or imported from Saudi Arabia and the United Arab Emirates: Final determination* (18 October 2019) – duties were imposed against both countries; Commission *Report No. 623 Investigation into the alleged circumvention of anti-dumping duties applicable to imports of clear float glass originating in or imported from Saudi Arabia and the United Arab Emirates by switching supply to Egypt (country-hopping investigation): Final determination* (19 March 2020) – duties imposed.

81 N 2984 in GG52029 of 31 January 2025.

82 Commission *Report No. 168 Investigation into the alleged dumping of unframed glass mirrors of a thickness of between 2mm to 6mm originating in or imported from India and Indonesia: Final determination* (4 July 2006) – duties were imposed against India and Indonesia, while the case against Chinese Taipei was withdrawn; Commission *Report No. 435: Investigation into the alleged dumping of unframed mirrors, of a thickness of 2mm or more but not exceeding 6mm, originating in or imported from the People's Republic of China: Final determination* (19 June 2013) – duties imposed.

83 Commission *Report No. 184 Investigation into the alleged dumping of toughened glass for incorporation in vehicles originating in or imported from the People's Republic of China: Final determination* (6 September 2006).

84 Commission *Report No. 697 Investigation into the alleged dumping of laminated safety glass originating in or imported from the People's Republic of China (PRC): Final determination* (24 September 2022).

85 Commission *Report No.* 722 *Investigation into the alleged dumping of windscreens for vehicles classifiable under tariff subheading 7007.21.20 originating in or imported from the People's Republic of China ("China") to be used in the Southern African Customs Union market as replacement glass in the aftermarket: Final determination* (19 September 2023).

minor modification of the product[86] and the other to country-hopping, that is, supply by a related exporter in Malaysia.[87]

Note that there is no allegation of bias in any of these cases. Some of the cases were terminated without the application of duty (even where dumping and injury were found), and some of the duties were imposed following the non-cooperation of exporters, leaving the Commission with no option but to rely on the information contained in the application. However, this shows how trade remedies were actively used in supporting the industry.

4.4 The poultry industry

Poultry is South Africa's biggest agricultural product and directly employs more than 50,000 workers.[88] The industry's production has increased significantly since 1995 and several new producers have entered the market. Nevertheless, imports have also increased, including for the products that have been subject to anti-dumping investigations (mostly whole birds and bone-in portions). The first anti-dumping investigation against poultry products was initiated in November 1999.[89] It resulted in the imposition of individual anti-dumping duties on two exporters and a residual duty on all other producers. In determining normal value, the Board (as it was then) rejected domestic costs after finding that the costs did not reasonably represent the cost actually incurred by the producers. This was based on the finding that US producers sold white meat (breasts) at a premium; that dark meat (drumsticks, thighs and wings) attracted lower prices; and that producers allocated costs on the net realisable value basis. The Board allocated costs on a weight basis, thus allocating the same costs to all cuts.[90] However, a WTO Panel has indicated – in a case relating to poultry – that

> in the case of joint products, which arise at a split-off point, pre-split-off costs cannot be directly assigned on a product-specific basis and must be allocated. Of

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86 N3036 in GG5227 of 7 March 2025.

87 N3036 in GG5227 of 7 March 2025.

88 South African Poultry Association "2019 industry profile" (2019) 16 available at https://www.sapoultry.co.za/pdf-docs/sapa-industry-profile.pdf (accessed 23 September 2024).

89 *Board Report 4088 Investigation into the alleged dumping of meat of the fowls of the species* Gallus domesticus*, originating in or imported from the United States of America: Final determination* (9 December 2000) at 3.

90 *Board Report 4088* (9 December 2000) at 21.

> the two types of methodologies for doing so that were discussed in this case – one based on relative sales value ("value-based allocation") and one based on the weight of the products ("weight-based allocation"), the Panel is of the view that neither method is in principle inherently unreasonable.[91]

In terms of the Anti-Dumping Agreement,[92] the actual costs incurred by the producer must be used in an authority's normal value determination. Since the producers' actual costs were not used in the original investigation against the US, it means that the basis for the 24-year old anti-dumping duties is flawed and open to WTO dispute. These duties, which have since been replaced by a single rate against all bone-in chicken portions from the US, have been reviewed four times and the duties have either been maintained or increased on each occasion, as exporters did not cooperate in the sunset reviews.

In 2011 the Commission initiated an investigation into whole birds and bone-in cuts from Brazil only, despite larger volumes being imported at lower prices from Argentina.[93] After imposing provisional duties, Brazil declared a WTO dispute against South Africa, alleging various shortcomings in the investigation.[94] Following dispute settlement consultations, the Minister rejected the Commission's recommendation to impose anti-dumping duties and terminated the investigation. Discussions with Commission officials indicate that the Minister felt he could not defend the case in the WTO. However, the Commission's final report still sets out its own findings, rather than those of the Minister.[95] The problem with this investigation is that the Brazilian exporters were indeed dumping and causing injury to the domestic industry, but because the Commission did not follow international procedures, no anti-dumping duties could be imposed.[96]

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91 Panel Report *China – broilers* at para 7.167.

92 Article 2.2.1.1.

93 Commission *Report No. 389 Investigation into the alleged dumping of frozen meat of the species* Gallus domesticus*, whole bird and boneless cuts, originating in or imported from Brazil: Preliminary determination* (30 January 2012).

94 *South Africa – Anti-dumping duties on frozen meat of fowls from Brazil* WT/DS439/1 (25 June 2012). See the discussion in section 5 below.

95 Commission *Report No. 399 Investigation into the alleged dumping of frozen meat of the species* Gallus domesticus*, whole bird and boneless cuts, originating in or imported from Brazil: Final determination* (27 November 2012).

96 The author represented some of the Brazilian exporters in the investigation and had first-hand knowledge of their domestic and export prices.

In 2013, the Commission initiated an investigation into the alleged dumping of bone-in portions from Germany, the Netherlands and the UK.[97] For initiation purposes, it accepted normal values that included prices for fresh poultry (which did not form part of the subject product), based on prices obtained in a supermarket (and thus far removed from an ex-works price), in a single city in each country and on a single day – something the panel in *Argentina – Poultry* specifically ruled to be insufficient.[98] For a company in the Netherlands, the Commission first excluded sales below cost and then found that the remaining sales were less than 5 per cent of exports sales to the Southern African Customs Union (SACU). It therefore rejected all domestic sales and used export sales to a third country.[99] There is no basis for such methodology in the Anti-Dumping Agreement. The Commission further determined price injury with reference to the average price of all products despite very distinct price differences between the different cuts. On this basis, significant anti-dumping duties were imposed.[100]

In 2021, the Commission initiated an investigation into the alleged dumping of bone-in portions from Brazil, Denmark, Ireland, Poland and Spain.[101] The domestic industry indicated the injury investigation period to be July 2017 to June 2020 and the dumping investigation period to be July 2019 to June 2020. The Commission accepted this.[102] However, since the last three months of the investigation period were affected by COVID-19 and a ban on imports from Poland due to an outbreak of avian influenza, the Commission decided that trade in the final *12* months of the investigation period was not normal.[103] It therefore essentially determined injury on the basis of the period ending June 2019, for all practical purposes excluding the information for the period ending June

97 Commission *Report No. 492 Investigation into the alleged dumping of frozen meat of the species* Gallus domesticus*, originating in or imported from Germany, the Netherlands and the United Kingdom: Final determination* (23 January 2015) 492 at 3.

98 Panel Report *Argentina – Poultry anti-dumping duties* at para 7.85.

99 Commission *Report No. 492 Investigation into the alleged dumping of frozen meat of the species* Gallus domesticus*, originating in or imported from Germany, the Netherlands and the United Kingdom: Final determination* (23 January 2015) at 35–36.

100 Commission *Report No. 492* at 60.

101 Commission *Report No. 695* at 3.

102 Commission *Report No. 695* at 9.

103 Commission *Report No. 695* at 115–116.

2020.[104] It failed to change the dumping investigation period, which means its causal-link analysis compared dumping in one period to injury in another. On this basis it found injurious dumping and imposed anti-dumping duties, despite information showing that objectively there was no injury over the three-year injury period.

In addition, neither the industry nor the Commission had reliable information on the size of the industry, and thus no qualitative analysis was undertaken to determine whether the applicants reasonably represented the industry as a whole, as required by the WTO,[105] with the report indicating variously that the applicants represented "over 60%" and "almost 50%"of the total domestic production.[106] The information in the application itself indicates that whereas the applicants' production and sales decreased, the production and sales of other domestic producers increased. This called for a qualitative analysis. For at least one exporter, incorrect products were compared to each other,[107] which led to an artificially inflated margin of dumping. For at least three exporters the Commission indicated that since more than 80 per cent of sales were sold at a loss, a normal value had to be constructed.[108] This has no basis in the Anti-Dumping Agreement. The issues highlighted above are merely an appetiser as to the myriad problems experienced in these investigations.

Lastly, the Poultry Master Plan refers specifically to the use of trade remedies to support the development of the industry.[109] This may introduce bias in the Commission's evaluation of poultry anti-dumping cases, as such protection has been agreed upon between the Commission, the Minister and the industry.

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104 Commission *Report No. 695* at 124 indicates that the "Commission did not exclude 2019/2020 from its analysis but made [a] decision to place less emphasis on this period due to exceptional trade circumstances".

105 Appellate Body Reports, *EC – fasteners (China) (article 21.5 – China)* at para 5.302; *Russia – commercial vehicles* para 5.13.

106 Commission *Report No. 695* at 45 and 46.

107 This is not reflected in the report, but information on this is available on the public file from interested parties' comments on the essential facts report. See also the discussion in the text to footnote 74 above.

108 Commission *Report No. 695* at 77, 84–85 and 86.

109 Poultry Master Plan at 6 and 13.

5 WTO DISPUTE SETTLEMENT

To date, South Africa has been challenged before the WTO Dispute Settlement Body five times, all relating to anti-dumping: pharmaceutical products from India;[110] blanketing from Turkey;[111] paper from Indonesia;[112] poultry from Brazil;[113] and cement from Pakistan.[114] In *Pharmaceutical products*, India challenged South Africa on the basis, inter alia, of articles 2 (dumping), 3 (injury), 6 (evidence), 12 (public notice and explanations), and 15 (special treatment for developing countries) of the Anti-Dumping Agreement. However, these challenges were too broad and did not identify the relevant issues (such as articles 2.2.1, 2.2.2 or 2.4) clearly and specifically enough. Following consultations, India did not pursue the dispute.

In *Blanketing*, Turkey challenged South Africa on, inter alia, articles 5.5 (pre-initiation notification to foreign government), 6.1, 6.1.3, 6.2, 6.9 and 6.10 (evidence), 9.2 and 9.3 (collection of anti-dumping duties), and 12 (notification and explanation of findings) of the Anti-Dumping Agreement. During the consultations, South Africa conceded it had not followed correct procedures and agreed to withdraw the duty, but indicated it would require a specified period in which to withdraw the duty, as the Commission would have to make a formal finding, one which the Minister would then have to consider before the Minister of Finance could instruct the Commissioner for SARS to withdraw the measure. Turkey agreed with the proposed period and the measure was withdrawn a few months later.[115]

In 2008, Indonesia challenged the continued imposition of anti-dumping duties on *Uncoated woodfree paper* in violation of article 11.3 of the Anti-Dumping Agreement (that is, the measure remained in place for more than 5 years) as well as article 11.4 (as South

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110 WTO WT/DS168/1 South Africa – Anti-Dumping Duties on Certain Pharmaceutical Products from India (13 April 1999).

111 WTO WT/DS288/1 South Africa – Definitive Anti-Dumping Measures on Blanketing from Turkey (15 April 2003).

112 WT DS/WT374/1 South Africa – Anti-Dumping Measures on Uncoated Woodfree Paper (16 May 2008).

113 WTO WT/DS439/1 South Africa – Anti-Dumping Duties on Frozen Meat of Fowls from Brazil (25 June 2012).

114 WTO WT/DS500/1 South Africa – Provisional Anti-Dumping Duties on Portland Cement from Pakistan (12 November 2015).

115 These facts are within the author's personal knowledge as the Director: Trade Remedies at the time, during which he participated in these consultations and was primarily responsible for technical inputs related to them.

Africa had taken more than 12 months to complete the sunset review). The Commission had initiated the sunset review on 2 April 2004[116] and on 22 September 2004 made a preliminary determination to terminate the anti-dumping duties against Indonesia.[117] In January 2005, the domestic industry obtained an interdict against the Minister, while shortly thereafter an importer lodged a dispute against a SARS decision to apply anti-dumping duties on a date, so it argued, at which the duties no longer existed. In September 2007, the court ruled that the duties had expired. Thereafter, it took the Commission and the Minister some time to finalise the investigation. The duties were terminated on 4 June 2008, with retrospective effect to 27 November 2003, and the dispute with Indonesia became moot.[118]

In *Poultry*, Brazil challenged the preliminary payment the Commission had imposed, doing so on just about every possible basis:

- determination of the normal value (articles 2.4 and 2.4.2 of the Anti-Dumping Agreement);
- injury and causality (articles 3.1, 3.2, 3.4 and 3.5);
- industry standing (article 4.1);
- the basis for initiating the investigation (articles 5.2, 5.3 and 5.8);
- the conduct of the investigation (articles 6.1 – notification; 6.2 – failure to provide parties a full opportunity to defend their interests; 6.4 – access to information; 6.5 and 6.5.1 – confidentiality; 6.7 and Annex I.7 and I.8 – verifications; 6.8 and Annex II at paragraphs 1, 3, 5, 6 and 7 – facts available; 6.9 – essential facts; and 6.10 – failure to determine individual margins of dumping for each exporter);
- application of provisional measures (article 7.1); and
- failure to provide detailed explanations for the preliminary determination (article 12.2.1).

116 Commission *Report No. 260 Withdrawal of the anti-dumping duties on uncoated woodfree white A4 paper originating in or imported from Brazil and Indonesia* (28 January 2008) at para 3.

117 Commission *Report No. 260* at para 5.

118 Commission *Report No. 260* at paras 19–20.

It should be noted that not all of these issues could be disputed, as, for instance, the requirements under article 6.9 (essential facts) arise only in the final determination. Nevertheless, after consultations the Commission confirmed its preliminary determination and made a final recommendation to the Minister to impose anti-dumping duties. However, the Minister, for the first time in history, rejected the Commission's recommendation and terminated the investigation, as he was concerned Brazil would also challenge any final measure and that he would not be able to defend the measure.[119]

Finally, in *Cement*, Pakistan challenged the Commission's preliminary determination on the basis of its failure to make a fair comparison between the normal value and the export price (article 2.4); a lack of parallelism between the scope of the provisional payment and the scope of the injury investigated (article 2.6 – like product); its injury determination (articles 3.1, 3.2, 3.4, 3.5, 3.6 and 12.1.1(i)); and various issues related to its investigation procedures (articles 6.1.3, 6.2, 6.4, 6.5, 6.8, Annex II.6, and article 12.2.1). However, the provisional measure was imposed on 15 May 2015 for a period of six months, which means it lapsed on 15 November 2015. Pakistan declared the dispute only on 9 November 2015, with the result that the measure lapsed before the parties could consult. Pakistan did not challenge the final anti-dumping measure.

6 REGIONAL INTEGRATION

Regional integration in Africa is taking place under the African Continental Free Trade Area Agreement (AfCFTA). The AfCFTA Protocol on Trade in Goods contains provisions on anti-dumping,[120] including that state parties may apply anti-dumping measures in line with the Anti-Dumping Agreement. Annex 9 to the Protocol on Trade in Goods deals specifically with trade remedies, yet contains precious few provisions on anti-dumping. However, of importance is that article 10 thereof provides for technical assistance by the Secretariat "to enhance the capacities of State Parties in the application of trade remedies measures", while article 11.1 calls on the Secretariat "in collaboration with partners [to] facilitate training and capacity building programmes in order to assist State Parties with

119 Staff members provided this information confidentially, as they were not allowed to make it available.

120 Article 17 of the Protocol on Trade in Goods.

the implementation of trade remedies". Article 11.2 calls on state parties "to cooperate in the area of trade remedies specifically in the dissemination of information …"

The latter is one area in which South Africa, as the most experienced user of anti-dumping, could assist other African countries. Over the past several years it has hosted trade remedy study tours for several other African countries, an initiative which has assisted them in building their capacity and skills. Article 13 of Annex 9 provides for the adoption of "AfCFTA Guidelines on the Implementation of Trade Remedies". These Guidelines have not been developed or adopted to date. It is submitted that South Africa could play a significant role in developing them.

7 CONCLUSION

Jackson notes that the main question in anti-dumping law and practice is determining whether the law does the job it is supposed to and whether there are other "techniques" that are more efficient. He argues that the response to the question depends in part "[on] the degree to which one trusts his governmental institutions …"[121] This requires at least two separate considerations: whether there is injurious dumping, and the impact on the industry and consumers.[122]

This means in turn that investigating officers should have the skills, training and tools necessary to determine the normal value and export price; to compare these two values to each other; and to determine if the industry is experiencing material injury, whether such injury was caused by the dumped imports, and, potentially, what the impact would be on the downstream industry and the consumer. South Africa's current trade remedies legislation dates back to 2003. Since then, the WTO Dispute Settlement Body has considered at least 45 disputes relating to anti-dumping,[123] all of which have interpreted specific provisions that are applied daily in anti-dumping investigations. Many of these interpretations contradict the existing practice in South Africa, leaving numerous South African anti-dumping measures vulnerable to WTO dispute settlement.

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121 Jackson (1979) "Introduction" at 5.

122 Edwards et al. (2022) at 5.

123 World Trade Organization "Disputes by agreement" available at https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm (accessed 24 September 2024).

Proposed amendments to the ITA Act were published in 2005,[124] yet no amendments were ever made. Likewise, in 2006 the Commission published proposed revised Anti-Dumping Regulations[125] but, following comments by interested parties, no further action was taken despite a clear need for it. Various articles by different authors over at least 20 years have highlighted flaws in either the legislation or its implementation,[126] and these would need to be considered in any revision. A roundtable between the Commission and all active trade remedies consultants would be an ideal point of departure, as a substantial (and substantive) overhaul of anti-dumping legislation is required. New programmes should be developed to determine the margins of dumping and injury. This would ensure greater transparency and result in all investigating officers applying the same calculations and criteria.

In addition, ministerial discretion in anti-dumping investigations should be expressly removed.[127] The Commission's decisions are in actuality decisions on behalf of the SACU Council of Ministers, and neither the Minister of Trade nor the Minister of Finance may displace Council decisions.[128] The Commission is regarded as a specialist institution that makes final decisions which the two Ministers have to implement without discretion on their part. This would also reduce the time taken to finalise investigations.

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124 N 1867 of 2005 in GG 28137 (14 October 2005).

125 N 1606 of 2006 in GG 29382 (10 November 2006).

126 See, for example, Brink G "The 10 major problems with the anti-dumping instrument in South Africa" (2005) 39(1) *Journal of World Trade*; Brink G "Dumping and injury margin calculation methods: Ten major problems in South Africa" (2007) 2(1) *Global Trade and Customs Journal*; Ndlovu L "South Africa and the World Trade Organization Anti-Dumping Agreement" (2013) 28(3) *South African Public Law*; Sibanda OS "An assessment of WTO compliance by the South African anti-dumping regime in respect of the determination of causation" (2013) 76 *Journal of Contemporary Roman-Dutch Law*; Brink G "X-raying injury findings in South Africa's anti-dumping investigations" (2015) 23(1) *African Journal of International and Comparative Law*; Vinti C "A spring without water: The conundrum of anti-dumping duties in South African law" (2016) 19 *Potchefstroom Electronic Law Journal*; Brink G "New directions taken by the Panel in *Russia – commercial vehicles* and the implications for South African anti-dumping investigations" (2017) 50(3) *Comparative and International Law Journal of Southern Africa* 417; Vinti C "The curious case of the 'non-co-operating interested party' in anti-dumping investigations in South Africa: A critical analysis of *Farm Frites International v International Trade Administration Commission*" (2018) 33(1) *Southern African Public Law* 1.

127 Vinti C "The scope of the powers of the Minister of Finance in terms of section 48(1)(b) of the Customs and Excise Act 91 of 1964: An appraisal of recent developments in case law" (2018) 21 *Potchefstroom Electronic Law Journal* 1 at 2.

128 See Brink G "The roles of the Southern African Customs Union Agreement, the International Trade Administration Commission and the Minister of Trade and Industry in the regulation of South Africa's international trade" (2013) *TSAR* 419.

Moreover, two anti-dumping investigation directorates in the Commission currently do the same work. Investigations are allocated on the basis of capacity. As the directorates often follow apply different methodologies and procedures, it would make sense to merge them and harmonise their methodologies and procedures. New standard operating procedures should be developed to ensure that investigations are completed timeously.

There is an urgent need for reviews of technical decisions by the Commission, similar to the Competition Tribunal's reviews of Competition Commission decisions. Thus, it is proposed that an international trade tribunal be established.[129] Courts have shown that they do not understand technical trade remedies issues.[130] Finally, it is proposed that all internal documents and processes in the investigation units be revised and updated, and that all investigating officers undergo training on the new legislation, documents and processes. Documents such as the application and exporter questionnaires are outdated and do not solicit all relevant information, while deficiencies are raised in respect of issues not required in the questionnaires. The updated questionnaires should also reflect the format in which information should be submitted to allow the Commission to determine both the margin of dumping and injury.

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