

MEDIA STATEMENT

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RAMIFICATIONS OF THE COURT RULING ON ANTI-DUMPING SUNSET REVIEWS

The subject of anti-dumping protection for South African manufacturers and the long-running court battle that ITAC was embroiled in over a legal technicality, that culminated in an, for ITAC, adverse Supreme Court of Appeal ruling, generated a quantum of media attention over recent weeks, to such an extent that it has become necessary to clear the air over this complex matter and the often arcane World Trade Organisation (WTO) principles and procedures that underpin the anti-dumping investigations and reviews conducted by ITAC.

The term ‘dumping’ as it is used in the context of international trade, first has to be clearly explained. The term is not well-understood by the general public and even within some sections of commerce and industry. Dumping, despite its name, has nothing to do with the importation of inferior, defective, or hazardous goods. Dumping is a term used in international trade for the unloading of sometimes large quantities of a particular product in another country at a low price. The product is sold in foreign markets at prices lower than the selling price in the country of origin. The aim is to penetrate a foreign market and maximize profits. It is not an uncommon business practice. The problem arises when it causes injury to the domestic manufacturers of the like product, in which case the WTO Agreement allows countries to act. The types of goods that are typically dumped from time to time are those goods produced by capital-intensive industries due to the particular operation of these industries and the ratio and relationship between fixed and variable costs.

Dumping then is technically defined as a situation where imported goods are being sold at prices lower than in the country of origin, and also causing financial injury to domestic producers of such goods. To remedy such unfair pricing, ITAC may recommend the imposition of, at times, substantial duties on imports, duties that are equivalent to the dumping margin (or to the margin of injury, if this margin is lower).

Because of the varied effects that anti-dumping duties can have on economic activity, ITAC has always endeavoured to carry out its investigations with the utmost rigour to ensure that duties are imposed only where warranted by the facts. In exceptional cases where there is clear evidence of financial distress due to dumping, provisional payments can be introduced as early as sixty days after initiation of an anti-dumping investigation. Should ITAC’s comprehensive investigation later reveal that injurious dumping indeed did occur, the definitive anti-dumping duties recommended at that point are implemented with retrospective to the date when the provisional payments were introduced. The payments by importers are refunded and no definitive anti-dumping duty recommended if no injurious dumping was evident. This practice is in line with that followed in other jurisdictions such as the EU and the US.

Now, according to the WTO Anti-dumping Agreement, any definitive anti-dumping duty has to be terminated not later than five years after imposition of that duty, unless a substantiated request by the domestic industry is made that the expiry of the duty would lead to the recurrence of dumping and injury. The request has to be made within a reasonable period prior to the expiry date to allow for a thorough investigation of the matter. These latter investigations are termed “sunset reviews”. In these reviews a determination is made by ITAC to maintain, amend or terminate the duties. The five-year period is critical.

The retrospective implementation of the anti-dumping duties in the sunset review to the date of imposition of the provisional payments in the case of A4 paper imported from Indonesia led to the Supreme Court of Appeal decision against ITAC and in favour of an importer of A4 paper, Progress Office Machines. The Court ruled that ITAC erred in the way it calculated the five-year period beyond which anti-dumping duties could not be maintained if no sunset review was initiated.

The Supreme Court of Appeal determined that in the context of South African legislation, the five-year period should have commenced at the date of imposition of the provisional payments where such provisional payments were imposed and not the date of the final decision to impose definitive anti-dumping duties.

The sunset review investigations by ITAC are now done in accordance with the Court decision. However, the ruling resonated and has wide ramifications for 19 affected industries. The ruling means that many anti-dumping sunset reviews were not initiated in time according to the WTO Agreement. The duty on A4 paper imported from Brazil and Indonesia had to be terminated, because the sunset review was not initiated before expiry of the five-year period as calculated according to the Court decision.

The incorrect initiation of the sunset reviews of a second category of products, namely Carbon Black from Egypt and India, and Welded Galvanised Steel Pipe from India had to be rescinded, again because the five-year period was exceeded before the

investigation was initiated. These then are sunset reviews that had been initiated but not yet finalised at the time of the Court decision.

As the Court judgement was made in September 2007, coinciding with the imminent initiation of three sunset reviews according to ITAC’s previous methodology, and as ITAC was still in the process of obtaining advice from Counsel on the Court judgement, ITAC was not in a position to initiate the three sunset reviews in accordance with the Court decision. This third category of anti-dumping duties comprised Aluminium Hollowware from China and Egypt; Suspension PVC from Brazil, France, UK, and USA; and Garden Picks from India. The duties had to be terminated in terms of the Court decision.

The implication for the affected industries is that, instead of the anti-dumping duties being continued in terms of the sunset review process, they will now have to approach ITAC with fresh applications, supported by *prima facie* evidence of injurious dumping upon which a comprehensive investigation will be launched by ITAC. Depending on the circumstances in each case, affected industries can apply for the initiation of a new anti-dumping investigation based on dumping causing actual material injury or a threat of material injury. In terms of the Anti-dumping Agreement and, again, depending on the circumstances, provisional payments can be imposed sixty days after initiation of an investigation.

A fourth category of sunset reviews affected are the ones where sunset reviews have been initiated, in some cases years ago, after the five-year lapse date and where the Commission already made determinations, which were approved by the Minister of Trade and Industry and implemented, that the duties should stay in place for another five years. The anti-dumping duties affected in this category are the following:

- Suspension PVC from Brazil etc. (also affected in the second category)
- Uncoated woodfree paper from Brazil and Poland
- Aluminium hollowware from China and Egypt (also affected in the second category)
- Blankets from China and Turkey
- Bolts and Nuts of iron or steel from from China
- Float Glass from China and France
- Flat glass from China and Indonesia
- Garlic from China
- Door locks and door handles from China
- Carbon black from Thailand
- Acetaminophenol from China, France and UK
- Automatic Circuit Breakers from France and Italy
- Garden Picks from India (also affected in the second category)
- Paper insulated lead covered electric cable from India
- Chicken meat portions from USA; and
- Lysine from USA.

For these remaining 16 cases (of which three are also included in the previous category), the priority now is to place the anti-dumping duties on a firmer footing than is the case at present, or in legal terminology to “regularise” the application of the anti-dumping duties, bearing in mind that the original initiations years ago were not done in accordance with the Court’s recent determination, leading to a precarious situation as far as the existence of the anti-dumping duties are concerned. ITAC and **thedti** are planning to approach the High Court with an application to regularise the application of the anti-dumping duties in this fourth category of affected cases.

The reason for the staggered approach to the different categories of cases as described above is because of the different circumstances characterizing each category which necessitated ITAC to handle these cases distinctly and at various stages since the Supreme Court of Appeal decision became known.

For the long term, ITAC and **thedti** are exploring legislative ways and means of remedying the situation to ensure that producers, in this respect, are treated similarly to their counterparts in other countries.