The weighted average price determination in anti-dumping in South Africa: is there fowl play?

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Abstract: This paper determines if the South African application of the weighted-average methodology in anti-dumping cases is compatible with the WTO rules, with particular reference to the case of Frozen Meat of Fowls – Brazil, ITAC Report No. 389. Recently, the South African anti-dumping regime, the fourth oldest in the world, has been alleged to be inconsistent with the World Trade Organization (WTO) rules. On 21 June 2012 Brazil’s challenged of the anti-dumping duties South Africa imposed on Brazilian frozen chicken imports. According to Brazil, South Africa was attempting to violate the WTO rules with impunity against the country’s obligations under the General Agreement on Tariffs and Trade (GATT 1994) and Agreement on Implementation of Article VI of the GATT 1994 (AD Agreement).

Keywords: anti-dumping; World Trade Organization; WTO; Brazil; chicken imports; GATT.


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1 Introduction

In antidumping proceedings the national anti-dumping authorities determine margins of dumping by comparing normal value with the export price of comparable goods. The authorities may also use constructed export prices, if appropriate. Some authorities use the weighted-average comparison market prices. The anti-dumping regime of the World Trade Organisation (WTO) is covered in the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994,¹ (hereafter AD Agreement), and Article VI of the 1994 General Agreement on Tariffs and Trade² (hereafter GATT). GATT Article VI makes provision for countries to take action against dumping; AD Agreement clarifies and expands upon the provisions of Article VI. And WTO members whose antidumping laws and/or practices do not conform to the ADA may be subject to the dispute settlement body (DSB) proceedings.

South Africa, one of the one of the growing and prolific users of anti-dumping measures as high preference measures for the sometimes alarming dumping of goods in her stream of commerce,³ has her anti-dumping regime is set out in the International Trade Administration Act of 2002⁴ (hereafter ITAA); the Anti-Dumping Regulations of 2003⁵ (hereafter ADR), which are in fact second-tier legislation implementing the ITAA; and in the Customs and Excise Act of 1964.⁶ The anti-dumping administration is done by the International Trade Administration Commission (ITAC), in conjunction and consultation with other government departments including the South African Revenue Services (SARS), and the Departments of Trade and Industries (DTI). The South African anti-dumping law is one of the oldest in the world⁷ and the fourth antidumping legislation after that of Canada,⁸ New Zealand⁹ and Australia,¹⁰ one would be excused of thinking that it is generally compliant with the WTO.

1.1 Objectives

This paper critically discusses the normal value and price determination in anti-dumping proceedings in South Africa, with particular reference to the weighted-average methodology as was disputed in the case of the frozen fowl meat from Brazil Dispute. As will be discussed, on 21 June 2012 Brazil challenged of the anti-dumping duties South Africa imposed on Brazilian chicken because of her administration of anti-dumping law and practice. This request was with respect to South Africa's preliminary determination and the imposition of provisional anti-dumping duties on frozen meat of fowls of the species Gallus Domesticus, whole bird and boneless cuts, originating in or imported from Brazil, which were published in the ITAC Report No. 389.¹¹ This follows the application for the imposition of anti-dumping duties that was lodged by the South African Poultry Association (SAPA) on behalf of the Southern African Customs Union (SACU) industry that was published in Notice No. R.105 of Government Gazette No. 35030, dated 10 February 2012.

1.2 Organisation of the paper

This paper is organised as follows: Section 2 briefly defines ‘dumping’, and briefly explains the concept of ‘dumping margin’. Section 3 briefly discusses both the state of poultry industry in South Africa and the some of the measures used by the authorities to
protect the industry. Section 4 outlines the recent Brazilian complain against anti-dumping measures imposed on Poultry from Brazil by the ITAC. Section 4 continues to discuss the ITACs determination of price and normal value in anti-dumping proceedings, particularly considering the weighted-average (and transaction-to-transaction) as comparability methods in the determination of normal value and price of allegedly dumped goods. The discussion would be incomplete without discussing, although briefly, issues of actual price; constructed price; price comparison, due allowance and adjustment. The paper is concluded in Section 5.

1.3 Methodological and information sources notes

This paper is based on qualitative research design for data collection. Major primary and secondary sources were consulted and reviewed to inform the determination whether the South African authorities’ use of the weighted average methodology in determining the normal value and price of dumped goods in WTO consistent. The primary sources used are the decisions of the ITAC and of the South African municipal courts, and the reports of the WTO Panels and the Appellate Body. A comprehensive search of information was performed including, but not limited to, searching the information databases of the ITAC, the Department of Trade and Industry (DTI); the Department of Agriculture, Forestry and Fisheries (DAF); SAPA; and the Association of Meat Importers and Exporters (AMIE); the Brazilian Poultry Association (UBABEF). Abstracts from the subject specific journals such as the World Trade Journal, and other relevant including the Brazilian Journal of Agricultural Policy, South African Mercantile Law Journal, the THRHR, the South African Journal of Agricultural Extension, Farmers’ Weekly which is South Africa’s oldest agricultural magazine, and others were critically appraised and the full article sought and read if the abstract was considered robust and relevant.

2 Conceptual issues

2.1 Definition of dumping

Dumping is a form of price discrimination or differential pricing of different units of the same good sold at different prices in different markets. Numerous definitions of dumping are found. With respect to the determination of dumping, Article 2.1 of the AD Agreement clearly states that:

For the purpose of this Agreement, a product is to be considered as being dumped, i.e., introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

ITA Act, Section 1(2), carries the same definition as the AD Agreement the essence of which is contained in the definition of dumping in Section 12(1) of the ADR. The price and value of the goods in question are used to determine whether dumping exists. As stated by the WTO Panel in the Thailand – H-Beams dispute, Article 2 of the AD Agreement “contains multiple obligations relating to the various components that enter into the complex process of determining the existence of dumping and calculating the dumping margin.” The difference with the definition by Viner and the WTO definition
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is that the former compares prices with variable costs and the latter compares prices with normal value.

There are a number of reasons that can be provided to justify the use of anti-dumping measures and related measures, all of which, it has been argued, are underlined by the importing country’s desire to protect domestic industry and consumers. In brief, there are good socio-economic reasons for anti-dumping measures. In South Africa, such measures regarded as indispensable governmental intervention to protect jobs and sustain investments. Anti-dumping measures, as it has been one of the arguments in the Brazil case, may also be important tool to protect consumers from the effects of predatory pricing which will in most cases be felt in the importing country. Thus anti-dumping measures may be regarded as strategic trade policy instrument, and consumer protection tool. As contingent protection measures they are “easier to use than any other protective remedies” with an added value of discretionary available to anti-dumping authorities, and the fact that countries exploit gaps in the current WTO rules because they are “not unambiguous and it contains provisions that are often subject to interpretation.”

2.2 Margin of dumping

The dumping margin is normally described as the difference between the normal value and the export price after allowance has been made for any difference affecting price comparability. The dumping margin can be calculated, for example, by subtracting the ex-factory export price from the ex-factory normal value for the products in question, and the difference will be expressed as a percentage of the free-on-board export price. In terms of the Article 2.2 of the AD Agreement, when determining the margin of dumping the national authority must compare the price of the dumped product with the price of the like product when exported to an appropriate third country. To be considered is also the cost of the products compared in their countries of origin, plus a reasonable amount for administrative, selling and general costs, and for profits.

3 The chicken industry and trade protection contingent measures: a brief account

3.1 Employment and revenue generation

Currently the South African chicken sector, which boost in its list of role players known companies such as Austral South Africa, Country Bird Holdings, RCL Foods, formerly Rainbow Chicken, and Afgrí South Africa, employs between 48,000 and 50,000 people directly and another 60,000 indirectly. There is a further 18,000 people who are employed in the grain industry that supply chicken fee. It is thus the biggest agricultural sector toward the eradication of food insecurity, and unemployment.

The poultry sector is also one of South Africa’s critical revenue generators of up to R30bn in farm-gate revenue and about R1bn in corporate taxes. This figure represents a quarter of the animal product contribution to South Africa’s GDP. In 2009, for example, South Africa was reported to have imported 66,000 tons of chicken leg-quarters. And the figure rose to 162,000 tons in 2012. The value of poultry meat imports in 2012, for example, was estimated at $US412 million and $US374 million in 2011.
3.2 Trade protection contingent measures

South Africa is the fourth largest producer in the world. But, this status is seemingly under threat due to the reported decline in headline earnings due to the increases in feed costs and the surge of imported poultry. In 2012 about 174 million chickens were imported in South Africa. The WTO rules and those of specific its associated agreements permits and authorise the use of certain measures, such as the imposition of higher duties, to protect local industries from certain trade practices, contingent upon certain conditions being satisfied. The commonly known contingent measures are anti-dumping duties, safeguard and countervailing duties. Studies show that the use of anti-dumping duties remains on the rise as a dominant form of trade protectionism in the 21st century. South Africa, for example, has maintained anti-dumping duties against chicken from the United States for more than 10 years effectively shrinking the US imports. South Africa also uses alongside anti-dumping measures tariffs to balance trade in the poultry sector by increasing tariffs on imported products which threaten local manufactures or where the applied tariff is below the bound rate allowed by the WTO.

3.3 Poultry industry struggle against imports

The reported total poultry imports into South Africa per country of origin in 2012 were as follows: Brazil = 52.5%, EU = 31.65, Argentina = 7.25, USA = 2.95, Canada = 1.85, Australia = 1.7%, Thailand = 2.1% and others = 0.15. The chicken products imported are split as follows: whole, fresh or chilled = 0.000605%, frozen flavoured, herbed or marinated = 0.3%, frozen mechanically deboned meat = 35/5%, carcasses excluding necks and offal, with all cuts removed = 3.4%, frozen whole bird = 3.3%, cuts and offal, fresh or chilled = 0.00028%, frozen boneless portions = 5.5%. Frozen fowls offal 8.3% frozen bone-in portions = 43.5%, and frozen, prepared or preserved meat, offal or blood pastes =0.00002%.

Figure 1  Trends in poultry meet import in South Africa in 1996–2013 (see online version for colours)

Source: Global Trade Atlas
The poultry products industries fall under the aggro-processing industries, which pursuant to the Industrial Policy Action Plan (IPAP) administered by DTI and the South African Trade Policy and Strategy Framework, may seek protection from cheap import through tariff increase. This happens through an invitation by the DTI for illegible industries to apply for tariff increases to protect them from cheap imported products. The DTI has recently had to consider and make determination if it is desirable to increase the current tax on imported poultry products an application by SAPA on behalf of its members to, and offal. Consequently, as an intervention to control the import and dumping of poultry on 30 September 2013 the DTI brought into effect significant poultry tariffs increases. The tariffs will apply to the Southern African Customs Union (SACU) but not to imports from the European Union, with which South Africa has a trade and cooperation agreement. The tariffs have been raised on several imported chicken by 8.75 percentage points on average, and 82 percentages on whole birds from the 27 percentage in 2012 to stabilise the balance between poultry supply and demand, and give some protection to domestic producers. The 82% increase is well within that permissible by the WTO. Tariff for boneless cuts has increased from 5% to 12%. And the tariff on carcasses has increased from 27% to 31% and for offal it has jumped from 27% to 30%. The new regime is that the import tariff will be changed from a specific duty of 220 cents per kilogram to an ad valorem duty of 37%. According to the DTI the country’s decision to increase tariffs was informed by the drop “in the production of poultry products in the whole of SACU in 2010–2012 while imports increased by 61-million kilograms”. And the tariff support was regarded as a measure to put SACU producers in “similar competitive footing as their counterparts abroad”. Another concern behind the tariff support has been the negative impact of the tariff hikes on consumer who may have to pay more on chicken and consequent shrinking of food security in the country.

In arriving at this tariff support measure the ITAC also considered the following, for example: The increasing levels of imports into SACU, and the ‘concomitant’ chipping away of the market share of SACU producers of chicken meat; the business and investment that the domestic industry has made in the poultry employment opportunities the poultry industry gives to the South African public; the declines in profits of the
domestic poultry industry due to dumped imports; the price disadvantage faced by domestic industries vis-à-vis foreign industries.

4 Appraisal of the Brazilian complain

On 21 June 2012 Brazil’s challenged of the anti-dumping duties South Africa imposed on Brazilian chicken. The dispute would be the fourth brought against South Africa at the WTO concerning South Africa’s application of anti-dumping measures, although to date none of these disputes brought by developing countries reached the panel stage. According to Brazil South Africa was attempting to violate the WTO rules with impunity and with flagrant disregard of numerous rules under the GATT 1994 and the AD Agreement. The Brazilian complaint followed the imposition in February 2012 of provisional anti-dumping duties of 62.93% and 46.59% on whole chickens and boneless cuts, respectively, imported from Brazil by ITAC. This is after ITACs investigation revealed that compared with the Brazilian market. Cooperative Central Oeste Catarinense – Aurora Alimentos (Aurora), a Sao Paulo-based poultry, pork and dairy conglomerate, sold its boneless chicken cuts in the SACU market at prices 6.3% lower than those sold in Brazil. Two other Sao Paulo-based companies, Brazil Foods (BRF), Brazil’s largest and the world’s tenth largest food company, and Palotina-based C-Vale Cooperative, a large Brazilian agribusiness, exported at prices that were 62.9% and 46.6% lower respectively.

According to the ITAC’s preliminary determination, the information submitted by interested parties and considered showed that there was dumping of products imported from Brazil, and that the SACU chicken producers had suffered material injury from the dumped products in the form of a substantial decline in profits, price under-cutting, price suppression, declining output volume, reduced market share, decrease in growth of revenue, and under-utilisation of production capacity, and that the injury suffered by the SACU industry was causally linked to the dumped chicken products originating in or imported from Brazil. The ITAC subsequently requested SARS to impose provisional payments. The ITAC’s finding of the dumping margin of 6.53% ex-factory export price was based on the weighted average of four types of boneless cuts sold by the exported in its domestic and the SACU market.

Notable that as part of the normal investigation procedures the Brazilian exporters whose products were the subjects of the investigation were given the opportunity to respond to the investigation by submitting the relevant information. The information submitted by BRF, Aurora and C-Vale was verified. However, Seara Alimentos (Seara) submitted deficient information and failed subsequently to address the deficiencies as requested by the ITAC, and therefore Seara’s information could not be used by the ITAC for the purposes of its preliminary determination. 31 Aurora produced and sold whole bird and four types of boneless cuts in its domestic market, but only exported boneless cuts to SACU during the period under investigation. Numerous SACU importers also responded to the ITAC’s importers’ questionnaire for information. However, some of the importers information was deficient and could not be verified and therefore could not be used by the ITAC for the purposes of its preliminary determination.

Consequently in June 2012, Brazil initiated a dispute against South Africa at the WTO. Brazil alleged that the preliminary determination and the imposition of provisional antidumping duties by ITAC, and the initiation and conduct of the investigation was inconsistent with South Africa's obligations under the provisions of GATT 1994 and the
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AD Agreement. In particular Articles 2.4, 2.4.2, 3.1, 3.2, 3.4, 4.1, 5.3, 5.8, 6.1.1, 6.1.2, 6.2, 6.5.1, 6.5.2, 6.6, 6.7, 6.8, in conjunction with Paragraphs 1, 3, 5, 6 and 7 of Annex II, 6.9, 6.10, 7.1, 12.2.1 of the AD Agreement. In summary, Brazil argued that South Africa's measures nullified and impaired benefits accruing to it directly or indirectly under the AD Agreement. In the light of the Brazilian authorities’ challenge the question is: Are the South African authorities when determining the weighted margin of dumping generally falling foul of the country’s obligations under WTO rules?

4.1 Is South Africa’s determination of weighted-average margin of dumping WTO consistent?

For the purposes of this paper, Brazil argued inconsistency with Article 2.4.2 of the AD Agreement because ITAC failed to make a comparison between a weighted average normal value with a weighted average of all prices of all comparable export transactions in the calculation of the residual dumping margins for boneless chicken cuts and for whole chicken. Moreover, Brazil argued that the ITAC used sales of only one type of boneless chicken cuts and one type of whole chicken to establish normal value, and comparing them with the export price of all types of boneless cuts and whole chicken sold to the SACU market (even products outside the scope of the investigation), without comparing the normal value with all comparable export transactions. South African authorities acted contrary to the letter and the spirit of Article 2.4 of the AD Agreement, Brazil argued.

When the exporter has more than one like product in the export market as is casu, the price difference is determined in accordance with Article 2.4.2 of the AD Agreement. Article 2.4.2 of the AD Agreement provides:

Subject to the provisions governing fair comparison in Paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction to transaction basis.

Article 2.4.2 AD Agreement sets two approaches to the determination of margin of dumping, namely the weighted-average methodology and the transaction-to-transaction comparison methodologies. The following calculation examples demonstrate the two methods and their end results:

<table>
<thead>
<tr>
<th>Date</th>
<th>Normal value</th>
<th>Export price</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 October</td>
<td>100</td>
<td>100</td>
</tr>
<tr>
<td>8 October</td>
<td>150</td>
<td>150</td>
</tr>
<tr>
<td>15 October</td>
<td>200</td>
<td>200</td>
</tr>
<tr>
<td>21 October</td>
<td>150</td>
<td>150</td>
</tr>
</tbody>
</table>

If we use the weighted average method, the weighted average normal value (600/4 = 150) is compared with the weighted average export price (600/4 = 150), as a result of which the dumping amount is zero.

Zeroing refers to “an asymmetrical calculative methodology in obtaining final dumping margins which omits any negative results occurring when export prices exceed
normal values (such as home prices) and instead includes only positive results occurring when home prices exceed export prices". The WTO Panel in the United States – Carbon Steel Sunset Review dispute described zeroing as the methodology that “has the potential of increasing the dumping margin – in relation to a dumping methodology that gives full credit to negative dumping margins – because it does not allow for an offset for negative dumping margins in the calculation of the overall margins”. The Appellate Body in the EC – Bed Linen dispute held that the zeroing methodology violates the WTO Member’s obligation of “fair comparison between export price and normal value, as required by Articles 2.4 and by 2.4.2” of the AD Agreement. In 2010 WTO Panel in the United States – Thailand Retail Carrier Bags from Thailand Polyethylene Bags dispute confirmed the now accepted approach by the Appellate Body against zeroing methodology. In the EC – Bed Linen case Appellate Body stated that:

Under this method, the investigating authorities are required to compare the weighted average normal value with the weighted average of prices of all comparable export transactions. Here, we emphasize that Article 2.4.2 speaks of ‘all’ comparable export transactions... Furthermore, we are also of the view that a comparison between export price and normal value that does not take fully into account the prices of all comparable export transactions – such as the practice of ‘zeroing’ at issue in this dispute – is not a ‘fair comparison’ between export price and normal value, as required by Article 2.4 and by Article 2.4.2.

As indicated Article 2.4 enjoins investigating authorities to make proper and fair comparisons between the export price and the normal value, these comparisons shall be made at the same level of trade and in respect of sales made at nearly the same time. Article 2.4 further requires that due allowance shall be made in each case, on its merits, for differences that affect price comparability. This includes differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and other differences that may be demonstrated to affect price comparability.

In South Africa the often used comparison method is that of comparing prices in the two markets on a weighted-average-to-weighted-average basis or on a transaction-to-transaction basis. Under the weighted-average method, the weighted-average normal value is compared with the weighted-average export price, whereas under the transaction-to-transaction method, domestic and export transactions which took place on or near the same date will be compared with each other. It should not, however, be assumed that the ITAC’s preferred method of adjustment is conclusively determined. Divergent approaches have been used over time. For example, different approached were used in the Optical Fibre Cable case and the Supertension Cable II case, respectively. In the former case, the BOTT indicated preference for using build-up costs in determining normal value, instead of making adjustments for differences exceeding 20% of the domestic selling price. However, the BOTT in the latter case made adjustments where the physical differences between the domestic product and the exported product exceeded 20%. Section 11.3 of the ADR speaks specifically to adjustments to the export price by stating that the comparison of normal value and export price should be made at the same terms of trade, including payment terms. However, it would seem that the South African anti-dumping authorities are sometimes reluctant to make adjustments for payment terms. Adjustments have been made in respect of annual rebates; free-on-board (FOB) costs, including harbour costs, inland transport costs, wharf freight-handling costs, gate charges, and others such as agents’ commission. Section 12.2 of ADR requires the weighted average margin to be determined.
with reference to the volume of exports instead of the value of exports. This volume-methodology as opposed to value-methodology has been sharply criticised as opening South Africa up to WTO challenges.49

Let us come back to Brazil argument that ITAC’s determination of weighted average dumping margin is defective because there was no comparison between a weighted average normal value with a weighted average of all prices of all comparable export transactions in the calculation of the residual dumping margins for boneless chicken cuts and for whole chicken. The dumping margin was determined on weighted average of four types of boneless chicken cuts sold by exported, Aurora, in both the SACU and the Brazilian market. In the case of non-cooperative exporters such as BRF, the ITAC had to use the residual margin of dumping based on the highest verifiable information in Brazil and used the weighted average domestic sales of both whole bird and cuts made by BRF during the investigation period. The ITAC did make a comparison in terms of the South African anti-dumping framework, which in my view, does not have to be the exact replica of the AD Agreements as long as it is functionally equivalent and can come to justiciable results. The other difficulties in this case were the non-cooperation of some exporters and imports requiring the ITAC to consider residual dumping information. Be that as it may, the South African anti-dumping law, and practice, seems to be functionally WTO-consistent.

4.2 WTO consistency of other relevant determinations, and practices

4.2.1 Normal value and price determination

The price of goods is very important in determining their normal value for the purpose of dumping investigations in the light of the determination of dumping. Article 2 of the AD Agreement and Section 1(2) of the ITAA require the ITAC to determine the price of the goods in question over and above the determination of the normal value of the goods. Thus normal value and price are not synonymous concepts.

4.2.1.1 Actual price

In terms of the ITAA, Section 34.2(b), export price refers to the actual amount paid or payable for goods sold or imported into South Africa, excluding all taxes, discounts and rebates actually granted and directly related to the sale under consideration. This is sometimes termed the ‘transaction value’ or ‘purchase price’ for exports from the importing country to all countries, which represent the domestic sales value of the good in question. No similar specific definition of export price is contained in the AD Agreement.

4.2.1.2 Constructed export price

Price reconstruction is dealt with under Section 32 of the ITAA and in the ADR. In terms of Section 32.5 of the ITAA, the ITAC must, under certain circumstances, reconstruct the export price with reference to the price offered to the first independent buyer minus all costs and the importer's profit incurred between the ex-factory price and the selling price. The reconstruction of the export price is further required under the South African anti-dumping regulations. An important obligation in the ADR is that the constructed
normal value shall be constructed using the producer’s own costs and profits that reflect the actual costs of the product in question, and are consistent with the Generally Accepted Accounting Practice (hereafter GAAP). In line with Article 2 of the AD Agreement, Section 8 of the ADR requires the authorities to consider costs consisting of production costs or direct costs, including the costs of raw materials and components, which can be determined or be obtained from different sources including foreign parties, overhead costs, including cost items such as rates and taxes, indirect labour, and research and development costs or expenses; selling costs, general and administrative costs; any other costs deemed necessary by the ITAC to compare the constructed normal value to the export price; and a reasonable profit made. These are determinable through actual realised profits on sales of the product in question, through the actual profit realised on sales of the narrowest range of products that can be identified, through the average of such actual profit realised by other sellers on the sales of the same category, or through any other reasonable basis.

In the Woven Labels – Zimbabwe case, for example, the normal value was constructed using the exporter’s cost structure, in particular using the actual sale price of the label on the Zimbabwean market and comparing it with the price of the same label generated on the Merlin costing system. In the Copper Tubes – Bulgaria, United Kingdom, Yugoslavia and the Acrylic Blankets – China, Hong Kong, India, Korea, Turkey investigations, the BOTT determined and accepted a profit margin of 10% as ‘reasonable profit’ for the purposes of normal value reconstruction.

The South African anti-dumping law in this regard is generally WTO-consistent. However, there are issues, some inconsequential, which may put the South African law’s consistency with the WTO in some doubt. Firstly, there is some difference in the wording of the provisions of the AD Agreement and the ADR. For example, Section 68.13(d) of the ADR states that costs may be determined ‘on any reasonable basis’; whilst the AD Agreement states that the determination of costs may be based on ‘any other method’. There is clearly a slight difference in the wording used, which some commentators may unfortunately regard as problematic in terms of the AD Agreement. The difference is inconsequential and does not make the South African law WTO-inconsistent. It would be jurisprudentially incorrect and imprudent to determine the national law’s consistency with the WTO requirements by overly relying on the verbatim resemblance of the provisions in question. Consequently, some provisions do not have to restate the WTO agreement in order to discharge national obligations under the WTO.

Be that as it may the ADR seems to perpetuate the undesirable state of difference with the provision of the ITAA. The ITAA provision on price construction is peremptorily couched, whereas in the ADR the provision is generally permissibly couched. I am of the view, and as Brink correctly states, that the provision of the ADR in this regard is ultra vires the ITAA. It is further submitted that the provisions of the ADR should be amended to address the inconsistency with the ITAA.

4.2.2 South Africa’s general practice of price comparison, due allowance and adjustment

The South African anti-dumping law is WTO-consistent in respect of the obligation for fair comparison and due allowance through the provisions of Section 11 of the ADR. The exporter questionnaire is also designed to seek information relevant to proper and fair comparison. Related to the requirement of fair comparison and due allowance is the
requirement of adjustment to the normal value. Adjustments to the normal value are important in order to ensure fair comparison of export price and normal value pursuant to Article 2.4 of the AD Agreement. There may be several adjustment factors that can affect proper comparability, which must be considered on a case-by-case basis, and on the facts before the investigating authority. In this regard, the ITAC’s practice is WTO-consistent because the ITAC always makes adjustments in order to achieve proper comparability. The following are examples of factors pursuant to Article 2.4 of the AD Agreement, which, it is submitted, the ITAC has made a good attempt to consider in arriving at a proper comparison.

4.2.2.1 Sales at different times
The anti-dumping authority must as far as possible, when comparing export price and normal value, consider sales to which the prices in question relate. The sense in this requirement of closeness of the sales is borne, for example, by the fact that a transaction in December 2009 may not be fairly compared to a transaction in April 2010.

4.2.2.2 Conditions and terms of sale
In terms of Section 11.1(a) of the ADR, in cases of differences in the terms of trade for the product exported to the SACU, the petitioner should indicate the terms of trade for the product in question; indicate the terms of trade for domestic sales in the exporting country; quantify the effect of the difference in the terms of trade on the price and submit details of the petitioner’s calculations; and quantify the effect of the difference in the terms of trade on the cost of the product and submit details of the calculations.

4.2.2.3 Physical characteristics
The WTO Panel in Argentina – Ceramic Tiles stated that the meaning of ‘due allowance in each case, on its merits’ means at a minimum that the investigating authority has to evaluate any identified differences in physical characteristics of the product in question which are demonstrated to affect comparability. In order to ensure that price comparison is fair, the ITAC requires that the export price and the normal value should be on a similar basis and level as regards the physical characteristics of the product – such as structure and design, the quantities sold, and the terms and conditions of sale. The differences to be considered are non-exhaustive and may include quality and chemical composition, as the case may be, so long as such variables affect price comparability. In such situations the exporter’s questionnaire requests the exporter to provide the ITAC, where there is a difference in physical characteristics, with some information in respect to such differences that should be listed in the questionnaire; the effect of the differences on the price of the product should be quantified; and the effect of the differences on the costs of production should also be quantified.

4.2.2.4 Level of trade
Article 2.4 of the AD Agreement explicitly requires that due allowance be made for differences that affect price comparability, including the differences in the level of trade. In order to arrive at an appropriate adjustment, the ITAC also makes comparison at the
same level of trade, preferably the ex-factory level.\textsuperscript{60} In the case of Trichloroethylene – Germany, for example, the BOTT considered only sales that took place at the same level of trade. In cases where the export price and normal value are not on a comparable basis, allowance is made for any differences. The applicant has a duty to indicate that domestic sales do not allow for a proper comparison with the export to the SACU, and to give reasons for the belief that the sales in the exporter’s market do not allow for a proper comparison.\textsuperscript{61}

4.2.2.5 Costs including duties and taxes

Article 2.4 of the AD Agreement requires adjustment to be made for costs, including duties and taxes, incurred between importation and resale, and for profits accruing. Similarly, Section 11.1(b) of the ADR and Section 32.3 of the ITAA require that adjustment be made for differences in taxation. In practice, the ITAC has allowed the exporter who paid customs duties for raw materials at importation to reclaim such duties when exporting the final product on condition that such final product was made from the raw materials on which the duty was imposed. Other taxes that may be allowed for adjustment may be taxes relating to turnover, sales, value added, stamp and transfer costs and excise duties. It is submitted that, pursuant to the common practice in this area of the law, other costs for adjustment may include delivery costs, after sales costs, inventory holding costs and other ancillary charges. Nothing in the ADR and the ITAA preclude the consideration of these costs.

4.2.2.6 Other adjustment factors

The list of adjustment factors in Section 11.1 of the ADR is not exhaustive. The ITAC may consider any other factors which affect price comparability when making its adjustments and which are quantifiable and verifiable, particularly those factors previously considered by its predecessor, the BOTT. These other factors may include environmental costs; difference in production costs; payment terms; agents’ commission; technical advice; and warehousing.

5 Conclusions

Admittedly, the South African anti-dumping law and practice has become notoriously to be known for its alleged non-compliance with the WTO rules. And this has necessitated a number of national courts decisions nullifying ITAC’s rulings. Fresh in the mind, for example, is the 2007 ruling of the South African Supreme Court of Appeals, confirmed on appeal in 2011, that the ITAC ruling over some poultry products was improperly calculated the timetable for the anti-dumping sunset review, and therefore illegal. Brazil also did request consultations with South Africa pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXIII of the GATT, and Article 17 of the AD Agreement. But the matter was later resolved diplomatically. The Brazilian Frozen Chicken dispute is one of the few disputes that were resolved through diplomatic means.

Indeed there may be questionable and grey areas in the South African anti-dumping law and practice. Most notable being the determination of the weighted average dumping
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margin, particularly given the seemingly at odds requirements of the ADR and the ITA Act as the application of the imports volume-methodology as opposed to imports value-methodology may place the ITAC in default of the WTO rules. Be that as it may, there is no water-tight justification for a general view that the South African anti-dumping practice is not in compliance with her WTO obligation and incompatible with the AD Agreement. Often the critics are ignorant of the view that the AD Agreement needs in the minimum functionally equivalent national anti-dumping rules, not mirror image of the AD Agreement. It would seem that the Brazilian contentions against the ITAC’s determination of dumping of frozen chicken and the imposition of preliminary anti-dumping duties are not reasonable and justifiable based on the merits of the case. Equally important to note is the revised tariff rates which, based on the facts and evidence presented, are justifiable from both the position of the protection of the SACU chicken industry from the threat and/or actual material injury resulting from the imports of dumped imports from Brazil, and from the position of food security of SACU consumers as indicated in the ITAC’s notice of increased tariffs.

Notes

6 Customs and Excise Act 91 of 1964.
7 The law can be traced back to 1914, when the Customs Tariff Act of 1914 was promulgated.
8 An Act to Amend the Customs Tariffs of 1897, S.C. 1904, C 11, S. 19.
9 The Agricultural Implement Manufacturer, Importation and Sale Act of 1905.
10 The Australian Industries Preservation Act of 1906.
11 Frozen Meat of Fowls – Brazil, ITAC Report no. 389.
12 See Viner, J. (1923) Dumping – a Problem in International Trade, pp.35–68, Brink, supra note 5.
14 Thailand – Anti-dumping Duties on Angles, Shapes and Sections of Iron or Non-alloy Steel and H-beams from Poland, WT/DS122/R 28 September (2000), par. 2.2 [Thailand – H-beams, Panel Report].
15 See generally, Sibanda, supra note 4.


Taken from Esterhuizen, supra note 29.

Other industries include: metal fabrication, capital equipment and transport equipment; green and energy-saving industries; agro-processing; automotive, components, medium and heavy commercial vehicles; plastics, pharmaceuticals and chemicals; clothing, textiles, footwear and leather; biofuels; forestry, paper, pulp and furniture; and business process servicing.


ITAC Report No. 442, ibid, p.17.

Mr Rob Davies, Minister of Trade and Industries announcing the increases in October 2013.

Rob Davies, ibid.

ITAC Report No. 442, supra note 34, p.17.

Frozen Chicken Mean – Brazil, ITAC Report No. 389, Para. 16.

See WT/DS439/1G/L/990G/ADP/D92/1.


South Africa – Anti-Dumping Duties on Frozen Meat of Fowls from Brazil: Request for Consultation by Brazil, WT/DS439/1 G/L/990 G/ADP/D92/1 25 June 2012.

Under the transaction-to-transaction method, domestic and export transactions which took place on or near the same date will be compared with each other.


US – Carbon Steel Sunset Review, Panel Report, par. 7.159.

European Communities – Anti-dumping Duties on Imports of Cotton-Type Linen from India, WT/DS141/AB/R, par. 55 (adopted 12 March 2001), [hereafter EC – Bed Linen from India, Appellate Body Report].

United States – Anti-dumping Measures on Polyethylene Retail Carrier Bags from Thailand, WT/DS383 (circulated on 22 January 2010) par. 8.2 [hereafter United States – Thailand Polyethylene Bags, Panel Report].
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40 European Communities – Anti-dumping Duties on Imports of Cotton-Type Linen from India, WT/DS141/AB/R, par. 55 (adopted 12 March 2001), [hereafter Appellate Body Report, EC – Bed Linen from India].
41 Appellate Body Report, EC – Bed Linen from India, Para. 55.
43 Optical Fibre Cable – Korea, BOTT Report 4029.
44 Supertension Cable II – Germany, BOTT Report No. 4031.
45 See, for example, Acrylic Blankets – China, Hong Kong, India, Korea, Turkey, BOTT Report 3936; Garlic – PRC, BOTT Report No. 4044.
46 See, for example, Paperboard – Australia, Germany, Netherlands, Spain, and BOTT Report No. 3808.
47 See, for example, Plasterboard – Thailand, BOTT Report 4062.
48 See, for example, PVC Based Roll Goods – India, Korea, Netherlands, Thailand – BOTT Report No. 4131.
50 ADR, s 8.11.
51 See also, for example, Glass microscopes – Australia, Belgium, Board Report 3822, par. 4.2.1.
52 See Porcelain Insulators – India, Board Report No. 3752 for the methodology used in the allocation of overheads.
53 See also ITAA, s 32(2)(b)(ii)(AA).
54 See, Penicilin – India, Board Report No. 3799; Stainless Steel Hollowware – China, Hong Kong, Korea, Taiwan, Board Report No. 3899; Copper Tubes – Bulgaria, United Kingdom, Yugoslavia, Board Report No. 3805.
55 See ADR, s 8.13 read with s 8.10.
56 See PADR, s 12.
57 Brink, supra note 5, p.811 fn 767.
58 See, for example, US – Lumber V, Panel Report, par.7.357.
60 See ADR, s 11.3–11.4.
61 See further ADR, s 11.1(c).