

On “Dumping” and the Competition Act of South Africa: No “double remedy”

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SUMMARY

In “‘Dumping’ and the Competition Act of South Africa”, Vinti espouses that the Competition Commission has jurisdiction over the actions of extra-territorial parties insofar as such actions involve “prohibited price discrimination” or “price dumping”. He finds that the Competition Act and the International Trade Administration Act both bestow jurisdiction over the matter and hence argues that this would constitute an unfair double remedy if both authorities were to take action. He therefore proposes, on the basis of a Memorandum of Agreement that has been concluded between the Competition Commission and the International Trade Administration Commission, that either of the Acts should be amended to ensure that no such double remedies are imposed. Although it is agreed that such “double remedy”, if applied, would indeed be unfair for several reasons, this article argues that no such double remedy exists and that, despite the provisions of the Competition Act, the Competition Commission has no jurisdiction in matters related to dumping.

1 Introduction

Vinti argues that there is dual jurisdiction in cases where dumping causes injury to a domestic industry, as the Competition Commission and the International Trade Administration Commission (ITAC) could have concurrent jurisdiction and that this could result in “double remedies” being imposed against dumped imports.¹ While it is recognised that such double remedies would be unfair to the affected parties, it is submitted that, regardless the wording of the Competition Act, as a result of South Africa’s international obligations, the Competition Commission does not have any jurisdiction in these matters and that no double remedies exist. It is further argued that there are significant differences between the like provisions in the competition and anti-dumping legislation, respectively, so that even if the Competition Commission did have jurisdiction, it could never apply the relevant provisions to exporters.

To illustrate this, this paper is divided into four parts: the first part of the paper provides a brief overview of the issues at stake and defines the relevant terms. Part two considers the relevant anti-dumping and

1 Vinti “‘Dumping’ and the Competition Act of South Africa” (2019) *De Rebus* 207.

competition legislation, and evaluates whether the corresponding legal provisions, specifically those relating to price discrimination and sales below cost, have the same meaning; part three considers South Africa's international obligations and international jurisprudence in this regard; and the final part of the paper offers a conclusion.

As Vinti has correctly indicated,² South Africa is a founding Member of the World Trade Organization (WTO). Therefore it is bound, at least at international level, by the WTO Agreement and all its covered agreements, including Article VI of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and the Agreement on Implementation of Article VI of GATT 1994 (the Anti-Dumping Agreement).³ With the exception of GATT,⁴ these agreements have not been promulgated as part of South Africa's municipal law and therefore only finds external application.⁵ However, South Africa has promulgated the International Trade Administration Act 71 of 2002 (ITA Act) and its accompanying Anti-Dumping Regulations (ADR),⁶ as well as chapter VI of the Customs and Excise Act 91 of 1964, to give domestic effect to its international obligations in this regard.⁷

Conceptually, there is only one form of dumping.⁸ Dumping takes place when the export price from a country⁹ is less than the normal value of that product.¹⁰ The normal value is usually determined with reference to the domestic selling price of the product in the exporting country.¹¹

2 Vinti (2019) 208-209.

3 See *Chairman Board on Tariffs and Trade v Brenco* 2001 (4) SA 511 (SCA) 28-29; *Progress Office Machines v SARS* [2007] SCA 118 (RSA), para 6; *Rhône Poulenc v Chairman of the Board on Tariffs and Trade* (Case 98/6589 T) 29; Eisenberg 'The GATT and the WTO Agreements: Comments on their legal applicability to the Republic of South Africa' (1993) 19 *South African Yearbook of International Law* 127.

4 See Geneva General Agreement on Tariffs and Trade Act, 29 of 1948. See also *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 4 SA 618 (CC) note 1.

5 *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 4 SA 618 (CC) para 2.

6 Anti-Dumping Regulations, GN3197 in GG25684 of 14 November 2003.

7 *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 4 SA 618 (CC) para 2.

8 Note that Vinti argues that "[t]here are two forms of 'dumping': the first is 'international price discrimination', which occurs through 'price discrimination by the investigated producer between the domestic and export markets'. The second form is 'cost dumping', which occurs when an exporter sells products in an importing country at below the cost of production." (footnotes omitted) Vinti (2019) 207.

9 For purposes of this article, "country" includes customs territories and customs unions.

10 Art VI:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994); Art 2.1 of the Agreement on Implementation of Article VI of GATT 1994 (the Anti-Dumping Agreement); s 1 of the International Trade Administration Act (ITA Act) 71 of 2002.

11 Art 2.1 of the Agreement on Implementation of Article VI of GATT 1994 (the Anti-Dumping Agreement); s 1 of the International Trade Administration Act (ITA Act) 71 of 2002.

This is why dumping is also referred to as international price discrimination.¹² However, when this price cannot be used,¹³ the normal value may be determined, in any order,¹⁴ either on the basis of the comparable export price of the product to an appropriate third country or on the basis of a constructed value.¹⁵ It is this final methodology, the constructed normal value, that Vinti refers to as "cost dumping"¹⁶ and that he equates to certain prohibited practices under the Competition Act.¹⁷

2 Legislative provisions and jurisdiction

2.1 Anti-dumping legislation

The ITA Act defines dumping as "the introduction of goods into the commerce of the Republic or the Common Customs Area [of the Southern African Customs Union] at an export price contemplated in section 32(2)(a) that is less than the normal value, as defined in section 32(2), of those goods". Section 32(2)(b) then defines normal value as

- i the comparable price paid or payable in the ordinary course of trade for like goods intended for consumption in the exporting country or country of origin; or
- ii in the absence of information on a price contemplated in subparagraph (i), either-
 - (aa) the constructed cost of production of the goods in the country of origin when destined for domestic consumption, plus a reasonable addition for selling, general and administrative costs and for profit; or
 - (bb) the highest comparable price of the like product when exported to an appropriate third or surrogate country, as long as that price is representative.

It must be noted that dumping is neither illegal, nor prohibited.¹⁸ However, if dumping causes injury, as defined in the Anti-Dumping Agreement and the ADR, to a domestic industry producing the like

12 See e.g. Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008, DSR 2008:II, p. 513 (Appellate Body Report, *US – Stainless Steel (Mexico)*), paras. 87, 88, 90, 91, 94, 95, and n 208; Panel Report, *Australia – Anti-Dumping Measures on A4 Copy Paper*, WT/DS529/R, adopted 27 January 2020 (*Australia – A4 Copy Paper*), para 7.64.

13 See Art 2.2 of the ADA and its sub-paragraphs, and Anti-Dumping Regulations (ADR) 8.2 and 8.3 for reasons not to rely on the domestic selling price. See also Brink *Anti-dumping and countervailing investigations in South Africa* (2002) 43-45; Brink *A theoretical framework for South African anti-dumping law* (LLD thesis 2004 UP) 773-774.

14 GATT *Report of the Group of Experts on Anti-Dumping and Countervailing*, para. 148; GATT Panel *US – Atlantic Salmon AD*, paras. 392-393; GATT Panel, *EC – Cotton Yarn*, para. 482; Appellate Body Report, *EC – Tube or Pipe Fittings*, paras. 93-95; Panel Report, *US – OCTG (Korea)*, para 7.15-7.16.

15 Art VI:1(b) of GATT 1994; Art 2.2 of the Anti-Dumping Agreement, s 32(2)(b)(ii) of the ITA Act.

16 Vinti (2019) 210.

17 S 8(d)(iv) of the Competition Act 89 of 1998

product, then an anti-dumping duty equivalent to, or lower than, the margin of dumping, that is, the difference between the normal value and the export price, may be imposed to level the playing fields and protect the domestic industry from the unfair trade.¹⁹

South Africa is also a signatory to both the GATT 1994, which has been incorporated into South Africa's domestic legislation,²⁰ and to the Anti-Dumping Agreement, which has not been incorporated into its domestic legislation.²¹

2 2 Competition legislation

In contrast, the Competition Act 89 of 1998 provides that a dominant firm may not sell goods or services "at predatory prices".²² The Competition Act regards predatory prices as prices below a company's "average avoidable cost" or "average variable cost".²³ Effectively, this means that a company may not sell a product below its marginal or average variable cost. In addition, the Competition Act provides that prohibited price discrimination exists where a dominant firm "involves in discrimination between ... purchasers in terms of the price charged for the goods".²⁴ However, the latter is not regarded as prohibited price discrimination if it relates to an act "in good faith to meet a price or benefit offered by a competitor",²⁵ "is in response to changing conditions affecting the market for the goods... concerned",²⁶ including

18 Art VI:1 of GATT 1994 provides that dumping "is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party..." (own underlining). Art VI of GATT 1994 and the Anti-Dumping Agreement do not contain any provisions on limiting dumping, but contain provisions on how to apply anti-dumping measures. Thus, it prescribes how investigations against dumping should be conducted, rather than to address dumping as such. See also Hailsham, Lord *Halsbury's Laws of England* 4th ed. (Volume 51) (1986) 489; Hudec 'United States Compliance with the 1967 GATT Antidumping Code' in Michigan Yearbook of International Legal Studies (1979) *Volume 1: Antidumping Law: Policy and Implementation* 205.

19 Art VI:1 of GATT 1994; Art 9.1 of the Anti-Dumping Agreement; ADR 1, 12 and 65.

20 Geneva General Agreement on Tariffs and Trade Act 29 of 1948. Technically, this incorporated GATT 1947 into South African legislation, but as regards anti-dumping, there have been no changes between Art VI of GATT 1947 and GATT 1994.

21 See the references in n 4.

22 S 8(d)(iv) of the Competition Act 89 of 1998.

23 S 1 of the Competition Act 89 of 1998. "Average avoidable cost", in turn, is defined as "the sum of all costs, including variable costs and product-specific fixed costs, that could have been avoided if the firm ceased producing an identified amount of additional output, divided by the quantity of the additional output", while "average variable cost" is defined as "the sum of all the costs that vary with an identified quantity of a particular product, divided by the total produced quantity of that product". *Idem*.

24 S 9(1)(c)(i) of the Competition Act 89 of 1998.

25 S 9(2)(b) of the Competition Act 89 of 1998.

26 S 9(2)(c) of the Competition Act 89 of 1998.

because of “any action in response to the actual or imminent deterioration of perishable goods”²⁷ and “any action in response to the obsolescence of goods”.²⁸

Vinti argues that:

“a foreign ‘dominant firm’, which has engaged in prohibited price discrimination or cost dumping, will have simultaneously violated the [Competition] Act and the anti-dumping law of South Africa. This may mean that a foreign producer may face the unpalatable prospect of both an administrative penalty imposed by the Competition Tribunal and an anti-dumping duty from the International Trade Administration Commission (ITAC). This would constitute a ‘double remedy’. The government of South Africa would in essence, be penalizing the same injury twice. This means that there is an overlap between the jurisdictions of ITAC and the Competition Commission.”

2 3 Prohibited price discrimination

Under the ADA and the ITA Act, any exporter can dump, that is, engage in price discrimination, and an anti-dumping duty may be imposed, provided the margin of dumping exceeds two per cent.²⁹ Furthermore, the dumped imports must have caused injury.³⁰ Under the Competition Act, only a “dominant” supplier can engage in the prohibited activity of price discrimination. While there are virtually no provisions in anti-dumping law regarding the size of the company practicing dumping, that is, price discrimination,³¹ under the Competition Act a firm is only dominant if it has acquired at least 35 per cent market share.³²

More often than not, in anti-dumping investigations the exporter is not a dominant supplier. For instance, an analysis of the five most recently completed original³³ anti-dumping investigations shows the following:

In the *Frozen Bone-in Portions* investigation, anti-dumping duties were separately imposed on ten exporters, while a further three exporters were found not to be dumping, and a residual anti-dumping duty was also imposed against non-cooperating exporters in each of the three

27 S 9(2)(c)(i) of the Competition Act 89 of 1998.

28 S 9(2)(c)(ii) of the Competition Act 89 of 1998.

29 Art 5.8 of the Anti-Dumping Agreement; ADR 12.3

30 Art 3 of the Anti-Dumping Agreement; ADR 13 and 16.

31 Art 5.8 of the Anti-Dumping Agreement provides that dumped imports would be negligible, and that an investigation would have to be terminated immediately without any anti-dumping measures imposed, where dumped imports from the *country* represent less than three per cent of the total volume of imports of that product in the importing country. Thus, negligibility applies on a country-wide basis, rather than on a company-basis. The same provision has been incorporated into South African municipal law through ADR 16.2.

32 S 7 of the Competition Act. Note that above 45%, this is irrefutable, while it is refutable between 35% and 45%. See e.g. Vinti 211.

33 This relates to the original investigations, that led to the imposition of anti-dumping measures, as opposed to any later reviews of such measures.

countries subject to investigation.³⁴ Bearing in mind that, worst case scenario, all the exporters combined represented less than twenty per cent of the total SACU market for bone-in chicken,³⁵ it is clear that none of the exporters could be regarded as a “dominant supplier”. Accordingly, the Competition Act would not have found application in this investigation.

In *Wheelbarrows*, the report identifies two exporters that cooperated fully in the investigation, while there were other non-cooperating exporters.³⁶ However, imports increased from 165,410 units in the first year under review to 540,710 units in the final year under review,³⁷ and although the domestic industry’s market share decreased as a result,³⁸ the domestic industry’s actual sales volume increased by between seven per cent³⁹ and 31 per cent⁴⁰ over the same period, again confirming that none of the exporters was a “dominant supplier”.

In *Cement*, the report identifies four exporters that cooperated fully in the investigation, while there were other non-cooperating exporters.⁴¹ Imports had increased from 142,806 kg in the first year under review to 1,091,235 kg in the final year under review,⁴² but this led to a decrease of only nine per cent in the domestic industry’s market share⁴³ as the industry increased its sales over the investigation period.⁴⁴ This confirmed that none of the exporters was a “dominant supplier”.

In *Float glass*, the report identified four exporters, although only three of them submitted proper responses that were taken into consideration.⁴⁵ The report separately provides import data for the four products that form the product under investigation, but failed to provide a consolidated set of data. Although this does not provide an accurate analysis, the author has simply added the volume of imports for each of

34 ITAC Report 492 – *Frozen Bone-in Portions (Germany, Netherlands, UK)*, 85, Table 8.3.

35 This is based on allegations by the South African Poultry Association, the applicant in the investigation, as is evident from the public file in the investigation. Note that ITAC Report 502 Table 5.5.4 indicates that the applicant’s market share *increased* by 5% over the investigation period, despite dumped imports growing 38-fold and its market share growing 33-fold (whereas other imports had decreased by 63%).

36 ITAC Report 502 – *Wheelbarrows (China)*, para 1.7.2. The fact that a residual anti-dumping duty was imposed on other exporters from China indicates that there were other exporters from that country.

37 ITAC Report 502 – *Wheelbarrows (China)*, para 5.2.1.

38 ITAC Report 502 – *Wheelbarrows (China)*, para 5.2.3.4.

39 ITAC Report 502 – *Wheelbarrows (China)*, para 5.2.3.1, Table 5.2.3.1(a).

40 ITAC Report 502 – *Wheelbarrows (China)*, para 5.2.3.1, Table 5.2.3.1(b).

41 ITAC Report 512 – *Cement (Pakistan)*, para 1.8.2. The fact that a residual anti-dumping duty was imposed on other exporters from Pakistan indicates that there were other exporters from that country.

42 ITAC Report 512 – *Cement (Pakistan)*, para 5.3.1.

43 ITAC Report 512 – *Cement (Pakistan)*, para 5.3.3.4, Table 5.3.3.4(c).

44 ITAC Report 512 – *Cement (Pakistan)*, para 5.3.3.2, Table 5.3.3.2(c).

45 ITAC Report 615 – *Float glass (Saudi Arabia, United Arab Emirates)*, para 1.8.2.

the four products to determine the total volume of float glass imports in square metres.⁴⁶ On this basis, the alleged dumped imports increased from 3,022,146 m² in 2016 to 3,630,256 m² in 2018. In 2018, there a total of 475,874 m² were also imported from other sources.⁴⁷ The domestic industry consisted of a single producer, and its indexed sales for three of the four products decreased by nine, thirteen and four per cent, respectively, while sales increased by eighteen per cent for the fourth product.⁴⁸ For the first product, which accounted for 62 per cent of all dumped imports by surface area, the alleged dumped imports had increased by 28 per cent, yet the decrease in the industry’s market share was only nine per cent, indicating that the single domestic producer was still at least three times as big as all the exporters combined. This again shows that there was no “dominant supplier”.

In *PET*, the report identifies six exporters from China,⁴⁹ while there were also imports from other countries.⁵⁰ On the one hand the report indicates only a single domestic producer,⁵¹ but on the other it indicates that the rest of the industry’s market share increased.⁵² There is no indication of the relative size of the applicant and other producers. While the applicant’s market share decreased by nearly 50 per cent over the period,⁵³ the market share of the dumped imports increased by 33 per cent. However, the market share of non-dumped imports increased by more than 200 per cent, and non-dumped imports amounted to 88 per cent of the volume of dumped imports, thus indicating that dumped imports only constituted only 53.3 per cent of total imports.⁵⁴ Accordingly, with several producers from several countries combined gaining less than 50 per cent of the applicant’s market share (and bearing in mind that there were other producers in South Africa as well), and that nearly half of the exporters were either not accused of dumping or found not to be dumping,⁵⁵ it is clear that there were also no dominant exporters in this investigation and that the Competition Act would not find application.

46 This is not an accurate way to determine the volume of imports, as the industry’s capacity is measured by weight, rather than surface area. The report does not indicate the conversion rates for the different products, which are differentiated by thickness, from surface area to weight.

47 ITAC Report 615 – *Float glass (Saudi Arabia, United Arab Emirates)*, para 5.3.1. Bearing in mind that “other imports had decreased from 782,134 m² in 2016 to 475,874 m² in 2018, a decrease of 306,620 m², while the dumped imports increased by 608,110 m², it follows that the dumped imports to a large extent replaced other imports rather than take market share away from the domestic industry.

48 ITAC Report 615 – *Float glass (Saudi Arabia, United Arab Emirates)*, para 5.4.1.

49 ITAC Report 621 – *PET (China)*, para 1.7.2.

50 ITAC Report 621 – *PET (China)*, paras 5.3.1 and 5.4.3.

51 ITAC Report 621 – *PET (China)*, para 1.7.1.

52 ITAC Report 621 – *PET (China)*, para 5.4.4.

53 ITAC Report 621 – *PET (China)*, para 5.4.4.

54 ITAC Report 621 – *PET (China)*, para 5.3.1.

55 ITAC Report 621 – *PET (China)*, para 4.3.4.

In view of the above, it is submitted that there would be very few, if any, instances where an exporter that dumps could be regarded as a “dominant supplier” as defined by the Competition Act. Accordingly, even if an exporter’s actions fell foul of what would constitute prohibited actions if it were a dominant supplier, its actions would not fall within the ambit of the Competition Commission.

In addition, the Competition Act provides that price discrimination is not regarded as prohibited price discrimination if it relates to an act “in good faith to meet a price or benefit offered by a competitor”.⁵⁶ Although no tangible proof exists, anecdotal evidence suggests that in many instances, dumping to South Africa takes place where an importer approaches an exporter with a purchase order at a price that would meet the price of either the domestic producer(s) or other importers.⁵⁷

2 4 Sales below cost

In terms of the Competition Act, a dominant firm may not sell goods at predatory prices,⁵⁸ that is, below their “average avoidable cost” or “average variable cost”.⁵⁹ Under anti-dumping legislation,

“Domestic sales or export sales to a third country may be considered to be not in the ordinary course of trade if the Commission determines that such sales–

- a took place at prices below total costs, including cost of production and administrative, selling, general and packaging costs, provided such sales took place –
 - i in substantial quantities equalling at least 20 per cent by volume of total domestic sales during the investigation period; and
 - ii over an extended period of time, which period shall normally be a year, but in no case less than 6 months.”⁶⁰

There is a clear distinction between these provisions. The average avoidable or variable cost in the Competition Act refers to the additional cost incurred to produce one more unit.⁶¹ This includes the bill of materials, that is, the volume and price of the different raw materials, as well as any additional direct (variable) costs, such as additional consumables, labour, energy and packaging material. However, this does not extend to indirect or fixed costs, such as fixed labour costs, depreciation, maintenance, rent and insurance, administration costs or any costs related to the sales of the product. Under anti-dumping law, however, the costs refer to the total costs to produce and sell a product. This means that it not only includes the variable cost of production, but

56 S 9(2)(b) of the Competition Act 89 of 1998.

57 This is evident from the comments of various importers in anti-dumping investigations.

58 S 8(d)(iv) of the Competition Act 89 of 1998.

59 S 1 of the Competition Act 89 of 1998.

60 ADR 8.2. See also Art 2.2 of the Anti-Dumping Agreement, where the provisions are slightly different.

61 Vinti (2019) 213.

also the fixed costs, the general office overheads and all costs incurred in selling the product. Therefore, there is a very significant difference in when a product will be regarded as being sold below cost under competition law and under anti-dumping law.

In addition, under anti-dumping law, where an exporter sells products on its domestic market at below the total cost thereof, it has to be determined whether such sales took place in significant quantities, such quantities being at least 20 per cent of the total sales on a product-by-product basis.⁶² If fewer than 20 per cent of sales, on a product-by-product basis, were sold below cost, those sales must, by law, still be included in the determination of the normal value that is used to determine whether dumping is taking place. Thus, not all sales at a loss are deemed to be unfair or “prohibited”.⁶³ Furthermore, such sales at a loss must also be made over an extended period of time, normally a year, but not less than six months, and must not provide for the recovery of all costs within a reasonable period of time before they may be rejected.⁶⁴ On the other hand, where there are targeted sales to South Africa below the price at which the same product is exported to other importers in South Africa, the ITAC may use a different methodology to determine the margin of dumping.⁶⁵ Therefore, rather than using the usual weighted average normal value-to-weighted average export price to determine the margin of dumping,⁶⁶ or even the alternative transaction-to-transaction methodology,⁶⁷ it may compare a “normal value established on a weighted average basis ... to prices of individual export transactions if [ITAC] finds a pattern of export prices which differ significantly among different purchasers”.⁶⁸

In the *Frozen Bone-in Portions* investigation,⁶⁹ the ITAC found that one of the German producers sold some products on its domestic market at less than the full cost of that product. However, it found that such “sales were found to be less than 20 percent by volume of domestic sales and therefore all domestic sales for this model ... were used for normal value determination.”⁷⁰ As regards one of the Dutch exporters in the same investigation, it “made a final determination to disregard sales at a loss, by volume exceeding 20 percent of total domestic sales during the period

62 Footnote 5 to the Anti-Dumping Agreement; ADR 8.2(a)(i); Brink (2004) 765.

63 Footnote 5 to the Anti-Dumping Agreement; ADR 8.2(a)(i); Brink (2004) 765.

64 ADR 8.2. See also, Art 2.2 of the Anti-Dumping Agreement.

65 Art 2.4, last sentence, of the Anti-Dumping Agreement; ADR 11.6; Board Report 4054 – *Sutures (Germany)*; Brink (2004) 832-833.

66 ADR 11.5, first part of the sentence.

67 ADR 11.5, second part of the sentence.

68 ADR 11.6, read with ADR 11.7.

69 Note that there is no reference to below cost sales in ITAC Reports 502 – *Wheelbarrows (China)*, 512 – *Cement (Pakistan)*, or 615 – *Float glass (Saudi Arabia, United Arab Emirates)*.

70 ITAC Report 492 – *Frozen Bone-in Portions (Germany, Netherlands, UK)*, 31, para 4.1.4(a).

of investigation for dumping in accordance with ADR 8.2.”⁷¹ For yet another producer, the ITAC found that

“Some of the sales of the two comparable models sold in the Netherlands were sold below cost. For model legs, [sic] sales made at a loss were found to be less than 20 percent by volume of domestic sales and therefore all domestic sales for this model were used for normal value determination. For wings A-grade, sales made at a loss were found to be more than 20 percent by volume of domestic sales. [ITAC] made a final determination to disregard the sales made at a loss, by volume exceeding 20 percent of total domestic sales during the period of investigation for dumping...”⁷²

Of significance from these findings is the different treatment accorded by the Competition Commission and the ITAC to sales below cost. For the Competition Commission, the relevance of sales below cost are those sales that were made below cost on the South African market. These sales are deemed to be prohibited, if made by a dominant supplier. For the ITAC, the question is whether the exporter makes sales at prices below cost *on its own domestic market*, that is, not in South Africa. If the volume of those below-cost sales are below the 20 per cent threshold, even these below-cost sales are included in the determination of the normal value. However, where below-cost sales reach the threshold, the ITAC will exclude these sales from the normal value determination. This has the effect of excluding low-priced sales from the calculation, thereby increasing the average normal value. Since the export price to SACU is compared to this weighted average normal value,⁷³ this has the effect of increasing the margin of dumping and, consequently, the anti-dumping duty that ITAC may recommend. Accordingly, ITAC may indirectly penalise an exporter, whether dominant or not, for selling products below costs on its own market, rather than on the SACU market, even where such sales were not made at prices below average avoidable or average variable cost.

3 International law and South Africa’s international obligations regarding protective measures against dumping

3 1 Restriction on remedies that may be used against dumping

In view of the above analyses, it is already clear that notwithstanding the provisions of the Competition Act and the ITA Act, there is little, if any, practical overlap between the jurisdiction exercised by the Competition

71 ITAC Report 492 – *Frozen Bone-in Portions (Germany, Netherlands, UK)*, 35, para 4.3(a).

72 ITAC Report 492 – *Frozen Bone-in Portions (Germany, Netherlands, UK)*, 38, para 4.4.1(a).

73 ADR 11.5.

Commission and that exercised by the ITAC. However, it is also necessary to consider South Africa’s international obligations in this regard, which completely remove any possible jurisdiction the Competition Commission might have wanted to exercise in respect of international trade.

Article VI of GATT 1994 and the Anti-Dumping Agreement only provide for provisional anti-dumping duties,⁷⁴ definitive anti-dumping duties⁷⁵ and price undertakings⁷⁶ as measures against the unfair trade. This limitation is further expressly limited by Article 18 of the Anti-Dumping Agreement, which provides that “[n]o specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.”⁷⁷ A panel has interpreted this to mean that “a measure will only constitute ‘specific action against dumping’ if (1) it acts specifically in response to dumping, in the sense that it may be taken only in situations presenting the constituent elements of dumping, and (2) it acts ‘against’ dumping, in the sense that it has an adverse bearing on dumping.”⁷⁸

This has been confirmed by the Appellate Body, which indicated that there are only three “permissible responses to dumping” available to WTO Members, being definitive anti-dumping duties, provisional duties, and price undertakings.⁷⁹

74 Add Note 1 to Art VI:2 of GATT 1994; Art 7 of the Anti-Dumping Agreement.

75 Art VI:2 of GATT 1994; Art 9 of the Anti-Dumping Agreement.

76 Art 8 of the Anti-Dumping Agreement.

77 Art 18.1 of the Anti-Dumping Agreement; Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, p. 3767 (Appellate Body Report, *Guatemala – Cement I*), paras 79-80.

78 Panel Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/R, WT/DS234/R, adopted 27 January 2003, as modified by Appellate Body Report WT/DS217/AB/R, WT/DS234/AB/R, DSR 2003:II, p. 489 (Panel Report, *US – Continued Offset (Byrd Amendment)*), para 7.18.

79 Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, p. 4793 (Appellate Body Report, *US – 1916 Act*), para. 137. See also Panel Report, *US – Continued Offset (Byrd Amendment)*, para 7.8. The panel in *US – 1916 Act (Japan)* also remarked that “[e]xcept for provisional measures and price undertakings, the only type of remedies foreseen by the Anti-Dumping Agreement is the imposition of duties. Panel Report, *United States – Anti-Dumping Act of 1916, Complaint by Japan*, WT/DS162/R and Add.1, adopted 26 September 2000, upheld by Appellate Body Report WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, p. 4831 (Panel Report, *US – 1916 Act (Japan)*), para 6.216.

The WTO's Dispute Settlement Body has interpreted the possible actions that may be taken against dumping in two separate disputes. The first related the United States of America's pre-existing legislation, dating back to 1916,⁸⁰ which criminalised dumping and made provision for punitive damages to be awarded to an affected domestic industry under certain conditions.⁸¹ After a long analysis, the panel found that

"Article VI:2 of the GATT 1994 provides that only measures in the form of antidumping duties may be applied to counteract dumping as such and that, by providing for the imposition of fines or imprisonment or for the recovery of treble damages, the 1916 Act violates Article VI:2 of the GATT 1994"⁸² and "conclude[d] that the 1916 Act, because it violates Article VI:2 of the GATT 1994 by providing for other remedies than antidumping duties, is not 'in accordance with the provisions of GATT 1994 as interpreted by [the AntiDumping Agreement]', within the meaning of Article 18.1. As a result, the 1916 Act also violates Article 18.1 of the AntiDumping Agreement."⁸³

This was confirmed on appeal,⁸⁴ with the result that the United States of America was required to bring its Act into conformity with its obligations under Article VI of the GATT 1994 and the Anti-Dumping Agreement.⁸⁵ It follows, therefore, that no criminal action can be brought against dumping and that damages may not be awarded to a domestic industry injured by dumping.

The second dispute in which the WTO's Dispute Settlement Body considered "other" actions against dumping, was *US - Offset Act (Byrd Amendment)*.⁸⁶ In this Act, the US adopted legislation in terms of which "offset" payments were (a) "made only and exclusively to US producers that supported an application for an anti-dumping investigation"; (b) "made only and exclusively to US producers 'affected' by an instance of dumping which is the subject of an anti-dumping order"; (c) "paid for 'qualifying expenses' incurred by the affected domestic producers 'after' the issuance of anti-dumping order"; and (d) the 'qualifying expenses'

80 See Title VIII of the United States Revenue Act of 1916, Act of 8 September 1916, 39 Stat. 756 (1916); 15 U.S.C. § 72, with the relevant portions also quoted in Appellate Body Report, *US - 1916 Act*, para 129.

81 See Panel Reports, *US - 1916 Act (Japan)*; *United States - Anti-Dumping Act of 1916, Complaint by the European Communities*, WT/DS136/R and Corr.1, adopted 26 September 2000, upheld by Appellate Body Report WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, p. 4593 (*US - 1916 Act (EC)*); Appellate Body Report, *US - 1916 Act*.

82 Panel Report, *US - 1916 Act (Japan)*, para 6.230 (footnote omitted).

83 Panel Report, *US - 1916 Act (Japan)*, para 6.231.

84 Appellate Body Report, *US - 1916 Act*, para 138.

85 Appellate Body Report, *US - 1916 Act*, para 156.

86 Appellate Body Report, *United States - Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, DSR 2003:I, p. 375 (Appellate Body Report, *US - Offset Act (Byrd Amendment)*); Panel Report, *United States - Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/R, WT/DS234/R, adopted 27 January 2003, as modified by Appellate Body Report WT/DS217/AB/R, WT/DS234/AB/R, DSR 2003:II, p. 489 (Panel Report, *US - Offset Act (Byrd Amendment)*).

must be related to the production of a product that is the subject of an anti-dumping order.”⁸⁷ In this regard, the panel noted that:

“... at first sight, the [Continued Dumping and Subsidies Offset Act] CDSOA contains no reference to the constituent elements of dumping. Nor are the constituent elements of dumping explicitly built into the essential elements of eligibility for offset payment subsidies. Nevertheless it is clear that CDSOA payments may only be made in situations where the constituent elements of dumping are present. Specifically, CDSOA offset payments follow automatically from the collection of anti-dumping duties, which in turn may only be collected following the imposition of anti-dumping orders, which may only be imposed following a determination of dumping (injury and causation). Thus there is a clear, direct and unavoidable connection between the determination of dumping and CDSOA offset payments. For domestic producers who have qualified for CDSOA payments by having supported the petition for an anti-dumping investigation, and having incurred qualifying expenses in the production of like products, the CDSOA offset payments flow as automatically from the presence of the constituent elements of dumping as do the anti-dumping duties themselves. For this reason, we find that CDSOA offset payments may be made only in situations presenting the constituent elements of dumping. Indeed, this conclusion is even suggested by the reference to ‘dumping’ in the title of the CDSOA.

In order to avoid any misunderstanding, we wish to emphasise that our finding that CDSOA offset payments may be made only in situations presenting the constituent elements of dumping is in no way based on the fact that offset payments are funded from collected anti-dumping duties. Even if CDSOA offset payments were funded directly from the US Treasury, and in an amount unrelated to collected anti-dumping duties, we would still be required to reach the conclusion – for the reasons set forth in the preceding paragraph – that offset payments may be made only in situations presenting the constituent elements of dumping.”⁸⁸

The panel then evaluated whether the payments to domestic companies that supported action against dumping qualified as action taken “against” dumping, and found that there was “no express requirement that the measure must act against the imported dumped product, or entities connected to, or responsible for, the dumped good such as the importer, exporter, or foreign producer”. The panel also noted that there was also no requirement that the action must act “directly” against dumping, but that any indirect action would be included within the scope of Article 18.1 of the Anti-Dumping Agreement.⁸⁹ Therefore, the panel concluded that the CDSOA had “an adverse bearing on dumping”⁹⁰ as it distorted competition between dumped and domestic products,⁹¹ and as it provided domestic producers with an incentive to lodge or support anti-dumping applications.⁹² Accordingly, the US government could not

87 Panel Report, *US – Offset Act (Byrd Amendment)*, para 7.19.

88 Panel Report, *US – Offset Act (Byrd Amendment)*, paras 7.21-7.22.

89 Panel Report, *US – Offset Act (Byrd Amendment)*, para 7.33.

90 Panel Report, *US – Offset Act (Byrd Amendment)*, para 7.34.

91 Panel Report, *US – Offset Act (Byrd Amendment)*, paras 7.35-7.41.

92 Panel Report, *US – Offset Act (Byrd Amendment)*, paras 7.42-746.

“reward” US producers that had been affected by dumping, as this was a violation of the only permissible remedies against injurious dumping.

In view of the above, it is submitted that the remedies available under the Competition Act, in response to prohibited price discrimination by dominant suppliers and sales below costs by a dominant supplier, would violate South Africa’s obligations under Article VI of the GATT 1994 and the Anti-Dumping Agreement if they were used in response to dumping. As a result, they cannot be applied in this way and, consequently, there cannot be any double remedies against dumping.

3 2 Requirement to treat imported and domestic products the same

Article III of the GATT 1994 provides for national treatment. In essence, this means that an imported and domestic like product must be treated equally and be subject to the same taxes and regulations. No measures may be introduced, other than normal customs duties, to “afford protection to domestic production”.⁹³

Although there are several paragraphs to Article III of the GATT 1994, two paragraphs are of particular importance: (a) paragraph 2, which provides that the imported product “shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products”; and (b) paragraph 4, which provides that the imported product “shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.”

Vinti argues that as the anti-dumping law does not apply to domestic firms in the sense that a domestic firm would only be subject to the Competition Act, as opposed to an exporter that would be subject to both the Competition Act and the anti-dumping provisions of the ITA Act and the Anti-Dumping Regulations, this would violate Article III:2 of the GATT 1994.⁹⁴ I concur. The same would apply as regards the imposition of measures by the Competition Commission, as these would violate Article III:4 of the GATT 1994.

4 Conclusion

Should a situation arise in which the provisions of the Competition Act on price discrimination or sales below cost are applied against an exporter that is dumping, this would result in a double remedy, which

⁹³ Art III.1 of the GATT 1994.

⁹⁴ Vinti (2019) 208.

would be unfair.⁹⁵ However, there are a number of reasons why it is not foreseen that such a double remedy would ever be applied.

Firstly, the Competition Act refers to price discrimination by a dominant firm, that is, a firm with at least 35 per cent market share. It has been shown that in South Africa’s five most recently completed anti-dumping investigations, imports in total seldom met that threshold and that such imports were shared between several exporters. Therefore, there are seldom, if ever, a dominant foreign supplier, with the result that this provision in the Competition Act would not find application.

Secondly, there is a distinct difference in the meaning of “sales below cost” in the Competition Act and in the ITA Act. In the Competition Act, this is restricted to sales below average avoidable or average variable (marginal) costs, whereas under the ITA Act it relates to sales below total cost of production and sale. However, sales at a loss under the ITA Act and the Anti-Dumping Agreement must meet several tests before they may be excluded from the margin of dumping determination. Additionally, as with the price discrimination test, under the Competition Act, this provision only finds application if such sales are made by a dominant firm.

Thirdly, South Africa has incurred international and domestic obligations under Article VI of GATT 1994, and international obligations under the Anti-Dumping Agreement. These obligations include that no remedy other than a provisional duty, a definitive duty and a price undertaking may be imposed “against” dumping. Accordingly, even if a dominant foreign supplier were to practice price discrimination (dumping) in respect of sales to South Africa, the Competition Act would still not find application. Alternatively, if a double remedy were applied, South Africa’s trading partners would have recourse to dispute settlement and arbitration under the WTO. Finally, the application of both the Competition Act and anti-dumping legislation to an exporter, but not to a domestic producer, would also be a violation of South Africa’s obligations under Article III of GATT 1994, which is part of our domestic legislation.

95 Vinti (2019) 208.