Making fair comparisons in anti-dumping investigations: *Lucky Cement v ITAC* (2022/048142) [2025] ZAGPHHC 243 (7 March 2025)

1 Introduction

In South Africa, anti-dumping investigations are governed by the International Trade Administration Act 71 of 2002 (ITA Act) and the Anti-Dumping Regulations (GN3197 in GG25684 of 14 November 2003) (ADR), and anti-dumping investigations are conducted by the International Trade Administration Commission (ITAC) (s 16(1)(a) of the ITA Act). Dumping takes place where the export price of a product is lower than the normal value of the like product (s 1(2) of the ITA Act), typically measured as the domestic selling price in the exporting country (s 32(2)(b) of the ITA Act). This is not a straightforward comparison and the Commission must make a fair comparison between the normal value and the export price. However, how this comparison must be made and what, how and when adjustments should be considered, and who should request them, can become quite contentious.

Holland-Muter J recently considered the issue and provided some clarity to parties in how to address adjustments in future investigations in South Africa, based on South African law, although this differs from international law.

2 Legal framework

The ITA Act provides that ITAC must make 'reasonable allowance for differences in conditions and terms of sale, differences in taxation and other differences affecting price comparability' when it determines the margin of dumping (s 32(2)(3) of the ITA Act). ADR 11.1 provides more guidance, providing that

> Adjustments shall be made in each case, on its merit, for differences which affect price comparability at the time of setting prices, including, but not limited to –
> (a) conditions and terms of trade;
> (b) taxation;
> (c) levels of trade;
> (d) physical characteristics; and
> (e) quantities.

The ADR also clearly spell out that it is the responsibility of the foreign producer to submit evidence of the adjustments it wishes to be made to ITAC and that such adjustments 'should' be requested in parties' 'original response' to the exporter questionnaire (ADR 11.2). The request for adjustments must be substantiated, verifiable, relate directly to the sale in question, and must have impacted prices at the time such prices were set (ADR 11.2).

How to cite: Brink 'Making fair comparisons in anti-dumping investigations: *Lucky Cement v ITAC* (2022/048142) [2025] ZAGPHHC 243 (7 March 2025)' 2026 *De Jure Law Journal* 29-34
http://dx.doi.org/10.29053/2225-7160/2026/v59a3

In *Wheelbarrows*, Qingdao Youhe, an exporter, indicated that it did not sell the 'like product' on its domestic market and proposed that the Commission use export sales to a third country to determine its normal value. However, the Commission found that while it did not sell the same model on its domestic market, it did sell other wheelbarrows on its domestic market. Qingdao Youhe indicated that the wheelbarrows sold in China were much bigger than those sold to South Africa and that this affected both costs and prices (ITAC *Report 502 Investigation into the alleged dumping of wheelbarrows from the People's Republic of China (China): Final determination* (2015.07.31), 30 (*Wheelbarrows*)).

These cost and price differences notwithstanding, ITAC refused to make adjustments for physical differences, finding that the exporter had not specifically claimed such adjustments in its original response (*Wheelbarrows*, 30-33), even though it had provided detailed cost information for all models and ITAC had verified those costs (*Wheelbarrows*, 31), indicating that ITAC was fully aware of the cost differences. This resulted in a significant (32.2 per cent) margin of dumping, when there may not have been any dumping in fact. Brink has previously indicated that ITAC's approach to adjustments is inconsistent and illustrated that with reference to the different outcomes in the *Wheelbarrows* and *Frozen Bone-in Portions* (ITAC *Report 492 Investigation into the alleged dumping of frozen bone-in portions of fowls of the species Gallus Domesticus, originating in or imported from Germany, the Netherlands and the United Kingdom: Final Determination*) investigations (Brink 'Anti-Dumping in Southern Africa', in Kugler and Sucker *International Economic Law: (southern) African perspectives and priorities*, 2021, 323-325). Brink further indicated the typical adjustments ITAC would make to both the normal value and the export price (*ibid*, 325-326. See Brink *Anti-Dumping and Countervailing Investigations in South Africa*, 2002, 75-102, for a detailed discussion on adjustments).

3 High Court's analysis of adjustments

In *Lucky Cement v International Trade Administration Commission* (2022/048142) [2025] ZAGPHHC 243 (7 March 2025) (*Lucky Cement*) the High Court had the opportunity to consider different parties' rights and obligations related to adjustments. Holland-Muter J set out the requirements of the ADR (par. 22) and confirmed that the substantiated adjustments should be requested in exporters' original response to the questionnaire (par. 23). He noted the adjustments ITAC granted and rejected (pars. 36-38) and confirmed that ITAC had discretion in this regard, which the court would be reluctant to interfere with, even if the court would have reached a different view (par. 40). The applicant argued that if only the three largest adjustments (on sales tax, excise duty and packaging) were granted, the margin of dumping would be less than half the anti-dumping duty that was applied (par. 54). However, the court found that the applicant could only succeed if the applicant could 'point out an established verifiable and uncontested fact that ITAC got wrong' (par. 58) and that it had failed to do this. This appears to open the door

to future reviews if an applicant could prove that ITAC's calculation of an adjustment is factually incorrect. While this is a positive finding, the court then closed the door by finding that the applicant 'has to show that ITAC acted *unlawfully* and not merely reached a wrong conclusion' (par. 59). It is not clear whether showing that a calculation is factually incorrect would make a finding 'unlawful'.

More importantly, Holland-Muter J finds that the request for these adjustments was not included in the original response to the exporters' questionnaire, nor was it shown that they were directly related to the sale (par. 60), and that the adjustments were not substantiated (par. 61). He specifically rejected the applicant's argument that it did not have to 'expressly' request the adjustments, finding not only that the regulations are clear in this regard, but also that 'there is no authority that it is permissible to allow a person to rely on so-called impliedly request to allow an adjustment' (sic) (par. 62). With this, Holland-Muter J by implication finds that a review requested by the exporter in *Wheelbarrows* would also have failed, despite the significant differences between the domestically sold and exported products.

It is clear that the decision is fully in line with the provisions of the ADR and in this regard the judgement cannot be faulted. However, it is important to consider international law, since South Africa, as a WTO Member, is bound by the provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Anti-Dumping Agreement) (*International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 CC, par. 25; *Progress Office Machines CC v South African Revenue Services and Others* 2008 (2) SA 13 (SCA), para 6).

4 International law of ensuring a fair comparison

Article 2.4 of the Anti-Dumping Agreement provides that a fair comparison must be made between the normal value and the export price for differences that affect price comparability, including for 'differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.' It further requires that investigating authorities must indicate to parties what information they have to submit to ensure a fair comparison and that an unreasonable burden may not be placed on the exporters.

A WTO panel has indicated that the Anti-Dumping Agreement does not prescribe how the fair comparison is to be made, that the investigating authority is free to decide on the methodology, and that although the obligation was on the authority to ensure a fair comparison, interested parties also incur an obligation in this process (Panel Report, *European Union – Anti-Dumping Measures on Certain Footwear from China*, WT/ DS405/R, adopted 22 February 2012, DSR 2012:IX, p. 4585 (*EU – Footwear*), par. 7.281). Another panel indicated that it is the

investigating authority that carries the obligation to ensure a fair comparison 'and it is therefore up to them to "make allowance" for differences when making a comparison.' At the same time, the party seeking an adjustment has 'to "demonstrate" that there is a difference and that it affects price comparability,' including by 'substantiating, "as constructively as possible", their requests for adjustments. Failing this, there is no obligation for the authority to make an adjustment' (Panel Report, *Morocco – Definitive Anti-Dumping Measures on School Exercise Books from Tunisia*, WT/DS578/R and Add.1, circulated to WTO Members 27 July 2021, appealed 28 July 2021 (*Morocco – Exercise Books*), par. 7.116). While this would appear to support Holland-Muter J's verdict in *Lucky Cement*, the panel then went further, and this is where the South African interpretation diverts from international law, by indicating that the process of ensuring a fair comparison 'which is likely to continue throughout the investigation' can be viewed 'as a "dialogue" between the authority and interested parties. *The distribution of the burden of proof between the authority and the interested parties is the same*, regardless of the method used by the authority to "make allowance" for differences affecting price comparability' (*Morocco – Exercise Books,* par. 7.117; own emphasis). This panel agreed with an earlier panel that there was no obligation on an exporter to request an adjustment in its initial questionnaire response (*Morocco – Exercise Books*, par. 7.125, with reference to Panel Reports, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ('HPSSST') from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ('HPSSST') from the European Union*, WT/DS454/R and Add.1 / WT/DS460/R, Add.1 and Corr.1, adopted 28 October 2015, as modified by Appellate Body Reports WT/DS454/AB/R / WT/DS460/AB/R, DSR 2015:IX, p. 4789 (*China – HP-SSST (Japan) / China – HP-SSST (EU)*), para. 7.83). The same panel also stressed the importance of a 'dialogue' between the investigating authority and the exporter, whereby the authority must specify the information it requires in support of adjustments once it becomes aware of differences that affect price comparability (*Morocco – Exercise Books*, par. 7.117).

The Appellate Body has further indicated that Article 2.4 specifically provides that the necessary adjustments must be 'made *in each case, on its merit*', indicating that the requirement for making adjustments 'must be assessed in light of the specific circumstances of each case.' (Appellate Body Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/AB/R and Add.1, adopted 26 October 2016, DSR 2016:VI, p. 2871, para. 6.87.)

At the same time, it is clear that the party alleging price differences must, at some point in the investigation, substantiate its request for adjustments 'as constructively as possible' and that without this information, the authority is under no obligation to make an adjustment (Appellate Body Report, *EC – Fasteners (China)*, para. 488, quoting Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted

18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R, DSR 2003:VII, p. 2701 (*EC – Tube or Pipe Fittings*), para. 7.158).

Thus, regardless the wording of the ADR, under international law ITAC cannot demand that all requests and substantiations for adjustments be made in an exporter's initial questionnaire response. This follows from the fact that ITAC and parties may have differing views on the comparability of products, as was evident in *Wheelbarrows*, and that a party should have the opportunity to claim and present information on adjustments at a later stage in the investigation if it becomes evident that the investigating authority would treat the products as like products capable of being compared if the necessary adjustments were made (*Morocco – Exercise Books*, par. 7.123). Yet another panel indicated that the obligation to make adjustments for differences that affect price comparability 'means at a minimum that the authority has to evaluate identified differences in physical characteristics to see whether an adjustment is required…' (Panel Report, *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R, adopted 5 November 2001, DSR 2001:XII, p. 6241 (*Argentina – Ceramic Tiles*), par. 6.113). The panel also indicated that it was for the authority to indicate in each instance what information the exporter should provide to substantiate an adjustment claim (*Ibid*, par. 6.113; see also Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted 1 October 2002, DSR 2002:VII, p. 2667, par. 7.352; *Morocco – Exercise Books*, par. 7.116). Likewise, in finding that the European Communities had acted consistently with the Anti-Dumping Agreement, the panel noted that the exporter had an opportunity throughout the investigation 'to substantiate its claimed adjustment' (Panel Report, *EC – Tube or Pipe Fittings*, par. 7.178).

All of this indicates that as soon as the authority becomes aware of differences that affect price comparability, it has the obligation to alert the exporter of the information required to prove the level of adjustment to be made and the exporter should then have an opportunity to submit the relevant information in that regard. This is regardless of when the authority becomes aware of such differences. Accordingly, South Africa's legislation shows a major divergence from its international obligations. This would leave it vulnerable to being challenged in a dispute before the WTO Dispute Settlement Body.

5 Conclusion

One cannot fault Holland-Muter J in finding that the ADR clearly provide that the request for adjustments must 'normally' be made in the exporter's original response to the exporter questionnaire and that such request must be substantiated. Indeed, while section 233 of the Constitution of the Republic of South Africa 108 of 1996 requires that '[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with

international law over any alternative interpretation that is inconsistent with international law', when there is a clear divergence between municipal and international law, it remains the municipal law that must be interpreted.

However, what this verdict shows is that the South African legislation in not in line with South Africa's international obligations. It is therefore proposed that the ADR be amended to take on board the various WTO Appellate Body and panel interpretations of the requirement for a fair comparison between the normal value and the export price.

Gustav Brink
BCom LLB LLD (UP)
Department of Mercantile Law, University of Pretoria