The determination of injury in South African anti-dumping investigations: recent approaches

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Abstract

The WTO's Anti-Dumping Agreement operates as an exception to its member's core obligations with respect to non-discrimination. However, anti-dumping measures can only be applied if the relevant investigating authority has determined that the dumped imports have caused or are causing injury to the domestic industry. Accordingly, injury and causality determinations are fundamental in anti-dumping investigations. In the last WTO consultation involving South Africa, Brazil challenged South Africa's anti-dumping procedures as regards the injury determination and the consequent demonstration of a causal link between the dumped imports and the injury caused to the SACU industry. This paper analyses the most recent investigative procedures of the ITAC against the backdrop of settled WTO jurisprudence, and examines whether the ITAC, the investigating authority for anti-dumping, has been able to rectify the *lacunae* raised by Brazil, or whether it has continued to commit the same mistake in its subsequent investigations.

INTRODUCTION

In order to foster free and fair trade among nations, national laws governing anti-dumping have recently assumed a significant place in international law. Accordingly, national anti-dumping law must conform to the disciplines set out in the World Trade Organisation's (WTO) Anti-Dumping Agreement

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(AD Agreement),[1] which represents the relevant international law in this regard. The AD Agreement prescribes rules and procedures to be adhered to by the respective investigating authorities when investigating and imposing anti-dumping duties on dumped imported products. However, these must be read together with article VI of the General Agreement on Tariffs and Trade (GATT),[2] the predecessor of the WTO, which defines the circumstances under which an imported product is to be considered to have been dumped.[3] The mere existence of these circumstances does not authorise national authorities to impose anti-dumping duties, unless they have determined either the existence of material injury or the threat thereof, which has been caused by the dumped import, and which has also had an impact on the domestic industry. In other words, investigating authorities must determine: i) the existence of injury or threat to injury caused to the domestic industry; and ii) whether such injury or threat has been caused by the dumped imports.[4] Therefore, if a WTO member is aggrieved by the manner in which an anti-dumping investigation resulting in the imposition of provisional or definitive anti-dumping duties, has been conducted by the national investigating authority of any member state, it may request consultations and the subsequent formation of a panel under the Dispute Settlement Understanding (DSU), in order further to investigate such an imposition of duties.[5]

South Africa has regularly used anti-dumping measures. Anti-dumping laws in South Africa reached their centennial year in 2014.[6] Currently anti-dumping is governed by the International Trade Administration Act, 2002,

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1 Agreement on Implementation of art VI of The General Agreement On Tariffs And Trade 1994, (GATT) Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, the legal texts: the results of the Uruguay round of multilateral trade negotiations 284 (1999), 1868 UNTS 279, 33 ILM 1125 (1994) (hereafter AD Agreement).

2 The General Agreement on Tariffs and Trade, which was the predecessor to the WTO, regulated dumping via art VI. It permitted the imposition of anti-dumping duties, but was nevertheless unclear about *inter alia* domestic industry, determination of injury and procedure for levying such duties. See, GATT, Annex 1A, The Legal Texts: The Results of the Uruguay Round of the Multilateral Trade Negotiations (15 April 1994).

3 *Id* at art VI.1.

4 Article 3 of the AD Agreement.

5 A WTO member who is aggrieved with the manner in which the investigating authority of another member conducted the anti-dumping investigation, may then approach the WTO Dispute Settlement Body (DSB) under the provisions of art XXIII of the GATT with respect to nullification and impairment of benefits accruing to it.

6 South Africa is one of the oldest countries in the world to enact legislation on anti-dumping. Canada, Australia and New Zealand were the other three countries to enact an anti-dumping law prior to South Africa. SeeViner *Dumping: a problem in international trade* (1923) 209–210 (1966 repr).

(ITAA)[7] and its Anti-Dumping Regulations, 2003, (ADR).[8] The International Trade Administrative Commission (ITAC) is the authority responsible for the investigation of dumping in the domestic industry and the determination of whether dumping has caused an injury to the domestic industry. Accordingly, the procedures adopted by the ITAC to establish an injury and its consequent impact on the domestic industry must comply with the precepts of the AD Agreement. However, the manner in which the ITAC undertakes the determination of dumping has often proved contentious and has been challenged by foreign governments in four disputes before the WTO.[9] None of these disputes, however, progressed beyond the consultation stage.

This paper examines recent trends and the approach adopted by the ITAC in anti-dumping investigations. It seeks to analyse the extent to which the injury standards prescribed by the AD Agreement have been disregarded, which would render the investigations inconsistent with the principles of the WTO. The circumstances under which a product is to be considered to have been dumped as per the GATT read with the AD Agreement, are set out by highlighting the requirements for proving an injury caused to the domestic industry and its impact on the latter. The corresponding provisions on dumping and injury determination, in general, in South African legislation and its pertinent regulations are identified. I then highlight the *lacunae* in the ITAC's procedures, to which Brazil objected in the WTO consultations with South Africa.[10] I therefore scrutinise the approach adopted by the ITAC in anti-dumping investigations post *Poultry (Brazil)*,[11] with respect to injury and causality determinations, against the backdrop of the WTO's

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7 International Trade Administration Act 71 of 2002.

8 International Trade Regulations N3197 of 2003 in *Government Gazette GG* 25684 of 14 November 2003. Even though Proposed Amendments to the Anti-Dumping Regulations 2003 were published in 2005, they are not yet promulgated in to a law. This leaves the current Anti-Dumping Regulations of 2003 as the law.

9 See *South Africa-Antidumping Duties on Certain Pharmaceutical Products from India*, DS168 (13 April 1999); *South Africa-Definitive Antidumping Measures on Blanketing from Turkey*, DS288 (15 April 2003); *South Africa-Antidumping Measures on Uncoated Woodfree Paper*, DS378 (16 May 2008); and *South Africa – Anti-Dumping Duties on Frozen Meat of Fowls from Brazil*, DS439 (25 June 2012). Although South Africa has been one of the founding Members of the WTO, its participation in the WTO DSU has been dismal. The above-mentioned are the only four disputes it has been involved in, to date.

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

11 See ITAC *Investigation into the Alleged Dumping of Frozen Meat of Fowls of the Species Gallus Domesticus, Whole Bird and Boneless Cuts Originating in or Imported from Brazil: Preliminary Determination* Report 399 (30 January 2012) (*Poultry-Brazil*).

jurisprudence. In the last part of the paper, I analyse the impact of the ITAC's causality determinations on the validity of its anti-dumping investigation as a whole, before offering some concluding remarks.

'DUMPING' UNDER THE WTO DISCIPLINES

Article VI of the GATT 1994, prescribes the circumstances under which a product will be considered to have been dumped into the commerce of another contracting party. However, these must be read together with the provisions of the AD Agreement, which stipulate the principles and procedures to be followed by the respective investigating authorities when investigating an alleged case of dumping. Accordingly, the GATT's definition[12] is the most authoritative legal definition of dumping,[13] and provides that

> for the purposes of this article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another
> (a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,
> (b) in the absence of such domestic price, is less than either
> (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or
> (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.[14]

This definition is complemented by, and must be read together with, article 2.1 – the interpretation clause – of the AD Agreement.[15]

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12 Viner's definition of dumping provides a foundation for the legal definition. Viner defines dumping, for the purpose of economics as 'a form of price discrimination where differential pricing is adopted to sell different units of the same good at different prices in different markets'. Viner n 6 above at 35–68.

13 This is because the definition finds place in a multilateral Agreement, imposing an onus on its members to restrict the respective definitions of 'dumping' in their domestic laws within the parameters of art VI.1 of the GATT read along with art 2.1 of the AD Agreement.

14 Article VI.1 of the GATT.

15 See Panel Report *United States – Final Anti-dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R (30 April 2008) par 96 (*US-Stainless Steel*). The Appellate Body found that the definition of 'dumping' has been provided in art 2.1 of the WTO Anti-Dumping Agreement. Accordingly, art 2.1 of the AD Agreement provides that: 'For the purpose of this Agreement, a product is to be considered as 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

Therefore, dumping is considered to have occurred when, on the basis of a comparison between the price at which the product is sold in the exporting member[16] (also referred to as the home market price or the normal value) in the ordinary course of trade,[17] and the price at which the 'like' product is sold to the market of the importing member[18] (referred to as the export price), the former exceeds the latter.[19] Such a comparison between normal value and export price must, however, be between products that are 'like', or, in other words, products that are identical or alike in all other respects[20]

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ordinary course of trade, for the like product when destined for consumption in the exporting country'.

16 Also see art 2.2 of the AD Agreement, which alternatively permits the investigating authorities of its members to make use of 'constructed normal values' in order to perform a price comparison between the normal value and the export price in its investigation process. Accordingly, constructed normal value may only be used to determine dumping when there are no sales of the like product in the ordinary course of trade in the exporting country's domestic market; or a particular market situation; or low volume of sales in the exporting country's domestic market does not permit a proper comparison of such sales. In such circumstances, the margin of dumping may be determined by comparing the comparable price of the like product when it is exporting to a third country; or on the basis of the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and profit.

17 Neither art VI of the GATT, nor the AD Agreement has defined the term 'ordinary course of trade'. On the contrary, only circumstances in which sales below costs would not be considered to be in the ordinary course of trade have been delineated in the AD Agreement. Accordingly, when such sales (below cost) have occurred i) during extended periods of time; ii) in substantial quantities; and iii) at prices that do not provide for recovery of all costs within a reasonable period of time; they would not be considered to be in the ordinary course of trade. See art 2.2.1 of the AD Agreement. *Cf* art 2.2 of the Anti-Dumping Agreement. Hence, if it were found that more than twenty per cent of the sales are made at a loss over a period of more than six months, with the full expectation that these costs would be recouped in a short period, such sales would be in the ordinary course of trade. See also Panel Report *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway* WT/DS337/R (16 November 2007) pars 7.274–7.277 (EC-Salmon); and Appellate Body Report *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* WT/DS184/AB/R (24 July 2001) pars 139–140. *(US- Hot-rolled Steel)*

18 See art 2.3 of the AD Agreement, which stipulates the use of a constructed export price, when there is either no export price; or when it appears to the respective investigating authorities of its members that such an export price is unreliable. Consequently, the export price may be constructed on the basis of the price at which the imported products are first re-sold to an independent buyer, or if the products are not re-sold to an independent buyer, or not re-sold in the condition as imported, on such reasonable basis as the authorities may determine.

19 See WTO Panel Report *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R (22 December 2000) par 6.90–91 (*US-Stainless Steel*).

20 Article. 2.6 of the Anti-Dumping Agreement, which defines 'like' products for the purpose of the AD Agreement. See, Panel Report, *European Communities-Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China* WT/DS397/R (3 December 2010) par 7.267–268. Also see, Panel Report *European Communities – Anti-*

to the product under consideration. The difference between the normal value and the export price is considered to constitute the margin of dumping.[21]

The mere introduction of a product into the territory of another country at a price lower than the comparable price in the exporting country, in the ordinary course of trade when that product is destined for consumption in the exporting country, does not in itself permit the investigating authorities of the respective members to impose anti-dumping duties. This means that both provisional and definitive anti-dumping duties may only be imposed when the respective authorities have determined that the dumped imports have been causing or are threatening to cause injury to the domestic industry of the importing country.

The 'injury' requirements under the Anti-Dumping Agreement

The determination of injury and its consequent impact on the domestic industry remain fundamental to anti-dumping investigations. The AD Agreement provides that the term 'injury' means 'material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry'.[22] Thus, neither article VI of the GATT, nor the AD Agreement, has specifically defined the term 'injury'.[23] On the contrary, they merely impose obligations on the investigating authorities of members for the purpose of determining if the dumped imports have indeed caused such injury to the domestic industry.

Dumping Measure on Farmed Salmon from Norway WT/DS337/R (16 November 2007) par 7.52 (*EC-Salmon*). The jurisprudence of the concept of 'likeness' evolved in the case of *Border Tax Adjustment* wherein the Panel laid down the guidelines to determine 'like' goods by following four general criteria: a) the property, nature and quality of the products; b) the end uses of the product; c) consumer tastes and habits and d) tariff classification of the products. Hence, the physical properties, the extent to which the product may be perceived as serving the same end use, the extent to which consumers perceive and treat the products as an alternative and the international classification of the products for tariff purposes is what ought to be taken into account. See, Working Party on *Border Tax Adjustments*, BISD 18S/97 par 18.

21 Panel Report *European Communities – Anti Dumping Duties on Imports of Cotton-Type Bed Linen from India* WT/DS141/RW (29 November 2002) par 51.

22 See footnote 9 to art 3 of the AD Agreement.

23 This is because the AD Agreement merely refers to injury as 'material injury', 'threat to material injury' or 'material retardation of the establishment of a domestic industry'. It does not specifically define what 'injury' means.

Article 3.1 of the AD Agreement sets out general, yet essential, obligations for investigating authorities when determining the existence of injury to the domestic industry; while paragraphs 2 to 8 of article 3 are more specific.[24]

Article 3.1 provides that material injury should be determined on the basis of

> … positive evidence and an objective examination of both the volume of the dumped imports, their effect on prices in the domestic market for like products, and their consequent impact on the domestic producers of such products.[25]

In this context, paragraphs 2 and 4 of article 3 stipulate specific obligations that investigating authorities must fulfil in determining, respectively, the volume and effect of dumped imports,[26] and their consequent impact on the domestic producers of such products.[27]

Consequently, the volume of the dumped imports must be considered on the basis of whether there has been a 'significant' increase in the dumped imports, either absolute or relative, when compared with the production or consumption in the importing member. At the same time, the effect of the dumped imports on the domestic prices of the products must be considered on the basis of whether there has been a 'significant price undercutting' in comparison with the price of the like product from the importing member; or whether the dumped imports have 'significantly' depressed or suppressed the domestic industry's prices. As a result, the determination of injury in terms of its effect on domestic prices must only be taken into account by the investigating authority if it is found to be 'significant' in terms of price undercutting, price suppression, or price depression.

On the other hand, paragraph 4 of article 3 sets out the obligations for assessing the impact of the dumped imports on the domestic industry as a part of the determination of the material injury caused to such an industry. It consequently stipulates a list of fifteen factors and indices that may have

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24 See Panel Report, *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 106 (*Thailand H-Beams*); Panel Report *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey* WT/DS211/R (8 August 2002) par 7.102 (*Egypt-Steel Rebar*)

25 See *EC-Bed Linen*, par 6.154–6.159.

26 Article 3.2 of the AD Agreement.

27 *Id* at art 3.4.

a bearing on the state of the industry.[28] It mandates investigating authorities to evaluate several factors including[29]

> the actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth and ability to raise capital on investments.[30]

In various disputes, the Panel has confirmed that article 3.4 imposes an obligation on investigating authorities to evaluate *each* of the fifteen factors listed,[31] and further implies the analysis of the data in terms of each factor individually as well as in relation to the other factors.[32] In this light, merely characterising a factor's relevance or irrelevance would not amount to evaluating that factor.[33]

Article 3.6 further provides that if in assessing the effect of the dumped imports on the domestic industry, an investigating authority is unable to determine the injury caused to the domestic industry due to its inability to identify separately the information of the production of the like product on the basis of, inter alia, the production process and the producer's sales and profit, it may consider information relating to the production of a broader group of products which includes the like product. In other words, article 3.6 does not permit the investigating authorities to use either the information of the production of a product which is narrower than the like product, or the information of the production of a product which is limited to an

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28 The Panel, in *Egypt-Steel Rebar*, clarified that the term 'having a bearing on' means 'relevant to, or having to do with the state of the industry'. Accordingly, the fifteen factors listed in art 3.4 do not depict the effect on the domestic industry, but rather describe the state of the domestic industry.

29 The Panel, in *EC-Bed Linen*, stated that the use of the term 'including' emphasises that while there may be other relevant factors that have a bearing on the state of the industry, the evaluation of the fifteen factors enlisted in art 3.4 is mandatory.

30 Article 3.4 of the AD Agreement.

31 See, for instance, Panel Report *Thailand – H-Beams* par 7.236; Panel Report *Egypt –Steel Rebar* WT/DS211/R (8 August 2002) par 7.42–7.45; and Panel Report *European Communities –Bed Linen* WT/DS141/RW (29 November 2002) par 6.162*;* Panel Report *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil* WT/DS219/R (7 March 2003) (*EC-Tube or Pipe Fittings*).

32 See Panel Report *EC – Tube or Pipe Fittings* par 7.314–7.316.

33 *Ibid*. Also, Panel Report *Thailand –H-Beams* par 7.236

examination of injury to the portion of the domestic production of the like product.[34]

Consequently, while article 3.4 addresses the determination of injury, article 3.5 addresses causation and requires the investigating authorities to show a causal relationship between the dumped imports and the injury caused to the domestic industry by examining all the relevant evidence before it. In other words, investigating authorities must prove beyond a reasonable doubt, that the dumped imports are the reason for material injury to the domestic industry.[35] However, it additionally imposes a responsibility on investigating authorities to examine and ensure that the existence of 'other known factors' – factors other than the dumped imports – are not contributing to the injury caused to the domestic industry. To this end, it provides a list of factors which could potentially contribute to the injury caused to the domestic industry. These include,

> the volume and prices of the imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.[36]

In *United States – Anti-Dumping Measures on Certain Hot-Rolled Products from Japan*, the Appellate Body stated that non-attribution of 'other known factors' causing an injury to the domestic industry must involve separating and distinguishing the injurious effects of factors other than the dumped imports.[37] Likewise, the need to separate and distinguish other known factors was confirmed by the Appellate Body in the *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb from New Zealand and Australia*, which stressed that the determination of injury to the domestic industry can only be made after the injurious effects caused by all the different causal factors have been separated and distinguished. This will

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34 See Panel Report *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States* WT/DS132/R (28 January 2000), par 7.157.

35 See art 3.7 of the AD Agreement, which mandates that *the determination of a threat to material injury shall be based on facts and not merely on an allegation, conjecture or remote possibility.*

36 Article 3.5 of the AD Agreement.

37 Appellate Body Report *US – Hot-Rolled Steel* pars 223–226.

reveal a genuine and substantial relationship of cause and effect between the dumped imports and the injury caused.[38]

Investigations aimed at determining the dumping of a product from more than one country, can therefore be conducted simultaneously only if the investigating authority has 'determined' that such 'a cumulative assessment of the effects of the imports is appropriate in the light of conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product'.[39]

The determination of a causal relationship between the dumped imports and the consequent injury, therefore, remains a *sine qua non* in anti-dumping determinations. Accordingly, neither provisional measures nor definitive anti-dumping duties can be imposed by investigating authorities unless the existence of this causal relationship has been determined on the basis of an evaluation of the factors set out in article 3.4. At the same time, the AD Agreement also mandates the investigating authority to determine whether 'other known factors' have contributed to the injury caused to the domestic industry.

DUMPING UNDER THE SOUTH AFRICAN LEGISLATION

As indicated, anti-dumping in South Africa is currently regulated by the ITAA, 2002, and the ADR, 2003, both of which were adopted in an attempt to comply with the international obligations governing anti-dumping investigations in the AD Agreement.[40] At the same time, Chapter 6 of the Customs and Excise Act, 1964, regulates the imposition of the anti-dumping duties in sections 55 and 55A of the Act.[41] Thus, despite the fact that the AD Agreement has not been formally promulgated by the South African Parliament,[42] the requirement that the ITAA, 2002, and the ADR, 2003, must

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38 Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb from New Zealand and Australia* WT/DS177/AB/R, WT/DS178/AB/R (1 May 2001) par 167.

39 Article 3.3 of the AD Agreement.

40 Both the Act and the Regulations are notified under the WTO laws. See WTO 'Notification of Laws and Regulations under Articles 18.5 and 32.6 of the Agreements' Committee on Anti-Dumping Practices and the Committee on Subsidies and Countervailing Measures G/ADP/N/1/ZAF/2 (20 January 2004); read along with General Notice 3197 of 2003.

41 Act 91 of 1964. Also see generally, Osode 'The scope of interested parties' rights to procedural fairness in the enforcement of South African anti-dumping law: *Board on Tariffs and Trade and Others v. Brenco Inc. and Others*' (2002) 16 *Speculum Juris* 290.

42 See s 231(2) of the Constitution, which provides that 'an international Agreement binds the Republic (of South Africa) only after it has been approved by resolution in both the

conform to the AD Agreement has been reinforced by the South African Constitution[43] and subsequent cases: *The Chairman of the Board of Tariffs and Trade v Brenco;*[44] *Progress Office Machines v SARS*;[45] and *International Trade Administrative Commission v SCAW (Pty) Ltd.*[46] That said, the application of South African anti-dumping legislation as stipulated in the ITAA, 2002, and the ADR, 2003, read together with the relevant provisions of the Customs and Excise Act 91 of 1964, also extend their application to the Southern African Customs Union (SACU) – Botswana, Lesotho, Namibia and Swaziland (commonly referred to as the BLNS countries), in addition to South Africa.[47] The determination of injury caused to the domestic industry is then understood to mean SACU industry for the purpose of investigating dumping.[48] Consequently, the ITAC investigates and determines the existence of dumping, the injury caused by dumped

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National Assembly and the National Council of Provinces, unless it is an Agreement of a technical, administrative or executive nature, referred to in subsection 3'. See also Debates of the Senate of South Africa, column 554 (6 April 1995); Debates of the National Assembly of South Africa, column 642 and 653 (6 April 1995); and Brink 'Anti-See dumping in South Africa' (July 2012) *Tralac Working Paper No. D12WP07/2012* 4.

43 Section 233 of the Constitution of South Africa 1996 (the Constitution). Besides the South African Constitution, the Promotion of Access to Information Act 2 of 2000, along with the Promotion of Administrative Justice Act 3 of 2000, also impact anti-dumping investigations. Accordingly, s 36 (1)(b) and (c) of the former provides the right to access information held by either the State or individuals, unless it relates to '*financial, commercial or scientific or technical information…of a third party, disclosure of which would be likely to cause harm to the commercial or financial interests of that party*.' The latter Act provides for administrative action on the basis of natural justice. Interestingly, the Reports of the Commission also indicate that the investigation procedure is conducted in accordance with the ITAA, 2002, and the Anti-Dumping Agreement.

44 2001 4 SA 511, which clarified that the obligations stipulated in the AD Agreement offer some assistance to the investigating authorities of South Africa while investigating dumping in the domestic industry in the country.

45 2007 SCA 118 par 6, which clarified that the passing of the ITAA 2002 and the ADR 2003 indicated the intention of the South African Parliament to give effect to the provisions of international treaties (in this case, being the AD Agreement), provided the latter is in conformity with s 233 of the Constitution. See also International Trade Centre Business *Guide to trade remedies in South Africa and the Southern African Customs Union* (2003) at 3.

46 CCT 59/09 (2010) ZACC 6 par 2.

47 The SACU has been defined by the Customs and Excise Act 91 of 1964 as a 'state or territory with the government of which an Agreement has been concluded under Section 51 of the Customs and Excise Act 1964.' See also, ITAC *Investigation into the Alleged Dumping of Disodium Carbonate (Soda Ash) Originating in or Imported from the United States of America (USA): Final Determination* Report 476 (26 May 2014), in which the Minister of Trade and Industry was requested to direct the ITAC to investigate alleged injury caused to the sole manufacturer of soda ash in Botswana, as a result of dumping of soda ash by exporters in the USA.

48 Brink 'South Africa' in Bienen *et al* (eds) *Guide to international anti-dumping practice* (2013) 521 at 522.

imports, and whether there is a causal relationship between the dumped imports and the injury caused to the SACU industry.[49]

In general 'dumping' is defined by the ITAA, 2002, to mean:

> The introduction of goods into the commerce of the Republic or the Common Customs Area 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.[50]

Therefore, a product is considered to have been dumped in the SACU industry, if the comparable price at which the 'like' products[51] are sold in the ordinary course of trade[52] in the exporting country, or in the country of origin (ie the normal value),[53] is higher than the price at which the goods are sold to the SACU industry, net of all taxes, discounts, and rebates actually granted and directly related to that sale (the export price).[54] Accordingly, the ITAA, 2002, also defines the terms 'export price' and 'normal value', and must be read together with the ADR, 2003, which in turn sets out detailed

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49 See art 4.3 of the AD Agreement, which permits customs unions that have been created in keeping with art XXIV: 8(a) of the GATT, to be considered as a domestic industry for the purpose of investigating dumping.

50 Section 1(1) of the ITAA.

51 The ADR's definition of 'like' products is based on the AD Agreement's definition of the term, and means products that are identical in all respects to, or having characteristics closely resembling those of the product under investigation.

52 ADR 8.2. While the ADR stipulates situations similar to the AD Agreement in terms of sales that cannot be considered to have occurred in the ordinary course of trade, it does not take into account of sales that would not be considered as being in the ordinary course of trade when they are '*at prices that do not provide for recovery of all costs within a reasonable period of time*.' In other words, even if twenty per cent of sales were made at a loss over a period of six months, with the full expectation that these costs would be recouped in a short period, these sales would nevertheless be considered as being outside the ordinary course of trade (being inconsistent with the AD Agreement's corresponding provision). Besides, the ADR additionally deems sales as not being made in the ordinary course of trade when they do not reflect 'normal commercial quantities': a stipulation not correspondingly reflected in the AD Agreement.

53 Section 32 (2)(b)(i) of the ITAA 2002 read along with ADR 8.1. Also See Section 32 (2)(b)(ii) of the ITAA 2002, which provides for the construction of the normal value in the absence of information pertaining to the normal value.

54 Section 32 (2)(a) of the ITAA 2002. Also see ADR 10, which provides for the construction of the export price.

guidelines for their evaluation.[55] Consequently, the difference between the normal value and the export price is accepted as the margin of dumping.[56]

Investigating authorities in the WTO member states are, however, not permitted to initiate anti-dumping investigations unless the domestic industry submits a written application evidencing not only dumping,[57] but also providing evidence that the domestic industry has been injured. This is done by establishing a causal relationship between the dumped imports the resulting injury.[58] In the following section I discuss how injury and causation are established under South African legislation.

Injury determinations under South African anti-dumping law

Regulations 13 to 16 of the ADR, 2003, provide for the determination of injury and causation. Therefore, while the ITAA, 2002, defines dumping, it must be read together with the relevant provisions in the ADR, 2003, in order to establish whether the dumped imports have indeed caused injury to the SACU industry.

As under the AD Agreement, the ADR, 2003, does not define the term 'injury' but merely defines 'material injury' as 'actual material injury, a threat of material injury, or the material retardation of the establishment of an industry'.[59] To determine the existence of material injury to the SACU industry, the ADR, 2003, mandates the ITAC to 'consider' whether there has been a significant price depression,[60] and/or price suppression[61] of equivalent SACU products.[62] Accordingly, while determining the existence of material

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55 See generally, Brink n 42 above at 15–16; and Brink 'The 10 major problems with the Anti-Dumping Instrument in South Africa' (2005) 39/1 *Journal of World Trade* 147 at 153–154, which analyses the inconsistencies that exist in the method of calculation of normal value and export price in comparison to the corresponding provisions in the AD Agreement, and the problems that these incompatibilities gives rise to.

56 ADR 12.1. Also see ADR 12.2, which provides for the calculation of the margin of dumping when there is more than one product under investigation.

57 Article 5.1 of the AD Agreement. Accordingly, a written application may be submitted either by the domestic industry itself, or on its behalf. Besides, investigating authorities may also initiate an investigation of dumping, in special circumstances, according to art 5.6 of the AD Agreement.

58 *Id* at art 5.2.

59 ADR 1.

60 *Ibid*. Price Depression is considered to have taken place when '*the SACU's ex-factory selling price decreases during the investigation period.*"

61 *Ibid*. Price Suppression is considered to have taken place when '*the cost-to-price ratio of the SACU industry increases, or where the SACU industry sells at a loss during the investigation period or part thereof.*'

62 ADR 13.1.

injury, the ITAC must further 'consider' whether there have been significant changes in the domestic performance of the SACU industry in terms of factors based on the AD Agreement's requirement that the dumped imports must have a bearing on the state of the industry.[63] Even though the requirements for determining material injury appear to be similar to and in line with the AD Agreement, the ADR, 2003, merely mandates the ITAC to 'consider' these factors, whereas the AD Agreement mandates an 'evaluation' of all the listed factors. While the AD Agreement requires the evaluation of injury caused to the domestic industry in terms of the 'actual and potential decline in sales', the ADR merely obliges the ITAC to 'consider' the injury caused to the sales volume.[64] This implies that the ITAC is not required to 'consider' the potential changes in terms of the decline in the price at which the domestic product is sold, which arise from dumping in the domestic industry. Rather, it would merely 'consider' whether dumping has impacted on the quantity of the dumped imports. Furthermore, there is no obligation on the ITAC to consider the 'magnitude of the margin of dumping' when it determines the impact of the dumped imports on the SACU industry[65] – a factor mandated by the AD Agreement when determining the impact of the dumped imports on the domestic industry.[66]

For the purpose of determining a causal relationship between the dumped imports and the injury to the domestic industry, the ADR obliges the ITAC to 'consider' all relevant factors, including

> (a) the change in the volume of dumped imports, whether absolute or relative to the production or consumption in the SACU market;
> (b) the price undercutting experienced by the SACU industry vis-à-vis the imported products;
> (c) the market share of the dumped imports;
> (d) the magnitude of the margin of dumping; and
> (e) the price of undumped imports available in the market.[67]

Interestingly, whereas the AD Agreement mandates investigating authorities to consider whether there has been 'significant' price undercutting by the

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63 ADR 13.2.
64 ADR 13.2(a).
65 Note that the 'magnitude of the margin of dumping' must only be 'considered' by the ITAC at the time of causality determinations under ADR 16.1, and not at the time of examining the impact of the dumped imports on the SACU industry.
66 ADR 13.2 read together with art 3.4 of the AD Agreement.
67 ADR 16.1.

dumped imports in comparison to the price of the like product in the domestic industry, the ADR merely requires the consideration of whether the SACU industry has been experiencing price undercutting[68] – irrespective of whether it is 'significant' or not.[69] Likewise, as regards the non-attribution of 'other known factors', the ADR provides that the ITAC 'consider' the 'other factors' that may contribute to the injury caused to the SACU industry, and so not attribute these to dumping.[70] Accordingly, the ITAC will only consider these 'other factors' if either the interested party has submitted information on such factors, or the ITAC itself has the information.[71] This appears to be in stark contrast to the AD Agreement which requires investigating authorities to 'examine' the 'other factors' and not to attribute these to dumping.[72]

ANALYSING RECENT APPROACHES BY THE ITAC IN CAUSATION DETERMINATIONS AND THEIR COMPATIBILITY WITH THE AD AGREEMENT

Vital differences between the AD Agreement and the ADR in terms of the requirements for determining injury caused to the domestic industry, and the subsequent establishment of a causal relationship between the dumped imports and the injury, has continued to elicit vigorous criticism of this aspect of the ITAC's procedure.

In this section I analyse recent ITAC approaches to the various facets of injury determination: comparable pricing; evaluation of relevant factors and indices; and causation against the backdrop of the latest WTO complaint against South Africa in which Brazil challenged the ITAC's procedure in imposing provisional duties, mainly on the ground that these violated the AD Agreement's requirements for causation.[73] Although definitive anti-dumping duties were never imposed as the Minister of Trade and Industry refused to

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68 ADR 1 defines 'price undercutting' as *'the extent to which the price of the imported product is lower than the unsuppressed selling price of the like product produced by the SACU industry, as measured at the appropriate point of comparison."*

69 ADR 16.1(b).

70 ADR 16.5, which lists the 'other factors' which are similar to, and based on the AD Agreements provision on non-attribution of other factors as listed in art 3.5. The 'other factors' include: the volume and prices of imports not sold at dumped prices; contraction in demand or changes in patterns of consumption; trade restrictive practices; developments in technology; other factors affecting SACU prices; the export performance of the SACU industry and the productivity of the SAM industry.

71 ADR 16.5.

72 Article 3.5 of the AD Agreement.

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

accept the ITAC's recommendation on the basis of issues raised by Brazil during the consultation process, the ITAC's procedure in its injury determination was inconsistent with relevant settled WTO rules. Accordingly, the extent to which the ITAC's procedures in the most recent disputes – *Cement (Pakistan); Poultry (EU)*; *Wheelbarrows (China)*; *Set Screws (China);* and *Threaded Rods (China)* – comply with settled WTO jurisprudence in this regard[74] in order to rectify the *lacunae* addressed by Brazil regarding the injury and causality requirements, will be discussed.

In *South Africa – Anti-Dumping Duties on Frozen Meat of Fowls from Brazil (South Africa – Poultry)*, Brazil approached the WTO's Dispute Settlement Body (DSB) to request consultations with South Africa to investigate, inter alia, how the ITAC had determined the injury caused to the SACU industry by the dumped imports, and imposed provisional anti-dumping duties on whole birds and boneless cuts from the former. Brazil's main contentions included that the ITAC had disregarded several of the AD Agreement's requirements on causation in terms of: i) the manner in which it performed a price comparison and subsequently determined price injury; ii) the evaluation of the injury factors; and iii) the determination of a causal link between the dumped imports and the injury caused to the SACU industry.[75] Accordingly, Brazil contended that the failure to respect these obligations as stipulated in the AD Agreement, meant that the ITAC had failed to conduct an objective investigation based on positive evidence of the volume of dumped imports and its effect on the prices in the domestic market.[76]

The determination of 'price injury' in proving a causal link

The determination of 'price injury' is the starting point for the establishment of a causal relationship between the dumped imports and the injury caused to the domestic industry. Accordingly, the determination by investigating authorities is used to assess the effect of dumped imports on the prices of like products in the domestic industry. Price injury is thus measured in terms of 'significant' price undercutting in comparison to the price of the like

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74 Although the rulings of the Panels and the Appellate Body do not *per se* have any precedential value in subsequent disputes, these do undoubtedly provide a guiding light to the DSB while deciding disputes. For this reason, the decisions provided by the Panel and the Appellate Body in previous disputes are as a matter of practice, relied upon while deciding upon similar matters before itself.

75 See ITAC *Investigation into the Alleged Dumping of Frozen Meat of Fowls of the Species Gallus Domesticus, Whole Bird and Boneless Cuts Originating in or Imported from Brazil: Preliminary Determination* Report 399 (2013) (*Poultry-Brazil*).

76 WTO *South Africa-Poultry* at 2.

product in the domestic industry, or in terms of 'significant' price depression or price suppression. In other words, investigating authorities must either prove 'significant' price undercutting, *or* price depression, *or* price suppression.[77] However, in considering whether the domestic industry has suffered significant price undercutting, it becomes important that the investigating authority perform an analysis of this factor by comparing the prices of the 'like' product in the domestic industry. The obligation imposed on investigating authorities to ensure comparable pricing for goods whose prices are being compared – *ie* the subject imports and the domestic like product – was confirmed in *China-Autos (US)*.[78] Therefore, even though article 3.2 does not specifically mandate the investigating authority to ensure price comparability, the need for an objective examination based on positive evidence requires that prices be compared.[79] In *China- GOES*, both the Panel and the Appellate Body confirmed the implications of price comparability.[80] While the former stressed the significance of price comparability in determining price undercutting,[81] the latter clarified that proper comparability between the dumped and the domestic like products, and also between the domestic like products *inter se,* was imperative in ensuring that the investigation was based on an objective examination of the effect of the dumped imports on domestic like products.[82] It added that price comparability would therefore further affect the determination of price depression and price suppression.[83] Similarly, in the *China – X-ray Equipment* dispute, the Panel confirmed that the failure to compare the prices of products at the same level of trade, with adjustments in the values,

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77 See Panel Report, *Korea – Anti-Dumping Duties on Imports of from Indonesia* WT/DS312/R (28 October 2005) *(Korea – Certain Paper)* par 7.253.

78 Panel *Report China-Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States* WT/DS440/R (23 May 2014) par 7.256.

79 *Id* at par 7.277.

80 Appellate Body Report *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States* WT/DS414AB/R (18 October 2012) (*China-GOES); and* Panel Report *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States* WT/DS414/R (15 June 2012).

81 Panel Report *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States* WT/DS414/R (15 June 2012) par 7.330.

82 Appellate Body Report *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States* WT/DS414AB/R (18 October 2012) (*China-GOES)* par 200.

83 *Ibid*.

would not result in an objective and unbiased analysis.[84] Price comparison therefore is a *sine qua non* or the determination of price undercutting.

In determining whether the dumped poultry products from Brazil were injuring the SACU industry in *Poultry – Brazil*, the ITAC divided the products into two groups: whole birds and boneless cuts. However, in further analysing the effect of these dumped products as regards price undercutting resulting from the dumping of whole birds, the ITAC failed to compare prices to establish the differences that might exist between the dumped imports and domestic whole birds. In other words, all types of whole bird were regarded as a single product, irrespective of whether each would command different prices. Likewise, in considering price undercutting resulting from boneless cuts, the ITAC failed to appreciate the difference in various types of boneless cut – such as drumsticks, thighs, breasts, and leg quarters – which would in turn result in differences in prices. On the contrary, it considered all types of whole bird and boneless cut as two different categories, without considering the differences that might exist individually between these and the effect this has on comparable pricing. The ITAC's methodology in performing price comparison was therefore inconsistent with settled WTO jurisprudence, which has established that product comparison must always take the differences in the product-mix into account.[85] For this reason, when comparing the price of a basket of goods over time, investigating authorities must have due regard to annual changes in the proportion of the product types making up the basket.[86] Therefore, simply because a broad basket of imported goods and a broad basket of domestic goods have been found to be 'like', does not imply that *each* of the goods in the domestic basket is 'like' *each* of the goods in the basket of the imported product.[87] Accordingly, the Panel, in *China-Broiler Products (US),* clarified that in situations where the investigating authority performs a price comparison on the basis of a 'basket' of products, it must ensure that the groups of products or transactions compared by both sides, are homogeneous

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84 Panel Report, *China-Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union* WT/DS425/R (26 February 2013) par 7.50 (*China -X-Ray Equipment*).

85 *Id* at par 7.57.

86 *Ibid*. Also see Panel Report *China-Autos (US)* par 7.281, in which the Panel stressed that the differences between the two basket of goods should prompt an objective decision maker to further inquire if those differences have affected prices, before undertaking a price effects analysis of the two basket of goods.

87 *Id* at 7.65; and *EC-Salmon,* par 7.13–7.76.

and sufficiently similar.[88] In *China-X-ray Equipment* the Panel further emphasised that the investigating authority's determination on the price of the dumped imports is 'so central' to the price effects analysis. This means that even if the latter's findings on the impact of the dumped imports is consistent, the flaws in determining the price effects would invalidate the overall finding on causation.[89]

At the same time, investigating authorities must consider whether the price undercutting, depression, or suppression resulting from the dumped imports, has been 'significant'. The Panel in *Thailand – H-Beams* clarified this provision by stating that it is not necessary for the investigating authority explicitly to state that the increase in the dumped imports has been 'significant'. It is enough that it appears from the report that the investigating authorities have considered that the increase in dumped imports has been 'significant' simply by taking this factor into account and giving a reasoned explanation for its determination.[90] Accordingly, the investigating authority must show that any of the three price effects of the dumped imports has been 'significant'.[91]

In *Poultry (Brazil)*, the ITAC analysed all three price effects set out in article 3.2. In determining the effect of the dumped whole birds on domestic like products, it found that the former had undercut the prices of the latter.[92] As regards dumped boneless cuts, the ITAC established similar undercutting and further that this had resulted in price suppression for domestic like products.[93] However, it failed to consider whether these effects were 'significant' and also offered no reasons to explain why the prices of the

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88 Panel Report *China-Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States* WT/DS427/R (2 August 2013) par 7.483 and 7.490 *(China – Broiler Products (US)).*

89 *Id* at par 7.251. Also See Panel Report *China-Autos (US)* par 7.327; and Panel Report *China – Measures Imposing Anti-Dumping Duties on High Performance Steel Seamless Tubes from Japan* and *China – Measures Imposing Anti-Dumping Duties on High Performance Steel Seamless Tubes from European Union* WT/DS454/R, WT/DS460/R (13 February 2015) par 7.191 and 7.205 (currently under appeal) (*China-HP-SSST (Japan and EU)).* In both these disputes, the Panel indicated that it would be difficult, if not impossible to make a determination of causation in accordance with art 3 of the AD Agreement, where price effects analysis is itself inconsistent with the provisions of this Agreement.

90 Panel Report *Thailand - H-Beams*, par 7.161.

91 Panel Report *Korea – Certain Paper*, par 7.253.

92 See ITAC *Poultry – Brazil*, par 5.2.2

93 *Id* at par 6.2.

domestic product could not be increased, at least up to the level of the dumped imports.[94]

Consequently, in its request for consultations before the DSB, Brazil alleged that South Africa had failed to conduct an objective examination, based on positive evidence, in that it had not properly determined the effect of the dumped imports on the prices of the like domestic product as required by article 3.2.

In subsequent investigations, the ITAC appears to have continued to ignore the differences in product categories when performing price comparison to establish injury. In a similar determination of price injury – *Poultry (EU)* – while cumulatively investigating the alleged dumping of frozen poultry products from Germany, the Netherlands, and the United Kingdom, the ITAC in failed to consider the differences between individual quick frozen (IQF) and bulk boxes of frozen chicken.[95] Likewise, the ITAC considered brined and un-brined frozen chicken as similar for the purpose of determining the effect of the imported product on the price of the like domestic product.[96] The ITAC's investigation in this case would be *void ab initio* in light of the corresponding provisions in the AD Agreement which permit the cumulative assessment of the dumping of a product from more than one country, *only if* the investigating authority has 'determined' that such cumulation would be appropriate in the light of the provisions of article 3.3 (that the conditions of competition are comparable). Accordingly, the ITAC failed to 'determine' independently whether the competition conditions were indeed comparable, and instead merely 'considered' that the conditions of competition were alike on the basis of the application on behalf of the SACU industry which alleged that it had been experiencing the dumping of frozen poultry products from Germany, the Netherlands and the United Kingdom.[97] The ITAC's report did not reflect the comments of the interested parties which claimed that neither IQF and bulk frozen chicken,

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94 *Id* at par 7.3. Also See Panel Report *China-X-ray* Equipment par 7.243-7.244, in which the Panel clarified that the consideration of price suppression must not merely involve an analysis of whether the same is 'significant' but also be accompanied with a reason as to why the prices of the domestic 'like' product could not be increased up to the level of the alleged dumped import.

95 ITAC *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* (Report 492) (23 January 2015) (*Poultry-EU*).

96 *Ibid*.

97 *Id* at par 14 read along with par 5.2.

nor brined and un-brined chicken, can be treated as like products as the imports do not compete with the SACU product.[98] While the SACU industry mainly sold chicken pieces, which were frozen and then individually packed, and were aimed primarily at domestic usage, the imported product was in the form of bulk frozen boxes of chicken: where the entire box was frozen and had therefore to be used at once.[99] Furthermore, the SACU product was heavily brined, while the imported product was not.[100]

In determining whether the dumped imports had undercut the price of the domestic product, the ITAC considered the imported product as a whole, without reflecting upon the differences between the products leading to differences in pricing.[101] Accordingly, while it determined the margin of dumping for each product type separately,[102] it should also have determined whether each imported product type itself undercut the price of the domestic 'like' product. The ITAC's determination of price injury is therefore flawed in several respects. First, it fails to consider the differences in product mix, and instead compared the pricing on a basket-to-basket basis despite the products in the basket being dissimilar. IQF chicken cannot be compared to frozen bulk chicken when the differences between these can be attributed to the difference in pricing between the products. Likewise, brined chicken cannot be compared to un-brined chicken. Second, the ITAC's analysis is also flawed as it failed to determine whether the dumped imports undercut the price of the domestic product significantly.[103] It also failed to provide reasons for its determination on price suppression.[104]

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98 *Id* at par 2.2.7 and 4.1.6.

99 *Ibid*.

100 *Ibid*.

101 *Id* at par 5.4.3.1. ITAC also ignored the comments of the interested parties, which asserted that price undercutting must be determined on a product-by-product basis.

102 *Id* at par 4.1 – 4.1.2.

103 *Id* at par 5.4.3.1. In a related context, also see the ITAC's investigation procedure in *Cement (Pakistan)*, in which it similarly overlooked whether the price undertaking that was being experienced by the dumped imports from Pakistan were undercutting the domestic prices of the like products in a 'significant' manner. See ITAC *Investigation into the Alleged Dumping of Portland Cement Originating in or Imported from Pakistan: Preliminary Determination*, ITAC Report 495 (29 April 2015) par 5.3.2.2. (*Cement-Pakistan*).

104 *Id* at par 5.4.3.3. Also See ITAC *Cement (Pakistan)* par 5.3.2.3, in which the ITAC considered that the dumped imports from Pakistan had suppressed the prices of the like domestic product, without explaining the reasons as to why the SACU industry was unable to recover the increases in costs with a consequent increase in selling prices. (Instead the ITAC merely provided a tabular representation indicating how the selling prices could not be increased in order to recover the increase in costs).

It is clear that price injury determination requires a comparison of the prices of the imported product *vis-à-vis* the domestic like product. Therefore, an assessment of the domestic like product for the purpose of price comparison in injury determination in the SACU market, would invariably involve the entire SACU market, and not merely a part of it. In its most recent investigation – *Cement (Pakistan)* – the ITAC merely emphasised price figures in the KwaZulu-Natal (KZN) region, instead of determining the price for the purpose of comparison on the basis of the entire SACU market. The ITAC's approach is therefore essentially flawed insofar as it considered the like product for the purpose of investigation to be 'Portland cement', which in turn included both bagged and bulk cement. Accordingly, the ITAC should have considered the injury caused by 'Portland cement' to the entire SACU market and not merely the KZN region.[105]

In *Wheelbarrows (China)*, the ITAC simply described the imported product as 'wheelbarrows',[106] completely disregarding that the imported wheelbarrows could not be considered 'comparable' for the purposes of price injury determination and did, therefore, not qualify as 'like' products. While the imported wheelbarrows differed from those produced locally in the SACU market – the former had a thicker bin, were wider, and could withstand heavier loads – the ITAC ignored these differences in its investigation.[107] Its analysis was additionally flawed as it failed to reflect on the comments by the interested parties claiming that the SACU wheelbarrows were not comparable in several respects.[108] The wheelbarrows sold in the domestic market (in China) were of a different size, load capacity, thickness of the raw material, colour of the frame, and the size of the wheel. In addition, the ITAC also classified steel and PVC wheelbarrows as 'like' for the for the determination of price injury.[109] Accordingly, it used the sales of the domestic product in the Chinese market to calculate the normal value, irrespective of the fact that the models of wheelbarrow sold in the Chinese market were so different that they could not be compared to the models exported to the SACU industry.[110]

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105 See ITAC *Cement (Pakistan)*. Most importantly, even the South African anti-dumping legislation does not provide for division of geographical area for the purpose of injury analysis.

106 ITAC *Investigation into the Alleged Dumping of Wheelbarrows Originating in or Imported from the People's Republic of China (China): Preliminary Determination* (28 January 2015) par 2.1.1. (*Wheelbarrows – China*).

107 *Id* at par 2.3.1.

108 *Ibid*.

109 *Ibid*.

110 *Id* at par 4.2.1–4.2.2.

The ITAC found that the SACU industry had suffered a price injury in the form of price suppression. However, it merely indicated that the SACU industry had been experiencing this effect as a result of to the dumping of wheelbarrows from China. This meant that SACU was unable to recover the costs of production through an increased selling price.[111] As a percentage of the selling price, the SACU industry's costs therefore increased from July 2011 to January 2014.[112] The ITAC made no attempt to clarify why the SACU industry could not increase its prices, at least to match the level of the alleged dumped imports, or whether this price suppression was 'significant'.[113]

The ITAC's approach to the determination of price injury and the consequent price comparability has been along similar lines in previous investigations. In its investigation into the alleged dumping in *Set Screws (China)*, the ITAC included various types of set screw as a single 'entity'.[114] Accordingly, it considered fully threaded set screws together with hexagon nuts, unthreaded set screws, set screws of diameters ranging between 6mm and 36mm, those of a length of between 10mm and 400mm, made of iron or steel, with or without nuts, as a single product for the purpose of determining their 'likeness'.[115] It failed to take the differences in the product categories before considering whether the SACU industry had experienced any form of price injury into account. Additionally, while determining whether the SACU industry was facing price undercutting, the ITAC merely stated that it had determined the price undercutting at 55,37 per cent.[116] It failed to take into account and clearly show whether or not this was 'significant' when compared to the price of the like domestic product. At the same time, for the purpose of considering price depression and price suppression, it merely indicated that the SACU industry was facing price depression insofar as the domestic industry's prices had fallen by eighteen per cent during the period of investigation.[117] Likewise, in considering price suppression, the ITAC

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111 *Id* at par 5.2.2.

112 *Ibid*.

113 *Ibid*.

114 ITAC *Investigation into the Alleged Dumping of Fully Threaded Screws with Hexagon Heads, Excluding those of Stainless Steel, originating in or Imported from the People's Republic of China: Final Determination* Report 408 (18 October 2012) (*Set Screws – China*)

115 *Id* at par 2.1.1.

116 *Id* at par 5.2.1.1. See also Brink 'X-Raying injury findings in South Africa's anti-dumping investigations' (2015) 23/1 *African Journal of International and Comparative Law* 144 at 161.

117 *Id* at par 5.2.2.2.

merely indicated that price undercutting had led to decreased profits, which could not match the level of production costs.[118] The ITAC's finding as regards the effect of the dumped set screws from China on the SACU industry, therefore, remained flawed insofar as it continued to ignore the importance of performing a proper price comparison. Accordingly, irrespective of whether it revealed that the effects on price injury were 'significant' or not, the ITAC's injury determination remained incompatible with the AD Agreement if the products under consideration were not properly compared.

In *Threaded Rod (China)*, too, the ITAC overlooked the differences between different types of threaded rod as regards size and categories (galvanised or un-galvanised), when determining price undercutting. In considering the effect of the dumped imports in terms of price depression and suppression, it divided the product category into 'mild steel/galvanised/black, stainless steel, and EN8', and merely listed, respectively, how the domestic industry had experienced a decrease in selling prices,[119] and how it was unable to recover the increases in the cost of production through its selling price.[120] In other words, the ITAC failed to show whether or not either of these effects was 'significant'.

The examination of the impact of dumped imports in proving a causal link

Several Panels have emphasised the obligation imposed on investigating authorities to 'evaluate' *each* of the fifteen factors and indices that may have a bearing on the state of the industry. Accordingly, in *Thailand-H-Beams*, both the Panel and the Appellate Body stated that such an evaluation under article 3.4 would not merely involve the characterisation of the degree of relevance or irrelevance of all fifteen factors. It requires a thorough evaluation of all the factors.[121] Furthermore, in *Egypt-Steel Rebar*, the Panel

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118 *Id* at par 5.2.2.3, in which the applicant demonstrated and the ITAC 'considered' that the profit percentage decreased from 100% to 35.16%, while the unit cost of production was 97.14 index points.

119 ITAC *Investigation into the alleged dumping of Screw Studding (Rods Threaded Throughout) of Steel and Stainless Steel (commonly known as Threaded Rods) Originating in or Imported from the People's Republic of China (PRC): Final Determination* Report No. 420 (18 December 2012) par 5.2.2 (*Threaded Rod – China*).

120 *Ibid*.

121 Panel Report *Thailand-H-Beams* par 7.236. Also See Panel Report *EC-Tube or Pipe Fittings*, par 7.314; and Panel Report *EC-Bed Linen* par 6.162.

stressed that such an 'evaluation' would indicate 'an analysis and interpretation of the facts established in relation to each listed factor'.[122]

The South African anti-dumping law, on the other hand, merely mandates the ITAC to 'consider' the stipulated factors.[123] The mere 'consideration' of the factors that may have a bearing on the state of the industry, while assessing the impact of the dumped imports on the domestic industry, was therefore one of the issues raised by Brazil in its request for consultations.[124] Brazil alleged that the ITAC was flawed in its investigation because it did not make an objective examination – based on positive evidence of the impact of the alleged dumped imports – as most of the domestic injury factors for whole chicken and boneless cuts were positive or showed positive trends.[125]

In the above investigation, the ITAC merely recited the information provided by the applicant in examining the impact of the dumped imports on whole birds and boneless cuts. Therefore, the report contained only information as to an increase or decrease with respect to each of the factors, instead of analysing and providing reasons as to whether the impact was the result of the dumped imports from Brazil. Moreover, while most of the factors were found to point to a positive trend, in its analysis of whole birds, the ITAC relied solely on the negative trends in growth and market share.[126] As regards its analysis of boneless cuts, the ITAC again elected to rely on negative trends in sales volume, output, capacity utilisation, and growth and market share, rather than the positive trends evident in most of the other factors.[127]

In several disputes dealing with this issue, the Panel has confirmed that in the light of such positive trends, the investigating authority must provide 'compelling reasons as to why and how, in the presence of such trends, the domestic industry would nevertheless be injured.'[128] In other words, 'a thorough and persuasive explanation as to whether and how' such positive

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122 Panel Report *Egypt-Steel Rebar*, par 7.51.
123 See ADR 13.2.
124 WTO, *South Africa-Poultry* at 2
125 *Ibid*.
126 ITAC *Poultry (Brazil)*, par 5.3
127 *Id* at par 6.3.
128 Panel Report *Thailand-H-Beams* par 7.249; Panel Report *EC-Countervailing Measures on DRAM Chips* par 7.372; Panel Report *EC-Fasteners* par 7.399; and Panel Report *China-X-ray* par 7.200–7.204. Also See G Brink *X-raying injury findings in South Africa's anti-dumping investigations* above at note 117 at 155–157.

trends would outweigh any other factor and index that showed a negative trend during the investigation period.[129]

In its most recent investigation report, the ITAC noted that cement imported from Pakistan had injured the SACU industry based on the allegedly negative trends in most of the factors and indices.[130] Accordingly, the applicant stated that during the period of investigation the sales volume of the SACU bagged cement declined from 100 to 94 points; total gross and net profit declined from 100 to 90 points and 75 points, respectively; output decreased from 100 to 90 points; the percentage of market share held by the applicants decreased from 100 to 96 points; return on investments declined from 100 index points to 95 index points; capacity utilisation declined from 100 to 90 points; cash flow declined from 100 to 97 index points; employment levels in terms of labour units decreased from 100 to 84 points; and growth in terms of sales volume also declined from 100 to 94 index points.[131] Therefore, the ITAC did not evaluate *any* of these nine factors, instead merely indicating an increase or decrease on the basis of information provided by the applicant. The ITAC merely 'noted' that 'injury experienced by the SACU industry is more prominent on volume and that sales, output and market share most clearly reflect the material injury suffered.'[132] In other words, it defaulted by not providing a clear and persuasive explanation for why it was the dumped imports from Pakistan that resulted in these negative trends.

While undertaking an analysis of the impact of the dumped imports on the domestic industry, the ITAC, in *Poultry (EU)*, merely recited the information as provided by the applicant without providing reasons for how these factors could be attributed to the dumped frozen poultry products from the three countries. Its report indicates that the domestic industry experienced injury because of a decrease in net and gross profits; returns on investment; capacity utilisation; and net cash flow.[133] As regards all the remaining factors, the SACU industry showed a positive trend. Interestingly, the ITAC merely 'considered' these factors when it recited the information provided by the applicant, without, however, evaluating how the negative trends they

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129 *Ibid*.
130 ITAC *Cement (Pakistan*).
131 *Id* at par 5.3.3.1–5.3.11.
132 *Id* at par 5.3.3.2.
133 ITAC *Poultry (EU)* par 5.5.

revealed were the result of the dumped imports.[134] Moreover, considering how the majority of the factors and indices pointed to a positive trend, the ITAC failed to offer a convincing explanation of why these positive trends could not outweigh the negative trends.

In *China (Wheelbarrows),* the ITAC's examination of the impact of the dumped imports on the domestic industry is in the main flawed insofar as it fails to 'evaluate' any of the factors and indices in terms of their bearing on the state of the industry. On the contrary, its report simply states the information provided by applicant regarding the factors and their bearing on the state of the industry in terms of an increase or decrease in each.[135] Its so-called 'analysis' merely involved an indication of the impact of the dumped imports on the SACU industry by means of a tabular representation declaring an increase or decrease for each of the factors during the period of investigation.[136] Therefore, no interpretation of the facts to show how the negative trends in some of the factors could be attributed to the dumped imports from China was undertaken. In terms of gross profits, the ITAC considered a negative trend exclusively on the basis of such a decline during 2010 to 2013, irrespective of whether there had been a positive trend in gross profits maintained consistently until January 2014.[137] For the purpose of market share, it merely indicated a decline from 100 per cent to 60 per cent from July 2010 to June 2013.[138] As regards capacity utilisation, despite the fact that there was an increase of 92 index points to 111 index points between June 2011 and June 2013, the ITAC nevertheless considered this a negative trend exclusively because there had been a decline in the preceding period.[139] Similarly, in terms of growth the ITAC saw a negative trend on the basis of a decline in sales volume from July 2011 to June 2012.[140] It is

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134 For instance, as regards decline in profits, the ITAC merely provided reasons as to why profits increased from 2010–2011, given the low volume of dumped imports. It flawed by not providing reasons as to why the profits decreased later on, and how this decrease was an impact of the dumped imports. As regards decline in returns on investment, the ITAC merely considered that because the subject product accounts for more than 67 percent, the decline in returns is also attributable to the subject product. In terms of capacity utilization, it merely stated that production did not increase enough to meet the capacity. For decline in cash flow, the ITAC merely accepted the applicant's allegations that such a decrease can be attributed to the subject product, which accounts for 67 percent of the total products. In other words, there was no evaluation or analysis of how the dumped imports have caused this negative trend in terms of cash flow.

135 ITAC *China (Wheelbarrows)* par 5.2.3.1–5.2.3.15.

136 *Id* at par 7.4.

137 *Id* at Table 5.2.3.2 (a) and (b).

138 *Id* at Table 5.2.3.4(a).

139 Id at Table 5.2.3.7(a).

140 *Id* at Table 5.2.3.14(a).

therefore clear that the ITAC made no effort to evaluate each of the factors and indices or to interpret why these negative trends impact on the dumped imports.

The ITAC's approach has, therefore, followed relatively the same lines in most anti-dumping investigations. Akin to the investigations above, in *Threaded Rod (China)* the ITAC also failed to examine and evaluate each of the fifteen factors and indices. Instead, it merely noted what the applicant had, for this purpose, submitted positive or negative trends observed during the period of investigation.[141]

The ITAC's injury determination post-*Poultry (Brazil)* was slightly different in *Set Screws (China)* where it at least analysed some of the factors and indices bearing on the state of the industry. Accordingly, it evaluated the factors relating to both actual and potential declines in sales, profit, output, market share, productivity, capacity utilisation, cash flow, growth and investment, and the extent of the margin of dumping.[142]

However, on the whole, the ITAC's resolve to examine the impact of the volume of the dumped imports on the SACU industry has failed to correct any of the shortcomings in its *Poultry (Brazil)* investigation, and therefore continues to be incompatible with the AD Agreement's standards in this regard.

The relevance of 'causation' in injury determinations

In *South Africa – Poultry*, Brazil claimed that the ITAC's causation determination was invalid because it failed to 'examine' the 'other known factors' which also contributed to the injury suffered by the SACU industry, and further by not considering these in the injury analysis as required by article 3.5 of the AD Agreement.[143]

To determine the causal relationship between the dumped imports and the consequent effect on the SACU industry, the ITAC merely listed each of the injury factors and indicated whether each had experienced an increase or a decrease. In its examination of 'other known factors', the ITAC merely indicated that the volume of imports of whole birds and boneless cuts from

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141 ITAC *Threaded Rod (China)* par 5.2.3.1–5.3.3.14.

142 ITAC *Set Screws (China)* par 5.3.1–5.3.10. See also Brink *X-raying injury findings in South Africa's anti-dumping investigations* above at note 116 at 166.

143 WTO *South Africa – Poultry* at 2.

Brazil had increased between 2008 and 2010.[144] As regards other factors relevant to: developments in technology; contraction in demand or changes in the pattern of consumption; and export performance and competition between foreign and domestic producers, the ITAC's report merely reproduced what the applicant had alleged.[145] Therefore, not only did the ITAC err in not 'examining' whether the factors could not be attributed to the injury caused to the SACU industry, it also failed to examine the aspects *separately* for whole birds and boneless cuts, in the manner it did with respect to the margin of dumping for these two product categories.

The AD Agreement provides that, once the investigating authority has determined the volume, effect, and the consequent impact of the dumped imports on the domestic industry, it must then show that the dumped imports have indeed, through the effects of dumping, caused injury to the industry.[146] Accordingly, even though price co-relation becomes important in assessing the competition between the dumped imports and domestic 'like' products,[147] such a co-relation or co-incidence is not enough to prove causality in that co-incidence and causality are two different concepts.[148] There must therefore be a reasoned and adequate explanation to show how the dumped imports have caused injury to the SACU industry. At the same time, investigating authorities must 'examine'[149] whether 'other known factors' have contributed to the injury caused to the domestic industry.[150] However, as noted above, if the investigating authority's findings on price effects are faulty, it would immediately also invalidate the resulting determination of causation. Accordingly, while the ITAC's findings on price effects have been consistently flawed in *Cement (Pakistan)*, *Wheelbarrows (China)*,

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144 ITAC *Poultry (Brazil)* par 7.4.1.

145 *Id* at par 7.4.2–7.4.4.

146 Cf art 3.5 of the AD Agreement.

147 Appellate Body Report *China-GOES* par 226; and Panel Report *China-Autos* par 7.262.

148 Panel Report *China-X-ray Equipment* par 7.246–7.248.

149 See Appellate Body Report *US – Hot-Rolled Steel*, par 226, which stated that in order to 'examine' the other known factors, the investigating authorities must '*separate and distinguish the injurious effects of the other factors, from the injurious effects of the dumped imports*;' failing which the authorities will be '*unable to conclude that the injury they ascribe to is actually caused by those imports, rather than by the other factors*.' Also see *Panel Report China – HP-SSST (Japan and EU)* par 7.200–7.201, in which the Panel stressed the importance of 'separating and distinguishing' the injurious effects of other known factors from the causality analysis. For this, the Panel must '*first properly establish if the dumped imports have caused material injury along with the 'nature and extent' of the injury caused by the subject imports and the injury caused by the other factor(s).*"

150 Appellate Body Report *EC-Tube or Pipe Fittings* par 175.

Poultry (EU), *Set Screws (China),* and *Threaded Rod (China)*, its causation the ITAC, determinations in these investigations are invalid.

Despite being incompatible with the WTO disciplines (means and entails WTO disciplines or rules on Anti-dumping as set forth in the AD Agreement) in this regard, and objections by Brazil in its consultations on the investigation procedure followed by the ITAC in *Poultry (Brazil)* relating, *inter alia*, to the ITAC's failure to 'examine' 'other known factors' and not attributing these to the injury caused by the dumped imports, the ITAC has failed to rectify these flaws.

In *Cement (Pakistan)* and *Wheelbarrows (China)*, the ITAC was satisfied that the SACU industry had suffered an injury as a result of the dumping of the subject products. It therefore imposed preliminary duties in both these investigations on the basis of a superficial 'consideration' of 'other known factors' that could contribute to the injury to the SACU industry. In doing so it cited only the applicant's assertions that no other known factor contributed to the injury to the SACU industry without any independent examination on its part.[151] Similarly, because the AD Agreement mandates investigating authorities to *demonstrate* that the dumped imports are causing an injury to the domestic market by 'examining' all relevant factors, the fact that the ITAC merely 'considered' the impact of these on the SACU industry by means of a list indicating an increase or decrease, invalidates its causation analysis and so its entire investigation.[152]

In *Poultry (EU)*, the ITAC imposed definitive anti-dumping duties on the basis of an 'examination' which amounted to a simple narration of the applicant's assertions and claims. Accordingly, its 'examination' as regards

- contraction in demand or changes in patterns of consumption was that 'the applicant stated that the SACU poultry market is a growing market';
- trade restrictive practices of foreign and domestic producers, was that 'the applicant is not aware of any such practice,' without itself examining whether any such practice existed or not;
- developments in technology was that 'the applicant stated that ... the technology used by the SACU poultry producers is substantially equivalent to those used elsewhere in the world';
- export performance was that 'the applicant stated that the SACU industry is not export oriented …';

[151] ITAC *Wheelbarrows (China)* par 7.6; and ITAC *Cement (Pakistan)* par 7.5.
[152] ITAC *Wheelbarrows (China)* par 7.4, 7.5.1–7.5.7; and ITAC *Cement (Pakistan)* par 7.4.

- productivity of the domestic industry was that 'the applicant believes that the member's productivity is comparable to overseas producer's productivity …'; and
- other factors affecting the SACU prices was 'none'.[153]

This formed the complete 'examination' by the ITAC of the other factors that may contribute to the injury caused to the SACU industry. It completely ignored the comments from the interested parties, which asserted that loss in production volumes, and cost increases were in fact attributable to labour unrest within the SACU industry during the investigation period.[154] Similarly, the ITAC also simply stated that the SACU industry's technological development is akin to that prevailing in the three countries without actually examining this aspect.[155] It considered the productivity of the domestic industry compared to that of overseas producers, irrespective of the fact that poultry products in the SACU industry were heavily brined which altered their taste.[156] Accordingly, the productivity of the SACU industry, in terms of equipment and genetics, could certainly not be considered comparable to that of overseas producers. Likewise, in determining the causal relationship between the dumped imports and the SACU industry, the ITAC, in terms reminiscent of *Poultry (Brazil)*, merely listed an increase or decrease in each of the factors bearing on the state of the industry.[157]

UNDERSTANDING THE IMPACT OF THE ITAC'S CAUSATION DETERMINATIONS ON THE VALIDITY OF ITS INVESTIGATIONS

Despite Brazil's initiation of consultations at the WTO in the *Poultry* dispute, the ITAC's investigation in subsequent anti-dumping disputes has continued to be incompatible with settled WTO principles with regard to causality, as set out in the AD Agreement.[158] The ITAC's flaws primarily revolve around its failure to analyse the potential differences between the

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153 ITAC *Poultry (EU)* par 6.5

154 *Id* at par 6.6

155 *Ibid*.

156 *Ibid*.

157 *Id* at par 6.4

158 This research has, in the main, analysed the ITAC's investigation procedure in the most recent anti-dumping cases. Hence, the investigation procedure in *Pakistan (Cement)*, *Poultry (EU)*, *China (Wheelbarrows)*, *Set Screws (China)* and *Threaded Rod (China)* has been analyzed; in order to demonstrate their compatibility with the WTO disciplines, post-*Poultry (Brazil)*.

subject imports and domestic products; the mere 'consideration' of the indices that impact on the state of the SACU industry, rather than a thorough and persuasive examination and explanation of what this impact in fact is; and mainly, the how it shows the effect of the dumped imports on the SACU industry without an 'examination' of 'other known factors' that also contribute to the resulting injury. As a result, the incompatibility of the ITAC's causation determination interacts with core AD provisions, impacts on the validity of its entire procedure.

As regards price comparability, the ITAC's failure appropriately to consider the differences between products when conducting its price comparison, in turn renders its calculation of normal value invalid. The AD Agreement provides in article 2.4 that the margin of dumping must be calculated on the basis a 'fair comparison' between the normal value and the export price, and must be made at the 'same level of trade' after 'due allowances are made, in each case for the differences which affect price comparability, including … physical characteristics, and other differences which are also demonstrated to affect price comparability'. Accordingly, the authorities are obliged to establish the normal value at the same level of trade[159] to establish whether price comparability has been correctly determined.[160] In these investigations, because the ITAC has consistently failed to perform an appropriate price comparison, the calculation of the margin of dumping itself is flawed in that there has been no fair comparison between the normal value and the export price.

Similarly, causality determinations are also central when it comes to assessing whether provisional measures have been validly imposed. Consequently, article 7 of the AD Agreement provides that provisional measures may only be applied if the investigating authority has initiated its investigation in accordance to the provisions of article 5. Article 5 of the AD Agreement obliges the domestic industry – in this case the SACU industry – to initiate a written complaint on the basis of, inter alia, evidence of dumping, injury, and a causal link between the dumped imports and the alleged injury. The investigating authority then must examine the accuracy

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159 It is interesting to note, that the ITAC's investigation in *Poultry (EU)* would also be flawed because the price comparison was not made at the 'same level of trade', (which should normally be at the ex-factory level. Instead, the ITAC compared the prices at Free-on-Board (FoB) level. Comparing prices at FoB level distorts the prices when the price of exportation would differ as a result of differences in transportation costs. See ITAC *Poultry (EU)* par 1.5, at 9.

160 Article 2.4 of the AD Agreement.

and adequacy of this evidence in order to justify the initiation of any anti-dumping investigation. The ITAC's investigations above must fail this test in that they failed to examine the accuracy and adequacy of the evidence in accordance with article 5 of the AD Agreement before initiating the investigation.[161] In fact, as shown in the preceding sections, the ITAC merely relies on the information provided by the applicants, and later 'considers' this evidence without any examination *per se*. Therefore, it fails to determine the sufficiency of such evidence before initiating the investigation. Even in its investigations post-*Poultry (Brazil)*, the ITAC has continued to overlook the positive trends while evaluating the indices that have a bearing on the state on the industry. Rather, it has considered only the negative trends – even if the former outweighed the latter.[162] As a result, it has not validly determined whether the evidence provided by the applicants is 'sufficient' to justify the initiation of the investigations. Similarly, in most of the investigations post-*Poultry (Brazil),* the ITAC has merely relied on information provided by the applicant as regards 'other known factors' which may also have contributed to the injury caused to the SACU industry, rather than itself determining whether the evidence provided in this regard is adequate.[163]

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[161] The Panel in *Guatemala – Cement II* held that the appropriate legal standard under Article 5.3 of the AD Agreement was not the examination of the accuracy and adequacy of the evidence provided in the application, but rather the sufficiency of that evidence. See Panel Report *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico* WT/DS156/R (24 October 2000) par 8.31.

[162] Refer to above discussion on the ITAC's procedure in examining the impact of dumped imports in proving a causal link in *Pakistan (Cement)*, *Poultry (EU)* and *Wheelbarrows (China)*.

[163] Refer to above discussion on the ITAC's procedure in 'The relevance of causality in injury determinations' in *Pakistan (Cement)*, *Poultry (EU)* and *Wheelbarrows (China).* In a similar context, art 5.4 also stipulates that anti-dumping investigations must only be initiated after the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application…by domestic producers … that the product has been made by or on behalf of the domestic industry. Given that, for instance in the investigation of *Poultry (Germany, the Netherlands and the United Kingdom)*, the ITAC initiated the investigation without determining, on the basis of an examination, that SAPA (the South African Poultry Association) indeed represented approximately seventy-two per cent of the SACU industry, the ITAC's investigation, and the subsequent imposition of determinative anti-dumping duties, would be *void* in the light of arts 5.4 read along with art 7.1(I). Likewise, also see the ITAC's investigations in *Wheelbarrows (China)*, *Cement (Pakistan)*, *Set Screws (China)* and *Threaded Rod (China)*, to name a few, where it did not 'determine, on the basis of an examination' the degree of support or opposition, and instead merely relied on the information provided by the applicants. See also Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000* WT/DS217/AB/R (16 January 2003) pars 286–290.

Whenever investigating authorities decide, on the evidence before them, that it would be appropriate to impose provisional duties, they must issue a separate notice or make available 'through a 'separate report', 'sufficiently detailed explanations' for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected'.[164] In none of the investigations discussed above, did the ITAC make this separate report available to explain its injury determination in detail. Therefore, on this ground too, its investigation must fail the test for WTO compliance. Accordingly, the provisional measures imposed by virtue of its preliminary determinations in its two most recent investigations – *Cement (Pakistan)* and *Wheelbarrows (China)* – are invalid. Interestingly, the ITAC's failure to provide a separate report violates even its own regulations, which mandate it to provide a non-confidential report within seven days of its preliminary finding on the '*relevant issues of fact and law'* that it considered in reaching the (preliminary) finding.[165] As regards the definitive anti-dumping duties imposed in *Poultry (EU)*, *Set Screws (China),* and *Threaded Rod (China)*, the ITAC's findings would likewise continue to be WTO-incompatible, even after *Poultry (Brazil),* on the basis of its failure to issue a notice, or otherwise make available the findings and conclusions reached on all issues of fact and law considered material, in sufficient detail, through a 'separate report'.[166]

CONCLUDING REMARKS

The ITAC's procedures fail to satisfy the minimum requirements for evaluating the injury caused to the SACU industry. Injury determinations are so central to anti-dumping investigations, that any incompatibility with the relevant provisions in the AD Agreement, would call the validity of the findings of the investigation into question insofar as they violate articles 5.2, 5.3, 7.1 and 12. In *South Africa – Poultry*, Brazil challenged the ITAC's procedures, its failure to perform appropriate price comparison, its failure to examine the impact of the dumped imports on the SACU industry, and the 'other known factors' that may also have contributed to the (SACU) industry, in its injury determinations. These flaws, in turn, render the ITAC's investigation incompatible with the WTO by virtue of its not being based on positive evidence and an objective examination as required by article 3.1 of the AD Agreement. Unfortunately, even though the Minister of Trade and

164 Article 12.3 of the AD Agreement.
165 See ADR 32(2)(k).
166 *Cf* art 12.2 of the AD Agreement.

Industry did not agree to impose definitive duties in this case due to the objections raised by Brazil in its WTO consultations with South Africa, the ITAC nevertheless steadfastly sticks to its tradition in its injury determinations. The ITAC's procedure also fails to reflect established WTO jurisprudence in this regard. In its investigations post-*Poultry (Brazil) – Cement (Pakistan)*, *Poultry (EU)*, *Wheelbarrows (China)*, *Set Screws (China)* and *Threaded Rod (China)* – I have shown that the ITAC has continued to be guilty of the same *faux pas* as regards price injury determination; how it considers the impact of the imports on the SACU industry; and the attribution (or non-attribution) of other factors to the injury caused to the examination of the impact on the SACU industry. This consequently invalidates the ITAC's procedure for failing to prove a causal link between the dumped imports, in the above-mentioned investigations, and the injury caused to the SACU industry.