New directions by the Panel in *Russia—Commercial Vehicles* and the implications for South African anti-dumping investigations

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Abstract

A World Trade Organisation (WTO) Panel recently issued its report in the *Russia—Commercial Vehicles* matter. It took some interesting decisions, deviating from earlier decisions on the same topic by other Panels and the Appellate Body; further diluted the requirement of establishing a causal link between dumped imports and the injury experienced by the domestic industry; and strengthened earlier panels' findings on issues such as the requirement to inform all interested parties of the essential facts under consideration in an anti-dumping investigation.

This article considers seven key findings in the report, compares them with the requirements of the WTO Anti-Dumping Agreement and, where applicable, previous Appellate Body and Panel reports, and then considers what each finding means for anti-dumping in South Africa. It concludes that South Africa's anti-dumping system fails to meet its WTO obligations in several respects and that there is a need to amend the Anti-Dumping Regulations.

INTRODUCTION

Russia—Commercial Vehicles[1] is the latest in a large body of dispute settlement reports issued by the World Trade Organisation (WTO) Dispute Settlement Body (DSB) relating to anti-dumping. The report, issued on 27 January 2017, deals with some issues that previous DSB Panels and the Appellate Body have considered, but views certain of the issues in a new light.

In Russia, the Department for Internal Market Defence (DMID) of the Eurasian Economic Commission (EEC)[2] is responsible for decisions in

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1 'Russia—Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy' WT/DS479/R (27 January 2017) [hereinafter *Russia—Commercial Vehicles*].

2 The EEC consists of Armenia, Belarus, Kazakhstan, Kyrgyzstan, and Russia—see <http://www.eurasiancommission.org/en/Pages/ses.aspx> accessed 29 June 2017.

anti-dumping investigations in the EEC. At play in this dispute were: the DMID's determination of the domestic industry; its selection of the injury investigation period; its determination of price suppression; injury under Article 3.4 of the Anti-Dumping Agreement;[3] the causal link between dumping and injury; how Russia treated information claimed to be confidential; and whether Russia properly informed all interested parties of all the essential facts it would consider in its final determination.

This article considers each of these issues and then compares them with the most recent practice of South Africa's anti-dumping investigation authority, the International Trade Administration Commission (ITAC). ITAC is an independent authority subject only to the Constitution, the law, and Policy Directives issued by the Minister of Trade and Industry.[4] Although all of ITAC's decisions are made on the basis of the various provisions in the ITA Act and the Anti-Dumping Regulations, *stare decisis* does not exist in a strict sense, as is also the case in the WTO,[5] although previous rulings do have persuasive force. ITAC decisions may be reviewed in the High Court.[6] Decisions of the WTO DSB, in this case the panel's findings, have persuasive value in South African courts as they constitute part of international law that municipal courts have to consider in terms of section 233 of the Constitution.[7]

Domestic Industry[8]

Russia determined that the domestic industry consisted of only a single producer despite the fact that there were two producers in the market. Article 4.1 of the Anti-Dumping Agreement defines the domestic industry as 'the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion

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3 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

4 Section 7 of the International Trade Administration Act (ITA Act) 71 of 2002.

5 Mitsuo Matsushita, 5 Selected GATT/WTO Panel Reports: Summaries and Commentaries (Fair Trade Center, Tokyo, 1999) ix. See eg Appellate Body Reports, 'Japan—Taxes on Alcoholic Beverages', WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/, 97 107–108 and 'United States—Import Prohibition of Certain Shrimp and Shrimp Products—Recourse to Article 21.5 of the DSU by Malaysia', WT/DS58/AB/RW *US—Shrimp (Article 21.5—Malaysia)*, para 109 for findings that indicate that previous decisions have persuasive value.

6 Section 46 of the ITA Act. See, eg, *AEL v ITAC* (Unreported case 15027/2006T); *Algorax v the Chief Commissioner, ITAC* (Unreported case 25233/2005T); *SATMC v ITAC* (Unreported case 45302/07T); *SCAW v ITAC* (Unreported case 48829/2008T).

7 See *Progress Office Machines v SARS* 2008 (2) SA 13 (SCA) para 7; *ITAC v SATMC* [2011] ZASCA 137 paras 6–7. See also Gustav Brink, 'Anti-dumping and Judicial Review in South Africa: An Urgent Need for Change' (2012) 7 (5) Global Trade and Customs Journal; Lonias Ndlovu, 'South Africa and the World Trade Organization Anti-Dumping Agreement Nineteen Years into Democracy' (2013) 28 SAPL 279.

8 Note that in the only court cases in which an ITAC decision on the definition of 'domestic industry' was in contention, ITAC conceded the issue and the court did not rule on the issue—see *AEL v ITAC* (Unreported case 15207/2006) 12.

of the total domestic production of those products.' The one producer represented 87.9 per cent of the total industry. However, the Panel found that Russia's determination of this producer as the domestic industry was inconsistent with its WTO obligations. Despite finding 'that an 87.9% share of total domestic production falls well within the quantitative bounds of the term "a major proportion"',[9] the Panel noted that there was also a qualitative aspect, which requires that the approach of the investigating authority 'does not create a risk of material distortion'.[10] In essence, it ruled against Russia as the decision to include only Sollers, the domestic producer whose information was used by the DMID, in the definition was not explained in the investigation report and, more importantly, was made after it had reviewed the other producer's information.[11] Russia argued that nothing in the Anti-Dumping Agreement indicated when the decision as to what constituted the domestic industry had to be finalised and that the final determination of who is included in the definition of domestic industry can only be made at the time of the overall final determination, based on the information then available to the investigating authority.[12] The European Union (EU) agreed that the 'domestic industry' could be redefined, but argued that this could not be done on the basis of deficient questionnaire responses or other reasons not foreseen in Article 4.1.[13] It should be noted that the Panel placed incorrect reliance on the Appellate Body finding in this regard in *EC—Salmon (Article 21.5)* in which it found that there was a qualitative aspect to the determination of the domestic industry. However, the Appellate Body also specifically noted that:

> When the domestic industry is defined as the domestic producers whose collective output constitutes a major proportion of total domestic production, a very high proportion that 'substantially reflects the total domestic production' will very likely satisfy both the quantitative and the qualitative aspect of the requirements of Articles 4.1 and 3.1.[14]

The Panel noted that 'we would consider that the DIMD acted inconsistently with Article 4.1 by including GAZ in the initial definition of the domestic industry and then purporting to redefine the domestic industry to not include GAZ on the basis of considerations not consistent with the parameters of Article 4.1.'[15] It should be noted that Russia has appealed this finding.[16]

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9 Paragraph 7.13 [underlining in original].
10 Paragraph 7.15.
11 Paragraph 7.27.
12 Paragraph 7.24.
13 Paragraph 7.25.
14 Appellate Body Report, *EC—Salmon*, WT/DS/397/AB/RW, para 5.303.
15 Paragraph 7.27.
16 WT/DS479/6.

The *Russia—Commercial Vehicles* finding is of interest to South Africa, as two recent investigations (*Frozen Chicken Portions*[17] and *Frozen Potato Chips*[18]) only considered the information of certain of the domestic producers. In both these investigations, the parties included in the definition of the domestic industry clearly met the quantitative aspect the Panel referred to, but there was no discussion of the qualitative aspect.[19] In fact, at least in the *Frozen Chicken Portions* investigations,[20] exporters specifically indicated that the producers included in the scope of domestic industry did not properly represent the industry and that there were other major producers whose information contradicted that of the producers that were considered.[21] Were the EU to challenge the determination of domestic industry in either of the two cases, on the basis of the decision in *Russia—Commercial Vehicles*, it appears that it would be successful.

In addition, in *Cement*[22] exporters argued that 'blenders', which represented a significant proportion of the total domestic industry, should have been included in the definition of domestic industry as they bought 'bulk' cement, blended it, and then resold it as 'bagged' cement. The total volume of cement resold by the blenders exceeded the total volume of imports from Pakistan. That domestic industry sales of bagged cement had decreased during the period, but that its sales of bulk cement had increased, was an important factor. On the basis of the Panel's finding that both quantitative and qualitative aspects were at play in the determination of the definition of domestic industry,[23] it appears that Pakistan would have been successful had it challenged this issue before the DSB.

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17 '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 UK: Final Determination' International Trade Administration Commission (ITAC) Report 492 (23 January 2015).

18 'Investigation into the Alleged Dumping of Frozen Potato Chips Originating in or Imported from Belgium and the Netherlands: Final Determination' ITAC Report 474 (22 May 2014).

19 'Frozen Chicken Portions' (ITAC Report 492) para 3; 'Frozen Potato Chips' (ITAC Report 474) para 3.

20 The plural is used as the WTO counts investigations separately by exporting country, ie the *Frozen Chicken Portions* case is counted as three distinct investigations and the *Frozen Potato Chips* case as two investigations.

21 See 'Frozen Chicken Portions' (ITAC Report 492) para 3; and submissions by AMIE available on the public file of the case.

22 'Investigation into the Alleged Dumping of Portland Cement Originating in or Imported from Pakistan: Final Report' ITAC Report 512 (24 November 2015).

23 It appears that the Panel may also have relied on the Panel report in *EC—Salmon* for its finding that there is a qualitative requirement in determining the domestic industry—see Panel Report, *EC—Salmon*, paras 7.101–7.134.

Should the Appellate Body not overturn this issue on appeal,[24] South Africa's investigating authority, ITAC,[25] will have to adjust the way in which it determines the domestic industry in anti-dumping investigations.

Investigation Period[26]

The EU complained that Russia had selected 'non-consecutive periods of non-equal duration' for the injury determination and claimed that the use of these periods failed to result in an objective injury determination. The period of investigation for dumping was July 2010 to June 2011. The Panel noted that Russia had used a four-year period of investigation for injury purposes, using full-year data for 2008, 2009, 2010 and 2011, and that it had *also* compared the first half of the investigation period (July to December 2010) to the same period in 2009, and the second half of the investigation period to the same period in 2010. It is this latter comparison of half-years that led to the EU's complaint, based on earlier rulings by DSB Panels in *Mexico—Anti-Dumping Measures on Rice*[27] and *Mexico—Steel Pipes and Tubes*[28] that the use and comparison of 'selected' periods within a year to each other 'could not be objective', unless proper reasons were supplied for the selection.

The Panel noted that Russia had properly determined injury trends by comparing full-year data, which made its determination WTO-consistent, and that it had conducted the half-year periods comparison in addition to the full-year comparison. It further noted that:

> We do not read these tables and narratives to suggest anything other than what they actually say. We find nothing in the record that supports the proposition that either the POI or the period of data collection was selected to artificially generate a finding of injury. We find nothing in the record that supports the proposition that the selection did, in fact, lead to such an artificial result.[29]

It therefore found that Russia's comparison was in line with its WTO obligations.

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24 See WT/DS479/6 paras 4–7.

25 International Trade Administration Commission, established in terms of s7 of the International Trade Administration Act 71 of 2002.

26 This issue has never been considered by South African courts.

27 Appellate Body Report, 'Mexico—Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice' WT/DS295/AB/R, paras 180–181, adopted 20 December 2005 [hereinafter *Mexico—Rice*).

28 Panel Report, 'Mexico—Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala' WT/DS331/R, adopted 24 July 2007 [hereinafter *Mexico—Steel Pipes and Tubes*].

29 *Russia—Commercial Vehicles* (n 1) para 7.40.

In *Frozen Potato Chips* ITAC also used a mix of periods for purposes of comparison. Its investigation periods were defined as follows:

> The investigation period for dumping was from 01 January 2012 to 31 December 2012. The injury investigation involved evaluation of data for the period 01 July 2009 to 30 June 2012 plus six months additional information for 2010 to 2012 (01 July to 31 December).[30]

It compared full-year (or 12-month) figures for July-June years and then, additionally, compared trends for the periods July to December. The problem with this approach was two-fold: first, there was no full-year information that could be compared with the dumping investigation period, which was important for causality considerations as it had to be proven that dumping was causing injury;[31] and second, the injury trends for various injury factors differed significantly between the full-year comparisons and the half-year comparisons. A single example will suffice: for profit, the following table can be construed from the information in the report:[32]

12-month comparison

	7/2009–6/2010	**7/2010–6/2011**	**7/2011–6/2012**
Sales value	100	90	96
Gross profit	100	-98	395
Net profit	Negative	Negative	Negative
Gross profit per ton	100	–110	395

6-month comparison

	7–12/2010	**7–12/2011**	**7–12/2012**
Sales value	100	104	118
Gross profit	Negative	100	342
Net profit	Negative	Negative	Negative
Gross profit per ton	Negative	100	126

Thus, for the 12-month period, sales values decreased significantly between the first and second periods and then recovered slightly in the third period, but to a value lower than the starting point. However, for the 6-month comparisons, there was a small increase between the first two periods and a very significant increase between the second and third periods. For the 12-month analysis, in the second period gross profit decreased to a loss

30 ITAC Report 474, para 1.6.

31 Article 3.5 of the Anti-Dumping Agreement; Article 16 of South Africa's Anti-Dumping Regulations.

32 ITAC Report 474, para 5.5.2.

nearly equal to the profit made in the first period, before soaring in the third period. However, for the 6-month analysis, gross profit changed from a loss to a profit between the first two periods and then increased significantly in the third period. Net profit remained negative throughout both comparisons, although no trends are supplied to indicate whether the loss increased or decreased. As regards gross profit per ton, the trends for the 12-month periods closely mirror those of actual gross profit, but for the 6-month periods there is significant disparity between the two values. This makes it extremely difficult to make any reasonable determination of the injury and makes it difficult, if not impossible, to determine whether dumping caused injury.

On the one hand, on the basis of the Panel's finding in *Russia—Commercial Vehicles* it is submitted that it may appear that 'either the POI or the period of data collection was selected to artificially generate a finding of injury'[33] and 'the record that supports the proposition that the selection did, in fact, lead to such an artificial result.'[34] The comparison of these periods may, therefore, be in breach of South Africa's WTO obligations. On the other hand, since ITAC did consider full 12-month periods and additionally also considered corresponding 6-month periods, it may have met its WTO obligations. However, it is submitted that it would have made more sense had the injury periods corresponded to the dumping period, that is, if the injury periods were also calendar years in this case, regardless the industry's financial years.

Price Suppression[35]

The Panel noted that Russia had selected the second year of the 4-year period as benchmark for the profit margin the industry should have achieved, based on the fact that the first year was not a normal year in that it was affected by start-up costs in the industry, and as the second year 'was the year in which the market share of dumped imports was the lowest and, for that reason, the year in which the impact of the dumped imports was minimal.'[36] It stated that the basis underlying the price suppression calculation was the price that the industry would have achieved in the absence of dumping.[37] The Panel noted that the fact that the profit margin was at its highest in the second year was not a problem in itself, but then continued to indicate that:

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33 Panel Report, *Russia—Commercial Vehicles* (n 1) para 7.40.

34 Idem.

35 This issue has never been considered by South African courts. However, see Gustav Brink, 'X-Raying Injury Findings in South Africa's Injury Determinations' (2015) 23.1 African Journal of Contemporary and International Law 159–163 for a discussion on WTO-inconsistencies in ITAC's approach to the determination of price suppression.

36 Paragraph 7.58

37 Paragraph 7.61

> If the rate of return used in constructing a counterfactual target domestic price is not one that the domestic industry could reasonably have expected to achieve in the subsequent years in normal conditions and in the absence of dumped imports, then using that rate of return would result in a consideration of the price suppressive effect of dumped imports inconsistent with Articles 3.1 and 3.2. For this reason, *a reasonable and objective investigating authority may need to go beyond identifying the rate of return achieved in a given year* if it undertakes such an analysis. If there is evidence before the investigating authority of market conditions during the selected year that bring into question whether that rate of return could be achieved in subsequent years under normal conditions of competition and in the absence of dumped imports, an investigating authority may not ignore such evidence.[38]

As a consequence, the Panel found that Russia had violated its WTO obligations as market conditions were not the same in the investigation period as in the second year, and that Russia should have investigated the impact this had on the profit margin and prices the industry could have expected. It should be noted that Russia has again appealed this decision.[39]

Turning to the question of whether an authority had to consider the ability of the market to absorb any additional price increases, the Panel noted that this would have to be taken into consideration if information had been submitted in that regard.[40] It held that 'where there is evidence that any observed price suppression is the effect of factors other than dumped imports, an investigating authority is required to consider that evidence.'[41] Finally, the Panel found that price suppression could occur even though the imported product's prices were consistently higher than those of the domestic industry, as other factors could play a role in the price determination.[42]

In *Frozen Chicken Portions* ITAC neither considered whether the return realised in the base year of comparison was realistic, nor whether it could be repeated in the final year of investigation. In addition, although there was a drought that had a significant impact on the price of maize, which contributes the largest proportion of the total production cost for chicken, and despite comments by importers and exporters that the industry would not have been able to pass on cost increases to consumers under the existing economic conditions, these issues were not reflected in ITAC's report. ITAC simply concluded that the 'constrained consumer spending argument is not consistent with the observed growing demand as indicated by growth of the SACU market',[43] but did not otherwise address the issue. The report

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38 Paragraph 7.64 [emphasis added].
39 WT/DS479/6.
40 Paragraphs 7.88–7.90
41 Paragraph 7.93.
42 Paragraph 7.106.
43 ITAC Report 492, para 5.4.3.3.

contains no analysis of such growth, other than a table in paragraph 5.5.14, which indicates growth of four per cent over the 3-year period (with a decline in the following year), which fails to address the very real issue of the increased maize price. Since this issue had been submitted as a specific issue for consideration and had not been addressed, it appears that ITAC's decision would have fallen foul of the finding in *Russia—Certain Vehicles*.

Material Injury[44]

The Appellate Body and several Panels[45] have ruled that all fifteen injury factors under Article 3.4 of the Anti-Dumping Agreement must be 'evaluated', that an evaluation 'implies the analysis of data through placing it in context in terms of the particular evolution of the data pertaining to each factor individually, as well as in relation to other factors examined'[46] and that 'an evaluation of a factor… is not limited to a mere characterisation of its relevance or irrelevance [but] implies the analysis of data through placing it in context in terms of the particular evolution of the data pertaining to each factor individually, as well as in relation to other factors examined.'[47] In *Mexico—Corn Syrup*[48] the Panel indicated that 'the mere recital of data does not constitute explanation, or findings and conclusions, sufficient to satisfy the requirements.'[49]

In *Russia—Commercial Vehicles* the Panel confirmed that Article 3.4 requires the evaluation of 'all relevant economic factors and indices having a bearing on the state of the industry.'[50] As regards the margin of dumping, the Panel found that Russia had failed to meet its obligations by not properly evaluating the margin of dumping, as it had: only concluded that the margin was more than *de minimis* without conducting any further evaluation;[51] confirmed that only the injury to 'producers' had to be included in the investigation; and that the inventories of related sellers were not relevant to the investigation.[52]

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44 This issue has never been considered by South African courts. However, see Brink, 'X-Raying Injury Findings' (n 35) 144–173 and Gustav Brink, 'The 10 Major Problems with the Anti-Dumping Instrument in South Africa' (2005) 39 (1) Journal of World Trade 155–156 for discussions on WTO-inconsistencies in ITAC's approach to injury determinations.

45 See eg Appellate Body Report, 'Thailand—Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland' WT/DS122/AB/R, para 128 [hereinafter *Thailand—H-Beams*]; Panel Report, 'European Communities—Anti-Dumping Duties on Imports of Cotton Type Bed Linen from India', WT/DS141/R, para 6.167.

46 *EC—Tube or Pipe Fittings* (n 45) para 7.314.

47 Idem.

48 Panel Report, 'Mexico—Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States' WT/DS132/R [hereinafter *Mexico—Corn Syrup*].

49 *Mexico—Corn Syrup* (n 48) para 7.140 fn 610.

50 *Russia—Commercial Vehicles* (n 1) para 7.122.

51 *Russia—Commercial Vehicles* (n 1) para 7.161.

52 ibid, para 7.122.

As regards the margin of dumping, since ITAC merely considers whether it exceeds the *de minimis* level, and does not conduct any further evaluation of the margin, it would also be found in violation of Article 3.4 on the same basis as the Panel's finding in *Russia—Certain Vehicles*.

On the evaluation of all injury factors, the Panel then reached a decision diametrically opposed to decisions reached by the Appellate Body and earlier Panels. It found that it is not restricted to the public report to determine whether an authority has evaluated each of the injury factors, noting that Russia 'did not even indicate that confidential information had been redacted from the non-confidential version in this context' and that this 'may give rise to concerns'.[53] This comment confirms earlier findings in this regard, such as the Appellate Body's ruling in *US—Cotton Yarn*, where it held that 'panels must … assess … whether an adequate explanation has been provided as to how those facts support the determination', [54] and in *US—Lamb* where it held that

> a panel can assess whether the competent authorities' explanation for its determination is reasoned and adequate *only* if the panel critically examines that explanation, in depth, and in the light of the facts before the panel. Panels must, therefore, review whether the competent authorities' explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data. A panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some *alternative explanation* of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation. [55]

This notwithstanding, the Panel then indicated that the Anti-Dumping Agreement requirement that an injury determination be based on positive evidence and involve an objective examination, 'does not imply that the

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53 ibid, para 7.165.

54 Appellate Body Report, 'United States—Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan' WT/DS192/AB/R, para 74. See also Matthias Oesch, 'Standards of Review in WTO Panel Proceedings' in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement: The First Ten Years* (Cambridge University Press 2005) 161–176 who notes at 169 that 'Panels and the Appellate Body have consistently [ie until *Russia—Commercial Vehicles*] emphasized the significance of "a reasoned and adequate explanation" of whether a policy determination is based on an "acceptable" evaluation of the relevant facts. The requirement to issue *an adequate explanation forms the starting point for a panel's analysis* of whether the national measure in question is based on a "acceptable" evaluation of the relevant facts' [footnote omitted, emphasis added] and the 'Appellate Body jurisprudence requires a panel to thoroughly and critically examine a domestic authority's explanation of how the "raw" evidence supports its overall factual conclusion.'

55 Appellate Body Report, 'United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia' WT/DS177/AB/R, WT/DS178/AB/R, para 106 [emphasis in original] [hereinafter *US—Lamb*].

determination must be based only on reasoning or facts that were disclosed to, or discernible by, the parties to an anti-dumping investigation.'[56] In this respect it relied, inappropriately, on the Appellate Body finding in *Thailand—H-Beams*,[57] where it was held that

> the ordinary meaning of the … terms ['objective examination' and 'positive evidence'] does not suggest that an investigating authority is required to base an injury determination only upon evidence disclosed to, or discernible by, the parties to the investigation. An anti-dumping investigation involves the commercial behaviour of firms, and, under the provisions of the *Anti-Dumping Agreement*, involves the collection and assessment of *both* confidential and non-confidential information. An injury determination conducted pursuant to the provisions of Article 3 of the *Anti-Dumping Agreement* must be based on the *totality* of that evidence. We see nothing in Article 3.1 which limits an investigating authority to base an injury determination only upon non-confidential information.[58]

However, it is clear that what the Appellate Body found was that an investigating authority could rely on *confidential* information to which interested parties did not have access. What the Appellate Body did *not* find is that an investigating authority could rely on information that was not disclosed to the interested parties in any form.

Based on an analysis of Russia's confidential investigation report, the Panel then found that its authority had indeed investigated all of the factors (other than the margin of dumping).[59] The Panel noted that Russia's failure to include an analysis of all injury factors in its public report could give rise to concerns as to whether the investigation conformed to the requirements of Article 12 of the Anti-Dumping Agreement[60]—which deals with the content of published notices and reports—mentioning that while the EU had included Article 12 in its request for the establishment of a Panel, it had failed to present any arguments or evidence in this regard.[61] It should be noted that this ruling is in stark contrast to the recent ruling in *Ukraine—Passenger Cars*[62] in which the Panel emphasised the importance of including all relevant information in the report and that this would be instructive as to whether the investigating authority actually considered such information.[63]

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56 Idem.
57 *Thailand—H-Beams* (n 45).
58 *Thailand—H-Beams* (n 45) para 111 [emphasis in original].
59 *Russia—Commercial Vehicles* (n 1) para 7.171.
60 ibid, para 7.165.
61 ibid, fn 300.
62 Panel Report, 'Ukraine—Definitive Safeguard Measures on Certain Passenger Cars' WT/DS468/R.
63 ibid, paras 7.250–7.251.

The same applies to the Appellate Body's finding in *China—GOES*, where it noted that

> an investigating authority's *consideration* under Articles 3.2 and 15.2 must be reflected in relevant documentation, such as an authority's final determination, so as to allow an interested party to verify whether the authority indeed *considered* such factors.[64]

The same argument would apply in respect of Article 3.4. It is submitted that the Panel should not have considered the confidential (internal) documents to determine whether Russia had actually considered the issues, but that it should have confirmed earlier Panels' views that if the public report did not reflect the issues, this would be *prima facie* evidence that the issue had not been considered. It should be noted that the EU has appealed this decision.[65]

The effect of the *Russia—Commercial Vehicles* ruling is that an authority could now simply fail to include any information in its public reports, thereby making it impossible for the exporting Member to have sufficient information available to challenge any of the findings in a dispute, other than that the report did not meet the requirements of Article 12. This is a very dangerous precedent and must be rejected. It also potentially opens the door to investigating authorities to amend the original confidential (internal) report after the dispute has been declared to show that certain factors had indeed been considered when, in fact, they had not. Again, this is in stark contrast to previous rulings, including *China—HP SSST*,[66] in which the Panel noted that:

> The ability of the public to understand the findings and conclusions of the investigating authority is important, for the concept of 'public' is broad: it includes 'interested parties' within the meaning of Article 6.11 of the Anti-Dumping Agreement and, for example, consumer organizations that might be expected to have an interest in the imposition of anti-dumping measures. Article 13 of the Anti-Dumping Agreement provides for judicial review of the final determinations referred to in Article 12.2.2. In our view, *the level of detail of the description of the authority's findings and conclusions must be sufficient to allow the abovementioned entities to assess the conformity of those findings and conclusions with domestic law*, and avail themselves of

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64 Appellate Body Report, 'China—Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States', WT/DS414/AB/R, para 131 [emphasis in original, footnote omitted].

65 WT/DS479/7.

66 Panel Report, 'China—Measures Imposing Anti-Dumping Duties on High Performance Stainless Steel Seamless Tubes ("HP SSST") from Japan WT/DS454/R, China—Measures Imposing Anti-Dumping Duties on High Performance Stainless Steel Seamless Tubes ("HP SSST") from the European Union' WT/DS460/R [hereinafter *China—HP SSST*].

> the Article 13 judicial review mechanism where they consider it necessary. In a similar vein, we also consider that *the level of detail should be sufficient to allow the relevant exporting Member to ascertain the conformity of the findings and conclusions with the provisions of the WTO Agreement*, and to avail itself of the WTO dispute settlement procedures where it considers it necessary.[67]

In addition, the Appellate Body has explained that the 'objective assessment' standard in Article 11 of the DSU[68] requires a Panel to review whether the authority has provided a reasoned and adequate explanation as to: (i) how the evidence on the record supported their factual findings; and (ii) how those factual findings support the overall determination.[69] This is, therefore, a requirement in the DSU itself, rather than a violation of a specific provision in the Anti-Dumping Agreement. As regards a Panel's standard of review, the Appellate Body has clarified that:

> A panel must examine *whether*, in the light of the evidence on the record, *the conclusions reached by the investigating authority are reasoned and adequate*… The panel must undertake an in-depth examination of whether the explanations given *disclose* how the investigating authority treated the facts and evidence in the record and whether there was positive evidence before it to support the inferences made and conclusions reached by it. *The panel must examine whether the explanations provided demonstrate that the investigating authority took proper account of the complexities of the data before it*, and that it explained why it rejected or discounted alternative explanations and interpretations of the record evidence. [70]

The Appellate Body also noted that the fact that an authority had not included findings on 'unforeseen developments' in a safeguard investigation report were fatal and that 'the logical connection between the "conditions" identified in the second clause of Article XIX:1(a) and the "circumstances" outlined in the first clause of that provision dictates that the demonstration of the existence of these circumstances must also feature in the same report of the competent authorities.'[71] This, despite the fact that the issue under discussion at that point of the report related to whether the investigating

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67 *China—HP SSST* (n 66) para 7.270 [footnotes omitted, emphasis added].

68 Understanding on Rules and Procedures Governing the Settlement of Disputes, commonly referred to as the Dispute Settlement Understanding or DSU.

69 Appellate Body Reports, 'United States—Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea' WT/DS296/AB/R, para 186; and *US—Lamb* (n 55) para 103.

70 Appellate Body Report, 'United States—Investigation of the International Trade Commission in Softwood Lumber from Canada—Recourse to Article 21.5 of the DSU by Canada' WT/DS277/AB/RW, para 93 [emphasis added].

71 *United States—Lamb* (n 55) para 73.

authority had found the existence of unforeseen developments and not whether the published report clearly set out all issues of law and fact considered relevant. One author notes that:

> Given that the United States investigating authorities simply had not addressed the issue of unforeseen developments in their determination, neither the panel nor the Appellate Body was prepared to address US arguments on the issue, *even to the extent those arguments were based on facts on the record*.[72]

Therefore, a Panel, as part of its standard terms of reference, must examine whether an investigating authority's *reasoning* is adequate, regardless of the specific requirements of Article 12 of the Anti-Dumping Agreement. The Panel in *Russia—Commercial Vehicles* failed to apply the proper standard of review.

As a consequence, it would be cold comfort to a Member successfully to challenge the inadequacy of another Member's investigation report, have to wait for another six to nine months after adoption of the dispute settlement report for the Member to address the deficiencies in the report and then to start a whole new dispute process to address the substantive and procedural deficiencies originally present. It would also potentially open up investigations to ex-post rationalisation to defend decisions incorrectly taken.

The effect of this ruling, if it were allowed to stand, would be that there would be no pressure on South Africa to improve the standard of its injury reporting in reports, which generally lacks any proper evaluation or analysis, but is a 'mere recitation of data'.[73] The Panel's views will make it very difficult, if not impossible, for anybody to challenge an ITAC decision as the defence will simply be that a confidential analysis was undertaken. While it would still be subject to challenges under Article 12,[74] as its reports may not meet the requirements of setting out all issues of fact and law, including why certain arguments were accepted or not,[75] this does not provide interested parties with the information on which to base a decision on whether to lodge a dispute against perceived substantive errors, as required by the Panel in *China—HP SSST*.[76]

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[72] Jesse Kreier, 'Contingent Trade Remedies and WTO Dispute Settlement: Some Particularities', in Yerxa and Wilson (n 54) 57–58 [emphasis added].

[73] *Mexico—Corn Syrup* (n 48) para 7.140 fn 610.

[74] The same would apply to Art 6.9, which requires the authority to provide interested parties with all the relevant essential facts that will be considered in the final determination.

[75] See Articles 12.2.1 and 12.2.2 of the Anti-Dumping Agreement.

[76] *China—HP SSST* (n 66) para 7.270.

Causality[77]

One of the three key findings to be made in an anti-dumping investigation is that there must be a causal link between the material injury the domestic industry experiences and the dumping. However, the requirement for a causal link has been watered down since the first Anti-Dumping Code of 1967, and more so by the WTO DSB. The Panel's findings in *Russia—Commercial Vehicles* leads to a further dilution of the causation requirement. Article 3.5 of the Anti-Dumping Agreement, which deals with causality, provides as follows:

> It must be demonstrated that the *dumped imports are*, through the effects of dumping… *causing injury*… The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports… [emphasis added].

This shows that a causal, and not just a casual, relationship must be established between the dumping and the injury. However, the Panel found that

> the investigating authority must demonstrate a relationship of cause and effect, such that dumped imports are shown *to have contributed to the injury* to the domestic industry. Dumped imports *need not be 'the' cause of the injury suffered by the domestic industry, provided they are 'a' cause of such injury*; that other factors may also have caused injury to the domestic industry is no bar to establishing this causal relationship.[78]

It is submitted that Article 3.5 does not provide for dumping to have 'contributed' to injury, but that it requires a direct and strong nexus: 'dumped imports *are*, through the effects of dumping… *causing injury*…' To exacerbate its finding, the Panel then found that

> While 'significant increases in imports have to be "consider[ed]" by investigating authorities under Article 3.2 … the text does not indicate that in the absence of such a significant increase, these imports could not be found to be causing injury' within the meaning of Article 3.5.[79]

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[77] South African courts have never considered this issue. However, see Brink, 'X-Raying Injury' (n 35) 170–172 for a discussion on WTO-inconsistencies in ITAC's approach to causality determinations.

[78] *Russia—Commercial Vehicles* (n 1) para 7.178 [footnote omitted, emphasis added].

[79] *Russia—Commercial Vehicles* (n 1) para 7.187.

Again, one has to consider the wording of the Anti-Dumping Agreement. Article 3.2 in relevant provides that:

> With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member.

It appears that the Panel based its decision, it is submitted again erroneously, on the Appellate Body's finding in *EC—Tube and Pipe Fittings*,[80] that there was 'no support' for excluding imports from a country where those imports had not increased during the investigation period 'from cumulative assessment' and that Article 3.2 'does not indicate that in the absence of such a significant increase, these imports could not be found to be causing injury.'[81] However, the Appellate Body specifically noted that when undertaking the volume and price analysis under Article 3.2, there is nothing in the Article to indicate that 'the analyses of volume … and prices must be performed on a *country-by-country* basis where an investigation involves imports from several countries.'[82] The Appellate Body's finding was limited to an argument by Brazil as to whether the exports from an individual country should be excluded from the *cumulative* assessment where there were imports from various countries that, taken together, have increased significantly. In that regard, the Appellate Body indicated this not to be the case, provided the imports from each country meet the necessary requirements related to *de minimis* dumping margin and negligible import volumes.

It is submitted that the Panel also illustrated a lack of understanding of market forces that may affect a product's prices. The Panel noted the EU's argument that petrol-engined light commercial vehicles (LVCs) could have affected the condition of the domestic diesel-engined LCV industry. However, the Panel found that since the DMID had already found that petrol-engined LCVs and diesel-engined LCVs were not like products, 'we do not consider that the DIMD was required to repeat that analysis in the context of its determination of causation.'[83] The Panel drew support for this statement from the Appellate Body Report in *EC—Tube and Pipe Fittings*, but again its reliance is flawed. The relevant citation the Panel refers to, reads as follows:

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80 Appellate Body Report, *European Communities—Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R [hereinafter *EC—Tube and Pipe Fittings*].

81 ibid fn 114.

82 ibid para 111 [emphasis added].

83 *Russia—Commercial Vehicles* (n 1) para 7.211.

> We understand the Panel… to have stated that the alleged causal factor *was* 'known' to the European Commission in the context of its dumping and injury analyses, but that the factor was nevertheless *not* 'known' in the context of its causality analysis. In our view, a factor is either 'known' to the investigating authority, or it is not 'known'; it cannot be 'known' in one stage of the investigation and unknown in a subsequent stage. This does not, however, affect our finding, which is premised on the fact that once the cost of production difference was found by the European Commission to be 'minimal', the factor claimed by Brazil to be 'injuring the domestic industry'" had effectively been found *not* to exist. As such, there was no 'factor' for the European Commission to 'examine' further pursuant to Article 3.5.[84]

One cannot agree with the Panel's reasoning. The fact that petrol engines were excluded from the scope of the investigation as not being 'like products' does not mean that they could not have an impact on the diesel engine market. If the sales of petrol-engined LCVs increased significantly, this would have had a direct impact on the volume of diesel-engined LCVs. If petrol-engined LCV prices decreased sharply, it would have an impact on the prices of diesel-engined LCVs. As such, the volume and prices of petrol-engined LCVs could have directly affected diesel-engined LCV prices, sales volumes, production, profit, and several of the other injury factors an authority has to consider. In this regard it is noted that Article 3.5 of the Anti-Dumping Agreement specifically provides that 'changes in the patterns of consumption' must be taken into consideration in the determination of causality. This would clearly include situations in where consumers started buying a different product, that is, a product that was not a 'like product' to the product under investigation. In *EC—Tube and Pipe Fittings* the situation was completely different: the investigating authority had determined that the cost of production difference was minimal and *for that reason* it could not affect the causal link.

The net effect of the Panel's ruling is that there may be an incomplete analysis of the causal relationship to be established between dumping and injury and that factors that affected the market, but are related to 'unlike' products, could simply be disregarded. This opens the door to, at best, a tenuous link between dumping and injury. This runs against all the panel and Appellate Body findings regarding the non-attribution rule, that is, that injury caused by other factors cannot be attributed to the dumping (or to the subsidised imports or to increased imports in the case of safeguards).[85]

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[84] *EC—Tube or Pipe Fittings* (n 80) para 178 [footnotes omitted, emphasis in original].

[85] See, eg, *Thailand—H-Beams* (n 45) para 222 and para 2.275; Panel Report, *Guatemala—Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico,* WT/DS156/R, para 8.272; *EC—Tube or Pipe Fittings* (n 80) para 7.356.

Applying the ruling to some recent South African investigations underscores the serious concern. In *Frozen Chicken Portions*, the industry's profit decreased as the price of maize, the major raw material, increased, and profit later increased despite increasing imports when maize prices came down. This showed a very strong link between the maize prices and the industry's performance, yet ITAC rejected the notion that this affected the causal link. It also dismissed the significant loss the industry itself acknowledged was caused by labour unrest at two of the largest producers, as well as several other causality arguments other interested parties raised. Likewise, in *Frozen Potato Chips* there had been a poor potato harvest because of adverse weather conditions, the domestic industry was the largest importer and could not differentiate between sales ex-own production and sales ex-own imports, the peak volume of imports was during the 2010 Football World Cup and decreased very significantly thereafter. ITAC essentially disregarded all of these issues.

With a ruling such as that in *Russia—Commercial Vehicles* there is a real risk that ITAC's consideration of other factors that affected the causal link will become even less engaging, meaning that anti-dumping duties will be imposed as soon as dumping and injury have been found and without any objective regard as to the cause of the injury.

Confidentiality[86]

The Anti-Dumping Agreement contains two important provisions on confidentiality. First, Article 6.5 requires that parties must show good cause for having information treated as confidential and that, if such good cause was shown, the authority may not release such information without consent of the party that submitted the information in confidence. Second, Article 6.5.1 obliges the investigating authority to require parties submitting confidential information to also submit a non-confidential version of that information that allows other interested parties a reasonable understanding of the essence of the information submitted in confidence. In exceptional circumstances, a party may indicate reasons why information would not be susceptible to summarisation.

In *Russia—Commercial Vehicles* Russia argued that certain information submitted by the domestic industry was confidential by nature and that 'the

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[86] Although South African courts have considered the issue of confidentiality in a number of cases (see, eg, *Chairman of the Board on Tariffs and Trade v Brenco* 2001(4) SA 511 (SCA); *Rhône Poulenc v Chairman of the Board* (Unreported case 6589/1998T); AMIE v ITAC (Unreported case 2013/30155NG); *Bridon International GMBH v International Trade Administration Commission* (538/2011) [2012] ZASCA 82), they have never considered the WTO requirement that 'good cause' be shown before a confidentiality request may be granted, nor have they considered whether the non-confidential conformed to the requirement to grant other interested parties a reasonable understanding of the information submitted in confidence. South Africa case law, therefore, does not provide any clarification of the issues the panel considered in *Russia—Commercial Vehicles*.

basis for providing confidential treatment is self-evident.'[87] It therefore did not require those parties to submit 'good cause' for confidential treatment on the basis that it was, in any event, a domestic legal requirement that good cause be shown. The Panel found this to be WTO-inconsistent, noting that the words 'upon good cause shown' 'imply the performance of an act—the showing of good cause—above and beyond the submission of information that is self-evidently confidential.'[88] It noted that the requirement to show good cause for confidential treatment applied equally to information that was confidential by nature and other information for which confidentiality was claimed. It rejected Russia's argument that the fact that an authority has granted confidentiality implies that it is satisfied that good cause was shown, noting that where no reasons were supplied for confidentiality it was 'difficult to see how an investigating authority could be "satisfied" with a condition precedent that by its own admission has not been met.'[89] It also noted that:

> Where non-confidential summaries are provided, they must be in 'sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence'. A 'summary' is not a facsimile. In providing a summary, an interested party is not required to ensure a full understanding of the confidential information, but rather a reasonable understanding of the substance of that information.[90]

It should be noted that Russia has appealed this decision.[91]

South Africa's anti-dumping regulations require that parties claiming confidentiality must 'indicate in each instance the reasons for confidentiality.'[92] In addition, the ITA Act[93] requires that parties must show how the information 'satisfies the requirements set out in the definition of "information that is by nature confidential"' or, in the case of information that is not by nature confidential, show why the information should be treated as confidential.[94] The definition of 'information that is confidential by nature' lists the types of information that are regarded as confidential and also provides that it would include categories of information that could 'result in a significant adverse effect on the owner, or on the person that provided the information' or 'give a significant competitive advantage to a competitor of the owner.'[95]

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87 *Russia—Commercial Vehicles* (n 1) para 7.239(c).
88 ibid para 7.245 [footnotes omitted].
89 ibid.
90 ibid para 7.249 (b) [underlining in original].
91 WT/DS479/6.
92 Anti-Dumping Regulation 2.1(b).
93 International Trade Administration Act 71 of 2002.
94 S 33(2)(a) of the ITA Act.
95 Section 1(2) of the ITA Act.

Nowhere in South African law is there a requirement that 'good cause' must be shown for confidential treatment. This already places South Africa on the back foot, as its legislation is not in line with its WTO obligations in this regard. In recent cases, ITAC has accepted all claims for confidentiality from parties without looking into the reasons for the requests. It has also rejected calls by opposing parties for the release of information submitted by other parties and for which the opposing party alleged confidentiality should not have been granted. ITAC also seldom determines whether a non-confidential version provides other interested parties with a reasonable understanding of the information that was submitted in confidence, which is another WTO requirement.[96] The ITA Act only provides that 'a written abstract of the information in a non-confidential form'[97] must accompany the confidential information, even though the Anti-Dumping Regulation, in line with the WTO requirements, provides that a non-confidential summary must 'be in sufficient detail to permit other interested parties a reasonable understanding of the substance of the information submitted in confidence.'[98] ITAC also typically issues a letter containing a single sentence that 'confidential treatment has been accorded to the information you have submitted in confidence' without providing any reasons for its findings.

In addition, the Panel in *Russia—Commercial Vehicles* held that Russia's argument that neither the confidential nor non-confidential information from the excluded producer's questionnaire response was available, was 'difficult to reconcile with the Investigation Report'[99], amongst others, as data of that producer were included as one of the two producers of the like product. In *Frozen Chicken Portions* each of the domestic producers supporting the application individually supplied information in confidence, while a consolidated application was also supplied. The industry supplied a non-confidential version of the consolidated application, but refused to submit non-confidential versions of each individual producer's submissions despite specific requests from other interested parties. In view of the Panel's finding in *Russia— Commercial Vehicles* it is clear that this constitutes a violation of Article 6.5.1.

It is therefore proposed that ITAC ensure that good cause is shown in each instance why confidentiality is requested and that it obliges interested parties to submit non-confidential summaries of all information submitted in confidence, including information submitted by individual producers forming part of the applicant.

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96 Article 6.5.1 of the Anti-Dumping Agreement.
97 Section 33(2)(b)(i) of the IA Act.
98 Anti-Dumping Regulation 2.1(c).
99 *Russia—Commercial Vehicles* (n 1) para 7.246 (c).

Essential facts[100]

The Anti-Dumping Agreement requires that an investigating authority inform all interested parties of the 'essential facts' under consideration that will form the basis of the authority's decision on whether or not to apply definitive anti-dumping measures.[101] In *Russia—Commercial Vehicles* the Panel broke down the requirements of Article 6.9 as follows:

> The first sentence is the operative part of Article 6.9. Broken down to its constituent parts, it has the following required elements:
> a. shall inform[102]
> b. all interested parties
> c. before a final determination is made
> d. of the essential facts[103]
> i. under consideration
> ii. which form the basis for the decision whether to apply definitive measures.

Thus, a complaining party demonstrates that an investigating authority has acted inconsistently with Article 6.9 where it establishes that any one of these required elements has not been satisfied.[104]

The second sentence of Article 6.9 is, on its face, a temporal exhortation. As context for the central obligation in Article 6.9, it gives an indication both of why disclosure is to be made and when it must be made. Nothing in the second sentence suggests that it is an element noncompliance with which must be independently demonstrated by the complaining party to establish inconsistency with Article 6.9. For this reason, to establish inconsistency with Article 6.9, a complaining party is not required to demonstrate that a failure to disclose essential facts did 'affect interested parties' right of defence'.[105]

The Panel then clearly indicated what is meant by 'facts', when such facts would be 'essential', and when such essential facts 'are under consideration'.[106] Important in this regard is that facts are under consideration when the investigating authority considers them in its final determination

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[100] To date no South African court has ever considered the issue of essential facts.

[101] Article 6.9 of the Anti-Dumping Agreement.

[102] The Panel in *Argentina—Ceramic tiles* found that there was a specific duty on the investigating authority to 'inform' interested parties of the essential facts and that the fact that interested parties had access to all information on the public file did not meet this requirement—see Panel Report, 'Argentina—Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy', WT/DS189/R, para 6.129 [hereinafter *Argentina—Ceramic tiles*].

[103] Note that Appellate Body in *China—GOES* has also distinguished what is meant by 'facts' and when facts would be 'essential'—see *China—GOES* (n 64) para 240.

[104] *Russia—Commercial Vehicles* (n 1) para 7.253.

[105] ibid para 7.254 [footnotes omitted].

[106] ibid para 7.256.

and not only when they support the authority's final determination.[107] It noted that:

> There are three cumulative elements as to the kinds of information an investigating authority is required to disclose:
> a. Article 6.9 requires the disclosure of facts: the information underlying a decision rather [than] the reasoning, calculation or methodology[108] that led to a determination.
> b. A fact is essential where it is 'extremely important and necessary', 'indispensable' or 'significant, important or salient' in the process of reaching a decision as to whether or not to apply definitive measures.
> c. Not every 'essential fact' is required to be disclosed. Article 6.9 requires the disclosure of 'essential facts under consideration': the 'facts on the record that may be taken into account by an authority in reaching a decision as to whether or not to apply definitive anti-dumping and/or countervailing duties.'[109]

The Panel found that 'entire pieces of information [were] missing' from the essential facts report.[110] It should be noted that both Russia and the EU have appealed this decision.[111]

This finding, fully in line with previous Panel and Appellate Body determinations on the matter,[112] places a significant burden on investigating authorities, one that ITAC fails to meet. For instance, in *Frozen Chicken Portions*, *Frozen Potato Chips* and in *Cement,* the essential facts report with respect to injury and causality, ITAC's essential facts letter failed to set out any of the essential facts. Looking only at the essential facts report in *Cement*, in all it provided the following as regards the essential facts relating to injury:

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[107] Panel Report, 'European Communities—Anti-Dumping Measure on Farmed Salmon from Norway', WT/DS337/R, para 7.796.

[108] Note that this finding is not in line with some previous panel decisions, for instance that in *China—HP SSST*, where the Panel found that 'we consider that, in disclosing the essential facts underlying its dumping determination, MOFCOM *should also have disclosed the calculation methodology* used to calculate the margin of dumping on the basis of those essential facts'—see *China—HP SSST* (n 66) para 7.239 [emphasis added].

[109] *Russia—Commercial Vehicles* (n 1) para 7.256 [footnotes omitted].

[110] ibid para 7.250.

[111] WT/DS479/6 and WT/DS479/7.

[112] See eg *China—GOES* (n 64); Appellate Body Report, 'European Communities—Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China', WT/DS397/AB/R; *Argentina—Ceramic tiles* (n 102); *China—HP SSST* (n 66); Panel Report, 'China—Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union', WT/DS425/R; *EC—Salmon (Norway)* (n 107); Panel Report, 'Mexico—Definitive Countervailing Measures on Olive Oil from the European Communities', WT/DS341/R; Panel Report, 'China—Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States', WT/DS427/R.

> 9. In addition to the information contained in the Commission's preliminary determination report, the Commission noted the comments by exporters as well as the responses by the Applicant.
> 10. The Commission in particular took note of the comments raised by exporter regarding the impact of the blenders on the injury suffered by the Applicant. The Commission noted that a number of blenders have expressed support for this application and indicated that they were also injured by dumped imports from Pakistan. The Commission further obtained sales information of blended bagged cement for 2012 and 2013 from the Business Marketing Intelligence (Pty) Ltd (BMI) study titled 'The South African Building Industry'. In analysing this information, the Commission is of the opinion that sales by blenders did not have a significant impact on the market share analysis.
> 11. Taking all comments received into consideration, the Commission is considering making a final determination that the SACU industry is experiencing volume injury, given its sales volume and output figures as well as price injury, given that it is experiencing price undercutting and price suppression and a decline in profits and cash flow.

As regards causality, the full essential facts disclosure in *Cement* provides the following:

> 12. In addition to the information contained in the Commission's preliminary determination report, the Commission noted the additional comments by exporters with regard to the effect of the findings by the Competition Commission.
> 13. The Commission is of the opinion that although there are factors other than dumping that could have contributed to the injury, such as the fines imposed by the Competition Tribunal, this did not sufficiently detract from the causal link between the dumping of the subject project and the material injury experienced by the SACU industry.

It is clear that this does not set out *any* essential facts, let alone *all* essential facts, and that it fails to meet even the most basic WTO requirement in this regard. Accordingly, in view of the Panel's finding in *Russia—Commercial Vehicles,* ITAC would have serious problems defending its essential facts disclosure if it were to be challenged before the WTO.

The Panel further noted that the Anti-Dumping Agreement required that 'all' interested parties be informed of the essential facts and that '[u]nless otherwise defined or indicated, "all" means everyone. Nothing in Article 6.9 provides a different definition of "all" or otherwise suggests that "all" should be interpreted as anything other than all.'[113] It also noted that an

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[113] *Russia—Commercial Vehicles* (n 1) para 7.273 [underlining in original].

'interested party's failure to fully cooperate in the investigation does not necessarily lessen the interest or concerns of that interested party with the conduct and outcome of an investigation.'[114]

This exposes another shortcoming in South Africa, where ITAC would typically only notify parties that have cooperated, at least partially, in the investigation of the essential facts.

As regards the obligation on an authority to 'inform' interested parties of the essential facts under consideration, the Panel held, in line with previous Panel and Appellate Body decisions, that 'the requirement to "inform" interested parties of essential facts "in a coherent way" is not met where interested parties are expected to deduce the essential facts themselves from information they have otherwise received.'[115]

On the basis of the information before it, the Panel found that Russia had failed to inform all interested parties of all the essential facts under consideration.

This again has serious implications for South Africa. For instance, in *Poultry—Brazil*[116] there were three different sets of import data on the record and ITAC failed to clarify in its essential facts report which set of import data it regarded as 'essential facts'. As quoted above, ITAC also failed to provide any essential facts in respect of injury and causality in its essential facts letters in *Frozen Chicken Portions*, *Frozen Potato Chips,* and in *Cement*, but required interested parties to 'deduce the essential facts themselves'.

It is submitted therefore that ITAC's treatment of essential facts is a clear violation of its WTO obligations in this regard.

SUMMARY AND CONCLUSION

Although the Panel report in *Russia—Commercial Vehicles* contains some decisions that have been appealed, it has reinforced[117] the notion that there are serious shortcomings in South Africa's anti-dumping procedures that need to be addressed as a matter of urgency. These include the following:

- ITAC may have to conduct both a quantitative and a qualitative analysis as of the domestic industry in instances where not all producers in the industry form part of the applicant, as opposed to the current practice that considers only the quantitative aspect.
- ITAC's current practice of the determination of the investigation period, although confusing in the *Frozen Potato Chips* investigation, meets the WTO requirements.

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[114] ibid para 7.274.

[115] ibid para 7.277.

[116] *Investigation in to the Alleged Dumping of Frozen Meat of Fowls of the Species Gallus Domesticus, Whole Bird and Boneless Cuts, Originating in or Imported from Brazil: Final Determination*, ITAC Report 399 (27 November 2012).

[117] See Brink, 'X-raying Injury' (n 35) 144–173.

- ITAC's price suppression determination will have to be amended to consider whether the return realised in the base year of comparison was realistic, and whether such return could be repeated in the final year of investigation, bearing in mind changed circumstances in the market.
- ITAC's discussion of injury might meet its WTO requirements under Article 3.4 (which deals with the question of whether the injury factors were actually considered), but does not appear to meet the requirements under Article 12.2 (which deals with the content of the report), and it will have to improve the narrative on injury.
- ITAC will have to include an analysis of the margin of dumping as an injury factor in its reports.
- ITAC's causality finding may meet the panel's watered-down WTO requirements under Article 3.5 (which deals with the question of whether injury issues were actually considered), although it may not meet the requirements of Article 12.2 (which deals with the content of the report), and it will have to improve the narrative on causality.
- ITAC's treatment of information for which confidentiality has been claimed, will have to change significantly, as it would have to ensure that 'good cause' is shown in each instance in which confidentiality is requested, and as it would have to oblige interested parties to submit non-confidential summaries of all information submitted in confidence, including information submitted by individual producers forming part of the applicant.
- ITAC's essential facts determination and notification will have to undergo radical surgery as it fails to meet the most basic WTO requirements in this regard. ITAC cannot simply indicate that the facts as set out in the preliminary report, along with some of the comments by interested parties, constitute the essential facts, but will actually have to spell out *all* essential facts, including providing a full confidential disclosure to each exporter on how its margin of dumping was determined and a line-by-line commentary on which transactions were included or excluded in the determination of the normal value.

It is therefore recommended that, to the extent necessary, the Anti-Dumping Regulations be amended and that ITAC change its procedure to meet its obligations as espoused by the WTO Dispute Settlement Body.