

# The Curious Case of the ‘Non-co-operating Interested Party’ in Anti-dumping Investigations in South Africa: A Critical Analysis of *Farm Frites International v International Trade Administration Commission*

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## Abstract

This article critically reflects on the position of the ‘non-co-operating interested party’ in anti-dumping investigations in South Africa through a detailed study of the case between Farm Frites International and the International Trade Administration Commission (ITAC). The article finds that the ‘essential facts letter’ is not the only factor under consideration by ITAC in making a final determination of ‘dumping’ in South African law. Secondly, the article finds that the applicant failed to prove it will suffer ‘severe prejudice’ because ITAC is legally entitled to disregard the submissions of a non-co-operating interested party and then to proceed on the basis of the ‘facts available’ or the ‘best information available’ and therefore any prejudice suffered was wholly self-inflicted. In the alternative, the article finds that even in the event that ‘serious prejudice’ was proved by the applicant, the application would nevertheless fail because such ‘prejudice’ could still be undone or remedied by the recommendation of ITAC to the minister and/or by the final decision of the minister.

**Keywords:** dumping; non-co-operating interested party; essential facts; facts available; best information available

## Introduction

This article reflects on the plight of the ‘non-co-operating interested party’ through a critical analysis of the judgment of Bam J in *Farm Frites International v International Trade Administration Commission* (‘*Farm Frites*’).<sup>1</sup> ‘Dumping’ means the introduction of goods into the commerce of a country or its common customs area at an export price less than the normal value of those goods.<sup>2</sup> In South Africa, the International Trade Administration Commission (ITAC), is the body charged with investigating allegations of dumping.<sup>3</sup> The investigation is formally initiated through publication of an initiation notice in the *Government Gazette*.<sup>4</sup> This investigation is conducted in two stages.<sup>5</sup> First, a preliminary investigation is conducted by investigating officers who, after the completion of the investigation, may make submissions to the commissioners of ITAC.<sup>6</sup> All interested parties are notified about the investigation and given an opportunity to make representations, which may be confidential.<sup>7</sup> If these representations are deemed ‘deficient’, such party is given seven days to remedy the deficiency.<sup>8</sup> If the submissions remain deficient, ITAC will disregard the submissions for the purposes of its preliminary finding.<sup>9</sup> Such party whose submissions are deemed deficient will be regarded as a ‘non-co-operating interested party’.<sup>10</sup> The final investigation phase commences with the comments of all interested parties on the preliminary report.<sup>11</sup> All the interested parties are granted 14 days from the date the preliminary report is made available to comment in writing.<sup>12</sup> Even non-co-operating interested parties may remedy their situation by addressing the deficiencies and ITAC will consider their information in its final finding.<sup>13</sup> If ITAC finds that dumping is occurring, it will recommend to the Minister of Trade and Industry (‘the minister’) that anti-dumping

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<sup>1</sup> *Farm Frites International v International Trade Administration Commission* (unreported, case no 32263/14, 20 May 2014, Gauteng Division, Pretoria) (*Farm Frites*).

<sup>2</sup> Section 1 of the International Trade Administration Act 71 of 2002 (‘the ITAA’). See, further, *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) para 1. See also *Farm Frites* (n 1) para 3. See, further, Lonias Ndlovu, ‘Assessing the WTO Compliance of Selected Aspects of South Africa’s International Trade Administration Amendment Bill’ 2010 *Obiter* 313.

<sup>3</sup> Section 16(1)(a) read with s 26 of the ITAA.

<sup>4</sup> Section 26(3)(a) of the ITAA read with reg 28.1 in GN 3197 in GG 25684 (14 November 2003) (International Trade Administration Commission Regulations on Anti-Dumping in South Africa) (‘the ADR’).

<sup>5</sup> *Farm Frites* (n 1) para 4.

<sup>6</sup> See regs 29–34 of the ADR and *Farm Frites* (n 1) para 4.

<sup>7</sup> Regulations 28–30 of the ADR; see also *Farm Frites* (n 1) para 4.

<sup>8</sup> Regulation 31.2 of the ADR; see also *Farm Frites* (n 1) para 4.

<sup>9</sup> Regulation 31.3 of the ADR; see also reg 32.4. See, further, *Farm Frites* (n 1) para 4.

<sup>10</sup> Regulation 32 of the ADR; see also *Farm Frites* (n 1) para 4.

<sup>11</sup> Regulation 35 of the ADR; see also *Farm Frites* (n 1) para 4.

<sup>12</sup> Regulation 35.1 of the ADR.

<sup>13</sup> Regulation 35.5 of the ADR; see also *Farm Frites* (n 1) para 4.

duties be imposed.<sup>14</sup> If the minister accepts the report and recommendations of ITAC, he can request the Minister of Finance to amend Schedule 2 of the Customs and Excise Act 91 of 1964 appropriately. This the Minister of Finance is permitted to do by notice in the *Government Gazette*.<sup>15</sup> The ‘dumped’ goods listed in Schedule 2 shall, upon entry for home consumption, be liable to the appropriate anti-dumping duties provided for in respect of such goods in that Schedule at the time of such entry, if they are imported from a supplier or originate in a territory specified in that Schedule.<sup>16</sup> The anti-dumping duties will be imposed in addition to any other duty payable in terms of the provisions of this Act.

In pursuance of this approach, ITAC had initiated an anti-dumping investigation into frozen chips originating in or imported from Belgium and the Netherlands on 21 June 2013.<sup>17</sup> ITAC then made a preliminary determination that these frozen potato chips were being ‘dumped’, causing material injury to the domestic industry, and imposed provisional payments on 20 December 2013 in order to protect the domestic industry while the investigation continued, up to and including 20 June 2014.<sup>18</sup>

In response, Farm Frites International (‘Farm Frites’), the applicant—a limited liability company involved in the export of potato chips from, among other sources, the Netherlands to the Republic of South Africa—sought relief against ITAC from the High Court in Pretoria.<sup>19</sup> In essence, Farm Frites approached the Court urgently to seek an interim interdict restraining ITAC from initially (i) rejecting the applicant’s submissions and/or information regarding the issue of dumping pending a review of ITAC’s decision to regard the applicant’s submissions in respect of dumping and (ii) treating the applicant as a non-co-operating interested party.<sup>20</sup> The application was dismissed with costs.<sup>21</sup> The investigation was finalised in 2014 and ITAC’s recommendation to impose final anti-dumping duties was accepted by the minister.<sup>22</sup> However, the minister decided to suspend imposition of the final anti-dumping duties until the termination of the

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<sup>14</sup> Section 16(3) of the ITAA. See, further, Clive Vinti, ‘A Spring without Water: The Conundrum of Anti-dumping Duties in South African Law’ (2016) 19 Potchefstroom Electronic Law Journal 4.

<sup>15</sup> See ss 55(2) and 56(1) of the Customs and Excise Act 91 of 1964. See also *Association of Meat Importers and Exporters v ITAC* 2013 (4) All SA 253 (SCA) para 6; also Vinti (n 14) 5.

<sup>16</sup> Section 55(1) of the Customs and Excise Act 91 of 1964.

<sup>17</sup> Government Notice 635 in GG 36575 (21 June 2013).

<sup>18</sup> Government Notice R1024 in GG 37175 (20 December 2013). See, further, ITAC South Africa Report 474, ‘Investigation into the Alleged Dumping of Frozen Potato Chips Originating in or Imported from Belgium and the Netherlands: Final Determination’ 3 (‘ITAC SA Report 474’) <[http://www.itac.org.za/upload/document\\_files/20161021022236\\_SKM\\_754e16102113580.pdf](http://www.itac.org.za/upload/document_files/20161021022236_SKM_754e16102113580.pdf)> accessed 22 September 2016. See also ITAC South Africa Annual Report 2014/15 22 <<http://www.itac.org.za/upload/2014-2015%20Annual%20Report.pdf>> accessed 12 September 2016 (‘ITAC SA Annual Report 2014/15’).

<sup>19</sup> *Farm Frites* (n 1) para 1.

<sup>20</sup> *Farm Frites* (n 1) para 2.

<sup>21</sup> *ibid*.

<sup>22</sup> ITAC SA Annual Report 2014/15 (n 18) 22.

safeguard duties.<sup>23</sup> This is because the frozen chips were the subject of safeguard measures after an earlier and separate finding by ITAC that the frozen chips were being imported in such increased quantities that they were causing serious injury to domestic industry.<sup>24</sup>

Consequently, this article proffers a critical assessment of the plight of the non-co-operating interested party through a detailed analysis of the *Farm Frites* judgment. It contends that the ‘essential facts letter’ is not conclusive in itself because it is not the *only* factor under consideration before ITAC when a final determination is made regarding ‘dumping’ in South African law. Secondly, the article contends that the High Court correctly held that the applicant, Farm Frites, will not suffer any ‘severe prejudice’ as a result of ITAC’s legal entitlement to disregard the submissions of a non-co-operating interested party and proceed on the basis of the ‘facts available’ or the ‘best information available’, and therefore that any ‘prejudice’ suffered was entirely self-inflicted. In the alternative, the article finds that even if ‘serious prejudice’ were found to be present in the dispute, it could still be undone or remedied by the final determination of ITAC or the decision of the minister.

At this juncture, it is imperative to highlight that the analysis of the *Farm Frites* judgment encountered hurdles that arose from the Court’s ambiguous identification of the main issues before it and the subsequent amorphous reasoning of the Court in relation to the conclusions it made. As a result, the analysis of the case is based on a more comprehensive approach that suggests the holistic approach the Court should have employed to resolve the dispute.

## Critical Analysis of the *Farm Frites* Judgment

### The ‘Essential Facts Letter’

It is common cause that South Africa's international obligations on tariffs and dumping arise from the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (‘the ADA’).<sup>25</sup> These obligations are honoured through domestic legislation that governs the imposition of anti-dumping duties, which

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<sup>23</sup> *ibid.*

<sup>24</sup> ITAC SA Report 457, ‘Investigation into Remedial Action in the Form of a Safeguard against the Increased Imports of frozen Potato Chips: Final Determination’ 85 <[http://www.itac.org.za/upload/document\\_files/20150727021633\\_scan0084.pdf](http://www.itac.org.za/upload/document_files/20150727021633_scan0084.pdf)> accessed 9 November 2016. See also GN R576 in GG 37855 (25 July 2014).

<sup>25</sup> See *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) para 2 and *Progress Office Machines v SARS* 2008 (2) SA 13 (SCA) para 6. See also Lonias Ndlovu, ‘South Africa and the World Trade Organization Anti-dumping Agreement Nineteen Years into Democracy’ (2013) 28 SAPL 296. See, further, Gustav Brink, ‘*Progress Office Machines v South African Revenue Services* [2007] SCA 118 (RSA)’ (2008) De Jure 645 and Zain Satardien, ‘South Africa’s International Trade Laws and its “Guillotine” Clause’ (2010) 7 Manchester Journal of International Economic Law 54. See, generally, Vinti (n 14) 16–21.

in South Africa's case consists of the International Trade Administration Act 71 of 2002 (ITAA) and the anti-dumping regulations (ADR). These must be read together with the Customs and Excise Act 91 of 1964 and, where appropriate, the Board on Tariffs and Trade Act 107 of 1986.<sup>26</sup>

The 'essential facts letter' is not defined in the ADR; the ADR merely provides that interested parties will be informed of the essential facts to be considered by the ITAC.<sup>27</sup> In pursuance of the approach elicited above, the ADA elucidates on the matter and it defines an 'essential facts letter' as facts under consideration which form the basis for the decision whether to apply definitive measures.<sup>28</sup> 'Essential facts' within the meaning of Article 6.9 of the ADA refers to the 'body of facts essential to the determinations' that must be made by ITAC before it can decide whether to apply definitive measures.<sup>29</sup> According to the ADR, submissions by an interested party responding to the foreign producer/exporter questionnaire may be deemed 'deficient' if inter alia, any relevant information has not been submitted.<sup>30</sup> ITAC will then give the party with the deficient submission seven days from the date of ITAC's notification letter to address the deficiency.<sup>31</sup> In the event that an exporter has submitted an incomplete or otherwise deficient submission by the deadline contemplated in Regulations 29, 30 and 31 of the ADR, ITAC will disregard its information for the purposes of its preliminary finding.<sup>32</sup>

As stated earlier, a party whose submissions are found to be 'deficient' is deemed to be a non-cooperating party.<sup>33</sup> In court, Farm Frites conceded that its initial responses were deficient and alleged that it tried to remedy the deficiency.<sup>34</sup> However, according to ITAC, Farm Frites failed to rectify the deficiencies in time for the preliminary finding.<sup>35</sup> This averment was disputed by the respondents, who comprised, on the one hand, ITAC (first respondent) and the minister (second respondent) as the regulatory authorities in the matter and, on the other hand, McCain Foods (SA) Pty Ltd (third respondent); Nature's Garden t/a Nature's Choice Products (Pty) Ltd (fourth respondent); Lamberts Bay Foods Ltd (fifth respondent) and Potatoes South Africa (sixth respondent), who are the major producers of the frozen potato chips in the Southern Africa Customs Union region that had successfully made an application to ITAC and the minister to impose

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<sup>26</sup> See *International Trade Administration Commission* (n 25) para 2.

<sup>27</sup> Regulation 37.1 of the ADR.

<sup>28</sup> Article 6.9 of the ADA.

<sup>29</sup> WTO Panel Report, China – Anti-dumping and Countervailing Duties on Certain Automobiles from the United States, DS440 (hereinafter 'China Automobiles'), adopted 18 June 2014, para 7.71. See also WTO Panel Report, European Communities – Anti-dumping Measure on Farmed Salmon from Norway, WT/DS337/R ('EC Salmon'), adopted 8 January 2008, para 7.807.

<sup>30</sup> Regulation 31.1(a) of the ADR.

<sup>31</sup> Regulation 31.2 of the ADR.

<sup>32</sup> Regulation 31.3 read with reg 32.4.

<sup>33</sup> Regulation 32.2 read with reg 32.3. See also *Farm Frites* (n 1) para 4.

<sup>34</sup> *Farm Frites* (n 1) para 5.

<sup>35</sup> *ibid.* See also ITAC SA Report 474 (n 18) 7 and 37. See, further, reg 31.3 of the ADR.

the anti-dumping duties on the frozen potato chips of the applicant.<sup>36</sup> However, it is not clear which ‘respondents’ disputed this allegation but it is presumed that the court, in this regard, was referring only to the regulatory authorities and not the producers of the frozen potato chips. It is submitted in this article that ITAC was legally entitled to disregard Farm Frites’ submissions in respect of the preliminary determination because they did not address the deficiencies as required by ITAC.<sup>37</sup>

In respect of the final investigation, the ADR provides that during the final investigation phase, parties that have submitted deficient responses and that have addressed the deficiencies prior to the deadline shall be deemed cooperating parties. Accordingly, ITAC will consider their information in its final finding, subject to the provisions of Regulation 36.1 and the requirements to finalise an investigation in a timely manner.<sup>38</sup> This requirement is reiterated by the ADA, which provides that all verifiable information that is appropriately submitted so that it can be used in the investigation without undue difficulties and that is supplied in a timely fashion should be taken into account when determinations are made.<sup>39</sup> These two related provisions of the ADR and the ADA work in tandem to authorise ITAC to disregard any information which is deemed to be inappropriately submitted or unverifiable or submitted late or ‘deficient’ and such party’s submissions will be disregarded in respect of ITAC’s final finding.

In the light of the above, it must be noted that after the preliminary determination but before the final determination, Farm Frites was granted an oral hearing but their submissions were again deemed deficient in material respects because the information submitted was incomplete, unreliable, questionable and unverifiable; in addition, some of the information was submitted on a date much later than the due date.<sup>40</sup> According to ITAC, this caused the process to be fraught with difficulties and, as a result, ITAC took the decision to treat Farm Frites as a non-co-operating party.<sup>41</sup> Ultimately, the submissions of Farm Frites were deemed to be ‘deficient’ and were disregarded in respect of both the preliminary and the final determinations.<sup>42</sup> It is submitted that this approach taken by ITAC is correct in law because it is in line with the pertinent provisions of the ADA and the ADR.

It has been suggested that the Court in *Farm Frites* did not fully comprehend the importance of the ‘essential facts letter’;<sup>43</sup> on the contrary, the Court attached the correct weight to it. Prudence is required in attaching weight to the essential facts letter. The

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<sup>36</sup> *Farm Frites* (n 1) para 5.

<sup>37</sup> See reg 31.3 of the ADR.

<sup>38</sup> Regulation 35.5 of the ADR; see also *Farm Frites* (n 1) para 4.

<sup>39</sup> Para 3 of Annex II: Best Information available in terms of para 8 of Art 6 (‘Annex II of the ADA’).

<sup>40</sup> See ITAC SA Report 474 (n 18) 38–40.

<sup>41</sup> See ITAC SA Report 474 (n 18) 38–39.

<sup>42</sup> See ITAC SA Report 474 (n 18) 37–40.

<sup>43</sup> Gustav Brink, ‘*Farm Frites v International Trade Administration Commission* Case 33264/14 GN’ (2015) De Jure 231.

possibility exists that, whatever decision may possibly have been foreseen or foreseeable at the time of disclosure of the essential facts, the final decision may be a different one, based on the defence of parties' interests following that disclosure.<sup>44</sup> It goes without saying that, in making its decision whether to apply definitive measures, ITAC must consider any information or argument parties submit subsequent to disclosure to defend their interests.<sup>45</sup> The alternative would render futile the right of parties to be accorded adequate time to properly defend their interests.<sup>46</sup> This is because 'essential facts' are not restricted to those that endorse the decision ultimately reached by the investigating authority, but include all facts necessary to the investigating authority's analysis and decision-making processes.<sup>47</sup> In hindsight, the minister's decision not to impose ITAC's final recommendation represents concrete and visible proof that the essential facts letter is not the *only* factor under consideration by the minister and that the outcome of the matter is therefore not a *fait accompli*.<sup>48</sup>

Furthermore, the ADR provides for a procedure for ascertaining the 'essential facts' that consistently accommodates interested parties in such a manner that prejudice is essentially avoided. First, the ADR provides that all interested parties will be given seven days from the date of ITAC's deficiency letter to make good any deficiencies pointed out by ITAC.<sup>49</sup> Second, at the final stage of the investigation, all the interested parties will receive seven days to comment on the essential facts and ITAC may, on good cause shown, grant parties an extension in this respect.<sup>50</sup> Third, the ADR even provides that at the review stage all the parties should be given 14 days from the dispatch of the essential facts letter to comment on it (this period can also be extended on good cause shown).<sup>51</sup>

There is ample proof that Farm Frites was given an opportunity to comment on and address the deficiencies identified at the preliminary and final stages of the investigation.<sup>52</sup> In fact, Farm Frites is expressly cited as having made comments on the essential facts letter that were submitted through its representatives.<sup>53</sup> In its Final Determination Report, ITAC explicitly referred to Farm Frites' submissions and explains in detail the rationale behind their rejection and the subsequent decision to disregard Farm Frites' submissions.<sup>54</sup> This serves a dual purpose: first, it complies with

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<sup>44</sup> EC Salmon (n 29) para 7.799.

<sup>45</sup> *ibid.*

<sup>46</sup> *ibid.*

<sup>47</sup> China Automobiles (n 29) para 7.141; see also EC Salmon (n 29) para 7.807.

<sup>48</sup> ITAC SA Annual Report 2014/15 (n 18) 22. It must be noted here that the minister decided to suspend the imposition of the final duties until the termination of the safeguard duties.

<sup>49</sup> Regulation 31.2 of the ADR.

<sup>50</sup> Regulation 37.2 read with reg 37.3 of the ADR.

<sup>51</sup> See further reg 43.2 read with reg 43.3 of the ADR.

<sup>52</sup> See ITAC SA Report 474 (n 18) 9 and 37–40.

<sup>53</sup> *ibid.*

<sup>54</sup> ITAC SA Report 474 (n 18) 37–40.

the ADA, which provides that the authorities shall, before a final determination is made, inform all the interested parties of the essential facts under consideration that form the basis of the decision whether to apply definitive measures; second, it means that ITAC complied with the due process requirements of the ADR, which requires that ITAC take all relevant comments on the essential facts into consideration in making its final finding.<sup>55</sup> Furthermore, such disclosure of the essential facts letter should take place in sufficient time for the parties to defend their interests.<sup>56</sup> The term ‘defend’ in the ADA is taken to mean being given an opportunity to make submissions and comment on the essential facts. ITAC duly complied with this procedure in this matter.<sup>57</sup>

Consequently, by virtue of Farm Frites’ repeatedly ‘deficient’ submissions, ITAC was legally entitled to disregard Farm Frites’ submissions and then to proceed with the investigation through the instrumentality of the ‘facts available’ or the ‘best information available’. In essence, an exporter must be given the opportunity to tender the information required by the investigating authority before the latter ‘resorts to ‘facts available’ that can be adverse to the exporter’s interests’.<sup>58</sup> The ADR defines ‘facts available’ as the information that is available to ITAC at the time of making a determination, whether preliminary or final, and that has been verified or is verifiable, provided that all the requirements regarding non-confidentiality and timely submission have been met.<sup>59</sup> The ADR goes a step further by providing that in cases of non-cooperation by an exporter, ‘facts available’ may include, inter alia, any other information at ITAC’s disposal provided that the Commission has, where practicable, checked the information from other independent sources at its disposal.<sup>60</sup> This provision is significant in two respects. First, it widens the ambit of the information before ITAC, to the advantage of a non-co-operating interested party such as the applicant, Farm Frites. This dispels the notion that once a party is found to be non-co-operating, it immediately implies that there can never be any information about that party before ITAC. This is because this provision leaves the door open for information pertaining to that party to be made available or acquired from other relevant sources. Second, it augments the veracity of ITAC’s factual findings because it authorises the information before ITAC to be verified through ‘independent sources’.

More specifically to non-co-operating interested parties, ITAC is entitled to impose provisional payments on the basis of the ‘facts available’ in the event that Farm Frites did not co-operate in an anti-dumping investigation by the deadline contemplated in Regulations 29 or 30 of the ADR.<sup>61</sup> The ADR also authorises ITAC to base its

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<sup>55</sup> See reg 37.1 read with reg 37.4 of the ADR and Art 6.9 of the ADA.

<sup>56</sup> Article 6.9 of the ADA.

<sup>57</sup> ITAC SA Report 474 (n 18) 9.

<sup>58</sup> WTO Appellate Body Report, Mexico – Definitive Anti-dumping Measures on Beef and Rice, WT/DS295/AB/R, adopted 20 December 2005, para 259.

<sup>59</sup> Regulation 1 of the ADR.

<sup>60</sup> *ibid.*

<sup>61</sup> Regulation 32.1 of the ADR.



preliminary determination on the ‘best information available’ when an entity such as Farm Frites fails to co-operate.<sup>62</sup> In the same vein, the ADA provides that in cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes an investigation, preliminary and final determinations, whether affirmative or negative, may be made on the basis of the facts available.<sup>63</sup> Article 6.8 of the ADA therefore permits the use of the available facts in making the necessary determination.<sup>64</sup>

Read in the light of the provisions of Annex II of the ADA, in particular paragraph 1, Article 6.8 of the ADA allows ITAC to use the ‘facts available’ to be able to make a determination in a situation where the information required for that determination was requested but was not provided.<sup>65</sup> It is contended that Farm Frites’ submissions were ‘deficient’ at the time of the making of the preliminary determination.<sup>66</sup> In these circumstances, ITAC is entitled to disregard Farm Frites’ information for the purposes of its preliminary finding.<sup>67</sup> This is exactly what ITAC did in respect of the applicant, Farm Frites, in that it legally disregarded Farm Frites’ submissions for lack of relevant information.<sup>68</sup>

In the same vein, Annex II of the ADA employs the term ‘best information available’. It also provides that the authorities should ensure that a party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the ‘facts available’, including those contained in the application for the domestic industry to initiate the investigation.<sup>69</sup> This rationale has been endorsed by the WTO Panel Report, *China Automobiles*, which held that it is clear from the text of this provision that if the investigating authority concludes that an interested party declined access to or did not tender the required information within a reasonable period or significantly hindered the investigation, it can use the ‘facts available’ in its determinations concerning that party.<sup>70</sup>

To this end, paragraph 1 of Annex II of the ADA establishes two important requirements for using the facts available.<sup>71</sup> First, it requires that, after initiation, ITAC ‘should specify in detail the information required of an interested party and the manner in which that information is to be structured.’<sup>72</sup> In the present matter, ITAC complied with this

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<sup>62</sup> Regulation 32.2 of the ADR.

<sup>63</sup> Article 6.8 of the ADA.

<sup>64</sup> *China Automobiles* (n 29) para 7.134.

<sup>65</sup> *ibid.*

<sup>66</sup> See reg 31.1 of the ADR and ITAC SA Report 474 (n 18) at 37; see also *Farm Frites* (n 1) para 5.

<sup>67</sup> Regulation 32.4 of the ADR.

<sup>68</sup> ITAC SA Report 474 (n 18) 37–40; see also reg 31.1(a) of the ADR.

<sup>69</sup> Para 1 of Annex II of the ADA.

<sup>70</sup> *China Automobiles* (n 29) paras 7.121–7.122.

<sup>71</sup> *China Automobiles* (n 29) para 7.122.

<sup>72</sup> *ibid.*

requirement and even ‘warned of the implications of not providing the information as requested.’<sup>73</sup> Second, it requires that ITAC ensure that the interested party has knowledge of the fact that if the required information is not submitted within a reasonable time, ITAC may make its determinations on the basis of facts available.<sup>74</sup> This is precisely what ITAC did in respect of Farm Frites in that Farm Frites was informed of the ‘incompleteness’ of its submissions and was ‘advised’ that ITAC may disregard its submissions in making a final determination.<sup>75</sup> In tandem with this, the ADA further strengthens ITAC’s case in that it provides that the determination of dumping must be based on an examination of all the relevant evidence before the authorities.<sup>76</sup> Consequently, ITAC legally proceeded on the basis of the *best information available* or the *facts available* after having duly warned Farm Frites of the consequences of not complying with the requirements of the ADR and the ADA. It bears mention that the ADA and the ADR use the terms ‘facts available’ and the ‘best information available’ interchangeably.<sup>77</sup> Consequently, it is clear that both terms should be taken as one and interpreted to mean that ITAC, as the investigating authority, has the duty to use information that is both available and verifiable or capable of verification from sources that are internationally recognised as objective.

### **The Issue of ‘Prejudice’**

In *Farm Frites*, the applicant contended that ITAC would have completed the final investigation on 13 May 2014, a day after the lodging of the application.<sup>78</sup> This was the reason for the application in urgent court as the applicant, Farm Frites, alleged that it would be severely prejudiced in the event of the application’s not succeeding. This could be the case in that on 13 May 2014 ITAC, without considering the applicant’s submission, would make a final recommendation to the minister, which recommendation would be prejudicial to the applicant, with dire consequences.<sup>79</sup> Brink therefore opined that, under the circumstances, ITAC could only make the determination that Farm Frites had not been co-operative and should assign it ‘the highest possible margin of dumping, resulting in anti-dumping duties significantly higher’ than those for any co-operating party.<sup>80</sup> However, Farm Frites’ averment to this effect was dismissed by the Court, which held that it was still possible that ITAC’s recommendation to the minister could have been favourable to the applicant and that the minister was enjoined to consider independently the recommendations of ITAC.<sup>81</sup>

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<sup>73</sup> See GN 635 in GG 36575 (21 June 2013) and ITAC SA Report 474 (n 18) 37.

<sup>74</sup> China Automobiles (n 29) para 7.122.

<sup>75</sup> See ITAC SA Report 474 (n 18) 7 and 37–39.

<sup>76</sup> Article 3.5 of the ADA.

<sup>77</sup> See Art 6.8 of the ADA read with Annex II of the ADA as well as reg 1 read with reg 32 of the ADR.

<sup>78</sup> *Farm Frites* (n 1) paras 5–6.

<sup>79</sup> *Farm Frites* (n 1) para 6.

<sup>80</sup> Brink (n 43) 231. See in this regard regs 32.2 and 32.3 of the ADR.

<sup>81</sup> *Farm Frites* (n 1) para 11.

Brink opined further that the decision to exclude a party's submissions from being taken into consideration in the final determination 'has a direct prejudicial effect, because ITAC may consider *only* the essential facts made known to interested parties in its final determination.'<sup>82</sup> Furthermore, according to Brink, 'where the essential facts indicate that the party's information has been rejected, there would be *no other facts* pertaining to that party before ITAC.'<sup>83</sup>

This viewpoint paints an incomplete picture. First, it has already been established that the ADR provides that in cases of non-co-operation by an exporter, the 'facts available' will be employed and these could include, inter alia, any other information at ITAC's disposal, provided that the Commission has, where practicable, checked the information from other independent sources.<sup>84</sup> This approach has been endorsed by the WTO Panel Report, *China Automobiles*. In this matter it was held that an investigating authority such as the ITAC can proceed on the basis of the 'facts available' if a party significantly hinders the investigation or did not provide the required information within a reasonable period as *in casu*.<sup>85</sup> Due process and the ADA require that a determination affecting an interested party must be based on information that is relevant to the issue and the party.<sup>86</sup> In the case of dumping margin determinations, it is preferred that this information is provided by the party in question.<sup>87</sup> However, where an interested party does not provide information, the ADA provides that the absence of information from such party cannot bar ITAC from making a determination.<sup>88</sup> Thus, Article 6.8 of the ADA authorises the use of 'facts available' in making the necessary determinations.<sup>89</sup>

Secondly, 'essential facts' are not restricted to those that support the decision ultimately reached by the investigating authority, but should include *all* facts necessary to the investigating authority's analysis and decision-making.<sup>90</sup> Thirdly, the ADR specifically makes provision for comments on the essential facts letter to be made by interested parties.<sup>91</sup> This is not merely a ruse to dupe the interested parties because the ADR specifically requires that ITAC must 'consider all relevant comments on the essential facts in its final finding.'<sup>92</sup> In this respect, ITAC did in fact follow the due process requirements of the ADR and ADA and received comments from Farm Frites which were repeatedly considered deficient because, inter alia, the information submitted was inconsistent, incomplete, unreliable and ultimately unverifiable in respect of the final

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<sup>82</sup> Brink (n 43) 231.

<sup>83</sup> *ibid.*

<sup>84</sup> Regulation 1 read with reg 32 of the ADR.

<sup>85</sup> *China Automobiles* (n 29) para 7.121.

<sup>86</sup> *Id* para 7.134.

<sup>87</sup> *ibid.*

<sup>88</sup> *ibid.*

<sup>89</sup> *ibid.*

<sup>90</sup> *China Automobiles* (n 29) para 7.141.

<sup>91</sup> Regulation 37.2 of the ADR.

<sup>92</sup> Regulation 37.4 of the ADR.

determination.<sup>93</sup> ITAC expressly asserted that Farm Frites was informed of the deficiencies, which it repeatedly failed to respond to, and advised that the information could not be taken into account for the final determination.<sup>94</sup> Therefore it was common cause in court and in ITAC's subsequent Final Determination Report that Farm Frites' 'initial responses' were 'deficient' and that subsequent attempts to cure this defect were unsuccessful because ITAC found that it would encounter 'undue difficulties' in the process of verifying the information intended to cure this defect.<sup>95</sup>

Eventually, ITAC explicitly made the final determination that 'after considering the submitted information, interested parties' comments and essential facts, that the frozen chips from Farm Frites were dumped into the SACU market.'<sup>96</sup> It is submitted that ITAC's rejection of the submissions of Farm Frites does not affect the validity of its preliminary or final determination. Determining the 'deficiency' of an interested party's submission is the duly authorised investigating authority's exclusive prerogative.<sup>97</sup> The ADA and the ADR authorise ITAC to disregard Farm Frites' submissions if they are deemed 'deficient' because it did not provide the necessary information and also if it did not provide relevant information within a reasonable period. They also authorise ITAC to proceed to make preliminary and final determinations, either affirmative or negative, on the basis of the 'facts available'.<sup>98</sup> Therefore, an adverse finding against an interested party that was found to be a non-co-operating interested party is not tantamount to 'prejudice'. There were *no other facts* pertaining to Farm Frites and therefore no prejudice was suffered as a result of Farm Frites' negligence in failing to make valid submissions according to the requirements of the ADA and the ADR.

Moreover, as already established earlier, the ADR requires the views of interested parties in respect of essential facts to be consistently considered during the preliminary and final investigation phases.<sup>99</sup> In the same vein, the ADA provides that throughout the anti-dumping investigation all interested parties shall have a full opportunity to defend their interests.<sup>100</sup> To this end, the ITAC must, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered.<sup>101</sup> These requirements were duly complied with to the extent that ITAC granted Farm Frites an opportunity to make

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<sup>93</sup> ITAC SA Report 474 (n 18) 8 and 39–40.

<sup>94</sup> Id 8 and 37–40.

<sup>95</sup> *Farm Frites* (n 1) para 5; see also ITAC SA Report 474 (n 18) 8 and 38–39.

<sup>96</sup> ITAC SA Report 474 (n 18) 9 and 80.

<sup>97</sup> See ss 16(1)(a) and 26 of the ITAA read with Arts 1 and 5 of the ADA. See also reg 31 of the ADR.

<sup>98</sup> Article 6.8 of the ADA read with Para 1 of Annex II of the ADA. See also in this regard reg 1 read with regs 32.1 and 32.2 of the ADR.

<sup>99</sup> See reg 31.2 read with reg 35.1 and reg 37.2 together with reg 37.4 of the ADR.

<sup>100</sup> Article 6.2 of the ADA.

<sup>101</sup> *ibid.*

oral submissions towards addressing the situation in March 2014.<sup>102</sup> The ADR takes it a step further and authorises the extension of the comment period on the essential facts on good cause shown.<sup>103</sup> This avenue was always available in this matter. The applicant therefore was unable to convince the court that it would suffer ‘serious prejudice’.<sup>104</sup> A contrary interpretation would imply that the matter was a *fait accompli* but, as argued above, the ADR and the ADA make it abundantly clear that the interested parties can defend their interests throughout the duration of the investigation. Also, it would unjustifiably imply that the minister has a tendency to act *mala fide*. Even if that were the case, the affected parties would still have a remedy to apply for a review of the decision of ITAC and the minister.<sup>105</sup> This is aptly illustrated by the fact the final anti-dumping duty has yet to be imposed by the minister.<sup>106</sup> This essentially confirms the rationale of the Court in *Farm Frites* that the minister could accept or reject ITAC’s recommendation even though here the minister is most likely going to impose the final recommendation after the termination of the safeguard measures.<sup>107</sup> Thus *Farm Frites*’ allegation of ‘prejudice’ cannot be sustained, because the determination was entirely due to its failure to comply with the requirements of the ADA and the ADR.

### **Regulation 64 of the ADR**

This brings to the fore the issue of judicial review of the preliminary determination of ITAC. Because of the inadequate reasoning elicited in the judgment, it remains unclear in *Farm Frites* whether the Court conducted the three-leg test created by Regulation 64 of the ADR. In fact, the Court does not make any mention of Regulation 64 of the ADR. However, based on the Court’s finding that the application was ‘premature’ and that the matter was yet to be finally considered by the minister,<sup>108</sup> it is presumed in this article that the Court at least explored the provisions of Regulation 64. Brink opined that the Court ‘incorrectly interpreted Regulation 64, which does not require a party to await the final decision by the minister.’<sup>109</sup> Indeed, the Court appears to have misconstrued the import of Regulation 64, which does allow for judicial review of a preliminary determination.

In essence, Regulation 64 of the ADR creates a three-leg test for judicial review of the preliminary determination of ITAC. First, it must be demonstrated that ITAC has acted

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<sup>102</sup> See in this regard ITAC SA Report 474 (n 18) 37–40; see also reg 5 of the ADR and Arts 6.2 and 6.3 of the ADA.

<sup>103</sup> See reg 37.3 of the ADR.

<sup>104</sup> *Farm Frites* (n 1) para 14.

<sup>105</sup> *Farm Frites* (n 1) para 12. See also reg 64 of the ADR, which permits the judicial review of ITAC’s preliminary decisions procedures prior to the finalisation of an investigation, subject to further conditions to be discussed later in the article. See in this regard Brink (n 43) 228. See also s 46 of the ITAA.

<sup>106</sup> ITAC SA Annual Report 2014/15 (n 18) 22.

<sup>107</sup> See, further, ITAC SA Annual Report 2014/15 (n 18) 22.

<sup>108</sup> *Farm Frites* (n 1) paras 11 and 14.

<sup>109</sup> Brink (n 43) 230.

contrary to the provisions of the ITAA and the ADR.<sup>110</sup> It has been contended that the Court in *Farm Frites* essentially found that ITAC had contravened Regulation 64.1(a) of the ADR.<sup>111</sup> However, the Court does not make a clear finding on Farm Frites' allegation that ITAC neither followed the correct procedure nor complied with the provisions of the ITAA and the ADR.<sup>112</sup> On this issue, the Court ventured that Farm Frites had reasonable grounds for review based on the alleged 'irrational actions' of ITAC.<sup>113</sup> It appears this issue may have been left, strangely, to the review court to resolve.<sup>114</sup> However, it is submitted that the correct procedure *was* followed in respect of Farm Frites as evinced by the Final Determination Report of ITAC.<sup>115</sup> To this end, it has been contended that applicants have a huge burden of proof because the courts are inclined to defer to ITAC as a specialist body.<sup>116</sup> Although theoretically, the High Court has the authority to issue injunctive relief, it rarely uses this discretion as it regards ITAC as a 'technical expert authority with whose decisions it will seldom interfere.'<sup>117</sup>

The second leg of the test is fatal to Farm Frites' application. Regulation 64.1(b) of the ADR provides that it must also be demonstrated that ITAC's action or omission has resulted in 'serious prejudice' to the complaining party. It has been suggested that the most important question in respect of a non-co-operating interested party such as Farm Frites is what possible 'prejudice' could be experienced as a result of preliminary determinations that 'cannot be undone by a future final determination'.<sup>118</sup> However, *in casu*, the issue of 'serious prejudice' was not established because Farm Frites was given an opportunity to submit its comments on the essential facts but repeatedly submitted 'deficient' responses to ITAC, to the extent that it was ultimately deemed a non-co-operating party.<sup>119</sup> Any 'prejudice' suffered was as a result of the negligence of the applicant, Farm Frites, and not the actions or omissions of ITAC.<sup>120</sup> In any event, the applicant's averment of 'prejudice' was predicated on the misconception that the essential facts letter is the *only* factor under consideration when ITAC makes a preliminary or a final determination.<sup>121</sup> As established earlier in the discussion, the World Trade Organization case law, the ADR and the ADA explicitly make it clear that the 'essential facts letter' is not the *only* factor to be considered and that ITAC's determination could differ materially if any other information at its disposal differs from

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<sup>110</sup> Regulation 64.1(a) of the ADR.

<sup>111</sup> Brink (n 43) 230.

<sup>112</sup> See in this regard *Farm Frites* (n 1) paras 5, 10 and 12.

<sup>113</sup> *Farm Frites* (n 1) paras 10 and 12.

<sup>114</sup> *ibid*.

<sup>115</sup> See further ITAC SA Report 474 (n 18) 6–10 and 37–40.

<sup>116</sup> Gustav Brink, 'Anti-dumping and Judicial Review in South Africa: An Urgent Need for Change' (2012) 7 *Global Trade and Customs Journal* 280.

<sup>117</sup> *ibid* 281.

<sup>118</sup> Brink (n 43) 230.

<sup>119</sup> See ITAC SA Report 474 (n 18) 37–40.

<sup>120</sup> See in this regard ITAC SA Report 474 (n 18) 37–40.

<sup>121</sup> *Farm Frites* (n 1) para 6.

the information listed in the essential facts letter.<sup>122</sup> Accordingly, since there was no ‘prejudice’ established, the enquiry should have ended at this juncture.

Finally, even if ‘prejudice’ were proven, the court’s findings were still correct on the final leg of the test. This leg provides that the application for judicial review should fail if the prejudice can be undone by ITAC’s future decision.<sup>123</sup> Regarding this issue, the Court *in casu* correctly held that ITAC could still make a recommendation that would be favourable to Farm Frites and so could the minister, whose decision is supposed to be made independently.<sup>124</sup> But Brink submits that the applicant’s business would be significantly affected by the uncertainty caused by the investigation and it may have to pay substantial fees to defend its interests in the matter; such prejudice could not be addressed by future action.<sup>125</sup> Regardless of this line of argument, in this particular dispute, the third leg of the test falls away because the element of ‘prejudice’ has not been established.

What has been demonstrated in this article is that the applicant’s allegation of ‘prejudice’ is not that which is contemplated in the ADR and therefore it is without any legal merit and is, at best, self-inflicted. The Court’s conclusion in this regard, therefore, although it is not articulated comprehensively,<sup>126</sup> is correct in law.

A further consideration in this regard is the requirements of the ADA which authorises judicial review of preliminary and final determinations.<sup>127</sup> Judicial review under the ADA envisages a two-leg test on review of the investigating authority’s establishment of the facts of a complaint. First, a court must determine whether ITAC established the facts in a manner that is proper.<sup>128</sup> Second, the court must establish whether ITAC’s evaluation of those facts was conducted in an unbiased and objective manner.<sup>129</sup> If the establishment of the facts was proper and the evaluation was unbiased and objective, then, even if the High Court or any other court might have reached a different conclusion, the evaluation shall not be overturned.<sup>130</sup> At this juncture, it must be noted that judicial review in South Africa has been criticised for allegedly being skewed towards review of only procedural, and not substantive, issues.<sup>131</sup> However, substantive issues such as the improper consideration of the facts could fall before a review court through the avenue of administrative law if the administrative action is alleged to be

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<sup>122</sup> See EC Salmon (n 29) para 7.799. See further China Automobiles (n 29) para 7.141. See also reg 37.4 of the ADR.

<sup>123</sup> Regulation 64.1(c) of the ADR.

<sup>124</sup> *Farm Frites* (n 1) paras 11 and 14. See also reg 47 of the ADR.

<sup>125</sup> Brink (n 43) 230.

<sup>126</sup> *Farm Frites* (n 1) para 2.

<sup>127</sup> Article 13 read with Arts 17.4 and 7 of the ADA.

<sup>128</sup> Article 17.6(i) of the ADA.

<sup>129</sup> *ibid.*

<sup>130</sup> *ibid.*

<sup>131</sup> Brink (n 116) 276–282.

unreasonable or irrational, or where the authority did not apply its mind.<sup>132</sup> This is in line with the ADA, which permits both procedural and substantive issues to be considered on review.<sup>133</sup>

Farm Frites did raise the issue of the conduct of ITAC, which was alleged to be ‘irrational’, and the Court did venture the view that Farm Frites did have ‘reasonable grounds’ for review on that issue.<sup>134</sup> However, it is contended in this article that Farm Frites was in fact treated with due consideration in that it was (i) permitted to defend itself; (ii) given adequate notice and opportunity to remedy the deficiencies in its submission throughout the course of the investigation, and (iii) was even permitted, in one instance, to submit its information on a date much later than the due date.<sup>135</sup> Therefore, apart from the fact that the allegation of ‘serious prejudice’ is actually patently unsustainable, it was wholly self-inflicted.

## Conclusion

It is disappointing that the Court in *Farm Frites* did not offer comprehensive reasons to justify some of its conclusions. Despite the problem of time constraints highlighted by the Court, the least it could have done was to avoid creating room for conjecture in an area of South African law that desperately needs certainty and clarity. The judgment in *Farm Frites* therefore unwittingly fuels the narrative that the courts in South Africa do not understand issues of dumping adequately nor that they interpret the pertinent legal provisions correctly.<sup>136</sup> Notwithstanding these limitations, this article finds that the ‘essential facts letter’ is not the *only* factor considered by ITAC in making a final determination in respect of dumping in South African law. Secondly, the article finds that the applicant failed to prove that it would suffer ‘severe prejudice’, because ITAC is legally authorised to disregard the submissions of a non-co-operating interested party and proceed on the basis of the ‘facts available’ or the ‘best information available’. Accordingly, any ‘prejudice’ suffered by Farm Frites was entirely self-inflicted. In the alternative, the article finds that even in the event that the applicant proved ‘serious prejudice’, it is contended that the application would nevertheless have failed because such ‘prejudice’ could still be undone or remedied on the recommendation of ITAC to the minister and/or through the final decision of the minister.<sup>137</sup>

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<sup>132</sup> Id 276.

<sup>133</sup> Article 13 read with Art 17.6 of the ADA.

<sup>134</sup> *Farm Frites* (n 1) para 10.

<sup>135</sup> ITAC SA Report 474 (n 18) 37–40. As an example of keeping with the spirit of the ADA of allowing the parties to ‘defend’ the matter throughout the investigation, the information on the cost build-up on ‘other’ products and ‘total company’ components was subsequently submitted very late after the due date. The information was submitted on 11 March 2014 when the deadline was 10 January 2014.

<sup>136</sup> Brink (n 116) 55 <<http://tinyurl.com/zk633kd>> accessed 23 September 2016.

<sup>137</sup> See *Farm Frites* (n 1) at para 14.



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