Judicial decisions

Price comparisons in anti-dumping investigations following *China – X-rays* WT/DS425/R

1 Background

On 26 February 2012 the Dispute Settlement Body of the World Trade Organisation (WTO) issued a report that considered, amongst others, the requirements to be met in determining price injury to the domestic industry in anti-dumping investigations.[1] It found that China erred in the methodology it had used to determine price injury under article 3.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (ADA). The finding attaches new meaning to the wording of the ADA and may have a significant impact on how South Africa's International Trade Administration Commission (ITAC) conducts its anti-dumping investigations.

After providing a broad overview of anti-dumping, this analysis considers *China – X-rays* and the implications it may have for anti-dumping investigations in South Africa.

2 Introduction to anti-dumping

Under the WTO, anti-dumping has become the instrument of choice for governments in protecting their domestic industries against imports. This is illustrated by the 4125 anti-dumping investigations initiated worldwide between 1995 and June 2012, compared to 291 countervailing (anti-subsidy), and 234 safeguard investigations.[2] Dumping and its elements are defined somewhat differently in the ADA and in South Africa's legislation,[3] although the basic underlying factors are the same. Under the ADA, dumping occurs where the export price of a product is less than its normal value.[4] The

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[1] WTO *China   Definitive anti dumping duties on X ray security inspection equipment from the European Union* WT/DS425/R (26 February 2013) (*China   X rays*).

[2] www.wto.org/english/tratop e/adp e/adp e.

[3] See Brink 'South Africa' in Bienen, Brink and Ciuriack *Guide to international anti dumping practice* (2013) at 521 568; and Brink 'A nutshell guide to anti dumping action' 2008 (71) *THRHR* at 255 271.

[4] Article 2.1.

International Trade Administration Act[5] defines dumping as 'the introduction of goods into the commerce of the Republic … at an export price … that is less than the normal value … of those goods'.[6]

Normal value, in turn, is defined in the ADA as 'the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country'[7] and, where this price is not available, or when domestic sales cannot be used, as either 'a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits'.[8] The ITA Act defines the normal value as 'the comparable price paid or payable in the ordinary course of trade for like goods intended for consumption in the exporting country or country of origin'[9] and where such price cannot be used, as 'the constructed cost of production of the goods in the country of origin when destined for domestic consumption, plus a reasonable addition for selling, general and administrative costs and for profit; or the highest comparable price of the like product when exported to an appropriate third or surrogate country, as long as that price is representative'.[10]

Both the ADA and the ITA Act require that a fair comparison be made between the normal value and the export price, with due allowances for 'differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability',[11] or 'for differences in conditions and terms of sale, differences in taxation and other differences affecting price comparability'.[12]

The definition of normal value, along with the requirement to make adjustments for differences between the domestically sold and exported products, raise a number of questions that must be addressed in an anti-dumping investigation. With reference to the South African legislation, the following requirements are clear:

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[5] 71 of 2002 (ITA Act).
[6] Section 1(2).
[7] Article 2.1.
[8] *Id* 2.2.
[9] Section 32(2)(b)(i).
[10] *Id* 32(2)(b)(ii).
[11] Article 2.4 of the ADA.
[12] Section 32(3) of the ITA Act.

(a) there must be a comparable price;
(b) which must be determined in the ordinary course of trade;[13]
(c) for 'like goods';
(d) destined for domestic consumption.

As a result of the relative importance of anti-dumping as a trade policy measure, any interpretation of the various articles of the ADA by panels or the Appellate Body under the WTO Dispute Settlement Body, serves an important role in clarifying how members apply the instrument. This follows, despite any dispute settlement ruling only having direct effect on the parties to the dispute,[14] and that South Africa is not bound by its decisions, but is merely guided them.[15] Both ITAC and the High Court, have referred specifically to decisions of the WTO, which further supports the importance of these rulings. Although the Dispute Settlement Body has previously considered the issue of the determination of price injury under article 3.2 of the ADA,[16] the panel in *China – X-rays* had the first opportunity to analyse certain of these requirements closely, and it is these requirements that are analysed here.

3 Like products

The ADA defines a like product as:

> a product which is identical, ie, alike in all respects, to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.[17]

South Africa's Anti-Dumping Regulations define a like product in similar terms, and then provide that the raw materials and other inputs used in producing the products; the production process; physical characteristics and

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[13] Anti Dumping Regulation 8.2.
[14] Article 17.14 of the WTO 'Understanding on Rules and Procedures Governing the Settlement of Disputes'; Stewart and Dwyer *Handbook on WTO trade remedy disputes: The first six years* (1995 2000) at 3.
[15] Section 233 of the Constitution of the Republic of South Africa, 1996; *Progress Office Machines v SARS* 2008 2 SA 13 (SCA) pars 5 6; Eisenberg 'The GATT and the WTO Agreements: Comments on their legal applicability to the Republic of South Africa' (1993) 19 *SAYIL* at 127; Brink 'Anti dumping and judicial review in South Africa: An urgent need for change' (2013) 7/5 *Global Trade and Customs Journal* at 274.
[16] WTO *China Countervailing and anti dumping duties on grain oriented flat rolled electrical steel from the United States* WT/DS414/R (15 June 2012) (*China GOES*); WTO *European Communities Anti Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R (7 March 2003) (*EC Tube or pipe fittings*); WTO *European Communities Definitive Anti Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/R (3 December 2010) (*EC Fasteners*).
[17] Article 2.6.

appearance of the product; the end-use of the product; the substitutability of the product with the product under investigation; tariff classification; and any other factor proven to the satisfaction of the Commission to be relevant, must be taken into consideration in this determination.[18]

The first step in the process is to determine the subject product, ie the product that is being investigated. It is up to the domestic industry to set out the scope of the product it wishes to have investigated, and then up to the authority to confirm or amend this scope. The scope of the subject product may include products imported under a separate tariff subheading, such as coated paper, imported under tariff subheading 4810.19.90; some products imported under a tariff subheading, such as 'whole birds' of the species *Gallus domesticus* that were imported under tariff subheading 0207.14.10, along with other products such as chicken carcasses that did not form part of the investigation;[19] or it could cover several tariff subheadings, such as bed linen imported under tariff subheadings 6302.21, 6302.22, 6302.32 and 6302.39.[20]

The narrower the scope of the subject product, the easier it is to determine the like product and specific product comparability. Conversely, the wider the scope of the subject product, the more difficult it becomes to compare the like products. In addition, there are always two like products in any investigation – first, the like product sold on the domestic market of the exporting country that is used to determine whether dumping is taking place; and, second, the like product sold by the domestic industry which is used to determine whether the domestic industry is experiencing material injury.[21] The panel in *Softwood Lumber*, however, held that not each individual item within the like-product definition, must be 'like' each individual item within the subject-product scope.[22] On the other hand, the Appellate Body in *Bed linen* held that:

> [h]aving defined the product at issue and the 'like product' on the Community market as it did, the European Communities could not, at a subsequent stage of the proceeding, take the position that some types or models of that product had physical characteristics that were so different from each other that these types or models were not 'comparable'.[23]

It then noted that there was a requirement in the ADA that adjustments be

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[18] Regulation 1.
[19] *Poultry (Brazil)* ITAC report 389.
[20] *Bed linen (Malawi, Pakistan)* ITAC report 178.
[21] *United States Final dumping determination on softwood lumber* WT/DS264/R (13 April 2004) (*US Softwood Lumber V)* par 7.149 7.151.
[22] Paragraph 7.156 7.157.
[23] *European Communities Anti dumping duties on imports of bed linen from India* WT/DS141/AB/R (1 March 2001) par 58.

made for physical differences between the subject and like products.[24] These findings, however, were made in relation to the determination of the margin of dumping, rather than material injury.

4 Price injury determinations

As regards material injury, the ADA provides that:

> [a] determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both *(a)* the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and *(b)* the consequent impact of these imports on domestic producers of such products.[25]

and

> [w]ith regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member.[26]

The Anti-Dumping Regulations define price disadvantage as the extent to which the price of the imported product is lower than the unsuppressed selling price of the Southern African Customs Union (SACU) 'like product', measured at the appropriate point of comparison. It defines price undercutting as the extent to which the price of the imported product is lower than the price of the SACU 'like product', again measured at the appropriate point of comparison. It further requires that the unsuppressed selling price must be determined for the 'like product'.[27] There is no reference to like product in relation to any other injury criteria.

Before *China –X-rays*, the Dispute Settlement Body had discussed the issue of price comparability between the subject product and the like product in the importing country, on a number of occasions - albeit not in the same detail as in *X-rays*. In *China – GOES,* the panel found that the prices an authority used for determining price undercutting must be 'properly comparable'.[28] The Appellate Body agreed with the panel's conclusion, and stated:

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[24]Paragraph 59.
[25]Article 3.1.
[26]*Id* 3.2.
[27]Regulation 1.
[28]Panel report par 7.530.

> an investigating authority must ensure comparability between prices that are being compared. Indeed ... we do not see how a failure to ensure price comparability could be consistent with the requirement under Article 3.1 … that a determination of injury be based on 'positive evidence' and involve an 'objective examination' of, *inter alia,* the effect of subject imports on the prices of domestic like products. Indeed, if subject import and domestic prices were not comparable, this would defeat the explanatory force that subject import prices might have for the depression or suppression of domestic prices.[29]

In *EC –Tube or Pipe Fittings,* the panel reasoned that:

> [i]n a dumping determination, one focus of adjustments may be on differences in costs that a producer/exporter might reasonably be expected to reflect in his prices; by contrast, the focus in a price undercutting analysis may be on differences between the imported and domestic like product that have a perceived importance to consumers.[30]

Likewise, in *EC – Fasteners (China),* the panel held that:

> adjustments in the context of price undercutting analysis may be a useful means of ensuring that the requirements of objective examination of positive evidence in Article 3.1 are satisfied, as might the use of carefully defined product categories for the collection of price information.[31]

In *China – X-rays* there were two clear product categories: 'high-energy' and 'low-energy' X-ray scanners. The high-energy scanners were typically used for scanning rail carriages, trucks, or marine cargo containers; whereas the low-energy scanners were typically used for scanning hand luggage at airports. However, there were several different types of high-energy scanner, all with greatly varying prices. The same was true of low-energy scanners. The cooperating European exporter only exported low-energy scanners to China. Despite this, China compared the average price for all scanners imported from this company, with the average selling price of all scanner – both low-energy and high-energy – sold by the Chinese domestic industry.[32]

China argued that it had no obligation under article 3.2 of the ADA to 'determine' whether there had been significant price undercutting by the subject product, as the provision only required it to 'consider' where there had been such undercutting. The panel, however, found that the consideration must still involve an objective examination of positive evidence, and quoted with approval the Appellate Body's findings in *China – GOES* that:

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[29]Appellate Body report par 200.
[30]Paragraph 7.292 7.293.
[31]*Id* at 7.328.
[32]*China X rays* par 7.68 7.92.

> [t]he notion of the word 'consider', when cast as an obligation upon a decision maker, is to oblige it to *take something into account* in reaching its decision. By the use of the word 'consider', Article 3.2 … [does] not impose an obligation on an investigating authority to make a *definitive determination* on the volume of subject imports and the effect of such imports on domestic prices. Nonetheless, an authority's *consideration* of the volume of subject imports and their price effects pursuant to Article 3.2 … is also subject to the overarching principles, under Article 3.1 … that it be based on positive evidence and involve an objective examination. In other words, the fact that no definitive determination is required does not diminish the rigour that is required of the inquiry under Articles 3.2 … [and] this does not diminish the scope of *what* the investigating authority is required to consider.[33]

The Appellate Body further held that there was an express link between the subject-product prices, and those of the like domestic products.[34]

On the basis of these findings, the panel in *X-rays* found that 'it is necessary to ensure that the prices being considered are actually comparable'.[35] As regards the level at which the prices had to be compared, it held that 'if two products are compared at different levels of trade, without adjustment, the outcome of this comparison would not lead to an objective, unbiased analysis'.[36] It therefore agreed with the Appellate Body's view in *China – GOES*, that it is necessary for an investigating authority to consider whether the subject product and like domestic prices are 'actually comparable'.[37] Thus, the panel found that 'when comparing the price of a basket of goods over time, it is necessary to ensure price comparability by considering, and if necessary taking into account, any changes in the proportion of the product types making up the basket each year'.[38] The panel found that China had not taken any steps to ensure that the prices in *X-rays* were in fact comparable.[39] This followed from the fact that China had not requested transaction-specific or model-by-model data from its domestic industry, but simply divided the total domestic sales value by the total domestic sales volume, despite there being two distinct product categories and significant price differences between the two categories and between models within these two categories.[40] The panel noted that a subject product 'used for scanning hand baggage at airports' cannot necessarily be compared to a domestic like product 'used for scanning rail carriages, trucks or marine cargo containers'.[41]

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[33] *China GOES* Appellate Body Report pars 130 131 (emphasis in original).
[34] *Id* at par 136.
[35] *Id* at par 7.49.
[36] *Id* at par 7.50.
[37] *Id* at pars 7.51 and 7.57.
[38] *Id* at par 7.57.
[39] *Id* at par 7.59.
[40] *Id* at par 7.68.
[41] *Id* at par 7.65.

The panel specifically held that as China 'did not request pricing data from the domestic industry either on a transaction-by-transaction basis or on a model-by-model basis, it appeared that China did not contemplate determining price undercutting on a model-to-model price analysis'[42] and, therefore, that China did not properly consider price comparability in determining price undercutting. Accordingly, it found that China had violated the requirements of article 3.2 of the ADA.[43]

5 Lessons for South Africa

This case is of particular importance to South Africa's investigating authority, ITAC. After receiving an application, and as part of the determination of the description of the subject product, ITAC verifies with customs whether the product description is such that customs can administer an anti-dumping duty.[44] In the application questionnaire, the domestic industry is required to describe both the SACU and the foreign like products. In practice, however, these two sections are usually mere duplications of the section on the subject product,[45] and differences are seldom indicated. It is then up to the exporter to indicate any differences between the like product sold on its domestic market, and that exported to South Africa,[46] or to point out any differences between the subject product and the SACU like product.[47]

ITAC's exporter questionnaire[48] requires the exporter to submit transaction-by-transaction information on its exports to South Africa, while the importer questionnaire requires the importer to submit transaction-by-transaction information on its imports into South Africa, including costs not only on the landed cost level, but also on its final resale prices.[49] Despite this, the domestic industry is not required to provide sales information on a model-by-model or transaction-by-transaction basis, and the application questionnaire[50] only requires the domestic industry to supply information on total annual sales volumes and values, and average annual prices. Where an applicant is of the opinion that such data do not show material injury, it may additionally include

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[42]*Id* at par 7.94.
[43]*Id* at par 7.97.
[44]Thus, in *Stainless Steel Hollowware (China, Hong Kong, Korea)*, customs advised that the product description be changed as the investigation did not relate to all products imported under the specific tariff subheading.
[45]See the applications in the *Garden tools (China) (sunset review)*; *Coated paper (China, Korea)*; *Set screws (China)*; and *Poultry (Brazil)* investigations.
[46]See the exporters' submissions in *Garden tools (China) (sunset review)* and *Set screws (China)*.
[47]See the importers' submissions in *Garden tools (China) (sunset review)*; *Set screws (China)*; and *Poultry (Brazil)*.
[48]Section E1.1.
[49]Section D3.1.
[50]Sections E3 and E4.

monthly figures. However, no attempt is made to distinguish prices on a model-by-model basis.

In *Poultry (Brazil)*,[51] ITAC rejected the exporters' information on the basis that they could not provide separate cost build-ups on a model-by-model (portion-by-portion) basis, to show that domestic sales of each model were made in the ordinary course of trade. ITAC, correctly, determined the margin of dumping on a model-by-model basis. It failed, however, to respond to queries as to whether it had obtained the domestic industry's information on a model-by-model basis. The only reasonable conclusion is that no such distinction had been made.

In its preliminary determination in *Tyres (China),*[52] ITAC calculated the margin of dumping on a product-group basis, dividing the products into passenger car tyres, light commercial vehicle tyres, and heavy commercial vehicle tyres. Each product group was separately classifiable under a different tariff subheading. However, no distinction was made within each product group, which means that the average export price of all passenger car tyres was compared to the average domestic selling price of all passenger car tyres, despite there being significant differences between the models and the product mix. No attempt was made to determine price suppression, price depression, or price undercutting at anything but the product-group level.

In *Wire, rope and cable (China, Germany, Korea, UK*)[53] ITAC did not consider the lesser duty rule, that is, whether a duty lower than the margin of dumping would be sufficient to remove the injury caused by the dumping,[54] as it had no methodology to compare the prices of the wide variety of imported models to those of the domestic industry.

In *Set screws (China)*[55] ITAC determined the margin of dumping separately for galvanised and ungalvanised products, but failed to determine the margin separately for mild steel and high tensile steel products. It then compared the average price of *all* imports, regardless of steel strength and whether or not galvanised, to the average price of all products sold by the South African industry. ITAC did exclude sizes that were not produced in South Africa from the scope of the final anti-dumping duty.

In addition, ITAC does not determine at which level of trade the subject

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[51]ITAC Report 389.
[52]ITAC Report 182
[53]ITAC Report 288.
[54]Anti Dumping Regulation 17.
[55]ITAC Report 395.

product and the domestic like product compete, and always determines price undercutting as the difference between the landed cost of the subject product and the ex-factory price of the domestic like product,[56] despite the requirement that the products should be compared at an appropriate level.[57]

These recent investigations show that ITAC risks running foul of the principle confirmed by the panel in *X-rays,* that 'a proper comparison' must be made between the subject product and the like domestic product, and that the comparison must take into consideration differences between individual products and levels of trade. The effect is that if South Africa were to be challenged on this issue before the Dispute Settlement Body, it would automatically lose the case, and would have to withdraw the anti-dumping duties imposed in each instance.

Accordingly, it is proposed that ITAC should amend its questionnaire to require the domestic industry to provide domestic sales information on a model-by-model basis, and that it should develop the methodology to compare the subject product price to the domestic like-product price on a model-specific basis at an appropriate level of trade determined independently in each investigation.

Gustav Brink
University of Pretoria