

**AN ANALYSIS OF THE CURRENT POSITION REGARDING ANTI-DUMPING  
LAW AND PROCEDURES IN SOUTH AFRICA**

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## ANTI-DUMPING LAW IN SOUTH AFRICA

In order to correctly assess the current status of anti-dumping law in South Africa, as well as to determine the role that it will play in the future, it is necessary to take its historical setting into account. This requires an investigation into the origins of South African anti-dumping law and the manner in which it was applied in the past. In this regard the economic and political conditions which prevailed in the past are relevant as is the way in which these conditions have changed.

As will become evident there has been much change regarding anti-dumping law in South Africa. This process of transition, concerning the status and role of anti-dumping law, must be recognised as forming the background when analysing the current position of anti-dumping law in South Africa.

To determine a way forward for the law relating to dumping, in a manner that takes these economic and political changes accurately into account, and which is of a nature that is practically workable for South Africa, it is desirable to refer to other legal systems and how these legal systems have used and developed their anti-dumping law.

### WHAT IS ANTI-DUMPING LAW ?

Anti-dumping law, in its current form, emerged out of 'The General Agreement on Tariffs and Trade' (the GATT). An investigation into anti-dumping law, therefore, clearly requires an understanding of the GATT as well the nature of South Africa's relationship with it.

### THE GENERAL AGREEMENT ON TARIFFS AND TRADE

The regulation of international trade, which started gradually after the Second World War, promoted a market economy; this means, for instance, liberalization of the movement of goods and prohibition of restrictions on competition by the market participants.<sup>1</sup>

The GATT was formed in 1947, after the establishment of the World Bank and the International Monetary Fund (IMF), by twenty-seven countries in order to advance free trade worldwide through a continuing process of trade liberalisation. It is comprised of a set of multilaterally-agreed rules which are aimed at governing the trade policies of individual countries. "GATT membership currently extends to

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<sup>1</sup> Van Houtte The Law of International Trade @ page 51

109 countries, which between them account for over 90% of world trade."<sup>2</sup>

Naturally there have not only been supporters of the GATT, there have also been critics who "have come to view GATT as an institution primarily serving the interests of the developed economies to the detriment of developing countries."<sup>3</sup> One of the major criticisms in this regard is that GATT has failed to adequately deal with the fundamental problems which are peculiar to developing countries and which are in serious need of attention.

South Africa was one of the founding members of the GATT and has always participated in the various rounds of negotiations that the GATT has held. For various reasons, however, South Africa has not always been a disciplined member of the GATT. One of the significant factors that resulted in it not being a disciplined member is that, historically, South Africa was protectionist in nature and tended to pursue a policy of import replacement rather than pursue a policy of openness towards the international market. The use of sanctions against South Africa, by the international community, was another contributory factor which led to its isolation. A further factor, in this regard, was its balance of payment problems and the approach that was used in dealing with them.

The early 1990's saw drastic political changes for South Africa. These changes resulted in the decades of its isolation coming to an end. South Africa has once again become part of the international trading community and this reintroduction of South Africa, into the international trading community, has meant that South Africa has had to re-assess its international economic relations. Importantly this process of re-assessment has included a questioning of the role that South Africa should play within the GATT.

The approach taken by South Africa towards the question of international trade, prior to the dramatic political changes that occurred, is apparent in Paragraph 1 of the Board on Tariffs and Trade's (the Board's) "Guide to the Policy and Procedure with regard to Action against Unfair International Trade Practices: Dumping, Subsidies and Other Forms of Disruptive Competition" (the Guide). This paragraph, under the heading "Perspective", reads:

"The export or threat of export of products from any country to the common area of the Southern African Customs Union (Customs Union) may disrupt the markets

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2 'The Uruguay Round: Implications for South Africa', Trade Monitoring Project, UCT - Number 1: February 1993 by Rashaad Cassim @ p 1

3 *ibid*

in the Customs Union, which could have a harmful effect on the economies of the Customs Union".<sup>4</sup>

The wording used in this paragraph is clear evidence of the protectionist attitude taken by South Africa in considering the role of international trade in its economy. This attitude forms a stark contrast to the current attitude displayed in the National Economic Forum's Report.<sup>5</sup> In this Report it is stated that:

"It is generally accepted that international trade can contribute to the well-being and improved standard of living of all the countries engaged in such trade. For this reason the international community has, for a considerable time, endeavoured to improve international trade through a number of rounds of negotiation as part of the GATT".<sup>6</sup>

It would seem, therefore, that South Africa has decided in favour of participation in the international trading community and has accepted that GATT can play a positive role in this regard. From the statement by the NEF it is not clear whether any of the major criticisms that have been directed against the GATT have been taken into account. Whilst it is true that most of these criticisms have emanated from the member states that are considered to be 'developing' states and South Africa can not altogether be considered to be a developing state it is also true that South Africa is not an entirely developed state. As a result, the criticisms levelled against the GATT should be seen to be of some interest for South Africa as they may well prove to be of some relevance.

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4 page 1 of the Guide

5 "Anti-dumping and Countervailing and Safeguard Measures Investigation by the Trade and Industry Working Group of the National Economic Forum. At the end of 1994 the Trade and Industry Working Group of the NEF published a report on Anti-Dumping and Countervailing Measures. The NEF was launched in October 1992 with organised business, organised labour and the Government as its principal participants. The NEF was established to provide a mechanism through which major economic stakeholders could address the economic challenges facing the country and seek consensus on their resolution principally during the transition and potentially thereafter. It has subsequently been replaced by the National Economic Development and Labour Council (NEDLAC) which includes organisations of community development interests, in addition to the interests represented on the NEF.

6 page 1 of the Report

The rounds of negotiations referred to in the Report are those mentioned earlier.<sup>7</sup> They are aimed at breaking down barriers to trade through a process of negotiating the outlawing of such barriers as well as by negotiating the reduction of tariffs generally. The attainment of free trade and free competition are seen to be the goals of the GATT with the ultimate goal being the achievement of zero-tariff protection.

Notwithstanding the fact that these are the stated ultimate aims of the GATT, the participants to the various rounds of negotiations have recognised that there are certain common international trade practices which could potentially be harmful to international trade as a whole. Two important manifestations of these practices are: firstly, the use of predatory pricing and secondly, the use of subsidies. It is believed, by the participants to the GATT, that where the use of these practices exceed the bounds of fair competition, to such an extent that local industries are not able to meet the competition through their own resources, a distortion in international trade may very well result and that this situation would be counter-productive to the aims of the GATT. Cassim<sup>8</sup> points out that "A fundamental contradiction of the GATT, or the free-trade ethos it advocates, is the diverse way in which countries have resorted to protective measures, specifically in the 1970s and 1980s, other than through conventional tariff mechanisms."

As a result of the recognition that potentially harmful international trade practices do exist, certain remedies against these practices were devised in the form of anti-dumping and countervailing duties. These remedies are, however, subject to very strict negotiated guide-lines. These strict guide-lines are considered necessary so as to ensure that the objective of free international trade is not frustrated as it is generally agreed that, in practice, a substantial amount of international trade occurs at dumped prices.

The latest round of the GATT negotiations, which commenced in 1986, is commonly known as the Uruguay Round. This Round represents an attempt by the members of GATT to deal with important international trade issues including: trade in agriculture; rapidly growing trade in other fields such as transfer of skills, technology and services; expansion of intra-firm trade and non-tariff barriers. The Uruguay Round found South Africa being placed under a substantial amount of pressure by its major trading partners to comply with the GATT requirements. In effect South Africa had to start opening up its markets to the international trading

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7 @ page 1

8 supra

community or be faced with retaliatory measures. As the majority of the most important trading partners South Africa has are member states to the GATT, any retaliatory measures taken by them could have drastic consequences for the South African economy. The extent of the pressure that was placed upon South Africa, amongst other countries, can be seen in this statement by the NEF in its Report:

"In terms of South Africa's obligations under the GATT, entered into by the majority of countries trading internationally, a number of customs duties applicable to certain products in ... Schedule [1 to the Customs and Excise Act] are bound against increases above specified levels. There is continuous pressure throughout the world, by the contracting parties to GATT, on all countries, including the Customs Union partners, to increase the number of bindings and also to lower the levels of protection afforded their industries by way of customs duties."9

It is perhaps a direct result of this increased pressure on South Africa to comply with the requirements of the GATT, or face retaliatory measures, that has brought about the seemingly sudden change in attitude that South Africa has displayed, regarding the role it sees international trade playing in its economy.

South Africa immediately became a signatory member to the results of the Uruguay Round. It did so, however, with the signature of the previous government. This left open the question as to whether the current government feels itself bound by the principles agreed on in the Uruguay Round or not. It soon became clear that the principles outlined by the Uruguay Round were also embraced by the ANC10-led Government of National Unity, which was elected in April 1994, and which has subsequently confirmed South Africa's commitment to the GATT and its principles.

This commitment to the GATT and its principles was reinforced when, during December 1994, the South African Government of National Unity lodged with the GATT-Secretariat a signed instrument of accession to the Agreement which established the World Trade Organisation (WTO). In doing so South Africa became a member of the WTO and a party to the multilateral agreements concluded in the Uruguay Round of trade negotiations. The Agreement establishing the WTO envisages a single institutional framework encompassing the GATT, as modified by the Uruguay Round, all agreements and arrangements concluded under its auspices and the complete results of the Uruguay Round. The WTO framework is aimed at ensuring a 'single undertaking

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4 ibid

10 African National Congress

approach' to the results of the Uruguay Round and as a result, membership in the WTO will entail accepting all the results of the Round without exception.

Included in the multilateral agreements is the Agreement on the Implementation of Article VI of the GATT which relates to dumping. This agreement is known as the Agreement on Implementation of Article VI of the GATT, The Uruguay Round Anti-Dumping Code. The GATT Anti-Dumping Agreement was initially concluded at the end of the Tokyo Round of Negotiations. The Code that came out of the Uruguay Round is a revision of this Agreement.

The accession to the WTO was approved by Parliament during April 1995, on the recommendation of both houses of Parliament, and in accordance with the provisions of the Interim Constitution of South Africa. The question remains, however, whether the agreements that fall under the WTO form part of the domestic law of South Africa. Section 231 of the Interim Constitution, regarding the Continuation of International Agreements and the Status of International Law, provides in Subsection 3 that:

"Where Parliament agrees to the ratification of or accession to an international agreement under subsection (2), such international agreement shall be binding on the Republic and shall form part of the law of the Republic, provided Parliament expressly so provides and such agreement is not inconsistent with this Constitution."

As Parliament has not passed an Act expressly incorporating the provisions of the WTO into South Africa's domestic law, as is required by the Interim Constitution, the agreements that form the substance of the WTO cannot, therefore, be invoked by citizens against the Government. The agreements that comprise the WTO, therefore remain in the public law sphere and are consequently only binding on the member states to the WTO.

#### THE GATT REGARDING ANTI-DUMPING

The GATT itself provides for anti-dumping mechanisms in Article VI. Dumping is described in Article VI(1) which provides that:

"... dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry ... or materially retards the establishment of a domestic industry."

The same Article then goes on to define when a product is to be considered as being introduced into the commerce of an importing country at less than its normal value. This is stated as occurring when the price of the product exported from one country to another:

- "(a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country; or
- (b) in the absence of such domestic price, is less than either
  - (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or
  - (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit."

The term 'like product' is used frequently in this Article. In practice this term can be most significant as the domestic products that are affected by dumping are not always identical to the imported product. The use of this term suggests that not only identical products but also products which are not identical but which have similar characteristics are relevant regarding a determination of dumping.

In practice goods are not always imported directly from the country in which they are produced (the country of origin). It can happen that they are imported via another country. When this occurs, in terms of this Article, the price in the country of export is used in order to provide the normal price. There are certain exceptions to this situation however: firstly, if the products were not manufactured in the country of export; secondly if there is no comparable price for the products in that country; and lastly if the products were merely trans-shipped through a second country. In terms of these exceptions a comparison with the price of the country of origin is permitted.<sup>12</sup>

Article VI(2) goes on to provide that in order to offset or prevent dumping:

"A contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product."

The prices must at every stage be compared at the same level of trade and in respect of sales made (as nearly as possible) the same time. Differences which may affect price

comparability are allowed for. These may include differences in conditions and terms of sale, taxation, deeds of trade, quantities and physical characteristics. The term 'dumping margin' refers to the difference between the price at importation and the higher price in the country of origin.<sup>13</sup>

Article VI(6)(a) provides, further, that "No contracting party shall levy any anti-dumping ... duty on the importation of any product of another contracting party unless it determines that the effect of the dumping ... is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry."

In terms of this provision it is clear that "[d]umping is only prohibited under the GATT when it causes material injury to a domestic industry, when it causes a threat of such injury or when it causes material retardation of the establishment of a new domestic industry. This injury must be established on foot of an objective examination as to the volume of the dumped goods and their effect on the price of like products on the local market, as well as on the local industry of said products.... Only injury caused by dumping itself is considered, not injury that can be attributed to other factors."<sup>14</sup>

It is these provisions of the GATT that provide the basis of anti-dumping law. These provisions acknowledge the existence of the practice of dumping and provide for the remedy that may be sought in the event that dumping occurs provided certain requirements are met. Van Houtte points out that "[d]umping is carried out by enterprises. However, the rules of the GATT are not directed at enterprises, but exclusively at the contracting states, which are responsible for the transposition of the GATT anti-dumping rules into national law."<sup>15</sup>

#### ANTI-DUMPING CODE

The principles on dumping are rather simply provided for in Article VI. This Article has, however, been extensively amplified by the Uruguay Round Anti-Dumping Code (1994) which replaced the earlier Anti-dumping Code (1979). South Africa is not yet a signatory to this Code, however when it became a signatory to the WTO, as the Anti-Dumping Code forms part of the agreements under the WTO, South Africa has to, effectively, take its provisions into account.

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13 ibid

14 ibid

15 supra @ page 94

The Code is very important as it deals with many of the practical aspects of a dumping investigation as well as issues regarding the imposition of an anti-dumping duty. It has given greater clarity and has provided more detailed rules concerning the method of determining that a product is dumped.

Included in the issues covered by the Code are the following: the determination of the precise margin of dumping (which is vital in fixing the duty which may legally be applied); the definition of domestic industry; the question of evidence and provisional measures which may be taken. Other important items covered by the Code are the procedures which are to be followed when initiating and conducting anti-dumping investigations as well as the implementation and duration of any anti-dumping measures that are taken.

The role of dispute settlement panels, in disputes relating to anti-dumping actions taken by domestic authorities, is also covered.<sup>16</sup> When a dispute arises the states must first discuss the issue amongst themselves. If this process does not provide a solution the 'Committee on Anti-dumping practices'<sup>17</sup> will attempt a conciliation. The Anti-dumping Code requests the states to show "sympathetic consideration" for the points of view of other states. If conciliation proves to be impossible, the Committee shall then convene a Panel. This Panel acts within the general GATT Integrated Dispute Settlement Procedure.<sup>18</sup> These procedures could prove to be very important at an international level in ensuring that the various signatories adhere to the GATT requirements regarding anti-dumping procedures and in this way they may contribute towards the general GATT aim of ensuring free and fair trade between countries.

Regarding the methodology for determining that a product is exported at a dumped price, the Code adds relatively specific provisions on such issues as criteria for allocating costs when the export price is compared with a 'constructed' normal value and rules to ensure that a fair comparison is made between the export price and the normal value of a product so as not to arbitrarily create or inflate margins of dumping.<sup>19</sup>

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16 in Article 15 of the Code. This Article essentially provides that parties should complete the dispute settlement procedures under this Code, should disputes arise between them regarding rights and obligations under this Code, before availing themselves of any rights which they have under the GATT.

17 where the states confer with each other on inter alia provisional and final anti-dumping measures

18 Van Houtte supra @ page 96

19 Article 2 of the Code

The Code strengthens the requirement for the importing country to establish a clear causal relationship between the dumped imports and the injury to the domestic industry.<sup>20</sup> The examination of the dumped imports on the industry concerned must include an evaluation of all the relevant economic factors bearing on the state of the industry concerned.

Further, the Code confirms the existing interpretation of the term 'domestic industry'.<sup>21</sup> Subject to a few exceptions, 'domestic industry' refers to the "domestic producers as the whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products".<sup>22</sup>

A significant improvement over the previous Agreement is provided by the addition of a new provision in terms of which anti-dumping measures shall expire five years after the date of imposition, unless a determination is made that, in the event of the termination of the measures, dumping and injury would be likely to continue or recur.<sup>23</sup> Further, it is provided that where provisional measures are taken to prevent injury, in the form of provisional anti-dumping duties or security for estimated anti-dumping duties, these provisional measures can only apply for four (and in exceptional cases six) months.<sup>24</sup>

Another new provision requires the immediate termination of an anti-dumping investigation in cases where the authorities determine that the margin of dumping is de minimus (this is defined as being less than 2%, expressed as a percentage of the export price of the product) or where the volume of dumped imports is negligible (generally when the volume of dumped imports from an individual country accounts for less than 3% of the imports of the product in question into the importing country).<sup>25</sup>

The Code also calls for prompt and detailed notification of all preliminary and final anti-dumping actions to a Committee on Anti-Dumping Practices. The Code affords the affected parties the opportunity for consultation on any matter relating to the operation of the Code or the furtherance of its objectives.<sup>26</sup>

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20 Article 3 of the Code

21 Article 4 of the Code

22 Van Houtte supra @ page 95

23 Article 9 of the Code

24 Van Houtte supra @ page 96

25 Article 5 of the Code

26 Articles 15 and 16 of the Code.

Very importantly the Code also calls, in Article 16, Paragraph 6, for all governments which accept or accede to it to take "all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of this Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Party in question."

#### THE LEGISLATIVE FRAMEWORK AND MECHANISMS INVOLVED IN AN ANTI-DUMPING INVESTIGATION IN SOUTH AFRICA

As will be seen, it has generally been recognised that the current South African legislation, regarding dumping, will have to be substantially amended and that these amendments are, in fact, imminent. The following comments must be seen in the light of this fact. Providing an outline, of the current mechanisms used in anti-dumping investigations, is further complicated by the fact that South Africa does not have the necessary legislative framework, case law or experience.

The Custom's and Excise Act<sup>27</sup>, (the Customs Act) provides for the current anti-dumping legislation in South Africa and has done so for several decades. There have, however, been very few anti-dumping investigations before 1992. This scarcity in anti-dumping investigations has largely been a result of the fact that South African producers were able to use other mechanisms, that were on the whole far more effective, in order to achieve the same (if not better) results. These more effective mechanisms included the use of formula duties<sup>28</sup>, import controls, and ad hoc applications for increases in duties.

These mechanisms are, however, not 'legal' in terms of the GATT and have, therefore, for the most part been dismantled as South Africa moves in the direction of complying with the GATT requirements. As these earlier mechanisms have largely been dismantled, and as they are currently in the process of being replaced by mechanisms that are 'GATT-friendly', anti-dumping measures have become very important for local producers as these measures are generally perceived to be

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<sup>27</sup> Act 91 of 1964

<sup>28</sup> A formula duty is an amount, in Rands, per unit of quantity (the reference price) less a percentage ad valorem on the export price. In most instances the effect of such a formula is, where the export price of any consignment is less than the reference price, the duty will be equal to the normal ad valorem duty on that export price, plus the full amount of the difference between the reference price and the export price. Therefore, in effect, the lower the price, the higher the duty.

the only remedy available to them as they face the threat of increasing numbers of low-priced imports. As the South African market opens up to international trade, and as tariffs are progressively being lowered, by the Government, in order to comply with the GATT requirements regarding tariff bindings, South African producers feel that they are under attack from several directions at once.

New anti-dumping legislation was introduced in South Africa during May 1992, in the form of amendments to the Board of Trade and Industry Act (the Board Act)<sup>29</sup>, and the Customs Act. When these amendments were introduced various concerns were expressed by people involved in South African industry. It was generally recognised that the amendments were contrary to the GATT and that they gave the Board an extremely wide discretion.<sup>30</sup> These amendments substantially narrowed the object of the renamed 'Board on Tariffs and Trade' and increased emphasis was placed on the investigation of dumping, the use of subsidies and a new concept of 'disruptive competition' was introduced.

Disruptive competition is defined in the Act as the "export or proposed export of goods to the Republic or the common customs area of the Southern African customs Union, other than dumping or subsidized export, in quantities and under circumstances which cause or may cause material injury to established industries in the Republic or the common customs area of the Southern African Customs Union or which may retard the establishment of industries in the Republic or the common customs area of the Southern African Customs Union."<sup>31</sup> It is not entirely clear whether this concept of disruptive competition falls within the provisions of the GATT. The NEF suggests that the wording 'disruptive competition' is too wide and needs to be changed to 'disruptive export'.<sup>32</sup>

The Board is a statutory body established in terms of the Board Act with the Board members being appointed by the State President on the basis of their knowledge and expertise in commerce, industry and the economy.<sup>33</sup> This appointment of members to the Board from such a wide variety of fields shows a recognition of the broader issues that are involved in international trade matters and the importance of including members who are able to take these issues into account. At present the full-time members form a 'management committee', which meets on a weekly basis. The

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29 Now renamed the Board on Tariffs and Trade Act 107 of 1986

30 'Anti-dumping Law and Practice in South Africa' by Leora Blumberg @ page 2

31 Section 1 of the Board Act

32 supra @ page 23

33 Section 5 of the Board Act

full Board meets on a monthly basis and, aside from dealing with other matters, reviews the decisions of the committee.<sup>34</sup> The actual day to day work of the Board is performed by officers, or employees, of the Department of Trade and Industry designated for that purpose by the Director-General of Trade and Industry. The authorised staff component consists of a director plus secretary, three deputy directors and six investigating officers ranging from Assistant Trade and Industry Adviser to Assistant Director.

The NEF suggests that "additional staff will need to be trained in the very near future to cope with the expected inflow of work resulting from the Gatt commitments. The retraining of the existing staff already designated for the work incidental to the Board's function should receive priority. As the existing staff is experienced in Customs tariff investigations their re-training to undertake investigations of alleged unfair international trade practices should not be a problem."<sup>35</sup> It would seem that with the increased emphasis that is being placed on anti-dumping investigations, in particular, and unfair trade practices, in general, this projection is probably correct.

Section 3 of the Board Act outlines the objects of the Board and provides that they are "to promote industrial growth within the framework of the economic policy of the Republic by conducting investigations into any matter which affects or may affect the trade and industry of the Republic or the common customs area of the Southern African Customs Union, and to advise the Minister in this regard." The fact that the Board is empowered to conduct investigations, within the 'framework of the economic policy of the Republic' is significant in that it is the change in the economic policy of the Republic that has resulted in increased emphasis being placed on concerns such as dumping.

For this purpose, and in terms of the Board Act, the Board may investigate dumping, of its own accord, in or to the republic and, if authorised thereto by an agreement, in or to the common customs area of the Southern African Customs Union<sup>36</sup> (SACU). The Board may also, by order of the Trade Minister, investigate any other matter which affects or may affect the trade and industry of the Republic and, if authorised thereto by an agreement, the common customs area of the SACU.<sup>37</sup> At the moment, however, the other Customs Union members do not see the Board as 'their' body as they do not have any direct representation on it. Be that as it may, they are obliged, through the Customs Union Agreement, to apply the tariff measures resulting from the Board's

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34 The NEF's Report supra @ page 16

35 op cit @ page 18

36 Section 4(1)(a)(i) of the Board Act

37 Section 4(1)(a)(iii) of the Board Act

recommendations. Since decisions by the Board affect the whole of the customs union area, consideration should be given to making the Board a truly representative customs union body.<sup>38</sup> This is clearly an important aspect that will have to be addressed in the future. It is not only necessary that the Board be a more representative body in that the actual membership of the Board should be representative of the members of the SACU but the members of the SACU should also be able to provide input regarding the procedures of an anti-dumping mechanism as they will also be bound to impose any anti-dumping duties that the Board determines are necessary.

The Board Act and the Customs Act legislate the basic procedure which must be followed in an anti-dumping investigation. The Board is the body that must conduct the actual anti-dumping investigation and once this has been done the Board must then make a recommendation to the Trade Minister who may either accept or reject that recommendation.<sup>39</sup> If the Trade Minister accepts the recommendation, the Trade Minister must then request the Minister of Finance to impose an anti-dumping duty and amend the tariff schedules accordingly.<sup>40</sup> The Minister of Finance does this by referring the matter to the Commissioner of Customs and Excise to publish the amendment in the Government Gazette and to collect the relevant duties when they are payable.

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38 The NEF's Report supra @ page 17

39 Section 4 of the Board Act

40 Section 4(2) of the Board Act. The Minister of Finance may in terms of section 55(1) and (2), and acting in accordance with any request of the Minister of Trade, impose the anti-dumping requested by the amendment of Schedule 2.

41 Whenever the Board publishes a notice in the Government Gazette that it is investigating the imposition of an anti-dumping duty, the Commissioner of Customs and Excise shall in terms of Section 57A, by notice in the Government Gazette, impose a provisional payment in respect of the goods subject to an investigation if so requested by the Board.

42 Section 57A(1) of the Customs Act

43 Investigation into the alleged dumping of knitted acrylic jersey's, exported from the Republic of China and Korea (Board Report No. 3313); Investigation into the alleged dumping of hydrogen peroxide imported from, originating in or supplied by the Federal Republic of Germany, the Kingdom of Belgium and the Republic of Italy (Board Report No. 3187) and the investigation into the alleged dumping of clear flat glass exported from the People's Republic of China, Hong Kong, Thailand and Singapore (Board Report No. 3408).

It is the Minister of Finance who must be requested to amend the tariff schedule and impose the anti-dumping duty as the Department of Finance is the only Government department authorised to collect duties. The discretion of the Minister of Finance is in this way limited and his only real function is the imposition and collection of duties.

However, in order for the Minister of Finance to make the necessary amendments regarding a final finding, the Minister needs to be provided with the necessary input from his Department, in particular from the Commissioner of Customs and Excise. It takes between one and three months from the date of the final finding by the Board to the date on which the amendment is actually published in the Government Gazette. As the period of validity of a provisional payment is specified in the international agreements, delays in reaching final findings and amendment of the relevant Schedule, has necessitated on various occasions the Board requesting the Commissioner for Customs and Excise to extend the validity of the provisional payment.<sup>47</sup> Once the Minister of Finance has amended the relevant Schedule, as requested, this amendment is still subject to ratification thereof by Parliament at its next sitting.

This situation is clearly not acceptable. A procedure, whereby the internationally agreed time limits can more easily be adhered to must be found. The NEF in its Report suggests that the current procedure can be "streamlined considerably by allowing the Board to direct a request for amendment of Schedule 2 to the Customs Act directly to the Minister of Finance. The Minister of Finance should be obliged to accede to this request and by presentation of the Board's report on the matter, by the Minister of Trade and Industry, to parliament at its next session parliament can ratify the amendment."<sup>48</sup> It would appear that this suggestion would present a way of dealing with the delays and should be considered when the current legislation is amended.

When the Minister of Finance is requested to amend the tariff schedule, the schedule which must be amended is

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44 Investigation into the alleged dumping of titanium dioxide pigment imported from or originating in Australia (Board Report No. 3449).

45 in the investigation into the alleged dumping of titanium dioxide pigment imported from or originating in Australia (Board Report No. 3449), the Board found that the provisional payment imposed was too high and that the definitive anti-dumping duty should be less than the provisional payment.

46 Paragraph 34 of the Guide

47 The NEF's Report supra @ page 13

48 ibid

Schedule 2 of the Customs Act. Section 55(1)49 provides that this Schedule specifies the goods which are, in addition to any other duty payable, liable to an anti-dumping duty.

In the past unfair trade practices were dealt with in terms of Schedule 1, of the Customs Act, which contains the permanent duties which are to be imposed on imported goods. As a result of South Africa striving to comply with the requirements of the GATT and as the GATT requires members to impose duties at an agreed level, this method is no longer practical. An anti-dumping duty which is imposed in terms of Schedule 1, as Schedule 1 relates to the permanent determination of tariffs, may very well amount to a breach of the requirements of the GATT. Unfair trade practices must, therefore, now be dealt with in terms of Schedule 2 which is specific and temporary and as a result complies with the agreed GATT anti-dumping measures. Section 5650 requires any amendment to be done by notice in the Government Gazette which is seen as a way of ensuring that any interested parties are informed.

Certain exceptions to the imposition of anti-dumping duties are provided for in Section 55(5)51. This section provides that the Commissioner of Customs and Excise may "exempt from payment of any anti-dumping ... duty, any goods which are imported in such circumstances or in such quantities that the importation of such goods does not, in his opinion, constitute regular importation of such goods for trade purposes." This suggests that goods which are imported for the purpose of being samples are exempt from the imposition of any anti-dumping duty.

It is clear then that the real control in determining whether and to what extent an anti-dumping duty is to be imposed is given to Board, under the auspices of the Minister of Trade. This limitation of the discretion of the Minister of Finance was effected by the 1992 amendments and they seem to have been done with the intention of limiting the liability of the Minister of Finance. It would appear, however, that the legislature has not been entirely successful in this regard as the Minister of Finance is one of the named Respondents in the first Supreme Court review of an anti-dumping action.<sup>52</sup>

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49 of the Customs Act

50 of the Customs Act

51 ibid

52 The unreported decision of Brengo Incorporated, FAG South Africa Limited, and Transnet Limited v The Chairman, Board on Tariffs and Trade, Minister of Trade and Industry and the Minister of Finance

The Board Act, in Section 16A provides for the promulgation of regulations regarding:

- "(a) procedure in connection with any function of the Board; and
- (b) any other matter in connection with the achievement of the objects of the Board."

Notwithstanding the fact that it would be very advantageous to be provided with regulations, for the purposes of defining the exact mechanisms of an anti-dumping investigation as well as the determination of the precise duty, none have yet been made. A Guide has, however, been published by the Board. This Guide refers, in rather general terms, to South Africa's obligations under the GATT and sets out the procedures that are to be adopted by the Board in an anti-dumping investigation. Some additional clarity has now been provided for but the Guide remains an internal document and has, therefore, no legal force. As a consequence additional problems may, in fact, have been created as applicants may find themselves relying on the contents of the Guide only to find that the Board has subsequently changed its approach. This could potentially involve extensive and unnecessary costs as the applicant could find itself in the position of having unwittingly followed the incorrect procedure and it would not be able to hold the Board to the contents of the Guide.

The Guide also fails to deal with a number of detailed issues that arise in anti-dumping investigations, and which could seriously impact the outcome of any anti-dumping investigation. Presently these issues are left to the discretion of the Board officials. Companies involved in investigations are left stumbling about in the dark without knowing the rules of the game. This situation clearly does not enhance procedural fairness and certainty, and is clearly not acceptable in terms of the GATT. In practice, however, the Board has conducted its investigations generally in accordance with the procedure laid out in Article 5 of the Uruguay Round Anti-dumping Code.<sup>53</sup>

Dumping is defined in Section 1 of the Board Act as occurring when goods are exported or are proposed to be exported to South Africa -

- "(a) at an export price lower than the price at which similar goods are being sold in the ordinary course of trade in the exporting country, for consumption there;

- (b) at an export price lower than the highest comparable price at which similar goods are being exported in the ordinary course of trade from the exporting country to any third country;
- (c) at an export price lower than the price which is made up as contemplated by subsection (2); or
- (d) at an export price lower than the comparable price at which similar goods are being exported to the Republic or the common customs area of the Southern African Customs Union from any other country;"<sup>54</sup>

The first three parts of this definition (although far broader and less specific) are similar to the definition found in Article VI of the GATT . There exists, however, an important difference between them in that in the South African definition the various categories are presented as alternatives whereas in the GATT definition they are to be applied to specific situations and in a particular sequence.

The fourth category is further problematic in that it can quite clearly lead to absurd results. In terms of this part of the definition, dumping is proved to exist if the price of the imported products is lower than the price of other imports of a similar product from any other country. This part of the definition was said to be used only in the case of non-market economies. It has, however, been used in the investigation into the alleged dumping of printed bed-linen, imported from or originating in Pakistan.<sup>55</sup> It is most commonly used in investigations relating to products from the People's Republic of China. In practice the Board has interpreted the provisions in the Board Act as giving it the power to use any one of the four definitions in any investigation and it has done so in practice. Obviously dumping cannot be found to have occurred in this situation as it implies that whenever a competitive product is introduced into the South African market it is seen to be dumped and consequently an anti-dumping duty can be imposed. This would quite clearly be in the face of the requirements of the GATT.

This definition of dumping has been amended, however, so as to bring it in line with the definition in the GATT and to do away with the absurd consequences of the fourth part of the current definition. It has been recognised, in the NEF Report that anti-dumping legislation and procedures must conform to the provisions of the GATT and the Uruguay Round Anti-dumping Code and that the existing legislation will have to be substantially amended. The amendments relating to the definition of 'dumping' did not in any way deal with the restructuring of the legislation or the institutions,

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<sup>54</sup> Section 1 of the Board Act

<sup>55</sup> Board Report No. 3297

and is generally considered to be an interim measure, pending a complete restructuring.<sup>56</sup>

Paragraph 3 of the Guide provides that the Board will consider imposing an anti-dumping duty on an export where:

- "(a) such export is the cause of material injury to an industry in the Customs Union; or
- (b) the probability exists that material injury may be caused to an industry in the Customs Union by such export or the threat of such export; or
- (c) such export or the threat of such export materially retards or prevents the establishment and development of an industry in the Customs Union; and
- (d) such action is in the national interest."<sup>57</sup>

In determining whether the requirements listed above have been complied with, the Board takes into account further factors such as:

- "(a) [the] actual and potential changes in output, sales, market share, profits, return on capital, productivity, capacity, utilisation, etc.; and
- (b) the actual or potential influence on cash flow, stocks, employment opportunities, wages, growth, ability to attract investments, ability to obtain capital, etc."<sup>58</sup>

It is evident from the wording of Paragraph 3 that there is an 'injury requirement' which must be met. This 'injury requirement' is generally seen to be a fundamental prerequisite for the imposition of anti-dumping duties. This requirement was, however, removed from the Customs Act by the 1992 amendments and was not replaced by the Board act with the result that the only mention of it is to be found in Paragraph 3. It is provided in the Guide that a determination of a threat of material injury is based on facts not merely on allegations, conjecture or remote possibility, and that the change in circumstances which would create a situation in which the dumping would cause material injury must be clearly foreseen and imminent. It is also provided that for that the injury must be material in that the decline and the negative effects must be substantial to the point where the effected industry cannot combat the impact of the dumped imports from its own

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56 Leora Blumberg supra

57 page 3 of the Guide

58 page 2 of the Guide

resources.<sup>59</sup> The Board has dismissed several cases on the basis that there is no material injury.<sup>60</sup>

These are by no means the only factors which the Board takes into account as, in order to impose a dumping duty, the Board must also consider whether any action taken will be in the 'National Interest'. When determining whether imposing an anti-dumping duty is in the 'National Interest', the Board contemplates, among other things, the following -

- "(a) the benefits of competition to the local industry, as measured against the seriousness of the potential material injury to the industry;
- (b) the effect that material injury to the industry will have on its supplying and consuming industries;
- (c) the effect that any action may have on the growth and development of any other industry;
- (d) the ability of the industry to adjust to changing circumstances and the resulting time-span over which additional protection will have to be provided;
- (e) the extent to which consumers benefit from the low import prices and the extent to which these benefits are passed on;
- (f) the influence on employment and job opportunities; and
- (g) the influence on the balance of payments."<sup>61</sup>

The question of whether a national interest clause should be included in the legislation is one that has been debated at length internationally. If no national interest clause is included, the investigating body will be obliged to introduce the duty even when the industry that is being protected is of dubious worth to the economy. The inclusion of a clause on national interest could, however, lead to a situation where a deserving case is not assisted as a result of 'political' pressure.

The concept of 'national interest' was introduced into the earlier legislation. Initially the concept was applied in a

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<sup>59</sup> Leora Blumberg supra @ page 7

<sup>60</sup> Investigation into the alleged dumping of unmodified starches from or originating in Belgium, Denmark, France, Germany, the Netherlands, Portugal, Switzerland and Thailand (Board Report No. 3486); Investigation into the alleged dumping of semi-refined paraffin wax imported or originating in the People's Republic of China and Hong Kong (Board Report No. 3492); Investigation into the alleged dumping of clay pigeon targets imported from or originating in France (Board Report No. 3384)

<sup>61</sup> op cit

protectionist manner. The policy of import replacement and factors such as the creation and maintenance of job opportunities were very dominant. There is a general concern that the concept of 'national interest' may be used by smaller undertakings, within an industry, in an attempt to protect themselves against an alleged unfair international trade practice. The Uruguay Round Anti-dumping Code, however, clearly defines a 'domestic industry' as referring to 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 of the total domestic production of those product and as a result, the interests of smaller undertakings, as opposed to those of the industry as a whole, should not be used in an anti-dumping investigation.

Using criteria such as the protection of jobs and the creation of captive markets for South African product inputs renders action against an alleged unfair international trade practice nothing more than a protectionist measure. This would be in the face of the stated aims of the GATT and therefore could not be tolerated in terms of the GATT requirements. It is as a result of these concerns that the NEF in its Report suggests that "the consideration of 'national interest' best be left out of the equation."<sup>62</sup>

The fact that the Board currently may take certain factors regarding 'national interest', such as those outlined above, into account give substance to the concerns raised by the NEF. These factors could easily be abused in order to prevent alleged unfair international trade practices and this would certainly amount to a contravention of the GATT requirements. Whilst it necessary for South African producers to have mechanisms available to them that prevent unfair international trade practices, the emphasis should be place on the unfairness of the practice. If factors, such as those currently outlined, are permitted to be taken into account the Board could, in theory, prevent international trade practices or take action against them despite the fact that they are not unfair.

The process does not end here, however, as having determined that injury has, in fact, occurred the Board must still determine whether that injury was caused by dumping, and not by some other factor. In Paragraph 6 of the Guide the elements that are considered in this part of the determination are laid out and these are:

- "(a) the volume of all relevant imports from all countries, existing tariffs and rebate provisions;
- (b) the impact of imports and their prices on the domestic market; and

- (c) factors such as political influences; the state of the economy; labour matters; boycotts; product quality and range; delivery periods; the technology employed; the utilisation of production factors; and the policies of the industry concerning production, marketing and finance."63

It is clear, therefore, that there is a stringent causality requirement that must be proved when determining whether an anti-dumping duty should be imposed. The relevant legislation does not mention this requirement and once again the only reference to it is to be found in the Guide. This causality requirement is of particular relevance to the South African situation. It may very well prove to be the undoing of many an application for an anti-dumping duty to be imposed. There are several reasons why locally produced products may suffer in the face of competition provided by imported products. These factors can be seen to be more a repercussion of the previous isolation of the South African economy and its protectionist past than as a result of the fact that products are being dumped. An economy that is protectionist in nature will result in products continuing to survive in a domestic market despite the fact that the producers are not using their resources effectively. The very weak South African exchange rate is another factor which may result in local products not being able to compete in an international market. Issues such as the low productivity rate in South Africa may also contribute to South African products not being able to compete successfully with imported products.

In the light of these other factors, therefore, it would seem that a very good indication as to whether injury in a domestic market is caused by the importation of competitive products, or whether it is caused by any other factors, is to determine whether the local manufacturer is exporting its product. It is generally accepted that in the current economic climate it is very desirable to be exporting your product, therefore if a local manufacturer is not doing so this fact could be used to provide a very good indication that their product is, firstly, not competitive and, secondly, that the local producer is not using their resources effectively.

In this regard the NEF, in its Report, suggests that when a domestic industry can no longer compete with imports at normal prices, "the domestic industry should, in such cases endeavour to improve its efficiency through structural adjustment or other measures in order to be able to compete. It is recognised that it might take time to implement such structural adjustment and a remedy in the form of safeguard measures were therefore negotiated. The purpose of the

safeguard is to allow a country to exceed the binding in respect of a tariff item for a temporary period of time in order to allow the domestic industry to effect structural adjustment."64

It is clear, therefore, that the limitations of anti-dumping mechanisms in the South African context are fully recognised, however it is just as apparent that any safeguard measures that have been negotiated for the time-being will not always be available and that South African producers will have to ensure that their products are competitive in an international market in order to effectively utilise the anti-dumping measures. Notwithstanding the fact that South Africa will be able to use temporary safeguard measures, the timeframe envisaged for the removal of these safeguard measures is unlikely to give South African manufacturers sufficient time in which to comprehensively implement the structural adjustment procedures as suggested by the NEF. This is a very real concern for South African producers and once again goes to highlight the significance of effective and accessible anti-dumping procedures for South African producers.

Section 4(1)(a)(i) of the Board Act provides that "... the Board may - of its own accord investigate dumping...." It is quite clear, however, that this is not the only way in which the Board can investigate dumping as the Guide provides in Paragraph 12 that:

"An investigation by the Board to determine the existence, degree and effect of any alleged unfair trade practice ... may be initiated by way of a written application on a questionnaire prescribed by the board, requesting such an investigation by or on behalf of the industry concerned."65

It is self-evident, therefore, that a large amount of scope is given to local manufacturers in order that they may petition the Board to make an investigation, either by motivating the industry concerned to do so on their behalf, or by doing so themselves on behalf of the local industry. In this way any local industry is afforded the opportunity of being pro-active when facing the importation of potentially dumped products. Another advantage of permitting local manufacturers to petition the Board is that any application brought by or on behalf of a local industry will have a fair amount of impetus as such an application will have the backing of the entire industry affected. However, the lodging of an application with the Board is no guarantee that the Board will embark on the investigation as there are certain prescribed requirements that first have to

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64 page 3 of the Report

65 page 4 of the Guide

be met before the Board will consider initiating an entire investigation.

These requirements that first have to be met are spelt out in Paragraph 13 of the Guide which states that:

- "Such application must include evidence of -
- (a) dumping ... benefiting the exported product;
  - (b) material injury or the threat thereof to the industry concerned; and
  - (c) a causal link between the alleged particular unfair trade practice concerned and the alleged material injury."66

It would seem that, in terms of the requirements laid out in Paragraph 13, a prime facie case has to be made, by the applicant, before the Board will seriously consider investigating an alleged unfair trade practice. The conclusion that a prima facie case has to be made by the applicant is reinforced by the contents of Paragraph 14 which emphasizes this by stating that "[m]ere assertion, unsubstantiated by the relevant evidence, will not be considered sufficient reason for the initiation of an investigation."67

When an applicant brings an application to the Board, and that applicant requires assistance in completing the prescribed questionnaire, that applicant may approach the Board in this regard.68 The NEF points out that this "[a]ssistance can be provided by [the] Liaison Unit [which] still does not exist due to lack of staff".69 That this Liaison Unit does not yet exist is very worrying as the entire process of bringing an application to the Board is extremely complicated and is furthermore of a technical nature. The fact that provision has been made for the creation of a Liaison Unit indicates that the Board recognises that a need exists for such a unit. In effect the lack of such a unit possibly has resulted in fewer applicants being successful in their applications as a result of the fact that they are unable to deal with the process effectively. The NEF suggests that "[t]he private sector should be provided with assistance to complete petitions. This function should, however be completely divorced from the investigative work in order to ensure complete neutrality on the part of the investigation personnel."70

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66 ibid

67 op cit @ 5

68 Paragraph 15, page 5 of the Guide

69 page 7 of the Report

70 Supra @ page 15

Paragraph 16 of the Guide specifies the information which must be supplied in support of an application and states that it must be such information which is reasonably available to the applicant on the following:

- "(a) The identity of the applicant and details of the volume and value of production of the like product by the applicant.
- (b) Where application is made on behalf of an industry, the identity of the industry on behalf of which the application is made and a list of all known producers of the like product plus, to the extent possible, details of the volume and value of domestic production of the like product accounted for by each producer.
- (c) A complete description of the imported product, the names of the country or countries of export or origin of the product, the identity of each known exporter or foreign producer of the product and the identities of known importers of the product.
- (d) In respect of dumped products, information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export or, where applicable, information on the prices at which the product is sold by the countries of origin for export to a third country or countries or the estimated cost of production in the country or countries of origin or export plus any other costs and profit deemed reasonable or, in the case of exports from a country without a free market economy, information in terms of any of the above three alternatives for any other country selected including the reasons for selecting the particular country."71

From the extensive list of requirements outlined in Paragraph 16 it seems that a substantial onus is placed on the applicant to provide a formidable amount of information. Despite the fact that it is stated that the information which must be supplied is that which is reasonably accessible to the applicant, as the applicant is relying on this information in order to ensure a successful application it will have to do its utmost to provide the Board with as much of the requested information as possible. The information required is further of a nature that could only be obtained after extensive research is done into the product that is allegedly being dumped. It would seem, also, that some of this required information may be quite difficult for the applicant to find out, particularly in regard to the requirements specified in Paragraph 16(d). In order for an applicant to include such information in its

report it would most probably have to employ a specialist to undertake the research which could very well result in a fair amount of expense being incurred by the applicant. Any applicant, who is already suffering financially as a result of the importation of competitive products, may find the incurring of any additional expense problematic, especially in the light of the fact that there is still no guarantee that the application for the imposition of anti-dumping duty will be successful.

Paragraphs 17 through to 20 outlines further requirements regarding information that must be supplied by the applicant. Paragraph 17 requires information to be supplied regarding the proof of 'material injury' and Paragraph 18 requires information to be supplied regarding the proof of 'the threat of material injury'. Paragraph 20 requires that "[t]he information supplied must, where possible, be substantiated by documentary evidence".<sup>72</sup>

Notwithstanding the fact that the placing of the onus onto the applicant may result in potential applicants choosing not to bring an application, this is probably the most effective way of ensuring that the Board only has to deal with applications that have a fairly good chance of succeeding. As it is envisaged that increasing numbers of applications will be brought to the Board and as a result the Board will have to deal with an increasingly heavy workload this could prove to be a very beneficial method of keeping this load to a minimum in the future. This is of even more importance when one considers the time pressures that are likely to be placed on the Board.

The application procedure is very crucial especially as a result of the view, held by many local producers, that the imposition of anti-dumping duties constitutes their only defence against an ever encroaching international market. The Board must ensure that the procedure used, when imposing an anti-dumping duty, are in line with the requirements of the GATT and as a result that certain standards are complied with. It is precisely these two potentially competing interests which must be taken into account by the Board that make its work very problematic.

Once the Board has received an application for an investigation into whether an anti-dumping duty must be imposed, the Board must assess the merits of the application. In doing so it must satisfy itself that there is sufficient evidence of an alleged unfair international trade practice, material injury or the threat thereof and that the latter is caused by the former to warrant an investigation.<sup>73</sup> The Board satisfies itself in this regard by examining the

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<sup>72</sup> page 7 of the Guide

<sup>73</sup> page 7 of the NEF Report

accuracy and adequacy of the evidence provided by the applicant.<sup>74</sup>

If the Board determines that the application does have merit, the application is then accepted and a formal investigation is initiated. However, the Board may also decide that the application does not have any merit and it must then inform the applicant to this effect. The applicant may then re-submit its application, together with additional information in order to further substantiate its allegations.

Once the Board has decided to initiate a formal application, a general notice will be published in the Government Gazette. This notice must set out -

- "(i) the name of the applicant;
- (ii) a description of the product covered by the application;
- (iii) the countries of origin or export of the products in question;
- (iv) a summary of the evidence submitted to the Board;
- (v) the procedure to be followed; and
- (vi) the time limit for a response to the notice."<sup>75</sup>

The Guide allows for a period of 30 days after receipt of the questionnaire for responses. Aside from this strict time limit, there seem to be no other time limits provided for. There has been no consistency in the time taken in investigations which has created a great deal of uncertainty. The time period from the date that the petition is lodged to the date that the investigation is actually initiated by notice in the Government Gazette has fluctuated from less than three weeks<sup>76</sup> to almost eighteen weeks<sup>77</sup> averaging at between two to three months. The investigation period, from the date of initiation in the Government Gazette to the date that the final decision is implemented in the Government Gazette has fluctuated from 98 days<sup>78</sup> to 581 days<sup>79</sup>. Whilst the period taken has been acceptable in certain of the investigations, there are a number of investigations where the period has far exceeded

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74 Paragraph 21, page 7 of the Guide

75 Paragraph 22 *ibid*

76 Investigation into alleged dumping of laundry drying machines from Australia (Board Report No. 3231)

77 Investigation into the alleged dumping of adhesive sanitary pads imported from or originating in Hungary, initiated in August 1995.

78 Investigation into the alleged dumping of laundry drying machines from Australia (see above).

79 Investigation into the alleged dumping of knitted acrylic jerseys, exported from the Republic of China and Korea (Board Report No. 3313).

that required in Article 5.10 of the Uruguay Round Anti-dumping Code.<sup>80</sup>

Interested parties are also invited to make submissions regarding the anti-dumping investigation. Interested parties would include consumer organisations as well as any individuals, corporate entities or trade or business associations likely to be affected by an anti-dumping investigation. The Guide also provides that the Board may hold public hearings where interested parties may submit evidence in connection with the allegation of dumping.<sup>81</sup>

In its report, the NEF looked at the actual modus operandi of the Board. It found that the governments of the exporting countries are also informed of the fact that an investigation is being undertaken regarding specific products being exported from their country. The Board provides the concerned governments, all known importers and exporters with questionnaires which they must complete.

These parties are all required to provide the Board with any non-confidential information that they consider to be relevant to the investigation and which they believe will amount to their version regarding the application. The Board then sets about determining whether the requested information, provided by the interested parties, is correct by visiting the parties and conducting an investigation pertaining to the information that they have provided. In this regard the Board, where it is considered necessary, will travel abroad in order to visit the exporters and/or producers in the country of export/origin after permission has been obtained from such exporters, producers and from the government of the country concerned. If the parties do not co-operate, the Board will base its information on the best information available, that is the information submitted by the local producer.

All the information that is collected and verified by the Board is made available to all the interested parties on request, excluding any confidential information.

In terms of Section 17 of the Board Act if a party indicates that information is confidential, the Board is not permitted to make the information available to the other party. That party must, however provide the Board with a non-confidential summary which must be submitted simultaneously with the confidential information and which can be made available to the other interested parties. The prohibition against disclosure in the Board Act specifically excludes disclosure of information when required to do so by a court of law. This provision may not, therefore, be able to

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<sup>80</sup> Leora Blumberg supra @ page 4

<sup>81</sup> Paragraph 27 of the Guide

prevent disclosure of the information to a court of law, in terms of the normal rules of discovery or other Supreme Court procedures should the matter be reviewed by the Supreme Court. An additional problem in relation to the use of confidential information is that, in terms of the rules of natural justice, which are applicable in administrative proceedings, a party is entitled to be in a position to properly answer the case against it.

The Board is an administrative body with a wide discretion, it is clearly subject to the administrative law requirements. As a result, the basic principles of natural justice applicable as well as the provisions of Section 24 of the Interim Constitution must be applied at all times. It does not appear as if the Board Act empowers the Board to deviate from these well-established rule of natural justice. Consequently, a failure to act in accordance with these rules will expose the Board to review proceedings by the Supreme Court. A court, in review proceedings, may find that the non-disclosure of confidential information amounts to a contravention of the rules of natural justice and therefore set the decision aside.<sup>82</sup>

The need to take the rules of natural justice into account is further emphasised by Section 24(c) of the Interim Constitution which provides that where a government institution takes administrative action against a subject, that subject is entitled to full reasons for that action. As a result if a party is not provided with full reasons, as the decision is partly based on confidential information, the action may be set aside as being contrary to the requirements of the Interim Constitution. These procedural issues are being raised by lawyers in anti-dumping investigations and the Board is of necessity becoming more sensitive to them.

A number of these procedural issues will be addressed in the first Supreme Court review of an anti-dumping case.<sup>83</sup> These issues will have to be thoroughly addressed in the amendment of the legislation as the procedures created by the amended legislation will have to take into account procedural fairness in order to be consistent with the requirements of the Interim Constitution.

In practice the Board does not play a pro-active role in the process of disclosure (or non-disclosure) of information. It is stated in the Guide that information which has been indicated as being confidential without acceptable reasons therefor and not accompanied by non-confidential summaries thereof are not taken into consideration. Parties can and do, however, effectively withhold more information than is

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<sup>82</sup> op cit @ page 5

<sup>83</sup> The Brenco case supra

necessary from the other party, on the grounds of confidentiality, without any reaction from the Board.<sup>84</sup>

The whole issue around confidentiality arises as a result of the fact that the parties are required to provide the Board with a substantial amount of information regarding the way in which they conduct their business. It clearly may not always be in their best interests to do so. As a result of this, when the parties first bring an application to the Board, they are sensitive regarding the information they put in their application. Similarly, the respondents who believe they are facing competition from South African producers will be reluctant to place all their information in their reply. Consequently the Board can be faced with a formidable problem when it comes to determining the precise margin of dumping.

The Board has recognised that this can present a problem and has provided for this by allowing parties to avoid placing information before the Board by making them an offer in terms of which the very sensitive information will only be made available to the Board when it goes to verify the information provided at the actual factory or place of business of the foreign manufacturer.

The uncertainty and lack of clarity, provided by the current situation, regarding the treatment of confidential information has and no doubt will continue to discourage parties from disclosing information to the Board. This clearly will have to be addressed in the near future. The requirements of Article 6 of the Uruguay Round Anti-dumping Code will also have to be taken into account in the amending of the legislation.

The NEF recommends that a review and an appeal mechanism which protects confidential information, while simultaneously promoting transparency of proceedings must be built into the system. For this purpose the process to arrive at a final determination must be split into two distinctly separate exercises. The first encompasses receipt of petitions for action against alleged unfair international trade practices, consideration of the petition (merit assessment), the actual investigation of allegations and counter arguments by professional staff, the consideration of the evidence by a body with the knowledge and expertise concerning the international rules (preliminary determination) and provisional measures where applicable. The second exercise consists of reviewing the preliminary determination using the same evidence and taking into consideration comments made by the parties concerned on the preliminary determination and making a final determination which, where applicable, leads to

counteraction by way of amendment of Schedule 2 to the Customs Act.

The body responsible for this review and the final determination must also attend to appeals against decisions made during the first exercise. This process will protect confidential information as it will limit law court actions to matters of procedure only.<sup>85</sup>

If the Board finds that all the requirements have been met, and that dumping has, in fact occurred, it must then determine a provisional duty which must be applied. In this regard the lesser of the dumping margin or the price disadvantage based on an unsuppressed selling price, in the South African market, is determined. This process is known as the 'lesser rule'. The Commissioner for Customs and Excise is requested to impose a provisional payment in respect of the products involved, in the amount as determined in terms of the procedure outlined above.<sup>86</sup>

A final submission to the Board is prepared by the same staff that conducted the preliminary investigation. The final determination is then made by the Board.

A report, consisting of the provisional determination and the final finding is submitted to the Minister of Trade and Industry. If the Minister accepts the Board's recommendation and if that recommendation calls for a duty, the Minister requests the Minister of Finance to impose the duty, as outlined above. If, however, the Board's recommendation is a rejection and the Minister supports this recommendation, the parties are advised, the rejection is published in the Government Gazette and any provisional payments collected, are refunded. Should the Minister not accept the recommendations of the Board, the matter is then referred back to the Board.

If the Minister accepts the Board's recommendation, and if the recommendation calls for a duty, he requests the Minister of Finance to impose the duty. The Uruguay Round Anti-dumping Code provides that the amount of the anti-dumping duty shall not exceed the margin of dumping.<sup>87</sup> It further provides, however, that it is desirable for the duty to be less than the margin, if such lesser duty would be adequate to remove the injury to the domestic market. In the South African legislation there is no provision for a 'margin of dumping'. The Customs Act merely provides that the rate of the duty will be set in accordance with the request of the Minister of Trade. there is no mention of how this will be

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85 The NEF's Report supra @ page 14

86 pages 8 and 9 of the Report

87 Article 9.3

calculated, nor whether it should bear any resemblance to the margin of dumping. The Guide does provide, however, that no anti-dumping duty shall exceed the margin of dumping but may be less if in the opinion of the Board, the lesser amount will be sufficient to remove the material injury. No mention is made as how the margin of dumping is to be determined. In this regard the amendments to the legislation will have to ensure that the minimum requirements of Article 9 of the Uruguay Round Anti-dumping Code are complied with.

However should the recommendation be a rejection and should the minister accept the recommendation, the applicant can do nothing further. The NEF points out that the Act gives an unlimited discretion to the Board to conduct the investigations in the way that it sees fit. "There are no parameters for the exercising of powers by the [Board] or the Minister of Trade and Industry."<sup>88</sup> The NEF, in its Report, goes on to criticise the current mechanisms by pointing out that they do "not allow for inexpensive and acceptable review and appeal mechanisms outside formal legal proceedings through the law court system. Added to this is the fact that the law courts will express themselves only on procedures and not on economic evidence considered and the consideration thereof. Furthermore, there is, albeit remote, a possibility that with the law court's access to confidential (secret) business information this information might be "leaked" without any recourse by the injured party to the court."<sup>89</sup>

These concerns expressed by the NEF are very valid, especially in the light of the importance of anti-dumping investigations to local producers. A local producer will feel particularly remediless, in the face of a rejection by the Board of an application for an anti-dumping investigation, if there is no appeal mechanism. This deficiency in further remedies together with the complicated nature of the application procedure itself could certainly lead to a situation where many local producers feel very hard done by. The fact that a local producer may use the review mechanisms of administrative law is of little consolation to an aggrieved applicant.

Presently the only remedy available to an aggrieved party is review by the Supreme Court, based on the common law and Constitutional grounds of review, neither of which incorporates the merits of a decision. In the first Supreme Court review of an anti-dumping action<sup>90</sup>, the State Attorney raised a technical preliminary point. If this had been successful, decisions by the Board would, effectively, have

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<sup>88</sup> page 9 of the Report.

<sup>89</sup> op cit @ 10

<sup>90</sup> The Brenco decision (see above).

been ruled to be not reviewable. The point was, however, dismissed by the judge and judicial review in respect of anti-dumping investigations was confirmed.

This is clearly another area which will have to be addressed when the current legislation is amended. This is recognised by Leora Blumberg who states that "it is hoped that in restructuring the legislation, serious consideration is given to the possibility of an automatic review of the merits of the case or an appeal procedure either to a separate administrative body, the Supreme Court, or to a specialised Trade Court."<sup>91</sup>

Another problem presented by the current legislation and procedures is that there is no 'sunset' clause provided for either in the legislation or the Guide. The Customs Act provides that the Minister of Finance may, in accordance with any request by the Trade Minister from time to time by notice in the Government Gazette withdraw or reduce, with or without retrospective effect and to such an extent as may be specified in the notice, any anti-dumping duty previously imposed.<sup>92</sup> No specific time limit is provided for. The Guide provides that in the case of anti-dumping duties, the exporter(s) against whom the duty was instituted, representatives of the country/countries of export/origin or any other person or organisation concerned with the relevant product may request that the matter be reinvestigated provided that twelve months has elapsed since the imposition of the duty.<sup>93</sup> The Board will in each case decide whether such a reinvestigation is justified after a preliminary investigation of the request has been carried out. The Board may also, on its own initiative, at any time decide to reinvestigate an anti-dumping duty. The legislation and procedures in this regard will clearly also have to be addressed in the amendments to the legislation if it is to be in line with the requirements of the Uruguay Round Anti-dumping Code.<sup>94</sup>

There is no requirement in the legislation that parties need to be represented by lawyers in their dealings with the Board in any anti-dumping or other tariff matters. The Guide provides that should parties wish to be represented in an investigation they must the Board with a letter of appointment, detailing the identity of the representative

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91 supra @ page 9

92 Section 56(2)

93 Withdrawal of anti-dumping duties was recommended by the Board in respect of acetaminophenol imported from Hong Kong (Board Report No. 3187) and labels with woven inscriptions imported from or originating in Zimbabwe (Board Report No. 3476).

94 In terms of Article 11 of the Uruguay Round Anti-dumping Code.

and the scope of their representation. Historically South African parties have not used lawyers in their dealings with the Board. It is only since the legislation was amended in 1992, that lawyers have started to play a role in anti-dumping investigations. Prior to that the Board was seen as a powerful organisation with a wide discretion and open to lobbying groups, rather than as a legal forum. The basis of past representations were, therefore, more economic and political, rather than legal. The Board itself was not used to legal scrutiny, and for decades its decisions relating to tariff issues have gone unchallenged. It is not surprising, therefore, that the Board has in the past been insensitive to legal issues in anti-dumping procedures and initially resisted any involvement by lawyers.<sup>95</sup>

There has been a fair amount of criticism directed against the Board by all the parties which are affected by the anti-dumping legislation. While local producers feel that the anti-dumping legislation and procedures are not effective and that the Board does not show enough sensitivity towards their particular problems, foreign exporters and importers believe that the legislation is a new form of protectionism. The most serious problem experienced by all parties in the implementation of the anti-dumping legislation, is the wide discretion of the Board and the concomitant uncertainty and lack of transparency.

More recently the Board has gained some experience and has developed its expertise in anti-dumping procedures. There is no doubt, however, that the South African legislation and procedure needs to be substantially overhauled in order to comply with the GATT and the Uruguay Anti-dumping Code.<sup>96</sup> The NEF in its Report, however, points out that "[t]he fact that a statutory body is responsible for the function of investigating unfair international trade practices is considered to be sound in that it can fulfil this function unbiased and without political or sectoral pressure."<sup>97</sup>

#### OTHER JURISDICTIONS

It is in the light of these criticisms that the manner in which anti-dumping investigations are conducted in foreign jurisdictions becomes relevant. In the United States of America dumping investigations are conducted by the Commerce department, while the International Trade Commission deals with injury determination. Each body operates independently with its own staff and budget. The International Trade Commission is a high powered statutory body, only answerable to the President of the USA. The total process is cumbersome and extremely expensive. Confidential

95 Leora Blumberg supra @ page 5

96 Leora Blumberg supra

97 supra @ page 17

procedural aspects. Lawyers involved in anti-dumping cases have been propagating the concept of a court of first instance for anti-dumping cases.<sup>99</sup>

It is interesting to note that the European Union faces similar problems regarding the review and appeal of anti-dumping actions. Further the fact that the anti-dumping body is staffed by representatives of the member states is significant in the light of the fact that anti-dumping duties determined in South Africa are also applicable by the states that are members of the SACU. South Africa could consider doing something similar in this regard.

In New Zealand anti-dumping investigations are conducted by the Department of Commerce (both the preliminary and final determinations). There are no provisions for appeal or review by another body.

The Australian procedure is quite different. The preliminary investigation is conducted by a special section of the Customs Service. The Anti-dumping Authority, a statutory body, conducts the final determination and also serves as an appeal body. A case that is rejected by the Customs Service can be appealed to the Anti-dumping Authority. The Authority does not undertake its own verifications and bases its determinations only on evidence that served before the Customs Service together with comments made by the parties concerned on the preliminary determination. As is the case in the European Union, the Australian Courts will rule on procedural aspects of the cases brought for review.<sup>100</sup>

The most significant conclusion that can be draw from this brief comparison of the review and appeal mechanisms used by these different jurisdictions is that, despite the fact that all these countries to the principles of the GATT, they have all structured their investigative bodies differently to suit their own circumstances and needs. South Africa, when amending its current legislation, should not, therefore feel bound to follow the procedures used by any one particular jurisdiction but should rather look at the circumstances and needs of those various jurisdictions and where they are relevant to the South African situation and thereby learn from other jurisdictions in this way.

#### CONCLUSION

Since the 1992 amendments, there has been a substantial increase in the number of applications that have been brought to the Board, with approximately 45 anti-dumping investigations actually being instituted. There can be

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<sup>99</sup> op cit @ page 11

<sup>100</sup> ibid

little doubt that with the changing trade policy in South Africa, the number of applications brought will continue to increase. A complete overhaul of the legislation and procedures is expected in the near future as it is quite clear that the Government recognises that these must change in order to comply with the GATT requirements. The question remains, however whether they will change in a way that is helpful for the local industries and the SACU. Clearly the interests of these two groups are of some concern for the Government. Any changes, however will have to be able to stand up to the most stringent international scrutiny if South Africa is not to face harsh retaliatory measures by its trading partners. Most of the important aspects that will have to be changed have been highlighted above and it will be interesting to see whether the new legislation takes them effectively into account. Only time will tell.

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