THE TELEPORTING OF 'CONFIDENTIAL' INFORMATION FROM ONE ANTI-DUMPING INVESTIGATION TO ANOTHER IN SOUTH AFRICAN LAW

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I. INTRODUCTION

According to the General Agreement on Tariffs and Trade 1994 (GATT), 'dumping' is the introduction of goods into the market of another country at a price that is less than their normal value. The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (ADA) substantiates Article VI of the GATT. South Africa is a member of the World Trade Organization (WTO) and assented to the Marrakesh Agreement, establishing the WTO and its attendant agreements, which include the GATT. [1] To give effect to its obligations, South Africa adopted the Board on Tariffs and Trade Act 107 of 1986 (BTTA), the Customs and Excise Act 91 of 1964 (CEA), the International Trade Administration Act 71 of 2002 (ITAA) and the attendant Anti-Dumping Regulations (ADR).[2] These treaty obligations do not create rights in municipal law, but they bind South Africa in international law.[3]

The International Trade Administration Commission (ITAC) has the duty to conduct the dumping investigation. This investigation hinges on the information

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1 See Appendix 1 of the 'Understanding on Rules and Procedures Governing the Settlement of Disputes' which provides the 'agreements covered' by the WTO.

2 GN 3197 in GG 25684 of 14 November 2003 for the ADR. For a discussion of South Africa's anti-dumping regime, see G. Brink, 'A Nutshell Guide to Anti-Dumping Action,' 71 *Journal of Contemporary Roman-Dutch Law* (2008): 255–71; L. Ndlovu, 'South Africa and the World Trade Organization Anti-Dumping Agreement Nineteen Years Into Democracy,' 28 *Southern African Public Law* (2013): 281–309, at 296; O. Sibanda, Sr, 'Procedural Requirements of the South African Anti-Dumping Law and Practice Prior to Imposition of Anti-Dumping Duties: Are They Really WTO-Inconsistent?' 55(2) *Foreign Trade Review* (2020): 1–23; S. Khanderia, 'Price Comparisons Under the South African Anti-Dumping Laws: The Faux Pas Continues?' 52(1) *Foreign Trade Review* (2017): 30–47.

3 *International Trade Administration Commission* v. *SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) (*SCAW*) para 25.

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that is availed by the applicant and interested parties who respond to the investigation. This information can be claimed as confidential and non-confidential summaries must be provided in this regard. If this information cannot be summarised, it must then be accompanied by a sworn statement to that effect. However, the authority to decide whether the information is confidential is conferred on ITAC. This information tendered to ITAC is cardinal to the determination of injurious dumping. It is presumed by the interested parties that this information is submitted on the basis that it will only be used for the current investigation and not subsequent investigations. However, on 19 November 2021, in the anti-dumping investigation on frozen potato chips, ITAC self-initiated an investigation based on confidential information that was tendered by parties during a prior case as the basis for a new anti-dumping case.[4] In particular, ITAC stated that the 'normal values for Belgium and the Netherlands were determined based on the verified price information from cooperating exporters in the previous sunset review.'[5] This is unequivocal even though ITAC subsequently denied this by stating that this information was 'manipulated' such that it was different from the information given in the earlier investigation and used in such a manner that it hid the identity of the persons who submitted this information.[6] Regardless, it is incumbent then to assess whether ITAC can initiate a new anti-dumping investigation based on confidential information submitted by a party during a prior anti-dumping investigation. This analysis is conducted using relevant case law, legislation and WTO law.

II. LEGAL FRAMEWORK FOR ANTI-DUMPING INVESTIGATIONS IN SOUTH AFRICA

The dumping investigation comprises the preliminary investigation phase and the final investigation phase. All investigations must be completed within eighteen months after they are initiated.[7] The anti-dumping investigation is preceded by a pre-initiation process which seeks to verify the application submitted. In this regard, section 3.1 of the ADR provides that an anti-dumping investigation must only be initiated by ITAC if it accepts a 'properly documented' written application by or on behalf of the Southern African Customs Union (SACU) industry.[8] This means that ITAC must establish whether the application includes such data as

4 ITAC Notice of Initiation of an investigation into the alleged dumping of frozen potato chips originating in or imported from Belgium, Germany and the Netherlands, Notice 674 of 2021 in GG 45500 of 19 November 2021, available at <http://www.itac.org.za/pages/services/trade-remedies/government-gazette-notices/initiation-notices-2> (accessed 15 June 2023).

5 *Ibid*.

6 See ITAC Investigation Report No. 706: Investigation into the Alleged Dumping of Frozen Potato Chips Originating in or Imported from Belgium, Germany and the Netherlands: Final Determination 62–3, dated 23 January 2023, available at <http://www.itac.org.za/pages/services/trade-remedies/investigation-reports> (accessed 15 June 2023). For the purposes of this discussion, anti-dumping investigations and reviews are regarded as the same only in so far as they both use information to establish injurious dumping or the likelihood thereof.

7 Section 20 of the ADR.

8 See sections 20–3 of the ADR; see further, O. Sibanda, Snr, *supra* note 2, at 5.

is 'reasonably available' to the applicant pertaining to the required information.[9] ITAC can also self-initiate an investigation if it has sufficient evidence of, or of a significant change in circumstances pertaining to, dumping, material injury and/or a causal link to necessitate the initiation of such investigation or review.[10] ITAC is also required to inform each country of origin and of export, where required, that a properly documented application has been submitted, after verification of the SACU industry's injury data, but before the investigation's initiation.[11] 'Verifications' are conducted so that ITAC can satisfy itself with the veracity of the information submitted by cooperating parties.[12] ITAC must do a merit assessment to establish if there is adequate information to establish a prima facie case that dumping is causing material injury to the SACU industry, as required by section 26 of the ADR. Any deficiencies or inaccuracies that do not take away from the prima facie establishment of a case of injurious dumping will not cause any delay in initiating an investigation.

The anti-dumping investigation commences formally through the promulgation of an initiation notice in the Government Gazette, which covers the following, amongst other things:

i. the identity of the applicant;
ii. a comprehensive description of the good under investigation, including its tariff subheading;
iii. the country or countries under investigation;
iv. the grounds for the averment of dumping;
v. a summary of the grounds on which the averment of injury is based;
vi. the time period for comments by interested parties.[13]

The preliminary investigation phase begins with interested parties making submissions on the application within thirty days from the date of receipt of the ITAC questionnaires.[14] Upon completion of the preliminary investigation, ITAC issues a non-confidential report within seven days of the publication of its preliminary finding, and may request the Commissioner for the South African Revenue Service (SARS) to impose 'provisional measures.'[15] The preliminary

9 Section 22.1 of the ADR.
10 Section 3.3 of the ADR.
11 Sections 22 and 27 of the ADR.
12 Sections 18 and 19 of the ADR. A non-confidential version of the verification report will be placed in the public file and parties can comment on this report. This report will be made available before the ITAC's preliminary findings. For a discussion of the plight of 'non-cooperating interested parties' under the ADR, see C. Vinti, 'The Curious Case of the Non-Co-Operating Interested Party in Anti-Dumping Investigations in South Africa: A Critical Analysis of *Farm Frites International* v. *International Trade Administration Commission*, Case Number 32263/14,' 33 *Southern African Public Law* (2018): 1–18; G. Brink, *supra* note 2, at 266.
13 Section 28.2 of the ADR.
14 Section 29.3 of the ADR.
15 Sections 33 and 34.1 of the ADR read with section 57A(1) of the CEA.

report will essentially specify the details of the product in question, the margin of dumping and ITAC's finding.[16]

The final investigation phase begins with comments by the interested parties on the preliminary investigation report.[17] ITAC must then notify interested parties of the 'essential facts' that will be contained in its final determination, and these parties can make submissions on these essential facts.[18] ITAC must consider these comments on the essential facts by the interested parties in its final determination.[19] ITAC then drafts a recommendation and a report to the Minister of Trade, Industry and Competition to either impose or abolish an anti-dumping duty.[20] The Minister can either accept or reject the recommendation of ITAC or send it back to ITAC for reconsideration.[21] If the Minister accepts the report and recommendations, they may then 'request' the Minister of Finance to amend Schedule 2 of the CEA to impose the duty.[22] As stated above, this investigation is based on both confidential and non-confidential information tendered by interested parties and the applicant.

In particular, section 1(2) of the ITAA defines 'confidential information' as information that is 'by nature, confidential' or recognised in terms of Part D of Chapter 4 of the ITAA 'to be otherwise confidential.' The 'confidentiality' clauses of the ITAA, namely, sections 33–37 of the ITAA sit squarely in Part D of Chapter 4 of the ITAA. Section 33(1) of the ITAA provides that a person may, when submitting information to ITAC, identify information that the person claims to be information that is confidential by its nature or the person otherwise wishes to be recognised as confidential. This claim must be supported by a written statement in the prescribed form and either a written abstract of the information in a non-confidential form or a sworn statement setting out reasons why it is impossible to provide the aforementioned written abstract.

Section 2.1 of the ADR explains that interested parties providing confidential information in any correspondence must also provide non-confidential summaries. These summaries must indicate in each instance where confidential information has been omitted and the reasons for confidentiality, and be in sufficient detail to permit other interested parties a reasonable understanding of the substance of the information submitted in confidence.

Section 2.2 of the ADR provides that where information does not permit summarisation, reasons should be provided as to why the information cannot be summarised. According to section 2.3, the following list indicates 'information

16 Section 34.2 of the ADR.

17 Section 35 of the ADR.

18 Sections 37.1 and 37.2 of the ADR.

19 Section 37.4 of the ADR.

20 Section 4(1)(b) of the BTTA read with Item 2 of Schedule 2 of ITAA; see *SCAW*, *supra* note 3, para 34. On the repealed BTTA, see G. Brink, 'The Roles of the Southern African Customs Union Agreement, the International Trade Administration Commission and the Minister of Trade and Industry in the Regulation of South Africa's International Trade,' 3 *Journal of South African Law* (2013): 421–3.

21 Section 4(2)(a) of the BTTA.

22 Sections 55(2)(a) and 56(2) of the CEA.

that is by nature confidential' as per section 33(1)(a) of the ITAA read with section 36 of the Promotion of Access to Information Act 2 of 2000:

(a) management accounts;
(b) financial accounts of a private company;
(c) actual and individual sales prices;
(d) actual costs, including cost of production and importation cost;
(e) actual sales volumes;
(f) individual sales prices;
(g) information, the release of which could have serious consequences for the person that provided such information; and
(h) information that would be of significant competitive advantage to a competitor;

provided that the party submitting such information indicates it to be confidential.

ITAC will not consider any information claimed as confidential that is not accepted as confidential by ITAC under section 34(1) of the ITAA.[23] Section 34(1) provides that if a person makes a claim in terms of section 33, ITAC must establish whether the information should be recognised as confidential. The claimant is notified in writing of ITAC's determination on confidentiality under section 34(3) of the ITAA.

Section 35(1) states that a claimant affected by a determination by ITAC on confidentiality in terms of section 34(3) of the ITAA may appeal against that determination to a High Court. Alternatively, section 35(2) of the ITAA states that a person who seeks access to information that ITAC has determined as confidential may:

(a) first, request that the Commission mediate between the owner of the information and that person; and
(b) failing mediation in terms of paragraph (a), apply to a High Court for—
    (i) an order setting aside the determination of the Commission; or
    (ii) any appropriate order concerning access to that information.

Section 35(3) of the ITAA states that upon appeal in terms of section 35(1), or an application in terms of section 35(2)(b) above, the High Court may determine whether the information is confidential and if it determines that it is confidential, make any appropriate order concerning access to that confidential information. This is the confidentiality regime of the ADR. The discussion to follow will then assess whether this legal framework allows ITAC to use confidential information tendered in a prior anti-dumping investigation in a new investigation.

23 Section 2.6 of the ADR.

III. EVALUATION OF THE RIGHT OF ITAC TO USE CONFIDENTIAL INFORMATION TENDERED IN A PRIOR ANTI-DUMPING INVESTIGATION IN A NEW INVESTIGATION

In this regard, section 36 of the ITAA deals with the disclosure of confidential information. It states that ITAC must treat any information that is the subject of a claim in terms of this part of the ITAA as confidential until a final determination has been made concerning such information. Once a 'final determination' has been made concerning any information, it is confidential only to the extent that the final determination has accepted it to be confidential information. A 'final determination' here means a decision by the High Court that in terms of the rules of court may not be appealed or has not been appealed within the time allowed, or a decision by the Supreme Court of Appeal. Thus, confidential information remains confidential until it is determined not to be by a court of law.

Section 37(1)(a) of the ITAA then states that when making 'any decision in terms of this Act,' ITAC may take confidential information into account in making its decision. This may confer on ITAC the right to consider information that was submitted to it in a previous investigation to initiate a new investigation. This was confirmed by the Supreme Court of Appeal in *Bridon International GMBH* v. *International Trade Administration Commission*, where it held that section 37(1)(a) of the ITAA 'authorises' ITAC to consider confidential information when making any decision in terms of this Act.[24] This patently includes ITAC's preliminary and final determinations during the anti-dumping investigation.

However, the same court had earlier explained that ITAC has an 'inherent conflict of interest.'[25] According to this court, ITAC has an interest in the protection of confidential information tendered to it because third parties may become disinclined to cooperate.[26] On the other hand, it has an interest in proving the rationality of its decision, which requires disclosure of as much information it relied upon to make that decision as possible.[27] Thus ITAC has an interest to protect both ways.[28]

The court in *Bridon* then further explained that the confidentiality regime in the ITAA seeks to give effect to South Africa's obligations in terms of international instruments.[29] This requires the protection of confidential information tendered in anti-dumping investigations 'as far as possible.'[30] According to this court, this is patently required in ITAC investigations.[31]

Thus, even though ITAC has the right to use confidential information in 'any decision in terms of this Act' under section 37 of the ITAA, this refers only

24 (538/2011) [2012] ZASCA 82 (30 May 2012) (*Bridon*) para 29.
25 *Ibid*., para 25.
26 *Ibid*.
27 *Ibid*.
28 *Ibid*.
29 *Ibid*., para 26.
30 *Ibid*.
31 *Ibid*.

to the current investigation and not to initiate a new investigation in terms of sections 16 and 26 of the ITAA. This is because, if ITAC has a duty to protect confidential information during an investigation and in 'subsequent proceedings' before a court, the same considerations should apply to a prior and a new ITAC investigation.

Section 50(1) of the ITAA supports this approach. Section 50(1) governs 'breach of confidence,' and it states that it is an offence to disclose any confidential information concerning the affairs of any person obtained in carrying out any function in terms of this Act; or as a result of initiating a complaint or participating in any proceedings in terms of this Act.

This means it is illegal for ITAC to disclose any information it obtained during a dumping investigation. However, section 50(1) does not apply to information disclosed as per section 50(2):

(a) for the purpose of the proper administration or enforcement of this Act;
(b) for the purpose of the administration of justice;
(c) at the request of an investigating officer or member of the Commission entitled to receive the information; or
(d) within the terms of the appropriate order of access made in terms of section 35(2).

The wide grounds in paragraphs (a)–(c), stipulated in section 50(2), act as a defence against the offence of the disclosure of confidential information. This may open the door for ITAC to use this confidential information to initiate a new investigation.

However, this approach is contradicted by the decision in *Geldenhuis and Others* v. *South African Batteries Importers' Association and Others* (*Geldenhuis*), which dealt with appellants who sought disclosure of information submitted to ITAC under the confidentiality regime of sections 33–37 of the ITAA, through the discovery regime provided under the Competition Act 89 of 1998.[32] 'Discovery' essentially requires the divulging of information by litigants of information or evidence that is relevant to one's case. The argument in this case was that the respondents sought to use this information for an ulterior purpose to lodge a new complaint/investigation with ITAC, this allegation was not denied by the respondents.[33] This court found that it was clear, on these facts, that the respondents sought to 'circumvent the confidentiality regime' by claiming access to information submitted to ITAC under a claim of confidentiality.[34] This court then explained that section 35(3) of the ITAA 'makes it clear that it is the High Court that may determine that the information is confidential and if it finds that the information is confidential, it may make an appropriate order concerning access

32 [2018] 1 CPLR 17 (CAC).
33 *Ibid*, para 35.
34 *Ibid*.

to that confidential information.'[35] Therefore, ITAC cannot divulge confidential information nor use it to self-initiate a new investigation. The right to use this information can only be granted under section 35(2)(a) through mediation or through an order of the High Court under section 35(2)(b) or section 35(3) of the ITAA.[36]

Furthermore, the decision in *City of Cape Town* v. *South African National Roads Authority* (*SANRAL*), emphatically explained in respect of an attempt to use confidential information disclosed (discovery) in one proceeding in a subsequent proceeding:

> Litigants must accordingly be encouraged to make full discovery on the assurance that their information will only be used for the purpose of the litigation and not for any other purpose. In that sense, so the thinking goes, the interests of the proper administration of justice require that there should be no disincentive to full and frank discovery.[37]

In other words, information tendered as confidential in one investigation cannot be used for 'any other purpose,' such as ITAC initiating a new investigation based on that confidential information. There is an 'assurance' in law that this confidential information submitted in a prior investigation cannot be used in a subsequent or new investigation. The ITAC approach, in this regard, acts as a 'disincentive' against 'full and frank' submissions that assist in making the final determination of ITAC. The veracity of ITAC's findings and South Africa's trade policy hinges on the quality of data and information that is provided by the market to ITAC.

The issue of whether the information tendered to ITAC can be classified as a type of 'discovery' is answered by the same court in *SANRAL*, which held that South African law and practice already impose limits on the dissemination of material produced by discovery or in terms of rule 53.[38] This includes statutes which restrict the publication of private and confidential information.[39] The court then explained that sections 33–37 of the ITAA and sections 44 and 45 of the Competition Act 89 of 1998 are part of this list.[40] Thus the court in *SANRAL* clarified that this rule is also applicable to the confidentiality rules in sections 33–37 of the ITAA.

Therefore, the rule of discovery in *SANRAL* that one must accordingly be 'encouraged to make full discovery on the assurance that their information will only be used for the purpose of the litigation and not for any other purpose' applies

35 *Ibid*., para 38.The lowest court in terms of hierarchy is the Magistrates' Court, from which litigants can appeal to the High Court, then the Supreme Court of Appeal and finally, the Constitutional Court as the highest court in South Africa.

36 *C Drahtseilwerk SAAR GMBH* v. *International Trade Administration Commission* 2011 (2) SA 261 (GNP) para 20; *Chairman: Board On Tariffs and Trade and Others* v. *Brenco Incorporated and Others* (285 of 1999) [2001] ZASCA 67 (25 May 2001) paras 35–7.

37 (20786/14) [2015] ZASCA 58 (30 March 2015) para 37.

38 *Ibid*., para 46.

39 *Ibid*.

40 *Ibid*., footnote 81, cited in para 46 of *SANRAL*.

here.[41] This restricts section 37 of the ITAA, which allows ITAC unfettered use of this information in the manner contemplated by the court in *Bridon*.[42] Thus, the *SANRAL* decision prohibits ITAC from using confidential information tendered in one investigation to initiate a new investigation. This would defeat the 'assurance' provided by discovery and be against 'the proper administration of justice.'

The same approach was confirmed by the court in *Mathias International Ltd and Another* v. *Baillache and Others* (*Baillache*), which held that information tendered to a public authority must not be 'used' for 'any other purpose than that for which it was averred to be sought,' and disclosure cannot occur 'without first obtaining the leave of the court.'[43]

Consequently, the only avenue available to ITAC is to request a court to grant it the right to use that information in a subsequent investigation or to request the affected party to consent to the use of that information. This much is evident from Article 6.5 of the ADA, which states that:

> Any information which is by nature confidential … or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it**.**

The import and weight of this protection of confidentiality under Article 6.5 of the ADA were authoritatively confirmed by *Panel Report EC Fasteners (China)*, which held in relevant part:

> Article 6.5.2 of the AD Agreement establishes certain requirements, not least of which is to give the supplier of the information an opportunity to make the information public or to authorise its disclosure in generalised or summary form. Moreover, even if the investigating authority concludes that a request for confidentiality is not warranted, Article 6.5.2 provides that if the supplier is unwilling to make the information public or to authorise its disclosure in generalised or summary form, the authorities may disregard the information. Article 6.5.2 does not, however, authorise the authorities to provide the information to other interested parties in the investigation.[44]

Thus, ITAC is not allowed to disclose this confidential information to other interested parties. Overall, based on the dictum of the courts in *Bridon*, *SANRAL and Baillache*, ITAC is not allowed to use confidential information tendered in one investigation for a new investigation (or review) without either an order of

41 *Ibid*., para 37.
42 See *Bridon*, *supra* note 24, para 29.
43 2015 (2) SA 357 (WCC) para 48.
44 WT/DS397/R (adopted on 28 July 2011) para 7.560.

the High Court or the consent of the affected party.[45] This finding is implicitly backed by ITAC's final investigation report on frozen potato chips where it stated that the confidential information of affected parties was 'manipulated' or used in such a manner that it is different from the information submitted in the earlier investigation and the identity of the particular exporter was hidden.[46] Thus ITAC accepted in its investigation, report number 706, on the alleged dumping of frozen potato chips that confidential information must remain confidential. The same considerations should apply to the other trade remedy investigations of safeguards and countervailing measures and even tariffs.[47]

IV. CONCLUSION

The conclusion that ITAC is not allowed to use confidential information tendered in a prior investigation in a new investigation has significant implications for other trade remedy investigations such as safeguards and countervailing measures. A failure to guarantee the 'assurance' that the information submitted to ITAC will only be used for the purpose of the litigation and not for any other purpose discourages 'full and frank' disclosure by interested parties during trade remedy investigations. Indeed, even applicants seeking trade remedy assistance from ITAC would be discouraged from launching a claim for fear that this information tendered in good faith will be used against them in future. The veracity of the findings of ITAC hinges on an unfettered supply of information and data. If interested parties hold back their relevant information, it undermines the quality of the investigations and, invariably, compromises the integrity of ITAC's findings. This would then negatively influence South Africa's industrial and trade policy. It is thus incumbent on ITAC to not allow this approach to be used.

45 On reviews in South African law, see C. Vinti, 'The Conduct of "Price Undertakings" and "Interim Reviews" in the Anti-Dumping Regime of South Africa [Discussion of *CASAR Drahtseilwerk SAAR GMBH* v. *International Trade Administration Commission* (66248/2014) 2020 ZAGPPHC 141 (14 February 2020),' 33 *Stellenbosch Law Review* (2022): 560–78.

46 ITAC Investigation Report No. 706, *supra* note 6, at 62–3.

47 See section 3 of the Amended Safeguard Regulations GN No. R. 662 in GG 27762 of 8 July 2005; section 3 of the Amended Tariff Investigations Regulations GN 652 in GG 39035 of 31 July 2015 and section 2 of the Countervailing Regulations GN No. R. 356 in GG 27475 of 15 April 2005. See also, C. Vinti, 'Opening Pandora's Box: The "Confidentiality" Clause in the International Trade Administration Commission Amended Tariff Investigations Regulations,' 31(1) *SA Mercantile Law Journal* (2019): 90–106.

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