ARTICLE

Duration of the Dumping Duty Liability and Sunset Reviews: A South African Perspective

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This article examines the issue of when the new five-year period of reimposition commences in an anti-dumping investigation after a sunset review under the Anti-Dumping Regulations of South Africa (ADR) within the backdrop of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade, 1994. The paper employs a comparative study with South Africa as the focal point of the inquiry and then exploring other jurisdictions to establish a global outlook of the legal position. The paper finds that the position is unclear in South Africa as the regulatory authority vacillates between the position that the date of reimposition commences after the expiry of the sunset review or that it commences at the end of the original period of imposition. A comparative review of the statutory framework in the European Union, India, Australia and Brazil yields an ambiguous picture with these jurisdictions choosing either position. The jurisprudence of the World Trade Organization (WTO) evinces that the date of reimposition commences upon the expiry of the sunset review. The preferred position of this article is that this duty is reimposed from the date of expiry of the original imposition.

Keywords: sunset/expiry reviews, anti-dumping duties, date of commencement, Anti-Dumping Agreement, Anti-Dumping Regulations of South Africa, WTO

1 Introduction

The Anti-Dumping Regulations of South Africa (ADR) regulate the unfair trade practice of dumping.[1] 'Dumping' constitutes price discrimination whereby an exporter charges a price for a product in the export market that is lower than the price of the like product in its home market. The ADR must be read with the International Trade Administration Act 71 of 2002 (ITAA), which is the enabling legislation that authorizes the administration of the anti-dumping investigation by the International Trade Administration Commission (ITAC).[2] The ADR provides the substantive and procedural requirements for antidumping investigations and reviews, which includes the sunset or expiry reviews. Section 4(2)(a) of the Board on Tariffs and Trade Act 107 of 1986 (BTTA) then requires ITAC to submit its recommendation after the investigation to the Minister of Trade, Industry and Competition (hereafter, Minister of Trade). If the Minister of Trade accepts ITAC's recommendation, a request is sent by the Minister of Trade to the Minister of Finance through section 4(2)(b) of the BTTA. If the Minister accedes to this request, the duty will be imposed or amended in accordance with section 56 of the Customs and Excise Act 91 of 1964 (CEA).

In this regard, the normal period of imposition of an anti-dumping duty is for a maximum period of five years. This period can be extended for another five years through a sunset or expiry review which is conducted prior to the lapse of the duty. The sunset review investigates whether the lapse of the duty will likely lead to the recurrence or continuation of dumping and injury. The sunset review usually must be completed within twelve months or eighteen months at most from the date the duty would have lapsed. During this period of the sunset review, the duty liability can remain in effect. This means that an anti-dumping duty can remain in operation for six and a half years. The question that arises here is when does the new five-year period of imposition commence? Is it when the original duty would have lapsed or at the end of the eighteen-month period of investigation of the sunset review? This question is pertinent because of the duty liability. Consequently, this paper seeks to establish when does the five-year period of reimposition commence after a sunset review in South Africa. This review will be conducted through an evaluation of relevant legislation, case

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1 General Notice 3197 in Government Gazette No. 25684 of 14 Nov. 2003, www.itac.org (accessed 9 Nov. 2024).

2 Sections 16 and 26 of the ITAA.

law and the law of the World Trade Organization (WTO). This study will also use a comparative study of anti-dumping legislation in five jurisdictions covering Africa, Asia, South America, Europe and Australia to establish the position in comparative law. This is augmented by an empirical review of a sample of notifications to the WTO under Article 16.4 of the ADA of anti-dumping actions taken by the selected countries in these aforementioned jurisdictions.

The comparative study has a sound legislative and jurisprudential basis. This is because the South African trade legislation must be construed within the context of Article VI of the General Agreement on Tariffs and Trade (1994) and the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade (1994) (hereafter, ADA), which regulate the practice of dumping under the WTO Framework. In *Progress Office Machines*,[3] the Supreme Court of Appeal of South Africa (SCA) held that the ITAA and the ADR are 'indicative' of an intention to give effect to the provisions of the ADA. Significantly, the Constitutional Court of South Africa in *ITAC v. SCAW South Africa (Pty) Ltd* (hereafter, *SCAW*),[4] confirmed that Parliament ratified South Africa's membership of the WTO on 2 December 1994 and approved the ADA on 6 April 1995.[5] The Constitutional Court then affirmed that *Progress Office Machines* was correct in finding that the ADA is binding on the Republic in international law, even though it has not been specifically enacted into municipal law.[6] In order to give effect to the ADA, Parliament has enacted legislation, and, in turn, the Minister of Trade prescribed the ADR.[7] Furthermore, the Constitutional Court in *Glenister v. President of the Republic of South Africa* (hereafter, *Glenister*),[8] clarified that treaties, both those that are binding and those that are not, are fundamental in South African law. Even though they do not create rights and obligations in municipal law, treaties can be employed as interpretive tools where relevant.[9] This is in accordance with the injunction to use a reasonable interpretation of international law when interpreting legislation in section 233 of the Constitution of the Republic of South Africa, 1996.[10] This is the approach followed in this paper.

In respect of the structure, this paper firstly, outlines the legal framework for anti-dumping in South Africa. Then the paper explores the South African position on the date of commencement of the new five-year period of imposition of a duty. Thereafter, the paper will cover the comparative position. The paper ends with a conclusion summarizing the findings of the inquiry.

2 The Course of an Anti-Dumping Investigation in South Africa

It is apposite to prefix this discussion with an outline of the course of an anti-dumping investigation in South African law. As stated above, this investigation is conducted by ITAC as empowered by section 7 of the ITAA 71 of 2002. The three essential elements that must be proven are dumping, injury and causation as required by Article 5.2 of the ADA.[11] This investigation has two stages: the preliminary and final investigation phases. An anti-dumping investigation can only be initiated upon a written application by the Southern African Customs Union ('SACU') industry.[12] This application must be properly documented, verified and must evince a prima facie case that dumping is causing material injury to the SACU industry.[13] Nevertheless, ITAC can itself conduct an anti-dumping investigation on its own without an application.[14] Any investigation is initiated formally through an Initiation Notice in the Government Gazette.[15] Interested parties have the right to make representations within thirty days of the date of Initiation Notice and may request an extension on good cause to file these submissions.[16] Any deficiencies identified in these submissions must be addressed.[17] Interested parties

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3 *Ibid.*, paras 6–7. The SCA is the second highest court in South Africa.

4 2012 (4) SA 618 (CC), para. 25, https://www.saflii.org/za/cases/ZACC/2010/6.html (accessed 25 Aug. 2024). The Constitutional Court is the highest court in South Africa.

5 *Ibid.*, para. 25.

6 *Ibid.*

7 *Ibid.*

8 2011 (3) SA 347 (CC), para. 96, https://www.saflii.org/za/cases/ZACC/2011/6.html (accessed 26 Aug. 2024).

9 *Ibid.*

10 *International Trade Administration Commission v. SCAW South Africa (Pty) Ltd* (CCT 59/09) [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC), 9 Mar. 2010, paras 26–40; *Casar Drahtseilwerk Saar GMBH v. International Trade Administration Commission* (66248/2014) 2020 ZAGPPHC 141, 14 Feb. 2020, paras 68–69.

11 *See* Reg. 26.1 of the ADR.

12 Reg. 3.1 of the ADR.

13 Regs. 18–26 of the ADR.

14 Reg. 3.3 of the ADR.

15 Reg. 28 of the ADR.

16 Reg. 29.3 of the ADR.

17 Reg. 31 of the ADR.

are also conferred the right to have oral hearings during the investigation.[18] When ITAC makes a preliminary finding, it provides interested parties with a non-confidential version of this report.[19] A provisional payment may then be imposed for a period of six months to address current dumping if a finding is made to that effect.[20]

The final investigation phase commences with the comments of the interested parties on the preliminary investigation report.[21] Interested parties are also given the 'essential facts' which form the basis of the decision of ITAC, and they can make representations on them.[22] All investigations and reviews must be completed within eighteen months after initiation.[23] Upon completion of the investigation, ITAC will make its final determination report which has its recommendation on whether it has found injurious dumping or not.[24] ITAC will then send this recommendation and a Ministerial Minute or Report to the Minister of Trade, who has the power to accept or reject this recommendation.[25] If the Minister accepts the recommendation of ITAC, the Minister may then 'request' the Minister of Finance to give effect to this 'request' through an amendment of Schedule 2 to the CEA 91 of 1964.[26] This then imposes the anti-dumping duty.[27]

These anti-dumping duties shall remain in place for a period not exceeding five years from the imposition or the last review thereof as stipulated by Regulation 53.1. Regulation 53.2 states that if a sunset review has been initiated prior to the lapse of an anti-dumping duty at the five-year mark, such anti-dumping duty shall remain in force until the sunset review has been finalized. A notice indicating that an anti-dumping duty will lapse on a specific date unless a sunset review is initiated shall be published in the Government Gazette approximately six months prior to the lapse of such anti-dumping duty as required by Regulation 54.1. Interested parties will receive thirty days from the publication of this notice to request a sunset review. If the Commission decides to initiate a sunset review, it shall publish an initiation notice in the Government Gazette prior to the lapse of such duties. Such notice shall contain the information as contemplated in Regulation 41. A sunset review shall consist of a single investigation phase.[28] ITAC's recommendation may result in the withdrawal, amendment or reconfirmation of the original anti-dumping duty.

In this regard, Article 11.1 of the ADA provides that an anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury. Article 11.3 states that any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition or from the date of the most recent review under Article 11.2 if that review has covered both dumping and injury, or under this paragraph, unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury i.e., a sunset review. The duty may remain in force pending the outcome of such a review. It is unclear from this wording if the period of the sunset review is deducted from the proposed five-year period of imposition.

By the same token, Regulation 38.1 provides that definitive anti-dumping duties will remain in place for a period of five years from the date of the publication of the Commission's final recommendation unless otherwise specified or unless reviewed prior to the lapse of the five-year period. Regulation 53.1 provides that anti-dumping duties shall remain in place for a period not exceeding five-years from the imposition or the last review thereof. Regulation 53.2 states that if a sunset review has been initiated prior to the lapse of an anti-dumping duty, such anti-dumping duty shall remain in force until the sunset review has been finalized.

Article 5.10 of the ADA provides that an investigation shall normally be concluded within twelve months and in no instance must it exceed eighteen months. This is reiterated by Regulation 20 of the ADR, which provides that all investigations and reviews shall be finalized within eighteen months after initiation. This means that the sunset review adds a further eighteen months to the original five-year period of imposition. However, it is unclear whether this eighteen-month period of imposition is incorporated into the new five-year period of imposition or if this commences at the end of the eighteen-month

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18 Reg. 5 of the ADR.

19 Reg. 34 of the ADR.

20 Reg. 33 of the ADR.

21 Reg. 35 of the ADR.

22 Reg. 37 of the ADR.

23 Reg. 20 of the ADR.

24 Reg. 38 of the ADR.

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

26 Reg. 4(2)(b) of the BTTA read with s. 55(2)(a) of the CEA.

27 Regs. 38.1 and 53.1 of the ADR .

28 Reg. 56 of the ADR.

period. This paper then explores when does the five-year period of reimposition commence after a sunset review in South African law. This involves a comparative study of relevant jurisdictions.

3 Discussion of when does the five-year period of reimposition of the duty commence after a sunset review

3.1 *The South African Position*

Vinti has previously explored the issue of the date of commencement of anti-dumping duties in South African law.[29] In this regard, the position is uncertain particularly when provisional measures are concerned.[30] In particular, Regulation 53 of the ADR states the following:

> **Duration of anti-dumping duties**
>
> 53.1 Anti-dumping duties shall remain in place for a period not exceeding 5 years from the imposition or the last **review** thereof. [own emphasis]

On the other hand, Regulation 38.1 of the ADR provides the following:

> Definitive anti-dumping duties will remain in place for a period of five years from the date of the publication of the Commission's final recommendation unless otherwise specified or unless reviewed prior to the lapse of the five year period.

The court in *Association of Meat Importers and Exporters v. ITAC* (hereafter, *AMIE*),[31] considered the conflicting wording of these provisions. According to this court, Regulation 38.1 imposes a default period for which an anti-dumping duty enters into operation, or continues without such a period being specified at the time.[32] If no period is stated, then the duty enters into operation, or endures for five years from the time ITAC's final decision is promulgated in the Gazette.[33]

Regulation 53.1 operates as the polar opposite of Regulation 38.1 because it acts as a guillotine on an anti-dumping duty that would continue beyond the stated period.[34] Therefore, it ensures that any period stipulated by the Minister of Finance, or the Minister of Trade, which ever case may be, does not exceed that period.[35] Regulation 51 terminates anti-dumping duties that would otherwise endure beyond the stipulated time.[36] Therefore, these two Regulations operate at the two ends of the spectrum of the lifetime of an anti-dumping duty.[37] Regulation 38.1 authorizes the imposition of the default period at the start of its life whereas Regulation 53.1 terminates an anti-dumping duty that seeks to continue beyond that period.[38] Regulation 38.1 is minted under the part of the ADR that contemplates their creation whereas Regulation 53 sits in the part that contemplates their end.[39] Yet despite this purported intention, the provisions do not concur even though that need not necessarily be so.[40]

Ultimately, the court preferred the construal that if the date of imposition is the date the schedule of the CEA is amended by notice in the Gazette, the two Regulations coincide if the publication of ITAC's final recommendation is to be taken as the date it is given effect by the relevant Minister of Trade.[41] It is common cause that legislation must be interpreted in favour of consistency, and against inconsistency, if the language allows it.[42] The only sensible interpretation that ensures consistency is if imposition in Regulation 53 means the date upon which Schedule 2 is amended by notice in the Gazette.[43] This construal will not mean that South Africa is in contravention of its obligations under Article 11.3 of the ADA.[44] Therefore, this case established that the five-year period for the lapse of duties is the date Schedule 2 to the CEA is amended in the Government

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[29] C. Vinti, *The Conundrum of Anti-dumping Duties in South African Law*, 10(19) Potchefstroom Elec. L.J. 1–25 (2016), doi: 10.17159/1727-3781/2016/v19i0a723.

[30] *Ibid.*, at 22.

[31] 2014 (4) BCLR 439 (SCA).

[32] *Ibid.*, para. 71.

[33] *Ibid.*

[34] *Ibid.*, para. 72.

[35] *Ibid.*

[36] *Ibid.*, at para. 74.

[37] *Ibid.*, para. 75.

[38] *Ibid.*

[39] *Ibid.*

[40] *Ibid.*, para. 76.

[41] *Ibid.*

[42] *Ibid.*, para. 81.

[43] *Ibid.*

[44] *Ibid.*, para. 82.

Gazette. Therefore, we know when the duty liability lapses when it is initially imposed. However, this case does not answer the question of the date of commencement of the new five-year period when the duty is imposed after a sunset review. The answer could be found in Regulation 53 itself.

In this regard, one construal could be that under the ADR, anti-dumping duties should be imposed from the date of completion of the sunset review. This is because Regulation 53.1 says that duties 'shall remain in place' for a maximum of five years from the 'last review'. This includes sunset or expiry reviews. This construal is confirmed by the fact that Regulation 53 regulates sunset reviews, as shown by the heading to Sub-Part IV, which is titled 'Sunset Reviews'. Thus, under ADR, the duties must be imposed from the date of completion of the sunset review. This would mean that the new five-year period commences at the end of the sunset review investigation. That is to say, five years plus the eighteen months period of the sunset review investigation.

However, ITAC itself, in the Report No. 657: *Sunset Review Investigation of the anti-dumping duties on frozen potato chips originating in or imported from Belgium and the Netherlands: Final Determination*,[45] explained that the 'duties will be effected retrospectively to the date the five-year period the duties would have lapsed'. Thus, according to ITAC, the five-year period runs from the date the original duties would have lapsed and not at the end of the sunset review. This construal is contradicted by a selected sample of South Africa's Article 16.4 of the ADA notification to the WTO of 14 April 2021[46]:

Table 1

Investigation	*Date of Original Imposition*	*Date of Extension of the Anti-Dumping Duty*
Frit 230911A	15 February 2013	15 June 2018
Unframed mirrors 21112	26 July 2013	21 December 2018
Stainless steel sinks 250708/A	6 November 2009	31 July 2015
PVC rigid 250408/A	25 April 2008	10 May 2013
Wire ropes 170807/A	28 August 2002	13 February 2009
Polyethylene terephthalate (PET) 300506/B	30 May 2006	4 March 2011
Unframed glass mirrors 251006/A	25 October 2006	4 March 2011
PET 300506/C	30 May 2006	4 March 2011
PVC rigid 250408/B	25 April 2008	10 May 2013
PET 300506/A	30 May 2006	4 March 2011
Soda ash 210613/C	19 June 14	30 March 2020
Stainless steel sinks 250708/B	6 November 2009	31 July 2015

From this notification above, it is clear that ITAC favours the interpretation that states that the five-year period envisaged in Regulations 38.1 and 53.1 begins when the sunset review investigation is completed. In all instances, the new five-year period commences more than five years after the original imposition contrary to ITAC's stated position in the sunset review of frozen potato chips. In other words, the position in South African law is unclear.

Article 11.3 of the ADA textually conveys the same ambiguity in the ADR in that it provides that those duties 'shall remain in place for a period not exceeding five years from … the last review thereof'. Relief is found in the Panel Report, *US DRAMS*, which clarified this question by finding that:

> We note that Article 11.3 provides for termination of a definitive anti-dumping duty five years from its imposition. However, such termination is conditional. First, the terms of Article 11.3 itself lay down that this should occur unless the authorities determine that the expiry would be 'likely to lead to continuation or recurrence of dumping and injury'. **Where there is a determination that both are likely, the duty may remain in force, and the five year clock is reset to start again from that point.** Second, Article 11.3 provides also for another situation whereby this five year period can be otherwise effectively extended, viz in a situation where a review under paragraph 2 covering both dumping and injury has taken place. If, for instance, such a review took place at the four year point, it could effectively extend the sunset review until 9 years from the original determination.[47] [own emphasis]

Thus, this Panel confirmed that under Article 11.3 of the ADA, the five-year period runs from the end of the sunset review in that it must 'start again from this point'. Thus, in my view, Regulation 53.1 of the ADR must be read in

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[45] 13 May 2021, at 27, https://www.itac.org.za/pages/services/trade-remedies/investigation-reports?search=1&k=&rno=657&tno=&submit= (accessed 13 May 2024).

[46] G/ADP/N/350/ZAF of 14 Apr. 2021, https://notifications.wto.org/en/notification-status/anti-dumping-procedures (accessed 5 Nov. 2023).

[47] WT/DS99/R, para. 6.48, fn. 494.

consonance with Article 11.3 of the ADA. This means that both the ADR and the ADA require that the five-year period runs from the end of the sunset review and not when the duties originally lapsed. This, of course, is in conflict with the approach of ITAC, which implies that the 'new' five-year period starts at the expiry of the 'original' five-year period. Therefore, the position on when does the five-year period of reimposition of a duty remains unclear because as stated earlier, the ADA is not part of South African law and thus, creates no rights. This necessitates a comparative review of the position in foreign law. This approach has a sound constitutional and jurisprudential basis.

To this end, section 233 of the Constitution confirms that '[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any interpretation that is inconsistent with international law'. This approach to the interpretation of Regulation 53 of the ADR is explicitly required by the court in *Progress Office Machines v. SARS*,[48] which held that imposing a duty for a period exceeding the time specified in the ADA would violate South Africa's international obligations under the ADA and unreasonable as is apparent in Regulation 53.1 of the ADR Consequently, Regulation 53.1 must be read according to Article 11.3. Article 11.3 is not only an 'interpretive tool' for Regulation 53.1; it also offers a 'reasonable interpretation' of international law. Sections 39(1)(c) and 233 of the Constitution then necessitate an evaluation of comparative law in this regard. In light of this requirement, I review the position in the European Union, India, Australia, Brazil. These jurisdictions offer a general global outlook from South America, Asia, Europe and Australia.

3.2 *The Comparative Position*

In *Casar Drahtseilwerk Saar GMBH v. ITAC and Others*, the High Court of South Africa confirmed the approach to seek direction from the EU Dumping Code.[49] In this regard, Article 11.2 of the EU Dumping Code is essentially the same as Article 11.3 of the ADA and Regulation 53.1 of the ADR. Under EU law, the duty is imposed from the date of the most recent sunset review under Article 11(2) of Regulation (EU) 2016/1036 European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union (codification). This is interpreted to mean that the duty is imposed from the date of completion of the expiry review as they call it in the EU. This construal is confirmed by a selected sample of the EU's Article 16.4 of the ADA notification to the WTO of 16 April 2021[50]:

Table 2

Investigation	*Date of Original Imposition*	*Date of Extension of the Anti-Dumping Duty*
Aluminium foil (certain) AD534 CN	6 October 2009	18 December 2015
Aluminium foil in small rolls AD582 CN	13 March 2013	5 June 2019
Citrus fruits (namely mandarins) AD524 CN	30 December 2008	11 December 2014
Coated fine paper AD552 CN	14 May 11	04 July 2017
Ironing boards1 AD506 CN	26 April 2007	23 July 2013
Threaded tube or pipe cast fittings, of malleable cast iron (MTF) AD585 CN	14 May 2013	25 July 2019
Melamine AD554 CN	13 May 2011	01 July 2017
Organic coated steel products (certain) AD584 CN	15 March 2013	03 May 2019
Oxalic acid AD568 CN	18 April 2012	02 July 2018
Sodium gluconate AD544 CN	28 October 2010	27 Jane 2017
Seamless pipes and tubes of stainless steel AD565 CN	20 December 2011	06 March 2018
Ceramic tableware and kitchenware AD586 CN	15 May 13	15 July 2019
Tube and pipe fittings of iron or steel (certain) AD579 RU	29 Jane 2013	10 April 2019
Threaded tube or pipe cast fittings, of malleable cast iron (MTF) AD585 TH	14 May 13	25 July 2019

As is clear from this notification of sunset reviews conducted by the EU between 2007 and 2019, the duties

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48 [2007] SCA 118 (RSA), para. 11, https://www.saflii.org/za/cases/ZASCA/2007/118.html (accessed 24 Aug. 2024).

49 (66248/2014) [2020] ZAGPPHC 141, 14 Feb. 2020, para. 16, https://www.saflii.org/za/cases/ZAGPPHC/2020/141.html (accessed 24 Aug. 2024).

50 G/ADP/N/350/EU, https://notifications.wto.org/en/notification-status/anti-dumping-procedures (accessed 4 Nov. 2023).

were always imposed at least a year after their projected date of expiry. The duties were then almost always imposed at least a year after the projected date of expiry, This means that in the EU, the duties are imposed after the sunset review is completed.

In India, sunset reviews are governed by section 23(1B) of the Customs Tariff (Identification, Assessment and Collection of Antidumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 (hereafter, the Customs Tariff Rules), which states the following on sunset reviews:

> (1B) Notwithstanding anything contained in sub-rule (1) or (1A), any definitive antidumping duty levied under the Act, shall be effective for a period not exceeding five years from the date of its imposition, unless the designated authority comes to a conclusion, on a review initiated before that period on its own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to the expiry of that period, that the expiry of the said anti-dumping duty is likely to lead to continuation or recurrence of dumping and injury to the domestic industry.
>
> (2) Any review initiated under sub-rule (1) shall be concluded within a period not exceeding twelve months from the date of initiation of such review. (3) The provisions of rules 6, 7, 8, 9, 10, 11, 16, 17, 18, 19, and 20 shall be mutatis mutandis applicable in the case of review.
>
> (3) The provisions of rules 6, 7, 8, 9, 10, 11, 16, 17, 18, 19, and 20 shall be mutatis mutandis applicable in the case of review.

As noted above in 23(1B)(3), Rule 20 of the Customs Tariff Rules applies to sunset reviews. Section 20 of the Customs Tariff Rules then states the following:

> 20. Commencement of duty.
>
> (1) The anti-dumping duty levied under rule 13 and rule 19 shall take effect from the **date of its publication in the Official Gazette.** [own emphasis]
>
> Rule 13 regulates the levy of a provisional duty whereas rule 19 governs the imposition of the definitive duty under rule 18.
>
> Section 9A(5) of the Customs Tariff Act 51 of 1975 then explains that:
>
> (5) The anti-dumping duty imposed under this section shall, unless revoked earlier, cease to have effect on the expiry of five years from the date of such imposition:
>
> Provided that if the Central Government, in a review, is of the opinion that the cessation of such duty is likely to lead to continuation or recurrence of dumping and injury, it may, from time to time, extend the period of such imposition for a further period of five years and such further period shall commence from the date of order of such extension:
>
> Provided further that where a review initiated before the expiry of the aforesaid period of five years has not come to a conclusion before such expiry, the anti-dumping duty may continue to remain in force pending the outcome of such a review for a further period not exceeding one year. [own emphasis]

Thus, in India, unless the duty is imposed retrospectively (as stipulated by section 9A(3)(ii) of the Customs Tariff Act and section 20(2)(b)(ii) of the Rule), it is imposed from the date it is published in the Official Gazette. As per Rule 20.1 of the Customs Tariff Rules, this date can only be the date on or after the sunset review is complete.-[51] This is confirmed by a selected sample of India's Article 16.4 of the ADA notification to the WTO of 19 April 2021[52]:

Table 3

Investigation	*Date of Original Imposition*	*Date of Extension of the Anti-Dumping Duty*
Glass fibres 14-28-2009-1/1	14 July 2010	13 July 2015
Sheet glass 14-22-2013-1/1	13 March 2015	12 March 2020
Electrical insulators 14-11-2013-1/1	16 September 2014	14 September 2019
Sodium citrate 14-23-2013-1/1	20 May 2015	19 May 2020
Electronic calculators 14-19-2013-1/1	29 May 2015	27 May 2020
Methylene chloride 14/33/2014-1/2	08 December 2020	01 December 2020
Cast aluminium alloy Wheels 14 July 2012-2/3	14 November 2014	09 April 2019

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[51] *See* Sunset Review Investigation concerning import of Cold- Rolled Steel Products of Stainless Steel of width 600 mm to 1250 mm of non bonafide usage originating in or exported from China PR, Korea RP, European Union, South Africa, Taiwan, Thailand and USA reg. para. 138 Case No –AD-SSR 08/2020 dated 20 Jan. 2021; Sunset Review (SSR) anti-dumping investigation concerning imports of Cold Rolled Flat Products of Stainless Steel from the Peoples Republic of China, Republic of Korea, the European Union, South Africa, Chinese Taipei, Thailand and the United States of America dated 12 Oct. 2015, para. 196. Final Findings in the Sunset Review of anti-dumping duty imposed on import of Caustic Soda from Saudi Arabia, Iran, Japan, United States of America and France para. 109 – date 31 Aug. 2012.

[52] G/ADP/N/350/IND of 19 Apr. 2021, https://notifications.wto.org/en/notification-status/anti-dumping-procedures (accessed 3 Nov. 2023).

Investigation	Date of Original Imposition	Date of Extension of the Anti-Dumping Duty
Clear float glass 14-25-2012-1/3	11 December 2014	10 December 2019
Grinding media balls (excluding forged grinding media balls) 14-34-2010-2/2	16 July 2012	13 July 2017

A contrary reading would be unsound since that would mean that the decision would have been made and published prior to the actual investigation. Therefore, the EU and India follow the same approach that the new five year period of the duty commences after the sunset review.

In Australia, section 269ZHG (5) of the Customs Act 6 of 1901 provides that:

> (5) If the Minister secures the continuation of anti-dumping measures in accordance with this section, **the measures continue in force for 5 years after the specified expiry day unless:**
>
> (a) in the case of a dumping duty notice or a countervailing duty notice – the notice is revoked before the end of that period; or
>
> (b) in the case of an undertaking – provision is made for its earlier expiration. [own emphasis]

Thus, in Australia, the 5-year period commences from the end of the original five-year period. This approach is confirmed by a selected sample of Australia's Article 16.4 of the ADA notification to the WTO of 19 April 2021[53]:

Table 4

Investigation	Date of Original Imposition	Date of Extension of the Anti-Dumping Duty
Dichlorophenoxy-acetic acid (2,4-D) TM 58 AD 1	24 March 2003	24 March 2008
Silicon metal ADC 237 AD 1	3 June 2015	3 June 2020
Wind towers ADC 221 AD 1 (*)	16 April 2014	16 April 2019
Zinc coated (galvanized) Steel ITR 190b AD 1 (*)	5 August 2013	5 August 2018
Aluminium zinc coated steel ITR 190a AD 1 (*)	5 August 2013	5 August 2018
Hollow structural sections TM 177 AD 1 (*)	3 July 2012	3 July 2017
Clear float glass TM 159 AD 1 (*)	17 October 2011	17 October 2016
Deep drawn stainless steel	26 March 2015	26 March 2020
Sinks ADC 238 AD 1 Quenched and tempered steel plate ADC 234 AD1	05 November 2014	05 November 2019
Power transformers ADC 219 AD 3 (*)	10 December 2014	10 December 2019
Hot rolled structural steel sections ADC 223 AD 1 (*)	20 November 2014	20 November 2019
Quenched and tempered steel plate ADC 234 AD 2	05 November 2014	05 November 2019
Steel reinforcing bar ADC 264 AD 1 (*)	19 November 2015	19 November 2020
Hot rolled coil steel TM 188 AD 4 (*)	20 December 2012	20 December 2017

For Brazil, Article 93 of the Decree (Regulates the administrative procedures relating to the investigation and application of antidumping measures) 1 October 2013 states that:

> Article 93. Any definitive anti-dumping duty shall be terminated on a date not later than five (5) years from the date of its imposition **or from the conclusion of the most recent review of the dumping, injury to the domestic injury, and causal link between the dumped imports and the alleged injury, pursuant to chapter VIII, section II.** [own emphasis]

Article 112 of this Decree then states that the 'review shall be concluded within a period of ten (10) months from the date of initiation of the review'. Paragraph 1 of Article 112 explains that in exceptional circumstances, the time limit above may be extended by up to two (2) months. This means that the extension review can last up to twelve months from the date of expiry of the original imposition. More directly, based on Article 93, the period of imposition commences from the date of the conclusion of the most recent review. Article 190 of this Decree then explains that the time period corresponding to the extension shall be added to the original time limit, such that the total time limit shall be counted consecutively from the beginning of the original time limit period. This

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[53] G/ADP/N/350/AUS, https://notifications.wto.org/en/notification-status/anti-dumping-procedures (accessed 2 Nov. 2023).

means that the duty lasts for at least the original imposition and the sunset review if it is initiated. Article 106 then explains that the time period for imposition established in Article 93 may be extended by means of a sunset review under this subsection for an equal period if it is determined that the termination of the anti-dumping duty would be highly likely to lead to a continuation or recurrence of dumping or the injury arising therefrom. In other words, five years plus twelve months for the sunset review and then a new five years is imposed after the sunset review. Thus, in Brazil, the five-year period of imposition after the original five-year period commences on the date of expiry of the sunset review. This mirrors the language of Article 11.3 of the ADA and the EU Dumping Code. This is confirmed by a selected sample of Brazil's Article 16.4 of the ADA notification to the WTO[54]:

Table 5

Investigation	*Date of Original Imposition*	*Date of Extension of the Anti-Dumping Duty*
Line Pipe For Oil And Gas Pipelines, Of Seamless Iron (other Than Cast Iron) Or Steel ID 1206160	4 November 2013	30 August 2019
SAPP ID 1316149	15 August 2014	15 June 2020
Non-oriented silicon steel ID 1203160	17 July 2013	15 July 2019
Seamed tubes of austenitic stainless steel of circular section, with an outside diameter of six mm (1/4 inch) or more but less than 2032 mm (eighty inches), with a thickness of 0.40 mm or more and less than or equal to 12.70 mm ID 1201160	29 July 2013	25 July 2019
Motorcycle rubber tires ID 1207160	19 December 2013	19 December 2019
Nylon yarns ID 1209160	27 December 2013	23 December 2019
Tableware and kitchenware of porcelain and ceramic ID 1216160	17 January 2014	17 January 2020
New bicycle/bike rubber tires ID 1211160	19 February 2014	19 February 2020
Tyres, of a kind used on motor cars ID 1210161	16 January 2014	16 January 2020
Seamless carbon steel line pipes for oil and gas pipelines ID 1401831	24 November 14	22 September 2020
SAPP ID 1316249	15 August 2014	15 June 2020
Polypropylene resin ID 1303361	28 August 2014	28 December 2020
New bicycle/bike rubber tires ID 1211361	19 February 2014	19 February 2020
Non-oriented silicon steel ID 1203190	17 July 2013	15 July 2019
Heavy plates ID 1204190	03 October 2013	02 October 2019
Nylon yarns ID 1209190	27 December 2013	23 December 2019
Tyres, of a kind used on motor cars**** ID 1210190	16 January 2014	16 January 2020
Non-oriented silicon steel ID 1203161	17 July 2013	15 July 2019
Cold-rolled stainless steel sheet, grades 304, 304L and 430 ID 1202161	04 October 2013	02 October 2019
Motorcycle rubber tires ID 1207776	19 December 13	19 December 19
Ethanolamines, grades MEA (monoethanolamine) and TEA (triethanolamine) ID 1205249	4 November 2013	1 November 2019

Therefore, from the chosen jurisdictions, only Australia favours the construal that the new five-year period of reimposition commences from the date of expiry of the duty. Contrary to this interpretation, India, Brazil and the EU follow the approach that duties are imposed from the expiry of the sunset review. Thus, it is unclear from comparative law whether the duty to pay the duty commences from the date of expiry of the duty or when the sunset review is completed. Against this backdrop, the position in South Africa remains unimpeachable. The

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[54] G/ADP/N/357/BRA of 19 Oct. 2021, https://notifications.wto.org/en/notification-status/anti-dumping-procedures (accessed 3 Nov. 2023).

problem of course is that it is unclear in South African what the position is. The better view is the one used by ITAC as the investigating authority, which is that this five-year period of reimposition commences before the commencement of the sunset review. This means that the duty is only reimposed for a period of five years from the date of expiry of the original imposition. This construal is in line with the rule of interpretation that the administrator's construal of the provision is instructive.

4 Conclusion and recommendations

It is unclear in South African law when a duty is reimposed if a sunset review is conducted. ITAC is of the view that is starts from the date of expiry of the initial imposition of the duty. This construal is contradicted by South Africa's notifications to the WTO which states that the duties are imposed from the date of completion of the sunset review. The ADR provides that it commences at the end of the sunset review. The ADR approach is confirmed by Article 11.3 of the ADA, which has been held by the Panel in *US DRAMS* to mean that the five-year period runs from the end of the sunset review in that it must 'start again from this point'.

This then necessitated a comparative and empirical review of jurisdictions in the Americas, Europe, Australia and Asia. Unfortunately, this did not yield a conclusive answer to this problem. The better view is that the duty commences on the date that the duty would have expired on its prior imposition as is followed by ITAC. The alternative view would unduly extend the life of a duty, which is often fatal to the enterprise of an exporter.

For practitioners and the courts, a few considerations to keep in mind. In South Africa, the courts or the legislature must clarify the starting point of the duty obligation when a sunset review has been conducted. Secondly, the current ambiguous position of WTO law in South Africa compels a comparative study of other jurisdictions together with the WTO position in accordance with the requirement of the Constitution to consider a reasonable interpretation of international law when interpreting legislation. Such a thorough approach would fortify the quality of the jurisprudence in this regard.

Thirdly, the notifications to the WTO on the date of imposition of duties must reflect the legal position in the applicable legislation. The investigating authority must also align its interpretation of the date of commencement of the duty liability to its notifications to the WTO and the relevant legislation.

Furthermore, the investigating authority must on their own initiative, use the interim review mechanism in Article 11.2 of the ADA to periodically review the need for an anti-dumping duty since they must never persist beyond their need. The utility of this mechanism must be impressed on the investigating authority by practitioners and affected parties.

Finally, if a sunset review results in the non-continuation of a duty, affected parties must request a refund of duties paid since the duty liability obligation is optional under the wording of Article 11.3 of the ADA.