ACCESS TO CONFIDENTIAL INFORMATION IN ANTI-DUMPING DISPUTES – A SACU PERSPECTIVE

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Confidential information in anti-dumping investigations is vehemently protected by the investigating authorities of all WTO Member States. This is due to the fact that the WTO Agreement on the Implementation of Article VI of the GATT of 1994 ("the Anti-dumping Agreement") requires the protection of confidential information submitted by an interested party to the anti-dumping investigation. Specifically Article 6.5 of the Anti-dumping Agreement provides that confidential information submitted by an interested party will be protected by the investigating authority. Article 6.5 states:

"6.5 *Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), 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.*[17]"

Thus it would seem that without the specific permission of the party submitting the confidential information, other parties to an anti-dumping investigation can, at most, have access to non-confidential versions submitted by the submitting party. Again investigating authorities rely on the Anti-dumping Agreement as justification for only allowing access to the non-confidential versions. Articles 6.5.1 and 6.5.2 provide the relevant international framework as it reads:

"*6.5.1 The authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that*

such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

6.5.2 *If the authorities find that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.*[18]

In general terms this situation is condoned, at least at the investigative level, where the investigative authority has not yet made any determination. In practice what often happens is that the confidential information that was submitted is claimed to be incapable of being summarised or in a best case scenario that the confidential information is summarised but the summary is woefully inadequate to *permit a reasonable understanding of the substance* of the confidential information that was submitted as required by Article 6.5.1. However in order to maintain a balance between the parties' needs to protect confidential information and parties' right to know the substance of the case against them Article 6.5 of the Anti-dumping Agreement contains a very important footnote. Footnote 17 provides for the possibility of disclosing the confidential information that was submitted to other parties pursuant to a protective order. Footnote 17 reads:

"[17] *Members are aware that in the territory of certain Members disclosure pursuant to a narrowly-drawn protective order may be required*."

Such disclosure typically allows for access to the confidential information by parties' legal representatives and consultants. The parties themselves are prevented from gaining access to confidential information themselves. The legal representatives or consultants thus only gain access to the confidential information in order to present their client's interest as best they can and to check the work conducted by the investigating authorities. North America (Canada, Mexico and the United States of America) employs this system whereby the legal representatives and consultants are allowed access under a protective order. A WTO Panel has acknowledged disclosure of confidential information in accordance with footnote 17.[1]

[1] Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatamala, WT/DS 331/R of 8 June 2007.

Typically access to the confidential information in North America, pursuant to a protective order, may already be had at the investigation level. In contrast the European Union employs a system whereby access pursuant to a narrowly drawn protective order is not a possibility. Thus not even where the investigating authority's decision is taken on review in the EU court will the interested parties be able to gain access to the confidential information submitted by any party. It is clear that both these systems granting protection to confidential information is acceptable under the WTO's Anti-dumping Agreement.

In the Southern African Customs Union ("SACU"), the International Trade Administration Commission of South Africa ("the ITAC") is tasked with amongst other things investigating alleged dumping into SACU[2]. The ITAC gains its authority to investigate alleged dumping from the International Trade Administration Act 71 of 2002 ("the ITA Act) and the Anti-dumping Regulations[3] promulgated thereunder. The legislative background to the activities of the ITAC were explained in the case of Progress Office Machines CC v South African revenue Service and Others 2008 (2) SA 13 (SCA) at 6 pages 16 to 18 as follows:

"[5] South Africa is a founding member of the World Trade Organization Agreement (WTO) and also a signatory to the General Agreement on Tariffs and Trade of 1947 (GATT). The South African Government acceded to GATT and its accession was published in the Government Gazette. Parliament approved the agreement in the Geneva General Agreement on Tariffs and Trade Act 29 of 1948. The World Trade Organization Agreement was the outcome of the so-called Uruguay Round of the GATT negotiations and was concluded in Marrakesh by the signing of some 27 agreements and instruments in April 1994 by the members, including South Africa. The WTO Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Anti-Dumping Agreement) forms part of the WTO Agreement. ….

[6] The effect of international treaties on municipal law is regulated by ss 231, 232 and 233 of the Constitution. Section 231(4) provides that '(a)ny international agreement becomes law in the Republic when it is enacted into law by national legislation'. The WTO Agreement was approved by parliament on 6 April 1995 and is thus binding on the Republic in international law but it has not been enacted into municipal law. Nor has the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade been made part

[2] This is due to the fact that SACU has not yet established the Tariff Board and in the interim the ITAC is tasked with the duties assigned to the Tariff Board.
[3] The Anti-dumping Regulations GN 3197 of 14 November 2003

of municipal law. No rights are therefore derived from the international agreements themselves. However, the passing of the International Trade Administration Act 71 of 2002 (ITAA) creating ITAC and the promulgation of the Anti-Dumping Regulations made under s 59 of ITAA are indicative of an intention to give effect to the provisions of the treaties binding on the Republic in international law. The text to be interpreted, however, remains the South African legislation and its construction must be in conformity with s 233 of the Constitution.

[7] The Anti-Dumping Regulations made under s 59 of ITAA which came into operation on 1 June 2003 20 seek to give effect to provisions of the Anti-
Dumping Agreement cited above.*"*

Accordingly the ITA Act echoes the provisions of the Anti-dumping Agreement. Section 33 of the ITA Act allows a person to claim confidentiality when submitting information to the ITAC and allows the person to also supply non-confidential summaries of the information and where the confidential information is not capable of summation, a motivation has to be give as to why the information cannot be summarised. Section 34 in turn provides that the ITAC must determine whether the information claimed as confidential should be recognised as confidential. Of importance is section 50 of the ITA Act which provides for the protection of the information that has been determined to be confidential as well as under what circumstances the confidential information may be disclosed. Specifically section 50 allows for the disclosure of confidential information for the purpose of the proper administration of the ITA Act, for the purpose of the administration of justice, or within the terms of an appropriate order of access made in terms of section 35(2). Section 50 of the ITA Act reads:

"50. (1) It is an offence to disclose any confidential information concerning the affairs of any person obtained—

(a) in carrying out any function in terms of this Act; or

(b) as a result of initiating a complaint, or participating in any proceedings in terms of this Act.

(2) Subsection (1) does not apply to information disclosed—

(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 appropriate order of access made in terms of section 35(2)."

Section 35(2) in turn provides that a person who seeks access to confidential information must first try to obtain the permission of the owner of the confidential information failing which, the party may approach the High Court for any appropriate order concerning access to that information. Section 35(2) thus reads:

"(2) A person who seeks access to information which the Commission has determined is, by nature, confidential, or should be recognised as otherwise 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."

It is thus clear that in terms of the legislative framework applicable in SACU an interested party may obtain access to the confidential information for the proper administration or enforcement of the ITA Act, or for the proper administration of justice or within the term of an appropriate order of access made in terms of section 35(2) of the ITA Act. It may well be argued that the interested party may gain access to the confidential information at the time of the investigation if the interested party relies on the proper administration or enforcement of the ITA Act or in terms of section 35(2) as outlined above. Typically where the proper administration of justice is relied upon, access to the confidential information will only be had after the decision whether to impose anti-dumping duties or not has been taken. It seems that SACU, through the implementation of the ITA Act, therefore followed the approach adopted by North America in allowing access to the confidential information pursuant to a narrowly dawn protective order as allowed in term of the international legal framework.

Recently the ITAC levied anti-dumping duties on steel wire, rope and cables originating in, amongst other countries, Germany pursuant to a sunset review. The anti-dumping duty in place before the sunset review was 12.9% and was increased to 93% for rope and cables and

243.54% for stranded wire originating or imported from Germany[4]. There are several manufacturers of the subject product in Germany who for various reasons had a residual dumping margin calculated against them and subsequently had an anti-dumping duty imposed against their imports into SACU. In calculating the residual dumping margin, the ITAC used the confidential information submitted by one German manufacturer ("Bridon") who was found not to dump the subject product in SACU.

Under the Constitution, the ITA Act and the Promotion of Administrative Justice Act 2 of 2000 one German manufacturer ("Casar") took the decision to increase the anti-dumping duties applicable to German imports under review. It argued that in order to effectively review the decision to increase the anti-dumping duties pursuant to the sunset review it needed access to the confidential information of Bridon as Bridon's information was used to calculate the residual dumping margin applicable to Casar.

Specifically Casar relied on Rule 53 of the High Court rules which requires that the record of the proceedings sought to be corrected or set aside must be provided by the ITAC. This will thus include the confidential information of Bridon as the ITAC's decision to levy the increased anti-dumping duties against Casar was based on Bridon's confidential information. The relevant portion of Rule 53 reads:

"(1) … all proceedings to bring under review the decision or proceedings of any … tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion … -

(a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and

(b) calling upon the magistrate, presiding officer, chairman or officer, as the case may be, to dispatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he is by law required or desires to give or make, and to notify the applicant that he has done so."

This rule was interpreted in the cases of Jockey Club of South Africa v Forbes 1993 (1) SA 649 (A), Ekuphumleni Resort (Pty) Ltd and Another v Gambling and Betting Board, Eastern

[4] The seemingly illogical increase of the anti-dumping duties to the new levels after five years of protection under already imposed anti-dumping duties is of course also taken on review.

Cape and Others 2010 (1) SA 228 (E) Unilver Plc and Another v Polagric (Pty) Ltd 2001 (2) SA 329 (C). In terms of this interpretation the purpose of Rule 53 is to facilitate the review of administrative decision and without the production of the full record on which the decision is based, the applicant will not have any knowledge of the reasons founding such decision. Thus were it not for Rule 53 the applicant would be obliged to launch the review proceedings in the dark and the applicant will not be able to meet the case before him. Of course a balance should be struck between the protection of confidential information and another party's right to take an administrative decision on review. Such a balance is struck by allowing a party's legal advisors and experts access to the confidential information without disclosing it to the actual party.

ITAC, cautiously and perhaps understandably, did not want to disclose the confidential information of Bridon without either an agreement between Casar and Bridon or a court order regulating access to the confidential information. As Bridon did not want to engage on discussions as to how the confidential information may be protected if it is disclosed, Casar had to launch an interlocutory application for a court order regulating access to Bridon's confidential information. Bridon raise a point in limine in terms of which it was of the opinion that the current legal framework within South Africa does not allow for the relief sought by Casar and failing which if it does, the court must first determine whether the information submitted by Bridon is confidential. The court found that there was no basis for Bridon's contention and that it was clear that the legal framework does allow for the relief sought by Casar. Furthermore, it was found that it is unnecessary for the court to determine whether the information is in fact confidential if the parties are ad idem that the information is in fact confidential and needs protection. The point in limine was accordingly dismissed.

The court went on to find that the confidentiality regime proposed by Casar in terms of which only the legal representatives and mutually agreed independent will have access to the confidential information of Bridon is in fact sufficient protection and granted an order that the ITAC must provide the confidential information to Casar once the legal representative and mutually agreed independent experts have signed confidentiality undertakings to protect the confidential information of Bridon. Therefore in terms of South Africa's current jurisprudence it would seems that confidential information may be accessed in order to review the decision taken by the ITAC. This represents a positive progression in anti-dumping practice in SACU and strikes a balance between a party's right to have its

confidential information protected and another party's rights to effectively review an administrative decision.