Is South Africa using trade remedies as a protectionist measure? Reflections on a court case:

International Trade Administration Commission v SCAW South Africa [2010] ZACC 6 (9 March 2010)[1]

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ABSTRACT

The recent decision of the South African Constitutional Court raises great concern on whether the leading economy of the continent and the role model country in Legal developments is taking a healthy route in deciding their international trade policy.

As many other countries, South Africa might be experiencing problems with having two parallel regulations with moderately similar aims, but both with a different scope of reach. On the one hand, South Africa is an enthusiastic producer and enforcer of competition laws and policies that apply only locally, and gladly agrees to the international commitments of free trade. On the other hand, inside institutions are using the WTO agreements (more specifically the anti-dumping agreement) to prevent competition from international economic rivals by hindering their access to the South African market

The importance of establishing whether South Africa uses trade remedies anti competitively is also pertinent to the global debate. The way the biggest economy in Africa deals with the situation is useful in trying to find a response to the problem of anti-competitive trade remedies that suits the interests of Africa and that is globally feasible. This paper will explore these issues from the perspective of the constitutional court rulings in International Trade Administration Commission v SCAW South Africa, and it will try to find a way to recon-

cile competition and anti-dumping in this particular case with the final aim to use it as a possible tool in the construction of a harmonized system of international trade.

Key Words: Anti-Dumping, Competition, South Africa's Trade policy, WTO

¿UTILIZA SUDÁFRICA EL ANTI-DUMPING COMO MEDIDA PROTECCIONISTA? ESTUDIO DEL CASO: "COMISIÓN DE ADMINISTRACIÓN DE COMERCIO EXTERIOR V SCAW SOUTH AFRICA"

SUMARIO

La reciente decisión de la Corte Constitucional sudafricana genera interrogantes sobre si la principal economía del continente y el modelo a seguir en materia de avances jurídicos está tomando un rumbo saludable en lo relativo a su política de comercio exterior.

Como muchos otros países, Sudáfrica puede estar experimentando problemas con dos tipos de regulaciones paralelas que tienen metas moderadamente similares, pero con alcance diferente. Por un lado, Sudáfrica es uno de los países más evolucionados en la creación y aplicación de políticas y normas de competencia que se aplican únicamente en el ámbito doméstico. Asimismo, Sudáfrica ha aceptado los compromisos internacionales de libre comercio. Por otro lado, instituciones locales están utilizando los acuerdos de la OMC (más específicamente el Acuerdo Anti-Dumping) para evitar la competencia de rivales comerciales internacionales al utilizarlos para obstaculizar el acceso al mercado Sudafricano.

La importancia de establecer si Sudáfrica utiliza los remedios comerciales de manera anticompetitiva también es pertinente para el debate global. Entender la forma como la economía más grande de África maneja la situación es útil en la búsqueda de una respuesta al problema que presenta el uso anticompetitivo de los acuerdos de la OMC. Esta respuesta deberá no solo atender los intereses de África, sino que su aplicación ha de ser plausible en el ámbito internacional. El presente artículo explora estos temas desde la perspectiva de la jurisprudencia constitucional contenida en el caso "International Trade Administration Commission v SCAW South Africa". De igual manera se intentará proponer una manera de reconciliar las políticas de competencia con las de anti-dumping en este caso particular, con el fin último de utilizar dicha reconciliación como una posible herramienta en la construcción de un sistema armónico de comercio internacional.

Palabras Clave: Anti-Dumping, Competencia, WTO, Política de Comercio Exterior en Sudáfrica

This article will discuss the use of Anti-Dumping Measures at the local level in South Africa using the recent decision of the South African Constitutional Court regarding the matter. The discussion brought up in this study will help to illustrate how the local practices are reflecting the worldwide tendency towards protectionism. The ignorance (or distrust, in the worst of the cases) of the multilateral disciplines contained in the WTO agreements is shown in the behaviour of administrative bodies and the reasoning of adjudicators. From decisions like the one explored in this article, it is also

possible to observe the permanent dilemma of opening the economy to free trade when there are local development strategies at the domestic level that do not necessarily correlate to the free trade logic.

Furthermore, there is a clear clash between disciplines which should be aligned by their nature but are differentiated by their regime; such is the case with trade remedies and competition (MESSERLIN, 1990). The Constitutional Court in this case brought to light some very important issues that should be considered as they are part of a live debate over the latent problem of competition conflicting with trade remedies, and more specifically, with anti-dumping measures around the world.

South Africa has a highly developed and sophisticated system of competition regulations and the promotion of competition inside the borders is up to the highest standards known worldwide. This means that the South African government considers competition rules as a necessary measure to ensure South Africa has access to the best products and services at the best prices for its consumers.

South Africa is also a member of the WTO and has accepted the rules of GATT by creating statutory regulations which have been implemented in the country. This should mean that South Africa is committed to facilitating international trade, and gradually reducing tariffs and customs duties. Legally, South Africa is bound by the Anti-Dumping Agreement that is part of GATT. Therefore, South Africa is entitled to impose anti-dumping duties to infringing Member States without exceeding the discretion given by the Agreement.

The importance of establishing whether South Africa uses trade remedies anti competitively is also pertinent to the global debate. The way the biggest economy in Africa deals with the situation is useful in trying to find a response to the problem that suits the interests of Africa and that is globally feasible.

Taking into account all these considerations, it is necessary to scrutinise the decision released on the 9th of March 2010 by the South African Constitutional court and consider the consequences of its *obiter dicta*. The situation of the clash between competition and trade worldwide will be explained based on this particular case.

This analysis is constructed on the assumption that an anti-dumping duty was imposed based on reasonable grounds, and that a material damage was being caused to the local industry due to the dumping of a product from a foreign economic agent. The examination of the decision will be focused in the problem of competition hindrances that might have been caused by the anti-dumping measure applied to non dumped goods or applied for more time than it was strictly necessary –in accordance to the Anti-Dumping Agreement. The possible consequences of the ability of the private industries to recourse to anti-dumping measures as business strategies will be traversed.

THE DECISION: INTERNATIONAL TRADE ADMINISTRATION COMMISSION V SCAW SOUTH AFRICA (PTY)

The international Trade Administration Commission (ITAC) is, since 2002[3], the administrative body in charge of monitoring international trade and making the pertinent recommendations to the Minister of Trade and Industry. Regarding Anti-Dumping affairs, ITAC completes an investigation

and issues a report with recommendations forwarded to the Minister of Trade and Industry who in turn, sends them to the Minister of Finance. The Minister of Finance has, ultimately, the power to impose, remove or modify anti-dumping duties according to the Anti- Dumping agreement signed by South Africa as part of its trade commitments derived from its membership to the WTO.

THE FACTS: ACTIONS OF THE COMPETITORS AND REACTIONS OF THE ADMINISTRATION

In 2002 an antidumping duty was imposed on stranded wire, rope and cables of iron steel originating in, or imported from various countries including the UK. More specifically, this action was initiated because it was alleged that a British manufacturer (Bridon International Ltd) was dumping the above mentioned goods. Bridon UK is a world leader in the production and distribution of steel products[4]. The investigation resulted in a recommendation to impose a stringent anti-dumping duty. The duty was imposed on a variety of products despite the fact that only fishing rope was found to be dumped[5]. Bridon UK's sales of the non-dumped products declined to the extent that sales became insignificant within the SACU once the duties were imposed[6].

SCAW South Africa (Pty) (SCAW) is the largest South African manufacturer of the products over which the duty was imposed[7]. In fact, they are also direct competitors of Bridon UK, as they produce and commercialise the same kind of products[8].

In 2006 Bridon UK requested a review of the duty claiming that the situation had changed substantially and that the duty should be removed. In 2007, ITAC started an interim investigation and found out that the goods were not being dumped and some of the goods (fishing ropes) were not being commercialised in the SACU. In the 2007 interim report ITAC found out that the imports of steel goods from Bridon UK to South Africa had decreased significantly. ITAC used this as their reasoning to maintain the anti-dumping duty without substantiating further. It is clearly evident that with the burden of a 42% duty the imports into SA would decrease. Essentially, the anti-dumping duty continued to be in force without any legal basis or definitive reasoning.

In 2007, SCAW requested a sunset review to the International Trade Administration Commission of South Africa (ITAC) with the intention that the anti-dumping duty was extended, as its normal period was close to expiry date. When ITAC finished its investigation and the findings of it were available, they recommended the removal of the duty. Almost immediately SCAW initiated legal actions in order to avoid competition from Bridon UK.

In 2008, administrative action was started against ITAC by SCAW based on grounds of procedural fairness and abuse of discretion (irrelevant considerations)[9]. The outcomes of the action started by SCAW and its development in the courts rekindle the debate on competition v. anti-dumping in South African international trade.

SCAW obtained from the North Gauteng High Court – Pretoria (High Court) an interdict that restrained ITAC from sending their recommendations to terminate the existing anti-dumping duty in force to the Minister, and also prevented the Minister of Trade from accepting ITAC's recommendation. In essence, they obtained a *de facto*

extension of the deciduous anti-dumping duty. ITAC applied for leave to appeal behind the Constitutional Court, who analysed the case, granted the appeal and set aside the interdict of the High Court.

The High Court had reasoned that the *possibility* of re-introducing dumped fishing rope in the market contained a significant risk of damage for the local industry. In their ponderings, the members of the High Court gave a higher importance to the above-mentioned possibility than the actual *probability* of crane rope, mining rope[10] and fishing rope accessing the market[11]. In fact, the Court did not have any material proof or even indication of dumping actions that would occur once the sanctions were lifted *if* the recommendation was adopted by the Minister of Trade and passed on to the Minister of Finance.

Finally, the Constitutional Court revised the case and set aside the interdict, although they failed to properly address the competition matter that emerges evidently from the facts. As such, the issue remains unsettled.

CONSIDERATIONS OF THE COURT

To contextualise the matter, Bridon UK and SCAW are direct competitors. They are also big players in the market for steel and derived products. An extension of the anti-dumping duty would be favourable to SCAW as it would remain as an unchallenged dominant provider in the market for Southern Africa.

Firstly it is relevant to note that the substantial duties imposed, in words of the Constitutional Court "shielded domestic manufacturers of steel products, including SCAW, from the competition posed by the dumped product of Bridon UK." This is important because it raises the questions on whether the anti-dumping duty was imposed taking into account competition criteria.

COMPETITION V ANTI-DUMPING IN INTERNATIONAL TRADE: THE SITUATION WORLDWIDE

The case object of this comment is just one amongst many in which international trade is distorted by competitors who use the international trade regulations strategically and push governments to act for the benefit of the local industry and neglect their international trade commitments. This allows them to obtain a privileged position in the local and regional markets and promotes "internationally anticompetitive behaviour" when it is strongly regulated both nationally and regionally.

SCAW was, in fact, unrivalled within the SACU in the distribution of *all* the products affected by the duty, even though only fishing rope was found to be dumped. South Africa opted to protect their local industry without realising that they were hindering market access to foreign suppliers of all the products that were not proven to have been dumped. This evidences the urgent need for substantial competition considerations when assessing international commerce, both within the national and regional trade authorities, and in the international trade authority, the WTO.

THE STATE OF AFFAIRS IN THE WTO

The abuse of trade remedies allowed by the General Agreement on Tariffs and Trade (GATT) is ultimately a violation of the Most Favoured Nation (MFN) rules, and could

sabotage the schedules of tariff reductions. It is useful to remember that such remedies were a negotiation tool and an "*incorporated reserve*" on the treaty in order to have the main economic player, the United States, join the agreement. Most importantly, abusive anti-dumping measures are anti-competitive according to the competition standards adopted by national and regional trade agreements.

When countries abuse trade remedies, and, more specifically, anti dumping measures, the only claim that may be made by the affected country is to seek compensation and trade sanctions. This is possible once the WTO decides that the conduct was indeed, in breach of the Anti-Dumping Agreement. Such compensation claims have been made several times and are generally solved by the Dispute Settlement Body (DSB) with the rules of the Anti-Dumping Agreement[12]. Nonetheless, the efforts from the Member States to unlawfully limit imports continues to increase as with the SCAW case, pushing a copious number of cases to the WTO and thus evidencing that the Anti Dumping regulations are not only anti-competitive, but also ineffective. There is not, however, a measure in place to restore the competitive balance in which fair trade can be practised (JANOW, 2005: 494).

This situation presents a problem because, despite the fact that major players in the global economy have indicated that competition regulation is an important facet of their trade affairs, the WTO, which is supposed to be a source of law and a centre for dispute resolution of the related matters, simply does not address the topic.

THE CURRENT SOLUTION – ESCAPING FROM GATT

As a result, some countries have neutralised anti-dumping measures by signing Regional Trade Agreements (RTAs) and bilateral agreements with strategic partners in order to create exceptions that will allow them to trade more freely. In other words, they have extricated themselves from both the MFN and anti-dumping effects of GATT in certain circumstances as well as with their important trade partners. They can also continue to hinder market access and MFN treatment with those trade partners who are not sufficiently attractive to them. This defeats the core purpose of the WTO and blurs the idea of an international trade system.

However, RTAs and bilateral agreements also meaningfully encourage free trade and force countries to abandon their unproductive industries, to rather specialise and become more competitive in their stronger trade services or products. They consider in detail most of the areas of economic interest in the participating countries and regulate them exhaustively. Most RTAs have considered competition as an important subject of concern and thus have developed a set of competition rules[13].

Competition regulations in RTAs and Bilateral Agreements try to avoid the harmful anti-dumping effect on trade by using the exceptions contained in the GATT. However, when one of these agreements is not available, there is not an effective solution available in the international system as established under GATT.

THE WTO IN THE SEARCH FOR A SOLUTION TO THE PROBLEM

The WTO has tried to address the competition issue in the negotiation table[14]. This means that they are aware of the impact of anti competitive conducts on international trade, and the challenges that it is facing due to a lack of concrete regulation. The attempts at resolution have, however, met with very little success.

In the interpretation of the GATT rule of Nullification and Impairment, in those cases where the facts inured themselves to a harmonizing interpretation, the panels stood by a fragmented and expired idea of a separation between competition regulations and trade. Also, the treatment given to the topic at the tables of negotiation has not been strategic, and has not addressed the challenge holistically.

The inaugural case that illustrates the jurisprudence of the WTO in competition matters is the Kodak- Fuji case[15]. In this case, the panel showed hostility to the idea of national competition laws informing the interpretation of the GATT rules (Art. XXIII:1 (b), Art III:1 and Art: X;1). This case illustrates how companies hinder access via anti-competitive actions (amongst which anti-dumping lobbying is prominent) and the protectionist attitude from the governments towards local industry. The Panel dismissed the possibility of considering Nullification and Impairment and gives it a restrictive interpretation. Such hermeneutic of Art XXIII incapacitates the WTO from balancing anti-competitive situations that affect international trade trough the DSB.

During the negotiations, the WTO approached the matter considering solely the harmful effect on trade that private practices might have, more specifically, hard core cartels. The WTO concluded that the hard core cartels and private anti-competitive practices could and did, in fact, "erode the benefits of prior trade reforms" (CLARKE & EVENETT, 1990). Another aspect taken into account was that the enforcement of competition laws was quite prolific in the countries that had adopted competition regulations.

This approximation was not fruitful and lead to confusion during the negotiations. The discussions did not consider that while competition regulation remained local, the international markets grew globally and there was no international regulation on international competition[16]. As a logical consequence, anti-competitive practices (which are broadly defined by the OECD) are deemed to arise in the international markets, and they have, ironically, arisen in the form of trade remedies.

All discussions on the topic have failed. Currently, consensus seems to be harder to reach than ever as competition has been excluded from the agenda of negotiations.

THE SOUTH AFRICAN PANORAMA

As with many other countries, South Africa might be experiencing the problem of having two parallel regulations with moderately similar aims, but with a different scope of reach. On the one hand, South Africa is an enthusiastic producer and enforcer of competition laws and policies locally and gladly agrees to the international commitments of free trade. On the other hand, inside institutions are using the rules of GATT (more specifically the anti dumping agreement and its local implementation statues) to prevent competition from inter-

national economic rivals by hindering their access to the South African market.

This is contradictory and defeats the objects of both the competition policies and the international trade agreements. It is not, however, the worst consequence of South African's conduct with regards to this issue. The Southern African Customs Union is composed by Botswana, Lesotho, Namibia, Swaziland and South Africa. The goods that access South Africa are then available to the member states of such union. Hindering an international competitor's access into the South African market, does not only deprive South African consumers of a variety of products and perhaps a better deal on prices, but also, all the member States of the SACU too.

This case is neuralgic for the future of South Africa as a strong international trader, a growing industry and as the biggest economy of the continent. Also it is very opportune for the international debate about competition regulations in international trade. That is why the attitude and actions taken by the South African government over this topic will have international consequences in a matter that is sensitive due to the diverse and powerful interests that are vigilant to the legal developments surrounding it and the economic consequences that those developments entail.

The time is ripe now for South Africa to internally balance the competition v antidumping issue that the situation has created. Alternatively, South Africa may follow the international trend and keep being part of the problem. This case is a great opportunity for the regulators to include competition criteria in their anti-dumping investigations and to openly accept free trade, even at the cost of not protecting members of the local industry. It is about time to start seeing the national industry flourish by the good quality of its products, their competitive prices and their persuasive marketing strategies rather than by their legal slyness.

The decision of this case lies ultimately in the Minister of Finance, but the responsibility of establishing a precedent that provides a competitive environment for the economic agents inside *and* outside the borders of South Africa is a collective responsibility where government, industries and citizens should be involved.

South Africa can then, play an active role in further negotiations in the WTO and help competition return to the agenda in this organ.

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3 The International Trade and Administration Act (2002) established and created the duties of the ITAC. The ITAC replaced the Board of tariffs and Trade, former authority in the matter.

4 Bridon International UK was originally formed in 1924 from an amalgamation of wire rope producers, the earliest of which date back to the late 18th Century. Bridon is now a major supplier to key industries throughout the World with numerous strategically positioned global operations. Bridon has now been acquired by Melrose PLC in 2008, a specialist manufacturing investor listed on the London Stock Exchange. http://www.bridon.com/live/about_us.htm.

5 SCAW South Africa v. International Trade Administration Commission. North Gauteng High Court. (5th Jan 2009)

6 Supra 3.

7 Scaw's operations are housed in two companies, Scaw South Africa (Pty) Limited and Scaw International Sarl. Scaw South Africa (Pty) is controlled by its majority shareholder Anglo American, and has a BEE ownership of 21.5%. Scaw International is a wholly-owned subsidiary of Anglo American. http://www.scaw.co.za/co_profile.php.

8 The "Like Product Test" is not necessary in this case as the products are identical in nature and use.

9 SCAW South Africa v. International Trade Administration Commission. North Gauteng High Court. (5th Jan 2009).

10 These goods were never proven to be dumped.

11 Fishing Rope was the only good that was dumped at the moment of the imposition of the original sanction.

12 US — Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan (DS184).

13 Supra JANOW.

14 Competition is one of the "Singapore Issues" that were launched at the Singapore Ministerial, but then it was abandoned in further negotiations during the Doha Round.

15 Japan- Measures affecting Consumer Photographic Film and paper WT/DS44/R

16 See - VON FINCKENSTEIN, KONRAD (2001).