

The effects of the South African anti-dumping and anti-competition measures upon foreign direct investment

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Keywords

Anti-Dumping, anti-competition, Domestic Industry, Foreign direct investment, Divestment, Protection, Tariffs

Abstract

Since the dawn of democracy South Africa has embarked in a process of dismantling protectionist business and trade policies, and made the country's stream of commerce one of the preferred globally. The country's sound competition and trade policies, natural resource endowments, market size and regional influence, attracted foreign business and foreign direct investment (FDI). Equally the country has been under pressure to protect the domestic industries from injurious competition and business, through sector specific laws, anti-dumping and countervailing duties laws, investment and competition regime. The concern has been the likelihood of the introduction of trade and competition barriers, and the alienation of FDI. This paper critically examines the impact the country's antidumping and competition law and practice upon foreign direct investment. Domestic industries have never been shy file anti-dumping and anti-competition suits against foreign companies, sometimes even against the public interest outcry. Relevant examples of these suits include the famous Wal-Mart anti-competition case, and recently the Brazilian frozen fowl meat anti-dumping case.

Introduction

Since the dawn of democracy South Africa has embarked in an intensive process of dismantling protectionist business and trade policies, and made the country's stream of commerce one of the preferred by investors globally. The country's sound competition and trade policies, natural resource endowments, market size and regional influence, attracted foreign business and foreign direct investment (FDI). FDI herein refers to specifically "relatively longer term, committed capital, and with 'patient' investors" (Howkins and Lockwood, 2001). And excludes investment in bonds, portfolio inflows, and investments that are made in shares on the Johannesburg Securities Exchange (JSE) due to the fact that they involve capital that is not committed and can be repatriated with ease. Arguably, FDI play a significant role in the development of South Africa's economy. This important role of FDI has been acknowledged in the country's economic strategies and policies including particularly the 1996 Growth, Employment and Redistribution Strategy. South Africa has relied on FDI in order to supplement national savings by capital inflows and promote economic development. It is one of the forms of capital flows which contribute significantly to the gross domestic product (GDP) of a country, in different sectors, although most of the FDI has been in the area of mergers and acquisitions (Mosoti 2003).

But this form of capital flow, and other trade transacting, is subject to other trade and business related policies such as the anti-dumping and competition policies. The country has been under pressure to protect the domestic industries from injurious competition and business, through sector specific laws, anti-dumping and countervailing duties laws, investment and

competition regime. The concern has been the introduction of trade and competition barriers, and the alienation of FDI. This paper critically examines the effects the country's antidumping and competition law and practice on FDI. From the onset one should note that there are indeed areas of interaction between anti-dumping law and competition law because at the heart of the two is the theory of perfectly competitive markets developed by economists since as early as the eighteenth century.

1.2 Methodological and Information Sources Notes

This study uses a qualitative research approach, this involves building a complex, holistic picture and reporting on detail views of informants and contained in different sources. These sources include but not limited to various international legislations, judicial decisions, journals, papers, information from the internet and other necessary reading materials. The qualitative approach chosen as relevant and most appropriate for the topic under investigation because it is interpretivist and constructionist. It allowed the thorough interrogation of issues and the exploration. Most importantly the approach chosen allowed the researcher to employ analytical, critical and the comparative approach in addressing the issues in question. Use was made of the literary library sources in particular, the primary sources that were examined include South African Competition Act of 1998; International Trade Administration Act (ITA Act) of 2002; Customs and Excise Act and WTO agreements in particular *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, (hereafter AD Agreement); Article VI of the 1994 *General Agreement on Tariffs and Trade* (hereafter GATT); and judicial decisions. Secondary sources in the form of academic writings such as books and journals were also consulted. Abstracts from the subject specific journals were critically appraised and the full article sought and read if the abstract was considered robust and relevant.

2. South Africa's Anti-dumping and Competition Law

2.1 General

In South Africa the anti-dumping regime is set out in the ITA Act; the Anti-Dumping Regulations of 2003 (hereafter ADR), which are in fact second-tier legislation implementing the ITAA; and in the Customs and Excise Act (Brink, 2004; Sibanda, 2011). The anti-dumping administration is done by the International Trade Administration Commission (ITAC), in conjunction and consultation with other government departments including the South African Revenue Services (SARS), and the Departments of Trade and Industries (DTI). The current anti-dumping law implements South Africa's obligations under AD Agreement, and GATT. Competition is regulated under the framework established by the Competition Act of 1998.

2.2 Effects of Anti-Dumping Measures

South Africa, one of the one of the growing and prolific users of anti-dumping measures as high preference measures for the sometimes alarming dumping of goods in her stream of commerce (Sibanda, 2011; Tao, 2006). The country's lack of hesitation in engaging its anti-dumping measures is said to date back to 1958, when South Africa was one of the 23 first contracting parties to GATT of 1947. According to Macroy *et al* (2005, p.45) South Africa counted for 32 of the 37 anti-dumping measures in force at the time.

Antidumping law is limited with respect to the scope of conduct prohibited. It prohibits only conduct defined as "dumping." In antidumping law, dumping is said to occur when a manufacturer exports its product at a price (i.e. the 'export price') which is below the price at

which the product is sold for in the market of origin (i.e. the 'normal value'). Article 2.1 of the AD Agreement specifically states that

...a product is to be considered as being dumped, i.e., introduced to the commerce of another country at less than normal value, if the export price of the product exported from one country to another is less than the comparable price, in the course of trade, for the like product when destined for consumption in the exporting country." Dumping, without more, is not prohibited. According to the provisions of Article 2.1 of the AD Agreement, which is restated in section 1(2) of ITA Act, dumping is prohibited only if it is deemed to cause "material injury" to market in which the product is exported (i.e. the 'domestic market'). In fact, there are many definitions that can be provided for dumping most of which depend on the rationale or the reason for the dumping of goods. And in competition parlance dumping is a form of price discrimination (Sibanda, 2013b). Further, in the application of antidumping law, injury to domestic market is synonymous with injury to domestic producers. To establish a breach under antidumping law, therefore, the authority needs to demonstrate injury only to domestic producers. Accordingly, enforcing antidumping law safeguards the welfare of domestic producers and not necessarily that of consumers.

However, in South Africa consumers may also be interested parties to anti-dumping investigations, thus, the law and practice in South Africa covers also the protection of consumers albeit in not explicit terms (Sibanda, 2013.a). From the numerous anti-dumping cases initiated and anti-dumping measures imposed it is clear that they may be good reasons justifying the country's un-wavering use of its anti-dumping law. These reasons may be socio-economic reasons designed to protect domestic industries and consumers (Sibanda, 2011).

Domestic industries have never been shy to file anti-dumping suits against foreign companies, sometimes even against the public interest outcry. A case in point is the Brazilian frozen fowl meat anti-dumping case (see Sibanda, 2013b) that attracted a lot of interest, in particular to consumers as group of people in the periphery that will also be adversely affected by the activities of multinational corporations (MNCs) in the South African stream of commerce. In the case concerned the threat posed to the domestic industry by the imports was lowly priced chicken products from Brazil. On 21 June 2012 Brazil challenged of the anti-dumping duties South Africa imposed on Brazilian chicken. This request was with respect to South Africa's preliminary determination and the imposition of provisional anti-dumping duties on frozen meat of fowls of the species *Gallus Domesticus*, whole bird and boneless cuts, originating in or imported from Brazil, which were published in the ITAC Report No. 389.

According to the ITAC's preliminary determination, the information submitted by interested parties and considered showed that there was dumping of products imported from Brazil, and that the SACU chicken producers had suffered material injury from the dumped products in the form of a substantial decline in profits, price under-cutting, price suppression, declining output volume, reduced market share, decrease in growth of revenue, and under-utilisation of production capacity, and that the injury suffered by the SACU industry was causally linked to the dumped chicken products originating in or imported from Brazil. The ITAC subsequently requested SARS to impose provisional payments. The ITAC's finding of the dumping margin of 6.53 percent ex-factory export price, based on the weighted average of four types of boneless cuts sold by the exported in its domestic and the SACU market.

In the *Increase in the Rates of Custom Duty on Frozen Meat Fowls of the Gallus Domesticus: Whole Birds, Boneless Cuts, Bone-In Portions, Carcasses and Offal*, ITAC Report No. 442 (hereinafter ITAC Report No. 442), the DTI had to consider and make a determination if it is desirable to increase the current tax on imported poultry products an application by South African Poultry

Association (SAPA) on behalf of its members to, and offal. On 30 September 2013 the DTI brought into effect significant poultry tariffs increases, which applied to the Southern African Customs Union (SACU) but not to imports from the European Union, with which South Africa has a trade and co-operation agreement (ITAC Report No 442, p.17). The tariffs were raised on several imported chicken by 8.75 percentage points on average, and 82 percentages on whole birds from the 27 percentage in 2012 to stabilise the balance between poultry supply and demand, and give some protection to domestic producers. Tariff for boneless cuts increased from 5% to 12%. And the tariff on carcasses increased from 27% to 31% and for offal jumped from 27% to 30%. The new regime is that the import tariff will be changed from a specific duty of 220 cents per kilogram to an ad valorem duty of 37%, has remarked the Honourable Minister of DTI, Mr Rob Davies, announcing the increases in October 2013. According to Minister Davies the DTI's decision to increase tariffs was informed by the drop "in the production of poultry products in the whole of SACU in 2010 - 2012 while imports increased by 61-million kilograms". And the tariff support was regarded as a measure to put SACU producers in "similar competitive footing as their counterparts abroad" (ITAC Report No 442, p.17).

Currently the South African chicken industry which includes major companies such as Austral South Africa, Country Bird Holdings, RCL Foods, formerly Rainbow Chicken, and Afgri South Africa, employs between 48,000 and 50,000 people directly and another 60,000 indirectly. There is a further 18,000 people who are employed in the grain industry that supply chicken feed (Sibanda, 2013a p.787-8). In *casu* it was inevitable that South Africa had to act against imports that were causing material injury or threatened to cause material injury to the domestic chicken industry. It is also instructive to note that poultry imports are reportedly also one of South Africa's critical revenue generators of up to R30bn in farm-gate revenue and about R1bn in corporate taxes. For instance in 2009 South Africa was reported to have imported 66,000 tons of chicken leg-quarters. And the figure rose to 162,000 tons in 2012 (Ensor, 2013). According to Esterhuizen (2013), the value of poultry meat imports in 2012 was estimated at \$US412 million and \$US374 million in 2011. Be that as it may, the two cases are one of a few decisions the South African government had to take in the interest of the protection of its market place.

2.3 Effects of Anti-Competition Measures

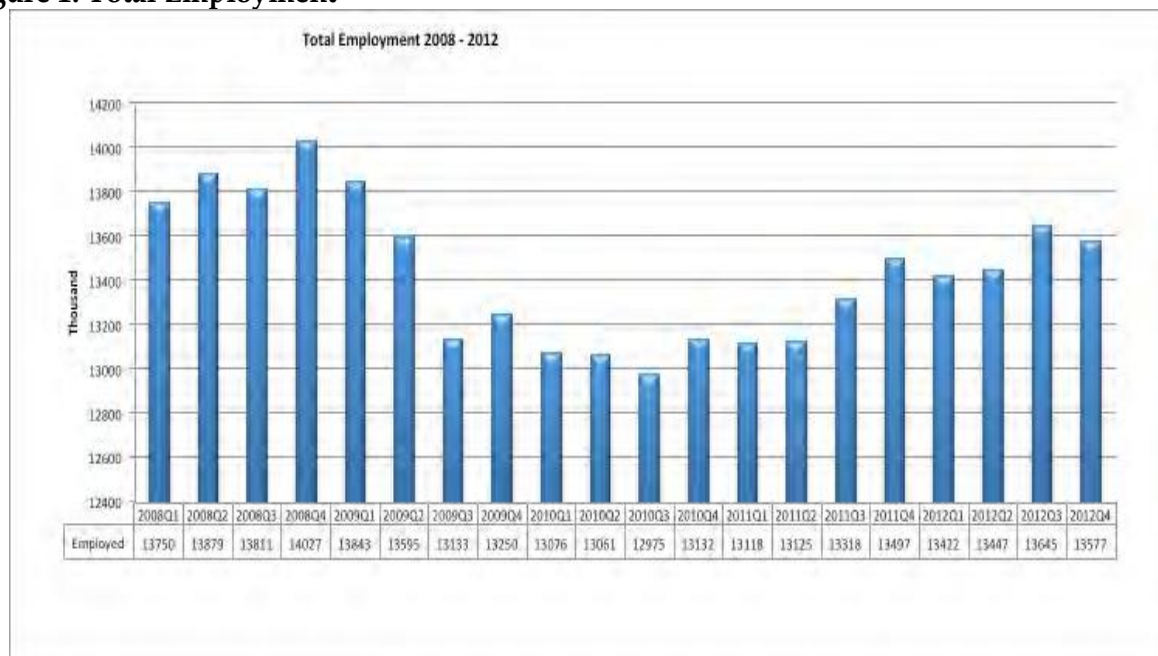
The Competition Act is one of the significant legislation in South Africa that reformed the country's competition legislation in line with those in comparable jurisdictions such as the European Union, US and Canadian (Sibanda, 2001). The Act attacks anti-competition conducts; monopolies and abuse of dominant positions. It also determines the legality of mergers – be it horizontal mergers, vertical mergers, or conglomerate mergers. The Competition Commission is responsible for investigating and evaluating mergers and prohibited practices. It has the power to disallow small and intermediate mergers, and makes recommendations on larger mergers to the Competition Tribunal. The commission is independent but its decisions may be appealed to the Competition Tribunal and the Competition Appeal Court.

The importance of the competition measures is to ensure that the investment in South Africa does not put domestic industries at a competitive disadvantage; and that consumers are not placed at a disadvantage. The case in point is the *Walmart/Massmart* merger case. The *Walmart/Massmart* merger dispute in 2012 was one of the FDI in South Africa that caught controversy, with a potential of chilling effect on investors. This began with the acquisition of 51% stake in Massmart by Walmart. The latter at the time was known to be the second-largest distributor of consumer goods in Africa, which generated 98 percent of its revenue, is generated in South Africa (Kruger 2012, p.2). The dispute revealed the tension between the social socio-

economic dimension of competition policy in South Africa and the investment attraction drive. The Walmart-Massmart merger was met with political, economic and social challenges. In particular, the national competition tribunal invoked the mandate in the Competition Act to ensure that jobs are not lost when it 503 workers who had been retrenched due to the merger; and secured an arrangement that *Walmart/Massmart* establish R100 million programme for the development of local South African suppliers, including SMMEs. The conditions imposed in part seek to align regulatory frameworks with the Government's objectives of job creation, localisation, industrialisation, skills development and poverty reduction (DTI, 2013).

It should be noted that South Africa is one of the countries that is struggling with the fluctuating rating of employment. According to the DTI (2013) the South African economy "experienced weak employment growth during the financial year under review. Employment grew by 80 000 new jobs, that is 0,6% from 13.5 million in 2011 to 13.6 million in 2012 (Figure 1). Growth was supported by an increase of 126 000 in community and social services, 65 000 in finance and other business services, and 55 000 jobs in agriculture. However, these gains were offset by the shedding of jobs by other sectors, led by the trade sector, which shed 139 000 jobs." (p.39). This is the same period the *Walmart/Massmart* dispute played itself out.

Figure 1: Total Employment



But, the type of conditions imposed as those in decisions as the *Walmart/Massmart* merger ruling in merger transactions are becoming reference point by foreign investors when considering South Africa as their investment destination. More problematic is when these policies that are required to interact with FDIs are uncertain or create the investment unfriendly environment. For instance the growing labour market instability due to industrial actions may militate against increased FDIs.

The issue can be aggravated when there is a perception, rightly or wrongly, of the unwarranted intervention by Government. Kruger (2012) argued that the intervention of departments in the *Massmart/Walmart* merger had the perfect elements of attracting the attention of the WTO paving a way for a case to be made against South Africa before the WTO under GATS, or alternatively under GATT and TRIMS, while GATT Article III and TRIMS Article 2 deal with good in particular put into question the legality of conditions imposed on the merging

parties. GATS Articles II and XVII deals with non-discrimination in the area of trade in services. The obligation of national treatment prohibits discriminating between foreign and domestic products, investments, or investors. The view, supported by the Competition Tribunal, is that provisions under GATS, GATT and TRIMS influence the ability of the South African government to impose performance requirements on multinationals and foreign companies. According to the Competition Tribunal stricter requirements such as those protecting local suppliers and labour rights "could violate the country's trade obligations" in the WTO. Kruger (2012:9) makes reference to the WTO Panel decision in *Indonesia- Autos*, in which the Canadian local content requirement was ruled as inconsistent with TRIMS. Indeed some of the conditions set such as quantitative restrictions (QRs) – be it explicit limits or quotas – on the quantity of goods that can be imported or exported during a specified time period must particularly be aligned to the requirements of the WTO agreements. GATT Article XI generally prohibits the use of quantitative restrictions, except under conditions specified by other GATT article. For instance, GATT Article XIII provides that QRs whenever applied should be non-discriminatory. The foreign investors in *Walmart/Massmart* merger alleged that the conditions of the merger were discriminatory; GATT Article XIX South Africa must show that quotas are intended to safeguard domestic industries from injury or damage caused by the surge of imports; GATT Article XX would allow such QRs if they are imposed for reasons of national security; GATT Articles XII and XVIII provide that quotas may be imposed for balance-of-payments (BoP) reasons under conditions laid out in GATT Article XVI; GATT Article XX provides for general exceptions by allowing special measures to apply for public health, objects of archaeological or historic interest, and numerous other categories of goods.

3. Conclusion

Even though the exact nature of FDI contribution in the economic development of a country remains uncertain and also questionable (See Charveriat et al, 2003; Cosbey, 2002; Cosbey, 2005), there is no denying the important contribution FDI has had and continues to have on the South African economy. Clearly anti-dumping and anti-competition measures have impact on the inflow of FDI. But to address the issue is like walking on a tight rope over a grand canyon. To begin with, South Africa still experiences dominance of some firms and low effective competition in certain sectors. Therefore, there still a need of other policies such as industrial and environmental policies to interact with FDIs. But, from a competition point of view the investment performance requirement – that is, special conditions imposed on FDI by South Africa as a recipient government, sometimes requiring commitments to export certain percentage of the output, to purchase specified supplies locally, or to safeguard the employment of a specified percentage of local labour and management – this is becoming a concern as it was the case in *Massmart/Walmart* merger. It may be regarded as a restrictive business requirement and prima facie rendering the matter vulnerable to consideration by the WTO.

The Brazilian chicken tariff increases may also be fouled as too excessive and thus having the unintended consequence of driving away FDI in the chicken industry. Such anti-dumping measures or measures resulting from anti-dumping action may lead to MNCs diverting their investment to a third country; also important to note is that anti-dumping measures are easy to be offset. If they have subsidiaries in the host country, the MNE may resort to transfer pricing to offset the AD effects, thus leading to collusion effect. The macro analysis of the behavior of investors faced with anti-dumping measures points to a possible movement from upper-stream to downstream when facing, and the transfer pricing designed to circumvent anti-dumping as a barrier of investments.

In sum, it is important for South Africa to have recourse to contingent measures to protect its industries from injurious investment and trade activities. It is equally important that the use of such measures are used judiciously and not in haste because the country can use them at the irreversible expense of FDI. Also, such measures may have an impact on consumers. One of the concerns of the tariff hikes in the Brazil poultry dispute was that it may have negative effect on consumers in a form of price hikes; consequent shrinking of food security in the country. In my view, it is not virtuous for any country if the value of FDI is representing 100% of the country's GDP in a particular sector, which was gradually becoming a case in the Brazilian dispute. Trends in poultry meet import in South Africa in 1996 – 2013 by Global Trade Atlas shows that poultry import from Brazil stood at 53 in 2010 of the total imports 57 in 2011; and rose to astounding 73% in 2013.

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