

# The roles of the Southern African Customs Union Agreement, the international trade administration commission and the minister of trade and industry in the regulation of South Africa's international trade

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## 1 Introduction

South Africa is a member of the oldest customs union in the world, the Southern African Customs Union.<sup>1</sup> The other members are Botswana, Lesotho, Namibia and Swaziland.<sup>2</sup> The most recent agreement setting out the rules and procedures regarding trade in, to and from the Southern African Customs Union is the Southern African Customs Union Agreement of 2002, which was signed by the heads of state or their representatives on 21 October 2002<sup>3</sup> and promulgated as part of South African municipal law on 2 July 2004.<sup>4</sup> The objectives of the Southern African Customs Union Agreement, which entered into force on 15 July 2004,<sup>5</sup> are:

- “(a) to facilitate the cross-border movement of goods between the member states;
- (b) to create effective, transparent and democratic institutions which will ensure equitable trade benefits to member states;
- (c) to promote conditions of fair competition in the common customs area;
- (d) to substantially increase investment opportunities in the common customs area;
- (e) to enhance the economic development, diversification, industrialization and competitiveness of member states;
- (f) to promote the integration of member states into the global economy through enhanced trade and investment;

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<sup>1</sup> See <http://www.sacu.int> (24-02-2013); WTO *Trade Policy Review Southern African Customs Union* WT/TRR/S/114 (24-03-2003). Note that the Southern African Customs Union, which dates back to 1910, was preceded by the South African Customs Union Convention (with “South Africa” describing the region rather than the country that was to be established at a later stage) – see McCarthy “A perspective on common industrial policies for the member states of the Southern African Customs Union” (Tralac Working Paper S13WP01/2013) 2.

<sup>2</sup> See a 5 of the Southern African Customs Union Agreement 2002, available at <http://sacu.int/main.php?id=468> (21-03-2013). See also Mathis *The Southern African Custom Union (SACU) Regional Cooperation Framework on Competition Policy and Unfair Trade Practices* (2005) 5.

<sup>3</sup> See the Southern African Customs Union Agreement 2002, <http://sacu.int/main.php?id=468> (21-03-2013). See also Mathis (n 2) 5.

<sup>4</sup> It was promulgated under s 49(1)(a), read with s 49(5), of the Customs and Excise Act 91 of 1964, as part 4 to sch 10 of that act. See GN 800 in GG 26537 of 2-07-2004.

<sup>5</sup> See a 46 of the Southern African Customs Union Agreement 2002; *Clear Enterprises (Pty) Ltd v Commissioner for the South African Revenue Services* (757/10) [2011] ZASCA 164 par 8; WTO *Trade Policy Review, Report of the Secretariat, Southern African Customs Union, Revision* WT/TRR/S/222/Rev 1 (14 Dec 2009) 5.

- (g) to facilitate the equitable sharing of revenue arising from customs and excise duties levied by member states; and
- (h) to facilitate the development of common policies and strategies.<sup>6</sup>

The Southern African Customs Union Agreement makes provision for the development of common policies relating to *inter alia* industrial development,<sup>7</sup> unfair trade practices,<sup>8</sup> the establishment of national bodies in each of the five member states to conduct investigations on matters related to trade and, specifically, on matters affecting customs duties,<sup>9</sup> including the level of customs tariffs, trade remedies and industrial and other rebates.<sup>10</sup> In each instance, the national body conducting an investigation is required to make a recommendation to the Southern African customs union tariff board,<sup>11</sup> which, in turn, will make a recommendation to the Southern African Customs Union council of ministers,<sup>12</sup> which will make a final decision to be implemented by each of the member states.<sup>13</sup> The council of ministers is the “supreme decision making authority on SACU matters”.<sup>14</sup> The Southern African Customs Union is to assist the member states “with the establishment of common procedures and technical capacity to ensure effective, efficient and transparent functioning of National Bodies”.<sup>15</sup> In the meantime, South Africa determines tariff, including trade remedies, policy on behalf of the Southern African Customs Union<sup>16</sup> and Botswana, Lesotho, Namibia and Swaziland impose any tariff and trade remedy amendments decided on by South Africa,<sup>17</sup> although these countries are in the process of establishing their own national bodies.<sup>18</sup>

South Africa’s national body is the international trade administration Commission, which is responsible for all tariff and trade remedy investigations, as well as import and export control.<sup>19</sup> It was established by the International Trade Administration Act,<sup>20</sup> to which the Southern African Customs Union Agreement 2002, once ratified, was supposed to be annexed.<sup>21</sup> The International Trade Administration Act provides that certain provisions of the act “may not

<sup>6</sup> a 2 of the Southern African Customs Union Agreement 2002. See also WTO (n 5) 6.

<sup>7</sup> a 2(h) and 38 of the Southern African Customs Union Agreement.

<sup>8</sup> a 2(h) and 41 of the Southern African Customs Union Agreement. See also WTO (n 5) vii.

<sup>9</sup> Note that for purposes of this article, any reference to “duties” or “customs duties” is to be understood as a reference to the tariffs imposed following tariff investigations (normal customs duties, industrial rebates and the like), as well as anti-dumping, countervailing and safeguard duties, while a reference to “tariffs” excludes anti-dumping, countervailing and safeguard duties.

<sup>10</sup> a 14.1 of the Southern African Customs Union Agreement. For more information on the working of the national bodies and the tariff board, see eg Brink *A Theoretical Framework for Anti-dumping Law in South Africa* (2004 thesis, UP) 913-914.

<sup>11</sup> a 14.2 of the Southern African Customs Union Agreement. The tariff board is established under a 7(d) of the Southern African Customs Union Agreement.

<sup>12</sup> a 11.2 of the Southern African Customs Union Agreement. See also WTO (n 5) 6.

<sup>13</sup> a 8.7 of the Southern African Customs Union Agreement.

<sup>14</sup> a 8.1 of the Southern African Customs Union Agreement. See also WTO (n 5) 6.

<sup>15</sup> a 14.3 of the Southern African Customs Union Agreement.

<sup>16</sup> See eg WTO (n 5) 7.

<sup>17</sup> WTO (n 5) viii and 27.

<sup>18</sup> *idem*. See also SACU Tender no SACU/007/2013/O *Development of training materials related to building the capacity of Botswana, Lesotho, Namibia & Swaziland to establish and operate their national bodies and the SACU tariff board*, available at [http://www.sacu.int/docs/tenders/2013/sacu007\\_2013\\_O.pdf](http://www.sacu.int/docs/tenders/2013/sacu007_2013_O.pdf) (21-03-2013).

<sup>19</sup> See the International Trade Administration Act 71 of 2002.

<sup>20</sup> International Trade Administration Act 71 of 2002.

<sup>21</sup> See sch 1 to the International Trade Administration Act.

come into operation until the Southern African Customs Union Agreement has become law in the Republic”<sup>22</sup> Until such time as these provisions came into operation, the international trade administration commission had to apply certain provisions of the Board on Tariffs and Trade Act (board act)<sup>23</sup> as though that act had not been repealed.<sup>24</sup> However, despite the Southern African Customs Union Agreement forming part of South Africa’s municipal law now, the international trade administration commission still applies certain provisions of the board act and regards certain of the International Trade Administration Act provisions as being suspended.

This article considers the requirements for international agreements to obtain municipal law status in South Africa; whether the suspended provisions of the International Trade Administration Act have come into operation; and what the effect would be on the International Trade Administration Commission’s procedures and tariff and trade remedy investigations if such provisions have come into effect.

## 2 *International agreements*

### 2.1 Requirements for an international agreement to become part of South African municipal law

The constitution<sup>25</sup> specifically deals with international agreements and provides how such agreements can become part of South African municipal law.<sup>26</sup> The constitution provides that South Africa is bound by international agreements only after such agreements have been ratified by parliament,<sup>27</sup> unless the particular agreement is of a technical, administrative or executive nature, or otherwise an agreement that does not require either ratification or accession<sup>28</sup> and is not inconsistent with the constitution.<sup>29</sup> Other than self-executing agreements, an

<sup>22</sup> s 64(2) of the International Trade Administration Act. Given the wording of the provision it is not clear whether the suspended provisions would automatically come into place when the Southern African Customs Union Agreement 2002 became law in South Africa or whether a proclamation would have to be issued indicating their date of entry into force.

<sup>23</sup> Board on Tariffs and Trade Act 107 of 1986.

<sup>24</sup> item 2(1) of sch 2 to the International Trade Administration Act.

<sup>25</sup> Constitution of the Republic of South Africa, 1996.

<sup>26</sup> s 231 of the constitution. See also *Progress Office Machines CC v South African Revenue Services* 2008 2 SA 13 (SCA) par 6.

<sup>27</sup> S 231(2) of the constitution provides that “[a]n international agreement binds the Republic only after it has been approved by both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3)”. See also Lansdowne *Dugard International Law A South African Perspective* (2000) 54-58; and Olivier “The status of international law in South African municipal law: section 231 of the 1993 constitution” 1993/94 *South African Yearbook of International Law* 10.

<sup>28</sup> S 231(3) of the constitution provides that “[a]n international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time”. See also Lansdowne (n 27) 56.

<sup>29</sup> Olivier (n 27) 10.

international agreement only becomes part of South African municipal law once it has been so enacted by national law.<sup>30</sup>

It also provides that South African courts have to take into consideration international law, including international agreements, even where such law and agreements do not form part of South Africa's municipal law, but only to the extent that international law is not contradictory to South African legislation<sup>31</sup> and that courts are to "prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law".<sup>32</sup> However, courts are obliged<sup>33</sup> to consider international law when interpreting the bill of rights.<sup>34</sup> In the *Brenco* case, Zulman JA held:

"The point is not that [the investigating authority] was obliged as a matter of law to comply with the two international agreements in question but that international practice is of some assistance in assessing the fairness of the practices of [the investigating authority] in conducting anti-dumping investigations."<sup>35</sup>

In *International Trade Administration Commission v SCAW*<sup>36</sup> the constitutional court held that South Africa, and hence the international trade administration commission, incurs international obligations as a result of our membership of the WTO,<sup>37</sup> while the supreme court of appeal also held in *Progress Office Machines*<sup>38</sup> that the WTO agreement is binding on South Africa.<sup>39</sup> The supreme court of appeal, however, made it clear that the international law has not become part of our municipal law and that regard must be had specifically to South African legislation.<sup>40</sup> To date, there is no jurisprudence on the application of the Southern African Customs Union Agreement in South Africa.<sup>41</sup> However, although the international trade administration commission appears to regard the agreement as part of international law only, it is submitted that it is in fact part of South Africa's municipal law.

<sup>30</sup> S 231(4) of the constitution provides that "[a]ny international agreement becomes law in the Republic when it is enacted into law by national legislation, but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament". See also *Lansdowne* (n 27) 55; *Azanian People's Organisation (AZAPO) v President of the Republic of South Africa* 1996 4 SA 671 (CC) 688. The mere publication of an international agreement for public information does not incorporate such agreement into municipal law. See *Lansdowne* (n 27) 57; *S v Tshabeleni* 1969 1 SA 153 (A).

<sup>31</sup> s 233 of the constitution. See also Olivier (n 27) 7; *Chairman Board on Tariffs and Trade v Brenco Inc* 2001 4 SA 511 (SCA).

<sup>32</sup> s 233 of the constitution. See also Olivier (n 27) 7; *Chairman Board on Tariffs and Trade v Brenco Inc* 2001 4 SA 511 (SCA).

<sup>33</sup> See *Burns Administrative Law under the 1996 Constitution* (2002) 49.

<sup>34</sup> S 39(1) of the constitution 1996 provides as follows: "When interpreting the Bill of Rights, a court, tribunal or forum ... (b) must consider international law; and (c) may consider foreign law" (own emphasis).

<sup>35</sup> *Chairman Board on Tariffs and Trade v Brenco Inc* 2001 4 SA 511 (SCA) 526.

<sup>36</sup> *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2010 5 BCLR 457 (CC) par 6.

<sup>37</sup> par 2 and 25.

<sup>38</sup> the *Progress Office Machines* case (n 38).

<sup>39</sup> par 6.

<sup>40</sup> the *Progress Office Machines* case (n 38) par 6.

<sup>41</sup> In *Clear Enterprises* (n 5) the court referred to the Southern African Customs Union Agreement in passing but did not rule on its applicability or whether it was part of South African municipal law.

## 2.2 Status of Southern African Customs Union Agreement in South African municipal law

The Southern African Customs Union Agreement opened for ratification on 21 October 2002.<sup>42</sup> The Southern African Customs Union Agreement came into force in all member states 30 days after the last member lodged its instruments of ratification with the Southern African Customs Union Secretariat.<sup>43</sup> South Africa was the last member to lodge such instruments on 15 June 2004.<sup>44</sup> The Southern African Customs Union Agreement therefore took effect on 15 July 2004.<sup>45</sup> Under this Agreement South Africa incurred international obligations *vis-à-vis* its Southern African Customs Union partners, including for payments to be made under the common revenue pool.<sup>46</sup> Despite the International Trade Administration Act specifically excluding the Southern African Customs Union Agreement from being considered part of the International Trade Administration Act,<sup>47</sup> it also specifically provides that the Southern African Customs Union Agreement should be appended as schedule 1 to the International Trade Administration Act.<sup>48</sup> It is trite that this was never done.

However, on 2 July 2004, that is, after ratification but before the Agreement came into force, the Southern African Customs Union Agreement was promulgated<sup>49</sup> as part 4 to schedule 10 to the Customs and Excise Act.<sup>50</sup> There can thus be no doubt that the Southern African Customs Union Agreement forms part of South Africa's municipal law. The only question that remains, therefore, is whether the suspended provisions in the International Trade Administration Act become operative upon this fact.

## 3 *The International Trade Administration Act and the Southern African Customs Union Agreement*

### 3.1 Introduction

In terms of the International Trade Administration Act, the international trade administration commission is responsible for all aspects of tariff, anti-dumping, countervailing and safeguard investigations, as well as for import and export control.<sup>51</sup> As will be indicated hereunder, it may receive such applications,<sup>52</sup> must consider and evaluate such applications,<sup>53</sup> may request the imposition of provisional

<sup>42</sup> See item 1.1 of annex B to the Southern African Customs Union Agreement. See also Mathis (n 2) 5; WTO (n 5) 5.

<sup>43</sup> a 46 of the Southern African Customs Union Agreement.

<sup>44</sup> See South Africa's instrument of ratification as signed by the minister of foreign affairs (copy on file with author).

<sup>45</sup> See a 46 of the Southern African Customs Union Agreement 2002; *Clear Enterprises* (n 5) par 8; WTO (n 5) 5.

<sup>46</sup> a 32 and 33 of the Southern African Customs Union Agreement; annex A to the Southern African Customs Union Agreement.

<sup>47</sup> "This Act" is defined in s 1 of the International Trade Administration Act as including "the regulations and Schedules, *other than Schedule 1*" (own emphasis).

<sup>48</sup> See the definition of "Southern African Customs Union Agreement" in s 1(2) of the International Trade Administration Act.

<sup>49</sup> See GN 800 in GG 26537 of 2-07-2004.

<sup>50</sup> Customs and Excise Act 91 of 1964.

<sup>51</sup> s 16(1) and 17 of the International Trade Administration Act.

<sup>52</sup> s 26(1) of the International Trade Administration Act.

<sup>53</sup> s 26(2) of the International Trade Administration Act.

payments<sup>54</sup> and must make recommendations to the Southern african customs union tariff board.<sup>55</sup>

### 3.2 Institutional structure

On 1 June 2003 the international trade administration commission was set up<sup>56</sup> as an independent authority to “foster economic growth and development in order to raise incomes and promote investment and employment”.<sup>57</sup> The international trade administration commission has four divisions, one of which deals with tariff investigations, one with trade remedies, one with import and export control and one with logistics and support.<sup>58</sup> The tariff investigations division is divided into two different directorates, each responsible for certain product categories. The trade remedies division is also divided into two directorates that are both responsible for all aspects of trade remedy (anti-dumping, countervailing and safeguard) investigations,<sup>59</sup> with work allocated to them on the basis of available capacity.

The international trade administration commission, without reference to the minister, may request the commissioner for the South African revenue service to impose provisional anti-dumping, countervailing or safeguard payments,<sup>60</sup> and the commissioner is bound to impose such provisional payments to the extent and for the duration so requested.<sup>61</sup> At present the international trade administration commission makes recommendations to the minister to make a final determination. The minister may accept, reject or refer back the recommendation.<sup>62</sup>

The South African revenue service<sup>63</sup> is also responsible for the implementation and administration of any definitive anti-dumping,<sup>64</sup> countervailing<sup>65</sup> or safeguard duties<sup>66</sup> as well as the imposition and administration of any changes to the customs tariff dispensation, including any rebate provisions.

### 3.3 Applicable legislation

#### 3.3.1 The International Trade Administration Act and the board act

The primary legislation related to trade, and especially international trade, is the International Trade Administration Act, which established the international trade

<sup>54</sup> s 30(5)(a) of the International Trade Administration Act.

<sup>55</sup> s 30(5)(b) of the International Trade Administration Act. See par 3.3 below for more detail.

<sup>56</sup> For a more detailed discussion on the history of the international trade administration commission and its predecessors, see Brink *Anti-dumping in South Africa* (2012) Tralac Working Paper 7-8 and Brink (n 10) 20-21, 690-695 and 709-710.

<sup>57</sup> s 2 of the International Trade Administration Act.

<sup>58</sup> See International Trade Administration Commission *Annual Report 2011/12*.

<sup>59</sup> *ibid*.

<sup>60</sup> s 30(5)(a) of the International Trade Administration Act; s 57A(1) of the Customs Act. Note, however, that s 30 (5)(a) of the International Trade Administration Act has also been suspended by s 64(2).

<sup>61</sup> s 57A(1) of the Customs and Excise Act.

<sup>62</sup> Note that this is still done in terms of s 4(2)(a) of the repealed board act – see the minister’s letters of 13-08-2012 and 21-12-2012 to the international trade administration commission in *Investigation into the alleged dumping of meat of the species Gallus Domesticus, imported from or originating from Brazil* – hereinafter *Poultry (Brazil)*.

<sup>63</sup> Note that any amendment to definitive duties is done on the basis of a request made by the minister of trade and industry to the minister of finance and implemented by the South African revenue service – see s 56(1) of the Customs and Excise Act.

<sup>64</sup> s 55(2)(a) and 56(1) of the Customs and Excise Act.

<sup>65</sup> s 55(2)(a) and 56A(1) of the Customs and Excise Act.

<sup>66</sup> s 55(2)(a) and 57(1) of the Customs and Excise Act.



administration commission.<sup>67</sup> The international trade administration commission is an independent institution subject only to the constitution and the law,<sup>68</sup> policy directives issued by the minister<sup>69</sup> and any functions assigned to it by the minister over and above those referred to in the International Trade Administration Act,<sup>70</sup> including the monitoring of matters that may affect trade and industry.<sup>71</sup> The object of the International Trade Administration Act is to foster economic growth and development in order to raise incomes and promote investment and employment in the Republic and within the common customs area by establishing an efficient and effective system for the administration of international trade subject to the act and the Southern African Customs Union agreement.<sup>72</sup>

The International Trade Administration Act provides that the international trade administration commission is responsible for anti-dumping, countervailing, safeguard and customs tariff investigations.<sup>73</sup> In the definition section it defines a countervailing duty, customs duty, dumping, information that is by nature confidential, the Southern African Customs Union Agreement, safeguard measure and “this Act”, which is defined as including regulations and Schedules to the act, other than Schedule one, that is, excluding the Southern African Customs Union Agreement.<sup>74</sup> It further provides that the international trade administration commission “may investigate, evaluate and determine applications and issue or recommend the issuing<sup>75</sup> of permits or certificates” related to rebate and drawback provisions of the Customs and Excise Act.<sup>76</sup> Next, the act provides that a person may, “in the prescribed manner and form”, apply to the International Trade Administration Commission for an import or export

<sup>67</sup> s 7 of the International Trade Administration Act.

<sup>68</sup> Note that reference is made to “the law” and not “this Act”, which indicates that the international trade administration commission is subject to *all* laws, including the Southern African Customs Union Agreement as part of the Customs and Excise Act. It is noteworthy that the same language is used in s 20(1)(a) of the Competition Act, 89 of 1998, where it is generally accepted that the Competition Commission is not subject to the minister’s powers. See *eg Competition Commission v Federal Mogul Aftermarket Southern Africa (Pty) Ltd* 08/CR/Mar01 par 130-135. In this regard, the constitutional court in *Van Rooyen v The State (General Council of the Bar of South Africa Intervening)* 2002 5 SA 246 (CC) par 106 has held that “[t]he mere fact, however, that the executive and the legislature make or participate in the appointment of judges is not inconsistent with the separation of powers or the judicial independence that the Constitution requires”. Accordingly, the fact that the President appoints the commissioners (s 8(2) of the International Trade Administration Act) does not alter this independence. In addition, neither s 7(2)(a)(i), nor s 7(3), of the International Trade Administration Act has been suspended by s 64(2), which reinforces the independence of the international trade administration commission and confirms that the minister does not have the power to interfere in the processes before the international trade administration commission or with its decisions.

<sup>69</sup> *ibid* s 7(2). The international trade administration commission is also subject to notices issued by the minister under s 7(2)(a)(iii) of the International Trade Administration Act, but these relate to the minister’s powers to regulate imports and exports, *ie* import and export control, and are not relevant to the current discussion.

<sup>70</sup> s 15(1).

<sup>71</sup> s 18(a).

<sup>72</sup> s 2.

<sup>73</sup> s 16(1).

<sup>74</sup> s 1(2).

<sup>75</sup> It is important to note the differentiation between “issue or recommend the issuing” of permits or certificates, as this clearly indicates that the International Trade Administration Commission can either issue a permit or certificate itself or may recommend to another person or institution that such permits or certificates be issued. No specific indication is given as to whom such recommendation would be addressed.

<sup>76</sup> s 17 of the International Trade Administration Act.

control permit;<sup>77</sup> for a rebate permit or certificate in terms of the Customs and Excise Act;<sup>78</sup> the amendment of customs duties, including anti-dumping, countervailing and safeguard duties;<sup>79</sup> or the imposition of safeguard measures other than a customs duty amendment.<sup>80</sup> The international trade administration commission must “evaluate the merits of every application received by it and dispose of each application” according to either part B<sup>81</sup> or C of chapter 4 of the International Trade Administration Act, depending on the type of application.<sup>82</sup> It further provides for certain procedures, including (as happens in all tariff, anti-dumping, countervailing and safeguard matters) the procedures to be followed in cases where the initiation is published in the *Government Gazette*.<sup>83</sup> Although section 30 of the act has been suspended from coming into operation until the Southern African Customs Union Agreement has become law in South Africa, it is important to note that the international trade administration commission applies section 30(1), which requires it to notify the Southern African customs union secretariat of all applications, and section 30(5), which authorises it to request the imposition of provisional payments.<sup>84</sup> This causes uncertainty as to whether the International Trade Administration Commission accepts that the Southern African Customs Union Agreement has become law in South Africa. Since it argues that the sections mentioned in section 64(2) remain suspended until the Southern African Customs Union Agreement has become law in South Africa, there is no basis for the International Trade Administration Commission to apply some of these provisions if it is of the opinion that the provisions have not come into operation. However, if the international trade administration commission does apply the provision on the basis that the council of ministers has requested it to take decisions on the council’s behalf until the tariff board has been properly established, there is no basis for it to argue that the other suspended provisions have not also come into operation or to make recommendations to the minister.

The International Trade Administration Act also defines export price,<sup>85</sup> normal value<sup>86</sup> and subsidised exports;<sup>87</sup> requires that reasonable allowances must be made for differences in terms and conditions of sale, taxation and other differences that affect price comparability in anti-dumping investigations;<sup>88</sup> and the methodology<sup>89</sup> for determining normal value in the case of imports from a non-market economy.

<sup>77</sup> s 26(1)(a).

<sup>78</sup> s 26(1)(b).

<sup>79</sup> s 26(1)(c).

<sup>80</sup> s 26(1)(d).

<sup>81</sup> Part B of ch 4 encompasses s 27-29 and deals exclusively with import and export control and is therefore not relevant to this discussion.

<sup>82</sup> s 26(2) of the International Trade Administration Act.

<sup>83</sup> s 26(3) and (4).

<sup>84</sup> This was confirmed by a source in the Southern African customs union secretariat who has wished to remain anonymous.

<sup>85</sup> s 32(2)(a), 32(5) and 32(6) of the International Trade Administration Act.

<sup>86</sup> s 32(2)(b).

<sup>87</sup> s 32(2)(c).

<sup>88</sup> s 32(3).

<sup>89</sup> s 32(4). Note that this provision has effectively been rendered redundant by the supreme court of appeal’s verdict in *International Trade Administration Commission v South African Tyre Manufacturers Conference (Pty) Ltd* 2011 ZASCA 137 par 27, because Harms AP confused s 32(4) of the International Trade Administration Act and s 32(2)(b)(ii)(bb) thereof (see par 22) and held, it is submitted erroneously, that the China Protocol of Accession did not form part of international law (par 18), when, in fact, it did; and that South Africa was not party to the protocol, when, in fact it clearly was. See Brink “*International Trade Administration Commission v South African Tyre Manufacturers Conference* [2011] ZASCA 137” 2013 *THRHR* 000 for a discussion of this case.



It further provides for the right and procedures to claim confidential treatment of information submitted in confidence and the procedure for other parties to challenge the confidentiality of such information.<sup>90</sup>

The International Trade Administration Act provides that sections 4, 15(3), 16(3), 19, 20, 30, 31 and 46(2) and item 2(3) of schedule 2 may not come into operation until the Southern African Customs Union Agreement has become law in the Republic.<sup>91</sup> This includes that it may not notify the Southern African Customs Union secretariat of any applications it has received,<sup>92</sup> it may not request the imposition of provisional payments<sup>93</sup> and it may not receive any applications for investigations from other member states.<sup>94</sup>

At present the international trade administration commission still conducts investigations<sup>95</sup> on the basis that these provisions remain suspended, even though it now recognises that the Southern African Customs Union Agreement has been promulgated as part of South Africa's municipal law.<sup>96</sup> Accordingly, the international trade administration commission still applies certain provisions of the board act,<sup>97</sup> which it alleges empowers it to investigate "dumping, subsidised export or disruptive competition"<sup>98</sup> and requires it to "report and make recommendations to the Minister" on all such investigations.<sup>99</sup> The board act authorises the minister to "accept or reject such report and recommendations, or refer them back to [the International Trade Administration Commission] for reconsideration".<sup>100</sup> In *International Trade Administration Commission v SCAW* the constitutional court indicated:

"The Act repealed the whole of the BTT Act. However, a number of its provisions have not come into operation. It remains necessary to read its provisions together with the BTT Act because its transitional provisions require that ITAC must investigate, evaluate and report on anti-dumping duties in accordance with the BTT Act as if it had not been repealed. The Act makes it clear

<sup>90</sup> s 33-37 of the International Trade Administration Act.

<sup>91</sup> s 64(2).

<sup>92</sup> s 30(1) of the International Trade Administration Act.

<sup>93</sup> s 30(5)(a) of the International Trade Administration Act.

<sup>94</sup> s 31 of the International Trade Administration Act.

<sup>95</sup> See Brink (n 56) for a detailed discussion of anti-dumping procedures in South Africa.

<sup>96</sup> See the international trade administration commission's replying affidavits in *Association of Meat Importers and Exporters v International Trade Administration Commission* Case 46075/2012 NG (withdrawn) (hereinafter *AMIE v International Trade Administration Commission*). Note that the International Trade Administration Commission argues that the fact that s 64(2) provides that the suspended provisions "may not come into operation" until the Southern African Customs Union Agreement has become law in South Africa, does not mean that it automatically became law once the Southern African Customs Union Agreement became law in South Africa, but that the minister has to publish a date on which these provisions would come into operation. It is submitted that this argument is flawed, as the act specifically provides in s 64(1) that the president must proclaim the date the act comes into operation. Had the drafters intended the minister to have similar powers in respect of s 64(2), they would have so provided.

<sup>97</sup> Item 2(1) of Schedule 2 to the International Trade Administration Act provides that "[b]efore the sections listed in section 64(2) come into operation, the Commission must investigate, and evaluate applications received by it in terms of section 26(1)(c) or (d) in accordance with section 32, read with the Board on Tariffs and Trade Act, as if that Act had not been repealed".

<sup>98</sup> s 4(1)(a)(i) of the board act.

<sup>99</sup> s 4(1)(b) of the board act.

<sup>100</sup> s 4(2)(a) of the board act. In his letter of 13-08-2012 to the international trade administration commission, the minister specifically relied on the provisions of s 4(2)(a) of the board act to refer the international trade administration commission's first recommendation in the *Poultry (Brazil)* investigation back to it for further investigation – see the minister's letters of 13-08-2012 and 21-12-2012 to the international trade administration commission on the public file of the *Poultry (Brazil)* (n 62) investigation.

that International Trade Administration Commission is the successor in title to the Board. More importantly, the transitional provisions preserve the statutory functions of the two Ministers provided for in the BTT Act and the Customs and Excise Act in relation to the determination of anti-dumping duties. The consequence of this is that ITAC is required to investigate and evaluate applications for anti-dumping duties in accordance with section 32 of the Act read with the BTT Act, as if the latter Act had not been repealed.”<sup>101</sup>

However, Moseneke DCJ did not consider the issue, as the fact that the Southern African Customs Union Agreement had been promulgated was never raised before him. In fact, it appears that until October 2012 the international trade administration commission was not aware of the fact that the Southern African Customs Union Agreement had been promulgated as part of South Africa’s municipal law.<sup>102</sup> However, ignorance of the law is no defence, as set out by the appellate division:

“At this stage of our legal development it must be accepted that the cliché that ‘every person is presumed to know the law’ has no ground for its existence and that the view that ‘ignorance of the law is no excuse’ is not legally applicable in the light of the present day concept of mens rea in our law. But the approach that it can be expected of a person who, in a modern State, wherein many facets of the acts and omissions of the legal subject are controlled by legal provisions, involves himself in a particular sphere, that he should keep himself informed of the legal provisions which are applicable to that particular sphere, can be approved.”<sup>103</sup>

The minister, in August and December 2012, on the basis of the repealed board act, first referred back an international trade administration commission recommendation and then rejected its final recommendation.<sup>104</sup> The fact that the international trade administration commission and the minister were not aware that the Southern African Customs Union Agreement 2002 had become part of South Africa’s municipal law cannot be proffered as a defence for applying provisions of the repealed board act.

### 3.3.2 The regulations

In addition to the International Trade Administration Act, the international trade administration commission is subject to four different sets of regulations, being the Anti-Dumping Regulations,<sup>105</sup> the Countervailing Regulations,<sup>106</sup> the Safeguard Regulations,<sup>107</sup> and the Tariff Regulations.<sup>108</sup>

The Anti-Dumping Regulations and the Countervailing Regulations are both divided into five parts, the third of which deals with procedural issues. Despite twenty regulations in each set of regulations dealing with procedural aspects of an

<sup>101</sup> the *International Trade* case (n 36) par 34 (footnotes omitted).

<sup>102</sup> See correspondence between the international trade administration commission and the importers in the *Poultry Brazil* (n 62) investigation, available on the public file.

<sup>103</sup> *S v De Blom* 1977 3 SA 513 (A) 514E-F.

<sup>104</sup> See the minister’s letter of 13-08- 2012 to the international trade administration commission (available on the public file of *Poultry (Brazil)*) referring back its first recommendation in the aforementioned matter; and the minister’s letter of 21-12-2012 to the international trade administration commission rejecting its final recommendation in that matter (also available on the public file).

<sup>105</sup> Promulgated through GN 3197 in GG 25684 of 13-11-2003.

<sup>106</sup> Promulgated through GN 356 in GG 27475 of 15-04-2005.

<sup>107</sup> Promulgated through GN 3197 in GG 26715 of 27-08-2004; amended through GN 662 in GG 27762 of 8-07- 2005.

<sup>108</sup> Promulgated through GN 397 in GG 258767 of 28-04-2006.

investigation,<sup>109</sup> no reference is made to any recommendations to be made to the minister. On the contrary, these regulations specifically provide that other than final decision-making powers, the commission may delegate any of its functions in respect of anti-dumping or countervailing investigations to its investigation staff.<sup>110</sup>

The Safeguard Regulations, in turn, do not contain a single reference to the minister, which means that no provision is made for any recommendations to the minister. On the other hand, the Tariff Regulations specifically provide that the commission will evaluate the merits of an application and shall forward a recommendation, which includes a report setting forth the results of its evaluation, to the minister, unless the provisions of section 64(2) of the main act have come into operation, in which case such submission shall be forwarded to the tariff board.<sup>111</sup>

The Tariff Regulations also provide that other than the decision-making powers concerning the evaluation whether to accept or reject an application as provided for in section 15 and the evaluation of the merits of an application as provided for in section 18, the international trade administration commission may delegate and the commission staff may perform any of the functions in respect of customs tariff investigations provided for in those regulations.<sup>112</sup> There is thus a clear differentiation between decision-making powers in tariff investigations and trade remedy (anti-dumping, countervailing and safeguard) investigations. In trade remedy investigations the international trade administration commission cannot delegate its “final decision-making powers”. Considered in conjunction with the request from the Southern African Customs Union council of ministers that the international trade administration commission take decisions in these (and tariff) matters,<sup>113</sup> it is submitted that this provides evidence that the international trade administration commission, and not the minister, must take the final decision in trade remedy investigations.<sup>114</sup>

#### 4 *The Southern African Customs Union Agreement*

##### 4.1 Introduction

The International Trade Administration Act indicates that the intention was that the Southern African Customs Union Agreement would be promulgated as Schedule 1 to the International Trade Administration Act, despite the fact that in

<sup>109</sup> Anti-Dumping Regulations 21-39.

<sup>110</sup> Anti-Dumping Regulation 67; Countervailing Regulation 67.

<sup>111</sup> Tariff Regulation 18.1.

<sup>112</sup> Tariff Regulation 20.

<sup>113</sup> See International Trade Administration Commission *Annual Report 2006-2007* 40 where it is indicated that “[t]he SACU Council of Ministers at its 7th meeting held in South Africa extended the mandate of ITAC to handle tariff amendments applications and trade remedies investigations until the SACU Tariff Board is operational”. <http://www.itac.org.za/downloads/ITAC%202006-2007%20Annual%20Report.pdf> (21-03-2013). Note that the only more recent annual report on the international trade administration commission’s website is that for 2011-2012, but this makes no reference to the request by the SACU council of ministers but indicates that the international trade administration commission has to conduct its operations “subject to [the International Trade Administration] Act and the Southern African Customs Union (SACU) Agreement”. See International Trade Administration Commission *Annual Report 2011-12* 9, <http://www.itac.org.za/docs/ITAC%20Annual%20Report%202011-2012.pdf> (21-03-2013).

<sup>114</sup> In view of the above, it is further submitted that Tariff Regulation 18.1 is *ultra vires* the International Trade Administration Act as the minister is not empowered under the act to make such decisions and therefore the Regulations cannot abdicate the international trade administration commission’s powers in this regard to the minister.

the International Trade Administration Act “this Act” is defined as excluding such agreement.<sup>115</sup> As indicated above, the international trade administration commission has expressed the opinion that the provisions referred to in section 64(2) of the act will remain suspended until the minister has promulgated the date on which they become operative, indicating that it will continue on the basis that the provisions are suspended and that it has to make recommendations to the minister.<sup>116</sup>

Once the suspended provisions become operative, the international trade administration commission will have to make a final recommendation to the Southern African customs union tariff board.<sup>117</sup> By March 2013 no appointments had been made to the tariff board, making recommendations to this institution an impossibility. The tariff board has to make a final recommendation to the Southern African Customs Union council of ministers,<sup>118</sup> but, as indicated above, the council has delegated this authority to the international trade administration commission.<sup>119</sup>

#### 4.2 Southern African Customs Union Agreement provisions on customs duties

The Southern African Customs Union Agreement directly and indirectly impacts on customs duty investigations. Member states must

“establish specialised, independent and dedicated National Bodies or designate institutions which shall be entrusted with receiving requests for tariff changes and other related Southern African Customs Union issues. The National Bodies will carry out preliminary investigations and recommend any tariff changes necessary to the Tariff Board.”<sup>120</sup>

National bodies must “study, investigate and determine the impact of tariffs”.<sup>121</sup> The international trade administration commission is South Africa’s national body.

The tariff board is an independent institution with full-time or part-time experts drawn from member states<sup>122</sup> and it must consider submissions from the national bodies and make recommendations to the council on the level and changes of customs, anti-dumping, countervailing and safeguard duties on goods imported from outside the common customs area, rebates, refunds and duty drawbacks based on the directives given to it by the council.<sup>123</sup>

The council of ministers is the supreme decision making-authority on customs duties in Southern African Customs Union<sup>124</sup> and is “responsible for the overall policy direction and functioning of Southern African Customs Union institutions, including the formulation of policy mandates, procedures and guidelines for the Southern African Customs Union institutions”.<sup>125</sup> Amongst its various functions,

<sup>115</sup> s 1 of the International Trade Administration Act.

<sup>116</sup> This view, based on internal international trade administration commission discussions, was shared with the author by an International Trade Administration Commission investigating officer on condition of anonymity.

<sup>117</sup> s 30(5)(b) of the International Trade Administration Act.

<sup>118</sup> a 11.2 of the Southern African Customs Union Agreement.

<sup>119</sup> See International Trade Administration Commission *Annual Report 2006-2007* 40, <http://www.itac.org.za/dloads/ITAC%202006-2007%20Annual%20Report.pdf> (21-03- 2013); and WTO (n 5) 27.

<sup>120</sup> a 14.1 of the Southern African Customs Union Agreement.

<sup>121</sup> a 14.2.

<sup>122</sup> a 11.1.

<sup>123</sup> a 11.2.

<sup>124</sup> a 8.1.

<sup>125</sup> a 8.2.

it must approve tariffs, rebates, drawbacks, refunds and trade remedies<sup>126</sup> and must “develop policies and instruments to address unfair trade practices between Member States” and annex such policies and measures to the agreement.<sup>127</sup> All customs tariff decisions must be made by consensus.<sup>128</sup> Member states must implement these final determinations.<sup>129</sup>

Within one month after the Southern African Customs Union Agreement came into force, that is, during August 2004, the council requested the international trade administration commission to take decisions on tariff matters on its behalf, as nobody had been appointed to the tariff board.<sup>130</sup>

### 5 *Minister’s powers and the suspended provisions*

Moseneke DCJ has indicated:

“The Act clothes the Minister with far-reaching authority in relation to trade policy. It includes the power to issue, subject to the constitution and the law, trade policy statements or directives and the power to regulate imports and exports. ITAC exercises its functions subject to these powers of the minister. The minister also wields the power to prescribe regulations in order to give effect to the object of the Act.”<sup>131</sup>

With reference to the constitution, Moseneke DCJ found that the ministers of trade and industry and of finance “exercise executive authority by implementing national legislation”; by “developing and implementing national policy”; and “perform [...] any other executive function” provided for in national legislation<sup>132</sup> and that

“the Act and the BTT Act variously require the two Ministers to formulate and implement national policy and to perform specified executive functions related to exports and imports of goods and other international trade activities. More pertinently, they are required to impose, change or remove anti-dumping duties in order to realise the primary economic and developmental objects of the statutes.”<sup>133</sup>

In this regard, he relied on specific provisions in the constitution, which provide as follows:

“The President exercises the executive authority, together with the other members of the Cabinet, by—

- (a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;
- (b) developing and implementing national policy; ...
- (e) performing any other executive function provided for in the Constitution or in national legislation.”<sup>134</sup>

He concluded by finding that “the setting, changing or removal of an anti-dumping duty in order to regulate exports and imports is a patently executive function that

<sup>126</sup> a 8.7.

<sup>127</sup> a 41 of the Southern African Customs Union Agreement. No such policies or measures have yet been annexed to the Southern African Customs Union Agreement.

<sup>128</sup> a 17.

<sup>129</sup> a 7.

<sup>130</sup> See WTO (n 5) 7.

<sup>131</sup> *International Trade Administration Commission v SCAW* (n 36) par 32 (footnotes omitted).

<sup>132</sup> par 42.

<sup>133</sup> *idem*.

<sup>134</sup> s 85(2) of the constitution.

flows from the power to formulate and implement domestic and international trade policy”.<sup>135</sup> All of this needs to be evaluated against the background to the International Trade Administration Act.

Under the board act the board was required to conduct tariff and trade remedy investigations and then make a recommendation to the minister, who was responsible for taking the final decision.<sup>136</sup> The International Trade Administration Act, however, contains no reference to any decision-making powers by the minister. As indicated above, under the International Trade Administration Act, the international trade administration commission must make recommendations to the Southern African Customs Union Tariff Board,<sup>137</sup> which, in turn, has to make a recommendation to the Southern African Customs Union council of ministers.<sup>138</sup> The council’s decisions must then be implemented by the relevant ministers in the Southern African Customs Union Member States. However, the council has delegated its decision-making powers to the international trade administration commission.<sup>139</sup> Under the maxim *delegatus delegare non potest* the international trade administration commission cannot delegate such a delegated function to the minister.<sup>140</sup> Thus, Innes ACJ held in *Shidiack v Union Government* that when a delegation has been made that requires something to be done to the satisfaction of the *delegatus*, “that cannot mean to the satisfaction of anybody else”.<sup>141</sup>

The provision that the international trade administration commission must make a recommendation to the tariff board was suspended pending the Southern African Customs Union Agreement becoming law in South Africa and certain provisions of the board act continue to be applied until that point in time. In this regard the International Trade Administration Act provides:

“Sections 4, 15(3), 16(3), 19, 20, 30, 31 and 46(2) and item 2(3) of Schedule 2, may not come into operation until the Southern African Customs Union Agreement has become law in the Republic.”<sup>142</sup>

<sup>135</sup> *International Trade Administration Commission v SCAW* (n 36) par 102.

<sup>136</sup> s 4(2) of the board act.

<sup>137</sup> s 30(3) of the International Trade Administration Act.

<sup>138</sup> a 11.2 of the Southern African Customs Union Agreement.

<sup>139</sup> See International Trade Administration Commission (n 112); WTO (n 5) 27. Regardless of whether this constitutes a valid delegation of powers, which is not the subject of this article and will not be further investigated, it is submitted that the International Trade Administration Commission cannot further delegate the delegated powers to the minister but has to take the decision itself.

<sup>140</sup> The maxim *delegatus delegare non potest* holds that “where the legislature has delegated powers and functions to a subordinate authority, it intended that authority itself to exercise those powers and to perform those functions, and not to delegate them to someone else, and that the power delegated does not therefore include the power to delegate. It is not every delegation of delegated powers that is hit by the maxim, but only such delegations as are not, either expressly or by necessary implication, authorised by the delegated powers.” See *Attorney-General, OFS v Cyril Anderson Investments (Pty) Ltd* 1965 4 SA 628 (A) 639C-D. See also *Minister of Trade and Industry v Nieuwoudt* 1985 2 SA 1 (C) 10D-E and 12H-13G; *Spier Properties (Pty) Ltd v Chairman, Wine and Spirit Board* 1999 3 SA 832 (C) 846D-E and *Zongo v MEC for the Department of Home Education (Eastern Cape Province)* case nr 1894/2004 [2011] ZACMHC 26 (29 Dec 2011) par 10. Whether a delegation, or sub-delegation, is permitted, will also depend on whether such delegation results in the total delegation of powers or only in a partial delegation – see eg *Aluchem (Pty) Ltd v Minister of Mineral and Energy Affairs* 1985 3 SA 626 (T) 631H; *Welkom Bottling Co (Pty) Ltd v Belfast Mineral Waters (OFS) (Pty) Ltd* 1968 2 SA 61 (O) 68H-69A and *Catholic Bishops Publishing Co v State President* 1990 1 SA 849 (A) 864I-865A.

<sup>141</sup> *Shidiack v Union Government* 1912 AD 642 649.

<sup>142</sup> S 64(2) of the International Trade Administration Act provides as follows: “Sections 4, 15(3), 16(3), 19, 20, 30, 31 and 46(2) and item 2(3) of Schedule 2, may not come into operation until the Southern African Customs Union Agreement has become law in the Republic.”



Before the sections listed in section 64(2) come into operation, the commission must investigate, and evaluate applications received by it in terms of section 26(1)(c) or (d) in accordance with section 32, read with the Board on Tariffs and Trade Act, as if that act had not been repealed.”<sup>143</sup>

Considering the wording of s 64(1) of the International Trade Administration Act, which specifically provides that the president must promulgate the date for the act to become operative, it is submitted that the provisions suspended from coming into operation by section 64(2) automatically came into operation the moment the Southern African Customs Union Agreement was promulgated as part of South African municipal law.<sup>144</sup> It is submitted that there would have been no basis for the council’s request that the international trade administration commission take decisions on its behalf if the relevant provisions had not come into operation. In addition, there is nothing in section 64(2) to indicate that either the president or the minister must promulgate a date for the operationalisation of these provisions.

Although the minister may issue trade policy statements or directives in the *Government Gazette*, which the international trade administration commission must give effect to,<sup>145</sup> no policy statements or directives has been published in the Gazette to date. The provision that empowers the international trade administration commission to request the commissioner for the South African revenue service to impose provisional anti-dumping, countervailing and safeguard measures is one of the provisions suspended by section 64(2).<sup>146</sup> Accordingly, if the commission argues that the provisions are still suspended, every provisional payment it has requested to date has been null and void.<sup>147</sup> This would also affect all definitive measures that were imposed with retrospective effect to the date of the provisional payment.

Under the Customs and Excise Act, the minister is also currently responsible for any requests to the minister of finance to impose definitive anti-dumping, countervailing or safeguard duties.<sup>148</sup> This authority has been deleted from the new Customs Bill and will in future lie with the international trade administration commission itself.<sup>149</sup> The same change is envisaged as regards the amendment of all tariffs.<sup>150</sup>

<sup>143</sup> item 2(1) to Schedule 2 to the International Trade Administration Act.

<sup>144</sup> S 64(1) provides: “This Act ... comes into operation on a date fixed by the President by proclamation in the Gazette.” No such requirements are contained in s 64(2) for the coming into operation of the suspended sections.

<sup>145</sup> S 5 of the International Trade Administration Act provides that “[t]he Minister may, by notice in the Gazette and in accordance with procedures and requirements established by the constitution or any other relevant law, issue Trade Policy Statements or Directives”.

<sup>146</sup> See s 30(5)(a) of the International Trade Administration Act.

<sup>147</sup> For examples of provisional payments requested, see *eg* International Trade Administration Commission “Investigation into the alleged dumping of fully threaded screws with hexagonal heads, excluding those of stainless steel originating in or imported from the People’s Republic of China: Preliminary determination” (Report 395 dated 25-04-2012); International Trade Administration Commission “Investigation into the alleged dumping of frit originating in or imported from Brazil: Preliminary determination” (Report 398 dated 26-06-2012); International Trade Administration Commission “Application for remedial action against the alleged dumping of unframed mirrors, of a thickness of 2mm or more but not exceeding 6 mm, originating in or imported from the People’s Republic of China (PRC): Preliminary determination” (Report 424 dated 21-02-2013).

<sup>148</sup> s 55(2)(a) of the Customs and Excise Act.

<sup>149</sup> See s 15(2)(a) of the Customs Bill, where this authority has been moved to the chief commissioner of the International Trade Administration Commission.

<sup>150</sup> (n 149).

Finally, the International Trade Administration Act provides:

“The State Liability Act, 1957 (Act No. 20 of 1957), read with the changes required by the context, applies to the Commission, but a reference in that Act to ‘the Minister of the Department concerned’ must be interpreted as referring to the Chief Commissioner of the Commission.”<sup>151</sup>

This provides further evidence of the international trade administration commission’s independence and that the international trade administration commission, rather than the minister, has to answer for any final determinations in tariff, anti-dumping, countervailing and safeguard investigations.

In *SCAW South Africa (Pty) Ltd v International Trade Administration Commission* the domestic industry obtained an interdict against the international trade administration commission preventing it from forwarding its recommendation to terminate the anti-dumping duties to the minister.<sup>152</sup> The international trade administration commission, however, appealed directly to the constitutional court, which ruled that the constitutional duties of ministers, that is, to develop and implement national policy and to perform executive functions provided for in the act, could not be interdicted.<sup>153</sup> This, however, would be true only if the minister actually had such functions to perform, which would not be the case if the suspended provisions have come into operation. It is clear from the constitution, which provides that “[t]he President exercises the executive authority, together with the other members of the Cabinet, by... (a) implementing national legislation *except where .... an Act of Parliament provides otherwise*”,<sup>154</sup> that the authority may resort in an institution rather than in the minister and it is submitted that this is the case as regards the International Trade Administration Commission as it has been specifically imbued with these powers that the minister would normally exercise.

It is therefore submitted that once the provisions suspended from coming into operation by section 64(2) of the act have come into operation, the minister has no role to play in tariff matters, except, at present, to request the minister of finance to implement any final decision taken by the Southern African Customs Union council of ministers, or by the international trade administration commission until such time as the council revokes its request that it takes final decisions on the council’s behalf. It is further submitted that the suspended provisions have already come into operation as the condition for suspension lapsed when the Southern African Customs Union Agreement was promulgated as part of South Africa’s municipal law on 2 July 2004.

## 6 Conclusion

Although the minister has practically always accepted the international trade administration commission’s recommendations, in 2012 the minister referred

<sup>151</sup> s 25 of the International Trade Administration Act.

<sup>152</sup> *SCAW South Africa (Pty) Ltd v International Trade Administration Commission* Case 48829/2008 [2009] ZAGPHC 54 (5 Jan 2009), (unreported). See also *Algorax (Pty) Ltd v International Trade Administration Commission* Case 25233/05 [2005] ZAGPHC 356 (10 Sep 2005) (unreported) and *African Explosives Limited v International Trade Administration Commission* Case 15027/2006 (5 Aug 2008) GNP (unreported).

<sup>153</sup> *International Trade Administration Commission v SCAW* (n 36) par 42. See Brink “*International Trade Administration Commission v SCAW South Africa (Pty) Ltd* Case CCT 59/09 [2010] ZACC 6” 2010 *De Jure* 371-377 for a detailed discussion of this case.

<sup>154</sup> s 85(2) of the constitution (emphasis added).

back a recommendation in an anti-dumping investigation for the first time<sup>155</sup> and then rejected the commission's subsequent final recommendation.<sup>156</sup> The question whether the minister had this authority therefore became important for the first time, as has the question what is meant by the international trade administration commission's "independence".

This article has shown that the minister has *no* powers in any investigations before the international trade administration commission and does *not* have the authority to consider, evaluate or decide on any "recommendations" made by it, but that the international trade administration commission, as an independent statutory institution, should accept full responsibility for all its decisions until such time as the Southern African Customs Union council of ministers revokes its delegation on decision-making to that Commission. At that point in time, the council will assume responsibility and the minister will still have no jurisdiction in these matters, other than to issue trade policy statements or directives in line with section 5 of the International Trade Administration Act.

It is therefore submitted that the international trade administration commission should take full responsibility for all decisions pertaining to anti-dumping, as well as to the other functions accorded to it under the International Trade Administration Act and in respect of which the Southern African Customs Union council of ministers has delegated final decisions-making powers to it and that it should refrain from making recommendations to the minister of trade and industry.

#### SAMEVATTING

##### **DIE ROL VAN DIE SUIDER-AFRIKAANSE DOEANE-UNIE, DIE INTERNASIONALE HANDELSKOMMISSIE EN DIE MINISTER VAN HANDEL EN NYWERHEID IN DIE REGULERING VAN SUID-AFRIKA SE INTERNASIONALE HANDEL**

Suid-Afrika is 'n lid van die oudste doeane-unie in die wêreld, die Suider-Afrikaanse Doeane-Unie, wat terugdateer tot 1910. Die nuutste doeane-unie-ooreenkoms is in 2002 onderteken en het in 2004 in werking getree. Ingevolge hierdie ooreenkoms moet elk van die lidlande, te wete Botswana, Lesotho, Namibië, Suid-Afrika en Swaziland, "nasionale liggame" daarstel om ondersoek in te stel na aangeleenthede rakende die tarief- en handelsremedies. Die nasionale liggame moet dan aanbevelings maak aan die Suider-Afrikaanse Doeane-Unie se tariefraad, wat weer aanbevelings maak aan die raad van ministers. Lidlande is verantwoordelik vir die implementering van die raad se finale besluite.

In 2003 is die Internasionale Handelsadministrasiewet in werking gestel en is die internasionale handelsadministrasiekommissie in die lewe geroep as Suid-Afrika se nasionale liggaam. Sekere bepalings van die Internasionale Handelsadministrasiewet is opgeskort hangende die proklamering van die Suider-Afrikaanse Doeane-Unie-ooreenkoms tot munisipale wetgewing in Suid-Afrika. Die effek hiervan was dat sekere bepalings van die herroepe Raad op Tariewe en Handelswet steeds toepassing gevind het. Derhalwe was die minister van handel en nywerheid steeds verantwoordelik vir die finale besluitneming in alle handelsremedies- en tariefaangeleenthede en kon die internasionale handelsadministrasiekommissie, 'n onafhanklike liggaam ingevolge die wet, slegs aanbevelings aan die minister maak. Na inwerkingtreding van die doeane-unie-ooreenkoms het die raad van ministers die Internasionale Handelsadministrasiekommissie versoek om besluite namens die raad te neem tot tyd en wyl die tariefraad behoorlik kon funksioneer.

<sup>155</sup> See the minister's letter of 13 August 2012 to the International Trade Administration Commission (available on the public file of the *Poultry (Brazil)* (n 62) investigation) referring back its first recommendation in the aforementioned matter.

<sup>156</sup> See the minister's letter of 21-12-2012 to the International Trade Administration Commission rejecting its final recommendation in that matter (also available on the public file of the *Poultry (Brazil)* (n 62) investigation).

Eers in Oktober 2012 het dit aan die lig gekom dat die doeane-unie-ooreenkoms reeds in 2004 gepromulgeer is as deel van die Suid-Afrikaanse munisipale reg. Die vraag ontstaan of die opgeskorte voorsienings in artikel 64(2) van die handelswet outomaties in werking tree en of 'n datum vir die inwerkingtreding eers geproklameer moet word. Daar word aangevoer dat, in die lig van die bepaling in die artikel 64(1) die president die datum van inwerkingtreding vir alle ander artikels moet bepaal en die stilswee daaroor in artikel 64(2), hierdie artikels outomaties in werking getree het toe die doeane-unie-ooreenkoms deel van Suid-Afrika se munisipale reg geword het.

Dit het verreikende gevolge vir die rolle van beide die minister en die kommissie in handelsaangeleenthede. Hierdie artikel voer aan dat die kommissie 'n onafhanklike liggaam is wat, totdat die raad van ministers die delegasie om besluite namens die doeane-unie te neem terugtrek, ten volle verantwoordelik is vir alle besluitneming met betrekking tot tariewe en handelsremedies en dat die minister geen mag het in aangewese sake nie, maar dat sy magte ingevolge die wet streng beperk is tot die uitreik van handelsbeleidstellings en die uitreik van regulasies. Hierdie interpretasie bots lynreg met die huidige prosedure in handelsremedies- en tariefondersoeke en sal 'n groot invloed hê op hoe ondersoeke in die toekoms hanteer word.