

THE NEED FOR AN INTERNATIONAL TRADE TRIBUNAL

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South Africa has both a National Consumer Commission and a National Consumer Tribunal. It also has both a Competition Commission and a Competition Tribunal. The courts have pleaded for a Customs Tribunal to be created to address challenges against findings related to customs matters. However, there is currently an International Trade Administration Commission, but no International Trade Tribunal. This article considers the significant interaction between competition law and international trade law, specifically anti-dumping law, including the use of like wording in the Competition Act and the International Trade Administration Act. Through an exposition of the procedures applied by both the Competition Commission and the International Trade Administration Commission, the article considers the importance of the Competition Tribunal and proposes that an International Trade Tribunal should be created to review and hear appeals against decisions of the Trade Commission, in line with South Africa's obligations under the World Trade Organization's Anti-Dumping Agreement.

I INTRODUCTION

Since the advent of democracy in South Africa, a new regulatory environment for trade has been created. This new environment includes the creation of the Competition Commission and the Competition Tribunal;¹ the National Consumer Commission, the National Credit Regulator and the National Consumer Tribunal;² and the International Trade Administration Commission ('ITAC').³ In view of the interface between anti-dumping and competition, this discussion will focus on ITAC and the competition authorities.

In brief, the Competition Commission is primarily responsible for enforcing the Competition Act,⁴ while the Competition Tribunal is, *inter alia*, responsible for any reviews of and appeals against Competition Commission decisions. ITAC is responsible for implementing the International

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¹ See s 19 and s 26 of the Competition Act 89 of 1998.

² See s 85 of the Consumer Protection Act 68 of 2008 and ss 12 and 26 of the National Credit Act 34 of 2005.

³ See s 7 of the International Trade Administration Act 71 of 2002. See also the proposals by the court in *CI Caravans (Pty) Ltd v Commissioner for Customs and Excise* (1989) 52 SATC 193 (N) at 202–3 that a specialised and knowledgeable customs tribunal should be established to adjudicate in customs tariff classification disputes and that the tribunal should have as members at least one person with tariff classification expertise to hear related appeals.

⁴ Act 89 of 1998.

Trade Administration Act ('ITA Act'),⁵ which means taking all decisions regarding tariff increases, decreases and industrial rebates; anti-dumping, countervailing and safeguarding measures; and import and export control. However, unlike in competition or consumer law, no tribunal has been set up to hear reviews of and appeals against ITAC decisions.

This article explores the correlation and analogies between competition and anti-dumping law to determine whether there is a need to establish an International Trade Tribunal and, if the answer is in the affirmative, what form such a tribunal should take. As regards the work of ITAC, the discussion will specifically focus on anti-dumping, which is essentially regarded as a form of unfair international trade.⁶

This article will first provide a brief overview of anti-dumping and competition law. The second part deals with the relevant authorities that are involved in applying and enforcing the legislation. The third part considers the international requirements in anti-dumping dispute settlement, including the standard of review, while the fourth part considers judicial reviews of anti-dumping in South Africa and points out the shortcomings when compared to the requirements of the WTO Agreements, before considering the review authority of the Competition Tribunal. Part five proposes the establishment of an independent International Trade Tribunal to consider reviews and appeals against ITAC's anti-dumping (and other) findings.⁷

II ANTI-DUMPING AND COMPETITION LAW

As will be indicated in more detail below, although there are major differences between anti-dumping and competition law, there are also various similarities. Both are generally regarded as mechanisms that deal with

⁵ The International Trade Administration Act 71 of 2002.

⁶ Derk Bienen, Gustav Brink & Dan Ciuriak (eds) *Guide to International Anti-Dumping Practice* (2013) 3; Edwin Vermulst *The WTO Anti-Dumping Agreement* (2005) 2. The rationale for focusing on anti-dumping is that relatively few tariff and industrial rebate decisions are challenged and that they are not as controversial as anti-dumping, while there has been very little use of countervailing and safeguard measures. Internationally, anti-dumping is the most widely used of the three trade remedies (anti-dumping, countervailing and safeguards), with 4519 investigations initiated worldwide between 1995 and the end of 2013 (see http://www.wto.org/english/tratop_e/adp_e/adp_e.htm), compared to only 335 countervailing and 279 safeguard investigations initiated worldwide during the same period (see http://www.wto.org/english/tratop_e/scm_e/scm_e.htm and http://www.wto.org/english/tratop_e/safeg_e/safeg_e.htm, respectively). Anti-dumping also specifically targets the perceived unfair action of specific parties, whereas countervailing targets subsidies granted by foreign governments, while safeguards target all imports indiscriminately. Tariff investigations deal purely with trade policy and do not relate to any perceived unfairness in trade. Anti-dumping therefore most closely resembles the actions of companies targeted by competition law, making this an apt comparison.

⁷ Note that although this article focuses on anti-dumping, such review powers could include the review of other decisions taken by ITAC, including those on countervailing, safeguards and tariff matters. It is not proposed that import and export control should be subject to review by an International Trade Tribunal.

unfair trade in the market and that provide rules on how to deal with such unfair trade. It is precisely because of these congruities that it will be proposed that there should be similar mechanisms to review decisions of the first-instance regulatory authorities.

(a) Overview of anti-dumping law

ITAC is responsible for various areas of trade policy in South Africa, including trade remedies.⁸ Trade remedies consist of anti-dumping, countervailing and safeguard actions. All trade remedy investigations in South Africa are conducted in terms of the ITA Act.⁹ Specific regulations have been promulgated to regulate, inter alia, anti-dumping investigations. Dumping relates to the perceived unfairness of companies applying price discrimination between different markets¹⁰ and is normally defined as taking place where the export price is less than the domestic selling price in the exporting country.¹¹

(i) Relevant anti-dumping legislation

South Africa's anti-dumping legislation is contained in two Acts and in regulations. The ITA Act contains the basic foundation of anti-dumping law and provides definitions of dumping,¹² normal value,¹³ export price,¹⁴ and confidential information.¹⁵ It circumscribes the Minister of Trade and Industry's role to issuing trade policy statements and directives and the publication of any decisions of the Southern African Customs Union ('SACU') Council of Ministers that affect South Africa's international trade.¹⁶ It provides that ITAC is responsible for conducting anti-dumping investigations,¹⁷ and that any person may apply for an amendment of customs duties with regard to any of the trade remedies.¹⁸ The purpose of the ITA Act is 'to foster economic growth and development in order to raise incomes and promote investment and employment in the Republic [...] by establishing an efficient and effective system for the administration of international trade

⁸ Sections 16, 26 and 32 of the ITA Act.

⁹ Section 16(1) of the ITA Act.

¹⁰ Article VI.1 of the General Agreement on Tariffs and Trade ('GATT') 1994, in World Trade Organization *The Legal Texts* (original ed 1999) 430–1.

¹¹ Article 2.1 of the Anti-Dumping Agreement; s 32(2)(b)(i) of the ITA Act.

¹² Section 1 of the ITA Act.

¹³ Section 32(2)(b) and 32(4) of the ITA Act.

¹⁴ Section 32(2)(a), 32(5) and 32(6) of the ITA Act.

¹⁵ Section 1 of the ITA Act.

¹⁶ Section 7(b) of the ITA Act. It is submitted that this would relate equally to final determinations made by ITAC on behalf of the SACU Council of Ministers, as the latter has delegated its decision-making authority in trade matters to ITAC. See Gustav Brink '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' 2013 TSAR 426.

¹⁷ Section 16 of the ITA Act.

¹⁸ Section 26(1) of the ITA Act.

subject to this Act and the SACU Agreement'.¹⁹ In addition, the Customs Act²⁰ provides for the imposition of provisional and definitive anti-dumping duties.²¹ Finally, both the Constitutional Court²² and the Supreme Court of Appeal²³ have held that South Africa is bound by the World Trade Organization ('WTO') Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade ('the Anti-Dumping Agreement'), although the South African legislation remains the law to be interpreted.²⁴

(ii) *Trade authority and investigation procedures*

ITAC was established in 2003 as an independent statutory body responsible for tariff and matters relating to trade remedies.²⁵ Some provisions of the ITA Act were suspended until the SACU Agreement (2002) became law in South Africa.²⁶ Until these provisions came into force, parts of the revoked Board on Tariffs and Trade Act²⁷ would be applied as if that Act had not been revoked, including the requirement that ITAC make recommendations to the Minister of Trade and Industry.²⁸

Any domestic producer can apply for the imposition of anti-dumping duties.²⁹ The applicant must use the prescribed form and provide prima facie proof of injurious dumping.³⁰ On receipt of a proper application, ITAC initiates an investigation through notice in the *Government Gazette*.³¹ All known interested parties are notified and have 37 days to respond.³² Confidential responses must be accompanied by a non-confidential version in sufficient detail to provide other parties with a reasonable understanding of the information submitted in confidence.³³ ITAC verifies all parties' submis-

¹⁹ Section 2 of the ITA Act.

²⁰ Customs and Excise Act 91 of 1964.

²¹ Section 56 of the Customs and Excise Act.

²² *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) para 2.

²³ *Progress Office Machines v South African Revenue Services & others* 2008 (2) SA 13 (SCA) para 6.

²⁴ *Association of Meat Importers and Exporters & others v International Trade Administration Commission* [2013] 4 All SA 253 (SCA) para 60; E C Schlemmer 'Die grondwetlike hof en die ooreenkoms ter vestiging van die wêreldhandelsorganisasie' 2010 TSAR 749.

²⁵ See ss 7, 16 and 26 of the ITAA Act.

²⁶ Section 64(2) of the ITAA Act.

²⁷ Act 107 of 1986.

²⁸ Section 64(2) of the ITAA Act.

²⁹ *Ibid* s 26(1)(c)(i).

³⁰ Anti-Dumping Regulations (hereafter 'ADR') 23 and 24.

³¹ For a more detailed discussion on the process see Gustav Brink *Anti-Dumping in South Africa* Tralac Working Paper D12WP07/2012 (2012) 26–31; Neil Joubert 'The reform of South Africa's anti-dumping regime' in Peter Gallagher, Patrick Low & Andrew L Stoler (eds) *Managing the Challenges of WTO Participation: 45 Case Studies* (2005) 516–31.

³² ADR 29.2 and 29.3.

³³ Section 33(2) of the ITA Act; ADR 2.1; WTO *China — Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*

sions³⁴ and issues a verification report.³⁵ Where an exporter has not co-operated fully, ITAC will make a preliminary determination on the available facts.³⁶ On finding injurious dumping, ITAC requests the Commissioner for the South African Revenue Service to impose a provisional duty.³⁷ A preliminary report is issued setting out ITAC's findings.³⁸ After further investigation ITAC issues an essential facts letter on which parties may comment before ITAC makes its final determination.³⁹ In terms of the ITA Act, such determination is to be made by ITAC.⁴⁰ In terms of the SACU Agreement, ITAC must make a recommendation to the SACU Tariff Board⁴¹ which, in turn, will make a recommendation to the SACU Council of Ministers.⁴² The SACU Council of Ministers has delegated the authority to ITAC as the Tariff Board has not yet been established.⁴³ In practice, ITAC makes a recommendation to the Minister of Trade and Industry.⁴⁴

It is important to consider ITAC's independence as this has to be compared to the independence of the Competition Commission and the Competition Tribunal. The ITA Act declares:

'The Commission —

- (a) is independent and subject only to —
 - (i) the Constitution and the law;
 - (ii) any Trade Policy Statement or Directive issued by the Minister . . .
- (b) must be impartial and must perform its functions without fear, favour or prejudice.'⁴⁵

The ITA Act further provides that ITAC 'may, after evaluating a matter in terms of subsection (1), take appropriate steps in accordance with this Act and the SACU Agreement and inform the Minister and the Tariff Board of its evaluation'.⁴⁶ There is nothing in the ITA Act bestowing any authority on

(hereafter 'WTO China — GOES Panel Report') WT/DS414/R (15 June 2012) paras 7.187–7.225.

³⁴ ADR 18.

³⁵ ADR 19.

³⁶ ADR 32.

³⁷ Section 57A (1) of the Customs and Excise Act; s 30(5)(a) of the ITA Act. See e.g. ITAC Report 458 *Frozen potato chips from Belgium and the Netherlands (Preliminary determination)* 61.

³⁸ ADR 34.

³⁹ ADR 37.2. See e.g. ITAC Report 458 op cit note 37.

⁴⁰ Section 16(1)(a) of the ITA Act.

⁴¹ Section 30(2)(b) of the ITA Act.

⁴² Article 11.2 of the SACU Agreement 2002.

⁴³ This falls within Brink's own knowledge in his previous capacity at ITAC and through discussions with various ITAC staff and commissioners.

⁴⁴ See e.g. the Minister's letter to ITAC dated 28 August 2012 in the *Poultry (Brazil)* investigation (on file with authors).

⁴⁵ Section 7(2) of the ITA Act.

⁴⁶ Section 16.3 of the ITA Act (emphasis supplied).

the Minister, and the Minister's only function is to request the Minister of Finance to implement a definitive anti-dumping duty.⁴⁷

(b) Overview of competition law

Competition policy is a regulatory tool that seeks to address market failures by maintaining or creating the foundations for effectively functioning markets.⁴⁸ It aims to emulate free market conditions by creating regulatory institutions and procedures to ensure equal opportunities for all businesses stimulate economic efficiency and protect consumers.⁴⁹ It includes economic policies adopted by government aimed at enhancing competition in the local and international markets such as trade policy, deregulation and privatisation as well as competition law.⁵⁰

(i) Relevant competition legislation

With the advent of democracy, the government revised its approach to competition and enacted the Competition Act with its three-tiered institutional enforcement hierarchy.⁵¹

The Competition Act aims to achieve the traditionally accepted competition law goals of lower prices and greater choice for consumers but also has certain macro-economic or wider public-interest goals such as the promotion of employment and the expansion of the ownership stakes of historically disadvantaged persons in the economy.⁵² In brief, the Competition Act regulates horizontal practices (interaction between competitors),⁵³ vertical practices (interaction between suppliers and their customers),⁵⁴ behaviour of dominant firms,⁵⁵ pricing behaviour⁵⁶ and mergers.⁵⁷ The Act applies to virtually all economic activity within, or having an effect in, South Africa.⁵⁸

⁴⁷ Sections 55(2) (a) and 56(2) of the Customs and Excise Act. See Brink op cit note 16 for a discussion on why the Minister has no such decision-making role.

⁴⁸ Minette Neuhoﬀ (ed) *A Practical Guide to the South African Competition Act* (2006) 11.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ For a historical overview of the development of competition law in South Africa see Philip Sutherland & Katherine Kemp *Competition Law of South Africa* (OS 2000, service issue 15) at 3-3 to 3-45. The authors point out (at 3-26) that the common law in South Africa never developed rules that could deal effectively with anti-competitive practices, with the effect that the lacuna had to be filled with legislation.

⁵² Neuhoﬀ (ed) op cit note 48 at 13. See further s 2 of the Competition Act for a detailed version of its objectives.

⁵³ Section 4 of the Competition Act.

⁵⁴ Section 5.

⁵⁵ Section 8.

⁵⁶ Section 9.

⁵⁷ Sections 11 to 18.

⁵⁸ It excludes some areas related to collective bargaining.

(ii) *Competition authorities and investigation procedures*

The Competition Act created three specialist institutions to attend to the enforcement and application of the Competition Act: the Competition Commission,⁵⁹ the Competition Tribunal,⁶⁰ and the Competition Appeal Court.⁶¹ Although these three bodies interact, they are independent of each other.⁶²

The Competition Commission

The Competition Commission is the primary regulatory body tasked with enforcement and application of the Act.⁶³ It is a juristic person with jurisdiction throughout the Republic and must exercise its functions in accordance with the Act.⁶⁴ The Act provides that the Commission is independent and subject only to the Constitution and the law⁶⁵ and that it must be impartial and perform its functions without fear, favour and prejudice.⁶⁶ It also provides that each organ of state must assist the Commission to maintain its independence and impartiality and to effectively carry out its powers and duties.⁶⁷

The Commission is responsible for improving market transparency; investigating contraventions of the Act; considering exemption applications; evaluating merger applications; negotiating consent orders; appearing before and advising any regulatory authority with respect to competition issues; and dealing with any other matter referred to it by the Tribunal.⁶⁸ In addition to these functions, the Commission may report to the Minister on any matter relating to the application of the Act; enquire into and report to the Minister on any matter concerning the purposes of the Act; and perform any function assigned to it in terms of the Competition Act or any other Act.⁶⁹ The operational framework within which the Commission carries out the functions assigned to it by the Act is contained in the Competition Commission Rules.⁷⁰

In order to fulfil its statutory functions the Competition Commission has five operating divisions.⁷¹ With regard to the regulation of business conduct,

⁵⁹ Section 19 of the Competition Act.

⁶⁰ Section 26.

⁶¹ Section 36.

⁶² Neuhoff (ed) op cit note 48 at 18.

⁶³ Section 21 of the Competition Act.

⁶⁴ Section 19(1)(c).

⁶⁵ Section 20(1)(a). See the corresponding provision in s 7(2)(a)(i) of the ITAA Act.

⁶⁶ Section 20(1)(b). See the corresponding provision in s 7(2)(b) of the ITAA Act.

⁶⁷ Section 20(3). See the corresponding provision in s 7(3) of the ITAA Act.

⁶⁸ Section 21(1)(a) to (f).

⁶⁹ Section 21(2). See the corresponding provision in ss 18 and 22 of the ITAA Act.

⁷⁰ Rules for the Conduct of Proceedings in the Competition Commission published under Proc 12 in GG 22025 of 1 Feb 2001 as amended by GN 215 in GG 31957 of 6 March 2009.

⁷¹ See Neuhoff (ed) op cit note 48 at 19.

namely restrictive practices, abuse of dominance and pricing behaviour, the functions of the Commission are mainly investigative in nature.⁷² Its Mergers and Acquisitions Division is tasked with investigating the impact of mergers and acquisitions on competition. In the case of all small and intermediate mergers, the Competition Commission is the principal decision-maker and its decisions in this regard may be taken on review or appeal to the Competition Tribunal.⁷³ The Competition Commission makes recommendations on large mergers to the Tribunal, which is then responsible for the final adjudication thereof.⁷⁴

The Commission may initiate or receive a complaint against an alleged prohibited practice from any person in the prescribed form.⁷⁵ It has wide investigative powers and may at any time during an investigation summon persons who are believed to be able to furnish any information on the subject of an investigation to appear before the Commissioner or another person authorised by the Commissioner.⁷⁶

At any time after initiating a complaint, the Commission has the discretion to refer the complaint to the Competition Tribunal pursuant to a completed investigation.⁷⁷ If the Commission issues a notice of non-referral in response to a complaint, the complainant may refer the complaint directly to the Tribunal.⁷⁸

The Competition Tribunal

The Competition Tribunal is an administrative tribunal established in terms of s 26 of the Act. The Tribunal, like the Competition Commission, is an independent body comprised of lawyers and economists.⁷⁹ The functions of

⁷² Section 21(c) of the Competition Act.

⁷³ Section 14(1)(b).

⁷⁴ Section 14(3).

⁷⁵ Section 49B.

⁷⁶ Section 49A. See also s 46(1).

⁷⁷ Section 50(1).

⁷⁸ Section 51(1). In terms of s 51(2) a referral to the Tribunal, whether by the Commission or a complainant directly, must be in the prescribed form CT1(1). Section 51(3) requires that each referral to the Tribunal be published in the *Government Gazette*. However, s 50(2) provides that within one year after a complaint was submitted to it, the Commissioner must, subject to s 50(3), refer the complaint to the Tribunal, if the Commission determines that a prohibited practice has been established or, in any other case it must issue a notice of non-referral to the complainant in the prescribed form. The prescribed form for such a non-referral is Form CC8. Section 50(4) provides that the time period for referral of a complaint may be extended by agreement between the Commission and the complainant or on application by the Tribunal to the Commission. If the Commission has not referred a complaint to the Tribunal or issued a notice of non-referral within the time contemplated in s 50(2) or the extended period contemplated in s 50(4), the Commission must be regarded as having issued a notice of non-referral on the expiry of the relevant period.

⁷⁹ In terms of s 26(4) of the Competition Act it is provided that s 20, which deals with the independence of the Competition Commission, read with the changes required by the context, applies to the Competition Tribunal.

the Tribunal are set out in the Competition Act and the operational framework within which these functions are conducted is contained in the Competition Tribunal Rules.⁸⁰ The Tribunal may adjudicate on any conduct prohibited in terms of chap 2 of the Act; hear appeals from or review any decision of the Commission; and make any ruling or order necessary or incidental to the performance of its functions in terms of the Act.⁸¹

For purposes of this article, most emphasis will be placed on the Tribunal's statutory jurisdiction to hear appeals from, or review any decision of, the Competition Commission.⁸² The Tribunal must conduct a hearing, subject to its rules, into every matter referred to it in terms of the Act.⁸³ In general such hearings must be conducted in public, as expeditiously as possible and in accordance with the principles of natural justice.⁸⁴ A hearing may be conducted informally or in an inquisitorial manner. Various powers are afforded to a member presiding at a hearing and such member may:⁸⁵

- (i) direct or summon any person to appear at any specified time and place;
- (ii) question any person under oath or affirmation;
- (iii) summon or order any person to produce any book, document or item necessary for the purposes of the hearing; or to perform any other act in relation to the Act;
- (iv) give directions prohibiting or restricting the publication of any evidence given to the Tribunal;
- (v) accept oral submissions from any applicant; and
- (vi) accept any other information that is submitted by a participant.⁸⁶

At the conclusion of a hearing the Tribunal must make any order permitted in terms of the Act and must issue written reasons for its decision.⁸⁷ The participants and other members of the public must be provided reasonable access by the Tribunal to the record of each hearing, subject to any ruling to protect confidential information made in terms of s 52(3)(a) of the Act.⁸⁸

The Competition Appeal Court

The Competition Appeal Court is a specialist court established in terms of s 36 of the Competition Act. Its status is similar to that of a high court and it

⁸⁰ Rules for the Conduct of Proceedings in the Competition Tribunal published under Proc 12 in GG 22025 of 1 February 2001.

⁸¹ Section 27 of the Competition Act. It may also adjudicate on any other matter that may, in terms of the Act, be considered by it, and make any order provided for in the Act.

⁸² See part II(d) below.

⁸³ Section 52(1).

⁸⁴ Section 52(2)(a).

⁸⁵ Section 54(a)–(f).

⁸⁶ Section 52(2)(b).

⁸⁷ Section 52(4).

⁸⁸ Section 52(5). The specific orders which the Tribunal may make are set out in s 58 of the Act.

has jurisdiction throughout the Republic.⁸⁹ The Competition Appeal Court comprises of at least three members, each of whom is a judge of the high court, and one of whom must be designated by the President to be the Judge President of the Competition Appeal Court.⁹⁰

The Act provides that this court may consider any review of or appeal against a decision of the Competition Tribunal. It may:

- (a) confirm, amend or set aside a decision or order that is the subject of an appeal or review from the Competition Tribunal; and
- (b) give any judgment or make any order that the circumstances require.⁹¹

It thus constitutes the third tier in the 'checks and balances' hierarchy created by the Competition Act.

(c) *The review of Competition Commission decisions*

The inevitable result of the regulatory hierarchy that is provided for in the Competition Act is that a panel of experts, who are all knowledgeable on competition law and its underlying economic policies and implications, scrutinises the decisions of the Commission as primary enforcement and investigative body. In respect of the prohibited practices contained in ss 4 and 5 of the Act, as well as the dominance and pricing provisions contained in ss 8 and 9 respectively, the Commission has an investigative function but does not act as the final decision-making body. If it concludes pursuant to an investigation that a prohibited practice has occurred it is obliged to refer the matter to the Tribunal, which has the final say regarding whether specific conduct by a firm indeed constitutes a prohibited practice as contemplated by the Competition Act.⁹² In essence, although the procedure does not fit the traditional model of a review, it does have the implication that the Tribunal considers or 'reviews' the information and evidence gathered by the Commission, as well as its process of reasoning in concluding that a prohibited practice took place. In this process the Tribunal will also consider whether any procedural irregularities occurred during the Commission's investigation into the alleged prohibited conduct.⁹³

The Tribunal is also assigned a traditional review and appeal function in respect of any decision taken by the Competition Commission.⁹⁴ Sutherland & Kemp explain that the Tribunal is empowered to hear appeals from, or review any decision of, the Commission that may be referred to it in terms of

⁸⁹ Section 36(1)(a) and (b). It is also a court of record. See Sutherland & Kemp op cit note 51 at 11–41 para 11.5.

⁹⁰ Section 36(2)(a).

⁹¹ Section 37(2) (a) and (b) of the Competition Act. As this discussion focuses upon the Competition Tribunal as a second tier that reviews Commission decisions, no further discussion of the Competition Appeals Court is given. For a detailed discussion see Sutherland & Kemp op cit note 51 at 11–42 para 11.5.4 and 11–43 para 11.5.5.

⁹² Section 27(1)(c).

⁹³ Ibid.

⁹⁴ Ibid.

the Competition Act.⁹⁵ In terms of the Act this includes the power to review the Commission's decision to grant, refuse to grant, or in some cases revoke an exemption with respect to prohibited practices;⁹⁶ and to reconsider any decision on a small or intermediate merger in respect of which the Commission has already issued a decision.⁹⁷

The Commission Rules also empower the Tribunal to review, or hear appeals from, other Commission decisions, inter alia, to review a notice of apparent breach of merger conditions issued by the Commission on the limited ground that the firm has substantially complied with its obligations in respect to the merger approval.⁹⁸ The Tribunal may also review Competition Commission decisions that relate to purely competition issues.⁹⁹ However, neither the Act nor the Tribunal Rules expressly give the Tribunal the power to review or hear appeals from such decisions.¹⁰⁰

In *AC Whitcher (Pty) Ltd v Competition Commission of South Africa & others*¹⁰¹ the applicant sought to review a decision of the Competition Commission to approve unconditionally an intermediate merger of three parties.¹⁰² The applicant, who was opposed to the merger, was a competitor of the merging parties as well as a customer of the acquiring firm.¹⁰³ At the hearing the applicant asked the Tribunal to consider three aspects of the Commission's decision in assessing whether there has been a reviewable irregularity, namely: (a) the Commission's finding of the relevant geographic market for sawn timber; (b) the Commission's finding that the merging parties would have no ability and no incentive to engage in forestry

⁹⁵ Sutherland & Kemp op cit note 51 at 11-30 para 11.4.9.

⁹⁶ Section 10(8) and item 8 Part A Schedule 1 respectively. See *Gas2Liquids (Pty) Ltd v Competition Commission* [2013] ZACT 5.

⁹⁷ Section 16(1)(a) and (b). See e.g. *TWK Agriculture Limited v Competition Commission & others* [2007] ZACAC 3; *AC Whitcher (Pty) Ltd v Competition Commission* [2008] ZACT 108.

⁹⁸ Competition Tribunal Rule 9(2)(b).

⁹⁹ *TWK Agriculture Ltd v Competition Commission* supra note 97 para 23, as confirmed on this point by *Johnnic Holdings Ltd v Competition Tribunal* [2008] ZACAC 2.

¹⁰⁰ Sutherland & Kemp op cit note 51 at 11-30 para 11.4.9. The authors indicate that the Competition Appeal Court has in *TWK Agriculture Ltd v Competition Commission* supra note 97 para 23 accepted that Tribunal Rule 42(3), which refers to 'the Commission's decision that is being appealed or reviewed', clearly envisages the possibility of a review by the Tribunal of a decision by the Commission. The Competition Appeal Court however distinguished the aforementioned decision in the latter case of *Johnnic Holdings Ltd v Competition Tribunal* supra note 99 and held that the *TWK* decision concerned an application for review of the Commission's decision relating to merger proceedings 'a purely competition issue' whereas, in *Johnnic*, the application for review was based on constitutional grounds and accordingly the Competition Appeal Court, and not the Tribunal, had the requisite jurisdiction to hear the application for review of the Commission's decision (at paras 35.2 and 37 of the *Johnnic* judgment).

¹⁰¹ *Whitcher v Competition Commission* op cit note 97.

¹⁰² Ibid paras 1, 5 and 6.

¹⁰³ Ibid para 7.

foreclosure strategy; and (c) the Commission's finding that the applicant's reduced supply was not merger specific but as a result of a fire that had destroyed a significant portion of the log supply.¹⁰⁴ In its judgment the Tribunal addressed the question whether the Competition Commission came to a reasonable decision¹⁰⁵ and explained at length the process which the Commission follows in deciding whether to approve a merger or not.¹⁰⁶ It said the following:

'Given the complex nature of the decision and the fact that the Commission exercises its discretion through direct engagement with the issues of fact, law and economics, this Tribunal would be inclined to show a high degree of respect for the decisions of the Commission and would only be inclined [to] set aside decisions of the Commission in circumstances of a grave or palpable error.'¹⁰⁷

It then commented that the Commission's investigation of the relevant transaction involved a high level of engagement and interaction, including that it took a number of factors into account, had solicited the views of customers and competitors, had gathered econometric evidence, had reviewed internal strategic documents of the merging parties and had repeatedly engaged with industry stakeholders.¹⁰⁸ All the information and data gathered was subject to legal and economic analysis.¹⁰⁹ The Tribunal could also not find fault in the Commission's definition of the relevant market, its computation of the market shares or its definition of the geographic market.¹¹⁰ It therefore held that the Commission had come to its conclusion in a reasoned manner and had taken all reasonable steps to test the theories of harm proposed by the applicant and the other objectors against the factual evidence put before it and gathered by it in the course of its investigation.¹¹¹ It then remarked:

'The Commission may have come to a wrong conclusion about the extent of the concentration in the relevant markets or that foreclosure was not merger specific. However the correctness of the Commission's conclusions would more appropriately be the subject of an appeal and not this enquiry.'¹¹²

The Tribunal then dealt with the argument that the Commission, by assuming that vertical mergers are efficiency enhancing, committed an error of law.¹¹³ It rejected that argument and remarked that to suggest that a particular theory is to be treated as the 'relevant standard' is to conflate that particular economic theory with the relevant legal standard. The legal

¹⁰⁴ Ibid para 11.

¹⁰⁵ Ibid para 22.

¹⁰⁶ Ibid paras 27–36.

¹⁰⁷ Ibid para 37.

¹⁰⁸ Ibid para 38.

¹⁰⁹ Ibid.

¹¹⁰ Ibid paras 39–42.

¹¹¹ Ibid para 45.

¹¹² Ibid.

¹¹³ Ibid para 46.

standard, according to the Competition Act, is whether a transaction is likely to lead to a substantial lessening or prevention of competition in a particular market having regard to a number of factors, the extent of vertical integration being only one of these.¹¹⁴ After dealing with the applicant's delay in bringing the application, it dismissed the review application.

The applicant subsequently launched an appeal before the Competition Appeal Court.¹¹⁵ The court indicated that the distinction between an appeal and a review is not without difficulty and that particularly under the Promotion of Administrative Justice Act ('PAJA'), the merits of a decision will, to some extent, form part of the scrutiny of the reviewing court.¹¹⁶ Thus the court held that the appellant was correct to contend that the Tribunal was required to scrutinise the reasoning of the Commission in order to establish whether the latter's decision constituted reasonable administrative action. It indicated that

'[the] tribunal was thus tasked not merely to describe the approach adopted by the Commission, and then accept its approach at face value, but rather carefully to examine the Commission's process of reasoning as reflected in its final report and to determine whether the reasoning displayed an appropriate understanding of the law and a reasonable application of the law to the facts as set out'.¹¹⁷

With regard to the Tribunal's emphasis of the importance of deference to the Commission, the court held that the concept of deference needs to be treated carefully but that it has been 'decidedly overworked in our law'.¹¹⁸ It held that care should be taken not to defer to the authority on the basis of the doctrine of separation of powers, but that the matter related to the Tribunal's supervisory role over the Commission, especially in cases where the Commission was both the investigator and the adjudicator.¹¹⁹ The court specifically indicated that 'an important criterion in assessing the level of deference owed in a review application is the expertise of the reviewing court relative to that of the administrative body' and that 'the Tribunal has significant economic expertise and knowledge of competition matters. It was set up for the purpose of constituting a specialist body'.¹²⁰ It concluded that the power of review extends to

'whether the factual information on which assessments are based is accurate and whether the conclusion drawn as to the facts are correct; whether the Commission undertook a thorough and painstaking investigation, and in particular whether it carefully inquired into and took sufficiently into consider-

¹¹⁴ Ibid para 47. It indicated that in this legal enquiry, many economic theories could be advanced as to why a particular transaction may or may not lead to a lessening of competition and the Commission had tested these economic theories against the details of the particular transaction and the evidence it had gathered.

¹¹⁵ [2009] ZACAC 2.

¹¹⁶ Ibid para 20.

¹¹⁷ Ibid para 21.

¹¹⁸ Ibid para 23.

¹¹⁹ Ibid para 24.

¹²⁰ Ibid.

ation all the relevant factors; and whether the various passages in the reasoning developed by the Commission in order to arrive at its conclusion in respect of the compatibility or otherwise of a concentration with the common market satisfy requirements of logic, coherence and appropriateness'.¹²¹

Consequently, the court held that a careful process of investigation of the reasoning adopted by the Commission was required.¹²²

Contrary to the finding of the Tribunal, the court found the Commission's reasoning to be erroneous in various respects.¹²³ The appeal was thus upheld and the merger was referred back to the Commission for further consideration as to whether it should be approved and if so, whether appropriate conditions should be attached to the merger.¹²⁴

The institutional hierarchy provided for in the Competition Act thus creates a system of checks and balances conducted by bodies composed of persons with relevant expertise regarding matters on which administrative decisions were taken by the Commission as primary decision-making body. With regard to small and intermediate mergers, exemptions, and corporate leniency the Tribunal is bestowed with 'traditional' review jurisdiction. This allows it to set aside a decision by the Commission which was tainted by a procedural irregularity. In fact, this specific review jurisdiction of the Tribunal as an expert body is broad enough to encompass not merely a consideration of the process followed by the Commission in reaching a decision, but also of its reasoning. Furthermore, the safeguard of an added layer of scrutiny is provided by the Competition Appeal Court's power to hear reviews and appeals against Tribunal decisions.

Once again the appeal and review jurisdiction of the Competition Appeal Court as an expert judicial body in respect of competition matters serves as a safeguard to ensure that the Tribunal properly carries out its checks and balances function vis-à-vis the Commission. Clearly this checks and balances system provided by the Competition Act is instrumental to ensure correct and efficient redress in competition law.

(d) Relationship between anti-dumping law and competition law

Brian Hindley indicates that

'[s]ensible rationales for anti-dumping laws almost invariably rely on imperfect competition in one form or another. But if imperfect competition is the issue,

¹²¹ Ibid, with reference to Matteo Bay & Javier Ruiz Calzado 'Tetra Laval II: The coming of age of the judicial review of merger decisions' (2005) 28 *World Competition* 433.

¹²² Ibid para 25. It indicated that that does not mean that where the Commission arrives at a plausible and justifiable conclusion, that it is permissible that such conclusion should be substituted for an alternative by the Tribunal, but that the Tribunal's task is to ask whether the process of reasoning as contained in the Commission's report can justify the conclusion at which the Commission arrived.

¹²³ Ibid paras 31–7.

¹²⁴ Ibid para 44.

why cannot allegations of dumping be dealt with under competition law — why is a separate law for dumping either desirable or needed?¹²⁵

Other authors have also called for the abolition of anti-dumping law or for anti-dumping law to be replaced by competition law.¹²⁶ On the other hand, some authors have indicated that '[a]ntidumping laws are a critical element of a globally competitive free-market economy'.¹²⁷ The mere fact that several authors argue for anti-dumping laws to be replaced with competition law or refer to anti-dumping law as necessary for competitive markets confirms the perceived direct link between the two fields.

As indicated above, the Competition Act deals with abuse of dominance and, inter alia, prohibits selling of goods or services below their marginal or average variable cost.¹²⁸ This practice is also known as 'predatory pricing'.¹²⁹ Anti-dumping, in turn, deals with price discrimination between the domestic and the export market, and the normal value may be determined on the basis of only profitable sales or a constructed cost where domestic sales are made in substantial quantities at less than total cost.¹³⁰

De Araujo remarks that the interaction between anti-dumping and antitrust is a polemical issue in every integration process for both legal and economic reasons.¹³¹ From a legal perspective, anti-dumping rules allow practices such as price undertakings that are forbidden by competition law and punish certain types of price differentiation that are justifiable under the competition rules.¹³² From an economic viewpoint the two policies pursue different objectives that may eventually lead to conflicting situations: anti-dumping is a trade remedy for industries injured by unfair import competition, and public interest seldom plays a role in anti-dumping determinations.¹³³ Competition law's final role is to promote consumer welfare.¹³⁴ At the same time, both anti-dumping and competition law

¹²⁵ Brian Hindley 'Preface' in Marceau *Anti-Dumping and Anti-Trust Issues in Free-Trade Areas* (1994) ix.

¹²⁶ Robert McGee 'The case to repeal the antidumping laws' (1993) 13 *Northwestern J of Int'l L & Bus* 491; Jorge Miranda 'Should antidumping laws be dumped' (1996) 28 *Law and Policy in Int'l Bus* 255; Brian Hindley & Patrick Messerlin *Antidumping Industrial Policy: Legalized Protection in the WTO and What to Do About It* (1996) 22–3; and Claude Barfield *High-Tech Protection: The Irrationality of Antidumping Laws* (2003) 58–62.

¹²⁷ Greg Mastel *Antidumping Laws and the U.S. Economy* (1998).

¹²⁸ Section 8(1)(d)(iv) of the Competition Act.

¹²⁹ Sutherland & Kemp op cit note 51 at 7–100 para 7.15.

¹³⁰ Article 2.2.1 of the Anti-Dumping Agreement; ADR 8.2 and 8.10.

¹³¹ José Tavares de Araujo 'Legal and economic interfaces between anti-dumping and competition policy' in United Nations Serie *Commercio Internacional e Integracion* vol 24 (2001) 7.

¹³² ADR 39 and art 8 of the Anti-Dumping Agreement.

¹³³ See Gustav Brink 'National interest in anti-dumping investigations' (2009) 126 *SALJ* 316.

¹³⁴ This is a factor that may be taken into consideration in determining whether the imposition of an anti-dumping duty would be in the public interest. However, public interest is seldom taken into consideration in anti-dumping investigations. See

promote productive efficiency which in part depends upon market contestability, wherein import competition often plays a key role.

There is thus a significant interface between anti-dumping and competition, and it is this interface that raises the question as to why there is no specialised dispute-resolution institution available in the case of decisions taken by ITAC, whereas the Competition Commission's decisions may be reviewed by the Competition Tribunal and the Competition Appeal Court.

III DISPUTE SETTLEMENT IN THE WTO

At least two WTO Agreements are directly applicable to anti-dumping dispute settlement. The first is the Anti-Dumping Agreement, which contains specific provisions regarding review of anti-dumping determinations,¹³⁵ including the standard of review, while all disputes in the WTO, regardless of the subject thereof, are subject to the provisions of the Understanding on Dispute Settlement ('DSU').¹³⁶ The Anti-Dumping Agreement provides as follows:

'Each Member whose national legislation contains provisions on anti-dumping measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review of administrative actions relating to final determinations¹³⁷ and reviews of determinations within the meaning of Article 11. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question.'¹³⁸

Two things are clear from this provision: first, it calls for judicial, arbitral or administrative tribunals or procedures, which appear to be a review body other than the national courts¹³⁹ and, secondly, it calls for the 'prompt

Aradhna Aggarwal *The WTO Anti-Dumping Agreement: Possible Reform through the inclusion of a Public Interest Clause* (Working Paper 142, Indian Council for Research on International Economic Relations) (2004) 6 (available at <http://www.icrier.org/pdf/wp142.pdf>, accessed on 28 September 2013); Brink op cit note 133 at 316ff; Paul Moen *Public Interest Issues in International and Domestic Anti-Dumping Law: The WTO, European Communities and Canada* (1998).

¹³⁵ Articles 13 and 17 of the Anti-Dumping Agreement.

¹³⁶ 'Understanding on Rules and Procedures Governing the Settlement of Disputes' (Annex 2) in WTO *The Legal Texts* op cit note 10 at 354–79.

¹³⁷ Note that art 17.4 of the Anti-Dumping Agreement also provides that a provisional measure may be challenged where it has a significant impact on trade.

¹³⁸ Article 13 of the Anti-Dumping Agreement (emphasis supplied). Note that this provision is binding on South Africa. Thus, in *ITAC v SCAC* supra note 22 para 25 Moseneke DCJ held that 'the Supreme Court of Appeal correctly concluded that the *Anti-Dumping Agreement* is binding on the Republic in international law, even though it has not been specifically enacted into municipal law' (emphasis supplied). See also *Progress Office Machines CC v SARS* supra note 23 para 6.

¹³⁹ See for instance the Trade Measures Review Office in Australia/Stephen Gageler 'Australia: Judicial review with merits review' in Müslüm Yilmaz *Domestic Judicial Review of Trade Remedies: Experiences of the Most Active WTO Members* (2013) 382; Daniel Moulis & Alistair Bridges 'Administrative review of anti-dumping measures in Australia' (2012) 7 *Global Trade and Customs Journal* 201. Note, however, that Yilmaz op cit at 423 equates courts with 'judicial tribunals'.

review' of administrative actions; something that is not always possible within South Africa's court systems. No distinction exists in the WTO between 'reviews' and 'appeals', and the standard of review envisaged in the provision quoted above is substantially different from what is understood to be a 'review' in South African courts.¹⁴⁰ The DSU specifically provides that

'a panel should make an objective assessment of the matter before it, *including an objective assessment of the facts of the case* and the applicability of and conformity with the relevant covered agreements';¹⁴¹

and that

'the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes'.¹⁴²

The standard of review under the Anti-Dumping Agreement is more specific and is set out as follows:

'In its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective'.¹⁴³

This clearly relates to a substantive review and not only to a determination as to whether the correct procedures were followed. The WTO Appellate Body has held that a panel's examination must be 'in-depth' and 'critical and searching'.¹⁴⁴

An analysis of trade-remedy disputes in the WTO¹⁴⁵ shows that WTO panels undertake a complete analysis both to determine whether the investigating authority properly established the facts and whether it made correct findings on the basis of such facts.¹⁴⁶

¹⁴⁰ See the text below. Note, however, that the WTO Appellate Body may only hear appeals from the Panel, i.e. an 'appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel' — art 17.6 of the Understanding on Dispute Settlement.

¹⁴¹ Article 11 of the DSU (emphasis supplied).

¹⁴² Article 12.7 of the DSU.

¹⁴³ Article 17.6(i) of the Anti-Dumping Agreement (emphasis supplied).

¹⁴⁴ WTO *China — GOES* Panel Report op cit note 33 para 7.4 (footnotes deleted), with reference to the Appellate Body findings in *United States — Investigation of the International Trade Commission in Softwood Lumber from Canada — Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW (adopted 9 May 2006) para 93.

¹⁴⁵ See Gustav Brink 'South Africa's experience with international trade dispute settlement' in Gregory C Shaffer & Ricardo Meléndez-Ortiz *Dispute Settlement in the WTO* (2010) 251 for a discussion on South Africa's experience in dispute resolution under the WTO. See also Bernard Horn & Petros Mavroidis *The American Law Institute Reporters' Studies on WTO Case Law: Legal and Economic Analysis* (2007).

¹⁴⁶ See e.g. the discussions by the panels in *WTO European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China (EC — Fasteners)* WT/DS397/R (adopted 28 July 2011); *United States — Anti-Dumping Measures on Certain Shrimp from Viet Nam (US — Shrimps)* WT/DS404/R (adopted 2 September 2011); *China — Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment*

IV JUDICIAL REVIEW OF ANTI-DUMPING IN SOUTH AFRICA

Should an interested party dispute ITAC's findings it may lodge a judicial review application with the high court, whence it may be appealed to the Supreme Court of Appeal.¹⁴⁷

Several authors indicate that the courts will review a matter if the administrative action is unreasonable, irrational or where the authority did not apply its mind, all of which may reflect an authority's improper consideration of the facts before it.¹⁴⁸ It therefore appears that South African courts will consider the substance of administrative conduct of organs of state, but only in so far as this relates to relevant factors that should have been considered by authorities, reasonableness, the rationality of the decision, and the requirement that an authority should apply its mind to the matter before it.¹⁴⁹

The different grounds that may be included in the notice of motion are indicated in PAJA.¹⁵⁰ Although it provides for several grounds of review,¹⁵¹ it only contains an inconspicuous provision regarding reviews on the basis of

from the European Union (China — X-Ray Equipment) WT/DS425/R (adopted 24 April 2013); and *China — Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States (China — Broiler products) WT/DS427/R* (adopted 25 September 2013).

¹⁴⁷ Note that the purpose of this article is not to provide a complete analysis of judicial review in South Africa and that this section serves merely as an introduction to the topic to indicate how the current judicial review system fails to provide for effective relief in anti-dumping law. For more detailed discussions of judicial reviews of anti-dumping in South Africa see Gustav Brink 'Duration of anti-dumping duties shortened following court order in South Africa' (2008) 3 *Global Trade and Customs Journal* 217; Gustav Brink 'International Trade Administration Commission v SCAW South Africa (Pty) Ltd Case CCT 59/09 [2010] ZACC 6' 2010 *De Jure* 380; Gustav Brink 'Anti-dumping and judicial reviews in South Africa: An urgent need for reform' (2012) 7 *Global Trade and Customs Journal* 275; Yilmaz op cit note 139 at 247–68; and Lonias Simayedwa Ndlovu 'South Africa and the World Trade Organization Anti-Dumping Agreement nineteen years into democracy' (2013) 28 *SAPL* 279.

¹⁴⁸ See Lawrence Baxter *Administrative Law* (1984, corrected reprint 1989) 489–97; Yvonne Burns *Administrative Law under the 1996 Constitution* (2006) 390–417; Cora Hoexter *Administrative Law in South Africa* (2007) 303–23; J R de Ville *Judicial Review of Administrative Action in South Africa* (2003) 195–216.

¹⁴⁹ See Burns op cit note 148 at 387–90; Hoexter op cit note 148 at 258; *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC); *Pharmaceutical Manufacturers of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC); *Nel v Suid-Afrikaanse Geneeskundige en Tandheelkundige Raad* 1996 (4) SA 1120 (T).

¹⁵⁰ Section 6(2) of PAJA.

¹⁵¹ See s 6 of PAJA. Note that Hoexter op cit note 148 at 114 indicates that the list is not exhaustive as 'three well-established grounds of review — vagueness, rigidity and fettering — are missing from the list'.

substantive errors.¹⁵² All parties affected by an administrative action have locus standi, which means that the domestic industry, importers and exporters are all entitled to lodge review proceedings.¹⁵³

While the ITA Act contains no provisions on judicial reviews, the Anti-Dumping Regulations provide as follows:

'Without limiting a court of law's jurisdiction to review final decisions of the Commission, interested parties may challenge preliminary decisions or the Commission's procedures prior to the finalisation of an investigation in cases where it can be demonstrated that —

- (a) the Commission has acted contrary to the provisions of the *Main Act* or these regulations;
- (b) the Commission's action or omission has resulted in serious prejudice to the complaining party; and
- (c) such prejudice cannot be made undone by the Commission's future final decision.'¹⁵⁴

In a recent analysis of domestic review of trade remedies (including anti-dumping) in several countries, it was found that

'[a]lmost all of the developing country chapters conclude that their judicial review systems are not effective. The specific reasons for this conclusion are: (a) the length of judicial review proceedings; (b) the high level of deference accorded to the investigating authorities; (c) the tribunals' reluctance to address substantive issues and instead limit their analysis to alleged procedural errors; and (d) the lack of knowledge on trade remedies on the part of judges.'¹⁵⁵

(a) High court findings

Despite the first South African judicial review of trade remedies taking place as early as 1923,¹⁵⁶ very few trade-remedy cases have been taken on review since the promulgation of the ITA Act and the Anti-Dumping Regulations.¹⁵⁷ Generally, our courts' view is in line with that of Australia, where, in respect to anti-dumping, the following has been held to apply:

¹⁵² Section 6 (2)(f)(ii)(cc) of PAJA provides as follows: 'A court or tribunal has the power to judicially review an administrative action if . . . the action itself . . . is not rationally connected to . . . the information before the administrator.'

¹⁵³ Section 38 of the Constitution of the Republic of South Africa, 1996. See also eg *Ferreira v Levin NO*, *Vryenhoek v Powell NO* 1996 (1) SA 984 (CC); *Minister of Health and Welfare v Woodcarb (Pty) Ltd* 1996 (3) SA 155 (N); *Van Huysteen v Minister of Environmental Affairs and Tourism* 1996 (1) SA 283 (C).

¹⁵⁴ ADR 64.1. Similar provisions are contained in Countervailing Regulation 64 and in Safeguard Regulation 22.

¹⁵⁵ Yilmaz op cit note 139 at 429.

¹⁵⁶ See *Minister of Finance v Randles Bros & Hudson* 1923 NPD 199. See also *Union Government v Fig Bros* 1925 CPD 280; *Watson's Shipping Co v Commissioner of Customs* 1927 TPD 642; *Rex v Lakofski*; *Rex v Griffiths* 1932 GWL 36 for more early cases.

¹⁵⁷ See *Association of Meat Importers and Exporters and others v ITAC* supra note 24; *Association of Electric Cable Manufacturers of South Africa (AECMSA) v ITAC* (unreported case 33807/2005 (T)); *African Explosives Limited (AEL) v ITAC* (unreported case 15027/2006 (T)); *Algorax v ITAC* (unreported case 18829/2001 (T)); *Degussa v ITAC* (unreported case 22264/2007 (T)); *South African Tyre Manufacturers' Conference (SATMC) v ITAC* (unreported case 45302/2007 (T)); *SCAW v ITAC* (unreported

'The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.'¹⁵⁸

Most recently, Nugent JA and Swain AJA held:

'It bears repeating that a review is not concerned with the correctness of a decision made by a functionary, but with whether he performed the function with which he was entrusted. When the law entrusts a functionary with a discretion it means just that: the law gives recognition to the evaluation made by the functionary to whom the discretion is entrusted, and it is not open to a court to second-guess his evaluation. The role of a court is no more than to ensure that the decision-maker has performed the function with which he was entrusted.'¹⁵⁹

and

'The law remains, as we see it, that when a functionary is entrusted with a discretion, the weight to be attached to particular factors, or how far a particular factor affects the eventual determination of the issue, is a matter for the functionary to decide, and as he acts in good faith (and reasonably and rationally) a court of law cannot interfere.'¹⁶⁰

The high court has generally refused to consider the substantive issues relating to any anti-dumping investigation, despite this forming the crux of the matter. Anti-dumping investigations by their very nature are highly technical and involve complex determinations of prices, costs and a variety of injury and causality factors. The court cannot determine whether ITAC followed the correct procedures or applied the law correctly if it does not understand these calculations and does not check whether the results bear any resemblance to the information that served before ITAC or, indeed, whether ITAC properly established the facts to start with.

Thus, although several arguments were raised as regards the facts before ITAC in the *SATMC* case, Hartzenberg J did not refer to or rule on any of

case 48829/2008 (T)); *Progress Office Machines v SARS* supra note 23; *ITAC v SCAW South Africa (Pty) Ltd* Case supra note 22; *International Trade Administration Commission & another v SA Tyre Manufacturers Conference (Pty) Ltd & others* [2011] ZASCA 137. See Gustav Brink *A Theoretical Framework for Anti-Dumping Law in South Africa* (LLD thesis, University of Pretoria, 2004) 933–9; Brink op cit note 147; Brink (2008) op cit note 147; Brink (2010) op cit note 147; Brink op cit note 31 at 50–3; Brink (2012) op cit note 147; Ndlovu op cit note 147 at 279–307; Schlemmer op cit note 24 for discussions on the judicial review of anti-dumping and other trade remedies in South Africa.

¹⁵⁸ *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35–6.

¹⁵⁹ *MEC for Environmental Affairs and Development Planning v Clairison's CC* 2013 (6) SA 235 (SCA) para 18.

¹⁶⁰ *Ibid* para 22.

these arguments and chose to rule exclusively on the legal question as to whether China should be regarded as a market economy.¹⁶¹ This means that by far the majority of issues raised were not even considered, despite these issues having a profound outcome on ITAC's final determination. Likewise, the court refused to rule on any of the substantive arguments proffered in *AECMSA*,¹⁶² *AEL*,¹⁶³ *Degussa*¹⁶⁴ and *SCAW*,¹⁶⁵ each time pronouncing only on issues of procedure.

In only one instance did the court consider the substance of the information before ITAC, when Botha J found that ITAC's determination was illogical and did not reflect a proper evaluation of the facts before it.¹⁶⁶ It is submitted that the decision by Botha J is correct as it gives effect to specific provisions of PAJA, which provides, in relevant part, that administrative action may be judicially reviewed if 'the action was taken . . . because irrelevant considerations were taken into account or relevant considerations were not considered'¹⁶⁷ and if 'the action itself . . . is not rationally connected to . . . the information before the administrator'.¹⁶⁸ It is further submitted that a court cannot rule on whether these two provisions of PAJA were adhered to if it fails to determine whether the facts of a matter were properly established and evaluated.

(b) Appeals

(i) Supreme Court of Appeal

Since the promulgation of the ITA Act, only three cases have been taken on appeal to the Supreme Court of Appeal ('SCA').¹⁶⁹ In *Progress Office Machines*¹⁷⁰ the SCA disregarded specific provisions of the Anti-Dumping Regulations as well as expert opinion from other jurisdictions¹⁷¹ to find,¹⁷² in contrast to the procedures in most other countries,¹⁷³ that where a definitive anti-dumping duty is imposed with retrospective effect to the date a provisional measure was imposed, the definitive duty will lapse five years after the date the provisional measure was imposed, rather than five years

¹⁶¹ *SATMC v ITAC* supra note 157.

¹⁶² *Association of Electric Cable Manufacturers of South Africa (AECMSA) v ITAC* supra note 157.

¹⁶³ *African Explosives Limited (AEL) v ITAC* supra note 157.

¹⁶⁴ *Degussa v ITAC* supra note 157.

¹⁶⁵ *SCAW v ITAC* supra note 157.

¹⁶⁶ *Algorax v ITAC* supra note 157 paras 13–14.

¹⁶⁷ Section 6(2)(e)(ii) of PAJA.

¹⁶⁸ Section 6(2)(f)(ii) of PAJA.

¹⁶⁹ *Progress Office Machines v SARS* supra note 23; *ITAC v SATMC* supra note 157; *AMIE v ITAC* supra note 24.

¹⁷⁰ *Progress Office Machines v SARS* ibid.

¹⁷¹ Ibid para 19.

¹⁷² Ibid para 18.

¹⁷³ See Carolina Saldanha-Ures 'Brazil' 166; Dan Ciuriack 'Canada' 214; and Mülüm Yılmaz 'Turkey' 596, all in Bienen, Brink & Ciuriack op cit note 6.

after the date the definitive duty was published in the *Government Gazette*,¹⁷⁴ as provided for in Anti-Dumping Regulation 38.1. In *AMIE*¹⁷⁵ the SCA was essentially asked to revisit its decision in *Progress Office Machines* to 'overcome the consequences of that decision',¹⁷⁶ and it effectively overturned its previous decision.

In *SATMC* the SCA effectively annulled the application of s 32(4) of the ITA Act and several provisions of the Anti-Dumping Regulations, while also finding that parties had to submit information not requested in ITAC's questionnaires.¹⁷⁷ It also confused different provisions of the ITA Act¹⁷⁸ and rejected China's Protocol of Accession to the WTO as part of international law even though finding that the WTO Agreement and all its annexes, of which the Protocol formed part, was part of international law.¹⁷⁹

It is therefore submitted that the SCA may not fully understand the technical issues at play in anti-dumping law disputes, and hence may fail to provide aggrieved parties with proper relief. In any event, the SCA would only address issues on appeal and would not consider whether ITAC had conducted a proper investigation. The SCA is therefore not in a position to give effect to South Africa's international obligations to conduct a prompt and substantive review of ITAC's findings as regards the proper establishment of the facts, the proper evaluation thereof and the procedures followed in reaching its final determination.

(ii) *The Constitutional Court*¹⁸⁰

Only one anti-dumping matter has been referred to the Constitutional Court to date. In *SCAW*¹⁸¹ the Constitutional Court held that no interdict could be obtained against the Minister to implement a recommendation of ITAC. This was despite the fact that the Anti-Dumping Regulations specifically provide for the judicial review of preliminary findings and interim procedures, the fact that interdicts had previously been granted,¹⁸² and that the Minister actually had no decision-making role in an investigation.¹⁸³ In any event, the

¹⁷⁴ See Brink (2008) op cit note 147; and Ndlovu op cit note 147 at 294–8 for discussions of the SCA's findings.

¹⁷⁵ *AMIE v ITAC* supra note 24.

¹⁷⁶ Ibid para 1.

¹⁷⁷ *ITAC v SATMC* supra note 157 para 20.

¹⁷⁸ Ibid para 22. Harms AP specifically confused s 32(2)(b)(ii)(bb), which relates to the export price from the exporting country to a third country as basis for normal value, with s 32(4), which provides the normal value in a third country that can be used as the basis for a normal value in cases where the country under consideration is alleged to be operating under non-market conditions.

¹⁷⁹ *ITAC v SATMC* supra note 157 para 6, with reference to *Progress Office Machines v SARS* supra note 23 para 5.

¹⁸⁰ Brink (2010) op cit note 147.

¹⁸¹ *ITAC v SCAW South Africa (Pty) Ltd* supra note 22. See Brink (2010) op cit note 147; Ndlovu op cit note 147; and Schlemmer op cit note 24 for discussions of the case.

¹⁸² See *Algorax v ITAC* supra note 157 and *SCAW v ITAC* supra note 157.

¹⁸³ See Brink op cit note 16. Note that Ndlovu op cit note 147 at 303–5 disagrees.

Constitutional Court will only address constitutional issues and will not consider whether ITAC conducted a proper investigation.¹⁸⁴ The court is therefore not in a position to give effect to South Africa's international obligation to conduct a substantive review of ITAC's findings.

From the foregoing discussion on appeals, it is submitted that the courts are not in a position to conduct a substantive review of and appeal against ITAC's findings¹⁸⁵ and that their failure to engage with the substance of anti-dumping investigations constitutes a violation of South Africa's international obligation to undertake substantive reviews as required by Article 13 of the Anti-Dumping Agreement. The court process is also too slow to give effect to the obligation of a 'prompt' review.

V RECOMMENDATIONS

The above discussion shows that there are considerable similarities between ITAC and the Competition Commission and the work they do. Both are independent institutions subject only to the Constitution and the law, with other state entities obliged to assist in ensuring their independence. Both rule on issues that have a direct impact on competition in the market, with ITAC dealing with matters of international trade and the Competition Commission dealing, *inter alia*, with matters affecting domestic trade. In some instances, the details they consider may even be similar, for example whether there is predatory pricing (or dumping) causing injury.

However, whereas the Competition Tribunal has been established to review Competition Commission findings, whence an appeal can be made to the Competition Appeal Court, any application for review of ITAC decisions must be made directly to the high court and its appeal courts, which does not appear to have the necessary expertise to undertake such a substantive review and appeal,¹⁸⁶ as required by South Africa's international obligations.

In view of the analogies between anti-dumping and competition law and bearing in mind the similarities in the technical nature of both subjects, it is submitted that it is desirable that there are also similar review procedures.¹⁸⁷ Recent experience has shown that many of ITAC's decisions may be

¹⁸⁴ Note that Schlemmer *op cit* note 24 at 750–2 also criticises the Constitutional Court verdict on the basis that it placed too much emphasis on the international agreement and too little on the applicable regulations, and that the Ministers are not performing these functions as constitutional functions, but as functions in terms of the SACU Agreement. See also *Executive Council of the Western Cape Legislature & others v President of the Republic of South Africa & others* 1995 (4) SA 877 (CC); *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd & others* 2014 (3) SA 1066 (CC).

¹⁸⁵ *ITAC v SCAW* *supra* note 22 para 100.

¹⁸⁶ *Ibid.*

¹⁸⁷ Note that although there is a specialist Competition Appeals Court, it is not proposed that such a specialist court be set up to hear anti-dumping cases, as there is simply an insufficient volume of cases to justify such a court. On the other hand, considering the similarities of cases, it might be appropriate to expand the Competi-

factually and procedurally flawed, but at present parties only have recourse to the high court or, in the case of exporters or foreign producers and provided they can convince their governments, they may pursue dispute settlement in the WTO.¹⁸⁸

Article 13 of the Anti-Dumping Agreement, quoted above, creates an international obligation with three separate requirements. The first requirement is to set up a judicial, arbitral or administrative *tribunal or procedures*, something that cannot normally be fulfilled by a non-specialised court. As regards the second requirement, analysis of WTO disputes also shows that the reference to 'review' is a reference to a *substantive* review, which determines whether the authority (a) properly established the facts of the matter; (b) objectively and fairly evaluated the facts; and (c) acted in line with the procedural requirements.¹⁸⁹ This extends significantly further than the review role our courts generally play. Such WTO reviews are also conducted by a team of specialists.

The final important requirement is that the review must be 'prompt', which is seldom possible in judicial reviews of anti-dumping matters. In a recent review, *SATCM v ITAC*, it took nearly three years before the high court could issue a verdict which was subsequently appealed, with the appeal taking more than a year to be finalised.¹⁹⁰

It is therefore proposed that an International Trade Tribunal, with review authority similar to that entrusted to the Competition Tribunal, be set up to review ITAC's decisions substantively and promptly. The functions of the proposed Tribunal should however not be limited to review functions alone, but should mirror the various functions of the Competition Tribunal, where appropriate and applicable. The Competition Tribunal, its competencies and procedures could thus serve as a basic model for the creation of an International Trade Tribunal with its own peculiar competencies and procedures. Such a Tribunal should allocate each review to a panel which has both legal and economic or accountancy competencies. Any interested party who co-operated in an investigation before ITAC should be able to refer a matter to the International Trade Tribunal, within a prescribed maximum period following ITAC's final determination, and without any advance notice having to be given to ITAC or SARS.¹⁹¹ Rules or regulations should be drafted to ensure parties' representatives have access to all the information that served before ITAC, including all confidential information, subject to confidentiality undertakings, and to ensure the prompt review of all cases

tion Appeal Court's jurisdiction to also hear appeals from the International Trade Tribunal.

¹⁸⁸ WTO *South Africa — Anti-Dumping Duties on Frozen Meat of Fowls from Brazil* WT/DS439/1 (25 June 2012).

¹⁸⁹ Articles 7, 11 and 12.7 of the Understanding on Dispute Settlement and art 17.6 of the Anti-Dumping Agreement.

¹⁹⁰ *SATMC v ITAC* supra note 157; *ITAC v SATMC* supra note 157.

¹⁹¹ At present, applicants have to give ITAC and SARS 30 days' advance notice of any impending review. See ADR 64.2 and s 96(1) of the Customs and Excise Act.

referred to the Tribunal. This would be in line with the mechanism in s 45(1) of the Competition Act, which is very similar in wording to s 35(3) of the ITA Act, in that it requires the Competition Tribunal to 'make any appropriate order concerning access to that confidential information'.¹⁹² In general, such a review should not take more than six months to complete, unless there are compelling reasons to exceed such time frame.

¹⁹² See *Competition Commission v Unilever plc* 2004 (3) SA 23 (CAC) at 30F–I.