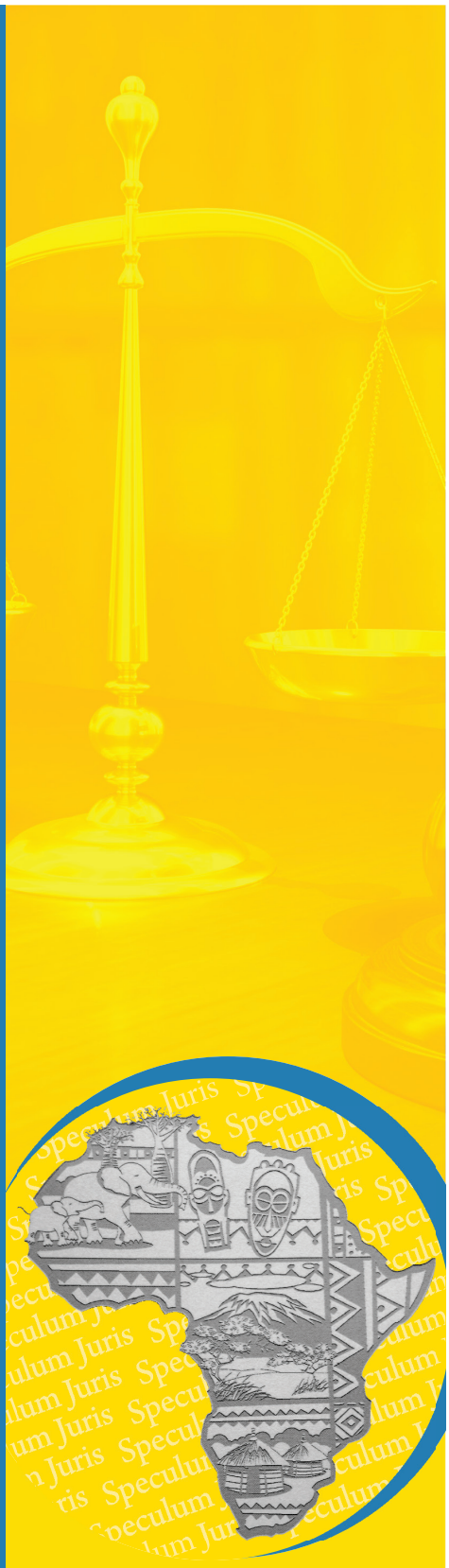
Speculum Juris



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A Critical Analysis of the Frozen Potato Chips Saga Between the Southern African Customs Union and Belgium and the Netherlands

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Abstract

Frozen potato chips originating in, or imported from Belgium and the Netherlands have been the subject of the concurrent imposition of anti-dumping and safeguard duties by the International Trade Administration Commission of South Africa. This article assesses the legal implications of this concurrent imposition of anti-dumping and safeguard duties. On the whole, this article argues that the concurrent imposition of anti-dumping duties and safeguard measures constitutes a "double remedy" which contravenes South Africa's cumulative obligations under the WTO Agreement because to a large extent, the overarching injury remedied by safeguard duties is similar to the overarching injury remedied by anti-dumping duties.

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1 INTRODUCTION

Frozen potato chips originating in, or imported from Belgium and the Netherlands have been the subject of anti-dumping and safeguard duties in South Africa.[1] It has emerged that these anti-dumping and safeguard duties have been imposed concurrently on the frozen potato chips in question. Consequently, this article critically examines the legal issues that emanate from the concurrent imposition of anti-dumping and safeguard duties by the International Trade Administration Commission (ITAC). This analysis will be conducted through a detailed analysis of the relevant case law and legislation, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (ADA) and the Agreement on Safeguards (AGS). Firstly, the article argues that the concurrent imposition of anti-dumping and safeguard duties constitutes a "double remedy" which falls foul of South Africa's cumulative obligations under the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement). Secondly, this article argues that some of the anti-dumping duties on frozen potato chips may have become illegal because the "margin of dumping" upon which they are based, has now become *de minimis*. Thirdly, the article finds that in the absence of an interim review, nor a *de novo* and proper price comparison, the Minister of Trade and Industry's decision to impose identical duties prior to, and after the suspension of the anti-dumping duties, could be found to be arbitrary and irrational in violation of the interested parties' constitutional right to just administrative action. Lastly, this article contends that since the "injury" no longer exists in respect of some of the exporters, there is no longer a causal nexus between "dumping" and the "material injury" found in the original investigation.

In the final analysis, the article makes two recommendations: firstly, that in light of the significantly changed circumstances, the ITAC should have conducted a *de novo* and fair price comparison between the normal value and the export price, together with an interim review *suo muto* prior to the lapsing of the suspension of the anti-dumping duties and secondly, it is suggested that the interested parties must pursue a judicial review as provided for by section 46 of the International Trade Administration Act 71 of 2002 (ITAA).

The discussion to follow is structured in three symbiotic parts. The first part of this article establishes the factual background that illustrates the "double remedy" conundrum *in casu*. The second part of this article explores the legal issues that arise out of the concurrent imposition of anti-dumping and safeguard duties. The final part suggests recommendations for the interested parties.

2 FACTUAL BACKGROUND

"Dumping" is defined as the introduction of goods into the commerce of a country or its common customs area at an export price less than the normal value of those goods.[2] In simple terms "dumping" connotes a situation of international price discrimination.[3] South Africa's international obligations on "dumping" emanate from the ADA.[4] The General Agreement on Tariffs and Trade 1994 (GATT) works in concert with the ADA to regulate the practice of "dumping."[5] To honour its obligations under the ADA, South Africa has promulgated the Customs and Excise Act 91 of 1964, the International Trade Administration Act 71 of 2002 (ITAA) and the International Trade Administration Commission Regulations on Anti-Dumping

1 See ITAC "Definitive Duties in force as of 31 December 2016" http://www.itac.org.za/upload/Definitive%20duties/Definitive%20duties%20in%20place%20December%202016.pdf (accessed 22-12-2016). See also ITAC SA "Report No.474: Investigation into the Alleged Dumping of Frozen Potato Chips Originating in or Imported from Belgium and the Netherlands: Final Determination" (ITAC Report No. 474) http://www.itac.org.za/upload/document_files/20161021022236_SKM_754e16102113580.pdf (accessed 21-01-2016); and ITAC South Africa "Report No.457: Investigation into Remedial Action in the Form of a Safeguard Against the Increased Imports of Frozen Potato Chips: Final Determination" (ITAC Report No. 457) http://www.itac.org.za/upload/document_files/20150727021633_scan0084.pdf6 (accessed 21-02-2016).The tariff heading for frozen potato chips is 2004.10.20.

2 Section 1 of International Trade Administration Act 71 of 2002 (ITAA). See also I*nternational Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 4 SA 618 (CC) (*SCAW*) para 1. See further Article VI of GATT.

3 Bhala *Modern GATT Law: A Treatise on the General Agreement on Tariffs and Trade* (2005) 684.

4 *SCAW* para 2. See also Vinti "A Spring without Water: The Conundrum of Anti-Dumping Duties in South African Law" 2016 *PER/PELJ* 1 2.

5 Vinti 2016 *PER/PELJ* 2.

in South Africa (ADR),[6] which are all read together to give effect to the ADA.[7] In essence, dumping is prohibited if it causes or threatens material injury to an established industry in the territory of a contracting party or if it materially retards the establishment of a domestic industry.[8]

A determination of threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility.[9] The change in circumstances which would create a situation in which dumping would cause material injury must be clearly foreseen and imminent.[10] One of the factors to be considered include whether products are entering, or will be entering the Southern African Customs Union (SACU) market at prices that will have a significant depressing or suppressing effect on the SACU price.[11] In considering whether there is a "causal link" between the dumping and the material injury, the ITAC shall consider all relevant factors, including, the price undercutting experienced by the SACU industry *vis-à-vis* the imported products.[12]

Pursuant to this approach, an anti-dumping investigation shall only be initiated upon acceptance of a written application by, or on behalf of the SACU industry.[13] This investigation must be formally initiated through publication of an initiation notice in the Government Gazette.[14] A preliminary investigation will then follow in which a questionnaire will be sent to all interested parties who will be required to supply the relevant information to the ITAC.[15] The interested parties shall receive thirty days from the receipt of the questionnaires to submit their responses to the ITAC.[16] Thereafter, a preliminary finding will be made and provisional measures can be imposed.[17] After the publication of the preliminary report, the final investigation ensues, in which responses to the preliminary report are received and taken into consideration.[18] The ITAC will then make a final determination and make a recommendation to the Minister of Trade and Industry (hereafter, the Minister).[19] The Minister is required to make an independent evaluation and he/she is entitled to accept or reject the ITAC's recommendation.[20] The Minister of Finance may then, by notice in the Gazette, amend schedule 2 to impose an anti-dumping duty.[21]

In casu, on 21 June 2013 an anti-dumping investigation into frozen potato chips from Belgium and the Netherlands was initiated.[22] The preliminary determination found that frozen potato chips originating in, or imported from Belgium and the Netherlands, were being "dumped", causing material injury to the domestic industry.[23] On 20 December 2013, up to and including 20 June 2014, provisional payments were imposed to protect the domestic industry while the investigation continued.[24]

6 GN 3197 in GG 25684 of 14 November 2003 (ADR).
7 *SCAW* para 2. See also Vinti 2016 *PER/PELJ* 2. See further, Satardien "South Africa's International Trade Laws and its 'guillotine' clause" 2010 *Manchester J of International Economic Law* 52 54.
8 Article VI.1 of the GATT read with regulation 13.1 of the ADR.
9 Article 3.7 of the ADA read with regulation 14.1 of the ADR.
10 Regulation 14.1 of the ADR.
11 Regulation 14.2(d) of the ADR.
12 Regulation 16.1 of the ADR read with Article 3.5 of the ADA.
13 Regulation 3 of the ADR.
14 Regulation 28.1 of the ADR.
15 Regulation 29-34 of the ADR.
16 Regulation 29.3 of the ADR.
17 Regulation 33-34 of the ADR read with Article 7 of the ADA.
18 Regulation 35 of the ADR.
19 Regulation 38 of the ADR.
20 Section 4(2) of Board on Tariffs and Trade Act 107 of 1986. See also *Farm Frites International v International Trade Administration Commission* (Unreported, Case Number 32263/14, delivered on 20 May 2014, Gauteng Division, Pretoria) para 4.
21 Section 56(1) read with section 55(2) of the Customs and Excise Act 91 of 1964.
22 GN 635 in GG 36575 of 21 June 2013.
23 GN 1024 in GG 37175 of 20 December 2013. See further ITAC Report No. 474 3 http://www.itac.org.za/upload/document_files/20161021022236_SKM_754e16102113580.pdf (accessed 22-09-2016).
24 GN 1024 in GG 37175 of 20 December 2013. See further ITAC Report No.474 3.

The ITAC's final recommendation to the Minister was that definite anti-dumping duties be imposed on frozen potato chips originating in, or imported from Belgium and the Netherlands.[25] These anti-dumping duties were technically imposed on 8 August 2014, but were suspended until 21 October 2016.[26] The Minister's decision to suspend the final duties was due to the fact that the Minister was waiting for the termination of the safeguard duties on the frozen potato chips.[27] These duties were then imposed as from 21 October 2016 and are still at the time of writing in 2018 in operation.[28]

In essence, safeguard measures refer to the right of a WTO Member to impose temporary tariffs, quotas, tariff rate quotas or other measures to ensure that its economy or domestic industries do not suffer serious harm from imports and trade concessions.[29] In pursuance of South Africa's obligations under the GATT and the AGS, the ITAC Amended Safeguard Regulations provide that a safeguard measure may only be imposed in response to a rapid and significant increase in imports of a product as a result of an unforeseen development, where such increased imports cause or threaten to cause serious injury to the SACU industry producing the like or directly competitive product.[30] The investigation into whether safeguard duties should be imposed on frozen potato chips had been initiated on 8 March 2013.[31] This investigation, like the anti-dumping investigation in respect of the same product, was initiated on behalf of the SACU industry by McCain Foods (SA) (Pty) Ltd, a major producer of frozen potato chips in the SACU.[32] The ITAC calculated the safeguard duty in question on the basis of price undercutting, which is the extent to which the price of the imported product is lower than the verified ex-factory selling price of the SACU product.[33] The ITAC then made the final determination to recommend to the Minister that the safeguard duties must be imposed for a period of two years and eleven months.[34] These safeguard duties were imposed on 25 July 2014.[35] On 5 June 2016, the safeguard duties were terminated.[36]

25 ITAC Report No. 474 80.
26 GN 634 in GG 37889 of 8 August 2014; ITAC "Notice of Conclusion of an Investigation into the Alleged Dumping of Frozen Potato Chips Originating in or Imported from Belgium and the Netherlands" (ITAC "Notice of Conclusion") 84-85. See also ITAC "Definitive Duties in force as of 31 December 2016".
27 ITAC "Notice of Conclusion" 85.
28 GN R. 1306 in GG 40363 of 21 October 2016 and ITAC "Definitive Anti-Dumping Measures in Force as of 30 June 2017." http://www.itac.org.za/upload/Definitive%20duties%20in%20place%2030%20June%202017.pdf (accessed 12-03-2018).
29 Matsushita et al *The World Trade Organization: Law, Practice and Policy* (2006) 438.
30 Preamble and Regulation 4.1 of the ITAC Amended Safeguard Regulations. See Art XIX of the GATT and section 16(b) and section 26 of the ITAA. See further Agreement on Safeguards.
31 GN 175 in GG 36207 of 8 March 2013.
32 ITAC Report No. 457 6. The safeguard investigation was also supported by Nature's Choice Products (Pty) Ltd and Lamberts Bay Foods. See also Regulation 7 of the ITAC Amended Safeguard Regulations.
33 ITAC Report No. 457 84.
34 *Ibid.* 85.
35 GN 576 in GG 37855 of 25 July 2014. See section 57(1) of the ITAA.
36 GN 593 in GG 40014 of 27 May 2016.

3 CRITICAL ANALYSIS OF THE CONCURRENT IMPOSITION OF ANTI-DUMPING AND SAFEGUARD DUTIES

3 1 Does the Concurrent Imposition of Anti-Dumping and Safeguard Duties Constitute a "Double Remedy"?

South Africa is a Member of the WTO.[37] Parliament ratified South Africa's membership of the WTO on 2 December 1994.[38] The WTO Agreement was approved by Parliament on 6 April 1995.[39] It is trite law that the ADA and the AGS are both considered as Multilateral Agreements on Trade in Goods contained in Annex 1A of the WTO Agreement and, as such, are both integral parts of the same treaty (the WTO Agreement) that are binding on all Members, including South Africa.[40] This means that the provisions of the ADA and the AGS, are all provisions of one treaty, the WTO Agreement.[41] Therefore, South Africa's international obligations on "dumping" arise out of the ADA.[42] It also follows then that South Africa's obligations on safeguard measures are borne out of the AGS.[43] The ADA and the AGS entered into force as part of the WTO Agreement at the same time.[44] They apply equally and are equally binding on all WTO Members.[45] South Africa entered into cumulative obligations under these covered agreements and should thus be aware of its actions under one agreement when taking action under another.[46] Such an interpretative approach of the WTO Agreement requires that the interpreter proceeds in a coherent and consistent manner, giving meaning to all applicable provisions harmoniously.[47] It is then required that the ADA and the AGS must be read as representing an inseparable package of rights and disciplines which have to be considered in conjunction.[48] An appropriate reading of this "inseparable package of rights and disciplines" must then be one that accords meaning to all the relevant provisions of the two equally binding agreements of the ADA and the AGS.[49]

Bearing this in mind, it is trite law that the simultaneous imposition of anti-dumping duties calculated under a non-market economy methodology and of countervailing duties likely results in any subsidy granted in respect of the good at issue being offset more than once.[50]

37 *SCAW* para 2.
38 *Ibid.* para 25.
39 *Progress Office Machines v SARS* 2008 2 SA 13 (SCA) para 6 (*Progress Office Machines*). See also *SCAW* para 25.
40 See *Progress Office Machines* para 5, on the place of the ADA in South African law. See also WTO Appellate Body Report, "US Subsidies on Upland Cotton WT/DS267/AB/R" ("US Upland Cotton"), adopted 20 June 2008, paras 549-550. See also WTO Appellate Body Report, "United States Standards for Reformulated and Conventional Gasoline", DS2 at 23, DSR 1996:I, 3, adopted 20 May 1996, 21; and WTO Appellate Body Report, "India Patent Protection for Pharmaceutical and Agricultural Chemical Products DS50", adopted on 16 January 1998, para 45.
41 WTO Appellate Body Report, "Argentina Safeguard Measures on Imports of Footwear" - AB-1999-7 -, DS121 ("Argentina Footwear"), adopted 12 January 2000, para 81.
42 *SCAW* para 2 and para 25. See also in this regard *Progress Office Machines* para 6. See also Satardien 2010 *Manchester J of International Economic Law* 54. See generally Vinti 2016 *PER/PELJ* 16-21. See further Ndlovu "South Africa and the World Trade Organization Anti-Dumping Agreement Nineteen Years into Democracy" 2013 *SAPL* 281 296. See further Brink "Progress Office Machines v South African Revenue Services [2007] SCA 118 (RSA)" 2008 *De Jure* 643 645.
43 D*egusa Africa Pty Ltd v ITAC,* Transvaal Provincial Division, Case Number 22264/2007, delivered 20 June 2007 (Unreported) para 6. See also *SCAW* para 2.
44 "Argentina Footwear" para 81.
45 *Ibid.*
46 WTO Appellate Body Report, "United States Definitive Anti-Dumping and Countervailing Duties on Certain Products from China" ("US Anti-Dumping and Countervailing Duties"), DS379, adopted 25 March 2011, para 570. See also "US Upland Cotton" paras 549-550.
47 "US Anti-Dumping and Countervailing Duties" para 570.
48 "Argentina Footwear" para 81.
49 *Ibid.*
50 "US Anti-Dumping and Countervailing Duties" para 14.67-14.68. The Panel defined a "non-market economy methodology" as a methodology for the calculation of dumping margins under which the export price is compared to a normal value that is based on "surrogate" costs or prices from a third country. See further para 543. See generally section 32(4) of the ITAA.

It seldom happens that a subsidy conferred upon the producer of an exported good has no effect at all on either the producer's costs of production or assuming they are relevant, export prices.[51] In most instances, a portion of that subsidy would be subject to a double remedy where both anti-dumping duties based on an non-market economy methodology, and countervailing duties, were imposed on imports of a given product.[52] The concurrent imposition of anti-dumping duties calculated under a non-market economy methodology and of countervailing duties creates the potential for the imposition of a "double remedy."[53] Double remedies may also arise in the context of domestic subsidies granted within market economies when anti-dumping and countervailing duties are concurrently imposed on the same products and an unsubsidised, constructed, or third country normal value is used in the anti-dumping investigation.[54] The "double remedy" is prohibited by the GATT, which provides that no product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidisation.[55] In light of this finding, it is argued in this article that the "double remedy" conundrum can also manifest in the form of the concurrent imposition of anti-dumping and safeguard duties.

To this end, the United States Court of Appeals for the Federal Circuit has elaborated on this conception of the "double remedy" by holding that, because anti-dumping duties and safeguard duties are substantially similar, it is sound to conclude that safeguard duties are more like anti-dumping duties "in purpose and function, than they are like ordinary customs duties."[56] Anti-dumping duties and safeguard duties, unlike normal customs duties, are imposed based on almost identical findings that a domestic industry is being injured or threatened with injury due to the imported product.[57] It has also been held that safeguard duties are like anti-dumping duties because they provide only interim relief from the injurious effects of imports.[58] Thus, it is sound to consider safeguard duties as anti-dumping duties and not to deduct them from the export price when calculating the dumping margin.[59] This is because "safeguard duties can reduce or eliminate the injury from dumping because, to a large extent, the overarching injury remedied by safeguard duties is similar to the overarching injury remedied by anti-dumping duties."[60] To evaluate both a safeguard duty and an anti-dumping duty on the same imports without due consideration of the safeguard duty, "would be to remedy *substantially overlapping injuries twice.*"[61] Therefore, it is "reasonable" to assume that the similarities between anti-dumping duties and safeguard duties, and the likelihood that deducting safeguard duties from the export price would result in collecting a "double remedy."[62] This reasoning was endorsed by the WTO Panel Report entitled "United States Definitive Anti-dumping and Countervailing Duties on Certain Products from China" where it was held that an investigating authority can decide not to deduct the safeguard duty from the export price thereby resulting in a "double remedy."[63] This is because safeguard duties may reduce or eliminate the injury that is required for an anti-dumping duty to continue and further, by deducting safeguard duties from the export price may result in an artificial dumping margin. This means that an investigating authority such as the ITAC would be punitively collecting additional anti-dumping duties if it were to increase dumping margins by deducting safeguard duties when calculating dumping margins.[64]

51 "US Anti-Dumping and Countervailing Duties" para 14.67-14.68.
52 "US Anti-Dumping and Countervailing Duties" para 14.74.
53 *Ibid.* para 14.70.
54 *Ibid.* para 543.
55 Article VI.5 of the GATT. See also Article 10 of the Agreement on Subsidies and Counterveiling Measures.
56 *Wheatland Tube Co. v United States, (Wheatland Tube)* 495 F.3d 1355 (Fed. Cir. 2007) 10.
57 *Ibid.* 11.
58 *Ibid.*
59 *Ibid.* 12.
60 *Ibid.* 18.
61 *Ibid.* 17 (Emphasis added).
62 *Ibid.* 13.
63 "US Anti-Dumping and Countervailing Duties" para 14.171 and footnote 1083.
64 Wheatland Tube 18.

In tandem with the ADA, the AGS seeks to avoid the "double remedy" by providing that in an investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry, the ITAC must evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, including the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, and changes in the level of sales, profits and losses.[65] This list is not exhaustive and would include the "double remedy" in the form of the concurrent imposition of anti-dumping and safeguard duties as *in casu*.

This does not mean that the ITAC may limit their evaluation of "all relevant factors", under Article 4.2(a) of the AGS, to the factors which the interested parties have cited as relevant.[66] The ITAC must in every case conduct a comprehensive investigation to enable it to conduct a proper evaluation of all of the relevant factors expressly mentioned in Article 4.2(a) of the AGS.[67] Article 4.2(a) also requires the ITAC, and not the interested parties, to examine fully the relevance, if any, of "other factors."[68] If the ITAC considers that a particular "other factor" may be relevant to the situation of the domestic industry, its duty to investigate and examine under Article 4.2(a) requires it to be vigilant, especially in the face of possible inadequacies in the evidence submitted, and views expressed, by the interested parties.[69] In such cases, where the ITAC has insufficient information before it to evaluate the possible relevance of such an "other factor", the ITAC is required to investigate fully that "other factor", so that it can comply with its obligations of evaluation under Article 4.2(a).[70] In that respect, the ITAC's "investigation" under Article 3.1 is not restricted to the investigative steps specified in that provision, but must simply "include" these steps.[71] Therefore, the ITAC must, when the circumstances so require, conduct additional investigative steps to comply with its obligation to assess all relevant factors.[72] The double remedy *in casu* requires an "additional" investigation as envisaged in Article 4.2 (a) of the AGS.

In the alternative, the Appellate Body's findings on double remedies could be seen to permit the concurrent imposition of non-market economy anti-dumping duties and countervailing duties only if the investigating authority affirmatively proves that double remedies would not arise in a specific proceeding or takes affirmative steps to prevent double remedies.[73] This implies that the concurrent imposition of anti-dumping and safeguard duties could be found to be legal if the ITAC can show that the anti-dumping and the safeguard duties are not functioning as a double remedy or that it has taken significant steps to avoid the double remedy. As already established earlier in the discussion, South Africa's steps to avoid the double remedy *in casu* constitute an exercise in futility because the Minister had technically imposed the definite anti-dumping duty from 8 August 2014. It is common cause that the safeguard duties in question were imposed on 25 July 2014,[74] and terminated on 5 June 2016.[75] This means that the definite anti-dumping duty and the safeguard duties ran concurrently. This constitutes the "double remedy" in violation of South Africa's cumulative obligations under the WTO Agreement.

3 2 What is the Date of Imposition of the Anti-Dumping Duties?

As established earlier in the discussion, the anti-dumping duties on the frozen potato chips had technically been imposed on 8 August 2014, but had been suspended until 21 October

65 Article 4.2(a) of the AGS.
66 WTO Appellate Body Report, "United States Definitive Safeguard Measures of Imports of Wheat Gluten from the European Communities" ("US Wheat Gluten"), DS177, adopted on 19 January 2001, para 55.
67 *Ibid.* para 55.
68 *Ibid.*
69 *Ibid.*
70 *Ibid.*
71 *Ibid.*
72 *Ibid.*
73 Zheng "Trade Remedies and Non-Market Economies: The WTO Appellate Body's Report in United States—Definitive Antidumping and Countervailing Duties on Certain Products from China" 2011 *Insights* 1 4.
74 GN 576 in GG 37855 of 25 July 2014. See also section 57(1) of the ITAA.
75 GN 593 in GG 40014 of 27 May 2016.

2016.[76] The safeguard duties in question had been imposed on 25 July 2014.[77] It has already been established that this approach results in the "double remedy." The question of the date of commencement and the date of termination of anti-dumping duties is also crucial to the inquiry into whether there has been a concurrent imposition of anti-dumping and safeguard duties. In this regard, it is trite law that an anti-dumping duty shall remain in force only as long as, and to the extent necessary to counteract dumping which is causing injury.[78] However, any definitive anti-dumping duty must cease on a date no later than five years from its imposition, unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by, or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would likely lead to the continuation or recurrence of dumping and injury.[79] In tandem with the ADA, the Regulations provide that the definitive anti-dumping duties will remain in place for a period of five years from the date of the publication of the ITAC's final recommendation unless otherwise specified or unless reviewed prior to the lapse of the five- year period.[80] In the same vein, regulation 53 of the ADR requires that the duration of the anti-dumping duties must not exceed a period of five years from the imposition or the last review thereof. Thus, it has been held that regulation 53 functions to bring down a guillotine on an anti-dumping duty that would otherwise continue beyond the period it specifies.[81]

The question on the date of the imposition of the anti-dumping duties has been adjudicated upon by the courts in *Progress Office Machines*, and more recently, in *Association of Meat Importers v ITAC (AMIE)*.[82] These two cases turn on the interpretation of the date of the "imposition" of definitive anti-dumping duties, which invariably determines the date of expiry of the duties as espoused by regulations 38 and 53 of the ADR respectively.[83] It is submitted that the court in *Progress Office Machines* correctly held that the date of imposition of a duty is the date when the "burden" to pay the duty takes effect.[84] The "burden" theory provides that the duty be imposed from the date when the importer must pay the duty.[85] Vinti opines that the implication of *Progress Office Machines* is that the purpose of amending schedule 2 is simply to record the duty which could have already commenced.[86] This issue of the date of the imposition of the anti-dumping duties, has *in casu*, been compounded by the Minister's decision to suspend the duties until 21 October 2016.[87] However, the ITAC has confirmed that the five-year period for the anti-dumping duties in question will be calculated from 8 August 2014, rather than 21 October 2016.[88] Therefore, the anti-dumping duties on frozen potato chips will expire on 7 August 2019.[89] This approach contravenes the reasoning of the court in *Progress Office Machines*, where it was held that the anti-dumping duty would only have commenced on the day the "burden" took effect. This would then mean that the definite anti-dumping duties were "imposed" as from 21 October 2016. Therefore, the Minister's decision in fixing the date of imposition of the definite anti-dumping duty as from 8 August 2014 is not correct in law because that is not the date the "burden" took effect. This would also mean that the anti-dumping duties in question would terminate prematurely on 7 August 2019, which is before the correctly calculated five-year period which ends on 20 October 2021. This approach could perpetuate the injury to the domestic industry.

76 GN 1306 in GG 40363 of 21 October 2016. See also ITAC "Notice of Conclusion" 84-85. See also ITAC "Definitive Duties".
77 GN 576 in GG 37855 of 25 July 2014.
78 Article 11.1 of the ADA.
79 Article 11.3 of the ADA.
80 Regulation 38.1 of the ADR read with Article 11.3 of the ADA.
81 *Progress Office Machines* para 72.
82 *Association of Meat Importers v ITAC* 2013 4 All SA 253 (SCA).
83 Vinti 2016 *PER/PELJ* 4.
84 *Progress Office Machines* para 16.
85 *Ibid.* para 15-16.
86 Vinti 2016 *PER/PELJ* 6.
87 GN 1306 in GG 40363 of 21 October 2016. See ITAC "Definitive Duties". It must be noted here that the process of actual amendment of the Schedule 2 is effected by the Minister of Finance as per section 56 of the Customs and Excise Act 91 of 1964.
88 ITAC "Notice of Conclusion" 84-85. See also ITAC "Definitive Duties".
89 Paradza "Period of Imposition of the Anti-Dumping Duties on French Fries" http://xa.co.za/period-of-imposition-of-the-anti-dumping-duties-on-french-fries/ (accessed 21-11-2016).

Contrary to this approach, the court in *AMIE* held that it is not the writing in the schedule that brings the anti-dumping duties into existence, but that they are brought into existence by the act of the Minister of Finance in publishing the amendment to the schedule.[90] This is the so-called "date of publication" theory.[91] The writing then inserted in the schedule simply records that amendment.[92] The duties in question were published in the Government Gazette on 8 August 2014.[93] This would then mean that on the basis of the *AMIE* decision, the Minister's decision that the anti-dumping duties will terminate on 7 August 2019 would be correct in law. Brink submits that the reasoning of the court in *AMIE* is correct and he argues that the duties commence on the date of publication of the notice in the Gazette.[94] In the same vein, Ndlovu asserts that the approach of the court in *Progress Office Machines* is devoid of a credible textual basis and it is problematic because it is prompted by judicial activism, which does not bode well for the future.[95] However, Vinti disagrees with the reasoning in *AMIE* and he submits that the decision in *Progress Office Machines* is correct on the basis of the WTO Panel Report "Mexico Anti-Dumping Investigation of High Fructose Corn Syrup from the United States". [96] In the Panel Report it was held that a provisional measure is the basis under which a Member may, if the requisite conditions are met, *levy* anti-dumping duties retroactively and is thus "generally determinative of the period for which a definitive anti-dumping duty may be levied retroactively."[97] Thus on the basis of the above-mentioned Panel Report the duties should have been imposed from 21 October 2016, which is the date when the "levy" or "burden" was imposed. This means then that the Minister's decision is in violation of the ADA which propagates the "burden" theory as opposed to the "date of publication theory." This brings to the fore the urgent need for the President of South Africa to bring the Customs Duty Act into effect.[98] The Customs Duty Act permits the ITAC to choose an appropriate date that allows for the duties to lapse when the five-year period required by the ADR lapses, unless re-authorised by a sunset review.[99]

3 3 Does the "Margin of Dumping" still Exist?

An enquiry into the legality of the concurrent imposition of anti-dumping and safeguard duties also requires an assessment of the "margin of dumping." This is because safeguard duties may reduce or eliminate the injury that is required for an anti-dumping duty to continue and because deducting safeguard duties from the export price may result in an artificial dumping margin. The ITAC would thus be punitively collecting additional anti-dumping duties if it were to increase dumping margins by deducting safeguard duties when calculating dumping margins.[100] To this end, when only one product is under investigation, the "margin of dumping" is determined as the amount by which the normal value exceeds the export price.[101]

"Normal value" in respect of any goods, means the comparable price paid or payable in the ordinary course of trade for like goods intended for consumption in the exporting country or country of origin.[102] "Export price" means the price actually paid or payable for goods sold for export, net of all taxes, discounts and rebates actually granted and directly related to that sale.[103] There must be immediate termination of an anti-dumping duty in cases where the authorities determine that the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, or the injury, is negligible.[104]

90 *AMIE* para 44.
91 Vinti 2016 *PER/PELJ* 6.
92 *AMIE* para 44.
93 ITAC "Notice of Conclusion" 84-85. See ITAC "Definitive Duties".
94 Brink 2008 *De Jure* 646-647.
95 Ndlovu 2013 *SAPL* 297.
96 Vinti 2016 *PER/PELJ* 8-9. See WTO Panel Report, "Mexico Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States" ("Mexico Corn Syrup") DS132, adopted 24 February 2000. See Article 10 of the ADA.
97 Vinti 2016 *PER/PELJ* 8-9. See "Mexico Corn Syrup" para 7.53. See also Article 10 of the ADA (Emphasis added).
98 Vinti 2016 *PER/PELJ* 7.
99 Section 15(1) and section 15(3) of the Customs Duty Act 30 of 2014. See Vinti 2016 *PER/PELJ* 7.
100 *Wheatland Tube* 18.
101 Regulation 1 read with regulation 12.1 of the ADR. See Article 2.2 of ADA.
102 Section 32(2)(b) of the ITAA.
103 Section 32(2)(a) of the ITAA.
104 Article 5.8 of the ADA read with regulation 12.3 of the ADR.

The margin of dumping shall be considered to be *de minimis* if this margin is less than two per cent, expressed as a percentage of the export price.[105] On the other hand, the volume of exports from a country shall normally be regarded as "negligible" if the volume of imports for the like product from that country is found to account for less than three per cent of the total imports of the like product into the SACU market, unless countries which individually account for less than three per cent of the total imports of the like product into the SACU market collectively account for more than seven per cent of the total imports of the like product into the SACU market.[106]

The margin of dumping that triggers immediate termination in terms of Article 5.8 of the ADA should be read to relate to the margin of dumping established for each producer or exporter individually, instead of a margin of dumping established for the exporting country as a whole.[107] This is reiterated by Article 6.10 of the ADA which provides that "the authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation."[108] The blanket approach of the South African authorities in imposing identical duties on the same exporters despite significantly changed circumstances, is inimical to the ADA which requires an exporter specific approach.[109] Thus, a single duty could cease in respect of some of those individual exporters even if it continues for others.[110]

The issue of the margin of dumping is also significant because the average price of frozen potato chips has risen from an average of R7.91 and R8.52 for Belgium and Netherlands respectively for 2014, to R9.75 and R12.00 per kilogram for 2016.[111] This represents a price increase of between eigtheen per cent and twenty-nine per cent.[112] The average price per kilogram in South Africa in 2016 was R10.59.[113] The prices have thus mostly already increased beyond the level of the duties or have become nearly equivalent to the local market price in South Africa, yet the duties have remained exactly the same since the original investigation.[114] This means that the margin of dumping could have become *de minimis f*or some of the exporters. This approach must be guided by prudence because the Appellate Body has held that determining whether a sales price is higher or lower than the "ordinary course" price is not merely a question of comparing prices.[115] To ascertain whether the price is high or low, the price must be evaluated with due consideration for the other terms and conditions of the transaction.[116] A number of other factors, such as the volume of sales transaction or insurance may be expected to have an impact on the evaluation of the price.[117] The ITAC, in its interim review of the anti-dumping duties on cold-rolled steel originating in, or imported from the Russian Federation, has accepted the averment that high prices constitute sufficient grounds for revocation of an anti-dumping duty.[118]

105 Article 5.8 of the ADA.
106 Regulation 16.2 of the ADR.
107 WTO Panel Report, "Canada - Anti-Dumping Measures on Imports of Certain Carbon Steel Welded Pipe from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu - DS482" ("Canada Steel Welded Pipe") adopted on 25 January 2017, para 7.21. See also WTO Panel Report, "Mexico Anti-Dumping Measures on Rice WT/DS295/R" ("Mexico Rice I"), adopted on 20 December 2005, para 7.137. See further WTO Report, "Mexico - Definitive Anti-dumping Measures on Beef and Rice - Complaint with Respect to Rice - AB-2005-6; WT/DS295/AB/R" (Mexico Rice II"), adopted on 20 December 2005 para 216.
108 "Mexico Rice I" para 7.137.
109 *Ibid.* para 7.141. See also "Canada Steel Welded Pipe" para 7.19. See generally regulation 8.8 of the ADR.
110 "Canada Steel Welded Pipe" para 7.21.
111 Potatoes SA "Consumer Prices for Different Starch Products, March 2016" http://www.potatoes.co.za/SiteResources/documents/PSA,%20Consumer%20prices%20for%20different%20starch%20products,%20March%202016.pdf (accessed 06-03-2017). See also http://app.stratalyze.com/#/app (accessed 06-03-2017).
112 Paradza.
113 See http://app.stratalyze.com/#/app (accessed 06-03-2017).
114 ITAC Report No.474 at 79 and GN 1306 in GG 40363 of 21 October 2016. See further ITAC "Definitive Duties". See also Paradza.
115 WTO Appellate Body Report, "United States Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan" ("US Hot Rolled Steel") DS184, adopted 23 August 2001, para 142.
116 *Ibid.*
117 *Ibid.*
118 ITAC "Report No. 157 Interim Review of the Anti-Dumping Duties on Cold Rolled Steel Originating in or Imported from the Russian Federation para 1.6.3.2 http://www.itac.org.za/upload/document_files/20141013072510_Report-157.pdf.para 1.6.3.2 (accessed 22-09-2016).

Thus, the approach of the ITAC contravenes the Constitutional Court's finding in *SCAW,* where it was held that a fundamental building block of the anti-dumping regime is that duties must be appropriately designed to address the injury the dumping of exports causes to the commerce of the country imposing the duties.[119] This reasoning is in line with the ADA which presupposes a measure of proportionality in that a duty must be imposed only for so long as it is necessary to stave off proven harmful dumping into the commerce of the country imposing it.[120] This principle persists throughout the entire life of an anti-dumping duty.[121] If, at any point in time, it is found that no injury is being caused to the domestic industry by the dumped imports, the rationale for the continuation of the duty would be extinguished.[122] The interpretation of Article 5.8 of the ADA means that there is no legally discernible dumping by an exporter with a zero margin of dumping.[123] This is because anti-dumping duties are not meant to impede permissible competition within the domestic economy.[124] Thus the anti-dumping duties in respect of some of the exporters should be terminated on the basis of Article 5.8 of the ADA.

Moreover, the approach of the ITAC could fall foul of the ADR which requires that there must be a fair comparison between the export price and the normal value.[125] The ADR further elaborates that this must be a "proper comparison."[126] This means that the comparison must be conducted "at the same level of trade, normally at the ex-factory level."[127] The obligation to ensure a "fair comparison" lies on the ITAC, and not the exporters.[128] Thus, the Minister's decision appears to be arbitrary, as no proof has been adduced to show why the duties which were suspended until 21 October 2016 were based on a "proper and fair comparison" conducted at the "same level of trade" as the original investigation. The issue of which specific "allowances" should be made in any case largely depends on the facts surrounding the calculation of the export price and normal value.[129] The Minister is well within his/her powers on the basis of section 18 of the ITAA, to instruct the ITAC to review and report on any matter that affects trade and industry. [130] The revaluation of the margin of dumping at the date of imposition falls within this ambit. This is particularly significant in instances when there have been concurrent imposition of anti-dumping and safeguard duties which has been compounded by the suspension to a later date, of the same anti-dumping duty.

South Africa also appears to be in fragrant violation of the ADA and the ITAA, which require that due consideration must be made in each case, on its merits, for differences which affect price comparability, including *inter alia*, differences in conditions and terms of sale, levels of trade, quantities, physical characteristics, and *any other differences*, which are also demonstrated to affect price comparability.[131] "Any other difference" includes safeguard duties. In the same vein, the ADA explicitly requires a fact-based, case-by-case analysis of differences that affect price comparability.[132] However, Article 2.4 of the ADA does not require that an adjustment be made automatically in all instances where a difference is found to exist, but only where, based on the merits of the case, that difference is found to affect price comparability.[133] Thus there is "*no differences affecting price comparability*" which are excluded from being the object of an "allowance."[134]

119 *SCAW* para 78.
120 *SCAW* para 78. See also Article 11.1 of the ADA.
121 WTO Appellate Body Report, "Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico", DS282 ("United States Tubular"), adopted 28 November 2005, para 115.
122 *Ibid.*
123 "Canada Steel Welded Pipe" para 7.88.
124 *SCAW* para 79.
125 Article 2.4 of the ADA read with regulation 11 of the ADR.
126 Regulation 8.3 of the ADR.
127 Regulation 11.1(c) of the ADR. See also ITAC Report No. 474 20. See further "US Hot Rolled Steel" para 167.
128 "US Hot Rolled Steel" para 178.
129 *Ibid.* para 179.
130 Section 18(a) of the ITAA.
131 See regulation 11.5 of the ADR read with Article 2.4 of the ADA and section 32(3) of the ITAA (Emphasis added).
132 See also WTO Panel Report, "Egypt Definitive Anti-Dumping Measures on Steel Rebar from Turkey" WT/DS211/R ("Egypt Rebar") adopted 1 October 2002, para 7.352.
133 See ITAC Report No. 474 at 20-21. See further WTO Panel Report, "United States Final Dumping Determination on Softwood Lumber from Canada" WT/DS264/R, adopted 31 August 2004, para 7.165.
134 "US Hot Rolled Steel" para 177.

The implication of Article 2.4 of the ADA is that when the product in question has been the subject of the concurrent imposition of anti-dumping and safeguard duties and the same anti-dumping duty has been suspended to a later date, prior to the termination of the period of suspension, it is required that the investigating authority must on the merits, conduct a *de novo* fair comparison of the export price and normal value. Support for this notion can be gleaned from the reasoning in *SCAW*, where the Constitutional Court held that without a preceding investigation and recommendation, the Minister may not on his or her own, request the Minister of Finance to impose an anti-dumping duty.[135] This means that a *de novo* and proper price comparison should be a prerequisite for a duty that has been technically imposed, but suspended to a later date. Thus, Article 2.4 is postulated widely to allow for adjustment for factors that distort the export price to the normal value comparison.[136] This comparison could negate the "double remedy." It is conceivable that the safeguard duties could have significantly changed the conditions and terms of sale of the frozen potato chips during the period of suspension of the definite anti-dumping duties.

Furthermore, the determination of what kind of adjustments need to be made to one or both sides of the dumping margin equation to ensure a fair comparison, is a dialogue between interested parties and the investigating authority, and must be conducted on a case-by-case basis, on the basis of factual evidence.[137] In line with the ADA, the ADR elaborates that the adjustments must be made in each case, on its merits and the interested parties must make submissions that are: (i) substantiated; (ii) verifiable; (iii) directly connected to the sale under consideration; and (iv) clearly demonstrated to have affected price comparability at the time of setting prices.[138] There is no indication that this process has occurred in this matter. Adjustments are particularly significant because sometimes, as *in casu*, the existence of a dumping margin may hinge centrally on whether a particular adjustment is made.[139]

The fair price comparison of the export price and normal price requires a consideration of Article 2.3 of the ADA. Article 2.3 of the ADA requires a consideration of the "double remedy" conundrum in that duties are cited as a relevant factor in instances where the export price has been alleged to be "unreliable." It is suggested that Article 2.3 must be read in such a way that it includes exceptional circumstances, such as when the export price becomes "unreliable" because there has been a concurrent imposition of the definite anti-dumping and safeguard duties and then the same definite anti-dumping duty has been suspended to a later date. A finding that the export price of the frozen potato chips is "unreliable" must be made through a *de novo* fair comparison of the export price and the normal value, through the avenue of Article 2.3. In this regard, the ITAA specifically provides that the constructed export price must be used in instances when the export price actually paid or payable is "unreliable for any other reason."[140] This connotes that there is no factor that is precluded in the determination of the constructed export price and this would presumably include the concurrent impact of safeguard duties. According to the ITAC, a price can be found to be "unreliable" after applying an objective test for assessing reliability.[141]

Concomitant, with the inquiry into the "margin of dumping" is the question of the causal nexus. This is because the magnitude of the margin of dumping and the price undercutting experienced by the SACU industry *vis-à-vis* the frozen potato chips, are factors that require due consideration by the ITAC in the determination of whether there is a causal nexus between dumping and the material injury.[142] In essence, it must be proved that the dumped imports are, through the effects of dumping, causing injury within the meaning of this ADA.[143] This demonstration of a causal relationship between the dumped imports and the injury to the domestic industry must be based on an examination of all relevant evidence before the authorities.[144] Since the magnitude of dumping is *de minimis* and there may be no price

135 *SCAW* para 108.
136 Kelly "Market Economies and Concurrent Antidumping and Countervailing Duty Remedies" 2014 *J of Intl Economic Law* 105 123.
137 "Egypt Rebar" para 7.352.
138 Article 11.2 of the ADR.
139 Bhala 736.
140 Section 32(6)(c) of the ITAA read with regulation 10(1)(c) of the ADR.
141 ITAC "Dumping Margin Calculations" 11 www.itac.org.za (accessed 21-02-2017).
142 Regulation 16.1(b) and 16.1(d) of the ADR.
143 Article 3.5 of the ADA read with regulation 16.4 of the ADR.
144 Article 3.5 of the ADA read with regulation 16.1 of the ADR.

undercutting in respect of some of the exporters of the frozen potato chips, it can be argued that at present there is no causal relationship between the dumped imports and the injury alleged. This is buttressed by the requirement that the threat of material injury must be based on facts, rather than speculation or conjecture.[145] At present, it can be argued that without a prior finding in a *de novo* price comparison nor an "additional" investigation, the margin of dumping *in casu* is based on speculation, rather than facts.

4 RECOMMENDATIONS AND CONCLUDING REMARKS

In light of above, the following are my recommendations: firstly, the affected interested parties can request the ITAC to conduct an interim review of the anti-dumping duty. An interim review must be initiated more than twelve months after the final finding in the original investigation.[146] The final finding in question was made more than twelve months ago. Furthermore, , regulation 45.1 of the ADR provides that the ITAC will only initiate an interim review if the party requesting such review can prove "significantly changed circumstances."[147] In this regard, the ITAC is required to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty was removed or varied, or both.[148] The significant change in the prices of the frozen potato chips would conceivably fall on either ground as required by the ITAC. The interim review process would permit a thorough assessment of the basis for the identical duties at 8 August 2014, and at 21 October 2016, in the face of significantly changed circumstances. This will be done through ensuring that all interested parties would be informed of the essential facts to be considered in the ITAC's final determination.[149] The ITAC will then consider all relevant comments on the essential facts letter made by co-operating interested parties, provided such comments are received by the deadline contemplated.[150]

It is suggested that regulation 45 of the ADR should either be amended or be read in such a way that the ITAC, as the investigating authority, must be authorised to institute an interim review *suo muto*. In this way, the ITAC would be able to conduct an interim review of an anti-dumping duty on its own accord. An interim review would be most appropriate in such an instance where a duty has been technically imposed, but suspended to a later date. This would also bring regulation 45 into line with Article 11.2 of the ADA. Article 11.2 provides that the *investigating authorities* can where warranted, *on their own initiative*, review the need for the continued imposition of the duty. In the alternative, Article 11.2 also provides that the ITAC must review the need for the continued imposition of the duty upon request by any *interested party*, after the passage of a *reasonable period* of time since imposition of the definitive duty and who has submitted positive information substantiating the need for a review.[151] In this way, it can be argued that regulation 45, unlike Article 11.2, unduly limits the rights of interested parties within the first twelve months of the final finding in the original investigation. The interested parties also have the right to request an interim review simultaneously with a sunset review in order to expand or limit the scope of application or level of any anti-dumping duties.[152] If, as a result of the interim review, the ITAC determines that the anti-dumping duty is no longer warranted, it must be terminated immediately.[153] The avenues suggested above are still available to the interested parties.

Secondly, the interested parties could apply for a judicial review to assess the legality of the decision of the Minister. This is because the Minister's decision to impose identical duties before and after the suspension of the definite anti-dumping duty could be found to be arbitrary and irrational. Judicial review is authorised by the ITAA which provides that a person affected by a determination, recommendation or decision of the ITAC in respect of "dumping" may apply

145 Regulation 14.1 of the ADR read with Article 3.7 of the ADA.
146 Regulation 44 of the ADR. See *AMIE* para 17.
147 See also *AMIE* para 17.
148 Article 11.2 of the ADA. See also ITAC "Report No. 157: Interim Review of the Anti-Dumping Duties on Cold Rolled Steel Originating in or Imported from the Russian Federation" para 1.5.1-1.5.2 http://www.itac.org.za/upload/document_files/20141013072510_Report-157.pdf (accessed 22-09-2016).
149 Regulation 43.1 of the ADR read with Article 6.9 of the ADA.
150 Regulation 43.4 of the ADR.
151 "Mexico Rice" para 314 (Emphasis added).
152 Regulation 45.3 of the ADR.
153 Article 11.2 of the ADA.

to a High Court for a review of that determination or decision.[154] The interested parties are perfectly entitled to require that the ITAC must act within the parameters of the Constitution and the law.[155] They are entitled to fairness in decision-making.[156] The Constitution requires that South Africa must honour its international obligations under the WTO Agreement.[157] It has been established earlier in this discussion that South Africa's cumulative obligations under the WTO Agreement require that the Minister must conduct an interim review *suo muto*, of the margin of dumping and a *de novo* and proper price comparison as well as an evaluation of all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, prior to the lapsing of the period of suspension of an anti-dumping duty. In this way it can be argued that the Minister's decision is not "procedurally fair" and it was made "arbitrarily", in contravention of the Promotion of Administration Justice Act 3 of 2000.[158] The issue of arbitrariness on the part of the Minister is predicated on the rule that empowers courts to review an administrative action if the action was not rationally linked to the information before the administrator or the reasons given for it.[159] What this means is that the information on which the decision is based and the reasons given for such decision must validate and justify the decision taken.[160] If they do not, the decision must be seen as being "arbitrary."[161] It can be argued *in casu* that the information on the "margins of dumping" does not justify the Minister's decision to impose identical duties before and after the suspension of the anti-dumping duties.

The rationality requirement alludes to both the means and the end, that is the process by which the decision is reached and the concomitant decision.[162] That is to say, the procedure by which the decision is made must provide an opportunity for the interested parties to be heard.[163] It is thus sound to conclude that, in the absence of an interim review nor a *de novo* price comparison, the decision of the Minister *in casu* will be found to be irrational upon judicial review. In the alternative, the blatant ignoring of the facts by the Minister in relation to the significant change in prices, could also be found to be "irrational." There is a three-stage enquiry to be made when a court is faced with an executive decision where certain factors were ignored: the first is whether the factors ignored are relevant; the second is whether the failure to consider the material concerned is rationally related to the purpose for which the power was bestowed; and the third, which arises only if the answer to the second stage of the enquiry is negative, is whether ignoring relevant facts is of a kind that taints the whole process with irrationality and thus renders the final decision irrational.[164] It follows then that the decision of the Minister in ignoring the change in prices, and its impact on the polycentric decision to levy identical anti-dumping duties before and after the suspension of the duties, inevitably tainted the process and could be found to be "irrational."

In the recent past, an interdict would have been an avenue for interested parties, but this path has been closed by the Constitutional Court in *SCAW*.[165] The court in *SCAW* explained that the statutory discretion the Minister enjoys in this respect is wide.[166] The interdict is not granted in these instances because where the Constitution or valid legislation has entrusted specific powers and functions to a specific organ of government, courts may not override that power or function by making a decision of their preference.[167] That would compromise the balance of power implied in the principle of separation of powers.[168]

154 Section 46 of the ITAA.
155 *SCAW* para 103.
156 *Ibid.* See section 3 and section 6(2)(c) of the Promotion of Administration Justice Act 3 of 2000 read with section 33 of the Constitution.
157 See section 231 read with section 233 of the Constitution.
158 Section 3 and section 6(2)(e)(vi) of the PAJA read with section 33 of the Constitution.
159 See also section (6)(2)(f)(ii)(cc) of the PAJA. See in this regard, *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims* (CCT 67/14) [2014] ZACC 36; 2015 (3) BCLR 268 (CC) (15 December 2014) (*Bapedi*) para 62.
160 *Ibid.*
161 *Ibid.*
162 *Democratic Alliance v President of South Africa* 2013 1 SA 248 (CC) para 32-36.
163 *Ibid.* para 34.
164 *Ibid.* para 39.
165 *SCAW* para 103-110.
166 *Ibid.* para 98.
167 *Ibid.* para 95.
168 *Ibid.*

The fact that the recommendation of the ITAC is a "jurisdictional fact" does not avail the aggrieved party with the remedy of an interdict.[169] Therefore, it was held that a court should be reluctant to override mandatory legislative provisions buttressed by international obligations.[170] As a consequence, the court in *SCAW* overruled the decisions in *African Explosives Ltd v ITAC*[171] and in *Algorax (Pty) Ltd v ITAC*,[172] to the extent that they are inconsistent with its decision.[173] To the contrary, Satardien argues that the decision in *SCAW* means that a party aggrieved by a clearly flawed decision of the ITAC has no immediate remedy.[174] In the same vein, Brink opines that the effect of the Constitutional Court's verdict is to deny parties the right to overturn the ITAC's decisions following sunset reviews and that it appears that the court has ignored the parties' right to fair administrative action.[175] In response, Ndlovu submits that the decision in *SCAW* is correct because South African courts should not be allowed to tamper with the executive domain with impunity.[176] Stubbs concurs with Ndlovu and he opines that the decision in *SCAW* interprets a national enactment of an international agreement in a manner which is consistent with the purport of both the international and the resultant domestic obligations arising from laws.[177]

In conclusion, it can then be seen that an analysis of the concurrent imposition of anti-dumping and safeguard duties yielded the following findings: firstly, this article argued that the concurrent imposition of anti-dumping duties and safeguard measures constitutes a "double remedy" which falls foul of South Africa's cumulative obligations under the WTO Agreement. Secondly, this article argued that some of the anti-dumping duties on frozen potato chips may have become illegal because the "margin of dumping" upon which they are based, has now become *de minimis*. Thirdly, the article found that in the absence of an interim review, nor a *de novo* and proper price comparison, the Minister's decision to impose identical duties is arbitrary and irrational thereby violating the interested parties' constitutional right to just administrative action. Fourthly, this article contended that since the "injury" no longer exists in respect of some of the exporters, there is no longer a causal nexus between "dumping" and the "material injury" found in the original investigation. To address these issues, this article recommends that the interested parties must request from the ITAC, a *de novo* and fair price comparison,[178] together with an interim review *suo muto*. Finally, the article suggests that the interested parties must pursue judicial review as provided for by section 46 of the ITAA.

169 *Ibid.* para 109.
170 *Ibid.* para 87.
171 *African Explosives Ltd v ITAC, North Gauteng High Court*, Pretoria, Case No 15027/2006, 5 August 2008, unreported.
172 *Algorax (Pty) Ltd v ITAC, North Gauteng High Court*, Pretoria, Case No 25233/05, 10 September 2005, unreported.
173 *SCAW* para 89.
174 Satardien 2010 *Manchester J of Intl Economic Law* 57.
175 Brink "*International Trade Administration Commission v SCAW South Africa (Pty) Ltd Case* CCT 59/09 [2010] ZACC 6" 2010 *De Jure* 380 383-385.
176 Ndlovu 2013 *SAPL* 308.
177 Stubbs "Three-level Games: Thoughts on Glenister, Scaw and International Law" 2011 *Constitutional Court Review* 137 164.
178 *SCAW* para 108.