South Africa and the World Trade Organization Anti-Dumping Agreement nineteen years into democracy*

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1 Introduction[1]

One of the most celebrated aspects of the Uruguay Round, which culminated in the establishment of the World Trade Organization (WTO) in 1995, was the adoption of the dispute settlement system. For a number of reasons, the WTO dispute settlement system has often been touted as a notable victory scored by the multilateral trading system. Firstly, compared to its predecessor under the erstwhile General Agreement on Tariffs and Trade (GATT), the dispute settlement system is often celebrated as rules-based rather than consensus-based system. Secondly, the system is praised for its transparency and strict time frames that ensure that a dispute is heard and finalised within a reasonable time.[2] Thirdly, because the system has become more predictable, many WTO members have accepted it as the legitimate legal regime to protect their international trade interests. This acceptance is evidenced by the increasing number of disputes

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*The title of this article was conceived as a somewhat belated but complimentary response to Schlemmer's famous article, 'South Africa and the WTO: Ten years into democracy' (2004) 29 *SAYIL* 125, going by a similar title, published some eight years ago.

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[1]This introductory part of the article and the related section entitled 'Laying the substantive legal foundation' rely substantially on my previous articles, namely: 'South Africa and the World Trade Organization Anti-Dumping Agreement' (published as Online Proceedings Working Paper no 2012/17 available at http://www.ssrn.com/link/SIEL-2012-Singapore-Conference.html) and 'An assessment of the WTO compliance of the recent regulatory regime of South Africa's dumping and anti-dumping law' (2010) 5 *Journal of International Commercial Law and Technology* 29-40 available at http://www.jiclt.com/index.php/jiclt/article/view/98. .

[2]As a general rule, once a WTO Panel has been established, it must dispose of the matter in nine months and if an appeal is lodged, the Appellate Body must finalise its report in ninety days (www.wto.org) (accessed 2012-08-20).

brought before WTO panels and the Appellate body. The legitimacy is further buttressed by the fact that litigants at the WTO come from both developed and developing countries, with participation by developing countries having increased significantly in the last decade.

The above positive aspects notwithstanding, the participation of African developing countries in particular has not been that significant when compared to their developed counterparts. Most developing countries are reluctant to initiate and defend disputes at the WTO for various reasons.[3] Compared to the rest of the WTO membership, Africa's participation has been limited and somewhat insignificant.

Like its African counterparts, South Africa has been conspicuous by its minimal participation in the WTO dispute settlement system.[4] However, despite its limited participation in WTO litigation, South Africa has made serious inroads in terms of developing and applying WTO law in the municipal context. This laudable trend has been largely confined to dumping/anti-dumping matters.

In comparison with other African states and the rest of the global community, South Africa has one of the most widespread and documented histories of applying anti-dumping measures.[5] South Africa's anti-dumping laws date back to 1914;[6] and the first anti-dumping duties are said to have been imposed in 1921.[7] In all documented instances of South's participation in the WTO[8] dispute settlement processes, the country was a respondent,[9] and the subject matter was

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[3]See generally Alavi 'African countries and the WTO's dispute settlement mechanism' (2007) 25 *Development Policy Review* 25-42.

[4]At the time of writing, South Africa has participated in the WTO dispute settlement system five times; thrice as respondent and twice as a complainant (see http://www.wto.org/english/thewto_e/countries_e/south_africa_e.htm) (accessed on 2012-06-20).

[5]See generally Joubert 'The reform of South Africa's anti-dumping regime' available at http://www.wto.org/english/res_e/booksp_e/casestudies_e/case38_e.htm (accessed 2012-06-12); Tao *Dumping and anti-dumping regulations with specific reference to the legal framework in South Africa and China* (LLM dissertation (University of the Free State)) (2006); and Brink and Kobayashi 'South Africa' in Nakagawa *Anti-dumping laws and practices of the new users* (2007) at 203. According to Macrory, Appleton and Plummer (eds) *The World Trade Organization: Legal, economic and political analysis* (2005) 45. In 1958, the GATT members had only 37 anti-dumping measures in force and South Africa alone accounted for 32.

[6]Section 8(1) of the Customs Tariff Act 26 of 1914.

[7]See Board Report no 42 (dumping or unfair competition 18/11/1924) in which reference was made to an imposition of anti-dumping duties on flour from Australia in 1921.

[8]Established on 1995-01-01, the World Trade Organization provides a forum for implementing the multilateral trading system, negotiating new trade agreements and resolving trade disputes.

[9]It is noteworthy that South Africa has never brought a complaint to the WTO about a trade measure taken by any of its trading partners. It has been the trend for South Africa to appear before WTO panels as the party against which complaints about anti-dumping matters have been laid. It has been argued by Busch and Reinhardt 'Developing countries and the General Agreement on Tariffs and Trade/World Trade Organization dispute settlement' (2003) 37 *Journal of World Trade* 719 at 720 that the extent of a country's participation in the WTO dispute settlement system is a reliable

dumping/anti-dumping.[10] True to this observed trend, South Africa was again recently hauled before the WTO dispute settlement system in a matter involving the imposition of provisional anti-dumping duties against chicken imports from Brazil.[11]

This article takes a critical look at two recent cases in which South African courts had the occasion to apply WTO law and develop anti-dumping jurisprudence. The pertinent cases are *Progress Office Machines v South African Revenue Services*[12]and *International Trade Administration Commission v SCAW South Africa (Pty) Ltd.*[13] A third and pertinent case, *Bridon International GMBH v International Trade Administration,*[14] was decided as a sequel to the *SCAW* case, but it will not be discussed here because it does not deal with substantial dumping/anti-dumping issues.

As the South African cases under discussion deal with the subject of dumping, it is appropriate that a brief overview of the law relating to dumping be given first. This is canvassed in the second part of the article after the introduction. The third section of the article is divided into appropriate subsections dealing with specific subthemes and critically tackles the individual contributions of each case in the development of South Africa's nascent anti-dumping jurisprudence.

The article concludes on a cautiously optimistic note that what South Africa has lost by not participating in the WTO dispute settlement system, it has gained by developing WTO jurisprudence on the municipal front.

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indicator of the level of its economic activity. Therefore, appearing only as respondent is not healthy because this points to the fact that there are a number of weaknesses in that legal system which trading partners regularly complain about.

[10]The pertinent disputes are *South Africa – Anti-dumping Duties on Certain Pharmaceutical Products from India,* DS168, *South Africa – Definitive Anti-Dumping Measures on Blanketing from Turkey*, DS288 and *South Africa – Anti-Dumping Measures on Uncoated Woodfree Paper*, DS374. It may be noted that in all three disputes, the matters did not go beyond the 'request for consultation' stage since South Africa successfully wriggled her way out of trouble through diplomatic overtures. In the first case, in which India was the complainant, consultations were requested but no panel was established nor any settlement notified. In the second case involving South Africa and Turkey, consultations were requested but no panel was established nor any settlement notified. In the last case, on 20 November 2008, Indonesia informed the Dispute Settlement Body that South Africa had promulgated an amendment to the Schedule of the Customs and Excise Act withdrawing the anti-dumping measures imposed on uncoated wood free white A4 paper from Indonesia with retrospective effect from 27 November 2003.

[11]See *South Africa – anti-dumping duties on frozen meat of fowls from Brazil, request for consultations by Brazil*, circulated in accordance with art 4.4 of the DSU on 2012-06-21 available at www.wto.org (accessed 2012-08-22).

[12][2007] SCA 118 (RSA).

[13][2010] ZACC 6.

[14]Case no 538/2011, [2012] ZASCA 82, decided on 30 May 2012.

2 Laying the substantive legal foundation

2.1 Dumping/anti-dumping: A WTO perspective

2.1.1 General definitional and conceptual issues

In international trade law as governed by the WTO, the law relating to dumping is encapsulated in article VI of GATT 1994[15] and the subsequent Anti-Dumping Agreement.[16] Dumping is said to take place when a product is introduced into the commerce of another country at less than its normal value.[17] Normal value is usually defined as the selling price in the country of export.[18]

In order to prove that dumping has occurred, the affected entity has to lead evidence proving that imports are being introduced at less than their normal value and, further, that such imports cause or threaten to cause material injury to local industries producing like products.[19] In the specific context of dumping, the term 'like product' shall be interpreted to mean a product which is identical (like in all respects) to the product under consideration.[20] If there is no identical product as pointed out above, 'like product' would be taken to mean another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.[21]

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[15]The agreement establishing the World Trade Organization, which was signed in Marrakesh, Morocco in 1994, incorporates the original General Agreement on Tariffs and Trade 1947 (hereafter GATT), which continues to apply to issues not covered by the more specific agreements negotiated during the Uruguay round. GATT 1994 in this article refers to GATT 1947 and other agreements concluded after 1994. Article VI allows governments to take action against dumping and the Anti-Dumping Agreement details how such action may be taken. The two instruments must be read together as contemporaneous documents.

[16]Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.This Agreement is listed in Annex 1A of *The legal texts the results of the Uruguay Round of multilateral trade negotiations* (1999) as one of the Multilateral Agreements on Trade in Goods. The full text of the agreement is available at pp 147-171 of this publication.

[17]Per art 2.1 of the Agreement. According to Osode 'An assessment of the WTO: Consistency of the procedural aspects of South African anti-dumping law and practice' (2003) 22 *Penn State ILR* 19, there is an additional form of dumping characterised as 'below cost sales' or simply 'cost dumping', which involves the sale of products in an export market at prices below their production cost.

[18]See Brink 'Proposed amendments to the anti-dumping regulations: Are the amendments in order?" (2006) *Tralac Working Paper* 1.

[19]World Trade Organization, *Understanding the WTO* (2007) 44-45. The WTO Appellate Body had an opportunity to pronounce on material injury generally and the factors determining injury in *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001 in which Poland complained that Thailand had not calculated its dumping margin correctly and that the Thai investigating authorities had not considered all injury factors. The Appellate Body ruled in favour of Thailand on the issue of the calculation of the dumping margin, but ruled against the same country on injury factors.

[20]Article 2.6 of the Anti-Dumping Agreement.

[21]*Ibid*. In the context of anti-dumping, the concept was litigated in the WTO dispute of *US – Softwood Lumber V*, Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS2264/AB/R, adopted 31 August 2004, DSR 2004:V, 18.

Therefore, the WTO Agreement, often called the 'Anti-Dumping Agreement', allows governments to act against dumping where there is genuine ('material') injury to competing domestic industry.[22] The Anti-Dumping Agreement does not outlaw dumping as such[23] but prescribes how governments can or cannot react to dumping.[24] Why dumping occurs is not considered relevant under WTO rules.[25] Additionally, it has been argued that there is no textual basis in article VI for the view that states harboured an intention to include other forms of dumping such as 'social' dumping.[26]

Despite the foregoing remarks, there are three main reasons for the widespread disapproval of dumping.[27] Firstly, it has often been argued that dumping has the effect of distorting market fundamentals because it enables an exporter to gain market share in an importing country without necessarily being an efficient producer.[28]

Secondly, dumping is said to contribute to a form of unfair competition/unfair trade because the perpetrators thereof are exporters who enjoy special privileges on the domestic market on which they can charge very high prices while banking on the absence of 'real'[29] competition in the importing country.[30] This scenario would be more than likely in the absence of arbitrage opportunities for competitors in the importing country.

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[22](N 17) 44. In South Africa, 'domestic industry' refers to the relevant industry in the Southern African Customs Union (SACU). According to Lehloenya 'The failed SACU-USA Trade Agreement in hindsight: A lost opportunity or disaster averted?' (2009) 4 *Journal of International Commercial Law and Technology* 117, SACU is a regional body comprising Botswana, Lesotho, Namibia, South Africa and Swaziland.

[23]See Horlick and Clarke 'Standards of panels reviewing anti-dumping determinations under the GATT and WTO' in Bronkers and Horlick (eds) *WTO jurisprudence and policy: Practitioners' perspectives* (2004) 115.

[24]*Id*.

[25]Hoekman and Kostecki *The political economy of the world trading system: The WTO and beyond* (2003) at 318-320. The authors argue that from a normative, economic perspective, it is important to know why dumping occurs. The reasons for dumping point at the typology of the business motivation for dumping such as profit maximisation, maintaining capacity during periods of slack demand, deterring entry by competitors, creating new markets, attacking a dominant supplier in an export market or attempting to establish a monopoly of an export market.

[26]See generally, Johnson *World trade and the law of GATT* (1969) and Mavroidis *Trade in goods: The GATT and other agreements regulating trade in goods* (2007). As an example of social dumping, Johnson (n 24) 674 cites the scenario where work is performed under iniquitous working conditions in order to make products which can be sold at a lower price compared to that which can be required by the observance of the minimum international labour standards.

[27]Johnson *Legal problems of international economic relations* (1995) 671-83.

[28](N 17) 19.

[29]Competition may be absent either due to the fact that there is no domestic industry producing *like products* (emphasis added) because its establishment is being frustrated by the availability of cheap competing imports, or, the domestic industry does exist but produces on such a small scale that it does not satisfy local demand for the product in question.

[30]Osode (n 17) 19.

Finally, dumping can produce overwhelmingly negative consequences for the government of the importing country, its domestic producers and the general public.[31] Indicators of the presence of negative consequences may be the shrinkage of the market share for the locally produced product leading to cuts in its local production and a reduction in the number of people employed in that industry.[32]

The above negatives notwithstanding, anti-dumping measures remain a prominent feature of contemporary international trade regulation largely due to the immense political support they enjoy.[33] The political support for anti-dumping actions may be motivated by governments' need to protect domestic industries that are threatened by cheap imports. It is reasonable to assume that the development of the economy through industrialisation will in turn spur development in other spheres such as innovation, job creation, and social and political stability. The result is that the overall productivity and investment strength of the domestic industry may be weakened. The law therefore jealously guards the status quo by ensuring that in addition to escape clauses/safeguards,[34] anti-dumping measures ensure the preservation of certain strategic local industries by keeping cheap imports out.

There are certain ways of establishing whether or not a product is being dumped lightly or heavily.[35] The Anti-Dumping Agreement provides three methods to calculate the products' normal value.[36] The main method uses the exporter's selling price in the domestic market[37] of the importing/complaining country. If the exporter's selling price in the domestic market cannot be used,[38] then the next

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[31]The extreme effects that readily come to mind are the possible demise of governments through debilitating strikes, massive unemployment, civil unrest by citizens and the shrinkage of domestic manufacturing caused by cheap imports.

[32]Hoekman and Kostecki (n 23) 324.

[33](N 15) 2.

[34]Article XIX of GATT 1994. Safeguard measures may be deployed in response to 'fairly-traded imports' in situations where import volumes have tremendously increased to such an extent that the increased imports injure producers of 'like or directly competitive products'. This would be the case where import volumes increase but not as a result of dumping. The form of injury that will trigger the application of the provisions of Article XIX of GATT 1994 is one that is characterised as 'serious'.

[35]See arts 3.2 and 3.3 of the Anti-Dumping Agreement. Light dumping is a form of dumping that is not very significant and against which authorities may not take action. This form of dumping would yield a *de minimis* dumping margin. On the other hand, heavy dumping is the one that threatens the existence of the domestic industry or frustrates its development as outlined in arts 3.4-3.8 of the Anti-Dumping Agreement.

[36]Generally canvassed in art 2 of the Anti-dumping Agreement.

[37]Article 2.1.

[38]Article 2.3. This impossibility may be occasioned by the absence of reliable data or because the exporter and importer have an association arrangement in terms of which the exporter compensates the importer to offset the price gap. This would be tantamount to an artificial manipulation of the dumping margin.

method is to use the price charged by an exporter in another country.[39] The third method is to use, as a basis of calculation the exporter's production costs, other expenses and normal profit margins.[40] The Anti-Dumping Agreement also specifies how a fair comparison can be made between the export price and what would be a normal price. A comparison between the export price and the normal value will yield the 'dumping margin'.[41]

Detailed procedures are set out on how anti-dumping investigations which, barring the existence of special circumstances must be concluded within one year,[42] are to be conducted. Conditions for initiating investigations, conducting them and ensuring that interested parties are given an opportunity to present evidence are provided for.[43] Anti-dumping measures must expire five years after the date of imposition, unless an investigation shows that ending the measure would lead to injury.[44] To prevent a proliferation of vexatious and baseless investigations and obviate the potential and actual abuse of process, the Anti-Dumping Agreement enjoins the authorities to examine the accuracy and adequacy of the evidence provided in the application in order to determine whether there is sufficient evidence to justify the initiation of an investigation.[45] This requirement has been addressed in a number of WTO disputes.[46]

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[39]Article 2.2.

[40]Article 2.4.

[41]A dumping margin as described by Horlick and Shea 'The World Trade Organization Antidumping Agreement' in Bronckers and Horlick (n 23) 418 is 'a comparison of individual prices to individual prices or weighted-average prices to weighted-average prices', and it assists authorities to decide whether or not to take action against the alleged dumping activity based on whether the alleged dumping is significant or *de minimis*.

[42]Article 5.10 of the Anti-Dumping Agreement.

[43]See arts 5 and 6 of the Anti-Dumping Agreement.

[44]Article 11.3 of the Anti-Dumping Agreement. This refers to the so-called 'sunset provision', now entrenched in GATT 1994 but conspicuously absent in the 1979 anti-dumping code which simply provided in Article IX 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'* (emphasis added). For a detailed account of the negotiation history of the WTO anti-dumping law see Horlick and Shea (n 23) 394-416.

[45]See art 5.3 of the Anti-Dumping Agreement. In South Africa, the competent body to undertake these investigations would be the International Trade Administration Commission (ITAC), which succeeded the erstwhile Board of Tariffs and Trade (BTT). In the South African context, the above fact was emphasised in the recent Constitutional Court case of *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* (2010) 5 BCLR 457 (CC) paras 25-40.

[46]The following disputes are pertinent in this regard: *Mexico – Corn Syrup*, Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R and Corr 1, adopted 24 February 2000, DSR 2000:III, 1345; *Guatemala – Cement II*, *Panel Report, Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, DSR 2000: XI, 5295; *Argentina – Poultry,* Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted on 19 May 2003, DSR 2003:V, 1727; *Anti-Dumping Duties*, *US – Softwood Lumber IV*, Appellate Body Report, *United States –Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, 571;

WTO members are urged to bring their anti-dumping laws and regulations into conformity with the Anti-Dumping Agreement.[47] This requirement was emphasised in the cases of *US-1916 Act*[48] and *US-Steel*,[49] in which the complainants in both cases alleged that the anti-dumping measures of the United States that were complained of did not conform to WTO standards. Further, members must inform the WTO Committee on anti-dumping practices taking into account all the preliminary and final anti-dumping actions promptly and in detail.[50] South Africa has always strictly adhered to the requirements of article VI of GATT 1994 and the Anti-Dumping Agreement, especially the notice requirements.[51]

2.2 Dumping/anti-dumping: A South African perspective

2.2.1 Overview

The legal regime regulating dumping/anti-dumping in South Africa is encapsulated in the GATT 1994 and the attendant Agreement, the Constitution,[52] the Customs and Excise Act,[53] the International Trade Administration Act (ITAC Act)[54] and the accompanying Regulations.[55] With specific regard to dumping/anti-dumping, South Africa's Minister of Trade and Industry will make the regulations

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US –Softwood Lumber V, Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS2264/AB/R, adopted 31 August 2004, DSR 2004:V, 1875; *US-DRAMS*, Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, WT/DS99/R, adopted 19 March 1999, DSR 1999:II, 521 and *Mexico – Anti-Dumping Measures on Rice*, Appellate Body Report, *Mexico – Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 10 January 2001, DSR 2001:I, 5.

[47] Article 18.4 of the Anti-Dumping Agreement. The Article enjoins each member to take all the necessary steps of a general or particular nature, to ensure that its laws, regulations and administrative procedures are in conformity with the provisions of the Anti-Dumping Agreement before entry into force of the WTO Agreement.

[48] Appellate Body Report *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS34/AB/R, adopted 26 September 2000, DSR 2000:X, 4793.

[49] Panel Report *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R and Corr 1, adopted 29 July 2002, DSR 2002: VI, 2073.

[50] Article 18.4 of the Anti-dumping Agreement. See also *Understanding the WTO* (n 16) 45.

[51] Joubert (n 5) at 3. Eg, in 1996, South Africa announced to the WTO Committee on Anti-dumping Practices that it intended to amend its legislation on anti-dumping to ensure compliance with the relevant WTO Agreements. The amendments gave birth to International Trade Administration Act, ITAC and the anti-dumping regulations of 1993, which have remained in force to date.

[52] Constitution of the Republic of South Africa, 1996 (hereafter the Constitution).

[53] Act 91 0f 1964.

[54] Act 71 of 2002.

[55] In terms of s 59 of the ITAC Act, the Minister of Trade and Industry may make regulations regarding the proceedings and functions of the Commission, after consultation with the Commission (s 59 (a)); give effect to the objects of the ITAC Act (s 59 (b)); and give policy directives on any matter that may or must be prescribed in terms of the Act (s 59 (c)).

pursuant to the provisions in section 59 of the ITAC Act.[56] South Africa's first Anti-Dumping Regulations were passed on the 14 November 2003.[57] Since November 2005, proposed amendments to the Anti-Dumping Regulations have been published for public comment.[58]

2.2.2 The salient constitutional provisions

Despite the fact that the WTO Agreements are yet to be promulgated as South African municipal law, the Constitution explicitly states that international agreements[59] should be used as references and guidelines in the interpretation of domestic laws.[60] In this regard, the following constitutional provisions are worth highlighting.[61]

An international agreement binds the Republic of South Africa only after it has been approved by resolution in both the National Assembly and the National Council of Provinces,[62] unless it is an agreement of a technical, administrative or executive nature.[63]

International agreements of a technical, administrative and executive nature or agreements that do not require either ratification or accession, entered into by the national executive, bind the Republic without approval by the National

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[56]Specifically, ss 59 (b) and 59 (c) of the ITAC Act.

[57]The Regulations were published in *GG* no 25684 on the 14 November 2003 as GN 3197 of 2003.

[58]Per e-mail correspondence (2009-03-30) between the present writer and Advocate Niki Kruger, then principal legal adviser to South Africa's International Trade Administration Commission. However, due to serious opposition from industry and trade law experts, the Bill has since been shelved and a revised version thereof will be published for public comment in due course.

[59]Such Agreements would logically include the WTO since South Africa has been a member thereof since 1994.

[60]See s 233 of the South African Constitution 1996. On a similar note, see Stemmet 'The influence of recent constitutional developments in South Africa on the relationship between international law and municipal law' (1999) 33 *International Lawyer* 47.

[61]The following account draws largely from Burrell *Burrell's South African Patent and Design Law* (2000) (3rd ed) 14-15.

[62]According to Rautenbach and Malherbe *Constitutional law* (2008) (5th ed) 122-123, the present South African parliament consists of two houses, namely the National Assembly and the National Council of Provinces. The National Assembly consists of legislators directly elected through a process of proportional representation of all the political parties involved in the general election. The National Council of Provinces represents the provinces in parliament and ensures that provincial interests are taken into account in the national sphere. For a complete exposition of the current South African parliamentary system, see generally Taljaard and Venter 'Parliament' in Venter (ed) *Government and politics in the new South Africa* (2001) 15-27.

[63]Section 231(2) of the Constitution. For an outline of the origin, academic debates and analysis of the provisions of this section generally and s 231(2) in particular, see Dugard 'International law and the South African Constitution' (1997) 8 *European JIL* 77; Olivier 'The status of international law in South African municipal law: Section 231 of the 1993 Constitution' (1994) 19 *SAYIL* 5; Olivier 'Interpretation of the constitutional provisions relating to international law' (2003) 6 *PELJ* 26 and Scholtz 'A few thoughts on section 231 of the South African Constitution' (2004) 29 *SAYIL* 202.

Assembly or the National Council of Provinces. The only requirement is that they must be tabled in the National Assembly and National Council of Provinces within a reasonable time.[64]

Any international agreement becomes law in the Republic when it is enacted into law by the national legislation; but a self-executing provision of an agreement that has been approved by parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of parliament.[65]

The Republic of South Africa is bound by international arrangements which were binding on the Republic on 4 February 1997[66] and customary international law is law in the Republic unless it is inconsistent with the South African Constitution or an Act of parliament.[67]

When interpreting any legislation, South African courts must prefer any reasonable interpretation of the legislation which is consistent with international law over any alternative interpretation that is inconsistent with international law.[68]

The importance of the Constitution in interpreting international trade laws was highlighted in the case of *Chairman: Board on Tariffs and Trade v Brenco*.[69] In this case, the court a quo had agreed with the respondent's allegation that the conduct of the Board on Tariffs and Trade, the predecessor to ITAC, had not complied with the rules of natural justice before anti-dumping duties were imposed. Upon appeal to the Supreme Court of Appeal, it was held that the guiding question to ask in that context is: 'Did the respondents receive sufficient information for the purposes of defending themselves in good time?'[70] If the answer is in the affirmative, then procedural fairness would have been observed in an anti-dumping context.[71] Therefore, in the absence of precise legislation, South African courts will have to look at international law and international provisions for guidance. In pursuit of the above constitutional imperative, South African courts must interpret laws and any legislation in such a manner that the interpretation promotes the object and purport of the country's Bill of Rights by infusing the values of human dignity, equality and freedom.[72] These values are important to anti-dumping law because it is not possible for South Africans to lead a dignified life while cheap imports threaten the establishment and development of local industries essential to the livelihoods of the people and to economic development for the betterment of the lives of all.[73]

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[64]Per s 231(3) of the Constitution.
[65]*Id* s 231(4).
[66]*Id* s 231(5).
[67]*Id* s 232.
[68]*Id* s 233.
[69]2001 4 SA 511 (SCA).
[70]*The Chairman on the Board on Tariffs and Trade v Brenco* at para 19.
[71]*Ibid*.
[72]See specifically ss 36 and 39 of the Constitution.
[73]The preamble to the Constitution clearly spells out that one of the aims of the Constitution is to improve the quality of life for all citizens and to free the potential of each person.

2.2.3 The relevant statutory enactments

The Customs and Excise Act,[74] the legislative predecessor to the ITAC Act, still plays a major role in dumping and anti-dumping matters since it gives guidelines to the International Trade Administration Commission as to the maximum tariff to be imposed on dumped imports.[75] Chapter VI of the Customs and Excise Act deals with, among other things, anti-dumping duties. The Act provides that the Minister of Finance may from time to time, by notice in the *Gazette*, withdraw anti-dumping duties in accordance with the request from the Minister of Trade and Industry.[76]

However, the ITAC Act is the most important statute in the present context because it defines related terms such as dumping,[77] normal value,[78] export price,[79] etc. The Act also deals generally with how investigations into alleged dumping may be conducted and how to deal with confidential information. As South Africa is a member of SACU,[80] the practical reality is that any dumping and anti-dumping investigation now assumes a SACU-wide ambit and a local industry which is being harmed or threatened with harm would now encompass the specific industry in the SACU region.

As there are detailed provisions in the current ITAC Act and the regulations relating to confidentiality of information in anti-dumping investigations,[81] it is likely that the pertinent provisions of South Africa's Promotion of Access to Information Act[82] will play a major role.

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[74]Act 91 of 1964, reprinted in the *GG* G/ADP/N/I/ZAF/I on 8 December 1995. Chapter VI of the Act deals specifically with matters pertaining to anti-dumping duties.

[75]For an overview of how the anti-dumping provisions of the predecessor to the ITAC Act, namely the Board on Tariffs and Trade Act 107 of 1996 (BTT Act) and how they were applied in practice for the very first time by a South African court, see Osode (n 15) 23-32 and Osode 'The scope of interested parties rights to procedural fairness in the enforcement of South African anti-dumping law: *Board on Tariffs and Trade and Others v Brenco Inc and Others*' (2002) 16 *Speculum Juris* 290.

[76]Section 56(2) of the Customs and Excise Act (n 71).

[77]Defined as the introduction of goods into the commerce of the Republic or the Common Customs Area at a price contemplated in s 32 (a) (2) of the ITAC Act that is less than the normal value, as defined in that Act, of those goods.

[78]Defined in s 32(2)(b)(i)-(ii) of the ITAC Act as encompassing the ordinary price at which goods intended for export are sold in the exporting country's domestic market or if the price is not easily ascertainable, the reasonable cost of producing and placing the product on the domestic market of the exporter.

[79]Defined in s 32(2)(a) of the ITAC Act as 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.

[80]According to the SACU website at www.sacu.int (accessed 2012-06-11), SACU is one of the world's oldest customs union and came into existence on 11 December 1969 with the signature of the Customs Union Agreement between South Africa, Botswana, Lesotho, Namibia and Swaziland. The final constitutive Agreement of the present SACU Customs Union consists of the 1910, 1969 and 2002 SACU Agreements.

[81]Section 33 of the ITAC Act, s 2 of the current Anti-Dumping Regulations and part B of the proposed Anti-Dumping Regulations.

[82]Act 2 of 2000.

Generally, with specific reference to information held by the state, individuals can apply for access to such information without giving their reasons for the request.[83] However, in matters between individuals (and even corporate bodies), a request for access to information in terms of the Act would have to be accompanied by written reasons. In all material circumstances, the state must provide access to such information unless the information relates to 'financial, scientific or technical commercial information'.[84] There are however exceptions to this provision which may remove the protective veil of confidentiality from the specified categories.[85] So far, one unreported South African case has dealt with the exceptions to confidentiality in a dumping/anti-dumping context, namely, *Rhone Poulence v Chairman of the Board on Tariffs and Trade*.[86]

Information relating to dumping is likely to affect commercial interests and the respondents in anti-dumping investigations are likely to seek refuge in the confidentiality provisions of the Promotion of Access to Information Act.[87]

The provisions of South Africa's Promotion of Administrative Justice Act[88] related to giving the parties advance notice and affording them an opportunity to make representations ought to be discussed together with the common law provisions on the same. In terms of the ITAC Act and the attendant regulations, read together with the pertinent provisions of PAJA, the Commission must give parties adequate notice of the proposed administrative action, an opportunity to make representations, a clear statement of the administrative action, notice of the review mechanism and the right to request reasons.[89] It can now be confidently submitted that the PAJA enshrines the common law principles of natural justice, including the *audi alteram partem and nemo iudex in rem sua* rules.[90]

Having laid the conceptual legal background above, it is now appropriate to analyse the relevant cases and their individual jurisprudential contributions to South African law. It is to these cases that our discussion now turns.

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[83]Section 11(1)(3)(a) of the Promotion of Access to Information Act, 2000.
[84]Section 36(1)(c) of Act 2 of 2000.
[85]See the exceptions enumerated in s 46 of the same Act.
[86]Case no 98/6589T 26.
[87]See s 36 of Act 2 of 2000.
[88]Act 3 of 2000 (hereafter PAJA). This Act was promulgated pursuant to s 33 of the South African Constitution which affords everyone the right to administrative action that is just, reasonable and procedurally fair.
[89]Section 3(2)(b) of PAJA.
[90]According to Hoexter *Adminstrative law in South Africa* (2007) 326 -328, the *audi alteram partem* rule implies that people are given an opportunity to participate in the decisions that will affect them and obtain an opportunity to influence the outcome of those decisions. On the other hand, the *nemo iudex in rem sua* principle is famously referred to as the rule against bias and ensures that a hearing is held before an impartial tribunal or in the context of dumping/anti-dumping, the ITAC must ensure a complete absence of bias against any of the interested parties.

3 The pertinent South African cases and their individual jurisprudential contributions

3.1 Preliminary remarks

The two cases discussed below have been chosen because of their perceived contribution to the development of South African law on dumping and anti-dumping. It is important to point out clearly that the perceived contribution and individual importance of each case is the present writer's own assessment. There are no instances in the South African literature where the contributions of these cases to South African jurisprudence have ever been analysed. The order in which each of the cases is discussed and analysed is chronological and I will start therefore with the first case decided in 2007 and end my discussion and analysis with the most recent case decided in 2010.

3.2 Progress Office Machines v South African Revenue Services

3.2.1 The pertinent facts

The appellant, Progress Office Machines CC, a duly incorporated Close Corporation registered in terms of the relevant South African law and specialising in the importation of paper products to sell on the domestic market, had failed to convince the High Court that certain anti-dumping duties imposed by the Minister of Finance in respect of paper products did not apply to the appellant.

The appellant imported four consignments of paper from Indonesia through the Port of Durban in September 2004 and paid the applicable customs duty. In 1998, the Minister of Finance imposed anti-dumping duties on paper products, particularly imported A4 paper. When the applicant took delivery of its consignments in early September 2004, the anti-dumping duties were not included with customs duty. In late October of 2004, the appellant received a letter from the South African Revenue Service (SARS) requesting payment of R1 565 569.60 for anti-dumping duties in respect of the September 2004 consignments.

The procedural background may be summed up as follows. A definitive anti-dumping duty was imposed on 28 May 1999[91] with retrospective effect to 27 November 1998.[92] In May 2003, ITAC gave notice[93] that the definitive anti-dumping duty would expire on 28 May 2004 unless a request was made for its continuance indicating that the expiry of the duty would likely lead to the

[91]GN R685 *GG* 20125 of 28 May 1999.
[92]The Minister of Finance imposed certain anti-dumping duties (in this case a 70% duty) *inter alia* on paper imported by the appellant as set out in the Schedule to the notice.
[93]GN 1560 *GG* 24893 of 30 May 2003.

continuation or recurrence of dumping and injury.[94] The termination of the anti-dumping duty was interrupted by the initiation of a sunset review process in November 2003 on the anti-dumping duties on the paper imported by the appellant.[95] The sunset review was initiated by Mondi Limited and Sappi Fine Paper (Pty) Ltd.[96]

It was the appellant's contention that it was not liable for payment of anti-dumping duties which had lapsed in 2003, five years from the date of their first imposition as required by the relevant international law,[97] the relevant domestic legislation[98] and its regulations.[99] On the other hand, it was argued on behalf of ITAC that the appellant was legally obliged to pay the anti-dumping duty which had been *imposed* (emphasis added) in 1999 and not in 1998. The High Court agreed with ITAC and ruled that Progress Office Machines owed SARS the duty and payment was due.

Not satisfied with the High Court's decision, Progress Office Machines appealed to the Supreme Court of Appeal. It is to the decision of the Supreme Court of Appeal that my discussion now turns.

3.2.2 Legal issues arising

The main issue before the Supreme Court of Appeal was whether the period of five years (the life of an anti-dumping duty) commenced on 25 May 1999, the date of the notice or 27 November 1998, the date from which the amendment to the Schedule in terms of the Customs and Excise Act was to have retrospective effect. The pertinent questions that begged legally reasoned answers were:

- What does the word 'imposition' or the phrase 'act of imposing' mean? and
- When does the imposition of an anti-dumping duty commence?

3.2.3 What was the High Court's decision?

The High Court had considered the date of the publication of the 'Amendment Notice' (28 May 1999) as the date on which imposition took place.[100] Thus the High Court came to the conclusion that 'the date of imposition must obviously be the date when the act of levying the duty is taken, ie, the date of publication'.[101]

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[94] *Progress Office Machines* para 9.
[95] *Id* para 10.
[96] *Ibid*.
[97] See art 11.3 of the WTO Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.
[98] The International Trade Administration Act 71 of 2002.
[99] Anti-dumping Regulation 53.1.
[100] *Progress Office Machines* para 13.
[101] Para 13.

In coming to such a conclusion, Judge Gyanda purported to rely on the 'stated intention' of the contracting parties to the WTO Agreement to maintain uniformity.[102] In the Judge's opinion, the date of imposition of the anti-dumping duty was the date of publication of the definitive anti-dumping measures. The Supreme Court of Appeal, per Acting Judge of Appeal Malan, disagreed and came to a different conclusion.

3.2.4 Subsequent decision of the Supreme Court of Appeal

The Supreme Court of Appeal overturned the High Court's decision and developed the law rather too creatively to the chagrin of some critics.[103] It is submitted that this creativity does not seem to have a textual basis in the relevant legislation and the Regulations. The court narrowed the issue down to a determination of whether the duration of the anti-dumping duty imposed 'retrospectively' is calculated from the retrospective date or from the date of imposition.[104]

The court correctly opined that the imposition of the anti-dumping duty on 28 May 1999 retroactively meant that 'the law shall be taken to have been that which it was not'.[105] The purpose of 'imposition' was to impose anti-dumping duties as from 27 November 1998.[106] This was analogous to a notice saying the duty applies in future hence such imposition is on a future date.[107] The court ruled that in order to resolve the problem, one needed simply to ask the question, 'when does the obligation to pay anti-dumping duties arise?' In the present case the obligation to pay arose in 1998, when provisional anti-dumping duties were levied. Definitive duties similar to those imposed in 1999 last for five years and this period may coincide with the period of the provisional payment.[108] Therefore, the court ruled that the five year period ought to have run from 1998 up to the end of November 2003 and by the time the sunset procedure was initiated, the anti-dumping duty in question had lapsed and its lifespan could not been extended by the sunset procedure. The appellant was not liable for payment of any anti-dumping duties in 2004 hence its appeal had to succeed. The court therefore found that the anti-dumping duty imposed in respect of paper products and in particular A4 paper imported from Indonesia had no force and effect from 27 November 2003.[109]

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[102] *Ibid*.
[103] See, for instance, Brink *'Progress Office Machines v South African Revenue Services* Case [2007] SCA 118 (RSA)' (2008) *De Jure* 643-648, who argues that the judgment is flawed.
[104] *Progress Office Machines* para 19.
[105] *Id* para 15.
[106] *Id* para 16.
[107] *Ibid*.
[108] *Id* para 19.
[109] *Id* para 20.

3.2.5 Jurisprudential contribution of *Progress Office Machines*

Notwithstanding the criticism against the case, outlined below, the judgment in *Progress Office Machines* does make a modest contribution to the positive development of South African anti-dumping jurisprudence. Four points are worth iterating in this specific regard.

The judgment may be credited for unequivocally clarifying the issue of whether or not WTO agreements (in particular the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade) are binding on South Africa in the express absence of their domestication into municipal law as required by the Constitution.[110] After referring to the appropriate sections of the Constitution dealing with the effect of international treaties on municipal law,[111] the Court correctly observed that despite the WTO Agreement having been approved by parliament in 1995,[112] it is binding on the Republic in international law but has not been enacted into municipal law.[113]Therefore, no rights are derived from the international agreements themselves. However, the fact that South Africa passed the International Trade Administration Act of 2002 and promulgated Anti-Dumping Regulations made under the relevant Act[114] is indicative of an intention to give effect to the provisions of the treaty binding the Republic in international law.[115] The judge therefore correctly ruled that the text for the courts to interpret in the specific context remains South African legislation and this must be done in conformity with section 233 of the Constitution.[116] The Anti-Dumping Regulations therefore give effect to the provisions of the WTO Anti-Dumping Agreement.[117]

The importance of the decision in *Progress Office Machines* in the context of clarifying South Africa's legal position *vis-à-vis* the WTO Anti-dumping Agreement was also acknowledged some two years later by the country's Constitutional Court in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*.[118]

In the later case, Deputy Chief Justice Moseneke pointed out that the Supreme Court correctly concluded that the Anti-dumping Agreement is binding on the Repu-

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[110]Section 231(4) of the Constitution of the Republic of South Africa, 1996.
[111]Namely ss 231, 232 and 233 of the Constitution.
[112]See *Hansard* (1995) col 642-653 at col 290.
[113]Para 6. See the authorities cited therein by Judge Malan in fn 14 of the judgment.
[114]The Regulations, made under s 59 of the International Trade Administration Act, were first published in GN 3197 *GG* 25684 of 2003-11-14 and came into operation on 2003-06-01.
[115]The authority for this submission is Botha 'International law' in *Law of South Africa (LAWSA)* First Re-issue vol 11 para 350.
[116]*Progress Office Machines* para 6. The relevant section provides that: 'When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'.
[117]*Progress Office Machines* para 7.
[118]I discuss the case below at 18-25.

blic in international law, even though it has not been specifically enacted into municipal law.[119] The judge further observed that in order to give effect to the Anti-Dumping Agreement, the South African parliament had enacted legislation and, in turn, the Minister of Trade and Industry had prescribed Anti-Dumping Regulations.[120] Therefore, *Progress Office Machines'* major jurisprudential contribution has been to clarify the issue of whether or not the WTO Anti-Dumping Agreement applies to South Africa in the absence of an express legislative provision domesticating it.

The judgment in *Progress Office Machines* clarifies the legal regimes applicable to both provisional and definitive anti-dumping duties and in this manner amplifies the differences between the two. This a welcome development because the differentiation did to a large extent help the Court to decide the issue of whether the anti-dumping duties were imposed in 1998 or 1999.[121]

To amplify the difference between a provisional and a definitive duty, the court observed that *in casu*, 'the imposition of the duty on 28 May 1999 with affect from 27 November 1998 meant that the law shall be taken to have been that which it was not'.[122] The court also noted that the payment of a provisional duty already imposed serves as security for the payment of a definitive duty when it will eventually be imposed.[123]

The judgment also makes it clear that in this case, the anti-dumping duty in force for the retrospective period, ie, from 27 November 1998 to 28 May 1999, was nothing less than a definitive anti-dumping duty.[124] The implication is that the period of a definitive anti-dumping duty and that of a provisional payment may coincide and not follow each other. Therefore, the conclusion that one can draw from the court's reasoning is that the life span of an anti-dumping duty (five years) is the sum total of the period of the provisional duty and that of the definitive duty. Such a conclusion, in the absence of any credible textual basis, is problematic because it is borne of judicial activism which does not bode well for the future. What is required in future is an amendment to the ITAC Act and the attendant regulations expressly providing for the calculation of the five-year period using a method that factors in the presence of provisional duties.[125] The jurisprudential lesson alluded to in the two preceding paragraphs is therefore tainted by the foregoing criticism.

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[119] *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* para 25.
[120] *Ibid*. In the main, the legislation consists of the International Trade Administration Act 71 of 2002, the Anti-Dumping Regulations made under the Act which must be read together with the Customs and Excise Act 91 of 1964; and where appropriate, the Board of Tariffs and Trade Act 107 of 1986.
[121] *Progress Office Machines* paras 12-17.
[122] The judge cited with approval the decision in *S v Mhlungu* 1995 3 SA 867 CC para 65 wherein the cited phraseology was used to illustrate the implication of a retrospective application of legislation.
[123] *Progress Office Machines* para 17. See also s 57A (3) of the ITAC Act.
[124] *Id* at para 19.
[125] See last paragraph at 26 and 27-28 below.

The other important jurisprudential lesson from the case, which cannot be ignored by any serious scholar of WTO law, is the importance of foreign precedents in resolving the type of disputes presented in the *Progress Office Machines*.[126] It is disheartening that despite the court's emphasis on the importance of international law and international practice in the specific context of the case, none of the foreign case law cited was considered supportive of the court's final judgment.

Judge Malan emphasised that a court is not only bound to prefer any reasonable interpretation of the legislation that is consistent with international law, but subordinate legislation such as the notice by the Minister of Finance imposing the anti-dumping duty must be reasonable.[127] In the High Court case, Judge Gyanda had referred to international law and foreign legislation from jurisdictions from as far afield as the United States of America, the European Communities and India in order to establish how the five-year duration of anti-dumping duties is calculated. On this score, the affidavit of Ms Trossevin of the USA relating to the application of Title VII (ss701-782) of the Tariff Act of 1930 was informative.[128] She demonstrated before the High Court how the five years is calculated in terms of the relevant legislation and clearly showed that the United States Tariff Act does not include the period during which provisional measures may have been applied.[129] However, out of the blue, the Supreme Court ruled that in South Africa, in the computation of the five-year period, any period during which a provisional duty may have been imposed is taken into account.[130] This ruling is against common practice in India and the European Communities, jurisdictions with more experience than South Africa in the administration of anti-dumping duties.

Therefore, jurisprudentially speaking, this case is important in the development of South African law in the specific regard for the following summed up reasons. Firstly, the case clarifies the question of whether or not WTO provisions are binding on the Republic at international law by showing clearly that with regard to dumping/anti-dumping, South Africa's obligations arise out of its statutory regime rather than the WTO Agreement itself. Secondly, the case clarifies the major differences between provisional and definitive anti-dumping duties and makes a far-reaching ruling as to how the five-year period is calculated. Finally, despite not making any reference to existing WTO jurisprudence on the subject, the decision in *Progress Office Machines* does

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[126] *Progress Office Machines* para 18. It is however disheartening to report that while the court could have referred to decided WTO jurisprudence on the subject to buttress its fidelity to international law, it referred to very few WTO disputes. How this happened in a court which employs legal researchers remains a mystery.

[127] *Id* para 11.

[128] *Id* para 18.

[129] Section 751(C) of the US Tariff Act.

[130] *Progress Office Machines* paras 19 and 20.

make reference to foreign law and highlights its importance in resolving domestic disputes as directed by the Constitution. This should positively be embraced. However, notwithstanding the above praiseworthy aspects of the decision in *Progress Office Machines*, the Supreme Court judgment has not escaped criticism, especially with regard to how the five-year period ought to be calculated. It is now appropriate to turn to the criticism and contextualise it.

3.2.6 Critiquing *Progress Office Machines*

From the present writer's perspective, as clearly spelled out above, the court overstepped its mandate when it went ahead and read into the law that which was not part of the law. Anti-dumping duties last for five years unless a sunset review is initiated.[131] It is common cause that in the absence of an express enabling provision in the relevant statute or the Regulations, the five-year period excludes the period during which provisional anti-dumping duties were imposed. While this may sound unfair to an importer who would have faithfully paid the provisional duty, it has traditionally been the South African practice and is supported by the WTO Agreement.[132]

In the absence of an amendment to the law expressly indicating that the five-year period shall include the period during which provisional duties were levied, it would seem that the judgment in *Progress Office Machines* was wrong on this score.

Brink[133] criticises the decision in *Progress Office Machines* on the following grounds. Firstly, he submits that in South African practice, wherever anti-dumping duties were imposed with retrospective effect, the total duration of the duty exceeded five years.[134] He further argues that the court had no basis to reject the practices adopted by the United States, European Communities and India since the countries' practices would be an indication of the international interpretation of the concept of 'imposition' and the calculation of the five-year period.[135] Brink argues that had the court considered the provisions of Anti-Dumping Regulation 38, which provides that anti-dumping duties last for five years from the date of publication of the notice; it would have come to a different conclusion.[136] To the extent that the provisions of Regulation 38, which spells out clearly that definitive anti-dumping duties last for five years, were ignored by the court, the decision is

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[131]See Anti-Dumping Regulation 53.1.
[132]Article 11.3 of the WTO Anti-Dumping Agreement.
[133]Brink (n 102) 643-648.
[134]*Id* 644.
[135]Brink (n 102) 646. While I agree with the critic on this score, I would have preferred a submission that recognises that the practices in those three jurisdictions are nothing more than municipal practices and then goes ahead and clarifies the WTO position.
[136]Brink (n 102) 647.

flawed.[137] In the safeguard regulations, Regulation 17 specifically provides that '[t]he period for which provisional measures are in force shall be regarded as part of the total duration for which safeguard measures are in force'.[138] In the absence of a similar provision in the Anti-Dumping Regulations, the court should not have come to the conclusion it reached in *Progress Office Machines*. The decision will not bode well for the cases that have been decided on the basis that the calculation of the five-year period excludes the period when provisional anti-dumping duties were in force.[139]

Therefore, to remedy the situation in the interests of a positive development of the law and greater clarity, three possible things ought to happen. The first would be for the Supreme Court of Appeal, when a similar case is next brought before it, to overturn its own decision on the basis that the ratio in *Progress Office Machines* was wrong. The second rather herculean course of action would be for an aggrieved importer to approach the Constitutional Court and ask it to set aside the decision on the basis that its misapplication of the law violates the Bill of Rights in that it infringes the right to freedom of economic activity. This may be a very steep legal mountain to climb, but when one considers the large volumes of cases ITAC has dealt with in which the five-year period has been determined in terms of Anti-Dumping Regulation 38, then there is justification for such a drastic step to be considered. The last alternative which, if successfully implemented, would eliminate the need for the possible solutions outlined immediately above to be pursued, would be to amend the ITAC Act and the Regulations to expressly provide for the exclusion/inclusion of the provisional duty from the calculation of the five-year period. Only time will tell the ramifications of the decision in *Progress Office Machines*.

3.3 International Trade Administration Commission v SCAW South Africa (Pty) Ltd [140]

3.3.1 Preliminary remarks

For the first time in South African legal history, the Constitutional Court had the occasion to adjudicate a dumping/anti-dumping dispute. However, the context was slightly different from *Progress Office Machines*. The manner in which the

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[137] *Ibid*.
[138] *Ibid*.
[139] *Ibid*.
[140] Hereafter *SCAW* case. Only two South African legal scholars, namely Brink '*International Trade Administration Commission v SCAW South Africa (Pty) Ltd* Case CCT 59/09 [2010] ZACC 6)' (2010) *De Jure* 380-387 and Satardien 'South Africa's International Trade Laws and its "guillotine" clause' (2010) 7 *Manchester Journal of International Economic* Law 52-59, have attempted to render an analysis of this case that goes beyond a mere descriptive account. This article intends making an additional imprint albeit with a different focus.

Constitutional Court dealt with the dispute in the specific case, especially the aspect dealing with the separation of powers, was very progressive and very context specific. It is heartening to observe that the Constitutional Court did cite with approval the decision in *Progress Office Machines* and concluded that the WTO Agreement is indeed binding on the Republic and that international law and practice are important matters in adjudicating dumping/anti-dumping disputes. In the ensuing paragraphs, I will analyse the Constitutional Court case.

3.3.2 The facts of the case

In 2002, after being lobbied by SCAW South Africa (Pty) Ltd, the largest South African manufacturer of a wide variety of steel products, including rolled steel and alloy iron castings, the erstwhile Board on Tariffs and Trade carried out an investigation into alleged dumping of stranded wire, rope and cables of iron and steel originating or imported from various countries including the United Kingdom.[141] The investigation resulted in the Minister of Finance imposing anti-dumping duties based on the recommendations of the BTT to the Minister of Trade and Industry.[142] The anti-dumping duties imposed on products from Bridon UK, by far the largest manufacturer of steel wire ropes in the United Kingdom, amounted to 42,1%. These substantial duties shielded domestic manufacturers of steel products, including SCAW, from the competition posed by the dumped product of Bridon UK.[143]

In August 2006, and at the request of Bridon UK, ITAC initiated a changed circumstances review.[144] At the end of the interim review, ITAC published a report in which it found that although Bridon UK did not continue dumping the impugned product, it could not prove whether the product was dumped or not, since there were no exports of the product to the Southern African Customs Union (SACU).[145] This finding meant that the review had been decided against Bridon UK and that the existing anti-dumping duties would remain in force.[146]

As SCAW had a vested interest in the continued existence of the anti-dumping duty, in February 2007, the company applied to ITAC to conduct a

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[141] *SCAW* case para 17.

[142] Section 4(1)(a) of the BTT Act empowered the Board to investigate dumping and to report and make recommendations to Minister of Trade and Industry in terms of s 4(1)(b). The Minister may accept or reject or remit the recommendation back to the Board for reconsideration as provided for in s 4(2)(a) of the BTT Act. In the event that the Minister of Trade and Industry accepts the recommendation, s 4(2)(b) provides that he may request the Minister of Finance to amend the duties.

[143] Para 17.

[144] A changed circumstances review may be initiated as an interim review of anti-dumping duties in a case of 'significantly changed circumstances' in order to ascertain if the anti-dumping duties may be discontinued or not. Regulation 45 of the Anti-Dumping Regulations provides for such reviews.

[145] Para 18.

[146] *Ibid*.

sunset review[147] before the expiry of the existing anti-dumping duty imposed in 2002.[148] ITAC heeded the request on 17 August 2007 and on completion of the investigation, recorded that while it had reason to believe that further dumping by other foreign exporters and producers would occur, it did not anticipate that there would be dumping of the product of Bridon UK.[149] In its investigation into whether to remove the duties, ITAC found that steel ropes produced by Bridon UK were stored in bonded warehouses and sold to foreign vessels so the question of their continued dumping could not arise.[150] ITAC therefore concluded that the lifting of existing anti-dumping duties could not result in further dumping by Bridon UK.[151]

On 14 October 2008, ITAC made a decision to recommend to the Minister that the existing anti-dumping duty on imports of the product by Bridon UK should be terminated but before it could recommend this to the Minister, it was interdicted by SCAW in the High Court.[152]Anticipating that the Minister would respond positively to the recommendation of ITAC, six days later, SCAW launched an urgent High Court application in which it sought injunctive relief against ITAC, the Minister of Trade and Industry and the Minister of Finance.[153]

SCAW sought an interdict restraining ITAC from forwarding to the Minister recommendations to terminate the relevant anti-dumping duties;[154] restraining the Minister from accepting ITAC's recommendations[155] and restraining the same Minister from passing on the recommendations to the Minister of Finance.[156] The order sought further to tie the hands of the Minister of Finance so that if he had already accepted the recommendation from the Minister, he was further interdicted from implementing the recommendation.[157] The interim relief was granted by the North Gauteng High Court on 5 January 2009 and, obviously incensed by the decision, ITAC sought leave to appeal against the decision. Leave to appeal was refused by the High Court and a subsequent appeal against the refusal of leave to appeal was launched with the Supreme Court of Appeal. Once again, leave to appeal was denied. ITAC had no choice but to appeal to the

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[147]Regulation 53.2 provides that:

> If a sunset review has been initiated prior to the lapse of an anti-dumping duty, such anti-dumping duty shall remain in force until the sunset review has been finalized.

[148]*SCAW* para 19. A sunset review, which may be initiated by any interested party, is aimed at establishing the desirability of the continued existence of the existing anti-dumping duty. If it is found that dumping will still occur after the lapse of the five-year period, then the duties will remain in place until ITAC is convinced that there will be no likelihood of the dumping continuing.

[149]*SCAW* para 21.

[150]*Id* para 22.

[151]*Ibid*.

[152]*Id* para 14.

[153]*Id* para 24.

[154]*Id* para 4(a).

[155]*Id* para 4(b).

[156]*Ibid*.

[157]*Id* para 4(c).

Constitutional Court, hence the decision in *International Trade Administration Commission v SCAW*, which is discussed below.

3.3.3 Legal issues arising and how they were decided

Three issues were to be decided by the Constitutional Court. They were:

- Whether it was in the interests of justice to entertain an appeal against a temporary restraining order granted by the High Court; and if it is,
- whether it was appropriate for the High Court to grant the restraining order; and
- what relief, if any, could be granted?[158]

After narrating the facts and thereafter discussing the applicable law through an exposition of the applicable statutory regime, Deputy Chief Justice Moseneke went on to dispose of each of the issues in a manner that I regard as satisfactory. The Judge summed up the crux of the appeal as one that was about 'the constitutional appropriateness of granting an interdict that extends an existing anti-dumping duty in a manner that implicates the separation of powers and the international trade obligations of the Republic'.[159]

In order for the Court to grant leave to appeal, it first had to deal with two important issues. The first one was whether a constitutional issue had arisen, and if it had, whether it was in the interests of justice to grant leave to appeal.[160] Leave to appeal was sought against a restraining order pending a review to set aside the impugned decision of ITAC recommending the termination of anti-dumping duties.[161]

The court was convinced that the application for leave to appeal involved constitutional matters.[162] This was due, firstly, to the fact that the order of the High Court restrained two members of Cabinet from exercising executive powers conferred upon them by the Constitution and national legislation.[163] The two Ministers exercise executive authority by 'implementing national legislation'; 'developing and implementing national policy'; and by 'performing any other executive function' provided for in national legislation.[164] The ITAC Act, the BTT Act and the Customs and Excise Act require the Ministers to impose, change or remove anti-dumping duties in order to realise the primary economic and developmental objects of the statutes.[165] For the above reasons therefore, the

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[158] For a different narrative on legal issues that fell to be decided, see Satardien (n 140) 54.
[159] *SCAW* para 66.
[160] *Id* para 41.
[161] *Ibid*.
[162] *Id* para 42.
[163] *Ibid*.
[164] *Ibid*. The empowering provision is s 85(2)(a), (b) and (c) of the South African Constitution.
[165] *Id* para 42.

court concluded that the subject matter of the appeal was indeed a constitutional one.

The other dimension of whether the order appealed against raised constitutional matters was that the impugned recommendation of ITAC had also been made in terms of national legislation that regulates the administration of international trade in a bid to give effect to the international obligations of the Republic.[166] The court ruled that the construction of the pertinent legislative provisions consistent with the Constitution, in itself raised a constitutional issue.[167]

On a slightly different tack, the court held that the restraining order on the two Ministers potentially infringed upon the separation of powers between the courts and the national executive and posed a potential risk of the state breaching its international obligations in relation to international trade.[168] This was due to the fact that the setting, changing or removal of an anti-dumping duty is a policy-laden executive decision that flows from the power to formulate and implement domestic and international trade policy.[169] Separation of powers and the related question of whether courts should observe any level of 'deference'[170] in making orders that perpetuate anti-dumping duties beyond their normal life span was held to be an important constitutional matter.[171]

On the issue of whether it was in the interests of justice to appeal against an interim order in the specific context of the case, the court first observed that in the present case, the order was not an interim order of execution but *an interim order against the exercise of statutory power* (my emphasis).[172] Generally, the question of whether an interim order may result in irreparable harm if leave to appeal is not granted is an important but not the sole requirement for granting leave to appeal.[173]

Coming to the specific order, the court noted that its immediate consequence was that it was final and caused irreparable harm.[174] The above conclusion was

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[166] *SCAW* para 43.

[167] The court relied on the following cases as pertinent authorities for the submission: *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* [2009] ZACC 32, Case no CCT 40/09, 14 October 2009 paras 42-3; *Department of Land v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12 para 31; *Alexkor Ltd v The Richtersveld Community* [2003] ZACC 18 para 23; and *National Education Health and Allied Workers Union v University of Cape Town* [2002] ZACC 27 paras 1-5.

[168] *SCAW* para 44.

[169] *Ibid*. That power resides in the heartland of national executive authority.

[170] See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* [2004] ZACC 15 para 46.

[171] *SCAW* para 44.

[172] *Id* para 45.

[173] *Ibid*. Other important considerations that speak to what is in the interests of justice will be the kind of, and importance of, the constitutional issue raised; whether there are prospects of success; whether the decision, although interlocutory, has a final effect; and whether irreparable harm will result if leave to appeal is not granted.

[174] *SCAW* para 55.

based on the fact that the order maintained the existence of an anti-dumping duty where it would otherwise have been ended either by the operation of law, based on the lifespan of anti-dumping duties, or as a result of ITAC's decision to recommend that the duty end on completion of the review.[175] The harmful effect of the order was that it instantly halted the sunset review, prevented its completion and precluded the exercise of any ministerial discretion that is dependent on ITAC's recommendation arising from the sunset review.[176] The court came to the conclusion that although the interdict granted by the High Court carried an interim tag, it was susceptible to an appeal because it had irreparable consequences and an immediate and final effect in the sense stated in *Metlika Trading Ltd v Commissioner, South African Revenue Service.*[177]

After deciding that the interim order was appealable, the court had to proceed and answer the question of whether leave to appeal should be granted. To answer the question satisfactorily, the court had to be guided by another question: Whether it was in the interests of justice to grant leave to appeal? Despite the fact that it is beyond doubt that the High Court has the power to entertain and grant an application for interim relief,[178] in the present case, the relevant question was whether the order was constitutionally permissible and appropriate.[179] It was argued on behalf of ITAC and Bridon UK that the interdict was intended to and in effect extended the duration of the anti-dumping duty.[180] The two parties further contended that the High Court had no power and that it was not appropriate for it to extend the lifespan of the anti-dumping duty.[181] The Constitutional Court agreed with the two contentions and held that the High Court order had the effect of preventing the anti-dumping duty from lapsing and in that vein the order was inappropriate.[182] On a related note, the court opined that a court 'should be slow to override mandatory legislative provisions buttressed by international obligations'.[183]

Finally, on the issue of separation of powers, the court first observed that although the Constitution makes no express provision for separation of powers, it is clear from decided cases that the doctrine is part of South African constitutional law.[184] The principle of separation of powers recognises the functional independence of branches of government, while on the other hand, the

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[175] *Id* para 57.
[176] *Id* para 57.
[177] 2005 3 SA 1 (SCA) para 24.
[178] See *National Gambling Board v Premier, KwaZulu-Natal* [2001] ZACC 8 para 48.
[179] *SCAW* para 69.
[180] *Id* para 75.
[181] *Ibid*.
[182] *SCAW* para 87.
[183] *Ibid*.
[184] *SCAW* para 91. See the cases cited in fn 92.

principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another.[185] The Court cautioned that where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference.[186] Doing so would frustrate the balance of power implied in the principle of separation of powers.[187]

The Minister had submitted an affidavit in which he made the final point that an interdict would hinder the proper administration of economic policy, a matter which the Constitution entrusts to the national executive.[188] The High Court had not properly considered the role of executive power and policy formulation in matters of national and international trade and industry.[189] Neither had the court considered South Africa's international trade obligations in relation to anti-dumping duties.[190] The Constitutional Court concluded that by downplaying the two issues above, the High Court inevitably granted the interdict in error.[191] In total agreement, the Constitutional Court ruled that when a court is invited to intrude into the terrain of the executive, especially when the executive decision-making process is not yet completed, it must do so only in the clearest of cases and only when irreparable harm is likely to ensue if interdictory relief is not granted.[192] Such a consideration would be of vital importance when the decision entails multiple considerations of national policy choices and specialist knowledge, in regard to which the courts are poorly suited to judge.[193]

Therefore, in the final analysis, the Constitutional Court found that the effect of the interdict granted by the High Court was to extend the legislatively determined duration of the existing anti-dumping duty.[194] Therefore, the Constitutional Court came to the inescapable conclusion that when the High Court extended the existing anti-dumping duty, it ventured into the constitutional terrain

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[185] See *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 [1996] ZACC 26 at para 109 and the cases cited in fn 91 of para 90 of the *SCAW* case.
[186] *SCAW* para 95.
[187] *Ibid*.
[188] *Id* para 97.
[189] *Id* para 99.
[190] *Ibid*.
[191] *Ibid*.
[192] The Judge cited with approval the decision in *Minister of Health v Treatment Action Campaign* [2002] ZACC 16 para 12.
[193] *SCAW* para 100.
[194] *SCAW* para 104. It is appropriate to add that apart from being legislatively determined, the duration of an anti-dumping duty, which cannot be extended by a court, is also internationally determined in terms of the WTO Anti-Dumping Agreement; and this international determination and related matters are the preserve of the national executive.

of the national executive[195] and such action was tantamount to a violation of the separation of powers doctrine. I fully agree with the Court's finding in this regard.

3.3.4 Important jurisprudential lessons from the *SCAW* case

I consider the judgment in this case to be very important for some or all of the reasons briefly outlined below.

Firstly, the case gave the South African Constitutional Court a rare opportunity to decide for the first time on an international trade dispute, specifically one dealing with dumping and develop the jurisprudence at the apex court level. This is very important for legal clarity since the Constitutional Court is the highest court in the land for constitutional matters, and whatever pronouncement on the law it makes, such a pronouncement will bind all the other courts and organs of state and hence legal clarity is achieved. The case establishes beyond any doubt that the current sources of South African dumping law are the WTO Anti-Dumping Agreement; International Trade Administration Act 2002; the Anti-Dumping Regulations of 2003 read together with the Customs and Excise Act of 1964, as amended from time to time; and where appropriate, the Board of Tariffs and Trade Act of 1986.[196]

Further on the issue of clarifying the legal position by isolating the applicable legal regime and applying it appropriately, this decision is important in that it invalidates two previous High Court decisions in as far as they misapplied the law.[197] In both cases, interdictory orders almost identical to the one granted by the High Court in the *SCAW* case were granted pending the finalisation of review applications.[198] The orders had the effect of extending the lifespans of anti-dumping duties. In light of the decision reached by the Constitutional Court in the *SCAW* case, the decisions of the North Gauteng High Court in *African Explosives* and in *Algorax* were appropriately overruled to the extent that they were inconsistent with the decision in *SCAW*.[199] I regard this as a very important lesson the Constitutional Court taught the lower courts and likeminded parties.

The second lesson drawn from the case, which I dispose of very briefly and with obvious haste in order not to sound too repetitive, is the emphasis by the *SCAW* judgment on the importance of international law in resolving domestic anti-dumping disputes. In my discussion of *Progress Office Machines* above,[200] reference was made to this important jurisprudential point and it need not be

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[195] *SCAW* para 104.
[196] See para 2 of the judgment.
[197] The pertinent decisions are *African Explosives Ltd v ITAC*, North Gauteng High Court, Pretoria, Case no 15027/2006, 5 August 2008, unreported and *Algorax (Pty) Ltd v ITAC* North Gauteng High Court, Pretoria, Case no 25233/05, 10 September 2005, unreported.
[198] See para 89 of *SCAW* case.
[199] *Ibid*.
[200] See above at 12-18.

reiterated here. Suffice to say that in *SCAW*, unlike in *Progress Office Machines*, the Constitutional Court went further and referred extensively to decisions of the WTO Panels and Appellate Body.[201] This is more than welcome in the development of South African law in compliance with the decisions of WTO Panels and the Appellate Body.

The third and last but most important contribution this case makes to South African jurisprudence on dumping/antidumping is its determination on the issue of the separation of powers. It will be recalled that the interdict sought to stop ITAC from recommending the removal of anti-dumping duties to the Minister of Trade and Industry, and further, if the Minister of Finance had received the recommendation from the Minister, he was interdicted from implementing it. The Court appropriately ruled that the interdict could be appealed against and such an appeal was in the interests of justice for two reasons. The first reason was that it was inappropriate for a court to extend an anti-dumping duty beyond its statutorily prescribed lifespan; and secondly, courts may not without justification encroach upon 'the polycentric policy terrain of international trade and its concomitant foreign relations or diplomatic considerations reserved by the Constitution for the national executive'.[202] If South African courts are allowed to encroach with impunity, then South Africa may be regarded by its peers in the WTO as a pariah state, a label the country can ill afford since it prides itself on being a constitutional state.

I therefore agree with the Constitutional Court on this score because it was proved that the interdict improperly breached the doctrine of separation of powers which is an integral part of the Constitution.[203] Further, I agree with the judgment that the High Court should not have granted an interim order which invaded the terrain of the national executive function without justification.[204]

The decision in this case has been caustically criticised by Brink[205] on the basis that it leaves the domestic industry with little protection in cases of incorrect decisions by the ITAC.[206] On the contrary, Satardien counters this criticism by saying that it has no legal basis because domestic industry has alternative relief in the form of recourse to provisional measures in terms of Regulation 33 of the Act, after launching a new investigation for dumping.[207] I concur with the latter view.

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[201] See the WTO disputes cited in note 85 of para 85 of the *SCAW* judgment.
[202] *SCAW* para 104.
[203] *Id* para 110.
[204] *Ibid*.
[205] (N 140).
[206] Brink (n 140) at 387.
[207] Satardien (n 140) at 58.

4 Concluding remarks

The two cases discussed above depict South African dumping/anti-dumping law as being in a continuous state of positive legal metamorphosis. With the noticeable exception of the reservations expressed about *Progress Office Machines*, the decisions under discussion were well reasoned and the inescapable conclusion is that the courts did apply WTO law and its municipal statutory equivalents properly. In the *SCAW* case, we are introduced to courts that ably negotiated the delicate balance between executive and legislative authority. In *SCAW*, apart from laying down the law and being a harbinger for future legal certainty on the subject of dumping/anti-dumping, the case colloquially 'brings to an end the business of interdicting the relevant Ministers' from exercising their statutory powers.[208] For this reason, it will be very rare in future for South African courts to allow injunctive relief to litigants seeking to stop the relevant Ministers from acting in accordance with their constitutional duties.

Therefore, South African dumping/anti-dumping law will now be encapsulated in the *SCAW* decision, which will in all likelihood eliminate any hitherto existing legal uncertainty created by the High Court decisions on the subject.

[208] It seems likely that this problem started in 2001 and was nipped in the bud by the Supreme Court of Appeal in *Chairman: Board On Tariffs and Trade v Brenco Incorporated* Case no 285/99, [2001] ZASCA 67, decided on 25 May 2001. However, the trend continued to rear its ugly head in the North Gauteng High Court in the cases of *African Explosives Ltd v ITAC*, North Gauteng High Court, Pretoria, Case no 15027/2006, 5 August 2008, unreported and *Algorax (Pty) Ltd v ITAC* North Gauteng High Court, Pretoria, Case no 25233/05, 10 September 2005, unreported. At this stage of the development of South African law on the subject, it is now more than likely that *SCAW* puts paid to the possibility of getting such injunctive relief from any of South Africa's courts in future.