

# Reflections on Aspects of the Regime on the Amendment of Tariffs under the International Trade Administration Act 71 of 2002: a Discussion of *Shoprite Checkers (Pty) Ltd v International Trade Administration Commission*

**Clive Vinti**

<https://orcid.org/0000-0002-3823-2400>

University of the Free State

VintiC@ufs.ac.za

## Abstract

This article evaluates aspects of the regime for the amendment of tariffs under the International Trade Administration Act 71 of 2002 (ITAA), with a specific focus on the decision-making powers of the International Trade Administration Commission (ITAC) and the Minister of Trade, Industry and Competition (Minister). This analysis is conducted through the conduit of the decision in *Shoprite Checkers (Pty) Ltd v International Trade Administration Commission*. The *Shoprite* decision incorrectly allowed a review of ITAC's 'recommendations' based on the ground of 'rationality' emanating from the principle of legality outside of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). It is settled law that all of ITAC's 'recommendations' or 'decisions' constitute 'administrative action', and thus, the grounds of appeal reside in PAJA, which includes the ground of rationality. Thus, the *Shoprite* approach conflated the point of departure, thereby incorrectly displacing the place of the PAJA and flouting the principle of subsidiarity. This case also incorrectly classified the power of the Minister when considering the ITAC 'recommendation' to impose or vary a duty as a 'constitutional' power. It is trite law that this power is 'executive' in nature. Thus, the *Shoprite* formulation causes confusion since all power can technically be regarded as 'constitutional'. The article concludes with an analysis of the seldom-used power by ITAC of revoking its recommendations under sections 26 and 48 of the ITAA.

**Keywords:** ITAC recommendations; custom duties; administrative action; executive action; rationality

## Introduction

South Africa is a founding member of the World Trade Organization (WTO) and has assented to the Marrakesh Agreement establishing the World Trade Organization (WTO Agreement), which includes the General Agreement on Tariffs and Trade 1994 (GATT) and several other multilateral trade agreements.<sup>1</sup> South Africa acceded to the original GATT on 13 October 1947.<sup>2</sup> Parliament ‘approved’ the GATT in the Geneva General Agreement on Tariffs and Trade Act 29 of 1948.<sup>3</sup> The WTO Agreement was then approved by Parliament on 6 April 1995 and is, therefore, binding on South Africa in international law, but it has not been adopted into domestic law.<sup>4</sup> However, the promulgation of the International Trade Administration Act 71 of 2002 (ITAA) is ‘indicative’ of South Africa’s ‘intention’ to be bound by the GATT.<sup>5</sup> The ITAA and its regulations constitute South Africa ‘honouring’ its international obligations on tariffs and trade.<sup>6</sup> To this end, Article II.1(b) of the GATT allows members to impose ‘tariffs’ within the ceiling of the ‘bound rate’, which is the maximum rate that can be imposed on a product.<sup>7</sup>

In essence, a ‘tariff’ is a tax on imported goods and they are usually used as a policy instrument to protect the local industry from import competition.<sup>8</sup> A tariff can either be an ‘applied’ tariff, which is the ‘actual’ tariff that is imposed on a product or a ‘bound’ tariff, which is the highest tariff that a country has agreed to impose on a product in its Schedule of Concessions to the WTO.<sup>9</sup>

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- 1 *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) (SCAW) para 2; *Progress Office Machines v SARS* 2008 (2) SA 13 (SCA) para 5; *Association of Meat Importers v ITAC* 2014 (4) BCLR 439 (SCA) para 10; See Gustav Brink, ‘Progress Office Machines v South African Revenue Services [2007] SCA 118 (RSA)’ (2008) 41 De Jure Law Journal 645.
  - 2 GN 2421 (18 November 1947). *Progress Office Machines* (n 1) para 5.
  - 3 *Progress Office Machines* (n 1) para 5. See Long Title read with section 2 of the Geneva General Agreement on Tariffs and Trade Act 29 of 1948.
  - 4 *Progress Office Machines* (n 1) para 6. Lonias Ndlovu, ‘Assessing the WTO Compliance of Selected Aspects of South Africa’s International Trade Administration Amendment Bill’ (2010) 31 Obiter 317.
  - 5 *Progress Office Machines* (n 1) para 6.
  - 6 *SCAW* (n 1) [2]. See also, *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) [95]–[96] See also Engela Schlemmer, ‘South Africa and the WTO Ten Years into Democracy’ (2004) 29 SAYIL 135.
  - 7 See Appellate Body Report, *India - Additional and Extra-Additional Duties on Imports from the United States* WT/DS360/AB/R (adopted on 17 November 2008) para 159.
  - 8 Raj Bhala, *Modern GATT Law: A Treatise on the General Agreement on Tariffs and Trade* (Sweet & Maxwell 2005) 175. See also, Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (3rd edn, Cambridge University Press 2016) 423. See Art II read with Art XXVIIbis of the GATT.
  - 9 Bhala (n 8) 531–533.

Consequently, in light of these obligations under the GATT, the ITAA and the attendant Amended Tariff Investigations Regulations (ATR) allow the amendment of customs duties/tariffs in respect of goods.<sup>10</sup>

Within the regime of the ITAA and the ATR, tariffs can either be increased or reduced or removed altogether.<sup>11</sup> It is within this framework that the High Court decision in *Shoprite Checkers (Pty) Ltd v International Trade Administration Commission (Shoprite Checkers)* explored the process of the amendment of a tariff in South African law.<sup>12</sup> Of particular interest in this decision is the court's findings on the nature of the powers of the Minister of Trade, Industry and Competition (Minister) when considering the 'recommendation' made by the International Trade Administration Commission (ITAC) to amend a tariff. Secondly, this case allowed the review of the 'recommendations' of ITAC on the ground of 'rationality' outside of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Lastly, this case also addressed the novel issue of ITAC amending or revoking its recommendations, which pits sections 26(6) and 48 of the ITAA as alternative mechanisms. The court's findings on these three issues are unprecedented and thus, merit further scrutiny. Consequently, this paper evaluates these aspects of the regime on the amendment of customs duties through the prism of the decision in *Shoprite Checkers*.

## The Chronology of Facts in the Matter

### The 2012 Investigation

On 25 May 2012, as a result of an application by Blue Ocean Mussels (Pty) Ltd (Blue Ocean), ITAC initiated the investigation for the increase of customs duties on frozen half-shelled mussels classified under Chapter 3 of the Schedule 1 to the Customs and Excise Act 91 of 1964 (CEA).<sup>13</sup> ITAC investigated and evaluated the application and decided to recommend to the Minister that the general rates of customs duty on mussels, classifiable under tariff sub-headings 0307.39.10 and 0307.39.90, be increased to 25 per cent *ad valorem*.<sup>14</sup>

The Minister accepted ITAC's recommendation and Schedule 1 to the CEA was then amended by the Minister of Finance, imposing customs duty of 25 per cent *ad valorem* on tariff sub-headings 0307.39.10 and 0307.39.90, with effect from 15 February 2013.<sup>15</sup>

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10 For the ATR, see GNR 652 in GG 39035 (31 July 2015).

11 ITAC, 'Tariff Investigations' (ITAC, 2020) 3–4 <<http://www.itac.org.za>> accessed 2 June 2020, here ITAC also notes that one can also apply for tariff rebates and drawbacks which operate to provide a 'customs duty waiver'.

12 [2019] JOL 46186 (WCC) (*Shoprite Checkers*).

13 *ibid* para 33.

14 *ibid* para 34.

15 *ibid* paras 38–39.

After this amendment, Blue Ocean requested that in order to assess the trade flow of the products properly, the following new 8-digit-tariff sub-headings be created: 0307.39.20 Frozen, not shelled (excluding smoked); 0307.39.30 Frozen, in half-shells (excluding smoked) and 0307.39.40 Frozen, shelled meat (excluding smoked).<sup>16</sup>

Blue Ocean was of the view that the current sub-headings that only differentiated between ‘smoked’ and ‘other’, were not adequately specific.<sup>17</sup> ITAC supported this request, and thus, the additional sub-headings requested by Blue Ocean were introduced in Schedule 1 to the CEA by Notice in the Government Gazette on 16 August 2013.<sup>18</sup>

### **The 2014 Investigation**

It appeared that the increase in tariffs did not have the impact intended by Blue Ocean and ITAC.<sup>19</sup> Blue Ocean inquired with the South African Revenue Service (SARS), who investigated the matter and found that there was circumvention in that the frozen half-shelled mussels were being imported not under Chapter 3 of Schedule 1, but under Chapter 16, more specifically under tariff heading 16.05, which provided for: ‘Crustaceans, molluscs and other aquatic invertebrates, prepared or preserved’.<sup>20</sup> The tariff sub-heading differentiated between ‘1605.53.20 other, in airtight metal containers’ and ‘1605.53.90 other’, which are collectively known as ‘the Chapter 16 mussels’.<sup>21</sup>

SARS found that before the freezing process, half-shelled mussels frozen in bags and out-of-shell mussels in bags went through blanching or precooking during the production process.<sup>22</sup> These processes occurred before importation.<sup>23</sup> It seemed that in the absence of the heat treatment prior to freezing, the flesh of the mussels become unsuitable for human consumption.<sup>24</sup> SARS was of the view that tariff heading 03.07, in Chapter 3, did not permit for any heat treatment process such as blanching or precooking other than by smoking.<sup>25</sup>

Thus, it was legally valid for the importers to import the product under the tariff headings in Chapter 16.<sup>26</sup>

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16 *ibid* para 40.

17 *ibid*.

18 *ibid*. See GN No. R. 609 in GG 36737 (16 August 2013).

19 *Shoprite Checkers* (n 12) para 41.

20 *ibid* paras 41–42.

21 *ibid* para 43.

22 *ibid* para 44.

23 *ibid*.

24 *ibid*.

25 *ibid* para 45.

26 *ibid*.

Therefore, ITAC's goal in increasing customs duty on Chapter 3 mussels was or could be circumvented through mussels being legally imported under Chapter 16.<sup>27</sup>

Blue Ocean then requested ITAC to extend the duty to also apply to the following Chapter 16 mussels: 'Mussel, prepared or preserved, in airtight metal containers, classifiable in tariff 1605.53.20 and other mussels, prepared or persevered, classifiable in tariff sub-heading 1605.53.90 from 5.5 c/kg respectively to 25 per cent respectively'.<sup>28</sup>

ITAC stated that it had decided to investigate the matter *mero metu*, as per section 16(1)(d)(ii) of the ITAA.<sup>29</sup> ITAC then published a Notice stating its intention to extend the tariff protection accorded under Chapter 3 to also apply to Chapter 16 mussels.<sup>30</sup> Interested parties were invited to make comments to ITAC within two weeks of the date of the Notice.<sup>31</sup> On 11 August 2014, M&L Distributors (Pty) Ltd (representing Shoprite and others) requested an extension to 29 August 2014, to tender its response.<sup>32</sup> ITAC alleged that this request was submitted late, baseless and contrary to the ATR and, therefore, denied it.<sup>33</sup> ITAC then found that the imports of Chapter 3 mussels increased by 1011 per cent and this implied that the duty increase in respect of Chapter 3 mussels was not yet 'effective' and, the mussel producing industry still had to contend with substantial import pressures.<sup>34</sup> Thus, ITAC decided to recommend to the Minister that the rate of customs duty on mussels classifiable under tariff sub-headings 1605.53.20 and 1605.53.90 (ie Chapter 16 mussels) be increased from 5.5c/kg to 25 per cent ad valorem.<sup>35</sup> The Minister accepted ITAC's 'recommendation' and 'requested' the Minister of Finance to amend Schedule 1 to the CEA, which he did on 3 October 2014.<sup>36</sup>

On 4 September 2014, Shoprite had belatedly submitted an objection to ITAC on the proposed amendment.<sup>37</sup> ITAC alleged that for the first time, it was alerted that the proposed amendment also covered smoked tinned (canned) mussels, which were not produced locally.<sup>38</sup> According to ITAC, this information had not been disclosed when the decision to increase the customs duty was made.<sup>39</sup>

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27 *ibid* para 46.

28 *ibid* para 48.

29 *ibid* para 49.

30 *ibid* para 50. See Notice 576 of 2014 in GG 37830 (18 July 2020).

31 *Shoprite Checkers* (n 12) para 51.

32 *ibid* para 56.

33 *ibid*.

34 *ibid* para 57.

35 *ibid* para 60.

36 *ibid* paras 61–62.

37 *ibid* para 63.

38 *ibid* para 64.

39 *ibid*.

## The 2016 Investigation

Consequently, M&L Distributors submitted an application on 21 November 2014 based on the allegation that there were no local producers of smoked canned mussels, and that the duty caused an added adversity to the smoked mussel consumer.<sup>40</sup>

On 8 December 2014, ITAC informed M&L Distributors that this application was ‘deficient’.<sup>41</sup> On 19 December 2014, M&L Distributors informed ITAC that it intended to reconfigure the application on behalf of major retailers.<sup>42</sup> In response, ITAC notified M&L Distributors that it would withdraw the application and attempt to finalise a duly completed application promptly.<sup>43</sup>

On or about 12 January 2015, Shoprite applied for the review application in this dispute.<sup>44</sup> In this regard, ITAC contended that it was astonished that Shoprite did not mention in its papers, its intention to apply to it for the reduction of the customs duty on tinned mussels through M&L Distributors.<sup>45</sup> ITAC then alleged that on 5 March 2015, it received a new application, submitted by M&L Distributors representing Shoprite, Pick 'n Pay (Pty) Ltd and Spar South Africa (Pty) Ltd.<sup>46</sup> The new application was also ‘deficient’ in specific facets, which were attended to by M&L Distributors.<sup>47</sup> ITAC then accepted the application as ‘properly documented’, ‘verified’ the information and published an Initiation Notice notifying interested parties of the new investigation to reduce the customs duty on mussels classifiable under tariff sub-heading 1605.53.20.<sup>48</sup>

To administer the intended exclusion, SARS advised ITAC that a reduction of customs duty on ‘other canned mussels in airtight metal containers’ must be implemented through the deletion of tariff sub-heading 1605.53.20, and the creation of two new tariff sub-headings for smoked and other mussels in airtight metal containers, under tariff sub-heading 1605.53.<sup>49</sup> After investigating and evaluating the application, ITAC found that there existed two markets in the mussel industry: a market for fresh mussels before depuration, and a market for the processed product.<sup>50</sup> The reason for the non-availability of smoked canned mussels was because of the high barriers to entry that existed.<sup>51</sup>

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40 *ibid* para 66.

41 *ibid* para 67. See s 15 of ATR.

42 *Shoprite Checkers* (n 12) para 68.

43 *ibid*.

44 *ibid* para 69.

45 *ibid*.

46 *ibid* para 70.

47 *ibid* para 71.

48 *ibid* para 72. Notice 709 of 2015 in GG 39220 (18 September 2015).

49 *Shoprite Checkers* (n 12) para 74.

50 *ibid* para 76.

51 *ibid*.

ITAC confirmed that the product was not produced locally and after evaluating other factors, decided to recommend to the Minister that the customs duty be reduced on smoked canned mussels through the deletion of tariff sub-heading 1605.53.20.<sup>52</sup> The Minister accepted ITAC’s ‘recommendation’ and requested the Minister of Finance to amend Schedule 1, which was done and took effect from 11 March 2016.<sup>53</sup>

## The Issues before the Court and the Applicable Law

Shoprite sought the following relief, amongst others, from the court:

- i. An order as per sections 6 and 8 of the PAJA reviewing and setting aside the decision taken on 12 August 2014 by ITAC to amend the recommendation made in ITAC Report 413 to include a recommendation to the Minister that the rate of customs duties on mussels classifiable under tariff heading 1605.53.20 be increased from 5.5c/kg to 25 per cent *ad valorem*, and ITAC’s communication of that decision to the Minister on 27 August 2014, alternatively an order in terms of section 172 (1) of the Constitution of the Republic of South Africa, 1996 declaring that the decision and communication is unconstitutional and invalid;
- ii. An order in terms of sections 6 and 8 of PAJA reviewing and setting aside the request by the Minister to the Deputy Minister of Finance on 2 September 2014 that the customs duties on the mussels in question to be so increased, alternatively an order in terms of section 172(1) of the Constitution declaring that request unconstitutional and invalid;
- iii. An order in terms of sections 6 and 8 of PAJA reviewing and setting aside the amendment of tariff heading 1605.053.20 by the Deputy Minister of Finance, acting on behalf of the Minister of Finance, in Notice No. R771 in GG 38052 of 3 October 2014, alternatively an order in terms of 172(1) of the Constitution declaring that amendment unconstitutional and invalid.<sup>54</sup>

The review was based on section 46(1) of the ITAA and section 6(1) of PAJA, which provide that any person may institute proceedings in a court for the judicial review of ITAC’s decisions, determinations and recommendations because they constitute ‘administrative action’.<sup>55</sup>

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52 *ibid* para 77. ITAC South Africa ‘Report 513: Reduction in the Rate of Customs Duty on Canned Mussels in Airtight Metal Containers’ (ITAC, 7 December 2015) <[http://www.itac.org.za/upload/document\\_files/20160311101142\\_Reduction-in-the-rate-of-customs-duty-on-canned-mussels-in-airtight-metal-containers.pdf](http://www.itac.org.za/upload/document_files/20160311101142_Reduction-in-the-rate-of-customs-duty-on-canned-mussels-in-airtight-metal-containers.pdf)> accessed 12 June 2020.

53 *Shoprite Checkers* (n 12) paras 79–80.

54 *ibid* para 2.

55 *ibid* para 7.

During the hearing of the application, Shoprite argued that it sought the judicial review of the decisions and conduct of the respondents based on the principle of ‘legality’ according to the Constitution of the Republic of South Africa, 1996 (Constitution).<sup>56</sup>

After outlining the rationale for tariffs, the court then explained that goods are classified under various chapters, sections, and tariff headings—the ‘4-digit-headings’.<sup>57</sup> Each good is classified under the relevant tariff sub-headings, i.e. a ‘6-digit-heading’, which follows the Harmonized Commodity Description and Coding System (HS) of tariff nomenclature.<sup>58</sup> The HS is an internationally standardised system of names and numbers to classify goods developed by the World Customs Organization.<sup>59</sup> Within the WTO framework, each country can create its own 8-digit-tariff sub-headings, to allow the country the latitude in policy-making, in the administration of customs duties.<sup>60</sup> The Commissioner of SARS, subject to the control of the Minister of Finance, has the duty to administer the CEA.<sup>61</sup> SARS has the mandate to administer the clearance of imported products and to classify products and make tariff determinations under section 47 of the CEA.<sup>62</sup> Thus, tariff classifications do not fall within the scope of ITAC’s expertise and powers.<sup>63</sup> When ITAC investigates a product, it is required to consult SARS on the relevant tariff classification of the product.<sup>64</sup>

The court then clarified that in terms of section 48(1)(b) of the CEA, the Minister of Finance may amend Part 1 of Schedule 1 by Notice in the Government Gazette to give effect to any ‘request’ by the Minister.<sup>65</sup> An increase in customs duties, as stipulated in the Schedule, is effected through an amendment to this Schedule.<sup>66</sup> The investigation preceding the amendment is based on section 26 of the ITAA read with section 4 of the Board of Tariffs and Trade Act 107 of 1986 (BTAA), which must be read as if the latter Act had not been repealed.<sup>67</sup> The process of the investigation is outlined in the ATR.

In essence, after ITAC receives a ‘properly documented’ application, it conducts a ‘verification’ to evaluate the accuracy of the information submitted in this application.<sup>68</sup>

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56 *ibid* para 8.

57 *ibid* para 13.

58 *ibid*.

59 *ibid*.

60 *ibid*.

61 *ibid* para 14.

62 *ibid*.

63 *ibid*.

64 *ibid*.

65 *ibid* para 16.

66 *ibid*.

67 *ibid* paras 19–25. See s 64(2) read with item 2 of Schedule 2 of the ITAA.

68 Sections 6, 11 and 12 of the ATR.

This application can be deemed ‘materially deficient’ on the basis that it, amongst other reasons, contains inconsistent or incorrect information.<sup>69</sup>

Once the application is ‘accepted’, an Initiation/Publication Notice is then published in the Government Gazette, which commences the investigation and notifies interested parties of the details and basis for the application.<sup>70</sup> Interested parties are given the opportunity to comment on the Initiation Notice and the ‘public file’ on the matter.<sup>71</sup>

ITAC will then make a ‘final finding’ which comprises a ‘recommendation’ approving or rejecting the application and a ‘ministerial minute’ or ‘report’ explaining the results to the Minister and thus, ITAC has both an investigative and decision-making function in the amendment of duties.<sup>72</sup> If the Minister accepts such recommendation and report, s/he will then make a ‘request’ to the Minister of Finance, who, if s/he agrees, can then amend Schedule 1 to ‘give effect’ to this ‘request’.<sup>73</sup> Thus, ITAC’s independence in trade investigations is thus limited by the BTTA, which makes it subject to the approval of the Ministers. In the same breath, ITAC is also constrained by sections 6 and 7 of the ITAA, which collectively provide that it is subject to the ‘notices’, ‘trade policy statements and directives’ of the Minister.

## Evaluation of the Court’s Findings

### **The Nature of the Minister’s Powers in Respect of a ‘Recommendation’ by ITAC**

The applicant principally relied on PAJA as required by the principle of subsidiarity, while in the alternative, it relied on section 172(1) of the Constitution if the court were to find that PAJA was not applicable.<sup>74</sup> According to the court, both *Pioneer* decisions endorsed the notion that the impugned ‘recommendations’ of ITAC in that matter, the subsequent ‘request’ by the Minister, and the ultimate decision of the Minister of Finance, involved ‘constitutional issues’; while the court in *SCAW* stated that ITAC’s recommendations raise a ‘constitutional issue’ and that the imposition, altering or removal of an anti-dumping duty is a polycentric power that flows from the power to

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69 Section 15 of the ATR.

70 Sections 16–18 of the ATR.

71 Sections 20 and 8 of the ATR.

72 Section 22 of the ATR. This must also be read with s 10 of the ATR on the ‘criteria’ that is considered in this regard and the International Trade Administration Act (71/2002): Policy directive on matters ITAC shall consider in evaluating applications for amendment of customs duties GN 476 in GG 39945 (21 April 2016). See Clive Vinti, ‘Regulation 22 of the Amended Tariff Investigations Regulations and the Right to ‘Procedural Fairness’ (2020) 53 De Jure Law Journal 212–228.

73 Section 4 of the BTTA read with s 48(1)(b) of the CEA.

74 *Shoprite Checkers* (n 12) para 82.

develop and implement trade policy, which power falls within the national executive authority.<sup>75</sup>

Therefore, the applicant accepted on that basis, that the review in this matter could not be determined under PAJA, but more correctly resorted to section 172(1) of the Constitution.<sup>76</sup> It is my view that it is incorrect to couch the Minister's powers when considering ITAC's recommendation to amend custom duties as 'constitutional' in nature. In fact, it is this flawed premise in the court's reasoning that led to the misconceived review of ITAC's 'recommendations' based on the ground of 'rationality' outside of PAJA, which will be discussed later in this article. First, in *SCAW*, the court stated that the Minister's power in considering ITAC's recommendation raised a 'constitutional issue'.<sup>77</sup> However, this did not mean that the power in question must be framed as a 'constitutional' power. According to *SCAW*, the leave to appeal sought was against a restraining order pending a review to set aside the challenged recommendation of ITAC.<sup>78</sup> The question of whether to grant leave to appeal depended on two significant factors: that is, whether it raised a 'constitutional issue' and if it did, whether it is in the interests of justice to grant leave to appeal.<sup>79</sup> Thus, the issue of whether the matter related to a 'constitutional issue' was a *point in limine* that established whether the matter fell within the jurisdiction of the Constitutional Court as required by section 167 of the Constitution.<sup>80</sup>

To illustrate the point further, this court made it clear, repeatedly, that the Minister's powers in this regard must be described as an 'executive function'.<sup>81</sup> This court could have described the Minister's powers as 'constitutional', but it did not. The same approach was reiterated in *International Trade Administration Commission v SA Tyre Manufacturers Conference*, which held that the powers of the Minister are 'executive' in nature.<sup>82</sup> Similarly, the court in *South Africa Sugar Association (SASA)* followed the formulation of the court in *SCAW* by asserting that the Minister's powers are 'polycentric'—that is to say, 'executive' in nature.<sup>83</sup>

In the same breath, the temptation to couch the Minister's powers as 'constitutional' was resisted by the High Court in the *Pioneer I* case.<sup>84</sup> Thus, the Minister's powers are

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75 *ibid* para 84. *SCAW* (n 1) para 44. See *Pioneer Foods (Pty) Ltd v Minister of Finance* 2019 (1) SA 273 (WCC) (*Pioneer I*) and *Pioneer Foods (Pty) Ltd v Minister of Finance* 2018 JDR 1483 (WCC) para 63.

76 *Shoprite Checkers* (n 12) para 85.

77 *SCAW* (n 1) para 42.

78 *ibid* para 41.

79 *ibid*.

80 *ibid* para 47.

81 *ibid* paras 42, 44 and 102.

82 (738/2010) [2011] ZASCA 137 para 42.

83 *South Africa Sugar Association v Minister of Trade and Industry* [2017] 4 All SA 555 (GP) (*SASA*) para 31.

84 *Pioneer I* (n 75) para 34.

regarded as ‘executive’ in nature. Contrary to this approach, the court in *Casar Drahtseilwerk Saar GMBH v International Trade Administration Commission* contradicted the approach of *SCAW* and deemed the power of the Minister in this regard as ‘administrative’ in nature.<sup>85</sup>

It is my view that this decision contravenes the doctrine of judicial precedent, which requires that the decisions of the Constitutional Court must be followed by the courts below it.<sup>86</sup> It follows that the dictum of *SCAW* is the law in this area, and thus, the Minister’s powers are ‘executive’ in nature.

That is not to say that these powers do not emanate from the Constitution—indeed they do. The court in *SCAW* was quick to point out that these powers emanate from section 85(2)(a), (b) and (e) of the Constitution.<sup>87</sup> In fact, all power can be classified as ‘constitutional’ since the Constitution is the source of all our law, whether directly or indirectly. For instance, the Constitutional Court has unequivocally stated that the cause of action and the grounds of review in respect of ‘administrative action’ is not section 33 of the Constitution, but PAJA.<sup>88</sup> This is the principle of subsidiarity, which provides that when legislation gives effect to a right in the Constitution, then the claim must be based on the legislation.<sup>89</sup> By the same token, the Minister’s power to ‘enact’ or amend legislation is referred to as ‘legislative’ power that has its genesis in section 85 of the Constitution, but such a power is not classified as a ‘constitutional’ power.<sup>90</sup> Consequently, the court in *Shoprite Checkers* was not free to reformulate the Minister’s powers as ‘constitutional’. This approach obfuscates a settled matter in international trade law in South Africa.

Viewed holistically, the *Shoprite Checkers* approach magnifies the significance of the correct classification of the power of the Minister when considering ITAC’s recommendations in the imposition or variation of a duty. This power has predominantly been regarded as ‘executive’ except in the *Casar* case where the High Court endorsed the view that this power is ‘administrative’. The difference between these powers is significant in light of the lack of success of affected parties in interdicting Ministerial decisions on trade duties, which are regarded as ‘executive’ and thus, insulated by the separation of powers doctrine. The same protection is not accorded to ‘administrative

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85 (66248/2014) [2020] ZAGPPHC 141 para 24.

86 *Ex Parte Minister of Safety and Security: In Re S v Walters* 2002 (4) SA 613 para 61.

87 *SCAW* (n 1) para 42.

88 *Walele v City of Cape Town* 2008 (6) SA 129 (CC) para 29; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 25. *SA Tyre Manufacturers Conference* (n 82) para 40.

89 *National Energy Regulator of South Africa v PG Group (Pty) Limited* 2020 (1) SA 450 (CC) para 112. Melanie Murcott and Werner van der Westhuizen, ‘The Ebb and Flow of the Application of the Principle of Subsidiarity – Critical Reflections on ‘*Motau* and *My Vote Counts*’ (2015) 7 Constitutional Court Review 44.

90 *Pioneer I* (n 75) paras 26 and 31. See s 85(2)(d) of the Constitution.

action’, which is open to attack through the PAJA. This issue has become even more prevalent on the back of the decisions in *SASA* and *Pioneer I*, which have conferred the final power to decide to impose or vary a duty on the Minister of Finance.<sup>91</sup>

Thus, the Minister of Finance can overrule the decisions of the Minister and the recommendation of ITAC, which is a specialist trade investigative body. However, it is argued that the yet to be promulgated Customs Duty Act will resolve this issue because it stipulates that the Minister of Finance has no discretion in respect of a ‘request’ by ITAC or the Minister to impose or vary a duty and s/he ‘must’ accede to such ‘request’.<sup>92</sup>

### The Review of ITAC’s Recommendations on the Ground of ‘Rationality’

It must be noted here that the applicant explicitly stated that it sought to review the conduct of the respondents based on the ground of ‘legality’. Consequently, the applicant argued that ITAC’s recommendation was both substantively and procedurally ‘irrational’,<sup>93</sup> that it had acted outside of the scope of its powers under the ITAA, and its principal attack on the conduct and the recommendation of ITAC was that it had failed to conduct any investigation in terms of section 26 of the ITAA, or at all, before making its recommendation to the Minister.<sup>94</sup> This meant that the request that followed from the Minister to the Minister of Finance was invalid and consequently, the decision by the Minister of Finance to increase the duty by the amendment of Schedule 1 was also unlawful.<sup>95</sup> To this end, the applicant argued that ITAC’s recommendation was substantively irrational because it had no rational relationship with ITAC’s stated objective and the purpose for which its power was exercised since it had no rational relationship with the information that was before ITAC when the recommendation was made.<sup>96</sup>

In short, the increase in customs on imported tinned mussels could not have had an impact on the domestic frozen mussel industry that ITAC intended because there was no domestic production of tinned smoked mussels.<sup>97</sup>

In this regard, the court referred to the decision in *Minister of Justice and Another v SA Restructuring and Insolvency Practitioners Association*, where it was held that rationality seeks to establish the connection between the objective and the medium

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91 See Clive Vinti, ‘The Right of ‘Interested Parties’ to be Heard during the Anti-dumping Investigation Conducted by the National Treasury on Behalf of the Minister of Finance’ (2020) 137 South African Law Journal 713–732. Clive Vinti, ‘The Scope of the Powers of the Minister of Finance in Terms of Section 48(1)(b) the Customs and Excise Act 91 of 1964: An appraisal of Recent Developments in Case Law’ (2018) 21 PELJ 1–25.

92 Section 8(1)(b) of the Customs Duty Act 30 of 2014. Vinti 2018 (n 91) 19.

93 *Shoprite Checkers* (n 12) para 8.

94 *ibid* para 95.

95 *ibid*.

96 *ibid* para 96.

97 *ibid*.

employed to achieve such objective.<sup>98</sup> It was unquestioned that ITAC's stated objective for increasing the duties was to protect the 'local mussel aquaculture sector'.<sup>99</sup>

The application for the increase of duties by the domestic industry sought to protect the mussel farming and processing industry from cheap imports of frozen half-shell mussels.<sup>100</sup> Even though the stated objective for the increased duties was not in issue, it appeared that the parties disagreed as to the instruments used by ITAC to achieve that purpose.<sup>101</sup>

In this regard, ITAC stated that the reason for extending the duties to 'Chapter 16 mussels' in 2014, followed an investigation by SARS which had found that the importers of frozen half-shell mussels were clearing the products under Chapter 16.<sup>102</sup> ITAC claimed that the import of mussels, in whichever form, reduced the demand for locally produced mussels.<sup>103</sup> ITAC then explicitly stated that tariff sub-heading 1605.53.20 'was included in the 2014 investigation' as it was unknown to ITAC at the time of the 2012 investigation how the like product was being imported into the Republic.<sup>104</sup> It stated that a tariff description would usually be broader than the product investigated by ITAC in an application.<sup>105</sup> ITAC expected interested parties to notify it about the fact that the tariff description includes products not meant to be covered by the duty sought to be imposed.<sup>106</sup> In such cases, ITAC alleged that it usually enlisted SARS to assist in the creation of a new 8-digit sub-heading, which would allow for stricter descriptions and which would ensure that products not intended to be covered by the duty may be imported under the sub-heading 'not covered by the duty'.<sup>107</sup>

ITAC then alleged that tariff sub-heading 1605.53.20 was therefore included in the 2014 recommendation, as it was unaware that there was no domestic production of smoked tinned mussels.<sup>108</sup> If it had been notified by the domestic industry that it was not producing smoked tinned mussels, ITAC would have evaluated that fact in assessing its recommendation.<sup>109</sup> In response, Shoprite argued that the inclusion of the tinned mussels in the increased tariffs was not related to the stated goal that ITAC sought to achieve.<sup>110</sup>

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98 [2011] 2 All SA 529 (SCA). *Shoprite Checkers* (n 12) para 97.

99 *Shoprite Checkers* (n 12) para 98.

100 *ibid.*

101 *ibid.*

102 *ibid.*

103 *ibid.*

104 *ibid.*

105 *ibid.*

106 *ibid.*

107 *ibid.*

108 *ibid* para 99.

109 *ibid.*

110 *ibid* para 100.

It claimed that when making its recommendation, ITAC had also considered Report 413, which was a wholly different sector of the mussel production industry.<sup>111</sup> This report pertained to the domestic frozen mussel industry and a threat to that industry from cheap imports of frozen mussels.<sup>112</sup> Shoprite further argued that there was no data on tinned mussels in that report nor in any documents prepared by ITAC.<sup>113</sup> According to the court, Shoprite did not understand that part of the investigation and processes that led to ITAC's recommendation of the increased tariffs relating to Chapter 16, were the 8-digit sub-headings 1605.53.20 and 1605.53.90 when SARS made the recommendation.<sup>114</sup> Even Blue Ocean, which had the sole production factory in the SACU and had played a vital role in the 2014 investigation, had itself also not raised with ITAC that tinned mussels were not locally produced.<sup>115</sup>

In Notice 576 of 2014, ITAC expressly cited Report 413, in which it stated its objective to augment and encourage the development of the mussel sector and that it had not included the mussels classified under the tariff sub-heading 1605.53 in its recommendation.<sup>116</sup> ITAC stated that the amendment would include the creation of additional 8-digit tariff sub-headings under tariff sub-heading 1605.53, with the same rate of duty as the mussels stipulated under Chapter 3, i.e. at 25 per cent *ad valorem*.<sup>117</sup>

The applicant responded to Notice 576 and alleged that this notice had 'caused a degree of confusion as it was unclear whether the intention was to create additional tariff sub-headings, or increase the import duty under existing sub-headings 1605.53.20 and 1605.53.90.'<sup>118</sup>

ITAC responded by stating that the purpose of Notice 576 was to notify interested parties that ITAC was investigating a specific tariff amendment and to invite public comment.<sup>119</sup> It argued that Notice 576 did not pre-empt or bind its final recommendation and it meant to notify interested parties, especially those who did not form part of the Chapter 3 investigation, that an increase in the Chapter 16 duties was being considered.<sup>120</sup>

ITAC regarded the main issue to be that of circumvention and claimed that it needed to know whether mussels could be imported in any other form to the detriment of the local

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111 *ibid.* ITAC South Africa, Report 413: Increase in the Rate of Custom Duty on Mussels (ITAC, 19 December 2012) <[http://www.itac.org.za/upload/document\\_files/20150226113512\\_Report-no-413.pdf](http://www.itac.org.za/upload/document_files/20150226113512_Report-no-413.pdf)> accessed 14 August 2020.

112 *Shoprite Checkers* (n 12) para 100. *Report 413* (n 111) 3.

113 *Shoprite Checkers* (n 12) para 100.

114 *ibid.*

115 *ibid.*

116 *ibid* para 101.

117 *ibid.*

118 *ibid* paras 102–103.

119 *ibid* para 103.

120 *ibid.*

industry.<sup>121</sup> Thus, it deleted the word ‘metal’ before airtight containers to extend its reach.<sup>122</sup> Notice 576 referred to the increase in duties through the creation of additional tariff sub-headings to exclude products not produced locally.<sup>123</sup>

In this regard, the court held that ITAC correctly argued that there was, in fact, a rational relationship between its recommendation to extend the duties to ‘Chapter 16 mussels’ and the material that was available before it at the relevant time.<sup>124</sup> ITAC had stated that the ‘tinned mussel industry’ was part of the wider mussel industry.<sup>125</sup> Data on frozen mussels, which makes up ninety per cent of the mussel industry in South Africa was undoubtedly pertinent to the broader mussel industry.<sup>126</sup> In any event, frozen half-shelled mussels were being imported under Chapter 3 and Chapter 16 of Schedule 1 of the ITAA so that the 2012 report it had assessed was also relevant to the amendment considered.<sup>127</sup>

ITAC argued further that following the 2016 investigation, it was amenable to the exclusion of smoked tinned mussels from the increased duties and thus, an amendment to the CEA was done.<sup>128</sup> This was based on factors other than simply that tinned mussels were not being produced locally, but also that it was not being seen as a substitute for frozen mussels, as was evident from the investigation.<sup>129</sup> Shoprite argued that the reasons offered by the respondents were simply an after the fact attempt at justifying its recommendation.<sup>130</sup> According to the court, that was not correct since ITAC explicitly cited the basis for the Notice 576 relating to ‘mussels prepared or preserved in airtight containers’ was a significant factor for the impact of its recommendations in Report 413.<sup>131</sup>

It is clear then that the court accepted the attack of ITAC’s recommendations based on the ground of ‘rationality’ outside of PAJA and on this basis, found that there was a rational relationship between ITAC’s recommendations and the information before it. It is my view that this approach is incorrect.

Firstly, section 46 of the ITAA makes it clear that all decisions, recommendations and determinations of IITAC are reviewable. These grounds of review are enshrined in PAJA.<sup>132</sup> Therefore, all the decisions, recommendations and determinations of ITAC

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121 *ibid.*

122 *ibid.*

123 *ibid.*

124 *ibid* para 104.

125 *ibid.*

126 *ibid.*

127 *ibid.*

128 *ibid* para 105.

129 *ibid.*

130 *ibid* para 106.

131 *ibid.*

132 *SA Tyre Manufacturers Conference* (n 82) para 40.

constitute ‘administrative action’, which is subject to PAJA. Thus, the court’s acceptance of the attack on ITAC’s recommendations through the ‘procedural irrationality’ ground outside of PAJA, is incorrect. In any event, PAJA already provides for the ‘rationality’ ground in that it allows for judicial review of administrative action if it is not rationally connected to:

- (i) the purpose for which it was taken;
- (ii) the purpose of the empowering provision;
- (iii) the information before the administrator; or
- (iv) the reasons given for it by the administrator.<sup>133</sup>

In evaluating whether the ‘rationality’ ground under PAJA has been complied with, the courts have cited two fundamental questions: is the administrative action rationally connected to the objective for which the power was conferred on the administrator and objectively viewed, is the administrative action rational?<sup>134</sup> The first question is about the appraisal of the relationship between means and ends.<sup>135</sup>

The second question can be reformulated as: is there a rational link between the information before the administrator and the finding made by the administrator?<sup>136</sup> This was the exact inquiry before the court in *Shoprite Checkers*.<sup>137</sup> Thus, there is a ‘rationality’ ground under section 6(2)(f)(ii) of PAJA, which the court in *Shoprite Checkers* should have engaged with since ITAC’s recommendations constitute ‘administrative action’. Litigants are not allowed to ‘sidestep’ PAJA where it applies depending on the principle of legality.<sup>138</sup> To allow this would gravely compromise PAJA and the principle of subsidiarity.<sup>139</sup>

Second, in *PG Group*, it was held in respect of the ‘rationality’ test under section 6(2)(f)(ii) of PAJA, that despite a lack of textual reference to ‘procedural rationality’ in the said provision, ‘rationality’ review under the PAJA includes ‘procedural’ and ‘substantive’ rationality.<sup>140</sup> This is because the court was of the view that ‘procedural’

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133 Section 6(2)(f)(ii) of PAJA.

134 *Black Eagle Project Roodekrans v MEC: Department of Agriculture, Conservation and Environment, Gauteng Provincial Department* [2019] 2 All SA 332 (GJ) para 26; Andrew Konstant, ‘Administrative Action, the Principle of Legality and Deference – The Case of Minister of Defence and Military Veterans v Motau’ (2015) 7 Constitutional Court Review 76. Cora Hoexter, *Administrative Law in South Africa* (2nd edn, Juta 2012) 124.

135 *Black Eagle Project Roodekrans* (n 134) para 26.

136 *ibid.*

137 *Shoprite Checkers* (n 12) para 104.

138 *PG Group* (n 89) para 113.

139 *ibid.*

140 *ibid* para 48.

and ‘substantive’ rationality are ‘inseparable’.<sup>141</sup> If not, then the courts would be merely evaluating the correctness of a decision based on after the fact reasoning.<sup>142</sup> This endorsement of ‘procedural rationality’ was based on the decisions in *DA v The President of the Republic* and *Zuma v Democratic Alliance*.<sup>143</sup> Thus the court did not see a basis for why rationality under PAJA must be given a ‘different’ and narrower meaning.<sup>144</sup> Therefore, rationality under PAJA includes the evaluation of whether the instrument, including all the steps taken in the process of making the decision connects to the end.<sup>145</sup> Complications identified in the process used to reach a decision can be instrumental evidence or indicative of a flawed rational connection.<sup>146</sup> The extent of the assessment of the process hinges on the facts of a particular case.<sup>147</sup> It is ‘procedural irrationality’ that indicates the ‘substantive irrationality’.<sup>148</sup> Thus the court in *PG Group* construed the rationality ground in section 6(2)(f)(ii) as encompassing both ‘procedural’ and ‘substantive’ rationality. This confirms that the resort to rationality review outside of PAJA in the *Shoprite Checkers* case was incorrect since PAJA provides for this ground, and thus, this court contravened the principle of subsidiarity. Section 6(2)(f)(ii) of PAJA encompasses both ‘substantive’ and ‘procedural’ rationality.

Furthermore, the courts have also clarified that the review of administrative action must always proceed from PAJA.<sup>149</sup> Review in respect of both PAJA and the principle of legality emanates from the rule of law in section 1(c) of the Constitution.<sup>150</sup> Section 33 of the Constitution and the PAJA substantiate the rule of law pertaining only to ‘administrative action’.<sup>151</sup> The legality principle substantiates the rule of law with respect to all ‘other exercises of public power, such as executive power’.<sup>152</sup> If a court deems a power not to be ‘administrative action’, then such exercise of public power must be subject to the principle of legality/rationality.<sup>153</sup>

However, when one applies for judicial review, as in *Shoprite Checkers*, there is no ‘choice’ as to the ‘pathway’ to review: if the challenged action constitutes ‘administrative action’ as defined in PAJA, the review must be based on section 6 of PAJA; if the challenged action is some other type of public power, the principle of

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141 *ibid.*

142 *ibid.*

143 2013 (1) SA 248 (CC) para 36; 2018 (1) SA 2000 (SCA) para 82.

144 *PG Group* (n 89) para 50.

145 *ibid.*

146 *ibid.*

147 *ibid.*

148 *ibid* para 51.

149 *Bato Star Fishing* (n 88) para 22.

150 *Minister of Home Affairs v Public Protector* 2018 (3) SA 380 (SCA) para 27. See s 1(c) of the Constitution.

151 *Public Protector* (n 150) para 27.

152 *ibid.*

153 *ibid* para 28.

‘legality’ must form the basis of the application for review.<sup>154</sup> Consequently, the review of ITAC’s recommendations which constitute ‘administrative action’ must be done under section 6 of PAJA. The court in *Shoprite Checkers* did not have a ‘choice’ between PAJA and the principle of legality/rationality in reviewing ITAC’s recommendations.

In the final analysis, the nature of ITAC’s recommendations has significant implications because if this power is assessed from the ‘rationality’ ground emanating from the principle of ‘legality’ as a component of the rule of law and outside of PAJA, then it incorrectly implies that such power is ‘executive’ power.<sup>155</sup> It is certainly not ‘legislative’ power. However, once this power is regarded as ‘executive’, it closes the door to the relatively ‘broad’ tool for the right to be heard under section 3(1) of PAJA as compared to the ground of ‘procedural rationality, which does not a general rule, allow for a right to be heard except in exceptional circumstances when the parties in question have ‘special knowledge that can assist the court.’<sup>156</sup>

The role of ITAC must also be viewed in light of the view that ITAC’s decisions as a specialist trade investigative body must be implemented without the approval of the Ministers.<sup>157</sup> There is certainly a case for deference to the decisions made by ITAC.<sup>158</sup> This clamour has culminated in the aforementioned section 8(1)(b) of the Customs Duty Act, which will not only bypass the consent of the Minister, but also compel the Minister of Finance to implement such a recommendation.

This certainly fortifies the independence of ITAC, which is somewhat shackled by sections 5 and 7 of the ITAA and section 4(2)(a) of the BTTA, which make its decisions subject to the approval and policy decisions of the Minister. This is undoubtedly the approach that Brink has been advocating for in this area.<sup>159</sup>

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154 *ibid.*

155 *Pharmaceutical Manufacturers Association of South Africa and Another: Re Ex p President of the Republic of South Africa and Others* 2000 (2) SA 674 paras 20 and 85.

156 *Minister of Home Affairs v Scalabrini Centre* 2013 (6) SA 421 (SCA) paras 69–72.

157 Gustav Brink, ‘The Roles of the Southern African Customs Union Agreement, the International Trade Administration Commission and the Minister of Trade and Industry in the Regulation of South Africa’s International Trade’ (2013) 3 *Journal of South African Law* 426–427.

158 *SCAW* (n 1) para 101; See further, Fiona Tregenna and Marko Kwaramba, ‘An Institutional Analysis of the International Trade Administration Commission of South Africa’ (2014) 7 *Journal of Economic and Financial Sciences* 651–652; Marko Kwaramba and Fiona Tregenna, ‘International Trade Administration Commission Tariff Investigations: An Analysis of the Poultry and Paper Cases’ (2014) 7 *Journal of Economic and Financial Sciences* 620–621.

159 Brink (n 157) 424.

## ITAC's Power to 'Revoke' its Decision, Determinations, or Recommendations

In this regard, Shoprite argued that ITAC had failed to conduct an investigation as contemplated by section 16 of the ITAA.<sup>160</sup> To the applicant, the 2014 investigation could only have been dealt with through section 26(6) of the ITAA, similar to an amendment of a recommendation sought to be made.<sup>161</sup> ITAC alleged that it chose to amend its earlier recommendation in terms of the provisions of section 48, based on the fact there was a mistake common to all of the parties in the matter.<sup>162</sup> Shoprite also argued that ITAC should have asked for a new application as per section 26 of the Act.<sup>163</sup> In response, the court held that Blue Ocean did not have to apply for an investigation in terms of section 26, nor did ITAC have to self-initiate such an application and thus, ITAC had the right to employ section 48 of the ITAA since the nature of the amendment fell squarely with the ambit of section 48 and not within the grounds of section 26(6).<sup>164</sup>

In my view, the court's approach is instructive as it clarifies that ITAC can rescind its recommendations or determinations or decisions either on the basis of section 26 or section 48 of the ITAA, depending on the circumstances of each case. Sections 26(6) and 48 provide an avenue for ITAC to 'amend' or 'vary' and to 'revoke' or 'rescind' a recommendation, decision or determination. The terms 'amend' and 'vary' denote changing ITAC's recommendation, and thus, they have a similar meaning. The same can be said in respect of 'revocations' and 'rescission', which have the same effect of nullifying ITAC's recommendation.

Furthermore, section 48 refers to 'orders' which in this regard refers to 'determinations' or 'recommendations' or 'decisions' of ITAC, while section 26(6) refers only to 'decisions' and 'recommendations'. There is no difference between these terms, which ITAC and the ITAA use interchangeably, and thus, sections 26(6) and 48 of the ITAA regulate the same issue. However, there is a slight difference in these sections in that section 26(6) only allows ITAC to revoke or amend a recommendation or decision it has made in terms of an application for a trade remedy. In contrast, section 48 allows both ITAC, *mero metu*, and a person affected by the recommendation or decision or determination of ITAC to apply for a variation or rescission of such an 'order'.

Thus, section 48 widens the group of persons who can request ITAC to revoke its decisions or recommendations.

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160 *Shoprite Checkers* (n 12) para 107.

161 *ibid* para 108.

162 *ibid*.

163 *ibid*.

164 *ibid*.

Another difference between section 26(6) and section 48 lies in the grounds for amendment or revocation that are available to affected parties and ITAC. Section 26(6) allows an amendment or revocation if:

- (i) the decision or recommendation was based on incorrect data and the applicant or supplier of the data caused the error in the information and benefited or could have benefited, from such decision or recommendation;
- (ii) the decision was acquired by deceit;
- (iii) or a person has violated a duty connected to the decision or recommendation.<sup>165</sup>

In contrast, section 48 allows a variation or rescission on the grounds that the recommendation or decision or determination:

- (i) has an ‘ambiguity, or an obvious error or omission, but only to the extent of correcting that ambiguity, error or omission’; or
- (ii) was ‘erroneously sought in the absence of a party affected by it’;
- (iii) was made as a consequence of a ‘mistake common to all of the parties to the proceedings’.

Thus, both section 26(6) and 48 have the common ground of an amendment or rescission based on an ‘error’ albeit under different circumstances. The difference between these provisions is that a ‘mistake common’ to all parties in a matter, ‘ambiguity’ and ‘omissions’ in a recommendation can only be challenged through section 48 and that recommendations based on ‘incorrect information’ and deceit can only be brought through section 26(6). This means that these provisions markedly differ, bar the narrow overlap between sections 26(6) and 48 on the ground of an ‘error’, but even then, these two provisions cannot be used interchangeably. Finally, a striking undertone of the *Shoprite Checkers* decision is the paucity of jurisprudence on section 48 by parties aggrieved by a recommendation of ITAC or through section 26(6) because of ITAC’s failure to use its powers *mero metu*. In this regard, section 48 could be seen as some form of internal appeal mechanism within ITAC to resolve an impasse that could result in litigation. This brings to mind the question of first exhausting internal remedies before launching judicial review proceedings as required by section 7(2) of PAJA.

It could be argued then that the courts must refuse to hear a review application by an affected party whose dispute falls within the ambit of section 48 of the ITAA. Only after ITAC has decided on an application for variation or rescission of its recommendation or determination under section 48 should judicial review under section 46 be triggered. Of course, if the matter falls within the ambit of section 26(6), which is an exclusive right conferred on ITAC, then the applicant will be allowed to disregard this internal mechanism and use section 46. This certainly appears to be a better strategy rather than

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<sup>165</sup> Section 26(6) of the ITAA.

attempting to use interdicts to prevent the Minister from accepting ITAC's recommendation. Our jurisprudence is clear that the courts are loath to use this power. ITAC could address its incorrect decisions before unnecessary and costly litigation ensues.

## Conclusion

The court in *Shoprite Checkers* was called to adjudicate on contentious matters relating to the decision-making powers of the Minister and ITAC in respect of the amendment of custom duties under the ITAA and the ATR. In this regard, this court was of the view that the power of the Minister in considering a recommendation from ITAC is 'constitutional' in nature. This finding is confusing and clouds a settled issue in South African trade law. This is because the courts have authoritatively confirmed in *SCAW*, *Tyre Manufacturers*, *SASA*, and *Pioneer* cases that this power is 'executive' in nature.

This issue is significant because the nature of the power determines the grounds to challenge such power. In particular, if the power is regarded as 'executive' in nature, then it can be challenged on the ground of rationality, whereas 'administrative' decisions must be challenged under the PAJA in line with the principle of subsidiarity. As stated earlier, this demarcation is crucial since the ground of procedural fairness under PAJA is relatively broader in respect of the right to be heard as compared to the ground of procedural rationality, which allows the right to be heard only in exceptional circumstances. Thus, the court's classification of power is not a perfunctory process that can be entangled in muddled language. Second, the court in *Shoprite Checkers* also allowed a novel approach of reviewing the recommendations of ITAC on the ground of 'rationality' under the principle of 'legality'. This approach is incorrect since all of ITAC's decisions are 'administrative' in nature as stipulated by section 46 of the ITAA, and thus, the grounds of review reside in PAJA. In this regard, it is trite law that the courts are not allowed to 'sidestep' PAJA when it applies. Incidentally, section 6(2)(f)(ii) of PAJA already provides for the ground of 'rationality', which should have been employed as required by the decision in *PG Group*. This approach also accords with the principle of subsidiarity.

Lastly, the court in *Shoprite Checkers* clarified that a recommendation of ITAC could be amended or revoked either on the basis of section 26(6) or section 48 of the ITAA, depending on the circumstances. It is my view that these two provisions must be used more by affected parties to get ITAC to amend or revoke its recommendations, where applicable and thus, to avoid costly litigation in courts. In fact, section 48, where applicable, must be read to be an internal remedy that must be exhausted before judicial review is launched, as required by section 7(2) of PAJA.

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