The Extension of "Safeguard Measures" in South Africa Within and Outside the Framework of the Agreement Establishing the African Continental Free Trade Area

C Vinti*

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Author

Clive Vinti

Affiliation

University of Witwatersrand, South Africa

Email

clive.vinti@wits.ac.za

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Abstract

Safeguard measures in the form of either a duty or a quota or both, function as safety valves for countries when a certain industry is suffering or there is a threat of serious injury to the industry due to a sudden, sharp and recent flood of imports of a product into their market. In essence, safeguard measures allow a country to suspend its obligations to other World Trade Organisation (WTO) Members for a specified period, normally three years. The imposition of safeguard measures is uncontroversial, but they are an extraordinary measure as they are not imposed as a response to unfair trade. However, there is no discernible process for the extension of safeguard measures both under the WTO and South African international trade law framework. Yet the extension of safeguard measures has serious financial implications for the affected industry and thus requires a clear investigative process. The aborted litigation in *Macsteel Services Centre SA (Pty) Ltd v ITAC* (Case No 55450/20) laid out the problems arising out of this gap in the law. The *Amended Safeguard Regulations*, the *WTO Agreement on Safeguards* and the *Agreement Establishing the African Continental Free Trade Area (AfCFTA) Protocol on Trade in Goods* are silent on this issue. In light of the recent commencement of trade by South Africa under the AfCFTA, it has become necessary to explore how this issue is regulated both within and outside the framework of the AfCFTA. Consequently, this article explores the regime for the extension of safeguard measures in South Africa within and outside the framework of the AfCFTA.

Keywords

Safeguard measures; *AfCFTA Protocol on Trade in Goods*; *Customs and Excise Act*; *International Trade Administration Act*; *WTO Agreement on Safeguards*; *Amended Safeguard Regulations*; extension of safeguard measures; ITAC.

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1 Introduction

According to Article XIX of the *General Agreement on Tariffs and Trade* (1994) (GATT), a "safeguard measure" is imposed if, as a consequence of unforeseen developments and of the effect of the obligations incurred by a contracting party under the GATT, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products in that territory. The contracting party may, in respect of such a product, and to the extent and for such time as may be necessary to prevent or remedy such an injury, suspend the obligation in whole or in part or withdraw or modify the concession.[1] However, not every measure suspending, withdrawing or modifying a GATT obligation or concession will constitute a "safeguard measure".[2] Rather, it is only measures which temporarily release a contracting party from its WTO commitments in order to pursue a course of action required to prevent or address serious injury that will constitute "safeguard measures".[3] In essence, a "safeguard measure" has two features: first, it should suspend or change a GATT obligation in whole or in part and second, the suspension, withdrawal, or modification in question must be modelled to prohibit or address serious injury to the Member's domestic industry caused or threatened by increased imports of the subject product.[4] Thus, a safeguard measure is employed against "fair" trade as opposed to "unfair" trade actions, as is the case with anti-dumping or countervailing measures.[5]

These "safeguard measures" can manifest as either a duty or a quota or a combination of these two. Internationally the substantive and procedural aspects of the imposition of safeguard measures are provided by the *Agreement on Safeguards* (AGS), which augments Article XIX of the GATT. In this regard South Africa is a member of the World Trade Organisation

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* Clive Vinti. LLB *cum laude* LLM PhD. Associate Professor, Oliver Schreiner School of Law, University of the Witwatersrand, South Africa. Email: clive.vinti@wits.ac.za. ORCiD: https://orcid.org/0000-0002-3823-2400. This paper was presented at the National University of Lesotho and World Trade Organisation (WTO) Chairs Programme 2nd Annual Conference: "The Political Economy of Regional Integration and International Trade in Africa" held on 5-6 October 2023 and was published as part of the Conference Proceedings.

1 Article XIX.1 of the *General Agreement on Tariffs and Trade* (1994) (GATT).

2 WTO Panel Report *Indonesia – Iron or Steel Products* WT/DS490/R, WT/DS496/R (adopted 27 August 2018) paras 7.14-7.15.

3 WTO Panel Report *Indonesia – Iron or Steel Products* WT/DS490/R, WT/DS496/R (adopted 27 August 2018) paras 7.14-7.15.

4 WTO Appellate Body Report *Indonesia – Iron or Steel Products* WT/DS490/AB/R, WT/DS496/AB/R (adopted 27 August 2018) para 5.60.

5 WTO Appellate Body Report *Argentina - Footwear EC* WT/DS121/AB/R (adopted 12 January 2000) para 96; Brink 2008 *THRHR* 540.

(WTO).[6] South Africa's membership of the WTO was approved by Parliament on 2 December 1994.[7] The *WTO Agreement* was approved by Parliament on 6 April 1995.[8] The AGS is part of the multilateral agreements on trade in goods contained in Annex 1A of the *WTO Agreement* and, therefore, it is binding on all Members, including South Africa.[9] Thus, South Africa's international obligations on safeguard measures arise out of the AGS, as part of the *WTO Agreement*.[10] In pursuance of these obligations under the GATT and AGS, South Africa enacted the *Customs and Excise Act* 91 of 1964 (CEA), the *International Trade Administration Act* 71 of 2002 (ITAA), the *Board on Tariffs and Trade Act* 107 of 1986 where relevant, and the *Amended Safeguard Regulations* (SGR).[11] However, the AGS does not form part of South African law and thus no rights can arise out of it.[12] This is despite the ITAA and its regulations, which include the SGR being seen as "indicative" of South Africa giving effect to the AGS.[13] The text to be construed is unequivocally the ITAA and its regulations in accordance with section 233 of the Constitution.[14] This then brings the AGS into play as part of this interpretive process to ensure a "reasonable interpretation" that is consistent with international law.

While the AGS provides for the right and the criteria to extend safeguard measures, it does not provide the procedure for the extension of safeguard measures. The AGS does not explain how a safeguard measure can be "extended" beyond its "initial" four-year period of imposition. This discretion is conferred on the contracting parties to the AGS. This ambiguity was then transplanted into the SGR.

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

7 *SCAW* para 25.

8 *Progress Office Machines v SARS* 2008 2 SA 13 (SCA) para 6 ("*Progress Office Machines"*); *SCAW* para 25.

9 See *Progress Office Machines* paras 5-6; WTO Appellate Body Report *US Subsidies on Upland Cotton* WT/DS267/AB/R (adopted 20 June 2008) paras 549-550; WTO Appellate Body Report *United States Standards for Reformulated and Conventional Gasoline* DSR 1996:I 3 (adopted 20 May 1996) 21; WTO Appellate Body Report *India Patent Protection for Pharmaceutical and Agricultural Chemical Products* WT/DS50/AB/R (adopted 16 January 1998) para 45.

10 *Degussa Africa (Pty) Ltd v International Trade Administration Commission* (22264/2007) [2007] ZAGPHC 112 (20 June 2007) ("*Degussa*") para 6; *SCAW* para 2; *WTO Appellate Body Report Argentina - Footwear EC* WT/DS121/AB/R (adopted 12 January 2000) para 81

11 *Amended Safeguard Regulations* (GN R662 in GG 27762 of 8 July 2005).

12 *SCAW* para 25; *Progress Office Machines* paras 5-6 and fn 14.

13 *Progress Office Machines* para 6.

14 *Bridon International GMBH v International Trade Administration Commission* (538/2011) [2012] ZASCA 82 (30 May 2012) ("*Bridon*") para 13; *Progress Office Machines* para 6.

Recently, the International Trade Administration Commission of South Africa (ITAC) published the *Amended Guidelines and Conditions Relating to the Extension of Safeguard Measures*.[15] However, these guidelines are not "binding" on ITAC or any court.

This issue has not been resolved by the *Agreement Establishing the African Continental Free Trade Area* (AfCFTA) *Protocol on Trade in Goods* ("Protocol"), which delegates this matter to its *Annex 9 on Trade Remedies* ("Annex 9") and its *Guidelines on Implementation of Trade Remedies* ("AfCFTA Guidelines"), Article XIX of the GATT and the AGS. The Protocol and its Annex 9, like the AGS, are silent on this issue. The AfCFTA Guidelines are not yet in existence. Thus, this gap leads the current regime for the extension of duties under the AfCFTA circuitously back to the unhelpful AGS. Therefore, unlike the regime for anti-dumping, there is no clarity on when exactly the extension investigation commences, amongst other issues. Do the safeguard measures continue to be applied pending the decision on the extension? If they are not kept, does the two-year moratorium post initial imposition apply? How long is the extension investigation? When is this extension investigation initiated? Does the extension investigation period get added to the overall period of imposition? In light of this uncertainty, this paper reviews the extension of a safeguard measure in South African law within and outside the context of the AfCFTA. This inquiry is prompted by the aborted litigation in *Macsteel Services Centre SA (Pty) Ltd v ITAC* ("*Macsteel*"), which challenged the legal validity of the purported "extension" of the safeguard duties on hot-rolled steel by ITAC.[16] This analysis will be conducted through an analysis of relevant case law, legislation and WTO law. The inquiry is necessary also since it has regional implications because ITAC seems to function as the de facto trade investigative body of the Southern African Customs Union (SACU) pending the long-awaited operationalisation of the SACU Tariff Board.

1.1 Background of the Macsteel safeguards dispute

It is apposite here to outline the peculiar facts leading to the litigation in the *Macsteel* case to set the scene for this discussion on the extension of safeguard measures. Initially, after a safeguard investigation, ITAC had made a finding on 12 April 2017 that it would be in the public interest to apply safeguards of 12% *ad valorem* on certain flat hot-rolled steel products for all exporters excluding imports originating from a developing country member that met the requirement for the exclusion.[17] ITAC further

15 *Amended Guidelines and Conditions Relating to Extension of Safeguard Measures* (N 542 in GG 45131 of 10 September 2021).

16 *Macsteel Services Centre SA (Pty) Ltd v ITAC* (Case No 55450/20).

17 ITAC 2017 https://www.itac.org.za/upload/document_files/20190527103852_Report-No.-551.pdf (ITAC *Investigation Report No 551*).

recommended that the duties be imposed for a period of three years and be liberalised as follows: Year 1-12%; Year 2-10%; Year 3-8%. Year 3 would end on 10 August 2020, at which point the duty should have been removed, in terms of the original decision.

Thereafter, on 24 July 2020, ITAC published an Initiation Notice indicating that the expiry of the safeguard duties on the imports of the products in question would likely lead to the recurrence of serious injury.[18] The South African Iron and Steel Institute (SAISI) on behalf of ArcelorMittal South Africa Limited (AMSA), the only producer of the subject product in the SACU, submitted an application to extend the safeguard duties to ITAC on 6 July 2020, whether or not in coils (including products cut-to-length and "narrow strip"), not further worked than hot-rolled (hot-rolled flat), not clad, plated or coated, excluding grain-oriented silicon electrical steel.[19] Based on the information submitted, ITAC found that the applicant had submitted *prima facie* information to indicate that the SACU industry was suffering serious injury and the expiry of the current duties would likely lead to the recurrence of serious injury, and kept the existing safeguard duties in place pending the finalisation of the investigation.[20] ITAC decided to proceed with the process of extending the safeguard measures in question at its meeting on 8 July 2020.[21] Interested parties were given 20 days from the date of publication of the Initiation Notice of 24 July 2020 to submit their comments on the investigation. It is this Initiation Notice that triggered the litigation in the *Macsteel* case. The discussion below will use this matter as the lens through which to assess the regime for the extension of safeguard measures in South Africa.

2 An evaluation of the legal framework for the extension of safeguard measures in South African law within and outside the context of the AfCFTA

2.1 Extension of safeguard measures in South Africa outside the framework of the AfCFTA

2.1.1 The place of the AGS in South African law

This discussion must commence with a review of the place of the AGS in South African law, since it is an underlying issue. The place of South Africa's WTO obligations in South African law has been the subject of much litigation

18 *Notice of Initiation of the Investigation into the Extension of Safeguard Measures on Imports of Certain Flat-Rolled Steel, Products of Iron, Non-Alloy Steel or Other Alloy Steel (Not Including Stainless Steel)* (N 392 in GG 43542 of 24 July 2020) (the "Notice of Initiation").

19 Notice of Initiation.

20 Notice of Initiation.

21 Notice of Initiation.

and academic debate. First the Supreme Court of Appeal (SCA) explained that the WTO Agreement, which includes the AGS, had been approved by Parliament on 6 April 1995 and was therefore binding on South Africa in international law but it had not been enacted into municipal law.[22] Thus, the text to be interpreted remained the South African legislation, and its construction had to conform to section 233 of the Constitution, which required interpreting it in line with a reasonable interpretation of international law.[23] This dictum was endorsed in the *Association of Meat Importers and Exporters* case.[24] Recently, the High Court in *Tata Chemicals* and *Bosch* rejected any application of the WTO Agreement and its covered agreements such as the AGS.[25]

However, *Progress Office Machines* explained that the adoption of the ITAA and its regulations is "indicative" of an intention to give effect to the provisions of the treaties binding on South Africa in international law.[26] The Constitutional Court confirmed in *SCAW* that South Africa's international obligations on trade arise from the *WTO Agreement*.[27] The court held that these obligations are "honoured" through domestic legislation such as the ITAA and the CEA, that govern the imposition of trade remedies. This construal is augmented by the approach of the same court in *Glenister v President of the Republic of South Africa* ("*Glenister*").[28]

In *Glenister*, it was held that a treaty becomes law in South Africa when it is promulgated into law by national legislation.[29] This will be done either by domesticating the treaty into South African law or by amending legislation to align South Africa's law with the treaty.[30] This rigid approach is criticised by Dugard, who deems it unpragmatic in light of the bureaucratic processes of government and thus frustrating the noble goal of harmonising international law and domestic law.[31]

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22 *Progress Office Machines* para 6 and fn 14.

23 *Progress Office Machines* para 6.

24 *Association of Meat Importers and Exporters v International Trade Administration Commission* 2014 4 BCLR 439 (SCA) paras 58-60.

25 *Tata Chemicals South Africa (Pty) Ltd v International Trade Administration Commission* (48248/2020) [2023] ZAGPPHC 295 (28 April 2023) para 54; *Bosch Home Appliances (Pty) Ltd t/a Bosch v International Trade and Administration Commission; Bosch Home Appliances (Pty) Ltd t/a Bosch v Minister of Trade Industry* (12160/18; 67553/18) [2021] ZAGPPHC 8 (5 January 2021) para 92.3.

26 *Progress Office Machines* para 6.

27 *SCAW* para 2.

28 *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) ("*Glenister*").

29 *Glenister* para 90.

30 *Glenister* para 91.

31 Dugard and Coutsodis "Place of International Law in South African Municipal Law" 73.

Significantly, the court in *Glenister* explained that the adoption of a treaty by a resolution of Parliament is not a "merely platitudinous or ineffectual act".[32] Ratification of a treaty by Parliament constitutes a "positive statement" to the signatories of that treaty that Parliament, subject to the provisions of the Constitution, will act "in accordance" with the ratified treaty.[33] Thus, both binding and non-binding treaties have an important place in South African law.[34] This does not mean that they acquire the status of domestic law in the Republic.[35] They provide "interpretive tools" to assess the Bill of Rights.[36] The majority decision here is silent on the international law obligations cited in the minority judgment despite the constitutional mandate to consider it.

Stubbs argues that the decision in *Glenister* breeds uncertainty, while *SCAW* is in accordance with the Constitution.[37] Sucker contends that in practice, treaties are approved and ratified but not incorporated into municipal law unless domestic implementation is required for compliance with South Africa's international obligations.[38] Thus, the current practice means that South Africa usually becomes a party to treaties without incorporating them into domestic law.[39]

Phooko asserts that the decisions in *Louis Karel Fick v Government of the Republic of Zimbabwe* ("*Fick*")[40] and *Law Society of South Africa v President of the Republic of South Africa* ("*LSSA*")[41] propagate monism by ignoring the constitutionally prescribed process of the incorporation of treaties into municipal law i.e. dualism, unless the treaty is self-executing, in the light of the separation of powers doctrine.[42] Schlemmer argues that the *WTO Agreement* and its covered agreements, which includes the AGS, despite being ratified, have never been incorporated into South African law and, thus, "cannot be a source of any rights for South African legal subjects".[43] Thus, South Africa follows a "hybrid approach" incorporating both the monist and dualist approaches.[44]

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32 *Glenister* para 96.
33 *Glenister* para 96.
34 *Glenister* para 96.
35 *Glenister* para 98.
36 *Glenister* para 96; *Arena Holdings (Pty) Ltd t/a Financial Mail v South African Revenue Service* (CCT 365/21) [2023] ZACC 13 (30 May 2023) para 92.
37 Stubbs 2011 *CCR* 165.
38 Sucker 2013 *CCR* 427.
39 Sucker 2013 *CCR* 427.
40 *Louis Karel Fick v Government of the Republic of Zimbabwe* 2013 5 SA 325 (CC) ("*Fick*") paras 31,59.
41 *Law Society of South Africa v President of the Republic of South Africa* 2019 3 SA 30 (CC) ("*LSSA*") para 53.
42 Phooko 2021 *AJICL* 178; Tladi 2018 *SALJ* 733.
43 Schlemmer "International Trade Law" 502.
44 Phooko 2021 *AJICL* 171.

However, as held by the apex court in *SCAW*, the obligations under the WTO Agreement, including the AGS, must be "honoured".[45] It is common cause that the decisions in *Makwanyane*, *Grootboom, Fick, LSSA* and *Glenister* require that South Africa's international obligations such as the AGS are used as interpretive tools. ITAC, the body charged with trade remedy investigations in South Africa, certainly administers its investigations as if the WTO obligations under the GATT apply to its investigations.[46] In *Bridon,* the court aptly captured the approach to follow by holding that the *WTO Agreement* which includes the AGS is "relevant" to the interpretation of the regulations to the ITAA as required by section 233 of the Constitution.[47] *Bridon* echoed the decision of the court in *SCAW* that the ITAA legislative framework "was a clear attempt to give effect to South Africa's obligations under these international instruments".[48] This would appear to mean that the AGS has been incorporated into South African law. At the very least, the *WTO Agreement* and its covered agreements, which includes the AGS, must be employed as "interpretive tools" in the construal of our legislation. This is the approach that is employed in this paper to review South Africa's framework for the extension of safeguard measures.

2.1.2 Evaluation of the extension of safeguard measures in South African law outside of the AfCFTA framework

The investigation on the extension of safeguard measures is conducted by ITAC in accordance with sections 16 and 26 of the ITAA and the SGR read with the AGS. To this end the SGR regulates the imposition of "definitive general safeguard measures". A "definitive general safeguard measure" may be applied only where ITAC finds firstly that the product in question is being imported into the SACU in such increased quantities, absolute or relative to SACU production; secondly, that it is under such conditions as to cause or threaten to cause serious injury to the SACU industry that produces like or directly competitive products; thirdly, that it is as a result of unforeseen developments and of the effect of the obligations incurred by the Republic or SACU under the WTO; fourthly, that such measures are required to facilitate adjustment in the SACU industry; and finally, that the SACU industry has submitted a detailed plan showing how it will adjust to meet import competition or has submitted proof of the restructuring that is being undertaken as provided by section 1.2 read with section 21.1.

According to section 21.5 of the SGR, ITAC may recommend a definitive safeguard measure in the form of either a customs duty, or a quantitative restriction, or a combination of these two measures. As per section 21.6 of

45 *SCAW* para 2.
46 Khanderia 2017 *AJICL* 351-352; Vinti 2016 *PELJ* 16-21.
47 *Bridon* para 13.
48 *Bridon* para 13.

the SGR, a definitive measure may "remain in place" for a period not exceeding four years, unless extended in terms of section 21.7. To this end section 21.7 of the SGR then provides that any definitive safeguard measure may be extended by a period of up to six years where ITAC "finds" that the lapse of the safeguard measure imposed in terms of section 21.6 of the SGR is likely to lead to the recurrence of serious injury, and there is evidence that the SACU industry is adjusting. This means that a safeguard measure can be imposed for a maximum period of 10 years when sections 21.6 and 21.7 are read together.

Furthermore, section 21.8 of the SGR provides that where a definitive safeguard measure is imposed for a period exceeding one year, ITAC shall recommend how the measure should be liberalised at regular intervals over the period that the measure is applied. Where the application of a safeguard measure is extended in terms of section 21.8, the safeguard shall continue to be further liberalised over the period of its application as provided by section 21.9. Section 21.9 of the SGR then states that where the application of a safeguard measure is extended in terms of section 21.8, the safeguard shall continue to be further liberalised over the period of its application. Section 21.10 of the SGR provides that where a definitive safeguard measure is imposed for a period exceeding three years, ITAC shall self-initiate a review of the measure at the halfway mark of its application to determine whether its continued application is required, whether it cannot be liberalised at an increased pace and whether the SACU industry is implementing its adjustment programme. Thus, this framework does not explain the process of extending a safeguard measure.

Consequently, and presumably prompted by the litigation on this point in *Macsteel*, on 21 August 2020 ITAC published the *Guidelines and Conditions Relating to Extension of Safeguard Measures* to purportedly address this issue.[49] These were subsequently replaced on 10 September 2021 with the publication of the *Amended Guidelines and Conditions Relating to Extension of Safeguard Measures* ("*Amended Guidelines*"). The *Amended Guidelines* owe their existence to section 60(1) of the ITAA, which provides that ITAC may issue guidelines on any matter within its jurisdiction. Section 1.1 states that the purpose of the *Amended Guidelines* is to provide a reference to and procedural guide pertaining to the application for an extension of safeguard measures in terms of the SGR. Their scope under section 2.1 covers the application process by applicants for an extension of safeguard measures in terms of section 21.7 of the SGR. Thus, the *Amended Guidelines* confirm and attempt to address the gap that exists in

49 *Guidelines and Conditions Relating to Extension of Safeguard Measures* (N 447 of 21 August 2020 in GG 43636).

South African law in terms of the procedure for the extension of safeguard measures.

Section 3.1 of the *Amended Guidelines* provides that the SACU industry should submit a properly documented application to request an extension of the safeguard measure to ITAC no later than 12 months before the lapse of the existing measure. This means that the application for the extension of safeguard measures would not be filed 17 days before the safeguard measure lapses, as was done in the *Macsteel* matter.

The Guidelines further require that the SACU industry to bring an application to ITAC containing information on the subject product relating to the likelihood of the recurrence of serious injury and or the threat thereof caused by increased imports and evidence that the SACU industry is adjusting. A public file will be available for inspection at ITAC's offices by all interested parties, by appointment, and interested parties are encouraged to inspect the public file regularly.

Section 3.11 of the *Amended Guidelines* requires that the application must contain injury information for the period when the safeguard measure was in place and an estimate should the safeguard measure lapse. The application must contain information on how the industry is adjusting as contemplated in the adjustment plan and a detailed explanation where the adjustment is not according to plan. In terms of section 3.13 of the *Amended Guidelines*, ITAC will, after considering the merits of an application made on behalf of SACU industry, decide to initiate an investigation if it is satisfied that there is prima facie proof of the likelihood of the recurrence of serious injury should the measures lapse. To this end, section 4.1 of the *Amended Guidelines* then provides that an investigation shall be formally initiated through the publication of an initiation notice in the Government Gazette. Section 4.3 of the *Amended Guidelines* states that a period of 20 days from the date of publication of the initiation notice will be provided for interested parties to submit comments to ITAC. The investigation shall consist of a single investigation phase which will allow for oral hearing. Section 5.1 of the *Amended Guidelines* requires that all participating interested parties will be informed of the essential facts to be considered by ITAC in making its final determination. All participating interested parties will receive seven days from dispatch of the essential facts letter to comment in writing on the essential facts.

According to section 6.2 of the *Amended Guidelines*, in the final determination, ITAC will consider if the lapse of the safeguard measure imposed in terms of subsection 6 is likely to lead to the recurrence of serious injury and if there is evidence that the SACU industry is adjusting. Under section 6.3 of the *Amended Guidelines*, ITAC's final recommendation will be forwarded to the Minister of Trade, Industry and Competition for final

determination. Section 6.4 of the *Amended Guidelines* requires ITAC to make available a final report on the reasons for the conclusions reached on issues of fact and law considered by it once the Minister's determination has been published. It is self-evident that these steps were not complied with in the *Macsteel* matter when the duty was "maintained" without a completed investigation as outlined above.

However, there are numerous issues posed by the *Amended Guidelines*. First, they do not provide that the extension investigation must be completed prior to the lapse of the safeguard measure. They merely require that the investigation must not commence beyond 12 months of the lapse of the safeguard measure. This is in contravention of Article 7.2 of the AGS and section 21.7 of the SGR, which require that the four year period mentioned in Article 7.1 of the AGS may be extended provided that the competent authorities of the importing Member have "determined" or "find" in conformity with the procedures set out in Articles 2, 3, 4 and 5, that the safeguard measure continues to be necessary to prevent or remedy serious injury and that there is evidence that the industry is adjusting, and provided that the pertinent provisions of Articles 8 and 12 are observed. Article 7.2 and section 21.7 are couched in the past tense in that the investigation to extend the safeguard measure must be completed before it is re-imposed.

Furthermore, according to Article 7.5, a safeguard measure cannot be imposed "again" for a period of time equal to that during which such measure "had been previously applied" provided that the period of non-application is at least two years. Section 21.16 of the SGR provides that re-imposition can happen only after half the life of that measure has passed, provided that the period of non-application is at least two years. The import of Article 7.5 and section 21.16 is that once the measure has lapsed, it can be reimposed only after the two-year moratorium. This entrenches the urgency of completing the extension investigation before it lapses. The drafters of the AGS did not see it fit to accord the right to extend a fair-trade remedy during its undetermined period of investigation. That would lead to countries potentially conducting safeguard investigations in such a manner that they would subvert the eight- to ten-year maximum period of imposition contemplated in the guillotine clauses in Articles 7.3 and 9.2 of the AGS and section 21.7 of the SGR. By rule of construction, the Appellate Body has held that provisions of the *WTO Agreement*, which includes the AGS, must be interpreted in such a manner that they "give meaning and effect to all the terms of the treaty".[50] An interpreter does not have the right to construe "clauses or paragraphs of a treaty to redundancy or inutility".[51] The proper

50 WTO Panel *US - Gasoline* WT/DS2/AB/R (adopted 20 May 1996) 21.

51 WTO Panel *US - Gasoline* WT/DS2/AB/R (adopted 20 May 1996) 21; WTO Panel Report *Canada - Dairy* WT/DS103/AB/R, WT/DS113/R (adopted 27 October 1999) para 133.

interpretation of this "inseparable package of rights and disciplines" has to be one that "gives meaning to all the relevant provisions" of the relevant *WTO Agreement*.[52] Thus, the AGS cannot be read to lengthen the period of imposition beyond the prescribed periods. The context of the AGS confirms that the notion of an extension investigation with no time limits is alien to safeguard measures.[53]

Additionally, in the South African context it can be read into section 21.7 of the SGR that the investigation period must be completed before the measure lapses in terms of section 21.6 to give effect to section 21.7. This approach has been unequivocally endorsed by South African courts, which have held that "words cannot be read into a statute by implication unless the implication is necessary in the sense that without it effect cannot be given to the statute as it stands and that without the implication the ostensible object of the legislation cannot be realised".[54] It is necessary within the purpose of the SGR that safeguard measures must not exceed the 10 year period lest they be deemed to be unnecessary and not meant to ensure adjustment. Thus, the extension investigation, however long it is, must be concluded before the initial period of imposition lapses so as to accord meaning to sections 21.7 and 21.16 of the SGR.

Furthermore, section 21.7 of the SGR does not provide for any of the procedural safeguards provided by Article 7.2 of the AGS, which requires that it must comply with Articles 2,3,4 and 5 of the AGS. These provisions essentially require a duly completed investigation and duration of such measures. A "reasonable interpretation" of section 21.7 of the SGR would favour a construal of this provision that incorporates these procedural safeguards required by Article 7.2 of the AGS. This is the approach that was followed by the apex court in *SCAW*, which rejected a construal of WTO obligations in a manner that countenances "inelastic term of duties", which would lead to a "routine breach of WTO obligations".[55] Certainly, even in circumstances when there appears to be no duty in law to conduct a safeguard investigation before imposing a duty, it cannot be said that "nothing would be expected, in most instances, from a party that seeks to adopt a valid safeguard measure".[56] This accords with the "limited and

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52 WTO Appellate Body Report *Argentina - Footwear EC* WT/DS121/AB/R (adopted 12 January 2000) para 81.

53 *Safeguards - Report by the Chairman of the Council to the Fortieth Session of the Contracting Parties* WTO Doc MDF/4, 31S/136 MDF/4, 31S/136 (1984) 137 para 7.

54 *Minister of Water and Sanitation v Lotter; Minister of Water and Sanitation v Wiid; Minister of Water and Sanitation v South African Association for Water Users Associations* 2023 4 SA 434 (CC) para 30.

55 *SCAW* paras 26-40 and 80.

56 *Final Report of the Arbitration Panel Southern African Customs Union – Safeguard Measure Imposed on Frozen Bone-In Chicken Cuts from the European Union* (3 August 2022) para 316.

extraordinary nature" of safeguard measures.[57] In short, ITAC could extend the safeguard measure only after a duly completed investigation. This did not happen in the *Macsteel* matter and as such, the purported extension was invalid.

Second, the *Amended Guidelines* do not clarify whether the safeguard measure continues to apply during the tenure of the extension investigation, as is the case with anti-dumping duties under Article 11.3 of the *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* in respect of sunset reviews. Ultimately the inherent defect of the *Amended Guidelines* is that they are not binding on either ITAC or the courts, and they can be deviated from as per section 60(2)(b) of the ITAA. Therefore, they offer no permanent solution in respect of the extension of safeguard measures in South African law for trade outside the AfCFTA. Thus, it is recommended that section 60(2) of the ITAA could be amended to stipulate that the Guidelines promulgated under this section are binding. In the alternative, the Minister could promulgate these Guidelines as "regulations" which are binding, but with the necessary amendments in line with the AGS as suggested in the preceding discussion. This would provide some legal certainty in this area of law. In the recent extension investigation on threaded fasteners, ITAC employed the Guidelines but cautioned that it was "giving due regard" to it in the same manner it does with the AGS, but it was clear that the investigation was conducted "in accordance" with the ITAA and the SGR.[58]

In line with the approach of the apex court in *SCAW* and the SCA in *Bridon*, the paper seeks interpretive guidance from the AGS. This approach is also directly justified by the only other litigation on safeguard measures, *Degussa*, where the High Court held that the AGS is binding on South Africa and directly applied it to the issue of the imposition of provisional payments under the SGR.[59] In this regard Article 7.1 of the AGS provides that a Member shall apply safeguard measures only for such a period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment. This period shall not exceed four years, unless it is extended under Article 7.2. In this respect, Article 7.2 then provides that the period of four years may be extended provided that the competent authorities of the importing Member have determined, in conformity with the procedures set out in Articles 2, 3, 4 and 5, that the safeguard measure continues to be necessary to prevent or remedy serious injury. There should also be

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57 *Final Report of the Arbitration Panel Southern African Customs Union – Safeguard Measure Imposed on Frozen Bone-In Chicken Cuts from the European Union* (3 August 2022) para 316.

58 ITAC 2023 https://www.itac.org.za/upload/document_files/20231031051802_20230721035845_Report-No-715.pdf (ITAC *Investigation Report No 715*).

59 *Degussa* 152-156.

evidence that the industry is adjusting and that the pertinent provisions of Articles 8 and 12 are being observed. There is no WTO jurisprudence on Article 7.2, the extension clause of the AGS.

From the aforementioned it is unclear from the AGS and the SGR how the process of extending safeguard measures is to be conducted. To this end, in *Macsteel* the actual term that can be used to describe the measure that was imposed by the Deputy Minister of Finance on 7 August 2020 is unclear.[60] The Gazette stated that the "safeguard duties" imposed through Notice Nos R829, R830 and R831 of Government Gazette No 41038 dated 11 August 2017 are hereby "extended" up to and including 10 August 2021 at the current rate of 8%. There are several issues with this amendment of Schedule 2 of the CEA, especially since these measures are imposed indiscriminately, unlike dumping duties.

First, Article 7.2 of the AGS does not allow ITAC to "extend" a safeguard measure without a completed investigation, since that provision requires an investigation completed in terms of Article 3, as outlined above. Therefore, ITAC had no right to impose the safeguard measure, let alone "extend" it without a completed investigation. Thus, the so-called "duty" was not in law a "definitive safeguard duty". It was certainly not a "provisional safeguard measure" as per Article 6 of the AGS, because that can be imposed only prior to a definitive safeguard duty and it must last for only 200 days. As per the Gazette of 7 August 2020, the Deputy Minister of Finance "extended" the safeguard for at least another year. Thus, this is not a "provisional safeguard measure". In any event, a provisional safeguard measure requires a preliminary finding. This was not done and ITAC had received only a prima facie case that triggers the initiation of an investigation, but that is not the same as a preliminary finding contemplated in section 18 of the SGR. There was no ITAC Report of a Preliminary Finding, which is what ITAC would normally publish in all trade investigations, including safeguard measures. In short, the purported "duty" reimposed on 7 August 2020 had no legal definition or legal basis. It is likely that this purported extension of the safeguard duty was prompted by the fact that these measures would lapse before the ITAC investigation was concluded. Once the duties had lapsed, they could not be reimposed on the same product unless a period equal to half that during which such a measure had been previously applied has lapsed. This period of non-application must be at least two years, as stipulated by section 21.16 of the SGR read with Article 7.5 of the AGS. This would essentially prevent the imposition of a safeguard duty on hot-rolled steel until 24 months has lapsed from the expiry of the initial period of imposition. Section 21.16 contradicts Article 7.5 of the AGS, which requires

60 *Customs and Excise Act 1964: Amendment of Schedule No 2 (No 2/3/43)* (GN R866 in GG 43597 of 7 August 2020).

that the period of non-imposition must be the same as the period of initial imposition, and such a period must be at least two years. Regardless, the measure imposed on 7 August 2020 would not have met the lower threshold of 18 months of non-imposition as set out in section 21.16 of the SGR.

Secondly, the *Macsteel* matter was compounded by the SARS Correction Notice of 28 August 2020, which purported to correct the apparent error in the Notice by the Deputy Minister of Finance on 7 August "extending" the safeguard duty.[61] This was done by the substitution of the word "extended" with the word "maintained", where it appears in Notice No R866 of Government Gazette No 43597 on 7 August 2020, with retrospective effect from 7 August 2020.[62] The issue here is that the AGS does not allow the "maintenance" of a duty. Duties can only be "extended", but they cannot be "maintained" under Article 7.2 of the AGS, which requires a completed investigation because it incorporates compliance with Articles 2, 3, 4 and 5 of the AGS. In particular, Articles 2.1 and 3.1 of the AGS explicitly require that a safeguard measure can be imposed only after the investigating authority has "determined" and "only following an investigation" by the investigating body. It is common cause that the safeguard investigation in *Macsteel* had not been completed when the duty was reimposed on 7 August 2020, because that investigation was completed only on 20 June 2023, as stated in ITAC Investigation Report 715. A *prima facie* case of injury or the likelihood of injury for the purposes of the initiation of an investigation is not sufficient to "maintain" a duty.

In any event, a duty if it could be "maintained" as stated in the Correction Notice Gazette, would require that the duty to continue at the very least be "progressively liberalised" as required by section 21.4 of the SGR and Article 7.4 of the AGS. Article 7.4 of the AGS provides that in order to facilitate an adjustment in a situation where the expected duration of a safeguard measure as notified under Article 12.1 is over one year, the Member applying the measure shall progressively liberalise it at regular intervals during the period of application. If the duration of the measure exceeds three years, the Member applying such a measure shall review the situation not later than the mid-term of the measure and, if appropriate, withdraw it or increase the pace of liberalisation. A measure extended under Article 7.2 must not be more restrictive than it was at the end of the initial period, and must continue to be liberalised.

To this end the WTO Panel in *Ukraine - Passenger Cars* held that "regular intervals" within the meaning of Article 7.4 of the AGS meant "uniform

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61 *Correction Notice: Customs and Excise Act, 1964 Amendment of Schedule No 2 (2/3/46)* (GN R939 in GG 43661 of 28 August 2020).

62 *Customs and Excise Act 1964: Amendment of Schedule No 2 (No 2/3/43)* (GN R866 in GG 43597 of 7 August 2020).

intervals", but that Article 7.4 did not specify how long such regular intervals should be and that the duty of "progressive liberalisation" also prohibits the importing Member from back-loading liberalisation, i.e. not taking any liberalisation steps until a late stage in the period of application of a safeguard measure.[63] It bears mention that the WTO Panel in *Ukraine – Passenger Cars* also stated that the AGS does not require that progressive liberalisation start at a given point in time.[64] Furthermore, the WTO Panel in *Argentina - Footwear EC* held that the only modifications of safeguard measures that Article 7.4 contemplates are those that reduce its restrictiveness, and thus the AGS does not envisage measures that increase the restrictiveness of a measure, and thus there are no notification requirements for such restrictive modifications.[65]

Therefore, the purported extension of the safeguard measure at the same level of 8% by ITAC violates sections 21.8-21.10 of the SGR and Article 7.4 of the AGS. Even if ITAC was authorised to extend this measure, at the very least the AGS and SGR require that the duty should then be liberalised. Thus, the Correction Notice of 28 August 2020 did nothing to save the safeguard duty on hot rolled steel as it had no legal basis in either the AGS or even the SGR. In effect, the duties on hot rolled steel which were terminated on 10 August 2021 by settlement before the court should have entitled the affected parties to the refund of all duties paid from 7 August 2020. The effect and design of the measure imposed on 7 August 2020 effectively "extended" the measure for at least another year.

The other related fundamental issue of ITAC was that the purported extension would have required a mid-term review at the 18-month mark by ITAC for it to be extended for another year, as required by section 21.10 of the SGR and Article 7.4 of the AGS. It is common cause that this mid or half term review was never conducted by ITAC. This procedural error is fatal to the purported extension of the safeguard duty on hot rolled steel. Thus, the unprecedented catalogue of administrative missteps in ITAC's purported "extension" or "maintenance" of the safeguard measures on hot-rolled steel aptly captures the problem caused by the lack of a binding procedural framework for the extension of safeguard measures in South Africa under the regime of the SGR and the AGS.[66] Even the *Amended Guidelines* fail to address all issues in this regard, such as whether the safeguard measure continues to apply during the safeguard investigation, and they do not

63 WTO Panel Report *Ukraine - Passenger Cars* WT/DS468/R (adopted 20 July 2015) paras 7.362-7.363.

64 WTO Panel Report *Ukraine - Passenger Cars* WT/DS468/R (adopted 20 July 2015) para 7.364.

65 WTO Panel Report *Argentina - Footwear EC* WT/DS121/R (adopted 12 January 2000) para 8.303.

66 See the discussion on pages 6-9 of this paper.

actually specify the length of the investigation. Thus, ITAC is free to do the investigation for as long as it needs to establish the need for the safeguard measure. This situation is untenable and promotes routine breaches of South Africa's international law obligations on "account of the laxity or tardiness of domestic authorities" as cautioned by the apex court in *SCAW*.[67]

2.2 Extension of safeguard measures in South Africa within the AfCFTA framework

Article 8 of the AfCFTA states that the Protocol and its associated Annexes and Appendices shall, upon adoption, form an integral part of the AfCFTA and it shall form part of the single undertaking, subject to entry into force. Pursuant to this, the AfCFTA has been ratified and incorporated into South African municipal law.[68] It thus creates rights in domestic law. Article 3.1 of the Protocol provides that the provisions of this Protocol shall apply to trade in goods between the State Parties. Annex 9 shall upon adoption form an integral part of this Protocol as provided by Article 3.2 of the Protocol. The Protocol entered into force on 30 May 2020.

Article 18 of the Protocol provides for global safeguard measures, whose implementation of this Article shall be in accordance with Annex 9 and the *AfCFTA Guidelines*, Article XIX of GATT 1994 and the AGS. Article 19 of the Protocol then states that in respect of preferential safeguards, State Parties may apply safeguard measures to situations where there is a sudden surge of a product imported into a State Party, under conditions which cause or threaten to cause serious injury to domestic producers of like or directly competing products within that territory. The implementation of this instrument must be in accordance with the provisions of Annex 9 to the Protocol and the AfCFTA Guidelines. It is apposite to note here that the terms global safeguard measures and preferential safeguards are not defined. It is assumed that global safeguards refer to those applied on countries which are not party to the AfCFTA and the latter apply to safeguard measures imposed between countries which are party to the AfCFTA. This is as far as the Protocol goes, offering no guidance on the extension of safeguard measures.

Article 6.3 of Annex 9 to the Protocol requires a State Party to immediately notify all State Parties of such initiation of the investigation according to the AGS in global safeguard investigations. However, under Article 6.4 of Annex 9 to the Protocol, in preferential safeguard investigations a State Party shall

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67 *SCAW* para 80.

68 *Amendment to Insert Part 8 to Schedule No 10 to Give Effect to the Implementation of the Agreement to Establish the African Continental Free Trade Area (AfCFTA)* (GN R1433 in GG 44049 of 31 December 2020).

immediately notify such initiation according to this Annex and the *AfCFTA Guidelines*. Article 2 of Annex 9 to the Protocol then provides that State Parties may, with respect to goods traded under the provisions of this Annex, apply safeguard measures as provided for in Articles 17-19 of the Protocol, this Annex and the *AfCFTA Guidelines* in accordance with the AGS. This leads the regime for the imposition and extension of safeguard measures back to the AGS. This formulation suggests that Article 2 is not a typical interpretation clause, which would apply only in case of uncertainty.[69] Erasmus then argues that this provision says the AfCFTA trade remedies must from the outset be WTO compatible.[70] Article 3 of Annex 9 to the Protocol reiterates that State Parties confirm their rights and obligations under Article XIX of the GATT and the AGS presumably in the application of global safeguards, since that is the heading of this provision. Thus, it is clear that the extension of these global safeguard measures is governed by Article XIX of the GATT and Article 7 of the AGS. Erasmus then explains that if this is the case, then Annex 9 to the Protocol and the *AfCFTA Guidelines* will add original principles and procedures only where explicitly provided for.[71] Thus, Erasmus concludes that even then, it would be possible to argue that where the AfCFTA provisions are ambiguous, WTO law must be used for the purpose of clarification.[72]

Article 4.6 of Annex 9 to the Protocol states that the preferential safeguard measure shall be applied only to the extent necessary to prevent or remedy serious injury or the threat thereof and to facilitate adjustment following an investigation by the importing State Party under the procedures established in this Annex and the *AfCFTA Guidelines*. Article 4.7 then provides that preferential safeguard measures shall not exceed a period of four years and shall contain clear indications of their progressive elimination at the end of the determined period. The preferential safeguard measure may be extended for another period not exceeding four years, subject to justification by the Investigating Authority under Article 4.7. Thus, Annex 9 to the Protocol does not provide any guidance on the process of extending a safeguard measure beyond the four-year mark save for saying that there must be clear proof of progressive elimination, and a justification must be provided. Therefore, global and preferential safeguards must be applied and extended in accordance with the AGS, as stated by Article 2 of Annex 9 to the Protocol. As established above, the AGS does not provide the

69 Erasmus 2021 https://www.tralac.org/blog/article/15407-what-lies-ahead-for-the-afcfta-trade-remedies-and-safeguards-regime.html.

70 Erasmus 2021 https://www.tralac.org/blog/article/15407-what-lies-ahead-for-the-afcfta-trade-remedies-and-safeguards-regime.html.

71 Erasmus 2021 https://www.tralac.org/blog/article/15407-what-lies-ahead-for-the-afcfta-trade-remedies-and-safeguards-regime.html.

72 Erasmus 2021 https://www.tralac.org/blog/article/15407-what-lies-ahead-for-the-afcfta-trade-remedies-and-safeguards-regime.html.

procedure for the extension of safeguard measures. This uncertainty mirrors the application of safeguard measures outside of the AfCFTA.

The *Southern African Development Community (SADC) Protocol on Trade*, the *Revised Treaty of the Economic Community of West African States* (*ECOWAS Treaty*) and the *East African Community Customs Union (Safeguard Measures) Regulations* are also silent on the procedure for the extension of safeguard measures.[73] The *SADC Protocol on Trade* actually specifies that its rules for the extension of safeguard measures are derived from Article 7 of the AGS, and thus offers no tangible solution to this issue. Thus, these regional trade agreements as building blocks of the AfCFTA under Article 5(b) do not provide any persuasive guidance in this regard. Since the AfCFTA suffers from the same affliction as the SGR of not providing a procedural framework for the extension of safeguard measures and thus follows the AGS' approach of deference to Member States, it is likely to pose the same problems for ITAC as the AGS regime unless the AfCFTA Guidelines are used as an opportunity to address this problem.

3 Conclusion and recommendations

South African law remains unclear on how to extend a safeguard measure, on when the investigation should be triggered, the duration of such an investigation and whether there is an obligation to pay the duty during the tenure of the extension investigation.

The non-binding *Amended Guidelines* adopted by ITAC also do not adequately address the gap, although they have value in that they confirm that there is indeed a gap in South African law. In short, the *Amended Guidelines* do not require that the extension investigation be completed before the safeguard measures lapses. The *Amended Guidelines* also do not provide for any of the procedural safeguards postulated in the AGS during an extension investigation and thus do not require a duly completed application in accordance with the structures of the AGS. The Guidelines also do not resolve the question of whether the safeguard measure applies during the course of the extension investigation. The *Amended Guidelines* do not even specify the length of the extension investigation. So even with this purported solution, the problems in the safeguard extensions framework remain unresolved and entrenched. Therefore, the issue of the extension of safeguard measures within and outside the context of the AfCFTA leads one back to the AGS. The AGS is not useful in this regard, since this power is delegated to the Member States of the AGS.

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73 Articles 25.5-25.6 of *SADC Protocol on Trade* (1996); Art 49.2 of the *Revised ECOWAS Treaty* (1993); Regulation 19 of the *East African Community Customs Union (Safeguard Measures) Regulations*.

It is against this backdrop that the recommendations to follow are developed. Firstly, section 60(2) of the ITAA must be amended to stipulate that the Guidelines promulgated under this section are binding. Alternatively, the Minister must promulgate these Guidelines as "regulations" which are binding, but with the necessary amendments in line with the AGS, as discussed above. Secondly, the SGR must actually be amended to provide for the procedure for the extension of safeguards for both AfCFTA and non-AfCFTA trade, the timing and duration of the extension investigation and whether the duty remains extant during such investigation. Thirdly, the AGS must also be amended to address this contentious issue, particularly since it is a fair-trade remedy with grave financial consequences for affected parties. Finally, the yet to be promulgated *AfCFTA Guidelines* must also address these issues. The futility of the ITAC Guidelines is self-evident, since they are non-binding on ITAC and the courts.

Bibliography

Literature

Brink 2008 *THRHR*
Brink G "A Nutshell Guide to Safeguard Action" 2008 *THRHR* 540-555

Dugard and Coutsodis "Place of International Law in South African Municipal Law"
Dugard J and Coutsodis A "The Place of International Law in South African Municipal Law" in Dugard J *et al* (eds) *Dugard's International Law: A South African Perspective* 5th ed (Juta Claremont 2021) 57-125

Khanderia 2017 *AJICL*
Khanderia S "The Compatibility of South African Anti-Dumping Laws with WTO Disciplines" 2017 *AJICL* 347-370

Phooko 2021 *AJICL*
Phooko M "Revisiting the Monism and Dualism Dichotomy: What Does the South African Constitution of 1996 and the Practice by the Courts Tell Us About the Reception of SADC Community Law (Treaty Law) in South Africa?" 2021 *AJICL* 168-182

Schlemmer "International Trade Law"
Schlemmer E "International Trade Law" in Strydom H (ed) *International Law* (Oxford University Press Cape Town 2020) 491-515

Stubbs 2011 *CCR*
Stubbs M "Three-Level Games: Thoughts on *Glenister*, *SCAW* and International Law" 2011 *CCR* 137-165

Sucker 2013 *CCR*
Sucker F "Approval of an International Treaty in Parliament: How Does Section 231(2) 'Bind the Republic'?" 2013 *CCR* 417-434

Tladi 2018 *SALJ*
Tladi D "The Interpretation and Identification of International Law in South African Court" 2018 *SALJ* 708-736

Vinti 2016 *PELJ*
Vinti C "A Spring without Water: The Conundrum of Anti-Dumping Duties in South African Law" 2016 *PELJ* 1-25

Case law

Arena Holdings (Pty) Ltd t/a Financial Mail v South African Revenue Service (CCT 365/21) [2023] ZACC 13 (30 May 2023)

Association of Meat Importers and Exporters v International Trade Administration Commission 2014 4 BCLR 439 (SCA)

Bosch Home Appliances (Pty) Ltd t/a Bosch v International Trade and Administration Commission; Bosch Home Appliances (Pty) Ltd t/a Bosch v Minister of Trade Industry (12160/18; 67553/18) [2021] ZAGPPHC 8 (5 January 2021)

Bridon International GMBH v International Trade Administration Commission (538/2011) [2012] ZASCA 82 (30 May 2012)

Degussa Africa (Pty) Ltd v International Trade Administration Commission (22264/2007) [2007] ZAGPHC 112 (20 June 2007)

Final Report of the Arbitration Panel Southern African Customs Union – Safeguard Measure Imposed on Frozen Bone-In Chicken Cuts from the European Union (3 August 2022)

Glenister v President of the Republic of South Africa 2011 3 SA 347 (CC)

Government of the Republic of South Africa v Grootboom 2001 1 SA 46 (CC)

International Trade Administration Commission v SCAW South Africa (Pty) Ltd 2012 4 SA 618 (CC)

Law Society of South Africa v President of the Republic of South Africa 2019 3 SA 30 (CC)

Louis Karel Fick v Government of the Republic of Zimbabwe 2013 5 SA 325 (CC)

Macsteel Services Centre SA (Pty) Ltd v ITAC (Case No 55450/20)

Minister of Water and Sanitation v Lotter; Minister of Water and Sanitation v Wiid; Minister of Water and Sanitation v South African Association for Water Users Associations 2023 4 SA 434 (CC)

Progress Office Machines v SARS 2008 2 SA 13 (SCA)

S v Makwanyane 1995 3 SA 391 (CC)

Tata Chemicals South Africa (Pty) Ltd v International Trade Administration Commission (48248/2020) [2023] ZAGPPHC 295 (28 April 2023)

WTO Appellate Body Report *Argentina - Footwear EC* WT/DS121/AB/R (adopted 12 January 2000)

WTO Appellate Body Report *India Patent Protection for Pharmaceutical and Agricultural Chemical Products* WT/DS50/AB/R (adopted 16 January 1998)

WTO Appellate Body Report *Indonesia – Iron or Steel Products* WT/DS490/AB/R, WT/DS496/AB/R (adopted 27 August 2018)

WTO Appellate Body Report *United States Standards for Reformulated and Conventional Gasoline* DSR 1996:I 3 (adopted 20 May 1996)

WTO Appellate Body Report *US Subsidies on Upland Cotton* WT/DS267/AB/R (adopted 20 June 2008)

WTO Panel Report *Argentina - Footwear EC* WT/DS121/R (adopted 12 January 2000)

WTO Panel Report *Canada - Dairy* WT/DS103/AB/R, WT/DS113/R (adopted 27 October 1999)

WTO Panel Report *Indonesia - Iron or Steel Products* WT/DS490/R, WT/DS496/R (adopted 27 August 2018)

WTO Panel Report *Ukraine - Passenger Cars* WT/DS468/R (adopted 20 July 2015)

WTO Panel Report *US - Gasoline* WT/DS2/AB/R (adopted 20 May 1996)

Legislation

Board on Tariffs and Trade Act 107 of 1986

Constitution of the Republic of South Africa, 1996

Customs and Excise Act 91 of 1964

International Trade Administration Act 71 of 2002

Government publications

Amended Guidelines and Conditions Relating to Extension of Safeguard Measures (N 542 in GG 45131 of 10 September 2021)

Amended Safeguard Regulations (GN R662 in GG 27762 of 8 July 2005)

Amendment to Insert Part 8 to Schedule No 10 to Give Effect to the Implementation of the Agreement to Establish the African Continental Free Trade Area (AfCFTA) (GN R1433 in GG 44049 of 31 December 2020)

Correction Notice: Customs and Excise Act, 1964 Amendment of Schedule No 2 (2/3/46) (GN R939 in GG 43661 of 28 August 2020)

Customs and Excise Act 1964: Amendment of Schedule No 2 (No 2/3/43) (GN R866 in GG 43597 of 7 August 2020)

GN R829, R830 and R831 in GG 41038 of 11 August 2017

Guidelines and Conditions Relating to Extension of Safeguard Measures (N 447 of 21 August 2020 in GG 43636)

Notice of Initiation of the Investigation into the Extension of Safeguard Measures on Imports of Certain Flat-Rolled Steel, Products of Iron, Non-Alloy Steel or Other Alloy Steel (Not Including Stainless Steel) (N 392 in GG 43542 of 24 July 2020)

International instruments

AfCFTA Protocol on Trade in Goods (2020)

Agreement Establishing the African Continental Free Trade Area (2018)

Agreement on Safeguards (Contained in Annex 1A of the Agreement Establishing the World Trade Organisation) (1995)

Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (1995)

Annex 9 on Trade Remedies: AfCFTA Protocol on Trade in Goods (2020)

East African Community Customs Union (Safeguard Measures) Regulations (2004)

General Agreement on Tariffs and Trade (1994)

Revised Treaty of the Economic Community of West African States (1993)

SADC Protocol on Trade (1996)

Safeguards - Report by the Chairman of the Council to the Fortieth Session of the Contracting Parties WTO Doc MDF/4, 31S/136 MDF/4, 31S/136 (1984)

Internet sources

Erasmus 2021 https://www.tralac.org/blog/article/15407-what-lies-ahead-for-the-afcfta-trade-remedies-and-safeguards-regime.html
Erasmus G 2021 *What Lies Ahead for the AfCFTA Trade Remedies and Safeguards Regime?* https://www.tralac.org/blog/article/15407-what-lies-ahead-for-the-afcfta-trade-remedies-and-safeguards-regime.html accessed 21 January 2024

ITAC 2017 https://www.itac.org.za/upload/document_files/20190527103852_Report-No.-551.pdf
International Trade Administration Commission 2017 *Investigation Report No 551: Investigation into Remedial Action in the Form of a Safeguard Against the Increased Imports of Certain Flat Hot-Rolled Steel Products: Final Determination* https://www.itac.org.za/upload/document_files/20190527103852_Report-No.-551.pdf accessed 3 December 2024

ITAC 2023 https://www.itac.org.za/upload/document_files/20231031051802_20230721035845_Report-No-715.pdf
International Trade Administration Commission 2023 *Investigation Report 715: Investigation into the Extension of a Safeguard Measure Against the Increased Imports of Threaded Fasteners of Iron or Steel: Bolt Ends and Screw Studs, Screw Studding and Other Hexagon Nuts (Excluding Those of Stainless Steel and Those Identifiable for Aircraft): Final Determination* https://www.itac.org.za/upload/document_files/20231031051802_20230721035845_Report-No-715.pdf accessed 3 December 2024

List of Abbreviations

AfCFTA	Agreement Establishing the African Continental Free Trade Area
AGS	Agreement on Safeguards
AJICL	African Journal of International and Comparative Law
AMSA	ArcelorMittal South Africa Limited
CCR	Constitutional Court Review
CEA	Customs and Excise Act 91 of 1964
ECOWAS	Economic Community of West African States
GATT	General Agreement on Tariffs and Trade (1994)
ITAA	International Trade Administration Act 71 of 2002
ITAC	International Trade Administration Commission

LSSA	Law Society of South Africa
PELJ	Potchefstroom Electronic Law Journal
SACU	Southern African Customs Union
SADC	Southern African Development Community
SAISI	South African Iron and Steel Institute
SALJ	South African Law Journal
SCA	Supreme Court of Appeal
SGR	Amended Safeguard Regulations
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
WTO	World Trade Organisation