

**INTERNATIONAL TRADE DISPUTE RESOLUTION:
LESSONS FROM SOUTH AFRICA**

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Abbreviations and Acronyms

AD Agreement	WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
CMT	cut, made and trimmed
DSB	Dispute Settlement Body (WTO)
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
DTI	Department of Trade and Industry
EC	European Commission
EFTA	European Free Trade Area
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
IBSA	India, Brazil and South Africa
ILO	International Labour Organization
ITA Act	International Trade Administration Act
ITAC	International Trade Administration Commission
ITEDD	International Trade and Economic Development Division
ITU	International Telecommunications Union
MIDP	Motor Industry Development Plan
MoU	Memorandum of Understanding
NEDLAC	National Economic Development and Labour Council
PTA	Preferential Trade Agreement
SACU	South African Customs Union (Botswana, Lesotho, Namibia, South Africa, Swaziland)
SADC	Southern African Development Community (Angola, Botswana, Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia, Zimbabwe)
SCM Agreement	Agreement on Subsidies and Countervailing Measures
TDCA	Trade, Development and Cooperation Agreement
TISA	Trade and Investment South Africa
Tralac	Trade Law Centre of Southern Africa
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization

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About the Author

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Introduction

Article 3.2 of the World Trade Organization (WTO) Understanding on Dispute Settlement (DSU)¹ provides that the rationale for dispute settlement is to “clarify the existing provisions” of the WTO Agreements “in accordance with the customary rules of interpretation of public international law.” However, African countries have not made significant use of the DSU² and only as either respondents or as third parties. There is thus a dearth of African experience in international trade dispute resolution, which this paper attempts to alleviate through reference to the South African experience, such as there is.

Section I provides background on the importance of South Africa in the African context, while Section II considers South Africa’s institutional structure and processes (both those applied and the ideal) with references to the disputes in which South Africa has been involved to date.³ It investigates the methodology used to ascertain the necessary facts in disputes and identifies the gaps that currently exist in the procedure to defend a case, while indicating that a vacuum exists as regards the procedure to be used when the domestic industry is of the opinion that its rights have been infringed in a third country. Section II concludes with an evaluation of the technical expertise available in South Africa before providing a brief overview of dispute settlement within the Southern African Customs Union (SACU) and the Southern African Development Community (SADC).

The paper concludes by proposing changes to the current system to ensure that South Africa can effectively and efficiently defend its rights under the WTO Agreements. These considerations and proposals can then be used by other African nations to avoid the pitfalls encountered in South Africa and assist in setting up proper structures.

I Background

South Africa has the largest economy in Africa and dominates Southern Africa where it accounts for more than 90 per cent of the total GDP of the Southern African Customs Union (SACU), which also consists of Botswana, Lesotho, Namibia and Swaziland. At the same time, it represents more than 80 per cent of the GDP of the Southern African Development Community (SADC), which, in addition to the above five members also includes Angola, the Democratic Republic of the Congo, Madagascar, Malawi, Mauritius, Mozambique, Tanzania, Zambia and Zimbabwe. Its GDP is more than three times that of Nigeria, the second largest economy in Africa.

South Africa is a leading exporter of mining products, some of which is beneficiated, as well as of manufactured and agricultural goods. It is one of the world's most significant producers of, *inter alia*, gold,⁴ diamonds,⁵ vanadium,⁶ platinum,⁷ manganese⁸ and chrome⁹ and it has large coal, steel and aluminium industries. Since 2002 South Africa's exchange rate has strengthened considerably from around USD = R10.80 to approximately USD = R5.80 in 2005 when it experienced its first annual trade deficit since 1981. Its trade deficit amounted to R7.7 billion (USD1.12 billion at July 2006 exchange rate) in July 2006 and its currency had devalued from USD=R6.1243 in January 2006 to USD=R6.88044 in July 2006 and to USD=R7.72532 by the end of September 2006.

South Africa is a founding Member of both the General Agreement on Tariffs and Trade (GATT) and the WTO and actively participates in its negotiation processes. It is a member of the G20 alliance in agriculture negotiations as well as the Cairns Group. South Africa has a Trade, Development and Cooperation Agreement (TDCA) in place with the European Union and, as part of SACU, a Free Trade Agreement (FTA) with the European Free Trade Area (EFTA). As part of SACU it is in the process of negotiating FTAs with Mercosur and the United States of America¹⁰ and a preferential trade agreement (PTA) with India. South Africa also signed a Memorandum of Understanding with the People's Republic of China (China) in August 2006 to investigate the possibility

of negotiating an FTA with that country. Furthermore, it is also investigating an economic cooperation agreement with Russia and considering the possibility of an FTA between India, Brazil and South Africa (IBSA).

II South Africa's Dispute Settlement Capacity

2.1 Introduction

To date all four disputes in which South Africa has been involved, whether formally pursued through the DSU or simply within the margins of the WTO without resulting in a formal dispute, have related to trade remedies. This applies equally to the domestic industry's request to the South African government to initiate a dispute and another case in which the European Union requested South Africa to become a third party in a dispute. South Africa has always been a major user of trade remedies, especially the anti-dumping instrument.¹¹ Over the past several years the use thereof can be closely linked to the changing exchange rate,¹² as is illustrated in the following table:

Table 1: Link between exchange rate and number of anti-dumping investigations

Year	Initiations	Exchange rate (USD=R)
1999	16	6.11867
2000	21	6.94303
2001	5	8.61545
2002	4	10.53061
2003	8	7.57035
2004	6	6.45881
2005	23	6.38113

2.2 South African Institutional Structures

2.2.1 Background

As indicated above, South Africa to date has been involved in two formal and at least two informal WTO disputes. In all four cases, other Members requested consultations with South Africa arguing that it had nullified or impaired the rights of that country under one of the Agreements covered by the WTO. These disputes related to:

- (a) Anti-dumping duties on penicillin from India;¹³
- (b) Anti-dumping duties on acrylic fabric from Turkey;¹⁴
- (c) Anti-dumping duties on carbonless copy paper from the European Union (informal dispute); and
- (d) Subsidies granted by the South African government under the Motor Industry Development Plan and challenged by Australia (informal dispute).

On at least one occasion, South African industry requested the initiation of a dispute, while the European Union has requested South Africa to be a third party in a dispute involving certain anti-dumping practices of the United States. These disputes related to:

- (a) A request by the South African wire, rope and cable industry to challenge European Union anti-dumping measures against South African exports; and
- (b) A request by the European Commission (EC) to join as a third party the EC's challenge against the United States' practice of "zeroing" in anti-dumping investigations.

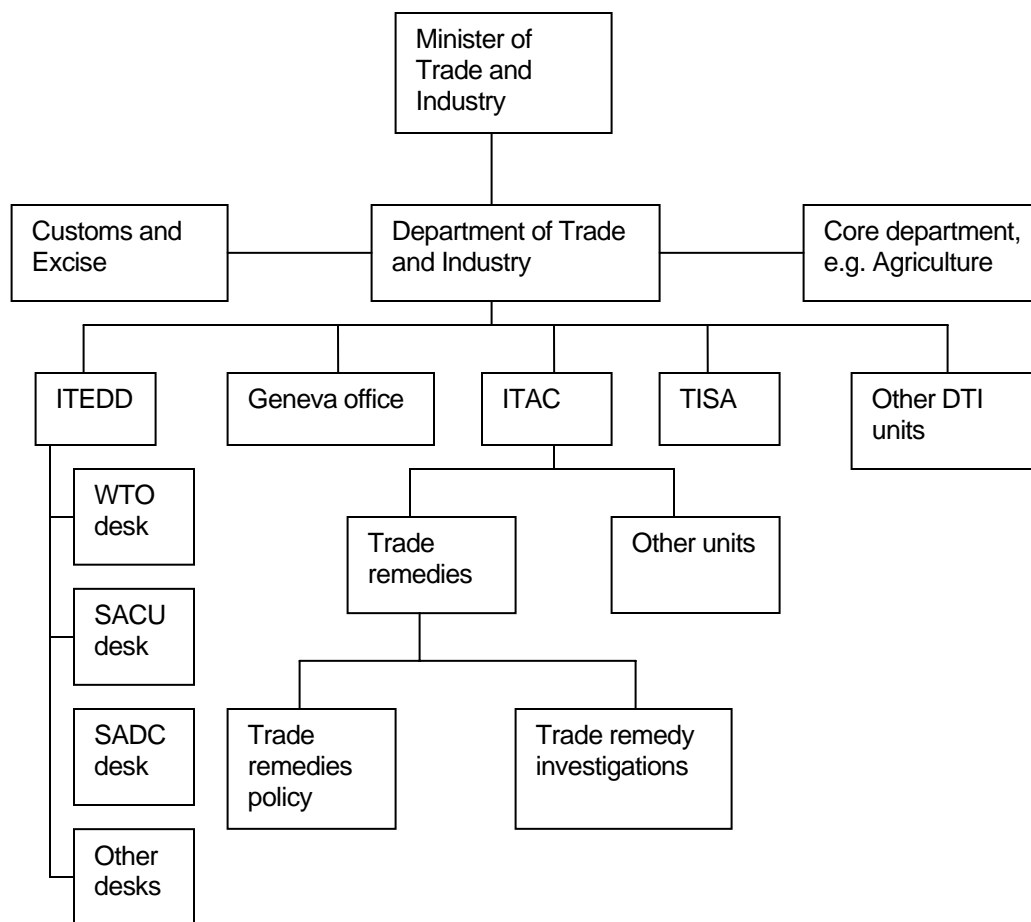
2.2.2 Government Structure Regarding International Trade Disputes

All trade matters in South Africa are handled by the Department of Trade and Industry (DTI), within its different divisions. However, other departments may also be involved. These are the Department of Finance (Customs and Excise) and core ministries such as the Department of Agriculture and the Department of Foreign Affairs. Furthermore, South Africa has a Permanent Mission in Geneva, staffed by DTI employees and headed by a Deputy Director General, i.e. a person second in rank only to the Director General of the DTI who in turn reports directly to the Minister. The Mission

is tasked not only with WTO issues, but has to report on all international issues from Geneva, for example the International Labour Organization (ILO) and the International Telecommunications Union (ITU).

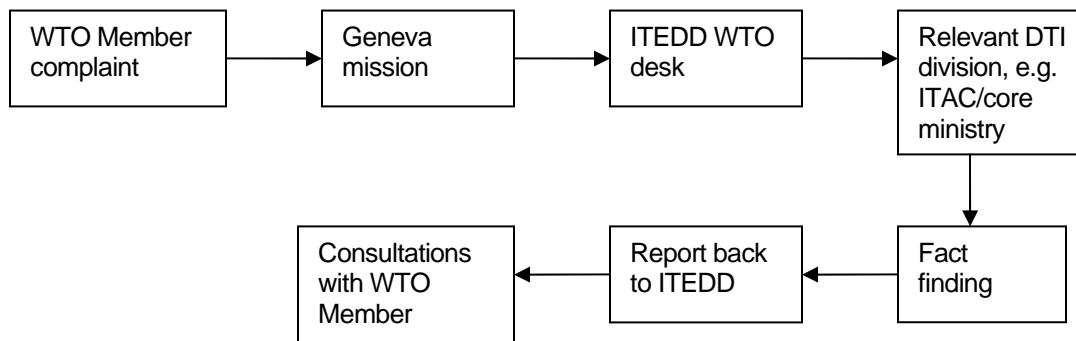
Any official request for consultations by a WTO Member shall be notified, in addition to the DSB, to the relevant Council or Committee in the WTO. In the cases involving South Africa, they were lodged with the Council for Trade in Goods. In theory, the Mission in Geneva should then immediately inform the WTO desk of the International Trade and Economic Development Division (ITEDD)¹⁵ of the DTI of the request. ITEDD has primary responsibility for all South Africa's trade negotiations, including all Free Trade and Preferential Trade Agreement negotiations, although it requests input from various other divisions in the DTI and from other departments. ITEDD comprises of a staff complement well-versed in the different WTO Agreements, but its staff members are not specialists in the technical aspects of the covered agreements, e.g. agriculture, textiles and trade remedies. However, ITEDD was not involved in any of the first three disputes initiated against South Africa under the WTO.¹⁶ Furthermore, it was not appraised of either the request to lodge a dispute regarding wire, ropes and cables or to act as a third party in the EC case on zeroing against the United States.

Organogram 1: South Africa's institutional structure



Once the Mission in Geneva has informed ITEDD of the dispute, ITEDD should liaise with the relevant divisions of the DTI and/or the relevant core ministries for the necessary inputs. As all cases to date have involved trade remedies, any defence would therefore have to involve the Trade Remedies unit, which forms a division within the International Trade Administration Commission (ITAC).¹⁷ ITAC itself is an independent statutory body responsible for international trade administration, including tariff and rebate applications, trade remedies and import and export control. It reports to the DTI via ITEDD. Where a dispute involves subsidies granted to South African industries by the DTI, Trade and Investment South Africa (TISA), a division of the DTI, will also be involved. Organogram 2 sets out the process that should be followed upon receipt of a request for consultations:

Organogram 2: Proper dispute resolution process



As indicated in Organogram 2, once the relevant divisions and/or departments have been notified of the dispute, these divisions and/or departments should engage in fact-finding to determine the facts that gave rise to the dispute. This requires a proper analysis both of the facts of the matter and the procedure followed, with report-back to ITEDD. ITEDD will then decide on the way forward based on the facts, its own evaluation thereof and the political implications of any action taken. To date, however, the actual process followed has been somewhat different.

(a) *Penicillin from India*

In the *Penicillin from India* case,¹⁸ ITAC¹⁹ held formal consultations with the Indian Trade Representative in South Africa without any intervention from ITEDD after India indicated that it considered the definition and calculation of the normal values to be inconsistent with the provisions of the WTO and that an erroneous methodology was used for determining the normal value and the resulting margin of dumping. The main issue concerned ITAC's refusal to grant an adjustment to the normal value for differences in raw material costs used for domestic and exported products. The fact-finding mission showed that ITAC's refusal was based on the determination that there were no differences between the product sold domestically and that exported and that it could not be proven that the lower priced raw material was exclusively used in the production of goods for the export market. As India decided not to proceed with a WTO dispute, it

appears that the consultations were successful. However, its domestic industry also pursued the matter in the High Court in South Africa, which rejected the application.²⁰ No further action was taken in the matter. It appears that ITEDD was not involved in the consultations as a result of internal DTI politics.

(b) *Acrylic Fabric from Turkey*

In another instance, after anti-dumping duties had been imposed on acrylic blankets from, *inter alia*, China and Turkey,²¹ the exporters in those two countries started exporting acrylic blanketing in roll form, i.e. material that only had to be cut, made and trimmed (CMT) to produce final blankets, in order to circumvent the anti-dumping duties. ITAC recommended anti-circumvention duties against China and Turkey without conducting an investigation conforming to the WTO requirements.²² Turkey challenged this decision on the basis that this was not provided for in the Anti-Dumping Agreement.²³ Informal discussions were held in Pretoria, but no mutual agreement could be reached. Turkey subsequently initiated a formal dispute and requested consultations with South Africa.²⁴

As the Geneva Mission is understaffed, it failed to alert ITEDD of the request for consultations by Turkey and South Africa accordingly missed the 10-day time limit for agreeing to consultations provided under Article 4.3 of the DSU. Eventually, a Brussels-based lawyer²⁵ informed the Trade Remedies unit at ITAC of the request some 14 days after the request had been lodged. Turkey agreed to hold consultations with South Africa despite the latter missing the deadline.²⁶ Following this, a team from ITAC, consisting of the Chief Commissioner, the Director of Trade Remedies Policy and the future Director of Legal Services visited Ankara, Turkey, to conduct consultations with the Turkish government. Turkey was represented by its Deputy Commercial Counsellor from its Permanent Mission to the WTO in Geneva,²⁷ the Deputy Director General of the General Directorate of Imports²⁸ and several staff members of the latter directorate. ITEDD was not informed of the consultations, nor was it involved at any stage. It appears to have been a deliberate decision of ITAC

not to involve ITEDD on the basis that the matter dealt with an issue within ITAC's authority, i.e. anti-dumping, but it may also have been based on the fact that ITEDD had failed to deal with the matter originally.

In its request, Turkey indicated that it considered that ITAC had failed to ensure proper notifications in this case, that the establishment of the facts was not proper and that its evaluation of these facts was not unbiased and objective particularly in relation to (a) the initiation of the investigation; (b) the conduct of the investigation; and (c) the imposition of the anti-dumping duty.

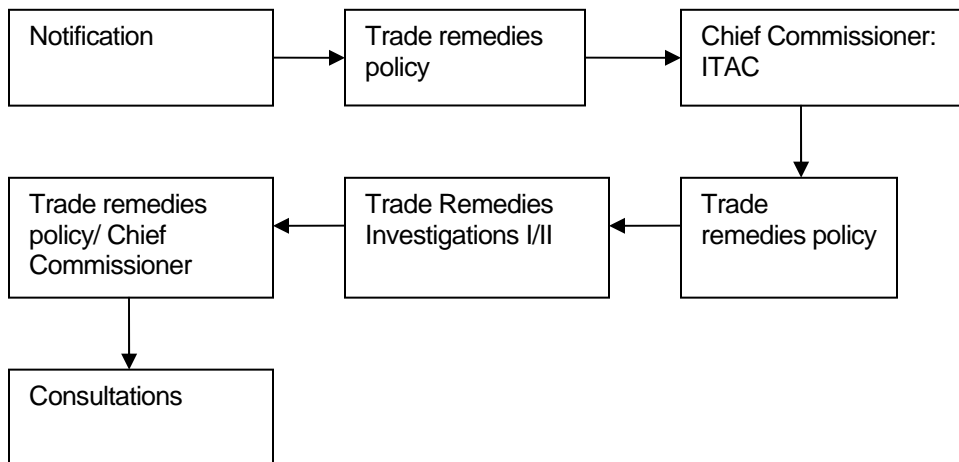
During the consultations in Ankara it was conceded that ITAC had not notified the Turkish Government of the receipt of an application for the imposition of anti-dumping duties prior to initiation as required by Article 5.5 of the Anti-Dumping Agreement and that it had not granted Turkish exporters a proper opportunity to provide the necessary normal value and export price information as envisaged by Article 6.1 of the Agreement. Moreover, it was agreed that ITAC had conducted an anti-circumvention review that is not provided for in the Anti-Dumping Agreement using procedures also not provided for in the said Agreement. This resulted in the imposition of anti-dumping duties in a manner inconsistent with the Agreement. On this basis, ITAC acknowledged that the procedure followed was WTO inconsistent. The Director, Trade Remedies Policy, subsequently prepared a submission to ITAC setting out the nature of the consultations and the agreement reached, recommending that the anti-dumping duties be terminated. The Commissioners accepted this and recommended to the Minister of Trade and Industry that the duties be withdrawn with immediate, but not retroactive, effect. The anti-dumping duties against China were also withdrawn as the same facts applied to China, even though it had not challenged the measures. No further steps were taken after the offending measure was terminated.

(c) *Carbonless Copy Paper from the European Union*

Another dispute, albeit an informal one, arose when the European Commission (EC) requested informal discussions with ITAC in 2004 regarding the imposition of anti-dumping duties on carbonless copy paper imported from Belgium, Germany and the United Kingdom. The request was made directly to ITAC.²⁹ After determining the facts of the matter, it was decided that they were so complex that the Director of Trade Remedies Investigations II should be included in the consultation team. The Chief Commissioner, the Director of Trade Remedies Policy and the Director of Trade Remedies II visited the EC in Brussels in 2004 to engage in consultations regarding the various substantive and procedural issues raised. During these consultations, ITAC was adamant that its investigation process and findings were sound and therefore indicated that it would not recommend any changes to the existing anti-dumping duties. As the matter was not formally pursued, it appears that the EC accepted ITAC's viewpoint. Again, ITEDD was not involved in the consultations at any stage, presumably on the basis that the dispute related exclusively to a matter (anti-dumping) within ITAC's authority.

The actual process followed in these three disputes can be outlined as follows:

Organogram 3: Actual process followed



(d) *Wire, Ropes and Cables from South Africa*

In 1998, the EC conducted an anti-dumping investigation against wire, rope and cables imported from South Africa. The South African industry alleged that the methodology used by the EC to determine the margin of dumping was unfair and that it disregarded the substantial differences between two categories of the product. This resulted in an exceptionally high margin of dumping being established. The industry, duly advised of its rights by its Brussels-based lawyers, requested ITAC³⁰ to initiate dispute settlement proceedings against the EC, but this was denied by ITAC. It appears that the basis for the refusal may have been the fact that South Africa was involved in the negotiations of the SA-EU Free Trade Agreement (TDCA) with the European Union at the time. Another reason for the refusal was that South Africa was afraid that its own anti-dumping procedures would then come under scrutiny and that this could lead to retaliation by the EC. The decision not to initiate a dispute was taken by ITAC without reference to ITEDD. The reasons for not involving ITEDD may again relate to the fact that the matter related to anti-dumping which falls within ITAC's mandate and to internal political differences between ITAC and ITEDD.

(e) *Zeroing in the United States*

In 2004, the EC lodged a formal complaint against the practice of "zeroing" by the United States (US) in anti-dumping investigations.³¹ The EC formally requested South Africa to join in the process as a third party.³² South Africa had a direct interest in the matter as zeroing was also applied in all US anti-dumping investigations against South Africa, which accounted for more than half of all anti-dumping investigations against South Africa. It was also the ideal opportunity to get involved in dispute settlement in the WTO, without being either the complaining or responding party, i.e. the ideal opportunity to build capacity. The issue of South Africa's possible involvement was debated extensively in ITAC. In the end, however, ITAC, for political reasons,³³ decided not to request third party status, despite the fact that the EC's request was never discussed with ITEDD, which was the only unit

that had the authority to decide on such a matter. It is not clear on what authority ITAC took this decision, nor what ITEDD's reaction was to being disregarded as the division responsible for taking decisions in this regard.

It is clear that the correct procedure was not followed in any of the five disputes discussed above, as ITEDD which is responsible for all political aspects of international trade and for trade negotiations was not involved in any of these instances. Although it may be argued that the specific issues related to matters within ITAC's jurisdiction, it is submitted that this is not the case. In terms of the International Trade Administration Act, 71 of 2002 (ITA Act), ITAC has the exclusive jurisdiction over anti-dumping and other customs duty investigations. However, this jurisdiction ends at the investigation level and does not include decisions of an international nature such as international trade disputes. It is submitted that the correct procedure would have been for ITAC to refer the matter to ITEDD in each instance, yet to remain involved in the fact finding aspects and, if so requested by ITEDD, in any consultations with foreign governments. This was finally only done in the automotive industry subsidies dispute.

(g) *Automotive Industry Subsidies*

In April 2004 Australia informally complained about subsidies granted by the South African Government to the manufacturers of leather seats for automotive use for export purposes under the Motor Industry Development Plan (MIDP). This followed after a similar program in Australia had been found to be WTO-inconsistent³⁴ and which obliged Australia to cease the program. At the same time, the subsidies in the South African MIDP programme were all contingent on the export of automotive vehicles and components and thus constituted a prohibited subsidy under the Agreement on Subsidies and Countervailing Measures (SCM Agreement). With the continuation of South Africa's program, its exporters gained international market shares at the expense of the Australian exporters.

The complaint from the Australian government was addressed directly to the Chief Commissioner of ITAC during the semi-annual meeting of the Subsidies Committee³⁵ in the WTO. The Chief Commissioner, however, realised that the request was extremely sensitive and that it did not merely relate to the substantive findings or procedures followed by ITAC, but that it could have far-reaching implications for the whole MIDP program and industrial policy in South Africa. The Chief Commissioner decided to refer the matter to ITEDD. This led to a series of discussions both internally between various divisions in the DTI, including ITEDD, ITAC, and Trade and Investment South Africa (TISA), as well as with external stakeholders, such as the automotive industry and a private sector expert, before proceeding to informal discussions with Australia held in Geneva, Canberra and in Pretoria. The Director of Trade Remedies Policy and a private sector economist were asked to consider the different options available to South Africa and to advise on how the MIDP programme could be changed to be WTO-consistent.³⁶ After several discussions between ITEDD and Australia, it was decided to exclude leather seats from the MIDP programme. This was done in order to prevent a formal complaint against the MIDP programme which could have jeopardised the whole programme. ITAC was not involved in the actual consultations in this case, but only provided ITEDD with the necessary input.

This was the first (and to date the only) dispute in which the correct procedure was followed.³⁷ The interaction between the various divisions of the DTI and the involvement of the private sector³⁸ and with a private sector expert is to be lauded as the correct procedure to be followed.

2.3 Textiles, Clothing and Footwear; Impact of the Free Trade Agreement Negotiations with China

Although strictly speaking not a dispute, the quotas imposed on the imports of certain clothing and textiles from China and the accompanying Memorandum of Understanding (MoU) signed with China have relevance in the discussion of South Africa's dispute settlement experience.

Clotrade, an organisation representing a significant portion of the South African clothing industry, lodged a safeguard application with ITEDD requesting safeguard measures to be imposed against clothing imports from China in the context of China's Accession Protocol.³⁹ It was alleged that imports had surged and that it had caused the loss of more than 20% of the jobs in the sector and the closure of several producers. A full year passed without any progress being made. Clotrade then lodged another application, this time with ITAC, for safeguard measures. A month later, the South African Clothing and Textile Workers' Union also lodged a special safeguard application with ITAC against clothing, textiles and footwear imports from China under China's Protocol. The South African government, however, was (and is) keen to negotiate an FTA with China and ITAC refused to initiate an investigation.⁴⁰ ITEDD subsequently decided to engage China in informal discussions outside of the WTO. All these discussions were held by ITEDD, with little involvement by ITAC and none by labour, industry and other stakeholders. The reasons for excluding all stakeholders are unknown. At the end of August 2006 the South African Government announced that it had entered into an MoU with the Chinese Government. This MoU imposed quotas on certain imports of textiles and clothing (but not on footwear) from China into South Africa (but not into SACU) in exchange for agreeing not to conduct any special safeguard investigations against China, granting China market economy status and an agreement to cooperate on anti-dumping investigations. Several further conditions were also placed on South Africa.⁴¹ All stakeholders, including both manufacturers and importers, have voiced their extreme concern at the methodology used and the quotas imposed without their input.⁴²

Considering the injury to the relevant SACU industry, the time taken to negotiate with China, the lack of protection granted by way of the quotas, the loopholes in the system and the concessions made to China, it is submitted that the outcome of the negotiations significantly favoured China.⁴³ It is submitted that this indicates the distinct lack of expertise in South Africa. It is further submitted that the same situation would prevail if South Africa were to proceed with formal dispute settlement against another WTO Member which has the necessary resources, unless private sector expertise and stakeholder involvement are sought.

2.4 Government's Dispute Settlement Skills

ITAC has taken some steps to develop its international trade dispute settlement skills by sending both the Director of Trade Remedies Policy and the Director of Trade Remedies Investigations II to WTO trade dispute settlement courses presented by UNCTAD in Geneva in 2003. However, since 2004 both these directors and two of the most knowledgeable trade remedy investigation officers have left ITAC. After serving out her contract, the chief commissioner also left ITAC at the end of September 2006. The loss of these people has resulted in a very significant loss of institutional knowledge that will be very difficult to replace, especially since few of these skills have been institutionalised. This follows from the fact that ITAC has not been involved in any disputes beyond the level of formal consultations with foreign governments.

Likewise, several knowledgeable people have left the service of ITEDD since 2003. This has seriously affected not only the DTI's, but South Africa's ability to deal with dispute settlement.⁴⁴ This emphasises one of the biggest problems experienced in small economies – the loss of a few knowledgeable people seriously impacts on a country's ability to properly engage in dispute settlement.

In this regard it should be noted that ITAC has a total staff complement of around 110. Most of the staff are investigating officers or support staff who will never be involved in dispute settlement. In addition, the staff of the Import and Export Control and the Tariff Investigations units are also unlikely to be involved in any dispute settlement. This leaves only the staff of the Trade Remedies unit, legal services and the newly created policy unit, which combined has a staff complement of only around 20.⁴⁵ ITEDD consists of only around 30 staff members, including support staff, which highlights the risk of losing knowledge if even a single person leaves.

2.5 Private Sector Knowledge of International Trade Dispute Settlement

South Africa had a closed economy in the 1980s and the early 1990s with trade sanctions authorised by the United Nations and enforced by several countries. As a result, many import-replacement industries were set up, information was closely guarded and little cognisance was taken of what happened in the rest of the world. When South Africa reintegrated into the world economy following its first democratic elections, the private sector was not mindful of the full realm of international trade. To a significant extent that has remained unchanged. While a number of companies in certain industries have become world players, e.g. Anglo-American, SAB and Sappi, most industries remain unaware of international trade rules. It should be noted that although the ITA Act obliges ITAC to promote public awareness of the provisions of the ITA Act, this covers a very small part of international trade matters.⁴⁶ Likewise, although the National Economic Development and Labour Council (NEDLAC) has been set up to facilitate policy discussions and decision-making between government, industry and labour, industry has indicated that government does not take NEDLAC seriously.⁴⁷ Accordingly, industry and labour does not have direct access to government as regards policy decisions or international trade matters.

The same cannot be said, however, of academics and private practitioners. Several universities, *inter alia* those of Pretoria, Stellenbosch, the Witwatersrand and the Western Cape, have postgraduate courses on international trade and trade law. The Trade Law Centre of Southern Africa (Tralac) was also set up in Stellenbosch with the specific aim of building international trade law capacity not only within South Africa, but in the whole of SADC. As regards the capacity of private practitioners to participate in and utilise international trade dispute resolution mechanisms it is important to note that South Africa has produced the latest WTO Appellate Body member, David Unterhalter, indicating the capacity that has been built in the private sector in South Africa. In addition, at least four other South Africans have served as WTO panellists.⁴⁸ A number of academics and scholars have also published text books, chapters in text books, treatises or articles on aspects of international trade law.⁴⁹ There are also several other private international trade and trade law practitioners who have developed the necessary skills to advise both private clients and government on the various aspects of international trade law and dispute settlement.

The question, however, remains whether the government will make use of this pool of resources. This answer is not straightforward, given some deep-seated, sensitive political considerations. Notwithstanding these however, it is submitted that the government should maintain links with those that have left its employ, as these are often the people who will be able to make a positive contribution without government incurring the huge costs of Geneva-based lawyers.⁵⁰

2.6 Regional Dispute Settlement Mechanisms in Africa

2.6.1 *Dispute Settlement within SACU*

South Africa has had occasion to deal with a number of regional disputes, having been accused of dumping products into SACU Member States, e.g. beer into Namibia and flour into Botswana. These disputes have to be settled at a political level

as the SACU Agreement makes no provision for taking anti-dumping measures against a fellow customs union member. Article 41 of the SACU Agreement provides for the development of “policies and instruments to address unfair trade practices between Member States”. However, these policies and instruments have not yet been finalized and still need to be addressed on an *ad hoc* basis.

ITEDD is responsible for the necessary consultations. ITEDD has a special unit, the SACU desk, that is dedicated to working with and resolving all SACU-related issues. The SACU desk staff members, many of whom were involved in the SACU Agreement negotiations, have significant expertise as regards the SACU Agreement, but do not necessarily have the technical expertise regarding the specific products or processes, e.g. on anti-dumping. Accordingly, ITEDD will normally request input from ITAC in trade remedy cases and that of other stakeholders where necessary. This may include input from, *inter alia*, Customs and Excise or from the Department of Agriculture. ITEDD, however, will retain primary responsibility for any consultations, even if other parties may be requested to join in the discussions. The outcome of consultations may be relayed to the relevant division or Department for implementation.

The SACU Agreement makes provision for the establishment of an *ad hoc* Tribunal to deal with all trade-related disputes. Article 13(3) of the SACU Agreement provides that the “Tribunal shall adjudicate on ... any dispute arising” under the Agreement. To date, however, no *ad hoc* Tribunal has been established and all disputes have been resolved bilaterally.

2.6.2 Dispute Settlement within SADC⁵¹

Article 4(e) of the SADC Treaty requires the peaceful settlement of disputes between members, while Article 16 provides that the Tribunal shall adjudicate on such matters as are referred to it.⁵² The Tribunal has not only jurisdiction over trade disputes

between States, but also disputes relating to other inter-State matters as well as disputes between natural or legal persons and States. Article 32 of the Treaty and Articles 31 and 32 of the SADC Protocol, which is annexed to the Treaty, provide some rules of procedure regarding dispute settlement. Matters may only be referred to the Tribunal if the dispute cannot be resolved amicably. Disputes are normally to be settled through the removal of the offensive measure that causes nullification or impairment of another Member's rights.

As with SACU disputes, all SADC trade disputes will be handled by ITEDD, with its SADC desk serving as the focal point. All disputes, whether brought by a member state against South Africa or by a South African entity against another member state should be directed via ITEDD's SADC desk. At present, industry in general is not aware of this and ITEDD and the DTI need to improve communication with stakeholders to ensure that the right procedure will be followed. As with all other disputes, ITEDD will require inputs from other divisions and/or departments as may be necessary to determine the facts of the matter and may even include staff from those divisions and/or Departments in the consultation team in cases where the issues are technically complex.

3 Conclusion and Proposals

Currently, the South African Government does not have the necessary capacity or skills internally to initiate dispute settlement against another Member nullifying or impairing its rights under the WTO Agreements, or to defend disputes lodged against South Africa. Such capacity and skills do exist in the private sector, but it is unclear whether or to what extent the South African Government would be willing to make use of such private sector capacity, especially where such capacity relates to ex-civil servants.

There are no clear procedural guidelines for dealing with trade disputes. Although in theory the Mission in Geneva should inform the WTO desk of ITEDD of all disputes lodged against South Africa, in practice this has not happened as the Mission is understaffed. It has also been shown that although ITEDD should take overall responsibility for all trade disputes, to date, ITAC has assumed that role in most cases, often not even informing ITEDD of the action taken. Likewise, there are no guidelines for lodging trade disputes with government. Although this paper has shown that any request for a dispute should be lodged with ITEDD, there is little or no public awareness of this fact. In addition, considering that lodging and proceeding with dispute settlement can be very expensive, it is highly unlikely that the South African Government will proceed with lodging a dispute on behalf of an affected industry unless the industry provides at least a substantial part of the resources and capacity. Even then, it is submitted that South Africa will first determine whether any such dispute might be detrimental to its political agenda, e.g. the negotiation of a FTA, regardless of the effect on the industry.

In view of the above it is submitted that South Africa should embark on an exercise to increase its international dispute settlement skills level. This can be done either by working with private sector experts and through training programmes, or by joining disputes as a third party or both. In addition, considering its economic position it is clear that South Africa has a significant role to play in building regional capacity. However, this can only be done if South Africa itself has proper procedures in place. It is therefore proposed that the DTI set up proper procedures to (a) stipulate how any trade disputes against South Africa will be defended and (b) how the private sector can approach the government to consider the possibility of lodging an international trade dispute. These procedures should include the following:

- (a) Increasing the capacity of the Mission in Geneva to ensure that all dispute settlement meetings in the WTO are monitored and to give the necessary

- feedback to the WTO desk at ITEDD, regardless of whether the dispute directly involves South Africa. This is important as there may be disputes in which South Africa may have an interest and where it could join as a third party to gain the necessary trade dispute settlement experience and expertise;
- (b) Ensuring that all spheres of government are made aware of the fact that ITEDD has the primary responsibility for dealing with trade disputes and that all stakeholders have to work with or through ITEDD in resolving any such disputes;
 - (c) Embarking on a public or stakeholder awareness programme to ensure that all stakeholders not only understand their rights as regards trade disputes, but are aware of the relevant procedures. This includes:⁵³
 - (i) the person(s) at ITEDD with whom to lodge any complaints;
 - (ii) admissibility of complaints, i.e. when may a complaint be lodged and the information required to do so;
 - (iii) eligibility for lodging a complaint; and
 - (iv) the basis on which ITEDD will determine whether to proceed with a formal dispute.
 - (d) The use of private sector experts to assist in developing the necessary arguments to defend or lodge a trade dispute.

It is submitted that once these guidelines are in place and are followed, and provided use is made of the extensive available pool of private sector skills and expertise, South Africa will be in a position to properly and effectively engage in international trade dispute resolution, both as complainant and as defendant, and to assist in building regional capacity in the field.

Endnotes

- ¹ Understanding on Rules and Procedures Governing the Settlement of Disputes.
- ² For recent papers on Africa's experience with international trade dispute resolution see Maonera (2006) and Ng'ong'ola (2005).
- ³ The two official disputes are first discussed in chronological order, followed by the unofficial dispute by the European Commission and subsequently the requests by the domestic industry and the European Commission, respectively, for South Africa's involvement in disputes. These disputes all followed the same, it is submitted incorrect, procedures. The unofficial dispute lodged by Australia against South African automotive industry subsidies, which is also the most recent dispute, is discussed last as it is submitted that this is the only case in which the correct methodology was followed.
- ⁴ Although decreasing in importance, South Africa was still the world's largest gold producer at 296 metric tones (world total 2,518 metric tones) in 2005. See www.goldsheetlinks.com/production.htm (10 December 2006). It has 40% of the world's proven reserves and gold exports contributed 37% of its total export earnings in 2005 – www.mbendi.co.za/indy/ming/gold/af/sa/p0005.htm (10 December 2006).
- ⁵ South Africa is the fifth largest producer of diamonds by volume (15.2 million carats, with world production at 160 million carats), yet it was the third largest producer by value (US\$1.61 billion of US\$13.4 billion) in 2005. See www.diamineexplorations.com/web/index.php?id=147 (10 December 2006).
- ⁶ South Africa produces 25,000 tons of the world's 60,000 tons annual output and has more than 50% of the world's total proven reserves – www.mbendi.co.za/indy/ming/vand/af/sa/p0005.htm (10 December 2006).
- ⁷ South Africa produces 50% of total world production of platinum and palladium and has 55% of total proven reserves – www.mbendi.co.za/indy/ming/plat/af/sa/p0005.htm (10 December 2006).
- ⁸ South Africa is the largest manganese producer in the world and has 80% of total proven reserves – www.mbendi.co.za/indy/ming/mang/af/sa/p0005.htm (10 December 2006).
- ⁹ South Africa produces 70% of total world production and has 75% of total proven reserves – www.mbendi.co.za/indy/ming/chrm/af/sa/p0005.htm (10 December 2006).
- ¹⁰ Note that the negotiations with the US have stalled.
- ¹¹ GATT (1958) 14 indicates that South Africa conducted 211 of the 420 anti-dumping and countervailing investigations undertaken worldwide between 1948 and 1958. See Brink (2002) 3 and De Lange (2003) 2 for comprehensive data on the period 1921 to 2002, and Table 1 for the period up to 2005.
- ¹² Note that there is a discernible time lag between the strengthening of the South African rand and the initiation of an increased number of anti-dumping investigations, as the injury caused by cheap imported goods must first be experienced in the market before an application can be compiled. However, as soon as the exchange rate weakens, many applications in the process of being prepared are scrapped, indicating a closer link between a weakening exchange rate and the decreased number of investigations initiated.
- ¹³ *South Africa – Anti-Dumping Duties on Imports of Certain Pharmaceutical Products from India* WT/DS168/1 (13 April 1999).
- ¹⁴ *South Africa – Definitive Anti-Dumping Duties on Blanketing from Turkey* WT/DS288/1 (15 April 2003).
- ¹⁵ Pronounced 'I-Ted'.
- ¹⁶ Note that ITEDD accepted full responsibility for consultations as regards the Motor Industry Development Plan (MIDP) challenge raised by Australia, but only after the International Trade Administration Commission (ITAC) refused to accept responsibility for the matter.
- ¹⁷ Pronounced 'I-Tack'. As Customs and Excise are responsible for the collection of all customs duties, including anti-dumping duties, it should be involved from the start in all disputes involving any customs duties.
- ¹⁸ *SA – Pharmaceuticals*, supra footnote 13.
- ¹⁹ Note that at the time investigations were still conducted by the Board on Tariffs and Trade. The Board was superseded by ITAC on 1 June 2003.
- ²⁰ *Ranbaxy Limited v Chairman, Board on Tariffs and Trade* (Unreported Case 659/98 T).
- ²¹ Anti-dumping duties were also imposed against Hong Kong, India and South Korea.
- ²² See the discussion infra in this paragraph.
- ²³ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.
- ²⁴ *SA – Blanketing*, supra note 14.
- ²⁵ Dr. Edwin Vermulst informed the author in his then-capacity as Director of Trade Remedies Policy of the request for consultations.

²⁶ Note that the author was the Director of Trade Remedies Policy, Coordination and Public Liaison from December 2001 to August 2004 and that this information falls within his personal knowledge. No documentation, other than Turkey's request for consultations, is available.

²⁷ Ms. Yelda Ünal.

²⁸ Mr. Ömür Kizilarslan.

²⁹ Note that these facts also fall within the personal knowledge of the author in his then-capacity as Director: Trade Remedies Policy.

³⁰ Then still the Board on Tariffs and Trade.

³¹ Note that the EC request for formal consultations with the US was first lodged on 3 October 2006. See WTO *United States – Laws, Regulations and Methodology for Calculating Dumping Margins* (“Zeroing”) WT/DS294/R (31 October 2005) par 1.1. The request for the establishment of a panel was lodged on 5 February 2004 – *ibid* par 1.2.

³² This request was addressed to the Director of Trade Remedies Policy, who referred the request to the Chief Commissioner.

³³ At the time South Africa, as part of SACU, was involved in FTA negotiations with the US.

³⁴ WTO *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather* WT/DS126/R (25 May 1999).

³⁵ Committee on Subsidies and Countervailing Measures.

³⁶ Note that government has indicated that some of these proposals will be implemented from 2007.

³⁷ However, a formal complaint should have been notified to ITEDD via the Mission in Geneva.

³⁸ Discussions were also held with the automotive industry, including specifically the leather seat manufacturers.

³⁹ WTO (2001) *Accession of the People's Republic of China* WT/L/432 (23 November 2001).

⁴⁰ Note that the application was also deficient in certain respects.

⁴¹ See Brink (2006) for a detailed analysis of the effects of the MoU.

⁴² Major concerns include that there is not clarity on how the products subject to quotas were determined, how the size of the quotas was determined, the short lead times to the application of the quotas, the duration of the quotas.

⁴³ See Brink (2006) for a detailed analysis of the costs of the MoU to South Africa and South African industry.

⁴⁴ Note that this does not mean that there are no skilled people left in government. People such as Xavier Carim, Chief Director and South Africa's chief negotiator in FTA and PTA negotiations, remains with ITEDD, as do several of his long-serving staff members.

⁴⁵ Note that neither the legal services unit, nor the policy unit existed at the time author left the employment of ITAC, indicating the lack of opportunity to institutionalise trade dispute settlement skills.

⁴⁶ ITAC's jurisdiction only extends to customs tariffs and import and export control, i.e. to only part of the regime governing trade in goods. It does not cover trade in services, trade related aspects of intellectual property rights or trade related investment measures, nor the full spectrum of trade in goods. In addition, ITAC has done very little to promote public awareness of what it has to offer and of its instruments.

⁴⁷ See e.g. the article *State 'no longer takes Nedlac seriously'* in the Mail and Guardian of 20/09/2005, available at www.mg.co.za/articlePage.aspx?articleid=251455&area=insight/insight_national (09/12/2006).

⁴⁸ Thinus Jacobsz (private consultant); Danie Jordaan (previous chairperson of the Board on Tariffs and Trade and now a private consultant on trade negotiations), Colin McCarthy (previous chairperson of ITAC, current Tralac associate), and Attie Swart (Department of Agriculture).

⁴⁹ See e.g. Blumberg (1996) *South Africa* in Steele (ed.) *Anti-Dumping under the WTO: A Comparative Review* 213-226 (Kluwer Law International: London); Booysen (1995) *The World Trade Organization and the Dispute Resolution* (Unpublished LLM Treatise, Georgetown University, Washington, D.C.); Brink (2002); Brink (2004); Brink and Kobayashi (2006) *Anti-Dumping in South Africa* in Nakagawa (ed.) *Antidumping Laws and Practices of the New Users* (Cameron May: London); De Lange (2003); Steinhauer (1998) *South Africa* in Santos (ed.) *The Compendium of Foreign Trade Remedy Laws* 275-287 (American Bar Association: United States); Zunckel (2005) *The African Awakening in United States – Upland Cotton* Vol. 39:6 *Journal of World Trade* 1071-1093. See also the various trade briefs and working papers published by Tralac (available at www.tralac.org).

⁵⁰ This does not imply that the government should not use Geneva-based lawyers, but only that as much of the preparations as possible should be done in South Africa to minimise costs and at the same time to build expertise in the region.

⁵¹ See Maonera (2006) 32-33 for a more detailed discussion.

⁵² Note that this does not preclude any Member State from pursuing dispute settlement via the WTO.

⁵³ See Maonera (2006) 11-21 and 34-39 for a more in-depth discussion on how the process could work.

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