

The end of the Multifibre Agreement: A case study of South Africa and China

By

Melissa Chantel Kruger

20086520

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ABSTRACT

The Multifibre Agreement ("MFA") regulated textile trade until 1 January 2005. It was predominantly focused on curtailing textile exports from developing countries, like South Africa and China. With the end of the MFA, a textile crisis occurred in South Africa due to the domination of the domestic market by more affordable Chinese textile products. This case study is applied to illustrate the inadequacy of domestic legislation to provide for the resolution of an international trade dispute that affects an industry. No legislation refers to the resolution of the trade dispute by entering into a Memorandum of Understanding ("MOU"), or recourse to the neutral dispute settlement body of the World Trade Organisation ("WTO"). Due to the absence of legislation that directly addresses either forum, all the power is vested in the government to determine the appropriate course of action. Applications brought by textile industry representative bodies like TEXTFED, CLOTRADE and SACTWU were inadequately investigated due to the limited powers of the independent investigative body, ITAC, and were ultimately abandoned. The government entered into a MOU with the Chinese government and in doing so violated international agreements, rights and obligations. An analysis of the inadequacy of the MOU that was entered into and the suitability of the WTO as dispute settlement body is conducted. It is concluded that the current legislation is inadequate in that it doesn't provide for recourse to the WTO and in that it doesn't clearly set out the obligations on government and the independent powers of an independent body.

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ENGLISH EXTRACT

In the globalised age we are living in, more international trade participants are entering into contracts or partnerships with parties often situated across borders. Companies are infiltrating new markets, often located in other countries, or investing in a foreign countries' infrastructure or products.¹ Trade between nations, spanning over various industries, is the norm.² As parties continue to trade on an international basis with increasing frequency, the frequency of disputes on an international level will also escalate.

While the International Trade Administration Act³ used to suffice with regard to dealing with international trade disputes domestically by referring parties to the independent International Trade Administration Commission ("ITAC")⁴ for investigation and advice,⁵ it did not keep pace with the ever-changing face of international trade and its' subsequent disputes that often had an impact on an entire industry or country.

Similar in this regard, is the Customs and Excise Act⁶ that only provides for the implementation of tariffs, customs and excise duties as methods to regulate imports and

1 Dreher *Measuring Globalisation* 5.

2 Balassa *Trade Between Developed and Developing Countries* 8.

3 71 of 2002.

4 Who in turn investigated the complaint and referred it to the Ministers of Trade and Industry and Finance.

5 Anon International Trade Administration Commission of Southern Africa Date Unknown <http://www.itac.org.za/>.

6 91 of 1964, as amended.

international trade.⁷ Neither of these Acts consider, facilitate nor refer to potential recourse to an international body specifically created with the object of administering international trade disputes between countries, like the World Trade Organisation ("WTO").⁸

The WTO is the ideal, impartial body to administer such disputes, as it has created a Dispute Settlement Body ("DSB") and Appellate Body ("AB") to hear, investigate and make a ruling in such matters.⁹ In this regard the Acts are of limited assistance with regard to setting out guidelines or proceedings pertaining to recourse to the WTO.¹⁰

When trade between countries reaches such a level that it becomes problematic¹¹ for a specific industry and both countries are signatories to the WTO, the most appropriate next step¹² would be for the one country to request consultations¹³ with the opposing country, under the neutral

7 The implementation of a duty or tariff might not necessarily be the best method to regulate trade or address a trade dispute, but the Act doesn't provide sufficiently for a variety of methods.

8 *Scaw Wire and Strand, a division of Scaw Metals SA, (Pty) Ltd v National Union of Metal Workers Union of South Africa and Others* (J32/2011) [2011] ZALCJHB 47.

9 Hudec *The new WTO Dispute Settlement Procedure* 15.

10 The cases of *Scaw Wire and Strand, a division of Scaw Metals SA (Pty) Ltd v National Union of Metal Workers Union of South Africa and Others* (J32/2011) [2011] ZALCJHB 47, *Progress Office Machines v SARS* 2008 2 SA 13 (SCA) and the *International Trade Administration Commission v SA tyre Manufacturers Conference* (738/2010) [2011] ZASCA 137 all confirm that ITAC's powers are limited to that of an investigative and advisory domestic body, and that, failing the incorporation of WTO law into national legislation, no individuals, manufacturers, or industries can rely on the international trade dispute resolution mechanisms as provided for by the WTO.

11 For example where the imports from one country stifles the domestic market.

12 While international arbitration proceedings are useful in international investment or commercial disputes, it will not be the appropriate forum where trade from a specific country impacts on an entire industry or where it violates a country's commitment or obligation under the WTO.

13 WTO Secretariat 2010 <http://www.wto.org/>.

auspice of the WTO.¹⁴ The WTO's main function is to effectively deal with the global rules of trade between nations and to ensure that trade flows as smoothly, predictably and freely as possible.¹⁵ Once a country, like South Africa, becomes a signatory to the WTO, it becomes a signatory to the WTO Agreements from which certain rights and obligations are derived. In the event that one signatory country believes that a right that it has under one of the WTO Agreements is being infringed upon by another signatory country, the first country will be entitled to dispute settlement proceedings and potential safeguard measures under the watchful eye of the WTO's DSB and AB.¹⁶

The case study of textile trade¹⁷ between South Africa¹⁸ and China¹⁹, both countries being signatories to the WTO, is one that clearly illustrates an example of an international trade dispute, covered by the WTO Agreements, where the lack of an adequate legal domestic framework and contrasting policy decisions prevented the dispute from being settled timeously and in line with both parties' rights and obligations under the WTO. It will be concluded that the current legal framework is inadequate when faced with an international trade dispute of this magnitude and

14 A dispute will qualify for WTO dispute settlement if one member government believes another member government is violating an agreement or a commitment that it has made in the WTO.

15 Hoekman *The WTO: Functions and Basic Principles* 41-42.

16 As governments participate in WTO dispute resolution, an industry, like the South African textile industry, will have to bring a complaint to the WTO with the support of government. As the international agreements to which the South African government is a signatory, has not been incorporated into domestic legislation, an industry or individual cannot derive any rights from it, WTO Secretariat 2010 <http://www.wto.org/>.

17 After the end of the Multifibre Agreement.

18 South Africa acceded to the WTO in 1995.

19 China acceded to the WTO in 2001.

government's wide discretion in this regard will also, with reference to case law, be analysed.

AFRIKAANSE UITTREKSEL

Na die einde van die Multitekstiel-Ooreenkoms: 'n Gevallestudie van Suid-Afrika en Sjina

In die geglobaliseerde era waarin ons leef, tree talle deelnemers aan internasionale handel in kontrakte of vennootskappe met partye wat dikwels trans-nasionaal geleë is. Maatskappye infiltreer nuwe markte wat dikwels in ander lande gevestig is of investeer in buitelandse infrastruktuur.²⁰ Die dryf van handel tussen lande, oor verskeie industrieë heen, is die norm.²¹ Soos wat partye toenemend handel dryf op internasionale vlak, neem internasionale dispute ook toe.

Alhoewel die Internasionale Handelsadministrasie Wet²² geskik is vir die plaaslike beslissing van internasionale geskille deur voorsiening te maak vir die verwysing van partye na die onafhanklike Internasionale Handelsadministrasie Kommissie ("IHK")²³, het dit nie tred gehou met die veranderende aard van internasionale handel

20 Dreher *Measuring Globalisation* 5.

21 Balassa *Trade Between Developed and Developing Countries* 8.

22 71 of 2002.

23 Die Kommissie het 'n ondersoekende en adviserende bevoegdheid. Indien gevind word dat daar meriete in die klag is, word dit verwys na die Ministers van Handel en Nywerheid en Finansies.

en die gepaardgaande dispute, wat dikwels 'n impak op 'n totale bedryf, of land het nie.

Soortgelyk in hierdie verband is die Doeane en Aksynswet²⁴ wat slegs voorsiening maak vir die implementering van tariewe, doeane en aksynsbelasting, as metodes wat gebruik kan word om invoer te beperk en internasionale handel te reguleer.²⁵ Nie een van hierdie wette oorweeg, fasiliteer of verwys na 'n internasionale liggaam, soos die Wereldhandelorganisasie ("WHO"); wat spesifiek daargestel is met die doel om internasionale handelsdispute tussen lande te besleg, nie.²⁶

Die WHO is die ideale, neutrale liggaam om internasionale handelsdispute te besleg, aangesien dit 'n Dispuutsbeslegtingsliggaam ("DBL") en Appélliggaam ("AL") geskep het om dispute aan te hoor, te ondersoek en 'n beslissing te maak.²⁷ In hierdie opsig is die voorafgenoemde Wette van beperkte hulp ten opsigte van die uiteensetting van riglyne of prosedures aangaande verwysing na die WHO.²⁸

24 91 of 1964, soos gewysig.

25 Die implementering van doeane- of aksynsbelasting is nie noodwendig die beste metode om handel te reguleer of om 'n handelsdispuut aan te spreek nie, maar die Wet skryf nie na behore voor ten opsigte van verskeie metodes nie.

26 *Scaw Wire and Strand, a division of Scaw Metals SA (Pty) Ltd v National Union of Metal Workers Union of South Africa and Others* (J32/2011) [2011] ZALCJHB 47.

27 Hudec *The new WTO Dispute Settlement Procedure* 15.

28 Die sake van *Scaw Wire and Strand, a division of Scaw Metals SA (Pty) Ltd v National Union of Metal Workers Union of South Africa and Others* (J32/2011) [2011] ZALCJHB 47, *Progress Office Machines v SARS* 2008 2 SA 13 (SCA) en die *International Trade Administration Commission v SA tyre Manufacturers Conference* (738/2010) [2011] ZASCA 137 bevestig dat IHK se bevoegdhede beperk is tot dit van 'n ondersoekende en adviserende plaaslike liggaam en dat geen individu, vervaardiger of bedryf op die dispuutbeslegtings meganismes van die WHO kan aanspraak maak, totdat dit in nasionale wetgewing neergele is nie.

Wanneer handel tussen lande so 'n vlak bereik dat dit problematies²⁹ word vir 'n spesifieke bedryf en beide lande is ondertekenaars en lidlande van die WHO, is die doeltreffendste volgende stap³⁰ vir een land om 'n "versoek tot konsultasie"³¹ te rig tot die opponerende land, onder die neutrale vaandel van die WHO.³²

Die WHO se hoof funksie is om effektief te handel met die wêreldwye handelsreëls tussen lande en om te verseker dat handel voorspelbaar en probleemvry vloei.³³

Sodra 'n land, soos Suid-Afrika, 'n lidland van die WHO word, word dit ook party tot die WHO Ooreenkomste waaruit sekere regte en verpligtinge voortspruit.

In die geval waar 'n lidland oortuig is dat 'n reg voortspruitend uit 'n WHO Ooreenkoms benadeel word deur 'n ander lidland, sal eersgenoemde geregtig wees tot dispuutbeslegtingsprosedures en moontlike veiligheidsmaatreëls onder die wakende oog van die WHO se DSB en AB.³⁴

29. Byvoorbeeld waar die invoer van een land na 'n ander die mark in laasgenoemde onderdruk.

30. Internasionale arbitrasie-prosedures is bruikbaar in gevalle van gewone internasionale investeringsdispute of kommersiele dispute, maar dit is nie die geskikte forum waar handel vanaf 'n spesifieke land so 'n impak het op 'n hele bedryf of waar dit teenstrydig is met 'n land se verpligtinge onder die WHO Ooreenkomste nie.

31. WTO Sekretariat 2010 <http://www.wto.org/>.

32. 'n Dispuut sal kwalifiseer vir WHO dispuutbeslegting indien een lidland glo dat 'n ander lidland nie 'n verpligting gemaak in terme van WHO Reg, eer nie.

33. Hoekman *The WTO: Functions and basic principles* 41-42.

34. WTO Sekretariat 2010 <http://www.wto.org/>.

Die betrokke studie van tekstielhandel³⁵ tussen Suid-Afrika³⁶ en Sjina³⁷, beide lidlande van die WHO, is een wat duidelik dien as voorbeeld van 'n internasionale handelsdispuut, gedek deur die WHO Ooreenkomste, waar die gebrek aan 'n plaaslike regsraamwerk en kontrasterende beleidsbesluite verhoed het dat die dispuut spoedig en in lyn met beide se regte en verpligtinge onder die WHO opgelos is.³⁸

In hierdie bespreking sal ondersoek word of die regering 'n te wye diskresie het wanneer internasionale handelsdispute ondersoek moet word. Daar sal geïllustreer word dat die huidige regsraamwerk nie na behore voorsiening maak vir die oplossing van 'n handelskrisis van hierdie aard nie.

35 Na die eiende van die Tekstiel-ooreenkoms.

36 Suid-Afrika het toegetree tot die WHO in 1995.

37 Sjina het toegetree tot die WHO in 2001.

38 Alhoewel die verteenwoordigende vakbonde aansoeke gebring het in die hoop om die saak voor die WHO te bring, het die regering besluit dat dit nie in die beste belang van die handelsverhouding sou wees nie. Aangesien die regering, as verteenwoordiger van die staat, die lidland tot die WHO is, kan industrieë nie individuele aansoeke voor die WHO bring nie en is hulle absoluut afhanklik van 'n staatsbesluit in die verband.

List of abbreviations

ATC	Agreement on Textiles and Clothing
DSU	WTO's Dispute Settlement Understanding
dti	Department of Trade and Industry
GATT	General Agreement on Tariffs and Trade
ITA	International Trade Administration Act 71 of 2002
ITAC	International Trade Administration Commission
IHK	Internasionale Handelsadministrasie-kommissie
MFA	Multifibre Agreement
MOU	Memorandum of Understanding
PAJA	<i>Promotion of Administration of Justice Act 3 of 2000</i>
UN	United Nations
WHO	Wêreldhandelsorganisasie
WTO	World Trade Organisation

KEYWORDS

Apparel

China

Clothing

International Agreement

International trade

International trade dispute

Memorandum of Understanding (MOU)

“Most Favoured Nation” Status

Quotas

South Africa

Textile

World Trade Organisation (WTO)

Introductory table

Chronology of significant events

Date	Event
1947	Establishment of GATT
1948	GATT becomes operational
1974 - 1994	Multifibre Arrangement
1986 - 15 December 1993	The Uruguay Round is held wherein negotiations regarding the integration of textiles and apparel into GATT is included for the first time
1 January 1995	South Africa's accession to the WTO [after previously being signatory to GATT]
1 January 1995 - 2004	WTO Agreement on Textiles and Clothing
1995 - 2010	More than 120 000 job losses in the textile industry
1 January 2005	Multifibre Agreement officially ends
2007	dti introduces a quota system on Chinese imports
2008	No extension – phasing out of quota system
2009	ITAC raises import duties on clothing and textile tariff lines to their bound rates
2010	Dti launches the Clothing and Textile Customised Sector Programme

Multifibre Agreement

1 Introduction and problem statement

In the globalised age of the late 20th and early 21st centuries, the world entered a new, fast-paced era of growing international trade. Where before global trade was dominated by the developed, or so-called North-North,³⁹ trade, developing countries stepped into the ring, fists raised, poised for the fight.

With an often unmatched advantage in natural resources and large populations compliant with working for low wages, the developing world had the potential to dominate.⁴⁰ Areas of choice focused mainly on the primary markets and included agriculture, mining and textiles. Fearful⁴¹ of the looming boom in the developing world, the developed countries, under the auspice of the international community, decided to enforce stricter regulations⁴² in the international arena for primary and introductory secondary products.⁴³

The Agreement on Textiles and Clothing (or the Multifibre Agreement, hereinafter referred to as "MFA") regulated the legal framework of the textile and clothing industry for the period of 1974 to 2004 by imposing quotas on textile exports from developing countries.⁴⁴

39 Kacowicz *Globalization, Poverty and the North-South Divide* 1-35.

40 Nunnenkamp & Spatz *FDI and Economic Growth in Developing Countries* 19-21.

41 Developed countries were fearful that the developing countries, with their labour intensive products and low labour costs, would dominate their markets if developing countries' exports were to be unhindered.

42 Kalish *Quotas End, Uncertainty Continues* 3.

43 Kalish *Quotas End, Uncertainty Continues* 3; Michalopoulos *Developing Countries in the WTO* 1-278.

44 Mlachila & Yang *The End of Textile Quotas* 4-7.

The MFA expired on 1 January 2005 to encourage textile trade from developing countries.⁴⁵ The lifting of the quotas and tariffs on textile exports gave way to more export-focused strategies from developing countries.

While the existence of the MFA had hindered the developing world from participating fully in global textile trade, it had also provided a form of protectionism⁴⁶ against the expanding textile industries of their developing trade partners.⁴⁷

With the end of the MFA, a few developing countries emerged into the market with guns blazing, none more so than the People's Republic of China.⁴⁸

Torn between protecting the South African textile and clothing industry and advancing the trade relationship with other developing countries, like China, the South African government was sluggish in its reaction to the end of the MFA. One is forced to make this statement when faced with the contrasting policy decisions and the lack of guiding legislation that effectively deal with international trade law issues, such as the one encountered with the textile dispute.

The actions taken by the government, unprecedented though it was, illustrated an unwillingness to regulate trade under WTO law⁴⁹ and highlighted the problematic lack of knowledge to effectively deal with an issue such as this,

45 Naumann *The MFA – WTO Agreement on Textiles and Clothing* 5-8.

46 Bhagwati *Protectionism* 43.

47 See generally: Lamar *The Apparel Industry and African Economic Development*.

48 Strasburg *Flood of China-made Garments* 7.

49 Carmody *A Theory of WTO Law* 1-49.

under the watchful eye of the WTO's Dispute Settlement Understanding (hereinafter referred to as "DSU").⁵⁰

The root of the problem is that, at present, domestic legislation does not provide adequately for the resolution⁵¹ of international trade disputes as it doesn't set out clear guidelines, rules or regulations for government and complainants when resolving these disputes.

In this paper it will be determined what the legal position regarding the resolution of an international trade dispute⁵² is, by analysing the current South African legal framework, put in place to administer the resolution of such a dispute. Specific reference will be made to the textile dispute that arose in South Africa, after the end of the MFA.

To highlight the current *lacuna* in South Africa's legislation that caters for international trade disputes and how it came to be, this report will focus on a discussion of the Multifibre Agreement⁵³ which provided the global legal framework for textile sectors worldwide until 2005, a case study of China's infiltration of the liberalised South African market, the lack of legislation and regulation to handle an international trade dispute of this magnitude and the necessity of a legal

50 WTO Secretariat 2010 <http://www.wto.org>.

51 Either by resolving it through negotiations and detailing the outcome of negotiations in a Memorandum of Understanding, or by providing for recourse to an international body's dispute settlement mechanism, like the WTO's DSU.

52 Deardoff's *Glossary of International Economics* defines a trade dispute as: "Any disagreement between nations involving their international trade or trade policies. Today, most such disputes appear as cases before the WTO dispute settlement mechanism, but prior to the WTO, some were handled by the GATT while others were dealt with bilaterally, sometimes precipitating trade wars" as per Deardoff Date Unknown <http://www-personal.umich.edu/~alandear/glossary/>.

53 Which consisted of the Multifibre Arrangement under GATT and the Agreement on Textiles and Clothing under the WTO as per the WTO Secretariat 2010 <http://www.wto.org>.

framework that caters for recourse to the WTO's dispute settlement body.

2 The Multifibre Agreement⁵⁴

2.1 Introduction

The global trading system generated a spreading entanglement of trade restrictions on textile and material exports from the developing world. The focal point of these restrictions was to prevent the labour intensive developing countries from expanding their exports to the developed world.⁵⁵ These restrictions inevitably led to the MFA of 1974.

The MFA oversaw the export growth rate quotas in the Organisation for Economic Cooperation and Development (OECD) markets for an increasing and expansive group of developing country suppliers.⁵⁶

At the end of 2004,⁵⁷ the MFA was finally dismantled. It represented the end of the ten-year⁵⁸ implementation period⁵⁹ which had followed the Agreement on Textiles and Clothing ("ATC") and which had been concluded in 1994 as a part of the Uruguay Round.⁶⁰

54 Hereinafter referred to as the MFA.

55 Naumann *The MFA – WTO Agreement on Textiles and Clothing* 5-8; Mlachila & Yang *The End of Textile Quotas* 4-7.

56 Ernst *et al The end of the MFA* 3-4.

57 Chandrasekhar "Future of Textiles and Clothing".

58 The implementation period lasted from the end of 1994 to the end of 2004 as per WTO Secretariat 2010 <http://www.wto.org>.

59 Mlachila & Yang *The end of Textiles Quotas* 3-7.

60 Hall *China casts a giant shadow* 7.

To adequately understand the MFA that spanned over several decades, the first phase, known as the Multifibre Arrangement, needs to be discussed.

2.2 The Multifibre Arrangement

The first legal framework for global quotas in the textile and material apparel trade surfaced from both the short term and long term arrangements which were originally negotiated under the scope of the General Agreement on Tariffs and Trade (GATT of 1962).⁶¹

These short and long-term agreements were extended to a large variety of materials, in addition to cotton materials, and it became known as the Multifibre Arrangement of 1974.

The Multifibre Arrangement stated that the quantitative limitations on the import growth rates were applicable by product, as well as between pairs of the importing and exporting countries for a five-year period.⁶² This entailed restrictions on the amount of a certain textile product imported into a country, from another country, for a period of five years.⁶³

As such, a succession of Multifibre Arrangement country negotiations took place under an extensive legal framework and the different Multifibre Arrangement agreements followed in series as MFA1, MFA2, MFA3 and MFA4.⁶⁴

61 Kolben *Trade, Monitoring, and the ILO* 4.

62 Hall *China casts a giant shadow* 6-11.

63 An example of a restriction on the amount of a country's product would be, per example, if Greece would only be allowed to import 1 ton of woollen jerseys from Holland.

64 Mlachila & Yang *The End of Textile Quotas* 4.

The objective of the Multifibre Arrangement was to allow the developed world time to become accustomed to the aggressive and labour-intensive competition of the developing world's textile and material trade.⁶⁵

This arrangement provided protective safeguards to producers in the developed world from the producers in the developing world.

Relevant to the regulating framework provided by the Multifibre Arrangement, was several bilateral arrangements agreed to by developed countries like the United States of America and European Union countries, as well as developing countries like India, Bangladesh and China. The Multifibre Arrangement was only applicable to trade with developing countries and did not find application to trade between developed countries.⁶⁶

After providing regulation for a thirty year time period it was decided to phase out⁶⁷ the Multifibre Arrangement through the application of the ATC.⁶⁸

65 Dayaratna-Banda & Whalley *After the Multifibre Agreement* 30.

66 WTO Secretariat Discussion Paper 5 2009 <http://www.wto.org>.

67 During the Uruguay Round, 1986 until 15 December 1993, an agreement was reached to phase out the Multifibre Arrangement through the implementation of the ATC. The ATC attempted to put an end to the constant extensions of the MFA by agreeing to a phase out plan after which the textiles and apparel sectors would no longer be subject to quotas. The timetable set out by the ATC was for four stages, beginning in January 1995, ending in a full phase out in January 2005. The process set out two important aspects: firstly, the integration of products into the world trading system and, secondly, the progressive raising of quotas. As per The WTO Agreement, "The Uruguay Round: Final Act" Date Unknown www.wto.org/english/docs_e/legal_e/htm.

68 Naumann *The MFA – WTO Agreement on Textiles and Clothing* 20.

2.3 The Agreement on Textiles and Clothing

On 1 January 1995 the World Trade Organisation (WTO) started the ten year-transitional programme with the Agreement on Textiles and Clothing.⁶⁹

This Agreement was concluded as a component of the negotiations of the Uruguay Round.⁷⁰ It was agreed that the ATC would replace the Multifibre Arrangement by the implementation of a "phasing out" plan that focused on the elimination of the previous quotas. The "phasing out" plan was implemented in January of 1995 and was integrated in four stages over a ten year period and required the amalgamation of products into the international trading system as well as the progressive increase of growth rates in quotas.

As such, it can be assumed that the ATC supposedly operated with the objective of striving to advance the interests of the developing world which had previously been denied access to the protected markets of the developed world. The ATC opened previously closed doors to the developing world.

The ATC provided for the systematic integration of a fraction of the material, textile and apparel imports which had not previously been included in the restrictive Multifibre Arrangement quotas.⁷¹

69 Mlachila & Yang *The End of Textile Quotas* 7.

70 Martin & Winters *Uruguay Round and the Developing Countries* 3.

71 Goutam *The Role of the Textiles Monitoring Body* 3-4.

Furthermore, the ATC provided for safeguard measures that were to be used by developed countries in the event of liberalised imports disrupting, or proving to be a significant threat, to their domestic markets. If such conditions were to occur, the ATC allowed developed countries to impose new trade restrictions.⁷²

For example, the United States of America imposed 24 safeguard measures against 14 World Trade Organisation members within a few months of the implementation of the ATC. The eventual result was that the termination of the Multifibre Arrangement was postponed till January 2005.

An unfortunate consequence of the global legislative framework provided by the long-spanning Multifibre Arrangement was quota-hopping foreign investment.⁷³

Quota hopping foreign investment was seen as:

...moving production away from newly constrained to temporarily unconstrained countries and inefficiently proliferating clothing industries in more countries than would have been the case in the absence of the MFA.⁷⁴

As a result, quota hopping foreign investment was profoundly aimed at export processing zones in developing countries, like South Africa. When a country had exhausted their quotas they searched for countries that had not yet exhausted their quotas, and they invested in those countries with the object of benefitting from those quotas.

72 See generally: Sandrey *Trade and Economic Implications of the SA Restrictions Regime on Imports of Clothing from China*.

73 A hypothetical example of quota-hopping will be if one country exhausts its allowable quota export amount to another country, but then searches for another country that has not yet exhausted its allowable quota export amount to try and obtain those rights.

74 Whalley *Developing Countries in the Global Economy* 18.

Under the Agreement, many exporting developing countries have focused on the development of their individual quota allocation frameworks.⁷⁵

These individual legislative frameworks for domestic textile markets focused on a variety of eligibility criteria as well as the categorisation of the quotas. In each country the quotas that were allocated were divided into categories ranging from residual quotas⁷⁶ to basic⁷⁷ quotas. Generally, the main categories focused on basic quotas.⁷⁸

The historical exporting performance was studied to establish who the appropriate recipient of a basic or closed quota should be, while different criterion were used to allocate residual or open quotas to the latest quota applicants or the already existing quota applicants.⁷⁹

This form of quotas encouraged the transshipment of clothing, materials, textiles and apparel, to either allow for residual upgrading by adding components like buttons, or to allow for the falsification of claims of origin.⁸⁰

75 Nordas *The Global Textile and Clothing Industry* 27.

76 A residual quota is encountered when an industry is unable to import the entire quota of permitted volumes that could possibly lead to a request to obtain permission to import the entire quota of the permitted volume in a subsequent time period, as per FE Bureau 2011 <http://www.financialexpress.com/news/residual-quota--says-ATMA/820191/>.

77 A basic quota is a quota calculated according to a formula specified by law that usually takes into consideration a variety of factors, including, but not limited to, intended purchases by domestic manufacturers, average exports and reserve stock requirements, as per Nunnenkamp & Spatz *FDI and Economic Growth in Developing Countries* 19-21.

78 Raworth & Reif *The Law of the WTO* 163-166.

79 Smith *A Thread of Protectionism* 1-2.

80 Hall *China Casts a Giant Shadow* 12.

Companies wishing to make use of the unused quotas in another country would make use of the transshipment of the clothing, materials, textiles and apparel to falsely claim origin.

When looking at the available statistics for Chinese transshipment, it is claimed that Chinese textile exports worth \$10 billion were unaccounted for by the year 2000.⁸¹

The ATC provided a global legal framework for the phasing out of quotas and presented an opportunity for individual countries, like South Africa, to gradually adapt, amend or streamline legislation, regulations and trade bodies for the eventual end of the MFA. Unfortunately, during this time, more emphasis was placed by South Africa on the strengthening of trade relationships, especially with China.

After the "phasing out" plan was concluded on 1 January 2005, the MFA officially ended and the textile industry was no longer quota-regulated under the WTO. This implied that it was no longer acceptable under the WTO to implement quotas on the importing country as a mechanism to deter the importing of textiles.⁸²

Once again the government focused on bilateral trade negotiations with its' most prolific trade partners, China being one of them.⁸³

81. Martin *Comparing US and Chinese Trade Data* 2-3.

82. The imposition of tariffs was considered to be an acceptable method, as will be discussed later on.

83. China was ranked in 2010 as the world's second largest economy. In addition, it is credited as being the fastest-growing major economy at present. China is also the largest exporter and second largest importer of goods in the world. As China's global importance and standing has grown, so has its negotiating power when entering into bilateral, multilateral and plurilateral agreements as per United Nations, Secretary General Date Unknown <http://www.un.org/>.

3 China as a trading partner⁸⁴

3.1 Introduction

For many decades now, the South African government has been concentrating on cementing trade and economic ties with several countries in the Asian region, with particular emphasis on China.⁸⁵

In 1996 South Africa signed a bilateral trade agreement with China to extend most-favoured nation status.⁸⁶ This relationship has, through the years, evolved to entail much more than that.⁸⁷

China's economic growth rate has seen the country evolve to one of the global leaders.⁸⁸ This has caused many legal analysts to ponder China's international and regional intention and objectives, when viewed within a legal framework.⁸⁹ China is in the fortunate position to be geographically located ideally for trade with both the

84 Before addressing South Africa's rights and obligations under the WTO, it is imperative to understand the trading relationship of South with a developing country such as China, as rights and obligations have to be understood within a certain context.

85 Fauconnier "China – South Africa Economic and Trade Cooperation Seminar".

86 Background paper prepared for the "Fighting FTAs" international strategy workshop organised by FTA Watch in cooperation with bilaterals.org, GRAIN and MSF in Bangkok on 2006 <http://www.bilaterals.org/IMG/pdf/Overview.pdf>.

87 In addition, as both China and South Africa are WTO members, by implication, they are automatically obliged to accord each other MFN status. The awarding of the status requires that both countries should treat the other as fairly as they would another WTO member country. The relationship between these trade partners, however, goes further than MFN, as South Africa has continuously acted in the best interests of China, sometimes to the detriment of other countries, as per Department of International Relations and Cooperation 2010 <http://www.dirco.gov.za/foreign/bilateral> and Sandrey 2010 *Trade and Economic Implications of the SA restrictions regime on imports of clothing from China*.

88 Kalish *Quotas End, Uncertainty Continues* 3-7.

89 Hall *China Casts a Giant Shadow* 6-11.

developed and developing world.⁹⁰ Due to China's membership of the UN Security Council as well as its linkage with the developing world dating back to the Bandung Conference of 1955⁹¹, it shares a strategic alliance with both the developed and developing countries.⁹²

Over the years China has changed its foreign policy from confrontation to cooperation, from revolution to economic development, and from isolation to international engagement.⁹³ In addition, they have vastly benefitted from an untapped labour force and low wages "averaging from 15 to 86 cents an hour in the garment industry...".⁹⁴

In due course, China has begun capitalizing on its linkage with South Africa in the form of high-level official exchanges and trade.⁹⁵ It is argued by both legal and economic analysts that China sees Africa as a partner in the fulfillment of its strategic goals like energy, trade as well as geopolitical interests.⁹⁶

In 2008 South Africa exported R35 billion-worth of goods to China and imported R82 billion-worth of Chinese goods.⁹⁷ When exports and imports are viewed together, one could say that Asia⁹⁸ has taken over from Europe as South

90 Azara 2010 *China's Geographical Location: Challenges and Opportunities* <http://knol.google.com/k/khuda-dad-azara/china-s-geographical-location/>.

91 The Bandung Conference, a meeting of Asian and African countries in Bandung, Indonesia, between April 18 and April 24, 1955 as per Best et al *International History of the Twentieth Century* 58.

92 Best et al *International History of the Twentieth Century* 58.

93 Yan Xuetong *Ancient Chinese Thought, Modern Chinese Power* 312.

94 Moberg 2011 *Trading down* <http://www.thenation.com/article/trading-down>.

95 Chinese Embassy 2011 <http://www.chinaembassy.org.zw/eng/19685.html>.

96 Alden *China in Africa* 31.

97 Anon Date Unknown <http://www.dti.gov.za>.

98 In 2007 it was recorded that of all clothing imports, 89% originates from China, 3% from India and 8% from the rest of the world, as per Textile Federation 2009 <http://www.textfed.co.za>.

Africa's leading trading region.⁹⁹ It is clear that South African-Chinese trade is expanding and that the legal implications of the Chinese influence in the domestic market and the continued negotiations regarding a free-trade agreement, warrants closer attention.

3.2 The case of South Africa and China

3.2.1 The Textile Crisis

In a developing country, like South Africa, the textile and clothing industry (hereinafter collectively referred to as "the industry") provides an opportunity to industrialise in a sector with low value added goods.¹⁰⁰ The industry is very relevant and suitable to the economic climate in South Africa, as it is highly labour intensive and has the possibility of providing jobs for many unskilled workers.¹⁰¹

The industry in South Africa is currently facing a very difficult trading environment.¹⁰² Since 2003, employment has declined from 70 500, to below 50 500 in 2006.¹⁰³ Furthermore, a number of textile factories have been closed, eliminating the potential for future employment.

In March 2009 the textile trading environment was dealt another blow when Steardal's Frame Textiles, the largest textile producer in Southern Africa, collapsed, which resulted in the loss of a further 1400 direct jobs.¹⁰⁴ Currently textile job numbers stand below 40 000, despite

99 Zafar *The Growing Relationship* 103-130.

100 Hall *China Casts a Giant Shadow* 1.

101 Burns *Safeguarding SA's Clothing, Textile and Footwear Industries* 14.

102 Burns *Safeguarding SA's Clothing, Textile and Footwear Industries* 13-14.

103 Textile Federation 2009 <http://www.textfed.co.za>.

104 Anon *The Economist* 9-12.

investment in new equipment and new plants.¹⁰⁵ This vast decline stems from the importation of cheap Chinese textile and material goods, resulting in rising domestic costs and a confused legislative response.¹⁰⁶

The import of textiles and clothing has increased over all sectors.¹⁰⁷ Specifically, the importation of made up textiles¹⁰⁸ have increased from 4 900 tons in the year of 2001, to 28 700 in the year of 2006.¹⁰⁹ This constitutes an increase of an estimated 500% in made up textiles. The import of clothing has increased from 139 million tons in 2001 to a staggering 567 million tons in 2006. This 300% increase clearly illustrates the dominance of the domestic market by the international market.¹¹⁰

Previously, Europe, Taiwan and South Korea had exported textiles and clothing to South Africa, but since 2001, imports have chiefly originated from China. Of all the clothing and textile imports, 3% currently originates from India, 8% from Europe, Taiwan and South Korea and 89% from China. Of all made up textiles, which include bed sheets, blankets, curtains, towels and linens, 60% originate from China.¹¹¹

At the peak of the textile crisis, the cheap, mass-produced Chinese products entered a primarily liberalized¹¹² South African market unhindered and successfully steamrolled an

105 Textile Federation 2009 <http://www.textfed.co.za>.

106 Brink *Anti-dumping and Countervailing Investigations in South Africa* 23.

107 Burns *Safeguarding SA's Clothing, Textile and Footwear Industries* 67.

108 Being textiles that have been fashioned to be useful e.g. curtains or clothes.

109 Textile Federation 2010 <http://www.textfed.co.za>.

110 Brink *Anti-dumping and Countervailing Investigations in South Africa* 29.

111 Nordas *The Global Textile and Clothing Industry* 19.

112 Free from strenuous regulation.

entire industry, causing numerous factories to close and resulting in more than 120 000 job losses.¹¹³

3.2.2 The Reaction

Alarmed by the unexpected, unregulated and overwhelming influx from China, the industry's trade unions approached the South African government through the International Trade and Administration Commission¹¹⁴ (hereinafter referred to as "ITAC") and the International Trade and Economic Development Division¹¹⁵ (hereafter "ITEDD").¹¹⁶

The Textile Federation (hereafter "Texfed"), lodged an anti-dumping¹¹⁷ application citing the imported textile products from China and emphasising the inability of the domestic market to compete with the predatorily priced¹¹⁸ Chinese alternatives to their products.¹¹⁹ With the Chinese products

113 Vlok *The Textile and Clothing Industry in South Africa* 4.

114 ITAC was established as an investigative and advisory body, through an Act of Parliament, the *International Trade Administration Act 71 of 2002*, which came into force on 1 June 2003. The aim of ITAC, as stated in the Act, is to foster economic growth and development in order to raise incomes and promote investment and employment in South Africa and within the Common Customs Union Area by establishing an efficient and effective system for the administration of international trade subject to this Act and the Southern African Customs Union ("SACU") Agreement. The core functions are: customs tariff investigations; trade remedies; and import and export control. The ITA Act makes provision for a Chief Commissioner who serves as the Chief Executive Officer directly accountable to the Minister of Trade and Industry. The Chief Commissioner is assisted by a Deputy Chief Commissioner and a maximum of ten Commissioners who can be appointed to serve on a full-time or part-time basis.

115 ITEDD acts as a sub-division of the Department of Trade and Industry and addresses matters dealing with International Trade and Economic Development.

116 SACTWU Official press release 2006 <http://www.sactwu.org.za>.

117 Dumping can be defined as : "...The act of charging a lower price for a good in a foreign market than one charges for the same good in a domestic market, selling at less than fair value..." Under the founding agreements of the WTO, dumping is condemned if it causes or threatens to cause material injury to a domestic industry in the importing country, as per Raworth & Reif *The Law of the WTO* 111.

118 A product is predatorily priced if it is so priced that it grants an unfair advantage and is not priced at fair value as per a report compiled by the OECD 2011 <http://www.oecd.org/dataoecd/7/54/2375661.pdf>.

119 Textile Federation 2009 <http://www.textfed.co.za>.

priced so low, local producers struggled to compete as a consumer will always purchase the cheapest alternative.¹²⁰

In 2002 Clotrade initiated discussions with ITEDD regarding the imposition of safeguard measures against China. After failing to reach a successful solution, Clotrade¹²¹ lodged a request¹²² from their members for safeguards to be imposed against textiles imported from China in 2004.¹²³ After a further year of discussions, no progress had been made with the application and ITEDD had failed to open a formal investigation. As a result, Clotrade lodged a safeguard application¹²⁴ with ITAC in 2005 in terms of the *International Trade Administration Act*,¹²⁵ generally known as the ITA Act.¹²⁶ In addition, another union from the textile industry, SACTWU, also lodged a safeguard application¹²⁷ against China, with ITAC.¹²⁸

120 Dwivedi *Microeconomics* 313-314.

121 A textile industry union responsible for regulating both domestic clothing manufacturers as well as importers

122 With ITEDD in its capacity as investigative and advisory sub-division of the dti with the object of requesting ITEDD to investigate the possibility of imposing safeguards.

123 Brink *Who Wins?* 3.

124 A safeguard application is made with the object of obtaining assistance from government with regard to the implementation of safeguard measures, generally known as "emergency" actions, with respect to increased imports of particular products, where such imports have caused or threaten to cause serious injury to the domestic industry, as defined by the WTO in The Editorial Update of the Law and Practice of the World Trade Organisation 1995 www.wto.org.

125 71 of 2002.

126 Clotrade requested ITAC to consider the remedial action taken by the European Union and the United States of America against the surging imports from China. As such, Clotrade requested a negotiated position whereby specific hindrances were to be imposed on Chinese imports under Chapters 61 and 62 of the Harmonised System, which covers approximately 263 tariff lines.

127 The Applications were made in terms of ss 16 and 26 of the ITA Act. S 16 states that ITAC "must investigate and evaluate ...applications in terms of section 26 with regard to safeguard measures (and that)....(i) the Minister directs the Commission to consider; or (ii) the Commission considers on its own initiative". In addition, s 26 provides the following: "...may...apply to the Commission for...the imposition of safeguard measures other than a customs duty amendment".

128 Brink *Who Wins?* 4.

Predominantly all of these applications were based on the lack of adequate regulation and an adequate legal framework after the expiry of the MFA.¹²⁹

The South African government started to negotiate a textile, clothing and material sector program with the unions, vendors and manufacturers.¹³⁰ They abandoned the attempt in 2005 in favour of concluding a memorandum of understanding (hereinafter referred to as "MOU")¹³¹ with China.¹³²

While negotiating the MOU, interim solutions in the form of the Duty Credit Certificate Scheme¹³³ ("DCCS") and the subsequent Textile and Clothing Industry Development Programme ("TCIDP") were pursued.¹³⁴ Both of these incentive schemes were unsuccessful¹³⁵ as they were implemented and enforced on an *ad hoc* basis and, as the implementation was not continuous, industry exporters

129 ITAC's duty was merely to investigate and to advise government, government's discretion was so wide that it could choose whether to implement safeguard measures in the form of tariff and customs duties, no other methods were taken into consideration. As government was hesitant to implement strenuous safeguard measures, China was able to infiltrate a mostly unregulated, liberalised market; Herman *Textile Disputes and Two-level Games* 115-130.

130 The negotiations were conducted by dti as part of their industrial and economic developmental policies, according to the Parliamentary Monitoring Group Date Unknown <http://www.pmg.org.za/node/22545>.

131 Full discussion on MOU to follow below.

132 Burns *Safeguarding SA's Clothing, Textile and Footwear Industries*.

133 The DCCS was an incentive created specifically by government for the textile and clothing manufacturers to encourage them to compete internationally. The Scheme advocates specialisation in export products whilst the participating manufacturer's domestic product range can be broadened by importing additional goods duty free using a duty credit certificate.

134 Schemes implemented by government with the object of uplifting the textile sector and promoting exports, without regulating Chinese imports. Anon 2011 <http://www.dti.gov.za>.

135 In addition, in 2009, officials of SACU and the National Economic Development and Labour Council ("NEDLAC") decided to discontinue the incentive schemes in their present (at that time) forms.

could not plan future export strategies due to the legal uncertainty¹³⁶ regarding exports under the scheme.¹³⁷

With the signing of the MOU, the industry held its breath that it would represent a legally sound precedent that would be consistent with South Africa's rights and obligations under WTO law, while at the same time legally constituting the trade relationship under international economic law.¹³⁸

At this point it would be appropriate to address the legal nature and implications of a MOU.

3.2.3 The MOU

3.2.3.1 The legal nature of a MOU¹³⁹

The MOU, as a legal document, defines and describes the bilateral (or multilateral) agreement between the involved parties. The MOU expresses the parties' convergence of will which illustrates their unanimous and planned line of action. In such an instance, in order to decide whether a contract exists, one looks first for the agreement by consent of two or more parties.¹⁴⁰

136 As the scheme was continued on an *ad hoc* basis, the legal lapse of the scheme during a period of time would cause legal uncertainty regarding exports under the scheme.

137 Sandrey *et al Potential Export Diversification Study* 52.

138 Brink *Who Wins?* 10; If the parties had referred the dispute to the WTO's dispute settlement mechanism, a neutral solution on equal footing might very possibly have been obtained as the WTO body would have had to consider the accession protocol of both parties, as well as their international rights and obligations; WTO Secretariat 2011 www.wto.org.

139 United Nations Legal Department 2010 <http://untreaty.un.org>.

140 Christie *The Law of Contract in South Africa* 21.

Whether or not a document, like a MOU, constitutes a legally binding contract¹⁴¹, depends on the presence or absence of the well-defined legal elements in the text proper of the document. As such, if a MOU is to be considered to be a binding contract, it has to contain the mutual consideration of the parties which entails the legally enforceable rights and obligations of the parties. Furthermore, the MOU's formation has to take place free of the general defenses¹⁴² to a valid contract formation.¹⁴³

In the private law a MOU is often used as a letter of intent.¹⁴⁴ When used between governmental departments or between the different departments in a company, or between closely held or affiliated companies, the MOU is generally used to define the inter-party relationships. The MOU in public international law is often used as a legal instrument in international relations where it falls under the expansive category of treaties.¹⁴⁵ As such it should be registered in the United Nations Treaty Databasis.¹⁴⁶

In practice it is sometimes found that MOU's are kept confidential, even though the UN's Legal Section stipulates that it should be registered in order to prevent "secret diplomacy".¹⁴⁷

When determining if a MOU is legally binding¹⁴⁸ under international law, it has to be determined if it is meant to be legally binding with regard to the intent of the parties, as

141 Murray *Murray on Contracts*.

142 Per example: duress, fraud, lack of mental capacity or age.

143 *International Court of Justice Qatar v Bahrain* 1994.

144 *Valof Letters of Intent*.

145 *International Court of Justice Qatar v Bahrain* 1994.

146 Chapter XVI *Charter of the United Nations*; to promote transparency in international trade policy.

147 Chapter XVI *Charter of the United Nations*.

well as the position of the signatories. The precise wording of the MOU also needs to be studied to determine the nature of the document.¹⁴⁹

The general advantage of a MOU is that it can be put into effect without parliamentary approval, due to the fact that the traditional obligations under international law may be avoided. As such, MOU's are commonly used to alter current treaties, which implies that the MOU will have factual treaty status.¹⁵⁰

When ratifying a MOU, notice should be taken of the signatory's domestic law as well as the subject of the agreement. If a MOU is not registered with the United Nations, it can not be enforced before an organ of the United Nations.¹⁵¹

3.2.3.2 The legal nature of a MOU in the South African context

Legal text and literature pertaining to the requirements and proper interpretation of a MOU is scarce in a South African context. When analysing the characteristics of a MOU, it appears to resemble that of a "gentleman's agreement."¹⁵²

148 *International Court of Justice Qatar v Bahrain* 1994.

149 United Nations Legal Department 2011 <http://untreaty.un.org>.

150 McNeill *International Agreements* 1994. If an MOU is utilised to amend or update a treaty, the implementations incorporated into the treaty, will have factual treaty status.

151 Article 102 of the Charter of the United Nations states the following: "...Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it...No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations...".

152 When applying the characteristics of a gentleman's agreement that includes, *inter alia*, trust, understanding, moral and ethical obligation, as per *Siyepu and Others v Premier of the Eastern Cape* [2011] ZAECBHC 8.

A MOU in a South African context can be equated to a "gentleman's agreement" in that it presupposes a relationship of trust, or an arrangement or understanding which is based upon the trust of both or all parties, rather than being legally binding.¹⁵³ By breaching such an arrangement, a party might be guilty of breaching a moral or ethical duty, without necessarily breaching an enforceable legal obligation.¹⁵⁴

If South Africa enters into a MOU with another country, like China, it will effectively be entering into a relationship based solely on trust. As there is no domestic legislation dealing directly with MOU's in such an instance, or even referring to it in brief, it will be impossible to test such a MOU against legislation. In addition, this will hinder the testing of the terms of a MOU against domestic administrative procedures and against the Constitution. As WTO law provides for the legal status of MOU's, we would be better able to test a MOU against the WTO Agreements. To illustrate this, the MOU between South Africa and China will be discussed, in light of the WTO Agreements.

3.2.3.3 The MOU between South Africa and China

The MOU between South Africa and China made provision for the textile, material and apparel trading relationship between South Africa and China. The MOU¹⁵⁵ was signed

153 *Thompson v South African Broadcasting Corporation* 2001 3 SA 746 SCA.

154 *De Wet & Van Wyk Kontraktereg en Handelsreg* 4-5.

155 *South African Revenue Service (2006) Custom and Excise Act, 1964. Amendment of Schedule No. 10 (No. 10/6): Memorandum of understanding between the government of the Republic of South Africa and the Government of the Peoples Republic of China on promoting bilateral trade and economic cooperation. Government Gazette 29185 and Department of Trade and Industry (2007) Import*

between the governments of South Africa and China in August of 2006. This Agreement stipulated that there were 31 tariff lines at different levels of the HS Classification¹⁵⁶ which were targeted.

Under the MOU, Chinese clothing and textiles were subject to South African quotas for an eighteen-month period. As the attempted protection offered to the industry came in the form of quantitative restrictions, many reasoned that, as both South Africa and China are signatories¹⁵⁷ to the WTO, the restrictions were contrary to South Africa's commitments under WTO law.¹⁵⁸

In addition, and apart from the fact that the South African government chose not to comply with its specific obligations under WTO law, the government chose to waive specific rights¹⁵⁹ granted to South Africa under China's WTO Accession Protocol.¹⁶⁰

Section 16 of the Accession Protocol¹⁶¹ concentrates on transitional product-specific safeguard mechanisms, which are relevant for the protection of the clothing and textile

restrictions and regulations on textiles and clothing originating from the People's Republic of China. Government Gazette 29738.

156 The Harmonised System is an international standardised system containing both names and numbers for the classification of trade products and was developed by the World Customs Organisation, as per the European Commission Enterprise and Industry Resolution Date Unknown <http://ec.europa.eu/harmonisedsystem>.

157 And therefore obligated to act in accordance with their specific obligations under the WTO Agreements.

158 Article XI of GATT states that the imposition of quotas to regulate trade is unacceptable. Thus, the fundamental nature on which the MOU was negotiated, was flawed under WTO law, as the MOU stipulated the imposition of quotas which were unacceptable in terms of Article XI of GATT.

159 Such as safeguard measures like the imposition of *ad valorem* duties or tariffs, as per the WTO Secretariat 2011 www.wto.org.

160 China acceded to the World Trade Organisation (hereafter the WTO) in 2001, which entails that there are multilateral agreements regulating the conduct of China with regard to other WTO member states. The accession protocol of China stipulates the terms and conditions of China's participation as can be found at <http://www.wto.org>.

161 Qin *Critical Appraisal of the China Accession Protocol* 872.

industry and on which a country can rely if the domestic industry is threatened, or harmed. The MOU between South Africa and China waived the application of the *Protocol 16* safeguard.

Section 3(3) of the MOU stated the following:

In view of the arrangement made by the Parties pertaining to the textile and apparel trade, South Africa commits itself to not applying Section 16 of the Protocol on Accession of China to the World Trade Organisation, and Paragraph 242 of the Report of the Working Party on the Accession of China against products originating from China, with the understanding that contentious trade issues shall be dealt with in an amicable manner.

This implied that South Africa had contracted out of the WTO safeguard mechanism provision and would not be able to invoke Protocol safeguards¹⁶² against any products originating from China, in light of section 3(3) of the MOU.

The practical effect of this was that because of the actions that the South African government took in this regard, they would not be able to rely on the specific WTO safeguard measures, as they had agreed to the "amicable" resolution of a South-Africa/Chinese trade dispute. Therefore, the Protocol safeguard in terms of which China agreed to withdraw from a country, should its import of a product threaten the local industry, could not be invoked.

At this point, the textile industry was subjected to further legal uncertainty¹⁶³ when South Africa imposed further

162 Rumbaugh & Blancher *China: International Trade and WTO accession* 12.

163 In 2006 quotas on clothing imports were increased and ranged from an increase of 9.00% to an increase of 16.02%. The increases on textile imports ranged from 7.% to 37.9%. After economic analysis, it appears that there was no scientific basis for the quota ranges and the determination thereof and the answer to how the specific

quotas¹⁶⁴ on Chinese textiles in 2006-2007, in conflict with the MOU.¹⁶⁵

3.2.3.4 The aftermath

In addition to South African policymakers not complying with their WTO obligations by entering into a MOU with terms contrary to the WTO agreements,¹⁶⁶ the later quotas imposed on Chinese imported products in conflict with the terms agreed to in the MOU plunged the industry into more uncertainty.¹⁶⁷

Furthermore, in the aftermath of the uncertain legal framework within which the textile industry was operating, "massive and systemic" fraud relating to clothing and textile imports from the People's Republic of China was

percentages were determined can only be answered by government. Brink *Who Wins?* 18.

164 With regard to the enforcement of quotas as safeguard measures, the Customs Act does not provide for the administration of quotas. As such, it is assumed that the enforcement of quotas and other safeguard measures should take place in accordance with the ITA Act, section 6(1)(b). There appears to be no conclusive provision that adequately provides for the administration of quotas in this regard.¹⁶⁴ As stated previously, quotas were limited on Chinese imports under the MOU entered into between the governments of South Africa and China, directly in contravention of their international obligations under the WTO.

165 While negotiating the basic terms of the initial MOU, the South African and Chinese governments agreed to the imposition of limited quotas. When comparing the MOU with the phase out-plan implemented during the final stage of the MFA, it is clear that the imposition of these quotas were against both countries' WTO obligations. In addition to violating their international obligations under WTO law, they subsequently acted contrary to the initial MOU as well, by imposing quotas in contravention of the "trust relationship" entered into with China under the MOU. The Centre for Chinese Studies *The China Monitor Issue* 37.

166 Like GATT and GATS.

167 At this stage the following becomes apparent: There is no domestic legislation to affirm the legal status of the MOU. As such, it is difficult to test the legality and enforceability of the MOU. When testing it against the WTO Agreements, such as GATT, it is apparent that it is in contravention of international obligations, directly undertaken under Article XI of GATT. The lack of legislation setting out a clear position when faced with a trade crisis enables a government to enter into "gentleman's agreements" with their trade partners, without necessarily complying with international obligations, or considering individuals or industries.

reported.¹⁶⁸ Examples included wide-spread customs fraud, under-invoicing of imports and cases of illegal transshipment of Chinese imports.¹⁶⁹

The South African Revenue Service reported that statistically imports on Chinese textile and clothing products were under invoiced by up to 60%.¹⁷⁰ In 2009 further reports¹⁷¹ came to light highlighting the fact that a number of foreign importers had illegally circumvented the quotas when they were still in place, using a variety of means and in so doing, effectively undermining the effectiveness of the quotas on Chinese textile and clothing products.¹⁷²

In 2009, the People's Republic of China denied South Africa's request for an extension of the quotas which had been in force for the two previous years.¹⁷³ Once again, SACTWU applied to ITAC to raise the import duty¹⁷⁴ on a

168 Anon 2010 <http://www.dti.gov.za>.

169 Another part of the problem emerges when it becomes apparent that there are inadequate provisions dealing with the determination of the origin of a product. The Customs Act attempts to address it in s46(1) where it states that "...goods shall not be regarded as having been produced or manufactured in any particular territory unless at least 25% of the production cost of the goods...is represented by materials produced and labour performed in that territory, the last process in the production or manufacture ...has taken place in that territory..." Additionally, ITAC's Anti-dumping Regulations provides in s60(5) that in anti-circumvention determinations it must be shown that at least 25% of value has been added in that territory and/or that the last major transformation process took place in that territory. In this regard, considering that these quotas will have to be enforced by the Commission rather than Customs, that imports into the BLNS countries are not covered by the quotas, and that China is continually getting more involved in Africa through the negotiations of a FTA with SADC¹⁶⁹, it is clear that it will be practically problematic to determine if imported textile, clothing and apparel are of a certain origin. Thus, since the current legislative framework for the sector is inadequate, it is possible for importers to skirt the quotas.

170 2008.

171 Parliamentary Monitoring Group 2009 <http://www.pmg.org>.

172 Geldenhuys *SA China Import Quotas* 12.

173 Mataboge *China's Quota Betrayal* 3-16.

174 Higher import duties deter importers from importing foreign products as the duty will make the foreign product more expensive, which boosts the domestic market, as consumers will then support the more affordable domestic products.

range of textile and clothing products.¹⁷⁵ Specifically, they requested that the import duty on 127 tariff lines be raised to the WTO bound tariff lines.¹⁷⁶ Without requesting consultations¹⁷⁷ with the Chinese government, 127 tariff lines were increased to 45%.¹⁷⁸ The heightened tariffs didn't seem to have an adverse effect on Chinese imports as customs fraud soared once again and the Chinese government subsidised products¹⁷⁹ kept flooding the market, the industry once again helpless as no proper legal framework was in place to implement and enforce countervailing¹⁸⁰ duties.¹⁸¹

The dispute between South Africa and China regarding China's refusal to renew and amend the MOU, as well as the Chinese government's unwillingness to negotiate a suitable bilateral agreement that addresses the domination of the South African market by the cheap Chinese imports, presented the ideal opportunity for the South African government to request consultations with China under WTO law to resolve this trade dispute.

175 SACTWU 2009 <http://www.sactwu.org.za>.

176 In accordance with WTO law, a bound tariff line is the absolute maximum duty a specific country may charge on imported products, South Africa's being 45%.

177 As advisable in terms of the WTO DSU.

178 STATSSA 2010 <http://www.statssa.gov.za/>.

179 In terms of the *WTO Agreement on Safeguard Measures*, a member country is entitled to invoke safeguard measures against another member country if the foreign government subsidises the products to such an extent that the foreign manufacturers are able to price their products so competitively that it presents a threat to local industry. Under WTO law the threatened country may invoke the WTO countervailing safeguard measures in such an instance. The customs fraud was an unfortunate by-product of an ineffective system that only provides for the implementation of higher tariffs to regulate trade, without considering alternative measures.

180 If a product or product group, such as textile and clothing garments and products, receives specific governmental assistance in order to be more competitive, it is considered to be unduly subsidised and recourse should be taken to the WTO DSU to assist with the proper implementation of countervailing duties and safeguard measures.

181 A duty placed on a subsidised product to bring the price in line with a market-accepted price, *Uruguay Round Agreement: Agreement on Subsidies and Countervailing Measures*, Ss 1-9.

The textile dispute¹⁸² has posed the question why South Africa, being one of the first African countries to become a signatory to the WTO, does not have the proper legal framework in place to accommodate and facilitate international dispute resolution under the WTO, and furthermore, if the existence of such a framework would have prevented, or at the very least curtailed, the textile crisis.¹⁸³

At present South Africa has legislation in place, discussed below, focused on the imposition of customs duties. This legislation, however, does not provide for a scenario where the mere imposition of these measures might not be enough and it does not set out a clear guideline for either industry or government where recourse to the WTO's DSU¹⁸⁴ might be the only viable solution.¹⁸⁵

182 In this instance the textile dispute clearly falls within the gambit of a "trade dispute", when referred to Deardoff's definition in fn 52 above, as there is disagreement between two nations, being the South African industries and the Chinese industries, as represented by government, regarding a mutually beneficial bilateral agreement pertaining to the textile industry after the end of the MFA. As the two governments struggled to reach agreement with the negotiation of the renewal of the MOU, they should have requested consultations as phase one of the WTO dispute resolution process.

183 As the South African government is the signatory to the WTO and the different agreements under WTO law, individuals can't derive specific rights under WTO law. The WTO needs to be approached via the South African government to fully utilise the dispute settlement mechanisms. Without legislation in place to cater for this, it is completely up to the South African government to institute these proceedings, even though individuals and industries are being affected. The playing field of the WTO's dispute settlement body is solely reserved for the participation of governments as representatives of industry. WTO Secretariat 2011 www.wto.org.

184 Under the auspice of the covered agreements of the Uruguay Round, such as the Marrakesh Agreement, GATT, GATS and the Agreement for the Resolution of Disputes, as per Raworth & Reif *The law of the WTO* 1-96.

185 A matter will be ripe for hearing before the WTO's DSB if there is an issue between nations that prevents trade from running smoothly. In addition, should actions by one country jeopardise, harm or threaten to harm the local industry of another country, the matter will be suitable for hearing before the WTO's DSU. In the case of the textile crisis in South Africa, the cheap imports from China severely injured the local textile industry, as discussed earlier. The original MOU, as negotiated between both governments, failed to address the solution of the threat by merely imposing quotas in contravention of both countries' WTO obligations. Furthermore,

Before discussing the viability of the WTO's DSU as a dispute settlement body, the inadequacy of the current legislation¹⁸⁶ needs to be addressed, as well as the relationship between international and municipal law.

4 The current legal basis

This Section analyses the legal basis for the general imposition of quotas and safeguard mechanisms. It also investigates if the current legislative framework provides adequately for the administrative process of the safeguard applications. The legal basis will be discussed with regard to the Constitution¹⁸⁷ and the relationship between international and municipal law, the applicable national legislation and the relevant international agreements.

4.1 The Constitution

The Constitution states the following:

Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.¹⁸⁸

This provision entails that a person is at liberty to import goods¹⁸⁹ and that that person is at liberty to do so, unless

the parties failed to reach agreement when they negotiated the renewal of the MOU. The dispute would be suitable for WTO dispute resolution as the AB would give both governments an opportunity to consult on equal footing, whilst taking consideration of domestic legislation and their respective international obligations and it would also consider the position of the industry affected by the dispute, as per WTO Secretariat Discussion Paper 5 2009 <http://www.wto.org>.

186 When an international trade dispute has to be dealt with.

187 *Constitution of the Republic of South Africa*, 1996.

188 S 22.

189 Clothing, textile, footwear apparel etc.

such importation is regulated¹⁹⁰ by law.¹⁹¹ Therefore, the mere importation of goods will not be prohibited, unless it is limited by law and the limitation is exceeded. Freedom to choose an occupation, trade or economic activity cannot be restricted by law unless the restriction is justifiable in terms of the limitation clause and the practice thereof can be regulated by law, provided the regulation is rational.¹⁹² Therefore, the mere importation of Chinese products, like textiles, clothing and apparel, may not be limited or restricted, unless it is justifiable and rational and limited by a law, regulation or Act.

In addition, the effect of international treaties or agreements on municipal law is regulated by sections 231, 232 and 233 of the Constitution.¹⁹³ Furthermore, the Constitution provides for the binding effect¹⁹⁴ of international agreements.¹⁹⁵

An international agreement will only become part of the South African municipal law if it has been enacted as such¹⁹⁶ by national law.¹⁹⁷ Section 231(4) states that:

...any international agreement becomes law in the Republic when it is enacted into law by the national legislation.

190 This regulation is subject to the limitation provisions of section 36. In accordance with this section it has to be determined if the assistance provided to the domestic textile industry could have been achieved in a different way and whether it is reasonable and justifiable.

191 *Brink Quotas on Clothing and Textile Imports from China* 7.

192 Currie & De Waal *The Bill of Rights Handbook* 488-489.

193 *Progress Office Machines v SARS* 2008 2 SA 13 (SCA) para 6.

194 On South Africa.

195 S 231 (2).

196 S 231(4).

197 With the exception of self-executing agreements.

South African courts are required to interpret South African law in such a way that it is consistent with international law.¹⁹⁸ The following is stated:

(Courts are instructed to)...prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.¹⁹⁹

Parliament approved the WTO Agreement²⁰⁰ on 6 April 1995 and it is therefore binding on the Republic in international law, but it has not been enacted into municipal law.²⁰¹ There is no Act or Regulation that specifically refers to the WTO, possible recourse to the WTO, or to the WTO's DSB or AB. Even though the ITA Act can be seen as an attempt to regulate international trade administration, it provides no clarity or reference pertaining to the WTO, or any similar dispute resolution mechanism, in the international community.

The *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade*, or "GATT", a WTO Founding Agreement focused on the regulation of tariffs and trade between nations, has also not been made part of municipal law.²⁰² As a result of these international agreements not being incorporated into municipal law, no rights are obtained from it.²⁰³

198 *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC), where both the Constitution and the position in terms of international law was considered.

199 S 233.

200 WTO Secretariat 2011 www.wto.org.

201 The High Court held in *Chairman Board on Tariffs and Trade v Brenco* (285/99) [2001] ZASCA 67 201 that the *World Trade Organisation Anti-dumping Agreement* finds application in South Africa.

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

203 The South African government bound South Africa, as a country, to the rights and obligations under the WTO Agreements, by acceding to the WTO and becoming a signatory to the WTO Agreements in 1995. By not incorporating the accession,

Malan AJA confirmed the same when he stated in para 6 of his judgment in the *Progress Office Machines*²⁰⁴ – case:

...no rights are therefore derived from the international agreements themselves.... the text to be interpreted remains the South African legislation....

4.2 South African legislation

The municipal law predominantly regulating international trade is the ITA Act.²⁰⁵ The main object of the ITA Act is to provide for the control of the import of goods and for the amendment of customs duties. To achieve this, ITAC, being the commission established in terms of the Act, has to investigate and evaluate applications for the amendment of customs duties pertaining to anti-dumping duties and to subsequently make recommendations regarding the duty rates. Furthermore, ITAC is obliged to take the appropriate steps to effect the recommendations. If the Minister of Trade and Industry decides to adopt the recommendations made by ITAC, he may choose to request the Minister of Finance to amend the schedules to the *Customs and Excise Act* 91 of 1964.

As confirmed in *Progress Office Machines*²⁰⁶, and more recently in *SA Tyre Manufacturers*²⁰⁷, it is clear that the powers given to the Minister relate to the imposition or withdrawal of anti-dumping duties and that he is also

rights and obligations and application of Agreements into national legislation, it has had the effect of limiting the rights that individuals or industries would have had under the WTO, otherwise.

204 2008 2 SA 13 (SCA).

205 71 of 2002.

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

207 *International Trade Administration Commission v SA tyre Manufacturers Conference* (738/2010) [2011] ZASCA 137.

granted a wide discretion when deciding whether he wants to act in this regard.²⁰⁸

The ITA Act and ITAC states as its objective:

...excellence in international trade administration, the enhancement of economic growth and development...creating an enabling environment for fair trade through the efficient and effective administration of its trade instrument.²⁰⁹

In terms of ITA, ITAC must investigate²¹⁰ and evaluate those applications²¹¹ with regard to safeguard measures and those matters with regard to safeguard measures or the amendment of customs duties in the Common Customs Area, that:

...the Minister directs the Commission to consider, or ... the Commission considers on its own initiative.²¹²

Furthermore, in section 26 it is explicitly provided that:

...a person may, in the prescribed manner and form, apply to the Commission for...the imposition of safeguard measures other than a customs duty amendment...²¹³

During the course of October 2007, the South African tyre industry²¹⁴, representing pneumatic rubber tyre

208 Para 5 of Judgment in *International Trade Administration Commission v SA tyre Manufacturers Conference* (738/2010) [2011] ZASCA 137.

209 International Trade Administration Commission 2011 www.ita.org.za.

210 S 16.

211 S 26.

212 S 16.

213 When ITAC makes a recommendation, it is communicated through the Minister of Finance and the Minister of Trade and Industry, to the Commissioner for SARS for implementation, even though the Customs Act makes no stipulation regarding safeguard measures that are not duties, which illustrates that if safeguard quotas are implemented it will have to be administered by the Commission itself.

214 In the case of *International Trade Administration Commission v SA tyre Manufacturers Conference* (738/2010) [2011] ZASCA 137 (23 September 2011).

manufacturers²¹⁵ brought an application to the North Gauteng High Court, Pretoria for a review of ITAC's recommendation and the Minister's decision not to proceed against Chinese exporters of pneumatic rubber tyres. On appeal, the Supreme Court of Appeal²¹⁶ confirmed that the manufacturers were entitled, in terms of section 46(1) of the ITA Act to apply to the High Court for a review²¹⁷ of ITAC's decision, but, it was also confirmed that the manufacturers themselves had no rights under the Chinese Protocol or the WTO Agreements and that ITAC's powers²¹⁸ were limited in this regard.

In his judgment, handed down on 23 September 2011, Harms AP²¹⁹ relied on the *Scaw* case²²⁰ and specifically referred to the passage where Moseneke DCJ dealt with the doctrine of separation of powers:

It seems to me self-evident that the setting, changing or removal of an anti-dumping duty in order to regulate exports and imports is a patently executive function that flows from the power to formulate and implement domestic and international trade policy. That power resides in the kraal of the national executive authority.

Once again, this emphasised that ITAC's powers are limited to that of an investigative and advisory domestic capacity,²²¹ and that, failing the incorporation of WTO law into national

215 Like Bridgestone South Africa (Pty) Ltd; Continental Tyre (South Africa) (Pty) Ltd; Dunlop Tyres International (Pty) Ltd and Goodyear Tyre and Rubber Holdings (Pty) Ltd.

216 Para 40.

217 The grounds for review are to be found in the *Promotion of Administrative Justice Act* 3 of 2000.

218 In accordance with the ITA Act and specifically ss 6, 16 and 26, the powers of ITAC are limited to that of an investigative and advisory body.

219 With Mthiyane, Cloete, Cachalia and Shongwe JJA concurring.

220 *Scaw Wire and Strand, a division of Scaw Metals SA (Pty) Ltd v National Union of Metal Workers Union of South Africa and Others* (J32/2011) [2011] ZALCJHB 47.

221 With regard to the monitoring of trade and other matters, dealt with in s 18, the ITA Act states that the Commission "may investigate matters relating to its functions in terms of this Act".

legislation, no individuals, manufacturers, or industries could rely on the international trade dispute resolution mechanisms as provided for by the WTO²²².

4.3 The investigation of the domestic safeguard applications in light of national legislation and the Constitution

Both SACTWU and Clotrade lodged a formal application with the Commission²²³, but no formal investigation was carried out by the Commission in terms of either section 16 or section 26 of ITA.²²⁴

Section 6 of ITA provides an additional legal basis for the imposition of safeguard measures:

- (1) The Minister may...prescribe that no goods of a specified class or kind may be –
 - (a) imported into the Republic
 - (b) imported into the Republic, except under the authority of and in accordance with the conditions stated in a permit issued by the Commission...
- (2) For the purposes of subsection (1) goods may be classified according to –
 - (a) their source of origin...

When reading ITA contextually²²⁵ it is clear that it is striving to enforce import and export control, which is put in force by ITAC's Import and Export Control directorate. The Import

222 As governments, as the representatives of industry, are the allowed participants in WTO dispute settlement, as per The Editorial Update of the Law and Practice of the World Trade Organisation 1995 www.wto.org.

223 ITAC.

224 Contrarily, other sources claim that the Commission did instigate a formal safeguard investigation in the SACTWU application, but that the Chief Commissioner overturned the decision after it was instigated. However, all sources are in agreement that an initiation notice wasn't published and an investigation wasn't conducted as per Anon Date Unknown <http://www.sactwu.org.za> and Anon Date Unknown <http://www.dti.gov.za>.

225 If it is read literally in isolation, it appears to grant the Minister discretion, Brink *Safeguarding South Africa's Clothing, Textile and Footwear Industries* 1-37.

Control Regulations and Export Control Regulations²²⁶ list the specific products that are covered by import and export control.²²⁷

If the literal interpretation is to be followed,²²⁸ a question with regard to how the Minister will execute his discretion arises. Section 195²²⁹ addresses participatory democracy²³⁰ to some extent.²³¹ It provides that:

(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

- (a) A high standard of professional ethics must be promoted and maintained.
- (b) Efficient, economic and effective use of resources must be promoted.
- (d) Services must be provided impartially, fairly, equitably and without bias.
- (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
- (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
- (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness...

(2) The above principles apply to –

- (a) administration in every sphere of government;
- (b) organs of state

Comparable with this section, is section 33.²³² This section²³³ provides that each person has the right to reasonable, lawful and procedurally fair administrative action.²³⁴ Furthermore, it provides that national legislation

226 Respective regulations.

227 These Regulations are updated every six months, as per Brink *Who wins?* 13.

228 The Minister has a discretion in this regard, as per fn 194 above.

229 Basic values and principles governing public administration.

230 Rossopoulos *Participatory Democracy* 211.

231 Constitution.

232 Constitution.

233 Just administrative action.

234 S 33(1).

must be so enacted to give effect to these administrative rights and to provide for administrative action by a court or appropriate tribunal.²³⁵

With regard to giving effect to these administrative rights, the *Promotion of Administrative Justice Act*²³⁶ stipulates that:

....in order to give effect to the right to procedurally fair administrative action, an administrator,..., must give a person:²³⁷

- (i) adequate notice of the nature and purpose of the proposed administrative action;
- (ii) a reasonable opportunity to make representations;
- (iii) a clear statement of the administrative action;
- (iv) adequate notice of any right of review or internal appeal, where applicable; and
- (v) adequate notice of the right to request reasons in terms of section 5.

Furthermore, PAJA²³⁸ also allows the administration to hold a public enquiry.²³⁹

Thus, these provisions clearly show that if administrative action is taken, the parties have a right to present their case²⁴⁰ and a reasonable and transparent process should be followed.²⁴¹ It is also clear that even though these sections present guidelines to be followed when ITAC, or a similar administrative body, is approached, it does not adequately illustrate how to proceed after ITAC has been approached and a request regarding, or an application for, an investigation has been made.

235 S 33(3)(a).

236 3 of 2000 (hereafter PAJA).

237 S 3(2)(b).

238 S 4(1)(a).

239 In the event of the administrative action materially and adversely affecting the public's rights.

240 *Dladla v Administrator Natal* 1995 3 SA 769 (N).

241 See generally: Hoexter *Administrative Law*.

In addition, it is alarming to note that no guidelines, regulations or sections refer to possible escalation to the WTO's DSU as an option to be pursued by government, should it be found that an international trade dispute necessitates intervention by the WTO to resolve the dispute between the countries involved.²⁴² The very wide discretionary power given to the Ministers²⁴³ predominantly relates to the imposition of customs duties or similar safeguard measures, and does not adequately provide for the possibility of another option.²⁴⁴

In the instance of the domestic safeguard applications, the domestic textile and material industry and the importers did not get the opportunity to present their case adequately²⁴⁵ and no consideration was given²⁴⁶ to the possibility of recourse to the WTO's DSU.²⁴⁷

242 As the WTO's dispute settlement mechanisms were created with the specific object of resolving trade disputes between countries in a neutral, impartial setting and in line with its member's rights and obligations, it would be the appropriate forum to approach when faced with a trade crisis of scale. In addition, the Appellate Body members who investigate each dispute, hail from different countries, which adds to the impartial and objective nature of the dispute settlement mechanism. Furthermore, each Appellate Body member possesses expertise in law, the WTO Agreements and negotiation skills and they apply their expertise to find an adequate solution to each dispute. Adv David Underhalter SC, the current Chairman of the Appellate Body, hails from South Africa.

243 Minister of Trade and Industry and Minister of Finance.

244 Such as a request for consultations with the other country, the first step in WTO dispute resolution.

245 "...although both Clotrade and SACTWU lodged formal applications with the Commission, no investigation was conducted....no initiation notice was published and no investigation conducted" as per Brink *Who Wins?* 11.

246 By neither the independent ITAC nor government.

247 The textile crisis would have qualified as a dispute under WTO law in terms of the *Multilateral Agreements on Trade in Goods*, specifically being the *GATT Agreement of 1994* and the *Dispute Settlement Understanding Agreement*, to be discussed in more detail herein.

Therefore, it must be concluded²⁴⁸ in this regard, that the administrative procedure that was followed with the domestic safeguard applications was not "lawful, reasonable and procedurally fair"²⁴⁹ and that the provisions which regulate these processes are inadequate²⁵⁰ in providing for a dispute resolution mechanism in an international forum, such as the WTO.

5 The World Trade Organisation and WTO Law

The WTO agreements provide the legal ground-rules for international commerce and serves as a forum for trade negotiations and dispute settlement.²⁵¹

South Africa is a member state of the WTO and participated in the formulation of both GATT and the Uruguay Round negotiations.²⁵² In addition, South Africa ratified the Marrakesh Agreement in 1994 and in doing so became a founding member of the WTO. As such, South Africa is a signatory to, and, as a Republic, is bound by all of the covered agreements²⁵³ of the WTO.²⁵⁴

This is confirmed by article 11.2 of the WTO Agreement which states that:

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- 248 When taking into consideration that no initiation notice was published and no formal investigation conducted, even though both Clotrade and SACTWU made a formal application to ITAC, as per Brink *Who Wins?* 11.
- 249 In accordance with the Constitution the aggrieved parties could have recourse to the court to have the Minister's decision set aside.
- 250 In that it doesn't provide guidelines for recourse to the WTO, should the trade crisis necessitate it and in that it doesn't adhere to the required transparency, as referred to in s 41(c) of the Constitution.
- 251 Verhoosel *National Treatment and WTO Dispute Settlement* 11.
- 252 Michalopoulos *Developing Countries in the WTO* 11.
- 253 Raworth & Reif *The Law of the WTO* 95.
- 254 Raworth & Reif *The Law of the WTO* 95.

...the agreements and associated legal instruments included in Annexes 1,2 and 3 are integral parts of this agreement, binding on all Members...

South Africa and the WTO's track record with regard to dispute settlement isn't a particularly complex one as South Africa has never acted as an active complainant or third party, and has only been involved as respondent against Turkey, India and Indonesia.²⁵⁵

It is again reiterated that even though the WTO Agreements are binding on the Republic, it will only form part of South African law if Parliament expressly provides for it.²⁵⁶ In addition, and upon careful reading of the parliamentary debates, it is clear that Parliament has not expressly provided for it, as the WTO Agreements were approved and ratified, but, due to incomplete actions of Parliament, it did not end up forming part of South African law and therefore it is not directly enforceable under South African law.²⁵⁷ A fact which, unfortunately, exposes a *lacuna* in the South African legislation when taking into consideration that Article 18.4 of the *Agreement on Implementation of Article VI*²⁵⁸ specifically provides that:

255 The Editorial Update of the Law and Practice of the World Trade Organisation 1995 www.wto.org.

256 S 231(4) of the *Constitution*. Even if both countries to a dispute are signatories to the WTO, recourse to the WTO will only be possible, currently, if the government so wills it. Only governments can participate, as representatives of industry, in the WTO dispute resolution process. As the current South African legal framework stands and as the discussed case law confirms, no individual or industry or company can derive rights from South Africa's WTO member status. Industries are completely reliant on government to settle international trade crises. South Africa's history with the WTO has shown that it is unwilling to act as claimant in the WTO dispute resolution process as it is considered to be seen as a lack of goodwill towards trading partners. This is contrary to the majority of WTO members who frequently participate in the WTO dispute resolution process that leads to the successful resolution of disputes. During the period of 1 January 1995 to 31 December 2004, 72% of all WTO cases involved developing countries, similar to South Africa. Mshomba *Africa and the WTO* 36.

257 Schlemmer *South Africa and the WTO* 13.

258 Of the *General Agreement on Tariffs and Trade*.

...each member²⁵⁹ shall take all necessary steps ... to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement ...

As an ideal, it is submitted that WTO law and domestic legal regimes should operate together as a properly functioning multi-layered legal order.²⁶⁰ As can clearly be seen from the chapter discussing South African legislation pertaining to international trade disputes, this is not the case in South Africa, as no mention is made of the recourse process when escalating an international trade dispute to the WTO, or the obligations or limitations of government and industry in this regard.

This is unfortunate, as it would appear that even though South Africa is a signatory to the WTO Agreements, it is not in a position to properly utilise the advantages, such as the dispute resolution mechanisms, when embroiled in an international trade dispute, such as the ongoing industry-wide textile crisis.²⁶¹

6 The WTO and the DSU²⁶²

The WTO resolves disputes under the DSU.²⁶³ A dispute arises when one member government, such as South Africa,

259 "Member" referring to the signatories.

260 Verhoosel *National Treatment and WTO Dispute Settlement* 22.

261 Hahn "WTO and South Africa". In addition, even though the South African government would be able to approach the WTO without having the proper legislation in place (as the lack of legislation would not prevent it from approaching the WTO) the lack of a legislation that clearly sets out the duties and discretions of all role players will grant a very wide discretion to government to act, or not, and will severely hinder industry in their approach to government, as they are unsure of the process to follow and as there is no proper procedure, or contact person at dti, to facilitate this process; Hahn & Da Gama "WTO and South Africa".

262 Verhoosel *National Treatment and WTO Dispute Settlement* 22.

believes that another member government, such as China, is violating a commitment or agreement that it has made in the WTO.²⁶⁴ The complaining member submits a "request for consultations" identifying the agreements it believes are being violated. More than one agreement can be cited.²⁶⁵ Furthermore, the relevant issue pertaining to a specific sector needs to be cited.²⁶⁶

The WTO's DSU places an emphasis on the importance of consultations when trying to resolve a dispute. If no solution is reached after parties have consulted, the complaining party may request the establishment of a panel. If the opposing member country refuses the request for consultations, the complaining party may move directly to request a panel. The DSU Panel sets out specific rules and deadlines for deciding the terms of reference and the composition of the panels. Should the parties not agree on the composition of the panel, it will be determined by the Director-General. The procedure followed by the Panel is transparent and set out in detail in the DSU. The concept of appellate review is a new feature of the DSU. An appeal will be limited to issues of law covered in the panel report and

263 WTO Secretariat 2011 www.wto.org.

264 With the textile crisis, South Africa could have brought an application under the auspice of *annex 1A* of the *Multilateral Agreements on Trade in Goods* which contains the *1994 GATT Agreement* that regulates and stipulates the general arrangements for tariffs and trade. More specifically, *Article VI of GATT 1994* contains anti-dumping provisions setting out measures against imports of a product at an export price below its "normal value", usually the price of the product in the domestic market of the exporting country. Furthermore, *GATT 1994* also sets out the position pertaining to rules of origin (where a product hails from), subsidies and countervailing measures (if the defendant government unduly subsidised the products) and safeguard measures (against market domination). *Annex 2 to the Agreement Establishing the WTO*, sets out the procedure when recourse to the DSU is considered, as well as the jurisdictional factors to be considered when lodging a complaint. Lastly, *China's Protocols of Accession to the WTO* will also be relevant, as there are certain safeguard measures that the WTO provided for in relation to possible market domination by China.

265 The Editorial Update of the Law and Practice of the World Trade Organisation 1995 www.wto.org.

266 Raworth & Reif *The Law of the WTO* 95.

legal interpretations developed by the panel. The concluding report will be adopted by the Dispute Settlement Body ("DSB") and unconditionally accepted by the parties within 30 days following its issuance to Members, unless the DSB decides by consensus against its adoption.

A central provision of the WTO's DSU reaffirms that Members shall not make determinations of violations, or suspend concessions, themselves, but shall make use of the dispute settlement rules and procedures of the DSU.

In this regard Article 23(2) regulates as follows:

...Members shall:

- (a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding;
- (b) follow the procedures set forth in Article 21 to determine the reasonable period of time for the Member concerned to implement the recommendations and rulings; and
- (c) follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations under the covered agreements in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time.²⁶⁷

6.1 Legal basis for a WTO dispute

267 *Uruguay Round Agreement: Understanding on Rules and Procedures Governing the Settlement of Disputes* 2011 <http://www.wto.org/>.

When determining the legal basis of a WTO dispute, reference should be made to the DSU and the WTO Agreements.

Article 1.1 of the DSU stipulates that its rules and procedures apply to :

....disputes brought pursuant to the consultation and dispute settlement provisions of the ... 'covered agreements'.

The basis or cause of action for a WTO dispute must, therefore, be found in the "covered agreements" listed in Appendix 1 to the DSU, namely, in the provisions on "consultation and dispute settlement" contained in those WTO Agreements.²⁶⁸

Thus, it is not the DSU, but rather the WTO Agreements that contain the substantive rights and obligations of WTO Members, which determine the possible grounds for a dispute.²⁶⁹

6.2 Required allegations

GATT 1994 contains certain consultation and dispute settlement provisions in both Articles XXII and XXIII. Specifically, Article XXIII:1 of GATT 1994 states the following:

Nullification or Impairment

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the

268 Raworth & Reif *The law of the WTO* 95.

269 Verhoosel *National Treatment and WTO Dispute Settlement* 22-27.

attainment of any objective of the Agreement is being impeded as the result of

- a. the failure of another contracting party to carry out its obligations under this Agreement, or
- b. the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
- c. the existence of any other situation,

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

Thus, in essence, there are three alternative options on which a complainant may rely, being a violation complaint; a non-violation complaint and a situation complaint.²⁷⁰

The WTO dispute settlement mechanism²⁷¹ has jurisdiction over any dispute that arises between WTO members under any of the covered agreements.²⁷² In the case of the textile crisis between South Africa and China, an international trade dispute arose between two WTO members²⁷³ under a number of the covered agreements.²⁷⁴ Upon perusal of the covered agreements, it is submitted that jurisdiction could

270 Hahn "WTO and South Africa" 2-14.

271 WTO Secretariat 2011 www.wto.org.

272 The Editorial Update of the Law and Practice of the World Trade Organisation 1995 www.wto.org.

273 As both countries have successfully acceded to the WTO.

274 The international trade dispute could be brought before the WTO on the basis that: (a) the governments of both countries had failed to reach an agreement with regard to the domination of the local textile industry by the Chinese industries that was in line with both parties international obligations and that (b) there was a serious threat that the Chinese imports would harm the local industry to such an extent that it would cause an economic industry crisis (an economic industry crisis would be declared if there was a significant and alarming loss of jobs and investment in a specific sector). The textile dispute led to a textile crisis in South Africa as there was an alarming and significant loss of jobs and investment with the closing of the industry, as confirmed by Cobweb Information Market Summary: "... (the textile industry)...in crisis with large-scale unemployment and factory closures.." Anon Date Unknown <http://gеп.cobwebinfo.co.za>.

have been founded on any of the following covered agreements:²⁷⁵

- a) The Agreement²⁷⁶ on Subsidies and Countervailing Measures²⁷⁷
- b) The Agreement²⁷⁸ on Safeguards²⁷⁹
- c) The Agreement²⁸⁰ on Rules of Origin²⁸¹
- d) The General Agreement²⁸² on Tariffs and Trade 1994²⁸³

275 The sections containing the specific dispute settlement provisions to follow in the subsequent footnotes.

276 The textile crisis could potentially have been referred to WTO dispute resolution due to "actionable" subsidies granted by the Chinese government. The agreement stipulates that no member should cause, through the use of subsidies, adverse effects to the interests of other signatories, such as an injury to the domestic industry of another signatory, nullification or impairment of benefits accruing directly or indirectly to other signatories under the General Agreement (in particular the benefits of bound tariff concessions), and serious prejudice to the interests of another member. In addition, and in terms of the Agreement, "serious prejudice" shall be presumed to exist for certain subsidies including when the total *ad valorem* subsidisation of a product exceeds 5%. Should this be the case, the onus will be on the subsidising member to show that the subsidies in question do not cause serious prejudice to the complaining member. Members affected by actionable subsidies may refer the matter to the WTO DSB. In the event that it is determined that such adverse effects exist, the subsidising member must withdraw the subsidy or remove the adverse effects, as per Verhoosel *National Treatment and WTO Dispute Settlement* 22-27 and WTO Secretariat 2011 www.wto.org.

277 A 4 and a 30.

278 Article XIX allows a member country, in this case South Africa, to take a "safeguard" action to protect a specific domestic industry from an unforeseen increase of imports of any product which is causing, or which is likely to cause, serious injury to the industry. In addition, the agreement clearly stipulates requirements for safeguard investigation, which include public notice for hearings and other appropriate means for interested parties to present evidence, including on whether or not a measure would be in the public interest. This will be specifically relevant in this instance, as the resolution of the textile crisis would most definitely be in the public's interest, as it impacts on both individuals and industry.

279 A 14.

280 This Annex to the *Multilateral Agreements on Trade in Goods* clearly states that each member must ensure that their rules of origin are transparent, that they do not have restricting, distorting or disruptive effects on international trade, that they are administered in a consistent, uniform, impartial and reasonable manner and that they are based on a positive standard, meaning that they should state what does constitute origin as opposed to what does not, as per Law and Practice of the World Trade Organisation *Treaty Bundle* 199-203.

281 A 7 and a 8.

282 This Agreement would be relevant as it contains the general rules and regulations pertaining to tariffs and international trade, as stated in the preamble.

283 A XXII and a XXIII.

Specifically, article XIX.1 of GATT, when read with the WTO Agreement on Safeguards, states that safeguard measures may be imposed if the product that is being imported into the *territorium* of the contracting party is in such increased amounts as to cause or threaten serious injury to the local producers in that *territorium*, if the increased imports are the result of unforeseen developments.²⁸⁴ In the case between South Africa and China, the textile, material and apparel imports from China had been continuing in an increasingly liberalised market, hardly affected by the slight quantitative restrictions or the heightened customs duties, raised to the bound tariff lines.

The general rule is that only governments can participate in WTO dispute resolution.²⁸⁵ A WTO agreement is an international agreement binding WTO members under public international law. Therefore, the rights and obligations as set out in the agreements, will only be binding on the signatories.

As such, ultimately governments must settle disputes at the WTO in terms of the Understanding on Rules and Procedures Governing the Settlement of Disputes, which also forms part of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations.²⁸⁶

Thus, governments act on behalf of the specific industries involved at the WTO and the successful outcome of the

284 Zunckel *Non-tariff barriers: the reward of curtailed freedom* 203.

285 Law and Practice of the World Trade Organisation *Treaty Bundle* 199-203.

286 WTO Secretariat 2011 www.wto.org.

dispute resolution process is advantageous for the industries involved.²⁸⁷

Once again this emphasises the importance of a symbiotic relationship²⁸⁸ between government and industry, where industry must be placed in a position to approach government with a matter ripe for WTO dispute resolution and where government would be willing to approach the WTO to request consultations with the opposing member country.²⁸⁹

This statement effectively underlines the current problem, as the present legal framework does not provide adequate legislation that regulates specific rights and obligations of both government and industry, does not highlight or illustrate the possibility and availability of recourse to the WTO and does not effectively protect the rights of an industry against what can, as in the textile crisis, only be described as a complete domination of an industry.

7 Conclusion and recommendations

An international trade dispute occurred between South Africa and China when cheap imported clothing, textile and material products from China infiltrated the South African market and dominated the domestic industry to such an extent that it caused a trade crisis²⁹⁰ where thousands of jobs were lost and the closing of factories served as a sign of the loss of investment in the market.

287 The Editorial Update of the Law and Practice of the World Trade Organisation 1995 www.wto.org.

288 Hahn "WTO and South Africa" 4-16.

289 Goelb "WTO and South Africa" 3-11.

290 A trade crisis can be found if there is a significant and alarming loss of jobs and investment in a specific sector; GEP 2011 <http://gep.cobwebinfo.co.za>.

The case study of the South African textile dispute effectively exposed that, after the end of the MFA, Chinese products were able to enter a mostly liberalised market. The lethargic response from government was in contrast to the alarm and uncertainty from industry and exposed an unwillingness by government to jeopardise the trading relationship between a major trading partner and South Africa, to the detriment of an entire industry.

The current legal framework provided no relief to industry, as the limited authority and advisory capacity given to the independent commission, ITAC, combined with the wide discretion given to government, did not assist in moving the applications that were brought by the various unions, forward.

By entering into a "trust relationship" of uncertain legal status, such as a MOU, a trade crisis will not be addressed adequately if the very document on which the solution relies appears to be formulated solely for the sake of cementing a trade relationship with a major player, without much regard for individuals or industry. As a MOU resembles a "gentleman's agreement, the legal enforcement of it is questionable. A statement one is forced to make when noting that, due to the lack of legislation on point, one will be hindered in testing the MOU appropriately. Furthermore, even if it is found that the MOU will be legally enforceable, comparison to the WTO Rules clearly illustrate the inadequacy of the MOU between South Africa and China when compared to the obligations of both countries under the WTO.

In addition, the dominant legislation, the ITA Act, which was enacted with the purpose of regulating imports and exports, establishing ITAC and administering international trade disputes, did not assist in setting out guidelines for the handling of an international trade dispute²⁹¹ of this magnitude, one that could potentially only be effectively arbitrated, and the outcome enforced, by the WTO.

The textile crisis is but one example²⁹² of the inadequacy of the national legal framework to administer an international trade dispute and, if need be, to escalate it to the WTO.

As South Africa continues to trade with both the developing and developed world with increasing frequency, the frequency of international trade disputes will also escalate. In anticipation of these international trade disputes, South Africa needs to address the inadequacy of the legal framework put in place for the administration of international trade disputes.

The ideal international trading environment - that South Africa needs to strive towards if it is to be considered as a viable competitor in the international arena - has to be one

291 The international trade dispute could be brought before the WTO on the basis that: (a) the governments of both countries had failed to reach an agreement with regard to the domination of the local textile industry by the Chinese industries that was in line with both parties international obligations and that (b) there was a serious threat that the Chinese imports would harm the local industry to such an extent that it would cause an economic industry crisis (an economic industry crisis would be declared if there was a significant and alarming loss of jobs and investment in a specific sector). The textile dispute led to a textile crisis in South Africa as there was an alarming and significant loss of jobs and investment with the closing of the factories, as confirmed by Cobweb Information Market Summary: "... (the textile industry)...in crisis with large-scale unemployment and factory closures.." 2011 <http://gcp.cobwebinfo.co.za/>.

292 Other industries like the agricultural industry, the tyre manufacturing industry, the table grape industry and numerous others have also approached ITAC with the object of escalating the matter to the WTO's first stage of consultations, with no success, as per the panel discussion group held on 12 September 2011, at Pretoria, between representatives from industry and the dti.

where free trade is possible, but where the power to resolve an international trade dispute is not vested unconditionally and completely in the hands of government. This recommendation requires legislation that sets out the process to be followed if the industry is faced with, or amidst, a trade dispute, and that clearly illustrates the role of a truly independent body to investigate a complaint, as well as the role of government to refer it to the WTO should it fall within the requirements and stipulations of the WTO covered agreements. This would enable industry to be placed in a position where it could effectively put its case to government, who would be under an obligation to initiate and conduct an official, formal investigation, after which their decision would be reviewable by a court.

It is ineffective²⁹³ for a country, like South Africa, to be a signatory to international agreements, like the WTO Agreements, whereto trading partners, like China, are also bound, if you don't enforce the rights derived from the agreements, or adhere to the obligations required under WTO law, or utilise the dispute settlement mechanisms specifically created to assist WTO members in the resolution of international trade crises.

The suggestion is not to control the role of government every step of the way, but merely to focus it on achieving a truly balanced solution whereby the industries' rights are acknowledged, protected and enforced.

293 Hahn "WTO and South Africa" 11.

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