The management of international trade disputes with specific reference to the legal framework of the International Trade Commission of South Africa

Siyali S

orcid.org/0000-0001-8363-6247

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Supervisor: Dr A Klaasen

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ABSTRACT

The dynamic nature of global commerce necessitates robust mechanisms for resolving international trade disputes, which are integral to the economic vitality of nations such as South Africa. This study critically examines the efficacy of the International Trade Administration Commission (ITAC) in managing these disputes within South Africa's legal framework, established under the International Trade Administration Act 71 of 2002. By scrutinizing ITAC's determinations and their impact on various stakeholders, particularly Small, Medium, and Micro Enterprises (SMMEs), the research assesses the adequacy of current dispute resolution mechanisms. Additionally, the study explores the potential benefits and challenges of instituting an independent international trade tribunal in South Africa, aiming to enhance fairness and accessibility in dispute resolution processes. The research methodology is centred on a comprehensive literature review, analysing primary and secondary legal sources, policy documents, and relevant case law. This inquiry not only addresses existing gaps in the literature but also contributes to the broader discourse on international trade law and sustainable economic practices in South Africa.

Keywords: international trade disputes; ITAC; trade regulation; dispute resolution mechanisms; small, medium, trade disputes, dispute settlement body and micro enterprises (SMMEs).

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LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
DSB	Dispute Settlement Body
DTIC	Department of Trade, Industry and Competition
IPAP	Industrial Policy Action Plan
NAFTA	North American Free Trade Agreement
NDP	National Development Plan
NGP	New Growth Path
PAJA	Promotion of Administration Act 3 of 2000
SADC	Southern African Development Community
SMME	Small, Medium, and Micro Enterprises
Trade Act	International Trade Administration Act 71 of 2002
WTO	World Trade Organization

Chapter 1 Introduction

1.1 Title

An analysis of the use of the International Trade Commission of South Africa in the resolution of trade disputes.

1.2 Problem statement

1.2.1 Background statement

International commerce plays a significant role in the economic landscape of South Africa, and the vitality of this sector necessitates the presence of robust dispute resolution mechanisms.[1] Such mechanisms comprise a myriad of institutional configurations, all of which must adapt to the ever-evolving sphere of global commerce, influenced by factors such as globalisation, digitization, and intricate supply chains.[2] Disputes frequently emerge as a result of commercial discord, disparate interpretations of contracts, or actions viewed as contravening International Trade Law.[3] Consequently, a reliable and effective system for resolving these disputes is essential for fostering an environment conducive to transnational trade.[4]

The predominant entity entrusted with the task of establishing an efficient system for the administration of international trade in South Africa is the International Trade Administration Commission (hereafter ITAC), instituted under the aegis of the *International Trade Administration Act* 71 of 2002 (hereafter *Trade Act*).[5] The determinations issued by the ITAC have a substantial bearing on the regulation of South Africa's international trade environment, with implications for both large corporations and vulnerable small, medium, and micro enterprises (hereafter

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1 Evenett and Hoekman *Economic Development and Multilateral Trade Cooperation* 333-334.
2 Hoekman *The World Economy* 1419.
3 Evenett and Bernard *Economic Development and Multilateral Trade Cooperation* 334-334.
4 Hoekman *The World Economy* 1419.
5 Evenett and Hoekman *Economic Development and Multilateral Trade Cooperation* 334.

SMMEs).[6] However, scant scrutiny has been applied to the efficacy of the ITAC's determinations or the encompassing dispute resolution framework.[7] Given the significant ramifications of these determinations on international trade within South Africa, a critical examination of the ITAC's efficacy constitutes the primary aim of this study.[8]

The World Trade Organization (hereafter WTO), the global entity dealing with trade rules between nations, permits only its member states to bring disputes before its Dispute Settlement Body (hereafter DSB).[9] This restriction, which precludes individuals, companies, and non-governmental organisations engaged in international trade, brings into question the accessibility and inclusivity of the dispute resolution mechanisms.[10] The *Trade Act* in South Africa has conferred powers upon the ITAC to handle disputes.[11] Nonetheless, the adequacy of these domestic mechanisms, particularly regarding the protection of SMMEs, remains a matter of uncertainty.[12]

Parties affected by the ITAC's determinations are required to seek an internal review by the ITAC or to approach the High Court for recourse, according to the dispute resolution process in South Africa as per the *International Trade Administration Act*.[13] This offers no avenue for an independent body to adjudicate such disputes, thereby casting doubt on the effectiveness and fairness of the existing system.[14] The legal framework offers limited dispute resolution alternatives, which is particularly problematic for SMMEs that may lack the resources to pursue costly litigation in the High Court.[15]

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6 Stilwell *South African Institute of International Affairs.*
7 Stilwell *South African Institute of International Affairs.*
8 Evenett and Hoekman *Economic Development and Multilateral Trade Cooperation.*
9 World Trade Organization *Understanding the WTO - The Organization Members and Observers.*
10 World Trade Organization *Understanding the WTO - The Organization Members and Observers.*
11 Stilwell *Competition Commission South Africa.*
12 Stilwell *South African Institute of International Affairs.*
13 International Trede Administration Act 71 of 2002.
14 Schaffer, Agusti and Earle *Cengage Learning.*
15 Schaffer, Agusti and Earle *Cengage Learning.*

The principal objective of this study is an exhaustive evaluation of the ITAC's efficiency, the adequacy of the current trade dispute resolution mechanisms available to cross-border traders, and the desirability of instituting an independent international trade tribunal in South Africa.[16] This research seeks to bridge the gaps in the extant body of knowledge, potentially illuminating areas requiring reform and contributing to the wider discourse around international trade dispute resolution within the South African context.[17]

1.2.2 Problem statement

The present-day international trade milieu is characterised by myriad complexities, inevitably culminating in an array of disputes.[18] Although the ITAC's rulings substantially shape South Africa's international trade regulations, a comprehensive examination of its efficacy in managing trade disputes remains conspicuously absent.[19] Furthermore, the wider dispute resolution framework within which the ITAC operates has not received adequate scrutiny. This research endeavour aims to bridge this *lacuna* in the literature by critically appraising both the ITAC's effectiveness and the more encompassing dispute resolution mechanisms within South Africa.

Being a member of the WTO, South Africa's international trade operations are enmeshed within the broader framework of global trade infrastructure.[20] Considering the escalating influence of non-state actors in international trade, questions regarding the accessibility and inclusivity of these dispute resolution mechanisms become increasingly germane. Therefore, a thorough exploration of the efficacy of existing mechanisms in serving all cross-border traders in South Africa is paramount.

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16 Evenett and Bernard *Economic Development and Multilateral Trade Cooperation* 335.
17 Hoekman *The World Economy* 1419.
18 Zhou *American Bar Association.*
19 Stilwell *Competition Commission South Africa.*
20 Narlikar *International Affairs* 717.

The nonexistence of an independent body to address these disputes potentially undermines the efficiency and fairness of the current system.[21] This void proves particularly challenging for SMMEs, which may be constrained by resources to engage in legal actions in the High Court. Hence, the research is geared towards evaluating the prospective advantages and challenges concomitant with the establishment of an independent international trade tribunal in South Africa.

Finally, the study is contextualised within an environment marked by a growing cognizance of the necessity for equitable trade practices that accrue benefits to all stakeholders.[22] Notably, the needs of vulnerable societal sectors, including SMMEs, which are often confronted with significant obstacles in seeking justice in trade disputes due to resource constraints and complex existing dispute resolution mechanisms, merit particular consideration.[23] By addressing the specific needs of SMMEs in the milieu of trade dispute resolution, this research aims to contribute towards initiatives aimed at reinforcing the rights and capacities of these entities in the domain of international trade.

1.3 Research question

How does the legal framework of the International Trade Administration Commission of South Africa contribute to the management of international trade disputes?

1.4 Research aim

The primary aim of this research is a comprehensive assessment of the effectiveness and adequacy of the current trade dispute resolution mechanisms in South Africa, with an emphasis on the determinations made by the ITAC. In addition, the study will explore the desirability and potential implications of establishing an independent

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21 Stilwell *Competition Commission South Africa.*

22 Palmeter and Mavroidis *Dispute settlement in the World Trade Organization: practice and procedure*.

23 Stilwell *Competition Commission South Africa.*

international trade tribunal in South Africa to enhance the efficiency of trade dispute resolution.

1.5 Research objectives

a) Conduct a critical evaluation of the effectiveness of the current trade dispute resolution mechanisms in South Africa, particularly focusing on the determinations made by the ITAC, in managing international trade disputes.

b) Assess the adequacy of the existing dispute resolution mechanisms in serving the needs of all cross-border traders, including large corporations and SMMEs.

c) Investigate the potential benefits and challenges associated with the establishment of an independent international trade tribunal in South Africa to resolve trade disputes more effectively and efficiently.

1.6 Research methodology

1.6.1 Justification for the selected methodology

The literature review, offering a comprehensive understanding of the subject matter and allowing a synthesis of existing knowledge pertinent to the research objectives, serves as a fitting methodology for this research. Given the research's focus on policy evaluation and legal analysis, the literature review provides the means to examine scholarly articles, reports, legal cases, and policy documents relevant to the research question.[24]

1.6.2 Scope of the methodology

This methodology revolves around a comprehensive exploration of sources relevant to the South African context of trade dispute resolution, including the ITAC and the potential for an independent international trade tribunal. The literature review will examine primary and secondary legal sources, key legislation, scholarly articles,

[24] Fink *Conducting Research Literature Reviews.*

government reports, international agreements, and relevant case studies.

1.6.3 Key policies and legislation to be examined

Several critical policies and legislations to be examined in this research include:

- The *Trade Act* of South Africa;
- Determinations made by the ITAC;
- WTO regulations, particularly those pertaining to dispute resolution; and
- Relevant case law from the High Court, Supreme Court of Appeal, and the Constitutional Court of South Africa.

1.6.4 Limitations of the study

The literature review methodology has its limitations, particularly on the availability and quality of existing literature. Any gaps in literature may complicate the attainment of comprehensive answers to the research question. Additionally, the literature review may fail to capture recent developments unless they have been documented and published. Finally, the interpretative nature of this methodology implies potential influence by the researcher's perspective and understanding of the issue.[25]

1.7 Framework

1.7.1 Chapter 1: Introduction

This chapter provides a research overview, encompassing the research problem, significance of the study, research question, and research objectives. It establishes the necessary context for understanding the topic and its relevance to the fields of trade law and dispute resolution.

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[25] Boell and Cecez-Kecmanovic 2015 *Journal of Information Technology* 161.

1.7.2 Chapter 2: Background to trade disputes in South Africa

The legal and institutional framework governing trade disputes, including the *Trade Act*, the role and determinations of the ITAC, and the WTO's dispute resolution mechanisms, are examined in this chapter. This detailed background to trade disputes in South Africa also explores trade dispute dynamics, challenges faced by cross-border traders, especially SMMEs.

1.7.3 Chapter 3: Research findings and interpretation

This chapter presents findings from the literature review and interprets these findings in light of the research question and objectives. It provides a critical evaluation of the effectiveness and adequacy of South Africa's current trade dispute resolution mechanisms, with an emphasis on the ITAC's determinations. In addition, this chapter explores the potential for establishing an independent international trade tribunal in South Africa.

1.7.4 Chapter 4: Conclusion and recommendations

This final chapter summarises the research's key findings, draws conclusions about the effectiveness of current trade dispute resolution mechanisms, and evaluates the need for an independent trade tribunal in South Africa. Based on these findings, it makes recommendations offering insights for policymakers, traders, and legal practitioners. This chapter also identifies potential areas for further research.

Chapter 2 - Background to trade disputes in South Africa

2.1 Introduction

The domain of international trade is pivotal to the economic landscape of South Africa, catalysing economic development, job creation, and facilitating access to essential goods and services. The nation's engagement in various regional and international trade agreements, including the Southern African Development Community (hereafter SADC) and the WTO, signifies its integration into the global trading system.[26] The expansion of international trade broadens South Africa's access to diverse markets, concurrently enhancing its involvement in intricate supply chains and commercial relationships across international boundaries.

However, the advantages derived from transnational commerce bring with them the inevitable prospect of commercial disputes within this dynamic environment. Discrepancies in agreement interpretations, perceived infractions of trade regulations, or accusations of unfair trade practices represent some of the myriad issues that may lead to international trade disputes.[27] Such disputes, if unresolved or ineffectively managed, possess the potential to disrupt supply chains, erode trade relations, and inhibit growth in this vital sector. This underscores the critical need for the development of robust and efficacious dispute resolution mechanisms, specifically designed to align with the South African milieu. The ITAC, established under the *Trade Act*, is integral to this framework. Occupying a central role in the regulation of international trade within South Africa, the ITAC's determinations exert a significant influence on the nation's trade dynamics. This chapter aims to provide an overview of the context surrounding trade disputes in South Africa, examining the legal and institutional structures that oversee their resolution, with a specific focus on the role of the ITAC.

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26 Afesorgbor and Van Bergeijk 2014 *South African Journal of Economics* 518-530.
27 Horn and Mavroidis 2023 *Journal of World Trade* 1-23.

2.2 Legal and institutional framework

The *Trade Act* constitutes the fundamental legal framework for the adjudication of trade disputes within South Africa.[28] Established through this Act, the ITAC is endowed with the jurisdiction to investigate claims of unfair trade practices, including dumping, subsidies, and the sudden increase in imports.[29] The Act encompasses critical provisions that empower the ITAC to apply remedial actions such as anti-dumping duties, countervailing duties, or safeguard measures as deemed necessary. It specifies the procedures for lodging a complaint with the ITAC, outlines the investigative procedures, stipulates timelines for the issuance of determinations, and delineates the procedures for internal review of the ITAC's decisions. Furthermore, the Act provides for the escalation of appeals to the High Court of South Africa for further judicial examination.[30]

As a founding member of the WTO, South Africa is obligated to adhere to the multilateral trade agreements and norms encapsulated within the WTO framework.[31] The DSB of the WTO offers a platform for member states to resolve disputes emanating from alleged contraventions of WTO agreements.[32] The dispute resolution mechanism of the DSB progresses through several phases, including initial consultations, the constitution of panels, the presentation of panel and Appellate Body reports, and the eventual ratification of decisions. A notable constraint of the DSB is its state-centric operation, which precludes direct participation by individual enterprises, traders, and non-governmental entities engaged in international trade. This limitation underscores the importance of domestic frameworks, such as the ITAC, in the resolution of trade disputes at the national level.[33]

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28 Preamble of the *International Trade Administration Act 71 of 2002*.
29 Erasmus and Fourie 2016 *Journal of World Trade* 803-823.
30 Banga 2018 *Journal of World Trade* 229-247.
31 WTO https://www.wto.org/english/thewto_e/countries_e/south_africa_e.htm.
32 WTO https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm.
33 Marceau and Stilwell 2015 *Journal of World Trade* 53-74.

2.3 The ITAC: Role and determinations

The ITAC occupies a critical role within the trade framework of South Africa, engaging in a broad spectrum of activities. Central among its duties is the initiation and execution of tariff investigations to ascertain the suitable levels of customs duties.[34] Furthermore, the ITAC is responsible for the administration of import and export control measures, which are implemented to moderate trade flows in alignment with policy objectives pertaining to health, safety, or national security. A pivotal function of the ITAC involves the examination of allegations concerning unfair trade practices, including issues such as dumping (the sale of goods at below market value in an export market), subsidies provided by foreign governments to their exporters, and sudden increases in imports that inflict or pose a risk of significant harm to domestic industries.

The decisions rendered by the ITAC play a significant role in influencing the contours of international trade within South Africa. The ITAC adjudicates a variety of disputes, including anti-dumping petitions, applications for safeguard measures, and challenges concerning tariff alterations or customs classifications. Should the ITAC's investigative processes validate a claim of unfair trading, it may advocate for the enforcement of corrective actions, such as anti-dumping or countervailing duties.[35] These verdicts bear immediate consequences for importers, exporters, domestic sectors, and consumers, influencing market prices, competitive landscapes, and the accessibility of commodities within the South African context.

Entities and stakeholders within South Africa embroiled in international trade disputes have the prerogative to lodge complaints with the ITAC regarding unfair trading practices or other trade-related grievances. This entails the submission of comprehensive applications and corroborative documents in accordance with the stipulations set forth by the ITAC. The ITAC adheres to established timelines for the investigation process, the issuance of provisional and conclusive decisions. The

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34 Masiteng 2020 *South African Journal of Economic and Management Sciences*.
35 Roberts 2016 *World Trade Review* 79-108.

Trade Act furnishes interested parties with the option to seek an internal review of the ITAC's adjudications. Additional legal recourse may be pursued through the High Court of South Africa, vested with the jurisdiction to scrutinize the ITAC's determinations on judicial grounds.[36]

2.4 Dynamics of trade disputes in South Africa

The landscape of trade within South Africa is distinguished by an array of disputes that mirror the complexities inherent in international commerce. Contractual disputes, emanating from divergent expectations, delays in payment, or issues related to the quality of goods, frequently emerge as points of contention between importers and exporters.[37] Disputes related to anti-dumping and countervailing measures are recurrent, with domestic sectors often asserting that international competitors are involved in unfair pricing strategies or are the beneficiaries of governmental subsidies.[38] Intellectual property disputes, focusing on patent infringements, trademark breaches, or the unauthorised utilisation of copyrighted materials, constitute another segment of trade conflicts encountered by enterprises. Additionally, non-tariff barriers, including technical standards, sanitary stipulations, or intricate customs protocols, may pose challenges and precipitate trade disputes.[39]

A confluence of factors contributes to the genesis of trade disputes in South Africa. The advent of globalisation has amplified trade dependencies, with complex supply chains extending across numerous nations. This intricacy augments the likelihood of miscommunications, logistical dilemmas, and the onset of disputes.[40] The array of trade regulations existing within South Africa and among its trade partners, when misconstrued or improperly implemented, can inadvertently precipitate trade disputes. Variations in standards, quality expectations, and certification processes

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36 Banga 2018 *Journal of World Trade* 229-247.
37 Horn and Mavroidis 2023 *Journal of World Trade* 1-23.
38 Roberts 2016 *World Trade Review* 79-108.
39 Beghin and Bureau 2021 *Annual Review of Resource Economics* 143-166.
40 Miroudot and Shepherd "Global value chains and trade policy" 243-264.

across jurisdictions can also be a focal point of dispute. Occasionally, protectionist measures aimed at safeguarding domestic sectors may be interpreted as discriminatory or obstructive by trade partners, thus inciting trade disputes.[41]

2.5 Challenges for cross-border traders

Even entities of substantial scale with significant resources encounter difficulties in navigating international trade disputes. The legal processes requisite for the resolution of such disputes encompass complexities and protracted durations, often entailing cross-jurisdictional considerations and the explication of international trade accords.[42] Extended disputes can levy a considerable demand on corporate resources, encompassing legal expenditures, consultancy fees, and the allocation of personnel time. In specific instances, political dynamics and lobbying activities may influence the adjudication of a trade dispute, engendering a scenario where larger entities may possess a discernible advantage.[43]

SMMEs participating in transnational commerce face distinct challenges in the realm of trade disputes. The constrained financial and legal capacities of SMMEs often render engagement with formal dispute resolution avenues a daunting and resource intensive endeavour.[44] The intricacies inherent in trade regulations, customs formalities, and the nuances of international trade legislation can act as formidable barriers, deterring SMMEs from pursuing legal redress. Such enterprises may find themselves particularly susceptible to inequitable trade practices, including dumping or the infringement of intellectual property rights, posing a critical threat to their viability.[45] Moreover, a deficiency in awareness regarding the dispute resolution facilities available through the ITAC or the WTO framework may further curtail the

41 Erasmus and Fourie 2016 *Journal of World Trade* 803-823.
42 Busch, Reinhardt and Shaffer 2009 *World Trade Review* 559-577.
43 Dür, Baccini, and Elsig 2014 *The Review of International Organizations* 353-375.
44 International Trade Centre *SME Competitiveness Outlook 2015: Connect Compete Change for Inclusive Growth*.
45 Gootiiz and Mattoo 2018 *Journal of Economic Literature* 1043-97.

capacity of SMMEs to safeguard their commercial interests.

Language barriers represent a formidable obstacle in the adjudication of international trade disputes. Legal documentation, contractual agreements, and technical regulations are frequently articulated in English or the official vernacular of the foreign nation implicated in the dispute.[46] Particularly for SMMEs, the financial incapacity to engage translators or legal practitioners proficient in the requisite linguistic competencies can impede their comprehension of the dispute's intricacies and the procedural mandates. Such linguistic challenges may precipitate an inequitable dynamic within the resolution process.

Trade disputes transcending borders may entail the interaction of parties originating from distinct cultural milieus, embodying divergent business conventions, negotiation approaches, and anticipatory frameworks.[47] Absent recognition and adept navigation of these cultural disparities, the potential for misinterpretations, procedural delays, and the intensification of conflicts is heightened. Proficiency in effective communication, the cultivation of trust, and the identification of consensual resolutions across cultural barriers is paramount for the efficacious resolution of trade disputes.

2.6 Legal framework governing trade disputes

The *Trade Act* constitutes the legal bedrock for the regulation of trade and the resolution of disputes within South Africa.[48] This statute delineates fundamental principles pertaining to import and export procedures, establishes the protocol for the application of tariff and non-tariff measures as deemed necessary, and articulates the methodology for the scrutiny of allegations concerning unfair trade practices. The Act distinctly elaborates on trade remedies, including anti-dumping duties, countervailing duties, and safeguard measures, intended to fortify domestic

46 Hoekman and Mavroidis "The WTO dispute settlement system and its users" 473-503.
47 Brady and Venter 2019 *Alternation* 114-139.
48 Preamble of the *International Trade Administration Act 71 of 2002*.

industries.

Constituted under the auspices of the *Trade Act*, the ITAC is instrumental in overseeing the international trade paradigm of South Africa.[49] Endowed with the competence to initiate and execute investigations concerning tariff modifications, import and export regulations, and accusations of unfair trade practices, the ITAC's purview encompasses the reception of grievances from domestic constituencies, the execution of impartial inquiries predicated on empirical evidence, and the issuance of verdicts that may culminate in the application of trade remedies. Furthermore, the ITAC serves in a consultative capacity to the Minister of Trade, Industry and Competition, offering insights on issues germane to trade.

The Department of Trade, Industry and Competition (hereafter DTIC) is charged with the expansive mandate of formulating and enacting South Africa's trade policies. Tasked with the development of strategies to spur industrial growth, augment competitiveness, and expedite trade exchanges congruent with the nation's economic aspirations, the DTIC collaborates with the ITAC on regulatory matters pertaining to trade and represents South African interests in global trade forums, including the WTO.

2.7 Institutional framework for trade dispute resolution

The ITAC functions as a quasi-autonomous entity, structured to effectively execute its mandates pertaining to trade regulation and dispute resolution. The organisation is segmented into various divisions that specialise in investigations, tariff analyses, import/export regulation, and the administration of trade remedies. Leadership within the ITAC is provided by Commissioners, appointed by the Minister of Trade, Industry and Competition, who possess a wealth of expertise in the fields of economics, law, and international commerce.[50] The dispute resolution capacity of the ITAC encompasses the receipt of complaints, the undertaking of objective

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49 Section 7 of the *International Trade Administration Act 71 of 2002*.
50 Section 8 & 9 of the *International Trade Administration Act 71 of 2002*.

investigations, the facilitation of hearings as required, and the issuance of findings. These findings have the potential to significantly influence international trade flows and the competitive environment within South Africa.

The DSB of the WTO offers a multilateral platform for resolving disputes among member nations that stem from alleged contraventions of the WTO agreements. The DSB employs a systematic procedure that entails consultations among disputing parties, the formation of panels, the delivery of panel and Appellate Body reports, and the final ratification of decisions.[51] This framework is designed to maintain the integrity of the rules-based international trading system and facilitate equitable dispute resolutions among countries.

As a participant in the WTO, South Africa is bound by the organisation's dispute resolution protocols. Should South Africa posit that another member state has breached WTO regulations, it may initiate a dispute through the request for consultations. In the event that these consultations do not yield a resolution, South Africa may request the establishment of a panel to deliberate on the dispute. Decisions issued by the WTO panels and the Appellate Body are capable of being binding on member states. Nonetheless, it is pertinent to acknowledge that the WTO's dispute settlement mechanism operates on a state-to-state basis, precluding individual enterprises or SMMEs from independently initiating cases without governmental mediation.[52]

2.8 Conclusion

This chapter has furnished an exhaustive elucidation of the legal and institutional scaffolding that presides over trade disputes within South Africa. The *Trade Act* is delineated as the foundational pillar of trade regulation, delineating the tenets pursuant to which trade disputes are adjudicated and laying the groundwork for the mandate of the ITAC. The ITAC is instrumental in probing allegations of unjust trade

51 Busch, Reinhardt and Shaffer 2009 *World Trade Review* 559-577.
52 Marceau and Stilwell 2015 *Journal of World Trade* 53-74.

practices, managing import and export controls, and undertaking tariff investigations. The affiliation of South Africa with the WTO further integrates the nation into the international framework for the resolution of trade disputes, with the WTO's Dispute Settlement Body acting as a venue for the mediation of disputes among member nations.

Notwithstanding the establishment of these entities and procedures, the arena of trade dispute resolution unveils a spectrum of challenges confronting various stakeholders. Entities of considerable scale, despite their enhanced resources, may navigate through intricate legal processes, prolonged disputes, and possible political ramifications. SMMEs encounter particular vulnerabilities, characterised by restricted financial and legal capacities, the complexity of regulations, and a predisposition to unjust trade practices. The ensuing chapter will embark on a critical examination of the sufficiency of the extant framework, with a specific focus on the ITAC's adjudications and their repercussions for South African enterprises and the wider trade environment.

Chapter 3 Evaluation and interpretation of relevant case law

3.1 Introduction

This chapter delves into the findings derived from an extensive literature review and case law analysis, centering on the effectiveness and adequacy of South Africa's trade dispute resolution mechanisms. The ITAC is an administrative body established by the *Trade Act* and tasked with the responsibility of administering South Africa's international trade. The ITAC's mandate includes customs tariff investigations, trade remedies, and import and export control.[53]

The chapter then scrutinises the accessibility and inclusivity of existing mechanisms for diverse cross-border traders, with a particular emphasis on the unique challenges encountered by SMMEs. The ability of small businesses to access dispute resolution mechanisms is crucial for their survival and growth in the international trade arena. The chapter culminates in an exploration of the potential merits and demerits associated with the establishment of an independent international trade tribunal in South Africa.[54]

3.2 Effectiveness of existing trade dispute resolution mechanisms in South Africa

The ITAC plays a crucial role in shaping South Africa's trade policy landscape by conducting investigations and making recommendations to the Minister of Trade, Industry, and Competition on tariff adjustments and trade remedies. However, the effectiveness of the ITAC has been questioned in various judicial reviews, with concerns raised about procedural fairness, timeliness, and the quality of its investigations.[55]

The efficiency and effectiveness of the ITAC's dispute resolution processes have

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53 *ITAC Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) para 3.
54 ITAC *Annual Performance Plan* 2020/2021.
55 ITAC *Report Number 488*: *Increase in the rate of customs duty on certain helical springs*.

been subject to both praise and criticism. On the one hand, the ITAC has been commended for its role in protecting the domestic industry and ensuring fair trade practices. In *South Africa Sugar Association v Minister of Trade and Industry and Others;*[56] the Court underscored the importance of the ITAC's role in the tariff-setting process, particularly in balancing the interests of domestic industries, consumers, and fair trade.[57] The Court acknowledged the challenges posed by fluctuating world sugar prices and exchange rates, necessitating timely tariff adjustments by the Minister of Finance based on the ITAC's recommendations.[58]

However, the ITAC's approach to trade dispute resolution has also been criticised for its lack of transparency, impartiality, and timeliness. In *Farm Frites v ITAC*,[59] the Court criticised the ITAC's administrative processes, highlighting instances where the commission's actions resulted in serious prejudice to the applicant. The Court emphasised the need for the ITAC to adhere to procedural fairness and ensure that its decisions are well-founded and do not unduly hinder international trade. In *SA Metal Group (Proprietary) Limited v ITAC and Another,*[60] the Court addressed the issue of urgency and prejudice in anti-dumping investigations, emphasising the need for the ITAC to act in a manner that complies with both domestic law and international trade agreements. These cases highlight the need for the ITAC to improve its processes to ensure fairness, transparency, and timeliness in its investigations and decision-making.[61]

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56 *South Africa Sugar Association v Minister of Trade and Industry and Others* 2017 4 All SA 555 (GP).

57 *South Africa Sugar Association v Minister of Trade and Industry* include the paragraph here.

58 *South Africa Sugar Association v Minister of Trade and Industry* include the paragraph here.

59 *Farm Frites International v International Trade Administration Commission and Others* (unreported) case number 32263/14 of 16 May 2014.

60 *SA Metal Group (Proprietary) Limited v ITAC and Another* (unreported) case number 267/2016 of 17 March 2017.

61 *SA Metal Group (Proprietary) Limited v ITAC and Another* (unreported) case number 267/2016 of 17 March 2017.

3.3 Analysis of landmark ITAC determinations in trade dispute cases

3.3.1 Columbus Stainless (Pty) Ltd v Hemraj[62]

In *Columbus Stainless (Pty) Ltd v Hemraj*, the Court examined the role of the ITAC in the tariff amendment process.[63] The case involved a claim for damages by Columbus Stainless against a former employee for failing to disclose financial interests in a supplier. The Court emphasised that tariff amendments, often based on the ITAC recommendations, are legislative acts with significant economic implications.[64] The Minister of Finance's decision to amend tariffs requires careful consideration of various interests, ensuring a lawful administrative process.[65] This case highlights the importance of the ITAC's role in maintaining fair trade practices and protecting domestic industries, especially in the face of fluctuating global prices and exchange rates, aligning with the broader goals of South Africa's trade policy to foster economic growth and development. However, it also underscores the need for the ITAC to adhere to procedural fairness and make well-founded decisions that do not unduly hinder international trade.[66]

3.3.2 South Africa Sugar Association v Minister of Trade and Industry

In this case, the South African Sugar Association challenged the respondents' failure to implement customs duty on imported sugar fairly and rationally. The Court emphasised the protective role of import duties for local industries and the need for timely adjustments due to fluctuations in world prices and exchange rates.[67] The ITAC's recommendations were deemed crucial in balancing the interests of domestic industries, consumers, and fair trade.[68] The judgement underscored the necessity for the Minister of Finance to make timely tariff adjustments based on the ITAC's

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62 *Columbus Stainless (Pty) Ltd v Hemraj* (unreported) case number 2199/2021 of 3 May 2024.
63 *Columbus Stainless (Pty) Ltd v Hemraj* para *1.*
64 *Columbus Stainless (Pty) Ltd v Hemraj* para *1 – 2.*
65 *Columbus Stainless (Pty) Ltd v Hemraj* para *6 - 8*
66 ITAC *Annual Performance Plan* 2020/2021.
67 *South Africa Sugar Association v Minister of Trade and Industry* insert relevant paragraph here.
68 *South Africa Sugar Association v Minister of Trade and Industry* insert relevant paragraph here.

recommendations, especially in response to volatile market conditions.[69] This case highlights the significance of the ITAC's role in safeguarding domestic industries while ensuring fair competition and consumer protection, aligning with the principles of the National Development Plan (hereafter NDP) to reduce poverty, unemployment, and inequality through inclusive economic growth.[70]

3.3.2.1 Increase in the rate of customs duty on certain helical springs

This report by the ITAC focused on an application by Bedding Component Manufacturers (Pty) Ltd for an increased customs duty on specific helical springs. The Commission's investigation revealed that the domestic industry faced price disadvantages compared to foreign producers.[71] The domestic industry experienced declines in production, market share, profit levels, and capacity utilisation.[72] The ITAC concluded that increasing the customs duty to 30% *ad valorem* would enhance the domestic industry's competitiveness and allow for better utilisation of production capacity.[73] This case demonstrates the ITAC's commitment to supporting local industries facing challenges from imports, aligning with the goals of the New Growth Path (hereafter NGP) and Industrial Policy Action Plan (hereafter IPAP) to promote industrial development and job creation.[74] The ITAC's proactive approach in conducting reviews to assess the impact of tariff adjustments reflects its dedication to evidence-based decision-making and continuous improvement of South Africa's trade policy landscape.[75]

3.3.3 ITAC v SCAW South Africa (Pty) Ltd

In this landmark case, the Constitutional Court of South Africa addressed the issue of anti-dumping duties and the role of the ITAC in making recommendations to the

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69 ITAC *Annual Performance Plan* 2020/2021.
70 *South Africa Sugar Association v Minister of Trade and Industry* para 9.
71 ITAC *Report Number 488*: *Increase in the rate of customs duty on certain helical springs*.
72 ITAC *Report Number 488*: *Increase in the rate of customs duty on certain helical springs*.
73 ITAC *Report Number 488*: *Increase in the rate of customs duty on certain helical springs*.
74 ITAC *Report Number 488*: *Increase in the rate of customs duty on certain helical springs*.
75 ITAC *Annual Performance Plan* 2020/2021.

Minister of Trade and Industry. The Court affirmed the importance of adhering to international trade agreements and domestic legislation in the imposition of anti-dumping duties.[76] The case involved a dispute over the termination of anti-dumping duties on steel wire rope imported from the United Kingdom. The Court's decision emphasised the need for a thorough investigation and adherence to legal procedures in determining the continuation or termination of such duties.[77] This case highlights the delicate balance between protecting domestic industries from unfair trade practices and ensuring compliance with international trade obligations, reflecting the complexities and challenges in administering South Africa's trade policy in a globalised economy.[78]

3.3.4 Farm Frites v ITAC

In *Farm Frites v ITAC*, the Court addressed the issue of urgency and prejudice in anti-dumping investigations. The case involved a dispute over the rejection of information submitted by Farm Frites, a potato chip manufacturer, during an anti-dumping investigation. The Court emphasised the need for the ITAC to act in a manner that complies with both domestic law and international trade agreements.[79] It highlighted the importance of procedural fairness and the potential for serious prejudice if the ITAC's actions are not well-founded.[80] This case underscores the need for the ITAC to balance the urgency of anti-dumping investigations with the rights of the parties involved and to ensure that its decisions are made in accordance with legal principles, upholding the principles of transparency and fairness in administrative decision-making as enshrined in the South African Constitution and the *Promotion of Administrative Justice Act* 3 of 2000 (hereafter *PAJA*).[81]

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76 *ITAC Commission v SCAW South Africa (Pty) Ltd* para 20 - 24.
77 *ITAC Commission v SCAW South Africa (Pty) Ltd* para 36.
78 *ITAC Commission v SCAW South Africa (Pty) Ltd* para 42.
79 *Farm Frites v ITAC* para 17.
80 *Farm Frites v ITAC* para 19.
81 *SA Metal Group (Proprietary) Limited v ITAC* para14.

3.4 Adequacy of existing mechanisms for all cross-border traders

The accessibility and inclusivity of South Africa's trade dispute resolution mechanisms exhibit significant disparities among different types of traders, potentially leading to inequitable outcomes in the resolution of trade conflicts. Large corporations, with their substantial financial resources and access to legal expertise, are generally well-positioned to navigate the complexities of these mechanisms.[82] Such entities can afford legal counsel, invest in comprehensive evidence gathering, and engage in protracted litigation processes, ensuring robust representation of their interests.[83] In contrast, SMMEs, which are critical to South Africa's economic framework, frequently encounter substantial barriers in accessing and effectively utilising these mechanisms.[84]

Despite their significant economic contributions, SMMEs often grapple with a lack of financial resources and specialised expertise, hindering their ability to fully participate in trade dispute resolution processes.[85] The financial burden associated with legal representation, procuring expert witnesses, and navigating administrative fees can be prohibitive for these smaller businesses, creating a substantial barrier to entry.[86] Additionally, SMMEs may lack the in-depth knowledge and understanding of intricate trade laws and regulations, which are often complex and subject to interpretation, making it challenging for them to adequately prepare and present their cases. This lack of access to justice not only undermines the principles of fairness and equality but also threatens the growth and sustainability of SMMEs, impeding their ability to compete effectively in the global market. This disparity in access to justice raises concerns about the inclusivity and fairness of South Africa's trade dispute resolution system, potentially disadvantaging smaller players in the international trade arena.

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82 *SA Metal Group (Proprietary) Limited v ITAC* para 9.
83 *Farm Frites v ITAC* para 37
84 *Farm Frites v ITAC* para 38 - 39.
85 *Farm Frites v ITAC* para 40.
86 *Farm Frites v ITAC* para 41 – 43.

The ITAC's determinations in trade dispute cases, while aimed at fostering fair trade and protecting domestic industries, can inadvertently create disproportionate impacts on SMMEs, potentially hindering their ability to thrive in the international trade landscape. The imposition of anti-dumping duties, although designed to shield local industries from unfair competition, can inadvertently escalate the cost of imported inputs for SMMEs. This increase in production costs can render their products less competitive in both domestic and international markets, thereby stifling their growth potential.[87] The case of *Columbus Stainless (Pty) Ltd v Hemraj* serves as a poignant reminder of the potential economic ramifications of tariff amendments, underscoring the need for a nuanced approach that takes into account the diverse interests of all stakeholders, including the vulnerable SMMEs.[88]

The unique challenges faced by SMMEs in accessing and utilising existing trade dispute resolution mechanisms underscore the imperative for the development of specialised or tailored mechanisms specifically designed to cater to the needs of these businesses.[89] Such mechanisms should prioritise accessibility and affordability, ensuring that SMMEs are not excluded from the justice system due to financial constraints or lack of expertise. Alternative dispute resolution (hereafter ADR) options, such as mediation and arbitration, present a viable avenue for achieving this goal. These ADR mechanisms offer a more streamlined and cost-effective approach to resolving disputes, circumventing the often lengthy and expensive litigation process.[90] Moreover, capacity-building initiatives, such as comprehensive training programs and informative workshops, can empower SMMEs with the requisite knowledge and skills to effectively understand and navigate the intricacies of trade dispute resolution.[91] By proactively addressing the specific needs and challenges of SMMEs, South Africa can cultivate a more inclusive and equitable trade

87 *ITAC Commission v SCAW South Africa (Pty) Ltd* para 30
88 ITAC *Annual Performance Plan* 2020/2021.
89 ITAC *Annual Performance Plan* 2020/2021.
90 *Association of Meat Importers and Exporters v International Trade Administration Commission and Others* 2024 1 All SA 106 (GP).
91 *Farm Frites v ITAC* para 44.

environment that nurtures the growth and development of all businesses, fostering a thriving and competitive economy.[92]

3.5 The Potential for an independent international trade tribunal in South Africa

The establishment of an independent international trade tribunal in South Africa could offer several potential benefits. Primarily, it could enhance expertise in trade dispute resolution.[93] A specialised tribunal, staffed with judges and experts possessing in-depth knowledge and experience in international trade law and practice, would facilitate more informed and nuanced decision-making.[94] Additionally, an independent tribunal could bolster impartiality and fairness in dispute resolution.[95] Operating independently of the executive branch and other government agencies, the tribunal would be insulated from political influence, enabling decisions based solely on legal principles and evidence.[96] Furthermore, an independent tribunal could improve the efficiency and timeliness of dispute resolution.[97] By focusing exclusively on trade disputes, the tribunal could streamline its procedures, reduce the backlog of cases, and provide faster and more effective remedies for aggrieved parties.[98]

International trade tribunals in other jurisdictions, such as the WTO Appellate Body and the North American Free Trade Agreement (hereafter NAFTA) dispute resolution mechanisms, offer valuable insights for South Africa.[99] The WTO Appellate Body has played a crucial role in clarifying and developing international trade law through its jurisprudence.[100] However, it has also faced challenges, such as the recent crisis

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92 ITAC *Annual Performance Plan* 2020/2021.
93 See para 3.3.3 above.
94 See para 3.3.3 above.
95 See para 3.3.3 above.
96 See para 3.3.1 above.
97 See para 3.3.2 above.
98 *SA Metal Group (Proprietary) Limited v ITAC* insert relevant paragraph here.
99 Shaffer, Elsigand Puig 2016 *Law and Contemp Probs 79*, 237.
100 Papaconstantinou and Pedreschi 2022 *Journal of World Trade* page.

over the appointment of new members, underscoring the need for robust institutional mechanisms to ensure the independence and effectiveness of such tribunals.[101] NAFTA dispute resolution mechanisms have been commended for their efficiency and effectiveness in resolving disputes between member states.[102] Nevertheless, they have also been criticised for their lack of transparency and limited access for non-state actors.[103]

Establishing an independent international trade tribunal in South Africa would not be without challenges and risks. Financial implications must be considered, as setting up and maintaining a specialised tribunal would require significant financial resources, including the recruitment of qualified judges and experts, the establishment of administrative infrastructure, and the provision of legal aid for indigent parties.[104] Jurisdictional issues would also need to be addressed to clearly define the tribunal's jurisdiction and avoid conflicts with existing courts and tribunals, both domestically and internationally.[105] Additionally, there is a risk of potential conflicts with existing institutions, such as the ITAC and the Department of Trade, Industry, and Competition.[106] The tribunal's mandate and powers would need to be carefully delineated to ensure that it complements, rather than undermines, the work of these institutions.[107]

The successful implementation of an independent international trade tribunal in South Africa would require a robust legal and institutional framework.[108] This framework would need to address issues such as the appointment and tenure of judges, the rules of procedure and evidence, the enforcement of judgments, and the relationship between the tribunal and other domestic and international

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101 Wolfe *et al* 2020 *Journal of World Trade* page.
102 Baker and Keiser 2019 *U Miami Inter-Am L Rev* 1.
103 Thomas 2021 *European Journal of Law Reform* page.
104 Thomas 2021 *European Journal of Law Reform* page.
105 See para 3.3.3 above.
106 Tregenna and Kwaramba 2014 *Journal of Economic and Financial Sciences* 7.
107 Tregenna and Kwaramba 2014 *Journal of Economic and Financial Sciences* 7.
108 *Farm Frites v ITAC* para 45

institutions.[109] Lessons from other jurisdictions, such as the WTO and NAFTA, can provide valuable guidance in this regard.[110] For instance, the WTO Appellate Body's experience highlights the importance of ensuring the independence and impartiality of tribunal members, while NAFTA's experience underscores the need for transparency and accessibility in dispute resolution processes.[111] By learning from these experiences, South Africa can design an independent trade tribunal that is both effective and legitimate, contributing to a fair and predictable international trade regime.[112]

3.6 Interpretation of evaluation in light of research question and objectives

The evaluation of relevant case law presents a nuanced view of the effectiveness and adequacy of South Africa's trade dispute resolution mechanisms. The ITAC plays a crucial role in investigating and making recommendations on trade remedies and tariff adjustments. Nevertheless, case law analysis indicates that the ITAC's processes have been subject to judicial scrutiny, with concerns raised regarding procedural fairness, timeliness, and the quality of investigations.[113] While the ITAC has been instrumental in protecting domestic industries and ensuring fair trade, as evidenced in cases such as *South Africa Sugar Association v Minister of Trade and Industry and Others*,[114] its effectiveness is hindered by delays and potential biases, as highlighted in *Farm Frites v ITAC.*[115]

The accessibility and inclusivity of these mechanisms for various trader categories also present significant concerns. Large corporations, with their substantial resources and legal expertise, are better equipped to navigate the complexities of

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109 *SA Metal Group (Proprietary) Limited v ITAC* insert relevant paragraph here.
110 See para 3.3.4 above.
111 *SA Metal Group (Proprietary) Limited v ITAC* insert relevant paragraph here.
112 See para 3.3.4 above.
113 ITAC *Annual Performance Plan* 2020/2021.
114 See para 3.3.2 above.
115 See para 3.3.4 above.

trade dispute resolution compared to SMMEs.[116] SMMEs often face amongst other factors, financial constraints and lack the necessary expertise to effectively participate in these processes, potentially hindering their growth and competitiveness in the international market.[117]

The analysis of landmark the ITAC determinations reveals the complexities and challenges in balancing the interests of various stakeholders, including domestic industries, importers, exporters, and consumers.[118] Cases such as *Columbus Stainless (Pty) Ltd v Hemraj* and *ITAC v SCAW South Africa (Pty) Ltd* underscore the importance of adhering to legal principles, procedural fairness, and international trade obligations in making decisions that have significant economic implications.[119]

The findings have several implications for the effectiveness and adequacy of South Africa's trade dispute resolution mechanisms. First, the delays and potential biases in the ITAC's processes can undermine the legitimacy and fairness of its decisions, eroding trust in the system.[120] Second, the lack of accessibility and inclusivity for SMMEs can create an uneven playing field in international trade, disadvantageous to smaller players and hindering their growth potential.[121] Third, the complexities and challenges in balancing the interests of various stakeholders in trade dispute cases necessitate a more nuanced and context-specific approach to decision-making.

The establishment of an independent international trade tribunal could potentially address some of the shortcomings identified in the current system. An independent tribunal, staffed with experts in international trade law, could enhance expertise, impartiality, and efficiency in dispute resolution.[122] By operating independently of

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116 Naradda Gamage *et al* 2020 *Economies* 79.
117 Botha *et al* 2021 *Development Southern Africa* 153-174.
118 *SA Metal Group (Proprietary) Limited v ITAC* insert relevant paragraph here.
119 See para 3.3.1, 3.3.3 above.
120 Tregenna and Kwaramba 2014 *Journal of Economic and Financial Sciences* 7.
121 Makwara 2019 *African Journal of Hospitality, Tourism and Leisure* 1-14.
122 Howse R Ruiz-Fabri H and Ulfstein G (eds) 2018 *The Legitimacy of International Trade Courts and Tribunals* Studies on International Courts and Tribunals.

political influence, the tribunal could make decisions based solely on legal principles and evidence, thereby enhancing fairness and impartiality. Furthermore, a specialised tribunal could streamline its procedures and reduce the backlog of cases, leading to faster and more effective remedies for aggrieved parties.[123] However, the establishment of such a tribunal would also present challenges, including financial implications, jurisdictional issues, and potential conflicts with existing institutions.[124]

3.6 Recommendations

3.6.1 Recommendations for policy reforms and practical measures

To enhance the accessibility, efficiency, and fairness of trade dispute resolution in South Africa, several policy reforms and practical measures are recommended:

a) The ITAC's capacity should be augmented to ensure timely and thorough investigations. This could involve increasing its resources, enhancing its expertise, and improving its administrative processes.

b) Measures should be implemented to enhance the transparency and impartiality of the ITAC's decision-making processes. This could include publishing more detailed reasons for its decisions, providing greater opportunities for public participation, and establishing clear guidelines for avoiding conflicts of interest.

c) The accessibility of trade dispute resolution mechanisms for SMMEs should be improved. This could involve providing financial assistance for legal representation and expert witnesses, offering simplified procedures for smaller cases, and conducting outreach and education programs to raise awareness of these mechanisms among SMMEs.

d) The use of ADR mechanisms, such as mediation and arbitration, should be encouraged to provide a more cost-effective and efficient way to resolve

123 ITAC *Annual Performance Plan* 2020/2021.
124 ITAC *Annual Performance Plan* 2020/2021.

disputes, particularly for SMMEs.

e) The feasibility of establishing an independent international trade tribunal should be further explored, considering the experiences of other jurisdictions and the specific needs of the South African trade context. Such a tribunal could potentially address some of the shortcomings identified in the current system, such as the lack of expertise and impartiality. However, careful consideration should be given to the potential challenges and risks associated with establishing such a tribunal, including financial implications and jurisdictional issues.

3.7 Conclusion

This chapter has scrutinized the effectiveness and adequacy of South Africa's trade dispute resolution mechanisms, with a particular emphasis on the role of the ITAC and the accessibility of these mechanisms for various trader categories, especially SMMEs. The analysis of case law and the ITAC determinations has highlighted a system that, while integral to the administration of South Africa's international trade, exhibits several shortcomings. These shortcomings include delays and potential biases in the ITAC's processes, alongside limited accessibility for SMMEs due to financial constraints and lack of expertise.

The findings underscore the necessity for reforms aimed at enhancing the efficiency, transparency, impartiality, and inclusivity of South Africa's trade dispute resolution mechanisms. Although the establishment of an independent international trade tribunal could potentially address some of these challenges, it is imperative to carefully consider the associated financial implications, jurisdictional issues, and potential conflicts with existing institutions. By addressing these issues and implementing the recommended reforms, South Africa can develop a more robust and equitable trade dispute resolution system that supports the growth and development of all businesses, thereby contributing to a more vibrant and competitive economy.

Chapter 4 - Conclusion and recommendations

4.1 Summary of key findings

The effectiveness of the ITAC in resolving trade disputes is pivotal for maintaining a fair and robust international trade environment in South Africa. The ITAC plays a crucial role in the adjudication of trade disputes, providing a structured mechanism within the legal framework to address issues ranging from anti-dumping to safeguard measures. This effectiveness is essential not only for ensuring compliance with national and international trade laws but also for fostering trust among domestic and international traders. A well-functioning dispute resolution body like the ITAC contributes to the stability and predictability of the trading system, which is critical for economic growth and development.[125] The assessment of the ITAC's performance reveals both commendable strengths and notable weaknesses, which are crucial for understanding its overall impact on the trade environment.[126]

The ITAC has demonstrated significant strengths in its regulatory compliance and adherence to legal frameworks. One of the key strengths of the ITAC is its ability to provide timely and legally sound resolutions to trade disputes, ensuring that decisions are aligned with both South African law and international trade agreements.[127] This has been particularly evident in the ITAC's handling of anti-dumping cases, where the commission has effectively utilised its regulatory authority to protect domestic industries from unfair trade practices.[128] Additionally, the ITAC's structured and transparent processes for dispute resolution have been instrumental in maintaining a high standard of legal rigour and procedural fairness.[129] These strengths underscore the ITAC's role in upholding the integrity of the trade regulatory framework and enhancing the credibility of South Africa's trade

125 Bown *Self-enforcing trade: developing countries and WTO dispute settlement*.
126 Hoekman and Kostecki *The political economy of the world trading system: the WTO and beyond*.
127 Viner *The customs union issue*.
128 Davis *Why adjudicate? Enforcing trade rules in the WTO*.
129 Hudec 1993 *Enforcing international trade law: The evolution of the modern GATT legal system*.

policies on a global stage.[130]

However, despite these strengths, the ITAC faces several limitations that impact its overall effectiveness, particularly in terms of accessibility, transparency, and inclusivity. One of the primary weaknesses identified is the limited accessibility of the ITAC's dispute resolution mechanisms for SMMEs.[131] These enterprises often lack the resources and legal expertise needed to navigate complex trade regulations and dispute resolution processes effectively.[132] Additionally, while the ITAC strives for transparency, there are concerns regarding the clarity and accessibility of its procedures and decisions for less experienced traders.[133] The inclusivity of the ITAC's processes is another area of concern, as the current framework may inadvertently favour larger corporations with greater resources and influence.[134] Addressing these weaknesses is critical for ensuring that the ITAC can fully achieve its mandate of providing fair and equitable trade dispute resolution for all stakeholders, thereby supporting a more inclusive and balanced trade environment in South Africa.[135]

4.2 Adequacy of current mechanisms

The adequacy of current dispute resolution mechanisms is critical in ensuring a balanced and equitable international trade environment for all cross-border traders. The mechanisms established by the ITAC aim to provide a fair process for resolving trade disputes in accordance with both national and international laws. However, the effectiveness of these mechanisms varies significantly across different types of traders.[136] While the framework is generally robust in its legal and procedural aspects, its practical implementation reveals disparities in accessibility and

130 Mattoo and Subramanian 2004 *World Trade Review* 385-407.
131 Peet *Unholy trinity: the IMF World Bank and WTO*.
132 Abbott, Cottier and Gurry *International intellectual property in an integrated world economy*.
133 Bethlehem *et al The Oxford handbook of international trade law.*
134 Stiglitz *Globalization and its discontents revisited: Anti-globalization in the era of Trump*.
135 Rodrik "One economics many recipes: globalization institutions and economic growth".
136 Bown *Self-enforcing trade: developing countries and WTO dispute settlement*.

effectiveness.[137] This section evaluates how well these mechanisms serve the needs of both large corporations and SMMEs, highlighting the stark contrasts in their experiences.[138]

Large corporations generally navigate the current dispute resolution system with relative ease, largely due to their extensive resources and legal expertise.[139] These entities are well-equipped to engage with the complex regulatory environment and can afford to hire experienced legal teams to represent their interests.[140] As a result, their needs are largely met by the existing mechanisms, allowing them to efficiently address and resolve trade disputes.[141] The procedural rigour and transparency of the ITAC's processes benefit these corporations, ensuring that their cases are handled with due diligence and within the framework of established legal norms.[142] This advantage enables large corporations to maintain their competitive edge and secure their market positions without significant disruptions.[143]

In stark contrast, SMMEs face substantial challenges when engaging with the current dispute resolution mechanisms.[144] These enterprises often operate with limited financial resources and lack the specialised legal expertise required to effectively navigate complex trade disputes.[145] The cost of legal representation and the time required to engage with the ITAC's processes can be prohibitive, often discouraging SMMEs from pursuing legitimate claims.[146] Additionally, the procedural intricacies and formalities of the dispute resolution process can be overwhelming for smaller businesses, leading to a sense of exclusion and disenfranchisement.[147] As a result, many SMMEs struggle to access justice and adequately protect their

137 Hoekman and Kostecki *The political economy of the world trading system: the WTO and beyond*.
138 Peet *Unholy trinity: the IMF World Bank and WTO*.
139 Davis *Why adjudicate? Enforcing trade rules in the WTO*.
140 Viner *The customs union issue*.
141 Hudec 1993 *Enforcing international trade law: The evolution of the modern GATT legal system*.
142 Mattoo and Subramanian 2004 *World Trade Review* 385-407.
143 Rodrik "One economics many recipes: globalization institutions and economic growth".
144 Stiglitz *Globalization and its discontents revisited: Anti-globalization in the era of Trump*.
145 Abbott, Cottier and Gurry *International intellectual property in an integrated world economy*.
146 Bethlehem *et al The Oxford handbook of international trade law page 36 – 41.*
147 Hoekman and Kostecki *The political economy of the world trading system: the WTO and beyond*.

trade interests, highlighting a significant gap in the current system that needs to be addressed to foster a more inclusive trade environment.[148]

4.3 Need for an independent tribunal

The necessity of establishing an independent international trade tribunal in South Africa has been a significant point of discussion in recent years. The current dispute resolution mechanisms, while functional, exhibit limitations that disproportionately affect smaller traders and undermine the overall fairness of the trade environment.[149] An independent tribunal would aim to address these deficiencies by providing a specialised and impartial forum dedicated exclusively to trade disputes.[150] This tribunal would operate independently from existing regulatory bodies like the ITAC, ensuring that its decisions are not influenced by political or economic pressures.[151] The establishment of such a tribunal is seen as essential for enhancing the credibility and effectiveness of South Africa's trade dispute resolution system, promoting a more equitable environment for all participants in international trade.[152]

The potential benefits of establishing an independent international trade tribunal are considerable. Firstly, it would increase the fairness and impartiality of dispute resolutions by ensuring that cases are adjudicated by experts with a deep understanding of international trade law.[153] This would mitigate the risk of biassed decisions that could arise from political or economic influences. Secondly, an independent tribunal would improve accessibility for all traders, including SMMEs, by providing a streamlined and dedicated process for handling trade disputes.[154] This could include simplified procedures and reduced costs, making it easier for

148 Peet *Unholy trinity: the IMF World Bank and WTO*.
149 *Peet Unholy trinity: the IMF World Bank and WTO.*
150 Bown *Self-enforcing trade: developing countries and WTO dispute settlement*.
151 Davis *Why adjudicate? Enforcing trade rules in the WTO*.
152 Hoekman and Kostecki *The political economy of the world trading system: the WTO and beyond*.
153 Hudec 1993 *Enforcing international trade law: The evolution of the modern GATT legal system*.
154 Mattoo and Subramanian 2004 *World Trade Review* 385-407.

smaller traders to seek redress. Additionally, the tribunal could foster greater consistency in decision-making, which would enhance the predictability and stability of the trade environment.[155] These benefits collectively would contribute to a more transparent and trustworthy system that supports the growth and sustainability of South Africa's international trade.

However, establishing an independent international trade tribunal also presents several challenges. The financial costs associated with creating and maintaining such a tribunal are significant and could be a major barrier. This includes expenses related to staffing, infrastructure, and ongoing operational costs. Political implications also pose a challenge, as the establishment of an independent tribunal might face resistance from stakeholders who benefit from the current system or fear a loss of control.[156] Additionally, integrating this new body with the existing legal structures would require careful planning and coordination to ensure that it complements rather than conflicts with existing mechanisms.[157] Legal reforms would be necessary to define the tribunal's jurisdiction, procedures, and authority, which could be a complex and contentious process.[158] Despite these challenges, the potential long-term benefits of a fairer and more efficient dispute resolution system make the establishment of an independent international trade tribunal a compelling proposition.

4.4 Evaluation of research objectives

4.4.1 Objective 1: Evaluate the effectiveness of the ITAC's determinations in managing international trade disputes.

The research indicates that the ITAC has established a robust framework for managing international trade disputes, demonstrating significant strengths in

155 Rodrik "One economics many recipes: globalization institutions and economic growth".
156 Bethlehem *et al The Oxford handbook of international trade law.*
157 Bethlehem *et al The Oxford handbook of international trade law.*
158 Abbott, Cottier and Gurry *International intellectual property in an integrated world economy*.

regulatory compliance and procedural rigour. The ITAC's determinations are generally aligned with both South African law and international trade agreements, providing timely and legally sound resolutions.[159] However, gaps remain, particularly in the accessibility and transparency of the dispute resolution process. SMMEs often struggle to navigate the complexities of the ITAC's mechanisms, highlighting a need for more inclusive and simplified procedures.[160] While the ITAC effectively serves larger corporations, the current system could be enhanced to better support all traders, ensuring equitable access to dispute resolution.

4.4.2 Objective 2: Assess the adequacy of existing mechanisms for all cross-border traders.

The findings reveal a significant disparity in the adequacy of existing mechanisms for different types of cross-border traders. Large corporations benefit from extensive resources and legal expertise, allowing them to effectively engage with the current dispute resolution system and meet their needs. In contrast, SMMEs face considerable challenges, including financial constraints and a lack of specialised knowledge, which hinder their ability to access justice through these mechanisms.[161] The complexity and cost of the processes act as significant barriers for smaller traders, indicating that the existing framework is not adequately serving all stakeholders. Addressing these disparities is crucial for creating a more balanced and accessible trade environment.

4.4.3 Objective 3: Investigate the desirability of an independent international trade tribunal.

The research underscores the potential benefits of establishing an independent international trade tribunal, including increased fairness, impartiality, and accessibility for all traders. Such a tribunal would provide a dedicated forum for

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159 Sibanda Sr 2020 *Foreign Trade Review* 216-238.

160 Ndlovu *Regulation of export cartel in South African competition law and SACD* page number.

161 Bhorat H *et al* 2018 *SMMEs in South Africa: Understanding the constraints on growth and performance* Cape Town: DPRU University of Cape Town.

trade disputes, free from political and economic influences, thereby enhancing the credibility and effectiveness of the dispute resolution process. However, significant challenges exist in establishing this tribunal, such as financial costs, political resistance, and the need for integration with existing legal structures. Despite these hurdles, the long-term advantages of a fairer and more efficient system make the proposal for an independent tribunal a compelling consideration.

4.5 Policy recommendations

4.5.1 Enhancing the ITAC's framework

Improving the effectiveness and fairness of the ITAC's dispute resolution framework necessitates several specific recommendations. Transparency is a critical aspect requiring attention. The ITAC should implement measures to increase the openness of its processes and decisions. This can include publishing detailed reports on the rationale behind each decision, making procedural documents readily available to the public, and establishing a formal mechanism for stakeholders to provide input during the dispute resolution process. Enhanced transparency will not only build trust among stakeholders but also ensure that decisions are perceived as fair and unbiased.

Accessibility for SMMEs is another crucial area for improvement. To make the dispute resolution process more accessible for SMMEs, the ITAC could introduce initiatives such as providing legal assistance or creating simplified procedures tailored to the needs of smaller enterprises. Legal assistance could be offered through partnerships with legal aid organisations or by establishing a dedicated support fund for SMMEs. Simplified procedures might involve streamlined documentation requirements and expedited timelines for dispute resolution, which would help reduce the financial and administrative burden on SMMEs. These measures would ensure that smaller traders have a fair chance to engage in the dispute resolution process and protect their trade interests effectively.

4.5.2 Establishment of an independent tribunal

The establishment of an independent international trade tribunal in South Africa requires a series of deliberate steps, beginning with legislative changes. Key legislative amendments would be necessary to provide a legal foundation for the tribunal, define its jurisdiction, and outline its operational procedures. This would involve revising existing trade and commerce laws to incorporate provisions for the independent tribunal and ensuring that its decisions are legally binding. Additionally, legislative measures should aim to guarantee the tribunal's independence from political and economic influences, thereby safeguarding its impartiality. A comprehensive legislative framework is essential to support the effective functioning of the tribunal and ensure its decisions are respected and enforced.

Structural considerations are also paramount in the successful establishment of the tribunal. Recommendations for the structure of the tribunal include defining clear jurisdictional boundaries to avoid overlap with existing bodies like the ITAC. The tribunal should have a well-defined mandate to handle specific types of trade disputes, ensuring clarity and focus on its operations. Operational procedures should emphasise fairness, efficiency, and accessibility, incorporating best practices from international models of trade dispute resolution. This could involve setting up a panel of expert adjudicators with extensive knowledge of international trade law, establishing transparent procedural rules, and providing mechanisms for stakeholder engagement. By addressing these structural and procedural aspects, the proposed tribunal would be well-positioned to enhance the overall trade dispute resolution landscape in South Africa.

4.5.3 Implications for policy and practice

The findings and recommendations from this research provide substantial insights for policymakers engaged in trade policy reforms. Addressing the identified gaps in the ITAC's current framework and promoting the establishment of an independent international trade tribunal can significantly enhance the fairness and effectiveness of trade dispute resolution mechanisms. Implementing measures to increase transparency in the ITAC's processes and decisions will build trust among

stakeholders and ensure that resolutions are perceived as equitable. Furthermore, simplifying procedures and providing legal assistance for SMMEs can make the dispute resolution process more accessible and inclusive, fostering a more balanced trade environment. These reforms are crucial for creating a supportive infrastructure that not only meets the needs of large corporations but also empowers smaller traders to protect their interests effectively. Policymakers should also consider the legislative amendments required to support the establishment of an independent tribunal, ensuring its integration with existing legal frameworks and safeguarding its impartiality. These efforts will contribute to a robust and credible trade policy that promotes sustainable economic growth and international competitiveness.

The practical implications of the recommended changes for traders are profound, particularly for both large corporations and SMMEs. For large corporations, enhanced transparency and a more structured dispute resolution process can lead to more predictable outcomes and reduced litigation costs, allowing them to focus resources on their core business operations. Improved accessibility and simplified procedures will significantly benefit SMMEs by reducing the financial and administrative burdens associated with dispute resolution. Access to legal assistance can level the playing field, enabling smaller traders to navigate complex legal landscapes and effectively advocate for their rights. The establishment of an independent international trade tribunal would offer a dedicated forum for trade disputes, ensuring impartial adjudication and fostering a more stable and trustworthy trading environment. These changes are expected to enhance the overall efficiency of trade dispute resolution, leading to quicker resolutions and reduced economic disruptions for all traders. By creating a more equitable and accessible system, these reforms will support the growth and sustainability of businesses across different sectors, contributing to a vibrant and resilient trade ecosystem.

4.6 Potential areas for further research

4.6.1 Expanding the scope

Further research could be significantly beneficial by expanding the scope of current studies to include comparative analyses with other countries' trade dispute resolution mechanisms. Comparative studies could provide valuable insights into best practices and innovative solutions adopted by other nations, which may be applicable to the South African context. For instance, examining the dispute resolution frameworks in countries like Singapore, known for its efficiency and impartiality, or the European Union, with its comprehensive legal structures, could highlight potential areas for improvement and adaptation in South Africa. Additionally, comparing the effectiveness and inclusivity of different international trade tribunals could offer a broader perspective on the benefits and challenges of establishing a similar institution in South Africa. Such comparative studies would not only enrich the understanding of global practices but also provide a robust basis for policy reforms aimed at enhancing the effectiveness and fairness of trade dispute resolution mechanisms. Exploring how other nations address the unique challenges faced by SMMEs could also inform targeted strategies to improve accessibility and support for smaller traders.

4.6.2 Longitudinal studies

Longitudinal studies are recommended to assess the long-term impact of any implemented changes on the effectiveness of trade dispute resolution in South Africa. These studies should track the performance and outcomes of the ITAC's revised framework and the proposed independent international trade tribunal over an extended period. By analysing data over time, researchers can evaluate the sustained effectiveness of transparency measures, accessibility improvements for SMMEs, and the overall fairness of the dispute resolution process. Longitudinal research would provide a comprehensive view of how policy reforms evolve and their real-world impact on trade dynamics, stakeholder satisfaction, and economic growth. This approach could also identify emerging trends and unintended consequences, enabling continuous refinement and adaptation of trade policies and mechanisms. Furthermore, longitudinal studies could offer insights into the

resilience and adaptability of the dispute resolution framework under various economic conditions, thereby informing more robust and forward-looking policy decisions. By committing to ongoing research, policymakers and stakeholders can ensure that trade dispute resolution mechanisms remain effective, equitable, and responsive to the needs of all traders.

4.7 Conclusion

In summary, this chapter has conducted a thorough review of the effectiveness and limitations inherent in the ITAC's current dispute resolution framework, with a particular emphasis on areas requiring enhancement such as transparency and accessibility for SMMEs. The necessity and potential advantages of establishing an independent international trade tribunal in South Africa have been examined, along with the associated challenges of its implementation. Policy recommendations have been outlined to improve the ITAC's processes and to support the establishment of the tribunal, focusing on legislative amendments and structural considerations. The implications of these findings for policymakers and traders underscore the critical importance of inclusive and effective trade dispute resolution mechanisms. Furthermore, suggestions for future research, including comparative studies and longitudinal assessments, have been provided to ensure the continuous improvement and efficacy of trade dispute resolution in South Africa.

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