

# Regulation 22 of the Amended Tariff Investigations Regulations and the right to “procedural fairness”

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## SUMMARY

Regulation 22 of the Amended Tariff Investigations Regulations (ATR) permits the International Trade Administration Commission (ITAC) to submit to the Minister of Trade and Industry, a “final finding” that consists of a recommendation to either approve or reject an application for a tariff amendment and a Ministerial Minute or a report explaining the reasons for ITAC’s evaluation. The Minister of Trade and Industry can then decide to either approve or reject ITAC’s recommendation. However, Regulation 22 of the ATR does not avail the affected parties any notice of the nature and purpose of this “proposed administrative action” nor a “reasonable opportunity to make representations” on it. Consequently, the object of this paper is to assess whether Regulation 22 complies with the right to “procedural fairness” in the manner contemplated by section 3 of the Promotion of Administrative Justice Act 3 of 2000.

## 1 Introduction

Regulation 22 of the Amended Tariff Investigations Regulations (ATR) permits the International Trade Administration Commission (ITAC) to submit to the Minister of Trade and Industry, a “final finding” that consists of a recommendation to either approve or reject an application for a tariff amendment together with a Ministerial Minute or a report explaining the basis of ITAC’s evaluation. The Minister of Trade and Industry (the Minister) can either approve or reject ITAC’s recommendation. However, Regulation 22 of the ATR does not provide affected parties with any notice of the nature and purpose of this “proposed administrative action” nor a “reasonable opportunity” to comment on it. Consequently, the purpose of this paper is to assess whether Regulation 22 complies with the right to “procedural fairness” as espoused by section 3 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

## 2 The process of ITAC in an “application” for a tariff amendment under the ATR

A “tariff” or “customs duty” is a tax on imported goods that is imposed at the border of a country.<sup>1</sup> Customs duties serve a purpose as they can be a source of revenue for government and they can also be used to protect and/or promote domestic industry.<sup>2</sup> There are three types of tariffs: first, is an “*ad valorem* tariff”, which is a tariff on the value of a product and the tariff is expressed as a percentage on the value of that product; second, a “specific duty/tariff” can also be imposed which is a “flat tariff” that is based on the number of units of merchandise imported and third, a “tariff rate quota”, which has features of a quota and a tariff that specifies the importable amount of the product that may enter at one tariff rate and any products in excess of that amount will enter at a different rate.<sup>3</sup> Irrespective of the type of tariff imposed by a regulatory authority, a difference exists between an “applied” and “bound” tariff.<sup>4</sup> An “applied” tariff is the “actual” tariff imposed whereas a “bound” tariff is the maximum tariff that a country has committed to impose in its Schedule of Concessions to the World Trade Organization.<sup>5</sup> The Schedule of Concessions is also known as a “tariff list” or “tariff schedule”, which gives details of the bound tariffs imposed on each good.<sup>6</sup> The Schedules of Concessions are part and parcel of the General Agreement on Tariffs and Trade, 1994 (GATT).<sup>7</sup> It is common cause that South Africa is a founding member of the World Trade Organization and has signed the Marrakesh Agreement Establishing the World Trade Organization and its covered agreements, including the GATT.<sup>8</sup> South Africa acceded to GATT and this accession was promulgated in the Government Gazette.<sup>9</sup> Parliament then endorsed the agreement through the Geneva General

1 Bhala *Modern GATT law: A treatise on the law and political economy of the General Agreement on Tariffs and trade and other World Trade Organisation Agreements* (2013) 529; Van den Bossche and Zdouc *The law and policy of the World Trade Organization* (2016) 420.

2 Van den Bossche and Zdouc 425-426.

3 Bhala 529-531.

4 Bhala 531.

5 Bhala 531-533.

6 Bhala 533. The Harmonized Commodity Description and Coding System, which operates under the auspices of the World Customs Organization, classifies these goods.

7 See Art II.7 of GATT; Bhala 533.

8 See *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) para 2; *Progress Office Machines v SARS* 2008 (2) SA 13 (SCA) para 6; *Association of Meat Importers v ITAC* [2013] 4 All SA 253 (SCA) 108 para 10; See Brink “*Progress Office Machines v South African Revenue Services* [2007] SCA 118 (RSA)” 2008 *De Jure Law Journal* 645; Ndlovu “South Africa and the World Trade Organization Anti-dumping Agreement Nineteen Years into Democracy” 2013 *SAPL* 296; Vinti “A Spring without Water: The Conundrum of Anti-dumping Duties in South African Law” 2016 *PER/PELJ* 16-21.

9 *Progress Office Machines v SARS* *supra*, para 5.

Agreement on Tariffs and Trade Act 29 of 1948.<sup>10</sup> The GATT permits Members to impose tariffs as long as they are not in excess of a Member's bound rate.<sup>11</sup> In pursuance of its tariff obligations under the GATT, South Africa has promulgated the International Trade Administration Act 71 of 2002 (ITAA) and the Amended Tariff Investigations Regulations (ATR).<sup>12</sup> In this regard, the ITAA and the ATR permit a person to apply to the ITAC for an amendment of a tariff.<sup>13</sup> ITAC is the official statutory body established under the ITAA that is responsible for the "administration of international trade".<sup>14</sup> The duties of ITAC include investigating, evaluating and making recommendations to the Minister on matters of international trade.<sup>15</sup>

Within this framework, a person can apply for an increase or decrease of a tariff as well as a rebate or drawback. In this regard, an increase in the rate of customs duties is used for protecting domestic producers that may be experiencing threatening import pressures to make the necessary adjustments so that eventually, they can become internationally competitive without any government intervention in the form of customs duty support.<sup>16</sup> The requested tariff increase occurs within the confines of the difference between the "applied" tariffs and the "bound" tariffs.<sup>17</sup> A reduction or removal of duties is used on a case-by case basis on resource-based inputs to lower input costs and in instances whereby intermediate goods, consumption goods, or capital goods are not produced domestically or unlikely to be manufactured domestically.<sup>18</sup> Lastly, rebate and drawbacks function as policy instruments which seek to provide a customs duty waiver and therefore, an availability at world competitive prices of goods that attract duties but are not manufactured or insufficiently produced domestically as an industrial or agricultural input for certain vital applications, as capital item, or as an agricultural product for consumption.<sup>19</sup> It is clear then, that a tariff amendment affects three different constituents: government, consumers and producers.<sup>20</sup>

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10 *Progress Office Machines v SARS* *supra*, para 5.

11 Art II.1(b) of the GATT; See Appellate Body Report, *India - Additional and Extra-Additional Duties on Imports from the United States*, WT/DS360/AB/R, adopted on 17 November 2008, para 159.

12 GN R 652 in GG 39035 issued in terms of the International Trade Administration Commission Act 71 of 2002 dated 31 July 2015; *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* *supra*, para 2; *International Trade Administration Commission v SA Tyre Manufacturers Conference* (738/2010) [2011] ZASCA 137 (23 September 2011) paras 4-5; *Progress Office Machines v SARS* *supra*, para 6.

13 See S 16(1)(c) read with S 26(1)(c) of the ITAA.

14 *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* *supra*, para 6.

15 See S 16 read with S 26 of ITAA; See *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* *supra*, para 6.

16 ITAC Tariff Investigations <http://www.itac.org.za> (accessed 2019-03-02) 3.

17 ITAC Tariff Investigations <http://www.itac.org.za> (accessed 2019-03-02) 3-4.

18 ITAC Tariff Investigations <http://www.itac.org.za> (accessed 2019-03-02) 4.

19 ITAC Tariff Investigations <http://www.itac.org.za> (accessed 2019-03-02) 4.

20 Bhala 539.

All applications for a tariff amendment must be submitted to ITAC in writing and in the prescribed format.<sup>21</sup> If an application contains “confidential” information, then “non-confidential” summaries of that information must be submitted with that application.<sup>22</sup> In the event that the information cannot be summarised in a non-confidential version, a sworn statement will be provided to that effect.<sup>23</sup> ITAC has the final say on claims for the “confidentiality” of the information submitted during the investigation in a tariff amendment application.<sup>24</sup>

It must be noted that ITAC may decline to “process” an application in instances whereby it is “materially deficient”, for instance when the application is not in the prescribed form or if it contains contradictory or incorrect information.<sup>25</sup> If the application is “deficient”, ITAC will notify the relevant party and they will have to submit a “corrected application” within the time prescribed in ITAC’s deficiency letter.<sup>26</sup> If an applicant fails to comply in this regard, ITAC will “refer” the matter back to the applicant.<sup>27</sup> It is unclear what “refer” means but it goes without saying, that the applicant can resubmit the application. However, ITAC may accept an application that is materially deficient in instances where “despite reasonable efforts”, the applicant was unable to obtain the required information or has only similar information.<sup>28</sup>

The investigation phase of an application for a tariff amendment comprises of two stages: the “Preliminary Investigation Phase” and the “Final Investigation Phase”. The “Preliminary Investigation Phase” consists of ITAC’s preliminary evaluation of an application.<sup>29</sup> In this regard, once an application for a tariff amendment has been accepted as properly “completed”, ITAC will evaluate whether to “accept” or “reject” the application.<sup>30</sup> If ITAC “accepts” an application, it must publish a Publication/Initiation Notice as provided for in Regulation 17.1 of the ATR.<sup>31</sup> The purpose of the Publication Notice is to notify “interested parties” that ITAC has “accepted” an application and that the investigation has commenced as well as providing a summary of the

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21 Reg 6.1 of the ATR.

22 Reg 6.2 of the ATR.

23 Reg 3.3 of the ATR.

24 Reg 3.6 and reg 3.7 read together with s 34 of ITAA.

25 Reg 15.1 of the ATR.

26 Reg 15.3 read with reg 15.4.

27 Reg 15.5 of the ATR.

28 Reg 15.2 of the ATR. In terms of “similar information”, ITAC cannot accept, except under “exceptional circumstances”, an application for evaluation under reg 16 that addresses the “same or a substantially similar matter” to that of an application which was submitted and assessed by ITAC earlier in time under reg 16.

29 Part C: Sub-Part III of the ATR.

30 Reg 16.1 of the ATR.

31 Reg 16.2 of the ATR.

reasons for the investigation.<sup>32</sup> This will be substantiated by the opening of a “Public File” on the matter that provides all the “non-confidential” documents of the investigation.<sup>33</sup> It must be noted that ITAC can “self-initiate” an investigation such as when there is a request by government organ.<sup>34</sup> After the Initiation Notice, interested parties can request a non-confidential version of the application that has been “accepted”, which can also be found in the Public File.<sup>35</sup> It is notable that access to the Public File is only acquired through an appointment with the relevant investigating official.<sup>36</sup> This could open the process to obstruction. On the other hand, if ITAC “rejects” an application, the applicant must be notified in writing of the decision and the reasons thereof.<sup>37</sup>

The second stage of ITAC’s investigation is termed the “Final Investigation Phase”.<sup>38</sup> This stage commences with interested parties submitting “comments” on the application where they can for instance, challenge the “confidentiality” of the submissions or that the application is “materially deficient”.<sup>39</sup> “Comments” made on the Publication notice must be in writing and they can be “confidential” or “non-confidential” and they must be submitted within the time period specified in the Initiation Notice.<sup>40</sup> If the comments made are “confidential”, then they must be accompanied by a non-confidential version as provided by Regulation 3 of the ATR.<sup>41</sup> Comments that are not accompanied by a non-confidential version or that are not properly indicated to be “confidential”, will not be regarded as “confidential”.<sup>42</sup> Interested parties can be granted an extension period on which to comment on the Publication Notice but such request for an extension must be submitted in writing “normally” at least two days before the deadline in the Publication Notice and must be properly motivated.<sup>43</sup> This implies that the relevant investigating official has a discretion on whether to accept a request for an extension within “two days” of the deadline in the Publication Notice. If there are “deficiencies” in the comments, the parties in question will be given a “deficiency” letter clearly outlining the deficiencies and specifying the time-period to rectify those deficiencies.<sup>44</sup> ITAC also has the right to “verify” the accuracy of the

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32 Reg 17.1 of the ATR. “Interested parties” under the ATR include Southern African Customs Union importers, exporters, trade unions, trade associations and producers as provided by reg 1 of the ATR. ITAC is also empowered to accept on its own or upon request, any person as an “interested party”.

33 See reg 8 of the ATR.

34 Reg 17.3 of the ATR.

35 Reg 18.3 of the ATR.

36 Reg 8.2 of the ATR.

37 Reg 16.3 of the ATR.

38 Part C: Sub-Part IV of the ATR.

39 See reg 20, reg 3 and reg 15 of the ATR.

40 Reg 20.1 of the ATR.

41 Reg 20.2 of the ATR.

42 Reg 20.3 of the ATR.

43 Reg 20.5 of the ATR.

44 Reg 21 of the ATR.

information submitted by an interested party including verifications at the premises of the interested party.<sup>45</sup> ITAC may then compile a “verification report” specifying which information was verified and a non-confidential version of that report will be placed in the public file.<sup>46</sup> An interested party whose submissions have been verified, has seven days to comment on the verification report.<sup>47</sup> Interested parties are also given an opportunity to request an oral hearing during an investigation.<sup>48</sup> The Final Investigation Phase concludes with the “Final Commission Evaluation of an application and finding”.<sup>49</sup> In this regard, ITAC will evaluate the application that has been “accepted” and investigated and make its finding on a case-by-case approach employing the criteria set out in Regulation 10 of the ATR, which assesses the following factors *inter alia*:

- "(a) the domestic industry's production capacity and potential;
- (b) employment, including considerations of labour intensity and labour demographics of the relevant industrial sector;
- (c) investment;
- (d) price differentials between the domestically manufactured product and the imported product;
- (e) market shares;
- (f) import and export data;
- (g) demand and supply conditions;
- (h) the financial state of the domestic industry, including profitability and return on investment ratios;
- (i) price and cost structures;
- (j) the rate of effective protection; and
- (k) the availability of a domestically manufactured identical or substitute product."<sup>50</sup>

These factors are not exhaustive and do not carry equal weight.<sup>51</sup> The weight attached to each factor will depend on each case.<sup>52</sup> Significantly, it is important to note that these factors are evaluated together with the industrial policy and economic objectives of government.<sup>53</sup> ITAC is also required to accord due consideration to the Policy Directive on matters ITAC shall consider in evaluating applications for amendment of customs duties (hereafter, the Policy Directive).<sup>54</sup> The Policy Directive requires a consideration of *inter alia*, whether it is necessary for the applicant to

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45 Reg 11 of the ATR.

46 Reg 12.1 and reg 12.3 of the ATR.

47 Reg 12.4 of the ATR; See reg 7 of the ATR on the “computation of periods of time”.

48 See reg 5 of the ATR.

49 Reg 22 of the ATR.

50 Reg 10.2 of the ATR.

51 Reg 10.2 of the ATR.

52 Reg 10.2 of the ATR.

53 Reg 10.1 of the ATR; See the New Growth Path, Industrial Policy Action Plan, National Industrial Policy Framework and the Trade Policy and Strategy Framework in GN 476 in GG 39945 of 2016-04-21.

54 National Industrial Policy Framework and the Trade Policy and Strategy Framework in GN 476 in GG 39945 of 2016-04-21.

make an objectively demonstrable and binding obligation as to what measures it will implement in order to ensure the raising of incomes, the promotion of investment or the promotion of employment, if the proposed measure is implemented and what commitments the applicant has made in this respect and the likely effect of these obligations on industrial output, investment in plant, equipment, skills and economic investment, economic investment and pricing of outputs.<sup>55</sup> Upon the evaluation of all these factors, ITAC then makes a “final finding” on the tariff amendment application, which is then submitted to the Minister for approval in terms of Regulation 22 of the ATR. Regulation 22 reads:

“22.1 The Commission shall evaluate the information obtained in connection with an investigation and shall forward a final finding in the form of a recommendation to approve or reject an application, together with a ministerial minute or a report setting forth the results of its evaluation, to the Minister, unless the provisions of section 64 (2) of the Act are in operation, in which case such recommendation and report shall also be forwarded to the SACU Tariff Board.

22.2 The Commission shall inform an applicant in writing of, as applicable –

- (a) the approval of its application and the reasons therefore after the Minister has considered the Commission’s recommendation and made a decision to approve the application and the Minister’s decision has been implemented by the South African Revenue Service through the publication of a notice in the Government Gazette; or
- (b) the rejection of its applications and the reasons therefore after the Minister has considered the Commission’s recommendation and made a decision to reject the application.

22.3 The Commission will publish the outcome of its investigations on its official website after the relevant action by the Minister and/or the South African Revenue Service contemplated in subsection 2 has been taken.”

Consequently, it is clear that Regulation 22 allows ITAC to submit to the Minister, the “final finding” that consists of a “recommendation” approving or rejecting the application together with a Ministerial Minute or report, which explains the results of ITAC’s assessment.<sup>56</sup> However, the problem here is that “interested parties” are not given any notice of the nature and purpose of the “final finding” of ITAC nor a reasonable opportunity to comment on it.<sup>57</sup> Consequently, the object of this paper is to establish whether Regulation 22 of the ATR complies with the right to “procedural fairness” as espoused by section 3 of PAJA.<sup>58</sup> This evaluation will be conducted through an analysis of relevant case law and legislation.

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55 Paras 1-3 of the Policy Directive.

56 Reg 22.1 of the ATR.

57 Reg 1 of the ATR.

58 S 3(2)(b)(i) of PAJA.

### 3 The right to “administrative action” that is “procedurally fair”

Section 33(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution), provides that “administrative action” must be lawful, reasonable and procedurally fair. The Constitution then required that Parliament must pass legislation to give effect to this right.<sup>59</sup> Consequently, Parliament then passed PAJA to give effect to section 33 of the Constitution.<sup>60</sup> Thus, the cause of action for the judicial review of “administrative action” now resides in PAJA.<sup>61</sup>

This paper does not seek to discuss the definition of “administrative action” as stipulated in section 1 of PAJA. Our courts and commentators are still grappling with that enigmatic and Herculean task. For purposes of this discussion, it is accepted that it is common cause that any decision, recommendation or determination of ITAC constitutes “administrative action” and is subject to judicial review.<sup>62</sup> The grounds of review in this regard are located in PAJA.<sup>63</sup> Within this approach, the “final finding” in Regulation 22 is a determination or decision of ITAC as an organ of state exercising a public function or power in terms of the ITAA, which materially and adversely affects the rights of affected parties and has a direct and external legal effect. Thus, there is no question that the “final finding” constitutes “proposed administrative action” that is awaiting the approval or rejection of the Minister. This then means that the “final finding” in Regulation 22 must comply with section 3 of PAJA, which encapsulates the right to “procedural fairness” affecting any person.

In this regard, section 3(1) of PAJA provides that administrative action, which materially and adversely affects the rights or legitimate expectations of any person, must be “procedurally fair”. This “procedural fairness” encapsulates two elements: *audi alteram partem*, which means that one is afforded an opportunity to participate in the decisions that will

<sup>59</sup> S 33(3) of the Constitution.

<sup>60</sup> See Long Title and Preamble to PAJA; *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) paras 95-96; See Murcott “Procedural fairness as a component of legality: is a reconciliation between *Albutt* and *Masetsha* possible?” 2013 SALJ 266-267.

<sup>61</sup> *Walele v City of Cape Town* 2008 (6) SA 129 (CC) para 29; *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) para 99; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) para 25.

<sup>62</sup> S 46 of ITAA; *International Trade Administration Commission v SA Tyre Manufacturers Conference* *supra*, para 40; *Minister of Finance v Paper Manufacturers Association of South Africa* 2008 (6) SA 540 (SCA) para 8; *Associated Equipment Company CC v International Trade Administration Commission* (15201/2013) [2014] ZAGPPHC 154 (4 April 2014) para 33; Brink “Anti-dumping and Judicial Review in South Africa: An Urgent Need for Change” 2012 *Global Trade & Customs Journal* 276.

<sup>63</sup> *International Trade Administration Commission v SA Tyre Manufacturers Conference* *supra*, para 40.

affect them and *nemo iudex in sua causa*, which means no one should be a judge in their own cause.<sup>64</sup> Even though these principles of common law have been supplanted by PAJA, they remain relevant for interpreting the objects of section 3 of PAJA.<sup>65</sup> Hoexter then submits that section 3 of PAJA has a dual structure: that is to say, sections 3(1) and 3(2) of PAJA are concerned with the “proposed action”, while the last three subsections refer to administrative action that has occurred.<sup>66</sup> Within this imperative, section 3(2)(b)(i) of PAJA provides that in order to give effect to the right to “procedural fairness”, an administrator must give a person whose rights or legitimate expectations have been materially and adversely affected, adequate notice of the nature and purpose of the proposed administrative action. This notice of impending action is fundamental to administrative law in South Africa because it is required that one must have knowledge of the charges against them.<sup>67</sup> The term “proposed” denotes that such notice must be “prior notice”.<sup>68</sup> The purpose of section 3(2)(b)(i) of PAJA is to guarantee the actual occasion to be afforded a hearing.<sup>69</sup> Its object is to afford the affected person a proper opportunity to evaluate their situation and prepare a defence.<sup>70</sup> However, this notice may not be required in instances in which it would hinder the purport of the given power.<sup>71</sup>

Unfortunately, PAJA does not define the term “adequate”.<sup>72</sup> This depends on the circumstances of the affected party and on the nature and gravity of the matter.<sup>73</sup> Hoexter submits that “adequacy” connotes “sufficient information” such that one can advocate for their rights.<sup>74</sup> It has been held that for the notice to be “adequate”, it must have all relevant details including the date and time of the proposed decision, the reason for the proposed decision and the place at which the affected parties can challenge the basis of the proposed decision.<sup>75</sup> Moreover, it must afford the applicants adequate time to conduct the required enquiries and investigations, to obtain legal counsel and to organise themselves collectively should they deem it necessary.<sup>76</sup> In respect of information about the proposed action, at common law, one was

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64 Hoexter *Administrative Law in South Africa* (2012) 362; *De Lange v Smuts* 1998 (3) SA 785 (CC) para 131.

65 Hoexter 362; *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 para 45; *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 para 136.

66 Hoexter 367.

67 Hoexter 369; *Kadalie v Hemsworth NO* 1928 TPD 495 (TPD) 506.

68 Burns *Administrative law* (2013) 256.

69 *POPCRU v Minister of Correctional Services* [2006] 4 BLLR 385 (E) para 73.

70 *POPCRU v Minister of Correctional Services* *supra*, para 73.

71 Hoexter 369.

72 Hoexter 369.

73 Hoexter 369.

74 Hoexter 369; *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (Corruption Watch as amici curiae)* 2014 (1) BCLR 1 (CC) para 90.

75 *Joseph v City of Johannesburg* 2010 (3) BCLR 212 (CC) para 60.

76 *Joseph v City of Johannesburg* *supra*, para 60.

required to be given adequate clarity on the nature and purpose, otherwise the right would be abstract rather than concrete.<sup>77</sup> If necessary, such notice may also specify time and place at which the submissions will be made.<sup>78</sup>

In the same breath, section 3(2)(b)(ii) of PAJA requires that an administrator must give a person whose rights or legitimate expectations have been materially and adversely affected by administrative action, “a reasonable opportunity to make representations”. The prescripts of a “reasonable opportunity” will differ from case to case.<sup>79</sup> This may require written or oral submissions depending on the nature of the matter, which falls within the discretion of the administrator.<sup>80</sup> Significantly, this opportunity to be heard must relate to all factors that are favourable and adverse to the case of the affected persons.<sup>81</sup> The “reasonable opportunity” to make representations can normally be given by ensuring that “reasonable steps” are taken to alert affected persons of the decision to be made.<sup>82</sup> It is inconceivable that one could be said to have been given a “reasonable opportunity” to comment on the proposed administrative action without adequate notice of the nature and purpose of the proposed administrative action.<sup>83</sup> In simple terms, one cannot comment on what they do not know about. Thus, section 3(2)(b)(i) and section 3(2)(b)(ii) of PAJA complement each other because the lack of information on the nature and purpose of the proposed administrative action will affect the quality of the affected person’s opportunity to make representations.<sup>84</sup> Consequently, there is a clear link between the amount and type of information availed to an affected person and the strength of their submission in this regard.<sup>85</sup> It can then be argued that a contravention of section 3(2)(b)(i) invariably means a violation of section 3(2)(b)(ii) of PAJA.

It must also be noted that a “fair administrative procedure depends on the circumstances of each case”.<sup>86</sup> Courts have affirmed and emphasised the need for flexibility in the application of the tenets of “fairness” in a

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77 Hoexter 370.

78 Hoexter 370.

79 Burns 257.

80 Burns 257.

81 Burns 257.

82 *Zondi v MEC for Traditional and Local Government Affairs* *supra*, para 112; *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening)* 2002 (1) SA 429 (CC) para 11; *Masetsha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) para 204.

83 See Hoexter 372.

84 Hoexter 372.

85 Hoexter 371; *Airports Company South Africa Limited v Airport Bookshops (Pty) Ltd t/a Exclusive Books* [2015] 3 All SA 561 (GJ) para 134.

86 S 3(2) of PAJA; Hoexter 365; See *Chairman: Board On Tariffs and Trade v Brenco Incorporated* (285/99) [2001] ZASCA 67 (25 May 2001) paras 13-14; *Metro Projects CC Klerksdorp Local Municipality* 2004 (1) SA 16 (SCA) para 13.

myriad of different contexts.<sup>87</sup> This flexibility is further evinced by PAJA when it provides that if it is “reasonable and justifiable in the circumstances”, an administrator may disregard the procedural fairness requirements taking into consideration factors that include: the objects of the empowering provision; the nature and purpose of, and the need to take the administrative action; the likely effect of the administrative action and the urgency of taking the administrative action or the urgency of the matter.<sup>88</sup> A literal reading of PAJA implies that the minimum requirements under section 3(2)(b) are compulsory and must be complied with if there is no departure by the administrator in terms of section 3(4).<sup>89</sup> On this construction, a court, would only be permitted to review a procedure that does not meet the minimum requirements of section 3(2)(b) when the administrator makes a decision in terms of section 3(4) to depart from these requirements and when such decision is taken on review.<sup>90</sup> According to Skweyiya J, such an approach would be oblivious of the flexibility inherent in the concept of procedural fairness.<sup>91</sup> A literal approach to section 3 of PAJA would lead to “circuitous litigation” where courts would be required to defer evaluating the “reasonableness” of disregarding the minimum requirements until the administrator acts under section 3(4) and such decision is taken on review.<sup>92</sup> Therefore, section 3(2)(a) of PAJA must be construed as an enabling provision that permits courts to exercise a discretion in enforcing the minimum procedural fairness requirements under section 3(2)(b).<sup>93</sup> For purposes of this discussion, this means that the ATR must be evaluated against the “procedural fairness” requirements of section 3(2)(b) of PAJA.

Furthermore, if the administrator has information at their disposal that is prejudicial to the affected parties, it would be “unfair” not to divulge that information and give the person the opportunity of addressing it.<sup>94</sup> This approach has met with some judicial resistance.<sup>95</sup> Regardless, section 3(2)(b) encapsulates the essence of the right when “fairness” requires a hearing to be given.<sup>96</sup> Thus section 3(2)(b) is concerned with

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87 *Chairman: Board On Tariffs and Trade v Brenco Incorporated* *supra*, para 14.

88 S 3(4) of PAJA.

89 *Joseph v City of Johannesburg* *supra*, para 56.

90 *Joseph v City of Johannesburg* *supra*, para 56.

91 *Joseph v City of Johannesburg* *supra*, para 57.

92 *Joseph v City of Johannesburg* *supra*, para 58.

93 *Joseph v City of Johannesburg* *supra*, para 58.

94 Hoexter 373; See *Du Bois v Stompendrift-Kamanassie Besproeiingsraad* 2002 (5) SA 186 (C).

95 *Simunye Developers CC v Lovedale Public FET College* [2010] ZAACGH 121 para 37 and *Thabo Mogudi Security Services CC v Randfontein Local Municipality* [2010] 4 All SA 314 (GSJ) (7 May 2010) para 42, which described such an approach as “anathema”, “impractical” and would “bog down” the process.

96 *POPCRU v Minister of Correctional Services* *supra*, para 70.

the *audi alterum partem* principle.<sup>97</sup> It is within this imperative that this paper seeks to assess whether ITAC’s “final finding” complies with the right to “procedural fairness” as espoused by section 3(2)(b)(i) and section 3(2)(b)(ii) of PAJA.

## 4 Evaluation

It has been established in this discussion that Regulation 22 of the ATR does not give affected parties any notice of the “final finding” nor a reasonable opportunity to comment on it. Therefore, the question to be resolved here is whether Regulation 22 complies with the right to “procedural fairness” as provided by section 3(2)(b)(i) and section 3(2)(b)(ii) of PAJA. There are other grounds of “procedural fairness” under sections 3 and 4 of PAJA but they are not the focus of this paper.

At first blush, the term ‘final finding’ in Regulation 22 implies that there is a “preliminary finding”. However, the ATR does not provide for a “preliminary finding”. Rather, the ATR only refers to the “preliminary evaluation” in terms of Regulation 16, which falls under the Preliminary Investigation Phase. In this regard, Regulation 16 empowers ITAC to “evaluate” whether the application must be “accepted” or “rejected”. The decision on whether to “accept” or “reject” an application hinges on the matrix of factors under Regulation 10 of ATR, the Policy Directive and the industry policy and economic objectives of the government. The factors under Regulation 10 are used for both the “Preliminary Commission evaluation” under Regulation 16, and the “Final Commission Evaluation” under Regulation 22 of the ATR. Thus, it appears that at each stage of the investigation phase, ITAC conducts an “evaluation” and makes a “finding” or “decision”.<sup>98</sup> It follows then that the decision to “accept” or “reject” an application by ITAC may be regarded as a “preliminary decision or finding”. As already established, interested parties are afforded a reasonable opportunity to comment on the Publication Notice, which evinces ITAC’s “preliminary finding”. It is then my view that since the affected parties are given adequate notice of the nature and purpose of the “preliminary finding” i.e. the Publication Notice, and a reasonable opportunity to “comment” on this “finding” under Regulation 20, it follows that the same opportunity be accorded to affected parties in respect of ITAC’s “final finding” under Regulation 22 of the ATR.

Secondly, it has been held that ITAC’s “final finding” in the form of a recommendation and “report” is not only a fundamental link in the administrative and legislative chain; it is regarded as a “jurisdictional fact” for the Minister’s decision on whether to approve or reject ITAC’s

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97 *Potgieter v Howie NNO* 2014 (3) SA 336 (GP) para 19; *Mobile Telephone Networks (Pty) Ltd v Chairperson of the Independent Communications Authority of South Africa; Vodacom (Pty) Ltd v Chairperson of the Independent Communications Authority of South Africa* [2014] 3 All SA 171 (GJ) para 39.

98 See reg 18.2 of the ATR.

recommendation on the application for a tariff amendment.<sup>99</sup> “Jurisdictional facts” refer in general, “to preconditions or conditions precedent that must exist prior to the exercise of the power and procedures to be followed or formalities to be observed, when exercising the public power”.<sup>100</sup> These facts are regarded as “jurisdictional” because the exercise of power hinges on their existence or compliance with them, as the case may be.<sup>101</sup> The administrator must confirm that the “jurisdictional facts” exist prior to exercising the discretionary power.<sup>102</sup> This is because it is settled law that even a preliminary finding could have significant consequences in particular matters including where it is a “jurisdictional fact” especially where it constitutes the basis of a decision “which may have grave consequences”.<sup>103</sup> This means that the legislative and administrative process hinges on a “‘valid’ ITAC report”, which is a “jurisdictional fact” for the Minister’s decision under Regulation 22.<sup>104</sup> Thus, an “invalid report” vitiates the administrative process and subsequent legislation to that extent.<sup>105</sup> This then means that a “fatal flaw” in the “final finding” under Regulation 22, invalidates ITAC’s administrative process and the “subsequent” decisions and legislation that arise out of this process.<sup>106</sup> In this regard, the interested parties in the tariff amendment application will only know of ITAC “final finding”, which is as a “jurisdictional fact” for the Minister’s “decision”, upon the publication of the said “decision” in the Government Gazette. In this way, a “fatal flaw” in the “final finding” would escape the scrutiny of interested parties who could have assisted ITAC to identify and cure the “fatal flaw”. Consequently, Regulation 22 contravenes the duties of ITAC to give affected parties adequate notice of the nature and purpose of the administrative action and a reasonable opportunity to make representations.<sup>107</sup> This is the antithesis of the *audi alteram partem* principle. It is obvious that this approach has “grave consequences” for the validity of ITAC’s administrative process, its “findings” and for the rights of affected parties.

Furthermore, upon a proper evaluation of the Board on Tariffs and Trade Act 107 of 1986, it is common cause that the Board on Tariffs and Trade (BTT) had an investigative and determinative function in deciding

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99 *Minister of Finance v Paper Manufacturers Association of South Africa* *supra*, para 8.

100 Hoexter 290.

101 Hoexter 290.

102 *Union of Refugee Women v Director, Private Security Industry Regulatory Authority* 2007 (4) SA 395 (CC) para 78.

103 *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* (133/98) [1999] 2 All SA 381 (A) (12 March 1999) para 17.

104 See *Minister of Finance v Paper Manufacturers Association of South Africa* *supra*, para 14.

105 See *Minister of Finance v Paper Manufacturers Association of South Africa* *supra*, para 14.

106 *Minister of Finance v Paper Manufacturers Association of South Africa* *supra*, para 8; *Chairman: Board On Tariffs and Trade v Brenco Incorporated* *supra*, para 10.

107 See S 3(2)(b)(i) of PAJA read with S 3(2)(b)(ii) of PAJA.

whether to approve a tariff amendment and making its final finding and recommendation to the Minister.<sup>108</sup> However, it was required that when the BTT exercised its deliberative or adjudicatory function, interested parties are given adequate notice of the nature and purpose of the proposed administrative action and they are accorded a reasonable opportunity to comment on it.<sup>109</sup> This is the encapsulation of “procedural fairness” in the manner contemplated by sections 3(2)(b)(i) and 3(2)(b)(ii) of PAJA.

In the same breath, it has been held that the *audi alteram partem* principle must apply at all stages of ITAC’s administrative process, which comprises of the investigation and adjudication stages.<sup>110</sup> By the same token, it was held in *Brenco*, that the Board on Tariffs and Trade Act in establishing the BTT and its ““administrative system””, shows that the BTT had the duty to conduct a hearing for all interested parties before the “final finding” that is submitted to Minister to make a decision.<sup>111</sup> It is trite law that the functions of the BTT and ITAC are similar and that the Board on Tariffs and Trade Act and the ITAA, must be read together in interpreting the duties and functions of ITAC.<sup>112</sup> Since the requirements of procedural fairness are “contextual and relative”, this then means that the “fairness” obligations of ITAC under the ITAA must be construed in light of the BTT. In fact, in certain instances like “dumping” investigations, ITAC is required to investigate and evaluate applications for anti-dumping duties as required by section 32 of the ITAA read with the Board on Tariffs and Trade Act, as if the latter Act had not been repealed.<sup>113</sup> This would then mean that ITAC has the same obligations towards affected parties like the BTT. Therefore, on the strength of the *dicta* of the courts in *Earthlife, SCAW* and *Brenco*, ITAC is required to give affected parties a reasonable opportunity to make representations or comment on its “final finding”, which is the “determinative or adjudicatory” stage of its process in an application for a tariff amendment.

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<sup>108</sup> See *Chairman: Board On Tariffs and Trade v Brenco Incorporated* *supra*, para 29; See s 4 of Board on Tariffs and Trade Act 107 of 1986.

<sup>109</sup> *Chairman: Board On Tariffs and Trade v Brenco Incorporated* *supra*, para 29.

<sup>110</sup> See *Earthlife Africa (Cape Town) v Director General: Department of Environmental Affairs and Tourism and Eskom Holdings* 2005 (3) SA 156 (C) para 54; *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* *supra*, para 83.

<sup>111</sup> *Chairman: Board On Tariffs and Trade v Brenco Incorporated* *supra*, para 15.

<sup>112</sup> *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* paras 2 and 34; *Progress Office Machines v SARS* *supra*, para 4; *Association of Meat Importers v ITAC* *supra*, paras 13- 14; See Ss 2,3 and 4 of Schedule 2 of the ITAA; See S 4 of Board on Tariffs and Trade Act 107 of 1986 and s 16 read with s 26 of ITAA.

<sup>113</sup> *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* *supra*, para 34. For a discussion on “dumping” in South Africa, see Vinti “The Curious Case of the ‘Non-co-operating Interested Party’ in Anti-dumping Investigations in South Africa: A Critical Analysis of *Farm Frites International v International Trade Administration Commission*” 2018 SAPL 1-18; Brink 2008 *De Jure Law Journal* 645.

By way of comparison, the Anti-Dumping Regulations, the Countervailing Regulations and the Amended Safeguard Regulations all provide for a reasonable opportunity to comment on the “final finding” of ITAC. First, the Anti-Dumping Regulations allow affected parties to comment on the preliminary report and the “essential facts letter”, which constitutes the basis of ITAC’s “final finding”.<sup>114</sup> In fact, the courts have gone as far as to hold that the “essential facts letter” contains ITAC’s recommendation.<sup>115</sup> Thus, there is no difference between the “essential facts” as employed in the abovementioned regulations, and the “final finding” in the ATR. The Anti-Dumping Regulations also allow ITAC to grant parties an extension to “comment” on the essential facts upon proof of “good cause”.<sup>116</sup> ITAC will then take all relevant “comments” on the essential facts into consideration in its final finding.<sup>117</sup> Similarly, the Countervailing Regulations provide affected parties the opportunity to comment on the preliminary report and the essential facts, which constitutes the basis of its “final finding”.<sup>118</sup> Interested parties are also given an opportunity to apply for an extension of the time-period to comment if they prove “good cause” for such an extension.<sup>119</sup> ITAC will then consider these “comments” in its final finding.<sup>120</sup> By the same token, the Amended Safeguard Regulations make provision for interested parties to comment on the preliminary report before it makes its final determination.<sup>121</sup> It is clear then that at the adjudicatory stage in respect of dumping, safeguards and countervailing investigations, the relevant regulations provide affected parties adequate notice of the nature and purpose of the “proposed administrative action” and a reasonable opportunity to comment on it. This is the essence of “procedural fairness” in the manner contemplated by PAJA. The ATR does not offer a “reasonable and justifiable” basis for a “departure” from this approach.

It bears mention that “fairness” does not require that the Minister must give the affected parties a hearing or an opportunity to comment on the “final finding” once s/he receives it from ITAC.<sup>122</sup> That

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114 Ss 35 and 37 of the International Trade Administration Commission Regulations on Anti-Dumping in South Africa of GN 3197 in GG 25684 issued in terms of the International Trade Administration Commission Act 71 of 2002 dated 14 November 2003.

115 *International Trade Administration Commission v SCAW South Africa (Pty) Ltd supra*, para 20.

116 S 37.3 of Anti-Dumping Regulations.

117 S 37.4 of Anti-Dumping Regulations.

118 Ss 35 and 37 of International Trade Administration Commission Countervailing Regulations in GN R 356 GG 27475 issued in terms of the International Trade Administration Commission Act 71 of 2002 dated 15 April 2005.

119 S 37.3 of the Countervailing Regulations.

120 S 37.4 of the Countervailing Regulations.

121 S 19 of the International Trade Administration Commission Amended Safeguard Regulations in GN R 662 in GG 27762 issued in terms of the International Trade Administration Commission Act 71 of 2002 dated 8 July 2005.

122 *Chairman: Board On Tariffs and Trade v Brenco Incorporated supra*, para 71.

responsibility falls squarely on ITAC as the body that conducted the investigation.<sup>123</sup> This “underscores” the fact that it is only ITAC that must give the affected parties a reasonable opportunity to make representations on its “final finding” and recommendation.<sup>124</sup> It is clear then, that Regulation 22 contravenes the rights of affected parties to have adequate notice of the nature and purpose of the proposed administrative action and to be given a reasonable opportunity to comment on it as required by PAJA.

To this end, PAJA constitutes framework legislation and thus, its provisions apply when enabling legislation makes no reference to the matter of fair procedures.<sup>125</sup> The one approach is to “read into” the enabling legislation if this is possible, that is when the legislation in question is “actually inconsistent” with PAJA.<sup>126</sup> The most common iteration is that where enabling legislation addressing fairness insufficiently, such that the provisions of section 3 will address the “gaps” in the provisions and thus, PAJA and enabling legislation must be read together.<sup>127</sup> Regulation 22 falls into the former category. This is because Regulation 22 denies affected parties both the right to adequate notice of the nature and purpose of the “final finding” and the right to be given a reasonable opportunity to comment on this proposed administrative action. This then means that the “procedural fairness” requirements of section 3(2)(b) of PAJA must be “read into” the ATR. This would then compel ITAC to give the affected parties i.e. the interested parties under the ATR, adequate notice of the nature and purpose of the “final finding” postulated in Regulation 22 of the ATR as well as a reasonable opportunity to comment on this finding. A failure or refusal by ITAC to read the ATR with section 3(2)(b) of PAJA, would render Regulation 22 unconstitutional.

## 5 Conclusion

Upon a close reading of Regulation 22 of the ATR, it is my view that it is not in accordance with the rights of affected parties to be given adequate notice of the nature and purpose of the proposed administrative action and a reasonable opportunity to comment on it as required by section 3(2)(b) of PAJA. This is because Regulation 22 allows ITAC to submit the “final finding” to the Minister without complying with the mandate to give affected parties adequate notice of the nature and purpose of the proposed administrative action and a reasonable opportunity to

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123 *Chairman: Board On Tariffs and Trade v Brenco Incorporated* *supra*, para 71.

124 See *Chairman: Board On Tariffs and Trade v Brenco Incorporated* *supra*, para 71.

125 Hoexter 367; *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd* 2006 (5) SA 483 (SCA) para 29; *Zondi v MEC for Traditional and Local Government Affairs* *supra*, para 101.

126 Hoexter 368; *Zondi v MEC for Traditional Affairs and Local Government Affairs* *supra*, para 101.

127 Hoexter 368.

comment on it. However, the absence of these provisions is not fatal. In this regard, section 3(2)(b)(i) and section 3(2)(b)(ii) of PAJA must be “read into” Regulation 22. This would then require that ITAC must give the “interested parties” adequate notice of the nature and purpose of the “final finding” and a reasonable opportunity to comment on this proposed administrative action. This approach would align the ATR with other legislation that ITAC administers and more importantly, bring the ATR into line with the Constitution and PAJA. A contrary approach by ITAC has profound implications for the validity of all of ITAC’s decisions on applications for tariff amendments under the ATR.