Association of Meat Importers and Exporters v International Trade Administration Commission (9233/2022) [2023] ZAGPPHC 1790 (12 October 2023)

More clarity offered on the decision-making process of the Minister of Finance in the imposition of anti-dumping duties (and other trade remedies) in South Africa.

1 Introduction

The High Court had occasion to establish the decision-making process in respect of the imposition of tariffs in South Africa under section 48(1)(b) of the Customs and Excise Act 91 of 1964 (CEA) in *South Africa Sugar Association v the Minister of Trade and Industry* [2017] 4 All SA 555 (GP) (30 August 2017) (hereafter, *SASA*) and *Pioneer Foods (Pty) Ltd v Minister of Finance* (15797/17) [2017] ZAWCHC 110 (29 September 2017) (hereafter, *Pioneer Foods*). In particular, the decisions in *Pioneer Foods* and *SASA* explained the scope of the powers of the Minister of Trade, Industry and Competition (Minister of Trade) and the Minister of Finance in respect of the amendment of Schedule 1 to the CEA to impose a tariff. Tariffs or duties are taxes on products imposed at the border. The High Court in both *Pioneer Foods* and *SASA* rejected the argument that the Minister of Finance merely "rubberstamps" the decision of the Minister of Trade to impose tariffs on a product (*SASA* para 37; *Pioneer Foods* para 30). Thus, both courts conclusively held that the final decision maker in respect of the imposition of tariffs is the Minister of Finance. This is because the High Court saw section 48(1)(b) of the CEA as employing directory language that conferred a discretion on the Minister of Finance upon receipt of the "request" of the Minister of Trade to impose a tariff. These decisions have been criticized as incorrect in law since they essentially arrogate the power to make trade policy from the Minister of Trade to the Minister of Finance (Vinti "The scope of the powers of the Minister of Finance in terms of section 48(1)(b) of the Customs and Excise Act 91 of 1964: An appraisal of recent developments in Case Law" 2018 *Potchefstroom Electronic Law Journal* 1-25). The High Court also remarked that it saw the same approach applying to the imposition of the trade remedies of dumping, safeguards and countervailing measures under Chapter VI of the CEA (*SASA* para 39). '

The High Court decisions also affirmed that the three decision makers for the imposition of trade remedies as being the International Trade Administration Commission (ITAC), the trade investigative body in South Africa established under section 7 of the International Trade Administration Act 71 of 2002 (ITAA), the Minister of Trade as conferred by section 4 of the Board on Tariffs and Trade Act 107 of 1986 (BTTA) and the Minister of Finance as bestowed by section 48(1)(b) of the CEA (*SASA* paras 33–34; *Pioneer Foods* paras 30–31). Significantly, the High Court

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uncovered that National Treasury is part of the decision-making process as it conducts an analysis of the impact of the imposition of a tariff on the fiscus on behalf of the Minister of Finance. Vinti has argued that this hitherto unknown investigation conducted by National Treasury on behalf of the Minister of Finance must allow for interested parties to be heard on the grounds of procedural fairness or rationality (Vinti "The right of 'interested parties' to be heard during an anti-dumping investigation conducted by the National Treasury on behalf of the Minister of Finance" 2020 *SALJ* 731-732). The case of the *Association of Meat Importers and Exporters v International Trade Administration Commission* (9233/2022) [2023] ZAGPPHC 1790 (12 October 2023) (hereafter, *AMIE v ITAC*) has brought this particular issue to the fore by focusing on the locus of decision making by the Minister of Finance and the right of interested parties to be heard and their views considered. Consequently, this note explores the implications of the decision in *AMIE v ITAC* with a specific focus on the decision-making process of the Minister of Finance. Invariably, the note touches on the requirements of the administrative process by ITAC in trade investigations.

It is apposite here to sketch the course of an anti-dumping investigation. "Dumping" essentially means the sale of a product in the market of another country at price below its normal price (Section 1(2) of the ITAA read with Article VI of the General Agreement on Tariffs and Trade 1994 (GATT)). Dumping is regulated by the Anti-Dumping Regulations, GN3197 in GG25684 of 14 November 2003 (hereafter, ADR), sections 16 and 26 of the ITAA, the CEA, BTTA and the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement). The Anti-Dumping Agreement has not been incorporated into South Africa's municipal law and thus does not creates any rights in municipal law but is binding on South Africa in international law (*International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 4 SA 618 (CC) para 25 (hereafter, *SCAW*); See further Brink "The 10 Major Problems with the Anti-Dumping Instrument in South Africa" 2005 *J World Trade* 147; Ndlovu "South Africa and the World Trade Organization Anti-dumping Agreement Nineteen Years into Democracy" 2013 *SAPL* 296; Sibanda "The South African Anti-Dumping Law: Consistency with the GATT Anti-Dumping Code" 2001 *CILSA* 242). However, the ITAA, BTTA, CEA and the ADR were promulgated to "give effect" to South Africa's obligations under the Anti-Dumping Agreement (*SCAW* para 25). In light of the approach of the apex court in *SCAW*, I routinely refer to the Anti-Dumping Agreement where applicable in line with section 233 of the Constitution, which mandates a reasonable interpretation of international law (*p*aras 25-40).

The applicant in a dumping investigation must prove dumping, injury and causation. As stated earlier, ITAC is responsible for tariffs and trade remedy investigations. An investigation is usually triggered by the submission of an application by the affected SACU industry which must have standing (ADR, reg 3). This means that the application must be supported by 25% of the domestic industry by volume and of those

participants who express an opinion on the application, 50% by volume support the application (ADR, reg 7.3). The application that is submitted must be properly documented (ADR, regs 21 and 22). This means that it must be supported by evidence that is reasonably available to the applicant. This application will go through a verification to assess its accuracy and adequacy (ADR, reg 18).

Thereafter, a merit assessment is conducted to check if it evinces a *prima facie* case (ADR, reg 26). If it does not, the application will be deemed materially deficient and sent back to the applicant who must address the deficiencies identified by ITAC (ADR, reg 31). If the application meets the threshold of a *prima facie* case, ITAC will then initiate the investigation through an Initiation Notice in the Government. The Initiation Notice will essentially notify interested parties of the product in question, the allegations made by the applicant and that they must usually respond within 30 days of the application (ADR, regs 28 and 29). A public file will be opened, and this will contain the application itself and any other non-confidential correspondence and submissions by all the parties. Access to the public file is granted through a request to the appointed investigating team. This Initiation Notice commences the preliminary investigation phase of the trade remedy investigation (Article 5 of the Anti-Dumping Agreement). Interested parties will then make submissions or comments on the application (ADR, reg 29). Subsequently, ITAC will then make its preliminary finding under Regulation 24 and usually, it can impose a provisional measure or duty to remedy the ongoing injury (Article 7 of the Anti-Dumping Agreement read with ADR, reg 33).

Thereafter, Regulation 36 allows interested parties to comment on the preliminary investigation report. This commences the final investigation phase. Interested parties are usually allowed an oral hearing provided the party indicates reasons for not relying on written submissions only as provided by Regulation 5. Thereafter, ITAC will then issue an essential facts letter under Regulation 37, which establishes the facts that are regarded as crucial to the determination of the case. Interested parties can comment on these essential facts (See also, Article 6.9 of the Anti-Dumping Agreement). Thereafter, ITAC can then make its final finding in the form of a recommendation to the Minister of Trade contained in the final investigation report and a Ministerial Minute summarising its findings. It is here that the process becomes opaque since interested parties are unaware as to whether ITAC has completed its investigation (Vinti "Regulation 22 of the Amended Tariff Investigations Regulations and the right to 'procedural fairness'" 2020 *De Jure* 212-228). The Amended Tariff Investigations Regulations, GNR652 in GG39035 of 31 July 2015, the ADR, the Amended Safeguard Regulations, GNR.662 in GG22762 of 8 July 2005 and the Countervailing Regulations, GNR.356 in GG27475 of 15 April 2005, do not require the prompt publication of the investigation report as soon as the ITAC Investigation is complete. It is this impervious process from the moment the recommendation leaves ITAC to the Ministers which was at the heart of the dispute in *AMIE v ITAC*.

After the Minister of Trade has received the recommendation of ITAC, the Minister can either accept or reject the recommendation as stipulated by section 4(2) of the BTTA but cannot alter it (*Chairman: Board on Tariffs and Trade v Brenco Inc* [2001] ZASCA 67 (hereafter, *Brenco*) paras 16-17). The decision made by the Minister here has widely been held to be polycentric and thus constitutes executive action (*International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 4 SA 618 (CC) (hereafter, *SCAW*) paras 95 and 98; *Pioneer Foods* para 31). This has been recently held to be an "administrative" power in *Bosch Home Appliances (Pty) Ltd t/a Bosch v International Trade and Administration Commission of South Africa* (12160/18; 67553/18) [2021] ZAGPPHC 8 (5 January 2021) para 182, thereby contradicting the apex court.

Regardless, if the Minister of Trade accepts the recommendation of ITAC, he forwards his request to the Minister of Finance under Chapter VI of the CEA as provided by sections 55 and 56. The Minister of Finance, through the assistance of National Treasury, can either accept or reject the request of the Minister of Trade as now established first in *Pioneer Foods* and *SASA* in respect of tariffs and in the current matter of discussion, *AMIE v ITAC* in respect of trade remedies. It is the decision-making process at the Ministry of Finance that is the focus of this case discussion of *AMIE v ITAC*. This whole investigation usually takes twelve months but no more than eighteen months (Article 5.10 of the Anti-Dumping Agreement read with ADR, reg 20). The anti-dumping duty must be imposed for a maximum period of five years unless it is extended in a sunset review (Article 11.3 of the Anti-Dumping Agreement).

The matter in question in *AMIE v ITAC* pertained to the sunset review of the duties in question. The task of the applicant in a sunset review investigation is to prove that the lapse of the anti-dumping duty will likely lead to the continuation or a recurrence of injurious dumping (Article 11.3 of the Anti-Dumping Agreement). Thus, the applicant must either prove dumping or injury or both. A sunset review consists of a single investigation phase as stated by Regulation 56 of the ADR.

ITAC usually will publish a notice in the Government Gazette approximately six months prior to the expiry of such anti-dumping duty stating that such duty will lapse on a specific date unless a sunset review is initiated (ADR, reg 54.1). ITAC will directly inform interested parties known from the original investigation or last review of the subject product of the imminent end of the anti-dumping duties as soon as the Initiation Notice has been published. Interested parties will be given 30 days from the publication of the notice to request a sunset review (ADR, reg 54.3).

If ITAC decides to initiate a sunset review, it will publish an Initiation Notice in the Government Gazette before the expiry of such duties. The governments of the interested parties must be notified of the impending lapse of the anti-dumping duty as required by Regulation 55 of the ADR. ITAC's recommendation may result in the withdrawal, amendment, or

reconfirmation of the original anti-dumping duty (ADR, reg 59). The decision-making process of the Ministers of Trade and Finance will then follow the process as outlined above.

2 Facts of *AMIE v ITAC*

The original duties on chicken were imposed on 27 February 2015 and were due to expire on 26 February 2020. On 24 May 2019, ITAC published a notice under Regulation 54.1 of the ADR that should an application not be lodged for a sunset review, the duties in question would lapse. A properly documented application was lodged by the South African Poultry Association (SAPA) on 20 February 2020. The decision to initiate the investigation was made on 24 February 2020. This started a single investigation phase as is the rule for sunset reviews. The duties would remain extant until the end of the investigation which was 24 August 2021 using the eighteen-month deadline. A public file was opened in which all non-confidential submissions are contained. AMIE argued that ITAC failed to update the public file between 24 May 2021 and July 2021, which hid the circumstances surrounding SAPA's request for an oral hearing on 8 June 2021 yet similar requests for an oral hearing by AMIE and Merlog Goods (Pty) Ltd were denied. On 28 April 2021, ITAC issued an essential facts letter to all interested parties. However, SAPA, twice and after the 12 May 2021 deadline, submitted additional comments on the essential facts and requested an oral hearing. Even though ITAC decided to disregard this, it nevertheless gave SAPA an oral hearing on 8 June 2021. AMIE argued that ITAC granting SAPA an oral hearing and its failure to update the public file during this "crucial time" was procedurally unfair and amounted to bias in the ITAC process.

On 10 June 2021, ITAC adopted the investigation report finding that there would be the likelihood of injury if the duties were removed. On 15 June 2021, ITAC submitted its signed investigation report to the Minister of Trade. On 12 July 2021, Merlog sent a letter to ITAC, the Minister of Trade and the Minister of Finance raising flaws in the ITAC process including allegations of fraud. Merlog stated that if the matter was not referred back to ITAC for consideration to allow it do deal with it before the decision was made, it would take the matter on review. AMIE also sent a letter to the Minister of Trade asking for an intervention to ensure that the decision was lawful, reasonable and procedural fair, which he did, and ITAC responded to the Minister's queries on 20 July 2021. ITAC in its response did not deny that access was denied and that some documents were missing. ITAC simply stated that AMIE must show how the absence affected its ability to defend its client during the investigation. On 4 August 2021, the Minister of Trade approved the ITAC recommendation and forwarded a letter to the Deputy Minister of Finance requesting him to reconfirm the anti-dumping duties in line with ITAC's recommendation. A copy of the final report was attached. There was no further correspondence between the Ministers of Trade and Finance. On 19 August 2021, the Deputy Minister of Finance accepted the request of the Minister of Trade. On 23 August 2021, the residual dumping duties

were reconfirmed and published in the Government Gazette. On 24 August 2021, ITAC submitted its final determination to various interested parties.

Consequently, AMIE sought to review all the decisions at the three legs of the decision-making process but in argument before the court, it mainly focused on the decision of the Minister to impose the dumping duty through amending Schedule 2 of the CEA. This is because AMIE saw the decision of the Minister of Finance as dispositive of the matter. The court was of the view that the decision of the Minister of Finance is not subject to the Promotion of Administrative Justice Act 3 of 2002 (PAJA) review since it is not administrative action as held in *SCAW* and thus held that it should be assessed on a legality review.

3 Findings of the court

Firstly, the court found that ITAC's failure to update the public file was procedurally unfair. According to the court, Regulation 5 of the ADR allows for oral hearings. The requests for a hearing filed by AMIE and Merlog were made after the finalization of the investigation and thus could not be granted by ITAC. These requests were filed during the "crucial period" when ITAC was not updating the public file. According to the court, this hindered interested parties from assessing ITAC's process and providing a "reasonable opportunity to make representation" to ITAC (paras 51-52). The argument made by AMIE here was that this was not transparent and in violation of Regulation 5.3 of the ADR. ITAC's denial of access to the public file was held to be prejudicial by the court (para 53). There was also a question of whether the Deputy Minister of Finance was entitled to make the decision to reimpose the duties. This issue was easily resolved when the State produced the delegation in question.

The crucial question for discussion here was whether the Minister of Finance or his Deputy has the power to make the final decision to impose the dumping duties. Vinti has argued that the Minister of Finance does not have this power because this a trade centric decision (Vinti 2018 *Potchefstroom Electronic Law Journal* 1-25). Vinti has then argued in the alternative that if the Minister has this power, then he must allow for interested parties to make submissions at this stage of the decision-making (Vinti 2020 *SALJ* 713-732). Against this backdrop, it was argued that the Minister could not "satisfy" himself under section 55(5) of the CEA (para 80). This argument failed because this provision was repealed. Consequently, the matter fell to be resolved on the question of rationality.

The argument on rationality was that the Minister did not consider the serious allegations levied against ITAC in respect of the administrative process, in particular the Merlog's complaints of 12 July 2021 which seemed not to have been considered at all (para 83). This required the Minister to assess whether the process followed by ITAC was procedurally fair. This was expanded to include the "conditions" in the SARS letter in which SARS informed the Deputy Minister that they at that time, were not

in a position to "confirm that all the factors and potential implications of the request to approve had been identified, considered and disclosed" (para 85). According to the court, for the Deputy Minister to meet the standard of rationality, he had to demonstrate that his decision was rationally related to the purpose for which the power was given and not made arbitrarily (para 86). This is an objective test that is different from reasonableness (para 86).

The court then made a significant finding by confirming that the Minister of Finance is the final decision maker in trade remedy investigations (para 89). In *SASA* and *Pioneer Foods*, the High Court had found that the Minister of Finance is the final decision maker in terms of tariffs. Now, this power has now been confirmed in terms of the trade remedy of dumping. In my view, this means that the Minister of Finance is the also the final decision maker in terms of countervailing and safeguard measures. This is because the text of section 56 for the imposition of anti-dumping duties, section 56A for the imposition of countervailing duties and section 57 for the imposition of safeguard measures is identical in that they all require the Minister of Finance to amend Schedule 2 to the CEA proceeding out of section 55(2). Therefore, the court's finding must apply to all trade remedies as they all proceed from section 55(2) and they are all trade remedies.

The court then explained that the decision of the Minister of Finance in this regard must be to be "satisfied that the competing interests of economic polices, the fiscus and the industry participants' interests were balanced before he made the decision" (para 90). This is the precise task of the Minister of Finance when considering the request of the Minister of Finance. A crucial concession made by SARS was that it defers to ITAC on matters of trade policy and this was held to be a matter of logic (para 92). The court thus confirmed that the Minister of Trade is the only one who can decide on trade policy whereas the Minister of Finance can only decide on fiscal matters (para 93). This means that the Minister of Finance cannot veto the trade policy considerations of the Minister of Trade. The Minister of Trade remains the final decision maker on trade policy. The Minister of Finance by way of process becomes the final decision maker when he decides on fiscal matters. So, when the Minister of Finance rejects the request of the Minister of Finance, he is not duplicating the inquiry made by the Minister of Trade but simply making his call solely on fiscal considerations. This is the same approach confirmed in *SASA* and *Pioneer Foods* in respect of tariffs under the Amended Tariff Investigations Regulations.

Having outlined the task of the Minister of Finance, the court found that the Deputy Minister of Finance failed to consider the complaints of AMIE and Merlog detailed letters of warning that conflicted with ITAC's final recommendation (para 96). This was contrasted with the approach of the Minister of Trade who fulfilled his task by considering the ITAC investigation report, the poultry sector Master Plan and the memorandum from the Agro-processing unit before accepting the ITAC

recommendation and he had considered the AMIE concerns, requested ITAC to respond and then considered ITAC;s report (para 97). Yet the Minister of Trade only provided the Deputy Minister with ITAC's recommendation. The record of the Minister of Finance however showed that he had received the letters of Merlog of 12 July and 2 August 2021 (para 98). The Merlog letters contained serious allegations, conflicting views about why their submission should be considered and complains about fraud, procedural irregularities during the ITAC investigation, the impact of the avian influenza and a stern warning of the risk of judicial review proceedings. The record showed that the Minister of Finance did not respond to these letters (para 99). There was no proof from the record that even an attempt was made to contact the Minister of Trade (para 99). AMIE employed the *Pioneer* case that the Minister of Finance "must satisfy himself" of the decision to amend the duties (para 100). The nub of the AMIE submission was that the Deputy Minister by refusing to consider the possible complaints, which may have altered the balance of the divergent views of industry participants and thus he did not perform his statutory duty (para 101). Resolving these diverse and conflicting views must be considered (para 101). The Minister of Finance was silent (para 101). The court agreed that the task of the Minister upon receipt of the "request" of the Minister of Finance, he must "satisfy himself" that the amendment of the duty will not have a detrimental effect on the country (paras 100-102). This assessment requires a balancing of the diverse interests including industry participants (para 101).

In accordance with the rationality standard, the court assessed whether the means selected have a rational connection with the goal sought to be achieved as held in *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC) paras 49-51 (hereafter, *Albutt*). In this regard, in *AMIE v ITAC*, the Merlog letters of 12 July and 2 August 2021 were left "unanswered" and there was nothing in the record that there were considered nor even an attempt to contact the Minister of Trade (para 101). The court thus ruled that there was a "constitutional breach" leading to a finding of irrationality (para 103). Therefore, the decision was sent back to the Minister of Finance to consider the weight of the complaints and interests and to exercise the powers a specified in the CEA within twelve months of the order of the court. This order is problematic since it essentially lengthens the investigation from the eighteen months to 30 months.

4 Evaluation

The decision in *AMIE v ITAC* has significant implications for the administration of international trade in South Africa. Firstly, this decision means that an interested party, like Merlog and AMIE did, can make submissions to the Minister of Finance which he must consider (paras 97-103). This essentially grants a right to be heard or consulted by the Minister of Finance as has been previously argued (Vinti 2020 *SALJ* 718-732). This is not to say there is a general duty to consult for executive action; In my view, in exceptional circumstances such as international

trade, there is a duty to consult interested parties with expert knowledge that is of assistance to the court (Vinti 2020 *SALJ* 730; *Albutt* para 50; Ally and Murcott "Beyond labels: Executive action and the duty to consult" 2023 *Law, Democracy and Development* 108). This is contradicted by the decision in *Brenco* where it was held that there is no duty to be consulted by the Minister of Finance (nor the Minister of Trade) under section 4(2) of the BTTA and the CEA (para 71). In my view, the *Brenco* decision was based on the ground of procedural fairness because the conduct of the Ministers of Trade and Finance was framed as administrative action rather than executive action. More significantly, the *Brenco* approach has now been superseded by the evolution of the rationality principle, which has opened the door to the right to be heard in executive action in circumstances where the matter involves specialist knowledge and the parties have expert knowledge that is of assistance to the court as outlined above (*Minister of Home Affairs v Scalabrini Centre* 2013 (6) SA 421 (SCA) para 72; *Electronic Media Network Ltd v e.tv (Pty) Ltd* 2017 (9) BCLR 1108 (CC) para 37-38; *The National Treasury v Kubukeli* 2016 (2) SA 507 (SCA) para 16). This is because the decisions of the Ministers are now generally accepted to be executive action (*SCAW* paras 95-98). This opens them to a procedural rationality challenge as was held in *AMIE v ITAC*. One might even venture to speculate that in fact, since rationality under PAJA has been held to be the same as rationality as conceived under the principle of legality as an instance of the rule of law from the Constitution, it therefore means that procedural rationality under PAJA would also grant a right to be heard as outlined above in respect of the context of international trade law and policy (*National Energy Regulator of South Africa v PG Group (Pty) Limited* 2020 (1) SA 450 (CC) para 48-50).

Secondly, the court confirmed that in addition to tariffs, the Minister of Finance is also the final decision maker in terms of the imposition dumping duties. In the same breath, the court explained the exact role of the Minister of Finance in respect of the imposition of a trade remedy. The court borrowed from the ratio of the High Court in *Pioneer Foods* on tariffs to hold that for dumping, the Minister "must satisfy" himself that the amendment will not have a detrimental effect on the country (para 100). This requires a "balancing" of the "diverse" interests of the domestic industry participants, the fiscus and the economic interests. The Minister cannot be silent. Thus, the court essentially placed an obligation on the Minister of Finance to show proof of this consideration or "satisfaction". This means that the Minister of Finance must explain the basis of his decision (paras 100-102). The usual SARS Implementation Notice in the Government Gazette is not sufficient since it does not avail the Minister of Finance's reasons for approval of the request of the Minister of Trade. Therefore, the court has infused transparency, accountability, openness and responsiveness into the previously clandestine and opaque process at the department of Finance as required by sections 1 and 195(1) of the Constitution of the Republic of South Africa, 1996. The same approach should apply to the other trade remedies of safeguard and countervailing measures which are also

imposed by the Minister of Finance through amendment of the very same Schedule 2 because they share the same genesis provision of section 55, and the text of section 56A for countervailing measures and section 57 for safeguard measures are virtually identical to that of section 56 on dumping duties (See further, Vinti "A Critical analysis of the Frozen Potato chips saga between the Southern African Customs Union and Belgium and the Netherlands" 2017 *Speculum Juris Journal* 155-159). I am fortified in this view by the Appellate Body which has held that these different trade remedies form part of one treaty, the Marrakesh Agreement Establishing the World Trade Organization, and thus, they are read "harmoniously" as an "inseparable package of rights and disciplines which must considered together (Appellate Body Report, *Argentina Footwear*, WT/DS121/AB/R, adopted on 12 January 2000, para 81). As stated earlier, this is the same conclusion reached by the court in *SASA* (para 39).

The High Court in *AMIE v ITAC* also seemed to intimate that a procedural fairness challenge under PAJA was available on the lack of an economic analysis by the divisions of Economic Policy and Financial Sector of National Treasury (para 94). In the same breath, ITAC's approach to the investigation of not updating the public file violated Regulation 5.3 of the ADR in that it did not give interested parties a reasonable opportunity to view the public file and this was found to be prejudicial since they could not assess the process (paras 49-53). This opens a challenge on procedural fairness under section 3(2) of PAJA and a possible violation of the constitutional values of transparency and openness under sections 1 and 195(1) of the Constitution.

In the final analysis, the court's findings advance the goals of transparency, openness and due process as espoused by Article 6.2 of the Anti-Dumping Agreement (Panel Report, *Guatemala – Cement II*, WT/DS156/6, adopted 17 November 2000, para 8.179). Article 6.2 requires throughout the course of an anti-dumping investigation as all interested parties must be given a 'full opportunity for the defence of their interests'. Regulatory authorities like ITAC and the Minister are required upon request, to avail opportunities for all interested parties to discuss with those parties with adverse interests, so that opposing views may be elicited and rebuttal arguments offered. Ultimately, there is no doubt that the decision of the Minister of Finance constitutes a determination that requires a consultation with interested parties since it explicitly reviews the fiscal impact of imposition, aspects which the ITAC investigation does not broach. The same due process requirements in Article 6.2 were violated by ITAC's tardiness in not updating the public file as it hinders one's ability to defend their interests. Thus, this decision reinforces the intractable due process requirements of an anti-dumping investigation under the Anti-Dumping Agreement.

5 Conclusion

The decision in *AMIE v ITAC* has further clarified the roles of ITAC, the Ministers of Trade and the Minister of Finance in a trade remedy investigation. It is now settled law that the Minister of Finance is the final decision maker in respect of anti-dumping duties and by parity of reasoning, this must include the other trade remedies as outlined above. Significantly, the precise task of the Minister of Finance has been outlined, and he must now publicly account for his decisions. The Minister must show that he "satisfied" himself that his decision will not negatively affect the country taking into consideration the divergent views of industry participants, the fiscus and economic policy. It appears that the door is slightly open for interested parties to make submissions to the Minister of Finance in respect of international trade on the ground of rationality. This decision must be commended for holding public officials to account for their decisions and requiring them to ensure that their administrative and executive decisions comply with the basic prescripts of public administration of openness, transparency, accountability and responsiveness. It is a victory for the due process requirements of the Anti-Dumping Agreement which must be honoured.

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