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A Discussion of the Power to Impose “Provisional Measures” During a Trade Remedy Investigation in South Africa: *Association of South Africa v the International Trade Administration Commission Case Number: 2022/010681**

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Abstract

The International Trade Administration Commission (ITAC) has the responsibility to administer trade remedy investigations in South Africa under the International Trade Administration Act 71 of 2002 (ITAA) and the Board on Tariffs and Trade Act 107 of 1986 where relevant. The ITAC investigation on trade remedies comprising of dumping, safeguard and countervailing measures has a preliminary and final investigation phase, which both conclude with an investigation report. At the end of the preliminary investigation, ITAC may impose “provisional measures” in the form of a duty or security. This provisional measure or payment is used to protect the domestic industry during the investigation from suffering harm that may be difficult to repair and there

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** LLB cum laude (UFH), LLM (UCT), PhD (Wits).

*is clear evidence that increased imports have caused or are threatening injury. It has always been accepted that ITAC has the right to request the Commissioner of the South African Revenue Services (CSARS) to impose the provisional payments. This is a consequence of section 57A(1) of the Customs and Excise Act 91 of 1964 (CEA), which empowers the CSARS to impose the provisional measure upon a request from ITAC. This is complicated by section 30(5) of the ITAA, which expressly empowers ITAC to make the request to the CSARS to impose the provisional measure, but it is not yet in operation. It is the interaction between these two provisions that triggered the litigation in *Association of South Africa v the International Trade Administration Commission Case Number: 2022/010681 (TIASA v ITAC)*. This note explores the case of *TIASA v ITAC* to assess whether ITAC has the power to make the request to the CSARS to impose provisional measures in South African law. In my view, ITAC does not have the power to impose provisional measures. This is because section 30(5) of the ITAA, the provision that empowers ITAC as a creature of statute to make this request, has not entered into operation. The discourse on trade remedies in South Africa has never engaged with the legality of ITAC’s power to impose provisional payments. This case offers a timely opportunity to open this discussion.*

Keywords: provisional measures; duties; trade remedies; ITAC; Customs and Excise Act

1 INTRODUCTION

The Customs and Excise Act 91 of 1964 (CEA) and the International Trade Administration Act 71 of 2002 (ITAA) and its attendant regulations on anti-dumping, safeguards and countervailing measures provide for the investigation of trade remedies by the International Trade Administration Commission (ITAC). This investigation comprises the preliminary and final investigation phases both concluding with the ITAC’s investigation report. In particular, at the end of the preliminary investigation, ITAC may request the Commissioner for the South African Revenue Service (CSARS), in terms of section 57A of the CEA, to impose a “provisional measure” as soon as ITAC has made a preliminary determination that there are critical circumstances where a delay would cause injury that would be difficult to repair and there is clear evidence that increased imports have caused or are threatening injury. Provisional measures or payments essentially consist of security or a provisional duty for the estimated duties. It has always been accepted that ITAC is legally allowed to request the CSARS to impose provisional measures. However, the validity of ITAC’s power to impose provisional payments was the subject of the aborted litigation in *Tyre Importers Association of South Africa v the International Trade Administration Commission Case Number: 2022/010681* (hereafter, *TIASA v ITAC*). This note explores the case of *TIASA v ITAC* to assess whether ITAC has the power to request the CSARS to impose provisional payments. This analysis will be conducted through an assessment of relevant case law, legislation and international law.

It is important to note here that provisional measures are germane to trade remedies in the form of anti-dumping, safeguard and countervailing measures. The literature in the area of trade remedies in South Africa has overwhelmingly focused on anti-dumping measures.¹ This has focused on substantive and procedural aspects of the South African legal framework on anti-dumping. Countervailing and safeguard measures that have not received much attention, but

¹ See for instance, Brink “A Nutshell Guide to Anti-dumping Action” 2008 *THRHR* 255–271; Khanderia “The Compatibility of South African Anti-dumping Laws with WTO Disciplines” 2017 *African Journal of International and Comparative Law* 347–370; Ndlovu “An Assessment of the WTO Compliance of the Recent Regulatory Regime of South Africa’s Dumping and Anti-dumping Law” 2010 *Journal of International Commercial Law and Technology* 29–40; Sibanda “Procedural Requirements of the South African Anti- Dumping Law and Practice Prior to Imposition of Anti- Dumping Duties: Are They Really WTO-inconsistent?” *Foreign Trade Review* 2020 55(2) 216–238; Brink “The 10 Major Problems with the Anti-Dumping Instrument in South Africa” 2005 *Journal of World Trade* 147–157; Brink “The 10 Major Problems with the Anti-dumping Instrument in South Africa” 2005 *Journal of World Trade* 325–350.

there has been some debate about these issues.² The significance of provisional measures is that they may precede the final imposition of a duty under a trade remedy to address ongoing injury to the domestic industry during the ITAC investigation, and thus, this discussion has significant implications for the administration and imposition of trade remedies in South Africa. A finding that ITAC does not have this power, may taint all ITAC trade remedy investigations in which provisional measures have been imposed. Indeed, a case may be made for a refund of these duties.

2 OUTLINE OF A TRADE REMEDIES INVESTIGATION BY ITAC

As stated above, ITAC has the mandate to conduct investigations on trade remedies as provided for by sections 16 and 26 of the ITAA. ITAC was created by section 7 of the ITAA and must execute its duties independently and impartially. In the main, ITAC consists of the Commission, which makes the decisions and the investigators who conduct the actual investigation. The ITAA and its regulations are the primary regulatory instrument for all trade investigations in conjunction with the Customs and Excise Act 91 of 1964 (CEA) and the Board on Tariffs and Trade Act 107 of 1986 (1), where relevant. In particular, the relevant regulations to the ITAA comprise the Anti-Dumping Regulations,³ the Amended Safeguard Regulations⁴ and the Countervailing Regulations.⁵ These cover the trade remedy investigations for safeguards, dumping and countervailing investigations. These instruments must be read within the context of the Marrakesh Agreement Establishing the World Trade Organisation (WTO Agreement). The WTO Agreement was adopted by parliament on 6 April 1995 and is therefore binding on South Africa in international law, but it has not been incorporated into municipal law.⁶ This means that no rights are therefore derived from its set of agreements.⁷ In this regard, as a member of the World Trade Organisation (WTO), South Africa's international obligations on trade remedies arise from the General Agreement on Tariffs and Trade 1994 (GATT), the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), the Agreement on Safeguards and the Agreement on Subsidies and Countervailing Measures. These international obligations are "honoured" through domestic legislation that governs the imposition of trade remedies, as outlined above, led by the ITAA and the CEA.⁸ Ultimately, it is this municipal legislation that must be interpreted, and this must be done in line with section 233 of the Constitution of the Republic of South Africa, 1996 (Constitution).⁹

Against this backdrop, an investigation shall only be initiated upon acceptance of a written application by or on behalf of the Southern African Customs Union (SACU) industry. ITAC can also self-initiate an investigation. Usually, an application shall be regarded as brought by or on behalf of the SACU industry, if at least 25 per cent of the SACU producers by domestic production volume support the application and of those producers that express an opinion on

2 Taweel and Brink "Trade Defence Instruments in Africa: Possible Scenarios for Implementation under the TFTA" 2018 *African Journal of International and Comparative Law* 157–180; Vinti "A Critical Analysis of the Frozen Potato Chips Saga Between the Southern African Customs Union and Belgium and the Netherlands" 2017 *Speculum Juris* 152–165; Brink "A nutshell guide to safeguard action" 2008 *THRHR* 540–555.

3 GN 3197 GG 25684 of 14 November 2003.

4 GN No R 662 in GG No 27762 of 8 July 2005.

5 Notice No R356 in GG No 27475 of 15 April 2005.

6 *Progress Office Machines v South African Revenue Services* 2008 2 SA 13 (SCA) para 6.

7 *Progress Office Machines* para 6.

8 *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 4 SA 618 (CC) para 2.

9 *Progress Office Machines* para 6.

the application, at least 50 per cent by domestic production volume support such application.

It is required that the application that is made for a trade remedy measure must be “properly documented”. This means that it must be based on the evidence that is reasonably available. A verification must then be conducted to assess the adequacy and sufficiency of the evidence presented. Then ITAC will conduct a “merit assessment” “to assess if a *prima facie* case has been made for the trade remedy. Before initiation, ITAC must then notify representatives of the country of origin and of export where applicable, that it has received a properly documented application.

An investigation shall be formally initiated through publication of an “initiation notice” in the *Government Gazette*. The investigation comprises two stages: the preliminary and final investigation phases. The Initiation Notice commences the preliminary investigation. A public file containing the application and the non-confidential submissions made on this application will be opened. The interested parties are given an opportunity to make submissions on the application, usually a period of 30 days. Interested parties have an opportunity to make oral submissions in an oral hearing. ITAC will then make a preliminary determination and will publish a preliminary investigation report. The preliminary report will contain ITAC’s preliminary finding.

Section 57A(1) of the CEA then states that whenever ITAC publishes a notice in the Gazette to the effect that it is investigating the imposition of an anti-dumping, countervailing or safeguard duty on goods imported from a supplier or originating in a territory specified in that notice, the CSARS must, in accordance with any request by ITAC, by notice in the Gazette impose a provisional payment/measure in respect of those goods for such period and for such amount as the Commission may specify in such request. These are usually imposed for a period of between four to six months depending on the applicable trade remedy. The period for which provisional measures are in force shall be regarded as part of the total duration for which the trade remedy is in force. Presumably, this provision must be read together with section 30(5) of the ITAA which empowers ITAC to request the CSARS to impose a provisional measure, but it has not entered into operation as yet. It is the interaction between section 30(5) of the ITAA and section 57A of the CEA, which promoted the litigation in *TIASA v ITAC* and is thus, the subject of this paper.

For the sake of completeness in this discussion, the final investigation commences with comments on the preliminary investigation report. ITAC will then publish the essential facts. These are the facts that will determine the final determination of ITAC. Upon consideration of the essential facts and comments made by interested parties on the essential facts, ITAC will then make its final determination in its final investigation report. This will then be sent as a “recommendation” to the Minister of Trade, Industry and Competition (minister) together with the Ministerial Minute or Report briefly explaining ITAC’s decision. The minister can either accept or reject this recommendation under section 4(2)(a) of the BTTA. Section 4(2)(b) of the BTAA then states that if the minister accepts ITAC’s recommendation, they can then forward this “request” to the Minister of Finance, who can either accept or reject this request to impose the trade remedy under Chapter VI of the CEA through an amendment of Schedule 2 to the CEA.

3 DISCUSSION OF *TIASA v ITAC*

3.1 Facts of the Case

It is apposite here to prefix this discussion with an outline of the case of *TIASA v ITAC* that prompted this inquiry. *TIASA* withdrew the litigation and thus there was no resolution, but there is value in assessing the merits of the arguments posed by the parties to this dispute. The

application by TIASA concerned an investigation that was being conducted by ITAC in respect of the possible imposition of anti-dumping duties on certain types of pneumatic tyres imported from the People's Republic of China (PRC). On 31 January 2022, ITAC notified the public that it was initiating an investigation into the alleged dumping of new pneumatic tyres of rubber of a kind used on motor cars (classifiable under tariff subheadings HS 4011.10.01, HS 4011.10.03, HS 4011.10.05, HS 4011.10.07, and HS 4011.10.09) and on buses or lorries (classifiable under tariff subheadings HS 4011.20.16, HS 4011.20.18, and HS 4011.20.26) originating in or imported from the PRC ("the investigation").¹⁰ On 22 April 2022, ITAC gave notice that it was limiting the examination to a reasonable number of exporters and importers or sampling in the investigation ("the limitation notice").¹¹ In this regard, the provisional payment was purportedly imposed with effect from 9 September 2022 on the importation of all tyres from China. In court, amongst other issues it raised, TIASA argued that since section 30(5) of the ITAA has not come into operation, ITAC did not have the power to request CSARS to impose the provisional payment. It is this contention that is the subject of this paper.

3 2 Evaluation of the Arguments Posed by the Parties in *TIASA v ITAC* on Whether ITAC Has the Power to Impose Provisional Measures?

As a point of departure, section 30(5) of the ITAA states:

(5) (a) The Commission may, when considering an application referred to in section 26 (1) (c), request the Commissioner for the South African Revenue Service to impose a provisional payment contemplated in Chapter VI of the Customs and Excise Act.

(b) If the Commission has acted in terms of paragraph (a), it must make a final recommendation to the Tariff Board when it has completed its evaluation.

(Date of commencement of s 30: to be proclaimed [own emphasis].)

Only SARS and ITAC filed their Answering Affidavits before the application was withdrawn by TIASA on 22 August 2023. In the Founding Affidavit, TIASA (the Applicant) argued that section 30 of the ITAA is not yet in operation and that the BTAA did not authorise ITAC to make the request to the minister to impose a provisional payment.¹² TIASA then contended that a proper interpretation of section 57A(1) yields the result that the request by ITAC must be "lawfully and duly authorised".¹³ It was TIASA's case that ITAC's request was not lawfully and duly authorised by any legislation since there was no legislation empowering ITAC to make the request.¹⁴ In other words, only section 30(5) of the ITAA authorises ITAC to make the request to the CSARS. However, the problem is that section 30(5) is not yet in existence. This problem is not overcome by section 57A(1) of the CEA, which TIASA argued does not authorise ITAC to make the request to the CSARS.

In response, in its Answering Affidavit, ITAC (the First Respondent) agreed with TIASA that section 30 was yet to be enacted.¹⁵ This is self-evident in the above highlighted legislative code that it will only enter into operation upon proclamation. ITAC then argued that pending the enactment of section 30, the transitional provision of Items 1-6 of Schedule 2 to the

10 GN 795 of 2022 in *GG* 45851. This notice was subsequently amended through GN 809 in *GG* 45891 of 9 February 2022.

11 Notice 991 of 2022 as published in *GG* 46255 of 22 April 2022.

12 *TIASA v ITAC* Founding Affidavit para 33.

13 *Ibid* para 34.

14 *Ibid*.

15 *Ibid* Answering Affidavit para 12.8.

ITAA would then apply.¹⁶ ITAC argued that based on the fact that section 30 is one of the provisions listed in section 64 of the ITAA, this means that ITAC must investigate and evaluate applications in terms of section 26(1)(c) of the ITAA.¹⁷ Section 64 of the ITAA largely deals with the commencement of certain provisions of the ITAA. Section 64(2) of the ITAA states that sections 4, 15(3), 16(3), 19, 20, 30, 31 and 46(2) and Item 2(3) of Schedule 2 may not come into operation until the SACU Agreement has become law in the Republic. The SACU Agreement actually came into operation on 15 July 2004.¹⁸ It is common cause that the second requirement of the proclamation of section 30 has yet to happen, hence this section still cannot enter into operation. In this regard, section 26(1)(c) of the ITAA empowers ITAC to conduct trade remedy investigations covering anti-dumping, countervailing and safeguard measures.

ITAC then explained that the applications for the imposition of duties must be made to ITAC and such powers are conferred expressly.¹⁹ Quoting Schedule 2 to the ITAA, ITAC then explained that any reference to the Board on Tariffs and Trade, refers to ITAC, as stated by Item 2(2)(c).²⁰ The Board on Tariffs and Trade (Board) is ITAC’s predecessor as was regulated by the BTTA. The ITAC then explained that section 4 of the BTTA was kept alive by the transitional provisions in Schedule 2 to the ITAA and as thus, all ITAC investigations continue to be governed by section 4(1) of the BTTA.²¹ Section 4(1) of the BTTA authorised the board to conduct a trade investigation and to make its recommendation to the minister.

The ITAC then explained that according to section 30(5) of the ITAA, the recommendation to the Tariff Board can only happen if ITAC has requested the CSARS to impose a provisional payment through the CEA.²² The Tariff Board under Article 11 of the SACU Agreement is supposed to be the body responsible for deciding on whether to impose a trade remedy or tariff on a product upon a recommendation emanating from the investigation conducted by ITAC. If the Tariff Board agrees with ITAC’s recommendation, it would then make a recommendation to the SACU Council of Ministers who would then decide on whether to impose the trade remedy under Article 8 of the SACU Agreement. However, this Tariff Board contemplated in section 30(5)(b) of the ITAA is yet to be formed hence investigations continue to be handled by the ITAC pending its formation.

According to ITAC, the effect of Item 5(1)(c)(i) of Schedule 2 to the ITAA is that the transitional provisions render section 30(5) operative.²³ Item 5 of the ITAA regulates “statutory references” in the ITAA and how they relate to similar terms in the BTTA. In particular, Item 5(1)(c)(i) states that a “report and recommendation to the minister referred to in section 4(1)(b) of the Board on Tariffs and Trade Act 1986”, depending on the context, must be regarded as a reference to include a “recommendation concerning a matter to the Tariff Board” in terms of section 30 of the ITAA. Thus, ITAC argued that this renders section 30 of the ITAA operative. This is because according to ITAC, the recommendation to the Tariff Board in terms of section 30(5)(b), which allows ITAC to make a final recommendation when it has completed its investigation, can only happen if the “Commission has requested the Commissioner of SARS to impose a provisional payment in terms of the Customs Act in terms of section 30(5)(a)”.²⁴ This argument is dubious

16 *Ibid* paras 12.8–12.9.

17 *Ibid* para 12.11. Section 26(1)(c) of the ITAA allows a person to apply to ITAC for the imposition of the trade remedies.

18 Notice R.800 in GG 26537 of 2 July 2004.

19 *TIASA v ITAC* ITAC Answering Affidavit para 12.12–12.13.

20 *Ibid* para 12.14.

21 *Ibid* para 12.11.

22 *Ibid* para 12.22.

23 *Ibid* paras 12.20–12.23.

24 *TIASA v ITAC* ITAC Answering Affidavit paras 12.21–12.23.

and unsound.

First, it is common cause that section 30 has not entered into operation as stated by ITAC itself. Therefore, reliance on section 30(5) as the basis of ITAC's power to make the request to CSARS is unsustainable. Second, section 30(5) speaks of a recommendation to the Tariff Board, a body which does not exist. This alone invalidates ITAC's argument. Third, the language of section 30(5)(a) is directory in that it says ITAC "may" request the imposition of a provisional payment. While this is not dispositive of whether the term is directory or peremptory, it nevertheless offers semantic guidance. There is certainly jurisprudential authority in the international trade context.²⁵ Further guidance can be sought from the purpose and context of section 30(5) of the ITAA. In this regard, it is common cause in WTO parlance that the imposition of provisional measures is not mandatory because they are only imposed where there is risk of injury that is difficult to repair as outlined by Article 7.1 of the Anti-Dumping Agreement, Article 6 of the Agreement on Safeguards and Article 17 of the Agreement on Subsidies and Countervailing measures, which all use the term "may". If ITAC logic was carried forward to its apparent absurdity, it would mean that every ITAC investigation would have to have a provisional measure imposed before a definitive duty is imposed. This is patently not the case.

I am emboldened in this conclusion by the fact that in the particular context of *TIASA v ITAC*, anti-dumping duties can be imposed retroactively to the date when the injury began, as stated by Article 10.2 of the ADA. According to Article 10.2, where a final determination of injury (but not of a threat thereof or of a material retardation of the establishment of an industry) is made or, in the case of a final determination of a threat of injury, where the effect of the dumped imports would, in the absence of the provisional measures, have led to a determination of injury, anti-dumping duties may be levied retroactively for the period for which provisional measures, if any, have been applied. This confirms that provisional measures are *unnecessary* as shown by the terms "in the absence of the provisional measures" and "if any", which collectively confirm that provisional measures do not always have to be imposed. This means that the non-imposition of provisional payments is not unconstitutional nor fatal to the working of the CEA or purposes of the ITAA. It follows thus, that ITAC is not required to impose a provisional payment in all investigations as a prerequisite to commence the final investigation phase nor even to make a final recommendation. The provisional measure in the preliminary investigation phase is not a jurisdictional fact for a final recommendation. Finally, the final recommendation of ITAC and the consequent definitive duty turn on the essential facts letter and submissions made in this regard, which can successfully contradict the preliminary finding and the provisional measure in such a manner that a refund can be given to the affected parties. These considerations dispose of ITAC's implausible attempt to give life to section 30(5) of the ITAA.

ITAC then argued that it was lawfully entitled to impose the provisional measure because this power to impose provisional measures is a "pre-existing power" of the Board.²⁶ ITAC explained that the Board was expressly allowed by virtue of section 57A(1) of the CEA prior to its amendment by Act 45 of 2003, to have requested the CSARS to impose provisional measures. In my view, the flaw in this argument is that the transitional provisions provided in Schedule 2 to the ITAA expressly *only* revive provisions of the BTAA and not the amended provisions of the CEA. Even if one entertained this unsound premise, by rule, the latter provision, which is the current iteration of section 57A, amended the old iteration of section 57A, which apparently allowed ITAC to make the request to the CSARS to impose provisional payments. To illustrate the point even further, the iteration of section 57A(1) of the CEA prior to its amendment in 2003

25 *South Africa Sugar Association v the Minister of Trade and Industry* [2017] 4 All SA 555 (GP) (30 August 2017) para 39.

26 *TIASA v ITAC* ITAC Answering Affidavit para 12.24.

provided:

(1) Whenever the Board on Tariffs and Trade publishes a notice in the Gazette to the effect that it is investigating the imposition of an anti-dumping, [duty or a] countervailing or safeguard duty on goods imported from a supplier or originating in a territory specified in that notice, the Commissioner shall, in accordance with any request by the said Board, by notice in the Gazette impose a provisional payment in respect of those goods for such period and for such amount as the Board may specify in such request.²⁷

This provision is verbatim to the current iteration of section 57A of the CEA save for substituting the term “Board on Tariffs and Trade” with the term “ITAC”. Ocular and conclusive proof of this finding is offered by the Explanatory Memorandum on the Revenue Laws Amendment Act 45 of 2003 which stated that:

Customs and Excise: Substitution of section 57A of the Customs and Excise Act, 1964

This section provides for the imposition of provisional payments in respect of antidumping, countervailing or safeguard duty at the request of the Board on Tariffs and Trade. “*International Trade Administration Commission*” is substituted for “*Board on Tariffs and Trade*” in view of the provisions of item 2(2) and 5(1) of Schedule 2 of the International Trade Administration Act, 2002 (Act No. 71 of 2002). [Own emphasis]²⁸

In other words, section 57A prior to its amendment in 2003, did not authorise ITAC nor the Board to request the CSARS to impose a provisional payment. If ITAC does not have the power in the current iteration of section 57A as ITAC is tacitly conceding here, then it cannot have the power under the pre-2003 iteration of section 57A because these two provisions are identical. This then means that ITAC does not have this power since ITAC had already conceded in its Answering Affidavit that section 30(5) is not yet in operation.

The ITAC then takes its argument a step further by triggering the doctrine of implied powers. According to ITAC, the power to request the CSARS to impose a provisional measure is a “logical or necessary consequence of powers expressly conferred upon ITAC” and/or is “reasonably required” and/or is “ancillary or incidental” or is “reasonably necessary or required to give effect” or is “reasonably or properly ancillary or incidental” to exercise its powers.²⁹ The ITAC explained that without this power, its role in anti-dumping investigations would be rendered “ineffective” and in fact, it would hamper the country’s ability to administer international trade and to protect the domestic industry. The ITAC asserts that without this power, dumping would be “rife” and this is confirmed by section 30(5) itself.³⁰ This argument of “implied powers” of ITAC to make the request deserves attention.

In respect of the doctrine of “implied powers”, the Constitutional Court has held that the view that “words cannot be read in to a statute by implication unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands”.³¹ Furthermore, this implication must be necessary to achieve the apparent legislative intention or to make the

27 See Item 2 of Schedule to the Board on Tariffs and Amendment Act 16 of 1997.

28 Explanatory Memorandum on the Revenue Laws Amendment Act 45 of 2003 101.

29 *TIASA v ITAC* ITAC Answering Affidavit para 12.27.

30 *TIASA v ITAC* ITAC Answering Affidavit paras 12.30–12.31.

31 *Masetlha v President of the Republic of South Africa* 2008 1 SA 566 (CC) para 192; *De Beer NO v North-Central Local Council and South-Central Local Council (Umhlatuzana Civic Association Intervening)* 2002 1 SA 429 (CC) para 48; *Rennie NO v Gordon NNO* 1988 1 SA 1 (A) 22E; *Bernstein v Bester NNO* 1996 2 SA 751 (CC) para 105; *Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) (6 September 1996) para 438; *Minister of Water and Sanitation v Lotter NO*; *Minister of Water and Sanitation v Wiid*; *Minister of Water and Sanitation v South African Association for Water Users Associations* [2023] ZACC 09 para 30; *Matatiele Municipality v President of RSA* 2006 5 SA 47 (CC) para 50.

statute “workable”.³² In the same breath, where the surrounding circumstances indicate that words were intentionally left out or if the implication would contradict the provisions of the Constitution or the statute, words cannot be implied.³³ This must be read with the settled principle of constitutional interpretation that where a statute is capable of more than one reasonable construction, one must prefer the interpretation that is in accordance with the Constitution if it is reasonable and within the scope of the statute.³⁴

Necessity seems to be the sole standard for establishing if a power is implied.³⁵ For a power to be implied, it must be implied by an express power.³⁶ Thus, there cannot be an implied power without an express power.³⁷ This power is implied if it is “necessary to give effect to the exercise of the explicit power”.³⁸ Hoexter contends that a power is implied if the main object of a statute cannot be achieved without it.³⁹

However, there is a difference between an implied primary power and an ancillary implied power.⁴⁰ An ancillary implied power occurs when a primary power, whether express or implied, conferred by a statute cannot be exercised if the ancillary implied power does not also exist.⁴¹ The ancillary power occurs when one power is required for an unquestionably existing power to be exercised.⁴² A primary power is a power to do something that needs to be done in terms of a statute and which does not owe its existence to, or whose existence does not depend on another power since it exists independently of other powers.⁴³ If a power owes its existence to another primary power, then it would be an ancillary power.⁴⁴ This primary power can be express or implied.⁴⁵ It is express if it is explicitly provided for.⁴⁶ It is implied if it is not explicitly provided for.⁴⁷ This implication arises from a proper construal of the provision.⁴⁸ The Constitution is vital to this interpretative exercise.⁴⁹ The answer to the question of whether an implied primary power exists, is a function of the normal practice of statutory interpretation, guided by a textual and purposive approach.⁵⁰ This difference between primary and implied powers is not inconsequential to this discussion. Therefore, in this regard, since section 30 has not entered into operation, then the question that must be answered is whether ITAC’s power to request the imposition of the provisional payment is an implied or “necessary” power arising

32 *Masetlha* para 192.

33 *Ibid*

34 *Ibid*.

35 *AmaBhungane Centre for Investigative Journalism NPC v Minister of Justice and Correctional Services; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC* 2021 3 SA 246 (CC) para 180.

36 *Amabhungane* para 180.

37 *Ibid*.

38 *Ibid*.

39 Hoexter *Administrative Law in South Africa* (2015) 45.

40 *Ibid*.

41 *Ibid*.

42 *Ibid* para 65.

43 *Ibid* para 69.

44 *Ibid*.

45 *Ibid* para 70.

46 *Ibid*.

47 *Ibid*.

48 *Ibid*.

49 *Ibid*.

50 *Ibid* para 71.

out of section 57A.

To this end, section 57A(1) states the following:

57A. Imposition of provisional payment.—(1) Whenever the International Trade Administration Commission publishes a notice in the Gazette to the effect that it is investigating the imposition of an anti-dumping, countervailing or safeguard duty on goods imported from a supplier or originating in a territory specified in that notice, the Commissioner shall, in accordance with any request by the said Commission, by notice in the Gazette impose a provisional payment in respect of those goods for such period and for such amount as the Commission may specify in such request.

It can be argued that the power of the CSARS in section 57A(1) cannot be exercised without the implication that ITAC has the necessary power to make the request to the CSARS to impose provisional payments. A contrary reading would render section 57A meaningless or purposeless which contradicts the rules of interpretation.⁵¹ So, by this rule of construction, one could then argue that for section 57A(1) to have effect, it would have to be reasonably inferred that ITAC has the implied power to make the request to the CSARS so that this provision is “workable”. This interpretation complements the legislative purpose of the CEA in section 57A, which is to protect the domestic industry, which may be suffering harm that is difficult to repair during the course of the investigation. Therefore, this argument of ITAC’s implied powers has merit.

However, it can be argued that section 57A(1) is an ancillary power since its exercise relies on the existence of ITAC’s power to make the request, which in itself is an ancillary power since ITAC cannot give effect to its intention without the CSARS. This must mean that ITAC’s power to make the request to CSARS must be provided for by a separate statutory provision. Section 57A(1) does not confer this power and section 30 is not yet in operation. So, as it turns out, the answer to the contention by ITAC that it has an implied power to make the request to CSARS may lie in the difference between primary and ancillary powers. In simple words, the power of CSARS in section 57A of the CEA requires section 30(5) of the ITAA to be in effect or a similar power in the BTTA or even the CEA itself. In the absence of the power in either section 30(5) of the ITAA or the CEA or the BTTA, ITAC is legally not empowered to make the request to CSARS to impose a provisional payment. Therefore, both the powers in section 57A and section 30(5) are ancillary powers, whose exercise cannot be done without the other power existing, and being in operation.

Furthermore, it is common cause that an implied power can only exist if there no explicit provision regulating the matter in question.⁵² In other words, there can be no discussion of implied power if there is no explicit law regulating that particular matter. More directly, there can be no discussion of an implied power in section 57A(1) of the CEA when section 30(5) of the ITAA exists even though it is not yet in operation. Reading in such a power on section 57A(1) would mean that a solution was found for a problem that does not exist i.e. it is “unnecessary”. A contrary construal would render section 30(5) redundant, and this contravenes the rule of construction that legislation is purposeless or useless. The mere existence of section 30(5) must halt any inquiry as to whether such a power is also implied by section 57A(1). The non-operation of section 30(5) does not beget nor countenance an orgy of interpretation so as to make the power in section 57A(1) to be exercised.

Hoexter suggests a series of factors that could assist in determining whether a power is implied or not. First, Hoexter explains that if the empowering provision uses peremptory language, then a court will likely accept the proposition that the existence of implied powers, which

51 *Ex Parte the Minister of Justice In Re Rex v Jacobson & Levy* 1931 AD 466 477.

52 Tsele “‘Observations’ on the State Capture Judgment” 2021 *SALJ* 494.

facilitates the fulfilment of the object of the power in question.⁵³ In this regard, section 57A is not preemptory as explained earlier and thus, the ITAC argument fails on this attack. Secondly, Hoexter identifies the extent of the express power as a factor in that if the express power i.e. section 57A is of a “broad, discretionary nature”, then it can be seen as “wide enough” to imply that ITAC has the power to make this request.⁵⁴ The problem here is that this factor is contingent on the power being conferred on the subject of that provision, which is the CSARS and not another institution (ITAC) that is not the subject of this provision. In any event, on this score, section 57A confers on the CSARS a narrow power to only impose provisional measures and nothing more. By virtue of the doctrine of implied powers, the CSARS may only have the implied power to impose the provisional measure but still, this requires a request from SARS. This is as far as the doctrine of implied powers can extend the meaning of section 57A. Implying that ITAC has the power to make this request goes beyond the remit of interpretation to law making, in violation of the doctrine of separation of powers.

Hoexter also identifies context as a factor, which was explored earlier in the discussion.⁵⁵ Finally, Hoexter cites the “nature of the action” as a factor in that if the implied power is “coercive, oppressive” or has “far-reaching effects”, then it is less likely to be seen as an implied power.⁵⁶ In my view, section 57A as contended by ITAC, has far-reaching powers in that it confers powers on ITAC, which is a creature of statute created under a different empowering statute and thus, this militates against section 57A conferring implied powers on ITAC.

In response to the case made by TIASA, SARS (the Third Respondent) argued that section 57A of the CEA, read together with the transitional provisions of the ITAA allows ITAC to impose the provisional payments. SARS agreed with TIASA and ITAC that section 30 has not come into operation. SARS then argued that section 30 is not the only provision that empowers ITAC to request the imposition of provisional measures.⁵⁷ SARS contended that section 57A is the basis for the imposition of provisional payments. According to SARS, Item 2(1) of Schedule 2 allows investigations on dumping to be initiated, in line with section 26(1)(c)(i) of the ITAA and must then be investigated and evaluated by ITAC under the BTAA. SARS then explained that the effect of Item (2)(a)–(c) is that any dumping applications must be dealt with in terms of the BTAA as though it had not been repealed.⁵⁸ This means section 4(1) of the BTAA is applicable. Section 4 of the BTAA states that the BTT must function “subject to the provisions of any other law” and thus, section 57A(1) of the CEA is “any other law”.⁵⁹ This argument has merit, but it too has an inherent defect. First, it confirms that ITAC is not empowered by either the ITAA or the BTAA to make the request to the CSARS to impose the provisional payment. Secondly, this argument misses the mark in that it does not concede that section 57A(1) confers to the CSARS an ancillary power. This means section 57A(1) is not a self-standing provision i.e. it can only be exercised as a consequence of an ancillary power as stated earlier, which in this case is section 30(5). In the absence of a provision in the BTAA or CEA or the ITAA empowering ITAC to make the request, section 57A cannot be triggered.

SARS then said that the ADR makes several references to ITAC’s power to impose provisional payments under the judicial review clause in Regulation 64, price undertakings in Regulation 39 and new shipper reviews in Regulation 50.⁶⁰ This, in their view, constitutes express grounds

53 Hoexter *Administrative Law* 44.

54 *Ibid* 45.

55 *Ibid*.

56 *Ibid*.

57 *TIASA v ITAC SARS Answering Affidavit* para 28.

58 *Ibid* paras 38–40.

59 *Ibid* paras 44–45.

60 *Ibid* paras 48–49.

for an ITAC request to the CSARS to impose provisional payments. However, this argument does not get out of the blocks in that it is fatally flawed on account of the rule of interpretation that subordinate legislation cannot provide for a right or power that is not provided for by the enabling legislation.⁶¹ If the ITAA does not authorise ITAC to make the request as SARS contended in their Answering Affidavit, the same fate befalls its progeny being the Regulations. This construal as contended by SARS would be ultra vires, at least in the interim until section 30(5) is proclaimed.

SARS then took the unusual step of citing case law in an affidavit using the cases of *Progress Office Machines v South African Revenue Services* 2008 2 SA 13 (SCA) (“*Progress Office Machines*”) and *Association of Meat Importers and Exporters v International Trade Administration Commission* [2013] 4 All SA 253 (SCA) (“*AMIE*”).⁶² In particular, in *Progress Office Machines* at para 4, the SCA held that section 57A “provides for the imposition of a ‘provisional payment’ by stating that:

Section 57A of the Act in addition provides for the imposition of a ‘provisional payment’. Provisional payments may be imposed by the Commissioner of Customs and Excise when the International Trade Administration Commission (‘ITAC’) or its predecessor, the Board on Tariffs and Trade, publishes a notice to the effect that it is investigating the imposition of anti-dumping duty on certain imported goods. The imposition of a provisional payment must be for the period, amount and goods specified in a request by ITAC without retrospective respect.⁴ A provisional payment is paid in respect of the goods subject to it ‘as security for any anti-dumping ... duty which may be retrospectively imposed’ on the goods in terms of s 56 (and 55) and may be set off against the amount of any retrospective anti-dumping duty payable.⁵ If no anti-dumping duty is imposed before the expiry of the period for which an antidumping duty has been imposed the amount of the duty has to be refunded.⁶ Where the amount of the provisional payment exceeds the amount of any antidumping duty retrospectively imposed the difference must be refunded but where it is less than the amount of the duty the difference may not be collected.

In this regard, the court in *AMIE* held at para 7:

[7] Whenever the Board on Tariffs and Trade published a notice in the Gazette to the effect that it was investigating the imposition of an antidumping duty, it was permitted to request the Commissioner of the South African Revenue Service to impose a provisional payment in respect of the goods in question, for such period, and in such amount, as the Board might specify. If so requested the Commissioner was obliged to impose the provisional payment by notice in the Gazette.⁵ When amending Schedule 2 so as to impose an anti-dumping duty the Minister was entitled to ante-date the duty to the date the provisional payment was imposed.

Thus, SARS was of the view that these two cases “dispose” of the matter because they “hold” that the BTTA was empowered to impose provisional payments based on section 57A of the CEA and that the CSARS was obliged by that provision to impose the provisional measures.⁶³ But the Supreme Court of Appeals (SCA) in both cases did not say ITAC is empowered to impose provisional payments. In *Progress Office Machines*, the SCA stated that the CSARS is empowered to impose the provisional payment, but it did not say ITAC is empowered to make this request. In the court’s words, section 57A “provides for the imposition of a ‘provisional payment’”. The court in *AMIE* did not specify the legal basis for ITAC’s power to make the request. Ultimately, the problem with this argument is that the statements of the SCA in *Progress Office Machines* and *AMIE* were not findings of the court because these were not the issues before the SCA. In both cases, the SCA was called upon to decide on the date of commencement

61 Botha *Statutory Interpretation: An Introduction to Students* 6 ed (2022) 29.

62 *TIASA v ITAC SARS Answering Affidavit* paras 64–68.

63 *TIASA v ITAC SARS Answering Affidavit* paras 64–68.

and termination of anti-dumping duties. Thus, the assertions made on the issue of provisional payments are simply *obiter dictum* and thus these cases do not constitute sufficient authority. At best, these remarks of the SCA offer persuasive authority for the proposition that ITAC is empowered by section 57A of the CEA to impose provisional payments.

A peek at comparative jurisdictions such as Namibia and Lesotho within SACU, and Zimbabwe provides a way forward. In Namibia, the Customs and Excise Act 20 of 1998 provides that the Minister of Finance, as the investigating authority, can impose a provisional payment whilst investigating an application to amend or remove or impose an anti-dumping or countervailing duty.⁶⁴ The same approach is followed by Zimbabwe⁶⁵ and Lesotho which expressly confer this power on the Minister of Finance.⁶⁶ The difference between South Africa and these comparative jurisdictions within Southern Africa is that the latter all expressly and unambiguously confer this power on the Minister of Finance, whose power is extant. South Africa should follow suit.

4 CONCLUSION

This note assessed whether ITAC has the power to request the CSARS to impose provisional payments as prompted by the aborted litigation in *TIASA v ITAC*. This question has profound implications for the administration of international trade in South Africa and the affected industry.

In *TIASA v ITAC*, both ITAC and SARS argued that section 57A(1) of the CEA authorises ITAC to make the request to the CSARS to impose provisional measures. The ITAC argued that prior to its amendment by Act 45 of 2003, section 57A of the CEA allowed ITAC to request the CSARS to impose provisional measures. A comparison of section 57A prior to, and after its amendment in Act 45 of 2003 revealed that the provisions are identical save for the substitution of the terms “Board on Tariffs and Trade” with the term “ITAC”. Therefore, by ITAC’s own admission, if the amended section 57A of 2003 did not allow it to make the request to the CSARS, by parity of reasoning, the pre-2003 amendment section 57A also does not confer such a power. So ITAC’s use of section 57A(1) is not valid in law. Needless to say, it is also unsound to base a claim on a legislative provision prior to its amendment in a current matter. The ITAC’s claim that section 30(5) of the ITAA has entered into operation does not merit further consideration since this provision is patently and evidently not yet in operation.

SARS made the same argument though couched differently. SARS argued that using the transitional provisions in Schedule 2 to the ITAA which give life to section 4 of the repealed BTTA, section 57A(1) is the “any other law” that section 4 of the BTAA refers to and thus, section 57A(1) would empower ITAC to request the CSARS to impose the duties. Yet, this argument has to overcome the hurdle that section 57A is not a stand-alone provision and thus relies on a preliminary provision in the ITAA, which is section 30(5) of the ITAA or section 4 of the BTAA to empower ITAC to make the request. Section 30(5) is not yet in operation whereas section 4 of the BTTA does not provide for this power. In other words, ITAC’s power to make the request to the CSARS does not exist.

However, the doctrine of implied powers does offer a compelling ground for ITAC’s case for the power to impose provisional payments. It would be absurd that section 57A of the CEA has no purpose and thus, giving ITAC this “necessary” power makes section 57A workable and is in accordance with the purpose of section 57A of the CEA. Yet the imposition of provisional payments is not necessary for the working of the CEA or the ITAA, since the provisional measures are not a mandatory requirement for all trade remedy investigations. In any event, in

64 Customs and Excise Act s 64(1)(b).

65 Customs and Excise Act 16 of 1995 s 91 (Chapter 23:02).

66 Customs and Excise Act 10 of 1982 s 57(1).

this context, the definitive anti-dumping duties can be imposed retroactively to the period when provisional measures could have been imposed, so that argument must fail.

As Tsele notes, an implied power can only exist if there is no explicit provision regulating the matter in question. Section 30(5) exists and thus, it is “unnecessary” to invoke the doctrine of implied powers into section 57A to confer this power on ITAC. The SCA’s pronouncements on provisional payments in *Progress Office Machines* and *AMIE* are *obiter dicta* and thus not binding.

In short, it is the author’s view that ITAC does not have the power to request the imposition of provisional payments. Ultimately, a simple recommendation to address this problem would be to expressly provide for ITAC’s power to make this request in section 57A or to bring section 30 of the ITAA into effect.