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**International trade law: The legal status of world trade
organization laws on anti-dumping and intellectual property in
South Africa and Zimbabwe**

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This dissertation is submitted in fulfilment of the requirements for the
degree of Master of Laws

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2019

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ABSTRACT

The main purpose of this study is to determine the legal consequences of the Anti-dumping Agreement (ADA) and the Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement) issued by the World Trade Organization on the domestic laws of South Africa and Zimbabwe. The discussion focuses on compliance of both countries to the international standards governing the practice of dumping and intellectual property. Focus is also on the implementation and enforcement mechanisms in both countries with respect to the above mentioned international laws.

As of late, there has been an increased need for protecting intellectual property rights and combating unfair trade practices such as dumping in the modern day global economy. Recently dumping has been catapulted to the forefront of the most controversial practices in international trade and is still a challenge in the global market. For intellectual property, it is the recognition of the contemporary significance of the knowledge economy, and private intellectual property (IP) as a major component of international trade that the TRIPS agreement stems its relevance from in today's world.

This thesis demonstrates that, despite the fact that a country has signed and ratified an international instrument, there is need to craft implementing legislation to give full effect to it. This is the deficiency in both South Africa and Zimbabwe when it comes to ADA. This research further demonstrates that failure to craft implementing legislation restricts the applicability of international law in the domestic system to the extent that no legal rights can be derived from it for private persons. In a nutshell without implementing legislation, international law is only relevant as an interpretive aide for legislation.

With regards to intellectual property laws, this thesis demonstrates that even after crafting implementing legislation there is a need to enhance enforcement mechanisms to ensure that the rights of private persons under international law are fully protected in the domestic system. Though the intellectual property laws of both countries are mostly compliant, enforcement is weak. The challenges facing intellectual property in South Africa from a legal and empirical point of view were highlighted in the ongoing exercise of coming up with a comprehensive intellectual property policy. The Draft Policy document was recently given the nod by Cabinet and major reforms are being proposed. Chief among those reforms is the proposal that there should be substantive patent examination in South Africa, a process which South Africa does

not currently practice. It is trite that a strong intellectual property regime encourages innovation and has a great impact on the growth of intellectual property.

This thesis concludes that there is need to fully domesticate the standards set out in ADA in both countries to ensure full compliance which will empower private persons to directly benefit from that agreement. For intellectual property, this thesis concludes that though the existing legal frameworks in both countries provide a substantial measure of compliance, the benefits of an improved and strengthened legal framework to both countries cannot be overemphasized.

Dedication

To the Almighty God

&

PATRICK KAMUSASA AND JOYLINE KAMUSASA (MY PARENTS)

For your great sacrifice and support

Acknowledgements

This journey was embarked on with the helping hand and support of God and so many loved ones. I am indeed blessed for having such people around me. I am extremely thankful. My profound gratitude goes to my supervisor Dr Sheetal Soni, who has been very helpful and supportive throughout this humbling experience and for her scholarly leadership. It has been a great pleasure working with you. I wish to thank my parents for their unwavering love and unquantifiable support and absolute belief in me. You impressed upon me the need to keep going despite the numerous hurdles and challenges. You made the journey easy to go through, your support is awesome and you are much appreciated. May God richly bless you and keep you!!!

I also thank my siblings Valentine, Vincent and Wisdom for their encouragement. God bless you!!!. For Vincent and Wisdom, my younger brothers, this achievement is just a benchmark which you should strive to surpass. You should aim higher!!! I am convinced that with hard work and determination you can achieve even greater things.

My gratitude also goes to Mrs Chireshe who sincerely interceded and prayed for me to succeed in this venture. Special thanks go to Major General (Retired) Happyton Bonyongwe, a partner in the law firm I work for. Your generosity and support in everything regarding my work and development as a lawyer is sincerely appreciated. I also thank the other partners and staff of the firm for their belief and support in me. I would also want to post-humously honour the late Professor Robert Sharrock for his input into my life through his sound teaching of the law of contract and the law of agency, which are branches of private law that I understand quite well. I was saddened to hear the news of your passing. I am so proud that I was one of your numerous students. May your soul continue to rest in eternal peace! Lastly I do not boast of my own strength, I give all the glory to the LORD who is worth of my praise.

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ABBREVIATIONS AND ACRONYMS

ADA	The Anti-Dumping Agreement
ARIPO	African Regional Intellectual Property Organization
AU	African union
BTT	Board on Tariffs and Trade
CDA	Customs Duty Act
CEA	Customs Excise Act
COMESA	Common Market for Eastern and Southern Africa
CTC	Competition and Tariff Commission
DTI	Department of Trade and Industry
DSU	Dispute Settlement Understanding
FDI	Foreign Direct Investment
GATT	General Agreement on Tariff and Trade
GI	Geographical Indication
IP	Intellectual Property
ITAC	International Trade Administration Commission
ITCC	Industry and Trade Competition Commission
IPRs	Intellectual Property Rights
TC	Tariff Commission
TRIPS	Trade related Aspects of Intellectual property rights
SADC	Southern African Development Association
SACU	South African Customs Union
MFN	Most Favoured Nation
SCA	Supreme Court of Appeal
SSE	Substantive Search and Examination
U.K	United Kingdom
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization
WIPO	World Intellectual Property Organization
ZIMRA	Zimbabwe Revenue Authority
ZIPO	Zimbabwe Intellectual Property Office

CHAPTER 1

STUDY BACKGROUND AND INTRODUCTION

1.1 General introduction

Generally, where a country is a party to an international convention/treaty which has entered into force, the question that arises is how the provisions of that treaty can become part of the country's own domestic law and how the obligations undertaken by the country on the international platform for the benefit of the private persons within its domestic jurisdiction can be transformed into obligations owed directly to those persons within its own domestic legal system.¹ This question in essence involves the relationship between international law and domestic law. The branch of international law that deals with this relationship is often referred to as private international law.

Usually for an international agreement to be binding on a State it must be domesticated and this process often begins by ratification of the agreement by Parliament.² Ratification is when a country declares its intention to be bound by a treaty it has signed whereas domestication is the act of making provisions, standards and practices under international law recognizable and enforceable under national law. The failure by a State to fully domesticate its international obligations can be problematic both on a national and international level. On a national level, private persons will not be able to enjoy any rights from international agreements that are merely signed by a State because of their non-binding effect.³ Articles 10 and 18 of the Vienna convention on the Law of treaties⁴ (hereinafter referred to as the Vienna Convention) provide

¹What is Private International Law? Available at <https://libguides.library.qut.edu.au/c.php?g=427886> [Accessed on 17 May 2019.]

² See Blix H "The Requirement of Ratification", (1953) BYIL 352, esp at p.355; The requirement of ratification gives the legislature a degree of control over the exercise of treaty-making power by the Executive.

³ Since the individual is an 'object', not a 'subject' of international law, international law only operates on the individual indirectly through the State; international responsibility is owed to the State. Thus any rights or obligations imposed by international law are 'enjoyed' through an exercise of a right held by the State. See Dugard J *International Law: A South African Perspective*, (2013) 4th ed (Juta Academic) at pages 1-2. See also Oppenheim, *International Law. A Treatise* (1905), at 18f, para. 13 with the orthodox account that subjects of international law were states 'solely and exclusively'; see in general Manner, 'The Object Theory of the Individual in International Law', 46 AJIL (1952) 428.

⁴The Vienna Convention on the Law of Treaties (VCLT) is an international agreement regulating treaties between states. Known as the "treaty on treaties," it establishes comprehensive rules, procedures, and guidelines for how treaties are defined, drafted, amended, interpreted, and generally operated. Concluded at Vienna on 23 May 1969.

that a signature by a State to a treaty or convention only qualifies it to proceed to ratification, acceptance or approval. On an international level failure to domesticate an international agreement can restrict a State's power to effectively implement its international obligations and this can possibly lead to conflict with other States since non-compliance can adversely affect the rights of other States. This is apparent from the fact that a defaulting State will not be able to successfully use its non-compliant national law as justification for not performing its obligations as per the Vienna Convention.⁵ The effect of domesticating agreements makes international law easier to enforce and implement as States will be bound by their own laws to act in accordance with their international obligations.

This research seeks to assess whether South Africa and Zimbabwe as developing countries have complied with their obligations under the Anti-Dumping Agreement (ADA) and the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement issued under the World Trade Organisation (WTO). Specific focus will be on whether the obligations under ADA and TRIPS are binding on both States and whether they have been fully domesticated in national law and also whether legal persons can benefit or derive any rights from them.

The World Trade Organization (WTO) is an inter-governmental organization which regulates international trade and also monitors national trade policies of members.⁶ The WTO was officially established on 1 January 1995 under the Marrakesh Agreement, which was signed by 123 countries on 15th April 1994.⁷ The Headquarters of the WTO is located in Geneva, Switzerland and it currently has 164 members.⁸ The WTO replaced the General Agreement on Tariffs and Trade (GATT), which had existed since 1948.⁹

⁵ Article 27 of the Vienna Convention precisely excludes an appeal to internal law as a justification for the non-performance of treaties

⁶World Trade Organization http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm 2 September 2017.

⁷ibid

⁸ibid

⁹ibid

It is submitted that developing countries who constitute 2/3 of the entire WTO membership are becoming more active in the global economy partly because that they are increasingly looking at trade as a vital tool for their development more than ever before.¹⁰ Furthermore, developing countries often have distinct views and concerns from those of developed countries with regards to the implementation of the rules and obligations of the WTO and these will be highlighted below in relation to South Africa and Zimbabwe.¹¹

1.2 The selected countries-South Africa and Zimbabwe

These two developing countries are significant in the sense that, South Africa is the biggest economy in Southern Africa and is one of the leading economies in Africa¹² whilst Zimbabwe is one of the currently struggling African economies with the highest inflation rate.¹³ A comparison of compliance levels of the two countries with ADA and TRIPS given their different economic levels and some-what similar legal systems will reflect the general trend regarding compliance levels amongst developing countries. Furthermore, a comparison of the compliance level in both countries is easier to assess since the validity of international law in both countries is determined by a rule of domestic law authorizing the application of international norms.

1.3 The selection of ADA and TRIPS

There are numerous trade agreements that have been signed and implemented since the WTO became operational. As already stated this research shall focus only on two agreements being ADA and TRIPS in assessing the compliance level of South Africa and Zimbabwe. Though these two agreements are not related *per se* but they have been selected because they are both very technical and procedural in nature and they require a high measure of compliance by the WTO members in terms of the domestic legal and institutional changes that must be put in

¹⁰UNDERSTANDING THE WTO: DEVELOPING COUNTRIES, Available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/dev1_e.htm accessed on 8 August 2020.

¹¹ibid

¹²The economy of South Africa is the second largest in Africa, after Nigeria. As a regional manufacturing hub, it is the most industrialized and diversified economy on the continent. See

¹³ C Muronzi, IMF: Zimbabwe has the highest inflation rate in the world available at <https://www.aljazeera.com/ajimpact/imf-zimbabwe-highest-inflation-rate-world-190927004536305.html> accessed on 3 August 2020.

place to achieve maximum compliance. Also noteworthy is the fact that both ADA and TRIPS are part of the agreements referred to as ‘multilateral’ since they create obligations or rights for all WTO members whilst other agreements are ‘plurilateral’ since they only bind members that accept them.

Also, the choice has been made taking into account the fact that the obligations under ADA and TRIPS are often a talking point and are mostly at the centre of most trade disputes in the global economy. For instance, the United States of America (USA) trade war with China is relevant. The USA continues to accuse China of unfair trade practices which include dumping and IP theft whilst China perceives the USA of trying to curb its rise as a global economic power.¹⁴ TRIPS therefore exists for the critical purpose of resolving trade disputes over IPR and to facilitate trade in knowledge and creativity whilst ADA exists to provide remedial action to WTO members against harmful practices such as dumping by other States. A brief summary of TRIPS and ADA is given below.

1.4 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

TRIPS sets down the minimum required standards of many forms of intellectual property which WTO members must regulate in their respective countries.¹⁵ It covers copyrights, trademarks, industrial designs, geographical indications, patents, integrated circuit designs, trade secrets, and anti-competitive contract restrictions.¹⁶ The TRIPS agreement was negotiated at the end of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) in 1994 and is administered by the WTO.¹⁷ It is submitted that TRIPS introduced intellectual property law into the international trading system for the first time and to date it remains the most elaborate and comprehensive international agreement on intellectual property.¹⁸

South Africa was a founding member of TRIPS and it deposited its instrument of acceptance for the 2005 protocol amending TRIPS on 23 February 2016, becoming the fourth WTO

¹⁴González, Anabel and Veron, Nicolas, EU Trade Policy Amid the China-US Clash: Caught in the Cross-Fire? (August 2, 2019). Peterson Institute for International Economics Working Paper No. 19-13, Available at SSRN: <https://ssrn.com/abstract=3431323> or <http://dx.doi.org/10.2139/ssrn.3431323>

¹⁵See part b of the Preamble of the TRIPS agreement

¹⁶ See Part II of the TRIPS agreement

¹⁷ Overview: the TRIPS agreement https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm 2 September 2017

¹⁸ ibid

member to do so in 2016.¹⁹ Zimbabwe is also a member of the WTO and has accepted the TRIPS agreement immediately upon its inception on 5 March 1995.²⁰

1.5 Anti-Dumping Agreement

The General Agreement on Tariffs and Trade (GATT) in 1948 birthed anti-dumping duties and these rules and procedures have been embodied in Article VI of the GATT.²¹ The provisions of GATT continue to be the main source of the international trade rules on the imposition of anti-dumping measures. However, these have now been modified by the WTO Agreement on Implementation of Article VI of GATT 1994, now known as the Anti-Dumping Agreement.²²

ADA as well as the current version of the GATT are the two multilateral agreements in respect of 'trade in goods' which are incorporated into the agreement establishing the World Trade Organization commonly known as the WTO agreement. For the purpose of ADA, dumping is a pricing system where a firm or an exporter charges a lower price for exporting goods than it does for the same goods sold domestically.²³ It is one of the most common form of price discrimination in international trade. Dumping also occurs if the export price of the product exported from one country to another is less than the comparable price in the ordinary course of trade.²⁴ Basically, where a product causes or threatens material injury to the established industry of another country or materially retards the establishment of a domestic industry, anti-dumping measures can be taken as a remedy.²⁵ The WTO Agreement does not focus on the actions of commercial entities engaged in "dumping". Its focus is on the manner that governments can or cannot react to the practice of dumping.²⁶ The governments are therefore

¹⁹ *ibid*

²⁰ Zimbabwe and the WTO, Available at https://www.wto.org/english/thewto_e/countries_e/zimbabwe_e.htm accessed on 8 August 2020.

²¹ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 available at https://www.wto.org/english/docs_e/legal_e/19-adp_01_e.htm

²² *ibid*

²³ Article 2.1 of ADA

²⁴ *ibid*

²⁵ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Anti-Dumping available at https://www.wto.org/english/tratop_e/invest_e/trims_e.htm (2 September 2017)

²⁶ *ibid*

the addressees. The WTO essentially disciplines dumping actions through the “Anti-dumping Agreement.”²⁷

ADA allows for the imposition of anti-dumping duties for as long as it is necessary to remedy the practice of dumping which causes injury.²⁸ This is, however, subject to the proviso that these duties must be terminated after five years unless a sunset review has been initiated.²⁹ A sunset review has the function of either permitting or terminating the continuation of an anti-dumping duty. This is important because if the sunset review is not initiated prior to the expiry of the five-year period, the anti-dumping duties will be terminated. In essence, a sunset review allows for the continuation of the duty until the sunset review is finalized, at which point the duty will either be terminated or will continue.³⁰

1.6 Limitations of this study

As already stated, this research shall assess the compliance level of South Africa and Zimbabwe to the WTO’s Agreements on Anti-dumping and TRIPS. However, not all aspects of these Agreements will be assessed. With regards to the Anti-dumping Agreement, the domestic laws of both countries covering the definition of dumping, calculation of dumping margins, duration of anti-dumping duties, provisional duties and dumping investigations only will be assessed. In terms of the TRIPS agreement, the domestic laws of both countries covering, patents, copyright, geographical indicators, industrial designs, integrated circuit layout designs and trademarks will be assessed. Primary focus will be on the extent and duration of protection afforded to these intellectual property rights in the domestic context.

1.7 Legal issues

There are several legal issues which can arise when a country attempts to implement its international obligations including those of the WTO. These include, *inter alia*,

- The complete or partial absence of conforming legislation

²⁷ *ibid*

²⁸ *Ibid*

²⁹ *ibid*

³⁰ Article 11.3 of the ADA.

- Possible clashes of obligations between WTO law with national and regional law of the WTO members.
- Conflict in interpretation and application of national and regional law in accordance with WTO rules.

Generally countries are often faced with the challenge of the absence of conforming legislation under their domestic laws which empower them to act in accordance to their international obligations. These gaps in the law can be complete or partial and may lead to inconsistent application of relevant legal principles, conflicting judgments and a general lack of legal certainty.

In the case of the WTO, it specifically mandates its members to bring their domestic law into conformity with their international obligations.

Article XVI:4 of the WTO Agreement provides that

“Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.”³¹

Although most of the provisions under ADA and TRIPS are honoured in the domestic laws of South Africa and Zimbabwe, there are some aspects of those agreements that have not yet been fully incorporated into domestic law meaning these agreements are only binding and enforceable to the extent that they are domesticated. The specific shortfalls will be elaborated under the heading ‘research problem’ below. Due to the incomplete actions of the Legislatures of Zimbabwe and South Africa, both countries are not fully compliant and the consequences of the non-compliance will also be discussed below. However non-binding clauses in international agreements may still be useful for purposes of interpretation of the domestic statutes of a State. This was affirmed in the South African case of *S v Makwanyane*³² where the court successfully used international law as a guideline to answer the question of whether the death penalty should be abolished or not. *Chaskalson P* stated that;

“the international and foreign authorities are of value because they analyze arguments for and against the death sentence and show how courts of other jurisdictions have dealt with this vexed issue. For that reason alone they require our attention. They may

³¹Marrakesh Agreement Establishing the World Trade Organization
https://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_04_e.htm 2 September 2017

³²1995 (6) BCLR 665...

also have to be considered because of their relevance to section 35(1) of the Constitution”

1.8 The Research Questions

The main questions that this thesis seeks to answer are:

- i) What is dumping under the WTO and what are the standards required for the utilisation and implementation of anti-dumping laws by a Member?
- ii) What are the intellectual property law standards under the WTO and what is required for the utilisation and implementation of these standards by a Member?
- iii) What is required to guarantee the full realisation and enjoyment of the rights under ADA and TRIPS by legal persons in both countries?
- iv) Has South Africa and Zimbabwe done enough according to their obligations under the World Trade Organisation to comply with the expected anti-dumping and intellectual property standards?
- v) What should Zimbabwe and South Africa do in order to improve their anti-dumping and intellectual property laws to ensure that they are wholly in compliance with their WTO obligations?

1.9 Chapter outline

The thesis will be divided into five chapters.

Chapter 1

This chapter lays the foundation for this thesis. The aims and objectives of the thesis are set out in chapter one. Furthermore, the structure of this thesis, research questions, research problem and scope of this study as well as the methodology will also be set out in this chapter. This chapter focuses on the rationales for the domestication of international laws and analyses why it is important for a country to domesticate and implement its international obligations. This chapter justifies the relevance of the study.

Chapter 2.

This chapter discusses the international obligations under ADA and TRIPS which South Africa and Zimbabwe as WTO members must comply with. A brief discussion of the structure of the WTO will also be made.

Chapter 3

This chapter discusses the ways that South Africa has complied with its WTO obligations under ADA and TRIPS as well as highlighting the shortcomings. This chapter critically examines the legislative and institutional frameworks as well as the relevant case law governing the South African anti-dumping and Intellectual property laws and also whether legal persons can enjoy any rights from these agreements domestically. In addition, there will be an examination of some key problems which restrict compliance to these agreements

Chapter 4

This chapter discusses the way that Zimbabwe has complied with WTO law with regards to the ADA and the TRIPS as well as highlighting the shortcomings. This chapter analyses the legislative and institutional frameworks as well as the relevant case law governing the Zimbabwean anti-dumping, and intellectual property laws. In addition, it assesses whether legal persons can derive any rights from ADA and TRIPS.

Chapter 5

This chapter contains recommendations on how South Africa and Zimbabwe can achieve full compliance with their international obligations under ADA and TRIPS. This chapter also contains concluding remarks.

1.10 The research methodology

This research is a qualitative, desktop (library) study. Extensive use will be made of primary and secondary legal materials, including journal articles, legislation, international instruments, textbooks, reports and government documents.

1.11 Application of International Law theories in the domestic context

It is worth noting that they are two schools of thought with regards to the application of international law in the domestic context. These are monism and dualism.³³ It is submitted that we should use these theories to explain how countries approach the relationship between international and domestic law.³⁴ Kelsen's³⁵ monistic theory of international law views international law and domestic law as part of a single universal legal system. Monism suggests that international law is superior to domestic law and should prevail in any conflict between the two laws.³⁶

A dualist system treats the international and domestic systems of law as separate and independent.³⁷ In essence, the validity of international law in a dualist domestic system is determined by a rule of domestic law authorizing the application of that international norm. It is submitted that because of the variety of ways in which domestic systems incorporate international law, some scholars have preferred the term "pluralism" to "dualism."³⁸ It is submitted that the distinction between the two is purely academic. However, this thesis is of the view that the dualist theory is more relevant in the modern day international system since most countries require international laws to be domesticated for them to be binding. This is the case in South Africa and Zimbabwe. Zimbabwe goes a step further by section 34 of the Zimbabwean constitution³⁹ imposes an obligation on the State to domesticate all international instruments/treaties it signs.

1.12. The Research Problem.

The problem in the implementation of the international obligations under ADA and TRIPS by South Africa and Zimbabwe is two-fold. Firstly, it relates to the absence of domestic law that

³³ H Charlesworth,... et al eds. *The Fluid State: International Law and National Legal Systems* (2005)

³⁴ *ibid*

³⁵ Kelsen states that the difference between municipal and International law is the same as that between law and morals. On law and morality, see also his *Essays In Legal and Moral Philosophy* (1973), at 83-113

³⁶ Monism and Dualism in International Law, Available at <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0168.xml#firstMatch> accessed on 7 January 2019.

³⁷ *ibid*

³⁸ *ibid*

³⁹ Constitution of Zimbabwe Amendment no.20 of 2013

is fully compliant with the provisions of ADA and TRIPS. This has resulted in inconsistencies in the application of certain principles under those agreements and this will be substantiated below. The second problem is the weak enforcement of the domesticated obligations by authorities in both countries mainly especially when it comes to the TRIPS agreement and this has resulted in holders of IP rights being unable to utilize criminal remedies in protecting their rights against infringing third parties.

The key problem in the anti-dumping laws of South Africa is the lack of legal clarity on the determination of the precise date of commencement of final anti-dumping when they have been imposed with retroactive effect⁴⁰. This scenario often happens where provisional duties have been imposed⁴¹. This debacle involves the date in which provisional duties are imposed and the date of publication of the provisional duties in the Government Gazette. The commencing date is crucial because it will determine the date of expiry of the duties which ordinarily should not go beyond 5 years unless a sunset review is initiated⁴²

⁴⁰ADA sets forth the general principle that both provisional and final anti-dumping duties may be applied only as of the date on which the determinations of dumping, injury and causality have been made. However, recognizing that injury may have occurred during the period of investigation, or that exporters may have taken actions to avoid the imposition of an anti-dumping duty, Article 10 of ADA contains rules for the retroactive imposition of dumping duties in specified circumstances. If the imposition of anti-dumping duties is based on a finding of material injury, as opposed to threat of material injury or material retardation of the establishment of a domestic industry, anti-dumping duties may be collected as of the date provisional measures were imposed. If provisional duties were collected in an amount greater than the amount of the final duty, or if the imposition of duties is based on a finding of threat of material injury or material retardation, a refund of provisional duties is required. Article 10.6 provides for retroactive application of final duties to a date not more than 90 days prior to the application of provisional measures in certain exceptional circumstances involving a history of dumping, massive dumped imports, and potential undermining of the remedial effects of the final duty.

⁴¹Article 7 of the ADA provides rules relating to the imposition of provisional measures. These include the requirement that authorities make a preliminary affirmative determination of dumping, injury, and causality before applying provisional measures, and the requirement that no provisional measures may be applied sooner than 60 days after initiation of an investigation. These provisions are honoured in Section 55 of the Customs Excise Act (CEA) which provides for the imposition of 'provisional payments/duties upon import products during the period when the International Trade Administration Commission (ITAC) is investigating allegations of dumping. Provisional measures may take the form of a provisional duty or, preferably, a security by cash deposit or bond equal to the amount of the preliminarily determined margin of dumping. The Agreement also contains time limits for the imposition of provisional measures-generally four months, with a possible extension to six months at the request of exporters.

⁴² Ibid note 18

The Supreme Court of Appeal (SCA) has delivered two important judgments firstly in the *Progress Office Machines v the South African Revenue Service*⁴³ and in the *Association of Meat Importers v ITAC*⁴⁴ (hereinafter the AMIE case). In each of these cases a sunset review was initiated more than 5 years after an anti-dumping duty was imposed by way of a provisional payment but within 5 years of the date of publication of the duty in the Government Gazette.⁴⁵ It is submitted that the correct calculation of the date of commencement of definitive antidumping duties when provisional measures have been taken is still not entirely settled due to these conflicting judgments. The *Progress Office Machines* case *supra* concerned the provisions of ADA and the interpretation of the relevant regulations. The legal question concerned whether an anti-dumping duty period, provided for in secondary legislation issued by the Ministry of Finance, violated article 11(3) of the Anti-dumping agreement.⁴⁶ The duty in *Progress Office Machines* was levied on paper products imported from Indonesia, by notice in the Government Gazette on 28 May 1999 with retrospective effect to 27 November 1998.⁴⁷ The SCA went on to find that the final anti-dumping duty had actually been imposed with effect from the date of imposition of provisional duties (27 November 1998) and not on the date of publication of these duties in the government gazette on (28 May 1999).⁴⁸ It also stated that ITAC is obligated to terminate anti-dumping duties 5 years from the date of imposition of provisional duties. The SCA concluded that the duties in question had expired prior to the initiation the sunset reviews. It is submitted that the approach adopted by the Constitutional Court was correct one as it will ensure that anti-dumping duties will not endure beyond five years as provided for in ADA.

In the *AMIE case* contrary to the position adopted in the *Progress Office machines* case it was decided that the final duty runs from the date of publication of notice in the Government Gazette. In the *AMIE case* three contentious anti-dumping duties that were scrutinized by *Nugent, J.* in his judgment pertained to chicken, garlic and glass. The SCA was of the view that all the three duties imposed did not expire prior to the launching of the sunset reviews. *Wallis*

⁴³2008 (2) SA 13 (SCA);

⁴⁴ 2013 ZASCA 108.

⁴⁵C Vinti "A Spring without Water: The Conundrum of Anti-Dumping Duties in South African Law" *PER/PELJ* 2016(19) - available at <http://www.saflii.org/za/journals/PER/2016/41.html> accessed 7 June 7, 2018.

⁴⁶ *ibid*

⁴⁷ *ibid*

⁴⁸ *ibid*

J in writing the minority judgment supported the view taken in the *Progress Office Machines* case that ITAC is obligated to terminate the duty 5 years from the date of imposition of provisional levies.

This paper agrees with the assessment of Clive Vinti⁴⁹ who thinks that the above mentioned judgments are in conflict and are riddled with inconsistencies since the SCA has in the recent *AMIE* case virtually rewritten its earlier judgment of *Progress Office Machines*. Brink's conclusion is that the approach of South African courts whether the *Anti-Dumping Agreement* is binding on South African law is fraught with uncertainty and ambivalence. Brink contends that in practice, in South Africa, when anti-dumping duties are imposed with retrospective effect, the total duration of the duties exceeds five years.⁵⁰ Given the fact that the *AMIE* judgment is more recent than the one in the *Progress Office Machines* case, the High Courts will most likely follow its reasoning and ITAC as well. Dr. Uri Weiss⁵¹ views legal uncertainty as a serious problem which has a regressive distributive effect as there are sides that gain from legal uncertainty and others that lose from it. He further states that legal uncertainty leads to regressive settlements and a culture of dishonesty in trade.

In addition to the views of the authors above, this thesis views the problem highlighted above as grave since it has possible constitutional implications on the right to equality under the law.⁵² This right is being violated as firms who import goods that are being dumped may have to pay duties for a different length of time depending on the judge who decides the matter when these duties are imposed with retrospective effect. The effect of two conflicting SCA means a High Court judge can elect which judgment to follow. This means other firms will have to pay final anti-dumping duties for a 5 year period calculated from the date of publication of provisional duties in the Government Gazette which may result in them paying duties for a longer period than the ones whose 5 years duties are calculated from the date of imposition of provisional duties. Furthermore the work of ITAC will be complicated, making it difficult for

⁴⁹ *ibid*

⁵⁰ *ibid*

⁵¹ U Weiss, *The Regressive Effect of Legal Uncertainty*, 2019 J. Disp. Resol. (2019) Available at: <https://scholarship.law.missouri.edu/jdr/vol2019/iss1/13>

⁵² See section 9 of the South African Constitution 1996, See also President of the Republic of South Africa v Hugo [1997] ZACC 4; 1997 (4) SALR 1 (CC) 41 para 112 (per Justice O'Regan).

it to fulfil its statutory obligations as officials will not know precisely how to compute the 5 year period when face with such a scenario.

As for Zimbabwean anti-dumping laws, they are mostly compliant with ADA however the implementation of the requirement to investigate before applying remedial action is not being adhered to. The Competition and Tariff Commission (CTC) which is the equivalent of ITAC in South Africa is the authority mandated to investigate unfair trade practices in Zimbabwe such as dumping.⁵³ Its major criticism is lack of capacity to investigate and prove that dumping is taking place in Zimbabwe. Currently in Zimbabwe there are a lot of cases where industries are being crippled due to dumping and the refrigeration sector is one of them. As a result not much dumping investigations have taken place as a result of this incapacitation of the Competition commission. This has resulted in reactionary and arbitrary actions being taken by politicians to safeguard the domestic industry from the influx of cheap foreign products, all this against the provisions of the Anti-dumping agreement.

In 2016 the then Zimbabwe's Minister of Industry and Commerce Mike Bimha gazetted the controversial Statutory Instrument 64 of 2016 (SI 64/2016)⁵⁴. This Instrument was gazetted as a safeguard measure to protect the domestic industry against the uncontrolled influx of cheap foreign goods from South Africa. Zimbabwe argued that it had such a right in terms of its domestic law and as well as under the WTO's Anti-dumping Agreement.⁵⁵ However some legal experts criticized this stating that safeguard measures cannot be taken arbitrarily nor can they be applied selectively by favouring the imports from one WTO member country over another.⁵⁶ It was contended that Zimbabwe cannot restrict imports from South Africa and at the same time allow similar imports from Botswana or Brazil as this could lead to trade

⁵³ Competition and Tariff Commission of Zimbabwe available at <http://www.competition.co.zw/>. Accessed on 7 May 2018.

⁵⁴SI 64/2016

⁵⁵SI64/2016 a disregard of international trade laws available at <https://www.newsday.co.zw/2016/07/si642016-disregard-international-trade-laws/> accessed on 2 September 2017.

⁵⁶ibid

disputes. The effect of SI 64/2016 was not to ban the importation of the said goods but to limit their importation through licensing.⁵⁷

As a result Zimbabwe has not fully complied with its obligations under ADA as it remains incapacitated to conduct dumping investigations and as a result decisions are often made to suit its interests at the expense of international law.

With regards to compliance with TRIPS, both South Africa and Zimbabwe have domesticated most of the standards under TRIPS. However this is negatively impacted by the absence of patent examination capacity and enforcement. Both countries do not examine patents before they are registered. This is a violation of Article 62.2 of TRIPS.⁵⁸ With regards to Zimbabwe, it is submitted that although it is home to many talented creators, their works are largely undervalued⁵⁹ and unprotected due to lack of IP enforcement.⁶⁰ It is further submitted that if Zimbabwe is to fully benefit from its wealth of creative and innovative talent and take its rightful place on the world IP stage, it needs to fully to enforce the rights of IP. Though Zimbabwe launched its long awaited National Intellectual Property Policy and Implementation Strategy⁶¹ it remains to be seen whether this will enhance economic growth, technology transfer, foreign direct investment and localized innovation as intended.

With regards to South Africa, the business community in particular raised concerns that the South African government is not doing enough to upgrade IP law, enforce existing laws and promote uptake of IPRs in key markets, especially Southern Africa. It is submitted that the

⁵⁷ibid

⁵⁸ Article 62:2 provides the following: Where the acquisition of an intellectual property right is subject to the right being granted or registered, Members shall ensure that the procedures for grant or registration, subject to compliance with the substantive conditions for acquisition of the right, permit the granting or registration of the right **within a reasonable period of time so as to avoid unwarranted curtailment of the period of protection** (emphasis added). In general terms, the aim of the above paragraph is to compel Member States to proceed expeditiously when examining patent applications, although no precise time frame is indicated

⁵⁹ Sibindi 'Legislator appeals to govt over piracy' available at <https://www.newsday.co.zw/2019/05/legislator-appeals-to-govt-over-piracy/> accessed 3 August 2020.

⁶⁰ *Raising Intellectual Property awareness in Zimbabwe: A call to action* Available at <https://www.chronicle.co.zw/raising-intellectual-property-awareness-in-zimbabwe-a-call-to-action/> accessed on 19 December 2018.

⁶¹ On Thursday the 28th of June, 2018. The aim of the IP policy and implementation strategy is to, over time, provide a plan whereby all national stakeholders can work together to create, own and exploit research results, innovations, new technologies and works of creativity.

TRIPS Agreement exposes some of these deficiencies in the South African intellectual property (IP) laws and regulations.⁶² While it is argued that South Africa's IP laws are quite strong on paper, enforcement has historically been weak. It is submitted that more has to be done in terms of strengthening the intellectual property policy framework and its enforcement.

These deficiencies triggered IP reforms and subsequently led to the drafting of a national IP policy. The Draft policy document of 2013⁶³ in acknowledging these challenges indicated that

“The purpose of this IP policy is to argue for the Policy to talk to other relevant national policies and international agreements that advance the aspirations of a developing nation and to co-ordinate the national and international approaches on various IP matters. South Africa does not have an IP policy and therefore its approach to IP matters is fragmented and not informed by national policies. Due to this international obligations are attracted, even if their cost of implementation outweighs the benefits. The lack of coordination also lead to the national approach being weakened.”

As a result of the above highlighted research problem, this thesis will strive to stress the gravity of the problem and the urgent need to have it addressed. The thesis will also provide recommendations on how these challenges can be resolved at law.

1.13 Chapter conclusion

In light of the foregoing, this thesis will argue for the full domestication of the standards under TRIPS and ADA by the two countries. Furthermore, it will highlight the need to implement and enforce the already existing TRIPS and ADA compliant provisions in the domestic legislation for the benefit of both natural and juristic persons in both countries.

⁶² Ibid

⁶³ GN no 38616 Notice no.918 of 2013

CHAPTER 2.

INTERNATIONAL OBLIGATIONS IMPOSED BY ADA AND TRIPS ON WTO MEMBERS.

2.1 Chapter introduction

This chapter will set out the obligations imposed by the ADA and TRIPS on WTO members. As stated in the previous chapter there is a general obligation on all WTO members to ensure conformity of their domestic laws, regulations and administrative procedures with the obligations provided in the WTO agreements.⁶⁴ This chapter will also include a brief discussion of the WTO structure and how it carries out its business as an organisation and how these obligations are arrived at including the negotiation principle (single undertaking principle) used during the formation of the WTO and advent of TRIPS and ADA. Furthermore the legal force of international treaties in general will be discussed and reference will be given to the Vienna Convention.

2.2 Structure of the World Trade Organisation

The obligations imposed on WTO members have to be understood in light with the responsibilities of the WTO as an organisation. One of the responsibilities of the WTO is to oversee matters of trade agreements and related legal instruments for the administration of trade relations among its members and also to ensure that international trade carried out on a non-discriminatory, substantially free and reciprocal basis.⁶⁵ The WTO's scope is wider than the one of its predecessor GATT which was confined to trade in goods. In addition to trade in goods the WTO covers trade in 'services' and intellectual property as well.⁶⁶ The legal and institutional change brought about by the WTO is substantial. From the text of the WTO Agreement it can be argued that it is the most comprehensive, detailed and legally binding multilateral economic treaty ever.⁶⁷

⁶⁴ See note 30

⁶⁵ See note 30

⁶⁶ See note 30

⁶⁷ Unlike the GATT, the WTO and its agreements are permanent. As an international organization, the WTO has a sound legal basis because members have ratified the WTO agreements, and the agreements themselves

The structure of the WTO agreement involves three main categories: the multilateral agreements on trade in goods⁶⁸ which incorporates the (GATT) and other agreements,⁶⁹ the General Agreement on Trade in Services (GATS) and Trade Related Aspects of Intellectual Property Rights (TRIPS).⁷⁰

The WTO's institutions are presided over by its member governments, consisting of the Trade Ministers of all WTO members. The WTO Ministerial Conference is the highest decision making body. The Conference convenes once in every two years and this is when all the final decisions are made and new negotiations launched and contentious issues are finalised.⁷¹ In essence it is the decisions made by these Ministerial Conferences that create binding obligations on the WTO members. For instance the agreement which established the WTO in 1994 popularly known as the (Marrakesh Agreement) imposes the obligation referred to above in which WTO members must ensure that their laws conform to the WTO agreements.

There is also a General Council which is the second in line when it comes to decision making at the WTO. It carries out the functions of the WTO and it comprises of usually ambassadors or corresponding office holders from all WTO members. It has the authority to act on behalf of the Ministerial Conference and to perform day to day work between Ministerial Conferences.⁷² The General Council's responsibilities are delegated to three bodies which are, the Council for trade in goods, (Goods council), Council for trade in services (Services council)

describe how the WTO is to function. GATT was ad hoc and provisional. The GATT was never ratified in members' parliaments, and it contained no provisions for the creation of an organization.

⁶⁸General Agreement on Tariffs and Trade 1994, Marrakesh agreement Establishing the World Trade Organisation (WTO Agreement Annex 1A http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm) Accessed 02 November 2017.

⁶⁹General Agreement on Tariffs and Trade 1994 (GATT 1994) Agreement on Agriculture, Agreement on the Application of Sanitary and Phytosanitary Measures, Agreement on Textiles and Clothing. Agreement on Technical Barriers to Trade, Agreement on Trade - Related Investment Measures, Agreement on Pre-shipment Inspection, Agreement on Rules of Origin, Agreement on Import Licensing Procedures, Agreement on Subsidies and Countervailing Measures, Agreement on Safeguards.

⁷⁰General Agreement on Trade in Services, Marrakesh agreement establishing the World Trade Organisation (WTO Agreement Annex 1B available at https://www.wto.org/English/docs_e/legal_e/04-wto_e.htm accessed 02 November 2017.

⁷¹ Ibid [Article IV (1) Uruguay Round Agreement, Marrakesh Agreement Establishing the World Trade Organisation.]

⁷²Ibid Article IV (2) Marrakesh Agreement

and the Council for Trade Related Aspects of Intellectual property (Intellectual Property Council).⁷³For purposes of this thesis, the Services Council and Intellectual Property Council are quite relevant as they oversee the implementation and functioning of the WTO agreements.⁷⁴This is important because the efforts by South Africa and Zimbabwe in the implementation of ADA and TRIPS are crucial for purposes of assessing compliance. The diagram below summarises the WTO structure.

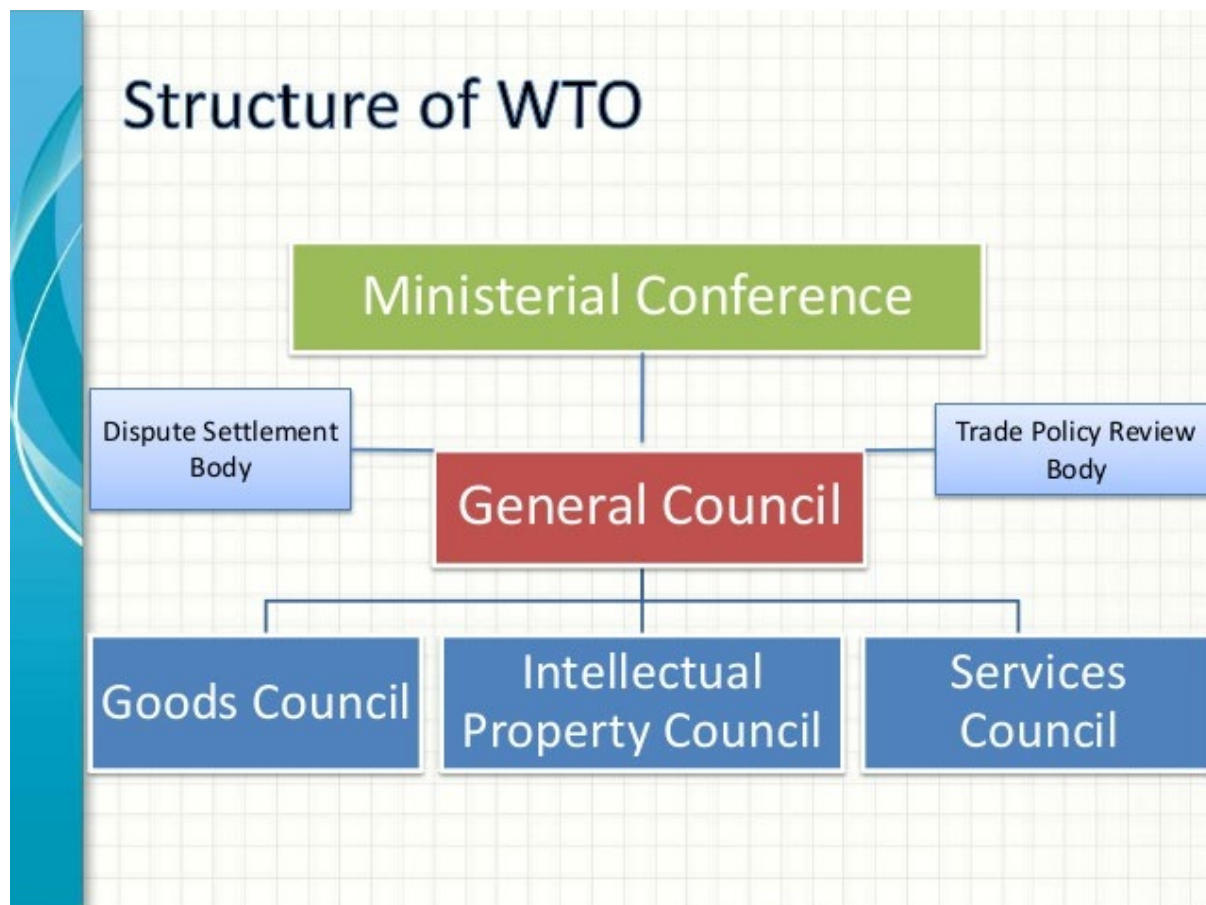


Diagram extracted from World Economic Forum Available at <https://www.weforum.org/agenda/2016/12/world-trade-organization-wto-explained/> Accessed on 8 August 2019.

2.3 The Single Undertaking Principle

The relevant WTO agreements are a single, integrated, treaty instrument, and this was achieved through the use of the negotiation technique known as the single undertaking

⁷³Article IV (5) Marrakesh Agreement

⁷⁴ Agreement on Trade Related Aspects of Intellectual Property Rights (Trips)

principle.⁷⁵ This implies that virtually every item of the negotiation is part of a whole and indivisible package and cannot be agreed separately.⁷⁶ The effect of this is that the obligations imposed by an agreement of the WTO will be binding on all WTO members and members cannot choose to adhere to certain obligations to the exclusion of others. Basically “nothing is agreed until everything is agreed”.⁷⁷ Article II of the WTO Agreement provides that the agreements and related legal instruments included in Multilateral Trade Agreements are important parts of the WTO and are therefore binding on all Members”.⁷⁸

Part B of article II deals with the interpretation and application and states that all WTO members are bound by all the rights and obligations in the WTO Agreements and its Annexes 1, 2 and 3.⁷⁹

2.4 The legal force of international laws in general

It is accepted that the legal force of the rules of international law is derived from the principles *pacta sunt servanda* and good faith fulfilment which are set out in the Vienna Convention on the Law of Treaties (VCLT).⁸⁰ The concept known by the Latin phrase ‘*pacta sunt servanda*’ means “agreements must be kept” is arguably the oldest principle of international law. In the absence of such a rule it is contended that no international convention would be enforceable or binding. This concept is often referred to in many international agreements that govern treaties, including the VCLT, which concerns treaties between states,⁸¹ The first principle (*pacta sunt*

⁷⁵R Wolfe ‘The WTO Single Undertaking as Negotiating Technique and Constitutive Metaphor’, *Journal of International Economic Law*, (2009) 12 (4) 1 Pages 835–858, available at <https://doi.org/10.1093/jiel/jgp03> accessed 28 November 2017.

⁷⁶ ‘How the negotiations are organized’ available at https://www.wto.org/english/Tratop_e/dda_e/work_organ_e.htm accessed on 28 November 2017.

⁷⁷ibid

⁷⁸Marrakesh Agreement Establishing the World Trade Organization available at https://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_01_e.htm accessed 28 November 2017.

⁷⁹Annexes 1A to 3 are integral parts of the Agreement and are binding on all members of the WTO. In contrast, the agreements included in Annex 4 are independent agreements and, therefore, binding only on the members that have accepted them.

⁸⁰ Article 26 of the Vienna Convention explains the principle of “PACTA SUNT SERVANDA” as meaning that every treaty in force is binding upon the parties to it and must be performed by them in good faith.

⁸¹International law and municipal law available at <https://www.britannica.com/topic/international-law/International-law-and-municipal-law#ref794916> accessed on 2 September 2017.

servanda’) places strong emphasis on compliance; the second requires states to comply in good faith. The manner of implementation of international rules in the domestic context is usually left to the discretion of each individual state. However the VCLT in Article 27 prohibits states from using their national law as justification for failure to fulfil obligations imposed by a treaty.⁸² It has been suggested that there is no “general duty” to align national law to with international law, only that domestic law cannot be used to justify non-compliance with international obligations. The WTO specifically mandates WTO members to bring their domestic law into conformity with their international obligations and article 27 of the Vienna conventions backs this position.

Similar to the concepts of *pacta sunt servanda* and good faith fulfilment are those of state responsibility, by which a state in breach of an agreement under international law has to make good to the impaired party for its wrongs.⁸³ The Dispute Settlement Understanding (DSU) of the WTO allows for compensation by the losing party failure of which, retaliatory measures such as suspension of concessions by the winning party can be applied. In addition a non-victorious party in any litigation is spontaneously required to bring its non-compliant domestic law into compliance with the relevant agreement deemed to have been contravened.⁸⁴ Furthermore, “prompt compliance” with this recommendation or ruling is obligatory.⁸⁵ However, the DSU goes a step further to state that the obligation of bringing domestic law into conformity with the relevant agreements is preferred to tendering compensation by a party in breach or allowing an aggrieved party to retaliate.⁸⁶ This speaks volumes about the WTO commitment in ensuring that members align their laws to the required standards.

2.5 Anti-Dumping Agreement

The objective of the ADA is to create an opportunity for import-competing industries to obtain protection against unfair trade practices such as dumping which causes material injury. What

⁸² Article 27 of the Vienna convention states deals with the issue of ‘Internal law and observance of treaties’ and it states that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

⁸³ ‘Principles and Concepts of General Public International Law’ available at https://www.wto.org/english/tratop_e/dispu_e/repertory_e/p3_e.htm accessed 28 November 2017.

⁸⁴ *ibid*

⁸⁵ Understanding on rules and procedures governing the settlement of disputes Available at https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm accessed 28 November 2017.

⁸⁶ *ibid*

constitutes material injury will be discussed below. Members of the WTO agreed that such dumping is unacceptable and that there should be a system in place to remedy injurious dumping. As already stated dumping occurs when a product is introduced into the commerce of another country at less than its normal value. The question that needs to be answered is what constitutes the ‘normal value’? This will be answered in the sub-heading below.

2.5.1 The normal value

The normal value can be calculated in a number of ways, but generally it relates to the price in the exporter’s domestic market.⁸⁷ It is the comparable price, in the ordinary course of trade.⁸⁸ Another way of calculating the normal value is referred to as the constructed normal value.⁸⁹ It is calculated by adding the cost of production, a reasonable amount for selling, general and administrative costs and profits in order to assess whether domestic sales are made below cost. In order to determine whether dumping occurred or not, the price of exports must be determined and compared with the normal value and the difference must be substantial. Though the ‘export price’ is not expressly defined by ADA, it is construed to be the price paid for the goods being exported from one country to another.⁹⁰

In calculating the normal value, the price of the ‘like product’ in the domestic market of the exporter is material to the determination of dumping in an investigation because it determines the normal value. For instance, a motor vehicle from country Y is exported to country X for US \$10 000, while the price of the same product in country Y is US \$30 000.⁹¹ When a company charges a different price in different markets for the same product this amounts to price discrimination. Dumping goes further than price discrimination, for dumping to occur, unlike price discrimination, the market has to be international⁹², between countries.

2.5.2 Calculating the dumping margin

The dumping margin is the percentage difference between the normal price of a product in the exporting country and its selling price to an importing country. ADA usually

⁸⁷See Article 2.2 as read with 2.2.1

⁸⁸ibid

⁸⁹Ibid

⁹⁰ ibid.

⁹¹Czako J, Human J & Miranda J A Handbook on Anti-dumping Investigations (2003) 126; see Art 2.4.2 of the ADA.

⁹²In the ordinary course of trade between countries

requires either a comparison of the normal value and the export price on a transaction-to-transaction basis or a comparison of the weighted average normal value to the weighted average of all comparable export prices.⁹³

The basic formula for determining the dumping margin is:

In the above scenario:

- Domestic price of Country Y = \$US30 000, Exporting price = \$US 10 000
- Dumping amount = \$US 20 000

The dumping margin is calculated as domestic price/ exporting price x 100.

Therefore:

- Dumping margin = $20\,000 / 10\,000 \times 100$
- = 200%

2.6 The nature and scope of obligations under ADA

In 1994, with the entry into force by the WTO and the ADA, detailed guidelines for countries to implement and manage anti-dumping laws were provided for.⁹⁴ Furthermore in comparison to the GATT, the WTO through ADA has introduced tighter obligations for a WTO member to implement a new anti-dumping measure although countries are permitted to use their discretion to implement their own anti-dumping laws which are consistent with the WTO rules.⁹⁵ In terms of the GATT 1947 anti-dumping duties were imposed easily even when the dumping margins were low, and the procedural requirements for imposition of these duties were less stringent and these duties could endure for long periods without reviews and now all this has changed as will be demonstrated below. These tighter obligations will be discussed in relation to Article 5.

Article 2.1 provides that a product is to be considered as being dumped when it is “introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product destined for consumption in the exporting country.”

⁹³See Art 2.4.2 of the ADA.

⁹⁴R Denton ‘Why Should Nations Utilize Anti-dumping Measures’ (1989) *Journal of International Law* 242-243.

⁹⁵ Art17.6 of the ADA ; Brown P ‘The WTO and Anti-dumping in Developing Countries’ (2007) *Working paper of the World Bank* No: 4014, 7.

Article 1 of ADA read with Article VI of the General Agreement on Tariffs and Trade 1994, makes it clear that anti-dumping duties are exceptional remedial measures that may only be imposed after properly conducted investigations show that dumping has taken place and that it causes or threatens material injury to the local industry. Article 9.1 provides that even where all the requirements for the imposition of a duty have been met, the imposition of the duty remains discretionary. Article 11.1 provides that, these dumping duties must remain in force for as long as and to the extent necessary to remedy the acts of dumping. Article 1 establishes that WTO members are obliged to only impose an anti-dumping measure after investigations have been initiated and conducted in accordance with the provisions of ADA. The relevant provision is Article 5 which imposes the obligations that the WTO members must follow in the initiation of investigations. It is specified that investigations should generally be initiated on the basis of written request submitted “by or on behalf of” a domestic industry. ADA establishes that it is only in special circumstances when authorities initiate without a written application from a domestic industry provided that they have sufficient evidence of dumping, injury, and causality.

In order to ensure to avoid endless investigations, Article 5.10 imposes an obligation that investigations should be completed within one year and in no case more than 18 months, after initiation. This is important because endless investigations can potentially disrupt legitimate trade activities. In situations when the dumping margin is *de minimis*, Article 5.8 provides for immediate termination of investigations. This is so because ADA was created to provide remedial relief where the injury is material. In terms of ADA the dumping margin is *de minimis* if it is less than 2%.

ADA imposes an obligation on governments to investigate and consider the material evidence first before imposing a final anti-dumping measure that restricts imports.⁹⁶ The importing country may impose anti-dumping duties to remedy the adverse effects of dumping after establishing the following; proof that actual dumping is occurring, the domestic industry producing a like product suffers material injury or threat thereof, and the injury is the result of dumped goods from the identified country.⁹⁷ It is not a must for WTO members to take remedial

⁹⁶ Article 6 of ADA

⁹⁷ Article 5.2 of ADA

action against dumping however if they wish to, they are obliged to prove the actual dumping and its adverse effects on its domestic industry. This means that there must be a connection between the dumping and the injury suffered hence a causal link is a necessity.⁹⁸ Basically for it to be said that dumping has taken place, the importing government must provide compelling evidence that the export price of the ‘like’ product is lower than the normal value.⁹⁹

Article 7 ADA imposes obligations on WTO members regarding the imposition of provisional measures. These include the requirement that authorities make a preliminary affirmative determination of dumping, injury, and causality before applying provisional measures.¹⁰⁰ These provisional measures may take different forms, it can be a provisional duty or, a security by cash deposit or bond equal to the amount of the preliminarily determined margin of dumping.¹⁰¹ There is also an obligation that provisional measures must not be applied sooner than 60 days after initiation of an investigation.¹⁰² ADA imposes time limits for the imposition of provisional measures which is generally four months, with a possible extension to six months at the request of exporters.¹⁰³ WTO members are therefore obliged to ensure that provisional measures are not imposed for more than six months.¹⁰⁴ Where a WTO member, imposes duties lower than the margin of dumping the period of provisional measures in that case is generally six months, with a possible extension to nine months at the request of exporters¹⁰⁵.

Article 10 imposes obligations regarding the retroactive imposition of final dumping duties in specified circumstances below. This retroactivity can be applied whether or not provisional measures have been effected.¹⁰⁶ As a general rule both provisional and final anti-dumping duties may be applied only on the date on which the determinations of dumping, injury and causality have been made. However, retroactive imposition is thus an exception to this rule and it seems as if the rationale of this exception is to cater for actual injuries that would have occurred during the investigation period or before. In terms of Article 10.6, the obligation on

⁹⁸ *ibid*

⁹⁹ See Art 5.8 of the ADA as read with Article 2.1

¹⁰⁰ See Article 7(1)(ii) of ADA

¹⁰¹ Article 7.2 of ADA

¹⁰² Article 7.3 of ADA

¹⁰³ Article 7.4 of ADA

¹⁰⁴ *ibid*

¹⁰⁵ *ibid*

¹⁰⁶ Article 10.2 of ADA

the WTO members is to ensure that the retroactive application of final duties is confined to a date not more than 90 days prior to the application of provisional measures.

With regards to the termination of anti-dumping duties, Article 11 embodies an obligation to terminate anti-dumping duties after a period of 5 years. There is however an exception and this is in terms of a sunset review.¹⁰⁷ The “sunset” requirement establishes that anti-dumping duties may continue beyond the 5 year threshold if a review investigation has been initiated prior to its expiry and has established that expiry of the duty would be likely to lead to continuation of dumping and injury.¹⁰⁸ This Article obliges WTO members to review the need for the continued imposition of a duty *mero motu* or upon request of an interested party provided that the reasonable period has lapsed since the imposition of a definitive/final anti-dumping duty.¹⁰⁹

2.7 TRIPS – The Nature and Scope of Obligations

By contrast to ADA which places obligations only when WTO members want to impose anti-dumping duties, TRIPS requires members to take positive action in adopting policies that protect a wide range of IP. TRIPS were established to define the minimum global standards for the protection of specified areas of intellectual property.¹¹⁰ TRIPS came into operation on 1 January 1995. It is the most comprehensive multilateral agreement on intellectual property to date because it is detailed covering a wide range of areas and it specifies the extent and duration of protection that should be accorded to each IP category.¹¹¹ The goal of the WTO agreements is to implement these standards across the world through its enforcement mechanisms.

Article 1 obliges WTO members to give effect to the provisions of TRIPS regarding intellectual property in their domestic laws however they are allowed to provide for more extensive protection than is required under the agreement. Furthermore there is an obligation to accord

¹⁰⁷Article 11.2 of ADA

¹⁰⁸*ibid*

¹⁰⁹*ibid*

¹¹⁰See the preamble of TRIPS

¹¹¹ See

the treatment provided for under TRIPS to the nationals of other members.¹¹² Article 2 obliges WTO members to comply with Articles 1 to 12, and Article 19, of the Paris Convention (1967).

Article 3 obliges every member to accord the nationals of other members treatment no less favourable than that it accords to its own nationals with regard to the protection of IP, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits.

Article 7 provides that the protection and enforcement of IPRs should contribute to the promotion of technological innovation and to the transfer and dissemination of technology. This must be to the mutual advantage of producers and users of technological knowledge and must be done in a manner conducive to social and economic welfare, and to a balance of rights and obligations. Thus Article 7 can be construed to encourage the responsible use and enjoyment of IP rights provided for in TRIPS and to also discourage the abuse of these rights as since protection is provided for a legitimate economic and commercial purpose.

Article 41 obliges WTO members to ensure that enforcement measures are available under domestic law in order to ensure that there is effective remedial action against any act of infringement of intellectual property rights covered by TRIPS. The scope of this obligation, includes the provision of expeditious remedies to prevent infringements and remedies which have a deterrent effect to further infringements.¹¹³ WTO members are obliged to apply these measures in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against the abuse of these rights.¹¹⁴

¹¹²When “nationals” are referred to in this Agreement, they are deemed, in the case of a separate customs territory Member of the WTO, to mean persons, natural or legal, who are domiciled or who have a real and effective industrial or commercial establishment in that customs territory

¹¹³See Article 41.1

¹¹⁴ibid

The scope of intellectual property rights covered by the TRIPS Agreement include copyright and related rights, geographical indications, trademarks encompassing service marks, industrial designs, patents, plant breeders rights, the layout designs of integrated circuits, and undisclosed information and trade secrets.¹¹⁵ The TRIPS agreement covers the subject matter of IP to be protected, the obligations on members, rights conferred, exceptions and the minimum duration of protection.¹¹⁶ The obligations imposed by TRIPS for WTO members which apply to each specific area of IP are stated below.

2.7.1 Copyright and related rights.

The obligations with regards to copyrights are enshrined in Articles 9 to 14 of the TRIPS agreement. Article 9 obliges members to comply with provisions of Berne Convention, 1971.¹¹⁷ It further provides that copyright protection shall extend to expression and not to ideas, procedures, and methods of operation or mathematical concepts.¹¹⁸ Article 10 obliges members to protect computer programs and compilations of data as literary works under the Berne convention.¹¹⁹ Article 10.2 obliges members to protect database and other compilations of data under copyright even where the databases include data that does not ordinarily fit under copyright.¹²⁰ Article 11 obliges members to ensure that the author and their successors in title for computer programs and cinematographic works have the right to authorize or to prohibit the commercial rental to the public of their copyright works.¹²¹ In terms of the general rule provided in Article 7(1) of the Berne Convention which was incorporated into the TRIPS agreement, members are obliged to ensure the protection of copyright and related rights for the entire life of the

¹¹⁵See Part II of TRIPS

¹¹⁶ibid

¹¹⁷ The Berne convention is regarded as the largest and most important international copyright convention. It basically regulated and harmonised copyright provisions amongst European states. The protection operates for the benefit of the author and his successors in title. The author's works will thus be protected in all countries of the Union and enjoyment of such rights is not dependent on domestic laws, a principle known as national treatment. However this convention alone provided no protection, protection was governed by the laws of the country where protection is claimed but it was this protection that was recognised in the countries in the Union and its colonies.

¹¹⁸Part II — Standards concerning the availability, scope and use of Intellectual Property Rights: copyright and related rights available at https://www.wto.org/english/docs_e/legal_e/27-trips_04_e.htm accessed on 23 March 2018.

¹¹⁹Article 10.1

¹²⁰Article 10 of the Trips agreement available at https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm accessed on 26 March 2018.

¹²¹ Article 11 of Trips available at https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm accessed on 26 March 2018.

author and for 50 years after his death except in the cases of photographic work or work of applied art. Article 13 provides that limitations or exceptions to exclusive rights should only be entertained in special circumstances and should not unreasonably prejudice the interests of the holder of the rights. With regards to related rights, Article 14.1 provides that performers shall have the right of prohibiting the unauthorized fixation of their performance on a phonogram such as the recording of a live musical performance.

2.7.2 Trademarks

The obligations for WTO members in relation to trademarks are enshrined in Article 15–21. Members are obliged to provide protection of trademark rights. Though, according to Article 6(1) of the Paris Convention and Article 15.2 of the TRIPS Agreement, the conditions for the filing and registering of a trademark are in principle determined by the domestic legislation of each WTO member, there are a number of common rules that have to be observed by all and these include the following,

- **The right of priority**– it ensures that on the basis of a regular first trademark application filed in a member country, the applicant (or the successor in title may, within a specified period of time, apply for registration of his or her trademark in another member country using the same priority date as the first application. Article 4 of the Paris Convention, provides that the priority period for trademarks is six months from the date of the first filing of that trademark in the jurisdiction of a member.
- **The publishing requirement**- Article 15.5 of the TRIPS Agreement, obliges WTO to publish a trademark either before, or promptly after it is registered. This obligation includes the provision of a reasonable opportunity to request the cancellation of the trademark to interested parties to challenge a registration if they so wish. This provision ensures transparency in the trademark registration process.

The protectable subject matter includes, any sign, or any combination of signs capable of distinguishing the goods or services of one undertaking from those of other undertakings. This includes personal names, letters, combination of colours,

etc. Article 16 lays down the rights which a member must give to the owner of a registered Trade Mark.¹²² This article obliges WTO members to ensure the owner of a registered trademark is empowered to exercise his rights exclusively entitling him to prevent all third parties who do not have his consent to use an identical trade mark in the course of trade. This right includes prohibition of use of similar signs for goods or services to those of the owner where such use would result in a likelihood of confusion. Article 17 obliges WTO members to ensure that there are limited exceptions to the rights conferred by the Trademark, such as fair use of descriptive items whilst Article 18 provides that registration of a Trademark shall be no less than seven years.

Article 19 of the TRIPS provides in instances where maintenance of registration is required such registration may only be cancelled after a continuous period of at least three years of non-use or use in a manner detrimental to its ability to distinguish the goods or services of one undertaking from those of other undertakings.

Though trademark rights, like other IPRs, are territorial, which means that they are in principle valid only in the jurisdiction where they have been registered or otherwise acquired however TRIPS provides an exception to this rule and obliges members to apply the exception in deserving cases¹²³ The TRIPS agreement explicitly recognizes in Article 16.1 a members' entitlement to make trademark rights available without registration on the basis of use and it requires protection for well-known marks that are not registered.

2.7.3 Patents

With regards to patents, the obligations on WTO members have been provided for in Articles 27 to 34 of the TRIPS. In Article 27 the patentable subject matter is identified and it includes both products and processes. This Article imposes obligations on members to ensure that patents are made available for any

¹²² *ibid*

¹²³ The protection for well-known marks required by Article 6bis of the Paris Convention and Article 16.2 and 16.3 of the TRIPS Agreement is an exception to that rule.

inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application.¹²⁴This Article places an obligation on WTO members to exclude certain items from patentability such as surgical methods for treatment of animals or humans and plants.

Article 28 obliges the WTO members to ensure that an owner of a patent has exclusive rights to prevent third parties from making, using, offering for sale, or importing patentable matter without the owner's consent. This is of course subject to Article 29 which provides that the invention must be sufficiently disclosed by the person wishing to register a patent in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art. It goes further to state that the person wishing to register a patent must indicate the best way for carrying out the invention at the filing date.¹²⁵Though Article 30 provides for exceptions to these exclusive rights it places an obligation on WTO members to only trigger exceptions in limited circumstances. In such a case, the legitimate interests of the patent owner must not be unreasonably prejudiced. There must be a balance between the legitimate interests of the patent owner and those of third parties. Article 31 provides for other uses where the consent of the patent right holder may not be sought. Such use may only be allowed provided that prior to such use, the proposed user has made efforts to obtain consent from the patent right holder on reasonable commercial terms and conditions and that such efforts have been fruitless within a reasonable time. Article 33 obliges WTO members to provide protection for patents for a duration not less than 20 years counted from the filing date.¹²⁶Article 34 places a burden on the defendant in civil proceedings to prove that the process to obtain an identical product is different from the patented process. In other words the defendant must prove that his process or method is different from that of the plaintiff.

¹²⁴For the purposes of this Article, the terms "inventive step" and "capable of industrial application" may be deemed by a Member to be synonymous with the terms "non-obvious" and "useful" respectively

¹²⁵ Article 29 of Trips available at https://www.wto.org/english/docs_e/legal_e/27-trips_04_e.htm accessed on 26 March 2018.

¹²⁶Article 33 of Trips available at https://www.wto.org/english/docs_e/legal_e/27-trips_04_e.htm accessed on 26 March 2018.

2.7.4 Industrial Designs

Article 25-26 of TRIPS outlines the obligations of WTO members with respect to industrial designs. Industrial design is a process of design applied to products that are to be manufactured through techniques of mass production. An industrial design can comprise of three dimensional features, such as the shape of an article, or two dimensional features, such as patterns, lines or colour.¹²⁷ Members are obliged to provide for the protection of independently created industrial designs that are new or original.¹²⁸ Such newness is determined if the new designs significantly differ from known designs or combinations of known designs.

WTO members are obliged to ensure that requirements for securing protection for textile do not unreasonably impair the opportunity to seek and obtain such protection designs.¹²⁹ This unreasonable impairment particularly relates to any cost, examination or publication requirements.¹³⁰ This obligation can be met through industrial design law or through copyright law. WTO are to ensure that the owner of a registered industrial design has the exclusive right to prevent third parties who do not have his consent from making, selling or importing articles bearing or embodying a design which is a copy, or substantially a copy, of the protected design, if such acts are done for commercial purposes¹³¹. Furthermore, there is an obligation to provide for protection of industrial design rights for a period of at least 10 years.¹³²

2.7.5 Geographical indications

The obligations for WTO members with regards to geographical indications are enshrined in Articles 22 and 23. A geographical indication (GI) is a sign used on products that have a specific geographical origin and possesses qualities or a reputation that are due to that origin.¹³³ In order to function as a GI, a sign must identify a product as originating in a given place. For the purposes of the TRIPS

¹²⁷Industrial Designs definition available at <http://www.wipo.int/designs/en/> accessed on 26 March 2018.

¹²⁸Article 25.1

¹²⁹Article 25.2

¹³⁰ibid

¹³¹Article 26.1 of TRIPS

¹³²Article 26.3 of TRIPS

¹³³Geographical Indications available at http://www.wipo.int/geo_indications/en/ accessed on 26 March 2018.

agreement, geographical indications (GIs) are indications which identify a good as originating in the territory of a member or a region or locality in that territory.¹³⁴

WTO members are obliged to provide the legal means for interested parties to prevent the use of GI that indicates or suggests that the good in question originates in a geographical area other than the true place of origin.¹³⁵ Furthermore in terms of this obligation, interested parties must be given legal means to prevent the use of a GI in a manner which misleads the public as to the geographical origin of the good.¹³⁶ WTO members are obliged to also empower interested persons to prevent any use of GI which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention (1967).¹³⁷ A member is empowered to refuse or invalidate the registration of a trademark which contains or consists of a geographical indication with respect to goods which does not originate in the territory indicated.¹³⁸ Article 23 provides for additional protection for geographical indications for wines and spirits. These obligations are akin to the ones in Article 22 just that these are in respect of wines and spirits. Article 23(1) obliges WTO members to provide the legal means for interested parties to prevent the use of GI for wines and spirits that indicates or suggests that the good in question originates in a geographical area other than the true place of origin. Despite the existence of extensive protective for GIs under TRIPS, the value of providing protection for geographical indications is debatable. Economic benefits for geographical indications have been suggested, such as the enhancement of geographical reputation, increased publicity for the localities, and more effective competition through enhanced capability to sell directly to final demand.

2.7.6 Layout Designs (Topographies) of Integrated Circuits

The obligations for WTO members with regards to the layout designs of integrated circuits are enshrined in Articles 35 to 37 of TRIPS. These also emanate from the Treaty on Intellectual Property in respect of Integrated Circuits. Essentially integrated circuits are commonly known as “chips” or “micro-chips”. In modern

¹³⁴Article 22(1)

¹³⁵Article 22(2)(a) of TRIPS

¹³⁶*ibid*

¹³⁷Article 22(2)(b) of TRIPS

¹³⁸Article 22(3)

technology, integrated circuits are essential elements for a wide range of electrical products, including articles of everyday use, such as watches, television sets, washing machines, and cars, as well as sophisticated computers, smart phones, and other digital devices. The need to develop innovative layout designs of integrated circuits is essential for the production of smaller digital devices with more functions.¹³⁹

TRIPS obliges WTO members to provide protection to the layout-designs of integrated circuits in Article 35. Article 36 obliges WTO members to give right holders exclusive rights to prohibit the importing, selling, or otherwise distributing for commercial purposes a protected layout-design without the authorization of the right holder. There is however an exception provided for in Article 37. In terms of Article 37, an obligation is imposed on WTO members not to declare as unlawful acts done by persons who genuinely did not know at the time of acquiring the integrated circuit that it incorporated an unlawfully reproduced layout-design. This is however subject to the payment of compensation to "right holder" after receiving notice that the integrated circuit that it incorporated an unlawfully reproduced layout-design.

2.8 Chapter conclusion

In conclusion the relevant obligations under ADA and TRIPS have been discussed above. In the next chapter, the legal compliance of South Africa will be assessed in relation to these agreements. Focus will be on the existing legislation and relevant regulations in assessing whether South Africa is wholly compliant to its obligations. Another issue which will be discussed will concern whether private personas in South Africa can derive any form of rights directly or indirectly from these agreements.

¹³⁹ibid

CHAPTER 3

COMPLIANCE OF SOUTH AFRICA WITH THE WTO AGREEMENTS ON ANTI-DUMPING AND TRIPS

3.1 Chapter Introduction

In the previous chapter the obligations of WTO members in relation to ADA and TRIPS have been laid out. In this chapter, the legal compliance of South Africa to ADA and TRIPS will be assessed. This will include an in depth analysis of the relevant statutes and case law to see how South Africa has adhered to international laws regarding dumping and intellectual property.

Generally when attempting to adhere to their international law obligations countries are often faced with the issue of conflicting obligations under their own domestic law and obligations under international law. At times when such a challenge is faced countries often prioritize their domestic laws and politics at the expense of their international obligations. South Africa in particular faced such a challenge in 2015 in a matter involving the ex-Sudanese President Al Bashir. The adherence of South Africa to international obligations was put to test with regards to the Rome Statute¹⁴⁰ in which South Africa had an obligation to arrest Sudanese President Omar Al Bashir when he visited the country during an African Union Summit. This obligation is however questionable as Article 98(2) of the Rome Statute has been often interpreted as excluding such an obligation since Sudan is not a signatory to the treaty but the High Court of South Africa¹⁴¹ confirmed its existence. AL-Bashir was wanted by the ICC on charges of genocide, war crimes and crimes against humanity, and was in South Africa for the 2015 African Union Summit. As a signatory to the Rome Statute that governs the jurisdiction and functioning of the Court, South Africa was obliged to arrest al-Bashir when he was in the country, and to extradite him to The Hague to face trial.¹⁴² However, South Africa had another conflicting obligation under international customary law to grant Bashir immunity and chose to adhere to that obligation instead. South Africa obviously considered the political implications of arresting a fellow African Head of State and chose not to, despite the existence of a court order to that effect.¹⁴³ South Africa's Supreme Court of Appeal subsequently ruled

¹⁴⁰Act 27 of 2002

¹⁴¹ South African Litigation Centre v Minister of Justice and Constitutional development and others, 2015 (5) SA

¹⁴²ibid

¹⁴³ ibid

that the failure to arrest al-Bashir was unlawful. The government remained resolute and months after the events surrounding the summit, the South African government announced its intention to withdraw from the ICC. This decision was subsequently ruled unconstitutional by the High Court in Pretoria.

This however does not mean that South Africa has a tradition of blatant disregard for international law. It has substantially tried to comply in areas such as intellectual property but more still has to be done in other areas such as dumping.

The challenges involved in complying with international obligations in South Africa are brought to light by the fact that a substantial number of important international treaties which South Africa has ratified have remained unimplemented.¹⁴⁴ An example of this is, despite the fact that South Africa was a founding member of the UN. No statute has ever been enacted to facilitate domestic implementation of UN Security Council decisions in South Africa.¹⁴⁵ Without implementing legislation it is difficult for a country to comply with its international law obligations since those obligations will not be part of its domestic law. South Africa is one of the original signatories to the Agreement Establishing the WTO (WTO Agreement) which is the umbrella agreement of the WTO system. The positive thing is Parliament ratified the WTO Agreement in terms of section 231(2) of the Interim Constitution on 6 April 1995.¹⁴⁶ It ratified the WTO Agreement, including the GATT and the Anti-Dumping Agreement which meant they became binding on South Africa under international law.¹⁴⁷ The GATT and the WTO Anti-Dumping Agreement are relevant in anti-dumping investigations in South Africa in view of section 233 of the Constitution which obliges every court to prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.¹⁴⁸

¹⁴⁴The Implementation of International Law in South Africa available at <http://www.icla.up.ac.za/events/53-the-implementation-of-international-law-in-south-africa> accessed on 2 May 2018.

¹⁴⁵ *ibid*

¹⁴⁶Trade Remedies available at <http://www.itac.org.za/pages/services/trade-remedies> accessed on 3 April 2018

¹⁴⁷ *ibid*

¹⁴⁸ Constitution of the Republic of South Africa Act 108 Of 1996

International law

231. (1).....
- (2).....
- (3).....
- (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

As stated above since GATT and the WTO Anti-Dumping Agreement were never enacted into South African law by national legislation in terms of section 231(4) of the constitution these agreements do not vest rights or impose obligations enforceable under South African domestic law. This implies that these agreements have no direct application in South Africa since they remain un-enacted under domestic legislation. They serve merely as an interpretative aide to the domestic legislation. In the *S v Makwanyane*¹⁴⁹ case the court successfully used international law as a guideline to answer the question of whether the death penalty should be abolished or not. *Chaskalson P* stated that

“the international and foreign authorities are of value because they analyse arguments for and against the death sentence and show how courts of other jurisdictions have dealt with this vexed issue. For that reason alone they require our attention. They may also have to be considered because of their relevance to section 35(1) of the Constitution, which states:

In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.”

The Court considered the constitutional rights to life and dignity, the International Covenant on Civil and Political Rights, the European Convention on Human Rights and it concluded that the death penalty for murder is unconstitutional. However despite the court’s extensive reference to international law it also stated that:

“In dealing with comparative law, we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and

¹⁴⁹(CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665

circumstances, and the structure and language of our own Constitution. We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it”

In the *Grootboom* case, Justice Yacoob of the Constitutional Court said:

*“The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.”*¹⁵⁰

It is submitted that the domesticated provisions of any treaty or international instrument are enforceable in South Africa whilst those which are not domesticated are relevant in terms of section 233 as interpretative aides however the weight attached to them by the courts will vary. The Court, in the *Chairman of the Board of Tariffs and Trade v. Brenco*,¹⁵¹ indicated that the obligations set forth by the WTO’s Anti-Dumping Agreement offer some assistance in adjudging the fairness of the investigating authorities in the matter of anti-dumping investigations. It is therefore trite that where there is ambiguity as to the meaning of certain provisions under the national legislation, courts are at liberty to refer to international law for assistance. However when this ambiguity is absent courts will ordinarily give effect to the existing domestic laws without referring to international law hence the effective implementation of international law requires the international obligations to be domesticated.

As stated in the previous chapter Article II.2 of the Marrakech Agreement imposes an obligation upon WTO members to harmonize their respective domestic laws within the parameters of the annexed agreements which include ADA and TRIPS.¹⁵² The extent that South Africa has harmonised its domestic laws to the relevant international agreements will be highlighted below starting with ADA.

¹⁵⁰2001 (1) SA 46 CC

¹⁵¹2001(4) SA 511

¹⁵²Article II.2 of the Marrakesh Agreement

3.2 History of anti-dumping law in South Africa.

Brink states that

*“South Africa is one of the oldest and biggest users of anti-dumping as a form of trade protection, with more than 1,000 investigations conducted over the past 100 years. It has imposed anti-dumping duties both on services (ocean freight) and to address depreciated currencies, long before these became issues in the WTO. Existing procedures do not meet South Africa’s WTO obligations and decisions are often influenced by political pressure to impose duties. Although there is an urgent need for a review tribunal, there have been some considerable improvements in transparency recently.”*¹⁵³

The above is evidence that the country’s anti-dumping regime is deficient in some areas. According to Brink, South Africa historically has been a prolific user of anti-dumping measures especially in the period between 1921 and 1947. In this period more than 90 anti-dumping and countervailing investigations were undertaken whilst another 818 investigations were undertaken between 1948 and October 2001¹⁵⁴. In the early 1990s when South Africa returned to the global community after decades of trade sanctions, its democratic reforms and transformation contributed to the removal of these trade embargoes.

South Africa reportedly initiated about 157 anti-dumping investigations and applied 106 anti-dumping measures between 1 January 1995 and 30 June 2002.¹⁵⁵ By so doing it made South Africa the 5th largest user of anti-dumping measures after the United States, the European Union (EU), India and Argentina.¹⁵⁶

The National Economic Forum (NEF) in 1994, a tripartite body consisting of representatives from across the spectrum, business, labour and government stressed the need for national legislation on anti-dumping and countervailing measures. In addition they also highlighted the need to establish an anti-dumping authority.¹⁵⁷ Consequentially this resulted in a few Acts

¹⁵³Brink, Gustavo F. ‘One hundred years of anti-dumping in South Africa’ Kluwer Law International 2015

¹⁵⁴Gustav F. Brink (2002), Anti-dumping and Countervailing Investigations in South Africa: A Practitioner’s Guide to the Practice and Procedures of the Board on Tariffs and Trade.

¹⁵⁵ ibid

¹⁵⁶ ibid

¹⁵⁷Niel Joubert ‘The reform of South Africa’s Anti- dumping regime’ available at https://www.wto.org/english/res_e/booksp_e/casestudies_e/case38_e.htm accessed on 4 April 2018.

being modified to give effect to the growing needs to combat the practice of dumping. The Board on Tariffs and Trade Amendment Act¹⁵⁸ of 1995 made some amendments to South African legislation in a bid to make the country's anti-dumping regime to resemble ADA.¹⁵⁹

3.3 Anti-dumping in modern day South Africa

These recommendations by NEF led to the promulgation of the International Trade Administration Act¹⁶⁰ (hereinafter the ITA Act) followed by the anti-dumping regulations in 2003. In modern day South Africa the implementation of the country's dumping laws are being spearheaded by the International Trade Administration Commission of South Africa (ITAC) a body created by the ITA Act. It oversees the anti-dumping investigations as well as imposition of trade remedies to counter dumping activities.¹⁶¹ It also evaluates the amendment of customs duties and communicates its findings in reports to the Minister of Trade.¹⁶² As already stated the Anti-dumping investigations conducted by ITAC are regulated by domestic legislation, such as the International Trade Administration Act,¹⁶³ and consequentially the anti-dumping regulations promulgated in 2003 to give effect to the Act.¹⁶⁴ This was an effort to bring the anti-dumping legislation of South Africa's in conformity with the requirements of the WTO.

If there is convincing evidence that the practice of dumping is happening, ITAC will make recommendations to the Minister of trade and industry to impose a duty.¹⁶⁵ If the Minister of trade and industry concurs with ITAC, he can make a request to the Minister of finance to amend Schedule 2 of the Customs Excise Act (CEA)¹⁶⁶ accordingly. The Minister of finance

¹⁵⁸ Board on Tariffs and trade act was originally enacted in 1986 and was amended twice in 1991 and 1995, the latest amendment was to bring it in line with the Anti-dumping agreement under the WTO. This Act regulates matters of trade in South Africa.

¹⁵⁹ G.F Brink *Anti-dumping and Countervailing Investigations in South Africa: A Practitioner's Guide to the Practice and Procedures of the Board on Tariffs and Trade* (2002)

¹⁶⁰ Act No. 71 of 2002

¹⁶¹ Ibid note 1

¹⁶² Section 16(1)(c) read with s 26(1)(c) of the ITA Act.

¹⁶³ Act No. 71 of 2002

¹⁶⁴ Ibid

¹⁶⁵ Act 71 of 2002 (section 10)

¹⁶⁶ Section 56(2) of the Customs and Excise Act. The Minister may from time to time by notice in the Gazette amend Schedule 2 to impose an anti-dumping duty in accordance with the provisions of section 55 (2) to give effect to ADA. The Minister may, in accordance with any request by the Minister of Trade and Industry and for Economic Co-ordination, from time to time by notice in the Gazette withdraw or reduce, with or without retrospective effect and to such extent as may be specified in the notice, any anti-dumping duty imposed.

is permitted to do so by giving such notice in the Government Gazette.¹⁶⁷ If the Minister of trade and industry accepts a recommendation of ITAC that a customs duty should be amended, the Minister of trade and industry is empowered by the same regime to request the Minister of Finance to amend the relevant Schedule to the CEA.¹⁶⁸

Brink¹⁶⁹ states that “*the use of the ADA as a model for South Africa’s legislation is an example of how a country can make use of WTO instruments to ensure that it complies with its WTO obligations.*” He submits that countries can adjust their instruments to suit their international obligations without having to reinvent the wheel.¹⁷⁰

South Africa has been involved in merely four disputes in the WTO as a respondent, all these have pertained to South Africa’s domestic anti-dumping regulation and its non-compliance with the WTO disciplines in this regard.¹⁷¹ Despite the fact that South Africa has been making considerable efforts to bring its domestic anti-dumping legislation in line with its international obligations enshrined in the WTO, some foreign governments have raised queries in the WTO’s dispute settlement and have stated that the country’s anti-dumping laws do not fully comply with the WTO standards. The nature of these disputes shall be discussed later in this chapter but now I shall discuss the relevant statutes.

3.4 Whether the legislation is compliant with ADA

As already stated, South Africa as a member of the WTO, its international obligations on tariffs and trade arise from the ADA.¹⁷² South Africa has crafted the Customs and Excise Act (CEA)¹⁷³

¹⁶⁷ Ibid note 24 para 6

¹⁶⁸ Section 4(2)(b) of the BTT Act. Though Act is repealed by ITA Act this provision applies as indicated in the ITA Act.

¹⁶⁹ Ibid note 20

¹⁷⁰ Jourbert ‘*The Reform of South Africa’s Anti-Dumping Regime*’ Available at https://www.wto.org/english/res_e/booksp_e/casestudies_e/case38_e.htm accessed on 2 May 2018

¹⁷¹ The four disputes are: South Africa – Antidumping Duties on Certain Pharmaceutical Products from India, DS168 (13 April 1999); South Africa – Definitive Antidumping Measures on Blanketing from Turkey, DS288 (15 April 2003); South Africa – Antidumping Measures on Uncoated Woodfree Paper, DS378 (16 May 2008); and South Africa – Anti-Dumping Duties on Frozen Meat of Fowls from Brazil, DS439 (25 June 2012). Interestingly though, none of these disputes went beyond the consultation stage, with no panel being established in any of these matters.

¹⁷² 2012 4 SA 618 (CC)

¹⁷³ Act 91 of 1964

and the International Trade Administration Act. It has also made regulations which are known as '*International Trade Administration Commission Regulations on Anti-Dumping in South Africa*' (hereafter, the Regulations).¹⁷⁴ These are all read together to give effect to the ADA.¹⁷⁵ South Africa is currently in the process of rewriting its customs legislation to bring it more in conformity with ADA.¹⁷⁶ As a consequence, the Customs Duty Act¹⁷⁷ (hereafter the CDA) will replace the CEA. The CDA will thus be the primary statute governing dumping in South Africa and will come into effect on a date determined by the President.¹⁷⁸

The CEA as amended is in harmony with the ITA Act. Chapter VI (sections 55-57A)¹⁷⁹ deal with anti-dumping, countervailing and safeguard duties. According to the International Trade Administration Commission (ITAC) these trade remedies are defined as follows;

Anti-dumping measures - are taken against injurious dumped imports. In an international trade context, dumping is used to refer to a situation where goods are sold in a foreign market at prices lower than in the country of origin.¹⁸⁰

Countervailing measures - are used against subsidised imports that threaten and/or cause injury (i.e. decrease in prices; loss of market share; decrease in profits; decrease in sales volumes; job losses, etc.) to the domestic manufacturer.¹⁸¹

Safeguards are actions against trade that may be regarded as fair but overwhelms domestic producers. Safeguards are used against an unforeseen surge of imports that threatens and/or causes injury to the domestic producers.¹⁸²

¹⁷⁴Act 71 of 2002

¹⁷⁵GN 3197 in GG 25684 of 14 November 2003 (International Trade Administration Commission Regulations on Anti-Dumping in South Africa)

¹⁷⁶SARS 2018 available at <http://www.sars.gov.za/ClientSegments/Customs-Excise/AboutCustoms/Pages/New-Customs-Legislation-update.aspx> Accessed on 2 May 2018.

¹⁷⁷Act 30 of 2014

¹⁷⁸ SARS 2018 available at <http://www.sars.gov.za/ClientSegments/Customs-Excise/AboutCustoms/Pages/New-Customs-Legislation-update.aspx> Accessed on 2 May 2018.

¹⁷⁹ Section 55 – 57 of the Customs and Excise Act.

¹⁸⁰An Overview of ITAC available at <http://www.itac.org.za/pages/about-itac/an-overview-of> accessed on 11 June 2018.

¹⁸¹ ibid

¹⁸² ibid

It is submitted that of these three remedies the most common one is the anti-dumping duty as they have been few countervailing measures and even less safeguards applied by ITAC.¹⁸³

The CEA as it stands today also creates the issue of "provisional payments" a necessary though a controversial thing.¹⁸⁴ As established in the previous chapter, provisional payments are imposed in the interim whilst ITAC is investigating the dumping.¹⁸⁵ As seen in the previous chapter, ADA provides for the imposition of "provisional measures" or provisional duties after a preliminary affirmative determination has been made of the dumping and the consequent injury to a domestic industry (my emphasis).¹⁸⁶ The problematic part is the CEA allows the imposition of a provisional duty whilst investigations are underway even before a preliminary determination of the dumping has been made. This is the first procedural inconsistency that South Africa finds itself in and this is a violation of Article 7 of ADA.

Apart from the CEA, South Africa promulgated the Regulations¹⁸⁷ in an effort to honour its obligations under the ADA. These Regulations were meant to be a replica of ADA.¹⁸⁸ Though they give effect to most of the provisions in ADA, they are deficient in some aspects. In line with the ADA, Regulation 38.1 provides that final anti-dumping duties will remain in force for a period of five years from the date of the publication of the Commission's final recommendation unless if they are reviewed prior to the expiry of the five-year period.¹⁸⁹ Regulation 53.1 reaffirms the five year threshold providing for an automatic termination of an anti-dumping duty at the expiry of five years from the date of imposition or from the last review¹⁹⁰ Therefore Regulation 38 introduces a default period of five years at the start of the anti-dumping duty whilst Regulation 53 operates to ensure that anti-dumping duties do not endure beyond that period.¹⁹¹

¹⁸³ *ibid*

¹⁸⁴ Section 55 of the CEA

¹⁸⁵ section 57A

¹⁸⁶ 2013 4 All SA 253 (SCA)

¹⁸⁷ GN 3197 of 14 November 2003., ITAC Regulations of 2003 available at <http://www.itac.org.za/upload/Anti-Dumping-Regulations.pdf> accessed on 31 May 2018.

¹⁸⁸ 2008 2 SA 13 (SCA) para 7.

¹⁸⁹ Regulation 38 of the 2003 Anti-Dumping Regulations

¹⁹⁰ Regulation 53

¹⁹¹ 2013 4 All SA 253 (SCA) para 75.

Though South Africa is compliant with Article 11 of ADA with regards to the five-year threshold, the commencing date of the anti-dumping duties as the date of publication is problematic as already demonstrated in relation to the *Progress Office Machines* case and the *AMIE* case in chapter 1 as part of the research problem. These cases will be analysed more below. It is noteworthy that ADA itself does not provide for the five year threshold to commence on the date of publication of the final report by the relevant commission. In fact a proper interpretation of the relevant provision of ADA actually favours the notion that the commencing date should actually be the precise date on which the determinations of dumping, injury and causality have been made. Hence South Africa is not compliant in that respect.

The effect of regulation 38 is that in calculating the five year period, it disregards the date on which the determination of dumping is made which results in final anti-dumping duties being in effect for a period more than five years from the date of determination of dumping. In practice the precise date on which the determinations of dumping, injury and causality are made is prior to the date of publication of the report. It therefore follows that if these anti-dumping duties are imposed retroactively, they should be imposed from the date that dumping is determined and if provisional duties are in place it should be from the date that these provisional duties are imposed. As will be discussed below this issue is now moot with no definite answer on precise date should be used since there are two conflicting Supreme Court judgments over the issue.

With regards to calculating the ‘normal value’, it is noteworthy that though the definition of normal value contained in the ITA Act is a replica of ADA, the method of calculating it is inconsistent with ADA ¹⁹² As stated in the previous chapter, the key consideration in the

¹⁹²The Regulations are based on the Anti-Dumping Agreement as far as issues such as: the definition of a like product (Regulation 1 and Article 2.6 of the Anti-Dumping Agreement); while sales of a like product in the domestic market in the exporting country may be considered sufficient (Regulation 8.3 is in line with Article 2.2 of the Anti-Dumping Agreement). The basis on which costs shall be calculated for the determination of dumping is covered under Regulation 8.11 and Article 2.2.1.1 of the Anti-Dumping Agreement); and the provision for the investigation to be limited to a reasonable number of parties or products in situations where the number of producers, exporters, importers or products is large (Regulation 8.6 and Article 6.10, 6.10.1 and 6.10.2 of the Anti-Dumping Agreement).

calculation of the normal value is through a comparison of the price of a like product when exported to an appropriate third country and alternatively it can be determined with the comparison with the cost of production in the country of production, (exporter) in addition to the reasonable administrative, selling, general costs and profit.¹⁹³ On the contrary the ITA Act gives primacy to the ‘constructed normal value’¹⁹⁴ over the price of the like product when exported to an appropriate third country. This method of calculating the normal value was similarly objected to by *India in South Africa v Pharmaceutical Products from India WTO*¹⁹⁵ dispute when the Board of Tariffs and Trade, made a determination of dumping of pharmaceutical products namely ‘*ampicillin*’ and ‘*amoxycillin*’ into SACU. India claimed that this resulted in a higher margin of dumping.¹⁹⁶

Another issue is that the ITA Act permits the calculation of the margin of dumping on the basis of either the export price to a third country or a surrogate country.¹⁹⁷ It is submitted that this provision falls outside the parameters stipulated by ADA. ADA also gives WTO an alternative method of calculating the margin of dumping on the basis of the export price in a third country and not on the basis of a surrogate country. Another criticism is also the term ‘surrogate’ has nowhere been defined in either the ITA Act or the Regulations.

Similarly the ITA Act uses the term ‘surrogate country’ when the normal value in the exporting country or country of origin cannot be established according to free market principles due to government intervention.¹⁹⁸ This is criticized by Khanderia¹⁹⁹ as she is of the view that this provision creates difficulties in evaluating the circumstances in which the normal value in the

¹⁹³ *ibid*

¹⁹⁴ The determination of normal value based on cost of production, selling, general and administrative expenses, and profits is referred to as the “constructed normal value” The rules for determining whether sales are made below cost also apply to performing a constructed normal value calculation. The principal difference is the inclusion of a “reasonable amount for profits” in the constructed value. See https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm accessed on 5 September 5, 2018.

¹⁹⁵ *WTO South Africa – Anti-Dumping Duties on the Import of Certain Pharmaceutical Products from India*, Request for Consultation by India WT/DS168/1 (13 April 1999). Available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds168_e.htm accessed 2 June 2018.

¹⁹⁶ *Ibid*

¹⁹⁷ Section 32 (2)(b)(ii)(bb) of the ITAA Act.

¹⁹⁸ *Ibid*. section 32(4).

¹⁹⁹ S Khanderia ‘*The Compatibility of South African Anti-Dumping Laws with WTO Disciplines*’ *African Journal of International and Comparative Law* 25 (3), 347-370.

exporting country cannot be established according to free market principles because neither the term ‘free market principles’ nor ‘government intervention’ has been defined. It is also submitted that it was prudent for ITA Act to propose a solution to the situation where the normal value is difficult to establish, the failure to define these terms raises substantial ambiguities.²⁰⁰

Regulation 20 echoes Article 5.3 of ADA by providing that all investigations and reviews “shall” be finalised within “18 months” after initiation.²⁰¹ The only controversial aspect of that regulation is the effect of a judicial review on the 18 month period. It has been contented as will be seen in the cases below that if a court case is launched prior to the expiry of this 18 month period, anti-dumping duties should continue until the determination of the court case even if the litigation is protracted and goes beyond the timelines.

Despite the shortfalls of the current anti-dumping regime, it is submitted that most of the discrepancies complained of in the Board on Tariffs and Trade Act (BTT Act) have largely been addressed by the ITA Act and the Regulations. An example is the substantive obligations regarding the determination of injury and causality as set out in ADA are also replicated in the Regulations.²⁰² Regulation 14 states that a determination of the threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. This is in line with Articles 5 and 6 of ADA. Furthermore the Regulations unlike the BTT Act, now make explicit provisions for a sunset clause²⁰³, interim and sunset reviews²⁰⁴ as well as judicial reviews²⁰⁵ and refunds.²⁰⁶

²⁰⁰ *ibid*

²⁰¹ Regulation 20, which provides for “Deadlines”, reads:

“All investigations and reviews shall be finalised within 18 months after initiation.”

²⁰² Sections 13 to 16 of the Regulations deal with the determination of injury and causality.

²⁰³ Regulation 38 of provides that definitive anti-dumping duties will remain in place for a period of five years.

²⁰⁴ Regulation 41 and 53

²⁰⁵ Regulation 64. Regulation 64.3 also specifically states that “(a)any Commission decision may be varied to give effect to a ruling of a Dispute Panel or the Appellate Body under the WTO Dispute Settlement Mechanism”, which further suggests that the domestic legal reform is undertaken with compliance with WTO law in focus.

²⁰⁶ Regulation 65

3.5 The relevance of Section 233 of the Constitution to ADA

As stated above when interpreting legislative provisions, the courts are obliged to adopt an interpretation that is consistent with international law in terms of section 233 of the constitution. The courts in South Africa have relatively been active in using the provisions of ADA in the interpretation of domestic legislative provisions as will be seen below. A practical example is the case of *Administration Commission v SCAW South Africa (Pty) Ltd.*²⁰⁷ It concerned the duration of and procedure for reviewing anti-dumping duties. The learned *Masoneke DCJ* confirmed that the courts are required by the Constitution to interpret domestic legislation governing the duration of anti-dumping duties consistently with these international obligations. Furthermore he stated that;

“South Africa is a member of the World Trade Organisation (WTO) and its international obligations on tariffs and trade arise from the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement). Furthermore these obligations are honoured through domestic legislation that governs the imposition of anti-dumping duties and other trade remedies. The main legislation consists of the International Trade Administration Act, 2002 (the Act), the Anti-Dumping regulations made under the Act which must be read together with the Customs and Excise Act, 1964”

In the above case, SCAW had prior to the lapsing of the five year period lodged an application with ITAC for the initiation of a “sunset review” with a view to maintaining the anti-dumping duties in place. The anti-dumping duties in question were imposed on the products of Bridon International Limited (Bridon UK), the biggest manufacturer of steel and wire ropes in the United Kingdom. Likewise ITAC initiated a sunset review and conducted an investigation into whether the removal of the duties was likely to lead to the continuation or recurrence of dumping. ITAC found that the removal of the duties was not likely to lead to the continuation or recurrence of dumping and made a recommendation to the Minister that the existing anti-dumping duties in respect of Bridon UK’s products should be terminated. Aggrieved with the said recommendation, SCAW launched an urgent application in the North Gauteng High Court in Pretoria (High Court) and successfully interdicted ITAC from forwarding its recommendation to the Minister for consideration, pending the final determination of SCAW’s

²⁰⁷ 2010 (5) BCLR 457 (CC)

application to review ITAC's recommendation. SCAW also succeeded in interdicting the relevant Minister and also the Minister for Finance from performing their respective duties in the implementation of a recommendation made by ITAC.

SCAW in arguing for the continuation of the anti-dumping duty contented that the domestic regulatory regime does not give rise to the lapse of the anti-dumping duties on the expiry of the five years and the 18 month period (in which a sunset review must be completed in terms of ADA). It argued that anti-dumping duties should continue and should go beyond the specified periods until there is a determination of whether the duty in question should terminate or continue and if there is a judicial review the duties should continue until the outcome of the review. SCAW alternatively contented if the Court found that the duties in question lapsed after 5 years and the 18 month period then these periods are suspended by the institution of a judicial review hence duties should continue to be levied.

It is submitted that the Constitutional Court in dismissing the arguments brought forward by SCAW it adopted an interpretation of the relevant regulations in a manner which is consistent with South Africa's obligations under ADA. The Court did so in terms of Section 233 and gave primacy to the duration of these duties as provided for in Article 5 and 11 of ADA. The Court thus took a purposive approach of interpretation of those provisions and found that the purpose of the specified durations was to prevent anti-dumping duties from being imposed for indefinite periods. In light with that approach the Court rejected SCAW's arguments as they will lead to violations of the obligations to terminate duties in terms of Article 5 of ADA by South Africa since it is highly probable that delays in courts and tribunals may extend beyond the prescribed lifespan of anti-dumping duties. Furthermore it was decided that the issue of 'indefinite elastic term of duties' would surface and this would also lead to a routine breach of international obligations on account of the laxity or tardiness of domestic authorities and legal uncertainty.

The Court also found that the termination of these duties after the prescribed periods will not prejudice any interested party since the Courts will still be able to review decisions by ITAC in any event. The Court further stated that the approach of the High Court was wrong since it usurped an executive function of extending expired duties and also in finding that SCAW had

a right to an extension of duties beyond the duration of dumping duties that the law permits. In that regard, the Court emphasized that decisions regarding the setting or lifting of anti-dumping duties are patently within the domain of the executive, and that the interdict prevented the Ministers involved from performing their legislative functions. It was stated that it was inappropriate for the High Court to grant the said interdict as it constituted an improper breach of the doctrine of separation of powers

In conclusion, *Moseneke DCJ* was of the view that the relevant regulations meant that anti-dumping duties will thus lapse on the expiry of the statutorily determined 5 years and 18 month period, and that the initiation of a judicial review or a sunset review or does not extend the lifespan of an anti-dumping duty beyond that period.

It is submitted that the approach adopted by the Constitutional Court was correct and is a perfect example of how the Court can use international law as an interpretive aide to domestic law provisions. The approach was also adopted by the Supreme Court of Appeal, in the *Progress Office Machines* case.²⁰⁸ In that case the Court made it clear that the text in dispute²⁰⁹ had to be interpreted in terms of South African legislation and its construction should be in line with section 233 of the Constitution.²¹⁰ Since it had been correctly and properly conceded by all parties that the duration of the definitive anti-dumping duty imposed by the Minister of Finance is a period of five years, it went on to find that a court is not only bound to ‘prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation which is inconsistent with international law,’²¹¹ subordinate legislation such as the notice by the Minister of Finance imposing the anti-dumping duty needs to be reasonable for it to be valid. This is supported by Dugard²¹² who submits that a court may ‘insist on compliance with a state’s international obligations as a requisite for the validity of subordinate legislation’. It was thus stated that the duration of the anti-dumping duty imposed

²⁰⁸2008 (2) SA 13 (SCA);

²⁰⁹Regulation 53.1: ‘Anti-dumping duties shall remain in place for a period not exceeding 5 years from the imposition or the last review thereof.’

²¹⁰*Ibid* note 78 paragraph 6.

²¹¹Section 233 of the Constitution.

²¹²John Dugard ‘International Human-Rights Norms in Domestic Courts: Can South Africa Learn from Britain and the United States?’ in Ellison Kahn (ed) *Fiat Iustitia: Essays in Memory of Oliver Deneys Schreiner* (1983) 221 p 238.

beyond the period allowed by ADA would breach of the Republic's international obligations hence an interpretation that is in line with ADA should be preferred.²¹³ In holding that the anti-dumping duty was imposed on the date of the notice the court a quo relied on the *Oxford English Dictionary* meaning²¹⁴ of the word 'imposition' as 'the action of imposing a charge, obligation, duty, etc'. By so doing the Court found that the date of 'imposition' of the anti-dumping duty as used in Article 11.3 of the WTO Agreement was the date the duty took effect which was 27 November 1998 and declared the anti-dumping duty to have no force or effect five years later.

However in the *AMIE* case despite that the legal issue was analogous to the one in the *Progress Office Machine's* case it was decided that the definitive duty runs from the date of publication of notice in the Government Gazette instead. It is interesting to note that the SCA in *AMIE* was of the view that its interpretation of the Regulations was in line with South Africa's obligations under Article 11.3 of the *Anti-Dumping Agreement*.²¹⁵ This is despite the fact that the Court itself had criticised the narrow approach used by the Court in the *Progress Offices Machines case supra* in defining the word 'impose' as meaning the placing of a burden. The Court in *AMIE* preferred a contextual interpretation instead and found that the definitive duty runs from the date of publication of the notice. In justifying its rationale, the court in *AMIE* restricted the ambit of *Progress Office Machines* to the application of Article 11.3 domestically and found that the *Progress Office Machines* case is immaterial in relation to South Africa's relations with its WTO members.²¹⁶ The SCA was thus persuaded by the fact that its interpretation was in line with how other countries interpret the relevant provision of ADA.

However the SCA in acknowledging that there could be problems in interpreting the relevant provision in future and recommended an amendment of the regulations. However the SCA in the *AMIE* failed to appreciate that disregarding the date on the notice or date which the provisional duties were imposed in preference for the date of publication had an effect of

²¹³Prima facie Parliament does not intend acting contrary to international law or in breach of its treaty obligations; *Binga v Cabinet for South West Africa and Others* 1988 (3) SA 155 (A) 184I - 185C.

²¹⁴The Shorter Oxford English Dictionary (1973) refers to 'imposition' as the 'action of imposing; the action of inflicting, levying or enjoining ... (taxation)' and 'impose' as 'to put a tax, to levy an impost'.

²¹⁵ *AMIE* para 82.

²¹⁶*AMIE* para 82.

increasing the lifespan of anti-dumping duties. The other problematic part of the AMIE judgment is that while the SCA partly endorsed the decision in *Progress Office Machines case* on the duration of duties it arrived at a different conclusion.²¹⁷ This creates uncertainty as to what the legal position is on the actual duration of duties.

The importance of legal certainty cannot be overstated. Legal certainty is also understood in many manners and from the objective point of view it is treated as predictability and accessibility in the law-making or law-applying activities and from a subjective one it is viewed as the subjects' feeling concerning the stability of law and legal security.²¹⁸ Generally it is considered to be a virtue in a legal system. However, legal uncertainty on the other hand is regarded as a vice since it is routinely blamed for undermining both the rule of law in general and the law's ability to achieve specific objectives such as deterring anti-social conduct or encouraging trade and investment. In the case of the above named SCA judgments it is clear that the problem of legal uncertainty will have adverse effects on firms who will be charged duties for a period longer than five years if ITAC is to go by the AMIE case judgment. Denial of justice is one of the consequences of the problem outlined above since firms in equal circumstances will have pay duties for a different length of period depending on which judgment is applied. Denial of justice is understood to be the obstruction or prevention of the enforcement of legal rights by state authorities or employees.

In this case, ITAC as the statutory body will potentially infringe the rights of companies and firms which bring goods into South Africa by discriminating and treating them unfairly. Section 9(1) of the Constitution of South Africa, referred to as equality clause, states:

“Everyone is equal before the law and has the right to equal protection and benefit of the law”.

Then section 9(2) states:

“Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken” [emphasis is mine].

²¹⁷AMIE para 82.

²¹⁸ Accessibility” concerns publicity and clarity of the law, “predictability” requires that laws are calculable and reliable. See also L Fuller, *The Morality of Law* (New Haven, Yale University Press, revised edn, 1973), 262. And Popelier, *Rechtszekerheid*, “Legal Certainty and Principles of Proper Law Making” (2000) 2 *European Journal of Law Reform*, 325

In light of the above, if firms are treated differently with regards to the same subject matter then there will be a violation of the equality clause. The problem highlighted above thus has constitutional implications. Furthermore in terms of the WTO, the ‘Most-favoured-nation (MFN)’²¹⁹ countries cannot normally discriminate between their trading partners. If a member grant someone a special favour (such as a lower customs duty rate for one of their products) they are obliged to do the same for all other WTO members. In light of this principle, as long as the legal uncertainty explained above persists, South Africa risks violating this principle through non consistent application and calculating of anti-dumping duties.

3.6 Anti-dumping disputes involving South Africa in the WTO

As already stated above South Africa has been involved four disputes in the WTO as a respondent, and all these have pertained to South Africa’s domestic anti-dumping regulation and its non-compliance with the WTO disciplines in this regard. Despite the fact that South Africa has been making considerable efforts to bring its domestic anti-dumping legislation in line with its international obligations enshrined in the WTO, there have been concerns regarding the conformity of its laws to ADA and these issues have been brought to the attention of the WTO’s dispute settlement. These disputes will be briefly highlighted below.

Interestingly enough, none of these disputes went beyond the consultation stage, with no panel being established in any of these matters.

3.6.1 South Africa-Anti-Dumping Duties on Certain Pharmaceutical Products from India

On 1 April 1999, there was a request by India to have consultations with South Africa with regards to a recommendation for the imposition of final anti-dumping duties by the South African Board on Tariffs and Trade (BTT). This recommendation was contained in the 1997 report of the Board on Tariffs and Trade concerning the importation of certain pharmaceutical products from India in October that year. India contended that South Africa had unprocedurally initiated anti-dumping proceedings

²¹⁹This principle is known as most-favoured-nation (MFN) treatment. It is so important that it is the first article of the General Agreement on Tariffs and Trade (GATT), which governs trade in goods. MFN is also a priority in the General Agreement on Trade in Services (GATS) (Article 2) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (Article 4), although in each agreement the principle is handled slightly differently.

against the importation of *ampicillin* and *amoxycillin* of 250mg capsules from India.²²⁰ The BTT had made a preliminary determination on 26 March 1997 that these products were being dumped into the South African Customs Union (SACU). Consequently it was alleged that the report was followed by a recommendation to impose final duties on these products by the BTT.²²¹

India argued that:

- An incorrect method of calculation of the normal value by the BTT was applied. Furthermore it was contended that the method applied was against South Africa's WTO obligations and consequently the dumping margin was higher than it should have been.
- The determination of injury was not supported by any real evidence. The determination of injury overlooked relevant economic factors and indices that had a bearing on the state of the industry. Consequently the determination of the material injury was erroneous.
- the South African authorities had improperly established their facts, and that their evaluation was biased and lacked objectivity;

India contended that there had been violations of specifically Articles 2, 3, 6(a) to (c) together with Articles 12 and 15 of the Anti-Dumping Agreement as well as Article I and VI of the GATT.²²²

3.6.2 South Africa-Provisional Anti-Dumping Duties on Portland cement from Pakistan

According to the WTO on 10 November 2015, Pakistan requested consultations with South Africa over the imposition of provisional anti-dumping measures by South Africa on the importation of Portland cement products from Pakistan.²²³ Pakistan claims that the measures imposed were not consistent with ADA such that they violated Articles 1, 2.4, 2.6, which advocate for a fair comparison between the export price and the normal

²²⁰DS168: South Africa — Anti-Dumping Duties on Certain Pharmaceutical Products from India available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds168_e.htm accessed on 6 June 2018.

²²¹ ibid

²²² ibid

²²³DS500: South Africa — Provisional Anti-Dumping Duties on Portland Cement from Pakistan available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds500_e.htm accessed on 6 June 2018.

value amongst other things. Pakistan insisted that such a comparison had to be made at the same level of trade which is normally the ex-factory at the time in question²²⁴

3.6.3 South Africa-Anti-Dumping Duties on Frozen Meat of Fowls from Brazil

Brazil, in 2012, requested to consult with South Africa over the preliminary determination and the imposition of provisional anti-dumping duties on frozen meat of fowls from Brazil which was stated in the IATC report.²²⁵

Brazil contended that both the preliminary determination and the imposition of provisional anti-dumping duties was not consistent with South Africa's obligations. Furthermore it was contended that the initiation and conduct of the investigation was also inconsistent with the Anti-Dumping Agreement.

3.6.4 South Africa-Definitive Anti-Dumping Measures on blanketing from Turkey

Turkey requested consultations with South Africa in 2003 in respect of its definitive anti-dumping measures on imports of blanketing in roll form from Turkey.²²⁶ Turkey claimed that the BTT failed to ensure proper notifications, secondly the establishment of facts was not proper; and lastly the BTT's evaluation of these facts was biased and not objective particularly in relation to the initiation and the conduct of the investigation as well as the imposition of the anti-dumping duty.²²⁷

The above disputes indicate that South Africa's anti-dumping regime still fall short of the accepted standards since fellow WTO members have at some stage objected to the procedures applied by South Africa in the course of conducting investigations. Some of the ambiguities which exist are as a result of the misinterpretation of the domestic

²²⁴ *ibid*

²²⁵ DS439: South Africa — Anti-Dumping Duties on Frozen Meat of Fowls from Brazil available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds439_e.htm accessed 7 June 2018.

²²⁶ DS288: South Africa — Definitive Anti-Dumping Measures on Blanketing from Turkey available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds288_e.htm accessed on June 8, 2018.

²²⁷ *ibid*

provisions by the Courts as highlighted above. As a result ITAC will be put in a very difficult position without knowing clearly when to impose or terminate duties.

3.7. Compliance of South African Legislation to TRIPS

South Africa is regarded by international standards as quite strong by reason of its legislation. South Africa's Intellectual property rights (IPRs) regime is top ranked among developing countries²²⁸, based on TRIPS compliance and the Patent Cooperation Treaty²²⁹ which supports for an efficient patent system.²³⁰ It has been contended that Section 25 of the Constitution which protects property also includes protection of IP.²³¹ Such an interpretation of the constitution will be progressive and will thus guarantee the protection of IP given the supremacy of the constitution. However the absence of patent examination capacity and enforcement concerns remain an issue.

The South African business community have in the past raised these concerns that the South African government is not doing enough to upgrade IP law, enforce existing laws and promote uptake of IPRs in key markets, especially Southern Africa. It is also imperative to note is that if often the norm for the business community to want more IP protection and it is thus important for their commercial interests to be balanced with the public interest. Though South Africa's IP laws have always been strong on paper, historically enforcement has been weak and an example relates to the weak enforcement of copyrights. It is submitted that more has to be done in terms of strengthening the intellectual property policy framework and its enforcement.

Some of the deficiencies include the failure of the IP regime to support innovation locally whilst foreign investors are able to easily protect their inventions cheaply and this *inter alia*

²²⁸ According to the World Economic Forum South Africa is ranked 18th in the world.

²²⁹ The Patent Cooperation Treaty (PCT) assists applicants in seeking patent protection internationally for their inventions, helps patent Offices with their patent granting decisions, and facilitates public access to a wealth of technical information relating to those inventions. By filing one international patent application under the PCT, applicants can simultaneously seek protection for an invention in a very large number of countries

²³⁰ Erika Kraemer-Mbula, Sacha Wunsch-Vincent *The Informal Economy in Developing Nations* Cambridge University Press, 2016

²³¹ Intellectual Property and the Constitution available at <http://blogs.sun.ac.za/iplaw/2015/07/14/intellectual-property-and-the-constitution/> accessed on 12 June 2018.

subsequently led to the drafting of a national IP policy. The Draft policy document of 2013²³² in acknowledging these challenges and stated that one of the objectives of the policy would be improving IP enforcement, promoting research and development, ensuring IP laws are relevant to development and innovation and promoting public awareness and education of IP in the country. It is submitted that if the IP policy achieves its objectives that would go a long way in strengthening IP protection in the country.

Regionally it is important to note that SADC members as members of the WTO are obliged to domesticate the TRIPS Agreement.²³³ The SADC Protocol on Trade confirms this position as it states that: *“WTO members shall adopt policies and implement measures within the Community for the protection of intellectual property rights, in accordance with the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights”*²³⁴

In light of the above it is evident that South Africa’s obligation to have TRIPS compliant legislation is both regional and international. An assessment of the relevant legislative instruments will indicate the compliance level of South Africa.

The main IP Laws: enacted by the Legislature are

- Intellectual Property Laws Amendment Act²³⁵
- Intellectual Property Rights from Publicly Financed Research and Development Act²³⁶
- Patents Amendment Act ²³⁷
- Merchandise Marks Act ²³⁸
- Performers' Protection Act ²³⁹
- Copyright Act²⁴⁰
- Designs Act 1993²⁴¹
- Intellectual Property Laws Rationalisation Act²⁴²
- Plant Breeders' Rights Amendment Act²⁴³

²³² GN no 38616 Notice no.918 of 2013

²³³ Article 66 of TRIPPS

²³⁴ SADC Protocol on Trade of 2012 available at http://www.sadc.int/files/7313/6439/6118/Protocol_on_Trade_in_Services_-_2012_-_English.pdf accessed 2 September 2017.

²³⁵ Act No. 28 of 2013

²³⁶ Act No. 51 of 2008

²³⁷ Act No. 20 of 2005

²³⁸ Act No. 17 of 1941, as amended up to Merchandise Marks Amendment Act 2002) (2003)

²³⁹ Act No. 11 of 1967 was amended in 2002.

²⁴⁰ Act No. 98 of 1978, as amended up to Copyright Amendment Act 2000

²⁴¹ Act No. 195 of 1993, as amended by Intellectual Property Laws Amendment Act 1997) compliance with the TRIPS Agreement and the PCT was the reason for the Intellectual Property Laws Amendment Act (1997).

²⁴² Act No. 107 of 1996

²⁴³ Act No. 673 of 1996

- Trade Marks Act 1993²⁴⁴

3.7.1 Compliance of patent law to TRIPS

With regards to Patent protection, South Africa has substantially complied with the obligations set out in TRIPS. As already stated the IP laws of South Africa were already strong from the private perspective prior to the TRIPS agreement and a number of amendments were made since 1997 to ensure compliance with TRIPS.

The Patents Act of 1978 (the Act)²⁴⁵ as amended in Section 45(1) states that

“the effect of a patent shall be to grant to the patentee the right to exclude other persons from making, using, exercising, disposing or offering to dispose of or importing the invention, so that the patentee shall have and enjoy the whole profit and advantage accruing by reason of the invention.”

It submitted that the above is in conformity with Article 28 of TRIPS which provides that WTO members must ensure that a right holder is granted exclusive rights to the patent owner.

The legislation also complies with the novelty requirement in Section 25 of the Act as prescribed by Article 27 of TRIPS which requires all WTO members to ensure the availability of patents for any inventions, whether products or processes, in all fields of technology provided that they are new despite the place of invention. Section 25 provides that a patent may be obtained in South Africa for an invention that is new, or involves an inventive step and is capable of being used or applied in trade, industry or agriculture. It further states that an invention is new if it does not form part of the state of the art²⁴⁶ immediately before the priority date of the invention. The Act in Section 46 complies with the TRIPS minimum patent term requirement of 20 years. The patentee is therefore able to enjoy and benefit from the full 20-year patent term.

²⁴⁴ Act No. 194 of 1993

²⁴⁵ Act 57 of 1978. This Act as amended up to Patents Amendment Act 2002) was also amended by the Intellectual Property of 1997.

²⁴⁶ The state of the art includes all matter that has been made available to the public whether in South Africa or elsewhere by written or oral description.

The key defect is that South Africa currently does not conduct patent examinations,²⁴⁷ primarily due to lack of capacity to determine a patent's novelty and also to limit its scope if the application is unduly wide. This is a violation of Article 62.2 which obliges WTO members to ensure compliance with the substantive conditions when it comes to rights which require registration first before they can be acquired and enjoyed.²⁴⁸

3.7.2 Copyright and related rights.

South Africa's copyright and related rights were deficient in several aspects in the pre-TRIPS era. These deficiencies mainly related to the duration of protection for these rights. Performers' rights were previously protected for only 20 years in South Africa rather than 50 years as required under the TRIPS agreement in Article 14.5. Furthermore performances and sound recordings were not protected retrospectively, as required under Article 14 of TRIPS and the Berne Convention. Another key issue was the non-protection of computer programs and databases as literary works as required by Article 10 of TRIPS. Also the lack of rental rights for authors of computer programs and cinematographic works as required by Article 11 and the failure to grant performers and broadcasters the exclusive right to communicate their work in the public as per Article 14 of TRIPS.

The mandatory obligations in relation to copyright and related rights are set out in Articles 9 to 14 of TRIPS. In summary these include protection of computer programs and databases as literary works, rental rights to be granted to authors of computer programs and for copyrights to be protected for 50 years. These include related rights such as those of performers, sound recordings and broadcasts require for at least 50 years for performers and 20 for broadcasts.²⁴⁹

The intellectual property amendment Act²⁵⁰ was South Africa's first major effort to bring its IP laws in line with TRIPS obligations and to address some of the above concerns. The Act amended, *inter alia*, the Copyright Act of 1978, as well as the Performance Protection

²⁴⁷ Patent Examination available at <http://www.svw.co.za/patent-examining> accessed on 15 June 2018.

²⁴⁸ Article 62.2 provides that;

Where the acquisition of an intellectual property right is subject to the right being granted or registered, Members shall ensure that the procedures for grant or registration, subject to compliance with the substantive conditions for acquisition of the right, permit the granting or registration of the

²⁴⁹ Article 14 of TRIPS

²⁵⁰ Act 38 of 1997

Act of 1967²⁵¹. With respect to the deficiencies in the Copyright Act identified above a number of changes were introduced which are as follows;

The definition of literary works was extended to include tables and compilations, including table and compilations of data stored or embodied in a computer in section 1 of the amendment Act. As for copyright in cinematography films, photographs and computer programs, 50 year protection was provided for in section 3(2). The scope of copyright in computer programs was extended to include exclusive rights to authorize the “letting or offering for hire by way of trade.”²⁵²

Section 7 of the Performers’ Protection Act was amended to increase the term of protection of performers’ rights from 20 years to 50 years in line with Article 14.5 of TRIPS. Section 14 was amended to give performers and producers of sound recordings full retroactivity to pre-existing rights in line with Article 18 of then Berne Convention.²⁵³

Though South Africa’s copyright laws are now substantially in compliance with TRIPS and the Berne Convention, the country opted out of sections 1-21 of the Berne text against the dictates of Article 9 of TRIPS which advocates for the full adoption of the Berne Convention.²⁵⁴

However, South Africa is currently in a process of reviewing its copyright regime and it is hoped the challenges of weak enforcement of these rights will be addressed by either the new Act or the IP policy which still being formulated.

3.7.3 Comments on the 2017 Copyright Amendment Bill

In 2017 South Africa introduced a draft Copyright amendment bill subsequent to similar efforts in 2013 and 2015. However much criticism has been levelled against the draft

²⁵¹ See note 142

²⁵² *ibid*

²⁵³ *ibid*

²⁵⁴ South Africa acceded to Berne Convention, Paris Act (1971), on December 24, 1974, but opted out of Articles 1 to 21, incorporated by Article 9 of TRIPS.

Notification, see: http://www.wipo.int/edocs/notdocs/en/beme/treatv_berne_64.html (accessed 13 June 2018)

amendment as some state that it is marred with a lot of inconsistencies and contradictions such that if it is passed in its current form it would lead to legal uncertainty with regards to copyright law in South Africa.

According to the commentary on the copyright amendment bill by Anton Mostert²⁵⁵ the bill contains violations of international obligations that South Africa is a party to. Specific reference is given to Section 12 of the amendment bill.

Section 12(1)(a)(vii) provides for what is termed ‘expanded exceptions for underserved populations’ as a heading. However the commentary criticizes this provision and states as follows;

“Copyright exceptions, such as fair dealing exceptions, relate to specific acts, which in the absence of the particular exceptions, would possibly constitute copyright infringement. In what sense is “expanding access for underserved populations” a specific exception?”

The commentary states boldly that the proposed provision is, arguably, in contravention of international obligations under Berne Convention for the Protection of Literary and Artistic Works particularly Article 13 which states the following;

***Article 13 of TRIPS
Limitations and Exceptions***

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder²⁵⁶

It is contended that this treaty requires that exceptions be confined to special cases only. A sweeping exception of the nature proposed, arguably, does not constitute a special case and is thus contrary to international norms ²⁵⁷

²⁵⁵Commentary on the Copyright Amendment Bill 2017 submitted by the Anton Mostert chair of Intellectual property law department of mercantile law, faculty of law Stellenbosch University

²⁵⁶Part II — Standards concerning the availability, scope and use of Intellectual Property Rights Available at https://www.wto.org/english/docs_e/legal_e/27-trips_04_e.htm accessed on 17 September 2018.

²⁵⁷ ibid

The Law society of South Africa also submitted its comments on the draft amendment bill through the South African Institute of intellectual property law which submitted the following;

“That throughout the Amendment Bill, terms which are both foreign and undefined have been used to describe the various persons involved in the creation and exploitation of a copyright work.”

The Committee’s was of the view that all references to undefined terms such as “user”, “performer” and “producer” should be replaced by either “author” or “owner” as the case may be. With regards to the terms “author” and “owner” it was submitted that these were properly defined and were used throughout the Principal Act (current Copyright Act). Consequently it was contended that there is a wealth of case law regarding those terms and it is not necessary to deviate from them as doing so will only lead to unnecessary contradictions and legal uncertainty²⁵⁸. It recommends that at the very least the provisions should be left in their current form.

3.7.4 Trade marks

The Intellectual Property Laws Amendment Act of 1997²⁵⁹ brought about amendments to the Trademark Act in section 35 which intended to align the trademark law to TRIPS. This section deals with how a trademark can be classified as well-known.²⁶⁰ South Africa's trademark law prior to TRIPS conformed to some of the provisions of TRIPS however there were areas of inconsistency or ambiguity. Some of these ambiguous areas regarded certain rights of owners of well-known trademarks. The Amendment Act amended section 35 and 10(6) to bring South Africa’s trademark law into conformity with Article 6 of the Paris Convention as read together with Article 16.2 of TRIPS. However there is still a lack of retroactivity in the law as required by obligations of Article 2 of TRIPS.²⁶¹

In terms of section 10(6):

²⁵⁸South African Institute of Intellectual Property Law: copyright law committee submissions on the copyright amendment bill, 2017 (Tabled in Parliament 16 May 2017) [B13-2017] available at <http://www.lssa.org.za/upload/LSSA%20Submission%20on%20Copyrigt%20Amendment%20Bill%202.pdf> accessed on 17 September 2018.

²⁵⁹ ibid

²⁶⁰ WIPO texts available at <http://www.wipo.int/edocs/lexdocs/laws/en/za/za009en.pdf> accessed 17 September 2018.

²⁶¹ ibid

"A trade mark application which constitutes, or the essential part of which constitutes a reproduction imitation or translation of a trade mark which is entitled to protection under the Paris Convention as a well-known trade mark and which is used for goods or services identical or similar to the goods or services in question will be unregistrable."

Under the new sections 35 and 10(6) of the Trademarks Act, protection is afforded to well-known marks which need not be registered under the Paris Convention. Those who own well-known marks are entitled to prevent the use and registration in South Africa of marks that:

- constitute, in whole or in essential part, a reproduction, imitation or translation of a well-known mark; and
- are used for identical or similar products or services to those of the well-known mark, where this use is likely to cause confusion or deception²⁶²

Also the scope of what constitutes a mark has been considerably broadened so as to include: *"any sign capable of being represented graphically, including a device, name, signature, word, letter, numeral, shape, configuration, pattern, ornamentation, colour or container for goods or combination of the aforementioned"*²⁶³

In compliance to the WTO under Article 63.2 of TRIPS the Amendment Act of 1997 provides for the registration of trademarks, certification trademarks and collective trademarks. The term of protection and registration is 10 years which is renewable indefinitely.²⁶⁴ Further as already stated they are specific provisions for the protection of well-known foreign trade marks.

This is a significant departure from the common law position in that the protection is now afforded whether or not the person claiming entitlement to the well-known trade mark carries on business or has any goodwill in South Africa.²⁶⁵

²⁶²Trademark rights and protection in South Africa available at <https://www.lexology.com/library/detail.aspx?g=1f68427a-0552-40bb-82b4-5c54075fec60> accessed 17 September 2018.

²⁶³ ibid

²⁶⁴ See note 231

²⁶⁵ Dr Owen Dean 'Trade Marks in South Africa - the 1993 Act' available at <https://www.spoor.com/en/News/trade-marks-in-south-africa-the-1993-act/> accessed on 17 September 2018.

Dean thinks the new amendments though not perfect they bring South Africa substantially in compliance to the TRIPS agreement. He states as follows

*“As it is our view that the advantages of the new Act clearly outweigh the disadvantages we welcome the new Act for the commercial reality it brings to trade mark law in South Africa which will take us well into the 21st century while keeping us in line with trade mark laws worldwide. There will undoubtedly be some teething problems with the implementation of the new Trade Marks Act but these will be minor and the bona fide trader has little to fear and much to gain. The "fly by night" operators, or those who "sail too close to the wind", on the other hand, might find that their activities are somewhat hindered by the new Act but for them we weep crocodile tears.”*²⁶⁶

In sum, South Africa's trademark law is largely in compliance with TRIPS though not fully in compliant. As indicated above, most areas were addressed by the amendments made in 1997 to the Trade Marks Act. However there are still some other areas lacking such as trademarks are not promptly published after registration, as required by Article 15.5 of TRIPS. The Trademark Act is currently in the process of amendment in order to ensure compliance with provisions of the TRIPS Agreement and Article 6ter of the Paris Convention.

3.7.5 Geographical indications

South Africa in terms of TRIPS has an obligation to ensure protection of GI's under its law however there is no GI specific law in SA and such protection is only available in a variety of statutes. South Africa thus notified the TRIPS council in 1996 that geographical indications are protected under laws focusing on business practices, such as the Trade Marks Act by way of collective or certification marks, the Liquor Products Act, Merchandise Marks Act (MMA) and the Counterfeit Goods Acts (CGA) *inter alia*. Protection of registered certification and collective trademarks is provided under sections 42 and 43 of the Trade Marks Act respectively.²⁶⁷ The most relevant provision states as follows,

42 Certification trade marks

²⁶⁶ ibid

²⁶⁷ Ibid note 244

- (1) *A mark capable of distinguishing, in the course of trade, goods or services certified by any person in respect of kind, quality, quantity, intended purpose, value, geographical origin or other characteristics of the goods or services, or the mode or time of production of the goods or of rendering of the services, as the case may be, from goods or services not so certified, shall, on application in the prescribed manner, be registrable as a certification trade mark in respect of such first-mentioned goods or services, in the name, as proprietor thereof, of that person: Provided that a mark may not be so registered in the name of a person who carries on a trade in the goods or services in respect of which registration is sought.*

In light of the above, it is thus clear that the obligation to ensure that there is protection and registration of geographical indications is being adhered to in the national law of South Africa.

Furthermore section 10(2)(b) of Trade Mark Act states prohibits the registration as of geographical indications under the normal trade mark registry but under the certification trade mark registry in terms of section 42 or section 43(2) as collective trademarks.

This complies with the requirement of ensuring that there is special protection for GI either under trade mark law or any other law. The obligation to prevent the abuse and misleading use of the GI of goods in Article 22(2)(a) of TRIPS is complied with in terms of section 6 of the MMA which makes it an offence to apply for a false trade description of goods. The CGA also prohibits among others the use of a mark involving IP in relation to goods without authority of the owner of the rights.²⁶⁸ With regards to the obligation to ensure the special protection GI's of wines and spirits in terms of Article 23 of TRIPS, the Liquor Products Act²⁶⁹ among others prohibits the sale of liquor products which contain names, words of expression which have an effect of misleading the public of the true geographic origin of liquor products.

Despite the lack of a specific GI statute, South Africa is in fulfilment of its obligations under TRIPS in relation to the protection of GI's.

²⁶⁸See Section 1(iv) and Section 2

²⁶⁹See section 11 of Act 60 of 1989

3.7.6 Industrial Designs

Industrial designs in South Africa are mainly protected under the Designs Act of 1993²⁷⁰ though they are also protected through designs law and copyright law. Section 14.1 the Industrial Designs Act provides for the protection of designs that are new and original in line the obligation under Articles 25.1 of TRIPS. In section 20, exclusive rights are granted to the owner of a protected design such that third parties are prohibited from '*making, importing, using or disposing of any article*' embodying the protected design in line with Article 26.1 of TRIPS. The obligation in Article 26.3 to protect designs for a minimum period of 10 years is complied with in section 22.1 of the Designs Act as aesthetic designs²⁷¹ are protected for fifteen years whilst functional designs for ten years in. Though South Africa complies with the obligation to provide limited exceptions to the exclusive rights of right holders of industrial designs, the exceptions provided for in Section 21²⁷² can potentially be interpreted broadly to include a wide range of exceptions. There are suggestions that these provisions go beyond the limited exceptions allowed under Article 26.2 of TRIPS.

3.8 Final remarks on IP Legislation and TRIPS

It is evident that South Africa's legislation is widely in compliance with the country's obligations under the TRIPS agreement. As stated earlier the problem with the IP regime has

²⁷⁰ Act 195 of 1993

²⁷¹ aesthetic design" means any design applied to any article, whether for the pattern or the shape or the configuration or the ornamentation thereof, or for any two or more of those purposes, and by whatever means it is applied, having features which appeal to and are judged solely by the eye, irrespective of the aesthetic quality thereof;

²⁷² Section 21 provides that;

(1) Any interested person who can show that the rights in a registered design are being abused, may apply to the court in the prescribed manner for the granting of a compulsory licence in respect of the registered design.

(2) The rights in a registered design shall be deemed to be abused if

(a) articles embodying the registered design are not available to the public in the Republic on a commercial scale or to an adequate extent after the registration date, and there is in the opinion of the court no satisfactory

reason therefore;

(b) the availability of articles embodying the registered design in the Republic on a commercial scale or to an adequate extent is being prevented or hindered by the importation of such articles;

(c) the demand for the articles embodying the registered design in the Republic is not being met to an adequate extent and on reasonable terms;

(d) by reason of the refusal of the registered proprietor to grant a licence or licences upon reasonable terms, the trade or industry or agriculture of the Republic or the trade of any person or class of persons trading in the Republic, or the establishment of any new trade or industry in the Republic, is being prejudiced, and it is in the public interest that a licence or licences should be granted; or

largely been the poor enforcement of IP right. The problem mainly relates to the remedies available to enforce IPRs and the first issue in that regards involves the lack of a consistent pattern of enforcement of these rights. This will be fleshed under the heading below.

3.9 How the Courts have interpreted TRIPS

South African courts have successfully used section 233 of the constitution to interpret domestic legislation in line with the TRIPS agreement. The question of whether a trade mark loses its status if it also serves a purpose of being a geographical indicator was answered by the SCA in a manner which is consistent with TRIPS. In *Group LFE versus Swartland Winery*²⁷³ the Supreme Court of Appeal in South Africa ruled that despite the fact that a trademark serves a dual purpose of being a descriptive geographical indicator and a trademark, it does not lose its status of being a trademark. This ruling is in line with Article 24(5)(b) which obliges members to ensure that the validity of a trade mark or right to use a trademark is not prejudiced on the basis that such a trademark is identical with, or similar to, a geographical indication. The approach of the SCA in that regard is therefore progressive as it brings closure to the subject of whether a trade mark maintains its trademark status if it also serves a purpose of being a geographical indicator. Reimers²⁷⁴ is of the view that this judgment provides an important clarification on whether a trademark loses its status once it has become a geographical indicator. It is now settled in our law that where a trademark has truly retained its trademark status despite having a dual descriptive meaning, it cannot be stripped of that status.

However South Africa is found wanting when it comes to the provision of consistent legislative remedies for right holders who seek to enforce their IP rights against infringers. In the *Terespolsky and Another v Morituri Restaurant (Lakeside) and Others*²⁷⁵ case it was noted by *Rojers J* in his analysis of the legislative remedies available for those who seek to enforce their rights and came to the conclusion that South Africa lacks a consistent pattern in the legislation relating to remedies for the infringement of intellectual property rights. In justifying his conclusion the learned judge referred to Section 65(3) of the Patents Act which provides various remedies including damages though it is subject to protection for the innocent infringer

²⁷³ 2011(4)SA 80 SCA

²⁷⁴ Reimers 'Supreme Court Says Trademark Remains even if used as Geographical Indicator' available at <https://www.spoor.com/en/News/supreme-court-says-trademark-remains-even-if-used-as-geographical-indicator/> accessed on October 4, 2018.

²⁷⁵ [2014] ZAWCHC 62

as per section 66(1). This protection is also available in the English legislation. Likewise the same is provided for in the Copyright Act and the Industrial Designs Act but however the inconsistency lies with the Trademark Act. Section 35(3) of the Trade Marks Act uses the word ‘may’ in relation to the listed remedies and contains no express protection for the innocent infringer.

This creates unnecessary complications in the enforcement remedies by applying different standards across the various areas of IP. It appears as if innocent infringers of trademarks will not enjoy the protection which should be available to them in terms of the TRIPS agreement. Article 45 of TRIPS provides authority to judicial authorities to order the infringer to pay the right holder damages adequate to compensate for the injury the right holder has suffered because of an infringement of that person’s intellectual property right by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity. Likewise Article 41.2 obliges members to ensure that procedures concerning the enforcement of intellectual property rights shall be fair and equitable and also that they are not unnecessarily complicated. The above suggests that there is some level of non-compliance with TRIPS as there lacks a consistent pattern of enforcement of IP rights.

In the *AM Moolla Group Ltd and Others v Gap Inc and Others*²⁷⁶ the SCA upheld the appeal in part by the A M Moolla Group in its dispute involving a trade mark with the US company, the Gap Inc and two of its subsidiaries. The dispute between the litigants related to the exclusive right to use the trade mark ‘GAP’ in relation to clothing and clothing stores. Three issues were discussed, the first one was about the use of well-known trademarks, and the second was about the principle of territoriality with regards to trademarks and thirdly compliance to the Paris convention.

The international principle of territoriality was upheld in this case, the court referred to *Nicholas AJA in Victoria’s Secrets*²⁷⁷ in these terms:

²⁷⁶ 2005(4) All SA 245 (SCA)

²⁷⁷ 1994 (3) SA 739 (A).

‘In the *Moorgate* judgment Mr Trollip²⁷⁸ stated that

“... a trade mark is purely a territorial concept; it is legally operative or effective only within the territory in which it is used and for which it is to be registered. Hence, the proprietorship, actual use, or proposed use of a trade mark mentioned in s 20(1) [of the Trade Marks Act 62 of 1963] are all premised by the subsection to be within the RSA.”

The Court confirmed that the principle of territoriality applies in South Africa. This can be construed to mean that even if a trade mark is registered and extensively used, by one person in a foreign country this does not in itself preclude its adoption and registration in South Africa by some other person. This is in line with Article 1 of TRIPS which obliges WTO members to give effect to the provisions of TRIPS regarding IP in their domestic laws and also in terms of the Paris convention which establishes principle of territoriality. Foreign trademarks that are not registered in South Africa are recognised only insofar as they qualify as well-known marks under the Trademarks Act and are protected under the common law.

3.10 Chapter conclusion

With regards to ADA it is evident that South Africa has made great strides to ensure its laws conform to the expected standards however there are shortcomings and grey areas as highlighted above. Furthermore the way that the Courts have used section 233 of the constitution at times has been inconsistent with the obligations under ADA especially in relation to the *AMIE* case. If the approach taken in the *AMIE* case is followed, South Africa will thus be in breach of its obligation to terminate definitive duties after 5 years. However the domesticated provisions do provide rights indirectly to persons such as the right to petition ITAC to conduct investigations when there is a suspected case of dumping, the right to have definitive duties terminated after 5 years (though there is some doubt when there is retroactive application). The right to fair and just administrative action is also available as private persons can have decisions by ITAC & the relevant Minister with regards to imposition of duties reviewed by the courts.

²⁷⁸ This is a reference to the ‘Honourable W G Trollip, a distinguished member of this Court between 1969 and 1982, in the written statement which was attached to the “Determination” under s 17(3) of the Act which he made as hearing officer appointed under s 6(2A) of the Act in the contested matter of *Moorgate Tobacco Co Ltd v Philip Morris Incorporated*, and which was delivered on 21 May 1986.’

With regards to TRIPS, though the legislative provisions are largely compliant, enforcement of IP rights remains weak. The remedies are not applied consistently as seen above. However private persons can acquire IP rights in terms of the law and the duration of protection is in conformity with the thresholds in TRIPS. Furthermore despite the lack of consistency, there are remedies available in terms of the law to enforce IP rights against infringers of such rights. The protection available is thus in line with the obligations under TRIPS however more can be done to guarantee more protection. It is hoped that the key objectives of the 2017 Draft IP Policy²⁷⁹ will be met as they will go a long way in strengthening IP laws.

The Draft IP Policy recommends key reforms, which include²⁸⁰:

- Substantive search and examination (SSE) for patents to be introduced.
- The leveraging of flexibilities contained in TRIPS to ensure that IP rights in South Africa are protected while simultaneously promoting public health, local manufacture, research and development, food security, innovation, environmental considerations, transfer of technology and broad socio-economic development.
- The promotion of regional cooperation and integration on IP.
- A commitment to all related international obligations to which South Africa is a party.
- The promotion of economic empowerment through, among other means, the implementation of the “utility model” to support the registration of patents by resident small, medium and micro-enterprises (SMMEs), historically disadvantaged individuals, and companies who are operating in the informal sector.
- The introduction of coordinated approach to creating awareness about IP in South Africa, so as to protect nationally-owned IP that is related to indigenous resources, traditional innovation and traditional knowledge.

²⁷⁹Draft National Policy on Intellectual Property, 2013, General Notice No.918 of 2013, published in the Government Gazette of 4 September 2013.

²⁸⁰This Draft IP Policy follows on from the IP Consultative Framework that was approved by the South African cabinet on 6 July 2016. Comments on the Framework can be found here: <http://www.spoor.com/en/News/south-africas-long-awaited-ip-policy/>

- The introduction of a system for protection for traditional knowledge which will safeguard misappropriation and exploitation, as well as promote further research and development into products and services based on traditional knowledge.
- The promotion of international best-practices in IP that align with South Africa's development objectives.

However it must be noted that the 2017 draft policy is just the first phase of coming up with a comprehensive IP policy and it mainly focuses on patent reform. It is hoped that in the next phases of the Draft policy, protection for traditional knowledge will be guaranteed amongst other things. In conclusion, having considered the relevant legislation and case law I come to the conclusion that South African laws are largely in compliance with the requirements of TRIPS and ADA. In the next chapter the legal compliance of Zimbabwe will be assessed

CHAPTER 4

THE LEGAL COMPLIANCE OF ZIMBABWE TO INTERNATIONAL ANTI DUMPING AND INTELLECTUAL PROPERTY LAWS (TRIPS)

4.1 Chapter Introduction

In the previous chapter the legal compliance of South Africa was assessed. In this chapter the legal status of ADA and TRIPS in Zimbabwe shall be assessed and a comparison shall be made with South Africa. As already stated this research argues that the best way to give effect to international agreements is to incorporate it into domestic law.

4.2. Legal status of International Law in Zimbabwe

In Zimbabwe the legal status of international law is enshrined in the Constitution.²⁸¹ Section 327 of the Constitution indicates that: An international treaty signed by the President or under Presidential authority does not bind Zimbabwe until it has been approved by Parliament.²⁸² It goes on to state that a treaty does not form part of the law of Zimbabwe unless it has been incorporated into the law through an Act of Parliament and goes further to state that other agreements which are not international treaties but have been signed by the President or under Presidential authority with foreign organizations or entities do not bind Zimbabwe until they have been approved by Parliament. This section is similar to the provisions of the South African constitution. *In the Minister of Foreign Affairs v Jenrich & Others* case it was confirmed that under s 327(2), an international treaty which has been concluded or executed by the President does not bind Zimbabwe until it has been approved by Parliament and does not form part of the law of Zimbabwe until it has been incorporated into the law by an Act of Parliament.²⁸³

The Zimbabwean constitution goes further than the South African one and imposes an obligation on the State to domesticate all international instruments that it is a party to, in section 34 which states as follows;

²⁸¹Constitution of Zimbabwe Amendment (No. 20) Act, 2013.

²⁸² Section 327 of the Zimbabwean constitution Amendment (No. 20) Act of 2013

²⁸³[2015] ZWHHC 232

34 Domestication of international instruments

The State must ensure that all international conventions, treaties and agreements to which Zimbabwe is a party are incorporated into domestic law.

Again just like South Africa in relation to international customary law, section 326(1) of the constitution states that customary international law is part of the law of Zimbabwe unless it is inconsistent with the Constitution or a law of Zimbabwe. The Constitution in section 326(6) imposes an obligation on the courts to adopt a reasonable interpretation of legislation that is consistent with international customary law applicable in Zimbabwe.

Whilst section 327(6)²⁸⁴ imposes a wider obligation upon the courts to adopt a reasonable interpretation that is consistent with any international convention, treaty or agreement which is binding on Zimbabwe, in preference to any alternative interpretation inconsistent with that convention, treaty or agreement. These provisions are similar to section 233 of the South African constitution which also obliges the courts to interpret legislation in a manner consistent with international law.²⁸⁵

The South African Constitution is considered to be one of the most international law-friendly constitutions in the world since it provides, for example, that the interpretation of the Bill of Rights must take into consideration international law; that when interpreting any legislation, any reasonable interpretation consistent with international law must take precedence over any other interpretation that is inconsistent with international law and that customary international law is recognised as binding in the Republic except where it violates a provision of the Constitution or an Act of Parliament²⁸⁶

I submit that the Zimbabwean constitution of 2013 should be reputed the same way as the South African one as it is arguably a better international-friendly constitution since it has similar provisions and goes a step further to impose an obligation on the State to domesticate all the international treaties that it is a party to. It is worth mentioning that the current Zimbabwean

²⁸⁴ Section 327 of the Zimbabwean Constitution amendment no.20 of 2013

²⁸⁵ Section 39 Constitution of the Republic of South Africa, 1996

²⁸⁶ *ibid*

constitution came as a result of lengthy process of consultations and negotiations between the relevant stakeholders, political parties, civil society and the general public and with SADC and AU providing mediation and oversight. It is a significantly better document than the other constitutions that Zimbabwe had since Independence and with regards to international law it gives due regard to and respect to it.

4.3. A brief background of the Zimbabwean anti-dumping regime

Article 18.5 of the ADA requires Members to notify their domestic laws and/or regulations relating to anti-dumping to the Anti-Dumping Practices Committee of the WTO.²⁸⁷ However the Zimbabwean government failed to ensure conformity of its laws to ADA by the date of entry and notified the WTO in 1995. Part of what was enshrined in the notice read as follows;

*“The Government of Zimbabwe wishes to inform that, due to various difficulties, it has been unable to meet, within the agreed timescale, the notification requirements of its laws, regulations and administrative procedures relating to the Agreements on Safeguards, Anti-Dumping and Subsidies and Countervailing Measures. Zimbabwe is making all effort to meet its notification obligations and will be submitting the required information as soon as possible”*²⁸⁸

Pursuant to this in 1996 the Zimbabwean government gave another notice to the WTO that it was in the process of aligning its domestic legislation to the Anti-dumping agreement especially the Customs Excise Act.²⁸⁹ In 2002 Zimbabwe took a major step to align its laws by publishing Anti-dumping regulations in the Government Gazette. These shall be discussed in detail below.

In Zimbabwe, the Anti-Dumping Agreement (ADA) is recognized under the Competition Act²⁹⁰ which was enacted to promote and maintain competition in the economy, to establish an Industry and Trade Competition Commission and to give it functions. One of its objectives is to provide for the prevention and control of restrictive practices, the regulation of mergers, the

²⁸⁷ Ibid

²⁸⁸ Notification of laws and regulations under articles 18.5 and 32.6 of the agreements (G/ADP/N/1/ZWE/1) Text available at https://www.wto.org/english/thewto_e/countries_e/zimbabwe_e.htm accessed October 24, 2018.

²⁸⁹ Act no 91 of 1964

²⁹⁰ Act no 7 of 1996 (Chapter 14:28)

prevention and control of monopoly situations and the prohibition of unfair trade practices; and other related matters. To effect this function the Government of Zimbabwe enacted two statutory instruments, namely: *the Competition (Anti-Dumping and Countervailing Duty) (Investigations) Regulations (hereinafter the Regulations)*²⁹¹ and *the Competition (Safeguards) (Investigations) Regulations*²⁹²

4.4 The Competition and Tariff Commission

The Competition and Tariff Commission (Commission) is a statutory body created under the Competition Act²⁹³. It is a product of the merger that took place in 2001 of the former Industry and Trade Competition Commission (ITCC) and Tariff Commission (TC). This merger was provided for under the Competition Amendment Act²⁹⁴ of 2001 which also repealed the Tariff Commission Act. The ITCC had been established under the Competition Act as a competition regulatory authority while the TC had been established under the Tariff Commission Act²⁹⁵ as a trade tariffs advisory authority. Both the ITCC and TC had started operations in 1998.

The reason for the merger was cost saving to the Government by running one instead of two interconnected Commissions. The Amendment Act also strengthened the Commission's handling of mergers and acquisitions and expanded the list of restrictive and unfair business practices. It further assigned the Commission more functions of price surveillance and monitoring.²⁹⁶ This means that the Commission therefore has the twin mandates of implementing Zimbabwe's competition policy and execution of the country's trade tariffs policy, with the primary objective of enforcing the Competition Act.

The statutory functions of the Commission in terms of section 5 of the Competition Act²⁹⁷ can be summarized as to encourage and promote competition in all sectors of the economy, reduce

²⁹¹Anti-Dumping and Countervailing Duties)(Investigation) Regulations, 2002.

²⁹²Competition (Safeguards) (Investigations) Regulations 2006

²⁹³ Act No.7 of 1996 [Chapter 14:28]

²⁹⁴ Act No.29 of 2001

²⁹⁵ Tariff Commission Act [Chapter 14:29]

²⁹⁶ Anti-Dumping available at <http://www.competition.co.zw/?s=anti+dumping> accessed on 8 October 2018.

²⁹⁷ Section 5 of Act No.7 of 1996 [Chapter 14:28]

barriers to any form of economic activity, to investigate, discourage and prevent restrictive practices and to advise the Minister of Industry and Commerce in regard to all aspects of economic competition. The Commission can recommend to the Ministry of Industry and Commerce after thorough investigations for application of anti-dumping duties, anti-subsidies and safeguards. Within the Competition and Tariff Commission, investigations are carried out by a directorate comprising full-time professionals with qualifications in economics, law, accounts, and business administration.²⁹⁸

The handling of tariff cases by the Commission is governed and directed by the provisions of Part IVB of the Competition Act on ***‘investigation of tariff charges, unfair trade practices and provision of assistance or protection to local industry’***.²⁹⁹ The term ‘tariff charge’ is defined in terms of section 34B of the Competition Act to mean “any duty, tax or charge levied by the State in connection with commodities or services imported into or exported from Zimbabwe”, while the term ‘unfair trade practice’ refers to “the dumping of imported commodities”³⁰⁰

The Anti-Dumping Agreement is also implemented through the Customs Excise Act (*hereinafter Customs Act*)³⁰¹ Section 90 of the Customs Act defines dumping much in line with its conventional meaning and also in conformity to ADA and states as follows;

90 Anti-dumping duties³⁰²

(1) For the purposes of this section, imported goods or goods likely to be imported shall be deemed to be dumped if the export price of such goods is less than—
(a) the domestic price of such goods, which means the price at which identical or comparable goods are being sold in the ordinary course of trade in the country of exportation or, where such price is fixed by the government in the country of exportation, such price as the investigating authority may determine; or
(b) if there is no domestic price in terms of paragraph (a), any of the following—
(i) the highest comparable price for identical or comparable goods when exported from the country of exportation and sold in any other foreign country in the ordinary course of trade; or

²⁹⁸See note 291

²⁹⁹ *ibid*

³⁰⁰ *ibid*

³⁰¹ Customs and Excise Act [Chapter 23:02].

³⁰² Section 90 Customs and Excise Act [Chapter 23:02].

(ii) the cost of production or manufacture of the goods plus such amount in respect of administration, selling and other costs and profit as the investigating authority may consider reasonable; or

The text above is a mimic of Article 2.1 of the ADA in all respects from the definition and methods of determining dumping.

4.5 Provisional duties

The Customs Act also empowers the Minister of Finance to impose provisional anti-dumping duties by notice in the *Gazette*, on goods that are likely to have been dumped for a period not exceeding three months from the date of publication of such notice.³⁰³ This is conditional on the provision that the said charge/duty does not exceed the amount estimated would constitute the margin of dumping. Regulation 21(3) which for the imposition of provisional measures mimics Article 7.2 of ADA which states that provisional measures can be imposed only after an affirmative preliminary investigation notice has been published.³⁰⁴ Furthermore this resonates with the principle laid down in Article 1 of ADA which states that anti-dumping measures may only be imposed pursuant to investigations initiated which are conducted in accordance with the provisions of this ADA.³⁰⁵ Regulation 22(2) in line with Article 7.3 of ADA provides that provisional measures shall not be imposed sooner than sixty days from the date of initiation of the investigation. With regards to imposition of provisional measures the legal framework in Zimbabwe it is safe to say that it is in line with ADA.

4.6 Imposition of a final duty

As already established, final duties are imposed after investigations have been completed and when a final report on dumping has been provided stating that dumping has occurred and its margin/extent including the proposed remedies to counter the negative effects of it. From the reading of the Competition Act and the Regulations it is clear that the Minister of Finance exercises the authority of imposing a final anti-dumping duty on the advice of the Minister of

³⁰³ Section 91 Customs and Excise Act [Chapter 23:02].

³⁰⁴ Article 7.2 of Agreement on Implementation of Article VI of the GATT 1994 (Anti-dumping agreement)

³⁰⁵ Article 1 of Agreement on Implementation of Article VI of the GATT 1994 (Anti-dumping agreement)

Industry and Commerce who would have received a final report from the Competition and Tariff commission.³⁰⁶

Regulation 19³⁰⁷ is a replica of Article 5.1 of ADA which provides for a written application to precede the initiation of an investigation on behalf of the domestic industry. Furthermore as stated in ADA this investigation must determine the existence, degree and effect of any alleged dumping. In line with Article 5.2 of ADA the Regulations require the provision of evidence of dumping, injury within the meaning of Article VI of GATT 1994 and a causal link between the dumped imports and the alleged injury. Regulation 20³⁰⁸ is again a replica of Article 5.10 of ADA which states that all investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation.

Regulation 93 sets out exceptions to the application of anti-dumping duties on certain materials. It provides that provisional anti-dumping charge or countervailing duty shall not apply to raw, semi-manufactured or manufactured materials or requisites of any industry which are entered for use in the manufacture, assembly or refining of any article within Zimbabwe under a rebate or remission of the ordinary duty prescribed in regulations unless the Minister has indicated otherwise. This is not a violation of ADA since the imposition of anti-dumping duties is a discretionary remedy. Furthermore it works better for Zimbabwe in the sense that players in the domestic industry can get cheap raw materials without duties being attached to them if they are being sold at a lower price than in the exporting country.

³⁰⁶Regulation 14 provides as follows,

(1) The Minister may, on the evidence furnished by the Commission after completing an investigation recommend the imposition by the Minister responsible for finance of an anti-dumping duty on any subject products imported into Zimbabwe where he determines—

(a) that the export price of the subject products is less than normal value; and

(b) that prejudice or potential prejudice to any domestic industry is occasioned in either of one of the following ways—

(i) the subject products are, through the effects of dumping, causing or threatening to cause material prejudice to the domestic industry in Zimbabwe producing like products;

(ii) the subject products are, through the effects of dumping, materially impeding the establishment of the domestic industry producing like products in Zimbabwe

³⁰⁷ Regulation 19 of the Anti-Dumping and Countervailing Duties)(Investigation) Regulations, 2002.

³⁰⁸ Regulation 20 of the Anti-Dumping and Countervailing Duties)(Investigation) Regulations, 2002.

When it comes to termination of final anti-dumping duties Regulation 26.7 provides that anti-dumping duties shall not be collected on imports after five years from the date of publication of the notice of the final determination and undertakings shall automatically lapse with respect to imports made after five years from the date of publication of the notice of suspension of investigation, unless the Minister determines on the basis of a review that the termination of such duties or undertaking likely lead to continuation or recurrence of dumping and prejudice.³⁰⁹ However the concerning part relates is where the calculation is done from the date of publication of the notice in the Gazette. It remains to be seen how this five year period will be determined where the final duties are imposed with retroactive effect where provisional duties are in force.

It is most likely that definitive duties may be imposed from the date of publication of the notice of provisional duties. This will be in violation of ADA as already explained in the previous chapter. Disregarding the date of the notice/or date of imposition of provisional duties will lead to the duties enduring beyond the five year threshold.

Since its effective entry into operation in November 1998, the Commission has handled over 800 competition cases in virtually all areas of economic activity in Zimbabwe.³¹⁰ It is unfortunate that the Commission is yet to carry out a full investigation into an unfair trade practice, with many dumping allegations referred to it for investigation not technically involving dumping as defined in the Regulations. As a result there haven't been any disputes that have been brought before the courts concerning the anti-dumping agreement. However in 2016 there was a trade issue between South Africa and Zimbabwe concerning certain goods from South Africa that were banned from entering Zimbabwe. Though it wasn't referred to the WTO the nature of this dispute is worth mentioning given that South Africa is the major trading partner of Zimbabwe.

³⁰⁹ Regulation 26.7 of the Anti-Dumping and Countervailing Duties)(Investigation) Regulations, 2002.

³¹⁰ Zimbabwe Trade Policy Review 2011 available at

https://www.wto.org/english/tratop_e/tpr_e/tp352_e.htm accessed on 10 December 2018. Trade Policy reviews are an exercise, mandated in the WTO agreements, in which member countries' trade and related policies are examined and evaluated at regular intervals. Significant developments that may have an impact on the global trading system are also monitored. All WTO members are subject to review, with the frequency of review depending on the country's size.

4.7 Statutory Instrument 64 of 2016 (SI 64)

In 2016, with the gazetting of Statutory Instrument 64 of 2016 (*SI 64/16*) traders were required to obtain an import license from the Ministry of Industry and Commerce before importing basic commodities such as coffee creamers, bottled water, white petroleum jellies and body creams, canned fruits and vegetables, plastic pipes and fittings, peanut butter, builders-ware products, metal clad insulated panels, cereals, baked beans, fertilizers, beds, flash doors, wardrobes, bedroom and dining suites, office furniture and woven fabrics of cotton, among many others.³¹¹ The *SI 64/16* was designed to meet two specific national objectives of limiting consumer spending on luxury imports, since Zimbabwe was and is still facing a huge balance of trade deficit which puts pressure on foreign currency balances.³¹² The other purpose was to boost industrialization by import substitution, and encourage cross border traders to buy locally instead of importing so as to keep foreign currency circulating in the economy. This component also known as the ‘buy local’ featured prominently in the country’s Industrial Development Policy of 2012-2016 hence *SI 64/16* was giving effect to it.

According to the press statement issued by the then Zimbabwean Minister of Industry and Commerce Mike Bimha on 22 June 2016, the aim of *SI 64/16* was not to “*ban*” the importation of the goods in question, but rather to “*regulate*” them. Further he stated “*the main purpose of SI 64/16 is to promote the revival of our local industries*” and the support so provided to the relevant local producers is “*not to be open-ended but time-bound and sector-specific*”. And that the relevant local industry is supposed to use the protection from imports to “*retool and bring in new technology and address production inefficiencies*”³¹³

Through *SI 64/16* it appeared as if Zimbabwe was attempting to apply “safeguard measures” one of the legitimate trade remedies against imports. It’s worth noting that safeguards are generally used when an influx of imports leads to domestic industries not being able to cope

³¹¹Statutory Instrument 64 of 2016. Control of Goods (Open General Import Licence) (No 2) (Amendment) Notice, 2016 (No. 8)

³¹² *ibid*

³¹³ ‘SA-Zim trade war: Time for WTO intervention?’ Posted on August 26, 2016 by The Independent in Analysis, Comment, Opinion, available online at <https://www.theindependent.co.zw/2016/08/26/sa-zim-trade-war-time-wto-intervention/> accessed on 10 December 2018.

with an increase in competition.³¹⁴ In terms of the World Trade Organization, a country is permitted to resort to safeguard measures if there is evidence of a surge of imports that will affect a country's manufacturing sector. Safeguards are temporary measures to allow the domestic industry to adjust and improve competitiveness. Zimbabwe's actions could be regarded as provisional safeguard measures which were violation of both the WTO Agreement on Safeguards and of Articles 20 and 20 BIS of the SADC Trade Protocol.³¹⁵ A closer look at the said Protocol will show that it is largely a repetition of the World Trade Organization (WTO) disciplines on multilateral international trade. It constituted a violation because the measure imposed should only have been a tariff increase pending an investigation and not a ban requiring a license as provided for in the Anti-dumping regulations. Though the Minister quoted above denied that it was a ban, the Statutory Instrument had all the attributes of a ban.

South Africa's Department of Trade and Industry (DTI) after meeting the Zimbabwean Minister reportedly issued the following statements in response saying

*"On behalf of the South African government, Minister of Trade and Industry Rob Davies has been engaging the Zimbabwean government bilaterally and through the SADC structures to find an amicable solution that is in accordance with Zimbabwe's obligations of the SADC Protocol on Trade, while at the same time being sensitive to Zimbabwe's industrial development and balance of payments challenges."*³¹⁶

*"Zimbabwe committed to provide a response in preparation for the extraordinary committee of ministers meeting scheduled for August 24 2016. Furthermore, Minister Bimha indicated that Zimbabwe will apply for derogation and will provide greater clarity on the duration of these measures,"*³¹⁷

³¹⁴ *ibid*

³¹⁵ *ibid*

³¹⁶ Zimbabwe's ill-advised SI 64 of 2016, South African government responds Available online at <http://www.ofzimba.co.zw/zimbabwes-ill-advised-si-64-2016-south-african-government-responds/> accessed on 7 December 2018.

³¹⁷ SA hits back at Zim imports ban available online at <https://www.thestandard.co.zw/2016/08/07/sa-hits-back-zim-imports-ban/> accessed on 7 December 2018.

*“South Africa hopes that the government of Zimbabwe will respond positively to the concerns raised by South Africa to ensure that the Zimbabwean market remains open to South Africa while at the same time being sensitive to Zimbabwe’s industrial development and balance of payments challenges,”*³¹⁸

These utterances show that South Africa was concerned by the measures taken by Zimbabwe. However the good news is that the issue was settled bilaterally and the trade dispute didn’t escalate but rather there were a series of internal protests in Zimbabwe by the ordinary people over the said Statutory Instrument which was harsh considering the high prices of the said goods in Zimbabwe at the time.

It is important to note that what triggered Zimbabwe’s move was the issue of a high trade deficit with South Africa at the time. Currently the trade deficit with South Africa has jumped 285% to \$585,76 million in the period February to September in 2018 compared to \$152,1 million recorded during the same period in 2017, latest figures show.³¹⁹ According to data from the Zimbabwe National Statistics Agency (ZimStat) shows that Zimbabwe’s trade deficit was \$44,4m in 2016 when the Statutory Instrument took effect.³²⁰ Zimbabwe continues to experience this growing deficit. This trade dispute could have potentially gone out of hand if it wasn’t handled properly just like the ongoing US-China trade war which the WTO has failed to address.

4.8 Concluding comments on Anti-Dumping in Zimbabwe.

Unlike South Africa, Zimbabwe has not been a big user of anti-dumping laws. In terms of the law, it has duplicated the key provisions of ADA in the Customs Act, Competition Act and the Regulations of 2002. Though Zimbabwe has substantially tried to comply with ADA domestically, authorities have not been able to investigate allegations of dumping primarily not

³¹⁸ ibid

³¹⁹ Zim trade deficit with SA jumps three-fold, Newsday - October 17, 2018 Available online at <https://www.newsday.co.zw/2018/10/zim-trade-deficit-with-sa-jumps-three-fold/> accessed on 7 December 2018

³²⁰ Zim in \$44,4m trade deficit with SA, Newsday - March 27, 2018 Available online at <https://www.newsday.co.zw/2018/03/zim-in-444m-trade-deficit-with-sa/> accessed on 7 December 2018.

only due to lack of capacity of the Commission but also because of the absence of enabling anti-dumping legislation that conforms to the WTO Agreement. Currently the country is in the process of building and capacitating the Competition and Tariff Commission to ensure that it performs its statutory functions and by so doing the country's rights and under the relevant WTO Agreements can be fully exercised and its trade interests will thus be protected. This should happen at a faster pace so as to enable the country to safeguard itself against dumped products.

Though the law on paper states that investigations should not exceed a year these investigations into unfair trade practices under the Anti-dumping Regulations are protracted.³²¹ This is so because they are not solely based on information given by the complainants in detailed dumping forms but also on extensive stakeholder consultations and inspection visits to the countries of origin of the alleged dumped products³²². Given the economic situation of Zimbabwe, it is not unusual that some investigations could take years to complete.

It is also worth noting that though the Regulations to a larger extent mimic the provisions of ADA their status isn't the same as legislation. These Regulations are Statutory Instruments in Zimbabwe which basically form government policy and can be easily altered or repealed without having to go through Parliament. The best way forward is for Parliament to create implementing legislation to give effect to the entire agreement. When such an agreement is enacted as an Act of parliament it remains in force despite a change of government and can only be repealed by Parliament. Acts of Parliament are superior to any other laws except the constitution. Currently the Minister of industry and commerce can easily relax, suspend, alter or withdraw part or all of these regulations as it is within his executive powers to do so.

4.9 Compliance with the TRIPS Agreement

Zimbabwe has one of the modern IP laws in Africa which are compliant to some of the major International Treaties such as TRIPS, Berne and Paris Convention.³²³ The laws were last

³²¹Tariffs operations available at <http://www.competition.co.zw/tariff/> accessed on 7 December 2018.

³²² ibid

³²³ ibid

updated in 2001 for compliance with TRIPS.³²⁴ Zimbabwe is one of the few African countries including Botswana and Liberia that have incorporated the provisions of the Banjul Protocol³²⁵ into its Trade Marks Act through the Trademarks Amendment Act of 2001.³²⁶

Zimbabwean law recognizes a number of intellectual property rights. These rights require formal registration at the Zimbabwe Intellectual Property Office (ZIPO) or the African Regional Intellectual Property Organization (ARIPO) or under the Madrid International Trademark System (Madrid System) before they can be protected and enforced against third parties.³²⁷ ARIPO's core mission includes the provision of a *shared pool of expertise in intellectual property matters and to foster harmonization of the relevant national frameworks within WTO members*.³²⁸ It operates a system for substantive examination of patent, trade mark applications, industrial design, and centralized filing.³²⁹ However the granting of protection to members of ARIPO is governed by each member's domestic legislation.³³⁰

Zimbabwe recognizes and protects the following intellectual property:

- Copyright³³¹
- Industrial Designs³³²
- Patent³³³
- Trade Marks³³⁴

³²⁴ *ibid*

³²⁵ The Banjul Protocol concerning trade marks came into effect in 1997, Zimbabwe being a founding member. The other Banjul members are Botswana, Lesotho, Liberia, Malawi, Namibia, Tanzania and Uganda.

³²⁶ Amendment Act No.10 of 2001

³²⁷ Intellectual Property Law in Zimbabwe Available at <https://www.honeyb.co.zw/intellectual-property-law-zimbabwe/> accessed on 11 December 2018.

³²⁸ The other ARIPO members are: Botswana, The Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mozambique, Namibia, Sierra Leone, Somalia, Sudan, Swaziland, Tanzania, Uganda, and Zambia; Angola and Madagascar have applied for membership.

³²⁹ *ibid*

³³⁰ When filing for protection, applicants may use either the national or the ARIPO channel. In the process of substantive examination, ARIPO must ensure compliance with national legislation. No provisions on parallel imports, including through compulsory licensing or government use, exist at ARIPO level.

³³¹ Regulated by the Copyright and Neighbouring Rights Act (Chapter 26:01)

³³² Regulated by the Industrial Designs Act (Chapter 26:02)

³³³ Patents Act (Chapter 26:03)

³³⁴ Regulated by the Trade Marks Act (Chapter 26:04)

- Geographical Indications ³³⁵
- Integrated Circuit Layout Designs³³⁶
- The Armorial Bearings, Names, Uniforms and Badges³³⁷
- Plant Breeders Rights 2001³³⁸
- Merchandise Marks ³³⁹

From 1998 Zimbabwe has been making efforts to bring its intellectual property regime to closer conformity with the provisions of the TRIPS Agreement.³⁴⁰ This was followed by a series of new legislation and amendments which was enacted including the Geographical Indications, Industrial Designs Act, Integrated Circuit Layout Design Act, the Merchandise Marks Act and the Plant Breeders Rights Act in 2001. The Intellectual Property Tribunal Act (IPT), ³⁴¹ of 2001 and the Trade Marks Amendment Act³⁴² were also enacted but only brought into force by statutory instruments on 10 September 2010 after a period of nine years. The IPT Act was created to provide for the establishment, functions and powers of the Intellectual Property Tribunal which replaced the Patents Tribunal in September 2010. The IPT has jurisdiction to hear all disputes under the Copyright and Neighbouring Rights Act, Geographical Indications Act, Industrial Designs Act, Integrated Circuit Layout Designs Act, Patent Act, and Trade Marks Act.³⁴³ The IPT is vested with all the powers that the High Court may exercise in a civil case.³⁴⁴ This is a very significant development that will go a long way in ensuring that there is strong protection and enforcement of intellectual property rights and the quick resolution of any related disputes.

4.9.1 Copyright and Neighbouring Rights

The Zimbabwean Copyright laws are largely in compliance with international standards governing intellectual property protection. The Zimbabwean Copyright laws provide

³³⁵Geographical Indications Act (Chapter 26:06)

³³⁶Integrated Circuit Layout Designs Act (Chapter 26:07)

³³⁷The Armorial Bearings, Names, Uniforms and Badges Act (Chapter 10:01)

³³⁸Plant Breeders Rights Act 2001(Chapter 18:16)

³³⁹Merchandise Marks Amendment Act 2001 (Chapter 14:13)

³⁴⁰Zimbabwe Trade Policy Review 2011 available at https://www.wto.org/english/tratop_e/tpr_e/tp352_e.htm accessed on 10 December 2018.

³⁴¹Intellectual Property Tribunal Act of 2001 (Chapter 26:08)

³⁴² See note 74

³⁴³ Ibid note 81

³⁴⁴ ibid

copyright owners with both exclusive economic and moral rights. The copyright legislation in Zimbabwe is found in the Copyright and Neighbouring Rights Act³⁴⁵ and Copyright and Neighbouring Rights Regulations of 2006³⁴⁶. Section 9 of the Copyright Act in line with Article 11 of TRIPS establishes that a copyright is a real right which entitles its owner exclusive control over it and prohibits the commercial rental or use of the same without his consent.

Works that are eligible for copyright protection include literary works, artistic works, musical works; sound recordings, audio-visual work, broadcasts; programme-carrying signals and published editions.³⁴⁷ This complies with the Article 14 of TRIPS and the Berne convention which provides creators such as authors, musicians, poets, painters etc. with the means to control how their works are used.³⁴⁸ The Copyright Act provides that ‘an audio-visual work, a collective work, a photograph or a computer program shall be protected for a period of fifty years from the end of the year in which the work is made available to the public with the consent of the owner of the copyright or, failing such an event within fifty years from the making of the work’.³⁴⁹ The same fifty year threshold applies to sound recording, broadcast, program carrying signal, published edition and any other literary, musical or artistic work. This is in compliance with Article 12 of TRIPS which prescribes which obliges members to adhere to that threshold.

With regards to infringement of copyright, section 52 of the Copyright Act provides ‘that an infringement of copyright is actionable at the suit of the owner of the copyright’. The plaintiff thus has remedies by way of interdict, damages, attachment, the rendering of accounts, the delivery of articles used or intended to be used for making infringing copies or other relief available in respect of the infringement of any other proprietary

³⁴⁵ See note 72

³⁴⁶ Copyright and Neighbouring Rights Regulations, 2006 (Statutory Instrument No. 256/2006)

³⁴⁷ Section 10 of the Copyright Act

³⁴⁸ The Berne Convention, adopted in 1886, deals with the protection of works and the rights of their authors. It provides creators such as authors, musicians, poets, painters etc. with the means to control how their works are used, by whom, and on what terms. It is based on three basic principles and contains a series of provisions determining the minimum protection to be granted, as well as special provisions available to developing countries that want to make use of them.

³⁴⁹ Section 15 of the Copyright Act.

right. In addition to that a criminal sanction is also imposed such that any person found guilty of infringing the provisions of the copyright law is punishable by imprisonment for a period of two years or a fine not exceeding level ten or both.³⁵⁰ The provision of the above remedies is in line with Article 42,45 and 46 of TRIPS which obliges members to make available to right holders civil judicial procedures concerning the enforcement of any intellectual property right covered in TRIPS.

In *S v Chiadzwa*³⁵¹ the accused had been charged with the offence of contravening of the then Copyright Act. He was convicted by a magistrate and sentenced to a fine of \$400 and in default of payment to 10 days imprisonment. Furthermore he was also ordered to surrender possession of the alleged infringing artefacts to the complainant. He then appealed to the High Court and *Chinhengo, J.* in upholding the appeal stated “that from s.27(1)(e) of the Copyright Act, it must be clear that for an offence to be committed the applicant's work of art should have been reproduced not that his idea should have been adopted. There must be a reproduction of an article in which copyright subsists.” Furthermore the Judge stated that the evidence in this case did not establish that any such article was copied or reproduced. He stated that section 27(1)(e) also requires that the accused person should have knowledge that the article which he exhibits is an infringing copy of the complainant's work and in terms of the Act the issue is whether the appellant exhibited in public, works of art in which the complainant had copyright and whether he did so with the knowledge that the works of art concerned infringed the complainant's copyright. The judge decided that the essentials of the offence were not proved and that the appellant was wrongly convicted of contravening s 27(1)(e) of the Act but may however be liable in delict. This approach of the High Court resonates with TRIPS which obliges WTO members to provide remedial action against infringers who do so with the knowledge that the works of art concerned infringed the complainant's copyright. It is clear that TRIPS does not intent to punish innocent infringers.

³⁵⁰ Section 59 of the Copyright Act, Level 10 fines are equivalent to USD \$700.00 in Zimbabwe.

³⁵¹ *S v Chiadzwa* [2004] ZWHHC 28

With regards to the scope of protection, the case of *George Hensher Ltd v Restawhile Upholstery (Lancs) Ltd*³⁵² established that copyright law is in essence concerned with the protection of the negative right of preventing the copying of physical existing material in the field of literature and the arts. Thus, for copyright to exist there must be existing material that the infringer has copied”. It finds support from English law, as it was established in *Donoghue v Allied Newspapers Ltd*³⁵³ by the High Court in the United Kingdom in 1938 that the law of copyright is concerned with the protection of the copying of physical material only and not the reproduction of ideas and does not intent to create a monopoly for any particular form of words or design.³⁵⁴ It is established that this long standing principle is still applicable today as it was confirmed by TRIPS which excludes ideas from the scope of copyright protection.

In the *S v Ndabezinhle Moyo and Dalokukle Tshab*³⁵⁵ the accused persons were selling or displaying for sale these items resulting in their arrest and prosecution for “selling or hiring out” [in respect of Moyo] and possession [in respect of Tshab] infringed copies of DVDs and CDs in contravention of section 59 of the Copyright and Neighbouring Rights Act [Chapter 26:05]. The learned *Ndou J* stated that;

“This is novel prosecution in this region for the protection of the creations of the human mind. This is a welcome development in our jurisdiction where copyright infringement is very rife but enforcement is extremely low. This scenario has resulted in the confusion of the public as to the source of the goods, products or service. In the circumstances intellectual property rights infringement has to be curbed with zeal and determination. Having said so, I should hasten to say that such a battle has to be within the confines of our procedural law.”

From the legislation on copyright discussed above, as well as the case law, it is clear that on paper Zimbabwe’s laws on copyright protection are in conformity to TRIPS. However the implementation over the past decade has been weak resulting in piracy being on the surge in Zimbabwe. Vendors are openly selling pirated material in the streets across the country with authorities rarely/occasionally going after them. To be

³⁵²[1976] AC 64

³⁵³*Donoghue v Allied Newspapers* [1938] Ch 106.

³⁵⁴*ibid*

³⁵⁵[2009] ZWBHC 18

quite frank enforcement of copyright law is seasonal as a result very few arrests have been made in this regard over the years, with the arrested getting away with a measly fine.³⁵⁶ This has resulted in authors, musicians and other originators or intellectual property crying foul as they feel cheated out of their income by the piracy practice. The other worrying thing is that has been very few recorded civil cases on piracy and copyright infringement of note, in the past couple of years due in part to the high cost of litigation which most copyright owners. Musicians are basically left with live shows as their main source of income, and some of them have resorted to sell their materials at the same price as the vendors in the streets.³⁵⁷ This has occurred due to the relevant authorities being reluctant and turning a blind eye on piracy. The statement by *Ndou J* in the *S v Ndabezinhle Moyo and Dalokukle Tshab* case that prosecution for the protection of the creations of the human mind in the region is novel says it all. More has to be done by the authorities to enforce copyright law.

4.9.2 Trade Marks

The Zimbabwean Trade Marks laws are in compliance with the TRIPS agreement with regards to the scope of protectable subject matter. The Trade Mark Act defines a mark as any sign capable of graphic representation and capable of distinguishing goods or services of one undertaking from another. The requirement for registration of a mark as a trade mark is that it must be distinctive or capable of becoming distinctive and in terms of the TRIPS agreement this is provided for in Article 15. The Trade Mark Act, provides for the registration of trade marks in respect of goods and services in section 7³⁵⁸ whilst names of companies, firms, individuals and invented words is provided for under section 12.³⁵⁹

³⁵⁶Zvinavashe K 'Copyright Laws In Zimbabwe: Authorities Reluctant To Curb Piracy' available online at <https://263chat.com/copyright-laws-in-zimbabwe-authorities-reluctant-to-curb-piracy/> Accessed on 17 December 2018.

³⁵⁷ ibid

³⁵⁸ Section 12 of the Trade Mark Act

³⁵⁹ Section 12 of the Trade Mark Act

Section 8 of the Trade Mark Act provides exclusive rights to right holders to prevent all third parties not having the owner's consent from using it in the course of trade. This is in line with Article 16 of TRIPS which confers exclusive rights to trade mark owners.

With regards to the duration of trade mark registration Article 18 of TRIPS provides that initial registration, and each renewal of registration of a trademark shall be for a term of no less than seven years whilst the Zimbabwean Trade Mark Act in Section 24 provides for a period of ten years which is well above the minimum threshold.

The courts in Zimbabwe have confirmed in granting relief to trademark owners in circumstances where their rights have been infringed. In the *Zimbabwe Gelatine (Pvt) Ltd. v Cairns Foods (Pvt) Ltd*³⁶⁰ case it was confirmed that once a trade mark is registered it gives the registered owner of the trade mark an exclusive right to use it concerning the goods for which it is registered.

In the *Vivon Investments (PVT) Limited v Win-King Investments (PVT) Limited*³⁶¹ it was emphasized that Zimbabwe is a party to the TRIPS Convention. Furthermore the court highlighted the need to protect owners of Trademarks and to ensure that those who used trademarks that are similar to those of others should be interdicted from doing so. The Court went ahead to grant an interdict sought by the Applicant to restrain the Respondent from using a similar trademark as such leads to confusion in the market.

In *Old Mutual Life Assurance Society of Zimbabwe v Intermarket Holdings Ltd and Ors*³⁶² the approach adopted by the Court will ensure protection against trade mark from the use of similar trade marks by third parties. It was stated that the test is whether there has been an infringement depends essentially on whether there is sufficient similarity which is likely to lead to confusion. It was stated that the word 'similar' must be given its ordinary meaning and it refers to a "marked resemblance or likeness" which is easy to recognize.

³⁶⁰[2003] ZWSC 67

³⁶¹ 2016 (272) -16 (HC)

³⁶²2006 (1) ZLR 73 H

It is submitted that over time and with the internationalization of trade practices, the relationship and regulation of the manufacturer-distributor has made the standard of proof of ownership of a trademark in passing-off actions cumbersome and costly to most trademark infringement victims.³⁶³ This is so because a number of requirements must be established hence legislative benefits that come with the Trade Mark Act make it easier and cheaper for legal action to be carried out as compared to the common law action of passing-off which has more requirements. These legislative benefits include protection of the registered mark from infringement even where it is not currently in use and absolution from proving ownership, repute or goodwill of the mark as prerequisite requirements.³⁶⁴ It is submitted that the Trade Mark Act offers comprehensive protection that is in line with international standards under the TRIPS agreement.

4.9.3 Geographical Indications

Zimbabwe's Geographical Indication laws provide for *sui generis* protection and registration of Geographical indications.³⁶⁵ It is submitted that this protection is primarily a result of pressure on Zimbabwe to fulfil its international obligations under TRIPS.³⁶⁶ The Zimbabwean Geographical Indications Act³⁶⁷ defines a "geographical indication" as an indication, however expressed, which identifies a product as originating in a particular area, where some quality, reputation or other characteristic of the product is essentially attributable to its geographical origin. This definition is in line with Article 22.1 of the TRIPS which provides for the same.

³⁶³ 'Intellectual Property Perspectives: Trademark infringement and available remedies' Available online at <https://www.theindependent.co.zw/2012/04/26/intellectual-property-perspectives-trademark-infringement-and-available-remedies/> Accessed on 18 December 2018.

³⁶⁴ *ibid*

³⁶⁵ Nyakoto, S. (2013). *The protection of geographical indications in Zimbabwe: An overview of the relevant legislation, institutional framework and mechanisms*. The Journal of World Intellectual Property, 16(3-4), 189-196.

³⁶⁶ *ibid*

³⁶⁷ Article 3 of TRIPS available at https://www.wto.org/english/docs_e/legal_e/27-trips_04b_e.htm accessed on 18 December 2018.12.18

Section 10 in line with Articles 42, 45 and 46 of TRIPS provides that interested persons shall be entitled to any appropriate remedy, whether interdict, damages, attachment or otherwise, that is available in respect of the infringement of any proprietary right. Section 9 prohibits the sale, importation, export and manufacture of any product to which a misleading geographical indication has been applied.³⁶⁸ This is in line with Article 22 of TRIPS which obliges WTO members to ensure that there is adequate protection against misleading geographical indications. Though Zimbabwe is compliant to TRIPS it lacks a number of potential domestic geographical indication products. It is submitted that one such product is Tanganda tea from Chipinge District, a best-selling brand of tea in Zimbabwe and central Africa.³⁶⁹

4.9.4 Industrial Designs

Zimbabwe provides protection to the creator or author of an industrial design who is treated as the proprietor of the design as prescribed by Article 25 of TRIPS. Section 7 of the Industrial Designs Act provides this protection of independently created industrial designs that are new or original.³⁷⁰ Exclusive rights are provided for in section 15 of the Industrial Designs Act in line with Article 26 of TRIPS.³⁷¹ Furthermore Section 16(2) provides for 10 year protection of an industrial design and this falls within the confines of Article 26(3) of TRIPS which obliges members to ensure that there is at least 10 years.

The TRIPS agreement also provides for exceptions to the exclusive right of owners in certain circumstances provided that such exceptions do not unreasonably conflict with the normal exploitation of protected industrial designs and do not unreasonably prejudice the legitimate interests of the owner of the protected design. These exceptions are provided for in terms of section 17, 18 and 20 of the Act in the case of use by the State and third parties. As envisaged above protection of industrial designs is guaranteed in Zimbabwe provided that they are registered.

³⁶⁸ Chapter 2 of the Geographical Indications Act.

³⁶⁹, T. Dagne (2016). Geographical indications (GIs) as tools for agricultural knowledge governance in selected East and Southern African countries. *The African Journal of Information and Communication (AJIC)*, 19, 143-152.

³⁷⁰ Section 7 of the Industrial Designs Act

³⁷¹ Section 15 of the Industrial Designs Act

4.9.5 Patents

The Zimbabwean Patents Act provides for registration and protection of patents in line with Article 27 of TRIPS. Section 25 of the Patents Act complies with the requirement in Article 33 of TRIPS to provide protection for a minimum period of twenty years for a patent counted from the filing date. Section 34 in line with Article 31 of TRIPS provides for exceptional circumstances where a patent can be used for both commercial and non-commercial purposes without the consent of the owner.³⁷² This applies in cases of a national emergency or other circumstances of extreme urgency provided that the right holder shall, nevertheless, be notified as soon as reasonably practicable.³⁷³ An example of how the Zimbabwean government has made use of these exceptions is described below.

4.9.6 State of Emergency on HIV/AIDS and its impact on Patent Law.

The government of Zimbabwe in 2002, declared HIV/AIDS and the lack of antiretroviral therapy an emergency for a period of six months. The purpose was to enable the State to make or use any patented drug used in the treatment of persons suffering from HIV/AIDS and its related conditions including antiretroviral drugs. This was lawful under section 34 of the Patent Act.³⁷⁴ The government sought to enable the State or a person authorized by the Minister to import any generic drug used for treating people suffering from HIV/AIDS. Section 34 mainly deals with a situation where the government makes the drugs or procures the drugs from a third party has been allowed specifically to produce the product for State use. On the other hand section 35 allows a third party, properly licensed by the Minister, to produce drugs for sale in a national emergency.³⁷⁵

This action was thus lawful as it was done in accordance with the Zimbabwean Patents Act and within the flexibilities provided for in the TRIPS Agreement. This legislation has been used by Zimbabwe to permit the manufacture of generic drugs through

³⁷² Article 31 of TRIPS

³⁷³ Ibid

³⁷⁴ General Notice 240 of 2002

³⁷⁵ Section 34 and 35 of the Patents Act

granting of compulsory licenses. Article 7 states that there must be ‘a balance of rights and obligations, allowing states to balance their obligations to patent holders with their obligations under human rights treaties.’³⁷⁶ This was an example of balancing of the interests of the patent holder and the public interest. This is further supported by Article 8 of TRIPS which obliges WTO members to take measures to prevent the abuse of intellectual property rights by allowing the adoption of measures to secure public health and other public interest reasons.³⁷⁷

4.9.7 Final remarks on Patent law

As stated above it is clear that Zimbabwean patent laws offer enough protection to patent holders. However the right conferred though exclusive, it is not absolute it can be limited in circumstances that are reasonable, hence that right is balanced with the right to protect the public at large especially when it comes to pharmaceutical products and public access to affordable health. The obvious defect in the patent system is lack of patent examining capacity also evident in South Africa. This definitely has to be worked on to ensure that whatever is registered under patent is truly verifiable.

4.9.8 Integrated Circuit-Layout Designs

The Integrated Circuit-Layout Designs Act provides for the registration and protection of integrated circuit-layout designs in Zimbabwe in line with Article 35 of TRIPS.

Section 15 of the Integrated Circuit-Layout Designs Act provides exclusive rights to owners of lay out designs in line with Article 36 of TRIPS. Section 16 provides for a 10 year term of protection thus complying with the minimum threshold set out in Article 38(3) of TRIPS. It is safe to conclude that the guidelines set out in TRIPS are embodied in the Zimbabwean legislation.

4.10 Chapter conclusion

It is evident that the intellectual property rights protection regime is compliant to the provisions of the TRIPS agreement. However though these laws are strong on paper, enforcements needs

³⁷⁶ Article 7 of TRIPS

³⁷⁷ Article 8 of TRIPS

to be strengthened especially on copyright and related rights. Piracy remains on the surge and musicians are being robbed of their hard earned income in the sight of law enforcement agents. It is thus important for owners of intellectual property to ensure that they register their rights in order to be better protected. With regards to patent law, patent examination has to be implemented in future. Though it is expensive to implement this, it will go a long way in ensuring the authenticity of patents to be registered.

The works of many talented artists are largely undervalued and remain vulnerable as a result of the weak enforcement of IP laws by authorities. Despite the shortfalls in IP enforcement Zimbabwe has one of the most comprehensive IP laws which are largely in compliant to the international standards. The other positive is that these international standards have been domesticated into national legislation which gives private citizens in Zimbabwe the *locus standi* to base their claims in local courts directly on the relevant international law provisions governing IP. It is safe to then conclude that the TRIPS agreement has direct effect in Zimbabwe, such that Zimbabwe is bound both on an international level and at the same time domestically as the national laws are a replica of TRIPS.

CHAPTER 5

RECOMMENDATIONS AND CONCLUSION

5.1 Chapter Introduction

In the previous chapters the legal force of the international standards that govern international trade in relation to anti-dumping and intellectual property rights in South Africa and Zimbabwe were assessed. In this chapter I will give recommendations on how the problems highlighted in the chapter 3 and 4 can be resolved within the domestic context of Zimbabwe and South Africa. This will include ways that ADA and TRIPS can be implemented more in these countries and generally how international law can be better implemented in these countries. After giving these recommendations I will then proceed to give concluding remarks. In the process of reaching a logical conclusion to the issues raised in this thesis, reference will be given to the research questions asked in chapter 1.

The summary of the findings in chapters 3 and 4 when it comes to anti-dumping, were that, South African laws are in conformity to some provisions of ADA and it is only those provisions that it has domesticated that have direct effect and the opposite applies to the provisions that have not been incorporated into domestic law. As for Zimbabwe, the anti-dumping laws are to a greater extent in conformity with ADA but the statutory body which is responsible for investigating dumping allegations lacks the requisite capacity to carry out its functions. With regards to IP the key findings were that both countries have TRIPS compliant legislation, strong IP laws, however the common deficiencies are lack of substantive patent examinations and generally poor enforcement of IP laws. Another key finding was that there is harmony between the regional laws of SADC and the international obligations under ADA and TRIPS. However as stated above there are areas which both South Africa and Zimbabwe need to improve on to ensure that they are wholly compliant with both ADA and TRIPS. As stated already the purpose of this chapter is to give recommendations, these are they,

5.2 Recommendations for the South African Anti-dumping regime

It is recommended that there should be an amendment to either the regulations concerned or Section 57A of the CEA to allow anti-dumping duties to be imposed with retroactive effect

from the date on the notice (date that the dumping is actually determined). This will resolve the inconsistencies brought about by the Supreme Court in the *Progress Office Machines* case and the *AMIE* case. The legislative must be amended to ensure that there is sufficient clarity concerning the applicable date in such circumstances. I agree with the approach adopted in the *Progress Office Machines* case as it resonates with the objectives of ADA of ensuring that anti-dumping measures do not last beyond the five year threshold even when provisional duties are applied. Fortunately there is already a new Customs Act which may help in resolving the problems if it comes into effect. As already stated, this will mean that the CDA will become the main statute regulating dumping in South Africa. However its entry into force is on the discretion of the President.³⁷⁸

Clive Vinti is of the view that if the CDA enters into force in its current form, sections 15(1) and 15 (3) make provision for the imposition of antidumping duties specifically by notice in the Government Gazette to take effect on a date specified in the notice which may be a date before, on, or after the date of publication of such notice. He submits that this unambiguous wording would resolve the uncertainty that pervades this issue. He believes that the said section will provide a far less contentious method of calculating the imposition date of antidumping duties because of the discretion and flexibility it gives the authorities. Furthermore, according to his analysis, section 15(3) is significant in two respects, firstly it departs from the CEA by explicitly requiring the publication of the said notice and secondly, the CDA just like the CEA provides for the retroactive application of the provisional anti-dumping duty and requires that such a date be specifically provided for in the said notice in the Gazette.³⁷⁹ There is no doubt that discretion can thus be applied depending on the circumstances of each case. However I am of the view that the said problem will not be entirely be settled by the CDA and this will be explained below,

Firstly the exercise of discretion means that authorities will determine each case based on its merits. Though this sounds nice, the problem in that approach is that there will not be a definite date which will be used and in some cases anti-dumping duties may endure beyond the five

³⁷⁸ SARS 2018 available at <http://www.sars.gov.za/ClientSegments/Customs-Excise/AboutCustoms/Pages/New-Customs-Legislation-update.aspx> Accessed on 2 May 2018.

³⁷⁹ Ibid note 22

year threshold whilst some may fall within the threshold. The legal uncertainty that pervades this subject area will thus persist. What is needed is a precise date which the duties should commence and I submit that the correct one is the date that provisional duties are imposed in circumstances where there is retroactivity. The calculation of the five year period should thus commence on this date since the burden to pay duties begins on that day. The approach adopted in the Progress Office Machines case is the correct one. In essence I am of the view that though the entry into force of the CDA may improve the situation but will not ultimately resolve the problem. Thus my submission is that there should be amendment of the said section including chapter 15 of the CDA to ensure that compliance with TRIPS is achieved.

Secondly it is recommended that ADA be fully incorporated in its entirety as was done with the Rome Statute. The Rome statute³⁸⁰ provides for a framework to ensure the effective implementation of the Rome Statute of the International Criminal Court in South Africa. By so doing, it guarantees the implementation of the agreement as all the provisions of it would have been converted into domestic law and will thus be binding. In a nutshell there will be direct application of the agreement and the rights and obligations under it will thus be binding. South Africa ought to have implemented ADA in the same way it did with the Rome statute.

Furthermore the CEA should be interpreted in a way that assures that provisional duties are only imposed after a preliminary affirmative determination of the dumping has been made. A purposive approach in interpretation will ensure that an interpretation that allows for the imposition of provisional duties only after a preliminary affirmative determination of the alleged dumping is preferred over the one that permits imposition of provisional duties before such a determination is finalized by ITAC.

As already established, the other problem with the ITA Act is that it has a lot of undefined terms. The ITA Act allows for the calculation of the margin of dumping on the basis of either the export price to a third country or a 'surrogate country' yet ADA does not mention the concept of a 'surrogate country at all'. Also the term 'surrogate' has nowhere been defined in the Regulations. It is thus recommended that the term 'surrogate' should thus be defined to

³⁸⁰Implementation of the Rome Statute of the International Criminal Court Act No. 27 of 2002

ensure that the intended meaning is not distorted. The same must be done in relation to other undefined terms. It is submitted that it is an essential feature of the rule of law that legislation be clear and be able to be understood by those who are bound by it.³⁸¹ Furthermore by not defining the above mentioned words, it should have been foreseen that these words may possibly be construed in a manner inconsistent with the objectives of the Act in question. Hence it is prudent that these terms be defined. Since amendments to the Act can be lengthy, the relevant Minister can thus use regulations instead to define these terms.

5.3 Recommendations for the Zimbabwean Anti-dumping regime

It is noteworthy that Zimbabwe has mainly used regulations/subsidiary legislation to comply with its obligations under ADA. The only problematic part is these regulations can easily be altered or amended or suspended at the discretion of the Minister without the involvement of parliament. As of late, the country has been run mainly through statutory instruments of which and in some instances there has been more than 100 statutory instruments introduced each year. The effect of this is when rules are changed frequently rules across all sectors of the economy there is a huge possibility of conflict and lack of harmony in the law. This can negatively affect the effective implementation of ADA if there is a clash between the Anti-dumping regulations and other subsequent statutory instruments. It is thus recommended that the country uses its main legislation instead by making amendments to the principal Act to ensure the effective and uninterrupted implementation of ADA by authorities. By introducing such amendments it will secure and ensure that the existing level legal compliance is not easily interfered with. As long as the main laws regarding anti-dumping remain under statutory instruments, they exist at the mercy of an individual.

With regards to strengthening the CTC, it is thus recommended that the current exercise of capacitating the Competition and Tariff Commission be fast tracked to ensure that Zimbabwe complies with its procedural obligations to conduct investigations before introducing anti-dumping duties.

³⁸¹ *Merkur Island Shipping Corporation v Laughton* (1983) 2 AC 570 at 612

5.4 Recommendations on the South African Intellectual property laws

It is recommended that the reforms contained in the 2017 draft IP policy to conduct substantive examination of patents come to fruition through amendments to the existing regulations. This will ensure that there is compliance with Article 62 of TRIPS. Furthermore the benefits of conducting substantive patent examination cannot be overstated. The current depository patent system only examines patents for compliance with the formal requirements only such as forms and fees. Potentially this means that there could be a large number of granted patterns which do not pass the test in examining jurisdictions. This can potentially have effects on the right to health in the sense that the more pharmaceutical companies that register these potentially invalid patents will cause the prices of medicines to rise, making the same inaccessible to a large portion of the population. At times this can even affect the availability of such medicines. Conducting substantive patent examination will thus ensure that no invalid patents are registered and will thus also positively influence the price of such medicines in the sense that they will remain available and affordable. This will also help the country to properly balance the private and public interest when it comes to patent protection.

Though the introduction of substantive patent examination will be costly in the sense that people with the required technical expertise to operate such a system will have to be hired, its benefits outweigh the shortfalls. The benefits of such an investment will guarantee the authenticity of the patents registered and protection of rights of both patent holders and consumers and also help in giving effect to the constitutional right to health. The right to health will be aided in the sense that there will be no undue restrictions to access to medicines. Furthermore by conducting examinations, it gives the applicants of patents an idea of the commerciality of the invention before registration and further it will provide information for assessing the prospects of actually obtaining patents and their potential scope of protection.

Furthermore, it is recommended that enforcement of Copyright laws be strengthened to combat piracy. The benefits of enforcing this right cannot be overstated. Increased protection for copyright will ensure that the work of artists remain an asset to them. It is not in doubt that artistic work can end up having considerable value in future and furthermore copyrights can be used as legacies since they last for decades and can thus be passed down as part of an estate.

Concerning the remedies available in enforcing IP rights it is thus recommended that these be revisited to ensure that there is consistency so as to ensure that all right holders can have the same level of protection afforded to right holders of other IP rights such as trademarks. At the moment right holders of trademarks can claim damages even from innocent infringers yet right holders of copyrights and industrial designs cannot. It remains unclear why there is such a differentiation. It is trite that it is an essential ingredient for the rule of law that laws must be applied equally without unjustifiable differentiation. This is why these remedies should be revisited.

5.5 Recommendations on the Zimbabwean Intellectual property laws

As already submitted, though Zimbabwe is home to many talented creators, their works are largely undervalued and unprotected due to poor IP enforcement. With regards to copyright laws, piracy remains on the surge in Zimbabwe and musicians are being robbed of their hard earned income in the sight of law enforcement agents. It is thus important for owners of intellectual property to ensure that they register their rights in order to be protected more easily in case of infringement as registration enables an owner to enforce her/his rights against third parties.

With regards to patents, it is recommended that Zimbabwean authorities invest in patent examination to prevent unjustified limitations to the right to health. Of course this could be a tall order to implement now given the current economic woes of the country. However as already stated the benefits of ensuring that there is a substantive patent examinations will have long lasting benefits.

5.6 Concluding remarks

It is clear that for international obligations in South Africa and Zimbabwe to be binding and enforceable, they must be domesticated. It is clear that most of the IP standards in TRIPS have been domesticated and in some instances even more extensive protection than is required has been provided for in domestic legislation. Private persons thus have rights in their domestic legislation which are enforceable against infringers. As far as civil remedies are concerned, it is clear that the courts are prepared to uphold IP rights when approached.

The major let down however is the non-use of criminal remedies. The utilization of criminal remedies requires the co-operation of the State of which its co-operation in both countries has been poor especially in regards to fighting piracy. So the passage of laws alone which comply with TRIPS is not enough, the enforcement mechanisms must be strong as well.

With regards to ADA in some instances as seen above, the courts have interpreted the domestic legislation in line with the international obligations however in other instances, the interpretation has been contrary to those obligations as seen in the previous chapters.

In order to achieve full compliance with the ADA and TRIPS, the recommendations contained above must be implemented. The said recommendations must thus be expressed in legislation in order for them to have a binding effect. It is noteworthy that in both countries, for international law to be apply, it must first become part of the domestic law thus the dualist theory applies in respect of to their legal systems. The same applies in the United Kingdom (U.K)³⁸² and the courts are not entitled to take into account provisions of international treaties if the legislature has not expressly enabled them. Furthermore in the U.K, Acts of parliament are supreme over any other law. This therefore means that, without a law by parliament that gives effect to international norms, international law will have little or no effect domestically. The only difference with the U.K is that in Zimbabwe and South Africa the constitutions are supreme but the dualist principle.

However in other countries such as France monism applies. For example Article 55 of the French Constitution excludes the need for implementing legislation in order for a treaty to be enforceable. This is the position even if such legislation is passed subsequent to the ratification of that treaty.³⁸³ Article 52 of the French Constitution gives power to the President to conclude treaties.³⁸⁴ The President does not only negotiate but also ratifies the treaties on his own thus the role of Parliament appears to be quite limited. In essence international treaties become part

³⁸²Paul Seighart "The International Law of Human Rights", Clarendon Press, Oxford, 1983, Pp. 40 – 41.

³⁸³ Articles 52 to 56 French Constitution deal with Treaties and International Agreements. Text of Articles 52 to 56

³⁸⁴ *ibid*

of their *corpus juris* from the date of ratification and no domestic legislation is necessary to enforce them at the domestic level. In Germany the position is akin to France, but Germany has gone even further by making international law self-executing, but assigning to it a rank which is equal to domestic legislation.³⁸⁵

In sum, this thesis has shown that WTO law does not induce the same level of compliance in all WTO members. The above analysis reveals the need for the domestication of obligations under international law. The benefits of doing so cannot be overstated.

³⁸⁵Article 55 – Constitution of France, 1958, says, “Treaties or agreements duly ratified or approved shall, upon their publication have an authority superior to that of laws, subject for each agreement or treaty, to its application by the other party. Germany – Basic Law of 8 May 1949, as amended on 1st Jan. 1966, Art. 25; “The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory”.

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