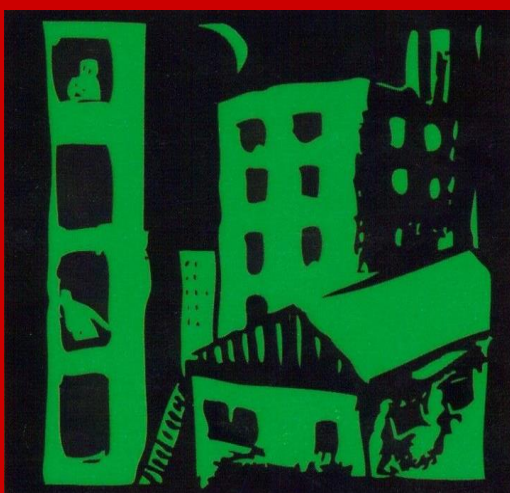


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**An exposition of  
trade policy  
formulation  
through the issuing  
of “Trade Policy  
Directives” by the  
Minister of Trade,  
Industry and  
Competition under  
the International  
Trade  
Administration Act  
71 of 2002**

CLIVE VINTI

*Lecturer, Department of Public Law,  
University of the Free State,  
Bloemfontein, South Africa*

<http://orcid.org/0000-0002-3823-2400>

**ABSTRACT**

*Section 5 of the International Trade Administration Act 71 of 2002 (ITAA) provides that the Minister of Trade, Industry and Competition has the power to issue “Trade Policy Directives” subject to the procedures and requirements of*

*the Constitution of the Republic of South Africa, 1996 (Constitution) and other laws. However, there is uncertainty as to how trade policy is formulated under section 5 of the ITAA and the rights of affected parties in this regard. Thus, this article offers an exposition of the process of trade policy formulation under section 5 of the ITAA. To this end, it is my view that trade policy formulation under section 5 must be guided by section 195 of the Constitution, which requires that the public must be “encouraged” to participate in policy formulation and that this must occur in a climate of openness, transparency and accountability. In the narrower sense, it is also my view that interested parties must be given an opportunity to participate in trade policy formulation on the ground of procedural rationality and to avoid a charge of arbitrariness as twin components of the rule of law.*

**Keywords:** Trade policy; International Trade Administration Act; rule of law; legality; rationality; arbitrariness; transparency; accountability; governance.

## 1 INTRODUCTION

The Minister of Trade, Industry and Competition (Minister) has the power to issue “Trade Policy Directives” under section 5 of the International Trade Administration Act 71 of 2002 (ITAA). This policy instrument can be used to regulate the import and export of goods into the Republic of South Africa. However, section 5 does not specifically prescribe the process of how policy decisions are formulated and the rights of affected parties in this regard. This creates uncertainty that may inadvertently create space for arbitrary trade policies. Consequently, this article seeks to proffer an exposition of the process of trade policy formulation by the Minister as provided by section 5 of the ITAA. This article will employ a case study of the “Trade Policy Directives” issued under section 5 of the ITAA to illustrate the uncertainty surrounding policy formulation under this section as well as an evaluation of relevant legislation and case law. This will inevitably involve a discussion of section 6 of the ITAA, which complements section 5 in respect of trade policy formulation.

## 2 TRADE POLICY UNDER SECTION 5 OF THE ITAA

A seminal feature of the authority of the Executive is national policy development as provided by the Constitution of the Republic of South Africa, 1996 (Constitution).<sup>1</sup> The word “policy” is intrinsically ambiguous and may carry divergent meanings.<sup>2</sup> Attempts at establishing what constitutes “policy” and what does not, are futile.<sup>3</sup> However,

<sup>1</sup> *Electronic Media Network Limited v E.TV (Pty) Limited* 2017 (9) BCLR 1108 (CC) (ETV (2017)) at para 2; section 85(2)(b) of the Constitution.

<sup>2</sup> *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* (252/99) [2001] ZASCA 59 (17 May 2001) (*Akani* (2001))) at para 7.

<sup>3</sup> *Akani* (2001) at para 7. See also, *Minister of Education v Harris* 2001 (4) SA 1297 (CC).

Mogoeng CJ has stated that in general, “policy” constitutes an amalgamation of “guidelines or principles” which give “direction” and form the basis of an organ’s mandate or vision.<sup>4</sup> The primary goals of a “policy” must be to attain “reasonable and consistent decision-making, to provide a guide and a measure of certainty to the public and to avoid case by case and fresh enquiry into every identical request or need for the exercise of public power”.<sup>5</sup> In respect of international trade, the Constitutional Court has explained that trade policy, at the very least, includes a consideration of “diplomatic relationships, the country’s balance of payments, the regional or global trading conditions, goods needed to foster economic growth and so forth”.<sup>6</sup> This is clearly not an exhaustive list of the considerations in this regard, but it provides a useful starting point.

In this regard, section 5 of the ITAA states that the Minister may, by Notice in the Gazette and in accordance with the procedures and requirements stipulated by the Constitution or any other applicable law, issue “Trade Policy Directives”. This is complemented by section 6 of the ITAA, which provides that the Minister may, by Notice in the Gazette, stipulate that no products of a particular type or no products other than products of a particular type may be:

- i. imported into the Republic of South Africa;
- ii. imported into the Republic of South Africa except under the power of and in line with the rules stipulated in a permit issued by the International Trade Administration Commission (ITAC);
- iii. exported from the Republic of South Africa; or
- iv. exported from the Republic of South Africa, unless it is authorised by and in line with the conditions stipulated in a permit given by the ITAC.

Thus section 6 allows the Minister to control the imports and exports of goods into the Republic of South Africa in line with the Trade Policy Directives under section 5. In this way, the Minister can use import and export permits and licences, quotas and export bans to control imports and exports.

This is augmented by the Export Control Regulations, which state that the Minister acting in terms of section 6 of the Act, prescribes that certain goods cannot be exported from the Republic of South Africa except on the basis of an export permit issued by the

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<sup>4</sup> *ETV* (2017) at para 30; *Arun Property Development (Pty) Ltd v City of Cape Town* 2015 (2) SA 584 (CC) (*Arun* (2015)) at para 47.

<sup>5</sup> *Arun* (2015) at para 47; Okpaluba C & Mhango M “Between separation of powers and justiciability: rationalising the constitutional court’s judgement in the Gauteng e-tolling litigation in South Africa” (2017) 21(1) *Law, Democracy and Development* 1 at 20.

<sup>6</sup> *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) (*SCAW* (2012)) at para 98.

ITAC.<sup>7</sup> This article will then illustrate the uncertainty in the process of trade policy formulation under section 5 of the ITAA through a study of the Trade Policy Directives issued under this provision, namely, the directives on scrap metal and on the amendment of tariffs.

### 3 TRADE POLICY DIRECTIVES ISSUED UNDER SECTION 5 OF THE ITAA

The ITAC is the body that is mandated to administer and conduct investigations on international trade in South Africa as provided by section 7 of the ITAA. The ITAC is required to exercise its powers in line with its functions in accordance with the ITAA and any other relevant law.<sup>8</sup> More specifically, the ITAC is an independent body subject “only” to the Constitution and the law and any Trade Policy Statement or Directive promulgated by the Minister according to section 5, and any notice issued by the Minister in accordance with section 6.<sup>9</sup> Within this framework, the Minister has issued three Trade Policy Directives, which will be outlined below.

#### 3.1 The Trade Policy Directives on metal waste and scrap

On 10 May 2013, the Minister issued the Policy Directive on the exportation of ferrous and non-ferrous waste and scrap metal ( 2013 Trade Policy Directive) in terms of section 5 of the ITAA. The 2013 Trade Policy Directive required the ITAC to employ its powers under the ITAA to ensure that ferrous and non-ferrous waste and scrap metal can only be exported after it has first been offered to domestic users of scrap. This would be for a period established by the ITAC and at a price discount or other formula established by the ITAC.<sup>10</sup> Thus, this policy seeks to promote domestic sale instead of export sale of scrap metal. This is the so-called Price Preference System (PPS). Scrap metal is a fundamental material for the domestic processing industry. The PPS

<sup>7</sup> GNR 91 in Government Gazette (GG) 35007 of 10 February 2012. These “regulations” are strange in that they do not prescribe a method of how one can apply to the Minister to impose an export control measure as is done by the other Regulations on tariffs, dumping and safeguards.

<sup>8</sup> Section 7(1) of ITAA. For a discussion of the role of ITAC in terms of policy implementation, see Tregenna F & Kwaramba M “An institutional analysis of the international trade administration commission of South Africa” (2014) 7 *Journal of Economic and Financial Sciences* 641; Kwaramba M & Tregenna F “International trade administration commission tariff investigations: an analysis of the poultry and paper cases” (2014) 7 *Journal of Economic and Financial Sciences* 619; Cassim R “The pace, nature and impact of trade policy in South Africa in the 1990s” (2003) 18 *South African Journal of Economic History* 76.

<sup>9</sup> Section 7(2) of ITAA; See Brink G “The roles of the Southern African Customs Union Agreement, the international trade administration commission and the minister of trade and industry in the regulation of South Africa’s international trade” (2013) 3 *Journal of South African Law* 431; Sibanda O “Trade liberalisation and its impact on food security in Sub-Saharan Africa” (2015) 5(1) *Int J Public Law and Policy* 92.

<sup>10</sup> GN 470 in GG 36451 of 10 May 2013 at para 2(a).

regulates exports to guarantee an affordable supply of quality scrap metal, to safeguard employment, and to promote infrastructure development.<sup>11</sup> This policy was expected to be in effect for five years. After the expiry of this period, it would be reviewed to assess whether it must be removed or extended for a limited period, with or without amendment. Consequently, the 2013 Trade Policy Directive has been extended until 31 July 2021 or the date on which the export duty/tax on the exportation of scrap metal is fully implemented at a rate that is higher than 0%, as approved by Parliament, whichever date comes first.<sup>12</sup>

The 2013 Trade Policy Directive was preceded by a Draft Policy Directive. It motivated the need for the proposed Policy Directive and it gave interested parties and stakeholders an opportunity to submit comments.<sup>13</sup> The Policy Directive was required to address the increase in the export of metal waste and scrap, which had financial implications for the recycling industry.<sup>14</sup> This impacted the availability of scrap metal in South Africa and could hamper infrastructure development and cause deindustrialisation.<sup>15</sup> This policy would also assist in generating scrap to reduce energy costs in support of South Africa's climate change obligations.<sup>16</sup> Thus, the 2013 Trade Policy Directive was preceded by a public consultation process. This allowed interested parties to comment on the proposed policy on the export of metal scrap and waste.

Subsequent to the 2013 Trade Policy Directive, there were two investigations conducted by ITAC on the PPS, namely, ITAC Report No 441: Price Preference System for Ferrous and Non-Ferrous Waste and Scrap dated 23 July 2013 (ITAC Report 441)<sup>17</sup> and ITAC Report No 490: Review of the Discount Rates in the Price Preference System for Ferrous and Non-Ferrous Waste and Scrap dated 30 January 2015 (ITAC Report 490).<sup>18</sup>

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<sup>11</sup> International Trade Administration Act (71/2002): Draft Policy Directive on the Exportation of Ferrous and Non-Ferrous Waste and Scrap Metal GN 33 in *GG* 36090 of 25 January 2013 (2013 Draft Policy Directive) at para 3.

<sup>12</sup> Extension of the Price Preference System on the exportation of ferrous and non-ferrous waste and scrap; Notice 740 of 2020 in *GG* 44037 of 24 December 2020; Extension of the Policy Directive on the exportation of ferrous and non-ferrous waste and scrap metal: GN No 1247 in *GG* 43929 of 23 November 2020.

<sup>13</sup> International Trade Administration Act (71/2002): Draft Policy Directive on the Exportation of Ferrous and Non-Ferrous Waste and Scrap Metal GN 33 in *GG* 36090 of 25 January 2013 at para 4.

<sup>14</sup> 2013 Draft Policy Directive at para 2.1.

<sup>15</sup> 2013 Draft Policy Directive at para 2.1.

<sup>16</sup> 2013 Draft Policy Directive at para 2.

<sup>17</sup> International Trade Administration Commission of South Africa (ITAC) available at <http://www.itac.org.za/> (accessed 12 June 2020).

<sup>18</sup> ITAC available at <http://www.itac.org.za/upload/Report%20No%20490.pdf> (accessed 12 June 2020).

ITAC Report 441 investigated the introduction of a price preference rate for domestic consumers of scrap metal to the extent of 20 per cent below the international spot prices for the different grades and types of metal waste and scrap.<sup>19</sup> The ITAC considered oral submissions from interested parties on the proposed discount rate.<sup>20</sup> Consequently, the ITAC arrived at a “moderate” rate of discount of 20 per cent.<sup>21</sup> It is Report 441 that informed the 2013 Guidelines on the Exportation of Ferrous and Non-Ferrous Waste and Scrap.<sup>22</sup>

The ITAC Report 441 also proposed a review of this rate after a year of implementation.<sup>23</sup> This occurred through ITAC Report 490. This Report noted that scrap suppliers covered the delivery costs prior to the introduction of the PPS. This benefitted domestic consumers as a tacit discount.<sup>24</sup> The prices established by ITAC for the PPS excluded these considerations.<sup>25</sup> In simple terms, this meant that the tacit discount offered to the domestic consuming industry would be negated by the cost of collecting the scrap metal from the scrap suppliers. Consequently, ITAC then changed the price discount to 30 per cent for all ferrous scrap and 25 per cent for all aluminium scrap.<sup>26</sup> The key observation here is that these two investigations of the PPS allowed interested parties an opportunity to comment on the proposed mechanism.

The 2013 Trade Policy Directive was substantiated by the Export Control Guidelines on the Exportation of Ferrous and non-Ferrous Waste and Scrap. This outlined the PPS system.<sup>27</sup> These Guidelines were also preceded by Draft Guidelines, which were published for public comment.<sup>28</sup> These were replaced by the 2018 Amended Export Control Guidelines on the Exportation of Ferrous and Non-Ferrous Waste and Scrap. These have, in turn, also been replaced by the 2020 Amended Export Control Guidelines.<sup>29</sup> The 2020 Amended Export Control Guidelines specify the

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<sup>19</sup> ITAC Report 441 at 2-3.

<sup>20</sup> ITAC Report 441 at 4-5.

<sup>21</sup> ITAC Report 441 at 5.

<sup>22</sup> GN R 543 in *GG* 36708 of 2 August 2013 at para 3.

<sup>23</sup> ITAC Report 441 at 5.

<sup>24</sup> ITAC Report 490 at 4.

<sup>25</sup> ITAC Report 490 at 5.

<sup>26</sup> ITAC Report 490 at 5.

<sup>27</sup> GN R. 543 in *GG* 36708 of 2 August 2013.

<sup>28</sup> Draft Export Control Guidelines on the Exportation of Ferrous and Non-Ferrous Metal Waste and Scrap, Notice 34 of 2013 in *GG* 36091 of 25 January 2013.

<sup>29</sup> For the 2018 Guidelines, see GNR 1012 in *GG* 41940 of 28 September 2018 and for the 2020 Guidelines, see Notice 532 of 2020 in *GG* 43765 of 2 October 2020.

discounts on various types and grades of ferrous and non-ferrous waste.<sup>30</sup> In general, the 2020 Amended Export Control Guidelines establish a 30% discount on steel scrap, 25% on aluminium, 20% on all other scrap metal, and 10% on copper metals. An additional discount of 10%, over and above the percentage value of 30%, will be deducted for specific ferrous scrap metal that is available in coastal provinces.<sup>31</sup> The 2020 Amended Export Control Guidelines were also preceded by a public comments process that allowed interested parties to make representations.<sup>32</sup> Amendments to the 2020 Amended Export Control Guidelines were published for comment. These, in essence, require the seller of scrap metal to arrange transportation and pay for the cost of delivery of this product to the premises of the consumer.<sup>33</sup> Thus the Guidelines have also generally been preceded by a public consultation process in line with the *audi alteram partem* principle. This is significant in light of the fact that these Guidelines substantiate the Policy Directives and are thus policy instruments borne out of section 5 of the ITAA.

On 3 July 2020, the Minister published the Policy Directive issued in terms of section 5 and a Notice in terms of section 6 of the Act on the Exportation of Ferrous and Non-ferrous Waste and Scrap Metal.<sup>34</sup> The 2020 Trade Policy Directive stated that the Minister had “received representations” from the “domestic consuming industry”. These representations stated that there was a shortage of affordable scrap metal and that the PPS was failing to fulfil its goals. This is causing serious damage to the industry and impeding its recovery from the deleterious effects of the COVID-19 global pandemic.<sup>35</sup>

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<sup>30</sup> 2020 Amended Export Control Guidelines on the Exportation of Ferrous and Non-Ferrous Waste and Scrap at paras 4 and 9.

<sup>31</sup> 2020 Amended Export Control Guidelines on the Exportation of Ferrous and Non-Ferrous Waste and Scrap at para 4.10.

<sup>32</sup> Proposed amendments to the Price Preference System (PPS) Policy Guidelines published in *GG* No 41940, Notice R 1012 on 28 September 2018 on the exportation of ferrous and non-ferrous waste and scrap metal, Notice 464 of 2020 in *GG* 43670 of 1 September 2020. This Notice gave interested parties two weeks to comment on the proposed PPS from its date of publication.

<sup>33</sup> Proposed amendments to the PPS Policy Guidelines published in *GG* No 43765, Notice 532 of 2020 on 2 October 2020 on the exportation of ferrous and non-ferrous waste and scrap metal: Notice 663 in *GG* 43913 of 20 November 2020. It is unclear whether these amendments have been effected yet. See Amendments to the Price Preference System (PPS) Policy Guidelines published in *GG* No 43765, Notice 532 of 2020 on 2 October 2020 on the exportation of ferrous and non-ferrous waste and scrap metal, Notice 305 of 2021 in *GG* 44593 of 21 May 2021.

<sup>34</sup> GNR 746 in *GG* 43501 of 3 July 2020 (2020 Trade Policy Directive).

<sup>35</sup> The 2018 Amended Export Control Guidelines on the Exportation of Ferrous and Non-Ferrous Waste and Scrap defines at para 1.1 “domestic consuming industry” as the domestic consumers of scrap metal, which are foundries, mills, mini-mills and secondary scrap smelters.

These “representations” apparently requested that the Minister “urgently” take action to address the situation.<sup>36</sup>

The 2020 Trade Policy Directive and “Notice” are intended, in the “short term”, to address the shortage of affordable quality scrap metal and directed the ITAC to investigate whether the PPS is achieving the objectives of the PPS.<sup>37</sup> The Notice established a two-month export ban on ferrous and non-ferrous waste and scrap.<sup>38</sup> This was subject to a proviso that ferrous and non-ferrous metals for which export permits were issued prior to the date of publication of the 2020 Trade Policy Directive and Notice, and after the date of publication thereof in respect of applications submitted prior to the date of publication of this Trade Policy Directive and Notice, may be exported.<sup>39</sup> The ITAC was also authorised to issue export permits for ferrous and non-ferrous metals listed in the Schedule to this Notice which it established are “not used” by the domestic processing industry.<sup>40</sup> However, the problem with the 2020 Trade Policy Directive is that a prior public consultation through a Notice in the Government Gazette as was done with its precursor, the 2013 Trade Policy Directive, did not occur. It appears from the 2020 Trade Policy Directive that consultation did occur, but it is unclear which parties participated in this process, how the choice of whom to contact was made, and which platform was used to notify interested parties. This brings to the fore the question of how trade policy must be formulated within the ambit of section 5 of the ITAA.

The 2020 Trade Policy Directive was amended on 2 September 2020.<sup>41</sup> The Minister then published the 2020 Amended Export Control Guidelines on 2 October 2020, which

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<sup>36</sup> 2020 Trade Policy Directive at para 1.6.

<sup>37</sup> 2020 Trade Policy Directive at para 1.7.

<sup>38</sup> 2020 Trade Policy Directive at para 2.2.1.2.

<sup>39</sup> 2020 Trade Policy Directive at para 2.2.1.2.

<sup>40</sup> 2020 Trade Policy Directive at para 2.2.2.

<sup>41</sup> See the International Trade Administration Act, 2002 (Act No 71 of 2002) Amendment of Policy Directive issued in terms of Section 5 and Notice in terms of Section 6 of the International Trade Administration Act, 2002 on the exportation of ferrous and non-ferrous waste and scrap metal, GNR 952 in GG 43677 of 2 September 2020. The amendments made include the following changes, amongst others: (i) The suspension of the operation of the PPS and the guidelines in place were kept until 2 October 2020 or until the promulgation of amendments to the PPS, whichever occurs first; (ii) No ferrous and non-ferrous waste and scrap of a type stipulated in the Schedule to this notice may be exported from the Republic from 3 July 2020 until 2 October 2020 or until the publication of amendments to the PPS, whichever event occurs first; (iii) ITAC may evaluate export permit applications for the exportation of certain grades of ferrous and non-ferrous metals listed in the Schedule to this Notice for which it determines are “not used by the domestic processing industry; or through confirmation received from the domestic processing industry or the DTIC sector desk that the industry is not consuming this grade of scrap at the time of application”.



made significant changes to the PPS.<sup>42</sup> This essentially lifted the export ban. Therefore, there have been two Trade Policy Directives on scrap metal and waste: the 2013 Trade Policy Directive and the 2020 Trade Policy Directive. The 2013 Trade Policy Directive was preceded by a prior public consultation process through the Government Gazette, whereas the 2020 Trade Policy Directive was not.

### **3.2 The Trade Policy Directive on matters ITAC shall consider in evaluating applications for amendment of customs duties**

The Trade Policy Directive on matters ITAC shall consider in evaluating applications for amendment of customs duties (2016 Trade Policy Directive) regulates all applications for the amendment of customs duties as stipulated by section 26(1)(c) of the ITAA, but it does not regulate amendments of anti-dumping duties, countervailing duties, or safeguard duties.<sup>43</sup> The ITAC must consider the following factors in making a recommendation to the Minister, and where required, ITAC must consult with the applicant in question in respect of these matters before making its determination:

- i. the desirability of the applicant making an objectively demonstrable and binding commitment as to which measure will be implemented to raise incomes, the promotion of investment or employment if the mooted measure is implemented;
- ii. what such commitments, if any, the applicant has made in this regard; and
- iii. the probable effect of those commitments on incomes, investment or employment.<sup>44</sup>

If the applicant in question argues that the measure in question is necessary to maintain or increase the market share of the domestic industry, the ITAC must consider the following aspects:

- i. the desirability of the applicant or other parties making a demonstrably palpable and binding commitment as to measures they will apply to ensure that the market share of local industry will be maintained or increased if the mooted instrument is implemented;
- ii. what such commitments, if any, the applicant or other parties have made in this respect; and
- iii. the probable effect of those commitments on the market share of local industry.<sup>45</sup>

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<sup>42</sup> See Proposed amendments to the Price Preference System (PPS) Policy Guidelines published in *GG* No 41940, Notice R 1012 on 28 September 2018 on the exportation of ferrous and non-ferrous waste and scrap metal, GN No 464 in *GG* 43670 of 1 September 2020.

<sup>43</sup> GN 476 in *GG* 39945 of 21 April 2016 at para 1.

<sup>44</sup> 2016 Trade Policy Directive at paras 1.1-1.3.

In each instance, the ITAC must specifically consider the following factors for determination, for the likely effect of the obligations on the following, amongst others:

- i. Job creation or job retention;
- ii. Industrial productivity;
- iii. Investments in plants and research;
- iv. Economic investment, and related activities by small enterprises, black-owned or black-managed businesses, and Common Customs Area supply chains; and
- v. Pricing of outputs.<sup>46</sup>

Ultimately, the ITAC is free to apply one or more of the guidelines specified in paragraph 3 of the 2016 Trade Policy Directive, in whole or in part, in respect of a specific application.<sup>47</sup> The 2016 Trade Policy Directive augments section 10 of the Amended Tariff Investigations Regulations.<sup>48</sup> However, the 2016 Trade Policy Directive was also not preceded by a prior public consultation process through the Government Gazette.

In summation, to date there have been three Trade Policy Directives promulgated by the Minister under section 5 of the ITAA. These are the 2013 Trade Policy Directive and the 2020 Trade Policy Directive on metal waste and scrap, and the 2016 Trade Policy Directive on the amendment of customs duties. A study of the regime of these three Trade Policy Directives, including draft Policy Directives, guidelines and ITAC investigations, reveals an inconsistent approach to the prior public consultation approach.<sup>49</sup> While the 2013 Trade Policy Directive was preceded by a prior public

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<sup>45</sup> 2016 Trade Policy Directive at paras 2.1-2.3.

<sup>46</sup> 2016 Trade Policy Directive at paras 3.1-3.5.

<sup>47</sup> 2016 Trade Policy Directive at para 4; For a comprehensive discussion of the regime for the amendment of custom duties and the 2016 Trade Policy Directive, see Vinti C “Opening pandora’s box: the confidentiality clause in the international trade administration commission amended tariff investigations regulations” (2019) 31(1) *South African Mercantile Law Journal* 91; Vinti C “Regulation 22 of the amended tariff investigations regulations and the right to ‘procedural fairness’ (2020) 53 *De Jure* 212; Vinti C “The scope of the powers of the minister of finance in terms of section 48(1)(b) the customs and excise act 91 of 1964: an appraisal of recent developments in case law” (2018) 21 *Potchefstroom Electronic Law Journal* 1.

<sup>48</sup> See Vinti (2020) at 217.

<sup>49</sup> Draft Amendment Export Control Guidelines, Notice 345 of 2014 in *GG* 37605 of 9 May 2014, where interested parties were given three weeks to comment; Draft Policy Directive on the exportation of ferrous and non-ferrous waste and scrap metal, GN 33 in *GG* 36090 of 25 January 2013, where interested parties can be given four weeks to comment; Proposed Amendments to the Price Preference System (PPS) Policy Guidelines published in *GG* No. 37992, Notice R 714 on 12 September 2014, on the Exportation of Ferrous and Non- Ferrous Waste and Scrap, GN No R1211 in *GG* 39499 of 11 December 2015, where interested parties were given four weeks to comment; Amendment to Government Notice No R1211 dated 11 December 2016, regarding the proposed amendments of *GG* No 37992 , Notice R 714 on September 2014 on the Exportation of Ferrous and Non-Ferrous Waste and Scrap, GN No R16 in *GG* 39580 of 8 January 2016; International Trade Administration Act (71/2002): Renewal of the

consultation, the same cannot be said of the 2016 and 2020 Trade Policy Directives. This is particularly disconcerting since the 2020 Trade Policy Directive, in tandem with the Notice issued in terms of section 6 of the ITAA, went as far as to impose an export ban on the export of scrap metal. This export ban had obvious financial implications for exporters of scrap metal in South Africa, who were compelled during the period of the export ban to sell all their scrap at the discounted prices of the PPS. This poses the question as to how trade policy formulation must occur under section 5 of the ITAA. This problem is compounded by the fact that it is unclear on which legal basis an interested party can approach the Minister to make “representations” so that s/he can issue a Policy Directive under section 5 of the ITAA. This then calls for a discussion of how trade policy must be formulated by the Minister under section 5 of the ITAA.

## 5 AN EVALUATION OF THE PROCESS OF TRADE POLICY FORMULATION UNDER SECTION 5 OF THE ITAA

At the outset, it must be noted that this article does not question the authority for the policy-making powers of the Minister under section 5 of the ITAA. That is settled law.<sup>50</sup> Neither is this a trial of the rationale for the trade policy on scrap metal and waste nor that of the amendment of tariffs – these are matters that are beyond the scope of this article.<sup>51</sup> Rather, this article seeks to offer an exposition of the process of trade policy formulation by the Minister under section 5 of the ITAA.

It is prudent to commence this analysis by looking at the purpose and context of section 5 in line with the approach of the court in *Natal Joint Municipal Pension Fund v Endumeni Municipality (Endumeni (2012))*.<sup>52</sup> In essence, this approach states that the purpose of legislation determines the construal of its provisions, which purpose must be

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Policy Directive on the exportation of ferrous and non-ferrous waste scrap metal, Notice 454 of 2018 in GG 41836 of 14 August 2018, which gave interested parties two weeks to comment; Extension of the Policy Directive on the Exportation of ferrous and non-ferrous waste and scrap metal, Notice 257 of 2019 in GG 42436 of 2 May 2019, which gave interested parties two weeks to comment; International Trade Administration Act (71/2002): Extension of the Policy Directive on the exportation of ferrous and non-ferrous waste and scrap metal, Notice 131 in GG 43058 of 28 February 2020 which gave interested parties two weeks to comment.

<sup>50</sup> *SCAW (2012)* at para 32; *South Africa Sugar Association v Minister of Trade and Industry [2017]* 4 All SA 555 (GP) (*Sugar Association (2017)*) at para 30; *Pioneer Foods (Pty) Ltd v Minister of Finance [2018]* 4 All SA 428 (WCC) (*Pioneer Foods(2018)*) at para 5.

<sup>51</sup> See in this regard, Chitaka T *Sustainability performance analysis and decision-making for minerals beneficiation: a South African iron and steel scrap case study* (unpublished MPhil thesis, University of Cape Town, 2015); Venter C “Economic Report on the Impact of an Export Restriction on Scrap Metal in South Africa” (2011) *Econex Research Note 24* available at [https://econex.co.za/wp-content/uploads/2015/04/econex\\_researchnote\\_24.pdf](https://econex.co.za/wp-content/uploads/2015/04/econex_researchnote_24.pdf) (accessed 20 June 2020).

<sup>52</sup> 2012 (4) SA 593 (SCA) at para 18; *Jaga v Donges* 1950 (4) SA 653 (A) at 663-664. See *Pioneer Foods (2018)* at para 27.

gleaned from the context of the statute in question. According to the then Deputy Minister of Trade and Industry, when the ITAA was being passed in the National Council of Provinces (NCOP), trade policy is steered by trade administration which must be guided by national interests and policy objectives. It should not be guided by “special interests” and “ad hoc lobbying”, which was prevalent in the past.<sup>53</sup> This means that trade policy under section 5 must be prompted by government trade policy. A contrary approach would lend the process to “special interests” and “ad hoc” policy objectives, which do not advance the trade policy objectives of the government. It has been held that “bias” occurs when a “deliberative process is subverted” by accepting “representations” and hearing one party to the intentional exclusion of the other.<sup>54</sup> This charge could be laid against the 2020 Trade Policy Directive. It was requested by the “domestic consuming industry” and does not evince the concerns of some of the metal recycling industry and scrap metal collectors.<sup>55</sup> It is unclear how one can approach the Minister to issue a Trade Policy Directive and the legal process that follows to assess the veracity of this request.

Furthermore, the then Deputy Minister of Trade and Industry also stated that the duty of the Minister to consult stakeholders in issuing Trade Policy Directives is required by the Constitution. This constitutes “good governance”.<sup>56</sup> The Department of Trade, Industry and Competition endorsed this approach in the ITAA, which emanated from the discussions of the committees of the National Assembly and the NCOP, as well as the submissions from stakeholders.<sup>57</sup> The requirement that the Minister must publish

<sup>53</sup> The Deputy Minister of Trade and Industry “NCOP Debate of the International Trade Administration Bill” 13 November 2002 at 48 available at [https://www.parliament.gov.za/hansard?sorts\[date\]=-1&queries\[search\]=2002&perPage=20](https://www.parliament.gov.za/hansard?sorts[date]=-1&queries[search]=2002&perPage=20) (accessed 2 June 2020).

<sup>54</sup> *Chairman: Board On Tariffs and Trade v Brenco Incorporated* (285/99) [2001] ZASCA 67 (25 May 2001) (*Brenco* (2001)) at para 65.

<sup>55</sup> Jooste R “Price Preference System: Only scraps are left for the metal recyclers” *Business Maverick* 1 December 2020 available at [https://www.dailymaverick.co.za/article/2020-12-01-price-preference-system-only-scraps-are-left-for-the-metal-recyclers/?tl\\_inbound=1&tl\\_groups\[0\]=80895&tl\\_period\\_type=3&utm\\_medium=email&utm\\_campaign=Business%20Maverick%20Wednesday%20%20December%20Ninety%20One%20Offshore&utm\\_content=Business%20Maverick%20Wednesday%20%20December%20Ninety%20One%20Offshore+CID\\_e038a73b2dc2509732268e4b0bf34146&utm\\_source=TouchBasePro&utm\\_term=Price%20Preference%20System%20Only%20scraps%20are%20left%20for%20the%20metal%20recyclers](https://www.dailymaverick.co.za/article/2020-12-01-price-preference-system-only-scraps-are-left-for-the-metal-recyclers/?tl_inbound=1&tl_groups[0]=80895&tl_period_type=3&utm_medium=email&utm_campaign=Business%20Maverick%20Wednesday%20%20December%20Ninety%20One%20Offshore&utm_content=Business%20Maverick%20Wednesday%20%20December%20Ninety%20One%20Offshore+CID_e038a73b2dc2509732268e4b0bf34146&utm_source=TouchBasePro&utm_term=Price%20Preference%20System%20Only%20scraps%20are%20left%20for%20the%20metal%20recyclers) (accessed 3 December 2020); MacKay D “New Policy Directive on the export of scrap and waste metal” 9 July 2020 available at <https://xa.co.za/worrying-new-policy-directive-on-the-export-of-scrap-and-waste-metal/> (accessed 12 July 2020); Markram B “SA’s recyclers poised for court if government passes scrap export directive” *Metal Bulletin* 14 June 2013 available at <https://www.metalbulletin.com/Article/3218924/SAs-recyclers-poised-for-court-if-government-passes-scrap-export-directive.html> (accessed 20 July 2020).

<sup>56</sup> The Deputy Minister of Trade and Industry (2002) at 49.

<sup>57</sup> The Deputy Minister of Trade and Industry (2002) at 49.

such Policy Directives in the Gazette was also deemed as “good governance”.<sup>58</sup> It is presumed here that “good governance” evokes “transparency, accountability, participation, rule of law, effectiveness, efficiency, proportionality, consistency and coherence”.<sup>59</sup> Thus the purpose and contextual history of the ITAA explicitly clarifies that the policy-making process of the Minister under section 5 requires prior public consultation with interested parties.

Secondly, a textual reading of section 5 of the ITAA confirms the purposive and contextual reading of this section. This is because section 5 of the ITAA requires that the Minister can only formulate trade policy in line with procedures and requirements stipulated by the Constitution or any other applicable law. The Constitution requires that public administration must be open, transparent and accountable.<sup>60</sup> Furthermore, section 195(1)(e) of the Constitution demands that the public must be “encouraged to participate in policy-making”. Thus the Constitution requires that the public must participate, or be consulted, in an open and transparent manner during trade policy formulation under section 5 of the ITAA.

Thirdly, “rationality” demands that the Minister consult with interested parties when formulating trade policy. “Rational” decision making is a requirement of the principle of legality, which is an element of the rule of law.<sup>61</sup> The objective of the “rationality” enquiry is not to establish whether there are other mechanisms that can be employed, but whether the instrument identified is rationally linked to the goal one seeks to achieve.<sup>62</sup> If it is not, it will not pass constitutional muster.<sup>63</sup> Furthermore, the process of making a decision and the merits of a decision must be rational.<sup>64</sup>

<sup>58</sup> The Deputy Minister of Trade and Industry (2002) at 49.

<sup>59</sup> Denkers J & Jägers N “The World Trade Organisation and human rights: the role of principles of good governance” (2008) 11(2) *Potchefstroom Electronic Law Journal* 1 at 3.

<sup>60</sup> Section 195(1)(f)-(g) and sec 1(d) of the Constitution.

<sup>61</sup> *Minister of Home Affairs v Scalabrini Centre, Cape Town* 2013 (6) SA 421 (SCA) (*Scalabrini* (2013)) at para 64; *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) (*Pharmaceutical Manufacturers* (2000)) at para 85; *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) (*Albutt* (2010)) at para 49; See also, Hoexter C *Administrative law in South Africa* 2<sup>nd</sup> ed Claremont: Juta (2012) at 124; Hoexter C “The principle of legality in South African administrative law” (2004) 4 *Maquarie Law Journal* 167 at 169; Konstant A “Administrative action, the principle of legality and deference: the case of *Minister of Defence and Military Veterans v Motau*” (2015) 7 *Constitutional Court Review* 68 at 76; Murcott M “Procedural fairness as a component of legality: is a reconciliation between *Albutt* and *Masetlha* possible?” (2013) 130(2) *South African Law Journal* 260 at 267.

<sup>62</sup> See *Albutt* (2010) at para 51.

<sup>63</sup> See *Albutt* (2010) at para 51; *Scalabrini* (2013) at para 64; *Pharmaceutical Manufacturers* (2000) at para 85.

<sup>64</sup> *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC) (*Democratic Alliance* (2013)) at para 34.

To this end, the Constitutional Court has established that “rationality” comprises “procedural” and “substantive” rationality, which are intertwined and cannot be “separated”.<sup>65</sup> This is because the decision in question and the process followed in making such a decision must be rational.<sup>66</sup> Rationality requires an analysis of the process.<sup>67</sup> If not, then one is compelled to assess whether a decision is correct based on “post hoc reasoning”.<sup>68</sup> This is because challenges faced in the process used to make a decision denote a “faulty rational link”.<sup>69</sup> This analysis depends on the facts of a particular case.<sup>70</sup> Thus, it is a logical conclusion that the process that preceded a decision needs to be rationally connected to the fulfilment of the objective for which the power is bestowed.<sup>71</sup>

In this regard, the courts have made it clear that there is no general obligation to consult interested parties in respect of policy formulation.<sup>72</sup> However, the courts have accepted that interested parties must be consulted when they have “special knowledge” and “experience” that would “assist” in the formulation of policy.<sup>73</sup> The “context” of the policy may also advocate for consultation, as is often the case with international trade matters.<sup>74</sup> This consultation must be fundamental because it promotes “responsiveness, participation, and transparency” that must regulate policy formulation.<sup>75</sup> Building on this approach, rationality requires that, in respect of national policy development, there must be a “genuine effort” to acquire the views of industry and the public.<sup>76</sup> In this way, a candid effort must be made to elicit the views that would assist the policymaker to

<sup>65</sup> *National Energy Regulator of South Africa & another v PG Group (Pty) Limited* 2019 ZACC 28 (*PG Group* (2019)) at para 48; *Democratic Alliance* (2013) at para 34; See also, Krüger R “The South African constitutional court and the rule of law: the *Masethla* judgment, a cause for concern?” (2010) 13(3) *Potchefstroom Electronic Law Journal* 468 at 484.

<sup>66</sup> *Democratic Alliance* (2013) at para 34; *Albutt* (2010) at para 72.

<sup>67</sup> *PG Group* (2019) at para 48.

<sup>68</sup> *PG Group* (2019) at para 48.

<sup>69</sup> *PG Group* (2019) at para 50.

<sup>70</sup> *PG Group* (2019) at para 50.

<sup>71</sup> *PG Group* (2019) at para 49; *Democratic Alliance* (2013) at paras 36-37.

<sup>72</sup> *Scalabrini* (2013) at para 70.

<sup>73</sup> *Scalabrini* (2013) at para 72; *Democratic Alliance* (2013) at para 34; *Minister for Justice and Constitutional Development v Chonco* 2010 (4) SA 82 (CC) at para 30; *ETV* (2017) at para 37; *The National Treasury v Kubukeli* 2016 (2) SA 507 (SCA) at para 16; Vinti C “The right of ‘interested parties’ to be heard during an anti-dumping investigation conducted by the national treasury on behalf of the minister of finance” (2020) 137(4) *South African Law Journal* 713 at 729-731.

<sup>74</sup> See *Albutt* (2010) at para 72; *Pioneer Foods* (2018) at para 35; *Sugar Association* (2017) at para 30; *Brenco* (2001) at para 17.

<sup>75</sup> *Scalabrini* (2013) at para 70; *Albutt* (2010) at para 71.

<sup>76</sup> *ETV* (2017) at para 37.

acquire a holistic “picture” of the policy in question.<sup>77</sup> In this respect, interested parties must be at liberty to comment in the formulation of a policy and it is cardinal that these representations must be submitted to the policymaker.<sup>78</sup> Thus consultation is fundamental, particularly in respect of national policy development, because it promotes an interaction of ideas that may assist the policymaker to ensure that policy-formulation is as “informed as possible for the good of all, *not some*” [own emphasis].<sup>79</sup> It must be noted, though, that this consultation is not a “consensus-seeking exercise”.<sup>80</sup>

Ultimately, “rationality” is a constitutional safeguard that promotes good governance and prevents arbitrariness and abuse of power, which must be used prudently.<sup>81</sup> The formulation of policy, especially that which is preceded by public participation and with outside expertise, is a fundamental instrument of government.<sup>82</sup> This is so because an adequately researched policy lends rationality, coherence, predictability and consistency to decision-making and thus negates the need for arduous inquiries into the history and nature of an issue each time a policy decision is made.<sup>83</sup> Thus, procedural rationality requires prior public consultation before the issuing of a Trade Policy Directive under section 5 of the ITAA.

It can be argued that the right to be consulted in trade policy formulation on the ground of procedural rationality is narrower than the right conferred by section 195 of the Constitution. Whether viewed from the broader perspective of section 195 of the Constitution or the narrower perspective of procedural rationality, the Minister is compelled, at the very least, to consult with interested parties. The value of prior public consultation and transparency is illustrated by the fact that the terms of the 2013 Trade Policy Directive have never been amended, whereas the 2020 Trade Policy Directive has been amended twice within four months of being promulgated. Thus the 2020 Trade Policy Directive falls short of the requirements of the court in *Arun* (2015), which were stated earlier in this discussion, that policy must be consistent and ensure certainty to avoid a “case by case” approach, as appears to be happening with the 2020 Trade Policy Directive.

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<sup>77</sup> *ETV* (2017) at para 37; *Janse van Rensburg v The Minister of Trade and Industry* 2001 (1) SA 29 at para 24; *Vinti* (2020) at 730-732.

<sup>78</sup> *ETV* (2017) at para 37; *Vinti* (2020) at 730-732.

<sup>79</sup> *ETV* (2017) at para 38.

<sup>80</sup> *ETV* (2017) at para 37.

<sup>81</sup> *ETV* (2017) at para 6.

<sup>82</sup> *Booth v Minister of Local Government, Environmental Affairs & Development Planning; City of Cape Town v William Booth Attorneys* 2013 (4) SA 519 (WCC) (*Booth* (2013)) at para 29.

<sup>83</sup> *Booth* (2013) at para 29; *Hoexter* (2012) at 319-320.

In the same breath, it is my view that trade policy formulation that is not preceded by a prior public consultation can be deemed “arbitrary”. While “arbitrariness” overlaps with “rationality”, it is a higher standard and is concerned with the “justification” for a decision, unlike the latter.<sup>84</sup> This is because it is a requirement of the rule of law that trade policy formulation must not be “arbitrary”.<sup>85</sup> A policy could be deemed “arbitrary” if it is prompted by reasons which do not “justify” the decision made.<sup>86</sup> The Constitution also requires that trade policy formulation must be informed by “plausible” grounds.<sup>87</sup> Thus, if a policy decision is made without a basis or valid basis, it is “arbitrary”.<sup>88</sup> Consequently, a trade policy formulated without prior public consultation can be deemed “arbitrary”. This must also include policies that do not consider the views of all interested parties.

Furthermore, in *City of Cape Town v South African National Roads Authority Limited*, the court held that the default approach in public administration must be one of “openness” rather than “secrecy”, even in instances relating to national security.<sup>89</sup> Even in light of the context of the COVID-19 pandemic, the High Court has unequivocally stated in *Khosa v Minister of Defence and Military Veterans* that public administration as required by the Constitution “must be accountable and transparency must be fostered by providing the public with timely, accessible, accountable and accurate information”.<sup>90</sup>

In summation, the text, purpose and context of section 5 and the rule of law (i.e. rationality and the duty to ensure that policies must not be arbitrary), and the Constitution, require prior public consultation with all interested parties when issuing Trade Policy Directives under section 5 of the ITAA. This public consultation must be conducted in a manner that promotes openness, accountability and transparency. The same considerations must apply, in general, to *all* trade policy formulated under the ITAA.

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<sup>84</sup> *Minister of Constitutional Development v South African Restructuring and Insolvency Practitioners Association* 2018 (5) SA 349 (CC) (*South African Restructuring and Insolvency Practitioners*) at para 55.

<sup>85</sup> *Pharmaceutical Manufacturers* (2000) at para 85.

<sup>86</sup> *South African Restructuring and Insolvency Practitioners* (2018) at para 55.

<sup>87</sup> *South African Restructuring and Insolvency Practitioners* (2018) at para 49.

<sup>88</sup> *South African Restructuring and Insolvency Practitioners* (2018) at para 49; *S v Makwanyane* 1995 (3) SA 391 (CC) at para 156; *Pharmaceutical Manufacturers* (2000) at para 84.

<sup>89</sup> *City of Cape Town v South African National Roads Authority Limited* 2015 (3) SA 386 (SCA).

<sup>90</sup> *Khosa v The Minister of Defence and Military Veterans* 2020 (7) BCLR 816 (GP) at para 8.



## 6 CONCLUSION

International trade is regulated by both legislation and “policy”. Legislation has a clear process for its formulation and adoption as required by the Constitution, which allows for interested parties to make submissions. The same cannot be said for “policy”. “Policy” has not only proven difficult to define, but even the process that leads to its adoption has proven elusive to delineate. This ambiguity has an impact on the right of interested parties to participate in the formulation of international trade policy that affects them. It is against this backdrop that this article has proffered an exposition of the process of trade policy formulation under section 5 of the ITAA. The process of trade policy formulation under section 5 must be in accordance with the Constitution and other laws. However, this approach does not explain what this process entails and the rights of affected persons. This may lend itself to irrational and arbitrary policy decisions.

This article then employed a case study of the Trade Policy Directives issued under section 5 of the ITAA to illustrate the uncertainty surrounding the process of policy formulation under this provision. In this regard, it is my view that trade policy formulation under section 5 of the ITAA must ensure prior public participation or consultation as required by the Constitution, procedural rationality, and to avoid a charge of arbitrariness. This consultation must be conducted in an open, accountable and transparent manner. In the final analysis, it is my view that these are the same considerations that must apply, in general, to all trade policy formulation under the ITAA. A contrary approach would be fatal to the trade policy decision since the policymaker does not have a complete “picture” of all relevant information.

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### **Thesis**

Chitaka T *Sustainability performance analysis and decision-making for minerals beneficiation: a South African iron and steel scrap case study* (unpublished MPhil thesis, University of Cape Town, 2015).