South Africa's Chicken Wars

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South Africa's poultry industry has been fighting a war on imports since 1999. The battles in this war include the use of anti-dumping, significantly increased customs duties, SPS measures in the form of full country-bans against outbreaks of highly pathogenic avian influenza (HPAI), and a free trade agreement safeguard measure against imports from the European Union (EU). Anti-dumping duties against the United States have been in place since 1999 and were recently extended to 2029, while anti-dumping duties are also in place against imports from Brazil, Denmark, Germany, Ireland, the Netherlands, Poland, Spain and the UK. Customs duties on whole birds have been increased from 27% to 82%, and for frozen bone-in portions from 18% to 62%. Once there is an HPAI outbreak in a country, all imports from that country are banned without the application of regionalism, and the ban sometimes remains in place as long as two years after the outbreak has been brought under control. South Africa also imposed a free trade agreement safeguard for four years on poultry imported from the EU. All of these measures have combined to make poultry one of the most protected industries in South Africa.

Keywords: anti-dumping, SPS, HPAI, safeguards, customs duties, WTO, trade protection, trade remedies, poultry

1 INTRODUCTION

Poultry is the biggest source of protein in the average South African's diet and makes up two thirds of all meat sold in that country. The poultry industry has been fighting imports since 1999 and has used anti-dumping, customs tariff increases, highly pathological avian influenza (HPAI) bans, and a free trade agreement safeguard to obtain ever-increasing levels of protection.

The term 'chicken war' is defined in the *Dictionary of Trade Policy Terms*.[1] Whereas the original 'chicken war' was waged for eighteen months between the European Economic Community and the United States of America (US), South

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1 Walter Goode, *Dictionary of Trade Policy Terms* 67 (4th ed., Cambridge University Press 2003) defines it thus: '**Chicken War**: a period of trade tension between the United States and the ***European Economic Community*** lasting from Jul. 1962 to January 1964 … triggered by the extension of ***variable levies*** under the ***Common Agricultural Policy …*** which trebled German import charges. This led to an immediate and drastic decline in the export of United States poultry to Germany … Claim and counterclaim for ***compensation*** followed. The establishment of a panel of experts by the GATT in November 1963 provided the basis of a solution' (original emphasis).

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Africa's chicken wars over the past twenty-five years have had a much wider aim, with anti-dumping action affecting nine countries on three continents, the safeguard affected imports from the whole of the European Union (EU), HPAI bans affected imports from all affected countries, and tariff increases imports from all countries other than the EU.[2]

The poultry industry is a major contributor to South Africa's agricultural GDP. It directly employs approximately 50,000 people,[3] with production at over 1,755,000 tons.[4] Despite this, production failed to keep up with the growth in domestic demand, and imports increased from less than 100,000 tons in 2000 to more than 500,000 tons by 2016.[5] While research shows that increased protection does not lead to significant changes in the domestic production volumes,[6] the South African Poultry Association (SAPA) alleged that removing all protection could lead to 23,000 job cuts.[7]

The South African poultry industry is regarded as the fifth most efficient in the world and its production costs are allegedly below those in the EU.[8] This notwithstanding, the then-Minister of Trade indicated that South Africa 'must defend its chicken farmers from an influx from Europe or face the collapse of the local industry'.[9]

Following this introduction, section 2 discusses the anti-dumping actions lodged by the industry, while section 3 considers customs duty increases. Section 4 provides an overview of the application HPAI bans, and section 5 contains a brief analysis of the free trade agreement safeguard, while section 6 concludes.

2 THE FIRST WAR: ANTI-DUMPING

2.1 Introduction

Just like anti-dumping is the favourite trade protection tool in the world, it is the favourite trade protection tool of SAPA. Four proceedings have resulted in the

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2 Jing Woei Chien Lawrence Edwards & Ayanda Hlatshwayo, *Importer Price Effects of Tariffs in the Context of Preferential Trade Agreements*, SA-TIED Working Paper 226, 4 (2024).

3 South African Poultry Association '2018 Industry Profile', at 16.

4 *Ibid.*, at 12.

5 N. Cochrane, J. Hansen, & R. Seeley *Poultry Production and Trade in the Republic of South Africa: A Look at Alternative Trade Policy Scenarios*, in *Economic Research Service, US Department of Agriculture* 4 (Cochrane 2015).

6 *Ibid.*, at 14.

7 National Agricultural Marketing Council, *Macroeconomic Impact of the South African Broiler Industry Applying the South African Inforum Model (SAFRIM)* (2015).

8 Brinkhuis, Pitman & Masemola, *SA Must Shut Down Dumped Chicken Imports to Prevent Industry Collapse* (2017), http://www.businesslive.co.za/bd/opinion/2017-01-26-sa-must-shut-down-dumped-chicken-imports-to-prevent-industry-collapse (accessed 7 Apr. 2024).

9 Kevin Cowley, *Chicken Farmers at Risk – Davies,* Business Report 26 Jan. 2017, 18 (2017).

initiation of ten anti-dumping investigations from 1999 to 2021, along with several sunset reviews to maintain and increase the level of anti-dumping duties.

Critical in the International Trade Administration Commission (Commission) determination of dumping is the strong US and EU preference for white meat that 'causes much of the dark meat to be exported or sold at lower prices',[10] which has resulted in the Commission sometimes replacing exporters' net realizable value-allocated costs with costs allocated on the basis of the weight of the respective cuts.

2.2 The United States

2.2[a] *The Original Investigation*

The US is the world's biggest poultry producer.[11] US consumers have a strong preference for 'white breast meat over dark poultry meat'.[12] The question arises whether the dark meat is 'dumped', or whether the export prices, even though lower than for breast meat, represent a 'fair price'. Production costs 'can either be based upon an Income Appraisal Approach or a Costs of Production Approach'.[13] This is where the battle lines between South Africa and the US were drawn, as South Africa insisted on applying the cost by weight approach, whereas US producers typically apply the 'net realisable value' approach. The WTO Dispute Settlement Body has ruled that cost methodologies based on 'relative sales value ("value-based allocation") and … on the weight of the products ("weight-based allocation")' are both reasonable.[14] The consequence of the panel's finding is that where an exporter has applied either of the two methodologies, the investigating authority should accept such methodology.

In November 1999, the Board on Tariffs and Trade (the Board) initiated an anti-dumping investigation covering whole chickens and bone-in portions.[15] It found a 'particular market situation' in the US because of the preference for white chicken meat[16] and that US domestic sales of dark meat were not made in the

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10 Nathan E. Wideman, Corliss O'Bryan & Philip G Crandall, *Factors Affecting Meat Colour and Consumer Preferences – a Review*, 72 World's Poultry Sci. J. 355–356 (2016), doi: 10.1017/S0043933916000015.

11 OECD (2018) *Market Examinations in Mexico: Case Study of the Chicken Meat Market* 39, https://www.oecd.org/daf/competition/ENG-WEB-REPORT-Chicken-MeatMarketMexico2018.pdf (accessed 28 Mar. 2024).

12 Wideman et al., *supra* n. 10, at 355, quoting the National Chicken Council survey of 2012. *See also* Richard Henry & Graeme Rothwell, *The World Poultry Industry* 12 (1995).

13 Stephen L. Ott & Kirsti Bergmeier, *Determining Poultry Indemnity Values: Examples and Lessons Learned from Poultry Disease Outbreaks in Canada and the United States* 3 (2005).

14 Panel Report, *China – Broilers*, para. 7.167.

15 Board Report 4088, para. 2.1.1.

16 *Ibid*., paras 4.6.2.1 and 4.7.1.1.

ordinary course of trade as these sales were made at a loss,[17] since costs were not allocated 'to the usual accumulation of costs principle'.[18] It 'concluded that the Exporter's treatment of its cost allocations resulted in a misallocation of cost and in addition … that the cost allocations were not reasonable'.[19]

Dumping margins were determined for two cooperating exporters (ZAR2.24/kg and ZAR2.45/kg), while the residual margin of dumping (ZAR6.96/kg) was based on the highest normal value of co-operating exporters (without adjustments).[20]

2.2[b] *The Sunset Reviews*

The first sunset review was initiated in September 2005.[21] There were no imports from the US following the imposition of anti-dumping duties. No likelihood of a recurrence of injury was found in the preliminary determination,[22] but following comments from the domestic industry and as exporters did not cooperate, the Commission's final determination was that US leg quarter prices would undercut both the SACU product and Brazilian imports.[23] It therefore decided to maintain the duties.

The second sunset review was initiated in June 2011.[24] Although the US exporters' association (USAPEEC) and the Embassy of the US commented, no exporters cooperated. The Commission relied on facts available (those in the application) to determine the likelihood of a recurrence of dumping. Although some problems plagued the injury likelihood analysis, in the absence of the exporters' cooperation, the Commission found a likelihood that injury would recur. In addition, it withdrew the individual treatment for the companies that had participated in the original investigation, and significantly increased the level of duties.[25]

The third sunset review was initiated in March 2017.[26] Exporters again elected not to participate. USAPEEC indicated that 'it did not register as an interested party in this third sunset review because its members lacked confidence

17 *Ibid.*, paras 4.6.2.2 and 4.7. For one exporter it was found that certain products were sold profitably and for these products normal values were determined on the basis of domestic sales, notwithstanding the finding of a 'particular market situation' – *ibid.*, para. 4.8.1.1.
18 *Ibid.*, para. 4.6.2.2.
19 *Ibid.*, paras 4.6.2.2 and 4.6.2.3.
20 *Ibid.*, para. 4.9.2.
21 Commission Report 195 – *Poultry from the US*, 3.
22 *Ibid.*, at 4.
23 *Ibid.*, at 4.
24 Commission Report 390, *Bone-in Cuts from the US (Second Sunset Review)*, 3.
25 *Ibid.*, at 15.
26 Commission Report 564, *Bone-in Cuts from the US (Third Sunset Review)*, at 3.

that their submissions will be taken into account or the anti-dumping duty will be based on information they would have provided'.[27]

Although importers indicated that non-subject goods were included in the review and that there were variances in grades, the Commission indicated that such information was 'not substantiated with positive evidence'.[28] Normal value was again determined on the applicant's information, based on an allegation of a particular market situation. A single normal value was calculated for leg quarters, thighs, drumsticks and 'other' cuts combined for the period July 2015 to June 2016, while a second normal value was calculated for breasts and all wings (combined) for the period July to December 2016.[29] The two normal values were then compared to the individual export prices of the six different cuts. Interested parties commented that the WTO had found that producers' domestic costs should be accepted whether they allocated costs on the basis of weight or net realizable value, and that the Commission was wrong in insisting on an allocation on the basis of weight. However, since no exporters cooperated, the Commission relied on the information in the application.[30]

Imports from the US had increased significantly during the review period because of an anti-dumping duty-free quota the US forced on South Africa to remain eligible under the Africa Growth and Opportunity Act.[31] Accordingly, there was sufficient information for a finding of a likelihood of a recurrence of injury, especially as imports under the anti-dumping duty free quota undercut industry prices.[32] The Commission maintained the level of anti-dumping duties.

The fourth sunset review was initiated in November 2022. Again, no US exporters cooperated and the decision to maintain duties for another five years,[33] until 2029, was based on facts available. By the time of the next sunset review, the duties will have been in place for twenty-eight years, making it one of the longest-lasting anti-dumping duties in the world.

2.3 Brazil

In June 2011, South Africa initiated an anti-dumping investigation against whole birds and frozen boneless cuts imported from Brazil.[34] Four exporters participated in the investigation.[35]

27 *Ibid.*, at 7.
28 *Ibid.*, at 13.
29 *Ibid.*, at 15–17.
30 *Ibid.*, at 21.
31 Commission Report 564, *supra* n. 24, at 23–24.
32 *Ibid.*, at 25.
33 Commission Report 716, *Bone-in Cuts from the US (Fourth Sunset Review)*, at 100.
34 N 404 of GG 34377 of 24 Jun. 2011.
35 Commission Report 399, *Poultry from Brazil* (Report 399), at 3–4.

For normal value, the application relied on poultry retail prices on a single day in a single supermarket,[36] while the export price for boneless cuts was determined on the weighted average price for all cuts combined.[37] The product classification for whole birds also included carcasses, that is, whole birds with all cuts removed. These carcasses significantly inflated the volume of product imported and, since they were sold at much lower prices, indicated a price that could not be attributed to whole birds.

Only three of SAPA's members participated in the investigation. Although the report indicates that these producers represented more than 50% of total domestic production, there is no record evidence to support this, to indicate how the size of the total domestic industry was determined, or to indicate whether this relates to whole birds, boneless cuts or both. No qualitative analysis of the defined industry was conducted.[38]

The report deals separately with dumping for whole birds[39] and boneless cuts.[40] It indicates that for BRF (an exporter), the normal value for whole birds was based on the single product that was exported to South Africa. No adjustments were made for domestic discounts, rebates, commission, administrative and marketing expenses, 'trade marketing', warehousing or volume adjustments,[41] while no adjustments were made to the export price for discounts, rebates, commission, administrative and marketing expenses, and warehousing.

The Commission rejected Seara's cost information and based the normal value for whole birds on the domestic price for BRF, making adjustments for domestic tax, payment terms, transport and packaging. No adjustment was made for a difference in the levels of trade, despite BRF's domestic selling price being determined as the retail price in a supermarket. No adjustment was made to the export price for payment terms or packaging, despite these costs being adjusted in the normal value determination.

The residual margin of dumping for whole birds was based on the 'adjusted simple average normal value' for BRF, and this was compared to BRF's 'adjusted simple average export price'.[42] No indication is provided why simple, rather than weighted, average prices were used. The residual margin of 40% was significantly higher than BRF's margin.

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36 *Ibid.*, at 19.

37 Since all cuts were classifiable under the same HS code, no other information was available.

38 Appellate Body Reports, *EC – Fasteners (China) (Art. 21.5 – China)*, para. 5.302; *EC – Fasteners (China)*, para. 412; *Russia – Commercial Vehicles*, para. 5.13; Panel Report, *India – Iron and Steel Products*, para. 7.167.

39 Report 399, *supra* n. 35, at 16–21.

40 *Ibid.*, at 47–58.

41 *Ibid.*, at 17.

42 *Ibid.*, at 21.

For boneless cuts, although the report indicates four different cuts sold on the domestic market, a single weighted average normal value was determined, which was compared to the 'weighted average export price based on the volumes of each product sold'.[43] Thus, although the different cuts had different prices and weightings in the domestic and export markets, the Commission compared different baskets of products to each other.[44] For the third exporter, several adjustments were rejected,[45] while for the fourth exporter, movement expenses were adjusted on export sales, but not domestic sales; packaging was adjusted on domestic sales but not export sales, no payment terms adjustment was made on either side, and a single normal value was calculated for all domestic sales.[46] The residual margin of dumping was determined 'using the weighted average dumping margins for' three of the producers (with margins of 6.39%, 19.06% and 3.72%), yet the residual margin of 25.88% is significantly higher than the highest individual margin.[47]

Injury was separately determined for whole birds[48] and boneless cuts.[49] Statistics indicate that there were no whole bird imports in 2008, very little in 2009 and a significant volume in 2010.[50] The HS code for whole birds had changed in November 2009, yet the Commission never obtained import volumes for whole birds prior to the change.[51] Accordingly, there was no basis to determine whether imports increased. Imports from Argentina increased significantly more and to higher levels than those from Brazil, and also undercut Brazilian prices.[52]

Although the final report indicates that there was price undercutting, there is no analysis to show whether undercutting increased or decreased over the investigation period. Whole bird injury was found in respect of increased imports, price undercutting, market share, growth, factors affecting prices and margin of dumping, while for boneless cuts it was found in respect of the same factors plus sales volumes, profit, output and capacity utilization.[53] In the summary on *boneless cuts* it further mentions that the 'information on investment, cashflow, ability to raise capital … do not relate to *whole bird* only', thus confusing the different products under investigation.[54]

43 *Ibid.*, at 48.
44 Panel Reports, *China – Broiler Products*, para. 7.483; *China – X-Ray* Equipment, paras 7.50–7.51.
45 Report 399, *supra* n. 35, at 54.
46 *Ibid.*, at 55.
47 *Ibid.*, at 56.
48 *Ibid.*, at 23–40.
49 *Ibid.*, at 59–69.
50 *Ibid.*, at 23.
51 *Ibid.*, at 23.
52 *Ibid.*, at 44, 46. Prices from Brazil were ZAR8.38/kg, whereas prices from Argentina were R4.91/kg – *see* oral hearing of 16 Jan. 2012 by XA, slide 15 (available on the public file), which also showed that 'whole bird' imports from Brazil represented 41.37% of total imports, whereas those from Argentina represented 49.56%.
53 *Ibid.*, at 23–36 and 59–68.
54 *Ibid.*, at 69.

In some instances, the industry's position deteriorated in 2009, but improved in 2010 and over the full period. No analysis was undertaken on the trends, nor was it analysed why the industry's performance improved when dumped and total imports increased significantly between 2009 and 2010. Some factors were based on company totals and were not product-specific.

No reference is made in the report to other causal link issues submitted to the Commission, such as that a major domestic producer had defrosted chicken pieces after their expiry date, treated them with chlorine, injected them with brine and printed a new expiry date[55]; that the Department of Health had determined that the level of brine with which poultry cuts were injected was in contravention of health regulations[56]; selling of underweight product[57]; and that increased feed costs were responsible for declining profit margins. The report merely indicates that the Commission considered all 'factors other than dumping, as well as factors alleged by interested parties to be detracting from causal link',[58] without any analysis.

Parties submitted that the essential facts letter did not contain all essential facts.[59] The Commission issued a second essential facts letter issued after the Minister referred the matter back to it,[60] which still did not set out all essential facts. Parties complained that confidentiality was granted for information that did not warrant confidential treatment,[61] parties were not granted timely opportunities to see information submitted by other parties,[62] exporters were not advised of the information that would be verified and the preliminary report did not contain 'sufficiently detailed explanations' of the issues of fact and law considered,[63] and that the Commission relied on incorrect import statistics overstating import volumes from Brazil and understating imports from Argentina, but this was not addressed.

In its final report, the Commission indicated that it 'considered that … [t]he essential facts letter *gave a brief description* of all the essential facts to be considered by the Commission, and that *details of what was considered was made available in the final*

55 Herman Scholtz, *'Botox Chicken' to Get the Chop* (6 Feb. 2011), http://www.fin24.com/Companies/Agribusiness/Botox-chicken-to-get-the-chop-20110206 (accessed 17 Mar. 2024).

56 https://www.news24.com/news24/chicken-scandal-state-faults-company-20150429 (accessed 16 Mar. 2024), which discussed the thawing and 'updated' expiry dates and also shows that up to 48% of a product's weight consisted of brine.

57 The National Regulator for Compulsory Specifications indicated that one of the biggest poultry producers 'has been selling short mass chicken products'. *See* https://www.poultryworld.net/poultry/astral-foods-taken-to-court-for-short-measure-chicken-products/ (accessed 17 Mar. 2024).

58 *Ibid.*, at 45.

59 Report 399, *supra* n. 35, at 7–8, 9.

60 *Ibid.*, at 10.

61 WT/DS439/1, para. 2, bullets 6 and 12.

62 *Ibid.*, para. 2, bullets 8, 9, 10 and 11.

63 *Ibid.*, para. 2, bullet 18.

report'.[64] Thus, the Commission itself acknowledged that the essential facts letter only set out a summary, rather than all essential facts.

Brazil declared a WTO dispute against the preliminary determination,[65] contending that the initiation, the conduct of the investigation, and the preliminary determination were inconsistent with the obligations under twenty-nine separate provisions of the Anti-dumping Agreement.[66] Following consultations, the Minister of Trade rejected the Commission's final recommendation to impose definitive anti-dumping duties.

2.4 Germany, the Netherlands and the United Kingdom

2.4[a] *Original Investigation*

South Africa and the EU concluded a free trade agreement in 1999. As a result of duties on poultry products imported from the EU decreasing, customs duties on imports from other countries increasing, the anti-dumping duties against the US, provisional anti-dumping duties against Brazil, and a two-year drought that ravished South Africa,[67] imports of poultry from the EU increased significantly.[68] In 2013 SAPA launched an anti-dumping application against imports of frozen bone-in portions imported from Germany, the Netherlands and the UK. The investigation was initiated in October 2013. Several exporters participated in the investigation.[69]

For a German exporter, the Commission determined that 'chicken leg with backbone' and 'chicken leg quarter' (without backbone) were 'one model for [the] dumping margin calculation', that is, although these products have significantly different costs and prices, no separate normal values or margins of dumping were determined, and no adjustments were made for packaging differences.[70]

The residual margin for Germany was based on the normal value information of the cooperating exporter, yet for the export price it also considered the unverified information for another producer that cooperated originally, but that only supplied export price information. No adjustments were made for payment

64 Report 399, *supra* n. 35, at 10 (emphasis added).
65 WT/DS439/1.
66 *Ibid.*, para. 2.
67 Anis Mohamed Karodia, *The South African Poultry Industry is in dire straits and is facing collapse: Is it a management and political issue*, 3(5) Int'l J. Res. Stud. Agric. Sci. 14 (2017), doi: 10.20431/2454-6224.0305002.
68 Kevin Cowley, *Chicken Farmers at Risk – Davies*, Business Report 18 (26 Jan. 2017) indicates that in the five years after the conclusion of the trade agreement poultry imports from the EU 'tripled to more than 188 million kilograms'.
69 Commission Report 492, *Bone-in Cuts from Germany, the Netherlands and the UK*, at 11–12.
70 *Ibid.*, at 26–27.

terms 'as adjustments to cost of payment terms were company specific'.[71] The residual margin was determined to be 76.52%, as opposed to the 32.72% of the cooperating exporter.

For one producer in the Netherlands, the Commission treated three companies as a single economic entity, yet in determining whether there were sufficient domestic sales, it separately considered the information of each company.[72] In determining a constructed normal value for products not sold in sufficient volumes, it determined the SGA costs on the basis of 'all cooperated (sic) poultry producers' costs' rather than with reference to the costs of the company, while it determined the reasonable amount of profit with reference to that of *other* cooperating producers' profit, excluding that of the other two companies in the group.[73]

For the Netherlands' residual margin, the Commission used one company's domestic sales made in the ordinary course of trade, while the export prices were determined on the basis of all participating exporters, without any adjustments, on the basis that 'the adjustments claimed were company specific'.[74] The residual margin was 22.83%, whereas the highest individual margin was 4.02%.

For the UK, the Commission found that for one exporter, all domestic sales were made below cost, that its costs were not comparable to the other producers' costs, and that the company had not exported directly to SACU, although it could prove that independent traders had exported its products to SACU. The Commission allocated these companies the same margin of dumping as found in respect of the other cooperating UK producer (13.07%).[75] For the residual duty, the same normal value (without any adjustments) was used and compared to the average export price based on Customs statistics, rendering a margin of 33.57%.[76]

Price suppression and price depression were both determined in relation to the average price of all products, rather than on a PCN basis. The Commission found that production cost increases as a result of high feed and energy costs could not be passed on to consumers[77] and, without any analysis, indicated that the growth in the SACU market obviated the 'constrained consumer spending argument'.[78] No analysis was done to determine whether industry would have been able to pass on these costs if there had been no dumping.[79]

[71] *Ibid.*, at 5.
[72] *Ibid.*, at 41.
[73] *Ibid.*, at 45.
[74] *Ibid.*, at 46.
[75] *Ibid.*, at 49.
[76] *Ibid.*, at 50.
[77] *Ibid.*, at 62.
[78] *Ibid.*, at 62. The size of the market grew by only 4% – *ibid.,* at 65.
[79] Panel Report, *Russia – Commercial Vehicles*, paras 7.61–7.66.

The industry's sales volume and value, output, employment, and wages all increased; industry experienced greater growth than that of the total market; annual capital investments doubled over the period; and its market share remained stable, while its productivity remained stable despite employing more workers. Gross profit decreased, as did its return on investment (without any analysis as to increased investment levels) and capacity utilization (because capacity increased faster than output) – with the Commission finding injury on the basis that production 'did not increase enough to enable producers to meet capacity',[80] while net cash flow decreased (likely the result of doubled annual capital expenditure). The figures for output differ in the sections on output and productivity,[81] raising questions as to their accuracy.

In its summary, the Commission found injury on the basis of increased imports, price suppression, price undercutting, profit, return on investments, capacity utilization and cash flow (seven out of nineteen factors). The Commission then indicates a 'but-for' approach, indicating without any analysis that output, profit and employment would have been higher but for the dumping.[82]

In its causal link analysis, the Commission merely included a list of all injury factors, but no analysis was conducted of the impact of non-dumped prices on the industry, despite the fact that non-dumped prices were lower than dumped prices in both 2010 and 2011 (and in 2013).[83] For one major exporter, the margin of dumping was lower than the margin of price undercutting, thus undercutting would still have existed without dumping.

Interested parties submitted information on labour unrest during the investigating period; that the industry's productivity and technology were not on par with that of the exporters; that industry was negatively impacted as a result of short-selling products and by increased feed, fuel, electricity and labour costs; and that a part of the industry's injury was caused by external factors such as increased 'capacity, new entrants and inability to pass on increased input costs and poor consumer demand'[84] Without analysis, the Commission found these issues not to detract from the causal link.

For initiation, some normal values were based on *fresh* bone-in cut prices, which sell at a premium to frozen product, while all normal values related only to September 2012.[85] Interested parties complained that confidentiality was granted

80 Report 492, *supra* n. 69, at 68.
81 *Ibid.*, at 64 and 66.
82 *Ibid.*, at 76.
83 *Ibid.*, at 78.
84 *Ibid.*, at 80.
85 *Ibid.*, at 50.

even where unwarranted[86]; that the Commission failed to inform all known interested parties of the initiation; that it failed to grant extensions despite good cause shown; that the initiation notice did not contain the requisite information; and that the information was more than six months old at initiation.[87]

While the essential facts disclosure sets out the dumping determination in detail, there are concerns on the injury and causality disclosure.[88] The complete essential facts disclosure in this regard is:

> **12. MATERIAL INJURY**
>
> The Commission is considering making a final determination that the imports from Germany, the Netherlands and the United Kingdom may be cumulated.
>
> The Commission is considering excluding for injury purposes imports from manufacturers/exporters that are being considered not being dumped during the period of investigation for dumping.
>
> The Commission is considering making a final determination that the SACU industry is experiencing material injury.
>
> **13. THREAT OF INJURY**
>
> The Commission is considering making a final determination that there is no threat of injury, but rather that the information on threat shows that the industry suffered by the SACU industry has not shown an improvement during in 2013. [sic]
>
> **14. CAUSAL LINK**
>
> 14.1 The Commission is considering making a final determination that there is no causal link between the material injury suffered by the SACU industry and the un-dumped imports originating in or imported from the Netherlands;
>
> 14.2 The Commission is considering causality factors as stipulated in Article 3.5 and other known factors: feed; electricity and fuel costs; labour unrest; negative publicity; brining; SACU producers' business model, and investment in upgraded technology; and
>
> 14.3 The Commission is considering that the remaining dumped imports are significant and other known factors do not sufficiently detract from causal link. Based on these the Commission is considering making a final determination that there is a causal link between the material injury suffered by the SACU industry and the dumped imports originating in or imported from Germany, the Netherlands and the United Kingdom.[89]

SAPA alleged that it represented 72% of total production in SACU, but there is no record evidence supporting this. Interested parties commented that 'SAPA is *estimating* the size of the rest of the SACU industry, and … no party other than those specifically submitting information in support of the application have submitted any information. Therefore there is no basis for SAPS's figures pertaining to the "rest of the SACU industry"'.[90] There is nothing on the record to indicate

[86] *Ibid.*, at 27.
[87] *Ibid.* South African Regulations provide that the investigation period shall normally end within six months before initiation of the investigation – ADR 1.
[88] Panel Report, *Russia – Commercial Vehicles*, paras 7.253–7.256.
[89] Commission Essential Facts Letter (26 Nov. 2014), at 20.
[90] *Ibid.*, at 25.

which of the producers actually supported the application. The cooperating producers represented approximately 44% of total domestic production,[91] but no qualitative analysis was undertaken to ensure that the definition of domestic industry did not introduce a material risk of distortion.[92]

Although it is clear that parties complained about investigation procedures, these issues are not addressed,[93] and the final report indicates that 'this report does not purport to present all comments received and considered by the Commission'.[94]

2.4[b] *Sunset Review (2021)*

In the sunset review, the Commission failed to give interested parties access to the public file for several weeks on the basis that the person responsible for the public file had COVID. However, it failed to make alternative arrangements despite the investigating officers not having COVID.

The Commission refused to provide the exporters with their margin of dumping calculations, indicating that the exporters had to calculate it themselves based on the methodology described in the essential facts letter. However, none of the exporters could recreate the margins, yet the Commission refused to provide more information, indicating that it was itself not in a position to recreate the calculations and that if they had to provide parties with the calculations, they would have to redo the calculations from scratch.[95] It is not clear how the Commissioners could take a decision on the margin of dumping if the investigating officers themselves had no idea how the margins were calculated.

Following the sunset review, the Commission imposed residual anti-dumping duties on exporters that had been found not to be dumping in the original investigation, despite these exporters not having been requested to cooperate. When this issue was raised with the Commission, it simply disregarded the letters and maintained the newly imposed anti-dumping duties. Only several weeks after the matter was enrolled for judicial review did the Commission acknowledge 'an

91 *Ibid.*, at 55. The report defines the industry as 'growers, processors and producers of the subject product' – *ibid.*, at 11. It is not clear how bone-in cuts can be 'grown', and noting that a letter of support was also received from the 'Animal Feed Manufacturers' Association', it appears that this definition violates the Appellate Body's finding in *US – Lamb*, paras 89–96 that upstream producers do not form part of the domestic industry.

92 Appellate Body Report, *EC – Fasteners (China)*, paras 414–416.

93 Report 492, *supra* n. 69, at 15 indicates that 'parties requested ITAC to terminate the investigation on account of procedural errors and the inconsistencies of the Commission's determination with the ADA'. The report does not indicate what these complaints were.

94 *Ibid.*, at 19.

95 Commission letter to XA, available on the public file.

oversight' and agreed to remove the duties on the exempted companies.[96] The duties were only removed on 19 April 2022, with retrospective effect to 23 August 2021, indicating that the duties were illegally in place for 239 days.

2.5 Brazil, Denmark, Ireland, Poland and Spain

An anti-dumping investigation was initiated against Brazil, Denmark, Ireland, Poland and Spain in February 2021. The investigation period for injury was July 2017 to June 2020, and for dumping from July 2019 to June 2020.

Provisional measures were imposed on 17 December 2021, but lapsed as the Commission could not finalize the investigation within the six-month period. The level of the provisional measures[97] had a significant impact on the volume of imports. The Commission made a final recommendation to impose anti-dumping duties varying from 8% to 265% against Brazil, 8%–67% against Denmark, 2.5%–37% against Ireland, 2.3%–97% against Poland, and 7.6%–86% against Spain, while two companies in each of Brazil and Poland were found not to be dumping.[98]

On initiation, the Commission made the curious decision to determine negligible imports on the basis of each individual tariff code, with the result that the same products were not investigated from all countries.[99] This raises the question on how it decided to cumulate imports. Next, despite initiating an investigation against five countries, each with several exporting producers, the Commission failed to resort to sampling, and twenty-eight exporters cooperated in the investigation. Of these, three were disregarded on the basis that they had not exported during the investigation period, while two more responses were rejected in their entirety on the basis that their submissions were partially deficient.[100]

Parties submitted that there were various procedural inconsistencies in the investigation, right from the consideration of the application to the final determination, relating to Articles 3.1, 5.2, 5.3, 6.1, 6.1.1, 6.5, 6.5.1, and 6.9 of the Anti-dumping Agreement, as well as that the domestic industry was only required to submit costing information relating to bone-in portions as a whole.[101] It is not clear how the Commission could perform its price depreciation, suppression and undercutting analyses without the relevant per-cut information from industry.[102]

96 *See* ITAC's letter to the attorneys of record on 11 Nov. 2021.
97 Commission Report 678 – *Bone-In Cuts from Brazil, Denmark, Ireland, Poland and Spain (preliminary)*, at 4–5.
98 Commission Report 695 – *Bone-In Cuts from Brazil, Denmark, Ireland, Poland and Spain (final)*, at 5.
99 *Ibid.*, at 6.
100 *Ibid.*, at 10.
101 After significant pressure by interested parties, the Commission eventually required the domestic industry to submit injury information by product cut, but still not by PCN.
102 Report 695, *supra* n. 98, at 12–17.

The Brazilian exporters' association pointed out that for initiation purposes, the normal value was based on 'selected data from several supermarkets',[103] while the Brazilian government complained that the adjustment to the retail price only considered the 'markup' and not differences such as freight and indirect taxes.[104] The EU argued that the Commission should not have accepted an application where the normal value was based on a constructed cost with allocations based on product weight, since the Commission was well aware that EU producers allocated costs on the net realizable value basis.[105]

Although the initiation notice was dated 5 February 2021 it was only *published* on 20 February 2021. The Commission insisted that parties had only thirty-seven days from 5 February 2021 to submit responses, and it was only after the Commission was threatened with judicial review that it agreed to extend the period, but at the time extension was granted, parties again had only two more weeks to respond. As a consequence, several parties never responded.

While the Commission stated that in all instances where confidentiality was claimed the applicant provided a summary, unless it indicated that a summary could not be provided, in several instances the non-confidential version merely indicated 'positive', 'negative', 'increased' or 'decreased', without providing 'a reasonable understanding of the substance of the information submitted in confidence'. At the same time, it demanded that exporters submit more information in non-confidential summaries than in any previous investigation, including providing detailed cost build-ups of each PCN, listing each cost element. The applicant, in turn, argued that:

> providing indexed information for market share or growth would allow other interested parties to calculate the confidential information (specifically sales volume, sales value and ex-factory selling price) of the Participating Producers. This could in turn be used to calculate other confidential information. This clearly demonstrates that the confidential information could not be indexed without revealing confidential information[106]

This is devoid of any substance. There were eight domestic producers that submitted information, making it impossible to discern the information of any one company. There was no information as to the information of the non-cooperating domestic producers. Thus, even if the total information of the eight producers could somehow be derived, the information of the individual producers could not be determined, nor could the actual market shares of the imports.

103 *Ibid.*, at 102.
104 *Ibid.*, at 104.
105 *Ibid.*, at 105–106.
106 *Ibid.*, at 22. Some of the figures claimed to be confidential in the anti-dumping investigation, such as the industry's market share, were regarded as non-confidential in the 2020 tariff increase investigation – Report 608, at 8.

The same applies to the essential facts letter, which merely indicated that 'non-confidential versions of all information and comments submitted are available on the public file. Where an issue is not specifically addressed, the Commission is considering confirming its preliminary determination as set out in its Preliminary Report'.[107] None of the comments on the preliminary report were included in the essential facts, nor were the issues addressed in the final report.[108]

The Commission, without obtaining the exporters' permission or even informing them, requested outside parties to assist it with the margin of dumping calculations, providing these outside parties with all confidential information (domestic sales, export sales to SACU, export sales to third countries, and costs per PCN). Once the exporters became aware of the situation and demanded the Commission to immediately revoke the authorization and that the third parties return all information to the Commission, the Commission refused, indicating that it did not have sufficient in-house capacity – despite the fact that several of its investigating officers were not involved in any other investigations or reviews at the time.

Regarding the margin of dumping calculations, for one exporter incorrect products were compared to each other, as the report confirms that the exporter indicated that the same PCN was not sold on the domestic market,[109] yet no adjustment was made for physical differences between the domestic and exported products, despite the cost build-ups for each PCN having been verified. The Commission rejected an adjustment for credit terms on both the domestic and the export markets, indicating that the calculation was based on effective credit days rather than invoiced terms, despite this having been corrected in the company's response to the deficiency letter.

The Commission indicated that for the residual duty it is 'general policy … to use the highest verified ex-factory normal value and the FOB import price obtained from SARS statistics'.[110] This means that it applies adverse facts available, rather than the 'best information available'.

The injury analysis is especially problematic. The industry submitted information for the period July 2017 and June 2020, indicating that this should be the investigation period. The investigation was initiated in February 2021. The injury analysis showed that the industry's performance had improved significantly in the last year under investigation and that imports had decreased by nearly 34% over the investigation period. The Commission then indicated that the final year was affected by COVID and an HPAI ban on Poland, an increase in non-EU customs duties and an EPA safeguard against EU imports, finding that this period was unusual and that

[107] 'Essential facts letter' of 22 Apr. 2022.
[108] Report 695, *supra* n. 98, at 49.
[109] *Ibid.*, at 71.
[110] *Ibid.*, at 111.

emphasis should be placed on the period ending June 2019.[111] The subsequent exclusion of the last period confirms that the injury investigation was not based on an objective evaluation based on positive evidence. Even for the period July 2018 to June 2019, the increase in imports was only 3.7%,[112] whereas imports from Argentina and the US, neither of which was subject to the investigation, increased significantly more – to 46% of all imports – and were priced significantly lower.

The first problem with this approach is that the domestic industry was aware of these factors when it submitted its application and proposed the investigation period. Likewise, the Commission was aware of these issues when it confirmed the investigation period to end in June 2020.

Second, COVID only impacted South Africa from April 2020, that is, in the last three *months* of the investigation. Accordingly, an unbiased investigating authority could have determined injury for the period ending March 2020.[113]

Third, the AI ban against Poland only kicked in in March 2020, when the last products landed.[114] Poland represented less than 20% of the alleged dumped imports in the period ending June 2019 (the last 'normal' year). Thus, banning imports for a quarter of a year for imports representing less than 20% of dumped imports likely had a negligible impact. South Africa has regularly imposed AI bans on imports from various EU countries over the previous ten and more years, indicating that this was not something 'extraordinary'.

Fourth, dumped imports decreased by more than 36% in the year ending June 2020, and by 34% over the full investigation period, while imports from other countries remained constant,[115] cooperating producers' sales increased each year (by 5% over the period), while non-cooperating producers' sales increased by 19% (raising causal link questions)[116] and the price undercutting margin decreased significantly.[117]

111 Report 695, *supra* n. 98, at 115–116.
112 *Ibid.*, at 47.
113 Astoundingly, despite its contradictory position on the impact of COVID on the industry, i.e., that it had to effectively disregard all information from the last year under investigation, the Commission then notes that the 'effects of the closure of the hospitality, restaurant and quick restaurant sectors and increase in non-feed expenses as a result of the COVID-19 outbreak and the feed price increases in the second half of Astral's financial year therefore *could not have had any impact* in the preceding 33 months of the period of investigation for injury'. Report 695, *supra* n. 98, at 222 (own emphasis).
114 The Commission erroneously indicates that 'Poland did not export the subject product in the second half of the 2020 injury period due to a bird flu outbreak in 2019'. Report 695, *supra* n. 98, at 122.
115 Report 695, *supra* n. 98, at 119.
116 *Ibid.*, at 131 & 219.
117 The report indicates that undercutting from Brazil decreased by 49%, from Denmark to 107% (i.e., no undercutting), from Ireland by 93% and from Spain by 44%, despite domestic industry prices increasing over the period. *Ibid.*, at 125 & 127. Panel Report, *India – Iron and Steel Products*, paras 7.267–7.268 indicate that where other domestic producers gained market share at the expense of the cooperating producers, the investigating authority must 'explain whether performance of producers outside the domestic industry was a factor causing injury to the domestic industry and how it made sure that injury, if any, caused by this factor was not attributed to the increased imports'. *See also* Panel Report, *Ukraine – Passenger Cars*, para. 7.334.

The injury analysis shows that industry's sales, output, market share, productivity, capacity utilization (despite increased capacity), cash flow, employment, wages, investments and growth all improved. The only negative indicators were price suppression, profit and return on investment. However, interested parties submitted that for the two public companies whose financial statements were available, the impact of COVID and companies' additional costs incurred to secure reliable access to water and electricity exceeded any decrease in profits, that is, if the impacts of those factors were removed, the two companies' profits actually increased. Once the profit figures are in contention, this also impacts price suppression and return on investment.

The report contains no analysis of factors affecting domestic prices or of the margin of dumping. The analysis contains clear errors, such as indicating that the domestic industry's market share decreased, despite its sales volume increasing and that of dumped and other imports decreasing significantly,[118] that the industry's growth was negative despite increased sales and declining imports,[119] and contains different figures for the same factor, sometimes even in the same table.[120] The summary of findings also indicates injury in respect of cash flow, despite net cash flow increasing by 633%.[121]

On threat of injury, notwithstanding its comments that the final year under investigation had been 'characterised by unprecedented upheaval in the global economy as a result of the COVID-19 pandemic', the Commission found that there was a threat that imports from all five countries would increase. This followed despite AMIE, the importers' association, submitting evidence that imports had continued to decrease in the seventeen months following the end of the investigation period[122] and information that showed that there had been new outbreaks of HPAI in at least three of the four subject EU Member States,[123] which meant a total ban on imports from those countries.

In its causal link analysis, the Commission stated that the decrease in dumped imports could be the result of increased customs duties, EU safeguard duties, the HPAI import ban and the worldwide lock down.[124]

Interested parties submitted information on the direct impact of COVID on the industry (as contained in some producers' public financial statements),

[118] *Ibid*., at 136.
[119] *Ibid*., at 149.
[120] *See* e.g., *ibid*., at 145–146, which contains different figures for the number of production workers in rows 1 and 3 of Table 5 Jun. 2010.
[121] *Ibid*., at 171 compared to *ibid.,* at 144.
[122] *Ibid*., at 185.
[123] *See* https://ec.europa.eu/food/system/files/2022-01/ad_control-measures_hapai_chrono_2021_map.pdf (accessed 17 Apr. 2024).
[124] *Ibid*., at 121.

additional costs to reliably access water and electricity, increased water and electricity costs, increased feed costs,[125] increased wages, prices from Argentina and the US (combined accounting for 46% of imports) were 20% lower than from the subject countries,[126] that non-cooperating domestic producers fared better than the cooperating producers,[127] and that at least some of imports from the subject countries were found not to be dumped. Parties argued that there was no contemporaneity between the increased imports and injury, and that only a single container of breasts was imported over the period, yet the industry's information shows that its sales for breasts decreased by 10%.[128] With the exclusion of the last year from the injury determination, there was no overlap between the dumping and injury periods.[129] There were several other discrepancies between its findings, such as that dumped import prices were lower than import prices from other countries and that demand for bone-in portions 'has increased *continuously* through the period of investigation for Injury',[130] despite clear record evidence to the contrary.[131]

In response, the Commission passed off the issue related to access to water and electricity by indicating that these costs were reflected in the application and that it 'was able to determine the impact of these costs on the profitability of the industry',[132] but the report does not reflect this. On feed costs, it indicates that feed price volatility is integral to the poultry business environment, thereby effective refusing to consider its impact.[133] It separately considered imports from Argentina and the US, finding that the volume of dumped imports was higher than from either of the two countries, disregarding the fact that lower-priced imports from those countries had increased from 36% to 46% of total imports, whereas dumped imports had decreased from 62% to 53%. The Commission noted that imports from the US were subject to anti-dumping duties, yet disregarded the anti-dumping duty-free quota on such imports.

125 Report 695, *supra* n. 98, at 169 & 210–212.
126 *Ibid.*, at 170. It was indicated that the average price of dumped imports was ZAR15.73/kg, whereas imports from the US (which constituted more than 30% of total imports) were priced at ZAR11.55/kg – *ibid.,* at 197, and that the import price from all other countries was ZAR15.60/kg.
127 *Ibid.*, at 199, 202 & 209.
128 *Ibid.*, at 199.
129 *Ibid.*, at 200.
130 *Ibid.*, at 204 (emphasis added). *Ibid.,* at 149 indicates that the 'Size of the SACU market' grew in FY2019 but decreased in FY2020.
131 AMIE went as far as to state that 'It is not the job of the Commission to find reasons to impose anti-dumping duties, but rather to act independently to determine if there was material injury caused by dumping during the investigation period'. *Ibid.*, at 216.
132 *Ibid.*, at 213.
133 It concludes that 'there was nothing to indicate that any of these cost increases were structural and permanent, rather than temporary cost increases attributable to certain events, which the agricultural sector commonly faces from time to time' – *ibid.*, at 213.

Despite strong record evidence of neither injury nor causality, the Commission found dumped imports caused material injury to the domestic industry, raising questions as to whether the outcome was designed to make good on a ministerial promise of protection for the poultry industry.

3 THE SECOND WAR: TARIFF INCREASES

South Africa bound its duties on poultry products at 82% for all frozen poultry product, yet the applied rate was significantly lower between 1995 and 2013. The duties on whole birds, carcasses and offal were all at 27%, with those on boneless portions and bone-in portions at 5% and 18% respectively.[134]

3.1 2013 INCREASE

In 2013, SAPA lodged an application for the increase of all poultry duties, alleging a distressed financial state and a large and rapid increase in low-priced poultry imports, which negatively impacted further investment, SACU production capacity and food security, and that industry faced increased input costs and higher administered wages.[135] The investigation was initiated just sixteen days later.[136] Parties had twenty-eight days to comment.

After considering all submissions, and emphasizing increased imports, the level of domestic investment and production, industry's decreasing profitability, its price disadvantage vis-à-vis imports and high input costs,[137] the Commission decided to increase duties as follows[138]:

Product	*Existing Duty*	*New Duty*
Whole bird	27%	82%
Boneless cuts	5%	12%
Bone-in portions	18%	37%
Offal	27%	30%
Carcasses	27%	31%

134 Commission Report 442, *Poultry Tariff Increase 2013* (Report 442), at 4.
135 *Ibid.,* at 5.
136 *Ibid.,* at 5.
137 Report 442, *supra* 134, at 16–17.
138 *Ibid.*, at 4.

AMIE commented that SAPA selected, and the Commission accepted, the period of 2008 to 2012 to determine that imports increased by 145%. Imports had only increased by 31% between 2006 and 2012, during which period the industry's production had increased by 24%.[139] Several other issues raised by interested parties were also not addressed.[140]

3.2 2020 INCREASE

In 2020, the domestic industry applied for the duties on boneless and bone-in cuts to be increased from 12% and 37% to 82%. The Commission found that between 2015 and 2018, domestic demand had decreased along with the cooperating producers' sales volumes, output, capacity utilization and market share.[141] While industry's profit had decreased in 2016, profits increased in both 2017 and 2018, yet industry submitted that that the profit margin was below the level it required.[142] The Commission requested the National Agricultural Marketing Council (NAMC) to conduct research to determine the impact of duties increased to various levels on production levels and consumer prices.[143]

For bone-in cuts, the NAMC recommended that the duty be increased to 62%, which the Commission accepted, even though it found that such increase would not completely remove the price disadvantage experienced by the industry.[144] The Commission recommended that the industry should undergo structural reforms as regards investment in technology, research development and racial transformation.[145] For boneless cuts, the Commission found that the industry's sales, output, capacity utilization and market share had decreased, while imports had increased. It found that an increase of the duty to 42% would place the industry on an equal footing with imports[146] and recommended that the industry undergo the same structural reforms as proposed in respect of bone-in portions.

Interested parties commented that the industry had been severely affected by domestic outbreaks of HPAI, that the increased duties would affect the reciprocal agreement concluded between South Africa and the US on 'meaningful access' to the South African market, and that dutiable imports had been diverted from the EU to Brazil as a result of the outbreak of HPAI in the EU.[147]

139 *Ibid.*, at 363.
140 *Ibid.*, at 363 and 366.
141 Report 608, *Increase in the General Rate of Customs Duty on Bone-in Portions and Boneless Cuts*, at 8.
142 *Ibid.*, at 10.
143 *Ibid.*, at 11.
144 Report 608, *supra* n. 141, at 11.
145 *Ibid.*, at 11.
146 *Ibid.*, at 14.
147 *Ibid.*, at 15–22.

The Commission decided to increase the customs duty for boneless cuts from 12% to 42%, and for bone-in cuts from 37% to 62%.

4 THE THIRD WAR: SPS ISSUES

The EU has seen several HPAI outbreaks in recent years.[148] South Africa regularly bans imports from countries affected by HPAI outbreaks.

When there is an HPAI outbreak in South Africa, all poultry within a radius of five km from the outbreak are culled, while no movement of any poultry products may take place within a radius of thirty km. If a poultry farm is situated thirty-one km from the outbreak, no restrictions apply. However, with the exception of the US, whenever there is an outbreak of HPAI in a foreign country, South Africa bans all imports from that country, regardless the distance between the outbreak and the farm that wishes to export.[149] Thus, if there is an outbreak around London, exports from Northern Ireland would be blocked, as Northern Ireland is part of the UK. This is a violation of Article III:4 of GATT[150] and several articles of the SPS Agreement.

At least one importer has called for South Africa 'to consider implementing regional rather than countrywide bans … and to reinstate import permits faster',[151] while SAPA has agreed that a regional approach on HPAI could work. Despite complaints that sometimes HPAI 'bans have remained on countries for years after they have been declared bird flu free',[152] South Africa is still to address this, indicating that 'it is carefully assessing all available internationally acceptable and scientific options'.[153]

5 THE FOURTH WAR: FTA SAFEGUARD

South Africa and the EU signed a Trade, Development and Co-operation Agreement (TDCA) in 1999, with full implementation, including the removal of all duties on poultry products by both parties, by 2012.[154]

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148 *See* https://ec.europa.eu/food/animals/animal-diseases/diseases-and-control-measures/avian-influenza_en (accessed 13 Apr. 2024).

149 Eckart Naumann, *South Africa and AGOA: Recent Developments 2015-2016 and Possible Suspension,* Tralac Working Paper US16WP09/2016 (2016), at 10.

150 AB Report, *Brazil – Taxation*, paras 6.8 and 6.13; Panel Report, *Brazil – Taxation*, para. 7.255.

151 Carin Smith, *120 000 Birds Dead as Avian Flu Strikes SA Commercial Farms*, https://www.news24.com/fin24/economy/120-000-birds-dead-as-avian-flu-strikes-sa-commercial-farms-20230427 (accessed 7 May 2024). The same importer also called for post-importation heat treatment of poultry on the same basis as is permitted in respect of pork, but other industry players rejected this call.

152 *Ibid.* For instance, in https://www.freightnews.co.za/article/chicken-imports-ireland-get-nod it is indicated that the AI ban on Irish poultry that had been imposed in 2021, was only lifted in Apr. 2023 (accessed 11 Apr. 2024).

153 *Ibid.*

154 Article 5.2 of the TDCA; WT/REG113/R/I (31 Oct. 2016), para. 1.1.

In February 2015, SAPA lodged an application for a safeguard under Article 16 of the TDCA, alleging that imports from the EU had increased significantly between 2011 and 2014. The application was updated in December 2015, claiming that the removal of duties under the TDCA 'resulted in serious disturbance to the South African market'.[155] In February 2016, the Commission initiated an investigation under Article 16 of the TDCA.[156] Parties had twenty days to make submissions, and could request a hearing within sixty days. In May 2016, industry updated its information to include information for the first quarter of 2016. The Commission issued essential facts letters on 24 August 2016 and again on 15 September 2016.

In October 2016, the Economic Partnership Agreement (EPA) between South Africa, Botswana, Lesotho, Mozambique, Namibia and Swaziland on the one hand, and EU on the other, came into force. This replaced the TDCA, expanded its scope to the five other countries, and revoked all bilateral safeguard provisions in the TDCA.[157] South Africa and the EU notified the WTO that the TDCA no longer applied.[158]

The EPA provides that safeguards may be imposed only 'if, as a result of the obligations incurred by a Party under *this* Agreement' a product was imported 'in such increased quantities and under such conditions as to cause' injury.[159] The Commission's second essential facts letter indicated that although the investigation had been initiated on the basis of the TDCA, 'Article 34 of the EU-SADC EPA makes provision for a bilateral safeguard which is similar to the agricultural safeguard provided for in' the TDCA.

However, paragraph 2 of Protocol 4 specifically provides that the provisions related to Trade and Trade-Related Issues, including all safeguards provisions, would lapse as soon as the EPA entered into force. On 15 December 2016, SACU imposed a provisional duty of 13.9% for 200 days, until 3 July 2017, although this lapsed as South Africa and the EU could not agree on any final measures. In the meantime, the EU submitted that the documents the Commission made available did not contain sufficient information on injury indicators and prices, that important factors were disregarded in the decision to implement a provisional measure, that Article 34 of the EPA had different requirements to Article 16 of the TDCA and that the investigation was accordingly inappropriate, and that anti-dumping duties already applied against Germany, the Netherlands and the UK, meaning that these imports no longer caused injury.[160]

155 EU First Written Submission before the Arbitration Panel, para. 33.
156 N 15/2016 in GG 39718 of 16 Feb. 2016.
157 Paragraph 1(a) of Protocol 4 to the EPA.
158 WT/REG113/R/I 31 Oct. 2016.
159 Article 34.2 of the EPA (emphasis added). *See also* Art. 34.5.
160 EU First Written Submission before the Arbitration Panel, para. 46.

Following hearings, on 14 August 2017 the Commission issued its third essential facts letter, followed on 10 September 2017 by its 'summary of findings' to the Minister of Trade. On 27 June 2018, the SACU Council of Ministers approved a safeguard measure for a period of 3.5 years, starting at 35.3% for the first six months, and decreasing to 30%, 25% and 15% in the ensuing three years,[161] but it was only implemented on 28 September 2018.

On 14 June 2019, the EU requested consultations under Article 77 of the EPA[162] and on 21 April 2020 it requested the establishment of an arbitration panel. The dispute settlement process, the first for the EU under any of its EPAs, was a complete shambles with delays, some deliberate, others (like those caused by COVID) not, causing the arbitration report to be issued on 4 July 2022, 804 days after the request for the establishment of a panel, by which time the measure had already lapsed.

The Arbitration report does not set out the Commission's economic analysis on which SACU's decision to impose a safeguard is based, and this report was never published.[163] This makes it difficult to determine whether there was a factual basis for the safeguard. However, while economic factors were considered for the period ending December 2016, the safeguard measure was only imposed in September 2018, and imports had decreased to decade-lows in 2017 and 2018.[164]

The Panel found no basis for SACU finding that the outdated facts still justified the adoption of a definitive safeguard measure[165] and concluded that the Commission's causal link analysis 'was less than enlightening, and could even be described as conclusory'[166] and that the measure was disproportionate to the injury caused by imports from the EU.[167] Accordingly, it found the safeguard duties were imposed without legal basis and merely served as unwarranted protection.

6 CONCLUSION

Since 1999, the poultry industry has become one of the most protected industries in South Africa, with customs duties twice increased to very high levels. Anti-dumping duties are in place against imports from Brazil, Denmark, Germany, Ireland, the Netherlands, Spain, the UK and the US. None of these investigations,

161 *Ibid.*, paras 68–69.
162 Arbitrators Report, *Southern African Customs Union – Safeguard Measure Imposed on Frozen Bone-in Chicken Cuts from the European Union* (Arbitrators Report), para. 4.
163 There is no requirement under the EPA to conduct such investigation, nor to publish the outcome thereof.
164 EU FWS, paras 145–155.
165 *Ibid.*, para. 341.
166 *Ibid.*, para. 353.
167 *Ibid.*, para. 371.

and few of the five sunset reviews conducted in the period, conformed to the requirements of the AD Agreement, leaving all of these duties open to dispute settlement. The US national poultry association has actively discouraged its members not to participate in sunset reviews, arguing that they would not be treated fairly. Of course, this is the worst possible advice any association can give its members, as non-cooperation leads to the application of facts available. The EPA safeguard imposed against bone-in portions imports from the EU was successfully challenged in dispute settlement.

In violation of the SPS Agreement, other than for the US, whenever there has been an outbreak of HPAI in a country, all imports from that country have been banned, while there has only been a ban on the movement of poultry products within thirty km from a similar outbreak in South Africa. South Africa has also been deliberately slow in removing HPAI bans once HPAI had cleared in a country, often taking as much as two years.

The Commission should start making objective analyses based on positive evidence. This would result in the termination of several anti-dumping duties and force the industry to become competitive. The alternative would be for countries impacted by the anti-dumping duties and HPAI bans to initiate WTO dispute settlement.