

**Assessing the Determination of Constructed Normal Value in the 2000 USA
Anti Dumping Poultry case in South Africa**

by

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Declaration

Except for references specifically indicated in this text, and such help as I have acknowledged, this thesis is wholly my own work.

Abstract

At the inception of the World Trade Organization (WTO) in 1994, South Africa, as one of the founding members, embarked on a robust trade liberalisation policy. This was mainly achieved through the drastic reduction of tariffs across a number of industries. The agricultural sector was also subjected to this trade liberalisation, which left it open to international competition. As part of the WTO legal framework, the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement / ADA) was adopted and all the WTO members were bound by it. The ADA enables a WTO member to impose Anti-Dumping (AD) duties against imports that are being dumped on its domestic market by an exporter of another WTO Member State.

In 1999, the South African Poultry Association (SAPA) petitioned the SA AD investigating authority, the Board on Tariffs and Trade (the Board), to impose AD duties on certain USA poultry imports. The Board made use of the constructed NV method, sanctioned by WTO law, to determine NV which resulted in the imposition of final AD duties against USA poultry imports on 9 December 2000. These AD duties were so high that it effectively stopped the importation of USA poultry into the SA market.

However, US Government, various interested parties, and scholars have since been very critical of the imposition of the December 2000 AD duties imposed against USA poultry products. It has been argued that the Board egregiously calculated the costs of production of the poultry products, a step vital to the determination of dumping. According to the critics of these AD duties, the Board intentionally made use of the constructed NV method to manipulate cost in order to protect an inefficient and uncompetitive SA poultry industry.

So, this study will seek to test the merits of the argument that the Board's determination of *constructed NV* was WTO inconsistent in its December 2000 AD decision against USA poultry products. In doing this, the author will analyse the Board's decision and WTO Panel reports on the interpretation of Article 2.2.1.1 of the ADA, which deals with the determination of *constructed NV*.

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Acronyms

ADA	Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (The Anti Dumping Agreement)
AD	Anti Dumping
ADR	Anti Dumping Regulations
AGOA	African Growth Opportunities Act
AMIEA	Association of Meat Importers Association
BTT	Board on Tariffs and Trade (The Board)
CAAA	China Animal Agricultural Association
CC	Competition Commission
DSB	Dispute Settlement Body
DTI	Department of Trade and Industry
EU	European Union
GATT	General Agreement on Tariffs and Trade 1994
HS System	Harmonised Tariff Classification System
ITAA	International Trade Administration Act
ITAC	International Trade Administration Commission
MOFCOM	Ministry of Commerce of People's Republic of China
NV	Normal Value
SACU	Southern African Customs Union
SAPA	South African Poultry Association
TDCA	Trade, Development and Cooperation Agreement
WTO	World Trade Organisation
USA	United States of America
USAAPEEC	United States of America Poultry and Egg Council
USAOA	United States of America Department of Agriculture
USDOC	United States Department of Commerce

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Chapter One

1 Introduction

South Africa's (SA) anti-dumping (AD) legislation dates back nearly a century and the country has been one of the major users of AD measures in the world.¹ The primary legislation that governs AD in SA is the International Trade Administration Act (ITAA), which establishes the International Trade Administration Commission (ITAC) responsible for AD investigations. Previously, ITAC used to be known as the Board of Tariffs and Trade (the Board). The substantive and procedural issues of the AD investigations are governed by the AD Regulations 2003 (ADR).² The use of these AD measures, in particular those dealing with *constructed normal value* (NV) will be considered in detail in this dissertation.

When SA joined the World Trade Organisation (WTO) it liberalised its trade by lowering tariffs beyond requirements imposed in the early nineties.³ Various local industries were left without support, particularly in the agricultural sector. The poultry industry was directly affected by this vigorous trade liberalisation and poultry imports became substantially cheaper. As a result, the poultry industry extensively sought the use of available AD measures against poultry imports.

In the year 2000, AD duties were imposed on poultry products from the United States of America (USA).⁴ At the time, the USA used to be the largest exporter of poultry products into SA.⁵ Shortly after the imposition of AD duties on USA poultry products into SA, their exports to SA fell to zero. Brazil then became the largest poultry exporter into SA, until the Trade, Development and Cooperation Agreement (TDCA) between SA and the European Union

¹G Brink "Anti Dumping in South Africa" (2012) *Tralac* 1.

²Brink (n1 above) 5.

³A Griffiths "The Domestic Politics of Agricultural Trade Policy making in South Africa" (2003) *Globalisation and Poverty* 2.

⁴Board on Tariffs and Trade Report No. 4088 "Investigation into the alleged dumping of meat of fowls of the species *Gallus Domesticus*, originating in or imported from the United States of America: Final Determination" 9 December 2000.

⁵N Cochrane *et al* "Poultry Production and Trade in the Republic of South Africa: A look at Alternative Trade Policy Scenarios" (2015) *Economic Research Service, U.S. Department of Agriculture* 2.

(EU) came into effect.⁶ The TDCA, a free trade agreement, enabled EU countries to enjoy the benefit of low tariffs for their poultry exports into SA and these countries therefore became the largest poultry exporters into SA.

It is clear that the SA poultry industry has petitioned the government to make extensive use of AD measures to protect it. It is the industry's view that such measures are necessary for local suppliers to survive as they cannot compete with cheap or more specifically dumped poultry imports. Opponents to this stance are of the view that ITAC is protecting the inefficient poultry industry by using AD measures, which is not in accord with the spirit of WTO rules on AD. As a result of the AD duties imposed on USA poultry exports into SA since 2000, the USA has threatened to deny SA trade benefits under the Africa Growth Opportunities Act (AGOA).⁷

This dissertation will assess the SA poultry industry's then petition to the Board, which was the government authority responsible for AD investigations at the time, to impose AD duties on certain imports of USA poultry products, which culminated in final AD duties being imposed on 9 December 2000. Particular focus will be given to the Board's determination of *constructed NV*. The author will endeavour to ascertain if the Board used the available AD rules dealing with the determination of *constructed NV* consistently with WTO rules. This will be achieved by analysing the said 2000 USA poultry AD case and WTO panel and appellate body decisions on the determination of *constructed NV*. Observations will then be made addressing whether the Board incorrectly determined *constructed NV*. The author may also make recommendations that could assist the current authority tasked with AD investigations, ITAC, in effectively applying WTO rules on *constructed NV*.

1.1 Research Problem

The demand for poultry products in SA has drastically increased over the last two decades. The SA poultry industry has been accused of being highly inefficient and uncompetitive for various reasons.⁸ Despite these accusations, the industry was successful in petitioning the

⁶Cochrane (n5 above) 2.

⁷As above.

⁸K Kulkarni "Anti-Dumping Law as a Trade Barrier: Case of South Africa Poultry Imports from USA" (2005) *University of Denver* 7.

Board that AD duties should be imposed on USA poultry imports in December 2000.⁹ This infersthat the Board was convinced that these poultry imports had been dumped in SA and caused material damage to the local industry. Others contend that the Board was simply protecting an industry that is highly inefficient. The Board was further accused that it was inconsistent with WTO standards when it decided to use *constructed NV* to determine NV.¹⁰

The proposedstudy will assess the Board’s determination of *constructed NV* in the 2000 USA poultry case that resulted in final AD duties being imposed on USA poultry products.Additionally, the researchwill examine certain WTO Panel and Appellate Body decisions dealing with the determination of *constructed NV*. Observationswill be presented subject to conclusions drawn from the analysis of the Board’s and the WTO Panel and Appellate Body decisions. Furthermore, the author may make recommendationsthatITAC could considerto effectively apply current AD measures dealing with *constructed NV*, to avoid potential future challenges at the WTO.

1.2 Research Question

The research will address the following research question: Was the Board inconsistent in its determination of *constructed NV* in the 2000 USA poultry case, with the WTO Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti Dumping Agreement / ADA) ?In answering the research question, the author will address the following sub - questions in this study:

- i. What are the substantive elements of the WTO ADA?
- ii. What are the substantive elements of the SA AD laws?
- iii. How has the Board applied the substantive SA AD laws in the 2000 USA poultry case, with specific reference to the determination of *constructed NV*?

⁹Kulkarni (n8 above) 7.

¹⁰C Coons & J Isakson “Senators Coons, Isakson to Trade Rep: South Africa must drop its duties on U.S. Chicken” 28 January 2015 [http://www.coons.senate.gov/newsroom/releases/release/senators-coons-isakson-to-trade-rep-sou th-africa-must-drop-its-duties-on-us-chicken](http://www.coons.senate.gov/newsroom/releases/release/senators-coons-isakson-to-trade-rep-sou-th-africa-must-drop-its-duties-on-us-chicken)(accessed 13 November 2015).

- iv. How have the WTO Panels and Appellate Body applied the ADA, with specific reference to the determination of *constructed normal value*?
- v. Was the Board's approach in determining *constructed NV* in the 2000 USA poultry case inconsistent in light of WTO law?
- vi. Are there any lessons that could be learned from the WTO Panel and Appellate Body decisions that could aid the current SA AD investigating authority, ITAC, in its future determination of *constructed NV*?

1.3 Thesis Statement

This study seeks to test the merits of the argument that the Board's determination of *constructed NV* was WTO inconsistent in its December 2000 AD decision against USA poultry products.

1.4 Justification

SA is a member of the WTO and has adopted local legislation and regulations to give effect to the AD rules in the General Agreement on Tariffs and Trade 1994(GATT)and the WTO ADA. Commentators observe that SA's AD legislation and AD Regulations (ADR) are well in line with WTO standards and may, in fact, go beyond requirements stipulated by the WTO.¹¹As much as the ADlegislation and regulations may be in line with global standards, it is also imperative that the application of these measures is up to global expectations. The latter is the focus of this paper.

The importance and relevance of the research is underscored by the recent out of cycle review of SA during the AGOA negotiations. The Board's protectionist use of AD measures, as hypothesised, resulted in the country nearly being excluded from AGOA.This situation may have had undesirable implications on certain SA exports to the USA. The alleged incorrect application of AD laws by the Board may be further compounded should ITAC impose AD duties on other poultry imports, as it attempted to do with Brazilian poultry imports, and end

¹¹ Brink (n1 above) 7.

up being challenged at the WTO. The study will significantly contribute to the understanding of the determination of *constructed NV* by the Board in the 2000 USA poultry case and by the WTO Panels and Appellate Body. This could aid ITAC in being WTO consistent when it determines *constructed NV* in the future and SA can potentially avoid retaliatory action such as the out of cycle AGOA review and potential challenges at the WTO in the future.

1.5 Literature Review

Support for the agricultural sector in SA diminished as a result of trade liberalisation from 1994 until 1999. Border tariffs and export subsidies were reduced well beyond the mandatory requirements imposed by the WTO following the Uruguay Round. An argument has been made that trade liberalisation has not helped the agricultural sector and that a reversion to protectionism is required.¹²

Griffiths, writing on the politics of agricultural trade policy making in SA, states that SA's trade liberalisation in the nineties was vigorous and that it went far beyond what was required.¹³ He further states that the government's aim in 1994 was to boost efficiency and exports, and to make the agricultural sector more internationally competitive. He also claims that in order for this goal to have been achieved, both the deregulation of marketing and trade liberalisation of the agricultural sector had to happen.¹⁴

Cassim, Onyango and Ernt van Seventer state that liberalisation in the agricultural sector first involved the tariffication of quantitative restrictions, which was followed by the reduction in diversity of advalorem tariffs.¹⁵ In 1996, the absolute number of tariff lines was well below the targets that were set for 2004. Margins ranged from 0% to 135.5% while the WTO bound rates ranged from 0% to 597%.¹⁶ These numbers are clearly indicative of just how much SA reduced its tariffs beyond what was required.

¹²R Sandrey *et al* "South African Agriculture Protection: How much policy space is there?" (2007) *Tralac Working Paper 2*.

¹³Griffiths (n3 above) 2.

¹⁴Griffiths (n3 above) 5.

¹⁵R Cassim *et al* "The State of Trade Policy in South Africa" (2004) *Trade and Industrial Policy Strategies* 11.

¹⁶As Above.

The focus of this study is how the Board determined *constructed NV* in the 2000 USA poultry case. The following paragraphs present views of literature dealing with the SA poultry industry, the 2000 USA poultry case and WTO Panel decisions.

Brink, a leading figure on AD in SA, notes that SA's AD legislation dates back almost a century and that it has been one of the major users of AD measures.¹⁷ Irrespective of the long historical use of AD measures, Brink states that the AD system is highly unpredictable and that the AD regulations are often not properly applied. This results in uncertainty in the market with the imposition of duties that should not be imposed and the non-imposition of duties that should have been imposed.¹⁸

The Board imposed preliminary AD duties on chicken leg quarters from the USA on 5 November 1999. These preliminary duties were then finalised on 9 December 2000.¹⁹ Kulkarni candidly states that this is a clear cut case of protectionism. He further claims that the SA poultry industry was not seeking protection from the dumping of chicken leg quarters, but from competition based on fair trade.²⁰

Cochrane, Hansen and Seeley observed that after the imposition of AD duties against the USA, Brazil became the leading exporter of chicken leg quarters to SA.²¹ The full liberalisation in trade between the EU and SA came into effect in 2012 as a result of the TDCA. This clarifies how the EU surpassed Brazil as the largest exporter of bone-in chicken leg quarters into SA. The poultry industry in the USA is confident that should the AD duties in place against the USA be removed, it could be competitive in the local market.²²

According to Agritrade, poultry meat consumption increased by 70% between 2000 and 2010, which resulted in an increase in the SA poultry production growth rate of an average of 6% per annum between 2004 and 2008. However, due to the increase in maize prices and a subsequent slowing of the demand for poultry meat, poultry production growth dropped to

¹⁷Brink (n1 above) 1.

¹⁸Brink (n1 above) 55.

¹⁹Kulkarni (n8 above) 7.

²⁰Kulkarni (n8 above) 15.

²¹Cochrane (n5 above) 2.

²²Cochrane (n5 above) 2.

1.6% by 2013. The decline in the production growth rate was further aggravated by rising poultry imports.²³

Ramburuth, on behalf of the SA Competition Commission (CC), found that the poultry industry was vertically integrated with high barriers to entry.²⁴ It can therefore be surmised that the poultry industry was inefficient. Moreover, the CC's report also found that increased tariffs would reduce choice and result in higher prices for consumers.²⁵ In 2005, Kulkarni maintained that the South African poultry industry was highly inefficient due to a poorly trained labour force, labour union problems, and high transportation costs. He notes that the major problem was high feed costs.²⁶

Stander, at the 108th South African Poultry Association (SAPA) Congress responded to the opinion that the SA poultry industry is uncompetitive and lacks capacity to sufficiently meet the demand for chicken.²⁷ He stated that this view was entirely misleading. He attributed the broiler industry's woes to considerable price and volume pressure, exacerbated by large increases in imported frozen poultry products from Brazil and the EU into SA.²⁸

Stander noted that the government of SA finally recognised that the industry was threatened by cheap imports and that tariffs on imports were increased on 30 September 2013. However he remained adamant that the "import problem" still existed.²⁹ The point was made that SA joined the WTO as a developed country, which meant the country opened its borders for trade. Stander further pointed out that African neighbouring countries are allowed to protect their domestic producers because they are developing countries in terms of the WTO. SA can also not export to the EU and the USA because of certain non-tariff barriers.³⁰

²³ "South Africa's experience of managing poultry sector trade policy" *Agritrade* September 2014 1.

²⁴ S Ramburuth "The Impact of Poultry Tariffs on Competition" (2013) *Competition Commission* 8.

²⁵ Ramburuth (n24 above) 8.

²⁶ Kulkarni (n8 above) 5.

²⁷ M Stander "Broiler Organisation Committee Chairperson's Report 2013" (2014) *108th SAPA Congress* 2.

²⁸ As above.

²⁹ As above.

³⁰ As above.

Watson observed that the government of the USA long claimed that the adverse dumping finding against USA poultry products was unfounded and incorrect. He noted that the Board relied on an illogical, result-oriented method to determine whether dumping had occurred.³¹ Watson further stated that AD laws can be used to penalise legitimate pricing practices. The Board's dumping finding against USA poultry products has been referred to as a good example of how authorities can abuse the complexities of AD law to justify duties that have no meaningful relationship with actual market conditions.³²

United States Senators Coons and Isakson wrote to the US Trade Representative and aired their displeasure with the SA AD duties imposed against US poultry exports.³³ They made reference to the case in 2013 when the WTO Panel ruled against China in an almost identical system of AD duties imposed on USA poultry. The senators therefore contended that a precedent is now available at the WTO that proved that the Board's finding of dumping against USA poultry products in 2000 did not conform to international trade rules.

The Board in the 2000 USA poultry case determined that dumping occurred by using *constructed NV* to determine the NV of poultry products in the USA. In order for the Board to have made use of *constructed NV*, it had to determine if either a *particular market situation* existed in the USA, or if the USA poultry was *not sold in the ordinary course of trade*. The Board found that both situations were present in the domestic USA poultry market and therefore it used *constructed NV* to determine NV.³⁴ This is what resulted in the finding of dumping against USA poultry products.

From the above literature, it can be deduced that the Board's determination of *constructed NV* has seriously been questioned. It is also clear that the SA poultry industry is convinced it was correct of the Board to have found dumping occurred. Should dumped USA poultry imports

³¹KW Watson "Antidumping Fowls Out: U.S. –South Africa Chicken Dispute Highlights the Need for Global Reform" 19 October 2015 <http://www.cato.org/publications/free-trade-bulletin/antidumping-fowls-out-us-south-africa-chicken-dispute-highlights>(accessed on 13 November 2015) .

³²Stander (n27 above).

³³C Coons & J Isakson "Senators Coons, Isakson to Trade Rep: South Africa must drop its duties on U.S. Chicken" 28 January 2015 <http://www.coons.senate.gov/newsroom/releases/release/senators-coons-isakson-to-trade-rep-south-africa-must-drop-its-duties-on-us-chicken>(accessed 13 November 2015).

³⁴BTT Report No. 4088 (n4 above) 35.

have gone unchecked, the SA poultry industry may have been decimated or at least suffered severely. It can be argued that the use of these AD measures against USA poultry products may have saved the SA poultry industry from experiencing serious damage. However, the criticisms against the industry's reliance on AD measures to protect itself from fair competition can simply not be ignored. More concerning is the accusation that was laid against the Board that it was protecting an inefficient and uncompetitive industry, by concocting the determination of *constructed NV*.

This study will focus on examining the 2000 AD poultry case against USA poultry products which resulted in final AD duties being imposed against these products. Existing literature will be supplemented on the use of AD measures in SA as the important 2000 USA AD poultry case is scrutinised. The author's comparative analysis of the WTO Panel and Appellate Body decisions against the Board's determination of *constructed NV* will produce a frame of reference for drawing practical conclusions on the matter. The study's significance lies in these conclusions, which ITAC could use in its future application of SA AD laws on the determination of *constructed NV*. These conclusions are particularly important for SA as the country cannot afford to face a WTO Panel or risk suffering the negative implications from non-WTO sanctioned retaliation, as the case nearly was with AGOA.

1.6 Research Methodology

This work will mainly comprise of desk and library based research. Valuable and extensive information on AD measures is also available on the internet. The research is based on a combination of the descriptive, analytical, comparative and prescriptive approaches.

The substantive WTO legal framework on AD and SA's substantive AD regulatory regime will be described. This will entail employing the descriptive approach to clearly outline the WTO ADA and SA's ADR plus the ITAA. The author will then use the analytical approach to analyse the Board's application of AD laws in determining *constructed NV* in the 2000 USA poultry case. The WTO Panel and Appellate Body decisions will also be analysed.

The interpretation of the determination of *constructed NV* by the WTO Panel and Appellate Body decisions will then be used as a benchmark to compare the Board's determination of *constructed NV* in the 2000 USA poultry case analysed. The conclusions drawn from this

comparative analysis could aid ITAC to be WTO consistent with the future determination of *constructed NV*.

1.7 Overview of the chapters

Chapter 1

This chapter will highlight the research topic and outline the structure of the mini-dissertation. The research problem, research question, thesis statement, justification, literature review and the research methodology will be set out.

Chapter 2

The development of the SA AD system will briefly be outlined. The current substantive elements of the WTO ADA and the SA AD system will be succinctly described and outlined.

Chapter 3

The Board's determination of *constructed NV* which resulted in the imposition of AD duties against USA poultry products will be examined. The author will specifically consider the Board's findings that a *particular market situation* existed in the USA and that the subject poultry products were *not sold in the ordinary course of trade* in the USA domestic market.

Chapter 4

The WTO Panel and Appellate Body's determination of *constructed NV* will be examined. The author will pay particular attention to a strikingly similar case to the 2000 USA poultry case, the *USA – China Broiler* case that was decided in 2013 by a WTO Panel. Other WTO Panel and Appellate Body reports in which *constructed NV* have been interpreted, will also be referred to. These include the Panel report in *EC – Norway Salmon* and the Panel and Appellate Body reports in *US – Softwood Lumber V* case.

Chapter 5

Practical conclusions will be drawn from comparing the Board's 2000 USA poultry case with the decisions by the WTO Panels and Appellate Body, on the determination of *constructed NV*. The author may also make recommendations based on these practical conclusions that could assist ITAC in its future determination of *constructed NV*.

Chapter 6

The concluding chapter will summarise the outcome on the hypothesis that the Board had erroneously *constructed NV* in order to protect the SA poultry industry in the 2000 USA poultry case, resulting in unacceptable barriers to trade for USA poultry imports.

CHAPTER TWO

SUBSTANTIVE ANTI DUMPING LAWS

2Introduction

The first Anti-Dumping (AD) law was implemented in 1904 by the Canadian government.

¹By the end of 2003, 100 years later, 98 countries, both developed and developing had adopted AD laws.² Developing countries have also become some of the most frequent users of AD laws since the inception of the World Trade Organisation (WTO) in 1995.³South Africa's (SA) AD laws also date back more than a century ago and it has been one of the most prolific users of AD measures in the world.⁴

In order to engage with AD measures, a concise definition of AD is necessary. If a company sells a product at a lower price in an export market than in its domestic market, dumping is occurring. Should this dumping then cause injury to domestic producers in the importing country, provided certain conditions are met, the authorities in the importing country may impose AD duties to offset the effects of dumping.⁵

This chapter will briefly examine the development of AD laws within the framework of the WTO since the General Agreement on Tariffs and Trade (GATT) of 1947. A concise historical background of AD laws and its use in SA will also be discussed. The author will then focus on succinctly outlining the current substantive AD regulations under the WTO and in SA.

2.1 History of AD laws since GATT 1947 to the WTO 1995

AD as a concept has been around since the late 18th century.⁶ At Bretton Woods in 1947, contracting parties formalised the international use of AD measures by drafting Article VI of

¹M Zanardi "Antidumping: A Problem in International Trade" (2004) *Tilburg University & CentER* 4.

²Zanardi (n1 above) 4.

³CP Bown "The WTO and Antidumping in Developing Countries" (2007) *Department of Economics & International Business School, Brandeis University* 1.

⁴G Brink "Anti Dumping in South Africa" (2012) *Tralac* 1.

⁵UNCTAD "Training Module on the WTO Agreement on Anti-Dumping" (2006) *United Nations* 3.

⁶CF Corr "Trade Protection in the New Millennium: The Ascendancy of Antidumping Measures" (1997) *Northwestern Journal of International Law & Business* 53.

the original GATT 1947.⁷ Article VI of GATT 1947 expressly condemned dumping that caused injury. The same article was brought over into GATT 1994.⁸ Since 1947, AD has been a central area of interest at the GATT and the WTO. A group of experts were established in 1960 after a GATT Secretariat study into national AD laws. The purpose of this group was to decide on certain common interpretations of the ambiguous terms of Article VI.⁹ During the 1967 Kennedy Round, an AD Code was negotiated and signed by seventeen countries. The AD Code was then revised during the 1976 Tokyo round and it then had twenty five signatories to it.¹⁰

In 1994, at Marrakesh in Morocco, ministers from over one hundred countries signed a trade agreement which created the WTO.¹¹ The Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti Dumping Agreement / ADA) was created shortly after the formation of the WTO and it replaced the 1976 AD Code. It is this ADA that WTO members must implement and abide by currently.¹² AD measures used to be a policy instrument implemented by developed countries, primarily the USA, Canada, EU and Australia. However, since the proliferation of the ADA, AD measures have been used globally by over forty WTO members, most frequently by developing countries.¹³

2.2 Brief Historical Account of AD laws in SA

SA's first AD measure was imposed in 1921.¹⁴ It was the biggest user of AD measures during the first ten years of the GATT 1947 and again a major user since the adoption of the ADA. Brink notes that prior to 1995, SA initiated no fewer than 883 AD investigations.¹⁵ The Board on Tariffs and Trade (the Board) was tasked with conducting AD investigations, but in

⁷Corr (n6 above) 54.

⁸ GATT 1994: Article VI:1 *"The contracting parties recognise that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry."*

⁹ UNCTAD (n5 above) 3.

¹⁰ UNCTAD (n5 above) 4.

¹¹ Corr (n6 above) 51.

¹² Corr (n6 above) 54.

¹³ Bown (n3 above) 7.

¹⁴ Brink (n4 above) 1.

¹⁵ Brink (n4 above) 1.

practice Customs conducted the dumping part of the investigations. The Board was responsible for investigating injury and causality and it had to make recommendations regarding the imposition of AD duties.¹⁶ In 1992 amendments to the Board on Tariffs and Trade Act¹⁷ transferred full responsibility for investigations to the Board.¹⁸ In the same year, a Directorate of Dumping Investigations was established within the Department of Trade and Industry (DTI) to assist the Board with conducting AD and countervailing investigations on behalf of the Board.¹⁹

After the fall of Apartheid in the early 1990's, SA returned to the international community and as a result actively participated in the Uruguay Round of trade negotiations and it was a founding member of the WTO.²⁰ SA embarked on a drastic trade liberalisation policy by reducing tariffs in-line with those of developed countries. As a result, domestic industries were exposed to both fair and unfair competition.²¹ These exposures lead to the extensive use of AD laws.

When SA joined the WTO it became a party to all its agreements including the ADA. Even though all the WTO agreements were ratified by the South African parliament, these agreements were never promulgated into South African law.²² In 1995, further amendments were made to the Board Act by passing the Board on Tariffs and Trade Amendment Act²³ to make it more in-line with the ADA of 1994.²⁴ These amendments only made some changes to SA's AD laws. Examples of these amendments included changing the definition of AD to reflect that of the ADA and it also introduced the concept of normal value.²⁵ It still did not provide a procedural framework or regulations for conducting AD investigations.²⁶

¹⁶ Brink (n4 above) 2.

¹⁷ Act 60 of 1992.

¹⁸ Brink (n4 above) 2.

¹⁹ N Joubert "The Reform of South Africa's Anti-Dumping Regime"

https://www.wto.org/english/res_e/booksp_e/casestudies_e/case38_e.htm(accessed 18 March 2016).

²⁰ Joubert (n19 above).

²¹ Joubert (n19 above).

²² Joubert (n19 above).

²³ Act 39 of 1995.

²⁴ Brink (n4 above) 2.

²⁵ Brink (n4 above) 2.

²⁶ Joubert (n19 above).

On 22 January 2003 the International Trade Administration (ITA) Act²⁷ was published and it created a new body to handle AD investigations, the ITAC. In November 2003 the AD Regulations (ADR) were passed to guide ITAC in conducting AD investigations.²⁸ Brink points out that the ITA Act and the ADR generally follow the ADA and that some provisions provide more detail or more stringent rules than the ADA.²⁹ However, it is observed that there is considerable margin for administrative discretion which means that one has to examine the administrative practice to evaluate SA's AD regime consistency with the WTO standards.³⁰ This dissertation sets out to do exactly that from chapter three onwards.

2.3 Substantive Elements of the ADA and SA's AD Regime

The substantive elements of both the ADA and the SA AD regime will now be outlined. The specific AD elements that will be discussed are:

2.3.1 Fair Comparison

2.3.2 Export Price

2.3.3 Normal Value and Constructed Normal Value

2.3.4 Margin of Dumping

2.3.5 Material Injury

2.3.6 Causality

2.3.1 Fair Comparison

ADA

Article 2.2 of the ADA entitles the national authority to determine whether dumping is occurring by comparing the export price (EP) of the subject product with the normal value (NV) of the subject product.³¹ The NV of the subject product could either be the exporter's home market price, a third country price or a constructed price.³² For a fair comparison to

²⁷ Act 71 of 2002.

²⁸ Joubert (n19 above).

²⁹ Brink (n4 above) 7.

³⁰ Brink (n4 above) 7.

³¹ ADA Art 2.2.

³² Corr (n6 above) 79.

occur, the ADA mandates for the comparison of the ex-factory starting price of sales for the same or similar product³³, to the first unrelated customers in the export market and the market during the investigation period.³⁴

To determine the ex-factory price the national authorities have to adjust the price by deducting expenses and if necessary, differences in trade levels.³⁵ The ADA requires that the expenses be calculated using the actual records of the responding firm.³⁶ Corr point out that these intricate calculations can be manipulated to inflate the AD margin.³⁷

SA AD Regime

The ITA Act makes provision for ITAC, in determining the margin of dumping of goods, to make reasonable allowances for differences in conditions and terms of sale, differences in taxation and other differences affecting price comparability.³⁸ ADR 11 gives further detail in this regard and specifically provides for adjustments in respect of differences in conditions and terms of trade³⁹, taxation⁴⁰, levels of trade⁴¹, physical characteristics⁴² and quantities.⁴³ In addition, the ADR provide that

“adjustments should be requested in interested parties’ original responses to the relevant questionnaire and it must be -(a) substantiated;(b) verifiable;(c) directly related to the sale under consideration; and(d) clearly demonstrated to have affected price comparability at the time of setting prices.”⁴⁴

Brink notes that in practice ITAC’s application of adjustments is inconsistent.⁴⁵ He specifically refers to the *Tyres (China)* investigation in which ITAC granted adjustments for

³³ ADA Art 2.4.

³⁴ ADA Art 2.3 & 2.4.

³⁵ ADA Art 2.3 & 2.4.

³⁶ ADA Art 2.2.1.1.

³⁷Corr (n6 above) 80.

³⁸ ITA Act sec 32(3).

³⁹ ADR 11.1(a).

⁴⁰ ADR 11.1(b).

⁴¹ ADR 11.1(c).

⁴² ADR 11.1(d).

⁴³ ADR 11.1(e).

⁴⁴ ADR 11.2.

⁴⁵Brink (n4 above) 20.

advertising costs and in selling, general and administrative costs, but refused to do so in other investigations.⁴⁶

It has been noted that ITAC would make adjustments to the export price for payment terms, packing costs, commission paid to export agents, ocean freight and insurance, etc.⁴⁷ Adjustments to the normal value is usually made for payment terms, packing costs, commission paid to export agents and inland transport.⁴⁸

2.3.2 Export Price

ADA

The EP refers to the targeted company's price to an unaffiliated customer for consumption in the domestic market off the importing country.⁴⁹ This is the price to a buyer in the importing country. Furthermore, the EP may be based on the resale price of the exporter's sales subsidiary in the importing country as a result of the requirement that the customer must be unaffiliated.⁵⁰ A constructed EP arises when sales transactions are done through a subsidiary, thus all the expenses of the subsidiary must be deducted from its resale price to construct an ex-factory starting price.⁵¹

SA AD Regime

The EP is defined in the ITA Act as:

*“the price actually paid or payable for goods sold for export, net of all taxes, discounts and rebates actually granted and directly related to that sale”*⁵²

ITAC is obliged to construct the EP for the goods in question on the basis of the price at which the imported goods are first resold to an independent buyer⁵³, when the following situations exist:

⁴⁶ Brink (n4 above) 20.

⁴⁷ Brink (n4 above) 20.

⁴⁸ Brink (n4 above) 21.

⁴⁹ ADA Art 2.3.

⁵⁰ Corr (n4 above) 80.

⁵¹ ADA Art 2.3 & 2.4.

⁵² ITA Act sec 32(2)(a).

⁵³ ITA Act sec 32(5).

“(a) there is no export price as contemplated in the definition of dumping; (b) there appears to be an association or compensatory arrangement in respect of the export price between the exported or foreign manufacturer concerned and the importer or the third party concerned; or (c) the export price actually paid or payable is unreliable for any other reason.”⁵⁴

The constructed EP will be determined, in practice by deducting all costs incurred between the exporter’s ex-factory price and the price to the first independent buyer, plus a deduction for profit made by the importer.⁵⁵

2.3.3 Normal Value and Constructed Normal Value

ADA

The EP is compared to what is known as the NV, which is determined by selecting comparable sales in the exporting country’s domestic market.⁵⁶ The domestic market will only be used when there are sufficient sales, i.e. at least five percent of the amount sold to the importing country.⁵⁷ These sufficient sales must be of like or comparable goods.⁵⁸ In the event that domestic market sales cannot be used as a comparison, then the national authority is allowed to either use export sales to third countries or alternatively calculate a constructed value of the exported goods.⁵⁹

The *constructed NV* refers to the total cost of production including the actual cost of materials, labour and overheads incurred for the production of the goods sold in the comparison market, plus selling, general and administrative expenses.⁶⁰ Therefore, if home market prices cannot be used as a benchmark against the export price, then NV could be constructed.⁶¹

In determining *constructed NV*, national authorities require actual product-specific costs and profits. Corr notes that many manufacturers use a process cost accounting system and do not derive actual per-product costs, which makes it difficult for them to provide actual product-

⁵⁴ ITA Act sec 32(6).

⁵⁵ Brink (n4 above) 15; ADR 10.2 & 10.3.

⁵⁶ Corr (n6 above) 80.

⁵⁷ As above.

⁵⁸ ADA Art 2.6.

⁵⁹ Corr (n6 above) 81.

⁶⁰ ADA Art 2.2.1.

⁶¹ Corr (n6 above) 81.

specific costs for AD purposes.⁶² Add to this the ADA's requirement of "fully loaded" production costs, rather than variable or marginal costs, which contradicts normal business practices, it may result in dumping margins.⁶³ It is observed that national authorities have substantial discretion in determining the adjustment of an exporter's reported full cost, which can have a significant effect on the margin of dumping.⁶⁴

SA AD Regime

The ITA Act defines NV as the comparable price paid or payable, in the ordinary course of trade, for like goods intended for consumption in the exporting country or the country of origin.⁶⁵ Should this information on the comparable price not be available, then the NV will either be

“(aa) the constructed cost of production of the goods in the originating country when destined for domestic consumption, plus a reasonable addition for selling, general and administrative costs and for profit: or (bb) the highest comparable price of the like product when exported to an appropriate third or surrogate country, as long as that price is representative.”⁶⁶

The ADR specifically provides that where the goods are not sold in the exporting country by the exporter or the producer, the NV has to be determined on the basis of the selling price of another seller or sellers in the market.⁶⁷ However, Brink notes that this regulation has not been applied in practice by ITAC.⁶⁸ Brink also makes the observation that ITAC may revert to using alternative methodologies to determine NV not only when no or insufficient sales in the ordinary course of trade in the domestic market of the exporting country is available, but also when no information on such prices is available.⁶⁹ He therefore contends that this creates a lower standard vis-à-vis the ADA requirements.⁷⁰

⁶² Corr (n6 above) 81.

⁶³ ADA Art 2.2.1; Corr (n6 above) 81.

⁶⁴ Corr (n6 above) 81.

⁶⁵ ITA Act sec 32(2)(b)(i).

⁶⁶ ITA Act sec 32(2)(b)(ii).

⁶⁷ ADR 8.1 (a) – (b).

⁶⁸ Brink (n4 above) 18.

⁶⁹ Brink (n4 above) 18.

⁷⁰ As above.

In most investigations, ITAC therefore *constructs* the NV rather than using the EP to a third country where information on domestic market sales are not available.⁷¹

2.3.4 Margin of Dumping

ADA

Once the appropriate NV and the adjusted ex-factory prices have been established, then the dumping margin will be calculated.⁷² This is done by comparing the export sales to the NV on either an average or a transaction basis.⁷³ The NV is converted to the currency of the EP by using the exchange rate on the day of the export sale.⁷⁴ To determine the dumping amount, the average unit EP is generally subtracted from the average NV on a product by product basis.⁷⁵ When it is found that the EP is higher than the NV, negative dumping is said to have occurred. This negative dumping could then be used to off-set positive dumping, but WTO members do not allow such offsetting. So when negative dumping is found, a zero value is attributed to the negatively dumped transactions. This practice is referred to as zeroing.⁷⁶

When the net EP is less than the NV, a quantity – weighted dumping margin is calculated.⁷⁷ The margins for sales of all product types are then added to calculate a total dumping margin.⁷⁸ It is then this margin that is used to determine the AD duty. Corr further notes that WTO Members are allowed to use different methodologies for imposing the duty and is thus granted significant discretion to do so.⁷⁹ The ADA gives national authorities the discretion not to impose an AD duty, or to reduce the amount calculated, if it finds it appropriate to do so.⁸⁰ Although, the national authorities are not allowed to exceed the AD duty calculated.⁸¹ The ADA also encourages a “lesser duty” than the calculated duty to be imposed if it will be

⁷¹As above.

⁷² Corr (n6 above) 82.

⁷³ ADA, Art. 2.4.2.

⁷⁴ ADA Art 2.4.1.

⁷⁵ Corr (n6 above) 82.

⁷⁶ UNCTAD (n5 above) 14.

⁷⁷ Corr (n6 above) 82.

⁷⁸ Corr (n6 above) 82.

⁷⁹ Corr (n6 above) 82.

⁸⁰ ADA Art 9.1.

⁸¹ ADA Art 9.3.

sufficient to offset the injurious effect of the dumping.⁸² It is clearly evident that the ADA gives national authorities incredible discretion when it comes to calculating and imposing the dumping duty.

SA AD Regime

When ITAC is faced with investigating more than one product, it is then tasked with calculating the weighted average margin of dumping.⁸³ In these circumstances the margin of dumping has to be calculated for each product separately and the average dumping margin for all products is then calculated on the individual export volume of each product.⁸⁴ Brink observes that because the ADR requires the average margin of dumping to be calculated using the volume of exports as opposed to the value of exports, the definition in this regard is WTO inconsistent.⁸⁵

2.3.5 Material Injury

ADA

The impact on the domestic industry has to be assessed by examining the volume of the products deemed to have been dumped and the effect of these imports on domestic prices and producers.⁸⁶ If imports from a particular country are negligible, less than three percent of total imports, than the investigation for that country has to be terminated unless there are a significant number of negligible countries.⁸⁷ In analysing the price effect of dumped imports a number of factors have to be considered including price undercutting and price depression. To consider the effect on domestic producers some of the factors that have to be considered include trends in sales, market share, capacity utilisation, profits and employment and investment levels.⁸⁸

⁸² ADA Art 9.1 – Note that this is not a requirement. Countries do not have to impose a lesser duty, they are merely encouraged to do so.

⁸³ ADR 12.2.

⁸⁴ ADR 12.2.

⁸⁵ Brink (n6 above) 21.

⁸⁶ ADA Art 3.

⁸⁷ ADA Art 5.8.

⁸⁸ ADA Art 3.4.

Once all these factors have been considered, the national authorities have to determine whether the domestic industry is (i) materially injured, (ii) threatened with material injury, or (iii) is materially retarded in its establishment.⁸⁹ Material injury and material retardation are not defined in the ADA.⁹⁰ A threat of material injury is defined to mean that the injury is clearly foreseen and imminent and not merely conjecture or a remote possibility.⁹¹

SA AD Regime

The ADR do not expressly require injury to be determined before an AD duty can be imposed, but it implies that injury must be determined as the following factors must be determined:

*“Sales, volume, profit and loss, output, market share, productivity, return on investment, capacity utilisation, cash flow, inventories, employment, wages, growth, ability to raise capital or investments, and any other relevant facts placed before ITAC”*⁹²

2.3.6 Causality

ADA

Prior to making an affirmative injury determination, the national authorities have to demonstrate the causal relationship between the dumped imports and the injury to the domestic market.⁹³ National authorities are also required to examine any known factors other than the dumped imports, like contraction of demand which could be causing injury to the domestic market.⁹⁴

SA AD Regime

The ADR specifically requires that dumping must be the cause of the material injury to the domestic market before an AD duty can be imposed.⁹⁵ The factors that have to be considered in determining the causal link between dumping and material injury include:

⁸⁹ ADA Art 3 n.9.

⁹⁰ Corr (n6 above) 85.

⁹¹ ADA Art 3.6.

⁹² ADR 13.1 and 13.2.

⁹³ ADA Art 3.5.

⁹⁴ ADA Art 3.5.

⁹⁵ ADR 16.4.

“the change in volume of dumped imports, price undercutting, the market share of the dumped imports, the magnitude of the margin of dumping and the price of non-dumped products in the market”⁹⁶

2.4 Concluding Remarks

It is evident that the development of AD laws have spanned over many years, culminating into the current AD regime under the WTO. It is safe to say that the WTO AD regime is comprehensive and detailed. WTO Members are expected to be consistent with these laws. The WTO AD regime is not without criticism as some scholars and practitioners argue that too much discretion is granted to national authorities in determining whether dumping has occurred, often resulting in the imposition of high AD duties.

The author has clearly outlined SA’s current substantive AD regime. SA has been one of the earliest users of AD measures and it has done so robustly. The WTO ADA has not been promulgated into SA law, but AD legislation has been adopted. It is largely accepted that the ITA Act and the ADR, which governs the AD regime in SA is mostly in-line with the ADA. Some authors even go as far as to claim that in a number of respects the ITA Act and the ADR are more detailed than the ADA.

As much as South Africa’s AD legislative regime is generally accepted as being in-line with the ADA, issues have been raised in terms of its implementation in practice. Allegations have been made that the AD laws have been applied inconsistently. Hence the reason why this dissertation sets out to analyse whether the determination of *constructed NV* by the Board, in the December 2000 USA poultry case was WTO inconsistent.

⁹⁶ ADR 16.1.

CHAPTER THREE

2000 SA ANTI DUMPING DUTIES ON USA POULTRY: AN ANALYSIS

3 Introduction

In December 2000, ITAC imposed AD duties against USA poultry imports. These measures effectively halted these imports into SA all together.¹ Interested and affected parties petitioned the United States government to challenge the imposition of these AD duties at the WTO, to no avail. It has been alleged that the said AD duties were fictitiously calculated and that USA poultry products were in fact not being dumped in SA.² It has been further alleged that the SA poultry industry is highly uncompetitive and inefficient, which lead the industry to petition the SA government to impose AD duties against USA imports.³

As a result of the 2000 AD duties imposed against USA poultry imports, SA was subjected to an out of cycle review for its continued participation in AGOA in 2014.⁴ AGOA is a unilateral preferential treaty extended by the USA to sub-Saharan African countries. Under AGAO, SA has greatly benefited from exporting certain products to the USA duty free. SA faced being excluded from continuing to participate in AGOA if it maintained the 2000 AD duties on USA poultry products.⁵ After tough negotiations, the USA and SA governments agreed that an initial 65000 tons of USA poultry would be imported to SA, exempted from the 2000 AD duties.⁶

¹ Board on Tariffs and Trade Report No. 4088(2000) "Investigation into the alleged dumping of meat of fowls of the species Gallus Domesticus, originating in or imported from the United States of America: Final Determination" 1.

² KW Watson "Antidumping Fowls Out: U.S. –South Africa Chicken Dispute Highlights the Need for Global Reform" Cato Trade Policy Analysis 62, 19 October 2015 <http://www.cato.org/publications/free-trade-bulletin/antidumping-fowls-out-us-south-africa-chicken-dispute-highlights>(accessed on 13 November 2015).

³ K Kulkarni "Anti-Dumping Law as a Trade Barrier: Case of South Africa Poultry Imports from USA" (2005) *University of Denver* 7.

⁴ "U.S. to suspend African Growth and Opportunities Act (AGOA) benefits to South Africa" November 2015 <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/november/us-suspend-african-growth-and>(accessed 25 April 2016).

⁵ As above.

⁶ K Lovell "Who is getting fat on Cheap US Chicken imports?" 24 April 2016

The following chapter sets out to analyse the Board on Tariffs and Trade's (the Board) application of the SA substantive AD law in the 2000 USA poultry case. The Board is now known as ITAC. Specific attention will be given to the methodology the Board used to determine NV. The reasoning used for the findings that a *particular market situation* existed and that brown poultry meat was *not being sold in the ordinary course of trade* in the USA, will be deliberated. Interrogating this claim is vital as it informs the reasoning for the Board justifying the determination of a *constructed NV*. It is the determination of this *constructed NV* that has heavily been criticised as fictitious and erroneous, with the sole purpose of protecting an inefficient poultry industry in SA.

Firstly, a synopsis of the background that gave rise to the imposition of the AD duties against USA poultry products will be presented. This will be followed by a detailed discussion on the determination of *constructed NV*, which enabled the Board to find that dumping occurred and it resulted in a dumping margin being established. Issues raised by critics on the methodology used to determine NV will also be explored and cross-examined.

Before concluding the section, the current situation with USA poultry imports will be outlined. In addition a brief analysis of the argument that the 2000 AD duties were imposed against USA poultry products as a result of protectionism by the local SA authorities is provided.

3.1 Background and Basis for the Petition

This section sets out the foundation of the 2000 USA poultry AD case by briefly discussing the background of the facts and the subject products involved.

3.1.1 Synopsis

On 5 November 1999 the Board formally initiated an AD investigation into the potential dumping of meat of fowls of the species *Gallus Domesticus* (poultry products) originating or imported from the USA, in the SA market.⁷ The petition was lodged by Rainbow Farms (Pty) Ltd (Rainbow Farms) on behalf of the Southern African Customs Union (SACU). This

<http://www.fin24.com/Opinion/who-is-getting-fat-on-cheap-us-chicken-imports-20160424> (accessed 25 April 2016).

⁷ Notice No. 2445 of Government Gazette No. 20599 5 November 1999.

petition by Rainbow Farms was supported by the South African Poultry Association (SAPA).⁸The allegation that the petitioner made was that the USA poultry products were being exported to the SACU at prices less than the NV in the USA.⁹On initiation of the AD investigation the necessary questionnaires were sent to producers and exporters of poultry products in the USA for completion.

The Board made a preliminary determination that USA poultry products were being dumped in the SACU market and that it was causing material injury to the SACU market.¹⁰ After receiving comments from all interested parties in the matter, the board on 9 December 2000, made a final determination that USA poultry products were indeed being dumped in the SACU market. The board further held that the dumped USA poultry products caused material injury to the SACU market and in order to level the playing field, it imposed AD duties on the said USA poultry products.¹¹

The investigation was conducted in line with the Board on Tariffs and Trade Act¹² (BTT Act) and the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (ADA).¹³The investigation period for the dumping determination was from 1 August 1998 to 31 July 1999. The injury determination entailed the evaluation of data from 1 April 1996 to 31 July 1999.¹⁴

3.1.2 The Poultry / Subject Products

The imported products generally consisted of frozen whole chickens with giblets, frozen bone-in chicken cuts comprising of chicken leg-quarters and prepared or preserved frozen whole chickens or chicken cuts.¹⁵ The imported products were classified in the SACU Tariff Book, which is based on the Harmonised Tariff Classification System (HS System) as follows:

⁸ BTT Report No 4088 (n1 above) 1.

⁹ BTT Report No 4088 (n1 above) 3.

¹⁰“ Board on Tariffs and Trade Report No 4065 (2000) “Investigation into the alleged dumping of meat of fowls of the species Gallus Domesticus, originating in or imported from the United States of America: Preliminary Determination”.

¹¹ BTT Report No 4088 (n1 above) 2.

¹² Board on Tariffs and Trade Act, 1986 as amended; BTT Report No 4088 (n1 above) 3.

¹³ Anti Dumping Agreement (ADA).

¹⁴ BTT Report No 4088 (n1 above) 5.

¹⁵ BTT Report No 4088 (n1 above) 7.

TARIFF SUB – HEADING	DESCRIPTION	DUTY
0207	Meat of edible offal, of the Poultry of Heading No.01.05, fresh, chilled, or frozen:	
0207.1	- of Fowls of the species <i>Gallus Domesticus</i> :	
0207.12	= Not cut in pieces, frozen	27%
0207.14	= Cuts and offal, frozen:	
.90	- Other	220c/kg
1602.32	= Of Fowls of Species <i>Gallus Domesticus</i> :	
.90	- Other	220c/kg

¹⁶

The SACU products generally consisted of frozen whole chickens without giblets and frozen bone-in chicken cuts consisting of drumsticks, leg quarters, breasts, thighs, backs and wings. These products were also classified under the same six digit tariff headings as the imported products above.¹⁷

In terms of the ADA, the Board had to determine if the poultry products produced by the SACU were *like products* to those imported USA poultry products. This was required for the Board to establish injury and the extent thereof to the SACU industry. SACU and the USA poultry products had to be like products.¹⁸

In order to have determined likeness of the SACU and the USA poultry products the Board considered a number of criteria including the raw materials used during the production process, the physical appearance of the products, the end use and the tariff classification.¹⁹ Based on these criteria, the Board found that there was a strong similarity between the SACU and the USA poultry products. It was therefore satisfied that these products were indeed *like products* for the purposes of Article 2.6 of the ADA.²⁰

¹⁶BTT Report No 4088 (n1 above) 8.

¹⁷BTT Report No 4088 (n1 above) 9.

¹⁸ADA Art 2.6 – “Throughout this Agreement the term “like products” (‘produits similaires’) shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration”.

¹⁹BTT Report No 4088 (n1 above) 11.

²⁰BTT Report No 4088 (n1 above) 12.

3.2 The Dumping Determination

Chapter 2 dealt with current SA and WTO substantive AD law. As indicated above, the 2000 USA poultry AD case was considered in terms of the BTT Act, which was replaced by the ITA Act and the ADR. For the purposes of this chapter, the specific and relevant sections dealing with NV will be quoted from the previous BTT Act.

The BTT Act provided a definition for dumping as follows:

*“Dumping means the introduction of goods into the commerce of the Republic or the Common Customs area of the Southern African Customs Union at an export price which is less than the normal value of the goods”.*²¹

The BTT Act also made provision for the determination of NV which was the price paid or payable for the like goods in the *ordinary course of trade* in the exporting country.²² In the event that it was not possible to determine the NV based on local prices in the exporting market, NV was to be determined based on the highest comparable price at which similar goods were being exported to a third country in the ordinary course of trade.²³ If it was not possible to determine NV on either the exporting country sales or third country exports, than a *constructed cost* could be used to establish NV.²⁴

The BBT Act further made provision for the determination of export prices²⁵ and for adjustments to be made.²⁶ Both the BBT Act and the ADA made provision for adjustments to be made for differences in conditions and terms of sale, taxation and differences that could affect price comparability.²⁷ After all the adjustments have been made, then the margin of

²¹BTT Act (n12 above) sec 1.

²²BTT Act (n12 above) sec 1(1)(a).

²³BTT Act (n12 above) sec 1(1)(b)(i).

²⁴BTT Act (n12 above) sec 1(1)(b)(ii) – “the constructed cost of production of the goods in the country of origin plus a reasonable addition for selling costs and profits”.

²⁵BTT Act (n12 above) sec 1(1) & 1(2)(e).

²⁶BTT Act (n12 above) sec 2.4.

²⁷G Brink “Determining the Weighted Average Margin of Dumping” (2011) 1.

dumping was calculated by subtracting the export price from the NV of the product, which was then expressed as a percentage of the export price.²⁸

3.3 Methodology used in the investigation

Legal representatives of certain exporters in the USA submitted that the Board should only consider the imports of chicken-leg quarters because it consisted of 97% of all imports to SACU.²⁹ The board also limited the cost information that was submitted to two companies, Tyson and Gold Kist.³⁰ This was so because these poultry producers represented a large share of the industry in the USA. Tyson represented a 25% market share in the USA and it was the single largest exporter of poultry products to the SACU market.³¹ As a result, the Board accepted that the cost information of the two companies would be accepted.

3.3.1 Type of Economy and NV Methodology

The Board held that the USA economy operated as a free market economy and as a result the definition of NV as contemplated in section 1(1)(a) or (b) of the BTT Act applied.³² Section 1(1) of the BBT Act was based on Article 2.2 of the ADA and it was only when the requirements of section 1(1)(a) could not be satisfied, when section (b) may have been considered. As the decision was based on Article 2.2 of the ADA, it is imperative that the entire section be quoted in text:

*“When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of sales in the domestic market of the exporting country, such sales do not permit a proper comparison with a comparable price of the like product when exported to a third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs for profits”³³
(own underlining)*

Article 2.2.1 of the ADA continues and states as follows:

²⁸As above.

²⁹ BTT Report No. 4088 (n1 above) 17.

³⁰ As above.

³¹ As above.

³² As above.

³³ ADA Art 2.2.

“Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value...”³⁴

The petitioner in the application submitted that the sales price in the USA showed an anomaly that could not be applied universally.³⁵ This was the basis for arguing that the product was not being sold in *the ordinary course of trade* in the USA. This position has vehemently been dismissed by Kulkarni who argued that because the USA is the largest poultry producer in the world, the world market more closely resembled the USA market.³⁶ These arguments will be further explored later in the chapter.

3.3.2 Particular Market Situation (Constructed NV)

The Board held that a *particular market situation* existed in the USA. It came to this decision because a distinctive feature of the USA market existed, which was the strong preference for white chicken meat over that of brown chicken meat.³⁷ The Board relied on a number of sources including an earlier Board report which found that frozen chicken cuts were imported into the SA market at abnormally low prices, due to consumer preferences.³⁸ These consumers were found to pay a premium price for the white chicken meat which resulted in a surplus of the brown chicken meat with artificially low prices. These, low priced, brown chicken cuts were then exported to South Africa where consumers prefer brown chicken meat and paid a premium for it.³⁹

The Board further relied on a publication by Richard Henry and Graeme Rothwell that explicitly stated that the USA market had a marked and increased preference for white poultry meat over brown poultry meat.⁴⁰ Due to this bias in the USA market, chicken legs and thighs (brown meat) had specialised export markets and constituted the majority of USA poultry exports.⁴¹ A report by the US Department of Agriculture (USDOA) also confirmed

³⁴ ADA Art 2.2.

³⁵ BTT Report No 4088 (n1 above) 18.

³⁶ Kulkarni (n3 above) 5.

³⁷ BTT Report No 4088 (n1 above) 18.

³⁸ BTT Report No 4088 (n1 above) 18; BTT Report No 3768 – Increase in Duty on Frozen Chicken Cuts 1997.

³⁹ BTT Report No 4088 (n1 above) 18.

⁴⁰ R Henry & G Rothwell “The World Poultry Industry” (1995) *International Finance Corporation* 12.

⁴¹ As above.

that since 1993 market segmentation has occurred in the USA market. More specifically, all white chicken meat was consumed locally and brown chicken meat was exported.⁴²

The Board therefore held that the situation in the USA market characterised a *particular market situation* where white poultry meat was preferred over brown poultry meat. It further stated that this situation was also prevalent in a number of other countries, such as Canada and the European Union (EU).⁴³ However, this was not the situation with all countries in the world. It was noted that other countries, mostly developing countries preferred brown chicken meat and paid a premium for it, or the preference for brown chicken meat was not as pronounced as the preference for white chicken meat in the USA. The SACU market was found to have a preference for brown chicken meat.⁴⁴

As a result of these considerations, the Board decided in its preliminary determination that a *particular market situation* existed in the USA market, in respect of brown chicken meat, and in line with Article 2.2 of the ADA decided that the cost of production methodology (*constructed NV*) would be used to determine NV.⁴⁵

Brink Lindsey and Dan Ikenson stated that because the South African consumers preferred brown chicken meat and were willing to pay extra for it, the presumption would be that dumping was not occurring.⁴⁶ This was so because exporters were earning higher prices and profits abroad than what they were able to earn on the domestic USA market. Kulkarni acknowledged that by declaring the sale of brown chicken meat in the USA as a *particular market situation*, the Board was able to reject allocations of costs based on net realisable value.⁴⁷ He was adamant that the Board chose to ignore the realistic and valid nature of the cost basis of chicken leg quarters in the USA and other markets. He further argued that by concluding that the USA had a *particular market situation*, the Board could deface net realisable value and replace it with its own construed calculations.⁴⁸

⁴² BTT Report No 4088 (n1 above) 20.

⁴³ BTT Report No 4088 (n1 above) 19.

⁴⁴ BTT Report No 4088 (n1 above) 19.

⁴⁵ BTT Report No 4088 (n1 above) 20.

⁴⁶ B Lindsey & D Ikenson "Coming Home to Roost: Proliferating Antidumping Laws and the Growing Threat to U.S. Exports" (2001) *Center for Trade Policy Studies* 14.

⁴⁷ Kulkarni (n3 above) 11.

⁴⁸ As above.

The USA exporters rejected the Board's preliminary finding of a *particular market situation* in the USA. They contended that the situation in South Africa was the *particular market situation*, and not the USA.⁴⁹ They made specific reference to the Board report, quoted earlier by the Board in which it alluded to “*consumers in competing overseas countries prefer white meat of the chicken*”. The deduction the exporters made was that “*competing overseas countries*” meant that the Board concluded it was in fact the SACU market that was the *particular market situation* compared to the rest of the world.⁵⁰ Kulkarni also maintained that the USA market did not present a *particular market situation* and that it actually reflected the world poultry market.⁵¹ However, he does concede that whether the USA market or the SA market was the *particular market situation*, was entirely within the Board's discretion to decide.⁵²

The Board, responding to the USA exporters, held that “*competing overseas countries*” referred to countries which exported chicken that competed with SACU producers.⁵³ These countries, at the time, mainly had markets where white chicken meat was preferred. Hence the exporters' submission was rejected. The Board therefore held that relative to the SACU market, the situation in the USA could be typified as a *particular market situation*. The preliminary determination of a *particular market situation* in the USA was then confirmed as final and the *constructed NV* method could then be used to determine NV of brown chicken meat.⁵⁴

3.3.3 Ordinary course of trade (Constructed NV)

In addition (or alternatively) to the existence of a *particular market situation*, the Board also considered whether the sale of brown chicken meat was in the *ordinary course of trade* in the USA. Based on Article 2.2.1 of the ADA, the Board found that the USA brown chicken meat sales were not in the *ordinary course of trade* as it was selling at prices below per unit (fixed

⁴⁹ BTT Report No 4088 (n1 above) 20.

⁵⁰ As above.

⁵¹ Kulkarni (n3 above) 11.

⁵² As above.

⁵³ BTT Report No 4088 (n1 above) 21.

⁵⁴ As above.

or variable) costs of production plus selling, general and administrative costs (SGA).⁵⁵ This also enabled the Board to use the *constructed NV* method to derive the NV.

Based on the data received from the two major USA poultry producers, the Board held that it was apparent that the cost of production for chickens, including brown meat, was based on the specific product's contribution towards sales and earnings.⁵⁶ This resulted in the production costs of brown chicken meat cuts to be less than the stated production costs of whole chickens. It was then concluded that this costing policy had the effect of not reasonably reflecting the actual production costs of chicken meat cuts in the USA.⁵⁷ However, the Board unreservedly accepted that the costing policy used by USA poultry producers was generally consistent with acceptable International Accounting Practices.⁵⁸

Article 2.2.1.1 of the ADA was specifically applicable on this point of law and follows:

“... costs shall normally be calculated on the basis of records kept by the exporter... provided that such records are kept in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under investigation...”⁵⁹ (own underling)

As a result of the above underlined section in Article 2.2.1.1, the Board disregarded the USA exporter's own allocation of costs (based on contribution to sales earnings) as it did not reasonably reflect the costs associated with the production and sale of brown chicken meat.⁶⁰ The USA exporters provided cost details of their chicken products from the grow-out phase to the processing and cutting up phase. The Board then used these cost details to allocate exact production costs to the respective leg quarters, thighs, drumsticks, backs, breasts, and wings.⁶¹ This is also known as the weight-based cost allocation method.

Lindsey and Ikenson were of the opinion that the purpose of allocating costs on the basis of weight, was to shift costs away from white meat to the brown meat; the subject product of the

⁵⁵ BTT Report No 4088 (n1 above) 22; also see “n34 above”.

⁵⁶ BTT Report No 4088 (n1 above) 22.

⁵⁷ As above.

⁵⁸ As above.

⁵⁹ ADA Art 2.2.1.1.

⁶⁰ BTT Report No 4088 (n1 above) 23.

⁶¹ BTT Report No 4088 (n1 above) 24.

investigation.⁶²This method ensured that the USA exporters failed the cost test and therefore the *constructed NV* would be used. As a result, dumping margins would be higher.⁶³Kulkarni stated that the weight based system of allocating costs enabled the Board to find that brown meat made up the greatest percentage of the chicken and as a result attracted the highest price.⁶⁴ It has been argued that this weight-based method was faulty because white meat (breast) and brown meat (wings + thighs + drumsticks) make up equal ratios of 29% of a chicken.⁶⁵This stands in contrast with the Board's determination that brown chicken meat on a chicken consisted of 40 – 43% of the weight.⁶⁶

It is important to note that the Board accepted the correctness of all the data and figures submitted by the USA exporters. The Board also did not question or dispute that the USA exporters' cost allocation methodology was consistent with the application of the generally accepted accounting practice (GAAP) in the USA.⁶⁷ However, the Board held that the company's normal accounting practice resulted in a misallocation of production costs.⁶⁸This conclusion has been critiqued as being illogical, misconstrued and, therefore, illegal. Lindsey and Ikenson, candidly stated that the Board came to this conclusion because it egregiously manipulated cost data.⁶⁹

The exporter responded that the Board's preliminary rejection of Tyson's normal accounting system was improper and that the use of allocating costs based on weight was distortive and contrary to economic reality.⁷⁰ In response to the Board's finding that Tyson's accounting practice was "*not according to the usual accumulation of costs principle*", the exporter submitted that no authority or accounting principles were cited.⁷¹ The exporter therefore submitted that the Board's preliminary finding was in direct contravention of Article 2.2.1.1

⁶² Lindsey (n46 above) 15.

⁶³ As above.

⁶⁴ Kulkarni (n3 above) 12.

⁶⁵ As above.

⁶⁶ BTT Report No 4088 (n1 above) 29.

⁶⁷ BTT Report No 4088 (n1 above) 23.

⁶⁸ As above.

⁶⁹ Lindsey (n46 above) 14.

⁷⁰ BTT Report No. 4088 (n1 above) 25.

⁷¹ As above.

of the ADA because Tyson's cost system was (1) a fair reflection of Tyson's costs; (2) long standing; and (3) consistent with GAAP and International Accounting Standards.⁷²

The exporter also submitted that it acknowledged that the Board had decided to accept two of the three criteria in Article 2.2.1.1 of the ADA for its cost allocation.⁷³ On the third requirement, which the Board decided Tyson's accounting practice did not reasonably reflect the costs associated with the production and sale of the brown chicken meat, the exporter submitted that the Board had no basis for its decision. This was so because Tyson's normal cost allocation was firmly grounded in accounting principles and economic reality.⁷⁴ Kulkarni submitted later that the Board's decision was unreasonable because the market determined USA poultry costs and the market determined that costs reflect the premium demanded by white poultry meat.⁷⁵ This was why the USA poultry industry did reasonably reflect the cost associated with production and sale because all costs were accounted for under the USA cost allocation system.⁷⁶

The Board acknowledged that the exporter's compliance with GAAP was not in question. It further accepted that the cost allocation methodology in the USA was standard practice and that it was widely used by the industry. However, it still maintained that this methodology did not reasonably or accurately reflect the cost of production associated with the brown chicken meat products.

The exporter also referred the Board to a number of USA court decisions in support of its allegations regarding the Board's rejection of its cost allocation methodology. For the purposes of this paper and to illustrate the Board's reasoning, the author will consider one of the cases cited. In the *Canned Pineapple Fruit from Thailand* case, the US Department of Commerce (DOC) determined that an allocation based on weight for the cost of pineapple was inappropriate.⁷⁷ The DOC held that to use weight alone to allocate cost, was to set up the illogical supposition that a load of shells, cores and ends, costs just as much as an equal weight of trimmed and cored pineapple cylinders.⁷⁸ It further noted that the physical

⁷² As above.

⁷³ As above.

⁷⁴ As above.

⁷⁵ Kulkarni (n3 above) 10.

⁷⁶ As above.

⁷⁷ BTT Report No 4088 (n1 above) 27.

⁷⁸ As above.

weighing for the allocation of cost, may have no relation to the revenue producing power of the individual products. An example of a hog (pig) was then used to explain this argument. The DOC stated that if the joint costs of a hog were assigned to the various products on the basis of weight, the center-cut pork-shops would have the same unit costs as pigs feet, lard, ham, bacon, etc. This would have resulted in fabulous profits for some cuts, while losses would consistently have been shown for others.⁷⁹

In response to the *Canned Pineapple* case the Board held that the components of a pineapple had significantly different uses and values, whilst the different parts of a chicken (white and brown meat products) were all edible meat portions for human consumption.⁸⁰ The components of a pineapple was found not be interchangeable, whereas in the case of chicken the distinctive factor was consumer preference and not non-interchangeability.⁸¹ It was also stated that the flesh of a pineapple could be made into pineapple juice or pineapple cylinders through a production process. This was not the same for chicken products as white chicken meat cannot be turned into brown chicken meat through a production process.⁸²

On the cited example of the hog, the Board found that it was an inappropriate comparison. This was so because certain products of a pig could be regarded as by-products, which in a chicken's case could be compared to the claws, heads or giblets. Those were not the subject products in the chicken case; the subject products were all edible and for human consumption.⁸³

The Board's final determination then followed and it decided that a *particular market situation* existed in the USA or, in the alternative, the sales of leg quarters in the USA was *not in the ordinary course of trade*. As a result, NV was then determined using the *constructed NV* methodology. The Board further took note of the exporter's cost allocation methodology (based on a product's income generating ability), accepted that it was in line with the GAAP, and that it was used within the USA poultry industry. However, the Board concluded that the net-realizable cost allocation methodology did not reasonably or

⁷⁹ As above.

⁸⁰ BTT Report No 4088 (n1 above) 28.

⁸¹ As above.

⁸² BTT Report No 4088 (n1 above) 29.

⁸³ As above.

accurately reflect the costs associated with the production and sale of the products in question.⁸⁴

3.3.4 Dumping Findings based on Constructed NV

After the Board found that dumping occurred it continued to determine a dumping margin, which resulted in the AD duties. What follows is a brief synopsis of how the Board arrived at the respective dumping margins.

Gold Kist

The Board found that, based on the cost and sales information provided by Gold Kist, the comparable products in the domestic market were sold at less than the actual cost of production. The company's normal accounting practices resulted in a misallocation of production costs and it was therefore disregarded (although the factual correctness of the figures was accepted). The sale of leg quarters, thighs and drumsticks could therefore *not* be regarded as being *sold in the ordinary course of trade*.⁸⁵ A dumping margin for each of the chicken products was then separately calculated and weighted by the export volumes to arrive at a dumping factor. After these factors were totalled, a consolidated dumping margin of 55,78 USA cents per pound was determined and imposed.⁸⁶

Tyson

The Board found that Tyson sold bulk-pack leg quarters and certain thighs below the cost of production, plus SGA and therefore it was *not in the ordinary course of trade*. Alternatively, it found that a *particular market situation* existed. Consequently, the Board found that the NV of the said chicken leg quarters and certain thighs would be calculated using the *constructed NV* methodology. The Board did not accept Tyson's cost allocation methodology because it did not reasonably or accurately reflect the costs associated with the production and sale of brown chicken meat.⁸⁷

⁸⁴ BTT Report No 4088 (n1 above) 35.

⁸⁵ BTT Report No 4088 (n1 above) 36.

⁸⁶ BTT Report No 4088 (n1 above) 40.

⁸⁷ BTT Report No 4088 (n1 above) 41 – 42.

Individual dumping margins were then calculated and the dumping factors were totalled to arrive at a consolidated dumping margin of 37.37 USA cents per pound.⁸⁸ Some products had a negative dumping margin, which means that it was being sold above the calculated NV. The Board applied the zeroing methodology in order to arrive at a single dumping margin.⁸⁹ This zeroing methodology has been labelled as beyond economic rationale and has been heavily criticised as being illogical.⁹⁰ Detailed discussion of this concept remains outside the scope of this paper.

Other Exporters

A residual margin was calculated as a result of the large number of chicken producers/exporters in the USA that did not co-operate with the Board.⁹¹ The NV was based on the highest NV of the co-operating exporters, which resulted in the NV being similar for leg quarters, chicken backs and thighs.⁹² The margin of dumping for frozen or prepared or preserved bone-in cuts was 52.29 USA cents per pound and for whole frozen chickens was 54 USA cents per pound.⁹³

3.4 Current Situation: USA Poultry Products in SA

In January 2016, USA President, Mr Barack Obama gave SA a deadline of 15 March 2016 to allow USA poultry into the SA market, or risk losing duty-free access for its farming products under AGOA.⁹⁴ This was the eventual result of USA Senators Chris Coons of Delaware and Johnny Isakson of Georgia, who both chaired the Senate Chicken Caucus.⁹⁵

⁸⁸ BTT Report No 4088 (n1 above) 47.

⁸⁹ BTT Report No 4088 (n1 above) 48.

⁹⁰ S Cho "Remedying Trade Remedies" (2007) *Stanford / Yale Junior Faculty Forum* 21 – 22.

⁹¹ BBT Report No 4088 (n1 above) 48.

⁹² BTT Report No 4088 (n1 above) 50.

⁹³ BTT Report No 4088 (n1 above) 53.

⁹⁴ A Powell "US Sets Deadline for South Africa Trade Imports" 12 January 2016

<http://www.voanews.com/content/us-sets-deadline-for-south-africa-trade-imports/3141274.html> (accessed 26 April 2016).

⁹⁵ "Which Came First? The United States is Bullying South Africa into buying its cheap unwanted chicken" 29 April 2015 <http://qz.com/394335/the-united-states-is-bullying-south-africa-into-buying-its-cheap-unwanted-chicken/> (accessed 26 April 2016).

The Senators were of the opinion that it was unfair for SA, who benefited the most from AGOA, to continue to impose unreasonable tariffs against USA poultry.⁹⁶

AGOA, which enables duty-free access to the USA market, is important to SA because the USA is one of SA's top five trading partners.⁹⁷ It has been argued that AGOA provides diversification opportunities to the SA agricultural market and that it opens up a highly competitive market for SA produce. This diversification and an alternative market are considered very important in managing volatile markets and changes in global demand.⁹⁸ The importance of accessibility to the trade benefits that AGOA offers to SA cannot be underestimated.

In consequence of the pressures SA faced from the USA government, including direct instruction from the President, the two governments came to an agreement. The agreement was negotiated between the USA Poultry & Egg Export Council (USAPEEC) and the SAPA.⁹⁹ Under the agreement, an import quota for USA chicken cuts of 65000 metric tons was established.¹⁰⁰ On 19 February 2016, the first shipment of USA chicken arrived at the Port of Durban in SA and on 22 February 2016 the poultry imports were cleared for sale by SA veterinary authorities.¹⁰¹

Kevin Lovell, Chief Executive Officer of SAPA, claimed that SA was never closed to USA poultry imports, but that an AD duty was imposed against chicken bone-in portions; considered more or less waste by USA consumers.¹⁰² He further stated that the merits of these AD duties were never challenged in a court of law or at the WTO. He said the threat to existing producers as a result of these imports was quantifiable and that for every

⁹⁶ As above.

⁹⁷ "Why South Africa needs the US for its agricultural trade" 25 November 2015
<http://theconversation.com/why-south-africa-needs-the-us-for-its-agricultural-trade-50663> (accessed 26 April 2016).

⁹⁸ As above.

⁹⁹ R Burgin "US Chicken Back on South African Soil" 2 March 2016
<http://www.worldpoultry.net/Meat/Articles/2016/3/US-chicken-back-on-South-African-soil-2769332W/> (accessed 26 April 2016).

¹⁰⁰ As above.

¹⁰¹ As above.

¹⁰² Lovell (n6 above).

10000 metric tons of chicken meat imported, 1000 jobs were lost in the local SA poultry industry.¹⁰³ He also alleged that the USA poultry imports were not in the local industry's interests and stressed that the legality of the AD duties was never challenged. This was in reference to the 65000 metric tons of USA poultry import-quota which has been referred to as a 'patriotic sacrifice', a term coined by the Minister of Trade and Industry, Rob Davies.¹⁰⁴

David Wolpert, CEO of the SA based Association of Meat Importers and Exporters Association (AMIEA), claimed that the benefits of USA chicken imports outweigh protecting the SA domestic poultry industry.¹⁰⁵ He said this will ensure better access to quality chicken for both local SA importers and consumers. He further said that importing USA chickens will keep the local industry honest and that it will keep prices in check.¹⁰⁶

3.5 Concluding Remarks

SA is known as one of the most prolific users of AD measures amongst developing countries and is the foremost adopter of AD measures in Africa. The poultry industry is no stranger to the use of AD duties and the 2000 USA poultry AD decision in particular has been the focus of much criticism. On 9 December 2000, the Board, then the authority responsible for AD investigations in SA imposed a final AD duty against USA poultry products. The duties were so inflated that USA poultry producers could not feasibly continue to export their poultry products to SA. Consequently, in the past sixteen years, USA poultry producers have not exported their products to SA.

The USA poultry exports to SA consisted mainly of brown chicken meat, specifically chicken leg quarters. After the exporters, Tyson and Gold Kist submitted the required information as per the questionnaires dispersed as part of the AD investigation, the Board resolved NV could only be determined by using the *constructed NV* method. This method is allowed and sanctioned under the WTO ADA and therefore perfectly legal in practice. The criticism that arose after the imposition of these AD duties on USA poultry products was how the Board arrived at making use of *constructed NV*.

¹⁰³ Lovell (n6 above).

¹⁰⁴ Lovell (n6 above).

¹⁰⁵ (n95 above).

¹⁰⁶ (n95 above).

The Board found that a *particular market situation* existed in the USA and that brown chicken meat was *not sold in the ordinary course of trade* in the USA. These were the only two points on which the Board could justify using the *constructed NV* method to determine NV. On the first basis, the Board found that the pronounced preference for white chicken meat over that of brown chicken meat was unique to the USA. The Board also conceded that this preference appeared in other regions of the world like Canada and the EU. However, it nonetheless found that this was not the case for all the countries in the world. As a result, the Board found that a *particular market situation* existed in the USA because of the consumers pronounced preference for white chicken meat in the USA. It therefore concluded that the *constructed NV* method would be used to determine NV.

Moreover, the Board also questioned whether brown chicken meat was being *sold in the ordinary course of trade* on the USA market. In order to determine this, the Board considered the cost allocation the exporters used to assign the cost of production plus SGA to brown chicken meat. Based on the data submitted by exporters, it was made clear that the company used the net realisable method i.e. based on a chicken's various products individual contribution to revenue and profit. The Board found that this cost allocation method was not acceptable as it did not reflect reasonable or accurate costs of production and sale of the chicken products, including brown chicken meat.

The Board then decided to use a weight-based cost allocation method and resigned the cost of production of a chicken amongst the various parts of a chicken. It is important to note however, that the Board unreservedly accepted the exporter's factual correctness of the data submitted. It also did not dispute that the exporter's cost allocation method was in line with GAAP, and that it was a method widely used by the poultry industry in the USA. Irrespective of these findings, the Board found that the net realisable method used by the exporter misallocated production costs and thus found that the sale of brown chicken meat was *not in the ordinary course of trade*. This also enabled the Board to use the *constructed NV* method to determine NV.

The Board's decision has been heavily criticised over the last fifteen years. It has been accused of egregiously concocting and manipulating the data to arrive at a NV that would most certainly amount to dumping. Critics share the opinion that the Board arrived at its decision because it was set on protecting the local SA poultry industry, an industry that has been viewed as being highly inefficient and difficult to penetrate. On *the particular market*

situation finding, it has been argued that SA was the *particular market situation*. This argument is considered valid because the USA is the world's largest chicken producer and as a result sets the trend in chicken production worldwide.

The finding that brown chicken meat was *not sold in the ordinary course of trade* has been vehemently disputed as the non-acceptance of the net realisable method of allocating cost, which has been considered as being simply illogical. Critics found it unfathomable that the Board could accept the exporter's cost allocation method acceptable in term of GAAP in the USA, but still disregarded the method. Instead using a weight – based cost allocation method that distorts production costs.

Affected parties in the USA managed to convince the USA government to take action against SA. Interestingly, the USA did not follow the proper channels by approaching a court of law or the WTO Dispute Settlement Body (DSB). Rather, a unilateral preferential treaty was applied, namely AGOA. The main of which was to force SA to reconsider its imposition of the standing AD duties on USA poultry products. As SAPA stated, this raises interesting questions. The fact remains that even though the USA is of the opinion that the Board erred in its AD finding against USA poultry imports in 2000, it did not challenge the legality thereof before a WTO Panel.

In early 2016, the SA government eventually capitulated and agreed to a 65 000 metric ton import- quota for USA poultry products. Accordingly, 65 000 metric tons of USA poultry products is now allowed to enter the SA market exempted from the 2000 AD duties. Any USA poultry imports above the indicated tonnage will still attract the AD duties. The first shipment of USA poultry products indeed landed in SA in mid-February 2016. Shortly thereafter the product was cleared for sale on the SA market.

At face value, the dispute appears resolved. However, an ongoing managed trade deal may imply trouble in the future. It is therefore crucial to determine if the Board's decision to impose AD duties against USA poultry imports was indeed inconsistent with WTO law. The lessons that could be learned from this could assist SA to avoid coming under such heavy negative criticism in the future.

CHAPTER FOUR

THE WTO'S VIEWS ON CONSTRUCTED NORMAL VALUE

4 Introduction

The negative critiques about the Board's determination in December 2000 to impose AD duties against USA poultry products have so far been discussed at length. These critiques were based on the Board's reasoning in determining *constructed NV*. The Board's finding that a *particular market situation* existed in the USA in terms of poultry products was heavily critiqued. The finding that brown chicken meat was *not sold in the ordinary course of trade* in the USA because the producers' records did not reasonably reflect the costs associated with the production and sale of the poultry products, also attracted negative criticism. Despite displeasure expressed with the Board's decision to impose AD duties against USA poultry products, the US government did not approach the WTO for a Panel to be established in order to deliberate the matter.

As previously mentioned, the aim of this research is to determine whether the Board acted inconsistently with WTO rules in its determination of *constructed NV* in light of WTO Panel and Appellate Body decisions. The WTO Panel's (the Panel) determination in the *USA – China Broiler* case, which was issued in August 2013, will be discussed in aid of clarifying matters.¹ On 25 September 2013 the Dispute Settlement Body (DSB) adopted this panel report.² The case was identified as being almost identical to the 2000 USA poultry AD case in SA.³ The Panel ruled against China and it has been claimed that there is now WTO precedent that the Board's imposition of AD duties against USA poultry products in December 2000 was indeed inconsistent with international trade regulations.⁴

¹WTO Panel Report WT/DS427/R "China -Anti Dumping and Countervailing Duty Measures on Broiler Products from the United States".

² Panel and Appellate Body Proceedings https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds427_e.htm (accessed 16 May 2016).

³ Coons and Isakson "Senators Coons, Isakson to Trade Rep: South Africa must drop its duties on US chicken" 28 January 2015 <https://www.coons.senate.gov/newsroom/press-releases/senators-coons-isakson-to-trade-rep-south-africa-must-drop-its-duties-on-us-chicken> (accessed 26 April 2016).

⁴ As above.

A number of issues were deliberated and determined by the Panel in the *US – China Broiler* case, however emphasis will be placed on the issues regarding the interpretation of Article 2.2.1.1 of the ADA. This is so because it is the Panel’s interpretation of Article 2.2.1.1 of the ADA that is relevant to the Board’s determination in December 2000 when it imposed AD duties on USA poultry products. The Panel in the *US – China Broiler* case also relied on previous WTO Panel and Appellate Body reports to support its reasoning. Reference will be made to these reports while discussing the *US – China Broiler* case. The *EC – Salmon (Norway)* case that was decided by a WTO Panel in November 2007 is one of the cases that will be referenced.⁵ Both the WTO Panel and Appellate Body reports in the *US – Softwood Lumber V* case will also be discussed.⁶

Before a discussion on the said cases may be formed, it is important to note that adopted WTO Panel and Appellate Body decisions are not binding on WTO members other than the parties directly involved in the matter.⁷ However, these decisions are important as they are often considered by subsequent WTO Panels and they create legitimate expectations amongst WTO member.⁸ It is therefore imperative that these decisions be taken into consideration by WTO members where they are relevant to any dispute. Based on this reasoning, the author has decided to compare the Board’s decision in light of the Panel report in the *US – China Broiler* case, which evidently relied on other Panel and Appellate Body reports. The outcomes from this chapter will therefore be used to assess whether the Board’s decision in the 2000 USA poultry AD case was WTO inconsistent in chapter five.

4.1 *US – China Broiler case (WT/DS427/R)*

The Panel in this case considered twelve issues that were raised by the USA. For the purposes of this research, the author will only consider the Panel’s outcomes on the interpretation of Article 2.2.1.1 of the ADA.

⁵WTO Panel Report WT/DS337/R “European Communities – Anti Dumping Measure on Farmed Salmon from Norway”.

⁶ WTO Panel Report “*US – Softwood Lumber V*”; WTO Appellate Body Report “*US – Softwood Lumber V*”.

⁷ “Status of Panel and Appellate Body

Reports”https://www.wto.org/english/tratop_e/dispu_e/repertory_e/s8_e.htm#S.8.1 (accessed 16 May 2016)

⁸ As above.

4.1.1 Factual Background

The USA's claims were based on AD and countervailing measures imposed by China on broiler (poultry) products from the USA. For the purposes of this work, the author will solely focus on the interpretation of the relevant AD aspects dealing with Article 2.2.1.1 of the ADA of the Panel report.

On 27 September 2009, the Chinese authority responsible for AD investigations, the Ministry of Commerce of the People's Republic of China ("MOFCOM"), initiated an AD investigation. The period of investigation was set at 1 July 2008 to 30 June 2009 and the period for the injury determination was set at 1 January 2006 to 30 June 2009.⁹ The investigation was initiated in response to a petition that was lodged by the China Animal Agricultural Association (CAAA), the petitioner.¹⁰

On 5 February 2010 MOFCOM published its preliminary AD determination in which it found that dumping had occurred in regards to USA poultry products exported to China during the period of investigation and that it caused material damage to the domestic market in China.¹¹ On 26 September 2010 MOFCOM published its final AD determination which confirmed its preliminary findings that USA poultry products were being dumped in China and that it caused material injury to the domestic market.¹²

The specific description of the subject products ("poultry products") were chicken products which came from a live broiler that was slaughtered and processed; including whole chickens, cuts and offal, side products of chicken products, fresh, chilled or frozen. The main usage for the poultry products in China was for human food directly through markets and supermarkets by retail or wholesale and indirectly through catering.¹³

As a result of the final AD determination by MOFCOM, the USA requested consultations with China on 20 September 2011.¹⁴ On 28 October 2011 representatives of the two countries

⁹ Panel Report 427 (n1 above) para 2.2.

¹⁰ As above.

¹¹ MOFCOM Notice No 8 "Preliminary Anti Dumping Determination" (2010).

¹² MOFCOM Notice No 51 "Final Anti Dumping Determination" (2010).

¹³ Panel Report 427 (n1 above) para 2.2 - refer specifically to footnote 8 of the report.

¹⁴ Panel Report 427 (n1 above) para 1.1 - The consultations were requested pursuant to Article 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article XXIII:1 of the

held consultations, but these consultations failed. The USA then requested a panel to be established and the Panel held meetings with the interested parties between September 2012 and December 2012. The Panel's interim report was issued on 8 May 2013 and its final report was released to the parties on 25 June 2013.¹⁵ It is this latter Panel report that is discussed in this work.

4.1.2 Dumping Determination

Relevant Provisions

The Panel considered the following provisions in determining whether MOFCOM's determination of *constructed NV* was WTO inconsistent.

Article 2.1 of the ADA provides that:

“A product is considered dumped if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.”¹⁶

Article 2.2 of the ADA states that:

“When there are no sales of the like product in the ordinary course of trade the margin of dumping shall be determined either by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profit.”¹⁷ (own underlining)

Article 2.2.1.1 of the ADA reads as follows:

“costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by

General Agreement on Tariffs and Trade 1994, and Article 17.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (“Anti Dumping Agreement”).

¹⁵ Panel Report 427 (n1 above) para 1.7.

¹⁶ ADA Art 2.1.

¹⁷ ADA Art 2.2.

*the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs. Unless already reflected in the cost allocations under this sub-paragraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations”.*¹⁸

USA’s claims before the Panel

The USA requested the Panel to find that MOFCOM acted inconsistently with Article 2.2.1.1 of the ADA:

(i) by rejecting, without any consideration and explanation, the costs kept in the books and records of the USA producers to calculate NV even though these were in line with GAAP (based on the first sentence of Article 2.2.1.1); and

(ii) by applying a methodology (“weighted – average”) which did not reasonably reflect the costs associated with the production and sale of the products subject to the investigation (based on the second sentence of Article 2.2.1.1).

China simply requested that the Panel reject all the USA’s claims and instead find that MOFCOM’s determinations in these investigations were fully consistent with China’s WTO commitments.

USA Producers / Exporters Books and Records

Three USA poultry producers were subject to MOFCOM’s AD investigation including Tyson, Keystone and Pilgrim’s Pride. During the investigation MOFCOM issued questionnaires and supplemental questionnaires to the three respondents (producers). All three producers reported that they had used a “relative sales value” (“value – based”) methodology, whereby pre-split-off costs of production were allocated to the various joint products according to the proportion of revenue generated by the sale of those products.¹⁹

In both its preliminary and final determinations MOFCOM concluded that it would not use all three USA producers cost allocation methodologies as reflected in their books and records.

¹⁸ ADA Art 2.2.1.1.

¹⁹ Panel Report 427 (n1 above) para 7.114 .

Rather, the Ministry would use its own methodology which allocated the pre-split-off costs based on the weight of the various chicken products. With respect to Tyson and Keystone, MOFCOM held that their cost did not reasonably reflect the production cost of the subject product (without providing reasons for its decision). With respect to Pilgrim's Pride, MOFCOM concluded that it could not use the records provided by Pilgrim's Pride because it was incomplete and it could therefore not be understood.²⁰

All the producers provided comments on MOFCOM's determinations in respect to not using their value - based cost allocation methodology. Tyson, in response to the final AD disclosure, submitted that MOFCOM did not provide sufficient justification for the reasonableness of its allocations. It further submitted that MOFCOM did not provide any logical explanation that value – based cost allocations were not reasonable. Keystone went further and disagreed with MOFCOM's characterisation that their costs were unreasonable because its cost were in accordance with books and records kept in the normal course of business, and that this was consistent with US GAAP and international accounting practice.²¹ The US Government also made submissions and supported the views of these USA exporters.²²

First Sentence of Article 2.2.1.1 – Did MOFCOM comply?

This following italicised sentence deals with the obligation on the investigating authority to *shall normally calculate costs on the basis of the producers' books and records*. The Panel proceeded to determine whether MOFCOM complied with this obligation by considering two questions. These will now briefly be discussed.

(a) Was MOFCOM obliged to explain its decision to decline to use the producers' books and records?

The USA argued that the term “*shall*” in the first sentence signified a legal duty and the definitions for the term “*normally*” included “*in the usual way*” or “*as a rule*”. It therefore submitted that MOFCOM should have calculated costs on the basis of records kept by the producers’ *as a rule* whenever (i) the records were consistent with GAAP of the exporting country and (ii) when it reasonably reflected the costs associated with the production and sale

²⁰ Panel Report 427 (n1 above) para 7.119 .

²¹ Panel Report 427 (n1 above) para 7.123.

²² Panel Report 427 (n1 above) para 7.124.

of the subject products.²³ The USA further submitted that Article 2.2.1.1 imposed a positive obligation on MOFCOM. This meant that if MOFCOM was satisfied that it met the requirements from derogating from such a positive obligation, it must have set forth its explanation for such derogation.²⁴

China submitted that the first sentence of Article 2.2.1.1 contains two independent conditions, (i) that of GAAP consistency and (ii) that the records “reasonably reflect” the costs of production and sale. China was therefore of the view that if either condition was not met, MOFCOM did not have to use the producers recorded costs. It further argued that the burden was on the producers’ to demonstrate that these two conditions were met, or at the very least that MOFCOM did not bear any special burden to demonstrate that the records did not reasonably reflect the costs.²⁵

The Panel relied on the *US – Softwood Lumber V* case where the Panel held that the first sentence of Article 2.2.1.1 imposes a positive obligation on an investigating authority to normally use the books and records of the producers’ if two conditions are met. Firstly, when the books and records are consistent with the GAAP of the exporting country and secondly, they reasonably reflect the cost associated with the production and sale of the product under consideration.²⁶ The Panel also referred to Article 17.6(i) of the ADA that stipulates that the role of a Panel is to review whether competent authorities have provided reasoned and adequate explanations on how the *evidence on record* supports their factual findings.²⁷

The Panel decided that irrespective of who bears the initial burden of proof on whether the producers’ books and records comply with the two conditions under article 2.2.1.1 of the ADA, the investigating authority was not excused from having to explain why it decided to deviate from the normal procedure outlined in Article 2.2.1.1 – i.e. *shall normally use the producers’ books and records*.²⁸ MOFCOM was therefore under an obligation to explain why it decided not to use the three producers’ books and records.

²³ Panel Report 427 (n1 above) para 7.133.

²⁴ Panel Report 427 (n1 above) para 7.134 .

²⁵ Panel Report 427 (n1 above) para 7.145.

²⁶ Panel Report 427 (n1 above) para 7.160; also see WTO Panel Report *US – Softwood Lumber V* para 7.237.

²⁷ Panel Report 427 (n1 above) para 7.162.

²⁸ Panel Report 427 (n1 above) para 7.163.

(b) Did MOFCOM correctly determine that the producers' books and records did not reasonably reflect the cost of production and sale?

The USA clarified that it was not arguing that if books and records were GAAP consistent, that it was *ipso facto* reasonable, but rather that GAAP consistency often meant that the costs associated with the production and sale of the subject product was reasonable.²⁹ The USA also disagreed with China's implication that costs determined on a value – based methodology could result in being “unfair” or “too low” for the Chinese market. This was because the GAAP referred to in Article 2.2.1.1 was based on the exporting country and not the importing country. Article 2.2.1.1 also requires an investigating authority to consider a producer's historically – used allocations, which the USA argued would never reflect the conditions in an importing country.³⁰

China argued that whether the producers' books and records reasonably reflected the costs associated with production and sale of the subject product, the particular purpose of the ADA must be considered. It submitted that the overarching purpose of the ADA was to establish a *fair price*.³¹ China noted that the use of an improper methodology may defeat the entire purpose of the proceeding to determine a *fair NV*. The use of a low price, it argued, could be outside of what is “*fair*” or “*normal*” and it amounts to circular reasoning that frustrates the purposes of determining NV.³² Therefore, China submitted that the focus should be on what the producer had to pay for the subject products and not on the revenue the subject products brought in.³³

The Panel noted that MOFCOM's decision to decline to use the exporters' books and records was more based on the second criteria, i.e. that it did not reasonably reflect the cost associated with the production and sale of the subject products.³⁴ The Panel held that the two conditions under the first sentence of Article 2.2.1.1 were cumulative and as a result, the fact

²⁹Panel Report 427 (n1 above) para 7.138.

³⁰Panel Report 427 (n1 above) para 7.139.

³¹Panel Report 427 (n1 above) para 7.146.

³²Panel Report 427 (n1 above) para 7.147.

³³Panel Report 427 (n1 above) para 7.149.

³⁴Panel Report 427 (n1 above) para 7.165.

that the exporters' books and records were GAAP consistent, did not in itself require MOFCOM to use the said books and records.³⁵

On the "value – based" and the "weight – based" cost allocation methodologies, the Panel was of the view that neither method was in principle inherently unreasonable.³⁶ China raised two main concerns about the producers' cost allocation methodology in justifying MOFCOM's decision not to use the books and records of the producers.³⁷ Firstly, China contended that the exporters' were using incorrect values to determine the pre-split off costs to allocate to each product. In particular, despite having significant global sales, the producers' only used domestic US sales in determining its value based allocations. MOFCOM already concluded that the sales in the USA were too small to permit a proper comparison with the export price and as a result, this data was not sufficient.³⁸ Secondly, China argued that even though paws (main product exported to China) had value in both the domestic and export market, the producers treated paws as a by-product, allocating no pre-split off costs to it.³⁹

The Panel noted that China asked a series of questions on the producers' cost accounting method in its questionnaires, which indicated a general concern for understanding this method. However, it held that in both of MOFCOM's preliminary and final AD determinations, in the case of Tyson and Keystone, it only provided the USA exporters with its conclusions without providing the supporting reasoning.⁴⁰ Understandably, the Panel found that MOFCOM's determination to decline to use Tyson and Keystone's books and records was inconsistent with the first sentence of Article 2.2.1.1.⁴¹ MOFCOM should have given an explanation in its preliminary and final AD determinations for not using the said exporters books and records.

It is important to note that the Panel did state that the arguments China made before it in justifying MOFCOM's decision not to use the producers' books and records, could have

³⁵Panel Report 427 (n1 above) para 7.166.

³⁶Panel Report 427(n1 above) para 7.167.

³⁷ As above.

³⁸Panel Report 427(n1 above) para 7.168.

³⁹Panel Report 427(n1 above) para 7.169.

⁴⁰Panel Report 427(n1 above) para 7.171.

⁴¹As above.

served as a basis to do so.⁴² The problem was that these reasons were not given to the producers during the AD determinations by MOFCOM i.e. it was not on the record of the AD determinations.

MOFCOM decided to reject Pilgrim's Pride's books and records based on the incompleteness thereof.⁴³ This reason for not using Pilgrim's Pride's books and records was given in both the preliminary and final AD determinations and as a result, the Panel found that in respect of Pilgrims Pride, MOFCOM did not act inconsistently with Article 2.2.1.1 of the ADA.⁴⁴

Second Sentence of Article 2.2.1.1 – Did MOFCOM comply?

The Panel had to determine whether MOFCOM complied with its obligation under the second sentence of Article 2.2.1.1 in *considering all the available evidence* before it when it devised and applied its own allocation methodology.

The USA's Arguments

The USA argued that because MOFCOM decided to reject the reported costs of the USA producers, it had to affirmatively demonstrate with relevant evidence that the allocation it was implementing was proper.⁴⁵ The USA argued that MOFCOM's allocation of costs was in itself inconsistent with Article 2.2.1.1 of the ADA by using a weight – based methodology. This was so because the cost of production of products as diverse as breast meat, leg quarters, and chicken paws was determined on a per pound basis.⁴⁶ It was further submitted that a weight – based cost allocation methodology was tailored to find dumping in these particular circumstances.⁴⁷

The USA also relied on the finding in *EC – Salmon (Norway)* where the Panel in that case held that it was incumbent on the investigating authority to at the very minimum explain why it was appropriate to allocate costs in the manner it did. In the absence of such an

⁴² As above.

⁴³ Panel Report 427 (n1 above) para 7.173.

⁴⁴ Panel Report 427(n1 above) para 7.174 .

⁴⁵ Panel Report 427(n1 above) para 7.176.

⁴⁶ Panel Report 427(n1 above) para 7.177.

⁴⁷ As above.

explanation, the investigating authority would then fail the test established under Article 2.2.1.1.⁴⁸

China's Arguments

China submitted that Article 2.2.1.1 contained only one affirmative obligation which was “to *consider all the available evidence* on the proper allocation of costs”. Therefore, if the producers’ cost allocations have been rejected for not reasonably reflecting the actual costs of production, then the authority may re-allocate costs provided it has *considered* all the evidence.⁴⁹ In China’s view, the obligation to *consider* did not require an explanation of the investigating authorities’ reasoning. It also noted that the text of Article 2.2.1.1 did not require the use of a particular allocation methodology should the investigating authority be required to allocate costs.⁵⁰

China also submitted that the weight – based methodology was a reasonable and neutral allocation alternative because it was not influenced by consumer perceptions in either China or the USA. It further argued that the weight – based methodology avoided the serious distortions of the value – based methodology and that it found support in accepted accounting principles.⁵¹ It was also argued that MOFCOM *considered* all the evidence before it concerning cost allocation to reach a reasonable allocation methodology.⁵²

Panel's Evaluation

The Panel had to determine (i) whether MOFCOM took into *consideration* “compelling evidence” with respect to the reasonableness of its own methodology and available alternatives and (ii) whether MOFCOM improperly included costs not associated with the production and sale of the product under consideration.⁵³ The latter determination is not directly relevant to this research and therefore the author will only consider the Panel’s decision on the first point.

⁴⁸Panel Report 427(n1 above) para 7.179.

⁴⁹Panel Report 427(n1 above) para 7.180.

⁵⁰ As above.

⁵¹Panel Report 427(n1 above) para 7.181.

⁵²Panel Report 427(n1 above) para 7.182.

⁵³Panel Report 427(n1 above) para 7.186.

The Panel referred to the Appellate Body decision in *US – Softwood Lumber V* that noted the ordinary meaning of “*consider*” was “*to look attentively*”, “*reflect on*”, or to “*weigh the merits of*”.⁵⁴ The Appellate Body in *US – Softwood Lumber V* further found support for its reading of the word “*consider*” in the second sentence of Article 2.2.1.1 in that it requires the consideration of “all the available evidence on *proper* allocation of costs”. The word *proper* in this sentence was held to mean that a degree of deliberation was necessary on the part of the investigating authority in “considering all available evidence”.⁵⁵

On a point that was pertinent to the Panel in this case, it principally relied on the Appellate Body’s finding in *US – Softwood Lumber V* that dealt with alternative methodologies. The Appellate Body held that when compelling evidence was available to the investigating authority that more than one cost allocation methodology may be potentially appropriate, the investigating authority may be required to “*reflect on*” and “*weigh the merits*” of such alternative methodologies. This was to satisfy the requirement to “*consider* all the available evidence”.⁵⁶ However, the Appellate Body also held that an investigating authority will not always be required to “*weigh the merits*” of evidence on alternative methodologies in all situations and that it depended on the circumstances.⁵⁷

The Panel, in determining whether MOFCOM did comply with the obligation in the second sentence had to address three questions;

- (i) Whether MOFCOM did more than simply receive the evidence and took note thereof;
- (ii) Whether, in this particular situation, MOFCOM was required to “*reflect on*” and “*weigh the merits*” of the various allocations methodologies; and if so
- (iii) Whether there was evidence of its consideration reflected in relevant documentation.⁵⁸

China indicated a general interest in the producers’ cost allocation and even asked questions about it. Therefore, in response to question one, China did more than simply take receipt of

⁵⁴Panel Report 427 (n1 above) para 7.187.

⁵⁵Panel Report 427 (n1 above) para 7.188; also see Appellate Body Report, *US – Softwood Lumber V*, para.133.

⁵⁶Panel Report 427 (n1 above) para 7.189; also see Appellate Body Report, *US – Softwood Lumber V*, para 138.

⁵⁷Panel Report 427 (n1 above) para.7.190 pg.75; also see Panel Report, *EC – Salmon (Norway)*, para 7.509.

⁵⁸ Panel Report 427(n1 above) para 7.192.

the books and records of the producers. The Panel found that the USA producers', in particular Tyson and Keystone provided MOFCOM with alternative methodologies to consider. The Panel found that China should have *weighed* or *reflected* on these alternative methodologies. However, there was no evidence on the investigation record that the merits of these alternative methodologies were *weighed* or *reflected* upon.⁵⁹ It also found that MOFCOM did not explain its reasons why its own allocation methodology, i.e. weight - based, led to a proper allocation of costs. Therefore, the Panel found that China acted inconsistently with the obligation in the second sentence of Article 2.2.1.1 by not considering *all the evidence on the proper allocation of costs*.⁶⁰

4.1.3 Concluding Remarks

The focus of this chapter was to outline and describe the Panel's interpretation of Article 2.2.1.1 of the ADA in the *US – China Broiler* case. The purpose for doing this was to use, in chapter five, the practical outcomes of the Panel's interpretations to assess and compare whether the Board in the USA poultry AD case acted inconsistently with the relevant WTO rules in its determination of *constructed NV*. It is important to take into consideration that the WTO Panel and Appellate Body reports are not binding on all WTO Members, but only on the parties directly involved in a particular dispute. However, these Panel and Appellate Body reports create legitimate expectations among WTO Members and the interpretations on WTO law in these reports are relied upon by subsequent Panels. Herein lies the importance of these reports as they have been treated as precedents, albeit it not officially binding on subsequent Panels.

Article 2.2.1.1 of the ADA explains Article 2.2.1 of the ADA that allows for investigating authorities to use *constructed NV* in order to determine the NV of the subject products in an investigation. In interpreting Article 2.2.1.1, the Panel essentially considered three questions. The first question was whether the investigating authority in an AD investigation was under an obligation to explain why it decided not to use the producers' books and records that was submitted. The Panel relied on the determination in the *US – Softwood Lumber V* case which held that the investigating authority is indeed under an obligation to explain why it decided not to use the producers' books and records. The Panel as a result concluded that MOFCOM was obliged to explain why it decided not to use the books and records of the USA producers.

⁵⁹Panel Report 427(n1 above) para 7.195.

⁶⁰ As above.

The second question the Panel addressed was whether MOFCOM correctly determined that the producers' books and records did not reasonably reflect the costs associated with the production and sale of the subject products, i.e. the first sentence of Article 2.2.1.1 of the ADA. The Panel held that two questions had to be satisfied to comply with the first sentence under Article 2.2.1.1 of the ADA. These were whether the producers' books and records were (i) consistent with the GAAP in the exporting country and (ii) reasonably reflected the costs associated with the production and sale of the subject products. It further concluded that GAAP consistency alone did not mean MOFCOM had to use the producers' books and records. Therefore, both the conditions were to be regarded cumulative and as a result both had to be satisfied.

On the second condition, whether the books and records reasonably reflected production and sales costs, MOFCOM provided reasons to the Panel for not using the producers' books and records. On the reasons provided for by Tyson and Keystone, the Panel held that the issue was not the reasons itself, but the fact that MOFCOM did not provide any explanation of its decision in its preliminary and final AD determinations. This meant that the Panel could not on the record, i.e. the preliminary and final AD determinations, decide if the reasons given during the Panel hearings were indeed the reasons initially used to decline to use Tyson and Keystone's books and records. It was on this basis that the Panel ruled that MOFCOM was inconsistent with the first sentence of Article 2.2.1.1 of the ADA in rejecting the use of Tyson and Keystone's books and records.

On the rejection of Pilgrim's Pride's books and records, the Panel held that MOFCOM did provide reasons for its decision in both the preliminary and final AD determinations. The Panel found that MOFCOM was therefore justified in rejecting the use of Pilgrim's Pride's books and records and that it was as a result not inconsistent with Article 2.2.1.1 of the ADA. It is therefore important to note that the Panel did not make a decision on the validity of MOFCOM's reasons for rejecting the producers books and records in itself for Tyson and Keystone, but because MOFCOM did not give an explanation for its decision during the AD determinations. However, the Panel observed that the reasons MOFCOM put forward at the hearings could have served as justification.

The third question the Panel considered was whether MOFCOM complied with its obligation under the second sentence of Article 2.2.1.1 of the ADA when it had to *consider all the available evidence* before it when it devised and applied its own cost allocation methodology.

The Panel held that in answering the third question, three separate questions had to be satisfied. The first was whether MOFCOM did more than just receive and note the books and records from the producers. The Panel found that MOFCOM showed that it tried to generally understand the producers' cost allocation methodology because it asked a number of questions about it. Therefore it did do more than just receive and note the books and records.

Secondly, did MOFOM have to “*reflect on*” and “*weigh the merits*” of different cost allocation methodologies? The Panel found that both Tyson and Keystone provided alternative cost allocation methodologies for MOFCOM to consider. The Panel therefore found that as a result, under the circumstance, MOFCOM had to consider these alternative methodologies. It did note however, that this will not always be the case where alternative methodologies are available and that it depends on the circumstances. Thirdly, the Panel had to decide whether there was evidence on the record whether MOFCOM *considered* the alternative methodologies that were available to it. The Panel found that there was no proof on the record that MOFCOM considered the alternative cost allocation methodologies submitted by Tyson and Keystone. The Panel also found that there was no evidence on the record where MOFCOM explained the reasons why its own cost allocating methodology i.e. weight – based, lead to a proper allocation of costs.

Therefore, the Panel found that MOFCOM was inconsistent with the second sentence of Article 2.2.1.1 of the ADA because it did not consider all the available evidence before it and it also did not explain why its own cost allocation methodology lead to a proper allocation of costs.

The striking similarity between the investigating authorities reasoning in the *US – China Broiler* case, MOFCOM, and the USA poultry AD case, the Board, cannot be denied. The question that arises is whether the claims that the Panel's determination in the *US –China Broiler* case is a precedent that serves as proof that the Board acted inconsistently with WTO rules in its determination of *constructedNV* in the USA poultry AD case are valid. In chapter five, when the author compares the outcomes of the Panel's determinations, this question will be addressed.

CHAPTER FIVE

PRACTICAL OUTCOMES AND OBSERVATIONS

5 Introduction

The question the author set out to address was whether the Board in December 2000, in its determination of *constructed NV* in the USA poultry AD case, acted inconsistently with WTO law. In chapter three, the Board's interpretation of Articles 2.2, 2.2.1 and 2.2.1.1 of the ADA was analysed and discussed. This was followed by a similar discussion of the WTO Panel decision in the *US – China Broiler* case, with specific reference to its interpretation of the same Articles as deliberated by the Board in the USA poultry AD case. Practical outcomes were drawn from the analysis of these cases in both chapters three and four. It is these outcomes that will now form the basis of the author's response to the research question, whether the Board was inconsistent with WTO law in its determination of *constructed NV* in the USA poultry AD case.

5.1 WTO Panel and Appellate Body Reports

The author focused on discussing the Panel's interpretation of Article 2.2.1.1 of the ADA in the *US – China Broiler* case. The reason for this is not only because the Board also relied on the same Article to determine *constructed NV* in the USA poultry AD case, but because the two cases were strikingly similar.

In the *US – China Broiler*¹ case the subject product, chicken paws, consisted of USA exports that had little to no value on the USA market. In the *USA AD Poultry*² case the subject product, chicken leg quarters, also had very little value on the USA market. The AD investigating authorities in both cases, MOFCOM and the Board respectively, both declined to use the USA producers' books and records, which relied on the *value – based* cost allocation methodology to determine NV. Both MOFCOM and the Board instead opted for a *weight – based* methodology to determine NV. The USA producers' also levelled similar

¹WTO Panel Report WT/DS427/R "China -Anti Dumping and Countervailing Duty Measures on Broiler Products from the United States".

²Board on Tariffs and Trade Report No. 4088 (2000) "Investigation into the alleged dumping of meat of fowls of the species *Gallus Domesticus*, originating in or imported from the United States of America: Final Determination" 1.

critique against these decisions, with the difference being that was China challenged before a WTO Panel and SA not.

The Board justified using *constructed NV* on two grounds, namely that the situation on the USA market pertaining to the subject product was a *particular market situation* and in the alternative, that the subject product was *not sold in the ordinary course of trade*. MOFCOM only relied on the latter reason to justify its use of *constructed NV*. As a result, the author will focus on the comparative analysis of the reason that the subject products were *not sold in the ordinary course of trade*. It is also important to note that the author did extensive research and could not find any decision under the auspices of the WTO that dealt with the interpretation of a *particular market situation* as envisioned in Article 2.2 of the ADA.

5.2 Practical Conclusions and Recommendations

The Panel in the *US – China Broiler* case essentially interpreted Article 2.2.1.1 of the ADA, in determining *constructed NV*, by addressing the first and the second sentences of the Article separately. The author will use the same format to answer the research question.

5.2.1 First Sentence of Article 2.2.1.1 – Did the Board comply with its obligation; *shall normally calculate costs on the basis of the producers’ books and records*? The Panel proceeded to determine whether MOFCOM complied with this obligation by considering two questions.

(a) *Was the Board obliged to explain its decision to decline to use the producers’ books and records?*

The Panel in the *US – China Broiler* case found that the investigating authority was indeed obliged to explain its departure from normally using the producers’ books and records to calculate costs.³ This was so because the first sentence of Article 2.2.1.1 of the ADA imposed an obligation on the investigating authority to do so. The Panel relied on the outcome in the case of *US – Softwood Lumber V* in which that Panel concluded the following: the first sentence of Article 2.2.1.1 of the ADA imposed an obligation on the investigating authority to use the producers’ books and records should (i) the books and records comply with GAAP

³Panel Report 427 (n1 above) para 7.163.

in the exporting country and (ii) they reasonably reflect the cost associated with the production and sale of the products under consideration.⁴

Based on the outcomes in both the WTO Panel reports cited above, one can argue that an investigating authority is compelled to explain why it decided to depart from its positive obligation under the first sentence of Article 2.2.1.1 of the ADA. Therefore, the Board in the USA poultry AD case was obliged in terms of WTO law to explain its reasons for declining to use the producers' books and records in calculating costs.

(b) *Did the Board correctly determine that the producers' books and records did not reasonably reflect the cost of production and sale?*

The Panel in the *US – China Broiler* case acknowledged that MOFCOM's decision to reject the books and records of the USA producers' were based on the second requirement of the first sentence of Article 2.2.1.1, which was that the books and records did not reasonably reflect the costs associated with the production and sale of the products under consideration.⁵ The Board's decision in both its preliminary and final AD determinations also focused on this second requirement in terms of the first sentence of Article 2.2.1.1.⁶

The Panel found that in both of MOFCOM's preliminary and final AD determinations, the producers Tyson and Keystone, were only provided with the conclusions that their books and records would *not* be used to determine the NV, without *any supporting reasoning*.⁷ It was then on this basis that the Panel found MOFCOM's decision to reject Tyson and Keystone's books and records inconsistent with the first sentence of Article 2.2.1.1.⁸ On the contrary, MOFCOM's decision to reject Pilgrim's Pride's books and records were found not to be inconsistent with Article 2.2.1.1 because MOFCOM did so based on its explanation that the said books and records were incomplete.⁹ This clearly means that if an investigating authority does *not give the reasons* for its decision to reject the use of producers' books and records to determine costs, it would be considered to have acted inconsistently with WTO rules.

⁴Panel Report 427 (n1 above) para 7.160; also see Panel Report, *US – Softwood Lumber V*, para 7.237.

⁵Panel Report 427 (n1 above) para 7.165.

⁶BTT Report 4088 (n2 above) 23.

⁷Panel Report 427 (n1 above) para 7.171.

⁸As above.

⁹Panel Report 427 (n1 above) para 7.174.

The question now is: Did the Board *explain* its reasoning for rejecting the books and records of the producers, Tyson and Gold Kist, when it calculated the costs of the subject products? In its preliminary determination, the Board found that the producers' normal accounting records resulted in a misallocation of costs and therefore rejected to use it.¹⁰ The Board also relied on USA case law in support of its reasoning and specifically quoted from the case *Fresh Atlantic Salmon from Chile* in which that court held that when a company's normal accounting practices result in a misallocation of costs, the respondent's costs can be adjusted by using an alternative methodology to more accurately capture actual costs incurred to produce the merchandise.¹¹ The USA producers also referred the Board to a number of USA legal decisions to justify its use of the value – based cost allocation methodology.¹² In its final determination, the Board addressed each of these cases and provided its reasons why these cases were not relevant to the matter before it. The case the author used to illustrate the Board's reasoning was *Canned Pineapple Fruit from Thailand*, discussed in chapter three.

As stated earlier, the Panel in the *US – China Broiler* case decided that MOFCOM had acted inconsistently with the first sentence of Article 2.2.1.1 of the ADA because it did not *explain* its reasons for declining to use the producers' books and records to calculate costs. The Panel found that it was not necessary to determine whether a weight – based approach to determine the costs in the case of joint – products was acceptable or not. The Panel only noted that neither the value – based nor the weight – based cost allocation method was, in principle, inherently not unreasonable.¹³ Therefore, the issue of calculating NV was decided on a procedural issue and not whether the weight – based methodology was inappropriate in these circumstances. It is on this basis that the author has to answer whether the Board *explained* its reasoning for rejecting the producers' books and records, without arguing the appropriateness of the Board's views on the value – based methodology as used by the USA producers.

The author is therefore of the view that the Board provided the USA producers in both the preliminary and final AD determinations its reason for deciding to reject their books and records; the reason being that their value – based cost allocation methodology resulted in a *misallocation* of costs. The Board also went further by using USA case law to support its view. It also responded to the USA producers' submissions in its final AD determination and

¹⁰BTT Report 4088 (n2 above) 23.

¹¹BTT Report 4088 (n2 above) 23; *Fresh Atlantic Salmon from Chile* FR 63 pg 31432.

¹²BTT Report 4088 (n2 above) 27.

¹³Panel Report 427 (n1 above) para 7.167.

pointed out why the cited USA case law did not support the USA producers matter before it. Based on the interpretation of the first sentence of Article 2.2.1.1 of the ADA by the Panel in the *US – China Broiler* case the author is of the view that the Board was (i) under an obligation to explain its reasoning for rejecting the producers books and records and (ii) that the Board did provide its reasoning for rejecting the producers books and records in both its preliminary and final AD determinations. The author is therefore of the opinion that the Board did not act inconsistently with the first sentence of Article 2.2.1.1 of the ADA based on the WTO Panel decisions as discussed in this paper.

5.2.2 Second Sentence of Article 2.2.1.1 – *Did the Board comply in considering all the available evidence before it when it devised and applied its own allocation methodology?*

The Panel referred to the Appellate Body decision in *US – Softwood Lumber V* in which the Appellate Body found that the ordinary meaning of “consider” was “to look attentively”, “reflect on”, or to “weigh the merits of”.¹⁴ The Appellate Body also held that when compelling evidence was available to the investigating authority that more than one cost allocation methodology may be potentially appropriate, the investigating authority *may* be required to “reflect on” and “weigh the merits” of such alternative methodologies.¹⁵

In determining whether MOFCOM had complied with the obligation in the second sentence, the Panel had to address three questions;

- (i) Whether MOFCOM did more than simply receive the evidence and took note thereof;
- (ii) Whether, in this particular situation, MOFCOM was required to “reflect on” and “weigh the merits” of the various allocations methodologies; and if so
- (iii) Whether there was evidence of its consideration reflected in relevant documentation.¹⁶

The Board received evidence from both Tyson and Gold Kist in the questionnaires that were sent to them and it was based on this that the Board made its decision not to use their cost

¹⁴Panel Report 427 (n1 above) para 7.187.

¹⁵Panel Report 427 (n1 above) para 7.189; also see Appellate Body Report, *US – Softwood Lumber V*, para 138.

¹⁶Panel Report 427 (n1 above) para 7.192.

allocation methodology.¹⁷ Both these producers also provided the Board with exact cost figures from the grow-out phase and the processing or the cutting up phase of the chicken, which was used to allocate costs on the weight – based method.¹⁸ The author is therefore satisfied that the Board went further than just merely receiving the evidence from the producers.

Both Tyson and Gold Kist did not provide alternative cost allocation methodologies for the Board to consider.¹⁹ Therefore, the other two questions set out above do not have to be addressed. Tyson, however, did request the Board to revise its cost test to take account of Tyson's cost recovery for all chicken products. The Board responded to this submission and narrowly interpreted Article 2.2.1.1 of the ADA to refer only to the subject product involved, which in this case were chicken leg quarters.²⁰

The Panel also held that MOFCOM did not explain, in both its preliminary and final AD determination why its own cost allocation, i.e. weight – based cost allocation methodology, lead to a proper allocation of costs. This, the Panel found was inconsistent with the second sentence of Article 2.2.1.1 of the ADA.

The imminent question is: did the Board explain why the weight – based cost allocation methodology led to a proper allocation of costs? It is evident from the Board's Final Determination how it went about calculating the costs of production of the chicken pieces.²¹ However, it is the author's view that the Board did not sufficiently explain and give reasons why its own cost allocation methodology resulted in a proper allocation of costs. It is on this basis that the author believes that in light of the WTO Panel decisions discussed in this paper that the Board acted inconsistently with the second sentence of Article 2.2.1.1 of the ADA.

Therefore, did the Board act inconsistently with WTO law in its determination of *constructed NV* in the December 2000 USA poultry AD case? Based on the outcome in the *US – China Broiler* Panel decision, the Board was inconsistent with WTO law because it did not sufficiently explain why its own cost allocation methodology lead to a proper allocation of costs.

¹⁷BTT Report 4088 (n2 above) 23.

¹⁸ BTT Report 4088 (n2 above) 24.

¹⁹BTT Report 4088 (n2 above) 26.

²⁰BTT Report 4088 (n2 above) 27.

²¹BTT Report 4088 (n2 above) 35 - 46.

As a result, it is vital for the current AD investigating authority, ITAC, to clearly explain its reasons for declining to use producers' books and records to calculate the costs associated with the production and sale of the subject products in order to be consistent with the first sentence of Article 2.2.1.1 of the ADA. ITAC will also have to explain its reasoning for using a particular cost allocation methodology and particularly why it believes such a methodology will lead to a proper allocation of costs in order to be consistent with the second sentence of Article 2.2.1.1 of the ADA.

5.3 Concluding Remarks

The WTO Panel and Appellate Body interpretations of Article 2.2.1.1 of the ADA, dealing with *constructed NV* serves as a good guide for AD investigating authorities around the world. The Panel in the *US – China Broiler* case reaffirmed previous Panel and Appellate Body interpretations on Article 2.2.1.1 of the ADA. The Panel, in essence, held that the first sentence of Article 2.2.1.1 imposes an obligation on an investigating authority to explain its reasons for declining to use a producer's books and records in calculating costs associated with the production and sale of the subject products in an investigation. It further held that an investigating authority will have to explain why its own cost allocation methodology will lead to a proper allocation of costs in order to satisfy the second sentence of Article 2.2.1.1. In the event alternative cost allocation methodologies are made available by the producers subject to an investigation, in certain circumstances, the investigating authority may be required to consider and assess these alternatives.

The author then compared the outcomes of the Board's determinations in the USA poultry AD case with the Panel's findings as stated above. It was found that, on the requirement of the first sentence of Article 2.2.1.1, that the Board satisfied its obligation to explain its reason for declining the producers' books and records. The Board therefore acted inconsistently with WTO rules in this regard. However, on the second sentence, the author is of the view that the Board did not sufficiently explain why its own cost allocation methodology lead to a proper allocation of costs. Therefore, the Board was inconsistent with the second sentence of Article 2.2.1.1 of the ADA.

Going forward, ITAC, the current AD investigating authority, has to ensure that when it relies on Article 2.2.1.1 of the ADA and use *constructed NV* to determine costs associated with the production and sale of subject products, that it sufficiently explains its reasons for doing so. ITAC is also at liberty to use the weight – based cost allocation methodology as the

Panel in the *US – China Broiler* case clearly stated that the methodology was not inherently unreasonable. All considered, it is the responsibility of the investigating authority to explain and provide clear reasons for its decision to use *constructed NV*.

CHAPTER SIX

6 Conclusion

Traditionally, AD measures were predominantly used by developed countries like the USA, Canada and Australia. However, since the establishment of the WTO in 1994, developing countries have become prolific users of AD as a trade remedy. Essentially the WTO legal regime was established to further aid the liberalization of international trade by reducing tariffs and non – tariff barriers to trade. However, it has been argued that trade remedies, and in particular AD measures, have been used as protectionist measures by both developed and developing countries as they reduce tariff protection.

SA has used AD measures for over 100 years and it continues to do so vigorously. Domestic legislation and regulations exist that are generally regarded as being WTO-consistent in SA. However, the implementation of these AD laws has been questioned and at times heavily critiqued. One of the SA AD decisions that came under significant attack was the then investigating authority's, the Board's, AD determination that imposed final AD duties on USA poultry products in December 2000. These AD duties were so inflated that it was not feasible for USA poultry producers to continue exporting their poultry products to SA. It has been argued that the Board egregiously manipulated cost data to find that dumping occurred, which enabled it to impose the AD duties. This, it has been said was done to protect an inefficient and uncompetitive SA poultry industry.

This research set out to test the merits of the argument that the Board's determination of *constructed NV* in its December 2000 AD decision against USA poultry products was WTO-inconsistent. The author analysed the Board's decision and relevant WTO Panel reports on the interpretation of Article 2.2.1.1 of the ADA, which deals with the determination of *constructed NV*. The Board justified its use of *constructed NV* because it found that a *particular market situation* existed and that the subject poultry products were *not sold in the ordinary course of trade*. The latter reason for using *constructed NV* formed the basis of this dissertation's comparative analysis.

Particular attention was given to the Panel report in the *US – China Broiler* case. The outcome of this analysis was that the Panel made a decision on mainly procedural grounds in terms of the determination of *constructed NV*. It was determined that Article 2.2.1.1 of the ADA requires that an investigating authority to explain its reasons for declining to use the

exporting producers' books and records. It was further held that an investigating authority had the liberty to use an alternative cost allocation methodology than that used by exporting producers', but in doing so it had to explain why such an alternative methodology lead to a proper allocation of the actual costs of production. The key word being, explain.

A comparative analysis of the practical outcomes from the Board's decision and the Panel report in the *US – China Broiler* case led the author to conclude that the Board was culpable to a certain extent and had acted inconsistently with WTO rules. The Board explained its reasons for rejecting the USA producers' books and records, but failed to sufficiently explain why its use of the weight – based cost allocation methodology led to a proper allocation of production costs. Therefore, the current WTO Panel and Appellate body reports that serve as credible sources of WTO law, have determined that when an investigating authority derogates from its obligation to use the books and records of the exporting producers, and opt for using *constructed NV*, they are obliged to *explain* their reasons for doing so. It is for this reason that the author recommends that when the current SA AD investigating authority, ITAC, decides to use *constructed NV* to determine the cost of production of the subject product in an investigation, it has to ensure that it *clearly and sufficiently explains* the reasons for doing so.

At the heart of the contention with the Board's December 2000 decision was its use of the weight – based cost allocation methodology over that of the USA producers' value – based methodology. The same arguments were put before the Panel in the *US – China Broiler* case. As mentioned earlier, the Panel decided the matter on procedural grounds and did not make a determination on which methodology was appropriate in the case of products that incur joint costs, but then when separated contribute vastly different percentages to profits i.e. chicken. The Panel only noted that neither the weight – based nor value – based cost allocation methodology was inherently inappropriate in these circumstances. The author is of the view that this issue is far from over. It is very likely that this question will again be deliberated before another WTO Panel in the future.

The poultry industry in SA claims that cheap poultry imports are detrimental to it, in particular in terms of employment losses and compromised the future food security of SA. However, it has been argued that the industry remains highly inefficient and uncompetitive and that protecting it only leads to the SA consumers taking the brunt for it by paying high prices for chicken. The poultry industry continues to successfully convince ITAC that it

needs the protection from cheap poultry imports. Recently ITAC imposed temporary safeguard duties against EU poultry products, which some critics view once again as protectionism. Should ITAC be using trade remedies, AD or safeguard measures, to unfairly protect inefficient industries in SA, it runs the risk of being challenged at the WTO. It also runs the risk of placing the SA Government in a very difficult situation as experienced with the recent out of cycle AGOA review. While WTO Members have the right to use trade remedies, they must do so consistently with WTO rules and procedures.

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