

**BEFORE THE ARBITRATION PANEL**

***SOUTHERN AFRICAN CUSTOMS UNION – SAFEGUARD  
MEASURE IMPOSED ON FROZEN BONE-IN CHICKEN  
CUTS FROM THE EUROPEAN UNION***

**FIRST WRITTEN SUBMISSION OF THE EUROPEAN UNION**

**20 December 2021**

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<i>China – GOES</i>	Appellate Body Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , WT/DS414/AB/R, adopted 16 November 2012, DSR 2012:XII, p. 6251
<i>China – X-Ray Equipment</i>	Panel Report, <i>China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union</i> , WT/DS425/R and Add.1, adopted 24 April 2013, DSR 2013:III, p. 659
<i>Dominican Republic – Safeguard Measures</i>	Panel Report, <i>Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric</i> , WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, and Add.1, adopted 22 February 2012, DSR 2012:XIII, p. 6775
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<i>India – Iron and Steel Products</i>	Panel Report, <i>India – Certain Measures on Imports of Iron and Steel Products</i> , WT/DS518/R and Add.1, circulated to WTO Members 6 November 2018 [appealed by India 14 December 2018 – the Division suspended its work on 10 December 2019]
<i>Indonesia – Iron or Steel Products</i>	Panel Report, <i>Indonesia – Safeguard on Certain Iron or Steel Products</i> , WT/DS490/R, WT/DS496/R, and Add.1, adopted 27 August 2018, as modified by Appellate Body Report WT/DS490/AB/R, WT/DS496/AB/R, DSR 2018:VII, p. 3707
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<i>Mexico – Anti-Dumping Measures on Rice</i>	Panel Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report WT/DS295/AB/R, DSR 2005:XXIII, p. 11007
<i>Mexico – Corn Syrup</i>	Panel Report, <i>Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States</i> , WT/DS132/R, adopted 24 February 2000, and Corr.1, DSR 2000:III, p. 1345
<i>Ukraine – Passenger Cars</i>	Panel Report, <i>Ukraine – Definitive Safeguard Measures on Certain Passenger Cars</i> , WT/DS468/R and Add.1, adopted 20 July 2015, DSR 2015:VI, p. 3117
<i>US – Lamb</i>	Appellate Body Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, p. 4051
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3
<i>US – Line Pipe</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea</i> , WT/DS202/AB/R, adopted 8 March 2002, DSR 2002:IV, p. 1403
<i>US – Line Pipe</i>	Panel Report, <i>United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea</i> , WT/DS202/R, adopted 8 March 2002, as modified by Appellate Body Report WT/DS202/AB/R, DSR 2002:IV, p. 1473
<i>US – OCTG (Korea)</i>	Panel Report, <i>United States – Anti-Dumping Measures on Certain Oil Country Tubular Goods from Korea</i> , WT/DS488/R and Add.1, adopted 12 January 2018, DSR 2018:I, p. 7
<i>US – Steel Safeguards</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, p. 3117
<i>US – Steel Safeguards</i>	Panel Reports, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , WT/DS248/R and Corr.1 / WT/DS249/R and Corr.1 / WT/DS251/R and Corr.1 / WT/DS252/R and Corr.1 / WT/DS253/R and Corr.1 / WT/DS254/R and Corr.1 / WT/DS258/R and Corr.1 / WT/DS259/R and Corr.1, adopted 10 December 2003, as modified by Appellate Body Report WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, DSR 2003:VIII, p. 3273
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, p. 717

<i>US – Wheat Gluten</i>	Panel Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/R, adopted 19 January 2001, as modified by Appellate Body Report WT/DS166/AB/R, DSR 2001:III, p. 779
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## **LIST OF ABBREVIATIONS**

<b>ABBREVIATION</b>	<b>DESCRIPTION</b>
AB	Appellate Body
AGOA	African Growth and Opportunity Act
ASG	WTO Agreement on Safeguards
AVEC	Association of Poultry Processors and Poultry Trade in the EU
DSB	WTO Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EPA	Economic Partnership Agreement
EU	European Union
FOB	Free On Board
GATT	General Agreement on Tariffs and Trade 1994
ITAC	International Trade Administration Commission
POI	Period of Investigation
SACU	South African Customs Union
SADC	South African Development Community
SAPA	South African Poultry Association
TDC	Trade and Development Committee under the EU–SADC EPA
TDCA	Agreement on Trade, Development and Cooperation
U.S.	United States of America
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

## LIST OF EXHIBITS

Exhibit No./ Pages	Title	Abbreviation
Exhibit EU-1 (53 pages)	Agreement on Trade, Development and Cooperation (TDCA) between the EU and South Africa  (For full text, see: <a href="https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:01999A1204(02)-20160301&amp;from=EN">https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:01999A1204(02)-20160301&amp;from=EN</a> )	TDCA
Exhibit EU-2 (52 pages)	Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part  (For full text, see: <a href="https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153915.pdf">https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153915.pdf</a> )	EU–SADC EPA
Exhibit EU-3 (1 page)	Notice concerning the provisional application of the Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part (OJ L 274, 11.10.2016, p. 1)	First EU notice of EPA provisional application
Exhibit EU-4 (3 pages)	European Union, Note Verbale (Request for Consultations) dated 14 June 2019	EU Request for Consultations
Exhibit EU-5 (3 pages)	European Union, South African Customs Union – Safeguard measure imposed on frozen bone-in chicken cuts from the European Union: Request for establishment of an arbitration panel by the European Union	EU Request for Establishment of Panel
Exhibit EU-6 (9 pages)	Decision No 2/2019 of the Joint Council established under the Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part, of 19 February 2019 on the adoption of the Rules of Procedure for dispute avoidance and settlement and the Code of Conduct for arbitrators and mediators [2019/438]	Rules of Procedure
Exhibit EU-7 (14 pages)	Investigation into Safeguard Measures in Terms of Article 34 of the EPA on Frozen Bone-in Portions of Fowls of the Species <i>Gallus Domesticus</i> : Summary of Findings dated September 2017	ITAC's 2017 Summary of Findings

<b>Exhibit EU-8</b> (6 pages)	The ITAC third letter of essential facts dated 14 August 2017	ITAC third letter of essential facts
<b>Exhibit EU-9</b> (3 pages)	Letter from Minister of Trade and Industry (Rob Davies) to the ITAC dated 6 December 2016	Davies letter to the ITAC
<b>Exhibit EU-10</b> (2 pages)	Letter from SADC EPA Group to the European Commission on 'Imposition of the Safeguard Duty on Bone-In Chicken Cuts Imported from EU' dated 18 July 2018 with reference number TIC 7/1/4 XII (67)	SACU definitive measure notification
<b>Exhibit EU-11</b> (57 pages)	South African Poultry Association's application to initiate a safeguard investigation under Article 16 of the TDCA on frozen bone-in portions of fowls of the Species <i>Gallus Domesticus</i> dated February 2015	SAPA Application
<b>Exhibit EU-12</b> (57 pages)	Revised application for Safeguard Measures in Terms of Article 16 of the Trade, Development and Co-operation Agreement on Frozen Bone-in Portions of Fowls of the Species <i>Gallus Domesticus</i> Originating in or Imported from the European Union dated 28 December 2015	Revised Application
<b>Exhibit EU-13</b> (4 pages)	Notice on Initiation of the Investigation for Safeguard Measures in terms of Article 16 of the Agreement on Trade, Development and Co-operation between the European Community and its Member States and the Republic of South Africa on frozen bone-in portions of fowls of the Species <i>Gallus Domesticus</i> .	Notice of Initiation
<b>Exhibit EU-14</b> (2 pages)	The ITAC's letter to Delegation of EU to South Africa, dated 20 June 2017	ITAC letter to EU delegation
<b>Exhibit EU-15</b> (3 pages)	The ITAC's first letter of essential facts dated 24 August 2016	ITAC first letter of essential facts
<b>Exhibit EU-16</b> (14 pages)	The ITAC's second letter of essential facts dated 15 September 2016	ITAC second letter of essential facts
<b>Exhibit EU-17</b> (1 page)	Notice concerning the provisional application of the Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part (OJ L 38, 10.2.2018, p. 1)	Second EU notice of EU provisional application
<b>Exhibit EU-18</b> (16 pages)	Letter from Minister of Trade and Industry (Rob Davies) to the EU and Summary of Findings dated 15 November 2016	Davies letter to the EU and 2016 Summary of Findings

<b>Exhibit EU-19</b> (3 pages)	Letter from the ITAC to EU on provisional measures dated 22 December 2016	ITAC letter to the EU
<b>Exhibit EU-20</b> (2 pages)	Letter from the ITAC to the South African Revenue Service dated 8 December 2016	ITAC letter to the SARS
<b>Exhibit EU-21</b> (2 pages)	EU submission to the ITAC on imposition of provisional measure dated 13 January 2017	EU submission on provisional measure
<b>Exhibit EU-22</b> (5 pages)	EU submission in context of Trade and Development Committee meeting dated 4 April 2017	EU TDC first submission
<b>Exhibit EU-23</b> (50 pages)	Investigation into Safeguard Measures on Frozen Bone-in Portions of Fowls of the Species <i>Gallus Domesticus</i> Originating in or Imported from the European Union: Updated Information dated 12 June 2017	SAPA Updated Information
<b>Exhibit EU-24</b> (3 pages)	EU submission on revised SAPA application dated 10 July 2017	EU submission on revised application
<b>Exhibit EU-25</b> (3 pages)	EU oral presentation to the ITAC dated 27 July 2017	EU oral presentation
<b>Exhibit EU-26</b> (4 pages)	EU reply to the third letter of essential facts dated 25 August 2017	EU reply to third letter of essential facts
<b>Exhibit EU-27</b> (4 pages)	EU submission following the Trade and Development Committee meeting dated 31 October 2017	EU TDC second submission
<b>Exhibit EU-28</b> (43 pages)	SAPA's Report on Key Market Signals in the Broiler Industry for Q4 2018	SAPA 2018 Report
<b>Exhibit EU-29</b> (7 pages)	SAPA's feed ingredient report using December 2018 as base with an outlook to July 2019 – Executive summary	SAPA's feed ingredient report
<b>Exhibit EU-30</b> (5 pages)	EU written submission of the European Commission on initiation regarding investigation for a safeguard measure in terms of Article 16 of the TDCA frozen bone-in portions of fowls of the Species <i>Gallus Domesticus</i> dated 21 March 2016	EU submission on initiation
<b>Exhibit EU-31</b> (17 pages)	Safeguard Proceeding Concerning Imports of Frozen Bone-In Portions of Fowls of the Species <i>Gallus Domesticus</i> from the European Union: Comments on behalf of AVEC on the second essential facts letter dated 22 September 2016	AVEC comments 2016

<b>Exhibit EU-32</b> (33 pages)	Comments on behalf of AVEC on the updated application filed by SAPA regarding Safeguard Proceeding Concerning Imports of Frozen Bone-In Portions of Fowls of the Species <i>Gallus Domesticus</i> from the European Union dated 10 July 2017	AVEC comments 2017
<b>Exhibit EU-33</b> (184 pages)	RCL Foods Integrated Annual Report for the year ended 30 June 2014	RCL Annual Report 2014
<b>Exhibit EU-34</b> (54 pages)	OECD Economic Surveys: South Africa 2015	OECD Report 2015
<b>Exhibit EU-35</b> (78 pages)	RCL Foods Integrated Annual Report for the year ended 30 June 2015	RCL Annual Report 2015
<b>Exhibit EU-36</b> (4 pages)	Attaché Report (GAIN), South Africa: United States Poultry Exports to South Africa Continue Steady Increase dated 1 May 2020	GAIN Report 2020
<b>Exhibit EU-37</b> (1 page)	South African Government Gazette No. 38493 No. R.126 dated 27 February 2015	South Africa Government Gazette Notification
<b>Exhibit EU-38</b> (86 pages)	Report No. 492 Investigation into the Alleged Dumping of Frozen Bone-in Portions of Fowls of the Species <i>Gallus Domesticus</i> originating in or imported from Germany, the Netherlands, and the United Kingdom: Final Determination dated 23 January 2015	ITAC final AD determination 2015

## **I. INTRODUCTION**

1. In 1999, the European Union (EU) and South Africa concluded a Trade and Development Cooperation Agreement (TDCA).<sup>1</sup> On 10 June 2016, the EU signed an Economic Partnership Agreement (EPA) with the SADC EPA Group comprising Botswana, Lesotho, Mozambique, Namibia, South Africa and Eswatini (formerly Swaziland).<sup>2</sup> The EU–SADC EPA entered into provisional application in October 2016<sup>3</sup> and became fully operational in February 2018.<sup>4</sup>
2. The EU–SADC EPA gives asymmetric access to the partners in the SADC EPA Group for their exports to the EU. By contrast, the SADC EPA Group can shield its sensitive products from full liberalization, and bilateral safeguards can be deployed when imports from the EU are growing too quickly as a result of the EU–SADC EPA.
3. The EU–SADC EPA guarantees access to the EU market without any duties or quotas for Botswana, Lesotho, Mozambique, Namibia, and Eswatini. South Africa benefits from new market access in comparison to the TDCA, which governed the trade relations with the EU until October 2016 (when the EPA entered into provisional application and thereby repealed the trade component of the TDCA).<sup>5</sup> The new access includes better trading terms mainly in agriculture and fisheries, including for wine, sugar, fisheries products, flowers and canned fruits.
4. Despite the new and improved partnership, the South African Customs Union (SACU) continued and carried over an existing safeguard investigation concerning frozen bone-in chicken cuts originating in the EU, which South Africa had started during the period of application of the TDCA and on the basis of the provisions of that agreement. As a result of that investigation, SACU imposed a provisional bilateral safeguard measure on imports of frozen chicken cuts from the EU in December 2016 and a definitive bilateral safeguard measure in September 2018.
5. The EU considers that the bilateral safeguard measure – an extra tariff of 35.3% subject to a progressive reduction over a period of three and a half years – imposed by SACU in September 2018, is not in conformity with the provisions of the EU–SADC EPA. Safeguard measures can legally only be adopted in exceptional circumstances, in order to temporarily counter surging imports that threaten a domestic industry. In this case, the safeguard measure was imposed illegally, as will be detailed below, and only had

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<sup>1</sup> Exhibit EU-1.

<sup>2</sup> See: European Commission, Countries and regions: Southern African Development Community (SADC), available at: < <https://ec.europa.eu/trade/policy/countries-and-regions/regions/sadc/>> (last accessed: 11 November 2021). Together, these five countries comprise the Southern African Customs Union (SACU).

<sup>3</sup> Exhibit EU-2, Article 113 (3) and (4). See also: Exhibit EU-3.

<sup>4</sup> Exhibit EU-2, Article 113 (2). See also: Council of the European Union, Treaties and Agreements database: EU-SADC EPA, available at: < <https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2016020>> (last accessed: 11 November 2021). The notification of the last instrument of ratification (Mozambique) took place on 25 January 2018.

<sup>5</sup> See: Exhibit EU-2, Article 111 and Protocol 4.

the effect of replacing EU imports, earlier worth some €183 million a year,<sup>6</sup> with imports from other countries, such as the U.S. and Brazil.

6. It is worth mentioning that these bilateral safeguard duties were imposed over and above anti-dumping duties that had already been imposed by South Africa in February 2015, against import of frozen bone-in chicken cuts from three EU Member States (Germany, the Netherlands, and the United Kingdom (former Member State)). These anti-dumping duties were as high as 22.81% for the Netherlands, 30.99% for the United Kingdom and 73.33% for Germany. On 24 August 2021, the International Trade Administration Commission of South Africa (ITAC) issued the final report in the sunset review of the anti-dumping duties imposed in February 2015, and prolonged the measures for another five years. The level of duties imposed on the producers from the Netherlands was kept unchanged, while the one imposed on certain German producers was increased from 31.3% to 73.33%. In addition, in February 2021, the ITAC has initiated yet another anti-dumping investigation into frozen bone-in chicken cuts, the scope of which includes Poland, Ireland, Denmark and Spain.
7. The EU has on numerous occasions sought an amicable solution to the issue of the bilateral safeguard duties unlawfully imposed by SACU, but, regrettably, to no avail. The EU hoped that both sides could still find a mutually satisfactory solution in the course of the period leading up to the dispute settlement. In the absence of such a solution, the EU has had no choice but to launch these dispute settlement proceedings.
8. This submission is structured as follows. Section II below addresses the procedural background of this dispute. Section III sets forth the factual background regarding this dispute. Section IV summarizes the applicable standard of review for the Panel to apply in this dispute. Section V provides a summary of the EU's legal arguments. Section VI provides the full legal arguments of the EU, and Section VII provides the conclusion of the EU.

## **II. PROCEDURAL BACKGROUND**

9. On 14 June 2019, the EU launched dispute settlement proceedings with SACU under the Dispute Settlement and Avoidance Part (Part III) of the EU–SADC EPA, by requesting consultations pursuant to Article 77 of the EU–SADC EPA concerning the definitive safeguard measure imposed by SACU on frozen bone-in chicken cuts from the EU.<sup>7</sup>
10. Consultations between the EU and SACU took place on 13 September 2019 in Gaborone, Botswana with a view of reaching a mutually acceptable resolution of the matter. While SACU engaged in the consultations, it insisted on the full compatibility of the measure with the provisions of the EU–SADC EPA.
11. Unfortunately, the consultations did not lead to a mutually acceptable solution of the dispute.

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<sup>6</sup> Source: Eurostat.

<sup>7</sup> Exhibit EU-4.

12. Therefore, on 21 April 2020, the EU requested the establishment of an arbitration panel with SACU, on the safeguard measure imposed in September 2018 on imports of frozen bone-in chicken cuts from the EU.<sup>8</sup>
13. The arbitration panel was requested to examine the matter with standard terms of reference. This request was made pursuant to Article 5 of the Decision No 2/2019 of the Joint Council established under the Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part, of 19 February 2019 on the adoption of the Rules of Procedure for dispute avoidance and settlement and the Code of Conduct for arbitrators and mediators [2019/438] (Rules of Procedure).<sup>9</sup> Pursuant to Article 79 (2) of the EU–SADC EPA, the request for the establishment of an arbitration panel was also transmitted to the Trade and Development Committee (TDC).
14. Following a request by SACU to pause the dispute settlement proceedings due to the COVID-19 crisis, on 22 April 2020, the EU informed SACU that, due to the COVID-19 crisis, the EU was not going to actively start the nomination of the panelists "*until the situation has stabilized*".
15. On 27 October 2020, the EU informed SACU that it believed that the situation in the EU and SACU allowed resuming the panel proceedings.
16. On 2 November 2020, SACU sent a letter to the EU explaining that during its meeting of 29 October 2020, the SACU Council of Ministers had concluded that the current situation did not allow the resumption of panel proceedings. SACU therefore suggested further delaying the resumption of panel proceedings. SACU also suggested further discussions with the EU in order to agree on the circumstances under which the situation may be considered to have sufficiently stabilized to allow the resumption of the panel proceedings.
17. On 17 November 2020, the EU confirmed its intention to proceed with the selection of the arbitration panel. As a gesture of goodwill, the EU informed SACU that it considered that the deadlines set by Article 80 of the EU–SADC, which the EU originally planned to make run as of 6 November 2020, would have started running 5 days after the notification of that letter, *i.e.* on 22 November 2020. The EU therefore invited SACU to appoint its arbitrator within the deadline set out in Article 80 of the EU–SADC EPA, and to inform the EU of the appointment.
18. On 2 December 2020, SACU again expressed its disagreement with the decision of the EU to proceed with the selection of the arbitration panel.
19. On 13 December 2020, as SACU had not yet confirmed its choice of arbitrator, the EU requested the chairperson of the TDC under the EU–SADC EPA, to select by lot (pursuant to Article 80 of the EU–SADC EPA), the member of the arbitration panel to be appointed by SACU as well as the chairperson of the arbitration panel.

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<sup>8</sup> Exhibit EU-5.

<sup>9</sup> Exhibit EU-6.



20. On 16 December 2020, SACU confirmed in writing to the EU its choice of arbitrator. Subsequently, the EU and SACU agreed on the criteria to be followed by the two arbitrators selected by the parties in the appointment of the chairperson of the arbitration panel. In this respect, the EU indicated that if the selection process of the chairperson of the arbitration panel was not completed by mid-January 2021, it would have to revert to the selection by lot. In light of the above, on 16 December 2020, the EU formally withdrew its requests to select by lot the members of the arbitration panel still outstanding.
21. On 26 January 2021, the two arbitrators appointed by the parties informed the EU and SACU that they had identified two candidates, from the list of individuals who could act as chairpersons agreed by the parties pursuant to Article 94 of the EU–SADC EPA, as possible chairpersons of the panel. As one of the two candidates was not available, the two arbitrators invited the parties to provide their position on the remaining candidate, in line with the criteria which had been agreed between the parties in December 2020.
22. On 4 February 2021, it became clear that SACU was not willing to accept the remaining candidate as chairperson. Instead it proposed the EU to suggest names of additional potential candidates to be discussed, thereby delaying the composition of the panel. In further communications, SACU repeatedly put forward new arguments to delay the process.
23. As no agreement could be reached on this issue, on 25 February 2021, the EU requested the Chairperson of the TDC to select the chairperson of the arbitration panel by lot pursuant to Article 80(3).
24. On 2 March 2021, Mr. Mmolawa, chairperson of the TDC, selected by lot the chairperson of the arbitration panel.
25. On 13 September 2021, the arbitrator originally selected by the EU was forced to withdraw because of personal reasons.
26. On 27 September 2021, the EU selected a new arbitrator. SACU agreed with this selection.
27. As a result, on 29 November 2021, the Panel was composed as follows:  
  
Chairperson: Professor Makane Moïse Mbengue  
  
Members: Professor Hélène Ruiz Fabri  
  
Advocate Faizel Ismail
28. On 29 November 2021, the Arbitration Panel (the Panel) was established<sup>10</sup> with standard terms of reference, as per Article 5 of the Rules of Procedure, which provides that

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<sup>10</sup> While SACU completed the signature of the contracts with the arbitrators only at the organizational meeting on 8 December 2021, the parties had agreed that for the purpose of the deadlines provided for by the EU–SADC EPA and the Rules of Procedure, other than the ones agreed by the parties, the panel is deemed to be established on 29 November 2021.

*"[u]nless the Parties agree otherwise, within seven (7) days of the establishment of the arbitration panel, the terms of reference... shall be:*

*(a) to examine, in the light of the relevant provisions of the Agreement cited by the Parties, the matter referred to in the request for the establishment of the arbitration panel;*

*(b) to make findings on the conformity of the measure at issue with the provisions covered under Article 76 of the Agreement; and*

*(c) to deliver a report in accordance with Articles 81 and 82 of the Agreement."*

### **III. FACTUAL BACKGROUND**

#### **A. The Investigating Authorities**

29. The safeguards investigation at issue was conducted by the ITAC.<sup>11</sup> The recommendations of the ITAC were approved through a decision dated 6 December 2016 issued by the South African Minister of Trade and Industry concerning the provisional safeguards,<sup>12</sup> and through a decision dated 27 June 2018 issued by the SACU Council of Ministers concerning the definitive safeguards.<sup>13</sup>

#### **B. The Description of the Product Under Investigation**

30. The product under investigation has been defined by the ITAC as frozen bone-in portions of fowls of the species *Gallus Domesticus*. The subject imports are covered under tariff subheadings 0207.14.91; 0207.14.93; 0207.14.95; 0207.14.96; 0207.14.97; 0207.14.98 and 0207.14.99. The product has also been referred to as "*frozen bone-in chicken cuts*". In this submission, the product will be referred to as "*frozen bone-in chicken cuts*" by the EU – particularly since the SACU notification regarding imposition of the safeguard measure refers to the product as such.

#### **C. Summary of the Safeguard Proceedings Leading to the of Safeguard Measures on Bone-In Chicken Cuts from the EU**

##### **1. Application and Revised Application Submitted by the Applicants**

31. In February 2015, the South African Poultry Association (SAPA) lodged, on behalf of the South African industry, the first version of an application<sup>14</sup> to the ITAC to initiate a safeguard investigation under Article 16 of the TDCA on imports of frozen bone-in chicken cuts from the EU.
32. The application alleged that imports of poultry from the EU had increased significantly over the period 2011-2014 following the removal of duties on frozen bone-in chicken

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<sup>11</sup> See for example: Exhibit EU-7, pg. 1; Exhibit EU-8, pg. 1.

<sup>12</sup> Exhibit EU-9, pg. 3.

<sup>13</sup> Exhibit EU-10.

<sup>14</sup> Exhibit EU-11.

cuts pursuant to the TDCA.<sup>15</sup> The application further claimed that this had created a "serious disturbance on the South African market"<sup>16</sup>, in the form of (i) price undercutting, price suppression and depression; (ii) a loss in market shares; (iii) a decline in sales and production volumes and capacity utilization; (iv) an increase in inventories; and (v) a decline/loss of profits. SAPA also claimed that exceptional circumstances existed justifying taking provisional measures to limit or redress the disturbance.<sup>17</sup>

33. On 28 December 2015, SAPA submitted a Revised Application including further information requested by the ITAC.<sup>18</sup> In the Revised Application, SAPA claimed that:
- i. The reduction and subsequent elimination in 2012 of the tariffs on frozen bone-in portions of fowls of the species *Gallus Domesticus* classifiable under tariff subheading 0207.14.9 imported from the EU as a result of the TDCA resulted in serious disturbance to the South African market for the subject product.
  - ii. Imports of frozen bone-in chicken cuts from the EU surged in absolute terms, in comparison to imports from other countries, and relative to production and demand in South Africa. The South African industry experienced price undercutting, price suppression, price disadvantage; a decline in market share with a corresponding increase in market share by the imports of the subject product from the EU; a decline in sales volumes; a decline in production volumes; a decline in capacity utilization; an increase in domestic inventories; a reduction in profits; losses in respect of the subject product and earnings before interest and taxes too low to sustain the poultry businesses of the participating producers.<sup>19</sup>
34. On 19 February 2016, South Africa published the ITAC's Notice of Initiation of the Investigation for Safeguard Measures in terms of Article 16 of the TDCA on frozen bone-in portions of fowls of the species *Gallus Domesticus*.<sup>20</sup> The said notice sets out that the South African Minister of Economic Development instructed the ITAC "to investigate and evaluate an application by the SAPA for the imposition of safeguard measures in terms of Article 16 of the TDCA".<sup>21</sup> The notice quotes the text of Article 16 of the TDCA.
35. In May 2016, the investigation was extended to cover imports including and until Q1 2016.<sup>22</sup>

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<sup>15</sup> Exhibit EU-11, pg. 46.

<sup>16</sup> *Ibid*, pg. 2, point 3.1

<sup>17</sup> *Ibid*, pg. 52.

<sup>18</sup> Exhibit EU-12.

<sup>19</sup> *Ibid*, pg. 2, paras. 2-4.

<sup>20</sup> Exhibit EU-13. The notice refers to products under tariff subheadings 0207.14.91; 0207.14.93; 0207.14.95; 0207.14.96; 0207.14.97; 0207.14.98 and 0207.14.99.

<sup>21</sup> *Ibid*.

<sup>22</sup> See: Exhibit EU-8, pg. 2, where it was noted that the ITAC "decided after a request by the Applicant to grant the Applicant the opportunity to update its injury information to the end of December 2016". See also: Exhibit EU-14.

## 2. The ITAC's First and Second Letter of Essential Facts

36. On 24 August 2016, the ITAC issued a first letter of essential facts.<sup>23</sup> On 15 September 2016, the ITAC issued a second letter of essential facts, detailing the results of the investigation and giving the interested parties the opportunity to provide comments.<sup>24</sup> In that second letter of essential facts, the ITAC drew attention to the fact that the "*Commission initiated the present investigation in February 2016 ... as contemplated in Article 16 TDCA*".<sup>25</sup> However, as the new EU–SADC EPA was likely to enter into force already in October 2016, the ITAC noted that:
- i. Article 34 of the EU–SADC EPA makes provision for a bilateral safeguard which is similar to the agricultural safeguard provided for in Article 16 of the TDCA. In the Commission's view, the jurisdictional requirements for these measures are overlapping. Thus, any substitution of Article 16 of the TDCA with Article 34 of the EU–SADC EPA would not affect the validity of the Commission's present investigation.
  - ii. In the event of the Commission deciding to recommend to the Minister of Trade and Industry that an agricultural safeguard should be imposed, and in the event of the Minister accepting the Commission's recommendation, the recommendation and any possible imposition of provisional measures would be governed by either Article 16 of the TDCA or Article 34 of the EU–SADC EPA, depending on the status of the respective agreements, as set out in Protocol 4 to the EU–SADC EPA.<sup>26</sup>

## 3. Provisional Application of EU–SADC EPA and Events Up To and Including the Provisional Measure

37. On 10 October 2016, the EU–SADC EPA entered into provisional application.<sup>27</sup>
38. Paragraph 2 of Protocol 4 of the EU–SADC EPA reads as follows:
- "2. In case of provisional application of this Agreement by the EU and ratification by South Africa pursuant to Article 113 of this Agreement:*
- (a) the application of Articles to be repealed under paragraph 1 shall be suspended."*
39. Paragraph 1 of the same Protocol provides *inter alia* that as of the date of entry into force of the EU–SADC EPA, the articles contained in Titles II (Trade) and III (Trade–Related Issues) shall be repealed. Article 16 of the TDCA is part of Title II of the same agreement.

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<sup>23</sup> Exhibit EU-15.

<sup>24</sup> Exhibit EU-16.

<sup>25</sup> *Ibid*, pg. 12.

<sup>26</sup> *Ibid*, pg. 13.

<sup>27</sup> Exhibit EU-17; Exhibit EU-3.

40. The South African authorities, however, chose to continue the investigation under Article 34 of the EU–SADC EPA (titled "General bilateral safeguards").
41. The EU summarizes below the critical factual events and aspects of this investigation.
42. On 15 November 2016, the South African Minister of Trade and Industry submitted to the EU a copy of the Summary of Findings of the ITAC on the investigation.<sup>28</sup> The 2016 Summary of Findings concluded that:
  - i. SAPA represented more than 50% of the total volume produced by the domestic (South African) industry, as mandated by the ITAC guidelines, and therefore was representative of the domestic industry;
  - ii. Unlike under the World Trade Organization (WTO) rules, Article 16 of the TDCA did not require a surge in imports but only that the *"increase in the rate and volume of imports is sufficient to cause or threaten to cause a serious disturbance in the affected party's market"*.<sup>29</sup> In this respect, imports of frozen bone-in chicken cuts to SACU from the EU increased by 150% between 2011 and 2015. Breaking down the increase between 2011 and 2015, the Summary of Findings concluded that between 2011 and 2012, the imports increased by 81%, between 2012 and 2015 by 38%, between 2014 and 2015 by 7.2%, and that the imports further increased during the first quarter of 2016;
  - iii. Threat of serious disturbance existed in the form of (i) price undercutting, (ii) price suppression, (iii) price depression during the first quarter of 2016, (iv) loss of market shares, as the market share of the applicant decreased by 12 index points over the period of investigation, while the South African market increased by 8 index points, the EU's market share increased by 151 index points, and imports from other countries decreased by 4 index points, (v) net profits that decreased by 86 index points during the period under investigation, and (vi) while inventories decreased between 2011 and 2014, they increased by more than 66 index points between 2014 and 2015, and domestic producers were forced to sell cheap because of a lack of storage capacity;
  - iv. The price disadvantage was calculated on the basis of the unsuppressed price (based on a profit margin of 8%) compared to the FOB export price including all costs from ex-factory export price to clearance into SACU including payable import duties. A 3.3% was added to the FOB price to take into account the anti-dumping duties imposed on imports from Germany, Netherlands (and the United Kingdom);
  - v. An indication of causality was the extent of the increase in volume of imports of poultry and the extent of the decrease in the market share of the domestic industry with a corresponding increase in the market share of the imported subject products;
  - vi. As regards other factors, although domestic producers were put under pressure by the volatility in feed raw materials (maize) and increases in other factors such as

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<sup>28</sup> Exhibit EU-18.

<sup>29</sup> *Ibid*, pg. 4.

costs of labor, diesel, electricity, plastic, cardboard boxes, the ITAC found that (i) as regards the increase of costs of maize due to draught, Article 16 of the TDCA provides that such sensitivities are a given and cannot be discounted; in any event, even if maize cost was considered, the increase in imports would still constitute a contributing factor; and (ii) that although other increasing costs played a role in the ability of domestic producer to compete with imports, they did not manage to break the causal link between the increase of imports and the threat of serious disturbance;

- vii. Thus the ITAC found that the exceptional conditions for the application of provisional measures were fulfilled.<sup>30</sup>
43. As a result of the above, the ITAC recommended imposing a provisional safeguard measure of 13.9% on imports of poultry from the EU.<sup>31</sup>
44. On 6 December 2016, on the basis of the recommendations received from the ITAC, the Minister of Trade and Industry of South Africa asked the ITAC to continue the investigation under Article 34 of the EU-SADC EPA, and approved the imposition of a provisional safeguard of 13.9% *ad valorem* on imports of poultry from the EU.<sup>32</sup>
45. On 15 December 2016, the Minister of Trade and Industry of South Africa's decision to adopt a provisional safeguard measure of 13.9% on frozen bone-in chicken portions from the EU under Article 34 of the EU-SADC EPA was published in the South African Official Journal.<sup>33</sup> The publication served also as notice of the fact that the ITAC investigation was continuing under Article 34 of the EU-SADC EPA and that parties could submit comments before 5 January 2017.<sup>34</sup> The provisional safeguard entered into force on 15 December 2016 for a period of 200 days and expired on 3 July 2017.<sup>35</sup>

#### 4. The Imposition of Provisional Safeguard Measures

##### a. EU Submission on Provisional Safeguard Measures

46. On 13 January 2017, the EU made a submission to the ITAC on the imposition of the provisional safeguard measure in which it pointed out that:
- i. The documents disclosed by the ITAC did not contain important factual information such as injury indicators and information on prices;
  - ii. The importance of other factors had not been properly taken into account, especially when deciding if a provisional safeguard was warranted;
  - iii. The investigation could not be automatically switched to Article 34 of the EU-SADC EPA as it has different requirements compared to Article 16 of the TDCA.

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<sup>30</sup> Exhibit EU-18, pg. 15.

<sup>31</sup> *Ibid.*

<sup>32</sup> Exhibit EU-9.

<sup>33</sup> Exhibit EU-19, Annex.

<sup>34</sup> *Ibid*, pg. 2.

<sup>35</sup> Exhibit EU-20, pg. 2.

Notably, Article 34 of the EU–SADC EPA provides that safeguards can be imposed only as a consequences of obligations taken "under this Agreement" (underlining added). Accordingly, the investigation should have been initiated and carried out under the EU–SADC EPA and its relevant legal provisions; and

- iv. As imports from Netherlands, Germany (and the United Kingdom) were already subject to anti-dumping duties, it was impossible that they could have caused further injury. The provisional safeguard measure was therefore not warranted.<sup>36</sup>

*b. The ITAC Allows Updated Information*

- 47. On 8 February 2017, the ITAC authorized SAPA to submit updated injury information to cover the period until the end of 2016.<sup>37</sup>

*c. Meeting of the TDC*

- 48. During the TDC meeting between the EU and SACU, which took place on 16 and 17 February 2017, South Africa confirmed that, following the entry into force of the EU–SADC EPA, the investigation having led to provisional safeguard measures continued under Article 34 of the EU–SADC EPA and stated that the investigation covered SACU as a whole.<sup>38</sup>

*d. Additional Submission by the EU*

- 49. On 4 April 2017, the EU made an additional submission to the ITAC in which it made the following points:
  - i. Under Article 34 of the EU–SADC EPA, a safeguard measure can only be imposed if there has been (i) an increase of the imports of a certain product into SACU as a whole; (ii) that has resulted from the obligations stemming from the EU–SADC EPA; and (iii) that has caused or threatens to cause injury or disturbances in SACU as a whole;
  - ii. Pursuant to Article 34 of the EU–SADC EPA, only imports after its entry into force (October 2016) can be taken into account; and during the period of October–December 2016, imports of poultry from the EU had dramatically decreased;
  - iii. Pursuant to Article 34 (2) of the EU–SADC EPA, safeguard measures may be taken only if "*as a result of the obligations incurred by a Party under this Agreement, including tariff concessions*", a product is imported in such increased quantities and under such conditions as to cause or threaten to cause one of the situations referred into sub-paragraphs (a) to (c). However, it is impossible to argue that the product concerned has been imported in such increased quantities and under such conditions as to cause or threaten to cause one of the situations referred to in sub-paragraphs (a) to (c). This is because the imports of the product concerned into SACU take place under the same conditions as compared to the

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<sup>36</sup> Exhibit EU-21.

<sup>37</sup> Exhibit EU-7, pg. 3.

<sup>38</sup> Exhibit EU-22, pg. 1.

obligations under the TDCA because SACU granted no further tariff concessions to the product concerned as compared to the tariff concessions under the TDCA;

- iv. The data used by the ITAC referred to the period from 2011 until the first half of 2016, and is thus clearly irrelevant for the investigation. Since the provisional application of EU–SADC EPA in October 2016, imports of poultry from the EU decreased;
- v. The EU invited the ITAC to take into due consideration feed (maize) costs surge in 2016 – following two years of exceptional drought – and factors such as high electricity prices, labor costs and fluctuation of the Rand. During the investigation leading to the imposition of provisional measures, the EU did not get access to any analysis that had been carried out to examine alleged inefficiencies that undermine the competitiveness of the South African poultry producers. No information was provided on the highly concentrated nature of the South African market and the ability of big poultry oligopolies to maintain prices above cost. Neither did the EU get access to the analysis of the impact on consumer choice of brining practices in place in 2016 in South Africa;
- vi. In the light of the above, the adoption of a provisional safeguard measure was not justified.<sup>39</sup>

*e. SAPA Provides Further Information on Injury*

- 50. On 16 May 2017, SAPA submitted an updated version of the injury data, covering the period until the end of 2016.<sup>40</sup>
- 51. On 12 June 2017, SAPA submitted an updated application with the updated injury information.<sup>41</sup> In particular, the updated application included data for the whole 2016 and starting from the data relating to 2011, focused on the market developments between 2015 and 2016. The updated application covered the following points:
  - i. The negative effects of imports from the EU on (i) the industry participants (ii) other SACU producers (although only other South African producers were listed) and (iii) other sectors such as feed (maize and soybeans);
  - ii. The nature of the subject product – in particular in the EU – where it would be a waste product; and sale in the SACU by the EU in an opportunistic manner, forcing SACU industry to sell at a loss;
  - iii. The analysis of disturbance and/or serious injury indicators proved that between 2015 and 2016 (i) imports from the EU continued to increase both in absolute terms (25.78%) and relative to imports from other countries and sales from SACU producers; (ii) FOB prices decreased by 1.25%; (iii) the industry experienced price undercutting, suppression and, in certain cases, depression; (iv) while sales increased slightly, market shares decreased; (v) capacity, and production

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<sup>39</sup> Exhibit EU-22.

<sup>40</sup> Exhibit EU-7, pg. 3.

<sup>41</sup> Exhibit EU-23.



- decreased while capacity utilization remained stable; (vi) inventory decreased because of the large amount of forced low price sales; (vii) great gross and net losses; (viii) the complaining industry experienced the highest level of price disadvantage; (ix) employment and wages were reduced;
- iv. A report from the poultry association AVEC published in 2017 forecasted that imports from the EU would increase in the future;
  - v. The above trends were not undermined by anti-dumping duties and SPS bans imposed following avian influenza outbreaks in several EU Member States;
  - vi. SAPA claimed that the safeguard duty imposed should be much higher than the price disadvantage as a percentage of the FOB import price because (i) the subject product was a surplus/waste product in the EU; (ii) it was sold irregularly and opportunistically to SACU, making it difficult for the local producers to respond; (iii) EU exporters showed the ability to lower prices in response to external circumstances; and (iv) the EU exports poultry below its true costs of production;
  - vii. In calculating price disadvantage and unsuppressed selling price, the ITAC should use the full 2016 data provided by SAPA;
  - viii. Unsuppressed selling price should be based on an average profit margin of 12% (measured in earnings before interest and tax) to allow a reasonable return on capital employed of 15%;
  - ix. Finally, in calculating the final safeguard measure, the ITAC should not consider the anti-dumping duties in place as they are an unfair trade remedy adopted for other purposes.

*f. Additional Comments by the EU*

52. On 10 July 2017, the EU submitted comments to the ITAC on the updated application.<sup>42</sup> In particular, the EU explained that contrary to what was stated by SAPA, the ITAC had never confirmed that the proceeding was based on Article 34 (5) of the EU–SADC EPA. Regardless of the issue of legal basis, the EU–SADC EPA could not be the legal basis for imposing safeguard measures for actions/situations that predated its entry into force or were independent of any increase in imports – such as, for example, high feed costs, and the 15% cap on brining that had marred the competitiveness of the South African producers.
53. The EU also argued that the comparison drawn by SAPA with Article 2.1 of the WTO Agreement on Safeguards (ASG) to argue that import data for the pre-EPA period can be included was erroneous, as was SAPA’s interpretation of the WTO Dispute Settlement Body (DSB) reports. The ASG is a multilateral agreement and merely expands the provisions in Article XIX of the GATT; it does not add to the obligations undertaken by the GATT (and subsequently) WTO signatories in terms of market liberalization and tariff reduction/elimination. In any event, contrary to SAPA’s understanding, in *Argentina – Footwear (EC)*, DS121, the Appellate Body (AB) explicitly noted that the investigation period should be in the recent past. In the EU’s

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<sup>42</sup> Exhibit EU-24.

view, if the ASG was to be considered of relevance in interpreting the clauses of Article 34 of the EU–SADC EPA, then this approach should be applied consistently for all aspects of the investigation.

54. The EU also noted that there was no evidence for SAPA’s statement that it had provided data on the SACU industry. The EU claimed that SAPA had based itself on the data of five participating South African producers while claiming disturbance on the whole SACU market and with respect to the whole SACU industry.
55. The EU finally noted that the submission by SAPA of additional injury data up to mid-June 2017 to justify the imposition of provisional measures in December 2016, and as a basis to seek definitive measures, underlined the legal and factual incoherence in the conduct of the present investigation. More importantly, SAPA had not provided any data for 2017, which would have shown that import volumes from the EU had continued to decline since the end of 2016.

*g. Oral Presentations to the ITAC*

56. On 8 August 2017, the EU and SAPA gave an oral presentation to the ITAC. The presentation of the EU focused on three points, namely, (i) the fact that an investigation that had been started under Article 16 of the TDCA could not continue under Article 34 of the EU–SADC EPA which had different requirements; (ii) that the requirements of Article 34 of the EU–SADC EPA (increase in imports stemming from obligations under the EU–SADC EPA that caused or threatened to cause serious injury or disturbance on the market) had not been fulfilled; and (iii) a possible violation of the procedural rules and rights.<sup>43</sup>

*h. The ITAC Issues the Third Essential Facts Letter*

57. On 14 August 2017, the ITAC issued another essential facts letter (the third essential facts letter).<sup>44</sup> In the third essential facts letter, the ITAC made the following findings and invited interested parties to present comments:
  - i. From 2015 to 2016 there had been a further increase in imports of poultry from the EU of 25.8%, at lower prices, despite the imposition of anti-dumping duties on imports from the Netherlands, Germany (and the United Kingdom);
  - ii. The SACU industry continued to experience a price disadvantage, undercutting and suppression as well as loss of market share. The available information further showed a decrease in gross and net profit;
  - iii. A price disadvantage of 35.3% was calculated as a percentage of the FOB export price;
  - iv. Although increased costs played a role in the domestic industry’s ability to compete, imports continued to increase despite the imposition of anti-dumping duties;

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<sup>43</sup> Exhibit EU-25.

<sup>44</sup> Exhibit EU-8.

- v. Although there were other factors causing a threat of serious injury/disturbance, they were not sufficient to break the causal link between the increased imports and the threat of serious injury/disturbance; and
  - vi. As the provisions of Article 34 of the EU–SADC EPA are similar to those of Article 16 of the TDCA, the substitution of legal basis did not affect the validity of the investigation.
58. On the basis of the above information, the ITAC concluded that it was considering recommending the adoption of a definitive safeguard duty.<sup>45</sup>

*i. EU Provides Comments on Third Essential Facts Letter*

59. On 25 August 2017, the EU replied to the third essential facts letter by pointing out that:
- i. As the EU had already explained, the change in legal basis in the present case was illegal. In particular, (i) Article 34 of the EU–SADC EPA provides for different requirements (*i.e.* an increase of preferential imports as a result of the entry into force of the Agreement, under such conditions as to cause (or threaten to cause) serious injury to the domestic industry or disturbances in the market for competitive agricultural products); (ii) Article 34 of the EU–SADC EPA covered the whole of SACU, whereas the TDCA only covered South Africa; and (iii) no proper publication had been made to enable the participation of other parties covered by the enlarged scope of the investigation.
  - ii. The ITAC had conducted a biased and inconclusive injury analysis. Indeed, (i) the data used did not allow the analysis of the effects of the entry into force of the EU–SADC EPA, nor the appreciation of the reduction in imports of poultry from the EU that started from October 2016 onwards; (ii) the essential facts letter did not specify whether the injury consisted of a threat of serious disturbance in the SACU market or a threat of injury to the SACU domestic industry; (iii) it was unclear whether imports volumes and prices referred only to imports into South Africa without any reference to the situation in other SACU countries; (iv) the updated injury analysis took a simplistic and non-objective end-to-end point analysis focusing only on the years 2011, 2015 and 2016, without considering the intermediate years; and (v) the injury analysis did not consider decisive elements which caused the deterioration of the situation between 2015 and 2016, namely the increase in costs and imports originating in other countries;
  - iii. The ITAC had failed to disclose crucial information to understand the calculations of the price disadvantage – in particular, the adjustments made, or the profit used to calculate the adjusted domestic price;
  - iv. The ITAC had made an unjustified use of indexed figures which are also questionable as they do not allow an understanding of the figures and trends on which the injury analysis is based;

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<sup>45</sup> Exhibit EU-8, pgs. 5 – 6.

- v. The worsening of the situation of the domestic industry between 2015 and 2016 was almost exclusively due to the increase in domestic costs of production;
  - vi. The 3.3% adjustment made to the FOB to take into account the anti-dumping duties was not legally or economically justifiable.<sup>46</sup>
60. On the basis of the above, the EU asked the ITAC to provide sufficiently detailed information in order to ensure transparency and an adequate right of defence to the EU, and to reconsider its possible recommendation.<sup>47</sup>

*j. The ITAC Issues Summary of Findings*

61. On 10 September 2017, the ITAC issued a summary of findings containing the following recommendations to the South African Minister of Trade and industry:
- i. With regard to the legal basis of the investigation, the ITAC merely repeated the statement already made several times during the procedure – namely, that the overlap between the provisions of Article 16 of the TDCA and Article 34 of the EU–SADC EPA made the substitution of legal basis valid. The ITAC claimed that this conclusion was based on a legal advice received, which was however never shared;
  - ii. The volume of imports from the EU increased by 147% between 2011 and 2015 and by a further 26% between 2015 and 2016. Imports from other countries increased by 19% between 2015 and 2016;
  - iii. SAPA experienced price undercutting, price suppression as the average cost-to-price ratio increased, although no price depression was experienced in the period under review;
  - iv. SAPA's market share decreased by 2 index points between 2015 and 2016 while the total SACU market decreased by 3 index points. The EU's market share increased by 48 index points between 2015 and 2016, while the market share of imports from other countries increased by 8 index points;
  - v. The ITAC noted that SAPA sold poultry at a net loss of 162 index points in 2016, down from a profit of 100 index points in 2011 and 87 index points in 2015;
  - vi. Between 2015 and 2016 the inventories declined by 17 index points both in volume and value, but this was due to the need to sell poultry at lower price due to the lack of storage capacity by domestic producers;
  - vii. In order to calculate the price disadvantage, the ITAC compared the unsuppressed selling price to the landed cost of the imported products. This includes all costs from ex-factory export price plus 14% for shipping, insurance and clearing costs. The anti-dumping duties imposed on Germany, the Netherlands and the United Kingdom were calculated by adding an average 3.3% to the FOB price. The price disadvantage was expressed as a percentage of the FOB export price. The

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<sup>46</sup> Exhibit EU-26.

<sup>47</sup> *Ibid*, pg. 4.

unsuppressed price was calculated by adding a reasonable profit margin to the total production cost of the applicant plus selling and administrative expenses. As a result, a price disadvantage of 35.3% *ad valorem* was calculated;

- viii. The ITAC explained that an indication of causality is the extent of the increase in volume of the imports and the extent to which the market share of the domestic industry has decreased, with a corresponding increase in the market share of the imported subject products;
- ix. In the case at hand, the ITAC considered that although there were factors other than the increase in import from the EU causing a threat of serious disturbance, they did not sufficiently detract from the causal link between imports and threat of serious disturbance on the SACU market. The ITAC then recalled again that the volume of imports from the EU increased by 147% between 2011 and 2015 and by a further 26% between 2015 and 2016. Imports from other countries increased by 19% between 2015 and 2016. However, the ITAC did not explain why the EU's arguments, regarding the injurious effects of other factors, were not taken into consideration;
- x. As regards market shares, imports from the EU increased by 144 index points between 2011 and 2015 and by a further 48 index points between 2015 and 2016. Imports from other countries decreased by 41 index points between 2011 and 2015 and increased by 8 index points between 2015 and 2016. The market share of the applicant decreased by 4 index points between 2011 and 2015 and by a further 2 index points in 2016. The total market share of all SACU producers decreased by 6 index points between 2011 and 2015 and 3 index points in 2016;
- xi. As regards other factors, annual reports of the domestic producers showed pressure from the volatility of feed raw material prices (maize and soy) and above inflation increases in costs of labor, diesel, electricity, plastic, cardboard boxes. Further issues affecting the SACU industry's competitiveness included the drought, the duty-free quota of imports from the U.S. under the African Growth and Opportunity Act (AGOA) program and the new brining regulation. Soybeans and soy oilcake used in production of feed need to be imported at a duty of 6.6%. However, despite these factors, imports kept increasing. In this respect, the ITAC explained that in its submission of 10 July 2017, the EU had submitted that in interpreting Article 4.2 (b) of the ASG, the AB had held that it is not necessary that imports themselves cause injury, as long as they are a contributory cause. Therefore, the above-mentioned other factors did not sufficiently detract from the causal link between the increased imports and the threat of serious disturbance in the SACU market.<sup>48</sup>

62. On the basis of the above elements, the ITAC decided to inform the Minister of Trade and Industry that there was sufficient information to raise the matter with the TDC in line with Article 34 of the EU–SADC EPA.<sup>49</sup>

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<sup>48</sup> Exhibit EU-7.

<sup>49</sup> *Ibid*, pg. 14.

63. The issue was discussed at the TDC meeting between the parties on 21 October 2017.<sup>50</sup>

*k. Final Written Comments of the EU to the ITAC*

64. On 31 October 2017, the EU made one last submission to the ITAC.<sup>51</sup> In particular, as it became clear that SACU was going to adopt a definitive safeguard measure, while affirming that this submission was made without prejudice to all arguments previously made, the EU focused on how a safeguard should be imposed and implemented pursuant to Article 34 of the EU–SADC EPA.
65. The EU submitted that in line with Article 34 of the EU–SADC EPA, (i) the matter should have been presented to the TDC for a thorough examination "*with a view to seeking solution acceptable to the parties concerned*"; (ii) "*priority must be given to those safeguard measures which least disturb the operation of the agreement*"; and (iii) these measures "*shall not exceed what is necessary to remedy or prevent the serious injury or disturbance*".
66. In this context, the EU submitted that there were three possible approaches to come to a remedy acceptable to the parties concerned and respecting the above conditions:
- i. The authorities should adhere to the initial period of investigation determined at the initiation of the investigation (2011-2015) and apply only findings from that period, *i.e.* a price disadvantage of 13.9%;
  - ii. If the authorities consider there were compelling reasons to widen the scope, it should have taken into account data until mid-2017, which would lead to a lower level of duty than the one currently proposed;
  - iii. In case the authorities still decided to use the 2016 data to establish the level of any measures, then the price disadvantage should have been significantly revised downward in order to ensure that measures would not exceed what is necessary to remove injury/disturbance caused by the imports.
67. Finally, if SACU decided to impose a safeguard measure for a period exceeding one year, such a measure should be subject to a progressive elimination, and periodic consultations should be held to establish a timetable for its abolition.

## **5. The Imposition of Final Safeguard Measures**

68. On 18 July 2018, SACU informed the EU that on 27 June 2018 the SACU Council of Ministers had approved the implementation of the safeguard measure for a period of four years.<sup>52</sup>
69. On 28 September 2018, the safeguard measure entered into force. The safeguard duty was set at 35.3% for the first 6 months, and was reduced to 30% in March 2019, to 25%

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<sup>50</sup> See: Exhibit EU-27 for the EU's position.

<sup>51</sup> *Ibid.*

<sup>52</sup> Exhibit EU-10.



in March 2020 and to 15% in March 2021. The safeguard measure will expire on 11 March 2022. However, it could be extended for a further 4 years thereafter.

#### IV. SUMMARY OF LEGAL ARGUMENTS

70. The EU presents its arguments in this case in a sequential manner. To this end, the EU will first demonstrate that once the EU–SADC EPA entered into force, the ITAC could not continue (under the EU–SADC EPA) an investigation that had been initiated under the TDCA. This is because the measure at issue was adopted by a different authority from the one which opened the investigation, and on a different legal basis. Specifically, the EU will show that the investigation that began under Article 16 of the TDCA cannot simply be continued under Article 34 (2) of the EU–SADC EPA. [**Claim 1**]
71. Moving to the investigation underlying the measure, the EU will first demonstrate that the ITAC erred in its analysis of the alleged increase in imports, as required by Article 34 (2) of the EU–SADC EPA. More specifically, the EU will show that the increase in imports analyzed by the ITAC did not result from obligations undertaken under the EU–SADC EPA, and that, logically, any import increases that occurred prior to the application of EU–SADC EPA cannot be a result of the obligations incurred under the EU–SADC EPA. [**Claim 2, First Argument**] The EU will further show that, in any case, the ITAC selected an incorrect POI and did not analyze the most recent import trends. The ITAC also did not take into consideration that the imports during the period December 2016 – December 2017 and January 2018 – March 2018 greatly decreased compared to the period covered by the investigation. [**Claim 2, Second Argument**].
72. Next, the EU will demonstrate that the ITAC erred in its causation analysis under Article 34 (2) of the EU–SADC EPA since it did not take into account other factors – such as the volatility of feed raw material prices, the increase in costs of labor, diesel, electricity, plastic and cardboard boxes, duties imposed on the soya oilcake used in production of feed and imports from other countries – that were the cause of (or, in the very least, contributed to) the alleged injury/disturbance to the domestic industry. [**Claim 3**]
73. Turning then to the application of the measure at issue, the EU will demonstrate that as per Articles 34 (1) and 34 (2) of the EU–SADC EPA, SACU, as a whole, cannot be allowed to impose the safeguard measure at issue since the ITAC only analyzed the alleged increase in imports and the alleged injury/disturbance with respect to South Africa. In other words, the measure at issue concerns a different geographic scope than the investigation, which did not take into account the import data relating to SACU but was based on data relating exclusively to South Africa. [**Claim 4, First Argument**] The EU will also show that the measure at issue exceeds what is necessary to remedy or prevent the serious injury/disturbance since other factors causing injury were not analyzed, recent imports show a downward trend, and the ITAC failed to properly account for the anti-dumping duties already in place on imports from the EU. [**Claim 4, Second Argument**]
74. Finally, the EU will also demonstrate that SACU acted inconsistently with Article 34 (7) (a) (b) and (c) of the EU–SADC EPA, and violated the EU's due process rights, by not properly disclosing to the EU all information relevant to the investigation. This includes information relating to adjustments made for calculating the price disadvantage, the profit used for calculating the adjusted domestic price, and certain crucial indexed data. [**Claim 5**]

75. The EU will elaborate on these arguments in the next section.

## V. LEGAL ARGUMENTS

### A. Relevance of WTO Law and Case Law for Interpretation of EU–SADC EPA

76. Before presenting its substantive arguments regarding the dispute, the EU would like to explain its usage of WTO law and case law in the present written submission. Article 92 of the EU–SADC EPA provides the relevant rules of interpretation for the agreement, including for the interpretation of Article 34 of the EU–SADC EPA. In relevant part, Article 92 of the EU–SADC EPA provides that:

*"The arbitration panel shall interpret the provisions of this Agreement in accordance with the customary rules of interpretation of public international law, including those codified in the Vienna Convention on the Law of Treaties..."* [underlining added].

77. Article 92 of the EU–SADC EPA thus directly refers to the Vienna Convention on the Law of Treaties (VCLT). Article 31 of the VCLT has been widely recognized as the key customary rule of interpretation of public international law.<sup>53</sup> In relevant part, Article 31.1 of the VCLT states that:

*"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."* [underlining added].

78. In this submission, therefore, the EU has applied VCLT rules of interpretation (*i.e.* Article 31 of the VCLT) to the EU–SADC EPA. More specifically, the EU has interpreted Article 34 of the EU–SADC EPA according to the ordinary meaning of the text of the provision, in light of its context and the object and purpose of the EU–SADC EPA as a whole.
79. WTO panels and the AB also rely on Article 31 of the VCLT to interpret the WTO agreements. Article 3.2 of the Dispute Settlement Understanding (DSU) requires panels and the AB to "*clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.*" It was recognized by the AB in *US – Gasoline* that Article 31 of the VCLT had indeed attained the status of "*rule of customary or general international law*", and that the panels and the AB were required by Article 3.2 of the DSU to follow Article 31 of the VCLT when interpreting the WTO agreements.<sup>54</sup>
80. Thus, the EU's approach in interpreting Article 34 of the EU–SADC EPA (on bilateral safeguards) is the same as the WTO panel's and the AB's approach in interpreting Article XIX of the GATT 1994 as well as the ASG. To this end, the EU has conducted an independent analysis and interpretation of the EU–SADC EPA, and found that in all

<sup>53</sup> See generally: O. Dörr, K. Schmalenbach, a commentary on Vienna Convention on the Law of Treaties, Springer, 2012, pg. 522, 541.

<sup>54</sup> Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, pg.17, 23.



instances, its conclusions match those of the WTO panels and the AB. Accordingly, to the extent that the text of the EU–SADC EPA and the WTO agreements (*in casu* ASG and the GATT 1994) is the same or materially similar, the EU has cited WTO case law in support of the EU's interpretation. When the text of the EU–SADC EPA and the WTO agreements (ASG and the GATT 1994) are not entirely identical, the jurisprudence of WTO panels and the AB nonetheless represent a reasonable and sensible way to interpret the relevant EU–SADC EPA provision(s), and thus relevant case law has been accordingly cited by the EU.

81. It is also worth noting in this regard that Article 1 (f) of the EU–SADC EPA, enumerating the "*objectives*" of the agreement, states that the operation of the EU–SADC EPA is to be "*consistent with WTO obligations [of the Parties]*" while the Preamble explains that in signing the EU–SADC EPA the parties have taken account of their WTO obligations.<sup>55</sup> Moreover, Article 31.3 (c) of the VCLT sets out that there shall be taken into account, together with the context any relevant rules of international law applicable in the relations between the parties. It is clear therefore that WTO law (as clarified by WTO case law) is relevant to the interpretation of the provisions of the EU–SADC EPA both because the parties have expressed their intention to enter into an international agreement that is in harmony with their WTO obligations and because this is what Article 31.3 (c) of the VCLT requires.

**B. Claim 1: Violation of Article 34 (2) of the EU–SADC EPA Because The Measure at Issue was Adopted by a Different Authority From the One Which Opened the Investigation, and On a Different Legal Basis**

82. As noted in the factual section above, South Africa published the ITAC's Notice of Initiation of the Investigation for Safeguard Measures on the basis of Article 16 of the TDCA.<sup>56</sup> Article 16 of the TDCA provides the following:

*"Notwithstanding other provisions of this Agreement and in particular Article 24, if, given the particular sensitivity of the agricultural markets, imports of products originating in one Party cause or threaten to cause a serious disturbance to the markets in the other Party, the Cooperation Council shall immediately consider the matter to find an appropriate solution. Pending a decision by the Cooperation Council, and where exceptional circumstances require immediate action, the affected Party may take provisional measures necessary to limit or redress the disturbance. In taking such provisional measures, the affected Party shall take into account the interests of both Parties."*<sup>57</sup>

83. The final safeguard measure, however, was – as can be observed from the SACU definitive measure notification – imposed by the SACU Council of Ministers on the basis of Article 34 of the EU–SADC EPA.<sup>58</sup>

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<sup>55</sup> See also the twelfth recital of the EU–SADC EPA which states: "*TAKING ACCOUNT of the Parties' rights and obligations in terms of their membership of the World Trade Organization ('WTO'), and reaffirming the importance of the multilateral trading system.*"

<sup>56</sup> Exhibit EU-13, pg. 57.

<sup>57</sup> Exhibit EU-1, Article 16.

<sup>58</sup> See: Exhibit EU-10.

84. In other words, the entity that imposed the final safeguard measure, *i.e.* the SACU Council of Ministers, is a different entity from the one that initiated the safeguard investigation, *i.e.* the ITAC on behalf of the South African authorities. The imposition of a safeguard measure by SACU is possible under Article 34 of the EU–SADC EPA (as that provision provides for safeguard measures by "*a Party or SACU*") but not under Article 16 of the TDCA, the provision on the basis of which the safeguard investigation was initiated. Article 16 of the TDCA only allows a Party to the TDCA (*i.e.* South Africa or the EU) to impose a safeguard measure. That restriction in Article 16 of the TDCA on who can impose a safeguard measure contrasts with the possibility under Article 24(3) of the TDCA for South Africa to impose a safeguard measure at the request of "*one or more of the other Members of the Southern African Customs Union*". The investigation, however, was not initiated under Article 24(3) of the TDCA but under Article 16 of the TDCA.
85. The change in the 'competent' authority appears to be the consequence of a change in the legal basis for the imposition of the final safeguard measure: from Article 16 of the TDCA to Article 34 of the EU–SADC EPA.
86. According to the ITAC, "*the substitution of article 16 of the TDCA with article 34 of the EPA did not affect the validity of the Commission's present investigation*" because "*Article 34 (2) of the EPA makes provision for a bilateral safeguard which is similar to the agricultural safeguard provided for in article 16 of the TDCA*".<sup>59</sup>
87. The EU disagrees that the legal basis for the final safeguard measure can be changed from Article 16 of the TDCA to Article 34 (2) of the EU–SADC EPA for the following reasons.
88. First, Protocol 4 to the EU–SADC EPA ('Concerning the relationship between the TDCA and [the EU–SADC EPA]') clearly states that, as of the date of entry into force of the EU – SADC EPA, all articles contained in Titles II (Trade) and III (Trade-Related Issues) are repealed and that, in case of provisional application of the EU–SADC EPA by the EU and ratification by South Africa, all articles contained in Titles II (Trade) and III (Trade-Related Issues) are suspended. Article 16 of the TDCA is part of Title II of the TDCA and was therefore suspended as of the date of provisional application (*i.e.* 10 October 2016). The suspension of Article 16 of the TDCA is also clear from the South African Minister of Trade and Industry's letter of 6 December 2016, referred to in the ITAC's 2017 Summary of Findings,<sup>60</sup> and the ITAC's third essential facts letter.<sup>61</sup>
89. Protocol 4 also provides that the powers of the Cooperation Council established under the TDCA to take any legally binding decisions in respect of the matters covered by the provisions repealed expires with the entry into force of the EU–SADC EPA and that the dispute settlement mechanism established under Article 104 of the TDCA shall not be available any longer for disputes relating to the application or interpretation of provisions repealed. Protocol 4 therefore clarifies that the TDCA is not replaced by the

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<sup>59</sup> See: Exhibit EU-8, paras. 6 – 7.

<sup>60</sup> See: Exhibit EU-7, pg. 2.

<sup>61</sup> Exhibit EU-8, pg. 1.

- EU–SADC EPA. In fact, many of the provisions of the TDCA (including Article 16 of the TDCA) were suspended because of the application of the EU–SADC EPA.
90. In summary, in Protocol 4 the Parties set out the arrangements that they considered necessary to regulate the relationship between these two international agreements. Those arrangements do not provide in any way that safeguard procedures ongoing under the TDCA can be continued under the EU–SADC EPA.
91. Moreover, having explicitly regulated the relationship between these two international agreements, Protocol 4 excludes the possibility that the EU-SADC EPA may be considered as the legal successor of the TDCA. This is also confirmed by the fact that the parties to the TDCA are the EU, its Member States and South Africa, whereas the parties to the EU-SADC EPA are the EU, its Member States and the SADC EPA States (the Republic of Botswana, the Kingdom of Lesotho, the Republic of Mozambique, the Republic of Namibia, the Republic of South Africa and the Kingdom of Swaziland).
92. In that connection, the EU notes that Article 31 of the VCLT gives primacy to the text of the treaty, particularly since the text is presumed to be an authentic expression of the intention of the parties to the treaty.<sup>62</sup> This has been confirmed by international courts and tribunals – such as the ICJ<sup>63</sup> and the WTO AB<sup>64</sup> – as well. As is clear from the very text of the EU–SADC EPA, the parties to the EU–SADC EPA intended to extinguish (suspend) all legal effects of Title II (including Article 16) of the TDCA upon the entry into force (provisional application) of the EU–SADC EPA. In this regard, Article 24.1 of the VCLT is clear that a "*treaty enters into force in such a manner... as the negotiating States agree*". Thus, Article 16 of the TDCA cannot form the legal basis of the safeguard investigation which was continued under the EU–SADC EPA, since, after the entry into force of the EU–SADC EPA, Article 16 possessed no legal effect.<sup>65</sup>
93. Second, were the Panel to consider that the EU-SADC EPA is the legal successor of the TDCA – *quod non* – contrary to the claim made by the ITAC in its third essential facts letter, Article 34(2) of the EU–SADC EPA, in any event, is not the legal successor of Article 16 of the TDCA. Indeed, as is clear from the text of the TDCA, the TDCA not only allows countries to impose agricultural safeguards (under Article 16 of the TDCA), it also allows the imposition of "*general*" safeguards under Article 24 of the TDCA. More specifically, Article 24(1) of the TDCA states that "[w]here any product is being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers of like or directly competitive products in the territory of one of the Contracting Parties, the Community or South Africa, whichever is concerned, may take appropriate measures under the conditions provided

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<sup>62</sup> See: United Nations (International Law Commission), *Draft Articles on the Law of Treaties with Commentary* (1966), pg. 220, para. 11; O. Dörr, K. Schmalenbach, a commentary on Vienna Convention on the Law of Treaties, Springer, 2012, pg. 522.

<sup>63</sup> See: ICJ, *Territorial Dispute (Libya v Chad)* [1994] ICJ Rep 6, para 41; ICJ, *Legality of the Use of Force (Serbia and Montenegro v Belgium) (Preliminary Objections)* [2004] ICJ Rep 279, para 100.

<sup>64</sup> Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, para. 93, stating that the "*purpose of treaty interpretation is to establish the common intention of the parties to the treaty*".

<sup>65</sup> See by analogy: O. Dörr, K. Schmalenbach, a commentary on Vienna Convention on the Law of Treaties, Springer, 2012, pgs. 1291 – 1292.

*for in the WTO Agreement on Safeguards or the Agreement on Agriculture annexed to the Marrakech Agreement establishing the WTO and in accordance with the procedures laid down in Article 26." Similarly, Article 24(3) of the TDCA states that "[w]here any product is being imported in such quantities and under such conditions as to cause or threaten to cause serious deterioration in the economic situation of one or more of the other Members of the Southern African Customs Union, South Africa, at the request of the country or countries concerned, and after having examined alternative solutions, may exceptionally take surveillance or safeguard measures in accordance with the procedures laid down in Article 26."*

94. A similar distinction between agricultural safeguards and regular safeguards exists in the EU–SADC EPA. While Article 34 of the EU–SADC EPA addresses general bilateral safeguards, the possibility of agricultural safeguards is addressed in Article 35 of the EU–SADC EPA. While both Article 16 of the TDCA and Article 34 of the EU–SADC EPA might provide for the possibility of bilateral safeguards, the claim that Article 34 of the EU–SADC EPA is the legal successor of Article 16 of the TDCA is legally incorrect. If there is a legal successor of Article 16 of the TDCA (with title "Agricultural safeguards") in the EU–SADC EPA, it is Article 35 of the EU–SADC EPA ("Agricultural safeguards") and not Article 34 of the EU–SADC EPA.
95. That only Article 35 of the EU–SADC EPA might be the legal successor of Article 16 of the TDCA is also clear from the fact that both Article 35 of the EU–SADC EPA and Article 16 of the TDCA allow the imposition of an agricultural safeguard *"notwithstanding other provisions of this Agreement and in particular [the provision covering general bilateral safeguards]"*.<sup>66</sup> In other words, while both Article 24 of the TDCA and Article 34 of the EU–SADC EPA provide for the possibility of general bilateral safeguards, the possibility to deviate from the rules set out in these provisions for agricultural products are set out in Article 16 of the TDCA and Article 35 of the EU–SADC EPA.
96. In this connection, the EU notes that SACU/the ITAC never claimed that the legal basis for the contested safeguard measure was Article 35 of the EU–SADC EPA.
97. Third, Article 16 of the TDCA does not allow the imposition of final safeguard measures. Indeed, the text of Article 16 of the TDCA clearly states that: *"[p]ending a decision by the Cooperation Council, and where exceptional circumstances require immediate action, the affected Party may take provisional measures necessary to limit or redress the disturbance"*. A final measure/solution can only be taken by the Cooperation Council pursuant to Article 16 of the TDCA. However, once the EU–SADC EPA (provisionally) entered into force, that Cooperation Council no longer had the power to take legally binding decisions pursuant to Protocol 4 to the EU – SADC EPA. Indeed, Point 2 (a) of Protocol 4 explicitly states that *"[i]n case of provisional application of this Agreement (...), (b) the Cooperation Council established under Article 97 of the TDCA shall not have the power to take any legally binding decisions in respect of the matters covered by the provisions suspended pursuant to paragraph 2(a)."*

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<sup>66</sup> Article 16 of the TDCA in relevant part provides that *"[n]otwithstanding other provisions of this Agreement and in particular Article 24"* whereas Article 35 of the EU–SADC EPA provides that *"[n]otwithstanding Article 34"*.

98. Article 34 of the EU–SADC EPA, on the other hand, allows both the imposition of a provisional safeguard measure (pursuant to Article 34 (8)) as well as a final safeguard measure (pursuant to Articles 34 (1) to (3)) by a Party to the EU–SADC EPA with only a notification to the TDC being required. The EU fails to see how a provision (*i.e.* Article 34 of the EU–SADC EPA) that allows the imposition of both provisional and final safeguard measures by a Party to the EU–SADC EPA can be considered the legal successor of a provision (*i.e.* Article 16 of the TDCA) that only allows the imposition of a provisional safeguard measure by a Party to the TDCA, while final measures can only be adopted by the Cooperation Council.
99. Fourth, the conditions set out under Article 34 of the EU–SADC EPA for the imposition of safeguard measures are very different than those required by Article 16 of the TDCA. For example, Article 34 of the EU–SADC EPA sets out detailed procedural rules (in Article 34 (7) of the EU–SADC EPA) to be followed during a bilateral safeguard investigation. Article 16 of the TDCA, with the exception of the requirement that the Cooperation Council must immediately consider the matter, contains no such procedural rules.
100. More importantly, the substantive requirements for the imposition of safeguard measures pursuant to Article 16 of the TDCA and Article 34 of the EU–SADC EPA are also substantially different. Article 16 of the TDCA only requires that *"imports of products originating in one Party cause or threaten to cause a serious disturbance to the markets in the other Party"*. In other words, Article 16 TDCA does not (unlike Article 24 of the TDCA) require an increase in imports, let alone an increase in imports resulting from obligations incurred under the TDCA.
101. Article 34 (2) of the EU–SADC EPA, by contrast, requires imports *"in such increased quantities and under such conditions"* that are *"a result of the obligations incurred by a Party under this Agreement, including tariff concessions"*. Article 34 (2) of the EU–SADC EPA therefore imposes two additional criteria compared to Article 16 of the TDCA, namely that (i) there is an increase in imports (ii) that is the result of obligations incurred under the EPA.<sup>67</sup>
102. Similarly, to the extent that SACU were to argue that the safeguard measure is imposed on the basis of Article 34 (5) of the EU–SADC EPA,<sup>68</sup> that provision also requires, unlike Article 16 of the TDCA, that *"a product originating in the EU is being imported in such increased quantities and under such conditions"* [underlining added].
103. It follows that the substantive requirements for the imposition of safeguard measures under Article 16 of the TDCA are very different from those under Article 34 (2) of the EU–SADC EPA, thereby refuting the claim that the legal basis for the final safeguard measure can be changed during the investigation from Article 16 of the TDCA to Article 34 (2) of the EU–SADC EPA.

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<sup>67</sup> See further: Exhibit EU-22, pg. 3. See also Exhibit EU-26, pg. 1.

<sup>68</sup> The EU notes that this was not the claim by SACU/the ITAC during the safeguard investigation. It is clear from the ITAC's third essential facts letter (Exhibit EU – 8, pg. 1) that it considered Article 34 (2) – and not Article 34 (5) – of the EU–SADC EPA to be the legal successor of Article 16 of the TDCA and that, therefore, Article 34(2) of the EU–SADC EPA constituted the legal basis for the imposition of the final safeguard measure.

104. In short, there is no legal and logical basis for considering that a safeguard investigation initiated under a set of procedural and substantive requirements can be continued and concluded by a different authority under a new and different set of procedural and substantive requirements (which moreover do not provide explicitly for that continuation).
105. This is particularly so because Article 34 of the EU–SADC EPA provides for the possibility of SACU (in addition to the Parties to the EU–SADC EPA) to impose a safeguard measure while Article 16 of the TDCA does not. Indeed, Article 16 of the TDCA only allows a Party (*i.e.* South Africa or the EU) to impose a safeguard measure. That restriction in Article 16 of the TDCA on who can impose a provisional safeguard measure contrasts with the possibility under Article 24(3) of the TDCA for South Africa to impose a safeguard measure at the request of "*one or more of the other Members of the Southern African Customs Union*". The investigation resulting in the final safeguard measure, however, was not initiated under Article 24(3) of the TDCA but under Article 16 of the TDCA.
106. In any event, even if the legal basis for the final safeguard measure could be changed from Article 16 of the TDCA to Article 34 (2) of the EU–SADC EPA – *quod non* – the conditions as set out in Article 34 (2) of the EU–SADC EPA – and not those set out under Article 16 of the TDCA – shall be met.
107. In that connection, the EU notes that point 3 of Protocol 4 to the EU–SADC EPA clearly states that "*in the event of any inconsistency between the TDCA and this Agreement, this Agreement [i.e. the EU–SADC EPA] shall prevail to the extent of the inconsistency*". As will be explained in more detail in Claims 2 and 3 below, these conditions were not fulfilled

C. **Claim 2, First Argument: Violation of Article 34 (2) of the EU–SADC EPA Because The Alleged Increase in Quantity of Imports Did Not Result From Obligations Incurred Under the EU–SADC EPA, and Any Import Increase that Occurred Prior to the Application of the EU–SADC EPA Cannot Be a Result of the Obligations Incurred Under the Same Agreement**

108. In relevant part, the text of Article 34 (2) of the EU–SADC EPA provides as follows:

*"Safeguard measures referred to in paragraph 1 may be taken if, **as a result of the obligations incurred by a Party under this Agreement, including tariff concessions,** a product originating in one Party is being imported into the territory of the other Party or SACU, as the case may be, in such increased quantities and under such conditions as to cause or threaten to cause..." [bold and underlining added]*

109. The Oxford Dictionary defines "result" as "*a consequence, effect, or outcome of something*". The text of Article 34 (2) of the EU–SADC EPA thus requires the investigating authority to establish that a product originating in one Party has been imported in the territory of another Party or SACU *as a consequence, effect or outcome of obligations incurred under the EU–SADC EPA*.

110. This requirement, as set out in the explicit text of Article 34 (2) of the EU–SADC EPA, has two consequences:<sup>69</sup>
- i. A logical link needs to be shown between the increase in imports and an obligation incurred by the importing Party under the EU–SADC EPA; and logically,
  - ii. To establish such a link, only imports after the entry into force of the EU–SADC EPA can be taken into consideration.
111. These two points will be addressed in the sub-sections below.

**1. Requirement to Demonstrate a Logical Link Between Obligations Incurred by a Party and the Increase in Imports**

112. As mentioned above, the requirement of demonstrating a logical link between the increase in imports and an obligation incurred by the importing Party, emerges from the ordinary meaning of the words used in Article 34 of the EU-SADC EPA.
113. It is noted, moreover, that the requirement of increased imports "*as a result of the obligations incurred by a Party under this Agreement, including tariff concessions*" in Article 34 (2) of the EU–SADC EPA is nearly identical in wording with the requirement in the text of Article XIX:1(a) of the GATT 1994. That Article provides that:

*"If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession."* [underlining added]

114. Both the WTO AB and WTO panels have interpreted the "*as a result of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions*" requirement on several occasions. In *Korea – Dairy*, DS98, for example, the AB ruled that it "*must be demonstrated, as a matter of fact, that the importing Member has incurred obligations under the GATT 1994, including tariff concessions*".<sup>70</sup> The AB then continued its analysis of the meaning of the "*as a result of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions*" requirement, and found that:

*"The first clause in Article XIX:1(a) – "as a result of unforeseen developments and of the obligations incurred by a Member under the Agreement, including tariff concessions ..." – is a dependent clause which, in our view, is linked grammatically to the verb phrase "is being imported" in the second clause of that*

<sup>69</sup> See also in general: Exhibit EU-22.

<sup>70</sup> Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, para. 84. See also Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, para. 91.

paragraph. Although we do not view the first clause in Article XIX:1(a) as establishing independent conditions for the application of a safeguard measure, additional to the conditions set forth in the second clause of that paragraph, we do believe that the first clause describes certain circumstances which must be demonstrated as a matter of fact in order for a safeguard measure to be applied consistently with the provisions of Article XIX of the GATT 1994. In this sense, we believe that there is a logical connection between the circumstances described in the first clause – "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions ..." – and the conditions set forth in the second clause of Article XIX:1(a) for the imposition of a safeguard measure".<sup>71</sup> [underlining added]

115. This requirement of not only demonstrating as a matter of fact the existence of obligations incurred by a member/party under the GATT 1994 but also the logical connection with the increase in imports justifying safeguard measures was subsequently confirmed in later cases such as *Dominican Republic – Safeguard Measures*, DS416,<sup>72</sup> and *Indonesia – Iron or Steel Products (Chinese Taipei)*, DS490<sup>73</sup>.
116. To the extent there is a marginal difference in the wording of Article XIX:1 of the GATT 1994 and Article 34(2) of the EU-SADC EPA that difference suggests that in the context of Article 34(2) of the EU-SADC EPA there is an even stronger need to prove the above connection. Indeed, Article XIX:1 of the GATT 1994 requires to show a link between the increasing imports and "the effect of the obligations incurred by a contracting party under this Agreement", whilst Article 34(2) of the EU-SADC EPA indicates that the increasing imports must be the "**result of the obligations incurred by a Party under this Agreement**".
117. In the present case, no connection exists between the alleged increase in imports into SACU and obligations incurred under the EU–SADC EPA and in any event SACU has not demonstrated the existence of such a connection.
118. As was explained by the EU in its first TDC submission – as well as in its oral presentation – the importation of the product under investigation into SACU under the EU–SADC EPA took place under the exact same conditions as under the TDCA.<sup>74</sup> Indeed, the EU–SADC EPA did not result in any further tariff concessions to the product concerned compared to the tariff concessions agreed under the TDCA. In this connection, the EU notes that at no time during the investigation resulting in the safeguard measure was a claim made that the EU–SADC EPA resulted in additional obligations with respect to the product concerned. Hence, since the relevant obligations were identical, it is difficult to understand how the increased in import could be the result of an obligation incurred by a Party under the EU–SADC EPA (given that the obligation

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<sup>71</sup> Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, para. 85. See also Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, para. 92.

<sup>72</sup> Panel Report, *Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric*, WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, para. 7.145.

<sup>73</sup> Panel Report, *Indonesia – Safeguard on Certain Iron or Steel Products*, WT/DS490/R, WT/DS496/R, as modified by Appellate Body Reports WT/DS490AB/R, WT/DS496/AB/R, para. 7.52

<sup>74</sup> Exhibit EU-22, pg. 2 and Exhibit EU-25, pg. 2.



had already been incurred). This is all the more true if the Panel were to consider (*quod non*) that Article 34 of the EU–SADC EPA is the legal successor of Article 16 of the TDCA. Indeed, if that were to be the case then, for the sake of consistency, also the tariff obligations under the TDCA that are reflected in the EU–SADC EPA (especially when they did not undergo any change) cannot be considered as having been incurred by a party under the successor treaty (the EU–SADC EPA) as they had been incurred already under the TDCA.

119. In any event, WTO case law in connection with the "*as a result of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions*" requirement is clear that the investigating authority must not only identify the specific relevant obligation, but also its effect on imports. Similarly, a party that intends to apply safeguard measures under Article 34 of the EU–SADC EPA must demonstrate that it complies with the requirements set out in that provision for imposing those measures (*i.e.* it shows that the increase import is the result of the obligations incurred by a Party under this Agreement. Indeed, in *Ukraine – Passenger Cars*, DS468, the Panel found that:

*"... a Member imposing a safeguard measure must demonstrate that a product has been imported in increased quantities as a result of the effect of GATT 1994 obligations of the Member concerned. In our view, given that there may be several obligations that apply to the product in question, this demonstration necessitates identification of the specific relevant obligation(s), as it is difficult to see how this demonstration could otherwise be made. In addition, it should be remembered that pursuant to Article XIX:1(a) it is not just the obligation per se that is to be identified, but also its effect. [...] It is therefore important for competent authorities to be clear as to which of the applicable obligations they find to have resulted in imports in increased quantities."*<sup>75</sup>

120. In addition, an investigating authority must not only identify the particular obligation (as well as its effect on the development of imports), but this identification and examination also needs to be clear from the published report. In *Dominican Republic – Safeguard Measures*, DS416, the Panel found that it "*falls to the importing Member to identify those obligations incurred under the GATT 1994 that are linked with the increase in imports causing serious injury to its domestic industry. These findings and conclusions must be reflected in the report of the competent authority*".<sup>76</sup> The same finding was reached in *India – Iron and Steel Products*, DS518, where the Panel ruled that the "*competent authority's published report must demonstrate that a WTO Member imposing a safeguard measure is subject to an obligation (or obligations) under the GATT 1994 and explain how that obligation constrains its ability to react to the import surge causing injury to its domestic industry*".<sup>77</sup>
121. The EU notes that the findings referred to above were made in the context of the interpretation of Article XIX:1 of the GATT 1994 – and more specifically the obligation to show increased imports are "*a result of the effect of the obligations incurred by a*

<sup>75</sup> Panel Report, *Ukraine – Definitive Safeguard Measures on Certain Passenger Cars*, WT/DS468/R, para. 7.96.

<sup>76</sup> Panel Report, *Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric*, WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, para. 7.146.

<sup>77</sup> Panel Report, *India – Certain Measures on Imports of Iron and Steel Products*, WT/DS518/R, para. 7.89.

*contracting party under this Agreement, including tariff concessions"* – and not (or only afterwards) in the context of the procedural obligations set out in Articles 3.1 and 4.2(c) ASG.

122. Indeed, the Panel exercised judicial economy in *Ukraine – Passenger Cars*, DS468, with respect to the claim that there was a violation of the procedural obligations set out in Article 3.1 ASG and 4.2(c) ASG<sup>78</sup> because it had already established a violation of Article XIX:1 of the GATT 1994.
123. Similarly, in *India – Iron and Steel Products*, DS518, the Panel found consequential violations of Articles 3.1 and 4.2(c) ASG after it had identified a violation of Article XIX:1 of the GATT 1994 due to the non-identification of the obligations incurred in the published report.<sup>79</sup>
124. In this connection – and as will be explained in more detail under Claim 5 below – the EU notes that the requirement in Article 34(7)(c) of the EU–SADC EPA to "*supply the Trade and Development Committee with all relevant information required for a thorough examination of the situation*" in essence incorporates the requirements of Articles 3.1 and 4.2(c) ASG to "*publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law*" and to "*publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined*".
125. Nowhere in the ITAC's published report(s) is there any mention of obligations incurred under the EU–SADC EPA that the investigating authority identified as not only existing, but also as having resulted in the development of imports of the product concerned.
126. While the EU considers that – as was explained above in Claim 1 – the investigation initiated under Article 16 of the TDCA could not be continued under Article 34 (2) of the EU–SADC EPA, the EU also notes that, even if that were the case, that did not allow the imposition of a safeguard measure without showing that the conditions set out in Article 34 (2) of the EU–SADC EPA were met. In this connection, the EU notes that point 3 of Protocol 4 to the EU–SADC EPA clearly states that "*in the event of any inconsistency between the TDCA and this Agreement, this Agreement shall prevail to the extent of the inconsistency*".
127. The imposition of the final safeguard measure without showing that the alleged increase in imports was a result of an obligation incurred by the importing Party under the EU–SADC EPA therefore constitutes a violation of Article 34 (2) of the EU–SADC EPA.

## **2. Only Imports After the Entry into Force of the EU–SADC EPA Can Be Taken Into Consideration by the ITAC**

128. The requirement set out in the text of Article 34 (2) of the EU–SADC EPA that the increase in imports must be due to obligations incurred by a Party under the EU–SADC

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<sup>78</sup> Panel Report, *Ukraine – Definitive Safeguard Measures on Certain Passenger Cars*, WT/DS468/R, para. 7.114.

<sup>79</sup> Panel Report, *India – Certain Measures on Imports of Iron and Steel Products*, WT/DS518/R, para. 7.289.

EPA *by definition* – and logically – implies that the increase in imports must have occurred *after* the entry into force of the EU–SADC EPA.

129. The text of Article 34(2) of the EU–SADC EPA is very clear in this respect. The increase in imports must be the "*result of the obligations incurred by a Party under **this Agreement**, including tariff concessions*". If the Parties had considered relevant the increase in import resulting from obligations incurred under the TDCA or any other agreements, they would have set that out either in the text of Article 34 of the EU–SADC EPA or in Protocol 4. In any event it is crystal clear that they would not have used the words "*under this Agreement*" if the intention of the Parties had been to include obligations incurred under other agreements, such as the TDCA.
130. As mentioned above, the EU–SADC EPA entered into provisional application on 10 October 2016. Therefore, only imports that took place after 10 October 2016, *i.e.* after the date any obligation under the EU–SADC EPA started to apply, can be taken into consideration in the analysis of whether the imposition of safeguard measures under Article 34 of the EU–SADC EPA is allowed.
131. When the provisional safeguard measure – adopted on 15 December 2016 – was imposed, that imposition was based on imports during the 2011 to 2015 period, *i.e.* *before* the entry into force of the EU–SADC EPA.
132. For the adoption of the final safeguard measure – on 27 June 2018 – information with respect to imports during the year 2016 was also taken into consideration. That decision was taken following a request by SAPA to have information for 2016 to be included. While that updated information included some very limited information after the provisional application of the EU–SADC EPA (*i.e.* for only 2 months and 21 days), the fact remains that – as far as imports are concerned – essentially all investigated imports occurred prior to the application of the EU–SADC EPA.
133. As a result, the imports taken into consideration for the imposition of the final safeguard measure do not enable any conclusion regarding whether "*as a result of the obligations incurred by a Party under this Agreement, including tariff concessions*" imports from the EU into SACU had increased. This constitutes a violation of Article 34 (2) of the EU–SADC EPA.
134. In this connection, the EU notes that if a proper analysis of the development of imports (*i.e.* after the incurrence of obligations by SACU under the EU–SADC EPA) had been conducted, it would have been clear that there was no such increase in imports. Indeed, as the table below shows, imports from the EU, in fact, decreased substantially (by more than 70% between 2016 and 2017) after the entry into force of the EU–SADC EPA:

Imports/Year <sup>80</sup>	2016	2017	January – March 2018
Imports from the EU (in tonnes)	208,142.7	61,340.06	11,770.9

<sup>80</sup> Unless mentioned otherwise, and except circumstances where EU refers to the ITAC's documents, the statistics provided by the EU in this written submission are derived from the EU's official statistical office, Eurostat.

135. To conclude, by failing to take into consideration only imports *after* the obligations incurred under the EU–SADC EPA applied, Article 34 (2) of the EU–SADC EPA has been violated. In addition, if a proper examination – *i.e.* analyzing imports after the entry into force of the EU–SADC EPA – had been undertaken, it would have been clear that the legal requirement of an increase in imports after 2016 was not met.

**D. Claim 2, Second Argument: Violation of Article 34 (2) of the EU–SADC EPA Because the ITAC's Assessment of the Existence of a Threat of Disturbance and/or Serious Injury as a Result of an Increase in Volume of Imports was Based on Outdated Import Data, and the Measure Does Not Take Into Consideration that the Imports During the Period December 2016 – December 2017 and January 2018 – March 2018 Greatly Decreased Compared to the Period Covered by the Investigation**

136. As mentioned above, in the relevant part, the text of Article 34 (2) of the EU–SADC EPA provides as follows:

*"Safeguard measures referred to in paragraph 1 may be taken if, as a result of the obligations incurred by a Party under this Agreement, including tariff concessions, a product originating in one Party is being imported into the territory of the other Party or SACU, as the case may be, in such increased quantities and under such conditions as to cause or threaten to cause: ..." [underlining added]*

137. The text of Article 34 (2) requires an investigating authority to establish that a product "*is being imported*" in "*increased quantities*", as a prerequisite for the imposition of a safeguard measure. This requirement is identical in wording to that contained in Article XIX:1(a) of the GATT 1994 and Article 2.1 of the ASG. The former provides that:

*"If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions ..., the contracting party shall be free, ... to suspend the obligation in whole or in part or to withdraw or modify the concession [i.e. to apply a safeguard measure]." [underlining added]*

138. Similarly, Article 2.1 of the ASG provides that:

*"A Member may apply a safeguard measure to a product only if ... such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products." [underlining added]*

139. Below, the EU demonstrates that the ITAC improperly determined that there was such an increase in EU imports of bone-in chicken products. In particular, the ITAC improperly (a) selected an outdated period of investigation (POI), and, as a result, (b) failed to consider the most recent import trends.

## 1. Necessity of an Appropriately Recent and Limited POI Under Article 34 (2) of the EU–SADC EPA

140. Article 34 (2) of the EU–SADC EPA requires an investigating authority to establish that a product "*is being*" imported in increased quantities. The AB in *Argentina – Footwear (EC)*, DS121, found that the use of the present tense of the verb requires "*the competent authorities to examine recent imports*".<sup>81</sup> In that case, the Argentine authorities had selected a five-year historical period to examine the trends in imports. The AB found this to be an improper approach for establishing an increase in quantities of imports; the AB held that an investigating authority is not permitted to assess "*trends in imports during the past five years – or, for that matter, during any other period of several years*".<sup>82</sup> Instead, the AB stressed that the investigating authority must focus on *recent* import trends. The term "*recent*" has been described by the Panel in *US – Line Pipe* as "*not long past; that happened, appeared, began to exist, or existed lately*".<sup>83</sup>
141. In the present case, the ITAC based its injury assessment on a six-year period (2011 – 2016).<sup>84</sup> According to the EU, given that the safeguard measure entered into force in September 2018, the appropriate POI should have been January 2016 – March 2018. With regard to the 2018 data, the EU considers that data for the first quarter was reasonably available because the investigation lasted well into June 2018 and the definitive measure was adopted in August 2018. Given further that there is usually a delay in the collection and reporting of data, the import data of the first quarter of 2018 (*i.e.* up till and including March 2018) was reasonably available with the ITAC when it concluded its investigation in June 2018. In the very least, the import data of 2017 should have been considered by the ITAC.
142. Thus, the ITAC's injury assessment is based on outdated import data due to an improperly selected (and very lengthy) POI. In this regard, the AB in *Argentina – Footwear (EC)*, DS121, found that "*the investigation period should be the recent past*".<sup>85</sup> This is because, in order to legally impose a safeguard measure, "*the increase in imports must have been ... recent*".<sup>86</sup>
143. Significantly, the Panel in *Ukraine – Passenger Cars*, DS468, held that: "*an increase in imports must ... not only be recent in relation to the date of the determination, but also in relation to the date of the decision to apply a safeguard measure*".<sup>87</sup> The Panel also held that any "*time gap between the determination and the application of the safeguard measure [should be] appropriately limited*".<sup>88</sup> In the present case there is a gap of 9

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<sup>81</sup> Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, para. 130 (footnote omitted).

<sup>82</sup> *Ibid.*

<sup>83</sup> Panel Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/R, paras. 7.204.

<sup>84</sup> See: Exhibit EU-7, pg. 12.

<sup>85</sup> Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, fn. 130 (emphasis original).

<sup>86</sup> *Ibid.*, para. 130.

<sup>87</sup> Panel Report, *Ukraine – Definitive Safeguard Measures on Certain Passenger Cars*, WT/DS468/R, para. 7.172.

<sup>88</sup> *Ibid.*

months between the end of the POI and the determination (*i.e.* the ITAC's 2017 Summary of Findings)<sup>89</sup>, and a gap of 18 months between the end of the POI and the decision to impose the safeguard measure<sup>90</sup>. Such gaps call into question the recentness of the increase in imports.<sup>91</sup> A safeguard measure cannot be imposed in late 2018 based on data as old as 2011 and as "recent" as 2016. Not even any consultations between the EU and SADC can justify this gap between the POI and the determination/imposition of the safeguard measure.<sup>92</sup>

144. The present issue is not merely a procedural one. Safeguard measures envisioned by the EU–SADC EPA are designed to counteract a *current* injury, or a prospective threat thereof. This is evident from the *tense* of the phrases "*is being imported*" and "*such conditions as to cause*" in Article 34 (2) of the EU–SADC EPA. In this regard, the AB in *Mexico – Anti-Dumping Measures on Rice*, DS295, endorsed the Panel's view that there is an "*inherent real-time link between the imposition of the measure and the conditions for application of the measure [i.e. the data used in the investigation]*."<sup>93</sup> However, the safeguard measure entered into force on September 2018, while the POI used by the ITAC ended in 2016. Thus, the ITAC prescribed the imposition of a safeguard measure (to remedy a present alleged injury or an "*imminent*"<sup>94</sup> threat thereof) based on old and outdated data. This means that the ITAC's substantive assessment of injury is incorrect, since it is also based on outdated data (2011 – 2016). Such an analysis should accordingly be rejected.

## 2. Necessity of Considering Most Recent Import Data Under Article 34 (2) of the EU–SADC EPA

145. Notwithstanding the duration of the POI selected, the ITAC also erred by not considering the most recent data on EU imports of bone-in chicken cuts. The AB in *Argentina – Footwear (EC)*, DS121, endorsed the Panel's view that the POI must "*end in the very recent past*".<sup>95</sup> Further, the AB, in *US – Lamb*, DS177, and *US – Steel Safeguard*, DS252, held that the investigating authority "*must assess*" data from "*the most recent past*".<sup>96</sup> Such data has been found by the AB to hold "*special importance*"

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<sup>89</sup> See: Exhibit EU-7.

<sup>90</sup> See: Exhibit EU-10, noting that the decision to impose the definitive safeguard duties was taken by the SACU Council of Ministers on 27 June 2018.

<sup>91</sup> Panel Report, *Ukraine – Definitive Safeguard Measures on Certain Passenger Cars*, WT/DS468/R, paras. 7.182, 7.184.

<sup>92</sup> *Ibid*, para. 7.182.

<sup>93</sup> See: Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice*, WT/DS295/AB/R, para. 167; Panel Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice*, WT/DS295/R, paras. 7.57 – 7.58.

<sup>94</sup> Appellate Body Report, *United States – Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from New Zealand*, WT/DS177/AB/R, para. 125.

<sup>95</sup> Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, fn. 130 (emphasis original); Panel Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/R, fn. 530.

<sup>96</sup> See: Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS252/AB/R, para. 388; Appellate Body Report, *United States – Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from New Zealand*, WT/DS177/AB/R, para. 138.

for the determination of injury.<sup>97</sup> As the Panel in *India – Iron and Steel Products*, DS518, stated, "*the data for the last year of POI is of particular importance, since it reflects the most recent trends in imports.*"<sup>98</sup> In the present case, the ITAC improperly disregarded import data from 2017 and the first quarter of 2018, which (as argued above) was the most recent data available to it.<sup>99</sup> The refusal of the ITAC to consider this more recent import data is especially problematic since at an earlier stage of the investigation, the ITAC did allow the submission of "*updated information*".<sup>100</sup> As also shown in the above section, a proper assessment of imports (including data from 2017 and the first quarter of 2018) would have revealed to the ITAC that imports of bone-in chicken cuts from the EU have actually *decreased* over the most recent past. This is demonstrated in the table below:

Imports/Year	2016	2017	January – March 2018
Imports from the EU (in tonnes)	208,142.7	61,340.06	11,770.9

146. While SACU may argue that a part of the decrease in imports is attributable to the imposition of provisional safeguard measures, it should be noted that these provisional measures existed only between 15 December 2016 and 3 July 2017, and therefore do not explain the *continued* decrease in imports from the EU (*i.e.* during August 2017 – March 2018 and beyond).<sup>101</sup> Indeed, there has been a recent, "*permanent or long-term*"<sup>102</sup> decrease in imports from the EU to SACU.
147. An analysis of a properly selected (*i.e.* limited and recent) POI demonstrates that there has been a continuous decrease in the volume of bone-in chicken cuts imports from the EU. In fact, in both 2017 and 2018, the volume of imports was lower than in the entire POI selected by the ITAC. A conclusion of decrease in imports remains valid notwithstanding any increase in imports during 2011 – 2015.
148. In this regard, the Panel in *Argentina – Footwear (EC)*, DS121, considered that the determination of a baseline (for comparison) "*has a decisive influence on whether an end-point-to-end-point comparison shows an increase or a decrease*".<sup>103</sup> The Panel further explained that: "*[i]f changing the starting-point and/or ending-point of the investigation period by just one year means that the comparison shows a decline in imports rather than an increase, this necessarily signifies an intervening decrease in imports at least equal to the initial increase, thus calling into question the conclusion*

<sup>97</sup> Appellate Body Report, *United States – Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from New Zealand*, WT/DS177/AB/R, para. 138.

<sup>98</sup> Panel Report, *India – Certain Measures on Imports of Iron and Steel Products*, WT/DS518/R, para. 7.150.

<sup>99</sup> See for example, the ITAC's (insufficient and unsatisfactory) response to EU's comments in: Exhibit EU-7, pg. 12.

<sup>100</sup> See: Exhibit EU-8, pg. 2; Exhibit EU-14.

<sup>101</sup> Note that imports from EU into SACU continued to fall during the rest of 2018 as well (as further noted below).

<sup>102</sup> Panel Report, *Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric*, WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, para. 7.233.

<sup>103</sup> Panel Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/R, para. 8.154.

*that there are increased imports".*<sup>104</sup> The same Panel went on and found that "[w]here ... the volume of imports has declined continuously and significantly during each of the most recent years of the period, more than a 'temporary' reversal of an increase has taken place".<sup>105</sup>

149. The factual situation in *Argentina – Footwear* is strikingly similar to the present case: by taking the baseline as the year 2011, the ITAC artificially used an unusually low import volume base year to support its biased conclusions. Indeed, in the third essential facts letter the ITAC focuses on the base year (2011) and the last year (2016), strongly suggesting an end-point-to-end-point comparison.<sup>106</sup> On the one hand, by changing the starting point by just one year (2012 instead of 2011), the baseline becomes almost two times higher. On the other hand, by changing the end point with just one (or two years), from 2016 to 2017/2018, so as to include the most recent period for which data is reasonably available, one can note a significant drop in import volumes,<sup>107</sup> which goes even below the 2011 levels (in 2017). It now becomes crystal clear why the ITAC (i) dug into "paleontology" (2011), and (ii) so dearly avoided considering the 2017 and 2018 import data.
150. In a similar vein, the Panel in *US – Steel Safeguards*, DS252 found that an investigating authority cannot conclude that there has been an(y) increase in imports if the imports have "*plummeted*" at the time of the determination.<sup>108</sup> This is what has happened in the present case, since imports from the EU fell to an all-time low during the most recent period of 2017-2018.
151. Finally, it bears note that the ITAC did not provide any "*compelling explanation*" about its "*methodology*"<sup>109</sup> – *i.e.* the reasons why it selected a historical (outdated) POI or why it rejected import data from the most recent years. In this regard, the Panel in *US – Line Pipe*, DS202, found that even if a longer POI was selected, the investigating authority had to nonetheless "*focus on recent imports*".<sup>110</sup> The Panel went on to find that a safeguard measure can be imposed only if imports have "*increased in the recent past*".<sup>111</sup> In a similar vein, the AB in *US – Steel Safeguards*, DS252, held that in case imports increased in the first phase of the POI and decreased in the second phase, an investigating authority had to explain how these trends support its findings.<sup>112</sup> This is not the situation in the present case, since, as shown above, imports of bone-in chicken from the EU continuously decreased over the period of 2016 – 2018. Additionally, the

<sup>104</sup> Panel Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/R, para. 8.156.

<sup>105</sup> *Ibid.*, paras. 8.161 – 8.162.

<sup>106</sup> See: Exhibit EU-8, Table at pg. 3, in particular the column titled "Change from Base Year (2011-2016)".

<sup>107</sup> On this point, see: Panel Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/R, paras. 8.156.

<sup>108</sup> See: Panel Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS252/R, para. 10.164.

<sup>109</sup> Panel Report, *India – Certain Measures on Imports of Iron and Steel Products*, WT/DS518/R, para. 7.218.

<sup>110</sup> Panel Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/R, paras. 7.199, 7.201.

<sup>111</sup> *Ibid.*, para. 207.

<sup>112</sup> Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS252/AB/R, para. 374.



ITAC did not explain the possible relevance (for its conclusion) of the decrease in imports in the period of 2017 – 2018.

152. This being said, the EU is mindful of the fact that in certain circumstances there may be no need for a determination that imports are presently still increasing; rather, imports could have increased in the recent past, but not necessarily be increasing up to the end of the POI or immediately preceding the determination leading to the imposition of safeguard measures. This is the position taken, for example, by the Panels in *US – Line Pipe*, DS202<sup>113</sup> and *Dominican Republic – Safeguard Measures*, DS416<sup>114</sup>. However, it should be noted that the facts of these two cases were crucially different than the facts of the present case. In particular, the decrease in imports in both cases lasted only for one year (immediately preceding the POI/determination) – between first semester 1998 and first semester 1999 in *US – Line Pipe*, DS202,<sup>115</sup> and between 2008 and 2009 in *Dominican Republic – Safeguard Measures*, DS416<sup>116</sup>. On the other hand, in the present case, imports have been continuously decreasing since 2016 (*i.e.* for a period of 2 years before the imposition of the safeguard measure). Thus, in the present case, there is indeed – in the words of the Panel in *Dominican Republic – Safeguard Measures*, DS416 – a "*permanent or long-term change*" (*i.e.* decrease).<sup>117</sup> Such a change (decrease) defeats the very *raison d'être* of the safeguard measures at issue.
153. Similarly, the EU also knows well that WTO Panels have, in the past, considered that there is "*nothing in the text of Article XIX:1(a) of the GATT 1994 or the Agreement on Safeguards to indicate that the rate of the increase in imports must accelerate (or be positive) at every moment of the period of investigation or that it is rising and positive only if every percentage increase is greater than the preceding increase*".<sup>118</sup> Nevertheless, at the very minimum, the ITAC should have included the most recent period for which data was reasonably available (including, in the least, the first quarter of 2018), and provided reasonable and adequate explanations of why it considered that its conclusions were not tainted by the pronounced decrease in imports in the years immediately preceding the imposition of the safeguard measure at issue.<sup>119</sup>
154. In this respect, the EU also notes that there is no seasonality trend. Indeed, by comparing the data for the period January – March for the ITAC's investigation period, there is an observable sharp decline in imports that took place in the first quarters of 2017 and 2018, as shown in the table below.

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<sup>113</sup> See: Panel Report, *United States - Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/R, para. 7.207.

<sup>114</sup> See: Panel Report, *Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric*, WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, para. 7.235.

<sup>115</sup> Panel Report, *United States - Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/R, para. 7.207.

<sup>116</sup> Panel Report, *Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric*, WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, para. 7.235.

<sup>117</sup> *Ibid*, para. 7.233.

<sup>118</sup> *Ibid*, para. 7.235, referring to Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, para. 131.

<sup>119</sup> On the need to provide such explanation, see: Panel Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/R, paras. 7.194.

Period	First Q 2011	First Q 2012	First Q 2013	First Q 2014	First Q 2015	First Q 2016	First Q 2017	First Q 2018
Imports (in tonnes) <sup>120</sup>	6,672.6	24,046.9	25,557.5	36,574.9	29,626.3	51,760.5	21,467.4	11,770.9

155. Furthermore, just for illustrative purposes, if one takes the data of the whole of 2018, the decreasing trend of imports is confirmed. The overall decrease in imports can be observed in the table below:

Period	2016	2017	2018
Imports (in tonnes) <sup>121</sup>	208,142.7	61,340.10	63,730.1

### 3. No Right to Impose a Safeguard Measure is Available Under Article 34 (2) of the EU–SADC EPA

156. Article 34 (2) of the EU–SADC EPA provides that a safeguard measure under the EPA "may be taken **if**" increased quantities of imports cause or threaten to cause serious injury or disturbances [bold and underlining added]. Thus, the right to impose a safeguard measure is predicated on the proper demonstration of increase in imports.<sup>122</sup> In turn, a proper determination of increased imports requires the selection of a correct POI.<sup>123</sup> In other words, if the POI selected by an investigating authority is not correct, the authority's determination regarding increased imports will be flawed; and a flawed determination regarding increased imports cannot justify the imposition of a safeguard measure. This is the situation in the present case. As explained above, the ITAC selected an incorrect POI since it (a) analyzed historic (outdated) imports, and (b) did not consider the most recent import data. Thus, the ITAC's assessment regarding increased imports was improper. Additionally, the ITAC did not provide "*an adequate, reasoned and reasonable explanation*" as to how the facts before it supported its determination that there existed an increase in imports.<sup>124</sup> Accordingly, the ITAC erred in recommending the imposition of the safeguard measure at issue. In other words, the SADC had no right to impose safeguard measure in the present case.

<sup>120</sup> Source of data: Eurostat.

<sup>121</sup> *Ibid.*

<sup>122</sup> This has been recognized in WTO case law as well. See: Panel Report, *Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric*, WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, para. 7.218, 7.221; and Panel Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/R, para. 8.31.

<sup>123</sup> This has been recognized in WTO case law as well. See: Appellate Body Report, *European Communities – Anti Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, para. 80.

<sup>124</sup> Panel Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/R, paras. 7.194.

#### 4. Conclusion

157. In sum, the ITAC erred by selecting an improper POI which (a) was historic (outdated) in nature, and (b) did not include the most recent import data that was available. This is an inconsistency with Article 34 (2) of the EU–SADC EPA in itself. As a result, the assessment of increased imports conducted by the ITAC was flawed. In turn, this makes the application of the safeguard measure at issue inconsistent with Article 34 (2) of the EU–SADC EPA.

**E. Claim 3: Violation of Article 34 (2) of the EU–SADC EPA Because Other Factors Were Not Appropriately Taken Into Account in the Analysis of the Existence and Level of Disturbance and/or Serious Injury, or Threat Thereof Because of an Increase in Volume of Imports**

158. It will be demonstrated below that the ITAC failed to show that the alleged serious injury/disturbance, or threat thereof to the SACU industry was not caused by factors other than the alleged increase in the product imports from the EU. Specifically: (i) the legal standards under WTO case law for establishing the correlation and non-attribution requirements will be discussed; (ii) it will be demonstrated that the ITAC did not perform the proper causation analysis and unreasonably disregarded other factors that contributed to the alleged serious injury/disturbance, or threat thereof; and (iii) other factors, such as the volatility of feed raw material prices, the increase in costs of labor, diesel, electricity, plastic and cardboard boxes, duties imposed on the soya oilcake used in production of feed and imports from other countries, causing the alleged serious injury/disturbance, or threat thereof, will be analyzed.

##### 1. Legal Obligations on the ITAC for Establishing Causation

159. Article 34 (2) of the EU–SADC EPA provides that for general bilateral safeguard measures to be imposed, a causal link must be established between the increase in imports and serious injury (or threat thereof) to the domestic industry or disturbances in a sector of economy (or threat thereof). It is noted that this provision very closely resembles the wording of Article 2.1 ASG.<sup>125</sup> The ASG provides more details on the causation requirement in Article 4.1(b) ASG which reads as follows:

*"The determination referred to in subparagraph (a) shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports." [underlining added].*

160. As explained by the AB in *US – Line Pipe*, DS202, when interpreting the causation requirement under Article 4.2(b) of the ASG, such an analysis involves two distinct elements that need to be demonstrated based on objective data:

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<sup>125</sup> "A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products" [underlining added].

- i. The existence of a causal link between the increased imports of the product(s) concerned and serious injury or threat thereof ("the correlation requirement"); and
  - ii. Ensuring that injury caused by factors other than the increased imports is not attributed to the increased imports (the "non-attribution requirement").<sup>126</sup>
161. However, a mere coincidence between an increase in imports and a decline in the relevant injury factors is not by itself enough to establish a causal link. The rate and amount of imports as well as the conditions of competition between the imports and the domestic production also need to be analyzed and adequately explained.<sup>127</sup>
162. In this respect, it is noted that the alleged increase in the investigated imports had no negative impact on the SACU industry since the SACU producers' production and capacity utilization remained stable; and sales increased over the period of 2015-2016<sup>128</sup> and were not negatively affected by the imports.
163. The correlation between an increase in imports and a decline in the domestic injury factors, such as sales, production, productivity, capacity utilization, profits and losses, and employment, was discussed by the Panel in *Argentina – Footwear (EC)*, DS121, who found that "[...] if causation is present, an increase in imports normally should coincide with a decline in the relevant injury factors. While such a coincidence by itself cannot prove causation [...], its absence would create serious doubts as to the existence of a causal link, and would require a very compelling analysis of why causation still is present".<sup>129</sup> Indeed, the lack of correlation between an increase in imports and a decline in the relevant injury factors casts "serious doubts" on the presence of the causal link in this case and on the adequacy of the ITAC's causation analysis (or, rather lack thereof).
164. As concerns the non-attribution requirement, the AB in *US – Wheat Gluten*, DS166, concluded that increased imports must make a particular contribution to causing the serious injury sustained by the domestic industry so as to establish the existence of the causal link required.<sup>130</sup>
165. The ITAC itself acknowledged that some other factors (analyzed below) have contributed to the situation of the industry. However, the ITAC did not carry out the necessary analysis in order to reach a reasoned conclusion.<sup>131</sup> It therefore failed to adequately analyze other factors that might have contributed to serious injury/disturbance, or threat thereof.

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<sup>126</sup> Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, para. 208.

<sup>127</sup> Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, paras. 144-145.

<sup>128</sup> See: Exhibit EU-8, para. 3.

<sup>129</sup> Panel Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/R, paras. 8.237-8.238.

<sup>130</sup> Appellate Body Report, *US – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, para. 66.

<sup>131</sup> Exhibit EU-7, pgs. 13 – 14; Exhibit EU-8, para. 5.

## **2. The ITAC Did Not Properly Examine the Other Factors that Led to the Alleged Serious Injury/Disturbance, or Threat Thereof to SACU Industry and Unreasonably Disregarded Them**

166. WTO case law sets out legal standards for investigating authorities to follow when analyzing the non-attribution factors, prescribing that "*all factors relevant to the overall situation of the industry should be included in the competent authorities' determination*".<sup>132</sup> Such legal standards are described in detail below with references to WTO case law whereby it is demonstrated that the ITAC did not properly examine other factors as required by WTO law.
167. First, the AB in *US – Wheat Gluten*, DS166, stated that "[i]f the competent authorities do not conduct [the examination of whether factors other than increased imports are simultaneously causing injury], they cannot ensure that injury caused by other factors is not 'attributed' to increased imports".<sup>133</sup>
168. It is noted that on several occasions, the EU (together with other interested parties) raised the issue of the presence of various other factors in its submissions.<sup>134</sup> In fact, the ITAC confirmed in its essential facts letters that other factors existed that could have had an influence on the alleged serious injury/disturbance, or threat thereof, to SACU industry.
169. For example, in the ITAC's third essential facts letter, the ITAC acknowledged that "*increasing costs played a role in the domestic industry's ability to compete with imports*"<sup>135</sup> and that "*there are factors other than the increase in the volume of imports from the EU that are causing a threat of serious injury / disturbance in the SACU market*".<sup>136</sup> Additionally, in the ITAC's 2017 Summary of Findings, the ITAC recognized the following:
- "According to domestic producers' own annual reports, they were under pressure due to volatility in feed raw material prices (maize & soya), above inflation increases in labor cost, diesel, electricity, plastics, cardboard boxes [...].*
- Further issues affecting the SACU industry's competitiveness include drought; imports under the AGOA; and the new brining regulation. Most of the soya oilcake used in the production of feed has to be imported, affecting a 6.6% duty and no rebate provisions exists for the feed industry. These issues all contributed to the local industry experiencing difficulty.*"<sup>137</sup>
170. However, after acknowledging the existence of other factors, the ITAC simply disregarded them without any explanations: "*although there are factors other than the increase in the volume of imports from the EU that are causing a threat of serious*

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<sup>132</sup> Appellate Body Report, *US – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, para. 74.

<sup>133</sup> *Ibid.*, para. 91.

<sup>134</sup> See for example: Exhibit EU-22, pg. 2; Exhibit EU-26, pg. 3, Exhibit EU-27, pgs. 2-3.

<sup>135</sup> Exhibit EU-8, para. 5.

<sup>136</sup> *Ibid.*

<sup>137</sup> Exhibit EU-7, pg.13, para. 4.3.

*disturbance in the SACU market, these factors do not sufficiently detract from the causal link between the increased imports and the threat of serious disturbance in the SACU market".*<sup>138</sup>

171. Merely listing other factors and unreasonably disregarding them<sup>139</sup> does not constitute a "reasoned and adequate explanation" by the investigating authority in the sense established by the AB in *United States – Line Pipe*, DS202.<sup>140</sup> It follows that a "reasoned and adequate explanation" and a non-attribution analysis should have been conducted by the ITAC.

172. Second, in *US – Wheat Gluten*, DS166, the AB explained that:

*"[...] It seems to us that the Panel arrived at this interpretation through the following steps of reasoning: first, under the first sentence of Article 4.2(b), there must be a 'causal link' between increased imports and serious injury; second, the non-'attribution' language of the last sentence of Article 4.2(b) means that the effects caused by increased imports must be distinguished from the effects caused by other factors; third, the effects caused by other factors must, therefore, be excluded totally from the determination of serious injury so as to ensure that these effects are not 'attributed' to the increased imports; fourth, the effects caused by increased imports alone, excluding the effects caused by other factors, must, therefore, be capable of causing serious injury."*<sup>141</sup> [underlining added].

173. To this end, what the ITAC should have done is to **distinguish** the effects caused by increased imports from the EU from the effects caused by other factors. Then, the effects caused by other factors should have been **excluded** from the determination of the alleged serious injury/disturbance, or threat thereof, in order to ensure that these effects are **not 'attributed'** to the increased imports of the product concerned from the EU. Following that, the ITAC should have demonstrated that the effects caused by increased EU imports alone, excluding the effects caused by other factors, were capable of causing serious injury/disturbance, or threat thereof.<sup>142</sup>
174. However, contrary to WTO case law, the ITAC bluntly dismissed the EU's arguments without providing any proper analysis.<sup>143</sup> Indeed, nowhere did the ITAC explain the effects of the increased imports as distinguished from the effects of other factors.
175. Third, the Panel in *Ukraine – Passenger Cars*, DS468, pointed out that a non-attribution analysis in investigations based on a threat of serious injury should be "forward looking": "Regardless of the method used by the competent authorities when performing a non-attribution analysis, cases involving a threat of serious injury to the domestic

<sup>138</sup> Exhibit EU-7, pg.14, para. 4.3.

<sup>139</sup> See for example: Exhibit EU-8, para. 5 and Exhibit EU-7, para. 4.3.

<sup>140</sup> Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, para. 217

<sup>141</sup> Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, para. 66.

<sup>142</sup> *Ibid.*

<sup>143</sup> See for example: Exhibit EU-8, para. 5.

industry should, in our view, include a forward-looking assessment of whether other factors currently causing injury to the domestic industry will continue to do so in the very near future."<sup>144</sup> [underlining added].

176. If the ITAC was basing this case on an alleged threat of serious injury/ disturbance,<sup>145</sup> the ITAC's analysis of other factors should have included a "*forward-looking assessment*" involving the most recent data to prove the absence of the causal link between the alleged threat of serious injury (disturbance) and other factors. No such analysis, involving developments post investigation period and its effect on the non-attribution analysis, has been included in the ITAC's investigation and recommendations.
177. As demonstrated above, the ITAC's non-attribution analysis suffers from various shortcomings and does not meet the legal standard set by WTO case law. Specifically, the ITAC (i) did not conduct "*reasoned and adequate*" non-attribution analysis; (ii) did not explain the effects of the increased imports as distinguished from the effects of other factors; and (iii) did not include a "*forward-looking assessment*" involving the most recent data to prove the absence of the causal link between the alleged threat of serious injury and other factors.
178. In this connection, the EU submits that if the other factors had been properly considered, it would have been clear that the alleged serious injury/disturbance, or threat thereof, was not caused by the allegedly increased EU imports.
179. Instead, the ITAC has conducted a very superficial examination of causation (or, rather, no examination at all). The obligation to conduct a proper correlation and non-attribution analysis in order to establish that the EU imports were the cause of the alleged serious injury or disturbance, or threat thereof, is not satisfied by simply disregarding the information provided by the EU and the interested parties. The ITAC was required to consider the facts and address the detailed comments of the EU and interested parties. To this end, these other factors that influenced the competitiveness of the SACU poultry industry, which should have formed a part of the ITAC's non-attribution analysis, are considered in detail below.

### **3. Analysis of Other Factors Causing Serious Injury (Disturbance), or Threat Thereof, to SACU industry**

#### *a. Other Factor (i): Feed Costs*

180. As the ITAC itself admitted, feed costs account for a significant portion of the cost of production (up to 70%). As demonstrated in the table below, in the period 2015-2016, EU import prices (index 146 to 144) slightly decreased while SACU sales increased (index 98 to 100). Under these conditions, the alleged deterioration of the SACU net profit in 2016 (index 87 to -158) are not related to imports but rather to an increase in

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<sup>144</sup> Panel Report, *Ukraine – Definitive Safeguard Measures on Certain Passenger Cars*, WT/DS468/R, para. 7.319.

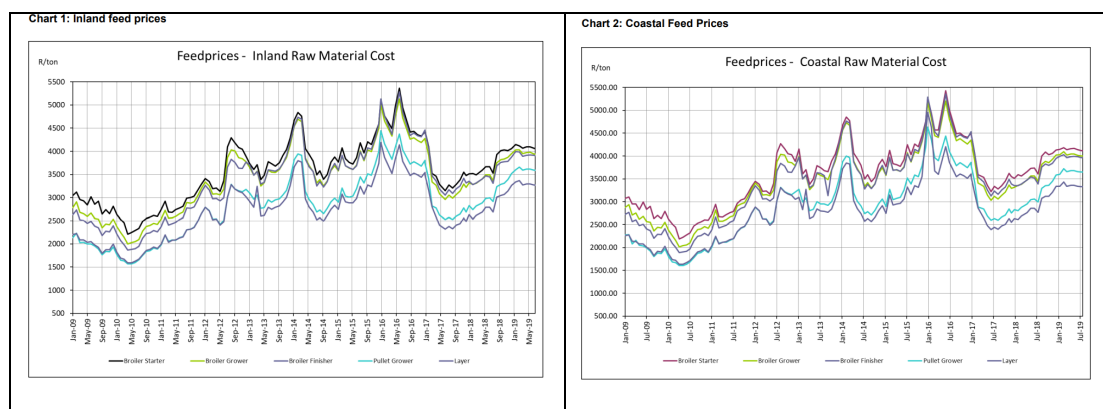
<sup>145</sup> See for example: Exhibit EU-8, para. 8(b).

costs, mainly feed costs. The increase in feed costs was also admitted by SACU producers as a factor in their poor performance during the period considered.<sup>146</sup>

(index)	2011	2015	2016	Disturbance in 2016?
EU import prices	100	146	144	
SACU production volume	100	100	99	
SACU sales	100	98	100	
SACU price depression	100	133	137	No
Net profit per unit	100	87	-158	Yes
price disadvantage	100	140	291	Yes
price disadvantage		13.9%	35.3%	

(Source: data provided in ITAC essential facts letter dated 14 August 2017)

181. In addition, most of the soya oilcake used in production of feed had to be imported, and was subject to a 6.6% duty.<sup>147</sup>
182. In line with the Panel report in *Ukraine – Passenger Cars*, DS468, the most recent data has to be taken into account for other factors analysis in cases concerning serious injury, or threat thereof.<sup>148</sup> Indeed, feed costs were very high in 2016 due to "*the worst drought since 1992*",<sup>149</sup> experienced through the 2014/2015 and 2015/2016 maize seasons.<sup>150</sup> Had the ITAC conducted a proper analysis of the feed costs, it would have discovered from publicly available sources, such as SAPA's website and SAPA's reports, similar information indicating that feed costs have been particularly high from around 2012, peaking in 2016:



<sup>146</sup> Exhibit EU-11, section D6.

<sup>147</sup> Exhibit EU-7, para. 4.3.

<sup>148</sup> Panel Report, *Ukraine – Definitive Safeguard Measures on Certain Passenger Cars*, WT/DS468/R, para. 7.319.

<sup>149</sup> Exhibit EU-11, pg. 39, para. 26.

<sup>150</sup> Exhibit EU-28, pg. 30.





Source: SAPA's feed ingredient report, pgs. 3-5.<sup>151</sup>

183. As demonstrated in Section (b) above, the ITAC acknowledged that "*increasing costs played a role in the domestic industry's ability to compete with imports*".<sup>152</sup> However, despite the EU<sup>153</sup> (and AVEC<sup>154</sup>) on several occasions pointing out the importance of this factor, the ITAC failed to properly address it. The ITAC failed to **distinguish** the effects caused by increased EU imports from the effects caused by increased feed costs. Moreover, the ITAC failed to **exclude** the effects of increased feed costs from the determination of serious injury/ disturbance, or threat thereof. Had the ITAC conducted a proper '**non-attribution analysis**' concerning the increased feed costs, it would have concluded that the increased feed costs were relevant to any alleged serious injury/disturbance or threat thereof.

<sup>151</sup> Exhibit EU-29, pgs. 3-5.

<sup>152</sup> Exhibit EU-8, para. 5.

<sup>153</sup> See for example: Exhibit EU-22, pg. 2; Exhibit EU-26, pg. 3, Exhibit EU-27, pgs. 2-3; Exhibit EU-30, section 5, pg. 4.

<sup>154</sup> Exhibit EU-31, para. 37; Exhibit EU-32, paras. 38 onwards.

b. *Other Factor (ii): The Increase in Costs of Labor, Diesel, Electricity, Plastic and Cardboard Boxes*

- 184.** In the ITAC's 2017 Summary of Findings, the ITAC confirmed that other factors, such as costs of labor, diesel, electricity, plastics, cardboard boxes played a role in the alleged deterioration in the domestic producers' situation:

*"According to domestic producers' own annual reports, they were under pressure due to [...] above inflation increases in labor cost, diesel, electricity, plastics, cardboard boxes [...]"*.<sup>155</sup>

- 185.** These issues had also been raised by the EU<sup>156</sup> and AVEC in their submissions.<sup>157</sup> Moreover, SACU producers admitted, *inter alia*, that they had experienced large cost increases in electricity and fuel.<sup>158</sup>
- 186.** Had the ITAC conducted a proper analysis of the costs of labor, diesel, electricity, plastic and cardboard boxes, it would have discovered information provided below, or, at the very least, similar information. In 2014, South Africa's economy faced uncertainty around electricity supply and government policy (particularly relating to the resources and agricultural sectors). Electricity generation was hit by a large-scale plant failure in the latter part of the year, leading to power outages continuing well into 2015. RCL Foods Limited ("Rainbow"), one of the largest poultry producers in SACU, employing approximately 6700 people in poultry production,<sup>159</sup> explained in the RCL Foods Integrated Annual Report for 2014, that cost increases were driven by manpower, along with high fuel and electricity prices.<sup>160</sup>
- 187.** South Africa's economy was indeed hit by labor market unrest.<sup>161</sup> Rainbow noted in RCL Foods Integrated Annual Reports for 2014 and 2015, the widespread labor disruptions<sup>162</sup> with increased labor costs.<sup>163</sup>
- 188.** Additionally, Mpact, the largest paper and plastics packaging and recycling business in Southern Africa, noted in its 2015 annual results an increase in both plastic and paper costs since 2013, which inevitably would have raised costs of input for bone-in chicken producers, that use these materials in poultry production and packaging:

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<sup>155</sup> Exhibit EU-7, pg.13, para. 4.3.

<sup>156</sup> See for example: Exhibit EU-22, pg. 2; Exhibit EU-27, pgs. 2-3.

<sup>157</sup> Exhibit EU-32, para. 63.

<sup>158</sup> Exhibit EU-11, para. 13.

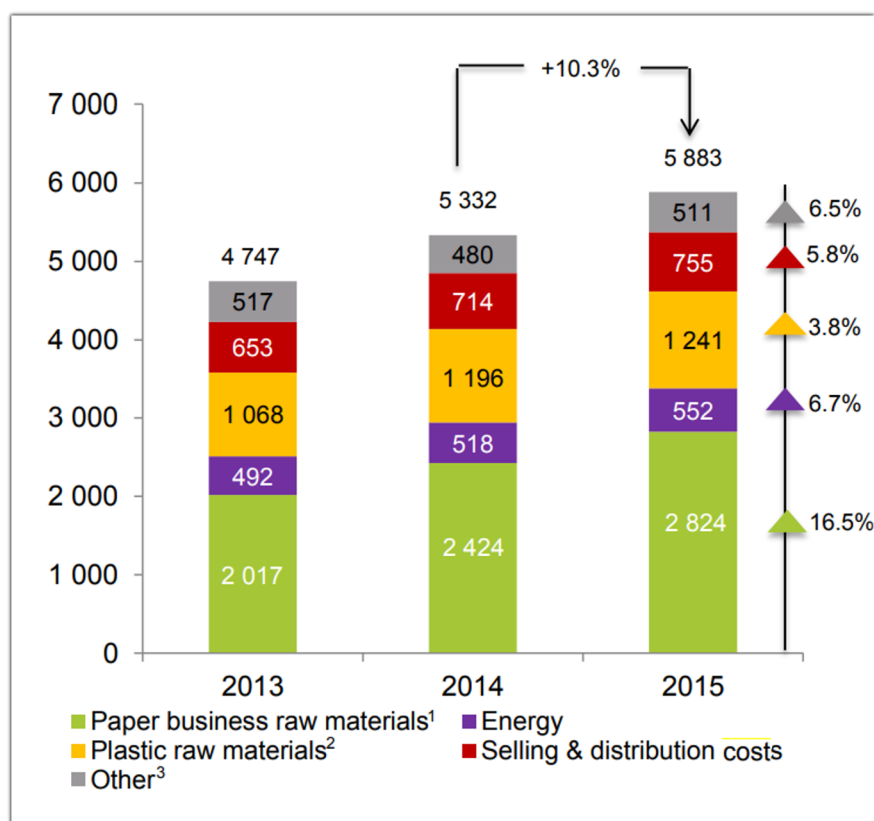
<sup>159</sup> Exhibit EU-23, para. 2.5.1

<sup>160</sup> Exhibit EU-33, pgs. 34 and 63.

<sup>161</sup> See: Exhibit EU-34, pg. 9.

<sup>162</sup> Exhibit EU-35, pg. 33 and Exhibit EU-33, pg. 21.

<sup>163</sup> Exhibit EU-35, pg. 14.



Source: 2015 Mpcat Group Annual Results 31 December 2015

189. Furthermore, the graph below shows a dramatic increase in inland diesel process in South Africa from 2010 to 2014:

	Petrol - 93 Unleaded	Petrol - 95 Unleaded	Diesel - 500PPM	Diesel - 50PPM
Jan 2010	R7.67	R7.86	R6.90	R6.92
Jan 2011	R8.58	R8.73	R7.84	R7.90
Jan 2012	R10.43	R10.61	R10.28	R10.33
Jan 2013	R11.65	R11.86	R11.11	R11.16
Jan 2014	R13.36	R13.57	R12.87	R12.91

Source: South African petrol prices – 2010 to 2020, available at: <https://mybroadband.co.za/news/motoring/363466-south-african-petrol-prices-2010-to-2020.html>

190. In these circumstances, it is unsurprising that the ITAC's second letter of essential facts of 15 September 2016 noted that, "according to the domestic producers' own annual reports they are under pressure due to [...] above inflation increase in labor cost, diesel, electricity, plastics, cardboard boxes [...]".<sup>164</sup>

<sup>164</sup> Exhibit EU-16, section 5.3.

191. In sum, despite the EU<sup>165</sup> and AVEC<sup>166</sup> raising the importance of the above-mentioned factors, the ITAC did not properly address such factors, even though the ITAC itself admitted that they had an impact on the domestic producers' performance.<sup>167</sup> The ITAC failed to **distinguish** the effects caused by increased EU imports from the effects caused by increased costs of labor, diesel, electricity, plastics, cardboard boxes. Moreover, the ITAC failed to **exclude** the effects of increased costs of labor, diesel, electricity, plastics, cardboard boxes from the determination of serious injury/disturbance, or threat thereof.
192. Had the ITAC conducted a proper '**non-attribution analysis**' concerning these other factors, it would have concluded that the increased costs of labor, diesel, electricity, plastics, cardboard boxes were relevant to any alleged serious injury/disturbance, or threat thereof. It follows that the ITAC failed to demonstrate that the increase in costs of labor, diesel, electricity, plastic, and cardboard boxes had no relevance to any serious injury/disturbance or threat thereof.

c. *Other Factor (iii): Imports from Other Countries (the U.S. and Brazil)*

193. In 2000, the South African Government imposed anti-dumping duties on U.S. bone-in chicken, following which U.S. exports to South Africa fell almost to zero. In June 2015, faced with a possible suspension of trade preferences under the recently renewed AGOA, South Africa agreed to allow a quota of 65,000 tonnes of U.S. chicken.<sup>168</sup> That quota was more than the poultry imports from the EU in 2017 and 2018.<sup>169</sup>
194. Even SAPA itself admitted in para. 33.2 of the Revised Application,<sup>170</sup> that "[t]he Quota will cause harm to the South African broiler industry, as these imports will significantly undercut the Participating Producers' process". [underlining added]. The EU<sup>171</sup> and the ITAC itself also confirmed the impact of the AGOA on the SACU industry's competitiveness<sup>172</sup> "as well as high import volume"<sup>173</sup> from countries other than the EU that put pressure on the domestic producers.
195. Had the ITAC conducted a proper analysis of imports under the AGOA, it would have found information provided below, or, at the very least, similar information. Specifically, the U.S. quota was increased to 68,590 tonnes to be imported quarterly for the April 2019 - March 2020 quota year. Since 2017, the U.S. quota was utilized fully during the years 2017/2018, 2018/2019, and again in 2019/2020.<sup>174</sup> The impact of the

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<sup>165</sup> See for example: Exhibit EU-22, pg. 2; Exhibit EU-27, pgs. 2-3.

<sup>166</sup> Exhibit EU-32, para. 63.

<sup>167</sup> Exhibit EU-7, para. 4.3, pg.13.

<sup>168</sup> See: A. Grane, What is the African Growth and Opportunity Act?, dated 17 February 2017, available at: <https://www.cfr.org/blog/what-african-growth-and-opportunity-act>.

<sup>169</sup> Total import of EU poultry to SACU in 2017 and 2018 was 61,340 tonnes and 63,730 tonnes respectively. Source: Eurostat.

<sup>170</sup> Exhibit EU-12, para. 33.2.

<sup>171</sup> Exhibit EU-30, section 5, pg. 4.

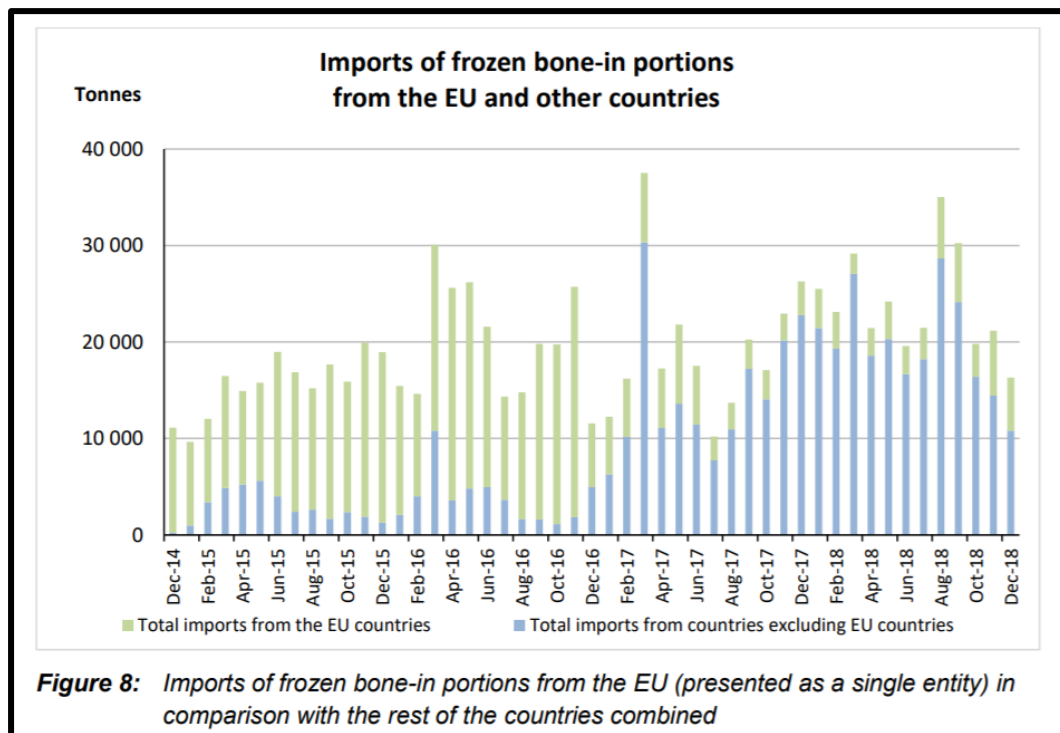
<sup>172</sup> Exhibit EU-7, para. 4.3, pg.13.

<sup>173</sup> *Ibid.*

<sup>174</sup> See: Exhibit EU-36.

U.S. imports on the SACU producers was also brought to the ITAC's attention by the EU<sup>175</sup> and other interested parties, such as AVEC,<sup>176</sup> but was subsequently ignored by the ITAC.

196. Furthermore, since the end of 2016 there is a clear increase in imports of bone-in chicken from other countries than the EU:



Source: SAPA 2018 Report<sup>177</sup>, pg. 16.

197. Indeed, as SAPA itself points out: "Brazil exported 18 799 t of frozen bone-in portions to South Africa in 2016; 78 049 t in 2017 and 132 461 t in 2018",<sup>178</sup> while "the US exported 77 971 t of bone-in portions to South Africa in 2017; and 80 695 t in 2018".<sup>179</sup> [underlining added]. From 2016 to 2018, there is a dramatic 605% increase in Brazilian imports of bone-in chicken.
198. SAPA itself is very apprehensive of Brazilian imports, blaming Brazil for import increase by 23.1 % in 2018 (over 2017 levels).<sup>180</sup> SAPA adds: "At an average of R13.59/kg (FOB), it is no wonder the local industry cannot compete. [...] The 2018 numbers demonstrate clearly how low Brazilian exporters can go with their pricing and still make a profit".<sup>181</sup>

<sup>175</sup> Exhibit EU-30, section 5, pg. 4.

<sup>176</sup> Exhibit EU-32, paras. 56 onwards.

<sup>177</sup> Exhibit EU-28, pg. 16.

<sup>178</sup> *Ibid*, pg. 17.

<sup>179</sup> *Ibid*.

<sup>180</sup> *Ibid*, pg. 40.

<sup>181</sup> *Ibid*.

199. It emerges that the ITAC has not conducted a proper analysis of the impact of imports from countries other than the EU, although it had acknowledged the existence of such factors,<sup>182</sup> after the EU<sup>183</sup> and other interested parties<sup>184</sup> had brought this issue to the ITAC's attention. In these circumstances, the EU imports could not have been and cannot be blamed for any alleged harm caused by the South Africa's arrangement with the U.S. and the sharp rise in imports from the U.S. and Brazil.
200. The ITAC failed to **distinguish** the effects caused by increased United States and Brazil imports from the effects caused by EU imports. Moreover, the ITAC failed to **exclude** the effects caused by the increased United States and Brazil imports from the determination of serious injury/disturbance, or threat thereof.
201. Had the ITAC conducted a proper '**non-attribution analysis**' concerning this other factor, it would have concluded that the increased United States and Brazil imports were relevant to any alleged serious injury/disturbance, or threat thereof. It follows that the ITAC failed to demonstrate that the increase in United States and Brazil imports had no relevance to any serious injury/disturbance, or threat thereof.

#### 4. Conclusion on Other Factors

202. In sum, as discussed above, there were multiple factors other than the imports of the product under investigation that caused the alleged serious injury/disturbance, or threat thereof to the SACU industry. The ITAC failed to prove that the increase in EU imports caused serious injury/disturbance, or threat thereof. Importantly, the ITAC did not **distinguish** the effects caused by EU increased imports from the effects caused by other factors. Moreover, the ITAC failed to **exclude** the effects caused by other factors from the determination of serious injury/disturbance, or threat thereof. Instead, even though the ITAC itself had admitted that at least some of these other factors contributed to the alleged serious injury/disturbance, or threat thereof, the ITAC simply disregarded these other factors.
203. Had the ITAC conducted a proper 'non-attribution analysis' concerning other factors – such as the volatility of feed raw material prices; the increase in costs of labor, diesel, electricity, plastic and cardboard boxes; the duties imposed on the soya oilcake used in production of feed; imports from other countries (the U.S. and Brazil) – it would have concluded that these other factors were relevant to any alleged serious injury/disturbance, or threat thereof. It follows that the ITAC failed to demonstrate (i) that other factors had no relevance to any serious injury/disturbance, or threat thereof; and (ii) that the alleged injury/disturbance, or threat thereof, was caused by the allegedly increased EU imports.
204. Accordingly, such a causation determination by the ITAC is inconsistent with Article 34 of the EU-SADC EPA.

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<sup>182</sup> Exhibit EU-7, para. 4.3, pg. 13.

<sup>183</sup> Exhibit EU-30, section 5, pg. 4.

<sup>184</sup> Exhibit EU-32, paras. 56 onwards.

**F. Claim 4, First Argument: Violation of Article 34 (2) of the EU–SADC EPA Because the Measure at Issue Concerns a Different Geographic Scope Than the Investigation, Which Did Not Take Into Account the Import Data Relating to SACU But Was Based on Data Relating Exclusively to South Africa**

205. In the relevant part, the text of Article 34 (1) of the EU–SADC EPA provides as follows:

*"Notwithstanding Article 33, after having examined alternative solutions, a Party or SACU, as the case may be, may apply safeguard measures of limited duration which derogate from the provisions of Articles 24 and 25, under the conditions and in accordance with the procedures laid down in this Article."* [underlining added]

206. As mentioned above, the text of Article 34 (2) of the EU–SADC EPA, in the relevant part, provides as follows:

*"Safeguard measures referred to in paragraph 1 may be taken if, as a result of the obligations incurred by a Party under this Agreement, including tariff concessions, a product originating in one Party is being imported into the territory of the other Party or SACU, as the case may be, in such increased quantities and under such conditions as to cause or threaten to cause:*

*(a) serious injury to the domestic industry producing like or directly competitive products in the territory of the importing Party or SACU, as the case may be; or*

*(b) disturbances in a sector of the economy producing like or directly competitive products, particularly where these disturbances produce major social problems, or difficulties which could bring about serious deterioration in the economic situation of the importing Party or SACU, as the case may be; or*

*(c) disturbances in the markets of like or directly competitive agricultural products in the territory of the importing Party or SACU, as the case may be."* [underlining added]

207. The text of Articles 34 (1) and 34 (2) of the EU–SADC EPA allows "a Party or SACU" to impose safeguard measures if there are increased imports of a product into the territory of "[a] Party or SACU", which cause injury or disturbances in the territory of "the importing Party or SACU". In other words, only the Party in whose territory the increased imports enter (and cause injury or disturbances) is allowed to impose the safeguard measure. For the SACU as a whole to impose safeguard measures, it must be demonstrated that the increased imports entered the territory of the entire SACU region and caused injury or disturbances to the whole SACU industry.

208. However, in the present case, the ITAC determination only analyzes imports into South Africa, and not into the entire SACU region.<sup>185</sup> Thus, SACU as a whole cannot be given

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<sup>185</sup> For details, see: *infra* para. 211.

the right to impose a safeguard measure.<sup>186</sup> As explained below, this would amount to a violation of what can be called "reverse parallelism". Further, the analysis of injury conducted by the ITAC also focuses only on South Africa (since all participating producers operate in South Africa), while there is a poultry industry that exists *within* SACU but *outside* South Africa. Since it is allegedly only the South African industry that is being injured/disturbed, the whole of SACU cannot be given the right to impose the safeguard measure.

### 1. Necessity of Maintaining "Reverse Parallelism" Under Articles 34 (1) and 34 (2) of the EU-SADC EPA

209. WTO case law has established the principle of "*parallelism*" for safeguard measures. This principle requires symmetry between the countries whose imports are analyzed by the investigating authority to determine injury, and the countries that are subject to the safeguard measure so authorized and imposed. In other words, if imports from all countries are analyzed to determine that injury exists, then the safeguard measure so authorized must be imposed against all countries and no country can be exempted from the application of the safeguard measure. This has been a consistent position of the AB, in cases like *Argentina – Footwear (EC)*, DS121,<sup>187</sup> *US – Wheat Gluten*, DS166,<sup>188</sup> *US – Line Pipe*, DS202,<sup>189</sup> and *US – Steel Safeguards*, DS252<sup>190</sup>. The fundamental idea behind parallelism is that the imports causing injury should be the same as the imports acted against through the safeguard measure.
210. The reverse of this principle is equally valid. If imports into a *certain country* are causing injury, only that country should have the right to impose a safeguard measure. This can be demonstrated based on the text of the EU–SADC EPA itself: as shown above, Articles 34 (1) and 34 (2) of the EU–SADC EPA require that the "*Party or SACU*" imposing the safeguard measure be the same as the "*importing Party or SACU*".
211. The ITAC's determination only analyzes imports into South Africa, and not the whole of SACU. The ITAC's 2017 Summary of Findings adopts the import statistics provided by the Applicant (SAPA).<sup>191</sup> Notably, SAPA's updated information, as provided to the ITAC, clearly states that it obtained these import statistics "*from the South African Revenue Service via email on Wednesday, 01 March 2017.*" [underlining added]<sup>192</sup> The website of the South African Revenue Service makes it clear that it is responsible for

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<sup>186</sup> The safeguard measure in the present case is technically available to the whole SACU industry. This is, in large part, because the decision to implement definitive safeguard measures in the present case was approved by the SACU Council of Ministers.

<sup>187</sup> See: Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, paras. 111 – 113.

<sup>188</sup> See: Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, paras. 95 – 98.

<sup>189</sup> See: Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, paras. 186 – 187.

<sup>190</sup> See: Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS252/AB/R, paras. 439, 444.

<sup>191</sup> Cf Exhibit EU-7, pg. 6 and Exhibit EU-23, pg. 15.

<sup>192</sup> Exhibit EU-23, pg. 15.



"administering the South African ... customs service". [underlining added]<sup>193</sup> Thus, clearly, the import statistics provided by the Applicant (and therefore, the statistics relied on by the ITAC) are those of South Africa, and not of SACU. Even if SACU argues before the Panel that a portion of imports into SACU enter *via* South Africa, there is no evidence on record to prove that imports of frozen bone-in chicken cuts from the EU, into non-South African SACU Members, were in fact considered by the ITAC, when determining an alleged increase in imports. In sum, allowing SACU as a whole to impose the safeguard measures at issue violates the implicit principle of "reverse parallelism".

## **2. Injury or Disturbance for SACU as a Whole has Not Been Demonstrated**

- 212.** Furthermore, Articles 34 (1) and 34 (2) (a), (b) and (c) of the EU–SADC make it clear that the "*Party or SACU*" imposing the safeguard measure must be the same as the "*importing Party or SACU*" that is facing serious injury/disturbances. In other words, only the Party that is economically injured or disturbed can impose the safeguard measure.
- 213.** The ITAC's determination only analyses alleged injury/disturbances occurring in the South African poultry industry, and not in the industry of the whole of SACU. The ITAC's 2017 Summary of Findings adopts the injury factors provided by the Applicant (SAPA).<sup>194</sup> Notably, SAPA's updated information clearly states that information on injury is "*provided by the Participating Producers*".<sup>195</sup> The updated information also reveals that the information in question is provided by five participating producers – namely, AFGRI Poultry (Proprietary) Limited Trading, Astral Operations Limited, RCL Foods Limited, Sovereign Food Investments Limited, and Supreme Poultry (Pty) Ltd – all of which operate within South Africa. Even the "Other SACU Producers" mentioned in the updated information document – namely, ANCA Foods, Elkana Boerdery, Grainfield Chickens, Mike's Chicken and Mikon Farming – all operate in South Africa.<sup>196</sup> In other words, no non-South African producer has been identified in SAPA's application; and the data of no non-South African producer was used by the ITAC to determine injury.
- 214.** To be sure, there was (during the POI), and continues to be, poultry production, and the existence of poultry industry, in non-South African SACU Members such as Botswana.<sup>197</sup> In fact, the Applicant's own report notes the production of poultry in other

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<sup>193</sup> South African Revenue Service, About SARS, available at: < <https://www.sars.gov.za/about/> > (last accessed 16 November 2021).

<sup>194</sup> For example, for price undercutting, Cf Exhibit EU-7, pg. 7 and Exhibit EU-23, pg. 12.

<sup>195</sup> See for example: Exhibit EU-23, pgs. 20, 21, 23, 26.

<sup>196</sup> *Ibid*, pgs. 6 – 7.

<sup>197</sup> For example, during the POI, Botswana produced over 1,000,000 chickens. See Statistics Botswana, Annual Agriculture Survey Report 2017, available at: < <https://www.statsbots.org.bw/sites/default/files/publications/ANNUAL%20AGRIC%20SURVEY%202017%20Revised%20Version.pdf> > (last accessed 16 November 2021), pg. 22. Poultry industry comprises of *inter alia* Tswana Pride (Pty) Ltd, Goodwill Chickens Pty Ltd, and Mmasedikwe Farm (Pty) Ltd.

SACU Members like eSwatini, Lesotho and Namibia.<sup>198</sup> Since the ITAC has only determined the existence of alleged injury/disturbances in South Africa, and has not determined any injury/disturbance with respect to the rest of the SACU industry, SACU as a whole cannot be allowed to impose the safeguard measure at issue.

215. In sum, allowing SACU to impose the safeguard would be a violation of Articles 34 (1) and 34 (2) of the EU–SADC EPA. Additionally, the last sentence of Article 34 (2) of the EU–SADC EPA requires that a safeguard measure not "*exceed what is necessary to remedy or prevent the serious injury or disturbances.*" In other words, safeguard measures must be applied in a manner that is "*commensurate with the goals of preventing or remedying serious injury.*"<sup>199</sup> In this regard, the Panel in *Chile – Price Band System*, DS207, found that "*at minimum, [there must be] a rational connection between the measure objective of preventing or remedying serious injury.*"<sup>200</sup> Allowing the entire SACU region to impose the safeguard measure would exceed what is necessary to remedy or prevent injury, since, allegedly, only South African producers are being injured/disturbed. There is no "*rational connection*" between the SACU safeguard measure and the (non-existent) injury/disturbance faced by non-South African producers.

### 3. Conclusion

216. The ITAC only analyzed alleged increased imports and alleged injury with respect to South Africa. Thus, there is no basis under the EU–SADC EPA for the ITAC to impose safeguard measures for the entire territory of SACU.

#### G. Claim 4, Second Argument: Violation of Article 34 (2) of the EU–SADC EPA Because the Measure Exceeds What Is Necessary to Remedy or Prevent the Serious Injury or Disturbance

217. In relevant part, the text of Article 34 (2) of the EU–SADC EPA provides that: "*safeguard measures shall not exceed what is necessary to remedy or prevent the serious injury or disturbance.*" This requirement (that a safeguard measure can only be imposed to the extent necessary to remedy or prevent serious injury or disturbance to the domestic industry) is similar to the requirement in Article 5.1 of the ASG. Pursuant to that provision, "[a] Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury" [underlining added].
218. Both the WTO AB and WTO panels have interpreted the requirement that a safeguard measure can only be imposed to the extent necessary on several occasions. In *Korea – Dairy*, DS98, the AB ruled that the wording "*only to the extent necessary*" in Article 5.1 of the ASG "*leaves no room for doubt that it imposes an obligation on a Member applying a safeguard measure to ensure that the measure applied is commensurate with*

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<sup>198</sup> South African Poultry Association, 2019 Industry Profile, available at: < <http://www.sapoultry.co.za/pdfs/docs/sapa-industry-profile.pdf> > (last accessed 16 November 2021).

<sup>199</sup> See: Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS/98/AB/R, para. 96.

<sup>200</sup> Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/R, para. 7.183 (emphasis original).

*the goals of preventing or remedying serious injury and of facilitating adjustment" and this regardless of the form of the safeguard measure.*<sup>201</sup>

219. Indeed, as the AB explained in *US – Line Pipe*, DS202, the right to impose a safeguard measure needs to be distinguished from whether the safeguard measure has been applied only to the extent necessary. In other words, *"the right to apply a safeguard measure – even where it has been found to exist in a particular case and thus can be exercised – is not unlimited. Even when a Member has fulfilled the treaty requirements that establish the right to apply a safeguard measure in a particular case, it must do so "only to the extent necessary ..."*<sup>202</sup>
220. The EU agrees that, unless the measure takes the form of a quantitative restriction that reduces the quantity of imports below the level of the last three years, there is no legal requirement to justify, at the time of application, that the safeguard measure at issue is applied *"only to the extent necessary"*.<sup>203</sup> That, however, does not mean that the party imposing a safeguard measure has *carte blanche* to do what it wants. Indeed, the AB in *US – Line Pipe*, DS202 clarified that *"meeting those obligations [set out in the ASG] should have the effect of clearly explaining and "justifying" the extent of the application of the measure"*, and this should also provide a benchmark against which the permissible extent of the measure should be determined.<sup>204</sup>
221. The Panel in *Chile – Price Band*, DS207, explained that *"in order to comply with the requirement of Article 5.1, the Member imposing the safeguard measure must ensure that the measure is only applied to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. We consider that a Member can only ensure that the safeguard measure is calibrated if there is, at a minimum, a rational connection between the measure and the objective of preventing or remedying serious injury and facilitating adjustment. In the absence of such a rational connection, a Member cannot possibly ensure that the measure is applied only to the extent necessary."*<sup>205</sup> [underlining added]
222. The EU submits that by imposing a safeguard measure at the level of (initially) a 35.3% safeguard duty reflecting a price disadvantage observed between imports and SACU sales prices during the year 2016, the final safeguard measure exceeded the level of what was necessary to remedy or prevent serious injury or disturbance because:
- i. Other factors such as the volatility of feed raw material prices, the increase in costs of labor, diesel, electricity, plastic and cardboard boxes, duties imposed on the soya oilcake used in production of feed and imports from other countries were not appropriately taken into account in the analysis of the existence and level of a threat of disturbance and/or serious injury;

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<sup>201</sup> Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, para. 96.

<sup>202</sup> Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, para. 84.

<sup>203</sup> *Ibid*, para. 233.

<sup>204</sup> *Ibid*, para. 236.

<sup>205</sup> Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/R, para. 7.183.

- ii. The measure at issue did not take into consideration that imports had actually greatly decreased in 2017; and
- iii. The measure at issue did not take into consideration the anti-dumping duties that had been adopted previously for the same products.

223. These three points will be addressed in turn below.

**1. Other Factors Were Not Appropriately Taken Into Account in the Analysis of the Existence and Threat of Disturbance and/or Serious Injury**

224. As was explained in Claim 3 above, the effects allegedly caused by increased imports from the EU were not distinguished from the effects caused by other factors (such as the volatility of feed raw material prices; the increase in costs of labor, diesel, electricity, plastic and cardboard boxes; duties imposed on the soya oilcake used in production of feed; and imports from other countries). A proper non-attribution analysis was therefore not undertaken even though the ITAC itself confirmed that at least some of these other factors had actually contributed to economic performance of the domestic industry.
225. As concerns the interplay between the importance of a proper non-attribution analysis and the extent to which a safeguard measure is necessary, the EU notes that the AB explained in *US – Line Pipe*, DS202, that these two requirements are closely intertwined. In that case, the AB ruled that:

*"the non-attribution language of the second sentence of Article 4.2(b) is an important part of the architecture of the Agreement on Safeguards and thus serves as necessary context in which Article 5.1, first sentence, must be interpreted. In our view, the non-attribution language of the second sentence of Article 4.2(b) has two objectives. First, it seeks, in situations where several factors cause injury at the same time, to prevent investigating authorities from inferring the required "causal link" between increased imports and serious injury or threat thereof on the basis of the injurious effects caused by factors other than increased imports. Second, it is a benchmark for ensuring that only an appropriate share of the overall injury is attributed to increased imports. As we read the Agreement, this latter objective, in turn, informs the permissible extent to which the safeguard measure may be applied pursuant to Article 5.1, first sentence. Indeed, as we see it, this is the only possible interpretation of the obligation set out in Article 4.2(b), last sentence, that ensures its consistency with Article 5.1, first sentence. It would be illogical to require an investigating authority to ensure that the "causal link" between increased imports and serious injury not be based on the share of injury attributed to factors other than increased imports while, at the same time, permitting a Member to apply a safeguard measure addressing injury caused by all factors."*<sup>206</sup> [underlining added]

226. The AB subsequently concluded that *"the phrase "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment" in Article 5.1, first sentence, must be read as requiring that safeguard measures may be applied only to the extent that they*

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<sup>206</sup> Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, para. 252.

*address serious injury attributed to increased imports".*<sup>207</sup> Completing its analysis, the AB then found a violation of Article 5.1 of the ASG because there was a violation of Article 4.2 (b) of the ASG in the absence of a rebuttal that, despite the violation of Article 4.2 (b) of the ASG, the safeguard measure was "*applied in such a manner that it addressed only a portion of the identified injurious effects, namely, the portion that is equal to or less than the injurious effects of increased imports*".<sup>208</sup>

227. In the present case, not only did SACU fail to carry out a proper non-attribution analysis (as demonstrated in Claim 3 above), but it also failed to ensure that it imposed a safeguard measure that was limited to the extent necessary. This is particularly so because the (initial) 35.3% safeguard duty was set on the basis of the "price disadvantage" between EU import prices and SACU sales prices during the year 2016, without even examining the extent to which SACU sales prices were affected by other factors. This constitutes a violation of Article 34 (2) of the EU–SADC EPA because the measure at issue exceeds what is necessary to remedy or prevent serious injury or disturbances.

**2. Failure to Consider that Imports Actually Decreased Between December 2016 and December 2017 and Between January 2018 – March 2018**

228. As was explained above, the (initial) final safeguard duty was set at 35.3%. This 35.3% safeguard duty was calculated by reference to the "price disadvantage" of SACU domestic sales compared to EU import prices. Crucially, the data used to establish this "*price disadvantage*" were based on price and profit information for the year 2016. The final safeguard measure, however, was only adopted on 27 June 2018 and entered into force on 28 September 2018.
229. In other words, as was also explained in Claim 2 *Second Argument* above, in connection with the examination of imports, there is a gap of one and a half years between the data used for setting the level of the final safeguard measure and the actual imposition of the final safeguard measure.
230. For this reason, the EU submits that at the time the final safeguard measure entered into application, *i.e.* 28 September 2018, imposing a safeguard duty at the level of 35.3% – based on data from 2016 – was no longer necessary to remedy or prevent any serious injury or disturbance to the SACU industry. That is particularly so since, as explained in Claim 2 *Second Argument* above, the decision to impose a final safeguard measure was based on outdated import data and that, after the investigation period used to analyze whether the conditions were met for imposing a safeguard measure, imports from the EU had substantially decreased.
231. In this connection, the EU refers to the AB's finding in *US – Line Pipe*, DS202, that the right to impose a safeguard measure needs to be distinguished from whether the safeguard measure has been applied only to the extent necessary.<sup>209</sup> Even when the

<sup>207</sup> Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, para. 260.

<sup>208</sup> *Ibid.*, paras. 261-262.

<sup>209</sup> *Ibid.*, para. 84.

conditions for imposing a safeguard measure are met, this does not necessarily mean that the safeguard measure imposed is limited to the extent necessary to remedy or prevent the serious injury or disturbance.

232. Moreover, the examination of whether the level of the safeguard measure imposed is limited to the extent necessary needs to take place at the time the safeguard measure is imposed. That logically requires that developments that occur after the investigation period – in this case a substantial decrease in imports in the period December 2016 – December 2017 and January 2018 – March 2018, compared to the period used to examine whether the conditions for a safeguard measure are met (the year 2016) – have to be taken into consideration. SACU did not do so.

### 3. Failure to Reflect the Anti-Dumping Duties Already in Place on Imports From the EU in Setting the Level of the Safeguard Duty

233. In February 2015, South Africa imposed anti-dumping duties on frozen bone-in chicken cuts, *i.e.* the same product that is subject to the safeguard measure. The applicable anti-dumping duties were between 31.3 and 73.33% for Germany; between 3.86 and 22.81% for the Netherlands (two producers in the Netherlands are not subject to anti-dumping duties), and between 12.07 and 30.99% for the United Kingdom.<sup>210</sup>
234. Throughout the safeguard investigation, interested parties and the European Commission submitted that, in order to avoid double counting, the imposition of anti-dumping duties should be taken into consideration in setting the safeguard duty in order to ensure that that "*safeguard measures shall not exceed what is necessary to remedy or prevent the serious injury or disturbance*".<sup>211</sup>
235. This is particularly relevant since the imports subject to anti-dumping duties and the imports taken into consideration for the assessment whether a safeguard measure can be imposed largely overlap. Indeed, as can be observed from the table below, the imports subject to anti-dumping duties accounted for between 78% and 91% of the total imports from the EU during the 2011-2013 period. In addition, as it emerges from page 3 of the ITAC's second essential facts letter, 61% of imports from the EU during Q1 2016 were also subject to anti-dumping duties.

**Table: Comparison between dumped imports and all EU imports**

	2011	2012	2013
Dumped imports (excluding imports subject to zero duty) <sup>212</sup>	53,004,925	87,837,816	105,822,822
Total imports from EU <sup>213</sup>	62,534,479	112,695,196	116,803,033

<sup>210</sup> See: Exhibit EU-37.

<sup>211</sup> See: for example: Exhibit EU-22, pg. 4. See also Exhibit EU-31, para. 27-29.

<sup>212</sup> Exhibit EU-38, pg. 57.

<sup>213</sup> Exhibit EU-7, pg. 9.

Dumped imports/total imports	85%	78%	91%
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236. In other words, the large majority of imports taken into consideration in the assessment whether a safeguard measure could be taken were already subject to anti-dumping duties ranging between 3.86% and 73.33%. In that connection, the EU also notes that, in that anti-dumping investigation, it was found that imports from Germany, the Netherlands and the United Kingdom undercut sales prices in South Africa by 11.11% on average.<sup>214</sup> With the exception of some imports from the Netherlands, however, the applicable anti-dumping duties were substantially above this level and, therefore, they already remedy any injury by the dumped imports.
237. From the ITAC's third essential facts letter dated 14 August 2017, it appears that in determining the price disadvantage, an adjustment of 3.3% was added to the average EU FOB import price to take into account the applicable anti-dumping duties. However, by adding the 3.3% adjustment, the ITAC has not solved the issue of the double application of trade remedies. The 3.3% added to the average EU FOB import price would still result in an excessive and double duty for the individual exporters subject to anti-dumping duties (ranging between 12.07% and 73%). This is both legally and economically unjustifiable.<sup>215</sup>
238. Moreover, no details were disclosed on how taking into account the applicable anti-dumping duties resulted in a safeguard duty of (initially) 35.3%. The EU has complained about this lack of disclosure in its letter of 25 August 2017,<sup>216</sup> yet no further clarifications have been provided.
239. In any event, there is no information whatsoever on the record that it was examined whether or not a 35.3% safeguard duty exceeded what is necessary to remedy or prevent the serious injury or disturbance.
240. For the above reasons, the EU submits that by not taking into consideration the anti-dumping duties that had been adopted previously for the same products when setting the level of the safeguard duty, the requirement in Article 34 (2) of the EU–SADC EPA that "*safeguard measures shall not exceed what is necessary to remedy or prevent the serious injury or disturbance*" was violated.

**H. Claim 5: Violation of Article 34 (7) (a) (b) and (c) Because the TDC (and therefore the EU) Was Not Provided with the Necessary Data or Was Provided Only With Indexed Data, Which Made It Impossible to Thoroughly and Fully Examine the Situation and Propose a Recommendation or Satisfactory Solution**

241. Article 34 (7) (a) (b) and (c) of the EU–SADC EPA cumulatively provides that before imposing safeguard measures, SACU is required to "*supply the Trade and Development Committee with all relevant information required for a thorough examination of the situation, with a view to seeking a solution acceptable to the parties concerned*" [underlining added]. In the context of WTO disclosure obligations, "*all relevant*

<sup>214</sup> See: Exhibit EU-38, pg. 59.

<sup>215</sup> Exhibit EU-26, pg. 3.

<sup>216</sup> *Ibid*, pgs. 2 – 3.

information" has been found to encompass "the matrix of facts, law and reasons that logically fit together to render the decision [of the investigating authority] to impose final measures".<sup>217</sup> The disclosure by investigating authorities should be such that it enables the public and interested parties to "understand [the investigating authority's] finding."<sup>218</sup> The disclosure must therefore be "sufficiently detail[ed]."<sup>219</sup> Further, "relevant information" is that which is "necessarily material";<sup>220</sup> and "material", in this respect, "refers to an issue which must be resolved in the course of the investigation in order for the investigating authority to reach its determination whether to impose a definitive ... duty."<sup>221</sup> An investigating authority must, therefore, set forth "explanations for all material elements of the determination".<sup>222</sup> The purpose behind such disclosure obligations is to ensure "fairness and due process" and to enable interested parties to pursue judicial review of the investigating authority's decision.<sup>223</sup> This is in line with the EU–SADC EPA, which requires that the ITAC must disclose to the TDC all relevant information "required for a thorough examination of the situation".<sup>224</sup>

242. In the present case, SACU did not provide the TDC (and therefore, the EU) with crucial information relating to *inter alia* adjustments made for calculating price disadvantage, profit used for calculating adjusted domestic price, and indexed information. Such information is "relevant" and "material", since it concerns issues that must have necessarily been resolved by the ITAC before imposing the final safeguard duty.
243. First, the ITAC did not provide adequate information that would enable the EU to understand the ITAC's comparison of the prices of domestic and imported products. In its reply to the ITAC's third essential facts letter, the EU had pointed out that the ITAC had not provided information "concerning the adjustments that have been made in order to compare prices". The EU also noted that such adjustments were "significant given the unavoidable differences in handling and post importation costs, as well as obvious differences in level of trade between imported and domestic products."<sup>225</sup> In response to this, the ITAC, in its 2017 Summary of Findings, simply stated that "the landed cost [of the imported product] includes all costs incurred from the ex-factory export price of R14.91/kg plus 14% shipping, insurance and clearing costs to where the goods cleared

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<sup>217</sup> Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States*, WT/DS414/AB/R, para. 258.

<sup>218</sup> *Ibid*, para. 267.

<sup>219</sup> Panel Report, *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*, WT/DS425/R, para. 7.459.

<sup>220</sup> Panel Report, *United States – Anti-Dumping Measures on Certain Oil Country Tubular Goods from Korea*, WT/DS488/R, paras. 7.299 – 7.300.

<sup>221</sup> Panel Report, *European Union – Anti-Dumping Measures on Certain Footwear from China*, WT/DS405/R, para. 7.844.

<sup>222</sup> Panel Report, *Mexico – Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States*, para. 7.103.

<sup>223</sup> Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States*, WT/DS414/AB/R, para. 258.

<sup>224</sup> Exhibit EU-2, Article 34 (7) (c).

<sup>225</sup> Exhibit EU-26, pg. 2.



in the SACU."<sup>226</sup> However, nowhere does the ITAC explain how it reached this figure of 14%. Such an explanation is critical for the EU to understand the methodology adopted by the ITAC, in order to "*thoroughly examine*" the ITAC's decision to impose definitive safeguard duties. It is pertinent to note that the AB in *China – GOES*, DS414, expressly found that non-disclosure of "*facts relating to the price comparisons of subject imports and domestic products*" violated WTO disclosure obligations.<sup>227</sup>

244. Second, the ITAC also did not provide adequate information regarding the ITAC's calculation of Applicant's "*unsuppressed selling price*". In particular, the EU pointed out in its reply to the ITAC's third essential facts letter, that the ITAC had not provided information about the "*the profit used to calculate the adjusted domestic price ... despite its crucial importance*."<sup>228</sup> In response to this, the ITAC, in its 2017 Summary of Findings, simply stated that "*the unsuppressed price of the Applicant was calculated by adding a reasonable profit margin to the total production cost of the Applicant plus selling and administration expenses*." However, the ITAC does not specify what this "*reasonable*" profit margin is or how it was calculated. Indeed, such a superficial statement does not satisfy the threshold of "*sufficient detail[s]*" that must be contained in the disclosure.<sup>229</sup> Without knowing the exact amount of profit that was added by the ITAC to the Applicant's production cost, it was impossible for the EU to properly examine its rights to review of the ITAC's decision. In particular, this lack of information hampered the EU in "*seeking a solution acceptable to [the EU and SACU]*."<sup>230</sup>
245. Even if SACU were to argue before the Panel that SACU did, in fact, provide the EU with information regarding the amount of – and underlying calculation regarding – the reasonable profit, during the EU-SACU consultations in this dispute,<sup>231</sup> such communication of information from SACU is insufficient to satisfy Article 34 (a), (b), and (c) of the EU–SADC EPA. This is because of three reasons. First, Article 34 (7) (c) is clear that SACU was supposed to provide this information "*before taking [i.e. imposing]*" the bilateral safeguard. It did not do so, and only provided partial information, much later – specifically, during EU-SADC consultations held on 13 September 2019 (*i.e.* more than a year after the definitive safeguard measure entered into force). Such delayed relaying of information robbed the EU from exercising its rights of defence during the ITAC's safeguard proceeding. Second, Article 34 (7) (c) is clear that such information, in any case, is to be supplied to the TDC, and not to individual interested parties. Thus, SACU violated not just the letter but also the spirit of the provision. Finally, even the information provided by SACU – *i.e.* an explanation

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<sup>226</sup> Exhibit EU-7, pg. 10.

<sup>227</sup> Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States*, WT/DS414/AB/R, para. 251.

<sup>228</sup> Exhibit EU-26, pg. 2.

<sup>229</sup> Panel Report, *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*, WT/DS425/R, para. 7.459.

<sup>230</sup> Exhibit EU-2, Article 34 (7) (c).

<sup>231</sup> During these consultations, SACU stated that the unsuppressed selling price for 2016 had been calculated based on an 8% profit margin. SACU further stated during consultations that in 2013, when they reviewed the MFN duty on the subject imports, they decided that, on the basis of the information provided by the industry the 8% profit margin was reasonable.

as to how it reached the figure of 8% profit margin – is superficial, and does not at all explain the economic or financial logic behind the ITAC's profit margin calculation.

246. Third, with respect to the analysis of price undercutting, price depression and suppression, market share, profit/losses, inventories, and price disadvantage, the ITAC has only provided indexed data for the domestic industry. The EU fails to understand why actual figures were not provided, given that the case did not involve a singular domestic producer, but rather at least 5 participating producers. Thus, there was no risk of disclosure of sensitive commercial information of any particular producer. Furthermore, even if there were allegedly confidentiality concerns that prompted the disclosure of only indexed information, the ITAC was still under an obligation to provide a "*reasoned and adequate explanation [of the data] through means other than the full disclosure of that data*", and to provide such explanation to the "*fullest extent possible*".<sup>232</sup> No such explanation was provided by the ITAC. Neither was a "*non-confidential summar[y]*" of the allegedly confidential information provided to the EU.<sup>233</sup> Thus, the EU was not put in a position to "*thoroughly examine*" the situation at hand. This further disallowed the EU from properly exercising its rights to review of the ITAC's decision, and prevented it from "*seeking a solution acceptable to [the EU and SACU]*".<sup>234</sup>
247. Thus, by refusing to fully disclose all relevant information, the ITAC has deprived the EU of its due process rights. More specifically, the ITAC has violated the requirements contained in Article 34 (7) (a), (b), and (c) EU–SADC EPA.

## VI. CONCLUSION

248. For the reasons set forth in this submission, the EU respectfully requests the Panel to find that the safeguard measure at issue, as set out above, is inconsistent with the obligations of SACU under the EU–SADC EPA. Therefore, the EU requests that the Panel recommend SACU to bring its measures into compliance with the EU–SADC EPA. In this regard, as per 82 (3) of the EU–SADC EPA, the EU suggests that, given the fundamental nature and pervasiveness of the inconsistencies that the EU has demonstrated to exist, the Panel recommend that SACU achieve compliance with the EU–SADC EPA by withdrawing the final safeguard measure imposed on frozen bone-in chicken cuts from the EU. The EU further suggests that the Panel recommend SACU to refund the safeguard duties already paid.

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<sup>232</sup> Panel Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS252/R, paras. 10.274, 10.549, 10.582.

<sup>233</sup> Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States*, WT/DS414/AB/R, para. 259.

<sup>234</sup> Exhibit EU-2, Article 34 (7) (c).